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WITNESS FOR PLAINTIFF.

Elsa R. Wolf,

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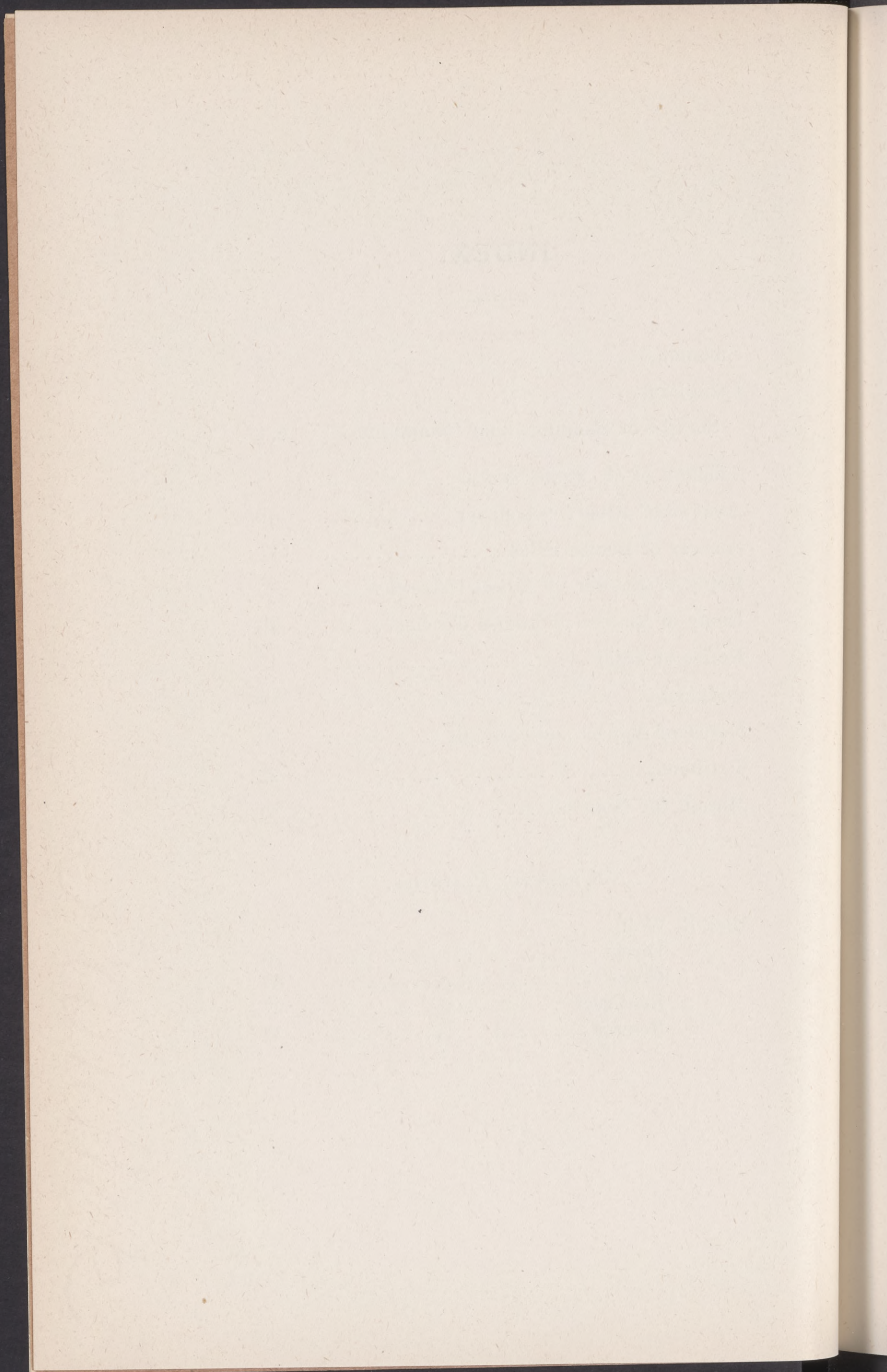

Summons.

State of New Jersey to Albert Oestreicher and Louise Fischer:

(Seal)

You are summoned to answer the annexed complaint of Elsa R. Wolf, in an Action at Law in the Supreme Court, and take notice, that unless you file your Answer to said Complaint with the Clerk of the Supreme Court, at Trenton within twenty days after service upon you of this Writ and the annexed Complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, Thomas J. Brogan, Chief Justice of the Supreme Court, at Trenton, this 24th day of August, Nineteen Hundred and Forty-three.

James J. Gavin,
Clerk.

Fred. W. De Voe,
Attorney.

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Complaint.

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY.

ELSA R. WOLF, Plaintiff, *vs.* ALBERT OSTREICHER and LOUISE FISCHER, Defendants.	Action at Law. Complaint.

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Plaintiff, Elsa R. Wolf of the Township of Piscataway, County of Middlesex and State of New Jersey, says that:

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FIRST COUNT.

1. On or about November 30, 1942, plaintiff Elsa R. Wolf, was lawfully riding as a passenger in a motor vehicle owned and operated by the defendant Albert Oestreicher at the invitation of said Albert Oestreicher, proceeding in a general westerly direction on the New Jersey State Highway, Route No. 29, near Somerville, N. J.

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2. At the time and place aforesaid, a motor vehicle owned and operated by the defendant Louise Fischer, was proceeding in a general easterly direction approaching the motor vehicle operated by the defendant Albert Oestreicher.

3. At the time and place aforesaid, the defendant Albert Oestreicher negligently and carelessly caused his motor vehicle to strike and crash head on with great force and violence into the motor vehicle operated by the said Louise Fischer.

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4. The defendant Albert Oestreicher was negligent in that he caused his motor vehicle to be driven at an excessive rate of speed without regard for the rights of others; that he proceeded without proper control of his motor vehicle; that he was operating his motor vehicle on the wrong side of the road and that he did not give adequate warning of his approach. 10

5. As a result of the aforementioned negligence of the defendant Albert Oestreicher, plaintiff Elsa R. Wolf was violently thrown from the motor vehicle of defendant Albert Oestreicher and sustained divers, painful and permanent, external and internal injuries, and her nervous system was greatly shocked and shattered, and she became and was sick, sore, maimed, lame and disabled, and so remained and continued from thence 20 hitherto, and will in the future so remain and continue, and during all that time suffered and underwent and will in the future suffer and undergo great physical pain and torment.

6. By reason of said injuries, plaintiff Elsa R. Wolf, was unable to perform her usual work and suffered loss of wages and has been obliged to spend large and divers sums of money for medicine and medical attention. 30

Second Count.

1. Plaintiff repeats paragraphs 1 and 2 of the First Count.

2. At the time and place aforesaid, the defendant Louise Fischer negligently and carelessly caused her motor vehicle to strike and crash head on with great force and violence into the motor vehicle operated by defendant Albert Oestreicher, 40

and in which plaintiff Elsa R. Wolf was a passenger.

3. The defendant Louise Fischer was negligent in that she caused her motor vehicle to be driven at an excessive rate of speed without regard for the rights of others; that she proceeded without proper control of her motor vehicle; that she was operating her motor vehicle on the wrong side of the road, and that she did not give adequate warning of her approach.

4. As a result of the aforementioned negligence of the defendant Louise Fischer, plaintiff Elsa R. Wolf was violently thrown from the motor vehicle of defendant Albert Oestreicher and sustained divers, painful and permanent, external and internal injuries, and her nervous system was greatly shocked and shattered, and she became and was sick, sore, maimed, lame and disabled, and so remained and continued from thence hitherto, and will in the future so remain and continue, and during all that time suffered and underwent and will in the future suffer and undergo great physical pain and torment.

5. Plaintiff repeats paragraph 6 of the First Count.

Plaintiff, Elsa R. Wolf, demands as damages, on either the First or Second Counts, or both counts, the sum of Twenty-five Thousand Dollars ($25,000.00) together with costs of this suit to be taxed.

Fred. W. DeVoe,
Attorney of Plaintiff.

Service of Summons and Complaint.

Sept. 8, 1943. Served the within summons and complaint upon Louise Fischer by leaving copies thereof at her usual place of abode in Bedminister Township, N. J., with her mother, a member of her family above the age of 14 years.

10

JOHN H. VEGHTE,
Sheriff of Somerset County.

By EDWARD J. O'CONNOR,
Under Sheriff.

Fees $4.40.

Service of the within Summons and Complaint is hereby acknowledged this 26th day of August, 1943.

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A. W. MAGEE,
Commissioner of Motor Vehicles.

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Service of Summons and Complaint.

STATE OF NEW JERSEY.

THE COMMISSIONER OF MOTOR VEHICLES.

Trenton, N. J.
August 31, 1943.

10 Clerk,
Supreme Court,
Trenton, N. J.

Elsa R. Wolf, Plaintiff,

vs.

Albert Ostreicher and Louise Fischer,
Defendants

20 Dear Sir:

Enclosed, herewith, I hand you the original Summons and Complaint, in the above matter, together with return registry receipt card, and our affidavit of Service, as required by the provisions of Chapter 7-3 of Title 39 of the Revised Statutes.

Very truly yours,

A. W. MAGEE,
Commissioner.

30 AWM.SP

40

Service of Summons and Complaint.

Return receipt, No. 29-184, hereto attached, was received by the Department today and is signed: Albert Oestreicher.

The date of delivery noted thereon is 8/30/43.

The postmark also indicates the following: Wilkes-Barre Aug 30 1 30 PM 1943 Pa. 10

P. S. Return of the original papers with proof of service is being made to the attorney for the plaintiff, Fred W. DeVoe, New Brunswick, N. J., in accordance with his letter of August 24, 1943.
AWM.
Encls.

Return Receipt.

August 31, 1943 20

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1. Albert Oestreicher

(signature of addressee)

2. Deliver to Addressee Only

Date of delivery 8/30/43

30

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Affidavit of M. Agnes Smith.

STATE OF NEW JERSEY.

THE COMMISSIONER OF MOTOR VEHICLES.

Trenton, N. J.

10 Elsa R. Wolf, Plaintiff,

vs.

Albert Ostreicher and Louise Fischer, Defendants

STATE OF NEW JERSEY, }
COUNTY OF MERCER. } ss.:

M. AGNES SMITH, of full age, being duly sworn
20 on her oath deposes and says that she is Administrative Clerk in the Office of the Commissioner of Motor Vehicles of the State of New Jersey and the person designated by the Commissioner of Motor Vehicles to acknowledge service of process under the provisions of Chapter 7 of Title 39 of the Revised Statutes, and is likewise the person designated by the Commissioner of Motor Vehicles to mail notice of service of copy of Summons and Complaint in proceedings under said statute.
30 Deponent further says that the original and a copy of the Summons and Complaint in the above-entitled case was served upon her the twenty-sixth day of August, One Thousand Nine Hundred and Forty-three, in accordance with the above-mentioned statutes, and that a notice of such service and a copy of Summons and Complaint was forthwith sent by registered mail to the defendant named therein and that the defendant's return receipt signed "Albert Oestreicher" hereto an-
40 nexed, for the registered letter, containing such

notice and copy of Summons and Complaint, was received by the deponent on the thirty-first day of August, One Thousand Nine Hundred and Forty-three.

Deponent further says that attached to this affidavit is the original return receipt above referred to, together with the original Summons and Complaint, served on deponent on the twenty-sixth day of August One Thousand Nine Hundred and Forty-three.

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M. Agnes Smith,
Acting for the Commissioner of Motor Vehicles.

Sworn and Subscribed to before me this thirty-first day of August, 1943.

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Anne L. Brettel,
Notary Public.

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Answer of Albert Ostreicher.

NEW JERSEY SUPREME COURT,
MIDDLESEX COUNTY.

ELSA R. WOLF, Plaintiff, *vs.* ALBERT OSTREICHER and LOUISE FISCHER, Defendants.	Action at Law. Answer.

10

The defendant, ALBERT OSTREICHER, answering the plaintiffs Complaint, says that:

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FIRST COUNT

1. He denies the allegations contained in Paragraph 1.

2. He admits the allegations contained in Paragraph 2.

3. He denies the allegations contained in Paragraphs 3, 4, 5, and 6.

30

SECOND COUNT

This defendant is advised that this Count is not directed to him, and he makes no answer thereto.

FIRST SEPARATE AND DISTINCT DEFENSE

1. The plaintiff, ELSA R. WOLF, is and was on November 30, 1942, an employee of the defendant, ALBERT OSTREICHER.

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Answer of Albert Ostreicher.

2. At the time of the alleged accident on November 30, 1942, the plaintiff, Elsa R. Wolf, was engaged in her employment by the defendant, Albert Ostreicher, and the alleged accident was one arising out of and in the course of her employment by the defendant, Albert Ostreicher.

10

3. The sole remedy of the plaintiff, Elsa R. Wolf, against the defendant, Albert Ostreicher, is provided by R. S. 34:15-1-102, and this Court is without jurisdiction to hear the matters set forth in the plaintiff's complaint against the defendant, Albert Ostreicher.

Cox & Walburg,
Cox & Walburg,
Attorneys for Defendant,
Albert Ostreicher.

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Answer of Louise Fischer.

NEW JERSEY SUPREME COURT,

Middlesex County.

Elsa R. Wolf, Plaintiff, *vs.* Albert Ostreicher and Louise Fischer, Defendants.	Action at Law. Answer.

10

Defendant, Louise Fischer, residing in Pluckemin, Somerset County, answering the complaint of the plaintiff, says that:

20

First Count

The allegations contained in the First Count do not apply to this defendant, and she is accordingly not obliged to make answer to the same.

Second Count

Paragraphs 1, 2, 3, 4 and 5 denied.

30

First Separate Defense

The accident set forth in the Complaint was not caused by an negligence whatsoever on the part of this defendant, Louise Fischer.

Second Separate Defense

Defendant, Louise Fischer, was not quilty of any negligence, carelessness or recklessness which was the proximate cause of the accident, injuries and damages complained of.

40

Third Separate Defense

Defendant, Louise Fischer, violated no duty owing by her to plaintiff.

Fourth Separate Defense

The accident, injuries and damages complained of were caused by the sole negligence of the defendant, Albert Oestreicher, in whose automobile plaintiff was then riding, in that he operated his automobile on the left hand side of the highway in the direction in which he was going; failed to exercise due care under the existing conditions and circumstances; assumed the risk of the happenings set forth in the complaint; operated his automobile at a fast and excessive rate of speed; operated said automobile on the highway aforesaid at such a speed as to endanger the life and limb of plaintiff as well as of other persons lawfully on said highway; operated said automobile without that degree of reasonable care which a person of reasonable prudence would and should have used under similar conditions and circumstances; operated said automobile at such a rapid speed as to lose control of it; failed to operate said automobile at a careful and prudent speed commensurate with the traffic and conditions of said highway; failed to make proper observation of the automobile of the defendant, Louise Fischer, which was then and there being lawfully and carefully operated; failed to have brakes adequate to control the movement and stop his said automobile; failed to give warning of the approach of said automobile by blowing his horn or otherwise; and otherwise negligently and carelessly operated his said automobile contrary to the laws of this State.

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FIFTH SEPARATE DEFENSE

Plaintiff was guilty of contributory negligence at the time and place of said accident in that:

1. The Fourth Separate Defense is repeated and made a part of this defense.

10 2. Plaintiff and defendant, Albert Oestreicher, were engaged in a joint enterprise for their mutual profit and advantage, and any negligence on the part of the said Albert Oestreicher is therefore imputable to plaintiff as a complete bar to her cause of action.

3. Plaintiff failed to use due care for her own safety, and assumed the risk of the accident set forth in the complaint.

4. By her own negligent acts, plaintiff caused
20 said accident and happenings.

SIXTH SEPARATE DEFENSE

Plaintiff and defendant, Albert Oestreicher, were engaged in a joint enterprise for their mutual profit and advantage, and any negligence on the part of the said Albert Oestreicher is therefore imputable to plaintiff as a complete bar to her cause of action. By her own negligent acts, she caused said accident and happenings.
30

SEVENTH SEPARATE DEFENSE

The accident set forth in the complaint was unavoidable insofar as this defendant, Louise Fischer, was concerned, and under the circumstances, there was nothing which this defendant could have done to avoid the same.

PHILIP M. BRENNER,
Philip M. Brenner,
40 Attorney for defendant,
Louise Fischer.

Reply to Answer of Albert Ostreicher.

NEW JERSEY SUPREME COURT,
MIDDLESEX COUNTY.

ELSA R. WOLF, Plaintiff, *vs.* ALBERT OSTREICHER and LOUISE FISCHER, Defendants.	Action at Law. Reply.

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Plaintiff, Elsa R. Wolf, replying to the Answer of the defendant Albert Oestreicher, says that:

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1. She joins issue with the defendant on the Answer to the First Count of the Complaint.

2. She denies the allegations of the First Separate and Distinct Defense to the First Count of the Complaint.

FRED W. DEVOE,
Fred W. DeVoe,
Attorney for Plaintiff.

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Reply to Answer of Louise Fischer.

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY.

ELSA R. WOLF, Plaintiff, *vs.* ALBERT OSTREICHER and LOUISE FISCHER, Defendants.	Action at Law. Reply.

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Plaintiff, Elsa R. Wolf, replying to the Answer of the defendant Louise Fischer, says that:

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1. She joins issue with the defendant on the Answer to the Second Count of the Complaint.

2. She denies the new matters raised in the First, Second, Third, Fourth, Fifth, Sixth and Seventh Separate Defenses to the Second Count of the Complaint and joins issue upon the same.

FRED W. DEVOE,
Fred W. DeVoe,
Attorney for Plaintiff.

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Notice of Trial.

NEW JERSEY SUPREME COURT,

Middlesex County.

Elsa R. Wolf, Plaintiff, *vs.* Albert Ostreicher and Louise Fischer, Defendants.	Action at Law. Notice of Trial.

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Sir:—Please to take notice, that the trial of the issue joined in this cause will be moved before said Court, in the presence of such Judge or Justice thereof, as shall then be holding said Court, on the Third Tuesday of January, A. D. 1944, at the Court House, in New Brunswick, in and for the County of Middlesex at ten o'clock in the forenoon, or as soon thereafter as the said Court can attend to the same.

20

Dated October 19th, A. D. 1943.

Your obedient servant,
Fred W. DeVoe,
Attorney of Plaintiff.

30

To Cox and Walburg, Esqs.,
Attorneys of Defendant, Albert Oestreicher.

To Philip M. Brenner, Esq.,
Attorney of Defendant, Louise Fischer.

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Notice of Trial.

Service of the within Notice of Trial is hereby acknowledged this 20th day of October, A. D. 1943.

Cox and Walburg,
Attorneys for Defendant,
Albert Oestreicher.

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Service of the within Notice of Trial is hereby acknowledged this 28th day of October, 1943.

Philip M. Brenner,
Attorney for Defendant,
Louise Fischer.

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Judgment.

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY.

ELSA R. WOLF, Plaintiff, *vs.* ALBERT OSTREICHER (or Oestreicher), Defendant.	Judgment.

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The above entitled cause was tried before the Honorable A. Dayton Oliphant, Judge of the Circuit Court to whom the same had been duly referred for trial, and a jury, at the Middlesex County Circuit Court, on the 24th day of April, 1944. 20

At the opening of the plaintiff's case, counsel for the plaintiff entered a voluntary non-suit as to the defendant, Louise Fischer.

At the close of the plaintiff's case, on motion of counsel for the defendant, Albert Ostreicher, the Court entered a non-suit in favor of the defendant, Albert Ostreicher, and against the plaintiff, Elsa R. Wolf, and dismissed the plaintiff's complaint. 30

Whereupon it is adjudged that the complaint of the plaintiff be dismissed, and that the defendant, Albert Ostreicher (or Oestreicher), do recover of the said plaintiff, Elsa R. Wolf, his costs, which have been taxed at the sum of fifty-one dollars and fifty cents.

Costs $51.50.

Judgment entered and signed April 29, 1944.

THOMAS J. BROGAN, 40
Chief Justice.

Notice of Appeal and Grounds.

(Filed September 19, 1944.)

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY.

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ELSA R. WOLF, Plaintiff, *vs.* ALBERT OSTREICHER and LOUISE FISCHER, Defendants.	Action at Law. Notice of Appeal and Grounds.

To Cox and Walburg, Attorneys of Defendant
20 *Albert Oestreicher, or to whom it may concern:*

Gentlemen:

PLEASE TAKE NOTICE that the plaintiff in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following ground, to wit:

30 Because the trial Judge, upon the trial of said cause, directed a judgment of non-suit against the plaintiff in favor of the defendant over the objection of said plaintiff, whereas said trial Judge

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should have submitted the case to the Jury for its verdict.

Respectfully yours,

Fred W. DeVoe,
Fred W. DeVoe,
Attorney of Plaintiff-Appellant. 10

Dated: August 7, 1944.

Service of the within Notice and Grounds of Appeal is hereby acknowledged this 9th day of August, 1944.

Cox and Walburg,
Attorneys for Defendant. 20

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NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY.

APRIL TERM, 1944.

10

ELSA R. WOLF, Plaintiff, *vs.* ALBERT OESTREICHER and LOUISE FISCHER, Defendants.	Testimony.

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Transcript of stenographer's notes of evidence in the above-entitled cause, taken before HON. A. DAYTON OLIPHANT, Circuit Court Judge, and a Jury, at the Middlesex County Court House, New Brunswick, N. J., on April 24, 1944.

Appearances:

FRED W. DEVOE, Esq.,
ISHMAEL SKLAREW, Esq., (Present),
Counsel for the plaintiff.

30

COX & WALBURG,
HARRY WALBURG, Esq., (Present),
Counsel for the defendant Albert Oestreicher.

PHILIP M. BRENNER, Esq.,
Counsel for the defendant Louise Fischer.

(A jury was duly impanelled and sworn.)

Mr. Sklarew: May it please the Court, at this

40

time the plaintiff Elsa Wolf wishes to take a

voluntary non-suit as to the defendant Miss Louise Fischer.

The Court: Very good.

(Mr. Sklarew made an opening statement to the jury on behalf of the plaintiff.)

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Mr. Walburg: If your Honor please, at this time I move for a non-suit on the plaintiff's opening on the pleadings, because as I understand his opening she conceives that she was being transported to Wilkes-Barre, and had been over a period of time, to a place where she was employed by the defendant. He makes a point this first stop was going to be made at the plaintiff's apartment, and it doesn't make any difference. If the transportation was made incidental to the employment it creates the relationship of master and servant, and the Workmen's Compensation Bureau of this state has sole jurisdiction in any action brought in this state.

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The Court: I will hear the evidence. I will deny your motion.

Mr. Walburg: I pray an exception.

(Mr. Walburg made an opening statement to the jury on behalf of the defendant.)

30

Elsa R. Wolf, the plaintiff, being duly sworn according to law, on her oath, saith:

Direct examination by Mr. Sklarew:

Q. Mrs. Wolf, you are the plaintiff in this case, is that right? A. That is right.

40

Q. Now, under what circumstances were you in Mr. Oestreicher's car?

Mr. Walburg: I object to that. That calls for a conclusion.

The Court: Yes. Objection sustained.

10 Q. You were riding in Mr. Oestreicher's car the morning of the accident? A. That is correct.

Q. And you were employed by Mr. Oestreicher? A. Yes.

Q. And you are still employed by him. A. That is correct.

Q. Where were you employed at the time of the accident? A. I was employed in Wilkes-Barre, Pennsylvania.

20 Q. And at the time of the accident where did you live, Mrs. Wolf? A. I lived during the week in Wilkes-Barre and over the week-end in Piscataway Township.

Q. You and your husband have a farm in Piscataway Township? A. That is correct.

Q. Now, did you have any arrangement or have any contract of employment with Mr. Oestreicher whereby he was to furnish you transportation to Wilkes-Barre?

30 Mr. Walburg: I object.

The Court: Yes. It calls for a conclusion.

Q. How would you get from Piscataway Township to Wilkes-Barre? A. Either train or bus.

Q. Or sometimes how else? A. Or in Mr. Oestreicher's car sometimes. We often used our own car.

Q. Your own car? A. That is correct.

40 Q. Mr. Wolf's car? A. That is right.

Q. And you said you went by train and bus. Now, when you went by train and bus who would pay for your fare? A. I paid for it.

Q. You paid your own fare? A. That is right.

Q. And when would you go by Mr. Oestreicher's car, on what occasions? A. Well, sometimes he intended to go in to New York, and he invited me to accompany him. He didn't care to drive in to New York, and he generally left the car at the farm.

10

Q. Did you charge him anything for leaving the car at the farm? A. Of course not, no.

Q. You worked for Mr. Oestreicher how many years, Mrs. Wolf? A. Since 1936.

Q. And then you would take the car to the farm, you say, and how would Mr. Oestreicher get to New York? A. He would take the train from New Brunswick.

20

Q. Was this one of those occasions, the morning of this accident, that you happened to be in his car? A. Yes, that is right.

Q. And where did you meet Mr. Oestreicher that morning? A. At New Brunswick station. I took his car in.

Q. And, incidentally, you met him at the station, and where were you going? A. We were going to Wilkes-Barre, to my apartment.

30

Q. Were you going to work? A. I was going to my apartment to have lunch, and after that I went to work.

Q. Was that what you usually did every time you went by car? A. Yes, we did.

Q. Did you ever at any time go directly from New Brunswick to the place of business? A. No, we never did.

Q. Now, had it been raining the night before, Mrs. Wolf? A. Yes.

40

Q. And this was the morning of November 30, 1942. A. Yes.

Q. And you proceeded toward Wilkes-Barre on Route 29. A. Yes.

Q. And went up to this Somerville highway and then started toward Wilkes-Barre, is that right?
10 A. That is right.

Q. What was the condition of the road as you were traveling along? A. Icy in spots.

Q. And did you have a conversation with Mr. Oestreicher immediately prior to the happening of this accident as to the condition of this road? A. Well, I would occasionally ask him to drive carefully.

Q. Did you on this morning ask him to drive carefully? A. Yes, I did.

20 Q. And how soon was that before the accident happened? A. Well, we were only for a short while on the road when the accident occurred.

Q. Where did you turn into the road, from where? A. I really don't know the road.

Q. I mean, it wasn't in North Plainfield, was it? A. No.

Q. You didn't turn into the road from where Trooper Lauterwald turned in. He turned in, he said, at Somerset Street, North Plainfield. A.
30 I think it is River Road. We generally drove all the way over and then took in Route 29.

Q. That is about eight miles east of where Trooper Lauterwald started from, is that right? A. Yes, I believe so.

Mr. Walburg: I object to that.
Mr. Sklarew: Eight miles west.
Mr. Walburg: That is different.

Q. What were you doing immediately prior to
40 the happening of the accident in the car? A. I was knitting.

Q. Were you conversing? A. Well, yes, we were speaking at the same time I was knitting.

Q. What were you talking about, just generally? A. Generally about business and different things.

Q. And do you remember anything that happened? A. No, I don't remember about any of the accident. As far as the accident is concerned, the only thing that I remember at the time is that I saw myself sitting on the ground with the wool all around me, and it appeared as though I was away from it, and all at once I felt someone feeling me, and I thought that if they would only leave me alone, I liked it, it seemed I was pleased right there; and he kept on feeling, someone feeling, and it seemed I slightly came to, and I asked, "What is this? What has happened?" And Mr. Oestreicher said, "Why, we were in an accident." And then he tried to get me up, and he says, "Try to get up." And I says, "I can't, I just can't get up." And then before I knew it I was in the car. I don't recall whether I walked or whether he carried me, or just what happened, but I know I was in the car, in the back of the car. Someone placed me there. And I was just chattering, my teeth were chattering. And all at once I heard someone say, "Put an extra coat over her. She is cold." I don't know who it was even to this day. And then after awhile the ambulance came and took me to the hospital. And all the way over my teeth were just chattering.

Q. How long did you stay in the hospital? A. Only one day and one night.

Q. Then where did you go? A. My husband called for me and I went to the farm.

Q. You went home? A. Went home to the farm.

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Q. And who took care of you at home? A. Mr. Wolf did.

Q. He nursed you? A. That is right, day and night.

Q. Until you were able to go back to work? A. That is right.

10 Q. And you were treated in this case by physicians, were you not, Mrs. Wolf? A. Yes.

Q. And who were these doctors? A. Dr. Koelsch.

Q. Who took the X-rays? A. Dr. Klein.

Q. Now, what injuries did you sustain, Mrs. Wolf? A. Well, I had——

Mr. Walburg: I object unless it was apparent to her.

Mr. Sklarew: If she knows.

20

Q. Do you know what injuries you had, Mrs. Wolf? A. Yes, I believe so.

Q. All right. Tell the jury.

Mr. Walburg: What I mean, regardless of X-ray findings.

Mr. Sklarew: I am not going into that. I will have Dr. Klein here to tell the Court and jury about the X-ray.

30

A. I had a bump on my head here. It seemed slightly cut. And I had a fracture in the skull.

Mr. Walburg: I object to that and ask it be stricken out.

The Court: Yes, strike it out.

Mr. Sklarew: We will connect it up.

Q. What else, Mrs. Wolf? A. I had the fractured skull.

40 Q. Don't say that.

The Court: Strike it out.

A. I had a pain in the eye, and there was a cut there which was stitched up at the hospital, at Somerset Hospital. My cheeks were swollen. My teeth were loose. Part of my mouth just felt as if someone just—like when you have teeth pulled you get cocaine injection. It all seemed dead like. And my neck hurt very much. In fact, if I tried to get up I would have to put my hand in back to lift my head in order to hold it up. And of course I had this broken wrist which was X-rayed at the hospital, and I had it in a cast, which naturally hurt.

10

Q. How about your ankle? A. And I had the right ankle, and the left ankle, at the knee it was bruised and cuts.

20

Q. Now, Mrs. Wolf, were you able to eat solids? A. No, not in the beginning. Later on even as I would try to bite into anything, I couldn't open my mouth very wide, and if I tried to bit into anything it would hurt so up in here, and it seemed to be terrible pain. I couldn't bite down.

Q. Now, your neck, how long after the accident did your neck trouble you? A. Why, it is still bothering me.

Q. How does it bother you, Mrs. Wolf? A. Well, if I lean over any length of time it just seems as though something is pulling. It hurts. And if I make a very fast turn it appears to hurt here. Of course, it is not like it was in the beginning. In the beginning it was pretty bad. Just the least bit like that would hurt.

30

Q. Is there anything else that hurts you today? A. Well, if I lift anything heavy. I can't lift anything very heavy. I don't seem to have the right strength in my left arm.

40

Q. Now, you have looked at your right and left forearms on occasions before this accident? A. Yes.

Q. Were they approximately the same size, Mrs. Wolf? A. Yes, I believe they were.

Q. And is there a difference in the size now?
10 A. I think so, yes.

Q. Now, that spot under your eye, is that of the same intensity that it was right after the accident? A. Yes, it always was black, right after.

Q. It hasn't gotten larger or smaller? A. I don't think so, no.

Q. Now, when did you go back to work? A. The first week in January.

Q. The first week in January? A. Yes.

20 Q. So that you were out from December or rather November 30, 1942, to the first week in January, 1943. A. That is correct.

Q. Are you presently under treatment for any of these things? A. No.

Mr. Sklarew: Cross examine.

Cross examination by Mr. Walburg:

Q. Now, Mrs. Wolf, as I understand it, this ac-
30 cident happened on November 30, 1942? A. Yes.

Q. What time of day? A. It was early in the morning.

Q. Well, approximately. A. Approximately around eight or eight-thirty.

Q. Somewhere between eight and eight-thirty in the morning? A. That is right.

Q. Now, you first started to work for Mr. Oestreicher in 1936, did you not? A. That is correct.

Q. And you worked in his New York office, I be-
40 lieve. A. That is right.

Q. At that time Mr. Oestreicher didn't have any factory where he manufactured goods, did he? A. No, he didn't. He had in the Phillipines.

Q. By the way, what kind of articles does he manufacture? A. Infants wear.

Q. And he used to import infants wear from the Phillipine Islands? A. That is correct. 10

Q. And after the Japanese invasion of course his supply was cut off? A. Yes, sir.

Q. And then he established a factory in Wilkes-Barre, Pennsylvania, didn't he? A. That is right.

Q. And you were working for him at the time he did that. A. Yes.

Q. And as I understand it, that factory was opened by him in January of 1942, the latter part of January. A. Yes, I believe it was that.

Q. And you agreed with Mr. Oestreicher that you would work at his factory in Wilkes-Barre as general manager, did you not? A. Yes. 20

Q. And designer also? A. That is correct.

Q. And you were paid by salary for your services. A. Well, I am on a percentage basis, drawing percentage.

Q. And at that time when that arrangement was made in January, 1942, you and your husband lived on your farm in Piscataway Township? A. Yes. 30

Q. Which is about five miles out, would you say, from New Brunswick? A. That is right.

Q. So that it was impossible for you to commute each day from your home in Piscataway Township to Wilkes-Barre and back each night, wasn't it? A. Yes.

Q. So you made an arrangement whereby you would live in Wilkes-Barre while you worked for Mr. Oestreicher from Monday until Friday, did you not? A. There was no arrangement made. I 40

had my mother come up and take care of my apartment.

Q. You took an apartment? A. That is right.

Q. And Mr. Oestreicher paid you for the cost of maintaining that apartment, didn't he? A. He didn't pay me, no. I paid my own expenses.

10 Q. Didn't he pay you some of your expenses for that? A. No, he did not.

Q. Well, in any event, whenever he had his automobile in Wilkes-Barre you would ride back with him and he would leave it in New Brunswick, isn't that so? A. That is right.

Q. And he would continue on to Brooklyn by train from New Brunswick? A. That is correct.

Q. And then, as I understand it, you would
20 drive Mr. Oestreicher's car to your farm and leave it there over the week-end? A. Yes.

Q. Monday morning you would drive the car back to meet Mr. Oestreicher at the Pennsylvania Station? A. That is right.

Q. At what time would you get there as a rule? A. Well, around 7:30, 7:40, something like that.

Q. And then when Mr. Oestreicher got off the train he would drive the car with you in it to Wilkes-Barre, is that right? A. Yes.

30 Q. And the day of this accident, November 30, 1942, that was a Monday morning, was it not? A. Yes.

Q. Now, on the Saturday or Friday night preceding the accident you had come down from Wilkes-Barre in Mr. Oestreicher's car? A. Yes, he invited me to come down.

Q. Then you had taken the car from New Brunswick to your farm and kept it there over the week-end and then you met him at the Pennsylvania
40 railroad station in New Brunswick sometime

around 7:30 Monday morning, November 30, 1942? A. That is right.

Q. And then he started to drive back to Wilkes-Barre with you? A. Yes.

Q. You were on your way to Wilkes-Barre when this accident happened. A. Yes.

Q. Did the accident happen near Somerville on Route 29? A. Well, I really don't know the exact spot. 10

Q. How far had you ridden on the highway before this accident happened, do you know? A. Well, I know it is at a railroad crossing and it is right across from some sort of building place there, that is all.

Q. I mean, had you driven a mile or two miles on this road approximately. A. Oh, I guess so.

Q. Now, this riding in Mr. Oestreicher's car, that first occurred, did it not, in the latter part of January, 1942, the first time you rode back and forth with him? A. No. In the beginning, in fact, the very first trip to New Brunswick was in our own car. And I believe Mr. Oestreicher's car was not used until sometime in April or May. 20

Q. Well, beginning in April or May of 1942 Mr. Oestriecher would use his car driving you there. A. Not always.

Q. No, not driving you from Wilkes-Barre to New Brunswick, but driving you from New Brunswick back to Wilkes-Barre. A. Yes. 30

Q. And most of the time, isn't it true that most of the weekends between April and November 30 when this accident happened you had ridden in Mr. Oestreicher's car from New Brunswick to Wilkes-Barre and back again? A. I wouldn't say most of the weekends. I wouldn't remember exactly how many weekends he did take the car to New York. He never liked to take the car. 40

Q. Isn't it true that a greater number of times between April, 1942, and November 30, 1942? A. That I really don't know. I couldn't estimate that, whether it was a greater number by car or greater times by train.

Q. It was a substantial number of times. A.
10 It was quite often, yes.

Q. Quite often? A. Yes.

Q. Now, on the day of this accident you were sitting on the right-hand side of the car. A. Yes.

Q. After Mr. Oestreicher started driving. A. Yes.

Q. And you were knitting, weren't you? A. Yes, I was.

Q. And as you rode along the highway you were
20 talking about the business, were you not? A. Well, we had general conversation, different things.

Q. Well, you did talk about the business. A. Just every day talk.

Q. In other words, this ride back and forth between Wilkes-Barre and New Brunswick gave you and Mr. Oestreicher an opportunity to discuss things that occurred in the business during the week and things to be expected in the future,
30 didn't it? A. While Mr. Oestreicher was driving the car?

Q. Yes. A. I don't think it would be a very good place.

Q. You said you were talking to him. A. Talking occasionally to him. I am not a very good talker in a car, because I want to be watching.

Q. You were knitting at the time. A. Knitting and watching. I can really knit.

Q. You didn't see just how this accident hap-
40 pened? A. No, that I did not.

Q. From the time your car got on that highway until this accident happened it hadn't skidded across the road at any time before, had it? A. No, I hadn't noticed it, no.

Q. And you didn't see any ice on that roadway at any time did you? A. No, there were just spots. It was just in spots. 10

Q. As a matter of fact, on that morning, from the time you got on highway twenty-nine until this accident happened you didn't see ice at any time, did you? A. There were icy spots, yes.

Q. Did you actually see ice? A. Yes.

Q. Where? A. I wouldn't recall exactly where you would find an icy spot. Just like you were driving around and you would say, "Well, it is a little icy." That is all.

Q. What was your occasion to tell Mr. Oestreicher to drive carefully? A. I like slow driving. 20

Q. Didn't he drive slow to suit your convenience? A. But I did nothing else but ask him to drive carefully.

Q. He wasn't driving fast at any time, was he? A. No, he wasn't driving fast, I wouldn't say, no.

Q. When did you return first to work after the accident, on January 4, 1943? A. Yes, it was the first Monday after New Years. 30

Q. And you still lived in Piscataway Township, did you? A. Yes.

Q. And how long did you continue to live in Piscataway Township while you continued at your work? A. Well, I moved up to Wilkes-Barre in January, I believe, of this year.

Q. January, 1944? A. Yes.

Q. So during the year 1943 you still lived in Piscataway Township and worked in Wilkes-Barre. And did you come back on week-ends again 40

and go back on Monday morning? A. Yes, at all times.

Q. In any event, while you worked in Wilkes-Barre you would come home every Friday night and go back every Monday morning? A. Yes.

Q. Now, the reason you went to Wilkes-Barre
10 in the latter part of January, 1944, and each week thereafter was because your place of employment was there with Mr. Oestreicher, isn't that so? A. Yes, the place of business is in Wilkes-Barre.

Q. And that is the reason? A. And that is where my work is.

Q. That is why you went there? A. Yes.

Q. Now, on Monday, you say, instead of going direct to the factory when you got there you would
20 have your lunch. A. Yes.

Q. What time would you get in Wilkes-Barre on Monday after you left here around 7:30 in the morning? A. About eleven or eleven-thirty.

Q. And then you would have lunch where, at your apartment? A. At my mother's apartment, yes.

Q. And then you would begin work at what time in the afternoon, as soon as your lunch was through? A. Yes, 12:30 or one o'clock generally.

30 Q. Of course, you had lunch hours on other days too. I mean, there were a lot of lunch hours during the course of your working there? A. Naturally.

Q. Now, on Monday, November 30, 1942, the reason you went to Wilkes-Barre was to go back to work on that day for Mr. Oestreicher, wasn't it? A. I went back to my apartment, to Wilkes-Barre, and also to the business later on, yes.

Q. The reason that required your presence in
40 Wilkes-Barre was because you had a job there? A. Naturally. And I had the apartment there.

Q. And if you didn't go back with Mr. Oestreicher you would have gone back on a train or a bus on that Monday, would you not? A. That is right.

Q. I show you a statement and ask you on the first page, that writing, Mrs. Elsa Wolf, that is your signature? A. That is my signature, yes. 10

Q. And over here on the left-hand corner as witness, Gerhard Wolf. Is that your husband's signature? A. That is right.

Q. And on the second page of this statement is that your signature? A. Yes.

Q. And on the left-hand corner of that is your husband's signature? A. That is right.

Mr. Walburg: May I have this marked for identification?

20

(The paper referred to was marked D-1 for identification.)

Mr. Walburg: That is all.

Re-direct examination by Mr. Sklarew:

Q. In what capacity are you hired by Mr. Oestreicher? A. I am general manager and designer.

Q. As general manager and designer are you familiar with the expenses? A. Yes, I am. 30

Q. In the operation of the business? A. That is correct.

Q. Are the expenses for this car used as a business deduction in the business?

Mr. Walburg: I object to that as irrelevant and immaterial.

Mr. Sklarew: I think it is very proper, if your Honor please.

Mr. Walburg: What difference does it make? The reason I say that is that the 40

defendant operates as an individual. Now, whether or not he charges it as a business expense or whether he takes it out of his other pocket is irrelevant and immaterial.

(Further discussion between counsel.)

10 (The question was read by the reporter.)

Mr. Walburg: In the first place it calls for a conclusion and it is not the proper way to prove it, not the best evidence. I object.

The Court: The objection is sustained.

By Mr. Sklarew:

Q. Are the expenses used in the operation of the car calculated as an operating expense in the manufacture of the goods that are manufactured by Mr. Oestreicher?

20

Mr. Walburg: I object to that.

The Court: Objection sustained.

Q. Now, precisely what do you do in this place, Mrs. Wolf? A. Well, I make all the designs for the various infants dresses that we manufacture. I am up in the factory. I watch that the girls do their work correctly. I hire the help, lay off help, see that the foreladies take care of their girls, and if anything goes wrong they come to me. At times if girls at special machines, if I didn't immediately change those garments it would mean other girls would have no work. So I have to be constantly there to make changes or anything that is necessary in order to keep the work going and not have any bottle-neck in the factory. Also in charge of the cutting, give out cutting slips,

30

40

and so forth. General managing of the entire business.

Mr. Sklarew: That is all.

Re-cross examination by Mr. Walburg:

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Q. Mrs. Wolf, my recollection is that your wages were paid during the time you were out. A. I have no way—

Mr. Sklarew: There is no claim for compensation of that kind in this case.

Mr. Walburg: That is all.

Mr. Sklarew: That is all.

Now, if your Honor please, I have one other witness, Dr. Klein, who was called on the telephone, and he was in the middle of taking an X-ray across the street, and he is to be called again. And with that I rest on my fact witnesses, except calling Dr. Klein for the X-ray.

20

Mr. Walburg: I would like to make a motion then.

MOTION FOR NON-SUIT

Mr. Walburg: At this time, if your Honor please, on behalf of the defendant Albert Oestreicher I move for a non-suit on one or more of the following grounds:

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One, because it appears from the evidence in this case that this Court does not have jurisdiction of the plaintiff's claim;

Second, on the ground it appears from the evidence in this case that the plaintiff's remedy, if any, against the defendant Oestreicher is under the Workmen's Compensation Act of the State of

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New Jersey as found in revised statutes 34-15-1 to 102;

Third, on the ground that there is no evidence that this defendant violated any duty to the plaintiff herein cognizable by this Court.

10 (Discussion between the Court and counsel.)

The Court: Counsel for the defendant made a motion for a non-suit on several grounds, the main one of which was that this suit was cognizable by the Workmen's Compensation Bureau rather than the Supreme Court in this present suit.

The facts are that the plaintiff was employed 20 by the defendant at his plant in Wilkes-Barre, Pennsylvania. She was the general manager and designer in that plant. She had worked for the defendant previous to the time the plant was established in Wilkes-Barre. She lived in Middlesex County, as I remember the testimony, about five miles from New Brunswick, but while she was working in Wilkes-Barre maintained an apartment there where she resided from the time she reached Wilkes-Barre on Monday to Friday after-30 noon when she returned home for the weekend. And she did return home each weekend.

The defendant, who lived in Brooklyn, often drove to Wilkes-Barre on Monday mornings and back on Friday afternoons. When he did this he took the plaintiff with him from New Brunswick to Wilkes-Barre and back from Wilkes-Barre to New Brunswick. They undoubtedly talked during these rides concerning the business of the company of which she was general manager 40 and designer and of which the defendant was the

owner. The car over the weekends was left with the plaintiff, as the defendant, according to the testimony, did not care to drive in to New York.

The only reason for the plaintiff going to Wilkes-Barre was in connection with her work in the defendant's plant. On the occasions when she went to Wilkes-Barre other than in the car of the defendant she paid her own fare on the train or bus. These facts bring the case directly within the rules laid down by the Supreme Court in Michelli *vs.* Erie Railroad, 130 Law, 448, and by the Court of Errors and Appeals in the same case in an opinion not yet reported. 10

The rides to and from New Brunswick and Wilkes-Barre had ripened into a custom incidental to the employment. These rides were with the knowledge and acquiescence of the employer. It was a continued practice over several months. I believe the testimony was from April, 1942, to the date of the accident, and without question was beneficial both to the employer and the employee. It was a privilege incidental to the employment, which are the words used by the Chief Justice in the Court of Appeals decision heretofore cited, with no deduction from the plaintiff's salary for the transportation. 20

I am of the opinion that while the plaintiff was riding with the defendant to her place of employment she was his servant and not a passenger, and that her forum is the Workmen's Compensation Bureau rather than this court. 30

For those reasons the motion will be granted. Mr. Sklarew, you may have your exception.

Mr. Sklarew: I pray an exception.

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(6604)

New Jersey Court of Errors and Appeals

ELSA R. WOLF, Plaintiff-Appellant, *vs.* ALBERT OESTREICHER, Defendant-Appellee, *and* LOUISE FISCHER, Defendant.	**On Appeal from New Jersey Supreme Court, Middlesex County.** **Sat below: Oliphant, *C.C.J.***

BRIEF OF PLAINTIFF-APPELLANT.

Italics (Briefer's).

For the sake of brevity "Plaintiff-Appellant" is hereinafter referred to as "Plaintiff" and "Defendant-Appellee" is hereinafter referred to as "Defendant."

Statement of Facts.

Plaintiff, Elsa R. Wolf, was seriously injured in an automobile accident, Monday morning, November 30, 1942 on New Jersey State Highway Route No. 29 near Somerville, N. J., while traveling in a car owned and operated by her employer, defendant Albert Oestreicher. Their destination was Wilkes-Barre, Pennsylvania, where plaintiff lived and worked during the week.

The testimony adduced at the trial of the cause revealed the following facts which stand unchallenged:

1. Sometime prior to January 1943, plaintiff Elsa R. Wolf was working for defendant Albert Oestreicher in New York City when an agreement was reached whereby she would

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manage a factory for him in Wilkes-Barre, Pa. Mrs. Wolf was employed by Mr. Oestreicher at Wilkes-Barre, Pa., at the time of the happening of the accident on November 30, 1942.

2. Mrs. Wolf lived on a farm with her husband in Piscataway Township, Middlesex County during the time she worked in New York City. She continued to live there week-ends while employed at Wilker-Barre, Pa.

3. No agreement was ever made between Mrs. Wolf and Mr. Oestreicher that her transportation to and from New Brunswick to Wilkes-Barre was to be arranged as part of the contract of employment. Mrs. Wolf did not commute daily between Piscataway Township and Wilkes-Barre, Pa. She lived in Wilkes-Barre during the week while she worked there and then spent her week-ends at her home in Piscataway Township, N. J.

4. Mrs. Wolf would travel to and from Piscataway Township at the beginning and end of each week by four different methods. Her own car at her own expense; train at her own expense; bus at her own expense; and in Mr. Oestreicher's car at his special invitation and at his expense.

5. *Mrs. Wolf was not on her way to work at the time the accident happened. She was on her way to her apartment in Wilkes-Barre where she lived. Mr. Oestreicher never used his car to transport Mrs. Wolf to work from Piscataway Township or to her home from work at Wilkes-Barre, Pa. The rides from Piscataway Township were always directly to Mrs. Wolf's apartment in Wilkes-Barre. The rides from Wilkes-Barre were never directly from work to her home in Piscataway Township.*

6. *Mrs. Wolf's duties were exclusively performed in the factory in Wilkes-Barre and were of inside character. She was general manager and designer.*

7. *Mr. Oestreicher never conducted a business in New Jersey nor did the business con-*

ducted in Wilkes-Barre have any connection with New Jersey whatsoever.

8. Mrs. Wolf was not due at the factory in Wilkes-Barre at any special time on any Monday at the beginning of each week. Her work day commenced when she arrived at the plant. Mrs. Wolf was not due at the plant until some time during the afternoon of said day.

At the trial of the cause, the plaintiff took a voluntary non-suit against defendant Louise Fischer and proceeded to trial against the defendant Albert Oestreicher.

At the end of plaintiff's case, the trial court directed a judgment of non-suit in favor of the defendant on the ground that plaintiff's forum was the Workmen's Compensation Bureau of New Jersey. From that decision plaintiff appeals.

Points Upon Which the Plaintiff Relies.

I. Assuming an employer-employee relationship existed between the plaintiff Elsa R. Wolf and the defendant Albert Oestreicher at the time of the accident, jurisdiction was never conferred upon the State of New Jersey under the Workmen's Compensation Act, N. J. S. A. 34:15-1 *et seq.*, and hence plaintiff's forum is not the Workmen's Compensation Bureau of New Jersey.

II. No testimony was adduced at the trial of the cause to support a finding by the court that an employer-employee relationship existed between the plaintiff Elsa R. Wolf and the defendant Albert Oestreicher at the time of the accident, and hence the action is not compensable under the Workmen's Compensation Act, N. J. S. A. 34:51-1 *et seq.* and plaintiff's forum is not the Workmen's Compensation Bureau of New Jersey.

III. It was for the jury to determine from the testimony adduced at the trial of the cause, whether an employer-employee relationship existed between the plaintiff Elsa R. Wolf and the defendant Albert Oestreicher at the time of the accident.

STATEMENT OF ARGUMENT.

POINT I.

Assuming an employer-employee relationship existed between the plaintiff Elsa R. Wolf and the defendant Albert Oestreicher at the time of the accident, jurisdiction was never conferred upon the State of New Jersey under the Workmen's Compensation Act, N. J. S. A. 34:15-1 et. seq. and hence plaintiff's forum is not the Workmen's Compensation Bureau of New Jersey.

Interstate travel has been responsible for the development of well settled rules of law which deal with the question of jurisdiction under the Workmen's Compensation Act, N. J. S. A. 34:15-1 *et. seq.*

It is interesting to note that under the decisions no one element is controlling in determining whether or not jurisdiction is conferred. These elements have to do with where the contract of hiring is effected, where the services contracted for are to be performed, where the accident took place and whether or not the services to be performed in New Jersey are substantial.

In no situation does the fact that the accident took place in New Jersey, alone, confer jurisdiction upon the Workmen's Compensation Bureau of New Jersey. We ask the court to particularly

bear this in mind because the plaintiff contends that the only element present in the case at bar is that an accident took place here.

First let us consider the situation whereby the contract of hiring is effected in New Jersey. From that premise flows the well settled rule of law that compensation for injuries arising out of and in the course of employment, will be awarded in this state although the accident actually occurred outside of the State of New Jersey. See *Miller* v. *National Chair Co.*, 127 N. J. L. 414, 22 A. 2d 804 affirming 18 A. 2d 847, 19 N. J. Misc. 275; *Steinmetz* v. *Snead & Co.*, 123 N. J. L. 138, 8 A. 2d 126; *Sweet* v. *Austin Co.*, 12 N. J. Misc. 381, 171 A. 684; *Frank Desiderio Sons* v. *Blunt*, 11 N. J. Misc. 494, 167 A. 29; *Rounsanville* v. *Central R. of New Jersey*, 90 N. J. L. 176, 101 A. 182; *Deey* v. *Wright & Cobb Lighterage Co.*, 36 N. J. L. J. 121; *West Jersey Trust Co.* v. *Philadelphia & R. Ry. Co.*, 88 N. J. L. 102, 95 A. 753; *Pennsylvania Mfrs. Casualty Insurance Co.* v. *Schmerbeck*, 131 N. J. L. 159, 35 A. 2d 719 Affirming 24 A. 2d 573, 128 N. J. L. 180.

Next we have to do with the situation whereby the contract of hiring is effected outside of New Jersey, but where the services contracted for are to be performed either wholly or partly in New Jersey and the accident took place in New Jersey. From that premise flows the well settled rule of law that regardless of where the contract of hiring took place, if it is contemplated that the services are to be performed in New Jersey, and the accident occurred in New Jersey, compensation will be awarded for injuries arising out of and in the course of employment in New Jersey. See *American Radiator Co.* v. *Rogge*, 86 N. J. L. 436, 92 A. 85, 94 A. 85 Aff. 87 N. J. L. 314, 93 A. 1083, and writ of error dismissed 245 U. S. 630; *David-*

heiser v. *Hay Foundry & Iron Works,* 87 N. J. L. 688, 94 A. 309 affirming 94 A. 1103; *Andres* v. *Keystone Varnish Co.,* 19 N. J. Misc. 17 A. 2d 268.

Another set of facts has to do with the situation whereby the contract of hiring is effected outside of the state and the services are to be performed exclusively outside of the state and the accident occurs outside of the state. From that premise flows the well settled rule of law that if the contract of hiring and the services to be performed and the accident occurs outside of the state, compensation will not be awarded for injuries arising out of and in the course of employment, notwithstanding that the employee is a resident of the State of New Jersey and the employer is authorized to transact business in the State of New Jersey. See *Hamm* v. *Rockwood Sprinkler Co.,* 88 N. J. L. 564, 97 A. 730.

Unquestionably, from the foregoing, if the Workmen's Compensation Bureau of New Jersey is to take jurisdiction in the case at bar, it must do so under the theory that some element is present other than the fact that the accident took place in New Jersey. Certainly the other element here can't be that the contract of hiring took place in New Jersey. The proofs are void as to that. The only other element available to confer jurisdiction, therefore, is that the services contracted for were to be performed wholly or partly in New Jersey.

Before discussing this phase of the question, it might be well to consider how the courts throughout the entire country have viewed what constitutes the performances of services in a particular state with respect to conferring jurisdiction under Workmen Compensation Laws.

In New Jersey, in the case of *Ritenour* v. *Creamery Service Inc.,* 17 A. 2d 283, 19 N. J. Misc. 82, the court held that the Workmen's Compensation

Act cited *supra* and the decisions construing them, *contemplate substantial services and not purely superficial services in order to confer jurisdiction upon a given state.*

In New York, in the case of *Eurbin* v. *Prudential Insurance Co. of America* (New York Appellate Division), 295 N. Y. S. 247, 250 App. Div. 889, the court held that the work done by a Massachusetts insurance agent in New York State at the time of the accident was so trivial that it was not incidental to his employment in Massachusetts and therefore, recovery was precluded under the compensation laws of the State of New York.

In New York, in the case of *Proper* v. *Polley* (New York Appellate Division), 253 N. Y. S. 530, 233 App. Div. 651 Aff. 259 N. Y. S. 516, 182 N. E. 161, it was held that compensation remedy under the Pennsylvania laws was exclusive for recovery in a death action during the temporary work in New York of a tool dresser who was regularly employed in Pennsylvania.

In Utah, in the case of *Buhler* v. *Maddeson,* 140 Pacific 2, 933, it was held that where an employee performed no service for the employer in Utah, and it was not contemplated that he should be employed in Utah, and the contract of hiring was not made in Utah, and all services were to be performed in Nevada, an employee could not recover for injuries sustained in Utah under the Utah compensation act.

In Colorado, in the case of *Hall* v. *Industrial Commission,* 235 P. 1073, 77 Colo. 338, the court held that the Colorado Industrial Commission had no jurisdiction to award compensation for injuries in Colorado to one employed under a contract made in another state for duties not to be performed principally in Colorado.

In North Carolina, in the case of *Mallard* v. *F. M. Bohannon, Inc.,* 221 N. C. 227, 19 S. E. 2, 880, the North Carolina Court held that where the contract of employment is for services to be rendered exclusively outside of the state and services thereunder are actually performed in their entirety elsewhere than in the state, the North Carolina compensation act is unapplicable for a claim for injuries sustained in North Carolina.

Returning to the instant case, the court below arbitrarily found that the week-end trips to and from Piscataway Township and Wilkes-Barre, Pa. constituted services being performed in New Jersey by the plaintiff Elsa R. Wolf. For the purpose of this discussion only, let us assume that to be the fact. *But were these services substantial enough to confer jurisdiction upon the Workmen's Compensation Courts of the State of New Jersey?*

Whether or not services are substantial, of course, is relative. The only fair test to apply is to compare the actual services being performed to the overall services contracted for and then consider what must have been the intention of the parties.

It is difficult to comprehend how these weekend trips to and from Piscataway Township and Wilkes-Barre, Pa., if services at all, can be construed as substantial when the defendant Albert Oestreicher at no time ever did business in New Jersey, and the proofs are silent as to any intention to do business here. Further, the services contracted for by the plaintiff Elsa R. Wolf, were to be performed exclusively and entirely in Wilkes-Barre, Pa. The defendant's factory was located there and so far as his business was concerned, the State of New Jersey didn't even exist. The proofs are also uncontroverted that the plain-

tiff Elsa R. Wolf traveled to Wilkes-Barre at the beginning of each week by either her own car, train, bus, or by Mr. Oestreicher's car, and that whatever traveling was done, was entirely disconnected with plaintiff's duties at Wilkes-Barre, Pa. Also unquestioned, is the fact that the nature of plaintiff's employment was such that she was forced to live in Wilkes-Barre during the week while she worked there. It was a physical impossibility for her to commute daily from her home in the Township of Piscataway to Wilkes-Barre, Pa.

It is obvious that our legislature never intended to have the Workmen's Compensation Laws of New Jersey cover the situation in the case at bar. The public policy of New Jersey and the will of our legislature with respect to the Workmen's Compensation law of New Jersey, has to do with the regulation of the conduct of the industries of New Jersey and the people who work in these industries. The legislature, through the Workmen's Compensation law, has sought to secure workmen by compensating them for injuries arising out of and in the course of their employment, regardless of the employer's fault. *Can it be said that the public policy of this State and the will of our legislature ever contemplated protecting plaintiff Elsa R. Wolf under these circumstances when all the services she was performing for the defendant Albert Oestreicher were being exclusively performed outside the State of New Jersey?*

In the case at bar, the services, if any, are less substantial than traveling to and from work between states because the plaintiff Elsa R. Wolf did not commute daily. The undisputed testimony is that she lived in Wilkes-Barre, Pennsylvania during the week while she worked and only came home to Piscataway Township on weekends where she maintained a residence.

Compare the facts of the case at bar with the *Ritenour* v. *Creamery Service Inc.* case, cited *supra.* In that case the petitioner was injured in New York State while driving a truck, which he was hired to do. He always traveled through New Jersey on his way to up-state New York. The New Jersey Workmen's Compensation Bureau refused to take jurisdiction of the action. Not because the accident did not take place in New Jersey, but because the actual services to be performed by the petitioner in New Jersey were too slight. Certainly, if the court refused to take jurisdiction in a matter where it is conceded that driving in New Jersey was part of the hired duties of the petitioner, it logically follows that it should refuse to take jurisdiction when the accident happened in New Jersey during a week-end ride which was entirely disconnected with the services performed by the plaintiff in Wilkes-Barre, Pa.

In the case of *Hunt* v. *Magnolia Petroleum Co.*, 10 So. 2nd, 109, it was held that in ascertaining the law of which state is to apply in a compensation case, all of the circumstances should be examined with a view of discovering the true intent of the parties. *Isn't it clear, in view of the plaintiff's services being exclusively performed in Wilkes-Barre, Pennsylvania, that it was never contemplated between the parties that New Jersey Compensation law should apply?*

Likewise, compare the case at bar, to *Eurbin* v. *Prudential Insurance Co. of America,* cited *supra,* New York Appellate Division. In that case, a Massachusetts insurance agent was injured in an automobile accident while driving in the State of New York to collect the premium from a policy holder who had moved from Massachusetts to New York. It was also shown that when an insured moved from Massachusetts to New York,

it was the practice for an agent to collect premiums in New York to conserve the business until the case could be transferred to a New York agent. The court held that the work to be done by the Massachusetts agent in New York State at the time of the accident, was so trivial that it was not incidental to his employment in Massachusetts. Recovery was denied under the Workmen's Compensation Laws of the State of New York. *How is it possible to reconcile the action of the court below in face of this decision? Week-end travel, even if construed to be arising out of and in the course of plaintiff's employment with the defendant, is certainly less substantial by comparison, than the collection of a premium in New York State by a Massachusetts insurance agent who was trying to conserve his business.*

In conclusion, it is respectfully urged that New Jersey does not have jurisdiction under the compensation laws because it was never contemplated that the services contracted for by the plaintiff, were ever to be performed in New Jersey and the week-end rides to and from Wilkes-Barre, Pennsylvania and New Jersey, if construed to be services at all, were not substantial enough to confer jurisdiction upon the Workmen's Compensation Bureau of New Jersey.

POINT II.

No testimony was adduced at the trial of the cause to support a finding by the Court that an employer-employee relationship existed between the plaintiff Elsa R. Wolf and the defendant Albert Oestreicher at the time of the accident, and hence the action is not compensable under the Workmen's Compensation Act, N. J. S. A. 34:15-1 et. seq. and plaintiff's forum is not the Workmen's Compensation Bureau of New Jersey.

The general rule of law is that injuries sustained by a workman when going to and returning from his place of work, are not considered as arising out of and in the course of employment. See *Micieli* vs. *Erie R. Co.,* 131 N. J. L. 427, 37 2d A. 2d 123, affirming 130 N. J. L. 448, 33 A. 2d 586; *Fisher* vs. *Tidewater Bldg. Co.,* 96 N. J. L. 103, 104, 114 A. 150, affirmed 97 N. J. L. 324, 116 A. 924, affirming 96 N. J. L. 103, 114 A. 150; *Laverty* v. *Ludington Management, Inc.,* 110 N. J. L. 410, 413, 166 A. 137; *Rubeo* v. *Arthur McMullen Co.,* 117 N. J. L. 574, 189 A. 662, conformed to 118 N. J. L. 530, 193 A. 797, Aff. 120 N. J. L. 182, 198 A. 843; *Grady* v. *Nevins Church Press Co.,* 120 N. J. L. 351, 199 A. 578, reversing 119 N. J. L. 135, 194 A. 782;; *Grotsky* v. *Charles Grotsky, Inc.,* 121 N. J. L. 461, 3 A. 2d 149, affirmed 124 N. J. L. 572, 12 A. 2d 856. The rule however, has its exceptions and we are here concerned with whether or not the case at bar falls within these exceptions.

The first exception considered by our New Jersey Courts in the development of the law, had to do with an employee who was employed to work at a certain place and as part of his contract of employment, his employer agreed to furnish him free

transportation to and from work. Our Court of Errors and Appeals held in the case of *Fisher* vs. *Tidewater Bldg. Co.,* cited *supra,* that under those circumstances, the period of service continues during the time of the transportation and if an injury occurs during the course of the transportation, it will be deemed to have arisen out of and in the course of employment.

After considering the testimony, the court below, in granting the motion for non-suit, did not find that there was an agreement between plaintiff Elsa R. Wolf and defendant Albert Oestreicher which was part of the contract of employment and hence, the case does not fall within that exception.

The next exception, we find to be a refinement of the first. In the case of *Rubeo* v. *Arthur McMullen Co.,* cited *supra,* (herein referred to as the *Rubeo* case), our Court of Errors and Appeals held that an agreement to transport an employee to and from work doesn't necessarily have to be expressed as part of the contract of employment, nor does it have to be proven that the act of transporting, even if not expressed, had so ripened into a custom to such an extent as to become part of the contract of employment. It is enough if it be established that the act of transporting was merely an accommodation which grew with the knowledge and acquiescence of the employer into a practice grounded into mutual convenience and advantage. *But the court also held it must be shown that the transportation to and from work is incidental to the employment, that it is a thing so intimately related to the particular service contracted for, as to be deemed in common parlance, a part of it.*

The facts of the *Rubeo* case aptly illustrate the exception to the rule. We quote directly from the Supreme Court decision:

"In May, 1934, the respondent-employer sought the services of the deceased employee, a skilled concrete worker who had been in its employ on prior occasions, for the performance of a contract for the building of a dock on Staten Island. Through its superintendent, Holt, it persuaded Rubeo to leave his employment at the Newark Airport, and to enlist in its service at the same base weekly wage. The evidence is in conflict as to whether the deceased was to be provided with transportation from his home to the situs of the construction work; but it is conceded that Holt, who lived in the City of Rahway, in this state, transported the deceased, almost daily, between his home, or the immediate vicinity thereof, and Staten Island. While they were engaged in "pouring concrete"—from May 7, 1934, to the ensuing May 24—daily transportation was provided, and thereafter until June 7, 1934 (the day of the fatal accident), it seems to have been the general practice. Holt said it was "done regularly." The vehicle was one of the employer's trucks assigned to the use of Holt, and garaged near his home at the employer's expense. The fatality occurred on the homeward trip, after the completion of the day's work."

The court held that the act of transporting the employee to and from work under those circumstances, was intimately connected with the services contracted for and an employer-employee relationship existed at the time of the accident.

Then in the case of *Micieli* vs. *Erie R. Co.*, cited *supra*, hereinafter referred to as the *Micieli* case, and *to which case the court below made reference in granting the motion of non-suit*, our Court of Errors and Appeals restated the principle of law laid down in the *Rubeo* Case, to wit, that an employee who is carried to and from his place of employment as part of his contract of service or as a privilege incidental thereto, with no de-

ductions from his regular wages for such transportation, is considered to be a servant and not a passenger.

Because the court below made such a point of the *Micieli* case, reference is herewith made to the facts exactly as reported by the Supreme Court:

> "From the stipulated facts we learn that at the time of the accident (January 6, 1938) and for two years prior thereto, decedent, whose sole dependent was his wife (respondent here) with whom he lived in Paterson, N. J., was engaged and worked for prosecutor railroad company as a baggage porter at its terminal in Jersey City, N. J. Decedent worked six days a week from 10:00 p. m., to 7:00 a. m., at the rate of fifty cents an hour and earned $24.00 a week. His rate of pay was the same as that of any employee living in Port Jervis, N. Y., or in Jersey City, N. J. His duties were confined entirely to Jersey City and consisted of handling, sorting, routing and loading of mail, newspapers and baggage arriving at Jersey City from New York and destined to points within and without the State of New Jersey.
>
> On January 6, 1938, decedent completed his work at his usual time (7:00 a. m.) and promptly thereafter boarded one of prosecutor's public trains which traveled from Jersey City to Paterson, N. J. As the train was moving into the Paterson station, at 7:33 a. m. at a speed of approximately 15 miles an hour, decedent was seen to jump off the train, run along the platform holding on to a grab handle, lose his footing, fall and roll under the train. He sustained fatal injuries.
>
> At the time of the accident decedent had in his possession a railroad pass which had been given to him by prosecutor at the time of his employment. The pass reads as follows

(Front)

''Erie Railroad Company.

''New York, Susquehanna and Western Railroad Co.

''The New Jersey & New York Railroad Co.

Eastern District.

''Not good on trains 1 and 2 except between Hornell and Buffalo, N. Y. 1937-1938.

''Pass Mr. Joseph Micielo

''Account Extra Baggage Porter (AIK)

''Between stns. Jersey City, N. J., and Paterson, N. J.

''Until December 31, 1938.

''Valid when countersigned by A. E. Hoffman.

''Countersigned A. E. Hoffman.

''Unless otherwise ordered and subject to conditions on back.

''W. M. White, General Manager.''

(Reverse Side)

''Conditions''

''A person accepting and using this free pass thereby assumes all risks of accidents, death, personal injury and loss of and damage to property whether caused by negligence of any railroad company named on the other side or negligence of any officer, agent or employee thereof or otherwise.

''As a condition precedent to the issuing and use of this pass, each recipient represents that he or she is not prohibited by law from receiving such free transportation and agrees that this pass is gratuitously, and furnished no part of consideration for services and that none of said railroad companies shall be considered as a common carrier as to the transportation furnished thereon. (Italics supplied).

''This pass is not transferable, and if presented by any other than an individual named thereon, the conductor will take up pass and collect fare. This free pass is

accepted and used upon the above conditions.

"(Signed) JOSEPH MICIELI.

"This pass will not be honored unless signed in ink or indelible pencil by the person or persons to whom issued."

The court held that the act of transporting decedent to and from work was incidental to the service contracted for and therefore, an employer-employee relation existed at the time of the accident.

Let us compare the facts of the *Rubeo* and *Micieli* case with the case at bar. In the *Rubeo* case, it is undisputed that the accident happened while the employee was going to work. So too in the *Micieli* case. That fact is admitted by both sides and raises no issue. *However, in the case at bar, the undisputed testimony is that Mrs. Wolf was not even going to work when the accident occurred. She was going to her apartment in Wilkes-Barre where she lived and where according to the uncontradicted testimony, it was necessary for her to live in order to work for Mr. Oestreicher.* It was physically impossible for her to commute daily between New Brunswick, N. J., and Wilkes-Barre, Pa. Yet the court below arbitrarily held that she was going to work at the time of the accident because in the words of the court, "The only reason for the plaintiff going to Wilkes-Barre, Pa., was in connection with her work in defendant's plant." This conclusion was made by the court in face of the fact that it was testified to that Mrs. Wolf was not due in the factory until early afternoon and that on no occasion did she ever go directly from her home in Piscataway Township to the factory, but always went to the place where she was residing with her mother.

Suppose for the sake of argument, when Mrs. Wolf arrived at her apartment, she suddenly took ill and didn't go to the factory for two days. According to the reasoning of the court below, it would be necessary to conclude that she was still on her way to work. The fallacy of the court's reasoning is obvious. The unsoundness of the court's decision is likewise obvious. When non-suiting it is well established that any doubt or any inference in favor of a plaintiff whose rights are materially affected, must be resolved in his favor. *It is inconceivable that the court below on a motion to non-suit, should have resolved that the plaintiff was going to work at the time of the accident when she said she wasn't, and no one else said she was.*

Let us further distinguish the case at bar with the *Rubeo* and *Micieli* case. In the *Rubeo* case, the petitioner vigorously contended that the employer was to furnish transportation to and from work as a part of the contract of employment. Justice Perskie, in resolving the facts in the Supreme Court after the Court of Errors and Appeals had remanded same to it for that express purpose, found as a fact that the provisions of transportation, if not the subject of an express or implied undertaking binding under any and all circumstances, was plainly within the contemplation of the parties, at the time of the making of the contract of employment. No such situation exists here.

In the *Micieli* case, it is undisputed that the agreement to transport was part of the contract of employment. The employee was handed a railroad pass at the time he was employed, which permitted him to ride free on the trains to and from work. No such situation exists here.

Incidently, the gravemen of the *Micieli* case is whether or not employers and employees can contract away certain rights which the legislature guarantees by operation of law. The issue revolved around whether or not it made any difference that the railroad pass was issued gratuitously and as a privilege and not as a consideration for services. The defendant railroad company tried to avoid liability on the theory that the transportation was furnished as a gratuity or "privilege," and that the employee agreed to the terms and conditions imposed on the back of the railroad pass when he accepted same. Those terms and conditions provided that the railroad was not liable in the event of an accident. The word "privilege" was used by the Chief Justice in the *Micieli* case to connote *lack of consideration.* The point the Court of Errors and Appeals made was that the employer-employee relationship between *Micieli* and the railroad was not defeated merely because no moneys were deducted from *Micieli's* pay for his transportation.

The plaintiff does not take the position that no employer-employee relationship existed because her employer Albert Oestreicher did not deduct the expenses of occasionally traveling to Wilkes-Barre in his car from her wages. She makes no issue of the fact that the rides when they took place, were furnished as a gratuity or privilege. *She contends that the occasional week-end trips to and from New Brunswick, N. J., to Wilkes-Barre, Pennsylvania, were not incidental to her employment and were not so intimately related to the particular services contracted for, as to be deemed in common parlance, a part of it.*

The *Micieli* case does not change the law in the State of New Jersey as the defendant tried to make the court below believe. Nor does it effect

the principle of law laid down in the *Rubeo* case, namely that transportation to and from work must be incidental to the employment and a thing so intimately related to the particular services contracted for, as to be deemed in common parlance, a part of it. As a matter of fact, the court in the *Micieli* case, did not reach it's decision until it found that the transportation was incidental to the employment contract.

In the *Rubeo* case, the Supreme Court said:

> "The deceased employee, while not directly concerned, in the journeys to and fro, with the performance of the work for which he was employed, was yet engaged in that which, by mutual consent, was considered as incidental to the employment. It was a thing so intimately related to the particular service contracted for as to be deemed in common parlance, a part of it. This is the legislative sense of the term 'employment'. The requisite relation of master and servant continued during the journey; and the hazards thereof are therefore regarded as reasonably incident to the service bargained for.
>
> In the circumstances, the transportation afforded the deceased employee was not solely for his benefit and convenience, so as to be disconnected from the employment in the statutory sense. The advantages accruing to the employer from this arrangement are obvious. It sought the skilled service of which the deceased employee was capable; and the furnishing of transportation between the employee's home and the situs of the current operations was designed to avoid the uncertainty and delay incident to travel on public conveyances, and thus to secure efficiency and expedition in the performance of the underlying construction contract. The scene of operations shifted from time to time; and the employer plainly deemed it good policy to sup-

ply transportation facilities for workmen who could not conveniently live at the locus. The provisions of a motor vehicle for the daily use of its superintendent, and its housing at the employer's expense near his home in Rahway, are proof of this."

In the *Micieli* case, Justice Perskie who wrote the opinion for our Supreme Court, said:

> "We need hardly labor the point that the pass was financially beneficial to decedent. It relieved him of his transportation costs. Again common experience of mankind preponderates the probability that the issuance of the pass was beneficial to prosecutor's business as a common carrier. It necessarily attracted workers of decedent's limited earning power, even if they lived some distance away from their place of work. It undoubtedly created and helped to maintain that humane relation between employer and employee which is beneficial and vital to their mutual social and economic welfare. If it were otherwise, common experience, common sense dictates that the pass would not have been issued to decedent.
>
> We do not share the view that the obligatory use of the pass was, as urged, a condition precedent to the requisite relation of master and servant between the parties. The issue here is not whether decedent could have used the pass while returning home from his work. The issue here is whether the fatal injury which decedent suffered while so using the pass is compensable. Decedent had the unquestionable right to use the pass as he did use it. He was in prosecutor's public train by virtue of a condition incidental to and part of his contract of employment as evidenced by his pass. Thus he was where he had a right to be under his contract of employment. Cf. Bryn *v.* Central R. Co. of N. J., 114 N. J. L. 534, 177 A. 857, affirmed 115 N. J. L. 508, 180

A. 874. The fact that he was where he had the right to be by virtue of a permissive rather than an obligatory use of the pass is beside the point. There is, moreover, nothing in the record remotely to indicate that prosecutor lacked such power as to chose to exercise over decedent while on its train. Cf. Rojeski *v.* Pennington Dairy Farms, Inc., 118 N. J. L. 335, 337, 192 A. 746.''

It is interesting to note what our Chief Justice had to say concerning that point in the affirming opinion of the Court of Errors and Appeals:

> ''In the instant case, free transportation of the employee on the employer's trains (i. e. between Paterson and Jersey City) was, as the Supreme Court found, mutually advantageous to both parties and stamps that feature of the fact situation as an incident of the employment contract''.

Let us now consider the case at bar. How, by any stretch of the imagination, can it be said or found, that the occasional week-end riding to Wilkes-Barre from Piscataway Township to the apartment of the plaintiff, Elsa R. Wolf, in Wilkes-Barre, was so intimately connected with the services contracted for as to be deemed in common parlance, a part of it? These rides were not a matter of daily commuting between home and place of business. While Mrs. Wolf worked in Wilkes-Barre, she lived there for that purpose. The testimony is uncontradicted that there was no set way of traveling to Wilkes-Barre at the beginning of the week. Mrs. Wolf testified that she would go and come from Wilkes-Barre by train, bus, her own car and Mr. Oestreicher's car only at his expressed invitation. Under direct and cross examination, it was clearly explained by Mrs. Wolf that on no occasion did Mr. Oestreicher ever travel directly from New Bruns-

wick to the place of business at Wilkes-Barre. The traveling to Wilkes-Barre from New Brunswick, it is respectfully submitted, bore absolutely no relation to the duties of the plaintiff in the factory owned by the defendant in Wilkes-Barre, Pa.

The court below in trying to justify the stand it took, concluded in granting the non-suit that because Mrs. Wolf and Mr. Oestreicher "*undoubtedly* talked during these rides concerning the business of the company of which she was general manager and designer and of which the defendant was the owner", that therefore, it was beneficial to the owner and mutually advantageous. It is respectfully urged that this is an extremely thin line upon which to non-suit and deny the rights of the plaintiff Elsa R. Wolf. It is almost ridiculous to assume that it made any difference to the duties performed by Elsa R. Wolf in Wilkes-Barre, Pennsylvania, whether or not she traveled week-ends to and from Wilkes-Barre, Pennsylvania, either by her own car, bus, train or in Mr. Oestreicher's car, and held a conversation while doing so.

As testified, all of Mrs. Wolf's duties were completely confined to the factory as manager and designer. She never travelled in a sales capacity or otherwise. She testified that she wasn't even due to start her duties at the factory until after lunch sometime in the afternoon. So far as the factory is concerned, it could not possibly have made any difference whether Mrs. Wolf went home week-ends or stayed in Wilkes-Barre. So far as the factory is concerned, it was necessary for Mrs. Wolf to live in Wilkes-Barre during the business week so that she could get to work every day. What Mrs. Wolf did with her time after returning to her apartment in Wilkes-Barre after the week's work, cannot by any interpretation,

be in any way connected with her services contracted for, let alone to be intimately connected.

Even to risk being criticized for being repetitious, may it again be pointed out to this Honorable Court that nowhere in the evidence is there any proof that at the time the accident happened, Mrs. Wolf was going to work. The uncontroverted proof is that Mrs. Wolf was being driven to her apartment in Wilkes-Barre at the time the accident happened. Our Court of Errors and Appeals, in the *Rubeo* case, on page 664, of 189 A, speaking through Justice Perskie, said:

> "No exact formula can be laid down which will automatically solve every case."

Why the court below drew a comparison between the case at bar and the *Micieli* case where the employee was riding on a pass given by the employer expressly for a certain railroad as a part of the contract of employment, proves very confusing. We are not here contending that the rules of law laid down in the *Micieli* and *Rubeo* cases are not sound. We take the position that the facts, as adduced, do not bring the case within the exceptions to the general rule as laid down in those cases because:

1. There is no evidence in the case that the plaintiff was riding to work at the time of the accident, which fact should make it unnecessary for this court even to consider whether the exception to the general rule applies; and

2. There is no evidence in the case to support a finding by the court below that the week-end travel to and from Piscataway Township, Middlesex County, N. J., and Wilkes-Barre, Pennsylvania, was so intimately connected with the serv-

ices contracted for between plaintiff Elsa R. Wolf and defendant Albert Oestreicher, as to be deemed in common parlance, a part of it.

POINT III.

It was for the jury to determine from the testimony adduced at the trial of the cause, whether an employer-employee relationship existed between the plaintiff Elsa R. Wolf and the defendant Albert Oestreicher at the time of the accident.

It is strongly urged that, at least, a factual question is present as to whether an employer-employee relationship existed between the plaintiff Elsa R. Wolf and the defendant Albert Oestreicher, at the time of the accident, because of the following reasons:

(1) The evidence does not conclusively prove that plaintiff Elsa R. Wolf was on her way to work at the time of the accident.

(2) The evidence does not conclusively prove that these weekend rides were so intimately related to the particular service contracted for as to be deemed in common parlance, a part of it.

(3) The evidence does not conclusively prove that these weekend rides were beneficial to the plaintiff Elsa R. Wolf and the defendant Albert Oestreicher in the business at Wilkes-Barre, Pa.

If this is a Workmen's Compensation case, then, under the decisions, all of the foregoing facts must have been conclusively established on the motion to non-suit. Otherwise the circumstances do not bring the case within the exception to the general rule that transportation to and from work is not

compensable under the Workmen's Compensation laws.

On a motion to non-suit, the court is strictly bound by certain rules of evidence, which it is here contended, the court below completely ignored. Recently our Court of Errors and Appeals, in the case of *Shappell, et al.* vs. *Apex Express, Inc.*, 131 N. J. L. 583, had occasion to restate those rules. The court said:

> "In passing upon a motion to direct a verdict, just as in passing upon a motion for a nonsuit, the evidence will not be weighed. The party against whom the motion is made is entitled to have all the evidence in his favor and all the legitimate inferences to be drawn therefrom treated as true. When fair minded men may honestly differ as to the conclusion to be reached from that evidence controverted or uncontroverted, the case must be submitted to the jury. *Repasky* v. *Novich*, 113 N. J. L. 126, 172 A. 374; *Christine* v. *Mutual Grocery Co.*, 119 N. J. L. 149, 151, 152, 194 A. 625. A verdict may be directed in favor of one party only when the evidence, together with the legitimate inferences to be drawn therefrom is such that no view which the jury might lawfully take of it favorable to the other party would be sustained. *Sardino* v. *Agnellino*, 119 N. J. L. 7, 194 A. 137."

Let us review the testimony taken at the trial and see if the court below properly applied the rules laid down in the above cited *Shappell* case in reaching its decision.

(1) Was Mrs. Wolf on her way to work at the time of the accident?

Of course, if she wasn't, under any circumstances, an employer-employee relationship at the time of the accident could not possibly exist. Mrs. Wolf testified on page 25, State of Case, that

she was on her way to her apartment in Wilkes-Barre at the time of the accident. She was to have lunch there and then was supposed to go to work at the factory. She further testified that she never went directly from New Brunswick or Piscataway Township to the place of business at Wilkes-Barre. On page 24, State of Case, she testified that she lived in Wilkes-Barre during the week while she worked and in Piscataway Township over the weekends.

The court below inferred from Mrs. Wolf's testimony that, because her ultimate objective in going to Wilkes-Barre was to work during the week, she was on her way to work when the accident happened. In doing so, the court below must have disregarded her testimony that she was not on the way to work at the time. At least the court below did not treat her testimony, and the legitimate inferences to be drawn therefrom, as true.

It is fundamental that a party may be nonsuited only when the evidence, together with the legitimate inferences to be drawn therefrom, is such that no view which the jury might lawfully take of it favorable to the other party, would be sustained. Isn't it clear that if the jury took the view that Mrs. Wolf was not on her way to work (because she said she wasn't and no other proof was offered that she was), no employer-employee relationship could have existed at the time. How then can the court below justify its action?

Further, it is well settled on a motion to nonsuit, that if fair minded men can honestly differ as to the conclusion to be reached from the evidence, controverted or uncontroverted, the case must be submitted to the jury. The court below found that Mrs. Wolf was going to work because her objective in going to Wilkes-Barre was ultimately

to work there during the week. Is that the only conclusion that can be drawn from her testimony? Isn't it probable that the jury might have concluded that Mrs. Wolf was going to her apartment and not to work, because that is *exactly what she said?* To hold otherwise, would mean that the jury could not legitimately distinguish Mrs. Wolf's apartment from the factory.

(2) Were the weekend rides so intimately related to the service contract for, as to be deemed in common parlance, a part of it?

Mrs. Wolf's testimony throughout clearly indicates that her duties were that of a general manager and designer for Mr. Oestreicher in his factory in Wilkes-Barre (See State of Case, pp. 38, 39). The entire business operation was at Wilkes-Barre. The State of New Jersey, Piscataway Township or New Brunswick, had absolutely nothing whatever to do with the services for which she contracted. She did not commute between New Brunswick and Wilkes-Barre because, as her testimony goes, it was physically impossible for her to work in Wilkes-Barre and commute daily from Piscataway Township. Her work at the beginning of each week, did not commence at any definite time. She testified on direct examination, that she was going to her apartment on the morning in question, to have lunch, and after which, she was to go to work (See State of Case, p. 25). On cross examination, she testified that she began work on Monday, generally about 12:30 or 1 o'clock after lunch (See State of Case, p. 36). There is nothing in the evidence to indicate that she was supposed to be at work at a certain time on a Monday, or that it was of greater benefit to the business for her to ride with Mr. Oestreicher instead of by train, bus or by her own car. To the contrary, these rides

appear disconnected and unimportant to the business.

The court below, on the motion to non-suit, determined that these week-end rides were incidental to her employment. In doing so it must have treated all of the foregoing testimony and inferences to be drawn therefrom, as untrue.

(3) Were these weekend rides beneficial to the plaintiff Elsa R. Wolf and the defendant Albert Oestreicher in the business at Wilkes-Barre, Pa.?

It is interesting to note that the court satisfied the beneficial requirement by concluding in its opinion on page 40, State of Case, that "they undoubtedly talked during these rides concerning the business of the company of which she was general manager and designer and of which the defendant was the owner." Let us examine the pertinent testimony and see whether the court below resolved the evidence in favor of the plaintiff and treated the legitimate inferences to be drawn therefrom, as true.

Pages 26, 27, State of Case, direct examination:

> "Q. What were you doing immediately prior to the happening of the accident in the car? A. I was knitting.
>
> Q. Were you conversing? A. Well, yes, we were speaking at the same time I was knitting.
>
> Q. What were you talking about, just generally? A. Generally about business and different things."

Page 34, State of Case, cross examination:

> "Q. And you were knitting, weren't you? A. Yes, I was.
>
> Q. And as you rode along the highway you were talking about the business, were you not? A. Well, we had general conversation, different things.

Q. Well, you did talk about the business. A. Just every day talk.

Q. In other words, this ride back and forth between Wilkes-Barre and New Brunswick gave you and Mr. Oestreicher an opportunity to discuss things that occurred in the business during the week and things to be expected in the future, didn't it? A. While Mr. Oestreicher was driving the car?

Q. Yes. A. I don't think it would be a very good place.

Q. You said you were talking to him. A. Talking occasionally to him. I am not a very good talker in a car, because I want to be watching.

Q. You were knitting at the time. A. Knitting and watching. I can really knit."

On direct examination, inquiry was made of Mrs. Wolf as to what she was doing immediately prior to the accident for the purpose of giving the jury a picture of what was transpiring inside of Mr. Oestreicher's car. On cross examination, an attempt was made by defense counsel to twist the "general conversation" between Mrs. Wolf and Mr. Oestreicher, to mean that these rides gave them an opportunity to discuss things that occurred in the business during the week and things to be expected in the future. Mrs. Wolf denied that implication (See State of Case, p. 34). Yet the court below ignored the denial of Mrs. Wolf and without the benefit of any other testimony, came to a contrary conclusion. In doing so, it violated the rule laid down in the *Shappell* case, cited *supra*, by failing to treat her denial and the legitimate inferences to be drawn therefrom, as true.

The injustice of the situation is further aggravated by the refusal of the court to permit the jury to decide whether these "business conferences", if they took place, were beneficial to Mrs. Wolf and Mr. Oestreicher in the business at Wilkes-Barre. After all, the business men and

women on the jury might have inferred that these alleged conversations were trivial and unimportant to the work and duties at Wilkes-Barre. At least fair minded men could have honestly differed as to the conclusions drawn from such testimony and if that is so, it was an error for the court below not to have submitted the issue to the jury.

In conclusion, it is respectfully submitted that the court below invaded the province of the jury and by such action, has deprived the plaintiff of the right to prosecute an action at law in the courts of our State.

Respectfully submitted,

Fred W. Devoe,
Attorney of Plaintiff-Appellant.

Ishmael Sklarew,
Of Counsel and on the Brief.

To be argued orally by either Fred W. DeVoe, Esquire, or Ishmael Sklarew, Esquire, or both, with the permission of the court.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.
(6684)

New Jersey Court of Errors and Appeals

Elsa R. Wolf, Plaintiff-Appellant, *vs.* Albert Oestreicher, Defendant-Appellee, *and* Louise Fischer, Defendant.	On Appeal from New Jersey Supreme Court, Middlesex County. Sat Below: Oliphant, *C.C.J.*

BRIEF OF DEFENDANT-APPELLEE.

This is an appeal on behalf of the plaintiff below from a judgment of nonsuit entered at the Middlesex Circuit by Judge Oliphant. The nonsuit was granted on the ground that at the time of the accident the plaintiff below was an occupant of an automobile owned and operated by her employer, the defendant below, in transporting her from New Brunswick, New Jersey, to her place of employment at Wilkes-Barre, Pennsylvania, and that this transportation was a privilege incidental to the employment beneficial to both, and had been a continued practice over several months, and that the plaintiff's sole remedy in New Jersey was in the Workmen's Compensation Bureau (S. C., p. 40, l. 20; p. 41, l. 40).

Statement of Facts.

The plaintiff testified that she first went to work for the defendant in New York in 1936 and at that time the defendant was an importer of in-

fants' wear from the Philippine Islands; that after the Japanese invasion cut off his source of supply he established a factory in Wilkes-Barre, Pennsylvania. This factory was opened in January, 1942, and she agreed with the defendant that she would work at this factory in Wilkes-Barre as general manager and designer; that her salary was paid on a percentage basis (S. C., p. 30, l. 30, to p. 31, l. 30).

Her duties with the defendant were to make all designs for the infants' dresses that were manufactured; to see that the employees did their work correctly; she hired and discharged the help and saw that the foreladies took care of the girls; if anything went wrong she would rectify it; it was her obligation to see that girls at special machines would have work to do; that it was her duty to be constantly there to make changes or anything that was necessary in order to keep the work going and not to have any bottle neck in the factory; that she was also in charge of the cutting, giving out cutting slips, and general manager of the entire business (S. C., p. 38, l. 20 to p. 39, l. 10).

When the plaintiff went to work for the defendant in January, 1942, she and her husband lived on a farm in Piscataway Township, Middlesex County, New Jersey, and they lived there at the time of the accident, which occurred on November 30, 1942. It was impossible for her to commute each day from her home in Piscataway Township to Wilkes-Barre, and as a result thereof she rented an apartment in Wilkes-Barre where she lived from Monday until Friday (S. C., p. 31, l. 30 to p. 32, l. 10).

She also testified that the defendant lived in Brooklyn and whenever he brought his automobile to Wilkes-Barre he would transport her in it to

New Brunswick on Friday night. He would then turn the automobile over to the plaintiff and he would proceed to his home in Brooklyn by train. The plaintiff would drive defendant's automobile from New Brunswick to her home at Piscataway Township and keep it there over the weekend. On Monday morning she would drive the defendant's automobile to the station at New Brunswick and the defendant would get off the train at New Brunswick and drive the plaintiff in his automobile to Wilkes-Barre (S. C., p. 32, l. 10 to p. 33, l. 10).

The transporting of the plaintiff began sometime in April or May of 1942; that between April, 1942, and November 30, 1942, when the accident occurred, the defendant, her employer, had transported her between Wilkes-Barre and New Brunswick and back again quite often (S. C., p. 33, l. 20, p. 34, l. 10).

If the plaintiff did not ride in the defendant employer's automobile she would have to use her own car or go by train or bus and pay her own fare from New Brunswick to Wilkes-Barre and return (S. C., p. 24, l. 30, to p. 25, l. 10), that it was the usual custom when she rode with the defendant in his automobile to leave New Brunswick around 7:30 or 7:40 A. M. on Monday morning (S. C., p. 32, ll. 20-30); that they would arrive in Wilkes-Barre about 11 or 11:30 A. M.; that she would then have lunch at her mother's apartment in Wilkes-Barre and she would generally begin work at 12:30 or 1 o'clock (S. C., p. 36, ll. 20-30).

The accident occurred on Monday morning, November 30, 1942, at about 8 or 8:30 A. M. (S. C., p. 30, ll. 30-40). On Friday night preceding the accident the defendant had driven her in his car to New Brunswick and he had continued to his home in Brooklyn by train, and the plaintiff had taken

the automobile on that evening to her farm in Piscataway Township. She returned with the defendant's automobile to New Brunswick on the morning of the accident at 7:30 A. M. where the defendant joined her and started to drive back with her in his automobile to Wilkes-Barre (S. C., p. 32, l. 30, p. 33, l. 10).

The accident occurred on New Jersey State Highway Route 29. It had rained the night before and the road was icy in spots. Plaintiff herself had no knowledge as to how the accident occurred (S. C., p. 26, l. 10 to p. 27, l. 30).

Plaintiff further testified that immediately prior to the accident she was knitting and talking generally about business and different things (S. C., p. 26, l. 40 to p. 27, l. 10).

The plaintiff also testified that the reason she went to Wilkes-Barre the latter part of January, 1942, and each week thereafter was because her place of employment was there with the defendant (S. C., p. 36, ll. 10-20).

On the day of the accident, November 30, 1942, the reason she was going to Wilkes-Barre was to go to her apartment for lunch and then to work for the defendant, and that the reason her presence in Wilkes-Barre was required was because her work was there; that if she was not transported by the defendant in his automobile, she would have had to return by train or bus (S. C., p. 36, l. 20 to p. 37, l. 10).

This concluded the testimony on the part of the plaintiff as far as the issues here are concerned.

A motion on behalf of the defendant was then made for a nonsuit on the grounds that the Court did not have jurisdiction of the plaintiff's claim

and that it appeared from the evidence that plaintiff's remedy,if any, against the defendant in this State was under the Workmen's Compensation Act as found in Rev. St. 34:15-1, *et seq.*, and on the ground that there was no evidence that the defendant violated any duty to the plaintiff cognizable by the Court. The Court granted the defendant's motion for nonsuit (S. C., p. 39, l. 30 to p. 41, l. 40).

ARGUMENT.

The uncontradicted evidence established that the plaintiff's remedy in this State is under the Workmen's Compensation Act.

The only testimony in the case at the time the nonsuit was entered relative to the plaintiff's status was that of the plaintiff herself. An examination of this uncontroverted testimony will show that at the time of the accident the plaintiff was being transported by her employer from New Brunswick, New Jersey, to her place of employment at Wilkes-Barre, Pennsylvania, in an automobile owned and operated by the defendant, her employer, and that the accident occurred in the State of New Jersey; that this transportation was the result of a continued practice which had existed from April, 1942, until November 30, 1942, the date of the accident; that this transportation was for the benefit of both the plaintiff and the defendant, and that it was a privilege incidental to her work with the defendant.

If the facts are as we assert, then under the established law the plaintiff received her injury as a result of an accident arising out of and in the course of her employment with the defendant, and her sole remedy upon invoking the jurisdiction

available to her in this State is under the Workmen's Compensation Act. It is admitted, of course, that the transportation was with the express authority of the employer as he personally transported the plaintiff from Wilkes-Barre to New Brunswick and from New Brunswick to Wilkes-Barre in his own car and operated it himself. It is also admitted by the plaintiff that she would return from Wilkes-Barre to her home in Piscataway Township every Friday night and leave New Brunswick every Monday morning to return to her place of employment at Wilkes-Barre (S. C., p. 31, l. 30; p. 32, l. 30); that on Friday night preceding the accident she had been transported by the defendant in his automobile from Wilkes-Barre to New Brunswick and the defendant continued to his home in Brooklyn; that she then took the defendant's car to her home in Piscataway Township and met the defendant on Monday morning at about 7:30 A. M. in New Brunswick, and that it was while driving back to Wilkes-Barre, her place of employment, on State Highway 29 somewhere near Somerville that the accident occurred (S. C., p. 32, l. 30 to p. 33, l. 10).

It also appeared that the plaintiff first went to work for the defendant in Wilkes-Barre in January, 1942, and that beginning in April or May, 1942, the defendant started using his car in transporting the plaintiff from the place of employment to her home and back again on the various weekends; that from April, 1942, until the date of the accident, November 30, 1942, this method of transportation was used quite often (S. C., p. 33, l. 20 to p. 34, l. 20).

If the plaintiff was not transported by the defendant, it was necessary for her to go by train or bus and pay her own fare (S. C., p. 25, ll. 10-20).

It is also clear from the testimony that her only purpose in going to Wilkes-Barre was to continue her employment there with the defendant. The fact that she had an apartment there was merely incidental to her employment because she could not commute every day from Wilkes-Barre to New Brunswick (S. C., p. 31, ll. 30-40). The journey on Monday morning from New Brunswick to Wilkes-Barre would begin around 7:30 A. M., and it did on the day of the accident, and they would reach Wilkes-Barre at around 11 or 11:30 A. M. (S. C., p. 32, l. 20 to p. 33, l. 10; p. 36, ll. 20-30).

Upon reaching Wilkes-Barre, it was the custom of the plaintiff to have lunch at her mother's apartment and then go to work at the defendant's plant at 12:30 or 1 o'clock. She would have a lunch hour on other days when she worked at the defendant's plant (S. C., p. 36, ll. 20-30).

She testified that the purpose of the trip on the day the accident occurred was to return to her employment with the defendant at Wilkes-Barre after she had lunch at her apartment (S. C., p. 36, ll. 10-40).

It is also evident that the transportation was beneficial both to the plaintiff and the defendant. The plaintiff saved her transportation costs from Wilkes-Barre to New Brunswick and return and in addition thereto her income was fixed on a percentage basis (S. C., p. 31, ll. 20-30). She was the general manager of the defendant's plant and she testified her duties were as follows (S. C., p. 38, l. 30 to p. 29, l. 10):

> "Q. Now, precisely what do you do in this place, Mrs. Wolf? A. Well, I make all the designs for the various infants dresses that we manufacture. I am up in the factory. I watch that the girls do their work correctly. I hire

the help, lay off help, see that the foreladies take care of their girls, and if anything goes wrong they come to me. At times if girls at special machines, if I didn't immediately change those garments it would mean other girls would have no work. So I have to be constantly there to make changes or anything that is necessary in order to keep the work going and not have any bottle-neck in the factory. Also in charge of the cutting, give out cutting slips, and so forth. General managing of the entire business."

It was beneficial both to the defendant to have his general manager there to operate his business and to the plaintiff to see that the business was being conducted properly as her income obviously was based on a percentage of the profits.

Applying the uncontradicted evidence to the settled law, it is self evident that the trial judge's conclusion in nonsuiting the plaintiff and holding that her remedy was solely under the New Jersey Workmen's Compensation Act as far as any proceeding in this State was concerned, is correct.

There is not any evidence in the case as to the place where the contract of hire was entered into between the plaintiff and the defendant, but the evidence is undisputed that the accident occurred in New Jersey.

In *American Radiator Company* v. *Rogge*, 86 N. J. L. 436, affirmed 87 N. J. L. 314, writ of error dismissed 245 U. S. 630, it was held that where a contract of hire was entered into in New York and the accident arose in New Jersey, the New Jersey Workmen's Compensation Bureau had jurisdiction of such claim if it arose out of and in the course of the employment. In that case the employee was hired in New York, but was working in New Jersey when he met his death as a result of an accident arising out of and in the course of his

employment. The employer contended that the contract of hire having been made in New York, the rights of the employee and employer were governed by the laws of the State of New York and that the Workmen's Compensation Bureau did not have jurisdiction of the claim. Our Supreme Court held to the contrary and its opinion was affirmed by this Court. In its opinion the Supreme Court said at page 437:

> "We think the answer to the prosecutor's contention is that the right of recovery rests not upon the New York contract but upon the New Jersey statute. The liability is indeed contractual in character by force of the very terms of the statute, but it is not the result of an express agreement between the parties; it is an agreement implied by the law, of a class now coming to be called in the more modern nomenclature of the books 'quasi-contracts'."
> * * *

and at page 440:

> "The legislation marks a complete change in the policy of the state, a change so complete that pecuniary liability in the class of cases covered by the act, rests not upon any fault of the defendant, but upon the simple fact of the relationship of employer and employee. The act makes no distinction between cases where that relationship is created by a contract made in New Jersey and a contract made in another state. The language of section 9 is general; it covers 'every contract of hiring'."

To the same effect is *Davidheiser* v. *Hay Foundry and Iron Works,* 87 N. J. L. 688.

N. J. R. S. 34:15-9 provides that every contract of hiring entered into shall be presumed to have been made with reference to the provisions of Article 2, which is the Workmen's Compensation

Act, unless either party shall, prior to the accident, in writing, inform the other party to the contract that the provisions are not intended to apply.

As pointed out in the case cited, the contract of hiring relates to any hiring, whether made in this State or any other State, so long as the accident occurred in this State and arose out of and in the course of the employment.

N. J. R. S. 34:15-8 provides that such implied agreement shall be a surrender of the parties thereto of any other method, form or amount of compensation, or determination thereof, than as provided in the Workmen's Compensation Bureau.

It being settled in this State that the employee's right to compensation is limited to the provisions of the Workmen's Compensation Act if the accident occurred in this State and arose out of and in the course of the employment, the only question that remains is, "Did the injury sustained by the plaintiff arise out of and in the course of her employment with the defendant?" That it did is settled by the cases in this Court.

It was early established in this State by this Court that "the relation of master and servant continues during the carriage of the servant to and from his work when done by the master, or with his consent, where from the character of the service such transportation is beneficial both to the master and servant". *Cicalese* v. *Lehigh Valley Railroad Co.*, 75 N. J. L. 897; *Depue* v. *Salmon Company*, 92 N. J. L. 551.

The last word by this Court on this question is in *Micieli* v. *Erie Railroad Co.*, 130 N. J. L. 448, affirmed 131 N. J. L. 427. In that case the plaintiff's decedent was an employee of the Erie Railroad Company and his entire work was as a bag-

gage porter at its terminal in Jersey City. He lived in Paterson and was provided with a pass which permitted him to ride on Erie Railroad's trains between Jersey City and Paterson. On his way home from work he attempted to jump from a moving train at Paterson, when he fell and met his death. The Supreme Court and this Court both held that although the employee was on his way home from work and had reached his home town that his accident arose out of and in the course of his employment with the railroad company. The Supreme Court in his opinion pointed out at 130 L., page 452:

> "Injuries sustained by a workman while he is provided with transportation when going to or coming from his work are considered as arising out of and in the course of his employment when such transportation, for examples, is the result of an 'express agreement' between the employer and his workman, or when it has ripened into a 'custom' to the extent and it is 'incidental to,' and 'part of' the 'contract of employment,' or when it is with the 'knowledge and acquiescence of the employer', or when it is the result of a 'continued practice' in the 'course of the employer's business' and which practice is 'beneficial to both employer and employee'."

and at page 455:

> "The 'requisite relation of master and servant' continued on decedent's homeward journey and legally the 'hazards thereof are regarded as reasonably incident to the services bargained for'."

This Court affirmed the judgment of the Supreme Court at 131 L. and said at page 439:

> "On the main question the general rule is that an employee who is carried to and from

his place of employment as part of his contract of service, or as a *privilege incidental thereto* with no deduction from his regular wages for such transportation, is considered by the weight of authority to be a servant, and not a passenger. (See 10 Amer. Jur. 37, § 973, and cases cited. Italics above supplied.) This principle is apt in this case; and the cases in this country are generally in accord (See 62 A. L. R. 1445; 145 A. L. R. 1035)."

* * * * * *

"In the instant case free transportation of the employee on the employer's trains (i. e., between Paterson and Jersey City) was, as the Supreme Court found, mutually advantageous to both parties and stamps that feature of the fact situation as an incident of the employment contract."

In *Rubeo* v. *McMullen Company,* 117 N. J. L. 574, 118 Id. 530; affirmed 120 Id. 182; the employee was transported by a truck of his employer from Rahway, New Jersey, to Staten Island, the place of the work, over a period of about 13 or 14 days. During one of these trips, returning from work, he fell from the truck when it was passing through Jersey City and received the injuries from which he died. The Supreme Court in the first appeal held that it was the obligation of the petitioner in the Compensation Court to establish that the transportation of the employer had ripened into a custom to such an extent as to become part of the contract of employment. This Court reversed the Supreme Court and in its opinion in 117 N. J. L. at page 577 said:

"Assuming that it can be said that the Supreme Court adopted the facts as found by the Court of Common Pleas, nevertheless, it based its affirmance of the judgment of the latter court on the grounds that the proofs failed to establish (1) either 'an express contract to provide transportation', or (2) that

> the transportation 'had (not) ripened into a custom to such an extent as to become part of the contract of employment'. In so doing it appears to us that the court, in effect, held that for injuries or death suffered by an employe during the transportation period to be compensable, *i. e.,* arising out of and in the course of the employment, it must appear that the transportation was in pursuance of either an express contract between the employer and the employe, or that the right to transportation must have ripened into a custom to such an extent as to become part of the contract. This is not necessarily so. The liability of the employer in the premises is not so limited or circumscribed. It is based on principles of law which are broader in base and effect than the stated limitations or circumscriptions would tend to indicate. The injuries or death suffered by the employe during the transportation period may not necessarily occur under the circumsances embraced within the principles of law pronounced by the court below and yet may well be, for example, the result of a practice between the parties which is beneficial both to the employer and employee. And it is the well settled law that an accident occurring in the latter circumstance is one arising out of and in the course of the employment and hence is compensable."

This Court in applying the factual situation in that case to the law postulated three questions at page 579:

> "Was the transportation for 13 or 14 days prior to and including the date of the accident with the express or implied knowledge and acquiescence of the employer?"

Applying the purport of that question to the facts at bar, the answer must be "Yes", because the employer himself transported the plaintiff in his own automobile.

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> "Was it the result of continued practice, or in the course of the business of the employer?"

The answer is again "Yes" as the plaintiff testified that she was transported quite often between Wilkes-Barre and New Brunswick and back again from April or May, 1942, and until November 30, 1942, when the accident happened.

> "Was it for the benefit of both employer and employee?"

Again the answer must be "Yes", because the employee saved her transportation costs and her income was based on a percentage of the profits; she was the general manager of the factory and had control of design, production and employees. Her presence was an important factor in the operation of the plant, so that it was beneficial to the plaintiff and the defendant that she arrive at the plant on Monday with reasonable dispatch and supervise the operation of the factory.

In the second appeal in the *Rubeo* case, the Supreme Court in 118 N. J. L., page 531, said:

> "When the accident happened, the essential statutory relation, in popular understanding and intent, had not been terminated. The line of delimitation is not so finely drawn. The provision of transportation, if not the subject of an express or implied undertaking binding under any and all circumstances, was plainly within the contemplation of the parties, at the time of the making of the contract of employment, as the thing to be done when in special circumstances the common interest would thereby be subserved. But however this may be, the furnishing of this accommodation grew, with the knowledge and acquiescence, if not indeed the direction, of the employer, into a practice grounded in mutual convenience and advantage. The de-

> ceased employe, while not directly concerned, in the journeys to and fro, with the performance of the work for which he was employed, was yet engaged in that which, by mutual consent, was considered as incidental to the employment. It was a thing so intimately related to the particular service contracted for as to be deemed, in common parlance, a part of it. This is the legislative sense of the term 'employment'. The requisite relation of master and servant continued during the journey; and the hazards thereof are therefore regarded as reasonably incident to the service bargained for."

The law set forth in the *Rubeo* case should be dispositive of the issues raised here. The transportation provided by the employer in the case at bar continued from month to month from April to November and was the result of mutual consent of the parties, beneficial to both parties and clearly incidental to the employment and the management of the factory, in which both were financially interested.

The facts in the case at bar are even more persuasive than those in the *Rubeo* case as the plaintiff here was manager and designer, and operated the entire plant of the defendant.

To the same effect is *Laverty* v. *Ludington,* 110 N. J. L. 410. This Court in its opinion adopted the language in *Saba* v. *Pioneer Contracting Co.,* 103 Conn. 559, 131 Atl. Rep. 394:

> "When an employe mounted the truck at the employer's direction to go to the job, in accord with the employer's contemplation of what his conduct would be in going to the place of the job, he came within the zone of his employment as contemplated by his employers. The mere fact that the time spent on the truck was not time for which by his contract of employment he was paid is immaterial, in view of the facts found."

Also *Alberta Contracting Corp.* v. *Santomassimo,* 107 N. J. L. 7 (Sup. Ct.) wherein the Court said:

> "We believe that the pertinent rule to be extracted from the cases is this: The relation of employer and employe continues while the employe is riding to and from his employer's premises, in a truck used in connection with his employer's work, by direction of his employer, with his knowledge and acquiescence in the continued practice, which was beneficial to both the employer and employee; and an injury sustained while so riding arises out of and in the course of his employment."

The plaintiff in her brief cites cases from other States on the theory that even though the accident happened within a State unless it was contemplated that the employee should perform work in that State of a substantial character, the State in which the accident occurred would not assume jurisdiction. This, of course, is of no avail to the plaintiff here, because the settled law of this State is to the contrary. The only case cited in this State by the plaintiff as an argument on that ground is *Ritenouer* v. *Creamery Service, Inc.,* 17 Atl. Rep. (2d) 283, 19 N. J. Misc. 82. That is an opinion of the Workmen's Compensation Bureau and the facts in that case are not applicable to the issues here.

The petitioner in that case entered into his contract of hire in the State of New York and the accident accurred in the State of New York, so that neither the contract of hire, nor the accident occurred in the State of New Jersey. The claim of the petitioner was that the New Jersey Bureau should take jurisdiction because in his daily route in driving a milk truck from Brooklyn, New York, to upstate New York he drove through a small

portion of New Jersey. Obviously the Compensation Bureau in that case was correct in its holding.

Regardless of which approach to the problem the plaintiff attempts, the ultimate determination is the same. If the accident happened in New Jersey, as it did here, and the accident arose out of and in the course of employment, as it did here, then the plaintiff having invoked the jurisdiction permitted in this State is bound by the adjudicated law, which limits the plaintiff solely to her remedy in the Workmen's Compensation Bureau.

The contention of the plaintiff that she was not on her way to work at the time the accident occurred and on the weekend transportation from New Brunswick to Wilkes-Barre is merely begging the question. The only reason she went to Wilkes-Barre in January, 1942, and returned there weekly thereafter was because of her position there as general manager of the defendant's plant. The mere fact that she intended to stop at her mother's apartment and have lunch before she proceeded to the plant does not change the character, or the nature, or the purpose of the transportation, as she admitted she always had lunch during the working days.

This Court in *Pilkington* v. *State Highway Department*, 124 N. J. L. 11, affirmed 125 Id. 444, adopted the law laid down by Justice Cardozo in the New York Court of Appeals in *Mark's Dependents* v. *Gray, et al.*, 167 N. E. Rep. 181, in which it was said:

> "We do not say that service to the employer must be the sole cause of the journey, but at least it must be a concurrent cause. To establish liability, the inference must be permissible that the trip would have been made

though the private errand had been cancelled. * * * The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. *Clawson* v. *Pierce-Arrow Motor Car Co.,* 231 N. Y. 273; 131 N. E. Rep. 914. If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk."

This rule was recently applied by the Supreme Court in *Martin* v. *Hasbrouck Heights Building Loan and Savings Association,* 132 N. J. L. 569. In that case the employee of the building and loan was on his way home as usual for his dinner, but also had made appointments to meet persons who had business with him as a representative of the building and loan at his home. The Court pointed out that the journey to his home for his dinner and to keep his appointments were concurrent acts and that, therefore, when he was struck by an automobile on a public highway on the way to his home the accident arose out of and in the course of his employment with the employer.

Here also it is clear that the necessity for the plaintiff's travel from her home to her place of employment at Wilkes-Barre was the motivating cause and the actual reason for the journey. If she did not have employment with the defendant at Wilkes-Barre she would not have lived there, and she would not have had an apartment there, and she would not have had her lunch there.

We, therefore, respectfully submit that the uncontradicted proofs on the part of the plaintiff herself establish that her accident arose out of and

in the course of her employment with the defendant and that her sole remedy in this State is in the Workmen's Compensation Bureau, and for that reason the judgment of nonsuit entered in the Supreme Court should be affirmed.

Respectfully submitted,

Cox and Walburg,
Attorneys for Defendant-Appellee.

Harry E. Walburg,
Of Counsel.

To be argued orally by Harry E. Walburg.

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