

SUPREME COURT OF OKLAHOMA

Thomas v. Holliday by and Through Holliday

764 P.2d 165 (Okla. 1988) · No. No. 63821 · Decided October 25, 1988

SUMMARY

The Oklahoma Supreme Court held that the evidence did not warrant a jury instruction on assumption of risk in a negligence action arising from injuries sustained while the plaintiff attempted to stop a departing vehicle. The court distinguished assumption of risk from contributory negligence and affirmed the trial court's order granting a new trial because the erroneous instruction presented assumption of risk as a complete defense.

CASE DETAILS

|                       |                                                                                                                                                                      |
|-----------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Oklahoma                                                                                                                                            |
| WRITING FOR THE COURT | Opala, Justice; Doolin, C.J.; Hargrave, V.C.J.; Hodges, J.; Lavender, J.; Alma Wilson, J.; Summers, J.; Kauger, J.; Simms, J.                                        |
| JURISDICTION          | Oklahoma                                                                                                                                                             |
| DECIDED               | October 25, 1988                                                                                                                                                     |
| DOCKET                | No. 63821                                                                                                                                                            |
| DISPOSITION           | affirmed                                                                                                                                                             |
| PROCEDURAL POSTURE    | Plaintiff appealed from an order granting him a new trial after the jury returned a defense verdict based on an assumption-of-risk instruction.                      |
| STANDARD OF REVIEW    | An order granting a new trial is reviewed for abuse of discretion; when the record discloses a legally tenable ground for the order, the order must be affirmed.     |
| PRECEDENTIAL VALUE    | Published Oklahoma Supreme Court opinion; precedential value not otherwise specified in the source.                                                                  |
| PARTIES               | Daniel Dee Holliday, a minor child under the age of 18 years of age, by and through his mother and next friend, Nagako Holliday, Nagako Holliday v. Donald R. Thomas |

TOPICS

- assumption of risk
- contributory negligence
- jury instructions
- appellate procedure
- standard of review

## PRACTICE AREAS

Torts

Civil procedure

Personal injury

## QUESTIONS PRESENTED

1. Whether the trial court erred in granting Thomas a new trial on the ground that the assumption-of-risk instruction was improperly given.
2. Whether the evidence supported an assumption-of-risk jury instruction in a negligence action involving a face-to-face encounter between strangers.
3. Whether Thomas's conduct constituted assumption of risk or instead presented an issue of contributory negligence.

## HOLDINGS

1. The evidence did not warrant an instruction on assumption of risk because Thomas did not expressly agree to release Holliday from liability, lack a legally relevant pre-existing or status-based relationship with Holliday, or consent to the particular harm he suffered.
2. Conduct that amounts to lack of due care or heedlessness, without consent to the harm, is contributory negligence rather than assumption of risk.
3. The trial court's order granting Thomas a new trial was legally tenable and therefore was affirmed.

## KEY QUOTATIONS

*"We answer this question in the negative and hold that the evidence adduced at trial did not warrant an instruction on assumption of risk."* (at 166)

*"A plaintiff may expose himself to potential harm and not consent to relieve the defendant of any future duty to act with reasonable care."* (at 170)

*"For risk assumption to avail as a defense to a tort claim for negligence 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."* (at 171)

## FACTUAL BACKGROUND

Thomas, a Safeway security guard and off-duty Lawton police officer, observed Holliday partially eat and replace a pastry in a grocery store. Thomas followed Holliday to a vehicle, approached it, and attempted to enter the vehicle or turn off its ignition as Holliday began driving away. Thomas grabbed the back of a bucket seat and jumped onto the side of the moving vehicle, then fell and injured his shoulder.

## PROCEDURAL HISTORY

Thomas sued Holliday for personal injuries sustained when Thomas attempted to stop or investigate Holliday's departure from a grocery-store parking lot. Holliday asserted assumption of risk, and the trial court gave a jury instruction treating that defense as a complete bar to recovery. The jury returned a verdict for Holliday. The trial

court granted Thomas a new trial because the assumption-of-risk instruction was improper, and Holliday appealed.

## DISPOSITION

affirmed

## CASES CITED

- Cruden v. Fentham, 2 Esp. 685, 170 Eng. Rep. 496 (1799)
- Priestley v. Fowler, 3 M. & W. 1, 150 Eng. Rep. 1030 (1837)
- St. Louis-San Francisco Ry. Co. v. Robinson, 225 P. 986 (Okla. 1924)
- Incorporated Town of Sallisaw v. Wells, 216 P. 118 (Okla. 1923)
- Sapulpa Refining Co. v. Sapulpa, 202 P. 780 (Okla. 1922)
- Wichita Falls & N.W. Ry. Co. v. Groves, 196 P. 677 (Okla. 1921)
- Tiller v. Atlantic Coast Line R.R. Co., 318 U.S. 54 (1943)
- Lyons v. Redding Construction Co., 515 P.2d 821 (Wash. 1973)
- Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974)
- McMurray v. Deere and Company, Inc., 858 F.2d 1436 (10th Cir. 1988)
- Murray v. Ramada Inns, Inc., 521 So. 2d 1123 (La. 1988)
- Anderson v. Ceccardi, 451 N.E.2d 780 (Ohio 1983)
- Duffy v. Midlothian Country Club, 481 N.E.2d 1037 (Ill. App. Ct. 1985)
- Springrose v. Willmore, 192 N.W.2d 826 (Minn. 1971)
- Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977)
- Lang v. Amateur Softball Ass'n of America, 520 P.2d 659 (Okla. 1974)
- Davis v. Whitsett, 435 P.2d 592 (Okla. 1967)
- Briscoe v. Oklahoma Natural Gas Co., 509 P.2d 126 (Okla. 1973)
- Centric Corp. v. Morrison-Knudsen Co., 731 P.2d 411 (Okla. 1986)
- Owens v. Union Pacific R.R. Co., 319 U.S. 715 (1943)
- Rogers v. Kelly, 679 S.W.2d 184 (Ark. 1984)
- Rutter v. Northeastern Beaver County, 437 A.2d 1198 (Pa. 1981)
- Story v. Howes, 344 N.Y.S.2d 10 (N.Y. App. Div. 1973)
- Keck v. Woodring, 208 P.2d 1133 (Okla. 1949)
- Bishop's Restaurants, Inc. of Tulsa v. Whomble, 355 P.2d 560 (Okla. 1960)
- Dodson v. Henderson Properties, Inc., 708 P.2d 1064 (Okla. 1985)
- Barnhart v. International Harvester Co., 441 P.2d 1000 (Okla. 1968)
- Chapman v. Tiger, 356 P.2d 571 (Okla. 1960)

