KEMP *v.* HUNTER TRANSFER COMPANY.

Opinion delivered June 22, 1931.

1. MASTER AND SERVANT—SAFE APPLIANCE—PRESUMPTION.—In an action against a master for damages caused by failure to furnish a safe appliance, it will be presumed that the master furnished a safe appliance, or, if defective, that the master was without notice and not negligently ignorant of such defect.
2. MASTER AND SERVANT—SAFE APPLIANCE—PRESUMPTION.—Proof that a servant was injured by the explosion of a tire did not overcome the presumption that the master performed his duty in furnishing the tire and in having repairs made thereon.
3. MASTER AND SERVANT—DUTY TO FURNISH SAFE APPLIANCE.—The master's duty to exercise ordinary care in furnishing a safe truck tire for the use of a servant was discharged by sending the tire to competent repairmen to be repaired and their return of the tire in apparently first-class condition.
4. MASTER AND SERVANT—NEGLIGENCE IN FURNISHING APPLIANCE—EVIDENCE.—Where there was no testimony tending to show a failure on the master's part to exercise ordinary care in furnishing a tire as repaired for the servant's use, the court did not err in instructing a verdict for defendant.

Appeal from Miller Circuit Court; *Dexter Bush*, Judge; affirmed.

STATEMENT BY THE COURT.

This appeal is prosecuted by appellant from a judgment on a verdict directed against him in a suit for damages for personal injuries alleged to have been suffered by appellant because of the negligence of appellee in not furnishing him with safe appliances for operating one of its trucks, of which he was the driver.

It appears from the testimony that appellant, an experienced motorcar driver, who had also had some

experience in putting on tires on automobiles while employed in a garage, had driven one of appellee's trucks from Texarkana, Arkansas, down through Louisiana to Alexandria, carrying a load of freight. That about 10 miles out from Texarkana and across Sulphur River the tire became punctured and was taken off the truck. It was later repaired on the journey and put back on the truck and suffered a blow-out. It was returned to appellee's house or place of business in this condition upon the return of the truck from the trip to Louisiana, and the blow-out and damage to the tire reported. The rim seemed to be in good condition with the tire in place, except it was flat from the blow-out, when it was sent by appellee company to Dixon & Horney, Inc., for repairs. They were independent contractors, expert in repairing and reconditioning tires of the kind, having the reputation of being the best in the city. Appellee company had a contract with them for repairing all its tires and equipment, etc., which included the furnishing of any necessary new parts by the repairers upon their suggestion to appellee that such was required for proper reconditioning of the defective equipment. The casing for the rim is a 40 x 8 and carries an air pressure of 115 pounds, and weighs about 200 pounds when mounted ready for use. The rim, when mounted, consists of a main rim, a flange rim, and a lock or clincher ring, a large inner tube and a hard rubber casing, and, when properly assembled, the lock or clincher ring holds it all together. The repairers notified appellee company that a new casing would be necessary as the old one was beyond repair, and put one on at the direction of appellee. The rim and tire, as assembled and mounted, were delivered at appellee's place of business on the platform about 4 o'clock in the afternoon, as appellee told appellant would be done, for his use with the truck in carrying a load of freight the next day. The truck had been loaded for the next day's run when appellee, who had seen the repaired tire on the platform two or three times in the afternoon, undertook to put it back

on the truck to be carried as a spare. He had a helper there who would have assisted in moving the rim, and who testified that he had offered to assist appellant. Appellant went up on the platform, however, which is about four feet above the ground, rolled the repaired tire, which appeared to be in good condition, down to the edge of the platform, pulled it off towards him, standing it up on its edge as it slipped down, and attempted to ease it down, holding it against his body and the platform, and when he got it about to his knees, and before it reached the ground, he testified, it exploded, throwing him about 8 or 10 feet, and injuring him severely. He was about three months in the hospital, and a second operation had to be performed on one of his legs, and a metal plate put on to hold the bones together.

The three operatives at Dixon & Horney, Inc., repairers, testified that the repairs were properly made and the tire re-assembled; that the lock ring was seated properly down into the groove made for it, and the casing and tube inflated with the usual amount of air therein; and that the mounted rim left the shop for delivery in good condition.

A representative of the Goodyear Tire Company, who had had large experience in the mounting of tires of the kind and the selling of casings and tubes therefor, testified that he was in the shop when the mounting was done and that it was properly done, and the lock ring seated in the groove made therefor to hold the tire on the rim securely.

The negligence alleged is that an old and bent lock ring was used; that the seat or groove for holding the lock ring was bent, closed almost at intervals around the rim, preventing the proper seating and fitting of the lock ring in the groove for holding the tire securely on the rim; that said lock ring was not seated properly, and that appellee company thereby failed to exercise ordinary care in supplying proper and safe appliances or equipment for use by appellant in the operation of the

truck, and also was negligent in failing to have the defective appliance inspected before furnishing it to appellant for use in his employment.

There was testimony tending to show that, if the tire as mounted had fallen from the platform, from which appellant was trying to ease it down at the time of his injury, and struck the hard surface pavement, as it appeared to have done at the time of the injury, it might have caused the displacement of the lock ring and the consequent explosion.

The testimony also showed that some of appellee's other employees saw the tire after it was returned as repaired, and that it appeared to be in good condition, as appellant also said. It was likewise shown that no inspection could have been made that would have discovered improper seating of the lock ring without dismounting the tire.

Upon the completion of the testimony, the court concluded that there was no substantial testimony showing any negligence on the part of appellee, and directed a verdict in its favor accordingly, and from the judgment the appeal is prosecuted.

Will Steel and *T. B. Vance,* for appellant.

W. H. Arnold, W. H. Arnold, Jr., and *David C. Arnold,* for appellee.

KIRBY, J., (after stating the facts). In *Wheeler* v. *Ellis,* 183 Ark. 133, 35 S. W. (2d) 64, where the negligence of the master was alleged to consist in the failure to exercise ordinary care to supply the servant with safe tools or appliances with which to do his work, the court said: "The action is founded on the alleged negligence of the master in failing to exercise ordinary care to furnish the servant with a safe tool or machine with which to do the work, the presumption being that the master has done his duty in the furnishing of such appliance, but, when this presumption is overcome by proof that the appliances were defective, there is a further presumption that the master was without notice or not negligently ignorant

of it, and the showing that the injury resulted from a defect in the machine, without evidence that the injury occurred because the master did not exercise proper care in furnishing the machine or having the repairs made thereon after notice, is not sufficient to establish a *prima facie* case or to support a recovery."

In *Railway* v. *Brown*, 67 Ark. 304, 54 S. W. 865, the court, quoting with approval an extract of the opinion in *Railway* v. *Gaines*, 46 Ark. 455, said: "Now notice of the alleged defect, or, what amounts to the same thing, the means of knowledge which the company failed to use, was a material fact which was necessarily involved in the verdict. Consequently, as no testimony was given from which the jury could infer that the company knew, or might by reasonable diligence have discovered, the defect in time to remedy it and prevent the casualty, the verdict is not supported by sufficient evidence."

In *Wheeler* v. *Ellis, supra*, a suit for damages for alleged negligence in respect to furnishing safe tools and appliances to the servant with which to do his work, and where the verdict was directed against the plaintiff, the court said: "It is true that the servant has a right to assume that the master has performed his duty, but it is also true that, unless the evidence shows to the contrary, the master is presumed to have performed his duty, and, as this court has repeatedly said, 'no presumption of negligence arises from the mere happening of the accident which caused the injury.' *Bryant Lumber Co.* v. *Stastney*, 87 Ark. 321, 112 S. W. 740. * * * 'It is not sufficient to show that the plaintiff was injured, and that the injury resulted from a defect in the machinery, but he must go further and establish the fact that the injury happened because the master did not exercise proper care in the premises.' *St. L., I. M. & S. R. Co.* v. *Gaines*, 46 Ark. 555; *Graysonia-Nashville Lumber Co.* v. *Whitesell*, 100 Ark. 422, 140 S. W. 592; *K. C. Sou. Ry. Co.* v. *Cook*,

100 Ark. 467, 140 S. W. 579." See also *Central Coal & Coke Co.* v. *Lockhart,* 161 Ark. 97, 256 S. W. 37.

In *Missouri & North Ark. Rd. Co.* v. *Vanzant,* 100 Ark. 465, 140 S. W. 587, the court said: "Where a servant knows the methods that are adopted by the master, the place furnished in which to work and the appliances with which it is done, and continues in the employment without complaint, he assumes the risks which may result from such known methods and appliances." *Railway Co.* v. *Kelton,* 55 Ark. 483, 18 S. W. 933; *Patterson Coal Co.* v. *Poe,* 81 Ark. 343, 90 S. W. 538; *St. L., I. M. & S. R. Co.* v. *Goins,* 90 Ark. 387, 119 S. W. 277; and *Graham* v. *Thrall,* 95 Ark. 560, 129 S. W. 532.

There is no evidence of negligence of the master in failing to exercise ordinary care to furnish the servant with a safe appliance with which to do his work, except as the inference may arise from the fact of the injury to plaintiff from a defect in the rim and the explosion of the tire, which does not overcome the presumption that the master performed his duty in exercising ordinary care in the furnishing of such appliance and in having the repairs made thereon. The undisputed testimony shows that the rim, upon which the new casing was mounted, had been used on the wheel of the truck the day before on its run to Alexandria. That the casing thereon "blew out," and the necessity for repairs was caused thereby. The old casing was still on the rim when it was returned and reported for repairs, and the lock ring still in place on the rim. Appellee company, having no means for making repairs of its trucks and tires, sent it to Dixon & Horney, Inc., independent contractors with whom it had a contract for doing such work, as was their custom, for repairs, and, being advised by them that a new casing was needed, directed that one be put on. Dixon & Horney were experienced and skilled mechanics, reputed to be "the best repairmen in the city," accustomed to making such repairs. They mounted the new casing on the rim and returned it in the afternoon to appellee's place of

business in apparently first class condition, putting it on the platform in front for use next day on the truck.

There was no testimony indicating or tending to show that the repairs were not properly made, while there is much testimony showing they were carefully and well done, with proper inspections before and after completion thereof.

Thomas, of appellee company, and also Mr. Hunter, saw the mounted rim after its return from the shop, and it appeared to be all right; could discover nothing wrong with it. Appellant also said he examined it, and it appeared to be all right, and that he could discover nothing wrong with it. There was no method of making an inspection of the tire after it was returned repaired that would have discovered whether the lock ring was not properly seated, if such was the fact, in the groove therefor, as the foreman at the repair shop testified was the case when the tire was assembled, without tearing it down again; and, as already said, the manager of appellee company, Mr. Hunter, and the appellant himself, all observed it, found it to be apparently all right and "could find nothing wrong with it."

The master's duty to exercise ordinary care in repairing and making safe the appliance for appellant's use in the performance of his service was fully discharged by his sending the appliance to Dixon & Horney, Inc., independent contractors, experts in that line, for making the repairs, and the showing by them of how the repairs were made and the inspections thereof by the repairers in the making and completion of the repairs and the return of the tire to appellee company in apparently first class condition, with the new casing mounted on the rim. *O'Donnell* v. *Bourn,* 38 Mo. App. 245; *Runyan* v. *Goodrum,* 147 Ark. 481, 228 S. W. 397, 13 A. L. R. 1403; *Devlin* v. *Snell,* 89 N. Y. 470, 42 Am. Rep. 311; *McClaren* v. *Weber Bros. Shoe Co.,* 166 Fed. 714.

There was no testimony showing any failure to exercise ordinary care in having the repairs made or neg-

ligence on the part of appellee in furnishing appellant with the appliance as repaired for use in the performance of his service. The testimony being undisputed, the court did not err in instructing the verdict.

The judgment is affirmed.