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NOTICE OF APPEAL.

(Filed June 23, 1931.)

NEW JERSEY SUPREME COURT.

10

ATLANTIC COUNTY.

EMIL KLEIN, administrator
ad prosequendum of the
estate of EDWARD R.
KLEIN, deceased,

Plaintiff,

v.

JOSEPH FRANK,

Defendant.

Action at Law.
Notice of Appeal.

20

To *Burton A. Gaskill, Esquire, Attorney for
Plaintiff:*

Take notice that the defendant in the above-
entitled cause appeals to the Court of Errors and
Appeals in the last resort in all causes in New Jer- 30
sey from the whole of the judgment entered in this
cause.

THOMPSON & HANSTEIN,
Attorneys of Defendant.

[ENDORSED]

Due and legal service hereby acknowledged this 22nd day of June, 1931.

Burton A. Gaskill,
Attorney of Plaintiff.

10

GROUND OF APPEAL.

(Filed August 18, 1931.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

20

EMIL KLEIN, administrator
ad prosequendum of the
estate of EDWARD R.
KLEIN, deceased,

Plaintiff-Respondent,

v.

JOSEPH FRANK,

Defendant-Appellant.

On Appeal.
Grounds of Appeal.

30

To Burton A. Gaskill, Attorney of Plaintiff-Respondent:

Take notice, that Joseph Frank, the defendant-appellant in the above-entitled cause, hereby assigns

the following grounds of appeal in the said above-entitled cause:

1. Because the Court refused to non-suit the plaintiff, to which an exception was duly taken.

2. Because the Court refused to direct a verdict against the plaintiff and in favor of the defendant, to which an exception was duly taken. 10

3. Because the Court charged the jury as follows:

"It seems to me that the questions of negligence and contributory negligence are largely determined, or, at least, to some extent determined by your determining where this collision occurred, if you find a collision did occur, between the automobile and the boy."

20

to which an exception was duly taken.

4. Because the Court charged the jury as follows:

"If from the evidence you should find that the boy was walking on the paved surface of the road, where it is common knowledge that automobiles were constantly running back and forth, and not on the shoulder of the road, which was the part intended for use by pedestrians, you would have a different situation than that which the plaintiff presents to you." 30

to which an exception was duly taken.

THOMPSON & HANSTEIN,
Attorneys of Joseph Frank,
Defendant-Appellant.

I hereby consent to the filing of the within grounds of appeal out of time, this 17th day of August, 1931.

BURTON A. GASKILL,
Attorney of Plaintiff-Respondent.

AMENDED COMPLAINT.

(Filed Oct. 10, 1930.)

NEW JERSEY SUPREME COURT.

ATLANTIC COUNTY.

EMIL KLEIN, administrator
ad prosequendum of the
estate of EDWARD R.
KLEIN, deceased,
Plaintiff,
v.
JOSEPH FRANK,
Defendant.

Action at Law.
Amended Complaint.

Emil Klein, administrator *ad prosequendum* of the estate of Edward R. Klein, deceased, of the town of Cologne, County of Atlantic and State of New Jersey, says:

1. That he was, on the 28th day of January, 1929, duly appointed by the surrogate of the County of Atlantic as administrator *ad prosequendum* of Edward R. Klein, a minor of the age of seventeen years.

2. On or about August 5, 1928, at ten-thirty P. M., while plaintiff's intestate was lawfully walking in 10
an easterly direction upon the gravel shoulder of White Horse Pike, a public highway in Atlantic County, New Jersey, well on his right side of said road, at a point about a quarter of a mile from Germania (Cologne), Atlantic County, New Jersey, the defendant, with reckless disregard for the rights and safety of plaintiff's intestate, so carelessly, recklessly and negligently operated an automobile owned and driven by him in an easterly direction 20
on said highway aforesaid, that the said defendant thereby caused and permitted said automobile to strike with great force, knock down and run over said plaintiff's intestate, causing plaintiff's intestate to receive such injuries that he died from the effects thereof within a few hours thereafter.

3. It was the duty of defendant to operate his automobile at the aforesaid time and place in a careful and prudent manner; to have said automobile equipped with proper lights, and to have his auto- 30
mobile under control, and to make proper observations of and have due regard for plaintiff's intestate and others lawfully on the highway aforesaid.

4. The defendant did, at the time and place afore-

said, operate his said automobile negligently and carelessly, in that:

- (a) He operated his said automobile at a high, reckless and unlawful rate of speed.
- (b) He operated his said automobile without giving any signal or warning of his approach.
- (c) He operated his said automobile without proper lights.
- (d) He operated his said automobile without proper brakes.
- (e) He operated his said automobile without making proper observation of the road ahead of him, and without due regard to the safety of pedestrians.
- (f) He operated his said automobile in such a manner that he did not have control of its course and direction.

As a result of defendant's divers acts of negligence as aforesaid, all without regard to the rights of plaintiff's intestate, who was lawfully on said highway, said intestate was run into by the automobile owned and driven by defendant, and as a result of the injuries so sustained, plaintiff's intestate died on August 6, 1928.

5. Said Edward R. Klein left him surviving as his next of kin, plaintiff, his father, Emil Klein; his mother, Margaret Klein; his sister, Margaret Louise

Klein, age 20; a brother, Charles E. Klein, age 15, and a brother, Joseph E. Klein, age 13, who, by his death, have suffered pecuniary injury to the amount of \$50,000.00, and for whose benefit this action is instituted within twenty-four calendar months of the death of said Edward R. Klein.

Judgment will be claimed for the sum of fifty thousand dollars (\$50,000.00), besides costs of suit. 10

BURTON A. GASKILL,
Attorney of Plaintiff.

[ENDORSED]

Due and legal service of the within 20
amended complaint is hereby acknowl-
edged this 4th day of October, 1930.

THOMPSON & HANSTEIN,
Attorneys for Defendant.

FIRST SEPARATE DEFENSE.

The negligence of the plaintiff's intestate was the sole cause of the accident.

SECOND SEPARATE DEFENSE.

10

The negligence of the plaintiff's intestate contributed to the accident.

THOMPSON & HANSTEIN,
Attorneys of Defendant.

20

30

REPLY TO ANSWER TO AMENDED
COMPLAINT.

(Filed Oct. 7, 1930.)

10 NEW JERSEY SUPREME COURT.

ATLANTIC COUNTY.

20	EMIL KLEIN, administrator ad prosequendum of the estate of EDWARD R. KLEIN, deceased, v. JOSEPH FRANK, Plaintiff, Defendant.	} Action at Law. Reply to Answer to Amended Complaint.
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30 Plaintiff denies the truth of the defendant's
answer to amended complaint, especially the first
and second defenses thereof, and joins issue.
BURTON A. GASKILL,
Attorney for Plaintiff.

POSTEA.

(Filed May 23, 1931.)

NEW JERSEY SUPREME COURT.

ATLANTIC COUNTY.

10

EMIL KLEIN, administrator
ad prosequendum of the
 estate of EDWARD R.
 KLEIN, deceased,
Plaintiff,
 v.
 JOSEPH FRANK,
Defendant.

Postea.

20

This case was tried before Judge William Frank Sooy with a jury, at the Atlantic County Circuit on May 19th, 1931. The jury rendered a general verdict in favor of Emil Klein, administrator *ad prosequendum* of the estate of Edward R. Klein, deceased, 30 and against Joseph Frank, defendant, in the sum of three thousand five hundred dollars (\$3500.00).

W. F. Sooy,

*Judge of the Atlantic
 County Circuit.*

(Filed May 23, 1931.)

10

20

costs, which have been taxed at the sum of sixty-four dollars and four cents, making in the whole the sum of three thousand five hundred sixty-four dollars and four cents.

Damages \$3,500.00

Costs 64.04

\$3,564.04

10

Judgment signed and entered May 23, 1931.

WM. S. GUMMERE,

C. J.

20

30

TESTIMONY.

NEW JERSEY SUPREME COURT.

ATLANTIC COUNTY.

10

EMIL KLEIN, administrator <i>ad prosequendum</i> of the Estate of EDWARD R. KLEIN, deceased, Plaintiff,	}	Action at Law.
v.		
JOSEPH FRANK, Defendant.	}	

20

Atlantic City, N. J., May 19th, 1931.

Before HONORABLE WILLIAM FRANK SOOY, Judge, and
a jury.

30

APPEARANCES:

For plaintiff: BURTON A. GASKILL, Esq.

For defendant: MESSRS. THOMPSON & HANSTEIN
(Mr. Hanstein appearing.)

(The jury was sworn at 10:20 A. M.)

(Mr. Gaskill opened the plaintiff's case to the jury and Mr. Hanstein opened the defendant's case.)

EMIL KLEIN, SWORN.

10

Direct examination.

By Mr. Gaskill:

Mr. Gaskill: By consent I offer in evidence the letters of administration.

(The paper was marked Exhibit P1.)

20

Q. Mr. Klein, where do you live?

A. Cologne, New Jersey.

Q. That is in Atlantic County?

A. Yes.

Q. How long have you lived there?

A. Four years.

Q. How long have you lived in Atlantic County?

A. Twenty-two years.

Q. On the fifth day of August, 1928, of whom did your family consist?

30

A. My wife.

Q. What is her name?

A. Margaret Klein.

Q. How old is she?

A. She was 42.

Q. Yes.

A. My daughter Margaret, she was then 19. My son Edward, who was killed.

Q. How old was he?

A. 17.

Q. Were there any other children?

A. Charles, 15.

Q. Any others?

10 A. Joseph, 13.

Q. All living at home with you?

A. Yes, sir.

Q. Mr. Klein, on this day, August 5th, 1928, when did you last see the boy at home?

A. Walking out at seven o'clock in the evening.

Q. Do you know where he went?

A. He was on his way to the show.

Q. Where?

A. To Egg Harbor.

20 Q. How far is Egg Harbor from your home?

A. Practically two miles.

Q. Did the boy go by automobile or did he go afoot?

A. No, he went afoot.

Q. Where did you next see him?

A. At the hospital in Atlantic City.

Q. Atlantic City Hospital?

A. Yes, sir.

Q. What time of the day?

30 A. Quarter after eleven.

Q. In the evening?

A. In the evening.

Q. Of that same day?

A. Yes, sir.

Q. What was his condition then?

A. He was unconscious, lying on the table having

his hair shaved off his head, and I was told that he would be ready——

Mr. Hanstein: That is objected to.

Q. Did he ever leave the hospital alive?

A. No, sir.

Q. When did he die?

10

A. Ten minutes to nine Monday morning.

Q. Was that the next day, August 6th?

A. Yes, sir.

Q. Now, Mr. Klein, how tall was this boy?

A. The boy was six foot two.

Q. 17 years of age?

A. 17 years of age.

Q. How much did he weigh?

A. He weighed 165 pounds.

Q. Prior to this August 5th, what had been the 20 condition of his health?

A. Very good.

Q. Had he ever had the attention of a doctor?

A. No, sir.

Q. Was he a strong boy or weak boy?

A. Very strong and healthy.

Q. Was he working at the time?

A. Yes, sir.

Q. How long had he been working?

A. Three years.

30

Q. For whom had he been working the three years?

A. The Taylor Packing Company at Pleasantville.

Q. What was his business there?

A. He was a butcher.

Q. Do you also work at the Taylor Packing Company?

A. I do.

Q. Did he work along with you?

A. Yes, sir.

Q. How much did he earn per week?

A. \$30 a week.

Q. What did he do with his money?

A. He turned it over to me.

10 Q. And what did you do with it?

A. Well, I spent it—

Mr. Hanstein: I object to that.

A. —to help to raise the family.

Mr. Hanstein: I object to what he did with the money.

20 The Court: I presume the father was entitled to the wages of the boy up until the time he was emancipated. What difference does it make what the father did with that which was his own?

Mr. Gaskill: I will withdraw that question and ask that it be stricken.

The Court: Yes.

30 Q. Now, Mr. Klein, what were the habits of the boy?

A. He hadn't any particular habits, only he smoked cigarettes now and then.

Q. Did he drink?

A. No, sir.

Q. How did he spend his evenings?

Mr. Hanstein: I object. I do not see how it is material. It does not relate to the accident and does not relate to damages.

Mr. Gaskill: I think the jury have a right to have a picture of this boy. If they find for the plaintiff, they are going to assess the damages that may accrue to this family by reason of his habits. I can understand that if a boy has been a drinking boy, a boy that had been a frequenter of pool rooms, stayed out all hours of the night, that there would be a different sort of a loss than the one with a boy who was of a quiet, home-loving nature. 10

The Court: The presumption of law is that he was all right.

Mr. Gaskill: Then I will let that presumption 20 continue.

Q. Now, Mr. Klein, between your home and Egg Harbor City how many public highways are there?

A. Just one main highway.

Q. Is there any other highway other than the main highway?

A. No, sir.

Q. What is the main highway?

A. White Horse Pike. 30

Q. Then in traveling between your home and Egg Harbor City one would have to travel over the White Horse Pike, the only public highway; is that right?

A. Yes, sir.

Cross-examination.

By Mr. Hanstein:

Q. Your boy lived at home, did he not?

A. He did.

Q. And you paid for his food, of course——

10 A. Yes.

Q. —and clothing? Isn't that correct?

A. Yes.

Q. And provided him with a home?

The Court: Mr. Klein, how old are you?

A. 45.

20

CHARLES MATEER, SWORN.

Direct examination.

By Mr. Gaskill:

Q. Mr. Mateer, where do you live now?

A. Moore's Mills, Dutchess County, New York.

30 Q. On August 5th, 1928, where did you live?

A. The White Horse Pike.

Q. Atlantic County?

A. Atlantic County, yes, sir.

Q. I show you a picture and ask you if you will tell me what that picture is.

A. That is the house I lived in.

Q. The house you lived in on August 5th, 1928?

A. Yes, sir.

(The photograph was marked P2 for identification.)

Q. Mr. Mateer, will you make a cross mark on the house in which you lived on this date? 10

A. On the house?

Q. Yes, make a cross on the paper. Make a mark on the paper, an X mark on P2 for identification.

A. Yes.

Q. Now, Mr. Mateer, on this day, about ten or thirty in the evening, was your attention directed to any happening on the White Horse Pike?

A. Yes, sir.

Q. What was it?

A. Squeaking brakes, and a thud like. 20

Q. Screeching brakes and a thud?

A. Yes.

Q. Where were you when you heard the screeching brakes and the thud?

A. In the house.

Q. What were you doing?

A. Having a cup of coffee and a sandwich.

Q. When you heard this, what did you do?

A. Rushed out the front.

Q. How far from where you were sitting was it to the front of the house? 30

A. Just across one room.

Q. How large is the room, about?

A. I would say about 25 feet.

Q. When you arrived at the front porch, what did you do, if anything?

A. Rushed out there and looked up and down the White Horse Pike, and I seen an automobile standing just a little below the house.

Q. A little above the house?

A. Below the house.

Q. In the direction of Atlantic City?

A. In the direction of Atlantic City, yes, sir.

10 Q. What kind of an automobile was it?

A. A Ford sedan.

Q. Did you make any other observation?

A. Then I looked up the Pike towards Egg Harbor and I saw a straw hat laying in the road, and a young man.

Q. Were the straw hat and the young man on the concrete portion of the road or on the shoulder of the road?

A. On the gravel part.

20 Q. On P2 for identification can you mark the point where you saw the young man?

(The witness made a mark on the photograph.)

Q. Indicated by an X along the fence?

A. In the gravel.

Mr. Gaskill: I want to offer this photograph in
30 evidence.

The Court: Merely for the purpose of illustrating the testimony of this witness?

Mr. Gaskill: Yes.

Mr. Hanstein: When was this photograph taken, may I ask?

Mr. Gaskill: A year ago.

(The photograph was marked Exhibit P2.)

Q. Mr. Mateer, as you made your observation up 10
and down the road, did you see any other automobile
near by, other than the Ford?

A. No, sir.

Q. When you saw the boy lying on the ground by
his straw hat, what did you do then?

A. I rushed down there and tried to stop a car
to get them to help me take him off the road.

Q. Did that car stop?

A. No, sir.

Q. Did you finally stop a car?

20

A. Yes, sir.

Q. Did you notice where the Ford automobile
went?

A. It went up into the next service—into a little
service station there. Pulled up at the service sta-
tion.

Q. Was the service station next to the house in
which you were living?

A. Yes, sir.

Q. Who is the owner of that, if you know?

30

A. Mr. Sauer.

Q. Then what happened to the boy?

A. We picked him up and laid him on the side of
the road and we telephoned for the police at Egg
Harbor, and the police came out and we put him

in a machine and took him down to Boysen's drug store.

Q. Then did the trooper appear on the scene?

A. Yes, sir.

Q. Did you have a conversation with the trooper?

A. Yes, sir.

- 10 Mr. Hanstein: I object to whether he had a conversation or whether he did not, as immaterial.

The Court: I will permit it.

(Exception noted for defendant.)

Q. As a result of that conversation, did you and the trooper go somewhere?

A. Yes, sir.

20

Mr. Hanstein: I object to that question and ask that the answer be stricken until my objection is noted.

The Court: You may note your objection. The objection is overruled and I refuse to strike.

(Exception noted for defendant.)

- 30 Q. Where did you go?

A. Up to Mr. Sauer's.

Q. Did you have a conversation with Mr. Sauer?

A. Yes, sir.

Mr. Hanstein: I object to that as irrelevant, incompetent and immaterial.

The Court: I will permit it.

(Exception noted for defendant.)

Q. In the presence of the trooper?

A. Yes, sir.

Q. As a result of that conversation did the trooper do anything?

10

Mr. Hanstein: I object to that. It is predicated on a conversation to which we cannot be a party, and the trooper might have done anything as a result of a conversation which is clearly in itself inadmissible.

The Court: I will permit it.

(Exception noted for defendant.)

20

(The question was repeated.)

A. We asked Mr. Sauer where that car was——

The Court: No.

Q. After the conversation, did the trooper do anything?

A. He telephoned.

30

Q. Do you know where he telephoned?

Mr. Hanstein: I object to that. Yes or no is probably all right, but it should be a yes or no answer.

The Court: Yes.

A. Yes.

Q. Where did he telephone?

Mr. Hanstein: I object to that on the ground that we cannot be bound by it. There is no proof that
10 we were present.

The Court: It seems to me that amounts to nothing more or less than something that he overheard the trooper saying, and that it would not be admissible.

Q. How far from the house in which you were living, the house indicated on Exhibit P2, was the body of the boy when you first saw it?

20 A. Well, I should judge about 50 feet.

Cross-examination.

By Mr. Hanstein:

Q. Do I understand you to say that you have marked on this Exhibit P2 where you saw the boy lying?

A. Yes, sir.

30 Q. Where did you mark it?

A. Right in there, right on the gravel.

Q. Do you say that is 50 feet from your house?

A. Down to about there.

Q. From—

A. From that little stoop. I should judge it would be about 50 feet.

Q. How wide is the front of your house?

A. I couldn't say.

Q. Well, can you judge that? Your house isn't 50 feet wide, is it?

A. No.

Q. The distance you saw the boy lying from your house is no greater than the width of your house, is it?

10

A. Oh, yes.

Q. It is?

A. Oh, yes.

Q. You referred to Sauer's service station. Is that this building?

A. Yes, sir.

Q. This building that has the sign on it, "Sir Walter Raleigh Tobacco?"

A. I don't know what the sign says. Yes, that's the house. That is the service station.

20

Q. That is Sauer's?

A. Yes.

Q. And it was at Sauer's that you saw this automobile stop, Sauer's service station?

A. It stopped before that.

Q. Stopped before that?

A. Yes, sir.

Q. Then you saw him pull into Sauer's service station?

A. Yes.

30

Re-direct examination.

By Mr. Gaskill:

Q. Mr. Mateer, how was the boy clothed that night, if you remember?

A. A light suit and a straw hat.

10 Q. Next to the house on P2 I notice a stand, a roadside stand?

A. Yes, sir.

Q. What was the condition of the lights about that the night of this accident?

A. Three electric lights in front of it and two inside.

Q. On up towards Egg Harbor were there any electric lights along the road there?

20 Mr. Hanstein: I object to that. Just saying, "On towards Egg Harbor," does not mean a thing. That might be a mile away.

Mr. Gaskill: I will withdraw it.

Q. Within 100 feet of where the boy was lying was there any other electric light other than the one at the stand?

A. No, sir.

30 Q. How far were the lights away?

A. I couldn't just say. There is one on the corner of Bremen Avenue.

Q. Do you know how far Bremen Avenue is?

A. I could not just say how far it is.

ANTHONY H. E. SAUER, SWORN.

Direct examination.

By Mr. Gaskill:

Q. Mr. Sauer, where do you live? 10

A. Galloway Township.

Q. Atlantic County, New Jersey?

A. Yes, sir.

Q. How long have you lived there?

A. 42 years.

Q. I show you plaintiff's Exhibit P2 and ask you if you will indicate on this photograph where your place of business is.

A. This is the service station. (Indicating.)

Q. Who lived on August 5th in this house? 20

A. Mr.—from New York. Charlie. I never knew his last name.

Q. The gentleman who just testified?

A. Yes.

Q. Mr. Sauer, on August 5th, 1928, was your attention directed to an accident happening on the White Horse Pike?

A. Not right away.

Q. Well, any time that day?

A. Yes. 30

Q. About what time?

A. About ten o'clock.

Q. Ten o'clock at night? Do you recognize Mr. Frank?

A. Well, no, I do not. I didn't—he wasn't there that long, to be recognized, and that is a while ago.

Q. Tell the jury what attracted your attention to the scene of an accident.

A. Well, I was in the service station and a car drove up, and I was going to go out and serve him, and the man asked me——

Mr. Hanstein: I object to something somebody
10 said to him.

The Court: Yes. You cannot give any conversation.

Q. Will you describe the man that was in the car?

A. Well, the man come right up that night again and we said it was the same man.

The Court: Not what was said. That would not
20 bind this defendant.

Q. Can you describe the man in the car?

A. No, sir, I could not.

Q. Was he an old man or a young man?

A. An old man.

Q. Was there anyone in the car with him?

A. A little girl or little boy, I don't know which it was, and a lot of bundles in the back.

Q. What kind of a car was it?

30 A. Ford.

Q. Did the man who came into your station at that time later return the same day?

A. That same night.

Mr. Hanstein: I object to that. It is quite immaterial.

(Exception noted for defendant.)

The Court: I will permit it.

Q. Who accompanied him back?

A. A trooper.

Mr. Hanstein: I object to that.

10

The Court: I will permit it.

(Exception noted for defendant.)

Q. Do you know the trooper that accompanied him back?

A. Well, I don't know their names, no.

Q. Do you see him in court here today?

A. Yes, sir, I do.

20

Q. Will you point him out?

A. It is that tall one there.

Mr. Gaskill: Will you stand up just a minute?

Q. Is this the trooper that came back?

A. Yes, sir.

Q. Trooper Baylon? He brought back the same man that had been in your station earlier in the evening; is that right?

30

Mr. Hanstein: I object to that. It is leading.

The Court: I will permit it.

(Exception noted for defendant.)

Q. Did you finally go to the scene of the accident?

A. I did.

Q. What did you find there?

A. Well, when we got there they said somebody got hit with the car.

Mr. Hanstein: That is objected to.

10

The Court: Not what somebody said.

Q. How long before you went to the accident was this Ford car with the elderly man, the little girl and the packages, in your service station?

Mr. Hanstein: I object to that as irrelevant, immaterial and incompetent.

20 The Court: I will permit it.

(Exception noted for defendant.)

(The question was repeated.)

A. The Ford car left about five minutes before I went there.

Q. Five minutes before you went there?

A. Yes, sir.

30 Q. On this same evening did you have a conversation with Trooper Baylon?

Mr. Hanstein: I object to that as incompetent, irrelevant and immaterial.

The Court: I will permit it. Just yes or no.

(Exception noted for defendant.)

A. Yes.

Q. Did you inform Trooper Baylon of the description of an elderly man and a child with a Ford sedan with bundles in the back that had been to your service station?

Mr. Hanstein: I object to that. We certainly cannot be bound in this case by what he may have told somebody.

10

The Court: I will permit him to say that he gave a description of the driver of the Ford to the trooper.

(Exception noted for defendant.)

Q. Did you give a description of the driver of the Ford to Trooper Baylon?

20

A. Yes, sir.

(No cross-examination.)

MICHAEL BEYLON, SWORN.

Direct examination.

30

By Mr. Gaskill:

Q. Mr. Beylon, where do you live?

A. 412 South Broad, Elizabeth, New Jersey.

Q. On August 5th, 1928, what was your position?

A. Member of the New Jersey State Police.

Q. Stationed at what station?

A. At that time I couldn't just tell you where I was stationed. I am pretty sure it was Port Norris.

Q. On this day, August 5th, 1928, where were you performing service, if anywhere?

10 A. I was patrolling the White Horse Pike between Elwood and Pomona.

Q. In the evening of that day, about ten o'clock, in what direction were you going?

A. Heading towards Atlantic City.

Q. Referring to P2, is this location familiar to you, Trooper?

A. Yes, sir.

Q. You have passed by there many times?

A. Yes, sir.

20 Q. As you were in the vicinity of the location of P2 on Sunday night, August 5th, did you see Edward Klein?

A. I saw a fellow walking along the side of the road there against the rail.

Mr. Hanstein: I ask that be stricken as not being responsive.

The Court: Yes, that is not responsive.

30

Q. Did you see a man walking along the roadway?

A. Yes, sir.

Q. On what part of the roadway was he walking?

A. He was walking on the——

Mr. Hanstein: I object to this. It is quite im-

material, unless there is going to be an identification.

The Court: I assume they are going to identify him. They cannot do it all at once. For that reason, I will admit it. Of course, if it is not connected up I will strike it out.

10

(The question was repeated.)

A. He was walking on the shoulder of the road on the right-hand side going towards Atlantic.

Q. In that same vicinity did you observe a Ford automobile?

A. Yes, sir.

Q. In what direction was the Ford going?

A. Heading south, towards Atlantic City.

Q. In what direction were you going?

20

A. Towards Atlantic City.

Q. And that was all in the vicinity of this house, the first house on P2?

A. Yes, sir.

Q. Were there any other cars other than the Ford moving in either direction on the White Horse Pike within the vicinity of that spot?

Mr. Hanstein: It seems to me that before they get into this, they ought to show that the trooper 30 saw this accident happen or that he knows where it happened, so that this inquiry as to other cars being around is pertinent to the time.

The Court: He has already testified it was about ten o'clock that he was going along the road, and

he is now testifying to certain things he saw. If it were possible for the plaintiff to go right to the scene of the accident at the time of the accident and just simply have a description of it, that would be all that would be necessary, but it is evidently not possible, and I cannot direct him as to what mode he shall adopt in arriving at the point.

10

Mr. Hanstein: I know that, but the point I make is this: here is the White Horse Pike, and you do not need witnesses to tell you that thousands of cars drive on it on Sunday night. There do come minutes when there are no cars. If the trooper is going to testify to one of those minutes when there were no cars, that has no probative value to show that there were no other cars around at the time of this accident, unless he says it happened when the accident happened. All I am looking for here is that we do not want a lot of things in this record that are going to confuse the jury, perhaps, and it has to be limited, it seems to me, to the time the accident happened.

20

The Court: He has already proved by the witness, Mateer, as to what Mateer saw at the time he heard a thud or shortly thereafter. He has had Mr. Sauer testify as to what he saw five minutes after the Ford went by, and he is now having the trooper testify as to what the conditions were when he went by. I will permit it.

30

(Exception noted for defendant.)

(The question was repeated.)

A. There were. There was one car. The only car moving was the Ford Sedan heading towards Atlantic, but going towards Philadelphia there were cars. Other cars were traveling towards Philly.

Q. Did you return to this vicinity later on?

A. Yes, sir.

Q. What did you find when you returned?

A. I saw cars from a distance, a sort of a mix- 10
up there, and I tried to get there as soon as possible, and when I got there I found out somebody had been hit by a car, so they were just putting the boy in the car to take him to a doctor.

Q. Now, Trooper, did you see the boy lying on the ground?

A. No, sir.

Q. How far away was he when you saw him when they were putting him in the car from the point where you saw him as you went down the White 20
Horse Pike?

A. I saw him about ten foot from where there were blood stains in the road, where the body had dropped after being hit. You could see the blood laying on the road there.

Mr. Hanstein: I object to the conclusion.

The Court: Yes. Where the body had been struck will be stricken. Saw him ten feet from the 30
blood stains on the road will be permitted to stand.

Q. Were the blood stains ten feet in the direction of Atlantic City from where you saw him as you passed along?

A. Yes, sir.

The Court: As he passed along the first time?

Mr. Gaskill: Yes.

Q. Now, Trooper, after this did you take the boy to the Atlantic City Hospital?

A. Yes, sir.

10 Q. Did you have a conversation with Anthony Sauer on the same evening?

Mr. Hanstein: I object to that, whether he did or whether he did not. It is quite immaterial.

The Court: I do not see what difference it makes. He did some things, and if he did them he might as well testify to them. The mere fact that he had a conversation does not help one way or the other.

20

Q. Did you or did you not communicate with the station at Absecon concerning this accident?

Mr. Hanstein: I object to that.

The Court: I will permit the question.

(Exception noted for defendant.)

30

A. Yes, sir.

The Court: I do not see that it makes any difference. What you are trying to do is to show something he did. If you think that is the best way to get at it, go ahead.

Q. Later that evening did you see the defendant?

A. Yes, sir.

Q. Where did you see him?

A. He was brought back by—from Absecon by the troopers there and turned over to me, to ——

Mr. Hanstein: I object to why he was turned over.

10

The Court: Yes.

Q. Turned over to you?

A. Yes.

Q. Did you have a conversation with Mr. Frank, the defendant, about this accident?

A. Yes, sir.

Q. What did he say about it?

A. He said he heard a noise, a thump, as if he had run over something or struck something.

Q. Did you take him to the vicinity of where the boy was found?

A. Yes, sir.

Q. Did you take him to Anthony Sauer's service station?

A. Yes, sir.

Q. Did Mr. Sauer at that time say he was the same man who was in there earlier in the evening?

30

Mr. Hanstein: I object to that. How can we be bound by that?

Mr. Gaskill: That is in the presence of the defendant.

Mr. Hanstein: If it is, that does not make us liable.

The Court: I do not see how it makes them liable at all. Mr. Sauer may testify that the man they brought back was the same man, but what he may have said makes no difference.

10

Q. Trooper, did or did not the defendant say he had —

Mr. Hanstein: I object to that. That is leading the witness.

The Court: I will have to have the question before I rule on it.

20

Mr. Hanstein: I think the unfairness of a question like that is apparent. He puts words in his mouth.

The Court: I will have to hear the question.

(The question was repeated.)

Q. —been in Sauer's station before that night?

A. I do not recall whether he did or not.

30

Q. Did you see the Ford automobile?

A. Yes, sir.

Q. I show you a picture and ask you if that is the Ford automobile that Mr. Frank had on that day?

A. It looks exactly like it. If I saw the plates, I could tell you.

Q. What was the condition of the automobile?

A. The right front fender was sort of bent up, and there was a dent in the right front near the door hinge, sort of a dent in the car there, and there was some hair sticking on one of the hinges.

Q. On which hinge?

A. On the right front hinge.

Q. The top, middle or bottom one?

10

A. Right there. (Indicating.)

Q. The middle hinge?

A. Right there.

Mr. Gaskill: I offer this picture in evidence.

Mr. Hanstein: He does not identify this as being the car.

The Court: He has not yet.

20

Q. Did you have this picture taken, Trooper?

A. Yes, sir.

By the Court:

Q. You had a picture taken?

A. Yes, sir.

Q. When?

A. The following day. The next day.

30

Q. Was that the same car that Mr. Frank had been back to the scene of the accident in?

A. Yes, sir. The license plates and all corresponded with it.

The Court: That would seem to identify it.

(The photograph was marked Exhibit P3.)

By Mr. Gaskill:

Q. I show you a picture and ask you if you know what that is.

A. Yes, sir, that is hair.

10 Q. On what?

A. On the bolt of the hinge, the door hinge.

Q. Of the automobile in P3?

A. Yes, sir.

Q. You had this picture taken?

A. Yes, sir.

Mr. Hanstein: Were you there when it was taken?

20 A. No, sir.

Mr. Hanstein: I let the other picture go in because it was identified, but here is something he did not even see taken.

The Court: He does not have to see it taken if he can identify it.

(The photograph was handed to the Court.)

30

The Court: I do not see any reason why a witness being shown that picture cannot say whether or not that is a correct representation of the hinge and bolt and of the hair sticking thereto that he saw when he went back with the defendant.

Q. Trooper, does this picture correctly represent the middle hinge of the front door of the Ford car of Exhibit P3, and the hair on the knob?

Mr. Hanstein: I object to that.

The Court: I will allow it.

(Exception noted for defendant.)

10

A. Yes, sir.

Mr. Gaskill: I offer it.

The Court: It is admitted.

(Exception noted for defendant.)

20

(The photograph was marked Exhibit P4.)

Q. Did you notice the color of the hair of the boy?

A. Yes, sir.

Q. What color was it?

A. Red.

Q. Light or dark?

A. Dark. Dark red.

Q. You noticed that as you were taking him to the hospital?

30

A. Yes, sir. Also in the doctor's office.

Q. Did you notice the color of the hair on the hinge of the door shown in P4?

A. Yes, sir.

Q. Did or did not that hair resemble the hair of Edward Klein?

A. Yes, sir.

By the Court:

Q. When Mr. Frank told you that he heard a
10 bump and that he had struck something, did he say anything with reference to where on the road he had felt that bump?

A. He couldn't say the exact location. He said it was somewhere up towards Egg Harbor somewhere before he stopped.

Q. Before he stopped?

A. Before he had made the stop, near Egg Harbor.

Q. That is, he heard the bump before he stopped?

20 A. He heard the bump and then he had stopped by a gas station. He told me he had stopped at a gas station.

By Mr. Gaskill:

Q. Mr. Beylon, on your return, where you found the body of the boy, what was the lighting condition at that place?

A. It was very good.

30

Mr. Hanstein: I object to that.

The Court: Yes.

Q. Just tell the conditions.

The Court: What lights were lit, if any.

A. There were lights lit at the stand and you could see for a distance around the vicinity of the stand.

Q. Was the boy's body in the vicinity of the stand?

A. Yes, sir.

10

Q. Do you remember what color suit he had on?

A. I wouldn't swear to it, but I ——

The Court: Never mind, then.

Cross-examination.

By Mr. Hanstein:

Q. That night there was a great deal of traffic 20
coming up from Atlantic City, you say?

A. The traffic was dying down at that time, but there was traffic coming up.

Q. The only reason you have for saying that this hair on the hinge was human hair was merely your own personal opinion? There was never any analysis made of it, was there?

A. No analysis made.

By the Court:

30

Q. You say that as you were coming down the road towards Atlantic City you passed a Ford and a man walking along the road?

A. Yes, sir.

Q. Did you at any time thereafter that night see

a Ford which you could recognize as being the Ford that you had passed going down the road?

A. It looked somewhat like it. A Ford sedan, an old Ford sedan.

By Mr. Hanstein:

10 Q. Of course, you see plenty of old Ford sedans on that road?

A. You see, we usually when we are riding along there, look mostly all the cars over. We try to look them over, especially when you are following them, following the cars.

Q. Of the cars on that road I guess the majority are Fords, aren't they?

A. Well, I wouldn't say.

Q. You used to see a great many Fords?

20 A. You see a great many of them.

Q. They all look alike, pretty much, don't they?

A. Yes, but they are not all old, very old.

Q. All the old ones look alike, don't they?

A. Yes, all the old ones look alike.

RICHARD MISCHLICH, sworn.

30 Direct examination.

By Mr. Gaskill:

Q. Mr. Mischlich, where do you live?

A. Egg Harbor City.

Q. How long have you lived there?

A. 25 years.

Q. What is your profession?

A. Attorney at law.

Q. Of New Jersey?

A. Yes, sir.

Q. On August 5th, 1928, did you see the defendant, Joseph Frank?

A. I did.

10

Q. Where did you see him?

A. In Magistrate Mischlich's office.

Q. In Egg Harbor City?

A. Right.

Q. Did you have a conversation with him concerning the happening of an accident at Cologne that night?

A. We were all talking to him there in the office. It wasn't just a conversation with me. I overheard the conversation, also, with the judge.

20

Q. Will you tell the Court and jury what Mr. Frank said about the happening of an accident?

A. At the time I was there he said that he had been driving all day and he was tired and the constant glare of headlights had made him quite tired and at times blinded him. Then he was asked whether he didn't feel a bump around this —

Mr. Hanstein: I object to anything somebody asked him.

30

The Court: I will permit it.

(Exception noted for defendant.)

The Court: I understand he made a reply to the question, didn't he?

A. Yes. He was asked whether he didn't feel a bump somewhere around the vicinity where this boy was, and he said he had felt what he called bumps all the way down when he got off the concrete onto the gravel shoulder, and when he would go back onto the concrete if it was raised he would feel sort of a bump and he said around this gas station, just
10 before he got to it, he felt a bump and he pulled into the gas station and stopped there.

Q. Did he say what rate of speed he was going down the pike?

A. Yes. About 35 miles an hour.

Q. Did he say anything about his operation of the automobile at the time of the bump?

Mr. Hanstein: I object to that. It is leading. He has asked the witness to repeat the conversation.
20

The Court: I do not think that is leading. I will permit it.

(Exception noted for defendant.)

A. He said that he had been talking to the child all the way down.

Q. Did he say anything about whether or not he
30 was talking at the time he felt the bump?

Mr. Hanstein: I object to that.

The Court: I think this witness is qualified to give the whole conversation.

Mr. Gaskill: I will withdraw that question.

Q. Mr. Mischlich, won't you tell the Court and jury any other conversation that Mr. Frank had that night about this accident?

A. Mr. Frank was asked whether he wasn't looking —

10

Mr. Hanstein: I will permit it.

Mr. Hanstein: I ask for an exception and ask that it be stricken.

(Exception noted for defendant.)

The Court: You cannot get it stricken yet. It is not in.

20

A. Mr. Frank was asked whether he hadn't been looking ahead and he said that all the way down he had been at times talking to the child and around this point he had been talking to the child, at the point of the accident, and he was also asked whether or not he saw the piece of scalp or hair on the hinge of the car and he said that he did, the trooper pointed it out to him.

Q. Was there any other conversation that you remember?

30

A. Not that I recall.

(No cross-examination.)

STEPHEN ATKINSON, sworn.

Direct examination.

By Mr. Gaskill:

10 Q. Mr. Atkinson, on August 5th, 1928, where were you employed?

A. New Jersey State Police.

Q. Where were you stationed?

A. Absecon.

Q. Directing your attention to about 10:30 in the evening of that day, were you given orders to stop a Ford automobile?

A. I was.

20 Q. What was the description of the Ford automobile you were to stop?

Mr. Hanstein: I object to that.

The Court: I do not see how that is competent. It seems to me all he may do is describe the automobile he stopped and the person who gave him the description of the automobile, if one was given, may testify to the description of the automobile that he saw, and in that way the jury has before it whether
30 or not he stopped that automobile.

(Mr. Gaskill handed a paper to Mr. Hanstein.)

Mr. Hanstein: Is all the purpose of this to show that this trooper stopped a Ford car driven by this defendant?

Mr. Gaskill: No, it goes further than that. It tends to show that Trooper Beylon communicated the description of the car to Officer Woodward in the Absecon Station, Woodward being in charge of the station, and Woodward gave the information to this trooper, who apprehended the automobile.

Mr. Hanstein: Apprehended an automobile driven 10
by the defendant?

Mr. Gaskill: Yes.

Mr. Hanstein: Well, that is all right.

Mr. Gaskill: May I read this into the record?

Mr. Hanstein: Don't misunderstand me on this.
I am not conceding it is the same car by any means. 20

Mr. Gaskill: "It is stipulated and agreed between counsel for the plaintiff and the defendant that if Norry Woodward were present he would testify as follows, and that the following testimony of Norry Woodward be entered into the record of this case and have the same force and effect as if the said Norry Woodward were present in court and had been sworn to testify" —

30

Mr. Hanstein: No. What I said to you was that I would save you the trouble of bringing the witness and admit that if somebody were present, whoever it is, he would testify as follows.

Mr. Gaskill: That is all I mean to say now.

“That on August 5th, 1928, Norry Woodward was a member of the New Jersey State Police, stationed at Absecon, New Jersey; that at or about ten o’clock P. M. of the said day he was in charge of said station and received a telephone message from Trooper M. J. Beylon of the New Jersey State Police, to hold for investigation a Ford sedan driven
10 by an elderly man, accompanied by a girl child of about eleven or twelve years of age, and that the Ford sedan had a number of packages on the rear seat; that said Norry Woodward assigned Trooper Atkinson to the duty of locating the said automobile.”

Q. Are you the Trooper Atkinson who was assigned to the duty of locating the automobile?

A. I am.

20 Q. Did you get a description of the automobile from Norry Woodward?

A. I did.

Q. What was the description of the automobile you were told to stop?

Mr. Hanstein: I object to that.

The Court: You have already got into the record what Mr. Woodward told Mr. Atkinson.

30

Q. As a result of your assignment, did you stop an automobile?

A. I did.

Q. What kind of an automobile did you stop?

A. Model T Ford sedan.

Q. Where did you stop it?

A. The intersection of the Shore Road and the Absecon Boulevard in Absecon.

Q. Who was driving the automobile?

A. Mr. Frank.

Q. The defendant?

A. This gentleman over here.

Q. Who was accompanying him?

A. A small girl.

10

Q. About how old?

A. Ten years.

Q. What was the condition inside the automobile?

A. Packages covered the near seat. Mr. Frank was driving and his little girl was sitting on the right-hand side of the car alongside of him on the front seat.

Q. Did you make an inspection of the automobile?

A. I did.

Q. Won't you tell the jury the condition in which 20 you found it?

A. I found the front fender on the right-hand side with brush marks on it, and the front fender was also bent up slightly on the right-hand side; the engine hood had marks of possibly a hand passing over it; there was a small dent in the right-hand cowl, close to the right front door. The hinge of the door wasn't damaged, but underneath the bolt that holds the hinge there was a small piece of scalp, with a piece of reddish, a few strands of reddish, 30 dark brown hair attached to it.

Q. I show you P3, and ask you if that is a picture of the automobile which you have just described?

A. That is a representation of the automobile.

Q. I show you P4, and ask you if you recognize

that picture as to the position of the hair on the hinge of the door?

A. It is exactly the same.

Q. Mr. Atkinson, were you given any instructions from Norry Woodward to locate a Cadillac car that night?

10 A. To the best of my recollection I received no such orders.

Cross-examination.

By Mr. Hanstein:

Q. Didn't you tell Mr. Frank that you were told to look for a Ford and a Cadillac that was traveling at a high rate of speed?

20 A. To the best of my recollection, I didn't.

Q. You think you might have, but don't recall it now?

A. I don't think I might have. I think I might not have, but I don't remember.

CHARLES MATEER, recalled.

30 Direct examination.

By Mr. Gaskill:

Q. Mr. Mateer, the Ford automobile that you saw as you came out to the front stoop stopped, you say, about 50 feet from your house?

A. Yes, sir.

Q. Then where did that automobile go?

A. On up into Mr. Sauer's service station.

Q. And you went to Mr. Sauer's service station in company with Trooper Beylon, did you not?

A. Yes, sir.

Q. Did you hear Mr. Sauer describe the driver and the occupants and the condition of the car to Trooper Beylon?

A. Yes, sir.

Mr. Hanstein: I object to that. I do not think we are here to meet a case of what somebody may have said.

The Court: I sustain the objection.

Mr. Hanstein: I would like the answer stricken. 20

The Court: Strike the answer.

(No cross-examination.)

Mr. Gaskill: So far as the death of the boy is concerned I am about ready to rest my case. May we have it entered on the record that Edward Klein died as the result of injuries received that night?

30

Mr. Hanstein: I do not make any point of it.

The Court: I think there is no doubt about it.

(The following motion was made in Chambers):

10

MOTION TO NON-SUIT.

Mr. Hanstein: If your Honor please, I move for a non-suit on the ground that the plaintiff has failed to make out a case, the plaintiff has failed to prove that his intestate was killed through any action of the defendant; on the further ground that there is no proof of negligence on the part of the defendant.

20

The Court: I refuse the motion to non-suit.

(Exception noted for defendant.)

(Recess taken until 1:30 P. M.)

(Afternoon session 1:30 P. M.)

30

DEFENDANT'S TESTIMONY.

JOSEPH FRANK, SWORN.

Direct examination.

By Mr. Hanstein:

10

Q. Mr. Frank, you are the defendant in this suit, aren't you?

A. Yes.

Q. Where do you live?

A. I live in Philadelphia.

Q. Do you remember the night of August 5th, 1928?

A. I do.

20

Q. At that time were you traveling on the White Horse Pike?

A. I did.

Q. What kind of a car were you driving?

A. Ford sedan.

Q. What type car was that?

A. That was a 1924 model.

Q. Model T?

A. Model T Ford, yes, sir.

Q. Who was with you at the time?

30

A. My little grandchild.

Q. How old was she?

A. About ten and a half years.

Q. Which side of the road were you traveling on?

A. On the right-hand side.

Q. What time did you leave Philadelphia?

A. A little bit after six o'clock.

Q. You left your home a little after six?

A. Yes.

Q. Did you encounter much traffic in Philadelphia?

A. Oh, yes. Where I live—I live at 5226 Park-side Avenue, and I have got to drive all the way down to the bridge. A lot of traffic down there.

10 Q. And you crossed the bridge?

A. Yes.

Q. And traveled from the bridge down towards Atlantic City?

A. Towards Atlantic City.

Q. Did you observe much traffic coming against you as you came down?

A. Very much.

Q. Do you recall as you got down towards the service station that is owned by Mr. Sauer?

20 A. I do.

Q. How fast were you going about that time?

A. I never drive any more than between 25 and 30 miles an hour.

Q. Would you say you were not going more than 30 miles an hour?

A. No. I never did drive any faster than between 25 and 30 miles.

Q. As you got near this service station do you recall hearing anything unusual?

30 A. Yes.

Q. What was it that you heard?

A. It was just like—on the right-hand side just like something like a bump, and I went to work and drove up to the gasoline station and stopped there, and I walked out of the car and I examined

my wheels to see there was nothing wrong, and I asked the man to ——

Q. Just a minute. To what did you attribute that bump?

A. Well, I really thought I had a flat tire.

Q. Did you see anybody walking on the road?

A. No, sir, I did not.

Q. At the time of that bump how fast were you 10 going?

A. About 25 miles.

Q. Were you looking ahead of you?

A. Positively.

Q. Were you riding on the hard surface at that time or on the shoulder?

A. On the hard surface, of course.

Q. You were on the hard surface?

A. Yes, sir.

Q. Were you able to see ahead of you?

20

A. Why, of course, I did.

Q. Did you have your lights lit?

A. Yes, sir.

Q. When you got out at this service station, did you know that you had hit anyone?

A. No, sir.

Q. You did not?

A. No, sir.

Q. You say you looked at your tires?

A. See what?

30

Q. You say you got out and looked at your tires?

A. Yes, sir, I did.

Q. Were they all right?

A. Yes, sir.

Q. Did you have the man at the service station do something to your car?

A. Yes, sir.

Q. What did you have him do?

A. I asked him to see my oil, and he tested my oil and he says, "The oil is O. K."

Q. And you didn't put any oil in ?

A. Then I asked my little grandchild ——

10 Mr. Gaskill: I object to that.

Q. You can't tell about these conversations. Then did you get something to drink?

A. Yes, sir, I got a bottle of soda water.

Q. Did you buy it from the man in the service station?

A. The gentleman took me in his store and opened up a little ice box and got out a bottle of soda water, and I talked to him about the heavy traffic out on
20 this road here.

Q. You can't tell us what you said. You bought a bottle of soda water?

A. Yes, sir.

Q. Paid him for it?

A. I certainly did.

Q. Did you buy one for your granddaughter?

A. No, she didn't want any.

Q. Did you drink it there?

A. Yes, sir.

30 Q. Did you get in your car then and drive off?

A. Drove off.

Q. Before you heard this bump on the road did you put on your brakes?

A. Not as I know. I only put my brakes gently on when I stopped my car right near the gasoline station.

Q. Before this bump, Mr. Mateer said he heard the squeaking of brakes and then a thud. Did you put on your brakes before you heard that bump?

A. No.

Q. You did not?

A. No, sir.

Q. What kind of brakes did your car have?

A. Well, a Model T Ford generally has those oil 10 brakes, you know. They are all soaked in oil. They never squeak.

Q. Where do these brakes operate?

A. I really couldn't explain it very much, how they operate, but I know you have got to always keep oil in them.

Q. And they don't squeak?

A. No, sir.

Q. They are not brakes that work on the wheel of the car, are they?

20

A. No, sir.

Q. Do you have any idea how long you stayed at the service station?

A. Well, just as soon as I had my oil tested and drank the bottle of soda water and I talked to the man about maybe a minute or two and then I went right on.

Q. And drove down towards Absecon?

A. Towards Absecon.

Q. Did you know that you had hit somebody?

30

A. No, sir.

Q. Do you know now that you hit anybody?

A. I don't know. That is what they say, I hit somebody, but I don't know.

Q. Did the front part of your car come into collision with anybody?

A. No, sir.

Q. As you went on, how fast did you drive from the service station down to Absecon?

A. About 25 miles an hour, something like that.

Q. When you got there, did an officer approach you?

A. Yes, sir.

10 Q. One of the State troopers?

A. Yes, sir.

Q. That is one of the officers who was on the witness stand, is it not?

A. Yes, the last one here.

Q. Mr. Atkinson?

A. I don't know his name, but that was the gentleman.

Q. The last one of the State troopers?

A. The short man.

20 Q. When he stopped you, did he tell you that he had received orders to look for a Ford car that had some bundles in the back, and also for a Cadillac car?

A. That's exactly what he said.

Q. He told you that?

A. Yes, sir.

Q. That he was looking for both of those cars?

A. Yes, sir.

Q. Did he tell you why he was looking for them?

30 A. Said that one of the cars hit a man.

Q. Did he examine your car?

A. He did, yes, sir.

Q. Were you there when he did it?

A. Yes. When he examined it?

Q. Yes.

A. I was sitting in the car and he was right in front of me with the flash-light.

Q. Where did he conduct this examination?

A. Right in the front of my car.

Q. You were right there?

A. I was sitting in the car, yes, sir.

Q. Did he go back to the barracks?

A. Yes, he told me to turn around.

10

Q. And you went back to the station?

A. I followed him right up to the barracks.

Q. And is that where the examination took place?

A. If you will permit me to tell you, then I will tell you exactly what happened.

Mr. Gaskill: I object.

Q. I want to know if the examination took place as soon as he stopped you or after you went back 20 to the station.

A. He examined the car when he stopped me, and then he told me to turn around and follow him, and I did follow him up to his barracks there, or the station house, whatever you call it, and then I parked my car opposite the station house, on the right-hand side, and he took a search-light and another man and they started to examine the car from every place around, and then he says to me, "I was wrong, your fender didn't hit the car; only 30 the side hinge of the right-hand side hit the man."

Q. Somebody has testified that the right-hand fender of your car was bent up. Is that a picture of your car?

A. Yes, that is a picture of the car, but you don't see that fender bent up there.

Q. I am going to ask you.

A. You can see that yourself. He acknowledged

Mr. Gaskill: Just a minute.

Q. Was the front fender of your car bent?

10

A. It was.

Q. Which way was it bent?

A. It was just a hit here, which I had my car parked —

The Court: No.

Q. There was a bend in the front fender?

A. Yes, sir.

Q. Was it bent up?

A. No, it was just a little bent here.

20

Q. Do you know how that dent got into your car?

A. Yes, sir, I do.

Q. How did it get into your car?

A. I parked in Kingston, New York, and a truck was alongside of me, and the truck was backing out and he touched my fender a little bit and that is what bent it.

Q. Do you remember when that happened?

A. Positively I do.

Q. Was that before the accident?

30

A. Before this accident. It was about two or three weeks before it.

Q. Do you say that there was any dent in your car that came from your running into this man who was killed on the pike that day?

A. No, there was no dent except he said this hinge hit the man.

The Court: Not what he said.

Q. There were no dents in your car?

A. No, sir.

Q. Now, this picture, P4, is supposed to be a picture of a hinge of your car, showing some hair. Which hinge of your car is that?

A. Well, I really don't know. I believe—they 10 told me the middle hinge of my car hit a man. That is what they told me.

Q. No other part of your car —

A. No, sir.

Q. —showed any signs of having hit that man?

A. No.

Q. You told us about being stopped by the trooper. Then they examined your car and then you went back to this service station of Mr. Sauer, didn't you? 20

A. Well, I will tell you what I told the trooper

Q. You went back to Sauer's service station?

A. Yes, the trooper took me back. He wanted to find out if I told him the truth.

The Court: No.

Q. You were taken from there to the office of the magistrate in Egg Harbor? 30

A. Yes.

Q. Is that right?

A. Yes, sir.

Q. Did you say in Magistrate Mischlich's office that you had been driving all day and that you were tired?

A. No, I wasn't driving all day.

Q. Did you say that?

A. I drove from ——

Q. No.

A. I didn't say anything like that.

Q. You didn't say anything like it?

A. No.

10 Q. Were you tired at the time you heard this bump?

A. I was not tired.

Q. What were you coming to Atlantic City for?

Mr. Gaskill: I object.

The Court: I will permit it.

20 A. I had my two daughters who were living in Atlantic City during the summer with their children, and they invited me to stay with them a few days, and naturally I brought little gifts ——

The Court: You were coming down to visit your daughters.

A. Yes.

Q. Is that what you mean?

A. Yes.

30 Q. You were coming to Atlantic City to visit your daughters?

A. To stay with my daughters.

Q. And these bundles in the back of your car, what were they?

A. I bought little gifts for my ——

Mr. Gaskill: I object.

The Court: I don't see that it makes any difference what they were.

Q. Did you say in Magistrate Mischlich's office that the headlights blinded you?

A. No, I didn't say anything of the kind.

Q. Did you say that at the time you heard this bump you were talking to your granddaughter?

A. No, I did not.

Q. Well, at the time you heard this bump were you looking ahead of you?

A. Of course, I did.

Q. Driving straight down the road?

A. Yes, sir.

Q. At 25 or 30 miles an hour?

A. That is it exactly.

Q. What lights did you have lit on your car? 20

A. Well, there is generally—lights what the Ford generally has.

Q. What are they? Headlights?

A. Yes, headlights, sure.

Q. When the trooper told you that you had struck someone, what did you say?

A. I said, "Not as I know." I told him, "It is impossible."

Q. And you say there was one small bump on the front of your fender? 30

A. Yes, sir, that is right.

Q. And you know that that came from —

A. From a truck —

Mr. Gaskill: He has gone over that in detail.

The Court: Yes.

Cross-examination.

By Mr. Gaskill:

Q. Mr. Frank, on August 5th you had been in Washington, D. C., hadn't you?

A. In what?

10 Q. In Washington, D. C.?

A. If I have ever been in Washington, D. C.?

Q. Yes.

The Court: No, you didn't ask him that.

Q. On August 5th?

A. No, sir.

Q. Had you been in Chester?

A. No, sir.

20 Q. Had you been in any other place other than Philadelphia?

A. In the afternoon I took my other two grandchildren out for a little drive.

Q. Where did you go?

A. Well, just around Philadelphia.

Q. You had been invited, you say, to come to Atlantic City?

A. Yes, sir.

30 Q. Was there any reason why you delayed it until six P. M. to come down on Sunday?

A. Well, I will tell you the day was awful hot and my daughter at home in Philadelphia says, "Dad, you had better stay here and let us have supper here, then it will be a little cooler for you to drive at night."

Q. You had been down the White Horse Pike before?

A. Yes, sir, many times.

Q. You preferred to drive down with the stream of cars coming towards Philadelphia, rather than come down in the hot day?

Mr. Hanstein: I object to that. I think that is 10 irrelevant and immaterial.

The Court: I will permit it.

(Exception noted for defendant.)

(The question was repeated.)

A. Well, the stream of cars has got nothing to do with my driving. I drive on my side and the 20 stream of cars drive on their side.

Q. Isn't it a fact that you had been driving your automobile all day Sunday?

A. Not the whole day.

Q. How much of the day had you been driving?

A. I took my children out for a ride and it was about two o'clock, and we drive about an hour and a half or so and then we were home and I had my supper with my daughter, and about a little after 30 six o'clock I left for Atlantic City.

Q. Where did you drive the children in Philadelphia?

A. Just around Broad Street and Fairmount Park. There is a lot of places in Philadelphia to drive.

Q. And you now say that you hadn't been in Washington, D. C.?

A. No, sir.

Q. And hadn't been in Chester, Pennsylvania?

A. No, sir.

Q. And no other city other than Philadelphia?

A. Absolutely, sir.

10 Q. How long had you driven this Ford car?

A. Well, I had driven it about four years, I believe.

Q. Did you ever put any oil on the brakes in the four years you had it?

A. Well, they always put the oil in where the brakes are, I suppose.

Q. What part of the car do they oil the brakes?

A. I don't know really. You can ask a mechanic and he will tell you more about it than I can.

20 Q. You say in this model Ford the brakes never screeched?

A. No.

Q. On account of the oil being on the brakes?

A. Yes, sir.

Q. Don't you know, as a matter of fact, that you don't put oil on any brakes?

A. Not on these shifting gear cars they don't use oil, but the Ford car always must have a lot of oil.

30 Q. Mr. Frank, don't you know that in order for a brake to hold it has to be dry and that oil makes it slip?

A. As far as I know I had my brakes relined, and when the mechanic took them out they have been very much soaked in oil. That is all I know about it.

Q. So you drive a car with oiled brakes?

A. Well, I don't know. I suppose so. The oil was there.

Q. Did you have a speedometer on the car?

A. No, sir.

Q. Had you ever driven any car other than a Ford?

A. No, sir.

10

Q. How do you now say your speed was 25 or 30 miles an hour?

A. Well, when I was driving and when they took me down to the station house one of them asked me how fast I was driving, one of those officers, and I told him I drive about 25 or 30 miles an hour—I never did drive any faster—about. I didn't tell him exactly.

Q. Just a minute.

20

Mr. Hanstein: Let him answer.

Mr. Gaskill: That is not responsive to the question.

The Court: The conversation you had with the officers is not competent in reply. The question is how you of your own knowledge knew that you were going 25 or 30 miles an hour.

30

A. Your Honor, in this particular case I can only say that the officer followed me about four miles and he stated the man was driving about 25 or 30 miles an hour, that tall officer that was here on the witness stand. That is all I can say. He followed me.

Q. That is the only estimate that you had as to

the rate of speed you were going, what somebody told you?

A. Yes, sir. He followed me.

Q. And you didn't know this night of the accident how fast you were going until somebody else told you, did you?

10 A. Well, I never drove any faster, too fast, especially this little car. You could never drive it very fast.

Q. I mean with no speedometer on your car in all the four years you were never able to be sure of how fast you were driving your car? Only a guess?

A. That is all. I never had a speedometer.

Q. You might have been going 35 miles an hour, mightn't you?

A. I don't think so.

Q. How do you arrive at that conclusion?

20 A. Because when a man drives a car he can easy tell what kind of speed he is making.

Q. He can?

A. Yes, sir, even if he hasn't got a speedometer.

Q. Then that is the way you arrived at your conclusion? You guessed at it?

A. Naturally I couldn't swear to it, because I didn't have no speedometer, but I really believe and think that I didn't drive any more than about 25 or 30 miles an hour. Never drove any more.

30 Q. How far ahead could you see with your headlights?

A. Well, I saw about—I don't know. About 25 or 30 feet ahead.

Q. About 25 or 30 feet ahead? A Ford of that model didn't have very good headlights, did it?

A. My lights were pretty fair.

Q. So you could see about 25 or 30 feet ahead?

A. Yes, sir.

Q. Where you felt this bump—are you familiar with this?

A. No, not very much.

Q. You know this service station, don't you?

A. Yes.

Q. This is within 100 feet, isn't it? This is with- 10
in 100 feet of it, isn't it?

A. I really couldn't find the place now if I wanted to find it.

Q. Where you felt this bump were there any lights?

A. Not as I saw any lights.

Q. Weren't you observing conditions along the road?

A. Yes, sir, I did.

Q. Then if there were lights there you would have 20
seen them, wouldn't you?

A. I saw all the lights in front of me.

Q. You did?

A. Yes.

Q. You are pretty sure, are you, that your lights give you a vision of about 25 to 30 feet ahead of you?

A. Something like that.

Q. And at the time you felt this bump you think you were going about 30 miles an hour? 30

A. Well, I believe I was going 25 or 30 miles an hour, something like that.

Q. Now, Mr. Frank, going at 25 miles an hour how quickly could you stop your automobile by the application of brakes?

A. I really wouldn't know what to answer.

Q. You couldn't stop it under 50 feet, could you?

A. Well, I know when I come to the gasoline station I stopped my car.

Q. I mean you are going along the road on the White Horse Pike, we will say, on the night this accident took place, at 25 miles an hour. Now, you don't know how many feet it will require you to stop
10 your car?

A. Well, I really couldn't say that. I don't know. I don't know how fast I could stop that car. I know that much, when I heard that bump and when you throw your feet off from your gas, your car generally slacks up itself immediately.

Q. Is that what you did? Did you slack up then?

A. When I heard that bump, naturally I slacked up, and I drove up slowly to the station down there and I stopped right in front of that gasoline station.
20 Q. What I mean is on the application of brakes, you are going 25 miles an hour, how quickly or in how many feet could you stop your car?

A. Well, I don't know. I told you that I don't know that, but I believe that I could stop the car mighty quick, you know. It just depends on what kind of brakes you have. If you have got good brakes, you can stop your car much quicker.

Q. You did have good brakes?

A. I did certainly have.

30 Q. But you don't know within how many feet you could have stopped your car, going at 25 miles an hour?

A. I couldn't say that.

Q. Might it have been 75 feet?

A. I couldn't say that. Couldn't say how quick I

could stop the car when I am going at the rate of 25 or 30 miles an hour.

Q. You can't say whether you could stop it within 25 or 30 feet?

The Court: I think you have covered that pretty well.

10

A. I really don't know. If I would know I would tell you.

Q. You had been driving, beginning about six o'clock?

A. No, I left Philadelphia past six o'clock.

Q. Half-past six?

A. No, past six o'clock when I left my home.

Q. What time did you arrive in Absecon?

A. Well, I believe it was around about nine-thirty or maybe a little later yet.

20

Q. Wasn't it ten-thirty?

A. No, not ten-thirty. It was around ten o'clock. I couldn't exactly say.

Q. Do you know how many miles it is from —

A. It must be about 40 miles, I guess.

Mr. Hanstein: From where to where?

A. From Philadelphia.

Q. To Absecon?

30

A. To Absecon.

Q. Did you make any other stops other than at this service station?

A. Yes.

Q. Where?

A. I stopped—my little grandchild told me she

wanted a sandwich and a glass of milk, and I stopped in Berlin.

Q. How long did you stop there?

A. I don't know. It must be about half an hour or so.

Q. Then it took you approximately three hours and a half to come from Philadelphia to Absecon?

10 A. Yes.

Q. You were not going 25 to 30 miles an hour all the way down, were you?

A. Well, I understand you —

Q. No. I am asking you the question.

A. Well, I want to answer that question the way I lose my time.

Q. You won't answer it?

A. I want to answer it. When you leave Philadelphia, the congestion on Sunday you lose a lot of
20 time.

Mr. Gaskill: I object to this.

The Court: The question is whether you were going 25 or 30 miles an hour all the time?

A. Yes, from the other side of Camden I was making that.

30 Q. Did you ever get over on the shoulder of the road?

A. Not as I know.

Q. Was there a stream of automobile lights from Atlantic City?

A. Yes.

Q. Did the headlights blind you at all?

A. Well, some of them do and some of them don't.

Q. Well, did they blind you this night?

A. Some of them do blind and some of them don't, but I kept myself pretty good on the side, because I drive a car for a good many years.

Q. Were you blinded by lights in the vicinity of where this accident happened? 10

A. No. At this particular place traffic was kind of a little lighter. The way the officer said, that traffic was much lighter.

Q. But there had been heavy traffic down?

A. Yes.

Q. It was the 5th of August and on a Sunday?

A. Yes.

Q. And there was a tremendous number of cars coming from Atlantic City?

A. Yes, sir, a lot of cars. 20

Q. Where is your granddaughter?

A. My little grandchild? She is home in Philadelphia.

Q. Will you show me on P3 this bump that you referred to that you received in Kingston?

A. That was on this fender here.

Q. The picture doesn't show it, does it?

A. No, but there was that bump on that fender.

Q. There was some human hair on your car, wasn't there? 30

A. Well, I didn't see that.

Q. You didn't see that?

A. No, sir.

Q. Do you mean to tell me, Mr. Frank, with the trooper telling you there was human hair on the

hinge of your car, that you didn't look to see whether it was there or not?

A. Of course, I couldn't see it, because they wouldn't let me out of the station house, but they examined the car outside. I couldn't go out of the station house to see the car. Never seen my car until three weeks later.

10 Q. Down at Absecon where he first stopped you, didn't he tell you there was hair on your car?

A. No, sir, he didn't. He told me he thinks my fender hit a man and I told him that my fender did not hit a man.

Mr. Gaskill: I ask the answer be stricken.

The Court: The answer was, "He did not."

20 Q. Did you ask to see the car after —

A. No, sir.

Q. You did not?

A. No, sir. He examined the car twice.

Q. Just a minute. Did you get out of the car when he started to examine it the first time?

A. No, sir.

Q. When he examined it the second time where were you?

A. I was in the station house.

30 Q. Then how do you know he was examining the car?

A. They went out. About four or five troopers went out there.

Q. You don't know that they were examining the car, if you didn't go out there?

A. When he came back he said, "Your fender

didn't hit a man, but the middle hinge of your car hit a man." He found hair there, he says, but I never saw it.

Q. Then you didn't demand to go out and see it for yourself, did you?

A. I couldn't go out. They wouldn't let me out.

Q. They took you to Egg Harbor, didn't they?

A. I was inside. I was arrested.

10

Q. So then you never saw the hair on your hinge?

A. I never did see it.

Q. Was this a light bump or a heavy bump near this service station that you felt?

A. Well, it was not heavy. It came from the right-hand side.

Q. The right-hand side?

A. That is the reason I thought my tire was flat.

Q. Were you on the extreme right-hand side of the road then?

20

A. Naturally I was keeping myself on the right-hand side.

Q. Right next to the shoulder of the road?

A. That's right.

Q. If there had been a man there walking along the shoulder of the road you would have seen him, wouldn't you?

A. I think I would.

Q. If you had been looking ahead?

A. I did look ahead.

30

Q. All the time?

A. You have got to look ahead when you have got such traffic in front of you.

Q. I don't care what you have got to do. I ask you what you did.

A. I always look ahead.

Q. You never look to the side when you are driving an automobile?

A. Well, mostly you look to the left-hand side who is approaching you and who is coming towards you.

Q. Did you talk to the little girl?

A. Well, I certainly did talk to the girl.

10 Q. Just about the time this bump came near this service station, you were talking to her?

A. No, sir, I don't remember that I was, not particular.

Q. You won't say you didn't?

A. I won't say I didn't talk to her. I drive with the child for three hours or three and a half hours. I surely did talk to her.

Q. You were not tired?

A. No, sir, not a bit.

20 Q. Did you notice a bump on the cowl part of your car?

A. No, not as I know of.

Q. When you got the car back wasn't there a bump there?

A. No, sir.

Q. Will you examine this picture and tell me whether or not there isn't a bump on the cowl of your car, right there?

A. Where do you see a bump there?

30 Q. I am asking you if you can see any indenture on your car on P3?

A. I couldn't see anything.

Q. Do you still have the car?

A. No.

Q. And you never saw a dent on the cowl part of that car?

A. Not as I know of.

Q. Either before the accident or after the accident?

A. I really don't remember.

Q. Is there anything else about this bump, this talk with the little girl, that you don't remember?

A. I don't get you right.

Q. You say it has been so long since the accident. 10
Isn't it a fact that you might have forgotten about talking with the little girl just at the time the bump happened?

A. You asked me a question if I remember the time that bump happened, if at that particular time I was talking to my little grandchild, and I told you I don't remember that, but I was talking to my grandchild all the way up, and I was driving with her, if you ask me a question if I talked to her or she talked to me. 20

Q. You thought when you felt this bump that you had had a blowout?

A. That's what I kind of thought.

Q. Did your car steer badly after that?

A. My car wasn't steering badly, no, sir.

Q. I mean after the bump?

A. No.

Q. Nothing was interfering with the operation of the car?

A. No, not at all. 30

Q. Did you feel any other bump between Camden and the service station, other than this one just about the service station?

A. No.

Q. You didn't go back to see what you had run over, did you, or bumped against?

A. I didn't think that I run over anything.

Q. When you discovered that your tire hadn't blown out, you didn't go back then to investigate, did you?

A. Well, if my car and everything was ——

The Court: Did you go back to investigate?

10

A. No, I did not.

Q. You told Trooper Beylon, didn't you, that you thought that you had run over something?

A. No, sir, I didn't say that.

Q. You didn't say that?

A. I just said that I felt a bump, and I drove up to the gasoline station and I tested my oil, as I stated in here, and he says, "I will find out if it is true," and he drove back and he stopped at that
20 same gasoline station and he called the gentleman out, and he said, "Do you recollect this man?" and he said, "Yes, sir, he came in here and I tested his oil and he bought a bottle of soda water, and that is all I know about him."

Q. I mean after feeling the bump and finding your car was in good condition, you didn't then go back to find out what you had run into?

A. Well, I didn't have such a tremendous bump, you know, to injure my car. Just I heard like some-
30 thing ——

The Court: He said he did not go back.

A. I didn't go back there.

Re-direct examination.

By Mr. Hanstein:

Q. Why did you want to test your oil?

A. Well, I had once burnt out my—what do you call it?

The Court: Bearings?

10

A. Bearings, and the mechanic told me that I shall —

Mr. Gaskill: I object to that.

Q. You had once burnt out a bearing?

A. Yes.

Q. When you burned out your bearings, did that 20 make any noise?

A. Yes.

Q. What kind of noise did that make?

A. Well, it started to knock.

Q. Was that anything like the bump you heard when you were driving along?

A. I couldn't say that. I knowed it was some kind of a bump and I thought the gasoline station was so close, and I drove up there and stopped there and I looked at my oil and looked at my tires. 30

Q. How many years have you been driving a car?

A. I have been driving a car for the last eleven or twelve years.

Q. Were you accustomed to driving it for long periods of time at a stretch?

A. Yes, sir.

Mr. Gaskill: I don't think this is proper.

The Court: I do not think it is rebuttal of anything.

Mr. Hanstein: He asked him if he was tired, and I asked him if he was accustomed to driving long distances.

10

The Court: I understood you on your direct examination to ask him whether he was tired and he said he was not. I do not think it is rebuttal.

Q. Did the trooper in Absecon tell you that there was any hair on the hinge of the car?

A. Yes. When he came in he says —

Mr. Gaskill: I object. That can be answered yes or no.

20

The Court: It may be answered yes or no. Did he tell you there was hair on the car?

A. Yes, sir.

Q. Where were you when he told you that?

A. I was inside, in the station house.

Q. In Absecon?

A. Absecon, inside, in the station house, and they examined the car outside and they came in, and they

30 says —

Q. Are you talking about Absecon or Egg Harbor?

A. I am talking about Absecon.

DEFENDANT RESTS.

TESTIMONY CLOSED.

(The following motion was made in Chambers):

MOTION TO DIRECT VERDICT
FOR DEFENDANT.

Mr. Hanstein: If your Honor please, I move for 10
the direction of the verdict for the defendant on the
ground that the complaint in this case charges that
the defendant operated his car at a high, reckless,
and unlawful rate of speed, and there is no proof of
that. It charges that he operated without warning
of an approach, and there is no proof whatever
that that contributed in any way to the accident.
Nor is there any proof that the speed of the car con-
tributed to the accident. It charges that the car was
operated without proper lights, and there is no proof 20
of that, or that the lights had anything to do with
the accident. That he operated without proper
brakes, and that has not been proved, nor is there
any proof that that had anything to do with the ac-
cident. It further charges, "and carelessly and
recklessly, without regard to the rights of the plain-
tiff's intestate, who was lawfully on the highway
aforesaid, all of which said divers acts of negligence
of the defendant aforesaid caused the injury from
which plaintiff's intestate died," and there is no 30
proof whatever that the car was operated carelessly,
recklessly, or without regard for the rights of the
plaintiff. In short, there is no proof whatever that
there was any negligence on the part of the defen-
dant, no proof whatever as to the manner of the
happening of this accident. Nothing under this com-

plaint by which the defendant could be held responsible for this accident.

The Court: The situation of the proof has not changed from the time I refused the motion for non-suit, and unless I was privileged to grant the motion for non-suit I would not be privileged to
10 grant the motion for a direction. I believed then that there was a jury question raised, and still believe that, and therefore, I will deny the motion and grant you an exception.

(Which exception is hereby noted.)

(The case was argued to the jury by counsel for the respective parties.)

20

30

COURT'S CHARGE TO THE JURY.

Sooy, J.:

Ladies and gentlemen of the jury: The person who brings the suit is termed the plaintiff. The person against whom the suit is brought is termed the defendant. When a plaintiff has what he or she conceives to be a cause of action, that plaintiff starts his suit by filing and issuing a summons and complaint. The complaint filed by the plaintiff sets forth in words the cause of action which the plaintiff thinks he has against the defendant, and the defendant must file an answer to that complaint, in which the defendant must set up his defenses to the complaint as filed. The controversy is determined on the pleadings so filed, and we lawyers call the controversy the issue. So today you have before you an issue joined between the plaintiff and the defendant, which issue you have to determine by your verdict. 10 20

You will have with you when you go out the pleadings that I have referred to as having been filed by the plaintiff and the defendant in this case, and you will notice that the plaintiff says that Edward Klein met his death by reason of negligence on the part of the defendant, and you will find that the plaintiff specifies various acts on the part of the defendant which the plaintiff says constituted negligence on the part of the defendant, and which the plaintiff says were the efficient cause of the collision between the automobile and the body of the deceased young man. 30

You have been sworn to return a verdict on the issue as joined between the plaintiff and the defendant, and return that verdict in strict accordance with the evidence which you have heard in this case, and it is obvious that you could not return a verdict in accordance with the evidence if you were basing that verdict on any sympathy that you might

10 feel either towards the plaintiff or towards the defendant. Sympathy is a fine quality in a person, and we all possess it to a greater or less degree, but if we allow sympathy to control our verdicts, our courts of law cease to function and the people generally cease to have confidence in them. To have such a condition obtained in a community would lead to nothing else than anarchy. So that it is highly important in this and in every other case that you hear that you put aside sympathy and look at

20 the cold facts as they are presented by the evidence, and return your verdict strictly in accordance therewith.

All lawyers know, and you will know before this term of court is over, and probably know now, that this plaintiff is not entitled to recover one cent in this case unless he proves by the greater weight of the believable evidence not only that this boy was killed, but that he was killed as the result of the negligence of the defendant. The plaintiff has the

30 burden of establishing by the greater weight of the believable evidence not only that the boy was killed, but that he was killed as the result of the negligence of the defendant, and of the particular act or acts of negligence alleged against the defendant in the complaint.

The mere fact that this automobile driven by the

defendant collided with this boy and the boy died as the result of that collision, standing alone, does not justify a finding of a verdict in favor of the plaintiff; but if, in addition to a finding of fact that this boy died as a result of injuries sustained by reason of that collision, you find that collision was caused and brought about by the defendant's negligence, then and then only you would be entitled to return a verdict against the defendant. 10

By the greater weight of the believable evidence the plaintiff must succeed, if he does succeed. What is the evidence in the case, as you see it, that would justify you in finding that the defendant was guilty of an act or the acts of negligence alleged against him? And what evidence is there in the case which would justify you in finding that that act or those acts of negligence were the efficient or producing cause of the injuries sustained by this boy? Under our system of law, the evidence, the facts in a case are solely for the jury. You are the sole judges, and it is not the duty of the Court in any wise to refer to them. You are the sole judges, and it is for you to pass upon the evidence in determining the two questions: First, was the boy hit by this car? And, secondly, was he hit by this car as the result of the negligence of the defendant? 20

The defendant says in his answer that he was not guilty of any of the acts of negligence alleged against him, and he says that even if you should find that he was guilty of any of the acts of negligence alleged against him, the plaintiff should not recover, because the boy himself was guilty of contributory negligence. That is a perfectly proper defense. It may seem inconsistent to you that a man should say, 30

"I am not guilty, but if I am guilty you cannot hold me," but it is a perfectly legitimate defense, one that the defendant had a right to plead and one that he has a right to ask you to consider.

10 The defendant says, "I was not guilty of negligence which caused this accident, but if I were, you are justified under the evidence in finding that the decedent was guilty of contributory negligence in such a manner as to bar his recovery."

The burden of proving contributory negligence is on the defendant. In order for the defendant to escape recovery on the part of the plaintiff by reason of the contributory negligence on the part of the deceased, the defendant would have to establish the contributory negligence on the part of that deceased by the greater weight of the believable evidence.

20 It seems to me that the questions of negligence and contributory negligence are largely determined, or, at least, to some extent determined by your determining where this collision occurred, if you find a collision did occur, between the automobile and the boy. The plaintiff insists that the collision occurred on the gravel shoulder of the road which ran parallel with and to the right of the paved section of the highway leading towards Atlantic City, and the plaintiff insists that the decedent was walking
30 on that gravel shoulder, where he had a right to walk, and which was the only place afforded him for walking towards or away from his home. The defendant says that if there was a collision, which he does not admit occurred, but which he says may have occurred, he says if there was a collision, it occurred while he was driving down on the paved

portion of the road and not over on the gravel shoulder at all.

If from the evidence you should find that the boy was walking on the paved surface of the road, where it is common knowledge that automobiles were constantly running back and forth, and not on the shoulder of the road, which was the part intended for use by pedestrians, you would have a different situation than that which the plaintiff presents to you. You would have a situation which would call upon you for close scrutiny to determine whether or not the young man could have, by the exercise of reasonable care on his part, prevented this collision, notwithstanding the negligence of which you may find the defendant was guilty. 10

Those questions are raised by the pleadings and they are properly submitted to you under the pleadings and they are to be determined by you upon a careful review of the testimony. It is true that the law presumes, in the absence of proof to the contrary, that the defendant was operating his automobile as a reasonably prudent person would and should have operated it, that is, that he was in the exercise of reasonable care. That is the presumption, subject to being rebutted by proof. The presumption also is that the boy was in the exercise of due care. That is the presumption of law, controlled by the proofs in the given case. 20 30

Has the presumption of due care on the part of the defendant been overcome by the proofs so that you say he was guilty of negligence which was the efficient cause of this collision? Has the presumption of due care on the part of the deceased boy

been overcome so that you say that he was guilty of contributory negligence which contributed to this accident in such a manner that you find he may not recover?

10 In considering the evidence you have a right to draw such fair inferences from proved facts as are justified by those proved facts. You may draw the fair inferences that arise from proved facts. You notice that you cannot draw an inference unless you have a proved fact from which that inference may arise. In other words, you cannot guess that the defendant was negligent. You cannot guess that the decedent was guilty of contributory negligence. But if there are proved facts from which fair inferences may be drawn, you have a right to draw fair inferences from those proved facts.

20 That in general is the law covering the case at hand, and with that law applied to this evidence, you will arrive at your verdict.

If your verdict is in favor of the defendant, it will be for no cause of action.

If your verdict is for the plaintiff, it will be governed by the statute with reference to damages in this kind of case. If your verdict is for the plaintiff it will have to be for a lump sum of money, and I call your attention to this: The suit is started by 30 Mr. Klein, the father of the deceased boy, as administrator *ad prosequendum*, as we call it; that is, administrator for the purpose of prosecuting this suit. He is the person who is suing to recover. If a verdict goes in his favor, you have nothing to do with the application of the moneys received by him. The law takes care of that. If the plaintiff re-

covers, as I have told you, he is entitled to recover the statutory measure of damages. Under the old law there could be no recovery in a suit of this kind. Under the law as it now exists there may be a recovery, and the statute says that, "The jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death to the father and next of kin 10 of the deceased person." You may give such damages as you deem fair and just in reference to the money injury resulting from the death of this young man to the father and next of kin of the deceased person. That is what the statute says, and our courts have repeatedly held that the damages are limited to compensation for deprivation of a reasonable expectation of money advantage from the continuance of the life of the deceased. That is, the 20 damages are limited to compensation to the next of kin of this deceased boy for their having been deprived of a reasonable expectation of money advantage from the continuance of his life.

You will notice the significance of the use of the word "pecuniary" in the statute. Money damage, money loss, and that means this: That you could not, if you found a verdict for this plaintiff, give anything to the next of kin for the loss of the society of this boy, for the injured feelings of the mother 30 or father, sister or brothers: You cannot give anything but the money recompense that they have lost by reason of having been deprived of this boy's expectancy of life and the pecuniary damage that follows their being deprived of that expectancy.

The damages are limited, as I have said before, to

- a money recompense, and that money recompense must represent the present value of all the money loss which will fall upon the next of kin in these death cases. In this case you are met by a peculiar situation. You have, as I said before, to measure the money loss. This boy was 17 years of age. He lived with his father and mother. The testimony
- 10 is that he was making \$30 a week. Under the law, the father was entitled to that \$30 a week during the time the boy should remain unemancipated, that is, during the time he should remain under the control and under the household of his father, or until he became 21 years of age. So that you see the money loss is the money loss by reason of being deprived of that which would have been turned over to the father during the time the boy remained un-
- 20 emancipated, or until he was 21 years of age. From that amount that was turned over there would have to be deducted that which it would cost the father and was costing the father for clothing, feeding, housing, medical expenses that might arise, other expenses that might arise; because while under the law the father had a right to the earnings of the child, he was also in duty bound to support, clothe, educate and provide for him as becomes their station in life.
- 30 You could not say with positiveness or any assurance or you have no right to say, I should say, that the father would have received from this boy \$30 per week for the rest of his life up to 21 years of age, and add those years and weeks and multiply by 30. You have no right to do that, because you have to take into consideration various contin-

gencies that may arise. The contingencies are those contingencies which arise in the natural course of events in any family. This boy might have left the home before he became 21 years of age. The boy might have died before he became 21 years of age. He might have become sick and his earning capacity have been reduced. All of those things you have to take into consideration in endeavoring 10 to arrive at a figure which will represent the present value of the pecuniary loss which will fall upon the father as a relative of this boy during the time that he remained unemancipated or until he became 21 years of age.

There is no testimony in the case with reference to any pecuniary advantage that the rest of the family were receiving from this boy or had received from this boy during his lifetime. Therefore, I 20 have limited the advantage in accordance with what I consider to be the law.

I will leave it to the jury to determine under the testimony whether or not there was a walk way provided for pedestrians on the White Horse Pike. My recollection of the testimony was that it was to the effect that the shoulder of the road was the only portion of the road upon which the young man had an opportunity to walk, going to and from his home. If I am wrong about that, your recollection will gov- 30 ern, not mine. You are the sole judges of the testimony and it is for you to say whether or not he was walking in a place provided for pedestrians or a place that was suitable for him to walk at the time he was walking.

DEFENDANT'S EXCEPTIONS.

Mr. Hanstein: Defendant excepts to that part of the Court's charge to the jury wherein the Court
10 said: "It seems to me that the questions of negligence and contributory negligence are largely determined, or, at least, to some extent determined by your determining where this collision occurred, if you find a collision did occur, between the automobile and the boy."

(Which exception is hereby noted.)

Mr. Hanstein: Defendant excepts to that part of
20 the Court's charge to the jury wherein the Court said: "If from the evidence you should find that the boy was walking on the paved surface of the road, where it is common knowledge that automobiles were constantly running back and forth, and not on the shoulder of the road, which was the part intended for use by pedestrians, you would have a different situation than that which the plaintiff presents to you."

30

(Which exception is hereby noted.)

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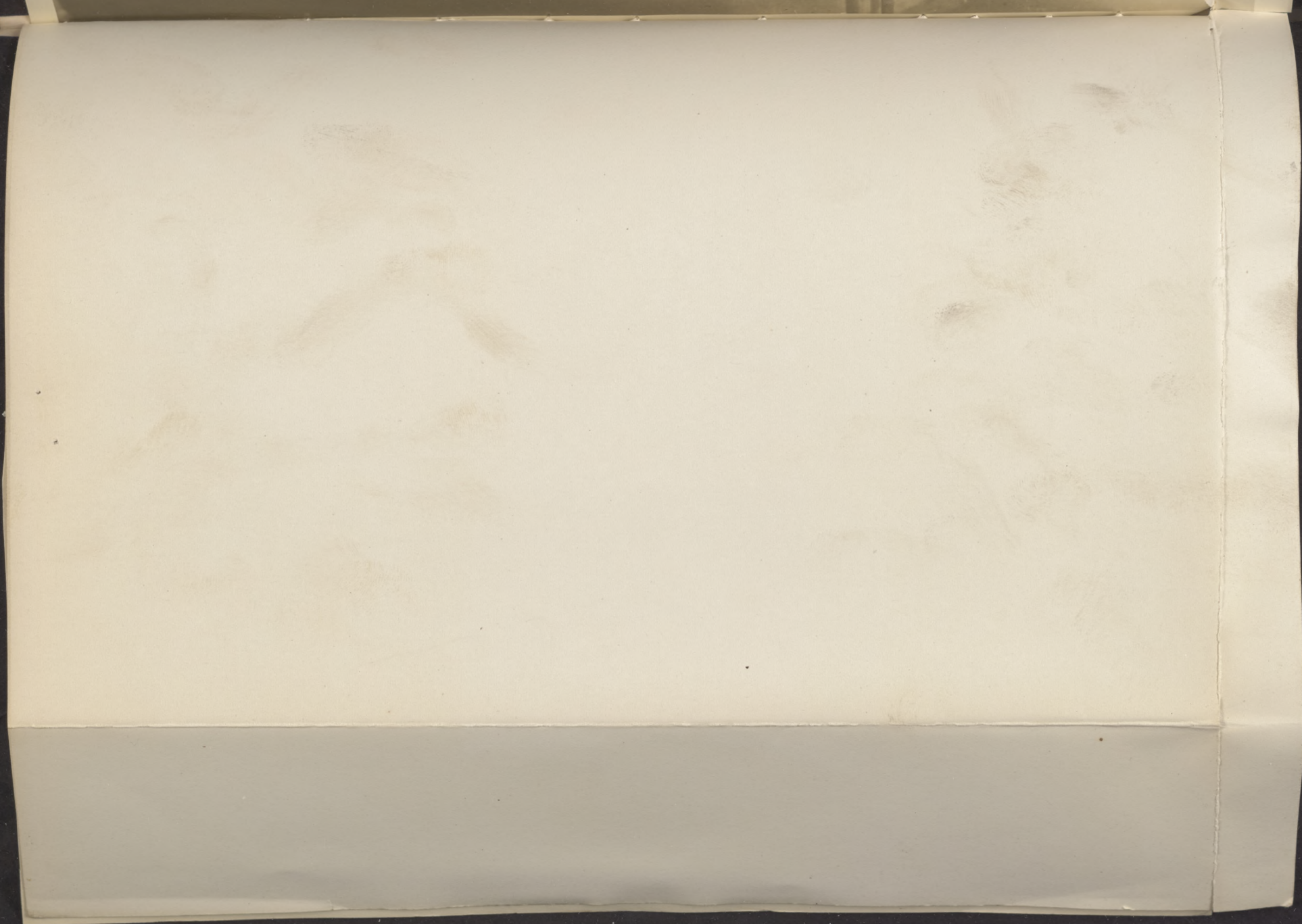


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NEW JERSEY COURT OF ERRORS AND
APPEALS.

EMIL KLEIN, administrator *ad prosequendum* of the
Estate of EDWARD R. KLEIN, deceased,
Plaintiff-Respondent,

v.

JOSEPH FRANK,
Defendant-Appellant.

ON APPEAL.

BRIEF OF DEFENDANT-APPELLANT.

The defendant brings up for review a judgment obtained by the plaintiff against the defendant in the New Jersey Supreme Court, Atlantic County.

The cause of action arose from the death of the plaintiff's intestate through an automobile accident.

The plaintiff's intestate was seen walking along the White Horse Pike on the 5th day of August, 1928, in the night time. Some time afterwards he was found to be lying on the road severely injured

as a result of which injuries he died within a few hours.

The defendant was driving his automobile along said road at about the time and place that the plaintiff's intestate was seen to be walking there, and was charged in the complaint with having negligently operated his car with the result that it caused the death of said Klein. There were no eye witnesses to the occurrence of the accident. The defendant denied all knowledge of it. However, there was some evidence in the case from which the jury could infer that Klein and the defendant's automobile came into collision.

The chief feature of that evidence was that the defendant admitted hearing a bump in the neighborhood of the place of the accident, and some hair which was identified as possibly coming from the head of Klein, was found on the door of the defendant's car. There was no proof, however, of any negligence on the part of the defendant, nor any facts from which such an inference of negligence could be drawn.

Accordingly, defendant's counsel moved for a non-suit and also a direction, both of which were denied by the Court. The failure of the Court to non-suit and direct, are made grounds of appeal as are two features in the charge of the Court.

We will undertake to briefly review the testimony in this case.

One Charles Mateer testified that he lived on the White Horse Pike and that he heard brakes of a car being applied and a thud while he was in the back of his house. He went to the front of the house

and saw young Klein lying on the road (page 22). He also saw the Ford automobile which was driven by the defendant, drive into the service station owned by one Sauer, which was next to Mateer's house (page 23).

Sauer, the owner of the service station referred to, testified that the defendant, an elderly gentleman, drove up to his service station with a young child in the front seat of the car, and with a pile of bundles on the back seat (page 30). It appears that at that time the defendant got out of his car and looked at his tires (page 59), asked Sauer to check his oil, which was found to be in order, and then purchased a bottle of soda water which he drank at the service station, and after a short conversation drove off (page 60).

The only testimony as to Klein being on the road was given by State Trooper Beylon, who had seen the youth walking along the road prior to the accident, going in the same direction as the defendant's car. He did not see the boy lying on the ground after the accident (page 37), but testified that he saw blood stains on the road, which were ten feet from where the boy was at the time he saw him walking (page 37).

Testimony was introduced which shows that although no one had seen the accident happen, the stopping of the defendant at Sauer's Service Station was linked up with the accident and the defendant was thereafter apprehended by the State Police in the neighborhood of Absecon, towards which direction he was traveling. He was brought back to the service station and identified by Sauer, as the man who had stopped to have his oil checked

and who had bought a bottle of soda water. The trooper testified as follows (page 41):

“Q. What was the condition of the automobile?

A. The right front fender was sort of bent up, and there was a dent in the right front near the door hinge, sort of a dent in the car there, and there was some hair sticking on one of the hinges.

Q. On which hinge?

A. On the right front hinge.

Q. The top, middle or bottom one?

A. Right there. (Indicating.)

Q. The middle hinge?

A. Right there.”

The trooper also testified that the defendant has said that he heard a noise or a bump as if he had run over something or struck something (page 39). He placed the location of the bump at a point somewhere near Egg Harbor, before he stopped (page 44).

The testimony of one Mischlich was also introduced as to a conversation in which he heard the defendant engage, and to which he testified as follows (page 48):

“A. Yes. He was asked whether he didn't feel a bump somewhere around the vicinity where this boy was, and he said he had felt what he called bumps all the way down when he got off the concrete onto the gravel shoulder, and when he would go back onto the concrete if it was raised he would feel sort of a bump and he said around this gas station, just before he got

to it, he felt a bump and he pulled into the gas station and stopped there.

Q. Did he say what rate of speed he was going down the pike?

A. Yes. About 35 miles an hour."

The defendant, Frank, testified that he was travelling along the White Horse Pike in the direction of Atlantic City intending to there visit his daughter and having with him at the time a young grandchild, ten years of age, and a number of packages containing gifts for his grandchildren. He was driving a 1924 Model T Ford with his lights lit and while travelling at a speed of twenty-five or thirty miles an hour, as he approached the service station operated by Mr. Sauer, he heard a bump. He attributed it to a flat tire (pages 58-59) and had no knowledge that he had hit anyone. He stopped at the service station which was a very short distance beyond the point where he heard the bump and there looked at his tires; finding them to be in order he then asked Sauer to check his oil (pages 59-60). His reason for doing that was that once he had burned out a bearing for lack of oil and his car had then made a noise similar to that on the night in question (page 83). Finding that his oil was in proper condition, he then ordered a bottle of soda water, which he drank on the premises (page 60), and when it was finished drove away. He asserts positively, that his lights were lit, and no one denies it. He said that he did not see young Klein and asserts also that the front part of his car did not come into collision with anybody. He explains the

condition of his fender by asserting the picture of his car does not show his fender to be bent up and an examination sustains him in that contention. Certainly, a blow by his fender that would be hard enough to kill a man would have left some visible impression on an old Model T Ford fender. The plaintiff introduced Exhibit P3 in evidence which is a photograph that shows the right fender of the defendant's car. An examination of that photograph certainly does not show any damage to the right fender that could be connected with the accident. He says that while in Kingston, New York, a truck bumped into his fender which accounts for the dent that is in it (page 64). He asserted that he was paying full attention to his driving and that he was driving carefully.

ARGUMENT.

I. THE COURT ERRED IN REFUSING TO NON-SUIT THE PLAINTIFF OR DIRECT A VERDICT IN FAVOR OF THE DEFEN- DANT.

The finding of hair on the hinge of the car, was, of course, evidence of a collision between the car of the defendant and the plaintiff's intestate, but did not prove that the accident happened through the negligence of the defendant. It did not prove that the defendant ran into Klein. It was as consistent with the innocence of the defendant and the negligence of Klein, as it was with the negligence of the defendant.

In the case of *McCombe v. Public Service Rail-*

way Company, 95 N. J. Law 187, at page 189, the law is laid down as follows:

“In this situation, the trial Judge was called upon to say, whether any facts had been established, from which negligence may be reasonably inferred. Metropolitan Railway Co. v. Jackson, L. R. App. Cas. 193; Newark Passenger Railway Co. v. Block, 55 N. J. Law 605. A motion for a non-suit admits the truth of the plaintiff's evidence and every inference of fact which can be legitimately drawn therefrom. Jones v. Public Service Railway Co., 86 I. D. 646. But the only presumptions of fact which the law recognizes are immediate inferences from the facts proved. Price v. New York Central R. R. Co., 92 I. D. 429. So, it has been said, mere theories and inferences do not authorize a verdict in a case of this nature, unless they are the only conclusions which can reasonably be drawn from the facts proven. Negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence. 29 Cyc. 589; Bien v. Unger, 64 N. J. L. 596.”

The case of *Alvino v. Public Service Railway Co.*, 97 N. J. Law 526, at page 527, holds that:

“Negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence. McCombe v. Public Service Railway Co., 95 N. J. L. 187.

The only presumptions of fact which the law recognizes are immediate inferences from the facts proved. Price v. New York Central Rail-

road Co., 92 N. J. L. 429; McCombe v. Public Service Railway Co., *supra.*; Adriance v. Schenck Bros., 95 N. J. L. 185.

Proof of a collision or facts from which a collision could be inferred by a jury does not make out a *prima facie* case of negligence. The doctrine or maxim *res ipsa loquitur* is not applicable. Conover v. Delaware &c. Railroad Co., 92 N. J. L. 602.

To establish a case of negligence and fix the liability of the defendant, it is incumbent upon the plaintiff to prove some fact which is more consistent with negligence of the defendant than with the absence of it. Toomey v. London, &c. Railway Co., 3 C. B. (N. S.) 150. When the plaintiff's evidence is equally consistent with the absence as with the existence of negligence on the part of the defendant, the plaintiff must fail (Cotton v. Wood, 8 C. B. (N. S.) 568), because there is always a presumption against negligence and in favor of innocence. Philadelphia &c. Railroad Co. v. Hummell, 44 Pa. St. 375. A probability is not sufficient. Searles v. Manhattan Railway Co., 101 N. Y. 661."

To justify the Court in refusing to non-suit and in refusing to direct a verdict, it must be said that there was in the case some evidence of negligence on the part of the defendant. The proof absolutely went no further than a showing that there had probably been a collision between Klein and the side of the defendant's car. The only point on the car of the defendant where it could legally be said that there was evidence of a collision with Klein was on

the hinge. There was, of course, evidence that there was a dent in the fender but whatever presumption there was with regard to that as having been the result of a collision with Klein, was certainly wiped out by the uncontradicted testimony that that was the result of a collision with a truck a month before. Proof that the side of the defendant's car came into collision with Klein at or about the hinge of the door of the car certainly would not raise a presumption that the defendant had negligently operated his car.

This case is absolutely no different from any other case where a car and a pedestrian come into collision on the highway without any eye witnesses to the occurrence. This Court has always adopted the view in those cases that the presumption favors the innocence of the defendant and not his guilt, and when that rule is applied in this case, as set out in the cited cases, it is quite apparent that there is no proof whatever of negligence on the part of the defendant.

In the complaint the plaintiff's allegation of the negligence of the defendant is as follows:

"(a). He operated his said automobile at a high, reckless and unlawful rate of speed,

(b). He operated his said automobile, without giving any signal, or warning of his approach,

(c). He operated his said automobile without proper lights,

(d). He operated his said automobile without proper brakes,

(e). He operated his said automobile, without making proper observation of the road ahead of

him, and without due regard to the safety of pedestrians,

(f). He operated his said automobile in such a manner that he did not have control of its course and direction."

These are certainly the same charges of negligence that were set up in *McCombe v. Public Service, supra*, which was a case of an accident that was not observed by any eye witness. The Court in that case held that the plaintiff failed to prove the allegations of negligence in his case from which the jury could infer negligence. In *Alvino v. Public Service, supra*, there was a collision between a trolley-car and a motorcycle. The Court in that case said that "an inference of fact could be drawn that there was a collision between the motorcycle and the trolley car but if so, how it happened and who is responsible for the collision is left entirely to conjecture; the record is silent on these points."

This is the situation in this case and the Court should have non-suited the plaintiff, or directed a verdict in favor of the defendant.

II. THE COURT ERRED IN CHARGING THE JURY AS FOLLOWS:

"It seems to me that the questions of negligence and contributory negligence are largely determined, or, at least, to some extent determined by your determining where this collision occurred, if you find a collision did occur, between the automobile and the boy."

"If from the evidence you should find that the boy was walking on the paved surface of the road, where it is common knowledge that automobiles were constantly running back and forth, and not on the shoulder of the road, which was the part intended for use by pedestrians, you would have a different situation than that which the plaintiff presents to you."

The road in question was the White Horse Pike, the main automobile highway running between Atlantic City and Camden and, as is known by the Court, one of the most heavily travelled roads in the State, particularly on a Sunday night in August. This road has a hard surface paving and also shoulders on the side as does practically every other hard surface road.

There was, of course, some testimony that prior to the time of the accident, the plaintiff's intestate was seen to be on the shoulder of the road. There was no proof whatever that the collision took place on the shoulder of the road nor is there any proof as to how soon after Klein was seen on the shoulder of the road the collision took place.

The parts of the Court's charge set out above which are complained of were apparently designed to charge the jury that if the accident happened on the paved surface of the road, the rights of the plaintiff would be different than if the accident happened on the shoulder of the road, and the Court specifically charged the jury that the shoulder of the road was the part intended for use by pedestrians. This charge could easily have led the jury to the conclusion that if this accident happened on the

shoulder of the road, the defendant was liable. That was not a correct statement of the law. The shoulder of the road is no more for the exclusive use of pedestrians than is the paved part. There was no evidence that the shoulder of the road was the part intended for the use of pedestrians and yet the Judge so charged the jury. It seems to us that that feature of the charge opened the door for the jury to say that if this accident happened on the shoulder of the road, the defendant was liable.

We submit that the parts of the charge excepted to were erroneous and permitted the jury to found a verdict upon an entirely improper basis of liability.

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 KLEIN, administrator *ad prosequendum*
of the Estate of Edward R. Klein,
deceased,
Plaintiff-Respondent,

v.

JOSEPH FRANK,
Defendant-Appellant.

ON APPEAL.

BRIEF OF PLAINTIFF-RESPONDENT.

On August 5, 1928, plaintiff's intestate, a seventeen year old boy, who stood six feet, two inches in height, and weighed 165 pounds, was walking on the gravel shoulder of the White Horse Pike, going in the direction of his home in Cologne, New Jersey, which is two miles from Egg Harbor City. It is in evidence that the White Horse Pike is the only public highway between Egg Harbor City, where

deceased had gone and was returning from, and the home of the deceased at Cologne.

State Trooper Michael Beylon testified he saw the young man walking on the gravel shoulder of the road toward Atlantic City, near the fence in the vicinity of Exhibit P2, also that he saw a model T Ford that resembled the defendant's automobile, in the same vicinity at the same time, as he was patrolling the highway at about 10:00 P. M.; also that he returned in a few minutes and found the boy being placed in an automobile, and blood stains on the gravel shoulder of the road ten feet in the direction of Atlantic City from where he had seen the boy as he, the trooper, passed the first time.

Charles Mateer testified that on the day of the accident he lived in the house marked X on Exhibit P2, and about 10:00 or 10:30 P. M. he heard "squeaking brakes, and a thud like;" that he rushed to the front of the house (about 25 feet) and looked up and down the White Horse Pike and saw a Ford sedan standing a short distance below his house, toward Atlantic City, and that there were no other automobiles near by, and that the Ford was then started up and driven into Sauers' gasoline station; that he saw plaintiff's intestate lying on the gravel shoulder of the road (at the X mark on road in P2), in the direction of Egg Harbor City, and that the roadstand on P2 was lighted by 3 electric lights without and 2 within. After the boy was removed, Mr. Mateer and Trooper Beylon went to Sauers' gasoline station and had a conversation with Mr. Sauers, who gave the trooper a description of the driver of the Ford, and then the trooper telephoned to headquarters at Absecon to "hold for investiga-

tion a Ford sedan driven by an elderly man, accompanied by a girl child of about eleven or twelve years of age, and that the Ford sedan had a number of packages on the rear seat." Trooper Atkinson of the Absecon Barracks was assigned to locate the automobile, and he did stop a model T Ford sedan answering the description given him, and found the car being driven by the defendant who was accompanied by a small girl about 10 years of age. He examined the automobile and reported its condition as follows: "I found the front fender on the right-hand side with brush marks on it, and the front fender was also bent up slightly on the right-hand side; the engine hood had marks of possibly a hand passing over it; there was a small dent in the right-hand cowl, close to the right front door. The hinge of the door wasn't damaged, but underneath the bolt that holds the hinge there was a small piece of scalp, with a piece of reddish, a few strands of reddish, dark brown hair attached to it." Trooper Beylon also examined the automobile and saw the piece of scalp and hair on the middle hinge of the right front door and also that the deceased boy's hair was dark red and that the hair on the hinge was of the same color and resembled the hair of Edward Klein, the deceased; he also described the automobile's condition as follows: "The right front fender was sort of bent up and there was a dent in the right-hand front near the door hinge, sort of a dent in the car there, and there was some hair sticking on one of the hinges." Both troopers identified P3 showing the automobile and P4 showing hair and scalp on the hinge.

3 The defendant on the night of the accident talked

of the accident in the hearing of Richard Mischlich, an attorney at law of New Jersey, who testified that the defendant said that he had been driving all day and he was tired; that the constant glare of headlights had made him quite tired and at times blinded him; that he had felt bumps all the way down when he got off the concrete onto the gravel shoulder and when he would go back onto the concrete if it was raised he would feel sort of a bump; that around the gas station, just before he got to it he felt a bump and pulled into the gas station; that defendant was travelling about 35 miles per hour; that he had been talking to the child at the point of the accident.

The defendant testified that just before going into the service station (C. 58) that he heard something "unusual" and "It was just like on the right-hand side just like something like a bump, * * *;" he also told Trooper Beylon (C. 39) that — "he heard a noise, a thump as if he had run over something or struck something." Defendant attempted to (C. 63) show that a dent on his fender was caused by a truck in Kingston, N. Y., sometime prior to the date of this accident.

"Q. There was a bend in the front fender?

A. Yes, sir.

Q. Was it bent up?

A. No, it was just a little bent here.

Q. Do you know how that dent got into your car?

A. Yes, sir, I do.

Q. How did it get into your car?

A. I parked in Kingston, New York, and a truck was alongside of me, and the truck was

backing out and he touched my fender a little bit and that is what bent it."

It will be noted that at no time does the record disclose that defendant was referring to the right-hand front fender of his car in this testimony and any reference to exhibits as explaining the dent received in Kingston is destroyed by his testimony at (C. 77):

"Q. Will you show me on P3 this bump that you referred to that you received in Kingston?

A. That was on this fender here.

Q. The picture doesn't show it, does it?

A. No, but there was that bump on that fender."

Defendant testified that at the time he felt the bump he was travelling at between 25 and 30 miles per hour. (Witness Mischlich testified defendant said 35 miles per hour) and that his lights were such (C. 72) that he could see only 25 to 30 feet ahead. He also testified that he did not see plaintiff's intestate.

ARGUMENT.

1. THE COURT DID NOT ERR IN REFUSING DEFENDANT'S MOTIONS FOR NON-SUIT AND DIRECTION OF A VERDICT.

Plaintiff joins defendant in his belief expressed in the brief that the finding of a piece of scalp and

some hair on the hinge of defendant's automobile was evidence of a collision between plaintiff's intestate and defendant's automobile. Adding to this important admission other proven facts and circumstances make it certain that the trial Judge did not err in refusing to non-suit or direct a verdict.

This Court, in the case of *Napurano v. Young*, 74 N. J. L. 627, states the rule of law applicable to this case, as follows:

"A jury may infer negligence from facts and circumstances which reasonably impute it."

And also in the case of *Auer v. Sinclair Refining Company, et al.*, 137 Atl. Rep., page 555, re-affirms this rule as follows:

"When negligence may reasonably and legitimately be inferred from the evidence, it is for the jury to say whether from such evidence negligence ought to be inferred."

It is true that no witness was produced who saw the actual collision between the automobile and plaintiff's intestate, but there are proven facts which reasonably and legitimately infer negligence on defendant's part. Witness Mateer resided in the house (C. 21) marked X on Exhibit P2; he heard application of brakes and a thud and he rushed out and saw the Ford car (the only car in the vicinity) stopped (C. 22 and 23) and young Klein lying on the gravel shoulder of the road at the X mark on the road on P2. From this testimony, coupled with testimony that defendant said that he was driving (C. 48) at the rate of thirty-five miles per hour (an unlawful speed, on August 8th, 1928), talking to a child (C.

49) when he was tired (C. 47), and the glare of headlights at times blinded him, and the further testimony of Trooper Beylon that he saw plaintiff's intestate on the gravel shoulder of the road walking in the direction of Atlantic City, that the trooper, on his return, saw blood stains on the gravel shoulder ten feet in the direction from Atlantic City from where he first saw the boy (C. 37), which indicates the young man was not only in his proper place on the road, but could have been seen by an alert and observing operator of an automobile. It is also in testimony that a roadstand between Mateer's home and the X mark on the roadway (P2) was lighted with three lights in front (C. 28) and two lights inside, thus lighting the vicinity of the accident, and added to this is the boy's height of six feet two inches and weight of one hundred sixty-five pounds, which surely made him an object that should have been seen had the defendant's car been equipped with proper lights and had the defendant been looking ahead with seeing eyes.

The case of *Pool v. Brown*, 89 N. J. L., page 314, quoting from the second paragraph on page 316, defines duty of the driver of an automobile in these words:

"The driver of the automobile was under a legal duty to use reasonable care to avoid colliding with other vehicles or persons in the public highway. His duty was to be on the alert, to observe persons who were in the street, or about to cross the street, and to use all reasonable care to avoid colliding with them. He was under a duty to have his automobile under proper control."

It would seem from the reasoning of this case and from the above stated facts, that the jury could draw a legitimate inference that the defendant was not in exercise of care in the operation of his automobile as the law required of him.

The testimony further shows that the front right fender had brush marks on it, was slightly bent up (C. 53), and the hood had marks as if a hand had passed over it, a dent in the right-hand cowl, and a piece of scalp with hairs attached to it on the middle hinge of the right front door. This condition was also observed (C. 41) by Trooper Beylon. Defendant attempted to explain away the condition of his fender by a prior collision in Kingston, New York, but this testimony is weakened, if not entirely destroyed by defendant's own testimony (C. 65) that no part of his automobile struck the boy, except the hinge, when Exhibit P3 clearly shows a dent in the cowl and the right front fender slightly turned up, also defendant testified that this exhibit did not show (C. 77) the bump or dent on the fender, which he claimed was done in Kingston, New York. The defendant also testified (C. 79) that he was driving right next to the shoulder when he felt the bump, that he thought it was a tire gone flat, also he told Mr. Mischlich that he felt bumps all the way down when he returned to the concrete after having driven on to the gravel shoulder, and that at or about the point of this accident he felt a bump, indicating that he had gone off the concrete on to the shoulder and struck plaintiff's intestate.

Defendant also testified that his lights gave him a vision of twenty-five to thirty feet ahead and that at no time did he see plaintiff's intestate.

From the above evidence, negligence might reasonably and legitimately be inferred, to wit:

A. That defendant, driving at thirty-five miles per hour, when tired, and blinded by the glare of headlights, and running to and fro from the concrete to the gravel, etc., was guilty of operating his automobile at a high, reckless and unlawful rate of speed.

B. That driving at the rate of thirty-five miles per hour with headlights that gave him a vision of only twenty-five to thirty feet, when it is common knowledge that it is impossible to stop a car being operated at thirty-five miles an hour in thirty feet, one might reasonably infer that he was operating his automobile without proper lights.

C. That he operated his car without proper brakes might be inferred from the testimony that his brakes were applied and then the boy was hit, as indicated by the thud, and that defendant's car went a distance exceeding fifty feet before it was stopped.

D. That he operated his automobile without making proper observations of the road ahead of him and without due regard for the safety of pedestrians, might be reasonably and legitimately inferred from the fact that the defendant denies having seen the boy, when it is practically undisputed that his automobile struck a six-foot boy with the front right fender and middle hinge of the front right door when the young man was on the shoulder of the road where he had equal rights with the defendant. Plaintiff's intestate having been seen by the trooper in a

lighted spot on the shoulder of the road and by the time he had gone ten feet, in the direction of the lights, he was run down and killed by the defendant, who was talking, at the time, with a child who accompanied him.

The case of *Napurano v. Young*, 74 N. J. L. 627, above quoted, seems to be a case in point. The plaintiff in that case was a six-year old child, but the Court said that this fact would not, *per se*, alter the rule by which the negligence of the driver is to be gauged, quoting from the syllabus which is in the body of the opinion and seems to be the settled law in this State:

“If the proof shows that a child of six years of age was run down at the crosswalk, by the driver of a team of horses going slow, and who had full opportunity to observe the child, and nothing else appears, whether or not there was negligence in the driver is not a court question, but is for the jury, and it is error to direct a non-suit.”

In the present case, the testimony even goes further than in the cited case and would seem to indicate that the question was one for decision by a jury and not the Court.

There, too, is a presumption existing that plaintiff's intestate, at the time of the collision, was in the exercise of due care and that at no place in the defendant's case is there any testimony or an inference therefrom that undertakes to rebut this presumption.

The case of *Ceslak v. Krause*, not yet officially reported, but found in 9 N. J. Adv. R. 580, seems to be exactly in point.

II. THERE WAS NO ERROR IN COURT'S CHARGE.

By referring to Exhibit P2, which is a picture of the White Horse Pike in the exact vicinity of the collision, it will be observed that Atlantic City is in the direction where the roadway nearly converges. Egg Harbor City is in the opposite direction. It will be noticed that on the left-hand side, going towards Atlantic City, the concrete pavement extends almost to the telephone poles, with no walkway on this side. On the right-hand side, it will be noticed, a shoulder is provided, and at the X mark on this shoulder, is where the body of plaintiff's intestate was found.

The part of the Court's charge complained of is respecting contributory negligence of plaintiff's intestate, particularly in reference to a different circumstance existing if the jury found that the young man was walking on the paved part of the road or on the shoulder of the road.

It must be conceded that automobiles and pedestrians have equal rights on a public highway; yet the Court evidently had in mind the opinion of the Supreme Court in *Laffler v. Lafer*, 142 Atl. Rep. 545, in which it is held:

"One walking down middle of highway on a dark night in a populous city held guilty of contributory negligence, precluding recovery for his death by being struck by an automobile."

The White Horse Pike, according to defendant's brief, is "one of the most heavily travelled roads in

the State, particularly on a Sunday night in August." We agree with this statement. Under the authority of the Laffler case, plaintiff's intestate would have been guilty of contributory negligence had he travelled down the paved portion that was so heavily travelled. Where then could he walk, since this highway was the only one between his home at Cologne and Egg Harbor City, without being guilty of contributory negligence, but on the gravel shoulder of this highway? It would seem his position on the paved or gravel part of the highway was important on the question of his contributory negligence and that is what the Court charged the jury in the following words, to which defendant took exception (C. 90):

"It seems to me that the questions of negligence and contributory negligence are largely determined, or, at least, to some extent determined by your determining where this collision occurred, if you find a collision did occur, between the automobile and the boy,"

and further (C. 91) the Court charged:

"If from the evidence you should find that the boy was walking on the paved surface of the road, where it is common knowledge that automobiles were constantly running back and forth, and not on the shoulder of the road, which was the part intended for use by pedestrians, you would have a different situation than that which the plaintiff presents to you,"

then the Court continues and explains contributory negligence, as follows:

“You would have a situation which would call upon you for close scrutiny to determine whether or not the young man could have, by the exercise of reasonable care on his part, prevented this collision, notwithstanding the negligence of which you may find the defendant was guilty.”

Plaintiff argues that the charge was a correct statement of the law, and the portion or substance of the charge defendant complains of, to wit:

“And the Court specifically charged the jury that the shoulder of the road was the part intended for use by pedestrians”

was apparently corrected, if it needed correction, at (C. 95), State of the Case, last paragraph, in these words:

“I will leave it to the jury to determine under the testimony whether or not there was a walkway provided for pedestrians on the White Horse Pike. My recollection of the testimony was that it was to the effect that the shoulder of the road was the only portion of the road upon which the young man had an opportunity to walk, going to and from his home. If I am wrong about that, your recollection will govern, not mine. You are the sole judges of the testimony and it is for you to say whether or not he was walking in a place provided for pedestrians or a place that was suitable for him to walk at the time he was walking.”

We respectfully submit the Court's ruling on the motion to non-suit and to direct a verdict was legally

correct and the charge of the Court was without error, and urge that defendant's appeal be dismissed and that judgment below be affirmed.

Respectfully submitted,

BURTON A. GASKILL,
Attorney for Plaintiff-Respondent.

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Respectfully submitted,

BERTON A. GASKILL,

Attorney for Plaintiff-Respondent.