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Amended Complaint.

Essex County Court of Common Pleas

FANNIE HENDLER and ISAAC
HENDLER,
Plaintiffs,

vs.

ROSE MEADOWS and MEYER
HENDLER,
Defendants.

10

Action at Law.
Amended
Complaint.

FIRST COUNT.

20

The plaintiff, Fannie Hendler, residing in the City of Newark, County of Essex and State of New Jersey, says that:

1. On or about July 18th, 1933, the plaintiff, Fannie Hendler, was a passenger and occupant of a certain motor vehicle, which automobile was owned by the defendant, Rose Meadows, and operated by her duly authorized agent and servant, Meyer Hendler.

30

2. Plaintiff, Fannie Hendler, was a passenger and occupant of the automobile of the defendant, Rose Meadows, at the special invitation and request of the said defendant, and her duly authorized agent and servant.

3. Said automobile was being operated by the defendant, by her duly authorized agent and servant, in a northerly direction on Ocean Avenue, at or near Third Avenue, public highways in the

40

Amended Complaint.

Borough of Bradley Beach, in the County of Monmouth and State of New Jersey.

10 4. The defendant, by her duly authorized agent and servant, operated the said motor vehicle in such a careless, reckless and negligent manner, at a rapid rate of speed without making any due and lawful observations, and without said car being properly equipped with brakes, and by reason of these and other acts of negligence, caused the said motor vehicle to collide with a cement light standard in the center of Ocean Avenue, at or near Third Avenue, as aforesaid, causing said plaintiff, Fannie Hendler, to be thrown about in the car, rendering her unconscious, and inflicting numerous severe and painful bodily injuries.

20 5. The plaintiff, Fannie Hendler, as a result of the said accident caused by the negligence of the defendant, by her duly authorized agent and servant, sustained a fracture of the left ankle, severe sprain of the right ankle, contusions of the chest, back, body and extremities, together with a concussion, as well as severe shock to her nervous system, from all of which plaintiff will suffer and undergo great pain and mental anguish.

30 6. As a further result of the accident, plaintiff, Fannie Hendler, was confined to a hospital for a long period of time, had X-rays taken, which indicate numerous internal and external injuries, and has suffered and will suffer from shock and nervousness.

7. As a further result of the accident, plaintiff, Fannie Hendler, will be permanently disabled.

40 8. As a further result of the accident, plaintiff, Fannie Hendler, was and will be confined to bed and home for a long period of time.

Amended Complaint.

WHEREFORE, plaintiff, Fannie Hendler, demands the sum of Twenty-five Thousand Dollars (\$25,000) as damages on this Count, together with costs of suit to be taxed of the defendant, Rose Meadows.

SECOND COUNT.

10

The plaintiff, Isaac Hendler, residing in the City of Newark, County of Essex and State of New Jersey, says that:

1. He repeats and makes part hereof paragraphs one, two, three, four, five, six, seven and eight of the First Count.

2. By reason of the foregoing premises, plaintiff, Isaac Hendler, did necessarily pay, lay out and expend large sums of money for medicines, medical attention and doctors' bills, in endeavoring to cure the plaintiff, Fannie Hendler, of her sickness, soreness, disorders and injuries caused as aforesaid, as well as the loss of the right to consortium of the plaintiff, Fannie Hendler, to which the plaintiff, Isaac Hendler, was entitled.

20

WHEREFORE, plaintiff, Isaac Hendler, demands as damages on this Count, the sum of Five Thousand Dollars (\$5,000), together with costs of suit to be taxed of the defendant, Rose Meadows.

30

THIRD COUNT.

The plaintiff, Fannie Hendler, says that:

1. On or about July 18th, 1933, the plaintiff, Fannie Hendler, was a passenger and occupant of a certain motor vehicle, which automobile was owned by the defendant, Rose Meadows, and operated by her duly authorized agent and servant, Meyer Hendler.

40

Amended Complaint.

2. Defendant, Meyer Hendler, operated said motor vehicle in such a careless, reckless and negligent manner, at a rapid rate of speed, without making any due and lawful observations, and without said car being properly equipped with brakes, and by reason of these and other acts of
10 negligence, the said defendant, Meyer Hendler, caused the said motor vehicle to collide with a pole in the center of Ocean Avenue, causing said plaintiff, Fannie Hendler, to be thrown about in the car, rendering her unconscious and inflicting numerous severe and painful bodily injuries.

3. The plaintiff, Fannie Hendler, as a result of the said accident caused by the negligence of the defendant, Meyer Hendler, sustained a fracture of
20 the left ankle, severe sprain of the right ankle, contusions of the chest, back, body and extremities, together with a concussion, as well as severe shock to her nervous system, from all of which plaintiff will suffer and undergo great pain and mental anguish.

4. As a further result of the accident, plaintiff, Fannie Hendler, was confined to a hospital for a long period of time, had X-rays taken, which indicate numerous internal and external injuries,
30 and has suffered and will suffer from shock and nervousness.

5. As a further result of the accident, plaintiff, Fannie Hendler, will be permanently disabled.

6. As a further result of the accident, plaintiff, Fannie Hendler, was and will be confined to bed and home for a long period of time.

WHEREFORE, plaintiff, Fannie Hendler, demands
40 the sum of Twenty-five Thousand Dollars (\$25,000) as damages on this Count, together

Amended Complaint.

with costs of suit to be taxed of the defendant, Meyer Hendler.

FOURTH COUNT.

Plaintiff, Isaac Hendler, says that:

1. He repeats and makes part hereof paragraphs one, two, three, four, five and six of the Third Count. 10

2. By reason of the foregoing premises, plaintiff, Isaac Hendler, did necessarily pay, lay out and expend large sums of money for medicines, medical attention and doctors' bills, in endeavoring to cure the plaintiff, Fannie Hendler, of her sickness, soreness, disorders and injuries caused as aforesaid, as well as the loss of the right to consortium of the plaintiff, Fannie Hendler, to which the plaintiff, Isaac Hendler, was entitled. 20

WHEREFORE, plaintiff, Isaac Hendler, demands as damages on this Count, the sum of Five Thousand Dollars (\$5,000), together with costs of suit to be taxed of the defendant, Meyer Hendler.

LOUIS SPIEGEL,
Attorney of Plaintiffs.

30

40

Answer to Amended Complaint.

ESSEX COUNTY COURT OF COMMON
PLEAS.

10

FANNIE HENDLER and ISAAC
HENDLER,

Plaintiffs,

vs.

ROSE MEADOWS and MEYER
HENDLER,

Defendants.

Action at Law.

Answer to
Amended
Complaint.

20

Defendants, answering the complaint in this cause, say that,—

First Defense to First Count.

They deny paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the first count.

First Defense to Second Count.

30

They deny paragraphs 1 and 2 of the second count.

First Defense to Third Count.

They deny paragraphs 1, 2, 3, 4, 5 and 6 of the third count.

40

*Answer to Amended Complaint.**First Defense to Fourth Count.*

They deny paragraphs 1 and 2 of the fourth count.

Second Defense to All Counts.

10

They deny they were guilty of the negligence charged against them in the complaint, or of any other negligence whatsoever.

Third Defense to All Counts.

At the time and place of the accident referred to in the complaint, plaintiff, Fannie Hendler, was a joint adventurer in the car in which she was riding and in joint control thereof.

20

McCARTER & ENGLISH,
Attorneys for Defendants.

30

40

Summons.

THE STATE OF NEW JERSEY

To Meyer Hendler and Rose Meadows:

10 [L. S.] You are summoned to answer the annexed complaint of Goldie Zipkin, in an action at law, in the Essex County Court of Common Pleas.

AND TAKE NOTICE, that unless you file your Answer to said complaint with the Clerk of the Essex County Court of Common Pleas, 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.

20 WITNESS, WALTER D. VAN RIPER, Judge of the Essex County Court of Common Pleas, at Newark, this 25th day of September, Nineteen Hundred and Thirty-three.

JOHN H. SCOTT,
Clerk.

30 EMANUEL M. EHRENKRANZ,
Attorney,
45 Branford Place,
Newark, New Jersey.

40

Complaint.ESSEX COUNTY COURT OF COMMON
PLEAS.

<p style="text-align: center;">GOLDIE ZIPKIN, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">MEYER HENDLER and ROSE MEADOWS, Defendants.</p>	}	<p>Action at Law. Complaint.</p>	10
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The plaintiff, Goldie Zipkin, residing in the City of Newark, County of Essex and State of New Jersey, complaining of the defendants, says that: 20

FIRST COUNT.

1. On or about July 18, 1933, the plaintiff, Goldie Zipkin, was a passenger and occupant of a certain motor vehicle, which automobile was owned by the defendant, Rose Meadows, and operated by the defendant, Meyer Hendler, in a Northerly direction on Ocean Avenue, at or near Third Avenue, public highways in the Borough of Bradley Beach, in the County of Monmouth, and State of New Jersey. 30

2. Defendant, Meyer Hendler, operated the said motor vehicle in such a careless, reckless and negligent manner, at a rapid rate of speed, without due and lawful observations being made, and without said car being properly equipped with brakes, and by reason of these and other acts of negligence, the said defendant, Meyer Hendler, 40

Complaint.

caused the said motor vehicle to collide with a pole in the center of Ocean Avenue, causing said plaintiff, Goldie Zipkin, to be thrown to the side, front and back of the car, rendering her unconscious, and inflicting numerous severe and painful bodily injuries.

10

3. As a result of the said accident, caused by the negligence of the defendant, Meyer Hendler, the plaintiff, Goldie Zipkin, received injuries and she became sick, sore, lame and disordered, and suffered and will suffer and undergo great pain and inconvenience of mental anguish, and also received and sustained injuries about her head, face, limbs and body, as well as a severe shock to her nervous system.

20

4. As a further result of the accident, plaintiff, Goldie Zipkin, was taken and confined and will be confined to the hospital for a long period of time, had X-rays taken, suffered numerous internal and external injuries, has suffered and will suffer from shock and nervousness, and was and will be obliged to expend money for medical attendance and medicines.

30

5. As a further result of the accident, plaintiff, Goldie Zipkin, will be permanently disabled.

6. As a further result of the accident, the plaintiff's teeth were broken and knocked out, and plaintiff was and will be obliged to engage dental attendance, many of her teeth will be extracted and treated, and she has and will be obliged to expend money for dental attendance and disbursements.

40

Complaint.

7. As a further result of the accident, said plaintiff, by reason of the marring in and about her face and mouth, will be hindered in marriage.

8. As a further result of the accident, the said plaintiff was and will be confined to bed and home for a long period of time, and lost and will lose whatever salary she would have earned, had it not been for the accident. 10

WHEREFORE, plaintiff, Goldie Zipkin, demands the sum of Ten Thousand Dollars (\$10,000) as damages on this Count, together with costs of this suit to be taxed, of the defendant, Meyer Hendler.

SECOND COUNT.

1. Plaintiff, Goldie Zipkin, repeats Paragraph One of the First Count, and makes same a part hereof as though repeated at length. 20

2. Defendant, Rose Meadows, by her agent, servant, employee, or member of her family, the defendant, Meyer Hendler, was negligent in that the said motor vehicle was operated in a careless, reckless and negligent manner, at such a rapid rate of speed, without due and lawful observations being made of others lawfully upon the highways, without having said motor vehicle equipped with proper brakes, and by reason of these and other acts of negligence, caused the said motor vehicle to run into a pole in the center of Ocean Avenue, causing the said plaintiff to be thrown to the side, front and back of the car, rendering her unconscious, and inflicting numerous severe and painful bodily injuries. 30

Complaint.

3. As a result of the said accident, caused by the negligence of the defendant, Rose Meadows, by her agent, servant, employee, or member of her family, the defendant, Meyer Hendler, the said plaintiff received injuries, and she became sick, sore, lame and disordered, and suffered and will suffer and undergo great pain and inconvenience of mental anguish, and also received and sustained injuries about her head, face, limbs and body, as well as a severe shock to her nervous system.

10

4. The Plaintiff, Goldie Zipkin, repeats the allegations contained in Paragraphs 4, 5, 6, 7, and 8 of the First Count, and makes same a part hereof, as though repeated at length.

20

WHEREFORE, plaintiff, Goldie Zipkin, demands the sum of Ten Thousand Dollars (\$10,000) as damages on this Count, together with costs of this suit to be taxed, of the defendant, Rose Meadows.

THIRD COUNT.

1. Plaintiff, Goldie Zipkin, repeats each and every allegation contained in the several paragraphs of the First and Second Counts, and makes same a part hereof as though repeated at length.

30

2. By reason of the negligence in the maintenance and operation of the motor vehicle, by the defendant, Rose Meadows, owner, and the defendant, Meyer Hendler, driver and operator, plaintiff received the injuries herein set forth.

40

WHEREFORE, plaintiff, Goldie Zipkin, demands the sum of Ten Thousand Dollars (\$10,000) as damages on this Count, together with costs of this

Answer.

suit to be taxed, of the defendants, Rose Meadows and Meyer Hendler.

EMANUEL M. EHRENKRANZ,
Attorney for Plaintiff.

10

Answer.

ESSEX COUNTY COURT OF COMMON
PLEAS.

<p style="text-align: center;">GOLDIE ZIPKIN, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">MEYER HENDLER and ROSE MEADOWS, Defendants.</p>	}	<p>Action at Law. 20</p> <p>Answer.</p>
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Defendants, answering the complaint in this cause, say that,—

First Defense to First Count.

They deny paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the first count. 30

First Defense to Second Count.

They deny paragraphs 1, 2, 3 and 4 of the second count.

First Defense to Third Count.

They deny paragraphs 1 and 2 of the third count. 40

*Reply.**Second Defense to All Counts.*

They deny they were guilty of the negligence charged against them in the complaint or of any other negligence whatsoever.

Third Defense to All Counts.

10

At the time and place of the accident referred to in the complaint, plaintiff was a joint adventurer with the defendants and in joint control of the operation of the automobile in which she was riding.

McCARTER & ENGLISH,
Attorneys for Defendants.

20

Reply.

ESSEX COUNTY COURT OF COMMON
PLEAS.

30

GOLDIE ZIPKIN,
Plaintiff,

vs.

MEYER HENDLER and ROSE
MEADOWS,
Defendants.

Action at Law.

Reply.

Plaintiff, in reply to the Answer of the defendants, says that:

1. Plaintiff joins issue with the allegations contained in the several defenses set forth in the answer of the defendants.

40

EMANUEL M. EHRENKRANZ,
Attorney of Plaintiff.

Testimony.

ESSEX COUNTY COURT OF COMMON
PLEAS.

<p style="text-align: center;">GOLDIE ZIPKIN, Plaintiff, <i>vs.</i> MEYER HENDLER and ROSE MEADOWS, Defendants,</p>	}	Action at Law.	10
<p style="text-align: center;">FANNIE HENDLER and ISAAC HENDLER, Plaintiffs, <i>vs.</i> ROSE MEADOWS and MEYER HENDLER, Defendants.</p>	}	Action at Law.	20

Monday, November 19, 1934.

Before HON. DALLAS FLANNAGAN, Judge, and a jury. 30

EMANUEL M. EHRENKRANZ for plaintiff Zipkin, by PERCY H. PENN, and LOUIS SPIEGEL, by BENJAMIN M. WEINBERG for plaintiffs Hendler.

McCARTER & ENGLISH, by GERALD M. F. McLAUGHLIN for defendants.

(By consent of counsel the above cases are tried together.) 40

Fannie Hendler, Plaintiff—Direct.

(A jury is drawn and sworn.)

Mr. Penn opens in behalf of plaintiff Zipkin.

Mr. Weinberg opens in behalf of plaintiffs Hendler.

Mr. McLaughlin opens in behalf of defendants.

10 ADJOURNED until tomorrow, Tuesday, November 20, 1934.

SECOND DAY.

Tuesday, November 20, 1934.

Continued pursuant to adjournment.

20 Present, counsel as before stated.

Mr. Weinberg: I am asking permission of the defendants' counsel to identify the plaintiff so that we may not have to keep the medical men here.

The Court: Certainly.

30 FANNIE HENDLER SWORN in behalf of plaintiffs.

By Mr. Weinberg:

Q. You are one of the plaintiffs in this case?

A. Yes, sir.

40

Herman Busch, for Plaintiff—Direct.

HERMAN BUSCH sworn in behalf of plaintiffs Hendler.

Direct examination by Mr. Weinberg:

Q. Doctor, you are practicing medicine? A. I am.

Q. In the City of Newark? A. Yes. 10

Q. Registered physician? A. Yes.

Q. How long have you been practicing? A. Oh, over twenty years.

Q. And are you connected with any of our medical institutions? A. Yes.

Q. What ones? A. Associated with City Hospital, Beth Israel Hospital and some others.

Q. Do you know the lady who was just on the stand, Fannie Hendler? A. I do. 20

Q. Were you called in to attend her professionally at any time during the summer of 1933? A. Yes.

Q. When was it that you first saw her? A. August 9, 1933.

Q. And where did you see her? A. Her home.

Q. Where? A. Hillside Avenue. 93.

Q. And where was she at the time you saw her? A. She was confined to bed.

Q. Did you make an examination of her? A. I did. 30

Q. And what did that examination disclose? A. She was threatened with vascular collapse.

Q. Meaning what? A. The blood pressure dropped, the diastolic, and she looked very pale, very anaemic. Her one leg was encased in a cast and both legs were markedly swollen and tender. She was short of breath and could not breathe. Her heart was beating very rapidly and she complained of dizziness and fainting spells. 40

Herman Busch, for Plaintiff—Direct.

Q. Did you do anything for her at that time?

A. Yes.

Q. What? A. Gave her some restoratives and advised her how to take care of herself and take care of her circulation and heart.

10 Q. Did you see her after that? A. I saw her twelve times from that day down to December 29th, the same year.

Q. When? A. Till December 29th, was the last call I made.

Q. And where did you see her on those occasions? A. At her home.

Q. And did you make any other or further examination than the one you made August 9th? A. I examined her at each visit.

20 Q. And what did you find, if anything, different from what was disclosed to you on your first examination? A. Well, she was still very nervous and her cardiovascular system was irregular, but she had showed some improvement.

Q. And was that the last time you saw her? A. Yes, the last time I saw her was December 29th.

Q. Have you seen her at any time in the hospital? A. I have not.

Q. Had you seen Mrs. Hendler at any time before that? A. No, I had not.

30 Q. That was the first acquaintance with her? A. Yes. I was called in by the doctor, the attending physician, for consultation.

Q. Who was that? A. Dr. Kessler.

Q. Dr. Kessler? A. H. H. Kessler.

Q. You said something about seeing her leg encased. I do not know whether you said plaster.

A. There was a plaster cast she had on.

40 Q. Where was this cast? A. Lower extremity, but I do not remember which one now. I have it home. Where she sustained her fracture.

Herman Busch, for Plaintiff—Cross.

Q. You did not do anything for that? A. No. That is not my line of work.

Q. You do not know what her vascular condition was prior to the time you saw her or what caused it? A. No, I do not.

Q. Now, doctor, will you tell us what the reasonable value of your services rendered by you amounted to? A. My bill was \$60. 10

Q. The condition that you found her in, was that a temporary one? A. Well, I would not say so. No, it is not. Some left over.

Q. Some what? A. Some disturbance of her cardiovascular system at the present time.

Q. At the present time? A. I mean the last time I saw her.

Q. I understand you have not seen her since December of last year? A. No. 20

Cross-examination by Mr. McLaughlin:

Q. And the first time you saw her, doctor, was August 9th? A. August 9, 1933.

Q. And then after August 9th, when was the next time you saw her? A. A few days later. Two or three days later.

Q. Two or three days later? A. Two days later.

Q. Two days later, and after that, when did you see her? A. I went in about six or seven times every other day and then probably once a week. I have a record of it home, if you want it. 30

Q. You have what? A. I have a record.

Q. Have you got it here? A. No, I haven't.

Q. Well, you knew you were going to testify before his Honor and the jury? A. I was just called at the hospital, and the call was received at the hospital and I rushed out of the hospital. I did not stop at my office. 40

Herman Busch, for Plaintiff—Cross.

Q. You knew about the case yesterday? A. Yes, I knew of it, but I thought I would have a chance to stop home.

Q. You saw her six or seven times every other day, you say? A. Yes, and then thereafter about once a week.

10 Q. You say she was nervous? A. Yes. Highly so.

Q. You did not see her at Beth Israel Hospital at all? A. No, I did not.

Q. And did you examine the record regarding her at the Beth Israel Hospital? A. I was not concerned with it.

Q. Are you connected with the Beth Israel Hospital? A. I am chief of the service.

20 Q. Is that the hospital you just came from? A. Yes.

Q. And this nervousness—withdraw that. You said when you first saw her her heart was beating fast, is that it? A. Yes, very rapidly.

Q. Did you scare her? A. Did I scare her? I am not in the habit of scaring people.

Q. Well, it is rather an elderly lady, isn't she? A. Yes.

Q. You had never seen her before? A. I had not.

30 Q. And a strange doctor coming in to this elderly lady who had already been in an accident that might readily cause the heart action to become fast? A. It had nothing to do with it.

Q. I beg your pardon? A. It had nothing to do with it.

Q. The heart action would continue the same? A. No. This was a minor case. Her main complaint was she had a vascular collapse.

40 Q. Something dropped? A. Her diastolic pressure particularly dropped. Her systolic was very low.

Fannie Hendler, Plaintiff—Direct.

Q. And then it picked up under your treatment?

A. Yes. Thereafter it improved.

Q. So much so that you saw her not more than once a week? A. About six times.

Q. After August? A. No. I saw her every other day from the first time about six or seven times and thereafter about once a week.

10

Q. And then December 29th you did not see her any more at all? A. No, I did not.

Q. You thought there was no further need for your services? A. I was not called to see her.

Q. I beg your pardon? A. They did not ask me to see her professionally.

Q. Any further? A. Any further.

20

FANNIE HENDLER, plaintiff, sworn in her own behalf.

Direct examination by Mr. Weinberg:

Q. Mrs. Hendler, where do you live? A. 93 Hillside Avenue.

Q. And what is your husband's name? A. Isaac Hendler.

Q. And where did you live in July, 1933? A. What?

30

Q. Where did you live in July, last year? A. 93 Hillside Avenue.

Q. Were you away during the month of July, 1933? A. Yes.

Q. Where were you? A. I was going on my vacation.

Q. Your vacation? A. Yes.

Q. Where? A. Asbury Park.

Q. And what hotel were you stopping at? A. In the New Brunswick Hotel.

40

Fannie Hendler, Plaintiff—Direct.

Q. When did you go to Asbury Park? A. July.

Q. Do you remember what day? A. I cannot remember what day. All I know the month of July.

Q. Was there any other member of your family stopping with you at the hotel at that time?

10 A. No.

Q. Do you remember going out in an automobile while you were stopping at Asbury Park? A. Yes.

Q. Do you remember the date? A. It was—I cannot remember the date.

Q. All right. With whom did you go riding? A. With Meyer.

Q. He is a son of yours? A. Yes.

20 Q. One of the defendants in this case? A. Yes.

Q. What time of day did you go out with him?

A. He come over in the afternoon and he told me, "Mother, you want to go for a ride?" I said, "All right."

Q. Did you know he was coming down? A. Yes. He called me, "Mother, come down in the afternoon."

Q. Where did he call you from? A. 93 Hillside Avenue.

30 Q. He called you up on the telephone? A. From Newark, New Jersey, on the telephone.

Q. And said he would be down to take you for a ride? A. Yes.

Q. Now, when you got in the car was anybody else in the car beside you and Meyer? A. No, nobody was.

Q. Where were you seated? A. In the back.

Q. And after you left Asbury Park where did you go? A. Go riding. Went all over.

40 Q. Did you take on anybody else in that car? A. Yes. Meyer was going in Belmar and said,

Fannie Hëndler, Plaintiff—Direct.

“Let us go, Mama, over and get Goldie Zipkin.”

Q. And where was she? A. She was in front with Meyer.

Q. And she was taken in the car in Belmar, do I understand? A. Yes. The car goes to Belmar and Bradley Beach.

Q. Well, that is after you and this young lady were in it? A. Yes. 10

Q. And you rode around, I understand, and you were going back to Asbury Park, were you? A. Yes.

Q. Now, you know where Bradley Beach is? A. Bradley Beach goes from Belmar to Bradley Beach; in Bradley Beach we have to go in Asbury Park.

Q. Go to Belmar— A. Bradley Beach.

Q. Belmar, then Bradley Beach, Ocean Grove and Asbury Park, is that right? A. Yes. 20

Q. When you got to Bradley Beach what, if anything happened? A. Meyer goes in Bradley Beach and the car goes into a post.

Q. Where was the post, could you see it? A. No. I cannot see the post, because I was in the back.

Q. Well, then, all you know is that the car hit something, is that right? A. Yes.

Q. You do not know what it hit? A. The car hit— 30

Q. Do you know what the car—do you know what it hit? A. It hit the post.

Q. How do you know that? A. Because the beginning I cannot see. I was unconscious, I cannot see nothing. The beginning I see it goes into the post.

Q. On what street was the automobile being driven at the time of the accident? A. Well, that I cannot tell you. 40

Fannie Hendler, Plaintiff—Direct.

Q. Well, do you know where Ocean Avenue is?

A. I cannot tell you. I do not know.

Q. You do not know the name of the street?

A. No.

Q. Do you know what time it was? A. It was about 9:30.

10 Q. It was then dark? A. Yes.

Q. Except the place is very well lighted up, Bradley Beach? A. Yes.

Q. Street lamps? A. Yes. The street lamps was lighted.

Q. What was the first thing you knew after there was an accident? A. I feel it myself.

Q. Where were you? A. I was in very much pain.

20 Q. Where were you at the time? A. I was in the machine, in the back.

Q. No, I mean after the accident. A. Yes.

Q. You said something about being unconscious. Do you know what that means? A. Yes.

Q. You did not know what was going on? A. No. It pained me.

Q. Now, where were you—then, you were not unconscious, were you? A. Yes, I was.

Q. Well, when did you become unconscious? A. Right after the accident.

30 Q. Then what was the first thing that you knew after the accident? A. My left leg.

Q. Your left leg hurt you? A. Yes.

Q. Where were you at that time when your left leg was hurting you? A. I was called for an ambulance; people called for an ambulance and took me to a doctor.

Q. Well, you know you went in an ambulance? A. Yes. They took me.

40 Q. And did you see the automobile at the time you went in to the ambulance? A. No, I didn't see that.

Fannie Hendler, Plaintiff—Direct.

Q. Uh? A. No, I didn't see that.

Q. You were in pain? A. Yes. I cannot see nothing.

Q. And where did the ambulance take you? A. The ambulance takes me in Bradley Beach to a doctor.

Q. To a doctor? A. Yes, and he put my foot 10
in bandages.

Q. And how long did you stay in the doctor's office? A. I stayed in the doctor's office about three or four hours.

Q. And where did you go from the doctor's office? A. I go to the New Brunswick Hotel, and the doctor gave me a nurse.

Q. Who took you back to the New Brunswick Hotel? A. An ambulance.

Q. An ambulance took you there? A. Yes. 20

Q. How long did you stay in the New Brunswick Hotel before you were removed from there? A. Oh, in the New Brunswick in Asbury Park the ambulance took me to Newark, New Jersey, to a hospital.

Q. Did you come to Newark in an ambulance? A. Yes.

Q. Well, did one of your other sons come down that morning for you? A. They was all coming down, all the children. 30

Q. Did you ride home with them? A. No, I don't ride home with them. He ride home by himself, because I cannot do it. I must have an ambulance.

Q. They went home themselves? A. I cannot go in the machine. I must be in an ambulance.

Q. What time do you think you got to the Beth Israel Hospital? A. Yes, I remember that. Oh, in the morning. It was about eleven—half past eleven. 40

Fannie Hendler, Plaintiff—Direct.

Q. Eleven or half past eleven in the morning?

A. Yes. That time.

Q. And where were you taken after you got to the hospital? Were you put in a room? A. In a room, yes; in a private room with a nurse.

10 Q. And do you remember who the doctor was who first started to treat you there or looked at you? A. Yes.

Q. Who was it? A. The first doctor was Dr. Kessler.

Q. Well, did you see a Dr. Plain that night? A. Yes.

Q. Where did you see him? A. He was by mine bed.

20 Q. When? A. The same time they took me in the hospital. They took me about half past eleven. Dr. Plain was one o'clock.

Q. In the morning? A. Yes.

Q. Where? A. In the hospital, in my room.

Q. In Asbury Park? A. No, in New Jersey, Newark.

Q. Didn't he go to Asbury Park? A. Dr. Plain? Yes.

Q. That is what I am asking you. A. Yes. He was in Asbury Park.

30 Q. What time did he get to Asbury Park? A. I cannot tell you the time it was. About twelve. Half past twelve. About that time.

Q. How did he get down there? A. Well, my children told him to go down.

Q. Your children came down with a Doctor Plain from Newark and saw you in Asbury Park that night? A. Yes.

Q. And then you came back to the Beth Israel Hospital? A. Yes.

40 Q. And Dr. Kessler took care of you there? A. Dr. Kessler took care of me there the couple of days I was there. I was there about twelve or thirteen days.

Fannie Hendler, Plaintiff—Direct.

Q. Twelve or thirteen days? A. Yes, and he put my foot in the cast.

Q. Which one? A. The left.

Q. What part? A. The ankle was broke.

Q. And how soon after you got in the hospital was your ankle put into a cast? A. He took me right home in the ambulance.

10

Q. You did not understand the question. [Question read as follows: "And how soon after you got in the hospital was your ankle put in a cast?"] A. Oh, they put the cast the next day when they take me in the hospital.

Q. Did that pain while it was in the cast? A. Oh, it was pain long enough.

Q. And did that bother your sleep? A. What?

Q. Could you sleep well? A. How can you sleep when you have such a pain?

20

Q. I am asking you, please. A. I cannot sleep for a couple of months.

Q. All right. After you left the hospital at the end of the twelve days you went home? A. Yes, mine home.

Q. Did you go to bed? A. Yes, sure.

Q. How long were you in bed? A. I was in bed about twelve or thirteen weeks.

Q. And did you have any help while you were there? A. Yes. I had two nurses.

30

Q. Two nurses? A. Yes, a night and a day nurse.

Q. And how long did you keep those two nurses? A. About eight or nine weeks.

Q. And at the end of the eight or nine weeks were you able to get around? A. No. I was in a wheel chair.

Q. And where were you wheeled? Where did you use the chair? A. I used the chair only for my front porch. They took me out.

40

Fannie Hendler, Plaintiff—Direct.

Q. And how long did you use a wheel chair?

A. About five or six weeks.

Q. And at the end of the five or six weeks were you able to get around all right? A. Well, the nurse took me down with the crutches.

Q. Did you use crutches for any length of time?

10 A. Oh, yes.

Q. How long? A. I used crutches near about four months.

Q. And after you got through using the crutches, did you have to use anything else? A. Yes, a cane.

Q. A cane? A. Yes.

Q. Do you wear the same kind of shoes that you wore before? A. No. Before I go buy shoes all over and now I have to get—the children take me
20 in the machine to Coward.

Q. You have a special shoe? A. Yes.

Q. And you have that on now? A. Yes. Now, home I have other special shoes, too.

Q. Are you wearing the special shoes? A. Yes.

Q. Who asked you to wear them? A. Dr. Kessler.

Q. How is your ankle today? A. No good.

Q. Is it the same size as it was? A. It is a little better, but I cannot walk. It is better than
30 it was in the beginning.

Q. Is that ankle the same size as it was before the accident? A. No.

Q. Is it smaller or larger? A. No, it is bigger.

Q. Bigger? A. Yes.

Q. Does it bother you at all? A. Yes. It bothers me all kinds of weather, when it rains. I cannot sleep.

Q. And how is it now? A. Now it hurts.

Q. Do you do the same kind of work around
40 the house that you did before? A. No.

Fannie Hendler, Plaintiff—Direct.

Q. What kind of work did you do before the accident? A. Before the accident I do all my work, but now I must have help. I cannot work.

Q. What do you mean by all of your work? A. Housework. What other women do. You know housework.

Q. Well, some do more work than others. A. 10
Oh, some people must work not so hard, though I cannot work.

Q. Did you keep any help before the accident? A. Oh, yes, I must.

Q. You must what? A. I must keep help.

Q. When? A. After the accident.

Q. Yes, but before the accident. A. Sometimes I get girls from the City Hall, but I cannot do my work myself, not now.

Q. What kind of work did you do before? A. 20
I do my work, housework. I was cooking, washed clothes and do everything. Now I must have help. I cannot do it.

Q. How often do you have help? A. Now?

Q. Yes. A. I have separate help from the time of the accident.

Q. What do you mean by that? A. I have a girl, a maid. I must have her.

Q. And you did not have one before? A. No.

Q. Except on and off? A. Sometimes I get a 30
woman a day, but not steady.

Q. How long have you been keeping a girl? A. Now?

Q. Yes. A. I keep her about the second year. Past July a year.

Q. How old are you? A. Me?

Q. Yes. A. Sixty.

Q. Sixty? A. Yes.

Q. Now, what doctors other than Dr. Plain and Dr. Busch saw you? You said Dr. Kessler? A. 40
Yes, Dr. Kessler.

Fannie Hendler, Plaintiff—Direct.

Q. Anybody else? A. Three doctors, and I was in the hospital, the hospital doctors.

Q. Did you call in Dr. Busch? A. Yes.

Q. And who was taking care of you when Dr. Busch was called in? A. I had a nurse.

Q. What doctor? A. Dr. Busch.

10 Q. Before you got Dr. Busch? A. Dr. Plain.

Q. But did you ask for Dr. Busch yourself or did the other doctors call in Dr. Busch? A. No. Mine whole heart hurt me, was black and blue, and they said, "You want to listen to me, Mrs. Hendler, I give you a good doctor; I cannot do it; I give you Dr. Busch." In come Dr. Busch and Dr. Plain.

Q. Now, you said something about being black and blue. A. My heart was black and blue.

20 Q. Well, you could not see your heart very well. Did you see any black and blue spots? A. Yes, the whole heart was black.

Q. You are pointing to your breast? A. Yes, sure.

Q. Well, beside the injury to your left ankle, were you hurt anywhere else? A. Yes.

Q. Where? A. I was hurt mine heart and I was hurt the other foot. I cannot walk.

30 Q. Did any other place hurt? A. Mine hand here [indicating].

Q. You are pointing to your right arm. Anything else? A. It hurt here a little bit [indicating].

Q. What is that? Describe what you just put your hand on. Your head? A. Yes.

Q. Back of your right ear? A. Yes.

Q. Now, are you the same weight you were at the time of the accident? A. No.

Q. Heavier or lighter? A. No, less.

40 Q. You weigh less? A. Yes.

Fannie Hendler, Plaintiff—Cross.

Q. Did you have to your knowledge anything the matter with your heart—oh, you would not know, but I mean about the blood vessels? A. No, never.

Q. Were you a well woman before the accident? A. Yes, sure I was.

Q. Had you had a doctor before the accident? A. I use never a doctor. I do not know sometimes I have a doctor for the children, but I am all right. 10

Q. You were generally all right? A. Yes.

Q. And you were living at the time of the accident with your husband, Isaac Hendler? A. Yes.

The Court: How long did you have the nurse?

Witness: Eight or nine weeks. 20

Cross-examination by Mr. McLaughlin:

Q. At your home on Hillside Avenue, I think you said, is where you lived, Mrs. Hendler, is that right? A. Yes.

Q. Your husband lives there with you, of course? A. Yes.

Q. Who else lives there? A. My children.

Q. And who stays with you? A. My daughter, Mrs. Meadows. 30

Q. Anybody else? A. No.

Q. Any of your sons live there? A. My single son. Two sons.

Q. They are grown men, are they not? A. Yes.

Q. What are their names? A. Meyer Hendler.

Q. That is the man you are suing? A. No. I am suing Mrs. Meadows.

Q. You are suing Mrs. Meadows? A. Yes.

Q. That is the daughter who lives with you? A. Yes. 40

Q. And you are not suing Meyer? A. No.

Fannie Hendler, Plaintiff—Cross.

Q. And who else lives there? A. My maid lives with me and mine children.

Q. I thought you said there was another son.
A. No. Only two sons single.

Q. One is Meyer and what is the name of the other one? A. Paul.

10 Q. He lives home with you? A. Yes.

Q. And Mrs. Meadows? A. Yes.

Q. Is that a private house where you live or an apartment? A. It is a one-family house.

Q. Down on Hillside Avenue, Newark? A. Yes.

Q. Owned by you and Mr. Hendler or by Mr. Hendler? A. I live with Mr. Hendler. That is my husband.

Q. And the house is his, is it? A. It is his and mine.

20 Q. And I think you told us that you were sixty years of age? A. Yes.

Q. And at the time of the accident you were fifty-eight or fifty-nine? A. Fifty-nine.

Q. Meyer and Paul, they work, do they? A. No.

Q. They do not work? A. No, Paul don't work.

Q. Does Paul go to school? A. No. He cannot get work now.

30 Q. Well, in any event, you live with your daughter Mrs. Meadows there? A. Yes.

Q. And your two grown sons? A. Yes.

Q. And your husband? A. Yes.

Q. And you are fifty-eight or fifty-nine? A. I was fifty-nine when I had the accident.

Q. You did all the housework at your age except you brought in somebody once in a while? A. Once or twice a day, yes.

Q. Did I understand that you were wearing special arch supporter shoes? A. Yes.

40 Q. And is that a special arch support on now?
A. Yes.

Irving Plain, for Plaintiff—Direct.

Q. And does that particular shoe support your arch? A. Yes.

Q. What kind of an automobile was this you were riding in, what kind? A. A Buick.

Q. And this accident happened July 18, 1933, didn't it? A. Yes.

Q. That is, a year ago last July? A. Yes. A 10
year last July.

Q. On May 23, 1933, two months before July, you claimed that you had an accident in the same Buick, didn't you? A. No, I don't have an accident in the same Buick. Mrs. Meadows' chauffeur was. It was their truck and I fell down and I hit my leg right here (indicating) in the knee.

Q. Wasn't it the same automobile? A. Yes.

Q. A Buick? A. Yes.

Q. So you had another claim against Mrs. 20
Meadows at that time? A. No, I haven't got a claim, because it stopped hurting me in a couple of days.

Q. What was hurting then? A. Here [indicating]; my knee.

Q. Is that your right leg? A. Yes, the right leg.

Q. That was two months before? A. I cannot remember that.

Q. It was the same year, was it? A. I cannot 30
remember.

IRVING PLAIN, sworn in behalf of plaintiff Hendler.

Direct examination by Mr. Weinberg:

Q. Doctor, you are practicing medicine in New Jersey? A. Yes.

Q. For how long? A. Three years. 40

Irving Plain, for Plaintiff—Direct.

Q. And what branch do you practice? A. General medicine.

Q. Where is your office? A. 2 Stratford Place, Newark, New Jersey.

Q. Do you know Mrs. Hendler, who was just on the stand? A. Yes.

10 Q. How long have you known her? A. Oh, quite a while. A number of years.

Q. Do you recall when you first treated her for anything? A. Yes. The morning of this accident.

Q. Before that you had not treated her? A. Well, except to give her friendly and casual advice. I had treated her for nothing specifically up till then.

20 Q. Now, around about July 18, 1933, did you treat her? A. On that day.

Q. Well, the night of that day or the morning of the next day? A. Yes, about 2:30 a. m.

Q. July 19th? A. Yes.

Q. And where did you see her? A. At the New Brunswick Hotel, Asbury Park.

Q. And how did you come to go from Newark to the New Brunswick Hotel at Asbury Park? A. I was called by the family.

30 Q. Who, anyone in particular? A. It was either one of her two sons or daughter. I do not recall just which. One of her sons or daughters-in-law. I am not quite sure.

Q. And you went from Newark to Asbury Park and got there about half-past two in the morning? A. Approximately. I would not say.

Q. Approximately? A. Yes.

Q. Where did you see Mrs. Hendler? A. Why, she was in bed in a hotel room there.

40 Q. Was anybody taking care of her? A. There was a registered nurse there, yes.

Irving Plain, for Plaintiff—Direct.

Q. How long did you stay there? A. Well, I was there until breakfast time.

Q. Did you make any examination of her that morning? A. Yes.

Q. What did you find from your examination? A. She was in shock.

Q. Meaning what, please? A. Well, a shock is a general condition we apply to a patient who is very much under because of pain or some trauma to the body. 10

Q. Trauma meaning injury? A. Injury, yes. She had contusions of the both shoulders; her chest was practically one contusion, the entire chest and the breast; it was already—it was so shortly after the accident it was extremely black and blue; she had swelling and pain on motion of both ankles and they were both extremely tender, and there were other minor contusions on other parts of her body, that is, general contusions. 20

Q. Now, did you do anything for the patient at that time? A. Why, yes. I gave her an injection of morphine.

Q. What was that for? A. She was in extreme pain, and I saw that she was made comfortable by the nurse, that is, I instructed the nurse to follow out the general routine, and I immobilized both of her ankles as well as I could at that time. 30

Q. How? A. Well, there were no splints there, but we put them up in a pillow. We made a trough out of a pillow. I bound that around her so she could not move her ankle.

Q. Did you determine what was the matter with both or either of the ankles? A. At that time I suspected fractures and I ordered x-rays.

Q. When did you order the x-rays? A. Why, the morning of that same day she was brought to the Beth Israel Hospital at Newark. The x-rays were taken as soon as she arrived there. 40

Irving Plain, for Plaintiff—Direct.

Q. At Newark? A. Yes.

Q. Yes, but I am asking now about what occurred in Asbury Park. A. Well, I thought clinically there was a fracture.

10 Q. Of which ankle? A. I thought at that time of the left ankle, at first of the left ankle, I was almost certain. I thought possibly there might be a fracture of the right ankle.

Q. What did you find out to be the fact later on? A. That both ankles were fractured.

Q. One any more than the other? A. Yes.

Q. Which one? A. The left ankle was fractured in two places.

Q. Where? A. At the internal malleolus.

20 Q. Will you show us where that is on yourself? A. Why, yes, I could. This bone here (indicating) is the tibia and this bone here (indicating) is the fibula. Now, both bones end down around the ankle joint and you can feel very easily at about the end of the tibia there is a large knob and at the end of the fibula there is also a knob. This point (indicating) marks the ends of both bones.

30 Q. Now, you said there were two fractures. You mean both of those bones? A. I meant that the malleolus, the internal malleolus, that is, the one on the inside of the foot, was fractured; that is, the malleolus on that side and the malleolus on the other, or malleoli. That was the left ankle and on the right ankle the malleolus of the fibula was fractured; that is, only one of those bones.

Q. Now, how did you determine that, Doctor?
A. First by examination and then by checking up with x-rays.

Q. Did each confirm the other? A. Yes.

Q. You say you ordered the x-rays? A. Yes.

40 Q. And did you see the x-ray after it was taken? A. Yes.

Irving Plain, for Plaintiff—Direct.

Q. Do you know that the film that you saw was a representation of the condition of the ankle, or both of them? A. I believe it was.

Q. Well, what do you know about it to say whether or not the x-ray that you examined was the x-ray of this patient's leg or ankle? A. Well, I went to the hospital x-ray room and asked to look at Mrs. Hendler's x-ray and I also looked at the written report which the x-ray man had dictated. 10

Mr. Weinberg: Well, I am told I can get the taking of this picture by Dr. Fruat, who is here, and I want to ask the witness a few questions.

Q. Can you say whether these films I have in my hand are the films you examined and which represent conditions in Mrs. Hendler's foot? A. Yes, but this is not the one (indicating). We later took one of her thorax. She had so many contusions on the chest here we thought there might be rib fractures. That is one of the chest. 20

Q. That is negative? A. Yes. There is no fracture of the chest.

Q. I show you four small films and ask you first whether you can identify those as representing the condition of Mrs. Hendler? Your answer will first have to be yes or no. A. Yes on that. Yes. 30

Q. As to how many of those? A. All of them.

Q. Well, now, can you read those films? Do you know how? A. Well, I am not an x-ray man, but I have a general knowledge of x-rays; that is, if there is a complete fracture through a thing I can see it.

Q. Well, can you see anything in there on those films that you can explain? A. Yes. There is one 40

Irving Plain, for Plaintiff—Direct.

definite fracture here (indicating) on this particular one.

Q. What number has that one that you are referring to? A. 1792-S.

10 Q. What does that show? Pardon me! Complete your answer. A. Now, I would like to change that. There is also a definite fracture at another point. It shows a fracture of both malleoli. The line is very distinct here (indicating) and here (indicating) is a fracture of this malleolus.

Q. Is it this opening that we see here right about at what appears to be at the end of the foot that indicates the fracture? A. No. This (indicating) is not the fracture. This (indicating) is part of the joint.

20 Q. Well, will you just show us where the fracture lines are? A. Right along here (indicating) on the tibia and right along here (indicating) on the fibula.

Q. So it must be on the end of those bones? A. Yes.

Q. All right. What else? A. Now, this (indicating) is one of the right ankle. It is No. 1792-K. The fracture line along here (indicating).

30 Q. Meaning where? A. The right fibula. Next?

Q. Yes. A. This one (indicating) is of the right ankle and its number is 792-K. This must have been taken after a plaster cast was applied. It is a lateral view.

Q. Can you read anything on that? A. No, sir; except that it is in plaster.

Q. Do not mix it with the others. Keep that aside.

40 Mr. McLaughlin: That picture you just held up?

Irving Plain, for Plaintiff—Direct.

Witness: 792-K

Mr. McLaughlin: Is that the right or left foot?

Witness: Right. Lateral view of the right foot.

Q. What one are you looking at now? A. This 10
left also lateral view.

Q. With or without the cast? A. Without. I cannot see much here. It is a lateral view.

Q. Meaning what? A. That that particular fracture does not show up in that position, that is, in that particular position.

Q. Looking at it sideways. A. Looking at it sideways.

Q. So so far as you are concerned the previous film and the present one which is marked 1792-S, 20
right? A. Yes.

Q. Because of the position from which it was taken you cannot read anything at all? A. That is, I cannot. Perhaps the x-ray man might.

Q. Now, I understand, doctor, you left Asbury Park, the patient went to Newark, Mrs. Hendler went to Newark? A. Yes. By ambulance.

Q. And did you see her after that? A. Yes.

Q. Where? A. At the hospital.

Q. When did you first see her at the hospital? 30
A. Shortly after she got there. I could not tell you what time.

Q. And did you make any examination of her there? A. Yes.

Q. What did you find from that examination?
A. That her pain was more severe; that is, the same findings were there but subjectively she was in much more pain.

Q. Well, what did you do or anyone else in your presence do for her? A. We put wet dressings 40

Irving Plain, for Plaintiff—Direct.

on both of her ankles. We had them in a dressing, that is, a gauze dressing to hold the solution we put on those ankles, and we immobilized them as much as we could at that time. We gave her a sedative and I think she required another injection of morphine and, of course, we took
10 x-rays.

Q. Then what? A. We let her rest. We could not put the most injured ankle, that is, the left, in a cast at that time, because it was much swollen and tender. We waited until the swelling came down.

Mr. McLaughlin: What date was that?

Witness: I am still talking about the same day.

20 Q. You say you waited until the pain and swelling subsided before you were able to put on a cast? A. Yes.

Q. And when was that put on? A. I could not tell you unless I refreshed my memory from the hospital chart.

Q. Did you do it? A. Dr. Kessler and myself.

Q. Well, do you know how long it was afterwards? A. Oh, it was possibly a week.

30 Q. And did you see her during that week at the hospital? A. Yes.

Q. What was done for her at that time? A. We had to give her sedatives continuously because of her nervous condition and pain and we just let her rest in bed, still continuing the dressings on both ankles until the cast was applied.

Q. Now, what sort of cast was put on? A. Plaster cast. Plaster paris.

Q. Rather a heavy affair? A. Yes.

40 Q. Why didn't you tape it? I. It would not hold the foot in good position.

Irving Plain, for Plaintiff—Direct.

Q. Now, during the time her foot was in the cast did you see her? A. Yes.

Q. What did you do for her then after you had put that left ankle in a cast; what did you do for her? A. I treated her condition; that is, I told her to apply hot bags, that is an electric pad or hot water bottle.

10

Q. To where? A. To the various contusive areas. I told her to rest. I told her to watch her diet. I kept on giving her sedatives. I told her to spare her good foot. She was in bed all this time, but I cautioned her against trying to even use the good one, the comparatively even good one, I should say, and I just watched her.

Q. There was nothing you did for the ankle after the cast was on? A. Not for the one which had the cast, no, sir.

20

Q. Now, you said you put hot bags and so forth. Where did she require that? A. Chest, shoulder and the lumbar region. I mean the contusions were practically general.

Q. Well, were the injuries to the chest just confined to the external muscles there? A. I would say they possibly went a bit deeper from the pain she had and the extensive discoloration of the skin.

Q. Now, after the cast was taken off where was that taken off? A. The cast?

30

Q. Yes. A. I imagine—that is, I think Dr. Kessler took it off.

Q. That was then taken off in the hospital? A. No, sir; she was home.

Q. When she was at home at any time did you see her with the cast on? A. Yes.

Q. And how long after she was home did the cast remain on to your knowledge? A. I could not tell you, because afterward Dr. Kessler took

40

Irving Plain, for Plaintiff—Direct.

sole charge of the case and her chest and those other conditions cleared up and he took care of that particular fracture.

Q. When did you cease your attendance on this lady? A. I would say about a month after her injury.

10 Q. That was some time in August? A. I believe it was some time in September. It was a little bit more than a month.

Q. Now, during the time you saw her in the hospital did she have a nurse taking care of her, Doctor? A. Yes.

Q. Have you any memorandum with you at all showing any date and times— A. Why, I came down here in a hurry and I did not bring my full record. I have a small memorandum here with the injuries.

20

Q. Well, I do not care whether it is small or large. Is it informative of this accident? A. As to the date of the accident, as to the time I saw her, yes.

Q. Now, as to whether or not she was in the hospital—did she have a nurse? A. Yes. The hospital nurse took care of her.

Q. How many did she have, do you know? A. I do not know.

30 Q. Do you know if she had more than a day nurse? A. I do not know.

Q. When she was home, during the period you treated her at home did she have a nurse there? A. Yes.

Q. More than one? A. Well, whenever I came there I always saw one. I do not know which one it was.

Q. Well, were you there in the day as well as night? A. Yes. I dropped in once or twice a day, as well as the night.

40

Irving Plain, for Plaintiff—Direct.

Q. And every time you found a nurse there?

A. Yes.

Q. You did not hire them? A. No.

Q. When did you give up treating Mrs. Hendler? A. I do not have an accurate date of that with me.

Q. Well, I mean about how long after? A. 10
From five to six weeks after.

Q. And do you know how many visits you made? A. Oh, very many. I do not have an accurate record of that either. I dropped in very often.

Q. Well, now, have you made any charge in the matter? A. Yes.

Q. Well, how did you arrive at that if you did not know the number of visits? A. That is I cannot tell you here. I have the number of calls I made and the charge I arrived at at my office. 20

Q. Do you know how much that is from having seen your records? A. Yes.

Q. How much? A. \$100.

Q. And how many calls would you say were included in that bill? A. I would say I made about forty-five calls on her.

Q. You were not charging very much a call, were you? A. No, sir.

Q. Charging young fellow's prices, were you? 30
A. No, sir, not at all. We were on very friendly terms and I did not want to charge for the full tariff.

Q. Did you have any occasion to examine Mrs. Hendler or know her condition after your services ceased? A. Yes.

Q. When did you last examine her? A. Several months ago.

Q. And where was she when you did examine her? A. At her home. 40

Irving Plain, for Plaintiff—Direct.

Q. Was anybody else present, any other doctor? A. No, sir.

10 Q. Well, what did you find as a result of your examination several months ago? A. She seemed to be in fairly good condition; that is, her ankles were as good as any ankles could be after a fracture of that nature.

Q. Well, were those ankles normal? A. They are not normal.

Q. Tell us what was the matter, so far as you know, with her ankles when you examined her about two months ago. A. First of all, she has had a fracture there.

20 Q. Tell us what you found remaining as a result of the injury. A. There was some swelling on both ankles and she complained of difficulty in walking at times and she would get occasional pain in both ankles.

Q. What does the swelling denominate, if anything? A. There was swelling.

Q. Yes, but what caused the swelling? A. I believe the old fractures very well may have caused that.

Q. Why would the swelling remain so long? A. Because when the bone is fractured, particularly in an old person, it is never quite the same.

30 Q. What happens to cause the swelling? A. Certain structural events take place.

Q. What happens there? A. There is a low grade inflammation laid around that particular joint.

Q. And what does that do? A. That causes a swelling. It causes pain.

Q. What swells? A. The soft tissue around that area.

40 Q. Now, keeping in mind the fact you found that condition a few months ago, what have you

Irving Plain, for Plaintiff—Cross.

to say as to the future condition there? A. Well, I do not think she will have much trouble with it, but there will always be a little bit of swelling at times and pain at times, particularly with the change of weather, with exercise. I mean more than she can stand.

Q. Do you think that at her age she could do the same type of housework she testified to here that she had been doing? A. No, sir. 10

Q. You heard her testify, didn't you, Doctor? A. Yes.

Q. And do you think she can walk as far as she used to before the accident? A. No.

Q. Or stand on her legs as long? A. No.

Q. Or that she can bend over on her knees? A. No.

Q. If she has to bend those ankles? A. No. 20

Q. Do you think that condition is ever going to entirely clear up? A. Not entirely.

Q. Now, you have spoken particularly about that left ankle. Did the right come around all right altogether? A. To a very great extent.

Cross-examination by Mr. McLaughlin:

Q. Was your bill paid, Doctor? A. No, sir.

Q. Are you a relative by blood or marriage of any of these Hendlers? A. No, sir. 30

Q. The left ankle condition that you have been talking about was a fracture of the protrusion, what we generally call the outside ankle bone, wasn't it? A. Yes.

Q. And on the inside of the bone, too? A. Yes.

Q. The inside of the ankle. In taking Mrs. Hendler home from Asbury Park you took her home in an ambulance, I understand? A. Yes.

Q. And did you ride with her? A. No, sir. 40

Irving Plain, for Plaintiff—Cross.

Q. And what was done, if anything, to her foot preparatory to moving her home? A. It was put in a pillow so that the pillow could be brought up around both sides of it so that she could not move either of her ankles, that is, it was immobilized temporarily.

10 Q. When were you admitted to practice in New Jersey? A. 1931.

Q. What month was that? A. It was around December.

Q. December? A. No. I have that year wrong, I believe. It was either—it was the end of the year or the beginning, I do not recall just which. I believe it was the end of 1932.

Q. The end of 1932? A. The end of 1932, yes.

20 Q. And this happened in July, 1933? A. Yes.

Q. You had been acting for about six months prior to the accident—you had been licensed to practice? A. About that.

Q. And you did not put the lady's left ankle or left lower leg in splints preparatory to coming up to Newark or on coming to Newark, sending her to Newark, did you? A. No, sir.

Q. And did you say there was a fracture of the right ankle? A. Yes.

30 Q. You saw the lady early in the morning of July 19th, I think? A. Yes.

Q. And you took a picture or had pictures taken or know there were pictures taken of the left ankle July 19, 1933? A. That is that same day, yes.

Q. I note that the pictures of the right ankle were taken July 30, 1933, over ten days later, is that correct? A. I do not know the date.

Q. Well, my goodness, you produced the pictures. Will you look at them? A. Yes.

40 Q. The date is on the upper right. A. That is right.

Irving Plain, for Plaintiff—Cross.

Q. July 30th, so apparently that ankle, the right ankle, had not given enough trouble to warrant even an x-ray until the end of the month, had it? A. No, it had given trouble, but we thought at that time it was a sprain.

Q. And as late as this week, in an amended complaint just filed Friday apparently, do you still think it is a sprain, speaking of paragraph five of the complaint, where it says, "There are sprains of the right ankle," have you all along contended that the right ankle was fractured? A. I believe that an x-ray man might read x-rays much better than I can and I went by that report. 10

Q. Oh, you were reading the x-rays here about five minutes ago and you told the jury—just a minute, please—and you told the jury somewhere in that picture there was a fracture of the right ankle. A. To my eye it appeared so. 20

Q. Well, was that news to you? A. No.

Q. Several months ago you say you saw Mrs. Hendler? A. Yes.

Q. And did I understand you to say that she had some light swelling at that time? A. Yes.

Q. That was not the bone swelling, was it? A. The bone rarely swells. It was the soft tissue.

Q. Just answer the question. A. It was the soft tissue. 30

Q. And it was not at the bone on either side that this slight swelling was, was it? A. It was around that area.

Q. It was above it? A. It was the ankle and that takes in the ankle.

Q. So we will get it clear, if you understand the question, the slight swelling which may have been there when you saw this lady several months ago was above where the fracture, if any, had been, isn't that so? A. Above and below. 40

Nathan J. Fruat, for Plaintiff—Direct.

Q. You were in court yesterday, weren't you, Doctor? A. Yes.

Q. And did I understand you to say that you neither had your record here today? A. I was not in the courtroom. I was called down. I had my record with me—

10 Q. Did you have it yesterday? A. —and the case was not reached.

Q. Well, it started yesterday. A. Yes, but I was here in the morning.

Q. You had your record with you yesterday? A. Yes.

Q. And then you were called again today and you knew yesterday that the case was going on today, but you did not bring your record today when we are actually trying the case? A. I was
20 out of town.

NATHAN J. FRUAT sworn in behalf of plaintiff Hendler.

Direct examination by Mr. Weinberg:

Q. Doctor, you are an M.D.? A. Yes.

30 Q. How long have you been practicing medicine? A. Since 1912.

Q. And where have you practiced since 1912?

Mr. McLaughlin: I admit Dr. Fruat's qualifications.

Mr. Weinberg: And you admit his qualifications as a roentgenologist, also?

Mr. McLaughlin: Yes.

40 Q. You specialize in the taking of x-rays? A. Yes.

Nathan J. Fruat, for Plaintiff—Direct.

Mr. Weinberg: And I should like to have the x-rays marked in evidence. I offer in evidence now, Mr. McLaughlin, the four x-ray plates that we used and numbers noted on the record.

(X-rays marked Exhibits P-1, P-2, P-3 and P-4.)

10

Q. Doctor, were you connected with the Beth Israel Hospital in July, last year? A. Yes.

Q. In what capacity? A. I had charge of the department of x-rays.

Q. Now, do you recall having made any x-rays of Fannie Hendler? A. These x-rays were made in my department, made by my technician, my assistant.

20

Q. You are referring to x-rays marked in evidence P-1 to P-4? A. Yes. These were taken on 7/19/3, two views of the left ankle, showing a fracture through the outer side of the ankle, this bone (indicating) on the outside and also a fracture through the inside bone. This (indicating) is the interior malleolus and this (indicating) the external malleolus. The position of the fragments in both fractures is good and there is also swelling of the soft structure, as shown by this convex line over here (indicating) and also by this line (indicating), instead of coming down straight, instead of hugging closely the bone, it goes almost an inch away from the bone, and this swelling is shown by a convex line over the outer side of the ankle. The fracture of the tibia in here (indicating) is again shown by this on the forward part, that is, the anterior part of the tibia. Both fracture lines go into the joint space.

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Q. Do they show any injury to the joint? A. Actual injury to the joint is not visible on these

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Nathan J. Fruat, for Plaintiff—Direct.

films at this time, excepting the fracture lines go into the joint space, that is, the part of the bone that forms the boundary of the joint space is broken.

10 Q. Now, will you take up the other two? A. These are two views of the right ankle taken on July 30, 1933. We reported a fracture through the external malleolus, that is, the bone on the outer part of the leg, without any displacement, an incomplete fracture with swelling of the soft tissues over that ankle bone.

Q. That film you have just referred to has no casing over it, a cast? A. No cast; no, sir.

Q. And the fracture that you find is at the base of which, the fibula? A. The fibula, yes.

20 Q. The extreme end? A. Well, within a quarter inch of the extreme end down here (indicating); this is the interior tip and the fracture line about one-quarter inch above it.

Q. You read that satisfactorily, do you? A. I think I do.

Q. Well, you are saying that with a smile and the record does not show it. A. Well, you are asking me to pass an opinion on myself.

30 Q. No. To your satisfaction. A. Yes, to my satisfaction, yes, that is a fracture and reported to her and put my signature on it. This (indicating) is the lateral view. This view does not show the fracture, because when this ankle is taken like that (illustrating) and turned around that way, the other bones cover the fracture line. That is why we take more than one view, because you may have a fracture like that and it may not be visible in both views.

40 Q. You use the word "simple" fracture. A. Simple fracture means when it is incomplete. It can be a complete fracture and not necessarily be compound.

Nathan J. Fruat, for Plaintiff—Direct.

Q. Incomplete means what? A. That the bone is not completely broken through. Only part of the bone is broken.

Q. Now, that last picture you have referred to, does that show it encased? A. This shows the block that we probably used, put on to help support the ankle.

10

Q. But does that show a cast over the foot? A. No, no cast.

Q. What is all that film there? A. That is just the folds of the skin.

Q. The toes do not appear distinct? A. No. We did not go to the toes. We focused directly for the ankle.

Q. Did you make any other x-rays that you know of? A. There was another set of x-rays made of the chest on July 19, 1933.

20

Q. Will you look at these larger films and tell us whether or not they are the films of the chest? A. Yes, they are exposures of the chest. Not a complete examination of the chest.

Q. Do they show anything at all? A. No. The patient would not cooperate with us and I refused to report whether there was or was not a fracture. The patient moved and would not permit us to make a complete examination.

Q. Aside from that do they show anything? A. These are just of the lower ribs. No, there is no visible fracture on these exposures.

30

Q. So there is nothing abnormal in that part of the patient's body as shown by those? A. Not on these exposures, no.

Q. Now, the evidence you have just given with respect to the injuries to the right and left ankles, was that reduced to writing and filed with the record at the Beth Israel Hospital? A. The reports should be on the chart, yes, the original reports.

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Nathan J. Fruat, for Plaintiff—Cross.

Q. And without reading them, then, do you identify those reports as yours, as having been made in your handwriting? A. This one (indicating) is my signature. The other two are my signature, with my secretary's name on them. She signed them for me. I may have been called out.

10

Q. But did you compose the contents of them?

A. Yes.

Q. They generally are practically the same thing you testified to? A. Yes.

Q. Did you have anything to do with Mrs. Hendler as a patient aside from making these? A. Nothing whatsoever.

Cross-examination by Mr. McLaughlin:

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Q. As I understand it, the big plates are the chest, negative? A. The lower part of the chest, yes.

Q. On the left ankle I think you said that the fracture is in good position? A. Yes, that is right.

Q. Will you be good enough, Doctor, to take those of the right? Looking at P-4, which is the upper left one, are we looking directly at the foot? A. You are looking at the ankle.

30

Q. And this, pointing to the left of the film, is that the outside bone of the ankle? A. Yes, that is right, external malleolus, as we call it.

Q. And the bone on the right of the picture is the inside bone? A. Yes.

Q. On P-2, Doctor, is that the right side of the right ankle as we look at the picture? A. That is a lateral view of the right ankle with the outside of the ankle in contact with the film.

40

Q. That would be the right? A. This is the right ankle. This would be the outer side of the

Nathan J. Fruat, for Plaintiff—Re-direct.

ankle with the foot down like that (illustrating), a lateral view. The other film was with the foot put down that way (illustrating).

Q. Well, Doctor, where is the bone which appears in the upper left of P-4 in P-2? A. It comes down like this (indicating), down through here, up here and in here (indicating). It is hidden behind the part which forms the astragalus, this bone here (indicating). 10

Q. But what we see, is that another bone that shows in P-4? A. Yes. That is the same as that, yes.

Q. And in that, looking at P-4, does that line that you have identified as a fracture line, does that show in P-4? A. No, it does not show in this film.

Q. You say it does not show? A. In the other view, yes. 20

Q. And this (indicating) is a line? A. That is a fracture line.

Q. With no displacements? A. No displacements.

Q. Sort of a crack, incomplete crack? A. That is perfectly cracked.

Re-direct examination by Mr. Weinberg:

Q. Just one question I forgot to ask you, Doctor. What is the reasonable price of those x-rays? A. The x-rays are not charged by me. They are charged by the hospital. I have nothing to do with charging the x-ray films. 30

Q. That is in the hospital bill? A. That is in the hospital bill, yes.

Irene Harris, for Plaintiff—Direct.

IRENE HARRIS SWORN in behalf of plaintiff Hendler:

Direct examination by Mr. Weinberg:

10 Q. Miss Harris, what position do you hold in the Beth Israel Hospital?

Mr. McLaughlin: I will admit Miss Harris is the custodian and probably brought the records here. I will admit that these are the bills of the hospital.

Mr. Weinberg: It is admitted that the two bills, one for ninety dollars and the other for twenty-nine dollars, are the bills of the Beth Israel Hospital in the case of Fannie Hendler.

20 Q. Miss Harris, this is the record of your hospital, is it? A. Yes, it is.

Q. Will you tell us when Mrs. Hendler was admitted to the hospital? A. She was admitted July 19, 1933.

Q. And can you tell us what room, if any, she occupied? A. She occupied room 521.

Q. Does the record show whether there was any nurse in attendance?

30 Mr. McLaughlin: Has Miss Harris any personal knowledge of that?

Mr. Weinberg: I am not going to ask anything with regard to the diagnosis.

Mr. McLaughlin: I understand that, but as the Court well knows the hospital records are used more, if anything, to refresh the recollection of the person who made the notes on them.

40 The Court: You have not any personal knowledge, have you?

Henry H. Kessler, for Defendant—Direct.

Witness: No, I have not.

Mr. Weinberg: I have never tried to use records and I am not intending to now aside from those facts I see it cannot be objected to. However, is there any objection to my inquiring—

10

Q. When was Mrs. Hendler discharged or when did she leave the hospital? Will the record show that? A. She was discharged from the hospital July 30, 1933.

Q. And was there, according to your record, about twelve days? A. Yes.

(Hospital records offered in evidence and marked Exhibits P-4 and P-5.)

20

HENRY H. KESSLER sworn in behalf of defendant Hendler.

Direct examination by Mr. Weinberg:

Q. Doctor, you are a practicing physician and surgeon of the State of New Jersey? A. I am.

Mr. McLaughlin: I will admit the doctor's qualifications.

30

Mr. Weinberg: You will admit his qualifications as a surgeon as well as a general practitioner?

Mr. McLaughlin: Yes.

Q. You are connected with a number of institutions, are you? A. I am.

Q. What ones? A. Newark Beth Israel Hospital, the Newark City Hospital, the Hospital for Crippled Children, the Newark Memorial Hospi-

40

Henry H. Kessler, for Defendant—Direct.

tal, Irvington General Hospital, several other hospitals; I am director of the State Rehabilitation Clinic in Newark.

Q. And you have been practicing how long? A. Fifteen years.

10 Q. Do you know the plaintiff, Mrs. Fannie Hendler? A. Yes.

Q. Have you any personal record with you at all in this case? A. I have an office record.

Q. Now, can you testify without refreshing your recollection—you may do so if you have to refer to your notes—I suppose there will be no objection to that—can you tell us when you first saw Mrs. Hendler? A. On July 18, 1933.

Q. And where? A. In the Newark Beth Israel Hospital.

20 Q. Now, was it the 18th or the 19th? A. It may have been the 19th.

Q. Have you a date there? A. I have the date of the accident July 18th, but I have not the date on my card that I saw her.

Q. Well, where was she when you did see her? A. She was in the hospital, in her room.

Q. And had she any cast on her at that time? A. No.

30 Q. Did you make an examination of her the first time you saw her? A. Yes.

Q. What examination was that, Doctor, and what did it disclose? A. It disclosed evidence of injuries to both legs and both ankles, which, in my opinion, were those of a fracture of the left ankle and a severe injury of the right ankle, a probable fracture.

Q. You were not in court here during the time Dr. Plain and Dr. Fruat testified, were you? A. No.

40

Henry H. Kessler, for Defendant—Direct.

Q. Did you have recourse to examination of any of the x-rays made of Mrs. Hendler's ankles? A. Yes.

Q. Did you make an examination of her ankle? A. Yes.

Q. And was what you stated a result of what you found from your own examination? A. When I first saw her, yes. 10

Q. Now, you afterwards confirmed your opinion as to what was troubling her? A. We had x-rays taken and these x-rays showed a fracture of the left ankle. I believe there was a fissure fracture or incomplete fracture of one of the bones of the other ankle. There was no displacement.

Q. Doctor, what, if any, treatment did you prescribe for her? A. Rest in bed and a plaster cast to the left leg. 20

Q. Who put the cast on? A. I believe I did.

Q. Do you know how long after the accident that was that you first saw her? A. I saw her the following day.

Q. Have you any record to show when that cast was put on? A. I have no record to indicate just when the cast was put on.

Q. Do you know how long that cast remained on? A. It was on about two months, to the best of my recollection. 30

Q. Do you know how many times you attended Mrs. Hendler in the hospital? A. I saw her every day in the hospital and saw her almost every day at home for some time.

Q. What did you do for her, Doctor, toward an attempt at effecting some amelioration of that condition, or curing it? A. Applying the plaster cast to the left leg and local bandaging to the right ankle and leg and keeping her in bed with the leg elevated and giving her general supportive treatment. 40

Henry H. Kessler, for Defendant—Direct.

Q. Did you make any examination of any other portion of her body other than her limbs? A. I do not recall.

Q. Do you recall whether or not you found any evidence of any injury to her body, chest or otherwise? A. I do not recall.

10 Q. Do you recall how Dr. Busch came to examine Mrs. Hendler? A. Yes. He came at my request because of the patient complaining of pain and weakness and dizziness and seemed to show evidence of a shock and affection of her heart and I felt it advisable to call in Dr. Busch because of her general physical condition.

Q. He was called in just as a heart man? A. Yes.

20 Q. Did you yourself find any symptoms of any difficulty there? A. I have already mentioned the fact that she had subjective complaints of pain in the region of her heart. She had weakness and shortness of breath.

Q. So you made no examination and called in Dr. Busch to take care of that? A. Yes.

Q. The symptoms you just mentioned, subjective or otherwise, can you definitely state their general origin? A. I believe they are complicating factors to her general injury.

30 Q. Had you known Mrs. Hendler before you first saw her at the hospital? A. No.

40 Q. And will you tell us, please—I may have asked you this before, but will you tell us what the treatment was that you gave her aside from the advice? A. There was nothing to do except to tell her to stay in bed; rest in bed was very important, of course, and change the position of her limbs daily because of the cyanosis or bluish discoloration of her feet and toes, the swelling of the toes. That had to be adjusted during the day con-

Henry H. Kessler, for Defendant—Direct.

stantly, because she had a great deal of pain in both ankles. As a matter of fact, she had as much pain, if not more, than she did in the left, which had the plaster cast on.

Q. Well, the plaster itself would cause pain?

A. No, the plaster cast itself did not cause pain. It usually relieves pain, but a woman in her age 10
upsets the balance of a limb and the secondary embarrassment would be sufficient to give her pain with or without the cast.

Q. Would the swelling of the feet under the cast cause any pain? A. Yes.

Q. That remains as long as the cast remains firm? A. Yes, the pain remains because of the swelling of the foot.

Q. Can you tell us when you last attended Mrs. Hendler? A. She was at home a long period of 20
time, never got out of bed, and gradually we got her up on crutches after removing the cast and she was given massage and manipulation and she was taught how to walk again with the aid of crutches.

Q. Under whose instructions? A. My personal instruction. I helped her to get off the bed, helped her to adjust her limbs and then she came down to my office for further treatment.

Q. When was she first able to get out of the 30
house? A. I do not know the first day she left the house, but I do know the first day she came to the office.

Q. When was that? A. October 2, 1933.

Q. And how did she come to your place, with what assistance? A. She came down with her daughter and I believe she came in an automobile.

Q. I mean did she carry anything, a cane or otherwise? A. She came with a crutch, crutches.

Q. And who ordered her to use crutches? A. 40
I did.

Henry H. Kessler, for Defendant—Direct.

Q. Do you know whether she was in a wheel chair at any time? A. She may have come upstairs in the office in a wheel chair.

Q. Do you know anything about any special shoes she wears? A. Yes. I ordered special shoes for her.

10 Q. And what was the difference about those shoes than the ordinary shoes? A. They are reinforced and had to be special orthopedic shoes in order to give her support to her weak foot and weak ankle.

Q. Do you know whether she wore those shoes? A. Yes.

Q. When did you last know that she was wearing that type of shoe? A. January 8th, I know she was wearing that type of shoe, of this year.

20 Q. You do not know how many different pairs she wore? A. No, I do not.

Q. Doctor, have you sufficient data before you to tell us the number of visits you made and the services that you have rendered? A. I have no data before me to indicate the number of visits I made to her at home. I saw her every day in the hospital and I daresay for a period of three or four weeks I saw her almost every day at home, and I saw her practically every other day after
30 that for a period of another month until she came to the office. There were some days I came twice a day to her home, because she had a great deal of pain.

Q. Well, do you know personally about the number of visits and the amount of service you rendered to give us what a reasonable charge would be? A. I sent her a bill for \$150 and I think that is a most reasonable charge for this kind of work.

40

Henry H. Kessler, for Defendant—Cross.

Cross-examination by Mr. McLaughlin:

Q. Has she paid? A. No.

Q. No? A. No.

Q. I understood you to say, Doctor, that you applied a local bandage to the lady's right leg, is that correct? A. Yes.

Q. Doctor, would you be good enough to look at P-4 and P-2, which are x-rays of July 30, 1933, at the right ankle we have been told, is that correct? A. Yes.

10

Q. Doctor, it has been testified here by a doctor on the stand who told us about x-rays that they show the right ankle in a cast. Does that show the right ankle in a cast? A. This picture does not show the right ankle.

Q. Will you look at the other one? Does that show the right ankle in a cast?

20

Mr. Weinberg. There is no testimony that the right ankle was ever in a cast.

Mr. McLaughlin: Dr. Plain testified that the picture showed it was in a cast.

The Witness: There is some sort of apparatus in back of this heel, but it is not a cast.

Q. The apparatus on the back of the heel, that is to support the foot while the picture is being taken? A. I do not know what it is for.

30

Q. Well, did you hear Dr. Fruat testify that it was such a support for the foot while the picture was being taken? A. I did not hear him.

Q. Was the right ankle ever in a cast, Doctor? A. I do not know. I do not think so.

Q. Well, you do remember, don't you? I mean you are the doctor who supervised the treatment, weren't you? A. As far as I recall, I do not think there was a plaster cast applied to the right leg.

40

Henry H. Kessler, for Defendant—Cross.

Q. And you said, Doctor, that there was severe injuries—withdraw that. I note that those pictures of the right ankle, Doctor, both pictures, show that the date of the film is July 30, 1933, in contradistinction of the left pictures which are July 19, 1933. Am I correct in that? A. Yes.

10 Q. You said, Doctor, that the lady had a severe injury to the right ankle following a fracture? A. Probable fracture.

Q. Following? A. I didn't say following. I said probable fracture.

Q. And severe injury to right ankle, probable fracture? A. Yes.

Q. And that fracture was not incurred on May 23, 1933?

20 Mr. Weinberg: Well, does the doctor know anything about what occurred in 1933 or do we know aside from the testimony that the right knee was struck slightly?

Mr. McLaughlin: We know that the lady had an alleged accident May 23, 1933, to the right leg, and we further know that this doctor, a very reputable physician and surgeon, treated this lady and following an accident on July 18, 1933; for some reason there is not any picture taken of the right ankle until the end of July, whereas the left ankle is taken immediately. Now, I ask the doctor whether or not in his opinion the injury which he found to the right ankle, severe injury, possible fracture, as the doctor says, might have been sustained in an accident in May or July.

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Mr. Weinberg: I am objecting to it for the reason that it is not disclosed in the evidence and that is all we are concerned with. If the doctor will answer, although

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Henry H. Kessler, for Defendant—Re-direct.

it is not cross examination, tell us what happened in April or May, then there cannot be any objection to Mr. McLaughlin's question.

The Court: No. I will allow the question. Plaintiff's counsel prays an exception to this ruling of the Court.

10

Exception noted as ground of appeal.

Witness: May I take the x-ray into consideration in forming my opinion? I cannot without it.

Mr. McLaughlin: Do anything you want.

Witness: Well, it is my opinion because of the local condition I found at the time that this happened, in the nature of the fissure fracture, that this condition could not have occurred May 23rd, but occurred at a later date than May 23rd, namely, July 18th.

20

Q. Did you get a history of the accident, any injury to the right leg of May 23, 1933? A. I do not recall.

Q. That would be of some importance, wouldn't it, in treating the case? A. Yes.

Q. You got a good result on both of the ankles, didn't you? A. The right ankle is all right, but the left ankle I would not say it is a very good result, because there are too many complicating factors.

30

Q. Would you say it is a good result? A. It is a fair result.

Re-direct examination by Mr. Weinberg:

Q. What is the matter with the ankle to keep you from saying that she did not obtain a good result? A. Well, you see, both bones of the ankle

40

Henry H. Kessler, for Defendant—Re-cross.

were broken and that has caused a permanent flattening of her foot, a permanent widening of the ankle joint, persistent swelling and marked circulatory disturbance.

10 Q. Well, now, the condition which you alone observed, in your opinion is that temporary or permanent? A. She has a permanent functional disability of the left foot and ankle.

Q. Meaning by that? A. That she has stiffness of the ankle, weakness in the foot, and all of which will cause inability for her to stand a long period of time or walk for long periods of time permitting her to carry on the routine of future life.

Re-cross examination by Mr. McLaughlin:

20 Q. Doctor, that left ankle was not broken all the way across, was it? A. Yes, it was.

Q. Why, isn't it a fact that the inner corner and the outer corner were fractured, isn't that so? A. It is not a corner. The bone was broken across.

Q. Is that the picture? A. Yes. All you have to do is look at it. That is broken through into the joint and this is broken through into the joint (indicating).

30 Q. Is there any damage in the joint itself? A. Yes.

40 Q. What damage? A. Right here (indicating), instead of having a normal, uniform, smooth contour to this side of the joint—you must remember the joint is more than simply the two surfaces of this lower big bone, the big bone of the leg and the upper surface of this astragalus bone. That is only part of the joint. The joint consists of all the bony constructions in apposition from the tip of this joint to this joint (indicating) and that

Henry H. Kessler, for Defendant—Re-direct.

Ann Gardner, for Plaintiff—Direct.

capsule is broken and torn and the conformation of this bone has been altered so that instead of having a smooth area you have a rough area and that is a primary cause of arthritis.

Q. And you say this lady has that? A. Yes.

10

Re-direct examination by Mr. Weinberg:

Q. What is arthritis? A. A destruction or change or alteration of the normal structure of a joint due to injury and injury in the nature of fracture that goes into the joint.

Q. Is that disabling? A. Yes. It is like walking on an open sore in the bottom of your foot, except the opening is on the ankle.

Q. And is that arthritis at the age of the subject we are discussing curable? A. It can be relieved to some extent by proper support, but it is not curable unless you restore the normal relationship of the entire joint, and that cannot be done.

20

ANN GARDNER, sworn in behalf of plaintiff Hendler.

Direct examination by Mr. Weinberg:

30

Q. Miss Gardner, what is your occupation? A. I have a nurse's registry.

Q. What does that mean? A. That means I send out nurses whenever I have a call.

Q. And can you tell us whether you recall any services rendered to Mrs. Fannie Hendler or Frances Hendler? A. Yes.

Q. Can you tell us when you supplied nurses? A. Yes. From August 1st—

40

Ann Gardner, for Plaintiff—Direct.

Mr. McLaughlin: Just a minute. This testimony is new to me, a lady who did not render services and saying she did this and that. The lady has not herself testified she is a nurse.

10 Witness: Yes, I am a nurse. I am an R. N.

Mr. McLaughlin: Whether that is so or not, there is no evidence——

Witness: I supply the nurse.

The Court: Wait until you are asked questions.

(Question read).

Mr. Weinberg: I will say if you supplied first.

20 The Court: I do not see the competency of it. The best evidence would be the testimony that the services were rendered.

Mr. Weinberg: That would be the testimony of the individual nurses.

30 The Court: Yes. The question is simply whether or not she supplied nurses. Now, as she has testified, the inference is that she is expecting to testify that she has supplied these nurses, not that she has any personal knowledge of their services.

Mr. Weinberg: Well, she might.

The Court: Well, you will have to develop that. You cannot leave the Court in any position to speculate. If you can show she has any personal knowledge I will allow her to say it.

40 Q. Miss Gardner, do you know whether any nurses supplied by you actually rendered services to Mrs. Hendler? A. Yes, absolutely.

Q. And what is your knowledge based on?

Ann Gardner, for Plaintiff—Direct.

The Court: Do you wish to cross examine on that?

Mr. McLaughlin: I think we are entitled to have Mr. Weinberg's question answered.

The Court: Oh, you asked her what it was based on.

Mr. Weinberg: Yes, sir. 10

(Question read.)

A. The payment of the commission by the nurses supplied.

Q. You have never visited Mrs. Hendler? A. No, never saw her.

Q. Now, these nurses that you have, are they permanently on your registration? A. That is right, and always report back after each time they leave a case. 20

Q. But they do not always remain with you? A. Well, no, I wouldn't say that. Lots of times they are out of town, called away for sickness or one thing or another.

Q. So to make it clear is the only way you know you recommend them to go and you get some pay from them? A. That is right.

Q. But whether they have gone where you sent them, you personally have no knowledge? A. Well, only what they report. 30

Q. But you personally? A. No.

Q. Meaning to say you were not on the premises and did not see them administering to Mrs. Hendler? A. No, that is right.

CROSS-EXAMINATION WAIVED.

Recess for one hour.

George Hendler, for Plaintiff—Direct.

AFTER RECESS.

GEORGE HENDLER SWORN in behalf of plaintiff Hendler.

Direct examination by Mr. Weinberg:

10 Q. The plaintiff, Fannie Hendler, is your mother? A. Yes.

Q. What is your father's name? A. Isaac Hendler.

Q. Did you lay out any money for your father in the care of your mother, medical care and otherwise? A. Yes.

Q. Will you please tell us what amount you laid out and for whom?

20 Mr. McLaughlin: I object to that. There is no suit here by George Hendler for anything.

The Court: No, the question was did you lay it out for your father.

30 Mr. McLaughlin: Well, if he laid it out for his father or not, it seems to me the suit here is not for anything that may have been expended by this man. There is a claim here that Isaac Hendler spent some money, and if this man spent some money for the father I do not think that is material.

The Court: Well, isn't there a line of cases that you are relying on where it is expended by a member of the family?

Mr. Weinberg: I am just relying on the ordinary law of agency.

The Court: You are proceeding on the theory that he did it for his father and on his father's responsibility to him?

40 Mr. Weinberg: Yes, sir.

George Hendler, for Plaintiff—Direct.

The Court: All right.

Mr. McLaughlin: Well, on your Honor's own language, it is quite obvious this man claims to have spent some money himself. Well, if he spent some money himself, I do not see on what theory the father can recover, and simply because he is the father he is an entirely different entity, and your Honor referred to some line of cases where it is expended by a member of the family. Undoubtedly there is, if your Honor has it in mind. I state that I know of no such line of cases. I do not see because my brother is responsible for something and I pay some money which takes care of that responsibility that my brother can sue, saying he paid and took care of that responsibility when I all the time spent my money, whether it is my brother or not. I do not think it is admissible. 10
20

The Court: It all depends, according to the theory we are now considering, whether or not the advance was made upon the request of the father and for his account, and that is what you intend to prove?

Mr. Weinberg: Yes, sir. If this defendant is liable, he is liable to the father for his losses, and between the two it is the father's business whether he gives it back or not, but it is his agent, the same as if the father borrowed the money from the bank. 30

The Court: Yes. In other words, it was really a loan, if this witness is laying it out for his father, or paying it out for his account, just as if the father went to the bank and said, "Will you pay these 40

George Hendler, for Plaintiff—Direct.

nurses?" and they said, "Certainly," and charged it to his account. Now, I understand that is the theory you are proceeding on here.

Mr. Weinberg: Yes, sir.

10 The Court: Well, if the testimony sustains it I am agreeing with you, but the testimony must sustain that contention.

Mr. Weinberg: I think the question was asked by your Honor.

The Court: You ask the question whether he was doing it for his father.

(Question read.)

20 Mr. McLaughlin: I object to that question. I do not think that question is within the scope of your Honor's theory, if he is taking his father's money and paying. That is not within that question. This man says he spent his own money.

30 The Court: It seems it should be made plainer. That question is a little bit ambiguous. It might not be fully understood that he was expending it for his father's account. I am willing to let you ask any question to bring out the facts, if they be facts, that this witness disbursed any money for his father's account.

Q. Using that language, Mr. Hendler, did you disburse any money for your father's account in and about endeavoring to cure your mother's wounds in the accident in question? A. Yes.

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

40 (Exception noted as ground of appeal.)

George Hendler, for Plaintiff—Direct.

The Court: You may cross-examine him on that.

Q. And will you tell us for what you laid out money, if you know, and to whom? A. The doctors, nurses, crutches.

Q. Well, go ahead. A. The doctors, nurses, 10
crutches, wheel chair, nurses' board, private ambulance; medically, well, gauze and bandages and adhesive tape.

Q. Did you pay the doctors anything on account? A. Yes.

Q. To whom? A. Dr. Feinberg, Asbury Park—

Mr. McLaughlin: I move that be stricken out.

Mr. Weinberg: There does not seem to be any proof the doctor attended her. 20

The Court: Will you supply the proof that Dr. Feinberg treated the plaintiff?

Mr. Weinberg: Well, I forgot to ask whether they had any temporary assistance there.

The Court: All right. If you omitted that by inadvertence. I will admit the testimony.

Mr. McLaughlin: I object. 30

(Counsel argue.)

Mr. Weinberg: I shall withdraw from this witness any question as to the value of the medical service. It is before the Court and it does not make any difference whether it has been paid or not, so I shall withdraw all of that and save time. It could not be more than one visit I was trying to bring in, anyway. 40

George Hendler, for Plaintiff—Direct.

Q. As to the nurses, do you know whether your mother had nurses? A. Yes.

Q. How do you know? A. I visited her every day and seen them there.

Q. Did you visit the nurses in Beth Israel Hospital, or visit her when she had nurses? A. Yes.

10 Q. And were you there both day and night?
A. A good part of the day and a little while during the night.

Q. Do you know who the nurses were? A. Not necessarily by name.

Q. But did you recognize the nurses who took care of your mother in the hospital? A. In the hospital I recognized the nurses.

Q. But did you personally pay those nurses?
A. I did.

20 Q. For what purpose? A. For nursing my mother.

Q. Now, will you tell us, if you can, to whom you paid and for what, keeping, if you can, separate when they were paid one from another?
A. You want me to tell about the nurses first or do you want me to start in Asbury Park? I had nurses in Asbury Park also and paid.

30 Q. No, they were there only that one evening.
A. The evening and the day. They charged for the day. If they come in and stay three or four hours they charge for the day.

Q. Just get along to Newark.

40 Mr. McLaughlin: I understand this witness is now going to attempt to give figures that are said to have been paid nurses. He is not going to say he paid Miss Jones so and so and Miss Smith so and so. That certainly is no proof. If any such nurses were used the nurses are the ones to testify

George Hendler, for Plaintiff—Direct.

and they are to testify to the reasonableness of the charges.

The Court: I will agree with you, unless that proof is supplied. The order of proof is in the discretion of the Court, but unless that proof is supplied this testimony will have to be stricken out. Unless proved these payments were reasonable it will have to be stricken out. 10

Mr. McLaughlin: The order of proof is important. I mean we have one very nice lady who was going to swear this bill through and now we are going to have a gentleman who is going to do the same thing. Now, we do not have the people who did the work. I respectfully submit the order of proof is quite important and until the proper proof is supplied that figures are not in the picture at all. 20

Mr. Weinberg: I cannot agree with counsel in that at all. The matter in the first instance of the reasonable charge is one which ordinarily appeals to the general knowledge the Court has on the subject. Now, I propose, with the Court's permission, of course, to have this witness to testify to just what Mr. McLaughlin is objecting to my having him testify to. I want to make that clear on the record. I want him to testify to the amount he paid nurses, whether he can give names or cannot, to cover the periods; then I propose to show what the nurses—we cannot follow nurses all time—by a competent witness what the ordinary charge is of a nurse in the community, and I think that makes complete proof as to the price paid and the reasonableness of the charge. 30 40

George Hendler, for Plaintiff—Direct.

10 The Court: Yes, I think so too, provided the form in which it is given by this witness is such that it may be matched up with the testimony you propose to offer as to reasonableness; in other words, it must be in such form that a man putting two together can determine what is a reasonable charge taking the testimony as the truth.

Mr. Weinberg: If there is a doctor in the court—

20 Mr. McLaughlin: Your Honor, here is a proposition where somebody says, "I was down to see my mother," and he says he saw a nurse and does not name her and he says he paid so much money. How does he know what services the nurse rendered and then they are going to have Mr. Hendler on the stand and because Mr. Hendler says he paid his wife and sister and the nurse so much, is that reasonable? How does Dr. Vanderhoff know? Why all this mystery about it?

30 Mr. Weinberg: There is no mystery here and there is no mumbo-jumbo business that counsel stated yesterday in this case. We are trying to put in the proof as we have it and if that theory of Mr. McLaughlin is right, if the nurse leaves or dies, no matter what the amount, it cannot be proved.

The Court: You are trying to get on without the nurse. You have not the nurse here.

Mr. Weinberg: No, we have not.

40 The Court: Now, the reason you have not got the nurse has not been disclosed, but, nevertheless, if you can offer legal proof of the service of these nurses and the

George Hendler, for Plaintiff—Direct.

value of these services it is for me to hear it.

Mr. Weinberg: That is what I am attempting to do.

The Court: Now, I think Dr. Vanderhoff is competent to testify what is the reasonable charge for nurses and if this witness can show that those nurses worked and you have that testimony, that is, the number of days and so forth that testimony of Dr. Vanderhoff, I think, is legal evidence.

10

Mr. Weinberg: Of course, Dr. Vanderhoff does not have to take the stand if he does not wish to.

Mr. McLaughlin: Of course he does not. He is in call for the defendant. With four doctors in court this morning and four more this afternoon, that one doctor should not be subjected to embarrassment.

20

Mr. Weinberg: It shows the tremendous confidence I have even in the doctor for the defense.

The Court: Of course, what you are asking Dr. Vanderhoff to do is to give expert testimony as to value. Now, I do not think he is compelled to take the stand if he does not want to.

30

Mr. Weinberg: He is not. I am not asking for this as a pure matter of accommodation or because I cannot get it. The medical men, as counsel says, are not here. If anyone comes in before my case is closed I will be glad to call on someone other than Dr. Vanderhoff.

The Court: Aren't there some other medical men coming here? I was asked a little while ago to sit after a quarter after

40

Alfred Manlet, for Plaintiff—Direct.

one to let some medical men testify. Are they coming in later?

Mr. Weinberg: They are physicians for the other plaintiff. If I can use them at this time, because I intend to close my case before they start in.

10

(Addressing witness.) Will you step down?

I understand there is another physician in the courtroom.

ALFRED MANLET SWORN in behalf of plaintiff Hendler.

20

Direct examination by Mr. Weinberg:

Q. Doctor, do you practice medicine in New Jersey? A. Yes.

Q. How long have you practiced? A. Since 1922.

Q. And are you connected with any hospital?

A. Connected with the Newark Memorial Hospital, Presbyterian Hospital, Beth Israel Hospital, New York Manhattan General Hospital, and Poly-clinic Hospital and several others.

30

Q. Now, are you familiar with the standard charges of nurses in the City of Newark in the year 1933, particularly from July 19, 1933, until, we will say, the end of the year? A. Well, to my knowledge—

Mr. McLaughlin: I think the answer calls for yes or no.

The Court: He asked, "Were you familiar?"

40

Witness: I am familiar.

Alfred Manlet, for Plaintiff—Cross.

Q. Are the charges standardized? A. They are standardized with two exceptions. These charges, what I understand—

Mr. McLaughlin: What you understand?

Witness: What I know. They are principally standard for services rendered, on the time of service. They have the eight hour three shifts or the twelve hour two shifts. The twelve hour is \$7 a day and the other, eight hour \$5 a day. 10

Q. And is that the same day or night? A. Yes.

The Court: What is a fraction of that period, one hour or two hours?

Witness: That is a special exception. They have the regular duty nurse who charges so much an hour. 20

The Court: I did not mean that. Where a nurse is called in and she remains on duty an hour or two or three, is the charge based on seven or eight hours, or the particular time?

Witness: My experience has been, when I call a nurse if she works less than the allotted time she was paid full time unless your arrangement had been made before the nurse was engaged by the hour, as they sometimes do. 30

The Court: In other words, if a nurse came in and she worked a less number of hours than eight she would get paid for eight hours.

Cross-examination by Mr. McLaughlin:

Q. Did you treat or have anything to do with the treatment of Mrs. Hendler? A. No, sir. 40

George Hendler, for Plaintiff—Recalled—Direct.

Q. Do you know anything about her treatment at all? A. No, sir.

10 Mr. McLaughlin: I ask that the doctor's testimony be stricken out. He knows nothing about who the nurses were or when they worked or anything else. He gives you something that he understands, which may be all right, good doctors' practice. We are dealing with a separate case.

The Court. Motion denied.

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

Exception noted as ground of appeal.

20 GEORGE HENDLER recalled in behalf of plaintiff Hendler.

30 The Court: Now, this witness' testimony must be brought within the information we received from the doctor. The doctor says that nurses worked on the basis of eight-hour a day employment, they got \$5, and those who worked on the basis of twelve-hour a day employment got \$7, and any nurse who works on a fraction of that time gets paid for the full time. Now, if he knows what he was paying them he can tell us.

Direct examination (continued) by Mr. Weinberg:

40 Q. Now, you first have to tell us, Mr. Hendler, if you know when your mother had any nurse and if you know how long per day these nurses attended her.

George Hendler, for Plaintiff—Recalled—Direct.

Mr. McLaughlin: I do not think the man can testify to that, even though he might be very willing to guess at it. He visited her frequently, sometimes daily, sometimes he was there at night. I submit he would be a very willing witness, but he cannot under oath speculate and guess at something obviously he does not have his own knowledge of. 10

Mr. Weinberg: I do not think we ought to anticipate how much a witness knows or does not know. He cannot say that a man cannot know that a nurse was on in the daytime or nighttime.

The Court: Did you hire the nurses yourself? 20

Witness: I directed the hospital to hire these nurses.

The Court: And after that direction the nurses came in.

Witness: Correct. I notified the superintendent of nurses at the hospital.

The Court: Well, did you specify the basis? 30

Witness: I asked her to charge—the superintendent of nurses what they would charge.

The Court: And did you specify which basis you were going to work under?

Witness: She told me. The superintendent of nurses told me they worked twelve hours a day.

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

The Court: Strike it out.

Well, cannot you tell us upon what basis you employed these nurses. Was it a twelve-hour basis? 40

George Hendler, for Plaintiff—Recalled—Direct.

Witness: Twelve-hour basis.

The Court: In other words, they were to work twelve hours?

Witness: Twelve hours at night and twelve—twelve hours on and twelve off.

10 Q. Now, did you pay any of these nurses with whom you made the agreement to work twelve on and twelve off? A. Yes.

Q. First can you give us any names? A. I never knew their names.

Q. Who supplied those nurses? A. The superintendent of Beth Israel Hospital.

Q. You are speaking now of the period limited to the Beth Israel Hospital? A. Correct.

20 Q. And to whom did you pay the money, the Beth Israel Hospital or to the nurses? A. To the nurses.

Q. Now, will you tell us what you paid for day nurses and night nurses, if you can separate them?

30 Mr. McLaughlin: I object to that on the ground that even assuming that Dr. Somebody has testified to a figure that there is nothing here to indicate to the jury a reasonable foundation or basis for payments to these people whose names he does not even know. Who knows if they were nurses or not, so far as the testimony in this case?

Mr. Weinberg: Are you going to assume that if the hospital supplied them?

40 The Court: Well, it seems to me a fair inference they were nurses if he went to the hospital. Now, the only thing we cannot assume, though, is that they worked for the period specified. Now, we must have some evidence that they worked for twelve

George Hendler, for Plaintiff—Recalled—Direct.

hours if they got \$7 a day for it or whatever they got.

Mr. McLaughlin: Your Honor overrules my objection.

The Court: Yes. Overrule it.

Defendant's counsel prays an exception to this ruling of the Court. 10

Exception noted as ground of appeal.

Tell us how you know how long these nurses worked, if you do know, that you paid.

Witness: Well, the day my mother went into the hospital I went to the superintendent of nurses and I asked—

The Court: No. Your own knowledge.

Witness: To my own knowledge they worked twelve hours. They worked twelve days to my own knowledge. 20

The Court: How often were you in and out to see your mother?

Witness: Well, during the day I practically spent the afternoon with her and in the evening I came in about 7:30 and went home 9:30. They would not allow visitors until after nine o'clock.

The Court: And these nurses were there every time you went? 30

Witness: Yes, sir.

The Court: All right. I think I will let him testify.

Q. Will you tell us, then, what you paid for the day and night nurses for the twelve days while your mother was at Beth Israel Hospital?

Mr. McLaughlin: I object.

The Court: No, not the lump sum; first we want to know how much you paid for a 40

George Hendler, for Plaintiff—Recalled—Direct.

specified period and then we can have the lump sum.

Witness: I paid \$14 a day for two nurses.

Mr. McLaughlin: I assume your Honor overrules my objection.

10 The Court: Yes.

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

Exception noted as ground of appeal.

Witness: I paid \$14 for two nurses. I also paid the hospital \$3 a day for board, for the nurses' board.

Q. How much a day did you pay? A. \$17 a day.

20 Q. That includes— A. Nurses and the board.

Q. —the nurses and board of the nurses? A. Correct.

Q. Now, did your mother have any nurses when she went home? A. Yes.

Q. Who hired those nurses? A. I did.

Q. And where did you get them from? A. I called up a lady by the name of Miss Gardner. She has a nurses' registry.

30 Q. Who is she, the lady who was in court this morning? A. Yes.

Q. And did you see any nurses come to your mother's home? A. Yes.

Q. Were you home every day? A. Every day my mother was in bed I was home.

Q. And did you see the nurses at all during the daytime when you were there? A. Yes.

Q. And do you know if there were any nurses there during the nighttime? A. There were.

40 Q. And did you make the arrangement with them for their pay? A. I did.

George Hendler, for Plaintiff—Recalled—Direct.

Q. And did you pay them? A. I did.

Q. I might add how do you know whether they were nurses? A. Calling the registry, this nurses registry, asking for nurses.

Q. Do you know the usual uniform of a nurse?
A. Their uniforms?

Q. Yes. A. Yes. 10

Q. And were these the uniforms that the professional nurse uses and wears? A. Yes.

Q. Now, for how many days did your mother have day nurses?

Mr. McLaughlin: I object. He is incompetent to testify to that.

The Court: Well, if he knows.

If you know you can tell us. 20

A. About fifty-six days.

Q. How do you figure that, from when to when?

A. From the first of August to the second or the first of October; somewhere around then.

The Court: Now, were these nurses employed on the basis of seven hours or five hours?

Witness: Twelve hours.

Q. And did you have the same nurses there day time that you had at night time or different ones? A. Different nurses. 30

Q. So that you figure approximately fifty-six days with two nurses. Well, how long did you have the two nurses there? A. I had both nurses for fifty-six days.

Q. They both came on together and quit together? A. No, they did not come on together.

Q. I mean did they start their service at about the same day? A. Correct. 40

George Hendler, for Plaintiff—Recalled—Direct.

Q. And when you dismissed one you dismissed the other one? A. Correct.

Q. And what was their pay? A. \$14 a day.

Mr. McLaughlin: I object to this line of testimony.

10 The Court: Yes, you may have an exception.

Exception noted as ground of appeal.

Q. No charge there for board in that \$14, there was no charge for board? A. Not to me there was no charge.

Q. How many crutches were there? A. Two pair.

20 Q. How much? A. \$4 or \$5 a pair; something like that.

Q. And the wheel chair was not an expensive thing? A. No, it was not an expensive wheel chair. As a matter of fact, I hired the wheel chair. I rented it. I did not purchase it.

Q. How much did that cost? A. They charged me about a dollar and a half a week.

Q. For how long? A. A few weeks.

Q. Now, who bought the medicine? A. I did.

Q. Doctor's prescriptions? A. From the doctor's prescriptions.

30 Q. Now, do you remember whose prescriptions? A. Dr. Kessler, Dr. Feinberg, Dr. Fruat, Dr. Plain.

Q. They all prescribed medicines? A. Yes.

Q. Who bought them? A. I did.

Q. You personally made the purchases? A. The majority of them I did personally and when I didn't I laid out the money for it.

40 Q. Now, you are limited for what you paid for these things. Did you keep any exact account of them? A. I kept a small piece of scrap paper of what I was laying out for medicine.

George Hendler, for Plaintiff—Recalled—Direct.

Q. Well, have you got that? A. Well, I did not keep it any more. I got a total on it and destroyed it.

Q. Do you know how many bottles of medicine or whatever it was you did buy? A. Yes. I bought sixty bottles of medicine.

Q. How do you figure that? A. Well, it so happened that the medicine prescribed was a solution to keep saturating the gauze that was on my mother's leg. 10

Q. How much a bottle did you pay for it? A. It run about \$1.25 a bottle.

Q. Well, you had more than one kind of medicine? A. Yes.

Q. During the entire time? A. During the entire time.

Q. Now, Mr. Hendler, were you at your mother's home at the time your mother went to the shore in the summer of 1933? I mean in the city. I do not mean the house. A. I was in the city. I was. 20

Q. Do you remember whether Mrs. Meadows, your sister, was in the city the day your mother was hurt? A. She was not in the city.

Q. Do you know when she went away? When did she leave the city? A. She left July 4th.

Q. Do you know that? A. I beg your pardon? 30

Q. I say you know that of your own knowledge? A. I know that of my own knowledge.

Q. And with whom did she go away? A. With her husband.

Q. Were you present at the time when your sister had a conversation with your brother Meyer regarding her automobile? A. I was.

Q. Where did the conversation take place? A. We were sitting around the living room at 93 Hillside Avenue. 40

George Hendler, for Plaintiff—Recalled—Direct.

Q. And what did Mrs. Meadows say to your brother Meyer? A. She said to my brother Meyer, "I want you to take Mama out riding, and if you cannot make it get Jimmy, my chauffeur."

10 Q. Who was this Jimmy? A. Jimmy, he is a chauffeur for my sister.

Q. Is he a regular chauffeur? A. He was working on and off, chauffeured her around, because she has no license. She cannot drive.

Q. She what? A. She had no license.

Q. Now, I understand then, she left just possibly a week before your mother did or a little less? A. She left exactly about eleven or twelve days.

20 Q. What date did your mother go to the shore? A. My mother went to the shore around July 15th.

Q. Well, now, had Meyer driven her around before the accident? A. Yes.

Q. And after your sister had left? A. Yes.

Q. And had this Jimmy also done the same thing? A. Yes.

Q. After your sister left? A. Yes.

Q. And when Jimmy was not there did Meyer do it? A. Yes.

30 Q. What kind of a car did your sister have? A. A Buick.

Q. Did you know the Buick, recognize the Buick? A. I recognized it when I see it.

Q. Did you see it again after your mother was hurt? A. Yes, I did.

Q. Where was it? A. Wrapped around a pole down at the shore in Bradley Beach.

Q. Whereabouts at the shore? A. In Bradley, I believe.

40 Q. When did you see that? A. The morning of July 19th.

George Hendler, for Plaintiff—Recalled—Cross.

Q. You went down when you heard your mother was hurt? A. Correct.

Cross-examination by Mr. McLaughlin:

Q. Where do you live, Mr. Hendler? A. 62 Custer Avenue, City. 10

Q. Oh, you do not live at Hillside Avenue? A. No.

Q. Are you married? A. Yes.

Q. Your mother lives at Hillside Avenue? A. Correct.

Q. And your sister lives at Hillside Avenue? A. Correct.

Q. And Meyer lives at Hillside Avenue? A. Correct.

Q. What business are you in? A. Real estate business I was in. 20

Q. I asked you what business are you in? A. Real estate business.

Q. Are you connected with the Hendler's Uptown Bakery? A. No, I am not.

Q. That is a corporation, isn't it? A. I don't know.

Q. Do you own any stock in the Hendler's Uptown Bakery that you do not know whether it is a corporation? A. I do not own any stock. I do not know whether it is a corporation. I believe it is. 30

Q. Who is in that business? A. My father works there, my brother Meyer.

Q. Yes, anyone else? A. That is all.

Q. Who is the secretary? A. Who is what?

Q. The secretary of the corporation. A. The secretary?

Q. Yes. A. I don't know.

Q. Your sister Rose, isn't she? A. How should I know that? 40

George Hendler, for Plaintiff—Recalled—Cross.

Q. Do you mean you do not know? A. No, I do not.

10 Q. This particular—these payments that you made, you have told us you bought the medicine, you had both nurses at home and you hired them and you hired the wheel chair, you paid the money for the nurses at the hospital, you hired the nurses at home, you directed the hospital to hire the nurses, and did you pay for them? A. I did.

Q. And those payments were made with your own money, of course, were they? A. Correct.

Q. And that was rendering as best service as you could to your mother, wasn't it? A. I was laying it out for my father.

20 Q. Tell us what you mean by laying it out for your father. A. Well, exactly what I mean, he did not have any cash money on hand and he asked me to keep laying it out for him. These people wanted to get paid and I was advancing it.

Q. Advancing it for who? A. For my father.

Q. How did you pay the hospital? A. Cash money.

Q. The hospital bill? A. Surely.

30 Q. Have you a checking account? A. I paid the nurses by cash money. The hospital bill is still pending.

Q. How did you pay any of the doctors, if any? A. One doctor I paid.

Q. Who? A. Dr. Feinberg in Asbury Park.

Q. Did you send him a check? A. No, I didn't.

Q. You went down to see him? A. I was there the day we took Mother home and he demanded his money.

Q. He demanded his money? A. Surely.

40 Q. And you paid him? A. I did.

George Hendler, for Plaintiff—Recalled—Cross.

Q. Your father at that time had not asked you to advance any money for him, had he? A. My father had not been there at that time.

Q. Well, so you paid Dr. Feinberg on your own? A. Feinberg I paid on my own. Correct.

Q. Well, why did you say on your direct examination, under oath, that you advanced that money to Feinberg for your father? A. I did not say Feinberg. 10

Q. You hired the wheel chair? A. I did.

Q. Did you hire that for your father? A. I did.

Q. Where did you hire it? A. 1060 Broad Street, I believe. I am not sure.

Q. Some sort of a surgical supply store? A. Correct.

Q. How did you pay for the hire, in cash. A. Cash. 20

Q. Was that a loan to your father, too? A. I advanced it for my father.

Q. And what have you, if anything, to say that these are advances by you for your father and not money paid by you on your own? A. All I have is my father's word for it. That is sufficient for me.

Q. Did you give him a record? A. He asked me what the total was and I gave him the total. 30

Q. I see, you just gave him a figure? A. I explained to him what it was and I told him what the amount was.

Q. When did you do that? A. Well, I done that seven or eight months back.

The Court: Did he repay you?

Witness: No, sir.

Q. Has he promised to? A. Some day he will. 40

Q. What did he say? What was the laying out?

George Hendler, for Plaintiff—Recalled—Cross.

What was that talk? A. He said, "When I am in a position to pay you I will reimburse you."

Q. Was that all that was said? A. That is all.

Q. Was there anything said before that? A. No.

10 Q. Well, there must have been something said about the account or something. A. No, there is not anything said. He trusted me as I went along.

Q. Well, didn't he in the first instance direct you at all to do anything? A. He did not direct me. He asked me if I would advance the money for him, he has not got it. Well, I did.

Q. Where was this talk your sister had with your brother Meyer? A. What talk are you referring to?

20 Q. About taking Mama out riding. A. At my mother's house.

Q. At whose house? A. My mother's house, 93 Hillside Avenue.

Q. And when was that? A. July 4th.

Q. Were you there? A. Yes, I was.

30 Q. Who else was there? A. My brother Meyer was there and my sister Rose was there. I was there and my brother-in-law was there. My mother was walking in and out and I presume she listened to it. My kid brother was in the house at the time.

Q. And what was said? A. Rose says to Meyer, "I want you to take Mama out riding. If you cannot make it, I want you to get Jimmy and take her out," because she has not a license, she is not a licensed chauffeur.

Q. Had your mother ever been taken out riding in Rose's car before? A. She was.

Q. Was that the usual thing? A. No, it was not the usual thing.

40

George Hendler, for Plaintiff—Recalled—Cross.

Q. Prior to July 4th, had you ever seen your mother riding in Rose's car? A. Yes, surely.

Q. With Meyer driving? A. Once in a while Meyer and once in a while Jimmy.

Q. Well, why these specific directions on July 4th, when this had happened for some time at least previous that Meyer drove Rose's car and took your mother out, Jimmy drove Rose's car and took your mother out; why does Rose at this particular conversation tell Meyer to drive his mother when Meyer has already driven his mother? A. Why? 10

Q. Yes. A. Rose was leaving on the road with her husband to be gone three weeks, probably four weeks, and she wanted to make certain sure that her mother was taken out riding. That is why she instructed my brother to make sure he does it. 20

Q. But Meyer had been driving her some time prior to July 4th? A. That is correct.

Q. So was Jimmy? A. Yes.

Q. And Rose left the car in Meyer's custody? A. Well, Rose was home at this particular day she was leaving.

Q. And she was leaving and leaving the car there? A. Yes.

Q. And the car was right at 93 Hillside Avenue in the garage where Meyer lived? A. That is correct. 30

Q. Where his mother lived? A. 93 Hillside Avenue.

Q. So there was nothing at all unusual about Meyer driving your mother in Rose's car? A. Not unless he was instructed to.

Q. I see, every time Rose wanted him to take your mother she would tell him? A. She would tell him or tell her chauffeur. 40

George Hendler, for Plaintiff—Recalled—Cross.

Q. Was Meyer working at the time? A. Yes, he was.

Q. What business was he in? A. In the bakery business.

Q. You said that you were familiar with this Buick automobile, is that right? A. I said I could recognize it if I seen it.

Q. Yes, you said you knew it. A. If I seen it I knew it, certainly.

Q. That car was formerly owned by Meyer, wasn't it? A. That is something I could not tell you.

Q. Can you tell us whether after that the car was transferred to Hendler's Uptown Bakery? A. I do not know whether it was transferred or whether it was not transferred.

Q. The bakery, that has the father and mother and brother and sister, the plaintiff and defendant here in it? A. I do not understand you. My mother has nothing to do with the bakery.

Q. Hasn't your mother any stock in the bakery? A. My mother has nothing to do in the bakery.

Q. No stock in the bakery? A. She is no stockholder in the corporation I know of.

Q. I am talking about the particular corporation, your corporation, the Hendler corporation. A. I am talking about that corporation also. Not that I know of. I do not think she has any stock there.

Q. And later on, just around the time of the accident, do you remember that the car went from the bakery, where your mother, you say, did not have any stock in, where your father works, and where Rose is the secretary and Meyer is in, went from the bakery to Rose; you remember that? A. You say the car went from the bakery to Rose?

*George Hendler, for Plaintiff—Recalled
—Re-direct.*

Q. Yes, transferred title just about the time of the accident? A. Transferred that title of the car?

Q. Yes. A. I do not know anything about any transfer of title.

Q. Did you have anything to do with the quick transfer of title? A. In reference to what? 10

Q. In reference to the car going out of the bakery and into Rose. A. I do not know of any transfer, I told you.

Re-direct examination by Mr. Weinberg:

Q. When Mrs. Meadows told Meyer to take your mother out, that she was leaving, did she say how often he was to take her out, or anything of that sort? A. Yes, surely. 20

Q. Uh? A. Surely.

Q. What did she say? A. She said, "I want you to take mother out every opportunity you have and if you cannot make it get my chauffeur to do it."

Q. Now, what has the Hendler Baking Company, or whatever it is called, to do with this matter, do you know? A. I do not know.

Q. Who did you say was in that company? A. In the Hendler Bakery? 30

Q. Yes. A. As far as I know it is my brother Meyer. He has charge of it.

Q. Were you ever in that business? A. I was in that business about eighteen years ago.

Q. When you were a youngster? A. When I was a young boy.

Q. And was that company then in existence? A. No, it was not that company. My father was in the bakery business. 40

Q. He has been a baker for a good many years in Newark? A. In Newark he has been a baker now thirty-two years.

Isaac Hendler, for Plaintiff—Direct.

Mr. Weinberg: Is there any denial that the car is registered in the name of Rose?

Mr. McLaughlin: No.

10 ISAAC HENDLER, sworn in behalf of the plaintiff Hendler.

Direct examination by Mr. Weinberg:

Q. Mr. Hendler, you live in Newark? A. Yes.

Q. And you have lived here a good many years?

A. About thirty years.

Q. And you have been a baker and you still are a baker during most of those years? A. Yes.

20 Q. What is your wife's name? A. Fannie.

Q. And you have always lived with her as husband and wife? A. Yes.

Q. And you did in July, 1933? A. Yes.

Q. And still today? A. Yes.

Q. You still live with her as your wife? A. Yes.

Q. Do you remember on July 18, 1933, when she was hurt? A. Yes.

Q. When did you see her after the accident? A. The day after.

30 Q. And where did you see her? A. In the hospital.

Q. Which one? A. In Beth Israel Hospital.

Q. And how long was she in Beth Israel Hospital? A. About twelve days.

Q. And did you visit here there? A. Yes.

Q. Do you know whether she had nurses there? A. Yes.

Q. How do you know? A. She was in very bad condition.

40

Isaac Hendler, for Plaintiff—Direct.

Q. Well, were you there to see them? Did you see the nurses? A. Yes.

Q. Were you there in the daytime? Did she have a nurse then? A. She had nurses day and night.

Q. You know that of your own knowledge? A. Yes.

10

Q. Now, do you remember when she came home from the hospital? Not the day. I mean do you recall the fact that she did come home from the hospital? A. Yes.

Q. Did she during the time she was at home after having left the hospital have the attention of any nurses? A. She had different nurses, because she was in bed and nobody can nurse her. I am a workman. She had to get nurses there.

Q. I know. A. She needed to have them.

20

Q. Did she have them? A. Yes.

Q. Did she have them during the daytime? A. Night and day.

Q. Do you know that of your own knowledge? A. Yes.

Q. And about how long do you think you had nurses night and day for your wife? A. She needed them for night and day.

Q. How long did that keep up about, do you know? A. That I cannot tell you. She was eight weeks in bed.

30

Q. About how long did you have the nurses for her? A. About eight or nine days. I didn't count the days. I no had money to pay the nurses. My son paid for me and I cannot tell you exactly what it is. If a person lies on the bed and he needs something and nobody is at home to take care of her she needs nurses.

Q. Now, before the accident who did the work at home? A. My wife.

40

Isaac Hendler, for Plaintiff—Direct.

Q. What kind of work did she do? A. She cooked, she cleaned the home; one day in the week she called the City Hall for a woman to wash one day in the week and then after all the work she done herself.

10 Q. How is it now, do you have anyone helping?
A. I have a girl in my home.

Q. How long have you had the girl? A. Since she had the accident.

Q. And what do you pay per week? A. I pay \$9 a week, the girl and board.

Q. And what work does she do? A. She do everything that we need necessary in the house, because my wife is sick. She cannot do it.

20 Q. Now, I understand that your son George laid out money? A. He laid out all the money that was paid for nurses and doctors and for the ambulance.

Q. How did he come to lay out the money? A. Because I no got it and I told him to lay it out; if I get sometimes money I pay him back.

Q. George was not living home with you? A. No. He was a father of children, too.

Q. How long has that been? A. How long has he been a married man?

30 Q. With a family? A. About five years. He has two children.

Cross-examination waived.

40 Mr. McLaughlin: Your Honor, I move that George Hendler's testimony be stricken out on the ground that it clearly proves, out of the mouth of this witness, that there was not any agent. This witness said, according to the record just now, "I told him to lay it out or pay it out." I think it was, "Pay it out," and then he

Colloquy of Counsel.

said, "If I get money sometime I pay it back or I will pay it back." Now, I submit that there is not any contract of agency either expressed or implied in George Hendler. The father says, "If I get the money sometime I will pay it back."

The Court: Because of the use of the word "if"?

Mr. McLaughlin: Because of the use of the entire testimony of the witness.

The Court: Because if he said, "When I get the money I will pay him back," you would not argue the same way?

Mr. McLaughlin: I would not argue the same way. If a man said, "I have not the money, you pay it and I will pay it back." There is no question about whether he had the money. He told George to pay it and then he says, his exact language is, "If I get money sometime I pay it back." So there is no agency there. It is volunteered.

The Court: Well, of course, the argument is that the expression of the witness indicated contingency rather than a definite promise. Now, perhaps there is not any use of having any misunderstanding on that subject. Of course, the witness' language was not exactly the language of an expert by any means, and just exactly what he meant by that expression is practically a question for the jury. Nevertheless, there is no use to have any misunderstanding about it. Why not recall the witness and find out if there was any contingency involved in this proposition?

Mr. McLaughlin: It seems to me this man has done business thirty years and

Goldie Zipkin, for Defendant—Direct.

that language is clear enough, "If I get money sometime I pay it back."

10 Mr. Weinberg: His testimony cannot be stricken out, because it is not known in the practice of the law because a few witnesses may somewhat substantially differ from each other you cannot have any portion of the testimony stricken out. The jury takes it as it finds it and lets them decide it. You cannot ask it be struck out. It may be a matter of argument.

The Court: No, I am going to leave it to the jury as to what the contract was between these parties.

20 The jury will understand that in order that a recovery be proper there must be a request on the part of the father; in other words, the money must have been laid out at the father's request and for his account and there must be a promise to repay it. Whether that is inferrable is a matter for the jury to say and I do not think it is for the Court.

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

Exception noted as ground of appeal.

30

GOLDIE ZIPKIN, sworn in behalf of defendant Hendler.

Direct examination by Mr. Weinberg:

Q. Miss Zipkin, you were riding in an automobile driven by Meyer Hendler July 18, 1933? A. Yes, I did.

40 Q. And did something occur while you were out riding? A. Yes.

Goldie Zipkin, for Defendant—Cross.

Q. What happened? A. We met with an accident, the car.

Q. What was it? A. The car ran into a pole on Ocean Avenue.

Q. What happened just before it ran into the pole? A. We were driving along Ocean Avenue and when we got to Third Avenue I noticed the car swerve and turn around and noticed the car go into the pole. 10

Q. Was there any other car right around you at the time? A. No.

Q. Was there anything that you could see that caused him to do that? A. No, nothing.

Cross-examination by Mr. McLaughlin:

Q. What seat were you riding in, Miss Zipkin? A. In the front of the car. 20

Q. In the front of the car? A. Yes.

Q. It was a Buick sedan? A. Buick sedan. That is right.

Q. And where had you been? A. We drove toward Spring Lake and we were going back to Asbury Park.

Q. Where had you gotten into the automobile? A. At my hotel in Belmar. At the Columbia Hotel in Belmar.

Q. And then you drove toward Spring Lake? A. Yes. 30

Q. Which is very close to Belmar? A. That is right.

Q. And what did you do, turn around? A. We turned around to go back to Asbury Park.

Q. And the older lady, Mrs. Hendler, Mr. Hendler's mother, was in the rear? A. That is right.

Q. That is the older lady who was on the stand? A. That is right. 40

Goldie Zipkin, for Defendant—Cross.

Q. And Mr. Hendler was driving? A. That is right.

Q. Were you engaged to Mr. Hendler at the time? A. No, I was not.

Q. I beg your pardon? A. No, I was not.

10 Q. You were very good friends. A. Yes. Just like friends. Just as friendly as my other friends.

Q. So friendly that he came down from Asbury Park with his mother and took you in the automobile on the family party, is that it? A. With him and his mother, yes.

Q. And you proceeded down toward Spring Lake on the shore front, was it? A. That is right.

Q. In travel? A. No, no travel at all.

Q. What day of the week was this? A. Tuesday evening.

20 Q. Tuesday evening about the middle of July? A. Correct.

Q. And it was rather early in the evening, wasn't it? A. Around nine o'clock in the evening.

Q. Are you familiar with that part of that north Jersey coast? A. Oh, yes, very much.

Q. And you had driven with Mr. Hendler on that part of the shore before? A. No.

Q. Never? A. No.

30 Q. Never in a Buick along the ocean front with Mr. Hendler? A. Not near Belmar, no, not as I remember.

Q. Well, near where? A. I do not remember going down to the shore with Mr. Hendler.

Q. Not down to the shore, but riding around the shore front. A. Before that evening?

Q. Yes. A. No, I do not remember.

Q. Weren't you ever in an automobile with him before? A. Oh, yes.

40 Q. In a Buick, wasn't it? A. I am not sure whether it was a Buick or not.

Goldie Zipkin, for Defendant—Cross.

Q. Well, it was the same car you were in that night? A. I was in a Buick that night.

Q. And that is the car you had ridden in before with Mr. Hendler? A. I do not know whether it was or not.

Q. You never had any trouble with him up to the time of this accident? A. No. 10

Mr. Weinberg: I object. Immaterial.

The Court: She said no and we are by it.

Q. On this particular evening, Mr. Hendler, going down south along the shore, went down toward Spring Lake on his righthand side of the street or road or avenue or boulevard? A. Yes.

Q. And Mr. Hendler had not been drinking, had he? 20

Mr. Weinberg: I object to that. It is immaterial. Negligence is not predicated solely on a man being drunk or drinking.

Mr. McLaughlin: Well, let us see, your Honor. This is a party to the action. It seems to me she is the one who was trying to tell us there was negligence, according to Mr. Weinberg. I am not confined on cross-examination to Mr. Weinberg's idea of drinking or being drunk, or what not. 30

The Court: I will allow the question. The question is material for the reason that if this witness had been riding with a man who had been drinking it might raise a question of his negligence.

Mr. Weinberg: Well, we have not said he was drinking.

Q. Well, here is your chance, Miss Zipkin; was he drinking? A. No. 40

Motion for Non-Suit.

Q. And he had this good friend of his, you, yourself, on the front seat, and his dear mother, his old mother, in the rear? A. Yes.

Q. And he was proceeding along the road in a careful, normal, decent fashion? A. Driving along.

10 Q. And all of a sudden, out of a clear sky, you are into a stanchion, is that right? A. Yes.

Q. And that is all you know about it, isn't it? A. Well, outside of the car swerving.

Q. The car swerved for no good reason you could see, that is right? A. That is right.

Q. The man was driving normally, decently and carefully with you and his mother in the car? A. Driving along.

20 Q. And there was an accident and you were hurt; you cut your lip, didn't you? A. Yes.

Plaintiffs Hendler rest.

Defendant's counsel moves for a non-suit in favor of the defendants on the ground that no negligence has been shown on the part of the defendants.

(Counsel argue. After argument.)

30 The Court: Well, gentlemen of the jury, I am going to submit this case to you. I do not think it is a case for the Court to decide. I think it is a case for you to decide and for that reason I am going to submit the matter to you and, therefore, I will deny this motion and grant an exception to the defendants' counsel.

Exception noted as ground of appeal.

Goldie Zipkin, Plaintiff—Direct.

GOLDIE ZIPKIN recalled in her own behalf.

Direct examination by Mr. Penn:

Q. Where do you live? A. 52 Millington Avenue.

Q. Is that in Newark? A. Newark.

Q. Who do you live with there? A. My mother and dad. 10

Q. Were you at Belmar July 18, 1933? A. Yes, I was.

Q. What were you doing there? A. I was spending my vacation there.

Q. Do you work? A. Yes, I do.

Q. Where do you work? A. L. Bamberger & Company.

Q. In what department? A. In the statistical department, on the eighth floor. 20

Q. What is your salary? A. Twenty dollars.

Q. Twenty dollars a week? A. Yes.

Q. Now, July 18, 1933, you say you were at the Columbia Hotel in Belmar? A. Columbia Hotel, Belmar.

Q. Will you tell the Court and jury what occurred that day? A. That afternoon I received a 'phone call from Meyer Hendler telling me he was in Asbury Park visiting his mother and couldn't he come over and visit me and I said he could. He came over that afternoon and spent the afternoon on the beach and when he was going home he said he would bring his mother for a drive and would I come along. I said I would. Meyer and his mother came to the hotel at nine o'clock that evening. 30

Q. Where did you go? A. We went toward Spring Lake.

Mr. McLaughlin: Your Honor, this witness just testified to this. 40

Goldie Zipkin, Plaintiff—Direct.

Mr. Penn: Well, do I understand everything testified to on behalf of the other plaintiff—

Mr. McLaughlin: Isn't that so?

10 The Court: They are consolidated here. As I have it, we are trying two suits at once.

Mr. McLaughlin: Yes, sir.

The Court: And is the testimony to be regarded in one as applying to the other?

Mr. McLaughlin: There is no misunderstanding on my part.

20 Mr. Penn: Well, it is not acceptable to us. That is the reason I sat down before, that in justice to this plaintiff she should not have her case confused in the minds of the jury with Mr. and Mrs. Hendler. We are not related to that family.

The Court: Your view is that testimony in one of these cases is not in the other at all, they are not consolidated, they are two cases tried at the same time.

Mr. Penn: That is right.

30 Mr. McLaughlin: The very purpose of the parties was to save the Court's time and the jurors' time. It is the same action.

The Court: That is correct. Now, we have been listening to the other plaintiff's testimony until we come to your case. Now, when we come to your case we will have the testimony applicable to both, but so far the testimony is only applicable to Mrs. Hendler.

40 Mr. Penn: If your Honor will draw the jury's attention that they are not bound by this relationship that covers our rights.

The Court: Of course, when two cases are tried together it is usually understood

Goldie Zipkin, Plaintiff—Direct.

that testimony in one suit is applicable to the other if the testimony is regarded as given in both suits and that is the reason we try them together.

Mr. Penn: In so far as the facts are involved, not the relationship of the parties.

Mr. McLaughlin: Your Honor has the correct idea. I do not mean the medical on the Hendler case has anything to do with this young lady, but on the facts. 10

The Court: That is the way I understand it. The understanding I have of it is that you are trying these cases together with the stipulation that testimony given in one is regarded as given in both.

Mr. Weinberg: That is as I understand it. 20

Q. Now, you were going down Ocean Avenue, you say, and approaching Third Avenue in Belmar?

Mr. McLaughlin: We are going over the whole thing again.

The Court: Go ahead.

Mr. McLaughlin: I call the Court's attention to the major point in the case. The major point is that this young lady has been examined and cross-examined on the facts of the accident. Mr. Penn refused in turn to examine her when she was on the stand as to that. Now, I have no objection to the young lady in such detail as the Court permits telling what happened after the accident, but I do respectfully submit the witness has been on the stand and sworn and testified for the attorneys and cross-examined regarding the facts of the accident. 30
40

Goldie Zipkin, Plaintiff—Direct.

The Court: Well, I imagine you are not intending to go over that again.

Mr. Penn: No, sir.

Q. Now, what happened as you approached Third Avenue on Ocean Avenue?

10 Mr. McLaughlin: There is the same question.

The Court: Now, we will get through quicker by allowing this question.

Mr. McLaughlin: All right.

Q. Will you tell us that? A. We were driving along Ocean Avenue toward Asbury Park—

The Court: That is all he asked you.

20 Mr. Penn: I asked her what happened.

The Court: No. I am not going over the details of the accident again. We have been over that.

Q. Now, when this Buick car crashed into that lamp post, from that point on will you tell us what happened? A. Well, I was unconscious. The next thing I remember somebody washing my face with cold water. I do not remember anything after the crash until somebody started washing my face with cold water and then I was helped into an ambulance. We were driven to a private hospital or doctor's home, and as soon as we got in there the doctor noticed my lip and mouth bleeding and he said, "I will have to sew your lip. All right?" and I said, "Yes," and then he sewed my lip.

30

Q. Which lip was that? A. My upper lip.

Q. And did he also suture your lower lip so far as you know? A. No, but it was cut. He did not suture it.

40

Goldie Zipkin, Plaintiff—Direct.

Q. And what else? A. And I felt my teeth terribly loose and I asked him to help me, and my gums were cut, and he said he could not do anything to my teeth and gums, I would have to go to a dentist.

Q. Which teeth? A. It was my upper gum and my four teeth on the right where my lip was sewed. 10

Q. You say the front? A. The right side toward the front.

The Court: Now, if there is any specific thing about this specific cut that you feel has not been adverted to, if you want to call the witness' attention to it, I do not want to cut you off. I do not know what you have in mind, but of course, you have been over this subject. It has been testified to, but as I say, if there is any specific and particular occurrence that you think has not been adverted to in the examination I wish you would call the witness' attention to it and I am willing to have her testify. 20

Q. Now, you say the doctor sutured your upper lip? A. Yes, he did.

Q. And said he could not do anything for the teeth? A. That is right. 30

Q. And then did you stay at that doctor's place that night? A. No, for a while until he treated Mr. and Mrs. Hendler.

Q. Then what? A. He put us back in the ambulance and drove us to Mrs. Hendler's hotel in Asbury Park. Then I remember we rented a room that night. We had a private nurse in Mrs. Hendler's room for the entire night and the doctor came in and said he was sent from Newark. That was Dr. Plain. I asked him if he could do some- 40

Goldie Zipkin, Plaintiff—Direct.

thing for me and he asked me how I felt and I told him——

Mr. McLaughlin: Please do not tell us what you told the doctor. I object to that.

10 Witness: (Continuing) Well, he took care of me.

Q. What did he do for you? A. He strapped my right ankle and took care of my knee. He applied wet lotions to my knee and he dressed my lip and told me to try and rest.

Q. Now, were any other parts of your body hurt as a result of this accident? A. My teeth and my lip, my instep—my right instep and my knee.

20 Q. Now, when were you—where did you go? A. The next morning, the latter part of the morning, I complained about my teeth being terribly loose and the Hendlers took me to a dentist. This dentist said——

Mr. McLaughlin: Please do not tell us what anybody else said.

30 Q. Did this dentist do anything for you? A. Yes. He wired my teeth for me to keep them from shaking and he told me to see my own dentist.

Mr. McLaughlin: I object to the witness giving all the conversations.

Mr. Penn: I asked her what he did.

The Court: And then she started to say he told her.

40 Q. No, only what he did for you. Now, after he wired your teeth, what did you do? A. One of the Hendlers drove me back to my hotel and two young ladies packed my grip for me and they drove me back to Newark.

Goldie Zipkin, Plaintiff—Direct.

Q. And when did you arrive in Newark and where did you go to? A. Well, the latter part of the afternoon.

Q. That was July 19th? A. July 19th.

Q. And you were taken to your home? A. To my home, yes.

Q. And then what happened? A. Then I remember Dr. Plain visiting me and taking care of me and I remember my sister calling up a doctor. We were trying to get our own physician then. Our own physician finally came up after office hours in the evening. 10

Q. Who is he? A. Dr. Metsky.

Q. What did he do for you? A. He noticed my lip and jaw terribly swollen and he noticed my lip especially and he had to take the stitches out and dress my wound again and he dressed my right instep for me and he directed a lotion for my knee that was swollen and bruised. 20

Q. How long did Dr. Metsky attend you? A. Oh, about four weeks after that.

Q. Now, during those four weeks were these injuries that you suffered painful to you? A. Yes, very much so.

Q. And were you able to take your food normally during this period? A. No. I had my food through a tube and then I could hardly draw my food through a tube on account of my lip being terribly sore. 30

Q. Did you eat any solid food during the first three weeks? A. No, none at all.

Q. When did you first eat solid food? A. Oh, I had not eaten solid food for about two months. I could not chew at all.

Q. Now, did you go anywhere before going back to work? A. Well, I was in bed for that three weeks and then I was driven to my sister's home 40

Goldie Zipkin, Plaintiff—Direct.

in Caldwell about ten days and just before I went back to business I went to Dr. Reich in the medical—in the Military Park Building.

Q. Who is he? A. He is a specialist.

Q. What does he do? A. Well, he extracts teeth and x-rays.

10 Q. And what did he do for you? A. Well, he took x-rays of my jaw, my upper gums and my nose.

Q. Did he do anything for your teeth? A. He wired them to keep them from shaking.

Q. And then what? A. And he told me to see my own dentist when the gums were a little healed.

20 Q. Did you do that? A. No. I could not see my own dentist until about three weeks later. My gums were terribly sore.

Q. Did you then go to your own dentist? A. I did.

Q. What did he do for you? A. Well, he treated my teeth and he told me he would try to save them for me.

Q. And do you know what he did for you in his effort to save those teeth? A. Yes. He had to take the nerves out of my teeth and he gave me treatment through my teeth into my gums.

30 Q. What do you mean he gave you treatment through your teeth? A. Well, he had to open my teeth to take the nerves out of the back of the teeth and he treated my teeth every day and every other day for quite a while.

Q. Was that a painful practice? A. Very painful.

Q. When were you able to get back to your work? A. (No answer.)

40 The Court: How many teeth did he take out?

Goldie Zipkin, Plaintiff—Direct.

Witness: Four.

The Court: Where were they in your mouth, in the front?

Witness: Yes, sir.

(Question read as follows: "When were you able to get back to your work?")

10

Witness: In a little less than five weeks after the accident.

Q. Do you have any present disabilities as a result of the injuries you got in that accident?

A. Yes. I am terribly self-conscious of my lip. It hangs. The upper part of my lip hangs. It is very noticeable.

Q. Does it interfere with you when you are eating? A. Yes. I sometimes bite into it and it sometimes interferes with my speech.

20

Q. Just what condition do you complain of now with your lip? A. I am so terribly self-conscious about it.

Q. Well, what is there about it that makes you feel self-conscious? A. Well, it is not normal. It does not look the way it did before the accident.

Mr. McLaughlin: I do not know what this is, but before Mr. Penn waves them before the jury, those pictures are not evidential in this case. We have the young lady on the stand here. We do not want pictures of what might have been. We have here the facts.

30

The Court: Are these pictures of the young lady as she is now?

Mr. Penn: That is just what I am getting at. It is a photograph of the young lady before the accident to show the condition of her lip before that time.

40

Goldie Zipkin, Plaintiff—Direct.

Q. I show you this photograph and ask you if that is an exact reproduction of yourself in photographic form? A. Yes.

Q. Did you have that taken? A. Yes, I did.

The Court: At what time?

10

Witness: Before the accident.

Q. When? A. Before the accident.

Q. And did you have this photograph of yourself taken before the accident? A. Yes, before the accident.

(Photographs offered in evidence and marked Exhibits D-1 and D-2.)

20

Q. How long before the accident were these photographs taken? A. About two or three years before the accident.

Adjourned until tomorrow, Wednesday, November 21, 1934, at ten o'clock a. m.

THIRD DAY.

Wednesday, November 21, 1934.

30

Continued pursuant to adjournment.
Present, counsel as before stated.

GOLDIE ZIPKIN, one of the plaintiffs, recalled in her own behalf.

Direct examination (continued) by Mr. Penn:

40

Q. Now, Miss Zipkin, you were telling us yesterday before adjournment about your lip. Just how does that affect you today? A. Well, sometimes I bite into it and again when I talk it inter-

Goldie Zipkin, Plaintiff—Direct.

feres with my speech and I am, of course, terribly self-conscious about my lip when I talk to people. I imagine they notice it immediately.

Q. Does it feel any differently to you on the inside of your mouth than it did before the accident? A. No, sir.

Q. No, I say does it feel any different on the inside of your lip today than it did before the accident? A. Oh, certainly. 10

Q. In what way? A. When I try to talk or when I chew my food it interferes with my chewing.

Q. And have you asked your doctor regarding the correction of that condition? A. I went to visit a plastic surgeon and asked him if he could do something.

Mr. McLaughlin: Do not tell us what he said. 20

Q. Miss Zipkin, who was that plastic surgeon? A. Dr. Manlet.

Q. And did he examine the condition? A. Yes, he did.

Q. And did your own family physician say anything to you regarding corrective measures? A. I told him I was going to visit a plastic surgeon about my lip. 30

Q. And did he advise it? A. I just told him I was going to see a plastic surgeon about my lip. I was worried about it.

Q. What other injuries did you sustain as a result of this accident? A. My teeth were knocked loose.

Mr. McLaughlin: We have had all this, your Honor. We went into this in great detail yesterday afternoon. I do not know that we have to rehash the whole testimony. 40

Goldie Zipkin, Plaintiff—Direct.

The Court: We have this one question.

10 Q. When were you first able to see a dentist regarding the treatment of those teeth in October? A. Before I went back to business I had x-rays taken of my teeth and my face and the x-rays showed a fracture.

Mr. McLaughlin: Just a minute. Your Honor, about these x-rays and going into the man who took them, I have that all in fully in my case yesterday.

The Court: Yes, I think you have.

20 Q. What did the dentist do? A. He advised me to wait until my gums were healed. They were terribly sore.

Q. After the gums were healed did you go back to the dentist? A. I went back to my own dentist.

Q. And what did he do? A. He told me——

Mr. McLaughlin: I object to this.

30 Q. Please try not to tell us what the dentist said to you, because the dentist will be here and tell us that, anyway. You just tell us what the dentist did for you. A. He treated my teeth and he took the nerves out of my four teeth, in the back of my teeth, and then he treated my gums through my teeth.

The Court: We had that yesterday.

Mr. Penn: Yes, sir.

Q. Now, what other bodily injuries did you sustain as a result of this accident? A. My right instep and my right knee.

40 Q. What is the condition of your knee? A. My knee was very much swollen.

Goldie Zipkin, Plaintiff—Direct.

Q. How long did that swelling last? A. Two or three weeks.

Q. Was that painful? A. Yes. I could not move in bed at all and had to lie on my back continuously.

Q. And what other injuries? A. And my right ankle was swollen. I had to have that strapped. 10

Q. Does that bother you when you stand on your foot? A. Yes. I spoke to my chiropodist and he strapped my foot about two weeks ago.

Q. In what other way did this accident affect you regarding your weight and so on? A. I lost a number of pounds. I lost thirteen pounds. I could not have any solid food at all. I had to have food through a tube on account of my injured lip and teeth.

Q. Now, after the accident happened at the shore, did you have any conversation with Meyer Hendler? A. Yes, I did. 20

Q. Will you tell us what you said to him and what he said to you? A. I asked Meyer how the accident happened and he said, "Gosh——"

Mr. McLaughlin: I object to this. Here was a woman who was in the automobile and who has told us about the accident and now out of a clear sky after the testimony produced yesterday we are having under the guise of something new, and after the colloquy between Court and counsel yesterday afternoon I submit, your Honor, that that is utterly unfair to pull this out of a clear sky now after this woman testified herself about facts of an accident. She was not unconscious at any time. She told the jury and your Honor everything that happened. Now, the next day, not satisfied with what has gone on so far, we are going 30 40

Goldie Zipkin, Plaintiff—Direct.

10 to have a conversation wherein one of these so-called defendants is supposed to have said something to her about how the accident happened. I submit that is within the wise discretion of the Court and this lady's testimony regarding the accident is all in, passed on by the Court, and it is a matter that should not be allowed to roll at us at this time.

The Court: I assume what you are proposing to prove are admissions against interest.

Mr. Penn: Yes, your Honor.

The Court: I know of no rule that enables the Court to rule on admissions against interest.

20 Mr. McLaughlin: Except this. This witness has testified.

The Court: She is not going to testify to what happened. She is going to testify against interest.

Mr. McLaughlin: Your Honor has my point. I made the objection and I assume the Court overrules me.

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

30 Exception noted as ground of appeal.

A. I asked Mr. Hendler how the accident happened and he said, "Gosh, I fell asleep a moment."

Q. Is that what he said? A. That is just what he said.

Q. And after that did you have any conversations with him regarding the accident in Newark?

A. Yes.

40

Goldie Zipkin, Plaintiff—Cross.

Q. What did he then say? A. He said the same thing all over again and he said it home in front of my folks. He repeated that more than once.

Q. Did you examine any of your clothing? A. Yes, I did. My hose were torn and my shoes were nicked in the front and my dress was covered with blood and my purse was knocked in. 10

Q. And what was the reasonable value of the clothes destroyed in this accident? A. About \$30.

Q. Now, this permanent disability of your lip, does it have any effect upon you other than physical effect?

Mr. McLaughlin: I object to that question. That is counsel's idea of the alleged injury in this case. 20

The Court: She says she is very much embarrassed, she was self-conscious, as she expressed it.

Cross-examination by Mr. McLaughlin:

Q. You were cut on your lip, you said? A. Yes, I was cut on my lip.

Q. And the blow hurt some of your teeth, four of your teeth? A. Yes, it did.

Q. I think you said they were loosened, or something or other. A. They were thrown out of the sockets. 30

Q. And they were loosened some? A. Yes.

Q. Now, then, they tightened up? A. Yes, eventually.

Q. Yes, today they are tight? A. They don't feel natural, though.

Q. They are natural? A. They are not.

Q. Haven't you the four natural teeth in your mouth that you were telling us about? A. My nerves were taken out. 40

Goldie Zipkin, Plaintiff—Cross.

Q. Perhaps you didn't understand the question. Have you the four natural teeth that you have been talking to us about in your mouth this minute? A. Yes, but they still are not natural.

Q. Were they false at the time of the accident? A. No.

10 Q. And you said something about a cutting on your lip that annoys you. A. It certainly does.

Mr. McLaughlin: May I have those pictures of Miss Zipkin?

(Photographs handed to counsel.)

Q. You have not a full length picture in court before the accident? You did not give your lawyer a full length picture? A. No.

20 Q. But this is before the accident? A. Yes.

Q. You were not stout before the accident, were you? A. No.

Q. But you were a little bit comfortable—I mean as far as weight goes? A. Yes.

Q. And then after the accident you went on some sort of a diet, I think; what was it, like the eighteen day diet? A. No. I never went on a diet, never.

30 Q. Well, after the accident you were careful about food. A. Well, I could not chew my food. I could only have liquids.

Q. So it was some kind of diet; what was it, milk? A. Milk, cereal.

Q. Orange juice? A. Yes.

Q. And as a result of that you lost thirteen pounds? A. I did.

Q. You are not complaining about that? A. Well, I was weak.

40 Q. You are not weak now? A. Well, naturally I am not.

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Q. And you talk generally, as you talked so lovely here the last two days, I mean, that is your usual speech, as you are talking to me now? A. Yes.

Q. And you chew your food now, don't you? A. Sure I do.

Q. But you do not eat too much, because you have to be careful about your figure? A. No, I eat just as much as I did before. 10

Q. And when did you go back to work? A. About five weeks after my accident.

Q. Well, you said it was less than five weeks yesterday? A. I said about five weeks after my accident.

Q. Well, we will quote the testimony. You said yesterday that you went back to work in less than five weeks. Now, that is not about five weeks. That is less, that is a smaller time than five weeks. Do you want to change that? 20

Mr. Penn: I object to that. That is about. It is merely argumentative.

Mr. McLaughlin: Well, it may be the same to counsel, but not the same to the Court and jury.

Q. So you went back in less than five weeks, didn't you? A. About five weeks, yes. 30

Q. And who are you working for? A. L. Bamberger.

Q. Had you been working for them some time before that? A. I had.

Q. And you are working for them now? A. I am.

Q. Did they give you a salary during the about five weeks you were out? A. Part of my salary.

Q. Why didn't you tell us about that on your direct examination? A. I was not asked that question. 40

Goldie Zipkin, Plaintiff—Cross.

Q. I see, but you wanted to conceal that. A. I did not want to conceal anything.

Q. You did not tell us because your lawyer did not ask you? A. You did not give me a chance to say anything yesterday.

10 Q. But I didn't talk to you yesterday and about the \$21 you had lost? A. You did not ask me.

Q. I did not get a chance to ask you until this morning and I am asking you now? A. I did not get a chance to answer you.

Q. Now, yesterday you told us all about the accident. You said early in the evening, about nine o'clock, nothing the matter with Mr. Hendler, had not been drinking— A. Not that I know of, no.

Q. Had not been drinking with you? A. No.

20 Q. And this we will come to in a moment. Do you remember when I said to you about drinking and your lawyer, Mr. Penn, objected, and the Court allowed the question and then I said to you, "Well, here is your chance, Miss Zipkin, was he drinking?" and the answer was, categorically, "No." You do not want to change that this morning? A. No.

Q. And then you said yesterday—this was right before the accident—"He was proceeding along the road in a careful, normal, decent fashion." A. I didn't say that. You said it.

30 Q. And you said, "Driving along." A. I said he was driving along.

Q. In answer to the question, "And he was proceeding along the road in a careful, normal, decent fashion?" you did not dispute that, but you did say, "Answer: Driving along." Was there something in your mind quibbling on the question? A. No. You spoke so loud.

Q. Can you hear me? A. I could hear you.

40 Q. Can you hear me now? A. Yes.

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Q. And "Question: And all of a sudden out of a clear sky you are into the stanchion, is that right? Answer: Yes." There was not any quibbling on that answer, was there? A. No.

Q. "Question: And that is all you know about it, isn't it?" "Well, outside of the car swerving." A. Yes. 10

Q. Were you quibbling on that? A. No.

Q. Well, when I asked you whether that was all you knew about the accident and when you said it was outside of the car swerving, why didn't you tell us yesterday afternoon that you had a talk with Hendler the night of the accident and that after that Hendler told you, "I fell asleep for a moment"? A. He did not ask me whether I had a talk after the accident. Naturally I could not speak in the car at the time of the accident, because we were all so terribly frightened. 20

Q. I asked you if that was all you knew about the accident? A. Right then and there.

Q. I asked you if that was all you knew about the accident and you heard that talk? A. You didn't ask me.

Q. Well, I didn't ask you yesterday about getting some money from Bamberger's. A. Naturally. 30

Q. Then I asked you another question—just look at me. A. I am.

Q. The man was driving normally, decently, carefully, with you and his mother in the car and you answered, "Driving along." A. Driving along.

Q. Were you again having something back of your mind that you did not agree with the question but that you were letting the jury get the impression that you did and this morning you 40

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changed it? A. I did not change anything. I said we were driving along and I am still saying we were driving along.

Q. Certainly, you were in the automobile and it was moving? A. Naturally.

10 Q. And then after court yesterday who did you have a talk with? A. I spoke to my folks and my lawyer generally about the case.

Q. And when did this come up that tomorrow I will go on and say Hendler told me he fell asleep? A. Oh, that happened a long time ago.

Q. When did you tell your lawyer? A. A long time ago.

Q. Has he a written statement of that? A. I don't know.

20 Q. Did you ever sign a paper for him saying that before yesterday afternoon? A. I didn't have to sign anything.

Q. So isn't it a fact that after your testimony yesterday this business about Hendler telling you about falling asleep came into the case this morning? A. No. He told me that after the accident happened.

Q. Did he tell you yesterday afternoon? A. No.

30 Q. Did he tell you last night? A. No. He told me that very same night of the accident when I asked him.

Q. You told us you were familiar, didn't you, with the north Jersey coast? A. Yes, partially.

Q. Spring Lake is next to Belmar, isn't it? A. Yes, it is.

Q. The Columbia is about the middle of Belmar on the ocean? A. About.

Q. So you traveled down to Spring Lake and you turned around? A. We did.

40

Goldie Zipkin, Plaintiff—Cross.

Q. And you came back and this thing happened somewhere about Third Avenue, didn't it?

A. Yes, it did.

Q. How close is that to the Columbia? A. We had to pass that before we came to Bradley Beach. About two miles or so, if not more.

Q. So you passed Belmar and passed Avon? 10

A. Uh, uh.

Q. And were in Bradley Beach? A. Yes.

Q. Where were you going? A. Going back to Asbury Park.

Q. What were you going to do? A. I do not know what we were going to do. All I know we were heading for Asbury Park.

Q. I see, you had been to Spring Lake and you turned back and were along the ocean in Belmar?

A. Yes. 20

Q. And you must have passed your hotel? A. We did.

Q. You were not asleep? A. No, I was not. I was not sleepy at all.

Q. You were going up to Asbury Park and stay in Asbury Park for a while? A. I do not know. We were probably going to take Meyer's mother home.

Q. And it was still early in the evening and you might have had a cup of coffee or a soda? 30
A. I don't know.

Q. Nobody was asleep, because if anybody had been Meyer would have let you off at your hotel, so there was not any talk about Hendler being asleep or tired? A. Well, it was a warm day, and probably he was tired.

Q. It was a warm day, but he spent it on the beach? A. Yes, that afternoon.

Q. He was lying on the sand in Belmar that afternoon? A. Yes. 40

Goldie Zipkin, Plaintiff—Cross.

Q. He had not been having any beer that day?

A. Not that I know of.

Q. He was not doing any exercise on the beach?

A. No. He was swimming.

Q. He did not swim so long? A. Well—

Q. In and out of the water? A. Yes.

10 Q. So there was not any cause that you knew of for Hendler suddenly, after being with you in the afternoon, driving his car down toward Spring Lake and through Belmar and Avon into Bradley Beach in a careful, normal, decent fashion—there was not any occasion for him to suddenly go unconscious, was there? A. I do not know.

Q. You had not done anything to him which would cause him to lose his senses, had you?

20 Mr. Penn: Your Honor, I have not objected up until now.

The Court: Sustained.

Q. And you were sitting on his right?

A. Uh, uh.

Q. You were all right, weren't you? A. Yes.

Q. And were you talking to him? A. Every now and then.

30 Q. Of course, you were friendly, weren't you, and this was an evening excursion, so you were talking to him about the beauties of Bradley Beach? A. No, we were not talking about the beauties of Bradley Beach.

Q. In any event, you were all right? A. It was just a peaceful ride until the accident happened.

Q. And until the accident happened you had in talking to him, you would look at him every so often? A. Yes, now and then.

Q. And no indication of sleep there, was there? A. Not that I know of.

40 Q. You did not see his eyes closed? A. I did not look that close.

Goldie Zipkin, Plaintiff—Cross.

Q. You saw the car swerve? A. I felt the car swerve.

Q. You saw it go into the stanchion? A. Yes, I just turned my head for the fraction of a moment.

Q. Turned your head for the fraction of a moment as the car was swerving? A. No. I felt it swerve. 10

Q. And you saw it go into the stanchion? A. Yes, right into the pole.

Q. And as you turned your head for the flash of a moment, the car having turned to the left, you turned your head to the left? A. I don't know.

Q. Well, let us see. You had been looking ahead, to the right is the ocean, to the left is the stanchion you saw, so you may not have turned to the left? A. I turned my head. 20

Q. And to the left? A. It must have been to the left.

Q. And as you turned your head to the left you did see Hendler alongside of you? A. I didn't have time to see Hendler alongside of me.

Q. It was not a question of time. You turned your head—your eyes were open? A. I just turned my head a second.

Q. And in a second, in your direct line of vision, as you see the stanchion you see Hendler alongside of you? A. I did not. All I saw was the post in front of me. 30

Q. And you not only saw him alongside of you but you saw him with his eyes closed? A. I did not look at him.

Q. You were not going to look at him? A. No.

Q. Put your hand up to your left eye so you could not see him? A. I did not have my— 40

Goldie Zipkin, Plaintiff—Re-direct.

Mr. Penn: Will counsel give the witness time to answer this group of questions?

Q. Is there any question that you would like to answer more fully, Miss Zipkin? A. No.

10 Q. Are you entirely content with your testimony? Is there anything else you want to say?

A. Not right now, no.

Q. So we will not have any misunderstanding, is there anything now that is back of your mind that you are intentionally or unintentionally concealing from the court and jury and myself?

A. I am not concealing anything.

Re-direct examination by Mr. Penn:

20 Q. Now, Miss Zipkin, with reference to this so-called diet that counsel refers to, was that a voluntary diet of liquids or of entire necessity and order of the doctor?

Mr. McLaughlin: I object to that. She has already testified to that.

The Court: Well, I think I will allow that, because she has already said that she took it because her teeth were sore and she had to use a tube and take a liquid diet.

30 Mr. Penn: That is right.

The Court: I will allow the question.

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

Exception noted as ground of appeal.

Q. Did you get the question? A. Yes, I did.

40 Q. What was your answer? A. Well, I could only take my food through a tube. I could only take a liquid through a tube. I could not chew anything for a while.

Goldie Zipkin, Plaintiff—Re-direct.

Q. And you took it under instructions of your doctor? A. Of my doctor.

When you had recovered sufficiently did you regain the weight you had lost in this so-called diet? A. Yes. Later on, after I could chew my food.

Q. Now, this money that you got from Bamberger & Company, was that salary or was that under an insurance company plan that you had with L. Bamberger as an employee? 10

Mr. McLaughlin: I object to that. She got the money. They said there was testimony about a loss of salary of \$21 a week for less than five weeks. It seems to me that cannot be pulled around now on the guise of redirect examination. 20

The Court: It seems to me it all depends whether it accumulated by reduction of her salary previously; in other words, if this was a fund supplied from her own effort it would not stand in the same position as if it were a direct loss of salary. So I will let you explain the situation. If you claim this was a fund accumulated from reduction of her salary.

Mr. Penn: From my experience I think that is the situation. 30

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

Exception noted as ground of appeal.

Q. Can you tell us if this was accumulated from the reduction of the employee's salary? A. Yes, we have a co-worker. Each employee is deducted from her salary each month and when that co-worker is ill she gets her salary. 40

Bessie Resnik, for Plaintiff—Direct.

Q. And that is the form you got this money?

A. Yes.

10

[A witness, Mrs. Zipkin, is called and Mr. Penn states the following: "Her testimony goes to the effect she attended the daughter and the condition of the daughter and the swelling of the knees and pain in the leg," to which Mr. McLaughlin replies: "I will admit that the witness will say so and so and will not annoy her with cross-examination at all." Witness withdrawn.]

20

BESSIE RESNIK, sworn in behalf of plaintiff Zipkin.

Direct examination by Mr. Penn:

Q. Mrs. Resnik, are you related to Miss Zipkin?

A. Yes, I am, she is my sister.

Q. Where do you live? A. I live on Cramer Avenue, West Caldwell.

Q. New Jersey? A. New Jersey.

Q. And who do you live with there? A. I live there with my family, my husband and two children.

30

Q. Now, did you see your sister shortly after this accident? A. Yes.

Q. July 17, 1933? A. I saw my sister the day after the accident, in the evening.

Q. And where did you see her? A. I saw her at her home, 52 Millington Avenue.

Q. And what condition was she in then? A. When I saw my sister that evening? I was very shocked at her condition.

40

Mr. McLaughlin: I object. This lady was not in the accident.

Bessie Resnik, for Plaintiff—Direct.

Q. Just tell us the condition your sister was in.

A. My sister looked very, very bad and she was in great pain.

Q. And did she later come to your home?

A. After being taken care of at her home for a period of three or over three weeks, she was brought to my home to Caldwell, to my home.

10

Q. And what was her condition when she came to your home? A. Her condition when she was brought to my home was that she was in a very nervous state and continual pain and she needed quietness and peacefulness. That is why we took her away, to give her the change and I had to attend her continually. I gave her her liquids through a glass tube and when she was taking the liquid I could see the terrible pain and everything she was going through just by having that tube touch her lip.

20

Q. And did she eat any solid food while at your home? A. No solid food at all. She could not take solid food.

Q. And when did she leave your home? A. She stayed with me for a little over ten days. She was not able to leave at that time.

Mr. McLaughlin: Your Honor, I do not think this witness should be trying to testify as a doctor. I object.

30

Q. How long did she stay at your home?

A. She stayed at my home a little over ten days. She had to go back to her position for fear she would lose it.

Q. Well, while she was at your home was she in bed? A. Well, she was in bed all the morning and then I would take her downstairs for a little while and set her out in the back yard.

40

Bessie Resnik, for Plaintiff—Cross.
Alfred Manlet, for Plaintiff—Direct.

Cross-examination by Mr. McLaughlin:

Q. You are a sister of Miss Zipkin, are you?
 A. Yes.

10 Q. And if I may, how old are you? A. I am
 thirty-five.

Q. Your upper right lip, have you had anything
 the matter with that? A. My upper right lip?

Q. Yes. A. No.

Q. I notice as it curls up to the right—were you
 in any accident, too? A. No.

Q. Is that usual with your family to have the
 upper right lip curl? A. What do you mean,
 usual?

20 Q. I mean is it a family characteristic? A. No,
 sir.

Mr. Penn: I object to this.

The Court: She has answered it and said
 no, so we are by that.

Q. Just you and your sister, is that it?

Mr. Penn: I object to that.

The Court: She did not say that.

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ALFRED MANLET, sworn in behalf of plaintiff
 Zipkin.

Direct examination by Mr. Penn:

Q. You are a duly licensed New Jersey phy-
 sician, Doctor? A. Yes, I am.

Q. Practicing in the City of Newark? A. I
 practice in Newark and New York.

40 Q. How long have you been practicing, Doctor?
 A. Since 1922.

Alfred Manlet, for Plaintiff—Direct.

Q. And do you have any specialty? A. Yes, my specialty is ear, nose and throat and plastic surgery of the face.

Q. And are you connected with any hospitals? A. Yes. I am on the staff of the Newark Memorial Hospital and Beth Israel Hospital.

Mr. McLaughlin: We have been all through this. This man was on the stand and sworn yesterday.

Q. Did you examine Miss Goldie Zipkin, the plaintiff in this case? A. I saw her in my office about two and a half weeks ago.

Q. Will you tell us what you found as a result of that examination? A. The examination showed that there is a long scar, healed scar, extending from the median or the middle of the lip on the inner surface toward the right angle of the—or the right corner of the mouth with a tissue of mucous membrane and pieces of muscle hanging down about a quarter inch below the lower border of the lip. The three front teeth showed misplacement or thrown forward a little bit compared with the rest of the other teeth of the upper jaw, forming malocclusion.

Q. What is malocclusion? A. Well, it is the condition when the teeth close do not meet properly.

Q. And she has such a condition? A. Well, it is not very marked. There are three teeth instead of the whole jaw being forward, as you will find sometimes. She only has three front teeth that are slightly down and forward.

Q. Now, that condition that you speak of with regard to the lip, is that a permanent condition with her? A. It is a permanent condition, yes.

Alfred Manlet, for Plaintiff—Direct.

Q. And what in your opinion, if anything, can be done to remedy that condition? A. I feel that this condition should be remedied, because it is a dangerous condition.

10 Q. Why do you feel it is dangerous? A. The patient very often in speaking or in chewing bites that redundant or hanging part of the lip, causing a slight irritation. The day I saw her I saw very definitely marks of a tooth on the part of that redundant or hanging down tissue. The danger, of course, is constant irritation, the same as any pipe smokers may lead to either a tumor or cancer.

20 Q. And in your opinion her condition should be corrected by plastic surgery? A. I think it is absolutely necessary, not only for the cosmetic appearance, but I think it is important from the health standpoint.

30 Q. Now, how long, Doctor, would the patient be taken from her work if such an operation were performed? A. It would have to be done in two stages, because of the condition of the muscle and the membrane, the mucous membrane that covers it. It happens to be at the very border of the muscle and mucous membrane. You would have to have an operation first to separate that and then heal and then the second operation. I will say about six weeks.

Q. And would that require hospitalization? A. It would require hospitalization for about half of that period.

Q. Can you tell us, Doctor, what would be a fair and reasonable cost for such an operation? A. I think a reasonable cost for the operation in the hospital would be \$450 or \$550.

40 Q. Now, does that lip, Doctor, in your opinion, have any effects upon her nervous system and her

Alfred Manlet, for Plaintiff—Cross.

mental health? A. Well, of course, I must take the patient's word for it. The patient said she—

Mr. McLaughlin: Wait a minute. This man examined for the purpose of testifying in court and I do not think we ought to take the patient's word when the witness is on the stand. 10

The Court: The patient has already testified, so we have direct testimony.

Q. Doctor, assuming that a patient has already testified that the condition affects her nervous system and her mental state of health and basing your opinion upon that testimony and the examination which you made of the patient's condition, can you, with reasonable certainty, tell us whether, in your opinion, such an injury would cause mental anguish and shock? A. I believe so. 20

Cross-examination by Mr. McLaughlin:

Q. When did you examine the lady, Doctor? A. About two and a half weeks ago.

Q. That is in November, 1934, is that right? A. Yes.

Q. What is that you are reading from? A. Those are my notes. 30

Q. Would you mind letting me see them? A. No. (Handing papers.)

Q. My goodness! It looks as though it was cut off from the top. A. I cut it off.

Q. Why is that? A. I had some private notes on that I did not want anyone to read.

Q. But this is quite evidently part of a letter addressed to somebody, isn't it?

Mr. Penn: If your Honor please, it is not in evidence. It is a memorandum. I object. 40

Alfred Manlet, for Plaintiff—Cross.

The Court: No. Any memorandum used by the witness to refresh his recollection is subject to inspection by counsel and also by the jury, if they desire.

10 Q. And the private notes you are referring to, why, it looks like part of a letter. A. Yes.

Q. Who is that addressed to? A. Dr. Metsky.

Q. Have you got the other part? A. No. I told you why I have not the other part. I have some private notes not referring to this case.

Q. Why have some private notes not referring to this case on this particular notes of this case?

A. Why not?

Mr. Penn: I object.

20 Q. Surely you are not trying to conceal anything?

Mr. Penn: No, I do not think that is very fair.

Q. This also, the part you have cut off, would have shown the date of the examination, wouldn't it? A. I have no date on that.

30 Q. You did not have any date on the letter to the doctor? A. No.

Q. Why not? A. I did not have it.

Q. You did not have it? A. The date of the letter sent to the doctor?

Q. Oh, you sent him a letter without any date on it? A. Yes.

Q. Was there any reason for that? A. No, sir.

40 Q. You are sure it was not through some typographical error a letter addressed to the lawyer, Mr. Penn, or one of the other lawyers, this lawyer here in the chair, or one of the other lawyers rep-

Alfred Manlet, for Plaintiff—Cross.

resenting Miss Zipkin? A. You heard me. I said no.

Mr. Penn: I object.

The Court: He has answered that.

Q. You had never seen Miss Zipkin before, had you? A. No, sir. 10

Q. And you saw her some time this month when the case was coming up for trial the first time, didn't you? A. Yes.

Q. As a matter of fact, you were actually in court before? A. When do you mean?

Q. When this case was coming up before. A. What date do you mean?

Q. This month some time. A. No, sir; I was here yesterday. 20

Q. Well, on the other time just after you had made your examination or about that time you were on telephone call? A. I was on telephone call since last week.

Q. And you said something about three upper teeth, the front teeth do not meet. A. Yes, the three upper teeth.

Q. Very usual thing, isn't it, for three upper front teeth not to meet? A. Well, if—

Q. Just answer yes or no. (Question read.) A. Just upper three teeth, certainly. 30

Q. Would you mind opening your mouth wide, please? A. Yes.

Q. Oh, you have an undershot jaw? A. Yes, but the difference is that the whole jaw is shot forward.

Q. But on the normal mouth the upper teeth come forward over the lower front teeth? A. Not normally, no.

Q. Your judgment of the normal mouth is that the upper teeth hit on the lower teeth? A. I think 40

Alfred Manlet, for Plaintiff—Cross.

just three teeth is different from the whole jaw, of course. You asked me if just a few teeth come forward.

Q. I am not trying to quibble. If you cannot answer it, say so. It seems to me it is an intelligent question. A. It is not an intelligent question.

10 Q. I do not want to mislead you. The front upper teeth hit on the front lower teeth. A. If all the rest of the teeth hit, certainly.

Q. How long have you been practicing? A. Since 1922.

Q. And then you are telling us, that the lady, in your judgment, is extremely nervous and so on, mental anguish, I think is what the lawyer gave you, and you said yes, is that right? A. Yes.

20 Q. Why did you say that? A. In my practice I come across a great many patients such as Miss Zipkin.

Q. I know you have a big practice, but I am interested—

Mr. Penn: Will counsel permit the witness to answer?

The Court: You asked him why he said that and he is going to be allowed to tell you.

30 Witness: In my practice, especially plastic surgery, especially where there is facial deformity, I have seen girls actually go insane due to some deformity. It preys upon their mind and it is not unusual to have people become depressed and become shut-in and refuse to go out and to come in contact with people due to a facial deformity, especially where you have a deformity, where the patient bites her lip causing bleeding and often has to push, as she did on the witness stand, before she

40

Alfred Manlet, for Plaintiff—Cross.

spoke, she pushed the little impediment forward.

Q. Now, as I understand it, in your judgment, seeing this lady one time for the purpose of coming here and testifying about this \$500 plastic surgery operation, you think she is going to go crazy, is that it? A. I don't say that. 10

Mr. Penn: I object. He said in his practice he had seen others.

Q. Did she give any indication of nervousness or mental anguish on the stand? A. No.

Q. Or did she give any other impression to you as you heard her in court than a shrewd, intelligent, mentally alert witness? A. Yes, she seemed to be alert. 20

Q. And with reference to her mouth as she talked for over a considerable period did it seem to you as you observed her that she had any difficulty in speaking or biting her lip? A. I noticed her putting her tongue forward several times.

Q. Where did you see that? A. From where I sat.

Q. In the back of the courtroom? A. No.

Q. Was that observable from where you sat? A. Yes. 30

Q. Was that the time I was examining her here, about the same distance I am from you? A. Yes.

Q. You could see that from the back, could you? A. Yes.

Jack H. Denhost, for Plaintiff—Direct.

JACK H. DENHOST sworn in behalf of plaintiff Zipkin.

Direct examination by Mr. Penn:

Q. Dr. Denhost, you are a Newark dentist? A. I am.

10 Q. How long have you been practicing in Newark? A. Approximately seven years.

Q. Duly licensed to practice in this state? A. Yes.

Q. Did you have occasion to do any dental work on Goldie Zipkin, the plaintiff in this case? A. I had.

20 Q. Will you tell us how she came to you and what you did for her? A. Miss Zipkin presented herself at the office on September 12th, after I received a call from a Dr. Jacob Reich, stating that he had x-rayed her mouth. I took x-rays of the upper right central, lateral cuspid and first bicuspid on September 12th.

30 Q. Now, will you please tell the jury in plain language, understandable language, just what those technical terms indicate with regard to the teeth in Miss Zipkin's mouth? A. Beginning from the center, taking the two upper large teeth, which you call the central, the one on the right is the right central; beginning from that and working upward the first, second and third teeth, beginning with that right central, those were the teeth that gave some indication, according to Dr. Reich's x-ray, some trouble. I took x-rays of those four teeth and found inflammation around the roots of the teeth, as evidenced by the x-ray pictures, and found it was necessary to open up three of those teeth, the right central, lateral and cuspid, the first, second and third from the medial
40 line, to open up those teeth to clean out the nerve

Jack H. Denhost, for Plaintiff—Direct.

canals and fill those nerve canals in order to save the teeth. That treatment extended from September 12th to February 22nd, 1934. September 12th, 1933, to February 22, 1934. September 13, 1934, we took a check-up x-ray to find out how the teeth were getting along.

Q. Now, are those teeth vital? A. Those teeth today are not vital due to the extirpation of those nerves. 10

Q. What do you mean by vital teeth? A. They have no living nerve in them.

Q. And in your opinion, what condition does that leave the teeth in? A. Just this, that the teeth will have to be checked periodically every six months for three years to find out whether any abscess will form on those teeth. There is a possibility of the teeth turning dark. 20

Mr. McLaughlin: I object to the possibility and ask it be stricken out.

The Court: Sustained.

Q. In your opinion, Doctor, based upon examination and treatment of this case, may those teeth change color in time?

Mr. McLaughlin: I object to that.

The Court: Sustained. You can ask what they probably will do. 30

Q. Based on your examination of the plaintiff here, Doctor, in your treatment, what are the probabilities regarding those teeth? A. The probabilities are acid formation or darkening of the teeth.

Q. And if that occurs. A. Should abscesses form at the apexes of these teeth we will have to do what we call apicoectomy. 40

Jack H. Denhost, for Plaintiff—Direct.

10 Q. What is that? A. That is a removal of a portion of the root without removing the tooth from the bone, which will necessitate a slight gum operation, cutting away part of the root and suture back the gum which had been cut away. Should the teeth turn dark and no abscess form it will necessitate a removal of the enamel of the tooth and putting a false enamel back on those teeth.

Q. What is a reasonable and fair charge for your services rendered to Miss Zipkin? A. To date \$175.

Q. Now, for a gum apicoectomy operation such as you speak of, what would the cost be of that? A. For each root \$25.

20 Q. And if it should require porcelain jacket what would the cost of that be? A. For each tooth \$50. That \$175 also included a small bridge on the bottom right-hand side.

Q. What was the matter with that? A. Sometime previous I made this bridge for Miss Zipkin and she came to me with that in her hand bent out of condition. I do not want you to be under the impression I charged that for the three teeth I worked on.

30 Q. You replaced that bridge? A. I replaced that bridge.

Q. What was the condition of that tooth? A. I had to make a new three-quarter crown because some of the enamel when I previously replaced that tooth had been broken away.

Q. Can you tell us based on your examination and treatment of this patient what was the cause of the condition when you found that? A. I could tell the probable causes.

40 Q. What was that? A. Due to a traumatic injury. The lower bridge could be due to traumatic injury; the upper could be due to a few causes

Jack H. Denhost, for Plaintiff—Cross.

such as decay and traumatic injury, but on the upper I found no decay on the central and the cuspid.

Q. So that indicated to you the cause in this case was what? A. Trauma.

Q. By trauma you mean physical injury? A. Yes, a blow.

10

Cross-examination by Mr. McLaughlin:

Q. When did you examine her, by the way, Doctor? A. On September 12, 1933.

Q. And when you examined her you found among other things an old bridge there in the mouth? A. In the mouth?

Q. Yes. A. No.

Q. Didn't you tell us that you had to do something about a bridge? A. She brought it in in her hand.

20

Q. Oh, it had been in her mouth? A. It had been.

Q. And prior to this accident that we are talking about? A. Yes.

Q. So the young lady had had dental work done to her teeth before the accident? A. Yes, by me.

Q. Fine, and she had considerable dental work to her teeth prior to the accident, hadn't she? A. She had two small bridges made in the lower jaw, one on each side.

30

Q. What is the purpose of bridges? A. Bridges is the replacement of the teeth.

Q. And she had two teeth that had been replaced before the accident? A. Two teeth on the lower mouth.

Q. What was that from, decay? A. I don't know. The patient had come to me without those teeth in her mouth. I did not remove those teeth.

Q. Caused perhaps by abscessed condition? A. Maybe congenitally missing.

40

Jack H. Denhost, for Plaintiff—Cross.

Q. Well, you would know if they were congenitally missing? A. I do not recall the lower mouth at the present time.

Q. You have not bothered about checking back on that at all? A. No.

10 Q. What is your name, Doctor? A. Dr. Denhost.

Q. You people are in the baking business, too? A. No.

Q. Your family? A. No.

Q. Aren't you the Denhost Bakery? A. You are thinking of Denberg.

Q. You said something about x-rays. Let me see those, won't you? A. There they are (handing x-rays).

20 Q. Are these the ones that Dr. Reich took? A. No. Those are the ones I took.

Q. Where are the ones that Dr. Reich took that we heard about yesterday when the young lady went to the specialist? She called him some elaborate name. A. I do not know. I have never seen them.

Q. Do you call an expert a fellow who takes x-rays? It begins with an O. A. A roentgenologist.

30 Q. What is Dr. Reich's specialty? A. Dr. Reich, as I understand it, is a dental surgeon.

Q. Do you call him an exodontist? A. Exodontist? That is not an x-ray specialist.

Q. And Dr. Reich is a specialist, isn't he? A. Yes.

Q. Is Dr. Reich in court? A. I do not know. If he is I am sure he will stand up.

Q. Do you know him to see him? A. Yes.

40 Q. What did you say was the matter with the teeth in accordance with these x-rays? A. We found what is called—

Jack H. Denhost, for Plaintiff—Cross.

Q. Who is "we"? A. I refer to myself as "we."

Q. A double personality? A. A thickening of the periodontal membrane. That is the little lining around the root of the teeth, which leads me to believe, or leads a dentist to believe—

Q. No, leaves you. A. No. According to the way I have been taught to lead a dentist; there is an inflammation around the root of the tooth causing that thickening. 10

Q. And you treated the tooth thereafter? A. Yes.

Q. And you filled the tooth, as I understand it? A. Yes.

Q. What did you call it, the nerve canal? A. Nerve canal.

Q. That is not an unusual thing in your practice, is it? A. No. 20

Q. And as you say the treatment and filling of the nerve canal can come from any number of causes, is that right? A. Yes.

Q. And filling teeth is the ordinary practice of a dentist, isn't it? A. One of the practices of a dentist, yes.

Q. And what the lady has now is three filled teeth, speaking about these particular teeth, isn't that right? A. No, filling a root canal—

Q. We are not talking about a root canal. A. Well, ordinary filling, the lady has filling in her mouth. 30

Q. And you say—I think you said—you did say, as a matter of fact, that on a filled tooth the tooth at its root or base or whatever you did say, an abscess may form at times? A. Not ordinarily on a filled tooth.

Q. No, and not ordinarily on these three teeth. A. Very ordinarily.

Q. Well, she had this alleged injury July 18, 1933. It is over a year and a half ago. No abscess 40

Jack H. Denhost, for Plaintiff—Cross.

now, is there? A. Her last picture showed no abscess.

Q. And when was the last picture? A. I think I have it there. I think September 13th.

Q. September 13th, 1934, over a year after the accident showed no abscess? A. No.

10 Q. And showed the tooth in healthy condition, didn't it? A. Yes.

Q. And did not show any discoloration, either, did it? A. No.

Q. And that is also a year and a half and more after the accident. Incidentally, abscesses are unfortunately around teeth—unfortunately are rather an ordinary condition in the human mouth? A. They are the extraordinary condition.

20 Q. Perhaps I may have used the wrong word. I mean they are a frequent occurrence in the human mouth? A. Yes.

Q. And at best or at worst, with these teeth in a healthy condition as late as September of this year and abscesses forming on one or more of these teeth is no more than a possibility, isn't that so? A. I can quote from my own mouth. I have one in my mouth twelve—

30 Q. I want you to answer the question. A. So far as my own practice and my own experience, it is problematical as to when an abscess may form. It may and then again it may not.

Q. And the same applies to a discoloration of these teeth or any tooth? A. A discoloration is more possible than an abscess.

Q. But it is still in the range of time and good treatment you have given the lady so far, it is still no more than a possibility? A. That would come on gradually, but the possibility is there.

40

Jack H. Denhost, for Plaintiff—Re-direct.

Re-direct examination by Mr. Penn:

Q. Doctor, do any of these x-rays show a definite abscessed condition on those teeth? A. To date all these x-rays show an abscessed condition and rarefaction around the roots of the teeth.

Q. And the probabilities are that where abscesses are they frequently recur? 10

Mr. McLaughlin: I object to that. We have been all over this. Counsel because he is not satisfied cannot draw up a leading question and try to get back at some stage he was on re-direct examination. It is not proper re-direct examination.

The Court: Well, I think the doctor has testified to that substantially already.

Mr. Penn: All right, your Honor. 20

Mr. McLaughlin: Now, your Honor, I move that the testimony of this doctor regarding some operation, that was \$25, an operation on something that might happen and regarding some other kind of operation where he puts porcelain somewhere or other, again if that might happen, I ask that that be stricken out on the ground that the doctor has specifically stated categorically that both of such conditions may happen. No more than a possibility. 30

The Court: Well, didn't he originally testify it was a probability.

Mr. McLaughlin: No, sir. First he said it was a possibility. He said it might happen, and then your Honor said, "Mr. Penn, you can have probabilities," and then he said probability, and then on cross-examination he said possibility, and that is the way his testimony is left and, therefore, it should be stricken out. 40

Irving Plain, for Plaintiff—Direct.

10 The Court: The possibility and probability are not inconsistent; in other words, he said they were within the probability. It is not inconsistent with the statement it is within the possibility, consequently, if these things were a possibility necessitates striking out other testimony that it was probable.

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

Exception noted as ground of appeal.

Mr. Penn: I offer these x-rays.

Mr. McLaughlin: Does that include the later picture taken in September? He said the later picture showed no abscess.

20

IRVING PLAIN recalled in behalf of plaintiff Zipkin.

Direct examination by Mr. Penn:

Q. On July 19th, the day after this accident, did you see Miss Zipkin at the shore? A. Yes. Asbury Park.

30 Q. Tell the Court and jury what condition she was in. A. I found her in bed. She was complaining of pain in various regions of her body. There was a jagged laceration of her upper right lip. There were four of her upper right teeth that were loosened and it seemed as if they were going to fall out. Now, she had contusions over her entire body and there was a sprain of the right ankle. Incidentally, at the time I saw her, her face and lip, they were both quite swollen.

40 Q. Did you do anything for her right instep? A. Yes. I put on a dressing around the foot and up beyond the ankle.

Irving Plain, for Plaintiff—Cross—Re-direct.

Q. Now, that condition that you found her in, Doctor, was that a painful condition, were those injuries painful? A. Yes.

Q. And do you know whether that continued to be painful for some time? A. Yes, as long as I saw her.

Q. Did you see her again after that, Doctor? 10
A. Yes. When she got to Newark I saw her at her home.

Q. Were there any sutures in the upper lip when you saw her? Had the lip been sutured?
A. I do not recall.

Q. Was there any swelling on any parts of the body? A. Yes, a marked swelling.

Q. Where? A. Of the upper lip, the entire lip, but most marked on the right side and that right side of the face and her ankle was swollen, also. 20

Cross-examination by Mr. McLaughlin:

Q. You said something about when you saw her apparently the night or early morning after the injury her teeth looked as though they were going to fall out. Why, in your experience as a medical man, did you ever see teeth that though to your eye looked like they would fall out that did not actually fall out? A. Yes.

Q. As a matter of fact, you do know that these teeth that you looked at, as a doctor, that they are now tight in the lady's mouth? A. Yes. 30

Re-direct examination by Mr. Penn:

Q. In your opinion, Doctor, if they were properly braced by a dentist, and nature was enabled to take its course in healing them would they continue tight? A. Yes.

Irving Plain, for Plaintiff—Re-cross.
Joseph Metsky, for Plaintiff—Direct.

Re-cross-examination by Mr. McLaughlin:

Q. And they did? A. Yes.

10 JOSEPH METSKY sworn in behalf of plaintiff Zipkin.

Direct examination by Mr. Penn:

Q. Dr. Metsky, you are a practicing physician in Newark? A. I am.

Q. How long have you been practicing? A. Eight years.

20 Q. Duly licensed to practice in this state? A. Yes.

Q. And did you on July 19, 1933, attend Miss Zipkin at her home? A. I did.

Q. Did you make an examination of her? A. I did.

30 Q. Can you tell the Court and jury what that examination disclosed? A. I found the following injuries: Laceration of the upper lip, contusion of the right cheek, lower jaw, contusion of the forehead, contusion of the right shoulder and arm, contusion of the right leg, contusion of the dorsum of the right hand, sprain and contusion of the right ankle and shock.

Q. Well, what did you do for her on that day, Doctor? A. I ordered rest in bed, cold applications and sedatives.

Q. Were any parts of her body swollen as a result of these injuries? A. Yes. There were swellings over the greater part of the body.

40 Q. And were those painful, Doctor? A. Very painful.

Joseph Metsky, for Plaintiff—Direct.

Jacob Reich, for Plaintiff—Direct.

Q. And did you do anything for her on that first day you visited her? A. Just dressed it.

Q. What was the condition of her lip on that first day? A. It was a ragged laceration and marked swelling of the upper lip.

Q. Did you attend her after that? A. I did. 10

Q. For how long a time did you attend her? A. She was under my care up until August 21st.

Q. And did she visit you after that? A. Once or twice after that in the office.

Q. Now, Doctor, was she able to eat any solid foods during this period of treatment? A. Not for about two weeks.

Q. How was she fed during that period? A. Through a straw. She had to subsist on liquids.

Q. Was that in accordance with your instructions? A. Yes. It was difficult—almost impossible for her to swallow solid food. 20

Q. And when eating was this condition very painful to her? A. Yes. It was quite painful.

Q. And what was the condition of her teeth? A. I found four teeth loose.

Q. And what did you do about that situation? A. I did not do anything about that. I recommended that when she was able to leave the house to go and see a dentist. 30

Q. And did she do that, do you know? A. Yes, she did.

Cross-examination waived.

JACOB REICH sworn in behalf of plaintiff Zipkin.

Direct examination by Mr. Penn:

Q. Dr. Reich, you are a practicing dentist in the City of Newark? A. I am. 40

Jacob Reich, for Plaintiff—Direct.

Q. How long have you been practicing dentistry? A. Twenty years.

Mr. McLaughlin: I will admit the doctor's qualifications.

10 Q. Doctor, did you examine Goldie Zipkin, the plaintiff in this case? A. I did.

Q. Will you tell the Court and jury what that examination disclosed? A. Well, she was sent in by her physician, Dr. Metsky, for examination and report on August 18th—no, August 12, 1933, and she gave me a history she had been in an automobile accident. Now, the outside of her face—I am confining myself to the jaw, around the jaw, that is all I am interested in—she had an indurated area on the upper lip on the right side and there was slight swelling present on the lower right side. Now, the internal examination, that is, the inside of her mouth, the upper right central, lateral and cuspid teeth were loosened and slightly elongated, a bridge which this patient had on the lower right side was knocked out as a result of this accident and the bicuspid tooth which acted as an abutment had some enamel tissue chipped off.

20 Q. What was the condition that that abutting tooth indicated to you, Doctor? A. Well, she had part of it broken off, part of the tooth.

30 Q. Did you take any x-rays of this condition? A. Yes, I did.

Q. What did they disclose, Doctor? A. Well, here is a report of the film. This is a report of the x-ray film. The upper right central, lateral and cuspid teeth have been loosened from their sockets and show a thickening of the periodontal membrane. There is a slight linear fracture of the alveolar process above these teeth with no

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Jacob Reich, for Plaintiff—Direct.

displacement. The sinus there shows a mild cloudiness of the right antrum and the treatment I gave was I placed a wire across the loosened upper teeth with the purpose in mind of immobilizing the same. I believe these teeth have been nonvital due to trauma and in order to prevent their removal pulp extirpation will be resorted to followed up by root canal therapy. However, even with these preventive precautions there is a—

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Mr. McLaughlin: Wait a minute. I do not want to restrict you at all for I did want your report, but as I understand it, your report on the facts. This is something that might happen later on.

Witness: Following.

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Mr. McLaughlin: Well, the doctor only saw the lady once and took the x-rays and we have actually had the man on the stand who told us what actually happened later on and I submit the doctor's opinion of what might happen on that first examination happily did not come true and if the doctor had continued treatment he would know the facts.

The Court: Yes, but the doctor did treat same to some extent.

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Mr. McLaughlin: I do not think the doctor ever saw her after this time.

Witness: Yes. I said I placed a wire up across the loosened upper teeth and I saw her once or twice after that.

Mr. McLaughlin: Then Dr. Denhost came in after you?

Witness: No, I do not know anything about that. I saw her on the 12th of August, the 14th of August and the 24th of August.

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Jacob Reich, for Plaintiff—Direct.

Mr. McLaughlin: And then they leave Dr. Reich and go to some other doctor and Dr. Denhost took it up later on.

The Court: He saw her three times and was the doctor treating her and he can give us his prognostication.

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

Exception noted as ground of appeal.

Witness: However, even with these preventive precautions there is a possibility of these teeth not responding to treatment and if such will be the case extraction will have to be done. Now, may I inject here—don't forget this is a report I sent away to the referring physician; this is a report I sent to him.

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The Court: Well, the possibilities we will have to strike out.

Q. Now, are those probabilities, Doctor—is that the sense in which you use the word possibility?

Mr. McLaughlin: I never heard such a word in court.

The Court: I will sustain it as leading.

30 Q. In your opinion, Doctor, and based upon your examination of this condition and your experience in the surgical field, are the probabilities there that these teeth may have to be extracted?

Mr. McLaughlin: I object to that. We have had the doctor's report. Dr. Reich says in his report if something happens, possibly these teeth come out and if something did not happen the teeth would not have to come out. Now, how can counsel get this intelligent, decent dentist to say

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Jacob Reich, for Plaintiff—Direct.

that probably the teeth came out when we know they did not?

The Court: Well, the doctor testified to what his prognostication was at that time and he was asked what it was and he gave what it was and he phrased it in the word possibility. Now, I think that will stand as it is. It was stricken out for that reason and I do not think it is proper to put a leading question to him now and ask him whether or not these are not probabilities, and I sustain the objection. 10

Counsel for plaintiff Zipkin prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Now, when you refer in your report to non-vital teeth, what does that mean? A. That means where the nerves die. The nerves have been killed. 20

Q. And was that the condition with these teeth? A. At that time it was.

Q. Doctor, what are the probabilities with regard to teeth in which the nerves have died in your opinion? A. Well, the probabilities are—

Mr. McLaughlin: It seems to me that Dr. Reich, if he does not know, should be allowed to know the facts in this case. I know that the doctor just came into the courtroom this minute and he said he did not talk to the other dentist. 30

Witness: I did not.

Mr. McLaughlin: So I think the doctor ought to be told. The doctor should not be put in a position of guessing about something when we all know it.

The Court: He is simply asked the one question, "What are the probabilities as to teeth where the nerves have been killed?" 40

Jacob Reich, for Plaintiff—Direct.

Mr. McLaughlin: Well, that might be all right as a generalization, but we are dealing with two teeth and we know what happened to them.

The Court: Surely.

10 Mr. McLaughlin: Well, then, it seems to me no matter how good Dr. Reich is he cannot tell us something different.

The Court: Well, what you are talking about is the importance of this testimony. What is the importance of it?

Mr. Penn: This, though we know the teeth are still in the mouth, Dr. Denhost has testified there may have to be an apicoectomy operation.

20 The Court: Go ahead.

Q. Now, Doctor, will you please tell us? (Question read.) A. The probability as to their staying in the mouth or have to be extracted?

The Court: That is not what you were asked.

30 Q. Well, what is the probability, any tooth in which the nerve has gone dead and for their staying in the mouth? A. Well, that still does not incorporate everything that would have to be known. Now, I am not here to ask questions, but were the nerves removed from the teeth?

The Court: In other words, if there is not sufficient in the hypothesis to enable you to answer just say so.

40 Q. Well, Doctor, if you were told that Dr. Denhost testified the nerves had been removed and the nerves were out of these teeth, what are the probabilities of those teeth staying in the mouth?

Jacob Reich, for Plaintiff—Direct.

Mr. McLaughlin: I think the doctor better be told that Dr. Denhost treated these teeth, that the teeth went back firm in the mouth and he has taken x-rays as late as September of this year and there was no abscessed condition or no other unusual condition with regard to the teeth, that the teeth are not discolored, that in his judgment the teeth have no abscessed condition of any kind and that what has been referred to here as a probability by counsel Dr. Denhost said himself was no more than a possibility at some future time just as with any other filled teeth, with nerve canal and root canal filled and so on, that perhaps later on an abscess forming might or might not and the same thing with discoloration. 10

Mr. Penn: I think that is a gross misstatement. The x-rays showed there were abscesses. 20

The Court: Now, you can put your question and if Mr. McLaughlin wants to amplify it on cross-examination and add different hypotheses, why, of course, he may. Now, you put your question and you can include such hypotheses as you think are favorable to your viewpoint and you are not bound to include any other. 30

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

Exception noted as ground of appeal.

Q. Doctor, you inspected these three teeth we are speaking of in Miss Zipkin's mouth? A. Yes, I have x-rayed them.

Q. If you were further told that Dr. Denhost found abscesses in them, but that he treated them 40

Jacob Reich, for Plaintiff—Cross.

by opening up the backs of the teeth to the root of the teeth, had to do root canal work after removing those nerves in the roots of those teeth and the teeth were non-vital and dead, can you tell us what are the probabilities of those teeth staying in the mouth, what are the probabilities of extraction or discoloration?

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Mr. McLaughlin: I object to that question on the grounds before stated.

The Court: Overruled.

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

Exception noted as ground of appeal.

A. Well, I think with teeth where the nerves have been extirpated that the chances are fifty per cent. they may remain and fifty per cent. that they may abscess and have to be extracted.

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Cross-examination by Mr. McLaughlin:

Q. Doctor, I show you Dr. Denhost's— A. If I may suggest, suppose we may compare the x-rays I took at that time. I have not seen these x-rays.

Q. I am going to show you one now of September 13, 1934, and if you will be kind enough to look at it, Dr. Denhost said there was nothing the matter with that picture. Incidentally, Doctor, I realize you have never seen the picture before. A. Well, these teeth do not show any growth abscess now, but they do show that there were root canals in them, that they are dead teeth.

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Q. There is no mystery about that, but does it show the root canals filled? A. Yes. You have the root canal filling right in there. These white lines (indicating), too, always shows a little thickening here (indicating) at the apex of this tooth.

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Jacob Reich, for Plaintiff—Re-direct—Re-cross.

Q. That is two of them? A. Well, there are three. Well, there is one here, one here, one here, one here; there are four, but this was taken of these teeth.

Q. How does it look, like a good job? A. Yes. That is nice root canal work.

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Re-direct examination by Mr. Penn:

Q. And what does that little thickening that you indicate— A. Well, it was abscessed.

Q. And will you look at these x-ray plates and see if they show definite abscessed conditions? A. Yes. You see this away up here. Well, now, that is an abscess (indicating). Now, that is an abscess right here (indicating). That tooth is abscessed right here (indicating). These definitely show abscesses. Now, there is a picture with the tooth before the root canal was filled, don't you see, before you put in these root canal fillings you treat these root canals to get rid of this abscessed area.

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Re-cross-examination by Mr. McLaughlin:

Q. And that is what happened here? A. Evidently.

Q. And so we come down to the picture of September 17, 1934, and they disappear. A. But they are still dead teeth.

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Q. If a tooth is dead you cannot bring it back to life? A. Exactly.

Re-direct examination by Mr. Penn:

Q. Doctor, what is a reasonable, fair price for the services you rendered? A. I charged \$25. She paid me \$25.

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(Plaintiff Zipkin rests.)

Motion for Nonsuit.

Defendant's counsel moves for a nonsuit in the Zipkin case on the same grounds as urged in the Hendler case, at the same time renewing the motion in the Hendler case for a nonsuit.

10 (Counsel argue. During argument.)

The Court: Of course, you refer, I presume, to the testimony this morning that the defendant Hendler said he fell asleep?

Mr. McLaughlin: I include all that, and so there will be no misunderstanding I will state it for the record. Your Honor, I am, of course, including whatever objections I have in the testimony. I am not waiving those objections.

20 The Court: Oh, yes.

Mr. McLaughlin: I am arguing whatever it is your Honor has admitted in the case, and I say that with these cases being tried together that the Zipkin testimony this morning is applicable to Mr. Weinberg's matter, Hendler. Now I say there is nothing in the testimony—certainly there was nothing yesterday—

30 The Court: We cannot be guided by yesterday when we have that testimony today.

Mr. McLaughlin: There is nothing yesterday which shows any inference of negligence among these cases. Now, coming to today—

40 The Court: Now, let us for the moment and sake of the argument assume that your argument that you made before is correct—I do not say so— Now, assuming that you superimpose on that the testimony that it was said by the driver—

Motion for Nonsuit.

Mr. McLaughlin: I certainly do.

The Court: —that he fell asleep for a moment. With that testimony in the case how can you say that the Court should grant a non-suit?

(Counsel argue. After argument.)

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The Court: I understood you to say that I was to regard for the purpose of this motion that Hendler said that he fell asleep was to be regarded as evidence as against Rose Meadows.

Mr. McLaughlin: No, your Honor.

The Court: Did you not say that?

Mr. McLaughlin: What I said was the evidence should be applied to Mr. Weinberg's case.

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The Court: Well, that is the same thing.

Mr. McLaughlin: Well, I thought Mr. Weinberg might have the idea that I was saying in Mr. Weinberg's case Miss Zipkin had not testified about this falling asleep at all.

The Court: Oh, the fact we have it understood that the testimony in one case—

Mr. McLaughlin: That is what I mean.

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The Court: If that is the understanding I want to be sure I am right. What I am going ahead on is this theory, that I am proceeding on the theory that the testimony with regard to Hendler going to sleep is evidential against Rose Meadows and also evidential against the other defendant. Now, if that be the case I think that your motion should be denied and so that will be the disposition.

(Addressing the jury.) Gentlemen, of course you will understand it is not my

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Irving M. Vanderhoff, for Defendants—Direct.

10 province to pass upon the facts at all. I am not the judge of the facts, but the judge of the law and I have to pass upon the law and all I am deciding here now is that under the law this is a case which should be submitted to the jury rather than to be decided by the Judge and that is all I am deciding. So please understand that I am not expressing an opinion in any way at all.

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

Exception noted as ground of appeal.

20 IRVING M. VANDERHOFF SWORN in behalf of defendants.

Direct examination by Mr. McLaughlin:

Q. Doctor, you are a practicing physician of our state? A. Yes.

Q. In Newark? A. Yes.

Q. How many years have you been practicing? A. Twenty-seven years.

30 Q. And at our request, Doctor, did you make a physical examination of Mrs. Hendler, one of the plaintiffs here? A. Yes.

Q. You made more than one, didn't you, Doctor? A. Yes.

Q. When was the first? A. June 6, 1933.

Q. And that is in this particular case? A. No, that is before this accident.

Q. Oh, you examined her June 6, 1933? A. Yes.

40 Q. We will come to that in a minute. You also made an examination of Miss Zipkin, didn't you? A. Yes.

Irving M. Vanderhoff, for Defendants—Direct.

Q. And now, going back to Mrs. Hendler, Doctor, you say you first made an examination of her June 6, 1933? A. That is right.

Q. That is before this accident? A. Yes.

Q. With reference to what, Doctor? A. An accident of May 12th.

Q. May 12th, the same year? A. Yes, sir. Just a minute. May 23rd. 10

Q. May 23rd, 1933? A. 1933.

Q. That is an alleged accident a couple of months before the later accident that you examined her for at some subsequent time? A. Yes.

Q. On June 6th, 1933, what was your examination, what did you find? A. I found the patient in bed following an automobile accident. The main complaint was the right lower extremity.

Q. By right lower extremity you mean right lower leg? A. The whole leg, upper and lower leg, both. She was not able to move her leg more than a few degrees and she complained of great pain in the knee. 20

Q. On this complaint of great pain did she make a great fuss? A. Absolutely. She would not let me bend her knee.

Q. All right. What else, Doctor, regarding that examination? A. That was the extent of the injury to that part of the body. 30

The Court: Now, this was June 6th, 1933?

Witness: June 6th, 1933.

The Court: And the accident that we are interested in, as I understand, gentlemen, occurred July 18th, 1933?

Mr. McLaughlin: That is what we claim. That referred to the earlier claim. You remember, she claimed an accident in the same automobile earlier. 40

The Court: Yes.

Irving M. Vanderhoff, for Defendants—Direct.

Q. Doctor, what was the next time you saw her?

A. The next time was July 25th, 1933.

Q. And where did you see her then? A. At Beth Israel Hospital. She was in bed there.

10 Q. And what was her condition, what did you find, Doctor. A. She had a cast on her left leg, which had been applied that day. It extended from the toes up to the knee—almost to the knee.

Q. That is the left leg? A. The left leg.

Q. With respect to that cast, was that a cast that was put on so stiffly that it would press on the leg and cause pain and suffering and all that sort of thing?

Mr. Weinberg: I object.

20 The Court: I do not think the word stiffly.

Q. So unevenly?

Mr. Weinberg: I object to that.

The Court: Yes.

Q. How about the cast, was there anything to the cast that would cause a swelling and pain and discomfort? A. Well, it was a nice looking cast and it looked to me as though it had been applied properly.

30 Q. And at that time the condition around the ankle had some swelling about it, didn't it?

A. Well, I could not judge that from the cast, but I saw the x-rays and they did show some swelling, yes.

Q. And with that swelling going down from this trauma the cast would become more loose?

A. That is right. They waited one week, I think,—no, it was more than that, for the swelling to go down before the cast was applied.

40 Q. All right. Doctor, go ahead and tell us about it. A. That was the only part that was being

Irving M. Vanderhoff, for Defendants—Direct.

treated, but I examined the various other parts of her body on the front of the chest above the breast was some discoloration, black and blue, but at that time it was beginning to fade and was sort of brownish, and there was a spot on the front of the right thigh, a similar spot of discoloration, and those were the real injuries that she had at the time. 10

Q. Did you see her after that? A. Yes, I saw her again November 5th of this year.

Q. And tell us about that, Doctor, will you?
A. At that time I examined her ankle—both ankles. She walked into the room where I was, she walked without any limp, she put full weight on her both feet, the ankle had healed well, there was no widening in the bones of the ankle, the bones were in good position originally and remained so and there was perfect healing as far as the bones are concerned. She had some swelling in that left leg. It is not at the ankle, above the ankle starting two or three inches above, in the calf, there is some swelling and that is from varicose veins and that is causing the swelling here. I also examined the right ankle and both ankles had full motion and she is able to bear weight on both feet. I also examined her back, which she was complaining of at that time. She went upstairs to the bedroom for that and removed her clothing. 20 30

Q. She went up herself? A. Yes.

Q. That is up to another floor of the house?

A. Yes, and she removed the clothing there and I examined the back and she complained of some slight and indefinite pain over the whole back, but I could not find one spot that was painful when I pressed.

Q. And she complained of a great deal of pain? 40

Irving M. Vanderhoff, for Defendants—Direct.

A. Well, she complained of pain about a foot square on the back.

Q. She did that June 6th when you first examined her? A. No, not the back. Oh, June 6th, yes. Yes.

10 Q. Was there anything the matter with the knee at that time? A. Well, it was a little swollen. She probably had bruised it.

Q. How about her heart and pulse? A. Her pulse was 72 on the last examination.

Q. What is that? A. That is a normal pulse rate. I listened to her heart and found nothing wrong with her heart.

Q. Anything else? A. Not except the x-rays.

20 Q. Tell us about the x-rays. A. Well, the x-rays showed a fracture, as described by Dr. Fruat.

30 Q. You are talking about the fracture of the left ankle? A. Yes. A corner is off that bone of the leg at the ankle, both on the outside and inside, and there is a distance a half inch in diameter. The fracture does not go across the bone, across the ankle. That line you see there (indicating) is the normal joint; in other words, the weight bearing was not affected. The accident had probably caused that twisting of the foot, tearing that off the corners of the bone. You have a bone coming up fitting in against the bone of the leg. The left hand represents the leg bone and when that foot twisted it broke the corner of the bone. One side was pushed off and the other pulled off.

Q. Hold that up. But there is no fracture across the upper part of the ankle, is that right? A. (Not answered.)

40 Mr. Weinberg: I object. I do not think the doctor requires any leading from Mr. McLaughlin. I object.

Irving M. Vanderhoff, for Defendants—Cross.

The Court: Well, I think it would be only repetition of what he said before. I will allow that to stand.

Now, the time you examined this lady, which is June 6, 1933, you referred to her knee and said she did not want to let you bend it. Now, which knee was that? 10

Witness: That was the right knee.

Q. Now, Doctor, with reference to Miss Zipkin, did you see her? A. Yes.

Q. When did you see her, Doctor?

Mr. Weinberg: If your Honor please, do you not think that this is the time for me to examine or cross-examine as to the plaintiff Mrs. Hendler? 20

The Court: Well, perhaps we better take it in that order. That is agreeable to you?

Mr. McLaughlin: I do not care.

The Court: All right.

Cross-examination by Mr. Weinberg:

Q. Doctor, you are not a heart specialist, are you? A. No, sir.

Q. And you practice medicine and surgery here? A. Yes. 30

Q. You examined Mrs. Hendler on the 6th of June, 1933? A. Yes.

Q. What was the occasion of your examination? A. She had had an automobile accident on May 23, 1933.

Q. And she reported that to you? A. No.

Q. Well, you examined her not on her own behalf, did you? A. No, sir.

Q. And when you examined her you did not find any evidence of any fracture of the tibia or fibula of the left leg? A. No, sir. 40

Irving M. Vanderhoff, for Defendants—Re-direct.

Q. You found no break in the ankle or any bruise to the lower ankle, to the bone there, did you? A. No.

Q. So that what you found on June 6, 1933, was entirely disconnected with what you found on your examination after the accident July 18, 1933? A. As far as what I found, yes.

Q. Yes. You found no evidence in your examination July 25th of the things about which she complained on June 6th, did you? A. No, sir.

Q. You understand the question plainly, don't you? A. Yes.

Q. So that there is no connection between the injuries that you found after July 18th and the bruises that you found on June 6th, right? A. As far as what I find is concerned, but her complaints are much the same.

Q. I am not speaking about complaints. I am speaking about the objective things. A. That is what I found, yes.

Q. And is that true with respect to the discoloration you found on the chest as late as the second examination July 25th? A. Yes.

Q. No connection between the injury of May 23rd and that discoloration on the chest on July 25th? A. No, sir.

Q Now, you examined the x-rays, did you? You saw them in court yesterday, didn't you? A. Yes.

Q. Would you mind looking at them again, please? Now, I understand that you are satisfied that what Dr. Fruat testified to with respect to the fractures of those two bones in the left ankle or above the left ankle is correct, is that so? A. Yes.

Q. And are you satisfied from the examination of the x-rays or any other examination made by you that there was also a fracture at the bottom

Irving M. Vanderhoff, for Defendants—Cross.

—I do not know whether it is of the tibia or not, of the right leg? A. According to that x-ray I found a fair interpretation that there may be a crack in the bone there. It is not very positive, but there is something there. There is no displacement in there.

Q. So there is no serious dispute so far as you are concerned that there was some sort of break or crack in one of the bones above the ankle on the right leg? A. But I do not know when that happened. 10

Q. No, I am not asking you that now, I am asking you you are satisfied in your examination of the x-rays and what you found in July that there was some break in one of the bones of the right leg above the ankle? A. I do not think I can be positive. 20

Q. Well, if you can be positive— A. There is more to the question than your x-rays.

Q. I see, you do not want to rest it upon the information you elicit? A. Yes, as far as the x-rays there was a line there which may be a complete fracture of the bone.

Q. And that is why you generally do have x-rays to show you things that you sometimes do not you yourself find and sometimes to corroborate you? A. That is right. 30

Q. And at times when the x-rays tell you something you are inclined to accept that? A. Yes. We may disagree on the interpretation.

Q. Then you are also satisfied from the examination of the x-ray that there were fractures—two of them—to the left ankle, or you call the ankle something different than the bones, do you not? A. Yes—no, the ankle. We use the ankle the same as you do. The joint between the bones, you say ankle joint; then it is different. 40

Irving M. Vanderhoff, for Defendants—Cross.

Q. Well, I said I was not using the right word because I know there is some distinction. May I ask when you speak about the leg what you include in the leg, anybody's leg? A. Anatomically we mean from the knee to the ankle.

10 Q. And above that you call it the thigh, is that right? A. Yes.

Q. Now, Doctor, in this case, you can tell, first, what happened after those two bones of the left leg were fractured, what happened, if you know?

A. What do you mean, about being brought up from Asbury Park?

20 Q. No. I am speaking now about the bones. What happened in the leg, calling that part of the leg after those two bones in the left leg were fractured, what happened? What did nature or the doctors do? A. Nature repaired them.

Q. The doctors put a cast on? A. Yes, so moving the foot would not knock the position out of place. They were in good position and if you moved them too much you would knock them out of place.

Q. Now, is there any difference in the healing of broken bones in younger persons and older persons? A. Not in the method. There may be in the lifetime.

30 Q. And in the muscles? A. No, I do not think so.

Q. Do old people receive the benefit from nature that young people do? A. The bones in older people may get harder.

Q. Now, you said there must necessarily have been swelling although you did not see under the cast. A. I saw in the x-ray.

Q. Under the cast? A. I saw the swelling in the x-ray.

40 Q. Can you see swelling? A. Well, you can see the contour. You know about where it should go.

Irving M. Vanderhoff, for Defendants—Cross.

Q. So there was swelling that was obvious to you or that you could see even though there was a cast on there? A. Well, not from looking at the cast, but looking at the x-ray.

Q. Well, looking through the cast. A. No, you cannot look through the cast.

Q. Will the x-ray light penetrate the cast? A. 10
Yes.

Q. And that is what you saw on an examination of the x-ray? You could see the picture which would to you indicate a swelling? A. No. I think the x-rays were taken before the cast was on, but, at any rate, the answer to your question is I could tell you there is swelling there from the x-ray.

Q. Now, if there is any swelling there and if there is a well-fitted cast there, doesn't that restriction cause considerable pain? A. No, it does not. It relieves the pain. 20

Q. Did you ever suffer yourself from such an injury? A. No, never. That I only know from treating other people.

Q. Now, do you know how long the cast was applied? A. From the toes up to the knee.

Q. I did not mean the length. I mean the period of time. A. How long it took to put the cast on? 30

Q. No. How long it was kept on. A. Well, she may have told me. I think about eight to ten weeks. I do not know.

Q. Do you know what the purpose was for having the cast run all the way up from the toes to the knee? A. Yes. The purpose is because these bones were all the way to the knee and we want to immobilize the ankle joint.

Q. So that it would not be sufficient to immobilize right at the seat of the injury? A. No. They 40
become so loose in the cast that you must run it quite a distance above.

Irving M. Vanderhoff, for Defendants—Direct.

Q. Now, after the July examination I understand you did not see this lady until December?

A. I did not say this past month. November.

Q. Oh, then you did not see her from July, 1933, until October of this year? A. November 5th, this year.

10 Q. That is just a few weeks ago? A. Yes.

Q. So that for a period of seventeen months, then, you do not know anything about the condition of this patient? A. No, I did not.

Direct examination (Continued) by Mr. McLaughlin.

Q. Now, Doctor, regarding Miss Zipkin, you told us that you examined her. When did you do that, Doctor? A. That was August 22nd, 1933.

20 Q. And did you see her once or more? A. Once.

Q. Where did you see her? A. I saw her at her home, 52 Millington Avenue, Newark.

Q. What date, Doctor? A. August 22, 1933.

Q. She was at her home in Newark? A. Yes, she certainly was.

Q. All right. Doctor, what did you find and what was your opinion? A. I found a scar on the right side of the upper lip, at the border of the lip, a scar a half inch long extending through on the inside of the mouth—inside of the lip. I found directly opposite on the lower lip a quarter inch scar. I examined her teeth. There was a wire about these two teeth, the first and second teeth in the right upper jaw. I tapped on those teeth and found sensation there. They were not moveable and no one of the four teeth was movable at that time, although she gave me a history of their having been loosened, but at that time they were fast. The wire was around two teeth

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allegedly loose. If they had been loose they would

Irving M. Vanderhoff, for Defendants—Direct.

have moved together. It is like fastening one post to another post. There is no question that the wire was only around those two teeth. There was a tooth out in the lower jaw and the next tooth had a groove on it, which I thought was from the bridge, but it has been said here a piece of enamel broke off there, but it is where the bridge went around the next tooth. Then the patient complained also of her knees and the one ankle. Now, on the front of each knee I could make out what appeared to be a fading bruise. I felt there had been a bruise to the knee which apparently faded then. The patient complained of the right ankle area, but both ankles are the same. The patient has a dropping of the arch in both feet. 10

Q. Is that flat-footed? A. Well, it has not reached the stage of being flat, but it is partly down in both feet. 20

Q. She claimed she got that in the accident?
A. No.

Q. One of her arches hurt her, and the other one was fallen, too? A. They were both down. Now, that was all with the exception of the x-rays. I saw the x-rays at Dr. Reich's office.

Q. Did you examine them in Dr. Reich's office?
A. I did.

Q. Did you talk to the doctor about them? A. Yes. 30

Q. Tell us about those x-rays. A. There were two films—

Mr. Penn: Before the doctor testifies on that, I want to ask whether he is a dentist or dental expert before he gives any expert dental opinion.

Witness: I have taken many x-rays of teeth, sir. 40

Irving M. Vanderhoff, for Defendants—Direct.

Q. And over a long period of years, Doctor, have you become familiar with the reading of x-rays? A. Yes.

Q. Before for Mr. Weinberg I think you said you could read these x-rays without having a special light. A. Well, those are large pictures. You can see them with ordinary light.

Q. Did you see these x-rays? A. Yes.

Q. Did you talk to Dr. Reich about them, the doctor who took them? A. Yes.

Q. What did he say regarding the x-rays? A. He stated what he had here—

Mr. Penn: I object.

The Court: Sustained.

Mr. McLaughlin: The doctor has been testifying as to what the x-rays found. Now, if there is some contradiction of Dr. Reich's testimony—

The Court: Did you lay any foundation for it?

Mr. McLaughlin: Specifically, no.

The Court: Well, then, you cannot proceed with it.

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

Exception noted as ground of appeal.

Q. How about the x-rays, Doctor, what did they show, in your judgment? A. Well, they showed very little wrong in those x-rays, sir, and I could not see any reason why those teeth should come out.

Mr. Penn: I move that be stricken out unless he is qualified as a dental expert as to what might happen to the teeth.

The Court: I will let it stand. The weight of it is for the jury.

Irving M. Vanderhoff, for Defendants—Cross.

Q. Anything else about Miss Zipkin? A. Not that I recall.

Cross-examination by Mr. Penn:

Q. When you saw her, Doctor, it was over a month after the accident happened? A. A month and four days, yes. 10

Q. By that time most of the swelling on the knees would have normally disappeared, wouldn't it, Doctor? A. If it were due to bruising, yes.

Q. And the swelling on the face would probably have disappeared? A. It had disappeared. The swelling was gone. It was healed when I saw it and I described the scar and not the cut, and the scar comes after the cut and it, of course, was healed. 20

Q. Now, Doctor, you said you read x-rays very well, did you not? A. I do not know them very well. I said I had taken many of them.

Q. Does that indicate an abscessed condition of the teeth? A. I would have to have a light for this. The one tooth here, that is, the second tooth from the center, has an area around the apex where the bone is less dense, but there is no abscess there because you still see bony condition in all that area. 30

Q. You see no abscess on that x-ray at all? A. No abscess on that x-ray.

Q. How about that x-ray, Doctor (handing x-ray)? A. This is taken after the teeth had been filled and, of course, there is no abscess here, because whatever condition was there had been treated before the filling. This is September 28th. That is only a month and six days after I saw her.

Q. That is right. A. You mean an abscess developed in that time was treated and cured and the tooth filled? 40

Irving M. Vanderhoff, for Defendants—Cross.

Q. I am not asking you that. Will you take that and show us if that shows an abscessed condition? A. No. This is the one I just examined, September 9th.

Q. No, that is not the one. A. Well, it is a similar one.

10 Q. However, you told us an x-ray shows— A. It shows the same condition.

Q. Does that x-ray show a filling in there? A. No.

Q. Which one is this (indicating)? A. This is the one you showed me first.

Q. A minute ago? A. It might have been a minute and a half. This is the one I looked at first before the fillings were put in and I described the area of the second tooth.

20 Q. Does that show an abscessed tooth? A. It does not, because all through that area there is bone yet, and where you have an abscess there is a destruction of the bone and pus.

Q. Now, look at that x-ray, not the upper, but the lower, and show us whether that contains an abscessed condition. A. No, it does not.

Mr. McLaughlin: I think counsel should say what he shows the doctor.

30 Witness: That is September 28, 1933.

Q. And the bottom view is being pointed out to the doctor and he is asked if that indicates any abscessed area around the tooth. A. It does not.

Q. It does not? A. No, sir.

Q. And I show you this x-ray picture dated September 9th, and ask you whether that shows any abscessed area. A. No, sir.

40 Q. It does not. You heard both Dr. Reich and Dr. Denhost testify on the stand? A. Yes.

Irving M. Vanderhoff, for Defendants—Re-direct.

Q. And those are the teeth they testified about, are they not? A. Presumably. I could not hear from where I sat.

Q. And are you satisfied that they are both dental men of experience and capacity?

The Court: He is not obliged to characterize them. 10

Q. You see no abscessed area in any of these teeth? A. I see no abscess. I described what I saw.

Re-direct examination, by Mr. McLaughlin:

Q. Well, apparently they have not Dr. Reich's x-rays here, Doctor. Coming back to these plates, the first date seems to be— 20

(X-rays offered in evidence and marked Exhibits P-2, P-3 and P-5.)

Q. Doctor, I show you P-3, which is the x-ray of the tooth produced by Dr. Denhost September 9th, 1933. Would you mind putting that up to the light and telling us what that shows?

The Court: Well, isn't that the one he read before? 30

Mr. McLaughlin: I don't know, your Honor. The doctor was not allowed to have the three of them at one time and counsel seemed to have some confusion as to which one the doctor was reading from and I am now giving them in proper sequence.

The Court: Well, the doctor identified them by the date before. Now, you are referring to them by the exhibit number. Suppose you give us the date also. 40

Irving M. Vanderhoff, for Defendants—Re-direct.

Witness: This is marked P-3, September 9th, 1933.

Q. Now, what does that show?

The Court: Is that the one you examined before?

10

Witness: Yes, twice before.

The Court: I mean here today.

Witness: Yes, twice before, right here.

Q. Now, Doctor, what does it show. A. In the second tooth in the right upper here, up at the apex, there is an area where the bone is less dense, but there is still bone there. Now, it seems to me that something had happened because of the change in the bone there. It might have been in the inflammatory process, but it did not go on and form an abscess. It did not form pus.

20

Q. Now, with reference to the teeth shown in that upper film, do they show abscessed condition?

A. The first tooth does not show any change.

Q. Would you indicate that by your pencil?

A. Yes. This tooth here (indicating). That is the second. Now, in the lower part of this this tooth is over here.

Q. Meaning the one that is in the center.

30

A. Upper one in the center of the film and that shows practically the same as up here (indicating). It is a little different field, and the third tooth shows good bone right at the apex. The fourth tooth is almost all here and what is here does not show anything wrong.

Q. Incidentally, Doctor, I think you did mention it, but I missed on it, which is the one that might have an inflammatory condition of the bone? A. This here (indicating).

40

Q. Does that show in the lower picture?

A. Yes.

Irving M. Vanderhoff, for Defendants—Re-direct.

Q. That is the second one shown in the lower picture? A. Yes.

Q. Does it in the lower picture show abscess? A. No. A similar condition.

Q. And then we have September 28, 1933. Now, does the second picture of September 28, 1933— A. It is marked P-5. 10

Q. And first of all does that second picture— does that show the same tooth as in the first picture P-3? A. It shows one, two and three in the right upper. Those two are the same.

Q. Would you put them up together and let us see what they are? A. Yes.

Q. The one you are holding right is the second? A. Yes.

Q. Now, how about those? A. This in reference to the upper film in P-5, that tooth is number one in the right upper and is the same tooth as this (indicating). It has now been filled. Number two has been filled. 20

Q. Doctor, that there very white streak that is down the center of these teeth, is that the filling substance? A. That is the filling substance, some artificial substance put in there. If you note, at the apex of that second tooth is this dark streak I speak of. Now, that is after the tooth is filled. That was not any abscess. 30

Q. How about the next tooth? A. Now, these teeth down here (indicating), although this has only one date on, do not have this material in them. Now, this might have been taken the same day and then the teeth been filled after and another picture taken after that.

Mr. Penn: I object to what might have been done.

The Court: I will allow it to stand. 40

Irving M. Vanderhoff, for Defendants—Re-direct.

Q. Now, as I understand it, Doctor—withdraw that. In Exhibit P-5, you have two films, is that correct? A. Correct.

Q. Will you please tell us whether the upper film embraces the same teeth as the lower film?

A. It does.

10 Q. And do I understand that the upper teeth are pictures supposedly taken the same day shows the condition different than the lower picture of the same teeth allegedly taken the same day, is that right? A. Yes. The upper one shows some artificial material put in there.

Q. Showing they have been filled? A. Some artificial material. I cannot say whether that is a permanent filling.

20 Q. But in any event that has been put in them in the upper film?

Mr. Penn: I object to all that. The doctor says he cannot testify to what they are in there.

The Court: Well, he reads x-rays and the testimony is for the jury and not for me.

Counsel for plaintiff Zipkin prays an exception to this ruling of the Court.

30 Exception noted as ground of appeal.

Q. Doctor, irrespective of whether you are a dentist or not, I am talking directly to the x-ray; as I understand it, pictures supposed to be taken the same day and have the same teeth, the upper one shows the teeth with some substance inside them, which is not the same—

Mr. Penn: I object.

40 Q. (Continuing)—as the condition of the teeth shown in the lower picture, is that right?

Irving M. Vanderhoff, for Defendants—Re-direct.

Mr. Penn: I object to that. Counsel states pictures taken on the same date. The dates are on there and it is very evident if they were on the same day—

The Court: Well, he means apparently and presumptively taken the same date.

10

Q. Will you answer the question? A. Yes. It shows some artificial material put in the teeth. Now, you cannot tell from the x-rays whether the thing is gold, silver, platinum, bronze or what it is. You can only tell it is artificial.

Q. Now, looking at P-4, x-ray dated September 13, 1934, does that show the same teeth as in the other film? A. The first tooth is cut off there and it shows the second and the third and the fourth, fifth and sixth.

20

Q. All right. Do I understand, Doctor, that the last x-ray, P-4, shows three of the four teeth that are in the other picture? A. Yes.

Q. And those are in the last picture, P-4. Looking from left to right, those are the second, third and fourth teeth shown? A. Yes. And by checking it up I can see the apex of the first, which is the important part.

Q. Doctor, with reference to those teeth, what do they show in this last picture? A. You see the root canal filled in the first, second and third teeth and tooth number six has the root canal filled with a large filling occupying a considerable part of the tooth. They show no abnormal condition of the bone around the teeth.

30

Q. And would that last statement of yours include absence of abscess? A. Yes. It is perfectly normal around the tooth.

40

Irving M. Vanderhoff, for Defendants—Cross.

Cross-examination by Mr. Penn:

Q. Doctor, in your experience as a medical man, have you done any root canal fillings? A. No.

Q. Have you ever filled a tooth under any circumstances? A. No.

10 Q. Now, you do not know anything from experience about filling teeth, do you, Doctor? A. Not about filling teeth, no, sir.

Q. And you have had no experience in filling teeth? A. Not in filling teeth.

Q. Do you know whether those teeth are vital or not vital, Doctor? A. You mean now or when I examined them? When I examined them they were vital. Since the doctor took the nerves out they are non-vital.

20 Q. I am not asking you if you know whether the teeth are non-vital. A. After the nerve is taken out the tooth is not vital.

Q. Those teeth are dead? A. Now they are. When I examined them they were alive.

Q. Was that August 22nd? A. Yes, they were alive.

Q. What makes you say they were alive? A. Because the patient felt pain in the teeth and because when I touched the teeth she could tell.

30 Q. Now, that day those gums were badly lacerated, weren't they? A. No.

Mr. McLaughlin: Your Honor, that has all been gone into.

The Court: This examination by Mr. McLaughlin was only addressed to these pictures.

40 Q. Now, wouldn't the patient react to pushing the teeth up into the gum if the area above there had been injured or affected?

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Mr. McLaughlin: I object. Dr. Vanderhoff has not said he pushed the teeth into the gum.

A. I said tapped on the teeth. I tapped with an instrument on the teeth. I was not pressing them up.

10

Q. And if there was some inflammation up there or injury to the membrane around the root of the teeth wouldn't the patient react to it?

A. Up to the part you speak of, yes.

Q. So you cannot tell from your examination whether it was a vital tooth or whether the reaction was due to a tender spot on the jaw?

A. Yes, I could.

Q. How could you tell? A. In the first place, there was no sore spot where I examined her.

20

Q. Well, did you have an x-ray right then and there? A. No. I am not talking about the x-ray. That is my examination.

Q. Well, would you know from your examination whether the periodontal membrane around the root of the teeth was injured? A. No.

Q. And if it was she would have reacted to it the same as if they were alive? A. No, sir, and I saw the x-rays and the periodontal membrane in the original x-ray was not injured.

30

Mr. McLaughlin: Was not injured?

Witness: Was not injured.

Q. You said in P-3, referring to P-3, Doctor, you said that there was evidence there of a less dense area at the root of one of the teeth; do you remember that? A. Yes.

Q. What causes that less dense area? A. I think that was due to an inflammatory process of some type.

40

Rose Meadows, Defendant—Direct.

Q. It might have been an abscess? A. No, it was not an abscess. You can have inflammation without abscess. An abscess is formation of pus.

Q. And you want to say there was no abscess there and that does not indicate abscess?

10 Mr. McLaughlin: He said that all the morning.

A. I am prepared to say August 22nd there was no abscess. I am prepared to say that the x-rays I saw in Dr. Reich's office did not show abscess and I am prepared to say that one does not show abscess (indicating), that does not show abscess (indicating), that one does not show abscess (indicating), and I have said so right along.

20 (Recess for one hour.)

AFTER RECESS.

ROSE MEADOWS, one of the defendants, sworn in her own behalf.

Direct examination by Mr. McLaughlin:

30 Q. Mrs. Meadows, you are one of the defendants in these suits, aren't you? A. Yes.

Q. You and your brother Meyer are being sued, is that right? A. Yes.

Q. And the plaintiffs, the people who are suing you, are Isaac Hendler, who is your father, isn't he? A. Yes.

Q. And Fannie Hendler is your mother, isn't she? A. Yes.

40 Q. And Goldie Zipkin? A. She is a friend of mine, right.

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- Q. Where do you live? A. 93 Hillside Avenue.
- Q. With your father and mother? A. And husband.
- Q. Your husband? A. Yes.
- Q. And you lived with your father and mother at 93 Hillside Avenue in July, in 1933? A. Yes.
- Q. And the Buick car that Meyer was driving in the accident, do you remember it? A. Right. 10
- Q. How did you get that car? A. Well, my husband purchased the car from Hendler's Uptown Bakery, Inc.
- Q. When did he do that? A. In May, 1933.
- Q. The same year? A. Yes.
- Q. Was it May or June? A. May.
- Q. And Hendler's Uptown Bakery, that is an incorporation? A. Yes.
- Q. And you are secretary of that corporation? A. Yes. 20
- Q. And the rest of the corporation are your brother Meyer, the fellow that is being sued here with you and your father? A. Father is just manager of the business. Father has no stock.
- Q. Your father is the manager of the business? A. Right.
- Q. Your father and Meyer run the Hendler Uptown Bakery, Inc? A. Yes.
- Q. And you are the former secretary? You do not do much up there? A. No. 30
- The Court: What is your brother Meyer?
Witness: The president.
- Q. I do not think you told us who the directors are. Who are the directors? A. There is not any.
- Q. No directors in a New Jersey Corporation? You do not mean that? A. I do not know.
- Q. You as secretary, you keep the formal books? A. I do. 40

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Q. And is Meyer the president of it? A. Yes.

Q. And is your father the vice-president? A. No, sir.

Q. Who is the treasurer? A. Well, I take both treasurer and secretary.

10 Q. Looking at this paper dated October 19, 1933, at the bottom of the first page is the signature Rose Meadows. Is that your signature? A. Yes.

Q. Look at the paper. A. Yes, it is.

Q. But the face of the paper is not in your writing? A. No.

Q. And the language starting, "On July 18, 1933, sometime in the morning"—

Mr. Weinberg: One moment.

20 Q. That language so starting, that is not in your writing?

Mr. Weinberg: I object.

The Court: Well, it is just some informal words, "In July, 1933," and stops there. He only identifies the paper writing.

Mr. McLaughlin: Yes.

30 Q. I want you to look at that and I do not want to read it to you on Mr. Weinberg's objection. Read that. A. Do you want me to read it out loud?

Q. No.

The Court: Read it to yourself.

Q. Read it to yourself. Did you read it? A. Yes.

Q. Is it clear to you? Can you understand it? A. Yes.

Q. That is not in your writing, either, is it? A. No.

40 Q. And on the second page of the same statement, the same October 19, 1933, again appears

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with the signature Rose Meadows. Is that in your handwriting? A. Yes.

Q. And is the witness on the left and immediately above your signature, appears the language, which has nothing to do with the facts, "I have read the two page statement and find it correct and true." Do you see that? A. Yes.

10

Q. Over your signature? A. Yes.

The Court: In whose handwriting is that, those words that were just read to you?

Q. None of the handwriting on the two page statement is yours with the exception of your signature, is that right? A. That is right.

Q. And the language before your signature and immediately above it, "I have read the two page statement and find it correct and true," that is not in your handwriting, either, is it? A. No.

20

Q. On July 18, 1933, were you in Newark? A. No, sir.

Q. In the morning? A. No, sir.

(Statement marked D-1 for identification.)

Q. On July 18, 1933, which is the day of the accident, were you talking to your brother Meyer? A. No, sir.

30

Q. Did you tell him to take and using your language, "My sedan and drive down to the Brunswick Hotel in Asbury Park, New Jersey, to see my mother, Mrs. Fannie Hendler, who was stopping at that hotel?"

Mr. Weinberg: One moment. In the first place, I object to the reading of a statement we know nothing about.

The Court: Sustained.

40

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Mr. Weinberg: And, secondly, there is no proof in this case on the 18th of July there was any such conversation. It was stated on the 4th of July there was, but not the 18th. I think the lady was not in the city on the 18th.

10 The Court: I am sustaining your objection that saying, "This is not your own language," I think that is not a proper form of question for this witness, because the statement is not in evidence.

Q. Mrs. Meadows, on July 18, 1933, sometime in the morning, did you tell your brother, Meyer Hendler, of 93 Hillside Avenue, Newark, New Jersey, to take your Buick sedan and drive down
20 to the Brunswick Hotel in Asbury Park, New Jersey, to see your mother, Mrs. Fannie Hendler, who was stopping at that hotel?

Mr. Weinberg: I object to that on the ground, first, that it is entirely leading and, secondly, that this witness is giving direct evidence, not in rebuttal, and, thirdly, that there is no proof in the case that on July 18th, she did tell her brother to go to Asbury Park or any other place. The only
30 proof in the case is that on July 4th, before she went away, she told Meyer that he should take his mother—her mother out whenever he could and if he could not to have Jimmie do it, and so forth. There is nothing in there about July 18th.

Mr. McLaughlin: Answering Mr. Weinberg as to the first question, the first point, that it is leading, perhaps it is a little bit leading. It may be. As I understand it,
40 leading questions are within the discretion of the Court.

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The Court: Now, I realize that is one objection that has been made. Now, I would rather hear you on the other objection.

Mr. McLaughlin: All right. The other objection seems to be that because some witness in the case, in the plaintiff's case, said that on July 4th, Mrs. Meadows said something, that Mrs. Meadows, a party to the action, cannot go on and say something different. 10

The Court: I think the question is leading, but I will overrule the objection, nevertheless.

Counsel for plaintiffs Hendler prays an exception to this ruling of the Court.

Exception noted as ground of appeal. 20

(Question read.)

Witness: Not on July 18th.

Q. Did you use that language to your brother on any date in July? A. I did.

Q. When? A. July 4th.

Q. And that is exactly what you told him, was it? A. Exactly.

Q. There is no confusion in your mind as to that, is there? A. No. 30

Q. And that is the exact truth? A. Yes.

Q. And that is all you told him, isn't it?

Mr. Weinberg: Wait a minute. Counsel was very careful in my examination, as he was right to be, against any leading questions. Now, I object to his pounding it into this witness what he wants her to say.

The Court: Overruled.

Counsel for plaintiff Hendler prays on exception to this ruling of the Court. 40

Exception noted as ground of appeal.

(Question read.)

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Q. Answer that yes or no. A. Well, I told him if he could not do it to get my chauffeur to do it.

Q. For your mother? A. To take mother out riding.

10 Q. Let us not have any misunderstanding about that. Perhaps you misunderstood the entire series of questions. Let me ask you again. You have already denied telling Meyer that he was to take your Buick sedan and drive down to the Brunswick Hotel in Asbury Park— A. Yes.

Q. —to see your mother, Mrs. Fannie Hendler, on July 18th. A. Well, I did not say when. I said when mother was down there to take the car and go down and see her, to pay her a visit.

20 Q. Again—it is probably my fault—did you on July 18, 1933, sometime in the morning, tell your brother, Meyer Hendler, of 93 Hillside Avenue, Newark, New Jersey, to take your Buick sedan and drive down to the Brunswick Hotel in Asbury Park, New Jersey, to see your mother, Mrs. Fannie Hendler, who was stopping at that hotel? A. Not on July 18, no, sir.

Q. Did you tell him that on July 4th? A. I did.

Q. And is that correct? A. Yes.

30 *Cross-examination by Mr. Weinberg:*

Q. I understood you to say that on July 18th, you had no such conversation with your brother. A. I did not.

Q. As a matter of fact, you were not in the city? A. No.

Q. But you were in the city on July 4th? A. Yes.

Q. And as a matter of fact, your mother was in Newark on July 4th? A. Yes.

40 Q. So, then, with that in mind, did you tell him to go to Asbury Park to take your mother out,

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she being in Newark? A. Well, my mother expected to go away, and when she was down there, to go down with the car to take her out.

Q. Yes. Did you say how often he could take her out? A. Well, every time he had a chance.

Q. That is what you told him and that was July 4th? A. Yes. 10

Q. And you also said something about Jimmie. Who is Jimmie? A. Well, he is a chauffeur that drove me around once in a while.

Q. And you paid for it? A. Yes.

Q. And you told Meyer if he did not have a chance he could get Jimmie? A. Right.

Q. And who was to pay Jimmie? A. I was.

Q. Had Jimmie been used while you were away by anyone? A. Yes.

Q. And did you pay for Jimmie's services? A. I did. 20

Q. Now, you said something about your husband getting that car from the bakery. Was there ever any such transfer made or any record in Trenton of your husband having been the owner of that car? A. No. My husband was not the owner. The car was bought in my name.

Q. Then it is registered in your name? A. My name.

Q. Well, then, what do you mean by saying your husband got it from the bakery? A. Well, he bought it from the bakery for me, in my name. 30

Q. It never was in his name? A. No.

Q. You have a registration card with you? A. No.

Q. Did you ever have one yourself? A. Yes.

Q. You paid for it in your name but you never got it? A. No.

Colloquy of Counsel.

Cross-examination by Mr. Penn:

Q. Isn't it a fact July 4, 1933, when you spoke to your brother Meyer about taking your mother out and whatever friend she may want to take that may be there with her? A. That is right.

10 Mr. McLaughlin: I plead surprise at the testimony which has just come off the stand and for the purpose of neutralizing that testimony I offer in evidence D-1 for identification.

20 Mr. Weinberg: If your Honor please, I have never heard of the party himself pleading surprise by his own testimony. This is one of the defendants. This is not a witness in the car and it is a most unheard of thing for the party himself to plead through his attorney surprise at his own testimony.

30 Mr. McLaughlin: I think the case of *State v. Bovino* was tried right in this courtroom. Exactly the same situation arose and the Prosecutor's office offered in evidence the statement of Big Sue, one of the people in the case, for the purpose of neutralizing the surprise occasioned by the witness' testimony contrary to a statement given prior to the trial. The fact that the witness happens to be a party does not change the essential fact that the party was a witness. This party was sworn as a witness and I say that the testimony and I say it in the utmost good faith, and I have a two-page statement with the woman signing those pages over her signature——

40 Mr. Weinberg: One moment. I am objecting.

Colloquy of Counsel.

Mr. McLaughlin (Continuing) —saying she had read the above statement and it is true, and she goes on the stand and deliberately testifies to something directly contrary.

Mr. Weinberg: I object to it.

The Court: Mr. McLaughlin, the point is this. There is nothing before the Court to show what the contents of that statement is, and the statement is not in evidence and you have no right to state before the jury what the statement is. 10

Mr. McLaughlin: I make the offer.

Mr. Weinberg: I object. Mr. McLaughlin has stated the case of *State v. Bovino*, but after all the State is the party, but here is counsel objecting to his own client, stating she is surprising him. She controls her own testimony and counsel does not. 20

The Court: I think we cannot lose sight of this fact, that your position here is merely one of agency. You are the agent of Mrs. Meadows and you are not a principal. Now, you are proposing to neutralize the testimony she gives. Have you any authority from her to take such action?

Mr. McLaughlin: To offer her statement. 30

The Court: No, to neutralize her statement that she has given on the stand.

Mr. McLaughlin: Why, of course not. Otherwise I would not make the statement to the Court that I am surprised. I am making that statement in good faith.

The Court: I suppose you are surprised. You are only an attorney and she has made a statement on the stand. Now, you are starting in to contradict her statement, at 40

Colloquy of Counsel.

least, neutralize her statement and wipe it off the slate.

Mr. McLaughlin: Yes, sir.

The Court: Now, I am asking you what authority have you to do such a thing.

10 Mr. McLaughlin: Your Honor, if you mean has Mrs. Meadows told me that in case she gets mad while on the stand I can put her statement in, I tell the Court very frankly that she told me no such thing and I had no such conversation with her, but before I did anything about the statement at all, before I talked to her on the stand, so there would not be any confusion, the paragraph which I read was the paragraph which she read on the stand. Now, in addition to Mrs. Meadows being a defendant here, incidentally, at this point, I do not know whether the Court has before it the fact that in both the cases, in the Hendler case there has been an amended complaint which joins Hendler. I mean the parties defendant are the same.

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The Court: I have the parties the same in both cases.

30 Mr. McLaughlin: Yes, sir. That is right. And along that line I consented to that amended complaint and there was no opportunity to file an amended answer. I think it is agreed by all that my answer to the original complaint acts as the answer to the amended complaint.

Mr. Weinberg: I have not seen it, but I am willing to consent to that.

40 The Court: What I have in mind, are not your actions in conflict with the actions of your principal? Your principal comes here and puts a statement on record. You

Colloquy of Counsel.

as agent immediately proceed to try to wipe it off the slate. Now, are you not acting contrary to her wishes and her action?

Mr. McLaughlin: No, sir. I have actions and I have a statement, and that is what I am acting in accordance with. In addition, your Honor, I may say that the other party in person before the Court here, that there is another party defendant, and I am also in court defending all phases of this case, and the offer, of course, of this statement, I am putting in my defense to both cases at once and the offer of the statement is also not only from the Meadows angle of this defense, but from the Meyer Hendler angle.

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The Court: Yes.

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Mr. McLaughlin: So on that basis it seems to me—

The Court: That presents a different angle.

Mr. Weinberg: May I be heard on that?

The Court: Certainly.

Mr. Weinberg: It seems to me to be rather ingenious, but here is the situation there. This witness has given no testimony which enlarges upon any liability so far as shown against the other defendants. Her testimony relates solely to her own actions and cannot by any stretch of the imagination or words be held to add any liability to that of Meyer, who is responsible for his own conduct, whether he received it with her consent or without her consent. She has said nothing here which imposes any liability upon Meyer except the liability to take the mother out and that is not some-

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Colloquy of Counsel.

thing he can be found guilty of damages in this case. It is only negligence against him.

10 The Court: There is another aspect of this matter. The date that the statement refers to is the date of the accident, that is, it is July 18th, judging from what the witness and counsel have said. Now, that is a statement as to what was done on that date and the testimony is that she did not have any conversation on that day, that she was out of town.

Mr. Weinberg: There is no evidence, if I may again speak without tiring your Honor, that there was no conversation with her on July 18th.

20 The Court: Well, did I not just state she did not have a conversation and was out of town?

Mr. Weinberg: Yes.

The Court: Well, precisely. You are saying exactly the same.

Mr. Weinberg: Then what can she contradict?

The Court: Now, what is there that you want to wipe off the slate?

30 Mr. McLaughlin: There is, your Honor, in this statement—I do not want to read the facts of the statement—in this statement I read to the Court, that under it there is no agency on the part of Meyer Hendler.

Mr. Weinberg: One moment. I must object to counsel telling this Court and this jury, as strongly as words can make it, a part of the paper that is not in evidence.

40 Mr. McLaughlin: I will withdraw that. It is in evidence on my question at least

Colloquy of Counsel.

five times, addressed to Mrs. Meadows, when I asked her, and that is in the record, and I can so state this to the Court, I asked Mrs. Meadows if on July 18th she specifically told her brother Meyer to take her Buick sedan and go down to Asbury Park and see her mother.

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The Court: And she denied it. She said, "I didn't, I didn't tell him anything, because I was not in Newark at the time, I was somewhere else."

Mr. McLaughlin: Right, and going further, also on direct examination she admitted that she used that exact identical language to Meyer Hendler on July 4th.

The Court: You must state something on the record which, on the slate, as the Court has called it, that you want to wipe off and make clean. Now, I am trying to find out what is there on the slate you want to wipe off.

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Mr. McLaughlin: I want to wipe off from the slate Mrs. Meadows' testimony on both direct and cross-examination.

The Court: In which she said what?

Mr. McLaughlin: In which she said, not on direct examination, but on cross-examination of both counsel, that she told Meyer on July 4th to go down and take her mother out in the automobile for a ride and what not and take any of Meyer's friends who happened to be around. I submit that there is a terrific distinction between a blanket authority to take out in the automobile on any day either some time prior to the date of the accident and a specific direction for him to use her automobile to

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Colloquy of Counsel.

go down and see his mother, to call on his mother, to visit his mother. That is not any authority to take his mother and Goldie out for a ride.

10 The Court: The situation is this, "I told my brother to take the automobile and go down to Asbury Park and take my mother out riding on the 4th of July." Now, what is there in this statement that contradicts that? The statement purports to refer only to a conversation July 18th and has no reference to any conversation on the 4th.

20 Mr. McLaughlin: It is the specific thing on July 18th that she tells her brother to do which results in this accident. That is how he gets down to Asbury Park in the automobile. He has no authority to take his mother out riding. He is only to use the automobile to go down and call on his mother.

30 The Court: The only effect of a statement used by a witness off the stand which may be contrary to what he says on the stand is to wipe the slate clean of the testimony on the stand. The effect of the statement is not *per se*—or has no effect to establish the truth of the allegations made in the statement. It is not evidential for that purpose at all. It is evidential only for one purpose, to wipe the slate clean. Now, you are trying to introduce a statement by her of something she says in the statement she made on the 18th. You are trying to use that to wipe the slate clean of something she said on the 4th. Now, it does not
40 seem to me that that ties up.

Motion for Direction of Verdict.

Mr. McLaughlin: Yes, your Honor. The authority talked about here for Meyer taking the automobile and taking these people out for a ride is urged as of July 4th. The statement says that what specifically he was to do with the automobile on the day and evening of the accident—I think your Honor has the point— 10

The Court: The statement purports to show specifically a conversation occurring on the 18th and, of course, she denies she had any such conversation on the 18th, or any such conversation at all, but it does not contradict the conversation she had on the 4th.

Mr. McLaughlin: Well, I do not want to tire you at length. 20

The Court: I do not want to tire you, but that is the difficulty. All you can do is to wipe the slate clean. You cannot prove the statements in the statement are true by using the statement. It has no such effect whatever and, so far as I can see, that statement would not wipe the slate clean of anything she has heretofore said, and, therefore, on that ground and the other grounds that have been suggested I sustain the objection. 30

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

Exception noted as ground of appeal.

(Defendants Rest.)

Mr. McLaughlin: I move for the direction of a verdict on behalf of the defendants and, of course, in both cases, on the grounds urged previously by me when the 40

Motion for Direction of Verdict.

10 matters were argued at length, that there is no negligence shown by the plaintiffs indicating that this accident was a proximate result of negligence on behalf of the defendants; the second ground, now, at the close of the case the great weight of the evidence clearly shows that this matter is a Court question and that the evidence stands by the clear weight that there was no negligence on the part of the defendants. For those reasons I ask the direction.

Mr. Weinberg: And at this time I ask a direction of a verdict against both defendants.

20 The Court: Wait a minute. You wish the Court to consider that you have repeated now specifically on the record all the objections that you made heretofore as a ground for non-suit and thus for the purpose of this motion they are to be considered as specifically repeated?

Mr. McLaughlin: Yes, sir.

The Court: And in each instance you are granted a separate exception.

Exceptions noted as ground of appeal.

30 Mr. McLaughlin: Of course, I do not think that last point that I made about the clear weight of the evidence was at the end of the case.

The Court: No, that is an additional point and on that is granted an additional exception.

Exception noted as ground of appeal.

40 Mr. Weinberg: Now, my motion, if your Honor please, is to direct a verdict in favor of the plaintiff that I represent against the defendants on the ground that

Motion for Direction of Verdict.

it clearly appears, without contradiction, that the accident was the result of the negligence of Meyer Hendler who up to date is shown to be the authorized agent of the defendant Rose Meadows.

(Counsel argue.)

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Mr. Penn: If your Honor please, I make the same motion on behalf of the plaintiff Goldie Zipkin. I will not go in length the same as Mr. Weinberg did, but the law being the same as to the facts it applies to our situation.

(Counsel argue.)

The Court: I am going to direct a verdict. In the present status of the case the testimony in the case applicable to both defendants is that the driver made the admission that he was asleep. I think the plaintiffs are entitled to the direction of a verdict and I will so order, and that leaves only the one question open and that is what should be the amount of the verdict in each case. Of course, both counsel will be entitled to sum up on that issue.

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So, gentlemen of the jury, you will be directed to bring in verdicts in each of these cases against both of the defendants and the question as to what should be the amount of those verdicts also will be submitted to you. Counsel will say whatever they see fit in summation upon that subject and after they conclude their address the Court will charge you on what should be the measure of the recovery.

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

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Court's Charge.

Exception noted as ground of appeal.

Mr. McLaughlin sums up in behalf of defendants.

Mr. Weinberg sums up in behalf of plaintiffs Hendler.

10 Mr. Penn sums up in behalf of plaintiff Zipkin.

Charge.

FLANNAGAN, J.

Gentlemen of the jury.

20 You have before you two suits and you have three plaintiffs and two defendants. Now, you will bring in verdicts in favor of each one of these plaintiffs. That will be three verdicts, a verdict in favor of Goldie Zipkin, a verdict in favor of Fannie Hendler and a verdict in favor of Isaac Hendler, in each case against both of these defendants.

30 Of course, the question remains for your determination what should be the amount of these three verdicts. The amount demanded in the complaint is not evidential. It is no guide. It has only one legal effect and that is to limit the amount of the recovery. Now, while that is the law and known to lawyers, unless human nature changes radically, we may always be sure, when they know that they cannot recover any more than they put in there, that they will take good care to put in enough, and that is all we can say about those demands. They are not evidential and they are not guides. The only effect is that they limit

40 the amount to that as a maximum.

Court's Charge.

Now, then, what is the guide that should govern the jury in determining the amount of the recovery as to Goldie Zipkin and Fannie Hendler? They will each be entitled to recover for their pain and suffering, for the injuries to their persons and health respectively and for the effect of those injuries upon their persons and health respectively. As to Goldie Zipkin, she will be entitled to have you consider in addition to that the testimony which you have heard about her loss of compensation for her services. She was working at the time. Whatever is proximately caused by this accident in the shape of loss of wages she is entitled to recover and in addition to that she is entitled to recover any reasonable expenses reasonably necessary which she may have reasonably expended or incurred in any effort to cure her ills or alleviate her suffering, to cure her injuries. As to Isaac Hendler, he is entitled to recover any loss of consortium on the part of his wife and any expenses which he may have reasonably incurred or made in any effort to relieve his wife's ills or cure her suffering, and it is claimed in that connection that he is entitled to recover for certain amounts which were paid by his son George. The theory upon which it is claimed he is entitled to recover that is that it was necessary, that it was reasonable in amount and that it was reasonably necessary and that it was expended by George under the situation that it was paid at the request of the father and on his promise to repay it, and if that be the fact, as you may find it, he will be entitled to have that considered in measuring his damages. As to whether or not recovery is to be had for any particular item, whether or not the injuries are the proximate result of the accident, which injuries are the proximate result

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Defendants' Exceptions.

of the accident, the burden of proof is upon the plaintiffs respectively in that regard as to any injuries which may have developed to show by a fair preponderance of all the evidence that those injuries, the particular injuries you may consider are the proximate result of the accident, and
 10 in respect to any amount of money expended or incurred the burden is upon the plaintiffs respectively to show what I have already said must be the basis of recovery of any of those amounts.

Gentlemen, I will not attempt to review the various expenditures and the various injuries. You have heard three counsel address you in regard to those matters and you heard all the testimony and the hour is late and I feel that no further discussion upon that subject on my part
 20 would serve any good purpose. Consequently, I submit the case to you, repeating that you are to bring in three verdicts, one in favor of Goldie Zipkin, one in favor of Fannie Hendler and one in favor of Isaac Hendler, measured as indicated in each instance in the charge of the Court.

(The jury retires.)

Defendant's counsel prays an exception to that part of the Court's charge that Isaac Hendler could recover for any loss of consortium on the
 30 ground that there is no such proof in this case of any such loss.

Exception noted as ground of appeal.

Defendant's counsel prays an exception to that part of the Court's charge wherein the Court said that Isaac Hendler could recover for any expenses he incurred to alleviate his wife's condition, or words to that effect, on the ground that there is
 40 no proof in this case that he incurred or made such expenditures.

Plaintiff Zipkin's Requests to Charge.

Exception noted as ground of appeal.

Defendant's counsel prays an exception to that part of the Court's charge wherein the Court stated that Isaac Hendler could recover for items expended by George, on the ground that the proof in the case clearly shows that such expenditures by George, if any, were not made on behalf of or on his account as the father's agent or in consequence of any contract or agreement between them both wherein the father agreed to reimburse George for such items. 10

Exception noted as ground of appeal.

REQUESTS TO CHARGE FOR PLAINTIFF ZIPKIN.

1. Parties cannot be said to be engaged in a joint enterprise unless there is a community of interests in the objects or purposes of the undertaking and an equal right to direct and govern the movement of each other with respect thereto. Each must have some voice and right to be heard in its control and management. 20

2. As between Goldie Zipkin and Meyer Hendler, there was no joint enterprise since Goldie Zipkin had no joint right to control the movement of the machine. 30

3. The negligence of the driver cannot be attributed to the passenger unless the passenger attempts to or has the right to exercise control. There is no evidence of a right or attempt by Miss Zipkin to control the car, and if Meyer Hendler was negligent, his negligence is not attributed to Goldie Zipkin.

4. The driver is bound to so operate his car so that at all times he has it under proper control, 40

Plaintiffs Hendlers' Requests to Charge.

and to maintain and exercise diligent and vigilant observation, and his failure so to do is negligence.

10 5. The situation presented is within the rule applicable to an accident, which suddenly and for no apparent cause happens, and yet from the very fact of its occurrence an abnormal situation is presented which bespeaks negligence in operation, under the doctrine of *res ipsa loquitur*, which calls upon the defendant for an explanation to exculpate himself from the legal inference or presumption of negligence arising therefrom.

6. A guest who is invited to occupy seat in a motorcar is an invitee to whom the owner owes duty of care.

20 7. The proof of ownership of an automobile on a public highway, raises the legal presumptions that the owner is in control personally, or that the driver in control of its operation is acting as the owner's servant.

30 8. If the defendant, Meyer Hendler, acted either expressly or by implication within the scope of his authority from his sister, Rose Meadows, then she, Rose Meadows, as well as Meyer Hendler, is liable to the plaintiff for any injury resulting proximately from her servant's negligence.

REQUESTS TO CHARGE FOR PLAINTIFFS HENDLER.

40 1. Merely because the plaintiffs in this action are the parents of the defendants is no reason for denying them recovery if they are otherwise entitled to recover under the principles of law expounded by this Court.

Plaintiffs Hendlers' Requests to Charge.

2. The defense of "common enterprise" is not available to the defendant Meyer Hendler, such defense not being available to the parties to such enterprise even though such has been established to your satisfaction.

3. The defense of "common enterprise" is not available to the defendant Rose Meadows if you believe that the defendant Meyer Hendler was at the time of the happening of the accident, acting as her servant or agent, and that the plaintiff Fannie Hendler was invited to ride with him in the automobile of the defendant Rose Meadows. 10

4. To constitute a common or joint enterprise within the rules as to imputed negligence, there should be a joint interest or community of interest in the object or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other in respect thereto. Each must have some voice and right to be heard in its control and management, and the mere fact that two persons are doing something together does not make each chargeable with the negligence of the other, nor does the mere fact that they have certain plans in common. 20

It appearing by and from the evidence adduced upon the part of the plaintiff herein, and not explained or contradicted by the defendants or either of them that the defendant Meyer Hendler was guilty of negligence which was the proximate cause of the accident, the Court charges you that the plaintiffs are entitled to compensation for such of their proven damages as were the direct result of defendant's negligence. 30

Exhibit D-1.

ROSE MEADOW.

Newark N J, October 19, 1933

10 I, Rose Meadow, of legal age, married, a house-
wife, residing at 93 Hillside Ave Newark N J
not connected with the Hendler's uptown Bakery
located at 263 Prince St Newark N J in any
capacity; owner on July 18, 1933 of a 1931-5 pas-
senger Buick sedan, do state that:—

20 On July 18, 1933 some time in the morning, I
told my brother, Meyer Hendler, of 93 Hillside
Ave Newark N J to take my Buick sedan and
drive down to the Brunswick Hotel in Asbury
Park N J to see my Mother, Mrs Fannie Hendler,
who was stopping at that hotel. Miss Goldie
Zipkin, who has gone on and off with my brother,
was spending her vacation at the New Columbia
Hotel in Belmar N J. My brother took the car
and left for Asbury Park N J. Between 10:00
and 10:30 Pm. a phone call from a police depart-
ment to the Hendler's Uptown Bakery Prince St.
Newark N J was received by my Father Isaac
Hendler that a serious accident had occurred at
the shore in which my car was involved. I later
30 learned that my brother Meyer; my Mother and
Miss Zipkin were hurt in this accident. The day
after, I returned home and learned that while my
brother was driving my car, he hit a post or traffic
stanchion, somewheres in Bradley Beach, which
resulted in the occupants injuries. My car was so
damaged that I had to sell it for junk to Dick's
Garage located on Clinton Ave Newark N J. My
Mother was brought home in an ambulance

40 Witness: M. B Decker Rose Meadow.

Newark N J October 19, 1933.

Defendant's Exhibit D-1.

and taken to the Beth Israel Hospital Newark N J suffering from compound fracture of left ankle, and a twisted right ankle & leg ; severe body bruises and lacerations of head. She is under the care of Dr Kessler of Newark N J, bone surgeon; Dr I. Plane of Strafford Place, Newark N J and Dr. Busch of Johnson Ave Newark N J are also treating my Mother. I don't know what injuries Miss Zipkin suffered. The car in question was in my name alone. 10

• I have read this two page statement and find it correct & true.

Witness: M. B Decker. Rose Meadow.

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Judgment Record.

ESSEX COUNTY COURT OF COMMON
PLEAS.

64818

AUTO CASE
July 18, 1933

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GOLDIE ZIPKIN,
Plaintiff,*v.*MEYER HENDLER and
ROSE MEADOWS,
Defendants.Actions at Law. Directed
Verdict by a Jury by
Order of the Court.Judgment entered No-
vember 21, 1934.

Damage \$1,150.00

Costs 113.47

Total \$1,263.47

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EMANUEL M. EHRENKRANZ, Attorney of Plaintiff.

JUDGE DALLAS FLANNAGAN.

64970

AUTO CASE
July 18, 1933

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FANNIE HENDLER and
ISAAC HENDLER,
Plaintiffs,*v.*ROSE MEADOWS and
MEYER HENDLER,
Defendants.

Damage \$2,500.00

" 500.00

Costs 111.47

These cases were tried
together by consent of
counsel of the respective
parties.

LOUIS SPIEGEL, Attorney of Plaintiffs.

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These actions were tried before Judge Dallas
Flannagan with a jury at the Essex County Court
of Common Pleas on November 21, 1934.

Judgment Record.

The causes having been heard and submitted to the jury, they, without retiring, by order of the Court, render their verdict as follows:

They find in favor of the plaintiff, Goldie Zipkin, and against the defendants, Meyer Hendler and Rose Meadows, for the sum of One Thousand One Hundred Fifty Dollars (\$1,150.00) damage in Case No. 64818. They find in favor of the plaintiff, Fannie Hendler, and against the defendants, Meyer Hendler and Rose Meadows, for the sum of Two Thousand Five Hundred Dollars (\$2,500.00) damage, and they find in favor of the plaintiff Isaac Hendler and against the defendants Meyer Hendler and Rose Meadows for the sum of Five Hundred Dollars (\$500.00) damage in Case No. 64970. 10

Whereupon it is adjudged that the plaintiff Goldie Zipkin recover of the defendants Meyer Hendler and Rose Meadows the sum of One Thousand One Hundred Fifty Dollars (\$1,150.00) damage and costs which are taxed at One Hundred Thirteen Dollars and Forty-seven Cents in Case No. 64818. The plaintiff Fannie Hendler recover of the defendants Meyer Hendler and Rose Meadows the sum of Two Thousand Five Hundred Dollars (\$2,500.00) damage; the plaintiff Isaac Hendler recover of the defendants Meyer Hendler and Rose Meadows the sum of Five Hundred Dollars (\$500.00) damage and costs which are taxed at One Hundred Eleven Dollars and Forty-seven Cents in Case No. 64970. 20 30

Judgment signed and entered November 21, 1934.

Notice of Appeal.

(Filed December 27, 1934.)

ESSEX COUNTY COURT OF COMMON
PLEAS.

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FANNIE HENDLER and ISAAC
HENDLER,
Plaintiffs,

vs.

ROSE MEADOWS and MEYER
HENDLER,
Defendants.

Action at Law.
Notice of Appeal.

20

GOLDIE ZIPKIN,
Plaintiff,

vs.

MEYER HENDLER and ROSE
MEADOWS,
Defendants.

To:

30

LOUIS SPIEGEL, Esq.,
17 Academy St.,
Newark, N. J.

EMANUEL EHRENKRANZ, Esq.,
45 Branford Place,
Newark, N. J.

Sirs:

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TAKE NOTICE that the defendants appeal to the
Supreme Court of the State of New Jersey from
the whole of the judgments entered in these causes.

MCCARTER & ENGLISH,
Attorneys for Defendants.

Notice of Appeal.

Service of the within Notice of Appeal is acknowledged this 20th day of December, 1934.

LOUIS SPIEGEL,
Attorney for Plaintiffs, Fannie
Hendler and Isaac Hendler.

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Service of the within Notice of Appeal is acknowledged this 20th day of December, 1934.

EMANUEL EHRENKRANZ,
Attorney for Plaintiff, Goldie Zipkin.

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Grounds of Appeal.

(Filed January 24, 1935.)

NEW JERSEY SUPREME COURT.

10

FANNIE HENDLER and ISAAC
HENDLER,
Plaintiffs-Respondents,

vs.

ROSE MEADOWS and MEYER
HENDLER,
Defendants-Appellants.

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GOLDIE ZIPKIN,
Plaintiff-Respondent,

vs.

MEYER HENDLER and ROSE
MEADOWS,
Defendants-Appellants.

Actions at Law.
On Appeal from
Essex County
Court of Common
Pleas.
Grounds of Appeal.

To:

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LOUIS SPIEGEL, Esq.,
17 Academy St.,
Newark, N. J.

EMANUEL EHRENKRANZ, Esq.,
45 Branford Place,
Newark, N. J.,
Attorneys, Plaintiffs-Respondents.

Sirs:

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TAKE NOTICE that the following are the grounds
of appeal of the defendants-appellants in the
above entitled causes:

Grounds of Appeal.

1. Because the Essex County Court of Common Pleas erred in refusing to admit in evidence D-1 for identification which is the signed statement of the defendant-appellant, Rose Meadows.

2. Because the Essex County Court of Common Pleas erred in directing verdicts in favor of the plaintiffs-respondents in the above entitled causes and against the defendants-appellants. 10

McCARTER & ENGLISH,
Attorneys for Defendants-Appellants.

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Notice of Argument.

(Filed January 25, 1935.)

NEW JERSEY SUPREME COURT.

10	FANNIE HENDLER and ISAAC HENDLER, Plaintiffs-Respondents, <i>vs.</i> ROSE MEADOWS and MEYER HENDLER, Defendants-Appellants.	} Actions at Law. On Appeal from Essex County Court of Common Pleas.
20	GOLDIE ZIPKIN, Plaintiff-Respondent, <i>vs.</i> MEYER HENDLER and ROSE MEADOWS, Defendants-Appellants.	

Notice of
 Argument.

30 TAKE NOTICE, of the Argument of the issue joined in this cause before the New Jersey Supreme Court, holden at State House, Trenton, in and for the County of on the first Tuesday of May next, at Ten o'clock in the forenoon, or as soon thereafter as the said Court can attend to the same.

Dated, January 24, 1935.

Yours respectfully,

MCCARTER & ENGLISH,
 Attorneys for Defendants-Appellants.

To:

40 LOUIS SPIEGEL, Esq.,
 17 Academy St.,
 Newark, N. J.

EMANUEL EHRENKRANZ, Esq.,
 45 Branford Place,
 Newark, N. J.,
 Attorneys of Plaintiffs-Respondents.

Opinion.

Nos. 7 and 8. May Term, 1935.

NEW JERSEY SUPREME COURT.

FANNIE HENDLER, *et als.*,
Plaintiffs-Respondents,

vs.

ROSE MEADOWS, *et als.*,
Defendants-Appellants.

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Argued May 8th, 1935; decided .

On appeal from judgments of the Essex County
Court of Common Pleas.

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Before BROGAN, C. J., and LLOYD and DONGES, JJ.

For the appellants: McCARTER & ENGLISH, Esqs.

For the respondents: LOUIS SPIEGEL, Esq., BEN-
JAMIN M. WEINBERG, Esq., and PERCY H. PENN,
Esq.

Per Curiam.

These are appeals from judgments of the Essex
County Court of Common Pleas. The suits arise
out of an automobile accident, and the trial judge
directed verdicts for the plaintiffs and submitted
to the jury on the question of the quantum of
damages.

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It appears that two of the three plaintiffs were
passengers in a car owned by the defendant Rose
Meadows and driven by the defendant Meyer Hen-
dler, her brother. Plaintiffs Fannie Hendler and
Isaac Hendler are the parents of the defendants,

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Opinion.

and plaintiff Goldie Zipkin is a friend of Meyer. They were taking an automobile ride on the night of July 18th, 1933, and while proceeding along Ocean Avenue in Bradley Beach the car ran into an electric light pole in the center of the street. The collision occurred at 9:30 P. M.

10 The first point argued deals with the refusal of the trial court to admit into evidence a statement signed by the appellant Rose Meadows prior to the trial. Counsel was attempting to develop the lack of agency of the driver at the time of the accident. The statement said, in part:

20 “On July 18, 1933, some time in the morning, I told my brother Meyer Hendler, of 93 Hillside Avenue, Newark, N. J., to take my Buick sedan and drive down to the Brunswick Hotel in Asbury Park, N. J., to see my mother. * * *”

30 On the stand Mrs. Meadows testified that she had previously, on July 4th, asked her brother to call on their mother as often as he might have an opportunity to take her out for a ride, and further that she had given him permission to take friends along on such rides. Mrs. Meadows' own counsel then pleaded surprise and asked to have the statement admitted to neutralize her testimony. In the circumstances of this case, the refusal to admit the statement was harmless. Its only effect could have been to wipe out Mrs. Meadows' testimony on this subject, and then there would have been left the presumption of agency arising from the operation of the automobile, and the testimony of George Hendler to the effect that Mrs. Meadows had told Meyer to take the mother out riding, all of which stands uncontradicted because the statement, if admitted, could not be

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Opinion.

given the effect of neutralizing testimony other than that of Mrs. Meadows.

The other point is that it was error to direct a verdict. The testimony was that while riding along Ocean Avenue the car suddenly swerved and struck the pole. There was testimony from Miss Zipkin that the driver stated at the time that he had dozed momentarily. The defendant offered no testimony as to the manner of the happening of the accident. Appellants argue as if the direction were based solely on the proof of the admission that Hendler fell asleep, but this is not so. When a car proceeding along a street suddenly swerves into a pole with no apparent cause, and there is no attempt to explain the occurrence, no claim that any other car or person was involved or that there was a hidden defect in the car, but simply a situation where the driver, whether asleep or awake, steered into a pole, it cannot be said that reasonable minds could differ on the question of negligence. There was no error in the direction of verdicts. *Vendola vs. P. S. Co.*, 5 Misc. 285. The judgments are affirmed, with costs.

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Order Affirming Judgment and Remittitur.

NEW JERSEY SUPREME COURT.

10	<p style="text-align: center;">FANNIE HENDLER and ISAAC HENDLER, Plaintiffs-Respondents,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">ROSE MEADOWS and MEYER HENDLER, Defendants-Appellants.</p>	<p>Action at Law. On Appeal. Order Affirming Judgment and Remittitur.</p>
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20 This cause having been duly submitted at the May Term, 1935, of this Court by Louis Spiegel, attorney for and of counsel with plaintiffs-respondents, Fannie Hendler and Isaac Hendler; and McCarter & English, of counsel for the appellants, Rose Meadows and Meyer Hendler, and the Court having inspected the record and judgment below and considered the causes assigned for error and the ground of appeals therein:

30 It is thereupon on this 28th day of August, 1935, ORDERED that the judgment of the Essex County Common Pleas Court be in all things affirmed with costs, and that the record and proceedings be remitted to the Essex County Common Pleas Court to be proceeded with in accordance with this judgment and the practice of the said Court.

40 Entered August 28th, 1935, on motion of Louis Spiegel, attorney for and of counsel with plaintiffs-respondents.

L. SPIEGEL.

Order Affirming Judgment and Remittitur.

NEW JERSEY SUPREME COURT.

<p style="text-align: center;">GOLDIE ZIPKIN, Plaintiff-Respondent,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">MEYER HENDLER and ROSE MEADOWS, Defendants-Appellants,</p>	}	<p>Action at Law on Appeal.</p> <p>Order Affirming Judgment and Remittitur.</p>	<p>10</p>
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This cause having been duly submitted at the May Term, 1935, of this Court by Percy H. Penn, attorney for and of counsel with plaintiff-respondent, Goldie Zipkin; and McCarter & English, of counsel for the appellants, Rose Meadows and Meyer Hendler, and the Court having inspected the record and judgment below and considered the causes assigned for error and the ground of appeals therein; 20

It is thereupon, on this day of September, 1935, ORDERED that the judgment of the Essex County Common Pleas Court be in all things affirmed with costs, and that the record and proceedings be remitted to the Essex County Common Pleas Court to be proceeded with in accordance with this judgment and the practice of the said Court. 30

Entered September , 1935, on motion of Percy H. Penn, attorney for and of counsel with plaintiff-respondent.

PERCY H. PENN. 40

Notice and Grounds of Appeal.

NEW JERSEY SUPREME COURT.

10	<p>FANNIE HENDLER and ISAAC HENDLER, Plaintiffs-Respondents, <i>vs.</i> ROSE MEADOWS and MEYER HENDLER, Defendants-Appellants.</p>	<p>Actions at Law. On Appeal from the Supreme Court.</p>
20	<p>GOLDIE ZIPKIN, Plaintiff-Respondent, <i>vs.</i> MEYER HENDLER and ROSE MEADOWS, Defendants-Appellants.</p>	

Notice and
Grounds of
Appeal.

To:

LOUIS SPIEGEL, Esq.,
17 Academy Street,
Newark, N. J.

30 EMANUEL EHRENKRANZ, Esq.,
45 Branford Place,
Newark, N. J.
Attorneys, Plaintiffs-Respondents.

Sirs:

TAKE NOTICE that the defendants-appellants in
the above entitled causes appeal from the whole
of the judgments of the Supreme Court in said

Notice and Grounds of Appeal.

causes to the Court of Errors and Appeals on the following grounds:

1. That the Supreme Court erred in giving judgments for the plaintiffs-respondents instead of for the defendants-appellants.

10

McCARTER & ENGLISH,
Attorneys, Defendants-Appellants.

Service of a copy of the within Notice and Grounds of Appeal is acknowledged the 30th day of August, 1935.

LOUIS SPIEGEL,
Attorney for Fannie Hendler
and Isaac Hendler, Plain-
tiffs-Respondents. 20

EMANUEL M. EHRENKRANZ,
Attorney for Goldie Zipkin,
Plaintiff-Respondent.

30

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New Jersey Court of Errors and Appeals

FANNIE HENDLER and ISAAC
HENDLER,
Plaintiffs-Respondents,

vs.

ROSE MEADOWS and MEYER
HENDLER,
Defendants-Appellants.

On Appeal from
New Jersey
Supreme Court.

GOLDIE ZIPKIN,
Plaintiff-Respondent,

vs.

MEYER HENDLER and ROSE
MEADOWS,
Defendants-Appellants.

BRIEF OF DEFENDANTS-APPELLANTS.

These two cases arise out of the same automobile accident. The plaintiff, Fannie Hendler, and the plaintiff, Goldie Zipkin, were passengers in the automobile being driven by the defendant, Meyer Hendler, and owned by the defendant, Rose Meadows. The plaintiffs, Fannie and Isaac Hendler, are the mother and father of the defendants, Rose Meadows and Meyer Hendler, while the plaintiff, Goldie Zipkin, was the girl friend of the defendant, Meyer Hendler. The accident out of which the cases arise occurred on July 18th, 1933, about 9:30 P. M., while plaintiffs and the defendant, Meyer Hendler, were riding along Ocean Avenue, in Bradley Beach, New Jer-

sey, when suddenly, to use the words of the plaintiff, Goldie Zipkin, "we were driving along Ocean Avenue and when we got to Third Avenue I noticed the car swerve and turn around and noticed the car go under the pole" (S. C., p. 99, l. 9). And again (S. C., p. 102, l. 7):

"Question. And he was proceeding along the road in a careful, normal, decent fashion?

Answer. Driving along.

Question. And all of a sudden out of a clear sky you were in the stanchion?

Answer. Yes.

Question. And that is all you know about it, isn't it?

Answer. Well, outside of the car swerving.

Question. The car swerved for no good reason you could see, that is right?

Answer. That is right.

Question. The man was driving normally, decently and carefully with you and his mother in the car.

Answer. Driving along."

Plaintiff, Goldie Zipkin, was riding in the front seat alongside of the driver, Meyer Hendler, and the mother, Fannie Hendler, was riding in the rear seat when the accident took place. Both the plaintiffs claim to have been injured as a result of the collision of the car with the post.

The cases were consolidated and tried together before Judge Flanagan and a jury and at the conclusion of the case the Judge directed a verdict in favor of the plaintiffs and against both defendants, leaving only to the jury the question of damages. Thereafter an appeal was taken from these judgments to the Supreme Court, which were affirmed in a *per curiam* decision (S. C., p. 215), and it is from the affirmance of these judgments that the defendants have appealed and respectfully urge that the judgments should be reversed on the following grounds.

FIRST GROUND OF APPEAL.

Because the Supreme Court erred in affirming the Essex County Court of Common Pleas in directing verdicts in favor of the plaintiffs-respondents in the above entitled causes and against the defendants-appellants.

At the conclusion of the testimony in these two causes following the refusal of the Court to direct a verdict in behalf of the defendants, the Court, on motion of the respective attorneys for the plaintiffs, directed verdicts in their favor leaving to the jury only the question of damages in the respective cases, to which the defendants' counsel took suitable exception (S. C., p. 199, ll. 19-41).

It is quite apparent from the language of the trial court in directing the verdicts that the direction was based largely upon the fact that one of the plaintiffs, Goldie Zipkin, testified to an alleged admission that the defendant, Meyer Hendler, made, that he was asleep at the time of the accident.

During the course of the trial of the case, plaintiff, Goldie Zipkin, was called to the stand, first as a witness on behalf of the plaintiffs, Fannie Hendler and Isaac Hendler, which examination was conducted by their counsel, Mr. Weinberg (S. C., pp. 88-99). She was then examined at length by the defendant's attorney (pp. 99-102) and during the course of the cross-examination she testified as to the happening of the accident in the manner heretofore set forth.

Goldie Zipkin was thereafter recalled to the stand as a witness in her own behalf. The examination was conducted by her counsel, Mr. Penn (S. C., pp. 103-112). She was still on the

stand when the case closed at the end of the second trial day. She continued her testimony on the third day of the trial (S. C., pp. 112, 117), when suddenly for the first time during the course of her testimony she testified to an alleged admission by the defendant driver, Meyer Hendler, saying, in answer to the question "Will you tell us what you said to him and what he said to you? A. I asked Meyer how the accident happened and he said, 'Gosh, I fell asleep a moment'" (S. C., p. 115, l. 22; p. 116, ll. 31-34). It is interesting to note the reason given on cross-examination by the plaintiff Goldie Zipkin, as to why this testimony was not given before in the case with her alleged reason being that she was not so asked specifically (S. C., p. 121, ll. 18-22).

This alleged admission is not corroborated by anyone and we respectfully submit that the testimony of Goldie Zipkin in this case should be subjected to the most careful scrutiny. It is quite apparent from the record and the atmosphere of the case that all the parties concerned were very friendly, that is, the plaintiffs Isaac Hendler and Fannie Hendler, were the mother and father of the defendants Meyer Hendler and Rose Meadows, and the plaintiff Goldie Zipkin was a girl friend of the defendant Meyer Hendler. She had already been called upon to testify as to how the accident happened in the case of the mother and father and it is quite apparent from her testimony that she told all she knew about the accident at that time, and it is interesting to observe that following her testimony at that time there was made a motion for a non-suit on behalf of the defendants with long argument and as is evident, on most substantial ground. The motion was denied but plaintiffs' attorneys knew it would be renewed at the end of the case (S. C., p. 102, ll. 21-36). It certainly seems reasonable to assume

that when taking the stand and testifying on behalf of the mother of her boy friend that she told all she knew about the accident which would be helpful to the plaintiffs' case. And it is also highly suspicious that when called to the stand immediately thereafter the same day by her own attorney, no effort was made to obtain from her the alleged admission of the defendant, but it was not until after recess of the Court at the conclusion of the day that the next morning she took the stand and testified for the first time to this purported admission against interest, which was the basis for the Judge's direction of a verdict.

In considering this situation it might be borne in mind that the undisputed testimony of the facts of this accident are that at around 9:30 in the evening the plaintiffs Goldie Zipkin, the girl friend of the defendant Meyer Hendler, and the plaintiff Fannie Hendler, the mother of the defendant Meyer Hendler, were out for a ride in the car proceeding along in a normal fashion. The testimony is quite clear that nothing unusual had happened that day to cause Meyer Hendler to be tired. It is difficult to imagine that a young man out for a ride in the evening along the shore at 9:30 o'clock in the evening riding purely for pleasure, accompanied by his mother and an attractive looking girl friend would, without any warning, suddenly fall asleep. Courts and juries are entitled to draw upon their every day experiences in life and it hardly seems possible, let alone probable, that with such pleasant company there would not be sufficient conversation or interest, let alone the fact that he was operating an automobile, to keep the defendant driver awake.

In the opinion of the Supreme Court upholding the Trial Judge in directing the verdict, it is stated that the

“appellants argue as if the direction were based solely on the proof of the admission that Meyer Hendler fell asleep, but this is not so. When a car, proceeding along a street, suddenly swerves into a pole with no apparent cause, and there is no attempt to explain the occurrence—no claim that any other car or person was involved, or that there was a hidden defect in the car but simply a situation where the driver, whether asleep or awake, steered into a pole,—it cannot be said that reasonable minds could differ on the question of negligence. There was no error in the direction of verdicts. *Vendola vs. Public Service Co.*, 5 Misc. 285” (S. C., p. 217, ll. 12-26).

The defendants-appellants most respectfully urge that the Supreme Court was in error in their understanding of how this accident occurred. There is no evidence in the case as to how the accident occurred other than that heretofore quoted. The plaintiff Fannie Hendler testified that all she knew is that the car hit something (S. C., p. 23, ll. 28-30) and Goldie Zipkin, whose testimony is quoted above, is the only other witness who testified as to the happening of the accident. To be sure, the testimony discloses that the car swerved into a post but there is not the slightest testimony that the defendant, Meyer Hendler, “steered into a pole.” The swerve is entirely unexplained and the inference can just as well be drawn that a mechanical defect or a road condition caused the swerve of the car, as that the driver steered into a pole.

Under this State of Facts the case seems to fall clearly under the situation as presented in *MacKenzie vs. Oakley*, 94 N. J. L. 66, in which, in a similar situation, the Court held that such an unexplained accident was one in which the doctrine of *res ipsa loquitur* applied.

The facts in the case of *MacKenzie vs. Oakley, supra*, are that an automobile proceeding along a road skidded and ran into a telegraph pole, apparently due to a shower of rain which had come up unexpectedly which made the road slippery, at a speed ranging from 18 to 30 miles an hour, according as one may view the credibility of the witnesses, and in this situation Justice Minturn, speaking for the Supreme Court, said:

“The situation presented is within the rule applicable to an accident which suddenly, for no apparent cause, happens and yet from the very fact of its occurrence an abnormal situation is presented which bespeaks negligence in operation under the rule of *res ipsa loquitur* which calls upon the defendant for an explanation to exculpate herself from the legal inference or presumption of negligence arising therefrom.” 94 N. J. L., page 67.

The rule has long been established in New Jersey as to just what effect the application of the doctrine of *res ipsa loquitur* has. In the case of *Hughes vs. Atlantic City, etc., Railroad Co.*, 85 N. J. L. 212, this question was considered at length. The facts of the case were simply that the plaintiff was a passenger in the car of the defendant and was injured by fragments of glass from the explosion of an electric light bulb in the ceiling of the car. There was no proof as to the cause of the explosion. The Trial Court held that the doctrine of *res ipsa loquitur* applied and went on to charge the jury:

“When an accident of this kind happens to some of the means of transportation the law shifts the burden of proof from the plaintiff as to the explanation or showing the actual cause to the defendant and imposes upon it the burden of making an explanation exculpating itself from negligence.”

and further charged the jury as follows:

“The explanation is one that you must pass upon, whether or not the burden which the law casts upon the defendant in a case of injuries, an accident of this kind, has been met. If it has, then, of course, the negligence that the law would infer from the proof of the facts of the accident and the nature of it, does not exist, and the company would not be answerable at all.”

Justice Swayze then went on in his opinion and said:

“The effect of this charge was to relieve the plaintiff from the duty to satisfy the jury by the preponderance of the evidence that the defendant had been negligent, and to deprive the defendant of his right, which we have said is a substantial one, to have the plaintiff bear the burden of the affirmative. *Bien v. Unger*, 35 Vroom 596; *McGilvery vs. Electric Light and Power Co.*, 34 *Id.* 591. The learned trial judge distinctly said that this burden shifted to the defendant and he did not even submit to the jury the question whether the plaintiff had established negligence; he treated that as a matter of legal inference and only left to the jury to say whether the defendant had exculpated itself. He thus put upon the defendant in a case where there was no direct evidence of negligence a burden from which it would have been free in a case where there was direct evidence. Instead of the question that has been so much discussed in the cases, whether negligence may be inferred from the mere fact of injury, we now have the proposition that the inference of negligence is so strong that the jury need not consider it at all, but need only consider whether the defendant has exculpated himself. This is an unwarranted extension of the application of the maxim *res ipsa loquitur*. The importance of the rule which finds expression in that maxim is found in the province of the trial judge and not in the province of the jury. He

is called on in the first instance to say whether there is any evidence of negligence to go to the jury; in the absence of direct evidence, he may, in cases where the maxim applies, hold that the circumstances are such as will, unexplained, permit the jury to draw the inference of negligence; but that inference is still one for the jury and not for the court. They may not believe the witnesses; the circumstances may be such that the jury will attribute the injury to some cause with which the defendant has nothing to do; they may find the inference of negligence too weak to persuade their minds; they may think a reasonably prudent man would have been unable to take precautions to avoid the injury; and in any event they may render a verdict for the defendant. This is within their province even when there is no explanation by the defendant. When there is such explanation, it is for the jury to decide just as in the ordinary case of whatever kind, what the actual facts are and what inference should be drawn therefrom. The most that is required of the defendant is explanation, not exculpation; and that explanation may leave the mind in equipoise in which case the defendant would be entitled to a verdict because the plaintiff has failed to prove his case by the weight of the evidence.

“The question discussed in the cases that involve the application of the maxim *res ipsa loquitur* has always been whether mere proof of the injury justified a jury in drawing an inference of negligence so that a nonsuit would be improper, or in other words, whether it sufficed to prevent a nonsuit. Negligence in such a case may be a permissible inference but is not a necessary one as the judge’s charge treated it. In the first case in which the maxim was discussed in this state, Chief Justice Beasley who dissented because he thought the plaintiff had made out a case, said that the facts as proved would have legally warranted a verdict against the defendants, but he did not suggest that in the

absence of explanation such a verdict would have been required, and the court would have been justified in directing a verdict for the plaintiff. The reason, of course, is that negligence in such a case is only a matter of inference and under our system is for the jury.

“The rule has been stated with great accuracy by Mr. Justice Dixon, speaking for this court, in an action by a passenger against a carrier. He says: ‘The rule supported by authority is that when a passenger shows that he was injured through some defect in the appliances of the carrier, or through some act or omission of the carrier’s servant, which might have been prevented by due care, then the jury have the right to infer negligence, unless the carrier proves that due care was exercised.’ *Whalen vs. Consolidated Traction Co.*, 32 Vroom 606. In *Mumma vs. Easton and Amboy Railroad Co.*, 44 *Id.* 653, we again said that the meaning of the maxim *res ipsa loquitur* was that ‘the occurrence itself in the absence of explanation by the defendant affords *prima facie* evidence that there was want of due care’. IT IS EVIDENCE: WHETHER IT AMOUNTS TO PROOF IS FOR THE JURY TO SAY, EVEN IN THE ABSENCE OF EXPLANATION BY THE DEFENDANT.” (Caps ours.)

This case has been cited on numerous occasions and the rule affirmed many times. *Collins vs. Central Railroad Company*, 91 N. J. L. 615; *Bud Dress Shop vs. Newark Glass Company*, 10 N. J. Misc. 614.

Vendola vs. Public Service Co., 5 Misc. 285 does not in any way change the rule of law as stated above and is not applicable to the situation in the case at bar. In the *Vendola* case a bus which operated as a common carrier collided with a truck which was standing in the roadway ahead of it. In reading the opinion of the Court it appears clearly that there was an act of negligence on the part of the driver of the bus in failing to see a truck in the road ahead of him. There is no

situation created in the *Vendola* case where the doctrine of *res ipsa loquitur* is applicable and the direction of the verdict in such a situation where there is an act of active negligence on the part of the defendant is of course proper.

The defendant, Meyer Hendler, the driver of the automobile involved in the accident, did not take the stand to testify for the reason that the Trial Court erred in refusing to allow trial counsel to use signed statements of the parties to neutralize their testimony. The failure of Hendler to take the stand, and the effect thereof, is so closely inter-related to the second point of appeal that we will present it at that time, as counsel for the plaintiffs-respondents made much of the failure of Hendler to take the stand.

It is submitted that the Supreme Court erred by finding affirmative negligence in the case when there is none and basing its decision upon such affirmative negligence. The principal point relied on by the trial court in the direction of its verdict was the alleged admission against interest of the defendant Hendler that he was asleep at the time of the accident.

The question of directing verdicts on admissions against interest given at a trial was ably and fully discussed by the late Chief Justice Gummere, speaking for the Court of Errors and Appeals in the case of *Schmidt v. Marconi Wireless Telegraph Company*, 86 N. J. L. 183. In that case a witness, namely, the late Governor Griggs, took the stand at the trial and testified to an admission made by one of the parties involved and on the basis of Governor Griggs' testimony, the Court directed a verdict. As to this the Chief Justice said, pages 185-186:

“There is nothing in the pleadings, or the proofs, to indicate that the plaintiff, who was the assignee of Levy Brothers, had any knowl-

edge that they had made the admissions of the non-ownership of stock by Miss Parsons testified to by Mr. Griggs, or that he had reason to anticipate that there would be any attempts made to prove her non-ownership by the admission of his assignors. None of the members of the firm of Levy Brothers were called as witnesses, and it does not even appear that they were in court at the trial. Not having been led to expect that the fact of non-ownership by Miss Parsons would be attempted to be proved by the admission of his assignors; not even having any knowledge, so far as the case shows, that Levy Brothers had any information upon this subject, he apparently was compelled to permit the testimony of Mr. Griggs to go unchallenged. It cannot, therefore, be said that by his failure to controvert it he impliedly admitted its truth. Of course, the testimony of a man whose character for truth and integrity is so universally known as that of Governor Griggs would always be accepted as a correct recital of the facts spoken to as he remembered them. But it will hardly do to say that the character of a witness is the determining factor upon the question whether the facts testified to by him shall be determined by the court or by the jury. It cannot be that where the character of the witness for truth and veracity is known by the court to be unimpeachable, the facts sought to be established by his testimony are to be determined by the court, but that where, in the judgment of the court, the witness is not entitled to full faith and credit, the facts sought to be proved by him must be determined by the jury. No such rule of evidence exists. In every case where the issue depends upon the determination of facts the existence of which is not admitted, the jury, and not the court, must determine them.

“We conclude, therefore, that it was error for the judge to take from the jury the question whether or not Miss Parsons, at the time of her assignment to Levy Brothers, was or was not the owner of stock in the defendant

company, and that, for this reason, the judgment must be reversed.”

In the case at bar the facts are very similar. There is nothing in the pleadings that the negligence of the defendant driver consisted in going to sleep but rather according to the amended complaint filed on behalf of Fannie Hendler and Isaac Hendler, that the defendant operated the said motor vehicle “in such a careless, reckless and negligent manner, at a rapid rate of speed, without making due and careful observation and without said car being properly equipped with brakes, and by reason of these and other acts of negligence causing the said Meyer Hendler to collide with a pole in the center of Ocean Avenue.” In the complaint in the *Zipkin* case the defendant Meyer Hendler was charged with operating the said motor vehicle “in such a careless, reckless and negligent manner, at a rapid rate of speed, without due and lawful observation being made and without having said motor vehicle equipped with proper brakes, and by reason of these and other acts of negligence, the said defendant Meyer Hendler caused the said motor vehicle to run into a pole in the center of Ocean Avenue, etc.” The Chief Justice points out in the *Schmidt* case that none of the members of the firm of Levy Brothers were called as witnesses and it does not even appear that they were in court at the trial. He goes on to say that not being advised beforehand that such alleged admission was going to be made that they probably were surprised and had to let the testimony of Ex-Governor Griggs go unchallenged. In the case at bar the situation could have been properly handled had the trial judge not fallen into error in refusing to allow defendants’ counsel to use statements of the defendants for the purpose of neutralizing the defendants’ testimony.

The rule as laid down in the case of *Schmidt vs. Marconi Wireless Telegraph Co.*, *supra*, was followed by the Court of Errors and Appeals as recently as 1934 in the case of *Koehl vs. Bollinger*, 112 N. J. L. 70.

From the circumstances surrounding the testimony of Goldie Zipkin, the plaintiff, as to the alleged admission of Meyer Hendler, the defendant, and her boy friend, if the jury had been permitted to pass on such question it might well have concluded that there was no basis in truth for the said admission and accordingly have disregarded the same.

SECOND GROUND OF APPEAL.

Because the Supreme Court erred in sustaining the Essex County Court of Common Pleas in refusing to admit in evidence D-1 for Identification, which is the signed statement of the defendant-appellant, Rose Meadows.

At the trial of these issues the defendants' attorney, after calling a physician who had made examinations of the plaintiff, called to the stand Rose Meadows, one of the defendants and the owner of the car involved, who was also the daughter of the plaintiffs, Fannie Hendler and Isaac Hendler. During the course of direct examination of the defendant, counsel had her identify and had marked for identification a statement of hers (S. C., p. 185, l. 26), which exhibit appears in full on page 206 of the state of the case. At the end of the cross-examination of the defendant (S. C., p. 190, l. 10) defendants' attorney said:

“I plead surprise at the testimony which has just come off the stand, and for the purpose of neutralizing that testimony I offer in evidence D-1 for Identification.”

Then followed a long argument between counsel during the course of which the Court said (S. C., p. 191, ll. 31 to 37):

“I suppose you are surprised.”

After further argument the Court sustained the objection to the admission of the statement in evidence, to which defendants' counsel took exception (S. C., p. 197, ll. 30 to 34).

The Court, in refusing to admit the statement in evidence, seemed to do so on two theories, the first of which was that the defense attorney had no right to contradict testimony of the defendants on the theory that the defendants were the principals and the attorney but an agent (S. C., pp. 191, 192, 193) and on the second ground that in the Court's opinion the statement offered in evidence would not in any way neutralize the testimony of the defendant (S. C., p. 197, l. 21).

The Supreme Court, in the case at bar, sustained the Trial Court in refusing to admit the statement in evidence on the theory that to admit the statement was harmless, saying:

“Its only effect would have been to wipe out Mrs. Meadows' testimony on this subject and then there would have been left the presumption of agency arising from the operation of the automobile and the testimony of George Hendler to the effect that Mrs. Meadows had told Meyer to take the mother out riding, all of which stands uncontradicted because the statement, if admitted, could not be given the effect of neutralizing testimony other than that of Mrs. Meadows.” (S. C., p. 216, ll. 32-40; S. C., p. 217, ll. 2-3.)

The Trial Court, in making its ruling, fell into error which greatly prejudiced the rights of the defendants. The Supreme Court had before it a similar question in the case of *Posner v. Nutkis*,

5 N. J. Misc. 593, decided June 4th, 1927. In that case the trial judge had allowed defendant's counsel to offer in evidence a statement made by the defendant for the purpose of discrediting the defendant's direct testimony, counsel having pleaded surprise. The case was argued before the Supreme Court on a rule to show cause before Justices Kalisch, Katzenbach and Lloyd, and in a *per curiam* decision they held at page 594:

“The only other point raised was that the trial judge erred in permitting the defendant to offer in evidence a statement made by the defendant himself for the purpose of discrediting defendant's direct testimony, counsel pleading surprise. The defendant was clearly friendly to the plaintiff's side of the case (the reason for which it is not difficult to surmise) and therefore hostile to his own. It was the right of counsel, under these circumstances, to offer in evidence the contradictory statements under the case of *State v. D'Adame*, 84 N. J. L. 386. The question of surprise was one for the trial judge. We think there was sufficient to indicate that the defendant's counsel was surprised, and this laid the ground for the introduction of the contradictory proofs.”

The rule laid down by the above case is that it is the right of the defendants' attorney to plead surprise and offer contradictory statements, the question of surprise being left to the trial judge. In the case at bar, as already pointed out, the trial judge found that there was surprise on the part of the defendants' counsel (S. C., p. 191, l. 37) and, therefore, the statement, with the questions of the weight to be given it and whether it actually contradicted the defendant and so neutralized her testimony, should have been left to the jury and its admissibility was not a preliminary question for the trial judge to decide.

It is interesting to note the language of the Court in the case of *Posner vs. Nutkis, supra*.

“The defendant was clearly friendly to the plaintiff’s side of the case (the reason for which it is not difficult to surmise) and therefore hostile to his own.”

It must be kept in mind in the cases at bar that in one case it is a father and a mother suing daughter and son, while in the other case it is a girl friend of the son suing him and his sister. Defendants’ counsel must have some method by which he can control the testimony of his nominal defendants.

The defendant, Rose Meadows, was asked the question on direct examination whether or not “On July 18, 1933, sometime in the morning, did you tell your brother, Meyer Hendler, of 93 Hillside Avenue, Newark, New Jersey, to take your Buick sedan and drive down to the Brunswick Hotel in Asbury Park, New Jersey, to see your mother, Mrs. Fannie Hendler, who was stopping at that hotel” (S. C., p. 186, ll. 15-22), and after colloquy between counsel the witness answered “Not on July 18th.” The question was then asked, “Did you use that language to your brother on any date in July?” The answer was “I did.” Question: “When?” Answer: “July 4th.” Question: “And that is exactly what you told him, was it?” Answer: “Exactly” (S. C., p. 187, ll. 23-28). The sum substance of this testimony was that there was no authority given by defendant Rose Meadows to her brother Meyer Hendler to use the car for any other purpose than going to Asbury Park to see his mother.

On cross-examination (S. C., p. 190, ll. 5-10) the question was then asked Mrs. Meadows: “Isn’t it a fact July 4, 1933, when you spoke to your brother Meyer about taking your mother out and

whatever friend she may want to take that may be there with her?" Answer: "That is right." This directly contradicted both Mrs. Meadows' testimony on direct examination and her story in her statement (D-1 for Identification, S. C., p. 206). It presented the picture in which the defendant, Rose Meadows, was deliberately and contrary to her own evidence, attempting to aid the plaintiffs in making her mother and her brother's friend, Goldie, invitees in her automobile.

The statement of Rose Meadows, which was offered in evidence and which appears in the State of the Case in full at page 206, shows clearly that the only authority given to the brother by Rose Meadows was "To take my Buick sedan and drive down to the Brunswick Hotel in Asbury Park, N. J., to see my mother, Mrs. Fannie Hendler, who was stopping at that hotel." It is thus apparent that the trial judge fell into error in not admitting this statement for the purpose of neutralizing the testimony of Mrs. Meadows on the point as to whether or not she gave her brother authority to take her mother and anyone else out in her car.

Furthermore, under the rule as laid down in *Posner v. Nutkis, supra*, if the trial judge is satisfied that the attorney is surprised, as the trial court was in this case, then the statement was admissible and the question as to whether or not it did neutralize the testimony of the witness or party, was one for the jury to determine and not the judge.

The plaintiffs, of course, were anxious to differentiate their case from the rule as recently laid down by the Supreme Court in *LaBelle v. Quostorf*, 13 N. J. M. 183, which held that even though a person is agent for the owner in driving his car, that agency to drive does not include authority to invite a passenger to ride in the car

so as to make the owner liable for injuries sustained by the passenger.

The refusal of the trial judge to admit in evidence the statement of the defendant Meadows, and the trial precedent thus created, seriously and substantially hindered the defense with the further presentation of its case. Even though the other defendant was in the courtroom, under the Judge's ruling, that statements of a party to the suit were not admissible to neutralize their testimony, there was no way in which the defendants' attorney could keep control of the situation and put the defendant Meyer Hendler on the stand.

The point was made below by the plaintiffs-respondents that the defendant, Meyer Hendler, was not called to the stand and therefore the inference is that he could not deny the admission testified to by Goldie Zipkin that he was asleep at the time of the accident.

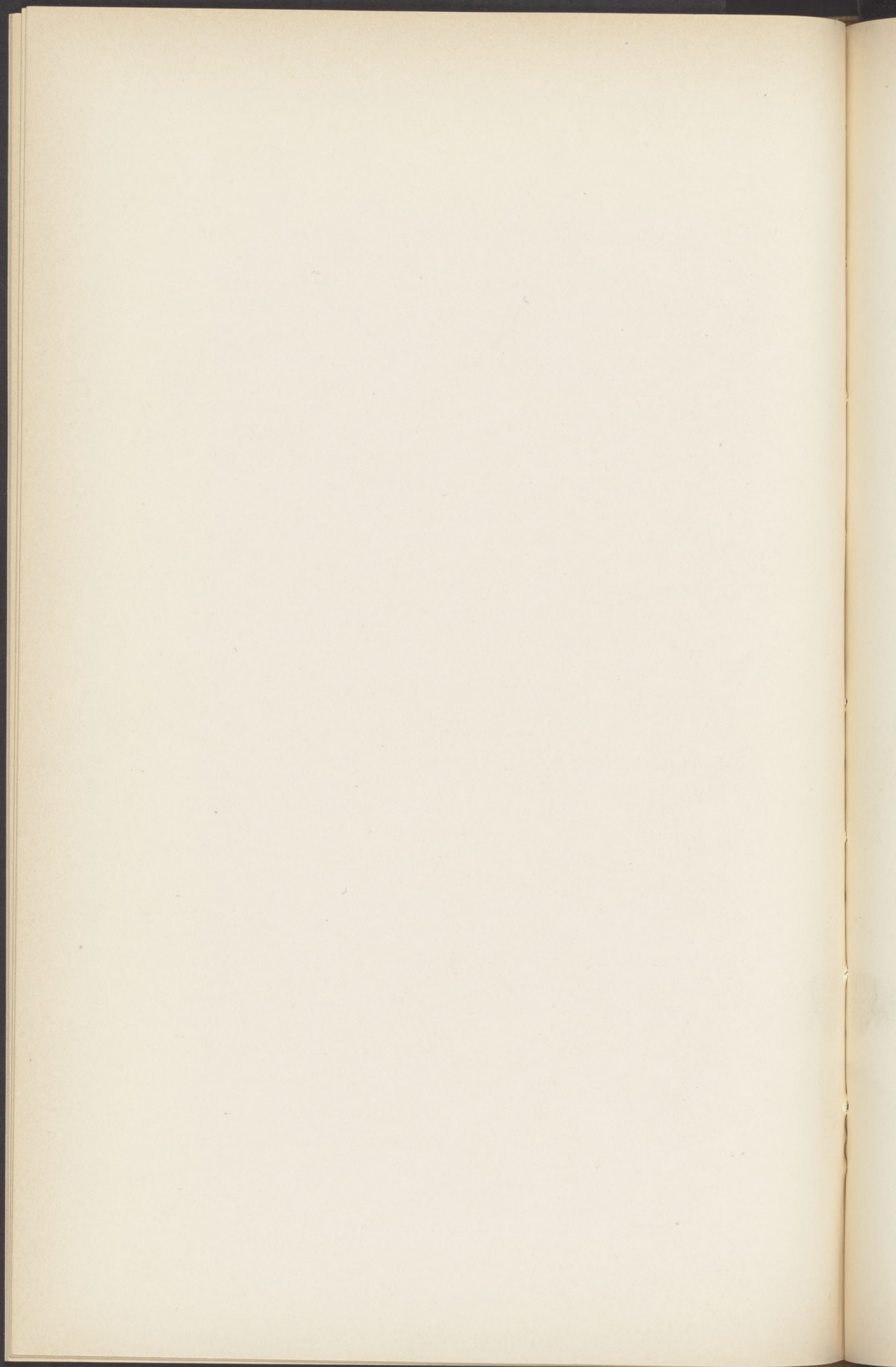
To this we can only say that it is quite obvious from the record, from the testimony, from the conduct of the parties at the trial, of the very close relationship that existed between all of them, of the desire of the defendants to see the plaintiffs recover, and it must be self-evident that the real client of the attorney for the defendant was not the party to the suit but that the named defendants were defendants in name only. Counsel in trying a case of this sort has to rely upon the written statements that have been given him or his real client by the named defendants in the suit. And it is for this reason as pointed out by the Supreme Court in the case of *Posner v. Nutkis, supra*, that defendant's attorney has the right to neutralize the testimony of his own defendants when surprised. It is almost impossible to separate the grounds of appeal in this case because one is so interrelated to the other that by the error of the trial court in refusing to allow the defendants'

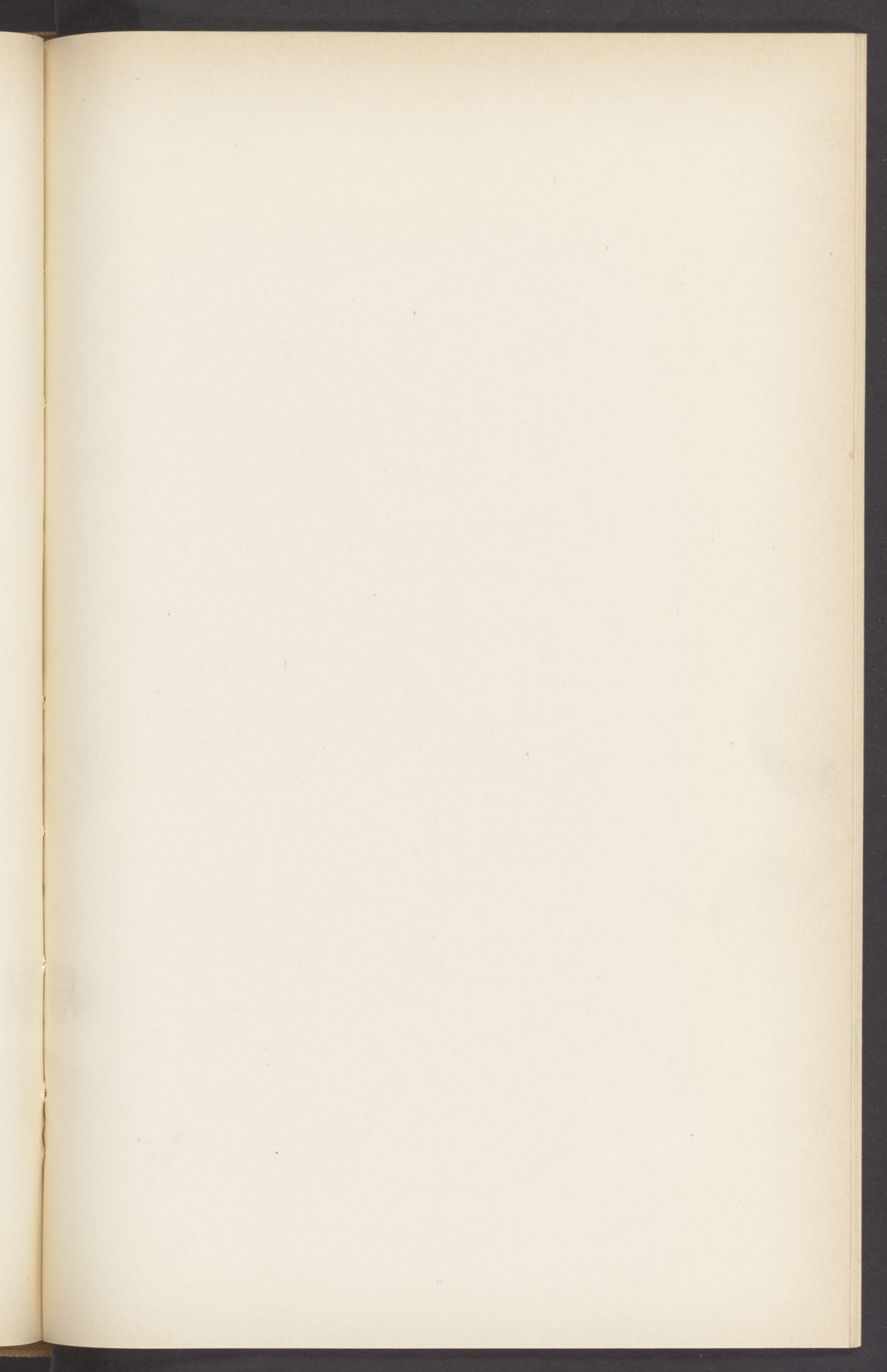
attorney to use the statement taken from the defendant Rose Meadows, to neutralize her testimony after she had taken the stand and testified differently from the statement the counsel had obtained from her, that counsel could not risk putting her brother, the other defendant, on the stand. The reason for this is quite obvious because certainly with the daughter denying telling the same story on the stand as she told in her statement, and the plaintiff Goldie Zipkin, the girl friend of the defendant, taking the stand and bringing in a suspicious admission for the first time after she had already testified at length before, there was no telling what the defendant Meyer Hendler would testify to. Ordinarily this would make little or no difference because under the rules of this Court such a situation could be controlled by the attorney for the defendant by holding the nominal defendant to the statement that counsel had from him. Counsel was compelled to assume that the trial judge will be consistent in his ruling and that having refused to admit the statement of Fannie Hendler he would likewise refuse to admit the statement of Meyer Hendler.

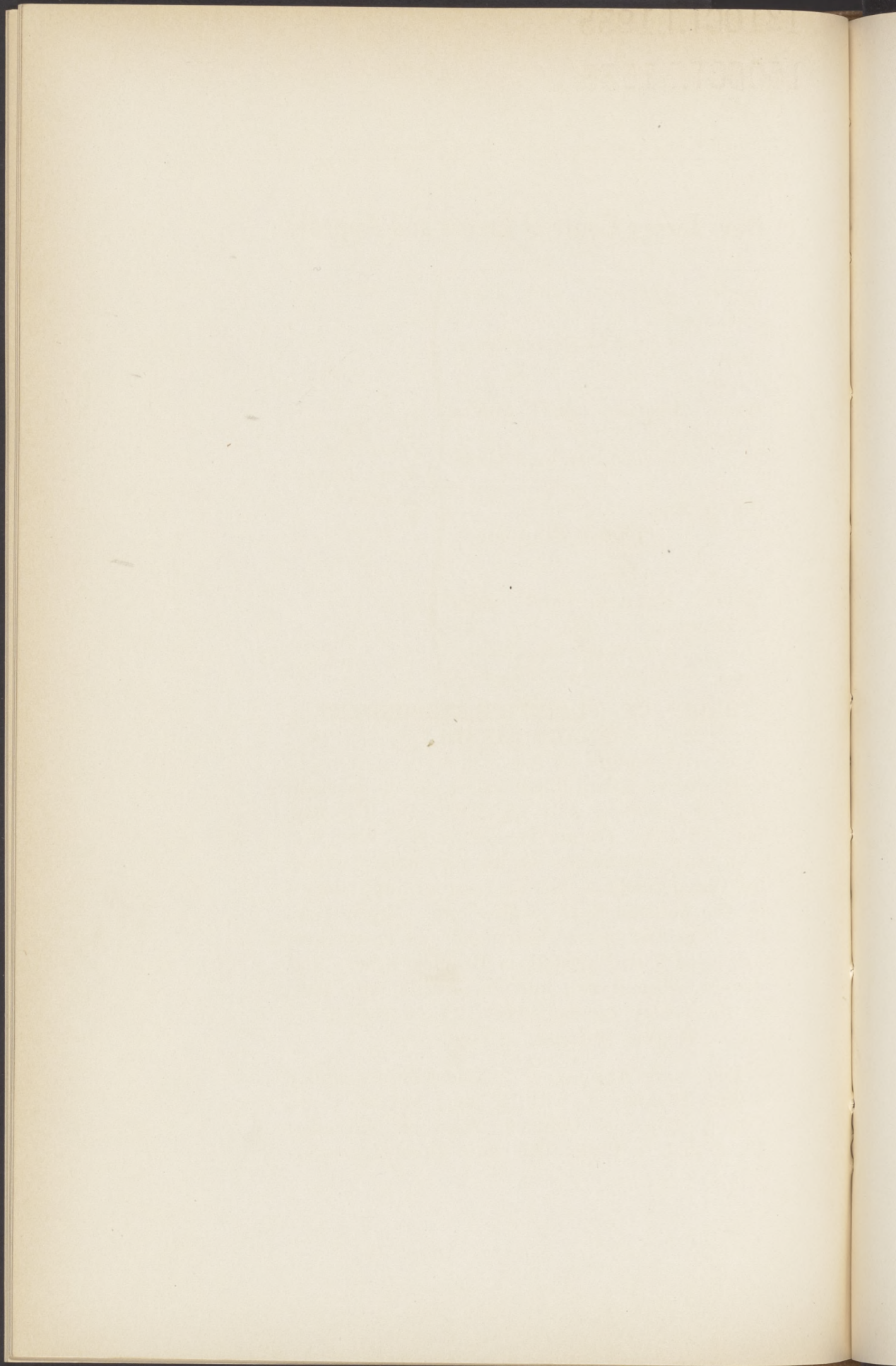
It is respectfully urged that the refusal of the Trial Court to allow the defendants' attorneys to use their statements to neutralize their testimony, coupled with the direction of a verdict in favor of the plaintiffs at the trial, created such substantial error in the case at bar that the judgments of the Supreme Court should be reversed and new trials granted.

McCARTER & ENGLISH,
Attorneys for Defendants-Appellants.

GERALD M. McLAUGHLIN,
RICHARD J. CONGLETON,
Of Counsel.







131 OCT. 1. 1935

150 OCT. 1935

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

FANNIE HENDLER and ISAAC
HENDLER,
Plaintiffs-Respondents,

vs.

ROSE MEADOWS and MEYER
HENDLER,
Defendants-Appellants.

GOLDIE ZIPKIN,
Plaintiff-Respondent,

vs.

MEYER HENDLER and ROSE
MEADOWS,
Defendants-Appellants.

*On Appeal
from the
New Jersey
Supreme
Court.*

BRIEF OF PLAINTIFF-RESPONDENT, GOLDIE ZIPKIN.

These cases had their origin in an accident that occurred on July 18, 1933. On that day, the plaintiffs, Fannie Hendler and Goldie Zipkin, were passengers in an automobile driven by the defendant, Meyer Hendler, and owned by the defendant, Rose Meadows. Meyer Hendler was driving the automobile on Ocean avenue, near Third avenue, in Bradley Beach, New Jersey, when it ran into an electric light pole, in the center of the street. As a result, the plaintiffs were seriously injured.

The cases were tried together before Judge Dallas Flannagan, with a jury, at the Essex County Court of Common Pleas on November 19, 20 and 21, 1934. The court directed verdicts

in favor of the plaintiffs, leaving to the jury the question of damages.

The defendants-appellants appealed to the Supreme Court, which affirmed the judgments (S. C. p. 215).

The defendants now appeal to this court on the following grounds:

1. That the Supreme Court erred in giving judgments for the plaintiffs-respondents instead of the defendants-appellants.

Two grounds of appeal were considered by the Supreme Court. Each of these will now be discussed separately:

First Ground of Appeal.

The refusal of the Essex County Court of Common Pleas to admit in evidence D. 1 for identification was the basis (S. C. p. 213) of the first ground of appeal. D. 1, as it appears on page 206 of the State of the Case is a statement made by the defendant-appellant, Rose Meadows, on October 19, 1933. According to the statement, Mrs. Meadows directed the defendant-appellant Hendler "to take my Buick sedan and drive down to the Brunswick Hotel in Asbury Park, N. J., to see my mother, Mrs. Fannie Hendler, who was stopping at that hotel."

The defendant-appellant, Mrs. Meadows, upon direct examination by her attorney, was asked the following questions (State of the Case, p. 186, l. 17 to p. 187, l. 26):

"Q Mrs. Meadows, on July 18, 1933, sometime in the morning, did you tell your brother, Meyer Hendler, of 93 Hillside avenue, Newark, New Jersey, to take your Buick sedan and drive down to the Bruns-

wick Hotel in Asbury Park, New Jersey, to see your mother, Mrs. Fannie Hendler, who was stopping at that hotel? A Not on July 18.

Q Did you use that language to your brother on any date in July? A I did.

Q When? A July 4."

The defendant's admission corroborates the testimony of George Hendler, which appears on page 85, line 25 of the State of the Case:

"Q Do you remember whether Mrs. Meadows, your sister, was in the city the day your mother was hurt? A She was not in the city.

Q Do you know when she went away? When did she leave the city? A She left July 4th."

On page 86, the testimony of George Hendler is as follows:

"Q And what did Mrs. Meadows say to your brother Meyer? A She said to my brother Meyer: 'I want you to take mama out riding, and if you cannot make it, get Jimmy, my chauffeur.'"

The defendant-appellant, Mrs. Meadows, upon being cross examined by Mr. Penn (p. 190 of the State of the Case) admitted that she had asked Meyer Hendler to take friends as well as her mother riding.

It was then that Mrs. Meadows' attorney offered in evidence D. 1 for identification, pleading surprise at "the testimony which has just come off the stand" (State of the Case, p. 190, l. 10). In the case of *Posner v. Nutkis*, 5 Misc. 593, it was held that an attorney might plead surprise at the testimony of his own client. In that case, the court said:

"The only other point raised was that the trial court erred in permitting the defendant to offer in evidence a statement

made by the defendant himself for the purpose of discrediting defendant's direct testimony, counsel pleading surprise. The defendant was clearly friendly to the plaintiff's side of the case (the reason for which it is not difficult to surmise) and therefore hostile to his own. It is the right of counsel under these circumstances to offer in evidence the contradictory statements under the case of *State v. D'Adame*, 84 N. J. Law 386. The question of surprise was one for the trial judge. We think there was sufficient to indicate that the defendant's counsel was surprised and this laid the ground for the introduction of the contradictory proofs."

It will be seen that in *Posner vs. Nutkis, supra*, that the defendant was "clearly friendly to the plaintiff's side of the case." But in these cases, the evidence shows no friendliness to the plaintiffs' side. Mrs. Meadows was questioned mainly about the authority of the defendant, Meyer Hendler, to use her automobile. Certainly there was no reason why she should seek to make herself liable to the plaintiff, Goldie Zipkin, who several years before the trial had been a friend of her brother. Nor does the testimony indicate that the defendant's testimony surprised her attorney. Upon direct examination after she had replied to some preliminary questions regarding identity, occupation and ownership of the automobile, Mrs. Meadows testified (*State of the Case*, p. 184, l. 9) as follows:

"Q Looking at this paper dated October 19, 1933 at the bottom of the first page, is the signature Rose Meadows. Is that your signature? A Yes."

Counsel for the defendant then went on to ask her many questions concerning Exhibit D. 1. It is apparent that counsel was not surprised at his client's testimony. His questions to her concern-

ing D. 1, without eliciting contrary testimony first, showed that he expected the answers given by her. At any rate, the question of surprise was for the trial judge. *Posner v. Nutkis, supra.*

It will be noted also, that in the *Posner* case, a statement was admitted in evidence to discredit the defendant's direct testimony. But the defendant's attorney in these cases offered in evidence D. 1 at the conclusion of cross examination by the plaintiffs, pleading, to quote his words again "surprise at the testimony which has just come off the stand."

Certainly, if the rule laid down in the *Posner* case was to be widened so as to permit the plea of surprise at one's client's testimony, elicited upon cross examination, the very purpose of cross examination would be defeated.

There is another reason why the refusal of the court to admit D. 1 in evidence was justified. The testimony of the defendant which was sought to be neutralized by the admission of D. 1 in evidence referred to a conversation on July 4. The statement contained in D. 1 referred to a conversation of July 18. That the trial court considered this matter in ruling upon the admissibility of D. 1 is shown by his remarks (State of the Case, p. 196, l. 8):

"The Court: The situation is this, 'I told my brother to take the automobile and go down to Asbury Park and take my mother out riding on the 4th of July.' Now what is there in the statement that contradicts that? The statement purports to refer only to a conversation July 18th and has no reference to any conversation on the 4th."

These remarks of the court show clearly that the Exhibit D. 1 was immaterial for the purpose for which it was offered.

But even if the court, in refusing to admit D. 1 in evidence erred, its error did not injuriously affect the substantial rights of the defendants, and therefore should not have resulted in reversal. *McWhinney v. Jacobson*, 9 Misc. 958. As the Supreme Court, in its opinion stated (S. C. p. 216):

“In the circumstances of this case the refusal to admit the statement was harmless. Its only effect could have been to wipe out Mrs. Meadows’ testimony on this subject, and then there would have been left the presumption of agency arising from the operation of the automobile and the testimony of George Hendler to the effect that Mrs. Meadows had told Meyer to take the mother out riding, all of which stands uncontradicted because the statement, if admitted, could not be given the effect of neutralizing testimony other than that of Mrs. Meadows.”

The substantial rights of Mrs. Meadows were unaffected by the refusal to admit D. 1 in evidence. And the liability of the defendant, Meyer Hendler, for his own negligence, was certainly unaffected.

The first ground of appeal, therefore, did not constitute ground for reversal of the court below by the Supreme Court because:

1. The testimony of Mrs. Meadows did not in fact surprise her attorney.
2. The question of surprise is for the trial judge, and no abuse of discretion was shown by him in refusing to admit D. 1 in evidence.
3. Exhibit D. 1 did not contradict the testimony of Mrs. Meadows, and hence could not serve to neutralize her testimony.

4. The plea of surprise was made following cross examination of the defendant, not after the direct examination.

5. Even if the court did err there was no injury to the substantial rights of the defendant, Rose Meadows, or of the defendant, Meyer Hendler.

Second Ground of Appeal.

The question presented by the second ground of appeal (S. C. p. 213, l. 9) considered by the Supreme Court was: Was direction of verdicts justified?

In the case of *Cirpriano v. Casalla*, 3 Misc. 1174, the Supreme Court said:

“Proximate cause and contributory negligence are questions ordinarily for the jury, but, where facts are undisputed and susceptible of but one inference, the question then becomes one of law for the court. Mayer, etc. *Baltimore v. Terio*, (Md.) 128 A. 353.”

The facts in these cases are undisputed. They show that Meyer Hendler was the driver of the car involved in the accident, that Rose Meadows was the owner, that Hendler was acting within the scope of his authority in taking the plaintiffs for a ride, that the plaintiffs were injured as a result of Hendler's driving the car into a light post, that the collision with the post occurred as a result of Hendler's falling asleep.

The facts are not only undisputed, they are capable of but one inference, namely, that the defendant, Meyer Hendler was negligent in operating the automobile. On page 116, lines 31-34

Law 521. No other inference than that he was negligent can be properly drawn from the facts. The cases fall squarely within the rule stated in *Cirpriano v. Casalla, supra*.

The Court of Errors and Appeals, in *Podolsky, et al. v. Sautter*, 102 N. J. Law 598, also discusses negligence as a matter for the court to determine. Mr. Justice Trenchard, speaking for the court, said:

“Before the judge can take away from the jury the question whether or not the negligence of the defendant is the proximate cause of the injury, and determine that question himself, the facts must not only be undisputed, but the inferences to be drawn from those facts must be such that fair-minded men ought not to differ about them.”

Certainly the facts in these cases clearly show that the negligence of the defendant, Meyer Hendler, was the cause of the plaintiffs' injuries. The trial court was justified in directing verdicts, since fair-minded men ought not to differ about the inferences to be drawn from the facts disclosed in these cases.

The principles in these cases cited above are not isolated in our reports. Others setting forth similar principles in negligence actions include *Sharpe v. Public Service Ry. Co.*, 103 N. J. Law 583; *Sakos v. Byers, et al.*, 112 N. J. Law 256; *Moebus v. Becker*, 46 N. J. Law 41; *Brower v. Public Service Corp.*, 74 N. J. Law 193; *Repasky v. Novich*, 113 N. J. Law 126; *O'Donnell v. Laggren Bros. Co., Inc.*, 112 N. J. Law 319; *Vendola v. Public Service Ry. Transp. Co.*, 5 Misc. 285. In the latter case, the trial court had directed a verdict in favor of the plaintiff, a passenger in the defendant's bus when it ran into a truck.

The Supreme Court on appeal affirmed the verdict of the trial court, saying:

“Surely the uncontradicted facts do not permit conflicting inferences to be drawn, but on the contrary unerringly point to negligent conduct on the part of the defendant’s servants.”

The appellants seek to differentiate between the *Vendola* case and these, stating that in the former it appeared “that there was an act of negligence on the part of the driver of the bus in failing to see a truck in the road ahead of him.” They fail to show, however, wherein that situation differs from the one presented here where the defendant Meyer Hendler failed to see a light post in the street ahead of him.

It is said by the appellants in their brief that the situation is similar to that in the case of *MacKenzie v. Oakley*, 94 N. J. Law 66, and that, as in that case the doctrine of *res ipsa loquitur* applies. But a reading of the *MacKenzie* case shows the vital difference. In that case Mr. Justice Minturn said:

“The skidding of the machine was apparently due to the fact that a shower of rain had come up unexpectedly which made the road slippery and dangerous. * * *”

Here there was no evidence presented that the road was slippery or dangerous; no testimony from which an inference that a mechanical defect caused Hendler to run the car into a pole could be drawn.

The case of *Hughes vs. Atlantic City, etc., Railroad Co.*, 85 N. J. Law 212, is quoted at length by appellants in an attempt to show that the doctrine of *res ipsa loquitur* is involved in these cases. The court there said:

“The question discussed in the cases that involve the application of the maxim *res ipsa*

loquitur has always been whether mere proof of the injury justified a jury in drawing an inference of negligence, so that a nonsuit would be improper, or in other words, whether it sufficed to prevent a nonsuit."

It is clear that these cases did not only present "mere proof of the injury." There was presented in the language of the Supreme Court (State of Case, p. 217, ll. 20-22) "a situation where the driver, whether asleep or awake, steered into a pole. * * *" In that situation, to quote further, "it cannot be said that reasonable minds could differ on the question of negligence."

It is respectfully submitted, therefore, that the Supreme Court did not err in affirming the judgments of the trial court, finding that there was no error in refusing to admit Exhibit D. 1 in evidence, and in directing verdicts for the plaintiffs-respondents, and its judgment should be sustained.

Respectfully submitted,

PERCY H. PENN,
Attorney for Goldie Zipkin,
Plaintiff-Respondent.

The first part of the paper is devoted to a general
 consideration of the subject. It is shown that the
 results of the experiments are in accordance with
 the theory. The second part is devoted to a
 detailed description of the apparatus used. The
 third part is devoted to a discussion of the
 results. It is shown that the results are in
 accordance with the theory. The fourth part is
 devoted to a summary of the results. It is
 shown that the results are in accordance with
 the theory. The fifth part is devoted to a
 conclusion. It is shown that the results are
 in accordance with the theory.



131 OCT. 1. 1935

150 OCT. 7. 1935

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

FANNIE HENDLER and ISAAC
HENDLER,
Plaintiffs-Respondents,

vs.

ROSE MEADOWS and MEYER
HENDLER,
Defendants-Appellants.

GOLDIE ZIPKIN,
Plaintiff-Respondent,

vs.

MEYER HENDLER and ROSE
MEADOWS,
Defendants-Appellants.

*On Appeal
from New
Jersey
Supreme
Court.*

BRIEF OF PLAINTIFFS-RESPONDENTS, FANNIE HENDLER AND ISAAC HENDLER.

Preliminary Statement.

The above mentioned cases were tried together before the Hon. Dallas Flannagan, with a jury, in the Essex County Court of Common Pleas, and verdicts were rendered in favor of the plaintiffs against both defendants on November 21, 1934, upon which verdicts, judgments were entered the same day (S. C. p. 208).

Thereafter an appeal was taken to the Supreme Court, which court affirmed the judgments below on August 28, 1935 (p. 218) (See its opinion on p. 215). The matter now comes before this court on an appeal from said affirmance by the Supreme Court. The grounds assigned for a reversal of the judgments are as follows:

(1) Because the Supreme Court erred in affirming the Essex County Court of Common Pleas in directing verdicts in favor of the plaintiffs-respondents in the above entitled causes and against the defendants-appellants.

(2) Because the Supreme Court erred in sustaining the Essex County Court of Common Pleas in refusing to admit in evidence D. 1 for identification, which is the signed statement of the defendant-appellant Rose Meadows.

Statement of Facts.

On July 18, 1933 at about 9:30 at night, while an automobile in which the plaintiffs Fannie Hendler (mother of the defendants) and Goldie Zipkin were riding, the said automobile operated by the defendant Meyer Hendler, ran into one of the light-standards located on Ocean avenue in Bradley Beach, N. J. The standard is referred to by plaintiff Fannie Hendler as a "post" (p. 23) and by the plaintiff Goldie Zipkin as a "pole" (p. 99, l. 10), and also as a "stanchion" (p. 102). Although it was dark at the time of the accident, the place was "very well lighted up, the street lamps being lighted" (p. 24).

So far as the plaintiff Fannie Hendler is concerned it appears, uncontradicted, from the testimony in the case, that when the defendant Rose Meadows, who was the owner of the automobile in which the parties were riding was about to leave the city with her husband on July 4, 1933 (p. 85) she said to her brother Meyer Hendler, "I want you to take mama out riding, and if you cannot make it get Jimmy my chauffeur." It appears that Jimmy had worked on and off as a chauffeur and drove the defendant Meadows

around because she could not drive and had no license to do so (p. 90). It also appears that the said defendant Meyer Hendler had on various other occasions driven her around (p. 91).

The witness George Hendler who gave the testimony mentioned stated that his mother went to the shore (Asbury Park) around July 15, 1933; that the next time he saw his mother was when he arrived in Bradley Beach on the morning of July 19th, when he found the automobile "wrapped around a pole down at the shore in Bradley Beach" (p. 86).

Goldie Zipkin was the only witness who gave particulars as to how the accident occurred (p. 99). She testified as follows:

Q What happened? A We met with an accident, the car.

Q What was it? A The car ran into a pole on Ocean avenue.

Q What happened just before it ran into the pole? A We were driving along Ocean avenue and when we got to Third avenue I noticed the car swerve and turn around and noticed the car go into the pole.

Q Was there any other car right around you at the time? A No.

Q Was there anything that you could see that caused him to do that? A No, nothing.

On cross examination she was asked as follows:

Q And all of a sudden, out of a clear sky, you are into a stanchion, is that right?
A Yes.

Q And that is all you know about it, isn't it? A Well, outside of the car swerving.

This witness further testified that after the accident she spoke to the driver, Meyer Hendler, and asked him how the accident happened and he

said, "Gosh, I fell asleep a moment" (p. 116) and that he repeated the same thing over again in front of her folks (p. 117).

The driver Meyer Hendler did not take the stand either in his own behalf or on behalf of his sister, the defendant Rose Meadows. The latter, however, did take the stand and stated that the plaintiff Fannie Hendler is her mother and that she lived with her parents in the City of Newark in the same month as the accident happened. After identifying a certain paper shown to her by her attorney (p. 186) she was asked as follows:

Q Mrs. Meadows, on July 18, 1933, some time in the morning, did you tell your brother Meyer Hendler, of 93 Hillside avenue, Newark, N. J. to take your Buick sedan and drive down to the Brunswick Hotel in Asbury Park, N. J. to see your mother, Mrs. Fannie Hendler, who was stopping at that hotel? A Not on July 18th (p. 187).

Upon the further question to her as to whether she used that language to her brother on any date in July, she answered that she did on July 4, and (at the top of p. 188) the witness stated that she did tell her brother that if he could not take her mother riding he should get her chauffeur to do it.

Further questions were asked of the witness, all directed to ascertaining whether the defendant Rose Meadows on July 18, 1933 told her brother to take her mother out riding, notwithstanding the fact that there had not, previously, been any evidence that such a conversation took place on July 18, 1933, but that such conversation did take place on July 4, 1933 (p. 188, l. 30 etc.).

Upon eliciting said information, counsel for the defendants made the following statement to the court:

Mr. McLaughlin: I plead surprise at the testimony which has just come off the stand and for the purpose of neutralizing that testimony I offer in evidence D. 1 for identification (p. 190).

The court refused to permit the offer and thereafter, upon motion of counsel for the plaintiffs, the court directed a verdict in their favor, leaving it to the jury to determine the amount of damages sustained by them.

ARGUMENT OF THE LAW.

(Unless otherwise noted, italics ours.)

POINT I.

The Supreme Court did not err in upholding the verdicts which were directed in favor of the plaintiffs-respondents by the Essex County Court of Common Pleas.

As shown in the forepart of this brief, Meyer Hendler, one of the defendants, who was driving the car, ran into a stanchion located on Ocean avenue in Bradley Beach, which as the court may know, is the main thoroughfare skirting the seashore in that vicinity. The streets were well lighted; no car or other object was around at the time to cause him to lose control of the car. According to the testimony, the impact was so great that, in the language of George Hendler, who visited the scene of the accident the next day, he found the automobile "wrapped around a pole down at the shore in Bradley Beach." As an excuse offered by Meyer Hen-

bler as to this most negligent act of his, he stated that he had fallen asleep, according to the witness Zipkin. How does the defendant meet this charge of negligence? By presenting no explanatory proofs whatsoever! The reason for not testifying given by the counsel for defendants (p. 19 of their brief) is as follows:

“To this (the charge made by plaintiffs that the defendant Meyer Hendler was not called to the stand because he could not deny the facts set forth by the plaintiff) we can only say that it is quite obvious from the record, from the testimony, from the conduct of the parties at the trial, of the very close relationship that existed between all of them, of the desire of the defendants to see the plaintiffs recover, and it must be self-evident *that the real client of the attorney of the defendant was not the party to the suit, but that the named defendants were defendants in name only.*”

This is really refreshing! We are being told that in cases where some one other than the defendant is called upon to pay the judgment, a new rule of law should be established in favor of such person, although he is not a party to the action. We do not believe that this court is willing to go that far.

Defendants' brief wishes to make it appear to this court that the real negligence upon which the learned court based its direction for the plaintiffs' verdict, was merely that which related to the statement of the driver that he had fallen asleep. This is indeed a very narrow conception of the proofs. Even without that statement in the case, the testimony clearly shows negligence, and, under the judicial decisions both in this state and elsewhere, the court was powerless to do anything other than direct a verdict in favor of plaintiffs.

While discussing the various citations submitted by appellants' counsel, which, it is argued, point to the duty of a trial court to submit the facts brought out by the plaintiffs, to the jury, under the doctrine of *res ipsa loquitur*, they concede that the decision in the case of *Vendola vs. P. S. Ry. Transp. Co.*, 136 Atl. 415, (5 N. J. Misc. 285) which is cited in the opinion of the Supreme Court in the instant case (S. C. pp. 215, &c.) was wholly justified and was eminently proper. They say (p. 10, etc.):

"*Vendola vs. Public Service Co.*, 5 Misc. 285 does not in any way change the rule of law (rule of *res ipsa loquitur*) as stated above and is not applicable to the situation in the case at bar. In the *Vendola* case a bus which operated as a common carrier collided with a truck which was standing in the roadway ahead of it. In reading the opinion of the court it appears clearly that *there was an act of negligence on the part of the driver of the bus in failing to see a truck in the road ahead of him.* There is no situation created in the *Vendola* case where the doctrine of *res ipsa loquitur* is applicable *and the direction of the verdict in such a situation where there is an act of active negligence on the part of the defendant is of course proper.*"

Let us see what the facts in the *Vendola* case were and distinguish it, if it can be humanly done, from the case we are now considering. The facts, briefly, were that the plaintiff was a passenger riding in a bus operated by the defendant company's servants, which bus, at night-time, collided with a disabled truck. The defendant put in no defense, and the court charged, *inter alia*,

"The evidence on the subject is uncontradicted and the court charges you that the plaintiff is entitled to a verdict for such

damages, as you find from the evidence, he has suffered by reason of this accident, so the court will not go further into the accident.”

It seems that a proper exception was not taken to that instruction nor to an instruction following the same, part of which is:

“The evidence on the subject is uncontradicted and the court charges you that the plaintiff is entitled to a verdict. * * *”

The court, however, considered the matter as though good exceptions had been taken, as appears from the following statement in the opinion (at p. 416):

“But even if the matter were before us for decision, we think, as the case stood, with the facts uncontroverted, it fell squarely within the legal rule enunciated in *Doyon v. Massoline Motorcar Co.*, 98 N. J. Law 540, at page 543, 120 A. 204, 206, where our Court of Errors and Appeals said: ‘No question for a jury arises where the facts are uncontroverted unless from the facts conflicting inferences may be drawn.’ Surely the uncontradicted facts in the present case do not permit conflicting inferences to be drawn, but, on the contrary, unerringly point to negligent conduct on the part of defendant’s servants.”

In the instant case the facts were that the defendant-driver collided with a lighted street light (stanchion) on a well-lighted public highway, no explanation or denial being given or made by him. The Supreme Court said (p. 217):

“When a car proceeding along a street suddenly swerves into a pole with no apparent cause, and there is no attempt to explain the occurrence, no claim that any other car or person was involved or that there was a hidden defect in the car, but

simply a situation where the driver, whether asleep or awake, steered into a pole, it cannot be said that reasonable minds could differ on the question of negligence. There was no error in the direction of verdicts. *Vendola vs. P. S. Co.*, 5 Misc. 285. The judgments are affirmed, with costs."

Some other cases where the court undertook to control the question of negligence are as follows:

In *Sharpe vs. Public Service Ry. Co.*, 106 N. J. L. 583, the facts were that plaintiff was riding a motorcycle and that while crossing an intersection, he ran into the side of a passing trolley car. The trial court non-suited the plaintiff and on appeal to this court, Justice Lloyd, in writing the opinion, said:

"If, however, upon the evidence adduced, it shall clearly appear that such negligence does exist, and that it has a causal relation to an injurious accident, the question becomes one of law for the court. *N. J. Express Co. v. Nichols*, 33 N. J. Law 434, 97 Am. Dec. 722."

In *Parave vs. P. S. Interstate Trans. Co.*, 109 N. J. L. 155, the first syllabus by the court, which is amply sustained by the opinion, written for the Court of Errors and Appeals by Judge Wells, states that:

"Before the trial court can take away from the jury the question whether or not the negligence of the defendant is the proximate cause of the injury and determine that question himself, the facts must not only be undisputed but the inference to be drawn from those facts must be such that fair-minded men ought not to differ about them."

See also, *Podolsky vs. Sautter*, 102 N. J. L. 598.

In the case of *Rudd vs. Byrnes*, 156 Cal. 636, 105 Pac. 957; 25 L. R. A. (N. S.) 134, it is stated in the opinion that:

“While the question of negligence is ordinarily one to be determined by the jury, yet where the facts are undisputed and no inference but that of negligence can be drawn from them, the court may determine that negligence is shown as a matter of law.”

Defendants, however, insist that irrespective of what the proven facts of negligence against them are, those facts the court was in duty bound to submit to a jury under the doctrine of *res ipsa loquitur*. So much has been said on this subject, with so little variance of statement, by our courts, and the courts of our sister states, that it is not deemed necessary to discuss a subject which could be made voluminous in its treatment.

In 45 *C. J.* 1201 (note 21) the compilers have undertaken to classify and list cases where the doctrine mentioned has been applied. They relate almost, if not exclusively to claims where inanimate objects have caused injuries. In these cases the doctrine that “the thing speaks for itself” has been applied. Some of the causes mentioned are as follows: The falling of awnings, barrels, boards, planks, beams or other timber; boxes, bricks or stones, buildings, chimneys, cornices, doors, dumb-waiters, fire escape ladders, fire extinguishers, flag-poles, floors, glass, insulators, ice, iron beams, bolts, lamps or lights, piano, pipes, plaster, poles, scaffolds, signs, skylights, structures, trees, walls, windows, and the like.

Under one of these classifications (falling barrels) comes the well-known case of *Byrne v.*

Boadle, 2 H. & C. 722, 159 Reprint 299 (where a barrel of flour rolled out of a warehouse and injured the plaintiff) in which case the doctrine of *res ipsa loquitur* was probably stated for the first time in a court of high authority.

That case presented the situation where it could not be said that the defendant was guilty of direct negligence, but only that the occurrence might indicate or speak of negligence on the part of the defendant.

But it is the treatment by the courts of our own state that, perhaps, more immediately concerns us than that of the courts of other jurisdictions.

In the early case of *Bahr v. Lombard, Ayres & Co.*, 53 N. J. L. 233 (Court of Errors and Appeals) a pipe used upon the premises of the defendant, burst, which caused injury to the plaintiff. No cause apparently could have been assigned by the plaintiff for its bursting. Justice Garrison, who wrote the opinion for the court, said:

“If, from the facts in evidence, two inferences as to the defendants’ conduct may legitimately be drawn, one favorable and the other unfavorable to its negligence, a question is presented which calls for the opinion of a jury.”

The noticeable part of this statement is that which points to a situation where “*two inferences* as to defendants’ conduct may *legitimately* be drawn”; not therefore, a single inference, and not an illegitimately drawn inference, is to be considered. If therefore, but one inference can be drawn in favor of either the plaintiff or the defendant, and that inference is legitimately drawn, there can be nothing for a jury to pass

upon, and the matter becomes one for the court to determine.

In the recent case of *Hochreutener v. Pfenninger*, 113 N. J. L. 317 this court (opinion per Hetfield, J.) said:

“The doctrine of *res ipsa loquitur* is applicable only when proof warrants a finding that the plaintiff has made out a prima facie case, *without any direct proof of actionable negligence* (*Bien v. Unger*, 54 N. J. L. 596); but, where all the facts and circumstances under which the accident occurred are disclosed by the evidence, and the question presented is whether, under the proofs submitted, the conduct of the defendant was negligent, which is the present situation, *there is nothing left to inference, and the rule res ipsa loquitur has no application.* (Citing cases). It should only be invoked where the proof of negligence is furnished by the occurrence itself.”

We note from the above that proof of direct negligence and the doctrine of *res ipsa loquitur* are antithetical. Where the proofs are complete and direct, there is no occasion to draw an inference; when only circumstantial or inferential negligence is shown, there could not logically be proof of direct negligence.

Defendants in their brief seek to show that under cited cases, the Supreme Court erred in not holding the issue in the instant case to be one where the doctrine of *res ipsa loquitur* should be applied, although admitting, as they have, that the Vendola case, *supra* (and necessarily, cases similar thereto), does not come under that rule.

Of the cases cited by defendants in their brief, we mention the following:

Hughes v. Atlantic City R. R. Co., 85 N. J. L. 212 where an electric light bulb attached to the ceiling of a passenger car, burst. Obviously at least two inferences could be drawn from the occurrence, one of which need not necessarily show negligence on the part of the defendant for the reason that, as stated in the court's opinion, the bulb might have burst from a cause beyond defendant's control.

It may be interesting at this point to inquire as to whether a defendant in a *res ipsa loquitur* case is obliged to exculpate himself or merely explain the situation, and we refer the court to its opinion in the case of *Bien v. Unger*, 64 N. J. L. 596, where Justice Garrison, speaking for this court, said (at p. 600) that the doctrine discussed called upon the defendant "to give such evidence as will exonerate him," and, statements made by this court in the case of *Mumma v. Easton & Amboy R. R. Co.*, 73 N. J. L. 653 as follows:

"If the act of the servant—the engine-driver—were unusual, and emphasis be laid upon this characteristic, then to hold that because of the unusual act or occurrence the defendants were required to put in explanatory, if not exculpatory, evidence, will also harmonize the present case with *Bahr v. Lombard & Ayres Co.*, 24 Id. 233 (citing cases)."

A statement by Justice Swayze in the *Hughes* case, *supra*, is to the effect that a defendant in a *res ipsa loquitur* case is not obliged to exculpate himself. His opinion however, leaves no doubt that where there is direct evidence

of negligence, the doctrine of *res ipsa loquitur* does not apply, for he states (top p. 214):

“The importance of the rule which finds expression in that maxim is found in the province of the trial judge and not in the province of the jury. He is called on in the first instance to say whether there is any evidence of negligence to go to the jury; in the absence of direct evidence, he may, in cases where the maxim applies, hold *that the circumstances are such as will, unexplained, permit the jury to draw the inference of negligence.* * * *”

Defendants' counsel emphasize in capital letters that part of the court's opinion in the Hughes case which runs,

“It is evidence; whether it amounts to proof is for the jury to say, even in the absence of explanation by the defendant” (Defendants' brief, p. 10).

The undoubted thought of the scrivener of the brief is that that reference is to the fact that *all* cases must be referred to a jury. This is not so. The statement refers to the doctrine of *res ipsa loquitur* only, under which doctrine the jury must determine the issue.

In other cases cited by the defendants, to wit, *Collins v. Central R. R. Co.*, 91 N. J. L. 615, plaintiff was injured by reason of a radiator falling upon him. Again a case where inferences of guilt, or inferences of unavoidable accident could well be found by a jury.

In *MacKenzie v. Oakley*, 94 N. J. L. 66, we find a car skidding and then running into a pole. Here the skidding was the proximate cause of the accident, and it might have resulted either from the act of the driver of the car, or from an act beyond his control.

In the case of *Bud Dress Shop v. Newark Glass Co.*, 10 N. J. Misc. 614, we have the fact of a glass sign having been broken while being installed. *Defendant gave testimony* showing that the glass broke because of a weakness due to cutting and grinding the glass too deeply. In this case, the court directed a verdict for the plaintiff which was properly reversed by the Supreme Court on the ground, inter alia, that the jury could have attributed the breakage to an undue weakness in the glass itself, etc.

In *Koehl v. Bollinger*, 102 N. J. L. 70, another case cited by defendants, plaintiff sued to recover on a note. Defendant pleaded payment, notwithstanding which the trial court directed a verdict in favor of the plaintiff. On appeal the judgment below was reversed. No comment on this case is necessary.

Under the facts and the law, as it has been herein set forth, and in consonance with reason, the court is urged that with the situation facing the trial court, viz., proof of the careless driving of the defendant Meyer Hendler, the agent of the defendant Rose Meadows, plus his statement that he must have fallen asleep at the time of the accident, plus the fact that though he was in court he did not attempt to explain, excuse, or deny, anything, the court had no alternative other than to direct the verdicts against the defendants. Leaving to the jury the question of the driver's guilt under the circumstances, would be to permit the jury to speculate, or even worse, to exercise its prejudice against the plaintiffs for perhaps the same reasons as those set forth in defendants' brief.

As we have seen, inferences and conclusions must be legitimately drawn, and cannot be based

upon matters not in evidence, and we conclude this part of our brief with a question: What inference other than that of negligence under the proofs in the case, could the jury have legitimately drawn? If none, then the trial court did not err in directing a verdict in favor of the plaintiff, and our Supreme Court did not err in affirming that judgment.

POINT II.

The Supreme Court did not err in sustaining the Essex County Court of Common Pleas in refusing to admit in evidence D. 1 for identification, which is the signed statement of the defendant-appellant, Rose Meadows.

It is submitted that a reading of the colloquy between counsel for the defendants and the court raised confusion in the mind of the court as to the position taken by the defendants. Counsel refers to said colloquy (bot. p. 191, top 192), as follows:

The Court: "I suppose you are surprised. You are only an attorney and she has made a statement on the stand. Now you are starting in to contradict her statement, at least neutralizing her statement and wipe it off the slate."

Mr. McLaughlin: "Yes, sir."

The Court: "Now I am asking you what authority have you to do such a thing."

And again at bot. p. 192:

The Court: "What I have in mind, are not your actions in conflict with the actions of your principal? Your principal comes here and puts a statement on record. You as agent immediately proceed to try to wipe it off the slate. Now, are you not acting contrary to her wishes and her action?"

To this counsel for the defendant made denial, more or less confusing, as same appears on p. 193.

The discussion continued further on p. 195:

The Court: "You must state something on the record which, on the slate, as the court has called it, that you want to wipe off and make clean. Now, I am trying to find out what is there on the slate you want to wipe off."

Mr. McLaughlin: "I want to wipe off from the slate Mrs. Meadows' testimony on both direct and cross examination."

The Court: "In which she said what?"

Mr. McLaughlin: "In which she said, not on direct examination, but on cross examination of both counsel, that she told Meyer on July 4th to go down and take her mother out in the automobile for a ride and what not and take any of Meyer's friends who happened to be around." * * *

And on p. 196:

The Court: "The situation is this, 'I told my brother to take the automobile and go down to Asbury Park and take my mother out riding on the 4th of July.' Now, what is there in this statement that contradicts that? The statement purports to refer only to a conversation on July 18th and has no reference to any conversation on the 4th."

Then follows an attempted explanation by Mr. McLaughlin.

The ruling therefore resulted in the so-called statement, marked D. 1 for identification, being rejected. Now, let us see what the controversy was about. It appears clearly from the testimony of plaintiffs' witness, Meyer Hendler, and that of the defendant Rose Meadows, that *on July 4, 1933 she gave Meyer Hendler, her brother, instructions to take her mother out riding, and*

that if he could not do so to hire "Jimmy" her chauffeur to do it. This clearly did not refer to a trip on July 18th to Asbury Park because, and for the very obvious reason that Rose Meadows had no idea where her mother would be on July 18th, and further because she, Rose Meadows, herself was out of the city on that day, as appears from the testimony (pp. 85, 86, 90, 188, 189), and also from the alleged statement marked Exhibit D. 1. That statement, when examined, is, for its size, a most contradictory sort of effusion. The paper is dated October 19, 1933 (two months after the accident) and recites that:

"On July 18, 1933 some time in the morning, I told my brother Meyer Hendler, of 93 Hillside Ave Newark N J to take my Buick sedan and drive down to the Brunswick Hotel in Asbury Park N J to see my Mother, Mrs. Fannie Hendler, who was stopping at that hotel. * * * My brother took the car and left for Asbury Park N J. Between 10:00 and 10:30 Pm. a phone call came from a police department to the Hendler's Uptown Bakery Prince St. Newark N J was received by my Father Isaac Hendler that a serious accident had occurred at the shore in which my car was involved. * * * *The day after, I returned home and learned that while my brother was driving my car, he hit a post or traffic stanchion, somewheres in Bradley Beach, which resulted in the occupants injuries. My car was so damaged that I had to sell it for junk Dick's Garage located on Clinton Ave Newark N J.* * * *

(signed) ROSE MEADOW"

The defendant had left the city July 4, 1933. She returned on July 19, 1933 and yet the statement causes her to say that on July 18, 1933 (when she was away from the city) she gave her brother the instructions to take her car to Asbury

Park and then makes statements regarding a police telephone call and gives the manner in which the accident occurred.

The learned trial judge very properly rejected a paper which did not contradict her oral testimony.

It is true that in the case of *Posner v. Nutkis*, 137 Atl. 716 (5 N. J. Misc. 593), the court had before it the situation where, after the defendant testified, his attorney offered in evidence a statement made by him, for the purpose of discrediting his *direct* testimony on counsel's plea of surprise. The court permitted the statement adding:

"The question of surprise is one for the trial judge."

This latter proposition, that the question of surprise was one for the trial judge, which is the fixed rule of law in this state, removes therefore from the case any right to appeal therefrom, unless an abuse of discretion is shown. See *Martin v. Lehigh Valley RR. Co.*, 176 Atl. 665 (Court of E. & A.).

In the case of *State v. MacRorie*, 86 N. J. L. 401, there was cited the case of *State v. D'Adame*, *supra*, for the principle that:

"where the state was 'surprised' by adverse testimony of a witness called by it, the trial court might, in the exercise of its sound discretion, permit proof of self-contradictory statements previously made by such witness, for the purpose, not of proving the truth of such statements, but to discredit, or neutralize, the effect of such adverse testimony."

In the case of *State v. Kysilka*, 85 N. J. L. 712, the state attempted to neutralize the effect of certain testimony given by one of the witnesses in the case. Judge White, writing the opinion

for the Court of Errors and Appeals, said (at p. 713):

“In *State v. D’Adame, supra*, we said: ‘In fact, as a general rule it may be said that a trial judge admitting evidence of this character (*and the admittance of such evidence is largely discretionary with him*, depending upon the particular circumstances of each case), should, in any event, limit its force and effect to the purpose for which only it is admissible; viz., as tending to efface or neutralize the evidence which it discredits.’ ”

And at p. 714 he continues:

“Evidence of this character is obviously extremely dangerous, and where a trial judge, in the exercise of his sound discretion, thinks its admission necessary in order to prevent a miscarriage of justice because of a ‘surprise’ in the form of an adverse evidential statement on a material point where the party had good and sufficient reason to expect a favorable one, he should take adequate measures to prevent it from doing a much greater wrong than the one it was intended to cure. * * * It is for this reason that *there is linked with the discretion of the trial judge as to whether there is or is not a proper necessity for the admission of such evidence, a duty, if he does admit it, to circumscribe its natural effect to the one purpose for which only it is admissible. If it is apparent to him that there is no actual ‘surprise’ and that the real purpose of offering the evidence is to get the benefit of hearsay testimony as having probative force, or that the injury resulting from the ‘surprise’ is fanciful rather than real, he should refuse to admit the evidence.*”

Aside from the court’s discretionary right to reject such offers generally, it had the specific right to do so for the very sufficient reason that the proffered paper did not contradict any testi-

mony whatsoever. After Mr. Penn, the attorney of the plaintiff Zipkin, obtained from the witness on cross examination the statement that her instruction to the defendant Meyer Hendler to take her mother out riding, included an invitation to also take out "any friend," defendants' attorney, for the sole purpose of attacking this admission, said (at p. 190)

Mr. McLaughlin: "I plead surprise at the testimony which has just come off the stand, and for the purpose of neutralizing that testimony, I offer in evidence D. 1 for identification."

Clearly such an offer was irregular, since the paper in question does not admit or deny any invitation to "any friend," but is wholly silent upon the subject, besides which, in any aspect whatsoever it may be viewed, it does not relate to any testimony in which the plaintiffs Hendler are concerned.

In the opinion delivered by the Supreme Court (p. 216), it said:

"In the circumstances of this case, the refusal to admit the statement was harmless. Its only effect could have been to wipe out Mrs. Meadows' testimony on this subject, and then there would have been left the presumption of agency arising from the operation of the automobile, and the testimony of George Hendler to the effect that Mrs. Meadows had told Meyer to take the mother out riding, all of which stands uncontradicted because the statement, if admitted, could not be given the effect of neutralizing testimony other than that of Mrs. Meadows."

In closing the discussion on this point, may we suggest most respectfully to this court that the case of *Posner v. Nutkis*, *supra*, is the only case which we have been able to find which gives a

party litigant the right to impeach himself. All the other cases found are those wherein the court permitted *an adverse witness* to have his testimony impeached.

It is therefore respectfully submitted that there is no merit in either of the grounds alleged for reversal and that the judgment of the Supreme Court affirming the judgment of the Essex County Court of Common Pleas in favor of the plaintiffs-respondents, Fannie Hendler and Isaac Hendler, and against the defendants-appellants, Rose Meadows and Meyer Hendler, should be affirmed, with costs.

Respectfully submitted,

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