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EXHIBITS.

Notice of Appeal.

(Filed March 21, 1938.)

New Jersey Supreme Court

MIDDLESEX COUNTY.

ISABELLA SIVAK and ANDREW SIVAK,
Plaintiffs,

vs.

CITY OF NEW BRUNSWICK,
a municipal corporation,
Defendant.

Action at Law.
Notice of Appeal.

To Thomas H. Hagerty, Esquire,
Attorney of Defendant.

TAKE NOTICE that the plaintiffs appeal to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

THEODORE STRONG & SON,
Attorneys of Plaintiffs.

Service of the within is hereby acknowledged this 17th day of March, 1938.

THOMAS H. HAGERTY,
Attorney of Defendant.

Grounds of Appeal.

(Filed April 5, 1938.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

ISABELLA SIVAK and ANDREW SIVAK, Plaintiffs-Appellants, *vs.* CITY OF NEW BRUNSWICK, a municipal corporation, Defendant-Appellee.	On Appeal from the New Jersey Supreme Court. Grounds of Appeal.

To Thomas H. Hagerty, Esquire, Attorney for Defendant-Appellee:

TAKE NOTICE that the plaintiffs-appellants state the following grounds of appeal:

1. Because the trial Judge upon the trial of this cause erroneously granted the motion of defendant-appellee, through its counsel, for a non-suit.

2. Because the judgment of non-suit was erroneously entered herein.

Dated—April 4th, 1938.

THEODORE STRONG & SON,
Attorneys for Plaintiffs-Appellants.

Service of the within is hereby acknowledged this 4th day of April, 1938.

THOMAS H. HAGERTY,
Attorney for Defendant-Appellee.

Judgment Record.

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY.

ISABELLA SIVAK and ANDREW SIVAK, Plaintiffs, *vs.* CITY OF NEW BRUNSWICK, a municipal corporation, Defendant.	Judgment Record. Action at Law. On Postea. Judgment of Non-Suit.

THOMAS H. HAGERTY, Attorney.

Summons.

City of New Brunswick, a municipal corporation the defendant in this cause was summoned to answer unto Isabella Sivak and Andrew Sivak the plaintiffs therein in an action at law upon the following complaint:

(Summons issued: April 3, 1935.)

Complaint.

Plaintiffs Isabella Sivak and Andrew Sivak, residing in the City of New Brunswick, in the County of Middlesex and State of New Jersey, say:

FIRST COUNT.

1. They are husband and wife.

2. On or about November 17, 1933, defendant was, and still is, a municipal corporation, organized and existing under and by virtue of certain acts of the Legislature of the State of New Jersey.

3. As such municipal corporation, it became and was the duty of defendant, to keep and maintain its public streets, and in particular its certain street known as Central Avenue, in good repair and condition, and to keep and maintain them in a reasonably clean and sanitary condition, for the convenience, safety and health of its citizens, and plaintiffs in particular; and to use reasonable care with regard to the safety of its citizens in keeping and maintaining said public streets as aforesaid.

4. Notwithstanding its duty as aforesaid, defendant, by its certain agent, servant or employee, negligently, carelessly and recklessly cleaned its certain public street known as Central Avenue, by having the same sprinkled with water on November 17, 1933, when the temperature was below 32 degrees Fahrenheit, causing said water to turn into ice upon said Central Avenue and creating thereby a condition, dangerous and hazardous, and without due or reasonable care for the safety of those using said Central Avenue.

5. By reason whereof, plaintiff, Isabella Sivak, with due care for her safety, walked upon said Central Avenue and slipped upon said ice and fell heavily to the pavement.

6. By reason whereof plaintiff, Isabella Sivak, sustained severe and permanent personal injuries.

Her right patella or knee cap was fractured, she suffered severe and permanent bruises, contusions and lacerations, and her nervous system was shocked and permanently injured, and she sustained divers other injuries.

7. By reason whereof, plaintiff, Isabella Sivak, underwent great pain and suffering, and does and in the future will undergo great pain and suffering, and was and will be prevented from attending to her usual work and business and thereby was and will be deprived of large sums of money which she otherwise would have earned.

Plaintiff, Isabella Sivak, demands as damages on this Count, from the defendant $15,000.00.

SECOND COUNT.

1. Plaintiff, Andrew Sivak, repeats paragraphs 1, 2, 3, 4, 5, 6 and 7 of the First Count.

2. By reason whereof, plaintiff, Andrew Sivak, lost and was deprived of the benefit, aid and assistance of plaintiff, Isabella Sivak, in and about his home and work, and was and will be forced and obliged to pay, lay out and expend large sums of money in an endeavor to heal and cure the said Isabella Sivak of her injuries aforesaid and suffered and sustained and will suffer and sustain other losses and expenses.

Plaintiff, Andrew Sivak, demands as damages, from the defendant, on this Count, $1,500.00.

THEODORE STRONG & SON,
Attorneys of Plaintiffs.

(Filed: June 10, 1935.)

Answer.

City of New Brunswick, a municipal corporation in the County of Middlesex and State of New Jersey, answering the plaintiff's complaint says that:

ANSWER TO FIRST COUNT.

1. Without affirming or denying the allegations contained in paragraphs one and three, defendant leaves plaintiffs to their proof thereon.

2. The allegations contained in paragraph two are admitted.

3. The allegations contained in paragraphs four, five, six and seven are denied.

ANSWER TO SECOND COUNT.

1. Defendant here repeats paragraphs one, two and three of the answers to the first count and makes them part hereof.

2. The allegations contained in paragraph two are denied.

OBJECTION TO COMPLAINT.

Complaint does not state facts sufficient to constitute a cause of action against the defendant, City of New Brunswick, and defendant reserves the right to move to strike out said complaint at the trial.

First Separate Defense.

Defendant City of New Brunswick denies that it was guilty of any negligence which caused the alleged injury to plaintiff Isabella Sivak.

Second Separate Defense.

Defendant denies that it was guilty of any negligence which caused the alleged injury to plaintiff Isabella Sivak, and says if plaintiff Isabella Sivak was injured it was caused solely through the negligence of said plaintiff.

Third Separate Defense.

Defendant alleges that plaintiff, Isabella Sivak, was guilty of contributory negligence.

Fourth Separate Defense.

Defendant is a municipal corporation, and at the time of the alleged injury to Isabella Sivak, it was engaged in governmental duties and functions and because of which defendant is not liable for the acts complained of.

Fifth Separate Defense.

Defendant is a municipal corporation, and at the time of the alleged injury to plaintiff Isabella Sivak, it was engaged in the performance of a public duty imposed by law and not for profit, and because of the same it is not liable for the acts complained of.

SIXTH SEPARATE DEFENSE.

Defendant is a municipal corporation, and at the time of the alleged injury to plaintiff, Isabella Sivak, it was engaged in governmental functions and execution of powers of a general character delegated to it for the welfare and protection of its inhabitants and the general public and because of which it is not liable for the acts complained of.

THOMAS H. HAGERTY,
Attorney of Defendant.

(Filed: May 24, 1935.)

Reply.

Plaintiff, replying to the answer of the defendant, says that:

1. Plaintiffs deny the allegations of the First Separate Defense.

2. Plaintiffs deny the allegations of the Second Separate Defense.

3. Plaintiffs deny the allegations of the Third Separate Defense.

4. Plaintiffs deny the allegations of the Fourth Separate Defense.

5. Plaintiffs deny the allegations of the Fifth Separate Defense.

6. Plaintiffs deny the allegations of the Sixth Separate Defense.

7. Plaintiffs deny the allegations of the Objection to Complaint.

THEODORE STRONG & SON,
Attorneys of Plaintiffs.

(Filed: June 10, 1935.)

Postea.

This case was tried before Judge John C. Barbour with a jury at the Middlesex Circuit on April 13, 1937. At the end of the plaintiffs' case defendant moved for a judgment of non-suit whereupon the Court did order a judgment of non-suit and taking the case from the jury adjudged that plaintiffs' complaint be dismissed with costs.

Judgment.

Whereupon it is adjudged that the complaint of the plaintiffs be dismissed and that the defendant City of New Brunswick, a municipal corporation, do recover of the said plaintiffs Isabella Sivak and Andrew Sivak its costs which have been taxed at the sum of Fifty-one dollars and fifty cents.

Costs $51.50

Judgment entered and signed April 16, 1937.

THOMAS J. BROGAN,
Chief Justice,

Clerk's Certificate.

I, FRED L. BLOODGOOD, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

IN TESTIMONY WHEREOF I have set my hand and the seal of said Court at Trenton, this twenty-third day of March, A. D. nineteen hundred and thirty-eight.

(Seal)

FRED L. BLOODGOOD,
Clerk.

Opening Statements.

Testimony.

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY.

April Term, 1937.

ISOBELLA SIVAK and ANDREW SIVAK,
Plaintiffs,
vs.
CITY OF NEW BRUNSWICK,
a municipal corporation,
Defendant.

Transcript of a portion of stenographer's notes of evidence in the above entitled cause, taken before HON. JOHN C. BARBOUR, Judge, and a Jury, at the Middlesex County Court House, New Brunswick, New Jersey, on the 13th day of April, 1937.

Appearances:

THEODORE STRONG & SON,
Attorneys for the Plaintiffs.

STEPHEN V. R. STRONG, ESQ., (present).

THEODORE STRONG, ESQ., (present).

THOMAS H. HAGERTY, ESQ.,
Attorney for the Defendant, (present).

WILLIAM D. DANBERRY, ESQ., (present).

(Mr. Strong made an opening statement to the jury on behalf of the plaintiffs, during the course of which the following took place):

Mr. Strong: And, therefore, created a nuisance.

Mr. Hagerty: He says that we created a nuisance. That is not pleaded, if your Honor please.

The Court: This action, as I read the complaint, is based upon an allegation of sprinkling the streets when the temperature was less than thirty-two degrees Fahrenheit.

Mr. Strong: That is true.

The Court: And, of course, you should confine yourself, Mr. Strong, to that which is within the pleading.

Mr. Strong: That is true. It is for the Court to determine whether it is a nuisance.

(Mr. Strong continued and completed his opening statement to the jury.)

Mr. Hagerty: If the Court please, I will waive my opening before the jury and will rely upon the defenses I have set forth in my answer. If the Court wants me to read the defenses to the jury, I will.

The Court: It might be wise for you to read them to the jury at this time.

(Mr. Hagerty read the defenses to the jury on behalf of the defendant.)

Louis H. Nichols, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. Strong:

Q. What is your occupation? A. Foreman.

Q. Employed by whom? A. Agricultural Experiment Station.

Q. That is the State of New Jersey, is it? A. Yes, sir.

Q. Now, in the course of your employment you also keep records of weather readings? A. I do.

Q. Does that include the temperature on different days? A. Yes, sir.

Q. Did you take the reading of the temperature on November 17, 1933? A. Yes, sir.

Mr. Hagerty: I object, unless we find out where he took this temperature or reading.

The Court: Yes.

By Mr. Strong:

Q. Where did you take this temperature? A. On the weather tower located on the Agricultural Experiment Station grounds.

By Mr. Hagerty:

Q. At where? A. New Brunswick.

By Mr. Strong:

Q. How far is that from the City of New Brunswick? A. From the center of the city?

Q. Away from here. A. About two miles.

Q. Now, did you keep a record of your readings on November 17, 1933? A. Yes, sir.

Q. Will you refer to them, or can you give us from your own recollection the high temperature for November 17, 1933? A. I have the record right here.

Q. Will you refer to it, please? Was the record made by you? A. Yes, sir.

Q. Will you give us the high temperature for November 17, 1933? A. The maximum or high temperature was thirty-five.

Q. And the low temperature for that day? A. Was fifteen.

Q. What was the temperature at five o'clock on that day? A. Thirty-two.

Q. Those temperatures you give us are Fahrenheit, are they not? A. Yes, sir.

Q. And thirty-two is the freezing point? A. Yes, sir.

Mr. Strong: Cross examine.

Cross examination by Mr. Hagerty:

Q. What kind of day was it that day, Mr. Nichols? A. It was clear.

Q. What time did the sun come up that day? A. That I could not say.

Q. Well, was the sun out at all that day? A. Yes, sir.

Q. Do you know what time the sun went down? A. I don't keep that record.

Q. What time was the low temperature taken? A. We read our temperatures at five o'clock.

Q. In the morning or afternoon? A. Afternoon. We take the thermometers there to record the high and low temperatures.

Q. So, you say that the low temperature was at five o'clock in the afternoon? A. No, sir.

Q. When was that? A. The low temperature was some time during the night.

Q. When was that taken? A. I say, the temperatures are taken at five o'clock. We take them once a day only.

Q. And how are they taken? A. By reading the Government thermometers.

Q. Now, when you say at five o'clock it was thirty-two, is that the low temperature for the day or the high? A. Well, no, it is not either.

Q. Well, now, all right, for that day you said the temperature at five o'clock was thirty-two? A. Yes, sir.

Q. Now, is that the cold part of the day or is that the warm part of the day? A. Well, it is cooling off. The warmest part of the day has passed.

Q. Have you got the temperature for the warmest part of the day? A. I read it as thirty-five.

Q. Thirty-five. What time was that? A. That I could not say, because I haven't——

Q. What? A. I don't make a record of that. We don't make an hourly reading.

Q. You can't say whether the sun was out that day? A. The sun was out.

Q. You can't say when the sun came up? A. All I can say on that, according to the Government specifications, if the sun is out all day with the exception of about three-tenths of the day, it is considered as clear, so, according to my readings I would say that it was clear; the sun was out all day.

Q. How could the thermometer show fifteen and thirty-five at the same time? A. They are special thermometers of the United States Weather Bureau, Department of Agriculture.

Q. Yes? A. And showing—they show the maximum and minimum temperatures for the day, and they are re-set again at five o'clock when we take the readings of the temperatures.

Q. Now, do I understand you, then, that the Government relays news as to the temperatures? A. No, sir, I relay it to the Government.

Q. Now, don't you get some of your temperatures at Trenton, New Jersey? A. Not my temperatures, no. The temperatures on this sheet here are taken all at New Brunswick.

Q. Can you tell, Mr. Nichols, at five o'clock in the afternoon, what the temperature was the night before or the day before? A. From five o'clock until five o'clock, we can tell the maximum and minimum temperatures by the——

Q. How? A. By the instrument that we have there, Government instruments official.

Q. Then, what instrument shows the fifteen and the other thirty-five? A. I beg your pardon?

Q. What instrument is it that shows the fifteen and the other thirty-five? A. We have one thermometer that shows the maximum temperature, and another thermometer that shows the minimum, and we read those two.

Q. At the same time? A. At the same time.

Q. Well, can there be a maximum and a minimum at the same time, temperature? A. No.

Q. Well, then, how do you arrive at thirty-five and fifteen? That is what I am trying to get at, Mr. Nichols. If you read them the same time, you can't give a temperature of thirty-five— A. The instruments are so constructed—if you care to, I will explain the instruments to you.

Q. Well, it might be— A. On the maximum thermometer there is a small obstruction at the base of the column, just an opening enough so as the temperature increases, the mercury is pushed by that obstruction; and, then, as the temperature decreases or goes down, the temperature—or the mercury stays up above the obstruction in that column, which will give you the maximum reading. To get that back to normal, you have to spin that very violently to get it back, so you can get the set temperature or the present temperature.

When we read the instruments, on the minimum thermometer, that is worked a little differently

there—ether, I believe, it has—where it comes from the top down, there is a small bar in the column. The ether as it grows colder expands and shoves the small bar down. As it gets warmer, the ether leaves the bar where it is at and goes back up to normal again, and that stays there.

Q. When are these thermometers set to get the temperature used the next day? A. At five o'clock. When I take the reading, I set them.

Q. That is, do you read from five o'clock in the afternoon until five o'clock the next morning? A. Yes, sir.

Q. And, then, you don't take the temperature again from five o'clock one afternoon until five o'clock the next afternoon? A. No, sir.

Q. And, then, do they—does this highest temperature show in the sun or in the shade? A. That is in a cage constructed by the United States Weather Bureau standards. It has venetian blinds on the sides of it so the air can get to it, and a double roof on it so that the sun is not hitting it at any time.

Q. So, it is not taken in the sun, is it, Mr. Nichols? A. No, sir.

Q. Then, you don't know the temperature on the pavement, then, Mr. Nichols? If this pavement, as they allege, was sprinkled in the afternoon and the sun shone on that pavement, wouldn't the temperature be different with the sun on that pavement?

Mr. Strong: I object to that, if your Honor please, as calling for a conclusion; in the second place, there is no testimony it was.

The Court: He has testified to temperatures, and has explained under what condi-

tions these temperatures were taken, the construction of the box or container in which these thermometers were. He has testified as to the reading of those particular thermometers. I do not understand that he has been qualified as an expert on temperatures, except to tell what the thermometers read. It may be that he is, but it does not yet appear. I will sustain the objection.

By Mr. Hagerty:

Q. Your thermometers, Mr. Nichols, show temperatures taken out at the Experimental Station, two miles from the scene where this accident is alleged to have occurred, and in the shade, is that right? A. They are in this little building, yes, sir.

Q. Can you tell what the temperature at any point in the City of New Brunswick would be at two o'clock in the afternoon and at five o'clock in the afternoon? A. No, sir.

Mr. Hagerty: Then, I move his testimony be stricken.

The Court: It will be allowed to remain for what it is worth.

Mr. Hagerty: That is all.

Re-direct examination by Mr. Strong:

Q. Just one question, Mr. Nichols. As I understand from your testimony, the low temperature of fifteen degrees occurred prior to five o'clock on November 17, 1933? A. Yes, sir.

Mr. Hagerty: I object to that. It is irrelevant and immaterial.

Mr. Strong: That is the only question I ask.

The Court: Well, I don't think it is quite proper re-direct.

By the Court:

Q. Mr. Nichols, this low temperature occurred some time between five o'clock in the afternoon of the previous day and five o'clock that afternoon, is that correct? A. Yes, sir.

Q. Presumably some time during the previous night, is that correct? A. Yes, sir.

Q. And the high temperature occurred within some time during the day of November 17, is that correct? A. Yes, sir.

Q. But you have no means of knowing at what time the temperature reached this maximum and commenced to fall? A. Only from past experience in watching the gauge is all.

Q. But you made no record of it? A. No, sir.

Q. Have you your record of the 18th with you? A. Yes, sir. I have the whole month here.

Q. Well, was the 18th a warmer day or a colder day than the 17th? A. It was warmer, thirty-eight was the maximum, and thirty-one was the minimum.

Q. The minimum between five o'clock in the afternoon of the 17th and five o'clock in the afternoon of the 18th was thirty-one? A. Yes, sir.

Q. All right. How about the day before, the 16th reading? A. Maximum was twenty-eight; the minimum was fourteen.

The Court: All right.

ISOBELLA SIVAK, one of the plaintiffs, called as a witness in her own behalf, being first duly sworn, testified as follows:

Direct examination by Mr. Strong:

Q. Mrs. Sivak, you are one of the plaintiffs in this suit? A. I beg your pardon?

Q. You are one of the plaintiffs bringing this suit? A. Yes.

Q. And you are the wife, are you not, of Andrew Sivak? A. I am.

Q. Where do you live? A. 158 Louis Street, New Brunswick.

Q. 158 Louis Street? A. New Brunswick.

Q. I want you to talk loud enough, now, so that everybody on this jury can hear you. A. All right.

Q. Did you live there in November, 1933? A. Yes, I just moved there.

Q. I see. You were injured on November 17, 1933? A. 1933, yes.

Q. What sort of day was it? A. Well, to my recollection, it was sort of—the sun was out, but not all day. It would come out and it would hide again. The sun was out, but it was cool.

Q. Did it rain or snow on that day? A. No.

Q. Now, some time in the afternoon, did you leave your house? A. I was out earlier in the afternoon.

Q. I see. At the time you were injured, were you going on any errand? A. Yes.

Q. Where were you going? A. I was going to the store to do my shopping.

Q. Your house is on Louis Street right near Central Avenue, is it not? A. Yes, the last house on Louis Street.

Q. Up to the point where you started to cross Central Avenue, will you tell us just what movements you made? A. At the time of the accident?

Q. Just before the accident. A. Before the accident, well, I left the house to go to the stores, and I walked across the street.

Q. Across what street? A. Louis Street, and there is a dirt path, it is not very long. I walked that through the property there, and I still took a few more steps to the door of the store there, to cross there, and I got about, I believe, maybe half way——

Q. Well, now, just a second. You took this catty-corner path and went a few more steps on Central Avenue, did you? A. Yes.

Q. And then started across? A. Yes.

Q. Well, now, as you crossed Louis Street in front of your home, what was the condition of that street? A. Well, it looked sort of wet.

Q. Louis Street? A. Oh, you mean, Louis Street?

Q. Yes, the street your house was on. A. Louis Street was all right. It was dry, nothing there.

Q. As you came to Central Avenue, did you notice that street? A. Yes, I did.

Q. What was its appearance? A. Well, it looked sort of wet like, as though it had been wet, the whole street.

Mr. Hagerty: I object to that.

By the Court:

Q. Just a minute, now. Just tell what you saw, not what you— A. Yes, that is what I saw in front of me. It looked sort of, well, wet, and I started to walk across the street, and I got about,

I believe, half way across, and there must have been some ice. I slipped on it.

Q. Not what there must have been.

Mr. Hagerty: I ask that it be stricken out.

The Court: That will be stricken out.

By Mr. Strong:

Q. You got half way across, and did you go down? A. Yes.

Q. How did you go down? Did you slip?

Mr. Hagerty: Well, now, if the Court please. Just a minute. Let the witness testify.

A. I slipped.

The Court: Just a minute, now.

Mr. Strong, don't lead your witness on the very crux of the whole case.

Mr. Strong: I beg the Court's pardon.

By Mr. Strong:

Q. How did you happen to fall down? A. I slipped. My leg, I feel, I believe, went under me. I could not get up. I didn't lose full consciousness. I wasn't fully conscious, I don't believe. I imagine I screamed.

Mr. Hagerty: Now, if the Court please——

By the Court:

Q. Not what you imagine. A. Well——

Q. Just tell what did happen. A. You know, when you fall like that, I don't know. You just can't explain it.

By Mr. Strong:

Q. At any rate, you were on the ground?

By the Court:

Q. Well, don't tell us anything that you can't explain. Just tell us what you can explain and what you really do remember.

By Mr. Strong:

Q. And then you were on the ground, as I understand it?

Mr. Hagerty: I object to that as leading.

The Court: She said she couldn't get up.

Mr. Hagerty: I don't think she ever got to the ground. Mr. Strong put her on the ground.

The Court: No, she said she could not get up.

By Mr. Strong:

Q. Now, did you determine then what was on the street— A. Yes.

Q. (Continuing) that made you fall? A. Before someone came to my aid, I felt ice around me.

Q. You felt ice around you. Well, now, were there big blocks of ice around there?

The Court: Oh, Mr. Strong.

Mr. Hagerty: I object to that, if the Court please.

Mr. Strong: I will withdraw it.

By Mr. Strong:

Q. What appearance did the ice have? A. Well, there was—when I looked, there were ice in spots,

and in other spots like and the places, it was sort of wet like.

Q. Well, now, who lifted you up? How did you get up? A. Some young man came to my aid.

Q. I see. Where did you go after that? A. To the hospital.

Q. Middlesex Hospital? A. Yes, to Middlesex Hospital.

Q. How long were you in Middlesex Hospital? A. From eleven to thirteen days, I believe.

Q. Do you recollect that operation that Dr. Nafey performed on you? A. Yes, Dr. Nafey performed the operation.

Q. Do you remember wearing a cast after that? A. Yes, I did.

Q. After you got out of the hospital, where did you go? A. Home, to 158 Louis Street. I was taken home.

Q. Were you up and around then or were you in bed? A. No, I was in bed.

Q. For how long were you in bed? A. Well, I don't remember exactly, but I do know at Christmas, still with the cast on, I was up on crutches. I was helped in to see the Christmas tree. That I remember.

Q. After that, were you in bed or up and around? A. Not up and around. Some time in bed, and some time up.

Q. Did you come out of your house? A. No, I could not.

Q. When did you go out of your house? A. Well, I was still unable to go around like that, just in the house, and I had a girl taking care of my home for me.

By the Court:

Q. No. The question is, when did you go out? You got out sometime, because you are here this

morning. A. Yes, I did get out. The weather was warm when I was out, just around the house, walking around with the aid of a cane then.

By Mr. Strong:

Q. Now, there was a baby born to you after this accident? A. February it was born.

Q. What was the date? A. The 6th.

Q. The 6th of February? A. Yes.

Q. At that time, did your knee bother you? A. Yes, more so than ever on account of the weight.

Q. After you had recovered from the effects of childbirth, did your knee still bother you? A. Well, it did cause me discomfort.

Q. In what way? A. Well, I could not bend it.

Mr. Hagerty: Well, now, if the Court please, that is very leading. I don't like to be objecting all the time.

Mr. Strong: I am asking her in what way it caused her discomfort.

A. Yes, it hurt.

By the Court:

Q. What happened? A. It would hurt and feel sensitive, and bad weather I would feel like there was something wrong with my knee.

By Mr. Strong:

Q. Now, do you still have pain in your knee? A. I beg your pardon?

Q. Now, do you still have pain in your knee?

The Court: Oh, Mr. Strong.

A. It doesn't hurt.

Mr. Strong: The answer is, "It doesn't hurt."

The Court: All right, if you want to bring it out that way that there is no permanent injury. In other words, there is no contention that there is any permanent injury, is that correct?

Mr. Strong: No, there is no permanent injury.

By Mr. Strong:

Q. When did the pain stop in your knee? A. Well, I don't just remember when the pain stopped, but it did feel sensitive for quite awhile.

Q. Well, how long do you mean by quite awhile? A. Well, for that matter, it even feels sensitive now if I should try and do my own housework, I mean, not hurt, but it has a sensitive feeling in the knee.

Q. Do you do your own housework? A. I do now.

Q. After this injury, did you do your own housework? A. No, I could not. I had a girl up to the early part of May. I believe, some time in May I had a girl, and then after that, my mother would come and help me.

Q. I see. You had a girl until some time in May? A. No, I had her from the date that I got home from the hospital up to May. I paid her five dollars a week to take care of—do my work.

Q. You paid her five dollars a week? A. And board.

Q. Did she live in your house? A. She stayed with me at that time, yes, all the time.

Q. Besides her board, you gave her five dollars a week? A. I beg your pardon?

Q. Besides her board, you gave her five dollars a week? A. Five dollars a week, yes.

Q. Until May, 1934? A. Yes, May.

Q. Do you have any other injuries besides— A. Yes, I do.

Q. What? A. I had that femur, the doctor spoke about, fifteen years ago, I got that.

Q. Did that trouble you at all since— A. No, I went to work a good many years after that.

Q. I mean, at the time the kneecap was broken, did you receive any other injuries in the fall? A. Well, the only thing, that my knees was swelled up and it was bruised.

Mr. Strong: I see. Cross examine.

Cross examination by Mr. Hagerty:

Q. Now, Mrs. Sivak, you lived at 158 Louis Street— A. Louis Street, yes.

Q. (Continuing) on November 17, 1933? A. Yes.

Q. And Louis Street runs at right angles to Central Avenue, and Central Avenue runs this way (indicating)? A. Yes.

Q. And Louis Street comes along this way (indicating), isn't that so? A. Yes.

Q. And you started from your home at what time that afternoon to do these errands? A. Oh, between four-thirty and five.

Q. And you walked over to the street? A. Across the street.

Q. Toward Central Avenue, and, you say, that Louis Street, the street on which you lived, was dry? A. Yes, it was.

Q. And then you came up to the sidewalk on Central Avenue, and you could see the road ahead of you, could you not? A. Yes.

Q. Was the road wet? A. It looked wet, yes.

Q. Did it look as though there was any ice on it, on the road? A. I hadn't noticed.

Q. I mean, you noticed that it was wet? A. Yes, wet like in spots.

Q. Well, now, did you do anything, then, when you saw the road wet? A. No.

Q. When you got to the curb, didn't you hesitate about stepping across it because it was wet? A. No, I got an errand to go across there to the store, so I just started out, I mean, I didn't hesitate.

Q. When you got to the curb and saw the road was wet, you didn't hesitate before going across? A. No.

Q. When you were there, did you see any icy spots on the road? A. I didn't notice any ice spots until after I fell.

Q. Now, what part of the road were you when you fell? A. I believe, about half way across.

Q. In the middle of the road. Was the sun shining at that time? A. Not at that time.

Q. What? A. Not at that time.

Q. When did the sun stop shining? A. I don't remember when it was shining, but I don't even believe it shined.

Q. I thought you said, Mrs. Sivak, that the sun was out more or less during the day? A. During the day, yes.

Q. When you left your house, was the sun shining then? A. No, I hadn't noticed the sun shining then.

Q. How long were you gone from your house? A. Just until that short time that I explained to you, to go across the street.

Q. Didn't you start out at two o'clock that afternoon to do some shopping? A. I was home. I came home to the house.

Q. Now, then, at two o'clock, when you left to go shopping, was the sun shining then? A. During the day it was out.

Q. Well, at two o'clock, when you also attempted to do your shopping, was the sun shining then? A. At two o'clock?

Q. Yes. A. I didn't go out as early as two, but when I did go out, there wasn't sun.

Q. Well, when you did go out, Mrs. Sivak, whether it was two o'clock, three o'clock, or four o'clock, or whether it was one, was the sun shining when you first left your house that day? A. Well, there was some sun, yes, I believe.

Q. Well, now, what time did you get back to the house after your first— A. What time?

Q. When you first left to do some shopping and came back, what time did you come back? A. A little bit before four.

Q. Was the sun shining then? A. I hadn't noticed then.

Q. Now, then, didn't you notice whether it was shining when you came out the second time to go on the second errand? A. No, I don't believe it was shining then.

Q. Are you positive? A. I didn't see any sun then at four-thirty, between four-thirty and five.

Q. Now, the second time you left, where were you going to go? A. I was going across the street to the store.

Q. To what store? A. Sotak's store.

Q. Who? A. Sotak's store.

Q. Now, when you stepped off the curb, Mrs. Sivak, to go over the road, onto the road, did you notice ice there then? A. No, I didn't noticé ice.

Q. Did you notice—was there any ice when you stepped off the curb? A. No, I didn't notice any ice until I was—I fell.

Q. And there was no ice on that roadway until you got to the center of the road? A. Well, I didn't look that close to know whether there was ice or not.

Q. I thought, on your direct testimony, you said part of the road was wet? A. Yes, part, and a part of it was dry.

Q. Was it dry? A. Yes.

Q. And part had ice on it? A. I don't know about—saying anything about ice. I discovered about the ice that I fell on after I fell.

Q. Wasn't there any ice on the road that day? A. Well, I hadn't noticed. It looked sort of just wet to me.

Q. Yes. That is what it looked like, wet. It wasn't icy, was it? A. Well, it must have been icy. I fell on ice on some part.

Q. Did you ever slip in the house on a wet cloth on the linoleum? A. Well, you see, it must have been such a thin thickening, kind of sprinkled, you see, it looked very sleek—it must have been a very thin film the way it was sprinkled there.

Q. It was a thin film? A. I say, it must be.

By the Court:

Q. Not what it must be. What it was.

By Mr. Hagerty:

Q. You call the ice a film, don't you, it was so thin? You say it looked like water, is that what you say? A. Just what it looked like there, just around about me that I noticed.

Q. Mrs. Sivak, it was so thin you could not see it, could you? A. Well, I don't notice any ice when I started to walk.

Q. It was so thin it was water, wasn't it?

Mr. Strong: You mean, after she fell?

Mr. Hagerty: At the time she fell, immediately.

A. At the time I fell, I didn't know anything right away, but when I did——

By Mr. Hagerty:

Q. I mean, just a second or two seconds before you fell, that was so thin that it looked like water, wasn't it? A. Just before I fell?

Q. Yes. A. I didn't look that close after I started crossing.

Q. Did you look after you fell, Mrs. Sivak? A. After I regained sort of consciousness, I knew that I fell on ice.

Q. Before you fell you didn't notice whether it was ice or whether it was water; after you fell, with the broken kneecap, then you discovered it was ice, is that it? A. Yes.

Q. And, then, right there and then? A. Not right there and then. I did know it was ice I fell on, and I had been—I overheard a man who picked me up saying that this is——

The Court: Oh,——

By Mr. Hagerty:

Q. Wait a minute. Then, you didn't see any ice on the street that day at all? A. That was just that particular time I was going across. See, I didn't see the street any other time.

Q. Mrs. Sivak, the only reason why you think there was ice on the street at that time is that the man that picked you up told you there was ice on it? A. No, I know there was ice. I felt the ice.

Q. You felt that that day, could you? A. After I fell, and I sort of regained consciousness, because there was no aid right away, I don't believe. I didn't fully faint. That I know.

Q. You didn't fully faint? A. I didn't lose fully consciousness, and, then, when I do remember, I was screaming, and I felt that, I felt the ice.

Q. But you could not see any ice there on the street before you fell? A. I felt it.

Q. What did you do? Put out your hand and reach to feel it? A. I had to put my whole body.

Q. And when you put your hand out, you felt the ice, is that it? A. Yes.

Q. But you didn't see it before you started to cross that street, did you? A. I never thought of anything when I was crossing the street.

Q. Now, you thought they had just been sprinkling the street? A. Yes, I thought that, because I saw that it was wet, so it must be that. There wasn't any other place.

Mr. Hagerty: That is all.

HELEN BISHOP, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. Strong:

Q. Mrs. Bishop, where do you live? A. At the present time, 265 Somerset Street.

By the Court:

Q. Keep your voice up, Mrs. Bishop.

By Mr. Strong:

Q. November, 1933, where did you live? A. At 227 Hamilton Street.

Q. That is near Central Avenue, is it? A. No, it is on the corner of Harvey and Robinson.

Q. That is about— A. It is a block from Central Avenue.

Q. Now, do you know the plaintiff Isobella Sivak? A. Yes.

Q. Did you know her in November, 1933? A. Yes.

Q. Did you learn that she had been injured on November 17, 1933? A. Yes, her husband stopped in and told me that evening.

Mr. Hagerty: Well, I object to that.

The Court: I think it is harmless.

By Mr. Strong:

Q. On that day in question, did you see any streets being sprinkled? A. Yes.

Mr. Hagerty: I object to that, if the Court please.

The Court: On what ground?

Mr. Hagerty: Any street being sprinkled? It might have been the whole city being sprinkled.

Mr. Strong: We will connect it up, if your Honor please.

The Court: All right.

By Mr. Strong:

Q. What streets did you see them sprinkling? A. Harvey Street and Robinson Street.

Mr. Hagerty: Just a minute, now, if the Court please,——

The Court: Harvey Street and Robinson Street?

Mr. Hagerty: I move that that be stricken out, because the street that we are involved in here is Central Avenue.

Mr. Strong: Well, now, I expect to show, with counsel's permission and the Court's permission, that Harvey and Robinson Streets run right into Central Avenue. Counsel's answer denies that the street was being sprinkled. Now, I will show through this witness and others that the streets were being sprinkled on that day. This witness shows it was in the vicinity of the spot in question.

The Court: I think you have to get right down to the street in question. The fact that they sprinkled somewheres else isn't material at all to this issue, and the jury must disregard the testimony of this witness that she saw Harvey Street and Robinson Street sprinkled, as it appears to the Court at this time.

Mr. Strong: Will your Honor grant me an exception?

The Court: Exception allowed.

By Mr. Strong:

Q. Now, Mrs. Bishop, what was the appearance of the streets that were not sprinkled?

Mr. Hagerty: Now, if the Court please. Just a minute. Are we interested in the appearance of streets that were not sprinkled in the City of New Brunswick?

The Court: We are interested in Central Avenue, and Central Avenue only. Let us get down to it and save a little time.

Mr. Strong: I will withdraw the witness.

Mr. Hagerty: No questions.

ELMER LEFFERTS, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. Strong:

Q. Where do you live, Mr. Lefferts? A. 158 Hamilton Street.

Q. Where are you employed? A. Johnson's.

Q. Do you know the plaintiff Isobella Sivak? A. No, I don't.

Q. Well, did you see her on November 17, 1933? A. I was the one that picked her up.

Q. Just before you picked her up, where had you been? A. Before I picked her up?

Q. Yes. A. I was down in that vicinity. I was unemployed then.

Q. I see. Exactly where were you in that vicinity? A. On Duke Street.

Q. On Duke Street. Now, whereabouts did you pick Mrs. Sivak up? A. Well, I would say, about at the entrance of Duke Street, on Central Avenue.

Q. Now, before you picked her up, did you see the city sprinkler that day? A. I did.

Q. Where did you see it? A. Going down Central Avenue.

Q. Was it in operation? A. Yes.

Q. How long before you picked up Mrs. Sivak was that? A. Oh, I would say, an hour, an hour and a half. I just don't remember.

Q. I see. What did you notice about the condition of the street, the spot where you picked Mrs. Sivak up? A. Well, there was a thin film of ice, coating of ice at the spot where she fell.

Q. I see. What was the appearance of the rest of the street? A. Well, it seemed to be dry in spots.

Mr. Hagerty: Just a minute. The rest of the street or the rest of the streets?

Mr. Strong: The rest of the street.

A. It seemed to be dry in spots, and, then, the little hollows in the street where water lays, there is no doubt where Mrs. Sivak fell.

Mr. Strong: Cross examine.

Cross examination by Mr. Hagerty:

Q. It was dry in spots and water in little hollow places? A. Right.

Q. But where she fell was the ice, is that it? A. Well, I imagine, on all those hollow spots——

Q. Yes, don't imagine at all. You are under oath, Mr. Lefferts.

Mr. Strong: Well, this is the only one he observed.

The Court: Now, there is no need of such remarks.

By Mr. Hagerty:

Q. There was a little hollow spot in that road, wasn't there? A. Right.

Q. Many of them? A. Well, I don't know as there was many of them or not.

Q. Well, how many would you say there were, did you see? A. Oh, I can't——

Q. Would you say a dozen or fifteen? A. Yes, I would say a dozen or fifteen.

Q. And right around where Mrs. Sivak was going across the road, right at that crossing there? A. Yes, there was.

Q. And was some of them right where she fell? A. What was that?

Q. And was some of them right where she fell? A. Was some?

Q. Was some of those hollows or little pools there right where she fell? A. Yes.

Q. And there was water in them, wasn't there? A. There was ice in them.

Q. Oh, ice in them? A. Yes.

Q. Now, a minute ago you said there was dry spots and little pools where the hollows were with water in them. Now, you say there was ice in them? Which is right? A. Well, the pools was frozen with ice where the water was laying in those hollows.

Q. Then, there wasn't pools; they were frozen over solid, weren't they? A. Well, I don't know as they were frozen solid or not. It was just a thin layer of ice.

Q. Did you take a look at the ice and examine it? A. No, I didn't.

Q. Do you know how thick it was? A. No, I don't.

Q. A minute ago you said it looked to you like a film? A. Yes.

Q. How did you determine there was ice in it? A. How did I determine it?

Q. Yes. A. How did I determine it was ice?

Q. Yes, how did you determine it was ice? A. I know ice when I see it.

Q. You saw ice? A. Yes.

Q. And where did you see the ice? A. In these little hollows.

Q. Did you see it anywheres else but in those little hollows? A. No.

Q. Did you see any near the curb when she stepped off? A. I didn't notice.

Q. Did you look? A. No, I didn't.

Q. Did you look any other place for ice but right there where she was? A. No, I didn't.

Q. When did you first notice ice right at this particular spot, Mr. Lefferts? A. When did I first notice it?

Q. Yes. A. Well, as soon as I ran over to pick Mrs. Sivak up.

Q. You didn't slide on it when you were running across, did you? A. No, I didn't.

Q. How much ice would you say was right around that particular spot where Mrs. Sivak fell? A. How much? Just what do you mean, how much ice?

Q. Well, would you say a piece as big as this pad I am holding, or was it a big sheet right across? A. I could not tell you; I don't remember.

Q. Well, now, let us see, did she fall in the middle of the road, or did she fall just as she stepped off the curb? A. She fell in the middle of the road.

Q. Did you see any ice—you say there wasn't any ice near the curb where she stepped off? A. I didn't notice.

Q. What? A. I hadn't noticed whether there was any ice or not.

Q. Wouldn't you see it, Mr. Lefferts? A. I don't know. I suppose I would if I looked for it.

Q. Well, how did you come to look for this particular piece of ice that Mrs. Sivak slid on or fell? A. Because she was laying right on top of it.

Q. Oh, that was it. She had it hidden from you, laying right on top of it? What was the size of that piece that she was laying on? A. Oh, I don't know.

Q. Now, do you know anything about this case at all, Mr. Lefferts?

Mr. Strong: Oh, I object to that.

Mr. Hagerty: All right.

The Court: What is objectionable about it? It is cross examination, I suppose.

Mr. Strong: I withdraw the objection.

A. All I know is, I picked the lady up.

By Mr. Hagerty:

Q. And you don't know whether there was any ice on Central Avenue that day or not, do you? You know that she was on the ground, and you picked her up, is that so? A. That is right.

Q. And that is all you do know, isn't it, Mr. Lefferts?

Mr. Strong: If your Honor please, it has been answered many times. The witness says he picked her up, and he found ice there.

The Court: This is cross examination, and counsel is entitled to some latitude on cross examination, especially when he is attempting to test the credibility of a witness.

By Mr. Hagerty:

Q. I see, Mr. Lefferts, all you know, you were on the corner of Duke and Central Avenue—did you say Duke intersects Central Avenue? A. That is right.

Q. You were there, about how far is that from this spot where Mrs. Sivak fell? A. I would say—from where I was, you mean?

Q. Yes. A. About a hundred yards.

Q. A hundred yards. Could you see from where you were, could you see her fall? A. No.

Q. Now, how did you get down there from Duke and Central Avenue? A. Oh, I was already past her. I was on my way home, and I already passed her, and I heard the woman scream, and I turned around and went back and assisted her.

Q. I thought you were up at Duke and Central Avenue. A. Oh, that is where I was mostly all day.

Q. But, at the particular time this accident happened, you weren't at Duke and Central Avenue? A. No, I was on my way home.

Q. How far away from her were you when you heard this yell or scream? A. Oh, I would say, a hundred feet past.

Q. A hundred feet? A. Yes.

Q. Didn't any other person return to her besides you? A. Yes, there was.

Q. How many of them? A. There was two or three of us.

Q. And they were there when you picked her up? A. They were.

Q. And helped to pick her up, too? A. Yes.

Q. Did you go to the hospital with her? A. I did.

Q. When did you first talk to her about there being ice in the road? A. When did I first talk to who?

Q. Mrs. Sivak. A. I haven't talked to her about there being ice in the road.

Q. Doesn't she know up until today that you knew there was ice in that road? How did you

come to be a witness here if you didn't speak to Mrs. Sivak about ice in the road? A. This is the first I have seen Mrs. Sivak since the time of the accident.

Q. Who did you talk to about the ice being in the road? A. Mr. Strong got in touch with me.

Q. Oh, and on the way to the hospital after the accident, you didn't say anything to Mrs. Sivak about her slipping on the ice? A. No, I didn't.

Q. And you didn't say anything to her about there being ice in the road at the time? A. No.

Q. When did you first tell Mr. Strong that there was ice in the road there? A. I don't know. I don't remember that.

Q. Now, can't you remember? Was it three years afterward? A. Oh, maybe a year or so, I could not tell you.

Q. Was it two years afterward? A. I would say, about a year.

Q. The suit wasn't started, you know, until about 1935. This happened November 17, 1933, and the suit was instituted in 1935. Now, was it 1935 when you told Mr. Strong that there was ice out on the road that day? A. I could not tell you.

Q. Well, it was around that time, wasn't it, Mr. Lefferts? A. I guess so.

Mr. Hagerty: That is all.

Re-direct examination by Mr. Strong:

Q. Now, Mr. Lefferts, do you know the name of the other person who helped pick Mrs. Sivak up? A. Lawrence Nicholson.

Q. He is employed by the City of New Brunswick, isn't he? A. I don't know.

Mr. Strong: That is all.

By the Court:

Q. Mr. Lefferts, from which side of the street was she crossing with reference to the side of the street you were on? A. She was on my opposite side, on my right side.

Q. Crossing towards your side of the street? A. Crossing towards my side, yes.

Q. And you had gone on about a hundred feet beyond the point where she was crossing? A. That is right.

Q. Now, how did you go back to where she was? Continue up the sidewalk or go straight to her? A. That I don't know. I know I heard screams, and I know I went there the fastest way possible. I saw her laying in the road.

Q. Did you walk, or how did you go? A. That I don't remember, whether I ran or walked or how.

Q. But, anyway, you got to her? A. I got to her.

Q. Did you see anyone else fall on that day right there? A. No.

Q. How many others were around there? A. Why, there was a car came along just as I arrived, and he was a painter, and he had his back seat full with cans and paint and things. It was impossible to put Mrs. Sivak into the——

Q. Never mind that. How many others were around where Mrs. Sivak was before she was taken away? A. I would say, four or five. Who they were, I could not tell you.

Q. This ice or water lay only in the depressions or hollows in the street, is that correct? A. Yes.

Q. And the high spots of the street, there was no ice or water at all? A. Well, they were damp, I imagine——

Q. Not what you imagine. What you saw. A. I don't remember whether they were perfectly dry or wet.

Q. Well, you said they were dry, didn't you? It was dry in spots and water or a skin of ice in the hollows? A. That is right.

Q. Is that correct? A. That is right.

Q. How close together were these hollow spots? A. That I didn't take notice to.

Q. Well, can't you give us any idea? A. Oh, I will say, maybe four foot, two foot.

Q. Two to four feet apart? A. Yes.

The Court: All right, that is all.

The Court: We will now recess until one-thirty.

PHILLIP S. AVERY, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Strong:

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

Q. How long have you been a physician? A. How long have I been a physician? Since 1924.

Q. Do you specialize in any field? A. In X-Ray.

Q. How long have you been specializing in X-Ray? A. Seven years.

Q. What institutions are you connected with now? A. Middlesex General Hospital in New Brunswick, and the Princeton Hospital, in Princeton.

Q. Are you a roentgenologist in both institutions? A. Yes.

Q. How long have you been roentgenologist in Middlesex Hospital? A. Four years last September.

Q. By roentgenologist is meant an X-Ray specialist, does it not? A. That is right.

Q. Do you have with you X-Rays of Isobella Sivak, made by you in November, 1933? A. They are right here.

Q. When were those X-Rays taken, doctor? A. On the eighteenth of November, 1933.

Q. Where were they taken? A. At Middlesex General Hospital.

Mr. Strong: With the Court's permission, may I have that X-Ray box?

By Mr. Strong:

Q. How many pictures did you take, doctor? A. Two.

Q. Did they both show a fracture? A. They do.

Q. What positions were the pictures taken? A. They were taken one in the lateral position and the other in the anterior posterior position.

Q. That is— A. One directly down in front, and one with the knee on the side.

Q. Now, doctor, will you take those X-Ray pictures and engage that machine there, and indicate to the jury just where the fracture occurred? A. This film is the film taken, I said, of the anterior posterior, in other words, down through this direction, from front to back of the knee. This film is the film taken sidewise or in the lateral position.

In the lateral view, you see the patella or knee cap out in front of the big bone of the knee. There is a complete break through the patella with a

small fragment, perhaps a third or, let us say one-fourth of that bone broken off and displaced downward.

The separation of the fragment is rather indicative of a rupture of the capsule surrounding the knee joint. We judge that simply by the degree of separation between these fragments. We can't see the capsule by X-Ray.

If you will look at it in this view, which is the A. P. view, the patella is partially obscured by the bone. In other words, we are going through the two bones at the same time, but you can see the fracture line through this position as you do on the other. This one shows more distinctly the position of the fragments and this broken capsule of the knee cap or patella.

Q. Doctor, you spoke of the rupture to the capsule. A. We simply judge that by the fact that the fragments of the broken bone are widely separated. If they are close together, we can't see that, and we don't see the capsule. It is just simply an assumption because of the separation of those fragments.

Q. Doctor, in ordinary words, where is that capsule, and where is it located on that picture? A. It is just simply a tendon that attaches to the upper part of the patella and to the lower part, and if there is a considerable separation, you feel those tendons are pulled out. We just feel with the surrounding fractures, it is separated.

Mr. Strong: Cross examine.

Cross examination by Mr. Hagerty:

Q. Did you take these X-Ray pictures, doctor? A. They were taken under my supervision.

Q. Taking these X-Ray pictures, did you notice a scar of about seven and a half inches long,

which was a fracture of the femur of that same limb? A. I know nothing about the scar on the femur. I know that the——

Q. Just a minute. A. (Continuing)—the lower, say four inches or so in this film—on this film, and there is a change in the bone which indicates an old healed fracture.

Q. And the bone that you X-Rayed, it shows what you said? A. Not that bone.

Q. An old healed— A. I would say that there had been an old healed fracture in the femur above the knee.

Mr. Hagerty: That is all, doctor.

Re-direct examination by Mr. Strong:

Q. How far above the knee, doctor? A. As I said, only the lower four and a half inches were included, so that we don't see the upper part of the bone, but there is—evidently it was in the middle third of the femur.

Q. In other words, that is between the hip? A. At approximately the junction of the middle third of the bone and the lower third of the bone.

Mr. Strong: That is all.

Re-cross examination by Mr. Hagerty:

Q. What is the femur, doctor, so that we all understand? A. Well, the femur is the bone in the thigh.

Q. Running from the knee to where? A. From the hip to the knee.

Mr. Hagerty: That is all.

By Mr. Strong:

Q. Will you indicate on your leg, doctor, just where that old fracture was, to the jury? A. In other words, for the purpose of deciding or of naming where a fracture is, instead of saying anything else—it measures so many inches from one place to another, your femur starts at the hip joint and extends down to the knee joint. Now, we divide that into an upper third, a middle third, and a lower third, just for convenience of saying easily where the fracture or whatever you may have would be, and I could judge from these films, it is approximately where this middle third joins the lower third. I would say that fracture is at about the junction——

By Mr. Hagerty:

Q. You are referring to the old fracture? A. The old fracture, that is right.

By Mr. Strong:

Q. The present fracture is right on the knee? A. The present fracture is on the knee cap itself.

Mr. Strong: That is all. I offer the pictures in evidence.

(The X-Rays referred to were received in evidence and marked Exhibits P-1 and P-2.)

By the Court:

Q. Doctor, is there anything on the X-Ray to indicate the age of the fracture that is shown there? A. You mean the patella or the knee cap?

Q. That fracture that is shown on this X-Ray? A. Oh, yes. That looks like a new fracture. There is no evidence of callous formation or any indication that it is old in any respect.

The Court: All right, doctor.

Herbert William Nafey, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Strong:

Q. Doctor, you are a practicing physician of the State of New Jersey? A. Yes.

Q. Practicing for how many years?

Mr. Hagerty: I will admit the doctor's qualifications.

By Mr. Strong:

Q. In the course of your profession, did you have occasion to treat Isobella Sivak in November, 1933? A. Yes.

Q. When did you first see her? A. The afternoon of the seventeenth of November, 1933.

Q. And where did you see her, doctor? A. Middlesex Hospital.

Q. What diagnosis did you make of her injury there? A. Fracture of her knee cap.

Q. Was that diagnosis subsequently confirmed? A. Yes.

Q. What treatment did you give her? A. I directed her to remain in the hospital for four days, and then I operated upon her knee—knee cap.

Q. After four days you operated on her knee cap? A. Yes.

Q. What was the purpose of that operation, doctor? A. To restore the function of the knee joint, the use of the knee joint.

Q. What was necessary? What did you have to do in the course of that operation? A. Opened over the knee cap, and removed the small lower fragment of a broken knee cap, and then repaired the torn sac in which that knee cap had originally been contained.

Q. Did you take out of it approximately one-quarter of the knee cap? A. Roughly, yes.

Q. That was taken out and removed altogether? A. Yes.

Q. Then you sewed together those ruptured tissues there? A. Yes.

Q. How long did that operation take, doctor? A. Roughly an hour.

Q. You gave her anaesthesia? A. Yes.

Q. Now, after the operation, what treatment did you give the plaintiff? A. The limb was maintained in a plaster paris cast for a period of six weeks to two months, and then subsequently she was encouraged to use it, to bend it, and to get about as soon as she regained the use of her joint and limb.

Q. And this cast that was applied to the leg, doctor, what part of the leg did that cover? A. The cast enclosed the limb from about the middle of the thigh down to and including the foot.

Q. Now, there has been testimony here of an old fracture of the femur, doctor. How long had you treated Mrs. Sivak before this inquiry? She had been a patient of yours before? A. Yes.

Q. Were you familiar with the circumstances of the old fracture, so-called? A. Yes, by her own report.

Q. I see. Had she recovered from the effect of that? A. Yes.

Q. Before this injury that you speak of now? A. Yes.

Q. Were there any other injuries that you observed on the body of Mrs. Sivak except this fractured knee cap? A. Yes.

Q. What other injuries did she have? A. Very decided swelling and discoloration and abrasion of the skin and the parts about the knee.

Q. What is your bill for services, doctor? A. It was so long ago, I don't remember what it was.

Q. I show you this piece of paper and ask you whether or not that refreshens your recollection? A. Yes, right. My bill was $150.

Q. In your opinion, was that a reasonable charge? A. Oh, yes.

Mr. Strong: Cross examine.

Cross examination by Mr. Hagerty:

Q. This old scar, doctor, that you speak about— A. I didn't speak about that.

Q. Well, you told Mr. Strong about it? A. Yes.

Q. You saw that on her leg? A. Yes.

Q. And you say she fully recovered from that fracture? A. Yes.

Q. You didn't treat her for it? A. No.

Q. Did she tell you she fully recovered, or had you that information of your own knowledge? A. I had that information of my own knowledge.

Q. How, doctor? A. May I ask first, the patient—I took care of Mrs. Sivak when her baby was born, and I think that baby is now about five or six years old.

By the Court:

Q. Wait a minute, doctor. That is not proper in a court room. You must testify from your own recollection. You can't go and ask someone now

to refresh it, someone who is not under oath. A. Well, roughly five years before this accident, I took care of Mrs. Sivak in maternity, and at that time she had no evidence whatsoever of disability from her old injury, and I base that time of five years on the age of this—her oldest child, which I delivered.

By Mr. Hagerty:

Q. Now, this operation you performed on Mrs. Sivak, it was a success, wasn't it, doctor? A. Yes, sir.

Q. And a complete recovery, wasn't it? A. I think so.

Q. No permanent injury? She has not had any permanent injury? A. No.

Mr. Hagerty: That is all, doctor.

Re-direct examination by Mr. Strong:

Q. Just one question, doctor. Naturally, after the operation she did have some disability?

Mr. Hagerty: Now, I object to that. He said there was a complete recovery.

Mr. Strong: I want to determine when the complete recovery was arrived at.

The Court: Ask him that.

By Mr. Strong:

Q. When had she completely recovered, doctor? A. I should say within a year after her accident.

Q. That is the normal time for a recovery from such an injury? A. I would think so.

Mr. Strong: That is all.

Motion for a Non-suit.

The Court: First, dealing with the point that the action cannot lie against the municipality because of the theory at law which exempts a municipality from liability arising out of the performance of governmental duties, clearly, the cleaning of streets is a governmental duty that is imposed by statute. Therefore, the mere fact of washing the street does not of itself render the City liable, and you must determine whether or not there was active negligence in the manner of washing the street.

The pleading of the plaintiffs alleges that there was active negligence by doing this at the time when the temperature was below the freezing point, thirty-two degrees Fahrenheit. It seems to the Court that if the City, for instance, should go out on Christmas Eve, when the thermometer was ten or fifteen degrees Fahrenheit, and clean different streets so as to have them nice and clean for Christmas, that then we would come very close to having a case of active negligence in the cleaning of the street, because they are not compelled to clean them with water.

It seems to me that we are confronted more with the question of whether the facts are sufficient to prove such active wrongdoing. The temperature that day reached a low some time during the previous night of fifteen degrees Fahrenheit, and a high during the day of thirty-five degrees Fahrenheit, with a temperature at five P. M. on that day of thirty-two degrees Fahrenheit. The sun was shining off and on during the day. I don't think that the

jury can infer that the pavement of the street is colder than a weather tower out at the State Agricultural Experimental Station, after the sun has been shining off and on, giving the plaintiffs the benefit of every inference, all day.

I am going to decide this on that point; that the plaintiffs have failed to sustain the case within its pleadings, because by its own expert, they have failed to show that at the time this street was sprinkled the temperature was, in fact, lower than thirty-two degrees Fahrenheit, because that is the pleading. It is a matter of common knowledge that at that time of the year the greatest warmth comes during the afternoon and that the chill comes with nightfall and sundown, and, yet, from five P. M. on that day until five P. M. the next day the temperature did not once go below thirty-one degrees Fahrenheit, presumably some time during the night. The jury would not have been justified in drawing an inference to the contrary, so that if the temperature at five P. M. was thirty-two, and it had been as high as thirty-five some time during the day, and it went down to one degree below freezing after five P. M., there is nothing to show that the temperature was less than thirty-two at the time this street was sprinkled, somewheres between three and three-thirty, if we take the testimony of the witness Lefferts, that he saw the sprinkler in operation about one hour or one and a half hours before the accident, and the testimony of the plaintiff that it was between four-thirty and five, so that it was some-

wheres in the neighborhood if we take the testimony of Lefferts, of, shall we say, between three and four, to give it its widest spread that this street was sprinkled.

There is no testimony that the temperature at that time was less than it was at five o'clock, when it was just thirty-two, so I feel that the plaintiffs have failed to prove a case within their pleadings, and, of course, considering everything to be true, as I am in duty bound on this motion, the plaintiffs have still failed. I will, therefore, grant a non-suit.

Mr. Strong: I take an exception to your Honor's ruling.

(In the courtroom.)

The Court: Ladies and gentlemen of the jury, a motion for a non-suit as to both plaintiffs has been made by the defendant on legal grounds, and I have found as a matter of law that the defendant is not liable, so far as the plaintiffs have attempted to prove their case, and I therefore have granted the motion for a judgment of non-suit against both plaintiffs. That completes your service in this case.

New Jersey Court of Errors and Appeals

ISABELLA SIVAK and ANDREW SIVAK, Plaintiffs-Appellants, vs. CITY OF NEW BRUNSWICK, a municipal corporation, Defendant-Appellee.	Action at Law On Appeal from New Jersey Supreme Court, Middlesex County. Sat Below: Barbour, C. C. J.

BRIEF OF PLAINTIFFS-APPELLANTS

Plaintiffs-appellants appeal from a judgment of non-suit entered in their action for personal injuries sustained by Isabella Sivak and damages per quod for her husband Andrew Sivak. The case was tried April 13th, 1937, before Circuit Court Judge Barbour and a jury at the Middlesex Circuit of the Supreme Court. The judgment was ordered at the conclusion of the testimony presented on behalf of plaintiffs-appellants.

Two grounds of appeal (page 2) are specified, both alleging that the judgment of non-suit was erroneous.

STATEMENT OF FACTS

Plaintiff-appellant, Isabella Sivak, resided on Louis Street in the City of New Brunswick (page 20 line 18). On November 17, 1933, she left her home and crossed Louis Street which was dry (page 21, line 20-28). She came to Central Avenue which "looked sort of wet like, as though it had been wet, the whole street" (page 21 line 31). She started to walk across Central Avenue and had gotten about half way across when she slipped and fell (page 22, line 28). She didn't notice any ice until she had fallen (page 29, line 39). Part of the street looked wet and part dry (page 30 line 10). That

which looked wet actually was covered by a thin film of ice (page 30 line 22-35), which plaintiff-appellant discovered after she had fallen (page 31 line 23). She felt the ice (page 31 line 40). About an hour or an hour and a half before the street had been sprinkled with water by the sprinkler of defendant-appellee (page 35 line 35-40). It left a thin film of ice where plaintiff-appellant fell and the rest of the street was dry in spots (page 36 line 1-10). Between 5:00 o'clock P. M. on November 16, 1933, and 5:00 o'clock P. M. on November 17, 1933 (the day of the injury), the official temperature at the New Jersey Agricultural Experiment Station two miles from the scene of the accident (page 18 line 16) had reached a low of 15 degrees Fahrenheit and a high of 35 degrees Fahrenheit (page 13 line 38, page 14 line 2). At 5:00 o'clock P. M. on November 17, 1933, the temperature was 32 degrees Fahrenheit (page 14 line 4) the freezing point (page 14 line 10). As a result of the fall, plaintiff-appellant, Isabella Sivak, sustained a fracture of her kneecap (page 48, line 33). The fall occurred at between 4:30 and 5:00 o'clock P. M. (page 29 line 28).

On these facts, the trial Judge, inferring that if the sprinkling had frozen there would have been actionable negligence (page 54 line 15-30), held that the plaintiffs-appellants had failed to prove the street was sprinkled so as to produce ice at the time (page 54 line 30-40, page 55) completely disregarding the testimony of plaintiff-appellant and the witness Lefferts that there actually was ice formed on the sprinkled street.

POINT I
THE TRIAL JUDGE ERRED IN GRANTING THE MOTION FOR A NON-SUIT BECAUSE A PRIMA FACIE CASE WITHIN THE PLEADINGS WAS PROVED.

The trial court granted the motion for non-suit

solely on the ground that the plaintiffs-appellants had not proven what they alleged, i.e., that the temperature at the time of the sprinkling of the street was below 32° Fahrenheit (page 55 line 10).

In a narrow construction of the testimony, leaving out all inference which plaintiffs-appellants are entitled to draw from the evidence adduced, the trial court can properly reach such conclusion.

But, actually, on behalf of plaintiffs-appellants, it was proved that the street in spots was covered with ice (page 36 line 15, page 37 line 12), which was a thin layer of ice (page 37 line 27, page 30 line 33), that an hour to an hour and a half before (page 35 line 40) the street had been sprinkled by defendant-appellee's sprinkler (page 35 line 35), that it was a dry day (page 20 line 30, page 15 line 22), that an adjoining street was dry at the time (page 21 line 26), and that in the preceding '23½ or 24 hours, during which the sprinkling was done, the official temperature had reached a low of 15° Fahrenheit and a high of 35° Fahrenheit (page 29 line 28, page 18 line 36, page 13 line 39, page 14 line 2).

From these proven facts plaintiffs-appellants are entitled to draw fair inferences. As was said in Jackson v. Delaware L. & W. R. R. Co., 111 N. J. L. 487,:

> "Where the evidence *and the inferences reasonably arising therefrom* will support a verdict for the plaintiff" (italics ours),

a motion for a non-suit must be denied. And further:

> "In civil cases it is sufficient if the evidence on the whole agrees with and supports the hypothesis which it is adduced to prove . . . ".

The trial judge erred in reaching his conclusion because the plaintiffs-appellants were entitled to draw full inferences from the facts proved. Such inferences are that the street was sprinkled at a time when the water

froze into a thin film or a dangerous layer of ice.

The trial judge depended upon the testimony as to the temperature *on the following day* (page 55 line 22).

The trial judge overlooked the testimony of the witness Sivak and the witness Lefferts that *there was ice where the injured plaintiff fell* (page 23 line 28, page 38 line 40). As the dissenting opinion of Justice Garrison held, in Kingsley v. D. L. & W. R. Co., 81 N. J. L. 536, 545:

> "The fact that the plaintiff actually stepped into a space so left was not only some proof of its existence and size, but also that it endangered the safety of those . . . owed a high degree of care . . . ",

so, here, the fact that the injured plaintiff fell on some ice was proof that it was there and presented a dangerous condition.

POINT II

THE JUDGMENT OF NON-SUIT WAS ERRONEOUS BECAUSE PLAINTIFFS-APPELLANTS PROVED ACTIVE WRONG-DOING ON THE PART OF THE DEFENDANT-APPELLEE AMOUNTING TO POSITIVE MISFEASANCE SUFFICIENT TO GO TO THE JURY.

The rule stated in Hart v. Freeholders of Union, 57 N. J. L. 90, and all subsequent cases, is that a defendant municipality is liable for special damages inflicted by a common and public nuisance created not by its neglect or negligence in performing a public duty, but by its active wrong-doing. This rule has been uniformly held and applied to many different types of wrongs.

McHugh v. Hawthorne B. & L. Association, 118 N. J. L. 78, defined a nuisance:

> "By force of the common law every part of the street is so dedicated to the public that any act or obstruction which when left unprotected unnecessarily incommodes or impedes its lawful use by the public, is a nuisance."

The cases of Lydecker v. Freeholders of Passaic, 91 N. J. L. 622, where the facts are similar, and Allas v. Borough of Rumson, 115 N. J. L. 593, where the rule is restated and the cases reviewed are helpful.

In the Lydecker case, supra, the minor plaintiff sued for damages sustained when his bicycle slipped and threw him on a public street which had been recently covered with oil by the Standard Oil Company of New Jersey under contract with the county. The trial court non-suited the plaintiff.

The appellate court stated:

> "In the present case all that the complaint avers is that the county negligently omitted to remove the oil from the highway, failed to close it from use by the public, failed to warn persons not to use it, and failed to make it safe after the spreading of the oil rendered its use dangerous, all of which are acts of omission and not of active wrongdoing."

These are mere charges of negligence and as the court in its opinion elsewhere stated, viz:

> "thus is charged the *negligent non-performance* by a municipality of a public duty which resulted in an alleged public nuisance and the proofs applicable to this branch of the case did not extend beyond the averments in the complaint" (italics ours).

The court indicated that the form of pleading was unfortunate and stated:

> "If the complaint had charged and the proof sustained the committing of an active wrong and not the negligent omission to perform a public

duty, a different question would be presented."

Judgment was, therefore, affirmed. The facts could well have supported a charge of active wrong-doing and the county held liable for a nuisance created.

In the instant case the facts are nearly identical except that the street was sprinkled with water which turned to ice and created a nuisance and that the injured plaintiff stepped upon it, thinking it was water, slipped, fell and was injured. The complaint properly charged active wrong-doing on the part of the municipality and hence should have avoided a non-suit.

In the case of Allas v. Borough of Rumson, supra, this court said:

> "The misfeasance consisted in the building of a ramp so fashioned as to constitute a place of danger. In constructing this sloping passage-way, without guard rails or barriers upon the adjoining ground levels or other device adequate to protect against injury persons exercising reasonable care in the use of the premises, the municipality was the active agent or instrument in the creation of a condition perilous to human safety on lands devoted by it to a public footway extending to its municipal building; it was directly responsible for the dangerous construction that in the darkness of night particularly, constituted an everpresent menace to the personal safety of the users of the premises. This is not a case of mere neglect by the municipality or negligence in the performance of a public duty imposed upon it by law; nor is it classable as the negligent performance of a public duty directly imposed by law on its officers . . .
>
> The wrongdoing here charged is no less than positive misfeasance within the contemplation of our cases. Misfeasance differs from malfeasance or nonfeasance. It has been defined as the wrongful and injurious exercise of lawful authority . . ."

Similarly, in the instant case, the defendant-appellee was the active agent or instrument in the creation of a

condition perilous to human safety on lands devoted by it to a public street; it was directly responsible for coating that street with ice, all the more treacherous because it did not appear to be ice.

The allegations and proof do not stop with mere negligence in sprinkling the street which was done under lawful authority. They go further and charge and show that the City actually created a nuisance.

It is difficult to conceive a situation more clearly setting forth an instance of positive misfeasane or active wrong-doing.

On numerous other occasions our courts have held that such wrong-doing or positive misfeasance appeared, on facts less clear than here.

In Hammond v. Monmouth County, 117 N. J. L. 11, the plaintiff was injured when his truck fell into an unlighted and unguarded excavation in the highway. Recovery was allowed.

In Cohen v. Town of Morristown, 15 Misc. 288 (not yet officially reported) one count of the complaint alleged that plaintiff had suffered injury by falling from a bridge or culvert without protection of guard rails or barriers or adequate lighting facilities. Motion to strike that count on the ground it did not set forth a cause of action was denied.

In Buffington v. Atlantic County, 167 Atlantic Rep. 327 (not yet officially reported), the complaint alleged that plaintiff was injured when the automobile in which she was a passenger collided with a large tree within the boundaries of the road. Motion to strike the complaint on the ground that it failed to allege a cause of action was denied.

In Van Zandt v. Bergen County 79 Fed. Rep. 2nd, 506, the U. S. Circuit Court of Appeals, Third Circuit, reversed a judgment for the defendant where the plaintiffs suffered injury after driving their automobile into unguarded excavations in a public highway.

And in the case *sub judice* the trial judge indicated

that he, too, thought this case, were the proof stronger, presented an action of active wrong-doing as may be seen from his words:

> "It seems to the court that if the City, for instance, should go out on Christmas Eve when the thermometer was 10 or 15 degrees f. and clean different streets so as to have them nice and clean for Christmas, that then we would come very close to having a case of active negligence in the cleaning of the streets because they are not compelled to clean them with water" (page 54 line 16-30).

Spreading a thin film of ice over a public street devoted to public use is the allegation and proof herein. In Allas v. Borough of Rumson, supra, it was held:

> "There is an obvious distinction between keeping a highway free of nuisance and affirmatively creating one. In the one case it is mere neglect of a public duty for which there is no action for a private injury; in the other there is positive misfeasance."

and again:

> "not upon the defendant's relation to the highway by reason of being charged with the duty of repairing it, but upon the question whether the obstruction was placed in the highway by the defendant or the defendant's servant. This would seem to be upon the theory of active wrong-doing, and so may be classified as an unguarded excavation on a public highway and likewise the unprotected ramp or sloping passageway upon a public footing such as we have here."

Can it be said that coating a public street with ice is not an obstruction to safe travel thereon?

CONCLUSION

It is respectfully submitted, therefore, that: (1) there

are sufficient allegations in the pleadings to present a question for the jury, with sufficient proof of those allegations that the street had been sprinkled a short time before the injury with water which turned to ice, coated the street with ice in spots, thereby creating a dangerous and hazardous condition amounting to a nuisance, and becoming a question for the jury, and; (2) that by reason of the cleaning of the street in this fashion so as to create a nuisance, the defendant municipality was guilty of active wrong-doing which amounted to positive misfeasance within the meaning of the cases cited, entitling the plaintiffs-appellants to go to the jury.

It is further respectfully submitted that judgment of non-suit should be reversed.

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NEW JERSEY
Court of Errors and Appeals

ISABELLA SIVAK and ANDREW SIVAK, *Plaintiff-Appellants,* *vs.* CITY OF NEW BRUNSWICK, a municipal corporation, *Defendant-Appellee.*	Action at Law. On Appeal from New Jersey Supreme Court, Middlesex County.

BRIEF OF DEFENDANT-APPELLEE

STATEMENT OF FACTS

Plaintiff-appellants' appeal from a judgment of "Non-Suit" entered in their action for personal injuries sustained by Isabella Sivak. The plaintiff-appellants by their pleadings alleged that the defendant-appellee caused Central Avenue, in the City of New Brunswick, to be sprinkled with water on November 17, 1933, while the temperature was below 32 degrees Fahrenheit, and that said water froze and turned to ice (s. c. page 4, lines 21 to 32). That plaintiff-appellant, Isabella Sivak, while walking upon said Central Avenue, slipped

on the ice, fell, and physically injured herself. She fixes the time of the accident between 4:30 P. M. and 5 P. M., on November 17, 1933 (page 27, lines 30 to 33), about one hour, or one and one-half hours after the street had been sprinkled with water by the sprinkler of the City (page 35, lines 35 to 40). The high temperature for November 17th was 35 degrees (page 13, lines 38 to 40), and the low temperature for that day was 15 degrees. The temperature at 5 P M. on that day was 32 degrees. All of these temperatures are Fahrenheit (page 14, lines 1 to 10). The aforesaid temperatures were taken in the shade at the New Jersey Experimental Station, two miles from the scene of the accident (page 18, lines 17 to 22). The cage is one constructed by the United States Weather Bureau standards, has venetian blinds on the sides of it so the air can get to it, and a double roof on it so that the sun is not hitting it at any time (page 17, lines 19 to 26). These temperatures are not recorded in the sun (page 17, lines 27-28).

POINT I

No prima facie case was proved under Plaintiff-Appellants' pleadings.

At the close of plaintiff-appellants' case the trial court granted defendant-appellee a motion for nonsuit, on the ground that plaintiff-appellants had not proven what they alleged in their complaint, to wit: that the temperature at the time of sprinkling Central Avenue was below 32 degrees Fahrenheit (page 55, lines 10 to 17) and in fact neglected to offer any proof showing the temperature at the point of the accident; and at the time the street was sprinkled by the City. The low temperature of 15 degrees, testified to by the

witness "Nichols" can, at the outset, be disregarded. He testified, in answer to the Court's question, as follows:

> Q. Mr. Nichols, this low temperature occurred some time between five o'clock in the afternoon of the previous day and five o'clock that afternoon, is that correct?
>
> A. Yes, sir.
>
> Q. Presumably some time during the previous night, is that correct?
>
> A. Yes, sir.
>
> Q. And the high temperature occurred within some time during the day of November 17th, is that correct?
>
> A. Yes, sir (page 19, lines 10 to 19).

Even these temperatures were not taken in the open air, or in the sun, but in a cage protected from the direct rays of the sun, by a double roof, and by venetian blinds on the sides (page 17, lines 19 to 28).

The trial court logically concluded from all of the testimony of the witness Nichols that at that time of the year the greatest warmth comes during the afternoon, and that the chill comes with nightfall and sun-down. Since the temperature expert Nichols testified that the temperature at 5 P. M. was 32 degrees (page 14, lines 6-7), and since the time of the sprinkling of the street is placed by the witness Lefferts at one, or one and one-half hours earlier than 5 P. M. (page 35, lines 35-40) the temperature at the time of the sprinkling of the street was necessarily above 32 degrees Fahrenheit. It is necessary to remember that even these temperatures were taken two miles from the point of accident, and in a sun-protected cage, from all of which it is obvious that the inferences reasonably arising from this testimony failed to

support the contentions of the plaintiff, and does not agree with and support the hypothesis which it was adduced to prove as set forth in the complaint and opening of counsel.

Appellant realizing that her proof before the court failed to sustain her case within the pleadings, now attempts to argue that irrespective of the positive evidence adduced by herself, that the temperature was not below freezing at the time the accident occurred, and also at the time the sprinkling was done by the City, there was testimony by the plaintiff herself, and the witness Lefferts, that at the time she fell she noticed a thin film or covering of ice on the street at the place where the accident occurred. The fact that there was some ice upon the street at the time the plaintiff fell, would not justify the jury in presuming that this ice was formed by reason of the sprinkling of the street by the City, one, or one and one-half hours before the accident, because many other agencies may have intervened, and undoubtedly did intervene, to have caused the formation of this ice at the time of the occurrence of the accident, or a short time preceding it. It is no exaggeration to state, that regardless of street sprinklings, it is most unusual for any city street to be entirely free from some wet areas, particularly where there are holes and crevices in the street, as testified to by the witness Lefferts in this case (page 43, lines 10 to 15).

The inuendos and insinuations relied upon by the appellant, are certainly not inferences reasonably arising from the evidence, and consequently do not bring their case within the true rule as laid down in *Jackson* vs. *Delaware, Lackawanna and Western Railway Company,* 111 N. J. L. 487.

On page 4 of appellant's brief is the following statement:

> "The trial judge depended upon the testimony as to the temperature 'on the following day' (page 55, line 22)."

The ruling of the trial court did not depend upon the testimony as to the temperature on the following day. The trial court simply pointed out that since all the temperature readings are taken from 5 P. M. one day to 5 P. M. the next day, that the temperature from 5 P. M. on the day of the accident to 5 P. M. the next day, did not once go below 31 degrees Fahrenheit, and that probably some time during the night. The court reasonably concluded from this, that in the earlier afternoon of November 17th, when the place where the accident occurred was sprinkled, that the temperature was necessarily much above 32 degrees Fahrenheit, so that it conclusively appears from the plaintiff's case that at the time of the sprinkling of Central Avenue the temperature was in fact above 32 degrees Fahrenheit, and that the appellants consequently failed to establish a prima facie case, within their pleadings, and upon the issues tried.

POINT II

Neither active or passive wrong-doing on the part of the municipality was proven by Plaintiff-Appellants.

The City admits that since the decision of this court in *Allas* vs. *Rumson*, 115 N. J. L. 593, any doubt which may theretofore have existed as to the liability of a municipality for active wrong-doing, has been clarified and settled. In the instant case, however, plaintiffs were nonsuited, because they failed to show any wrong-doing, either active or passive, on the part of the City to their detriment.

Although *Reilly* vs. *City of New Brunswick*, 92 N. J. L. 547, is not referred to in the cases collected in Mr. Justice Heher's opinion in *Allas* vs. *Rumson, supra,* it seems that the rule of law laid down there by this court has been overruled; at any rate, when applied to facts such as that case presented.

In the instant case plaintiff-appellants failed to make out a prima facie case as set forth in their complaint, and in their opening; and failed to show any wrong-doing on behalf of the City as charged in their pleadings.

CONCLUSION

It is therefore respectfully submitted that on the pleadings and proofs as presented to the court below, no prima facie case was presented, entitling plaintiff-appellants to be heard by a jury.

It is further respectfully submitted that the judgment of "nonsuit" should be sustained.

PAUL W. EWING,
Attorney for and of Counsel with Defendant-Appellee.

This appeal will be argued orally for defendant-appellee by PAUL W. EWING, *City Attorney.*

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