

IN THE SUPREME COURT

STATE OF ARIZONA

CHARLES PHELPS,
an Arizona resident,
Plaintiff-Appellant

v.

FIREBIRD RACEWAY, INC.,
an Arizona corporation aka and/or dba
FIREBIRD INTERNATIONAL RACEWAY,
An Arizona corporation
Defendant-Appellee.

No. CV 04-0114 PR

Arizona Court of Appeals Case No. 1 CA-CV 03-0404
Maricopa County Superior Court Case No. CV2002-092570
Honorable Bethany G. Hicks

**AMICUS CURIAE BRIEF OF
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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	3
LEGAL ARGUMENT	4
Respecting the Words of the Arizona Constitution	4
CONCLUSION	6
CERTIFICATE OF COMPLIANCE	7
MAILING CERTIFICATE	7

TABLE OF AUTHORITIES

Cases

	<u>Page</u>
<u>Adams v. Bolin</u> , 74 Ariz. 269, 247 P.2d 617 (1952)	10
<u>Airport Properties v. Maricopa County</u> , 195 Ariz. 89, 985 P.2d 574 (App. 1999)	10
<u>Empress Adult Video and Bookstore v. City of Tucson</u> , 204 Ariz. 50, 59 P.3d 814 (App. 2002)	10
<u>In re Cameron T.</u> , 190 Ariz. 456, 949 P.2d 545 (App. 1997)	10
<u>Soto v. Superior Court</u> , 190 Ariz. 450, 949 P.2d 539 (App. 1997)	10
<u>US West Communications, Inc. v. Arizona Corp. Com'n</u> , 201 Ariz. 242, 34 P.3d 351 (2001)	10
	10

Arizona Constitution

Ariz. Const. art. 18, § 5	10
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Other Authorities

<u>Merriam-Webster's Collegiate Dictionary</u> 1345 (10th ed. 1993)	10
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LEGAL ARGUMENT

Respecting the Words of the Arizona Constitution.

Article 18, Section 5 of the Arizona Constitution is a model of clear, strong English. It provides that: *“The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.”* The astounding mistake in the opinion of the Arizona Court of Appeals is the adamant refusal to apply the Arizona Constitution’s plain, direct and unvarnished words.

“In all cases” means in every case – with no exceptions of any kind.

“Whatsoever” and “at all times” reinforce the already all-inclusive “in all cases” language. As the Arizona Court of Appeals observed concerning the meaning of the word “all” in another constitutional clause: “In this context, the word means ‘each and every one of’ or ‘every.’” Empress Adult Video and Bookstore v. City of Tucson, 204 Ariz. 50, 55, 59 P.3d 814, 819 (App. 2002). As far as “whatsoever,” that is one of the most all-encompassing terms in the English language, meaning “whatever” and hence “of any kind at all.” Merriam-Webster’s Collegiate Dictionary 1345 (10th ed. 1993).

The natural, obvious and ordinary meaning of such terms as “in all cases whatsoever” and “at all times” is to make the defense of assumption of the risk one that is **always** a question of fact for the jury. “And, unless the constitution

otherwise defines them, we give the words of a constitutional provision their natural, obvious and ordinary meaning.” Empress, 204 Ariz. at 55, 59 P.3d at 819. “Undefined words in a constitutional provision are to be interpreted as generally understood and used by the people, according to their natural, obvious and ordinary meaning.” Airport Properties v. Maricopa County, 195 Ariz. 89, 99, 985 P.2d 574, 584 (App. 1999). This rule is so strong that Arizona courts “may **not** use extrinsic evidence to vary a provision’s apparent meaning.” Circle K Stores, Inc. v. Apache County, 199 Ariz. 402, 406, 18 P.3d 713, 717 (App. 2001) (emphasis added).

Over and over again, Arizona’s courts have said that the plain terms of the Arizona Constitution control and must be followed. “Nothing is more firmly settled than under ordinary circumstances, where there is involved no ambiguity or absurdity, a statutory or constitutional provision requires no interpretation.” Adams v. Bolin, 74 Ariz. 269, 273, 247 P.2d 617, 620 (1952). “Unambiguous constitutional language . . . is to be given its plain meaning and effect.” US West Communications, Inc. v. Arizona Corp. Com’n, 201 Ariz. 242, 245, 34 P.3d 351, 354 (2001). “No judicial construction is required or proper if a constitutional provision is clear.” In re Cameron T., 190 Ariz. 456, 460, 949 P.2d 545, 549 (App. 1997). “We only look beyond the plain language if the provision is not clear on its face.” Soto v. Superior Court, 190 Ariz. 450, 455, 949 P.2d 539, 544 (App. 1997).

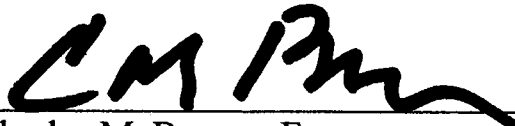
In this case, the Arizona Supreme Court ignored our state's basic and established constitutional jurisprudence. The language in Article 18, Section 5 is plain, simple and direct. There was no need to do more than to apply the language. When the Arizona Court of Appeals failed to do so, it violated its duty to enforce the clear terms of the Arizona Constitution.

CONCLUSION

The Arizona Court of Appeals went far beyond the plain terms of Article 18, Section 5 when it restricted the protections of that constitutional clause to implied tort assumption of the risk. The Arizona Constitution can stand on its own clear words. They are strong, clear and direct, making the defense of assumption of the risk an exclusive jury matter at all times and in all cases whatsoever. The Arizona Court of Appeals erred when it chose to limit the scope and effect of this powerful constitutional protection.

DATED this 9th day of June, 2004.

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CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, the above signatory certifies that the attached document uses proportionally-spaced type of 14 points or more, is double-spaced using a Roman font, except for quotations and footnotes, if there are any, and contains 637 words, according to the computer word-processing program used to prepare this document.

MAILING CERTIFICATE

The above signatory also certifies that the original of this document, and six copies thereof, were filed with the Clerk of the Court, Arizona Supreme Court, on the above date, and that two copies each of this document were then mailed on the above-stated date to the following entities, persons and/or parties, as follows:

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