ARKANSAS POWER & LIGHT COMPANY *v.* DILLINGER.

4-3209

Opinion delivered December 11, 1933.

1. STREET RAILROADS—CARE TO BE EXERCISED.—An instruction to the effect that the care to be exercised with respect to an automobile approaching a crossing would increase with the apparent danger to be avoided was not erroneous, since such care would be the care which a reasonably prudent and cautious person would exercise under similar circumstances.
2. APPEAL AND ERROR—INVITED ERROR.—In an action for personal injuries, defendant may not complain of a correct instruction on discovered peril where defendant requested an instruction on the same point.
3. NEGLIGENCE—DISCOVERED PERIL.—Where one discovers the perilous situation of another in time by the exercise of ordinary care to prevent injury to him, and fails to do so, he is guilty of negligence which is regarded in law as the proximate cause of the injury, regardless of the contributory negligence of the injured person.

Appeal from St. Francis Circuit Court; *W. D. Davenport,* Judge; affirmed.

STATEMENT BY THE COURT.

This appeal comes from a judgment in favor of appellee, S. Dillinger, against the appellant, Arkansas Power & Light Company, returned in the St. Francis Circuit Court on a verdict of the jury for damages growing out of personal injuries received by appellee as a result of a collision between the appellant's street car and appellee's automobile on Lewis Street, where it is crossed by 23d Street, in the city of Little Rock, on June 6, 1931.

Appellee was traveling west on 23d Street and the street car of appellant was traveling north. Lewis Street runs north and south, and appellant's car track is on that street, while 23d Street runs east and west. Prior to, and at the time of, the collision there was a store building on the southeast corner of 23d and Lewis streets, the store facing north, or 23d Street, with a porch extending out 6 or 7 feet in front of said store building. There was also attached to the front or northwest corner of the store building and a post in the ditch, just west of the store itself, a large sign about four feet wide and between 10 and 14 feet long. The sign was resting on about 18 inches of lattice, and obstructed the view of appellee as he approached the street car tracks on Lewis Street until he was upon the little culvert and within about 15 feet of the nearest street car rail, looking to his left or to the south.

Appellee was driving a 1927 model "T" Ford touring car, and from the front end of his car to the front seat where he was sitting is 7 feet, and the street car is about 8 feet wide and extends over the rails about 2 feet on each side. When appellee first saw the street car, he was on the little culvert, and at that time the street car was about 65 or 70 feet away, traveling at the rate of about 35 miles per hour. Appellee saw the motorman at the time, and he was not looking ahead, but was looking to one side. At the time appellee first saw the street car, the front end of his automobile was within 4 to 6 feet of where it could have been hit by the street car if it continued its course or stopped. Appellee could not stop

his automobile or keep it from rolling into the path of said street car, so he attempted to race his automobile across the street car tracks to avoid being hit by said street car, and only lacked about 18 inches of getting his automobile across the tracks when he was struck. The motorman of appellant's street car did not slacken his speed until he hit the appellee's automobile. He did not ring a bell or sound a gong on approaching said crossing, and ran into the intersection or crossing without looking to see whether any one was about to cross the tracks. There was considerable traffic moving to and fro over appellant's tracks across 23d Street, which is a thickly populated and built-up section of Little Rock. At the time appellee first saw appellant's street car, he and his automobile were well within the intersection of Lewis Street and the street car was 65 or 70 feet from the intersection of 23d Street. The street car could have been stopped within 25 or 30 feet traveling at the rate of 35 miles per hour. Appellee's automobile was hit about 18 inches from the back end and thrown against a telephone pole on the north side of 23d Street and demolished. The street car, after striking the automobile, ran about a car length or more before stopping. Appellee, as a result of the collision, sustained severe and permanent injuries to his back, spine and neck.

Appellee relied for recovery on the negligence of the motorman of appellant and upon the doctrine of the last clear chance of appellant's operative to have avoided the injury to appellee after discovering his perilous position upon its tracks.

Appellant's defense was a general denial of all the material allegations as to the negligence of the motorman and a plea of contributory negligence on the part of the appellee as a bar to his right of recovery.

The testimony is voluminous, and any further necessary statement of it will be set out in the opinion.

The case was submitted to the jury upon instructions from the court, some of which, especially No. 1 given for appellee, were objected to and insisted upon as erroneous. The jury returned a verdict for appellee, and from the judgment thereon this appeal is prosecuted.

Rose, Hemingway, Cantrell & Loughborough and *J. W. Barron*, for appellant.

M. B. Norfleet, L. A. Hardin and *C. W. Garner*, for appellee.

KIRBY, J., (after stating the facts). It is insisted that said instruction No. 1, given for appellee, is erroneous in that it required a higher degree of care to be exercised by the motorman in proportion to the greater danger to be avoided than the law warrants. Said instruction reads as follows: "The court instructs the jury that the defendant in the operation of its street cars in the city of Little Rock over and across streets that people are constantly traveling over, it is the duty of the operatives of the said street car to exercise due care. The operators must be governed to some extent by the circumstances that surround them at the various street crossings along their line. And, if you find from the evidence that there was a building on the east side of said street car track and south of 23d Street, and was built and situated so that the view to said 23d Street was cut off and obstructed, so that the operatives of said street car could not see an automobile approaching said car line from the east until said automobile was near or upon said tracks, then the operatives of said street cars traveling north and approaching said 23d Street crossing would be required to exercise a higher degree of care in proportion to the greater danger; and the operatives of said street car should reduce the speed of said street car or take other precaution, so as to have their street car under such control as would enable them to avoid dangers and injuries to others using or traveling over said tracks at said crossing."

The instruction is not open to the objection made against it, and only tells the jury that the care necessary to be exercised would increase with the apparent dangers to be avoided, which, under the circumstances, would only be ordinary care, or that care which a reasonably prudent and cautious person would exercise under similar circumstances, and it was not meant to, and did not, require the exercise of a greater degree of care than ordinary care.

In *St. Louis, I. M. & S. R. Co.* v. *Chamberlain,* 105 Ark. 180, 190, 150 S. W. 157, it is said: "The degree of care varies with the circumstances of each case, and necessarily depends upon the hazard or danger. It would not be improper to say that a greater degree of care should be exercised when the situation or circumstances is more dangerous or hazardous. Under such circumstances, a reasonably prudent and cautious person would exercise greater care than when the situation involved less or no danger. The exercise of the greater care, under more dangerous and hazardous circumstances, would therefore only be the exercise of that care which a reasonably prudent and cautious person would exercise under similar circumstances, and would therefore be at last only ordinary care. And this, we think, is but the meaning and effect of the instruction given." See also *Bona* v. *Thomas Auto Co.,* 137 Ark. 224, 208 S. W. 306; *Carter* v. *Brown,* 136 Ark. 23, 206 S. W. 71; and *Minor* v. *Mapes,* 102 Ark. 351-54, 144 S. W. 219.

Appellant next complains that appellee's requested instruction No. 3, stating that appellee relied upon the doctrine of discovered peril or last clear chance for recovery, etc., is erroneous, and that said doctrine has no application whatever in this case. Appellant, however, asked instructions on the same point, and the instruction complained of is not out of harmony with this court's former declarations upon such doctrine. *Pankey* v. *L. R. Ry. & Elec. Co.,* 117 Ark. 337, 174 S. W. 1170; *Hot Springs St. Ry. Co.* v. *Hildreth,* 72 Ark. 572, 82 S. W. 245; *Citizens' St. Ry. Co.* v. *Steen,* 42 Ark. 321; *Chicago, R. I. & P. Ry. Co.* v. *Bunch,* 82 Ark. 522, 102 S. W. 369; *St. Louis, I. M. & S. Ry. Co.* v. *Freeman,* 36 Ark. 46.

In *St. Louis S. W. R. Co.* v. *Simpson,* 184 Ark. 638, 43 S. W. (2d) 251, the court said: "The discovered peril doctrine, or the doctrine of the last clear chance, as it is sometimes called, constitutes an exception to the rule that the contributory negligence of the plaintiff is a bar to this action. Under this doctrine, where one discovers the perilous situation of another in time, by the exercise of ordinary care, to prevent injury to him, it is his duty to do

so, and he is guilty of negligence if he fails to do so, which is regarded in law as the proximate cause of the injury, and this, too, regardless of the contributory negligence of the injured person. Such a person is regarded in law as having the last clear chance to prevent injury or death to another, and it is his duty to do so."

Although this case was reversed by the United States Supreme Court, 286 U. S. 346, on the facts, the rule of law appears not to have been affected thereby. See also *Mo. Pac. Ry. Co.* v. *Skipper,* 174 Ark. 1096, 298 S. W. 849.

Appellant, by its instructions asked for and granted by the court, had the issues submitted to the jury on the doctrine of last clear chance, and the jury found against appellant on conflicting testimony.

Appellant makes a strong determined assault upon the rule of the last clear chance doctrine as announced by our decisions and cites cases from most of the other jurisdictions in favor of its contention; but the matter has long been settled here, and we do not regard that there exists any necessity for additions or amendments to this doctrine as already announced.

We do not set out any further instructions complained of, but, after a careful examination of them all, we believe appellant had the benefit of several instructions that were more favorable to its contention than the law warrants.

A careful examination of the whole record discloses that no prejudicial error was committed in the trial of this case. The judgment is affirmed.