OKLAHOMA CITY UNIVERSITY
LAW REVIEW

VOLUME 49 SUMMER 2025 NUMBER 3

NOTE

IMPLIED ASSUMPTION OF RISK POST-*HOLLIDAY*

Daniel Gilliam[*]

Introduction: The History of Common Law Assumption of Risk, Contributory Negligence, and Comparative Fault

Assumption of risk and contributory negligence are similar yet distinct defenses to a negligence action that are now the source of much confusion.[1] Traditionally, under Oklahoma law, contributory negligence was an affirmative defense that stood to completely bar recovery when the plaintiff's own breach of duty contributed to his injuries.[2] Because contributory negligence completely barred the plaintiff's recovery, it was what is known as a complete defense.[3] However, Oklahoma adopted a "comparative negligence" statute in 1979 that provides that contributory negligence no longer completely bars the plaintiff's recovery.[4] The statute reads:

* Juris Doctor Candidate, Oklahoma City University School of Law, May 2025. I would like to thank Professor Barry Johnson for his feedback and guidance during the writing and research of this Note.

1. *See* Thomas v. Holliday *ex rel.* Holliday, 764 P.2d 165 (Okla. 1988).
2. Miller v. Price, 33 P.2d 624, 626 (Okla. 1934).
3. *Holliday*, 764 P.2d at 166 n.1.
4. OKLA. STAT. tit. 23, § 13 (1979).

> In all actions hereafter brought[] . . . for negligence resulting in personal injuries or wrongful death, or injury to property, contributory negligence shall not bar a recovery, unless any negligence of the person so injured, damaged or killed, is of greater degree than any negligence of the person[] . . . causing such damage, or unless any negligence of the person so injured, damaged or killed, is of greater degree than the combined negligence of any persons[] . . . causing such damage.[5]

Statutes such as this one are commonly known as "comparative fault" schemes.[6] Under a comparative fault scheme, the jury shall compare the percentage of negligence of the plaintiff(s) to that of the defendant(s).[7] Damages will be allocated according to that percentage, and shall no longer bar recovery altogether.[8]

Prior to the advent of comparative fault, the distinctions made between the defenses of assumption of risk and contributory negligence "seldom made any difference."[9] This is because before courts adopted comparative fault, both contributory negligence and assumption of risk acted as complete, all-or-nothing defenses.[10]

Accordingly, with comparative fault rules, the two defenses began to have drastically different effects, even though the defenses often arose within similar sets of facts.[11] The Supreme Court of Idaho commented on such incongruity, noting the "'gross legal inconsistency [of] prohibiting the use of contributory negligence as an absolute bar,' while allowing 'its effect to continue' through assumption of risk defenses."[12] We now face a difficult question: is there a sufficient logical basis to allow assumption of risk to live on as a separate defense within the modern legal backdrop of comparative fault schemes?

---

5. *Id.*
6. *See* Coomer v. Kansas City Royals Baseball Corp., 437 S.W.3d 184 (Mo. 2014).
7. Okla. Unif. Jury Instr. CIV 9-18.
8. *Id.*
9. *Coomer*, 437 S.W.3d at 191.
10. *See* Oklahoma Pipe Line Co. v. Fallin, 56 P.2d 372, 375 (Okla. 1936); Miller v. Price, 33 P.2d 624, 626 (Okla. 1934).
11. Thomas v. Holliday *ex rel.* Holliday, 764 P.2d 165, 170 n.17 (Okla. 1988).
12. Rountree v. Boise Baseball, LLC, 296 P.3d 373, 381 (Idaho 2013) (quoting Salinas v. Vierstra, 695 P.2d 369, 374 (Idaho 1985)).

I. Justice Opala Breaks Down the Doctrine of Assumption of Risk in *Holliday*

Nine years after Oklahoma's adoption of comparative fault, *Thomas v. Holliday* came before the Oklahoma Supreme Court.[13] In this case, the plaintiff asked the court to retain the assumption of risk defense's status as a complete shield from liability.[14] Conversely, the defendant "contend[ed] that under Oklahoma's comparative negligence statute assumption of risk should be apportioned similarly to contributory negligence."[15]

The facts of the case are as follows. The plaintiff, Thomas, was a security guard at a grocery store, and he witnessed the defendant, Holliday, take a bite out of a pastry and put it back on the shelf.[16] The defendant then left the store and was followed by the plaintiff.[17] The defendant then began to drive away, and the plaintiff proceeded to "open[] the car door . . . to get inside or turn off the ignition."[18] After failing to do either, the plaintiff "jumped on the side of the car and fell from it while [the vehicle] was turning."[19] He brought this action against the defendant for the injuries he sustained.[20] Should the assumption of risk defense apply to these facts, and, if so, should it afford the defendant a "complete shield from liability?"[21]

Justice Opala wrote the opinion for the court, and in it he broke down the doctrine of assumption of risk.[22] The court explained that there are three aspects or categories of assumption of risk.[23] The first category is express assumption of risk and the second and third categories are within the umbrella of "implied" assumption of risk.[24] First, "express" assumption of risk occurs when "the plaintiff expressly consents to relieve the defendant of an obligation of conduct to him and to take the chance of injury from a known risk arising from what the defendant is to do or leave

13. *See Holliday*, 764 P.2d 165.
14. *Id.* at 166.
15. *Id.* at 166-67 (footnote omitted).
16. *Id.* at 166.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* (emphasis omitted) (footnote omitted).
22. *Id.* at 166-67.
23. *Id.* at 167-70.
24. *Id.* at 168 n.8.

undone."[25] This type of express agreement is made via contract where the plaintiff agrees not to sue the defendant for any future injuries which may be caused by the defendant's negligence.[26] Express assumption of risk raises questions of contract law and public policy, but it is not in tension with comparative fault schemes and will therefore not be the focus of this essay.

Second:

> [I]mplied primary assumption of risk[] [cases] are cases where the plaintiff has made no express agreement to release the defendant from future liability but is presumed to have consented to such a release because he has voluntarily participated in a particular activity or situation which involves inherent and well-known risks.[27]

"A classic example of this type of risk assumption is afforded by a fan injured while attending a sports event."[28] The court stated:

> In [this] . . . instance, the defendant would not be negligent because he owes no duty to the plaintiff. . . . The fan is deemed to have consented that the game may be played without taking any precautions to protect him from stray balls, and the law takes notice of the existence of a special "relational" duty between the fan and the owner.[29]

The assertion that here the "defendant would not be negligent because he owes no duty" appears to suggest that implied primary assumption of risk is not an affirmative defense but is instead a "no duty" rule akin to "open and obvious" danger.[30] Here, according to the court, implied primary assumption of risk simply seeks to negate the elements of duty or breach.[31] "An affirmative defense is a defense which admits the cause of

25. *Id.* at 168 (footnote omitted).
26. *Id.* at 168 n.8.
27. *Id.* (emphasis omitted) (citation omitted).
28. *Id.* at 168-69 (footnote omitted).
29. *Id.* (footnotes omitted).
30. *Id.* at 168; *id.* at 168 n.10 (footnote omitted).

action[] but avoids liability . . . ."[32] Therefore, if this is the case, implied primary assumption of risk will always act as a complete defense because duty is an essential element of any negligence action.[33]

Last, "the third category[] [is] called implied secondary assumption of risk."[34] Here, the court explained:

> [T]he plaintiff implicitly assumes the risk created by the plaintiff's negligence. Even though the defendant in such cases is found to be at fault, the plaintiff is barred from recovery on the ground that he knew of the unreasonable risk created by the defendant's conduct and voluntarily chose to encounter that risk. The plaintiff's conduct in those cases has been viewed as functionally similar to contributory negligence.[35]

The court explained further that implied secondary assumption of risk is related to the Roman maxim "*volenti non fit injuria*, which means: "[i]f one, knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from recovery for the resulting injury."[36] The court further explained that the *volenti* principle is "predicated on the theory of knowledge and appreciation of the danger and voluntary assent to the risk associated with it."[37] Additionally, the *volenti* doctrine "affords a universally recognized defense in products liability actions."[38]

The court continued on to state that "[t]he touchstone of the assumption-of-risk defense is *consent* to harm and not heedlessness or indifference."[39] Additionally, "it is not true that in every case where the plaintiff voluntarily encounters a known danger he necessarily consents to any future negligence of the defendant."[40] This statement is quite puzzling.

---

32. State Farm Mut. Auto. Ins. Co. v. Curran, 135 So.3d 1071, 1079 (Fla. 2014) (quoting St. Paul Mercury Ins. Co. v. Coucher, 837 So.2d 483, 487 (Fla. Dist. Ct. App. 2002)).

33. Fargo v. Hays-Kuehn, 2015 OK 56, ¶ 13, 352 P.3d 1223, 1227 (citing Jackson v. Jones, 907 P.2d 1067, 1071-72 (Okla. 1995)) (emphasis omitted).

34. *Holliday*, 764 P.2d at 168 n.8 (emphasis omitted).

35. *Id.* (emphasis omitted) (citation omitted).

36. *Id.* at 169.

37. *Id.* at 169 n.12.

38. *Id.* (citation omitted).

39. *Id.* at 169.

40. *Id.* (emphasis omitted).

More than once in the opinion, the court defined implied secondary assumption of risk as knowing and appreciating a risk and voluntarily encountering it anyway.[41] Seemingly, the court meant that these elements are necessary but are not actually sufficient to conclude that the defense of implied secondary assumption of risk is appropriate.[42] The court elaborated on the above idea with an example where it demonstrated:

> A pedestrian who crosses the street in the middle of a block through a stream of traffic traveling at excessive speed cannot be deemed to consent that the drivers shall not use care to watch for him and avoid running him down. On the contrary, he is insisting that they shall. *This is simply a case for application of contributory negligence.* A plaintiff may expose himself to potential harm and not consent to relieve the defendant of any future duty to act with reasonable care.[43]

The above example seemingly meets the definition of implied secondary assumption of risk in that the pedestrian knew of the risk that crossing the busy street posed but voluntarily encountered it anyway.[44] Yet, the court stated that this is simply a question of contributory negligence and not of assumption of risk.[45] If the touchstone of assumption of risk is consent to harm, what else is needed to infer such consent? The court does not appear to answer this question, but it does say where such inference cannot be found: "where neither the law, status, nor contract calls for the application of some relational duty between the parties[] . . . neither *assumption of risk* nor *consent to injury* may be inferred . . . from a mere face-to-face chance encounter of one stranger with another."[46]

This assertion raises more questions than answers. If, in all circumstances, a relational duty between the parties is necessary, how are the primary and secondary categories to be distinguished from one another? Does implied secondary assumption of risk continue to exist

41. *Id.*
42. *See id.*
43. *Id.* at 169-70 (emphasis added) (footnotes omitted).
44. *Id.* at 168 n.8.
45. *Id.* at 171.
46. *Id.* at 170 (footnotes omitted).

separately only within products liability?[47] Also, what kind of relational duty between the parties is necessary? Earlier in the opinion, the court noted that for the baseball fan in attendance, "the law takes notice of the existence of a special 'relational' duty between the fan and the owner."[48] Remember, such a scenario is an example of implied primary assumption of risk.[49] What other scenarios raise a special relational duty? Some clues may be found in footnote sixteen, where the court explained:

> [The] [a]ssumption-of-risk defense is applicable to a situation where two or more persons are associated together in, or enter as a matter of law into, some form of *voluntary relationship,* whether by contract or otherwise (e.g., physician-patient, attorney-client, landowner/ occupier-entrant, ballpark owner-participant/spectator, etc.) and assume such a risk as will *destroy any duty* which the defendant might owe to the plaintiff. General negligence[] . . . is not applicable when these special relations may validly exist.[50]

Here, the court has enumerated key instances for the application for implied primary assumption of risk.[51] But the court previously stated that implied assumption of risk as a whole cannot be found "where neither the law, status, nor contract calls for the application of some relational duty between the parties."[52] What exactly does the court mean by "the law," or "status"? One possibility is that implied assumption of risk can only exist when found in one of the enumerated instances above. If this is the case, the court is evidently calling for the extinction of the implied secondary assumption of risk. Or perhaps the court understands implied secondary assumption of risk to act as a catch-all and continues to allow it to be found in instances that manifest consent due to a certain "status" between the parties but is not otherwise found in the enumerated relationships.[53]

Regardless, the court continued the *Holliday* opinion by pointing out the key differences between contributory negligence and assumption of

47. *Id.* at 169 n.12.
48. *Id.* at 169.
49. *Id.* at 168 n.8.
50. *Id.* at 170 n.16.
51. *Id.*
52. *Id.* at 170.
53. *Id.*

risk.[54] First, it pointed out that "[t]he test for contributory negligence relies on an *objective* standard of conduct that falls below the degree of care which would be exercised by a reasonable person."[55] Assumption of risk, meanwhile, uses a subjective standard to determine whether the plaintiff actually knows, understands, and appreciates the risk.[56] Additionally, the court stated:

> What is in actuality lack of due care or heedlessness on the part of a plaintiff is often mislabeled assumption of risk. For risk assumption to avail as a defense . . . there must either be an express agreement, a pre-existing status between the defendant and plaintiff, or an element of consent to the harm that is known and appreciated by the plaintiff. *Anything falling outside these areas is simply contributory negligence.*[57]

It remains unclear, however, if a pre-existing status may be found outside of the enumerated list, and how to recognize "an element of consent" when examining applicable facts.[58]

Finally, the court answered the first of two key questions before it: is the plaintiff here entitled to the assumption of risk defense?[59] Its answer, by now, should come as no surprise: no, assumption of risk is not appropriate for these facts.[60] "[I]t cannot be said that the plaintiff consented to being thrown from the car when he jumped onto it. The plaintiff may have been reckless and exhibited a lack of due care, but that would require a jury charge on contributory negligence and not on assumption of risk."[61]

More importantly, however, what is the court's answer to the *second* question posed to it? That is, does the assumption of risk defense still provide a complete shield from liability?[62] To that, the court stated, "[b]ecause we hold . . . that Holliday's assumption-of-risk defense did not

54. *Id.*
55. *Id.* at 170-71 (footnotes omitted).
56. *Id.* at 171 n.19.
57. *Id.* at 171 (footnote omitted).
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 166.

avail to him and was hence improperly invoked, we reserve for another day the broader issue whether, and in what context, if any, assumption of risk may constitute a 'complete defense' under Oklahoma's present-day comparative negligence regime."[63] The magnitude of this utterance cannot be understated. If assumption of risk may no longer pose a complete bar to recovery, it would, in essence, become merged with the comparative fault scheme of contributory negligence. If this is the case, the defense may be effectively abolished.

With this statement, the court presented the courts of Oklahoma with an opportunity to hit "reset" on its body of assumption-of-risk precedent. How did the courts respond to the crossroads before them?

II. Oklahoma's Post-*Holliday* Treatment of Implied Assumption of Risk

First, as of the time of this writing, the Oklahoma Uniform Jury Instructions (OUJI) § 9.14 titled "Assumption of Risk" lays out the applicable jury instructions for this defense.[64] In the "notes on use," the OUJI states:

> In order to give this Instruction the court must determine that there is evidence in the record of either 1) an express agreement by the plaintiff to assume the risk of injury, 2) a pre-existing relation between the defendant and plaintiff that alters the normal duty of care that the defendant would otherwise owe to the plaintiff, or 3) the plaintiff's consent to an injury that the plaintiff knew and appreciated.[65]

Then, the instruction is as follows:

> [Plaintiff] assumed the risk of injury resulting from [Defendant's] negligence if [he/she] voluntarily exposed [himself/herself] to injury with knowledge and appreciation of the danger and risk involved. To establish this defense, [Defendant] must show . . . that:

63. *Id.* at 167 n.2.
64. Okla. Unif. Jury Instr. CIV 9-14.
65. *Id.*

1. [Plaintiff] knew of the risk and appreciated the degree of danger;
2. [Plaintiff] had the opportunity to avoid the risk;
3. [Plaintiff] acted voluntarily; and
4. [Plaintiff]'s action was the direct cause of [his/her] injury.[66]

These instructions very clearly resemble the guidelines laid out by the court in *Holliday*.[67]

A. Implied Primary and the Landowner/Occupier-Entrant Relationship

Byford v. Town of Asher came before the Oklahoma Supreme Court six years after *Holliday*, and it offers insight into how Oklahoma courts treat assumption of risk post-*Holliday*.[68] There, the plaintiff injured his leg when he stepped into a rut in a city-owned alley.[69] Because the plaintiff was familiar with the alley and its defects, the trial court held that as a matter of law, he had assumed the risk and was barred from recovery.[70] The issue before the court was whether the trial court had erred in sustaining the defendant's demurrer and instead should have allowed the issue to be decided by a jury.[71]

In *Byford,* Justice Opala pointed out in his concurring opinion that, per the Oklahoma Constitution, "[t]he defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury."[72] However, the court also pointed out two exceptions:

> First, the defense of assumption of risk need not be submitted to the jury if the plaintiff fails to present evidence showing primary negligence on the part of the defendant. . . . Second, the defense need not be submitted to the jury where there are no disputed material facts and

66. *Id.*
67. *See Holliday*, 764 P.2d 165.
68. Byford v. Town of Asher, 874 P.2d 45 (Okla. 1994).
69. *Id.* at 46-47.
70. *Id.*
71. *Id.* at 47.
72. *Id.* at 50 n.1 (Opala, J., concurring) (citing Okla. Const. art. XXIII, § 6) (emphasis omitted).

> reasonable people exercising fair and impartial judgment could not reasonably reach differing conclusions.[73]

In the court's analysis of the first exception, it discussed several of the defendant's arguments that it had no duty to maintain the alley.[74] Interestingly, implied primary assumption of risk was not one of these arguments.[75] This observation is noteworthy because it suggests that implied primary assumption of risk is, in fact, treated as an affirmative defense separate from a *prima facie* negligence case and is not simply a "no duty" rule that *Holliday* seems to indicate.[76]

While analyzing the second exception, the court cited *Holliday* and noted the three situations in which the assumption of risk can arise.[77] First, the court noted the express assumption of risk, and for the next two, the court stated:

> The second is where the two parties stand in some sort of voluntary relationship by which the plaintiff assumes such a risk so as to destroy any duty which defendant might owe the plaintiff. The third involves voluntarily exposing oneself to a known danger, even though not negligent in so doing. . . . Unlike contributory negligence . . . the defense of assumption of risk . . . still constitutes an absolute bar to recovery.[78]

This quote is paramount in that it answers two of the questions raised by the curious language of the court in *Holliday*. First, it confirms that assumption of risk "still constitutes an *absolute bar to recovery*."[79] Second, despite the court's language, Oklahoma courts continue to view and treat implied primary assumption of risk as distinct from implied secondary assumption of risk.[80]

---

73. *Byford*, 874 P.2d at 47 (citation omitted).
74. *Id.* at 48.
75. *Id.*
76. *See* Thomas v. Holliday *ex rel.* Holliday, 764 P.2d 165, 170 n.17 (Okla. 1988).
77. *Byford*, 874 P.2d at 48 (citing *Holliday*, 764 P.2d at 168-69).
78. *Id.* at 48-49 (footnote omitted) (citations omitted).
79. *Id.* at 49 (emphasis added).
80. *Id.* at 48; *see Holliday*, 764 P.2d at 170 n.16.

The *Byford* court then illustrated the rule for the application of implied primary assumption of risk.[81] First, the court made note of the enumerated voluntary relationships that give rise to an application of implied primary.[82] The list, as given in *Holliday*, is "physician-patient, attorney-client, landowner/occupier-entrant, ballpark owner-participant/spectator, etc."[83] Here, the *Byford* plaintiff became injured on the defendant's premises, and therefore, the two parties had formed the relationship of landowner-entrant.[84]

The defendant in *Byford* argued that the plaintiff, "as an entrant on to the premises, assumed the risks of the obvious and open dangers presented by the conditions of the land."[85] The court replied:

> We agree that Byford, as an entrant on to the Town's premises, assumed all *normal or ordinary risks* attendant upon the use of the premises, and the owner or occupant [of the land] is under no legal duty to warn an invitee of a danger which was obvious and should have been observed in the exercise of ordinary care.[86]

However, the court also noted that "it is the [defendant's] responsibility to maintain the alley in a reasonably safe condition."[87]

Now, the court has established the existence of the special relationship between the plaintiff and the defendant.[88] So, how does the court finish the implied primary analysis post-*Holliday*? The key question the court then had to decide is whether the existence of the special relationship is, in addition to the plaintiff's knowledge of the general conditions of the alley, sufficient to conclude that reasonable minds could not differ as to the conclusion that the plaintiff had assumed the risk.[89] To this question the court stated, "[f]amiliarity with existing physical conditions which are responsible for a party's injury or mere knowledge of the danger without

81. *Byford*, 874 P.2d at 49.
82. *Id.* (citing *Holliday*, 764 P.2d at 170 n.16) (emphasis omitted).
83. *Holliday*, 764 P.2d at 170 n.16.
84. *Byford*, 874 P.2d at 49.
85. *Id.*
86. *Id.* (emphasis added) (citations omitted).
87. *Id.* (citation omitted).
88. *Id.*
89. *Id.*

full appreciation of the risk will not bar recovery."[90] The court also stated that "[a] reasonable inference from the testimony is that [the plaintiff] believed he was able to minimize any risk in crossing the alley not only by proceeding slowly but by also wearing a brace, using a cane and lighting the alley."[91] The court found that this evidence was sufficient to conclude that reasonable people may differ as to whether the plaintiff had assumed the risks associated with crossing the alley.[92] Because the court held that the plaintiff had presented enough evidence to present a claim for primary negligence, the court therefore reversed the judgment of the district court and remanded it for further proceedings.[93]

In review, several key insights about how Oklahoma treats implied primary assumption of risk post-*Holliday* may be gleaned from *Byford*.[94] Most importantly, Oklahoma treats assumption of risk, both implied primary and secondary, as a complete defense.[95] Additionally, despite the *Holliday* court's language, Oklahoma continues to treat implied primary and secondary as distinct from each other.[96] Last, voluntarily encountering a risk of which one has mere awareness may not be enough to constitute assumption of risk, especially when coupled with the belief that his precautions minimize such risk.[97]

Another key insight that *Byford* provides post-*Holliday* is that the court has carefully delineated between implied primary assumption of risk and the no-duty rule of "open and obvious dangers."[98] The language used by the court in *Holliday* called into question whether implied primary was simply a no-duty rule, akin to the "open and obvious hazards" rule.[99] *Byford* declared this is not the case.[100] For instance, it is noteworthy that where the defendant argued that Byford had assumed "the risks of the obvious and open dangers" on the premises, the court replied that instead, Byford had "assumed all normal or ordinary risks."[101] Such a distinction

90. *Id.* at 50 (citing Anderson v. Northwestern Elec. Co-op., 760 P.2d 188, 192 (Okla. 1988)).
91. *Id.*
92. *Id.*
93. *Id.*
94. *See generally id.*
95. *Id.* at 48-49.
96. *Id.* at 48-50.
97. *Id.* at 50.
98. *Id.* at 48-49.
99. *Holliday*, 764 P.2d at 168 n.10.
100. *Byford*, 874 P.2d at 49.
101. *Id.*

is important because, when dealing with premises liability, there is substantial factual overlap between dangers that are "open and obvious" and instances where the defendant voluntarily encounters a known risk, namely one that is "normal or ordinary" for the premises.[102] Despite their factual similarities, the doctrines have different legal ramifications.[103] First, Oklahoma courts have established that landowners generally have no duty to protect a third party from open and obvious defects on their premises.[104] The analysis for whether a plaintiff owes a duty pertaining to the open and obvious dangers on his land depends on the foreseeability that such dangers may result in injury to another.[105] On the other hand, implied assumption of risk asks whether the plaintiff consented to the risk by knowingly and voluntarily encountering it.[106]

Interestingly, Justice Opala wrote a concurring opinion in *Byford* where he also comments on this distinction.[107] Commenting on the actionability of harm flowing from open and obvious defects, he stated: "[w]hether harm from an *open and obvious* defect is actionable depends on the *objective standard of due care—i.e.,* whether under similar or like circumstances an ordinary prudent person would have been able to see the defect in time to avoid being injured."[108] Additionally, Justice Opala stated:

> The entrant's "risk assumption" is *at times* mistakenly used to state that the occupier bears no *liability for* open and obvious hazards on the land. *This manner of explaining the law confuses risk assumption with nonliability*. To avoid the resulting conceptual mess, it would be far more correct to state that the landowner *is generally not liable* to entrants for open and obvious defects instead of saying that the *entrant assumes all the risk of open and obvious hazards*.[109]

102. *Id.*
103. *Id.*
104. Wood v. Mercedes-Benz of Okla. City, 2014 OK 68, ¶ 6, 336 P.3d 457, 459.
105. *Id.*
106. *Holliday*, 764 P.2d at 168 n.8.
107. *Byford*, 874 P.2d at 52 (Opala, J., concurring).
108. *Id.* (footnote omitted).
109. *Id.* at 55 (footnote omitted).

These quotes reiterate the idea that the "open and obvious dangers" rule will often have a factual overlap with the implied assumption of risk, and it is important not to conflate the two doctrines.[110] Additionally, Justice Opala stated in his concurrence that "[t]he assumption-of-risk defense is not *negative*—it does not rest on liability's *denial.* Rather, it is in the nature of *confession and avoidance.* It forms a special exception from general liability for negligence."[111] Here, Justice Opala helps to further clarify that implied assumption of risk is an affirmative defense, whereas the "open and obvious dangers" rule is a denial of liability from a "no duty" standpoint, thereby negating the plaintiff's primary showing of negligence.[112]

B. Implied Primary and the "Baseball Rule"

In addition to the landowner-entrant relationship, ballpark owner-spectator is another key example of an implied primary special relationship.[113] In *Tucker v. ADG, Inc.*, the plaintiffs alleged that while attending an Oklahoma City RedHawks game, one of the plaintiffs was injured when a foul ball struck his face.[114] Consequently, the plaintiffs alleged that the defendants "negligently fail[ed] to provide a reasonably safe facility and premises . . . as well as use of protective devices, nets, and other available safeguards available on the market."[115] Plaintiffs additionally alleged that the "protective net behind home plate was dangerous in design and wasn't large enough and was too low to protect the Plaintiff from injury."[116] The defendants ultimately filed motions to dismiss citing *Hull v. Oklahoma City Baseball Co.*[117] in their arguments that the plaintiff had voluntarily assumed the risk of injury while attending a baseball game.[118]

In *Hull,* the issue on appeal before the court was whether it was negligent for the defendants to fail to screen the portion of seating where

110. *Id.*
111. *Id.* at 56 (footnote omitted).
112. *Id.*
113. Tucker v. ADG, Inc., 2004 OK 71, ¶ 1, 102 P.3d 660, 662.
114. *Id.*
115. *Id.*
116. *Id.* at 663 (footnote omitted).
117. Hull v. Okla. City Baseball Co., 163 P.2d 982 (Okla. 1945).
118. *Tucker*, 102 P.3d at 663.

the plaintiff was in attendance.[119] The defendants argued that their only duty "was to afford protected seats to those of the patrons who desired them and that defendants performed this duty by screening a reasonable number of seats."[120] The court concluded that:

> [W]hen a person has a choice of a safe place and a less safe place to view a baseball game and chooses the latter and is injured as a result of exposure to a known danger, the court as a matter of law may determine upon the absence of primary negligence.[121]

Similar to the landowner-entrant relationship, the invitee assumes all normal or ordinary risks involved in the use of the premises, and the owner or occupant is under no legal duty to reconstruct or alter the premises so as to remove known and obvious dangers.[122] Here, the risk of injury from a foul ball is a "normal or ordinary risk" of attending a baseball game. Therefore, the *Hull* court determined that the trial court did not err in its conclusion that the plaintiff had assumed such risk.[123]

Interestingly, in *Tucker*, the plaintiff responded to the defendants' motions for dismissal with the following:

> [T]his is an unusual case in that ultimately, all the Defendants will be entitled to have either Motions to Dismiss or, more probably, Motions for Summary Judgment, sustained. This is so because this case seeks to raise the issue whether the Oklahoma Supreme Court will change the old rule of *Hull v. Oklahoma City Baseball Co.*, that a fan who sits in the unscreened portion of the bleachers at a baseball game cannot recover if hit by a ball.[124]

The plaintiff argued that *Hull* should be overturned due to the Oklahoma Constitutional provision in article XXIII, section 6, which was

119. *Hull*, 163 P.2d at 983.
120. *Id.* (citation omitted).
121. *Id.* (citation omitted).
122. *Id.* at 982.
123. *Id.* at 984.
124. *Tucker*, 102 P.3d at 663.

previously discussed in *Byford,* and that Oklahoma's "Good Samaritan Act," title 76, section 5 of the Oklahoma Statutes, conflicted with the *Hull* rule.[125] Now, the *Tucker* court faced an opportunity to get rid of the baseball rule promulgated by *Hull.* The court, prior to evaluating the plaintiff's proposition, elaborated on the *Hull* rule.[126] It stated, "*Hull's* conclusion that 'there was no unreasonable risk not appreciated by the plaintiff as a spectator of the baseball game,' amounts to a determination that the risk of injury by a foul ball is a normal or ordinary risk."[127] The court also noted that, according to *Hull*, the risk posed by a foul ball is "open and obvious to a spectator at a baseball game as a matter of law, for which defendants have no duty to warn."[128]

Additionally, the court in *Tucker* noted the factual similarities between the case at hand and *Hull.*[129] For instance, both plaintiffs alleged that the protective net behind home plate "wasn't large enough and was too low to protect the Plaintiff from injury."[130] Additionally, they alleged that the plaintiffs "sat behind a screen but that the screen was inadequate."[131] The court pointed out that it was noteworthy that absent from both *Hull* and the case at hand were any allegations of defective conditions of either grandstand structures or protective screens, nor were there allegations that the defendants failed to screen a reasonable number of seats.[132]

Next, the court determined that both of the reasons presented by the plaintiff to overturn *Hull* failed.[133] First, article XXIII, section 6 of the Oklahoma Constitution states that the defenses of assumption of risk and contributory negligence are questions of fact to be presented to a jury, has two exceptions.[134] The court noted that the "'fan injured while attending a sports event [is] a classic example' of implied primary assumption of risk."[135] Then, the court noted that the first exception to article XXIII, section 6 of the Oklahoma Constitution is when "there is no duty or

125. *Id.* at 664; OKLA. CONST. art. XXIII, § 6; OKLA. STAT. tit. 76, § 5 (2024); *see Hull*, 163 P.2d at 983.
126. *Tucker*, 102 P.3d at 666 (citation omitted).
127. *Id.* (quoting *Hull*, 163 P.2d at 984).
128. *Id.*
129. *Id.*
130. *Id.* (citation omitted).
131. *Id.* (citation omitted).
132. *Id.* at 666-67.
133. *Id.* at 667-68.
134. *Id.* at 667; OKLA. CONST. art. XXIII, § 6.
135. *Id.* (quoting Thomas v. Holliday *ex rel.* Holliday, 764 P.2d 165, 169 (Okla. 1988)).

negligence on the part of the defendant."[136] The court proceeded to quote the footnotes in *Holliday*, where it stated that "*[i]mplied primary assumption of risk is, arguably, not a true negligence defense since no duty is ever owed the plaintiff and no cause of action for negligence is ever alleged.*"[137] The court then reiterated that the facts here "amount to a classic example of implied primary assumption of the risk such that no duty is ever owed to the Plaintiff in the first instance," and accordingly there is no showing of primary negligence.[138]

This analysis by the court highlights the confusion that the application of implied assumption of risk presents. *Byford* had previously established in the majority opinion that primary implied assumption of risk is an affirmative defense and not merely a negation of duty.[139] Additionally, the *Tucker* court made its contradictory conclusion based on the language of the *Holliday* court authored by Justice Opala.[140] But Justice Opala stated in his own concurring *Byford* opinion that he recognized primary implied as an affirmative defense.[141] Be that as it may, *Tucker* was published ten years after *Byford*, and therefore the law presumably rests where *Tucker* has now laid it.

As for the plaintiff's argument that the Good Samaritan Act of title 76, section 5 of the Oklahoma Statutes conflicts with the *Hull* baseball rule, the plaintiff argued that the "statute imposes legal responsibility 'upon everyone' for injury" caused by negligence, and "the statute does not expressly exclude cases involving a fan injured at a ball park."[142] While the court acknowledged that this is true, it found the argument unpersuasive due to "the absence of any expression of legislative intent to abrogate the common-law duty of care applicable" to these facts, and "[g]enerally, abrogation of the common law 'must be clearly and plainly expressed.'"[143] For the aforementioned reasons, the court upheld the *Hull* rule.[144]

136. *Id.* at 667.
137. *Id.* at 667 (quoting *Holliday*, 764 P.2d at 168 n.8).
138. *Id.* at 667 (footnote omitted).
139. Byford v. Town of Asher, 874 P.2d 45, 48 (Okla. 1994).
140. *Tucker*, 102 P.3d at 667.
141. *Byford*, 874 P.2d at 56 (Opala, J., concurring).
142. *Tucker*, 102 P.3d at 668; OKLA. STAT. tit. 76, § 5 (2024).
143. *Tucker*, 102 P.3d at 668 (footnote omitted) (citation omitted).
144. *Id.* at 670.

In sum, the analysis for implied primary assumption of risk in Oklahoma case law is a two-step process.[145] The courts identify whether a special relationship is present between the parties, such as landowner-entrant or ballpark owner-spectator.[146] If so, the plaintiff will be found to have assumed all "normal or ordinary risks" incident to the use of the premises or the activity in which he is engaged.[147]

C. Implied Primary: Other Activities Which Involve Inherent Risk

In *Reddell v. Johnson*, the parties had "agreed to participate in a BB gun war."[148] The two participants additionally agreed upon a set of rules, such as no shots should be "aimed above the waist."[149] Notwithstanding the rules, however, "Johnson shot Reddell in the eye," causing injury.[150]

The question before the Oklahoma Supreme Court was whether the trial court had erred in granting summary judgment for the defendant on the basis of assumption of risk.[151] Again, the court cited *Holliday*, stating, "[n]o duty is owed in situations in which 'plaintiff has made no express agreement to release the defendant from future liability but is presumed to have consented to such a release because he has voluntarily participated in a *particular activity or situation which involves inherent risks.*'"[152] The court additionally stated that "[t]his 'presumed consent' involves situations such as voluntary participation in a sport or game."[153] Furthermore, the court stated that "[t]he dangers of this game were and are readily apparent," and that the plaintiff is deemed to have "consented to the risks inherent in the sport."[154] Such was the case here, and the court affirmed the trial court's judgment.[155]

---

145. *See generally Byford*, 874 P.2d 45; *see generally Tucker*, 102 P.3d 660.
146. *Byford,* 874 P.2d at 49.
147. *Tucker*, 102 P.3d at 662.
148. Reddell v. Johnson, 1997 OK 86, ¶ 2, 942 P.2d 200, 202.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* ¶ 14, 942 P.2d at 203 (emphasis added) (citing Thomas v. Holliday *ex rel.* Holliday, 764 P.2d 165, 168 n.8 (Okla. 1988)).
153. *Id.* ¶ 15, 942 P.2d at 203 (citation omitted).
154. *Id.* ¶¶ 19-20, 942 P.2d at 204-05 (citation omitted).
155. *Id.* ¶ 20, 942 P.2d at 205.

D. Implied Secondary Assumption of Risk

CNA Ins. Co. v. Krueger, Inc., of Tulsa provides a clear example of how Oklahoma courts apply the defense of implied secondary assumption of risk.[156] Here, the case dealt with a faulty fryer used by a truck stop kitchen that ultimately "caught fire and caused extensive damage to the restaurant."[157] The incident began when the "fryer malfunctioned and the manager" of the truck stop "was unable to turn it off."[158] The manager proceeded to contact an electrician to "immediately . . . turn off the electricity to the fryer at the main circuit breaker."[159] A repairman, from B.M.I., was scheduled to come the following day, and the manager gave the assistant manager some key instructions.[160] Most important was that the assistant manager was to ensure that the circuit breaker had been turned off once the repairman was done with the fryer.[161] Several minutes after the repairman had arrived, he noticed a part was missing that he didn't have, so he left, unable to fix the fryer.[162] The assistant manager "asked the repairman if he had turned off the circuit breaker," and he was "assured that he had."[163] The assistant manager, however, did not check for himself, and shortly after, "the fryer caught fire and caused extensive damage to the restaurant."[164]

The plaintiff alleged negligence on the part of the repairman.[165] "B.M.I. contended[] . . . that the truck stop assumed the risk that the defective fryer might cause a fire because [the assistant manager] did not switch off the power to the fryer himself, or check to make sure the fryer was turned off at the circuit breaker, despite having been instructed . . . to do so."[166]

The trial court subsequently granted B.M.I.'s request regarding the following jury instruction on assumption of risk:

---

156. CNA Ins. Co. v. Krueger, Inc., of Tulsa, 1997 OK 142, 949 P.2d 676.
157. *Id.* ¶ 2, 949 P.2d at 677 (footnote omitted).
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* (footnote omitted).
165. *Id.*
166. *Id.* ¶ 4, 949 P.2d at 677.

> Plaintiff's insured assumed the risk of injury resulting from B.M.I., Inc.'s negligence if its employee, Rick Lishbrook, voluntarily exposed Plaintiff's insured to injury with knowledge and appreciation of the danger and risks involved.
>
> To establish this defense, B.M.I., Inc., must show . . . that:
>
> 1. Mr. Lishbrook knew of the risk and appreciated the degree of danger.
> 2. Mr. Lishbrook had the opportunity to avoid the risk.
> 3. Mr. Lishbrook acted voluntarily.
> 4. Mr. Lishbrook's action was the direct cause of Plaintiff's insured's injury.
>
> The trial judge also instructed on contributory negligence. The jury returned a verdict for the defendant . . . .[167]

"The Court of Civil Appeals felt that the evidence supported a contributory negligence instruction, but not one on assumption of the risk," and it reversed.[168] However, the Oklahoma Supreme Court found "that there was evidence to support giving an instruction on assumption of risk."[169] Accordingly, the court found that the trial court did not err in giving the instruction.[170]

The court proceeded to discuss the different applications of assumption of risk and contributory negligence.[171] The court noted that in *Holliday* and *Byford*, it had discussed the "situation in which the defense of assumption of risk may arise: voluntarily exposing oneself to a known danger, even though not negligent in so doing."[172] Also, the defense requires "a subjective standard in evaluating a plaintiff's knowledge, comprehension and appreciation of the risk."[173] Lastly, "unlike contributory negligence which must be compared to the primary negligence of the defendant, with the plaintiff's recovery reduced

167. *Id.* ¶¶ 4-5, 949 P.2d at 678.
168. *Id.* ¶ 6, 949 P.2d at 678.
169. *Id.*
170. *Id.* ¶ 7, 949 P.2d at 678.
171. *Id.* ¶¶ 7-8, 949 P.2d at 678.
172. *Id.* ¶ 8, 949 P.2d at 678.
173. *Id.* (citation omitted).

accordingly, the defense of assumption of risk may exist in the absence of negligence on the part of the plaintiff and still constitute an absolute bar to recovery."[174]

After describing the difference between the two defenses, the court stated that although the case at hand was "more properly a question of contributory negligence," there was enough evidence to support giving an instruction on assumption of risk.[175] For instance, element one of the instruction required that the defendant knew of and appreciated the danger of not turning off the switch, and the court stated that these could be found true "under any version of the disputed facts."[176] Additionally, the court held that based on the facts, the jury could find that he "'voluntarily' or 'negligently' failed to check on the circuit breaker, creating the risk of a fire starting."[177] The court concluded its discussion of the defenses here.[178]

Although the jury found the defendant not liable, it is unknown whether this finding was due to the assumption of risk or lack of primary negligence.[179] Regardless, it is striking to note the simple effect of the distinction between "voluntarily" and "negligently." If the jury had found that negligence on the part of the defendant had been established, the resolution of the case would have depended on the distinction between these two terms.[180] For instance, if the jury had found that the assistant manager voluntarily failed to check on the circuit breaker, this fact would constitute the final piece needed to satisfy the elements of assumption of risk.[181] Considering that he knew of the risk and appreciated the degree of danger, that he had the opportunity to avoid the risk, and that his failure to check was a direct cause of the damage, the only missing piece is whether such failure was voluntary.[182] Accordingly, if the assistant manager's decision was in some way less than voluntary, for example, that he forgot, then the plaintiff would not be barred from recovery, and comparative fault would apply instead.[183]

---

174. *Id.*
175. *Id.* ¶ 11, 949 P.2d at 678-79.
176. *Id.* ¶ 11, 949 P.2d at 679.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* ¶¶ 4-11, 949 P.2d at 678.
181. *Id.*
182. *Id.*
183. *Id.*

Such an application of implied secondary assumption of risk, however, seemingly goes against what the court provided in *Holliday* in that it leaves out the idea of *consent.*[184] *Holliday* made clear that the facts in that case should not constitute an assumption of risk, *even though all of the elements of implied secondary assumption of risk had been met.*[185] There, the plaintiff had voluntarily jumped onto the defendant's car, and he clearly knew and appreciated the danger involved in doing so.[186] Be that as it may, the court stated that the facts at hand did not constitute consent to the risk of injury or relieve the defendant of his duty of care.[187] Likewise, it seems unlikely that the defendant was consenting to the risk posed by leaving the electricity connected to the fryer, nor had he consented to relieve the defendant of his duty of care. Additionally, the court there did not use the word "consent" a single time in its opinion.[188]

Another key case that highlights the implied secondary assumption of risk under Oklahoma law is *Thomas v. Wheat.*[189] There, the "[p]laintiff had been hired to paint a house" adjacent to a golf course.[190] While the plaintiff was outside cleaning his paintbrushes, the defendant hit an errant shot, and the ball struck the plaintiff in the mouth, injuring him.[191] The trial court granted summary judgment for the defendant because of lack of primary negligence and that the plaintiff had assumed the risk.[192]

As for the question of primary negligence, the court found that factual questions existed that would "preclude the granting of summary judgment."[193] So the key issue that remained before the court was whether the plaintiff had assumed the risk.[194] To begin its analysis, the court cited the Oklahoma Uniform Jury Instructions, stating:

> Generally, to establish the defense of assumption of risk, a defendant must show:

184. Thomas v. Holliday *ex rel.* Holliday, 764 P.2d 165, 169 (Okla. 1988).
185. *Id.* at 171.
186. *Id.* at 168.
187. *Id.* at 170.
188. *See* CNA Ins. Co. v. Krueger, Inc., of Tulsa, 1997 OK 142, 949 P.2d 676.
189. Thomas v. Wheat, 2006 OK CIV APP 106, 143 P.3d 767.
190. *Id.* ¶ 2, 143 P.3d at 768.
191. *Id.* ¶ 1, 143 P.3d at 768.
192. *Id.*
193. *Id.* ¶ 17, 143 P.3d at 771.
194. *Id.*

1. [The plaintiff] knew of the risk and appreciated the degree of danger;
2. [The plaintiff] had the opportunity to avoid the risk;
3. [The plaintiff] acted voluntarily; and
4. [The plaintiff's] action was the direct cause of [his/her] injury.[195]

The court continued, stating that "[t]here is a presumption that a plaintiff assumed the risk of injury from an errant golf ball if he or she is within the bounds of a golf course."[196] This appears to be an assertion that such a situation calls for the *implied primary* assumption of risk. However, the court stated, "when someone is injured . . . while outside the bounds of a golf course, application of the defense depends upon the specific facts of each case."[197] This assertion, on the other hand, appears to call instead for the *implied secondary* assumption of risk. Here, the court noted that:

> [A]lthough [p]laintiff admitted knowing that he was working at a house adjacent to the golf course and that golf balls were often hit into the backyard, his affidavit stated that he did not appreciate the damage a golf ball could cause and that he was behind trees which he thought would protect him from errant shots.[198]

Accordingly, the court concluded that "a substantial controversy exists regarding . . . Plaintiff's alleged assumption of . . . risk."[199] The court therefore found that summary judgment should not have been granted and reversed.[200]

Again, the word "consent" does not appear a single time in the *Wheat* opinion.[201] This observation is perplexing given that *Holliday* tells us that consent is the touchstone of the assumption of risk defense.[202] There appear to be three potential explanations for this omission. First is that this

195. *Id.* ¶ 17, 143 P.3d at 771 (citing Okla. Unif. Jury Instr. CIV 9-14).
196. *Id.* ¶ 19, 143 P.3d at 771.
197. *Id.* ¶ 18, 143 P.3d at 771.
198. *Id.*
199. *Id.*
200. *Id.*
201. *See generally id.*
202. Thomas v. Holliday *ex rel.* Holliday, 764 P.2d 165, 169 (Okla. 1988).

lack-of-consent discussion is an intentional departure from *Holliday*. Second, maybe the *Wheat* and *Krueger* courts believe that the OUJI elements of assumption of risk are sufficient to manifest consent, and therefore a separate consent analysis would be duplicative. Or, third, perhaps the omission is merely a result of the confusing nature of the assumption of risk defense, and its core essence has become lost in translation.

In review, the preceding case law answers two key questions about Oklahoma's post-*Holliday* approach to implied secondary assumption of risk. First, implied secondary assumption of risk continues to act as a complete defense.[203] Second, implied secondary assumption of risk applies to more cases than just product liability.[204]

III. The Current Oklahoma Law Is in Conflict with the Third Restatement

How does Oklahoma's stance on the implied assumption of risk compare to the general landscape of modern torts law in light of the Third Restatement and comparative fault schemes? Most notably, the Restatement (Third) of Torts has eliminated the defense altogether.[205] Section 2, comment (i) is titled "*Implied assumption of risk distinguished*," and it states that when a plaintiff merely voluntarily confronts a risk that he or she is aware of, such conduct "does not otherwise constitute a defense unless it constitutes consent to an intentional tort."[206] It further states that "[a] plaintiff's conduct in the face of a known risk, however, might constitute plaintiff's negligence and therefore result in a percentage reduction of the plaintiff's recovery."[207] Therefore, the Third Restatement has made clear its intent to abolish the affirmative defense of implied *secondary* assumption of risk in light of comparative fault.

Section 3, comment (c) of the Third Restatement elaborates on the idea that the facts that used to give rise to implied secondary assumption of risk should now be approached under the contributory negligence analysis.[208]

---

203. CNA Ins. Co. v. Krueger, Inc., of Tulsa, 1997 OK 142, ¶ 11, 949 P.2d 676, 679.

204. *See generally Wheat*, 143 P.3d 767.

205. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 2 cmt. i (Am. L. Inst. 2000).

206. *Id.*

207. *Id.*

208. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 3 cmt. c (AM. L. INST. 2000) (emphasis omitted).

First, the Third Restatement establishes that a "plaintiff who is . . . aware of a reasonable risk and voluntarily undertakes it[] . . . is not negligent."[209] For example, "a parent [who] tries to rescue a child from a fire[] is not negligent."[210] This example highlights the impact of the departure from the defense of implied assumption of risk. Previously, these facts would have met the elements of voluntarily encountering a known risk. Accordingly, implied assumption of risk might have acted to bar the plaintiff's recovery. Now, under the Third Restatement, the plaintiff's recovery would not even be reduced because contributory negligence would not apply to a non-negligent plaintiff.

What about implied primary assumption of risk? Section 2, comment (j), titled "*Relationship to other liability-limiting doctrines*," references what has previously been labeled as implied primary assumption of risk.[211] There, the Third Restatement says:

> A plaintiff's knowledge of a risk may support a conclusion, based on other liability-limiting doctrines, that the defendant is not liable. These . . . sometimes are called "no duty" or "limited duty" rules . . . the limited liability (or duty) one participant in a sporting event has to other participants. Those issues are questions of a defendant's primary liability (or duty) under tort law and are not addressed in this Restatement. This Section neither supports nor precludes a determination that a particular actor has limited or no liability (or duty) in specific circumstances.[212]

The last sentence, in particular, is striking in that the Third Restatement has abstained from taking a stance on the implied primary assumption of risk.[213] It has, at least, clarified that the implied primary assumption of risk is considered part of the "duty" analysis, as opposed to an affirmative defense.[214] Clearly, the Third Restatement does not suggest that the considerations behind implied assumption of risk should be

209. *Id.*
210. *Id.*
211. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 2 cmt. j (AM. L. INST. 2000).
212. *Id.*
213. *Id.*
214. *Id.*

ignored altogether. Instead, it now affects either the defense of contributory negligence or the primary negligence of the defendant. This stance on implied primary assumption of risk is not actually in tension with Oklahoma case law post-*Tucker*.[215]

Section 3, comment (c) also discusses the ways in which what was previously implied secondary assumption of risk can affect the primary negligence case.[216] For example, "[w]hether the defendant reasonably believes that the plaintiff is aware of a risk and voluntarily undertakes it may be relevant to whether the defendant acted reasonably. The defendant might reasonably have relied on the plaintiff to avoid the known risk."[217] These statements refer to a "better position" argument under the analysis for whether the defendant *breached*.[218] Additionally, the Third Restatement says "[w]hether the plaintiff is aware of a risk and voluntarily assumes it may also be relevant to whether the plaintiff's conduct is a superseding cause."[219] Whether something is a superseding cause affects the negligence element of proximate causation/scope of liability.[220]

Should Oklahoma follow the majority of jurisdictions and adopt the Third Restatement's approach?[221] Although counterintuitive, the answer may lie within the now-outdated Second Restatement of Torts. As previously discussed, treating the implied assumption of risk as a complete defense is now in tension with modern comparative fault schemes.[222] The Restatement (Second) of Torts, written in 1965, highlights this tension by its discussion of contributory negligence and the assumption of risk largely before the advent of comparative fault.[223] Section 496A, comment (d), titled "*Relation to contributory negligence*," begins by stating "[t]he same conduct on the part of the plaintiff may thus amount to both assumption of risk and contributory negligence, and may subject him to both defenses."[224] For example:

---

215. *See generally* Tucker v. ADG, Inc., 2004 OK 71, 102 P.3d 66.

216. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 3 cmt. c (AM. L. INST. 2000).

217. *Id.*

218. *See generally* Stinnett v. Buchele, 598 S.W.2d 469 (Ky. Ct. App. 1980).

219. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 3 cmt. c (AM. L. INST. 2000).

220. *See* Snell v. Norwalk Yellow Cab, Inc., 212 A.3d 646, 672 (Conn. 2019).

221. *Assumption of Risk*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/assumption_of_risk (last visited Dec. 17, 2024).

222. Rountree v. Boise Baseball, LLC, 296 P.2d 373, 381 (Idaho 2013).

223. RESTATEMENT (SECOND) OF TORTS § 496A, cmt. d (AM. L. INST. 1965).

224. *Id.*

> [The plaintiff's] conduct in accepting the risk may be unreasonable and thus negligent, because the danger is out of all proportion to the interest he is seeking to advance, as where he consents to ride with a drunken driver in an unlighted car on a dark night . . . . The great majority of the cases involving assumption of risk have been of this type, where the defense overlaps that of contributory negligence. *The same kind of conduct frequently is given either name, or both.*[225]

Additionally:

> In theory the distinction between the two is that assumption of risk rests upon the voluntary consent of the plaintiff to encounter the risk and take his chances, while contributory negligence rests upon his failure to exercise the care of a reasonable man for his own protection. Where the plaintiff voluntarily consents to take an unreasonable chance, there may obviously be both.[226]

The notion of consent was obviously at the forefront of Justice Opala's mind in *Holliday*, and it will continue to be important in the discussion of whether Oklahoma should abolish the implied assumption of risk.

Finally, comment (d) acknowledges the existence of comparative fault statutes and their effects on the assumption of risk.[227] The Second Restatement notes that some jurisdictions have construed their statutes to leave assumption of risk as a complete defense.[228] Such is the case in Oklahoma.[229] Furthermore, the Second Restatement adds that such a construction "defeats the intent of the statute in any case where the same conduct constitutes both contributory negligence and assumption of risk, since the purpose of the act would appear to be to reduce the damages in

225. *Id.* (emphasis added).
226. *Id.*
227. *Id.*
228. *Id.*
229. CNA Ins. Co. v. Krueger, Inc., of Tulsa, 1997 OK 142, ¶ 5, 949 P.2d 676, 678.

the case of all such negligent conduct, whatever the defense may be called."[230]

Are the authors of the Second Restatement correct in their assumption that this construction runs counter to legislative intent? There are several different possibilities of intent behind the comparative fault statutes. The first possibility is the idea behind the Third Restatement's position, which is that under comparative fault schemes, the affirmative defense of implied assumption of risk should be eliminated.[231] The second possibility is that where there is overlap between findings of contributory negligence and the assumption of risk, comparative fault should override the complete bar posed by implied assumption of risk and instead comparatively apportion responsibility. The last possibility is when there is factual overlap between the two defenses, the complete bar of implied assumption of risk dominates. So under this approach, the implied assumption of risk will always act as a complete bar to the plaintiff's claim.

The second approach should clearly be rejected due to the absurd results it would produce. Under the second approach, the implied assumption of risk would only act as a complete bar when there is no overlap with contributory negligence. Accordingly, this would arise only in situations where the plaintiff consents to a reasonable risk, such as a parent rescuing a child from a burning building. Surely, such an application would run counter to legislative intent because it would treat plaintiffs who acted reasonably more punitively than those who acted unreasonably. There, the plaintiffs who consented to an unreasonable risk would not be barred completely but would instead merely be subject to reduced recovery under comparative fault.[232]

That leaves the third possibility, where a plaintiff who is found to have assumed the risk will be barred from recovery, regardless of an overlap with a finding of contributory negligence. As the Second Restatement notes, this overlap is prevalent in negligence claims.[233] So the instances where contributory negligence results in an application of comparative fault will be limited in comparison to the total number of cases where contributory negligence is found. The Second Restatement argues that this observation is evidence that "such a construction . . . defeats the intent of

230. RESTATEMENT (SECOND) OF TORTS, § 496A, cmt. d (AM. L. INST. 1965).

231. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 2 cmt. i (AM. L. INST. 2000).

232. *See* OKLA. STAT. tit. 23, § 13 (1979).

233. RESTATEMENT (SECOND) OF TORTS, § 496A, cmt. d (AM. L. INST. 1965).

the statute . . . since the purpose of the act would appear to be to reduce the damages in the case of all such negligent conduct, whatever the defense may be called."[234]

Do the actions of the Oklahoma legislature refute the Second Restatement's assumptions regarding legislative intent? It is most notable that Oklahoma's comparative negligence statute was enacted in 1979 and has never been amended.[235] Ever since *Byford* was decided by the Oklahoma Supreme Court in 1994, the legislature has been put on notice that the Oklahoma courts were not only continuing to recognize assumption of risk as an affirmative defense, but that it was still treated as a complete bar to recovery.[236] Accordingly, the Oklahoma legislature has had thirty years post-*Byford* to correct this alleged misunderstanding, yet it has failed to do so. Such inaction may easily be understood as acquiescence, or that the interpretation was never in conflict with the legislature's own understanding. Additionally, as late as 2014, the OUJI contained a section in chapter 9 titled "*Preface to the Comparative Negligence Instructions*," and it is self-described as being "designed to provide a brief overview of the basic stages of the development of comparative negligence law in Oklahoma."[237] Within this section, confusions in comparative negligence's application are discussed, such as its application to joint and several liability.[238] However, the Second Restatement's alleged contradiction pertaining to the implied assumption of risk is wholly absent.[239] Despite the Second Restatement's justification, there is a notable lack of evidence that the treatment of implied assumption of risk by Oklahoma's courts is contrary to its legislative intent behind the shift to comparative negligence. The question remains, however, whether Oklahoma should abandon the defense for other reasons.

One reason that would undoubtedly point in favor of such abandonment is if the continued recognition of the defense would be internally inconsistent or is otherwise rooted in faulty reasoning. An example of such inconsistency could be the aforementioned possibility that the non-negligent plaintiff is treated unfavorably compared to the negligent one. Remember, this example would arise if contributory

234. *Id.*
235. OKLA. STAT. tit. 23, § 13 (1979).
236. Byford v. Town of Asher, 874 P.2d 45, 49 (Okla. 1994).
237. In re: Amends. to the Okla. Unif. Jury Instructions, 2014 OK 17, at *9.
238. *Id.*
239. *Id.*

negligence and comparative fault predominated over a concurrent finding of assumption of risk. This would be the case because assumption of risk would then only act as a complete bar in the instances where contributory negligence is not found; that is, the plaintiff was not negligent. A careful reading of *Krueger, Inc., of Tulsa* reveals that this is not how Oklahoma approaches concurring instances of the two defenses.[240] Again, there, the jury was given instructions on both contributory negligence and assumption of risk, and it returned a verdict in favor of the defendant.[241] However, it remained unclear whether the jury actually found that the plaintiff had impliedly assumed the risk or found that the defendant was simply not negligent.[242] The court's lack of discussion about whether the jury made a finding of contributory negligence, even though the opinion repeatedly notes this defense is more applicable to the facts, strongly suggests that such a finding would be immaterial, even if assumption of risk was the reason for denying the plaintiff liability.[243] If Oklahoma courts did treat comparative negligence as predominant over the complete defense of the implied assumption of risk, then the jury's conclusion pertaining to each defense would be paramount to a determination of whether the plaintiff could recover.

Therefore, Oklahoma is situated within the third possibility discussed above, where a finding of the implied assumption of risk will act as a complete bar to recovery, regardless of overlap with contributory negligence. Unlike the second possibility discussed above, there are no obvious defects in the reasoning behind such treatment that would demand abandonment. The idea of intentionally encountering a risk is categorically different from mere negligence resulting in harm to the plaintiff's self, even if those actions would also satisfy the elements of negligence. Regarding the difference between an intentional encounter and a merely negligent one, an analogy may be made to the criminal law doctrine of *mens rea* and the "mental-state 'hierarchy.'"[244] Pertaining to this hierarchy of mental states, the United States Supreme Court stated that purpose and knowledge are more culpable mental states than recklessness or negligence.[245] The same reasoning behind this conclusion applies here as

240. CNA Ins. Co. v. Krueger, Inc., of Tulsa, 1997 OK 142, 949 P.2d 676.
241. *Id.* at 678.
242. *Id.*
243. *Id.*
244. Borden v. United States, 593 U.S. 420, 426 (2021) (citations omitted).
245. *Id.* at 427.

well. Accordingly, it is nonsensical to treat a plaintiff who knowingly and voluntarily encounters a danger less favorably as compared to a plaintiff who merely negligently acted in a way that resulted in injury to himself. Although assumption of risk shall not be immediately dismissed due to some internal inconsistency or dubious reasoning, the distinction between intentional encounters and mere negligence is not persuasive enough to argue that retaining the defense should be preferred.

The notion of consent, on the other hand, is perhaps indicative that retaining the defense of the assumption of risk may be preferable over abolition. Kenneth Simons weighs the idea of consent against the modern pressure to abolish the assumption of risk in his entry in the Boston University Law Review titled *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*.[246] Simons posed the simple question: if "[c]onsent is an accepted defense to an intentional tort[,] why then are we uncertain about the status of assumption of risk, which is often equated with consent?"[247] Additionally, "[w]hy has the doctrine of assumption of risk persisted in many states, despite overwhelming criticism and the ascension of comparative fault?"[248] It is worth noting that Simons's article was written in 1987, whereas now in 2025 most jurisdictions follow the Third Restatement's approach and have abolished the defense.[249] Regardless, Simons's initial justification for retaining the defense is hard to argue:

> [If] defendant provided plaintiff with choice A rather than choice B, yet plaintiff actually prefers A to B, ordinarily there is no good reason to grant plaintiff recovery. This intuitively powerful proposition can be further justified in various ways: plaintiff should not obtain the benefits of a choice without incurring the expected risks; . . . plaintiff is the "co-author of his own harm."[250]

246. Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 BOS. U. L. REV. 213 (1987).

247. *Id.* at 214-15.

248. *Id.* at 215 (footnote omitted).

249. *Assumption of Risk*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/assumption_of_risk (last visited Dec. 17, 2024).

250. Simons, *supra* note 246, at 218-19 (footnotes omitted).

However, Simons recognizes that this issue is not easily resolved.[251] It is often unclear what exactly the plaintiff has consented to.[252]

For example, a plaintiff may "agree[] to the particular conduct of [the] defendant, or to a particular result."[253] But "[d]oes [the] plaintiff also necessarily agree to all further consequences of that conduct or result."[254] Looking back at *Holliday*, the court implicitly raised these exact questions with its use of language such as "consent to harm."[255] Again, the court even went so far as to say "[t]he touchstone of the assumption-of-risk defense is *consent* to harm."[256] This statement seems to take for granted the idea that consenting to *risk* necessarily entails consent to the ensuing harm posed by that risk. For instance, it may be fair to say that a spectator at a baseball game who sits in an unscreened portion of seats consents to the risk of being pelted by a foul ball. It seems unlikely, however, that such a "risk-preferring" individual is, therefore, consenting to take a foul ball from the bat of Ronald Acuña Jr. to the temple. Accordingly, the spectator here has consented to the risk but is counting on the risk to not manifest itself in actual harm. At the very least, it is up to debate whether consent to risk of harm or certain conduct equates to consent to actual ensuing harm, and such uncertainty is discussed by Simons in his article.[257]

IV. The Overwhelming Confusion Involved in the Application of the Assumption of Risk Defense Outweighs the Benefit of Recognizing Consent

On one hand, the court provided Oklahoma courts with guidance on how to proceed with their administration of the assumption of risk defense with its *Holliday* opinion.[258] On the other, its use of curious language left the courts with more questions than answers, and its guidance seems to have become lost in translation. For example, with implied secondary assumption of risk, courts have resorted to defining the defense along the lines of a plaintiff who knows of the risk, appreciates the degree of danger,

---

251. *See id.* at 229.
252. *Id.*
253. *Id.*
254. *Id.*
255. Thomas v. Holliday *ex rel.* Holliday, 764 P.2d 165, 169 (Okla. 1988) (emphasis omitted).
256. *Id.*
257. Simons, *supra* note 246, at 229.
258. *See Holliday*, 764 P.2d 165.

and voluntarily encounters the risk.[259] This description is carried over from the court's opinion in *Holliday*.[260] However, despite the court's assertion that "[t]he touchstone of the assumption-of-risk defense is *consent* to harm," neither *Wheat* nor *Krueger* uses the word "consent" a single time in its respective opinions.[261] The court instead relied on the above description of voluntarily encountering a known risk.[262] The major problem with that, however, is that the court makes clear that this description alone is insufficient to constitute consent. This is problematic because my own and Kenneth Simons's understanding is that the notion of recognizing consent is the best argument in favor of retaining the defense of assumption of risk as opposed to adopting the Third Restatement's approach of abolition.[263]

Even if the courts of Oklahoma could be reminded that the most important aspect of the assumption of risk is true consent, it is perhaps not feasible to create a manageable standard of how to recognize a manifestation of implied consent other than the aforementioned description, which falls flat. Unfortunately, the court recognized this truth, but failed to provide an ascertainable standard.[264] For example, in the *Holliday* facts (security guard leaping onto a moving vehicle) and the Prosser jaywalker example (intentionally walking out into a busy street), I am hard-pressed to find an aspect of the description of implied secondary assumption of risk that is not satisfied.[265] However, the court says that these descriptions give rise to an application of contributory negligence and not assumption of risk.[266] The court adds to the confusion by suggesting that the type of consent it is looking for here is consent to the future negligence of the defendant.[267] The court leaves no semblance of clarity how this type of consent relates to mere consent to harm or how to know when the plaintiff's conduct gives rise to either of these aspects of consent.[268]

---

259. *See* Thomas v. Wheat, 2006 OK CIV APP 106, 143 P.3d 767, 771.
260. *Holliday*, 764 P.2d at 168.
261. *Id.* at 169; *Wheat*, 2006 OK CIV APP 106, 143 P.3d 767; CNA Ins. Co. v. Krueger, Inc., of Tulsa, 1997 OK 142, 949 P.2d 676.
262. *Wheat*, 2006 OK CIV APP 106, 143 P.3d 767; *Krueger*, 1997 OK 142, 949 P.2d 676.
263. Simons, *supra* note 246, at 218-19.
264. *Holliday*, 764 P.2d at 169.
265. *Id.*
266. *Id.*
267. *Id.*
268. *See generally id.*

While the above discussion pertains primarily to the implied secondary assumption of risk, the implied primary assumption of risk entails much confusion as well. As previously described, it is unclear what exactly the plaintiff, such as a spectator at a baseball game, is consenting to. Additionally, Oklahoma courts cannot seem to agree on whether implied primary should be treated as a "no duty" rule or as an affirmative defense.[269] As seen in *Byford*, the "no duty" rule of "open and obvious dangers" is hardly distinguishable in the context of landowner-entrant relationships.[270] So the defense of implied primary assumption of risk primarily adds confusion, and the defendant would be left with ample sources of law to defend their case on similar grounds without it.

Finally, courts in other jurisdictions have made convincing arguments that the policy decisions embedded within implied primary are better left to the legislature than the courts.[271] In *Rountree*, the Supreme Court of Idaho decided against adopting a "Baseball Rule" for this reason.[272] There, the court said that "drawing lines as to where a stadium owner's duty begins, where netting should be placed, and so on, becomes guesswork."[273] Accordingly, such questions are more "appropriate for the Legislature because it 'has the resources for the research, study and proper formulation of broad public policy.'"[274] The court concluded by recognizing that there was no compelling public policy for it to adopt a baseball rule itself and that the legislature could adopt such a rule if it chooses.[275]

Conclusion: Oklahoma Should Adopt the Modern View of the Third Restatement and Abolish the Defense of Implied Assumption of Risk

In the *Holliday* opinion, Justice Opala presented Oklahoma courts with an opportunity to hit reset on its implied assumption of risk precedent and abandon the defense. However, as established herein, the courts elected against the view of the majority of jurisdictions and the Third Restatement, and retained the defense as separate from contributory negligence, thereby preserving the complete bar from liability that it

269. *See* Tucker v. ADG, Inc., 2004 OK 71, ¶ 21, 102 P.3d 660, 669. *But see* Byford v. Town of Asher, 874 P.2d 45, 47 (Okla. 1994).
270. *Byford*, 874 P.2d at 49.
271. Rountree v. Boise Baseball, LLC, 296 P.3d 373, 379 (Idaho 2013).
272. *Id.*
273. *Id.*
274. *Id.* (quoting Anstine v. Hawkins, 447 P.2d 677, 679 (Idaho 1968)).
275. *Rountree*, 296 P.3d at 379.

entails. Although this stance should not be immediately dismissed, the ensuing confusion was inevitable. Oklahoma's comparative negligence scheme is undermined by the complete bar of the assumption of risk, which runs concurrent with many instances of contributory negligence. But more importantly, the essence of assumption of risk itself has become lost in translation. As the *Holliday* court put it, "[t]he touchstone of the assumption-of-risk . . . is consent."[276] However, Oklahoma courts post-*Holliday* fail to discuss whether the plaintiff's conduct is actually manifesting consent. With its core essence now forgotten by Oklahoma courts, it is increasingly difficult to justify retaining the defense in the modern backdrop of comparative fault schemes.

276. Thomas v. Holliday *ex rel.* Holliday, 764 P.2d 165, 169 (Okla. 1988) (emphasis omitted).