## INDEX



## TESTIMONY

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY.

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| MARGARET BENNETT, by next friend, et al., *Plaintiffs,* vs. HENRY EAGLEKE, ANGELO DE CARLO and PATSY PERRI, *Defendants.* | NOTICE AND GROUNDS OF APPEAL. |

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To QUINN, PARSONS & DOREMUS, ESQS.,
Attorneys for Plaintiffs:

TAKE NOTICE that the defendants, Angelo De Carlo, appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in this case, upon the following grounds:

1. The trial court refused to direct a judgment of non suit against the plaintiffs and in favor of the defendant, Angelo DeCarlo, when thereunto moved by counsel for the defendant, Angelo DeCarlo, whereas said court should have directed a judgment of non suit against the plaintiffs and in favor of the defendant, Angelo De Carlo, to which an exception was allowed the defendant, Angelo De Carlo.

2. The trial court refused to direct a verdict in favor of the defendant, Angelo DeCarlo, and against the plaintiffs when thereunto moved by counsel for the defendant, Angelo De Carlo, whereas said court should have directed a verdict in favor of the defendant, Angelo De Carlo, and against the plaintiffs to which an exception was allowed the defendant, Angelo De Carlo.

3. Because the trial court erroneously refused to charge the jury the first request to charge of the defendant, Angelo De Carlo, as follows:

"The plaintiff must prove by the greater weight of evidence that not only was the operator of the Dodge car driving it with the knowledge of the defendant De Carlo but that he was the servant or agent of the defendant and subject to the control of the defendant DeCarlo."

to which refusal an exception was allowed the defendant, Angelo DeCarlo.

4. Because the trial court erroneously refused to charge the jury the second request to charge of the defendant, Angelo DeCarlo, as follows:

"Proof that Eagleke obtained the defendant's car at the request of DeCarlo to wash it for the defendant and was driving it back to the defendant's place of business after washing it at the time of the accident will not charge the defendant DeCarlo with negligence unless the plaintiff also proves that the driver was the agent or servant of DeCarlo and subject to the control of DeCarlo."

to which refusal an exception was allowed the defendant, Angelo DeCarlo.

5. Because the trial court erroneously refused to charge the jury the third request to charge of the defendant, Angelo DeCarlo, as follows:

> "If you find that Eagleke operated a car washing business for himself or was employed by someone to wash cars and the defendant DeCarlo was a customer of Eagleke's or a customer of Eagleke's employer, and that DeCarlo contracted with Eagleke to have his car washed and that Eagleke in pursuance of such agreement took the defendant DeCarlo's car to Eagleke's place of business to wash it and that DeCarlo had no control over Eagleke from the time the car was taken to the time the car was returned, and while returning it Eagleke had an accident. Eagleke was not an employee, servant or agent of the defendant De Carlo and as to De Carlo there must be a verdict of no cause for action."

to which refusal an exception was allowed the defendant, Angelo De Carlo.

6. Because the trial court erroneously refused, to charge the jury the fourth request to charge of the defendant, Angelo De Carlo, as follows:

> ' If the defendant De Carlo neither directed nor controlled Eagleke, or exercised over him any power, authority, or supervision, but hired him only to wash the car, leaving to him the exclusive management, itinerary, direction and control of the car, the relation of master

New Jersey State Library

and servant did not exist between Eagleke and De Carlo."

to which refusal an exception was allowed the defendant, Angelo De Carlo.

7. Because the trial court erroneously refused to charge the jury the fifth request to charge of the defendant, Angelo De Carlo, as follows:

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"De Carlo having contracted with Eagleke to wash his car and thereafter having exercised no power, authority, supervision or control over Eagleke, either with respect to his manner of taking the car to the place where it was to be washed or with respect to the washing of the car itself, Eagleke was an independent contractor and De Carlo was not responsible for the negligence of Eagleke while driving the car and the verdict as to De Carlo must be no cause for action."

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to which refusal an exception was allowed the defendant, Angelo De Carlo.

6. Because the trial judge erroneously charged the jury as follows, and allowed the defendant, Angelo De Carlo, an exception in due course:

"It is conceivable that a person who washed your car may not only contract to do it but likewise to take your

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car from your garage to the place where he is accustomed to conduct such business, and if a contract with him contemplates the taking of the car from the garage and returning it, it may well be he will be engaged in an independent contract entirely for which he might in

case of negligence in driving directly be liable. Here, however, there is an issue of fact whereby it may be ascertained—whether it is or not is for you to say, you are the judges of the fact—that what really happened with regard to De Carlo was he desired to have the truck in question washed preparatory to having it painted, that Eagleke was either sent for or went to De Carlo's place of business, and according to his statement De Carlo said to him: "I wish you could come and get my car and wash it." Now, De Carlo states that he called, as I recall his testimony, if I am incorrect you will correct me, and sent to the place where Eagleke was accustomed to work and was told that he (Eagleke) would be sent to get the car for the purpose of washing it. There is a difference there you see, because if it appeared that a part of the contract was not only to have the car washed but to come and get it and return it to the owner, and the person so performing that service was to be compensated for coming and getting it, plus the washing, then it might well be that De Carlo would be heard to say that at the time of this accident the driver was not his agent or his servant, express or implied. If you believe Eagleke's statement, however, that De Carlo said to him in his butcher shop Saturday night: "I want my car washed, you come and get it" then it may be that you will, if you believe the testimony, find as a fact that after all when Eagleke was driving the car he was the agent of De Carlo because of the latter's interest in having the car washed and thereby, for the time being, the latter became the principal, the driver the agent, and the accident having happened, if it is shown under the fair preponderance of the proof, due to the negligence of Eagleke, the driver, then the principal De Carlo would

be liable just as though he had been driving the car at the moment himself.

Respectfully yours,

HUDSPETH & HARRIS,
Attorneys for Defendants,
Angelo De Carlo.

Dated: March 1, 1930.

THE STATE OF NEW JERSEY:

TO HENRY EAGLEKE, ANGELO DE CARLO and PATSY PERRI:

(SEAL) YOU ARE SUMMONED to answer the Complaint of MARGARET BENNETT, by her next friend, LEON BENNETT, and LEON BENNETT, in an action at law in the Supreme Court.

AND TAKE NOTICE, that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, 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, WILLIAM S. GUMMERE, Esquire, Chief Justice of the Supreme Court, at Trenton, this twenty-sixth day of June, A. D. Nineteen Hundred and Twenty-eight.

FRED L. BLOODGOOD,
Clerk.

QUINN, PARSONS & DOREMUS,
Attorneys.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY.

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| MARGARET BENNETT, by next friend, et al., *Plaintiffs,* vs. HENRY EAGLEKE, ANGELO DE CARLO and PATSY PERRI, *Defendants.* | ACTION AT LAW. COMPLAINT. |

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Plaintiffs, Margaret Bennett, an infant under the age of twenty-one years, by her next friend, Leon Bennett, specially admitted by an order of this court to prosecute this action for her, and Leon Bennett, both residing in the Borough of Red Bank, in the County of Monmouth and State of New Jersey, say that-

1 They each have a cause of action against the defendants arising out of the same occurrence and involving the same questions of law and fact.

2. On June 10, 1928, plaintiff Margaret Bennett was lawfully walking in and upon the sidewalk upon the easterly side of Bridge Avenue, a public highway in the Borough of Red Bank.

3. On the day and year aforesaid, the defendant Angelo DeCarlo, by his agent or servant, Henry Eagleke,

was driving and operating an automobile in a southerly direction upon Bridge Avenue, in the Borough of Red Bank aforesaid.

4. On the day and year aforesaid, defendant Patsy Perri, was also operating an automobile in a southerly direction upon Bridge Avenue and approaching Catherine Street, and the defendant Angelo DeCarlo, by his agent or servant, Henry Eagleke, was operating an automobile also along Bridge Avenue, in a southerly direction and approaching Catherine Street.

5. It then and there became the duty of said defendants to so operate and drive theis said automobiles so that they should refrain from running into and colliding with and striking the plaintiff Margaret Bennett, lawfully upon the sidewalk.

6. Notwithstanding the premises, the defendants so carelessly, negligently, unlawfully and recklessly drove and operated their respective automobiles so that as a result of their individual and collective negligence, plaintiff Margaret Bennett was struck while upon the sidewalk and suffered the injuries hereinafter set forth.

7. The defendant, Patsy Perri, was negligent in the operation of his automobile in the following respects:

(a) He operated said automobile at a high and excessive rate of speed.

(b) He did not keep a proper lookout or watch upon the highway.

(c) Said automobile was not equipped with a proper mirror.

(d) He made a turn at a street corner without giving any signal of so doing.

(e) He was in divers other respects careless and negligent in the operation of said automobile.

8. The defendants, Angelo DeCarlo, and his agent or servant, Henry Eagleke, were negligent in the operation of their said automobile in the following respects:

(a) Said automobile was operated at a high and excessive rate of speed.

(b) No proper watch or lookout was maintained upon the highway.

(c) No warning was given of the approach of said automobile by horn or other signal.

(d) Said automobile was not equipped with proper brakes or stopping appliances.

(e) Said automobile was operated upon the wrong or lefthand side of the public highway.

(f) Said automobile was operated in divers other careless and negligent respects.

9. As a direct and proximate result of the negligence of the defendants, the plaintiffs suffered and sustained the folowing injuries.

(a) Plaintiff Margaret Bennett suffered and sustained cuts and contusions in and about her body, legs head and arms. She more particularly suffered lacerations upon the face which will result in permanent scars which will disfigure her so long as she shall live, impairing and lessening her chances of marriage. She suffered severe injuries to the chest and abdomen and to the organs thereof, which injuries will be permanent and will cripple her so long as she shall live. She will be rendered unable to earn her livelihood. She has suffered great pain and nervous shock and will in the future and so long as she shall live suffer from pain and nervous shock.

(b) Plaintiff Leon Bennett is the father of plaintiff Margaret Bennett. He has been forced to expend large sums of money in and about endeavoring to cure his daughter of her injuries. He will, in the future, for doctor's, hospital and medical expenses, be forced to expend further large sums of money. He will be further forced to support and maintain his daughter and will be deprived of her aid and assistance in the household and of her earnings so long as she shall live.

Plaintiff Margaret Bennett, by her next friend, Leon Bennett, demands as damages the sum of Thirty Thousand dollars and costs of this suit.

Plaintiff Leon Bennett demands as damages the sum of Ten Thousand Dollars and costs of this suit.

QUINN, PARSONS & DOREMUS,
Attorneys of Plaintiffs.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY.

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|---|---|---|
| MARGARET BENNETT, by next friend, et al., *Plaintiffs,* | ACTION AT LAW. | 10 |
| vs. | | |
| HENRY EAGLEKE, ANGELO DE CARLO and PATSY PERRI, *Defendants.* | ANSWER. | |

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Defendant, ANGELO DE CARLO, residing in the Borough of Red Bank, in the County of Monmouth and State of New Jersey, in answer to the plaintiff's complaint, says 20 that:

1. He denies paragraph 1 in so far as it states that a cause of action exists against himself and he has no knowledge or information sufficient to form a belief as to the rest of paragraph 1 and therefore denies the same, leaving the plaintiffs to their proof thereof.

2. He has no knowledge or information sufficient to form a belief, of the matters and things set forth in para- 30 graph 2, and therefore denies same, leaving the plaintiffs to their proof thereof.

3. He denies each and every allegation contained in paragraph 3.

4. He admits that part of paragraph 4 which states "On the day and year aforesaid, defendant, Patsy Perri, was also operating an automobile in a southerly direction upon Bridge Avenue and aproaching Catherine Street," but denies the rest of said paragraph.

5. He denies each and every allegation of paragraph 5, except in so far as it relates to the duty of defendant, Patsy Perri, towards the plaintiffs.

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6. He denies each and every allegation set forth in paragraph 6, except in so far as it relates to the carelessness, negligence and recklessness of the defendant, Patsy Perri.

7. He admits each and every allegation contained in paragraph 7.

8. He denies each and every allegation contained in
20 paragraph 8 and 9.

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## FIRST SEPARATE DEFENSE

Defendant, Angelo DeCarlo, by way of separate defense says that:

1. The alleged injury and damage complained of by the plaintiffs was caused through their own negligence in that they did not exercise that degree of care which ordinary, reasonable and prudent persons would and should have exercised under the circumstances of the case, which negligence was the proximate cause of the injury and damage complained of by them.

## SECOND SEPARATE DEFENSE

1. The alleged injury and damage complained or by the plaintiffs was caused entirely through the negligence of the defendant, Patsy Perri, in that he did not exercise that degree of care which an ordinary, reasonable and prudent person would and should have exercised under the circumstances of the case, which negligence was the proximate cause of the injury and damage complained of.

HUDSPETH & HARRIS,
Attorneys for Defendant,
Angelo De Carlo.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY.

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|---|---|
| MARGARET BENNETT, by her next friend, LEON BENNETT, and LEON BENNETT, *Plaintiffs,* | ACTION AT LAW. |
| vs. | |
| HENRY EAGLEKE, ANGELO DE CARLO and PATSY PERRI, *Defendants.* | REPLY. |

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Plaintiffs, by way of reply to the answer of defendant, Angelo DeCarlo, filed herein, say that—

They deny the new matter raised therein, and join issue upon the same.

QUINN, PARSONS & DOREMUS,
Attorneys of Plaintiffs.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY.

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|---|---|
| MARGARET BENNETT, by her next friend, LEON BENNETT, and LEON BENNETT, *Plaintiffs,* | ACTION AT LAW. |
| vs. | |
| HENRY EAGLEKE, ANGELO DE CARLO and PATSY PERRI, *Defendants.* | POSTEA. |

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This case was tried at the Monmouth Circuit before Judge Rulif V. Lawrence and a jury at Freehold, New Jersey, on March 25th, 1929. The jury rendered a general verdict against the defendant Angelo DeCarlo and in favor of the plaintiff Margaret Bennett, by her next friend Leon Bennett, in the sum of Ten Thousand dollars ($10,000.00) and a general verdict against the defendant Angelo DeCarlo and in favor of the plaintiff Leon Bennett, in the sum of One thousand seven hundred and twenty-two dollars and thirty cents ($1,722.30).

RULIF V. LAWRENCE,
Judge.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

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MARGARET BENNETT, by next friend, et al., *Plaintiffs,*
vs.
HENRY EAGLEKE, ANGELO DE CARLO and PATSY PERRI, *Defendants.*
ACTION AT LAW.

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Freehold, N. J., March 22, 1929.

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ALGIE DILLARD, Sworn for Plaintiff.

DIRECT EXAMINATION

By MR. PARSONS:

Q. Algie, do you remember June 10, 1928? A. Yes, sir.

Q. And you live at Red Bank, do you? A. Yes, sir.

Q. And on that day you were driving an automobile? A. Yes, sir.

Q. Driving it on what street? A. Bridge Avenue.

Q. And what direction on Bridge Avenue were you driving it? A. Going south.

Q. South on Bridge Avenue, and what direction does Bridge Avenue run? A. This way (indicating).

Q. Well, can you tell me by the points of the compass what way does it run? A. This way and this way (indicating).

By THE COURT:

Q. North and South? A. North and South.

By MR. PARSONS:

Q. And you were going in the direction of what street? A. Bergen Place.

Q. And that is south, that is in a southerly direction? A. Sure.

Q. Now as you were driving down Bridge Avenue, Algie, did you see a car driven by any one pass you? A. Eagleke passed me.

Q. And whose car was he driving? A. Charlie, the butcher.

Q. At what point on Bridge Avenue did he pass you? A. What point?

Q. Yes. A. I don't know just where he passed me at; he passed me before I got to Catherine Street.

Q. Passed you before you got to Catherine Street? A. Yes.

Q. And how fast were you going on Bridge Avenue? A. Oh, ten or fifteen miles an hour.

Q. What did you see happen? A. Well, I didn't see—I saw—I heard an accident.

Q. You heard it? A. Yes.

By THE COURT:

Q. Did you see it? A. Well, just as I went by I heard the cars crash.

Q. They crashed back of you then, did they? A. I just had passed.

Q. Did you stop? A. Sure I stopped.

Q. Then what did you do, go back? A. I went back.

Q. What did you do then? A. Well, I didn't see the girl when she got hit.

Q. What did you find when you got back there? A. I found an accident.

Q. Go on and tell what you saw. A. That is all I seen of it.

Q. You saw an accident, but what comprised the accident? A. Well, one car was trying to pass another.

Q. Where were the cars when you got back there after the crash? A. The Pontiac was up in the yard.

Q. The Pontiac was up in the yard? Whose yard was it? A. I don't know whose yard it was.

Q. Well, all right. Where was the other car? A. The Dodge?

Q. The Dodge; was that Charlie the butcher's car? A. Sure.

Q. The Dodge, where was that? A. He had been turned into Catherine Street on the left.

Q. That had turned into Catherine Street on the left, and the Pontiac was up on the lawn? A. Sure.

Q. In the yard? A. Yes.

Q. Where was the girl? A. They had done got the girl out from underneath the car.

Q. And the girl was underneath the Pontiac? A. They had done got her out.

Q. Taken her away? A. Sure.

THE COURT—Go on, Mr. Parsons.

MR. PARSONS—That is all.

THE COURT—Cross-examine.

CROSS EXAMINATION

By MR. MATLACK:

Q. How far back of the two cars were you? A. Well, about from here to the back door.

Q. You were going the same direction as the other two cars? A. Sure.

Q. And you were driving a car yourself? A. Sure.

Q. And you saw Eagleke start to pass? A. Sure I seen him.

Q. Now did you see Perri put his hand out or not? A. I did not.

Q. Perri didn't put his hand out? A. I didn't see him put his hand out.

Q. You were watching Eagleke trying to pass Perri? A. I was watching my car mostly. I was driving myself.

Q. You saw Eagleke start to pass Perri, though, did you? A. Sure.

Q. Then the accident happened right after that? A. Sure.

Q. You didn't see the accident itself? A. No, I didn't see it.

MR. MATLACK—That is all.

MR. PARSONS—That is all.

MORRIS BECKER, Sworn for Plaintiff.

DIRECT EXAMINATION

By MR. PARSONS:

Q. Mr. Becker, you live in Red Bank? A. Yes.

Q. And do you remember the day of this accident, June 10, 1928? A. Yes, sir.

Q. Where were you on that day? A. I was on the corner of Herbert Street and Bridge Avenue.

Q. Which side? A. On the east side.

Q. Where? A. Bridge Avenue.

Q. East side of Bridge Avenue? A. Yes.

Q. Did you see girls? A. I seen the girls passing by me, then I seen two cars going up.

Q. Which side of the street were the girls on? A. On the east side of the way, east side of Bridge Avenue.

Q. In which direction were you walking on Bridge Avenue? A. I was on the east side of the corner there.

Q. And which way were you walking? A. I was walking down Bridge Avenue and stopping, talking to a man.

Q. Now walking down— A. Walking down.

By THE COURT:

Q. South on Bridge Avenue? A. I was walking down towards the—

By MR. PARSONS:

Q. Walking towards Bergen Place or towards the station? A. Towards the station.

Q. Towards the station? A. Towards the station.

Q. So you were walking north? A. Yes.

Q. What did you see there after you seen the two girls? A. They passed me by and I said hello to the girls and I seen the two cars going by pretty fast.

Q. What two cars did you see? A. I seen the little Ford and the Dodge.

Q. The little Ford and the Dodge? A. Yes.

Q. Did you see the fellow driving the little Ford, this fellow here that was on the stand? A. Yes, he was on the right of the Dodge, or on the left.

Q. And were they going pretty fast there too? A. Going pretty fast.

Q. Do you know whose car the Dodge was? A. I recognized the car.

Q. And whose car was it? A. Well, Charlie's car.

Q. Charlie's car? You didn't actually see the accident, did you, Mr. Becker? A. No, sir.

THE COURT—Well identify Charlie.

MR. PARSONS—We will identify Charlie before it is over.

By THE COURT:

Q. What is his last name? A. I don't know.

Q. All you know him by is Charlie the butcher? A. Charlie the butcher.

Q. Is that so? What is in a name?

THE COURT—Go on.

By MR. PARSONS:

Q. You say you didn't see the accident, Mr. Becker? A. I didn't.

Q. What was the first thing you knew about it? A. As soon as I heard the crash over there, I run right over and seen Margaret laying down on the ground there and helped pull her up.

Q. You saw Maragaret there?

By THE COURT:

Q. Was she under the car? A. She was right alongside the car.

Q. She was right alongside the car? A. Yes.

Q. And you helped her out? A. I helped lift her up and bring her to the car and take her home.

By MR. PARSONS:

Q. Where were the cars when you got there? A. On the corner of Catherine Street.

By THE COURT:

Q. And Bridge? A. And Bridge Avenue, yes sir.

By MR. PARSONS:

Q. Can you tell us which corner it was, Mr. Becker, on the corner towards Bergen Place or the corner towards the station? A. On the corner towards Bergen Place.

Q. On the corner towards Bergen Place? A. Yes, sir.

Q. And was it on the east corner or west corner towards Bergen Place? A. On the east corner.

Q. On the east corner? A. On the east corner.

Q. Towards Bergen Place? A. Yes.

Q. Just locate the place where you picked the girl up or found her. A. Almost alongside the building.

Q. Almost alonside the building? A. Yes, sir.

By THE COURT:

Q. How far from the sidewalk? A. Quite a ways, about ten feet.

Q. Ten feet from the sidewalk? A. Yes.

By MR. PARSONS:

Q. That is ten feet over the sidewalk? A. Over the sidewalk.

By THE COURT:

Q. In on the property? A. In on the property, yes, sir.

By MR. PARSONS:

Q. Where was the Pontiac car? A. The Pontiac was almost over the sidewalk.

By THE COURT:

Q. By the way, when you last saw the girls, including Margaret, they were walking on the sidewalk? A. Yes, sir.

By MR. PARSONS:

Q. And where was the Dodge? A. The Dodge was on Catherine Street.

Q. On Catherine Street, down the same corner? A. Down the same corner.

MR. PARSONS—Cross-examine.

## CROSS EXAMINATION

By MR. MATLACK:

Q. You say you saw the Ford and Dodge going past you? You saw the Ford going past you? A. What is that?

Q. You said, didn't you, that you saw the Ford and the Dodge car pass you? A. Yes, sir.

Q. Did you see a Pontiac? A. No, sir, I didn't see a Pontiac.

Q. You didn't see it? A. No, sir.

Q. Were you going in the same direction that the cars were going? A. I was going down, the two cars were going up.

Q. They went by you? A. They went by me.

Q. But you didn't notice a Pontiac going ahead of the Ford and the Dodge? A. No, sir.

Q. Do you know which car hit the little girl? A. No, sir, the Pontiac, I seen it. The Pontiac was there when I got there, the Pontiac was right alongside the girl.

By THE COURT:

Q. And where was the Dodge? A. In the street, alongside the sidewalk.

Q. Bridge or Catherine Street? A. Catherine Street.

Q. What had become of the Ford? A. The Ford was gone.

Q. Gone? A. Yes, sir.

THE COURT—All right.

By MR. MATLACK

Q. Did you notice the damages to the car, if any? A. Yes, the Pontiac was pretty well bunged up.

Q. How was the Dodge? A. The Dodge wasn't touched.

Q. The Dodge wasn't touched? A. The fender was a little bit marked up there.

MR. MATLACK—That is all.

MR. PARSONS—That is all, Mr. Becker.

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ADELINE OLSEN, Sworn for Plaintiff.

DIRECT EXAMINATION

By MR. PARSONS:

Q. Adeline, you live in Red Bank, do you? A. I do.

Q. Did you live there on June 10, 1928? A. I did.

Q. Did you see this accident? A. Yes, sir.

Q. Will you just tell us what you saw, Adeline? A. Well, the Pontiac was at the corner, almost at the corner of Catherine Street and Bridge Avenue, and we were

going south and the other car, the Dodge, was going south and the Pontiac was going slow and the driver put his hand out to turn down Catherine Street, and the Pontiac was going to turn and the Dodge was going to turn and the Dodge was going fast and the girls were on the sidewalk and the Pontiac was hit by the Dodge and thrown up on the lawn and hit the girls.

By THE COURT:

Q. Where were the girls, on the sidewalk? A. They were.

By MR. PARSONS:

Q. Did you know the two girls that were hit? A. Margaret Bennett and Esther Hartman.

Q. You live where, Adeline? A. Newman Springs Road.

By THE COURT:

Q. Were you one of the girls? A. I was not. I was with my sister.

MR. PARSONS—Cross-examine.

## CROSS EXAMINATION

By MR. MATLACK:

Q. Where were you standing, Adeline? A. I was on the north corner of Catherine and Bridge Avenue.

Q. Catherine and Bridge, did you say? A. Bridge Avenue.

Q. That was across the street, wasn't it, from where the accident happened? A. Yes.

Q. Had you been talking to Margaret Bennett and—what is the other girl's name?

MR. PARSONS—Esther Hartman.

Q. The Hartman girl? A. We were walking right at the back of them and we just crossed the street.

Q. You had been talking to them? A. Well, we were friends and we talked before but we didn't talk exactly going home.

By THE COURT:

Q. In other words, you were going down towards the school, wern't you? Were you going to school or going down? A. Going home from Sunday school.

Q. Oh, it was Sunday? A. Yes.

Q. You were going south on Bridge? A. Yes, sir.

Q. And the Ford was going north? A. I didn't see the Ford.

Q. What about the Dodge? What direction was that going? A. And the Dodge was going south.

Q. Going south, and the Pontiac— A. Was going north.

Q. Which car was going to turn into Catherine? A. They both were.

Q. Oh, both were?

THE COURT—Go on.

By MR. MATLACK:

Q. Now were you watching those two cars going down the street? A. I was not.

Q. What did you first see? A. The Pontiac had come almost to a standstill and I turned around and saw that, and he had his hand out, and the Pontiac went to turn and the Dodge hit it.

Q. What part of the Pontiac car was hit, do you know? A. I think the back part of it.

Q. Was the Dodge also turning at that time? A. The Dodge?

Q. Yes. A. The Dodge slowed up and turned down Catherine Street along the curb.

Q. Did it slow up before it struck the Pontiac? A. I don't think that it did.

Q. Well, did the Pontiac turn right in front of the Dodge? A. The Pontiac was going to turn and the Dodge hit it and threw it up on the lawn.

Q. Well, had it started to turn when the Dodge hit it? A. Yes it had.

Q. And was the Dodge going to turn into Catherine Street? A. I think it was.

Q. Suppose you step down to the blackboard and draw the two streets there and then show the movement of the two cars, the Pontiac and the other. You are familiar with the blackboard, are you? A. Yes. (Draws on blackboard.) The Pontiac was going down here.

By THE COURT:

Q. Wait a moment. Which is Bridge there?

(Witness indicates).

Q. And the other is Catherine? A. Catherine.

Q. Now the Pontiac—go on. A. The Pontiac was going here and the Dodge was in back of it and went to turn here.

Q. Make a mark just as you saw it.

(Witness marks on blackboard).

A. And up there on the lawn.

Q. Oh, they were both going in the same direction? A. Yes, sir.

Q. Where did the Dodge hit the Pontiac? A. Hit it right down at the corner.

Q. At the corner? A. Yes, sir.

Q. And what are the directions there? Which is north and which is south?

(Witness marks the points of the compass on the blackboard).

By MR. MATLACK:

Q. So that the Pontiac had almost gotten around the corner, hadn't it? A. Yes, sir.

Q. Now just show us about where you were standing over there.

(Witness indicates.)

Q. And the other girl was with her? A. Yes.

Q. Now you were walking south, you say? A. South.

Q. Did you see the Pontiac strike Margaret? A. I did.

Q. And what happened when it struck her, drag her or just knock her down? A. Well, she was pretty badly hurt.

By THE COURT:

Q. Did it run over Margaret? A. It did.
Q. Actually ran over her? A. Yes.

By MR. MATLACK:

Q. Did it carry her along any way? A. I didn't notice whether it did or not.
Q. The Dodge didn't strike her at all? A. No.

By THE COURT:

Q. Where did the Dodge stop? A. The Dodge slowed up and turned down Catherine Street and stopped.

By MR. MATLACK:

Q. Was the collision very bad or was it just a glance? A. I guess it came with some force.

MR. MATLACK—I guess that is all.

By MR. PARSONS:

Q. Adeline, how old are you? A. Thirteen.

MINNIE OLSEN, Sworn for Plaintiff.

DIRECT EXAMINATION

By MR. PARSONS:

Q. Minnie, you are a sister of Adeline? A. Yes.

Q. And were you with her on this day of June 10th? A. I was.

Q. Do you remember the happening of this accident? A. Yes.

Q. Will you tell us just what you saw? A. Well, I was walking south on Bridge Avenue, on the opposite side of the street from Margaret, and the Pontiac car came up in back of us and I turned around and looked and I saw the man had slowed up almost to a standstill and he had his hand out, and about a block away a truck—Dodge truck—was coming at a pretty fast rate of speed; and just as the fellow in the Dodge turned down Catherine Street, the Dodge hit him on the left side and threw him up on the lawn of the house on the corner.

By THE COURT:

Q. How far up on the lawn did the Pontiac go? A. I don't know; about twenty feet.

Q. And as it went over the walk it struck Margaret? A. No, Margaret and Esther ran when they saw the car coming and ran up toward the corner of the house, and the car caught them before they could get out of the way.

MR. PARSONS—Cross-examine.

New Jersey State Library

CROSS EXAMINATION

By MR. MATLACK:

Q. You were with your sister, you say? A. Yes, sir.

Q. And you saw the same thing that she saw? A. Yes.

Q. But you are sure you saw the man put his hand out. A. Yes I did.

Q. And you are also sure that he was almost at a standstill A. Yes.

Q. How far around the corner of Catherine Street had the Pontiac gotten when it was struck? A. Well, I think it was halfway between Bridge Avenue and down into Catherine Street. Half of the car was on Bridge Avenue, the back end.

Q. Did it strike it squarely? Did the Dodge strike the Pontiac squarely or was it turning. A. No, I think the Dodge was going straight down, straight south on Bridge Avenue, and it turned in Catherine Street to try to avoid the collision.

Q. And where did it stop, the Dodge? A. Just around the corner of Catherine Street.

Q. How far down? A. About five or six feet from the corner.

Q. Do you know what part of the Pontiac was struck, the front or rear? A. I am not sure, I think it was by the left door.

Q. Are you sure? A. Yes.

Q. And that continued for twenty feet or more up over a sidewalk? A. Yes.

Q. Did it run over Margaret Bennett? A. I think it landed on her, because there was like a ditch where the tires landed, almost a foot deep.

By THE COURT:

Q. Made a rut in the lot? A. Yes.
Q. Did it fall over after that? A. No, it didn't. It landed on four wheels.

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MR. PARSONS—If your honor please, I have one other school girl here.

THE COURT—I will allow her to be examined and then we will take a recess.

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ESTHER HARTMAN, Sworn for Plaintiff.

DIRECT EXAMINATION

By MR. PARSONS:

Q. Esther, you live at Red Bank, don't you? A. Yes.
Q. And you are the girl that was with Margaret Bennett on Sunday, June 10th? A. Yes.
Q. Will you tell us just what you saw about this accident. A Well, I didn't see it. We were coming from Sunday school and we had just crossed the street on Catherine Street, we were up on the sidewalk about two feet

from the corner, and then we were just talking there and all of a sudden we were just hit, that is all.

Q. That is all you know? A. That is all I know.

Q. But you were up on the sidewalk? A. We were.

CROSS EXAMINATION

By MR. MATLACK:

Q. You were struck too, weren't you? A. Yes.

Q. Not so badly as Margaret? A. No.

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Adjourned till March 25, 1929, at 10. A. M.

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PETER ROMANO, Sworn for the Plaintiff.

DIRECT EXAMINATION

By MR. PARSONS:

Q. Peter, you live where? A. Red Bank.

Q. And on what Street? A. Bridge Avenue, 193 Bridge Avenue, Red Bank.

Q. Where is your home with reference to Catherine Street? A. Right on the east side of Bridge Street between Catherine and River Street.

Q. Do you remember the day of this accident? A. Yes, sir.

Q. What did you see? A. Well, we was—

Q. First, let me ask you where were you at the time? A. Right in front of my porch, sitting over there talk-

ing, me and my brother-in-law. I seen this man had his hands out and he said "look, look" and at the time I looked they bumped together right away.

Q. What did you first see? Q. I see this man had hands out and I saw Dodge car in back.

Q. The man had his hand out, do you know what kind of a car he was driving? A. A Pontiac.

Q. Do you know who it was? A. Yes, sir.

Q. Who was it? A. Patsy.

Q. Patsy Perri? A. Yes, sir.

Q. The Dodge was coming from behind? A. Yes sir.

Q. Do you know whose car that was? A. Charley, I don't know his last name.

Q. Charley the Butcher? A. I guess so.

Q. Who was driving his car, do you know? A. I didn't know who was driving it.

Q. Can you tell me whether it was a colored man or not? A. He was a colored man, I don't know his name.

Q. As they approached Catherine Street, can you tell us what the car in back did? A. I didn't see any more, by the time I turned around it was so quick I didn't see anything else.

Q. What about the two cars? A. The two cars was right on the sidewalk, the two girls was right on the sidewalk, the Dodge hit the Pontiac and the Pontiac went where the girls was.

Q. Where did the Dodge go? A. The Dodge go down Catherine Street and bump two more cars there.

MR. PARSONS—Cross-examine.

MR. MATLACK—No questions.

NICK DePERRO, Sworn for Plaintiff.

DIRECT EXAMINATION

By MR. PARSONS:

Q. Mr. DePerro, you were sitting on the porch with Mr. Romano, were you? A. Yes sir.

Q. Did you see this accident? A. Yes sir.

Q. Will you tell us what you saw? A. Well, I was talking with my brother-in-law and I was watching the side of Bridge Avenue and my brother-in-law told me to watch yourself, I turn my face down and I see Patsy Perri with hands out and the other hand make his turn, as soon as he reach the corner, east side of my house, they get together, he hit him front mudguard and make him jump the sidewalk and the girl was standing on the corner of my house and run over into the Pontiac and missed my house about that much.

Q. Where did the Dodge go? A. The Dodge go down Catherine Street and bumped an Oakland and smashed my car about fifty feet from the other car. He hit the Oakland and the Oakland went over to my car.

Q. I see, he hit the Oakland and the Oakland went over and hit you car? A. Yes sir.

Q. Did you look at the street afterwards? A. What do you mean?

Q. Did you look at Bridge Avenue, did you find any evidence of brake marks or anything?

MR. MATLACK—I object.

A. No, I don't see that.

THE COURT—He said he didn't.

MR. PARSONS—Cross-examine.

CROSS EXAMINATION

By MR. MATLACK:

Q. What did you first see, Nick? A. I see when I turn my face, I saw Patsy Perri with his hands out and make his turn on the corner, the Dodge truck come around and he turned the same way Patsy did and he hit him on the front mudguard.

Q. You didn't see them come down the street, did you? A. They was coming down from the station.

Q. How far were they from the corner when you first saw them, or the Dodge car? A. It was so close to one side, I can't tell, it was running so fast.

Q. You saw them right at the corner? A. Right at the corner.

Q. You didn't see the Dodge before it got to the corner? A. Well, I saw the car running, I don't know if it was the Dodge or who was it.

Q. You didn't see Charley the Butcher's car before it got to the corner? A. I see when it was done and when it was hit.

Q. Just when it was hit that is the first you saw it? A. That's all.

Q. So you don't know what Charley's car was doing before it was hit? A. It was coming up.

Q. Did you see it? A. Yes, sir. I think I saw the car coming up.

By THE COURT:

Q. How long did you see Charley's car before it hit? A. I saw that car before Charley's car hit because my brother-in-law told me watch out and just as I turn my face down I saw Patsy turn his car and the Dodge truck come up, I don't know if it was Charley's car or somebody else. I can't tell.

Q. I guess that is the best you can do. A. When they bump together, the Pontiac run up on the sidewalk and then together—they was standing together— and they run over to my house and then I jump off the fence and me and my brother-in-law and some other guy around there raise up the car.

THE COURT— That is all.

MR. MATLACK—That is all.

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CHRISTOPHER C. SELBY, Sworn for the Plaintiff.

DIRECT EXAMINATION

By MR. PARSONS:

Q. Mr. Selby, you live at Red Bank, do you? A. Yes sir.

Q. Where do you live there? A. 188 Spring Street.

Q. On June 10,1928, were you on Bridge Avenue? A. I was.

Q. Where were you on Bridge Avenue? A. I was going up to the Calvary Church and walking along on Bridge Avenue I heard—

Q. Which side of Bridge Avenue were you walking on, Mr. Selby? A. I was on the east side of Bridge Avenue.

Q. East side of Bridge Avenue? A. Yes sir.

Q. Where were you when you heard this crash? A. I was walking along and heard these cars coming and they seemed to be coming quite speedy like and I was walking slow and I turned and looked to my right and the two cars was coming and I began to think—

MR. MATLACK—I object to what he thought, your Honor.

By THE COURT:

Q. What did they do, what did you see? A. As they were going southwards they passed me and when they passed me why they struck.

Q. Came together? A. Yes sir, just before they struck, I looked on the corner and just across from me on the corner I see a couple of ladies coming and those ladies—I didn't know who they were at the time—and those ladies, they kind of halted on the corner, I imagine they had to, so when these cars struck why one of the cars turned off on Catherine Street and the other one shot right between Mr. Warren and Mr. Osborn's side and the telegraph pole there and went on the lawn.

Q. And hit one of the girls? A. They were on the sidewalk and why it knocked them both down and I takes off and run and I was the first one that got there and the car stopped I suppose about four to six foot of the stoop and this lady up on the stoop began to holler and I run and I got there and got hold of the guard there, the front bumper, and I tried to raise it up.

Q. Was the girl under it? A. Yes sir, both of them was, they both was down under it and I tried to raise it up but the other men was right there and we soon lifted it up and we got the girls from under it and they throwed a blanket or something over one of the girls and got her in the car and got to the hospital as quick as they could.

THE COURT—Cross-examine.

MR. MATLACK—No questions

Q. Just one other question, Mr. Selby, did you see where the Dodge went? A. When you talk about one car and another, I don't know, but there was one car went down Catherine Street, that is eastward, it ran quite a little ways down Catherine Street.

MR. PARSONS—That is all.

THE COURT—That is all.

MR. MATLACK—No questions.

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ZOLTON MOLSAN, Sworn for Plaintiff.

DIRECT EXAMINATION

By MR. PARSONS:

Q. Mr. Molesan, you live where? A. Perth Amboy.
Q. On June 10, 1928, where were you? A. Red Bank.

Q. Do you know where Bridge Avenue is in Red Bank? A. I do.

Q. Were you on Bridge Avenue? A. Yes sir.

Q. Did you see this accident? A. Yes.

Q. Will you just tell us what you saw? A. I was going down Bridge Avenue, going north on Bridge Avenue.

Q. Going where? A. North.

Q. Is that towards the railroad station? A. Towards the railroad station and I seen this fellow on the left hand side, I think it was the Pontiac, he stopped for me, and this fellow with the Dodge he was coming up pretty fast. As he passed this fellow, this fellow started turning and all of a sudden I hear a crash and I looks back and I sees these two cars piled up.

Q. Where did the Dodge go, Mr. Molcsan? A. It turned right in the side street there.

Q. Did you go back and examine the street, Bridge Avenue? Do you look at the pavement on the street? A. Yes, I think the truck skidded a lot.

Q. It skidded? A. Yes sir.

MR. PARSONS—Cross-examine.

## CROSS EXAMINATION

By MR. MATLACK:

Q. You don't know which car caused the skid, do you? A. I think it was the Pontiac.

Q. I asked you do you know? A. Which car caused it?

Q. Yes.

By THE COURT:

Q. He is asking whether you know postively whether it was the Pontiac that caused the skid? A. That is the one thing I couldn't tell you.

MR. MATLACK—That is all.

THE COURT—That is all.

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DR. WALTER GOSLING, Sworn for the Plaintiff.

DIRECT EXAMINATION

By MR. PARSONS:

Q. Doctor, you live in Red Bank, do you? A. I do.

Q. You are a licensed physician and surgeon of New Jersey? A. I am.

Q. You are associated in practice with Doctor Garrison of Red Bank? A. I am.

Q. On June 10, 1928, did you see Margaret Bennett? A. I did.

Q. Will you describe her condition when you first treated her? A. When I arrived at the hospital she had already had first aid treatment but she was in great state of shock, that was the principal feature of the condition and was treated for that and held over for observation to see what the real state of her condition was.

Q. Did you diagnose her condition later on? A. Later on, yes.

Q. Will you tell us what you found her condition to be? A. Shock, multiple bruises about the body and contusions, especially over both thighs, buttocks, hematuria, which is bleeding, bloody urine.

Q. Bloody urine, you say? A. Yes and the shock was the big feature with some possible internal condition which later developed, proved itself after operation, as a ruptured kidney resulting in an abcess.

Q. There was a ruptured kidney there? A. There was.

Q. What treatment was given? A. A general treatment for shock and the usual treatment for the contusions and abrasions and bruises about the body and the kidney area was opened and the abcess drained through the wound by Doctor Garrison and then the patient had to be revived and kept alone and a transfusion was instituted to bring her up, keep her going. The condition of her blood count, blood picture and general resistance to the shock of the accident was so depleted she needed stimulation. Doctor Wagner gave that.

Q. I show you Doctor Wagner's bill for the blood transfusion in the amount of one hundred and twenty-five dollars and ask you if that is a fair and reasonable charge for the services rendered in that case? A. I do, from the number he does and I have seen him do.

MR. PARSONS—I offer this bill in evidence.

Dr. Wagner's bill marked Exhibit P-.

Q. Doctor, directing you attention to the operation upon Margaret, will you describe that operation, what it was, what was the purpose of the operation? A. The operation was on incision and drainage of an abcess and the location was about the kidney area. The purpose was to remove the pus that was not draining through the kidney, although she was getting blood and urine and pus through the normal kidney channel but it was an effort to remove that pus.

Q. The kidney has what function in the body? A. To relieve some of the waste products from the body.

Q. And a ruptured kidney such as existed in this case, will the kidney ever regain its normal function? A. It is rather hard to say at this time, it is still present. Last week the urine report came back ten-twelves specific gravity, forty-fifty pus cells per figure.

Q. And I show you the bill of Doctor Garrison—

By THE COURT:

Q. I suppose her youth, however, is favorable to arecovery? A. That is is. There will always be a slight impairment of that one kidney.

Q. Doctor, I show you Doctor Garrison's bill amounting to five hundred dollars for the operation and after treatment and ask you if that is a fair and reasonable bill for the services rendered by Doctor Garrison? A. I believe it to be.

MR. PARSONS—I offer this in evidence.

Dr. Garrison's bill marked Exhibit P-2.

Q. Doctor, you personally took care of the girl yourself also? A. I did.

Q. Are you taking care of her at the present time? A. Yes, sir.

Q. Do you know the amount of your bill to date? A. No, because she was in last week and it isn't made up to date. I think I gave it to you at one time.

Q. I have it to September 24, 1928. I show you this bill in the amount of two hundred and sixteen dollars to

September 24, 1928, and ask you if that is a fair and reasonable bill? A. I believe as it is enumerated it is.

Q. Approximately how many visits have you given the girl since September 24, 1928? A. Only just a small number, five to ten at the most.

MR. PARSONS—I offer this in evidence.

Dr. Gosling's bill marked Exhibit P-3.

Q. This girl was in the hospital for approximately how long? A. I guess I will have to refer you to the dates in the hospital record.

Q. I show you a series of bills totaling $662.12 for hospital expenses and nurses in the hospital and so on and ask you to glance through those and tell me if those are fair and reasonable charges for hospital expenses? A. I would say that they were.

MR. PARSONS—I offer that series of bills in evidence, if your Honor please.

MR. MATLACK—What does that total?

MR. PARSONS—$662.12. Mr. Matlack kindly informs me it should be $722.00.

MR. MATLACK—$722.30.

Q. Doctor, directing your attention particularly to the kidney condition of Margaret, you say that there will be a permanent impairment of the kidney, will you tell us what the result will be upon the other kidney? A. One kidney being bad the other has to make up for the function that the other looses.

By THE COURT:

Q. In other words, it put an extra— A. —strain on the other one.

Q. What would be the effect of that strain in all reasonable probability? A. As the person will grow older, in this case or in cases that had long illness, the added straining together with the already strain would topple over and cause probably a hematuria of the normal kidney at this time.

By THE COURT:

Q. Hemorrhage? A. Yes, sir.

Q. And the function of the kidney is to clear the body of waste products? A. One of the main functions, yes.

Q. Failure in that function has what effect upon the body, Doctor? A. It would tend to keep within the body some of the products that should be eliminated and thereby keep the person below par.

MR. PARSONS—Cross-examine.

CROSS EXAMINATION

By MR. MATLACK:

Q. What is the present condition of this little girl, Doctor? A. As the urinary report shows, the condition of the kidney still remains, some of the pusy condition in that kidney.

By THE COURT:

Q. Is she improving under your treatment, Doctor? A. She has been.

THE COURT—Why didn't you ask him that question?

Q. And she is likely to continue to improve, isn't she? A. With her age and all I would say she would.

Q. So your decision is in the course of time she would get back to normal? A. Not exactly normal.

Q. In what way wouldn't she? A. Since there has been a rupture, one of them will always be weak on that particular side. If you have broken your leg or injured your body, you may recover but you will never be the same.

Q. What is it, sort of pyelitis? A. That is right.

Q. That is quite common in a good many people, isn't it, even people who haven't had a ruptured kidney? A. Yes.

Q. Is it possible part of the pyelitis comes from natural causes? A. No, because that is a different type of pyelitis.

By THE COURT:

Q. This is traumatic? A. Traumatic abcess.

Q. Within what period of time do you expect she will have been cured of this condition? A. Probably six months. The reason for keeping track of her is to see why by this time she hadn't fully recovered. The evidence last week—she came in for the purpose of not feeling well, she had a back ache again.

Q. She has a very good recovery under the circum-

stances? A. Considering the severity of the case, I would say she was doing remarkably well.

MR. MATLACK—That is all.

REDIRECT EXAMINATION

By MR. PARSONS:

Q. Might I ask you how about Margaret's ability to do physical exercise in school and so on. A. At school she has complained of a great deal of distress when she took part in the physical exercises and as yet she is hindered in a great many ways.

Q. Is that due to the kidney condition? A. I believe it is.

Q. You say this kidney is permanently impaired?

MR. MATLACK—I object, he doesn't say that.

MR. PARSONS—There is a rupture of this kidney.

THE COURT—He hasn't said that definitely. You probably hoped he would say it.

MR. PARSONS—I hadn't hoped he would say anything that isn't true.

Q. Is there a permanent condition? A. The present urinary findings prove there is. I wouldn't say that, I will take that back. You can't tell at this date, at present she certainly is not cured.

Q. The conditions do exist as you say? A. Yes, they do.

Q. You examined her no later than last week? A. Yes.

THE COURT—I suppose that is as far as you went then.

Q. There is one question I didn't ask the Doctor that I wanted to bring out; Doctor, with relation to whether there has been a ruptured kidney, does that rupture heal or is there a permanent condition of that kidney? A. The rupture heals.

Q. What is the effect upon the kidney? A. It is showing its effect now.

MR. PARSONS—That is all, Doctor.

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HENRY EAGLEKE, Sworn for the Plaintiff.

DIRECT EXAMINATION

By MR. PARSONS:

Q Q. You are also known as Ham Skin? A. What?

Q. Mr. Eagleke, you were driving in whose car on June 10, 1928? A. Perri's truck.

Q. What can you tell us about the condition of the brakes on that truck? A. Well, I pushed on them, they seemed like they didn't hold so extra good as I told you before, see.

Q. I am not asking you anything about the accident, I just want to know about the condition of the brakes.

Mr. Matlack can ask you about the accident. You were driving Charley's car, do you know his last name? A. Charley is all I know.

Q. Can you identify him here in Court? A. Yes.

THE COURT—Stand up, Charley. Charley the Butcher.

Q. That is the man whose ar you were driving? A. Yes.

MR. PARSONS—That is all.

MR. MATLACK—No questions.

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ANGELO DeCARLO, Sworn for the Plaintiff.

DIRECT EXAMINATION

By MR. PARSONS:

Q. Angelo, you are the one that is known as Charley the Butcher, in this case? A. Yes, I am a good fellow, Charley the Butcher.

Q. It was your car that was in the accident? A. Yes.

MR. PARSONS—That is all, the Plaintiff rests.

THE COURT—Proceed with the defense.

MR. PARSONS—If your Honor please, Doctor Garrison is actually operating at the present time, he

says he will be here a little later and I would like to put him on when he gets here.

MR. MATLACK—If the Court please, I would like to move for a non-suit as to the Defendant De Carlo. There is no evidence in this case that the driver of the automobile, Eagleke, was the agent or servant of the DeCarlo. The only evidence indicates he was driving the car of DeCarlo and for that reason I ask for a non-suit.

THE COURT—I know but you forget the elementary rule as to the presumption. Wherever an automobile appears upon the highway being driven by someone and later it is disclosed that the driver is not the owner, in the absence of all other evidence explaining the situation there is a presumption the driver is driving the car not only with the permission but for some purpose of the owner; and, therefore, a prima facia situation is left that we have the presumption the car was on the road being driven by Eagleke and that DeCarlo owned it; therefore, it follows as a matter of law it is presumed Eagleke was driving it for some purpose of DeCarlo. The motion is denied, you may have an exception.

## CROSS EXAMINATION

By MR. MATLACK

Q. Angelo, on June tenth, who was driving your car, do you know? A. I call up on Saturday, it was about five o'clock, whenever I have my truck painted I get it washed first and I talk to the fellow that was going to paint my truck for me and he told me to get the car

washed and I call up the service station where Ham Skin was and tell them I want the car washed and he said, "all right, I send a man tomorrow morning to get it," and Ham Skin came to my store on Saturday night and I told him I call up the place where he work, he buys meat off me, and he said he would send a man tomorow morning.

Q. Who did you call up? A. Down at the service station where the man works.

Q. That was Saturday night? A. Saturday night.

Q. And Sunday morning what happened? A Sunday morning Eagleke come and get the truck, it was about six o'clock.

Q. In the morning? A. I don't know, six or seven, I don't know the time it was.

Q. Where was your car? A. My car was in the garage, I went and get it and give it to Ham Skin.

Q. He took the car? A. He took the car to wash.

Q. When was the next you heard of the car? A. Somebody run up to my store and say you have an accident. I left some people in the store, and I guess I lost some money that morning, too.

Q. Did you tell Eagleke how to drive your car? A. I can't, Eagleke drive a car a good many years in Red Bank.

Q. Did you tell him where to take it? A. I tell him, he took it up the street to wash.

Q. Did you tell him to go on any particular street? A. No, I say "take my car to get washed."

Q. Did you tell him to wash the car? A. I tell him to wash my car in good shape because I was going to put new paint on.

Q. Did he work for you? A. No, he never worked for me. I know he worked for Jones, that is the place I know he is working.

Q. Did he ever work for you? A. He never worked for me, I work for myself.

MR. MATLACK—Cross-examine.

CROSS EXAMINATION

By MR. PARSONS:

Q. You say you were going to have this car painted, is that right? A. Yes sir.

Q. How old was this car? A. This car was about two years old now.

Q. How long before the accident on June 10, 1928, had you had the car to a garage? A. Ham Skin washed my car about four times.

Q. How long before June 10, 1928, had you had the car to a garage? A. I know one thing Mr. Sandangelo put brakes on for me, eleven dollars for brakes and five dollars for putting it on.

Q. When was that? A. It was May thirtieth, I remember, I got the bill.

Q. Where did you have that done? A. Put a brake, new lining on the brake.

Q. Where did you have that done? A. Frank Sandangelo.

Q. And when? A. I don't know, I got a bill, I don't know what is the date.

Q. Had you had it back to him at all? A. New brakes you don't have to touch it for three months.

Q. Had you had it back to him for him to adjust it? A. Frank Sandangelo fix the brakes and say O. K.

Q. Did you take it back to him after the time he fixed it? A. No, you see—

Q. You can answer that question yes or no, between the time you had that new brake lining put in— A. Yes, sir.

Q. And the time of the accident, did you take it back to him at any time? A. No, sir, a couple of week he test all the brakes in my car.

Q. Where? A. Up at the Dodge people and Frank Sandangelo was work for me, no work for me, but take care of my car. I was giving him twenty-five dollars a month.

Q. You did it once a week? A. Just to work on the car once a week I gave him twenty-five dollars once a month.

Q. You gave him twenty-five dollars a month just to look after your brakes once a week? A. Yes.

Q. Where did Frank work? A. He work for Jones, he do a little extra work for me.

Q. The Dodge can't be a very good car when you have to pay a man twenty-five dollars a month to fix the brakes on it. A. I don't take no chance.

Q. You pay twenty-five dollars a month for a man to take care of the brakes on your car? A. Yes.

Q. Do you understand that question? A. Yes, because I got to get my brakes fixed.

Q. How did you pay this money to this man? A. How? In cash.

Q. Is he in Court? A. I don't know if he is in Court.

Q. Did you bring him here to Court today? A. No.

Q. Did you bring him here last Friday? A. He gave me a bill, I don't know anything about if he is away or not.

Q. You paid him twenty-five dollars a month to look after your brakes? A. Just look at the brakes.

Q. Then you were sort of worrying about the brakes on this Dodge car, weren't you? A. I got a bill.

Q. You were sort of worrying about the brakes on this Dodge car, weren't you? A. It had a new brake on.

Q. But you had to have a man look at them all the time, didn't you? A. Yes, sir.

Q. Then the brakes weren't very good, you had to have them adjusted. A. I had new brake lining put on May 30th and put on brand new brakes for me, I paid eleven dollars for it.

Q. How did you pay for that? A. Eleven dollars.

Q. Cash or check? A. Cash.

Q. If you were paying him twenty-five dollars a month to look after your brakes, why did you pay him that? A. I have to pay what they ask, that is my business, I can give cash or cheese or oil.

Q. You paid him twenty-five dollars a month, how did you pay that? A. I gave him cheese and oil and gasoline, that is my business.

Q. If you paid him twenty-five dollars a month to take care of these brakes— A. I pay him for the material that goes into the car.

Q. Between the time he put that new material on that you talk about, when did he look at the car the next time? A. I don't remember when he look at the car but I know the car had good brakes.

Q. Will you answer the question, please. After he put the new brake lining on, when was the next time he looked at the car? A. Who, me?

Q. No, the man that put it in. A. Frank Sandangelo?

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Q. Yes. A. Frank Sandangelo told me the brakes were O. K.

Q. After he told you that when was the next time he looked at the car? A. No, waits a minute, one brake, one was getting a little on fire and he turn it out and put a little oil on it.

Q. Who did that? A. Frankie, it was too tight, it was put up today and two days afterwards it was adjusted and tried on the road and he said O. K.

Q. And he unloosened it then? A. Just a little bit.

Q. When next did he see it? A. He didn't see it any more next.

Q. He didn't see it any more after he loosened it up? A. No.

Q. On this particular day in question who was working for you at the time? A. Working for me?

Q. Yes. A. I got a boy named Nortius Corbino.

Q. How many times did he take that car of yours down to get it washed?

MR. MATLACK—I object to that, your Honor.

A. He never took it down to get it washed.

Q. Who did take it down to get it washed? A. He used to work in the butcher shop.

Q. Who did take it down? A. Nobody took it down, I got to call up the service station for a man.

MR. PARSONS—I object, that is not responsive.

THE COURT—He has testified as a matter of fact that the garage people sent a man to come and get it, he says the other boy didn't take it.

MR. PARSONS—I have testimony to the contrary.

THE COURT—You can contradict him, of course.

Q. Didn't Nortius as you call him usually take that car down to get it washed?

MR. MATLACK—I object, your Honor.

A. No, sir, he never took my car down to get it washed.

Q. That is your answer, he never took it down? A. He never took a car to get it washed.

THE COURT—Mr. Parsons, I don't suppose it would make any difference whether he did or not. On this day the accident happened it is admitted the car was being driven, not by Nortius, but by the colored man.

MR. PARSONS—It goes to the fact of agency.

THE COURT—That has nothing to do with it at all. You are going to admit the colored man drove it.

MR. PARSONS—I am going to insist he didn't drive it as the agent of Jones but for DeCarlo. I think Eagleke will testify to that if he follows up what he has testified.

THE COURT—Any thing more?

MR. PARSONS—No, that is all.

EDWARD J. RILEY, Sworn for the Defendants.

DIRECT EXAMINATION

By MR. MATLACK:

Q. Mr. Riley, what is your business? A. A Salesroom Manager.

Q. What one? A. Orland B. Jones Cadillac Company.

Q. Of what place? A. Red Bank.

Q. Do you know this colored man, Henry Eagleke? A. I do.

Q. What was his employment? A. He is not employed by us.

Q. Who did he work for? A. Himself.

Q. What was his business there? A. The washing of cars.

Q. And he washed cars for himself? A. Yes.

Q. And he also paid and received money for himself? A. Yes, sir.

Q. He had nothing to do with the Jones Company? A. Not a thing.

Q. Do you know whether or not he worked for DeCarlo or not? A. I don't know nothing about that.

Q. He was in your place every day, working, washing cars? A. He was.

Q. He washed the Jones Company cars? A. He did.

Q. And he washed other people's cars? A. He did.

Q. Was it his habit to go get cars and bring them down to get them washed? A. He was his own free lance.

Q. Have you ever seen him bring cars there? A. I have seen him bring cars there.

MR. MATLACK—That is all.

MR. PARSONS—No cross examination.

MR. MATLACK—The Defendant rests.

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HENRY EAGLEKE, Recalled, by the Plaintiff.

DIRECT EXAMINATION

By MR. PARSONS:

Q. Henry, do you recollect after this accident a hearing was held at the Borough Hall? A. Yes, sir.

Q. Do you remember your testimony in that case? A. I think I do, yes, sir.

Q. How many times approximately had you washed the car of DeCarlo? A. Well, I washed it one or two times but that was the first time I take it down myself.

Q. Who brought it down usually? A. I don't know exactly, one of the boys, Frankie brought it down once or twice.

Q. On this occasion, how did you happen to get the car and take it down? A. I go by there Saturday night and he told me to stop on Sunday morning and bring the car down and clean it because he wanted it cleaned.

Q. He told you to stop on Sunday morning and get the car and take it down? A. Yes, sir.

MR. PARSONS—That is all.

CROSS EXAMINATION

By MR. MATLACK:

Q. Who were you working for, Henry? A. I was working for myself at Mr. Jones' place.

Q. You did your own work? A. Yes, sir.

Q. You received the money for the washing of the cars? A. Yes, sir.

Q. What was the agreement with DeCarlo as to the washing of this car? A. There wasn't any agreement at all, only wash it.

Q. How much were you to get for it? A. Three dollars.

Q. And that whole three dollars was yours, wasn't it? A. Yes, sir.

Q. And did you agree with him to wash it for three dollars? A. He said he would pay three dollars to wash the truck because he wanted a good job on it.

Q. You agreed to wash it for three dollars? A. Yes, sir.

Q. Did you tell him you would go down there and get it and bring it down? A. I told him I would stop down on Sunday morning and stop and get it.

Q. You never worked for DeCarlo did you? A. No, I never worked for DeCarlo.

MR. MATLACK—That is all.

REDIRECT EXAMINATION

By MR. PARSONS:

Q. At the time of this accident, do you remember putting your brakes on? A. Yes sir, I do.

Q. Did your brakes hold? A. Well, as I told you before, they didn't hold so extra good.

Q. Do you remember testifying as follows: "Did they take hold" answer "Well, no." A. What did you say?

Q. Do you remember this question " did they take hold?" Answer, "Well, no." Do you remember saying that before?

By THE COURT:

Q. Do you remember saying that before the Magistrate at Red Bank? A. I don't know what you mean, Judge your Honor.

Q. Did your brakes hold? A. Not so extra good.

Q. That is what you say now, before you said "Well, no" do you remember saying that before?

Q. Do you remember being down before Squire Poulson in Red Bank? A. Yes sir, I was there.

Q. Do you remember saying when you were asked if the brakes held, you said "well, no?" A. If I said that down there, I say it here. That is the whole thing.

THE COURT—Nothing like being consistent is there?

THE WITNESS—No.

MR. PARSONS—That is all.

RE-CROSS EXAMINATION

By MR. MATLACK:

Q. Now, how did the brakes hold on your way down to the shop? A. I didn't have to use them so extra much, only to make a corner, and they held pretty good.

Q. When you wash cars the brakes get wet? A. Sure they would.

Q. Was it because they were wet they wouldn't hold? A. Lots of times it is.

Q. I ask you whether in this case was it because they were wet they wouldn't hold? A. I don't know because they were wet.

THE COURT—Had he washed the car?

MR. MATLACK—This was after he washed the car.

THE COURT—And he was on his way back?

MR. MATLACK—Yes sir.

THE COURT—Were the brakes wet?

THE WITNESS—Yes sir.

THE COURT—That isn't good for the brakes, is it?

THE WITNESS—I don't know, Judge.

MR. MATLACK—That is all.

REDIRECT EXAMINATION

By MR. PARSONS:

Q. Don't brakes usually hold better when they get wet, it swells the brake lining and makes them hold better?

MR. MATLACK—Now, don't you testify Mr. Parsons.

A. I don't know about no brakes what they do when they get wet or swell or what.

THE COURT—That is all, is that the case, gentlemen?

MR. PARSONS—That is our case.

MR. MATLACK—That is our case. Now, I move for a direction of verdict, if the Court please, as to the defendant DeCarlo.

THE COURT—What have you got to say about that, Mr. Parsons?

MR. PARSONS—If your Honor desires that argument before the jury I have the case of Warren vs. Moore, 86 N. J. Law, 710.

THE COURT—I am inclined to the view there is another principle involved here and that is that the owner had a direct interest in the purpose for which the car was being driven at the time. It is question of

fact as to whether Eagleke was compliedly an agent for the moment, whether the relationship of principal and agent applied. The motion will be denied, you may have an exception.

MR. PARSONS—If your Honor please, I would like to call one or two more witnesses.

MR. MATLACK—I have no objetion.

THE COURT—You may.

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MARGARET BENNETT, Sworn for the Plaintiff.

DIRECT EXAMINATION

By MR. PARSONS:

Q. Mrs. Bennett, you are the mother of Margaret, are you? A. Yes sir.

Q. Do you remember the day of the accident? A. Yes.

Q. Where was Margaret taken? A. She was brought home and then we took her to the hospital.

Q. How long did she remain in the hospital? A. Six weeks.

Q. Do you know how many operations she had there? A. She had one.

Q. And then she had a— A. Blood transfusion.

Q. Who gave the blood? A. I did.

Q. Do you know who performed that blood transfusion? A. Doctor Wagner.

Q. Can you tell us briefly what has been the condition of Margaret since she has been out of the hospital? A. Well, she hasn't been able to play, she complains of her side, sick to her stomach and severe headaches and pressed for breath across her chest and she gets weak spells, that is about all. I have to take her to the doctor all the time.

Q. Doctor Gosling has been taking care of her, has he? A. Yes.

Q. Doctor Garrison performed the operation? A. Yes sir.

MR. PARSONS—That is all.

CROSS EXAMINATION

By MR. MATLACK:

Q. She has been able to be up and around? A. Yes.

Q. She goes to school? A. Not regularly.

Q. Well, how often? A. She has been home for the last three weeks, off and on.

Q. Before that how often? A. Not regular.

MR. MATLACK—That is all.

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LEON BENNETT, Sworn for the Plaintiff.

DIRECT EXAMINATION

By MR. PARSONS:

Q. Mr. Bennett, you are the father of Margaret Bennett, are you? A. I am.

Q. Do you remember the day of the accident? A. I do.

Q. Margaret was taken to the hospital was she? A. She was.

Q. These bills which have been offered in evidence, the hospital bills totalling $662.00, did you receive any additional bills to those, Mr. Bennett? A. Why, I don't remember just now. It runs in my mind it was over seven hundred dollars in the hospital, I don't know whether the charges for the operating room and the other things are in those bills or not.

Q. I have got it right here. I show you bills totalling $722.30, is that the bill at the hospital? A. Yes sir.

Q. You have paid that bill? A. I did, I paid $60.18, or something like that, the morning I took Margaret out.

Q. That was the final payment was it? A. Yes sir.

MR. PARSONS—That is all.

MR. MATLACK—No questions.

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MARGARET BENNETT, Sworn for the Plaintiff.

DIRECT EXAMINATION

By MR. PARSONS:

Q. Margaret, before the time that you were hurt did you go to school regularly? A. I did.

Q. Do you remember being at the hospital? A. I do.

Q. Do you remember having a blood transfusion? A. No, I don't.

Q. Have you got any evidence of that, can you show the jury where the transfusion took place; do you remember being down there? A. I do.

Q. How did you feel when you were down there Margaret? A. Very sick.

Q. Since you have been out and have been going to school, do you skip rope? A. I don't.

Q. How do you feel generally, just tell us? A. Well, part of the time I feel very upset and I have severe headaches.

Q. Where do you get the headaches? A. Right over my eyes, right here.

Q. Do you have any pains in the side? A. I do.

Q. And which side? A. My left side.

Q. After the drain was inserted for that kidney, how long did they keep it open, how long did it drain, Margaret? A. I couln't tell you.

Q. Was the drain there after you got out of the hospital? A. I don't think so.

Q. Do you have any trouble with your side now? A. I do.

Q. Do you have any back aches? A. I do.

MR. PARSONS—That is all.

MR. MATLACK—That is all.

MR. PARSONS—If your Honor please, Doctor Garrison is actually operating and I can't produce him here. That is our case.

THE COURT—Both sides rest? Proceed to address the jury.

MR. MATLACK—Is Doctor Kline here?

THE COURT—He doesn't appear.

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BOTH SIDES REST

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## CHARGE OF THE COURT

LAWRENCE, J. Ladies and Gentlemen of the Jury:

The plaintiffs are father and daughter, and they seek to recover in their respective rights money compensation for an injury which the daughter suffered as the result of being struck by an automobile passing over a sidewalk where she was standing at the time.

The father seeks to recover the expenditures, the aggregate of expenditures, made by him for physicians and surgeons and hospital care in attempting to cure his daughter of the injuries which she is alleged to have suffered.

The defendants are three in number, one Perri, who apparently was the owner of an automobile, and the other DeCarlo likewise the owner of another automobile, which it seems were in collision at the time the young girl was injured. There is added as a defendant one Eagleke, who appears to have been driving DeCarlo's car at the time.

The primary question, of course, will be whether negligence has been shown under a fair preponderance of the proof as against Eagleke and DeCarlo, or as against the former for which DeCarlo is to be held in fact under the rules of law that I shall presently give you, and likewise whether Perri is to be held as a defendant, involved in concurring negligence.

I might say, technically speaking, negligence is either the omission to do something which a reasonable person guided by circumstances which ordinarily regulate the conduct of human affairs would do, or the doing of something which a prudent and reasonable person would not do; but when negligence arises out of an act of commis-

sion or omission by one for whose conduct another is responsible, it must be with reference to some duty which the responsible party owed to the party injured. I give you that definition for the reason that it is a question of fact here, as I see it, whether DeCarlo is to be held for the negligent driving of Eagleke, and whether you hold him or not will depend on how you find the fact to be.

We have in the law a recognized principle that if negligence is due to an independent contractor, even though he may be using some property belonging to you, then you may not be liable as a matter of fact, or indeed as a matter of law, if the facts are not disputed. It is conceivable that a person who washes your car may not only contract to do it but likewise to take your car from your garage to the place where he is accustomed to conduct such business, and if a contract with him contemplates the taking of the car from the garage and returning it, it may well be he will be engaged in an independent contract entirely for which he might in case of negligence in driving directly be liable. Here, however, there is a issue of fact whereby it may be ascertained—whether it is or not is for you to say, you are the judges of the fact—that what really happened with regard to DeCarlo was he desired to have the truck in question washed, preparatory to having it painted, that Eagleke was either sent for or went to DeCarlo's place of business, and according to his statement DeCarlo said to him: "I wish you would come and get my car and wash it." Now, DeCarlo states that he called, as I recall his testimony, if I am incorrect you will correct me, and sent to the place where Eagleke was accustomed to work and was told that he (Eagleke) would be sent to get the car for the purpose of washing it. There is a difference there you see, because if it appeared that a part of the contract was not only to have

the car washed out but to come and get it and return it to the owner, and the person so performing that service was to be compensated for coming and getting it, plus the washing, then it might well be that DeCarlo would be heard to say that at the time of this accident the driver was not his agent or his servant, express or implied. If you believe Eagleke's statement, however, that DeCarlo said to him in his butcher shop Saturday night: "I want my car washed, you come and get it" then it may be that you will, if you believe the testimony, find as a fact that after all when Eagleke was driving the car as he was the agent of DeCarlo because of the latter's interest in having the car washed and thereby, for the time being, the latter became the principal, the driver the agent, and the accident having happened, if it is shown under the fair preponderance of the proof, due to the negligence of Eagleke, the driver, then the principal DeCarlo would be liable just as though he had been driving the car at the moment himself. That is an issue of fact. How you are going to resolve that is peculiarly, as I see it, for you to say. You will bear in mind the distinction which I have endeavored to indicate to you with regard to the rule of law that would be applicable in the circumstances, dependent entirely upon how you find the fact to be.

It further appears that a question is left here as to the condition of the brakes on that car of DeCarlo at the time; and, of course, if the brakes were in such condition that it would be evidence of carelessness on the part of the owner to allow the car to be driven which might in reasonable probability involve it in an accident because of such defective brakes, then that would be an element and fact to be examined by you in determining whether negligence had been established against DeCarlo or as against Eagleke, as the case may be.

I may say that the appellate courts of this State apparently have little hesitation in holding the driver of an automobile responsible in negligence where such an automobile mounts a sidewalk and injures a pedestrian. That is upon the theory that such an automobile has no place on the sidewalk; and, therefore, in one case I have in mind the Supreme Court had this to say: "The idea that the driver of an automobile, who for the purpose of avoiding a collision with another vehicle runs blindly up onto a sidewalk without regard to the danger that threatens people lawfully there, is in the exercise of due care, in a proposition which has not yet met with the approval of the Courts, so far as we know, and in our judgment is not likely to do so in the future."

Here it appears this young girl with a companion was standing on the sidewalk and suddenly an automobile mounts the curb and passes over it, striking her and knocking her onto the adjoining lot. The question of negligence ought not to be very difficult to determine, and the driver of that car, as the text of the case to which I have just referred indicates, cannot justify such conduct on the theory that he was endeavoring to avoid collision with another car because the language is— "The idea that the driver of an automobile, who for the purpose of avoiding a collision with another vehicle runs blindly—you will bear that in mind, the use of that word—up onto a sidewalk without regard to the danger that threatens people lawfully there, is in the exercise of due care, is a proposition which has not yet met with the approval of the Courts."

Here you have two vehicles in collision. Who was at fault is a question of fact. Whether Eagleke concurred in such fault is an issue for you to determine. If you find he was not guilty of negligence but Perri was solely negli-

gent, of course, you wouldn't hold either Eagleke or DeCarlo, as the case may be, assuming you find him to be liable at all because of the principle of master and servant or principal and agent. On the other hand, if you find this accident due to the concurring negligence of both drivers, then you would hold them both. That condition depends on how you would determine that question of principle and agent or master and servant. In the event you resolve this question, whether it be against all three defendants or not under the rules as given you, then you would award the young girl a sum, which is your sound judgment and discretion would adequately compensate her for the injuries she suffered, having in mind its nature and extent, the pain and suffering accompanying it, and likewise having ascertained whether there is any permanent feature attached to the injury or not in all reasonable probability, and then such sum as you may return must adequately cover all the injuries and all of the features thus indicated in the rule. With regard to the father, he would be entitled to recover such money as he may have expended for physicians and surgeons and hospital care, in other words, such sums as may have been reasonably necessary and are reasonable charges, likewise for such professional care and hospitalization. As I recall it, they are the principal elements that are included in the claim of the plaintiffs.

You will take the case and endeavor to do justice between these parties, bearing in mind the plaintiff carries the burden of satisfying you by credible legal evidence as to the negligence of the defendants, or such as you find liable, and having done that, you will have done justice between these litigants.

MR. MATLACK—I ask an exception to the Court's failure to charge the requests of the defendant DeCarlo, and because the Court left it to the jury to say whether the defendant DeCarlo had knowledge—

THE COURT—Just a moment, Ladies and Gentlemen: I have been requested by Counsel for the defendant to charge that the plaintiff must not only prove that the brakes on the DeCarlo car were in fact defective, but must also prove that DeCarlo had knowledge of their defective condition or that they had been in a defective condition for such a length of time that he would be chargeable with notice that they were defective.

If the brakes on DeCarlo's car were not in a defective condition at the time the car was taken by Eagleke but became defective after Eagleke took the car either because they had become wet from the washing or for other reasons, DeCarlo was not negligent and the verdict must be no cause for action. I so charge you, bearing in mind, moreover, the matters submitted in the main charge with regard to the alleged relationship of principal and agent or master and servant between DeCarlo and Eagleke. Of course, if there was no such relationship there can be no liability on the part of DeCarlo. If Eagleke was engaged in the independent business with regard to washing cars, and one of the elements was that he should go and get the car and wash it, then the situation as to an independent contractor would arise and the rule applicable would apply.

MR. MATLACK—I ask an exception to the Court's failure to charge the first five requests of the defendant DeCarlo, and because the Court charged that if DeCarlo

sent for the service station man to wash the car and to come and get it, that there would be then a principal and agent or master and servant relationship between DeCarlo and Eagleke, whereas the defendant DeCarlo contends it makes no difference whether he sent for the service station man to come and have it washed or the service station offered to come and get it, as the test of the relationship is the employment of Eagleke and not whether he came as the result of a call to get the car or because he offered to take the car and have it washed.

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## REQUESTS TO CHARGE FOR DEFENDANT DECARLO

1. The plaintiff must prove by the greater weight of evidence that not only was the operator of the Dodge car driving it with the knowledge of the defendant DeCarlo but that he was the servant or agent of the defendant and subject to the control of the defendant DeCarlo.

2. Proof that Eagleke obtained the defendant's car at the request of DeCarlo to wash it for the defendant and was driving it back to the defendant's place of business after washing it at the time of the accident will not charge the defendant DeCarlo with negligence unless the plaintiff also proves that the driver was the agent or servant of DeCarlo and subject to the control of DeCarlo.

3. If you find that Eagleke operated a car washing business for himself or was employed by someone to wash cars and the defendant DeCarlo was a customer of

Eagleke's or a customer of Eagleke's employer, and that DeCarlo contracted with Eagleke to have his car washed and that Eagleke in pursuance of such agreement took the defendant DeCarlo's car to Eagleke's place of business to wash it and that DeCarlo had no control over Eagleke from the time the car was taken to the time the car was returned, and while returning it Eagleke had an accident. Eagleke was not an employee, servant or agent of the defendant DeCarlo and as to DeCarlo there must be a verdict of no cause for action.

4. If the defendant DeCarlo neither directed nor controlled Eagleke, or exercised over him any power, authority, or supervision, but hired him only to wash the car, leaving to him the exclusive management, itinerary, direction and control of the car, the relation of master and servant did not exist between Eagleke and DeCarlo.

5. DeCarlo having contracted with Eagleke to wash his car and thereafter having exercised no power, authority, supervision or control over Eagleke, either with respect to his manner of taking the car to the place where it was to be washed or with respect to the washing of the car itself, Eagleke was an independent contractor and DeCarlo was not responsible for the negligence of Eagleke while driving the car and the verdict as to DeCarlo must be no cause for action.

6. The plaintiff must not only prove that the brakes on the DeCarlo car were in fact defective, but must also prove that DeCarlo had knowledge of their defective condition or that they had been in a defective condition for such a length of time that he would be chargeable with notice that they were defective.

7. If the brakes on DeCarlo's car were not in a defective condition at the time the car was taken by Eagleke but became defective after Eagleke took the car either because they had become wet from the washing or for other reasons, DeCarlo was not negligent and the verdict must be no cause for action.

# New Jersey
# Court of Errors and Appeals

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| MARGARET BENNETT, by next friend, *et al.*, Plaintiffs-Respondents, vs. HENRY EAGLEKE and ANGELO DE CARLO, Defendants-Appellants. | Action at Law<br>On Appeal from Supreme Court |

## BRIEF OF THE PLAINTIFFS-RESPONDENTS.

### STATEMENT.

Defendant, Angelo De Carlo, has appealed from a verdict rendered by the Monmouth Circuit Court on March 25, 1929.

The infant plaintiff, while standing upon the sidewalk at the corner of Bridge Avenue and Catherine Street, in the Borough of Red Bank, was struck by an automobile owned by the appellant, Angelo De Carlo, and driven by one Henry Eagleke. She sustained a ruptured kidney and other serious injuries. The jury gave her a verdict of $10,000.00 and her father a verdict of $722.32.

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At the May Term, 1929, the appellant in this suit prosecuted a rule to show cause in the Supreme Court before Chief Justice Gummere and Justices Kalisch and Campbell.

The opinion of the Supreme Court is reported in 8 N. J. Misc. 61. The opinion recites that the rule requests the verdict to be set aside for three reasons:

(1) As against the weight of evidence.

(2) As excessive.

(3) As inconsistent.

The rule to show cause was discharged and the verdicts affirmed.

Thereafter this appeal was taken by the defendant-appellant, who had procured the rule to show cause.

The entire argument of the defendant-appellant in this appeal bears upon the question whether De Carlo was operating the car by an agent or servant. The facts briefly were that De Carlo, a butcher, desired to have his car washed. The washer, Eagleke, stopped into his store and De Carlo asked him to take his car down. Eagleke did so. It was while on this trip that the accident happened.

While the defendant-appellant in his brief argues five different points, all five points bear upon this issue. Four of the points relate to the Court's charges and refusal to charge defendant's request. The other point charges error by the Trial Court in refusing to grant a non-suit or direct a verdict for the defendant.

## ARGUMENT.

### I.

### A JURY QUESTION WAS PRESENTED UPON THE RELATION OF MASTER AND SERVANT BETWEEN THE APPELLANT DE CARLO AND EAGLEKE.

Respondents respectfully submit to this court that the appellant is barred from urging this point as a ground of appeal. Mention has been made in the statement of the rule to show cause and the argument of the same by the defendant, who now appeals.

The Supreme Court, in *Bennett* v. *Eagleke*, *supra*, says:

> "These verdicts were asked to be set aside for three reasons: 1. Because they are against the weight of evidence. The principal, if not the sole reason urged under this ground is that the finding, in order to warrant recoveries by the plaintiffs, must have been that at the time of the happening, the relationship of master and servant existed as between DeCarlo, the owner of the car, and Eagleke, its driver, and such finding is not supported by a preponderance of the proofs.
>
> *"We think the evidence warranted such finding by the jury."*

Reference to the brief and to this opinion is conclusive, that the appellant here, in his argument for the rule, based his reasons for a new trial upon this specific reason. He now, in his argument in this appeal, that the Court erred in refusing to nonsuit or direct the verdict, uses the identical argument. This Court has, in the case

of *Jones* v. *U-Drive-It Co.*, 8 N. J. Misc. 356, recently said:

> "*Where it is urged under such a rule (to show cause for new trial) the verdict is against the weight of the evidence such insistence is tantamount to an admission that there was some evidence, although insufficient, to support the verdict.* Under such circumstances, a reservation of exceptions to refusal to nonsuit or direct a verdict is unavailing as a ground of appeal. *Catterall* v. *Otis Elevator Company,* 103 N. J. L. 381."

This is a restatement of a well-settled principle and it is submitted that this ground and reason can be of no avail to the appellant.

This Court, in *Klein* v. *Schryer* (not yet officially reported), 150 Atl. 321, also held:

> "The rule is well settled with the reason assigned for the new trial, that the verdict is contrary to the weight of evidence, which reason was argued, considered and decided on the return of the rule; is necessarily impressed within exceptions to the refusal to nonsuit and to direct a verdict, on the ground that there was no evidence of defendants' negligence and that contributory negligence of the plaintiff conclusively appeared, which were reserved in the rule and, therefore, such exceptions cannot be considered on appeal."

However, because of the fact that all of the other reasons urged by the appellant are directly related to this issue, this point will be argued fully.

DeCarlo was admittedly the owner of the automobile. This raised a presumption that its op-

ration on the highway was with the authority of appellant DeCarlo and for his benefit. This presumption could only be rebutted by uncontradicted proof. No such proof was submitted. The proof submitted was clearly a statement of facts requiring submission to the jury for the determination of the relation between DeCarlo and Eagleke to the jury.

On page 50 DeCarlo admitted that he was the owner of the car in the accident. On cross-examination he stated that he called up and said he wanted his truck washed the next day. The man at the washstand said:

> "All right. I send a man tomorrow morning to get it" (p. 52, ll. 1 to 8).

The next morning Eagleke came to get the truck (p. 52, l. 10), DeCarlo said:

> "My car was in the garage; I went and get it and give it to Ham Skin" (p. 52, l. 16).

He then said:

> "Q. Did you tell him where to take it? A. I tell him, he took it up the street to wash" (p. 52, l. 26).

Eagleke stated that he had washed the car one or two times; that the occasion of the accident was the first time he had taken it down himself. Usually one of DeCarlo's boys took it down (p. 59, ll. 22 to 27). He then said:

> "Q. On this occasion how did you happen to get the car and take it down? A. I go by there Saturday night and he told me to stop on Sunday morning and bring the car down and clean it because he wanted it cleaned.

Q. He told you to stop on Sunday morning and get the car and take it down? A. Yes, sir" (p. 59, ll. 28 to 33). * * *

"Q. What was the agreement with DeCarlo as to the washing of this car? A. There wasn't any agreement at all, only wash it" (p. 60, ll. 11 to 13).

This testimony represents the situation presented to the Trial Court and the jury. The Supreme Court, in its opinion, held that here was sufficient evidence to warrant a finding by the jury that Eagleke was acting as the agent or servant of appellant DeCarlo. Appellant in his brief has treated the relation of DeCarlo to Eagleke as that of one contracting with an independent contractor. Appellant assumes that this was proven beyond question. The Supreme Court in the rule decided to the contrary, and held that the evidence warranted a finding that the relation of master and servant was probable and had not existed between DeCarlo and Eagleke.

Since the decision in the Supreme Court on the rule to show cause in this case, the Court of Errors and Appeals, in *Meicke* v. *Silk City News Company,* 8 N. J. A. R. 412 (not yet officially reported) held in a similar situation, in which the facts were more favorable to such a contention, that it was properly a jury question where the relation of master and servant existed. In this case, the driver of the automobile causing the injury was employed by one Manketo and also did work for the Silk City News Company. Proof showed that both Manketo and the News Company were interested in delivery of the papers. The charge of the Trial Court was as follows:

> "The test as to whether there is a relationship of master and servant is that the driver, so-called servant, was at the time of the accident engaged in something for the master. * * * So the question for your determination is whether the evidence has disclosed by a fair preponderance of the evidence that the driver was, technically speaking, a servant of the News Company, that is, whether he was doing something for the News Company, and that at its request, or by its acquiescence, or by its permission."

This charge was affirmed by the Court of Errors and Appeals, and under the evidence adduced, this Court held the relationship was properly a jury question.

The situation before the Court is not a novel situation. Similar situations have been passed upon by this court repeatedly. In *Spelde* v. *Galtieri,* 102 L. 203, the jury was permitted to find the relationship existing upon the express denial of the owner of the car and upon lack of proof of the name of the driver. In the often-cited case of *Mahan* v. *Walker,* 97 L. 304, defendant's son-in-law, a garage mechanic, was testing a car out while it was in the garage being repaired. The son-in-law was requested by the garageman to drive the car so as to test the repairs which had been made. Under such circumstances, this Court held that the relationship was a jury question.

In *Warne* v. *Moore,* 86 L. 710, the Court of Errors and Appeals reversed a judgment of nonsuit. The defendant hired a chauffeur to drive his car from Trenton to Passaic. The defendant contended in the state of facts that there was no relationship of master and servant, but that the

driver was an independent contractor. This Court held that upon such proof no such relationship was established, but that the chauffeur was the defendant's servant.

In *Holloway* v. *Schield* (Mo.), 243 S. W. 163, the owner of an automobile was held liable where it was being driven from the owner's home to the garage by a servant of the garageman, who had come for the car at the request of the owner. There was no proof or evidence that the owner paid the garage for this service. He had simply requested the garageman to drive his car to the garage. The owner was liable because, under such a state of facts, the garageman was acting for the owner.

In *Bailey* v. *Smith* (S. C.), 128 S. E. 423, the owner stopped at a garage to have his car washed and an employe went with the owner to his place of business, so as to bring the car back to wash. The Court held, under such a state of facts, it to be a jury question whether the employe of the washstand, in driving the car from the owner's place of business to the washstand, was acting as an agent or servant of the owner.

In *Marron* v. *Bohannan* (Conn.), 133 Atl. 667, the defendant had left her car with a garageman to be repaired. She asked the garageman to bring it over to the church. In bringing the car over to the church the garageman injured the plaintiff. Chief Justice Wheeler, speaking for the Supreme Court of Connecticut, held that the benefit was for the defendant and that the driver was acting as an agent or servant of the defendant and so the defendant was responsible for his acts.

This issue was submitted to the jury clearly and concisely by the Trial Court in its charge to the jury:

> "We have in the law a recognized principle that if negligence is due to an independent contractor, even though he may be using some property belonging to you, then you may not be liable as a matter of fact, or indeed as a matter of law, if the facts are not disputed. It is conceivable that a person who washes your car may not only contract to do it but likewise to take your car from your garage to the place where he is accustomed to conduct such business, and if a contract with him contemplates the taking of the car from the garage and returning it, it may well be he will be engaged in an independent contract entirely for which he might in case of negligence in driving directly be liable. Here, however, there is an issue of fact whereby it may be ascertained—whether it is or not is for you to say, you are the judges of the fact—that what really happened with regard to DeCarlo was he desired to have the truck in question washed, preparatory to having it painted, that Eagleke was either sent for or went to DeCarlo's place of business, and according to his statement DeCarlo said to him: 'I wish you would come and get my car and wash it.' Now, DeCarlo states that he called, as I recall his testimony, if I am incorrect you will correct me, and sent to the place where Eagleke was accustomed to work and was told that he (Eagleke) would be sent to get the car for the purpose of washing it. There is a difference there, you see, because if it appeared that a part of the contract was not only to have the car washed out but to come and get it and return it to the owner, and the person so performing

> that service was to be compensated for coming and getting it, plus the washing, then it might well be that DeCarlo would be heard to say that at the time of this accident the driver was not his agent or his servant, express or implied. If you believe Eagleke's statement, however, that DeCarlo said to him in his butcher shop Saturday night: 'I want my car washed; you come and get it,' then it may be that you will, if you believe the testimony, find as a fact that after all, when Eagleke was driving the car as he was the agent of DeCarlo because of the latter's interest in having the car washed and thereby, for the time being, the latter became the principal, the driver the agent, and the accident having happened, if it is shown under the fair preponderance of the proof, due to the negligence of Eagleke, the driver, then the principal DeCarlo would be liable just as though he had been driving the car at the moment himself. That is an issue of fact. How you are going to resolve that is peculiarly, as I see it, for you to say. You will bear in mind the distinction which I have endeavored to indicate to you with regard to the rule of law that would be applicable in the circumstances, dependent entirely upon how you find the fact to be" (p. 70, l. 8; p. 71, l. 25).

Now the situation is presented to this Court upon appeal. It is simply one variation of those circumstances, to which the general principles of master and servant and principal and agent must be applied. The general presumption that the automobile of DeCarlo was being operated upon the highway for his benefit by his agent or servant was in no wise rebutted. The only attempt to rebut this presumption was a statement by DeCarlo that he asked to have a man sent up to

get his car to have it washed. Under the evidence in the case heretofore recited, it is apparent that the $3.00 which DeCarlo was to pay was for the washing of his car. There was no contract whatsoever made by DeCarlo covering the fetching and delivering of the car. It was apparent from the testimony of both DeCarlo and Eagleke that Eagleke's act in delivering this car was a favor to DeCarlo. No charge was made for this favor. There is no intimation that in the contract for the washing of the car such service was to be rendered.

A clear reading of the testimony would indicate that Eagleke was doing this as a favor to DeCarlo. In fact, Eagleke affirmatively testified that he washed DeCarlo's car on several other occasions. On every occasion except the day of the accident DeCarlo had caused the car to be delivered at the washstand. On this one instance, at DeCarlo's request, Eagleke had taken the car to wash it and was going to return it. The price was no different from the standard price. From the evidence it is apparent that in the driving of this car to the stand and the delivery of the car back to DeCarlo, Eagleke was acting as DeCarlo's agent. Not only is the presumption of agency not rebutted, but it is strengthened by an examination of the testimony.

From the cases similar in facts stated above, from the facts in the instant case, and from the well settled principles of law in this jurisdiction, the verdict of the jury was correctly rendered and properly within the relationship of master and servant between DeCarlo and Eagleke.

## II.

## THE TRIAL COURT MADE NO ERRORS IN THE CHARGE TO THE JURY.

Appellant argues under four separate points that the Trial Court erred in failing to charge the third, fourth and fifth requests submitted by the appellant, and also made an error in his charge, to which exception was taken. These four points may well be grouped under two heads:

A. The Trial Court properly omitted charging requests Nos. 3, 4 and 5.

B. The Trial Court's charge was proper.

Requests Nos. 3, 4 and 5 of the appellant comprise categorical statements, all tending to support the defendants' theory that Eagleke was an independent contractor. In the first place, all three of these requests cover facts which were not in the case, or only cover a portion of the facts in the case.

It is an elementary principle, needing no citation and support that a request of charge must be within the facts of the case. Appellant states affirmatively that DeCarlo exercised no power, authority, supervision or control over Eagleke. Appellant states affirmatively that Eagleke, in pursuance of a contract to wash the car, took the car to his place of business. Appellant states affirmatively that DeCarlo had no control over Eagleke. A proper consideration of the evidence gives no support to such statements. The jury, from the plaintiffs' viewpoint, at least, could infer from the evidence that DeCarlo did have the right of telling Eagleke when, how or where to drive the automobile, and did actually go out to the garage for the purpose of obtaining the automobile.

Furthermore, the requests of charge are properly and fully covered by the Trial Court in his charge. The Trial Court explicitly laid down the principle of independent contractor and of master and servant (see p. 70, l. 8; p. 71, l. 25). This statement was clear and concise and comprised the substance of the requests submitted by the appellant.

In *Rapp* v. *Butler-Newark Bus Line,* 103 L. 512, Chief Justice Gummere said:

> "A careful examination of the charge as delivered satisfies us that this request was charged in substance. This being so, it is immaterial whether or not the language embodied in the request was adopted by the Court in the charge or was not."

Considering these requests, with the actual charge of the Trial Court, appellant cannot complain. The Trial Court charged the legal principle requested by the appellant in his three requests, substantially. This was what the Court was required to do and the appellant has suffered no harm thereby. The Trial Court made no error in its charge.

The argument of the appellant upon this point is involved and complex. Appellant has, since taking his exception, reconsidered, evidently, his reasons for taking the exception. The exception is set forth on page 74, line 32 to page 75, line 10. This exception is directed to that portion of the charge already quoted, and more particularly to that portion wherein the Court gave the two examples to the jury which erroneously stated the law.

At the time of the exception, counsel for the appellant gave as his reason for the exception that the test of the relationship is the employment

of Eagleke, and that it made no difference whether he sent for the service man to come and have it washed or the service man offered to come and get it. This contention is completely answered by carefully reading the Court's charge. The Court explicitly set forth the elements necessary to create an independent contractor, and also the elements necessary to create Eagleke a servant of DeCarlo. The appellant has attempted to pick out a few sentences of the charge and spell out a different meaning. The charge must be taken as a whole, and isolated portions of the charge cannot be selected for criticism. (See *Brown* v. *Spence,* 79 L. 452; *Sullivan* v. *North Hudson R. R. Co.,* 51 L. 518.)

Reading this charge as a whole, it is respectfully submitted that the Trial Court made no error in the portion excepted.

## III.

## CONCLUSION.

1. Because the appellant cannot argue as error the refusal to nonsuit or direct a verdict;

2. Because the requests to charge were substantially charged;

3. Because the facts contained in the requests to charge did not comprise the facts of the case;

4. Because the Court made no error in his charge, it is respectfully submitted that the judgment below be affirmed.

Respectfully submitted,

THEODORE D. PARSONS,
*Of Counsel for Plaintiffs-Respondents.*

QUINN, PARSONS & DOREMUS,
*Attorneys.*

NEW JERSEY COURT OF ERRORS AND APPEALS

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| MARGARET BENNETT, by next friend, et al., *Plaintiffs*, vs. HENRY EAGLEKE, ANGELO DE CARLO and PATSY PERRI, *Defendants*. | ACTION AT LAW. ON APPEAL FROM SUPREME COURT. |

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Brief on behalf of Defendant-Appellant.

This is an appeal from a verdict rendered at the Monmouth Circuit before Judge Rulif V. Lawrence, March 25, 1929. The suits grow out of an automobile accident on June 10, 1928, at the corner of Ridge Avenue and Catherine Street in the Borough of Red Bank. There were three defendants and the jury rendered a verdict against but one, namely Angelo De Carlo, the appellant herein. The other two defendants against whom no verdict was rendered were Patsy Perri, owner and driver of the car in collision with the car of De Carlo and Henry Eagleke a service station man who was driving De Carlo's car after washing it.

The defendant Angelo De Carlo, desiring to have his car washed employed Henry Eagleke to wash the car for the sum of $3.00. Eagleke went to De Carlo's

place, obtained the car, took it to his place of business, washed it, and when returning the car to De Carlo's garage became involved in the accident out of which grew the injuries to the plaintiff's. Neither Patsy Perri nor Eagleke defended at the trial, but in spite of this the jury rendered a verdict only against the defendant De Carlo.

The sole contention of the defendant Angelo De Carlo at the trial was that Henry Eagleke was not the servant or agent of the defendant De Carlo, at the time of the accident but was an independent contractor.

## THE ASSIGNMENTS OF ERROR

The assignments of error relied upon are as follows:

2. The trial court refused to direct a verdict in favor of the defendant, Angelo De Carlo, and against the plaintiffs when thereunto moved by counsel for the defendant, Angelo De Carlo, whereas said court should have directed a verdict in favor of the defendant, Angelo De Carlo, and against the plaintiffs to which an exception was allowed the defendant, Angelo De Carlo.

5. Because the trial court erroneously refused to charge the jury the third request to charge of the defendant, Angelo De Carlo, as follows:

"If you find that Eagleke operated a car washing business for himself or was employed by someone to wash cars and the defendant De Carlo,

was a customer of Eagleke's or a customer of Eagleke's employer, and that De Carlo contracted with Eagleke to have his car washed and that Eagleke in pursuance of such agreement took the defendant, De Carlo's, car to Eagleke's place of business to wash it and that De Carlo had no control over Eagleke from the time the car was taken to the time the car was returned, and while returning Eagleke had an accident. Eagleke was not an employee, servant or agent of the defendant, De Carlo, and as to De Carlo there must be a verdict of no cause for action."

to which refusal an exception was allowed the defendant, Angelo De Carlo.

6. Because the trial court erroneously refused to charge the jury the fourth request to charge of the defendant, Angelo De Carlo, as follows:

"If the defendant, De Carlo, neither directed nor controlled Eagleke, or exercised over him any power, authority, or supervision, but hired him only to wash the car, leaving to him the exclusive management, itinerary, direction and control of the car, the relation of master and servant did not exist between Eagleke and De Carlo."

to which refusal an exception was allowed the defendant, Angelo De Carlo.

7. Because the trial court erroneously refused to charge the jury the fifth request to charge of the defendant, Angelo De Carlo, as follows:

"De Carlo having contracted with Eagleke to wash his car and thereafter having exercised no power, authority, supervision or control over Eagleke, either with respect to his manner of taking the car to the place where it was to be washed or with respect to the washing of the car itself, Eagleke was an independent contractor and De Carlo was not responsible for the negligence of Eagleke while driving the car and the verdict as to De Carlo must be no cause for action."

to which refusal an exception was allowed the defendant, Angelo De Carlo.

8. Because the trial judge erroneously charged the jury as follows, and allowed the defendant, Angelo De Carlo, an exception in due course:

"It is conceivable that a person who washed your car may not only contract to do it but likewise to take your car from your garage to the place where he is accustomed to conduct such business, and if a contract with him contemplates the taking of the car from the garage and returning it, it may well be he will be engaged in an independent contract entirely for which he might in case of negligence in driving directly be liable. Here, however, there is an issue of fact whereby it may be ascertained—whether it is or not is for you to say, you are the judges of the fact—that what really happened with regard to De Carlo was he desired to have the truck in question washed preparatory to having it painted, that Eagleke was either sent for or went to De Carlo's

place of business, and according to his statement De Carlo said to him: "I wish you could come and get my car and wash it." Now, De Carlo states that he (Eagleke) would be sent to get the car for the purpose of washing it. There is a difference there you see, bceause if it appeared that a part of the contract was not only to have the car washed but to come and get it and return it to the owner, and the person so performing that service was to be compensated for coming and getting it, plus the washing, then it might be that De Carlo would be heard to say that at the time of this accident the driver was not his agent or his servant, express or implied. If you believe Eagleke's statement, however, that De Carlo said to him in his butcher shop Saturday night: "I want my car washed, you come and get it" then it may be that you will, if you believe the testimony, find as a fact that after all when Eagleke was driving the car he was the agent of De Carlo because of the latter's interest in having the car washed and thereby, for the time being, the latter became the principal, the driver the agent, and the accident having happened, if it is shown under the fair preponderance of the proof, due to the negligence of Eagleke, the driver, then the principal De Carlo, would be liable just as though he had been driving the car at the moment himself."

## POINT ONE

### IT WAS ERROR FOR THE TRIAL COURT TO REFUSE TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT, ANGELO DE CARLO.

The presumption of fact that the driver of an automobile on a public highway is a servant or agent of the owner is rebuttable by uncontradicted proof to the contrary and when so contradicted the issue becomes a matter of law for the court. *Tischler vs. Steinholtz,* 99 New Jersey Law, 149.

The testimony of Henry Eagleke, the driver of the car, Angelo De Carlo, the owner of the car, and Edward J. Riley, which is the only testimony bearing on the relationship between the defendant, De Carlo, and the driver, Henry Eagleke, is uncontradicted that Eagleke was in business for himself washing cars, that De Carlo desired his car washed and that he called the place of business of Eagleke, as a result of which Eagleke went to De Carlo's place of business and De Carlo again told him he desired his car washed and Eagleke on the following morning came and took the car of De Carlo to his (Eagleke's) place of business, washed it and was returning it when the accident happened.

We set forth the entire testimony bearing on this phase of the case because it is clearly uncontradicted, and not reasonably capable of contradictory interpretations. Angelo De Carlo testified as follows: (S. C. pp. 51 and 52.)

"Q. Angelo, on June tenth, who was driving your car, do you know? A. I call up on Saturday, it was about five o'clock, whenever I have my truck painted I get it washed first and I talk to the fellow that was going to paint my truck for me and he told me to get the car washed and I call up the service station where Ham Skin was and tell them I want the car washed and he said, 'all right, I send a man tomorrow morning to get it,' and Ham Skin came to my store on Saturday night and I told him I call up the place where he work, he buys a meat off me, and he said he would send a man tomorrow morning.

Q. Who did you call up? A. Down at the service station where the man works.

Q. That was on Saturday night? A. Saturday night.

Q. And Sunday morning what happened? A. Sunday morning Eagleke come and get the truck, it was about six o'clock.

Q. In the morning? A. I don't know, six or seven, I don't know the time it was.

Q. Where was your car? A. My car was in the garage, I went and get it and give it to Ham Skin.

Q. He took the car? A. He took the car to wash.

Q. When was the next you heard of the car? A. Somebody run up to my store and say you have an accident. I left some people in the store, and I guess I lost some money that morning, too.

Q. Did you tell Eagleke how to drive your car? A. I can't, Eagleke drive a car a good many years in Red Bank.

Q. Did you tell him where to take it? A. I tell him, he took it up the street to wash.

Q. Did you tell him to go any particular street? A. No, I say 'take my car to get washed.'

Q. Did you tell him to wash the car? A. I tell him to wash my car in good shape because I was going to put new paint on.

Q. Did he work for you? A. No, he never worked for me. I know he worked for Jones, that is the place I know he is working.

Q. Did he ever work for you? A. He never worked for me, I work for myself."

At page 56 he testified:

"Q. On this particular day in question who was working for you at the time? A. Working for me?

Q. Yes. A. I got a boy named Nortius Corbino.

Q. How many times did he take that car of yours down to get it washed?

MR. MATLACK—I object to that, your Honor.

A. He never took it down to get it washed.

Q. Who did take it down to get it washed? A. He used to work in the butcher shop.

Q. Who did take it down? A. Nobody took it down, I got to call up the service station for a man.

MR. PARSONS—I object, that is not responsive.

THE COURT—He has testified as a matter of fact that the garage people sent a man to come and get it, he says the other boy didn't take it.

At page 57 he testified:

MR. PARSONS— I have testimony to the contrary.

THE COURT—You can contradict him, of course.

Q. Didn't Nortius as you call him usually take that car down to get it washed?

MR. MATLACK—I object, your Honor.

A. No, sir, he never took my car down to get it washed.

Q. That is your answer, he never took it down to get it washed. A. He never took a car to get it washed.

THE COURT—Mr. Parsons, I don't suppose it would make any difference whether he did or not. On this day the accident happened it is admitted the car was being driven, not by Nortius, but by the colored man.

MR. PARSONS—It goes to the fact of agency.

THE COURT—That has nothing to do with it at all. You are going to admit the colored man drove it.

MR. PARSONS—I am going to insist he didn't drive it as the agent of Jones but for De Carlo. I think Eagleke will testify to that if he follows up what he has testified.

THE COURT—Anything more?

MR. PARSONS—No, that is all.

Edward J. Riley testified as follows (S. C. p. 58).

"Q. Mr. Riley, what is your business? A. A Salesroom Manager.

Q. What one? A. Orland B. Jones Cadillac Company.

Q. Of what place? A. Red Bank.

Q. Do you know this colored man, Henry Eagleke? A. I do.

Q. What was his employment? A. He is not employed by us.

Q. Who did he work for? A. Himself.

Q. What was his business there? A. The washing of cars.

Q. And he washed cars for himself? A. Yes.

Q. And he also paid and received money for himself? A. Yes, sir.

Q. And he also paid and received money for himself? A. Yes, sir.

Q. He had nothing to do with the Jones Company? A. Not a thing.

Q. Do you know whether or not he worked for De Carlo or not? A. I don't know nothing about that.

Q. He was in your place every day, working, washing cars? A. He was.

Q. He washed the Jones Company cars? A. He did.

Q. And he washed other people's cars? A. He did.

Q. Was it his habit to go get cars and bring them

down to get them washed? A. He was his own free lance.

Q. Have you ever seen him bring cars there? A. I have seen him bring cars there."

Henry Eagleke testified as follows: (S. C. pp. 59 and 60).

"Q. Henry, do you recollect after this accident a hearing was held at the Borough Hall? A. Yes, sir.

Q. Do you remember your testimony in that case? A. I think I do, yes, sir.

Q. How many times approximately had you washed the car of De Carlo? A. Well, I washed it one or two times but that was the first time I take it down myself.

Q. Who brought it down usually? A. I don't know exactly, one of the boys, Frankie brought it down once or twice.

Q. On this occasion, how did you happen to get the car and take it down? A. I go by there Saturday night and he told me to stop on Sunday morning and bring the car down and clean it because he wanted it cleaned.

Q. He told you to stop on Sunday morning and get the car and take it down? A. Yes, sir.

MR. PARSONS—That is all.

Q. Who were you working for, Henry? A. I was working for myself, at Mr. Jones' place.

Q. You did your own work? A. Yes, sir.

Q. You received the money for the washing of the cars? A. Yes, sir.

Q. What was the agreement with De Carlo as to the washing of this car? A. There wasn't any agreement at all, only wash it.

Q. How much were you to get for it? A. Three dollars.

Q. And that whole three dollars was yours, wasn't it? A. Yes, sir.

Q. And did you agree with him to wash it for three dollars? A. He said he would pay three dollars to wash the truck because he wanted a good job on it.

Q. You agreed to wash it for three dollars? A. Yes, sir.

Q. Did you tell him you would go down there and get it and bring it down? A. I told him I would stop down on Sunday morning and stop and get it.

Q. You never worked for De Carlo, did you? A. No, I never worked for De Carlo.

MR. MATLACK—That is all.

This is the entire testimony and it is not contradicted by any witness nor is it in any way inconsistent with itself or reasonably capable of contradictory interpretations, but shows clearly that De Carlo contracted with Eagleke to have his car washed and that Eagleke in pursuance of such agreement obtained the car, took it to his place to be washed and was returning at the time of the accident.

The testimony shows that De Carlo had no control, authority or supervision over Eagleke and gave

no instructions as to his itinerary, direction, place to take the car or management but that all these were vested in Eagleke the moment he took the car from De Carlo's garage.

In 14 Ruling Case Law at page 68 it is said,

> "The control of the work reserved in the employer which makes the employee a mere servant is a control, not only of the result of the work, but also of the means and manner of the performance thereof; where the employee represents the will of the employer as to the result of the work but not as to the means or manner of accomplishment, he is an independent contractor."

So, too, in the case of Reisman vs. Public Service 82 New Jersey Law, 464, the Court of Errors and Appeals said at page 467,

> "In 26 Cyc. 1546, an independent contractor is defined to be one who, carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work."

See also—*Bell vs. State,* 138 Atl. 227. *Whalen Admr. vs. Sheehan,* 237 Mass. 112, 18 A. L. R. 972.

In the case at bar De Carlo had no control over the means of doing the work or of taking the car to and from De Carlo's place. The sole thing De Carlo did

was to make a contract with Eagleke to wash his car. Where or how it was done was within Eagleke's control, not De Carlo's.

It is therefore respectfully submitted that the uncontradicted proof on this matter left no question for the jury and that the trial court should have directed a verdict for the defendant, Angelo De Carlo.

## POINT TWO

### IT WAS ERROR FOR THE COURT TO DENY DEFENDANT'S THIRD REQUEST TO CHARGE.

> If you find that Eagleke operated a car washing business for himself or was employed by someone to wash cars and the defendant, De Carlo, was a customer of Eagleke's or a customer of Eagleke's employer, and that De Carlo contracted with Eagleke to have his car washed and that Eagleke in pursuance of such agreement took the defendant De Carlo's car to Eagleke's place of business to wash it and that De Carlo had no control over Eagleke from the time the car was taken to the time the car was returned, and while returning it Eagleke had an accident. Eagleke was not an employee, servant or agent of the defendant De Carlo, and as to De Carlo there must be a verdict of no cause for action.

The purpose of this request to charge was to place before the jury the elements necessary to enable the jury to determine whether Eagleke was a servant or agent of De Carlo or was an independent con-

tractor. At no place in the charge of the court was the jury charged with respect to the proper test to be applied to determine the issue placed before the jury by the trial court. The court in spite of the request of the defendant refused to charge the jury the law with respect to the method of determining whether Eagleke was an independent contractor or the servant or agent of the defendant, Angelo De Carlo.

## POINT THREE

### IT WAS ERROR FOR THE COURT TO DENY DEFENDANT'S FOURTH REQUEST TO CHARGE.

The request is as follows:

> If the defendant, De Carlo, neither diercted nor controlled Eagleke, or exercised over him any power, authority, or supervision, but hired him only to wash the car, leaving to him the exclusive management, itinerary, direction and control of the car, the relation of master and servant did not exist between Eagleke and De Carlo.

This request is taken from the case of Courtinard vs. Gray Burial & Cremation Co., et als., 98 New Jersey Law at page 493 and is a paraphrase of the language used by Justice Minturn at page 496, wherein he said:

> "Tested, therefore, by this principle, it is manifest from the undisputed facts in the record, that

the defendants, Caseys, neither hired, directed nor controlled the driver; nor did they exercise over him power, authority or supervision, more than to impart to him, as was done in the Steinbrenner case, the particular purpose and object of his employment, leaving to him the exclusive management, itinerary, direction and control of the vehicle, which factors, as we have observed, present the substantial inquiries and determinative tests for ascertaining the existence of the legal relationship of master and servant, and consequent liability thereunder."

The elements to determine whether Eagleke was a servant or agent or an independent contractor should have been given to the jury by the court as requested. The request to charge sets forth the determinative tests for ascertaining the existence of the legal relationship of master and servant and consequent liability thereunder. The issue put before the jury by the trial court did not give to the jury the determinative tests as set down by the Court of Errors and Appeals in the case of Courtinard vs. Gray, et als., supra. If the defendant had not requested the court to charge with respect to these tests it might well be he would not be heard at this time to complain but having requested the court to charge and the court having refused to charge with respect thereto, it is respectfully submitted that it was error prejudicial to the defendant, Angelo De Carlo.

## POINT FOUR

### IT WAS ERROR FOR THE TRIAL COURT TO REFUSE THE FIFTH REQUEST TO CHARGE OF THE DEFENDANT.

The request is as follows:

> De Carlo having contracted with Eagleke to wash his car and thereafter having exercised no power, authority, supervision or control over Eagleke, either with respect to his manner of taking the car to the place where it was to be washed or with respect to the washing of the car itself, Eagleke was an independent contractor and De Carlo was not responsible for the negligence of Eagleke while driving the car and the verdict as to De Carlo must be no cause for action.

The fifth request of the defendant is likewise based on the language found in the case of Courtinard vs. Gray et al., supra, and the argument made under Point Three of this brief is applicable here. It was error for the trial court to refuse to charge the jury with respect to the proper elements of the relationship of principal and agent to be considered by them in determining the actual relationship that did exist.

## POINT FIVE

### IT WAS ERROR FOR THE COURT TO CHARGE THAT IT IS CONCEIVABLE THAT A PERSON WHO WASHED YOUR CAR MAY NOT ONLY CONTRACT TO DO IT BUT LIKEWISE TO TAKE YOUR CAR FROM YOUR GARAGE, ETC.

The portion of charge objected to is found, beginning (S. C. p. 70,l. 12) and ending (S. C. p. 71,l. 20).

> It is conceivable that a person who washes your car may not only contract to do it but likewise to take your car from your garage to the place where he is accustomed to conduct such business, and if a contract with him contemplates the taking of the car from the garage and returning it, it may well be he will be engaged in an independent contract entirely for which he might in case of negligence in driving directly be liable. Here, however, there is an issue of fact whereby it may be ascertained—whether it is or not is for you to say, you are the judges of the fact—that what really happened with regard to De Carlo was he desired to have the truck in question washed, preparatory to having it painted, that Eagleke was either sent for or went to De Carlo's place of business, and according to his statement De Carlo said to him: "I wish you would come and get my car and wash it." Now De Carlo states that he called, as I recall his testimony, if I am incorrect you will cor-

rect me, and sent to the place where Eagleke was accustomed to work and was told that he (Eagleke) would be sent to get the car for the purpose of washing it. There is a difference there you see, because if it appeared that a part of the contract was not only to have the car washed out but to come and get it and return it to the owner and the person so performing that service was to be compensated for coming and getting it, plus the washing, then it might well be that De Carlo would be heard to say that at the time of this accident the driver was not his agent or his servant, express or implied. If you believe Eagleke's statement, however, that De Carlo said to him in his butcher shop Saturday night: "I want my car washed, you come and get it," then it may be that you will, if you believe the testimony, find as a fact that after all when Eagleke was driving the car as he was the agent of De Carlo because the latter's interest in having the car washed and thereby, for the time being, the latter became the principal, the driver, the agent, and the accident having happened, it is shown under the fair preponderance of the proof, due to the negligence of Eagleke, the driver, then the principal, De Carlo would be liable just as though he had been driving the car at the moment himself. That is an issue of fact.

The objection to this part of the charge is that the court in placing before the jury the issue as to whether or not the relationship of independent contractor or the relationship of principal and agent be-

tween Eagleke and De Carlo existed, charges the jury that if they find the fact to be that De Carlo sent to the place where Eagleke was accustomed to work and was told that he would be sent to get the car that then the jury would be justified in finding that Eagleke was an independent contractor but that if they believed that De Carlo said to Eagleke, "I wish you would come and get my car and wash it," that then they would be justified in finding the relationship of principal and agent. It is submitted there is no difference in either situation with respect to whether or not there was an independent contract and under either set of circumstances the court should have charged that it was the duty of the jury to ascertain the fact of the relationship as determined by the tests applied by the Court of Errors and Appeals in the case of Courtinard vs. Gray, &c., supra.

It makes no difference in law whether De Carlo said, "come and get my car," or Eagleke said, upon being engaged to wash the car, "I will come and get it," because in either event, the test is in the nature of the employment at the time the contract was made. The jury under the charge as given was instructed to come and get the car that the relationship of principal and agent would exist but that if they believed that De Carlo called Eagleke's place of business and was told that he would be sent that then they might find that Eagleke was an independent contractor. Under either situation the jury could find the existence of an independent contract if the proper test to determine the relationship were given to the jury.

There is no conflict in the evidence which would justify the trial court in the charge which he gave as a fair reading of the testimony as found on pages (S. C. 51, 52, 56, 57, 58, 59 and 60) will show. This leaves no other conclusion but that De Carlo called at Eagleke's place of business and in response thereto Eagleke came to De Carlo's place of business where the substance of De Carlo's conversation was repeated and Eagleke said he would come and get the car to wash it.

It was error therefore, for the trial court to charge the jury as it did, namely, that there was a difference in the resulting relationship if they believed the testimony as the court quoted it, whereas the court should have left it entirely to the jury under proper instructions to determine the nature of the relationship.

## SUMMARY

It is respectfully submitted that by reason of the failure of the court to charge the third, fourth and fifth requests of the defendant and because of the error in the charge of the court, the verdict should be reversed.

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