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NOTICE OF ARGUMENT.

New Jersey Court of Errors and Appeals

LOUIS J. ILLIS, <i>Plaintiff-Appellee,</i>	}	<i>Action at Law.</i>	10
<i>vs.</i>		<i>Notice of Argument.</i>	
JOHN OBERLE, <i>Defendant-Appellant.</i>			

To Breslin & Breslin, Esqs., 296 Ridge Road,
Lyndhurst, N. J., attorneys of plaintiff-ap-
pellee.

SIRS:

PLEASE TO TAKE NOTICE, that the argument of
the issue joined in this cause will be moved before
said Court, in the presence of such Judge or
Justice thereof, as shall then be holding said
Court, on the third Tuesday of May, A. D.
1929, at the State House, in Trenton, in and
for the County of Mercer, at ten o'clock in the
forenoon, or as soon thereafter as the said Court
can attend to the same. 20

Dated, March 20, A. D. 1929. 30

Your obedient servants,

SCHNEIDER & SCHNEIDER,
Attorneys of Defendant-Appellant.

Service of the within notice of trial is hereby
acknowledged this 22nd day of March, A. D.
1929.

BRESLIN & BRESLIN,
Attorneys for Plaintiff-Appellee. 40

GROUNDS OF APPEAL.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

LOUIS J. ILLIS, <i>Plaintiff-Appellee,</i>	}	<i>Action at Law.</i>	10
vs.	}	<i>On Appeal from Supreme Court, Bergen County.</i>	
JOHN OBERLE, <i>Defendant-Appellant.</i>	}	<i>Grounds of Appeal.</i>	

The defendant-appellant, John Oberle, hereby sets up the following as grounds of appeal: 20

The trial court in its charge to the jury erroneously limited the defense to a denial of negligence by charging the jury as follows: "The defendant's contention is an absolute denial," and without mentioning the contributory negligence feature which was specifically set forth and was called to the Court's attention.

SCHNEIDER & SCHNEIDER,
Attorneys of Defendant-Appellant. 30

SUMMONS.

The State of New Jersey to John
Oberle, 53 Treacy avenue, Newark,
(L. s.) N. J., GREETINGS:

10 You are hereby summoned to answer
the annexed complaint of Louis J.
Illis, in an action at law in the New Jersey Supreme Court, and take notice that unless you file your answer with the Clerk of the said New Jersey Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, plaintiff may proceed in this suit, and judgment will be entered against you.

WITNESS, WILLIAM S. GUMMERE, Esq., Chief
Justice of the New Jersey Supreme Court, at
20 Trenton, this day of 1928.

FRED L. BLOODGOOD,
Clerk.

BRESLIN & BRESLIN,
Attorneys for Plaintiff.

30

40

COMPLAINT.

NEW JERSEY SUPREME COURT.
BERGEN COUNTY.

LOUIS J. ILLIS, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	10
<div style="text-align: center;"><i>vs.</i></div> JOHN OBERLE, 53 Treacy Avenue, Newark, N. J., <div style="text-align: right;"><i>Defendant.</i></div>		<i>Action at Law.</i> <i>Complaint.</i>

The plaintiff, Louis J. Illis, of the Township of Lyndhurst, County of Bergen and State of New Jersey, says that:

20

FIRST COUNT.

1. On or about the 6th day of June, nineteen hundred and twenty-eight, the plaintiff owned and operated a certain automobile in a careful and cautious manner, along a certain highway in a northerly direction, known as River Road, in the Town of Kearny, County of Hudson and State of New Jersey.

30

2. On the aforesaid date, the defendant, John Oberle, owned and operated through himself, his agent or servant, a certain truck in a careless and negligent manner, in a northerly direction along a certain highway known as River Road, in the Town of Kearny, County of Hudson and State of New Jersey.

3. The defendant, John Oberle, or his agent or servant, so carelessly and negligently operated

40

Complaint.

said truck, that it crashed into and collided with automobile operated by plaintiff, greatly damaging plaintiff's automobile.

10 4. As a result of the aforesaid collision, plaintiff's automobile has greatly depreciated in value, and plaintiff has been obliged to expend and incur divers sums of money for the repair of same, and plaintiff has been obliged to expend and incur divers sums of money for the hire of another automobile, while damaged automobile was being repaired.

SECOND COUNT.

20 1. The plaintiff, Louis J. Illis, of the Township of Lyndhurst, County of Bergen and State of New Jersey, further says that:

1. He repeats and makes a part hereof of paragraphs 1 and 2 of the first count.

2. The defendant, John Oberle, his agent or servant, so carelessly and negligently operated said truck that it crashed into and collided with automobile operated by plaintiff, causing the plaintiff to be thrown out of the automobile to the ground, and knocked unconscious.

30 3. The accident aforesaid was caused by the negligence of the defendant, his agent or servant, which consisted in this:

a. To keep a lookout for persons in the vicinity of said automobile.

b. To control the motion thereof so as to avoid striking persons in the vicinity thereof.

c. To give warning of the approach thereof.

40 d. To propel same at the rate of speed, safe to persons in the vicinity thereof.

Complaint.

e. To operate his automobile on the right side of the thoroughfare.

4. By reason of and as a proximate result of the aforesaid collision, plaintiff became and was sick, sore, lame and disabled, has suffered and will continue to undergo great pain and torment, both of body and mind, in the future. 10

5. By reason of and as a proximate result of the aforesaid injuries sustained in the aforesaid collision, the plaintiff, Louis J. Illis, has been unable to go about his usual occupation, and in consequence thereof, plaintiff has and will in the future suffer great damage.

6. By reason of and as a proximate result of the aforesaid injuries sustained in the aforesaid collision, plaintiff has been obliged to expend and incur divers sums of money for doctors, nurses, medicines, hospital, and other surgical treatments in order to obtain a cure for himself. 20

Wherefore, the plaintiff demands the sum of one thousand (\$1,000.00) dollars as damages on the first count.

Wherefore, the plaintiff demands the sum of ten thousand (\$10,000.00) dollars as damages on the second count. 30

Dated, June 29, 1928.

BRESLIN & BRESLIN,
Attorneys for Plaintiff.

ANSWER.

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

10 LOUIS J. ILLIS,

*Plaintiff,**vs.*

JOHN OBERLE,

*Defendant.**Action
at Law.**Answer.*

20 The defendant, residing in the City of Newark,
County of Essex and State of New Jersey, an-
swering the complaint filed herein, says that he
denies all the allegations thereof.

FIRST DEFENSE.

The plaintiff was guilty of contributory negli-
gence.

SCHNEIDER & SCHNEIDER,
Attorneys of Defendant.

30

40

REPLY.

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

LOUIS J. ILLIS,	}	<i>Action at Law. Reply.</i>	10
<i>Plaintiff,</i>			
<i>vs.</i>			
JOHN OBERLE,			
	<i>Defendant.</i>		

The plaintiff, Louis J. Illis, by way of reply to answer filed by the defendant, says that:

1. He denies each and every allegation contained in the answer. 20

BRESLIN & BRESLIN,
Attorneys for Plaintiff.

30

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Plaintiff's Opening.

TESTIMONY.

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

10	<table border="0" style="width: 100%;"> <tr> <td style="width: 40%; vertical-align: top;"> LOUIS J. ILLIS, vs. JOHN OBERLE, </td> <td style="width: 20%; vertical-align: middle; text-align: center;"> Plaintiff, Defendant. </td> <td style="width: 40%; vertical-align: middle; padding-left: 10px;"> } <i>Action at Law.</i> </td> </tr> </table>	LOUIS J. ILLIS, vs. JOHN OBERLE,	Plaintiff, Defendant.	} <i>Action at Law.</i>
LOUIS J. ILLIS, vs. JOHN OBERLE,	Plaintiff, Defendant.	} <i>Action at Law.</i>		

Hackensack, N. J., January 10, 1929.

20 Before: Hon. Edwin C. Caffrey, Judge, and a jury.

Appearances:

For the Plaintiff: Messrs. Breslin & Breslin; by John J. Breslin, Jr., Esq.

For the Defendant: Messrs. Schneider & Schneider; by William P. Braun, Esq.

A jury was accepted and sworn.

30 Mr. Breslin opened the case to the jury as follows:

Mr. Breslin: May it please the Court, members of the jury: This case is different from the usual collision case. I represent Mr. Illis, who was driving his car along River Road on the 6th day of June, 1927. Mr. Illis was going in a general northerly direction. River Road runs in a general southerly and northerly direction, parallel with the river. Perhaps most of the jurors have driven over the road at some time.

40

Plaintiff's Opening.

As Mr. Illis was going north there was a truck ahead of him operated by the defendant. We will show you that it is open country, no houses in the vicinity, and, under the law, Mr. Illis had a perfect right to blow his horn and pass this truck. He blew his horn and passed the truck and got by, and after he got by, the driver of the truck stepped on it, despite Mr. Illis' warning for him to keep over; and the driver of the truck increased his speed and operated his car at such a velocity, although Mr. Illis was almost on the right hand side of the road, he hit our car with such a terrific impact that he knocked the car across the road, down the embankment, on and along the bed of the river. That is the negligence in the case. 10

Now, Mr. Illis at the time was employed by the Prudential Company of Newark. He is a veteran of the World War, and he had been trained by the Veterans' Bureau for— 20

Mr. Braun: Now, if the Court please, I object to that as immaterial in this case, whether he was a veteran or not. I do not think that is proper.

The Court: I imagine this jury will decide the case on the evidence, that is all, with respect to the proof. 30

Mr. Braun: Why waste time with such narrations?

The Court: Well, there is no use of—

Mr. Breslin (Continuing): Members of the Jury, I am not wishing to waste your time. I know your time is valuable. But I think, in all fairness to this man that I represent, that is crippled today, that I should state these facts probably to you at the outset. 40

Plaintiff's Opening.

Now this man is a wounded veteran of the World War. He was trained by the Veterans' Bureau to do a particular work with the Prudential Insurance Company in Newark. He was put in charge of agents, and he was trained to do typing, and trained to do writing. And we
10 contend that, as a result of the negligence of the defendant, he is a permanent cripple today, and that he cannot do the work.

Now I am not trying to sympathize with you or trying to prejudice you. But that is the reason that I state at this time that he is a wounded veteran.

As a result of the accident, after having been thrown down the embankment, he was taken to the hospital. He has an incision of four and a
20 half inches on his hand. This hand is crippled today. He cannot do this typewriting, he cannot do the writing. It is true he is working with the Prudential, but his salary has decreased considerably. He was laid up for a considerable length of time. But we say the main element of damage in this case is the fact that this man is crippled, and he is unable to do the work for which he was trained.

If we show you that the driver of the truck
30 was negligent, we are going to ask you to award Mr. Illis whatever you think is fair and reasonable, for the injuries he suffered and for his loss in the future.

Mr. Braun: If the Court please, I move to strike out the plaintiff's opening as at variance with his pleadings. In his pleadings he says that this plaintiff was thrown off the road. In his opening he said he was thrown into the river.

The Court: I never knew you could strike
40 anything out on the ground of variance of the opening.

John R. Oberle, direct.

Mr. Braun: Certainly. I can object to the opening, to saying he is going to produce any testimony that is at variance with his pleadings.

The Court: You can object; you can raise the question as the proof goes on. We have not come to it yet.

Mr. Braun: If I am entitled to move for a non-suit on his opening, I certainly would be entitled to move to strike out such— 10

The Court: You are not entitled to move for a non-suit on that opening.

Mr. Braun: Not on this opening, no. But if he had failed to state facts which constituted a cause of action, I could move for a non-suit on it. And I can move to strike out his opening or make him reopen in accordance with his pleadings, and object to it. 20

The Court: The opening is not part of the case.

Mr. Braun: Remarks to the jury are certainly part of the case, and part of the record.

The Court: The jury is going to decide this on the evidence, not on what counsel says.

Mr. Braun: Does your Honor overrule my motion?

The Court: Yes. 30

Mr. Braun: I ask an exception.

(Mr. Braun opened the case to the jury.)

JOHN R. OBERLE, the defendant, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Breslin.

Q Mr. Oberle, you are the defendant in this case? You are being sued? A Yes. 40

Dr. Walter R. Rieck, direct.

Q That is correct, is it not? A So I understand, yes.

Q During the year of 1928 did you own an automobile? A Yes, sir.

Q What kind of a car was it? A It was a Reo truck, small truck.

10 Q Reo Speed Wagon? A Yes, sir.

Q What was the number of that truck? A I don't—

Q X6398? A That is right.

Mr. Breslin: Is there any objection to calling the doctor out of turn?

Mr. Braun: Not at all.

20

DR. WALTER R. RIECK, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Breslin.

Q Doctor, you are a physician, licensed to practice medicine and surgery in the State of New Jersey? A I am.

30 Q How long have you been so licensed? A Twenty-one years.

Q Where is your office at the present time? A 379 Kearny avenue, Kearny, New Jersey.

Q Are you engaged in general practice? A Yes. I do a general practice; mostly surgery.

Q Are you connected with any hospitals? A West Hudson Hospital.

Q What particular line of work do you handle there, mostly? A Directing senior surgical service.

40

Dr. Walter R. Rieck, direct.

Q On or about the 6th day of June, 1928, did you have occasion to treat Mr. Illis? A Yes, I did.

Q Where did you treat him? A At the hospital, West Hudson Hospital, Kearny, New Jersey.

Q Can you tell us what his condition was when you first examined him? A Well, when I first examined him he was pretty well shocked, and he had severe hemorrhage at that time from his right forearm, close to the wrist. And upon examining it, it was sort of a ragged cut, a laceration, extending clean down to the bone, cutting every tendon, extensor tendon, down to the bone, and about half of the annular ligament that holds these tendons down and keeps them from coming up.

10

Q What treatment did you give him, doctor? A Well, I administered first aid right away, bandaged him up; sent him up to the operating-room, and operated that arm, bringing together the tendons by approximating the tendons that were severed. At the time he had a complete wrist drop; absolutely impossible to do this (illustrating). I examined that before going into the operating-room, that he couldn't extend his hand at all. In order to bring that back and have it right, I had to operate him right away, so as to catch up those tendons.

20

30

Q What did this operation consist of? A The suturing of cut parts of the tendons, that is, the muscles, the tendon part of the muscle, bringing them together so that his fingers would come up, and try to get them up as much as possible.

Q How many stitches did you place there? A Oh, it was impossible to tell you, but it was over a hundred.

40

Dr. Walter R. Rieck, direct.

Q Over a hundred stitches? A Yes, to bring those all together; a complete cut right straight across.

10 Q Did you give him any other treatment the first day? A The first aid, of course, was—the day of the accident, the first aid treatment in the emergency room; then took him right up-
stairs to operate right away, so that I could reach those tendons before they came down into the tissue of the hand, and so up into the arm, so that I would be able to get them. If you allow those things to go too long, they retract, and you can't get them.

20 Q What treatment did you give him after that, doctor? A Of course, I had him in bed for over a week. I think it was a week or more. And then I allowed him to go home. And he came to the office for a month or more, because there is a certain amount of sloughing, as parts slough over, to the tissues, which occurs where it is grounded and burned, or a brushburn, such things as that.

Q Did you put a cast on? A I put a splint on to hold that hand.

Q Do you know how long he had that on? A Oh, he had that on a month or more.

30 Q When did you have occasion to examine him last, doctor? A I saw him the last time just for a minute. I saw him for a minute at the office. I think it was last week; a little more; probably five minutes or so.

Q Doctor, from your examination and from your experience can you say whether or not he will have any permanent injury as a result of this accident?

40 Mr. Braun: I object, unless it refers to probability.

Dr. Walter R. Rieck, cross.

The Court: I did not hear the question.

(Question read.)

Q Can you say with reasonable probability whether or not he will have a permanent injury, doctor? A I am positive that he will have a permanent injury, from the condition of his arm. 10

Q What will that condition be, doctor? A Inability to function his fingers, or his thumb, some one part. Probably some of those tendons were mixed up. You can't have them labeled any way under anaesthetic.

Q Doctor, what was your charge? A \$200.

Q Is that a fair and reasonable charge for the work you performed? A I considered it very, very fair.

Cross examination by Mr. Braun. 20

Q Doctor, what else did you do for him besides sew up these muscles and tendons and put the splint on? A Why, that was in itself—that was the whole thing. And treating him, of course, for shock, as he had been in. But the whole thing hinged right on the saving of the hand from the wrist drop, so as to allow an extension. As it was, he would never have got his hand back to any account at all. 30

Q You just dressed it, of course? A Oh, yes.

Q And put the splint on. How long was the splint on? A I believe it was over a month.

Q Was it healed by the time you took the splint off? A Not entirely, no. There was just a little skin surface that had not quite healed yet.

Q What did you do after the splint was taken off? A It was just a case of applying it in 40

Dr. Walter R. Rieck, cross.

warm water and massaging it, to loosen up the tissues within the wrist.

Q What did he call at your office last week for, for what purpose? A Why, he belongs to the Prudential Insurance Company, and there is sort of some kind of a social or benefit of some kind, or employees' benefit, or something, for
10 the short time that he had been out of work. He wanted to know about a paper, about signing the paper, in case he should want me to do it, would I be willing to do it; that is all.

Q It was not for any professional treatment? A Absolutely not.

Q When was the last time you saw him professionally? A Oh, I don't remember. It was afterwards, when I had done, I thought, as
20 much as I could do for him.

Q And you have not seen him or examined his hand since then? A Well, I don't think I have seen him.

Q I mean professionally. A No, not professionally.

Q You say when he was brought to the hospital he was suffering from shock. Was he still in shock or was he conscious, or what was his condition? A Oh, he was conscious; not un-
30 conscious from shock, you know.

Q Was there any other condition that you noticed? A There were abrasions all over him; that is, bruises.

Q I mean as to his physical condition. A Physical condition. Only the bruises, that is all. There was no other physical condition, except that he was injured and hurt badly.

Q Did you notice anything else except what you have told us, that might have affected his
40 consciousness or his ability to coordinate, or

Louis J. Illis, direct.

anything of that sort? A There was not a thing. He was just alert in every way, as far as that was concerned.

LOUIS J. ILLIS, the plaintiff, called as a witness in his own behalf, being duly sworn, testifies as follows: 10

Direct examination by Mr. Breslin.

Q Mr. Illis, where do you live? A I live at 283 Park avenue, Lyndhurst.

Q How long have you lived there? A I only lived there six months, but I have lived in Lyndhurst for the last ten years. 20

Q Where are you employed at the present time? A Prudential Insurance Company of America. 20

Q Do you recall the day of this accident? A I do, sir.

Q What street were you driving on? A River Road.

Q Whereabouts on River Road? A About three city blocks north of Bergen avenue, on River Road. 30

Q Are there houses along the river there, or is it open country? A There is not any. It is an open country.

Q As you were proceeding northerly were there any vehicles or cars ahead of you? A Only one, sir.

Q What was that? A That was a truck.

Q What kind of a truck? A It was—appeared to be a Reo open truck, with a few pieces of lumber on it. 40

Louis J. Illis, direct.

Q What did you do, in so far as the truck was concerned? A I was trying to pass him.

Q What did you do before you tried to pass the truck? A I blowed my horn.

Q Did you pass the truck? A Yes, sir.

10 Q Who was driving the truck? A John Oberle.

Q Will you point him out, Mr. Oberle? A The gentleman who sits there in the first row on the left.

Q As you passed him what, if anything, did you say to him? A Why, I said nothing when I passed him; but as I passed him, he stepped on the gas and pulled up alongside of me.

20 Q What did you say to him? A I yelled, "Stop," because he was bearing over to the left.

Q What did he do after you yelled, "Stop"? A He passed me.

Q What part of your car did he strike? A The right front wheel.

Q Now, with reference to River Road, on what side of the street were you when the actual collision occurred? A Going north I was on the left side of him.

30 Q That would be on what side of the street? A Well, about the center of the street, where my position was.

Q What happened to your car? A As he hit me, he took the wheel out of my hand. My car completely turned to the left, and dropped down twenty foot, to the bottom of the river.

Q Did Mr. Illis come down there? A Who?

Q Mr. Oberle. Did he come down there? A No, sir. He did not give me a hand at all.

40 Q Who helped you out of there? A A gentleman by the name of Jaffe, Mr. Jaffe from

Louis J. Illis, direct.

Passaic, the first car arriving. When I came to he was talking to me. He asked me if there was anybody else in the car, because the car was pretty well submerged.

Q Who was doing this talking? A Mr. Jaffe.

Q Did you see the defendant there after you came up? A After I came up he was standing there, yes, sir. 10

Q Did you talk with him? A Yes, sir, I did.

Q What did he say? A I told Mr. Jaffe to take his number, he hit me.

Q What did the defendant say? A He said, "I was on the right."

Q All right. What kind of a car was this that you had? A Pontiac sedan.

Q When did you purchase the car? A I purchased it in 1927, in June. 20

Q How much did you pay for it? A \$900.

Q What was its general condition prior to the accident? A It was in very good condition.

Q What parts of the car were damaged? A All the body was smashed, all the windshield, glasses.

Q Did you have the car repaired? A Yes, sir.

Q What was the cost of the repair? A Altogether \$400. 30

Q What was the general condition of your health prior to the accident? A I was in good health.

Q What part or parts of your body were injured in this accident? A My hand.

Q Your hand. What happened to your hand? A Ran through the windshield.

Q Where were you taken? A Taken to the West Hudson Hospital. 40

Louis J. Illis, direct.

Q Were you in pain at that time? A Immediately after I didn't. I didn't even know I was hurt. Mr. Jaffe told me that I would have to be taken to the hospital because my hand was hanging down like that (indicating).

Q Were you taken to the hospital? A Immediately.

10 Q Were you in pain when you arrived at the hospital? A Well, the pain—no, I would not say that. The pain did not start until after the operation. I was getting nervous just at the time I got to the hospital, from the loss of blood.

Q What kind of an operation did they perform? A Well, I suppose they sewed me up.

Q Were you conscious or did they give you ether? A I got ether immediately I got there.

20 Q When you came to what was the condition of your hand? A I had it in splints alongside of me.

Q Were you in pain then? A Yes, pretty good pain for some time.

Q How long did you remain at the hospital? A Eleven days.

Q Then where did you go? A Went home.

Q How long were you confined to your home? A I was home about three weeks after that.

30 Q What kind of work were you doing prior to the accident? A Clerical work; general clerical, and supervising work, requiring the operation of a typewriter, adding machine, and my hand, in collection of moneys.

Q Did you have a special training for that? A I have had. I received that from the Veterans' Bureau.

Q Are you able to do that work now? A Partially.

40 Q What can you not do that you could do before the accident? A I can't write more

Louis J. Illis, direct.

than half an hour at a time. I can't use the adding machine at all, and I can't use the typewriter at all.

Q Could you grasp objects with your hand before the accident? A Oh, absolutely. I was perfect.

Q Can you grasp objects now? A Can't use the thumb. 10

Q Cannot use the thumb? A No.

Mr. Breslin: With your Honor's permission I would like to show the injury to the jury.

The Court: Yes.

Q Will you step down and show your hand to the jury? A (Witness leaves the stand and exhibits hand to the jury, and then resumes the stand.) 20

Q Do you know the length of that cut? Do you, yourself? If you do not, say that you do not? A Five inches.

Q Now, Mr. Illis, what was your weekly earnings prior to the accident?

Mr. Braun: If the Court please, I object to that, until it is shown what the earnings consisted of, what the source of his income is, whether by salary or wages or commission. 30

The Court: Well, that can be established.

Mr. Braun: I think that should be established before the man is asked.

The Court: He can testify as to his weekly earnings. 40

Louis J. Illis, direct.

Mr. Braun: He might have made some of it on the stock market.

The Court: That is all right, if he is entitled to be compensated for it.

10 Mr. Breslin: He would not be here today if he made any money on the stock market.

Mr. Braun: Not for injuries; not for losses claimed as the result of the injuries.

The Court: Suppose it came about, as a result of his employment, that he had two or three resources of employment?

Mr. Braun: Suppose it was invested capital, your Honor?

Mr. Breslin: We would not be here today if we had a lot of money.

20 The Court: Well, that is far fetched.

Mr. Braun: It might be the source. I do not know. I think we ought to know.

The Court: I do not think the injury would affect invested capital, if it were not his own.

Mr. Braun: That is just the reason I want to find out where his income comes from.

30 Q Where did you work before the accident? How many jobs did you have? Were you president of the Standard Oil or United States Steel, or anything like that? A No. It is the only job I had ever since getting out of school, after the war.

Q The only job you had since the war. Whom were you working for? A Prudential Insurance Company.

40 Q How much a week were you making? A A guaranteed salary of \$45 a week, with commissions; commissions besides.

Louis J. Illis, direct.

Q What do your commissions average? A My commissions averaged in the neighborhood of \$55 a week, and over.

Q Just what work did you have in reference to the other agents? A I received an overwriting commission. I am responsible for the production. I am responsible for the collection of a debit of the company's moneys, financially and otherwise. 10

Q How long were you laid up before you were able to go back to your job? A It was five weeks when I went back to the work.

Q Since the accident what have your average weekly earnings been?

Mr. Braun: I object to that, because it cannot be assessed. This work is merely supervision over the others. The fact that his hand is injured does not disturb his supervision. It is a commission proposition, fluctuating. 20

The Court: This is a tort action, and the jury can determine that. It does not have to be established to a certainty in a tort action.

Mr. Braun: That is true, but you cannot guess either, your Honor. You have to show it is the result of the accident. 30

The Court: Let the jury decide from the evidence whether there has been any loss or not. I will allow the question.

Mr. Braun: Allow me an exception.

(Question read)

A With commissions, \$55 a week.

Louis J. Illis, cross.

Cross examination by Mr. Braun.

Q What office do you work at? A I worked in the Newark district, Newark, New Jersey.

Q What is your official title, if any? A Assistant superintendent.

10 Q As assistant superintendent your work is purely supervisory; you do not have any collecting to do unless you go out with a man to try to stir up his own debit? A I have collections to do, when I put them in or take one off, or when someone is sick. I have to do the agents' work.

Q What salary did you get during these five weeks? A Full salary of \$45, with no commissions.

20 Q And did not get any commissions? A No, sir.

Q Did not the men work while you were out? A They were on a decrease. Decrease is something, if the Court permits, I have to explain.

Q How many men have you under you? A Ten.

Q And did they all go on a decrease while you were out? A No; just some.

30 Q Did you not receive any commissions whatsoever? A No. You see, I get the sum total of increase. Decreases come out of increases of the other fellow.

Q None of them had any increases enough to carry over the decreases in the others? A No. Up to the present time I only had one-tenth of my last half year's increase.

By the Court.

40 Q Did I understand you to say before the accident you made \$55 a week? A No, that

Louis J. Illis, cross.

was—during the accident, your Honor, the question was asked; since the accident.

Q What were you making before, as a result of your efforts for the insurance company? A Before this accident?

Q Yes. A My salary was the same as it is now, your Honor. 10

Q What was that? A \$45, commissions.

Q What were your commissions? A Averaged from \$45, up, a week.

Q In addition to the \$45? A In addition to the \$45, yes, sir.

By Mr. Braun.

Q How was your commission fixed? A How was it fixed?

Q Yes. A May I ask you just what you mean? 20

Q Well, how did you compute it; on what? A You want to know how much the company paid me as commissions?

Q No. I want to know how they computed this \$45 a week up, commission, that you claim you got? A A certain amount of the premium that the agents write, it is an over-writing amount to me; net increase.

Q Is that new business? A New business over lapses. 30

Q How much was that commission; what per cent? A That varies, according to contract.

Q How much new business over lapses did you average before the accident? A Well, I averaged commissions—well, there are three different kinds of business; they paid different kinds of commissions. So if you ask me the regular kind that I derive most income out of, I can tell you. 40

Louis J. Illis, cross.

Q No; I ask you what amount of new business you wrote over and above lapses, prior to the accident; what was your average weekly overwriting? A The amount of the insurance written?

10 Q Yes. A Well, I could not answer that correctly.

Q What kind of insurance did it consist of, industrial, or— A And ordinary; both.

Q How much ordinary did you write before? A You mean my men or myself?

Q Well, your men. You did not write it individually? A Well, I generally write a half a million every three months; ten men.

Q Do you keep any books? A My company does.

20 Q Do you not have any office records? A I have my confidential records for my salary.

Q Have you got them here? A No, sir.

Q Can you get them here? A I can't get them here now.

Q Could you get them here at two o'clock? A If the Court so rules, yes.

Q You will not bring them voluntarily, though? A Why, yes, I certainly will volunteer to bring them, if it will help any.

30 Q Where are the records, in Lyndhurst? A No, in Newark.

Q You can go down and get them. A Yes.

Q Will they show all of your business, before and after the accident? A Yes, sir, it will show what happened to my business since my accident. It shows for a year and a half back, and since that.

40 Q How about before the accident? A Well, I have not had that position—yes, before the accident, a year and a half, and since the accident.

Louis J. Illis, cross.

Q How long did you have the position of assistant superintendent? A Well, two years, now.

Q What kind of a car did you have? A Pontiac sedan.

Q Who was with you? A No one in my car.

Q Where did you first overtake this truck?
A Well, about three blocks—say, about 500 yards north of Bergen avenue, on River Road. 10

Q Was it not near South Midland avenue?
A Well, there is no intersecting streets there, so I think it is nearer to Bergen.

Q You told the police about this accident, did you not? A Why, the police came up when I was semi-conscious in the hospital—that is the only time I saw the police—asking me details about it.

Q You told them about the accident? A No, I did not tell them. I told them I would like to get the man. 20

Q Do you remember seeing that newspaper account (handing paper to witness), in which you were supposed to have told the police it happened near Midland avenue?

Mr. Breslin: I object to the question, in which he is supposed to have told the police.

The Court: Well, he is the main witness, being a party to the action. Anything he said and referred to may be inquired into; but you must be definite. There ought to be some police or somebody, some time, and some place. 30

Mr. Braun: I could put a witness on the stand and have him to testify to what he read in the paper.

The Court: Not to contradict this man.

Mr. Braun: Yes, sir. 40

Louis J. Illis, cross.

The Court: Oh, no.

Mr. Braun: I can refer to the case.

The Court: You are not attempting now to do anything more than to establish an admission by this witness. Before you can establish an admission he is entitled to know to whom he has made the admission.

10

Q Did you not report to the Kearny police and the Hudson County police the facts regarding this accident? A I did not report to the county police. The Hudson County police was at my bedside as soon as I got out of ether. I couldn't distinguish their faces. All I seen was their uniforms.

Q Did you not tell them that it was while you were approaching South Midland avenue that the accident occurred? A No, nothing.

20

Q And if they reported that, they were in error?

Mr. Breslin: I object to that.

The Court: I sustain the objection.

Q If you did say that you do not have any recollection of saying it? A I said nothing of the kind. I told him, "Did you get the man?" He said, "We got your car. We put it in the Midland avenue garage."

30

Q How long were you traveling abreast of this Reo; for what distance? A I was not traveling abreast, more than I just passed him; about as long as it takes to pass a Reo, about twenty miles an hour, or twenty-five.

Q And how wide was the road at that place? A Well, I think it is about twenty-five foot road

40

Louis J. Illis, cross.

there, according to my recollection. I am not certain on that.

Q How much clearance did you give the Reo, as you went past it? A I would say I gave him about four or five feet; plenty.

Q Had you completely passed him? A My—
I passed him as far as my reference to the driver's seat is concerned. I didn't look back. I passed him. I passed the truck; didn't see any of the truck, when he approached again. 10

Q Were there any other cars on the road? A Why, I seen one coming from the distance, from the opposite direction, and I seen one coming from the back. I just happened to know that, because, looking back, before I tried to pass the fellow. There was one behind me.

Q How close? A Oh, I would say he was about fifty feet. 20

Q And how close was that car that was approaching from the other direction? A I would say he was about a hundred feet.

Q What became of those cars, if anything, before the accident? A What do you mean, what became of them?

Q Did they pass you? A No, no.

Q And were they still in that position, relative position, when the accident occurred? A Why, they were at that distance away. That is the time I am telling you, when the accident occurred. There was one behind me, about fifty feet; a hundred feet, ahead of me. I am sure I could pass. That is the only reason I know that is how they were. 30

Q How did you recognize the driver of this truck? A When the man picked me out of the car I asked him to get that truck's number. He said he stopped. I said, "Get his number." He 40

Louis J. Illis, cross.

said, "You better go to the hospital, young fellow. You are badly cut." I didn't notice it. I said "Get his number," or I wouldn't go.

Q What man was that? A The man sitting there. He was sitting on the road; Mr. Oberle.

10 Q Whom did you say to get— A Mr. Jaffe. I told him to get this man's name.

Q You did not recognize Mr. Oberle in court this morning? A I didn't see Mr. Oberle until he came on the stand.

Q Well, then, why did you testify that Mr. Oberle was the driver of that car with whom you had a conversation just before the accident? A Mr. Oberle was in the car?

20 Q Yes. Well, I seen him right after the accident, sir. I talked to him right after the accident.

Q Oh, you did talk to him right after the accident? A Yes.

Q He helped take you out of the car, did he not? A No, he did not. He was standing on the road; would not give me a hand. He was standing there.

Q He would not? A No.

Q Did you see him there (indicating man in court room)? A He was not there.

30 Q Did he not go into the river after you? A No, sir. There is only one man after me in the river. That was Mr. Jaffe.

Q You do not remember him at all? A He was not there.

40 Q Where did you have this conversation with Mr. Oberle? A Right on the bank, as I come up twenty foot, by the assistance of Mr. Jaffe. He helped me up. The man was standing there. I said, "Did you drive that car?" He said, "Yes." "Get his number." He produced his card. He

Louis J. Illis, cross.

didn't have no driver's license, but he had the other one.

Q Where was the car? A Whose car; the truck?

Q The Reo, yes. A Standing right there.

Q Right opposite? A Right opposite where I got out of the river. 10

Q And where in the road? A On the right side of the road, going north.

Q How far did you travel from the time you reached the rear of the truck and started to pass it—from the time you reached a point opposite the rear of the truck and started to pass it, before the collision took place? A I would say about a minute.

Q And how far did you travel? A Well, I traveled about the truck's length before he pulled up right against me on the right. 20

Q How far did you travel in the road? A I couldn't measure that. It was a truck's length, both driving.

Q Were you passing anything, any landmarks, or anything that you could figure out? A I was not observing anything. I had to pay attention to the truck on the right of me.

Q Is that road straight there? A It is straight at the place it happened; yes, sir. 30

Q For how great a distance? A Why, about twenty-five feet—fifty feet below me, and about a hundred feet above me, is straight, straight shoot.

Q Where did you start to pass the truck with relation to that straight place? A Why, just about twenty feet from the curb. As I told you, where the straight shoot starts, and got in the clear, that is where I started to pass him. 40

Louis J. Illis, cross.

Q You had gone about how far when the accident happened then? A About twenty-five feet.

Q And in that twenty-five feet you had pulled around and up, so that you went past the driver of this truck? A Yes.

10 Q And then the driver of the truck had pulled up and collided with you? A And the driver of the truck pulled up on the right, and when he got even I yelled at him to stop.

Q Where were you in the road when he pulled up on the right? A I was slightly to the right; about the middle; slightly to the right of the road.

Q Slightly to the right of the middle? A I was just going to get into the middle after passing from the left, when the truck appeared on the right again.

20 Q What did you do then? A I yelled at him to stop.

Q Is that all? A And the next thing I was down in the river.

Q You did not put on your brakes? A Well, I had no chance. I was hit immediately. He passed me with terrific speed immediately, and the wheel went out of my hand, and the hand went through the windshield, and down I went.

Q Passed at a terrific speed? A Yes.

30 Q Did you see any pile of dirt on the left of the road as you were traveling there? A I didn't see anything, because the minute I was hit I was over.

Q Did you not see it before you were hit? A Well, I was not watching anything on the left side of the road.

Q Did you see it after you were hit? A No, I couldn't say that I did.

40 Q But you did have a conversation with Mr. Oberle after the accident? A The only con-

Louis J. Illis, cross.

versation I had, I asked Mr. Jaffe to take that car's number. I said, "Here is the man." I told him the man. I said, "You hit me." He said, "I was on the right." And he took his number and he rushed me to the hospital. And that is all the conversation I had with him.

Q How did you recognize him as the man that hit you? A I asked Mr. Jaffe to get the number. I said, "Here is the man." I asked him, "You are the man?" He said, "That is my car." I said, "You hit me." He said, "I was on the right." Mr. Jaffe took the number and rushed me to the hospital. 10

Q Where was Mr. Jaffe when this accident happened? A He was behind me, apparently.

Q How long were you in the river? A How long? 20

Q Yes. A I can't recall it. I was partly conscious, partly unconscious.

Q You do not know what part of the cars came together, do you? A Why, yes. I seen his rear left pass so close to me that that is the part that hit me, and as my hand—he hit me, the wheel swerved to the left with such force that a piece of the steering wheel come off, and my hand went down through the windshield. I was immediately turned 45 degrees when he hit me. 30

Q His car got almost completely past before this collision? A Yes. His right hit me, his right rear.

Q His what? A His left rear hit me.

Q And where did it hit you? A On the right front wheel.

Q On the right front wheel? A My right front wheel, yes.

Q Were you traveling in a straight course? A Why, yes. 40

Fred A. Keckeisar, direct.

Q Was he traveling in a straight course? A Well, I don't know how he was traveling, because he was trying to bear to the left of me, and I yelled at him just before that and said, "Stop," when I got hit.

10 Q And you yelled at him, "Stop," because he was trying to pass you on the right, did you not?

A On the right, and too close.

Q You made no effort to turn to your left?

A I had no chance.

Q Answer the question. A I am answering your question. I had no chance. It happened in a moment.

Q All this happened in a moment? A Yes, sir.

Q Although you had time to yell, "Stop"?

20 A Yes.

Q And he was still abreast of you then? A When I yelled; yes, sir.

Q Then he kept on, and the whole car got by, with the exception of the rear left wheel, which collided with your right front wheel? A Yes, sir.

Q That is your version of the accident? A Yes, sir.

30 Mr. Braun: That is all.

FRED A. KECKEISAR, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Breslin.

40 Q Mr. Keckeisar, where do you live? A 177 Second street, Newark, New Jersey.

Fred A. Keckeisar, direct.

Q Prior to the accident, did you know Mr. Illis? A No, I didn't know him.

Q Are you related to him? A No, sir.

Q Were you driving a car on River Road at the time of this accident? A I was.

Q Which direction were you going in? A I was going towards Newark. 10

Q In a southerly direction? A Southerly direction.

Q What kind of a car were you driving? A Nash.

Q Did you see Mr. Illis' car? A I did.

Q What kind of a car did he have? A It looked like a sedan, a coach.

Q Did you see any other cars? A I saw the truck. 20

Q What kind of a truck? A Reo truck.

Q Who was driving that truck? A Mr.—the fellow in the corner.

Q The man in the end there? A In the end.

Q Did you see the actual collision between the two cars? A Well, as much as I seen of it.

Q Just tell us what you saw. A I seen Mr. Illis trying to go by Mr.— I don't know his name.

Q Yes. A And the truck started to pass him again; and as he passed him he bore left, and as he bore left, why, the car went in the river. 30

Q The truck hit Mr. Illis' car?

Mr. Braun: I object to that.

Q If you saw it. Did you see it? A Well, I really can't say whether he hit him or not.

Q But as the truck went to go past Mr. Illis' car went down in the river? A Illis' car went down in the river. 40

Fred A. Keckeisar, cross.

Cross examination by Mr. Braun.

Q What did you do? A I stopped my car.

Q Then what? A I stayed there.

Q Just stand there? A Yes. I seen the accident. There was a man behind Mr. Illis. He ran
10 down the bank after.

Q You just stood there? A Well, I stayed there. I was not right up on the scene at the time he went in. I got up there a couple of minutes later.

By the Court.

Q Did you go to the scene of the accident later? A Just a little later. That is, I seen the accident in the distance.

20 Q Then you went up to where it occurred?
A Up to where it occurred. And by that time he had help already. Otherwise I would have gone down myself.

By Mr. Braun.

Q You were going toward this thing when it happened? A Toward Mr. Illis, yes.

Q About a hundred feet away? A I was a little over that, I think.

30 Q Maybe two hundred feet? A About a block.

Q About a block away? A Pretty near; three-quarters of a block.

Q Is the road straight for a block along there?
A I think it is, yes.

Q How long did it take you to reach the scene of the accident? A Not very long.

Q You were about a block away when you saw this? A Well, I won't say a block, but it is
40 pretty near a block anyway.

Fred A. Keckeisar, cross.

Q Pretty near a block away when you saw this? A Yes.

Q And how fast were you traveling? A About eighteen miles an hour.

Q How much? A About eighteen.

Q About eighteen miles an hour? A Yes.

Q You were driving what kind of a car? A 10
Nash.

Q And you had plenty of time, of course, to stop when you reached the scene where the car was in the river, had you not? A Oh, yes.

Q Did you not get out and try to get this man out of the car? A Got out of my car. He already had a man down there.

Q They already had him up? A No. I say there was a man already down there helping him out. 20

Q And you did not think it was necessary to go down because he was already being helped out of the car? A Well, I seen that party there and I was going to continue my trip on to Newark.

Q Did you continue your trip on to Newark?

A A couple of minutes later, yes.

Q Did you talk to anybody? A No, I didn't.

Q How did you come to know Mr. Illis? A 30
I seen it in the paper the next day, about him being injured, and his agent collects at my home, and he told me that he was injured, and I told him I was on the street at the time.

Q And he collects in your neighborhood? A Not Mr. Illis; one of his—

Q He has charge of the district that your house is in? A Yes, sir.

Q How did you come to be talking about Mr. Illis to your insurance agent? A To my insurance agent? I told him that I seen an accident 40

Fred A. Keckeisar, cross.

the day before, and he happened to tell me that was his boss that really was in the accident.

Q You did not recognize him? A Who, Mr. Illis?

Q At the time of the accident you were not close enough to recognize him as Mr. Illis? A
10 As Mr. Illis?

Q Yes. A I was not close enough to recognize him?

Q Yes. You did not go up and speak to him, or anything; you went right on after you saw somebody else helping him out of his car? A Yes. I didn't see Mr. Illis' face.

Q You did not see his face; you did not know who the man was that was in the river, did you? A I know he was in there.
20

Q You did not recognize him, did you? A Not right then.

Q You did not see his face, did you, at the scene of the accident? A I wouldn't really say whether I could pick him right out then or not, but I know afterwards that he—

Q How did you know that the man your agent spoke about was the man involved in the accident you had seen? A He showed me—I showed him the paper, and he told me it was his boss.
30

Q How did you happen to show him the paper? A We were speaking about accidents.

Q What time was this in the day? A It was at night when I spoke to the agent.

Q At your home? A At my home, yes.

Q What time at night? A After supper.

Q Who is the agent? A A man by the name of Kerr.

Q What was he doing at that time of night? A He was collecting my insurance.

John R. Oberle, direct.

Q And you showed him the paper? A Yes, the morning before; the morning's paper that it was in.

Q You saw this whole thing from a distance of about a block? A Yes, sir.

Mr. Breslin: I want to tell the Court and jury that I subpoenaed Mr. Jaffe. I called his office, Passaic 5000, and the word I got this morning was that he was sick, and rather than put off the case I decided to go ahead with it. That is why he is not here. 10

PLAINTIFF RESTS.

DEFENDANT'S CASE. 20

JOHN R. OBERLE, the defendant, called as a witness in his own behalf, being previously duly sworn, testifies as follows:

Direct examination by Mr. Braun.

Q Mr. Oberle, you were driving your car along River Road when Mr. Illis met with an accident? A Yes, sir. 30

Q Where were you going? A I was going north on River Road.

Q To where? A I was going to come here to Hackensack. I was doing some work here.

Q What did you have, if anything, on your car or truck? A I had building material, and scaffolding.

Q Do you know approximately what the load was? A Why, I guess it weighed about eighteen to nineteen hundred pounds. 40

John R. Oberle, direct.

Q What is the capacity of your truck? A It is a one-ton truck.

Q You were traveling on what portion of the highway? A On the right side, as near as possible.

10 Q And how fast were you going? A I was going about eighteen to twenty miles an hour.

Q When did you first know that Mr. Illis was in the vicinity? A Why, I will tell you. He come along so fast I didn't see him until he had passed me.

Q After he had passed you what happened? A After he had passed me he went about between fifty and seventy-five feet, and he cut into the right this way, and almost run off the road on the right; and something must have happened with his steering wheel, and he swung around and made an S shape; and being it was a big pile of dirt there that a truck had dumped there, off the road, about fifteen feet off the road—

20

Q On which side? A On the left side.

Q The river side? A The river side. And he hit that pile of dirt so hard, he cut it off, and the back of the machine raised right up and went over the top and rolled right down to the bank, into the river.

30

Naturally, when I saw that I stopped. His machine was laying on the side, in the river. So my man I was taking to the job, I ran back with him; and he ran down the bank, into the water, and pulled him out. And I was down alongside the river, in the bank, helping him walk up the hill. And as we were running over there, there was only one man coming up the road, coming north, and we stopped him to take him to the hospital. And there was no other

40

John R. Oberle, cross.

machine within five hundred feet in sight when this accident happened.

Q Now, did your truck and this car ever come in contact? A No, sir.

Q How close did he pass your car as he went by? A Well, within a foot, I believe, the front part of the car. 10

Q How fast was he traveling? A He was going between forty and fifty miles an hour.

Q Did he sound any warning when he attempted to pass you? A No, sir.

Q Did he shout at you, "Stop"? A I didn't hear him shout either.

Q Did you attempt to pass him after he had passed you? A No, sir. I could go nowheres near as fast as he was going with my truck loaded. 20

Q How did he get to the hospital? A We stopped a man that just happened by in a car, and he come over, helping him; and after we had him up the bank we tied the handkerchief around his wrist to stop his blood from flowing. And I told him personally to hustle him in the car and get him off; and I give him my card, because he accused me, see.

Q What did he say? A Why, he simply says that I crowded him off the road. 30

Cross examination by Mr. Breslin.

Q Do you know Mr. Jaffe, the short, stocky fellow with glasses? A That was the man we stopped, that come along with his car.

Q He was the man that went down the embankment and brought Mr. Illis up? A No, sir.

Q Do you say you went down the embankment? A I went down the embankment. My 40

John R. Oberle, cross.

man over there went in the river after him, and got him out of his car. And I stood on the bottom of the embankment after my man had him out, and walked up. I had one side his arm, coming up the embankment.

10 Q Where were you going? A Where was I going?

Q Yes. A When?

Q At the time of the accident? A I was coming here to Hackensack; was doing work on an oil station over here on the main road, for the Gulf Refining Company.

Q What is your business? A I was doing plastering work.

Q What time of the day was it? A 1:45.

20 Q Who was this man? A Which man do you mean?

Q You did not have anybody with you that day? A Yes; one of my workmen.

Q You were all alone in the truck? A I was not; positively not.

Mr. Braun: If the Court please, that is not a question.

The Court: That is a statement.

30 Q Were you not all alone in the truck? A No, sir.

Q Now you say that he shot ahead of you and then he turned to the right; is not that right? A Yes, sir.

Q Do you not know that there is a stone embankment there on the right? A There was no stone embankment there when this happened.

Q How long have you driven along the River Road? A How long?

40 Q Yes. A I have been driving a car since 1912.

John R. Oberle, cross.

Q You know there is a stone embankment along River Road? A Yes, certain parts, yes.

Q Do you know where the Children's Home is there on River Road? A I do.

Q Where did it happen with reference to the Children's Home? A Pretty near in back of it. It was near Midland avenue. I never looked at the Children's Home. 10

Q Do you know where the linoleum factory is? A Yes.

Q Did it happen north of that place? A North of the linoleum, yes.

Q How far north of it? A Oh, quite a ways.

Q Do you know where the Children's Home is? A There is a Catholic institution there, I know.

Q It is up on the hill? A Yes. 20

Q Did it happen near that? A Past that.

Q Up near the railroad tracks? A No, no; down below the railroad tracks.

Q How far south of the railroad tracks? A Well, I should judge it was about six or seven hundred yards.

Q You know there is a stone wall along River Road, do you not? A There is a stone wall, yes.

Q You say this man's car pulled to the right? A Yes, sir. 30

Q Then what did it do? A It made a complete S.

Q It pulled to the right? A Yes.

Q And then hit? A Swung around and made an S, and came around this way again (indicating) and hit the bank.

Q Hit the pile of dirt that was there? A Hit the dirt and cut it off, just as though there was nothing lying there; and the back of the car 40

Gustav Brenstetter, direct.

toppled over; the back of the car went up into the air.

Q Which part of the car went into the river first? A The back part went over first, and rolled over on the side.

10 Q The back part went down first? A Yes, sir.

Mr. Breslin: That is all.

GUSTAV BRENSTETTER, called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

Direct examination by Mr. Braun.

20 Q You live where—Mr. Brenstetter, is it? A Yes, Brenstetter.

Q You live where? A In Hillside.

Q Were you with Mr. Oberle on the day of this accident? A Yes, sir.

Q You were working for him then, were you not? A Yes, sir. He moved me on a new job.

Q Are you working for him now? A No.

30 Q Whom are you working for now? A I am working for—oh, for some carpenter over in Union now.

Q What is your business? What do you do? A Mason.

Q And where were you going on this day with Mr. Oberle? A Over here to Hackensack, on the new job. He brought me on the station.

Q Oil station; gas station? A Yes, an oil station.

40 Q What did you have on the truck? A Adamant cement, scaffolding, planks and horses.

Gustav Brenstetter, direct.

Q How fast was the truck going? A It can't go fast with a load on like that.

Q Was it going fast or slow? A Maybe fifteen or twenty miles; eighteen.

Q As you were coming along River Road, what side of the road was the truck traveling in? A Coming from Newark? 10

Q Yes. On what side of the road were you traveling? A On the right side, sure.

Q Is that the side nearest or furthest from the river there? A That is the furthest side from the river.

Q When did you first see this other car? A This car there? After he come like lightening. I tell you the truth, gentlemen, I can call him a road hog. I am driving a motorcycle myself. He come like lightening, cut us off. He shoot up to the right, and then he pretty near run up to the right. Then he turned around, and then I saw him go down. I was the first one got him out, and he said I was not there. I went in twice in your car and got you out. 20

The Court: Just a minute.

The Witness: He is lying. I got wet all the way up to here (indicating). 30

The Court: Just answer questions.

The Witness: I am not a liar.

The Court: Just a minute. Just answer questions.

Q Did you see any car coming from the opposite direction? A South?

Q Coming toward you? A No.

Q Was there any car immediately behind you? A Yes, sir. This first car I stopped came 40

Gustav Brenstetter, cross.

this way. I couldn't get him alone out. I needed help.

Q What happened to him after you got him out of the car? A The day before was rain, and that bank—

10 Q What happened to him after you got him out of the car? What did you do with him? A Well, I pulled him out, see. I went down. And after I had him out that car came, and I stopped it before, see, before I went down. Then that car came, and I said, "Take that fellow away quick." See, we had a load on the truck. And soon there were more cars there. I don't know where they come from. There are always cars on River Road.

20 *Cross examination by Mr. Breslin.*

Q Whereabouts was this job in Hackensack? A That was not Hackensack. We moved down to Tenafly.

Q Oh, Tenafly. The job was not in Hackensack? A Wasn't it? Or Lodi?

Q Just a minute; just a minute.

The Court: Just answer the question.

30 Q Oh, the job was in Tenafly. Where had you been that morning? A What?

Q The morning of the accident where had you been?

The Court: Where were you working?

40 Q Where were you working that morning? A We get things ready; that is, finish up another job. Then I got ready.

Gustav Brenstetter, cross.

Q Where did you finish the other job up?

A Up in Newark.

Q Whereabouts in Newark? A Where was it, now? I don't know. I can't remember.

Q You do not remember where in Newark?

A We got jobs all over.

Q What time did you start from Newark that day? A Well, I think it was before twelve; something like that.

10

Q After you left the accident where did you go; to Tenafly? A We move our tools.

Q To Tenafly? A I don't know, was it Tenafly, Lodi or Paterson.

Q You do not know whether it was Tenafly, Lodi or Paterson, do you? A No. We had lots of work around here. I can't keep track of where we moved that day.

20

Q You cannot keep track of every move that day. Did you talk this case over with Mr. Oberle this morning? A With who?

Q Did you talk the case over with Mr. Oberle this morning? A No.

Q Did you come to court with him? A One of the gentlemen there brought me here.

Q Did you talk to Oberle at all this morning? A Yes. I met him out here.

Q What did you talk about, the weather, or about the case? A What do you mean, weather?

30

Q Weather outside. What did you talk to him about? A What you say when you meet somebody? Don't get my goat.

Q I could not do that; I could not do that. That is impossible? A Oh, your questions. I want to say the truth, that is all.

The Court: Did you talk to him about the case? What was your conversation?

40

Gustav Brenstetter, cross.

The Witness: I was late. Supposed to be here nine o'clock.

Mr. Braun: He did not get here until almost eleven.

The Witness: I am not used to this.

10 Q Did you talk the case over with Oberle? A There was not much said. Only I have been listening here to the stories I hear here, that is all.

Q You have been listening to the stories? A Yes.

Q Do you know where you went that day? Where were you going on the job? Were you going to Tenafly, Paterson or Lodi? A I don't know it for sure.

20 Q You do not know where you were going, do you? A Well, we move to the job

Q What time did you get to the job in the afternoon? A Well, it was late.

Q What time? A Oh, maybe three o'clock.

Q Three o'clock? A We could not start no more. Or four o'clock. I don't know for sure. We just moved the tools there.

Q Did you stop from Kearny to the job? Did you make any particular stops from the time you
30 left Kearny to the time you got— A No; stopped nowhere.

Q And did not get to the job until three o'clock? A Yes, about. Just move the tools there; take everything in; and the next day we start.

Q Did you do any work that day? A Came back again.

Q You did not do any work that day? Just left the stuff there and went away? A At three
40 o'clock there is no use starting in any more.

Gustav Brenstetter, re-direct—re-cross.

Q Union man? A Yes.

Q Were you a Union man then? A Yes;
still yet.

RECESS.

10

AFTER RECESS.

GUSTAV BRENSTETTER, resumes the stand
and testifies as follows:

Re-direct examination by Mr. Braun.

Q How many times did you go into the
water there? A Twice.

Q Why did you go back the second time? A
He told me to get the books and different things
in the car, papers.

20

Q Did you get them? A Yes, sir.

Re-cross examination by Mr. Breslin.

Q What kind of books were they? A I
didn't read them. I just went and got them, and
handed them to him.

Q What kind of books? How big were they?
A Oh, about that long, and like that (indicat-
ing).

30

Q Did they have any names on them? A
I did not read them. I had no time to read.

Q You say you went down to the bed of the
river and helped this man back? A Yes, sir.

Mr. Breslin: Will you stand up, please?
(Man stands.)

40

Victor Jaffe, direct.

Q Did you see Mr. Jaffe there at the time of the accident? A Yes. That is the man I stopped.

Q You say that you stopped Mr. Jaffe? A I stopped him. The first car coming I stopped.

10 Mr. Braun: Defense rests.

PLAINTIFF'S REBUTTAL.

VICTOR JAFFE, called as a witness on behalf of the plaintiff, in rebuttal, being duly sworn, testifies as follows:

20 *Direct examination* by Mr. Breslin.

Q Mr. Jaffe, what is your business? A Title searcher.

Q Where do you live? A Passaic.

Q Prior to this accident did you ever know Mr. Illis? A No, sir.

Q On the day of the accident which direction were you driving in? A I was driving north toward Hackensack.

30 Q In which direction was Mr. Illis driving?
A North, towards Rutherford.

Mr. Braun: Now, if the Court please, I think this is not proper rebuttal.

The Court: I will allow it, because he was not here before.

40 Mr. Breslin: I will ask the Court to allow me to go into this matter. I realize it is purely discretionary, but I want the jury to have all the facts.

Victor Jaffe, cross.

Q Did you see this Reo truck? A Yes, sir.

Q What did you see, in so far as the sedan and the truck were concerned? A I don't understand your question.

Q Did you see the accident? A Yes, sir.

Q What did you see? A This Pontiac was trying to pass this Reo truck, and the Reo truck suddenly swerved to the left, and it hit this right front wheel of the Pontiac, and then that is the last I saw of the Pontiac, because it went in the river. 10

Q Who was the first one to get down to the river? A I was.

Q Was that man down there, the man that just testified that he helped Mr. Illis up? A No. I was the only one that helped him.

Q Where did you help Illis to? A To put him in my car, and took him to the hospital. 20

Q Did you see Oberle there? A Which one is that?

Q The bald-headed man? A I don't know. I don't remember.

Q What happened to the driver of the truck; do you know? A Why, he was very reluctant in giving Illis his license, and I said to him, "You better give it to him, because we can get it from your car anyway." 30

Cross examination by Mr. Braun.

Q You do not know whether he was there or not, do you? A I don't know, no, sir.

The Court: Was anybody there; any other persons?

The Witness: Why a crowd started forming right away, and I don't know who was there and who was not there. 40

Victor Jaffe, cross.

Q You rushed him to the hospital, did you not? A Yes, sir.

Q And you did not stop to dicker about it, did you, or quibble about anything? A Oh, no.

Q The man was bleeding, was he not? A Yes, sir.

10 Q You wanted to get him to the hospital quickly? A Yes, sir.

Q What kind of a car did you have? A Hudson.

Q Sedan? A Brougham; 1926 model.

Q You were how far behind the Illis car before he started to pass this truck? A About 200 feet.

Q And how far were you behind him when he did pass it? A I didn't see him pass it.

20 Q Did you not see him passing it? A No, sir. He never got past the Reo truck. The Reo truck swerved to the left and forced him in the river.

Q Did you not see him swing out to the left of the road and then come back in close, and then the Reo come up parallel with him? A No, sir.

Q You were not here this morning, were you? A No, sir.

30 Q You did not hear Mr. Illis testify? A No, sir.

The Court: Where was Mr. Illis when you got to the river bank?

The Witness: He was coming out of the car himself, and I asked him, "Is anybody else down there?" He said, "No."

Q Then you did not help him out of the car; you helped him up the bank? A Yes, I helped
40 him up the bank.

Victor Jaffe, cross.

Q He was not seated in the car when you got down there? A No, sir.

Q How close were you when the car went into the river, still 200 feet? A I don't understand your question.

Q How close were you to the Illis car when it started to go in the river, still 200 feet? A 10
When I got to the point where the Illis car went into the river I stopped my car and went down in the bank to help him out.

Q You were following the Illis car at about 200 feet, you say? A Yes, sir.

Q Were you still 200 feet behind when he started to go off the road? A I have not any idea.

Q How fast were you going? A I was going 20
about thirty-five miles an hour.

Q And how fast was he going? A I can't tell.

Q Were you gaining on him? A No.

Q He was going at least thirty-five, then? A Yes.

Q Where did you start to follow him; for how long a distance? A I didn't follow him for any distance. When I looked up into the road I was about 200 feet behind him, when I saw this 30
accident happen. I was not following him.

Q Was that the first you saw of him? A Sure.

Q You were going in the same direction that he was traveling? A Yes.

Q And, as a matter of fact, you did not see the whole of the accident at all, did you? A I saw the whole accident.

Q Did you actually see the contact between the cars at 200 feet? A Yes.

Victor Jaffe, cross.

Q And how far past the other car had he gotten when the contact took place? A He didn't get past the car.

Q No part of his car was ahead? A No.

Q Was he abreast of it? A He was just about abreast of it.

10 Q Was he even with the driver of the truck?
A Do you mean were the wheels even?

Q Was his seat even with the seat of the truck? A From the point where I was I couldn't tell.

Q Do you know what part of the truck and what part of the Pontiac came together? A The left front wheel of the truck and the right front wheel of the automobile.

Q You are sure about that? A Yes, sir.

20 Q You say you are a title examiner? A Yes, sir.

Q By whom are you employed? A I am in business for myself.

Q Are you not employed by your brother, the attorney? A I do work for him, but I am not employed by him.

Q Do work for Mr. Breslin's office? A No, sir.

Q Acquainted with him, though, are you not?

30 A Why, I hadn't known Mr. Breslin until he was interested in this case, until he spoke to me about it one day.

Q Where were you this morning? A I was home in bed.

Q And when did you first learn that this case was coming on? A It was supposed to come on the first week of New Year's.

Q When did you first know that it was actually on triad today? A Why, the girl in the office called me and told me that Mr. Breslin called up

40

Charge to Jury.

and wanted me to be here, and I told her to call Mr. Breslin back and tell him I was sick in bed and couldn't be here.

Q You say the left front wheel of the truck and the right front of the Pontiac came together?

A Yes, sir.

10

Mr. Braun: That is all.

Mr. Breslin: We rest.

(Mr. Braun summed up the case to the jury.)

(Mr. Breslin summed up the case to the jury.)

CHARGE.

The Court charged the jury as follows:

20

The Court: Ladies and Gentlemen of the Jury: The plaintiff in this case sues to recover for damages by reason of a collision between his automobile and a Reo truck owned by the defendant. The accident happened on River Road, in the Town of Kearny.

From the testimony of the plaintiff, he was proceeding in a northerly direction when he reached this truck, or at a point where he thought it was necessary to run to the left, and he swerved and attempted to pass it. When he had reached a certain portion of the Reo truck, the driver of the Reo truck turned to his left, and then he shouted and said, "Stop." I think the plaintiff said that the rear of the Reo truck struck his front wheel, causing him to lose control of the Pontiac, which he was driving, and that he continued to the left and landed in the river at the foot of the embankment.

30

40

Charge to Jury.

The defendant, on the other hand, says that he was riding as the plaintiff testified, but he did not strike the plaintiff's car; that the plaintiff had passed him entirely and had gone several feet, and then he swerved to the right and then to the left, and in doing one or the other he struck a mound or pile of dirt, and that the automobile tumbled into the river; and I think the way he illustrated it to you was that when it upset the back seemed to roll forward, and that is what tumbled down the embankment.

So, you see, taking the two theories, they are so entirely inconsistent, there must be a mistake, at least as to one story or the other.

A witness called on behalf of the plaintiff testified that he was traveling in the opposite direction. You will remember his testimony. Then there is a witness, a Mr. Brenstetter, I think, who said he was riding with Mr. Oberle, the defendant. He said that this automobile had passed, and he, in substance, testified as Mr. Oberle did.

Mr. Jaffe was called and said that he was riding in the same direction, and he noticed the Reo truck and also the Pontiac, and said he was about two hundred feet in the rear of both cars when he saw the Pontiac attempt to pass, and before it had done so the left of the truck struck the front of the Pontiac, causing it to fall down the embankment.

So far as this case is concerned, it does not make very much difference who reached this man first, but in view of the conflicting testimony, of course, the difference in the testimony of the witnesses with respect to that has much to do with the credibility of the witnesses. Mr. Oberle said that Mr. Brenstetter assisted Mr. Illis out of the car, and Mr. Brenstetter himself testified

Charge to Jury.

to that, whereas Mr. Illis said no, it was not he, it was Mr. Jaffe. Mr. Jaffe himself said that he did not take the plaintiff out of the automobile, but he assisted him up the embankment. Mr. Brenstetter said, not only did he go into this automobile once, but he went in twice, and took out some papers which Mr. Illis had told him were in there. 10

So, you see, with this mass of conflicting evidence, you must decide who is telling the truth.

In this case the plaintiff sets up negligence, in that the defendant did not drive his car as a reasonably prudent man should have, under the circumstances then existing.

The defendant's contention is an absolute denial. In other words, the defendant says that the truck had already passed him, and no act of his occasioned the upsetting of the car and the resultant tumbling into the river. 20

Our motor vehicle law provides that a driver of any vehicle overtaking another vehicle proceeding in the same direction shall pass at a safe distance to the left and shall not again drive to the right side of the highway until safely clear of such overtaken vehicle.

The driver of an overtaking motor vehicle not within a business or residence district shall give audible warning with his horn or other warning device before passing or attempting to pass a vehicle proceeding in the same direction. 30

Another part: The driver of a vehicle shall not overtake and pass another vehicle proceeding in the same direction upon the crest of a grade or upon a curve in a highway where the driver's view along the highway is obscured within the distance of five hundred feet. 40

Charge to Jury.

Another provision applicable in this case: The driver of a vehicle upon a highway, about to be overtaken and passed by another vehicle, approaching from the rear, shall give way to the right in favor of the overtaking vehicle on suitable and audible signal being given by the driver of the overtaking vehicle, and shall not increase the speed of his vehicle until completely passed by the overtaking vehicle.

Now, these are provisions of our Motor Vehicle Act. A violation of all or any one of these provisions in itself, the law has said, does not constitute negligence *per se*, but a violation, if established to your satisfaction, shall be a circumstance that you may consider, in your deliberations.

So, as I said before, you must find the facts. If you conclude that the plaintiff has made out a case, then your consideration will be that of damages. You heard his testimony with relation to his injury, and the physician's testimony, as to the nature of it. And you also heard his testimony with regard to his disability for a time after. He said he was earning \$55 a week. I do not think there is any loss or claim for loss of wages during that time, but there is a claim that by reason of that accident he has been unable to do certain work, which has decreased his commissions. As to that evidence, there is very little upon which to predicate even damages as to commission, because, as I understand his testimony, the commissions depend not so much upon his efforts as upon the efforts of his agents, and whether or not, by reason of his disability, the acts of the agents are the result of that, I do not think that was brought out very clearly by way of testimony.

Exception to Charge.

Now, if you conclude, however, that the defendant is not guilty of negligence, that the accident, as disclosed by the testimony, was not due to the defendant's fault, then, of course, you are not interested at all in the question of damages, and your verdict, in that instance, ought to be a verdict in favor of the defendant.

10

You may take the case.

(Mr. Breslin confers with the Court.)

The Court: My attention has been directed to testimony concerning the damage to the automobile. There seems to be no evidence contradictory, that the cost of repairs was \$444, I think. Of course, that element is contingent upon your finding liability.

20

(The jury retired at 2:47 P. M.)

Mr. Braun: I respectfully take an exception to that part of the Court's charge in which the Court charged the jury as follows: "The defense in this case is an absolute denial of negligence," or words to that effect, and without mentioning the contributory negligence feature.

30

40

STIPULATION.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

LOUIS J. ILLIS,

*Plaintiff-Appellee,**vs.*

JOHN OBERLE,

*Defendant-Appellant.**Action
at Law.**Stipulation.*

10

It is hereby stipulated and agreed by and between counsel for the respective parties in the above-entitled matter that the argument on the rule to show cause be submitted on briefs without oral argument. 20

BRESLIN & BRESLIN,
Attorneys of Plaintiff-Appellee.

SCHNEIDER & SCHNEIDER,
Attorneys of Defendant-Appellant.

Dated March 20, 1929.

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New Jersey Court of Errors and Appeals

LOUIS J. ILLIS, Plaintiff-Appellee, vs. JOHN OBERLE, Defendant-Appellant.	} Action at Law. On Appeal from Supreme Court, Bergen County.
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BRIEF OF DEFENDANT-APPELLANT.

This is an appeal from a judgment entered in the New Jersey Supreme Court on a verdict rendered by a jury in the Bergen County Circuit on January 10, 1929, in favor of the plaintiff and against the defendant in the sum of five thousand dollars.

The Facts.

The plaintiff was injured in an accident on June 6, 1928, when the automobile that he was driving northerly on River Road, in the Town of Kearny, County of Hudson and State of New Jersey, ran off the road and into the Passaic River. It was the plaintiff's contention that while he was passing a truck owned and operated by the defendant and also going in a northerly direction, the defendant swerved his truck so as to collide with the plaintiff's car, causing him to lose control over it. Defendant denied any contact between the two vehicles and claimed that it was the speed and negligent driving of the plaintiff that caused him to lose control over his machine. As previously stated,

the jury brought in a verdict in favor of the plaintiff in the amount set forth above.

The Errors Alleged.

The Trial Court in its charge to the jury erroneously limited the defense to a denial of negligence by charging the jury as follows: "The defendant's contention is an absolute denial," and failing to charge on contributory negligence although this defense was set forth in the answer and was called to the Court's attention.

POINT ONE.

The Trial Court failed to charge the jury on the law regarding contributory negligence and limited the defendant in his defense by charging as follows: "The defendant's contention is an absolute denial of negligence."

The answer of the defendant in addition to a general denial of negligence, set up as a separate defense the contributory negligence of the plaintiff (C, p. 8). In support of this separate defense, the evidence discloses the statement of the defendant that the plaintiff was going forty to fifty miles an hour and gave no warning of his intention to pass (C., 43, ll. 11-14), and that after passing the defendant's truck, the plaintiff appeared to lose control (C., 42, ll. 15-30).

Witness, Gustav Brenstetter, testified that the plaintiff's car came like lightning (C., 47, ll. 16-26). Even the plaintiff's own witness, Mr. Jaffe, who was approximately two hundred feet behind the plaintiff at the time of the accident, said that the plaintiff was going at least thirty-five miles per hour (C., 35, ll. 15-26). In the face of this evidence and of the separate defense set forth in the answer, it is respectfully

contended that a jury question as to the contributory negligence of the plaintiff was clearly presented, particularly in view of the fact that the plaintiff did not testify as to his own speed nor deny the statements made by the other witnesses with respect thereto.

The learned Trial Judge in charging the jury, after charging as follows: "In this case the plaintiff sets up negligence, in that the defendant did not drive his car as a reasonably prudent man should have, under the circumstances then existing," continued with the following paragraph: "The defendant's contention is an absolute denial. In other words, the defendant says that the truck had already passed him, and no act of his occasioned the upsetting of the car and the resultant tumbling into the river" (C., 59, ll. 14-22). Nothing whatsoever was said by the Trial Court with respect to contributory negligence, the previous portion of the charge being confined to a resume of the testimony and the balance of the charge consisting of various quotations from the Motor Vehicle Act and evidence as to the plaintiff's damages.

At the conclusion of the Court's charge, the following conversation took place between the Court and the attorney for the defendant (C., 61, ll. 30-40):

"Mr. Braun: You did not charge contributory negligence.

The Court: You did not request it.

Mr. Braun: I pleaded it.

The Court: Yes, but as I understood your defense, you claim that the accident to the plaintiff came about as the result of his own act after passing the defendant's truck, and the defendant had nothing to do with the injury whatsoever.

Mr. Braun: I ask for an exception."

This conversation was unfortunately not taken down by the stenographer originally, but is set up in the State of Case in substantial phraseology to the best of the Trial Court's recollections. An exception was duly taken, and noted on the record, to the Trial Court's failure and refusal to charge on contributory negligence even after it was called to his attention.

It is well recognized in this State that ordinarily a Trial Judge is not bound to charge on matters of law which are not specifically requested in writing and this, of course, is particularly true in the case of intricate legal propositions. The whole theory, however, upon which this rule is based is on the ever present desire of the courts to facilitate the disposition of litigation and not leave it open to endless prolongation by permitting reversals where the Trial Court inadvertently overlooks some unimportant or minute legal phase of the case, and also to prevent prolonged and excessive charges to a jury which would tend to confuse them with respect to the real and meritorious issues in the case. It would be ridiculous, however, to assume that a Trial Court unless specifically requested in writing and particularly where the matter was called to the Court's attention, would fail or refuse to charge on a fundamental rule of law which was of vital importance to the interest of either or both of the parties. It was to this effect that the original hard and fast rule that it was not reversible error for a Trial Court to neglect or refuse to charge on a fundamental rule of law when the matter was called to the attention of the Court, was modified in the opinion of Justice Minturn in the case of

Lambert v. Trenton and Mercer, etc., Corp. (103 Law 25), wherein it was held as follows:

“Counsel, therefore, might properly assume that the basic rules regulating the quantum of damages recoverable by each plaintiff would receive the attention of the court as an essential portion of its charge, without suggestion from counsel, and acting upon that assumption be prepared for nothing further than to enter an exception to such portion of the charge as should fail to meet the legal requisite, as conceived by counsel. When, therefore, the court entirely omitted from its charge a statement of the fundamental rule of law governing the assessment of damages by the jury, no other practicable course would seem to have been open to counsel than the one he adopted of calling the court’s attention to the omission, and requesting a statement to the jury of the law upon the subject. We think that in the exigency, the learned trial court, realizing the omission, should have detained the jury sufficiently to state to them the rule of law governing the subject, or, as an alternative, if deemed necessary, should have requested counsel to reduce his request in writing and submit it for the court’s consideration before final submission of the case to the jury.”

It is respectfully contended that the law with respect to the contributory negligence of the plaintiff was as fundamental a rule of law insofar as the defendant was concerned as the law with respect to the assessment of damages and comes squarely within the principle laid down in the case cited, and that under the circumstances presented in the case at bar it was reversible error warranting a *venire de novo* for the Trial Court to omit or refuse a charge to the jury with respect to the law on this subject.

SCHNIEDER & SCHNEIDER,
Attorneys of Defendant-Appellant.

WILLIAM P. BRAUN,
OF COUNSEL.

WILLIAM W. BEECHER
1850

New Jersey Court of Errors and Appeals

LOUIS J. ILLIS,

Plaintiff-Respondent,

vs.

JOHN OBERLE,

Defendant-Appellant.

Action at Law.
On Appeal
from
Supreme
Court,
Bergen
County

BRIEF OF PLAINTIFF-RESPONDENT

THE FACTS

On June 6, 1928, the plaintiff was operating his automobile in a northerly direction along River Road, in the Town of Kearney, County of Hudson, State of New Jersey. The defendant was operating a car in a similar direction along the road. The plaintiff, desiring to pass the defendant, gave the statutory signal. As the plaintiff was about to pass the defendant, the defendant swerved to the left striking the plaintiff's car. As a result of the impact, the plaintiff's car was forced down an embankment into the river. The plaintiff suffered certain permanent injuries to his hand as a result of the accident. The case was tried in the Bergen Circuit and the jury returned a verdict in favor of the plaintiff in the sum of Five Thousand Dollars.

Only one ground of appeal is argued, to wit:

The Trial Court failed to charge the Jury on the law regarding contributory negligence and limited the Defendant in his defense by charging as follows: "The Defendant's contention is an absolute denial of negligence."

ANSWER

Under the facts in the case, a clear cut issue was presented for determination of the Jury.

The plaintiff testified that as he attempted to pass the defendant, he blew his horn. (Page 20, line 7). As the cars approached each other, he warned the defendant "to stop" (Page 20, line 19), because the defendant was bearing to the left. After this admonition, the defendant passed the plaintiff's car, striking the right front wheel (Page 20, line 24). As a result of the impact, the plaintiff lost control of his car, which dropped to the bottom of the river (Page 20, line 35).

Fred Keckeisar, a witness for the plaintiff, stated he was driving a car in a southerly direction (Page 37, line 12). He testified that as the truck went to pass the plaintiff's car, it went down in the river (Page 37, line 40).

Victor Jaffe testified for the plaintiff that the Reo Truck operated by the defendant swerved to the left, and struck the front wheel of the Pontiac, the plaintiff's car (Page 53, line 15).

The defense was a complete denial of the collision.

The defendant stated that there was no actual collision (Page 43, line 4).

The sole other witness for the defense, one Brenstetter, testified along similar lines (Page 47, lines 16 to 26).

Under these facts, the Court was justified in charging the jury:

“So, you see, with this mass of conflicting evidence, you must decide who is telling the truth.

In this case the plaintiff sets up negligence, in that the defendant did not drive his car as a reasonably prudent man should drive, under the circumstances then existing.

The defendant's contention is an absolute denial. In other words, the defendant says that the truck had already passed him, and no act of his occasioned the upsetting of the car and the resultant tumbling into the river.”

Under the defendant's allegations, he was free from all negligence as the actual collision was most emphatically denied. There can be no contributory negligence unless there was negligence on the part of defendant to which alleged negligence the plaintiff contributed. This rule is enunciated in *O'Brien vs. Staiger* (1 N. J. Mis. Reports, 607).

Furthermore, it is an elementary principle of law, that a court is not required to charge a certain rule unless specifically requested to do so.

The case of *Van Sciver vs. Public Service Railway Company* (96 N. J. L., 13) holds that—“the omission of a trial judge to instruct a jury with relation to a particular matter is not assignable unless such instruction be specially requested.

The case of Osbun vs. De Young (122 Atlantic 809) asserts the following rule:—

“If counsel wants question of contributory negligence considered by the jury, he must point out by a request what conduct on plaintiff’s part, if believed by jury, constitutes contributory negligence, and where testimony disclosed no negligence of plaintiff, and no request for instructions was made, it was not error to omit to charge on contributory negligence, since counsel’s exception ‘in that the court did not take up the question of contributory negligence’ was not legally sufficient to make it a basis for appeal.”

In the instant case, the exception that the defendant took was substantially the same as in the Osbun vs. De Young case, to wit, complaint was made that the court did not charge on the question of contributory negligence. This exception, according to the above-mentioned rule, is insufficient to raise the question on appeal.

For the reasons expressed above, it is respectfully urged that the judgment be affirmed.

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