INDEX

(Filed February 7th, 1928.)

New Jersey Supreme Court

Bergen County

Anna May Hopper, et als.,
Plaintiffs,
vs.
Harold E. Gillett,
Defendant.

10

NOTICE OF APPEAL

To: Edward M. & Runyon Colie, Attorneys for Defendant.

Please take notice that the plaintiffs appeal from the whole part of the judgment and order of the New Jersey Supreme Court in the above stated cause to the New Jersey Court of Errors and Appeals in the last resort of all causes.

Dated: February 4th, 1928.

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Jacob L. Bernstein,
Louis C. Friedman,
Attorneys for Plaintiffs.

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Ground of Appeal

(Filed February 24, 1928)

NEW JERSEY COURT OF ERRORS AND APPEALS

Anna May Hopper, et als.,
Plaintiffs,
vs.
Harold E. Gillett,
Defendant.

GROUND OF APPEAL

To: Edward M. & Runyon Colie, Attorneys for Defendant

Please take notice that the following is the Ground of Appeal of the plaintiffs in the above stated cause.

1. The New Jersey Supreme Court committed error in ordering and adjudging that the plaintiffs furnish to the defendant further particulars by way of full answer to the specific inquiries made in demands No. 28, 29 and 30 for bill of particulars as indicated in its opinion filed in the above cause on January 18th, 1928, and whereas it should have refused to order that the plaintiffs furnish the aforesaid answers to the aforesaid demands for particulars.

Dated: February 4th, 1928.

Jacob L. Bernstein
Louis C. Friedman,
Attorneys for Plaintiffs.

Complaint

(Filed March 22, 1927.)

NEW JERSEY SUPREME COURT

Bergen County

Anna May Hopper, by her next friend Frank Hopper, Jr., Frank Hopper, Jr., individually, and Frank Hopper, Jr., and Cecelia Hopper, his wife, jointly,
Plaintiffs,
vs.
Harold E. Gillett,
Defendant.
} Action at Law

COMPLAINT

FIRST COUNT

The plaintiff Anna May Hopper, an infant of the age of thirteen years, residing in Wyckoff, Township of Franklin, County of Bergen and State of New Jersey, by her next friend Frank Hopper, Jr., says that:

1. Defendant is a resident of the Borough of Ramsey, County of Bergen and State of New Jersey.

2. That in the month of December, 1926, and prior thereto, the said defendant had been holding himself out to the public as a physician and surgeon, skilled in his profession and during all the time aforesaid, had exercised and is exercising and carrying on the art, mystery and profession of physi-

cian and surgeon, his said profession, at the Borough of Ramsey, in the County and State aforesaid.

3. Plaintiff Anna May Hopper, on or about the 4th day of December, 1926, as a result of a certain accident, sustained serious injuries, to wit, a fracture of the right leg, knee and kneecap, and other serious injuries, consisting of fractures of the bones and separation thereof, in and about the right leg of the said plaintiff.

4. That the said defendant, being such physician and surgeon of the art and mystery aforesaid, was thereupon employed for a reasonable reward to be thereafter paid, to skillfully and carefully treat, set, cure and heal the fractures aforesaid, and other injuries and fractured bones in and about the right leg of the plaintiff Anna May Hopper, and did on, to wit, the 4th day of December, 1926, and thereafter agree and undertake within a reasonable time, to skillfully and carefully treat, set, cure and heal the said plaintiff of the said fractured leg, knee and kneecap and all the broken and fractured bones in the right leg of the plaintiff as aforesaid; and to carefully and skillfully look after and care for the physical constitution and health of the said plaintiff, during the time of such treatments, and to carefully and skillfully diagnose the character of the injuries so received by the plaintiff aforesaid.

5. That the said defendant then and there carelessly, negligently, improperly and unskillfully behaved and governed himself in and about the premises, to wit, in and about the diagnosing of the character of the fracture and of the injuries received by the plaintiff aforesaid, and carelessly, negligently, improperly and unskillfully governed himself in the

setting and treatment of the said fracture and in not properly setting and treating it as the condition required; and carelessly, negligently, improperly and unskillfully failed to give proper care, attention, medicines, appliances and skill in the treatment of said fracture of the right leg, knee and kneecap and other injuries; and well knowing that he was not properly taking care of the said fractures and treating the plaintiff as he should have done, carelessly, negligently and improperly prevented plaintiff from the services of other physicians and surgeons, to the end that the said injuries received as aforesaid, could have been properly attended to; and well knowing that he had failed to properly diagnose the character of said fractures, and had failed to cure the same, carelessly, negligently and improperly failed to apprise the plaintiff of the said fact, so that other proper treatment could have been applied; and carelessly, negligently and improperly gave erroneous and improper information to the plaintiff as to the character of the injuries received by her and of the care, treatment and attention required.

6. By reason of the premises, and by and through the neglect, carelessness, default and unskillfulness of the said defendant, as such physician and surgeon, the said plaintiff Anna May Hopper, was caused to suffer great and excruciating pain, and in the future will continue to suffer great and excruciating pain; that the said right leg, knee and kneecap, all have become permanently injured, in that she has suffered a shortening of her right leg to the extent of two inches, and in so far as the plaintiff is unable to walk properly, that the said

plaintiff has become permanently lame and disfigured and the general health of the said plaintiff was impaired, weakened and ruined, to such an extent that she has been unable to do any kind of labor; and in the future will continue likewise.

7. By reason of the premises, the plaintiff Anna May Hopper, has been prevented and will in the future continue to be prevented from carrying on her usual work and employment, and has lost and will continue to lose large sum of money.

By reason of the premises the plaintiff Anna May Hopper, by her next friend Frank Hopper, Jr. demands as damages the sum of $50,000.00.

SECOND COUNT

Plaintiff Frank Hopper, Jr., residing in Wyckoff, Township of Franklin, County of Bergen and State of New Jersey, says that:

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

2. He is the father of plaintiff Anna May Hopper.

3. As a consequence of the injuries and negligence aforesaid, plaintiff has been compelled and will in the future be compelled to employ medical and surgical care on behalf of his said infant daughter, and has heretofore and will in the future be deprived of and lose the services of his said infant daughter.

By reason of the premises, the plaintiff Frank Hopper, Jr. demands as damages in the sum of $15,000.00.

THIRD COUNT

Plaintiffs Frank Hopper, Jr. and Cecelia Hopper, residing in Wyckoff, Township of Franklin, County of Bergen and State of New Jersey, say that:—

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

2. They are father and mother respectively, of the plaintiff Anna May Hopper.

3. As a consequence of the injuries and negligence aforesaid, the aforesaid plaintiffs Frank Hopper, Jr. and Cecelia Hopper, his wife, were deprived of the services and earnings of the plaintiff Anna May Hopper, and in the future will be likewise deprived of such services and earnings.

By reason of the premises, the plaintiffs Frank Hopper, Jr. and Cecelia Hopper, his wife will claim damages in the sum of $15,000.00.

Jacob L. Bernstein and
Louis C. Friedman,
Attorneys for Plaintiffs.

(Filed April 25, 1927)

NEW JERSEY SUPREME COURT

Bergen County

Anna May Hopper, by her next friend Frank Hopper, Jr., Frank Hopper, Jr., individually, and Frank Hopper, Jr., and Cecelia Hopper, his wife, jointly, Plaintiffs, vs. Harold E. Gillett, Defendant.	Action at Law.

DEMAND FOR BILL OF PARTICULARS

The defendant, Harold E. Gillett, hereby demands a bill of particulars of the plaintiffs, as follows:

1. State particularly wherein defendant carelessly, negligently, improperly and unskillfully governed and behaved himself in and about the diagnosing of the character of the fracture received by plaintiff, Anna May Hopper.

2. State particularly wherein defendant carelessly, negligently, improperly and unskillfully governed and behaved himself in and about the diagnosing of the injuries received by plaintiff, Anna May Hopper.

3. State particularly wherein defendant carelessly, negligently, improperly and unskillfully governed himself in the setting of the fracture of the right leg of the plaintiff, Anna May Hopper.

4. State particularly wherein defendant carelessly, negligently, improperly and unskillfully governed himself in the treatment of the fracture of the right leg of said plaintiff.

5. State particularly wherein the defendant carelessly, negligently, improperly and unskillfully failed to give proper care in the treatment of the fracture of the right leg of said plaintiff.

6. State particularly wherein defendant carelessly, negligently, improperly and unskillfully failed to give proper attention in the treatment of the fracture of the right leg of said plaintiff.

7. State particularly wherein defendant careless-

8. State particularly wherein defendant carelessly, negligently, improperly and unskillfully failed to give proper appliances in the treatment of the fracture of the right leg of said plaintiff.

ly, negligently, improperly and unskillfully failed to give proper medicines in the treatment of the fracture of the right leg of said plaintiff.

9. State particularly wherein defendant carelessly, negligently, improperly and unskillfully failed to give proper skill in the treatment of the fracture of the right leg of said plaintiff.

10. State particularly wherein defendant carelessly, negligently, improperly and unskillfully failed to give proper care, attention, medicines, appliances and skill in the treatment of the alleged fracture of the knee and knee-cap and other injuries.

11. State particularly wherein and whereby defendant carelessly, negligently and improperly prevented said plaintiff from the services of other physicians and surgeons.

12. State particularly wherein defendant carelessly, negligently and improperly gave erroneous and

improper information to the plaintiff, Anna May Hopper, as to the character of the injuries received by her.

13. State particularly what was the erroneous and improper information alleged to have been given by defendant to plaintiff, Anna May Hopper, as to the character of the injuries received by her.

14. State particularly wherein defendant carelessly, negligently and improperly gave erroneous and improper information to the plaintiff, Anna May Hopper, as to the care required of the injuries received by her.

15. State particularly what was the erroneous and improper information alleged to have been given by defendant to plaintiff, Anna May Hopper, as to the care required of the injuries received by her.

16. State particularly wherein defendant carelessly, negligently and improperly gave erroneous and improper information to the plaintiff, Anna May Hopper, as to the treatment required for the injuries received by her.

17. State particularly what was the erroneous and improper information alleged to have been given by defendant to plaintiff, Anna May Hopper, as to the treatment required for the injuries received by her.

18. State particularly wherein defendant carelessly, negligently and improperly gave erroneous and improper information to the plaintiff, Anna May Hopper, as to the attention required for the injuries received by her.

19. State particularly what was the erroneous and improper information alleged to have been given by defendant to plaintiff, Anna May Hopper, as to the attention required for the injuries received by her.

20. State particularly wherein the general health of the plaintiff, Anna May Hopper, has been affected by said accident, as alleged in paragraph 6.

21. State particularly the disability which prevents said plaintiff from doing any kind of labor, as alleged in paragraph 6.

22. State particularly the disability which will prevent said plaintiff from doing any kind of labor, as alleged in paragraph 6.

23. State particularly any specific disease or disorder from which plaintiff, Anna May Hopper, suffers, which it is alleged has resulted from defendant's negligence.

24. State what work plaintiff, Anna May Hopper, did prior to said accident.

25. State the amount of remuneration or pay she received for said work.

26. State the hours which she worked.

27. State for whom she worked.

28. State whom Frank Hopper, Jr. has been compelled to employ for medical and surgical care of plaintiff, Anna May Hopper, as alleged in paragraph 3 of the Second Count of the Complaint.

29. State how much plaintiff, Frank Hopper, Jr. has expended or such medical and surgical care and to whom.

30. State in how much plaintiff, Frank Hopper, Jr., has become indebted for such medical and surgical care and to whom?

31. State what services of the plaintiff, Anna May Hopper, plaintiff, Frank Hopper, Jr., has been deprived by reason of defendant's alleged negligence.

32. State what services of the plaintiff, Anna May Hopper, plaintiffs, Frank Hopper, Jr., and Ce-

celia Hopper have been deprived by reason of defendant's alleged negligence.

Dated, April 22, 1927.

Edward M. and Runyon Colie,
Attorneys of Defendant.

To Jacob L. Bernstein, and
Louis C. Friedman, Esqs.,
Attorneys of Plaintiffs.

NEW JERSEY SUPREME COURT

Bergen County

Anna May Hopper, by her next friend Frank Hopper, Jr., Frank Hopper, Jr., individually, and Frank Hopper, Jr., and Cecelia Hopper, his wife, jointly, Plaintiffs, vs. Harold E. Gillett, Defendant.	Action at Law.

NOTICE

To Edward M. and Runyon Colie,
Attorneys of defendant, Harold E. Gillet.

Sirs:

Please take notice that on Saturday, the 14th day of May, 1927 at 10 A. M. at the Court House in Morristown, New Jersey or as soon thereafter as counsel can be heard, we shall move before Hon. Charles W. Parker, Justice of the Supreme Court to strike out the Demand for Bill of Particulars in the above entitled cause on the ground that same are improper and are a mere prying into the plaintiff's case, and on the further ground that the complaint is broad enough to apprise the defendant of the scope of the plaintiffs' claim in order to permit the defendant to answer thereto.

Dated, April 26, 1927.

Respectfully,
Jacob L. Bernstein
Louis C. Friedman,
Attorneys for Plaintiffs.

NEW JERSEY SUPREME COURT

Bergen County

Anna May Hopper, by her next friend Frank Hopper, Jr., Frank Hopper, Jr., individually, and Frank Hopper, Jr., and Cecelia Hopper, his wife, jointly, Plaintiffs, vs. Harold E. Gillett, Defendant.	Action at Law.

ANSWER TO DEMAND FOR BILL OF PARTICULARS

To Harold E. Gillett and Edward M. and Runyon Colie,
his attorneys.

Please take notice that the following are the answers to the defendant's demand for a bill of particulars.

1. Defendant failed to ask the plaintiff, Anna May Hopper, the circumstances under which she received her fracture and failed to X-Ray the fracture before treating and after treating the same. Defendant failed to take a history of the plaintiff, Anna May Hopper's case. Defendant did not take sufficient time in diagnosing the injuries of Anna May Hopper. Defendant failed and neglected to find out the extent and scope of the injuries of Anna

May Hopper. Defendant failed to palpate and massage the plaintiff's injuries.

2. Same answer as No. 1.

3. Defendant failed to use an X-Ray before and after treating and setting the fracture of the plaintiff's leg. Defendant failed to ascertain the extent and scope of the plaintiff's fracture. Defendant failed to use weigths, pulleys and other medical and surgical appliances in the treatment and setting of the plaintiff's fracture.

4. Same as previous answers.

5. Defendant failed to advise plaintiff of the scope and extent of her injuries and failed to make reasonable visits to her home for the treatment of her fracture and failed to provide medicines and failed to advise the plaintiff what care and steps she should take in caring for her fractured leg in the defendant's absence and same answers as previous answers.

6. Same as previous answers.

7. Same as previous answers.

8. Same as previous answers.

9. Same as previous answers.

10. Same as previous answers.

11. Defendant advised plaintiffs that he would not permit them to employ other physicians and surgeons to assist and advise him and work in conjunction with him in the treatment of plaintiff, Anna May Hopper's fractured leg and that if they employed other physicians and surgeons he would not proceed any further in considering her as his patient and in treating her fractured leg.

12. Defendant advised plaintiff that she had no fracture, but that her ligaments, muscles, nerves

and tendons were slightly sprained, weakened and in a nervous condition and that her injury was slight and that she had nothing to worry about.

13. Same as answer to 12.

14. Defendant advised plaintiff that she had nothing to do in his absence in taking care of her injured leg, and that her injuries were slight and did not require much medical attention, and that in a short space of time, her leg would regain normality.

15. Same as previous answers.

16. Same as previous answers.

17. Same as previous answers.

18. Same as previous answers.

19. Same as previous answers.

20. Plaintiff, Anna May's right leg, knee and kneecap were fractured; she suffered a shortening of her right leg to an extent of two inches. Her right leg has become shriveled, lame and disfigured; she is unable to walk properly; she has lost her appetite; she has lost sleep and suffers from insomnia; she suffers dizzy spells; she has lost considerable weight; she has suffered a permanent shock to her nervous system and is unable to do any kind of work without complaining of being tired, dizzy and sleepy in a short space of time.

21. Same as answer to No. 20.

22. Same as answer to No. 20.

23. Same as answer to No. 20.

24. School work, house work and social and athletic activities.

25. Nothing.

26. Regular school hours.

27. At home after school.

28. Plaintiff refuses to answer on the ground

that defendant under the guise of a bill of particulars is attempting to pry into plaintiff's case and attempting to find out the names of the plaintiffs' witnesses.

29. Approximately $200.00 to date as far as our records show. Plaintiff refuses to give the name or names of the physicians to whom such payment was made on the ground that the defendant is attempting to find out the names of the plaintiffs' witnesses.

30. Same as answer to No. 29.

31. Services around the household.

32. Same as answer to No. 31.

Jacob L. Bernstein
Louis C. Friedman,
Attorneys for Plaintiffs.

Dated: May 20, 1927.

NEW JERSEY SUPREME COURT

Bergen County

Anna May Hopper, by her next friend Frank Hopper, Jr., Frank Hopper, Jr., individually, and Frank Hopper, Jr., and Cecelia Hopper, his wife, jointly, Plaintiffs, vs. Harold E. Gillett, Defendant.	Action at Law

NOTICE OF MOTION FOR RULE FOR FURTHER ANSWERS TO DEMAND FOR PARTICULARS

To Jacob L. Bernstein & Louis C. Friedman,
Attorneys of Plaintiffs.

Please Take Notice that we will apply to his Honor, Charles W. Parker, Justice of the New Jersey Supreme Court, or such Justice or Judge as may hear motions in Supreme Court matters, at 10 A. M., Daylight Saving Time, Saturday, May 28, 1927, at the Chancery Chambers, Industrial Office Building, Newark, New Jersey, for a rule requiring plaintiffs to furnish further answers to demand for particulars in the following respects:

1st. A more particular answer to Demand No. 3, especially that portion which charges defendant with failure to use "other medical and surgical appliances in the treatment and setting of plaintiff's fracture."

2nd. A more particular answer to Demand No. 4 in the same respect.

3rd. A more particular answer to Demand No. 5, especially that portion which charges defendant without failure "to advise the plaintiff what care and steps she should take in caring for her fractured leg, in the defendant's absence."

4th. A more particular answer to Demand No. 6 in the same respect.

5th. An answer to Demand No. 8, which appears to be unanswered except by reference to the indefinite answer given to Demand No. 3.

6th. An answer to Demand No. 9.

7th. An answer to Demand No. 10.

8th. An answer to Demand No. 28.

9th. A more particular answer to Demand No. 29 as to the amount of expenditures and an answer as to the persons to whom such expenditures were made.

10th. An answer to Demand No. 30.

Edward M. & Runyon Colie,
Attorneys of Defendant.

Rule Requiring Plaintiff to Furnish Particulars

(Filed June 11, 1927)

NEW JERSEY SUPREME COURT

Bergen County

Anna May Hopper, by her next friend Frank Hopper, Jr., Frank Hopper, Jr., individually, and Frank Hopper, Jr., and Cecelia Hopper, his wife, jointly, Plaintiffs, vs. Harold E. Gillett, Defendant.	Action at Law

RULE REQUIRING PLAINTIFF TO FURNISH PARTICULARS

This matter having been argued before me by the attorneys of the respective parties, and a memorandum having been filed by me to the effect that the defendant was entitled to the particulars asked for, with certain exceptions noted therein,

It is, on this ninth day of June, 1927, on motion of Edward M. & Runyon Colie, attorneys of defendant, Ordered that the plaintiffs furnish to the defendant further particulars by way of full answer to the specific inquiries made in demands No. 3, No. 4, No. 28, No. 29 and No. 30, as indicated in said memorandum.

Let this rule be entered.

C. W. Parker,
J. S. C.

On Motion for More Specific Bill of Particulars

NEW JERSEY SUPREME COURT

Bergen County

Anna May Hopper, by her next friend Frank Hopper, Jr., Frank Hopper, Jr., individually, and Frank Hopper, Jr., and Cecelia Hopper, his wife, jointly, Plaintiffs, vs. Harold E. Gillett, Defendant.	Action at Law.

ON MOTION FOR MORE SPECIFIC BILL OF PARTICULARS

Before:

Parker, J., at Chambers.

For the Plaintiffs, Jacob L. Bernstein and Louis C. Friedman.

For the Defendant, Edward M. & Runyon Colie.

Memorandum, by Parker, J. (For information of counsel.)

This is a medical malpractice case. The plaintiff is an infant and sues by her father as next friend, and the father and mother add their claims per quod. The defendant has not answered and demanded particulars of the alleged unskillful and negligent treatment by the defendant of a fracture of the leg, and also, as claimed, a fracture of or injury to the patella, as well as of the amounts expended or further treatment, and the party or parties to

whom said amounts were paid. The plaintiff has responded to this demand in part but not in toto, and the present motion is to require a further specification of particulars before the defendant is required to answer.

The first objection goes to a portion of the reply to paragraph three of the demand that plaintiff state particularly wherein defendant carelessly, negligently, etc. governed himself in the setting of the fracture of the leg. The last part of this answer reads as follows: "Defendant failed to use weights, pulleys and other medical and surgical appliances in the treatment and setting of the plaintiff's fracture." If the clause "and other medical and surgical appliances," etc., means that the defendant failed to use any other medical or surgical appliances in the treatment, the answer is sufficient; but plaintiff does not concede that this is what it means and maintains that under this answer the plaintiffs' counsel will undertake to show at the trial what the medical and surgical appliances were that should have been used and were not used, without any further answer. This I consider should not be done, and the plaintiffs will be required to specify what the medical or surgical appliances were that ought to have been used and were not used, to the end that they may be restricted in their proof to such as they specify, and that the defendant may be enabled to prepare his defense on that score.

The next objection goes to the reply to demand number five, which is very much of the same character as number three. The objection is that, although it says that the defendant failed to provide medicines, "and failed to advise the plaintiff what

care and steps she should take in caring for her fractured leg in the defendant's absence, this is not sufficiently specific. On the motion, I construed it to mean that the defendant failed to give plaintiff any advice whatever as to what care and steps she should take in caring for the injury in the defendant's absence. This was conceded by counsel to be correct, and it was stipulated in open court that this would be the character of the plaintiffs' proof. Hence, the answer stands as made.

The other objections to the answers go to the refusal of the plaintiff to answer fully demands number twenty-eight and twenty-nine. Number twenty-eight is as follows: "State whom Frank Hopper, Jr., has been compelled to employ for medical and surgical care of plaintiff, Anna May Hopper, as alleged in paragraph three." Demand number twenty-nine is: "State how much plaintiff, Frank Hopper, Jr., has expended for such medical and surgical care and to whom." Number twenty-eight plaintiff refuses to answer on the ground that defendant, under the guise of bill of particulars, is attempting to pry into plaintiffs' case and attempting to find out the names of the plaintiffs' witnesses; and under number twenty-nine, plaintiff answers, approximately $200.00 to date, as far as records show, and refuses to give the name or names of the physicians to whom such payment was made on the ground that the defendant is attempting to find out the names of the plaintiffs' witnesses.

Number thirty is to the same effect, and on the same ground. There may be some others, but they are all covered by the point made in numbers twenty-eight and twenty-nine.

If the function of a bill of particulars was confined in a case of this character to the enabling of the defendant to make a suitable answer, I should be disposed to rule that as these inquiries go solely to the measure of damages and not to the fundamental question of liability, the defendant would not be entitled to have them answered; but the rule I believe to be otherwise. The bill of particulars has a two-fold effect of informing the defendant with relation to the details of the plaintiffs' case with a view of preparation of a proper pleading in reply to the complaint, and also of limiting the plaintiff's proof on the trial as well as apprising the defendant what is proposed to set up (in this case by way of consequential damages), to the end that the defendant may prepare a proper defense. And so it was held by the late Justice Garrison in the case of Heppard v. Carr & Smith, 12 N. J. L. J. 186, that particulars of cost of materials and help procured by the plaintiff, and also the names of the parties furnishing such help and supplying such materials were proper to be given. This was a contract case, but I see no distinction from the present case on that account. The recent case of Dixon v. Swenson in the Supreme Court, 3d N. J. Adv. Rep. 492, was also a contract case. In that case the action of the trial judge in ordering further particulars was set aside, not because the particulars were not such as ought to have been given, but because the rule requiring further particulars was made after answer had been filed, and the Supreme Court considered that after answer, the defendant was not entitled to any further particulars than he had at the time he answered. It is true that this was a case in contract

and that the furnishing of particulars in contract cases is largely, if not entirely, regulated by the statute, whereas, n cases of tort, like the one before me, particulars are ordered as a matter of common law. See my remarks in the case of Watkins v. Cope, with which counsel are familiar.

But for the opinion in Dixon v. Swenson, I should have little hesitation in holding that, in a tort case at least, where the particulars desired are those that relate to preparation for trial and not to the filing of an answer, the defendant should be entitled to ask for them up to within a reasonable time of the trial whether answer had been filed or not; but in view of the ruling in Dixon v. Swenson, which is rather broad in its terms, I do not feel safe in so holding as a single judge on a practice motion or, if the matter were then taken to the full court and decided the other way, the defendant would be out of court on the question of particulars. Consequently, following the general lines of Dixon v. Swenson, I feel constrained to say, in the interests of safety, that the defendant is entitled to the particulars he desires now, whether they relate to the answer or relate to the preparation for trial. With the exceptions noted above, therefore, the order will be that the plaintiff furnish the further particulars by way of full answer to the specific inquiries made in the demand. If the plaintiffs are not satisfied with this disposition of the matter, they are entitled, if they desire, to apply to the court in banc to set aside this ruling.

NEW JERSEY SUPREME COURT

Bergen County

Anna May Hopper, by her next friend, Frank Hopper, Jr., Frank Hopper, Jr., individually, and Frank Hopper, Jr. and Cecilia Hopper, his wife, jointly, Plaintiffs, vs. Harold E. Gillett, Defendant.	Action at Law.

NOTICE

To Harold E. Gillett or Edward M. & Runyon Colie, his Attorneys.

Please Take Notice that on Friday, the 24th day of June, 1927 at 1:30 at the State House in Trenton, we shall apply before the Supreme Court in banc for a rule or order setting aside the rule of June 9, 1927, wherein it was ordered by Hon. Charles W. Parker, a Justice of the Supreme Court, that the plaintiffs furnish to the defendant further particulars by way of full answer to the specific inquiries made in demands No. 3, No. 4, No. 28, No. 29 and

No. 30, as indicated in a memorandum signed by the said justice for information of counsel.

Respectfully,
Jacob L. Bernstein
and Louis C. Friedman,
Attorneys for Plaintiffs.

Service of the within notice is hereby acknowledged this 17th day of June, 1927.

Edward M. & Runyon Colie,
Attorneys for Defendant.

Rule

(Filed June 24, 1927)

NEW JERSEY SUPREME COURT

Bergen County

Anna May Hopper, by her next friend, et als,
Plaintiffs,
vs.
Harold E. Gillett,
Defendant.
} Action at Law

RULE

On the argument of the above matter, the plaintiffs having withdrawn their motion as to demands No. 3 and No. 4 and having stipulated in open court that the filing of an answer by defendant would not operate as a waiver of defendant's right, if any, to apply for further answers to demands for particulars No. 28, No. 29 and No. 30, but that such right remain notwithstanding such answer,

It Is Thereupon, on this 24th day of June, 1927, Ordered that the rule heretofore entered be modified by striking out, without prejudice as aforesaid, defendant's demand for particulars No. 28, No. 29 and No. 30.

Let this rule be entered.

C. W. Parker,
J. S. C.

Further Answer to Demand for Bill of Particulars

NEW JERSEY SUPREME COURT

Bergen County

Anna May Hopper, by her next friend, Frank Hopper, Jr., Frank Hopper, Jr., individually, and Frank Hopper, Jr. and Cecilia Hopper, his wife, jointly,
Plaintiffs,
vs.
Harold E. Gillett,
Defendant.
} Action at Law

FURTHER ANSWER TO DEMAND FOR BILL OF PARTICULARS

To Harold E. Gillett and Edward M. & Runyon Colie, his attorneys.

Please Take Notice that the following are further answers to the defendant's demands 3 and 4.

1. Defendant failed and neglected to use an elastic supporter to prevent foot drop.

2. Defendant failed and neglected to use a sling for the leg to permit adduction and abduction of the lower extremity.

3. Defendant failed and neglected to use a plaster of Paris shell.

4. Defendant failed and neglected to use an overhead frame to facilitate the handling of the patient.

5. Defendant failed and neglected to use an overhead frame for the suspension of the right foot, leg and thigh, and the defendant failed to use any

other medical or surgical appliance in the treatment of the fracture of the plaintiff's leg, knee and knee-cap.

Jacob L. Bernstein
Louis C. Friedman,
Attorneys for Plaintiffs.

Service of a copy of the within Further Answer to Demand for Bill of Particulars is hereby acknowledged this 7th day of July, 1927.

Edward M. & Runyon Colie,
Attorneys for Defendant.

(Filed July 12, 1927)

NEW JERSEY SUPREME COURT
Bergen County

Anna May Hopper, by her next friend Frank Hopper, Jr., Frank Hopper, Jr., individually, and Frank Hopper, Jr., and Cecelia Hopper, his wife, jointly, Plaintiffs, vs. Harold E. Gillett, Defendant.	Action at Law

ANSWER

Defendant, answering the complaint in the above entitled cause, says that:

AS TO FIRST COUNT

1. He admits the first paragraph.

2. He admits that in December, 1926, he was a practicing physician and surgeon at the Borough of Ramsey and that he held himself out as such.

3. He admits that plaintiff, Anna May Hopper, on or about December 4, 1926, as a result of a certain accident, sustained serious injuries, to wit, a fracture of the lower third of the right femur (thigh). Except as so admitted he denies the third paragraph.

4. He admits that he was employed to set and treat said broken thigh and that by implication, said employment was for a reasonable reward, and that by implication, it required of him that amount of knowledge, skill and care which physicians practicing in Ramsey and similar localities, ordinarily possess and exercise. Except as so admitted, he denies the fourth paragraph.

5. He denies the fifth, sixth and seventh paragraphs.

AS TO SECOND COUNT

1. He makes the same answer to paragraph 1, repeating the allegations of paragraphs 1 to 7 of the First Count as above made to said paragraphs in the First Count, which answers are hereby made part of the answer to this count as though they were pleaded at length.

2. He admits the second paragraph.

3. He denies the third paragraph.

AS TO THIRD COUNT

1. He makes the same answer to paragraph 1, repeating the allegations of paragraphs 1 to 7 of the First Count as above made to said paragraphs in the First Count, which answers are hereby made part of the answer to this count as though they were pleaded at length.

2. He admits the second paragraph.

3. He denies the third paragraph.

OBJECTION IN POINT OF LAW TO SECOND COUNT

Defendant hereby objects, in point of law, to so much of the Second Count as sets up, or attempts to set up, a cause of action in Frank Hopper, Jr., for loss of services of his infant daughter, Anna May Hopper, on the ground that the action for loss of services is not in the father of the injured minor alone, but in the father and mother jointly.

OBJECTION IN POINT OF LAW TO THIRD COUNT

Defendant hereby objects, in point of law, to so much of the Third Count as sets up, or attempts to set up, a cause of action in Frank Hopper, Jr., and Cecilia Hopper, his wife, for loss of services of their infant daughter, Anna May Hopper, on the ground that the action for loss of services is not in the parents jointly, but is in the father alone.

Edward M. & Runyon Colie,
Attorneys of Defendant.

Notice of Trial

(Filed August 22, 1927)

NEW JERSEY SUPREME COURT
Bergen County

Anna May Hopper, by her next friend Frank Hopper, Jr., Frank Hopper, Jr., individually, and Frank Hopper, Jr., and Cecelia Hopper, his wife, jointly, Plaintiffs, vs. Harold E. Gillett, Defendant.	Action at Law.

NOTICE OF TRIAL

Sir:

Please To Take Notice, that the trial of the issue joined in this cause will be moved before said Court, in the presence of such Judge or Justice thereof, as shall then be holding said Court, on the second Tuesday of September, A. D. 1927, at the Court House in Hackensack in and for the County of Bergen at ten o'clock in the forenoon, or as soon thereafter as the said Court can attend to the same.

Dated: July 15th, 1927.

Your obedient servants,
Jacob L. Bernstein,
Louis C. Friedman,
Attorneys of Plaintiffs.

To Edward M. & Runyon Colie, Esqs.,
Attorneys of Defendant.

Notice

(Filed September 20, 1927)

NEW JERSEY SUPREME COURT
Bergen County

Anna May Hopper, by her next friend Frank Hopper, Jr., Frank Hopper, Jr., individually, and Frank Hopper, Jr., and Cecelia Hopper, his wife, jointly, Plaintiffs, vs. Harold E. Gillett, Defendant.	Action at Law

NOTICE

To Jacob L. Bernstein, Attorney of Plaintiffs:

Take Notice that on Tuesday, October 4, 1927, at the State House, Trenton, New Jersey, at 10 A. M. or as soon thereafter as the matter can be heard, we will apply to the Supreme Court for a rule directing plaintiffs to make further answers to demands for particulars Nos. 28, 29 and 30 heretofore served on plaintiffs, copies of which particulars are hereto attached and herewith again served on plaintiffs.

Dated: August 17, 1927.

Edward M. & Runyon Colie,
Attorneys of Defendant.

Demand for Particulars Nos. 28, 29 and 30.

28. State whom Frank Hopper, Jr. has been compelled to employ for medical and surgical care

of plaintiff, Anna May Hopper, as alleged in paragraph 3 of the Second Count of the Complaint.

29. State how much plaintiff, Frank Hopper, Jr., has expended for such medical and surgical care and to whom.

30. State in how much plaintiff, Frank Hopper, Jr., has become indebted for such medical and surgical care and to whom.

NEW JERSEY SUPREME COURT
No. 412, October Term, 1927.

Anna May Hopper, by her next friend, et al.,
Plaintiffs
vs.
Harold E. Gillett,
Defendant.

Argued October 4, 1927; decided January , 1928.

On motion for rule requiring that plaintiff answer certain demands for particulars.

Before:

Justices Parker, Minturn and Campbell.

For the plaintiffs, Louis C. Friedman, Jacob L. Bernstein of Counsel.

For the defendant, Runyon Colie.

Per Curiam. This is a medical malpractice case.

Defendant demanded certain particulars before answering, and when they were not furnished applied to Mr. Justice Parker on notice for a rule requiring them to be furnished. After argument, a memorandum of decision was filed and a rule was made under date of June 9, 1927, requiring more specific reply to demands Nos. 28, 29 and 30, and two others, which latter have since been eliminated from the controversy. Plaintiffs being dissatisfied with this ruling, moved to set it aside before Part III of the court, and were heard at Trenton about June 24 by Justices Parker and Campbell sitting as Part III. It then appearing that the rule to answer demands Nos. 28, 29 and 30 had been made before

answer filed because of the opinion in Dixon v. Swenson, 3 Adv. Rep. 492, 127 Atl. 591, and plaintiff stipulating in open court that the filing of an answer should not operate as a waiver of defendant's right, if any, to apply for further answers to said three demands, but that such right remain notwithstanding such answer, the court overruled the demands at that time, but without prejudice to a renewal of the motion after answer filed. Such motion was made at the October term and is now to be disposed of on the merits.

The following are extracts from the memorandum filed by Mr. Justice Parker in deciding the motion of June 9:

> "The other objections to the answers go to the refusal of the plaintiff to answer fully demands number twenty-eight and twenty-nine. Number twenty-eight is as follows: 'State whom Frank Hopper, Jr., has been compelled to employ for medical and surgical care of plaintiff, Anna May Hopper, as alleged in paragraph three.' Demand number twenty-nine is: 'State how much plaintiff, Frank Hopper, Jr., has expended for such medical and surgical care and to whom.' Number twenty-eight plaintiff refuses to answer on the ground that defendant, under the guise of bill of particulars, is attempting to pry into plaintiffs' case and attempting to find out the names of the plaintiffs' witnesses; and under number twenty-nine, plaintiff answers, approximately $200.00 to date, as far as records show, and refuse to give the name or names of the physicians to whom such payment was made on the ground that the defendant is attempting to find out the names of the plaintiffs' witnesses. Number thirty is to the same effect, and on the same ground. There may be some others, but they are all covered by the point made in numbers twenty-eight and twenty-nine.
>
> "If the function of a bill of particulars was confined in a case of this character to the enabling of the defendant to make a suitable answer, I should be disposed to rule that as these inquiries go solely to the measure of damages and not to the fundamental question of liability, the defendant would not be entitled to have them answered; but the rule I believe to be otherwise. The bill of particulars has the two-fold effect of informing the defendant with relation to the details of the plaintiff's case with a view of preparation of a proper pleading in reply to the complaint, and also of limiting the plaintiff's proof on the trial as well as apprising the defendant what is proposed to be set up (in this case by way of consequential damages), to the end that the defendant may prepare a proper defense. And so it was held by the late Justice Garrison in the case of Heppard vs. Carr & Smith, 12 N. J. L. J. 186, that particulars of cost of materials and help procured by the plaintiff, and also the names of the parties furnishing such help and supplying such materials were proper to be given. This was a contract case, but I see no distinction from the present case on that account. The recent

case of Dixon vs. Swenson in the Supreme Court, 3d N. J. Adv. Rep. 492, was also a contract case. In that case the action of the trial judge in ordering further particulars was set aside, not because the particulars were not such as ought to have been given, but because the rule requiring further particulars was made after answer had been filed, and the Supreme Court considered that after answer, the defendant was not entitled to any further particulars that he had at the time he answered. This, however, was a case in contract, and the furnishing of particulars in contract cases is largely, if not entirely, regulated by the statute; whereas, in cases of tort, like the one before me, particulars are ordered as a matter of common law. See my remarks in the case of Watkins vs. Cope, 84 N. J. L. 143, with which counsel are familiar."

We concur in these views; and as a result, rule may be entered in conformity to that of June 9 requiring the plaintiffs to furnish the further particulars by way of full answer to the specific inquiries Nos. 28, 29 and 30 made in the demand.

Rule

(Filed January 26, 1928)

NEW JERSEY SUPREME COURT
Bergen County

Anna May Hopper, by her next friend, et al., Plaintiffs, vs. Harold E. Gillett, Defendant.	On Motion for Further Particulars.

RULE

This matter having come on for argument before this Court at the October Term, 1927, on motion of defendant for rule for further answers to certain particulars and this Court having filed its opinion thereon on January 18, 1928,

It Is on this 26th day of January, 1928, on motion of Edward M. & Runyon Colie, attorneys of defendant, Ordered that the plaintiffs furnish to the defendant further particulars by way of full answer to the specific inquiries made in demands No. 28, No. 29, and No. 30 as indicated in said opinion filed in this cause on January 18, 1928.

Entered January 26, 1928.

On motion of

Edward M. & Runyon Colie,
Attorneys of Defendant.

ANNA MAY HOPPER, et. als.,
Plaintiff's-Appellants

vs.

HAROLD E. GILLETT,
Defendant-Appellee

On Appeal From
Supreme Court

STATEMENT OF FACTS

This is an appeal from an order and judgment of the New Jersey Supreme Court whose opinion was filed January 18, 1928 and pursuant thereto, the defendant's attorneys filed a rule on January 26, 1928. The Supreme Court ordered that the plaintiffs should answer the defendant's demands Nos. 28, 29 and 30 of a bill of particulars which the plaintiffs now allege was error.

POINT 1.

THE ORDER OR RULE OF THE SUPREME COURT THAT THE PLAINTIFFS FURNISH TO THE DEFENDANT FURTHER PARTICULARS BY WAY OF FULL ANSWER TO THE SPECIFIC INQUIRIES MADE IN DEMANDS NOS. 28, 29 and 30. AS INDICATED IN ITS OPINION FILED JANUARY 18, 1928 IS *APPEALABLE*.

Counsel for the plaintiffs appellants argues the appealability of the order of the Supreme Court because defandant's counsel has intimated at the time notice of appeal was served upon him that an order of the Supreme Court requiring a party to furnish particulars is not appealable to the Court of Errors and Appeals and the appellants counsel anticipates that counsel for the defendant will make such argument in

this Court and hence is ready to meet such argument at this time and will not plead surprise.

An appeal from an order requiring the plaintiff to furnish particulars lies to the Court of Errors from the Supreme Court even though strictly speaking an order or rule to furnish particulars is not a final judgment as to the whole case but it is a final judgment as to that particular practice question involved, "To furnish particulars of defendant's demand." The situation or legal proposition in this case is analogous to the case of Attorney General vs Verdon reported in 90 N. J. L. p. 494 which was an appeal taken from the Court of Quarter Session to the Supreme Court. and then from the Supreme Court to the Court of Errors and Appeals, and which was a contempt proceeding.

Mr. Justice Kalisch in the Verdon case wrote a dissenting opinion to the effect that the appeal from the Supreme Court to the Court of Errors and Appeals in a contempt case would not lie and was the only Justice of the Court of Errors who voted to dismiss the appeal in that case, whereas, the remainder of the Court gave no weight to the opinion voting for a dismissal.

The case at bar is appealable also for the reason that the plaintiff is seeking "Relief Inter Parties" and as Mr. Justice Depue distinguished in the case of Dodd vs Una 40 N. J. L. E. Q. p. 718 the appealability of contempt orders where the object of the appeal of a proceeding in contempt was to punish contemptuous conduct in the presence or with respect to the authority or dignity of the Court and where the object of the appeal of a proceeding in contempt was to afford a method of "Relief Inter Partes." The fact that the Verdon case and the Dodd case are contempt cases does not change the analogous legal situation involved, to wit, "the appealability of an order or

judgment of the Supreme Court which in itself is not a final judgment of the entire case but is only final as to an intermediate step in the proceedings."

If an appeal lies in a contempt case from the Supreme Court to the Court of Errors and Appeals as is shown in the Verdon case 90 N. J. L. p. 494 and in Dodd vs Una, Supra, which were not final judgments as is meant or intended by the statute which allows appeals to the Court of Errors and Appeals from final judgments, then an appeal from the Supreme Court which orders a party to furnish answers to a demand for particulars to a defendant, should also be appealable to the Court of Errors and Appeals as the appeal in both of the cases that is from a contempt order and an order to furnish particulars would be in the same category, and what is sauce for the goose should also be sauce for the gander.

If the plaintiff in this case should wait till the final disposition and final judgment of the trial in this cause and then appeal from the order of the Supreme Court which ordered and required the plaintiff to furnish answers to defendant's demand for particulars, then the damage to the plaintiffs case would already have been accomplished for the names of his witnesses would already be in the possession of the defendant, which is just the thing the plaintiff is attempting to withhold by this appeal from the Supreme Court to the Court of Errors & Appeals.

If the plaintiff has to proceed to trial and give the names of his witnesses to the defendant the damage to the plaintiff's case which the plaintiff is trying to prevent would already result and the information which the plaintiff argues the defendant is not entitled to would have to be in the hands of the defendant before the plaintiff could proceed to trial, and if the plaintiff under the statute concerning appeals from final judgments could only appeal after the trial and

final judgment in his case, then his appeal to the Court of Errors and Appeals from the order of the Supreme Court requiring him to answer the defendant's demands for particulars would be of no consequence and would be an argument merely on a naked technicality, to wit, whether the Supreme Court committed error in ordering the plaintiffs to answer the defendant's demands Nos. 28, 29 and 30. In other words what benefits would enure to the plaintiffs or in what respect would they profit if the names of their witnesses had to be given to the defendants before they proceeded to trial and then after trial and final judgment they apppealed to the Court of Errors and Appeals from the order of the Supreme Court requiring them to give to the defendant the names of their witnesses or answer the defendant's demands Nos. 28, 29 and 30 in their demands for particulars.

The plaintiffs do not desire to appeal a naked technicality but are in good faith attempting to withhold the names of their witnesses from the defendant because the nature of their case, (a mal practice case) dictates to them that if the defendant gets the names of their witnesses (doctors) the nature of their case will be in the hands of the defendant, and that valuable information of the plaintiffs will be within the knowledge of the defendant.

~~POINT 1.~~

The Court will please not Rule 94 of the Supreme Court Rules which gives authority to Supreme Court Commissioners to make orders in respect to bills of particulars and other preliminary matters before trial. This rule also allows an appeal from such an order after final judgment. If an appeal lies from an order of a Supreme Court Commissioner, which pertains to bills of particulars, it would seem that an appeal

would also lie from an order of a Supreme Court Justice or the Supreme Court which pertains to bills of particulars. The whole question of the appealability of the rule of the Supreme Court is whether or not an appeal lies before the entire case is disposed of on its merits or whether an appeal lies before a verdict and judgment has been arrived at.

In other words, the question seems to be whether or not under rule 94 this appeal is premature and the appellants contend that rule 94 should be relaxed in this case, as very serious damage will be done to the appellants' case if they have to go to trial and give the names of their witnesses to the appellee. Our Courts have held time and time again, that the rule of Court are mere guides for the Court's procedure and are not absolute and impregnable and will be relaxed and dispensed with to make the ends of justice meet. See the cases of Camden & Amboy R. R. Co. vs. Steward, 21 N. J. Eq. at page 487 last paragraph and 1st and 2nd paragraphs on page 488. Also the case of Greenville & Hudson Railway Co. vs. Grey, Atty-Gen. 62 N. J. Eq. 768 last paragraph.

POINT 2.

THE SUPREME COURT COMMITTED ERROR IN ORDERING THE PLAINTIFFS TO FURNISH TO THE DEFENDANT FURTHER PARTICULARS BY WAY OF FULL ANSWER TO THE SPECIFIC INQUIRIES MADE IN DEFENDANT'S DEMANDS Nos. 28, 29 and 30 AS INDICATED IN THEIR OPINION FILED IN THIS CAUSE JANUARY 18, 1928.

The Supreme Court in its opinion (S of C p. 39 L. 15-25) held that **"a bill of particulars has a twofold**

effect of informing the defendant with relation to the details of the plaintiff's case with a view of preparation of a proper pleading in reply to the complaint and also of limiting the plaintiff's proof on the trial as well as apprising the defendant what is proposed to be set up (in this case by way of consequential damages) to the end that the defendant may prepare a proper defense."

The Supreme Court failed to decide whether or not the plaintiff's complaint was broad enough to apprise the defendant what was proposed to be set up by the plaintiff, by way of consequential damages, and the Supreme Court failed further to decide whether or not the plaintiff's complaint was broad enough to apprise the defendant and inform the defendant of the scope of the plaintiff's claim to permit the defendant to answer thereto.

How could the Supreme Court order the plaintiff to answer the defendant's demands for particulars, so that the plaintiff could inform the defendant with relation to the details of the plaintiff's case with a view of preparation of a proper pleading by the defendant in reply to the complaint, as well as apprising the defendant what is proposed to be set up by way of consequential damages, if it did not decide or hold that the plaintiff's complaint was not broad enough to answer that purpose and one of the arguments why the plaintiffs objected to answer the defendant's demands in the Supreme Court was because the plaintiffs claimed that their complaint was broad enough to apprise the defendant of the scope of the plaintiff's claim in order to permit the defendant to answer thereto. (S of C p. 13).

In other words the Supreme Court ordered that the plaintiffs give certain information to the defendant by way of answers to particulars without deciding whether the plaintiffs complaint fulfilled that purpose and in this the appellant argues the Supreme Court committed error.

Now as to that part of the opinion of the Supreme Court which holds that the defendant is entitled to have the plaintiff answer his demands for particulars because such an answer by the plaintiff to the defendant's demand would limit the plaintiffs proof on the trial, the plaintiff argues for that reason the Supreme Court committed error in ordering the plaintiff appellant to answer the defendant's demands for particulars, because it's an elementary proposition of law that the plaintiff would be limited at the trial to those facts which he pleaded in his complaint, and that only those issues would be entitled to be heard at the trial which were alleged in the complaint, see case of Dellabello vs Central R. R. Co. 99 N. J. L. p. 348.

In other words the Supreme Court held that the defendant was entitled to have the plaintiff answer his demands for particulars, so that the plaintiffs proof would be limited at the trial and if that is one of the reasons of the Supreme Court for ordering the plaintiffs to answer the defendant's demand for particulars. its order and judgment in that respect was error, because as a matter of law, the plaintiffs could go no further in their proof than they had already gone in their complaint, and therefore, that reason for requiring the plaintiffs to answer the defendant's particulars is without substance.

The next reason in the opinion of the Supreme Court (S of C p. 39 L. 15-25) as to why the plaintiffs must answer the defendant's demand for particulars was, "TO THE END THAT THE DEFENDANT MAY PREPARE A PROPER DEFENSE," and this the appellant now argues is legal error, because the Supreme Court overlooked a material part of the opinion in Dixon vs Swenson reported in 127 Atl. Rep. 591 at p. 593, 2nd column, 2nd line from top of page which held "The history of our statutory legislation on the subject of bills in cases

upon contract down from the year 1799 emphasizes and illustrates, THAT THE FUNCTION OF A BILL OF PARTICULARS WAS NONE OTHER THAN TO FURNISH THE PLEADER WITH INFORMATION SO THAT HE WOULD BE ENABLED TO FRAME HIS *PLEADING* IN DEFENSE OR REPLY."

The Court will please note that the case of Dixon vs Swenson states that the pleader is entitled to a bill of particulars in order to get information to enable him to frame his *PLEADING* in defense or reply and the Dixon case nowhere holds that a pleader is entitled to information to prepare a proper defense as contra distinguished from preparing pleadings in defense, in other words the Dixon case holds that all you're entitled to get in a bill of particulars is information to help you prepare proper pleadings and not information to help you prepare your defense, and the Supreme Court in the appellants case held that the defendant was entitled to information not only to aid him in preparing his pleadings, but also to aid him in preparing his defense and this the appellant argues was legal error.

The Supreme Court in the appellants case also held in its opinion (S of C p. 39 L. 30-34) that there was no difference between a contract case and a tort case as far as the furnishing of particulars was concerned, and if that is so, the common-law as to furnishing bills of particulars still holds good in New Jersey. By the 10th article of the Constitution of 1844, it is declared that the common-law and statute laws now in force shall remain in force until they expire by their own limitation, or be altered or repealed by the Legislature.

Since the adoption of the Constitution of 1844, the legislative enactment in regard to such bills of particulars and actions upon contract, broadened the common-law rule and practice by extending the right to demand a bill of particulars to a plaintiff before filing his replication, but in no sense has there been an extension by statute or Court rule as regards bills of particulars in tort cases.

The case of Taylor vs Harris, 4 Barn & Ald. 83 referred to in Watkins vs Cope 84 N. J. L. p. 147, as illustrative of the common-law doctrine relating to bills of particulars makes it plain that the sole function of particulars in a case upon contract was to enable the litigant demanding such particulars TO FRAME HIS ANSWERING PLEA OR REPLY, AS THE CASE MAY BE, and so it was held in the case of Mowbray vs Schuberth, 13 East. 508; and Derry vs Lloyd, 1. Chitty 395. and these three cases and their doctrines have been cited and quoted with approval in the case of Dixon vs Swenson, supra, and if it is true that there is no difference between a contract case and a tort case as regards bills of particulars as was held by the Supreme Court in its opinion in the appellants case (S of C p. 39 1. 30-34), then the common-law rule as relates to the purpose of bills of particulars as outlined in Taylor vs Harris and Mowbray vs Schuberth and Derry vs Lloyd as quoted in Dixon vs Swenson should prevail and the Supreme Court in the appellants case committed error in stating and deciding that the defendant was entitled to have his demand for particulars answered by the plaintiffs because he was entitled to have information to properly prepare his defense as contra distinguished from pleadings in defense.

~~POINT 2.~~

In the case of Watkins vs. Cope, supra, it was held that a party litigant was not entitled to the names of

witnesses in answer to interrogatories. A demand for a bill of particulars is much more broader in its scope than a demand for answers to interrogatories, and if a party litigant is not entitled to the names of witnesses in answer to interrogatories, surely he cannot get the same by a demand for a bill of particulars. The case of Heppard vs Carr cited by Supreme Court has been practically over-ruled by the case of Watkins vs Cope, supra and the Supreme Court under the doctrine of Stare Decisis should have followed Watkins vs Cope.

For all of which reasons, the appellants respectfully submit that the order, judgment and rule of the Supreme Court be reversed and for nothing holden and that the defendant's demands Nos. 28, 29 and 30 in his bill of particulars be denied.

LOUIS C. FRIEDMAN,
Attorney of Plaintiffs.

May Term 1928

Jacob L. Bernstein
JACOB L. BERNSTEIN,
Of Counsel.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

ANNA MAY HOPPER, *et als.*,
Plaintiffs-Appellants,

vs.

HAROLD E. GILLETT,
Defendant-Appellee.

Action at Law.

On Appeal from the Supreme Court.

BRIEF OF DEFENDANT-APPELLEE.

POINT I.

This appeal should be dismissed because an appeal will not lie in an action at law from an interlocutory rule until after final judgment.

The appeal is from a rule, made by Part III of the Supreme Court after argument, directing the appellants (plaintiffs) to furnish the defendant (appellee) particulars as to three specific inquiries demanded before the defendant had answered the complaint. The opinion of the Court is found, case, page 37, *seq.;* the rule, case, page 41; the particulars demanded, Case, page 35, *seq.*

This appeal is in violation of the statute relating to appeals and contrary to the uniform decisions.

Section 1 of the act entitled "An Act respecting Writs of Error" is as follows:

> "That a writ of error shall not be granted or issued in any case, until final judgment is rendered." C. S., p. 2207.

An appeal is now substituted for a writ of error, Practice Act, Sec. 25, and that statute provides that:

"In lieu of a writ of error an appeal may be taken in any case in which the appellant would heretofore have been entitled to that writ."

There has been no modification by the Practice Act of the rule that a writ of error (now an appeal) cannot be taken from an interlocutory rule until after final judgment, and there is no authority for such an appeal at common law.

Young v. *Broad,* 84 N. J. Law 770, at 771;

Sentliffe v. *Jacobs,* 84 N. J. Law 128, at 130;

Wheat v. *P. S. Gas Co.,* 97 N. J. Law, p. 584.

The law is stated by Chief Justice Beasley in *Cooper* v. *Vanderveer,* 47 N. J. Law at 179, speaking for this court in the following language:

"Even if the order in question could be put under the cognizance of this court, such course could not be taken until after final judgment. A writ of error will not run until the conclusion of the course of law in the court of first instance. The most serious vexation and delay would be attendant upon the opposite rule."

Subsequently the rule was re-stated by Justice Swayze in *Van Hoogenstyn* v. *D., L & W. R. R. Co.,* 90 N. J. Law 190, speaking for this court, as follows:

"That there could be no relief by writ of error until after final judgment is elementary learning. Courts of law do not permit the intolerable delay and expense that would arise if interlocutory appeals were permitted from every order that might be incidental to the progress of the cause."

This rule is again stated and applied by this court in *Salmons* v. *Rugyeri,* 5 N. J. Advanced Reports 886 (not yet officially reported).

The plaintiffs argue that as certain contempt proceedings have been reviewed by this court—citing the *Verdon case* and *Dodd* v. *Una*—that there is an "analogous legal situation involved, to wit: 'the appealability of an order or judgment of the Supreme Court which in itself is not a final judgment of the entire case but is only final as to an intermediate step in the proceedings.' "

A rule that "is only final as to an intermediate step in the proceedings" has not the quality of finality required by the statute above quoted. An adjudication in contempt is final within the meaning of the statute, and a proceeding for contempt is regarded as a distinct and independent suit; Bouvier, Vol. 1, Title "Contempt."

It is next argued in the brief we are answering that if plaintiff cannot now appeal from this rule but must await final judgment he will suffer an irremediable injury, because the question would be then "a naked technicality."

It is unnecessary to inquire what would be the position of the plaintiff if judgment went against him and he took an appeal and could show that the granting of the rule by the Court was erroneous and he had suffered material injury thereby.

There are many instances in which intermediate rules cannot be reviewed even after final judgment. Striking out a sham plea is an illustration; *Mershon* v. *Castree,* 57 N. J. Law 484.

Finally, it is argued that inasmuch as by Rule 94 of the Supreme Court giving authority to commissioners appointed to make orders in respect to bills of particulars and other preliminary matters before trial, the rule allows an appeal from such an order after final judgment, and inasmuch as

the Court has power to modify or relax its rules, therefore, the Court in this instance should relax Rule 94 to meet the appellant's case. But the appellant forgets that the provision in Rule 94 as to an appeal from an order after final judgment is but a reiteration of Section 1 of the act relating to writs of error quoted above, and that the Court is not asked to relax a rule but is asked to ignore the statute which confers upon it jurisdiction on appeal.

POINT II.

The rule of the Supreme Court ordering full answers to the particulars demanded was not erroneous.

There is little, probably nothing, that the defendant can add to the *per curiam* opinion of the Supreme Court, in which that court held that the particulars demanded were proper and should be furnished by the plaintiff. That opinion, which is reported in Volume 140, Atlantic Reporter, page 17 (not yet officially reported), is found at case, pages 37-40.

If the Supreme Court is reversed, it can only be upon the ground that the function of a bill of particulars in a *tort* case is solely to allow defendant to plead and that it is no proper part of the function of a bill of particulars to furnish defendant with information as to plaintiff's case for the purpose of permitting defendant to intelligently prepare a proper defense. The plaintiff cites no authority either in New Jersey or elsewhere for the proposition that in a tort case a bill of particulars is so limited.

There is no such limitation on the use of a bill of particulars in tort cases.

In *Watkins* v. *Cope,* 84 N. J. Law 143, the Supreme Court held that interrogatories were not the proper method of inquiring as to damages. It went on to add that the proper method of such inquiry was by demanding a bill of particulars. The particular interrogatories, as to which this statement was made, were those asking the names of the persons in whose presence slanderous statements were uttered. *Watkins* v. *Cope* is, therefore, authority in favor of the rule made by the Supreme Court in the instant case. *Watkins* v. *Cope* has never been criticised or overruled and *Watkins* v. *Cope* far from "practically overruling" *Heppard* v. *Carr,* 12 N. J. L. J. 186, which is also authority for granting the rule in this case, on the contrary cites *Heppard* v. *Carr* with approval.

Dixon v. *Swenson,* 101 N. J. Law 22, is no authority for denying the particulars in the instant case. In the first place, *Dixon* v. *Swenson* is distinguishable as a contract case. Secondly, in *Dixon* v. *Swenson* all that was decided was that it was not within the power of the Justice to grant a rule for particulars after issue joined. The Court expressly based its determination on this limited point and not on the impropriety of the particulars demanded. On this point, we quote from the opinion of Mr. Justice Kalisch at page 25:

> "It is not questioned but that the defendant was entitled to apply for a more specific bill of particulars, if no answer had been filed, and that the justice to whom the application was made could within the exercise of a sound discretion, grant or refuse the application."

It follows, even if the ruling of the Supreme Court were the proper subject of an appeal, that the ruling should be affirmed.

Respectfully submitted,

EDWARD M. and RUNYON COLIE,
Attorneys of Defendant.

EDWARD M. COLIE,
RUNYON COLIE,
Of Counsel.