

Southern Railway Co., 241 U. S. 229, 235, 236. Where such violations are not involved, the defense of assumption of risk is available in actions under the Federal Employers' Liability Act. *Seaboard Air Line Ry. v. Horton*, *supra*; *Jacobs v. Southern Railway Co.*, *supra*; *Atchison, T. & S. F. Ry. Co. v. Swearingen*, 239 U. S. 339, 344; *Baugham v. New York, P. & N. R. Co.*, 241 U. S. 237, 241; *Chicago, R. I. & P. Ry. Co. v. Ward*, 252 U. S. 18, 21.

Despite this erroneous ruling, we are of the opinion that the judgment should be affirmed upon the first ground taken by the state court, that is, that the question of assumption of risk was for the jury. It is not contended that the instructions of the trial court upon that defense were erroneous. The contention is that there was no evidence to go to the jury. We think that there was.

The judgment is affirmed with respect to the petitioner Great Northern Railway Company. As to the petitioner George Pappas, the writ of certiorari is dismissed upon the ground that the federal question as to the right of recovery under the Act against him individually, as distinguished from the Railway Company, was not properly presented.

Affirmed in part; dismissed in part.

MR. JUSTICE BLACK is of the opinion that the writ of certiorari should be dismissed as to both petitioners.

TEXAS CONSOLIDATED THEATRES, INC. v.
PITTMAN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT.

No. 26. Submitted October 19, 1938.—Decided November 7, 1938.

CERTIORARI, 304 U. S. 556, to review a judgment of the Circuit Court of Appeals, 93 F. 2d 21; 94 *id.* 203, affirming a judgment for damages against petitioner, *dismissed*,

with costs, in view of subsequent settlement in the District Court &c.

Mr. W. B. Handley submitted for petitioner.

No appearance for respondent.

PER CURIAM.

Respondent recovered judgment for damages in an action for injuries suffered by his wife. After appeal had been argued and while it was under advisement in the Circuit Court of Appeals, the parties entered into a stipulation for settlement on payment of a sum less than the judgment and providing that the judgment should be reversed and judgment entered in the District Court for costs only. The Circuit Court of Appeals affirmed the judgment. 93 F. 2d 21. Alleging that the court had been informed of the compromise and stipulation, petitioner sought a rehearing, which was denied. 94 F. 2d 203. We granted certiorari.

Upon the case being called for argument in this Court, respondent did not appear. Petitioner submitted a statement showing that, since the issue of the writ, an order upon hearing had been entered in the District Court whereby the judgment involved was decreed to be satisfied and discharged in full and the issue of execution thereon was prohibited; that respondent excepted to the order and gave notice of appeal but that the appeal had not been prosecuted.

Petitioner submitted the case for such order as the Court may deem proper and suggested that the costs of this proceeding may be taxed against it.

The writ of certiorari is dismissed with costs against petitioner.

Dismissed.