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Notice of Appeal to New Jersey Court of Errors
and Appeals.

New Jersey Supreme Court.

10

STELLA SUDOL, by her next
friend JOHN SUDOL, and JOHN
SUDOL, individually,
Plaintiffs-Appellees,

vs.

MAX GURTMAN and IDA GURT-
MAN, (first name fictitious,
being unknown), EDWARD
KRONES, BENJAMIN KRONES
and L. & G. BUILDING COM-
PANY, a corporation,
Defendants-Appellants.

In Tort.
Notice
of Appeal.

20

To FEDER & RINZLER, ESQS.,
Attorneys of Plaintiff-Appellees,
Liggett Building,
Passaic, New Jersey.

30

Sirs:

Take Notice that the defendant-appellants, Max
Gurtman and L. & G. Building Company, a corpor-
ation, hereby appeal to the Court of Errors and
Appeals from the decision of the New Jersey Su-

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Notice of Appeal.

preme Court rendered in the above entitled action on the fifth day of October, 1927.

GURTMAN & WALKER,
Attorneys for Defendant-Appellants,
Max Gurtman and L. & G. Building
Company, a corporation.

10

Consent is hereby given to file within Notice of Appeal as of time.

Dated: October 15, 1927.

FEDER & RINZLER,
Attorneys for Plaintiffs-Appellees.

20

30

40

Specification of Ground of Appeal.

COURT OF ERRORS AND APPEALS OF NEW JERSEY.

STELLA SUDOL, by her next friend, JOHN SUDOL and JOHN SUDOL, Individually,
Plaintiffs-Respondents,

vs.

MAX GURTMAN and IDA GURTMAN, (First name fictitious, being unknown), et als.,
Defendants-Appellants.

In Tort. 10
On Appeal from Supreme Court.
Specification of Ground of Appeal.

20

That the New Jersey Supreme Court erred in rendering judgment in favor of plaintiffs-appellees and against defendants-appellants, Max Gurtman, Ida Gurtman, and L. & G. Building Company, a corporation.

Dated: October 25, 1927.

Yours very truly,

GURTMAN & WALKER,
Attorneys for Defendants-Appellants.

30

NICHOLAS O. BEERY,
Of Counsel.

40

Rule Affirming Judgment.

NEW JERSEY SUPREME COURT.

10 STELLA SUDOL, by her next friend, JOHN SUDOL and JOHN SUDOL, Individually, Plaintiffs-Respondents,

vs.

20 MAX GURTMAN and IDA GURTMAN, (First name fictitious, being unknown), et als., Defendants-Appellants.

On Appeal.
Rule Affirming Judgment.

20 At the trial of this case in the Passaic District Court, the trial judge having entered judgment for the plaintiff, Stella Sudol, by her next friend, John Sudol, against the above named defendants in the sum of Three Hundred and Fifty (\$350.00) Dollars, besides costs, said defendants appealed from said judgment to this court, and this court having duly heard and considered the arguments of the attorneys for the plaintiffs and of the defendants at
30 the May Term, 1927, of this court:

It is, on this 15th day of October, 1927, ORDERED, that the aforesaid judgment be and the same is hereby affirmed with costs, and the record be re-

Rule Affirming Judgment.

mitted to the court below to be proceeded with according to law and the practice of said court.

Entered - October 15th, 1927.

On Motion of
FEDER & RINZLER,
Attorneys of Plaintiffs-Respondents. 10

A true copy
EDWARD J. KELLEHER,
Clerk.

Notice of Appeal.
PASSAIC DISTRICT COURT.

10 STELLA SUDOL, by her next friend JOHN SUDOL, and JOHN SUDOL, individually, Plaintiffs,

vs.

20 MAX GURTMAN and IDA GURTMAN, (first name fictitious, being unknown), EDWARD KRONES, BENJAMIN KRONES and L. & G. BUILDING COMPANY, a corporation, Defendants.

In Tort
Notice of
Appeal

To FEDER & RINZLER, ESQS., Attorneys of Plaintiffs:

Sirs:

30 TAKE NOTICE that the defendants, Max Gurtman and L. & G. Building Company, a corporation, hereby appeal to the New Jersey Supreme Court from the judgment of the Passaic District Court rendered in the above stated action on the twenty-eighth day of January, 1927.

GURTMAN & WALKER,
Attorneys for Defendants, Max Gurtman and L. & G. Building Company, a corporation.

40 Service of copy of within Notice of Appeal acknowledged this 29th day of January, 1927.

FEDER & RINZLER,
Attorneys of Plaintiffs.

Transcript.

PASSAIC DISTRICT COURT.

State of New Jersey, {
Passaic County. } ss.:

Before ROBERT J. McDERMOTT, Esq.,
Acting Judge.

In Tort, Demand, \$500.00

10

APPEARANCES:

FEDER & RINZLER, Plaintiffs' Attorneys.
GURTMAN & WALKER, Defendants' Attorneys.

No. 29122.

20 STELLA SUDOL, by her next friend JOHN SUDOL, and JOHN SUDOL, individually, Plaintiffs,

vs.

30 MAX GURTMAN and IDA GURTMAN, (first name fictitious, being unknown), EDWARD KRONES, BENJAMIN KRONES and L. & G. BUILDING COMPANY, a corporation, Defendants.

In Tort
Transcript

A summons was issued out of this court, tested January 7, 1926, returnable January 14, 1926, at ten o'clock in the forenoon at the Court-room of said Passaic District Court. The constable or 40

Transcript.

Sergeant-at-Arms made the following return on the summons, viz.:

“Served this summons January 7, 1927 by reading the same to Benjamin Kroner, Edward Kroner, the defendant, and delivering to them a copy thereof.

10

JOHN P. GRANEY,
Sergeant-at-Arms or Constable.”

“Served this summons January 7, 1927, by leaving a copy thereof at the defendant's place of abode in presence of Sophie Levitt, wife of Sidney Levitt, pres. of def. Co. a person of the family, of the age of fourteen years, who was informed of the contents thereof; the said defendant not being found.

20

JOHN P. GRANEY,
Sergeant-at-Arms or Constable.”

“Service of a true copy of State of Demand and Summons is hereby accepted as for defendants, Max Gurtman and Ida Gurtman, Process herein waived.

30

GURTMAN & WALKER,
W. N. Gurtman.”

Plaintiffs' State of Demand was filed on January 7, 1926.

The cause was listed for trial January 12, 1927 and adjourned to January 14, 1927, when it was further adjourned to January 28, 1927.

On January 28, 1927 plaintiffs appeared and the defendants appeared and the cause proceeded as follows:

40

*Transcript.**On the Part of the Plaintiffs*

Petition and Order for Appointment of Next Friend filed.

Leonard W. Meyers, stenographer, sworn according to Statute by Judge Robert J. McDermott.

Then the following persons were sworn as witnesses and gave testimony—Stella Sudol, Edward Kroner, Sidney Levitt, John Sudol and Sophia Sudol.

10

On the Part of the Defendants

Max Gurtman, Elias Kovak and Sidney Leavitt.

Saul Eigen and Nellie Koval were sworn as interpreters.

Non-suit entered as to Edward Kroner and Benjamin Kroner.

20

Judgment was then entered against Max Gurtman and L. & G. Building Company and in favor of Stella Sudol for Three Hundred and Fifty (\$350.) Dollars, together with costs of suit.

February 2, 1927 Notice of Appeal filed.

February 2, 1927 Bond of Max Gurtman filed.

February 2, 1927 Bond of L. & G. Building Company filed.

I, Dominick DeMuro, Esq., Clerk of the Passaic District Court certify that said Court is a Court of Record with a Seal; that the foregoing is a Transcript and true copy of the record of a Judgment of said Court in an action In Tort, in which on the 28th day of January, 1927, the Plaintiff, Stella Sudol, recovered against the defendants, Max Gurtman and L. & G. Building Company, the sum of Three Hundred Fifty (\$350.00) Dollars debt, and Twenty-two dollars and Seventy (\$22.70) cents,

30

40

Transcript.

costs of suit, including attorneys' allowance 5%, and that said Judgment remains of record unsatisfied.

10 IN WITNESS WHEREOF, I have hereunto set my hand as Clerk of the said Passaic District Court, and affixed the seal of said Court, this eleventh day of February, One Thousand Nine Hundred and Twenty-seven.

(Seal) D. DE MURO,
Clerk.

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Specifications of Grounds of Appeal.

NEW JERSEY SUPREME COURT.

STELLA SUDOL, by her next friend JOHN SUDOL, and JOHN SUDOL, individually,
Plaintiffs-Appellees,

vs.

MAX GURTMAN and IDA GURTMAN, (first name fictitious, being unknown), EDWARD KRONES, BENJAMIN KRONES and L. & G. BUILDING COMPANY, a corporation,
Defendants-Appellants.

10

In Tort
On Appeal
from Passaic
District
Court.
Specification
of Grounds
of Appeal.

20

To FEDER & RINZLER, ESQS.,
Attorneys of Plaintiffs-Appellees,
and
EDWARD J. KELLEHER, ESQ.,
Clerk of New Jersey Supreme Court.

30

Sirs:

The following are the specifications of the determinations of the Passaic District Court, with which the defendants-appellants, Max Gurtman and L. & G. Building Company, a corporation, are dissatisfied.

1. That the court erred in not granting nonsuit in favor of defendants-appellants at conclusion of plaintiffs' case.

40

Specification of Grounds of Appeal.

2. That the court erred in not directing verdict in favor of defendant-appellant, Max Gurtman, at time his case was rested.

3. That the court erred in not directing verdict in favor of defendant-appellant, L. & G. Building Company, at time its case was rested.

10 4. That the case was devoid of evidence from which negligence, expressed or implied, of defendants-appellants or either of them, could be reasonably inferred.

5. That the verdict was contrary to the weight of evidence.

6. That the damages awarded were excessive in the face of the evidence.

20 7. That the court erred in denying defendants-appellants right to examine scar of plaintiff, Stella Sudol.

Dated February 11, 1927.

Yours very truly,

GURTMAN & WALKER,
Attorneys of Defendants-Appellants.
NICHOLAS O. BEERY,
Of Counsel.

30

Endorsed:

Service as of time of copy of within Specifications of Grounds of Appeal is hereby acknowledged this 20th day of May, 1927.

FEDER & RINZLER,
Attorneys of Plaintiffs-Appellees.

40

PASSAIC DISTRICT COURT.

STELLA SUDOL, <i>etc.</i> , Plaintiff,	}	Action at Law	10
vs.			
MAX and IDA GURTMAN, <i>et als</i> , Defendants.			

Passaic, N. J., January 28, 1927.

Before: HONORABLE ROBERT J. McDERMOTT, Judge.

APPEARANCES:

For the Plaintiffs:
MESSRS. FEDER & RINZLER; By Jack Rinzler, Esq. 20

For the Defendants:
EDWARD F. MURPHY, ESQ., for Edward Kronos and Benjamin Kronos.
WILLIAM GURTMAN, ESQ., for Max and Ida Gurtman and the L. & G. Building Company.

Leonard W. Meyer was duly sworn as Stenographer. 30

STELLA SUDOL, one of the plaintiffs herein, called as a witness on behalf of the plaintiffs, being duly sworn, testifies as follows:

DIRECT-EXAMINATION BY MR. RINZLER:

Q. Miss Sudol, how old are you? A. Fifteen.

Q. On July 8th, 1926, did you have an accident while walking along Madison Street? A. Yes. 40

Stella Sudol—Direct—for Plaintiffs.

Q. Did you have an accident while you were walking on the sidewalk? A. On the sidewalk.

Mr. Murphy: I object, if it please the Court, because this is a leading question on a material issue.

10 Q. Did that happen in the open or on the street?

The Court: Did you have an accident while you were passing by the building; is that what you mean?

Mr. Rinzler: Yes.

The Court: Put it that way.

The Witness: It happened on the sidewalk.

20 Q. It happened on the sidewalk in front of which property? A. I don't know whose property it belongs to, because when I was hurt I was unconscious for about ten minutes, and then I came to. My mother don't know how to speak in English; so there was a boy there—

Q. In front of what property; what is the number of the property? A. 220.

Q. 220 Madison Street? A. Madison Street.

30 Q. Just tell his Honor how you walked by that building and what happened to you as you walked by. A. Well, we were coming from Monroe Street, so we took a shorter cut up to Madison Street, because, well, in case the bus comes, so we can get the bus right across the street. We were walking. When we were passing the building one of the fellows was going up the ladder, and one of the fellows was down. So I don't know what happened after that, because something dropped, and I don't know—when I come to I saw that there was a lead-
40 er pipe there.

Stella Sudol—Direct—for Plaintiffs.

Q. A leader pipe? A. Yes.

Q. Did you know that it dropped until it hit you? A. No.

Mr. Murphy: I object, if it please the Court, on the ground that the question is leading, and it is a question material to the issue. 10

The Court: How is it leading?

Mr. Murphy: He asks her, "Did you know it was?"

The Court: Well, ask her if she knew what it was.

Mr. Murphy: She has testified that she was picked up unconscious, and when she was picked up she saw a piece of leader pipe. What connection has that leader pipe with her injury? 20

The Court: I know, but that does not decide the case. If she saw that, that does not say she was hit by it then.

Mr. Murphy: That is it. He asked the next question, "Did you see this falling before it hit you?"

Mr. Rinzler: I am not saying what it was, whatever it was.

The Court: Ask her if she knew what hit her and what happened. 30

Q. You say something hit you? A. Yes.

Q. Before it actually hit you did you know that something was falling? A. Why, no, I didn't know nothing was falling.

Q. Where did it strike you? A. It struck me on my right shoulder.

Q. What happened to you when it struck you on your right shoulder? A. I fell right down. 40

Stella Sudol—Direct—for Plaintiffs.

Q. Were you conscious or unconscious? A. I was unconscious for about five minutes.

Q. Unconscious for about five minutes? A. Yes.

Q. Then when you became conscious again— A. I couldn't say anything when I come conscious.

Q. Just answer my question. When you became
10 conscious again did you see anything around you?

A. Why, yes; the pipe was right by me.

Q. The leader pipe? A. Yes.

Mr. Murphy: I object, if it please the Court, upon the ground that the question is leading.

The Court: When she became conscious she saw—

Mr. Murphy: A pipe.

20 The Court: —a piece of leader pipe lying by her. That is all right. That is testifying from observation. That is all that amounts to.

Q. About how big was this leader pipe that you saw? A. It was about six feet long.

Q. Was there any other object lying near you or

30 Mr. Murphy: I object upon the ground, if it please the Court, that it is immaterial whether or not there was any other object—

Mr. Rinzler: I have not asked the question yet.

The Court: It has not any great material bearing on the case, the fact that she saw, after she recovered consciousness, a piece of pipe lying on the sidewalk. I cannot presume that hit her unless they prove it.

40 Mr. Murphy: Ask it.

Stella Sudol—Direct—for Plaintiffs.

Q. Was there anything else around you or near you at that time? A. No, nothing else.

Q. Were you hurt? A. Why, yes.

Q. What injuries did you receive? A. I got three cuts on my right shoulder, and I got a scar there now.

Q. Is it there yet? A. Why, yes.

Q. About how big is the scar now? A. It is about this big (indicating).
10

Mr. Rinzler: Indicating how much, your Honor?

The Court: About an inch and a half.

Mr. Rinzler: An inch and a half.

Q. Did you ever have a scar there before these injuries were received by you? A. No, never.
20

Q. Now, as you fell to the sidewalk, what part of your body struck the sidewalk, do you know? How did you fall? A. I fell right down this way (indicating).

Q. With your face down? A. Yes.

Q. And when you regained consciousness where did you go? A. I couldn't say anything. I just kept still. My mother could not speak English, so she did not say anything. There were two fellows. One of the fellows was going up, and another fellow down there said, "Why don't you look what you are doing?", he said. "I thought that leader pipe was banged from the wall," he said.
30

Q. Who said that? A. Another fellow that was up on top of the roof.

Mr. Murphy: I object to that as far as it affects the defendants Edward Krones and Benjamin Krones, because I do not see how
40

Stella Sudol—Direct—for Plaintiffs.

any statement made on the roof by some fellow can bind them.

Q. This man that spoke to you, where was he?

A. He was right by me. He picked me up.

Q. Where did he come from? A. He was a workman, I imagine.

10 Q. I mean was he working there? A. I don't know. He said he was working there for Max Gurtman.

Q. Did you see a ladder there? A. Yes.

Q. Who was on the ladder? A. The fellow was just about to go on the roof then.

Q. Which fellow was it that said he was working for Max Gurtman? A. The fellow that was down on the sidewalk by me.

20 Q. Did he write down his name? A. He did not write down the name. He gave me his address.

Q. The address of whom? A. Max Gurtman.

Q. Is that the paper that he wrote down upon and gave to you? A. Yes.

Q. Is that the same as he gave it to you? A. "Max Gurtman," yes.

Mr. Rinzler: I offer it in evidence.

30 Mr. Gurtman: I object to it because it is not material. I object to that piece of paper.

The Court: On what ground is it immaterial?

Mr. Gurtman: On the ground that—I want her to name or identify the man that wrote it.

The Witness: He gave me a little card. My father had the card, and I wrote that down there.

40 Mr. Gurtman: You copied this from the card?

Stella Sudol—Direct—for Plaintiffs.

The Witness: Yes.

The Court: Oh, well,—

Mr. Rinzler: That is the same thing.

Mr. Gurtman: No, it is a lot different.

The Witness: There was a little boy there. I didn't know who it was. It must have been Mr. Gurtman's son. He said, "Here is my father's address." And he gave me the card.

10

Q. Gave you the name, Max Gurtman? A. Yes, he gave me the name, Max Gurtman.

Q. Where were you taken? A. I was taken home.

Q. How? A. I took the bus home. I walked. I couldn't get home, so I just walked home. There was no officer, or anything around, so I walked home.

20

Q. Did you have a doctor? A. Yes.

Q. What doctor? A. Morris Simon, from Washington Place.

Q. Did he treat you? A. Yes.

Q. How long were you under his care? A. Well, I was in bed for about two weeks, and after I got up he come to see me about two or three times.

Q. Did he come to treat you during the two weeks? A. Why, yes.

30

Q. Did you suffer any pain during those two weeks? A. Yes, I did.

Q. Where? A. Right above—right on my shoulder here. I couldn't move it or anything.

Q. The right shoulder? A. Yes.

Q. Had you been working before this accident? A. No.

Q. After the two weeks were you able to go around? A. Why, no, I didn't go out for about—I stayed in because I couldn't use my arm or any-

40

Stella Sudol—Direct—for Plaintiffs.

thing. So I stayed in the house for two weeks. I laid in bed. And the third week I got up already.

Q. After the two weeks how did you feel? A. I still feel pains in the arm yet.

Q. You still suffer pain in the arm? A. Yes, I do.

10 Q. Whereabouts? A. Right on the shoulder—just above the shoulder, or right around here (indicating).

Q. Around the shoulder? A. Yes.

Q. About how many times did Doctor Simon treat you, Morris Simon? A. Why, I couldn't say how many times.

Q. Does it still hurt you now? A. Yes.

Q. Did you ever have any pain or injury or trouble with your right shoulder or arm before? A. 20 Never.

Mr. Murphy: I object, if it please the Court; it is immaterial.

The Court: There is no jury.

CROSS-EXAMINATION BY MR. MURPHY:

Q. Now, with whom were you traveling on this day, Miss Sudol? A. My mother.

30 Q. And where were you going? A. We were coming up from Monroe Street, and we took the shorter cut to Madison Street, because we get the Athenia bus right across; so in case the bus was coming, we just cross the street and get the bus. So we were coming through Madison Street then.

Q. And you were coming along there? A. Yes.

Q. On your way to Lexington Avenue? A. Yes.

Q. Did you notice anything, any work going on there when you came along? A. Why, yes.

40 Q. What kind of work was going on? A. They were fixing the roof. I don't know what work be-

Stella Sudol—Cross—for Plaintiffs.

cause I was not looking up there. When I walk I don't look what they are doing up on top of the roof; I look where I walk. So I was walking down, and suddenly—

Q. How high was that roof they were working on? A. It was not very high. It was about one story high. 10

Q. Who was working on it? A. There were two fellows I saw. That is all I saw.

Q. Did they have a ladder up? A. Yes.

Q. Did that ladder come over on the sidewalk? A. Yes.

Q. And you were walking along. How far away from the ladder were you? A. Why, about three or four feet away from the ladder.

Q. And your mother was next to the curb and you were next to the building? A. Yes. 20

Q. Did you notice anything peculiar going on as you walked along? A. Why, no.

Q. These men were working there? A. Yes.

Q. You paid no attention to them? A. No.

Q. Just walked along? A. Yes.

Q. The first thing you knew you were picking yourself up? A. Yes.

Q. After having been unconscious for some time? A. (No answer). 30

Q. You didn't know yourself how long you had been unconscious? A. No.

Q. Somebody told you? A. My mother told me.

Q. How much did you pay Doctor Simon? A. I didn't pay anything. He didn't give me no doctor bill.

Q. You say he attended, you, though, for how long? A. For about three weeks. And then after that he come over about a few times.

Q. About three times after those three weeks? 40

Stella Sudol—Cross—for Plaintiffs.

A. Yes, but he did not get us a doctor, see because when I was home my father called up Mr. Gurtman, and Mr. Gurtman said that he has got insurance. Then when he says that, he said, "Take care of her and get your family doctor."

Q. Now, did you ever see—

10 Mr. Gurtman: May I interrupt? I didn't want to. I want that stricken out, with reference to Mr. Gurtman having insurance.

Mr. Rinzler: The answer is in.

Mr. Gurtman: If it is an objectionable answer it is not a part of the case.

The Court: What difference does that make, whether he had insurance?

Mr. Gurtman: As a matter of fact, he has not got it.

20 The Court: It does not make any difference whether he has or not.

Mr. Murphy: There is no jury.

The Court: I am not concerned with whether a man has insurance or not. I do not know whether he has the ability to pay. It is none of my business.

30 Q. You didn't know who owned the building at this time? A. No, I didn't know who owned the building.

Q. When did that accident happen? A. I don't really know what day it was, but I know it was July 8th, because on the certificate it was in the afternoon, about one o'clock.

Q. Which certificate? A. That I got from Doctor Simon for their certificate from the drugstore.

40 Q. Oh, the prescription? A. Yes, the prescription.

Q. That was the day you were hurt? A. Yes.

Stella Sudol—Cross—for Plaintiffs.

Q. Do you know Mr. Edward Kroner? A. Never heard of him.

Q. Do you know Mr. Benjamin Kroner? A. No.

Q. You never went and told them you had been hurt? A. No.

BY MR. RINZLER:

10 Q. Do you know who owns the building? A. No. They told me that if there is anything wrong, "If there is anything the matter," he said, "here is the name of Max Gurtman," and he said, "Let him know about it." So my father called up, and he didn't know anything about it then.

Q. You do not know who owned the buildings? A. Why, no.

20 Q. Excepting as you found there and were told? A. Yes.

CROSS-EXAMINATION BY MR. GURTMAN:

Q. Did you work before this accident? A. No, I never worked.

Q. How old did you say you were? A. Fifteen.

Q. Got any other sisters?

30 Mr. Rinzler: I object. That is not relevant. What difference does it make, whether or not she has sisters or none at all?

Mr. Gurtman: It may have in the next question.

The Court: What is the next question?

Q. Did you ever work in your father's store? A. No, I never worked.

Mr. Rinzler: I object.

40 The Court: What has that got to do with the accident?

Stella Sudol—Cross—for Plaintiffs.

Mr. Gurtman: Perhaps I can prove two or three days later she was down at the store. I think it is material, if your Honor please.

10 The Court: The point is this. This young lady says she has a scar on her shoulder an inch and a half long. Outside of the pain and suffering, it may be a serious thing to have that on the shoulder.

Mr. Gurtman: I wouldn't deny that for a moment, but I thought the period of time might be in question here, as to how long she was disabled. Of course, if it is unnecessary to go into that, I won't press it.

20 The Court: She says she never went to work. There is no claim for loss of earnings.

BY THE COURT:

Q. Do you go to school? A. Yes.

BY MR. GURTMAN:

Q. When you got to this place of the accident you saw a ladder against the building? A. Yes.

30 Q. How many men were near or on the ladder?
A. Well, one was on top of the roof, and one was down by the sidewalk.

Q. Standing at the foot of the ladder? A. Yes.

Q. When you say the other man was on top of the roof do you mean he was standing on the roof or on the ladder? A. He was standing, one foot on the roof and one foot on the ladder.

40 Q. How high is the roof from the ground? Rather, how high a building is that? A. It is about as high as that white cement thing there (indicating).

Q. Just what was he doing? A. I don't know

Stella Sudol—Cross—for Plaintiffs.

what he was doing, because I was not looking, in fact.

Q. Was he doing anything, do you know? A. I don't know.

Q. Did you hear any sound? A. No.

Q. Did you see whether he was working? A. I don't know whether he was working or not. 10

Q. Did you see if he had any tools in his hand? A. I didn't look up.

Q. When did you first see the ladder? How far away from the place of the accident were you when you first saw the ladder? A. Why, about eight feet away, when I saw the ladder. There were people passing through there too.

Q. You were eight feet away when you first saw the ladder? A. Yes, sir.

20 Q. Now, about how far, just approximately, was the bottom of the ladder away from the building? You know what I mean, from the wall of the building; about how far away was it? A. I don't know. I can't tell you.

Q. Was it half way out, would you say? A. It was about half way out, I would think.

Q. And you were walking along on the inside and your mother was walking on the outside; is that right? A. Yes. 30

Q. Now, just where on the sidewalk were you walking; that is, between the curb and the building? Were you half way from the building, further away, or closer to the building? A. Half way; half way from the building.

Q. About in the same line where the foot of the ladder was? A. Yes.

Q. Did you notice what, if anything, the man who was standing at the foot of the ladder was doing? A. No. 40

Stella Sudol—Cross—for Plaintiffs.

Q. Had you ever passed that building before?

A. Why, yes, I did.

Q. Had you ever had occasion to look at the leader? A. Never.

Q. You say that someone called Mr. Gurtman up on the telephone? A. Yes. My father did.

10 Q. Were you there when he called up? A. No. I was upstairs in bed, I suppose.

Q. How did you know he called up? A. Because he told me.

Q. You didn't hear this? A. No, I didn't.

Q. You were confined to your bedroom, that is, your bed, for two weeks? A. Yes.

Q. During those two weeks the doctor came and saw you? A. Yes.

20 Q. Could you say about how often he came? A. No, I couldn't say how often he came.

Q. Were you able to walk around the house? A. Why, I usually got up when I wanted something, because my mother had some work; so I got up for myself.

Q. The pain was in your shoulder? A. Yes.

Q. Would you have any objection to permitting the Judge to see the scar on the shoulder? A. Why, no; why, no, I wouldn't.

30 Q. You would not want to let the Judge see it? A. No.

Mr. Gurtman: If your Honor please, I do not want to press the matter, but counsel feels that you might examine the scar.

Mr. Murphy: Counsel is not interested.

Mr. Rinzler: Must the young lady be embarrassed?

Mr. Murphy: Not here.

Mr. Rinzler: Would you like to see it?

40 Mr. Gurtman: Now you are asking me an embarrassing question.

Stella Sudol—Cross—for Plaintiffs.

Mr. Murphy: The young lady's mother is here, and the examination could be made in the presence of her mother.

Mr. Rinzler: The court has held, if your Honor please, where the woman's person was involved you could not compel an examination medically before trial, even, under the statute. 10

Mr. Murphy: Mr. Harris seems to disagree with you, as late as 1926.

The Court: What do you want done?

The Witness: I do not want anybody to see it.

Mr. Murphy: If she does not want to show it we will have the benefit of it.

Mr. Gurtman: That is all. 20

EDWARD KRONES, called as a witness on behalf of the plaintiffs, being duly sworn, testifies as follows:

DIRECT-EXAMINATION BY MR. RINZLER:

Q. Mr. Krones, you are a defendant in this case. A. Yes, sir.

Q. You are a brother of the defendant Benjamin Krones? A. Yes, sir. 30

Q. You and your brother Benjamin Krones own the property at No. 220 Madison Street, Passaic?

A. Yes, sir.

Q. Both of you have owned it now for how long? A. Five years.

Q. In July, 1926, were you having any construction or alteration work done on your property? A. Our property is at 32 and 34 Lexington Avenue. In the rear of that was a lot of forty feet. 40

Edward Kroner—Direct—for Plaintiffs.

Q. The rear part fronts on Madison Street? A. That is right on the corner of Madison.

Q. The rear part is known as 220 Madison Street? A. 218 and 220 Madison.

Q. Yes. A. And we got a tenant for it and started building. I give the work to the L. & G. Building Company.

10 Q. L. & G. Building Company? A. Building and Construction Company.

Q. That is a corporation; Mr. Leavitt is one of the officers connected with the company? A. Yes, sir.

Q. What kind of construction and alteration work were you having done there? A. Regular building; one story building.

Q. You were putting up a new building? A. New building.

20 Q. What kind of a building? A. Brick.

Q. And the L. & G. Building Company was given the general construction work? A. Contract, yes.

Q. The contract work. When was the building finished? A. About the 15th of August.

Q. Of 1926? A. Yes, sir.

Q. When was it started? A. The early part of June.

30 Q. So that the construction work went on from— A. About June 10th, and it was finished about August 15th, two months.

Q. So the construction work went on from early June, 1926, until about August 15th, 1926? A. That is right.

Q. During the month of July? A. Yes.

Q. Of course you had leaders on your property? A. I guess so.

40 Q. Do you know who was constructing or equip-

Edward Kroner—Cross—for Plaintiffs.

ing the building with leaders? A. I don't know a thing about it.

Q. You merely left it to the L. & G.? A. That is right.

CROSS-EXAMINATION BY MR. MURPHY:

Q. This work with the L. & G. Building Com- 10
pany was entered into by you under a contract, wasn't it? A. Yes, sir.

Q. Did you have any jurisdiction over the men employed by the L. & G. Company? A. No, sir.

Q. Did you have any say as to what men should be engaged to do this sort of work or what men should be engaged? A. I give out the whole general contract to the L. & G. Building & Construction Company. 20

Q. And as far as you were concerned you were through until the building was delivered to you completed? A. That is right.

Mr. Murphy: That is all.

Mr. Gurtman: No questions.

SIDNEY LEAVITT, called as a witness on be- 30
half of the plaintiffs, being duly sworn, testifies as follows:

DIRECT-EXAMINATION BY MR. RINZLER:

Q. Mr. Leavitt, you are an officer of the L. & G. Building Company? A. Right.

Q. What is the correct name of the company? A. L. & G. Building Company.

Q. That is a corporation? A. Yes, sir. 40

Q. You are an officer of it? A. Yes, sir.

Sidney Leavitt—Direct—for Plaintiffs.

Q. You have been now for how long? A. For how long? About fifteen years.

Q. The L. & G. Building Company had a contract with Edward Krones and Benjamin Krones for the construction of a building on the Krones property, fronting at Nos. 218 and 220 Madison Street, Pas-
saic? A. Right.

10 Q. And you commenced work on that building in June, 1926? A. In June; right.

Q. And you worked through the month of June and then through the months of July and August, until about the middle of August, 1926; is that right? A. Yes, sir.

Q. Do you remember July 8th, 1926? A. If I remember?

Q. Yes. A. That date?

20 Q. Yes. A. If I remember the date?

Q. Yes. A. Sure.

Q. Do you remember what work you were doing at that time? A. At that time. No, not just then.

Q. Did you see the accident? A. No.

Q. Who was doing the leader work? A. Gurtman.

Q. Max Gurtman? A. That was on the old building, not on the new building.

30 Q. On which is the new building? A. It is on the corner of Lexington and Madison.

Q. Madison Street. That is also the Krones property, Edward and Benjamin Krones' property? A. Yes.

Q. And what kind of leader work was he doing? A. He just removed—he just done a little removal of the same leader, the old leader.

Q. Pardon me? A. I say he removed the leader from one corner to the next one.

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Sidney Leavitt—Direct—for Plaintiffs.

Q. Adjoining the new building? A. Not the new; on the old one.

Q. Adjoining the new building? A. Right.

Q. And he was removing the leader from one corner to the other? A. Yes, on the same corner.

Q. Of the same building? A. Same building.

Mr. Gurtman: Just a moment. Of course it is apparent that this party is not speaking of what he knows to be a fact, whether he was removing or what he was doing. I think we ought to confine ourselves to what he knows.

Mr. Rinzler: He is testifying—

The Court: Do you know that he was doing that?

The Witness: I called him up to take care of the leader. I know it was an old leader, and it was leaking on the wall; and I called him up, he should take care of the leader. What he was doing I don't know. I was not there.

The Court: You mean he came there as a result of your calling him up?

The Witness: I called him up, he should take care of it.

The Court: You called him up for the purpose of taking care of the leader?

The Witness: Taking care of the leader.

Q. That is what you hired him for? A. I did.

Q. You do not do that kind of work? A. No.

Q. He does; that is his business? A. Yes, sir.

Q. He has been in that business for how long? A. For quite some years; a few years.

Q. How long did it take him to do that leader work there? A. I couldn't tell you.

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Sidney Leavitt—Cross—for Plaintiffs.

CROSS-EXAMINATION BY MR. MURPHY:

Q. Now, Mr. Leavitt, when you went upon this property on Madison Avenue,—or is it Madison Street? A. Madison Street.

10 Q. To put up this building, that leader was on the old building? A. Right.

Q. Was it secure on the old building? A. Yes, sir.

Q. In good condition? A. Yes.

Q. Could you put up your addition with that leader coming down from what would be the roof of this building to the ground? A. The addition was done.

Q. The addition was done? A. Was done.

20 Q. Had you made your change from the leader that came straight down to the leader that was substituted in the front of your new building? A. That is what I called him up, he should do.

Q. Oh, he was going to do that? A. Yes.

Q. Did he have to cut away the old leader? A. The old leader, yes, sir.

Q. Well, on July 8th how far had you progressed with this building? A. On July 8th, I don't remember exactly.

30 Q. Did you have it up to the roof? A. No.

Q. How much of it did you have up? A. We had some part of the work up, but I don't remember just exactly.

40 Q. Why did that become necessary, for you to have Gurtman come in and do this leader work at all? A. You see, that old leader had a leak in the side; there was a hole in the leader, and the water used to run on the wall; and I called him up to take care of it.

Sidney Leavitt—Cross—for Plaintiffs.

Q. But was it secure to the building? A. Oh, yes.

Q. It wouldn't fall of its own weight? A. No.

Q. It was perfectly safe? A. Yes.

BY MR. RINZLER:

Q. What was the reason for changing it? A. It was an old leader, and it was a hole in that leader, and the water used to run on the wall; and I called him up to take care of it. 10

Q. You did not examine it to see if it was secure or not, did you? A. No,—

Q. Did you examine it to see whether it was secure or not? A. If I examined the leader? No.

Q. You just looked at it from the sidewalk? A. I looked from the sidewalk.

CROSS-EXAMINATION BY MR. GURTMAN:

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Q. How long did you say you were in the building business? A. Oh, about sixteen or seventeen years.

Q. And on July 8th was the date during which the building was still in the course of construction, wasn't it? A. Yes.

Q. It was not complete? A. No.

Q. Who had placed that piece of leader where it was, if you know; who put it where it was at the time, on July 8th, if you know; who put it there? A. Who put the leader up there? 30

Q. The piece of leader; who put it in its place, if you know? A. I don't remember.

Q. Well, was it one of the men who worked for you in the course of construction? A. Maybe it was. I don't remember.

Q. Who has supervision of all the work on the jobs that you do? A. I got a foreman. 40

Sidney Leavitt—Cross—for Plaintiffs.

Q. You have a foreman? A. Yes, sir.

Q. A man of experience? A. Yes, sir.

Q. How often do you come around to see a job, yourself? A. Twice; twice a day; sometimes three times.

10 Q. On July 8th, from your observation, had the L. & G. Building Company done all in its power to keep that building safe for pedestrians? Do you understand my question? A. Yes.

Q. Had you done everything you could possibly do to secure the safety of people walking on the sidewalk? A. Positively.

Q. From what you knew and from reports you received, was that leader secure against the wall on July 8th; was it secured against the wall? A. Yes, yes.

20 Q. The mechanics you engage are all competent men? A. Yes.

Q. The men that work for you, are they all competent men? A. Yes.

Q. Had you received any kind of complaint with reference to that leader prior to July 8th? A. No complaint.

Q. That it was loose? A. No.

Q. That it was dangerous? A. Never.

30 Q. You say that you called Mr. Gurtman to take that leader off and put a permanent leader on? A. Right.

Q. Why? A. Because it was leaking. That leader was an old leader.

Q. You are sure it was not because it was not nailed on right? A. No, I don't think so. That leader was to the wall.

Q. The leader was nailed to the wall? A. Yes, it was to the wall.

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Sidney Leavitt—Redirect—for Plaintiffs.

Q. You had never received any report about it being dangerous at all? A. No.

Q. As a matter of fact, did you see anyone do any work on the leader there; did you see any of Gurtman's men doing the work? A. No.

Q. Personally? A. No.

Q. Do you know whether he ever got there? A. 10 No.

Q. Do you know whether any work was ever done, as a matter of fact? A. No, sir.

Q. You only know you called him up? A. I called him up to take care of it.

Q. You do not remember what day you called him up, by any chance? A. No.

Mr. Gurtman: That is all.

REDIRECT-EXAMINATION BY MR. RINZLER: 20

Q. You called whom up? A. Gurtman's place.

Q. What for? A. To take care of the leader.

RE-CROSS-EXAMINATION BY MR. GURTMAN:

Q. Mr. Leavitt, on the Madison Street side of the building, on July 8th, or about that time, how many leaders were there against the building, one or more 30 than one? A. On the old building?

Q. Old and new building, along Madison Street, how many leaders are there? A. One.

Q. Are you sure? A. I am not sure, but I—

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John Sudol—Direct—for Plaintiffs.

JOHN SUDOL, one of the plaintiffs, called as a witness on behalf of the plaintiffs, being duly sworn, testifies as follows:

DIRECT-EXAMINATION BY MR. RINZLER:

- 10 Q. You are the father of Stella Sudol? A. Yes, sir.
- Q. You didn't see the accident, did you? A. No.
- Q. After the accident— A. After the accident.
- Q. —what did you do? A. After the accident—
- Q. Talk up loudly so everybody can hear you.

The Court: Speak up.

A. My daughter, bring home.

Q. When your daughter, bring her home? A. Yes.

- 20 Q. Yes. A. I call a doctor right away. Of course I see it is too bad; and now after, when I call him up, Mr. Gurtman.

Q. You called up Mr. Gurtman? A. Yes.

Q. What did you say to him? A. Mr. Gurtman said to me, "I don't know anything about nothing here," he said, "I call him up my working men. I find out."

- 30 Q. You called Mr. Gurtman up; the first time he said he doesn't know anything yet, but he is going to talk to the workingmen, his workmen, and find out? A. Yes.

Q. Then did you call him again? A. And after Mr. Gurtman said, "I am going to call you up too."

Q. He is going to call you up? A. Yes.

Q. Now, one moment. Did Mr. Max Gurtman call you up? A. Yes.

Q. And what did he say to you? A. He told me like that, "Mr. Sudol, you take good care of your

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John Sudol—Cross—for Plaintiffs.

daughter." I say, "I got a doctor." He wants to know what doctor I got. Say, "I got Morris Simon, Doctor." He said, "All right." I go and tell him myself, Mr. Morris Simon, Doctor, to take good care of your daughter." He said, "What is coming is going to pay for."

Q. "What is coming I going to pay for?" A. 10 Yes.

Q. Did he tell you that he spoke to the workingmen? A. Yes, sir.

Q. Did he tell you what the workingmen said to him? A. The workmen said to him, told him he knows all about it, what kind of is it.

Q. He knows all about it, what happened? A. What happened.

CROSS-EXAMINATION BY MR. GURTMAN: 20

Q. You called Mr. Gurtman? A. The same day of the accident, right away when my daughter, bring home.

Q. And he called you up when? A. The same day, bring the daughter home.

Q. You called him up first? A. Yes.

Q. That was on the same day of the accident? A. Yes.

Q. And he said to you he didn't know anything, 30 "I will ask my workmen"? A. Yes.

Q. "Then I will call you up"? A. Yes, sir.

Q. Did he call you up again? A. Yes, sir.

Q. The same day? A. Right away; maybe twenty minutes, half an hour.

Q. Then he spoke to you; and in those twenty minutes you called the doctor? A. I got the doctor already in my home.

Q. In the meantime? A. Yes. I told him, "I got 40

John Sudol—Cross—for Plaintiffs.

a doctor," and he wants to know what doctor I got. I told him—

Q. Just a moment. You got a doctor in the meantime? A. Yes.

Q. Then Mr. Gurtman called you up? A. Yes, sir.

10 Q. And he said to you that he had talked to his workmen? A. Yes, sir.

Q. And the workmen told him all about the daughter? A. Yes.

Q. Did he say it was his fault? A. Yes, sir.

Q. You are sure about it? A. Well, he told me, "Now, take good care of your daughter. What is coming, I got insurance." He is going to pay for it.

Q. He told you he had insurance? A. Yes, sir.

20 Q. And whatever was necessary, he would pay for it? A. Yes, sir.

Q. No doubt about that in your mind? A. That is what he told me, after he called up the doctor.

Q. You are sure about that, that he said he would pay you? A. Yes, sir.

Q. Did Mr. Gurtman ever call you up again? A. After that day, no.

Q. Did you ever go to see him? A. No.

30 Q. Did you ever send him a bill? A. Who?

Q. Mr. Gurtman? A. No.

Q. If he promised to pay you, why didn't you go around to see him? Do you understand my question? A. Don't go myself.

Q. You say Mr. Gurtman promised to pay you everything? A. Yes.

Q. Did you go around to see him, to ask him for the money? A. No, I didn't go to see.

40 Q. Why not? A. Because I can't go. I got a broke leg. I got an accident.

John Sudol—Redirect—for Plaintiffs.

Q. I see. A. Yes, sir.

Q. Did your wife go to him? A. Wife, she don't go.

Q. Did any member of the family go? A. No.

Q. Did you send anybody? A. That is all what I told him, over the phone.

Q. Did you send anybody to get the money from him that he promised you? A. No. 10

Q. Who went to the lawyer? A. The lawyer, Mr. Rinzler.

Q. Who went to his office when you brought the case there? A. He is coming up when I call him up on the home.

Q. Who went to the office? Did you go to the office? A. First when I give him the case I call him on the home because I can't go to the office. 20

Mr. Rinzler: He said he had a broken leg and somebody went to his house from the office, after he called up.

Mr. Gurtman: Oh, I beg your pardon. Now I understand you.

Q. Did someone from your family go to Feder & Rinzler's office? A. After we go, yes.

Q. Did they go to see Mr. Gurtman and ask him for the money first? 30

Mr. Rinzler: I object. How does he know what we did?

A. I can't go because I got a broke leg.

Mr. Gurtman: All right. That is all.

REDIRECT-EXAMINATION BY MR. RINZLER:

Q. Did you ever get a bill from the doctor? A. Not yet. 40

Sophia Sudol—Direct—for Plaintiffs.

Q. You could not give him the bill before you got it.

Mr. Rinzler: That is all.

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SOPHIA SUDOL, called as a witness on behalf of the plaintiffs, being duly sworn, testifies as follows: through the Interpreter).

(Nellie Kowal was duly sworn as Interpreter).

DIRECT-EXAMINATION BY MR. RINZLER:

Q. You were walking with your daughter by the Kronen building on Madison Street on July 8th, 1926? A. I was walking with my daughter, and we were going to take the bus, when the pipe fell on her.

20

Q. Whom did the pipe fall on, you or your daughter? A. It fell on my daughter.

Q. And where did it hit her? A. On the shoulder (indicating).

Q. The right shoulder. What happened to her when it struck her? A. She fell and fainted.

Q. What was it that struck your daughter? A. The leader struck the daughter.

30

Mr. Rinzler: Where water runs, she said?
The Interpreter: Yes.

Q. Did you see the leader coming down on her? A. I didn't see it falling, but I saw it fall on the daughter.

Q. And that was on Monroe Street? A. Madison Street.

Q. Madison Street, rather.

The Interpreter: Yes.

40

Sophia Sudol—Cross—for Plaintiffs.

CROSS-EXAMINATION BY MR. MURPHY:

Q. You didn't know where the pipe came from?

A. Yes. And there was a man up on the roof and one down, and the pipe fall down on my daughter.

Q. Do you know how the pipe happened to fall down? A. Yes; I saw the pipe falling.

10

Mr. Murphy: I move that the— Ask the question over again.

Q. (Question repeated). A. I saw the pipe on top of my daughter, because when I looked up, and it fell on the daughter.

Mr. Murphy: That is not responsive. I will give you the question in another way.

Q. Do you know what caused this pipe to fall so that it fell upon your daughter? A. I don't know.

20

Mr. Murphy: No further questions.

The Witness: I don't know what caused it. There was one man standing down and one on the roof, and that is all I saw.

CROSS-EXAMINATION BY MR. GURTMAN:

Q. Did you see what the man on the roof was doing, if anything? A. I don't know what the man was doing, but all I know is that the man was up there.

30

Q. Were his feet on the roof or on a part of the ladder? A. My daughter was laying on the sidewalk. His feet were on the roof.

Q. Did you see what the man on the ground was doing, if anything? A. I did not see, because I was all excited; and the man that was on the sidewalk picked her up.

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Sophia Sudol—Cross—for Plaintiffs.

Mr. Rinzler: The man that was on the sidewalk picked her up?

The Interpreter: Picked her up.

Mr. Gurtman: That is all.

The Witness: And took a card and told her to go to the doctor.

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The Court: What?

The Interpreter: Took a slip and told her to go to the doctor.

The Court: The man on the sidewalk?

The Interpreter: The man that was standing on the sidewalk.

The Court: Is that man here?

The Interpreter: She don't know who he is, because she was all excited, and she don't know, but he was a worker.

20

The Court: Has she got the card?

Mr. Gurtman: We admit the workman gave the address of his employer.

BY MR. GURTMAN:

Q. Just one more question. Did you see how far away from the leader the top of the ladder was?

A. There was no ladder there.

30

Q. There was what? A. No ladder.

Q. There was no ladder against the building?

The Interpreter: She don't remember, "I don't remember", she said.

Mr. Gurtman: Will you ask her again, was there, any ladder anywhere near the accident, where the accident happened?

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The Witness: I don't recall because I was all excited; but I remember that one man was on the roof and one was on the sidewalk.

Motion for Non-Suit.

Mr. Gurtman: But she don't remember seeing the ladder?

The Interpreter: No.

Mr. Rinzler: Doctor Morris L. Simon, who treated the young lady, is on a confinement case. Your Honor can appreciate the difficulty. And I should like to rest with your Honor's privilege to call him. We are going to get a telephone call from his office as soon as he is through with the case.

10

Subject to that, we rest, your Honor.

Mr. Murphy: If it please the Court, I should like to move at this time for a non-suit as against the defendants Edward Krones and Benjamin Krones, the owners of this building and the adjoining building to which the leader was attached, upon the grounds, first, that there is no testimony that this girl was injured as a result of the negligence of the defendants Edward Krones and Benjamin Krones; more particularly because there is no direct testimony that she was injured as a result of the fall of this pipe. The only testimony we have, supplied by herself and her mother, was that a piece of leader from this building came in contact with her shoulder, causing the injury of which she complains.

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The second ground upon which I urge a non-suit is that the owners of this property had relinquished all control, and that the work upon this property was taken over by the L. & G. Building Company, as independ-

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Motion for Non-Suit.

ent contractors; and the law is well settled that when an independent contractor enters into—

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The Court: There is no proof of agency, either. There would have to be proof of agency to hold the owner, if these workmen were doing the work for the owners. The L. & G. Building Company, it has been testified, were doing the work of repairing the building, and they called in Gurtman to repair the pipe. So, under those circumstances, there is no evidence to hold the owners of the building.

There will be a non-suit granted as to them.

20

It lies between the L. & G. Building Company and Gurtman.

Mr. Gurtman: With reference to Mr. Gurtman, I must reiterate a part of what was said by counsel. The mere fact that a man is near a building, engaged in his lawful occupation,—

30

The Court: Oh, no, there is a presumption. The testimony of this gentleman, representing the L. & G. Building Company, was to the effect that, in the course of his operations in the repairs, he saw that this leader needed attention, and he called up Gurtman to come over to repair the leader, remove it, said it was leaking.

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Mr. Gurtman: There was this distinction, though. I move for the non-suit on this ground. We admit of necessity, by the testimony of Mr. Leavitt. That perhaps there was a leak in the leader. Many leaders hang secure with leaks for years. If the

Motion for Non-Suit.

landlord were taking precautions the leaking of itself would not cause it to fall. We cannot presume negligence. On the part of Mr. Leavitt we have this testimony—

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The Court: No presuming negligence at all. On the prima facie case made out by the plaintiff there is evidence here sufficient to hold either of them for the negligence or damages which were had as a result of that injury.

Mr. Gurtman: Of course I won't press it too long. I will put my parties on. I just want to leave this one thought, if your Honor please. It puts us in the position where we cannot meet an issue well defined. We are not told that anyone was negligent in putting the ladder in its place; we are not told that they permitted something to happen to it; we don't know what leader fell down.

20

The Court: Surely this young girl had a right on the street, on the sidewalk. She was where she had a right to be.

Mr. Gurtman: True. And Mr. Leavitt had a right to be a contractor and have his workmen there.

30

The Court: Yes.

Mr. Gurtman: Now, between the two, which has the presumption that he was negligent? At least we should get some indication of what to meet.

The Court: Would you assume that the young lady was negligent?

Mr. Gurtman: No, I do not. I do not allege that negligence by any means. But, if you review the testimony, I say what did

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Max Gurtman—Direct—for Defendants.

Mr. Leavitt do or fail to do to have met every obligation to pedestrians? I asked him, "Did you engage competent people?" "Yes."

"Did you inspect the buildings?" "Yes."

"Did you ever receive a complaint as to the leader?" "No."

10

"Why did you order it changed?" "Because there was a leak in it."

Now a leak, if your Honor please, you can take cognizance of the fact that that would not cause the leader to fall.

The Court: That would not help the young girl who has been hurt.

Mr. Gurtman: There are many misfortunes that happen where nobody is liable.

20

The Court: You better go on with your defense.

Mr. Gurtman: Will you allow me an exception, if your Honor please?

The Court: Yes, surely.

DEFENDANTS' CASE.

30 MAX GURTMAN, one of the defendants, called as a witness in his own behalf, being duly sworn, testifies as follows:

DIRECT-EXAMINATION BY MR. GURTMAN:

Q. What business are you engaged in, Mr. Gurtman? A. Sheet metal work.

Q. How long have you been engaged in that business? A. Well, for the last sixteen years.

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Q. Do you recall receiving an order from Mr.

Max Gurtman—Direct—for Defendants.

Leavitt to do certain work on the Kronos building?

A. I do.

Q. In response to that order what did you do?

A. I left orders in the shop to send out a man to take care of this particular work.

Q. Had you ever done any work on that building before you received this order? A. No, sir. 10

Q. Had you ever been on the building before you received this order? A. I cannot remember. I don't think I was there.

Q. I am not speaking about years back. I am speaking about the time this pipe was attached, had you done any work there? A. I may have been there to speak to Mr. Leavitt about some new work, about the new work.

Q. Did you do any work there? A. No.

Q. Did any of your men do any work there? A. No. 20

Q. Were any of your tools on the job prior to this order? A. No.

Q. Did you have anything to do with this leader spoken of before July 8th? A. No.

Q. Did your men have anything to do with it? A. No.

Q. Did any of your men fasten it in the place where it was? A. No. 30

Q. Did you fasten it in the place where it was? A. No.

Q. Were you there when your men got to the job? A. No, sir.

Q. How soon after you received the order did you send them? A. Well, I cannot tell, but I suppose in about four hours, something around there.

Q. What time in the day did you receive the order? A. I presume—

Q. Was it in the morning or late afternoon? A. 40

Max Gurtman—Direct—for Defendants.

No, it was late at night. Then in the morning they called me again, because that morning it was raining and they called me, that the water is coming into the new building; the building was up, see; and that leader was removed by someone else, not by us.

10 Q. Up to the time of this alleged accident you had nothing whatever to do with that leader? A. No, absolutely not.

Q. And none of your men had anything to do with it? A. No.

Q. Either to remove it or put it there? A. No, sir.

Q. Were you there when your men got to the job? A. No, sir.

20 Q. You heard Mr. Sudol testify that you called him up on the telephone? A. I never did.

Q. Didn't you call him at all? A. I never called Mr. Sudol.

Q. Did he call you? A. He did.

Q. Will you give us what the conversation was? A. Well, I think he said everything the truth, that is, at first, when he said that he called me up and told me that his girl was hurt, and he says to me so and so. I said, "I don't know a thing about it."

30 Of course I came in after, and I am in and out from the shop. My men are not there. And I said, "I don't know anything about it, and I will investigate." When I investigated the next day, this man told me that—

Q. Just a moment. We are not interested in what your man told you.

Mr. Rinzler: Which man told you?

40 Q. Are you speaking of your own workmen? A. Speaking of my own workman.

Max Gurtman—Direct—for Defendants.

Q. Did you subsequently call him on the phone?

A. No, sir.

Q. Did you at any time tell him that you would pay the bills? A. Never did.

Q. Did you at any time tell him that it was your fault? A. No, sir.

CROSS-EXAMINATION BY MR. RINZLER:

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Q. You did do the leader work on that property, didn't you; yes or no? A. Not prior to this—

Q. Yes or no. A. On the new building.

Mr. Gurtman: Just a moment. I do not want to interrupt. Let us define it, from before or after July 8th. After July 8th we admit that we ordered men to go up there. So that we might make a distinction there. That is very serious.

20

Q. Did you do the leader work on the new building? A. I did.

Q. Did you change the leader and remove it from one place to the other on the old building? A. Well,—

Q. You did or you did not. Now, did you? Answer yes or no, please? Just yes or no. A. But that was after that time.

30

Q. Did you, sir?

Mr. Gurtman: State that.

A. After, why—

Q. You know that the girl was hurt in front of that property, don't you? A. I do.

Q. And you know that one of your workmen who was at the property at the time, gave her a

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Max Gurtman—Cross—for Defendants.

card with your name on it, don't you? A. That was my little son.

Q. Your boy? A. Well, he just happened to go from school, and he passed there, and, like a little boy, wants to show off, he said, "My father is working here," and takes out a card and gives to her a card.

10 Q. Someone working at the time? A. The men were working. They came to work on the job.

Q. They were working? A. They came on the job.

Q. They came on this job to do the work for you on the job, didn't they? A. Yes.

Q. And your boy, whether he wanted to show off or not,— A. Yes.

20 Q. —said, "My father is doing the work here," and he gave the girl your card? A. That is right.

Mr. Gurtman: We admit that.

The Witness: We admit that.

Q. How many men did you have working there at the time she was injured in front of this property? A. Two men.

Q. They were doing tin work? A. When she was hurt they were not doing anything yet.

30 Mr. Gurtman: May I get this clear? As a matter of fact, this all happened when he was not there. What does Mr. Gurtman know about what they were doing? I brought it out specifically that he was not there.

The Court: Those men were simply his workingmen, weren't they?

Mr. Gurtman: I want to get it clear that he is speaking of what he heard rather than

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Max Gurtman—Cross—for Defendants.

from what he saw, with reference to the place of the accident. He was not there at that time.

Q. You sent them there to do the work for you on that day, didn't you? A. Yes.

Q. The leader work? A. Yes.

Q. How old is your boy? A. Nine years.

10

Q. And he had your card with him? A. Yes.

Q. How long had he been on the job for you?

Mr. Gurtman: Well, answer the question, if you know.

A. He was not on the job.

Q. Where is the boy? A. Well, he is in school today.

Q. Just by accident happened to be there, eh?

A. Well, I will explain why. I will explain it.

20

Mr. Gurtman: Not necessary.

Q. You had two of your workingmen that day?

A. Two men.

Q. And they were there at the time when she was injured? A. Yes.

Q. They were there when the leader struck her?

A. Well, I don't know the leader struck her or anything else.

30

Q. They were there when the leader struck her?

A. I was not there; I don't know.

Q. They reported that to you, didn't they, when you investigated? A. Well, they did tell me, yes.

Q. Did the L. & G. Building Company do any leader work there? A. I do not know.

Q. Did they move any leaders? A. Probably did.

Q. They did? A. Probably did.

40

Max Gurtman—Cross—for Defendants.

Q. So that you and the L. & G. Building Company did the leader work there; is that right? A. I must answer to the Court.

Q. Is that correct, sir? A. Well, there is no answer I can answer.

10 Q. Answer the best you can. A. I can't speak as a mechanic. I can—

Q. You are speaking as a mechanic?

The Court: Go ahead, speak.

A. I can explain what it was.

The Court: Yes, go ahead.

20 A. (Continuing) When the L. & G. had to put up a lower building—there was a three-story building right on the corner, and they had to put on a one-story affair right adjoining to the three-story building. Before they could put up that wall they had to remove that leader; they had to remove one floor of leader. In the meantime, when they went up with that wall, all that water from the main building, from the three-story building, begin pouring into this here building, to that one story affair. Therefore I presume they had some of their men there to take a piece of leader and just stick it on there while it was raining, so as to keep the water running out from the building. Then they called me up and told me to go up there and make a permanent connection from this leader, so that the water would not go in there. And that is when I sent my men down. That is the whole story.

The Court: That was from the L. & G. Building Company?

40 The Witness: From the L. & G. Building Company.

Max Gurtman—Redirect—for Defendants.

REDIRECT-EXAMINATION BY MR. GURTMAN:

Q. This piece of leader that is spoken of here, this temporary connection,— A. Yes.

Q. —which had to be made to take the water away, did you put that on there? A. No, sir.

10

RECROSS-EXAMINATION BY MR. RINZLER:

Q. You did not put anything on yourself, did you? A. None of my men did the other work neither.

Q. I say you did not put anything on yourself? A. No.

REDIRECT-EXAMINATION BY MR. GURTMAN:

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Q. Did any of the other men put this on?

Mr. Rinzler: I object. He was not there.

The Court: He said he sent his men up when he was asked to put up the permanent connection.

(To witness) That is right, isn't it?

The Witness: That is right.

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ELIAS KOVAK, called as a witness on behalf of the defendants, being duly sworn, testifies as follows:

DIRECT-EXAMINATION BY MR. GURTMAN:

Q. Where do you work? A. Max Gurtman's.

Q. How long have you been working there? A. About three and a half years.

Q. How long have you done sheet metal work? 40
A. Four years.

Elias Kovak—Direct—for Defendants.

Q. Do you remember being sent to Madison Street? A. Yes, sir.

Q. Do you remember what day it was? A. I think it was June 8th.

Q. And do you remember who was with you at the time? A. One of the mechanics.

10 Q. Now just tell us what happened when you got there? A. We were sent out on the job and we got there. We put up the ladder against the building. I went up to take the leader down. As I was going up the ladder this girl passed by and the leader struck her while I was on the ladder.

Mr. Rinzler: The leader struck her while you were on the ladder?

The Witness: While I was on the ladder.

20 BY THE COURT:

Q. Explain that now, how it struck her. A. Well, it was up there, leaning up against the building, with only a piece of wood underneath to hold it up.

Q. In other words, you had put the ladder up against the building? A. Against the building.

Q. And you were going to remove it? A. To remove the leader.

30 Q. And before you got there it fell? A. Before I got to the top it fell down.

Q. And struck the girl? A. Struck the girl, as she was passing by.

BY MR. GURTMAN:

Q. Had the ladder touched the leader at all? A. No, sir.

Q. Had you touched the leader? A. No, sir.

40 Q. Had the man at the foot of the ladder touched the leader? A. No, sir.

Elias Kovak—Cross—for Defendants.

Q. Did you apply any tool to it at all? A. No, sir.

Q. From what you observed had anyone, either you or the man with you, or the ladder, or anything you carried, touched that leader? A. No, sir.

Q. Before it fell? A. No, sir.

Q. You saw it fall? A. No, I didn't.

10 Q. By the way, how far away from the leader was the top of your ladder? A. Oh, five or six feet.

Q. Had you actually done any work at the time it fell? A. No, sir.

CROSS-EXAMINATION BY MR. RINZLER:

Q. Where do you live? A. Passaic.

Q. Where? A. Parker Avenue.

Q. What number? A. 190.

20 Q. What time of the day was it that this leader fell and struck this young lady? A. About half past one.

Q. In the afternoon? A. In the afternoon.

Q. And what time of the day did you start working, doing the leader work on that property? A. Just got on the job.

Q. What time? A. Half past one.

30 Q. Had you been working on it the day before? A. No, sir.

Q. When was the last time you worked on it? A. Never.

Q. Now, you were present when this young lady got the card with Max Gurtman's name on it, weren't you? A. No, sir.

Q. You were not there? A. I was on the ladder.

Q. Weren't you present? A. Yes, I was present.

40 Q. Did you see Gurtman's boy there? A. Yes, sir.

Elias Kovak—Cross—for Defendants.

Q. Did you see Gurtman's boy hand one of the workmen a card? A. No, sir.

Q. You did not? Did you see Miss Sudol get a card? Pardon me? A. No, sir.

Q. You don't? A. No, sir.

Q. You know that she got a card with Max Gurtman's name on, don't you? A. No, sir.

10 Q. Who else was there with you that time? A. Some mechanic.

Q. Where is he? A. I don't know.

Q. He worked on the job? A. He worked on this job with me.

Q. You do not know where he is now? A. No, sir.

20 Mr. Gurtman: We will explain, if your Honor please. That mechanic is in New York, and we are unable to get him today. We can get him if the Court wants him here for corroborative testimony. We admit the giving of the card. The boy gave it. I am very anxious if possible to get a look at the card, if there is anything on it besides the address.

30 Q. Did the fellow on the sidewalk say to the man on the ladder at the time, "Why in the hell don't you look out what you are doing?" A. I was on the ladder.

Q. Did somebody from the sidewalk say to one on the ladder, "Why don't you look out what you are doing?" A. No, sir; he never said anything to me.

Q. You did not come down at all? A. I come down after it hit her, after I looked around and I seen the leader down.

40 Q. Did you pick her up? A. No, sir; she wasn't even fainted.

Elias Kovak—Cross—for Defendants.

Q. Did you pick her up? A. She walked away.

Q. Did you pick her up? A. No, sir.

Q. You didn't? A. No, sir.

Q. And you do not know who gave her the card? A. No, sir.

Q. You didn't tell her to get the card? A. No, sir.

10 Q. Did the L. & G. Building Company do leader work there? A. I don't know if they did or not.

Q. How many days had you been working there? A. I was just coming on the job; I was not there at all.

Q. How many days had Mr. Max Gurtman been doing work there? A. That was the first time I come on the job.

Q. I thought you said you went there in June?

Mr. Gurtman: When did he say that?

A. I didn't say in June.

Mr. Rinzler: On direct examination.

Mr. Gurtman: Never.

The Witness: That was the first day we went on the job.

Q. I mean you. Did any of the other men from Gurtman's work there? A. No, sir.

REDIRECT-EXAMINATION BY MR. GURTMAN:

Q. Actually, if you can give us an idea, how many minutes were you at that place before this girl was hit? A. About five minutes.

Q. Where had you just come from? A. Off the truck. We just unloaded the stuff and put the ladder up against the building.

Elias Kovak—Redirect—for Defendants.

Q. Before you got there with the truck where had you been? A. In the shop.

Q. And you had just gotten there and been there about five minutes? A. Yes, sir.

Q. Did you hear anybody say to you, "Why don't you look out what you are doing?" A. No, sir.

10 Q. You are sure, of course, that you didn't touch the leader? A. Yes, sir.

Q. And you didn't see anybody else touch it? A. No, sir.

Q. And you are sure you were never on that job before? A. Yes, sir.

Mr. Gurtman: All right. That is all.

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Mr. Gurtman: If your Honor please, may I at this time state that, with the evidence in for Mr. Gurtman, the first time they were there his men were there for five minutes?

Mr. Rinzler: You are not arguing the case now, are you?

Mr. Gurtman: I am pressing a motion to non-suit at this time on Mr. Gurtman's case.

The Court: Are you through?

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Mr. Gurtman: Yes, we rest our case as far as Gurtman is concerned.

The Court: If there is no more evidence to go in you may ask for a direction, not for a non-suit.

Mr. Gurtman: I want to distinguish these cases, I want to put Mr. Leavitt on the stand for his own benefit. I am representing him just because he was not represented. He has asked me, of course, for an adjournment as far as his case goes.

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Colloquy.

The Court: Let us look at the thing right square in the face. Here is the young lady coming down the street, where she had a right to be. That is agreed upon.

Mr. Gurtman: Yes.

The Court: This building was under repairs. Suddenly a piece of pipe fell and struck her on the shoulder, causing these injuries. The L. & G. Building Company admit that they had the contract to repair this building. They noticed the leaky pipe and called up this Mr. Gurtman, and he sent his men up there to fix it. And the testimony of the man is that while he was erecting this ladder to reach the pipe, the pipe fell.

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Now I don't know whether his movements with that ladder caused the pipe to loosen. However, this thing you have to take into consideration, and that is that the L. & G. Building Company were the contractors, and that the L. & G. Building Company called up Mr. Gurtman and asked him to repair this pipe. Those are the facts as brought out.

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Mr. Gurtman: Yes, sir.

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The Court: Now then, the question of agency arises, as to how far on the question of agency we can go. Was Gurtman working for the L. & G. Building Company or was the L. & G. Building Company responsible?

Mr. Gurtman: True; but let us assume for a moment, if your Honor please,—

The Court: I know Judge Newman in a similar case said that somebody was negli-

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Colloquy.

gent, and the Supreme Court reversed him because they said he had no right to say that, and the Court of Errors and Appeals sustained him, and said he had a right to say that. So that is the law. Somebody in this case is negligent, and that we can safely say now, in accordance with that decision.

10

Mr. Gurtman: Do I understand, then, if your Honor please, taking the actual facts, presuming, for a moment, that Mr. Gurtman is an independent agent, that man comes on the job. He never had anything to do with the leader—

The Court: If you will just listen a moment. The jury in that case held them jointly liable for the injuries sustained. It was a trolley and jitney bus that came together, and this woman that was injured was a passenger in the bus. It was the contact between the jitney bus and the trolley car. She had nothing to do with it, was perfectly innocent, like this young girl is.

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Mr. Gurtman: That is a distinction. That is on the theory of *res ipsa loquitor*, if I can speak a little Latin.

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The Court: Now this young girl is walking along the streets. The owners of the building had nothing to do with it. They gave out the contract, and the contractor or the general contractor then turns around and engages Gurtman, and Gurtman says, "I don't know anything about it. I sent my men up there." Therefore those men were working for Gurtman.

40

Mr. Gurtman: Surely. But what do they do, if your Honor please?

Colloquy.

The Court: Are we going to say whether it was Gurtmans' men or whether it was the L. & G. Building Company's men that cause the injury, or are we going to say that it was between them?

Mr. Gurtman: May I be permitted to say this?

10

The Court: Go ahead. That is the way it occurs to me.

Mr. Gurtman: Yes, but we have to take the evidence here. I am given a job to do some work on the building next door. I get there, or my men get there. They put up a ladder five feet away from a piece of pipe. The evidence is uncontradicted that no man in the employ of Mr. Gurtman touched that pipe, ever had anything to do with it before, neither he nor anyone in his employ. The ladder did not touch it. He did not touch it. The pipe falls. Well, are we to have the burden cast upon us?

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The Court: Do you think somebody should be held?

Mr. Gurtman: But, if your Honor please, we are not to be placed in the position that we have to look for someone to be liable. The law books are full of cases where people have been killed, and no negligence shown. Mr. Gurtman never touched that pipe. No man in his employ ever touched that pipe, had nothing to do with hanging the pipe there. We must have some evidence of negligence upon which to be blamed for liability. How can we ask Mr. Gurtman or anybody else to be liable because we feel sorry? On what ground will we base that decision?

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Colloquy.

The Court: But that is not going to do this girl any good.

Mr. Gurtman: Negligence is what they have to prove here. In what act has Mr. Gurtman been negligent?

10 The Court: The Court is the sole judge of the negligence, the question of fact.

Mr. Gurtman: I merely ask you this. On what act or lack of act on the part of Mr. Gurtman or his employees can negligence be based upon?

The Court: He said Gurtman was called up, and he sent his men there, and when they were already there they were erecting the ladder, and the ladder fell.

Mr. Gurtman: What did they do?

20 The Court: That is what I want to know. What did they do?

Mr. Gurtman: Well, the plaintiff must prove it.

The Court: Well, he did prove it to my satisfaction, and I think they both should be held.

Mr. Gurtman: I want to make myself clear, for the purpose of the record.

30 The Court: Yes. You have it all on the record.

Mr. Gurtman: I have not got it yet, and I would like to get it on at this time.

The Court: All of it.

40 Mr. Gurtman: There is not one iota of evidence on the part of the plaintiff that Max Gurtman or his employees did anything or neglected to do anything upon which liability can be based. There is not an iota of evidence on the part of the plaintiff that any man in Gurtman's employ was seen to

Colloquy.

touch the pipe at any time; did not put it there; had nothing to do with it; got there, and, at most, were there five minutes. And even then there is not any testimony that they touched it.

Now upon what ground does your Honor state any act of negligence or lack of act? 10 What did they neglect to do upon which you are basing the determination of liability?

The Court: It is between the two of them.

Mr. Gurtman: I ask for an exception at this time.

The Court: You may have an exception. I think the young lady is entitled to damages.

Mr. Gurtman: Just a moment. I want to ask Mr. Leavitt to take the stand. 20

The Court: You have some more testimony?

Mr. Gurtman: I have to show that this man is represented and asked for an adjournment.

Mr. Leavitt: I did not have no lawyer.

The Court: Do you want to take the stand?

Mr. Gurtman: He wants an adjournment, as a matter of fact. 30

The Court: I will not give any adjournment now. (To Mr. Leavitt) You have been sworn. Take the stand.

Sidney Leavitt—Recalled—for Defendants.

SIDNEY LEAVITT, called as a witness on behalf of the defendants, having been previously sworn, testifies as follows:

DIRECT-EXAMINATION BY MR. GURTMAN:

10 Q. Mr. Leavitt, do you know who put that piece of leader where it was? A. Well, I called up Gurtman about it.

Q. No, no; the piece of leader that fell down, who put it there? A. That piece of leader, I don't know.

Q. You don't know who put it there? A. No. I know it was an old leader there on the wall, and the leader was leaking; and I called up Gurtman, he shall take care of it; and I was not there when he did take care of it.

20 Q. Did he ever do any leader work before that day? A. Before that day?

Q. On that job? A. On that job? No.

Q. Mr. Leavitt, was that leader fastened against that wall in a secure manner?

Mr. Rinzler: I object. He said before he had not examined it, your Honor.

Mr. Gurtman: I am permitted to ask that question.

30 A. That leader was by the wall.

Q. Was it securely fastened to the wall? A. Well, I don't know it. I looked at it from the sidewalk, and the only thing what I find out about the leader, the water was running on the brick wall, and I called up Gurtman, he shall take care of it.

40 Q. When you called Gurtman up did you call him because you were afraid the leader would fall or because the water would leak? A. The water was leaking.

Sidney Leavitt—Recalled—for Defendants.

Q. Into the new building? A. Yes, sir.

Q. Did anyone complain to you that that leader was in a dangerous condition? A. No.

Q. As far as you know, was it fastened securely against the wall?

Mr. Rinzler: He said he doesn't know.

Mr. Gurtman: If your Honor please, I 10 want to ask my question.

The Court: Let him do so.

Q. As far as you know was that secure against the wall? A. If it was secure against the wall?

Q. Strong against the wall; nailed against it? A. Please, I don't know. I couldn't tell you. The way it was leaking on it, that is what I found out; the water was running off it.

20 Q. Mr. Leavitt, before you called Mr. Gurtman, I ask you again, did he ever have anything to do with that piece of leader, as far as you know of, before that fell down, before July 8th? A. Please, I don't know. I called him.

Q. Did you ever call him before? A. Before, no.

Mr. Gurtman: That is all, and I rest.

I repeat my motion, that there is no evidence whatsoever to hold either party.

30 The Court: Now you did not prove any damages as to the doctor. Do you want to waive that?

Mr. Rinzler: I suppose we can agree it would probably be about \$35, your Honor.

Mr. Gurtman: How much?

Mr. Rinzler: About \$35. It covered three weeks of treatment.

Mr. Gurtman: You mean to say we stood here all day for \$35? 40

Verdict.

Mr. Rinzler: No, the doctor.

Mr. Gurtman: No, we don't agree. We want the doctor here. I am very much interested in having the doctor here.

The Court: If you want me to decide it I will decide it without the doctor.

10 Mr. Rinzler: All right, your Honor.

Mr. Gurtman: I request that the Court's decision be withheld pending the testimony of the doctor.

The Court: I will decide it without the testimony of the doctor.

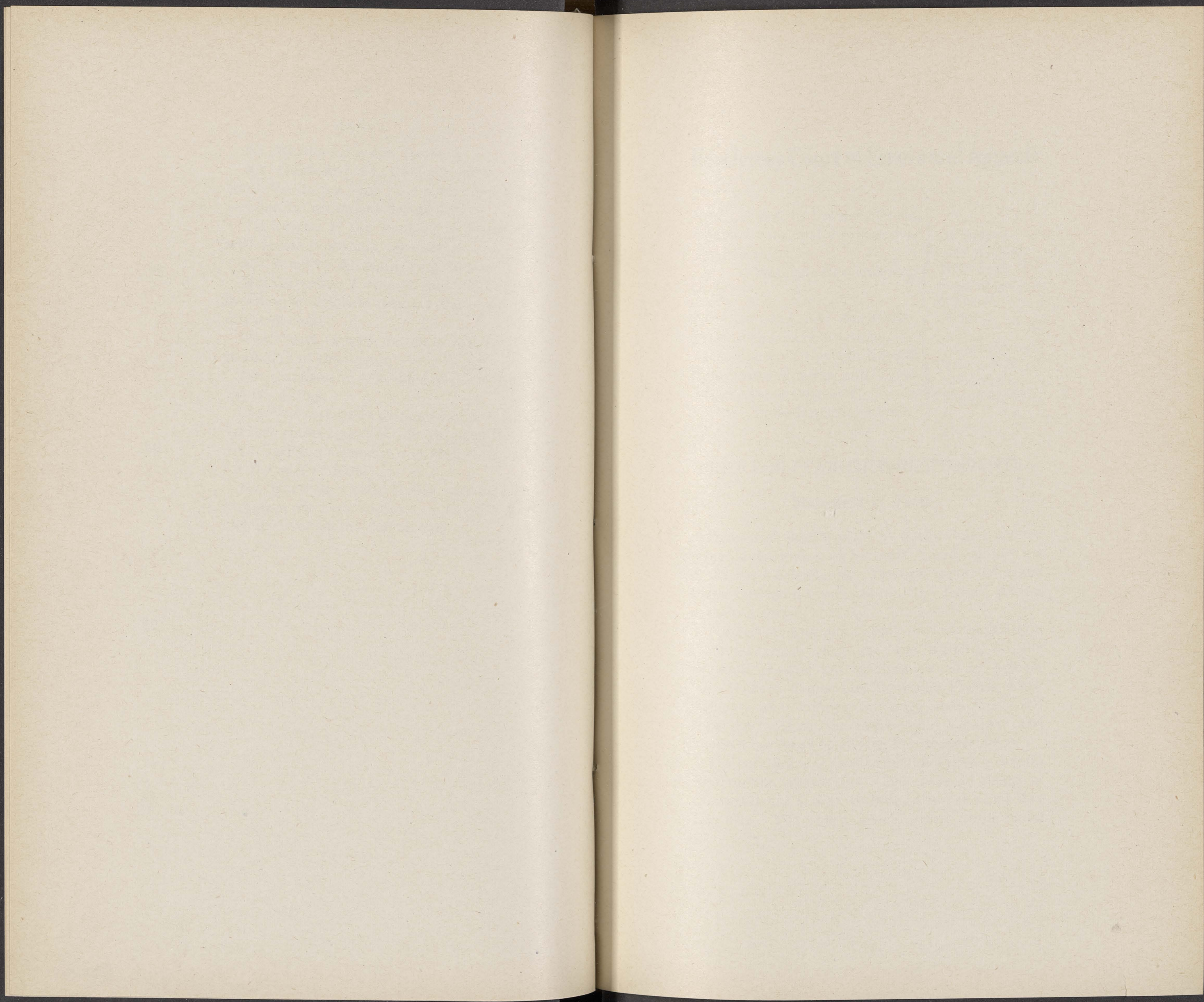
Mr. Gurtman: I take an exception to the Court's ruling.

20 The Court: I think there should be a joint verdict entered against the defendants, L. & G. Building Company and Max Gurtman, for the sum of \$350.

Mr. Gurtman: Your Honor will note an exception on both motions to direct a verdict in favor of the defendants.

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New Jersey Court of Errors and Appeals

STELLA SUDOL, by her next friend,
JOHN SUDOL, and JOHN SUDOL,
Individually,
Plaintiffs-Respondents,
vs.

MAX GURTMAN and IDA GURT-
MAN, (first name fictitious, be-
ing unknown) EDWARD KRONES.
BENJAMIN KRONES and L. &
G. BUILDING COMPANY,
Defendants-Appellants.

On Defend-
ants' Appeal
from Judg-
ment of the
Supreme
Court.

Sat below:
Parker, Min-
turn and
Campbell, *JJ.*

BRIEF FOR PLAINTIFFS-RESPONDENTS.

Statement of Facts.

This action was brought by Stella Sudol, by her father, John Sudol, as her next friend, against all of the above defendants. The case was tried in the Passaic District Court before the Judge, sitting without a jury.

The action arose out of the injuries which Stella Sudol sustained while she was walking on the sidewalk, passing the building owned by defend-ants, Edward Krones and Benjamin Krones, when suddenly and without warning, some object fell from the building, struck her right shoulder and knocked her down rendering her unconscious.

The building was at the time undergoing certain construction alterations which were in charge of the appellants, L. & G. Building Company and Max Gurtman. The object which struck Stella Sudol

was a leader pipe about six feet long. It fell from the wall of the building where two of appellants' employees in charge of the construction work were working. The leader pipe which injured the plaintiff had been temporarily placed against the building by these workmen, and was so insecurely placed that it became detached and fell from the first story of the building.

Inasmuch as the owners had nothing to do with the leader pipe, or its placement against the building, or with any other of the construction work, and inasmuch as the leader pipe had been placed there by the workmen of the co-defendants, and it, as well as the whole alteration job, was then exclusively in charge of and under the control of the co-defendants (appellants) and its workmen, there was a nonsuit granted in favor of the owners, but a judgment was entered in favor of Stella Sudol, the injured plaintiff, against the L. & G. Building Company and Max Gurtman, for Three Hundred and Fifty (\$350.00) Dollars.

The attending physician who treated Stella Sudol did not appear at the trial with the result that there was no proof of the loss of her father, John Sudol. His claim for damages was, therefore, waived, and his action abandoned.

The defendants appealed from this judgment to the Supreme Court where the judgment was affirmed. They now appeal from the judgment affirming the lower Court.

POINT I.

The trial judge properly refused to nonsuit the plaintiffs at the close of the case.

At the close of plaintiffs' case, there was evidence before the Judge establishing the following facts: Defendants, Kroner Brothers, owners of some land on Madison Street, Passaic, New Jersey, engaged defendant, L. & G. Building Company, to construct a new building on Lexington Avenue, and, likewise, to make certain substantial construction alterations on the building adjoining the same to the rear, fronting at No. 20 Madison Street, Passaic, New Jersey (Case, p. 27, ls. 30-45, and Case, p. 28, ls. 1-12; the L. & G. Building Company was given a contract for the construction work on both buildings; the work was started about June 10th, and was finished about two months later; there were old leaders on the property (Case, p. 28, ls. 30-40; the owners left all of the work to the "L. & G." (Case, p. 29, top); the owners had no jurisdiction over the men employed by the L. & G., and did not have "any say as to what men should be engaged to do this sort of work"; the owners gave out the "whole, general contract to the L. & G. Building Company"; "and as far as you (the owners) were concerned you were through until the building was delivered to you completed? A. That is right" (Case, p. 29, ls. 10-25).

The plaintiffs produced as their witness, one, Sidney Leavitt, an officer of the L. & G. Building Company, which was in charge of the construction work on both buildings (Case, p. 29, ls. 35-40; and Case, p. 30, ls. 1-12). His testimony es-

established that the work was commenced in June, was continued until about the middle of August, when the job was finished; *he called up defendant, Max Gurtman, and instructed him to do the leader work on the "old building" (in front of which the accident happened); Max Gurtman, and his men, removed the old leader from one corner of the building to the next (Case, p. 30, ls. 22-40, and Case, p. 31, ls. 1-10); "and he (Max Gurtman) was removing the leader from one corner to the other? A. Yes, on the same corner." "Q. That is what you hired him for? A. I did" (Case, p. 31, ls. 5-40).*

Leavitt called up Gurtman and instructed him to "change from the leader that came straight down to the leader that was substituted in the front of the new building"; he had to "cut away the old leader"; the old leader had a leak in the side; there was a hole in it, and the water used to run on the wall; and he called him up to take care of it (Case p. 32, ls. 20-40; and p. 33, ls. 1-12).

On cross examination, he said that he "called Mr. Gurtman to take that leader off and put a permanent leader on, because it was leaking"; that leader was an old one (Case, p. 34, ls. 30-40); he (Leavitt) did none of the leader work himself; he called Gurtman up and directed him "to take care of it" (Case, p. 35, ls. 12-25).

Plaintiff, Stella Sudol, testified that on July 8th, 1926, she was walking on the sidewalk, passing in front of the building #220 Madison Street, Passaic; and as she walked by the building with her mother, one of the workmen was going up a ladder that was leaning against the front wall of the building, and another workman was down on the sidewalk near the ladder; "I don't know what happened after that, because something

dropped, and I don't know—when I come to I saw that there was a leader pipe there (Case, pp. 13 and 14); she did not know that anything was falling until she was hit; it struck her right shoulder, knocked her down and made her unconscious for about five minutes (Case, p. 15 and top p. 16); when she regained consciousness she saw the leader pipe right by her; it was about six feet long, and there was nothing lying around or near her at the time (Case, p. 16 top, Case p. 17); when she regained consciousness, she observed that one of the two fellows was going up the ladder, and another fellow down the ladder said to the former, "Why don't you look what you are doing", and one of the workmen on the roof of the building said, "I thught that leader was banged from the wall" (Case, p. 17 ls. 20-40); one of the men that spoke had picked her up after she had fallen; he said he was working there for Max Gurtman; one of the fellows working there "was just about to go on the roof then"; *the one that was down on the sidewalk said that he was working for Max Gurtman; he gave her Max Gurtman's address (Case, p. 18, ls. 1-28); there was a little boy there who, it developed, was Gurtman's son; he said to her: "Here is my father's address", and he gave her his father's card; he gave her the name, Max Gurtman (Case, p. 18, ls. 22-40; and Case p. 19, ls. 1-12).*

On cross-examination, she said that "they were fixing the roof. I don't know what work because I was not looking up there. When I walk I don't look what they are doing up on top of the roof; I look where I walk. So I was walking down, and suddenly"—(Case, p. 20, bottom, and Case p. 21, top); the roof was about one story high; there were two fellows working on it; she was about

three or four feet away from the ladder; she did not notice anything peculiar going on as she walked along; she saw the men working but paid no attention, and the first thing she knew she was struck (Case, p. 21, ls. 1-32).

On re-direct examination, she said that one of the workmen told her "that if there is anything wrong, 'if there is anything the matter,' he said, 'here is the name of Max Gurtman', and he said 'Let him know about it'. So my father called up, and he didn't know anything about it then"; that the workingman who was on the top of the roof was standing with one foot on the roof and one foot on the ladder (Case, p. 16, ls. 20-50); that her father called Mr. Gurtman on the telephone after the accident (Case, p. 26, ls. 1-12).

Plaintiff's mother, Sophia Sudol, testified that she was walking with her daughter when the pipe fell and hit her daughter in the right shoulder; the latter fell and fainted; she did not see the leader falling but saw it strike her daughter (Case, p. 40, ls. 22-40); there was a man up on the roof and one down when the pipe fell on her daughter; she saw the pipe on top of her daughter; she does not know what caused the pipe to fall; she "don't know what caused it. There was one man standing down and one on the roof, and that is all I saw"; she does not know "what the man was doing, but all I know is that the man was up there"; she does not know what either of the men were doing (Case, p. 41, ls. 10-33); the man that stood on the sidewalk near the ladder picked her up, took a card and told her to go to the doctor (Case, p. 42, ls. 1-22). The Court then asked, "Has she got the card", Counsel then replied, "We admit the workman gave the address of his employer" (Case, p. 42, ls. 20-22).

John Sudol, the father, testified that he did not

see the accident; when his daughter was brought home he called the doctor, and later called up the defendant, Mr. Gurtman, who told him that he did not know anything about the accident as yet, but that he would talk to his workmen and find out, and then he would call Mr. Sudol back; *Defendant Gurtman did call Mr. Sudol back on the telephone and told him to take good care of his daughter, to get a doctor to take good care of her, and whatever there will be due he would pay;* he also told Mr. Sudol that he had spoken to his workmen, and that the latter told him that they know all about the accident, they knew all that happened (Case, p. 36, ls. 10-40); and Case, p. 37, ls. 1-20); that Gurtman told him *that it was his (meaning Gurtman's) fault; that he carried insurance and would pay for whatever is necessary* (Case, p. 31, ls. 10-21).

It is elementary that in passing on a motion for a nonsuit, the trial judge is required to take as true all of the evidence which supports the plaintiff's view.

Littman vs. Slack (Err. & App.), 5 A. R. 139;

Kerner vs. Zerr, (Err. & App.), 135 Atl. 866 (not officially reported).

The trial judge was, therefore, warranted in finding that the owners had no charge, supervision or control of the building at the time of the accident; *that the L. & G. Building Company, Max Gurtman and the latter's subordinates had exclusive charge and control of the alteration and construction work on the old as well as the new building; that they had removed the six foot leader pipe from one corner of the old building to another corner thereof; that while the men were working*

on the building this leader pipe suddenly and without warning became detached and loosened from the building, and fell striking the plaintiff; plaintiff did not know that any object was falling until she was struck by the leader pipe; her mother, who was with her, did not know that anything was falling until she saw the pipe upon her daughter; they were unable to explain what caused the pipe to fall, or the pipe to become detached from the building and fall.

In that situation, there was evidence from which an inference of negligence could be clearly drawn which required the defendant, the L. & G. Building Company and Max Gurtman, who were in the exclusive charge and control of the building, and the alteration work that was going on, and who had removed the leader pipe from one corner of the building and placed it on another part of the building to offer explanatory evidence. It became necessary for the defendants to rebut the presumption of negligence in order to exculpate themselves from liability.

It is an unusual happening for a leader pipe to become detached and loosened from a building. It must be borne in mind that the leader pipe had just recently been removed from one part of the building to another by the defendants and their workingmen who were doing the construction work.

Such evidence justified the trial judge in concluding from the evidence that the leader pipe was so insecurely or negligently placed against the building that as a proximate result whereof it became detached and fell.

As was said by the Supreme Court in *Mackenzie vs. Oakley*, 94 N. J. Law 66:

"The situation presented is within the rule applicable to an accident, which suddenly and for no apparent cause happens, and yet from the very fact of its occurrence an abnormal situation is presented which bespeaks negligence * * *, under the rule of *res ipsa loquitur*, which calls upon the defendant for an explanation to exculpate herself from the legal inference or presumption of negligence arising therefrom." (Citing cases from this court).

In *Sheridan vs. Foley*, 58 N. J. L. 230, the syllabus reads: "Where one engaged in laying a sewer in a building is injured by a falling brick, in the absence of explanation by the contractor doing the brick work, it will be presumed that it occurred from want of reasonable care on his part, and he is liable for the injuries received."

In that case, Chief Justice Gummere, who wrote the opinion, said:

"The facts in the present case bring it within the application of this principle (meaning *res ipsa loquitur*). The bricks were in the custody of the defendant's servants at the time when this one fell, and it was their duty to so handle them as not to endanger others, who were engaged in other work upon the same premises. This brick could not have fallen of itself, and the fact that it fell, in the absence of explanation by the defendant, raises a presumption of negligence. *If there are any facts inconsistent with negligence, it is for the defendant to prove them.*" (Italics ours).

Applying the rule which was settled in *Sheridan vs. Foley*, *supra*, we say that the defendants were in exclusive charge and control of the leader pipe; they caused it to be removed from one part of the building and attached it to another; it was the

duty of the defendants and their servants to so handle the leader pipe and to so securely attach it to the building, as not to endanger persons who were lawfully walking by the building on the sidewalk. This leader pipe could not have fallen of itself, and the fact that it fell, in the absence of explanation by the defendants, raises a presumption of negligence. So that if there are any facts inconsistent with negligence, it is for the *defendants* to prove them.

Sheridan vs. Foley, supra, was recently again followed and approved by this Court in *Crawford vs. American Stores Co.*, 5 Misc. (No. 15) page 413, where plaintiff entered defendant's grocery store, and while standing in front of the counter was injured by some falling cans of pickles which had been piled on the counter to a height of nearly three feet. According to the plaintiff's testimony the cans, which were piled in pyramid fashion, tumbled over on her, one or more of them striking her on the head and severely injuring her. A motion for a nonsuit was made and based on the contention that there was no evidence to establish the defendant's negligence. Against this it was contended that the rule of *res ipsa loquitur* applies. This court said:

"We incline to think that it does. It is difficult to see a distinction in principle between a pile of cans falling over from a counter and a brick falling from the scaffold of a building. *Sheridan v. Foley*, 58 N. J. L. 230. Both being under the control of the defendant, placed there by it, the fact of a fall might justify a finding of neglect in properly securing it."

The opinion of the Supreme Court in the case at bar is reported in 5 N. J. Misc. 929. The trial

judge was in duty bound to deny the motion for a nonsuit.

Moreover, counsel, who represented both appellants, made a motion for a nonsuit only on behalf of defendant, Gurtman. He made no motion for a nonsuit on behalf of the defendant, L. & G. Building Company.

POINT II.

The trial judge did not err "in not directing a verdict in favor of defendants-appellants".

The trial judge sat without a jury. In that situation, the trial judge had no one to whom to direct the entering of a verdict.

Moreover, if there were a jury sitting, the trial judge would be duty bound in law to submit the case to the jury because the case clearly presented a question of fact.

The question arises whether or not at the close of the case defendants' explanation, if any, was sufficiently exculpatory to rebut the legal inference or presumption of negligence. That constituted a question of fact for the trial judge, acting as a jury, to determine, and not a matter of law, and having entered judgment for the plaintiff the legal inference results that the explanation offered was not sufficient to exculpate the defendants from liability or to rebut the presumption of negligence.

Mackenzie vs. Oakley, supra.

Defendant, Max Gurtman, admitted that he received an order from Mr. Leavitt, an officer of the defendant, L. & G. Building Company, to do certain work on the Kronos Building, *whereupon he*

sent some of his men to do the work (Case, p. 46, bottom, and p. 47, top); he did the leader work on the new building and removed the leader from one part of the old building and placed it elsewhere on the building (Case, p. 49, ls. 22-40); that at the time of the accident his son, who was at the property, said to the plaintiff, "My father is doing the work here," and gave the plaintiff his (defendant's) card; he had two men working there at the time plaintiff was injured (Case, p. 49, bottom, and Case, p. 50, ls. 1-25); that he sent them there to do the leader work for him (Case, p. 51, ls. 1-15); his two men who were working on the job told him about the accident; that the L. & G. Building Company "probably did" leader work on the building (Case, p. 51, bottom); he was then asked, "Q. So that you and the L. & G. Building Company did the leader work there; is that right?"; the defendant was asked substantially the same question again, but each time he dodged and evaded the question (Case, p. 51, ls. 1-20; and finally persisted in explaining the situation in his own way, and in doing so said that the L. & G. was putting up the new building—"there was a three story building, right, on the corner, and they had to put a one-story affair right adjoining the three story building. Before they could put up that wall they had to remove that leader, they had to remove one floor of leader. In the meantime, when they went up with that wall, all that water from the main building, from the three-story building, began pouring into this here building, to that one story affair. Therefore I presume they had some of their men there to take a piece of leader and just stick it on there while it was raining, so as to keep the water running out from the building. Then they called me up and told me

to go up there and make a permanent connection from this leader, so that the water would not go in there. And that is when I sent my men down. That is the whole story. The Court: *That was from the L. & G. Building?* The Witness: *From the L. & G. Building Company*" (Case, p. 52, ls. 18-40), "Q. *This piece of leader that is spoken of here, this temporary connection?* A. *Yes*" (Case, p. 53, top).

Elias Kovak, a witness produced on behalf of the defendant, testified that he works for defendant, Max Gurtman, and had been in his employ for four years as a sheet metal worker (Case, p. 53, bottom); he was sent to work on the Madison Street job; one of the mechanics was with him (Case, p. 54 top); while he was on the ladder which was leaning against the building, the leader fell and struck the plaintiff (Case, p. 54, ls. 1-15).

When asked by the court to explain how the leader struck her, the witness said:

"Well, it was up there, leaning up against the building, with only a piece of wood underneath to hold it up" (Case, p. 54, ls. 20-25).

He said that the ladder had not touched the leader at all (Case, p. 54, bottom, and Case, p. 55, top).

Sidney Leavitt, an officer of the L. & G. Building Company, who had already testified as plaintiffs' witness, was called as a witness for the defendants. He was asked: "Do you know who put that piece of leader where it was? A. *Well, I called up Gurtman about it.* Q. You don't know who put it there? A. No, I know it was an old leader there on the wall, and the leader was leaking; and I called up Gurtman, he shall take care of it; and

I was not there when he did take care of it. Q. Did he ever do any leader work before that day? A. Before that day? Q. On that job? A. On that job? A. No" (Case, p. 64, ls. 10-21).

So that the leader must have been changed from one corner of the building and placed upon another portion of the building on the same day of the accident.

Defendants' explanation, if we may call it such, though we question that it can be considered an explanation, was not exculpatory. On the contrary, there was evidence of defendants' liability. When defendants' witness was asked to "explain that now, how it struck her", he answered, "*Well, it was up there, leaning up against the building, with only a piece of wood underneath to hold it up*"; and although the leader pipe had just been removed from a corner of the building and placed upon another part thereof, it fell from the building although it was not touched by the ladder, or anything else.

POINT III.

The case abounds with evidence from which negligence can be reasonably inferred.

This is in answer to defendants' claim that the case is devoid of such evidence.

We consider that our recitation of the facts established by the evidence manifestly shows this charge to be untenable.

CONCLUSION.

For the foregoing reasons, we respectfully submit that no harmful or reversible error is shown, and that the judgment entered in the Passaic District Court should be affirmed.

Respectfully submitted,

FEDER & RINZLER,
Attorneys of Plaintiffs-Respondents.

FEDER & RINZLER,
Of Counsel.

New Jersey Court of Errors and Appeals

STELLA SUDOL, by her next friend,
JOHN SUDOL, and JOHN SUDOL,
Individually,

Plaintiffs-Respondents,

vs.

MAX GURTMAN and IDA GURT-
MAN, (first name fictitious, be-
ing unknown) EDWARD KRONES.

BENJAMIN KRONES and L. &
G. BUILDING COMPANY,

Defendants-Appellants.

In Tort.

On Appeal
from Su-
preme Court.

BRIEF OF DEFENDANTS-APPELLANTS.

The case was tried by the Passaic District Court without a jury and judgment was rendered for the plaintiff infant for \$350.00 against the defendants, Max Gurtman and L. & G. Building Company.

The testimony of the case, as summarized by the Supreme Court, in its *per curiam* opinion, follows: (the portion in italics being the testimony of the defendant):

"The action was brought to recover for personal injuries sustained by a fifteen year old girl in being struck by a leader which fell from a building as she was walking on the sidewalk. The building from which the leader fell was a one story structure adjacent to a three story building, and was being erected by L. & G. Building Company, as general contractors. The building company engaged the defendant, Gurtman, as

sheet metal sub-contractor to repair or replace the leader. *The latter sent two workmen to perform the work, one of whom testified that within five minutes after they arrived at the building they unloaded the truck, placed a ladder to the roof of the one story annex, five or six feet away from the leader, whereupon the witness started to ascend the ladder when the leader fell and struck the plaintiff. He also testified that the leader had been leaning against the building with only a piece of wood underneath to support it. The defendant Gurtman who did not witness the accident testified that the leader on the three story building was in part removed as the work progressed on the new building, and that a piece of the leader was temporarily placed against the new building, presumably by workmen of L. & G. Building Company in order to carry rain from the walls of the new building.* The plaintiff's evidence was that at the time of the accident, workmen on the sidewalk called to a workman on the ladder, "Why don't you look out what you are doing?" (this was denied by defendant's witnesses). A workman on the sidewalk picked the girl up and gave her the address of the defendant Gurtman. (The address was given by a boy, Mr. Gurtman's son who was on his way from school P. 19 l. 7 to 10). The plaintiff's father testified that he called Gurtman on the phone and was informed by him that he would investigate the accident and report back; that in compliance with such promise Gurtman called the father and advised him to give the child the best medical attention,

and that he would pay the bill, and that he was insured against accidents. Gurtman denied ever calling plaintiff's father on the phone.

Omitting from the above summary the testimony presented by the defendants we have merely the fact that an accident occurred. At the close of the plaintiff's case counsel for the respective defendants' moved for a non-suit. The motion of the defendant owners was granted on the ground that *no agency was proved* (Pg. 44, l. 7 to 18). In connection with this determination of the court it must be remembered that the basis of the proof that the owners had no connection with the work was the testimony of one of the owners, Edward Kroner (Pg. 29, ll. 3 and 4).

The motion for non-suit on behalf of defendant Max Gurtman and L. & G. Building Company was denied. The basis of the court's denial is set forth in the discussion between court and counsel (Pg. 44, 45 and 46).

At one point (Pg. 44, l. 26) the court states that the plaintiff's case raised a "presumption"; at another point (Pg. 45, l. 8) there was "no presuming negligence"; rather it was "on the *prima facie* case made out by the plaintiff" that the motion was denied, (Pg. 45, ll. 9 and 10). "Surely" says the court (Pg. 45, l. 24 to 27) "this young girl had a right on the street, on the sidewalk. She was where she had a right to be." And answering the proposition that the contractor and his workmen had a right to be there also and that the accident may have come about through no negligence, the court stated (Pg. 46, l. 14) "That would not help the young girl who has been hurt."

We respectfully submit that at the close of the

plaintiff's case a *prima facie* case had not been established and that a non-suit should have been granted in favor of all of the defendants. We further submit that the granting of the non-suit in favor of the owners alone on their own self-serving testimony was erroneous.

It is apparent that the court, in refusing the non-suit of the defendants Gurtman and L. & G. Building Company, was basing its decision on the theory that the happening of the accident raised a "presumption" of negligence and established "a *prima facie* case." Such being the case all parties defendant stood upon an equal footing before the court to offer exculpatory testimony.

We submit, however, that the facts in this case did not warrant the application of the theory of *res ipsa loquitur*; that such was the theory applied by the court throughout the case is evident from the statements of the court above stated and from the further colloquy at the close of the case (Pgs. 58, 59, 60, 61, 62 and 63).

The Supreme Court, in affirming the action of the District Court cites the case of Sheridan vs. Foley (58 N. J. L. 230). We submit that there is an obvious distinction between the case cited and the instant case.

In Sheridan vs. Foley the facts clearly warrant the application of the rule. The plaintiff, a plumber mechanic, was injured when struck by a brick which fell from above him where employees of the defendant, mason contractor, were working on the building. Chief Justice Gummere, speaking for this Court, points out that this is one of a class of "cases where the accident is such as, in the ordinary course of things, would not have happened if proper care had been used." And further, "the bricks were in the custody of the defendant's ser-

vants at the time when this one fell, and it was their duty to so handle them as not to endanger others who were engaged in other work upon the same premises. This brick could not have fallen of itself, and the fact that it fell, in the absence of explanation by the defendant, raises a presumption of negligence. If there are any facts inconsistent with negligence it is for the defendant to prove them."

Two pertinent questions immediately arise in applying the instant case to the case cited.

In whom was the custody of the leader at the time of the accident? Could not a leader fall, in the ordinary course of events and barring unusual natural phenomena, without the intervention of human agency?

In the Foley case there existed the obvious necessity to call upon the defendant to explain away the presumption of negligence; this necessity arose from the particular facts. The brick having fallen the facts with respect to the cause of its falling were exclusively in the defendant's keeping (assuming that no other witnesses were available) and if the defendant was permitted to maintain silence it would result in apparent injustice to the plaintiff. The court in the Foley case did not decide that the falling of the brick was negligence; it merely decided that the falling of the brick called for an explanation from the defendant.

In Levendusky vs. Empire Rubber Mfg. Co., (84 N. J. L. 698) Justice Parker, speaking for this court, stressed the fact that the rule of *res ipsa loquitur* does not relieve the plaintiff from the necessity of proving his case.

"He (the plaintiff)" says the court, "made no pretense of having submitted all the evidence that he had been able to obtain on this point, or that

he had been unable to obtain any, but rested on the proposition that, no matter what he knew or could show, the defendant on proof of the occurrence of the accident was bound to explain it away. The Bahr case is directly to the contrary;" the case cited was one in which the plaintiff was injured by the explosion of a vulcanizer on the defendant's premises while he was walking on the highway on his way to work in the defendant's plant.

It is evident that a defendant charged with negligence is not to be penalized by plaintiff's unwillingness or carelessness in presenting his case. In the instant case all the facts surrounding the accident were in possession of the plaintiff or were obtainable by him. He could have presented proof of the method of fastening to the wall; the nature of the fracture of the leader after the fall; the condition of the nail or other fastening after the accident; the leader itself; these and many other items of proof were available to him or the inability to obtain them should have been explained by him. This he fails to do and rests entirely upon the occurrence of the accident itself.

We respectfully call attention to the fact that the alleged statement "Why don't you look out what you are doing?" which was denied in the defendant's case, provides no basis for predicating negligence. Even if evidential, against whom is it chargeable? Likewise the testimony with respect to the alleged telephone conversations between plaintiff's father and Max Gurtman wherein Gurtman instructed plaintiff's father to give the girl the best medical attention, that he would pay the bill and that he was insured, is no basis or admission of negligence. Gurtman's statement certainly cannot be chargeable against the L. & G. Building Company and if against L. & G. Build-

ing Company, why not against the owner? At best the alleged statement (which Gurtman denied particularly) might be the basis of an action on contract against Gurtman alone for the amount expended for medical attention. In view of the fact that the plaintiff refused to hold the case pending the appearance of her physician, the judgment rendered certainly could not have been based on the sums expended for such medical care.

In Sheridan vs. Foley, the court cites Bahr vs. Lombard (53 N. J. L. 233) which has been cited with approval by this court. In the Bahr case the plaintiff was injured by the explosion of a pipe conveying crude oil while in the employ of the defendant.

Speaking of the application of the *res ipsa loquitur* rule Justice Garrison points out that the quantum of proof required of the plaintiff depends on the circumstances of the particular case. "It is evident" states the court "that this phrase (*res ipsa loquitur*) clearly imparts that there must, in each case, be something in the facts that speaks of the negligence of the defendant." And referring to the duty of the plaintiff to present his case the Court states, "In the present case it is not necessary to discuss either the existence of such doctrine or its harmony with the canons of proof, for the reason that its application, in any event, must depend on whether the party invoking it has adduced all of the testimony reasonably within its power, for it is in such cases only that the rule in question is applied by those who maintain its soundness." "In any case" states the court, "it must be conceded that unless a plaintiff has presented the testimony which was reasonably within his power he can derive no benefit from the proposed doctrine." In the case cited there was far

more difficulty for the plaintiff to present testimony surrounding the explosion of the crude oil pipe which was under the exclusive control of the defendant than there was for the plaintiff in the instant case.

The instant case falls in line with the following cases: Bahr vs. Lombard, 53 N. J. L. 233; Noonan vs. Great Atlantic & Pacific Tea Co., 139 Atl. 9; Levendusky vs. Empire Rubber Mfg. Co., 84 N. J. L. 698; Holmes vs. Pellegrino, 133 Atl. 194; Fenderson vs. Atlantic City R. R. Co., 31 Atl. 967.

These cases are distinguished from those in which the facts adduced by plaintiff were sufficient to bring them within the rule: Mannon vs. Vesper Lodge I. O. O. F. 116 Atl. 784; DeGroat vs. Ward Baking Co., 130 Atl. 540; Newark Electric Light Co. vs. Ruddy, 62 N. J. L. 505; Bergen County Traction Co. vs. Demarest, 62 N. J. L. 255; Higgins vs. Goerke-Krich, 91 N. J. L. 464.

We respectfully submit therefore that the District Court erroneously applied the theory of *res ipsa loquitur* and should have granted a non-suit in favor of all defendants at the close of the plaintiff's case.

At the close of the defendant's case counsel moved for the direction of a verdict. This was denied. The defendant Gurtman testified, through himself and his employees, that neither he nor they had ever touched the leader up to the time of the accident. This was not contradicted. The defendant Levitt, explained, that he always maintained the most competent help and could offer no explanation of the falling of the leader. It was a temporary leader, he testified, which he called the defendant Gurtman to replace when he found that it was causing the water to run on the wall because of its leaking. At the close of the

defendant's case there was no evidence which pointed to negligence on the part of either defendant.

It is apparent that the court was prompted to award judgment on the theory that the accident had happened, the plaintiff was injured and she ought to be compensated (Pg. 59, 60, 61, 62 and 63).

"Do you think somebody should be held?" asked the Court (Pg. 61, l. 25).

Mr. Gurtman: "But, if your Honor please, we are not to be placed in the position that we have to look for someone to be liable. The law books are full of cases where people have been killed and no negligence shown. Mr. Gurtman never touched that pipe. No man in his employ ever touched that pipe, had nothing to do with hanging the pipe there. We must have some evidence of negligence upon which to be blamed for liability. How can we ask Mr. Gurtman or anybody else to be liable because we feel sorry? On what ground will we base that decision."

The Court: "But that is not going to do the girl any good."

We respectfully submit that even if the court properly denied a non-suit on the plaintiff's case, the explanation presented by the defendants required a direction of a verdict in their favor.

Respectfully submitted,

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