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SUMMONS.

THE STATE OF NEW JERSEY TO SARAH ELDREDGE, GREETING:

You are summoned to answer the annexed complaint of Elizabeth McLain Rich, next friend of James McLain Rich, and Elizabeth McLain Rich in her own right, in an action at law in the Cape May County Circuit Court.

(Seal)

And take notice that unless you file your answer to said complaint with the clerk of Cape May County Circuit Court, at Cape May Court House, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, HONORABLE W. FRANK SOOY, Judge of our Cape May County Circuit Court, at Cape May Court House, New Jersey, this 25th day of July, 1928.

A. C. HILDRETH,
Clerk.

SAMUEL M. GARFINKLE,
Attorney of Plaintiff.

COMPLAINT.

CAPE MAY COUNTY CIRCUIT COURT.

ELIZABETH MCLAIN RICH, next friend of JAMES MCLAIN RICH, and ELIZABETH MCLAIN RICH, in her own right, *Plaintiff*,
v.
SARAH ELDREDGE, *Defendant*.

Action at Law.
Complaint.

Plaintiff, James McLain Rich, by Elizabeth McLain Rich, his next friend, both residing at Cape May Court House, Cape May County, New Jersey, complaining says:

FIRST COUNT:

1. That on the 14th day of April, 1928, plaintiff, James McLain Rich, was lawfully in Mechanic Street, in front of Heisler's restaurant, or thereabouts, the same being one of the public highways in Cape May Court House, Cape May County, New Jersey.

2. That while plaintiff, James McLain Rich, was thus lawfully in said highway, Sarah Eldredge, the defendant, operated an automobile over said high-

way, in an easterly direction, at a high and unlawful rate of speed, and in a careless, reckless and negligent manner.

3. That the said defendant, by reason of such negligence and careless operation of said automobile, struck plaintiff, James McLain Rich, throwing him to the ground with great force and thence ran over plaintiff's body, with said automobile, severely injuring plaintiff, from which injury plaintiff is sick, sore and lame, and endured great pain and suffering and was permanently injured.

4. That as the result of said carelessness and negligence of the said defendant, plaintiff's right thigh was fractured in two places and the bone splintered, his head and face were badly cut and lacerated in numerous places, his left knee was lacerated and severely injured, his private parts were also severely injured, the exact nature of which are as yet unknown to the plaintiff and his memory impaired. All of which caused him and still causes him pain and deprived him of the normal uses of his body and its members.

5. By reason of all of which as aforesaid, plaintiff has been damaged by the defendant in the sum of $30,000.00 (thirty thousand dollars).

Wherefore, plaintiff, James McLain Rich, claims damages against said defendant, Sarah Eldredge, in the sum of thirty-thousand dollars ($30,000.00).

SECOND COUNT.

1. Plaintiff, Elizabeth McLain Rich, in her own right, repeats paragraphs 1, 2, 3, 4 and 5, and says

that by reason of the negligence of the said defendant, Sarah Eldredge, this plaintiff was obliged to pay, lay out and expend large sums of money for doctors' services and medicines, in the support, nursing, care and curing, and in an endeavor to cure the said plaintiff, James McLain Rich, as well as other necessary expenditures so occasioned, to wit: the sum of fifteen hundred dollars ($1500.00).

Wherefore, this plaintiff claims judgment against the said defendant, Sarah Eldredge, for the sum of fifteen hundred dollars ($1500.00).

SAMUEL M. GARFINKLE,
Attorney for Plaintiff.

[ENDORSED]

Personal service made July 26th, 1928, upon Sarah Eldredge by showing her the original and leaving with her a copy thereof at her usual place of abode Green Creek, New Jersey.
Sheriff's Fees $4.25.

James T. Hoffman,
Sheriff.
By Harry W. Spalding,
Special Deputy Sheriff.

RETURN TO SHERIFF.

STATE OF NEW JERSEY, }
COUNTY OF CAPE MAY, } *ss.*

Personally appeared before me, Harry Spalding, who being duly sworn, upon his oath deposeth and saith that he is the special deputy sheriff of the County of Cape May, State of New Jersey, and that as such sheriff he served the annexed action at law, summons and complaint personally on Sarah Eldredge on the twenty-sixth day of July, A. D. 1928, by showing her the original and leaving with her a copy thereof.

HARRY SPALDING,
Special Deputy Sheriff.

Sworn and subscribed to before me this 27th day of July, A. D. 1928.

IRVING FITCH,
Surrogate.

ANSWER.

CAPE MAY COUNTY CIRCUIT COURT.

ELIZABETH MCLAIN RICH, next friend of JAMES MCLAIN RICH, and ELIZABETH MCLAIN RICH, in her own right, *Plaintiff*, v. SARAH ELDREDGE, *Defendant*.	Action at Law. Answer.

Sarah Eldredge residing in Cape May Court House, Cape May County, New Jersey, in answer to the complaint in the above-entitled cause, says that:

FIRST COUNT.

1. She denies paragraph 1.

2. She denies paragraph 2.

3. She denies paragraph 3.

4. She denies paragraph 4.

5. She denies paragraph 5.

SECOND COUNT.

Defendant denies paragraph 1.

FIRST DEFENSE.

The defendant was not guilty of negligence.

S. RUSLING LEAP,
Attorney for Defendant.

ORDER.

CAPE MAY COUNTY CIRCUIT COURT.

JAMES MCLAIN RICH,
Plaintiff,
v.
SARAH ELDREDGE,
Defendant.

In Tort.
Order.

It appearing upon reading the petition of James McLain Rich and the consent of Elizabeth McLain Rich thereto, and the affidavit of Forest M. Rich thereto attached, that James McLain Rich has a good cause of action against the defendant, Sarah Eldredge, and is an infant under the age of twenty-one years.

It is, on this 24th day of July, 1928, ordered, that Elizabeth McLain Rich be permitted to prosecute the said cause of action for the said James McLain

Rich in the above Court against the said defendant, Sarah Eldredge, as next friend.

Let the above rule be entered on the minutes.

LUTHER A. CAMPBELL,
Justice of the Supreme Court.

On the motion of
S. M. GARFINKLE,
Attorney of Plaintiff.
Dated July 21st, 1928.

PETITION FOR APPOINTMENT OF NEXT FRIEND.

CAPE MAY COUNTY CIRCUIT COURT.

JAMES MCLAIN RICH, *Petitioner,* v. SARAH ELDREDGE, *Defendant.*	In Tort. Petition for Appointment of Next Friend.

Plaintiff in the above stated cause of action shows that he is an infant, under the age of twenty-one years, to wit, the age of six years, and that he is advised that he has a just cause of action against Sarah Eldredge because of injuries received by him by being struck and run over by the said defendant, Sarah Eldredge, and that your petitioner has lately commenced an action in the above Court for the same.

Your petitioner therefore humbly prays your Honor to permit him to prosecute the said cause of action by his next friend, Elizabeth McLain Rich, who lives at Cape May Court House, in the County of Cape May, as your petitioner's next friend.

And your petitioner will ever pray, &c.

JAMES MCLAIN RICH.

I hereby consent and agree that the above-named James McLain Rich, shall be at liberty to prosecute his said action by me, as his next friend, according to the prayer of the above petition.

ELIZABETH MCLAIN RICH.

STATE OF NEW JERSEY, }
COUNTY OF CAPE MAY, } *ss.*

FOREST M. RICH, of full age, being duly sworn according to law, upon his oath says:

That he was present when the name, James McLain Rich, plaintiff named in the foregoing action, was signed to the foregoing petition by Elizabeth McLain Rich, and also he was present and saw Elizabeth McLain Rich, the person named in the foregoing petition, sign the consent thereto.

FOREST M. RICH.

Sworn and subscribed to before me this 21st day of July, A. D. 1928.

PHOEBE GRACE,
Deputy Surrogate.

TESTIMONY.

CAPE MAY COUNTY CIRCUIT COURT.

ELIZABETH MCLAIN RICH, next friend of JAMES MCLAIN RICH, and ELIZABETH MCLAIN RICH, in her own right, *Plaintiff*,
v.
SARAH ELDREDGE, *Defendant*.
} Action at Law.

APPEARANCES:
SAMUEL M. GARFINKLE, ESQ. (GEORGE BOURGEOIS, ESQ.), for the plaintiffs.
S. RUSLING LEAP, ESQ., for the defendant.

(The above entitled cause was tried September 14, 1928, before WILLIAM FRANK SOOY, Judge, and a jury.)

(Mr. Bourgeois opened the plaintiffs' case to the jury.)

(Mr. Leap opened the defendant's case to the jury.)

FRANK R. SHEPARD, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Bourgeois:

Q. Doctor, you are a physician and surgeon?
A. I am.
Q. Practicing where?
A. Millville, New Jersey.
Q. Do you know this little Rich boy, James McLain Rich?
A. I do.
Q. Since when?
A. About the middle of April, this year.
Q. Under what circumstances did you first know him or learn of him?
A. He was brought to the Millville Hospital and placed under my care.
Q. And what was the trouble with him?
A. Examination showed contusion of the head, body, limbs, with a fracture of one femur.
Q. What was the nature of this fractured femur?
A. The nature of the fracture? It was what we term a comminuted simple fracture.
Q. What did you term it?
A. Comminuted.
Q. Comminuted simple fracture?
A. Yes.
Q. What do you mean by comminuted?
A. That is, broken in more than one place. It was broken as you would strike an egg shell; that is, splintered.

Q. Can you explain to the jury just the nature of that splintering, how it appeared in the bone?

A. The fracture of the bone—the main fracture was oblique. It was not across the bone. It was an oblique direction. On one side one piece was slit out so that it left very little bone that you could bring end to end together, on account of a splinter off one side of the bone, probably about forty per-cent of the bone was split off the side.

Q. Was there any other part splintered other than that?

A. No. The oblique fracture and the splitting off the side of the bone.

Q. See if I understand you. The main fracture was obliquely across the bone?

A. Obliquely across the bone.

Q. Then there was a splintered off piece that looked like a flattened out triangle?

A. Yes.

Q. That had separated from the other parts of the bone?

A. Yes. I think about three inches in length.

Q. What was done by way of reducing it or setting it?

A. The leg temporarily that night was simply put at rest. The boy was in quite a severe state of shock and it was put up on a emergency splint. Later it was strung up in an upright position, hung up over the bed and the weight of the body acted as a counter ball in order to relax the muscles and bring the ends of the bones as near their original position as possible, together.

Q. Why would they not take their original position?

A. On account of the small fragment which had been broken off and the very small amount of bone which could be brought in apposition.

Q. And did the oblique nature of the fracture also prevent you from keeping it in position?

A. Yes; it made it very much more difficult.

Q. How long was it suspended in that position?

A. I think about six weeks.

Q. Then what did you do?

A. The limb was dropped down and placed in a plaster paris cast.

Q. And what resulted then?

A. We found that there was no bony union.

Q. No bone union?

A. No bone union.

Q. No.

A. The fragments would slip apart again.

Q. What makes them slip by?

A. Why, lack of union.

Q. What?

A. From lack of union.

Q. Well, I know, but unless there is something you would just ——

A. The muscles pulling.

Q. Contraction of the muscles?

A. Yes, contraction of the muscles. The leg was again suspended.

Q. In the cast or not in the cast?

A. No, with the cast removed. The leg was suspended and held in position until about the twentieth, I think, of June when the suspension was taken off and there was a bony union.

Q. How long was the child in the hospital in all?

A. On or about the fourteenth of April to about the twenty-fourth of June.

Q. What was his age?

A. Three or four years; I don't know just what it was.

Q. Was an X-ray taken of that?

New Jersey State Library

A. Yes. X-rays were taken on four or five occasions.

Q. Have you one of the plates here?

A. I have.

Q. Will you produce it, please?

The Court: How old was the boy?

Mr. Garfinkle: Five when the accident occurred, but he is six now.

Mr. Bourgeois: I wanted to show the jury ——

Mr. Leap: By whom were the X-rays taken?

Mr. Bourgeois: I don't know. I will find out.

The Witness: Unfortunately the damp weather has made these plates so they are not very legible. It is almost impossible to read them in this light at all. It takes a white background.

Q. That is not very good?

A. No; you can't get them in this light.

Q. By whom were they taken?

A. They were taken by the X-ray technician, Mr. Jagers.

Q. And is he a person skilled in that work?

A. Yes, sir; he does the X-ray work in the Millville Hospital.

Q. And does this show the bone as it actually existed or did exist in that boy's leg at that time?

A. Yes, it does. At just this angle of light you can get the shadow.

Q. That shows the nature of the union and the break, does it?

A. Yes.

New Jersey State Library

Mr. Bourgeois: It is pretty poor, Mr. Leap, about the worst I have ever seen. I am going to offer it so the jury can look at it.

Mr. Leap: No objection.

(The radiograph is received in evidence and designated as an exhibit for the plaintiff, P1.)

Q. Now, what can you tell me about the effect of this fracture upon the length of that child's leg?

A. There is about a quarter of an inch of shortness.

Q. About a quarter inch of shortening?

A. Of shortening.

Q. And will that disappear as he grows older?

A. The pelvis will rock over to a certain extent to compensate for it.

Q. But by the pelvis rocking over, you mean the pelvis will assume an unnatural position to compensate for it?

A. Yes.

Q. I don't want to know that. I don't want to know if some other part of the body is going to compensate. I want to know will that leg take up that shortening?

A. It will never be as long as the other leg.

Q. Is he permanently injured then?

A. Yes, permanent injury.

Q. Now, what other injuries did the child have besides an injury to the leg?

A. He had an injury to both the front and back of the head. He had some abrasions on his arms and abrasions on both knees and scratches on the body where the skin was simply rubbed.

Q. What was the nature of the wound on the back of his head?

A. He had a swelling, what we term a contusion.

Q. A contusion?

A. Yes.

Q. Well, was there any shaking up of the brain or anything of that sort?

A. When he came in the hospital he was in a condition of shock which condition is frequently the result of an injury to the head. A severe injury to any part of the body can produce shock, but an injury to the head produces a more pronounced shock as a rule.

Q. What was the extent of this condition, can you tell me? Did it amount to a concussion of the brain?

A. Yes. It gave symptoms of brain contusion.

Q. I see. And just what is that?

A. That is shaking up and bruising, you might say, of the brain. If it was on the exterior surface of the body you would term it a bruise. It is due to either direct or transmitted impulse through the brain substance, which is soft. Impulse is transmitted through it as it would be through a liquid.

Q. And what is the probable result—no, let me ask you this. Assume that the child has lost memory since this accident happened, of what would that probably result?

A. Probably due to some injury of brain cell.

Q. And when would that loss of memory manifest itself?

A. I have examined the boy today, if I can testify in that way, and I find that his mind is not keen as it was back three months ago.

Q. Now, tell me just about the progress, how that thing works? When the child was first injured what was his state of mind?

A. He was very excited and shocked.

Q. And after the shock, the greater part of the

shock, had passed by, what would be the condition of his mind?

A. He was apparently perfectly normal then. He was a bright child.

Q. And after that time he would become dull; is that the idea?

A. I saw the child four of five weeks ago and I noticed that he was very dull at the time. Now, on examining him today he didn't know me.

Q. Now, Doctor, I want you to explain to the jury, if you will, just how that happened; you say that after the accident, when the accident first happened, he was shocked, so of course, he would be dull; and when he would recover from the shock he would be bright and then gradually he would be less bright—tell me how that occurs?

A. Where a brain is injured either by direct or indirect violence, the damaged cells must either be repaired or replaced by new brain cells. If the contusion of the brain is severe enough new cells are more or less of the scar type and they are not active mental cells such as the normal cells of the brain.

Q. Is it probable that this injury to the brain cells will disappear? I mean in so far as its effect upon his mentality is concerned?

A. That simply would depend on the amount of brain repair. I don't think anyone could anticipate how much the brain will repair or regenerate itself.

Q. But there has been some defect up to the present time?

A. Yes, there is a mental slowing down.

Q. Is there any means of telling to what extent that the mental slowing down will continue?

A. No; I don't think so. That would depend simply on the amount of brain repair and the carrying on of the mental function by other cells in the brain.

Q. Is there any means of determining the extent of that by X-rays or fluoroscope or anything of that sort?

A. No.

Mr. Bourgeois: Cross-examine.

Cross-examination.

By Mr. Leap:

Q. Had you ever seen the boy prior to the accident, Doctor?

A. I have not, to the best of my knowledge.

Q. Do you know anything at all about his mental condition prior to the accident?

A. I do not.

Q. And you cannot say then to what extent, or if at all the boy will be affected mentally as a result of this accident; can you?

A. I simply observed today that he is not as bright, quick, as he was during his time in the hospital.

Q. That might be attributed to other outside conditions, to something that may have happened this summer?

A. Well, that I do not know.

Q. It might? Some other circumstance might have intervened that caused that little dullness that you noticed today?

A. Yes, if he had some other brain injury or brain disease.

Q. Or something else had happened to the child this summer? The child has not been under your supervision; has he?

A. No. I have seen him on one occasion before

since he left the hospital. That is four or five weeks ago.

Q. So far as his brain condition is concerned you feel the cells will heal themselves and there really is nothing serious to fear from the injury from that standpoint?

A. That I don't know. It is impossible to answer that question because ——

Q. You couldn't say that it would or would not?

A. You cannot anticipate what will happen to the brain.

Q. About the pelvis rocking. That would compensate for the loss or for the shortening of a half inch? As a matter of fact in a great many adults it is not uncommon, is it, that one leg would be shorter than the other?

A. You often find a trifle shortening.

Q. Is a half inch unusual?

A. Yes, I would say that is unusual unless there has been some injury or some defect in development.

Q. As the boy gets older will this injury in any way affect his ability to work or walk?

A. He will always have some impairment in walking.

Q. Possibly a slight limp?

A. Possibly a slight limp, yes.

Q. All the other functions are good? He can bend the leg or swing it or do anything else?

A. Yes, he has very good motility of the leg.

Q. In other words, the work you did was a complete and perfect job to that extent, that the boy has the free use or function of his leg?

A. As near as we can get results in a fracture of that kind.

Q. So that the only effect was a slight shortening of the leg; that is true?

A. Yes, he has a shortening, and a limp incident to the shortening.

Q. But that will gradually disappear as he grows older?

A. No, I don't think it will all disappear. It depends on the amount of rocking of the pelvis and then the necessity of wearing a thicker soled shoe.

Q. How much can the pelvic bone rock so as to make it possible that he might not limp? Can that compensate ——

A. Not without giving him an angulation at the hip, and the amount of compensation by the rocking pelvis would depend very largely on the amount of give in the pelvis and in the lower portion of the spine.

Mr. Leap: That is all.

Re-direct examination.

By Mr. Bourgeois:

Q. Doctor, about that lower portion of the spine, what do you mean, curvature of the spine?

A. No. I am alluding to the pelvic spine.

Q. Now, if the pelvis itself does not rock then is this boy going to have curvature of the spine?

A. No; he will not get curvature of the spine unless he got the pelvic rocking. There would be nothing to throw it out of line.

Q. Suppose he got the rocking. Might he get the curvature?

A. He would get a curvature.

Q. Suppose he has a curvature, what benefit is that to him or detriment?

A. It is not of any benefit, and the greatest detriment, I would say would be cosmetic.

Q. What?

A. It would be cosmetic, a detriment.

Q. Tell me what that means in English?

A. Well, he would not look quite straight, quite as good as he would with a straight back.

Q. Now, Doctor, did you notice the left knee? Do you remember a sore place on that left knee?

A. Yes. He had contusions on both knees.

Q. Assuming that is still sore, what would you say about that?

A. I think it was simply due to a bruising and contusing.

Q. What about a bruise or contusion that lasts from the middle of April to the middle of September?

A. It shows an injury to the synovial membrane in the joint.

Q. Anything permanent about that?

A. No; they usually clear up in time.

Q. Was this injury that this little boy received painful?

A. Oh, yes; it was very painful.

Q. What was the injury to the front part of the brain—I mean the front part of the head?

A. He had contusion there and bruise.

Q. If the child did have a severe contusion on the back of the head and also on the front of the head and he is losing his memory, if that is gradually becoming dull and duller, what would you say was the probable cause, having the knowledge of the fact that there was an accident?

A. I would say some brain disturbance or contusion of the brain cells.

Q. I want to know to what you would attribute the cause? What would you attribute the initial cause to?

A. To brain contusion; that is, brain injury transmitted ——

Q. Would the accident have anything to do with it?

A. Yes, it would be because of a blow, accident.

Q. Now, assuming that there had been an accident and this contusion did arise and there had been no other accident; that he had not suffered any other accident or any other disease, to what would his present condition be probably due?

A. To an accident.

Q. To the accident?

A. I think that is all.

Q. One is proven and there is no other proven, so it would be this one; wouldn't it?

A. This one.

Mr. Bourgeois: That is all.

Mr. Leap: I offer this map in evidence.

Mr. Bourgeois: No objection.

(The map offered is received in evidence and marked as an exhibit for the defendant, D1.)

Mr. Leap: And the automobile may be received.

(Trial adjourned to Tuesday, September 18, 1928 at 10:15 A. M.)

September 18, 1928.

Trial resumed pursuant to adjournment.

DOROTHY RICE, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Bourgeois:

Q. You reside where?
A. Cape May Court House.
Q. What is your vocation?
A. County nurse.
Q. Were you county nurse during April of this year?
A. Yes, sir.
Q. Your office is where?
A. In the court building.
Q. And where do you live? Where is your home?
A. On Mechanic Street.
Q. What part of Mechanic Street?
A. Near Boyd.
Q. Near what?
A. Near Boyd Street, near Boyd and Mechanic.
Q. Tell me with relation, then I will know something about it.
A. Four houses this side of the Reading Railroad on the left-hand side of Mechanic Street.
Q. At what time of the day do you go for your lunch?
A. Sometime between eleven and twelve.

Q. Do you remember the fourteenth of April of 1928 when an accident to the little Rich boy?

A. Yes, sir.

Q. Where were you?

A. I was going west on Mechanic Street coming home.

Q. From where to where?

A. From the court building, my office, to my home.

Q. What time of the day was that about?

A. About twelve-thirty.

Q. Then you went down the main highway and turned right into Mechanic Street?

A. Yes, sir.

Q. Now, when you turned into Mechanic Street what, if anything did you see in the way of vehicles?

A. There were cars parked on either side of the street, and cars coming.

Q. Now, where were the cars parked on either side of the street?

A. About in front of the A. & P. store and between Warwick's and Heisler's, a restaurant and dry-goods store.

Q. Were they directly opposite, or staggered, as it were?

A. They were directly opposite.

Q. You said a vehicle coming, or something coming. Where was that?

A. I saw a car coming. I think it was about as I came abreast of these other two cars—this car and I would pass at the same time. I saw one coming toward me.

Q. You were going west?

A. I was going west. The car was coming east.

Q. Now what, if anything, did you see opposite these two parked cars? And the car approaching you?

A. Children playing on the sidewalk on the left-hand side of the street.

Q. And what happened to those children or any of them?

A. I saw one child leave the others to cross the street.

Q. Can—cross the street from which side of the street?

A. From the left to the right.

Q. That is from the lower side coming north?

A. Yes, sir.

Q. And where was that child with relation to the parked automobile?

A. The child was on the concrete when I saw it.

Q. Was on what?

A. Was on concrete, on the walk, on the concrete walk.

Q. In the street? In the street or on the sidewalk?

A. On the sidewalk.

Q. How did he proceed? What did he do?

A. Stepped down from the sidewalk to the street to cross.

Q. And where with relation to the parked car was he when he started to cross?

A. Directly in front.

Q. Did you see him come out into the street?

A. Yes.

Q. How far beyond the parked car did he come into the street?

A. I would say about a foot.

Q. And when he was about a foot into the street beyond the parked car, where was this oncoming vehicle? How far from him?

A. Right there.

Q. Well, what do you mean by, "right there"?

A. Right by him.

Q. Immediately by him, a car's length or two cars' length or what do you mean by, "right by him?"

A. When he was in front of the parked car the other car and myself were right there together.

Q. Now, can you tell me that in feet, what distance so that I may know?

A. Well, I don't think there were any feet. I think we were all right there together directly opposite.

Q. And how fast were you traveling?

A. I judge about twelve or fifteen miles an hour.

Q. And how fast was the other automobile traveling, the one that was coming toward you?

A. I would say the same.

Q. About twelve or fifteen miles an hour. And what was the width of the street at the place where you were passing each other, considering the fact that the two cars were parked opposite? How much space did you have to pass each other?

A. Just enough to pass.

Q. How close did you drive your car to the automobile that was parked on the right-hand side of the street as you were going out?

A. About a few inches.

Q. And how much space was there between your car and the oncoming car?

A. I would say about the same distance.

Q. Now, did you see the boy struck? Did you see the automobile that came along strike the boy?

A. Yes, sir.

Q. Could you see or did you see what happened to the child?

A. I did not.

Q. Where were you at that time?

A. I was going on west on Mechanic Street to draw into the curb. That was two car lengths I

had to go before I could stop, before I could draw into the curb.

Q. Did you notice how far the other automobile travelled after it struck the child?

A. I did not.

Q. Did you go back to the scene of the accident?

A. Yes.

Q. Did you see where the car was—her car was at that time?

A. No.

Q. You didn't notice?

A. I was watching the child.

Q. Did you have any conversation with the person who was driving the other automobile?

A. No, sir.

Q. Did you know who it was?

A. No, sir.

Q. I see. Do you now know who it was?

A. Yes.

Q. What?

A. Yes.

Q. Who was it?

A. Mrs. Eldredge.

Q. What sort of car was she driving, do you know?

A. I thought at the time it was another Ford, but I didn't notice that particularly.

Q. What sort of car were you driving?

A. A Ford sedan, tudor.

Q. What sort of car was it parked on the right-hand side of the street, if you know?

A. That was a large car, a large sedan.

Q. And what sort of car was it on the south side of the street?

A. That was a large sedan.

Q. You don't know the make of it?

A. No, I don't.

Cross-examination.

By Mr. Leap:

Q. How fast did you say that you were going down the street?

A. I would judge between twelve and fifteen.

Q. Did you look at your speedometer?

A. No; I have no speedometer on the car.

Q. How do you judge speed?

A. I have been in a car which has had a speedometer.

Q. As a matter of fact you were driving faster than Mrs. Eldredge; weren't you?

A. I might have been.

Q. So, that you don't know how fast Mrs. Eldredge was driving; do you?

A. No, sir.

Q. The fact was you simply saw both cars—you saw her car; you saw that it was a Ford—you saw that it was a very narrow space to get through; didn't you?

Q. And you saw this boy?

A. Yes.

Q. Now, how tall was the boy?

A. I judge about three—about three feet.

Q. Would he come very much above that table?

A. No, sir.

Q. Then the boy's head could not be seen from the top of the radiator of the automobile that was parked on the side of the street; could it?

A. I don't see how it could be seen very plainly, no.

Q. The radiator of the car is higher than this table; isn't it?

A. No, that I don't know.

Q. When you first saw the boy he was in front of the Atlantic and Pacific Store; is that correct?

A. Yes, just about in front of the Atlantic and Pacific, Heisler's restaurant.

Q. Heisler's restaurant?

A. Yes; that is on the left-hand side of the street.

Q. And there was a car parked opposite the A. & P.?

A. Yes, sir.

Q. And one parked opposite Warwick or Heisler's?

A. Between the two.

Q. Parked between the two. The boy was over on the sidewalk in front of the A. & P., wasn't he?

A. In front of Heisler's.

Q. Oh, the boy was in front of Heisler's. I see.

A. Yes, sir.

Q. Now, the car that was parked in front of Heisler's was parked with its front toward Mechanic Street?

A. Yes, sir.

Q. And the other car that was in front of the A. & P. was parked toward the railroad?

A. Was parked the same way.

Q. Parked the same way?

A. Yes.

Q. They were both parked toward Mechanic Street?

A. Yes, sir.

Q. I see. Now, you say that the boy was in front of the parked car and when the boy was in front of the parked car the other car was there. Now, tell us just what you mean by that, Miss Rice.

A. I mean that he had stepped from the curb. I saw him step from the curb on the left-hand side of the street to go across the street.

Q. And he at that time was obscured from Mrs. Eldredge's view by the radiator of the other car?

A. Yes. He was in front of this parked car. The oncoming car and myself arrived right beside the parked cars and the boy at the same time.

Q. Was it possible for her to see the boy at that time?

Mr. Bourgeois: I object.

The Court: I do not see how she can tell whether it was possible or not.

The Witness: That I couldn't tell.

Q. Was the boy in such a position in relation to the parked car that he could have been seen from down the street?

Mr. Bourgeois: I object to that.

The Court: I do not see how this witness is qualified to testify what somebody else may have seen.

Mr. Leap: All right.

Q. The parked car was between the boy and Mrs. Eldredge, was it not?

A. Yes, sir.

Q. Then, to continue, you saw the boy step down from the curb. Then what did he do?

A. Started across the street.

Q. Started across the street, still in front of the radiator of this car; was he?

A. Yes, sir.

Q. Then, when he stepped out from in front of

the radiator of the car where was Mrs. Eldredge's car?

A. As he stepped in front of the radiator or the front wheel she was right there and I was right there.

Q. Did Mrs. Eldredge hit the boy or did the boy run into her car?

A. That I cannot say.

Q. You don't know. Did you actually see the real collision between them?

A. I saw the boy there and I saw the car there.

Q. Would you say which one was there first?

A. They were there together.

Q. They were there together. So that just at the minute—say, for instance, that this is the parked automobile. Just the instant that the boy stepped out from the screen of the parked automobile Mrs. Eldredge was at the same point. Is that what you mean by that?

A. Yes.

Q. That they both arrived at this point at the same time?

A. Yes, sir.

Q. And when you saw the boy he was not more than a foot away from the parked automobile; is that right?

A. Not more than that.

Q. What?

A. Not more than that.

Q. Not more than that. Do you know what part of Mrs. Eldredge's car actually hit the boy or went over him?

A. I do not. I couldn't see whether it went over him or not.

Q. How far was Mrs. Eldredge's car away from the parked car from in back of which the boy came when you went up there, do you know?

A. About another car's length.
Q. About another car's length?
A. That is, the parked car and another car.

The Court: How was the boy going across the street? How was the boy attempting to go across the street; that is, what was his gait?

The Witness: He started in a hurry.

The Court: Just what do you mean by started in a hurry?

The Witness: They were playing on the street and the boy just left them and started across. I don't know whether you would say darted or—he was not walking.

The Court: Was he running?

The Witness: Yes, I would say he was.

Re-direct examination.

By Mr. Bourgeois:

Q. Was he running when he got beyond the parked car?
A. No, not as I saw that.
Q. Now, Miss Rice, I don't understand at all the question and answer of Mr. Leap about where Mrs. Eldredge's car was with relation to the boy when you came up. I don't understand that.
A. Two car lengths away from the boy.
Q. When he stepped out in front of the car?
A. When he stepped out in front of the car—

when he stepped from the concrete, from the sidewalk.

Q. From the sidewalk?

A. Yes.

Q. Then he ran out; but he was not running when he got beyond the car?

A. I didn't see that because he came—because we all came together just at that time.

Q. Was this parked car on the lower side of the street the usual kind of a parked car? Did it have a mud guard?

A. Yes, sir.

Q. On the side next to the street?

A. Yes, sir.

Q. And Mrs. Eldredge's car, did that also have a mud guard on the side next to where the boy was?

A. Yes, sir.

Q. Can you tell me whether there is any difference in his size now from what it was in April?

A. He is a little bit taller.

Q. Now?

A. He is a little bit taller; he has grown.

(Witness excused.)

FORREST N. RICH, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Bourgeois:

Q. Mr. Rich, you are the step-father of this boy?

A. I am.

Q. On the night of the accident did Mrs. Eldredge call to see you?

A. About five-thirty.

Q. Will you state to the jury what she said with regard to the happening of this accident?

Mr. Leap: I object. It would not be evidential in any way, shape or form.

The Court: What Mrs. Eldredge herself said?

Mr. Leap: I withdraw the objection.

Q. (Repeated by the stenographer.) Will you state to the jury what she said with regard to the happening of this accident?

A. At that time she asked what the extent of the injury was. I told her he has just gotten back from the hospital and the doctor had taken an X-ray showing a double break in the thigh bone, and the extent of the other injuries could not be determined.

Mr. Leap: I object to that.

Q. Not what the doctor said; but tell me what she said to you. You are telling her that.

A. Yes.

Q. Tell me what she said to you?

A. She said she had seen the little fellow standing there watching Miss Rice's car.

Q. Miss Rice's car coming up?

A. Coming west.

Q. Did she make any statement of how fast she was going?

A. No. I didn't question Mrs. Eldredge at that time.

Q. Now, did you see the car that Mrs. Eldredge was driving at the time of this accident?

A. The State trooper and I did right after the accident.

Q. And what was the condition of the car?

A. The left front mud guard—the left front headlight was broken.

Q. What sort of car was it?

A. A Chevrolet sedan.

Q. Now, Mr. Rich, I assume there was some expense as the result of this accident?

A. Yes, sir.

Q. Do you know what bills were contracted?

A. I have the receipted bills here.

Mr. Leap: I object to the testimony.

The Court: He says he has the receipted bills here.

Q. Do you know what bills were contracted? Now, you can answer that yes or no.

A. Yes.

Q. Have you those bills here?

A. With the exception of the doctor's bills.

Q. What doctor?

A. Dr. Shepard has never sent his bill yet.

Q. Dr. Shepard? Would you produce the bills that you have spoken of?

The Court: The witness has produced bills which he says represent all the bills that were paid except the doctor bill—Dr. Shepard's bill which has not been rendered.

Q. You have produced ten bills?

A. Yes, sir.

Q. And they are the ones that you say were contracted?

A. And there are two weeks that Mrs. Boynton was there at the house with him.

Q. Two weeks or three weeks?

A. Three weeks.

Q. Were these bills paid by you?

A. I paid the bills. I used to go to the hospital every time and I took the checks up.

Q. Whose checks?

A. Her checks—Mrs. Rich's checks.

Mr. Bourgeois: I offer those in evidence.

(The bills offered are received in evidence and marked as one exhibit for the plaintiff, P2.)

Q. What is the aggregate?

A. Less the three weeks that Mrs. Boynton was at the home, which she never gave me a bill for—there is three weeks nurse bill that is not in there that was paid Mrs. Boynton.

Q. I want to know the amount of the aggregate of these bills.

A. I couldn't say. I haven't figured those up. The totals are all there. I can figure that up.

Q. In addition to these bills you say there are other bills?

A. Dr. Shepard's bill.

Q. And what about the nurse bill?

A. There is three weeks nurse bill which was paid, which is not included in these bills.

Q. And what was the weekly amount?

A. Of what?

Q. Of the nurse's bills?

A. Forty-two dollars.

Q. Forty-two. That is $126?

A. Yes.
Q. Besides what is here?
A. Yes.

Mr. Bourgeois: You may cross-examine.

Cross-examination.

By Mr. Leap:

Q. When did you state that Mrs. Eldredge came over to your house?
A. About five-thirty. I had just gotten back from the hospital. I don't know the exact time, Mr. Leap.
Q. About five-thirty?
A. I should say it was five-thirty; possibly a little later.
Q. Who else was there at the time?
A. No, one.
Q. Just you and Mrs. Eldredge?
A. Mrs. Eldredge stood in the doorway, right at the doorway.
Q. Was her husband there with her?
A. No; her husband was in the car in the yard. Her husband didn't come in.
Q. How far was her husband from where she was standing?
A. I should say fifty feet. The door was closed.
Q. She was on the inside?
A. The inside of the house; yes, sir.
Q. Was it the outside door or just the screen door closed?
A. Wooden door, solid door. I asked her to sit down. She said she was taking her husband back to Stone Harbor. He was out in the car at the time.

Q. Did she say how long she had seen the boy standing there?

A. No, she did not.

Q. But she didn't tell you how long she saw the boy standing there?

A. No, sir. The only statement she made, she made voluntarily. I didn't question her. That was when she said she saw the little fellow. She said, "Little fellow," watching Miss Rice's car.

Q. You are sure you heard right?

A. Positively.

Q. From the testimony of Miss Rice it was hardly possible that she could have made that statement; isn't it?

A. Well, from the testimony today of Miss Rice, yes; but heretofore Miss Rice ——

The Court: No, no.

Mr. Leap: That is all.

(Witness excused.)

PLAINTIFF RESTS.

DEFENDANT'S MOTION FOR NON-SUIT.

Mr. Leap: I move for a non-suit on the ground there has been no evidence of negligence. My motion is based on the ground there is no negligence shown on the part of Mrs. Eldredge. The only testimony that was given was by Miss Rice, that she was driving her own car at between twelve and fifteen miles an hour and on cross-examination Miss Rice admitted that she did not know exactly how

fast Mrs. Eldredge was going; and possibly Mrs. Eldredge might have been going slower than she was, and that she did not know. The only other testimony was a statement by Mr. Rich that Mrs. Eldredge admitted to him that she had seen the boy standing watching the Rice car. Without the testimony of Mr. Rich there is not even a statement as to where the boy was standing. The boy might have been standing on the sidewalk. The testimony didn't show whether Mrs. Eldredge had in fact seen the boy back on the sidewalk before he darted off. There is no attempt to locate the boy in reference to Mrs. Eldredge's car, so that the only testimony that you have before you is the testimony of Miss Rice, the eye-witness, that at the instant the boy reached the point of collision the Eldredge car was there and that she was not sure whether the boy ran into the Eldredge car or whether the Eldredge car ran into the boy; and I do not see where there is any testimony sufficient to carry the case to the jury so the jury can make a finding of fact.

Mr. Bourgeois: I think there is a case for the jury here. It is not as strong as some of the cases have been, but it is a case for the jury. For instance, whether or not this woman was guilty of negligence is a jury question to be drawn from the facts. The testimony of Miss Rice was that as she was coming about twelve or fifteen miles an hour this other woman was coming down about the same rate of speed, although she qualified her answer under cross-examination for Mr. Leap. The value of that testimony, and which view the jury will take are for them, and not for the Court. Now, then, you are coming along a narrow street, a street that is so narrow that with a car parked either side of

it there is only room for two cars to pass with a few inches to spare. Any person who traveled at the rate of twelve or fifteen miles an hour in a situation of that sort, where there is no chance at all if anything comes in front of them to swerve either side is guilty of negligence.

The Court: Are they supposed to anticipate that in the middle of a block, going at the rate of twelve or fifteen miles an hour, they have not got their car under sufficient control to take care of those things which might ordinarily be expected to happen?

Mr. Bourgeois: You never know what is going to happen in front of a parked car. No person has a right to go past a parked car without having his car under such control that he can absolutely control it.

The Court: There is no testimony here that she did not have her car under such control as to enable her to stop it almost instantly, as far as that is concerned.

Mr. Bourgeois: If she is going twelve or fifteen miles an hour, you mean? He has got to argue on this motion that the jury is going to find that it wasn't twelve or fifteen miles an hour.

The Court: They can't find that it went faster.

Mr. Bourgeois: No, just that it was going twelve or fifteen miles an hour. Now, if there was little room, only a few inches, on either side of her car when she passed these parked cars, she had no right to be going twelve or fifteen miles an hour.

The Court: There is no testimony that anything she could have done could possibly have avoided this accident. The testimony is that instantly with the boy's coming out from behind a parked automobile she was there and the boy was there, in a second.

Mr. Bourgeois: Your Honor is taking Miss Rice's testimony.

The Court: That is all there is.

Mr. Bourgeois: Her testimony is that she saw the boy standing there. If she saw the boy standing there and did not have her car under such control that she could have stopped it instantly, she is guilty of negligence.

The Court: The only testimony we have here is that that boy was not standing at any time except when he was on the sidewalk with the other boys; because he immediately stepped down in the street and started at a run or whatever you may say—not a walk—across the street.

Mr. Bourgeois: But she saw him. The driver saw him standing. She could not see him on the side walk because the car was between them; but she did say when he was in the street before he was struck she saw him standing watching Miss Rice's car. There is no testimony that he was standing anywhere else.

The Court: The only testimony—the testimony is that the only time he was standing is when he was standing on the sidewalk. I cannot see in this case where there is any proof of negligence; nor can I see how any fair-minded man would have a right

to raise an inference of negligence, from the testimony that has been given.

I will grant the non-suit.

Mr. Bougeois: Allow us an exception.

The Court: Yes.

JUDGMENT.

CAPE MAY CIRCUIT COURT.

ELIZABETH MCLAIN RICH, next friend of JAMES MCLAIN RICH, and ELIZABETH MCLAIN RICH, *Plaintiff,* v. SARAH ELDREDGE, *Defendant.*	At Law. Judgment for Costs on Non-suit. S. Rusling Leap, Attorney for Defendant.

And now, to wit, on this eighteenth day of September, nineteen hundred twenty-eight, judgment for defendant's costs on non-suit is hereby entered in favor of Sarah Eldredge, defendant, and against Elizabeth McLain Rich, next of friend of James McLain Rich and Elizabeth McLain Rich, plaintiffs, in the sum of forty-nine dollars and thirty cents $49.30. Entered September 18, 1928, at 1 P. M.

W. FRANK SOOY,
Judge.

NOTICE OF APPEAL.

CAPE MAY COUNTY CIRCUIT COURT.

ELIZABETH MCLAIN RICH, next friend of JAMES MCLAIN RICH, and ELIZABETH MCLAIN RICH, in her own right, *Plaintiff*,
v.
SARAH ELDREDGE, *Defendant*.

Action at Law.
Notice of Appeal.

Sir:

Take notice, that the plaintiff appeals to the Court of Errors and Appeals from the judgment of nonsuit entered in the above-stated cause, on the following grounds:

1. Because there was a question of fact that should have been submitted to the jury.

2. Because the Court erred in granting a nonsuit.

SAMUEL M. GARFINKLE,
BOURGEOIS & COULOMB,
Attorneys of Plaintiff.

Dated: November 5th, 1928.

To S. Rusling Leap, Esq.,
Attorney of Defendant.

[ENDORSED]

November 12th, 1928.
Service of copy of the within Notice of Appeal is hereby acknowledged.
S. Rusling Leap,
Attorney of Defendant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ELIZABETH MCLAIN RICH, next friend of JAMES MCLAIN RICH, and ELIZABETH MCLAIN RICH, in her own right,

Plaintiff-Appellant,

v.

SARAH ELDREDGE,

Defendant-Respondent.

ON APPEAL.

BRIEF OF PLAINTIFF-APPELLANT.

STATEMENT.

This appeal brings here for review a judgment of non-suit entered against the plaintiff in an action at law in the Cape May County Circuit Court.

The suit was prosecuted on behalf of the infant plaintiff, James McLain Rich, by Elizabeth McLain Rich, his next friend, to recover damages for the injuries sustained by the said infant as a result of his being struck by the automobile of the defendant, Sarah Eldredge, on April 14th, 1928, while he was crossing Mechanic Street, Cape May Court House. The sole grounds of appeal are:

1. That there was a question of fact that should have been submitted to the jury.

2. That the Court erred in granting a non-suit.

FACTS OF THE CASE.

Mechanic Street is one of the principal thoroughfares in Cape May Court House, and runs approximately east and west. The accident occurred at about 12:30 P. M.; and just previous thereto the infant plaintiff, a child of six, had been playing with some other children on the sidewalk on the south side of said street. At the particular section where this accident occurred there were two large sedans parked directly opposite each other on either side of the street; the one on the south side in front of Heisler's Restaurant; the other on the north side in front of a store of the Atlantic & Pacific Tea Company. The position occupied by these cars resulted in narrowing considerably at this point the width of Mechanic Street through which vehicular traffic might pass. Indeed, plaintiff's witness, Dorothy Rice, who, at the time of the accident was driving her car west along Mechanic Street, and in the opposite direction from which defendant's car was approaching, testified that there was room for the two cars to pass with a few inches clearance. As the two cars were approaching this particular spot, the child left his companions on the sidewalk and ran in front of the radiator of the automobile parked in front of the said Heisler's Restaurant on the south side of the street. After he had passed beyond the mud guard of the car, and about a foot into the street he was struck by the oncoming auto-

mobile of the defendant being driven at 12 or 15 miles per hour.

ARGUMENT.

It is respectfully insisted that the circumstances and conditions surrounding this accident rendered the question of the defendant's negligence one to be submitted to the jury. The learned trial Court concluded that there was no evidence from which a jury might infer that the defendant failed to have her car under proper control at the time of the accident, and furthermore, that there was nothing she could have done to avoid the accident. The car was proceeding at 12 or 15 miles per hour, with only a few inches clearance; but under such circumstances the Court could not, as a matter of law, declare this speed was not negligence or evidence of negligence from which a jury might infer negligence. The testimony of Miss Rice clearly demonstrates the situation present at the time of the accident. At p. 24, l. 15, she testified:

> "Q. Now, when you turned into Mechanic Street what, if anything, did you see in the way of vehicles?
>
> A. There were cars parked on either side of the street, and cars coming.
>
> Q. Now, where were the cars parked on either side of the street?
>
> A. About in front of the A. & P. store and between Warwick's and Heisler's, a restaurant and dry-goods store.
>
> Q. Were they directly opposite, or staggered, as it were?
>
> A. They were directly opposite.

Q. You said a vehicle coming, or something coming. Where was that?

A. I saw a car coming. I think it was about as I came abreast of these other two cars—this car and I would pass at the same time. I saw one coming toward me."

And at p. 26, l. 13, her testimony appears thus:

"Q. And how fast was the other automobile travelling, the one that was coming toward you?

A. I would say the same.

Q. About twelve or fifteen miles an hour. And what was the width of the street at the place where you were passing each other, considering the fact that the two cars were parked opposite? How much space did you have to pass each other?

A. Just enough to pass.

Q. How close did you drive your car to the automobile that was parked on the right-hand side of the street as you were going out?

A. About a few inches.

Q. And how much space was there between your car and the oncoming car?

A. I would say about the same distance."

Forrest M. Rich, the stepfather of the plaintiff, testified that on the night of the accident the defendant came to see him. After discussing the extent of the injuries *she voluntarily admitted that she did see the boy watching Miss Rice's car before she struck him.* His testimony in this particular is found at p. 34, and is as follows:

"Q. Not what the doctor said; but tell me what she said to you. You are telling her that.

A. Yes.

Q. Tell me what she said to you?

A. She said she had seen the little fellow standing there watching Miss Rice's car.

Q. Miss Rice's car coming up?

A. Coming west.

Q. Did she make any statement of how fast she was going?

A. No. I didn't question Mrs. Eldredge at that time."

In this posture of affairs it was encumbent upon the plaintiff to appreciate her position and exercise that degree of care commensurate with the circumstances. She was bound to anticipate or foresee that some one might emerge from behind the parked car directly into her path, and that due to the width of the street at that point and the space of clearance between her car and the oncoming car of Miss Rice she would be unable to turn right or left. She saw the child standing in front of her, but was powerless to stop and avoid the accident. The jury would have been justified in finding the defendant negligent.

In the case of *Balog, et al. v. F. M. Mitchell Motor Company* (3 N. J. Misc. 1000; 130 Atl. 441), it appeared that the defendant saw a child playing in the gutter as he approached the spot where the accident occurred. The child ran across the street in front of his car and was struck. On rule to show cause it was urged that the jury were not justified in finding the defendant guilty of negligence.

The Supreme Court said:

"The first ground urged for making the rule absolute is that the jury were not justified in their finding that the accident was the result of the negligence of the driver of the defendant's car. According to the story told by the latter, he saw this little child about 2 years of age,

playing in the gutter as he approached this spot where the accident happened; that he was driving along the street, about the middle thereof, when the child undertook to run across in front of his car; that he was not able to stop it in time to prevent the accident. No one was looking after the child at the time of the occurrence.

It seems to us that on the basis of the driver's own story the jury were justified in finding that the accident was the result of his carelessness. Having observed the child playing in the gutter, with no one in charge of it, he could not foretell what the child would or would not do, and it was certainly a question for the jury to say whether or not it was his business, in the exercise of reasonable care, to have his car under such control that he could stop it almost immediately if the child should suddenly undertake to run across in front of the car as it was proceeding along the street."

In the case of *Ferris, Admx. v. McArdle* (92 N. J. L. 580), it appeared that the plaintiff's intestate, a child of five, while crossing a street in Jersey City, was struck by the defendant's truck; that just prior to the accident a trolley car was approaching on one of the tracks in the street, in front of which she passed, and that while on the next line of tracks she apparently hesitated, stepped back a foot or two, and then started to run to the other side; that the servant of the defendant, driving along the second line of tracks, undertook to turn out and avoid her and in so doing ran her down. On appeal it was contended that the trial Court erred in refusing to non-suit the plaintiff, and to direct a verdict in favor of the defendant. One of the grounds for

this contention was that there was no evidence of the defendant's negligence.

Justice Bergen, speaking for this Court, said:

> "As to the first, we think that when the driver could see these children crossing the street, nearly in front of him, as he must if he had looked, as a jury might find, ordinary prudence required that he should have had his auto under such control as he approached along the track they were intending to cross, as to enable him to avoid running over them. What the driver saw, or ought to have seen, was two small children near, or on the track along which he was driving, with a trolley car, approaching from the same direction on the other line of tracks, which he had just passed. The children could not remain where they were without being run down by the car or auto, and to avoid this, must leave the tracks. In this position they attempted to proceed and the driver also turned in the same direction, without attempting to stop, and ran into the children from the rear. These circumstances raised the question whether the driver had exercised prudent care towards those having an equal right in the highway, and the motions to non-suit or direct for defendant for want of his negligence were properly refused."

In the case of *Silberstein v. Showell, Fryer & Co.* (267 Pa. 298), it was held that when an automobile driver sees a child in a place of danger, or has reason to apprehend that it might run into a place of danger, and has sufficient time to stop his car, if under proper control, it is his duty to exercise such care as would be reasonably necessary to avoid a collision.

In the case of *Pool v. Brown* (89 N. J. L. 314),

Mr. Justice Kalisch speaking for the Court of Errors and Appeals at p. 316 said:

> "At the very outset it is highly important that it should not escape observation that the situation, presented by the facts under consideration, relates to a pedestrian in the exercise of a lawful right to cross a public highway and the driver of a vehicle who had no superior legal right in the use of the street. Under such circumstances, the law imposes reciprocal obligations. Those reciprocal obligations are the offspring of elementary and familiar legal principles, which, by reason of their soundness and wisdom, have become firmly imbedded in the law. In fact, it is a strict observance of those legal principles that tends to make our public highways passable and safe to the drivers of vehicles and pedestrians alike. The circumstances that new elements of locomotion, such as electricity, steam, &c., have been added to vehicles using public highways has not wrought any modification of those legal principles.
>
> The driver of the automobile was under a legal duty to use reasonable care to avoid colliding with other vehicles or persons in the public highway. His duty was to be on the alert, to observe persons who were in the street, or about to cross the street, and to use reasonable care to avoid colliding with them. He was under a duty to have his automobile under proper control. He was under an obligation to take notice of the conditions existing in the public street and to propel his car in a manner suitable to those conditions."

It was held in this case that the defendant was under a duty to observe the condition which existed

at the cross-walk in that for a distance of 12 feet the view of the person crossing from the east to the west side of Halsey Street was obscured by a top wagon. It was further held that under all the circumstances, the question of the defendant's negligence was one for the jury and the judgment of nonsuit entered in the lower Court was reversed.

In *Berry on Automobiles* (4th Ed. Sec. 154, p. 142), the author in discussing the care required of the operator of a motor vehicle says:

> "The quantum of required care is to be measured by the exigencies of the particular situation, and accordingly varies with the surroundings, as the likelihood of causing injury is great or small. What would be ordinary care in the operation of an automobile on a country road would not be ordinary care in its control on a much travelled city street.
>
> The required care is commensurate with the risk of injury to others, having in view the condition of the traffic at the time and place, and the nature and condition of the machine being operated."

It is submitted that reasonable minds might well differ upon the question of the proper speed at which a traveller confronted with the situation in this case should proceed.

It may be conceded that in many instances a Court might, as a matter of law, properly hold that traveling at the rate of 12 or 15 miles an hour is not negligence, but certainly not under the conditions present in the case at bar. It is manifestly a problem which a jury should solve.

In the case of *Sutton v. Bell* (79 N. J. L. p. 508), this Court said:

> "Verdict and judgment having been rendered for the plaintiff, the defendant, now the plaintiff-in-error, contends that the case should have been taken from the jury either upon the ground that the defendant was not negligent or upon the contributory negligence of the plaintiff. The trial Court rightly refused these motions. The existence of negligence, whether of the plaintiff or of the defendant, depended upon the conclusion to be reached from a variety of circumstances considered not as isolated occurrences but altogether and in view of their relation to and reaction upon each other, to draw a conclusion as to the conduct of the parties under circumstances thus connected, is of the very essence of the jury function. In proportion as such circumstances multiply and intercalate, it becomes more and more a matter of deciding between conflicting inferences, and less and less a matter of declaring that one inference alone is conclusively compelled by the testimony."

In *Shearman and Redfield on Negligence* (6th Ed. Vol. 1, Sec. 54), the commentators state the rule to be:

> "The question of negligence must be submitted to the jury as one of fact, not only where there is room for difference of opinion between reasonable men as to the existence of the facts from which it is proposed to infer negligence, but also where there is room for such a difference as to the inferences which might fairly be drawn from conceded facts. Where this is the case, the issue must go to the jury, no matter what may be the opinion of the Court as to the value of the evidence or the credibility of the

witnesses. So, if this issue narrows itself to a distinction between what is reasonably safe and what is not so, the question is emphatically one for the jury."

Concerning particularly the question of speed, Mr. Berry in his work on automobiles (4th Ed. at p. 159) says:

> "He is bound to anticipate that he may meet persons at any point in the public street and he must keep a proper lookout for them and keep his machine under such control as will enable him, in the exercise of due care, to avoid a collision with a person using proper care and caution; and, if necessary, he must slow up and even stop. No blowing of a horn or of a whistle or ringing of a bell or gong, without an attempt to slacken the speed, is sufficient, if the circumstances at a given point demand that the speed be slackened or the machine be stopped, and such a course is reasonably practicable.
>
> *Although the rate of speed of an automobile may not have been great, it is generally a question of fact for the jury whether in a given instance it was dangerous."* (Italics ours.)

In the case of *Morrison v. Flowers* (308 Ill. 189; 139 N. E. 10), the Court said:

> "The jury had a right to conclude from the evidence submitted that a rate of speed in excess of 10 miles an hour across Bluff Street—a busy thoroughfare in the business portion of the city—was unreasonable and dangerous under the circumstances, and therefore unlawful, and that the injury to appellee was the direct result of such unlawful driving."

In *Coffman v. Singh* (1920) (49 Cal. App. 342; 193 Pac. 259), the jury were held justified in finding the defendant guilty of negligence in passing the plaintiff's truck, which had been stopped on the wrong side of the street about noon for the purpose of adjusting the carburetor, where there was evidence that under ordinary conditions there was hardly enough room for two cars to pass; that defendant approached at 12 miles an hour without giving any warning; that he gave his car more gas as he neared the rear end of the truck, and speeded up to 15 miles an hour, and struck the plaintiff, who was standing against the truck.

Disregarding, however, the question of speed there is another factor in this case which the Court seems to have overlooked. In the argument which ensued on the motion for non-suit it will be seen that the trial Judge considered the uncontradicted testimony to show that the plaintiff emerged from behind the parked car instantaneously with the arrival of the defendant at that point. Although the testimony of Miss Rice, standing alone, might seem to substantiate this conclusion, it is flatly contradicted by a statement of the defendant herself, as shown by the testimony of Mr. Rich heretofore quoted.

This statement being in the nature of an admission against interest was, of course, clearly evidentially as against the defendant, and was so treated by the Court. The weight and credibility of this testimony being for the jury, it clearly raised a conflict of evidence for the determination of the jury for it cannot be gainsaid that had the defendant seen the boy in time to have stopped her car and failed to do so she would have been guilty of negligence. *Considered as a whole, therefore, the testimony in this case was certainly sufficient to warrant the submission of this very question to the jury.*

In *Amabile, Admrx., &c. v. Crane, et al.* (5 N. J. Misc. 149), our Supreme Court said:

> "This suit was brought to recover damages under the Death Act. The deceased was a boy ten years old, when he was injured. The injuries causing his death on November 28th, 1924. He was struck by a motor-bus as is alleged by the plaintiff, or he ran into the motor-bus as is claimed by the defendants, which was owned by the defendant, John Crane, and operated by the defendant, John Reilly, on Pacific Avenue near Ash Street, in Jersey City, New Jersey. The trial resulted in a verdict for the plaintiff for $5,000. The defendants obtained a rule to show cause and writes down seven reasons for a new trial:
>
> * * * * * * *
>
> *Second*: Error in refusing to non-suit the plaintiff. Not so. Questions of fact were involved under the testimony. Just how the boy was injured is the vital question in dispute.
>
> * * * * * * *
>
> *Fifth*: There was no evidence to support the verdict. Not so."

Kennedy v. Sullivan (66 N. J. L. 185). In this case a child of tender years was struck by a horse and cart belonging to the defendant, and driven by his employe, as he emerged from behind a wagon parked near the curb. There was testimony to show that the defendant's employe was driving with his chin down on his chest. He, however, testified that as he was driving he was looking straight ahead of him and that the plaintiff ran into him. There being a conflict in the testimony, the matter was submitted to the jury and on rule to show cause a verdict in the plaintiff's favor was not disturbed.

For the reasons above advanced it is respectfully submitted that the judgment of non-suit should be reversed.

SAMUEL M. GARFINKLE,
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GEORGE A. BOURGEOIS,
Of Counsel.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ELIZABETH MCLAIN RICH, next friend of JAMES MCLAIN RICH, and ELIZABETH MCLAIN RICH, in her own right,

Plaintiff-Appellant,

v.

SARAH ELDREDGE,

Defendant-Respondent.

ON APPEAL.

BRIEF OF DEFENDANT-RESPONDENT.

STATEMENT.

The plaintiff's statement of fact is substantially correct, with the following exceptions: that there was no testimony to warrant the statement that the boy had run out one foot, beyond the mudguard of the parked car, into the street. The testimony was to the contrary; also the witness, Miss Rice, was not positive that Mrs. Eldredge was even driving twelve to fifteen miles per hour.

1. That there was a question of fact that should have been submitted to the jury.

2. That the Court erred in granting a non-suit.

FACTS OF THE CASE.

The only evidence submitted by the plaintiff as to the accident was that of Miss Rice, the county health nurse, to the effect that while on her way to her home for lunch (p. 23, line 34), she was going west on Mechanic Street (p. 24, line 5), saw cars parked on either side of the street, and cars coming (p. 24, line 17); one parked in front of the Atlantic & Pacific Tea Company's store, and one between a restaurant and a dry-goods store (p. 24, line 20), directly opposite (p. 24, line 26). She saw children playing on the sidewalk on the left-hand side of the street (p. 25, line 1); she saw one of the children leave the group and run off the curb starting across the street (p. 32, line 13 to line 21). The parked car was between the boy and the car driven by Mrs. Eldredge (p. 30, line 27 to line 29), and as the boy stepped out from in front of the radiator of the parked car, Mrs. Eldredge, Miss Rice and the boy were there together (p. 31, line 1 to line 5); Mrs. Eldredge and the boy both arrived at the point at the same time (p. 31, line 21). Miss Rice testified that the boy was about three feet tall (p. 28, line 27), and that his head could not be seen plainly because of the radiator of the parked car (p. 28, line 32).

As to speed, Miss Rice testified that she was traveling about twelve to fifteen miles an hour and she thought the other car was making about the same speed (p. 26, line 11 to line 19), but was not positive whether her car or that of Mrs. Eldredge was traveling the faster (p. 28, line 19).

Immediately after the accident Miss Rice ran her car to the curb and went back to look after the boy

(p. 27, line 7), and found that the Eldredge car was about another car's length from the parked car.

Forrest Rich, the boy's step-father, testified (p. 34, line 29), that the defendant stated that she had seen the little fellow standing there watching Miss Rice's car; and in the light of the testimony of plaintiff's other witness, Miss Rice, after the boy was out of Mrs. Eldredge's range of vision, by reason of the parked car. The boy darted off the sidewalk and ran into the Eldredge car from the front of the parked car.

Consider the pleadings in the light of the above digest of the testimony.

Paragraph 2 of the first count alleges that the defendant was driving at a high and unlawful rate of speed, and in a careless, reckless and negligent manner.

There was no direct evidence of speed offered; simply an approximation by Miss Rice, and she placed her own speed at from twelve to fifteen, and admitted that Mrs. Eldredge may have been driving at a slower rate (p. 28, line 13).

As to the charge: careless, reckless and negligent manner, absolutely no evidence to establish this fact was produced.

From the reading of the testimony, there is disclosed the fact that the boy ran off the sidewalk, in front of the parked car which prevented the defendant from seeing him, and the boy and the defendant's car came together at the very instant that the boy emerged from the front of the parked car.

There was in fact no attempt made to prove the allegations in paragraph two of the first count or paragraph one of the second count, so far as negligence, recklessness or fast driving is concerned.

The accident did not occur at a cross-walk, so the defendant had no reason to presume that anyone

would attempt to cross at this particular point—pedestrians being given the right of way at cross-walks.

There was no evidence for the jury to consider, concerning the width of the street, or the clearance, save that of a guess by Miss Rice that she was within a few inches from the car on her right side and that Mrs. Eldredge was about the same distance from her. This was, at its best, only an approximation, and nothing from which the jury could have determined the actual situation.

The plaintiff has cited several cases to support a situation which presumed the boy to be out in the street one foot beyond the parked car. There is, as I stated before, not the slightest iota of evidence to support this contention; the boy in fact was located, by the evidence, as standing on the side-walk. There is no evidence that he was standing at any other point.

As to the cases cited by plaintiff.

In the case of *Balog v. Mitchell,* 130 Atl., 441, the child was playing in the gutter. The child in that case was two years, in this case five years.

In the Ferris case—*Ferris, Admx., v. McArdle,* 92 N. J. Law, page 580—the child was actually crossing the street, being on one of the trolley tracks.

Silberstein v. Showell, Fryer & Co., 267 Pa., 298, was predicated on the fact that the driver saw the child in a place of danger, or that the circumstances were such that a reasonable person would apprehend that it might run into a place of danger. This case is, in no sense, based on parallel facts, as the child in the present case was safely upon the side-walk, engaged in play, and gave no evidence of crossing the street.

The case, *Pool v. Brown* (89 L., 314), was an accident occurring at a cross-walk; and under our law,

at a cross-walk, the presumption is that some person will or may cross the street at this point, and under the Traffic Act, as in effect in April, 1928, the pedestrian was given the right of way at cross-walks.

There was, in the present case, nothing to show that the conditions attending the driving there were dangerous, only that two cars were parked opposite each other on the opposite sides of Mechanic Street; no evidence that there were other cars parked at the time; no other evidence of the condition of traffic, from which the jury might determine the care required, under the circumstances.

The mere evidence that an accident has occurred can, in no sense, establish the fact that a condition existed which required especial care. There is absolutely nothing upon which a jury could base such a finding.

There is no testimony to the effect that Mrs. Eldredge did not stop her car instantly; evidence as to the position of the boy after the accident, whether he was at the front or back of the Eldredge car. There were no facts presented so that a jury might have determined the degree of care actually exercised by the defendant; no testimony as to the condition of the brakes on the Eldredge car; and in fact no evidence from which a jury might have found Mrs. Eldredge to have been guilty of negligence.

It is for the trial Judge, when requested to nonsuit, to say whether any facts have been established by evidence, from which negligence may be reasonably inferred. If not, there is no case to go to a jury; but if from facts established, negligence may reasonably and legitimately be inferred, it is for the jury to say whether from those facts negligence ought to be inferred. *Kerner v. Zerr,* 103 N. J. Law, page 424.

The trial Judge properly ruled (page 41, line 32):

> "The only testimony—the testimony is that the only time he was standing is when he was standing on the sidewalk. I cannot see in this case where there is any proof of negligence; nor can I see how any fair-minded man would have a right to raise an inference of negligence from the testimony that has been given."

I respectfully submit that the judgment of nonsuit should be affirmed.

S. RUSLING LEAP,
Attorney and Counsel for Defendant-Respondent.