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NOTICE OF APPEAL.

(Filed December 2, 1928.)

NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

EMIL P. MORGENWECK, *Plaintiff,*	
v.	On Appeal. Notice of Appeal.
CITY OF EGG HARBOR CITY, a municipal corporation, *Defendant.*	

To William C. French, Esquire, attorney for plaintiff:

Sir:

Take notice that the defendant, City of Egg Harbor City, a municipal corporation, hereby appeals to the New Jersey Court of Errors and Appeals from the judgment of the New Jersey Supreme Court rendered in the above-stated action on the twenty-eighth day of November, nineteen hundred and twenty-nine.

Dated December 14, 1928.

THOMPSON & HANSTEIN,
Attorneys for Defendant.

NOTICE OF GROUNDS OF APPEAL.

(Filed April 12, 1929.)

COURT OF ERRORS AND APPEALS FOR THE STATE OF NEW JERSEY.

EMIL P. MORGENWECK,
Plaintiff,

v.

CITY OF EGG HARBOR CITY,
a municipal corporation,
Defendant.

Action at Law.
Notice of Grounds of Appeal.

To William C. French, Esquire, attorney of plaintiff:

Please take notice that the defendant, Egg Harbor City, a municipal corporation, the defendant in the above-entitled cause, appeals to the Court of Errors and Appeals as the last resort of all causes in New Jersey from the whole of the judgment entered in the above-entitled cause in the New Jersey Supreme Court on the following grounds, to wit:

1. Because the Court refused to grant the defendant's motion to dismiss the complaint in the above-entitled cause on the ground that said complaint failed to allege a cause of action.

2. On the ground that the Court permitted the plaintiff to amend the complaint at the time of trial so as to state a cause of action despite the objection of the defendant and despite the fact that the cause of action so stated by the complaint as amended was at the time of the amendment barred by the Statute of Limitations.

3. Because the Court refused to grant the defendant's motion for a non-suit at the close of the plaintiff's case on grounds urged.

4. Because the Court refused to grant the defendant's motion for a directed verdict at the close of the defendant's case on the grounds urged by the defendant.

5. Because the Court erred in permitting the jury to pass on the question of liability as based on the negligence or lack of negligence of the City of Egg Harbor City, the defendant in this cause, a municipal corporation through or by its servants, agents or employees.

THOMPSON & HANSTEIN.

SUMMONS.

(Filed August 15, 1927.)

STATE OF NEW JERSEY TO CITY OF EGG HARBOR CITY, A MUNICIPAL CORPORATION:

You are summoned to answer the annexed complaint of Emil P. Morgenweck, (Seal) in an action at law in the Supreme Court, and take notice that unless you file your answer to the said complaint with the Clerk of the Supreme Court, at Trenton, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in his suit and judgment may be entered against you.

Witness, HONORABLE WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this 23rd day of July, A. D. 1927.

EDWARD J. KELLEHER,
Clerk.

WILLIAM C. FRENCH,
Attorney.

COMPLAINT.

NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

EMIL P. MORGENWECK, *Plaintiff,*	
v.	Action at Law. Complaint.
CITY OF EGG HARBOR CITY, a municipal corporation, *Defendant.*	

Emil P. Morgenweck, of the City of Egg Harbor City, in the County of Atlantic and State of New Jersey, the plaintiff herein, says that:

1. On the 2nd day of August, in the year 1926, the plaintiff was lawfully upon Seventh Terrace, one of the public highways of the City of Egg Harbor City and State of New Jersey.

2. At the time and place aforesaid the City of Egg Harbor City, the defendant herein, a municipality of the State of New Jersey was operating, along the White Horse Pike, also a public highway of this State, a truck used by the sewer department of the said City of Egg Harbor City, which was outside of the governmental and municipal function of the said city and was carrying on a business of

operating the said sewer system and business as and for a means of revenue and charging and collecting money for the said service.

3. That it then and there became the duty of the said defendant to use reasonable care in the operation of the said truck.

4. Yet the said defendant wholly failed and neglected so to do but operated the said truck at an excessive rate of speed under the circumstances of the case and entirely without signals and without a proper application of brakes and upon an improper part of the said highway and without having the said truck under control and without having any regard for the rights and safety of other users of the said highway, so that the plaintiff was struck and thrown with great force and violence to the ground.

5. So that, by the means aforesaid, the plaintiff was seriously and permanently injured, both internally and externally, and suffered great pain and was hindered from following his occupation and lost much money in wages and profits and was compelled to lay out and expend large sums of money for medicine and medical attendance and expenses and was disfigured and incapacitated for the future.

6. The cause of said accident was the defendant's negligence as hereinbefore set forth.

7. So that plaintiff says that an action has accrued to him and he has sustained damage in the sum of twenty-five thousand dollars ($25,000.00) and therefore he brings his suit.

WILLIAM C. FRENCH,
Attorney for Plaintiff.

[ENDORSEMENTS.]

Duly served within Summons & Complaint August 1st, 1927, on City of Egg Harbor City, a municipal corporation, by delivering a copy personally to Wm. Morgenweck, Jr., City Clerk, at Egg Harbor City, Atlantic County, New Jersey.

Sheriff's Fees, $4.34.

James Cimino, Sheriff.
By: Robert C. Miller,
Under Sheriff.

Received, Jul. 30, 1927, Sheriff.

A true copy,
FRED L. BLOODGOOD,
Clerk.

ANSWER.

(Filed August 31, 1927.)

NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

EMIL P. MORGENWECK,
Plaintiff,

v.

CITY OF EGG HARBOR CITY,
a municipal corporation,
Defendant.

Action at Law.
Answer.

Defendant, City of Egg Harbor City, a municipal corporation, answering plaintiff's complaint, says that:

1. It has no knowledge sufficient to form a belief of the allegations contained in paragraph 1 of the plaintiff's complaint and leaves the plaintiff to his proof.

2. It denies the allegations contained in paragraphs 2, 3 and 4 of the plaintiff's complaint.

3. It has no knowledge sufficient to form a belief of the allegations contained in paragraphs 5 and 6

of the plaintiff's complaint and leaves the plaintiff to his proof.

4. It denies the allegations contained in paragraph 7 of the plaintiff's complaint.

AFFIRMATIVE DEFENSES.

1. Said accident was caused solely and entirely by negligence on the part of the plaintiff and without any contributory negligence on the part of this defendant.

2. Said accident was due to the contributory negligence of the plaintiff.

3. Defendant is a municipal or public corporation and was at the time of the said accident above referred to engaged in the performance of a public duty or purely governmental function.

THOMPSON & HANSTEIN,
Attorneys for Defendant.

NOTICE.

NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

EMIL P. MORGENWECK,
Plaintiff,

v.

CITY OF EGG HARBOR CITY,
a municipal corporation,
Defendant.

Action at Law.
Notice.

Take notice that at the time and place of trial of the above-entitled cause, we will move to strike the complaint heretofore filed in this cause for the reason that it fails to set up a cause of action.

THOMPSON & HANSTEIN,
Attorneys for Defendant.

A true copy,
FRED L. BLOODGOOD,
Clerk.

[ENDORSED.]

I consent to the filing of the within Notice and Answer out of time.

William C. French,
Atty. for Plaintiff.

8/30/27.

REPLY.

(Filed September 13, 1927.)

NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

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EMIL P. MORGENWECK,
Plaintiff,

v.

CITY OF EGG HARBOR CITY,
a municipal corporation,
Defendant.

Action at Law.
Reply.

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Plaintiff, replying to the answer of the defendant filed herein, denies each and every allegation contained in the affirmative defenses of the said answer and joins issue thereon.

WM. C. FRENCH,
Attorney for Plaintiff.

A true copy,
FRED L. BLOODGOOD,
Clerk.

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INTERROGATORIES.

(Filed April 16, 1929.)

NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

EMIL P. MORGENWECK,
Plaintiff,

v.

CITY OF EGG HARBOR CITY,
a municipal corporation,
Defendant.

Action at Law.
Interrogatories.

Thompson & Hanstein, Esqs., attorneys for defendant, Law Building, Atlantic City, New Jersey.

Gentlemen:

Please take notice that the plaintiff in the above-entitled cause requires answers under oath from the City of Egg Harbor City, a municipal corporation, the defendant therein, or whatever person or persons has or have knowledge of the facts, to the following interrogatories in the above-entitled cause, within ten days after service thereof upon you.

1. At or about the happening of the accident in question to the plaintiff, was the City of Egg Harbor City operating a sewage department?

Answer: Yes.

2. If the answer to the above question is yes, in connection therewith, was one of the trucks of that department operated by the city that figured in the accident to Morgenweck?

Answer: Yes.

3. Did the City of Egg Harbor City, in the course of its operation of the sewage department, charge fees or collect moneys, perquisites, and so forth, from the citizens of Egg Harbor City in connection therewith?

Answer: Yes.

4. In the year during which the said accident happened, did the receipts from the said sewage department exceed the expenditures?

Answer: Yes.

5. In the year above mentioned, give both receipts and expenditures connected with the said department.

Answer:

Total receipts, $4,515.50.

Total expenditures, $4,430.30.

6. How was the said sewage department operated at or about the time when the accident in question happened, meaning what city officials, city department or body of men operated, controlled or managed the said department?

Answer:

The mayor and three members of this city council as the department of sewers.

Very truly yours,

WILLIAM C. FRENCH,

Attorney for Plaintiff.

Dated February 3rd, 1928.

STATE OF NEW JERSEY, }
COUNTY OF CAMDEN, } *ss.*

ADOLPH C. GOLLER, of the City of Egg Harbor City, a municipal corporation, being of full age, and duly sworn according to law, on his oath deposes and says that he is the mayor of the City of Egg Harbor City, a municipal corporation, the defendant in the suit in which the foregoing interrogatories and answers and the statements thereto are made, and that the facts set out in the said answers and the statements made therein are true to the best of his knowledge and as he verily believes.

ADOLPH C. GOLLER.

Sworn and subscribed to before me, this twenty-sixth day of October, at Egg Harbor City, New Jersey, A. D. 1928.

WM. MORGENWECK,
Notary Public.

(Seal)

A true copy,
FRED L. BLOODGOOD,
Clerk.

[ENDORSED.]

Service of the original and a copy of the within interrogatories is hereby acknowledged this 29th day of October, 1928.

THOMPSON & HANSTEIN,
Attorneys for Defendant.

TESTIMONY.

IN THE SUPREME COURT, STATE OF NEW JERSEY.

EMIL P. MORGENWECK,
Plaintiff,
v.
CITY OF EGG HARBOR CITY,
a municipal corporation.

Before HONORABLE W. FRANK SOOY, J., and a jury.

Atlantic City, N. J.,
Tuesday, November 27, 1928.

PRESENT OF COUNSEL:

WILLIAM I. GARRISON, ESQ. (representing French, Richards & Bradley, Esqs.), for plaintiff.

WILBUR C. BISHOP, ESQ. (representing Thompson & Hanstein, Esqs.), for defendant.

(Jury sworn)

(Mr. Garrison opens to jury.)

Mr. Bishop: I ask that from the opening of counsel be stricken the remark that the sewer company was running a truck on a certain morning, and that all reference to that truck and the name of the driver, be stricken from the record.

The Court: I do not think he meant to say sewer company. I think he meant to say Egg Harbor City.

Mr. Garrison: I meant to say the sewer department.

Mr. Bishop: I ask that it be stricken, in reference to the driver and his name. It is not in the pleadings.

(Motion denied.)

(Exception to defendant.)

Mr. Bishop: Do you want an opening?

The Court: I think you had better open and then make whatever motion you may have.

(Mr. Bishop opens to jury.)

The Court: Do you want to make a motion?

Mr. Bishop: Yes, addressed to the complaint.

(Following motion at side bar.)

Mr. Bishop: My motion addressed to the complaint is, that the allegations set forth only that the defendant, a corporation, did so and so. In other words, "at the time and place aforesaid, the City of Egg Harbor City, the defendant herein, a municipality of the State of New Jersey, was operating a truck along the White Horse Pike," &c.

The allegations are that the corporation did the acts complained of and there is no allegation of the plaintiff that they were done by any person for the corporation.

(Mr. Bishop, in support, cites Tomlin, et al., v. Cape May.)

Mr. Garrison: We have a later one than that.

The Court: You do not say, "through its servants, employes, agents.," &c.

Mr. Garrison: I would ask permission to amend.

The Court: Do I understand you gave notice?

Mr. Bishop: Notice has been served and filed with the county clerk.

Mr. Garrison: That is such a matter as could not hurt the defendant, and should be amended.

The Court: I do not see how you are prejudiced by the insertion of "servant, agents and employes."

Application is now made for permission to amend the complaint herein by inserting in the second line after the word "city" and before the word "the," the additional words, "by is servants, agents and employes;"

And in line 5, after the word "city," and before the word, , the words "by its servants, agents and employes;"

And in line 1, paragraph 4, after the word "defendant," and before the word "wholly," the words "by its servants, agents and employes."

Further; in view of the decision in the case of Wilson vs. Dairymen's * * Co-operative Ass'n, reported, Vol. 143, Atlantic Reports, page 454, and under the reasoning set forth in that case, the motion will be granted, it clearly appearing to the Court that the defendant cannot be said to be taken by surprise by the amendment.

Further, it would seem to the Court that to at this time strike out the complaint would bar the plaintiff from bringing another action, the Statute of Limitations having run.

I will grant the motion and consider the amendment as made, granting an exception both to my refusal to strike out the complaint and also to my granting the motion for the amendment.

Mr. Bishop: An exception also to your refusal to grant my plea of surprise?

The Court: I do not grant your plea, and do not see how you can be surprised here. On what ground?

Mr. Bishop: I will not press that. My objection is also to the fact that the complaint, as drawn, sets up no cause of action, but as amended sets up a cause of action itself after the Statute of Limitations; and that cannot be done.

Mr. Garrison: I offer in evidence, answer to interrogatories which were acknowledged October 29,

1928; sworn to on the same date. Do you want to see these interrogatories?

Mr. Bishop: No.

Mr. Garrison: I wish to read them to the jury.

(Six interrogatories read to jury, marked PX1, and admitted in evidence.)

ADOLPH MUELLER, JR., sworn.

By Mr. Garrison:

Q. Where do you live?
A. Egg Harbor City.
Q. Were you living in Egg Harbor City on August 2, 1926?
A. Yes.
Q. At that time what was your business?
A. I was employed in the Sewer Department of Egg Harbor City.
Q. What sewer department?
A. Egg Harbor City.
Q. On August 2, 1926 what were you doing for the sewer department?
A. I was going around inspecting manholes and traps, in the alleys.

Cross-examination.

By Mr. Bishop:

Q. You were inspecting manholes, traps, and what else?
A. That is all.

By Mr. Garrison:

Q. When you were inspecting manholes and traps were you doing that on foot or in a wagon?
A. In an automobile.
Q. In a truck?
A. In a truck, yes.

By the Court:

Q. Did that truck belong to Egg Harbor City?
A. Yes.

Mr. Bishop: I ask that the answer be stricken.

The Court: Yes, I think that ought to be stricken.

Mr. Garrison: That was your question?

The Court: Yes. I think that was simply a conclusion and ought to be stricken. It may be stricken and the jury disregard it.

Mr. Garrison: I will call him back to the stand. I will straighten that out.

(Witness, Mueller, having left the stand is recalled and interrogated as follows:)

By Mr. Garrison:

Q. Where did you get the truck that morning?
A. At the garage in the city hall, underneath city hall.
Q. Had you been using that truck before?
A. Yes.
Q. While you were in the employ of the sewer department how long had you been using that particular truck?
A. Since I started.
Q. Can you give us some idea of how many weeks or months?
A. I don't know; about 3 months, I guess.

By the Court:

Q. Did the truck have any lettering on it?
A. Yes.
Q. What was it?
A. "Department of Sewers, Egg Harbor City."

Mr. Bishop: No questions.

(Dr.) Myrtile Frank, sworn.

By Mr. Garrison:

Q. You are a practicing physician in Egg Harbor City?
A. I am.
Q. How long have you been practicing medicine in Egg Harbor City?
A. For almost 28 years.

Q. Were you practicing medicine in Egg Harbor City on August 2, 1926?

A. I was.

Q. On that date was the plaintiff, or did he become a patient of yours?

A. Yes.

Q. What time on that day you examine him?

A. About 10 o'clock I suppose. I don't exactly remember the time, but in the forenoon.

Q. What was the result of your examination?

A. He had a laceration on the left-hand side of the face, some bruises on his body, on his back and 4 fractured ribs.

Q. On which side of his body were the fractured ribs?

A. On the left side.

Q. How long did you attend him?

A. From August 2, to September 3rd.

Q. Have you examined him since?

A. Not since.

Q. Not since?

A. No, sir.

Q. What was your bill—do you know?

A. I beg your pardon?

Q. What was your bill?

A. $50.00, aside from the X-ray; there is an X-ray aside from that.

Q. What was your X-ray bill?

A. Either $30 or $35.

Q. What did you do for Mr. Mueller in the way of treatment?

A. Strapped him and ordered rest.

Q. Were his injuries as you found them, painful injuries?

A. Fairly painful, yes.

Cross-examination.

By Mr. Bishop:

Q. Do you recall on how many occasions you saw Mr. Morgenweck between August 2 and September 3, 1926?

A. Every day up to the 17th, at his home, and from then on he came to the office.

Q. How often did he come to the office?

A. Practically every day except the last few days. There was a day skipped—the last one.

Q. At that time you discharged him?

A. Yes.

Q. Cured?

A. Yes.

EMIL P. MORGENWECK, sworn.

By Mr. Garrison:

Q. Where do you live?

A. Egg Harbor City.

Q. How long have you lived in Egg Harbor City?

A. Practically 52 years, next May.

Q. Do you remember August 2nd, 1926?

A. I do.

Q. Where were you on that day?

A. I had to go to the factory on Buffalo Avenue. I was on the sidewalk, crossing what we call a little crossing, this alley, and this truck hit me.

Q. On that day you were hit by a truck?

A. Yes.

Q. What truck hit you?

A. The sewerage truck, of the sewer department of Egg Harbor City.

Q. Who was driving the truck?

A. Mr. Adolph Mueller.

Q. The young man who just testified?

A. Yes.

Q. Do you recognize this part of this drawing here as the White Horse Pike?

A. Yes.

Q. You recognize this as the Terrace?

A. I certainly do.

Q. Was it at this Terrace where you were struck?

A. Positively; right about here, I should think. The sidewalk is 20 feet wide across this way.

Q. Was there a car standing in that street?

A. Mr. Wills.'

Q. Is he in court?

A. I think he is. He is supposed to be in. Yes, he is in.

Q. When you were struck how near were you to the car that was standing in the street?

A. I couldn't tell you that.

Q. You don't know how near?

A. I know I landed up against this car. I know that. He threw me that far.

Q. When you were struck you were thrown against what?

A. The car.

Q. The car that belongs to Mr. Wills?

A. Yes, right here. (Indicating.)

Q. You say that the truck driven by Mr. Mueller, belonging to the city, struck you?

A. Yes.

Q. Where did that truck come from?

A. From that side of the street and turned in here. (Indicating.)

Q. Turned in there?

A. Yes.

Q. Did he sound any warning?

A. Not a thing; never.

Q. Was the truck going fast or slow?

A. No, very fast; he couldn't stop until he hit the other car.

Q. When it struck what happened to you?

A. Happened to me? Had me between the two cars. That is all I can remember. They took me to the doctor.

Q. You say you were thrown up against the other car?

A. Yes.

Q. Where were you when the truck stopped?

A. Right underneath, between the two cars.

Q. Was the car still standing on the macadam?

A. Standing still.

Q. Do you know where Mr. Wills was at that time?

A. Right in the car, because I waved to him.

Q. Did anything happen to the car that you were driven into? You say you were knocked into this car, driven into it. Did anything happen to the car?

A. Just bent the fender or something like that, a little bit.

Q. Where were you injured?

A. On the left-hand side. 4 ribs were broken; took all the skin off my back, my arm and everything; cut my face open here; my whole hand was bruised. It is there yet.

Q. You just have the scars?

A. Yes. The doctor said it will never leave.

Q. Have you any particular evidence of this injury that you can show the jury?

A. This lump. (Indicating.)

Q. Will you show the jury the lump?

(Witness shows lump to jury.)

Q. Did you have that lump before this accident?
A. I did not.
Q. I don't hear you.
A. I did not.
Q. After you were struck what became of you then?
A. They took me to Dr. Frank and he bandaged me up and strapped me and took me home and put me to bed.
A. At that time were you employed?
A. I had been employed by E. Wood and Company of New York, 55 Wier Street.
Q. Were you on a salary?
A. I was.
Q. How much per week?
A. $50.00.
Q. How long after you were struck by this truck was it before you were able to work?
A. I was able to work—I opened the factory 8 weeks after that.

Mr. Bishop: Objected to. That is not responsive.

The Court: No.

Q. How long was it before you were able to work?
A. It was two or three months before I did any work.
Q. Why couldn't you work?
A. Because of the pains.
Q. Did you experience any pain from this injury?
A. Yes.
Q. Since that time?

A. Yes.

Q. Of recent date have you experienced any pain?

A. Yes, when I work all day on the cutting table I couldn't walk on that side. It just kinks in on me; it seems I can't stand the pressure.

Q. Does the lump give you any trouble?

A. The more I work the bigger it gets; expands it at the same time.

Q. Do you suffer pain?

A. Certainly.

Q. Do you suffer pain in any other way, in any other portion of your body, except where the lump is?

A. No, sir, I do not.

Q. Did you have any other expenses besides your doctor's expenses and your X-ray?

A. No.

Q. You had no nurse?

A. No, I had no nurse. My wife nursed me. She didn't get pay.

Cross-examination.

By Mr. Bishop:

Q. Were you working at the time of the accident?

A. Not just then. I was going to the post office.

Q. Were you working that day?

A. No.

Q. You had no work that day?

A. No.

Q. The lease expired a few days before the accident, didn't it?

A. Yes.

Q. When did the factory re-open?

A. If I am not mistaken it was October 3rd; I

think it was in that neighborhood. I don't have no dates, but I think it was October 3rd.

Q. Did you do any work in preparation for opening of the factory?

A. What is that?

Q. Did you do any work in preparation for opening of the factory?

A. Did I do any preparations?

Q. Yes.

A. I was, on that day. I was on that day supposed to go to Philadelphia—if that is what you mean, by "preparations."

Q. I don't think you understand. (Last question read to witness, "Did you do any work in preparation for opening of the factory?")

A. Not after I was hit, until I got well again.

Mr. Bishop: Can I have the question answered?

The Court: I do not think he understands it.

Mr. Bishop: I do not want to press it if he doesn't understand it.

Q. Did you start in to work again when the factory re-opened?

A. Yes, I was there every day.

Q. What were you doing just prior to the accident?

A. Making union suits.

Q. I mean immediately prior to the accident?

A. Coming from the factory, going to the post-office.

Q. And you reached this alley?

A. Yes.

Q. You know Mr. Wills?

A. I certainly do.

Q. You knew him before the accident?
A. Before the accident?
Q. Yes.
A. Yes.
Q. Did you stop to speak to him that day?
A. Did I stop to speak to him? I just spoke to him. He spoke to me. I waved to him and I said, "I will see you later."
Q. Where was Mr. Wills' car with relation to the intersection of the White Horse Pike and the Terrace? Does this little square (on blackboard) represent it?
A. This is the sidewalk, between 20 and 30 feet.
Q. Does this little square represent it—about?
A. Yes.
Q. That is where his car was parked, is that right? (Indicating on blackboard.)
A. Yes.
Q. You were coming from the general direction of Atlantic City, crossing the Terrace, toward Camden?
A. Going to Philadelphia Avenue, to the post-office.
Q. As you reached that point you waved to Mr. Wills?
A. I certainly did.
Q. Did you have anything to say to him?
A. No, he wanted to talk to me.
Q. He wanted to talk to you?
A. Yes.
Q. Did he call you over?
A. I said I would see him later.
Q. You said you would see him?
A. Yes.
Q. When did you first see the car that hit you, if at all, before the accident occurred?
A. It was right on top of me, it was so quick.

Q. He was coming down the White Horse Pike and turned into this alley?

A. He was coming this way, swung into there and hit me.

Q. Swung into there?

A. Yes.

Q. Did you look for a car coming on that side of the street?

A. I looked.

Q. You looked on one side of the street and not on the other?

A. I didn't look for a car.

Q. I asked you if you looked on one side of the street and not on the other?

A. I didn't expect to look for a car.

Mr. Bishop: I ask that that be stricken.

Q. You looked on one side of the White Horse Pike but not on the other, is that correct?

A. No, it is not correct. I looked up the White Horse Pike to see if a car was coming this way, there was none coming, so I crossed the street.

Q. The car hit you that was coming from that direction?

A. I didn't see it.

Q. You didn't see it?

A. No.

Q. You didn't see it at all before the accident?

A. Not until it hit me.

Q. So that you don't know whether it was going fast or not?

A. I don't know.

HARRY J. WILLS, sworn.

By Mr. Garrison:

Q. Where do you live?
A. Egg Harbor City.
Q. How long have you lived in Egg Harbor City?
A. About 11 years.
Q. You live in the vicinity of 7th Terrace?
A. I did at the time.
Q. Do you remember August 2, 1926?
A. I do.
Q. When the accident occurred in the Terrace?
A. I do.
Q. Where were you at that time?
A. I just came out of my house, right alongside of that and just got into my car.
Q. What happened after you got in your car?
A. When I got in my car I looked through the corner of my car and I saw Mr. Morgenweck coming, and as I often get wiping rags for use in my garage, from him, and I beckoned to him that I wanted to see him, to speak to him, and it kind of seemed as if something happened, that he didn't come around so I glanced through the mirror of my car at that time and I saw a car coming in and I seen the top of his head; and all of a sudden there was a bump, and he dropped.
Q. He was behind your car?
A. Yes, evidently, as near as I can say, he stepped behind my car. This truck was behind mine and I figured ——

Mr. Bishop: Objected to, as to what he figured, and ask it be stricken.

Q. Did you see the truck coming?

A. Not until it was right back of me.

Q. Can you tell anything about the speed of the truck at that time?

A. I figured the truck was coming with quite some speed and couldn't make the curve.

Mr. Bishop: I ask that that be stricken. It is not responsive.

Q. On what side of the street was your car parked?

A. Right next to my property.

Q. On the right side of the street?

A. Going in.

Q. It was standing there when it was struck?

A. Yes.

Q. Did the truck sound any warning or blow any horn?

A. Not that I know of. I didn't hear any.

Q. Did you have any conversation with Mr. Mueller after it happened?

A. At the time, I jumped back and grabbed hold of Mr. Mueller and I said, "You bumped into me."

Mr. Bishop: Objected to as to any conversation had with Mueller and ask that it be stricken.

Mr. Garrison: I withdraw it.

Q. After the accident did you see Mr. Morgenweck?

A. I did. I picked him up and took him to the doctor's and from there took him to his home.

Cross-examination.

By Mr. Bishop:

Q. You didn't see the truck until it was right up to your car?
A. At the time it bumped.
Q. Practically at the time it bumped?
A. Yes.
Q. You didn't know of any truck approaching until then?
A. No, as I said, I sat there and watched and I could see something through my mirror, coming, and there was a bump; and the first thing I knew

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Q. Mr. Morgenweck beckoned to you?
A. No, I waved to him, beckoned to him, then. I said I would like to speak to him.

Dr. Garfield C. Burroughs, sworn.

By Mr. Garrison:

Q. Were you invited to examine Mr. Morgenweck today?
A. I was.
Q. Did you examine him?
A. I did.
Q. What did you find?
A. I found that he was a man of about apparently the stated age—52 years.

Mr. Bishop: Objected to. I ask that that be

stricken. There is no statement that he was 52 years of age.

Mr. Garrison: He said he had been living in Egg Harbor City 52 years.

Mr. Bishop: He said he had been living in Egg Harbor City 52 years.

Mr. Garrison: (Addressing witness.) Do not say how old he is.

A. On examination I found on the left side of his leg a scar about 2 1/2, I didn't measure exactly; and on the knuckles of the left-hand I found scars on all four fingers, on exposing the left side of the chest, in the anterior line, about 2 or 2½ inches from the midline of the sternum I found a mass or tumor which was immovable and which on palpation gave pain. On examination of this mass I found it to be the size of a small hen's egg, very hard to the touch and, as I say, painful and immovable. I came to the conclusion or simply made my diagnosis that this was bony tissue and had resulted from a fracture of the rib at that point, or two ribs at that point.

Q. In your judgment is that a permanent injury?

A. It is.

Q. Is it liable to give the plaintiff trouble in the future?

A. Yes.

Q. What sort of trouble is it liable to give him?

A. There will be a continued sense of pain as a result of that because of its location, not only of the muscles that are used in breathing but also in all movements of the body.

Q. Will that interfere with his stooping or lifting?

A. It does; it causes pain.

Q. After a day's work would that have a tendency to produce tiredness and weakness?

Mr. Bishop: I ask that that be stricken, and that he do not answer the question. I do not think he is qualified to say whether it would produce weakness or not.

The Court: I think he is qualified to testify as an expert as to what the result of effort would be on a particular spot of the body. It may be that this question was considered indefinite.

Mr. Garrison: I will reframe it.

Q. What effect would work and muscular effort have on the trouble you have described?

A. It would increase his pain, cause him anguish; so much so as to bother him considerably.

Q. In his work?

A. In his work. That is what I mean.

Cross-examination.

By Mr. Bishop:

Q. Of course, you can see the scars on the cheek?

A. Yes.

Q. But you can't see pain?

A. That is true.

Q. And you have no way of telling whether a patient is in pain or not, except what he tells you?

A. I do not. I have other ways of finding out.

Q. You do?

A. Yes.

Q. What are they?

A. On examination.

Q. What is peculiar about the examination?

A. I don't just quite understand your question.

Q. What is the method of examination. What method of examination do you pursue to determine whether or not a patient has pain?

A. A general examination will bring out that. Much palpation, much friction, over that point or handling of that mass, or in that neighborhood at the time of his moving will produce evidence of pain.

Q. What evidence of pain?

A. He will not complete his full movement; in case of a movement he will not complete it. An ordinary man should do or will do it with difficulty, or will wince or give facial evidence of pain if those parts are palpated or touched.

Q. All of this evidence you have described can be acted or faked by a patient, can they not?

A. They can to a degree; I will admit that.

Q. Also to a very great degree?

A. Well, I have seen it both ways.

Q. What do you mean by that?

A. I have seen it faked, also seen it real.

Q. You have no method of telling whether or not it is real or affected, or faked?

A. I think you can come to a pretty good conclusion, whether or not it is faked or real, according to the history of your case, knowing what man your are dealing with, the patient you are dealing with, his work and his station in life. These things will very often help you to arrive at a correct decision.

Q. In other words, they are all things which help you to determine whether or not the person whom you are examining is dependable and trustworthy.

A. Absolutely.

Q. But beyond that you cannot tell?

A. Beyond that you cannot tell, no.

Q. An actor could put it on, could he not?

A. And not get away with it very much, because there are certain things, especially if you have an opportunity to examine this man under different conditions, that help you to determine that. I generally like to examine a man say two or three times.

Q. Have you examined him two or three times?

A. Twice.

Q. When was the other time besides today?

A. Later in the day; twice this morning.

Q. What time were your examinations?

A. One examination was in the neighborhood of ten o'clock; the other one, I think, was around eleven-thirty.

Q. 10 and 11:30 you had two examinations?

A. Yes.

Q. How long did each take?

A. The first one 20 minutes, possibly, and the second one possibly the same time.

Q. They were both made at Mr. Garrison's request?

A. The second one was not made exactly at Mr. Garrison's request.

Q. What do you mean by exactly?

A. He didn't come to me and say, as he did the first time, "I would like you to examine this man," for me.

Q. How did the second one come about?

A. I requested it.

Q. You requested it?

A. I did.

Q. You said, I believe, that the lump or mass or tumor that you noticed was, in your opinion, a result of fractures at that point?

A. A fracture at that point, yes.

Q. At what point of the body, is that, with relation to the ribs of this man?

A. Right in the line of the rib.

Q. Which rib?

A. The 7th and 8th ribs.

Q. The 7th and 8th ribs?

A. Yes.

By Mr. Garrison:

Q. In speaking of pain and your method of discovering pain in a patient, can't that be determined by the sort of injury you are examining?

A. I included that.

Q. Isn't it common knowledge among the medical fraternity that certain things pain and certain things do not?

A. Yes, I included that in my description.

Q. In other words, your examination was of a mass on this man's chest?

A. Yes.

Q. And as you felt around it you discovered that he gave signs of pain? Is that true?

A. Yes.

Q. That isn't a hard thing for a doctor to determine—whether the patient is having pain, under those circumstances?

A. No, sir.

Dr. Maxwell B. Kremens, called in behalf of defendant and out of order, by consent of counsel, sworn.

By Mr. Bishop:

Q. You are a practicing physician?
A. I am.
Q. You practice where?
A. 109 States Avenue.
Q. Atlantic City?
A. Yes; New Jersey.
Q. How long have you been practicing medicine?
A. I have been practicing close to 20 years.
Q. Did you examine the plaintiff, Emil P. Morgenweck?
A. I did.
Q. Can you tell me when you made that examination?
A. August 31, 1926.
Q. Did he give you a history of the accident?
A. He did, in reference to the injuries.
Q. What did your examination disclose?
A. Mr. Morgenweck gave me a history of an injury, of a cut to the left side of his cheek. He told me an X-ray was taken of the 2nd, 3rd, 4th and 5th ribs on the left-hand side, anterior to the axillary line and he told me he sustained general bruises and contusions of the body. When I arrived at his home I found him fully dressed, sitting on the porch. As he preceded me into the house I noticed he walked in a normal manner, without limp, pain or disability. I examined his face and it showed a small, slight scar starting from below the mouth up on the cheek this way, and about an inch and a

half long. It wasn't very red, or hard or indurated, but rather superficial and there was no pain or tenderness when I pressed on it. I told him to remove his clothes, which he did removed them, pretty good, and undershirt, without any disability. I had had a history of straps on his chest, which were on loosely, and I had Dr. Frank's permission to remove these straps as Dr. Frank had told me over the phone previous to that day, that it was time to remove the straps, that he didn't need them any more.

Mr. Garrison: I ask it be stricken as to what the doctor said over the phone.

Witness: I removed the straps. The chest was normal at that time and showed no evidence of injury. I went over every rib, both right and left sides, both front and back, making pressure and feeling each rib along its entire course and found no swellings, no nodules, no pain, no tenderness. I took his respiration for a minute; it was eighteen; took his temperature, 98, and which is normal. I examined his legs, went over his chest thoroughly. His legs showed nothing abnormal or wrong. I listened to his pleura; there was nothing wrong with the pleura; there was no friction sound: I got no evidence of any injury. I took his station and reflexes and they were perfectly normal. His pulsation was 78, regular, and good volume. I had him walk for me, bending in all directions. I found absolutely nothing wrong. I asked him whether or not he was working and he told me, no. But he told me he was going back to work the following week. I found no lumps or swelling on any part of his chest or body.

Q. Did you have the patient move for you then, sidewise?

A. I had him stand, bend over, touch the ground, the floor, with his fingers; then had him bend backward, side to side; had him stand, and twist around; I had him breath in very deeply and exhale deeply, and at no time did he show signs of anything wrong, in pain or disability.

Q. Did he complain to you of pain during those movements?

A. No, sir, he did not.

Cross-examination.

By Mr. Garrison:

Q. When you made this examination you did not expect that two years from that date this man would have a lump the size of a hen's egg, at the region of that fracture?

A. No, sir, it would be impossible.

Q. You have answered it?

A. No, sir.

Q. Will you look at his side and tell us what that lump comes from?

A. I will be glad to.

Q. Go right up there. (Plaintiff shows lump to doctor.)

A. I am satisfied.

Mr. Garrison: He says he is satisfied, Mr. Morgenweck, so sit down, here.

Q. I think the question was, what relation does the lump, you have examined, bear, to his injury which you examined in 1926.

Mr. Bishop: That is not the question.

Q. (Question read to witness: Q. When you made this examination you did not expect that two years from that date this man would have a lump the size of a hen's egg, at the region of that fracture?)

A. None whatever.

Q. It had nothing at all to do with it?

A. Nothing at all, for this reason. The fractured ribs were the 2nd, 3rd, 4th and 5th. This lump is way down here where all the lower ribs meet and it is a very common condition to have one side larger than the other, normally. I have seen it dozens of times.

Q. Do you mean to tell this jury that that lump in the region of that injury is a regular condition?

A. Yes, I have seen it dozens of times.

Q. And bears no relation to this accident?

A. None whatever, because the X-ray showed no breaks at the 7th, 8th, 9th and 10th ribs.

Q. I am not talking about X-rays. Do you mean to tell this jury that a man injured in the side, resulting in 4 broken ribs, with this lump raising and continuing to raise after that injury until to-day it is the size of a small hen's egg, that it bears no relation to this accident?

A. No, sir, absolutely none whatever.

Q. What does it come from?

A. Before, I testified that I have seen it any number of times.

Q. Where does it come from?

A. Simply his ribs; I wouldn't call it 'adhered,' but it is present in some people and in others it is not.

Q. Isn't it strange that it came in this man right after the accident?

A. I don't know anything about that.

Q. He says it did.
A. I think he has always had it, in my opinion.
Q. You say he has had that lump there before the accident?
A. In my opinion he had it there, because I don't think it was the result of the accident.
Q. You have examined him once?
A. Yes, only once.
Q. Have you that lump on you?
A. I have never looked.
Q. Look. Take a little time off when you go home, and look. That is all.

PLAINTIFF'S TESTIMONY (resumed.)

DAISY SHOTWELL, sworn.

By Mr. Garrison:

Q. Where do you live?
A. Egg Harbor City.
Q. How long have you lived there?
A. More than twenty years.
Q. Do you know Mr. Morgenweck?
A. Yes.
Q. Do you know Mr. Wills?
A. Yes.
Q. How near to the place do you live, where Mr. Morgenweck met with this accident on the 2nd day of August, 1926?
A. The house was right next to it, where I lived; not now.
Q. It was then?
A. Yes.

Q. Did the house have a porch to it?
A. Yes.
Q. Did you see this accident?
A. No, I did not.
Q. What did you see of this accident?
A. I didn't see anything.
Q. What did you see after it happened?
A. I didn't see anything after it happened. I heard a good many that went out to inquire who was hurt; that was all.
Q. Did you see the truck before the accident?
A. No.
Q. You didn't see Mr. Morgenweck before the accident?
A. No, sir.
Q. Did you see Mr. Wills' car standing there?
A. Not particularly; I don't think so.
Q. Did you, after the accident?
A. No, because Mr. Wills had gone.
Q. He had gone?
A. Yes.

(No cross-examination.)

PHILLIP REINHARDT, sworn.

By Mr. Garrison:

Q. You are the chief of police of Egg Harbor City?
A. Yes.
Q. You didn't see this accident?
A. No, I did not.
Q. Did you see it after it happened?

A. I seen him at the doctor's office after it happened.

Q. Did you see Mr. Morgenweck?

A. I did.

Q. Did you see whether or not he was injured?

A. He was injured.

Q. Where was he injured?

A. The doctor had him bandaged up when I got there, bandages around his wrist.

Q. Were there any other injuries?

A. He was bandaged up, had a brush wound or whatever you call it.

Q. Did you see any cut in his face?

A. Yes, a little cut in his face.

(No cross-examination.)

PLAINTIFF RESTS.

(Defendant makes the following motions at side bar.)

Mr. Bishop: My first motion has to do with the failure of the plaintiff to show any negligence on the part of the driver of the truck at the time of the accident.

Second. This accident was caused by the contributory negligence of this plaintiff because if he had looked carefully, with seeing eyes, he would have seen this truck.

Third. I believe that, even assuming there was negligent driving and that there is no contributory negligence in the case, still we are entitled to a

non-suit on the ground that the defendant, Egg Harbor City, is a municipal corporation engaged in a public duty of a governmental function and that there being no act of active wrong-doing shown on their part they are not chargeable with any negligence on the part of the driver of this truck, assuming that such negligence existed, of course.

(Defendant cites Bray vs. Jersey City, 32 Law, p. 394, etc.)

(Motion for non-suit denied.)

Mr. Garrison: I move for the privilege of re-opening our case in order that we may put on a witness who I was not aware of at the time of the closing of the case.

(Motion opposed by defendant.)

(Motion is allowed.)

(Exception to defendant to denial of motion for non-suit; and granting of motion to re-open plaintiff's case for the purpose of putting on the one witness referred to by Mr. Garrison.)

SECOND DAY.

Before Honorable W. Frank Sooy, J., and a jury.

Atlantic City, N. J., Wednesday, November 28, 1928.

Mr. Bishop: I understand it is admitted that the rates charged by the city of Egg Harbor City for the sewer department are not sufficient to cover the interest on the bonds for the sewer plant and depreciation on the plant; and that those items form a deficit which is taken care of annually by appropriation from the general taxes of the city.

Mr. Garrison: I have no objection.

(Motion for direction and non-suit refused.)

(Exception to defendant.)

(Mr. Garrison to the jury.)

(Mr. Bishop to the jury.)

(Mr. Garrison, summation to jury.)

CHARGE OF THE COURT.

Before Sooy, J., and a jury.

Atlantic City, N. J., November 28, 1928

Ladies and gentlemen of the jury: The average case where a person is hurt by employes of a city, do not come to your attention by reason of the fact that in the average case there can be no recovery.

In the case at hand the law is such that if the plaintiff has sustained an injury, the burden of proving his complaint is on the plaintiff and he would be entitled to recover against the city, notwithstanding the usual rules to the contrary; that is, to say, he would be entitled to recover if he proves his complaint, and that is true provided you do not find that the plaintiff himself by his own act has barred his recovery.

The allegation upon which the plaintiff seeks to recover is that the servant and agent of the city of Egg Harbor City, while driving one of its trucks, failed to exercise that degree of care in the performance of his duty, that he owed to the plaintiff.

The allegation of the plaintiff is that the duty of the defendant was to use reasonable care in the operation of the truck. He says that the defendant, through its servants, agents and employes did not use that due care, but that on the other hand he

failed so to do, in that he drove the truck at an excessive rate of speed under the circumstances, entirely without signals, without proper application of the brakes and upon the improved part of the highway without having the truck under control and without regard to the rights of pedestrians or other users of the highway. That is the allegation of negligence upon which the plaintiff seeks to recover.

As I have charged you so frequently during this term, I now re-charge you, that the mere fact that a plaintiff has sustained injuries does not warrant a recovery, that fact standing alone. He must not only prove to you that he has sustained his injuries but he must prove that he has sustained them by reason of the negligence of the defendant and he must, if he does recover, recover on the negligence alleged in the complaint.

So that the first thing for you to consider is the evidence as presented; not what counsel has said the evidence was, but what your recollection of the evidence is; and after having considered the evidence, you have the right to draw the fair inferences that may arise from the evidence in order that you may determine by a fair interpretation of those inferences what negligence the plaintiff has proved, if any, under the allegation that the defendant through its servants, agents and employes, was guilty of negligence as alleged; in other words, whether or not the defendant drove that truck, operated and controlled it as a reasonably prudent person would and should have done under all the circumstances. If the plaintiff has failed to prove that he sustained his injuries by reason of the negligent operation of that truck by the defendant, its servants, agents and employes, he cannot recover, under any circumstances.

Then having determined in your mind whether or

not the defendant was guilty of negligence, as charged, and if you determine that it was, you proceed to the next step in your deliberation. The defendant says that it was not negligent and that the plaintiff has not proved the negligence that he, the plaintiff, alleges; and the defendant therefore elects to stand on plaintiff's own testimony for your consideration, without offering any proof because, defendant says, that from that testimony, of the plaintiff, there can be no recovery. What the defendant says is, that if you, in your judgment, determine that the defendant was guilty of negligence, that then the plaintiff ought not to recover because he has contributed to this accident by his own negligence and in such a manner as to bar his recovery.

Now, then, in order to determine whether or not the plaintiff has been guilty of contributory negligence, you apply exactly the same tests and rules that I have laid down for your consideration in determining whether or not the defendant is guilty of negligence.

What did the plaintiff do? How did he approach that crossing? How did he attempt to cross the street and what were his actions? Did he, in endeavoring to cross that street exercise that degree of care which an ordinarily prudent person would and should have done under the circumstances? In order to answer that question you have to consider the surrounding circumstances; consider the place at which he crossed; consider the manner of his crossing; what he says he did with reference to looking before he crossed, or as he crossed. Consider these things and determine whether or not he exercised that degree of care which an ordinary prudent person would have and should have done there at that time and under those circumstances, remembering that the duty of exercising care varies with

the known dangers that a person is confronted with. The ordinary citizen is the type of man that you deal with and you have the ordinary citizen crossing at a point 30 feet, or something like that, you will remember the testimony, from the street intersection. Crossing at that place did he use the care which he should have used in attempting to cross. If you find that he did, and that he, the plaintiff, was not guilty of contributory negligence, and you find that the defendant was guilty of negligence then the plaintiff is entitled to recover; but if you find that he did not use that care which he should have used in crossing at that place, and that if he had exercised proper care under the circumstances, he could have avoided the injury notwithstanding the negligence of the defendant, if you so find, then the plaintiff cannot recover.

If plaintiff does recover, he is entitled to recover such sum of money as will compensate him, pay him, for the following elements of damage; the bodily injury he has sustained, the pain he has undergone, and the effect on his health, according to its degree, the probable duration as likely to be temporary or permanent, the expenses incidental to an attempt to cure or lessen the amount of his injuries, which would include all expenses for doctors, nurses and hospitals or whatever he may have expended for a cure; and also the money loss sustained through his inability to attend to his business which again may be of a temporary or permanent character.

I have frequently called your attention, before and now reiterate, that you must award no future damages or loss unless the testimony of the plaintiff convinces you to a reasonable certainty that there will be a future loss or damage; and if you reach the conclusion that there will be future loss

or damage, your award should be for the present value of that future loss.

The defendant has submitted two requests for charge.

(There can be no recovery for loss of earnings during the period in which the factory was closed down.)

(There can be no recovery by this plaintiff even though the defendant was negligent, if the plaintiff was also negligent and that negligence of the plaintiff contributed to the accident, regardless of the proposition of negligence of the plaintiff and the defendant.)

The Court: I refuse to charge the first; and the second I think I have charged, substantially.

Mr. Garrison: I think the Court failed to speak to the jury on contributory negligence.

The Court: In contributory negligence, the burden is on the defendant to satisfy you that the plaintiff is guilty of contributory negligence; and he must convince you by the greater weight of the believable evidence in order that the plaintiff would be barred from recovery.

The jury may now retire and take with you the exhibits and pleadings in the case.

Mr. Bishop: I would like to have an exception to that portion of the Court's charge where the Court says: "In the case at hand the law is such that if the plaintiff has sustained an injury, the burden of proving his complaint is on the plaintiff

and he would be entitled to recover against the city, notwithstanding the usual rules to the contrary; that is to say, he would be entitled to recover if he proves his complaint, and that is true provided you do not find that the plaintiff himself by his own act has barred his recovery."

And also where the Court says: "If the plaintiff has failed to prove that he sustained his injuries by reason of the negligent operation of that truck by the defendant, its servants, agents and employes, he cannot recover, under any circumstances."

(Jury out.)

POSTEA.

(Filed December 1, 1928.)

NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

EMIL P. MORGENWECK,
Plaintiff,

v.

CITY OF EGG HARBOR CITY,
a municipal corporation,
Defendant.

Action at Law.
Postea.

This cause was tried before Judge W. Frank Sooy with a jury at the Atlantic County Circuit Court on November 28th, 1928.

The jury rendered a verdict against the defendant, City of Egg Harbor City, a municipal corporation, for one thousand ($1,000.00) dollars.

W. F. SOOY,
C. C. J.

A true copy,
FRED L. BLOODGOOD,
Clerk.

JUDGMENT NISI ON POSTEA.

NEW JERSEY SUPREME COURT.

EMIL P. MORGENWECK,
Plaintiff,

v.

CITY OF EGG HARBOR CITY,
a municipal corporation,
Defendant.

Action at Law.
On Postea.

It is ordered that judgment be, and hereby is, entered in favor of plaintiff and against the defendant for the sum of one thousand dollars, besides costs to be taxed *nisi.*

Entered: December 1, 1928.

On motion of,
WM. C. FRENCH,
Attorney.

$1,000.00

$

A true copy,
FRED L. BLOODGOOD,
Clerk.

JUDGMENT FOR PLAINTIFF.

NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

EMIL P. MORGENWECK, *Plaintiff,*	Action at Law.
v.	On Postea. Judgment for Plaintiff.
CITY OF EGG HARBOR CITY, a municipal corporation, *Defendant.*	Thompson & Hanstein, Attorneys.

Whereupon, it is adjudged that Emil P. Morgenweck, the plaintiff in this cause, do recover of the City of Egg Harbor City, a municipal corporation, the defendant in this cause, the sum of one thousand dollars damages, together with his costs, which have been taxed at the sum of

Damages. $1,000.00
Costs,

Judgment entered December 1, 1928.

WM. S. GUMMERE,
C. J.

A true copy,
FRED L. BLOODGOOD,
Clerk.

New Jersey Court of Errors and Appeals

EMIL P. MORGENWECK,
Plaintiff-Appellee,

v.

CITY OF EGG HARBOR CITY, a municipal corporation,
Defendant-Appellant.

On Appeal from Supreme Court.

BRIEF OF DEFENDANT-APPELLANT.

This is an appeal from a judgment in the New Jersey Supreme Court, Atlantic County, in favor of the plaintiff. The complaint alleges (S. C. p. 5) that the defendant, the City of Egg Harbor City, was operating a truck used by its sewerage department, along a public highway, and that the defendant operated said truck negligently, as a result of which the plaintiff was injured.

At the beginning of the trial, pursuant to notice, a motion was made to strike the complaint on the ground that the complaint failed to disclose that the truck was operated by some agent, or servant of the municipality, citing *Tomlin v. Hildreth,* 65 New Jer-

sey Law 438; which motion, the Court refused, and then the Court granted the plaintiff permission to amend, and an exception was granted to the defense as to both the refusal to strike the complaint, and also to granting the motion for the amendment. At the time the amendment was allowed the cause of action was barred by our Statute of Limitations.

The trial then proceeded, and, although motions for a non-suit and for a directed verdict were made, at the appropriate times, they were both refused, and the trial resulted in a verdict in favor of the plaintiff.

I.

THE COURT ERRED IN REFUSING TO DISMISS THE COMPLAINT.

The complaint, as has been noted, recites that the City of Egg Harbor City "operated a truck, at an excessive rate of speed," &c. As was said in *Tomlin v. Hildreth,* 36 New Jersey Equity 438 (at page 441):

> "To say that the 'City of Cape May' assaulted, is to state a proposition which is a *reductio ad absurdum.* A corporation only acts by its agents or servants, and to charge it with an actionable injury resulting from a wilful or negligent act, it is necessary to allege that it acted by 'its agents and servants,' which and which only imports a possible liability by a corporation. A corporation itself, the legal entity, cannot commit either a wilful or negligent act. It is not responsible for the act of any person not its agent or servant, hence the declaration

must contain the words which impute liability to it through its actors—its officers, agents or servants. The declaration must, upon its face, show that an action has accrued against the corporation by the alleged act or default of those for whom it must respond under the well-established principle of *respondeat superior*. The facts from which this will appear must be stated in the pleadings. Facts to constitute a cause of action must appear. 1 Chit. Pl. 214."

It is obvious, therefore, that the complaint was void, and it should have been stricken.

Of course, it is the law that amendments are within the discretion of the Court, but, nevertheless, it is doubtful if a Court may permit an amendment of a void complaint, after the Statute of Limitations, has barred the cause of action set up by the amendment.

II.

THERE SHOULD HAVE BEEN A NON-SUIT, OR A DIRECTION ON THE GROUND THAT THERE WAS NO PROOF OF NEGLIGENCE.

There were four witnesses called as to the happening of the accident. Mueller, the driver of the truck of the sewerage department was called. He was not questioned as to the manner in which the accident happened.

The plaintiff himself testified:

"Q. The car hit you that was coming from that direction?

A. I didn't see it.

Q. You didn't see it?

A. No.

Q. You didn't see it at all before the accident?

A. Not until it hit me.

Q. So that you don't know whether it was going fast or not?

A. I don't know."

(S. C. p. 30, ll. 25-34.)

Another witness, Harry J. Wills, testified as follows:

"Q. You didn't see the truck until it was right up to your car?

A. At the time it bumped.

Q. Practically at the time it bumped?

A. Yes.

Q. You didn't know of any truck approaching until then?

A. No, as I said, I sat there and watched and I could see something, through my mirror, coming, and there was a bump; and the first thing I knew ——

Q. Mr. Morgenweck beckoned to you?

A. No, I waved to him, beckoned to him, then. I said I would like to speak to him."

(S. C. p. 33, ll. 3-19.)

Two other witnesses testified, Daisy Shotwell and Phillip Reinhardt. The former testified as follows:

"Q. What did you see of this accident?

A. I didn't see anything."

(S. C. p. 44, ll. 5-7.)

The latter testified as follows:

"Q. You didn't see this accident?

A. No, I did not."

(S. C. p. 44, ll. 34-36.)

These were the only witnesses testifying as to the manner of the happening of the accident. None of them stated anything from which negligence could be inferred. The presumption, of course, is against negligence and in favor of innocence, and there being no direct testimony of negligence, the presumption necessarily favors the defendant, and it is submitted that there was nothing on the question of negligence that should have been submitted to the jury. *Olsen v. Erie Railroad Co.,* 99 New Jersey Law 485.

III.

THERE SHOULD HAVE BEEN A NON-SUIT, OR A DIRECTION ON THE GROUND THAT THE DOCTRINE OF RESPONDEAT SUPERIOR DOES NOT APPLY.

The testimony disclosed that the driver of the truck, which had the collision with the plaintiff, was driving the truck for the sewerage department of the City of Egg Harbor City. In the case of *Condict v. Jersey City,* 46 New Jersey Law 157, the plaintiff was injured by being struck by a wagon driven by an employe of the city, for the purpose of removing ashes from the boxes and barrels placed on the sidewalks of the city by the inhabitants, to the dumping grounds. The Court of Errors and Appeals held (at page 159):

> "In the execution of the duties of a municipal government the services of inferior officers having only ministerial duties to perform, and of workmen and other employes, are required for the transaction of its business; and the principle

on which the cases above cited were decided would be of little importance if the municipality was liable to actions for the negligence of such persons. It has been held that with respect to such officers and employes, the doctrine of *respondeat superior* does not apply. Thus, a city is not liable to an action for the negligence of its assessor and collector in assessing and levying taxes (Alger v. Easton, 119 Mass. 77); nor for the wrongful acts of its police officers in the enforcement of ordinances (Buttrick v. City of Lowell, 1 Allen 172; Calwell v. City of Boone, 51 Iowa 687); nor for the negligence of its officers and agents in executing sanitary regulations for preventing the spread of contagious disease (Ogg v. City of Lansing, 35 Iowa 495; Brown v. Inhabitants of Vinalhaven, 65 Me. 402); nor for the negligence of its fire department, Jewett v. City of New Haven, 38 Conn. 368; Smith v. City of Rochester, 76 N. Y. 506-513; Boone on Corp. Section 301).

A person who has suffered an injury by reason of the neglect of the selectmen, or of the physician employed by them, in the performance of duties imposed upon town officers, in relation to the small-pox, has no remedy against the town therefor. Brown v. Vinalhaven, *supra*. One who is injured in his person or property by the negligence or misconduct of members of a fire department when engaged in extinguishing a fire, cannot hold the city liable in damages, though the fire department was organized under provisions of the city charter, and its members were selected and paid by the city. Hafford v. New Bedford, 16 Gray 297; Fisher v. City of Boston, 104 Mass. 87; Jewett v. City of New

Haven, *supra;* Howard v. City of San Francisco, 51 Cal. 52; Hayes v. City of Oshkosh, 33 Wis. 314. A town is not liable for an injury sustained by reason of the negligence of a laborer employed by one of its highway surveyors to aid him in performing the duties of his office. Walcot v. Swampscott, 1 Allen 101. Nor is a city liable for an injury caused by the negligence of a teamster employed in transporting stone to repair a highway by the superintendent of streets, who is charged with the duty of keeping the streets in repair. Barney v. Lowell, 98 Mass. 500. A city is not liable for the negligence of an employe of the commissioners of public charities in driving an ambulance-wagon belonging to the city, which struck and caused the death of the plaintiff's intestate. Maximilian v. Mayor of New York, 62 N. Y. 160."

This case was followed by *Wild v. Paterson,* 47 New Jersey Law 406, which was a case where the plaintiff was injured by a fire engine of the city going to a fire. The Court held (p. 411):

"It has been settled beyond the possibility of further contention in this State, that municipal corporations are not liable to action for neglect to perform or negligence in performing duties imposed on them by law and due to the public, in behalf of any individual suffering damage by reason of such negligence, unless an action is given by statute. Where the employes or officers of a municipal corporation are negligent in the performance of such duties, the doctrine of *respondeat superior* will not apply. Livermore v. Board, &c., Vroom 508; Pray v. Jersey City, 3 Vroom 394; Cooley v. Freeholders, &c., 3

> Dutcher 415; Freeholders, &c. v. Strader, 3 Harr. 108; Condict v. Jersey City, 17 Vroom 157."

In the case of *Muller v. Bayonne,* the city clerk issued a tax search, which was erroneous, in that it omitted certain assessments. A bill was filed to restrain the city from enforcing the lien of those taxes. The Court of Errors and Appeals held:

> "If this duty of furnishing certificates of search to those who apply for them can be regarded as a duty to the public, or imposed for the public benefit, like the ordinary duties of municipal corporations, the settled doctrine would be applicable that no action lies for an individual against the corporation, either for its own negligence or that of its agents or officers in respect to such public duty, unless expressly given by statute. Condict v. Jersey City, 17 Vr. 157; Wild v. Paterson, 18 Vr. 406." 45 New Jersey Equity, 237 at page 240.

The same doctrine as the above cases has been followed by the Court of Errors and Appeals in the case of *Florio v. Mayor and Aldermen of Jersey City,* 101 New Jersey Law 535.

IV.

THE CITY WAS ENGAGED IN THE PERFORMANCE OF A PUBLIC DUTY.

The testimony in this case showed, first, by the interrogatories that the receipts from the operation of the sewerage department amounted to

$4515.50, and the expenditures amounted to $4430.30; but that did not take into consideration the depreciation of the sewerage plant, nor the interest on the bonds of the sewerage plant, which items formed a deficit, which is taken care of annually by appropriation from the general taxes of the city, which was stipulated at page 47 of the State of the Case.

It is, therefore, apparent that the plant is operated at a loss, and the case, therefore, does not fall within the rule of such cases as *Olesiewicz v. Camden,* 100 New Jersey Law 336, where the City operated an asphalt plant, an enterprise in which it embarked for profit, or for some special benefit or advantage of its own; nor does it fall within the rule of such a case of *Zboyan v. Newark,* Vol. 6 Advanced Reports p. 460, in which case the City was conducting a public market, renting stands to tenants at a rental. Both of the enterprises in the two cases above referred to were enterprises from which the municipality derived special benefits, or advantages.

Our case falls rather within the case of *Waters v. Newark,* 56 New Jersey Law 361, where the sewerage system owned by the City of Newark, by reason of the increase of the amount of sewage flowed into a particular pipe, overflowed, and damaged the plaintiff's property. The Court held:

> "The courts of this State have said in conclusive form that the neglect of a municipal corporation to perform or its negligence in the performance of a public duty imposed on it by law, is a public wrong to be remedied by indictment, and cannot constitute the basis of a civil action by an individual who has suffered particular damage by reason of such neglect. Strader v. Sussex, 3 Harr. 108; Cooley v. Essex, 3 Dutcher

415; Livermore v. Camden, 5 Id. 245; Callahan v. Morris, 1 Vroom 161; Livermore v. Camden, 2 Id. 507; Pray v. Jersey City, 3 Id. 394; Union v. Durkis, 9 Id. 21; Marvin Safe Co. v. Ward, 17 Id. 19; Condict v. Jersey City, Id. 157; Little v. Dusenbury, Id. 614, 636; Wild v. Paterson, 18 Id. 406, 411; Varrath v. Hoboken, 20 Id. 285." 56 New Jersey Law 361, at page 363.

And the Court in that case determined that the basis of plaintiff's complaint was one in which an indictment would lie; hence, there was no right of action in the plaintiff.

Now, applying all of the cited cases to the case at hand, we find that *Waters v. Newark, supra,* holds in effect, that the operation of a sewerage plant by a city is the performance of a public duty. *Wild v. Paterson, supra,* and the other cases cited under point III, hold that the doctrine of *respondeat superior* does not apply to the negligence of municipal employes in the performance of the public duties of a municipality.

It follows, therefore, that both the motion for the non-suit, and the motion for the direction, should have been granted.

It is respectfully submitted that the judgment below should be reversed.

THOMPSON & HANSTEIN,
Attorneys for and of Counsel with Defendant-Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS

EMIL P. MORGENWECK,

Plaintiff-Appellee,

VS.

CITY OF EGG HARBOR CITY, a municipal corporation,

Defendant-Appellant.

BRIEF OF PLAINTIFF-APPELLEE.

The plaintiff, Emil P. Morgenweck, obtained judgment in the New Jersey Supreme Court, Atlantic County, in the sum of one thousand dollars. The complaint alleged that the defendant, the City of Egg Harbor City, was operating a truck used by its sewerage department, along a public highway, and that through the negligence of the defendant, complainant was injured.

Judge Sooy permitted the complaint to be amended (see page 18) and said:

> "In view of the decision in the case of Wilson versus Dairymen's Co-operative Association reported, Volume 143, Atlantic Reporter, page 454, that it clearly appeared to the Court that the defendant cannot be said to be taken by surprise, and further that it would seem to the Court that to strike out the complaint at that time would bar the plaintiff from bringing another action,"

and the amendment was allowed.

In the case cited, Justice Katzenbach said:

> "In the early days of our jurisprudence, many actions were brought to a summary conclusion by reason of mistakes as to form. These decisions resulted frequently in miscarriages of justice. The only meritorious result of dismissing suitors on technicalities was to create a bar adept in the science of pleading. For many years the trend has properly been in the other direction. The aim of courts and legislatures is to abolish technicalities and enable suitors to have the merits of their controversies fully tried. The Practice Act of 1903 (3 C. S., page 4091,

pp. 126) provides:

> " 'In order to prevent the failure of justice by reason of mistakes and objections of form, the Court or a Judge at all times may amend all defects and errors in any proceeding in civil actions, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made with or without costs and upon terms; and all such amendments as may be necessary for the purpose of determining in the existing action the real question in controversy between the parties shall be so made.' "

Also see Section 23 of the Practice Act of 1912, page 377; Public Service Electric Company versus Post, 257 F. 933; Brice versus Atlantic Coast Electric Railway Company, 102 N. J. Law 288.

II

The appellant alleges that there should have been a non-suit or a direction on the ground that there was no proof of negligence. The plaintiff was crossing a side street known as Seventh Terrace, which ran off of the

White Horse Pike; that on the morning in question the driver of the defendant turned from the White Horse Pike into the Terrace and the proof shows that he gave no warning as he turned into the Terrace; that he was driving very fast, and that he struck plaintiff and threw him against another automobile, and that when the driver was able to stop his truck the plaintiff was wedged between the standing car and the truck owned and operated by the defendant.

Mr. Morgenweck testified as follows (pages 23, 24 and 25):

"EMIL P. MORGENWECK, sworn.

By Mr. Garrison:

Q. Where do you live?

A. Egg Harbor City.

Q. How long have you lived in Egg Harbor City?

A. Practically fifty-two years, next May.

Q. Do you remember August 2, 1926?

A. I do.

Q. Where were you on that day?

A. I had to go to the factory on Buffalo Avenue. I was on the sidewalk, crossing what we call a little crossing, this alley, and this truck hit me.

Q. On that day you were hit by a truck?

A. Yes.

Q. What truck hit you?

A. The sewerage truck, of the sewer department of Egg Harbor City.

Q. Who was driving the truck?

A. Mr. Adolph Mueller.

Q. The young man who just testified?

A. Yes.

Q. Do you recognize this part of this drawing here as the White Horse Pike?

A. Yes.

Q. You recognize this as the Terrace?

A. I certainly do.

Q. Was it at this Terrace where you were struck?

A. Positively; right about here, I should think. The sidewalk is twenty feet wide across this way.

Q. Was there a car standing in that street?

A. Mr. Wills'.

Q. Is he in court?

A. I think he is. He is supposed to be in. Yes, he is in.

Q. When you were struck how near were you to the car that was standing in the street?

A. I couldn't tell you that.

Q. You don't know how near?

A. I know I landed up against this car. I know that. He threw me that far.

Q. When you were struck you were thrown against what?

A. The car.

Q. The car that belongs to Mr. Wills?

A. Yes, right here. (Indicating.)

Q. You say that the truck driven by Mr. Mueller,

belonging to the city, struck you?

A. Yes.

Q. Where did that truck come from?

A. From that side of the street and turned in here. (Indicating.)

Q. Turned in there?

A. Yes.

Q. Did he sound any warning?

A. Not a thing; never.

Q. Was the truck going fast or slow?

A. No, very fast; he couldn't stop until he hit the other car.

Q. When it struck what happened to you?

A. Happened to me? Had me between the two cars. That is all I can remember. They took me to the doctor.

Q. You say you were thrown up against the other car?

A. Yes.

Q. Where were you when the truck stopped?

A. Right underneath, between the two cars.

Q. Was the car still standing on the macadam?

A. Standing still.

Q. Do you know where Mr. Wills was at that time?

A. Right in the car, because I waved to him.

Q. Did anything happen to the car that you were driven into? You say you were knocked into this car, driven into it. Did anything happen to the car?"

The defendant offered no proof in this case and the above testimony remains uncontradicted; therefore, there was evidence to go to the jury and under all the cases the Court was powerless to grant a non-suit.

III AND IV

The doctrine of Respondeat Superior does apply in this case. The testimony shows (page 13, Printed Book) it was operating a sewage department and charged fees and collected moneys and perquisites from the citizens of Egg Harbor City in connection therewith and that dur-

ing the year of the accident their receipts exceeded their expenditures.

On pages 19 and 20, Adolph Mueller, who was driving the truck for the defendant, says that he was employed by the defendant company, and had been using that particular truck for about three months, and that the lettering on the truck was, "Department of Sewers, Egg Harbor City."

The law seems to be clearly defined in Olesiewicz, et al., versus City of Camden, and reported in Volume 126, Atlantic Reporter, page 317. In that case the city owned and conducted an asphalt plant and performed work for private persons and corporations. In the present case the defendant was operating and conducting a sewage system for profit and it was held in this case that the common law rule

> "that a municipality in the exercise of a public duty can commit no wrong for which a person injured thereby can recover compensation"

has its limitations and exceptions. See Livermore versus Freeholders of Camden, 31 N. J. Law, page 508; also see Tomlin versus Hildreth, 65 N. J. Law, page 438.

Justice Kalisch, in rendering the opinion in Olesiewicz

versus City of Camden, said:

> "Moreover, the consensus of judicial opinion appears to be that when a municipality embarks upon a private business enterprise the law casts upon it the same duties and obligations as are required to be performed and borne by individuals, and to the performance of such duties or obligations the doctrine of respondeat superior is applicable. (28 Cyc. 1257, 1258, 1259.)
>
> It is only where the business or work of the municipality is confined to the exercise of a strictly governmental function, free from any active wrongdoing on its part, that immunity from responding in damages to person injured through the negligence of its public officers, agents or servants is warranted."
>
> Jersey City versus Kiernan, 50 N. J. Law, page 246; Cochran versus Public Service, 97 N. J. Law, page 480; Biching versus Asbury Park, 80 N. J. Law, page 416; Curran versus City of Boston, 151 Mass., page 505; Karpenski versus South River, 84 N. J. Law, page 149.

In view of the above cases, which we have carefully examined, we are of the opinion that the judgment below should be affirmed.

Respectfully submitted,

WILLIAM I. GARRISON,

WILLIAM C. FRENCH,

Attorneys for Plaintiff-Appellee.