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Notice of Appeal.

NOTICE OF APPEAL.

Filed May 22, 1927.

New Jersey Supreme Court

MIDDLESEX COUNTY.

10

ASTRID PEDERSON and THOMAS
PEDERSON,

Plaintiffs,

vs.

EDWARD SHOE CORPORATION, a
New York corporation, and
CHARLES POLENSKY,

Defendants.

On Appeal.

Notice.

20

To John E. Toolan, attorney for plaintiffs:

TAKE NOTICE, that the defendant, Charles Polensky, appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

THOMAS BROWN,

Attorney for Defendant, Charles Polensky.

30

STATE OF NEW JERSEY, }
COUNTY OF MIDDLESEX. } *ss.*

ANDREW D. DESMOND, of full age, being duly sworn, on his oath deposes and says, that he served the within notice of appeal upon John E. Toolan, attorney for the plaintiffs, by leaving a copy thereof at his law office, at 216 Smith street, Perth Amboy, New Jersey, with Sadie Cohen, the person then in charge thereof on

40

Notice of Appeal.

May 21, 1927, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon *i. e.* at 10:25 A. M.

ANDREW D. DESMOND.

10 Sworn and subscribed to before me this 21st day of May, 1927.

NATHAN DUFF,
Notary Public of New Jersey.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

20

ASTRID PEDERSON and THOMAS
PEDERSON,

Plaintiffs,

vs.

EDWARD SHOE CORPORATION, a
New York corporation, and
CHARLES POLENSKY,

Defendants.

30

On Appeal.

Notice.

To Edward Shoe Corporation, a New York corporation, or Morris S. Schwebel, its statutory agent in the State of New Jersey:

TAKE NOTICE, that the defendant, Charles Polensky, appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

40

THOMAS BROWN,
Attorney for Defendant, Charles Polensky.

Notice of Appeal.

STATE OF NEW JERSEY, }
COUNTY OF MIDDLESEX. } ss.

SAMUEL V. CONVERY, of full age, being duly sworn according to law, upon his oath deposes and says, that he served a copy of the within notice on the Edward Shoe Corporation, a New York corporation, on the 16th day of September, 1927, by leaving a copy thereof with Morris S. Schwebel, the statutory agent in the State of New Jersey, at the Edward Shoe Store, located on Smith street, Perth Amboy, New Jersey.

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SAMUEL V. CONVERY.

Sworn and subscribed to before me this 16th day of September, 1927.

NATHAN DUFF,
Attorney at Law of N. J.

20

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Amended Grounds of Appeal.

AMENDED GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

10 ASTRID PEDERSON and THOMAS PEDERSON,

Plaintiffs,

vs.

EDWARD SHOE CORPORATION, a New York corporation, and CHARLES POLENSKY,

Defendants.

Action at Law.

Amended Grounds of Appeal.

20 The defendant, Charles Polensky, states and urges the following grounds of appeal in this cause:

1. Because the learned Judge of the Circuit Court before whom the said cause was tried, erroneously refused to grant a motion of the defendant, Charles Polensky, to non-suit the plaintiffs and allowed the defendant an exception to such ruling.

30 2. Because the learned Judge of the Circuit Court, who tried the case for the Supreme Court, erroneously refused to grant defendant's motion to direct a verdict in favor of the defendant, Charles Polensky, and against the plaintiffs and allowed defendant an exception to such ruling.

40 3. Because the Court, over objection of the defendant, Charles Polensky, permitted plaintiffs' counsel to ask of the witness, Astrid Pederson, "Before this accident, what did you do?" and the question "Why can't you stand it?"

Amended Grounds of Appeal.

4. Because the Court sustained the objection of plaintiffs' counsel to the following question propounded by the attorney for the defendant, Charles Polensky, to the witness, Frank Planko, "Well, did you have any instructions from Polensky as to the opening of cellar doors?"

10

5. Because the Court permitted the witness, Frank Planko, to answer over objection of counsel for the defendant, Charles Polensky, the following question, "Do you mean when they gave you permission to do it, then you could do it?"

THOMAS BROWN,

Attorney for Defendant, Charles Polensky.

STATE OF NEW JERSEY, }
COUNTY OF MIDDLESEX. }^{ss.}

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NATHAN DUFF, of full age, being duly sworn according to law, on his oath deposes and says, that he served a copy of the within amended grounds of appeal upon John E. Toolan, attorney for within plaintiffs, by leaving the same at his office in the First National Bank Building, Smith street, Perth Amboy, N. J., between the hours of 9 o'clock in the forenoon and 4 o'clock in the afternoon, with Robert Haney, a clerk in said office on the 12th day of August, 1927.

30

NATHAN DUFF.

Sworn and subscribed to this 12th day of August, 1927.

JOHN C. STOCKEL,
Notary Public of New Jersey.

40

Summons.

SUMMONS.

The State of New Jersey to Edward Shoe Corporation, a New York corporation, and Charles Polensky: You ARE SUMMONED to answer the annexed complaint of Astrid Pederson and Thomas Pederson, in an action at law in the New Jersey Supreme Court. AND TAKE NOTICE, that unless you file your answer to said complaint with the Clerk of the New Jersey Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiffs may proceed in the suit and judgment may be entered against you.

WITNESS, WILLIAM S. GUMMERE, Esq., Chief Justice of our said Court at Trenton, this 4th day of December, one thousand nine hundred and twenty-six.

EDWARD J. KELLEHER,
Clerk.

JOHN E. TOOLAN,
Attorney.

30

40

Complaint.

COMPLAINT.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

ASTRID PEDERSON and THOMAS PEDERSON,

Plaintiffs,

vs.

EDWARD SHOE CORPORATION, a New York corporation, and CHARLES POLENSKY,

Defendants.

10

Action at Law.

Complaint.

FIRST COUNT.

20

Plaintiff herein, Astrid Pederson, residing in the City of Perth Amboy, in the County of Middlesex and State of New Jersey, complaining of the defendants, says that:

(1) Plaintiff herein on or about May 28, 1926, was lawfully walking along the northerly sidewalk on Smith street, Perth Amboy, New Jersey.

(2) Defendants herein, jointly and severally, through their agents and servants, occupied and were in possession of certain premises situate on the northerly side of said Smith street as aforesaid and known as No. 110 Smith street, Perth Amboy, New Jersey.

(3) Access to the cellar of the premises at No. 110 Smith street, as aforesaid, was gained through an airway opening on the Smith street sidewalk. The airway was covered or protected by means of steel doors.

30

40

Complaint.

(4) It became and was the duty of the defendants herein upon opening or attempting to open said steel doors leading to the cellar, to do so in such manner as to avoid striking or injuring persons lawfully using said sidewalk, and to refrain from opening said doorway while pedestrians were standing or walking at or near said airway except upon giving a sufficient or proper signal or warning to such persons.

(5) Defendants herein, not regarding their duty as aforesaid, while plaintiff was walking or standing on the sidewalk on Smith street as aforesaid at or near the steel doors as aforesaid, negligently and carelessly and without giving plaintiff any signal or warning, opened said steel doorway and struck plaintiff in the leg.

(6) As a direct and proximate result of being struck as aforesaid, plaintiff suffered and sustained a broken leg and was otherwise permanently disabled and disfigured. Ever since the injury aforesaid plaintiff has been unable to do or perform her usual household work or duties and has expended large sums of money for medical care and assistance and has been obliged to employ help to do her household work. Plaintiff has suffered severe mental and physical pain and anguish and will in the future continue to so suffer as a result of the permanent nature of her injuries as aforesaid.

Plaintiff demands as damages the sum of fifteen thousand (\$15,000) dollars.

SECOND COUNT.

Plaintiff herein, Thomas Pederson, residing in the City of Perth Amboy, in the County of

40

Complaint.

Middlesex and State of New Jersey, complaining of the defendants, says that:

(1) Plaintiff repeats paragraphs 1, 2, 3, 4, 5 and 6 of the first count.

(2) Plaintiff at the times aforesaid was the husband of the said Astrid Pederson and the person legally and morally chargeable with her support and maintenance.

(3) As a result of the injuries sustained by his wife as aforesaid, plaintiff herein was obliged to expend large sums of money for doctors, nurses and to engage assistance about his house to do and perform the work that his said wife would otherwise have done. As a further result of said injury, plaintiff was deprived of the society, comfort and association of his wife for a long period of time.

Plaintiff demands as damages the sum of one thousand (\$1,000) dollars.

JOHN E. TOOLAN,
Attorney of the Plaintiffs.

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40

Answer of Defendant, Charles Polensky.

**ANSWER OF DEFENDANT, CHARLES
POLENSKY.**

Filed December 21, 1926.

NEW JERSEY SUPREME COURT.

10

MIDDLESEX COUNTY.

ASTRID PEDERSON and THOMAS
PEDERSON,

Plaintiffs,

vs.

EDWARD SHOE CORPORATION, a
New York corporation, and
CHARLES POLENSKY,

20

Defendants.

*Action
at Law.*

*Answer of
Defendant,
Charles
Polensky.*

The defendant, Charles Polensky, residing in the City of Perth Amboy, County of Middlesex and State of New Jersey, answering the first count of the plaintiffs' complaint, says that:

ANSWER TO FIRST COUNT.

30

1. He has no information sufficient to form a belief as to paragraphs 1 and 3 of the plaintiffs' complaint and leaves the plaintiffs to their proof.

2. He denies paragraphs 2, 4, 5 and 6 of the complaint.

FIRST DEFENSE TO THE FIRST COUNT.

40

The injuries alleged to have been sustained by the plaintiffs were due to the negligence on the part of the plaintiffs which contributed to the happening of the alleged accident.

Answer of Defendant, Charles Polensky.

ANSWER TO SECOND COUNT.

The defendant, Charles Polensky, answering the second count of the complaint, says that:

1. He repeats his answers to paragraphs 1, 2, 3, 4, 5 and 6 of the first count.

10

2. He denies paragraphs 2 and 3 of the second count of the plaintiffs' complaint.

FIRST DEFENSE TO THE SECOND COUNT.

1. The injuries alleged to have been sustained by the plaintiffs were due to the negligence on the part of the plaintiffs which contributed to the happening of the alleged accident.

THOMAS BROWN,

Attorney of Defendant, Charles Polensky.

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Reply.

REPLY.

Filed January 6, 1927.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

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ASTRID PEDERSON and THOMAS
PEDERSON,

Plaintiffs,

vs.

EDWARD SHOE CORPORATION, a
New York corporation, and
CHARLES POLENSKY,

Defendants.

*Action
at Law.*

Reply.

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Plaintiffs deny each and every allegation in
the answer of the defendant, Charles Polensky.

JOHN E. TOOLAN,
Attorney of the Plaintiffs.

30

40

Postea.

POSTEA.

Filed May 19, 1927.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

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ASTRID PEDERSON and THOMAS
PEDERSON,

Plaintiffs,

vs.

CHARLES POLENSKY, Impld. &c.,
Defendant.

*Action
at Law.*

Postea.

This case was tried before the Honorable
Peter F. Daly, Circuit Court Judge, and a jury,
at the Middlesex Circuit, April Term, on Wed-
nesday, May 11, 1927.

20

The jury returned a verdict in favor of the
plaintiff, Astrid Pederson, and against the de-
fendant, Charles Polensky, in the sum of fifteen
hundred (\$1,500) dollars, and in favor of the
plaintiff, Thomas Pederson, and against the de-
fendant, Charles Polensky, in the sum of five
hundred (\$500) dollars, and a verdict of no
cause of action against the defendant, Edward
Shoe Corporation.

30

PETER F. DALY,
Circuit Court Judge.

40

Judgment.

JUDGMENT.

Whereupon it is adjudged that the plaintiff, Astrid Pederson, do recover of the said defendant, Charles Polensky, Impld. &c., the sum of fifteen hundred dollars damages, and that the plaintiff, Thomas Pederson, do recover of the said defendant, Charles Polensky, Impld. &c., the sum of five hundred dollars damages, together with their costs, which have been taxed at the sum of sixty dollars and sixty-six cents, making in the whole, the sum of two thousand and sixty dollars and sixty-six cents.

Judgment entered, May 19, 1927.

WM. S. GUMMERE,
C. J.

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Opening.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY CIRCUIT.

April Term, 1927.

ASTRID PEDERSON and THOMAS
PEDERSON,

vs.

EDWARD SHOE CORPORATION and
CHARLES POLENSKY.

10

Transcript of stenographer's notes of evidence in the above-entitled cause, taken before Hon. Peter F. Daly, Circuit Court Judge, and a jury, at the Middlesex County Court House, in the City of New Brunswick, New Jersey, on the 11th day of May A. D. 1927, at 10 A. M.

20

Appearances:

John E. Toolan, Esq., attorney for the plaintiffs.

Thomas Brown, Esq., John A. Coan, Esq. (Present), attorneys for the defendant, Charles Polensky.

30

A jury being empaneled and found satisfactory, they were sworn.

Mr. Toolan opens the case for the plaintiffs.

Mr. Coan opens the case for the defendant.

40

Astrid Pederson, direct.

ASTRID PEDERSON, one of the plaintiffs, being duly sworn according to law, on her oath saith:

Direct examination by Mr. Toolan.

10 Q Your name is Astrid Pederson? A Yes.

Q You are the wife of Thomas Pederson? A Yes.

Q You live in Perth Amboy, Mrs. Pederson? A Yes.

Q And you lived there on the 28th of May, 1926? A Yes.

Q On the 28th of May, 1926, were you on Smith street, Perth Amboy, New Jersey? A Yes.

20 Q About what time in the afternoon? A Three o'clock.

Q What way were you walking on Smith street, which direction? A Down Smith street.

Q What is that? A Down Smith street.

Q When you say down Smith street do you mean down towards the water? A Yes.

Mr. Toolan: May we agree that is easterly?

30 Mr. Coan: Yes, sir.

Q Was there anyone with you, Mrs. Pederson? A No.

Q You were all alone? A Yes.

Q Where were you walking, on the sidewalk? A No.

Q What is that? A Yes, I was walking on the sidewalk.

40 Q And what part of the sidewalk were you walking on, the inside or the outside? A The inside.

Astrid Pederson, direct.

Mr. Coan: I submit that is rather leading.

Mr. Toolan: That is leading, yes.

Q What side were you walking on? A The inside.

Q What part of Smith street were you on? 10 A The corner of Smith and State streets.

Q From Smith and State streets you walk towards the water? A Yes.

Q Do you know where the Edwards Shoe Company store was on Smith street at that time? A Yes.

Q What, if anything, happened as you walked along Smith street in front of the Edwards Shoe Company store? A I was stepping my foot on the cellar door, there was some fellow opened 20 up the half of the door as I stepped down.

Q Well, what happened? A I faint. I have a broken leg. That is all.

Q Well, what happened to you before you fainted? A I don't remember anything, because I was fainting.

Q I don't want to know what happened afterward. You were walking along? A Yes.

Q And you say you were on half of the cellar door? A Yes. 30

Q And then what happened? A The other half of the door opens up, I stepped down.

Q You stepped down? A Yes, in the cellar.

Q Well, what happened to you then when you stepped down? A I don't remember what happened because I faint.

Q Well, when did you come to? A Inside in the shoe store.

Q And who was there when you came to? A There was two policemen and another fellow, I don't remember. 40

Astrid Pederson, direct.

Q I can't hear you. A There was two policemen in the shoe store.

Q And who else? A Other fellow. I don't know.

Q Other fellows you don't know? A Yes.

10 Q Where did you go then, did you go to a doctor? A The policeman took me home. I called the doctor to my home.

Q Did the doctor come? A Yes.

Q What doctor? A Dr. Lund.

Q That same afternoon? A Yes.

Q Well, when you regained, or when you recovered from this fainting spell and got home, what was wrong with you? A I have a broken leg.

Q Which leg? A The left.

20 Q You were under Dr. Lund's care then? A Yes.

Q What did Dr. Lund do for you, how did he treat your leg? A Oh, I don't know what kind.

Q Well, did he put your leg in splints? A No.

Q What did he do? A I have some hot water.

Q What is that? A I can't explain this.

30 Q What did Dr. Lund do for your leg that you saw, can't you tell us? A He put some, I don't know what kind of stuff he has put on.

Q Well, how long were you laid up with that leg? A Nine weeks.

Q At the end of nine weeks' time what happened? After the nine weeks were you able to do your usual work? A Oh, no. A long time.

Q What is that? A It took a long time.

40 Q Well, how long a time? A I can't tell exactly. Most of the summer.

Astrid Pederson, direct.

Q Well, now, Mrs. Pederson, you had the broken leg, and I didn't, and I want you to tell me your story. When you said nine weeks what did you mean by nine weeks? A I was in bed nine weeks.

Q You were in bed nine weeks? A Yes.

10 Q When you got up out of bed at the end of nine weeks' time— A Yes.

Q (Continuing)—were you able to walk around or not? A No, not for a long time.

Q Now, you say not for a long time. How long a time? How soon, or what was the first that you were able to walk around? A In the house?

Q Yes. A In the house I couldn't walk around when I get out of bed.

20 Q What is that? A I couldn't walk around.

Q When was the first that you could walk? A I think two weeks after I could start around the house.

Q Do you mean at the end of eleven weeks after the accident? A Yes.

Q Two weeks after you got out of bed you could walk around the house? A Yes.

30 Q How long were you laid up in the house? A I think two or three weeks.

Q Two or three weeks after? A Yes.

Q How long was it before you were able to walk about on the street? A I couldn't tell you, because we have the car. We are out in the car. My husband get me down the steps, I come in the car, I couldn't tell you how long.

Q Well, Mrs. Pederson, what was the first that you were able to walk around the town as you could before the accident? A I couldn't tell you exactly what time.

Astrid Pederson, direct.

Q Well, you are able to walk now, aren't you?

A Yes.

Q Well, how long has it been that you have been walking around the way you are now? A Oh, I think it was June, the last part of July.

Q What is that? A The last part of July
10 or August.

Q That is, of 1926? A Yes.

Q Well, in the latter part of July or early August of 1926 was your leg entirely better?

A Yes.

Q It was all better? A Yes.

Q You didn't have any trouble with it after that?

Mr. Coan: I object to that, very leading.

20 A Sure, it hurt.

The Court: It was leading. She has answered it, however.

A It still hurts.

Q You say your leg still hurts? A Yes.

Q Do you understand the questions? A Yes, I do. The only thing I can't answer.

Q Well, after July or August of 1926, will
30 you tell us how you felt? A I don't feel good.

Q Well, what happened after that time, anything? A I don't know. I can't explain it.

Q Well, were you laid up after that at any time? A I don't do any work the most part of the summer, only inside the house, and my husband took me out to the car once in a while.

Q Well, after July or August did you have any trouble at all after that time? A Yes, I still have trouble.

40 Q You still have trouble? A Yes.

Astrid Pederson, direct.

Q And what do you mean when you say you still have trouble? A I can't step on the leg because it is hurt down in the ankle. I have some water on the ankle, I still have.

Q Now, Mrs. Pederson, where was your leg broken? A The outside.

Q I mean what part of the leg? A I don't
10 know.

Q Well, near the ankle or near the knee? A Near the knee.

Q Well, you just said you had some water on the ankle? A Yes.

Q Is that true? A Yes.

Q Did you ever have any water on the ankle before this accident? A No, never.

Q Now, will you please tell us what way your
20 leg bothers you now, then? How does it hurt you or trouble you now? A It hurt me every step I take, it hurt me all the time. I have to get up a couple of times every night to put some liniments on it to stop the pain.

Q Do you still put liniments on it? A Yes. All kinds of stuff.

Q Where do you live in Perth Amboy? A
145 Jefferson street.

Q On what floor? A First floor—second
30 floor.

Q And what business is your husband in? A Auto laundry.

Q Before this accident what did you do?

Mr. Coan: I object. There is nothing in the pleadings which would justify this question.

The Court: I will allow the question. You may take an exception. It goes to show
40

Astrid Pederson, direct.

what the physical condition of this woman was before the accident.

Mr. Coan: Prays exception.

Q What did you do before this accident, Mrs. Pederson? A I come down to help my husband clean all the windows and shine the nickel and finish the car up. Chamois the car and windows and nickel.

Q Where is your husband's business conducted, from what address? A 145 Jefferson street.

Q On what floor? A First floor.

Q That is under your home? A Yes.

Q How long had you been helping your husband in this business, as you say, before this?

20

Mr. Coan: I object.

The Court: Objection sustained. It is only allowed on the ground of showing, or helping to show the jury what was her physical condition before.

Q Now, did you also take care of your home before the accident? A Yes.

Q After the accident or since the accident what have you done? A Only take care of the house.

Q Have you ever helped your husband in his business?

Mr. Coan: I object.

A Oh, maybe once in awhile. Only for hour or two, because I can't stand no more.

Q You can't stand it. Why can't you stand it?

40

Mr. Coan: I move to strike out the last answer.

Astrid Pederson, direct.

The Court: No, I will not strike it out. You may have an exception. It goes to show what her present physical condition is.

Mr. Coan: Prays exception.

Q Why can't you stand it?

Mr. Coan: I object.

10

The Court: Objection overruled. You may have an exception.

Mr. Coan: Prays exception.

A Because the leg hurts so much I can't stand down in the garage more.

Q Now, Mrs. Pederson, do you know what Dr. Lund's bill was? A Yes.

Q What was it? A \$65.

Q Now, did you spend any money for anything else? A Yes. For drugs.

20

Q What did you spend at the drug store? A I think \$110.

Q What is that? A \$110.

Q Anything else? A Yes. Dr. Pugh.

Q What did he do? What is his business? A Massage.

Q How much did you spend with Mr. Pugh? A \$28.

Q Did you spend any other money, Mrs. Pederson? A Yes, for the X-ray.

30

Q What did you spend for the X-ray? A I didn't know exactly how much.

Q Now, Mrs. Pederson, did you have any pain? A Now?

Q No. At the time of the accident? A Yes.

Q Well, tell us what kind of pain? A The leg is hurt all the time.

Q How long did that keep up? A It still keeps up.

40

Astrid Pederson, cross.

Q Did you lose any weight? A Yes, this time.

Q How much weight did you lose? A I think it was twelve pounds.

Q And have you regained that weight or not?
A I think so.

10

Cross examination by Mr. Coan.

Q When was it you lost this twelve pounds, Mrs. Pederson? A I don't know.

Q How do you know you lost the twelve pounds? A Because I know I lost some.

Q How do you know? A Because I can feel I lose some.

Q Did you ever weigh yourself? A Yes.

20 Q How much did you weigh before the accident? A I can't tell you because I ain't—

Q When did you weigh yourself after the accident? A The first time I go out.

Q Well, when was that? A I think it was August. I don't know now what time.

Q Where did you weigh yourself then? A In the corner drug store.

Q How much did you weigh then? A 145, I think it was.

30 Q How much do you weigh now? A 158, I think, or 160.

Q When did you weigh yourself last? A Oh, it is a long time ago.

Q Well, how long ago? A Oh, I think last summer. I don't know.

Q What time last summer? A I can't tell you.

Q Well, when you weighed yourself this last summer you weighed 158 or 160 pounds? A

40 Yes.

Astrid Pederson, cross.

Q Now, was it in the month of July that you weighed yourself? A I couldn't tell you.

Q You don't know whether it was in June or July? A It was August, I think.

Q You think it was August? A Yes. I couldn't tell you.

Q What time was it you went to Niagara Falls? A August, I think.

10

Q Do you know what part of August it was? A No.

Q Well, wasn't it the early part of August, the first two weeks? A I couldn't tell you.

Q Well, now, Mrs. Pederson, can't you tell this jury what time you took a trip to Niagara Falls last summer? A Because I didn't know what time in August it was.

20

Q How did you go to Niagara Falls? A In the car.

Q What does your family consist of, how many in your family? A Only one boy.

Q How old is the boy? A Twenty-one.

Q This sidewalk on Smith street is a very wide sidewalk, isn't it? A Yes.

Q It is as wide as from you to Mr. Toolan? A Maybe.

Q Well, approximately about that, isn't it? 30
A Yes.

The Court: That is how wide? About fourteen feet?

Mr. Toolan: I think it is a fourteen-foot sidewalk, yes.

The Court: About twelve. It is sixteen and one-half feet to that first post. That would make it about twelve feet, you agree, gentlemen?

40

Astrid Pederson, cross.

Mr. Toolan: Yes. I think Smith street is either twelve or fourteen feet. It is quite a wide sidewalk.

Q This cellar door is only about three feet long, isn't it? A Maybe. I don't know.

10 Q Well, now, you know what three feet is, don't you? A Yes, I know.

Q Four feet? A Yes.

Q An ordinary cellar door, wasn't it? A Yes. Half a door.

Q Well, there were two doors there, weren't there? A Yes. I was standing on the half a door.

Q And it laid flush with the sidewalk? A Yes.

20 Q Right in close to the building? A No. I don't think it is close to the building.

Q Don't you know that the cellar door is right in against the building? A Maybe.

Q There is not any question about that, is there, Mrs. Pederson? A I don't know.

Q Do you mean that, that you don't know whether the cellar door was in against the building or not? A No.

30 Q You don't mean it? Well, now, which was it? A I didn't get you.

Q I say wasn't the cellar door right in against the building? A I don't know.

Q You don't think it was out in the middle of the sidewalk, do you? A I don't know.

Q But whatever it was you stepped on it? A Yes.

Q There was lots of room outside of that for you to walk, wasn't there? A There wasn't any room, because I passed by all the policemen.

40 Q What? A I passed by all the policemen.

Astrid Pederson, cross.

Q Which way were the policemen going? A They come up Smith street this way and I come down this way.

Q In the opposite direction to you? A Yes. I passed by them.

Q Had you passed them at the time you stepped on this cellar door? A Yes. 10

Q Then they were gone by? A Yes.

Q Then there was the whole sidewalk for you to walk on, wasn't there? A There wasn't any sidewalk, because I only step so much to the side, I passed by all the policemen.

Q Where did the policemen pass you? A Right outside of the Edwards Shoe Store.

Q What were you doing at the time you stepped on this cellar door? A What I was doing? 20

Q Yes. A I come down Smith street.

Q Well, where were your eyes? Where were you looking? A I was looking straight ahead.

Q Did you see this cellar door rise? A No.

Q Why not, if you were looking straight ahead? A I couldn't tell you because I didn't see the cellar door open up. I was standing on the half a door and some other fellow—and there was some fellow open up the half a door.

Q Did you see the fellow that opened up the door? A No. 30

Q How do you know he opened the cellar door? A Because I speak to the fellow after.

Q How high did the cellar door open? A I don't think much. I couldn't tell you, because I faint.

Q Did you see how much it opened? A No.

Q Now, after the accident you were taken inside of the shoe store? A Yes. This is the first I remember. 40

Astrid Pederson, cross.

Q You were taken from there home in a taxicab, weren't you? A Yes.

Q You walked from the shoe store out to the taxicab? A No. The policemen carried me, though.

Q Carried you out? A Yes, two policemen.

10 Q Didn't you go out on your feet with the assistance of a policeman on each side of you? A No.

Q Now, how many times had you been out before you went to Niagara Falls? A I don't know.

Q Well, was it fifty times? A No.

Q Was it twenty-five times? A We took this trip because Dr. Lund told me I have—

20 Q I didn't ask you, Mrs. Pederson, why you took the trip. I ask you how many times you were out before you took the trip? A I couldn't understand you.

Q How is it you can't tell me most of the things that I ask you? A Because I don't remember.

Q Well, you went out and did your marketing before you went to Niagara Falls, didn't you? A I don't understand "marketing."

30 *By the Court.*

Q The butcher and the grocer. A No.

By Mr. Coan.

Q You didn't go to the butcher and the grocer before you went to Niagara Falls? A No.

Q Did you go to church? A No.

Q Do you go to church at all? A Yes, I do.

40 Q You say that there were not any splints put on your leg? A No.

Astrid Pederson, cross.

Q No cast put on it? A No.

Q Now, what did you do during the two weeks after you got up out of bed? A I was inside the house.

Q Doing what? A Nothing. Sitting in the chair. I have the legs up on another chair.

10 Q How many weeks was it after the accident before you went to Niagara Falls? A I couldn't tell you.

Q Well, when you came back from Niagara Falls did you go out and do your purchasing at the butchers and grocers and so forth? A It took a long time. I never was out without the car.

Q Who did the work around your house? A There was some woman I have.

20 Q How long was she there? A Nine weeks.

Q After the nine weeks who did the work around your house? A I have some friends to come up and help me out.

Q How long a time did the friends come up and do the work around the house? A I couldn't tell you how long.

Q Who were the friends that came around there? A Mrs. Ross.

Q Who else? A Nothing else.

30 Q Who was the woman that was there for nine weeks? A There was a Dane.

Q Who was she? A She isn't here now. She has gone home.

Q Who was she? A Mrs. Lamy.

Q How many weeks was Mrs. Ross there? A She come up once in awhile and help me out.

Q That is, she just came up to see you during the nine weeks? A What?

40 Q She just came up to see you and call on you in the nine weeks? A The nine weeks I have a woman in the house.

Astrid Pederson, cross.

Q I ask you how many weeks was Mrs. Ross there? A All the time she come up and see me.

Q Do you mean to say she stayed at your house all the time? A No.

10 Q You mean she would come in every few days? A Yes.

Q Just to make a call on you. This is the lady that you said did the work after the Danish woman left? A Yes.

Q When she did the work after the Danish woman left did she only come in every couple of days the same as she did before? A I don't know what you mean.

20 Q What is there about it you don't know, Mrs. Pederson? A What? I have to answer in Danish.

Q I can't understand Danish. A There is a Danish fellow there.

Q Just a moment. You say that Mrs. Ross helped you do the work after the Danish woman left after the nine weeks? A Yes.

Q I asked you she came in every few days? A Yes.

Q Who prepared your meals after the Danish woman left? A My husband and my son.

30 Q Didn't you do anything in the way of cooking after the Danish woman left? A No.

Q How long before you started to do the cooking? A I couldn't tell you exactly. It took a long time.

Q What do you mean by a long time? A Couple of weeks.

Q By a couple of weeks you mean two weeks? A It took longer time.

40 Q A long time does not mean anything. Can you tell us how many weeks it was? A No.

Astrid Pederson, cross.

Q Now, Mrs. Pederson, you said on your direct examination that during the latter part of July or August you could walk around, that is right, is it? A I think there was 1st of August.

Q When you say that your leg hurts yet? A Yes.

Q How does it hurt now? A Down in the 10 ankle.

Q How do you know you have water on the ankle? A Because Dr. Lund told me.

Mr. Coan: I move to strike out the answer.

The Court: Yes, it is stricken out.

Q Did Dr. Lund tell you you didn't have any water on the ankle before the accident? A I never have water before. 20

Q How do you know you didn't? A I couldn't tell how I know it.

Q Your ankle wasn't hurt by this door, was it? A Yes.

Q I thought it was up near your knee that the leg was broken? A Yes. It were hurt all over.

Q That is the whole leg was hurt? A Yes.

Q Now, who told you to rub this liniment that you are using every night? A Who told me? 30

Q Yes. A I told myself about it. I buy all kinds of stuff.

Q You are not doing that by Dr. Lund's directions, are you? A No.

Q When was it you had the X-ray taken? A I think it was ten days after the accident.

Q Where was it taken? A Home.

Q Who took it? A Dr. Klein.

Q That was the only time that X-rays were taken, was it? A No, I had taken one more. 40

John L. Lund, direct.

Q When? A Now, have a couple of weeks ago.

Q A couple of weeks ago? A Yes.

Mr. Coan: I think that is all.

10

JOHN L. LUND, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Toolan.

Q Dr. Lund, you are a practicing physician in the City of Perth Amboy? A Yes, sir.

Q And have been for how many years, doctor? 20

Mr. Coan: The doctor's qualifications are admitted.

Q Doctor, did you, on or about the 28th of May, 1926, attend Mrs. Astrid Pederson, the witness who just left the stand? A I did.

Q And where did you attend her, doctor?

A At her home.

Q And when you called at her home, doctor, what did you find was wrong? A She complained of a lot of pain in her leg, and on examination I found the leg injured. There was a lot of ecymosis, that is red blood and blue and spots on it and swollen and very painful. She also had bruises on other parts of the body. I examined the leg for a possible fracture. I couldn't elicit any evidence of a fracture by manipulation, so I told her I hardly thought it was broken, but I wasn't absolutely sure. I 40 I advised her to keep in bed and have the

John L. Lund, direct.

leg elevated and apply local applications, lotions, and so forth, to take the swelling down; and I saw her right along after that each day.

Q Well, doctor, did you afterwards determine whether or not there was a fracture? A I did.

Q And what part of the leg was fractured?

A It was the outer bone of the leg, the fibula, it was broken about the middle of the shaft. 10

Q When you say the outer bone, or the fibula, do you mean what is commonly referred to as the shin bone, doctor? A No, sir. The shin bone is the larger bone. The outer bone is the fibula, or the thin bone on the outer side of the leg.

Q And you say that was broken about midway between the ankle and the knee? A About midway between the ankle and the knee. 20

Q And what course of treatment did you prescribe, doctor? A Rest in bed, because the fracture was not displaced; it was what we call a greenstick fracture. It wasn't a complete break.

Q In other words, there was no disunion of the two parts? A There was no overlapping at all.

Q Well, how long was that treatment kept up, doctor? A Well, I suppose it was kept up— she was in bed—well, I suppose twenty-six or twenty-seven days, possibly. I am not absolutely positive of that. I think so. 30

Q Well, doctor, was there any injury to any other part of the leg other than the place where you have located this fracture? A Not that particular leg; no, sir.

Q Well, any other leg? A Yes, there was an injury around the right knee, and there was bruising around the shoulder and also on the back. 40

John L. Lund, direct.

Q Did any complications develop as the result of this injury? A No, sir.

Q Mrs. Pederson has spoken about water on the ankle. A Well, I would not call that a complication.

10 Q Well, that is what I want to know, did she have water on the ankle? A She had a little edema there; yes, sir. Swelling.

Q What was the treatment for that, doctor? A Nothing particular except bandaging.

Q Well, how long was Mrs. Pederson under your care, doctor? A I should say about four weeks, five weeks, something like that. Four or five weeks.

20 Q How long was she laid up, do you know, as the result of this injury? A Well, she was laid up all that time and after she began to walk around she was still not able, or partially able to do her walking, but she was lame around, oh, about four or five weeks she was under my care. That is, I called at the house.

Q Well, at the time you stopped making your calls, doctor, after four or five weeks, was Mrs. Pederson completely cured of her injury or not? What I mean is in the sense that she had completely recovered? A Well, she was not perfect, so she could do her work, I don't think so.

30 Q Would she or would she not be able to do her usual work at the time you ceased treating her? A No, I don't think she was.

Q And in your opinion, doctor, how long would this injury for which you treated her lay her up, or incapacitate her? A Eight weeks, I would say would be a good limit.

40 Q Doctor, is there anything in your opinion which would cause her any pain now with that leg? A Well, all broken legs they give a lot

John L. Lund, direct.

of pain. She has a good result from the fracture; that she may have pain off and on I don't doubt at all, but the result is very good.

Q Is Mrs. Pederson still under your care, doctor? A No, I would not say she is. I saw her possibly ten days ago, when she came down and complained about this swelling in the ankle, and pain in the ankle. I said, well, if you want to you can have another X-ray taken, Mrs. Pederson, if you wish, but I don't think it would do you any good, but if you want it done for your own satisfaction, go ahead; and she had another one taken. And it was negative as far as any anatomical trouble was. 10

Q That is as far as any fracture is concerned? A Yes.

Q Other than what had been revealed before? A Yes, sir. 20

Q But, was she in your office with a swelling as late as ten days ago, doctor? A Yes, sir.

Q And where was that swelling located? A Around the ankle. At the ankle joint; around the ankle joint.

Q And have you seen her any time prior to that ten days ago, doctor? What was the time before that that you had seen her? A Well, I couldn't say. I have seen her several times. She has been down to the office. 30

Q Well, what I want to know is this: Since the date of the accident on the 28th of May, 1926, has she made frequent calls to your office? A Not frequent calls; no, sir.

Q Well, about how often would you say you have seen her, doctor? A Well, on a rough guess, possibly a half a dozen times.

Q And on each occasion what was it that she came to your office for, doctor? A Complaining of pain. 40

John L. Lund, cross.

Q Pain where? A Pain in the leg.

Q In the leg that was injured, doctor? A Yes, sir.

Q Was this swelling on the ankle ten days ago perceptible to the eye, doctor? A Oh, yes.

10 Q Well, was it a substantial swelling or not? A No, I would not call it very large. It was perceptible all right.

Q To the eye? A Yes.

Q What, doctor, in your opinion, caused that swelling at this late date? A I really don't know. I don't think it is due to the injury, or to the original accident, I don't think so.

Q Well, did you treat this woman before the accident, doctor? A She had been a patient of mine a good many years.

20 Q Did she ever come to you with any complaint about the ankle prior to this accident? A No, sir.

Q Well, is there anything that you know that you can attribute it to other than the accident, doctor? A No, I don't think there is any other particular thing I can attribute it to. Those things will sometimes happen and sometimes not.

30 Q In other words, you say you don't know whether it is because of the accident or not? A That is my opinion.

Cross examination by Mr. Coan.

Q But, in your judgment, doctor, it was not caused by the accident, that is true, isn't it? A I don't say that.

40 Q Didn't you say I don't think the swelling was caused by the accident just a moment ago? A Did I say that? Well, if I said that, that is my judgment.

John L. Lund, cross.

Q That is the fact, isn't it? A Well, that is what I say.

Q This thing that Mrs. Pederson called water on the ankle, that is this swelling that you refer to, isn't it? A Naturally.

Q There was a good result from this break? A Very good. 10

Q I would like you to tell us just exactly what this greenstick fracture is. A Well, a greenstick fracture is a fracture of a bone, the same as you take a green stick off a tree and snap it. You will break it on one side and the other side is intact. It is not complete.

Q That is the kind of a fracture there was in this case? A That is the case; yes, sir.

Q I think you have already said there wasn't any disunion of the two parts of the bone? A Yes, sir. 20

The Court: What he did say was there was no overlapping.

Q Was there a disunion, doctor? A No, sir; there was no displacement even.

By the Court.

Q There was a disunion if it was a part fracture, wasn't there? A If what? 30

Q If it was a part fracture? A I say there was no complete disunion.

By Mr. Coan.

Q Now, doctor, you say that Mrs. Pederson was in bed for twenty-six or twenty-seven days? A Yes, sir.

Q You attended her for the twenty-six or twenty-seven days after the accident? A Yes, sir. 40

John L. Lund, re-direct.

Q So that while you were attending Mrs. Pederson she had arisen from her bed? A Yes, sir; she was up before I left.

Q For how long a time before you ceased your visits was Mrs. Pederson up and out of bed? A Oh, not more than four or five days.

10 Q So that approximately twenty-two or twenty-three days after the accident she was up out of bed, that is right, is it? A Twenty-two or twenty-three? No, sir; I didn't say that.

Q She was up four or five days before you stopped coming? A Yes, sir.

Q That was, you say, twenty-six or twenty-seven days? A Yes, sir.

Mr. Coan: I think that is all, doctor.

20

Re-direct examination by Mr. Toolan.

Q Doctor, when you say twenty-six or twenty-seven days have you any record to indicate the exact period that you treated her and the period that she was in bed? A No, I have no definite record.

Q What I mean, you are depending now upon your recollection? A Yes, sir.

30 Q Well, Mrs. Pederson has testified she was in bed nine weeks. Is it your recollection that she was in bed that long or not? A I couldn't say that for sure.

Q You would not say for sure? A No.

Q And when you say now twenty-five or twenty-six days are you testifying to that length of time as the result of definite recollection of what you have now? A Why, I am very sure that is about the time, because as a rule a fracture of a leg takes that length of time.

40

John L. Lund, re-cross.

Q I know, doctor, that is just what I want to know, whether you are testifying now as to how long Mrs. Pederson was in bed, because of the general rule, or because of a definite recollection of how long she actually was in bed? A Well, to the best of my knowledge that is the time, that is the length of time she was in bed. The fracture itself—

10

Q Well, you have not refreshed your recollection on anything? A No, I have not.

Mr. Toolan: That is all.

Re-cross examination by Mr. Coan.

Q Doctor, you know that you did not attend her for any nine or ten weeks after the accident, don't you? A I couldn't tell exactly that I attended her or not. I say twenty-six or twenty-seven days. I think, to the best of my recollection, that is the time.

20

Q She was out of bed before you stopped attending her? A Yes, sir.

By Mr. Toolan.

Q What was your bill, doctor? A \$66.

Q Was she sitting in a chair when you stopped attending her or not? A She had been up sitting in a chair. She could not walk very well.

30

Q Did you stop attending her while she was in that condition? A Yes, sir.

Mr. Toolan: That is all.

40

Albert McDonald, direct.

ALBERT McDONALD, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Toolan.

10 Q Mr. McDonald, you are a member of the police department of the City of Perth Amboy?
A Yes, sir.

Q And you were on the 28th of May, 1926?
A Yes, sir.

Q You are assigned to the traffic squad? A Yes, sir.

Q And do duty at the corner of Smith and State streets, Perth Amboy? A Yes, sir.

20 Q How far is the corner of Smith and State street, where you do duty, from the Edwards Shoe Company store on Smith street? A About fifty or fifty-two feet.

Q About what? A Fifty-two feet.

Q There is just the one building on the corner and then the next building is the Edwards Shoe Company? A Yes, sir.

Q Do you know Mrs. Pederson? A Know her now.

30 Q On the 28th of May did you see Mrs. Pederson? A Why, we was coming up the street when she stepped into the cellar door, is the first time I saw her.

Q When you say we were coming up the street who do you mean, officer? A The squad.

Q Which squad is that, that comes on duty what time? A Three o'clock in the afternoon.

Q That was three o'clock squad coming along Smith street? A Yes, sir.

40 Q In which direction? A We were going west on Smith street.

Albert McDonald, direct.

Q What direction was Mrs. Pederson going in? A East on Smith street.

Q As you came along, officer, will you please tell us, as you approached the Edwards Shoe Company, will you please tell us just exactly what you saw? A Well, the door had suddenly opened and Mrs. Pederson had stepped into this trap door and was falling when I caught her. 10

Q You caught her? A I did.

Q Had any part of it fallen on her? A Yes, sir. The door had been left down and her leg went through that iron door.

Q What part of the leg was it on? A Why, it was on the left leg and it was between the knee and the foot.

Q What character of door is this, officer? A It is a solid iron door. 20

Q Up against the building? A Up against the building.

Q Is that door in sections or halves? A It is in half. Two parts of it.

Q There is an easterly and westerly section, is there not? A Yes, sir.

Q Which section of the door was it that had been opened? A Easterly section.

Q Where was Mrs. Pederson with reference to the westerly section? A She appeared to me to be standing just about onto it. She was taking another step. 30

Q Now, officer, I show you a picture here and ask you whether or not that indicates the— shows the physical conditions in front of the Edwards Shoe Store and the store on the corner on Smith street where this accident happened? A It does.

Mr. Toolan: I want to offer that picture. 40

Albert McDonald, direct.

Mr. Coan: No objection.

(Photograph entered in evidence and marked Exhibit P. 1.)

10 Q Will you please indicate on this picture, officer, with a mark, where the Edwards Shoe Company is? Put the letter "M" in front of the Edwards Shoe Company.

(Witness marks photograph.)

Q I show you another picture, Officer, and ask you whether or not that indicates or shows the Edwards Shoe Company at closer range?
A It does.

20 Mr. Toolan: I want to offer that picture.

Mr. Coan: No objection.

The Court: It is admitted.

(Photograph entered in evidence and marked Exhibit P. 2.)

30 Q Officer, I show you Exhibit P. 2 and ask you whether or not this exhibit shows the solid door in front of the Edwards Shoe Company, in which Mrs. Pederson fell that day? A It does.

Q And will you please mark that with an "X," officer, the solid door?

(Witness marks photograph.)

By the Court.

40 Q Are there two lids to that door? A Yes, sir.

William E. Ramsey, direct.

Q Where is the mark of the lids, between the two lids? A I think that they are pretty close together (indicating). Right in the center.

By Mr. Toolan.

Q Did you see who had opened the door? A Why, I just quite can't remember now. This man was in the cellar. 10

Q Did you see or speak to him subsequently?
A Not I; no, sir.

Mr. Toolan: That is all I have. Cross examine.

Mr. Coan: No questions.

Mr. Coan: With counsel's consent may I call Dr. Ramsey now? 20

Mr. Toolan: We have no objection at all.

The Court: Certainly.

DEFENDANT'S MEDICAL TESTIMONY.

WILLIAM E. RAMSEY, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith: 30

Direct examination by Mr. Coan.

Mr. Coan: I assume the doctor's qualifications are admitted?

Mr. Toolan: Absolutely.

Q Doctor, at the request of Senator Brown did you examine Mrs. Astrid Pederson? A I did. 40

William E. Ramsey, cross.

Q And when was that, doctor? A About April 28th, I think.

Q At that time did you examine this left leg which had been broken? A I did.

10 Q What did you find? A I found that there had been a fracture of the fibula, the small bone of the leg, about the junction of the middle and the lower third of the leg, and that it was in perfect union now, and there was no evidence of any further injury than a laceration or an abrasion on the side of the leg about one inch by three-quarters of an inch. The knee was normal and the ankle joint appeared to be normal.

20 Q What was the result of the treatment of the fracture, doctor? A Seemed to be a very good result.

Mr. Coan: Cross examine.

Cross examination by Mr. Toolan.

Q This examination of yours was on April 28, 1927? A It was.

Mr. Toolan: That is all.

30 Mr. Coan: That is all.

Frank Planko, for Plaintiffs, direct.

PLAINTIFFS' CASE CONTINUED

CHARLES POLENSKY, one of the defendants, being duly sworn according to law, on his oath saith:

Direct examination by Toolan. 10

Q Mr. Polensky, you are the defendant in this suit? A I presume so.

Q Did you, on the twenty-eighth of May, 1926, employ a man named Frank Planko? A Yes, sir.

Cross examination by Mr. Coan.

Q What did you employ him to do, Mr. Polensky? A Why, to deliver coal. 20

Mr. Coan: I think that is all at this time.

Mr. Toolan: That is all.

FRANK PLANKO, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Toolan. 30

Q Mr. Planko, by whom were you employed on May 28, 1926? A Charles Polensky of the Raritan Coal and Charcoal Company.

Q On that day did you deliver any coal to the premises occupied by the Edwards Shoe Company on Smith street? A Yes, sir.

Q Did you go into the cellar of the property occupied by the Edwards Shoe Company? A No, sir. I went in the store first. 40

Frank Planko, for Plaintiffs, cross—re-direct.

Q Well, then, did you go into the cellar? A After I was told to go in the cellar then I went.

Q And when you went in the cellar what did you do? A I took out the latch and lift the door out.

10 Q And when you lift the door up what happened? A Somebody stepped on it and then the door closed tight again. That is all I remember. I didn't see nothing else. Door closed again.

Mr. Toolan: That is all I have. Cross examine.

Cross examination by Mr. Coan.

20 Q You say you went into the store first? A Yes, sir.

Q And what did you go into the store for? A To ask him where does the coal go.

Q Whom did you ask that question from? A There was a man stand by the counter.

Q Was there any other person in the store at the time? A I didn't see anyone. I just saw that one man there standing.

Q Did you go into the cellar by what that man told you? A Yes, sir.

30 Q What did he tell you? A He said go—he showed me a side door from the store go into the cellar and told me to open the doors.

Q Had you ever been in that cellar before? A No, sir.

Q How did you know where the door was? A He told me just where it is.

Re-direct examination by Mr. Toolan.

40 Q Will you please tell us the exact conversation you had from the time you went in the store

Frank Planko, for Plaintiffs, re-direct.

until you went down into the cellar? Tell us just exactly what you said to the man and what the man said to you. A I come in and I said, coal man from the Raritan Coal and Charcoal Company; where does it go. He said you take that door by left side and go inside and you will see a door, and open it. I went in there, I lift one door up about three inches, and then someone stepped over it and she closed again. I couldn't say anything else. 10

Q Were there any other men with you on the coal truck? A No, sir. Not on the coal truck. I was driving a horse and wagon.

Q Was there any other man on the horse and wagon with you? A There was a man, yes, he was standing outside at that time.

Q One of the Polensky employees? A Yes. 20

Q Man who was working with you delivering coal? A No, he wasn't working with me. He had another horse and wagon there and he was by his wagon and stand outside.

Q He was also delivering coal for Polensky? A Yes.

Q He was on another wagon that was standing there loaded with coal? A Yes.

Q And both your wagon and his wagon was to be delivered at the same time, is that correct? A Yes, sir. 30

Q How many coal wagons were there altogether? A Two.

Q How many men? A Two.

Q Two men and two coal wagons.

By the Court.

Q When you asked this man who was in the Edwards store where the coal was to go to, 40

Frank Planko, for Plaintiffs, re-cross.

what did he say? A He said it goes in the cellar.

By Mr. Toolan.

10 Q I show you a grating here next to the cellar door and ask you whether or not before you lifted the door you looked up through that grating? A No, sir I didn't look through the grating. I just went there and opened the door.

Q Do you know whether or not you can see through that grating? A I don't know. I don't remember seeing any grating at all up there.

Mr. Toolan: That is all.

20 *By Mr. Coan.*

Q Now, you said, in reply to a question by Judge Daly, when you asked him where the coal was to go he said the coal was to go in the cellar is that all he said? A Yes, and he told me what way to get there.

30 Q What did he say? A He said take that door through the side and you go in the cellar you will find where to open the door up and take the coal in through there.

Q When he told you the coal was to go in the cellar what did you say to him, if anything? A Well, I just went down the way he showed me the door from the store.

Q Well, did you have any instructions from Polensky as to the opening of cellar doors?

Mr. Toolan: I object. I do not think it is material. It is not proper cross examination.

40

George Kozusko, for Plaintiffs, direct.

Mr. Coan: I submit counsel has shown he was there and we have a right to show under what authority he was there.

The Court: I sustain the objection.

Mr. Coan: Prays exception.

The Court: You will bring this out subsequently, possibly, through this witness, but not now. Besides it is not re-cross examination. 10

GEORGE KOZUSKO, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Toolan. 20

Q Mr. Kozusko, you are a Sergeant of Police in Perth Amboy? A Yes, sir.

Q And you were on the twenty-eighth of May, 1926? A Yes, sir.

Q And what squad were you on that day? A On the three to eleven shift.

Q At or about three o'clock in the afternoon of that day were you in the vicinity of the Edwards Shoe Company store on Smith street? A Yes, sir. 30

Q With the three o'clock squad? A Yes, sir.

Q Will you please tell us what you saw, officer, as you approached that store? A Why, we left our headquarters at seven minutes of three, and just about three o'clock we happened to reach the corner of Smith street and State street, and as I was leading the squad—Officer McDonald generally leads, the tallest man in the squad, and I was in the rear, a squad of eight 40

Thomas Pederson, direct.

men, and as we reached close to Edwards Shoe Store we generally take a two row in the center, and anyone passing would either go one side of us or the other side of us and as we reached the corner—not the corner, but the building of Edwards Shoe Store, we seen a lady stepping and
 10 fall, and Officer McDonald picked her up and lifted her up. I rushed from the rear and just happened to see where her leg was in the door caught. Then we lifted the other half of the door open, and we seen a man down the cellar. Then we brought Mrs. Pederson to Edwards Shoe Store under a faint. The young man there brought her a glass of water. From there Officer Sullivan and I took her over to a taxi, from a taxi I myself took her to her home at 145 Jefferson street and carried her upstairs and put
 20 her to bed, and that is all I know.

Mr. Toolan: That is all I have. Cross examine.

Mr. Coan: No questions.

The Court: That is all.

30 THOMAS PEDERSON, one of the plaintiffs, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Toolan.

Q You are the husband of Mrs. Astrid Pederson? A Yes, sir.

Q What is your business, Mr. Pederson? A I operate an auto laundry.

40 Q At what address? A 145 Jefferson.

Thomas Pederson, direct.

Q You live in that same building, do you, upstairs? A Yes, sir.

Q Do you remember the twenty-eighth of May, 1926, the date on which your wife was injured? A Yes, sir.

Q When did you first know that she had been injured? A Why, the time the police officer brought her home in a taxi. 10

Q Now, Mr. Pederson, how long was she laid up? A Oh, she was laid up for two or three months.

Q Well, until about when was it first that she was able to get about to go outside at all? A She wasn't able to go out until she was up out of bed, and she was first outside the latter part of July. 20

Q Well, how well could she get about then? A Oh, she couldn't get out. She was just limping along. She couldn't carry her own weight.

Q Well, could she walk unassisted at that time? A No. She had to have a cane.

Q Well, how long was it before she was able to walk as she could walk before the accident? A Oh, three or four months before she was able to, and then still she was limping. 30

Q Prior to this accident Mrs. Pederson took care of your home? A Yes, sir.

Q After she was hurt was she able to take care of your home? A No.

Q Did you have anybody assist you? A Yes, sir.

Q Who? A I had a woman upstairs and a man downstairs.

Q Now, with reference to— 40

Thomas Pederson, direct.

By the Court.

Q What do you mean a man downstairs? A Why, my wife used to help me.

The Court: Never mind about that. Strike out the man downstairs.

10

By Mr. Toolan.

Q With reference to the woman upstairs whom did you have upstairs? A I had a Danish lady.

Q What was her name? A Her name was Mrs. Larson.

Q How long did you have her around the house? A She was up around the house about nine or ten weeks.

20 Q And what did you pay her? A I had to pay her twenty-five dollars a week.

Q Now, before your wife's accident did she assist you in your business? A Yes, sir.

Q In what way?

Mr. Coan: I object.

The Court: Objection sustained.

30 Mr. Toolan: I think that under our pleadings, the original pleadings, that is, they are broad enough to permit us to prove this item of damage that we claim by reason of this lady's injuries.

The Court: I sustain the objection.

Mr. Toolan: Prays exception.

The Court: Certainly. You may ask this man what was her physical condition before this accident.

40 Q Before the accident what was your wife's physical condition? A A, number one. She never had a sick day.

Thomas Pederson, direct.

By the Court.

Q Was she a strong woman or a weak woman? A Yes, sir; powerful woman.

By Mr. Toolan.

Q Able to work about the house? A Yes, 10 sir.

Q And where else did she work?

Mr. Coan: I object.

A She worked along with me in the garage.

Mr. Toolan: I think we are entitled to show that, not with a view of proving any other damage, but simply to show—

The Court: I know, but you have done it. 20 He says she was so physically strong that she was able to help him around the garage. Now, that you have got.

Q Has she been able to help you in your business since that time? A No.

Q Has she been able to do the housework? A Well, not what she should do, because washing, and all that extra work we had to hire a woman, or send it to the laundry, which she always done 30 before that.

Q Well, has your wife suffered in any way that you have seen? Tell us only what you have seen. A Yes, sir.

Q Since this accident and up until recently? A Yes, sir.

Q In what way? A Well, she was so nervous and pain, for the last year, in the middle part of August I had to take her a trip, take a trip with her to make her nerves rest up, to Canada. 40

Thomas Pederson, direct.

Q Since that trip to Canada have you seen anything with your own eyes? A Yes, sir.

Q What? A She is just a total nervous wreck since that time, which she never was before.

10 Q In addition to that have you seen anything else wrong with her physically that you can say? A Yes. Her leg, she has got a terribly disfigured leg, big scar on there. Which take an awful long time to heal up.

Mr. Coan: I move to strike that out.

The Court: Yes. It is stricken out.

Q Have you ever seen anything wrong with her leg yourself other than that scar? A Yes.

20 Q What? A Every night she has complained about pain.

Mr. Coan: I move to strike it out.

The Court: It is stricken out.

Q Have you seen any swelling? A Yes.

Q Where? A From her knee down.

30 Mr. Coan: I move to strike it out. Dr. Lund says it is not because of an accident.

Mr. Toolan: No. He said he didn't know whether it was or not, in response to a specific question put by me. He testified that he had attended this woman before and she never had this trouble before the accident he said that he couldn't say what it was due to.

40 The Court. He also said he didn't think it was due to the fracture. It is hard to tell what he was saying, in some parts of his

Thomas Pederson, cross.

testimony, but it struck me—I do not know how it affected the jury—but I will allow this question.

(Question and answer repeated by stenographer.)

Q Well, any particular place? A Yes, sir; 10 she had a big cut on her shin bone.

Q I am not referring to the cut. I am referring to any swelling that you have seen in any particular part of the leg. A Swelling all the way down, from her knee and down to her foot. Foot and all the ankle.

Q When are you referring to now? When you are speaking about this swelling from her knee down what time are you referring to? A It is swelled down to the ankle at the present 20 time.

Mr. Toolan: That is all I have.

Cross examination by Mr. Coan.

Q Swelled all the way from the knee down to the ankle at the present time, is it? A At the present time the ankle is swollen.

Q You were in court here and heard Dr. 30 Lund testify, did you? A Yes.

Q You heard Dr. Ramsey testify? A Yes.

Q Now, this woman that you paid \$25 a week to, what did she do at your house? A Why, she took care of the house.

Q Ordinary housework. Paid her \$25 a week? A Yes, sir.

Q How long a time was she there? A She was there about nine or ten weeks.

Q Don't you know whether it was nine or ten weeks that you paid this \$25 a week? A Sure. 40

Thomas Pederson, cross.

Q Well, which was it? A About nine or ten weeks.

Q Which was it? A I couldn't say exactly.

Q You didn't take any receipts for it, did you? A No.

10 Q This woman is not around now? A No.

Q Where is she? A I guess she is in Denmark.

Q At the present time Mrs. Pederson is taking care of the house, isn't she? A Partly, yes.

Q Been doing it ever since she came back from Canada? A No.

Q You didn't have anybody after this nine or ten weeks, did you? A Oh, yes.

Q Who was it? A We had Mrs. Ross.

20 Q She came in every couple of days? A Mrs. Ross made a visit very near every day, whatever time she could spare.

Q You saw her there every day? A Well, I couldn't say every day, because I am not there all day long.

Q Well, nearly every day? A I am not there all day long.

Q Then there were days you didn't see her there at all, weren't there? A Oh, yes.

30 Q Many days? A There is hardly a day I don't believe she missed.

Q But you were working downstairs in this auto laundry? A Yes, sir.

Q What time in August was it that you started for Canada? A About the middle part of August.

Q Don't you know what time it was? A No. Probably about the fourteenth or fifteenth.

40 Q Well, I am not asking you what it was probably. Don't you know exactly what time it was? A No, I don't remember.

Leon Franzblau, direct.

Q You don't remember what day you returned either? A Well, I imagine about—

Q I don't want your imagination. Do you know, is the question? A The last part of August or the first part of September.

Q You don't know what day? A No.

Q This was your wife who was on the stand 10 this morning? A Yes, sir.

Mr. Coan: That is all.

Mr. Toolan: That is all.

LEON FRANZBLAU, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath saith: 20

Direct examination by Mr. Toolan.

Q Mr. Franzblau, you are now employed by the Edwards Shoe Company? A Yes, sir.

Q And you were employed by the Edwards Shoe Corporation, were you not? A Yes, sir.

Q On May 28, 1926? A Yes, sir.

Q You are familiar, are you not, with the front of the store and the entrance to the cellarway from the street? A Yes, sir. 30

Q I show you these pictures here and ask you whether or not the picture indicating the cellar doorway, shown on Exhibit P. 2, indicates the layout and location and physical condition of the cellar doorway? A Yes, sir.

Q At the present time? A Yes, sir.

Q And was it in that same condition on the twenty-eighth of May, 1926? A It was.

Q I call your attention to a drillwork here, or iron lattice work between the doorway and the 40

Motion for Non-suit.

building and ask you whether or not that was there on the twenty-eighth of May, 1926? A It was.

Q Mr. Franzblau, do you know whether or not a man standing down in the cellar, about to open the door, can see up through that lattice work?

10 A He can.

Q See persons coming along the street? A Yes, sir, he can.

Mr. Toolan: That is all I have.

Mr. Coan: No questions.

Mr. Toolan: We rest.

MOTION FOR NON-SUIT.

20

Mr. Coan: So far as Charles Polensky the defendant is concerned I move for a non-suit on the ground that it appears that the gentleman who opened the door, at the time of opening the door was not the servant of Polensky in doing that work, but on the contrary was the servant of the Edwards Shoe Corporation or Shoe Company.

30

Also on the ground that the contributory negligence of the plaintiff contributed to the accident in such a way as to bar recovery.

The Court: The motion is denied.

Mr. Coan: Prays exception.

40

Charles Polensky, for Defendants, direct.

DEFENDANT'S CASE.

CHARLES POLENSKY, re-called.

Direct examination by Mr. Coan.

Q Mr. Polensky, you are the same Charles Polensky who is the defendant in this case? A Yes, sir. 10

Q The witness Planko who was here on the stand this morning was employed by you? A Yes, sir.

Q In what capacity was he employed? A As a driver.

Q Were there any general rules that you had made known to your drivers respecting the delivery of coal? A Yes, sir. 20

Q What were they? A They are not to open any cellar doors, any manholes, and any of the places where the coal is to be delivered. They are personally responsible for it. That is the general standing instructions.

Q Were such instructions communicated to Frank Planko, one of your drivers? A Yes, sir; to all the drivers.

Q I am referring particularly to Planko, were those instructions given to Planko? A Oh, yes, sir, all right. 30

Q You were not present at the Edwards Shoe store on the day that this coal was delivered? A I wasn't there at that time. I was there later.

Q How much later? A I presume about an hour and a half later.

Q Mrs. Pederson was not there at the time that you were there? A No, she was not.

Mr. Coan: Cross examine.

40

Charles Polensky, for Defendants, cross.

Cross examination by Mr. Toolan.

Q Mr. Polensky, those instructions that you had for your drivers were never printed, were they? A Yes. We have a form in the office.

10 Q You haven't any copy of it here, have you? A Well, we don't carry them around in our pockets. It is our rules. We have various rules.

Q Just what is this rule with reference to delivering coal? Suppose you tell it to me so that I will understand its extent and its limitations. A I don't quite understand you.

Q I want you to tell me exactly what the rule is. A The rule is when they go out with the coal they generally go into the house—

20 Q Never mind generally. I want to know what the rule is that you have for your drivers. A Well, the rule is to deliver the coal to the people.

Q Yes. A But they are not to open up any cellars, or any manholes. That is all to be done by the customers. In other words, that is our instructions.

30 Q I suppose if you were delivering a ton of coal down in the residential district in Perth Amboy, the driver goes to the front door and rings the door bell, and if there is not a man in the house, the lady in the house is supposed to open up the— A Yes, sir.

Q Everything in the house so that the coal may be delivered? A No. Supposed to open up the door. They have got no right to go into other people's places to open doors.

40 Q It does not make any difference whose home you go into, it is up to the lady of the house, if the man of the house is not there, to

Charles Polensky, for Defendants, cross.

open everything up so your man can deliver the coal? A Just to open the door for them.

Q Open what door? A Open the cellar door to leave them in.

Q And then?

By the Court.

10

Q Leave who in? A To leave the driver in to carry the coal in.

By Mr. Toolan.

Q After the party opens up the door and lets them in, why, then the drivers go ahead and make all their arrangements, isn't that so? A No. I presume the customers—

20 Q Not what you presume. A Well, the customer, as a rule, tells them where the coal is to be put in the cellar.

Q Yes. A Or wherever it may be, wherever they want it.

Q Then your drivers go ahead and do the balance of work, don't they? A Well, they carry the coal in there.

30 Q Well, they make arrangements, such as putting the chute in, and doing whatever else is necessary to deliver the coal, isn't that true? A No, only wherever—they put the coal in, as a rule our coal comes in bags. Carried in.

Q You have to carry your bags into the chute generally, don't you. A No.

Q If you are delivering it at a private home you do, don't you? A No, sir. We don't carry bags in. We carry it right into the bin.

Q If there is a cellar window immediately alongside of the bin? A Yes, sir.

40 Q Into which you can put a chute, to have the coal go in? A Yes.

Charles Polensky, for Defendants, cross.

Q You don't insist that your men walk around to the back of the house and down the cellar steps and around through the cellar to the coal bin, do you? A No. As a rule they set one bag down, and they open the window, or the window is opened by the party.

10 Q Well, now, which is it? A And they throw the coal right in there.

Q Does your rule require that the lady of the house, if she happens to be there, open up the window for them, too? A Yes, sir. They have strict instructions not to open any doors or any windows.

Q Well, do you let them put the chute in the cellar? A It is not necessary to chute wherever the coal is dumped that way.

20 Q Suppose you want to deliver it through a chute, do you let your drivers put the chute in the cellarway? A No.

Q I suppose you make the lady of the house carry the chute off your wagon? A No. There is no chute used to the cellar. Used to the manhole.

30 Q Mr. Polensky, you know very well, do you not, that you generally deliver coal by putting it into the chute and delivering it that way into the coal bin? A Well, there is no chute used in the cellar. The chutes are to be used outside of the cellar, but not in the cellar.

Q The chute runs from the outside into the coal bin, doesn't it? A Well, as a rule, yes.

Q Well, in that situation don't your men put the chute in? A They put the chute in from the outside when the place is opened for them.

40 Q It has been a standing rule your men are to do nothing except put the chute in? A When the place is opened for them to put the coal in.

Charles Polensky, for Defendants, cross.

Q Did you ever have any difficulty enforcing that rule? A Well, we make it a practice to enforce it.

Q I suppose if the parties don't come down and open everything up for your drivers, they go back with the coal? A We have had them time and again come back. 10

Q You have a lot of them come back? A Well, no.

Q Not many? A On rare occasions. Probably once a year it will happen.

Q All the other times of the year your drivers generally open up the cellarways themselves?

Mr. Coan: I object to that.

A No. 20

Q What are your orders, provided they don't come down and open everything up and prepare for your drivers, what are your orders? A I have already told you what the orders are.

Q What is the order in that situation? A Why, to come back with the coal, if the place isn't opened for them.

Q Well, you mean if nobody is home? A No. 30

Q So that they can't get in, they come back? A No. If the place is not opened for them they come back with the coal.

Q And you say you have about one driver a year come back? A Well, I say occasionally it happens that they come back once or twice.

Q Well, you said a few minutes ago that it happens about once a year? A It may happen on a rare occasion where they come back with it, but as a rule they are opened. 40

Charles Polensky, for Defendants, cross.

Q Did you ever follow your drivers around to see if they ever violate your rules? A I do; yes, sir.

Q You never found them violating this rule? A Not to that extent.

10 *By the Court.*

Q What do you mean not that extent? A Well, there are strict rules on that. They will come back—the orders is to come back with the coal if the place isn't opened for them.

By Mr. Toolan.

Q Did you ever follow your drivers around to make sure they were carrying out your rules?

20 A Well, I do occasionally follow them around for other purposes.

The Court: He said for other purposes.

Q I mean to see that this rule was enforced? A No. I have followed them around for various purposes.

Q Well, did you ever follow them around to see that they were enforcing this rule? A Well, I do occasionally go over, yes.

30 Q Well, occasionally means how often? A Well, probably once a month or twice a month.

Q On these occasions when you follow them around, did you see the lady, or somebody in the place where they were delivering coal, opening everything up and making ready for them? A Well, if I am not there at that moment I can't say.

40 Q Well, these times that you went out to see, I am asking you. A Well, I have seen them

Charles Polensky, for Defendants, cross.

put coal in. Sometimes I get there after the coal is put in.

Q I am asking you about enforcing this rule. A Yes. There are times again where the people have opened the cellar doors and told them to put the coal in there.

Q And open up the windows? A The win- 10
dow or the cellar door.

Q Do all the things? A Not all the things, no. I didn't say all the things. They are to carry the coal in.

Mr. Toolan: That is all.

Mr. Coan: That is all.

By the Court.

Q About these rules that you say you have 20
printed? A We have printed, yes.

Q You said something that you didn't carry them around in your pocket? A No.

Q You knew this case was coming on today, didn't you? A That this case was coming on?

Q Yes, you knew this case, and that you are a defendant? A I knew this case was coming on, it was supposed to come up last week, Judge.

Q You knew it was coming today. You say 30
you have these printed rules. Why didn't you bring them up here? A I didn't think it was necessary.

Q Where are they? A We have got them.

Q Where? A In the office.

Q Hanging up? A Well, we have got them around in card form.

Q Tacked up on the wall? A In card form.

Q How many. A One.

Q How big is the card? A Just a small one 40
about that big (indicating).

Charles Polensky, for Defendants, cross.

By the Court.

Q About a foot and a half? A Well, I presume about that big.

Q Square? What does it say on it as near as you can remember the language? A All coal that is being delivered are to be delivered to the people's houses—I just can't recall.

Q I know, but this is very, very important. Don't you remember the language of that rule?

A No doors or no cellar doors or manholes are to be opened by our drivers.

Q That is just what it says, is it? A Yes, sir.

Q When you sell this coal, or agree to sell this coal, that includes delivering it, doesn't it, and putting it wherever the people want it put, doesn't it? A Wherever the people want to put it, yes, in the cellar.

Q In their cellar, yes. So the duty of your driver is to see that it is actually delivered in the bin in the cellar, in case that is where it is to go, isn't it? A Yes. But the cellar is to be opened by the people. The doors is to be opened by the people, by the customer.

Q I understand, you have said that several times. I am asking you, however, if the actual delivery of the coal is not to be made by your driver right to the bin by carrying it, through some means or another, right to the bin and leaving it there? A Until they put it in the bins, yes, sir.

The Court: That is all I have.

By Mr. Toolan.

Q Did you ever call Planko's attention to that printed card? A Why, Planko has been working on and off.

Frank Planko, for Defendants, direct.

Q Did you ever call Planko's attention to that printed card? A No. But he has been told.

By Mr. Coan.

Q Did you ever tell Planko of this rule? A Yes, sir.

Mr. Coan: That is all.

FRANK PLANKO, re-called.

Direct examination by Mr. Coan.

Q Mr. Planko, you were the driver of this wagon of Mr. Polensky's? A Yes, sir.

Q What were your instructions generally as to the delivery of coal? A When I was hired he called out in the yard, the day I was hired, in the afternoon, he says, don't open any windows, don't drive over lawns, or open manholes or anything like that unless you are told to do it.

By the Court.

Q Unless you are told to do it? A I only done it when I was told to do it by the people of the house.

By Mr. Coan.

Q On this occasion at the Edwards Shoe Company were you told to do it? A Yes, sir.

Q By whom? A There was a man standing up there and he told me to go open the door.

Q Is the man in court now, the man who told you to do it? A I don't know if I can just recognize him.

Frank Planko, for Defendants, cross.

Q See if you recognize anybody in court that looks like that man.

Mr. Coan: Mr. Schwed, stand up, please.

A I don't know if it was him. It was a man in a gray suit. He had gray clothes.

10 Q Is this the man, do you know? A I don't know. I can't recognize him.

Mr. Coan: Cross examine.

Cross examination by Mr. Toolan.

Q Your instructions from Polensky were never to go into anybody's house and open up their cellar doors, or open up any manholes until you had first asked the person who owned the premises about doing it, isn't that so? A Yes, 20 sir; and they told me, when they told me to do it, then I done it.

By the Court.

Q Do you mean when they gave you permission to do it then you could do it?

Mr. Coan: I object.

30 A Yes, sir.

The Court: You may have an objection and an exception to it.

The Court: That is what he has already said, as I understand it. I don't know how the jury will understand it.

By Mr. Toolan.

40 Q When you went out to deliver coal what would you do? A Stop on the right-hand side

Frank Planko, for Defendants, cross.

and go inside and ask the lady where does the coal go.

Q Where does the coal go? A Yes, sir. A lot of people, where there was a maid, or something, she went and opened the window. A lot of places they told me to do it and I done it, 10 opened the place.

Q In other words, your instructions were never to go break in anybody's place until you first asked permission to put the coal in, is that right? A Yes, sir.

Q On this day with the Edwards Shoe Company, as I understand it, you went there and said, Raritan Coal Company? A Yes, sir.

Q Where does the coal go, is that right? A Yes, sir. 20

Q And the man said down cellar? A Yes, sir.

Q And you went down and opened the door? A He said go down cellar and open your doors.

Q Well, he told you where the coal bin was, didn't he, where it went? A Yes.

Q You knew it went in the cellar somewhere, didn't you? A Yes.

Q He pointed out to you the door by which you could get in the cellar? A Yes. 30

Q He didn't go down the cellar with you? A No, sir.

Q Or anything else? A No, sir.

Q Simply pointed the door that you could get into the cellar and you went and did the rest yourself? A Yes, sir.

Mr. Toolan: That is all.

Frank Planko, for Defendants, cross.

By the Court.

Q Did you ever see a card in the office? A I don't remember ever seeing any cards in the office.

Q No printed notice on a card in the office?

10 A I never read any.

By Mr. Toolan.

Q Wasn't your foreman with you that day?

A He come after it happened.

Q Well, didn't he go into the cellar with you?

A He was in the cellar after. Well, I saw him after while the lady was in the store upstairs.

Q He wasn't with you when you went into the cellar? A No, sir.

20 Q Was he outside when you went in the cellar? A I don't know where he was. He come after it happened, I saw him.

Q How long after it happened? A About fifteen or twenty minutes the foreman come there.

Q Did he ride down on one of the coal wagons or not? A No, sir. He has got a car of his own.

30 Q Do you know whether he was there when you went into the store? A I don't know.

Mr. Toolan: That is all.

By Mr. Coan.

Q Mr. Planko, were you present when Officer Kozusko was there and the lady had been taken in the store? A There was some cop there. I don't remember his name.

40 Q Did the cop who was there say anything to you about opening the door? A I don't re-

George Kozusko, for Defendants, direct.

member. All I know he asked my name and address. That is all I remember.

Mr. Coan: All right.

The Court: That is all.

Mr. Toolan: That is all.

10

GEORGE KOZUSKO, re-called.

Direct examination by Mr. Coan.

Q Officer Kozusko, on this day in May, last, when Mrs. Pederson was injured did you see Planko the man who was just on the stand there in the store? A Yes, sir. I didn't see him in the store. He came in afterwards.

20

Q Well, now, did you have any conversation with him about the door?

Mr. Toolan: I object. How is that binding on us?

The Court: I do not think it is, but, however, I do not know. How is that binding?

Mr. Coan: I propose to show that he asked this man why he opened it, and the man of the store said right there he did tell him to open the door. That is the purpose of it.

30

The Court: Who are you contradicting?

Mr. Coan: I am not contradicting anybody. I am just having direct testimony to that effect. It is corroboration of the testimony of Planko and of Polensky.

Mr. Toolan: Even if that is true, it is no defense.

40

George Kozusko, for Defendants, direct.

Mr. Coan: I submit that it is a defense.

The Court: I do not quite understand yet. That Planko, who has already testified in one way or another, that the man told him to go down the cellar and open the door, is that what you mean?

10

Mr. Coan: Yes, sir.

The Court: And it is going to corroborate him, Planko?

Mr. Coan: Yes, sir.

The Court: What Planko told the police officer afterwards?

Mr. Coan: In part, yes, sir.

The Court: What else do you mean?

20

Mr. Coan: It is also to show that at this time this officer asked the manager of the store if he did tell him.

The Court: The manager of the store, yes, but not Planko. You cannot put in what Planko said afterwards, to corroborate Planko. It is of the same general nature as a self-serving declaration.

Mr. Coan: Planko's statement is just leading up to the statement by the manager.

30

The Court: Bring out the manager first and then the whole conversation may be competent. Bring the manager in first.

Mr. Coan: That is to show that he was there?

The Court: Yes.

Q At the time there was Mr. Franzblau? A Yes, sir.

Q Was he the only man who was there in charge of that store at the time?

40

George Kozusko, for Defendants, direct.

Mr. Toolan: I object. How does he know?

By the Court.

Q Was he the only man in the store? A There were two men in the store at the time.

10

By Mr. Coan.

Q Who was the other man? A small dark complected fellow. I don't know his name.

Q The gentleman who stood up back here a few minutes ago? A It might have been him. Might not. I wouldn't say it was him.

Q Did you, at that time, say anything to Planko as to opening the door?

Mr. Toolan: I object.

20

Mr. Coan: In the presence of those two men.

Mr. Toolan: I object.

The Court: I will allow it, if it was in the presence of those two men.

Mr. Toolan: My reason for that is simply this, on the same line of reasoning that counsel is indulging in, their theory is, of course, that this man was the agent of the Edwards Shoe Company rather than the agent of Polensky when he went down there. I don't know who the two men in the store were; it has not been developed who they were. If the Edwards Shoe Company can come along and say that man who was in the store had no authority on their part to employ or make this other man his agent, and then both of them will be taking the position that he was not Polensky's agent,

30

40

George Kozusko, for Defendants, direct.

and he was not the Edwards Shoe Company's agent, and of course it lets everybody out. They must show first, I think, as a foundation for this question, that there was any such conversation that the man with whom the conversation took place was authorized by the Edwards Shoe Company to give that authority.

By the Court.

Q There were two men there, officer, in the store? A Yes, sir.

Q Were they working about the store? A Yes, sir.

Q Were those two men in the hearing when you had the conversation with Planko? A Yes, sir.

The Court: Proceed. I will allow it.

By Mr. Coan.

Q What did you say or what did he say? A Well, I sort of upbraded Planko for opening the door, the outside door, the cellar door.

Q What did you say to him? A I told Planko he should have a man watching that door as soon as he is lifting it up, on account of pedestrians on the street. And he said, why, there is a gentleman told me to go down the cellar.

Q Yes. Did he say anything further than go down the cellar? A That he had permission to go down, told him to go down the cellar.

Q To do what? A Open the door.

Q Did he say open the door? A To open the cellar door. And I asked the manager—or, he pointed out the man, it was a dark, short,

Morris S. Schwebel, direct—cross.

completed fellow, and I spoke to him, I said, did you he said yes. Told Planko to go down the cellar and open the door, and he did.

Cross examination by Mr. Toolan.

Q You used the words that you asked Planko, and Planko said he had permission to go down and open the door? A From the man in the store.

Q And then you asked the man whether or not he gave Planko permission to go down and open the door, and he said yes? A Yes.

Mr. Toolan: That is all I have.

Mr. Coan: That is all.

20

MORRIS S. SCHWEBEL, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Coan.

Q Mr. Schwebel, in May last, May 28, 1926, what was your business? A I was with the Edwards Shoe Corporation at that time.

Q In what store? A 110 Smith street.

Q Is that the store in front of which Mrs. Pederson was injured? A Yes.

Q Are you the man who was referred to by Officer Kozusko as having talked to there on that day? A I suppose so.

Mr. Coan. That is all.

Cross examination by Mr. Toolan.

Q Do you know? A What?

40

Morris S. Schwebel, re-direct.

Q Did Officer Kozusko speak to you there that day? A Not that I remember of anything saying to me.

Q Were you in the store that day? A I was.

10 Q Do you remember any conversation with Officer Kozusko? A Nothing whatsoever.

Q Was there anyone else in the store at that time? A I don't remember. Of course there was always a few men working in there.

Q I mean, were there other men other than you working there? A Oh, yes. There was quite a crowd at the time even when it happened.

Re-direct examination by Mr. Coan.

20 Q You were present there when Officer Kozusko came in and was talking to Planko, weren't you. A Not that I remember.

Q Weren't you there at the time Mrs. Pederson was injured? A I was in the store.

Q You remember Mrs. Pederson being brought into the store, don't you? A I do remember.

30 Q And the police officer was there at that time, wasn't he? A It was two, I believe, at the time.

Q All right, whether there were two or not, Officer Kozusko was one of them, wasn't he? A Yes.

Q And Planko, the driver of the car, was there, too, wasn't he? A In the store?

Q Yes. A I don't remember him being in the store.

40 Q Don't you know he was in the store when that woman was brought in there injured? A I do not.

Morris S. Schwebel, re-direct.

Q And didn't Officer Kozusko have with you the conversation which he just related on the witness stand?

Mr. Toolan: This is their own witness.

A Not that I remember. I do not remember. 10

The Court: He says he don't remember.

Q Now, do you know Prantle who worked for the coal company? A Yes, this is the gentleman that came over there after the accident happened, or he was there at the time, and he hollered to his man, he said, how do you come to open the cellar from the inside—

The Court: That is not competent.

Mr. Coan: I did not want him to testify 20 to that.

Mr. Toolan. I move that last answer be stricken out.

The Court: Strike out the answer. Answer the question of Mr. Coan. Answer yes or no.

A I do.

30 Q That man was there on that day, wasn't he? A At the time it happened I seen him. That means after it happened I happened to see the man outside.

Q As a matter of fact, didn't you tell this man Prantle to come down and take a light out of the toilet and light up the cellarway there so he could find the door?

Mr. Toolan: I object. This is something this man told Prantle who came there twenty minutes after the accident. 40

Joseph Prantle, direct.

Mr. Coan: No. This is just before the accident.

Mr. Toolan. The testimony of the driver is that Prantle wasn't there until twenty minutes after.

10 The Court: I know, but he is being asked if there wasn't a different situation. Of course, this is not re-direct examination, but if you want to bring it out I will allow it.

(Question repeated by stenographer. A Never said a word.

Q Wasn't Prantle there before the cellar door was opened and before Mrs. Pederson was hurt?
A Who was there?

20 Q Prantle. A I don't know if he was there or not.

Mr. Coan: That is all.

Mr. Toolan: That is all.

The Court: That is all.

30 JOSEPH PRANTLE, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Coan.

Q Mr. Prantle, are you employed by Mr. Polensky? A Yes, sir.

Q Were you employed on May 28, 1926? A Yes, sir.

40 Q State whether or not you were one of the drivers who took coal to the Edwards Shoe Company at 110 Smith street? A No, sir.

Joseph Prantle, direct.

Q Did you go to 110 Smith street on May 28, 1926? A Yes, sir.

Q When you got there where was Planko? A Down in the cellar.

Q Was that before Mrs. Pederson had been injured that you got there? A Yes, sir. 10

Q Where did you go when you got there? A I went in the store. The drivers had two wagons there and a truck. The truck came later and I came there after the truck got there, because the truck left the yard after the wagon got loaded. We load the wagons first and send two wagons and two drivers at the same time.

Q You got there before Mrs. Pederson was injured? A Yes.

Q Where was Planko when you got there? A He was down the cellar. 20

Q What did you do? A I went in the store and I asked where the driver was.

Q Whom did you ask? A That short man.

Q The man who was just on the witness stand? A Yes, sir.

Q What did he say to you? A He was down the cellar.

Q Yes. Go on, what else was said? A So I looked through the door and there was no lights down there, and I asked him to turn the lights on and he told me to turn the lights on, so I went over to the switch, the switch is up on top of the steps, and I didn't know which switch it was, so he put them on himself. 30

Q You are a foreman for Polensky, as I understand? A Yes, sir.

Q Did you see Planko in the cellar? A Yes, I saw him just at the time as he was raising the doors.

Q What did you say to him, if anything? 40

Joseph Prantle, direct.

Mr. Toolan: I object. It is not binding on us, what he said to Planko.

The Court: He is the foreman of the witness Planko.

10 Mr. Toolan: This is the man Planko said was not there.

The Court: I know Planko said he was not there. It is astounding, it seems to me. I will allow it.

A Planko had just his shoulder under the doors when I said, don't open those doors from the inside.

Q Did he open them? A They were opened, well, I would say, a couple of inches.

20 Q Was that after you told him not to open them? A Yes, sir.

Q Did you find the light? A There was a light in the toilet, that was all there was.

Q What did you do with it? A I took the light out and put it in the socket so the driver could see something, so he could see his way. There was no light at all down there.

Mr. Coan: Cross examine.

Mr. Toolan: No questions.

30 The Court: That is all.

Mr. Coan: That is our case.

Mr. Toolan: We have nothing further.

Charge to Jury.

MOTION FOR DIRECTION OF A VERDICT.

Mr. Coan: I move that a verdict be directed in favor of the defendant Charles Polensky on the ground that it now appears without contradiction that the man who opened the doors did so in direct contradiction of his orders, both from Polensky and the foreman given at that time. He is not responsible for any injuries that were occasioned by the opening of that door. 10

The Court: The motion is denied.

Adjourned until 1:30 P. M.

AFTERNOON SESSION 1:30 P. M. 20

Mr. Coan sums up the case for the defendant.

Mr. Toolan sums up the case for the plaintiffs.

COURT'S CHARGE TO JURY.

Court's charge to the jury by Honorable Peter F. Daly, Circuit Court Judge, as follows: 30

Members of the Jury: There are two plaintiffs in this case, Astrid Pederson and Thomas Pederson, her husband; and there are two defendants, the Edwards Shoe Corporation, a New York corporation, and Charles Polensky, and the suit is a claim for damages made upon the part of the plaintiffs, upon the basis that Astrid Pederson, one of the plaintiffs, was physically injured as the result of the sole and exclusive negli- 40

Charge to Jury.

gence of a servant, who was the servant or agent of either one or the other of the defendants.

I have said that the suit is based upon the claim of negligence, and negligence is a fact which must be proved; it cannot be presumed; the plaintiff must prove to you by a preponderance of the evidence that the defendants, or either of them, was negligent, and that such negligence was the proximate cause of the injury to the plaintiff, Astrid Pederson.

Negligence is the failure to observe the care, caution, thoughtfulness, and conduct of an ordinarily prudent person, such as an ordinarily prudent person would have exercised under the time, place and circumstances, and from which failure there directly results to another injuries; and as has already been stated, the burden of proving negligence is upon the part of the person who asserts it; so in this case the very first question of fact that you have to pass upon is whether or not this lady, Mrs. Pederson, was injured by the negligence of Planko, that is, was it his negligence that was the proximate or immediately effective cause of the injuries to Mrs. Pederson? If you are satisfied from a preponderance of the evidence in the case that his negligence was the proximate cause of injuries to Mrs. Pederson, then you have the further question, did she contribute by her negligence to those injuries. In other words, was she guilty of contributory negligence? The burden of proving contributory negligence is upon the party who asserts it, which in this case is the defendant.

Contributory negligence is such negligence that without which the party would not have suffered injury even though there was negligence upon the part of the defendant.

Charge to Jury.

If you are satisfied from the preponderance of the evidence in this case that the injuries to Mrs. Pederson were the result of the sole and exclusive negligence of Planko, then you will come to the question of fact as to who Planko was acting for at the time that he opened this cellar door. Was he the agent or servant of Mr. Polensky, or was he the agent or servant of the Edwards Shoe Corporation? If you find that the driver Planko was guilty of negligence that was the sole and exclusive cause of the injuries to Mrs. Pederson, and was given instructions not to open any coal holes, or areaways, and if you further find that the driver Planko expressly or impliedly assented to the transfer of his services from his master, Polensky, to the Edwards Shoe Company, and if you further find that Planko submitted himself to the direction and control of the Edwards Shoe Company when he proceeded to open the cellar door, then you must find for the defendant Polensky and against the defendant Edwards Shoe Company. If the driver Planko was guilty of negligence that was the sole and exclusive cause of the injuries to Mrs. Pederson, submitted himself to the direction and control of the person in charge of the Edwards Shoe Company's store when he opened the cellar door in question, and if he either expressly or impliedly consented to accept the Edwards Shoe Company as his master, then you must find in favor of the defendant Charles Polensky and against the defendant the Edwards Shoe Company.

Was that Planko's job? The defendant Polensky in this case claims that he had given positive instructions to Planko never to open an areaway or a door such as the door in question here; that that always must be done by the property owner,

Charge to Jury.

or someone representing the property owner, and that if Mr. Planko opened the door in this case he was violating positive instructions, and it is the contention of the defendant Polensky that the time that he, Planko, did that, that he was acting under the instructions and directions of the
 10 Edwards Shoe Corporation and not of Polensky. A question you will have to pass upon is what was Planko's job. Was it his job, according to the terms of hiring between Planko and his boss, Polensky, that he was not only to deliver the coal, but that he was to do the opening of such doors as this? That is a question. There is no need of my going into a detailing of the testimony. I have already charged you as to the law along this line. If Planko, in the opening
 20 of that door, was acting in the course and scope of his employment under Polensky, then, of course, Polensky would be responsible for any negligence of his servant Planko. If that was not in the course and within the scope of the employment of Planko in his relations with Polensky, but that he was violating a rule of Polensky's and was really doing the job of the Edwards Shoe Company, that is, doing their work of opening the door so that the coal might be
 30 brought into the cellar, then the Edwards Shoe Company would be responsible, provided Planko's negligence was the sole and exclusive cause of the injuries to Mrs. Pederson.

So there you have first the question as to negligence; second, the question as to contributory negligence; third, the question as to whom Planko was working for at the time he opened that door.

If you find that this plaintiff, Mrs. Pederson, is entitled to a verdict against either one or the
 40 other of the defendants, then, and then alone, do

Charge to Jury.

you come to the question of damages; and if she is entitled to a verdict, then she is entitled to a verdict that will fairly and adequately compensate her for the physical injuries that she suffered, and for the pain and suffering that she went through. There is also some claim made
 10 that there is some injury still continuing as a result of this accident, and our law is that before you can compensate, for permanent continuing injury, you must be satisfied from a preponderance of the evidence to a point of reasonable certainty as to the fact of that permanent injury, as to the extent of that permanent injury, and as to the period it will continue, based upon the preponderance of the evidence in the case; and also you must be satisfied from a preponderance
 20 of the evidence in the case, to a point of reasonable certainty, that if there is permanent and continuing injury, that that permanent and continuing injury has directly resulted from the accident complained of. If she is entitled to a verdict, then her husband is also entitled to a verdict that will reimburse him for the expenses that he reasonably and properly incurred in the reasonable and proper treatment of his wife's injuries, along medical lines and the like; and he is also
 30 entitled to be reimbursed for any expenses that he reasonably and properly incurred in the reasonable and necessary substitution of someone else to do his household work, and his household work alone, not any business work, but his household work alone, while his wife was incapacitated, as a direct result of her injuries that are involved in this case. And he would also be entitled to be compensated, whatever you think is fair and proper—there is no concrete evidence along that line—for the loss of the society, what
 40

Charge to Jury.

we call the conjugal society, the association and companionship and the other privileges of the marital relation, for the time that she was incapacitated. I say there is no concrete evidence as to just what would be the loss in such a case as that; it is hard to measure for that particular item, and the jury are warned to be very careful when they are considering that, in estimating pecuniary damages as a measurement of what that loss amounts to.

You may take the case.

Counsel has called my attention that the complaint was not broad enough to justify me in calling your attention to the subject of any damages for the husband, in case he is entitled to a verdict at all, on the ground of the loss of any marriage privileges. You understand perfectly what I mean. Just ignore that.

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21 FEB. T. 1928

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

ASTRID PEDERSON and THOMAS
PEDERSON,

Plaintiffs-Appellees,

vs.

EDWARD SHOE CORPORATION, a
New York corporation, and
CHARLES POLENSKY,

Defendants-Appellants.

*Action
at Law.*

*On Appeal
from
Supreme
Court.*

BRIEF OF THOMAS BROWN FOR DEFENDANT-APPELLANT CHARLES POLENSKY.

This cause was tried at the New Jersey Supreme Court, Middlesex County, before the Honorable Peter F. Daly, Circuit Court Judge, with a jury and resulted in a verdict in favor of the plaintiff Astrid Pederson and against the defendant, Charles Polensky, in the sum of \$1,500.00 and in favor of the plaintiff, Thomas Pederson, and against the defendant, Charles Polensky, in the sum of \$500.00, and a verdict of no cause of action against the defendant, Edward Shoe Corporation. Following the verdict, judgment thereon was entered May 19, 1927, and from the whole of the said judgment so entered the defendant, Charles Polensky, appeals to this Court on the grounds that:

A. The learned Judge of the Circuit Court before whom the said cause was tried, erroneously refused to grant a motion of the defendant, Charles Polensky, to non-suit the plaintiffs and allowed the defendant an exception to such ruling.

B. The learned Judge of the Circuit Court, who tried the case for the Supreme Court, erroneously refused to grant defend-

ant's motion to direct a verdict in favor of the defendant, Charles Polensky, and against the plaintiffs and allowed defendant an exception to such ruling.

C. The Court, over objection of the defendant, Charles Polensky, permitted plaintiffs' counsel to ask of the witness, Astrid Pederson, "Before this accident, what did you do?" and the question "Why can't you stand it?"

D. The Court sustained the objection of plaintiffs' counsel to the following question propounded by the attorney for the defendant, Charles Polensky, to the witness, Frank Planko, "Well, did you have any instructions from Polensky as to the opening of cellar doors?"

E. The Court permitted the witness, Frank Planko, to answer over objection of counsel for the defendant, Charles Polensky, the following question, "Do you mean when they gave you permission to do it, then you could do it?"

STATEMENT OF FACTS.

The plaintiff, Astrid Pederson, while walking along the northerly sidewalk on Smith street, in the City of Perth Amboy, was injured about the foot and leg when she was struck by a steel door situated in front of the premises of the Edward Shoe Corporation, in the City of Perth Amboy aforesaid, when it was opened. The plaintiff, Astrid Pederson, brought suit for the injuries so sustained and her husband, Thomas Pederson, brought suit on account of the fact that he was obliged to expend large sums of money for doctor's bills, medical expenses, and to engage assistance about his house to do and perform the work that his said wife would otherwise have done.

One Planko was employed by the defendant, Charles Polensky to deliver coal to the latter's

customers. When he was hired he was instructed never to open any coal holes or manholes unless he was told so to do (S. C., p. 67, ll. 20 to 25). On the day in question brought his coal wagon to the Edward Shoe Company's store and abiding by the strict instructions of his employer given to him, when he was hired, never to open any coal holes, he entered the store to advise the purchaser of the coal (*i. e.* Edward Shoe Corporation or its agent) that the coal was delivered (S. C., p. 67).

The person in charge of the store directed Planko to go into the cellar and open the steel door (which was in front of the building and when closed formed part of the sidewalk) through which the coal was to be brought into the premises (S. C., p. 46). Obeying such order and direction Planko proceeded into the cellar and opened the door which caused the injury, and which he found by following the instructions of his new master, The Edward Shoe Corporation.

The defendant-appellant contended that Planko was in his employ up to the time he entered the store of the Edward Shoe Corporation and that thereafter he became the agent and servant of the Edward Shoe Corporation and that if when he opened the door and caused the injury to the plaintiff-appellee, Astrid Pederson, his negligence was attributable not to the defendant-appellant but to the Edward Shoe Corporation, whose servant he was at that time.

LAW.

The Trial Court erroneously refused to grant the motion for a non-suit made by counsel for the defendant-appellant, Polensky.

A general servant of one person may, for a particular work or occasion become, *pro hac vice*, the servant of another person. This doctrine was set forth in the case of *D. L. & W. R. R. Co. v. Hardy*, 59 N. J. Law, p. 35, where Justice Magie speaking for the Supreme Court said, on page 37:

“Doubtless, no man can serve two masters, yet the law clearly recognizes a sort of duality of service. *A general servant of one person may, for a particular work or a particular occasion, become, pro hac vice, the servant of another person.* What will suffice to prove the assumption of the dual service gives rise to question. I think the applicable rule is admirably expressed by Lord Watson thus: ‘I can well conceive that the general servant of A might, by working towards a common end along with the servants of B, and submitting himself to the control and orders of B, become, *pro hac vice*, B’s servant in such sense as not only to disable him from recovering from B for injuries sustained through the fault of B’s proper servants, but to exclude the liability of A for injury occasioned by his fault to B’s own workmen. In order to produce that result the circumstances must be such as to show conclusively that the servant submitted himself to the control of another person than his proper master, and either expressly or impliedly consented to accept that other person as his master for the purposes of the common employment.’ *Johnson v. Lindsay*, 1891 App. Cas. 371.

To establish the fact that the servant of one has thus transferred his services to another *pro hac vice*, it must appear that he has assented, expressly or impliedly, to such

transfer. No one could transfer the services of his servant to another master without the servant’s consent. *It must further appear that the servant has, in fact, entered upon the service and submitted himself to the direction and control of the new master.* His assent may be established by direct proof that he agreed to accept the new master and to submit himself to his control, or by indirect proof of circumstances justifying the inference of such assent. *Such evidence may be strong enough to justify a Court in removing the question from the jury, or it may require to be submitted to the jury.’*

It is to be gathered from this pronouncement that if it was proved in this case that

- (1) the servant Planko assented expressly or impliedly to a transfer of his services from the defendant-appellant Polensky to the Edward Shoe Corporation, and
- (2) the servant Planko submitted himself to the direction and control of the new master, Edward Shoe Corporation,

then these facts conclusively establish that the Edward Shoe Corporation was the person liable for the negligent acts of Planko and not the defendant-appellant Polensky, and the proof of such facts established sufficient cause and would warrant the trial court in granting the motion for a non-suit. The testimony in this cause establishes beyond any doubt both of these requisite points. Planko, sworn on behalf of the plaintiff, testified thus (S. C., p. 45, l. 38 to l. 2 on p. 46):

“Q Did you go into the cellar of the property occupied by the Edward Shoe Company? A No, sir. I went in the store first.

Q Well, then, did you go into the cellar? A After I was told to go in the cellar then I went.”

and, further, on re-cross examination the witness testified, as follows (S. C., p. 48, ll. 20 to 34):

“Q Now, you said, in reply to a question by Judge Daly, when you asked him where the coal was to go he said the coal was to go in the cellar, is that all he said? A Yes, and he told me what way to get there.

Q What did he say? A He said take that door through the side and you go in the cellar you will find where to open the door up and take the coal in through there.

Q When he told you the coal was to go in the cellar what did you say to him, if anything? A Well, I just went down the way he showed me the door from the store.”

This testimony establishes that the servant, Planko, assented expressly to a transfer of his services from the defendant-appellant, Polensky, to the Edward Shoe Company, and, further, that Planko submitted himself to the direction and control of the new master, and this testimony was brought out when Planko testified on behalf of the plaintiff. The plaintiffs having brought out these facts by their own witness, there was no other course for the trial court but to non-suit the plaintiff as to the defendant-appellant, Polensky, and the Court's refusal so to do was legal error. The witness testified emphatically (S. C., p. 46, l. 2):

“A After I was told to go in the cellar then I went.”

All the testimony indicated that he only went into the cellar at the direction of his new master, the Edward Shoe Corporation. This testimony was neither contradicted nor neutralized by the plaintiff, so it remained undisputed that when Planko committed the negligent act whereby the plaintiff was injured, he was acting in the capacity of a servant, *pro hac vice*, for the defendant, Edward Shoe Corporation, and the trial

court should have granted the motion of the defendant-appellant to non-suit the plaintiff as to him.

The Trial Court erroneously refused to grant the defendant-appellant's motion to direct a verdict in favor of the defendant, Charles Polensky, and against the plaintiffs.

The defendant-appellant showed by testimony that his servants who were entrusted with the delivery of coal were not at any time to open any cellar doors or manholes or any other openings through which coal was to be put into houses. This testimony was brought out by the defendant, Polensky, when he testified, as follows (S. C., p. 59, ll. 13 to 30):

“Q The witness, Planko, who was here on the stand this morning was employed by you?

A Yes, sir.

Q In what capacity was he employed? A As a driver.

Q Were there any general rules that you had made known to your drivers respecting the delivery of coal? A Yes, sir.

Q What were they? A They are not to open any cellar doors, any manholes, and any of the places where the coal is to be delivered. They are personally responsible for it. That is the general standing instructions.

Q Were such instructions communicated to Frank Planko, one of your drivers? A Yes, sir; to all the drivers.

Q I am referring particularly to Planko, were those instructions given to Planko? A Oh, yes, sir, all right.”

Although counsel for the plaintiff attempted to weaken the testimony of the defendant, Polensky, the latter maintained that his men engaged to deliver coal were not to open any cellar doors or manholes but that such work was to be done by the occupants of the houses, or their servants,

and although this rule worked a hardship on the defendant-appellant, still he maintained it in spite of the fact that his drivers returned with the coal when the persons occupying the houses to which the same was to be delivered, did not open the coal chute or manhole for his drivers, and to this he testified in the following language (S. C., p. 62, l. 28 to l. 33 on p. 63):

“Q Mr. Polensky, you know very well, do you not, that you generally deliver coal by putting it into the chute and delivering it that way into the coal bin? A Well, there is no chute used in the cellar. The chutes are to be used outside of the cellar, but not in the cellar.

Q The chute runs from the outside into the coal bin, doesn't it? A Well, as a rule, yes.

Q Well, in that situation don't your men put the chute in? A They put the chute in from the outside when the place is opened for them.

Q It has been a standing rule your men are to do nothing except put the chute in? A When the place is opened for them to put the coal in.

Q Did you ever have any difficulty enforcing that rule? A Well, we make it a practice to enforce it.

Q I suppose if the parties don't come down and open everything up for your drivers, they go back with the coal? A We have had them time and again come back.

Q You have a lot of them come back? A Well, no.

Q Not many? A On rare occasions. Probably once a year it will happen.

Q All the other times of the year your drivers generally open up the cellarways themselves?

Mr. Coan: I object to that.

A No.

Q What are your orders, provided they don't come down and open everything up

and prepare for your drivers, what are your orders? A I have already told you what the orders are.

Q What is the order in that situation? A Why, to come back with the coal, if the place isn't opened for them.

Q Well, you mean if nobody is home? A No.

Q So that they can't get in, they come back? A No. If the place is not opened for them they come back with the coal.”

and questioned by the Court the defendant testified (S. C., p. 64, ll. 10 to 14):

“Q What do you mean not that extent? A Well, there are strict rules on that. They will come back—the orders is to come back with the coal if the place isn't opened for them.”

and, further, on cross examination the defendant, Polensky, testified that a card bearing printed instructions that the drivers were not to open any doors or manholes when delivering coal was posted in his office (S. C., p. 65, l. 34 to l. 14, p. 66):

“Q Where? A In the office.

Q Hanging up? A Well, we have got them around in card form.

Q Tacked up on the wall? A In card form.

Q How many? A One.

Q How big is the card? A Just a small one about that big (indicating).

By the Court.

Q About a foot and a half? A Well, I presume about that big.

Q Square? What does it say on it as near as you can remember the language? A All coal that is being delivered are to be delivered to the people's houses—I just can't recall.

Q I know, but this is very, very important. Don't you remember the language of that rule? A No doors or no cellar doors

or manholes are to be opened by our drivers."

Asked whether Planko was not aware of these rules, he testified (S. C., p. 67, ll. 1 to 10) as follows:

"Q Did you ever call Planko's attention to that printed card? A No. But he has been told.

By Mr. Coan.

Q Did you ever tell Planko of this rule?
A Yes, sir."

The servant, Planko, called on behalf of the defendant-appellant, corroborated the testimony given by Polensky when he testified (S. C., p. 67, ll. 18 to 30):

"Q Mr. Planko you were the driver of this wagon of Mr. Polensky's? A Yes, sir.

Q What were your instructions generally as to the delivery of coal? A When I was hired he called out in the yard, the day I was hired, in the afternoon, he says, don't open any windows, don't drive over lawns, or open manholes or anything like that unless you are told to do it.

By the Court.

Q Unless you were told to do it? A I only done it when I was told to do it by the people of the house."

The witness, Planko, followed these instructions not to open any doors or cellarways on behalf of his general employer, Polensky, on the day that the plaintiff was injured. He testified to this on (S. C., p. 67, ll. 34 to 37):

"Q On this occasion at the Edwards Shoe Company were you told to do it? A Yes, sir.

Q By whom? A There was a man standing up there and he told me to go open the door."

aed he conclusively establishes that he transferred his services from the defendant, Polensky, to his new master, the Edward Shoe Corporation, and submitted himself to the direction of such new master when he testified as follows (S. C., p. 68, ll. 16 to 30):

"Q Your instructions from Polensky were never to go into anybody's house and open up their cellar doors, or open up any manholes until you had first asked the person who owned the premises about doing it, isn't that so? A Yes, sir; and they told me, when they told me to do it, then I done it.

By the Court.

Q Do you mean when they gave you permission to do it then you could do it?

Mr. Coan: I object.

A Yes, sir."

and, further, on cross examination testified (S. C., p. 68, l. 39 to l. 23, p. 69):

"Q When you went out to deliver coal what would you do? A Stop on the right-hand side and go inside and ask the lady where does the coal go.

Q Where does the coal go? A Yes, sir. A lot of people, where there was a maid, or something, she went and opened the window. A lot of places they told me to do it and I done it, opened the place.

Q In other words, your instructions were never to go break in anybody's place until you first asked permission to put the coal in, is that right? A Yes, sir.

Q On this day with the Edwards Shoe Company, as I understand it, you went there and said, Raritan Coal Company? A Yes, sir.

Q Where does the coal go, is that right? A Yes, sir.

Q And the man said, down cellar? A Yes, sir.

Q And you went down and opened the door? A He said go down cellar and open your doors."

Immediately after the accident occurred, Police Officer George Kuzusko questioned the servant, Planko, and the manager of the Edward Shoe Company, and he corroborated the testimony of Planko when he testified as follows (S. C., p. 74, l. 28 to l. 3, p. 75):

"Q What did you say to him? A I told Planko he should have a man watching that door as soon as he is lifting it up, on account of pedestrians on the street. And he said, why, there is a gentleman told me to go down the cellar.

Q Yes. Did he say anything further than go down the cellar? A That he had permission to go down, told him to go down the cellar.

Q To do what? A Open the door.

Q Did he say open the door? A To open the cellar door. And I asked the manager—or, he pointed out the man, it was a dark, short, complected fellow, and I spoke to him, I said, did you he said yes. Told Planko to go down the cellar and open the door, and he did."

At the close of the defendant's case, the attorney for the defendant-appellant moved that a verdict be directed in favor of the defendant, Charles Polensky, on the ground that it then appeared without contradiction that the man who opened the door did so in direct contradiction of his order from Polensky. This motion was denied and the defendant-appellant contends that the trial court committed legal error in so doing. The testimony given on behalf of the plaintiff established that the servant, Planko, expressly assented to a transfer of his services from Polensky to the Edward Shoe Corporation, and also that he submitted himself to the direction and

control of the new master. Throughout the defendant's case the proof was strengthened that Planko expressly assented to a transfer of his services and submitted himself to the direction and control of his new master and when the trial court disregarded this proof and refused to direct a verdict, it disregarded the doctrine set forth in the Delaware, Lackawanna & Western Railroad case, *supra*. This case was affirmed by the Court of Errors and Appeals in 59 N. J. Law 562 for the reasons given by the Supreme Court and heretofore particularly set forth.

Another case involving the very same principle as that in the railroad case, *supra*, was *Naunczik v. McAllister Lighterage Line*, 94 N. J. Law, p. 447, where Justice Swayze, speaking for the Court of Errors and Appeals, said on page 447:

"The only question of interest is whether the defendant is liable or whether the engineer had become *pro hac vice* the servant of the railroad company. That he was generally the servant of the defendant, by whom he was paid, cannot be questioned. He was to some extent certainly subject to the orders of the railroad company who had made a contract with the defendant by which the latter supplied the necessary labor. The question is whether this evidence conclusively shows that the engineer submitted himself to the control of another person (the railroad company) than his proper master (the defendant), and either expressly or impliedly consented to accept the railroad company as his master. We think, to say the least, that a jury might properly infer that the engineer had not consented. The law cannot be better stated than in Delaware, Lackawanna and Western Railroad *v. Hardy*, 59 N. J. Law, 35, approved by this Court in *Id.* 562."

In the last above quotation the question was submitted to the jury as to whether or not the

servant of one became, *pro hac vice*, the servant of another person and the reason for such submission was stated by the Court when it said:

“a jury might properly infer that the engineer had consented” (consented to become the servant of another).

Such is not the facts in the case *sub judice*. Here the servant, Planko, as was brought out when he was sworn as the plaintiffs' witness, expressly consented to become the servant of the Edward Shoe Corporation and that he submitted himself to the direction of the new master. This testimony remains undisputed throughout the case and the plaintiffs made no attempt or effort to introduce an iota of evidence to neutralize or contradict the story of the servant, Planko. There was nothing for the jury to determine, but it was purely a question of law and the Court erred in refusing to direct a verdict.

Error Prejudicial to the Defendant-Appellant.

This suit was instituted against The Edward Shoe Corporation, the occupant of the premises in front of which, the accident occurred and Charles Polensky the coal dealer in whose general employ the servant, Planko, was engaged. The appellant, Polensky, defended the suit and introduced evidence to show that although Planko was the general servant of Polensky he was, *pro hac vice*, the servant of the Edward Shoe Corporation. The case is replete with testimony from which the jury should have come to no other conclusion than that the negligence of Planko was imputable to his then master, the Edward Shoe Corporation. No evidence whatsoever was introduced by the Shoe Company nor did it deny by either pleadings or proof the charges contained in the complaint. The case is

barren of even the slightest symptom of defense offered on behalf of the Shoe Company and yet in face of all this, and in total disregard of the evidence adduced, the jury returned a verdict of no cause of action against the defendant, Edward Shoe Corporation. This verdict is legally unjustifiable and without any evidential foundation. Beyond any doubt the jury's verdict was contrary to the clear weight of the evidence adduced at the trial when it, without any evidence being offered on behalf of the Shoe Company, rendered a verdict that the latter was without liability in the suit. The appellant showed that the Shoe Company ordered the coal and that delivery terminated only after the occupant opened the necessary coal hole; that in this case the driver, Planko, when hired was given express and specific instructions never to open any such coal hole; that he obeyed such instructions and opened the door at the direction of the Shoe Company after he submitted to the control of the latter, his new master. In view of this convincing and undisputed testimony the jury's verdict exonerating the other defendant is so palpably erroneous as to warrant this Court in the name of justice, in setting aside the verdict rendered.

Conclusions.

It is respectfully submitted that the judgment entered in this case be reversed for the reasons that (a) the trial court erred in refusing to grant the motion to non-suit the plaintiff as to this defendant, when requested so to do and (b) the trial court erred in refusing to direct a verdict in favor of this defendant when requested so to do and (c) the verdict of the jury was against the clear weight of the evidence adduced at the trial

and was legally unwarranted for the reasons hereinabove stated.

THOMAS BROWN,
Attorney for Defendant-Appellant,
Charles Polensky.

brief is hereby acknowledged this 10th day of February, 1928

21 21 FEB.T.1928

Thomas Brown
Attorney for Defendant-Appellant Charles Polensky.

NEW JERSEY COURT OF ERRORS AND

APPEALS

ASTRID PEDERSON and
THOMAS PEDERSON,

Plaintiffs-Appellees,

vs.

EDWARD SHOE CORPORA-
TION, a New York Corporation,
and CHARLES POLENSKY,

Defendant-Appellant.

Action at Law. 10

On Appeal from
Supreme Court.

BRIEF OF JOHN E. TOOLAN 20
Attorney for Plaintiffs-Appellees.

STATEMENT OF FACTS

On the 28th day of May, 1926, at three o'clock in the afternoon, the plaintiff, Astrid Pederson, was walking in an easterly direction along the northerly sidewalk on Smith Street, in the City of Perth Amboy, New Jersey. The evidence showed that the sidewalk was twelve feet wide, that there was a cellar door four feet wide laying flush with the sidewalk immediately in front of the building occupied by the defendant, Edward Shoe Corporation; that there was a squad of policemen coming in the opposite direction, and that plaintiff walked on the inside of the sidewalk close to the buildings; that she reached a point in front of the store of the defendant, Edward Shoe Corporation, and was standing on the westerly half of the cellar door and was about to step on to the easterly half, when one Planko, a servant and agent of 40

the defendant, Charles Polensky, suddenly opened the door and the plaintiff, Astrid Pederson, stepped into this opening, the door falling upon her left leg, causing a fracture of the fibula bone. At the time of the accident the defendant, Charles Polensky, was delivering coal to the building occupied by the Edward Shoe Corporation, and Planko, one of his servants and agents, had gone into the basement of the building for the purpose of opening the door leading from the sidewalk to the basement in order to place the coal in the bins and thereby complete his delivery.

The trial of the case resulted in a verdict in favor of the plaintiff, Astrid Pedersen, in the sum of Fifteen Hundred (\$1,500.00) Dollars, and in favor of the plaintiff, Thomas Pederson, in the sum of Five Hundred (\$500.00) Dollars, against the defendant, Charles Polensky, and a verdict of no cause of action against the defendant, Edward Shoe Corporation.

ARGUMENT

Counsel for the defendant-appellant, Charles Polensky, relies upon numbers one and two of his grounds of appeal, all other grounds being abandoned. The arguments advanced by the defendant will be taken up in the order given in his brief.

POINT I.

30 **The Trial Court committed no error in refusing to grant the Defendant-Appellant a non-suit.**

The defendant, Polensky's theory of the case was that Planko, who was one of his employees, had ceased to be such as soon as he entered the store of the defendant, Edward Shoe Corporation, to open the cellar door and that thereafter he became the servant or agent of the Edward Shoe Corporation.

40 Counsel for the defendant, Polensky, in his motion for a non-suit, based his argument on the above stated

theory (State of Case, p. 58, 11, 21-29), although there had not been the slightest bit of evidence in the plaintiffs' case to support his contention. As the testimony will show, the only evidence bearing upon the point was in direct opposition to this theory.

We will now analyze and set forth the testimony of the various witnesses produced on behalf of the plaintiff.

The first witness called was the plaintiff, Astrid Pederson, who testified (State of Case, p. 16):

Q. On the 28th day of May, 1926, were you on Smith Street, Perth Amboy, New Jersey?

A. Yes.

Q. About what time in the afternoon?

A. Three o'clock.

Q. What way were you walking on Smith Street, which direction?

A. Down Smith Street.

Mr. Toolan: May we agree that is easterly?

Mr. Coan: Yes, sir.

Q. And what part of the sidewalk were you walking on, the inside or outside?

A. The inside.

And then (State of Case, p. 17):

Q. What, if anything, happened as you walked along Smith Street in front of the Edward Shoe Company Store?

A. I was stepping my foot on the cellar door, there was some fellow opened up half of the door as I stepped down.

Q. Well, what happened?

A. I faint. I have a broken leg. That is all.

Q. And you say you were on half of the cellar door?

A. Yes.

Q. And then what happened?

A. The other half of the door opens up, I stepped down.

10 The witness then testified that she had received a broken leg and was laid up for nine weeks (State of Case, p. 18):

Q. Well, when you regained, or when you recovered from this fainting spell and got home, what was wrong with you?

A. I have a broken leg.

Q. Which leg?

A. The left.

20 Q. Well, how long were you laid up with that leg?

A. Nine weeks.

Further (State of Case, p. 19):

Q. Well, Now Mrs. Pederson, you had the broken leg, and I didn't, and I want you to tell me your story. When you said nine weeks what did you mean by nine weeks?

A. I was in bed nine weeks.

30 Mrs. Pederson further testified that she still has trouble with her leg (State of Case, pp. 20-21):

Q. You still have trouble?

A. Yes.

Q. And what do you mean when you say you still have trouble?

40 A. I can't step on the leg because it is hurt down in the ankle. I have some water on the ankle, I still have.

The witness then testified that prior to the accident she assisted her husband who was engaged in the automobile washing business (State of Case, p. 22), but is no longer able to do so.

Q. What did you do before this accident, Mrs. Pederson?

A. I come down to help my husband clean all the windows and shine the nickel and finish the car up. Chamois the car and windows and nickel. 10

Q. After the accident or since the accident what have you done?

A. Only take care of the house.

Q. Have you ever helped your husband in his business?

A. Oh, maybe once in a while. Only for hour or two, because I can't stand no more.

Further (State of Case, p. 23): 20

Q. Why can't you stand it?

A. Because the leg hurts so much I can't stand down in the garage more.

As to the position and width of the cellar door the plaintiff testified (State of Case, p. 26):

Q. That cellar door is only about three feet long, isn't it? 30

A. Maybe; I don't know.

Q. Well, now, you know what three feet is, don't you?

A. Yes; I know.

Q. Four feet?

A. Yes.

Q. An ordinary cellar door, wasn't it?

A. Yes; half a door.

Q. Well, there were two doors there, weren't there? 40

- A. Yes. I was standing on the half a door.
 Q. And it laid flush with the sidewalk?
 A. Yes.
 Q. Right in close to the building?
 A. No. I don't think it is close to the building.

The next witness was Dr. Lund who testified that the plaintiff had a fracture of the left leg, and complained of having considerable pain. The Doctor further said that the plaintiff was incapacitated for about eight weeks (State of Case, p. 32).

Albert McDonald, a police officer, was then called and testified as to what he saw as he was coming up Smith Street with a squad of policemen (State of Case, p. 40):

- Q. Mr. McDonald, you are a member of the police department of the City of Perth Amboy?
 A. Yes, sir.
 Q. On the 28th day of May, did you see Mrs. Pederson?
 A. Why, we was coming up the street when she stepped into the cellar door, is the first time I saw her.

The officer testified that he was walking along Smith Street with a squad of policemen in the opposite direction to which Mrs. Pederson was walking and as he was coming along, the door in front of the store of the Edward Shoe Corporation suddenly opened and Mrs. Pederson stepped into the opening and was falling when he caught her (State of Case, p. 41):

- Q. As you came along, officer, will you please tell us, as you approached the Edwards Shoe Company, will you please tell us just exactly what you saw?

- A. Well, the door had suddenly opened and Mrs. Pederson had stepped into this trap door and was falling when I caught her.
 Q. Had any part of it fallen on her?
 A. Yes, sir. The door had been left down and her leg went through that iron door.

The officer then testified as to the character of the door (State of Case, p. 41):

- Q. What character of door is this, officer?
 A. It is a solid iron door.
 Q. Up against the building?
 A. Up against the building.
 Q. Is that door in sections or halves?
 A. It is in half. Two parts of it.
 Q. There is an easterly and westerly section, is there not?
 A. Yes, sir.

The witness testified further that the easterly section was opened and that Mrs. Pederson was standing on the westerly section (State of Case, p. 41):

- Q. Which section of the door was it that had been opened?
 A. Easterly section.
 Q. Where was Mrs. Pederson with reference to the westerly section?
 A. She appeared to me to be standing just about on to it. She was taking another step.

Another witness was the defendant, Charles Polensky, who testified that Frank Planko was in his employ on the day of the accident (State of Case, p. 45).

The next witness was Frank Planko, an employee of the defendant, Polensky, who testified (State of Case, p. 45):

- Q. Mr. Planko, by whom were you employed on May 28, 1926?

A. Charles Polensky of the Raritan Coal and Charcoal Company.

Q. Did you go into the cellar of the property occupied by the Edwards Shoe Company?

A. No, sir. I went in the store first.

Then on cross-examination by counsel for the defendant, Polensky, the witness, his own employee, testified (State of Case, p. 46):

10

Q. And what did you go into the store for?

A. To ask him where the coal go.

And when questioned by the Court (State of Case, p. 47, 11. 38-40; p. 48, 11. 1-4) the witness testified:

Q. When you asked this man who was in the Edwards Store where the coal was to go to, what did he say?

A. He said it goes in the cellar.

20

With the exception of the testimony of Thomas Pederson, the husband of the plaintiff, whose testimony was only concerning expenditures made and damages sustained, and the testimony of Officer Kozusko which was substantially the same as that of Officer McDonald, the plaintiffs called no other witnesses and rested their case.

30

In view of the testimony produced by the plaintiffs it is manifest that the learned trial judge committed no error in denying the motion made for a non-suit. There was not the slightest scintilla of evidence in the plaintiffs' case to show that the servant and agent of the defendant, Polensky, transferred his services to the defendant, Edward Shoe Corporation. A very important part of the testimony was that of the defendant's own employee, Planko, who testified that he went into the store for the purpose of inquiring where the coal was to be delivered, presumably for the purpose of completing his delivery.

40

This was the only testimony in the plaintiffs' case bearing upon the theory advanced by counsel for the defendant, Polensky.

The case of D. L. & W. R. R. Co. vs. Hardy, 57 N. J. L. 505, cited in the appellant's brief, supposedly in support of his contention, was a case in which one Hardy was employed by the Passaic Rolling Mill Company, who had contracted with the defendant, D L. & W. R. R. Company to furnish materials and also skilled workmen to rebuild certain bridges. The workmen were paid by the Rolling Mill Company, but the work was done under the direction of engineers of the railroad company. Hardy, the plaintiff in the case, was a workman furnished under the contract and was injured by a locomotive belonging to the defendant railroad company. The question involved was whether or not Hardy and the engineer who drove the locomotive which injured him were engaged at the time in a common employment and servants of the railroad company, so that the company was not liable for the engineer's negligence. The Court held: "That there was no error, or at least none injurious to the Railroad Company, in submitting to the jury the question whether Hardy at the time of his injury was in its employ."

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It can readily be seen that even though there was an abundance of evidence produced on the question of agency in the above case, the trial court refused to take the case from the jury, which ruling fully substantiates our contention in the case at bar, to wit, that the trial court committed no error in submitting to the jury the question whether the driver of the defendant Polensky's truck was acting as his agent or as the agent of the defendant, Edward Shoe Corporation. In any event it has been repeatedly held by this court that the question of agency is one for the jury.

See Missell vs. Hayes, 86 L. 348.

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Norman vs. Middlesex & Somerset Traction Co., 68 N. J. L. 728.

An interesting and illuminating case upon this question is that of Coutinard vs. Gray Burial and Cremation Co., 98 N. J. L. 493, in which case the defendants, a firm of undertakers, hired an automobile with a driver to go from Plainfield to attend a funeral in Brooklyn. One of the defendants rode on the front seat with the driver, but gave no directions and exercised no control over the machine, excepting to state to the driver their destination. While the automobile was crossing an intersecting street in New York City, it struck and injured the plaintiff. The court held, that as the defendants neither hired, directed or controlled the driver, nor exercised any power, authority or supervision over him, but left to him the exclusive management, direction and control of the vehicle, the relationship of master and servant did not exist, especially in the absence of any testimony to show that the driver consented expressly or impliedly, to the transfer of his services, pro hac vice, to the defendants.

Applying the principle enunciated in the above case, to the one at bar, it is evident from the undisputed facts in the record that the defendant, Edward Shoe Corporation, neither hired, directed nor controlled the driver of Polensky's truck; nor did they exercise any power, authority or supervision over him and to our mind these factors present the substantial inquiries and determinative tests for ascertaining the existence of the legal relationship of master and servant and consequent liability thereunder.

And as the court stated in the Coutinard case, supra, "Nor can the factual and legal status of the driver be ignored in dealing with the liability of the parties; for manifestly as a sentient being capable of choosing his own employment, his services could not be trans-

ferred to another without his consent, expressly or impliedly given; and whether such transfer was, in fact, effectuated would inevitably become a jury question." So in this case the question was one for the jury and the learned trial judge in view of these decisions very properly refused to non-suit the plaintiffs and likewise committed no legal error by refusing so to do.

POINT II.

The Trial Court committed no error in refusing to direct a verdict in favor of the Defendant-Appellant.

Before proceeding with the argument under this point, may we direct the court's attention to the fact that counsel for the defendant-appellant failed to take an exception to the trial court's refusal to direct a verdict and under the decisions of this court this point cannot be considered on appeal. See Byrne vs. Snead Co., 98 N. J. L. 256.

After the motion for a non-suit, the defendant, Polensky, proceeded to put in his defense. Now let us take the testimony produced by the defendant, Charles Polensky, who was the first witness called and who testified as follows (State of Case, p. 59, 11. 13-30):

Q. Mr. Polensky, you are the same Charles Polensky who is the defendant in this case?

A. Yes, sir.

Q. The witness Planko who was here on the stand this morning was employed by you?

A. Yes, sir.

Q. In what capacity was he employed?

A. As a driver.

Q. Were there any general rules that you had made known to your drivers respecting the delivery of coal?

A. Yes, sir.

Q. What were they?

A. They are not to open any cellar doors, any manholes, and any of the places where the coal is to be delivered. They are personally responsible for it.

Q. Mr. Polensky, those instructions that you had for your drivers were never printed, were they?

A. Yes; we had a form in the office.

Q. You haven't any copy of it here, have you?

10 A. Well, we don't carry them around in our pockets. It is our rules. We have various rules.

The witness then testified that the rules were to deliver the coal to the people (State of Case, p. 60, 1. 20):

Q. Never mind generally. I want to know what the rule is that you have for your drivers.

20 A. Well, the rules is to deliver the coal to the people.

And then (p. 62, 1. 12.) Polensky stated that it was the rules of his concern to make the lady of the house open all doors and windows.

Q. Does your rule require that the lady of the house, if she happens to be there, open up the window for them too?

30 A. Yes, sir. They have strict instructions not to open any doors or any windows.

Notwithstanding the fact that he testified to all the alleged rules and regulations which were in force, the defendant, Polensky, stated that he had never followed the drivers to see that the alleged rules were enforced (State of Case, p. 64, 1. 18-1. 27):

Q. Did you ever follow your drivers around to make sure they were carrying out your rules?

40 A. Well, I do occasionally follow them around

for other purposes.

Q. I mean to see that this rule was enforced?

A. No. I have followed them around for various purposes.

The defendant, Polensky, was then questioned by the court as to the alleged rules and regulations which he claimed to be in force (State of Case, p. 65, 11. 20-40):

Q. About these rules that you say you have printed? 10

A. We have printed, yes.

Q. You said something that you didn't carry them around in your pocket?

A. No.

Q. You knew this case was coming on today, didn't you?

A. That this case was coming on?

Q. Yes, you knew this case, and that you are a defendant? 20

A. I knew this case was coming on, it was supposed to come up last week, Judge.

Q. You knew it was coming today. You say you have these printed rules. Why didn't you bring them up here?

A. I didn't think it was necessary.

Q. Where are they?

A. We have got them.

Q. Where? 30

A. In the office.

Q. Hanging up?

A. Well, we got them around in card form.

Q. Tacked up on the wall?

A. In card form.

Q. How many?

A. One.

Q. How big is the card?

A. Just a small one, about that big (indicating). 40

And then (State of Case, p. 66):

Q. About a foot and a half?

A. Well, I presume about that big.

Q. Square? What does it say on it as near as you can remember the language?

A. All coal that is being delivered are to be delivered to the people's houses—I just can't recall.

10 Q. I know, but this is very, very important. Don't you remember the language of that rule?

A. No doors or no cellar doors or manholes are to be opened by our drivers.

The witness was then asked if Planko, the driver of the truck, had ever been shown the card and the witness said no (State of Case, p. 67, 11. 3-5):

20 Q. Did you ever call Planko's attention to that printed card?

A. No. But he has been told.

The next witness called was the driver of the defendant Polensky's truck, one Frank Planko, who testified that he didn't open any windows, manholes, etc., unless he was told to do it (State of Case, p. 67, 11. 20-25):

30 Q. What were your instructions generally as to the delivery of coal?

A. When I was hired he called out in the yard, the day I was hired, in the afternoon, he says, don't open any windows, don't drive over lawns, or open manholes or anything like that unless you are told to do it.

40 The witness then testified that he was told to open this particular cellar door by a man standing in front of the store. Asked if he could recognize anybody in

court that looked like the man, he testified (State of Case, p. 68, 11. 1-10):

Q. See if you recognize anybody in court that looks like that man.

Mr. Coan: Mr. Schwed, stand up, please.

A. I don't know if it was him. It was a man in a gray suit. He had gray clothes.

Q. Is this the man, do you know?

A. I don't know. I can't recognize him. 10

The witness was then asked to state just what he did when he delivered coal and he testified (State of Case, p. 69, 11. 10-20):

Q. In other words, your instructions were never to go break in anybody's place until you first asked permission to put the coal in, is that right?

A. Yes, sir. 20

Q. On this day with the Edwards Shoe Company, as I understand it, you went there and said, Raritan Coal Company.

A. Yes, sir.

Q. Where does the coal go, is that right?

A. Yes, sir.

Q. And the man said down cellar?

A. Yes, sir.

And further (State of Case, p. 70, 11. 12-25) the witness stated that his foreman did not arrive until fifteen or twenty minutes after the accident happened. 30

The last witness called was Joseph Prantle, a foreman, for the defendant Polensky, who testified that he was in the cellar of the building with Planko, the driver of the Polensky coal wagon at the time the plaintiff was injured (State of Case, p. 79, 11. 5-9):

Q. When you got there where was Planko?

A. Down in the cellar. 40

Q. Was that before Mrs. Pederson had been injured that you got there?

A. Yes, sir.

And then (p. 79, 11. 35-40):

Q. You are a foreman for Polensky, as I understand?

10 A. Yes, sir.

Q. Did you see Planko in the cellar?

A. Yes, I saw him just at the time as he was raising the doors.

20 This testimony was produced notwithstanding the fact that Polensky's driver, their own witness, had only a few moments before stated that this witness, Prantle, was not at the store until fifteen or twenty minutes after the accident had happened.

In view of the absurd and (to put it mildly) conflicting testimony of the defendant, Polensky, and his own witnesses, is it any wonder that the learned trial judge refused to take the case from the jury?

30 Counsel for the defendant in his brief makes the bald statement that the testimony given on behalf of the plaintiff established that the agent and servant of Polensky expressly assented to a transfer of his services from Polensky to the Edward Shoe Corporation without supporting his statement by any testimony. It is fair to presume that there is no evidence in the case indicating that the servant or agent of Polensky expressly assented to a transfer of his services; otherwise counsel would have been able to point it out to the court in his argument.

40 In light of all the testimony in the case, the court could certainly not direct a verdict in favor of the de-

endant and very properly submitted the case to the jury.

It is respectfully submitted that the verdict appealed from should be affirmed.

JOHN E. TOOLAN,
Solicitor for and of Counsel
with the Plaintiffs-Appellees.

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