

# INDEX

## PLEADINGS, ETC.

Complaint .....	1
Answer of Sanitary Construction Co., and Anthony Cervino .....	8
Answer of Jacob Mende .....	11
Discontinuance as to Jacob Mende .....	18
Postea .....	14
Notice of Appeal .....	15
Grounds of Appeal .....	16
Stipulation .....	17
Non-Suit .....	44

## TESTIMONY

Barbara Tappash, direct .....	19
cross .....	21
Joseph Devine, direct .....	22
cross .....	28
Peter DeRue, direct .....	30
cross .....	35
Rose Dirk, direct .....	37
Otto Dirk, direct .....	39
cross .....	41

## EXHIBIT

P-1—Dress worn by Mrs. Dirk. In evidence on page .....	38
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(Filed January 14, 1927.)

# New Jersey Supreme Court

Passaic County.

Rose Dirk and Otto Dirk, her husband,	} Plaintiffs,	} Action at Law	} 10
vs.			
The Sanitary Construction Co., a corp., Anthony Cervino, and Jacob Mende, and in the alternative, Jacob Mende,	} Defendants.		

## COMPLAINT

The plaintiffs by Ward & McGinnis, their attorneys, complain of the defendants as follows:

### FIRST COUNT. 20

1. The plaintiffs are residents of Singac, County of Passaic, and State of New Jersey.
2. The defendant, The Sanitary Construction Co., is a New Jersey corporation.
3. The defendant, Anthony Cervino is a resident of the City of Paterson, County of Passaic, and State of New Jersey.
4. The defendant, Jacob Mende is a resident of the township of West Milford, County of Passaic, and State of New Jersey. 30
5. That at the time of the committing of the grievances hereinafter mentioned, the defendant, The Sanitary Construction Co., owned the automobile truck hereinafter mentioned.

*Complaint*

6. That at the time of the committing of the grievances hereinafter mentioned, the defendant, Anthony Cervino operated the automobile truck of the defendant, The Sanitary Construction Co., acting as their duly authorized agent, servant, and employee and under their orders and directions.

10 That at the time of the committing of the grievances hereinafter mentioned, the defendant, Jacob Mende owned and operated the Chevrolet automobile hereinafter mentioned.

8. That at the time of the committing of the grievances hereinafter mentioned, the defendant, The Sanitary Construction Co., by its duly authorized agent, Anthony Cervino operated its automobile truck along a certain public street or highway known as Pompton Avenue, which ran in a general easterly and westerly direction in Singac, in the County of Passaic, and State of New Jersey and operated 20 the same in a general westerly direction on said highway.

9. That at the time of the committing of the grievances hereinafter mentioned, the defendant, Jacob Mende operated his Chevrolet automobile along the highway aforesaid, known as Pompton Avenue in the County aforesaid, in a general easterly direction.

30 10. That on or about the 18th day of August, 1926, the defendant, The Sanitary Construction Co., by its duly authorized servant, agent, and employee Anthony Cervino, operated its automobile truck in a careless, reckless, and negligent manner in that it was run at a high and excessive rate of speed, and carelessly, negligently, and recklessly operated the same while it was in a defective condition and

*Complaint*

carelessly, negligently and improperly failed to steer, guide, or operate said automobile truck or check the speed thereof and carelessly, negligently, and improperly failed to give any signal or warning of its approach and carelessly, negligently, and improperly operated the same without due regard to the safety or the right of other automobiles on the highway or pedestrians on the sidewalk near the highway, and so carelessly, negligently, and improperly, suddenly swerved from the right hand side of said highway across to the left hand side of said highway attempting to enter a side street on the left hand side of said highway and so carelessly, negligently, and improperly attempted to cut off the procedure of another motor vehicle owned and operated by the defendant, Jacob Mende which was proceeding in an easterly direction on the right hand side of said highway and so carelessly, negligently, and improperly permitted an incompetent driver to operate said automobile truck whose incompetency was well known to the defendant, The Sanitary Construction Co., from the time of his hiring to the time of the committing of the grievances herein mentioned. 20

11. That on or about the 18th day of August, 1926, the defendant, Jacob Mende operated a Chevrolet automobile in a careless, negligent, and reckless manner in that he operated the same at a high and excessive rate of speed and carelessly, negligently, and improperly operated the same while it was in a defective condition and carelessly, negligently, and recklessly, failed to steer, guide, or operate the said automobile or check the speed thereof and so carelessly, negligently, and improperly failed 30

*Complaint*

to give any warning or signal of its approach and so carelessly, negligently, and improperly operated the same without due regard to the safety or the right of other automobiles on the highway aforesaid or pedestrians on the sidewalk near the highway and so carelessly, negligently, and improperly attempted to cut off the procedure of another motor vehicle owned by the defendant, The Sanitary Construction Co., a corp., and operated by its duly authorized agent, Anthony Cervino, which was proceeding in a westerly direction on the right hand side of said highway and about to enter a side street on the left hand side of said highway and so carelessly, negligently, and improperly operated the said automobile while he was an incompetent driver.

12. By reason of the careless, negligent, and improper conduct of all of the said defendants, the said automobile truck of the defendant, The Sanitary Construction Co., collided with the Chevrolet automobile of the defendant, Jacob Mende with such force and violence that they both entered and landed upon the sidewalk, a distance of about twenty-five feet (25) from the point of collision of said motor vehicles and pinned the plaintiff, Rose Dirk, against the wall of a building which she was entering and by reason thereof she sustained the following injuries:

13. The said Rose Dirk was cut and bruised about the head, face, neck, chest, arms, shoulders, back and legs and was cut, bruised, and lacerated about her entire body; her hearing was impaired; her eyesight was impaired; she suffered contusions and ulcerations of the breast-bone; her back was sprained and wrenched; she suffered ecchymosis of the left

*Complaint*

thigh; her ankles were sprained; she sustained a black and blue face and black and blue marks all over her entire body; she suffered a severe and permanent shock to her nervous system.

14. The said Rose Dirk has been laid up for a long period of time and has suffered great and excruciating pain. She has been rendered sick, sore, lame, diseased, disordered, wounded, and debilitated, and in the future will so remain; she has been prevented from carrying on her usual work and employment and in the future will so remain.

15. The plaintiff, Rose Dirk alleges that irrespective of any question of negligence, the said automobile truck which came in contact with the Chevrolet automobile at the time and place aforesaid, was owned by the defendant, The Sanitary Construction Co.

16. The plaintiff, Rose Dirk, further alleges that irrespective of any question of negligence, the said automobile truck which came in contact with the Chevrolet automobile at the time and place aforesaid, was operated by their duly authorized agent for and in their behalf and under their orders and directions.

17. The plaintiff, Rose Dirk, further alleges that irrespective of any question of negligence, the said Chevrolet automobile which came in contact with the automobile truck at the time and place aforesaid, was owned by the defendant, Jacob Mende and operated by him.

18. By reason of the premises, the plaintiff, Rose Dirk, has sustained damage in the amount of Ten Thousand Dollars (\$10,000) for which amount she will claim judgment under this count from the de-

*Complaint*

defendants, The Sanitary Construction Co., a corp., Anthony Cervino, and Jacob Mende.

SECOND COUNT

1. Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 of the first count are hereby included and made part of this count as though they were pleaded at length.

10 2. By reason of the careless, negligent, and improper conduct of the defendants, The Sanitary Construction Co., and Anthony Cervino or the defendant, Jacob Mende, the said automobile truck of the defendant, The Sanitary Construction Co., collided with the Chevrolet automobile of the defendant, Jacob Mende with such great force and violence that they both entered and landed upon the sidewalk, a distance of about twenty-five feet (25) from the point of collision of said motor vehicles and pinned the plaintiff, Rose Dirk, against the wall of a building which she was entering and by reason thereof she sustained the following injuries:

20 3. Paragraphs 13, 14, 15, 16 and 17 of the first count are hereby included and made part of this count as if they were pleaded at length.

30 4. By reason of the premises the plaintiff, Rose Dirk, has sustained damage in the amount of Ten Thousand Dollars (\$10,000) for which amount she will claim judgment under this count from the defendants, The Sanitary Construction Co., and Anthony Cervino or in the alternative from the defendant, Jacob Mende.

*Complaint*

THIRD COUNT.

1. Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 of the first count are hereby included and made part of this count as though they were pleaded at length.

2. Paragraphs 1, 2, and 3 of the second count are hereby included and made part of this count as though they were pleaded at length.

3. The plaintiff, Otto Dirk, avers that at the time of the committing of the grievances hereinbefore mentioned he was and still is the husband of the said Rose Dirk and that by reason of the injuries she sustained he was forced and obliged to lay out and expend a large sum of money in order to have his said wife healed and cured of the said injuries and in order to have his said wife's household duties attended to, and was forced and obliged to lay out and expend divers sums of money for medical attendance and in the future will be obliged to expend such money for such purpose and that by reason of said premises he also lost and was deprived of the society, services, and consortium of his said wife and in the future will be deprived of the same.

4. By reason of the premises, the plaintiff, Otto Dirk has sustained damage in the amount of Five Thousand Dollars (\$5,000) for which amount he will claim judgment under this count from the defendants, The Sanitary Construction Co., a corp., Anthony Cervino and Jacob Mende or in the alternative from the defendant, Jacob Mende.

Ward & McGinnis,  
Attorneys of the Plaintiffs

Answer

(Filed January 29, 1927.)

NEW JERSEY SUPREME COURT  
Passaic County.

Rose Dirk and Otto Dirk, her  
husband,

Plaintiffs,

vs.

10 The Sanitary Construction Co., a corp., Anthony Cervino, and Jacob Mende, and in the alternative, Jacob Mende, Defendants. } Action at Law

ANSWER.

20 Sanitary Construction Co., a corporation, and Anthony Cervino, two of the defendants in the above entitled cause answering say that

FIRST COUNT

1. Defendants have no information nor knowledge sufficient to form a belief as to paragraph one of the first count of the complaint.

2. Defendants admit paragraph two of the first count of the complaint.

30 3. Defendants admit paragraph three of the first count of the complaint.

4. Defendants have no information nor knowledge sufficient to form a belief as to paragraph four of the first count of the complaint.

5. Defendants deny paragraph five of the first count of the complaint.

Answer

6. Defendants deny paragraph six of the first count of the complaint.

7. Defendants have no knowledge nor information sufficient to form a belief as to paragraph seven of the first count of the complaint.

8. Defendants deny paragraph eight of the first count of the complaint.

9. Defendants admit paragraph nine of the first count of the complaint.

10. Defendants deny paragraph ten of the first count of the complaint. 10

11. Defendants deny that part of paragraph eleven of the first count of the complaint, which refers to the Sanitary Construction Co. and Anthony Cervino.

12. Defendants deny paragraph twelve of the first count of the complaint.

13. Defendants deny paragraph thirteen of the first count of the complaint. 20

14. Defendants deny paragraph fourteen of the first count of the complaint.

15. Defendants deny paragraph fifteen of the first count of the complaint.

16. Defendants deny paragraph sixteen of the first count of the complaint.

17. Defendants have no information nor knowledge sufficient to form a belief as to paragraph seventeen of the first count of the complaint.

18. Defendants deny paragraph eighteen of the first count of the complaint. 30

SECOND COUNT

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the first count are hereby repeated

Answer

and made a part of this count as though they were pleaded at length.

2. Defendants deny that part of paragraph two of the second count of the complaint, which refers to the Sanitary Construction Co. and Anthony Cervino.

10 3. The answers to paragraphs 13, 14, 15, 16, and 17 of the first count are hereby repeated and made a part of this count as though they were pleaded at length.

4. Defendants deny paragraph four of the second count of the complaint.

THIRD COUNT

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the first count are hereby made a part of this count as though they were pleaded at length.

20 2. The answers to paragraphs 1, 2 and 3 of the second count are hereby made a part of this count as though they were pleaded at length.

3. Defendants deny paragraph three of the third count of the complaint.

4. Defendants deny paragraph four of the third count of the complaint.

John L. Griggs,  
Attorney of Defendants,  
Sanitary Construction Co.  
and Anthony Cervino.

Answer

(Filed January 26, 1927.)

NEW JERSEY SUPREME COURT  
Passaic County.

Rose Dirk and Otto Dirk, her husband,	}	Plaintiffs,	Action at Law	10
The Sanitary Construction Co., a corp., Anthony Cervino, and Jacob Mende, and in the al- ternative, Jacob Mende, Defendants.				
vs.				

ANSWER

Defendant, Jacob Mende, residing in the Township of West Milford, in the County of Passaic and State of New Jersey, says that: 20

ANSWER TO FIRST COUNT

1. Paragraph 1 is admitted.
2. Paragraph 2 is admitted.
3. Paragraph 3 is admitted.
4. Paragraph 4 is admitted.
5. Paragraph 5 is admitted.
6. Paragraph 6 is admitted. 30
7. Paragraph 7 is admitted.
8. Paragraph 8 is admitted, save that said Pompton Avenue, also known as Pompton Turnpike runs in a general northerly and southerly direction.
9. Paragraph 9 is admitted, save that Jacob Mende was operating his automobile in general southerly direction.

Answer

10. Paragraph 10 is admitted, save that the automobile of said Jacob Mende was proceeding in a southerly direction on his right hand side of said highway.

11. Paragraph 11 is denied.

10 12. Paragraph 12 is denied, save that the automobile truck of the Sanitary Construction, by reason of its careless, negligent and improper operation, ran into the automobile of this defendant and caused plaintiff to be struck.

13. Paragraph 13 is denied.

14. Paragraph 14 is denied.

15. Paragraph 15 is admitted.

16. Paragraph 16 is admitted.

17. Paragraph 17 is admitted.

18. Paragraph 18 is denied.

ANSWER TO SECOND COUNT

20 1. As to the allegations of paragraph 1 of this count, the answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 of the first count are hereby repeated and made a part hereof.

30 2. As to the allegations of paragraph 2, this defendant admits that by reason of the carelessness, negligence and improper conduct of the defendants the Sanitary Construction Company and Anthony Cervino, the said automobile truck of the Sanitary Construction Company ran into the automobile of this defendant, but denies each and every other allegation of said paragraph.

3. As to the allegations of paragraph 3, the answers to paragraphs 13, 14, 15, 17, and 17 of the

Answer

first count are hereby repeated and made a part hereof.

4. Paragraph 4 is denied.

ANSWER TO THIRD COUNT

1. As to the allegations of paragraph 1 of this count, the answers of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the first count are hereby repeated and made a part hereof. 10

2. As to the allegations of paragraph 2 of this count, the answers to paragraphs 1, 2 and 3 of the second count are hereby repeated and made a part hereof.

3. Paragraph 3 is denied, save the allegation that Otto Dirk is the husband of the said Rose Dirk, as to which allegation this defendant has not sufficient knowledge or information to form a belief, and leaves same for plaintiffs to prove. 20

4. Paragraph 4 is denied.

FIRST SEPARATE DEFENSE

This defendant was not negligent in the premises.

SECOND SEPARATE DEFENSE

If plaintiff, Rose Dirk, received any injuries on or about August 18th, 1926, as alleged in said complaint, the same were due solely to the negligence of defendant, the Sanitary Construction Company and its agent, defendant Anthony Cervino. 30

Wayne Dumont,  
Attorney of Defendant, Jacob Mende.

*Postea*

(Filed February 18, 1928.)

NEW JERSEY SUPREME COURT  
Passaic County.

Rose Dirk and Otto Dirk, her husband,	}	Plaintiffs,	Action at Law
vs.		10 The Sanitary Construction Co., a corp., Anthony Cervino, and Jacob Mende, and in the al- ternative, Jacob Mende, Defendants.	

POSTEA

20 This action came regularly on for trial on the 3rd day of February, 1928. The plaintiff proved his case and rested, and the Court ordered a judgment of nonsuit against the plaintiffs, and in favor of the defendant, the Sanitary Construction Co., a corporation, and Anthony Cervino, and the case against the defendant, Jacob Mende was discontinued before trial.

Clifford L. Newman,  
Judge, Passaic Circuit,  
New Jersey Supreme Court.

30 Dated February 9, 1928.

(Filed February 18, 1928.)

NEW JERSEY SUPREME COURT  
Passaic County.

Rose Dirk and Otto Dirk, her husband,	}	Plaintiffs,	10
vs.		The Sanitary Construction Co., a corp., Anthony Cervino, and Jacob Mende, and in the al- ternative, Jacob Mende, Defendants.	

NOTICE OF APPEAL

To John L. Griggs, attorney for defendants, The Sanitary Construction Co., a corp., and Anthony Cervino:  
Sir—

Please Take Notice, that the plaintiffs appeal from the whole of the judgment of nonsuit entered in the above stated cause, to the New Jersey Court of Errors and Appeals in the last resort in all causes.

Ward and McGinnis,  
Attorneys of Plaintiffs.

Newman C. C. S. 30

Due and legal service of a within copy hereby acknowledged this 14th day of February 1928.

John L. Griggs,  
Attorney of Defendants, The Sanitary  
Construction Co., and Anthony Cervino.

(Filed February 18, 1928.)

*Grounds of Appeal*

NEW JERSEY SUPREME COURT  
Passaic County.

	Rose Dirk and Otto Dirk, her husband,	}
	Plaintiffs,	
	vs.	
10	The Sanitary Construction Co., a corp., Anthony Cervino, and Jacob Mende, and in the al- ternative, Jacob Mende,	}
	Defendants.	

**GROUND OF APPEAL**

To John L. Griggs, attorney for defendants, The Sanitary Construction Co., a corp., and Anthony Cervino:

20 Sir—

Please Take Notice, that the following are the grounds of appeal:

1. Because the trial Court committed error in ordering a judgment of nonsuit against the plaintiffs and in favor of the defendants, The Sanitary Construction Co., a corp., and Anthony Cervino.
2. Because the trial Court committed error in granting the defendants' motion for nonsuit against the plaintiffs on the ground that no negligence was shown on the part of the defendants, The Sanitary Construction Co., a corp., and Anthony Cervino.
3. Because the trial Court committed error in not refusing the defendants' motion for a nonsuit against the plaintiffs.

Ward and McGinnis,  
Attorneys of Plaintiffs.

Due and legal service of a within copy hereby acknowledged this 14th day of February 1928

John L. Griggs,  
Attorney of Defendants, The Sanitary Construction Co., and Anthony Cervino.

*Stipulation*

NEW JERSEY COURT OF ERRORS AND  
APPEALS

	Rose Dirk and Otto Dirk, her husband,	}
	Plaintiffs,	
	vs.	
	The Sanitary Construction Co., a corp., Anthony Cervino, and Jacob Mende, and in the al- ternative, Jacob Mende,	}
10	Defendants.	

**STIPULATION**

It is hereby stipulated by and between counsel of the respective parties, that the above stated cause be argued and submitted on briefs for the May term of Court, 1928, provided State of Case and Briefs are served within time. 20

Ward and McGinnis,  
Attorneys of Plaintiffs.  
John L. Griggs,  
Attorney of Defendants,  
The Sanitary Construction Co.,  
and Anthony Cervino.



*Mrs. Barbara Tappash—direct*

of a noise did you hear? A. Well, Mrs. Dirk hollered.

Q. She hollered? A. Yes.

By the Court:

Q. Where was she? On the road or where? A. No; she was by my store, right to the steps.

Q. Steps of your store? A. Yes.

10 Q. Near the road? A. No; by the store, by the steps.

Q. How far was it from the road? A. Not so far yet.

Q. Well, how far is that? A. Because the store by the corner, you know, I don't know how far.

By Mr. Freedman:

20 Q. How far is this store from Pompton Avenue, where these automobiles run? A. Well, not so far.

Q. How many feet, about, roughly, so we can estimate? A. I can't say sure how many feet.

Q. Eh? A. It was close to sidewalk.

Q. Close to the sidewalk, your store is? A. Yes.

Q. What kind of a dress did Mrs. Dirk wear on that day? A. Pink.

30 Q. Now, after the accident you came out; did you help Mrs. Dirk? A. Yes.

Q. What did you do? A. She was sick and I help her stand up.

Q. Did you take her home? A. No, I gave her husband's sister.

*Mrs. Barbara Tappash—cross*

Q. Did you see the automobile truck at that time? A. Both was on the front.

Q. Both the automobile truck and the Chevrolet were in front of the house? A. Yes.

Cross-examination by Mr. Stalter:

Q. What time was this, Mrs. Tappash? A. A. Well, I don't know sure what time; about nine o'clock, maybe eight, I don't know; was early in the morning. 10

Q. It was early in the morning. Was it a bit foggy that day? A. It was foggy and rain a little bit.

Q. Mrs. Dirk walked home, didn't she? A. No; she just came to the store.

Q. She came in the store? A. Yes.

Q. Well, she eventually went home, didn't she? A. Well, at that time she got hit she go home back. 20

Q. She went back to her house. Do you know who went with her? A. Who was with her.

Q. Yes. A. She was only self; she only come self to the store.

Q. Then she walked home from the store? A. Oh, no, she don't go home to bed; she can't go to the store any more.

Q. You misunderstand me. Right after Mrs. Dirk was hit? A. She go back.

Q. She came in your store, didn't she? A. She came to my store in after she get hit, by the steps there; go back home. She didn't buy nothing at that time. 30

Q. No; I mean she walked home herself? A. Her husband's sister bring her home.

*Joseph Devine—direct*

Q. You didn't answer the question. She walked home? A. She walked slow.

Q. All right. Where was the automobile truck with reference to the Chevrolet? A. I see both on the front of my store.

Q. But it was the Chevrolet that was up against Mrs. Dirk? A. Yes.

10 (Testimony of Dr. Lucent omitted from this transcript.)

JOSEPH DEVINE, sworn.

Direct Examination by Mr. Freedman:

Q. Mr. Devine, do you remember an accident on August 18, 1926? A. I do.

Q. While on Pompton Turnpike? A. Yes, sir.

20 Q. Where were you? A. Why, I was going up Pompton Turnpike.

Q. What time of the day was that? A. I guess about quarter to eight or eight o'clock, somewhere around that, or quarter after eight, somewhere about that.

Q. Did you see any automobiles on the highway at that time? A. Yes, sir; the Chevrolet touring car passed me.

30 Q. Chevrolet touring car passed you? A. Yes, sir.

Q. Going in the same direction as you were going? A. In the same direction.

Q. You were going in which direction, north or south? A. I was going south.

Q. Now, did you see any other automobile? A.

*Joseph Devine—direct*

Yes; I saw a truck belonging to the Sanitary Construction Company.

Q. Coming in the opposite direction? A. Coming the opposite way.

Q. That would be north? A. That would be going north, yes.

Q. Were you past Gray Street at the time this Chevrolet passed you? A. No, sir; I was 200 yards.

Q. You had not crossed Gray Street yet? A. 10 No, sir.

Q. You remember seeing a collision between the truck and the Chevrolet car? A. Yes, sir.

Q. Where did that collision occur in reference to Gray Street and the store on Pompton Avenue near Gray Street? A. Why, that happened off Gray Street, I should judge about thirty or thirty-five foot from Gray Street.

Q. The collision of the automobiles was thirty or 20 thirty-five feet from Gray Street? A. Yes, sir.

Q. The front of what premises, if you know? A. In front of a grocery store.

Q. In front of a grocery store? A. Yes.

Q. Do you know who owned that grocery store? A. Yes.

Q. Who? A. Woman by the name of Tappash.

Q. Is that the lady who was on the stand before? A. Yes, sir.

Q. Now, did you see Mrs. Dirk at that time? A. 30 Yes, sir.

Q. Where was she? A. Why, she was walking up in front of me.

Q. Walking up in front of you? A. Yes.

Q. About how many feet? A. Well, I should judge 200 yards or so.

*Joseph Devine—direct*

Q. 200 yards. Now, at the time of this collision where was Mrs. Dirk? A. She was on the sidewalk, just about to step into the store.

Q. About to step into the store? A. Yes.

Q. Well, what was the distance between her and the store at the time of the collision? A. Why, she only had to make a step up the step, that is all.

Q. I see. You say you saw these automobiles come together? A. Yes, sir. 10

Q. Which automobile pinned Mrs. Dirk against the wall of the store? A. The Chevrolet.

Q. Where was the automobile truck? A. The automobile truck was on the left side of the Chevrolet, but the Chevrolet had her pinned, and the other truck was up against the Chevrolet.

Q. The Chevrolet had Mrs. Dirk pinned against the wall? A. Against the wall.

Q. And the truck was up against the Chevrolet? A. Yes, sir. 20

By the Court:

Q. The Chevrolet and the truck are two different cars, are they? A. Yes, sir.

Q. The truck which pushed her against—pinned her— A. No, it was the Chevrolet.

Q. The Chevrolet pinned her and the truck was against the Chevrolet? A. The truck was against the Chevrolet. 30

By Mr. Freedman:

Q. Did you see the Chevrolet proceeding on Pompton Avenue? A. Yes, sir.

*Joseph Devine—direct*

The Court—Which is the Sanitary Construction Company car, the truck or the Chevrolet?

The Witness—The truck.

Mr. Stalter—The other is the Mende car, the defendant who has been discontinued against, the Chevrolet.

Mr. Freedman—That is correct.

Q. Now, did you see the automobile truck come down the highway before the accident? A. Why, the automobile truck, I believe, was standing there. I couldn't swear. 10

Mr. Stalter—I object.

The Court—No, not what you believe; just what you saw.

The Witness—All I saw was when the two came together. 20

Q. How far is the store in front of which the accident took place from Gray Street? A. Why, about thirty-five feet, I should say, thirty or thirty-five feet.

Q. As you saw the truck coming down Pompton Avenue, on what side of the road was it? A. Well, I didn't notice that truck coming down, but it was on the right side of the road, but when it turned and the two cars hit, it was on the left side of the road. 30

Q. Did I understand you to say that the automobile truck turned? A. The automobile truck turned.

Q. In which direction? A. It made a left turn.

*Joseph Devine—direct*

By the Court:

Q. Going or coming which way? A. It was coming towards me and turned.

Q. Going north or south? A. Going north.

Q. The truck was going north? A. Yes.

Q. It made a turn to the left? A. Made a left turn.

10 Q. This store is on the left-hand side of the road going north? A. Yes, sir.

By Mr. Freedman:

Q. Then, this automobile truck made a left-hand turn going north on Pompton Avenue in front of this store which was thirty-five feet from Gray Street, which is a side street? A. Yes.

Q. Just where this store is there is no cross street there, is there? A. No, sir.

20 Q. Was that an easy left-hand turn he made?

Mr. Stalter—I object.

The Court—Sustain the objection.

Q. Describe just how he made the left-hand turn? A. Well, he made the left-hand turn where there is no street intersection, and the two cars, when they seen what was coming, I suppose, they pulled—

30 The Court—Oh, no, just what happened.

A. Well, the car ran into it, the Chevrolet touring car and the truck collided.

Q. You said the car ran into it? A. They both run together.

*Joseph Devine—direct*

Q. Just describe how the cars collided. A. Well, they both—one was making a turn—this fellow was a little past Gray Street, he couldn't get into Gray when he seen that car turning, naturally he turned with it.

The Court—Tell just what he did, not naturally.

A. That is all they did. They collided there on the turn; they were both headed towards in the store. 10

Q. Which car struck which car?

The Court—That is what the jury has to find out from the evidence. Let him tell what happened. Which ran into the other one is a jury question.

Q. Well, was this Chevrolet speeding? 20

The Court—Oh, no, that is a leading question, too. You may ask him what speed he was going.

Q. Do you know just what speed the Chevrolet was going? A. I couldn't tell you the rate to the mile, no.

Q. Well, was he going fast or slow? A. Well, he was going along pretty good; I should judge maybe twenty-five miles. 30

Q. Twenty-five miles an hour? A. I should say about that.

Q. Now, at that part of the highway do you know

*Joseph Devine—cross*

whether or not the buildings are a hundred feet apart? A. Why, some of them are, yes.

Cross Examination by Mr. Stalter:

Q. Gray Street does not continue across Pompton Avenue, does it? A. No, sir.

Q. As I understand it, Gray Street intersects it and stops dead in a T shape; is that right? A. 10 Yes.

Q. Where is this grocery store with reference to the Newark side of Gray Street? That which would be south, would it not? A. Yes.

Q. Where is the grocery store relative to that corner? A. To Gray Street?

Q. Yes, Gray Street and Pompton Avenue. A. Well, it sets about thirty-five feet, I should judge, from the center of Gray Street.

Q. Oh, no; how far is it from Pompton Avenue? 20 It is right on the corner, isn't it? A. It is on the corner, yes.

Q. It is on the corner of Pompton Avenue and Gray Street? A. On Gray Street, yes.

Q. Well, then, when you say it is thirty-five feet you mean the grocery store is thirty-five from the center of Gray? A. Of Gray Street. There is no sidewalk laid there.

Q. There are no sidewalks there. As a matter of fact, the sidewalk, or where the sidewalk would be, is a little lower than the crown of the road, isn't 30 it? A. Yes, I guess it is.

Q. When I am speaking of the road I am speaking of the Newark-Pompton Turnpike? A. Yes.

Q. Where were you when this accident occurred? A. On the Pompton Turnpike.

*Joseph Devine—cross*

Q. How far from Gray Street? A. I should judge about 200 yards.

Q. That is 200 yards, 600 feet? A. Yes, I guess it is.

Q. What called your attention to the Sanitary Construction Company's truck? A. Why, I heard the crash and looked—I was walking right in the direction and noticed the cars.

Q. You didn't see the truck before the crash, did 10 you? A. I seen him just making the turn.

Q. That turn was made at the intersection of Gray Street and Pompton Turnpike? A. It was made a little above Gray Street.

Q. Up above? You mean towards you or towards Newark? A. Towards Newark.

Q. Well, how could you tell that from where you were? A. Well, I could see it.

Q. You were 600 feet away? A. Yes.

Q. It was a foggy morning that morning, wasn't 20 it? A. It was not very foggy, it was raining a little.

Q. Raining and misty; vision was not very clear, was it? A. Yes, the vision was clear enough.

Q. Did you have an umbrella? A. No, sir.

Q. How far from the steps of this store would you say that the two cars collided? A. How far from the steps?

Q. Yes. A. Why, the Chevrolet was on the one side of the step— 30

Q. No, no; you misunderstand me. How far from those steps did the cars collide? A. Well, I should judge just about where the gutter should be for the sidewalk.

*Peter De Rue—direct*

Q. About how far is that, just approximately?

A. Well, say twelve feet or ten feet, whatever the sidewalk should be.

Q. And the Chevrolet traveled that ten or twelve feet after the collision up to the steps? A. Up to the steps.

10 Mr. Freedman—I object to counsel putting any words in the mouth of the witness.

The Court—He cannot put anything in his mouth on cross-examination.

Q. Did you see Mrs. Dirk after the accident?

A. Well, I saw her as she was pinned to the wall.

Q. Did you have to move the car back to get her out? A. We had to shove the car away to get her out.

20 Q. What did Mrs. Dirk do then? A. Why, she just kept hollering and crying.

Q. She went home, did she? Did you see her go home? A. I noticed her going home, yes.

Q. How was she taken home? Was she carried or did she walk? A. Well, she limped on some woman's arms; I don't know who they were. I didn't recognize them.

Q. She limped home that way? A. Yes.

30 PETER DE RUE, sworn.

Direct Examination by Mr. Freedman:

Q. Mr. DeRue, what is your occupation? A. Police officer.

Q. Where? A. Little Falls Township.

*Peter De Rue—direct*

Q. Do you remember an accident on the 18th of August, 1926? A. I do.

Q. Did you see the accident? A. I did not.

Q. How soon after the accident were you there? A. About fifteen minutes.

Q. Fifteen minutes? A. Yes, sir.

Q. At the time you were there were the cars removed? A. Why, the truck was—the Sanitary truck was pushed back a little, so they had told me. I didn't see whether they had moved or whether they did not. 10

Q. When you got there what did you do? A. Why, I looked to see the accident, questioned both drivers, and asked them how they came to get up there.

Q. I see. Did you notice what part of the Sanitary Construction truck was damaged? A. Why, as near as I could see he had a mudguard bent. I didn't pay a whole lot of attention to it. There was a mudguard bent and I believe the radiator was leaking. 20

Q. The mudguard was bent and the radiator was leaking? A. Yes.

The Court—Which car was that?

The Witness—Sanitary Construction Company.

Q. What mudguard was it? A. Right. 30

Q. Front? A. Front right.

Q. Did you notice the Chevrolet automobile? A. Yes, I did.

Q. What part of the Chevrolet was damaged?

A. Why, the left mudguard and the wheel was

*Peter De Rue—direct*

pushed or looks as though it had been hit back, and the radiator was bent from where he had hit the porch in the front.

Q. The left side of the Chevrolet was damaged?

A. Yes, sir.

Q. Did you have a conversation with the driver of the Sanitary Construction Company's truck, Mr. Cervino? A. I did.

10 Q. Is this the gentleman at the table? A. Yes, sir.

Mr. Stalter—If your Honor please, unless it is proven that the defendant corporation was present I object to any conversation as not being binding on the defendant corporation.

The Court—It is only binding as against Cervino personally. He is the defendant.

20 Q. What conversation did you have with him, Officer? A. I asked him, Mr. Cervino, how he happened to go up there, up on the sidewalk.

Q. Yes? A. And he told me he was going to turn into Gray Street.

Q. He was going to turn into Gray Street? A. That is what he told me, yes, sir.

Q. Do you know how far Gray Street is from the place where this grocery store is?

30 The Court—I understood the grocery store is on Gray Street.

Mr. Stalter—On the corner.

The Court—I understood the grocery store is on Gray Street.

*Peter De Rue—direct*

Mr. Freedman—It is not.

Mr. Stalter—Your witness said so.

Mr. Freedman—He said it was thirty-five--

The Court—Thirty-five feet from the center of Pompton Avenue.

Mr. Stalter—No, sir; from the center of Gray Street to the store was thirty-five feet, and it was on the corner of Pompton Avenue.

Mr. Freedman—I don't understand it, and I will ask the officer. 10

Q. Officer, where is this grocery store in reference to Pompton Avenue and Gray Street? A. Running in from the edge of the road to the edge of the grocery store.

The Court—Which road?

The Witness—Gray Street or the Pompton Turnpike, about the same. 20

Q. On the corner, isn't it? A. Yes, on the corner.

Q. Grocery store is on the corner of Gray Street and Pompton Avenue? A. Pompton Avenue.

Q. Well, is there a sidewalk on Gray Street? A. No, not from this location.

Q. Is there a sidewalk on Pompton Avenue? A. Not a graded—

Q. Taking the right-hand curb of Gray Street, assuming that the curb line is there, how far would you say that was from the grocery store? A. To the store?

Q. Yes.

*Peter De Rue—direct*

The Court—Which do you call the right-hand side,—the southerly side or the northerly side?

Mr. Freedman—The northerly side.

Q. The northerly side of Gray Street, the curb line to the grocery store—how far would that be?

A. That would be fifteen feet, about.

10 Q. Fifteen feet? A. To the store, yes.

The Court—Clear across the street?

The Witness—No; this was between the store and the street line.

Q. Well, I asked you between the store and the north side, that is the opposite side. A. Oh, that would be about thirty-five, to the opposite side of the store.

20 Q. Would be thirty-five feet from the opposite side? A. That is to the opposite side, the northerly side of the store.

By the Court:

Q. The northerly side of the street he is talking about. From the store to the northerly side of the street, that would be clear across the street, is that about thirty-five feet? A. No; I don't just get that right. Excuse me.

30 Q. Well, here is Gray Street and here is the grocery store. He asked you how far between the store and the northerly curb of Gray Street. A. Well, that would be about fifteen feet between.

Q. Well, how far would it be from the edge of the store to the— A. Edge of the road?

*Peter De Rue—cross*

Q. Not the edge of the road. On the opposite side of the road. A. That would be about thirty-five feet.

By Mr. Freedman:

Q. How far, Officer, would you say the steps of the store were from the side of Gray Street nearest to the store? A. From where?

Q. From the steps in front of the store to the side of Gray Street which is nearest to the store. 10

Mr. Stalter—I object to that question. It would be very indefinite because there is no curb or gutter or sidewalk.

Q. Assuming there was a curb line there.

Mr. Stalter—The officer certainly is not the city engineer. 20

The Court—You may give that.

A. About twenty-five feet.

Q. About twenty-five feet. You said Cervino told you he wanted to turn into Gray Street; is that correct? A. Yes, sir.

Q. Did he say anything else to you? A. No, sir.

Cross Examination by Mr. Stalter: 30

Q. You had a conversation with Mr. Mende there, too, didn't you, Officer? A. I did.

Q. As a matter of fact, you wrote out a ticket for Mr. Mende for speeding, didn't you?

*Peter De Rue—cross*

Mr. Freedman—I object.

The Court—Sustain the objection.

Q. The crown of the road, Officer, of Gray Street, —the middle of the crown of the road is about thirty-five feet to the store, isn't it? A. On the northerly side is, about.

10 Q. About that. Then, how wide would you say Gray Street is? A. About twenty feet at that point.

Q. Only twenty feet, eh? A. There is two ditch,—ditch on each side. About twenty feet. Of course, I didn't measure it. I should judge about twenty feet.

20 Q. So that the edge of the road, of course, then, would be ten feet from the center, and that would leave about fifteen feet from the edge of the road to the store steps, would it not? I think that was your testimony. A. No, from the center—you mean from the center of the crown?

Q. From the center of the crown to the store it is about thirty-five feet? A. No; about twenty feet from the center. Between twenty and twenty-five feet.

30 Mr. Freedman—For the purposes of the record, if the Court please, counsel has agreed that the agency and ownership of the automobile truck is as alleged in the complaint.

Mr. Stalter—Of course, I agree and admit the Sanitary Construction Company owned the truck and that Anthony Cervino was driving for the company.

*Mrs. Rose Dirk—direct*

Mr. Freedman—At the time of the accident?

Mr. Stalter—At the time of the accident.

MRS. ROSE DIRK, sworn.

Direct Examination by Mr. Freedman:

Q. Mrs. Dirk, did you have an accident on August 18, 1926? A. Yes. 10

Q. Were you injured? A. Yes.

Q. Where were you at the time of the accident? A. I was at the store.

Q. Whose store? A. Mrs. Tappash's.

Q. When you were at the store just where were you? A. I was right at the side of the step.

Q. On the side of the step? A. Yes.

Q. What happened? A. Well, I got hit; automobile hit him and this Chevrolet come along and hit me. 20

The Court—The Chevrolet struck you?

The Witness—Chevrolet.

Q. Where was the automobile truck? A. On the other side of the Chevrolet, in the back.

Q. On the other side of the Chevrolet in the back? 30

By the Court:

Q. Where were you when the Chevrolet struck you? A. I was outside of the store.

Q. Off the road? A. Yes, sir.

*Mrs. Rose Dirk—direct*

Q. The Chevrolet was the car which was against you; is that it? A. Yes, sir.

Q. You say the truck was against that? A. The truck was side of the Chevrolet.

By Mr. Freedman:

Q. What kind of a dress did you wear on that day? A. A pink one.

10 Q. Is that it there? A. Yes.

Q. Is that the dress you wore? A. Yes, sir.

Q. Now, just hold it up, will you please? Do you know what this is? A. That is radiator marks.

Q. From which car? A. Chevrolet.

Mr. Freedman—I offer this in evidence.  
(Dress marked exhibit P-1.)

Q. How long were you in bed, Mrs. Dirk? A.  
20 Two weeks.

Q. How long after that were you confined to your home? A. About three weeks after.

Q. Did you have any help at the time you were ill? A. Yes, sir.

Q. What was the name of the lady who was your nurse? A. Mrs. Balkas.

Q. How long was she at your service? A. Two weeks.

Q. Did you have anyone else? A. Mrs. Bow-  
30 ley.

Q. What was she? A. She took care of the children and did the cooking and housework.

Q. How long was she at your home? A. Two weeks.

*Otto Dirk—direct*

Q. Do you have any pains yet, Mrs. Dirk? A. I still have pain in my back, a little.

Q. Did you have pains, Mrs. Dirk?

Mr. Stalter—When?

Q. At the time you were injured? A. Yes.

Q. How long did those pains last? A. Well, they were on and off along, a couple of days they  
10 were hurting right along, too.

No Cross Examination.

OTTO DIRK, sworn.

Direct Examination by Mr. Freedman:

Q. Mr. Dirk, you are the husband of Mrs. Dirk?  
A. Yes. 20

Q. You were at the time of the accident? A. Yes.

Q. Now, did you spend any money to heal and cure your wife? A. Yes.

Q. What moneys did you spend? A. I spent money for the doctor.

Q. How much? A. \$53.

Q. What other moneys did you spend? A. I spent \$75 for the nurse, and also housekeeper.

Q. And \$75 for the housekeeper? 30

The Court—He said \$75 for the nurse and also housekeeper.

Q. And also \$75 for the housekeeper?

*Otto Dirk—direct*

The Court—I don't think he said that.

Q. I will ask him again. How much did you spend for the nurse, Mr. Dirk? A. \$75.

Q. How much did you spend for the housekeeper? A. \$75.

Q. I show you a paper and ask you what it is? A. That is a receipt.

10

Mr. Stalter—I object.

The Court—No, the paper speaks for itself if it is admissible at all.

Q. Who signed that paper?

The Court—Receipts would not be admissible. What is the use of wasting time?

Mr. Freedman—If he saw it signed.

20

The Court—It would not be admissible if he helped to write it.

Q. Did you spend any other moneys? A. Yes, we spent for liniments, I believe.

Q. How much? A. Three dollars.

Q. Did you spend any other moneys besides that? A. Not that I know of.

Q. What did the dress cost, if you know? A. Dress cost \$2.

30

Q. Now, did the nurse and housekeeper eat at your home? A. Yes, sir.

Q. Did the moneys you gave them include meals, or was that exclusive of board? A. I think that was exclusive of board.

Q. What, in your opinion, is the value of their

*Otto Dirk—cross*

board per week? A. Well, I should judge about twelve dollars a week.

Q. For each one? A. Yes.

Q. Each one was at your home two weeks? A. Yes, sir.

Cross Examination by Mr. Stalter:

Q. What makes you think it costs twelve dollars a week to board them, Mr. Dirk? A. Well, if I went to board I knew it would cost me fifteen dollars somewheres else. 10

Q. Did it actually cost you twelve dollars to feed the nurse, Mrs. Balkas, Mr. Dirk? A. Well, I didn't ask her how much she expended, but I should judge it cost twelve dollars a week to live.

Q. That is just your opinion? A. That is my opinion.

Q. Who was this Mrs. Balkas? A. Why, Mrs. Balkas is her sister. 20

Q. Whose sister? A. My wife's sister.

Q. Is your sister-in-law? A. Yes, sir.

Q. She was there two weeks, was she? A. Yes, sir.

The Court—Was she the nurse or the housekeeper?

The Witness—She was the nurse.

Q. What hospital is she a graduate of? A. I don't know as she graduate from any hospital. I asked her to take care of her sister. 30

Q. Is she a practical nurse, do you know? A. She understands something about it, she has had some experience.

*Otto Dirk—cross*

Q. Do you know what her experience has been?

A. I don't know much about her.

Q. How far from your house does she live? A. She lives—

Mr. Freedman—I object to that.

The Court—I will permit it.

10 Q. How far? A. She lives in the State of Connecticut.

Q. Did she come down from Connecticut to take care of your wife? A. Yes.

Q. Is she here today? A. No, sir.

Q. Did you pay her \$37.50 a week? A. I have.

The Court—Seventy-five.

A. I paid her for two weeks.

20 Mr. Stalter—The testimony was she was there two weeks and he paid \$75.

The Witness—I also paid her transportation here and to Connecticut.

Q. I see. I asked you if you paid her \$37.50 a week.

30 Mr. Freedman—I object on the ground it has been answered. He said he paid her \$75 for two weeks.

The Court—I will permit it.

A. Yes, sir.

Q. That was your wife's sister? A. Yes, sir.

*Otto Dirk—cross*

Q. She was there for two weeks? A. Yes, sir.

Q. Not a trained nurse? A. No, sir.

Q. Now, how about the housekeeper; she was there for two weeks, too? A. Yes. Well, she couldn't take care of everything; I had four children.

Q. I didn't ask you that. Just a minute, please. Did you pay her \$37.50 a week? A. Yes, sir.

Q. What did she do? A. She took care of the children, dressed them and washed them and fed them. 10

Q. They were not going to school at that time, were they? A. One of them was going to school.

Q. In August? A. I think so.

Q. What school is that? A. Singac school, public school in Singac.

Q. Open in August? A. I don't know whether she was going at that time. I know she was of school age, but, no, the school wasn't going. 20

Q. How old is she now? A. Going on seven.

Q. She was going to school in August? A. No, she was not going to school in August. She was of school age.

Q. Now, you paid these two people, then, between the two of them, \$75 a week to run your household? A. Yes.

Plaintiff Rests.

30

*Motion for Non-suit***MOTION FOR NON-SUIT**

Mr. Stalter—If your Honor please, I move for a non-suit on the part of the Construction Company, on the ground there is not any testimony that shows any act of negligence on the part of the Construction Company, sir. I submit that a prima facie case has not been made out against the trucking company.

10

(Discussion.)

The Court—I will grant the non-suit.

Mr. Freedman—Your Honor permit me an exception?

The Court—You may have it.

Members of the Jury, the Court has taken the responsibility of deciding this question on a question of law. You may take your seats in the audience.

20

30

**New Jersey Court of Errors and Appeals**

Rose Dirk and Otto Dirk, her husband,

Plaintiffs-Appellants,

vs.

The Sanitary Construction Co., a corp., and Anthony Cervino,

Defendants-Appellees.

On Appeal from  
Supreme Court

**BRIEF OF DEFENDANTS, THE SANITARY  
CONSTRUCTION CO. AND ANTHONY  
CERVINO**

This action arose out of an injury received by the plaintiff, Rose Dirk, while in front of a building which stands at the intersection of a public highway known as Pompton Turnpike and a public highway known as Gray Street. Gray Street runs into the above named Pompton Turnpike, and forms the letter "T" with said Turnpike. The defendant, Anthony Cervino, was driving the truck of the defendant, The Sanitary Construction Co., in a general northerly direction on the Pompton Turnpike. The road was wet, it was raining and foggy. The defendant, Anthony Cervino, started to make a left turn into said Gray Street, when a Chevrolet, driven by one Jacob Mende, traveling in a general southerly direction, the opposite direction to which the defendants were driving, and traveling at a high rate of speed, crashed into the front of the defendants' truck, proceeded across the sidewalk and pinned the plaintiff, Rose Dirk, against the front of the build-

ing. There is no curb or gutter on this corner. The car of Jacob Mende, **WHO WAS** a party defendant to this suit, and against whom the plaintiffs **VOLUNTARILY DISCONTINUED**, at the opening of the suit, was the car that struck the plaintiff, Rose Dirk. When both cars came to rest the left side of the Chevrolet was against the right front of the Sanitary Construction Co.'s truck. There was no testimony introduced to show that the defendant, The Sanitary Construction Co., through its driver, Anthony Cervino, was in any way negligent in the operation of its truck. Counsel for defendant moved for a non-suit at the completion of plaintiffs' case and the motion was granted. Plaintiffs prayed for an exception, which was allowed, and are the appellants herein. The reasons stated in the brief of plaintiffs-appellants will be treated in their order.

#### POINT I.

(A) The trial court below did not commit an error in ordering a judgment of non-suit against the plaintiffs and in favor of the defendants, The Sanitary Construction Co. and Anthony Cervino, for the reason that:

Plaintiffs did not make out a prima facie case against the Sanitary Construction Co. and Anthony Cervino. The plaintiffs called four witnesses to prove their case and not one of them testified that the defendants' truck was being operated in any other way than in a careful manner where it had a legal right to be. No testimony was introduced to show that the defendants' truck was traveling at a fast rate of speed. No

testimony was introduced to show that the driver, Anthony Cervino, did not signal that he was about to make a left turn, and no testimony was introduced by the plaintiffs to show that there was any violation of a right owed to the plaintiffs, Rose Dirk and Otto Dirk. The testimony of the witnesses of the plaintiffs showed just the contrary. The only eye witness to the accident was one Joseph Devine who was **TWO HUNDRED YARDS** away from the intersection where the accident happened, in other words, **SIX HUNDRED FEET AWAY**. (P. 23, l. 8 to 10.)

Joseph Devine, witness, on direct examination:

"Q. Were you past Gray Street at the time this Chevrolet passed you? A. No, sir; I was 200 yards."

This witness also stated that the car of Jacob Mende, (who the court will remember was granted a voluntary discontinuance by the plaintiffs at the opening of the case and who for an unexplained reason did not appear to testify) passed him, Joseph Devine, traveling at the rate of twenty-five miles per hour, in the rain and fog on a very slippery pavement. (P. 27, l. 29 to l. 31.)

Joseph Devine, witness, on direct examination:

"Q. Well, was he going fast or slow? A. Well, he was going along pretty good; I should judge maybe twenty-five miles."

It would appear then that the only evidence in the case of any negligence was that of the mysterious Jacob Mende. It was Jacob Mende's car that was exceeding the speed limit, and it was Jacob Mende's car that struck the plaintiff, Rose Dirk. Because the automobile of the ex-defendant, Jacob Mende, collided with the truck of the defendant,

The Sanitary Construction Co., before it struck the plaintiff, Rose Dirk, it is contended that the defendant, The Sanitary Construction Co., was negligent and that the injuries suffered by the plaintiff, Rose Dirk, were a direct result of that negligence. Counsel for the plaintiffs does not touch on the point that even after the collision between the two automobiles, according to the testimony of the plaintiffs' witness, Joseph Devine, the Chevrolet driven by Jacob Mende, traveled twelve feet before it struck the plaintiff, Rose Dirk. (P. 30, l. 1 to 6.)

Joseph Devine, witness, on cross examination:

"Q. About how far is that, just approximately? A. Well, say twelve feet or ten feet, whatever the sidewalk should be. Q. And the Chevrolet traveled that ten or twelve feet after the collision up to the steps? A. Up to the steps."

Counsel for plaintiffs in his brief in reciting the statement of facts, states that Mr. Devine, the witness above referred to, testified that the collision occurred thirty-five feet from the side street known as Gray Street. Counsel for the plaintiffs also recited in his brief that this Mr. Devine testified that the store was thirty-five feet from Gray Street. Your appellees beg to call attention to the direct examination of Joseph Devine. (P. 27, l. 10 to l. 12.)

"A. That is all they did. They collided there on the turn; they were both headed towards in the store."

Certainly said witness states that the cars collided on the turn. What Mr. Devine meant when he stated that the grocery store was thirty-five

feet from the corner is fully explained on cross examination when he was asked where the grocery store was relative to the corner of Gray Street and Pompton Avenue. Devine stated that it was about thirty five feet from the center of Gray Street, right on the corner of Pompton Avenue. (P. 28, l. 11 to l. 27.)

Joseph Devine, witness, on cross examination:

"Q. Where is this grocery store with reference to the Newark side of Gray Street? That which would be south, would it not?

A. Yes. Q. Where is the grocery store relative to that corner? A. To Gray Street?

Q. Yes, Gray Street and Pompton Avenue.

A. Well, it sets about thirty-five feet, I should judge, from the center of Gray Street.

Q. Oh, no; how far is it from Pompton Avenue? It is right on the corner, isn't it? A. It is on the corner, yes.

Q. It is on the corner of Pompton Avenue and Gray Street? A. On Gray Street, yes.

Q. Well, then, when you say it is thirty-five feet you mean the grocery store is thirty-five feet from the center of Gray?

A. Of Gray Street. There is no sidewalk laid there."

The statement of counsel for appellant in his brief then, that the store mentioned in the testimony was thirty-five feet from the corner is misleading. Mr. Devine also states under cross examination that he heard the crash and looked. (P. 29, l. 5 to l. 8.)

Joseph Devine, witness, on cross examination:

“Q. What called your attention to the Sanitary Construction Company’s truck?

A. Why, I heard the crash and looked—I was walking right in the direction and noticed the cars.”

It is evident then from the testimony of the plaintiffs’ case that there is no testimony of lack of care on the part of the defendants or either of them. It is perfectly evident from the testimony that the automobile of Jacob Mende was solely responsible for the accident. Plaintiffs’ counsel in his brief also states that the Chevrolet could not get into Gray Street when he saw the driver of the truck making a left hand turn. The fact that the one-time defendant against whom a discontinuance was entered, could not turn into Gray Street nor could not stop speaks most eloquently of the fact that this light car was traveling at a great rate of speed, which is also borne out by testimony that after the Chevrolet crashed into the front of the truck it traveled twelve feet in the direction in which it was going on the sidewalk to hit the plaintiff, Rose Dirk. It is contended by your relator again that these facts testified to by a witness six hundred feet away do not show negligence on the part of the defendants, The Sanitary Construction Co. and Anthony Cervino. Your relator also wishes to remind this Honorable Court that the one-time defendant, Jacob Mende, did not appear in court to give the court and jury the benefit of his testimony.

Officer DeRue who did not see the accident contributed nothing in so far as imputing any negligence to the defendants, The Sanitary Construction Co. and Anthony Cervino, is concerned. The plaintiffs-appellants again contend that the officer testified that the store was twenty-five feet from Gray Street. That statement in itself is again misleading because there is no curb or gutter on said street, the sidewalk and street being on the same level and uninterrupted by any curb or gutter line of any description. On cross examination the officer stated that **THE CROWN** of the road of Gray St. was thirty-five feet from the store and Gray Street was thirty-five feet from the store and that Gray Street itself was about twenty feet at that point. (P. 36, l. 1 to l. 11.)

Peter DeRue, witness, on cross examination:

“Q. The crown of the road, Officer, of Gray Street,—the middle of the crown of the road is about thirty-five feet to the store, isn’t it? A. On the northerly side is about. Q. About that. Then, how wide would you say Gray Street is? A. About twenty feet at that point.”

Plaintiff’s, Rose Dirk, own testimony was to the effect that the two cars collided and the Chevrolet hit her. Outside of that her testimony contributed nothing. She also introduced into evidence a dress showing the radiator marks of the Chevrolet owned by the ex-defendant, Jacob Mende, when he struck her.

In conclusion the plaintiffs, Rose Dirk and Otto Dirk, did not make out a prima facie case against the defendants, The Sanitary Construction Co. and Anthony Cervino, in that there was not one iota of testimony introduced to show any negligence on the part of either or both of them.

(B) The trial court did not err in granting the defendants' plea for a non-suit for the reasons stated in Point 1, Paragraph A.

(C) The trial court committed no error in granting defendants a non-suit for the reasons stated in Point 1, Paragraph A.

Respectfully submitted,  
JOHN L. GRIGGS,  
CHARLES C. STALTER,  
Of counsel with Defendants.

### New Jersey Court of Errors and Appeals

Rose Dirk and Otto Dirk, her husband, Plaintiffs-Appellants, vs. The Sanitary Construction Co., a corp., and Anthony Cervino, Defendants-Appellees.	}	On Appeal from Supreme Court
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#### STATEMENTS OF FACTS

On August 18th, 1926, the plaintiff, Rose Dirk, was injured through the collision and negligence of two automobiles, one of which was a truck owned by the defendant, The Sanitary Construction Company, and operated by its agent at the time of the accident (S. of C., p. 36, l. 35). At the time of the accident the truck of the defendant, The Sanitary Construction Company, was proceeding in a northerly direction on a public highway known as Pompton Turnpike, which ran in a general northerly and southerly direction. The other automobile, a Chevrolet car, was proceeding in a southerly direction on the same highway, (S. of C., p. 22, l. 30; p. 23, l. 1.) At the time of the accident, the plaintiff was by the stoop or front of a store on the westerly side of Pompton Turnpike, and the Chevrolet was close against Mrs. Dirk, they were both tight together (S. of C., p. 19, l. 30). The truck of the defendant turned left on the highway, proceeding in a northerly direction and collided with the Chevrolet car, proceeding south on

the same highway, and both cars collided on the westerly side of Pompton Turnpike, which is the left hand side of the road in the direction in which the automobile truck of the defendant was proceeding. The Chevrolet car had pinned the plaintiff against the wall, and the automobile truck of the defendant was up against the Chevrolet (S. of C., p. 24, l. 10 to 20). At the time of the accident, the plaintiff, Rose Dirk was ten or twelve feet from where the both cars collided (S. of C., p. 29, 30, l. 1).

After the plaintiff proved the collision of two cars proceeding in opposite directions on the highway, which landed on the sidewalk ten or twelve feet from the gutter where they collided, and pinned the plaintiff against the wall of the building, ten or twelve feet from the gutter, it rested its case. Whereupon counsel for the defendant, The Sanitary Construction Company moved for a nonsuit on the ground that there wasn't any testimony that showed any act of negligence on the part of The Sanitary Construction Company, and that a prima facie case was not made out against The Sanitary Construction Company which motion was granted by the trial Court, and to which counsel for the plaintiff prayed an exception, which exception was allowed.

The plaintiff called four witnesses to prove its case.

The first witness called was Barbara Tappash, who testified that on the 18th day of August, 1926, she owned a store on Pompton Turnpike, in Singac, New Jersey (S. of C., p. 19, l. 10). The wit-

ness heard a noise and came out from her house and saw the Chevrolet automobile and the plaintiff by her stoop or front of her store, near the wall of the store (S. of C., p. 19, l. 20) and that the Chevrolet and the plaintiff were together, tight together (S. of C., p. 19, l. 30) and that the store was close to the sidewalk (S. of C., p. 20, l. 25) and that the automobile truck and the Chevrolet were in front of the house (S. of C., p. 21, l. 1; p. 22, l. 3).

The next witness called by the plaintiff was Joseph Devine, who testified that the Chevrolet was going in the same direction as he was, traveling south on Pompton Turnpike (S. of C., p. 22, l. 30) and that he saw the truck belonging to The Sanitary Construction Company coming in the opposite direction which would be north (S. of C., p. 23, l. 1). Mr. Devine saw the collision between the truck of The Sanitary Construction Company and the Chevrolet car, and that the collision occurred thirty-five feet from a side street known as Gray Street (S. of C., p. 23, l. 13, l. 20). Mr. Devine also testified that at the time of the collision, the plaintiff, Mrs. Dirk, was on the sidewalk just about to step into the store, and that she only had to take a step for the step, that is all (S. of C., p. 24, l. 1 to 10) and that the Chevrolet pinned Mrs. Dirk against the wall of the store, and that the truck was on the left side of the Chevrolet up against it (S. of C., p. 24, l. 10 to 20). This witness also testified again that the store in front of which the accident took place, was thirty-five feet from Gray Street, a side street

(S. of C., p. 25, l. 1) and that the truck of the defendant, The Sanitary Construction Company, was on the right side of the road when he saw it, but when it turned and the two cars hit, it was on the left side of the road (S. of C., p. 25, l. 25). He also testified that the automobile truck of The Sanitary Construction Company made a left turn (S. of C., p. 25, l. 33). The automobile truck of The Sanitary Construction Company was going north and made a left turn (S. of C., p. 26, l. 4) and that the store is on the left hand side of the road going north (S. of C., p. 26, l. 10). He also testified that the automobile truck made a left hand turn going north on Pompton Turnpike in front of this store where the accident took place, which was thirty-five feet from Gray Street, which is a side street, and that where this store is, in front of which the accident took place, there is no cross street (S. of C., p. 26, l. 11 to 20). There was also testimony by this witness that the driver of The Sanitary Construction Company's truck made a left-hand turn where there wasn't any street intersection, and that when the Chevrolet touring car and the truck collided, they both ran together (S. of C., p. 26, l. 25 to 35). The witness said that one of the drivers was making a turn, that would be the driver of The Sanitary Construction Company's truck, and that the driver of the Chevrolet could not get into Gray Street when he saw the driver of the truck making a left-hand turn (S. of C., p. 27, l. 1 to 5). The testimony is that both cars collided on the turn which would be the spot where the driver of the truck of The Sanitary Construction Company turned left, so that the

accident took place on the left hand side of the road going north, or in other words, the driver of the truck belonging to The Sanitary Construction Company, was on the wrong side of the highway, or the left, when the Chevrolet collided with him.

The next witness called was Peter DeRue, who testified that the front right mud guard of the truck belonging to the defendant, The Sanitary Construction Company was bent, and the radiator leaking; and that the left mud guard and wheel of the Chevrolet was pushed or set back, and the radiator was bent on the Chevrolet car, and that the left side of the Chevrolet was damaged (S. of C., p. 31, l. 30; p. 32, l. 1 to 7). Mr. DeRue, being a police officer of Little Falls Township, where the accident took place, questioned the driver of the truck as to how he happened to get on the sidewalk, and the driver of the truck belonging to the defendant, The Sanitary Construction Company, told him he was going to turn into Gray Street, (S. of C., p. 32, l. 20 to 30), and the Court will please recall that the previous witness, Mr. Devine, testified that Gray Street was a side street, thirty-five feet from the grocery store, in front of which the accident took place (S. of C., p. 26, l. 10 to 20). Mr. DeRue, the police officer, testified that the store, in front of which the accident took place, was twenty-five feet from Gray Street, which was a side street (S. of C., p. 35, l. 22) and that Cervino, the driver of the truck belonging to the defendant, The Sanitary Construction Company, told him he wanted to turn into Gray Street.

The next witness called was the plaintiff. She testified that at the time of the accident she was right on the side of the step of the store on Pompton Turnpike. She said that she got hit (S. of C., p. 37, l. 19). She said, "Automobile hit him and this Chevrolet came along and hit me" (S. of C., p. 37, l. 20) meaning thereby that the automobile truck hit him, the Chevrolet, and that the Chevrolet came along and struck her. She testifies further, the Chevrolet struck her, and that the automobile truck of the defendant was on the other side of the Chevrolet in the back (S. of C., p. 37, l. 25 to 30). She also testified she was off the road and outside of the store when the Chevrolet struck her (S. of C., p. 37, l. 35). She testified further that the Chevrolet car was up against her, and that the truck was up against the Chevrolet car (S. of C., p. 38, l. 1 to 6) and that the dress she wore, which was admitted in evidence, had radiator marks on it (S. of C., p. 38, l. 10 to 15).

After counsel for the plaintiff proved the following facts, the Court granted a nonsuit as to the defendant, The Sanitary Construction Company, which the plaintiff now argues is error.

#### POINT I.

Counsel for the plaintiff will argue one point, which will be sub-divided into three sections, raising practically the same argument.

(A) The trial Court committed error in ordering a judgment of nonsuit against the plaintiffs,

and in favor of the defendants, The Sanitary Construction Co., a corp., and Anthony Cervino.

(B) The trial Court committed error in granting the defendants' motion for nonsuit against the plaintiffs on the ground that no negligence was shown on the part of the defendants, The Sanitary Construction Co., a corp., and Anthony Cervino.

(C) The trial Court committed error in not refusing the defendants' motion for a nonsuit against the plaintiffs.

The facts as presented at the trial by the evidence, raised a factual question for the jury, and the refusal of the Court to permit the jury to receive the case, was error. Under the facts it was within the province of the jury to say whether negligence of the defendants, The Sanitary Construction Co., and Anthony Cervino could be inferred from those facts and circumstances in the case, and whether the accident could reasonably be imputed to their negligence.

It is the plaintiff's contention that there were sufficient facts and circumstances in the case from which the jury could reasonably infer and impute negligence to the defendants, The Sanitary Construction Co., and Anthony Cervino, and that the plaintiff made out a prima facie case at least which called for an explanation by the defendants, The Sanitary Construction Company, and Anthony Cervino, and that as a matter of law, the doctrine of *res ipsa loquitur* applied in this case

as both cars, at the time of the accident, were up on the sidewalk where they had no right to be.

The plaintiff's entire contention is that the accident spoke for itself, and that after the plaintiff rested its case, the facts proven by it called for an explanation by the defendants, the Sanitary Construction Co., and Anthony Cervino. As was said by Mr. Justice Trenchard, speaking for the Court of Errors and Appeals, in the case of *Najarian v. Jersey City, etc., R. R. Co.*, 77 N. J. L., p. 704, last paragraph,

"It was not necessary for the plaintiff, in order to make out a prima facie case, to prove the cause of the accident. All that she was required to do was to show the existence of negligence, on the part of the defendant, which occasioned the injury resulting in death. This she did by proving that the rear of the car left the straight track upon which the front part of it was proceeding so as to kill the plaintiff's intestate who was standing in what was normally a place of safety. Ordinarily, proof of the occurrence of an accident will not of itself support a conclusion of the defendant's carelessness; but this principle is not of universal application. Where the accident is one which, in the ordinary course of events, would not have happened, if proper care had been used by the defendant, the maxim *res ipsa loquitur*, applies."

The facts of the plaintiffs' case are almost on all fours with the case of *Work v. Philadelphia*

*Supply Company*, 95 N. J. L., p. 193, which were as follows:

"The plaintiff was walking in a northerly direction, on the west side of a public road, on that part of the road used by pedestrians, on a side path. The automobile of the defendant was proceeding in a northerly direction, on the easterly side of the same public road, being the side opposite to that on which the plaintiff was walking. The automobile suddenly turned and slid across the road to the left, turned over in back of the plaintiff, and fell upon her, causing injuries to the plaintiff,"

and the Court held in that case that,

"On the point of the defendant's negligence, all the trial Court had to decide was whether negligence of the defendant may be reasonably inferred. It was open to the jury then to say whether, from the facts and proof, negligence ought to be inferred."

The Court held in the *Work* case,

"The duty of making a satisfactory explanation to the jury how the accident happened was on the defendant; whether it did so or not was a jury question under the line of cases therein cited."

Counsel for the appellant in the case cited also contends that the factual situation in the appellant's case presented a jury question and at least called for an explanation by the defendant as to how the accident happened.

In the case of *Rosenberg v. Holt, et als.*, 130 Atl. Rep., p. 6, 608, Mr. Justice Minturn speaking for the Court of Errors and Appeals held,

“It was sufficient evidence to present a prima facie case for a jury as to the question of negligence in driving a truck partly on the sidewalk, where the injured boy was riding on a tricycle, as the truck turned into an intersecting street.

He said,

“The question presented by the appeal in this case is whether the trial Court was legally correct in directing a judgment of nonsuit, under the following circumstances.”

“The plaintiff, a boy of about four years of age, while riding a tricycle upon the sidewalk of a narrow street called Colloway Avenue, near Connecticut Avenue, in Atlantic City, was injured by a collision between the tricycle and an auto truck, belonging to the defendant.”

“The truck, traveling, according to one of the witnesses, ‘pretty fast,’ in turning into Connecticut Avenue, ran partly upon the sidewalk where the boy was riding, and in some manner not clearly described struck the tricycle and injured the child, to recover for which injuries this suit is sued. There was testimony, establishing the fact that the corner was known to be dangerous, from which the inference was derivable that drivers using it, as in this instance, were required to use due care for those

lawfully using the conjoining sidewalk. It was also in evidence that upon this walk, it was quite generally observed children congregated for play; and that public knowledge emphasized the duty of a driver to so operate his vehicle as not to injure those non sui juris lawfully there, and entitled in their immature minds to assume that when they were upon the sidewalk, they occupied a zone free at least from the dangers incident to vehicular invasion. **This factual situation presented a prima facie case of negligence. If there were another side to this question, manifestly it was the defendant’s province to present it, and that situation obviously, under the well-settled rule, evolved a question for the jury, and not for the Court.”**

Citing *Ritscher v. O. & P. V. Railway Co.*, 79 N. J. L., p. 462.

The plaintiffs-appellant also calls the Court’s attention to the case of *DeMott v. Knowlton*, 100 N. J. Law, p. 296, at the top of page 298, where Mr. Justice Trenchard, speaking for the Court of Errors said:

“It appeared that she drove the automobile from and off the roadway and on to the sidewalk, and struck and injured the plaintiff Mrs. DeMott, who was walking there. That evidence, even when considered in connection with the driver’s evidence, required the submission of the question of the driver’s negligence to the jury.”

For all of which reasons, it is respectfully submitted that the judgment and order of the New Jersey Supreme Court, Passaic Circuit, be hereby reversed, and for nothing holden, and that a Venire De Novo issue.

Respectfully submitted this 6th day of March, 1928.

WARD & MCGINNIS, and  
LOUIS C. FRIEDMAN,  
Attys. of Plaintiff.  
PETER J. MCGINNIS,  
Of Counsel.

*Peter J. McGinnis  
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