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Notice of Appeal.

NOTICE OF APPEAL.

New Jersey Supreme Court

ANNA KALB, <i>Plaintiff-Appellee,</i> <i>vs.</i> MORRIS FISHER, <i>Defendant-Appellant.</i>	}	<i>Action at Law.</i>	10
		<i>Notice of Appeal to Court of Errors and Appeals.</i>	

To Silberman & Grosman, or Grosman & Grosman, attorneys of Anna Kalb, plaintiff-appellee, or to whom it may concern.

PLEASE TAKE NOTICE, that Morris Fisher the defendant-appellant in the above-entitled cause, hereby appeals to the New Jersey Court of Errors and Appeals from the judgment of the New Jersey Supreme Court, reversing a judgment of Essex County Circuit Court. 20

NATHAN H. BERGER,
Attorney of Defendant-Appellant.

I hereby conceive there is good cause for appeal in the above-stated case. 30

NATHAN H. BERGER,
Attorney for Defendant-Appellant.

JACOB SCHNEIDER,
Of Counsel.

Grounds of Appeal.

GROUNDS OF APPEAL.

New Jersey Court of Errors and Appeals

10	ANNA KALB, <i>Plaintiff-Appellee,</i> <i>vs.</i> MORRIS FISHER, <i>Defendant-Appellant.</i>	}	<i>On Appeal from New Jersey Supreme Court. Reasons.</i>
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The defendant-appellant assigns the following reasons for the appeal of the above-entitled cause from the New Jersey Supreme Court to the New Jersey Court of Errors and Appeals:

20

1. The New Jersey Supreme Court erred in reversing the judgment of the trial court directing a judgment of non-suit against the plaintiff and in favor of the defendant.

NATHAN H. BERGER,
 Attorney of Defendant-Appellant.

JACOB SCHNEIDER,
 Of Counsel.

30

40

Notice and Grounds of Appeal.

NOTICE AND GROUNDS OF APPEAL.

Filed November 30, 1926.

Essex County Circuit Court

ANNA KALB, <i>vs.</i> MORRIS FISHER,	<i>Plaintiff,</i> <i>Defendant.</i>	} <i>Action at Law.</i> } <i>Notice and Grounds of Appeal.</i>	10
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To Nathan H. Berger, Esq., attorney of defendant.

SIR:

TAKE NOTICE, that the plaintiff, Annie Kalb, appeals to the New Jersey Supreme Court from the whole of the judgment entered in this cause in favor of the defendant and against the plaintiff, upon the following grounds:

1. The Trial Court directed a judgment of non-suit against the plaintiff and in favor of the defendant when thereunto moved by counsel for the defendant, whereas the said Court should have denied said motion and should have submitted to the jury for decision the questions involved in the issue.

2. Said judgment of non-suit in favor of the defendant and against the plaintiff was erroneous and contrary to law.

Dated, November 29, 1926.

SILBERMAN & GROSMAN,
Attorneys of Plaintiff.

Summons.

Service of the foregoing notice and grounds of appeal is hereby acknowledged this 29th day of November, 1926.

NATHAN H. BERGER,
Attorney of Defendant.

10

SUMMONS.

The State of New Jersey to Morris Fisher, 298 Belmont Avenue, Newark,
(L. s.) N. J.

20 YOU ARE SUMMONED to answer the annexed complaint of Annie Kalb, in an action at law in the Essex County Circuit Court. And TAKE NOTICE, that unless you file your answer to said complaint with the Clerk of the Essex County Circuit Court, at Newark, within twenty days after service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, HON. NELSON Y. DUNGAN, Judge of the Essex County Circuit Court, this 3rd day of August, 1925.

30

JOHN H. SCOTT,
Clerk.

SILBERMAN & GROSMAN,
Attorneys.

40

Complaint.

COMPLAINT.

Filed August 3, 1925.

ESSEX COUNTY CIRCUIT COURT.

ANNA KALB,	}	<i>Plaintiff,</i> <i>vs.</i> <i>Defendant.</i>	<i>Action</i> <i>at Law.</i> <i>Complaint.</i>	10
<i>vs.</i>				
MORRIS FISHER,				

Plaintiff, who resides in the City of Newark, in the County of Essex and State of New Jersey, says that:

1. On the 23rd day of April, 1925, and for a long time prior thereto, Morris Fisher, the defendant herein, was the owner of a certain lot of land with a building thereon erected, abutting upon and known and designated as No. 298 Belmont avenue, a public highway in the City of Newark, in the county aforesaid.

2. The defendant on said day and on the first floor of said premises maintained and conducted a grocery and vegetable store wherein he sold groceries, vegetables and kindred products usually sold in such places, to the public in general.

2. That it was at all times the duty of the defendant, both as owner of said premises and as occupant of the store on the first floor thereof, to keep the sidewalk in front of said premises and the entrance to his said store clear of all obstructions so that the public in general as well

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30

40

Complaint.

as persons desiring to enter and leave his said store might do so with safety.

10 3. That on said 23rd day of April, 1925, this plaintiff entered the defendant's store and there made a number of purchases; that as she was leaving said store holding in her arms the merchandise which she had purchased from the defendant, she stumbled over a box which the defendant had negligently and carelessly placed on the sidewalk in front of the entrance to said store, slipped on some vegetable leaves which the defendant had negligently and carelessly permitted to remain on the sidewalk immediately in front of said store, in consequence whereof this plaintiff lost her balance, fell to the sidewalk and in so doing struck her right
20 knee on said box which the defendant had negligently and carelessly permitted to remain on the sidewalk in front of his store, as hereinbefore stated and injured herself severely.

30 4. In consequence of the negligence and carelessness of the defendant as hereinbefore stated, the muscles and tendons surrounding plaintiff's right knee were bruised and strained and she sustained other severe injuries to her said right knee and leg which are of a technical nature and which she cannot personally describe; she was confined to her bed for a long period of time, she suffered great pain and was compelled to expend large sums of money for medical treatment required to alleviate the suffering experienced by her as the result of her injuries.

40 5. The negligence with which plaintiff charges the defendant is that as owner of said building and as occupant of the store on the first floor thereof, he failed to keep the sidewalk

Complaint.

in front of said premises and the entrance to said store free from obstructions and that he carelessly and negligently permitted garbage and wooden boxes to lie in the entrance to said store, in consequence whereof this plaintiff could not safely leave the said store after having transacted her business with the defendant.

10

6. Plaintiff entered the defendant's said store by his invitation for the purpose of purchasing merchandise which he had for sale on said premises and it was consequently the further duty of the defendant to see that the entrance to said store was in proper condition for this plaintiff to safely enter and leave the same, all of which the defendant failed to do.

Judgment will be claimed for the sum of five thousand dollars (\$5,000).

20

SILBERMAN & GROSMAN,
Attorneys of Plaintiff.

I hereby appoint and depute Fred E. Ober to serve the within writ.

Witness my hand and seal this 5th day of August, 1925.

HARRY B. O'CONNELL,
Sheriff.

By CONRAD DEUCHLER,
Under Sheriff.

30

Served the within summons and complaint August 18, 1925, personally upon Morris Fisher, the within-named defendant, at his usual place of abode, 393-393 Belmont Ave., Newark, N. J.

HARRY B. O'CONNELL,
Sheriff.

By FRED E. OBER,
Special Deputy.

40

Answer.

ANSWER.

Filed September 2, 1925.

The defendant, Morris Fisher, residing in the City of Newark, Essex County, New Jersey, answering the complaint herein, says:

10

1. He admits the allegations of the first and second paragraphs of the complaint.

2. He admits the allegations of the third paragraph of the complaint, which is numbered 2.

3. Defendant has no information to form a belief as to the allegations contained in the fourth paragraph of the complaint, which is numbered 3, and leaves the plaintiff to her proofs.

20

4. Defendant has no information to form a belief as to the allegations contained in the fifth paragraph of the complaint, which is numbered 4, and leaves the plaintiff to her proofs.

5. Defendant denies the allegations of the sixth paragraph of the complaint, which is numbered 5.

30

6. Defendant denies the allegations of the seventh paragraph of the complaint, which is numbered 6.

FIRST SEPARATE DEFENSE.

The plaintiff, at the time of the happening of the accident complained of, failed to exercise reasonable care for her own safety, because, at the time of the said accident, the plaintiff, in leaving the store of the defendant, held in her arms a number of packages of merchandise which obstructed her view, and she failed to observe

40

Answer.

the box and other objects which plaintiff claims caused her to stumble and slip, although the same were in plain view, and the defendant alleges, therefore, that the plaintiff was guilty of contributory negligence, barring recovery.

SECOND SEPARATE DEFENSE.

10

The defendant was not guilty of any negligence whatsoever.

THIRD SEPARATE DEFENSE.

The defendant did not cause the accident to plaintiff, nor did he contribute in any incident whatsoever to the occurrence of this said accident.

FOURTH SEPARATE DEFENSE.

20

Whatever damages and injuries were sustained by the plaintiff at the time and place mentioned in the complaint, were caused and contributed to by the plaintiff's negligence, in that the plaintiff negligently and carelessly exposed herself to the risk of such an accident, and neglected to take precaution or to exercise care to guard and protect herself against such an accident; moreover, at the time and place mentioned in the complaint, the plaintiff conducted herself in a careless, negligent and reckless manner and was not exercising care or taking proper precautions. 30

WHEREFORE, the defendant demands judgment that the complaint herein be dismissed, with the costs and disbursements in this action.

NATHAN H. BERGER,
Attorney of Defendant.

40

Reply.

REPLY.

Filed September 11, 1925.

Annie Kalb, the plaintiff in the foregoing action replying to the answer of the defendant filed herein, says that:

10

1. She denies that at the time of the happening of the accident complained of she failed to exercise reasonable care for her own safety, because, at the time of the said accident, the plaintiff, in leaving the store of the defendant, held in her arms a number of packages of merchandise which obstructed her view and that she failed to observe the box and other objects which plaintiff claims caused her to stumble and slip, although same were in plain view, and she denies that therefore she was guilty of contributory negligence barring recovery.

20

2. She denies that the defendant was not guilty of any negligence whatsoever.

3. She denies that the defendant did not cause the accident to her. She denies that the defendant did not contribute in any incident whatsoever to the occurrence of the said accident.

30

4. She denies that the damage and injuries sustained by her were caused and contributed by her negligence, in that she negligently and carelessly exposed herself to the risk of such an accident, and neglected to take precautions or to exercise care to guard and protect herself against such an accident. She further denies that she conducted herself in a careless, negligent and reckless manner, and was not exer-

40

Judgment.

cising care, or taking proper precautions at the time of the accident.

5. She denies that she was guilty of any negligence whatsoever.

SILBERMAN & GROSMAN,
Attorneys of Plaintiff. 10

JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

38655 ANNIE KALB, <i>vs.</i> MORRIS FISHER, 	<i>Plaintiff,</i> <i>Defendant.</i>	} <i>Action at Law.</i> <i>On Non-suit.</i>	20
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Costs\$54.18

Nathan H. Berger, attorney of defendant.

Judgment on non-suit in the above-entitled action was rendered on the 1st day of November, A. D. nineteen hundred and twenty-six, in favor of the defendant, Morris Fisher, and against plaintiff, Annie Kalb, for fifty-four dollars and eighteen cents, costs of suit. 30

Judgment entered and signed November 1, 1926.

WILLIAM S. GUMMERE,
Judge.

Recorded November 1, 1926, Book 101, Circuit Court Judgments, page 557. 40

Clerk's Certificate.

ESSEX COUNTY CLERK'S OFFICE.

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

10 I, JOHN H. SCOTT, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey, DO HEREBY CERTIFY, that the foregoing is a true and correct copy of all the records in the case of Annie Kalb, plaintiff, v. Morris Fisher, defendant, together with a copy of the judgment record recorded in Book 101, Circuit Court Judgments, page 557, and the same is taken from and compared with original copies of all the records and as the same now remains on the files of said office.

20 IN TESTIMONY WHEREOF, I have here-
 (SEAL) unto set my hand and affixed the official seal of said Court and County at Newark, N. J., this 9th day of December A. D. 1926.

JOHN H. SCOTT,
 Clerk.

30

40

Anna Kalb, direct.

ESSEX CIRCUIT COURT.

Monday, November 21, 1926.

ANNA KALB,

vs.

MORRIS FISHER.

*Action
at Law.*

10

Before Hon. William A. Smith, *J.*, and a jury.

For the plaintiff appear Silberman & Grosman (by Robert D. Grosman).

For the defendant appears Nathan H. Berger.

(A jury is called and sworn.)

20

Mr. Grosman opens for the plaintiff.

Mr. Berger opens for the defendant.

ANNIE KALB, plaintiff, sworn in her own behalf.

Direct examination by Mr. Grosman.

Q Mrs. Kalb, you are the plaintiff in this suit? A Yes.

30

Q Do you remember the 23rd of April, 1925? A Yes, sir.

Q Were you in Morris Fisher's grocery store on that day? A Yes, sir.

Q What happened? A I went in and he made my order and he wrapped it up. There was nobody in the store. And I walked out. As soon as I went down from the stoop I slipped right away; I couldn't get up.

Q What happened to you? A I fell down and I couldn't get up.

40

Anna Kalb, direct.

Q Do you know whether you struck anything or not? A I fell on the box of lettuce.

Q Where was this box of lettuce? A On the side by the door.

10 Q Do you know what you slipped on? A I couldn't turn around to see what I slipped on because I fell right down on both knees.

Q What time of the day was this? A Supper time.

Q Who was in the store? A Nobody, only Mr. Fisher.

Q Morris Fisher, the man you are suing? A Yes.

Q Did he come out after you slipped and fell? A I don't know.

20 Q Were you able to see what was going on? A No, I couldn't turn around.

Q How long were you there? A About two minutes.

Q Then what happened? A Mrs. Beyer came out of the green store and she hollered.

Q Who picked you up? A Mrs. Beyer from the green store.

Q Who else was there? A The lady from the bakery, Mrs. Rauchwerger, and the children, too.

30 Q What part of your body did you hurt? A My right knee.

Q Were you able to walk? A No, they took me in.

Q Who took you in? A Mrs. Rauchwerger and the children.

Q Were you able to stand on your foot? A No.

Q What did you do? A They took me in and they called the doctor.

40 Q Which doctor? A Dr. Weinstock.

Anna Kalb, direct.

Q How long were you in bed? A Two or three weeks; not quite three weeks; and then I was sitting on the chair a few months.

Q During the time you speak of, were you out of bed at all? A They took me out on the chair little by little.

Q What was the condition of your knee as far as you could see? A It was all swelled up and black. 10

Q How many times did Dr. Weinstock see you? A They brought me over in the machine and took X-rays by Dr. Kaufman.

Q After that, did you come home? A They took me home.

Q Were you able to stand on your foot after the X-rays were taken? A No, I couldn't get into the store for weeks. 20

Q How long before you were able to walk around on the foot? A I suffer yet.

Q How long after the accident were you able to walk around as well as you are walking? A It was about two or three months.

Q Did you have any other doctor than Dr. Weinstock? A Dr. Kessler.

Q How long did you go to Dr. Kessler? A About two or three weeks.

Q How much of a bill did Dr. Weinstock give you for his services? A He didn't give me a bill yet. 30

Q Did you get a bill from Dr. Kessler? A Yes.

Q How much?

Objected to.

Objection sustained.

Q What was your occupation before the 23rd of April, 1925? 40

Anna Kalb, direct.

Objected to as immaterial, and on the ground that there is no claim for loss of any wages.

Objection sustained.

10 Q What else besides your knee troubled you, if anything? A I got nervous and I couldn't do nothing; I couldn't go in the store no more.

Q Who did your housework? A I had a woman all the time.

Q Who did the housework before the accident? A I used to hire a woman for one day; and like this I had to hire a woman for every day.

Q Did you suffer any pain with that knee? A Yes.

20 Q How long did you suffer pain? A I am suffering them; I got like a saw—I am suffering with my knee yet.

Q Did you suffer more pain after the accident than you do now? A Yes.

Q How long after the accident did you continue to suffer more pain than you do now? A For eight or nine months; I couldn't put on no shoe for months and months; couldn't go no place.

30 Q Did you ever have any trouble with your knee before the accident? A No, sir.

Q You have had doctors before the accident for other troubles? A For other troubles, but not for my knee.

Q Did you see Morris Fisher after the accident? Did you talk to him? A He came to see me with his wife.

Q How soon after the accident? A A few days later.

40 Q Where were you at that time? A In bed.

Anna Kalb, cross.

Q Did you live near this Fisher place? A The third door.

Q The third house away? A No, the second house away.

Q Where did you say you were when Morris Fisher and his wife came to see you? A In bed. 10

Q What did he say to you? A "How do you feel?" I said, "I suffer terrible and the doctor comes every day." He said, "You will get for what you suffer." I will be paid for what I suffer; I shouldn't worry.

Q Did you see him again after that? A About a week later he came in and he said he is not insured—

Q Don't tell us about that. What else did he say about that? 20

Mr. Berger: I object to that. Give the entire conversation.

Q Very well, tell us everything he said. A I shall go to the lawyer—

Q Tell us about the insurance. A He is not insured in this house, but in another house but to tell him I fell by the A. & P. and I said I can't put on my shoes. Why should I say a lie? I never was in court. 30

Q Who else was there? A Mrs. Riner.

Q I am speaking now about the day when he came in to tell you what you have told us. Mrs. Riner was there? A Yes.

Q Did you see Morris Fisher again after that? A No.

Cross examination by Mr. Berger:

Q You say that you lived two doors away from this store? A Yes. 40

Anna Kalb, cross.

Q What number did you live at? A 302.

Q Belmont avenue, Newark? A Yes.

Q And this store was 298 Belmont avenue, Newark? A Yes.

Q There was a green and vegetable store next door to this property at 300 Belmont avenue? A Yes, Mrs. Bayer.

Q You used to buy in Mr. Fisher's grocery store, did you not? A Yes, for five years.

Q You went there in the morning and again in the evening, isn't that true? A Yes.

Q So, that for five years you kept going in and out at least twice a day? A Only when I need things.

Q You were there at least every day, were you not? A Yes, sir.

Q You say you were there on the day of the accident toward evening? A Supper time.

Q What time was it? A Around six o'clock it was; between six and seven.

Q This was a pretty busy grocery store, wasn't it; a lot of women came there? A It is like all grocery stores; there was nobody there then.

Q You have seen lots of women going into that store every day? A Sure, it's a grocery; everybody comes in.

Q This was a pretty busy grocery? A I didn't watch his business.

Q You say it was between six and seven? A Yes.

Q Isn't it usually very busy there at this time of the night? A No.

Q When you came there on this night you saw Mr. Fisher and you say he was the only person in that store? A Yes.

Q And nobody else? A Nobody else.

Anna Kalb, cross.

Q Who waited on you? A Mr. Fisher.

Q Did you see this lady there (indicating)?

A That is a sister-in-law, but she wasn't in the store.

Q Did she ever wait on you at all? A Sometimes, sure.

10

Q You are sure she didn't wait on you this time? A No.

Q You are sure that she wasn't there? A No.

Q Did you see this lady there (indicating)?

A No, she lives upstairs; the janitor there.

Q You are sure she wasn't there? A No, not with me in the store.

Q You say that when you fell there was a box of lettuce standing at the door. Was it on the sidewalk or in the street? A When you go out; on the stoop.

20

Q Was it outside or inside the store? A Outside.

Q That box of lettuce was usually outside of that store. You used to see it when you went in and out? A I got no business to look; I walked in and took my order.

Q Isn't it a fact that there were boxes of goods usually standing outside of the show window? A This is the door and here was the box (indicating).

30

By the Court.

Q Was it usually standing there? A There was always a lot of things outside.

By Mr. Berger.

Q As you used to go in and out of the store you noticed those things, did you not? A Yes, sure.

40

Anna Kalb, cross.

Q You bought a number of items, didn't you?

A Yes.

Q And you had several bundles in your hand?

A One bundle; I carried it like that (indicating).

Q Show us how you carried it. A Like that (indicating); because I had more bundles.

10 Q As you were walking out of the store, when did you first see the box of lettuce? A I didn't see nothing; I just walked out on the stoop and I slipped right away on my knee.

Q Did you slip after you stepped from the stoop to the sidewalk? A I fell right on the box of lettuce.

Q You fell on the box of lettuce after you lost your balance? A No, as soon as I put my foot down and the other foot down I fell on the box.

20 Q The passageway was the same as when you entered? A Half a door—

Q The passageway was clear? A Yes.

Q Wasn't the box of lettuce on the side of the door? A It was half a door; the other half was to go in.

Q What was it that caused you to fall? A I slipped.

Q On what? A I suppose on the lettuce.

30 Q Not what you suppose. Do you know what you slipped on? A I don't know on what because I couldn't turn around.

Q You say after you had slipped on something, you don't know what it was, you then fell on the box of lettuce? A I didn't say on what I slipped.

Q You slipped on something, you don't know what it was, and you then fell on the box of lettuce? A I fell right away on my knees.

40 Q You say Mr. Fisher was in the store? A Yes, sir.

Anna Kalb, cross.

Q And he didn't come out to you at all? A
No.

Q Was he busy with anyone at the time? A
No.

Q There wasn't a customer in the place? A
No.

Q Was it light or dark at that time? A It 10
was between six and seven o'clock.

Q Was it light or dark at that time? A
Light.

Q You could see plainly around you? A
Yes.

Q How were you facing after you fell?
Toward the curbstone, or toward the store?
Was your head pointed toward the street or
toward the store? A Toward the street.

Q How long did you remain in that position 20
before some one came to lift you up? A Maybe
two minutes—a minute—I don't know.

Q Who was the first person that came over?
A Mrs. Beyer.

Q She is the vegetable lady next door? A
Yes.

Q She lifted you up? A No, she couldn't;
Mrs. Rauchwerger came over.

Q After Mrs. Beyer tried she couldn't lift
you up and Mrs. Rauchwerger came over to 30
help you? A I couldn't walk and then she
started to holler for my boy and he saw they
was running and they called, "Willie, come over
to help mamma; she fell."

Q And then they helped you in? A Yes.

Q Did you live on the ground floor or up-
stairs? A On the ground floor.

Q You say you went to bed? A Yes, they
took me to bed.

Q How long were you in bed? A I don't 40
know, about two weeks or three weeks.

Anna Kalb, cross.

Q You say for a period of two weeks you didn't leave your bed? A Yes.

Q Are you sure about that? A They took me down a little on a chair.

Q There is a store in front of your flat? A I live in back of the store.

10 Q Didn't you within a few days thereafter stay in that store and transact business? A I did not.

Q Are you sure of that? A Yes.

Q Didn't you wait on this lady (indicating) within a few days there and sell her meat? A No, a few months later.

Q You are sure of that? A I am sure of that.

Q It wasn't a few days later? A No, a few months later.

20 Q You are sure of that? A Yes.

Q Weren't you walking on the street within a period of three weeks? A They took me out on a chair and I was holding my foot like this (indicating).

Q Weren't you walking out on the sidewalk on Belmont avenue within less than two weeks of the date of the accident? A No.

Q You are sure of that? A I am sure of that, I couldn't walk.

30 Q You said you had terrible pains for a period of eight or nine months. Is that right? A Yes.

Q How long were you confined to your house altogether; that is, from the time you were in bed to the time you were able to sit up in a chair in the house? A I don't remember; I got pain, yes.

Q Answer my question. A I walked—but I couldn't walk; all summer I walked in my slipper

40

Anna Kalb, cross.

and I couldn't go for two or three weeks like I used to.

Q How long after the accident were you out walking either in a slipper or in a shoe? A About three or four months.

Q You are sure of that? A Yes, I am sure of that; I was sitting outside. 10

Q You say Mr. Fisher called on you a few days after the accident? A Two weeks.

Q Was that the last time he called on you? A Two weeks later he came to ask me to go to the lawyer.

Q Two weeks after the accident Fisher came to you to ask you to go to the lawyer and tell him you met with an accident in front of the house next door? A Yes.

Q Which lawyer? Mr. Grosman? A Yes. 20

Q Is this the lawyer? A Yes.

Q Two weeks later you had a lawyer and Fisher knew about it? A Yes, Fisher came and told me.

Q How did Fisher know that this was your lawyer in the case?

Objected to.

Objection sustained.

Q Did you tell Fisher you had a lawyer? 30

Mr. Grosman: I object to that. What difference does it make?

The Court: I will allow it.

The Witness: No.

Q Even though you didn't tell him you had a lawyer he told you to see the lawyer and tell him you had an accident next door two weeks 40

Anna Kalb, re-direct—re-cross.

after the accident. A I don't remember whether it was two weeks or three weeks; it was on Friday, I remember.

Re-direct examination by Mr. Grosman.

- 10 Q What did you buy on that day in Fisher's store? A Half a pound of butter; some cheese; and salmon, I bought a box; and a pint of cream; it cost about 98 cents.

Re-cross examination by Mr. Berger.

Q How many times did you have Dr. Weinstock at your home? A I don't know; he didn't give me a bill yet.

- 20 Q How many times were you in his office? A I didn't count it because he didn't give me no bill.

Q How long ago were you there the last time? A About eight or ten weeks, because I moved from there eight or nine weeks.

Q How many times were you to Dr. Kessler's office? A I don't remember; I got the bill here.

Q Did you have Dr. Weinstock treat you for your knee before this accident? A No.

- 30 Q Or any other doctor? A No.

Q Didn't you have any trouble with your knee before the accident? A Not with the knee.

Q Did you have trouble with your foot? A Not that foot.

Q Didn't you have flat feet or trouble with your feet before the accident? A No, I never had trouble with my feet.

Michael B. Weinstock, direct.

MICHAEL B. WEINSTOCK, sworn in behalf of the plaintiff.

Direct examination by Mr. Grosman.

Q Doctor, did you treat Mrs. Kalb for an injury to her knee? A Yes, sir. 10

Q Which knee? A The right knee.

Q When? A Probably a year or so ago; last April.

Q When you saw her what was her condition? A Her knee was markedly swollen, black and blue, tender, and painful.

Q How long did you treat her? A For a month or so then I sent her to Dr. Kessler, an orthopedic surgeon, for further treatment.

Q How did you diagnose her case? A Synovitis of the knee joint, with water in the knee joints and chronic arthritis. 20

Q What does that mean? A A joint which is probably injured due to an accident.

Q When you speak of water on the knee, what does that mean? A That the joint is swollen and full of fluid.

Q That is an abnormal condition? A Yes.

Q Can you tell us anything about the permanency of that injury? A She will probably have trouble with her knee the rest of her life. 30

Q Are you this lady's family physician? A Yes, sir.

Q Did you ever treat her for this knee before the accident? A No, sir.

Q What did you treat her for? A For heart trouble and once in a while a slight nervous spell. 40

Michael B. Weinstock, direct.

Q Can you tell whether that was accompanied by pain? A Yes, marked pain; swollen traumatic joints.

Q Have you any idea from your experience, how long that pain will continue? A She will probably have pain the rest of her life.

10 Q It won't be as acute. A No, she won't have it all the time; probably worse with the change of weather.

Q Can you tell us how long it continued? A She had acute pain for the month I treated her; that is the reason I sent her to Dr. Kessler.

Q Can you tell us whether within two days after you first saw her in April, 1925, this woman could have stood on the knee and gone about her business? A It would be practically impossible for a woman with that knee to do it.

20 Q Within two weeks could she have done it? A No, practically impossible on account of the pain.

Q Was she in bed when you saw her? A Yes.

Q Did she remain in bed as you continued to see her? A Yes.

Q How many times did you see her? A The first week every day and then probably two or three times a week.

30 Q Did you find her in bed when you called? A I always found her in bed when I called.

Q Did you send her a bill? A No, she comes into my office yet.

Mr. Berger: I move at this time to strike out any of the doctor's testimony that in any way relates to a permanent injury.

40 The Court: I will allow it.

Michael B. Weinstock, direct.

Q What is your bill? A About \$75, approximately, at the present time.

Q Is that a reasonable charge? A Three dollars at the home, and two dollars at the office.

Q Have you any idea how long you will have to continue treating this lady? A She will probably— 10

Objected to.

Objection sustained.

Q Is she cured? A No, sir.

Objected to.

The Court: I will allow it. 20

Q Will she require further medical treatment for that injury?

Objected to.

Objection overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Witness: Yes, sir. 30

Q For how long, in your opinion? A As far as I know she will be complaining of that for the rest of her life.

Mr. Berger: I move to strike that out on the ground that it is not proper and that there is no allegation in the pleadings to that effect.

The Court: I will allow it to stand. 40

Michael B. Weinstock, cross.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Cross examination by Mr. Berger.

10 Q When were you called in to treat her for the first time? A The same evening.

Q Can you fix the date, or have you any record? A I have no record with me here.

Q When were you there the next time? A The following day.

Q How often were you there the first two weeks? A The first week every day and after that two or three times a week.

20 Q You say you found water on the knee? A You mean did I see the water on the knee?

Q Did you diagnose her trouble as being partly due to water on the knee? A Yes, sir.

Q How did you arrive at the diagnosis? A The swelling—and signs and symptoms.

Q What signs and symptoms besides the swelling? A She had an X-ray taken and that showed traumatic synovitis—fluid on that knee.

Q Wasn't that X-ray negative? A As far as I know; the X-ray has been lost.

30 Q Didn't you state to Dr. Silverstein within the last couple weeks that the X-ray was negative? A You mean negative as to the fracture?

Q You mean to say that an X-ray would show fluid? A Yes, sir.

Q You are sure of that? A Absolutely.

Q And you are as sure of that as you are of the rest of your diagnosis? A Yes, sir.

Q When did you make that diagnosis with reference to the date of the accident? A I made a diagnosis of a traumatic knee.

40

Michael B. Weinstock, cross.

Q When did you make it? A As soon as I saw Mrs. Kalb.

Q Did she have considerable swelling? A Yes.

Q Did you apply your hands in any way to the limbs? A Absolutely, by objective signs and mental signs; felt her leg— 10

Q How long after the accident was it that you did this? A I saw her probably within the hour or half hour after the accident.

Q Was the knee swollen considerably? A Yes.

Q You found water on the knee? A I made a diagnosis, I said.

Q Did the swelling go down? A Yes.

Q How long afterward? A It gradually came down; I think a month or six weeks after the accident, to the size it is now. 20

Q When did she come to your office? A Probably five or six weeks after the accident.

Q Did you go to her home before that? A Yes.

Q You said during the first week you were there almost every day? A Yes.

Q After that how many times? A Two or three times a week. 30

Q Haven't you a record with you? A No, sir; they got me from the hospital.

Q How many times did you have her come to your office? A Probably twice a week.

Q Didn't you advise the patient to go and work out the stiffness? A No.

Q Didn't you state to Dr. Silverstein there were two weeks of total disability and two weeks of partial disability? A I said I advised that the third or fourth week. 40

Michael B. Weinstock, cross.

Q Didn't you see him and didn't he write down in your presence a statement to the effect that this woman was totally disabled for two weeks and then partially for one week? A No, sir; I made no such statement to him and what he wrote down I did not see.

10 Q Were you present when Dr. Silverstein examined her? A Right in my office.

Q Was there any swelling? A To a certain extent there was; there was a swelling which he admitted in my presence, and after the X-ray I told him I was in touch with Dr. Kaufman and that it was lost and he said—

Q Did you tell him that this woman suffered from a case of flat feet? A No, sir; never made such a statement; I never treated her for that.

20 Q You saw her three or four or five weeks—
A I can't recall now—about one month, as I said, then I sent her, a week or so later—I can't recall—I sent her to Dr. Kessler, who is an orthopedic surgeon, for further treatment. When she went to his office she came back to my office.

Q You don't know that she was there? A Absolutely; Dr. Kessler called me up.

30 Q How many times was she there? A I don't know; I didn't watch the woman to see how many times she was there.

Q You say you charged three dollars at the house and two dollars at the office? A Yes, sir.

Q How did you arrive at that figure? A I figure approximately \$75 or so.

Q It may be more or less? A Yes, it is around there some place.

40 Q It may be less or it may be more? A I question whether it is less.

Henry H. Kessler, direct.

Q Is there water on the knee now? A At the present time, no.

Re-direct examination by Mr. Grosman.

Q Does this water on the knee come back from time to time? A It will come back from time to time. 10

Recess from 1 to 2 P. M.

AFTER RECESS.

HENRY H. KESSLER, sworn in behalf of plaintiff.

20

Direct examination by Mr. Grosman.

Q Dr. Kessler, you are a licensed physician practicing medicine in the State of New Jersey?

A I am.

Q And you have been for how long? A Since 1920.

Q You specialize in any branch? A Orthopedic surgery.

30

Q Are you connected with any institutions? A New Jersey Rehabilitation Commission, State Department of Labor, in the capacity of director; Beth Israel Hospital, Newark City Hospital, as orthopedic surgeon.

Q Did you examine Mrs. Kalb in this place? A Yes.

Q Did you treat her? A Yes.

Q Do you recall when you first saw her? A May 20, 1925.

40

Henry H. Kessler, direct.

Q Who sent her to you? A I believe Dr. Weinstock referred her to me.

Q When you examined her in May, 1925, what did you find her condition to be? A She came into my office, limping, with the assistance of some relatives, I forget whom, and complained
10 of pain and swelling in the right knee. On examination, as I recall it, it is a year back now, I found definite swelling of the knee; tenderness on pressure over the inner aspect of the knee; crepitus, a creaking sensation on bending; and pain on the movement of the knee.

Q What was your diagnosis? A Synovitis, or inflammation of the lining of the knee joint.

Q Was there any water present? A If you mean by that the fluid that sometimes results
20 from this inflammation, yes.

Q How long did you treat her? A My record indicates I treated her over a period close to two months; that is, May 20th to June 19th.

Q Did she show any improvement? A She showed some improvement.

Q Was she cured when she ceased coming to you? A I wouldn't say she was cured.

Q Do these injuries heal quickly? A Every
30 case depends on the individual and every case depends on its own merits.

Q How about this case? A Taking into consideration that she had treatments over those two months and what I see today I wouldn't say she is completely cured.

Q Can you tell from looking at this woman how long she will suffer from this injury?

Objected to.

Objection overruled.

Henry H. Kessler, cross.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Witness: I can't. Taking into consideration the type of injury, the length of treatment, she will have permanent disability of this injury.

10

Q Was that injury which you saw in May, painful? A I believe she would experience pain from this type of injury.

Q Very much pain? A That is a relative thing depending upon the individual.

Q Did you present your bill? A I did; I didn't formally discharge her.

By the Court.

20

Q Just your bill. A I have my bill here.

Q What is your bill? A My bill is twelve treatments at \$3—\$36.

By Mr. Grosman.

Q Did you order her to buy apparatus of any kind? A I prescribed a white knee-cap, which is of elastic with two steel bars alongside the knee-joint to give the knee support.

30

Cross examination by Mr. Berger.

Q You say she came on May 20th? A That is my record.

Q How many treatments did she take? A My record indicates that she took twelve treatments.

Q You speak of an elastic knee-cap that you prescribed. A Yes.

40

Henry H. Kessler, cross.

Q Do you know whether she got the knee-cap? A I believe she did.

Q You don't know positively? A I can't say without asking her again.

Q Isn't it a fact that a large number of these cases recover? A You can't generalize.

10 Q How many similar cases have you had in your experience? A In the last seven years I have seen that same kind of case close to 1,200 times.

Q Do you know what percentage recover? A I would say that the larger percentage had permanent disability.

Q Isn't it a fact that this patient walks normally—doesn't limp? A That can't be used as a criterion.

20 Q I ask merely as a statement of fact without its being a criterion. A I just noticed her walk and she did present a limp and as she walked upstairs she seemed to go upstairs with a certain amount of difficulty.

Q You spoke of there being the presence of fluid. That is a temporary condition? A I wouldn't say she had fluid, but she has swelling. We found the right knee is one-half inch larger than the left.

30 Q Is there fluid? A I wouldn't say there is, but there is thickening and swelling.

Q Won't you say whether there is fluid or not? A I think I answered it.

Q Then do I understand that there is no fluid? A I would say that there is no fluid today.

Q You say you measured the two knees and made a comparison of the measurements? A Yes, I measured them in the presence of Dr. Washington.

40

Sarah Einspruch, direct.

Q You say one is larger than the other? A Yes, one-half inch.

Q Isn't it a fact that persons usually have a difference? A Examining several thousand knees for the Workmen's Compensation Bureau never proved that to be a fact—passing on permanent disability. 10

Re-direct examination by Mr. Grosman.

Q Does the fact that there is no fluid indicate that the woman is cured? A There are other structures besides the lining of the joints that can be injured.

Q What are they? A The soft structures and ligaments around the joints.

Q Is there any evidence of such injury? A There appears to be injury of the insertion of the internal lateral ligaments where they are incorporated in the lining of the bone. 20

Q Does this fluid go away and come back? A These injuries very often result in recurrence of synovitis and a return of the accumulation of fluid.

Q Can you say whether this lady is likely to have this fluid again? A That would be speculative; I couldn't say. 30

SARAH EINSPRUCH, sworn in behalf of the plaintiff.

Direct examination by Mr. Grosman.

Q Where were you living on the 23rd of April, 1925? A 284 Belmont avenue; my place of business was 302 Belmont avenue. 40

Sarah Einspruch, direct.

Q How far was your place of business from this place conducted by Morris Fisher? A The third store.

Q Do you remember the accident to Mrs. Kalb? A Yes, sir.

10 Q What did you see of it? A I was sitting outside of my store and I heard some one scream, and I ran and Mrs. Kalb was laying on the floor and Mrs. Beyer and I picked her up.

Q Where was Mrs. Kalb when you arrived? A On her knees, on the sidewalk.

Q In front of whose place? A Mr. Fisher's.

Q How near to the front of Mr. Fisher's entrance? A About two feet.

20 Q What did you do? A Mrs. Beyer and I couldn't pick her up and we called Willie and we picked her up and I shoved the lettuce away with my foot.

Q Did you see any lettuce in front of Mr. Fisher's place? A I shoved it away with my foot.

Q Where was that? A Along the sidewalk.

Q And where with reference to the door? A Here is the stoop (indicating) and the box was rested against the stoop and the lettuce was all along the sidewalk.

30 Q Can you tell us how near the door was this lettuce? A Maybe two feet; maybe three.

Q Where did you take Mrs. Kalb? A Into her house.

Q What did you do with her, if anything? A She went to bed and I went out to my store.

Q Did you visit Mrs. Kalb afterwards? A I used to be in there two or three times a day.

Q Did you see her in bed? A Yes, sir.

40 Q How long? A I used to come in every day for a week.

Sarah Einspruch, direct.

Q Did you see her in bed? A Yes, sir.

Q Were you ever present when Mr. Fisher visited Mrs. Kalb after the accident? A He was in there.

Q Did you hear him say anything to Mrs. Kalb? A No, I used to be in for a minute and then I used to run out to my store. 10

Q You never heard Mr. Fisher say anything? A No.

Q About how many times did you pass Mr. Fisher's store? A About forty or fifty times.

Q Can you tell me what the conditions were on the stoop on the 23rd of April, 1925? A He had all kinds of crates; potatoes, and all kinds of vegetables and a box of lettuce was on the stoop; and the box was turned over. 20

By the Court.

Q How was it standing? A This way (indicating).

Q Propped up? A Yes.

By Mr. Grosman.

Q Did you ever observe that condition prior to April, 1925? 30

The Court: What condition? Better have her testify the condition she sees every day.

Q Will you tell us the condition you saw with reference to the lettuce and other vegetables prior to the 23rd of April, 1925?

Objected to as immaterial.

Objection overruled. 40

Sarah Einspruch, cross.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

10 The Witness: It was always scattered around and the inspector used to come around and say, "Say, Fisher, take those things in."

By the Court.

Q Do you mean in the boxes or out of the boxes? A Out of the boxes.

By Mr. Grossman.

20 Q Would Fisher make any effort to clean the place up? A He said, "All right, all right, I will clean it up" and as soon as the inspector walked away he would laugh at the inspector.

Q How often have you heard inspectors tell Fisher to clean up? A Every day I was there the street cleaner or the inspector would come along and tell him to take it in and he would tell the vegetable store to take them in.

Cross examination by Mr. Berger.

30 Q Did you say you were sitting in front of your store when Mrs. Kalb screamed? A Yes, sir.

Q And then you went over? A Yes, sir.

Q How long before this happened was it that you passed Fisher's place? A I couldn't just say; maybe an hour, maybe twenty minutes before.

40 Q You say you went up and down all day long? A Yes, sir.

Sarah Einspruch, cross.

Q You had a bakery store in this neighborhood? A Yes, sir, the third house from Mr. Fisher.

Q You attended to the customers in your store? A Yes.

Q You say this was at what time? A 10
Around supper time, between six and seven.

Q Isn't that your busy hour? A Sometimes and sometimes not.

Q On this day? A Not exactly.

Q On this particular day you were sitting out in front with nothing to do? A Yes, it was a warm day.

Q You told us when you ran over you kicked pieces of lettuce out of the way A Yes, with my foot. 20

Q You say two or three feet away from the building? A Yes, sir.

Q Toward the street? A From the stoop.

Q The stoop extends over there? A Yes.

Q How many feet does the stoop extend from the house to the end of it? A I don't know.

Q A couple of feet would you say? A Yes.

Q And lettuce was two or three feet beyond that? A Yes, sir.

Q Was the box in which the lettuce was contained upset? A It was rested against the stoop. 30

Q Was it upset? A Yes.

Q And there were a number of pieces of lettuce scattered around? A Yes, sir.

Q You stated also that you had observed lettuce around the place prior to this on other occasions? A Yes, sir.

Q And an inspector of the Board of Health ordered him to clean it up? A Yes, sir. 40

Sarah Einspruch, cross.

Q Is this the inspector you are referring to (indicating)? A He was there sometimes.

Q Isn't it a fact that this gentleman always inspected this block? A There were a few more.

Q You are sure of that? A Positively.

10 Q You are quite friendly with Mr. Fisher?

A Just as friendly as I am with you.

Q You want this jury to believe that?

Objected to.

Objection sustained.

Q Isn't it a fact that you had litigation with Mr. Fisher? A He had me in court.

20 Q And you still feel as friendly toward him as toward me? A Yes, sir, positively.

Q And as friendly as toward Mrs. Kalb?

A Yes, sir.

Q You are not here to hurt Mr. Fisher in any way? A No, sir.

Q Or to help Mrs. Kalb in any way? A No, sir.

Q You say that you had observed lettuce leaves right after Mrs. Kalb fell? A Yes, sir.

30 Q When did you see any lettuce leaves on this place prior to this? A Always.

Q This day? A Yes, sir, I shoved it off the sidewalk with my foot.

Q Did you before the accident that day, see it? A Positively.

Q How did you come to see them that day?

A It was always scattered around there.

By the Court.

40 Q You are asked about this same day. A It was laying around the sidewalk.

Sarah Einspruch, cross.

By Mr. Berger.

Q Did you, before the accident see any there that day? A Yes, sir.

Q When? A In the morning.

Q Did they stay there all day long? A It was maybe other lettuce. 10

Q What called it to your attention that makes you say it was always there that day? A Why, it was always scattered around.

Q Inasmuch as it was always scattered around, how is it you particularly noticed it that morning? A I passed by there and I seen it.

Q It was there all day long? A Maybe other lettuce fell there the same day.

Q Two feet away from the stoop there were lettuce leaves or heads of lettuce and it was there that morning? A Yes, sir. 20

Q Isn't it a fact that this is a pretty busy street with people passing up and down? A Not very busy.

Q Aren't there stores there? A Yes, sir.

Q Aren't there people always patronizing these stores? A Yes.

Q There is a trolley transfer there, isn't there? A Yes. 30

Q A few doors away? A Yes.

Q You say the condition of these lettuce leaves continued through that day? A Yes, sir.

Q You are sure of that? A Positively.

Q There is a vegetable and green store next door? A Yes, sir.

Q They carry lettuce, do they? A Yes, sir. 40

Sarah Einspruch, cross.

Q And they are right next door to each other? A Yes; they wasn't before; there was an A. & P. between them.

Q This lady who had the vegetable store also kept boxes of lettuce out in the street? A Yes, sir.

10 Q You don't know where the lettuce on the sidewalk came from? A Yes, she fell in front of Mr. Fisher's store.

Q I asked you whether you knew where the lettuce leaves that morning came from? A Yes, sir.

Q How do you know? A Because it was in front of Mr. Fisher's place.

Q Only because you saw it two feet away from the stoop in front of Mr. Fisher's place?

20 A Yes, sir.

Q You have no other way of knowing it, have you? A No, sir.

Q You don't know whether some other person dropped it there, do you? A No, sir.

Q You don't know whether it came from the green store next door? A It couldn't come from her place.

Q You don't know that, do you? A No, sir.

30 Q When this lady fell you ran over hurriedly to help her? A Yes, sir.

Q You didn't see her fall? A No, sir, I heard her scream.

Q When you looked she was already down? A Yes, sir.

Q Describe her condition with reference to the stoop? A The stoop is here and the box of lettuce was this way (indicating), and she was here right on her knees (indicating).

Saras Einspruch, cross.

Q How far was her body from the end of the stoop? A About your distance.

Q You can tell us in inches how much that would be? A I couldn't say in inches.

The Court: That would be about a foot and a half. 10

Mr. Berger: Yes, sir.

Q Isn't it a fact that when you observed her you also observed the box of lettuce upset?

A Mrs. Beyer was on this side and I was here (indicating), and I kicked the lettuce away.

Q I asked you whether you didn't notice at that time that the box of lettuce was turned over?

A No, sir.

Q It was still standing propped up? A 20
Against the sidewalk, yes, sir, against the stoop.

Q Against the stoop? A Yes, sir.

Q On the side of the stoop? A Yes, sir.

Q The box of lettuce was against the side of the stoop and this lady was in front of the stoop? A On the box, yes, sir; and the piece of wood was right in front of them.

Q Did you hear this inspector ever say to Fisher to clean up the place? A Yes, sir.

Q This gentleman here (indicating)? A 30
Positively.

Q And the place was littered up? A He said, "It's about time that the place was cleaned."

Q You are as sure of that as you are of your other testimony? A Positively—

Mr. Grosman: I object to those questions.

Objection sustained. 40

Minnie Riner, direct.

Re-direct examination by Mr. Grosman.

Q There was no green store next to Fisher?

A No, sir, an A. & P.

Q When did the green store move next door?

A The A. & P. moved out about seven or
10 eight months ago.

Q And the green store moved next door? A
The vegetable store moved over about three or
four months ago; the A. & P. moved three or
four doors away and the wall was broken open
and they have the whole place.

Q There was an A. & P. store next? A Yes,
sir.

By the Court.

20 Q Was there any mark of her slipping? A
Yes, sir, it was all wet from the lettuce on her
knee and I kicked it off the sidewalk.

MINNIE RINER, sworn in behalf of plaintiff.

Direct examination by Mr. Grosman.

30 Q Mrs. Riner, were you present on the 23rd
of April, 1925, about the time that Mrs. Kalb
fell on Belmont avenue? A Yes.

Q What did you see? A Half-past six I
went over to Mrs. Rauchwerger's store and I
heard Mrs. Kalb scream and I walked over and
I saw Mrs. Kalb in great pain with her right
knee.

Q You heard a scream? A Yes.

Q What did you do? A I walked into Mrs.
Kalb's house to see what was the matter.

40

Minnie Riner, direct.

Q Weren't you there when Mrs. Kalb fell?

A I was there a half hour later, when Mrs. Kalb was in the house. I was there a few minutes and the doctor came. When the doctor came in I walked out.

Q Did you go to Mr. Fisher's place? A Mr. Fisher's place was always full of material. 10

Mr. Berger: I ask that that be stricken out.

The Court: Strike it out.

Q You went to the bakery? A Yes.

Q And you heard Mrs. Kalb scream? A Yes.

Q Where did you find her? A In bed.

Q After that, did you go to Fisher's place? A No, I just passed by. 20

Q How soon after you had been to Mrs. Kalb's did you pass by Fisher's place? A About a half hour.

Q When you passed by there, did you see what the condition of the sidewalk was?

The Court: Answer yes or no.

The Witness: Yes. 30

Q What did you see there?

Objected to as immaterial.

Objection sustained.

Q Before this 23rd of April, 1925, when you say that you visited Mrs. Kalb, did you ever pass by Fisher's store? A Yes.

Q How often? A Twice—three times a day. 40

Motion for a Non-suit.

Q Where did you live? A Near Rose street; 266 Belmont avenue.

Q On these occasions when you passed by Fisher's place, can you tell us what the condition of his stoop and sidewalk, were?

10 Objected to as immaterial and as not connected with this accident.

 Objection sustained.

Q Did you ever see lettuce scattered around the front of this place before?

 Objected to on the same ground.

 Same ruling.

 Cross examination waived.

20 PLAINTIFF RESTS.

Defendant's counsel moves that plaintiff be non-suited on the following grounds:

1. That there is absolutely no evidence to go to the jury to charge the defendant with any negligence on the testimony of the plaintiff.

2. That the plaintiff has not established by a preponderance of the evidence the fact that a certain condition existed which was proved to be the cause of the accident and which was actually brought to the notice of the storekeeper before the accident or existed for a sufficient length of time to charge the storekeeper with notice thereof.

30

The Court: It seems to me the motion ought to be granted. There is some doubt in my mind as to whether this lettuce is tied up with this woman's fall, but conceding there is testimony

40

Motion for a Non-suit.

to support that, you have to bring out that the fact that this particular box of lettuce fell was brought home to the defendant. I think this comes under the case of Taylor v. Roth & Company, 4 N. J. Adv. Reports 974, where the plaintiff slipped on a piece of meat. I therefore grant the motion for a non-suit.

10

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

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30

40

Opinion of Supreme Court.

OPINION OF SUPREME COURT.

NEW JERSEY SUPREME COURT.

10	ANNA KALB, <i>Plaintiff-Respondent,</i> <i>vs.</i> MORRIS FISHER, <i>Defendant-Appellant.</i>	}	<i>Judgment.</i>
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PER CURIAM. This is the plaintiff's appeal from a judgment of non-suit in the Essex Circuit Court. The ground of appeal is that the Court erroneously granted a non-suit.

20 The case made by the plaintiff was that on April 23, 1925, she entered the defendant's grocery and vegetable store at 298 Belmont avenue, Newark, to make some purchases. As she was leaving the store at the stoop leading from the store to the sidewalk, she slipped, fell and struck her right knee on a lettuce box and received injuries for which the present action was brought.

30 The non-suit was granted by the learned trial judge apparently on the ground that no negligence was shown. We think this conclusion cannot be justified under the evidence. The proofs showed that the sidewalk in front of the defendant's store was habitually littered with lettuce and other vegetable refuse and the defendant was on a number of occasions notified by the street cleaners and city inspectors to abate the condition, which the defendant, though promising to comply, would refuse to do. There was proof that the plaintiff stepped on some of the

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Opinion of Supreme Court.

lettuce leaves that were allowed to collect and that she received the injuries in consequence.

Respondent relies upon the case of *Taylor v. Roth & Co.* (N. J. Err. & Appeals), 33 A. 386. That case, however, is not authority in the present situation. Plaintiff in that case sought to invoke the doctrine of *res ipsa loquitur*. The Court held that the doctrine was not applicable, and that, inasmuch as the plaintiff had not proved that she had fallen on any slippery substance placed on the floor by the defendant, no negligence was established, and that a non-suit was proper. In the present case there is proof, not only that the plaintiff fell upon the lettuce leaves allowed to collect on the sidewalk by the defendant, but that this was a condition of long standing of which the defendant had both actual and constructive notice. 10 20

The judgment is reversed and a venire *de novo* awarded.

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THE HISTORY

New Jersey Court of Errors and Appeals

ANNA KALB,
Plaintiff-Respondent,

vs.

MORRIS FISHER,
Defendant-Appellant.

On Appeal
from ~~Essex~~
~~Circuit~~
New Jersey Supreme Court.

BRIEF OF DEFENDANT-APPELLANT.

Facts.

Plaintiff-Respondent (hereinafter referred to as plaintiff) made purchases at defendant's grocery store, and as she stepped off the stoop in front of said store, she slipped and fell on a box of lettuce which was propped alongside of said stoop. Plaintiff suffered injuries for which she brought this suit.

The Trial Court entered a judgment of non-suit—the plaintiff-respondent appealed from this judgment to the New Jersey Supreme Court, and upon said appeal the judgment of the Trial Court was reversed, and a venire de novo awarded.

POINT I.

There is no evidence in this case to establish the cause which occasioned plaintiff's injuries.

The plaintiff in her testimony admits that she does not know just what caused her to fall.

The only other witness (Einspruch) for the plaintiff who testified to what occurred, arrived upon the scene of the accident after the accident had occurred.

The accident actually occurred between six and seven o'clock in the evening on April 23rd, 1925. (State of Case, page 16). The Witness Einspruch testified that she had observed lettuce leaves on the sidewalk at the scene of the accident, right after the plaintiff fell. That she also saw lettuce on the sidewalk on the morning of the date of the accident. (State of Case, page 39, Fol. 1-10). She testified however that there were a number of stores near the scene of the accident; that there is a vegetable and green store next door to the store of the defendant-appellant where they carry lettuce, where boxes of lettuce were kept out in the street; that she could not tell where the lettuce she saw at the time of the accident came from. (State of Case, page 39, Fol. 38-40) (Page 40).

There is not a scintilla of evidence on the part of any witness for plaintiff that it was lettuce leaves that caused the plaintiff to fall, and if lettuce leaves did cause her to fall, that they had come out of plaintiff's store, or that plaintiff was in any way responsible for their being on the sidewalk where the accident occurred.

On the other hand, the plaintiff herself testified that she fell on a box of lettuce as she put her foot down from the stoop in front of defendant's store; that she supposed she slipped on lettuce; that she did not actually know what she slipped on, because she could not turn around. (State of Case, page 18, Fol. 18-32).

The witness Einspruch testified that when she heard a scream she ran over to where plaintiff was lying on her knees on the sidewalk, two or three feet away from the entrance to defendant's store;

that a box of lettuce was turned over. (State of Case, page 34, Fols. 10-32; page 35, Fols. 18-25).

It is perfectly reasonable to suppose that the lettuce which the witness Einspruch found scattered, came out of the box of lettuce which was propped over against the wall of defendant's store, and which the plaintiff herself upset as she tripped, and she may have slipped on the lettuce which she herself scattered.

In the case of *Stumpf vs. D. L. & W. R. R. Co.*, 76 N. J. Law, 153, 69 Atl. 207, plaintiff sued for damages for injuries sustained by him by being struck on the head by a piece of coal, while sailing a boat on the Passaic River, near a bridge of the defendant. The proof was that this coal was either thrown or fell from the bridge or from a coal car of defendant. On appeal from the refusal of the trial court to enter a judgment of nonsuit, our Supreme Court held that where it appeared that injuries were occasioned by one of two causes, for one of which the defendant is responsible, but not for the other, the plaintiff must fail, if the evidence does not show that the injury was the result of the former cause. That inasmuch as it was just as probable that the piece of coal came either from the bridge or from a car, that it was either thrown or fell, that there can be no recovery by plaintiff.

In the case of *Chester vs. Cape May Real Estate Company*, 78 N. J. Law, p. 131. 73 Atl. p. 836, the same principle was reiterated and applied.

In the instant case we have no evidence to the effect that any specific object caused plaintiff to fall. From the testimony of the witness Einspruch, it may be inferred that the plaintiff may have slipped and fallen on lettuce leaves, but it is just as probable that it was caused by any other object that may have been there or by a mis-step

taken by plaintiff. If under the testimony it is just as probable that it was caused by the one as the other, she cannot recover.

In the case of *Maphet vs. Hudson and Manhattan R. R. Co.*, 98 N. J. Law, 369—119 Atl. page 777. Plaintiff sued for damages and proved that as he stepped from the car of the defendant, to the station platform, he stepped on a fuse plug, causing him to fall, resulting in the injuries sued for; that the defendant's servants used these fuses in connection with the business of the defendant and when no longer useful were thrown on the tracks of the company.

On appeal from the judgment of the Trial Court, our Supreme Court held that, inasmuch as fuses can be purchased and carried by any passenger and that the fuse in question may have been dropped in some way, with which the defendant was not connected, the defendant cannot be held liable for plaintiff's injuries.

The Court held, in its opinion, that negligence must be proved and cannot be presumed. If the plaintiff is to succeed, it is incumbent on him, in the absence of direct evidence, to show not only existence of such possible responsibility, but the existence of such circumstances as would justify the inference that the plaintiff's injuries were caused by the negligent act of the defendant, and which would exclude the idea that it was a cause with which the defendant was not connected.

In the instant case it cannot be said that from the testimony of the plaintiff and her witness, the inference can be drawn that the plaintiff's injury was caused by the negligent act of the defendant, to the exclusion of the idea that some cause, with which the defendant was not connected, may have caused her injury, and therefore the judgment of non-suit was proper.

In the case of *McCombe vs. Public Service Railway Co.*, 95 N. J. Law, 188, 112 Atl. Rep. 255, an action was brought to recover damages under the death act, for the death of one Saunders, who was found on the tracks of the defendant, seriously injured, and mangled, and blood on the tracks. The Trial Court non-suited plaintiff, and on appeal to our Court of Errors and Appeals, it was held that judgment of non-suit was proper, holding that mere theories and inferences do not authorize a verdict, unless they are the only conclusion that can reasonably be drawn from the facts proven.

That negligence is a fact which must be shown and will not be presumed. There is always a presumption against negligence, citing *Price vs. New York Central R. R. Co.*, 92 N. J. Law, 432, 105 Atl. 187; 29 Cyc. 589; *Bien vs. Unger*, 64 N. J. Law, 596, 46 Atl. Rep. 593.

The Court held further that it was incumbent upon plaintiff to prove that Saunders death was caused by the wrongful act of the defendant, and which would exclude the idea that it was a cause with which the defendant was unconnected, citing *Suburban Electric Co. vs. Nugent*, 58 N. J. Law, 658, 34 Atl. 6095, *Austin vs. Pa. R. R. Co.*, 82 N. J. Law, 416, 81 Atl. page 739.

POINT II.

There is no proof that defendant had been guilty of want of reasonable care in keeping his store safe for plaintiff's use.

Plaintiff failed to prove what substance caused the accident, how long it had been there, or that defendant knew of its presence. The judgment of non-suit was therefore proper (*Taylor vs. Roth & Co.*, 102 N. J. L. 702, 133 Atl. 386.)

While the rule of law is undoubted that the defendant owed plaintiff the duty to exercise reasonable care to keep his store in a safe condition, and that if plaintiff be injured in consequence of defendant's failure to perform that duty, he is responsible for the consequences, yet what, under the undisputed circumstances in this case, constituted the exercise of reasonable care by defendant was the pivotal question to be solved by the trial court upon the motion to non-suit.

When plaintiff rested her case, it had not appeared that defendant had been guilty of any want of reasonable care in keeping his store safe for plaintiff's use; she failed to show what substance caused her accident, or that the cause of her slipping or falling had either (a) been fact brought to the previous notice of the defendant, or (b) had existed for such space of time before that occurrence as would have afforded the defendant sufficient opportunity to make proper inspection of said premises to ascertain the presence of this condition. In the absence of proof of either, the legal presumption is that defendant had used reasonable care. The defendant was not an insurer of the safety of the plaintiff against an accident happening to her. *Schmatterer v. Bamberger*, 81 New Jersey Law 558, 79 Atl. Rep. 324.

In the case of *Rom vs. Huber*, 94 N. J. Law 258, 109 Atlantic Rep. 504 (in which case the plaintiff was injured in a public bath by slipping on a piece of soap left on the floor) our Court of Errors and Appeals held that there was no evidence that the soap on the floor was due to defendant's negligence. The occasional fall of pieces of soap on the floor is inevitable, and as patrons went from one room to another, we cannot assume that it might not have been sent by customers of the bath into the steam room where plaintiff fell.

It may well be argued with equal force and logic that if there should be found any proof that some lettuce caused plaintiff in the instant case to slip and fall, the occasional fall of lettuce in a grocery store is inevitable, and as the other customers of defendant came in and out of said store, it may be presumed that they may have dropped this lettuce, as there is not a scintilla of evidence that defendant dropped any lettuce there.

The findings of our Court of Errors and Appeals in the case of *Taylor v. Roth & Co.*, *supra*, applies with full force to the instant case, namely:

“There is no evidence to show that the object which caused the accident belonged to defendant, or that it was placed at the spot where the accident occurred by the defendant or by his servants, or that the defendant or any of his servants knew of its presence: nor was there any evidence produced to show the length of time such object was there prior to the time of the accident, nor what the object which caused the accident really was.”

In the absence of proof that the condition complained of had been brought to the notice of the defendant or had existed for such a length of time as to charge him with notice, a *prima facie* case of negligence was not made out. The rule is that, where liability is made to depend at all upon notice to the defendant the plaintiff must establish the notice before the defendant is called upon to contest it; in other words it is not to be presumed.

Garland v. Furst Store, 107 At. Rep. 38, on page 40, 93 New Jersey Law, 127. Citing the case of *Schmatterer v. Bamberger* (*supra*) and *DeMateo v. Perano*, 80 N. J. Law, 437.

There is no evidence in the instant case that there was a defect in or a substance on the stoop in front of defendants' store that caused plaintiff to slip and fall. There is no evidence whatever of notice to the defendant of this alleged defect or of any substance being on said stoop. The testimony of the witness, Sarah Einspruch, that there was lettuce on the sidewalk two or three feet away from the stoop, is too remote to connect it with the cause of the accident.

In the case of *Bodine vs. Goerke Company*, 133 Atl. Rep. 295, Vol. 4 Advanced Reports page 972, the plaintiff sues for damages sustained in a department store, where she fell in the entrance, which she testified was dirty and slushy. The Court permitted the case to go to the jury and on appeal to the Court of Errors and Appeals it was held that no disputed facts could be found in the record from which any inference could be drawn that could or ought to justify the jury in finding that the defendant was guilty of negligence, and that it was an error for the trial judge to submit the case to the jury; that it was error for the trial court not to have directed a verdict in favor of the defendant. The judgment was reversed.

It is respectfully urged that the judgment of the Supreme Court should be reversed and the judgment of the Essex County Circuit Court should be affirmed.

Respectfully submitted,

NATHAN H. BERGER,
Attorney for Defendant-Appellant.

New Jersey Court of Errors and Appeals

ANNIE KALB,

Plaintiff-Respondent,

vs.

MORRIS FISHER,

Defendant-Appellant.

*On Appeal
from New
Jersey Su-
preme Court.*

POINTS AND BRIEF OF PLAINTIFF- RESPONDENT.

Facts.

This suit is brought by the plaintiff to recover damages for injuries sustained by her through the negligence of the defendant. The case was tried before Hon. William A. Smith, Judge, and a jury, at the Essex Circuit, and judgment of non-suit was entered for defendant.

The plaintiff-respondent appealed to the Supreme Court and a reversal of the non-suit followed. The facts are these:

On the 23rd day of April, 1925, and prior thereto the defendant was the owner of a building designated as No. 298 Belmont avenue, in the City of Newark, N. J. On the ground floor of this building he maintained a grocery and vegetable store.

On said day the plaintiff entered the defendant's store and made a number of purchases. As she was leaving the store and just as she stepped on the stoop leading to the defendant's store, she slipped, fell and struck her right knee on a wooden lettuce box which was propped up against the side of the door leading into the de-

defendant's place of business and injured herself severely in this manner.

The testimony discloses that at the time the respondent slipped and fell in the manner described, the steps leading from the sidewalk to the defendant's store as well as the sidewalk immediately surrounding these steps were littered with lettuce leaves and that the plaintiff slipped on some of these leaves and fell. That the sidewalk in front of as well as the steps leading to the defendant's grocery and vegetable store were habitually covered with lettuce and other vegetable refuse. The accident happened about supper time on the day in question. That on the morning of and all that day the lettuce was strewed all over the steps and about the entrance to the defendant's store. That when the plaintiff slipped and fell she was unable to get up and that a very short interval of time thereafter, one of the witnesses who heard the plaintiff scream ran to her assistance and being unable to lift the plaintiff up herself, summoned help; that this witness shoved away the lettuce leaves from in front of the defendant's place and there was a wet mark from the lettuce where plaintiff had slipped and the lettuce was kicked away at the time that the respondent was helped to her feet after her fall.

It further appeared in the testimony that lettuce leaves and other vegetable refuse were always scattered around and that the street cleaner or the inspector would frequently come around and tell the defendant to take those things in; that these warnings were given to the defendant every day that the witness was there and that she passed the defendant's store about forty or fifty times. That the defendant would reply to the street cleaners or to the inspectors when

told to remove the rubbish from in front of his place, "Alright, alright, I will clean it up," and as soon as the inspector walked away he would laugh at the inspector and one of the inspectors who warned the defendant and requested him to clean up his place was present in court and identified by the witness at the instance of the defendant.

At the conclusion of the plaintiff's case, the Court, on the defendant's motion, directed a judgment of non-suit against the plaintiff and in favor of the defendant.

This action was taken by the Court under the authority of the case of *Taylor v. Roth & Co.*, 4 N. J. Adv. Rep. 974, 133 Atl. 386.

POINT I.

In passing upon a motion to non-suit the Court cannot weigh the evidence, but must take as true all testimony which supports the view of the party against whom the motion was made.

This principle is so firmly entrenched in our law as to require but passing mention.

In the case of *Maudsley, et al. v. Richardson & Boynton Co.*, 129 Atl. 139, (N. J.) a *per curiam* opinion by the Court of Errors and Appeals, it was held, at p. 140, Sec. 1:

"In passing upon a motion to non-suit the Court cannot weigh the evidence, but must take as true all testimony which supports the view of the party against whom the motion is made, and must give him the benefit of all legitimate inferences which are to be drawn therefrom in his favor. *Mulrooney v. O'Keefe*, 98 N. J. L. 53, 121 A. 721."

With this statement of the law in mind, it was incumbent upon the trial court, for purposes of

the motion to non-suit, to accept as true every fact adduced by the plaintiff which might tend by a fair inference to establish the negligence of the defendant. Let us now consider the facts.

POINT II.

The pleadings and the testimony clearly establish the negligence of the defendant in the maintenance of his store and it was incumbent upon the Court to submit the questions thus presented to the jury for its determination.

The complaint filed in the cause (S. C., p. 3) charges in paragraph one that the defendant on the day in question was the owner of the building whereupon the store was located. This the defendant by his answer (S. C., p. 6) admits.

Paragraph two of the complaint charges as follows:

“The defendant on said day and on the first floor of said premises maintained and conducted a grocery and vegetable store wherein he sold groceries, vegetables and kindred products, usually sold in such places, to the public in general.”

This allegation the defendant by paragraph one of his answer (S. C., p. 6) admits.

The third paragraph of the complaint (S. C., p. 3) erroneously numbered two, alleges as follows:

“That it was at all times the duty of the defendant, both as owner of said premises and as occupant of the store on the first floor thereof, to keep the sidewalk in front of said premises and the entrance to his said store clear of all obstructions so that the public in general as well as persons desiring to enter and leave his said store might do so with safety.”

This allegation by paragraph two of the answer is admitted.

The plaintiff testifies (S. C., p. 11, l. 30) that she went into the defendant's store on the day in question. Made a number of purchases which were wrapped up for her by the defendant and that she then proceeded to walk out. She stepped on the stoop and immediately slipped, fell, and could not get up and that as she fell (S. C., p. 18, l. 10) she struck a box of lettuce propped up against the side of the door of the defendant's place. She further states that she could not turn around to see what she had slipped on but that she remained there until a lady named Beyer and one named Rauchwerger (S. C., p. 12, l. 28) came to her assistance and helped pick her up. That about a week after the accident the defendant came to the plaintiff and told her that he carried no insurance on the premises on which she fell but that he did carry insurance on another house in the neighborhood where the A. & P. maintained a store and that he told the plaintiff to go to her lawyer and tell him that she fell in front of the A. & P. and not in front of his place (S. C., p. 15, l. 20).

This last mentioned statement was elicited from the plaintiff by the defendant's attorney on cross examination and should be given consideration as an indication of the defendant's knowledge of his guilt.

The plaintiff on cross examination amplified her explanation of the manner in which she fell, by this testimony (S. C., p. 18, l. 10):

“Q As you were walking out of the store, when did you first see the box of lettuce? A I didn't see nothing; I just walked out on the stoop and I slipped right away on my knee.”

Sarah Einspruch whose name at the time of the accident was Rauchwerger and who was one of the persons who ran to the plaintiff's assistance when she fell and screamed, testified at (S. C., p. 34, l. 1) that her place of business was the third store removed from that of the defendant and that at the time of the accident she was sitting in front of her store. She heard someone scream and she ran and found the plaintiff lying on the floor and she and a woman named Beyer picked her up and she then gives the following testimony (at S. C., p. 34, l. 10):

“Q Where was Mrs. Kalb when you arrived? A On her knees, on the sidewalk.

Q In front of whose place? A Mr. Fisher's.

Q How near to the front of Mr. Fisher's entrance? A About two feet.

Q What did you do? A Mrs. Beyer and I couldn't pick her up and we called Willie and we picked her up and I shoved the lettuce away with my foot.

Q Did you see any lettuce in front of Mr. Fisher's place? A I shoved it away with my foot.

Q Where was that? A Along the sidewalk.

Q And where with reference to the door? A Here is the stoop (indicating) and the box was rested against the stoop and the lettuce was all along the sidewalk.”

(At S. C., p. 35, l. 12) she testifies:

“Q About how many times did you pass Mr. Fisher's store? A About forty or fifty times.

Q Can you tell me what the conditions were on the stoop on the 23rd of April, 1925? A He had all kinds of crates; potatoes and all kinds of vegetables and a box of lettuce was on the stoop; and the box was turned over.”

(At S. C., p. 35, l. 34) she states:

“Q Will you tell us the condition you saw with reference to the lettuce and other vegetables prior to the 23rd day of April, 1925? (S. C., p. 36.) A It was always scattered around and the inspector used to come around and say, ‘Say, Fisher, take those things in.’ ”

By the Court.

“Q Do you mean in the boxes or out of the boxes? A Out of the boxes.

Q Would Fisher make an effort to clean the place up? A He said, ‘Alright, alright, I will clean it up,’ and as soon as the inspector walked away he would laugh at the inspector.

Q How often have you heard inspectors tell Fisher to clean up? A Every day I was there the street cleaner or the inspector would come along and tell him to take it in and he would tell the vegetable store to take them in.”

(At S. C., p. 37, l. 35):

“Q You stated also that you had observed lettuce around the place prior to this on other occasions? A Yes, sir.

Q And an inspector of the Board of Health ordered him to clean it up? A Yes, sir.

Q Is this the inspector you are referring to? (Indicating.) A He was there sometimes.”

(At S. C., p. 38, l. 24):

“Q You say that you had observed lettuce leaves right after Mrs. Kalb fell? A Yes, sir.

Q When did you see any lettuce leaves on this place prior to this? A Always.

Q This day? A Yes, sir, I shoved it off the sidewalk with my foot.

Q Did you before the accident that day? A Positively.

Q How did you come to see them that day? A It was always scattered around there.”

By the Court.

“Q You are asked about this same day.

A It was lying around the sidewalk.

Q Did you, before the accident see any there that day? A Yes, sir.

Q When? A In the morning.

Q Did they stay there all day long? A It was maybe other lettuce.

Q What called it to your attention that makes you say it was always there that day?

A Why it was always scattered around.

Q Inasmuch as it was always scattered around, how is it you particularly noticed it that morning? A I passed by there and I seen it.

Q It was there all day long? A Maybe other lettuce fell there the same day.”

(At S. C., p. 39, l. 33):

“Q You say the condition of these lettuce leaves continued through that day? A Yes, sir.

Q You are sure of that? A Positively.”

(At S. C., p. 41, l. 30) the witness testifies:

“Q Did you hear this inspector ever say to Fisher to clean up the place? A Yes, sir.

Q This gentleman here? (Indicating.)

A Positively.

Q And the place was littered up? A He said, ‘It’s about time that the place was cleaned.’

Q You are as sure of that as you are of your other testimony? A Positively.”

(At S. C., p. 42, l. 20) we have this testimony:

By the Court.

“Q Was there any mark of her slipping?

A Yes, sir, it was all wet from the lettuce on her knee and I kicked it off the sidewalk.”

Minnie Riner, another witness testified as follows: (S. C., p. 43, l. 10.)

“Q. Did you go to Mr. Fisher’s place? A. Mr. Fisher’s place was always full of material.”

Taking all of this testimony to be true, as it must be taken on a motion of this nature, it follows that Fisher’s place, or rather the sidewalk in front of it and the entrance to it, was habitually littered with garbage; that it was littered all of that day. That the defendant had been repeatedly warned by street cleaners and inspectors of the Board of Health to clean up his place and that he invariably promised that he would and never did so but would laugh at the official after he had gone. In this condition of affairs the Court could not as a matter of law say that the defendant was not guilty of negligence and the issue should have been submitted to the jury for its determination.

POINT III.

The owner of a store or business or public house holds out a constructive invitation to the public to enter and to trade with him, such invitation implying an undertaking to exercise due care for the visitor or invitee while upon the premises commensurate with the situation and the circumstances.

This doctrine was enunciated by our Supreme Court in the case of *Finberg v. Public Service Ry. Co.*, 108 Atl. 311, 94 N. J. L. 55.

This rule was approved by the Court of Errors and Appeals in *Mayes v. Splitdorf Electrical Co.*, in 111 Atl. 10.

In the case of *McKeown, et al. v. King*, 122 Atl. 753, 99 N. J. L. 251, the Court of Errors and Appeals held that:

“If an iron covering placed over a drain extending across the sidewalk has been in a defective condition for some time, it is proper to submit to a jury the question of the negligence of the one responsible for keeping the sidewalk in a reasonably safe condition for use by the public, although no actual notice of the defective condition of the sidewalk may have been received.”

The case further holds that it was the duty of the tenant to keep the sidewalk in front of his premises in a safe condition.

It follows that whether the plaintiff be considered from the standpoint of a customer of the defendant or merely as a member of the general public using the sidewalk, the defendant is liable for his negligence in maintaining the sidewalk littered with vegetable refuse and so rendered unsafe for use either by his customers or by the public. This issue was a proper one under the last named case to submit to the jury.

I am mindful of the leading case in this State upon the question of the duty owed by a merchant to his customers with reference to maintaining the premises in a safe condition for use, namely, the case of *Schnatterer v. Bamberger & Co.*, 81 N. J. L. 558.

In that case it was held that the defect or unsafe condition must either have been brought to the notice of the storekeeper before the accident or have existed for such a length of time as to charge the storekeeper with notice thereof.

It is respectfully submitted that the instant case comes fairly within the principles defined in the Bamberger case.

It has been shown and must be taken to be true that on the day of the accident, the defendant's sidewalk was littered from early morning until suppertime when the accident happened, with lettuce leaves; that the entrance to his store and the sidewalk in front of it was habitually littered with vegetable refuse and that though warned repeatedly to keep his place clean, the defendant scoffed at the warnings and persisted in keeping the sidewalk in front of his store and the entrance thereto littered with refuse.

Under these circumstances, it is respectfully submitted that it would be fair and reasonable to draw the inference that the defendant negligently and carelessly permitted the sidewalk in front of and the entrance to his place of business to be habitually littered with refuse and that being so littered, he was chargeable with notice that persons entering and leaving his store, particularly by means of the steps leading from the sidewalk to the store, might slip thereon, fall and injure themselves.

In the case of *Stark v. Great Atlantic & Pacific Tea Co.*, 133 Atl. 172 (N. J.), the Court of Errors and Appeals once again enunciates the rule governing the liability of a storekeeper to his customers.

It distinguishes the case from the Bamberger case and others following it. It holds in effect that it may be a jury question whether the conditions and circumstances existing would not warrant the inference that the defendant is chargeable with notice of such conditions from the very nature thereof.

I am inclined to think that an exhaustive analysis of the authorities of this State covering

the subject under inquiry is somewhat needless in view of the fact that the trial court entered the judgment of non-suit upon the authority of the case of *Taylor v. Roth & Co.*, 133 Atl. 386, decided by our Court of Errors and Appeals on May 17, 1926.

(At S. C., p. 44, l. 35) the Court states:

“It seems to me the motion ought to be granted. There is some doubt in my mind as to whether this lettuce is tied up with this woman’s fall, but conceding there is testimony to support that, you have to bring out that the fact that this particular box of lettuce fell was brought home to the defendant. I think this comes under the case of *Taylor v. Roth & Co.*, 4 N. J. Adv. Rep. 974, where the plaintiff slipped on a piece of meat. I therefore grant the motion for a non-suit.”

In view of this definite position taken by the Court, I take the liberty of directing the Court’s attention to a consideration of the *Taylor v. Roth* case without further delay.

It is respectfully submitted that the instant case is in no respect similar to the *Taylor v. Roth* case except that both cases were between customers and merchants.

In the case of *Taylor v. Roth* (*supra*) the plaintiff entered the defendant’s butcher shop and stepped on something slippery, something very thick and slippery, and went down. There was evidence to the effect that there was a pail near this place which contained scraps of meat and other refuse and waste material.

The floor was covered with sawdust as is customary in butcher shops and the sawdust was placed there expressly for the purpose of preventing the floor from becoming slippery and

greased. No person testified as to what substance caused the fall.

The Court after likening the case to that of *Schnatterer v. Bamberger* (*supra*) and other cases along the same line, holds at page 387, sec. 2, that:

“In the case under review there is no evidence to show that the object which caused the accident belonged to the defendant, or that it was placed on the floor by the defendant or any of its servants, or that the defendant or any of its servants knew of its presence; nor was there any evidence to show the length of time such object was on the floor prior to the time of the accident, nor what the object which caused the accident really was.”

All of these elements which the Court mentions as having been absent from the case of *Taylor v. Roth* are present in the case at bar.

The object upon which the plaintiff fell, namely, lettuce leaves, is known. The existence of this vegetable refuse upon the sidewalk habitually is evident. The knowledge of the defendant as to the condition of his premises is not left to inference. He not only knew that his premises were habitually littered with refuse but he even refused to correct this condition after he had been warned by members of the street cleaning department and by inspectors of the Board of Health.

While it is true that the plaintiff herself does not know on what she slipped, nevertheless the witness, Einspruch, testifies that when she picked the plaintiff up she kicked the lettuce away from her with her foot and that there were marks left by the wet lettuce leaves on the sidewalk where the plaintiff had slipped and fallen.

It is respectfully insisted that the defendant must be presumed to have been aware of the fact that the vegetable refuse which he habitually permitted to accumulate and remain in front of his place of business and in front of the entrance thereto might result in somebody slipping thereon, falling and sustaining injuries. This conclusion is unescapable.

The Court seems to have taken it for granted that the presence of the lettuce in the entrance to defendant's place of business was caused by the falling of the box of lettuce which was propped up against his doorway.

It is respectfully submitted that the Court was not warranted in drawing this conclusion from the evidence.

There is no evidence whatsoever that the box of lettuce propped up against the defendant's doorway fell before the accident and caused its contents to be scattered about the sidewalk and entrance to the store.

The plaintiff testifies (at S. C., p. 12, l. 1) as follows:

“Q Do you know whether you struck anything or not? A I fell on the box of lettuce.”

The witness, Sarah Einspruch (at S. C., p. 41, l. 10) testifies as follows with reference to the position of the box of lettuce after the plaintiff fell:

“Q Isn't it a fact that when you observed her you also observed the box of lettuce upset? A Mrs. Beyer was on this side and I was here (indicating) and I kicked the lettuce away.

Q I asked you whether you didn't notice at that time that the box of lettuce was turned over? A No, sir.

Q It was still standing propped up? A Against the sidewalk, yes, sir; against the stoop.

Q Against the stoop? A Yes, sir.

Q On the side of the stoop? A Yes, sir.

Q The box of lettuce was against the side of the stoop and this lady was in front of the stoop? A On the box, yes, sir; and the piece of wood was right in front of them."

On the motion to non-suit it was the duty of Court to take the best and most favorable evidence for the plaintiff and it had no right in view of this testimony to assume that the lettuce leaves were present on the sidewalk because the box containing them had been upset.

I have been unable to find any cases in this jurisdiction squarely in point. They all seem to deal for the most part with defective stairways or floors or other structural parts of buildings.

The case of *Langley v. F. W. Woolworth Co.*, 131 Atl. 194, a decision by the Supreme Court of Rhode Island, may be somewhat helpful.

In this case the plaintiff entered the defendant's store. In one of the aisles she slipped and fell. Neither she nor anyone else testified explicitly as to the cause of the fall.

Another customer present heard the bump of plaintiff's falling and saw her being assisted to her feet. She went over, picked up the plaintiff's handbag, saw some "peanuts and peanut shells, perhaps a pint," that "had all been stepped on," "all crushed as though they had been walked over," and "almost ground into the floor." Plaintiff's skirt was torn at the knee and witness brushed therefrom some peanut shells. The same witness testified that on entering the store, at a time which she definitely fixed at three o'clock, she had noticed and walked

around the peanuts and peanut shells on the spot where the plaintiff fell. Her fall occurred about ten minutes after four.

It further appears in this case that the defendant had his employees looking about the store for just such conditions and would remedy them as soon as found. A verdict was found for the plaintiff and the Court held that:

“In an action for injury to customer from slipping on floor of store, Supreme Court could not find as a matter of law that presence of peanuts on floor did not constitute source from which dangerous condition might rise.

That the question of negligence was properly left to the jury.

That the question whether the peanuts upon which the customer slipped and fell were the same peanuts as those seen by witness an hour earlier was properly submitted to the jury.

That the inference that plaintiff slipped on peanuts on floor of store, rather than that she fainted or tripped on skirt, could reasonably be drawn from evidence, and question was one for jury.”

And where a butcher maintained a wet and greasy incline from the doorsill to the sidewalk in front of his shop, and a customer slipped thereon and sustained injuries in leaving the shop, the Court, in *Dent v. Grimm*, 1901, 65 App. Div. 81, 72 N. Y. Supp. 471, held, on the authority of *Quirk v. Siegel Cooper Co.*, 60 N. Y. Supp. 226, that, in view of the condition of the slide and the fact that it had existed in this condition for more than a year, the question whether the proprietor exercised reasonable care to keep his premises safe should have been submitted to the jury, and reversed a non-suit.

In *Frost v. McCarthy*, 200 Mass. 445, 86 N. E. 918, it was held:

“A store proprietor who permits a temporary entrance to his store, maintained during repairs, to become sprinkled with plaster or mortar, may be found guilty of negligence rendering him liable for injuries to a customer who slipped and fell thereon, where, from the dry condition of some of the mortar at the time of the accident, it can be inferred that such condition had existed a sufficient length of time to give the proprietor notice thereof, in view of his knowledge that repairs were being made.”

The case most squarely in point with the case at bar is that of *Markman v. Bell Stores Co.*, 132 Atl. 178, 43 A. L. R. 862, decided by the Pennsylvania Supreme Court, where it was held:

“A storekeeper may be found to have been negligent so as to be liable for injury to a patron by falling at the entrance to his store, where vegetable leaves and meat scraps were permitted to accumulate there so often as to call for frequent notice to him of the dangerous condition, and, on one occasion, to the police, while the injury was caused by such condition.”

At page 180, sections 4-5, the Court states:

“In the present case, it appeared the defendant conducted a store selling groceries, meat and vegetables, and it was to make purchases of these that plaintiff entered upon the premises. When she left, and fell, there were found on her shoe fat meat and cabbage leaves, evidently the cause of her slipping. Testimony was offered to show that celery, lettuce, and other plants were washed on the street at the right of the door, that parts became loose and accumulated on the pavement and step, and that this condition existed at the time of the accident. Under proper instructions, the jury has found that there was a failure to protect customers from this possible peril, and the injury here

complained of was the result. The mere presence of such refuse, as described, does not in itself show negligence, for this condition may temporarily arise in any store of this character, though the proprietor has exercised due care; and, if it appears that proper efforts are made to keep clean the passageways so they may be safely traversed, he is not to be held responsible if some one accidentally slips and falls. Where, however, it is disclosed, as here, that the dangerous condition, arising from the same cause, was not a mere chance occurrence, but so often repeated as to call for frequent notices to the owner, and on one occasion to the police, and the same situation was shown to have existed when the customer was hurt, we cannot say the jury was not justified in finding defendant failed in his legal duty. The owner was liable for the negligence of the employees in not keeping the aisles and entrances reasonably clean and safe, though the dangerous condition existing was contrary to his orders or wishes. *Whaley v. Citizens' Nat. Bank*, 28 Pa. Super. Ct. 531; *Saunders v. Altoona & Logan Valley E. R. Co.*, 84 Pa. Super. Ct. 385."

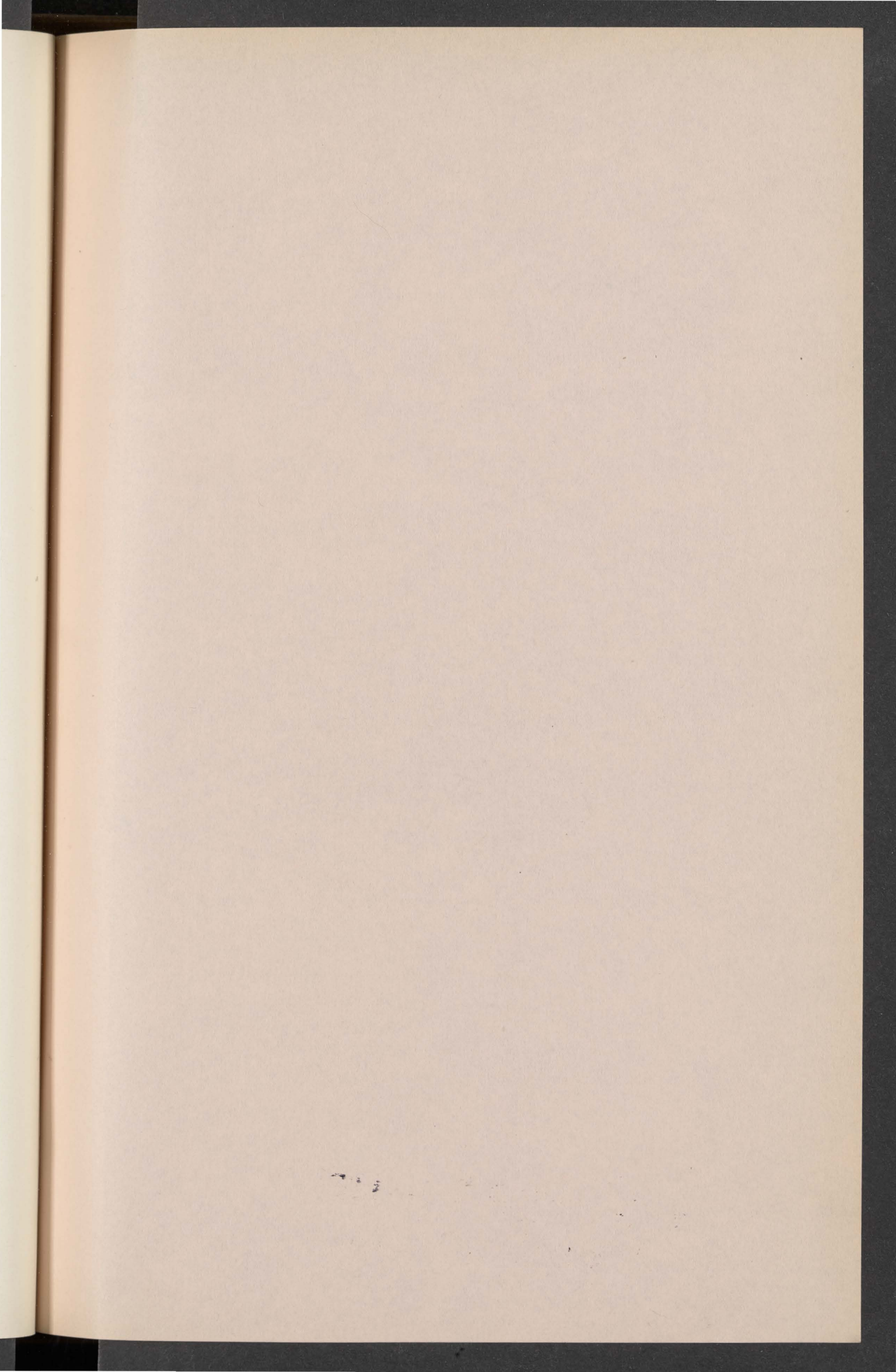
Conclusion.

It is therefore respectfully insisted that under the testimony produced by the plaintiff, there was sufficient evidence of defendant's negligence to warrant the Court in submitting the issues to the jury. The rule laid down in the case of *Taylor v. Roth & Co.* (*supra*) does not apply in the instant case. The trial court was properly reversed by the Supreme Court and its judgment should be affirmed with costs.

Respectfully submitted,

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Of Counsel.



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Conclusion.

It is therefore respectfully insisted that under the testimony produced by the plaintiff, there was sufficient evidence of defendant's negligence to warrant the Court in submitting the issue to the jury. The rule laid down in the case of *Kepler v. Rock & Co.* (supra) does not apply in the instant case. The trial court was properly reversed by the Supreme Court, and its judgment should be affirmed with costs.

Respectfully submitted,

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