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SUPPLEMENTAL STATE OF CASE.

ON APPEAL TO COURT OF ERRORS AND APPEALS.

TESTIMONY.

Notice and Grounds of Appeal to Court of Errors and Appeals.

(Filed August 2, 1930.)

New Jersey Court of Errors and Appeals

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO, Plaintiffs, *vs.* EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS, Defendants.	On Appeal from New Jersey Supreme Court. Notice of Appeal and Grounds.

To JOSEPH J. LOORI, 586 Newark Avenue, Jersey City, New Jersey, Plaintiff's Attorney.

Sir:

PLEASE TAKE NOTICE, that the defendants in the above entitled cause appeal to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following grounds, to wit:

1. Because the Supreme Court erred in giving judgment to the plaintiffs instead of to the defendants.

Dated July 31, 1930.

HEINE & LAIRD,
Attorneys for Defendants.

Affidavit of Thomas Moloney.

NEW JERSEY COURT OF ERRORS AND APPEALS.

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO, Plaintiffs, *vs.* EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS, Defendants.	On Appeal from New Jersey Supreme Court. Action at Law. Affidavit.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

THOMAS MOLONEY, of full age, being duly sworn according to law upon his oath deposes and says:

He is an employee of the law firm of Heine & Laird, attorneys for the defendants in the above entitled case. On Thursday, July 31, 1930, he served a copy of the attached Notice of Appeal and Grounds on Joseph J. Loori, attorney for plaintiffs, by leaving a copy of same at his office at 586 Newark Avenue, Jersey City, New Jersey.

THOMAS MOLONEY.

Sworn and subscribed to before me }
this 1st day of August, A.D., 1930. }

EDWARD L. DUGGAN,
An Attorney at Law of New Jersey.

Petition for appointment of next friend.

Filed Feb. 24, 1927.

HUDSON COUNTY COMMON PLEAS COURT.

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, Plaintiff, vs. EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS, Defendants.	Action at Law. Petition for appointment of next friend.

To the Honorable Judges of the Hudson County Court of Common Pleas:

The petition of Patsy Benedetto, of the City of Jersey City, in the county of Hudson and State of New Jersey, respectfully shows:

1. That he is the father of Lillian Benedetto, said Lillian Benedetto is an infant under the age of 21 years, to wit, nine years of age.

2. That he is advised that said Lillian Benedetto has a just cause of action against Edward F. Fleckenstein and Albert F. Fleckenstein, partners trading as Ed. Fleckenstein's Sons, for injuries sustained by said Lillian Benedetto on or about October 11th, 1926, when she was knocked down and run over by a truck belonging to said defend-

ants, and which was being operated and driven in a negligent and careless manner by the agent and servant of the said defendants in a northerly direction on and along the Hudson County Boulevard, Jersey City, N. J., a public highway in said City; as the result of the foregoing the said Lillian Benedetto sustained a series of injuries and contusions to her head, arms, legs and other parts of her body.

3. That he desires to prosecute said cause of action for his said daughter, Lillian Benedetto, against the said defendants.

Petitioners therefore prays that he may be appointed the next friend of said Lillian Benedetto for the purpose aforesaid.

And your petitioner will ever pray, etc.

PATSY BENEDETTO,
Petitioner.

State of New Jersey, }
County of Hudson, } ss.:

Patsy Benedetto, being duly sworn according to law, upon his oath deposes and says:

1. I am the Petitioner named in the foregoing petition, I know the contents thereof and the matters, things and facts therein contained are true.

PATSY BENEDETTO.

Subscribed and sworn to this 29th day
of January, A. D., 1927, before me
Joseph Jno. Loori
Master in Chancery
of New Jersey.

Order.

HUDSON COUNTY COMMON PLEAS COURT.

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, Plaintiff, vs. EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS, Defendants.	Action at Law. On Petition for appointment of next friend. Order.

Upon reading and filing the petition of Patsy Benedetto hereto annexed, praying that he may be appointed the next friend of Lillian Benedetto, his daughter, an infant under the age of 14 years, to prosecute said cause of action;

It is, on this 24th day of February, A. D. 1927, on motion of Joseph J. Loori, Attorney for Plaintiff, ORDERED, that Patsy Benedetto, the father of Lillian Benedetto, be and he hereby is admitted as next friend to prosecute the above cause for and on behalf of said Lillian Benedetto.

CHARLES M. EGAN,
Judge.

Summons.

The State of New Jersey,

(Seal)

To Edward F. Fleckenstein and Albert F. Fleckenstein, partners trading as Ed. Fleckenstein's Sons. You are hereby summoned to answer the annexed Complaint of Lillian Benedetto, an infant, who sues by Patsy Benedetto, her next friend, and Patsy Benedetto, in an action at law.

And Take Notice that unless you file your answer to said complaint with the Clerk of the Hudson County Common Pleas Court, at the Court House, in Jersey City, N. J., within twenty days after service upon you of this Writ and the annexed Complaint, the plaintiffs may proceed in the suit, and judgment may be entered against you.

Witness, CHARLES M. EGAN, President Judge of our said Court, at Jersey City, this 24 day of February, A. D. 1927.

JOHN J. McGOVERN,
Clerk.

JOSEPH J. LOORI
Attorney for Plaintiffs.

Complaint.

Filed March 16, 1927.

HUDSON COUNTY COMMON PLEAS COURT.

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO, Plaintiffs, vs. EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS, Defendants.	Action at Law. Complaint.

FIRST COUNT.

Plaintiff, Lillian Benedetto, an infant who sues by Patsy Benedetto, her next friend, of the City of Jersey City, in the County of Hudson and State of New Jersey, says that:

1. On or about October 11, 1926, defendants were the owners of a certain Ford automobile truck which they were operating, by their agents, servants and employees, in a northerly direction on and along the Hudson County Boulevard, at or near where Cliff Street, intersects the same, both being public highways in Jersey City, Hudson County, New Jersey.

2. On the day aforesaid plaintiff, Lillian Benedetto, was lawfully in and upon said Hudson County Boulevard, at or near the place of intersec-

tion aforesaid, in the act of crossing said Hudson County Boulevard.

3. The defendants on the day aforesaid and at the place aforesaid, through its said agents, servants and employees, operated and drove the said automombile truck in so careless and negligent a manner that it ran into said plaintiff, Lillian Benedetto, throwing her to the ground with great force and violence and passing over her body thereby injuring her as hereinafter set forth.

4. Defendants' negligence consisted in this: That said automobile truck was not equipped with proper and sufficient brakes so that it could be stopped before causing injuries to persons; that said truck was driven at a high and excessive rate of speed and without regard for the safety of persons using said highway; and without giving or sounding any warning of approach; that said automobile truck was operated contrary to and in violation of the Motor Vehicle Act of the State of New Jersey; that defendants did not have said automobile truck under control while operating the same as aforesaid; so that the same could be brought to a stop when it was apparent that plaintiff, Lillian Benedetto, was in danger therefrom; that said defendants did not stop said automobile truck when it was apparent that continuing it on its journey would cause injury to plaintiff, Lillian Benedetto.

5. By reason of all the foregoing plaintiff, Lillian Benedetto, was severely and painfully injured in and about her head, chest, arms, back and spine, left hip, nervous system and legs, thereby causing a shortening to the left leg of said plaintiff, Lil-

lian Benedetto, which said injury to her left leg and to her spine are permanent injuries, by reason of which she did suffer great pain for a long period of time, to wit, from thence hitherto and she will continue to suffer great pain from her said injuries; and she was obliged to go to a hospital where she remained for a long period of time; and she was confined to her bed and home for a long period of time and will in the future be so confined.

SECOND COUNT.

Plaintiff, Patsy Benedetto, of the City of Jersey City, in the County of Hudson and State of New Jersey, says that;

1. He is the father of Lillian Benedetto, who is an infant under the age of fourteen years, she being nine years old.

2. He repeats the matters alleged in paragraphs 1, 2, 3, 4 and 5 of the First Count hereof and makes the same a part of this Count.

3. By reason of the premises, plaintiff, Patsy Benedetto, has been deprived of the services of plaintiff, Lillian Benedetto, to which services he was entitled; and has been obliged to lay out and expend and will in the future be obliged to lay out and expend, learge sums of money for medicines, medical attention and hospital services to have said plaintiff, Lillian Benedetto, cured of her injuries aforesaid.

Plaintiff, Lillian Benedetto, an infant, who sues by Patsy Benedetto, her next friend, demands as damages, on the First Count, the sum of $150,000.-00.

Complaint.

Plaintiff, Pasy Benedetto, demands as damages on the Second Count, the sum of $50,000.00.

JOSEPH J. LOORI,
Attorney for Plaintiffs.

I hereby deputize Eugene McDermott to serve the within Writ. Witness my hand and Seal this 24 day of February, 1927.

JOHN J. COPPINGER, Sheriff
By Thomas J. Prior, Under Sheriff.

Served within Summons and Complaint Feby. 28/27, on the defendants Edward F. Fleckenstein and Albert Fleckenstein, by leaving a true copy thereof for each at their usual place of abode Edward F. Fleckenstein, at 35 King Avenue, Weehawken, Albert Fleckenstein, at 29 King Avenue, Weehawken, with a member of their family above the age of fourteen years whom I informed of the contents thereof.

JOHN J. COPPINGER, Sheriff
By Eugene McDermott, S. D. S.

Rule for Interlocutory Judgment.

Filed March 25, 1927.

HUDSON COUNTY COMMON PLEAS COURT.

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO, Plaintiffs, vs. EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS, Defendants.	Action at Law. Rule for Interlocutory Judgment.

The summons and complaint in this cause having been duly served upon the defendants on February 28th, 1927, and defendants having failed to file an answer or taken any other step in response to said complaint within the time limited by the rule of the Court;

It is on this 25th day of March, 1927, Ordered that judgment interlocutory be entered against the defendants, Edward F. Fleckenstein and Albert F. Fleckenstein, partners trading as Ed. Fleckenstein's Sons, and in favor of the plaintiffs, Lillian Benedetto, an infant who sues by Patsy Benedetto, her next friend, and Patsy Benedetto.

CHARLES M. EGAN,
Judge.

On motion of
JOSEPH J. LOORI,
Attorney.

Rule actually entered this 25th day of March, 1927.

Order Fixing Date.

Filed June 15, 1929.

HUDSON COUNTY COURT OF COMMON PLEAS.

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO,

Plaintiffs,

vs.

EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS,

Defendants.

Action at Law.

Order fixing date.

Application being made to fix a day for the assessment of damages in the above entitled cause:

It is on this 29th day of March, 1929, Ordered, that the 8th day of April, 1929, at 10:00 o'clock in the forenoon, at the Court House in Jersey City, be and the same is hereby fixed as the time and place for assessing the damages by a jury drawn from the general panel.

CHARLES M. EGAN,
Judge.

On motion of
JOSEPH J. LOORI,
Attorney for Plaintiff.

Notice.

HUDSON COUNTY COURT OF COMMON PLEAS.

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO, Plaintiffs, vs. EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS, Defendants.	Action at Law. Notice.

To Edward F. Fleckenstein and Albert F. Fleckenstein, partners trading as Ed. Fleckenstein's Sons, defendants in the above cause.

Please Take Notice, that on Monday, the 8th day of April, 1929, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard thereon, the plaintiffs in the above cause, shall apply to this court at the Court House in Jersey City, N. J., to have the damages of the plaintiffs herein assessed by a jury drawn from the general panel.

Dated: Jersey City, N. J.,
March 20th, 1929.

JULIUS A. KEPSEL,
Attorney for Plaintiffs.

Affidavit of Service.

HUDSON COUNTY COMMON PLEAS COURT.

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO, Plaintiffs, vs. EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS, Defendants.	Action at Law. Affidavit of Service.

State of New Jersey, }
County of Hudson, } ss.:

Sidney H. Kantrowitz, being duly sworn according to law upon his oath deposes and says:

1. On March 29th, 1929, I served upon Edward F. Fleckenstein, a notice of the assessment of damages in the above entitled cause before this Court on the 8th day of April, 1929, by leaving the same at his usual place of abode at 29 King Avenue, Weehawken, New Jersey, by leaving the same with a member of his family above the age of fourteen years and informed said person of the contents thereof; the original of which is hereto annexed.

SIDNEY H. KANTROWITZ.

Subscribed and sworn to before me,
this 5th day of April, 1929.
Nathan Schulman,
Notary Public of New Jersey.

Affidavit of Service.

Filed June 15, 1929.

HUDSON COUNTY COMMON PLEAS COURT.

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO,

Plaintiffs,

vs.

EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS,

Defendants.

Action at Law.

Affidavit of Service.

State of New Jersey, } ss.
County of Hudson, }

John Loori, being duly sworn according to law upon his oath deposes and says:

1. On March 20th, 1929, I served upon Albert F. Fleckenstein, a notice of the assessment of damages in the above entitled cause before this Court on the 8th day of April, 1929, by leaving the same at his usual place of abode at 35 King Avenue, Weehawken, New Jersey, by leaving the same with a member of his family above the age of fourteen years and informed said person of the contents thereof; the original of which is hereto annexed.

JOHN LOORI.

Subscribed and sworn to before me,
this 5th day of April, 1929.
Nathan Schulman,
Notary Public of New Jersey.

Order.

Filed Sept. 19, 1929.

HUDSON COUNTY COURT OF COMMON PLEAS.

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO, Plaintiffs, vs. EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS, Defendants.	Action at Law. Order.

An application for a Rule to Show Cause why the interlocutory judgment by default in the above entitled cause should not be vacated and set aside, and the defendants allowed to file an answer to the complaint, having been made to me by Heine & Laird, attorneys for defendants on the 8th day of April, 1929, and after having considered the affidavit of Charles H. Sisson on behalf of the defendants, and having heard the arguments by Edward L. Duggan of Heine & Laird, and Julius A. Kepsel, and I having orally denied that application for a Rule to Show Cause on behalf of the defendants, it is on this 19th day of September, 1929,

ORDERED, that the application on behalf of the defendants for a Rule to Show Cause why the

interlocutory judgment by default should not be vacated and set aside, and the defendants allowed to file an Answer to the Complaint in this cause be denied, and this Order entered without prejudice in the minutes as of April 8, 1929, *nunc pro tunc.*

DANIEL O'REGAN,
Judge.

On motion of
HEINE & LAIRD,
Attorneys for Defendants.

Affidavit of Charles H. Sisson.

HUDSON COUNTY COURT OF COMMON PLEAS.

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO,

Plaintiffs,

vs.

EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS,

Defendants.

Action at Law. Affidavit.

State of New Jersey, } ss.:
County of Essex, }

Charles H. Sisson, of full age being duly sworn according to law upon his oath deposes and says:

That I am Manager of the Claim Department of the American Automobile Insurance Company at Newark, New Jersey, the Insurance Company for the defendants in the above entitled case.

That on or about the 11th day of March, 1927 I received in my office a summons and complaint in the above entitled action, and on the same day I communicated by telephone with Joseph J. Loori, the attorney for the plaintiffs regarding a settlement in the above entitled case, and it was agreed at that time between Joseph J. Loori and myself that pending the determination as to whether this case could be settled that he would treat this action at law as a claim and would not move it until

he notified me and in conformity with our telephone conversation, on the following day I wrote a letter to Joseph J. Loori to the effect that this suit was not to be moved until an agreed date between himself and me, a copy of that letter is attached to this affidavit.

I received no notice of any nature that this case was to be moved until I received a notice that the plaintiff intended to apply to this Court on April 8, 1929, to have the damages assessed by a jury.

I have conferred with the defendants in the above entitled case, and I believe that there is a just and legal defense to the action brought by the plaintiff. The accident was caused by the negligence of the infant plaintiff, age nine years, in running from the sidewalk into the side of the car of the defendant.

CHAS. H. SISSON.

Subscribed and sworn to before me
this 6th day of April, 1929.
Edward L. Duggan,
An Attorney at Law of New Jersey.

Affidavit of Charles H. Sisson.

March 12th, 1927.

Joseph J. Loori, Esq.,
586 Newark Avenue,
Jersey City, N. J.
Dear Sir:

Re: Claim#607892
Benedetto vs. Fleckenstein

Pursuant to telephone conversation of even date I am attaching memorandum to my file to the effect that this suit will not be moved until an agreed date between us.

Yours very truly,

AMERICAN AUTOMOBILE INSURANCE CO.
By
Claim Department.

CHS/B

Order for Final Judgment.

Filed April 30, 1929.

HUDSON COUNTY COURT OF COMMON PLEAS.

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO,

Plaintiffs,

vs.

EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS,

Defendants.

Action at Law.

Order for final Judgment.

The Court having, by its Order of March 20th, 1929, fixed April 8th, 1929, as the day for having the damages assessed by a Jury drawn from the general panel; and it further appearing that due notice of the time and place fixed for the assessment of the damages of the plaintiffs was duly given unto the above defendants.

On April 8th, 1929, the defendants applied unto the Court for another date. And the Court being of the opinion that said application should be granted, thereupon the Court fixed April 25th, 1929, as the day for the assessment of said damages.

On April 25th, 1929, this cause was tried before Judge Daniel T. O'Regan with a Jury.

The Jury rendered a general verdict against the defendants on the First Count and in favor of the

plaintiff, Lillian Benedetto, an infant, who sues by Patsy Benedetto, her next friend, for Twelve Thousand Five Hundred Dollars ($12,500.) Dollars; the Jury also rendered a general verdict against the defendants on the Second Count and in the favor of plaintiff, Patsy Benedetto, for Four Thousand ($4,000.) Dollars; with costs to be taxed.

DANIEL O'REGAN,
Judge.

Judgment.

HUDSON COUNTY COURT OF COMMON PLEAS.

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO,

Plaintiffs,

vs.

EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS,

Defendants.

Judgment entered April 30, 1929.

Damages	$16,500.00
Costs	70.20
Total	$16,570.20

JOSEPH J. LOORI,
Attorney for Plaintiffs.

Judgment on Verdict in the above entitled cause was entered in this Court on the 30th day of April in the year of our Lord One Thousand Nine Hundred and Twenty-nine in favor of the Plaintiffs, Lillian Benedetto, an infant, for $12,500.00 and Patsy Benedetto for $4,000.00 and against the Defendants, Edward F. Fleckenstein and Albert F. Fleckenstein, partners trading as Ed. Fleckenstein's Sons, in a plea of Action at Law for the sum of Sixteen Thousand Five Hundred Dollars damages and Seventy Dollars Twenty Cents cost of suit.

Judgment entered and signed this 30th day of April, 1929.

DANIEL O'REGAN,
Judge.

Petition.

HUDSON COUNTY COURT OF COMMON PLEAS.

LILLIAN BENEDETTO, by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO,
Plaintiffs,

vs.

EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS,
Defendants.

Action at Law.

Petition.

The petition of Edward F. Fleckenstein and Albert Fleckenstein, co-partners, defendants in the above entitled cause, respectfully shows to the Court and alleges:

That the above entitled suit was commenced by the issuance of a summons with the complaint on February 24th, 1927.

That the complaint sounds in negligence for damages arising out of an automobile accident suffered by the plaintiff on October 11th, 1926. That service of the summons and complaint was made on defendants on February 28th, 1927, and interlocutory judgment by default against the defendants was entered on March 25, 1927, directing the damages to be assessed against the defendants.

That thereafter plaintiffs' attorney took no steps in this cause until April 8th, 1929 when notice of inquest before a jury was served on defendants.

That thereupon application was made to this

Court to open the interlocutory judgment taken on default on March 25th, 1927, which application was made upon the affidavit of Charles H. Sisson, Claim Manager for the American Automobile Insurance Company, the insurance carrier of the defendants, which affidavit is annexed hereto and made a part hereof. That the application being denied inquest was duly held before this Court and a jury on April 25th, 1929 and damages found in favor of the plaintiff, Lillian Benedetto, for the sum of $12,500.00 and for the Plaintiff, Patsy Benedetto, the sum of $4,000.00.

That the insurance carrier of these defendants is said American Automobile Insurance Company, of St. Louis, Missouri, hereinbefore mentioned, and the Claim Manager in charge of that company's affairs in New Jersey is one, Charles H. Sisson. That after service upon the defendants of the summons and complaint as above mentioned, the defendants duly forwarded the same to said Charles H. Sisson, at Newark, New Jersey, and as defendants are advised, he received said summons and complaint on or about March 11th, 1927, and thereafter as appears by his affidavit annexed hereto, did on or about said March 11th, 1927, enter into an agreement with Joseph J. Loori, attorney for plaintiffs, that pending negotiations for settlement of the case, the same would be regarded as a claim, and that said plaintiffs' attorney would not proceed in the matter until settlement negotiations then pending were definitely concluded, and that said plaintiffs' attorney would not move in the case or do anything which would prevent the interposition of any defense these defendants might have in the event that settlement negotiations proved futile.

Petition.

That in violation of this agreement and even while said negotiations for settlement were pending, plaintiffs' attorney did, as hereinbefore shown, enter up an interlocutory judgment by default against the defendants on March 25th, 1927 without notice to these defendants or their insurance carrier and thereby precluded defendants from interposing their defense to the action.

That the settlement negotiations conducted by these defendants and their insurance carrier were undertaken and carried on in good faith, and on or about December 17th, 1926, a licensed physician, to wit, Irving M. Vanderhoof made an examination of the plaintiff and a report thereon, o copy of which is annexed hereto. That from said medical examination and the X-rays available and therein referred to and the records of Christ Hospital, it appeared that the injury suffered was a minor one and that the amount involved in any settlement would not be large and no claim for any large amount was at that time, nor down to the date of hearing before this Court, ever made or advanced by plaintiffs' attorney.

That these defendants are advised that they have a good and sufficient legal defense to the action brought by the plaintiffs, which by the violation of the agreement above mentioned, that have been precluded from presenting to the Court.

That annexed hereto is the affidavit of Peter M. Imytrow, driver of defendants' automobile at the time of the accident.

Defendants further show that since the inquest taken herewith defendants have discovered new evidence in support of their defense, which evidence was entirely unknown to them at the time of making the application to this Court to open

the default hereinbefore referred to. That annexed hereto is the affidavit of Edward Garrison setting forth the facts of said newly discovered evidence.

That at the time of the accident in 1926, when defendants inquired of their driver as to the facts of the accident, said driver failed to inform the defendants concerning said Edward Garrison having witnesses this accident or incorrectly remembered his name, so that defendants and their insurance carrier had no knowledge of the existence of this witness until after April 25th, 1929.

That the accident having happened in 1926 and no steps being taken by the plaintiffs' attorney to the knowledge of these defendants, to prosecute the claim actively until 1929, there was no reason for these defendants continuing their investigation, and although they used due diligence in ascertaining the story of the driver, they considered from the action of the plaintiffs' attorney in agreeing to negotiate for a settlement and from the report of Dr. Vanderhoof and the records of Christ Hospital, that the matter was a minor one and that the claim had been abandoned, and there appeared to be no reason why these defendants should continue investigation into the matter in view of the failure of plaintiffs' attorney to press the claim or to continue the negotiations for settlement.

That it appears from the investigation made by and for these defendants in 1926, that the injuries sustained by the plaintiff were of a minor character and the action of Plaintiffs' attorney between October 11th, 1926 and April 1929 induced these defendants to believe that the injury was of such a minor character that the suit had been abandon-

ed. That there was no indication to these defend ants from any source that injuries of a serious character such as were claimed at the inquest had been suffered by this plaintiff, and it was admitted on the trial that the X-ray pictures on which the alleged injuries were based, were only taken on April 23, 1929, two days before the inquest.

Defendants further show that Dr. Doran of the staff of the Jersey City Hospital is an experienced Orthopedic surgeon and that he had charge of the treatment of this plaintiff according to the records of the Jersey City Hospital between November 14th and December 7th, 1926 and that his record of treatment of the plaintiff shows no serious disability. That plaintiffs' attorney did not bring on this case for inquest until shortly after Dr. Doran had left for Europe for an absence of one year. His testimony was unavailable at the trial on the question of injuries.

That the physicians who testified at the inquest were only called in by the plaintiffs' attorney just prior to the trial and had no knowledge of the physical condition of this child during the preceding period of years and plaintiffs' attorney failed to call Dr. Finger or any of the physicians in either the Christ Hospital or Jersey City Hospital other than the intern who had received the child when it was originally brought to Christ Hospital.

Defendants further show that Dr. Loori, who claims to have been the family physician of plaintiff, testified at the inquest that he had treated plaintiff continuously from November 7th, 1926 to the end of that month every day at her home in Cliff Street, Jersey City, New Jersey, although it appears from the record of the Jersey City Hospi-

tal that the plaintiff was in said hospital from November 14th to December 7th, 1926; and it further appears from the examination of Dr. Vanderhoof, copy of which is annexed, that Dr. Loori in December 1926 made no claim for any serious spinal injury to this plaintiff.

The defendants further show that in accordance with the affidavit of Amelia H. Bettell annexed hereto the plaintiff has been attendant at school with much greater regularity than was testified to at the inquest, and further, that she has been able to play and conduct herself in a manner negativing any serious injury, contrary to the testimony at the inquest, and that the physical examinations at school failed to show any spine condition of injury.

These defendants verily believe that there is grave cause to apprehend that the injuries as testified to at the inquest are not the result of the accident in which the plaintiff was involved and as set forth in the complaint herein, and that said plaintiff has either suffered a subsequent injury or that some other aggravating cause than the injuries sustained on October 11th, 1926 has intervened and created the condition for which the plaintiff seeks to hold this defendant responsible.

WHEREFORE your defendants respectfully petition this Honorable Court for a re-hearing of the application to reopen the default taken herein in violation of the agreement herein referred to and for a new trial on the whole case both as to liability and damages; and further, that the plaintiffs' exhibits at the inquest, P-1 and P-2, being X-rays of the spine of the plaintiff, may be impounded with the Clerk of this Court until further

order made herein, subject to examination by both sides, and that an X-ray picture may be taken of plaintiff's spine by Dr. Charles Baker of Newark, New Jersey, at the expense of the defendants, and that all further proceedings in entering judgment or issuing execution thereon on the part of the plaintiff may be in the meantime and until the further order of this Court, stayed, and for such other and further relief as the circumstances may require, and that defendants may have such additional time to complete their investigation and submit the same to this Court as may be reasonably necessary.

And your petitioner will ever pray, &c.

HEINE & LAIRD,
Attorneys for Petitioner.

State of New Jersey, }
County of Essex, } ss.:

M. Casewell Heine, of full age, being duly sworn according to law, on his oath, deposes and says:

I am one of the attorneys for the petitioners and in charge of and familiar with the matters mentioned in the foregoing petition; I have read said petition and know the contents thereof and the same is true to the best of my knowledge and belief.

M. CASEWELL HEINE.

Sworn and subscribed to before me
this 2 day of May A. D. 1929.
Marie Sullivan
Notary Public of New Jersey.
(Seal)

Petition.

IRVING M. VANDERHOFF,
9 Clinton Street,
Newark, N. J.

Dec. 17, 1926.

Mr. Sisson,
Amer. Auto. Ins. Co.,
20 Branford Place,
Newark, N. J.

Case No. 607892
Injured—Lillian Bendetto.
Assured—Fleckenstein Sons.

Dear Sir:

History: This child is 9 years of age. She was injured on October 11, 1926. She was taken to Christ Hospital in Jersey City and was there two days. She was admitted to the Jersey City Hospital on November 14, 1926, and was discharged on December 7, 1926. These dates of admission and discharge at the Jersey City Hospital I learned at the hospital on December 15th. The diagnosis at the hospital was contusion of spine. X-ray was negative.

Examination: Made at child's home, 16 Cliff St. Jersey City, N. J. on December 3, 1926. Your letter requesting me to examine this little girl is dated November 9, 1926. I was to get in touch with Attorney Loori to make the examination. I attempted to do so promptly. I was unable to get in touch with him for some days and when I did finally, he told me that he would have the doctor, his brother, call me up. This doctor did not do so for some time. Finally I did arrange to meet the doctor and he took me to this girl's home. He stated that he had been there only once before.

He seemed to know nothing about the little girl's injuries at all. The grandmother was present at the examination. I was permitted to make a complete examination. The only thing I can find is two small scabs on the small of child's back. Neither scab is over three-eights of an inch in diameter. Both scabs are dry and one would wonder how they could possibly remain on here so long if the child had been bathed at all frequently. The little girl states that the left leg was hurt. There is no record of this at the hospital and I do not find any injury to the child's leg. Doctor Loori started to talk about shortening. There is absolutely no shortening in the child's leg.

Opinion: When I examined this child, I was told by her that she was at the City Hospital for a month. I therefore communicated with Mr. Swenson by phone to see if he had any record of the diagnosis there. As he did not, I delayed this report in order to secure the hospital record. I think by contusion of spine they mean contusion over spine. The child was on the service of Doctor Doran. This doctor has an excellent reputation. Had there been any fracture of the spine or anything bad, I feel sure that he would have found it. In my examination I find practically nothing wrong with the child. I believe she had made an excellent recovery from whatever injury she may have had.

Very truly yours,

IRVING M. VANDERHOOF. (signed)

IMV:TF

Affidavit of Peter Dmytrow.

HUDSON COUNTY COURT OF COMMON PLEAS.

LILLIAN BENEDETTO by PATSY BENEDETTO, her next friend, Plaintiff, vs. EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS, Defendants.	Action at Law. Affidavit.

State of New Jersey, } ss.:
County of Hudson, }

Peter M. Dmytrow being duly sworn according to law on his oath says:

1. On October 11, 1926, I was employed by the above titled defendants as driver of a Ford Truck which was being operated by me at about 3:15 P. M. along and upon the Hudson County Boulevard in Jersey City, N. J. at or near a point where the said Hudson Boulevard is intersected by Cliff Street.

2. I was driving my truck in a northerly direction at said time and place. As I approached Cliff Street I noticed a number of children in the immediate vicinity. After proceeding beyond Cliff Street and having travelled some twenty-five or thirty feet northerly beyond the intersection I sensed rather than felt an impact with somebody at the right rear of my truck. I did not see the infant plaintiff in this suit dash from the curb but after the impact above referred to I jammed on my

brakes and stopped the car. I had not travelled four feet from the time wherein the impact was noticed and the time wherein the brakes had been applied and the car stopped. The car had been travelling at a speed of not more than eight miles per hour.

3. I alighted from my truck and then noticed a child lying in the highway with her two legs under the truck and the rest of her body outside the line of the truck and lying on the highway. The truck itself at the time was almost on the white line designating the center of the Boulevard and when it stopped it was about twenty feet from the right hand curb. I picked the child up and with the assistance of one Edward Garrison, driver of a Public Service Gas Company truck took her to Christ Hospital where Dr. Finger examined into her injuries. I remained during the entire examination and distinctly heard Dr. Finger say that there was no serious injuries with the exception of a bruised leg and a slight scratch on her back. He advised, however, that the child should remain at the Hospital over night for observation. After the examination had been completed the child was led out of the examining room by a nurse and showed no evidence of injury, made no complaints of pain and to me appeared as being perfectly normal with the lone exception that she seemed somewhat frightened.

4. I left the Hospital and went to the Oakland Avenue Police Station to report the accident. No notice of any suit has ever been served upon me with the exception of a subpoena to testify which was served about April 5th past.

5. The fault for the accident and for the in-

juries resultant therefrom was entirely accountable to the negligence of the child and the claim made that I was negligent is absurd for the reason that I knew nothing of the accident until I sensed the impact with the rear of my car and some eight feet behind my line of vision.

PETER M. DMYTROW.

Sworn and subscribed to before me
this 30th day of April, 1929.
James A. Tumulty, Jr.,
Master in Chancery of N. J.

Affidavit of Edward Garrison.

HUDSON COUNTY COURT OF COMMON PLEAS.

LILLIAN BENEDETTO by PATSY BENEDETTO, her next friend, Plaintiffs, vs. EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS, Defendants.	Action at Law. Affidavit.

State of New Jersey, }
County of Hudson, } ss.:

Edward Garrison being duly sworn according to law on his oath says:

1. On October 11, 1926, I was employed by the Public Service Gas Company as a driver of one of said company's trucks. At about 3:15 P. M. on that date I was travelling along the Hudson County Boulevard in a northerly direction thereon about fifty feet behind a truck owned by Ed Fleckenstein's Sons and the one particularly involved in the accident on which the above suit is founded. I was traveling at the time at a very conservative rate of speed and verily believe that the truck in front of me was not travelling in excess of ten miles per hour.

2. The accident happened about twenty-five or thirty feet beyond the intersection of Cliff Street. I distinctly saw the child plaintiff in the above run into the right rear mud guard of Ed Fleckenstein's Sons truck. I am sure that the truck had com-

pleted the intersection of Cliff Street and am further sure that at practically the same moment that the child struck the truck the truck itself was stopped. The truck had been travelling in the same direction with me and was almost on the white line which determines the center of the said Hudson County Boulevard so that there was about twenty feet intervening between the truck itself and the right curb from which the child had started. At the same time and at the immediate scene of the accident I verily believe there were some cars parked at the curbing so that the child must have run out from between these same parked cars. I arrived at the point of the accident almost immediately after the child struck the right rear mud guard and assisted the driver of Fleckenstein's truck into my car, he having already picked up the infant. We proceeded to Christ Hospital with the child and no complaints of pain or otherwise were made by said child during the journey. She appeared somewhat dazed but beyond that gave no evidence of injury. Dr. Finger of Christ Hospital Staff examined the child and I myself saw the nurse lead the child out of the examining room. She appeared practically normal and made no outcries whatsoever. She walked with a practically normal step when led from the examining room.

3. After leaving the hospital I took Peter M. Dmytrow, Fleckenstein's driver to the Oakland Avenue Police Station. I assured him of my willingness to testify in his behalf and tendered my name and address to him. I have had no notice whatsoever of the above stated suit nor have I at any time been called upon to testify or to make any statement other than the foregoing.

Affidavit of Edward Garrison.

4. From my observation of the accident and all of the facts surrounding same I have no hesitancy in saying that the fault was entirely that of the child and in no way accountable to the negligence or carelessness of Peter M. Dmytrow, driver of Ed Fleckenstein's Sons truck at the time and place of this accident.

EDWARD GARRISON.

Sworn and subscribed to before me
this 30th day of April, 1929.
James A. Tumulty, Jr.,
Master in Chancery of N. J.

Affidavit of Amelia H. Bettell.

Filed May 4, 1929.

HUDSON COUNTY COURT OF COMMON PLEAS.

LILLIAN BENEDETTO by PATSY BENEDETTO, her next friend, Plaintiff, vs. EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS, Defendants.	Action at Law. Affidavit.

State of New Jersey, County of Essex, } ss.:

Amelia H. Bettell, of full age, being duly sworn according to law, on his oath deposes and says:

I reside in Bloomfield, New Jersey; my occupation is that of investigator.

On April 29th, 1929 I called at the home of Mr. and Mrs. Benedetto, 16 Cliff Street, Jersey City, New Jersey. At this residence which is a one-family frame house in the rear of a lot, I inquired for Mrs. Benedetto and a woman about thirty-eight years old asked me to go into a sub-cellar where a little girl about eleven years old with blue eyes and light brown hair and about four feet tall was sitting on a stool near a table. This girl was introduced to me by Mrs. Benedetto as being her daughter Lillian.

Lillian Benedetto told me she was attending Public School No. 25 in Jersey City, New Jersey.

On April 30th, 1929 I went to Public School No.

25 in Jersey City, New Jersey and interviewed Mrs. Swiney who told me that she was the teacher of Lillian Benedetto. Mrs. Swiney said that Lillian was promoted to her class in February of 1929 and that she was absent only two days during February of this year and that she was also absent during the months of March and April. She also told me that she had received on or about March 12, 1929 a note from Lillian's doctor, Dr. Loori, which stated "Must be out of school—Doctor's orders". On March 12, 1929 she received word from Dr. Brinkerhoff that child was permanently excused from school. Mrs. Swiney stated that the child did not complain about her back while she was in her class.

While I was talking to Mrs. Swiney, a classmate of Lillian's, Gertrude Wilkins, 29½ Cliff Street, Jersey City, New Jersey, told both me and Mrs. Swiney that Lillian was able to play in front of her home just as other children played.

Mrs. Swiney told me to interview Miss Hoffman who was formerly Lillian's teacher at this school, but I found that Miss Hoffman was ill and I was unable to interview her.

Lillian Benedetto entered this school in September, 1928.

After I had talked to Mrs. Swiney, I went into the Principal's office in school No. 25 and secured from the assistant there, the medical record of Lillian Benedetto. This record is as follows:

Sex-Female
Date of Birth—August 18, 1918
Schools—#31—25
Grade—4B—5A

Affidavit of Amelia H. Bettell.

Dates of Phys. Exams. February 2, 4, 28, 1928
Vaccination—O. K.
Nutrition—O. K.
Enl. Cerv. Gl.—O. K.
Chorea—O. K.
Card. Dis.—O. K.
Pulm. Dis.—O. K.
Skin Disease—O. K.
Def. Spine—O. K.
Def. Extrem.—O. K.
Def. Vision (R)—O. K.
Def. Vision (L)—O. K.
Def. Hearing—O. K.
Def. Nas. Br.—O. K.
Def. Teeth—xx
Def. Palate—O. K.
Imp. Speech—O. K.
Hyper. Tons—O. K.
Adenoids—O. K.
Epilepsy—O. K.
X denotes defect at present
Examination—12/4/28 by Dr. H. White at school.

On April 20th, 1929 I called at Public School No. 31 in Jersey City, New Jersey and interviewed Miss Ward. Miss Ward stated to me that when Lillian was absent it was due to her mother and father working and her staying home to attend to the house duties. She entered this school in February 28th, 1928 and was transferred on September 25, 1928 to Public School No. 25. She told me that she would mail to me the complete records as soon as she was able to locate them.

On April 30th, 1929 I called at St. Johns School, Jersey City, New Jersey and interviewed Sister Vic-

torina who gave me the following record as to attendance of Lillian Benedetto at this schol. She stated that during the Fall term of 1926, Lillian was in Class 3-B, in the charge of Sister Rosalie and that during the term of the class of 3-B she was present 48 days and absent 41 days. Sister Victorina also told me that during the 4-A term of 1927 Lillian Benedetto was in class 4-A under the charge of Sister Rosalie and that she was absent ten days. Sister Rosalie is no longer with this school and I was unable to interview her.

AMELIA H. BETTELL.

Subscribed and sworn to before me
this 1st day of May, A. D. 1929.
Edward L. Duggan,
An Attorney at Law
of New Jersey.

Service of a copy of the within original Petition with the affidavits and statements thereto attached is acknowledged this third day of May, 1929.

JOSEPH J. LOORI,
Attorney of Plaintiff.

Rule to Show Cause.

Filed May 4, 1929.

HUDSON COUNTY COMMON PLEAS COURT.

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO, Plaintiffs, vs. EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS, Defendants.	Action at Law. Rule to Show Cause.

The matter being opened to the court on the petition of the defendants and good cause appearing therefor, it is on this 2nd day of May, 1929, on motion of Heine & Laird, attorneys for the defendants

ORDERED that the plaintiffs do show cause before this court on the 7th day of June next at the Court House at ten o'clock in the forenoon or as soon thereafter as the matter may be heard why the verdict on the inquest herein should not be set aside and why the application heretofore made to open the interlocutory judgment should not be reheard, and why a new trial should not be heard upon the whole case, and in the meantime and until the further order of this court all proceedings herein on the part of the plaintiffs in the above entitled matter are stayed, and it is further

ORDERED that the X-ray pictures, marked Ex-

hibit P-1 and Exhibit P-2, upon the inquest herein be delivered by the plaintiffs' attorney to the clerk of this court, and be by him impounded and held until further order herein, subject to examination by both parties or their duly authorized representative, and it is further

ORDERED that the plaintiff, Lillian Benedet- to be produced at the office of Dr. Charles F. Baker, Newark, New Jersey, for the taking of an X-ray picture by said Dr. Baker at the expense of defendants including transportation to and from plaintiff's home. It is further

ORDERED that service of a copy of this Rule shall be made upon the attorney for the plaintiffs within 5 days from the date hereof, together with a copy of the petition filed by defendants, and that additional affidavits may be submitted upon the argument of this Rule by both sides provided the same have been served upon the opposing party at least three days before the return day hereof.

DANIEL O'REGAN,
Judge of the Hudson County
Common Pleas Court.

Service of a copy of the within original Rule is acknowledged this third day of May, 1929.

JOSEPH J. LOORI,
Attorney for Plaintiff.

Order discharging Rule to Show Cause.

Filed June 15, 1929.

HUDSON COUNTY COURT OF COMMON PLEAS.

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO, Plaintiffs, vs. EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS, Defendants.	Action at Law. Order discharging Rule to Show Cause.

This matter coming on to be heard on a Rule to Show Cause granted in the above cause on May 2nd, 1929, and returnable June 7th, 1929, said return day having from time to time been continued until this day; and

The Court having heard the arguments of the attorneys for the respective parties and being of the opinion that the said Rule to Show Cause of May 2nd, 1929, should be vacated, and that the judgment awarded unto the plaintiff, Patsy Benedetto, on the second count of the complaint, was excessive and the same should be reduced from the sum of Four thousand ($4,000.) Dollars to the sum of Two thousand ($2,000.) Dollars.

It is thereupon, on the 14th day of June, 1929,

Order discharging Rule to Show Cause.

on motion of Joseph J. Loori, Attorney for plaintiffs,

ORDERED, that the Rule to Show Cause granted herein on May 2nd, 1929, be and the same is hereby discharged and vacated; and it is further ordered that the verdict rendered in favor of the plaintiff, Patsy Benedetto, on the second count of the complaint, be reduced from the sum of Four Thousand ($4,000.) Dollars to the sum of Two Thousand ($2,000.) Dollars; and it is further ordered that execution in this cause be and the same is hereby stayed for a period of thirty days from the date hereof.

DANIEL O'REGAN,
Judge.

Order.

Filed July 16, 1929.

HUDSON COUNTY COURT OF COMMON PLEAS.

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO, Plaintiffs, vs. EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS, Defendants.	Action at Law. Order.

This matter being opened to the Court, and good cause appearing therefor, it is, on motion of Heine & Laird, attorneys for defendants,

ORDERED that the time for the defendants to file and perfect their appeal from the order and judgment of the Court be and the same hereby is further extended from July 15th, 1929 to August 20th, 1929; and it is further

ORDERED that all proceedings on the part of the plaintiff and execution be further stayed until said August 20th, 1929.

DANIEL O'REGAN,
Judge.

Notice of Appeal.

Filed Aug. 19, 1929.

HUDSON COUNTY COURT OF COMMON PLEAS.

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO, Plaintiffs, vs. EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS, Defendants.	Action at Law. Notice of Appeal.

To JOSEPH J. LOORI, 591 Summit Avenue, Jersey City, New Jersey, Attorney of Plaintiffs.

Please Take Notice, that the defendants in the above entitled cause appeal to the New Jersey Supreme Court from the judgments entered in this cause.

Respectfully yours,

HEINE & LAIRD,
Attorneys of Defendants.

Affidavit of Service.

HUDSON COUNTY COURT OF COMMON PLEAS.

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO, Plaintiffs, vs. EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS, Defendants.	Action at Law. Affidavit.

State of New Jersey, }
County of Essex, } ss.:

Edward A. Underriner, of full age, being duly sworn according to law upon his oath deposes and says:

I am in the employ of Heine & Laird, the attorneys for the defendants in the above entitled case. On Monday, August 19th, 1929 I served a true copy of the attached Notice of Appeal on Joseph J. Loori, the attorney for the plaintiffs, by leaving the same at his office at 591 Summit Avenue, Jersey City, New Jersey.

EDWARD A. UNDERRINER.

Sworn and subscribed to before me
this 19th day of August, 1929.
Marie Sullivan
Notary Public of New Jersey
(Seal)

Amended Notice of Appeal.

HUDSON COUNTY COURT OF COMMON PLEAS.

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO, Plaintiffs, vs. EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS, Defendants.	Action at Law. Amended Notice of Appeal.

To JOSEPH J. LOORI, 591 Summit Avenue, Jersey City, New Jersey, Attorney of Plaintiffs,

Please Take Notice, that the defendants in the above entitled cause appeal to the New Jersey Supreme Court from the order of Judge Daniel J. O'Regan of the Hudson County Court of Common Pleas denying the defendants a Rule to Show Cause why the interlocutory judgment by default entered in the above entitled case should not be vacated and set aside, and also from the order of Judge Daniel J. O'Regan of the Hudson County Court of Common Pleas discharging the Rule to Show Cause why the verdict on the inquest herein should not be set aside and why the application heretofore made to open the interlocutory judg-

ment should not be reheard, and why a new trial should not be had upon the whole case, and also from the judgments entered in this cause.

Respectfully yours,

HEINE & LAIRD,
Attorneys of Defendants.

Affidavit of Service.

Filed Sept. 9, 1929.

HUDSON COUNTY COURT OF COMMON PLEAS.

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO,

Plaintiffs,

vs.

EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS,

Defendants.

Action at Law.
Affidavit.

State of New Jersey, }
County of Hudson, } ss.:

Edward L. Duggan, of full age, being duly sworn according to law deposes and says:

I am an attorney at law of the State of New Jersey and in the employ of Heine & Laird, the at-

torneys for the defendants in the above entitled case.

On September 9, 1929 I served a true copy of the attached Amended Notice of Appeal on Joseph J. Loori, the attorney for the plaintiff, by leaving it at his office at 591 Summit Avenue, Jersey City, New Jersey.

EDWARD L. DUGGAN.

Sworn and subscribed to before me
this 9th day of September, 1929.

William F. Ward,
Notary Public of N. J.

Grounds of Appeal.

Filed September 12, 1929.

NEW JERSEY SUPREME COURT.

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO,

Plaintiffs,

vs.

EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS,

Defendants.

Grounds of Appeal.

Action at Law.

On Appeal from Hudson County Court of Common Pleas.

To JOSEPH J. LOORI, ESQ.,
Attorney for Plaintiffs.

Please Take Notice, that the defendants herein state the following grounds of appeal.

1. The refusal of Judge Daniel J. O'Regan of the Hudson County Court of Common Pleas to grant the defendants a Rule to Show Cause why the interlocutory judgment by default entered in the above entitled cause should not be vacated and set aside, and the defendants be allowed to file an Answer to the Complaint filed in this cause, which refusal the defendants contend is an abuse of discretion.

2. The refusal of Judge Daniel J. O'Regan of the Hudson County Court of Common Pleas to

open the interlocutory judgment by default, which refusal the defendants contend is an abuse of discretion.

3. The refusal of Judge Daniel J. O'Regan of the Hudson County Court of Common Pleas to vacate the judgment entered on the verdict rendered at the inquest, and to grant the defendants a new trial on the merits of the whole case, which refusal the defendants contend is an abuse of discretion.

HEINE & LAIRD,
Attorneys for Defendants.

Affidavit of Service.

NEW JERSEY SUPREME COURT.

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO, Plaintiffs, vs. EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS, Defendants.	Action at Law. Affidavit.

State of New Jersey, }
County of Essex, } ss.:

Edward L. Duggan, of full age, being duly sworn according to law upon his oath deposes and says:

I am an Attorney at Law of the State of New Jersey and in the employ of Heine & Laird, attorneys for defendants in the above entitled case.

On September 9, 1929 about 2 P. M. I served a true copy of the attached Grounds of Appeal upon Joseph J. Loori, the attorney for the plaintiff by leaving it at his office at 591 Summit Avenue, Jersey City, New Jersey.

EDWARD L. DUGGAN.

Sworn and subscribed to before me
this 11th day of September, 1929.
Marie Sullivan,
Notary Public of N. J.

Testimony.

HUDSON COUNTY COURT OF COMMON PLEAS.

LILLIAN BENEDETTO, an infant and PATSY BENEDETTO, individually,

Plaintiffs,

vs.

EDWARD F. FLECKENSTEIN,

Defendant.

Before: HON. DANIEL J. O'REGAN, Judge, and a Jury.

Jersey City, N. J., April 25th, 1929.

APPEARANCES:

JOSEPH J. LOORI, ESQ., for the Plaintiffs. (By MR. KEPSEL).

HEINE & LAIRD, ESQS., for the Defendant. (By MR. HEINE).

Mr. Heine then stated to the Court that the plaintiff's attorney had refused to permit a medical examination by Doctors Arlitz and Vanderhoff on the part of the defendant, although due to the situation in the suit no examination had been had since the original examination by Dr. Vanderhoff in 1926. (Argument by Counsel) The Court then directed the examination to be

made forthwith before the commencement of the trial.

Request was then made by Mr. Heine to have it noted on the record that he proceeded with the trial without in any way waiving his right of objection to the Court's denial of the motion to open the default of the defendants in failing to file their answer.

(A jury was duly impanelled, found satisfactory, and sworn.)

(Opening by counsel.)

DR. HARRY J. PERLBERG, sworn.

Direct-examination by Mr. Kepsel:

Q. You are a practicing physician of the State of New Jersey? A. Yes, sir.

Q. Connected with any institutions, Doctor?

Mr. Heine: I admit the qualifications.

Mr. Kepsel: I would rather bring it out.

The Witness: I am County Roentgenologist in charge of all the X-ray work in the various County institutions of Hudson County. I was assistant Roentgenologist of Jersey City, and consulting X-ray specialist of the New Jersey State Rehabilitation Commission.

Q. An X-ray specialist, is that it? A. Yes, sir.

Q. How long have you pursued X-ray work, Doctor? A. Eleven years.

Q. Did you take any X-ray pictures of Lillian Bendetto? A. I did.

Q. When? A. On the 23rd of April, 1929.

Q. Have you the plates that you took, Doctor? A. I have.

Q. Are those the plates (handing witness films)? A. (Examining films.) Yes.

Mr. Kepsel: Is there any objection to offering them?

Mr. Heine: No objection if they are connected.

(Received and marked in evidence Exhibit P-1 and P-2.)

Q. These plates are the plates taken by you of a portion of the body of Lillian Bendetto? A. They are.

Q. Will you explain—will you stand up, Lillian?

(Lillian Bendetto arises in court room.)

Is this the child? A. Yes, sir.

Q. Will you just show the jury, and the court, what you found in these plates, what they disclosed? A. This is an X-ray film (referring to P-1.) I will show P-2 first. This shows the spine of the little girl that just stood up. It shows the spine and the middle back down to the end of the spine, and this is a side view. This shows a crushing fracture to the 11th dorsal spine. That is next to the last rib at the waist line. This spine has been fractured and crushed, and has an inflammatory process about it, as is seen in contrast to the other vertebrae that are smooth and regular. There is also a diminution in the space between the 11th and the 12th dorsal vertebrae as noted here. The space is from one quarter to three

eights, approximately. Here it has been reduced to perhaps to one eighth inch or less, which would cause pressure upon whatever might come out between the vertebrae.

(Referring to Exhibit P-1)

This is the same case with the patient lying on the back. P-1 is a view of the same case with the patient lying on the back and the X-ray going through the abdomen and out the back. This shows—this is the eleventh dorsal spine, the ribs are attached to it. This is the eleventh rib and this is the twelfth rib. It has an inflammatory process with partial destruction of the eleventh spine affecting principally the lower portions; also involving the upper part of the twelfth. This can be seen by comparison with the other vertebrae that are smooth and regular in outline. The space here (indicating) is practically nothing. One appears to lie exactly on top of the other, the space having been destroyed by the inflammatory condition of the fracture. This vertebra is also displaced and is slightly to the right side. It is a trifle out of line. This is the right side as marked on the film. It is displaced slightly towards the right side. There is also a shadow along the right side; a gray shadow which shows the presence of callous, or new bone, which is usually found at the site of any fracture, and indicates a repair process on the part of nature. This callous is present. That tells you all about it.

Q. Doctor, is what you have just described known commonly as a broken back? A. Yes.

Q. Does this condition tend to interfere with the child's power of locomotion? A. It would. Due

to the displacement of the spine, and the loss of space between the two vertebrae, it would cause pressure between the nerves which emerge from the spine, and also by the formation of the new bone which I described on the film, this new bone gradually presses upon and perhaps envelops the nerves.

Q. What treatment, Doctor, would relieve this condition, if any? A. It is difficult to state whether any treatment will relieve the condition, but the child should get the benefit of a surgical operation to go down and try to chisel away such of that new bone that is formed, and try to cause a space to be formed between the two vertebrae, which would relieve the pressure upon the nerves; and, of course, if the nerve is not too far destroyed by now it might regenerate, and the power in the leg—the left leg—would return, provided the nerve has not gone too far by now.

Q. Would that be a simple operation, Doctor Perlberg? A. No; a very serious operation.

Q. Like all other operations there is an uncertainty about the outcome? A. No; after the operation she would have to be placed in bed with an extention to try to pull the segments apart and keep them apart until nature had assembled the thing properly. It is not a sure thing as to the result at all.

Q. Is it such an operation any practitioner could perform? A. No; one must be particularly qualified in neurol surgery, in that particular line of work. Some very good man must do it.

Q. You have no idea of the cost of an operation of this kind?

Mr. Heine: I object.

The Court: Yes.

Q. Dr. Perlberg, could you say from your examination and from these plates what caused this injury? A. I would state that this due to a traumatic process; to a blow of some sort.

Q. By a trauma, you mean a strike? A. A blow; yes.

Mr. Kepsel: Take the witness.

Cross-examination by Mr. Heine:

Q. Do you say that the operative method is the only method of relieving this condition? A. That is my opinion.

Q. Might it not be possible that if an ordinary cast were used so as to relieve the pressure, that that callous might be absorbed to some extent? A. I don't think so. Do you want me to give my reason?

Q. Your opinion is that the callous would not absorb? A. It would not, because it is already fixed. The application of a cast and immobilization might prevent a formation of more callous, but it will not in my opinion absorb the callous which is already there.

Q. You feel, Doctor, that this case having remained during a period of two years without any treatment of that kind, that the time when absorbtion is possible has now passed? A. I think it is pretty well fixed by this time.

Q. Your answer to that is yes? A. Yes.

Q. Had a measure of that kind been taken early in the case, there might have been the possibility of an absorbtion of the callous before it had become fixed to the extent it now is?

Mr. Kepsel: I object.

The Court: I think it follows the previous question. There was no objection to the previous question.

The Witness: That would have to be properly authorized by a qualified orthopedic surgeon, who has had extensive experience with those cases. I am not an orthopedic surgeon.

Q. Even though you cannot be qualified as an orthopedic surgeon, your general experience would tell you that absorption of callous would apply to this condition as well as to any general condition where callous is present and has been formed recently?

Mr. Kepsel: I object. We are not dealing with generalities.

The Court: I think I will sustain the objection now.

Q. Doctor, would, in this particular case, in your opinion, there have been a possibility of the absorption of some of the excess callous which you now find present had the pressure been removed soon after the accident?

The Court: I remember the Doctor saying he is not qualified as an orthopedic surgeon. You first ought to find out if he is qualified to pass on what would happen if this treatment had been taken.

The Witness: My answers to the questions have been based on general surgical knowledge as a physician and surgeon; but that is a delicate point, and if it were my

case I would refer it to a first class orthopedic physician and not depend upon myself.

Q. You would do that before you would say the operative was the only method? A. Yes; I cannot state beyond a shadow of a doubt the operative method is the only one.

The Court: We will take recess until two o'clock.

(Addressing jury.) Gentlemen, do not express any opinion about this case until you have heard the testimony of all the witnesses both for the plaintiff and the defendant. Do not express any opinion among yourselves. Keep your minds open until you have all the facts. Of course, do not let any one talk to you about the case or discuss it in your presence. If any one attempts to do that it will be your duty to report that to the court.

(Recess until two o'clock.)

After Recess, 2 P. M., April 25, 1929.

PATSY BENDETTO, sworn.

Direct-examination by Mr. Kepsel:

Q. Mr. Bendetto, are you the father of Lillian Bendetto? A. Yes, sir.

Q. Where do you live? A. 16 Cliff Street, Jersey City.

Q. Do you remember your daughter having an accident in October, 1926? A. Yes, sir.

Q. Up to that time, Mr. Bendetto, what was the condition of your daughter's health? A. All right.

Q. Had she ever been sick? A. No, sir; she had never been sick. She had measles—

Q. Just child's diseases, that's all? A. Child's diseases.

Q. Do you know what happened in October 1926? A. She told me she got run over.

Mr. Heine: I ask that your Honor strike that out.

The Court: Yes; strike it out. Get down to the damages on this.

Q. Were any of your child's clothing ruined as a result of the accident? A. A spring overcoat she had.

Q. How old was that coat? A. That coat? About three months old.

Q. How much did it cost you? A. Fifteen dollars.

Q. How much? A. Fifteen dollars.

Q. Was there any other clothing that was destroyed? A. Well, her dresses and things like that.

Q. What happened to her dresses? A. They were torn and dirty.

Q. Could they be used again? A. No, sir.

Q. What did the dresses cost? A. Well, my wife bought the goods and she made it herself.

Q. Did you have to buy any medicines for your daughter, Mr. Bendetto? A. Yes, sir.

Q. Did you pay for them? A. Yes.

Q. Do you remember about what you paid for them? A. There is so many items. It amounts to one hundred dollars.

Q. Over this whole time one hundred dollars? A. About one hundred dollars.

Q. Did you have to pay anything to Christ Hospital? A. They wanted money; we could not pay.

Q. Answer the question. Did you pay any money to Christ Hospital? A. No, sir.

Q. Did you pay any money to the City Hospital when she was there? A. No, sir.

Q. Have you paid Dr. Loori yet? A. No, sir.

Q. You have not paid any doctors yet, have you? A. No, sir.

Q. Since this accident, what has been the condition of your daughter's health? A. Well, she walks lame, and she always has pain in the daytime and night. She is always pained.

Q. She complains of pain? A. Yes.

Q. Did she lose any school? A. Yes, sir.

Q. About how much? A. Oh, about six months altogether.

Q. Does she go to school now? A. No, sir; she was not able to go to school.

Q. What seems to be the trouble, do you know? A. Her back pains, and she cries an awful lot. Pained back and the leg.

Mr. Kepsel: That's all.

Mr. Heine: No cross.

LILLIAN BENDETTO, called.

By the Court:

Q. How old are you, Lillian? A. Eleven years.

Q. Do you go to school? A. No.

Q. Did you go to school? A. I didn't go for six months altogether.

Q. Did you ever go to any school? A. Yes.

Q. What school did you go to? A. When I could I went to St. John's, then I went to 31.

Q. What class were you in? A. In St. John's?

Q. Yes. A. Well, 4-B.

Q. Do you know what it means to tell a lie? Will anything happen to you if you tell a lie? A. Yes, sir.

Q. What would happen? A. I would go down to Hell.

Mr. Kepsel: Is your Honor satisfied?

The Court: Yes.

Witness sworn.

Direct-examination by Mr. Kepsel:

Q. Lillian, before you were hit with this automobile, how were your legs? A. They were in the middle of a box, a square box.

Q. No, no. Before the automobile hit you did your legs ever hurt you? A. No.

Q. Now, you remember when you were hurt, don't you? A. Yes, sir.

Q. Did you have any pain after that, Lillian? A. After I was hit, sure I did, after I was hit.

Q. Yes, you did? A. Sure.

Q. Where did you have pain, Lillian? A. I had it in my back and in my leg.

Q. Which leg, Lillian? A. The left leg.

Q. Is this the only accident that you had? Nothing else hit your back, did it? A. No.

Q. The only thing that hit you was this car on October 1926? A. Yes.

Q. Well, come down here, Lillian, please.

(Witness descends from the stand.)

Q. Can you pull down your stocking?

(Witness complies.)

Q. Pull down your other stocking, too, Lillian.

(Witness complies.)

Q. Where does it hurt you in the back?

(Indicating the right side.)

Q. Now, since you were hit, Lillian, how have you been feeling? A. I was not feeling as good as always because those pains bother me.

Q. What do they do to you? A. They hurted me.

Q. Just describe how you feel. Where you have pain. Just tell us all about it, Lillian. A. On rainy days like today I have been having pains. A couple of days before we would get a day that it rains I have pains all the time.

Q. Do you ever get weak? A. Oh, well, you know, when I go to stores I feel myself fainting. All of a sudden I get a certain place and I drop.

Q. Do you go to stores much? A. No; not much.

Q. How many times does that happen to you, Lillian, that you fainted? A. About two or three times.

Q. Now, Lillian, after you were hit, do you know where you were taken? After the accident where were you taken, Lillian? A. The next morning I knew where I was. In the Christ Hospital.

Q. You did not know that day at all? A. No.

Q. Until the next morning? A. Yes.

Q. And you were where? A. Christ Hospital.

Q. What time were you hit, Lillian? What

time of day was it, do you know, about? A. About half past three.

Q. And about what time the next day did you know where you were, Lillian? A. When we got up for breakfast I don't know what time it was.

Q. How long did you stay in Christ Hospital? A. Three days.

Q. Where did you go then, Lillian? A. Then I was—I stayed in the house and then the next morning I was brought over to Jersey City Hospital.

Q. How long were you in Jersey City Hospital? A. Four weeks.

Q. How were you brought there? A. In my father's car.

Q. Could you stand up, Lillian? After the accident were you able to stand on your feet? A. No.

Q. When was the first time you were able to stand on your feet? A. In the hospital. It was two weeks after I was in Jersey City Hospital that I started to walk around, and then after when I went to lift myself I fell two or three times. Until I went to walk by myself just a little bit I was lame.

Q. You say you are not going to school now? A. No.

Q. Why, Lillian? A. Because those pains bother me.

Mr. Kepsel: Take the witness.

Cross-examination by Mr. Heine:

Q. After you left Jersey City Hospital, Lillian, did you go back home? A. Yes, sir.

Q. Your father took you in his car, in his automobile? A. Yes.

Q. And you have been home ever since? A. Not ever since, no. But I was home three months after I came out of Jersey City Hospital. Then I started to go back when the pains still bothered me.

Q. Did you go back to Jersey City Hospital? A. I went back to get X-rays and all.

Q. Who was the doctor that was looking at you then? A. I don't know his name.

Q. Dr. Loori? A. In the house he did take care of me.

Q. He was your doctor then, was he? A. Yes.

Q. Was there any other doctor took care of you, except Dr. Loori? A. No; the only doctor was Dr. Loori in the house.

Q. From 1926 after you came out, Dr. Loori, your own doctor, he is the only doctor you had to right now? A. Yes.

Mr. Heine: That's all.

DR. SETH B. SPRAGUE, sworn.

Direct-examination by Mr. Kepsel:

Q. Dr. Sprague, you are a licensed practising physician of the State of New Jersey? A. Yes, sir.

Mr. Heine: The qualifications will be admitted.

Mr. Kepsel: I prefer to bring them out.

The Court: All right.

Q. Practising how long? A. Twenty-two years.

Q. Do you specialize in any particular line? A. Orthopedic surgery.

Q. Connected with any institutions, Doctor? A. I am attending orthopedic surgeon at the Jersey City Hospital; Christ Hospital; Englewood Hospital, and Assistant Professor, New York Post-Graduate.

Q. You examined Lillian Bendetto, this little girl? (Indicating.) A. I did.

Q. What did you find, Doctor?

Mr. Heine: Fix the time.

Q. When did you examine her, Doctor? A. The day before yesterday.

Q. Where? A. —(Continuing)—and this morning, I also examined her, this morning. The day before yesterday in my office, and this morning in the superintendent's office here, with the other doctors that were here, about eleven o'clock.

Q. Will you tell us what you found?

Mr. Heine: On which examination?

Q. On the first examination. A. I undressed the child. I noticed that her left leg was smaller than the right; that she was walking with a limp. I put her up on a table and made measurements and found that the left leg was an inch smaller at the thigh than the other leg. The left leg was smaller at the thigh, one half inch smaller just about the kneecap; one half inch smaller right over the calf. I found that foot is a quarter smaller than the other foot, the right foot.

Q. Measured from heel to toe? A. Measured from heel to toe.

Q. Yes, Doctor, go on? A. Then they gave me the history of the injury to the spine, so I looked at the X-rays given me. I thought I saw something in it. I was not sure. I had my suspicions. So I sent up to Dr. Perlberg to have new pictures taken of the spine, both anterior and lateral, and when they came back it showed a crushing and dislocation of the eleventh thoracic vertebra, the part over the thorax. It was crushed down this way (indicating) anterior and posterior. It is a little bit off, a little over one eighth inch to the right side.

Q. Well, would you say that this condition of the spine, Doctor, is what is commonly known as a broken back? A. It is; yes, sir.

Q. Is this a serious injury or a slight injury? A. Quite a serious injury.

Q. In your opinion, do you think this girl can be cured of this injury? A. That is an awfully hard question to answer. I would say there could not be an absolute cure; no.

Q. She cannot be cured? A. I don't think so.

Q. What would be the course of treatment in a case of this kind? A. The only course of treatment that I know, that she should have a man that is an expert on operations of the spine, and to have an operation that might relieve the pressure on that cord.

Q. Is this a serious operation? A. Quite.

Q. Have you any idea of what the outcome of such an operation might be, the result? A. I have not.

Q. Have you any idea what such an operation would cost, Doctor?

Mr. Heine: I object.

The Witness: I could not tell you that.

Q. Do you know the approximate length of confinement that would be incident to such an operation? A. I could not state exactly, no, sir.

Q. Well, Doctor, can you give us the probability of the cure of this girl? A. The probabilities are very slim in my opinion at this late stage of the injury.

Q. Doctor, this smaller condition of the left leg that you noticed. Is that what is commonly known as a drying up of the limb? A. That is what we call an atrophy due to some interference with the nerve supply. It is not a drying up, but the leg has not grown equally to keep up pace with the other due to enervation.

Q. If that condition is permitted to continue, what would be the probable outcome so far as that leg is concerned? A. A nerve specialist would have to tell you that, I would not be able to tell you that.

Q. Doctor, what is atrophy? A. Atrophy is where the bone of the leg shrinks and does not grow quite as fast as the other one.

Q. Doctor, did you find as much life in the one limb as you did in the other? A. No; I did not.

Mr. Kepsel: Take the witness.

Cross-examination by Mr. Heine:

Q. Doctor, Dr. Durant is a recognized orthopedic man in this city, is he not? A. He is.

Q. He was at the Jersey City Hospital at the time that this little girl was interned? A. He was.

Q. Did you receive any history of the case from Dr. Durant? A. Dr. Durant is in Europe.

Q. That may be, but have you received the history? A. No, I have not.

Q. You were not called into this case until the day before yesterday? A. The day before yesterday the first time.

Q. You had from 1926 until two days ago, and you were not in the case and had no interest in the matter? A. Not in the case.

Q. You say, Doctor, as I recall your statement, at this late day the question of absolute cure, which I assume is a complete cure, the chances were slim at this late date. In expressing that opinion am I to understand that had measures—curative measures been taken early after the receipt of this injury by this child that the situation might be very much improved?

Mr. Kepsel: I object.

The Court: That is perfectly proper.

Mr. Kepsel: Exception.

The Witness: It is a hard question to answer. I do not know what conditions were. Unless I saw what was the condition at the time I could not state.

Q. What is that? A. I have no idea what the condition was at the time. I just saw it now.

Q. I wondered, Doctor, what laid in your mind when you say at this late day. You used the words, "The chances were slim at this late day." I wanted to find out what was in your mind? A. The history came to me that the child was injured a year ago last October.

Q. November 1926? A. October, some time, I

think; two years and a half ago. I don't know when that injury took place, but if it extended since that time the prospects for cure, I think, are slim.

Q. Looking at it in the present condition? A. Looking at it in the present condition.

Q. You do not know what treatment, if any, had been received by the patient, or anything of that kind? A. I do not.

Q. You have no knowledge of the details? A. No, sir.

Q. Would you be better able to give a more authoritative statement, more information on the matter if you had that information about the method of treatment employed during these years?

Mr. Kepsel: I object. That is not based on actual facts; he is basing it on a supposition.

The Court: I think that would go in the history of the case as the basis of examination.

The Witness: Yes; I think I could, if I saw the X-rays at the time and had known anything about it I could give a better opinion.

Q. Do you know when the X-rays were taken that you examined, the X-rays offered in evidence? A. Some doctor in West Hoboken had taken them some time ago.

Q. What did they show? A. I looked at one. That only showed one position; that did not show the side, anterior posterior.

Q. Did you see anything on that X-ray which

showed anything positive? A. Nothing positive, no.

Q. That is the reason you had the other X-ray taken? A. I had my suspicions; but nothing positive.

Q. You say you had your suspicion. You would not be able to say anything on which you would be able to base your testimony, so you had a new one taken? A. I saw something there; yes.

Q. But not enough to justify your feeling that you should not take it up? A. No, sir.

Q. You thought you ought to take it up? A. I thought I ought to take it up.

Q. This was Exhibit P-1, that is a lateral, I think, and Exhibit P-2 is the posterior-anterior. A. One is anterior, the other posterior. No. 1, is A. P.

Q. What is the other? A. Lateral.

Q. Doctor, the injury here is between the bottom of the 12th and the top of the 11th dorsal vertebrae? A. The top of the 12th and the bottom of the 11th.

Q. The injury between those two is not to the process of the vertebra, but to the body of the vertebra itself, isn't it? A. The bone itself and the process too.

Q. From examination, you are of the opinion that the processes are involved also? A. Yes, sir.

Q. And that involvement would involve the nerve? A. Yes, sir, slightly.

Q. What nerves come out from the spine between the 11th and 12th dorsal vertebrae? A. I think it is the 12th thoracic nerve comes out there.

Q. Yes, and the costal nerve comes to the stern-

um or to the ribs? A. I am not enough of a nerve expert to just state what that does do.

Q. You say the thoracic comes to the chest. In other words, it is the nerve that goes to the chest, isn't that right. A. I think it is connected with the lumbar nerve, too. It forms a plexus; all these different nerves form a plexus.

Q. The nerve that comes out at the point of injury goes to the chest and not the legs? A. I cannot state that at the present time.

Q. A general atrophy usually comes from disuse, doesn't it, Doctor. The atrophy of the legs I am speaking about, in this particular case. Atrophy of the legs would be from disuse? A. It could come from that; yes.

Q. In a child who had been kept at home from school, and had not used the limbs, that atrophy might be the result of such a course?

Mr. Kepsel: I object to the question. There is no evidence that this child has been subjected to disuse of the limb.

The Court: I think she said so herself. She was home from school six months. That would curtail her use of the limbs.

Mr. Kepsel: Exception.

The Witness: If it was due to non-use both legs would have been equal. She was walking with both legs in my office. As far as I know she is using both legs equally.

Q. Your observation as to the causes of atrophy is largely confined to the actual examination made two days ago? A. Yes, sir.

Dr. David R. Godlin—Direct.

DR. DAVID R. GODLIN, sworn.

Direct-examination by Mr. Kepsel:

Q. Doctor Godlin, you are a licensed practising physician of the State of New Jersey, are you? A. the State of New Jersey? A. Yes, sir.

Q. Practising how long? A. Two years.

Q. And in October 1926, were you connected with any institution, Doctor? A. I was house surgeon at Christ Hospital at that time.

Q. You had charge of admitting patients to the hospital, did you? A. Yes, sir.

Q. In what kind of cases? A. Emergency cases I would have to look at, and other cases coming in through the regular office routine.

Q. Doctor, I show you a loose sheet—

Mr. Heine: I object to the Doctor using the loose sheet until he cannot remember what you are going to ask him.

The Court: You cannot refer to those now.

Q. Did you make any record at the time this girl was admitted? A. It was customary to make a record.

Mr. Heine: I object.

The Court: Not what was customary.

Q. Did you make any record? A. Yes.

Q. Is this the record (handing witness paper)?

Mr. Heine: I object, if your Honor please, until the witness' memory is exhausted.

The Court: Do you remember the record you made?

The Witness: I recall the case now, seeing the little girl in court.

The Court: All right; tell us about it

The Witness: This little girl was admitted in the emergency room following an automobile accident, carried in by the chauffeur of the automobile.

Mr. Heine: I move to strike out the testimony as to the accident.

The Court: We are not interested in the accident. All we want to know is the extent of the injuries.

The Witness: At the time the child was complaining of severe pain in the leg and abdomen. She was unable to stand on her feet when I tried to stand her up. We had her admitted to the ward. She was unable to pass any urine for twelve or fifteen hours. At that time we suspected—

Mr. Heine: I object to what you suspected. The diagnosis would not be made by an interne, and it would be hearsay.

The Court: Did you make the diagnosis?

The Witness: I made one of the diagnoses; yes, sir.

Q. You say you were practising two years?

The Witness: But you have to have a license before you are an interne.

The Court: I understand you say you are a graduate of a medical institution?

The Witness: I was an interne licensed physician at that time.

The Court: Proceed, Doctor. You made a diagnosis. What did you find?

The Witness: At that time I thought that there might be a possibility of either a spinal injury or injury to the leg from her gen-

eral symptoms. In these cases you really cannot make a diagnosis immediately; you have to watch them.

The Court: Keep your voice up.

The Witness: (Continuing)—you cannot pin your diagnosis down immediately. You have to observe them a day or two to rule out various factors that might rise.

The Court: Did you find anything on the girl then?

The Witness: We X-rayed the knees and legs and they proved to be negative.

Mr. Heine: By that you mean no injury?

The Witness: No injury to the knees or legs.

Q. Did you X-ray the back, Doctor? A. I don't know; we did not X-ray the back at that time.

Q. Do you know how long the girl was there? A. She was probably about nine or ten years of age.

Q. No. Do you know how long she was at the hospital? A. Oh; she stayed a few days.

Mr. Kepsel: That's all.

Mr. Heine: No cross.

DR. WILLIAM A. LOORI, sworn.

Direct-examination by Mr. Kepsel:

Q. You are a licensed practising physician in the State of New eJrsey? A. Yes, sir.

Q. How long? A. Four years.

Q. Do you remember treating Lillian Bendetto. A. The Bendetto girl?

Q. Yes. A. I remember being called in on November 7th, 1926.

Q. Where were you called to, Doctor? A. I was called to the child's home, 16 Cliff Street.

Q. Will you tell us what you found, Doctor? A. Well, on examination I found that the child was unable to walk on both legs. She was able to limp around on the right leg, and upon lying down I found a mass around the 11th and 12th thoracic vertebrae in the spine. Upon applying pressure she had terrific pain. The child was unable to stand any pressure at all; unable to sleep well lying on the back. She complained of pain, always intense pain in the region of the 11th and 12th thoracic vertebrae.

The Court: When you say thoracic vertebrae, that is what I understand is the dorsal?

The Witness: Under the new terminology it is thoracic. She complained of headache, vertigo; insomnia; inability to sleep. I found a slight condition of—

Mr. Heine: Are you testifying from records, Doctor?

The Witness: I do not need the records. Of course it is quite a few years back.

Mr. Heine: If you need the record I have no objection if it is used in the proper way.

The Witness: It is my own record since the time, November 7, 1926, at the time of the first call. Pain and tenderness at the left hip at the time. A slight curvature, deviating from normal on the left side of the

spine, covering from the first down to the eleventh thoracic or dorsal vertebra.

Mr. Heine: May I ask what the date is; whether the date affects this examination.

The Witness: November 7, 1926, was the first call.

Q. You have been treating this child since that time, have you, Doctor? A. I have been treating her since that time. Not every day, though.

Q. Approximately how often, Doctor? A. Well, I have some records here. On November 7th I was called. Then all during the month of November I treated the child. That month I was there.

Q. Give us the dates. A. The 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th. I was there pretty near every day the rest of that month. The 16th to 21st, 25th to 30th, from then on I was less often.

Q. Approximately how many times in all, Doctor, do you recall? A. I have a record from November 7th, 1926. I made in all one hundred and five visits to the house, and she was treated twelve times in my office by electric therapeutic diathermic.

Q. What is that, Doctor? A. Diathermic is an electrical treatment whereby the limb is stimulated. To try to stimulate more activity in the muscles of the leg so that the child is able to use it.

Q. This condition that you find, do you think it can be cured? A. The condition? There is a possibility. I do not think there is a real cure.

Mr. Heine: I think the question is whether the Doctor can state with reason-

able probability one way or the other from his examination.

The Court: Do you think you would be qualified to give us an answer now as to the probability of a complete cure.

The Witness: I think I can safely say there is little probability of a complete cure, in a case like this. I have seen a number of them in experience through several hospitals and they are never completely cured.

Mr. Heine: I move that that part be stricken out as to the remark of what generally happens in a hospital.

The Court: Yes. In this particular case, Doctor.

The Witness: If I think there ever could be a complete cure?

The Court: You can't, or can you? Do you think you are qualified to tell us?

The Witness: If there is any possibility in this case a very serious operation might be performed. Of course, there are chances of not coming through the operation, and never being entirely cured, anyway, even if the operation is performed.

Q. This operation you speak about, Doctor, is that a serious operation or a slight operation? A. Very serious operation.

Q. Would that be performed by any surgeon? A. It requires an expert on bones; requires a specialist on bones. No ordinary surgeon could do that. There are very few surgeons qualified for that kind of work.

Q. Did you find anything the matter with the

child's leg, Doctor, the left leg? A. The left leg? Yes, there is a partial atrophy of the left leg. On measuring the leg I found the left leg to be—

Mr. Heine: When was this, Doctor?

The Witness: All through the treatment.

Mr. Heine: You are giving measurements. When was the measurement made, what date. You are testifying to a specific measurement. I want the date that the measurement was made.

The Witness: I didn't put down all. I just put this from observation, measured with my hands at the time I made the approximate measurement.

Mr. Heine: I object to the Doctor testifying as an engineer or surveyor.

The Court: Did you make any definite measurements?

The Witness: No, I did not; but I took them from general observations. I observed the size of the leg. The leg shows a partial atrophy. The muscles are shrunk on the entire left leg.

Q. What do you think that is due to, Doctor? A. Atrophy of the muscles is due to some process; pressure on the nerve supplying these muscles, in this case, from the spine.

Q. Now, this spinal injury, is that what is commonly known as a broken back? A. It is a broken back.

Q. Doctor, how much do you charge per visit? A. Well, my fee is three dollars a house call, and five dollars for special office electrical treatment.

Q. What does your bill amount to? A. Well, I

have a bill of one hundred and five house calls at three dollars, that is three hundred and fifteen dollars, and sixty dollars for six treatments, amounting to three hundred and seventy-five dollars, since November 7th, 1926.

Q. Up to what time, Doctor? A. Up until March 29th, 1928.

Q. Did you render any service after March 29, 1928? A. I have seen the child a few times since that, but there wasn't much more could be done at that time. I thought best to stop the treatment at that time except for a possible operation.

Q. There is nothing more that you could do? A. There was nothing more that I could do, so I gave it up at that time.

Q. Did you give any prescriptions for this girl? A. Yes; I gave a number of prescriptions during the various calls. At times I prescribed medicines for the pain and the insomnia. The child was unable to sleep and experienced a great deal of pain on lying down. She was unable to lie flat on the back. She always had a slight swelling where the bone was injured.

Q. Is that what is known as a lateral curvature? A. There is a slight lateral curvature.

Q. When did you see the girl last, if you recall? A. The last treatment was March 29th, 1928.

Q. You have seen her since then, haven't you? A. I have seen her since then.

Q. Did she complain at that time when pressure was applied to her back?

Mr. Heine: I object to leading.

Q. The last time you treated her, Doctor, did

you apply any pressure to her back? A. Pressure? Yes; I applied pressure.

Q. What was the result of that? A. The result at that time was the same, as it has always practically been the same. She was unable to stand any pressure. I examined her about a week ago for the same thing.

Q. And what will be the ultimate result if this girl is permitted to go on without the operation you speak of?

Mr. Heine: I object. It has no basis of fact, it is a hypothetical question.

The Court: Yes.

Mr. Kepsel: I withdraw the question. Take the witness.

Cross-examination by Mr. Heine:

Q. Your records which you have referred to commenced November 7, 1926? A. November 7, 1926.

Q. They continue every day practically through November? A. Yes, sir; I have a record of all the treatments.

Q. And they are charged as calls at the house in Cliff Street? A. That is right.

Q. Isn't it a fact that this patient was admitted on the 14th of November to Jersey City Hospital, and that she was in there until December 7th, 1926?

Mr. Kepsel: There is no such evidence in the case.

Mr. Heine: I am asking the doctor.

The Court: I will allow the question.

Mr. Kepsel: Exception.

The Witness: I don't know; I know I was called on that date.

Q. You have records of continuous treatment right through November? A. Yes, sir.

Q. Now, Doctor, if you treated this child, and she was admitted to the City Hospital on the 14th of November, and remained there until December 7th? A. She was in the hospital in October.

Q. But two days, from the 11th to the 13th? A. Yes, sir, of October.

Q. That was Christ Hospital? A. That was Christ Hospital.

Q. She was re-admitted—she says herself she went back to Jersey City Hospital at a certain time, November 14th? A. November 14th?

Q. So if this memorandum of charge and treatment is correct, it is at the hospital and not at the house? A. I don't know just when she was in the hospital. I have the records of Christ Hospital—

Q. That was back in October, and you were not called in until November.

Mr. Kepsel: I object.

The Court: Were you an interne—were you on service, or did you have work in the City Hospital during November 1926, on the staff?

The Witness: Not in the City Hospital.

Q. Were you on the force at all? A. Not in City Hospital.

Q. In what we call Jersey City Hospital? A. Jersey City Hospital. I was connected with St. Francis Hospital.

Dr. William A. Loori—Cross.

Q. Didn't you at any time see her at the Jersey City Hospital during November, 1926? A. No, sir.

Q. Do you know of your own knowledge whether all of the treatment from November 14, 1926, to the end of the month were given at the address in Cliff Street, or whether she was in the hospital at that time? A. I never saw her in the hospital. I treated the child at her home and in my office.

Q. So, she, of course, was home on November 7th? A. That is what I have on my record.

Q. But whether she was home on November 14th you are unable to recall positively? A. November 14th? I have a treatment for November 14th. She was home.

Q. And from the 14th to the end of the month was she home, or did you see her at the hospital? A. I have all the calls. I read them off before.

Q. Those treatments were all rendered in the house? A. In the house, yes.

The Court: Have you some basis for saying she was in the hospital November 14th, 1926?

Mr. Heine: I called for the Jersey City Hospital records. I have them under call.

Mr. Kepsel: All the doctors connected with the case are all gone.

The Court: I want to find out for the benefit of the jury when she was in the hospital.

Mr. Heine: I have the records from the Jersey City Hospital. She went in the hospital November 14th, 1926, and remained until December 7th, 1926, between those two dates.

Mr. Kepsel: It is not so. We looked at the records ourselves.

Mr. Heine: Do you think it is of sufficient importance to procure the records?

The Court: No; it is your case.

Q. During the time that you treated this girl, Doctor, did you send her to any orthopedic surgeon until three days ago when you sent her to Dr. Sprague? A. I did not. I often suggested it, but the people are too poor to pay for any special treatment, but I suggested it a number of times; various times.

Q. That she go to whom? A. Orthopedic man.

Q. Whom did you suggest? A. I suggested a doctor in New York.

Q. Dr. Sprague is an orthopedic man, isn't he? A. Yes, he is an orthopedic surgeon.

Q. And Dr. Durant is an orthopedic man connected with the clinic in the City Hospital? A. Yes.

Q. And was connected in 1926 on the service there? A. Yes, sir.

Q. And so, this litlte girl could have been taken or sent by you to Dr. Durant, one of the best orthopedic men in the country.

Mr. Kepsel: I object.

The Court: I sustain the objection.

Q. You could have sent her down to the clinic, the orthopedic clinic operated by Dr. Durant at any time in 1926, could you not?

Mr. Kepsel: I object to what he could have done.

The Court: I sustain the objection.

Dr. William A. Loori—Cross.

Q. Why didn't you send her down to the clinic where Dr. Durant handled orthopedic work in the City Hospital after November 7th? A. The people were too poor; they had no money to pay for any treatment. I never collected five cents from them.

Q. Why didn't you send her down to Dr. Durant's free clinic where he handled orthopedic cases? A. I thought the child was in the City Hospital before I saw her. Two hospitals had tried to treat the child.

Q. Doctor, your statement that you recommended going to a New York Orthopedic Specialist, at what institution or where to? A. I do not believe there is a doctor in Jersey City that does that work. Dr. Albee, in New York.

Q. Dr. Albee is not primarily an orthopedic surgeon? A. Dr. Albee has an operation specifically for a condition like that.

Q. Dr. Albee does reconstruction work.

Mr. Kepsel: What can this man testify as to what Dr. Albee knows or does not know.

Q. Will you tell me why you sent her to a Doctor in New York? A. I told you I recommended Dr. Albee.

Q. Would he be the highest priced physician in the world?

The Court: Strike that out.

Q. Doctor, why didn't you send her down to the orthopedic clinic at Jersey City or Christ Hospital?

The Court: I think he has answered that. He said the child was in the hospital, two

hospitals, in fact, and he gave that as his reason.

Mr. Heine: She was in one hospital as an emergency case for two days. The child was then taken for a period of two or three weeks where Dr. Durant is.

The Court: He may give the reason he gave before. Is that the reason?

The Witness: Yes, sir.

Q. You treated her after she left Jersey City Hospital, didn't you? A. Yes, sir.

Q. And after she had left Jersey City Hospital, and you had resumed treatment, what did you do for her? A. Well, I treated the child symptomatically.

Q. What did you do for her? A. You mean at the house.

Q. After she came from the hospital, Jersey City Hospital. A. I treated the child symptomatically.

Q. What does that mean in English, so the jury and I can understand? A. I treated the child, I treated her to alleviate the pain, and I tried to make the child as comfortable as possible.

Q. In other words, you did not attempt a cure at all, but eased the symptoms? A. I am no bone specialist. I did the best I could as far as I could go.

Q. You were not an orthopedic man? A. I wasn't an orthopedic man.

Q. And since you recognized your limitation in that line, you did not recommend her to go to Jersey City Hospital or any other hospital where there is an orthopedic man?

Mr. Kepsel: I object to that as already answered.

The Court: I sustain the objection.

Q. And the last time you saw this child was in March 1928. What did you do for her on that occasion as a matter of treatment? A. I went over the child again and examined her, and found still a marked tenderness over that area in the spine, and she still limped, unable to stand on the left leg.

Q. You have told us all that. What did you do about it? A. Treated her symptomatically again.

Q. Treated her symptomatically? A. I could not operate on her in the house.

Q. And you admit you are not qualified as an orthopedic man to do it? A. Yes.

Q. You did not send her to any other orthopedic man, so you treated her symptomatically? A. They had no money, and I could not save her.

Mr. Heine: That is all.

Mr. Kepsel: That is the plaintiff's case.

Mr. Heine: I do not think there is anything in the medical testimony that has gone in that my own doctors do not confirm. I do not think there is any reason for taking the court's time. There is no use putting two injuries in two different terms, and we are satisfied. I will state to the jury that two doctors, physicians who are here, made an examination this morning, and one who made an examination prior. I feel there is nothing to be gained by putting more medical terms in the case. Both mean the same thing, but we call them different. I think

the statement of Dr. Sprague is substantially correct. I don't see the use of taking the time of the gentlemen of the jury and the court in putting additional testimony in. I think the facts are sufficiently stated by Dr. Sprague.

(Summing up by counsel.)

CHARGE OF THE COURT.

The Court thereupon charged the jury as follows:

Gentlemen of the Jury:

Your duties in this case are somewhat different than in the ordinary case. In the ordinary civil case which you are called upon to hear, you hear both sides of the case, both the side for the plaintiff and the side for the defendant, and you get a more complete understanding of all the facts than you do in a case of this kind, which is merely to assess damages.

Now, this suit was started by Lillian Bendetto, an infant, who sued by Patsy Bendetto, her next friend, and Patsy Bendetto individually, against Edward F. Fleckenstein, and Albert Fleckenstein, partners trading as Fleckenstein & Son. The action was started in 1927, and the defendant was served on the 28th day of February, 1927, and the defendant failed to file an answer to the complaint. Consequently, on the 25th day of March application was made to the court to enter what is known as interlocutory judgment, and the interlocutory judgment was filed on the 25th of March, and now,

you, gentlemen, are impanelled for the purpose of assessing what damages you are to give as compensation to Lillian Bendetto and Patsy Bendetto for the damages that approximately flowed from this accident.

You are not to consider now any liability at all. Your duty now is to state the damages that shall be given to these plaintiffs as the natural and proximate result of these injuries. Your task is not an easy one. If you were able to put this child back in the condition she was before the accident, of course, your duty would be simple, but you cannot do that, and you must, therefore, do the next best thing, and that next best thing is to give her compensation for the injuries that she has sustained.

Now, fix in your mind what the injuries to this child really are, that is, the injuries that approximately resulted from this accident. The burden rests, of course, upon the plaintiffs to prove the damages—that is, the extent of the damages, to your satisfaction by a fair preponderance of the evidence. Now, if they have done that, you are to give them what in your mind is a fair and just compensation for what this child actually suffered. You know what pain is; you have heard the testimony of the length of time she has been suffering. You are to use your practical common sense, and pay her, what is your best opinion, will be a fair compensation for what she has suffered up to date. If, in your opinion, she is going to suffer in the future, then you will fix what in your estimation will be a fair and just compensation to pay her for whatever suffering she will undergo in the

future, if, in your opinion, she will undergo suffering.

You must not be swayed by sympathy, bias, or anything else. Your duty is to compensate.

Now, I think that is about as clear as I can make it to you. You, of course, will have to use your own judgment.

Now, the father would be entitled to his expenses and loss of services. Of course, he would be entitled to have the services of this child up to and including her majority, or until the time she was emancipated, but he would also be compelled to support her during her inability to support herself. He would be entitled to receive from you a fair and just compensation for that; he would be entitled to receive from you a recompense for the expenses that he actually underwent as a result of this injury, that is, the proximate result.

I do not know if I have the figures right. Of course, my figures will not bind you. It is your own recollection of the fact that will bind, but as I jotted it down, the father said the clothing loss was something around fifteen dollars; that his medicine bill was around one hundred dollars, and that Dr. Loori testified his bill was three hundred and seventy-five dollars. Those are the only figures I have, but, as I stated before, you are to be guided by your remembrance of the testimony; not by what I say they are, because you are the sole judges of the facts.

You have, of course, a serious duty to perform, gentlemen, and the court presumes that you will look upon that duty with all the seriousness that it deserves. You are here to do justice between

these individuals. The plaintiff, of course, expects it from you, and the defendant expects it from you. Now, you have the case, consider it with all the seriousness that it is entitled to, and when you have done that, then decide upon the damages, and if you can reconcile the verdict you give in this case with your consciences then you will be doing your full duty to both parties.

You may now retire.

(The jury retired.)

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HUDSON COUNTY COURT OF COMMON PLEAS.

LILLIAN BENDETTO, an infant, and PATSY BENDETTO, individually,

Plaintiffs,

vs.

EDWARD F. FLECKENSTEIN,

Defendant.

Before—Hon. DANIEL T. O'REGAN, Judge, and a jury.

Jersey City, N. J., June 14, 1929.

APPEARANCES:

JOSEPH J. LOORI, Esq., For the Plaintiffs (By Mr. Kepsel).

HEINE & LAIRD, Esqs., For the Defendant (By Mr. Heine).

PROCEEDINGS ON RETURN OF RULE TO SHOW CAUSE.

Mr. Heine: If your Honor please, I will, in order to refresh your Honor's recollection, just give the picture as I see it of the present state of the proceedings.

Proceedings on Return of Rule to Show Cause.

In this case Lillian Bendetto by next friend, and her father, are the plaintiffs, and Fleckenstein Sons are defendants, and an accident happened over here on the Boulevard in the fall of 1926, along in the fall of 1926, in which the child was struck by one of the light trucks operated by Fleckenstein Sons' driver. It appears from the record—and Mr. Kepsel will speak if I make any statement which he feels is not supported by the record of the suit down to the present time, and petition and affidavit supporting it—the situation then was that she was taken to the hospital and apparently had difficulty in standing. An X-ray was taken at, I think, Christ Hospital of Lillian, which was entirely negative, and she was later removed to the Jersey City Hospital. Now, in that interim suit was filed on the part of the plaintiff in February, 1927, a guardian order entered in February and suit started February 8, 1927. It seems strange at that time that the injury was not considered by anyone concerned, either by the defendant or the insurance carrier—the defendant having given the insurance carrier proper notice —it was not considered to be of a serious character. The physician, Dr. Vanderhoff, on behalf of the insurance carrier made an examination, which is made a part of the petition, in which he went to the house of this girl with Dr. Loori—

The Court: What was the date of the accident?

Mr. Heine: October 11, 1926. Dr. Vanderhoff made his examination on December 17, 1926, with Dr. Loori, and it is significant, as Dr. Vanderhoff's affidavit and report sets forth, that at that time Dr. Loori apparently was not in regular at-

tendance, as he testified on the trial, but had difficulty in finding the house. He went there with Dr. Vanderhoff and they had to hunt around to find the house, and he apparently considered it a case of minor injury, and Dr. Vanderhoff so reported, that it appeared to be a case of minor injury; and the two physicians are practically in accord in December, 1926, that this is not a serious injury to the child. So that we have that situation when the matter is taken up by suit with the insurance carrier. The insurance carrier then writes, or evidently has telephone conversation back and forth as to settlement; so that when they take the matter up it is apparently the adjustment of a minor injury.

According to the affidavit filed by the agent of the insurance carrier, he entered into a stipulation with the office of the plaintiff's attorney, Mr. Loori, on the 12th of March, 1927, suit having been begun on February 28th, as indicated by the following memorandum: "Pursuant to telephone conversation of even date I am attaching memorandum to my file to effect that this suit will not be moved until an agreed date between us." That was a stipulation entered into during the settlement negotiations.

Now, apparently the settlement negotiations were not pressed by the plaintiff's attorney, and in view of the fact that it was apparently a minor injury, as Dr. Vanderhoff's examination and Dr. Loori's examination together had showed, the matter was allowed to rest, and I think that it is a fair statement of fact that neither side at that time realized the seriousness, the claimed serious-

ness of the injury. It appears from the X-rays taken at Christ Hospital and the Jersey City Hospital, which X-rays have been impounded here, and which have been examined by Dr. Vanderhoff, that no fracture was shown in the original X-rays. Now, that is a very important element, because it goes to corroborate Dr. Vanderhoff in his report and Dr. Loori's then attitude, that it was not a very serious injury.

The Court: What was the date of that X-ray?

Mr. Heine: I cannot give you the date. It is impounded here, but the admission to the Jersey City Hospital was October 14. The date of the X-ray at the Jersey City Hospital is October 14, 1926, and that shows no fracture.

Now, on the 25th of March, 1927, as the defendant claims in violation of this stipulation, an interlocutory judgment was entered without notice, in default of pleading. That was permitted to lie from March, 1927, until March or April, 1929, without any step to take the inquest, and your Honor will readily see—I need not call it an element of estoppel, but really in effect it is—the action of the plaintiff in so permitting this judgment to remain in abeyance for two years is to be viewed from two aspects. First, if this plaintiff was injured and entitled to compensation, her attorneys neglected to protect her interests over a period of two years, which would be entirely inexcusable in relation to their duty to their client. On the other hand, having entered into this stipulation with the insurance carrier, the permitting of this to lie for two years after having entered the judgment, without any knowledge on the part

of the insurance carrier, lulled them to sleep, lulled them into inaction and placed them in a position where they were justified so far as the facts were concerned in considering that the claim, a trivial one, had been abandoned, and I think the plaintiff's attorney is, I may say, severely taxed with conduct in relation to his client and also in relation to fair treatment of a defendant against whom an interlocutory judgment had been taken; and it must be assumed for the purpose of this record that this stipulation was entered into, because affidavit has been made by the insurance carrier's representative, Mr. Sissing, that such an agreement was entered into, and no statement in affidavit form denying it is before your Honor. So that I think for the purposes of this application that must be admitted. The inquest was brought on by a notice, not given by the attorney of record but given by counsel, which, of course, is an irregularity that under the circumstances has been waived, but, nevertheless, it is to be taken into consideration in connection with the plaintiff's handling of the entire case.

Now we come to the second element in the case. Having brought the case on by notice for hearing and inquest to assess damages, the plaintiff's idea of the character of the injuries is very clearly indicated by one salient fact. When the inquest was first noticed a settlement proposition was made directly to counsel for some $3,500 or $3,800. That was two weeks before the trial of the inquest, indicating that the value placed by the plaintiff was about that amount. Two days before the inquest was reached for trial, X-rays were

taken by Dr. Perlberg and Dr. Sprague was called in to examine her, and that X-ray, two days before the trial, showed what is claimed to be a fracture between the 11th and 12th vertebrae of the spine, causing a deformity, and the settlement figure then went from $3,500 or $3,800 to $15,000 or $18,000 and stood at that point before we went into the actual trial. So that it raises this question. If this child did not have a fracture in 1926, and if Dr. Loori's treatment was intermittent, as he said to Dr. Vanderhoff and fails to deny, and as he testified on the trial, he was in attendance there every day during October, 1926, although it appears from the hospital record in this court that during the latter half of that month she was in the hospital—Dr. Loori says he attended her every day at her home during the month of November, yet she was in the hospital half that month, and he further does not deny Dr. Vanderhoff's statement that he had difficulty in finding the house—now, if he had been treating her there daily, he certainly would have been familiar with the location of that house, the house of a patient whom he was treating every day—so that it seems that on the evidence it cannot be gainsaid that she was considered to have had a trivial injury.

Now, the question before this court, the injury having been shown to be what it was at the trial—and I will pass the excessive damages to the plaintiff on the inquest for the present—the question comes down to this: Before apparently the plaintiff realized the seriousness of this injury as it now exists, two days before the trial, and was willing to take such a comparatively small amount,

application was made to the court to open the default under the Practice Act, and all of these facts were not then known to the defendant, and the application was not made as fully as it might have been to the court, and the court I think probably did not have before it, fully presented, the action of the plaintiff in delaying this matter two years, really as a result of the plaintiff's own violation of the agreement and as a result of his own inaction; and the application here is to the question of granting a new trial as well as to deal with the amount of damages found on the inquest.

Now, taking up that element, the right of the court to grant a new trial on the whole case in the interest of justice, there are numerous cases, but I will read to your Honor just one citation from an opinion of the Supreme Court in Fox vs. Simon, 109 Atlantic, page 900, and in that case, before Justices Swayze and Parker, in which Mr. Rurode and Mr. Kristeller were the counsel, the law is laid down. As to the section of the Practice Act your Honor is familiar, the Practice Act of 1903, page 135. "If a judgment by default is entered for want of a plea, the Court or a Judge on four days' notice, upon proof that such judgment was improvidently or fraudulently entered, or that the defendant has a just and legal defense to the action, may order that such judgment be set aside or opened to let the defendant in to plead; provided, if such judgment shall have been regularly obtained and without fraud, the order shall be that the defendant be permitted to plead on such terms as may be equitable, and the lien acquired by such judgment and by the execution

thereon shall remain as security for the satisfaction of any judgment the plaintiff may recover in the action." And there is a large list of cases from the old days right down, but the meat is this: "The statute bearing on this subject relates to the failure of the attorney to file a pleading. Practice Act, 1903 (P. L., 1903, p. 569), Section 112; also Section 135. But in the case of Lance vs. Fredericks, 21 N. J. Law Journal, 344, Mr. Justice Garrison dealt with an affidavit of merits as a pleading; and, whether this be technically correct or not, it is entirely clear that the court, as a matter of common law, exercises its discretion in dealing with this equitable relief, having full control of its own judgment, and that it should not permit injustice under the form of law. So ample, indeed, is the discretion that it was held by this court that the statute above referred to did not interfere with such discretion, and, if it did so, it would be unconstitutional." Citing Smith vs. Livesey, 67 N. J. Law, 269. And in the annotations I find a case which was decided quite a while back—it is in 1 Harrison, but it was decided by the Supreme Court, and there it was held that an affidavit of the defendant showing that he had expected to compromise the suit before the entry of judgment is sufficient. In other words, if there was a bona fide negotiation for the settlement of the suit and the defendant had a defense, the court would open it. Now, in the case at bar it appears that the driver of this car was driving along the Boulevard and was followed by a Public Service gas company automobile, and that he was fairly out towards the white line at

the center. There were cars parked along the side. Out from between these cars parked on the side came this child, and she ran into the right rear mudguard of this car and was thrown back. The defendant felt the impact, stopped the car, and this man behind stopped his car and helped take her to the hospital, and I have that man's affidavit submitted to your Honor. So that it appears that they considered after having taken her to the hospital—that the driver considered that there was nothing to do, and he failed to give this information to the employer and the insurance carrier failed to obtain it. But there is nevertheless the driver's own statement upon which we felt that there was no injury—the insurance file was sent to me—on which we felt there was no injury in the case. Bear in mind that this notice never came to counsel until this notice of inquest was served in 1929. The insurance carrier after the agreement of March, 1927, had no information about this case until the notice to take the inquest two years later was handed down. We have here a meritorious defense. That is, the affidavit of the driver. We have a corroborating affidavit of a disinterested third party to the effect that this child ran out into the right rear mudguard after our driver had entirely passed the two cars, from between which the child came, and that she struck this mudguard. Now, in striking that mudguard it is quite arguable that there was no serious injury done such as appears in the X-ray taken two days, and only two days, before the inquest. And there is corroboration of the X-ray taken in the Jersey City Hospital show-

ing no fracture. There is the corroboration of Dr. Vanderhoff's and Dr. Loori's then attitude that there was nothing serious, and there is corroboration of the reasonableness of such an arrangement being entered into in a comparatively trivial case between the insurance carrier and plaintiff's counsel, allowing the matter to remain in abeyance in the meantime, which would not be the attitude of plaintiff's counsel in a serious case, plaintiff's counsel delaying it for two years and finding out only two days before the trial that this was, as they claim, a broken-back case.

Now under the circumstances there is a very serious question raised: Is this injury shown only two days before this inquest, is this the injury which was inflicted when this child ran into the back of this car, or has there been subsequent injury? Dr. Finger, who treated this child at the hospital at the time, his affidavit is here, and Dr. Finger at Christ Hospital examined the child and he and the nurse found that she practically appeared normal and made no outcries whatsoever, she walked with practically normal step and was led from the examining room where she was examined. In other words she was not unconscious, as was apparently the inference brought out at the trial. She walked from the operating room, and that was before any X-ray was taken. She walked out of the examining room at Christ Hospital. That was before she was taken to the Jersey City Hospital.

So that we have a situation here, your Honor, which raises a serious question as to whether there was a supervening cause which produced

this injury which apparently was not known to be so serious even to the plaintiffs themselves, until two days before the inquest was brought on. Unless that be true, unless the plaintiffs did not figure that this was a serious situation they would be very much to blame in their relations with their client for allowing their rights to sleep for two years. The answer that counsel indicated in the trial of the case was, "We purposely delayed this case in order to see how these injuries would develop." But that statement is met by the statement from their own mouths on the day they gave notice of the inquest, that they were willing to accept $3,500 in settlement, indicating that they still did not consider this to be serious. So they cannot square the two statements. They are on the horns of the dilemma. Either they considered it to be a trivial accident and up to the time they brought it on for inquest were willing to take $3,500 or so, or else they did not know up to that time and did not know until two days before the inquest that it was of apparently serious character, indicated by Dr. Perlberg's X-rays.

The child testified she had not gone to school for a considerable number of months, and it appears from the affidavit submitted here that she has a school record in the parochial school and in the public school, and the attendance record is entirely at variance with the testimony that she was not able to attend at all. Furthermore, the physical examination that was made in the school is attached to the affidavits, and that physical examination made prior to the inquest shows no curvature or deformity or inability to walk or anything

of the kind, so that you have the regular physicians of the City examining this child in the ordinary course of school duties and making a report that there was no serious injury.

The Court: When was that school examination?

Mr. Heine: She entered the school in September, 1928, so it must have been after September, 1928, and there are no defects shown of any kind.

Now, I feel that your Honor is in this position with regard to this application: I opened my first office in New Jersey here and I have known your Honor's reputation and your method of practice, and your desire on the bench I feel is to protect this child and also to protect this defendant. The fact that the defendant corporation is a well-to-do corporation in the eyes of the law makes no difference. The fact that a child is poor and injured makes no difference. Their rights are to be dealt with according to justice, and your Honor has full equity power in dealing with this situation.

Now, it seems to me that enough doubt has arisen in connection with this injury to make it a very serious question as to whether the truth has been brought out or fully tested on the inquest, and on the application to open and try on the whole issue there is an affidavit here in compliance with law that there is a meritorious defense. The default is in pleading and comes properly under section 135 of the Practice Act, and under those circumstances the law is that if the defendant has a meritorious defense he shall not be deprived of that although the judgment obtained in default when it is once obtained is allowed to stand as

security. And for a stronger reason we have here evidence uncontradicted that there were settlement negotiations in progress between the two parties, and a case directly in point which holds that where such settlement negotiations are in progress and a judgment is obtained the court may open it where there is a meritorious defense.

Now, under those circumstances it seems to me that in fairness to the plaintiff, on her side, and in fairness to this defendant who has this defense, on its side, that if your Honor would dispose of this matter by directing a trial on the whole case, the issue of the damages and the issue of the liability and if that could be disposed of by setting it down for a special day promptly so there would be no hardship in any further delay—although the delay of two years was caused by the plaintiff's own action in the matter—that there would be then an opportunity which, so far as I can read the law, has never been denied a defendant who has a defense and who is not blameworthy in a serious sense in permitting a default to be taken—that that would fulfill the ends of justice and would give both these parties litigant their rights as they should be dealt with in a court which is administering justice between the parties. And in granting a new trial, if it could be granted so it would not lose the advantage of the present term, if that could be arranged your Honor's handling of that matter, would, it seems to me, take away any basis of complaint because the attitude of the plaintiff I do not think should commend itself to the court, first, in the admitted taking advantage of the insurance carrier in entering the judgment;

second, in the delay in bringing on the inquest and lulling the defendant into the idea that the trivial claim, as it appeared to be, had been abandoned, and then in the objection most strenuously urged to our having any physical examination after two years—immediately before the inquest we had to come and get it from your Honor on the very day of the trial, and that perhaps was not as thorough an examination as we should have had—but the whole attitude of the plaintiff has been apparently to hold an unfair advantage which it had obtained in a manner which the defendant charges was unfair, and which is not denied by anybody; and I submit that, dealing with this broadly, in the same spirit of justice which I think we invoke from the court and in which we should come to the court, we should have a new trial of this whole issue on the merits of liability and damages, and if possible have that promptly so as to conserve any rights which the plaintiff may have in the situation.

The Court: You had an examination of those X-rays subsequent to your application for this argument?

Mr. Heine: Yes; I have Dr. Baker's report in which he finds that there was no fracture in the early hospital X-rays.

The Court: I suppose that is conceded, isn't it?

Mr. Kepsel: No.

Mr. Heine: I will read you his report. It is very brief.

The Court: The report on Dr. Perlberg's examination is the only one.

Mr. Heine: "Films were made of the lumbar and dorsal regions of the spine, anterior and poste-

rior positions. The examination was made in the presence of Dr. Perlberg and Dr. Vanderhoff. The examination indicates that there has been a traumatic lesion of the spine with fracture of the lower anterior third of the eleventh dorsal vertebrae and also a similar fracture, but of less degree, of the anterior margin of the 12th dorsal. In the lateral view this seems to have resulted in a marked angulation of the spine at this point. As viewed in the anterior-posterior position there is a slight anterior displacement of the body of the 11th toward the right. This amounts to less than one quarter inch. I can find no indication that the laminae, which are the bony projections extending backwards from the bodies of the vertebrae and uniting in midline to form the spinous processes, have been fractured. As a result of the injury deposits have formed in the lateral ligaments as callus developments or repair. There is no marked destruction of the bodies by erosion. The patient seems to be progressing as well as possible, particularly as the condition is said to have been unrecognized and untreated."

Mr. Kepsel: My first resistance to this application is that it was not made within six days. The verdict was entered April 5, 1929. The rule was signed May 2, 1929. A period of seven days.

The Court: We will eliminate that, because the application was made in time personally to me.

Mr. Kepsel: Then we have here the affidavit of Mr. Heine who swears positively that Dr. Loori did not examine the child as he stated on the trial until after November the 7th, 1926. Mr. Heine says the child was not discharged from the Jersey City Hospital until December the 7th, 1926. That

is not true. The child was discharged on November 7th, 1926, and on that same evening was seen by Dr. Loori.

The Court: Have you the hospital records?

Mr. Kepsel: The records are right here, your Honor.

The Court: Will the records show that? I remember at the trial the records seemed to indicate that during half of the month in which Dr. Loori said he was examining this child at her home the child was confined to the City Hospital.

Mr. Heine: Yes, there is no question about it.

The Court: Have you the records here?

Mr. Heine: I have an abstract of the record here. The child was admitted to the Jersey City Hospital on November 14 and was discharged on December 7. Now, she went into Christ Hospital October 11 and was discharged on October 13, at 10 a. m., when her mother took her away and signed a release; so that puts her in Christ Hospital from the 11th to the 13th. Then she was admitted to the Jersey City Hospital on November 14 and remained in there until December 7, and Dr. Loori's testimony on the trial was that he treated her after the early part of November, the 7th, continuously every day at her home.

The Court: That is my recollection.

Mr. Kepsel: The original records are here. They show she was admitted to the hospital—

The Court: Where are the original records?

Mr. Kepsel: Right here.

The Court: Get them. There is no dispute about Christ Hospital?

Mr. Kepsel: No.

The Court: "Lillian Bendetto, Ward 15, admitted 10/14/26. Discharged 11/7/26."

Mr. Kepsel: And Dr. Loori testified he saw her the first time November the 26th.

The Court: So that seems to dispose of that, Mr. Heine. These are the original records. October the 14th, 1926; discharged November the 7th, 1926.

Mr. Heine: Those dates correspond, and the months differ. That is November and this is December; and it is October and November. But that does not dispose of the situation that the injury as supposed by Dr. Loori and Dr. Vanderhoff, who examined in December when Dr. Loori could not even find the house—

The Court: We are only arguing this one question as to the testimony of Dr. Loori that he was attending this patient at her home during most of the month of November. Your contention was that he could not have been doing that because the child was in the hospital. Now, the records seem to show that your contention is not borne out. "October 14, October 16." The reports are written out in long hand. The daily record is written out.

Mr. Heine: In this typewritten copy I have, they have simply made it November and December instead of October and November. That apparently is the explanation.

Mr. Kepsel: The next point is that the assessment of damages is signed by some other person.

Mr. Heine: I waive that. We came in to try it.

Mr. Kepsel: If your Honor will recall, there were two physicians, Dr. Vanderhoff and Dr.

Arlitz, who examined this child. Neither of these gentlemen were put on the stand at the trial to controvert anything that our physicians said.

The Court: How could they?

Mr. Kepsel: They examined her. The hospitals X-rayed the limbs instead of the back. Dr. Sprague confessed that he was at sea. He said, "Take her to Dr. Perlberg; I cannot seem to find out what is wrong with this child." Dr. Perlberg made his X-ray, and then he took what he called a lateral view, and that disclosed this condition. That further indicates that what the Public Service man says cannot be so, that she walked into the rear of this car. The X-ray indicates that the spine was pushed to the right. Our testimony was that she was standing on the white line and this automobile came along and pushed her from the right to the left, driving the spine over in the right direction.

Mr. Heine: There was no testimony as to how the accident happened.

The Court: I do not think we ought to go into the question of how this thing happened.

Mr. Heine: I would like to call your Honor's attention to the fact that the record of the Jersey City Hospital X-ray, which is here, shows that there was a picture of the spine taken October 14, 1926.

The Court: Right and left leg, it says here.

Mr. Heine: That is Christ Hospital.

The Court: There was no X-ray taken at Christ Hospital, as I understand.

Mr. Kepsel: Here is the Jersey City Hospital X-ray.

The Court: I thought you said there was no X-ray of the spine taken at the Jersey City Hospital.

Mr. Kepsel: At Christ Hospital there was no picture of the spine.

Mr. Heine: You said both.

Mr. Kepsel: I am mistaken then about that. The legs were taken at Christ Hospital. The spine was taken at Jersey City Hospital. The plate will indicate that there is some sort of a process right in there. You can see how the bone is shoved out.

The Court: I am not going to try to interpret the X-ray.

Mr. Kepsel: So far as the delay is concerned, if it is of any moment—but I do not think it is—your Honor will recall that the Common Pleas did not for quite some time try any civil issues. We have by notice applied here for the fixing of a day for some time past, and we have not, because of the pressure of other business that the Common Pleas had, been able to get a date for the trial. I could not stand up and tell the jury that that was the situation.

The Court: That of course is a fact. The Common Pleas did not function as a Civil Court.

Mr. Heine: But it was from 1927 until 1929 before they gave notice. Two years. Not a word. We did not know anything was going to happen. You gave the first notice in March.

Mr. Kepsel: That is true, because Judge Egan signed the order in March, 1929, fixing April the 8th, 1929.

The Court: Well, you did not make any application for a day before two years?

Mr. Kepsel: Oh yes; we left a notice over here soon after the entry of the judgment interlocutory.

The Court: If you left it with the County Clerk there would be a stamped date on it.

Mr. Kepsel: No; it was left with the clerk here.

The Court: Well, if it was left with him in his official custody he would have to file it.

Mr. Kepsel: But no date was ever fixed for the reason that the Common Pleas was not functioning as a Civil Court owing to the pressure of business.

Mr. Heine: It functioned several times. We came over here and tried cases.

Mr. Kepsel: I at least had the decency not to interrupt while you spoke.

The Court: I remember I went through the list in April of 1927 and I completed the list.

Mr. Kepsel: But this was not in the list. Mr. Loori took the matter up with you for the fixing of a day. Interlocutory judgment was entered and it would not be in the list. Mr. Loori came over and was told to prepare his order and leave it with the clerk outside, and you would assign a day.

The Court: Do you mean Mr. Loori made application to me for a day for the assessment of damages prior to March, 1929?

Mr. Kepsel: Long prior.

The Court: Do you say that, Mr. Loori?

Mr. Loori: I am not sure of the date.

Mr. Kepsel: I will get that from the records. I remember making the application.

The Court: All right, let us pass that for the time being. How do you explain the fact you were asking $3,500 two or three days before the date set for the assessment of damages?

Mr. Kepsel: None of the doctors knew what was wrong with this girl until Mr. Sprague sent her to Dr. Perlberg, and then discovered the seriousness of the situation. Dr. Sprague is a very reputable man. Dr. Sprague frankly confessed when Dr. Loori was stumped—Dr. Loori testified he was stumped as far as it went. Dr. Godwin, who was the doctor who examined her originally in the hospital, we had him in court. We brought down our whole line of medical examination from that time on. It was not until after, as I said, that Dr. Sprague suggested this child going to Dr. Perlberg—your Honor knows Dr. Perlberg's reputation also—it was not until then that it was discovered that this girl was seriously injured. She was complaining of pains in her legs. X-rays of the limbs did not disclose anything. And that was the thing that put an entirely different aspect on the case.

The Court: And you made this application for $3,500 to the insurance company before the examination by Dr. Sprague and the X-ray taken by Dr. Perlberg?

Mr. Kepsel: That is true. We were not sure of what the condition was. Of course we had to depend upon the doctors. They did not seem to know just what exactly was wrong with this child. Now there has been no contradiction of any of the medical testimony that was offered in this case, although Dr. Vanderhoff was in court. Dr. Vanderhoff made an examination way back, as they claim in December, 1926 or 1927. He was not put on the stand to dispute it. Dr. Sprague said about what Dr. Loori said. There may be some doubt

about what Dr. Arlitz may have said about the case.

Mr. Heine: Dr. Durant?

Mr. Kepsel: No; Dr. Arlitz.

Mr. Heine: Durant examined her in the Jersey City Hospital.

Mr. Kepsel: There were several other doctors in the Jersey City Hospital too; and it was not, as I said, until Dr. Sprague made this discovery through Dr. Perlberg's X-ray that we knew of the seriousness of the injury. I have here an affidavit of Mr. Loori denying that he ever entered into such an arrangement with Mr. Sissing.

Mr. Heine: I call your Honor's attention to the terms of the order, that affidavits must be served within a certain time.

The Court: I think we disposed of that conclusively at the argument for a re-opening of the case, where you were represented by someone.

Mr. Heine: Mr. Dugan argued the matter.

The Court: I do not remember the facts now, but I was convinced at that time that there was no such arrangement entered into. We are not touching section 135 on this at all.

Mr. Kepsel: Then do I understand we are proceeding on the question of newly discovered evidence?

The Court: You just proceed in answer to his arguments. Now you said it was before the X-ray taken by Dr. Perlberg and before the examination made by Dr. Sprague that you submitted this offer of $3,500.

Mr. Kepsel: Yes. There was some dickering. We thought we could get it cleaned up for $3,500.

We had not had the father's absolute consent on it, and we did not know at that time the gravity of the child's illness. It was not until after Dr. Perlberg's X-ray that they felt there was a broken back, and then of course the $3,500 proposition was absolutely out of the question.

The Court: Now, Mr. Heine, have you anything other than a suspicion to offer that this child was injured in any other manner than as alleged in this complaint, between the time of this accident and some time in October?

Mr. Heine: We have the affidavit of Dr. Finger, the statement in the hospital record of Dr. Durant, the examination by Dr. Vanderhoff in the presence of Dr. Loori. Dr. Finger's examination was in Christ Hospital. He was available at the trial, and he was not produced. He states that he and Dr. Loori were unable to find any definite information, and subsequent to this the X-rays were taken by Dr. Perlberg, which show this condition which was shown at the trial.

Now, your Honor asked me a direct question. It is more than a suspicion I feel because of the contributing elements that enter in. First, the injury. According to the evidence of the way it happened, by these two men, the driver and the man who was a disinterested witness, she ran into the right rear mudguard, running out from the side. We have Dr. Finger who examined her every day at Christ Hospital—

The Court: Do we not know as a matter of fact that an injury of that kind, a spinal injury, or an internal injury, may take some time to develop?

Mr. Heine: Yes, but we have Dr. Vanderhoff's

examination in the presence of Dr. Loori in December, and the injury was in October. Then we have this examination in October, 1927, at which they are unable to find it, and then suddenly—

The Court: Didn't you say in one of the examinations the child complained of injuries, no matter what part of the spine was touched?

Mr. Heine: Yes, she could not localize. She complained no matter which part they touched.

The Court: As a matter of fact wouldn't an injury to any part of the spine hurt the entire spine?

Mr. Heine: I cannot answer that question. It is a medical question. But Dr. Durant, who is one of the best medical men in this State, was at the hospital at the time of the injury. So it raises a serious question: Did something happen about which we know nothing between the time of this injury when these doctors diagnosed it as trivial and when the attorneys, guided by their doctors, considered it trivial, when suddenly two days before the action it becomes of major seriousness? Now, that is the answer to the question. I think the indirect evidence, circumstantial, raises more than a suspicion as to whether there was a supervening injury or whether from some other cause not proximate to the operation of this car the injury was aggravated by some other cause, a fall or something which we have had no opportunity to investigate, because the defendants had no chance to go into this thing. Two days before the trial it appears serious, whether it was a subsequent injury, or subsequent aggravation, we do not know. We had no opportunity to go into the case

before the trial went on. So it seems to me the case contains elements from various angles of such a nature that justice would be promoted to both the parties by giving us a trial on all the elements in the case at a day to be fixed.

The Court: I will hear you now on the question of excessive damages.

Mr. Heine: The damages were $12,500 and $4,000 for the father. The minutes have not been written up, but my recollection is that the testimony showed that the medical expense of the father was very slight.

The Court: What about the child's injury?

Mr. Heine: I can make no contention that if the injuries are of that character those damages would be excessive. I think I would be stultifying myself by contending that those damages, if that character of injury existed, would be excessive. I am very frank to say that if injuries of that character were proven on the trial of the whole case the child would recover substantial damages. But on the father's damages, Dr. Loori's bill I have forgotten. It was a comparatively small amount. The medicines were a comparatively small amount.

The Court: Do you remember what Dr. Loori's bill was?

Mr. Kepsel: Two hundred and some odd visits. About $600.

Mr. Heine: But in any event the loss of service element is without foundation. The child was of school age; there was no loss of service involved in the situation; and it seems to me that an award of $4,000 on the evidence is very clearly excessive.

Mr. Kepsel: You will recall that both doctors said that the child would have to have an operation, and that that is an expensive proposition and requires the services of an expert man, and that I think is what the jury had in mind, what he would have to spend in the future for the cure of this child. Dr. Sprague said he would not undertake an operation of that kind and it would be an expensive proposition to undergo this operation. That I think is what the jury had in its mind when it awarded the father $4,000.

The Court: What is your idea of what a reasonable award to the father would be, Mr. Heine? There were no medical bills to amount to anything.

Mr. Kepsel: Not at the hospital, your Honor.

The Court: Or for medicine.

Mr. Kepsel: It was simply sedatives that Dr. Loori prescribed.

Mr. Loori: There was the expense of the experts.

Mr. Heine: My idea of the father's damages would be $750 to a thousand dollars.

The Court: I do not think that would be enough. I think $4,000 is excessive. I think $2,000 would cover his expenses, and let the judgment stand at $12,500 for the child and $2,000 for the father.

Mr. Heine: Will your Honor deal with the application under Section 135?

The Court: That will be denied.

Mr. Heine: I ask an exception. This is a serious matter in the angle in which it comes before the court, and I shall probably be under the necessity of endeavoring to review the court's decision under the circumstances; and under those circum-

stances—I think counsel know Fleckenstein's Sons are responsible—may I have a stay of any execution until I can prepare an appeal?

The Court: How long do you think it will take?

Mr. Heine: If we could have thirty days that would be ample to perfect the appeal.

The Court: You can have longer than thirty days if you want.

Mr. Heine: If counsel want a bond we can file it. Counsel know that the judgment is good.

Mr. Kepsel: I do not know, they may go into insolvency.

The Court: I do not think you need a bond.

Mr. Kepsel: How about this bill of Dr. Perlberg's for going to Newark?

Mr. Heine: In your order your Honor directed that the child be taken to Newark for the purpose of Dr. Baker taking an X-ray at the expense of the defendant, and we sent over an automobile with a physician, and there was some resistance and delay about the matter, mutual convenience did not suit and so on, and the result was that Dr. Perlberg went over with the child to Dr. Baker's office, and, of course, we had no objection; we furnished the transportation over and back. He submitted a bill for $50. I am not in a position to speak at first hand, because the arrangement was not made with me, the arrangement was made over the 'phone with Mr. Dugan; but Dr. Baker charged $20 for taking the X-ray. We supplied an automobile for taking the child over, and the doctor now submits a bill for $50. The order did not provide for him to come, but I do not think it is fair. I do not think we should be mulcted; when the taking of the X-ray by Dr. Baker costs

$20 I do not think it is fair to be charged $50 for Dr. Perlberg riding over with the child.

The Court: I do not think you should question Dr. Perlberg's fee.

Mr. Heine: But your Honor did not order it.

The Court: They asked me for it at the trial, and on their statement that they thought it was necessary to have their X-ray physician on hand when the X-ray was taken I thought that they were entitled to it.

Mr. Heine: Your Honor would like me to pay that amount?

The Court: Yes; I do not think I would like to dispute his bill.

Mr. Kepsel: I will include in the order that execution is stayed for thirty days.

Mr. Heine: Yes.

Affidavit of Joseph J. Loori.

HUDSON COUNTY COMMON PLEAS COURT.

(Filed, July 15th, 1929.)

LILLIAN BENEDETTO, an infant, who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO,

Plaintiffs,

vs.

EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS,

Defendants.

Action at Law.
Affidavit.

State of New Jersey, }
County of Hudson, } ss.:

Joseph J. Loori, being duly sworn according to law, upon his oath deposes and says:

1. I am the attorney for the plaintiffs in the above-entitled cause. I have read the affidavit of Charles H. Sisson, manager of the Claim Department of the American Automobile Insurance Company. I have also read the copy of the letter annexed to said affidavit bearing date March 12th, 1927. It is untrue that the original of said letter of March 12th, 1927, was ever received by me. It

is also untrue that the understanding alleged to have existed between Mr. Sisson and myself was ever made. I never entered into any agreement with Mr. Sisson that this action would be treated as a claim. As a matter of fact I cannot recall ever having had any conversation with a Mr. Sisson regarding this matter after the institution of suit. In light of the understanding alleged to have existed between us on March 12th, 1927, I would not have, on March 25th, 1927, entered an interlocutory judgment.

JOSEPH J. LOORI.

Subscribed and sworn to before me,
this 5th day of June, 1929.

FRANK J. GUARINI,
Attorney at Law
of New Jersey.

Affidavit of Frederick Finger.

HUDSON COUNTY COURT OF COMMON PLEAS.

LILLIAN BENEDETTO, by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO,
Plaintiffs,
vs.
EDWARD F. FLECKENSTEIN and ALBERT FLECKENSTEIN, partners trading as ED. FLECKENSTEIN'S SONS,
Defendants.

Action at Law.
Affidavit.

State of New Jersey, }
County of Essex, } ss.:

Frederick Finger, of full age, being duly sworn on his oath according to law deposes and says:

I reside at 121 North 38th Street, Bayonne, New Jersey, and am a practicing physician in the State of New Jersey and have been practicing in this State since 1927. On October 11, 1926, I was an intern in Christ Hospital, 176 Palisade Avenue, Jersey City. On that day Lillian Benedetto, a girl about nine years of age, was brought in to this hospital. A history was given that this girl had been in an automobile accident on that day. I examined this girl for injuries that she might have sustained. The only external signs of any injuries were abrasions on her legs and her knees and the complaints that she made were that she could not stand on her feet. I made a complete

examination of this child for any other possible injuries and from that examination I was unable to find any other injuries. I ordered X-rays to be taken of both her knees and her legs and these X-rays revealed no evidence of any fracture. This girl made no complaint of injuries to her back and from my examination I was unable to find any evidence of an injury to her back.

This girl was taken from the Christ Hospital on October 13, 1926, at the request of her mother who signed a release.

The X-rays of this girl's legs and knees were taken by Dr. William W. Maber.

On April 6, 1929, at the request of Joseph J. Loori, I attended a conference at the office of Doctor D. Lettieri, 515 Palisade Avenue, Union City. At this conference were Dr. Loori, Joseph Loori, Dr. Lettieri, and myself. Several X-ray pictures which had been taken by Dr. D. Lettieri were shown to me and I was unable to find any marked noticeable manifestation of an injury to the back of Lillian Benedetto. Dr. D. Lettieri stated that from his examinations of the X-rays the most that he could say was that there was a slight deviation from the normal in the lower dorsal region. Dr. Loori stated from his examination of the child and also from looking at the X-ray pictures of her back that it was very difficult to tell whether or not this girl had sustained an injury to her spine.

Both Dr. Loori and I examined the back of Lillian Benedetto on this day. There was no external evidence of an injury to her spine or back. When we would touch the top of her spine she

would complain just the same as when we would touch the middle of the spine or near the end of the spine so that it was impossible to tell from these complaints just what part of the spine was injured.

FREDERICK A. FINGER.

Sworn and subscribed before me,
this 4th day of May, 1929.

EDWARD L. DUGGAN,
An Attorney at Law
of New Jersey.

Per Curiam.

NEW JERSEY SUPREME COURT.

No. 61—October Term, 1929.

Lillian Benedetto, *et al.*, *vs.* Edward F. Fleckenstein, *et al.*	Appeal from Hudson Common Pleas.

Appeal from Hudson Common Pleas.

Argued before Gummere, Chief Justice, and Justice Campbell.

For the appellants, M. Casewell Heine.

For the respondents, Julius A. Kepsel.

Per Curiam.

This suit was brought to recover compensation for injuries received by Lillian Benedetto, an infant, in a collision between the car in which she was riding and an automobile belonging to the defendants. Her father also joined in the suit to recover compensation for the expenses to which he was put by reason of the child's injuries. The suit was brought in 1927. No answer was filed by the defendants, and in June, 1929, an interlocutory judgment by default was entered. Damages were assessed by a jury drawn from the general panel, and judgment final was entered upon the jury's award. In September of that year an application was made by the defendants for a rule to show cause why the judgment should not be set aside and the defendants allowed to file an answer. The hearing of the rule resulted in its discharge,

and the defendants thereupon appealed from the judgment, the only ground upon which the appeal is based being that the refusal of the trial judge to open the judgment and grant the defendants a trial on the merits, was an abuse of judicial discretion.

The general rule relating to a situation like the present, is stated by the Court of Errors and Appeals in *Assets Development Co.* v. *Wall,* 97 N. J. L. 470; viz.—that an application to open a judgment regularly entered is addressed wholly to the discretion of the Court in which it was rendered, and that consequently, a writ of error will not lie to review the determination of that court. Assuming that this doctrine does not apply where it is manifest that the discretion of the Court has been abused, we find nothing in the present case which is even suggestive of the existence of such a condition.

We conclude, therefore, that the judgment under review should be affirmed.

Judgment of Affirmance.

NEW JERSEY SUPREME COURT.

LILLIAN BENEDETTO, *et al.*, Plaintiffs-Appellees, *vs.* EDWARD F. FLECKENSTEIN, *et al.*, Defendants-Appellants.	On Appeal from Hudson Common Pleas. Judgment of Affirmance.

This case was heard before our Supreme Court at the October Term, 1929, and judgment of affirmance was rendered in favor of the plaintiffs-appellees on July 15, 1930.

It is thereupon, ORDERED and ADJUDGED that the judgment of the Hudson County Court of Common Pleas, from which an appeal was taken in this cause, be and the same hereby is affirmed, with costs to the plaintiffs-appellees, and said record is hereby remitted to the Court below to be proceeded with according to law and the practice of said Court.

Entered July 22, 1930.

On Motion of

JOSEPH J. LOORI,
Attorney for Plaintiffs-Appellees.

New Jersey Court of Errors and Appeals

LILLIAN BENEDETTO, an infant who sues by Patsy Benedetto, her next friend, and PATSY BENEDETTO, Plaintiffs, *vs.* EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners trading as Ed. Fleckenstein's Sons, Defendants.	On Appeal from Supreme Court.

BRIEF OF DEFENDANTS-APPELLANTS.

Statement.

This is an appeal from a judgment of the Supreme Court affirming an order of the Hudson County Court of Common Pleas (State of Case, p. 14) refusing to grant defendants a rule to show cause why a default judgment entered on failure to file an answer should not be opened and also from a judgment of the Supreme Court affirming an order of the Hudson County Court of Common Pleas (State of Case, p. 43) discharging a rule to show cause why the application originally made to open the default judgment should not be reheard and why defendants should not have a trial on the whole case.

This whole case hinges upon the question whether a defendant against whom a default judgment has been entered is entitled upon a showing of the facts required by law, to have the judgment opened and to present its defense.

Facts.

Plaintiff, Lillian Benedetto, was struck by an automobile driven by defendants' servant on October 11, 1926 (State of Case, p. 31 and p. 34). A summons and complaint was issued on February 24, 1927 and served on the defendants on February 28, 1927. The insurance carrier of the defendants was the American Automobile Insurance Company and its representative at Newark, New Jersey, was one Charles H. Sisson (State of Case, p. 16) in charge of claims.

On March 11, 1927 the defendants forwarded the said summons and complaint to Mr. Sisson and he then took up negotiations for settlement with plaintiffs' attorney, Mr. Loori.

On March 12, 1927 Mr. Sisson, pursuant to a telephone conversation with Mr. Loori, plaintiffs' attorney, forwarded a memorandum (State of Case, p. 18) to Mr. Loori to the effect that suit would not be moved until an agreed date between them pending negotiations.

The case was sent to no attorney for the defendants by Mr. Sisson pending these negotiations.

On March 25, 1927 a rule for interlocutory judgment was entered (State of Case, p. 9). No notice of the entry of this rule was given to the insurance carrier or to the defendants.

Plaintiffs' attorney then allowed the case to sleep for two years until March 29, 1929, when an order was entered fixing a date to assess damages. This notice to assess damages was served on the defendants and immediately forwarded by

them to Mr. Sisson, of the insurance carrier, American Automobile Insurance Company, and was by Mr. Sisson immediately sent to their attorneys, Messrs. Heine & Laird, who immediately applied to the Court for a rule to show cause why the default judgment should not be opened, which application was made upon the affidavit of Mr. Sisson found in State of Case, p. 16.

On April 8, 1929 the Court refused to grant to the defendants either a rule to show cause or to stay the proceedings in assessment of damages (State of Case, p. 14), which accordingly went forward over the objection of defendants' counsel and resulted in a verdict and judgment being entered April 30, 1929, $12,500.00 for the plaintiff, Lillian Benedetto, and $4,000.00 for her father, Patsy Benedetto.

On May 2, 1929 defendants' attorney on petition and affidavits (State of Case, pp. 22-40) secured a rule to show cause from the Court (State of Case, p. 41) why the application theretofore made to open the default should not be reheard and why the defendants should not have a trial upon the whole case. The Court discharged this rule, denied the application for a trial upon the whole case and judgment final was entered, reducing the amount of award to Patsy Benedetto from $4,000.00 to $2,000.00 (State of Case, p. 43).

The facts of the happening of the accident and the meritorious character of the defendants' case are set forth in the State of Case, p. 31 (Driver's affidavit) and State of Case, p. 34 (Affidavit of disinterested witness who was driving a car immediately behind defendants' automobile).

GROUNDS OF APPEAL

BECAUSE THE SUPREME COURT ERRED IN GIVING JUDGMENT TO THE PLAINTIFFS INSTEAD OF THE DEFENDANTS.

ARGUMENT.

The contention of appellants is that the Trial Court in denying defendants' original application of April 8, 1929 to open the default, refused to exercise its discretion (See order, State of Case, p. 14) and that this refusal to exercise discretion is error.

The subsequent refusal of the Court to rehear the application to open the default (State of Case, p. 41, l. 30 and l. 32; and p. 43), presents the same error. Appellants' second contention, if the Court should hold that there was not a refusal to hear the application to open the default, is that such action on the part of the Trial Court amounts to an abuse of discretion.

POINT I.

The action of the Trial Court in refusing to open the default judgment is in violation of the public policy of this State.

As we understand the Public Policy of the State, it is that litigants shall have an opportunity to present their causes of action and defenses on the merits before the proper judicial tribunal.

The Courts of this State have always upheld the right of the defendant against whom a default judgment has been taken to have it opened, provided that he can show that he did not permit it voluntarily and that he had a prima facie defense on the merits.

This was recognized in 1818 in *Abrams* v. *Wood,* 4 N. J. L. (1 South.) p. 33. In that case Mr. Gordon met a defendant, Rolfe, against whom a writ had been issued, before the return thereof and told Rolfe that he was going to Trenton. Rolfe

gave Gordon $15.00 to retain one Mr. Ewing, an attorney, for him, but unfortunately he was prevented from coming to Trenton and did not retain Mr. Ewing and did not inform Mr. Rolfe that he had been unable to make the arrangements with the attorney. Rolfe in the meantime did nothing, believing that his case was taken care of, and a default judgment was entered against him. Abrams made affidavit that he had a just defense. The Court states, "The facts authorize the opening of the judgment. Let the defendants pay the costs and plead within ten days".

In 1923, in *Walter* v. *Keuthe,* 98 N. J. L. p. 823, this Court speaking by Mr. Justice Kalisch, reviews the cases and affirms the principle, at p. 827:

> "Now if the defendant had intended to defend the action against her and her default was not voluntary, and if she had a good and legal defense to the plaintiff's action upon the merits of the case, her proper course was to apply to the Supreme Court to vacate the judgment and for leave to file an answer, and upon showing that her default was not intentional, and by presenting facts from which it appeared that she had a meritorious defense the court unquestionably would have granted the relief asked."

See also opinion by the Chief Justice in *Assets Development Co.* v. *Wall,* 97 N. J. L., p. 468 at p. 470.

In the case at bar, the defendants forwarded the process served upon them promptly to the insurance carrier. The insurance carrier's representative promptly got in touch with plaintiffs' attorney and the result of this was the memorandum between them found on State of Case, p. 18.

It does not make any difference whether the plaintiffs' attorney denies that he entered into this arrangement with the insurance carrier's representative or not.

The defendants, the real parties in interest, had transmitted the process to their insurance company and supposed the matter was being taken care of.

Whether the action of the insurance carrier's representative in relying upon the memorandum on p. 18 of the State of Case instead of securing a formal, written stipulation was improvident or not is immaterial.

The one salient fact is that as far as the defendants are concerned, any judgment was involuntary.

The second salient fact in the case at bar is that the defendants present prima facie proof that they have a meritorious defense.

This appears from the affidavits of the driver (State of Case, p. 31) and from the affidavit of a disinterested witness who was driving an automobile immediately behind defendants' automobile when the accident occurred (State of Case, p. 34). The conclusion (using the adjective employed by Justice Kalisch) is that *"unquestionably"* the Court should grant relief to the defendants upon such terms as justice might require and to permit them to try their case on the merits.

There is no question of laches on the part of the defendants.

The first notice which they had of the entry of judgment in March, 1927, was on March 29, 1929. Why the plaintiffs' attorney should permit this default judgment to thus remain incomplete without applying for an assessment of damages for over two years is entirely incomprehensible and without explanation except the statement of plaintiffs' attorney, that during these two years the Court of Common Pleas of Hudson County was too busy to attend to civil cases (Supplemental State of Case, p. 19, ll. 20-30).

Defendants upon being apprised of the entry of the judgment on March 29, 1929 moved promptly on April 8, 1929 to have the default opened.

Certainly these defendants placed themselves squarely under the authorities as entitling them to relief. The default was not voluntary and they have a meritorious defense.

The Violated Agreement.

The above reasoning and conclusion is entirely without regard to the agreement between plaintiffs' attorney and the insurance carrier's representative, that the matter should remain in abeyance pending settlement negotiations and that no further action would be taken by the plaintiffs' attorney without notice to the insurance carrier's representative (State of Case, pp. 16, 18). The evidence that such an agreement was made is persuasive and the sole denial is an oral one by plaintiffs' counsel.

Assuming such an agreement to have been made and that the Court should have found such, the situation then comes clearly under the line of cases such as that of *Binsse* v. *Barker,* 13 N. J. L. 263, where the Court says:

> "Without expressing any opinion as to the sufficiency of the state of demand, the court reverses the judgment below for the sixth reason filed. It is apparent, that there was an honest agreement between the parties that the cause should be adjourned, and yet the plaintiff below without notice to the defendant and in violation of this agreement, proceeded to trial and obtained judgment in his absence. Whether the agreement was precedent or subsequent, can make no difference, the defendant has been injured by the want of good faith on the part of the plaintiff, and this court will not sustain a judgment under

> such circumstances. This court has in several cases reversed judgments obtained by fraud or surprise.''

The record in the case at bar, whether it amounts to bad faith or merely a misunderstanding, entitles these defendants to relief under the rules of law.

The defendants are injured substantially by a large judgment. Whether in excess of the policy limit of the insurance carrier or not makes no difference.

Justice is not served if a judgment involuntarily rendered by default against a defendant who has a meritorious defense is not opened upon proper and fair terms.

If, as Dean Pound contends, the end of law is to satisfy social wants—the claims and demands involved in the existence of civilized society—by giving effect to as much as we may with the least sacrifice, assuredly the rights of these defendants to a judicial trial cannot be sacrificed without defeating the very end and purpose of law.

POINT II.

The Supreme Court misapprehended the issue before it.

It is apparent from the opinion of the Supreme Court (Supplemental State of Case, p. 35) that the Supreme Court based its opinion upon the theory that the Court below had granted a rule to show cause why the default should not be opened and the defendants permitted to plead.

This is not in accordance with the facts.

Immediately upon receiving notice in 1929 of the entry of the judgment in 1927 and that application would be made for an inquest as to damages

on April 8, defendants applied for a rule to show cause why the default judgment should not be opened. The Court then denied the application and refused to give defendants such an order to show cause as appears from the *nunc pro tunc* order on pp. 14 and 15 of the State of the Case.

It is incontestable that this was a refusal on the part of the lower Court to exercise its discretion and to hear the application to open the default.

Defendants immediately thereafter presented a further application and secured the order to show cause of May 2, 1929 (State of Case, p. 41) why the application made on April 8 for an order to show cause to open the default should not be *reheard* (State of Case, p. 41, ll. 30-32). This application in the rule to show cause of May 2, to rehear the application to open the default was denied by the Court's order of June 7, 1929 (State of Case, p. 43).

The result is that down to the present time the Court has never exercised any discretion and has refused to hear the original application of defendants for a rule why the default should not be opened.

It is obvious that since the Court refused to consider the question of opening the default and to stay the inquest for damages, that the plaintiff proceeded with the inquest and had the damages liquidated, all over defendants' objection. The rule to show cause of May 2, in addition to the application above mentioned to open the default, brought up the question of the inquest and the amounts thereby fixed, and this matter was also disposed of by the Court's order of June 7, 1929.

This later phase of the case, however, is entirely separate from the refusal to exercise discretion or its abuse by the Court in dealing with the defendants' application to open the default.

The Supreme Court apparently in its affirmance dealt only with the second branch of the rule to show cause of May 2, namely the application to modify the amounts found at the inquest or to grant a new trial on the whole case. The Supreme Court leaves undecided the chief error complained of by the defendants, namely, the refusal to open the default or to grant a rule to bring up this question.

This refusal, either because of the Court's not dealing with the question at all or dealing with it in such a way as to amount to an abuse of discretion, was not passed upon by the Supreme Court's opinion.

POINT III.

It is submitted that the judgment of the Supreme Court affirming the orders of the Court of Common Pleas of Hudson County should be reversed and the judgment entered in the Hudson County Court of Common Pleas in favor of the plaintiffs vacated and the defendants permitted to plead upon terms.

Respectfully submitted,

HEINE & LAIRD,
Attorneys for Defendants.

M. CASEWELL HEINE,
Of Counsel.

New Jersey Court of Errors and Appeals

LILLIAN BENEDETTO, an infant who sues by PATSY BENEDETTO, her next friend, and PATSY BENEDETTO, *Plaintiffs-Appellees,* vs. EDWARD F. FLECKENSTEIN and ALBERT F. FLECKENSTEIN, partners, trading as Ed. Fleckenstein's Sons, *Defendants-Appellants.*	On Appeal from Supreme Court.

BRIEF FOR PLAINTIFFS-APPELLEES.

Statement.

Succinctly stated, the situation is that plaintiffs brought their action and defendants were properly brought into Court and negligently failed to file an answer or to make an appearance. Thereupon, interlocutory judgment was entered. An informal application to reopen the default judgment was not made until April 8th, 1929, al-

though notice of assessment was given unto Albert F. Fleckenstein, one of the partner defendants, on March 29th, 1929 (Case, p. 12).

This application to open interlocutory judgment was without previous notice to attorney for plaintiffs and was made as already pointed out on April 8th, 1929 (Case, p. 14, line 28), being the day fixed by the order of March 29th, 1929, for the assessment of damages (Case, p. 10).

At the time of the making of the informal application to reopen the default, that is on April 8th, 1929, the trial Court had before it the affidavit of Charles H. Sisson, as well as Mr. Loori, counsel for plaintiffs, in person. The Court considered the affidavit as well as counsel's denial, and the Court found, in very emphatic language, that no such arrangement existed (Supplemental Case, p. 22, line 26).

Thereupon, defendants applied for a continuance until April 25th, 1929, which was granted, and on that day damages were duly assessed, in the presence of defendants' attorney, a rule to show cause was thereafter granted and argued, with the result that the damages of the father-plaintiff were reduced by $2,000, and in all other respects the judgment permitted to stand.

Argument.

We are unable to conceive the contention of the appellants as set forth under this division of their brief. The fact is, that the trial Court did hear their application to open the default and properly exercised its discretion in denying the same. The trial Court did exercise its discretion in granting a rule to show cause and the trial

Court did exercise its discretion in refusing to make the rule to show cause absolute. There was an exercise of discretion, by the trial Court, which was not, in any wise, abused, but exercised fairly, justly and properly.

The fact that someone in the office of an insurance carrier fails to give proper attention to its business should not serve as a reason for charging our Courts with having abused discretion, when they decline to be cat's paws, or refuse to submit to the whim of insurance companies.

POINT I.

The trial Court did not violate any public policy of this State in refusing to open the default judgment.

We are unable to see any authority in appellants' brief, or are we able to find any in the books, supporting this view. There seems to be no doubt as to what the policy of the law on this question is. The law is settled.

This Court, in the case of Smith vs. Livesey, 67 N. J. L., 269, in which the question dealt with was a refusal of the Supreme Court to open a default judgment, held:

> "1. A motion made in the Supreme Court to open one of its judgments regularly entered by default, is addressed to the discretion of the Court, and its determination thereon cannot be reviewed by a writ of error."

The case of Abrams vs. Wood, 4 N. J. L. (1 South.), page 33, can have no application to this

case, for the reason that there the defendant was, through accident of one Gordon, prevented from engaging counsel. Certainly not the situation in the case under review.

The case of Walter vs. Keuthe, 98 N. J. L., 823, opinion by this Court, through Mr. Justice Kalisch, points out that the application to open a default should be made to the Court in which it was entered—there, to the Supreme Court.

In the instant case, there was an application to the trial Court and defendants presented their reasons in support thereof and these were found to be insufficient to disturb either the default or the judgment, save on the question of excessive damages. This complaint was decided in defendants' favor in so far as the plaintiff father was concerned, in that the amount awarded to him was reduced from $4,000 to $2,000 (Case, pp. 43 and 44).

On the hearing of the application to reopen the trial Court had before it the affidavit of the driver (Case, p. 31) and the affidavit of the "disinterested witness" (Case, p. 34), and considered the same. It might not be amiss at this time to give attention to these affidavits.

The affidavit of Peter Dmytrow, the driver (Case, p. 31), still in the employ of the defendants, at the time of making the same, was not newly discovered evidence (one of the grounds upon which a new trial was sought), but evidence which was known and available to the defendants from the date of the accident. The same applies to the matters contained in the affidavit of Edward Garrison, "the disinterested witness" (Case, p. 34). It should also be noted that in both the affidavit of Dmytrow and Garrison, there

is a statement that "Dr. Finger of Christ Hospital" examined the injured plaintiff. The fact is that Dr. Godlin of that institution made the examination and so testified at the inquest (Case, pp. 75 to 77).

> "Affidavits of witnesses, drawn up by counsel and sworn to in the same words, by different persons, are suspicious and objectionable."
>
> Moore vs. Ewing, 1 N. J. L. (Coxe), 144.

The principle that there can be no review of a rule to show cause is established by several cases. In Clark vs. Swersky, 128 Atl., 613, the Court said:

> "There can be no appeal from order discharging rule to show cause why verdict should not be set aside.
>
> Party who invokes discretionary power of judge to review case on rule to show cause, held to waive right of appeal, except as to matters reserved by Court as grounds of appeal."

In Caliopoulous vs. Chagaris, 126 Atl., 471, we read:

> "An application for setting aside a verdict and awarding a new trial is always addressed to the judicial discretion of a Court, and error cannot be urged against such exercise of that discretion."

Again in McIlvain vs. Mt. Holly National Bank, 129 Atl., 871, we find:

> "The action of a Court in granting or refusing a new trial cannot be brought before a Court on appeal." Citing Gaffney vs. Illingsworth, 90 N. J. L., 490, 101 Atl., 243.

The case of Koenigsberger vs. Mial, 90 N. J. L., 695, presents a much stronger and a more substantial reason for relief. It seems that the defendant in that case moved to strike out a part of the plaintiff's amended complaint. The Court having granted the motion, the defendant failed to enter a rule pursuant to that finding. Thereupon, plaintiff entered judgment by default. A rule to show cause was had and argued and thereafter discharged. The defendant then applied to the Supreme Court and that Court affirmed the ruling below and from that ruling the defendant appealed to this Court and the finding of the Supreme Court was sustained.

Appellants misstate the rule laid down by Justice Kalisch in Walter vs. Keuthe, 98 N. J. L., 823, what was said is, "the Court unquestionably would have granted the relief," and not as appellants have it in their brief (p. 6, par. 5), namely, "unquestionably the Court should grant relief."

When appellants say that the only explanation in the delay of the assessment of damages is counsel's statement, they are in error, for the trial court's remark on that subject answers that question:

> "The Court: Tht of course is a fact. The Common Pleas did not function as a Civil Court." (Supplemental Case, follow-lowing p. 93 of the State of the Case, at p. 19, line 30.)

Had the appellants not manifested an utter disregard of the situation, they would have found that interlocutory judgment had been entered on March 25th, 1927, some three or four days after the time to answer had expired. It was a public record.

Surely, if the agreement of March 12th, 1927, existed between Mr. Sisson and Mr. Loori (Case, p. 18) it is unlikely that judgment interlocutory would have been entered thirteen days after this alleged agreement.

That appellees acted with all possible speed is apparent from the fact that as soon as the day was fixed by the trial Court, notice thereof was given defendants, that is, the order fixing the day was granted on March 29th, 1929 (Case, p. 10), and on that day notice was given to the defendants (Case, pp. 12 and 13).

The Violated Agreement.

Why appellants insist upon harping on an *agreement* is beyond comprehension. The trial Court found that no agreement or arrangement was entered into between Mr. Loori and Mr. Sisson. On page 22 of the Supplemental Case, line 26, we read:

> "The Court: I do not remember the facts now, but I was convinced at that time there was no such arrangement entered into."

In addition we have Mr. Loori's denial of such arrangement or understanding, under oath (Supplemental Case, p. 29).

In Binsse vs. Barker, 13 N. J. L., 263, at page 264, no question as to the agreement to adjourn the cause and agree upon a trial day existed. We have no such situation in the case under review. On the contrary, there is a denial of the existence of any agreement with Mr. Sisson and a finding by the trial Court that no such agreement existed. Hence the Binsse case has no application.

POINT II.

The Supreme Court did not misapprehend the issue before it.

The Supreme Court had before it all the questions raised by the appellants, which it duly considered, and the only ground worthy of comment was the one dealing with the question of abuse of discretion. That question, the Supreme Court disposed of on the authority of the rule laid down by this Court in Assets Development Co. vs. Wall, 97 N. J. L., 407.

There is nothing to be found in the entire record that even hints at a suggestion of the abuse of discretion on the part of the trial Court.

Therefore, there was but one course for the Supreme Court to pursue, and that was to follow the well settled law of this State. That, the Supreme Court did, when it affirmed the judgment it was reviewing.

In passing, may we respectfully say, in fairness to the trial Court and to the Supreme Court, that these appeals are but a bald attempt on the part of the insurance carrier representative to befog their real purpose, through sending up a cry of abuse of discretion, and there by hope to foist

the responsibility for the neglect of the case to someone else, in this instance on the trial Court, and failing in that, on the Supreme Court.

POINT III.

It is respectfully submitted that the judgment of the Supreme Court, affirming the orders of the Court of Common Pleas of Hudson County, should be affirmed.

Respectfully submitted,

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