

**IT'S THE END OF THE WORLD AS WE KNOW IT ... AND I FEEL FINE:<sup>1</sup>  
THE NEW RULES FOR DRAFTING LIABILITY WAIVERS IN ARIZONA**

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Liability waivers and pre-accident releases are everywhere. Come to Arizona to play golf ... sign a waiver for snakebites and errant drivers (both carts and golf balls). Want to take an aerial tour of the Grand Canyon ... sign a waiver. Indeed, businesses—particularly the recreational tourism industry which is forming an ever-growing percentage of Arizona's economy—often ask customers to sign a waiver before engaging in any activity that may involve some risk of injury. The purpose of these waivers is twofold: (1) to inform customers about the potential risks of a particular activity, and (2) to show that the customer understand and voluntarily assumes those risks. The big question, however, is whether these liability waivers are enforceable? As usual, the lawyer's answer is: maybe.

It has long been the law in Arizona that a liability waiver is enforceable if the signer clearly understood the risk he or she was assuming. Indeed, Arizona courts traditionally have granted a defendant summary judgment if the plaintiff signed a clearly-worded release and there was no serious question that the signer understood what he or she was signing. The recent Arizona Supreme Court case of *Phelps v. Firebird Raceway*,<sup>3</sup> however, changes this. It holds that, in all cases, the jury gets to decide whether an affirmative defense of "assumption of risk" is valid.

***Holding:***

In a 3-2 decision, Justice Ryan, writing for Justices Berch and Hurwitz, held that under Article 18, § 5 of the Arizona Constitution, the defense of assumption of risk, whether implied or express, written or oral, must always be submitted to a jury. In so ruling, the Court struck down decisions by the trial court and the Court of Appeals where summary judgment was granted to a releasee based on the uncontested existence of a written (contractual) assumption of risk.<sup>4</sup>

Vice-Chief Justice McGregor and Chief Justice Jones dissented arguing that the constitutional use of the phrase "assumption of risk" in Art. 18, § 5, was ambiguous and, based on the "language and history" of that provision, "refers only to implied assumption of risk and not to express contractual waivers of liability."<sup>5</sup>

***Facts:***

Charles Phelps was a professional race car driver who had participated in more than 100 races at Firebird Raceway. Racers at Firebird must sign a "Release and Covenant Not to Sue" ("Release") and a "Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement" ("Waiver") before they are allowed to participate in a race. Phelps signed both the Release and Waiver. The Release states, in part: "I hereby release, discharge and acquit . . . Firebird . . . from any and all liability claims, actions, or demands for losses or damages . . . when participating in any race activities." Moreover, the Release provided: "I understand that participating . . . contains danger and risk of injury or death [and] . . . I voluntarily elect to accept the risks connected with [racing]." In addition the Waiver provided that "the Undersigned . . . hereby releases, waives, discharges, and covenants not to sue [Firebird] . . . for all loss or damage . . . whether caused by the negligence of releasees or otherwise . . . [and] expressly acknowledges the injuries received may be compounded or increased by negligent rescue operations or procedures of the releasees."<sup>6</sup>

During the race, Phelps lost control of his vehicle and crashed into a wall. Phelps' vehicle erupted into flames and he suffered severe burns. Phelps sued Firebird claiming that its employees were negligent in failing to rescue him more quickly and in failing to provide adequate emergency medical care.<sup>7</sup>

Firebird's defense relied almost exclusively on the Release and Waiver signed by Phelps. Phelps moved for partial summary judgment arguing that Art. 18, § 5 required that the assumption of risk issue be decided by a jury. Firebird then moved for partial summary judgment arguing that Art. 18, § 5 did not

apply to contractual assumptions of risk (as differentiated from an implied assumption of risk). The trial court denied Phelps' motion, granted Firebird's motion, and thus ultimately dismissed Phelps' claims.

On appeal, the Court of Appeals, Judge Ehlich, with J. Patrick Irvine and *judge pro tempore* David R. Cole concurring, concluded that "when the drafters of the Constitution discussed 'the defense of assumption of risk,' they were referring to an implied assumption of risk that had developed in the common law of torts."<sup>8</sup> Thus, the Court of Appeals affirmed the trial court's grant of summary judgment to Firebird because, "absent questions of fact for the jury, this court has applied a standard contract-law analysis when construing exculpatory agreements, and upheld summary judgment when no material factual issue has existed as to the validity of the agreement or its applicability to the claims."<sup>9</sup>

#### *Analysis:*

According to the Court, Firebird's primary contention amounted to an argument that "memorialization in writing somehow causes [a *contractual* assumption of risk] to fall outside the ambit of [Art. 18, § 5]." Specifically, Firebird argued that:

- (1) the term "assumption of risk" in Art. 18, § 5, was ambiguous because that term covers several different legally distinct concepts (*i.e.* express and implied assumptions) and that the constitutional Framers, who were focused on *labor* issues when drafting Art. 18, necessarily were "referring to an implied assumption of risk that had . . . [been] consistently used to bar suits by injured laborers" *rather* than *all* assumptions of risk;
- (2) the Supreme Court of Oklahoma, interpreting an identical constitutional provision, permits their trial courts to rule as a matter of law that an express assumption of risk is governed by contract principles while implied assumption of risk is governed by tort principles (and therefore only the latter must be tried to a jury);
- (3) that prior Arizona decisions have implied that summary judgment could be entered if there were no factual disputes surrounding the *signing* of the contractual assumption of risk (in other words, in a contractual assumption case the jury becomes involved only where a question arises as to the validity of the underlying contract).

The Court rejected each of these arguments in turn. First, the court noted that the broad language employed by Art. 18, § 5 "demonstrates that they did not intend to distinguish implied assumptions [] from express assumptions."<sup>10</sup> The majority refused to examine the legislative history relied on by the Court of Appeals because they held the Constitutional provision was "facially clear and unambiguous."<sup>11</sup> Second, the majority rejected the analysis of similar cases decided by the Supreme Court of Oklahoma because (1) according to the majority the Oklahoma decisions "actually" "held that the provision covers both express and implied assumptions," (2) Arizona courts "have interpreted Arizona's constitution[] . . . quite differently than Oklahoma courts have interpreted Oklahoma's provision," and (3) because the Majority frankly did "not consider the Oklahoma[] case law persuasive."<sup>12</sup> Next, the majority held that differentiating between express and implied assumptions was folly because "after long ago arriving in the torts arena as a refugee from contract law . . . assumption of risk, whether express or implied, is a defense to *tort* claims."<sup>13</sup> Finally, the Court noted that in all previous cases where a court has upheld a summary judgment order enforcing a contractual assumption of risk, the "prior litigants did not assert their constitutional rights [and] our courts did not address them."<sup>14</sup>

The dissent, authored by Vice-Chief Justice McGregor, and joined by Chief Justice Jones, proceeds on a two-step analysis. First, the dissent rejected the majority's conclusion that the phrase "assumption of risk" was unambiguous. Second, the dissent then used the legislative history, the Framers' "proposals and comments" in drafting Art. 18, §5 to divine that the true intent of Framers was to require only implied assumptions be tried to a jury (not contractual assumptions).

The dissent begins from the proposition that "assumption of risk is a legal term of art that describes a legal theory that has evolved over the years . . . based on analogies to contract theory and limited to the master servant context . . . [and] by the drafting of the Arizona constitution, the defense had developed into an amorphous concept defined in a variety of ways by commentators and courts."<sup>15</sup> The dissent noted that

“Justice Frankfurter captured well the confusion surrounding the phrase” when he wrote: “The phrase ‘assumption of risk’ is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, indiscriminately used to express different and sometimes contradictory ideas.”<sup>16</sup> Justice McGregor stated: “I simply cannot regard a phrase that carries ‘different and sometimes contradictory’ meanings as unambiguous.”<sup>17</sup>

Having found the phrase ambiguous, the dissent turned to the proposals and statements made by the Framers in drafting Art. 18 § 5 which it found as “compelling evidence” that the Framers intended “to limit the phrase [assumption of risk] to implied assumptions of risk [only].”<sup>18</sup> First, the dissent cites to Proposition 88 and Proposition 50 which ultimately became Art. 18, § 5. They argue that the language of these propositions clearly delineates a distinction between contractual and implied assumptions.<sup>19</sup> Second, the dissent argues that the “debate surrounding this clause provides strong evidence that the delegates were keenly aware of the distinction between contractual waivers and the common law defense of assumption of risk.”<sup>20</sup> Finally, the dissent notes that the state of case law in Arizona in existence when Art. 18, § 5, was adopted “emphasizes the distinction made between implied and express assumption[s].”<sup>21</sup>

The majority responds to the dissent first by noting that the phrase “assumption of risk,” along with the other provisions of Art. 18, § 5, were *unambiguous* and thus refused to base their decision on, or even consider, the legislative history relied on by the dissent. Second, they rejected the dissent’s interpretation of the legislative history by noting: (1) the Framers rejected Proposition 88 and Proposition 50 in favor of the current “broad” language of Art. 18 § 5; and (2) the majority dissects and deconstructs the Framers’ statements cited by the dissent in order to disprove the dissent’s conclusion.

#### ***Implications:***

So, what does *Phelps* mean? Simply, it means that in Arizona summary judgment will no longer be available to a defendant presenting the affirmative defense of contractual assumption of risk. As a result of *Phelps*, every case involving a contractual assumption of risk will now go to trial. That is not to say that defendants will always lose, merely that they will have to convince a jury, rather than a judge, that the plaintiff understood and knowingly assumed the risk of injury. While these cases could often be disposed of before trial, they will now all go to trial and, in at least some percentage of those cases, the jury will simply refuse to enforce the release. In practical terms, because of *Phelps*, there clearly will be cases in which plaintiffs will recover where, before *Phelps*, they would not. *Phelps*, however, does not mean that such liability waivers and contractual assumptions of risk are invalid in Arizona or will never be enforced, only that the jury decides whether the plaintiff did in fact assume the risk—contractually or otherwise.

As a result, it is now more important than ever that lawyers and businesses draft liability waivers and releases in the most simple, explicit, and clear terms as possible. Clear enough, in fact, that the average juror, rather than the average judge, would have no doubt the plaintiff actually did understand and assume a given risk. *Phelps* should provide every business that employs such waivers/releases in Arizona with the impetus to take a fresh look at them and, if necessary, make changes. The question is no longer just how a judge will view the release, but how a jury of lay people will.

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<sup>1</sup> R.E.M., “It’s the End of the World as we Know it and I feel fine,” *Document* (IRS Music, 1998).

<sup>2</sup> Nathanael J. Scheer is an Associate of Low & Childers who assisted in the writing of this article.

<sup>3</sup> 210 Ariz. 403, 111 P.3d 1003 (2005).

<sup>4</sup> *Phelps*, at ¶¶ 1, 43

<sup>5</sup> *Id.* at ¶ 44.

<sup>6</sup> *Id.* at ¶ 2 (emphasis omitted)

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<sup>7</sup> *Id.* at ¶ 3.

<sup>8</sup> *Phelps v. Firebird Raceway, Inc.*, 207 Ariz. 149, 151-52, 83 P.3d 1090, 1092-93 (App. 2004).

<sup>9</sup> *Id.* at 153, 83 P.3d at 1094.

<sup>10</sup> *Id.* at ¶ 15-17.

<sup>11</sup> *Id.* While refusing to use legislative history as a basis for their decision, the Court nonetheless analyzed the legislative history concluding that it supported their position rather than that of the dissent.

<sup>12</sup> *Id.* at ¶¶ 24-28.

<sup>13</sup> *Id.* at ¶¶ 29-32 (emphasis added).

<sup>14</sup> *Id.* at ¶32.

<sup>15</sup> *Id.* at ¶¶ 45-50 (J. McGregor dissenting; C.J. Jones concurring in dissent).

<sup>16</sup> *Phelps*, at ¶ 49 (quoting *Tiller v. Atl. Coast Line R.R. Co.*, 318 U.S. 54, 68, 63 S. Ct. 444 (1943) (Frankfurter, J., concurring)).

<sup>17</sup> *Id.* at ¶ 50.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at ¶¶ 53-60. Note that the majority counters by arguing that the fact that the Framers adopted Art. 18, § 5 without these distinctions is evidence that no such distinction was intended.

<sup>20</sup> *Id.* at ¶ 61. Here, the majority counters by analyzing (deconstructing) the statements cited by the dissent to reach a contrary conclusion.

<sup>21</sup> *Id.* at 62.