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PLEADINGS, Etc.

TESTIMONY

EXHIBITS

New Jersey Supreme Court

Passaic County

Regina Conklin
Plaintiff,
vs.
Brighton Mills, Inc.,
Defendant.

TRANSCRIPT OF PLEADINGS

(Summons issued April 21, 1927.)

Ward & McGinnis,
Attorneys for Plaintiff.
Kellogg & Chance,
Attorneys for Defendant.

The plaintiff, by her attorneys, Ward & McGinnis, hereby amends the second count of her complaint and paragraph 12 of the first count as follows:

First Count.

1. The plaintiff is a resident of the City of Paterson, County of Passaic, and State of New Jersey.

2. The defendant, Brighton Mills, Inc., is a New Jersey corporation with its principal office at Allwood, New Jersey.

3. That at the time of the committing of the grievances hereinafter mentioned, the plaintiff, Regina Conklin, was an employee of the defendant corporation, Brighton Mills, Inc.

4. That at the time of the committing of the grievances hereinafter mentioned, Steve Kovalsky

was a servant, agent, and employee of the defendant, Brighton Mills, Inc.

5. That at the time of the committing of the grievances hereinafter mentioned, Steve Kovalsky was acting under the orders and directions of the defendant, Brighton Mills, Inc.

6. That at the time of the committing of the grievances hereinafter mentioned, Steve Kovalsky acted and performed his duties for the benefit of the defendant, Brighton Mills, Inc.

7. That at the time of the committing of the grievances hereinafter mentioned, Steve Kovalsky was on the business of the defendant, Brighton Mills, Inc.

8. That at the time of the committing of the grievances hereinafter mentioned, Steve Kovalsky acted at the request and instance of the defendant, Brighton Mills, Inc.

9. That at the time of the committing of the grievances hereinafter mentioned, the defendant, Brighton Mills, Inc., owned the electrical freight-carrying truck hereinafter mentioned.

10. That at the time of the committing of the grievances hereinafter mentioned, the defendant corporation, Brighton Mills, Inc., operated the electrical freight-carrying truck hereinafter mentioned, through their duly authorized servant, agent, and employee, Steve Kovalsky.

11. That on, to wit, the 5th day of June, 1925, the plaintiff, Regina Conklin, entered upon a certain electrical freight-carrying truck while it was at rest, which electrical freight-carrying truck was used by the defendant corporation solely for the purpose of conveying bales of cotton and other materials in and about the mill, and which was at

the time of the committing of the grievances standing on the floor of the mill of the defendant corporation.

12. That on the day and year aforesaid, the defendant, Brighton Mills, Inc., through its duly authorized servant, agent, and employee, Steve Kovalsky, so carelessly, negligently, and wrongfully commenced operating the aforesaid electrical freight-carrying truck at a high and excessive rate of speed while the plaintiff was still on the aforesaid truck, and so carelessly, negligently, and wrongfully operated the same in a backward direction, and so carelessly, negligently, and wrongfully operated the same in a zig-zag fashion, and so carelessly, negligently, and wrongfully stopped and started the aforesaid truck at sudden intervals of time, and so carelessly, negligently and wrongfully operated it at a high, excessive, and dangerous rate of speed, and so carelessly, negligently, and wrongfully operated the same as aforesaid without giving any warning or signal to the plaintiff, and so carelessly, negligently, and wrongfully operated the same while he was an incompetent driver, whose incompetency was well-known to the defendant, Brighton Mills, Inc., from the day of his hiring to and including the time of the committing of the grievances herein mentioned, so that by reason of the said careless, negligent, and wrongful conduct of the defendant, Brighton Mills, Inc., the plaintiff, Regina Conklin was thrown from the aforesaid electrical freight-carrying truck to the floor of the mill of the defendant, Brighton Mills, Inc., with such great force and violence that she sustained severe and permanent injuries.

13. By reason of the premises, the plaintiff Regina Conklin was laid up for a long period of time and suffered severe and excruciating pain and in the future will suffer likewise.

14. By reason of the premises, the plaintiff has been rendered sick, sore, lame, diseased, disordered, wounded and debilitated, and in the future will continue likewise.

15. By reason of the premises, the plaintiff suffered contusions, abrasions, lacerations, cuts, and wounds over her entire body; she was black and blue over her entire body; she was rendered unconscious for a considerable period of time; her eyesight was impaired; her hearing was impaired; she suffered a concussion of the brain; she suffered insomnia; loss of appetite; she suffered several compound fractures of the tibia and fibula bones of her left leg; the ligaments, blood vessels, and muscles of her left leg were torn; she suffered several severe and extended operations of both bones of her left leg; her left leg has become shriveled; her left leg has become shorter a great number of inches; her left leg has become thin and paralyzed; she has suffered severe and permanent internal injuries, and a severe and permanent shock to her nervous system.

16. By reason of the premises, the plaintiff has become obliged to lay out and expend a large sum of money in order to heal and cure herself of the injuries she sustained, and in the future will continue likewise.

17. By reason of the premises, the plaintiff has been unable to carry on her usual work and employment and in the future will continue likewise.

18. By reason of the premises, the plaintiff has

been deprived of the earnings, gains, and profits which she otherwise would have had and in the future will continue likewise.

By reason of the premises, the plaintiff has suffered damages in the sum of $50,000.00 for which she will claim judgment under this count.

Second Count.

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

2. That on the day and year aforesaid, the defendant, Brighton Mills, Inc., through its duly authorized servant, agent, and employee, Steve Kovalsky willfully and maliciously commenced operating the aforesaid electrical freight-carrying truck at a high and excessive rate of speed while the plaintiff was still on the aforesaid truck, and so willfully and maliciously operated the same in a backward direction, and so willfully and maliciously operated the same in a zig-zag fashion, and so willfully and maliciously stopped and started the aforesaid truck at sudden intervals of time, and so willfully and maliciously operated the same at a high and dangerous rate of speed, and so willfully and maliciously operated the same as aforesaid without giving any warning or signal to the plaintiff, so that by reason of the said willful and malicious conduct of the defendant, Brighton Hills, Inc., the plaintiff, Regina Conklin was thrown from the aforesaid electrical freight-carrying truck to the floor of the mill of the defendant, Brighton Mills, Inc., with such

great force and violence, that she sustained severe and permanent injuries.

3. That on, to wit, the 5th day of June, 1925, the defendant, Brighton Mills, Inc., through its duly authorized servant, agent, and employee, Steve Kovalsky, acting under its orders and directions with force and arms assaulted the plaintiff, Regina Conklin at the mill of the defendant corporation, in the County of Passaic, and State of New Jersey, and then and there with great force and violence beat, bruised, kicked, and ill-treated her, and then and there gave and struck the aforesaid plaintiff a great many violent blows and strokes on and about divers parts of her body; and also then and there with great force and violence shook and pulled about the said plaintiff, and cast and threw the said plaintiff down from the electrical freight-carrying truck, while it was in motion, and upon the ground with such great force and violence that she suffered severe and permanent injuries.

4. Paragraphs 13, 14, 15, 16, 17, and 18 of the first count are hereby included and made part of this count as though they were pleaded at length.

By reason of the premises, the plaintiff has suffered damages in the sum of $50,000.00 for which amount she will claim judgment under this count.

Ward & McGinnis,
Attorneys of Plaintiff.

Filed June 4, 1927.

Defendant having a place of business in Allwood, New Jersey, for answer to the complaint herein states and alleges as follows:

First Defense to First Count.

1. This defendant has no knowledge or information sufficient to form a belief as to the matters alleged in the first paragraph of the first count.

2. The second paragraph of the first count is admitted.

3. Answering the third paragraph of the first count this defendant states that no such grievances as are therein mentioned were ever committed, but this defendant admits that the plaintiff Regina Conklin was an employee of the defendant Brighton Mills, Inc., on the date she alleges such things occurred.

4. Answering the fourth paragraph of the first count this defendant says that no such grievances as are therein mentioned were ever committed, but this defendant admits that Steve Kovalsky was an employee of the defendant Brighton Mills, Inc. but this defendant avers by way of explanation that at the time Regina Conklin was injured on the date in question Steve Kovalsky was not acting in the course and scope of his employment.

5. The fifth paragraph is denied.

6. The sixth paragraph is denied.

7. The seventh paragraph is denied.

8. The eighth paragraph is denied.

9. The defendant admits the allegation of the ninth paragraph that it owned an electrical freight carrying truck on June 5th, 1925, but except as admitted by that statement the ninth paragraph is denied.

10. Each and every allegation of the tenth paragraph of the first count is denied.

11. This defendant admits the allegation that on the fifth day of June, 1925, the plaintiff Regina Conklin entered upon a certain electrical freight carrying truck which was used by the defendant solely for the purpose of conveying material in and about it's mill, and was upon the same as a tresspasser, but except as admitted by this statement the eleventh paragraph of the first count is denied.

12. Answering the twelfth paragraph of the first count this defendant admits that the plaintiff sustained injuries when she fell from the electrical freight carrying truck of this defendant, but denies each and every other allegation of the twelfth paragraph.

13-14-15-16-17-18. This defendant has no knowledge or information sufficient to form a belief as to any of the matters alleged in the 13th to 18th paragraphs, inclusive, of the first count, except the allegations in said paragraphs mentioned that the things therein alleged were "by reason of the premises", which are denied.

Second Defense to First Count.

When plaintiff Regina Conklin was upon the electrical freight carrying truck of this defendant she was there as a trespasser.

Third Defense to First Count.

Steve Kovalsky was guilty of no negligence whatsoever at the time and place the plaintiff sustained whatever of injury she sustained.

Fourth Defense to First Count.

At the time and place plaintiff was upon the electrical freight carrying truck mentioned in the first count Steve Kovalsky was not acting within

the scope of his employment and was not acting for this defendant.

Fifth Defense to First Count.

Plaintiff's injuries were caused by her own negligence in engaging with Steve Kovalsky in a joy riding enterprise and not holding fast while she was upon said truck, rather than through any fault of this defendant.

First Defense to Second Count.

1. Paragraphs 1 to 11, inclusive of the first defense to first count are hereby repeated as an answer to the first paragraph of the second count.

2. The allegation of the second paragraph of the second count that Regina Conklin fell to the floor and was injured is admitted, but all other allegations of the second paragraph of the second count are denied.

3. The third paragraph of the second count is denied.

4. Paragraphs 13 to 18, inclusive, of the first defense to first count are repeated as an answer to the fourth paragraph of the second count.

Second Defense to Second Count.

At the time and place the plaintiff sustained her injury Steve Kovalsky was not acting in the scope of his employment with this defendant and was not acting for this defendant.

Third Defense to Second Count.

At the time and place the plaintiff sustained her injury Steve Kovalsky was not acting willfully toward her and did not do any of the things alleged by the second count, but on the contrary was skylarking and using the truck of this defend-

ant for his own purpose and the purpose of the plaintiff in a sort of joy riding common enterprise.

Kellogg & Chance,
Attorneys of Defendant.

Filed June 30, 1927.

The plaintiff by way of reply denies all the matters pleaded in the separate defenses of the defendant's answer.

Ward & McGinnis,
Attorneys of Plaintiff.

Filed July 25, 1927.

I, Fred L. Bloodgood, Clerk of the Supreme Court of the State of New Jersey do certify that the foregoing is a true transcript of the pleadings in the above-stated cause as the same remain on file in my office,

In testimony whereof I have set my hand and the seal of said Court at Trenton, this twenty-ninth day of May A. D. nineteen hundred and twenty-eight.

Fred L. Bloodgood, Clerk.

Postea

Filed May 25, 1928

NEW JERSEY SUPREME COURT
Passaic County

Regina Conklin, Plaintiff, vs. Brighton Mills, Inc., Defendant.	Action at Law

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POSTEA

This case came up for trial before Judge Clifford L. Newman, with a jury, at the Passaic Circuit on May 18th, 1928.

The plaintiff submitted the proofs in her case, and rested, and thereupon the Court ordered that a judgment of nonsuit be entered against the plaintiff, and in favor of the defendant.

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Clifford L. Newman,
Judge, Passaic Circuit.

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Notice and Grounds of Appeal

Filed June 4, 1928

NEW JERSEY SUPREME COURT
Passaic County

Regina Conklin,
Plaintiff,
vs.
Brighton Mills, Inc.,
Defendant.

NOTICE AND GROUNDS OF APPEAL

To: Kellogg & Chance, Attorneys of Defendant:

Sirs:

Please take notice, that the plaintiff in the above stated cause, appeals from the whole of the judgment of nonsuit entered therein in the New Jersey Supreme Court, and every part thereof, to the New Jersey Court of Errors and Appeals, in the last resort in all causes, and the following are the grounds of appeal:

1. The Supreme Court committed error in granting the defendant's motion for nonsuit.

2. The Supreme Court committed error in not refusing to grant the defendant's motion for nonsuit.

3. The Supreme Court should have refused the defendant's motion to nonsuit the plaintiff, and should have permitted the jury to receive the case for their consideration.

Ward & McGinnis,
Attorneys of Plaintiff.

NEW JERSEY SUPREME COURT
Passaic Circuit

Regina Conklin, Plaintiff, vs. Brighton Mills, Inc., Defendant.	At Law

Paterson, N. J., May 18, 1928.

Before:
Hon. Clifford L. Newman, Judge,
and a Jury.

Appearances:
For Plaintiff: Ward and McGinnis, Esqs.,
and Louis C. Friedman, Esq.
For Defendant: Kellogg and Chance, Esqs.,
by Mr. Chance.

(A jury was called and sworn and counsel for the plaintiff (Mr. Friedman) opened the case to the jury, as follows:)

Mr. Friedman—May it please the Court, and ladies and gentlemen of the jury:

This is an action brought by Regina Conklin for personal injuries received on the 5th day of June, 1925, while she was employed by the Brighton Mills, of Allwood, New Jersey, about a quarter to one on that day, the lunch-hour period. She came into the shipping room, accompanied with other girls, and went upon an electric freight conveying truck. This truck was used by the de-

fendant for the shipping of various materials from one department of the mill to another, and at the time she went upon this truck it was standing still in the shipping room. This room is about four or five hundred feet in length and about fifty feet wide. The truck is one of these considerably heavy trucks, operated by one of the employees, by a hand lever.

While they were on the truck on this afternoon, the man who operated the truck, one of the employees, Steve Kovalsky, came in this shipping room and ordered these girls off the truck, and as he did that he got on the truck and began operating this truck very fast, and operated it backwards and from one side of the room to the other for a great distance through this mill, and as he did that three of the girls fell off this truck. But the plaintiff in this case was still on the truck, and he went a further distance, operating this truck in a negligent manner, so that she fell off, and as she fell off this truck the truck ran over her leg and she sustained a broken leg, a very bad fracture, a very bad injury to that leg, and also an injury to the foot of the other leg. Now, she was laid up, I think, in the hospital for about ten months, with severe pain. Her leg now is in one of these braces; she uses a cane now, and she is unable to work at all. She has had very many —she has had a great deal of expenses for doctors and nurses and medicinies. She has

lost wages while she was out of work and sick in the hospital. She has been unable to work until today, and probably will not be able to work for the rest of her life.

Now, this agent of the company, Steve Kovalsky, we say, is the man responsible for this accident, and we say further that he was working for the Brighton Mills at this time. His duties were to use this truck for conveying the different bales of cotton or yarn through this mill. He was instructed to take care of this truck, and it was his duty to see that no one got upon this truck. Those were his orders.

Now, when he ordered these girls off the truck he immediately got on that truck and used what we say was excessive force. We say he acted unreasonably at the time, and this excess force which he used caused this girl to sustain her injuries.

And if we prove to your satisfaction that this agent of the company used excessive force, we will ask you to bring in a substantial verdict for the plaintiff, for her pain and suffering, for her mental anguish, for her doctors' and nurses' bills, and other expenses so incurred, for her loss of wages until today and for any time in the future, and also for any other expenses that will be proven in the case. Thank you.

Mr. Chance—If the Court please, I wish to move at this time for a non-suit, on counsel's opening. I have requested the stenographer to take down what he said, and he

has taken it down. If you will recall what he has told you, he has not told you that he intends to prove that this woman got on that truck by any right. She had no legal right on there, so far as he has stated he intends to prove.

That being so, she was either a trespasser, or to make it the most favorable from her standpoint, she would be merely a licensee. Under such circumstances, it seems to me, the law is clear that the only duty owed or which could arise would be to refrain from willful injury. There are a long line of cases to that effect. In his statement of what he intends to prove, he has not indicated at all that he intends to prove any willful act whatever. He has told the jury that he intends to prove what he conceives to be negligence.

That being so, it seems to me that if he proved everything that he said he would prove, he would not make out a case which would justify the submission of the matter by you to the jury, and accordingly I at this time move for a nonsuit on those grounds.

The Court—The motion for non-suit depends not only upon the opening, but upon what is in the complaint. I have not examined the complaint, but I think it is better practice to withhold the motion for nonsuit until the testimony is in. I will hold the motion in abeyance.

Mr. Chance—The motion is held in abeyance until later in the case?

The Court—Yes.

(Mr. Chance opened the case to the jury on behalf of the defendant.)

REGINA CONKLIN, sworn.

Direct Examination by Mr. Friedman:

Q. Miss Conklin, you are the plaintiff in this case? A. Yes.

Q. How old are you? A. Thirty-eight.

Q. How old? A. Thirty-eight.

Q. Please speak up so the last juror can hear you. A. Thirty-eight.

Q. Where were you employed on June 5, 1925? A. Brighton Mills, Allwood.

Q. How was your health at that time and before then? A. My health was all right then.

Q. Feeling all right? A. All right.

Q. How long had you been working for the Brighton Mills? A. About six years I was working for them.

Q. About six years. What was the nature of your work? A. Inspector, final inspector.

Q. Pardon? A. Final inspector. I worked in the finishing room.

Q. Final inspector? A. Yes.

Q. Now, please keep your voice up, because it is difficult for me to hear you, and for the last juror— A. I can't talk much louder.

Q. Do you remember having an accident on that day? A. Yes.

Q. What time of day was it? A. Very warm day.

Q. What time of day was it? A. Oh! About ten minutes to one.

Q. Ten minutes to one? A. Yes.

Q. Where did this accident occur? A. In the shipping room.

Q. Of the Brighton Mills? A. Of the Brighton Mills.

Q. How large is this room, Miss Conklin? A. About 400 feet long or so.

Q. About 400 feet long? A. About 400 feet long.

By the Court:

Q. 400 feet by what? A. I don't know just exactly. About 400.

The Court—Speak up so the jury can hear you.

The Witness—About 400 feet long.

By Mr. Friedman:

Q. About how wide? A. About 50 feet wide.

Q. 50 feet wide. And were you on that truck that day? A. Yes. Three other girls and I—

Q. Were on the truck? A. —were on the truck.

Q. How long were you on the truck before the accident? A. How long?

Q. Yes. A. Oh, only about five minutes, I guess.

Q. About five minutes? A. About five minutes.

Q. Then what happened? A. On the truck?

Q. Yes. A. We were on the truck—

Q. Yes. A. And Mr. Kovalsky came and he saw us on the truck and he came over—

Q. Speak up, please. A. Mr. Kovalsky saw us on the truck—

Q. Yes? A. —and he came over and he said in a rough way for us to get off the truck, and before we had a chance to get off he started the truck and swerved it and throwed the girls off.

Q. He swerved it? A. He swerved the truck.

Q. Indicating from side to side. A. Yes. He was going every way.

Q. How fast was this truck going? A. Oh, it seemed to me as if it was going about fifty miles an hour it was going so fast.

By the Court:

Q. Let me hear that again. A. In a rough way he told us to get off.

Q. And then what is next? A. He got on right away and started it, and we didn't have a chance to get off.

By Mr. Friedman:

Q. Who is Steve Kovalsky? A. He is the employee.

Q. What? A. An employee.

By the Court:

Q. Employment? A. An employee.

By Mr. Friedman:

Q. Of the Brighton Mills? A. Of the Brighton Mills.

Q. Do you know what part of the mill he works in? A. He worked in the shipping room. He did then.

Q. And is that the place where the electric truck was? A. Yes, it was in the shipping room.

Q. How many trucks are there in that shipping room? A. Only one.

Q. Only one. Now, how far did he drive that truck before the other girls fell off? A. Oh, about fifty feet.

Q. And were you the last one to fall off? A. Yes, I was the last one.

Q. And how far after that did it travel, did the truck travel, before you fell off? A. It is easy about ten or twelve feet.

Q. More? A. More.

Q. How did you fall off? A. I fell off on my right side, and my left leg run over.

Q. Don't drop your voice. A. I say, I fell off on my right side.

Q. Yes? A. And my left leg got caught under the truck, and it run over it.

Q. And the truck ran over your left leg? A. Yes.

Q. What happened to you then? A. Then I had a terrible burning sensation. I didn't know what happened to me.

Q. Were you conscious at that time? A. I was conscious, but I was screaming and I didn't know what I was doing.

Q. And where were you taken to? A. I was taken to the nurse's room.

Q. Now, how was this truck operated by Steve Kovalsky when you girls were on the truck? Forward or backward? A. No, he ran it backwards. It was backwards.

Q. Do you mean that the truck was being operated with your back toward the direction in which

the truck was proceeding? A. Yes, we were facing Mr. Kovalsky and the truck was going the opposite way.

Q. Steve Kovalsky was facing the direction in which the truck was going? A. Yes.

Q. And your back was facing that direction? A. Yes.

Q. So that you were face to face with Steve Kovalsky? A. Yes.

By the Court:

Q. I understand that the truck was running backwards, or you were just sitting backwards? A. No, we were not sitting; we were standing. The truck was going backwards.

Q. Were you standing up? A. Standing up. There was nothing to hold on.

By Mr. Friedman:

Q. There was nothing to hold on to? A. Nothing to hold on.

Q. Are there any walls on that truck? A. No.

Q. Just a plain platform? A. Platform.

Q. Now, do you know or can you recall at this time—withdraw that.

Q. After the accident where were you taken? A. To the St. Mary's Hospital.

Q. In Passaic? A. Yes.

Q. And how long were you there? A. From Friday until Wednesday.

Q. And then where were you taken? A. To St. Joseph's, St. Joseph's Hospital.

Q. At Paterson? A. Yes.

Q. And how long were you there? A. Ten months.

Q. Now, have you had any expenses in this case? A. Yes.

Q. I will withdraw that.

Q. Now, after you came out of the hospital did you go back to work? A. No. I couldn't work.

Q. Pardon? A. I couldn't work.

Q. Are you able to work now? A. No.

Q. Why? A. Because my leg handicaps me.

Q. How? A. I have such pains in my back.

Q. Yes? A. And when I sit very long my foot goes numb and I have pains in it.

By the Court:

Q. What goes numb? Your leg? A. My leg.

By Mr. Friedman:

Q. How long have you worn that brace on your leg? A. I got the brace three months after I came out of the hospital. That is almost two years.

Q. Have you worn it since? A. Yes. I will always have to wear it unless it is fixed.

Q. What? A. I will always have to wear it unless I can get my leg fixed.

Q. Just where is your leg broken, Miss Conklin? A. Two double compound fractures in both bones.

Q. Of what leg? A. The left foot.

Q. The left leg? A. Yes.

By the Court:

Q. The left leg, you say? A. Yes.

By Mr. McGinnis:

Q. Between what parts? A. Between the knee and the ankle; and my ankle is crushed, and my foot was smashed.

By Mr. Friedman:

Q. If your Honor please, we would like to remove the brace and let the jury see the leg. A. There is a nurse out there, Miss Buckley.

Mr. Friedman—Is there a nurse, Miss Buckley here?

(A lady came to the witness-stand and removed a brace from the leg of the plaintiff, and the leg of the plaintiff was exhibited to the jury.)

Q. Are you able to raise that leg higher than that?

Can you members of the jury view that leg?

Now, does that leg pain you now, Miss Conklin? A. Yes. It always pains.

Q. Pardon? A. It always pains.

Q. Always pains. Have you difficulty in walking? A. Yes. When I walk there is a pain on my side and my back hurts so.

Q. How do you walk? A. One leg is much shorter than the other.

Q. I mean, have you anything to aid you in walking? A. I have a cane.

Q. Do you use that when you walk, all the time? A. I use it all the time.

Q. Are you able to walk without that cane? A. No, in the street I don't walk.

Q. How much shortage is there in your leg?

Mr. Chance—I object to that. I think the doctor had better tell us that.

The Court—The doctor would probably be more accurate.

Mr. McGinnis—We will produce the doctor.

The Court—She is entitled to tell, if she knows.

A. I don't really know how short it is. Here is the doctor now—no, it is not.

Q. Have you lost any weight since this accident? A. Well, I did while I was in the hospital, but I am gaining a little better now.

Q. Are you nervous now? A. Yes.

Q. Are you nervous out of court? A. Yes.

Q. Had you been nervous before the accident? A. No, I was not nervous.

Q. Pardon? A. I wasn't nervous.

Q. How do you sleep, Miss Conklin? A. I don't sleep well. I have the nightmares.

Q. You have nightmares? A. Yes.

Q. How does that affect you? A. Choking.

Q. Pardon? A. Choking. I feel as if I was choking, and my mother had to wake me up and get me out of it.

Q. How much money were you making per week while you were working for the Brighton Mills? A. Well, we worked on bonus. We averaged about twenty-five or thirty dollars a week.

Q. Have you been paid any wages since the accident? A. No.

Q. Who is your doctor, Miss Conklin? A. Dr. McBride.

Q. Have you paid him anything as yet? A. No.

Mr. Chance—I object to it as immaterial.

Q. Had he rendered a bill to you? A. Yes.

Mr. Chance—I object to that. It is immaterial whether he rendered a bill or not.

The Court—I will permit the question.

Q. I show you a paper and ask you whether this is the bill Dr. McBride rendered to you? A. Yes.

Mr. Friedman—I will offer it in evidence.

Mr. Chance—I object to it.

The Court—It is not admissible.

Q. How much is that bill, Miss Conklin?

The Court—No, no. Not how much is that bill? How much has he charged you.

Q. What was his charge for the medical treatment given you, Miss Conklin? A. $1498.

By the Court:

Q. $1,498? A. Yes, sir.

By Mr. Friedman:

Q. Are you under doctor's treatment today? A. Yes.

Q. How often does your doctor see you today, at this time? A. Well, at this time—I don't know—I don't go to see him often; I go down to show my leg, how it is getting along, and he has been trating me for my nerves.

Q. Now, what charge did St. Joseph's Hospital make to you while you were there? A. $1,262.93.

By the Court:

Q. $1,262.93? A. Yes.

The Court—All right.

By Mr. Friedman:

Q. Now, what charge was made to you by St. Mary's Hospital? A. $35.

Q. Did you have any nurses while you were in St. Joseph's Hospital? A. Yes.

Q. How many? A. Two nurses. One night and one day.

Q. What charge, if any, did these nurses make to you? A. Well, the day nurse, her charge was $380, and the night nurse was $210.

Q. Are there any other expenses which you have had—did you pay the nurses? A. Yes.

Q. Have you paid the hospital? A. Not all.

Q. Had you had any other expenses? A. Yes. My brace, $50.

Q. Yes? A. And electric that they used on me in the hospital was $40.

Q. That was the electricity used for the ten-month period? A. Yes.

Q. Were there any other expenses? A. My crutches, $14, and $100 for other little things.

By the Court:

Q. For what? A. A hundred dollars for other things I had to get—bandages.

By Mr. Friedman:

Q. Incidentals? A. Since I have been home —and cotton.

Q. Miss Conklin, did you have any other doctors besides Dr. McBride in consultation about your case? A. Yes, Dr. McBride called in Dr. McCoy.

Q. Yes? A. Dr. Gallagher.

Q. Yes? A. Dr. Jacobs and Dr. Botbyl was there, and Dr. McGuffy in Passaic.

Q. Who? A. McGuffy.

Q. Now, do you know what Dr. Jacobs or Dr. McBride did to your leg when they operated upon it? A. I don't know what they done, because I was under.

Q. Do you know what was the matter with your leg while you were under treatment? A. Yes. I had gas bacillus infection.

Q. Gas bacillus infection? A. Yes, and they had to cut my leg from my knee to my ankle. They cut it all out.

Q. They cut your leg from your knee to your ankle? A. Yes, to keep the poison down from the hip. They were going to take it off at the hip.

Q. Were there any tubes in your leg? A. Oh, yes, there were five tubes.

Q. How long were they in your leg? A. Oh, they were in about six months, I guess.

Q. Six months? A. About that.

Mr. Friedman—Take the witness.

Cross Examination by Mr. Chance:

Q. Your employment was in the finishing room, wasn't it? A. Yes.

Q. And this accident happened in the shipping room, didn't it? A. Yes.

Q. The lunch hour was from twelve to one, wasn't it? A. Yes.

Q. This accident happened during the lunch hour? A. Yes, about ten minutes to one.

Q. Ten minutes before the lunch hour had ended? A. Yes.

Q. Now, then—

By the Court:

Q. Was that lunch hour for all the employees as well as you? A. Yes.

By Mr. Chance:

Q. Now, this truck runs both ways, doesn't it, backwards and forwards? A. Yes.

Q. Did you know the place where the driver, or the man who operates it, stands, and the back of it there is a sort of framework where the mechanism is located, is there not? A. Mechanism? What do you mean by that?

Q. Do you know what the battery is? This thing runs by electricity, don't it? A. Yes.

Q. Do you know where the battery is in it? A. You couldn't hold on that.

Q. I didn't ask you that. I ask that it be stricken out.

The Court—Strike it out.

Q. There are two platforms on this truck, aren't there, one back and one front? A. Where? Where the man stands to run it?

Q. Where the man stands to run it, and then there is another platform on which you were standing? A. Yes.

Q. And between you and the platform on which the man stands what is there? A. I couldn't tell you what that is now; I don't remember.

Q. You don't remember what was there? A. No.

Q. The two platforms are not continuous, are they? A. I know we were standing right on that platform.

By the Court:

Q. How large is that platform on which you were standing? A. It was quite large.

Q. About how many feet wide and about how many feet long? A. I should judge a little bigger than this desk here (indicating).

Q. You mean the width or the length? A. About just like this, the width and length.

Q. About that much square? A. About that.

Q. Three or four feet square? A. About that.

By Mr. Chance:

Q. You remember answering some interrogatories in this case, answering some questions that were submitted to your lawyer in writing? A. What lawyer?

Q. I didn't hear you. A. What lawyer?

Q. Ward and McGinnis. A. Answering their questions?

Q. Do you remember having some? A. The only thing I remember what I told the lawyer myself.

Q. Is that your signature (handing a paper to the witness and indicating)? A. Yes.

Q. That is your signature? A. Yes.

The Court—Did she say yes?

Mr. Chance—Yes, sir.

The Witness—Yes.

The Court—Let that be marked.

(The paper referred to was marked D-1 for identification.)

Mr. Chance—That is all.

JULE HARRISON, sworn.

Direct Examination by Mr. Friedman:

Q. Miss Harrison, are you employed by the Brighton Mills now? A. Yes.

Q. Do you remember the occasion where Miss Conklin had the accident? A. Yes, I do.

Q. And were you on the truck that day? A. A. Yes, with three other girls.

Q. There were three of you on the truck? A. No, I was on the truck with three other girls.

Q. You were on the truck with three other girls? A. Yes.

Q. Now, did anyone order you to get off the truck? A. Why, yes. When we were on the truck one of the operators, Steve—

Mr. Chance—I object to this, because it has not been shown that Mr. Steve that they

are talking about has any authority to make any order or do anything in regard to that truck on behalf of this defendant.

Mr. Friedman—I will connect it up.

The Court—Proceed.

Mr. Chance—I will move later to strike it out if not connected.

Q. What did Steve do, Miss Harrison? A. Why, he just came out to the truck.

The Court—Speak up.

A. He just came out to the truck and told us to get off.

Q. And then what happened? A. And before we got a chance to get off he started the truck and we couldn't get off.

Q. How did he operate this truck? A. Why, the truck was backwards.

Q. Yes? A. And he was standing and we were facing him.

Q. You were facing him? A. Yes.

Q. How fast do you think this truck was going? A. Oh, it was going fast. I just don't know how fast. It was going fast.

Q. Did he operate it in a straight line? A. No, he was going zig-zag.

Q. And for what distance did that truck go from the moment you started until the moment you fell off? A. Oh, I should judge about fifty or fifty-five feet.

Q. About fifty or fifty-five feet? A. Yes.

Q. And did Miss Conklin fall off before you or

after you? A. No, three of us girls fell off first and then Miss Conklin fell.

Q. Now, was there anything on that truck upon which you could hold? A. No, there is nothing. It is just a platform that you stand.

The Court—I can't hear you, Miss Harrison. Can't you speak louder?

The Witness—No, there is not anything to hold. It is just a platform to stand on.

Mr. Friedman—Take the witness.

Cross Examination by Mr. Chance:

Q. Well, you and Miss Conklin and the other girls were all employed in the finishing department, weren't you? A. Yes.

Q. And your work did not require you to go to the shipping room, did it? A. Why—

Q. Yes or no. Did your work require you to go to the shipping room? A. Sometimes.

Q. At the noon hour when this accident happened did your work require you or Miss Conklin's work require her to be in the shipping room? A. No, not at noon hour.

Mr. Friedman—I ask that the part in reference to Miss Conklin be stricken out.

The Court—I will permit it to stand.

Q. Miss Harrison, will you explain to us a little more fully the way this truck looked? There were two platforms, weren't there? A. No, there is not two platforms; just the one platform.

Q. Where did the driver stand? A. There is just a little place that he stands.

Q. That is a different thing from the platform you girls were riding on, isn't it? A. Yes.

Q. And between the platform where you girls were and where the driver stood there was a part of the truck that is built up, isn't there? A. Well, there is just a thing that he operates the truck, some kind of a handle or something. I just don't—

Q. Now, did you girls call to the man who was seated near this truck, and that you called Steve, to give you a short ride on the truck? A. No.

Q. Is that your signature (handing a paper to the witness and indicating)? A. Yes.

Q. Now I ask you if on the 25th of June, 1925, in the presence of Mr. Marra of the Brighton Mills, if you affixed your signature that I had just shown you to this paper that I have just shown you.

Mr. McGinnis—There are a number of questions involved there. We have first in the presence of Mr. Marra, and we have June 25th and whose signature—

Mr. Chance—And if I didn't ask all of them he would be objecting because I didn't put them all in.

A. Well, at that time I put that signature, but I didn't make the statement.

Q. You didn't know what you were signing at that time? A. Well, it was right after it happened and I was nervous.

Q. When did this accident happen? A. Why, June the 5th.

Q. And on the 25th of June you were so nervous that you didn't know what happened as well as you know what happened today? A. Well, that is to read off the statement, and I just said yes.

The Court—June 5th of what year?
Mr. Chance—1925.

Q. Well, I ask you if you didn't, on the 25th of June, 1925, in the presence of Mr. Marra at the Brighton Mills, say, "We called to a man seated nearby to give us a short ride." Did you make that statement? A. Why, no, I didn't.

Mr. McGinnis—We ought to have the whole statement.

Mr. Chance—You will get enough statements before you get through. I am handling my side of the case, and I object to counsel doing that.

(Question repeated by the stenographer.)

The Witness—I don't remember saying that statement.

Mr. Chance—I will ask to have this marked for identification.

(Paper referred to marked D-2 for identification.)

Q. I ask you to examine the paper which has been marked D-2 for identification, and after reading that see if it refreshes your recollection to the effect that you did make the statement, "We called to a man seated nearby to give us a short ride."

Mr. McGinnis—I object to that unless the person is identified to whom this request is made.

The Court—I was wondering that you didn't say to whom you stated in the presence of Mr. Marra. If she made the statement to any particular person you ought to designate that person, I think.

Mr. Chance—All right, to Mr. Marra.

The Court—The question is whether that reading refreshes your recollection.

Mr. Chance—That is all I am asking her, whether, having read that, she can have her recollection refreshed.

A. Well, I just don't remember if that is the way it happened, but we didn't see Steve. He wasn't in the shipping room at the time.

By the Court:

Q. What did you say? A. The operator, Steve, wasn't in the shipping room at the time.

Mr. Chance—I move to strike it out.

Mr. McGinnis—I would like to hear it first.

The Court—It is stricken out. The only question is whether that refreshes your recollection or not.

Q. Does the examination that you have just made of exhibit D-2 for identification refresh your recollection as to whether on June 25, 1925, you stated to Mr. Marra—"We called to a man seated nearby to give us a short ride"?

The Court—The question is whether it refreshes your recollection or not, whether your mind is clear as to whether you said so, or isn't it?

A. We didn't ask him.

Q. Do you remember saying that or not.

The Court—Yes or no will be your answer, whether it refreshes your recollection or not.

Q. Do you remember saying that to Mr. Marra or not? A. I do not.

Q. You don't remember. But did you know what you were signing when your name was put to exhibit D-2 for identification? A. Why, that statement was read to me and I just signed my name.

Q. You knew you were signing what purported to be your statement of how this took place, didn't you? A. Well, I didn't know whether it was—

Q. Did you know that or didn't you? A. No, I didn't know.

Q. What did you think you were signing when you signed your name to the paper? A. Well, I just signed it; I knew that I was in on the truck.

Q. Is that all that you thought you were signing, that you knew you were on the truck? A. Yes.

Q. Did the number of lines to the exhibit, D-2 for identification, that you were signing make you think that maybe there was something else in the statement beside the fact that you were on the truck? A. No.

Mr. Friedman—I object to that question.

The Court—I will permit it.

The Witness—Well, I signed, just thinking I was on the truck. I just signed my name to it that I was on the truck.

Q. Just tell us everything that you thought you were signing to when you signed this paper, exhibit D-2 for identification. A. Well, I just signed my name to that, that I was on the truck.

Q. And that is all that you thought there was in the paper that you signed? A. That I was on the truck with the other girls.

Q. Well, now, is there anything else that you thought was in the paper? A. No.

Q. I have forgotten whether—no, I did. That is all.

The Court—Anything else?

Mr. Friedman—That is all.

FRANCES VISCELLI, sworn.

Direct Examination by Mr. Friedman:

Q. Miss Viscelli, are you still employed by the Brighton Mills? A. Yes.

Q. Were you employed by them on June 5, 1925? A. Yes.

Q. Were you on this truck at the time of the accident? A. Yes.

Q. Did you fall off this truck also? A. Yes.

Q. About how fast was this truck going at the time you fell off? A. He was going very fast.

Q. Who was operating the truck at that time? A. Steve, an employee at the mill.

Q. Do you know what part of the mill he worked in? A. In the shipping room.

Q. Is that the place where the truck was used? A. Yes.

Q. And how was this truck operated? What kind of a direction? A. Well, it was going towards that way (indicating).

Q. Pardon?

The Court—You will have to speak up.

A. Towards that way (indicating).

Q. Please speak up a little bit. A. It was going towards the room.

Q. Towards the room? A. Yes.

Q. In a straight line? A. Not a straight line, but he was going zig-zag.

Q. You mean from side to side? A. Yes, from side to side.

Q. And was it going backwards or forwards? A. Well, he was going front-ways.

Q. I mean when you were on the truck. A. He was facing me.

Q. Were you facing the direction in which the truck was going? A. No, no.

Q. Your back was facing that direction? A. Yes, back was turned.

Q. Now, what did Steve say to the girls when he came into the shipping room and he saw you on the truck?

Mr. Chance—I object to what Steve said, because there is no authority shown on the part of Steve to make speeches for this defendant.

The Court—There is as yet no testimony.

Mr. Friedman—I am going to connect it up.

The Court—If you connect it up I will permit the question, and you can move to strike it out if it is not connected up.

Mr. Chance—Your Honor will allow me an exception?

Mr. Friedman—Your Honor permits the question?

The Court—Subject to your connecting it up.

Q. Just what did Steve do and say when he came in the shipping room and found you girls on the truck? A. Well, he told us to get off, but he went so fast—he started as soon as he got on there.

Q. He started—A. As soon as he got on the truck, so he went so fast that we all fell off. We fell off first and Jean fell off after.

Q. By Jean you mean Regina? A. Yes.

Q. Did Steve use these words, "Get off the truck," or any other expression? A. Well—

Mr. Chance—I object to the question as leading.

The Court—I think that is a little leading.

Q. What did he say to you about getting off the truck? A. He didn't say anything. He says just, "Get off the truck.'

Q. "Get off the truck"? A. Yes.

Q. Did you have time to get off the truck before he started it? A. No, because he went very fast as soon as he got on there.

Q. Did he do any swearing?

Mr. Chance—I object to that.

A. Well, I didn't hear him.

The Court—That is a little leading, and I am afraid I don't think it makes much difference if he did or not. If negligence is the basis, it doesn't make any difference whether he swore or not.

Q. What happened to Regina when she fell off the truck? A. Well, the wheel went over her leg.

The Court—I can't hear a word you say.

The Witness—The wheel went over her leg, the wheel of the truck.

Mr. Friedman—Take the witness.

Cross-examination by Mr. Chance:

Q. This accident happened in the lunch hour, did it? A. Yes.

Q. You and the other young ladies had had lunch in a separate room, hadn't you? A. Yes.

Q. In a separate room set apart for the lunch purposes of the employees of the Brighton Mills, isn't it? A. Yes.

Q. You will have to say it so the stenographer can hear you. A. Yes.

Q. None of you had any work to do in the shipping room during the lunch hour, did you? A. No.

Q. And you had merely gone to the shipping room because it was cooler there, had you not? A. Yes.

Q. And seeing this electric truck standing there, didn't the four of you, Misses Conklin, Wagner, Harrison, and yourself, ask a man to give you a ride on it? A. No.

Q. I ask you if this is your signature on the paper which I now show you (handing a paper to the witness and indicating). A. Yes.

Mr. Chance—Will you mark that for identification? (The paper referred to was marked D-3 for identification.)

Q. Did you put your signature to this paper, D-3 for identification, on July 7, 1925? A. I don't remember.

The Court—I can't hear you.

The Witness—I don't remember if I did.

Q. You don't remember the date, you mean? A. No, I don't remember.

Q. But you remember that is your signature? A. That is my signature.

Q. You don't remember when or where you signed that paper? A. No.

Q. Well, I ask you to examine this paper, D-3 for identification, for the purpose of refreshing your recollection. A. (Witness complies.)

Q. Having refreshed your recollection from D-3 for identification, I ask you if you now recall whether or not on July 7, 1925, you stated at the Brighton Mills to Mr. Marra of that company,

"Seeing a truck, electric, standing idle, the four of us, Misses Conklin, Harrison, Wagner, and I asked the man to give us a ride on it." A. No, we didn't ask the man to give us a ride.

Mr. McGinnis—What was that answer?

The Witness—No, we didn't ask the man to give us a ride.

Q. Now, then, having looked at the paper and read it, have you any recollection of having ever signed it? A. I don't know. I signed the paper, but I don't know—I only know I signed it,—

Q. You don't remember when or where you signed it? A. —because I was on the truck. I don't remember that.

Q. Well, you haven't any—has anything been said to you to refresh your recollection as to what took place on the day this accident happened?

Mr. Friedman—By whom?

A. No.

Q. No? Well, can you give us any explanation of how it is that you can recall what took place on the 5th of June, 1925, but cannot recall ever having signed this paper which is admittedly bearing your signature? A. I remember that I signed the name, but I don't know what for. I only know that I was on the truck. That is the only thing I know I signed it for.

Q. Now, you do remember signing your name, don't you? A. I don't know. I don't know about that.

Q. There is no doubt that the signature is there? A. Yes, it is my signature, but I don't know whether I signed that or not that day. I don't know which day.

The Court—Don't be so modest. We want to hear what you say, and the jury want to hear you.

Q. You did sign it some day? A. I said I signed that paper, but I don't know which day I signed it.

Q. Well, do you remember the circumstances of the signing of that paper, D-3 for identification? A. Well, the only thing I know why I signed it, because I was on the truck.

Q. Where were you when you signed D-3 for identification, this paper? A. I don't know. I don't know where I was.

Q. You don't remember where you were?

The Court—Speak out. Speak out.

Q. Who was present when you signed it? Do you remember that? A. I think Mr. Marra was there; I don't know for sure.

Q. You think Mr. Marra was there, but you don't remember whether he was or not? A. No, I don't remember quite well.

Q. What time of day did you sign this paper? A. Oh, I don't know. I don't know the time.

Q. Well, except for the fact that you see your signature on there, D-3 for identification, you would not have any recollection of having ever signed that paper at all, would you?

The Court—The stenographer can't hear you shake your head.

A. No.

Q. And the only recollection that you have, or the only way that you know you signed that paper, is by recognizing your signature on it, is it not? A. That is all.

Mr. Chance—"That is all," is the answer.

Q. Do you deny that on July 7, 1925, at the Brighton Mills, you stated to Mr. Marra, "Seeing a truck, electric, standing idle, the four of us, Misses Conklin, Wagner, Harrison, and I asked a man to give us a ride on it"? Do you deny having made that statement? A. Yes, I deny it. I don't know anything about it.

STEVE KOVALSKY, sworn.

Direct Examination by Mr. Friedman:

Q. Mr. Kovalsky, by whom are you employed now? Who are you working for now? A. I work for—I work in the finnishing room for John Garrisch for a while.

Q. Where do you work now? A. For Brighton Mills.

Q. For the Brighton Mills? A. Yes, sir.

Q. Did you work there on June 5, 1925? A. Yes, sir.

Q. What room did you work in? A. What I work in the shipping room.

Q. What do you do in the shipping room? A.

I do—I drive electric truck and I do any kind of work in the shipping room.

Q. And driving the electric truck? A. Yes.

Q. Now, did you see girls on the truck? A. Yes, sir.

Q. On June 5, 1925? A. Yes, sir.

Q. Now, when you saw the girls on the truck what did you do? A. I come and swerved the truck and told them, "Get off of the truck."

Q. And then what did you do? A. There jumped on the truck and I drive him.

Q. Why did you tell them to get off? A. Well, I told them, "Get off."

Q. Why?

Mr. Chance—I object. It is immaterial.

A. Well, I didn't want—because the boss—

Mr. Chance—He has no authority from the company to speak for this company.

Mr. Friedman—I will connect it up, your Honor.

Mr. Chance—I will make the same objection as before.

Q. Why did you tell these to get off? A. Because I got order of the boss in the shipping room clerk told anybody you see on the truck tell them get off.

Mr. Chance—I object to what somebody else said and move to strike it out.

Mr. McGinnis—His boss ordered him.

The Court—The boss, he says, told him if

he saw anybody on the truck tell them to get off.

Q. Who is your boss? A. Tom Conklin.

Q. Who? A. Tom Conklin.

Q. He is foreman of the shipping room? A. Yes, yes.

Q. How many men work in that shipping room? A. They work about five.

Mr. Friedman—That is all.

Cross-examination by Mr. Chance:

Q. Tom Conklin, he is a brother of Regina Conklin, isn't he? A. Yes.

Q. This accident happened between twelve and one that day? A. About ten minutes to one.

Q. Ten minutes to one? How do you know that it is just ten minutes instead of fifteen or seven or some other time? A. The other fellow has got a watch by his pocket. It says ten minutes to one was happened that accident.

Q. Who had the watch? A. John Matsko.

Q. John Mitchell? A. Yes.

Q. What was your lunch period that day? A. My lunch was just twelve o'clock.

Q. From twelve to one? A. Yes.

Q. The same as everybody else in the shop, in the Brighton Mills, lunch hour was from twelve to one that day? A. Yes, yes.

Q. And during the lunch hour the mill shut down, did it? A. Yes.

Q. No work? A. No work.

Q. Nobody worked? A. No.

Q. You, the girls, and everybody were off duty from twelve to one? A. Yes.

Q. You could take your lunch or do what you pleased from twelve to one? A. Yes.

Q. That was your own time? A. Yes, that is mine time.

Q. Now, then, you had been, just before the time when the girls got on the truck, you had been out in the bushes, hadn't you, sleeping? A. There was no bushes there; it was outside in the grass.

Q. Oh, sleeping in the grass? A. Yes.

Q. And then you came in just a little—about ten minutes to one? A. Yes.

Q. Did the girls ask you to take them for a ride? A. He don't ask me. They never ask me. Just I told them, "Get off that truck," I told them.

Mr. Chance—I move to strike it out.
The Court—Yes, strike it out.

Q. Did the girls ask you to take them for a ride on the small electric truck?

Mr. Friedman—He answered that question.

By the Court:

Q. Yes or no. A. No.

By Mr. Chance:

Q. There is no doubt in your mind that this accident happened before the whistle blew for one o'clock? A. Before one o'clock?

Q. Before one o'clock. A. Yes.

Q. And the girls got on the truck before you did, didn't they? A. Yes.

Q. And how many speeds has this truck? A. Two.

Q. First speed and second speed? A. Yes.

Mr. Friedman—What is that?

The Court—Don't shake your head. You must answer.

Q. And when the accident happened you were going in first speed, weren't you?

Mr. McGinnis—I object to it as not proper cross-examination; I mean, he was brought on as a witness to testify solely as to his agency. The rest of it I don't think is cross-examination. We didn't go into it.

The Court—No, I think now.

Mr. Chance—Well, they are talking a lot about connecting it up. I would like to lay some foundation now. I will withdraw it.

Q. Well, I ask you if on the 25th of June you made—June, 1925—you made the statement in the Brighton Mills to Mr. Marra about how this accident happened. A. It happened.

Q. Did you make a statement to him or didn't you?

By the Court:

Q. Did you tell how it happened to Mr. Marra? A. Oh, yes, I told him to another man, not Marra; some other man came there.

Mr. McGinnis—That only calls for yes or no, sir.

Q. Well, did you make a statement to Mr. Marra and some other man on June 25, 1925? A. Another man come in the Brighton Mill and he asked me questions.

Q. Two men, Mr. Marra and another man, and they asked you questions? A. Yes.

Q. And do you know whether that paper was written down at the time you were asked these questions (handing a paper to the witness)? A. I don't know whether they are written down or not.

By the Court:

Q. Did you sign your name to it? A. (No answer.)

By Mr. Chance:

Q. You don't know whether that—do you admit making that mark on that or not (indicating)? A. Yes, I think I make it. I don't know.

Q. You think you made that mark on that paper, do you? A. Maybe. I don't know.

The Court—Talk out loud.

The Witness—Yes, I make it.

Q. You did make your mark on some paper, did you? A. Some paper.

Q. And it was a paper about that size, was it? A. I don't know is this size or another size I don't know.

Q. You don't remember or—A. No.

Q. Did you talk to anybody about this case before you came here, other than those two men? A. No.

Q. No? A. No.

Q. Never told anybody about how this accident happened except those two men? A. No, I never tell him nobody, no.

Q. You never told anybody? A. No.

Q. This truck was a truck to carry freight on, wasn't it? A. Carry me on, and anything like that.

Q. To carry freight? A. Freight.

Q. Not to carry workmen around the plant, was it? A. No.

Q. Nor working girls around the plant, was it? A. No.

Mr. Chance—I guess that is all.

JULE HARRISON, recalled.

Direct Examination by Mr. Friedman:

Q. Were you ever in the shipping room before the day of the accident? A. Yes.

Mr. Chance—I object to it as immaterial.
The Court—Permit it.
Mr. Chance—Exception.

Q. Were the other girls there before the accident? A. Yes.

Mr. Chance—I object to it as immaterial.
The Court—Permit it.

Mr. Chance—Exception.

Q. Was there any objection to your being in the shipping room?

Mr. Chance—I object to it as immaterial.
The Court—I don't suppose there is much difference whether there was any objection to their being there.
Mr. Friedman—That is all.

REGINA CONKLIN, recalled.

Direct Examination by Mr. Friedman:

Q. Were you ever in the shipping room before this accident? A. Yes.

Mr. Chance—I object to it as immaterial.
The Court—Permit it.
Mr. Chance—Exception.

Q. Was there any objection ever made by anyone?

Mr. Chance—I object as immaterial and irrelevant.

A. No.

The Court—Permit it.
Mr. Chance—Exception.
Mr. Friedman—That is all.

THOMAS E. CONKLIN, sworn.

Direct Examination by Mr. Friedman:

Q. Mr. Conklin, you are the brother of the plaintiff, Regina Conklin? A. Yes, sir.

Q. Are you are presently employed by the Brighton Mills? A. Yes, sir.

Q. How long have you been employed by that company? A. Why, ten years and a half.

Q. And what is your position today with that company? A. Foreman in the shipping room, receiving and shipping department.

Q. How long have you been foreman of that department? A. June, 1924.

Q. That is about a year before the accident your sister had? A. Yes, sir.

Q. And who made you foreman of that department? A. Mr. Kelly.

Q. And who is Mr. Kelly? A. Mr. Kelly is vice-president and factory manager.

Q. Pardon? A. Vice-president and factory manager.

Q. Of the Brighton Mills? A. Yes.

Mr. Chance—This is Mr. Kelly, to make sure of it (indicating).

Mr. Friedman—Thank you.

Q. When you were made foreman did you have any orders or instructions received by you from Mr. Kelly? A. Why, he told me not to leave anyone under any circumstances ride on that truck, other than the man who was driving the truck, at no time.

Q. Who gave you those instructions? A. Mr. Kelly and Mr. McCann, the superintendent.

Q. What did you do with those instructions given by them to you? A. I carried them out to the men under me in the shipping department.

Q. How many men are there in the shipping department? A. Why, five.

Q. What instructions did you give to these men? A. I told them when they are running that truck to be very careful not to let anyone on that truck under any circumstances, not even giving them a ride, other than the man who was on the truck; it was very dangerous to ride on that truck.

Q. Was Steve Kovalsky one of the men to whom you gave these instructions? A. Yes, sir.

Q. How long before the accident were these instructions given by you to these men in the shipping room? A. About a year, I should judge.

Q. Is that the only time you gave those instructions? A. From time to time I gave them instructions, because I wanted to be certain that the instructions were followed out.

Mr. Friedman—That is all.

Cross Examination by Mr. Chance:

Q. You were not there when the accident happened, were you? A. No, I wasn't.

Q. These girls had no duties, working in the shipping room, had they? A. No, sir.

Q. They were not employees under you? A. No, sir.

Q. Did you have anybody whose duty it was to run this electric truck during working hours? A. Yes, there were three or four men that I had given duties to run that truck during working hours, previous to the accident, not since.

Q. Who were they? A. Mr. John Matsko was

one, Mr. Kovalsky, and Mr. John Yensley, and Charlie Stoniolo.

Q. Why weren't you at the factory when this accident happened? A. I was home to my lunch.

Q. Well, who was in charge of the shipping room when you were not there? A. Why, Mr. Matsko was the head laborer. At that time I had no clerk under me; now I have a clerk. At that time there was no clerk.

Q. Well, at that time from twelve to one everybody's time was his own, was it not? A. Yes, sir.

Q. And that applies to everybody in your department? A. Yes, sir.

Q. And then when the whistle would blow at one o'clock it would be the duty of you and the men to be there and resume your activities for the Brighton Mills, would it? A. There was a warning whistle blew at five minutes to one, to warn the men to get in and get their things and be at work when the one o'clock whistle blew.

Q. And until this warning whistle blew they could go out on the grass if they wanted to? A. Yes.

Q. Or stay any place they felt like? A. Yes.

Q. And Steve had a right to be out in the grass? A. Oh, yes.

Q. He didn't have to do anything until one o'clock? A. No, sir.

Mr. Chance—That is all.

Redirect Examination by Mr. Friedman:

Q. Mr. Conklin, during the lunch period do most of the people stay around this mill?

Mr. Chance—I object to that as immaterial.

The Court—I don't see that it makes much difference. Does it?

Mr. McGinnis—Except this, if your Honor please, that they were not obliged to go away. I think it does make some difference that they were permitted to stay in the place and have their lunches and loaf around. It makes the difference between a trespasser and the licensee.

Mr. Chance—The rule of law is the same.

Mr. McGinniss—We will discuss that later.

The Court—I don't think it makes any difference.

Mr. McGinnis—I take exception to your Honor's ruling.

Q. Now, was there ever any work done in the shipping department between twelve and one?

Mr. Chance—I object to that line as being irrelevant and immaterial.

The Court—What is the purpose of it?

Mr. Friedman—Just the conduct on the part of the defendant.

The Court—I don't think it makes any difference.

Mr. Friedman—Your Honor will permit me an exception.

That is all.

Mr. Friedman—Our doctor, your Honor please,—one of them, Dr. Jacobs—said he would be here at twelve.

Mr. McGinnis—With the exception of putting in the medical testimony, we rest.

The Court—The plaintiff rests, with the exception of the medical testimony.

Plaintiff Rests.

MOTION FOR NON-SUIT

Mr. Chance—I now move for a non-suit, your Honor please. The evidence is clear and undisputed—

The Court—State your grounds, first.

Mr. Chance—I move for a non-suit at this time upon the following grounds:

First, that nothing has been shown which gives to Miss Conklin any legal right to be upon the truck of the defendant, and that there is nothing which shows that there was any wilful injury to Miss Conklin;

Secondly, upon the ground that there has been no negligence shown on the part of the defendant;

Thirdly, that at the time this accident happened Mr. Kovalsky, who was operating the truck, was not acting as an employee of the Brighton Mills in the scope of any duty which has been shown by this evidence to have been owed by him in his work;

Fourth, that if this lady has not been shown to be a trespasser, she was at least a licensee; and as to a licensee the only duty is to refrain from willful injury, no proof of which appears in this case.

(Mr. Chance proceeded to argue his motion for a non-suit, after which Mr. McGinnis replied for the plaintiff.)

Mr. Chance—And the point your Honor brought up in addition, I move further on the ground that this Workmens Compensation Law of New Jersey is the exclusive remedy in such a case as this.

(Further argument.)

Motion for Non-suit

The Court—The case is not free from difficulties, and of course it is a case of considerable importance to both sides. The undisputed testimony, as I recall it, shows that Miss Conklin, the plaintiff, with other girls was upon this truck, as it is called, a truck in the shipping room; that the accident occurred about ten minutes of one; that all the employees were off duty, so to speak, from twelve to one o'clock, or until the whistle blew warning that it was five minutes to one. The gravamen of the complaint is that this man Steve, who was an employee of the defendant—the first count is that he was negligent, and the second count is that he committed an assault and battery upon the plaintiff.

Now, in either event, it makes the defendant responsible for the conduct of Steve, either of negligence or in the nature of an assault and battery. It would have to disclose that Steve, at the time the action was committed, was acting in the performance of some service, under instructions or in the course of his employment. And, of course, the testimony shows that there was no employment until at least the warning whistle blew.

I think there is no evidence which will support the case on the first count, as to negligence. Now, as to the second count, alleging technical assault, the evidence of Mr. Conklin upon which the plaintiff relies is that Steve was not to let anyone ride on the truck except the driver, and of course that would have to be sometime during his

employment, I suspect, but if during the noon time when he was not engaged in his employment he undertook to drive somebody off the truck, I doubt if the defendant could be held responsible for that conduct.

While there are other points raised in the case, there is one point which it seems to me is defective in the plaintiff's case, and that is, assuming that there was this technical assault, it would have to take place while he was within the scope of his employment or instructions.

I do not think that that is sufficiently shown by the testimony on behalf of the plaintiff. For that reason I will grant the non-suit and allow you an exception.

Mr. McGinnis—Exception.

(Jury excused.)

New Jersey Court of Errors and Appeals

Regina Conklin,
Plaintiff-Appellant,
vs.
Brighton Mills, Inc.,
Defendant-Appellee.

BRIEF OF PLAINTIFF-APPELLANT

WARD & McGINNIS and
LOUIS C. FRIEDMAN,
Attorneys for Plaintiff-Appellant.

STATEMENT OF FACTS

This was an action instituted by Regina Conklin against the Brighton Mills, Inc., for injuries received by her upon the 5th day of June, 1925, when she and three other girls entered upon the platform of the electrical freight conveying truck, which stood at rest in the shipping room of the defendant's mill. The operator of the truck entered the shipping department about ten minutes to one on the day aforesaid, and in a rough way requested the four girls to leave the truck, and before they had a chance to get off the truck, the defendant's agent got upon the truck and operated it at about fifty miles an hour, from one side of the room to the other in a zig-zag fashion, and operated it in a backward manner, and while the girls were standing on the platform of the truck with their backs in the direction in which the truck was proceeding, and with nothing to hold on, so that by reason of the wilful and mal-

icious conduct of the defendant's agent, three of the girls fell off the truck after it had proceeded about fifty or fifty-five feet, and then about ten or twelve feet further, the plaintiff fell off the truck, by reason of the recklessness of the operator of the truck, so that the truck ran over her legs when she fell off, and caused her to suffer severe compound fractures of the left leg, and other serious injuries, from which she has not as yet recovered.

The case came on for trial, and the trial court was of the opinion that since the accident occurred ten minutes to one, the defendant's agent was not acting in the course and within the scope of his employment and nonsuited the plaintiff which the plaintiff-appellant contends is error, under the circumstances in the case.

POINT 1.

THE TRIAL COURT COMMITTED ERROR IN GRANTING THE DEFENDANT'S MOTION FOR A NONSUIT.

Paragraph eleven of the first count of the complaint alleges that the plaintiff, Regina Conklin, entered upon a certain electrical freight-carrying truck of the defendant while it was at rest and standing on the floor of the mill of the defendant, (S. of C., P. 2, L. 30.)

Paragraph three of the first count of the complaint alleges the plaintiff, Regina Conklin, was an employee of the defendant, at the time of the committing of the grievances. (S. of C., P. 1, L. 30.)

Paragraphs four, five, six, seven and eight of the

first count of the complaint allege that Steve Kovalsky was an employee of the defendant at the time of the committing of the grievances, and was acting under the orders and directions, and at the request, and on behalf of the defendant. (S. of C., P. 2, L. 1 to 30.)

Paragraph twelve of the first count of the complaint alleges that the defendant corporation, through its duly authorized servant and agent, Steve Kovalsky, carelessly, negligently and wrongfully operated the electrical freight carrying truck at a high and excessive rate of speed while the plaintiff was on the truck, and carelessly, negligently and wrongfully operated the same in a backward direction, and carelessly, negligently and wrongfully operated the same in a zig-zag fashion, and carelessly, negligently and wrongfully operated it at a high, excessive and dangerous rate of speed, and carelessly, negligently, and wrongfully operated the same as aforesaid without giving any warning or signal to the plaintiff, and carelessly, negligently and wrongfully operated the same while he was an incompetent driver, so that by reason of the premises, the plaintiff was thrown from the electrical freight carrying truck to the floor, with such great force that she sustained severe and permanent injuries. (S. of C., P. 3, L. 4 to 35.)

The first count of the complaint was also incorporated into the first paragraph of the second count of the complaint by reference, (S. of C., P. 5, L. 10 to 13.)

Paragraph two of the second count of the complaint alleges that the defendant through its duly authorized servant and agent wilfully and malicious-

ly operated the truck as aforesaid, etc. (S. of C., P. 5, L. 10 to 35.)

Paragraph three of the second count of the complaint alleges that the defendant, through its duly authorized servant and agent, Steve Kovalsky, under its orders and directions with force and arms assaulted the plaintiff, Regina Conklin at the mill of the defendant and then and there with great force and violence shook and pulled about the said plaintiff, and cast and threw the said plaintiff down from the electrical freight carrying truck, while it was in motion with such great force and violence that she sustained severe and permanent injuries. (S. of C., P. 6, L. 3 to 22.)

The defendant's answer to the first count of the complaint is that it admits the plaintiff was an employee of the defendant at the time of the committing of the grievances, and that Steve Kovalsky was its employee, servant and agent at the time of the committing of the grievances, but that the aforesaid Steve Kovalsky was not acting in the course and scope of his employment. (S. of C., P. 7, L. 1 to 25.) The defendant admits it owned the electrical freight carrying truck. (S. of C., P. 7, L. 30 to 35.)

The defendant further in its answer alleges the plaintiff was a trespasser on the electrical freight carrying truck. (S. of C., P. 8, L. 1 to 10.)

The second defense to the first count of the complaint is that the plaintiff was a trespasser. (S. of C., P. 8, L. 20 to 25.)

The third defense to the first count of the complaint is that the agent of the defendant, Steve Kovalsky, was not guilty of negligence at the time of the accident. (S. of C., P. 8, L. 25 to 30.)

The fourth defense to the first count of the complaint is that Steve Kovalsky was not acting within the scope of his employment, and was not acting for the defendant at the time of the accident. (S. of C., P. 8, L. 30 to 35); (S. of C., P. 9, L. 1 to 2.)

The fifth defense to the first count of the complaint is that the plaintiff's injuries were caused by her own negligence in engaging with Steve Kovalsky in a joy riding enterprize, and not holding fast while she was upon said truck. (S. of C., P. 9, L. 3 to 10.)

The defenses to the second count of the complaint are practically the same as the defenses to the first count of the complaint, with the addition that the defendant, in its third defense to the second count of the complaint, denies that its agent, Steve Kovalsky was acting wilfully, and that its agent, Steve Kovalsky, was skylarking and using the defendant's truck for his own purpose, etc. (S. of C., P. 9, L. 30 to 35); (S. of C., P. 10, L. 1 to 3.) The plaintiff denied the allegations of the defendant's answer. (S. of C., P. 10, L. 8 to 10.)

The plaintiff's attorney, in opening the case to the jury, stated that the plaintiff came into the shipping room, accompanied with other girls, and went upon the electrical freight carrying truck (S. of C., P. 13, L. 30 to 35) and while the plaintiff and her girl friends were upon the truck, Steve Kovalsky came in the shipping room and ordered the girls off the truck, and as he did that he got on the truck, and began operating the truck very fast, and operated it backwards, and from one side of the room to the other for a great distance through this mill, and as he did that three of the girls fell off the truck.

The plaintiff was still on the truck, and he went a further distance, operating the truck in a negligent manner, so that the plaintiff fell off, and as she fell off the truck, the truck ran over her leg and she sustained a broken leg, etc. (S. of C., P. 14, L. 10 to 28). The plaintiff's attorney continued further in his opening as follows:

> "Now, this agent of the company, Steve Kovalsky, we say, is the man responsible for this accident, and we say further that he was working for the Brighton Mills at this time. His duties were to use this truck for conveying the different bales of cotton or yarn through this mill. He was instructed to take care of this truck, and it was his duty to see that no one got upon this truck. Those were his orders." (S. of C., P. 15, L. 5 to 15.)

Now when he ordered these girls off the truck he immediately got on that truck, and used what we say was excessive force. We say he acted unreasonably at the time, and this excess force which he used, caused this girl to sustain her injuries. (S. of C., P. 15, L. 15 to 20.) The defendant moved for a nonsuit on the plaintiff's opening, which motion was held in abeyance by the court until the plaintiff rested her proofs. (S. of C., P. 16, L. 28 to 35.)

The defendant at the end of the plaintiff's case, renewed its motion for a nonsuit, (S. of C., P. 56, L. 1 to 35), which motion the court granted, and to which the plaintiff took an exception. (S. of C., P. 58, L. 15 to 20.)

POINT 2.

THE PLAINTIFF WAS AN INVITEE AND NOT A TRESPASSER.

The plaintiff testified as follows:

Q. How long had you been working for the Brighton Mills? A. About six years I was working for them.

Q. About six years. What was the nature of your work? A. Inspector, final inspector.

Q. Pardon? A. Final inspector. I worked in the finishing room. (S. of C., P. 17, L. 20 to 26.)

Q. Were you ever in the shipping room before this accident? A. Yes.

Q. Was there any objection ever made by anyone? A. No. (S. of C., P. 51, L. 14 to 30.)

Jule Harrison, testified as follows:

Q. Miss Harrison, are you employed by the Brighton Mills now? A. Yes.

Q. Do you remember the occasion where Miss Conklin had the accident? A. Yes, I do.

Q. And were you on the truck that day? A. Yes, with three other girls, (S. of C., P. 30, L. 20 to 26.)

Q. Were you ever in the shipping room before the day of the accident? A. Yes.

Q. Were the other girls there before the accident? A. Yes. (S. of C., P. 50, L. 25 to 35.)

From the above testimony the court can readily see that the plaintiff's presence in the shipping room amounted to an implied invitation, as she was in the shipping room on previous occasions without any apparent objection.

Mr. Justice Trenchard, speaking for the Court of Errors and Appeals, in the case of Gibeson v. Skidmore, reported in 99 N. J. L., on page 133, said on p. 133, in the first paragraph:

> "Now, the rule is that an owner or occupier of premises, who by express invitation or by invitation to be implied from acts and conduct, induces a person to make use of the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for such purposes,"

and cites the case of Phillips v. Library Co., 55 N. J. L., p. 307.

And in the case of Miller, Adm., etc., v. Schmidt, reported in 100 N. J. L., p. 324, Mr. Justice Minturn, speaking for the Court of Errors & Appeals, said in the first syllabus,

> "The owner of property may expel trespassers from his property, ***and the mere act of allowing a child to play in a dangerous environment may charge the owner with liability as to a presumptive invitee.***"

Assuming for the sake of argument, but in no wise conceding the same, that the plaintiff was a trespasser, still there was evidence in the case to show the injury the plaintiff received was through the

gross negligence and willfulness of the defendant's servant, which point will be argued elsewhere in this brief.

POINT 3.

THE CONDUCT OF THE DEFENDANT'S SERVANT WAS WILLFUL AND WANTON AND AMOUNTED TO ASSAULT AND BATTERY AND CONSISTED NOT ONLY OF NEGLIGENCE BUT OF GROSS NEGLIGENCE AND EXCESS FORCE.

The plaintiff testified as follows as to how the accident happened:

> Q. How long were you on the truck before the accident? A. How long?
>
> Q. Yes. A. Oh, only about five minutes, I guess.
>
> Q. About five minutes? A. About five minutes.
>
> Q. Then what happened? A. On the truck?
>
> Q. Yes. A. We were on the truck—
>
> Q. Yes. A. And Mr. Kovalsky came and he saw us on the truck and he came over. (S. of C., P. 18, L. 25 to 35.)
>
> Q. Speak up, please. A. Mr. Kovalsky saw us on the truck—
>
> Q. Yes. A. ***And he came over and he said in a rough way for us to get off the truck,*** and before we had a chance to get off he started the truck and swerved it and throwed the girls off.

Q. He swerved it? A. He swerved the truck.

Q. Indicating from side to side. A. Yes. He was going every way.

Q. How fast was this truck going? A. Oh, it seemed to me as if it was going about fifty miles an hour it was going so fast, (S. of C., P. 19, L. 1 to 15.)

Q. Only one. Now, how far did he drive that truck before the other girls fell off? A. Oh, about fifty feet.

Q. And were you the last one to fall off? A. Yes, I was the last one.

Q. And how far after that did it travel, did the truck travel, before you fell off? A. It is easy about ten or twelve feet.

Q. More? A. More. (S. of C., P. 20, L. 5 to 15.)

Q. Now, how was this truck operated by Steve Kovalsky when you girls were on the truck? Forward or backward? A. No, he ran it backwards. It was backwards.

Q. Do you mean that the truck was being operated with your back toward the direction in which the truck was proceeding? A. Yes, we were facing Mr. Kovalsky and the truck was going the opposite way. (S. of C., P. 20, L. 31 to 35.)

Q. Steve Kovalsky was facing the direction in which the truck was going? A. Yes.

Q. And your back was facing that direction? A. Yes.

Q. So that you were face to face with Steve Kovalsky? A. Yes.

By the Court:

Q. I understand that the truck was running backwards, or you were just sitting backwards? A. No, we were not sitting; we were standing. The truck was going backwards.

Q. Were you standing up? A. Standing up. There was nothing to hold on.

By Mr. Friedman:

Q. There was nothing to hold on to? A. Nothing to hold on.

Q. Are there any walls on that truck? A. No.

Q. Just a plain platform? A. Platform. (S. of C., P. 21, L. 12 to 25.)

Jule Harrison testified as follows as to how the accident happened:

Q. Miss Harrison, are you employed by the Brighton Mills now? A. Yes.

Q. Do you remember the occasion where Miss Conklin had the accident? A. Yes, I do.

Q. And were you on the truck that day? A. No, I was on the truck with three other girls.

Q. You were on the truck with three other girls? A. Yes.

Q. Now, did anyone order you to get off the truck? A. Why, yes. When we were on the truck, one of the operators, Steve— (S. of C., P. 30, L. 21 to 33.)

Q. What did Steve do, Miss Harrison? A. Why, he just came out to the truck. He just

came out to the truck and told us to get off.

Q. And then what happened? A. And before we got a chance to get off, he started the truck and we couldn't get off.

Q. How did he operate this truck? A. Why the truck was backwards.

Q. Yes? A. And he was standing and we were facing him.

Q. You were facing him? A. Yes.

Q. How fast do you think this truck was going? A. Oh, it was going fast. I just don't know how fast. It was going fast.

Q. Did he operate it in a straight line? A. No, he was going zig-zag.

Q. And for what distance did that truck go from the moment you started until the moment you fell off? A. Oh, I should judge about fifty or fifty-five feet.

Q. About fifty or fifty-five feet? A. Yes. (S. of C., P. 31, L. 10 to 34.)

Q. And did Miss Conklin fall off before you or after you? A. No, three of us girls fell off first and then Miss Conklin fell.

Q. Now, was there anything on that truck upon which you could hold? A. No, there was nothing. It is just a platform that you stand. (S. of C., P. 32, L. 1 to 5.)

Frances Viscelli testified as follows as to how the accident happened:

Q. Miss Viscelli, are you still employed by the Brighton Mills? A. Yes.

Q. Were you employed by them on June 4, 1925? A. Yes.

Q. Were you on this truck at the time of the accident? A. Yes.

Q. Did you fall off this truck also? A. Yes.

Q. About how fast was this truck going at the time you fell off? A. He was going very fast.

Q. Who was operating the truck at that time? A. Steve, an employee at the mill. (S. of C., P. 37, L. 25 to 35.)

Q. In a straight line? A. Not a straight line, but he was going zig-zag.

Q. You mean from side to side? A. Yes, from side to side.

Q. And was it going backwards or forward? A. Well, he was going front-ways.

Q. I mean when you were on the truck? A. He was facing me.

Q. Were you facing the direction in which the truck was going? A. No, no.

Q. Your back was facing that direction? A. Yes, back was turned.

Q. Now, what did Steve say to the girls when he came into the shipping room, and he saw you on the truck? (S. of C., P. 38, L. 17 to 31.)

Q. Just what did Steve do and say when he came in the shipping room and found you girls on the truck? A. Well, he told us to get off, but he went so fast, he started as soon as he got on there.

Q. He started— A. As soon as he got on the truck, so he went so fast that we fell off. We fell off first and Jean fell off after.

Q. By Jean you mean Regina? A. Yes.

Q. What did he say to you about getting off the truck? A. He didn't say anything. He says just, "Get off the truck."

Q. "Get off the truck?" A. Yes.

Q. Did you have time to get off the truck before he started it? A. No, because he went very fast as soon as he got on there. (S. of C., P. 39, L. 14 to 35.)

The defendant's servant and agent, Steve Kovalsky, testified as follows as to how the accident happened:

Q. Where do you work now? A. For Brighton Mills.

Q. For the Brighton Mills? A. Yes, sir.

Q. Did you work there on June 5, 1925? A. Yes, sir.

Q. What room did you work in? A. What I work in, the shipping room.

Q. What do you do in the shipping room? A. I do—I drive electric truck and I do any kind of work in the shipping room. (S. of C., P. 44, L. 28 to 35.)

Q. And driving the electric truck? A. Yes.

Q. Now, did you see the girls on the truck? A. Yes, sir.

Q. On June 5, 1925? A. Yes, sir.

Q. Now, when you saw the girls on the truck what did you do? A. I come and swerved the truck and told them, "Get off the truck."

Q. And then what did you do? A. There jumped on the truck and I drive him (the witness meaning, he then jumped on the truck and began operating it).

Q. Why did you tell them to get off? A. Well, I told them, "Get off."

Q. Why? A. Well, I didn't want because the boss—

Q. Why did you tell these to get off? A. Because I got order of the boss in the shipping room clerk told anybody you see on the truck tell them get off.

Mr. Chance—Objection.

The Court—The boss, he says, told him if he saw anybody on the truck tell them to get off. (S. of C., P. 45, L. 3 to 34.)

Q. Who is your boss? A. Tom Conklin.

Q. Who? A. Tom Conklin.

Q. He is the foreman of the shipping room? A. Yes, yes. (S. of C., P. 46, L. 3 to 8.)

From the above testimony of the four witnesses called by the plaintiff, the Court can readily see that the conduct of the servant and agent of the defendant was willful and wanton, and amounted not only to asault and battery, but consisted also, not only of negligence, but gross negligence.

The Court of Errors & Appeals decided in the case of Barry v. Borden Farm Products Co., 100 N. J. L., p. 106, that:

"A motion for nonsuit, in effect, admits the truth of the evidence and every inference

> of fact that can be legitimately drawn therefrom which is favorable to the plaintiff, but only denies its sufficiency in law; and where such evidence or inferences of fact will support a verdict for the plaintiff, such motion must be denied."

See also the case of Hunke v. Hunke, 5 N. J. Adv. R., 791.

Chancellor Walker, in the case of James Iaconio v. John D'Angelo and James P. D'Angelo, writing for the Court of Errors & Appeals, in 6 N. J. Adv. R. p. 868, on p. 870, fourth paragraph, said:

> "Willful or wanton injury can only be established by showing that one, with knowledge of existing conditions, and conscious from such knowledge that injury will likely or probably result from his conduct and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result." Citing the case of Staub v. Public Service Railway Co., 97 N. J. L. 297.

The Court of Errors & Appeals in the case of Holberg v. Collins, Lavery & Co., 80 N. J. L. 425, said at p. 428:

> "That to force a man from a rapidly moving railway train, it is well known, is to subject him to hazards, almost certain to result in loss of life or severe bodily harm. Such an act, therefore, if the conditions are known, is itself malicious and wrongful."

The Court of Errors & Appeals, in the case of Iaconio v. D'Angelo, supra, approved the law in the Holberg case, and said on p. 870 of the opinion, in the sixth paragraph, two lines from the bottom of the page:

> "And the driver of this auto car could not have helped knowing that to push this boy off a rapidly moving machine would result in injury to him, more or less serious. His conduct, undenied as it is, falls directly within the ruling of Holberg v. Collins, Lavery & Co."

Now in the Iaconio case, if the Court held that the driver of the automobile in that case could not have helped knowing that to push a boy off a rapidly moving machine, would result in injury to him more or less serious, and that under these circumstances there could be no other conclusion that by reckless indifference to consequences, the driver consciously and intentionally did the wrongful act of ejecting the boy from the car, where the latter was a trespasser by deliberately pushing him off, how can it be said, that the servant and agent, Steve Kovalsky, of the defendant, Brighton Mills, Inc., in the case at bar, was not also acting consciously and intentionally, and did not do a wrongful act by reckless indifference to consequences, by operating a huge electrical freight carrying truck through a mill, with four girls on it, at a high rate of speed, and operating it from one side of the room to the other, in a zig-zag fashion, and operating it when the backs of the girls were facing the direction in which the truck was proceeding, so that they could

not see just where they were being driven, and the agent, Steve Kovalsky also testified that he told the girls to get off, and then he got on the truck and swerved the truck, in which statements he was corroborated by three witnesses, and these witnesses also testified that before they had a chance to get off the electrical freight carrying truck, it was going at a fast rate of speed, and one witness said fifty miles an hour?

Now, the agent who operated the electrical freight conveying truck, knew its mechanism and its speed, and the witness testified that when he operated the truck for about fifty or fifty-five feet, three of the girls fell off, and that about ten or twelve feet thereafter, the plaintiff fell off. In the light of these circumstances, Steve Kovalsky, the agent of the defendant, by reckless indifference to consequences, consciously and intentionally did the wrongful act of continuing to operate the electrical freight conveying truck, at a high rate of speed, when the plaintiff was on the truck, after the other three girls fell off. In other words, when the first three girls fell off the truck, at least at that time, Steve Kovalsky, the defendant's agent knew or should have known, that he was operating the truck in a reckless manner, and that the manner in which he was operating it, would result in injuries, more or less serious, to the plaintiff. Steve Kovalsky had knowledge at the time he operated the truck, that the three girls fell, and with that in his possession, when he continued to proceed further with the truck at a high rate of speed, he was conscious or ought to be conscious of such knowledge that injury would likely or probably result to the plaintiff from his

conduct, and when he continued, with reckless indifference to the consequences, to proceed further for ten or twelve feet with the plaintiff on the truck, which was a plain platform, without any walls and nothing to hold upon, he did a wrongful act and omitted to discharge a duty which was owing to the plaintiff, and which produced an injurious result, and constructively amounted to willful and wanton injury, and constructively amounted under the law, to an intent to do severe bodily harm. In other words, assuming for the sake of argument that to prove willful or wanton injury, there must be an intent to do severe bodily harm, yet, where a person conducts himself in such a manner, which amounts to gross negligence when there are circumstances at the time present, which make it incumbent upon the actor to owe a duty to a person within his physical control, and the actor not only fails to perform that duty to the person present and under his physical control, but actively commits a gross wrong, the law construes the conduct towards that person as being willful and wanton, and that he must have intended some serious injury to the person present, and under his physical control, under the circumstances.

When Steve, the defendant's agent, ordered the girls off the truck, and immediately got on the truck and began operating it at a high rate of speed, and in a reckless manner and swerving it before they had a chance to get off, his conduct under those circumstances must have been willful and wanton, when, as the evidence shows, the platform was an ordinary floor on the truck, with no walls around it, or anything to hold on to protect the girls from falling off the truck.

The following factors are material in construing the intent of the defendant's agent: (1) the truck was a huge electrical truck, with just a plain platform, with no walls and nothing to hold on, and the girls were standing on the same. (S. of C., P. 21, L. 15 to 25.) (2) the truck was operated by the defendant's agent ten or twelve feet further after the first three girls fell off, and about fifty feet before the first three girls fell off. (S. of C., P. 20, L. 5 to 15.) (3) the defendant's agent ordered the girls off the truck in a rough way and before they had a chance to get off the truck, he started the truck and swerved it, and threw them off, and he was going about fifty miles an hour. (S. of C., P. 19, L. 1 to 15.) (4) the defendant's agent operated the truck in a backward fashion, that is, he was facing in the direction in which the truck was proceeding, but the girls were face to face with him, and with their backs in the direction in which the truck was proceeding, (S. of C., P. 20, L. 31 to 35.) (5) the truck was being operated by the defendant's agent not in a straight line, but in a zigzag fashion, and was going very fast, and they couldn't get off, because he started the truck before they had a chance to get off. (S. of C., P. 31, L. 10 to 34.) (6) the defendant's agent continued to operate the truck, after the first three girls fell off, and then the plaintiff fell off. (S. of C., P. 32, L. 1 to 5.) These facts are corroborated by another witness. (S. of C., P. 27, L. 25 to 35; S. of C., P. 38, L. 17 to 31; S. of C., P. 39, L. 14 to 35.) The defendant's agent himself testified he came and swerved the truck and told them to get off the truck, and then jumped on the truck and began operating it,

and told them to get off, because those were his boss' orders. (S. of C., P 45, L. 3 to 35.)

In the Holberg case, supra, and in the Iaconio case, supra, the plaintiff was ejected or pushed off a rapidly moving vehicle, and it cannot be said that that fact distinguishes those cases from the case sub judice, because the plaintiff in this case was not pushed off, but fell off. In other words, it is merely a distinction without a difference. The defendant's agent knew the truck had no walls, and there was nothing to hold upon. He was facing the girls and saw the way they stood on the truck, and that there was nothing to prevent them from falling off at the time, and under the conditions present, when he was operating the truck. His conduct under those circumstances amounted to pushing or ejecting the plaintiff and her girl friends off the truck. He intended to throw them off the truck in that fashion because he ordered them off the truck and it was his purpose to get them off. Those were his orders from his boss in the shipping room, and operating a truck, with nothing to hold on, with no walls surrounding it, at a high and excessive rate of speed, in a zig-zag fashion and backwards, amounts in law to ejecting and pushing a person off a rapidly moving vehicle, as if it was done by using his hands on the person of the plaintiff and her girl friends and pulling them off the truck. In other words, it was not necessary for the defendant's agent to lay his hands on the plaintiff and her girl friends and pull or push them off the truck to bring the present case within the decisions of the Holberg and Iaconio cases, but as his conduct was

such that he used his efforts on an instrumentality which was so operated, as to become a dangerous instrument to bring about a result of throwing the plaintiff and her girl friends off the truck, such conduct amounted in law, and is identical to his using his hands on the person of the plaintiff and her girl friends, and pulling or pushing them off a rapidly moving vehicle.

The conduct of the defendant's agent obviously shows that it was such that amounted to excess force, and that he could have, in all probability removed the girls and the plaintiff from the truck, if he did not use such excess force, but only used such reasonable force as was appropriate under the circumstances.

Mr. Judge White, speaking for the Court of Errors and Appeals, in the case of Rose v Campbell, 102 N. J. L., 449, said six lines down from the beginning of the opinion:

> "That while it is true that liability for injury to a trespasser or to a licensee can only arise from a positive intention to do injury, as distinguished from a positive intent only to do the act which by reason of its negligent or unlawful character happens to cause the injury, such an intent to do injury may, nevertheless, be found where the wrongful act willfully done is of such a nature that the injury complained of, is (to the wrong-doer) the obviously natural result to be expected therefrom. This is so because the law presumes that a wrong-doer intends what he knows, or should know, to be the natural consequence of his wrongful act."

Mr. Justice Lloyd gave his views in Rose v. Campbell, supra, as follows, on page 451, in the third paragraph:

> "The opinion of the Supreme Court, it seems to me, excludes liability under the foregoing rule of law, which rule, as I understand it, implies nothing more than that when one does an act with the knowledge that the doing of that act will likely do injury to another, whether done purposely or recklessly, with indifference to consequences, the law will attach to such conduct, if injury ensues, the willfulness and wantonness of which the books are full. In other words, it was not essential that Campbell should have an actual purpose to kill or injure the other occupants of his car to create liability; it is sufficient if his conduct in the operation of his car, with the knowledge of the dangerous consequences likely to follow from his driving, would probably do injury to or kill them, and the law would attach to his recklessness and indifference to their safety the element of wantonness regardless of actual intent."

In the case of State v. Schutte, 88 N. J. L., p. 396, there was a conviction of assault and battery. In that case, the defendant drove his car at a dangerous rate of speed, through a crowded thoroughfare. There was no claim in the case of the existence of a purpose to do injury to others. In the opinion of Mr. Justice Garrison, 87 N. J. L. P. 15, and affirmed by the Court of Errors, 88 N. J. L. P. 396, the Court said:

> "Counsel for the plaintiff in error correctly contends that both the willful wrong doing that constitutes malice in the law and also an intention to inflict injury are of the essence of a criminal assault; and that, as a necessary corollary, mere negligence will not sustain a conviction for such crime. With these abstract propositions no fault is to be found, provided it is borne in mind that the necessary malice may be implied from the doing of an unlawful thing from which injury is reasonably to be apprehended and also that an intention to injure need not be specifically directed to the particular individual that was injured, but may be inferred in law from the consequences that are naturally to be apprehended as the result of the particular act, the doing of which was intentional."

And in the case of Haucke v. Beckman, 96 N. J. L., p. 409, the Court held that:

> "The driving of an automobile at forty to fifty miles an hour around a curve, striking and injuring one standing on private property beside the roadway (presumably out of view), exhibited such a wanton and reckless disregard of the injured person's rights as to stamp the driver's conduct as willful and intentional. It is obvious that the willfulness indicated is a legal implication and not an actual fact, for the reason that it is quite apparent that the driver was in total ignorance of conditions beyond the curve, and certainly did not intend to strike or injure the girl

> standing on private property. It was the reckless doing of an act which would likely lead to serious consequences, to which the law attached a wrongful motive."

And in Rose v. Campbell, supra, on p. 453 of the opinion, second paragraph, Mr. Justice Lloyd continues:

> "It seems to me that these cases fully demonstrate that an actual intent on the part of Campbell to do injury either to himself or to the women by his side was not essential to create liability, even though they were but licensees, but that it would be sufficient if the acts done by Campbell were of such a character as to be likely to cause death or injury, and that these acts were not willfully performed with a knowledge of their probable consequences."

In the case of Aiken v. Holyoke Street Railway Co., 184 Mass., 269; 68 N. E. Rep. 238, Chief Justice Knowlton at p. 239 says:

> "The law is regardful of human life and personal safety, and, if one is grossly and wantonly reckless in exposing others to danger, it holds him to have intended the natural consequences of his act, and treats him as guilty of a willful and intentional wrong. It is no defense to a charge of manslaughter for the defendant to show that, while grossly reckless, he did not actually intend to cause the death of his victim. In these cases of personal injury there is a constructive in-

> tention as to the consequences, which, entering into the willful, intentional act, the law imputes to the offender, and in this way a charge which otherwise would be mere negligence becomes, by reason of a reckless disregard of probable consequences, a willful wrong. That this constructive intention to do an injury in such cases will be imputed in the absence of an actual intent to harm a particular person is recognized as an elementary principle in criminal law. It is also recognized in civil actions for recklessly and wantonly injuring others by carelessness."

In Southern Railway Co. v. McNeeley, 88 N. E. Rep., p. 710, it is said:

> "The authorities from the earliest years of the common law, recognize the rule that there may be a willful wrong without a direct design to do harm. This principle has been applied to furious driving; to collisions between vessels, etc."

Further in the opinion it is said:

> "There is little distinction, except in degree, between a positive will to do wrong, and an indifference whether wrong is done or not. Therefore, carelessness is criminal and within limits, supplied the place of the direct criminal intent."

And further on it was said:

> "If a man neglects obvious means to learn what will be the probable consequence of his act, and so proceeds rashly, the doctrine of carelessness already discussed, applies to the case, and he is not excused."

And in the case of State v. Schutte, 87 N. J. L. p. 15, it was said on p. 18:

> "It requires neither argument nor illustration to show that the excessive rate of speed at which an automobile is driven is a product of the will of its driver and not the result of his mere inattention or negligence."

POINT 4.

IT WAS A JURY QUESTION WHETHER THE DEFENDANT'S AGENT USED EXCESSIVE OR INAPPROPRIATE FORCE UNDER THE CIRCUMSTANCES, AND ALSO THE INTENT OF THE DEFENDANT'S AGENT AT THE TIME HE USED FORCE.

The law is well settled in this State, that excessive or inappropriate force cannot be used to expel a trespasser, and that if it is used, a cause of action arises in favor of the injured person. So it was held in the cases of West v. Welch, 62 N. J. L., 658 at 662; Letts v. Hoboken, 70 N. J. L., 358; Powell v. Erie, 70 N. J. L., 292.

Some cases hold that it is the defendant's duty to refrain from acts willfully injurious. Turess v. New York, 61 N. J. L. 320; D. L. & W. v. Reich, 61 N. J. L. 643.

In the case at bar, it is not merely the speed of the truck, but it is taking the facts collectively from which the jury could have inferred willful and wan-

ton conduct on the part of the defendant's agent and the use of excess force, and that his conduct was unreasonable at the time, and if the defendant's agent used more force than was necessary and reasonable, at the time to fulfill the orders and directions, which he received from the defendant, through his boss in the shipping room, his conduct amounted not only to excess force and gross negligence, but also to an assault and battery.

POINT 5.

THE WORKMEN'S COMPENSATION LAW WAS NOT AT ISSUE UNDER THE PLEADINGS IN THE CASE, AND THEREFORE THEY WERE WAIVED BY THE DEFENDANT.

The defendant's answer is set out on page seven, eight, nine and ten of the state of case, and nowhere therein is to be found any defense, that the plaintiff's remedy was under the Workmen's Compensation Law of New Jersey, and if the defendant did not plead the same, they cannot come to Court, and raise that as an objection on a motion for nonsuit.

Mr. Justice Kalisch, speaking for the Supreme Court, in the case of Dellabello v. Central Railroad Co., 99 N. J. L., p. 348, said at p. 355, in the last paragraph,

> "It is not only an elementary but an inflexible rule of pleading at common law, that facts intended to be set up in bar of an action must be specially pleaded. The new Practice act of 1912 does not deviate from the common

law rule, and requires defenses to the action to be specially pleaded."

Chief Justice Gummere in the case of Shack v. Dickenhorst, 99 N. J. L., p. 120, in the third syllabus, said:

"It is an elementary rule of pleading that the existence of every fact upon which plaintiff's right of action depends must be specially averred in his complaint, and the absence of such an averment raises the presumption that no such fact exists, and, consequently, no liability on the part of the defendant is shown."

Now, if it is true that material allegations must be alleged in a complaint, the converse of the same is true, that material allegations of a defense must be raised in the answer of a defendant, and since the defendant did not raise the question of the Workmen's Compensation Law in his answering pleading, the question of the Workmen's Compensation Law is not an issue in the case, and has been waived by the defendant, and cannot prevent the plaintiff's common law action in the circuit of the New Jersey Supreme Court.

Another reason why the plaintiff's case is not within the Compensation Law, is because the accident occurred ten minutes to one, whereas her employment did not start until one o'clock that afternoon, but this in no way affects the defendant's liability as to the defendant's agent, Steve Kovalsky, as his orders were so broad as to make his employ-

ment continuous right through and including the lunch hour period.

POINT 6.

THE DEFENDANT'S AGENT, STEVE KOVALSKY, AT THE TIME OF THE ACCIDENT, WAS ACTING IN THE COURSE AND WITHIN THE SCOPE OF HIS EMPLOYMENT.

The testimony in that respect shows the following: Thomas E. Conklin testified:

> Q. How long have you been employed by that company? A. Why, ten years and a half.
>
> Q. And what is your position today with that company? A. Foreman in the shipping room, receiving and shipping department.
>
> Q. How long have you been foreman of that department? A. June, 1924.
>
> Q. That is about a year before the accident your sister had? A. Yes, sir.
>
> Q. And who made you foreman of that department? A. Mr. Kelly.
>
> Q. And who is Mr. Kelly? A. Mr. Kelly is vice-president and factory manager.
>
> Q. Of the Brighton Mills? A. Yes.
>
> Q. When you were made foreman did you have any orders or instructions received by you from Mr. Kelly? A. Why, he told me not to leave anyone under any circumstances ride on that truck, other than the man who was driving the truck, at no time.
>
> Q. Who gave you those instructions? A

Mr. Kelly and Mr. McCann, the superintendent. (S. of C., P. 52, L. 10 to 35.)

Q. What did you do with those instructions given by them to you? A. I carried them out to the men under me in the shipping department.

Q. How many men are there in the shipping department? A. Why, five.

Q. What instructions did you give to these men? A. I told them when they are running that truck to be very careful not to let anyone on that truck under any circumstances, not even giving them a ride, other than the man who was on the truck; it was very dangerous to ride on that truck.

Q. Was Steve Kovalsky one of the men to whom you gave these instructions? A. Yes, sir.

Q. How long before the accident were these instructions given by you to these men in the shipping room? A. About a year, I should judge.

Q. Is that the only time you gave those instructions? A. From time to time I gave them instructions because I wanted to be certain that the instructions were followed out. (S. of C., P. 53, L. 1 to 20.)

It will be seen from the above testimony by Thomas E. Conklin, that he was the foreman of the shipping department where Steve Kovalsky operated the electrical freight carrying truck, and that the orders which Conklin, the foreman, gave to Steve, the operator of the truck, were received by the foreman from

Mr. Kelly and Mr. McCann, the vice-president and factory manager, and the superintendent of the mill, respectively. It can be readily seen that the orders came from the head of the mill, down to the foreman of the shipping department, and to the men under him.

It is now necessary to ascertain what those orders were, and Tom Conklin testified that he was told not to leave anyone under any circumstances ride on the truck, other than the man who was driving the truck, at no time (S. of C., P. 52, L. 30 to 35) and that he carried those instructions out to the men under him, and to Steve Kovalsky, who was one of those men, and that the following are the orders he told Steve Kovalsky:

> "I told them when they are running that truck to be very careful not to let anyone on that truck under any circumstances, not even giving them a ride, other than the man who was on the truck; it was very dangerous to ride on that truck." (S. of C., P. 53, L. 7 to 11.)

Now, if the instructions given to Thomas E. Conklin, the foreman of the mill, were not to let anyone on the truck under any circumstances, at no time, and he in turn instructed Steve Kovalsky, and the other men under him in the shipping room, to be very careful and not to let anyone on the truck when they are running the truck under any circumstances, it seems that those instructions meant that Steve Kovalsky, the defendant's agent, was acting in the course and scope of his employment, when he attempted to put anyone off the truck at any time

when he saw them on it, whether it was lunch hour or not. If Steve's instructions were not to let anyone on the truck while he was at work, then of course, if he attempted to put someone off the truck between twelve and one, and injury resulted to the person whom he had attempted to put off the truck, Steve then would not be acting in the course and within the scope of his employment, because twelve to one would have been his lunch hour, but as the testimony shows, his orders were not to leave anyone on the truck under any circumstances when he was running the truck, and at no time; he carried out his orders when he was putting the plaintiff off the truck.

It is the appellant's contention that, ***"under any circumstances"*** and ***"at no time"*** to let anyone ride on the truck, means that Steve had the right, and was acting in the course and scope of his employment, at any time when he saw someone on the truck in the mill of the defendant, and tried to put them off. In other words, assuming for the sake of argument, but in no wise conceding the same, that when the accident happened at ten minutes to one, it was Steve's lunch hour, that fact standing alone is not sufficient to attack the doctrine of respondent superior, as Steve's orders were not to let anyone on the truck while he was running it, and under any circumstances and at no time.

Tom Conklin testified that those orders, which he received he carried out to the men under him, and he said, Q. "What did you do with those instructions given by them to you?" A. "I carried them out to the men under me in the shipping department." (S. of C., P. 53, L. 1 to 3.)

It is the appellant's contention that Steve, the defendant's agent, when he put the girls off the truck, by operating the same in a reckless and willful manner, acted in the course and scope of his employment, and therefore, his master, the defendant, is liable, because even though his lunch hour was from twelve to one, yet the orders and instructions which he got from his foreman, were such that if the occasion presented itself which would require his duties to his master to be fulfilled, it was incumbent upon him to perform those acts for the benefit of his master, even though they would have to be done during his lunch period, as the orders which he received ***"under any circumstances"*** and ***"at no time while he was running the truck,"*** are so broad in their meaning as to embrace his lunch period. In other words, Steve's job was the same as a night watchman, who is given a gun by his employer to protect his employer's property from a burglar, and one night the watchman spies a person attempting to carry away his master's property from the premises, it happening to be at that hour of the night when the watchman is having his lunch, and then the watchman takes his revolver from his belt, and shoots at the burglar and kills him, will it be said, that under those circumstances the night watchman was not acting in the course and scope of his employment, even though he was having his lunch at the time he fired his gun? The mere fact that Steve's lunch hour was from twelve to one, does not prevent the doctrine of respondent superior from being applied in the case sub judice, as it is a fact of common knowledge that there are many men at

work with their lunch hours from twelve to one, and yet during their lunch hour are doing acts in the course and scope of their employment, because the orders which they received from their superiors are so broad, as to make it incumbent upon them to do some act or acts for their master during that lunch hour, even though it may be an isolated act, during a lunch period.

In the case of Bryant, Admrx. v. Fissell, 84 N. J. L. p. 72, it was said on p. 73, syllabus 7:

> "An accident arises *'in the course of the employment'* if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time."

And with that language in mind, how can it be questioned that what Steve did at the time of the accident, from which the plaintiff received injuries, was something which he might not have reasonably done at the time he did it, and at the place, when his orders were so broad as to embrace almost any time that he was at the mill?

And on page 76 of the opinion in Bryant v. Fissell, supra, in the fourth paragraph, fourth line, the Court said:

> "The words 'out of' point, I think, to the origin and cause of the accident; the words 'in the course of' to the time, place and circumstances under which the accident takes place.'

Now with that definition as to the meaning of

the words ***"in the course of"***, how can it be said that Steve, the defendant's agent, when he operated the truck, which caused the plaintiff's injuries, was not acting in the course of his employment, when we keep in mind the orders that he received from his foreman, ***not to let anyone on the truck, "under any circumstances"*** and ***"at no time," "and while he was running it."***

The definition of the word "any" has been passed upon by our Courts in the case of Carson v. Scully, 90 N. J. L. p. 295, at p. 299, the second paragraph, the Chancellor said, speaking for the Court of Errors,

> "The popular and generally accepted meaning of language is to be applied to the construction of a statute in the absence of a legislative intent to the contrary."

Citing the case of Conover v. Public Service Railway Co., 80 N. J. L. p. 681.

> "The word ***'any'*** means 'one out of many' and is given full force of ***'every'*** and ***'all'."***

Citing Bouv. L. Dict. (Rawle's rev.) 205.

And in the next paragraph, the Chancellor cites the case of Purdy v. The People (New York Court of Errors), 4 Hill 384, Scott, senator, in his opinion at p. 14 observes:

> "Johnson says that the word 'every' means each one of all, and gives this example: 'All the congregation are holy, everyone of them. Numbers.' The same lexicographer defines 'any' to mean 'every,' and says: 'It is, in

all its senses, applied indifferently to persons and things.' "

Now with this definition, if the word 'any' means the same as "every" or "all" and Steve's orders were not to let anyone on the truck under ***any*** or ***every*** or ***all circumstances,*** his conduct when he put someone off the truck, under the definition just used, would make his master liable for the consequences of his act, as he was acting within the scope of his authority.

The Court in granting the defendant's motion for nonsuit, in its opinion, seemed to think that the plaintiff had a good cause of action for negligence and for assault and battery, and for willful and malicious conduct, but that the defendant was not liable, because Steve, the defendant's agent, was not acting in the course of his employment, at the time, because the Court said that the testimony showed that there was no employment, until at least the warning whistle blew, which of course would be around one o'clock. See the Court's opinion at p. 57, S. of C., L. 1 to 35; S. of C., p. 58, L. 1 to 15.

The Court said further that as to the second count, which alleged assault and battery,

> "The evidence of Mr. Conklin, upon which the plaintiff relies, is that Steve was not to let anyone ride on the truck except the driver, and of course, that would have to be some time during his employment, I suspect, but if during the noon time when he was not engaged in his employment, he undertook to drive somebody off the truck, I doubt if the defendant could be held responsible for that conduct."

The trial Court seemed to forget the testimony in the case of Tom Conklin, the foreman in the shipping department, who testified that Steve was not to let anyone on the truck, ***"under any circumstances" and "at no time,"*** and ***"while he was running the truck."*** Now, of course, those words were orders from the foreman, and are broad enough to include the noon hour period, and the trial court disregarded the words "at no time" and "under any circumstances" and "while Steve was running the truck."

Just because the accident happened at the lunch hour period, does not relieve the defendant from liability, because the instructions given to Steve were such that he was practically working for the defendant continuously and every minute he was on the premises of the defendant, whether it was lunch hour or not. The mere fact that it was the lunch hour, did not break the chain of employment between Steve and the defendant as long as some conditions and circumstances presented themselves, which required Steve to act to fulfill the orders which he received from his superior on behalf of his master. True, it may be said that from the hour of twelve to one was Steve's own time, it was his dinner hour, but that in no way relieves the defendant from liability, because it was Steve's duty, under the orders he received from his foreman, to remove anyone from the truck when the circumstances presented themselves to call for his personal action for that purpose, and the mere fact that those circumstances, which called for his personal action to remove someone from the truck, occurred at the lunch hour, is not a sufficient cloak for the

defendant to cover up the conduct of its duly authorized servant and agent, so as to relieve it from the natural and probable consequences of his acts.

In the case of Michael v. Southern Lumber Co., 101 N. J. L. p. 1, the Court said on p. 3, fifth paragraph:

> "For all acts done by a servant in obedience to the express orders or direction of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the service required, the instructions given and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions the servant alone is responsible."

Citing the case of Bennett v. Busch, 75 N. J. L. 240. See the case of Reinhardt v. G. W. Tisdale, Inc., et al, 133 Atl., p. 523.

It will be readily seen by the Court from reading the testimony that what the defendant's agent, Steve Kovalsky, did was within the scope of his employment. He testified as follows:

> Q. Now, when you saw the girls on the truck what did you do? A. I come and swerved the truck and told them, "Get off of the truck." (S. of C., P. 45, L. 7 to 10.)
>
> Q. Why did you tell these to get off? A. Because I got order of the boss of the shipping room. (S. of C., p. 45, L. 28 to 30.)

Q. Who is your boss? A. Tom Conklin.
Q. He is foreman of the shipping room?
A. Yes, yes. (S. of C., P. 46, L. 4 to 8.)

The defendant's agent, Steve Kovalsky, was corroborated by the foreman of the shipping department, Tom Conklin, who testified as follows:

> Q. What instructions did you give to these men? A. I told them when they are running that truck to be very careful not to let anyone on that truck under any circumstances, not even giving them a ride, other than the man who was on the truck; it was very dangerous to ride on that truck.
>
> Q. Was Steve Kovalsky one of the men to whom you gave these instructions? A. Yes, sir. (S. of C., P. 35, L. 6 to 12.)

The foreman also testified that he received these orders from the vice-president and factory manager, and superintendent of the mill, Mr. Kelly and Mr. McCann, respectively, and that he, in turn, carried out the orders and instructions from his superiors to Steve, the defendant's agent and operator of the truck in the shipping department. (S. of C., P. 52, L. 18 to 35; S. of C., P. 53, L. 1 to 3.)

The Trial Court seemed to be of the opinion that Steve was not acting within the scope of his employment or instructions, and not acting in the course of his employment, and this the appellant contends is also error.

POINT 7.

IT WAS A JURY QUESTION WHETHER THE DEFENDANT'S AGENT, STEVE KOVALSKY, WAS ACTING IN THE COURSE AND SCOPE OF HIS EMPLOYMENT.

The appellant contends that the question "in the course of employment" and "scope of employment" is a mixed question of law and fact. It is a question of law when we come to consider what is meant by the term "in the course of employment" and by the term "scope of employment," but it is a question of fact for the jury to decide in the case under consideration, whether the defendant's agent was acting in the course and scope of his employment at the time the plaintiff received her injuries. That is, if the trial court instructs the jury as to what is meant by the term "in the course of employment" and "scope of employment," then it is the jury's duty to decide, under the facts in the case, whether the defendant's agent was acting under the instructions of the defendant, and in the course and scope of his employment. If the Court defines those terms, it is practically analogous to the legal situation of a wife, who has separated from her husband, and has purchased merchandise, charging them to her husband, who refuses to pay for them on the ground that they were not necessaries. The question then would be, "What are necessaries?" and it would be a mixed question of law and fact, that is, the court would instruct the jury, as a matter of law, what are necessaries as defined by the law, and it would be a jury question, or a question of fact, whether

or not the merchandise which the wife purchased were necessaries in her case

It is therefore respectfully submitted that the judgment of nonsuit entered in the above cause be reversed, vacated and for nothing holden, and that a venire de novo issue.

WARD & McGINNIS, and
LOUIS C. FRIEDMAN,
Attorneys for Plaintiff.

PETER J. McGINNIS,
Of Counsel.

October Term, 1928.

Peter J. Mc Ginnis
Of Counsel

New Jersey Court of Errors and Appeals

REGINA CONKLIN, *Plaintiff-Appellant,* *vs.* BRIGHTON MILLS, INC., *Defendant-Appellee.*	*On Appeal from the Supreme Court.*

BRIEF OF DEFENDANT-APPELLEE FOR AFFIRMANCE OF NON-SUIT

STATEMENT

This appeal is from a non-suit granted by Judge Clifford L. Newman at the Passaic Circuit. Good and sufficient reasons for the trial judge's ruling are stated by him at pages 57 and 58.

As the law is that a non-suit valid on any ground will not be reversed (*Ferguson* vs. *Gillispie*, 78 N. J. L., 470) additional reasons are stated herein.

Counsel for the appellee may be influenced by the fact that had the non-suit not prevented, contradictory statements of plaintiff's winesses marked D-1, 2 and 3 respectively for identification at pages 30, 34 and 41, as well as other proofs would have been presented to show that the accident in question took place during a frolic when the plaintiff fell from a freight conveyor on which she had asked a ride, which was being given her without authority from the defendant, but it seems to us that appellant's counsel by omitting some and stressing other testimony extracted from its context, presents a distorted picture of the evidence as a whole. We

shall accordingly endeavor to supply the omissions, restore the stressed testimony to its proper setting, and show that the evidence when applied to the perinent law supports the non-suit.

There is no reasonable room for dispute that under the evidence Regina Conklin sustained injuries on June 5th, 1925, during the noon hour when defendant's factory was shut down (page 46, line 34) and the employees "off duty" (page 47, line 1). She fell from the platform of a freight conveyor in the shipping room of the defendant's mill. Details of the accident will be discussed under the points involved.

In passing it may be noted that the appellee contends that under the evidence the man who operated the truck from which the plaintiff fell was not acting on behalf of the defendant-appellee at the time, which was the noon hour when the factory was shut down and that the plaintiff was not an invitee, and that the man on the truck did not willfully injure the plaintiff.

The statement of appellant's counsel to the effect that the freight truck had such accelerative power that in 67 feet it could go from a standing position to 50 miles an hour in defendant's factory is ridiculous on its face. It may have "seemed" (case, page 19, line 12) like 50 miles to the plaintiff as she fell from the truck, but if so, obviously her fright gave her an exaggerated idea of its speed.

ALLEGED GROUNDS OF APPEAL

The three grounds of appeal stated by the appellant (case, page 12) are really one contention variously stated, namely, that the trial court should not have non-suited the plaintiff. In this brief we shall first state the reasons for upholding the trial judge's

action and then refute the fallacies advanced by the appellant's points to the contrary.

THE PLEADINGS

The pleadings are amended complaint, answer and reply.

COMPLAINT (page 1)

The amended complaint is in two counts. The first count in substance alleges that the plaintiff was an employee of the defendant on the date in question, as was one Steve Kovalsky, and that said Steve Kovalsky in the course of his employment and at the instance and request of the defendant by negligent operation threw plaintiff from a freight carrying electric truck causing injury to her.

The second count is to the same effect as the first, except that instead of alleging that Steve Kovalsky acted negligently it is alleged that he committed a willful assault on the plaintiff.

ANSWER (page 7)
(To First Count)

The answer to the first count consists of five separate defenses. The first defense to first count is a denial that Steve Kovalsky at the time of the injury to plaintiff was acting in the scope of his employment or under orders and directions of the defendant, a denial that the defendant operated the truck at the time of the accident and a denial that Steve Kovalsky was guilty of negligence.

The second defense to the first count is that the plaintiff was a trespasser upon the freight carrying truck.

The third defense to the first count is that Steve Kovalsky was not guilty of any negligence.

The fourth defense to the first count is that Steve was not acting for this defendant at the time of the accident.

The fifth defense to the first count is that plaintiff's injuries were caused by her own negligence in engaging with Steve Kovalsky in a joy riding enterprise and not holding fast while she was upon the truck.

(To Second Count)

The first defense to the second count is substantially the same as the first defense to the first count.

The second defense to the second count is that Steve Kovalsky was not acting for this defendant at the time of the plaintiff's injury.

The third defense to the second count is that Steve Kovalsky was not acting willfully toward the plaintiff and did not do the things alleged by the second count, but on the contrary was skylarking and used the truck of this defendant for his own purpose and that of the plaintiff in a sort of joy riding common enterprise.

The details of the situation are alleged in the pleadings, but the foregoing is a gist of the outstanding facts.

REPLY (page 10)

The reply denies the matters in the separate defenses of the defendant's answer.

POINTS OF DEFENDANT-APPELLEE

I.

THE NON-SUIT WAS PROPER BECAUSE STEVE KOVALSKY WHO OPERATED THE

FREIGHT TRUCK FROM WHICH PLAINTIFF FELL, WAS NOT ACTING FOR THE DEFENDANT AT THE TIME OF THE HAPPENING OF THE ACCIDENT INVOLVED.

II.

AS TO COUNT 1 BASED ON ALLEGED NEGLIGENCE THE NON-SUIT WAS PROPER BECAUSE PLAINTIFF WAS NOT AN INVITEE.

III.

AS TO COUNT 2 BASED ON ALLEGED MALICIOUS INJURY THE NON-SUIT WAS PROPER BECAUSE THERE IS NO PROOF OF A WILLFUL INJURY BY THE MAN OPERATING THE TRUCK AND FURTHERMORE THE MAN WAS "OFF DUTY," THAT IS, NOT WORKING FOR THIS DEFENDANT AT THE TIME.

IV.

EVEN IF COURSE OF EMPLOYMENT INCLUDES THE LUNCH HOUR FOR BRIGHTON MILLS EMPLOYEES DESPITE THE EVIDENCE TO THE CONTRARY, THE NON-SUIT WOULD BE PROPER AS THE PLAINTIFF'S EXCLUSIVE REMEDY WOULD BE UNDER THE WORKMEN'S COMPENSATION ACT.

V.

APPELLANT'S ALLEGED POINTS ARE NOT WELL TAKEN.

ARGUMENT

I.

THE NON-SUIT WAS PROPER BECAUSE STEVE KOVALSKY WHO OPERATED THE FREIGHT TRUCK FROM WHICH PLAINTIFF

FELL, WAS NOT ACTING FOR THE DEFENDANT AT THE TIME OF THE HAPPENING OF THE ACCIDENT INVOLVED.

The evidence is clear that at the time the accident happened the defendant's employees were "off duty," that is the accident was not in working hours.

Excerpts of testimony showing this follow:

REGINA CONKLIN, plaintiff, testified:

Q Do you remember having an accident on that day? A Yes.

Q What time of day was it? A Very warm day.

Q What time of day was it? A Oh! about ten minutes to one. (Page 17, lines 30 to 36.)

Q Ten minutes to one? A Yes. (Page 18, line 1.)

Q The lunch hour was from twelve to one, wasn't it? A Yes.

Q This accident happened during the lunch hour? A Yes, about ten minutes to one.

Q Ten minutes before the lunch hour had ended? A Yes.

Q Now, then—

By the Court.

Q Was that lunch hour for all the employees as well as you? A Yes. (Page 28, lines 9 to 20.)

JULE HARRISON testified:

Q Well, you and Miss Conklin and the other girls were all employed in the finishing department, weren't you? A Yes.

Q And your work did not require you to go to the shipping room, did it? A Why—

Q Yes, or no. Did your work require you to go to the shipping room? A Sometimes.

Q At the noon hour when this accident happened did your work require you or Miss Conklin's work require her to be in the shipping room? A No, not at noon hour. (Page 32, lines 15 to 26.)

FRANCES VISCELLI testified:

Q This accident happened in the lunch hour, did it? A Yes. (Page 40, lines 22 and 23.)

STEVE KOVALSKY testified:

Q This accident happened between twelve and one that day? A About ten minutes to one.

Q Ten minutes to one? How do you know that it is just ten minutes instead of fifteen or seven or some other time? A The other fellow has got a watch by his pocket. It says ten minutes to one was happened that accident.

Q Who had the watch? A John Matsko.

Q John Mitchell? A Yes.

Q What was your lunch period that day? A My lunch was just twelve o'clock.

Q From twelve to one? A Yes.

Q The same as everybody else in the shop, in the Brighton Mills, lunch hour was from twelve to one that day? A Yes, yes.

Q And during the lunch hour the mill shut down, did it? A Yes.

Q No work? A No work.

Q Nobody worked? A No. (Page 46, lines 15 to 47.)

Q There is no doubt in your mind that this accident happened before the whistle blew for one o'clock? A Before one o'clock?

Q Before one o'clock? A Yes. (Page 47, lines 30 to 34.)

THOMAS E. CONKLIN (plaintiff's brother) testified:

Q Why weren't you at the factory when this accident happened? A I was home to my lunch.

Q Well, who was in charge of the shipping room when you were not there? A Why, Mr. Matsko was the head laborer. At that time I had no clerk under me; now I have a clerk. At that time there was no clerk.

Q Well, at that time from twelve to one everybody's time was his own, was it not? A Yes, sir.

Q And that applies to everybody in your department? A Yes, sir.

Q And then when the whistle would blow at one o'clock it would be the duty of you and the men to be there and resume your activities for the Brighton Mills, would it? A There was a warning whistle blew at five minutes to one, to warn the men to get in and get their things and be at work when the one o'clock whistle blew.

Q And until this warning whistle blew they could go out on the grass if they wanted to? A Yes.

Q Or stay any place they felt like? A Yes.

Q And Steve had a right to be out in the grass? A Oh, yes.

Q He didn't have to do anything until one o'clock? A No, sir. (Page 54, lines 3 to 30.)

The appellant overlooks that this testimony clearly shows that Steve Kovalsky had no duties to perform for the defendant in the lunch hour when the accident happened. As the trial judge says (page 58) any instructions by plaintiff's brother Tom Conklin as to how Steve Kovalsky should do his work and what his work included would only relate to his activities during working hours, not at noon time when the mill was shut down (page 46, line 34) the employees "off duty" (page 47, line 1) and everybody's time was his own (page 54, line 10), and Steve didn't have anything to do until one o'clock (page 54, line 29).

In refuting appellant's sixth point we shall go into this a little further and now summarize the foregoing by saying that Steve Kovalsky was not acting for the defendant at the time of the accident, because it was the noon hour when the mill was shut down (page 46, line 34) and he had no duties to perform until one o'clock (page 54, line 29), and also because the instructions were expressly limited to when he was supposed to be running the truck for his employer (page 57, line 7), and that even then his instructions were only to "tell" people to get off (page 46, line 1) which is no authority to willfully injure anybody.

II.

AS TO COUNT 1 BASED ON ALLEGED NEGLIGENCE THE NON-SUIT WAS PROPER BECAUSE PLAINTIFF WAS NOT AN INVITEE.

The statement of the complaint that the defendant's freight carrying truck was used solely for carrying bales of cotton and other materials (page 2,

lines 33 to 36; page 5, line 11; page 2, line 22; page 2, line 27; page 2 line 32; page 3, line 10; page 3, line 32; page 5, line 19; page 5, line 34; page 6, line 19), should be admission enough to establish that the defendant-appellee did not invite the plaintiff upon the freight truck in question.

These admissions of the pleadings are supplemented by testimony as follows:

REGINA CONKLIN said her work was in the finishing room, while the accident happened in the shipping room (page 28, lines 6 to 8; page 18, line 3).

JULE HARRISON said Miss Conklin's work was in the finishing department and did not require her presence in the shipping room (page 32, lines 15 to 26); she also said the truck was to carry freight and not to carry workmen or working girls around the plant (page 50, lines 15 to 20).

FRANCES VISCELLI said none of the girls had any work in the shipping room during the lunch hour when the accident happened (page 40, lines 22 to 35).

THOMAS E. CONKLIN, plaintiff's brother, said the girls had no duties in the shipping room (page 53, lines 28 and 29).

Counsel for plaintiff-appellant under his Point 2 urges that the plaintiff was an invitee on the truck because of testimony to the effect that she was in the shipping room on previous occasions without objections being made.

The futility of such argument is apparent. In the first place mere permissive use of property does not amount to an invitation.

Phillips vs. *Library Co.*, 55 N. J. L., 307.

Fitzpatrick vs. *Glass Mfg. Co.*, 61 N. J. L., 378.

D., L. & W. R. R. Co. vs. *Reich*, 61 N. J. L., 635.

Fleckenstein vs. *G. At. P.*, 91 N. J. L., 145 at 147.

Even attraction or temptation is not legally equivalent to invitation.

Friedman vs. *Snare & Treist*, 71 N. J. L., 605.

Secondly, even if the fact that the plaintiff had been in the shipping room before could be given the far fetched construction of amounting to an invitation by the defendant it certainly could not be construed as an invitation to go upon a truck, which as the complaint alleges and witnesses state was used by the defendant "solely for the purpose of conveying bales of cotton and other materials in and about the mill." This is true because the duty to one as an invitee is circumscribed by the invitation.

Guse vs. *Martin*, 96 N. J. L., 262.

Garin vs. *O'Connor*, 99 N. J. L., 162.

The decision of *Gibeson* vs. *Skidmore*, 99 N. J. L., 131, 133, mentioned by appellant's counsel presented an entirely different state of facts because the defendant in that case had put up hooks upon which people were to hang their coats. That is entirely different from owning a freight truck used solely for freight, which the evidence does not show was ever to the knowledge of the defendant, used by the girls for a ride or any other purpose.

Appellant's reference to *Miller* vs. *Schmidt*, 100 N. J. L., 324, about a child as a presumptive invitee in certain cases is irrelevant. It is unnecessary to question whether the language quoted by appellant's counsel is contrary to the turntable cases. It is sufficient to say that any rules of duty based on the plaintiff being an immature child can have no pertinency to this plaintiff who is 38 years old.

Of course, it is fundamental that as to a trespasser or mere licensee as distinguished from an invitee there is no liability unless willful injury is shown.

Hoberg vs. *Collins Lavery Co.*, 80 N. J. L., 425.

Faggioni vs. *Weiss*, 99 N. J. L., 157.

Since there was no proof that plaintiff was an invitee the non-suit was proper insofar as the action was based on negligence.

III.

AS TO COUNT 2 BASED ON ALLEGED MALICIOUS INJURY THERE IS NO PROOF OF WILLFUL INJURY BY THE MAN OPERATING THE TRUCK AND FURTHERMORE THE MAN WAS "OFF DUTY," THAT IS, NOT WORKING FOR THIS DEFENDANT AT THE TIME.

Elsewhere we show that Steve Kovalsky was not acting as this defendant's servant when the accident happened. We now point out further that his conduct was not willful injury within the legal meaning of that term.

In *Rose* vs. *Squires*, 101 N. J. L., 438, the second syllabus is as follows:

> "The duty of the operator of a vehicle toward a passenger riding therein as a trespasser or mere licensee is only to abstain from acts willfully injurious, and mere fast and reckless driving is not within that class of acts, unless the evidence shows that it was done with an intent that injury result."

This case was affirmed under the name *Rose* vs. *Campbell,* in 102 N. J. L., 449. While the Court of Errors and Appeals opinions express differences as to what the judges severally deem willful injury the facts of that case seem so parallel with those made out by the plaintiff's evidence in this case that the legal situation should be the same, namely, the conduct held not willful.

The third syllabus in *Miller* vs. *Schmidt*, 100 N. J. L., 324, is:

> "The test of willful maliciousness in the exercise of a legal right is not whether a possible injury to a trespasser might reasonably have been anticipated, but whether there was any evidence of an intention to do an injury."

The cases mentioned by appellant's counsel in which persons were deliberately pushed from vehicles are not in point. Kovalsky did not push the plaintiff. Her story is that he ran the truck in a zig-zag fashion, but there is no evidence which justifies the idea that he knew or should have known that the plaintiff would fall as she did. It is common knowledge that frolicing customers of amusement parks pay admission for the privilege of using devices that give a zig-zag ride. There is no evidence of anybody falling before and counsel's statement that the truck was "huge" is not supported by a citation of evidence and in fact is inaccurate. Counsel's statement that the truck was going 50 miles an

hour after 67 feet of travel from a standing position is already refuted, whatever the speed may have "seemed" (case, page 19) to the plaintiff. That the girls were face to face with Steve with their backs in the direction in which the truck was proceeding does not prove willful injury, or that the ride in question was other than the defendant contends, namely, a frolic or joy riding trip in which the defendant's freight truck was used without its authority.

However, whether Steve Kovalsky acted willfully or not, he was acting as shown in our first point for himself, and not for this defendant.

There is no basis for holding a master responsible for an act done by a servant for the accomplishment of the independent malicious or mischievous act of the servant. Such an act is not as a matter of fact, the act of the master in any sense and should not be deemed so as a matter of law. As to it the relation of master and servant does not exist between the parties and for the injury resulting to a third person from it, the servant alone should be responsible.

Evers vs. *Krouse*, 70 N. J. L., 653.
Ward vs. *E. R. R.*, 89 N. J. L., 525.
Karas vs *Burns Bros.*, 94 N. J. L., 59.
Zampella vs. *Fitzhenry*, 97 N. J. L., 517.

Hence the non-suit was proper so far as the action was based on alleged willful injury.

IV.

EVEN IF COURSE OF EMPLOYMENT INCLUDES THE LUNCH HOUR FOR BRIGHTON MILLS EMPLOYEES DESPITE THE EVIDENCE TO THE CONTRARY, THE NON-SUIT

WOULD BE PROPER AS THE PLAINTIFF'S EXCLUSIVE REMEDY WOULD BE UNDER THE WORKMEN'S COMPENSATION ACT.

The complaint in this case does not allege the giving of notice that Section 2 of the Workmen's Compensation Law should not apply to the plaintiff's employment. Accordingly if her employment could be deemed to continue during the lunch hour and her accident could be deemed to have arisen from her employment, her exclusive remedy would be under the workmen's compensation law. This case differs from *Bolos* vs. *Trenton Fire Clay, &c.,* 102 N. J. L., 479, in the fact that the whistle had blown for the workmen to resume work in that case while in the present case it was still the lunch hour. If the lunch period be deemed so reasonably incidental as to be part of the employment, then the non-suit was proper because of the exclusive features of the workmen's compensation law.

Appellant's counsel errs in suggesting that the defendant waived the workmen's compensation law by failure to plead it. An answer is not supposed to be a brief. It is not necessary nor proper to plead legal conclusions (31 Cyc., 49), 72 N. J. L., 19, and for a plaintiff to prevail in an action at law despite the presumption of the applicability of Section 2 of the Compensation Act, such plaintiff must plead and prove facts which prevent the application of the compensation law.

Gregutis vs. *W. A. Clark Wire Wks.*, 86 N. J. L., 610.

McNutt vs. *Adams,* 94 N. J. L., 487.

As an answer to the argument that Steve Kovalsky's employment was continuous through the lunch hour, we refer to our first point where along with

others Tom Conklin is quoted as to Steve "He didn't have to do anything until one o'clock? A No, sir." (Case, page 54, line 29.)

V.

APPELLANT'S ALLEGED POINTS ARE NOT WELL TAKEN.

To the extent that the foregoing argument anticipated appellant's alleged points repetition seems unnecessary. We shall, however, briefly comment on each of such alleged points.

* * * * *

1.

Under appellant's first point no argument is given why the non-suit should be reversed. There is only a narration of counsel's version of the pleadings and what his associate said in opening the case to the jury.

* * * * *

2.

Plaintiff's alleged point 2 is refuted in our point II in which we say, among other things, that permissive use of a shipping room was no invitation, and certainly no invitation to go on a truck kept by the defendant solely for freight.

* * * * *

3.

Appellant's alleged point 3 is refuted by our point III in which we point out, among other things, that the proof does not show Steve Kovalsky to have willfully injured the plaintiff, and furthermore that whether he acted willfully or not, when the accident happened he was "off duty," that is not acting for the defendant.

4.

Appellant's alleged point 4 is a fallacy in that it assumes the man on the truck was acting as this defendant's agent at the time the accident happened when in fact as we have shown elsewhere he was "off duty" during the lunch hour when the mill was shut down and his time was his own, and he didn't have anything to do until one o'clock. All this and more to the same effect appears in our first point. This being clearly established there was no reason to submit to the jury the question of whether his action was willful. Further, the cases cited by appellant that one must not willfully injure a trespasser do not make Brighton Mills liable for the acts of one not acting as its agent at the time.

* * * * *

5.

Appellant's alleged point 5 that defendant's failure to plead the workmen's compensation law waived it is refuted under our point IV where we show among other things, that a defendant need not plead conclusions of law or presumptions such as that of the applicability of section II of the workmen's compensation law.

* * * * *

6.

Appellant's alleged point 6 that Steve Kovalsky was defendant's agent at the time of the accident is refuted by our point I. As there pointed out the instructions Steve got was merely to tell people, but whatever his instructions the trial judge correctly ruled that they only related to during his employment. It should take more than the printing in appellant's brief of certain words in heavy type to make Tom Conklin's instructions to Steve

extend to a time when Steve was not engaged in his employment, especially in the light of said Conklin's statement about Steve Kovalsky.

> "He didn't have to do anything until one o'clock? A No, sir." (Page 54, line 29.)

And his other statement:

> "Well, at that time from twelve to one everybody's time was his own, was it not? A Yes. Q And that applies to everybody in your department? A Yes, sir." (Case, page 54, lines 10 to 12.)

Incidentally the bold faced "at no time" does not appear in Conklin's statement of what he instructed the man. See page 53, line 7, *et seq.* And in addition to what has been said above, the words "when they (the men) are running the truck," at page 57, line 7, gives further evidence that the trial judge ruled correctly when he held that Conklin's instructions only related to when Steve Kovalsky was engaged in his employment, and not to the noon hour when the mill was shut down (case, page 46, line 34) and nobody worked (page 46, last line), and everybody was "off duty" (page 47, line 1), and everybody's time was his own (page 54, line 10) and Steve Kovalsky didn't have anything to do until one o'clock (page 54, line 27).

Clearly the specious argument in appellant's sixth point should not over-ride the clear testimony at the pages just mentioned.

* * * * *

7.

Appellant's point 7 that it was a jury question whether Steve was acting in the course of his employment overlooks the testimony just referred to in the last paragraph above. That testimony shows

ascertained facts beyond reasonable dispute. Accordingly their significance was a question of law, there was nothing for the jury and the non-suit was proper.

CONCLUSION

As a summary of the foregoing we urge that the non-suit was proper as to both counts, because Steve Kovalsky was not acting for the defendant when the accident happened, the plaintiff has no standing so far as claim based on negligence is concerned, because she was not an invitee and she has no standing so far as the claim is based on willful injury, because there was no willful injury by Kovalsky, and Kovalsky was not acting for this defendant. In addition to this the Workmen's Compensation Law would give the exclusive remedy if the Brighton Mills employees employment continued during the lunch hour.

From the foregoing considerations we respectfully submit that the non-suit should be affirmed.

Respectfully submitted,

KELLOGG & CHANCE,

Attorneys for and of Counsel
with Defendant-Appellee.

INDEX

Testimony.