CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* GARRETT.

Opinion delivered June 3, 1929.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict will not be disturbed on appeal if there is any substantial legal evidence to support it, when viewed in the light most favorable to appellee and given its highest probative value with all inferences reasonably deducible.
2. MASTER AND SERVANT — NEGLIGENCE IN SPLICING ROPE — SUFFICIENCY OF EVIDENCE.—Evidence *held* to justify the jury in finding that the negligence of a fellow servant in splicing the rope which held the swinging scaffold on which plaintiff's deceased was working was the cause of his death.
3. MASTER AND SERVANT—ASSUMED RISK—INSTRUCTION.—In an action against a railroad for death of a bridge painter alleged to have fallen from a scaffold by reason of the negligence of a fellow servant, an instruction that the employer did not assume the risk of negligence of his employer or a fellow servant unless known to him or apparent, *held* not objectionable.

Appeal from Saline Circuit Court; *Thomas E. Toler*, Judge; affirmed.

STATEMENT BY THE COURT.

This appeal is prosecuted from a judgment for damages recovered by the administrator of the estate of John G. Garrett, deceased, for his death by drowning, alleged to have been caused by the negligence of appellant company.

John G. Garrett, the deceased, was, on the 17th day of July, 1928, engaged with other employees in painting a railroad bridge of appellant company, which spans the Arkansas River at Little Rock. It was necessary in doing the work to use a scaffold, held in place by ropes which were attached to the floor of the scaffold and placed over pulleys above, so it could be raised or lowered at will as the work progressed. While engaged in adjusting the scaffold, lowering it, it was alleged that Garrett was thrown therefrom, and in falling struck some of the braces of the bridge before striking the water, where he drowned.

The evidence tended to show that, about 20 minutes before deceased fell into the river, another employee had spliced the rope holding the scaffold, lengthening it, and in doing so had tied a knot therein as large as a man's fist. The knot had been drawn up to the floor of the scaffold, where it caught in one of the cracks of the floor, so that, when deceased untied the rope holding his end of the scaffold in place, it suddenly slipped off the knot upon which it had caught, causing the floor or scaffold upon which both painters stood to drop suddenly and with great force, throwing Garrett over against some of the braces of the bridge, and into the river. After striking the water he began swimming, crying for help, and continued to do so for about five minutes, when he sank and drowned. The ropes were cut and the floor of the scaffold thrown into the river, so that he might, if possible, grasp it and save himself. He attempted to swim to the floor, but, after about five minutes, he was unable to reach it on account of the strong current, and went down.

Garrett had not been told that a knot was tied in the rope in splicing it, about twenty minutes before the accident occurred; and, while he was an experienced employee, the evidence does not disclose that he knew the knot was there.

The scaffold or floor of the swing was about 18 inches to 2½ feet wide, with one-half inch cracks between the floor boards, which were nailed to cross-pieces 2x4, and extended about six inches beyond the cross-pieces at the ends. The rope, which hung below the floor of the scaffold, hung over the ends of the floor, and was about a ¾-inch rope. The employee who spliced the rope stated that the knot had been drawn up to the floor of the scaffold, and Garrett untied his end of the rope to lower it.

Damages were claimed both for the benefit of the estate and the father of the deceased as next of kin, it being alleged that deceased would have contributed to the support of his father during the period of his father's life, had he lived.

The answer denied the material allegations of the complaint, and pleaded assumed risk and contributory negligence of the decedent.

The jury returned a verdict awarding $3,000 for the benefit of the estate and $1,500 for the next of kin, and from the judgment for the sum of $4,500 against it the appellant prosecutes this appeal.

Thos. S. Buzbee, H. T. Harrison and *A. S. Buzbee,* for appellant.

W. R. Donham, for appellee.

KIRBY, J., (after stating the facts). It is urged that the court erred in not directing a verdict in appellant's favor, because the proof did not establish any negligence of appellant company sufficient to support the verdict. "The rule is that a verdict of a jury will not be disturbed by this court on appeal if there is any substantial legal evidence to support it, when viewed in its most favorable light to appellee and when given its highest probative value with all inferences reasonably

deducible." *Standard Oil Co. of La.* v. *Hydrick,* 174 Ark. 813, 296 S. W. 708; *Hall* v. *Jones,* 129 Ark. 18, 195 S. W. 399; *Arkansas Land & Lbr. Co.* v. *Fitzhugh,* 143 Ark. 122, 219 S. W. 1022.

The testimony tended to show that the knot in the spliced rope was about up to the floor of the swinging scaffold, and that, when the end of the rope was untied by deceased to lower the scaffold, the knot caught in the space between the ends of the floor boards of the scaffold extending over the frame upon which they were nailed, and that, in lowering it, it slipped out and suddenly fell, jerking the rope from the hands of the deceased as he attempted to lower it, dropping his end of the scaffold, throwing him among the braces of the bridge and into the river. It was also shown that it was not customary to splice the line by making a knot in it, and it was not safe to do so. There was no testimony indicating deceased had any notice that the rope had been spliced by tying a knot in it about twenty minutes before the accident occurred.

The court is of opinion that the jury was warranted in concluding that the splicing of the rope by tying the knot therein was the cause of the injury to deceased, making the scaffold or swing used by him in the performance of his work unsafe, and that such inference is fairly and reasonably deducible from the testimony, and sufficient to support the allegation of negligence. Other cases holding negligence established by inference fairly deducible from the testimony, and not based on speculation or conjecture: *St. L. S. W. Ry. Co.* v. *Rogers,* 166 Ark. 389, 266 S. W. 281; *Central Coal & Coke Co.* v. *Burns,* 140 Ark. 147, 215 S. W. 265; *St. L. I. M. & S. Ry. Co.* v. *Hempfling,* 107 Ark. 476, 156 S. W. 171.

It is next contended that the court erred in giving instruction No. 1, allowing the appellee to recover if the defendant negligently failed to furnish the deceased with a reasonably safe scaffold, as alleged in the complaint, and deceased was caused to fall into the river and drown because thereof while he was in the exercise

of ordinary care for his own safety, and had not assumed the risk, etc., without mentioning the other grounds of alleged negligence in failing to provide means or prevent the deceased from falling into the water, and negligently failing to provide a means of escape or rescue. The court instructed the jury, however, upon appellant's request Nos. 6 and 7, that it could not take into consideration said allegations of the complaint, the case being submitted on the one issue, the safety of the scaffold, the complaint alleging that the scaffold was made unsafe by reason of the knot in the rope. Neither is the instruction open to the objection that it assumes that the defects or dangers were not known to decedent, and were not open and apparent.

Neither was error committed in the giving of instruction No. 4 complained of, it not being open to the objection urged against it by appellant. It only told the jury that, while the employee assumes all the risk necessarily incident to his employment, he does not assume the risk incident to the negligence of his employer or any other servant of the employer, unless the same was known to him, or open and apparent, and did not submit the question of deceased's assuming the risk of defendant's failure to provide a scaffold from which he could not fall, nor authorize the jury to find, considered with plaintiff's instruction No. 1, for plaintiff, if it disregarded the theory of the injury being caused by the knot made in splicing the rope.

The other assignments of error appear to have been abandoned.

We find no error in the record, and the judgment is affirmed.