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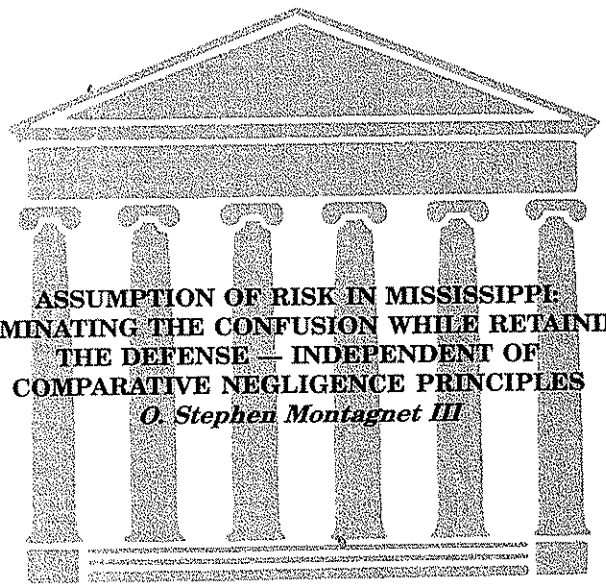

ASSUMPTION OF RISK IN MISSISSIPPI: ELIMINATING THE CONFUSION WHILE RETAINING THE DEFENSE — INDEPENDENT OF COMPARATIVE NEGLIGENCE PRINCIPLES

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COMMENTS

ASSUMPTION OF RISK IN MISSISSIPPI: ELIMINATING THE CONFUSION WHILE RETAINING THE DEFENSE— INDEPENDENT OF COMPARATIVE NEGLIGENCE PRINCIPLES

For over a century, Mississippi jurisprudence has recognized the affirmative defense of assumption of risk[1] in personal injury litigation. With certain limitations, this defense continues to preclude a plaintiff's recovery when the plaintiff's injury results from his voluntary exposure to a known risk. However, a recent decision of the Mississippi Supreme Court indicates that, despite its long history, this defense may be on the eve of abrogation.[2] This comment attempts to refute the reasons for this defense's waning viability and to provide justification for its continued and expanded application.

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[1] The maxim *volenti non fit injuria*, which means "he who consents cannot receive an injury," developed the doctrine of assumption of risk. 65A C.J.S. *Negligence* § 174(1) (1966).

[2] *See* Tharp v. Bunge Corp., 641 So. 2d 20 (Miss. 1994) (abrogating "open and obvious" defense in premises liability cases because its effect of completely barring plaintiff recovery was held inconsistent with apportionment principles of comparative negligence); *see infra* notes 110-12 and accompanying text.

I. ASSUMPTION OF RISK: AN OVERVIEW

Assumption of risk refers to the tort doctrine under which a plaintiff's voluntary exposure to a known risk may relieve a defendant of liability.[3] In order for a defendant to prevail under this theory, he must establish three elements:

> (1) Knowledge on the part of the injured party of a condition inconsistent with his safety; (2) appreciation by the injured party of the danger in the condition; and (3) a deliberate and voluntary choice on the part of the injured party to expose his person to that danger in such a manner as to register assent on the continuance of the dangerous condition.[4]

When established, these elements reveal that the plaintiff comprehended an impending peril and was willing to encounter

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[3] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 68 at 440 (4th ed. 1971). While the doctrine of assumption of risk has been defined and categorized in many, sometimes confusing, ways, the doctrine is usually divided into its "primary" and "secondary" forms. *See generally* PROSSER, *supra* § 67; 57A AM. JUR. 2D *Negligence* §§ 809-12 (1989) (advocating three forms into which assumption of risk may be divided); Robert L. Spell, *Stemming the Tide of Expanding Liability: The Coexistence of Comparative Negligence and Assumption of Risk*, 8 MISS. C. L. REV. 159, 165 (1987). Secondary assumption of risk has been described as synonymous with contributory negligence and requires an objective "reasonable man" analysis. 57A AM. JUR. 2D *Negligence* §§ 809-12 (1989). This secondary form of the doctrine is not the focus of this comment. Rather, this comment focuses on the doctrine in its primary form. Primary assumption of risk includes both express and implied voluntary acceptances of a known risk on the part of the plaintiff. 57A AM. JUR. 2D *Negligence* §§ 809-12 (1989). "Express" assumption of risk involves a contractual relationship and refers to the situation wherein the plaintiff has given the defendant consent to relieve the defendant of an obligation of conduct otherwise owed. 65A C.J.S. *Negligence* § 174(1) (1966). "Implied" assumption of risk encompasses those circumstances where the plaintiff, aware of a previously created risk, proceeds voluntarily to encounter it. PROSSER, *supra* § 68. Unlike contributory negligence, the focus of primary assumption of risk is the subjective knowledge and conduct of the plaintiff. 57A AM. JUR. 2D *Negligence* §§ 809-12 (1989).

[4] Elias v. New Laurel Radio Station, Inc. 146 So. 2d 558, 561-62 (Miss. 1962) (quoting Paul N. Nunnery, Note, 19 MISS. L.J. 369, 370 (1947-48)). The knowledge element can be satisfied by direct evidence of the plaintiff's realization of the dangerous condition or by circumstantial evidence showing that the plaintiff must have known. Alexander v. Conveyors & Dumpers, Inc., 731 F.2d 1221, 1224 (5th Cir. 1984).

it.[5] Assumption of risk does not necessarily entail fault or negligence on the part of the plaintiff.[6] Moreover, a plaintiff is precluded from recovering under this doctrine despite any negligence on the part of the defendant.[7] Where the defense is recognized, the rationale for its existence is that a plaintiff should not be able to hold another person liable when the plaintiff voluntarily exposed himself to a known risk of harm which he could have avoided.[8]

Assumption of risk has been recognized as a viable defense in Mississippi tort law since 1890.[9] The Mississippi Supreme Court has repeatedly recognized that, where a defendant establishes the above quoted elements, the plaintiff will be precluded from recovery.[10] While the Mississippi Legislature has abrogated the defense specifically as it would otherwise apply in actions involving an employer's negligence resulting in an employee's injury,[11] the defense remains "in full force in this state."[12] Nevertheless, the doctrine has been under attack in many jurisdictions, including this one, for its perceived inconsistency with principles of comparative negligence.[13]

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[5] 65A C.J.S. *Negligence* § 174(1) (1966). It has been repeated that assumption of risk involves an inherent characteristic of "venturousness" on the part of the plaintiff. *See* Shurley v. Hoskins, 271 So. 2d 439, 443 (Miss. 1973) (stating that assumption of risk involves mental state of willingness to deliberately venture forth into situation containing dangers); Herod v. Grant, 262 So. 2d 781, 783 (Miss. 1972) (recognizing venturous characteristic inherent in third element of defense); *see also infra* notes 68-76 and accompanying text.

[6] 65A C.J.S. *Negligence* § 174(1) (1966).

[7] Walker v. Kerr-McGee Chemical Corp., 793 F. Supp. 688, 698 (N.D. Miss. 1992). "[T]o acquiesce in, or consent to, a course of negligent conduct is to assume the risks incident thereto. . . ." 65A C.J.S. *Negligence* § 174(1) (1966). *But see* McLeod v. Whitten, 413 So. 2d 1020, 1023-24 (Miss. 1982) (suggesting that assumption of risk instruction should contain requirement that defendant be free of negligence).

[8] 65A C.J.S. *Negligence* § 174(1) (1966).

[9] While not specifically mentioning the defense, the Mississippi Constitution effectively abolished the defense as it applied to railroad employees. *See* MISS. CONST. art. VII, § 193; *see also infra* notes 24, 29 and accompanying text.

[10] *See* Nichols v. Western Auto Supply Co., 477 So. 2d 261, 264 (Miss. 1985); Alley v. Praschak Mach. Co., 366 So. 2d 661, 665 (Miss. 1979).

[11] *See* MISS. CODE ANN. § 11-7-19 (1989); McDonald v. Wilmut Gas & Oil Co., 176 So. 395, 397 (Miss. 1937); *infra* notes 24-31 and accompanying text.

[12] Saxton v. Rose, 29 So. 2d 646, 648 (1947).

[13] *See generally* 57B AM. JUR. 2D *Negligence* § 1201 (1989) (discussing

II. COMPARATIVE NEGLIGENCE AND ITS PERCEIVED INCONSISTENCY WITH ASSUMPTION OF RISK

Almost every state in this country has adopted some form of comparative negligence.[14] In most instances, this adoption was a reaction to the harsh results of the application of pure contributory negligence,[15] which completely barred a plaintiff from recovery when that plaintiff was negligent to any degree.[16] By contrast, comparative negligence allows a plaintiff to recover despite the fact that his negligence contributed to his injury.[17] His award, in most cases, will equal the amount of his damages less the proportional amount of damages attributable to his negligence.[18]

Because the intent of comparative negligence is to allocate fault between the plaintiff and the defendant, complete defenses such as assumption of risk have been viewed as inconsistent with this principle.[19] Different jurisdictions have adopted, in general, three separate responses to this concern.[20] Eight states have abolished the defense altogether.[21] Twenty-seven states have eliminated it as a defense to the extent that it is a complete bar. Instead, these states recognize it only as a factor

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different jurisdictions' approaches to interplay of assumption of risk and comparative negligence principles).

[14] Jean W. Saxton, Note, 67 TEMP. L. REV. 903, 903 (1994). The only states which have not adopted some form of comparative negligence are Alabama, Maryland, North Carolina, and the District of Columbia. Gail D. Hollister, *Using Comparative Fault to Replace the All-or-Nothing Lottery Imposed in Intentional Torts Suits in Which Both Plaintiff and Defendant Are at Fault*, 46 VAND. L. REV. 121, 123 n.2 (1993).

[15] Hollister, *supra* note 14, at 122-23; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 67, at 469 (5th ed. 1984).

[16] Howard J. Alperin, Annotation, *The Doctrine of Comparative Negligence and its Relation to the Doctrine of Contributory Negligence*, 32 A.L.R.3D 463, 488-90 (1970).

[17] Alperin, *supra* note 16, at 472.

[18] *Id.*

[19] PROSSER, *supra* note 3, at 456-57.

[20] For an extensive state-by-state analysis, see 57B AM. JUR. 2D *Negligence* §§ 1300-1751 (1989).

[21] 57B AM. JUR. 2D *Negligence* §§ 1300-1751 (1989). Connecticut, Illinois, Kansas, Kentucky, Massachusetts, Michigan, North Dakota, and Oregon have, at least practically, abolished the defense. *Id.*

in determining the respective fault of the parties.[22] Still, fifteen states and the District of Columbia have kept assumption of risk as an independent, viable defense regardless of whether the particular state has adopted comparative negligence principles.[23] Mississippi's approach in this regard does not fall neatly into any of these categories. Indeed, as the next section explains, Mississippi's status in this area is not clearly defined at all.

III. MISSISSIPPI'S LEGISLATIVE AND JUDICIAL TREATMENT OF THE RELATIONSHIP BETWEEN ASSUMPTION OF RISK AND COMPARATIVE NEGLIGENCE

In 1890, the state's recognition of the defense of assumption of risk was evidenced by the state's constitution which abrogated the defense as it would otherwise apply in cases where an employee of a railroad was injured on the job.[24] In 1910, the Mississippi Legislature enacted the nation's first comparative negligence statute.[25] Its immediate effects were to abolish the strict doctrine of contributory negligence[26] and to allow the jury to diminish the plaintiff's recovery "in proportion to the amount of negligence attributable to the person injured."[27] This action did not statutorily abolish the doctrine of assumption of risk.[28] However, its applicability was limited four years later when the legislature eliminated the defense in

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[22] *Id.* These states include: Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Texas, Utah, Vermont, Washington, Wisconsin and Wyoming. *Id.*

[23] *Id.* These states include: Alabama, Delaware, Georgia, Maryland, Mississippi, Nebraska, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, West Virginia and Pennsylvania. *Id.*

[24] MISS. CONST. of 1890, art. 7, § 193.

[25] Act of Apr. 16, 1910, ch. 135, 1910 Miss. Laws 125 (codified as amended at MISS. CODE ANN. § 11-7-15 (1972)); KEETON ET AL., *supra* note 15, § 67, at 471.

[26] H. Wesley Williams III, *1989 Tort "Reform" in Mississippi: Modification of Joint and Several Liability and the Adoption of Comparative Contribution*, 13 MISS. C. L. REV. 133, 133 (1992).

[27] MISS. CODE ANN. § 11-7-15 (1989).

[28] Olger C. Twyner III, *A Survey and Analysis of Comparative Fault in Mississippi*, 52 MISS. L.J. 563, 574 (1982).

all cases involving an employee's injury due to the negligence of the employer.[29] The "master and servant" exception was reinforced in 1948 when the legislature prohibited the use of the defense by an employer in cases where an employee was seeking coverage under the state's worker's compensation statute.[30] Moreover, the Mississippi Legislature recently gave an implicit blessing to the defense by incorporating the elements of assumption of risk into the newly enacted products liability statute.[31] Thus, while the legislature expressed its will by eliminating the complete defense of contributory negligence, it seems apparent that their intention was, and still is, to retain the defense of assumption of risk.

Nevertheless, the suggestion has been raised by at least one commentator that the legislature did, in fact, intend to abolish the defense of assumption of risk when it enacted the 1914 statute.[32] This argument is premised on the proposition that, in 1914, when the statute abolishing the defense in master and servant cases was enacted, the only assumption of risk cases in Mississippi had involved a master and servant relationship.[33] Since the legislature abrogated the defense to that

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[29] Act of Feb. 28, 1914, ch. 156, 1914 Miss. Laws 200 (codified at MISS. CODE ANN. § 11-7-19 (1972)). Essentially, the legislature took the language of § 193 of the state constitution, which abrogated the defense in railroad employee cases, and expanded its application to all cases involving any master and servant. *See* MISS. CONST. art. VII, § 193. While providing the general rule that assumption of risk shall not be a defense as between master and servant, this statute, like its constitutional counterpart, does except from the rule situations involving injuries to "conductors, or locomotive engineers, in charge of dangerous or unsafe cars or engines voluntarily operated by them." MISS. CODE ANN. § 11-7-19 (1972).

[30] *See* MISS. CODE ANN. § 11-1-63(d) (1994).

[31] *See* MISS. CODE ANN. § 11-1-63(d) (1994). Unlike the defense's "master and servant" limitations, the products liability statute codified existing law, since assumption of risk had already been held applicable in products cases. *See* Little v. Liquid Air Corp., 37 F.3d 1069, 1079 (5th Cir. 1994) (applying doctrine in products case); Alley v. Praschak Mach. Co., 366 So. 2d 661, 665 (Miss. 1979) (applying doctrine in products case).

[32] *See* David E. Wilder, *Assumption of Risk in Mississippi - Time For a Change?*, 44 MISS. L.J. 452, 465-66 (1973).

[33] Wilder, *supra* note 32, at 465. Other commentators have stated that the doctrine of assumption of risk arose from the employer/employee relationship, as a product of the industrial revolution. *See* John L. Diamond, *Assumption of Risk*

extent in 1914, it is suggested that the defense was abrogated in its entirety at that time.[34] According to this argument, the question remains, "[h]ad the legislature known of the future extensions of the assumed risk doctrine, would they have limited it as they limited contributory negligence?"[35]

This question is the result of a well-reasoned argument, but the argument wrongly assumes that the legislature was unaware that the defense could be used in situations outside of the master and servant context. While it is true that most of the Mississippi cases prior to 1914 limited the defense's application to this context, there are some cases which indicate that the court was at least cognizant of a broader application.[36] In fact, the court seemed to directly apply the doctrine in the 1910 case of *Ingram-Day Lumber Co. v. Harvey*,[37] which did not involve a master and servant relationship.[38] In *Harvey*, the plaintiff had been awarded a judgment against a lumber company, which was not Harvey's employer, as a result of an injury sustained on a logging train.[39] The Mississippi Supreme Court reversed the judgment and denied Harvey's recovery, stating that "[w]hen Harvey took passage on the train as he did, he is bound with a knowledge of the character of the road he was taking passage on and assumed the risk."[40] *Harvey* and the other aforementioned cases indicate that the court

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After Comparative Negligence: Integrating Contract Theory into Tort Doctrine, 52 OHIO ST. L.J. 717, 750 n.5 (1991); Spell, *supra* note 3, at 159.

[34] Wilder, *supra* note 32, at 465.

[35] Wilder, *supra* note 32, at 465.

[36] *See* Pulliam v. Illinois Cent. R. Co., 23 So. 359, 360 (Miss. 1898) (distinguishing contributory negligence from "voluntary, deliberate, willful, reckless exposure of one's self to injury" in non-master/servant case); Alabama & V. Ry. v. Jones, 19 So. 105, 107 (Miss. 1895) (making same distinction in another non-master/servant case); Dix v. Brown, 41 Miss. 131, 136 (1866) (stating general rule in non-master/servant case, "that no one can maintain an action for a wrong where he has consented . . . to the act which occasions his loss.").

[37] 53 So. 347 (Miss. 1910).

[38] *Harvey*, 53 So. at 347.

[39] *Id.* at 348. Harvey was seeking employment at the time of his injury, but he was held not to be employed at the time. *Id.* The logging train, which was in an obvious state of disrepair, was not meant for passengers. *Id.*

[40] *Id.*

recognized that the doctrine of assumption of risk applied outside of the context of master and servant cases.

There are two explanations for the fact that only a few cases during this period acknowledged a broader application of the doctrine. First, the majority of the negligence cases prior to 1914 involved a master and servant relationship. Therefore, except for *Harvey* and the other non-master and servant cases mentioned above, the only cases to which the doctrine could be applied were master and servant cases. Secondly, because, prior to 1910, contributory negligence had the same effect as assumption of risk in totally barring recovery, but required a lesser showing, it was only natural that the defense of assumption of risk was seldom litigated during this era.[41] For these reasons, the suggestion that the Mississippi Legislature intended to abolish the doctrine of assumption of risk when it enacted the 1914 statute is untenable.

A. Mississippi's Judicial Treatment Before 1973

Unlike the legislature's consistent treatment of the defense of assumption of risk, the Mississippi Supreme Court has had more difficulty in defining its applicability. Until 1973, however, the court was largely consistent in its position, repeatedly maintaining that the defense of assumption of risk and comparative negligence were independently applicable doctrines.[42] During this period, the assumption of risk instruction was routinely given whenever the facts at issue supported the elements of the defense. The 1947 decision of *Saxton v. Rose*[43] il-

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[41] The proposition that the doctrine's application exceeded the master and servant area in 1914 is also supported by the fact that cases rendered shortly thereafter recognized a broader application. *See* McDonald v. Wilmut Gas & Oil Co., 176 So. 395, 397 (Miss. 1937) (applying assumption of risk in premises liability action and stating "[t]he common-law doctrine of assumption of risk is in full force in this state, except as between master and servant."); Lucas v. Hammond, 116 So. 536, 537 (Miss. 1928) (recognizing elements of assumption of risk in premises liability case, but not applying them since defendant was relieved of liability on other grounds).

[42] *But see* Wilder, *supra* note 32, at 467-70 (arguing existence of rare instances of inconsistent application of doctrine prior to 1973).

[43] 29 So. 2d 646 (Miss. 1947).

lustrates the court's position during this period. In *Saxton*, the decedent's widow brought a wrongful death action against the driver of the car in which the decedent was killed while riding as a passenger.[44] The question before the court was whether the trial court erred in applying the assumption of risk doctrine and not contributory negligence.[45] After distinguishing the two defenses,[46] the court noted that the case was squarely one of assumption of risk and affirmed the trial court's judgment in favor of the defendant.[47] *Griffin v. Holliday*,[48] a 1970 case similar to *Saxton*,[49] indicated that the court had not changed its mind during the interim twenty-three years.[50] Two years later, in *Herod v. Grant*,[51] the court held that the doctrine was

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[44] *Saxton*, 29 So. 2d at 647. The plaintiff alleged that the driver was grossly negligent in driving while intoxicated. *Id.* Evidence elicited at trial indicated that the decedent/passenger knew that the driver was intoxicated when he entered the car. *Id.*

[45] *Id.* at 648.

[46] *Id.* at 648-49. The court noted that assumption of risk "applies when a party voluntarily and knowingly places himself in such a position, or submits himself to such a condition, appreciating that injury to himself on account thereof is liable to occur at any and all times so long as such a position or condition continues." *Id.* at 649. In contrast, the court stated that contributory negligence applies when "the injured person, by his own conduct has done something, or has omitted to do something, which contributes to the particular event, and at the particular time and place, which was the immediate cause of the injury." *Id.* The court summarized the distinction by defining assumption of risk as the "venturousness" of the injured person while contributory negligence was defined as his "carelessness." *Id.*

[47] *Id.* at 649-50.

[48] 233 So. 2d 820 (Miss. 1970).

[49] *Griffin*, 233 So. 2d at 822. In this case, the defendant/driver and the plaintiff/passenger drove thirty-five miles to a bar with the intention to drink beer. *Id.* After remaining at the bar for two hours, consistent with their intentions, they began their return trip home. *Id.* On their way home, the vehicle overturned, resulting in the plaintiff's injuries. *Id.*

[50] *Id.* After a jury verdict for the defendant, the plaintiff appealed, assigning as error the instruction regarding assumption of risk. *Id.* While the court did reverse the decision of the lower court, it found error only in the phrasing of the instruction which applied a reasonable man standard instead of a subjective one. *Id.* The court did not find error in the applicability of the doctrine to the facts at bar. *Id.* Rather, it reinforced the court's position on the defense by stating that "the basic issue in the case [was] whether [the] plaintiff should be denied recovery of damages because he assumed the risk." *Id.* at 823.

[51] 262 So. 2d 781 (Miss. 1972).

applicable in a case where the plaintiff was injured while hunting in a seated position on top of a tool box in the back of a moving truck.[52] *Herod* marked the end of the court's consistent treatment of the defense as an independent doctrine entirely separate from contributory negligence.

B. The "Overlap" Rule of Braswell v. Economy Supply

Many scholars, practitioners, and jurists have opined that the doctrine of assumption of risk is inconsistent with the fault-apportioning system of comparative negligence.[53] In 1973, the landmark decision of *Braswell v. Economy Supply Co.*[54] demonstrated that the Mississippi Supreme Court was somewhat persuaded by this argument. In *Braswell*, the court addressed the propriety of submitting jury instructions on both assumption of risk and contributory negligence.[55] The court held that "where assumption of risk *overlaps and coincides* with contributory negligence the rules of the defense of contributory negligence shall apply."[56] The court reversed the jury's defense verdict and remanded for a new trial, finding error in the court's instruction on the defense of assumption of risk.[57]

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[52] *Herod*, 262 So. 2d at 782. Assigned as error in *Herod* was the trial court's refusal to grant the defendant's motion for a directed verdict based on the defense of assumption of risk. *Id.* at 783. Finding that the trial court committed error in this respect, the Mississippi Supreme Court reversed the jury's award in favor of the plaintiff. *Id.*

[53] Bryant v. Nealey, 599 F. Supp. 248, 249-50 (N.D. Miss. 1984). *See generally* Annotation, *Effect of Adoption of Comparative Negligence Rules on Assumption of Risk*, 16 A.L.R.4TH 700, 703; 57B AM. JUR. 2D *Negligence* §§ 1201-06 (1989).

[54] 281 So. 2d 669 (Miss. 1973).

[55] *Braswell*, 281 So. 2d at 673. Braswell was injured by some falling lumber while on the defendant's property. *Id.* at 670. Braswell alleged that his injury was caused by the defendant's negligence in stacking the lumber. *Id.* The defendant denied liability, arguing that Braswell's own negligence in climbing the stack was the cause of his injuries and that Braswell "assumed the risk of entering the bin where the lumber was stacked." *Id.*

[56] *Id.* at 677 (emphasis added). Earlier in the same year that *Braswell* was decided, the Mississippi Supreme Court implied that there is no overlap between the two defenses. *See* Shurley v. Hoskins, 271 So. 2d 439, 443 (Miss. 1973) (stating "[i]t should . . . be pointed out that these two doctrines are separate, distinct, and not to be mistaken for one another.").

[57] *Braswell*, 281 So. 2d at 678.

Before announcing its holding, the court quoted a large portion of text written by Prosser.[58] Prosser, in discussing the disfavoring of the defense of assumption of risk in Federal Employer Liability Act cases, suggested that the same rationale should apply under state laws which apportion damages according to fault.[59] "'[W]hile contributory negligence went only to reduce the plaintiff's damages, assumption of risk remained as a complete defense, which barred the action entirely. . . . *In all probability this defeats the basic intention of the statute.* . . .'"[60] In apparent agreement with this logic, but without discussing whether assumption of risk offends the intent of Mississippi's comparative negligence law, the court eliminated assumption of risk to the extent that it overlapped and coincided with comparative negligence.[61]

Braswell seemed to indicate that the defense of assumption of risk would be significantly limited in application by precluding the defendant from submitting an instruction on assumption of risk whenever both defenses were applicable. Unfortunately, the *Braswell* court did not provide enough guidance for identifying exactly when the limitation was triggered.[62] As a result, application of *Braswell*'s holding has been somewhat problematic.

Since *Braswell* was decided, there have been several published Mississippi Supreme Court and federal court decisions

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[58] *Id.* at 676-77.

[59] *Id.*

[60] *Id.* at 676 (quoting PROSSER, *supra* note 3, at 456-57) (emphasis added).

[61] *Id.* at 677. Instead of giving deference to this State's historical treatment of the two defenses, the court seemed to rely mainly on the fact that "[t]he doctrine of assumption of risk has been under attack in many jurisdictions and has been brought into sharp focus in those jurisdictions which, like Mississippi, have comparative negligence statutes apportioning damages between plaintiff and defendant." *Id.* at 676.

[62] Moreover, the "overlap" test, which seems to require a substantive analysis of the facts, may be subject to a procedural flaw. Contributory negligence and assumption of risk are affirmative defenses which must be pleaded in order to be available for the defense in the form of jury instructions. MISS. R. CIV. P. 8(c). While the issue has not been litigated, a defendant could conceivably avoid *Braswell*'s overlap analysis by pleading only assumption of risk, arguing that the two defenses could not then overlap since only one is available.

discussing the interplay of assumption of risk and comparative negligence. Several other cases omit any mention of *Braswell*'s rule, even where both defenses would seem applicable. The language of these collective opinions is often contradictory and confusing.

Singleton v. Wiley,[63] which was decided only six years after *Braswell*, best illustrates the court's confusion in this area. In *Singleton*, the court affirmed the trial court's granting of an assumption of risk instruction in a case involving a high-school student who was injured after jumping on the trunk of the defendant's moving car.[64] In discussing *Braswell*, the court completely misstated *Braswell*'s rule, holding that "[t]his is one of those rare cases where the doctrines of comparative negligence and assumption of risk appear to overlap, and where instructions on both could be given."[65] Moreover, the court seemed to justify assumption of risk instructions in two different situations: whenever the plaintiff's conduct was venturous and whenever the plaintiff's conduct was the sole proximate cause of his injuries.[66] Because of *Singleton*'s obvious analytical flaws, that case provides little help in determining the court's approach in applying *Braswell*'s rules. Other cases have been clearer, however, revealing that four general approaches have been used by Mississippi's courts in attempting to follow *Braswell*.[67]

One approach taken was to allow an instruction on assumption of risk only when the facts indicated that the

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[63] 372 So. 2d 272 (Miss. 1979).

[64] *Singleton*, 372 So. 2d at 273-75.

[65] *Id.* at 274. The erroneous statement seems to have been predicated on a faulty reading of *Braswell*'s analysis. In discussing *Braswell*, the court quoted the language of the opinion which expressed a concern over the applicability of both defenses. *Id.* at 275. The court then said, "[h]owever, in *Braswell*, we did go on to say: 'The doctrine of assumption of risk was properly applied to the unusual facts of this case and it represents one of the rare instances where it is applicable.'" *Id.* This quoted language from *Braswell* was actually referring to the case of *Herod v. Grant*, and not to the facts of *Braswell*, wherein the instruction was, of course, disallowed. *Braswell*, 281 So. 2d at 675.

[66] *Singleton*, 372 So. 2d at 275.

[67] As will be shown below, the Mississippi Supreme Court has used all four of these approaches since 1973.

plaintiff's actions evidenced "venturousness" on his part. In *Richardson v. Clayton & Lambert Mfg. Co.*,[68] the only case that has attempted to define the "overlap" of the two defenses, the Federal District Court for the Northern District of Mississippi required a separate element of "venturousness."[69] In defining the overlap, the court stated:

> If the circumstances show that the plaintiff may have assumed the risk but also indicate that the plaintiff may have been negligent without assuming the risk, then the two doctrines overlap, and only the comparative negligence instruction should be given. In such a case an instruction on assumption of risk should not be given unless the court finds that the circumstances of the case qualify the case as one of those rare cases where the plaintiff's conduct is deemed to be venturous.[70]

Richardson suggests that venturousness is a requirement, separate from the traditional elements of the defense, which must be present before the instruction can be allowed. Later cases have impliedly rejected this rationale, finding venturousness to be an implicit characteristic embodied in the normal three-element definition of the defense.[71]

Richardson's approach is largely predicated on *Yarbrough v. Phipps*,[72] a 1973 Mississippi Supreme Court decision. In *Yarbrough*, the court reversed the trial court's defense verdict

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[68] 657 F. Supp. 751 (N.D. Miss. 1987).

[69] *Richardson*, 657 F. Supp. at 754. *Richardson* involved a plaintiff who was injured after diving into a pool. *Id.* at 752.

[70] *Id.* at 754. The quoted language seems to be inconsistent, since it first prohibits the granting of an assumption of risk instruction where the defined overlap occurs, but then provides that the instruction may nonetheless be proper if venturousness is found.

[71] *See* Little v. Liquid Air Corp., 37 F.3d 1069, 1078-79 n.26 (5th Cir. 1994) (stating that venturous distinction between assumption of risk and contributory negligence is reflected by Mississippi's definition of elements of assumption of risk); Huffman v. Walker Jones Equip. Co., 658 So. 2d 871, 874 (Miss. 1995) (stating "[t]he injured party's conduct must rise to a level of venturousness, as opposed to carelessness, with regards to appreciation of the known peril"); *see also infra* notes 103, 104 and accompanying text.

[72] 285 So. 2d 788 (Miss. 1973).

on the ground that the assumption of risk instruction was too indefinite.[73] Specifically, the instruction failed to include the third element of the defense, which requires a voluntary and deliberate choice to expose one's self to danger.[74] The court concluded that because the third element was missing, the instruction lacked an element of venturous conduct on the part of the plaintiff.[75] Finally, the court stated that, upon retrial, no assumption of risk instruction should be given, because the evidence did not support the requisite finding of venturousness.[76] Apparently, the district court in *Richardson* focused only on this last statement, interpreting it to require a separate element of venturousness, in addition to the regular three-element test.

A second approach, though never actually applied, was suggested by the Mississippi Supreme Court in *Alley v. Praschak Machine Co.*[77] In this products liability action, the court stated in a footnote that assumption of risk is applicable only when the plaintiff's negligence was the sole proximate cause of the accident.[78] After apparently finding that to be the situation in *Alley*, the court affirmed the trial court's granting of the instruction.[79] The obvious problem with this approach is that it effectively abolishes the doctrine of assumption of risk.[80]

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[73] *Yarbrough*, 285 So. 2d at 790-91.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] 366 So. 2d 661 (Miss. 1979).

[78] *Alley*, 366 So. 2d at 665 n.1. In *Alley*, the plaintiff's arm was amputated while working on a machine built by the defendant. *Id.* at 663. The plaintiff sued under theories of strict liability and negligence. *Id.*

[79] *Id.* at 665.

[80] The fact that such an approach is tantamount to abrogation of the defense is evidenced by Justice Lee's statement that in such a case the issue of sole proximate cause "should be submitted to the jury rather than assumption of risk." *Id.* at 665 n.1. The origin of this approach may come from the *Braswell* opinion, wherein the court added that "[t]his [overlap] rule does not prevent a defense on the ground that a plaintiff's injury was caused by his negligence, if his negligence was the *sole* proximate cause of the injury." *Braswell*, 281 So. 2d at 677 (emphasis in original).

The Mississippi Supreme Court applied a third approach in *Nichols v. Western Auto Supply*.[81] In another products case, the court suggested that assumption of risk is an available defense whenever the facts of the case can be distinguished from *Braswell*.[82] The court indicated that, since *Braswell* involved premises liability and the case at bar was a products liability case, *Braswell*'s rule was inapplicable.[83] The court discussed *Alley* in apparent support of this approach.[84] Of course, the problem with this approach is that *Braswell* did not limit its holding to its facts, or to premises liability cases in general.[85]

The final and most popular approach has surfaced in the majority of post-*Braswell* assumption of risk cases. Under this approach, assumption of risk is applicable whenever the elements can be satisfied despite *Braswell*'s holding. In two Mississippi Supreme Court cases, *McLeod v. Whitten*[86] and *McDaniel v. Ritter*,[87] the majority opinions omit any discussion of *Braswell*'s rule.[88] In *McLeod*, the court analogized the facts to *Herod v. Grant*,[89] a pre-*Braswell* case, and affirmed the defense verdict.[90] In *McDaniel*, the court, sitting en banc

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[81] 477 So. 2d 261 (Miss. 1985).

[82] *Nichols*, 477 So. 2d at 263. In *Nichols*, the appellant, citing *Braswell*, argued that the lower court erred in granting an instruction on assumption of risk without granting one on comparative negligence. *Id.*

[83] *Id.* The court held that the doctrine of assumption of risk is applicable in cases involving strict liability. *Id.* at 264.

[84] *Id.* at 263-64. In an apparent response to the questionable viability of the defense, the court stated "[r]egardless of the feeling of attorneys and judges on assumption of risk, the doctrine has not been abolished in Mississippi and . . . [the instruction] properly submitted the question to the jury." *Id.* at 264.

[85] *See Braswell*, 281 So. 2d at 677; *see also supra* note 56 and accompanying text.

[86] 413 So. 2d 1020 (Miss. 1982).

[87] 556 So. 2d 303 (Miss. 1989).

[88] While the majority opinion in *McDaniel* omitted any discussion of *Braswell*, Justice Sullivan dissented separately. *See McDaniel*, 556 So. 2d at 319-21 (Sullivan, J., dissenting). In his opinion, Justice Sullivan discussed *Braswell* at length and called for the abolition of the defense. *Id.* at 319-20 (Sullivan, J., dissenting).

[89] *See supra* notes 51, 52 and accompanying text.

[90] *McLeod*, 413 So. 2d at 1022-24. Oddly, the court did find error in the in-

and with only one judge dissenting, affirmed the circuit court's granting of a new trial based on the court's erroneous submission of an assumption of risk instruction.[91] The court did not base its decision on *Braswell*, finding only that the evidence at trial did not support the knowledge element of the assumption of risk defense.[92] Other Mississippi cases reveal that Mississippi courts rarely apply *Braswell*'s rule, instead choosing to base the applicability determination solely on whether the evidence supports the elements of the defense.[93]

Federal courts, in applying Mississippi law, have also followed this approach of applying assumption of risk whenever the facts support the elements of the defense.[94] In *Bryant v. Nealey*,[95] the Federal District Court for the Northern District of Mississippi discussed *Braswell* at length.[96] The court noted

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struction, stating that the instruction should have required the jury to find that the defendant acted without negligence. *Id.* at 1023. Because the jury returned a verdict in favor of the defendant and included the language "[n]ot guilty of negligence," the court found the error harmless. *Id.* at 1023-24.

[91] *McDaniel*, 556 So. 2d at 316. The circuit court refused the plaintiff's instruction on comparative negligence, but granted the defendant's assumption of risk instruction. *Id.* at 314. After a jury returned a verdict for the defendant, the circuit court found that it should not have submitted the issue of assumption of risk to the jury. *Id.* at 304.

[92] *Id.* at 314-15. The court stated that the trial record only raised an issue of the plaintiff's negligence and that the evidence did not satisfy the elements of the assumption of risk defense. *Id.* at 315-16.

[93] *See* Huffman v. Walker Jones Equip Co., 658 So. 2d 871, 874 (Miss. 1995) (reversing summary judgment where evidence did not support finding that plaintiff appreciated specific risk involved); Sugg v. Sanderson, 515 So. 2d 909, 911 (Miss. 1987) (finding evidence supported instruction); Edwards v. Ellis, 478 So. 2d 282, 288-89 (Miss. 1985) (affirming decision to refuse instruction where evidence did not support finding of elements); Munford v. Peterson, 368 So. 2d 213, 218 (Miss. 1979) (noting that evidence did not support instruction); Mississippi Power & Light Co. v. Shepard, 285 So. 2d 725, 740-41 (Miss. 1973) (holding that evidence did not support instruction).

[94] Of the six federal decisions discussing this area of Mississippi law, only *Richardson* follows a different approach. *See supra* notes 68-70 and accompanying text.

[95] 599 F. Supp. 248 (N.D. Miss. 1984).

[96] *Bryant*, 599 F. Supp. at 250. In *Bryant*, the district court denied the defendant's motion for summary judgment, stating that there was a genuine issue of material fact as to whether the plaintiff was an employee of the defendant. *Id.* at 251. As noted earlier, such a relationship would preclude the applicability of

a commentator's suggestion that *Braswell*'s "overlap" consisted of situations in which the plaintiff unreasonably encountered a known risk.[97] The court then rejected this analysis, stating that "later cases have not interpreted *Braswell* in this manner and have uniformly allowed standard assumption of the risk instructions where there was evidence that the plaintiff voluntarily encountered a known risk."[98]

Likewise, the Fifth Circuit Court of Appeals has consistently applied pre-*Braswell* law in resolving issues of conflict between assumption of risk and comparative negligence. In *Little v. Liquid Air Corp.*,[99] a products liability action, the Fifth Circuit affirmed the district court's granting of summary judgment in favor of the defendant.[100] The court noted that the appellant did not sufficiently raise the issue of whether the district court erred in applying assumption of risk when it granted summary judgment on the plaintiffs' strict liability claims.[101]

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the assumption of risk defense. *See* MISS. CODE ANN. § 11-7-19; *supra* note 29 and accompanying text. Nevertheless, the court plainly indicated that it would have applied the defense absent this issue. *Bryant*, 599 F. Supp. at 250. It is interesting to note that Judge Biggers did not have to discuss *Braswell* and its effect, or lack thereof, on subsequent cases, since the statutory prohibition was the dispositive factor in his decision. *See Bryant*, 599 F. Supp. at 250-51 (recognizing that case supported assumption of risk instruction but denying summary judgment due to possible employment relationship between parties).

[97] *Id.* at 250 (citing Twyner, *supra* note 28, at 576-77).

[98] *Id.* The court cited *McGowan*, *Singleton*, and *Alley* as cases in which, despite the rule in *Braswell*, the Mississippi Supreme Court allowed assumption of risk instructions where the evidence supported the defense's elements. *Id.* (citing *McGowan*, 419 F. Supp. at 746; *Singleton*, 372 So. 2d at 274-75; *Alley*, 366 So. 2d at 665).

[99] 37 F.3d 1069 (5th Cir. 1994).

[100] *Little*, 37 F.3d at 1079. In *Little*, two wrongful death actions were filed on behalf of welders who died as a result of an explosion which occurred after one of them lit a cigarette near a leaky gas hose. *Id.* at 1071. The plaintiffs sued the gas manufacturer and retailer under theories of strict liability and negligence. *Id.* at 1078 n.26. The district court granted summary judgment in favor of the defendants on both claims, finding that the decedents' failure to evacuate and the lighting of the cigarette were superseding causes which relieved the defendant of liability with regard to the negligence claim. *Id.* Moreover, the district court granted summary judgment on the strict liability claim, finding that the plaintiffs assumed the risk of their injury. *Id.*

[101] *Id.* at 1071. The court noted that the plaintiffs waived any challenge to the application of assumption of risk. *Id.* at 1079 n.26.

Nevertheless, the court, sitting en banc, approved the district court's action in this regard, noting that the Mississippi Supreme Court reaffirmed the doctrine of assumption of risk in *McDaniel*, despite *Braswell*'s language to the contrary.[102] In addressing the alleged conflict between the defenses of assumption of risk and contributory negligence, the court stated:

> To the extent that contributory negligence and assumption of the risk are distinguished by degree, contributory negligence crosses the pale into assumption of risk when the plaintiff's conduct is not merely negligent - or even grossly negligent - but instead, the plaintiff's conduct is a wilful, venturous challenge to a fully-appreciated danger to his own self-interest and safety. *This distinction is reflected by Mississippi's definition of the elements of assumption of risk*. . . .[103]

Thus, the Fifth Circuit is of the opinion that, while venturousness may be the distinguishing factor which removes assumption of risk from any overlap with comparative negligence, the finding of venturousness is satisfied whenever the elements of the defense are supported by the facts.[104] This opinion is in harmony with the current trend of allowing the defense of assumption of risk to be applicable whenever the circumstances support the elements of the defense, though seemingly contrary to the holding in *Braswell*.

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[102] *Id.* at 1078 n.26. The court stated:

> Assumption of the risk is a valid defense under Mississippi law. Notwithstanding the sometime musings of the Mississippi Supreme Court concerning the continued vitality of the defense in the light of contributory negligence and Mississippi's adoption of comparative fault, the doctrine has been reaffirmed in unequivocal terms, and actually extended to apply to products liability cases.

Id. (citations omitted).

[103] *Id.* at 1078-79 n.26 (emphasis added).

[104] *See* Alexander v. Conveyors & Dumpers, Inc., 731 F.2d 1221, 1223-24 (5th Cir. 1984) (acknowledging applicability of defense if supported by evidence and holding that knowledge element may be satisfied by circumstantial evidence showing that plaintiff must have known existence of dangerous condition).

IV. ELIMINATING THE CONFUSION ENGENDERED BY *BRASWELL*

While most of the recent assumption of risk cases have effectively ignored, or impliedly rejected, *Braswell*'s "overlap" analysis, *Braswell* has not been overruled. Moreover, as discussed above, the Mississippi Supreme Court has applied four separate approaches to the assumption of risk / comparative negligence dilemma. In short, confusion abounds in this area of law, and a uniform rule would be welcome. One method of eliminating the confusion would be to abolish the doctrine of assumption of risk altogether. A more prudent solution would be for the Mississippi Supreme Court to overrule *Braswell*. An analysis of these two alternatives follows.

A. Why Abrogation of the Defense is not the Answer

Several jurisdictions, when presented with the supposed conflict between the principles of comparative negligence and assumption of risk, have opted to abrogate the latter defense.[105] There have been hints that the Mississippi Supreme Court is leaning in that direction. For instance, the court recognized a supposed conflict between the two defenses in *Hill v. Dunaway*,[106] wherein Justice Robertson stated that "there is some movement in other states toward elimination of the strict doctrine of assumption of risk."[107] In his dissent in *McDaniel v. Ritter*,[108] Justice Sullivan stated that the court was "waiting for the right case to once and for all abolish the doctrine of assumption of the risk and treat all fault under the comparative negligence statute."[109] More recently, Justice McRae, in

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[105] Annotation, *supra* note 53, at 703; 57B AM. JUR. 2D *Negligence* § 1202 (1989).

[106] 487 So. 2d 807 (Miss. 1986).

[107] *Hill*, 487 So. 2d 807, 810 n.1. This recognition of the national trend apparently did not represent Justice Robertson's view of the defense's viability. *See* Elam v. Pilcher, 552 So. 2d 814, 820 (Miss. 1989) (Robertson, J., dissenting) (stating "[i]ndeed, in extreme circumstances, such action on the part of a voluntary passenger [of a car driven by a visibly intoxicated driver] can constitute assumption of risk").

[108] 556 So. 2d 303 (Miss. 1989).

[109] *McDaniel*, 556 So. 2d at 320 (Sullivan, J., dissenting).

writing his dissent to the original *Tharp v. Bunge Corp.*[110] opinion, stated that "assumption of the risk is synonymous with open and obvious."[111] On rehearing, Justice McRae's majority opinion abolished the defense of "open and obvious," thereby foreshadowing the demise of assumption of risk.[112] Despite these statements of impending doom, case after case has reiterated that the defense of assumption of risk remains viable in Mississippi.[113]

Obviously, these conflicting viewpoints are a reaction to the confusion created by *Braswell*. However, the argument that the doctrine of assumption of risk is inconsistent with principles of comparative negligence cannot be made in a vacuum. When discussing the relationship between these two doctrines, the argument must be made against the backdrop of the particular jurisdiction's legislative and judicial history with respect to this area of the law. While abrogation of assumption of risk may be an easy way to clean-up the confusion, electing that

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[110] No. 90-CA-1160 (Miss. Sept. 2, 1993), *withdrawn on reh'g*, 641 So. 2d 20 (Miss. 1994).

[111] *Tharp*, No. 90-CA-1160, at 3 (McRae, J., dissenting). While the defenses of "open and obvious" and "assumption of risk" may have some similarities, they are not synonymous doctrines. Unlike the subjective standard employed in assumption of risk analyses, the test for "open and obvious" requires an objective analysis. *See* Toney v. Kawasaki Heavy Indus., Ltd., 975 F.2d 162, 166 (5th Cir. 1992) (applying Mississippi law and defining open and obvious as "'apparent and obvious to a casual observer'.") (quoting Harrist v. Spencer-Harris Tool Co., 140 So. 2d 558, 561 (Miss. 1962)) (emphasis omitted).

[112] Tharp v. Bunge Corp., 641 So. 2d 20, 25 (Miss. 1994). Nevertheless, even if the two defenses were actually synonymous, then "open and obvious" should have been retained since assumption of risk remains as a viable doctrine in Mississippi. Until just recently, Mississippi defendants in premises liability action could avail themselves of the defense of "open and obvious." *See* Sara Falkinham, Note, *The "Open and Obvious" Defense is No Longer a Complete Bar to Plaintiff Recovery*, 64 MISS. L.J. 241, 251 (1994).

[113] *See, e.g., Little*, 37 F.3d at 1078 n.26 (reiterating viability "[n]otwithstanding the sometime musings of the Mississippi Supreme Court"); *Bryant*, 599 F. Supp. at 250 (recognizing confusion created by *Braswell*); *Nichols*, 477 So. 2d at 264 (finding no error in jury instructions on doctrine). *But see* Byrd v. Matthews, 571 So. 2d 258, 259 (Miss. 1990) (stating "this Court is cognizant of the seemingly-*unquestionable* viability of the assumption-of-risk doctrine in actions involving a 'sports' injury and the *questionable* viability of the doctrine in actions involving a non-'sports' injury").

solution is inappropriate if premised on the proposition that the defense is inconsistent with Mississippi's comparative negligence statute. This is so for three reasons.

First, despite language in *Braswell* to the contrary, the doctrine of assumption of risk is facially consistent with the comparative negligence statute.[114] Unlike comparative negligence which employs a reasonable man standard, the doctrine of assumption of risk focuses on the *subjective* knowledge and conduct of the plaintiff.[115] Assumption of risk can not be used as a mere factor in determining the respective negligence of the parties, since negligence is measured by an objective standard.[116] In assessing whether an injured party assumed the risk, the conduct "must be judged in the light of his own knowledge rather than what he 'should have known.'"[117] Most of the states that use assumption of risk as a factor in determining the relative fault of the parties have a "comparative fault" system of apportioning damages.[118] Unlike these states, Mississippi's statute requires a comparison of negligence, not fault.[119] Therefore, the Mississippi statute is not offended

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[114] *Braswell*, 281 So. 2d at 677. In *Braswell*, the Mississippi Supreme Court partially predicated its holding on the supposed facial inconsistency between assumption of risk and Mississippi's comparative negligence statute. *Id.*

[115] *See* Saxton v. Rose, 29 So. 2d 646, 649 (Miss. 1947) (distinguishing assumption of risk from contributory negligence).

[116] Annotation, *supra* note 53, at 703.

[117] *Alexander*, 731 F.2d at 1224; *see also* Huffman v. Walker Jones Equip Co., 658 So. 2d 871, 874 (Miss. 1995) (noting comparative negligence application to situations involving plaintiff's carelessness as opposed to venturousness); Griffin v. Holliday, 233 So. 2d 820, 822 (Miss. 1970) (stating "whether the plaintiff assumed the risk depends upon what he knew and appreciated by the subjective standard of the plaintiff himself, not by the objective standard of the reasonable man") (citing Daves v. Reed, 222 So. 2d 411, 414 (Miss. 1969)); Saxton v. Rose, 29 So. 2d 646, 649 (Miss. 1947) (stating "'[a]ssumption of risk'. . . applies when a party *voluntarily* and *knowingly* places himself in such a position . . . appreciating that injury to himself on account thereof is liable to occur") (emphasis added). It is clear that a subjective standard, which requires proof of the plaintiff's knowledge, is much more difficult to meet than an objective standard. *See* Herod v. Grant, 262 So. 2d 781, 782-83 (Miss. 1972) (discussing relative difficulty in proving plaintiff's subjective knowledge as opposed to objective analysis) (citing 1 BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 64.3 (3d ed. 1965)).

[118] *See* 57B AM. JUR. 2D *Negligence* §§ 1300-1751 (1989).

[119] MISS. CODE ANN. § 11-7-15 (1972); *see supra* note 27 and accompanying

when a plaintiff's assumption of risk, which is more than mere negligence, is not compared to the defendant's negligence.

A related argument of facial inconsistency appears in *Richardson*, wherein the Federal District Court for the Northern District of Mississippi attempted to define when assumption of risk and contributory negligence overlap.[120] In a footnote supporting this definition, the court indicated that Mississippi Code section 11-7-17, which mandates that "[a]ll questions of negligence and contributory negligence shall be for the jury to determine," prohibits the granting of both instructions.[121] The fallacy in this reasoning is that it assumes the jury must determine all issues of negligence, even when such a finding is no longer necessary. For instance, the statute does not preclude the granting of dispositive motions or peremptory instructions in a negligence case, but the granting of such motions or instructions does keep negligence issues away from the jury.[122] The reason for this is that when a judge makes a determination that the defendant is entitled to dismissal, summary judgment, directed verdict, or judgment notwithstanding the verdict, the judge effectively determines that there is no negligence question for the jury to answer.[123] Similarly, when a

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text.

[120] *Richardson*, 657 F. Supp at 754; *see supra* note 70 and accompanying text.

[121] *Id.* at 754 n.2 (emphasis omitted) (quoting MISS CODE ANN. § 11-7-17 (1972)). The court stated that "when an assumption of risk instruction is given, the rule that all questions of negligence should be determined by the jury is in effect ignored." *Id.; see also Braswell*, 281 So. 2d at 676 (stating that assumption of risk instructions "deny the jury the right to weigh the respective negligence, if any, of the parties").

[122] *See* Mayor & Bd. of Alderman v. Young, 616 So. 2d 883, 885 (Miss. 1992) (holding that comparative negligence statute does not preclude instructing jury that plaintiff was not contributorily negligent); City of Greenville v. Laury, 159 So. 121, 122 (Miss. 1935) (acknowledging situations where determinations of negligence or absence thereof may be for judge and not for jury). The statute does not prohibit a bench trial in a negligence case, despite the fact that the judge will determine the question of negligence. *See* McGowan v. St. Regis Paper Co., 419 F. Supp. 742, 743 (S.D. Miss. 1976).

[123] McGee v. Bolen, 369 So. 2d 486, 493 (Miss. 1979); *see also Little*, 37 F.3d at 1079 n.26 (affirming granting of summary judgment based on assumption of risk); *Young*, 616 So. 2d at 887 (affirming granting of peremptory instruction on contributory negligence); Holley v. Funtime Skateland S., Inc., 392 So. 2d 1135,

judge or jury finds that the plaintiff assumed the risk, the statute is equally unoffended since such a finding is tantamount to a determination that there is no longer a question of negligence for the jury.

Finally, the viability of the defense is consistent with legislative intent. The most common argument used in justifying the abrogation of a complete defense such as assumption of risk is that the viability of the defense is inconsistent with the legislature's intent in enacting a comparative negligence statute.[124] Indeed, in *Braswell*, the Mississippi Supreme Court quoted Prosser who stated that "'[i]n all probability [the assumption of risk defense] . . . defeats the basic intention of the [comparative negligence] statute.'"[125] While this may be the case in certain jurisdictions, Mississippi's legislative history proves the contrary. Mississippi's legislature, after enacting the comparative negligence statute, has specifically abrogated the defense as it would apply in certain cases.[126] Such selective abrogation implies an understanding that the doctrine remains applicable in all other situations. Moreover, perhaps in response to the confusion engendered by *Braswell* and its progeny, the legislature incorporated the elements of the assumption of risk defense into the recently enacted products liability statute.[127] Therefore, any argument for abrogation based on legislative intent must fail.

B. Why Overruling Braswell *is the Answer*

The doctrine of assumption of risk reflects the state's historical and current attitude concerning a plaintiff's ability to

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1138 (Miss. 1981) (affirming directed verdict in favor of defendant on issue of assumption of risk); Gen. Tire & Rubber Co. v. Darnell, 221 So. 2d 104, 107-08 (Miss. 1969) (holding that trial court should have granted J.N.O.V. for defendant where plaintiff failed to prove negligence).

[124] Annotation, *supra* note 53, at 703.

[125] *Braswell*, 281 So. 2d at 676 (quoting PROSSER, *supra* note 3, at 456-57); *see supra* notes 58-60 and accompanying text.

[126] *See supra* notes 29, 30 and accompanying text.

[127] MISS. CODE ANN. § 11-1-63(d) (Supp. 1995); *see supra* note 31 and accompanying text.

recover. Mississippi courts continue to apply the doctrine whenever each of the elements is satisfied,[128] thus acknowledging that a plaintiff's conduct can be so egregious that he should be denied recovery altogether, even if his actions are not the sole proximate cause of his injury. Moreover, the elected representatives of this state have collectively indicated that this defense is desirable, at least in the area of products liability.[129]

As noted above, assumption of risk is compatible with Mississippi's system of comparative negligence. [130] Because assumption of risk focuses on the subjective knowledge and behavior of the plaintiff, the defense is separate from the doctrine of comparative negligence. As a separate doctrine where proof of the elements are presented by the defendant, an instruction on the defense should be given to the jury, regardless of any other defenses which may be applicable.

Detractors of assumption of risk disregard the subjective/objective distinction as justification for the defense's application, arguing that comparative negligence principles should apply regardless of whether the plaintiff's actions were intentional or voluntary.[131] However, in disregarding this distinction, and in arguing that comparative negligence principles be applied regardless of the voluntary nature of the plaintiff's aactions, this rule of tort law—that individuals must bear full responsibility for their intentional acts means nothing. An example of the practical application of this rule is that most, if not all, jurisdictions recognize that comparative negligence is not a defense to an intentional tort action.[132] This is so be-

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[128] *See supra* notes 87-104 and accompanying text.

[129] *See supra* notes 31, 127 and accompanying text.

[130] *See supra* notes 114-19 and accompanying text.

[131] *See* David W. Robertson, *Ruminations on Comparative Fault, Duty-Risk Analysis, Affirmative Defenses, and Defensive Doctrines in Negligence and Strict Liability Litigation in Louisiana*, 44 LA. L. REV. 1341, 1373 & n.179 (1984) (arguing that maintaining distinction is pointless and should be discontinued).

[132] *See* Graves v. Graves, 531 So. 2d 817, 819 (Miss. 1988) (affirming rule that defenses of contributory or comparative negligence are not applicable to intentional tort actions); St. Louis & S.R.R. v. Ault, 56 So. 783, 785 (Miss. 1911). This rule is applied throughout American jurisdictions. *Graves*, 531 So. 2d at 819; 6 AM. JUR. 2D *Assault and Battery* § 153 (1989).

cause, where a defendant voluntarily chooses to injure another, it is irrelevant that the injured person's negligence may have contributed to his full responsibility for the consequences of his voluntary conduct.[133] Because the defendant acts intentionally, he takes full responsibility for the consequences of his voluntary conduct. The defense of assumption of risk is a corollary to this rule, mandating the same result in cases where the conduct at issue is that of the plaintiff's. Where a plaintiff's injury results from his intentional conduct, the plaintiff also must accept full responsibility for the consequences of his actions.[134] Neither a defendant nor a plaintiff accepts full responsibility for his or her intentional conduct when comparative negligence principles are applied.

Braswell notwithstanding, the fact that any "overlap" may exist between the two defenses should have no bearing on their applicability.[135] If it is agreed that a plaintiff's voluntary exposure to a known risk should preclude him from recovering, then it does not make sense to allow him to recover because he *also* acted unreasonably. Indeed, "[w]hen one acts knowingly, it is immaterial whether he acts reasonably."[136] As such, instructions on both defenses should be submitted to the jury in appropriate cases, with the jury applying comparative negligence principles only in the event that it finds the plaintiff did not assume a known risk. This view is consistent with the legislature's intent,[137] Mississippi common law before *Braswell*,[138] and the majority of assumption of risk cases following *Braswell*.[139] Therefore, *Braswell* should be overruled as an aberration of an otherwise consistent aspect of Mississip-

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[133] KEETON ET AL., *supra* note 15, at 462.

[134] *See supra* notes 128-29 and accompanying text.

[135] Because of the fundamental difference in the concepts of negligence and knowledge, at least one court has recognized that there is no such overlap between assumption of risk and comparative negligence. *See* Kennedy v. Providence Hockey Club, Inc., 376 A.2d 329, 332 (R.I. 1977) (citing *Braswell* with disapproval).

[136] *Kennedy*, 376 A.2d at 333.

[137] *See supra* notes 25-41 and accompanying text.

[138] *See supra* notes 42-52 and accompanying text.

[139] *See supra* notes 87-104 and accompanying text.

pi personal injury law.[140]

V. CONCLUSION

When a person voluntarily consents to expose himself to a known danger, the law of Mississippi does not allow the person to hold another liable for his subsequent injury.[141] More egregious than mere negligent behavior, assuming a risk requires knowledge of the existing danger on the part of the plaintiff.[142] Precluding recovery under these circumstances does not offend the comparative negligence statute, since in these circumstances it is immaterial whether the injured party also acted negligently.[143]

In *Braswell v. Economy Supply*, the Mississippi Supreme Court attempted to limit substantially the application of the assumption of risk doctrine.[144] This decision seems to have been rooted wholly in the recognition of the contemporaneous trend of other jurisdictions.[145] *Braswell*'s "overlap" rule was created, not against a backdrop of Mississippi's legislative and judicial treatment of the two defenses, but in response to two concerns: 1) that assumption of risk, "[i]n all probability . . . defeats the basic intention of the [comparative negligence] statute,"[146] and 2) that assumption of risk precludes plaintiff recovery while comparative negligence does not.[147] Had the

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[140] One commentator has suggested that "[a]ny attempt to dismiss the curious opinion in *Braswell* as an aberration is unsuccessful because the supreme court reiterated [*Braswell*'s] apparent incongruities in *Singleton v. Wiley*." Twyner, *supra* note 28, at 577 n.119 (citations omitted). There is no doubt that *Singleton*, with its obvious analytical errors, is even more incongruous than is *Braswell*. *See supra* notes 63-67 and accompanying text. As such, both incongruous decisions should be dismissed as aberrations, in light of the overwhelming contrary judicial history of the assumption of risk doctrine since the rendering of these opinions. *See supra* notes 87-104 and accompanying text.

[141] Excepting, of course, situations where an employer's negligence causes the employee's injury. *See supra* notes 29, 30 and accompanying text.

[142] *See supra* notes 3, 4 and accompanying text.

[143] *See supra* notes 114-19 and accompanying text.

[144] *See supra* notes 56, 62 and accompanying text.

[145] *See supra* note 61 and accompanying text.

[146] *Braswell*, 281 So. 2d at 676 (quoting PROSSER, *supra* note 3, at 456-57).

[147] *See supra* note 114 and accompanying text.

court based its decision on an analysis of Mississippi's legislative intent, instead of Prosser's generalizations, it would have come to the contrary conclusion that both defenses were intended to be independent doctrines.[148]

Unfortunately, the court did not come to this conclusion in 1973. Even more unfortunate is that the court failed to provide adequate guidelines for determining exactly when the overlap rule became applicable.[149] As a result, no less than four different approaches have been used by Mississippi's courts in determining when assumption of risk can be applied.[150] However, with the exception of one case, the *Braswell* rule has never been applied to exclude the defense.[151] Nevertheless, *Braswell* remains good law, and until it is overruled, the decision will undoubtedly continue to inject confusion into this area of Mississippi tort law.

O. Stephen Montagnet III

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[148] *See supra* notes 25-41 and accompanying text.
[149] *See supra* note 62 and accompanying text.
[150] *See supra* notes 67-104 and accompanying text.
[151] *See supra* notes 68-71 and accompanying text.