

# I N D E X

## PLEADINGS, etc.

Notice and grounds of appeal .....	1
Summons .....	2
Complaint .....	3
Answer .....	6
Rule to substitute counsel .....	8
Rule for judgment .....	9
Non-suit .....	47

## TESTIMONY

Florence Woody, direct .....	10
cross .....	28
redirect .....	45
recross .....	46

(Filed February 15, 1929.)

## Passaic County Circuit Court

Florence Woody and Thomas J.  
Woody, her husband,  
Plaintiffs,

vs.

Franklin J. Keller,  
Defendant.

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### NOTICE AND GROUNDS OF APPEAL

To Edward M. and Runyon Colie, Attorneys for Defendant:

Sirs:

Please take notice that the plaintiffs in the above stated cause appeal from the whole of the judgment of nonsuit entered against them in the Passaic County Circuit Court, and every part thereof, to the New Jersey Court of Errors and Appeals, in the last resort in all causes, and the following are the grounds of appeal: 20

1. The trial court committed error in granting the defendant's motion for nonsuit against the plaintiffs.

2. The trial court committed error in not refusing to grant the defendant's motion for a nonsuit against the plaintiffs.

3. The trial court should have refused to grant the defendant's motion for a nonsuit against the plaintiffs. 20

*Summons*

4. The trial court committed error in not permitting the case to go to the jury.

Ward & McGinnis & Louis C.  
Friedman.

Attorneys for Plaintiffs-Appellants.

Service of the within is hereby acknowledged this 31st day of January, 1929.

10

Edward M. & Runyon Colie,  
Attorney for Defendant-Respondent.

(Filed November 9, 1922.)

Passaic Co. ss

The State of New Jersey, L. S.

To: Franklin J. Keller

20

Greetings: You are summoned to answer the annexed complaint of Florence Woody and Thomas Woody, in an action at law, in the Passaic Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the Passaic Circuit Court, at Paterson, 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.

30

Witness, James F. Minturn, Judge of our Passaic Circuit Court, at Paterson, this 3 day of November, 1922.

Ward & McGinnis and  
Louis C. Friedman,

Attorneys.

John McCutcheon,  
Clerk.

*Complaint*

(Filed November 9, 1922.)  
PASSAIC CIRCUIT COURT

Florence Woody and Thomas J. Woody, her husband, <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> Franklin J. Keller, <p style="text-align: right;">Defendant.</p>	}	Action at Law.
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**COMPLAINT**

Plaintiffs by their attorneys, Ward & McGinnis,  
complaint of the defendant as follows:

First Count.

1. Plaintiff Florence Woody, is a resident of the  
City of Paterson, County of Passaic and State of  
New Jersey.

20

2. Defendant is a resident of the City of Pater-  
son, County of Passaic and State of New Jersey.

3. That on the first day of February, 1922, and  
before that time, and subsequent thereto, the defen-  
dant, in the City of Paterson, has been holding him-  
self out to the public as being a doctor skilled in the  
art and profession of medicine and surgery.

4. That on the first day of February, 1922, the  
plaintiff suffered a fracture of the left wrist and  
left forearm, and engaged the defendant at a reason-  
able price and reward to be paid, to skillfully diag-  
nose, treat, and care for her injuries and to apply  
medicaments and perform all necessary operations  
and give all necessary adjustments for the proper  
treatment and cure her said arm.

30

5. That the defendant being such a physician

*Complaint*

and surgeon in the art and profession aforesaid, did on or about the first day of February, 1922, agree and undertake the care of the plaintiff, to skillfully diagnose, treat, set, cure and heal the left wrist and forearm of the plaintiff, and to do all necessary work, to apply all necessary medicaments, perform all necessary operations and to make all necessary adjustments for the proper treatment and cure her said arm.

10 6. That the defendant then and there negligently, carelessly and unskillfully governed himself in and about the diagnosis, setting, treatment and care of the plaintiff's arm, in the proper diagnosing, setting, and treating of the arm as necessary, in not using the proper care, attention, medicaments, appliances and skill in the treatment of the said arm; and so carelessly, negligently and improperly failed to perform the necessary operations upon the said  
20 arm, and the defendant well knowing that he was not properly taking care of the plaintiff's arm, the defendant prevented the plaintiff from securing the services of any other man skilled in the profession to care for the said arm.

30 7. That by the neglect, carelessness, default and unskillfulness of the said defendant, as such physician and surgeon, the said plaintiff was caused to suffer great and excruciating pain in the said wrist and arm, and will in the future continue to suffer great and excruciating pain, in the said wrist and arm; and her arm has been permanently injured and practically useless to the plaintiff, as it has lost its functional power, the said wrist and arm of the plaintiff has become disfigured and shortened and general health of the plaintiff has been impaired, weakened and ruined, and plaintiff has suffered extreme anguish in mind thereof.

*Complaint*

8. By reason of the premises plaintiff has been sick, sore, lame, wounded, diseased and disordered.

By reason of the premises plaintiff has sustained damage in the sum of Twenty Thousand Dollars, (\$20,000) for which she will claim judgment.

## Second Count.

1. Plaintiff Thomas J. Woody, is a resident of the City of Paterson, County of Passaic and State of New Jersey.

2. Paragraphs, 2, 3, 4, 5, 6, 7, and 8 are hereby made parts of this count. 10

3. Plaintiff on the first day of February, 1922, has been and is the husband of the plaintiff Florence Woody, and by reason of the carelessness and neglect of the defendant has been and will be deprived of the services, earnings and consortiun of his wife, and will in the future be deprived of the services, earnings and consortiun of his wife.

4. By reason of the premises plaintiff has been compelled to expend large sums of money to bring about the proper cure of his wife's arm and wrist and in the future will be compelled to pay out large sums of money for the same purpose. 20

Plaintiff has suffered damage in the sum of \$10,000 for which he will claim judgment.

Ward & McGinnis and Louis C.  
Friedman,  
Attorneys for Plaintiff.

*Answer*

(Filed December 2, 1922.)

## PASSAIC CIRCUIT COURT

Florence Woody and Thomas J. Woody, her husband, Plaintiffs, vs. Franklin J. Keller, Defendant.	}	Action at Law.
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## ANSWER

Defendant, Franklin J. Keller, by his attorneys, Wall, Haight, Carey & Hartpence, for answer to the first count of the complaint herein says:

1. He admits the allegations of the first paragraph.
- 20   2. He admits the allegations of the second paragraph.
3. He admits the allegations of the third paragraph.
4. He denies the allegations of the fourth paragraph and says that on the day stated plaintiff suffered a fracture of the left radius and engaged the defendant to treat her for such injury.
5. He denies the allegations of the fifth paragraph.
- 30   6. He denies the allegations of the sixth paragraph.
7. He denies the allegations of the seventh paragraph.
8. He denies the allegations of the eighth paragraph.

*Answer*

For answer to the second count of the complaint, this defendant says:

1. He has no knowledge as to the truth of the allegations of the first paragraph and therefore denies the same.

2. He reiterates his answers to paragraphs 2, 3, 4, 5, 6, 7, and 8 of the first count.

3. He denies the allegations of the third paragraph.

4. He has no knowledge as to the truth of the allegations of the fourth paragraph and therefore denies the same. 10

Wall, Haight, Carey & Hartpence,  
Attorneys of Defendant.

*Rule for Substitution*

(Filed February 3, 1926.)

PASSAIC COUNTY CIRCUIT COURT

Florence Woody and Thomas J. Woody, her husband, Plaintiff,	}
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vs.

<b>10</b> Franklin J. Keller, Defendant,	}
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**RULE FOR SUBSTITUTION**

Attorneys of defendant consenting hereto,  
Ordered that Edward M. and Runyon Colie be substituted as attorneys of defendant.

On motion of

**20** Edward M. & Runyon Colie  
Attorneys of Defendant.

We consent to the entry of the above rule.

January 27, 1926.

Wall, Haight, Carey & Hartpence,  
per Wall  
Attorneys of Defendant.

*Rule for Judgment*

(Filed March 15, 1928.)

PASSAIC CIRCUIT COURT

Florence Woody and Thomas J.  
Woody, her husband,

Plaintiffs,

vs.

Franklin J. Keller,

Defendant.

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**RULE FOR JUDGMENT**

This case was tried before Hon. Newton H. Porter, with a jury, on Wednesday, March 7th, 1928.

On motion for a nonsuit by the attorney of the defendant, the Judge granted said motion.

Newton H. Porter,

Judge.

20

30

*Florence Woody—direct*

## PASSAIC COUNTY CIRCUIT COURT

Florence Woody, etc.,	}	Plaintiffs,
against		
Franklin J. Keller,		Defendant,

Paterson, N. J., March 7, 1928.

10

Before

Hon. Newton H. Porter, J., and a Jury.

Appearances:

For the plaintiffs: Ward and McGinnis, Esqs., by  
Louis C. Friedman, Esq.For the defendant: Edw. M. and Runyon Colie,  
Esqs.

20

(A jury was called and sworn and counsel  
for the respective parties opened the case to  
the jury.)

FLORENCE WOODY, sworn.

Direct Examination by Mr. Friedman:

Q. Mrs. Woody, you are the plaintiff in this  
case? A. I am.

30

Q. Speak a litle louder. A. Yes.

Q. Do you recall having an accident on about the  
first day of February, 1922? A. I do.Q. Did you receive an injury on or about that  
day? A. I did.

Q. You will have to raise your voice. A. I did.

*Florence Woody—direct*

Q. Where did you receive that injury? A. You mean—

Q. What part of your body? A. My arm and wrist.

Q. Which arm and wrist? A. Left

Q. Left arm and wrist? A. Yes.

Q. And after you received your injury did you go to get medical attention? A. I did.

Q. What did you do? A. Well, called up Dr. Keller; someone recommended Dr. Keller to me. We called up Dr. Keller and about, well, twenty minutes or a half an hour he was there, and he pulled my arm this way and that way (indicating), and fixed it rather nice, seemed like, and put adhesive tape around it. He told me then the next morning to go to the hospital, St. Joseph's, and have a picture taken of it. So the next morning about nine o'clock, why, I went over to St. Joseph's and had a picture made, two different pictures, I think, one this way and one that way (indicating.) So in a little while he came in and he says, "Yes, your arm is fractured, I am sorry to say." He says, "I will be over to the house in a little while to see about it—"Put it in splints"—I think that is the words he used. So I went on home and in a little while Dr. Keller was there, and he put it in splints, top splint, I believe he called it. and bottom splint. So I wore it that way ten days. It seemed to get along real nicely. Ten days—why, he took it out of the splints and put it in a plaster cast. He come in that morning and said, "Well, let us see about this hand"—

Mr. Colie—I can't hear you.

The Witness—In ten days, yes.

*Florence Woody—direct*

Q. Don't drop your voice. We have difficulty in hearing you. A. Well, he sat down in front of me. Of course, you know what a plaster cast is, wrapping around and around and around.

Q. Let's see, Mrs. Woody. The first time Dr. Keller came to the house; is that correct? A. Yes.

Q. How long was he there? A. The first day?

Q. Yes. A. Well, not very long.

10 Q. Well, about how long? A. Let's see. Oh, it would not be over twenty minutes or something like that.

Q. And what did he do the first time he came—to your arm? A. Of course, he examined my arm.

Q. Well, what did he do? A. He pulled it this way and pushed it that way (indicating).

Q. And then he applied—A. Adhesive tape.

Q. —a plaster?

20

The Court—No, adhesive tape.

Mr. Friedman—Pardon me.

The Court—And the next day he took her to the hospital and put it in splints and ten days later he came and put it in a cast.

Q. Ten days after he came and put your arm in splints he came to your house to take the splints off and put it in a cast? A. Yes.

30 Q. Now, at the time he put that cast on your wrist did you suffer any pain? A. The cast?

Q. The plaster cast. A. Oh, I should say I did.

Q. Well, did you say anything to the doctor?

Mr. Colie—I think, your Honor, that that is objectionable as leading. I think she should

*Florence Woody—direct*

tell what occurred at the time of the plaster cast being put on.

The Court—Yes. I think that is the quicker way. She was getting along fine when you interrupted her.

Mr. Friedman—I am sorry.

By the Court:

Q. What happened when the cast was put on? 10  
You say it hurt you. Tell us about that, please. A.  
Well—

Q. About the putting of the cast on your arm.  
A. You want me to tell?

Q. Tell the whole thing? A. Well, you see, he  
sat down in front of me and he began to wrap.

Q. Wrap? A. Wrap.

Q. All right. A. And "Oh, Doctor." Of course,  
I would say, "You are hurting me." "Oh, don't be a  
baby." 20

Q. He said what? A. "Don't be a baby," or  
a few more little stronger things than that. And as  
he would hold my fingers he would keep pushing to-  
wards me, pushing this hand. Well, he would wrap  
and wrap and wrap and push. He says, "Now, have  
you got nerve enough to hold yourself this way until  
it gets real hard?" "Sure, I have." And it was just  
killing me. I cried for four hours, I think. And then  
it went almost to sleep. 30

By Mr. Friedman:

Q. What did? A. My arm.

Q. Did you tell the doctor about that? A. Well,  
of course, I told him when I seen him.

Q. What did he do when you told him your arm

*Florence Woody—direct*

went asleep? A. Oh, it was natural, or something like that. "Let it alone; don't be a baby," or something to that effect.

Q. Now, what did he do when he applied that plaster cast? Just how did he handle your arm at that time, Mrs. Woody? A. When he put it on?

Q. Yes. A. Why, he put my arm up this way (indicating).

10 Q. Yes? A. And he held my fingers this way (indicating), and as he would wrap he would push this hand.

Q. Backward? Towards your body? A. Toward my body. He was sitting in front of me, and it was just like it was—oh, the misery of it.

Q. Did you say anything to him at that time? A. Of course, I did.

20 Q. What did you say? A. I said, "Oh, Doctor, you are killing me. Doctor, don't do that." Of course, he would say, "Don't be a baby," or "Quit belly-aching around," or something like that. I think that was his words exactly, and, why, it was just killing me.

Q. Did you say anything else? A. Well, I think that was about all.

Q. Now, how soon after he put that plaster cast on did he come to see you again? A. Oh, I don't know. The doctor dropped in there real often, most every day he was in there.

30 Q. Mostly every day? A. Yes.

Q. Would you call—

Mr. Colie—I object to it as leading, your Honor.

Mr. Friedman—I will withdraw it.

The Court—It is withdrawn.

*Florence Woody—direct*

Q. Did you ever have any occasion to call him on the telephone? A. Why, yes, after he told me he would leave the cast on for so many days.

Mr. Colie—I object to the question as leading. I think this witness is competent to tell what she did and what transpired between her and the doctor, without having to be reminded of telephone calls or otherwise.

The Court—Yes. Tell us what happened. 10

The Witness—Well, it is rather a hard thing in a way.

By th Court:

Q. You see, we weren't there, and we don't know about it, and unless you tell us there is no way in which we can find out. A. When he put the cast on I suffered awful.

Q. You told us about that. A. And kept on suffering, and it would hurt all the time, and I 20 thought it would quit and it didn't quit, and I told him about it.

Q. All right. A. And he would say, "Leave it on a little longer and we will take it off." He kept promising to take it off and promising to take it off, and didn't take it off.

Q. And he finally took it off, didn't he? A. Yes.

By Mr. Friedman:

Q. That continued for how many days from the 30 time he put the cast on until the time he took it off?

A. Thirty-six days.

Q. Now, would he come to your home just casually or would he come at your request? Sometimes casually and sometimes we would call him.

Q. How soon after you called him would he get

*Florence Woody—direct*

to your home? A. Sometimes afternoon and sometimes the next morning.

The Court—"Sometimes afternoon and sometimes the next morning."

Q. You will have to please speak a little louder. Don't drop your voice, because if I can't get it I am sure the jury can't. Please remember that. A.  
10 All right.

Q. How often did he come—withdraw that. A.  
A. How often—

The Court—He has withdrawn the question.

Q. Now, did you ever have occasion to call him during the morning hours?

Mr. Colie—I object.  
20

The Court—I will allow it. It is a little leading, though.

By the Court:

Q. Did you? A. Why, we didn't have a telephone in the house. My daughter would say, "I will call him as soon as I get to the office."

Q. You don't know whether she would or not, except as she told you? A. She told me she would.  
30

The Court—Strike it out.

The Witness—And told me she did.

By Mr. Friedman:

Q. Now, at the time Dr. Keller applied the cast

*Florence Woody—direct*

to your arm—pushed your arm backward—did you tell him it felt as if your arm was breaking? A. I certainly did.

Q. What did he say about that? A. Yes—

Mr. Colie—Your Honor please, I object to that as very leading.

The Court—Strike it out. He has already said he bent it back and she told him he was killing her. 10

Mr. Colie—But not that it was breaking, as counsel said.

The Court—Yes. Strike it out. It is leading.

Q. Did you ever tell Dr. Keller at the time he applied that plaster cast anything besides that he was killing you? A. Well, I told him he was hurting me; he was breaking my arm.

Q. Did you tell him that? A. I certainly did. 20

Q. What did he say to that, Mrs. Woody? A. He told me not to cry, not to be a baby, that I had nerve enough to stand it. "Can't you stand it?"

Q. Now, did Dr. Keller ever take that cast off before the thirty-sixth day? A. He did not, no.

Q. After that cast was on, what would be his conduct toward the treatment of your arm with the cast on, when he came to your home to treat you?

A. Well, he would not treat me.

Q. What would he do after your cast was on and Dr. Keller came to your home? What would he do? 30

A. Well, he just asked me how the arm is coming along.

Q. And what would you say? A. "Oh, Doctor." Of course, I would tell him the misery I had,

*Florence Woody—direct*

such an awful misery in here, and how it was hurting me and so on.

Q. Anything else? A. I don't know; just telling him the misery of it and how it was hurting, and can't he take it off.

Q. What would be his reply? A. He couldn't do it. He wouldn't do it. He set a date. He would set a date.

10 Q. And that continued the same way for thirty-six days? A. And I would always write my husband telling him I was going to have the cast taken off at a certain date.

Mr. Colie—I object to that.

The Court—Objection sustained. Strike it out.

20 Q. Never mind what you told your husband, Mrs. Woody. Now, at the end of the thirty-sixth day did Dr. Keller come to your home again? A. Yes.

Q. And what happened then? A. Well, he taken the cast off, sawed it off, looked at my arm, shook his head—

By the Court:

Q. What did he say? A. He says, "She is an ugly thing."

30 Q. What else? A. Done this way, lifted my hand up, done this (indicating). He says at the time that was—

By Mr. Colie:

Q. May I see that just again? A. Pulled this part of my hand up, pushed this down (indicating). He said it should have been that way (indicating).

*Florence Woody—direct*

Pulled this around, and then he said, "Oh, well, don't worry" he says, "it will come along, it will be as straight as a stick in a week or ten days." He said, "We all make mistakes." He said, "Don't worry about it. It will come along all right." He said, "I wish it was that way." Just kept talking that way. So he said, "Well, of course, it is all—we all make mistakes. We are all human. I realize it was my fault, but don't worry. I will make it as straight as a stick in a little while,"—a week or ten days, I believe, is the way he always expressed it to me. 10

By Mr. Friedman:

Q. And after he took the cast off, at that time did he ever come around again and offer you treatment? A. Well, he told me to massage it and use a little ball in my hand.

Q. What? A. A rubber ball. My hand was stiff. And "Are you doing this? Are you doing that?" "Yes." 20

Q. Did Dr. Keller ever try—I will withdraw that. Did Dr. Keller himself personally take care of that wrist and forearm after he took off the plaster cast? A. Well, he just told me what to do.

Q. But he didn't do anything, did he? A. No.

Q. He told you what to do? A. Yes.

Q. And yet he told you that he would straighten it out and make it as straight as a stick; is that correct? A. Yes. 30

Mr. Friedman—May I have the stenographer read back a little, what the doctor said?

The Court—He said, "I am sorry, it is my fault, we all make mistakes, I will make it

*Florence Woody—direct*

straight in a week or ten days, as straight as a stick," as I remember it.

Q. How many days after the cast was taken off did Dr. Keller come to your home, Mrs. Woody? A. Well, I don't remember just how many times.

Q. Well, can you say approximately? A. It wasn't many times, because he told me he would want me to come to his office, or something like that.

Q. Did you go to his office? A. Twice.

Q. What treatment did he give you there? A. "How is this arm coming on?" Well, he says, "It should be this way."

Q. How long was that after the cast was removed? A. Probably the next week. I can't say.

Q. Did he send you or submit to you a bill for his services? A. He did.

Q. What was the amount of that bill? A. Fifty dollars.

Mr. Colie—Is that material, your Honor?

The Court—Just a moment. What has that to do with it?

Mr. Friedman—Pardon me?

The Court—What materiality has that?

Mr. Friedman—Just to show if the doctor got paid, I suppose.

The Court—I don't think it has any materiality, whether he sent a bill or whether he got paid or how much it was.

Mr. Friedman—I think it may go to the weight of the evidence.

The Court—In what regard? I don't think it is material.

*Florence Woody—direct*

Mr. Colie—She has answered that he sent a bill, but as to the amount of the bill, it seems to me we are getting away from the issue, and I object to that.

The Court—It has nothing to do with it.

Mr. Friedman—If counsel did not object to the question whether he submitted a bill or not, I would like to know if the bill was paid.

The Court—What difference does it make whether it was or whether it wasn't? 10

Mr. Friedman—Well, if the doctor did not try to have his bill paid, it may raise a question whether or not the job was done properly. It goes to the weight, the treatment, the character of the treatment given by the doctor.

The Court—No, I think it is improper.

Mr. Friedman—The jury may infer something from that. 20

The Court—Yes, they may infer that she refused to pay it and told him she would not pay it under any circumstances.

Mr. Friedman—And they may infer that the doctor did not care to receive it because he didn't think he ought to be paid for the job he did.

The Court—The answer to that is that he is here saying that he did what a reasonable doctor would have done under the circumstances. 30

Mr. Friedman—There is no testimony to that effect yet.

The Court—There will be before you get through. I will sustain the objection.

*Florence Woody—direct*

Mr. Friedman—Your Honor will permit me an exception.

The Court—You may have it.

By Mr. Friedman:

Q. Now, after this cast was removed, Mrs. Woody, how did your arm get along, your left arm and wrist? A. Get along.

10 Q. Yes. A. Why, it has always hurt me. It hurt me awful.

Q. Do you have the same usefulness out of that left wrist today? A. Oh, no, I couldn't hold anything, and I can't yet. Things all drop.

Q. Will you please hold up your hand and show the jury? A. (Witness complies.)

Q. Hold the two arms out this way, straight. Can you straighten them both out? A. Yes (indicating.)

20 Q. Where do you have pain in that left arm today? A. Here, here, and half of this in this side.

Q. Indicating the pinkey and the finger next to the pinkey.

The Court—The ring finger.

Q. And the ring finger, and one-half of the middle finger. And where else? A. Down to the elbow, and then across here. It always swells in here  
30 all the time.

Q. It what? A. Swells if I try to do anything, why, it always swells right in here (indicating.)

Q. Indicating around the wrist.

By the Court:

Q. What did you say about your fingers? A.

*Florence Woody—direct*

This finger, this finger, and half of this finger, down to my elbow (indicating).

Q. Well, what about it? A. Well, of a morning they are numb, and daytime they are always hurting me, and especially it all keeps right in my elbow.

The Court—Proceed.

By Mr. Friedman:

10

Q. Hold your arms out this way, both of them. Can you stretch them out? A. (Witness complies.)

Mr. Friedman (To the jury)—Can the jury see the difference in the wrists?

A Juror—She says the difference in the wrist. On what side?

The Court—It is the left wrist that was broken. 20

The Juror—Yes, but on which side was the break?

The Court—Indicate it, Mrs. Woody.

(The witness complies.)

Mr. Colie—The break, if I may interrupt, is on the thumb side.

The Juror—The break was on the thumb side?

The Court—Yes. 30

The Juror—Where does he say the difference is in the wrist?

The Court—Suppose she goes down and shows that.

Q. Just come down here. A. (The witness

*Florence Woody—direct*

stood before the jury and exhibited both arms.)

Q. Just hold your two hands stretched out to the jury.

Mr. Colie—I object to counsel stretching those fingers, your Honor.

Mr. Friedman—I haven't done a thing, and I ask—

10 The Court—If you haven't, then it is all right.

Mr. Friedman—I don't want counsel to intimate that I have done anything improper.

The Court—Let her do the stretching.

Q. Just stretch your arms out, Mrs. Woody. A. This arm is crooked all in here. I should have—

By Mr. Colie:

20 Q. Mrs. Woody, will you please just straighten your left hand out? A. Yes.

By Mr. Friedman:

Q. All right. What kind of work, if any, did you do before you had this fractured arm, Mrs. Woody? A. Well, I had boarders, and I always sewed.

30 By the Court:

Q. Did you sew for gain? A. Yes, dress-maker.

By Mr. Friedman:

Q. Are you able to now or not? A. Oh, no.

Q. To do these things? A. No.

Q. And why not, Mrs. Woody? A. Well, be-

*Florence Woody—direct*

cause I don't have the strength in my arm.

Q. You haven't the strength in your arms? A. No.

Q. How about your grip? A. Well, I don't have grip. I always let things fall, and my boarders—I could never lift, I could never lift a pitcher of water, never in that hand, because it doesn't hold it, doesn't have the strength.

Q. Now, in your business that you maintained before the accident what would be your yearly amount of business? 10

The Court—You mean her yearly earnings.

Mr. Friedman—Yes, the gross yearly income.

Q. Well, approximately. A. Well, when I sewed I always tried to average thirty dollars a week in sewing, by taking in dresses, and then with my boarders, you can't say; sometimes I have four or five, and sometimes two or three. 20

Q. What would your boarders average a week?

A. They would average, let's see, four—\$15 a week was what I got for them.

Q. For all of them? A. \$15. apiece.

Q. I see. What would be, roughly, your income from your sewing and your keeping of boarders before the accident, immediately before the accident?

Mr. Colie—Not roughly, your Honor. I think this woman must give something more than a rough figure. 30

The Court—Yes.

Q. Well, approximately.

*Florence Woody—direct*

The Court—We want it as nearly as you can give it.

Q. Approximately.

Mr. Colie—I object to approximating her income.

The Court—Yes. We want it exactly, if you can give it.

10

Mr. Friedman—Under the case of Nichols vs. New Jersey Express Company—

The Court—She has not yet said she couldn't give it to us exactly.

A. I couldn't give it exactly.

By the Court:

Q. Well, you did give us the thirty dollars a week from your sewing. A. Yes.

20

Q. Now, is that correct? A. Yes, on the average it would be, certainly; to average it all it, some weeks more and some weeks less.

Q. How much of that would be profit? A. Well, that was my sewing; I made that.

Q. That was profit, was it? A. Yes.

Q. All right. Now, what did you make profit out of your boarders? How many boarders did you have on an average and how much profit did you make out of them weekly? A. Well, my two children paid me board and I had four all the time I was in here.

30

Q. You mean four boarders besides your two children? A. Yes, yes.

Q. All right. How much did that net you? A. They paid me \$15 a week.

*Florence Woody—direct*

Q. Your children and the four boarders? A. Yes, apiece.

Q. That was \$90. Now, how much did it cost you to maintain them? How much of that \$90 was profit? A. Oh, I couldn't tell you that.

Q. All right. It doesn't help us any, then. A. There was quite a lot of it, because I paid my rent, and it was my living.

Q. You made your living out of it? A. I certainly did.

10

Q. How much did you make? How much was your rent, for instance? A. I paid \$50 rent. \$45 and then \$50 rent.

Q. Did you have enough profit from your boarders to pay your rent? A. I certainly did, and I saved some.

Q. How much more than your rent did you make from your boarders? A. I couldn't exactly say that.

Q. Then, you made at least \$50 a month net from you boarders; is that it? A. Oh, yes.

20

Q. But you don't know how much more? A. No, I couldn't say.

The Court—All right.

By Mr. Friedman:

Q. After your accident or after the treatment of this fracture by Dr. Keller, did you maintain any business at all? A. Why, I couldn't. I had to be waited on.

30

Q. Now, at the time Dr. Keller applied the plaster cast did he do anything to your arm?

*Florence Woody—cross*

By the Court:

Q. Other than what you have told us.

By Mr. Friedman:

Q. Other than what you have told us? A. I don't recall.

10 Mr. Colie—At the time of the application of the plaster?

Mr. Friedman—Yes.

The Court—She doesn't recall.

Q. You don't recall? A. No.

Q. Now, did you obey every order the doctor gave you as to the treatment of your arm? A. I certainly did.

Mr. Friedman—Take the witness.

20

Cross-examination by Mr. Colie:

Q. Mrs. Woody, in regard to your income first: What was your residence at the time you broke your wrist? A. Well, it was Union Avenue. I don't just recall the number.

Q. Union Avenue, Paterson? A. Yes, on Union Avenue, Paterson.

30 Q. In other words, you resided at the place where you—or next door to where you suffered your fracture? A. Yes.

Q. And is it from that residence that you carried on your dressmaking business? A. And my boarders, my boarders.

Q. And your boarders? A. Yes.

Q. By boarders do you mean boarders or merely

*Florence Woody—cross*

roomers? A. No, roomers and boarders, too. I fed them.

Q. So that in figuring up the net profit from the \$15 a week you have to figure not only rent for a larger place than you would have occupied yourself, but you have to figure such linen as you furnished them, did you, and the washing and the food—you had to buy for six different mouths; is that right?

A. Yes, yes.

• 10

Mr. Friedman—I can't hear you.

The Court—The answer is "Yes."

Q. Well, now, your dressmaking business, you say, netted you thirty dollars a week? A. Yes.

Q. Did you have a sign in your window? A. Never have a sign. Never had a sign.

Q. Who were your customers?

Mr. Friedman—Objected to. I don't see how that is relevant. 20

The Court—But you say she made thirty dollars a week. They have a right to inquire into that. That is proper cross-examination.

Mr. Friedman—All right.

A. Well, lots of times I make a dress for a person I couldn't know their name.

Q. From whom did you get your orders? A. My daughter. 30

Q. Your daughter? A. Yes.

Q. Now, of the lots of times you made dresses, as I understand it, you don't know who they were—

A. I didn't really know the name. I just know my friend so-and-so.

*Florence Woody—cross*

Q. Your daughter's friend so-and-so? A. Yes.

Q. Now, the people whose names you do know were whom? A. Mrs. Brown, Margie Brown, her daughter, and Virginia Frank, and Mrs. Foulds, Caroline Foulds and Pauline Foulds, friends of theirs. Now, that is some of the names that I know, that I recall right now.

10. Q. Were those Browns,—was that the family of your daughter? A. They wasn't then.

Q. Oh, they were the family into which your daughter married? A. Yes.

Q. And the Foulds are living here in Paterson? A. They was then. I think they are in Europe now.

Q. How much did you charge a dress? A. From five to seven dollars.

Q. From five to seven dollars. Were they standard dresses as to size? A. Yes.

Q. Standard sizes? A. Yes.

20. Q. How many did you average a week? A. Well, I tried to put out five, four or five, sometimes six dresses a week.

Q. Your demand amounted to that? A. Yes.

Q. And it was all through your daughter, except for the few names that you can't remember? A. Yes.

Q. Can you give us the present addresses?

30. Mr. Friedman—That I object to on the ground that counsel is attempting to find out the names of our witnesses or the names of our customers. I don't think it is proper, sir. I think this cross-examination has gone far enough.

The Court—She says that she made thirty

*Florence Woody—cross*

dollars a week, and that she made gowns for Mrs. Brown.

Mr. Friedman—Yes.

The Court—Now, he has a right to ask where Mrs. Brown is so that he can verify that and bring Mrs. Brown in to see whether that is true or not.

Mr. Friedman—I will withdraw the objection.

10

Q. Other than the Brown family into which your daughter married, can you give me the name and address of any of your dress customers? A. Fouldses.

Q. Yes? A. Mrs. Foulds, Caroline Folds, and Pauline Foulds.

Q. Now, Caroline Foulds, what is the last address you know for her? A. It was in Washington Apartments.

Q. Washington Apartments? A. Was when I sewed for them, where they lived.

Q. In Paterson? A. Yes.

Q. How long after this accident to your wrist did you continue to keep your boarders? A. How long after?

Q. Yes. A. I never kept boarders since.

Q. Well, how soon after you broke your wrist did you send away your boarders? A. Well, my son tried to do the work, and my daughter tried to do the work a little.

30

Q. Yes? A. But I couldn't wait on them.

Q. How soon—A. As soon as they could get places. I don't remember just how soon.

Q. How long, as nearly as you can recall, did the

*Florence Woody—cross*

boarders stay with you after February 1st, 1922, when you broke your wrist? A. Well, one only stayed one week; I remember that. And one tried to wait on himself a little while, until he got a place, and it was a little while before he left.

By the Court:

- Q. How long? A. Well, three weeks, probably.
- 10 Q. All right. How about the rest of them? A. They left as soon as they could find places. I don't recall. It was maybe four weeks, maybe five weeks, maybe longer than that.
- Q. So in about four weeks you had no boarders except your children? A. Son and daughter.
- Q. Is that correct? A. Yes.

By Mr. Colie:

- 20 Q. For the year 1921 did you make an income tax return? A. No, sir.
- Q. Are you aware that by law that a person making an income over a thousand dollars is required to make an income tax return?

Mr. Friedman—I object to that. I don't see how it is relevant in this case.

The Court—Oh, yes, that is very relevant.

Mr. Friedman—That she knew she had to had to make a return?

30

The Court—Yes.

Mr. Friedman—What bearing would that have upon this case?

The Court—Well, if she had an income that was taxable and she didn't know it was taxable, why, it will help you; if she did know it

*Florence Woody—cross*

was taxable and made no return, it won't help you.

Mr. Friedman—I know, but what difference does it make in this case, sir?

The Court—Why, we are trying to find out what her income was, and whether or not she made an income tax return on it is relevant.

Mr. Colie—I will withdraw the question.

The Court—The question is withdrawn.

10

Q. Did you carry on your dressmaking business during the year 1921? A. 1921?

Q. Yes. A. Yes.

Q. Practically throughout the full year? A. Yes.

Q. Did you have these boarders during 1921?

A. Them what?

Q. Did you have the roomers during 1921? A. When did I come here? Yes, I guess I did, 1921, the next year was 1922.

20

Q. Now, in regard to your treatment of the broken wrist: Before the doctor came what was the position of the hand? Was it hanging straight down or was it off at one side or how? A. Pardon me, I didn't just get that question.

Q. When you sent for the doctor what was it that led you to do it? A. Well, I had fell.

Q. Yes? A. And thought I had broken—I knew I had hurt my arm. It was become dead, numb, and the wrist was all spread out, and, of course, I wanted to see what was the matter.

30

Q. Pain, numbness, and swelling? A. Yes.

Q. After the fall; is that right? A. Well, of course, it didn't begin to swell then.

*Florence Woody—cross*

Q. I am just asking you, now, what were the symptoms that led you to send for Dr. Keller? A. Oh course, the arm has got numb, the severe pain of it.

Q. Severe pain and numbness? A. Yes.

Q. What was the position of the arm up to the time Dr. Keller came and took it in his charge? Do you understand what I mean by that? Sometimes when we have a fracture we find that our arm or  
10 foot, whatever it may be, sticks out at right angles.

A. This just seem to be spread out.

Q. In the wrist? A. In the wrist, yes.

Q. Spread out? A. Yes.

Q. Did the wrist slant off either way from the forearm, or was it straight out? A. No, as far as I remember it was just spread out.

Q. Spread. The wrist joint was spread? Did you try to move it yourself before he came? A. Well, I don't remember that.

20 Q. You don't remember. When the doctor came did he tell you that you had broken your wrist or your arm, or don't you recall? A. I don't remember.

Q. What did the doctor do when he came? A. Well, he pulled my hand, straightened it around, pulled it around, and wrapped adhesive tape around it.

Q. He did his pulling before he put the adhesive tape on, didn't he? A. Yes.

30 Q. Did you notice any material difference in the position of your hand before and after the doctor got through pulling it? A. I was suffering so I don't remember.

Q. You can't say? A. I couldn't say.

Q. Did he have to pull very long? A. No.

*Florence Woody—cross*

Q. How much of your hand was wrapped in adhesive, I mean from what point to what point? Just indicate on your left arm, or if it is easier, on your right. A. The picture shows that.

Q. I am asking you. A. From here to here (indicating.)

The Court—Indicating about five inches.

The Witness—Four or five inches, I should think.

10

Q. The doctor saw you the next day at the hospital, didn't he? A. He did. He did, yes.

Q. Was it on the next day that he put a splint on your arm or was it the day after the X-ray? A. The day of the X-ray.

Q. The day of the X-ray? The X-ray was the day after he set it? A. Yes.

Q. And then that same day he put a splint on? A. Yes.

20

Q. Now, will you tell us, was it a double splint or was it on one side of the arm only? A. Both sides.

Q. Both sides. Did you keep a record—the splint was on for ten days, you say? A. Yes.

Q. Did you keep a record of the time, so you know? A. I know it was ten days.

Q. How? A. Well, because. He told me I would have to wear it ten days, and I was so glad when the ten days was up. I know it was ten days.

30

Q. Was the splint painful, too? A. No, the splint was not painful.

Q. Why were you so glad when the ten days were up? A. Well, I didn't think I would have to have it in a plaster cast.

*Florence Woody—cross*

By the Court:

Q. You did think so? A. I didn't think so.

By Mr. Colie:

Q. So the plaster cast in itself was a great disappointment to you? A. Certainly was, yes; certainly was.

10 Q. Before you found out—have you talked to any friends about fractures since this injury, Mrs. Woody?

Mr. Friedman—Objected to as irrelevant and incompetent.

The Court—I will sustain the objection.

Q. The plaster cast was put on at your home; is that correct? A. Yes, sir.

20 Q. And am I correct in saying that it consists of rolls of sort of plaster tape that the doctor put on with hot water? A. Yes, sir. Yes, sir.

Q. And just which way did you say the doctor put your hand at the time he put it in the plaster cast? A. He sat down in front of me. He fixed my hand up this way, straight, and he began, and he would wrap, sitting in front of me, he would bear on my fingers this way and this way and keep wrapping tight and tight.

30 By the Court:

Q. Indicating that he was pushing the hand towards the body? A. Yes.

*Florence Woody—cross*

By Mr. Colie:

Q. And did the hand assume a position toward the body? Was that the position after the plaster cast was on? Was the position one in which the hand pointed toward the body? A. Yes.

Q. And that is the position which was maintained for how many days? A. Thirty-six days.

Q. Now, are you certain, Mrs. Woody, that Dr. Keller did not push your hand away from the body? A. Why, of course, I am certain. 10

Q. Now, how soon after the plaster cast was applied was it first cut down at all?

Mr. Friedman—I don't understand that question, and I don't know whether the witness does.

By the Court:

Q. Do you understand it? A. Yes. 20

Q. How soon was the plaster cast cut down? A. The doctor told me to keep from my fingers getting stiff he would give me a little room, and he gave me a little room in this part of my fingers.

Q. By cutting down the cast? A. Yes.

Q. How soon was that? A. I don't know. I couldn't answer that correctly.

By Mr. Colie:

Q. And when the doctor cut down the fingers—the cast—so as to allow you to move your fingers, what else did he do, if anything? A. Nothing. 30

Q. On any of these occasions did he touch your hand? A. Oh, yes, he would look at my finger once, and looked at my hand.

*Florence Woody—cross*

Q. Did he move your fingers at all? A. I don't remember that.

Q. Did he move your wrist at all? A. Oh, no.

Q. No? A. No.

Q. He didn't move your wrist? A. No.

Q. When did you have your wrist first moved? When do you recall, rather, that your wrist first moved? I will strike out the first question. A. Why, I think when he put it in the plaster cast.

10 Q. He moved it before he put it in the plaster cast? By movement of your wrists I would like to explain I mean this or this motion in the wrist joint (indicating.) A. Well, it didn't move at all while it was in the plaster cast.

Q. So that before it went in the plaster cast, as you recall, the wrist was not moved at all? A. No, not that I remember.

Q. And at the time that you can't recall of, then, when the doctor cut down the cast and moved your fingers—A. It was only this much, to let this part.

Q. —that gave you a little motion in your wrist, didn't it? A. Not in the wrist.

Q. Not in your wrist? A. No.

Q. When did you first move your wrist? A. After the cast was taken off.

Q. Who moved it for you? A. Myself. Well, the doctor, when he first moved it, he done it this way, moved, pulled my hand up and pushed this down this way.

30 Q. Who first gave your wrist—did you yourself or did the doctor first give your wrist motion? A. Well, it was so stiff it had no motion for a long time, that kind of motion (indicating.)

Q. But your wrist has now got some motion, hasn't it? A. Yes.

*Florence Woody—cross*

Q. I am asking you a different question. The first motion to your wrist, was it by your own action or by the doctor's? A. Well, it was from the balls and things that I would use. I don't know how to answer that.

Q. The first motion that you can recall was exercising with this ball that the doctor gave you? A. The first thing, the doctor done this to my wrist.

Q. I am asking you about motion. That wrist moves today, doesn't it, some? A. Yes. 10

Q. You can recall the motion of the ball which, as I gather, may cause some motion to the wrist? A. Yes.

Q. But the wrist, as to other motions, up and down and sideways, did you or the doctor first move your wrist that way? A. Why, it was the exercise that I gave it that moved it. It was stiff at first.

Q. Yes, and who moved it first, the doctor or you? A. I don't know how you can answer that, because it gradually came on, the movement. 20

Q. Didn't you take rather definite exercise to move your wrist? A. Of course, yes.

Q. Didn't the doctor recommend some exercise to you to move your wrist? A. Yes, yes, and my fingers.

Q. Recommend this (indicating)? A. Yes.

Q. Did he also recommend any other exercise that you can now recall? A. Massaging. 30

Q. And exercises? A. Squeeze a ball.

Q. Yes. Did he recommend holding onto anything at all? A. Yes.

Q. What was that? A. See how you could grip, most anything that you could grip.

Q. Recommend anything that tended toward

*Florence Woody—cross*

stretching it, that you can recall? A. No, I don't recall.

Q. By the way, were those exercises painful?

A. Awfully painful.

Q. Hurt a great deal, didn't they? A. Yes.

Q. Did you nibble at this cast yourself from time time? A. I did not.

Q. Although it hurt you a good deal? A. Yes.

10 Q. The doctor twice cut this cast down, didn't he, before it was finally taken off? A. I don't recall but once.

Q. I see. Don't you recall side cuts? A. Oh, no.

Q. Up the cast almost to the wrist? A. No, indeed. No, indeed. No.

Q. Now, what was the outward condition of your fingers at the time the cast was taken off? How did they look? A. There was nothing but skin and bones, just perished.

20 Q. Thin? A. Yes.

Q. Withered away? A. Yes.

Q. And your arm underneath the cast, when it was removed, what was its outward condition? A. All withered away.

Q. Withered away? A. Yes.

Q. Tell us just what you noticed about your— did you notice anything other than the withering to your hand while your cast was on? A. While the cast was on?

30 Q. Yes. Your fingers were exposed, weren't they? A. Yes.

Q. And they began to wither and get thin? A. Yes.

Q. What else? A. Why, I suffered awful all the time.

*Florence Woody—cross*

By the Court:

Q. The appearance. A. Well, that was about all.

Q. Just thin and withered? A. Yes.

By Mr. Colie:

Q. Today you can grasp things with your thumb and index finger, the first finger of your left hand, can't you, Mrs. Woody? A. Pretty well, yes. 10

Q. And during the period that you were under treatment you went out and did your own marketing, didn't you? A. Pardon me?

Q. Did you, during the period that you were under treatment, go out and do your own marketing? A. Right across the street.

Q. Across the street to the grocery store to buy the things? A. Yes, but I didn't go downtown and get my meats like I always did. I went across the street. 20

Q. So you made your purchases and brought them back; is that correct? A. No, I didn't bring them back.

Q. You had them delivered? A. Yes.

Q. Now, by November 11th of 1922 did you put the curtains up in your rooms yourself? A. I might have helped.

Q. You might have? A. I might have helped. I don't recall it.

Q. You don't recall it? A. No. 30

Q. When did you last see Dr. Keller professionally? A. I don't remember.

Q. What happened on the last occasion that you saw Dr. Keller professionally? A. Why, he just

*Florence Woody—cross*

looked at my hand and he says, "She is still an ugly thing." That is about all I remember.

Q. Where was this? A. Dr. Keller's office.

Q. Were you taking your exercises at that time?

A. I was.

Q. Is that when you got the X-ray plate from Dr. Keller or is that on an earlier occasion? Do you understand the question? Is that the time when you got the X-ray plate from Dr. Keller? A. I never got the plate from Dr. Keller myself.

Q. You have the X-ray plate of your arm, haven't you? A. The lawyer has it.

Q. What? A. A lawyer has it.

Q. Yes. He got it from you, didn't he? A. I think he got it from a lawyer in Washington. I am certain he did.

Q. Did the lawyer in Washington get it from you? A. I don't remember.

Q. Did you ever have the X-ray plate of the arm in your possession? A. If I had it in my possession?

Q. Where did you get it from? A. From a doctor at—I can't say.

Q. You don't know where you got it? A. I don't remember. It has been so long that I have forgotten that.

Q. According to your best recollection, you didn't get it from Dr. Keller at his office? A. I don't remember.

Q. Now, when you walked out of Dr. Keller's office on this particular day, the last time you saw him professionally, you never came back to him for further treatment or examination; is that correct? A. That is right.

*Florence Woody—cross*

Mr. Friedman—You will have to speak a little louder. I can't hear your answer.

The Witness—That is right. That is right. Yes.

Q. Did you tell the doctor that you were not coming back? A. No, not that I recall.

Q. How soon thereafter did you have further treatment for your arm? A. I don't know how soon. It wasn't long before I went to Dr. Foley. 10

Q. Not long before you went to Dr. Foley? A. Yes.

Q. Now, when did you go to Dr. Foley? A. I can't say exactly.

Q. Where was that? A. Where? Washington, D. C.

Q. Washington. You left Paterson immediately after you last saw Dr. Keller professionally? A. Yes. Yes. 20

Q. And that was—how nearly can you fix that day? A. No, it was not shortly after, it was the next Spring. I left Washington in April.

Q. You went to Washington in April? A. In April, yes.

Q. Of 1922 or 1923? A. 1923.

Q. Twenty what? A. 1923.

Q. Do you recall ever having seen Dr. Keller—that was after you brought this suit, was it? This was after you brought the suit, was it not? A. That I went to Washington? 30

Q. Yes. A. Yes, after. Yes.

Q. And you went from the time Dr. Keller last saw you at his office until April, 1923, without being seen by any physician or receiving any treatment for the arm? A. No, I didn't say that.

*Florence Woody—cross*

Q. Now correct me. A. I went backwards and forwards to Washington. My husband was there, you see, and about once every other month I went down there, of the Fall, to see Dr. Foley and Dr. Shan, a bone specialist.

By the Court:

10 Q. The Fall of what year? A. The same year it was broken.

Q. 1922? A. Yes.

By Mr. Colie:

Q. Then, when you answered that you hadn't seen anyone professionally until you went to Washington in April, 1923, you didn't understand me, did you? A. I thought you said when did I leave Washington.

20 Q. I am not interested in when you were in Washington and I am not interested in when you were in Paterson. I am interested in what you saw a professional doctor for this arm. A. It was that summer—fall.

Q. Fall? A. Yes.

Q. What month? A. I don't remember.

Q. You don't recall when you first saw the doctor again by months? It was just in the Fall of 1922? A. No, I don't remember.

30 Q. You don't recall when you last saw Dr. Keller? A. No.

Q. Can you give me the month you last saw Dr. Keller professionally? A. No, I don't remember.

By the Court:

Q. Well, but you had the cast on thirty-six days

*Florence Woody—redirect*

and you had the splint on for eleven days. That made forty-seven days? A. Yes.

Q. And you only saw him a few times after that, as I understand it? A. Yes.

Q. And that would bring it up to the end of March, we will say. Would that be about the time when you last saw Dr. Keller? A. It must have been later than that, because it was warm. It must have been in April.

Q. In April, then, you saw Dr. Keller professionally for the last time; is that correct? A. Yes, I guess that is right. Yes, that is right. 10

Q. And from April; until the Fall, you saw nobody professionally for your arm? A. I went to see Dr. Foley during the Summer and I went to see Dr. Shan in the Fall.

By Mr. Colie:

Q. When in the Summer did you see Dr. Foley? 20  
A. I don't remember what time I saw him.

Q. Have you had any X-ray of this arm other than the X-ray at St. Joseph's Hospital the day after the break? A. No.

Mr. Colie—That is all.

Redirect Examination by Mr. Friedman:

Q. Just a moment, Mrs. Woody. Did you at any time after or during the time you were being treated, 30  
do anything to that arm to injure it yourself?

Mr. Colie—I object to that, your Honor, as clearly calling for a conclusion.

The Court—Yes. Objection sustained.

*Florence Woody—recross*

Q. Did you use your arm? Did you do any work during the time you were being treated—your left arm or wrist—any heavy work? A. Why, no.

Mr. Colie—I didn't hear you.

The Court—"Why, no."

Mr. Friedman—That is all.

Re-cross-examination by Mr. Colie:

10

Q. You just said you didn't use your arm to do any work. A. I said heavy work, pardon me.

Mr. Friedman—Heavy work.

Q. What work did you do during the period you were being treated? A. Well, I dusted around in the house; I put the dishes on the table.

Q. Using your left arm? A. No, with my right arm.

20

Q. How much did you use your left arm? A. Well, I couldn't use my left arm. I didn't use it at all.

Q. You didn't use it at all? A. No, because it was so painful I couldn't.

Q. I see. Were you ever given any narcotics or drugs to soothe your pain?

Mr. Friedman—By whom?

30

Q. By Dr. Keller during the period you were in the cast? A. Yes, the first night.

Q. The first night? A. Yes.

Q. Now, after the first night during these agonizing thirty-six days, did he give you drugs or narcotics? A. No.

*Motion for Nonsuit*

Mr. Colie—That is all.

Mr. Friedman—The plaintiff rests.

## PLAINTIFF RESTS

## MOTION FOR NON-SUIT

Mr. Colie—I ask for a non-suit, if your Honor please on the ground that there is no evidence at all of negligence on the part of Dr. Keller, because there is no evidence in that what he did was not what would ordinarily be done by a doctor in the treatment of such a fracture. 10

The Court—What do you say about that?

(Mr. Friedman replies.)

(Extended discussion.)

The Court—The motion will be granted and a non-suit will be entered.

Mr. Friedman—Your Honor will permit me an exception? 20

The Court—You may have it. There is no evidence that the treatment of Dr. Keller was such a treatment that in the eyes of an expert, a physician, it was the want of skill and care that a physician is required—that ordinarily is given by another physician practicing that profession, and I understand that to be the rule laid down by our Courts in the case of Smith against Corrigan. 30

Mr. Friedman—Your Honor will permit me an exception?

The Court—Certainly.

(The jury was excused.)

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## New Jersey Court of Errors and Appeals

Florence Woody and Thomas J.

Woody, her husband,

Plaintiffs-Appellants,

vs.

Franklin J. Keller,

Defendant-Appellee.

On Appeal from  
the Passaic Cir-  
cuit Court.

### Brief for Plaintiffs-Appellants

#### STATEMENT OF FACTS

This is an appeal from a judgment of nonsuit entered in the Passaic County Circuit Court on March 7th, 1928 (S of C p. 47, ll 5-30). The complaint alleges negligence and malpractice in general against the defendant, who is a physician, in the treatment and setting of a fracture of the plaintiff's left arm and wrist. The plaintiff at the time of trial submitted her proofs and rested, and on motion of defendant's counsel, a nonsuit was ordered to which plaintiff excepted (S of C p. 47).

At the time of trial, the following facts appeared:

The plaintiff received an injury to her left arm and wrist and then called upon Dr. Keller, and he pulled her arm this way and that way, plaintiff indicating, and put some adhesive tape around it. The defendant physician then advised her, the plaintiff, to go to St. Joseph's Hospital and have a picture taken of it and the next morning she went to the hospital and had two (2) picture taken. After that the defendant advised the plaintiff that she had a fracture of the arm and told her he would be over to her house in a little while to see about it. The

defendant then visited the plaintiff at her home and put her arm in splints and she wore it that way for **ten days** and after the ten days he put her arm in a plaster cast. (S of C, p. 11, l. 10-30.)

At the time the defendant first applied the plaster cast the plaintiff advised him she was feeling pain (S of C, p. 12, l. 30-35). At the time the defendant physician applied the cast to the plaintiff's arm she advised him it was hurting her and the defendant replied, "Oh, don't be a baby" (S of C, p. 13, l. 18-20). The plaintiff cried for hours after the plaster cast was applied and then she testified her arm almost went to sleep (S of C, p. 13, l. 28-30). When the plaintiff advised the defendant that her arm almost went to sleep, he told her it was natural, he told her to let it alone and not be a baby (S of C, p. 13, l. 35) (S of C, p. 14, l. 1-3). The plaintiff advised the defendant physician that she was suffering and that her arm would hurt her all the time and he would say, "Leave it on a little longer and we will take it off" and the defendant kept promising to take it off and he did not take it off, and then finally he took off the plaster cast (S of C, p. 15, l. 18-28). The defendant left the plaster cast on the plaintiff's arm for **thirty-six days** (S of C, p. 15, l. 30-32).

At the time the defendant applied the plaster cast, the plaintiff told him he was hurting her and that he was breaking her arm and he told her not to cry, not to be a baby, and that she had nerve enough to stand it. (S of C, p. 17, l. 15-25.) The defendant left the plaster cast on the plaintiff's arm for **thirty-six days** and never took it off before that time (S of C, p. 17, l. 25-27). After the plaintiff had her arm in the plaster cast and the doctor came to visit her,

all he would do was ask her how her arm was coming along and she advised him all the time that she was having misery in her arm and that it was hurting her so (S of C, p. 17, l. 30.35), and the plaintiff asked the defendant to take off the plaster cast and he advised her he couldn't do it, he wouldn't do it, and he would set a date, and that continued for thirty-six days (S of C, p. 18, l. 1-10).

After the thirty-sixth day, the defendant sawed off the plaster cast from the plaintiff's arm and shook his head (S of C, p. 18, l. 21-23) and then the defendant said, "She is an ugly thing" (S of C, page 18, l. 26) and the defendant said, "It should have been that way" (indicating), (S of C, p. 18, l. 35), and then the defendant said, "Oh, well, don't worry, it will come along, it will be as straight as a stick in a week or ten days." He said, "We all make mistakes." He said, "Don't worry about it. It will come along alright." He said, "I wish it was that way." Just kept talking that way so he said, "Well, of course, it is all—we all make mistakes. We are all human. I REALIZE IT WAS MY FAULT, but don't worry. I will make it as straight as a stick in a little while,—a week or ten days, I believe, is the way he always expressed it to me."

After Dr. Keller took off the plaintiff's plaster cast, he did not do anything for the plaintiff as far as treatments were concerned, although he told her he would straighten it out and make it as straight as a stick (S of C, p. 19, l. 21-30).

After the plaster cast was taken off, the plaintiff visited the defendant's office about twice, but he did not give her any treatment but just asked her, "How is this arm coming along?" "Well," he says,

"it should be this way." That was the next week after the cast was taken off. (S of C, p. 20, l. 11-19.)

After the plaintiff's cast was taken off, her left arm and wrist always hurt her and she couldn't hold anything and couldn't at the time of trial. "Things all drop" and she indicated at the time of trial just where the pain in her arm was, indicating a pain in the pinkey and ring finger and the swelling around the wrist (S of C, p. 22, l. 22-33). Plaintiff also testified that in the morning the pinkey and ring finger on the left arm are numb and in the day time and always hurts her and also in the elbow (S of C, p. 23, l. 1-7). Plaintiff testified that she hasn't any grip in her arm and she doesn't have any strength and always lets things fall (S of C, p. 25, l. 1-10).

#### POINT I.

#### THE PLAINTIFFS PROVED NEGLIGENCE AND MALPRACTICE ON THE PART OF THE DEFENDANT BY HIS OWN ADMISSION TO THE PLAINTIFF AND THEREFORE THE NONSUIT WAS ERROR.

The trial court was of the opinion that the case of Smith vs. Corrigan reported in 126 Atl. p. 680, controlled the facts in the case sub judice and this the defendants-appellants claim is error.

In the case of Smith vs. Corrigan, supra, in the third Syllabus the following appears:

"The skill and care a physician is required to give a patient is that ordinarily possessed and exercised by others in the profession."

The defendants-appellants contend however that ordinarily such is the law in this State but in the

case at bar there is a condition present which takes it out of that class of cases controlled by the decision in *Smith vs. Corrigan*, supra.

The plaintiff, Florence Woody, testified on direct examination as to a conversation she had with the defendant as follows:

"So he said," (meaning the defendant), "Well, of course, it is all—we all make mistakes. We are all human. **I realize it was my fault but don't worry. I will make it as straight as a stick in a little while.**"  
S of C, p. 19, l. 5-10.)

The appellants contend that an admission from the defendant on the plaintiff's direct case that it was the defendant's fault; that her arm was not straight after his treatment, was a fact sufficient to make out a prima facie case against the defendant as to his negligence and malpractice and that no expert testimony was required in behalf of the plaintiff, to prove that the defendant at the time he treated the plaintiff failed to use that degree of skill and care a physician is required to give a patient that is ordinarily possessed and exercised by others in the profession, and as a consequence, the case of *Smith vs. Corrigan*, supra, was not controlling as to the facts presented in the case at bar.

#### POINT II.

**THE DEFENDANT'S ADMISSION TO THE PLAINTIFF THAT IT WAS HIS FAULT, MADE HIS NEGLIGENCE AND MALPRACTICE AND THE TREATMENT OF THE PLAINTIFF A JURY QUESTION.**

The plaintiff's testimony that the defendant stated to her it was his fault, that her arm was an

ugly sight was not a self-serving declaration and if it was, it was not objected to by the counsel for the defendant and hence is considered waived.

The defendant's admission that it was his fault was an admission against interest and like in all negligence cases, such an admission made it a jury question as to whether or not he used that degree of skill and care a physician is required to give a patient that is ordinarily possessed and exercised by others in the profession.

It became a jury question whether or not the defendant used that degree of skill as outlined in *Smith vs. Corrigan, supra*, in leaving the plaintiff's arm and wrist in a splint for ten days (S of C, p. 12, l. 25-30) when she cried and complained of pain to him and it became a jury question whether or not the doctor used that degree of skill outlined in *Smith vs. Corrigan, supra*, in leaving a plaster cast on the plaintiff's arm and wrist for thirty-six days when she cried and complained of pain to him, (S of C, p. 15, l. 30-32).

The defendant's statement or admission brought out by the plaintiff's testimony in her direct case "that it was his fault, but don't worry," was also admissible against him as prima facia evidence of his negligence in the treatment of the plaintiff's arm and wrist because it was part of the *res gestae* and because it took place at a time when the defendant was treating the plaintiff's arm and at a time when he took off the plaster case and furthermore, because it was a natural emotion on the part of the doctor to make such a statement and exclamation when he saw the bad results of his labors when the plaster cast was removed from the plaintiff's arm and wrist by him.

A conversation which was had between the plaintiff and defendant and as to the defendant's admission of his fault or negligence was also permitted in the case of *Camden, etc. Co. vs Williams* reported in 61 N. J. L., p. 646 and p. 651, second paragraph and also in 40 Atl., reported at p. 634.

In the case of *McBlain vs. Edgar* reported in 65 N. J. L. p. 634 at p. 637 next to the last paragraph on the page the court said:

"The declaration of any party to a cause as to the subject matter of the controversy—the issue in the cause—is competent to be proven by the opposite party as a substantive matter of proof for the plaintiff or defendant. Such evidence is not as in the case of other witnesses, solely to contradict or discredit; it is affirmative proof." (11 Am. & Eng. Encyl. L. 2nd ed. p. 508.)

"If the ruling here under review was sustained, even declarations against interest could not be admitted until after calling the attention of the party who may have made them to them, as a preliminary to their admissibility."

There is no rule of evidence so requiring, 1 Greenleaf on Evidence. (15th ed., paragraph 171.)

A declaration is admissible as original evidence where the fact that it was made is the point in controversy and not its truth or falsity. 1 Greenleaf on Evidence (15th ed.,

paragraph 123) (1 Jones on Evidence, paragraph 854).

And in this case the negligence of the defendant is the issue in the case which was sought to be proven by the defendant's declaration, as substantive matter of proof for the plaintiff as to the defendant's negligence.

A malpractice case in no way differs from an ordinary negligence case and there is no question that if the plaintiff's case discloses a declaration by the defendant that it was his fault that an accident was caused it would be sufficient prima facie to send the case to the jury and of course the weight and credibility of such a declaration or statement by a defendant would be for the jury. In other words, if the defendant, Dr. Keller, stated at the time he treated the plaintiff that it was his fault that the fracture of her arm and wrist was not cured properly, such a statement by him is synonymous to his saying that he was negligent in the treatment of her fracture of the arm and wrist, and therefore, a jury question was presented as to whether or not he made such a statement and as to whether or not even though he declared it to be his fault he used that degree of care and skill which is ordinarily possessed and exercised by others in the profession as outlined in *Smith vs. Corrigan*, supra.

The plaintiff's position is, that an admission by the defendant which is part of a conversation he had with the plaintiff and which is against his interest and part of the *res gestae* is sufficient in itself to

present a jury question, as to whether or not he should respond in damages for his negligence without any further proof and without expert proof as is required under *Smith vs. Corrigan*, supra.

To illustrate the proposition, let us assume that A and B had an automobile accident, and that B said to A at the time of the accident that it was his fault; would not such a statement or admission on B's part, which is presented on A's proofs, be sufficient in itself as a prima facie case to get beyond a nonsuit?

It would be superfluous for the plaintiff to procure and present expert testimony as to the defendant's negligence in the treatment of her arm and wrist when she had the best proof available, to-wit: the defendant's own admission that it was his fault that her arm and wrist was crippled. What probative force would an admission have if negligence on the part of defendant could not be proven affirmatively by his own statement or admission against interest?

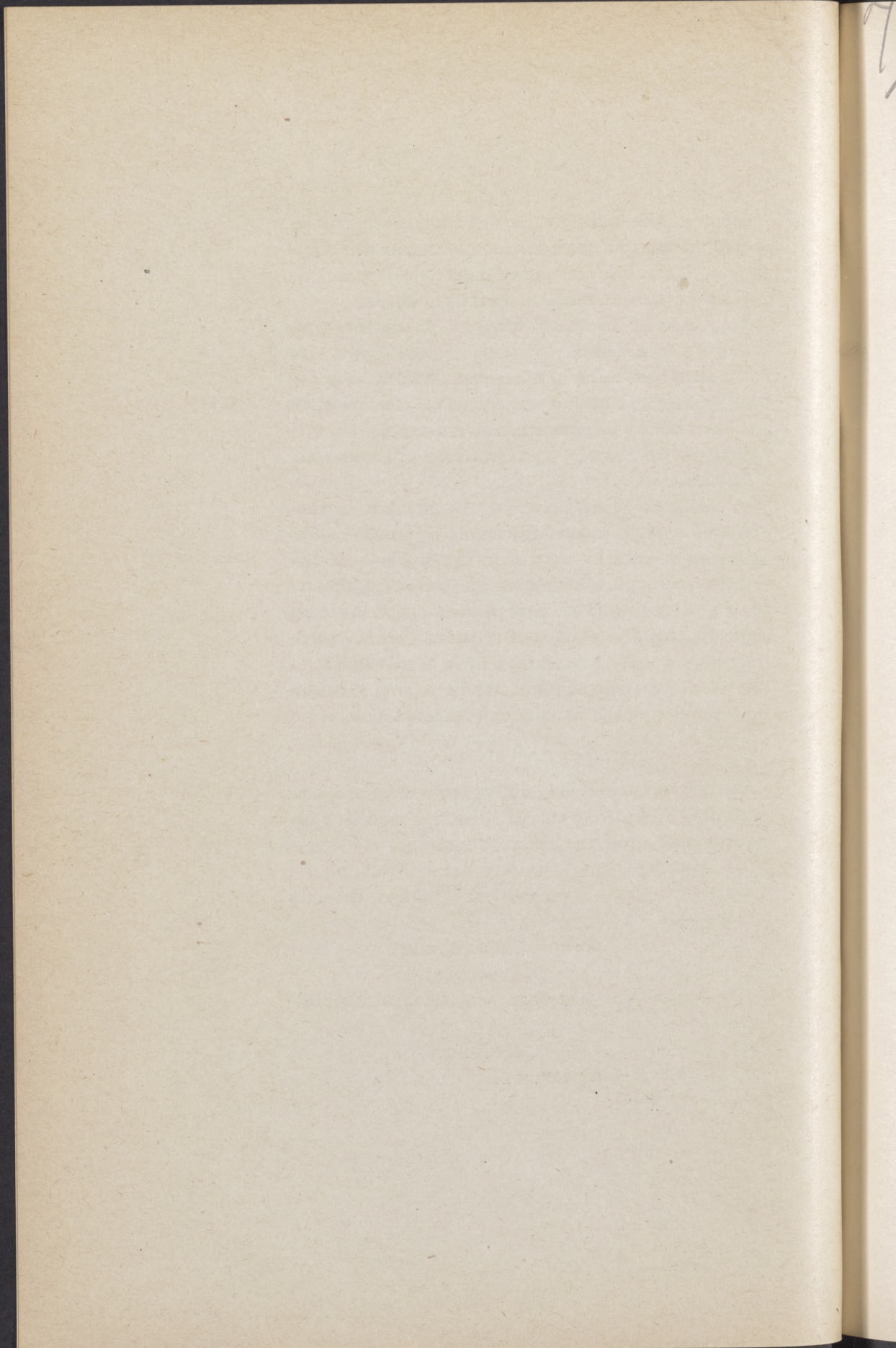
For the foregoing reasons, it is therefore respectfully submitted, that the trial court committed error in nonsuiting the plaintiff and that the judgment of nonsuit should be reversed and for nothing holden and that a venire de novo issue with costs to be taxed.

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*Peter J. McGinnis*  
*of Counsel*

May Term, 1929.



## New Jersey Court of Errors and Appeals

FLORENCE WOODY, *et al.*,  
*Plaintiffs-Appellants,*

*vs.*

FRANKLIN J. KELLER,  
*Defendant-Appellee.*

### BRIEF FOR DEFENDANT-APPELLEE.

This is an appeal from a judgment of non-suit in an action for malpractice against the defendant, a physician, brought by Florence Woody and her husband. The Trial Court found no evidence of negligence.

The only witness testifying on behalf of the plaintiffs-appellants was the plaintiff, Mrs. Woody. Plaintiffs relied, for proof of negligence, on the statements made to Mrs. Woody by Dr. Keller at the time he took off the remainder of the plaster cast from her arm. The statements of Dr. Keller referred to will be fully considered later in this brief.

There was no medical testimony produced in the case. The plaintiffs could have produced medical testimony had they seen fit to avail themselves thereof, for Mrs. Woody testified (Case, p. 45, l. 14)—

“I went to see Dr. Foley during the summer and I went to see Dr. Shan in the fall.”

At page 44, line 1, of State of the Case, Mrs. Woody described Dr. Shan as a “bone specialist.” Neither Dr. Foley nor Dr. Shan were called as witnesses by plaintiffs.

In view of the emphasis given in appellants' brief to the fact that the cast was left on for thirty-six days, we call attention to the omission in appellants' statement of facts of any reference to the fact that during the thirty-six days, the doctor cut down the cast (Case, p. 40, l. 10, *et seq.*), and since the plaintiffs' case does not disclose any specific act of negligence, we call attention to the almost daily visits by defendant to Mrs. Woody's home (Case, p. 14, l. 26), and the treatments defendant prescribed (Case, p. 39, l. 10, *et seq.*).

The testimony further shows (Case, p. 41, l. 8) that at the time of the trial the witness could grasp things with her thumb and index finger of her left hand pretty well (Case, p. 41, l. 8). It would also seem from the testimony that the plaintiff's arm is in a condition so that she can do work, but not heavy work (Case, p. 46, l. 12). And the deformity is slight, as clearly shown by the fact that when the two arms were held up to the jury for inspection, at least one of the jurors could not see any difference in the wrists without closer inspection. (Case, p. 23, l. 20, *et seq.*)

The case is of great consequence to the medical profession, for if the trial judge was wrong in granting the non-suit, then a doctor can be found liable for malpractice without any medical testimony to show his work was not "performed with the ordinary skill and in the ordinary manner of his profession" (*Lolli v. Gray*, 101 N. J. Law, at 340, in this court), and without any testimony of any kind to show *wherein* the doctor was negligent.

The complaint (Case, p. 4, lines 10, *et seq.*) charges negligence in the diagnosis, the setting,

the treatment, in not using proper appliances, in failing to perform necessary operations and in preventing plaintiff from securing another physician. There is no evidence of negligence in any one of these particulars, and as we read appellants' brief, there is no claim that any particular act of negligence is proved, but the claim is that because of defendant's statements or admissions, the jury was entitled to guess that he had been in some way negligent.

It seems that plaintiffs wanted the jury to infer that the cast had been left on too long. It is so stated on page 6 of appellants' brief. A complete answer to this suggestion is that no jurymen is qualified to decide how long a cast should be left on a broken limb. In this case there can be no suggestion that the cast was left on through neglect or oversight, but, on the contrary, plaintiff's testimony shows that the doctor left it on deliberately in the exercise of a conscious judgment (Case, p. 15, ll. 23, *et seq.*).

Without medical expert testimony, there was nothing before the jury to show that the doctor's judgment in this respect was wrong or that he was negligent in any particular. Under such circumstances a non-suit was properly entered in this case.

#### I.

**In order to establish malpractice in a fracture case, medical expert evidence is essential.**

The reason why expert evidence is essential was so well stated by Chief Justice Taft when sitting as a United States Circuit Judge that his language has come to be quoted with approval

in the textbooks and in leading cases on the subject. He says:

“When a case concerns the highly specialized art of treating an eye for cataract, or for the mysterious and dread disease of glaucoma, with respect to which a layman can have no knowledge at all, the Court and jury must be dependent on expert evidence. There can be no other guide, and, where want of skill or attention is not thus shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury.” *Ewing v. Goode*, 78 Fed. Rep., p. 442, at p. 444.

This rule has been applied to the ordinary malpractice case and has been uniformly followed. In *Wigmore on Evidence* (2nd Ed.), Vol. 4, par. 2090, the author says:

“Generally, the topics on which only an expert witness can be received form usually but one element in the main issuable fact. Moreover, generally, the parties are eager enough to produce such expert testimony without any rule to require them. It happens, however, that in one class of cases, viz.: *actions for malpractice against a physician or surgeon*, the main issue of the defendant’s use of suitable professional skill is generally a topic calling for expert testimony only; and also that the plaintiff in such an action often prefers to rest his case on the mere facts of his sufferings, and to rely upon the jury’s untutored sympathies, without attempting specifically to evidence the defendant’s unskilfulness as the cause of those sufferings. Here the Courts have been obliged to insist on the dictate of simple logic, resulting from the principle above cited (of § 555, *ante*), that expert testimony on the main fact in issue must somewhere appear in the plaintiff’s whole evidence; and for lack of it the Court may rule, in its general power to pass upon the sufficiency of evidence (*post*, § 2551), that there is not

sufficient evidence to go to the jury." (Italics in text.)

This authority cites a wealth of cases to sustain the quoted statement.

A diligent examination of the cases shows that the treatment of fractures is declared to be "a highly specialized art" in surgery, and requires expert testimony to establish the standards of practice before a jury case is made. Wigmore in the note to the section quoted cites no less than eight cases in which this rule has been applied to the treatment of fractures.

An illustrative fracture case is *Snearly v. McCarthy*, 180 Iowa 81, 161 N. W. 108, which involved alleged malpractice in reducing a fractured leg. There being no expert evidence, on appeal a directed verdict was affirmed. In that case, the Court at page 110 says:

"While the method of treatment adopted by defendant is fully pointed out and described in the testimony, no witness was called by plaintiffs to show that this was not regarded as proper practice by the profession \* \* \*. As a general rule, it may be safely affirmed that in matters requiring special skill and training, it is not permissible for laymen as non-experts to set up any artificial standards as to methods of treatment. This is especially true in surgery; for in that field neither courts nor juries are presumed to know more regarding methods of treatment than ordinary laymen, and that is practically nothing. After hearing the theories, deductions, and scientific facts from experts, both judge and jury must often oppose one set of opinions against another and determine which is the more reasonable, but they cannot, without some guide, presume to fix any standard upon which to determine the correctness of any kind of treatment."

## II.

The plaintiff, who is the sole witness in the case, does not take her case out of the settled rule by her testimony as to the remarks the doctor made when he removed the remainder of the plaster cast.

1. *Facts, circumstances and nature of the alleged admission:*

It may first be said generally that testimony as to verbal declarations against interest is regarded as somewhat dangerous evidence. 1 *Greenleaf on Evidence*, par. 199. It is scrutinized with care and interpreted and construed in the light of all the circumstances attending the making thereof. The statement as a whole must be considered. *Wigmore on Evidence* (2nd Ed.), par. 2094.

In *Tousey v. Hastings*, 86 N. E. 831 (New York Court of Appeals), it is declared "that aside from the danger of fabrication, verbal admissions are unreliable since they are frequently misunderstood, imperfectly remembered or inadvertently made." Oral admissions are to be received with great caution owing to their liability to being misunderstood and mis-reported. 1 *Greenleaf on Evidence*, par. 200.

But we will assume, as perhaps we must, on a motion for a non-suit, that the plaintiff has correctly remembered and truthfully stated what the doctor said and the circumstances under which he said it. In order that the Court may have the circumstances under which the conversation took place, we set forth in full all the testimony on that subject (Case, p. 18, ll. 21, *et seq.*):

"Q And what happened then? A Well, he taken the cast off, sawed it off, looked at my arm, shook his head—

*By the Court.*

Q What did he say? A He says, 'She is an ugly thing.'

Q What else? A Done this way, lifted my hand up, done this (indicating). He says at the time that was—

*By Mr. Colie.*

Q May I see that just again? A Pulled this part of my hand up, pushed this down (indicating). He said it should have been that way (indicating). Pulled this around, and then he said, 'Oh, well, don't worry,' he says, 'It will come along, it will be as straight as a stick in a week or ten days.' He said, 'We all make mistakes.' He said, 'Don't worry about it. It will come along all right.' He said, 'I wish it was that way.' Just kept talking that way. So he said, 'Well, of course, it is all—we all make mistakes. We are all human. I realize it was my fault, but don't worry. I will make it as straight as a stick in a little while'—a week or ten days, I believe is the way he always expressed it to me."

(Case, p. 41, ll. 33, *et seq.*)

"Q What happened on the last occasion that you saw Dr. Keller professionally? A Why, he just looked at my hand and he says, 'She is still an ugly thing.' That is about all I remember."

The significance of what was said by Dr. Keller must be determined by a consideration of all that he said and not by the separation of particular and isolated words from the context, and by a consideration of the occasion on which the words were spoken. The conversation took place when the doctor was confronted with the unsatisfactory result of his treatment, and naturally there would occur to him alternative approved methods of treatment that in the light of his experience in this case, with the benefit of what is called "hindsight," might have led to a better re-

sult. It is manifest that he was expressing his disappointment and surprise at the condition in which he found the plaintiff's forearm.

The statement as given by the plaintiff is fragmentary and largely exclamatory, and by the plaintiff's testimony is manifestly of doubtful accuracy—for when she quotes the doctor as saying, "I realize it was my fault, but don't worry. I will make it as straight as a stick in a little while—a week or ten days," she adds (Case, p. 19, l. 10), "I *believe* is the way he always expressed it to me." And when she testifies as to her last visit to the doctor (Case, p. 41, l. 35) she says, "Why, he just looked at my hand and he says, 'She is still an ugly thing,' that is *about* all I *remember*." In the same breath, in the same sentence, in which the doctor used the word "fault," according to the plaintiff, he added "but don't worry, I will make it as straight as a stick in a little while—a week or ten days." These added words, in the same sentence, must be taken into consideration in determining the meaning the doctor intended to convey by the use of the word "fault."

Moreover, the statements made by the doctor seem to be addressed to himself as a monologue, for the plaintiff referring to the occasion—after repeating his words according to her remembrance says, "He said, 'I wish it was that way.' Just kept talking that way."

Considering all the language and the circumstances, the doctor's statement would appear to be a little more than the natural expression of sympathy and regret at the result, or as stated at the bottom of page 6 of the brief for the plain-

tiffs-appellants, which we take the liberty of italicizing—

“It was a *natural emotion* on the part of the doctor to make such a statement and *exclamation* when he saw the bad results of his labors when the plaster cast was removed from the plaintiff’s wrist and arm by him.”

Manifestly, the fact that this was a spontaneous exclamation precludes the possibility of its being an expression of the doctor’s considered conclusion as to the treatment, or of his judgment of his course measured by the legal standard of his obligation.

Such a statement, made under such circumstances, cannot be held to prove that a physician and surgeon did not possess and exercise the skill and care ordinarily possessed and exercised by others in the profession, which is the standard required of a physician or surgeon. (See *Lolli v. Gray, infra.*)

2. *An admission of mistake is insufficient to prove negligence:*

In the leading case of *Ely v. Wilbur*, 49 N. J. L. 685, it was held that a physician can recover for his services even though he made a mistake in diagnosis and treated the wrong disease. The case was tried before Chief Justice Beasley. The defendant offered evidence tending to show that the plaintiff had mistaken the nature of defendant’s disease and in treating him prescribed and administered remedies for a disease which he did not have. The case came to this court on a writ of error on exceptions to the charge of the Chief Justice, who instructed the jury that this “insistment of the defendant, even if true, would not prevent a recovery; that the question was whether the plaintiff exercised proper care and

skill as a physician; that if the jury should conclude that the doctor was mistaken in the nature of the defendant's disease, they must go still further, and say that a want of care and skill was exhibited. If no want of care or skill appeared, he was entitled to a fair compensation although he fell into a mistake."

At page 687, the opinion states the rule given in *Smith v. Hyde*, 19 Vt. 54, to the effect that the physician, like the attorney, undertakes that he is possessed of that degree of knowledge and skill which usually pertains to other members of the profession and that in attending his patients engages that he will use due care to discover the nature of the disease which gives rise for his services and in applying the usual remedies. But beyond this measure of skill and diligence the law makes no exaction. If he is to be held for results or a guarantor of success it can only be by virtue of express engagement.

*Ely v. Wilbur* was cited with approval in *Lolli v. Gray*, 101 N. J. L. 337, in which latter case this Court adopted as a measure of a physician's duty the rule given by the late Justice Katzenbach in *Smith v. Corrigan*, 100 N. J. L. 267, that the skill and care a physician is required to give a patient is that ordinarily possessed and exercised by others in the profession.

In view of the law as settled in this State, it is clear that an admission of mistake does not make a case for the jury, for even if the mistake were incontrovertibly proved there would be no justification for a verdict without evidence of malpractice, *i. e.*, of failure to use that skill and care ordinarily possessed and exercised by others in the profession.

3. *The so-called admission of fault is insufficient to prove negligence:*

In considering the language of the admission attributed to defendant in this case, we repeat that the significance of what Dr. Keller said must be determined by a consideration of all that was said and of the circumstances under which it was said, and that it is not proper to separate words from their context in construing their meaning, nor to construe the words in an artificial and technical manner.

The immediate context of Dr. Keller's admission of fault was "We all make mistakes. We are all human. I realize it was my fault, but don't worry." This is tied up inextricably with the admission that the doctor had merely made one of the mistakes all humans are liable to make. As already pointed out, this was in the nature of an exclamation by the doctor, and there is nothing whatsoever to justify an inference that when he was blaming himself, if indeed he was so doing, he was measuring his conduct by the legal standard. The doctor might very well—and some doctors in fact do—measure his conduct by a more strict measure than the care and skill practiced by an ordinary physician. This is illustrated by the case of *Schwartz v. Shull*, 31 S. E. 914 (W. Va.), in which the defendant requested the Court to instruct the jury, in substance, that even if they found that defendant had admitted that he was to blame and that the accident (an explosion) was his fault, still their verdict should be for defendant unless on all the evidence it was shown that defendant was negligent and the negligence was the proximate cause of the injury.

The Trial Court refused to so charge and on appeal this was held error, the Court saying:

“This instruction should have been given, for a person may acknowledge that he is morally responsible for an act when not legally so. He may feel, on account of sensitiveness, that by using more prudence than the law requires, or by having prevented a remote cause, he might have rendered the proximate cause of the accident impossible.”

Moreover, the doctor was looking at the result when he made this exclamation; he then had knowledge that was not open to him when he diagnosed the injury, reduced the fracture and treated it. That such a statement as this is of no significance is well illustrated by the case of *Staloch v. Holm*, 111 N. W. 264 (Minn.), a malpractice case in which the operation on a crushed leg resulted in the death of the patient. On the effect of admissions made by the defendant, the Court on page 256 said:

“Nor is it significant whether, as the plaintiff’s case tended to show and the defendants’ case to deny, the defendant subsequently made damaging admissions concerning the propriety of the operation, in view of his after-acquired knowledge. His negligence is to be determined by reference to pertinent facts then in existence, of which he knew or should have known in the exercise of due care, when the operation was performed. It would be a work of supererogation to cite authorities for so obvious and necessary a principle, or for this specific application of a general rule. There is an apt and neglected analogy in the rule restricting proof of the presence or absence of probable cause for instituting an original judicial proceeding complained of in an action for malicious prosecution to known or knowable facts in existence at the time of the commencement of that original proceeding.”

The inadequacy of such testimony to send a case to the jury seems clear from an analogy to our own profession. The first reaction of many a lawyer upon losing a case is to feel that if he had conducted it differently the result would or might have been different. In view of his after-acquired knowledge he has felt that he has made a mistake in this or that respect.

In *McCullough v. Sullivan*, 102 N. J. L. 381, it was held by this Court that the measure of the duty of a lawyer towards his client is the same as the measure of the duty of a physician toward his patient, to wit: to use the reasonable knowledge and skill which other members of the profession of ordinary ability and skill possess and exercise.

If a lawyer at the end of a trial says to his client that he is sorry for the result and that we all makes mistakes and that it was his fault, can it be that thereby he furnished sufficient evidence to take the case to a jury in an action against him for professional malpractice?

### III.

**An admission of mistake and fault without more is in law insufficient to make a prima facie case for the jury.**

Appellants contend and give an imaginary case between A and B to illustrate that an admission of this character is sufficient to make a prima facie case in an ordinary negligence action. A diligent examination of the authorities reveals no case so holding.

The appellants' brief on page 7 cites *Camden, etc. Co. v. Williams*, 61 N. J. L. 646, to the effect that such an admission is permitted in evidence.

We do not contend that it is inadmissible but we do claim it alone cannot make a case for the jury and support a verdict in favor of plaintiff. No case in this State holds that such an admission is sufficient without other evidence of negligence. The said case of *Camden, etc. Co. v. Williams* indicates to the contrary. The language of Justice Collins, speaking for this Court, at page 651 is as follows:

“The Judge was asked to charge the jury that if they believed the doctor’s statement of what the deceased said, there was negligence *per se* and the plaintiff could not recover. He properly declined so to charge. The question could not be wholly decided upon that statement. The plaintiff was entitled to a verdict in accordance with the facts and was not estopped by decedent’s declaration.”

Although *McBlaine v. Edgar*, 65 N. J. L. 634, cited by appellants, holds that a declaration of a party is admissible as substantive evidence, it does not hold that an admission of a mistake or fault or any other admission is sufficient of itself to make a case for the jury. An admission of fault in a negligence action will not make a case for the jury and Courts of high repute in other jurisdictions so hold.

*Bunewicz v. Haglin*, 103 Minn. 297, 115 N. W. 271, is a leading case upon the point, and as the circumstances in that case are very similar to those here, for the convenience of the Court we refer to it at some length. This was an action by an employee against his employer because of injuries sustained on alleged defective premises. The plaintiff was called as a witness, but his memory had been destroyed and he knew nothing of what had occurred. Plaintiff’s wife testified that the defendant said to her: “Don’t cry, I

know it was my fault, not your man's. I know your man was hurt bad. That was not your man's fault." The defendant was in court at the time of the trial but did not explain, qualify or deny the wife's testimony. Verdict for defendant was directed and on appeal judgment was affirmed. It was held that there was no evidence that the master was actually negligent. The Court said (p. 272)—

"The essential question in the case is whether under these conditions liability may be predicated upon defendant's admissions, donations, and promises of assistance. The paucity of specific authorities on the subject is significant."

The Court cited two cases in which admissions were held sufficient to prove particular facts in contract cases, but then says (p. 272)—

"On the other hand, in *Swift Electric Light Co. v. Grant*, 90 Mich. 469, 51 N. W. 539, it was held that if the defendant was not legally liable by reason of his negligence his admission, if made, did not create such liability.

No case has been called to our attention, nor have we been able to find one in which liability for negligence has been based on admissions alone. This conforms to the general conception of the nature of admissions as evidence."

The Court held in the case before it (p. 273)—

"Defendant's admission may not have been a mere sympathetic assurance; but it was not an admission of negligence or liability."

In *Swift Electric Light Co. v. Grant*, cited in the foregoing case of *Bunewicz v. Haglin*, the language of the defendant passed upon was—

"He told me it was his fault; his carelessness in attempting to put it in with blocks that were not sufficiently strong."

The Court of review upheld the instruction that—

“If at that time the defendant had not been guilty of such a degree of negligence on his part as to render him liable for that accident under the rules of law as I have defined them, then the statement upon his part that he was liable would not, in and of itself create any liability. His liability is not dependent upon what he may admit or upon what he may deny; but it is dependent upon a state of facts upon which due care or want of care is predicated.”

#### IV.

Appellants' position, as stated in their own brief, contains its own refutation.

At the end of the second paragraph on page 8 appellants' brief states:

“\* \* \* a jury question was presented as to whether or not he (Dr. Keller) made such a statement and as to whether or not even though he declared it to be his fault he used that degree of care and skill which is ordinarily possessed and exercised by others in the profession as outlined in *Smith v. Corrigan, supra.*”

Here appellants admit in so many words that even though Dr. Keller made the statement it ~~was with~~ still a question “as to whether or not \* \* \* he used that degree of care and skill which is ordinarily possessed and exercised by others in the profession.” In other words, it was still a question as to whether defendant was negligent. In solving this question, *the jury had literally no evidence whatsoever to guide them*; that is to say, no evidence as to the degree of care and skill ordinarily possessed and exercised by others in the profession, or of any departure therefrom. This question which remained for deci-

sion, even though the jury believed the statement was made by Dr. Keller, is one which all authorities hold can only be settled by competent proof.

In the second paragraph of page 6 of appellants' brief, it is stated that it became a jury question whether or not defendant used that degree of care and skill as outlined in *Smith v. Corrigan* in leaving the plaintiff's arm and wrist in a splint for ten days, when it was painful, and in leaving a plaster cast on her arm and wrist for thirty-six days, when it was painful. We respectfully ask how a jury could so find in the absence of any evidence that these steps were not in accordance with the ordinary and proper practice. Plaintiff's answer seems to be that because of Dr. Keller's statement the jury was entitled to guess as to whether he was free from negligence, or was negligent in some one or all of the particulars of the treatment. To us such a proposition is self-evidently unsound.

A fallacy which may have misled appellants is found in the statement at the beginning of the second paragraph of page 8 of their brief:

"a malpractice case in no way differs from an ordinary negligence case."

This statement is erroneous because in an ordinary negligence case the question is what a reasonably careful and prudent man would have done under the circumstances, and the jury can determine for themselves, as laymen, whether there has been a variation from this standard. But in a malpractice case, the standard is ~~as to~~ <sup>the</sup> what skill and care is ordinarily possessed and exercised by members of the medical profession under the circumstances. As to this, in the absence of medical testimony, the jury can have no knowledge and there can be no basis whatsoever

for a determination that there has been a deviation therefrom. This is conclusive as to the instant case. Moreover, it seems to be the law, as shown by the authorities already cited, that even in an ordinary negligence action, a mere general admission of mistake or fault is insufficient in the absence of other proof of negligence to make a case for the jury.

If a plaintiff could make a case for the jury of malpractice against a defendant solely by her testimony as to remarks such as are here under consideration, made under the circumstances here disclosed, then an additional peril would be added to the practice of medicine or surgery—professions already perilous enough. Fortunately, such is not the law.

The judge correctly ordered a non-suit and the judgment thereon should be affirmed.

Respectfully submitted,

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