ARKANSAS POWER & LIGHT COMPANY *v.* GRAVES.

4-3555

Opinion delivered October 15, 1934.

1. CARRIERS—NEGLIGENCE OF MOTORMAN—JURY QUESTION.—In an action by a street car passenger for injuries sustained when the motorman made an emergency stop, where it was shown that the motorman was negligent in failing to keep a proper lookout on approaching a boulevard stop, it was not error to submit the issue as to the motorman's negligence in making a sudden stop to avoid a collision, since the emergency arose through his negligence.
2. CARRIERS—CONTRIBUTORY NEGLIGENCE—INSTRUCTION.—In an action by the passenger of a street car for injuries received in a sudden stoppage of the car, where the court instructed as to contributory negligence, refusal of the court to give an instruction that the jury could not compare the negligence of plaintiff and defendant if plaintiff's negligence contributed in the slightest degree to the injuries.

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

Rose, Hemingway, Cantrell & Loughborough, for appellant.

T. E. Abington and *Tom W. Campbell,* for appellee.

MCHANEY, J. Appellee recovered judgment for $3,000 against appellant for personal injuries she alleged she sustained while riding as a passenger on appellant's street car on the 15th Street car line in the city of Little Rock, on May 30, 1931. She is the only witness who testified as to how the alleged injury occurred. The operator of the street car was dead at the time of trial and made no report of an accident on said date. Only one other passenger was on the car, and he was not available as a witness. Appellee testified that she boarded the car at the end of the line at 25th and Summit. As they were traveling east on 16th Street, she noticed the motorman writing in a small book and not keeping a lookout, and, just as the car entered the intersection of 16th and Battery, the latter being a boulevard stop, the motorman noticed that he was about to collide with an automobile traveling on Battery Street, and that he made an emergency stop which was so sudden and violent as to throw her forward against the window frame and seat in front of her, causing the injuries of which she complains.

For a reversal of the judgment against it, appellant assigns as error the giving of appellee's instructions Nos. 1 and 2.* These instructions will be copied by the

*APPELLEE'S INSTRUCTION No. 1.

"The jury is instructed that if you find from a preponderance of the evidence in this case that on May 30, 1931, the plaintiff, Mrs. Walter Graves, became a passenger on an eastbound street car then and there owned and operated by the defendant, Arkansas Power & Light Company, on one of said defendant's street car lines in the city of Little Rock, Arkansas, and that the plaintiff then and there paid to the operator of said street car the regular passenger fare for riding upon said street car and that when said street car was running east on Sixteenth Street in the said city of Little Rock approaching the intersection of Battery Street in said city the operator of said street car failed to keep a reasonable lookout ahead of said street car for automobiles and other traffic crossing said Sixteenth Street upon said Battery Street and that there was then and there an automobile approaching said intersection upon said Battery Street and that if said operator of said street car had been keeping such reasonable lookout he would have seen said automobile in time gradually to have checked the speed of said street car and avoid the danger of collision with said automobile without making an emergency stop of said street car but that the said operator of said street car failed to see said automobile until both said automobile and said street car were quite near to said street intersection and that the operator of said street car then suddenly stopped said street car with such force and violence that the plaintiff was thereby thrown from her seat in said street car forward against the casing of the window of said street car and the wall thereof

reporter in a footnote to this opinion. The criticism made of No. 1 is that the only issue made by the pleadings was the failure of the motorman to keep a proper lookout, and that said instruction not only submitted that issue, but went further and submitted "the false issue as to whether or not the motorman was negligent in stopping the car suddenly in an effort to avoid an imminent collision." It is insisted that it was the motorman's duty to stop as quickly as possible under the circumstances, and that no liability can be predicated on the fact that he made a quick and sudden stop. In other words, "the motorman could not do right and wrong at the same time." A number of cases are cited from other jurisdictions holding to the effect that liability against a street railway company cannot be predicated on an injury caused by a sudden stop in order to avoid a collision in an emergency created by the act of some third person or agency over which the motorman had no control. For instance, in the case of *Cleveland City Ry.*

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and back of the seat in front of the plaintiff and thereby injured and that the operator of said street car in failing to keep a reasonable lookout to discover automobiles approaching said street intersection and in stopping said street car in such manner, if you find from a preponderance of the evidence in this case that the operator of said street car did fail to keep such reasonable lookout and did stop said street car in such manner, failed to exercise ordinary care for the safety of passengers upon said street car and that his conduct in so doing, if you find he was guilty of such conduct, was the cause of such injury to the plaintiff and that the plaintiff was not guilty of contributory negligence, then, in such event, you should find for the plaintiff in this case and assess her damages as hereinafter explained in these instructions."

APPELLEE'S INSTRUCTION No. 2.

"You are instructed that if you find from a preponderance of the evidence in this case that the plaintiff was a passenger on an eastbound street car owned and operated by the defendant in the city of Little Rock and had paid her fare thereon and that when said street car was running east on Sixteenth Street in said city approaching the intersection of Battery Street the operator of said street car failed to stop said street car at said street intersection before entering Battery Street and that Battery Street at that point was a boulevard and that there was a stop sign in Sixteenth Street at the west edge of Battery Street and that there was an automobile running south on Battery Street at that point and that the failure of the motorman of said street car to stop said street car at said stop sign before entering Battery Street, if you find from the evidence he did fail to do so, made it necessary for him suddenly to stop said street car to avoid striking said automobile and that he did suddenly stop said street car on that account and that the plaintiff was thereby injured and that such conduct on the part of the motorman of said street car, if you find from the evidence he was guilty of such conduct, was the cause of plaintiff's injuries and that the motorman of said street car in running said street car over said stop sign into Battery Street without stopping and in suddenly stopping said street car to avoid striking the said automobile, if you find from the evidence that he did so, said motorman failed to exercise reasonable care for the safety of the plaintiff, and that the plaintiff was not guilty of contributory negligence, then you should find for the plaintiff in this case and assess her damages as hereinafter explained in these instructions." (Reporter.)

Co. v. *Osbourn,* 66 Ohio State 45, 63 N. E. 604, the appellee was a passenger on a street car which was brought to a sudden stop in order to avoid a collision with a bakery wagon which was driven on the track directly in front of the street car. From a judgment based on the sudden stop, the court on appeal held that it was the duty of the motorman to stop in order to avoid a collision with the wagon,—an emergency created by the act of a third person. Recovery was denied, the court saying: "The judgment of the lower court presents the anomaly of requiring of one the strict performance of an act as a legal duty, yet requiring it at his peril. One cannot do right and do wrong at the same time." Here the facts are entirely different. An emergency was created or arose, not by any act of a third person, but by the negligence of the motorman himself in failing to keep a proper lookout and in failing to bring his car to a stop in the usual and customary way at a boulevard stop. It was his duty to bring his car to a stop at 16th and Battery, whether an automobile was crossing the street car track at that time or not, and had he kept a proper lookout, he no doubt would have done so in the usual way. Having created the emergency by his own negligence, appellant cannot escape liability thereon. We therefore hold said instructions were proper under the facts of this case.

Error is also assigned for the refusal of the court to give requested instructions 9, 11 and 12. We do not set them out for, in so far as 9 and 11 were correct, they were fully covered by other instructions given. No. 12 would have told the jury that they could not compare the negligence of appellee, if any, with that of appellant, if any, but that, if appellee were negligent and such negligence contributed to her injuries in any slightest degree, she could not recover. Instructions were given on contributory negligence, and it was not necessary to repeat them.

No error appearing, the judgment must be affirmed.