

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, a
corporation,

Defendant-Appellee.

No. CV 04 0114 PR

Court of Appeals No.
CA-CV 03-0404

Maricopa County Superior Court
No. CV 02-092570

**FIREBIRD'S RESPONSE TO BRIEFS OF AMICI CURIAE
ARIZONA TRIAL LAWYERS ASSOCIATION AND
THE LAW FIRM OF CHARLES M. BREWER, LTD.**

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ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONSTRUED THE CONSTITUTION'S LANGUAGE.

Both amici curiae suggest that the language in Article 18, section 5 so clearly provides that the assumption of risk defense must be left to the jury in all cases that no judicial construction is warranted. Indeed, this is the only argument offered by amicus curiae the Law Firm of Charles M. Brewer, LTD. This argument misses the mark altogether.

Firebird has never argued, and the Court of Appeals did not hold, that Article 18, section 5 is unclear as to “who” gets to decide the “defense . . . of assumption of risk.” Instead, the ambiguity and confusion arises out of what the drafters meant by the phrase “defense . . . of assumption of risk.” Accordingly, if the framers of the Constitution intended to include written release agreements within the “defense . . . of assumption of risk,” then it is clear that the effect of such an agreement must be left to the jury. However, if that was not the framers’ intent, it is equally clear that Article 18, section 5 does not apply and the court of appeals decision is correct.

No one, including Phelps and amici curiae, disputes that the term “assumption of risk” is ambiguous and confusing. Authorities uniformly

acknowledge that it “has been surrounded by much confusion, because ‘assumption of risk’ has been used by the courts in several senses, which traditionally have been lumped together under the one name, often without realizing that any difference exists.” P. Keeton, D. Dobbs, R. Keeton & D. Owen, *The Law of Torts* § 68 at p. 480 (5th ed. 1984).

Recognizing this confusing use of a single label to refer to separate and distinct concepts, courts throughout the country have distinguished express release agreements from other forms of “assumption of risk.” *See, e.g., Meistrich v. Casino Arena Attractions, Inc.*, 155 A.2d 90, 93 (N.J. 1959) (“Assumption of risk is a term of several meanings. For present purposes, we may place to one side certain situations which sometimes are brought within the sweeping term but which are readily differentiated from the troublesome area.”). It is precisely because of this confusion that the Supreme Court of Utah went so far as to suggest that express release agreements should not even be included “within assumption of risk terminology.” *Jacobsen Construction Co. v. Structo Lite Engineering, Inc.*, 619 P.2d 306, 310 (Utah 1980).

Accordingly, contrary to amici curiae, the fundamental issue in this case is not **who** gets to decide the “defense . . . of assumption of risk.” The issue is actually one layer deeper: **what** did the framers mean by the “defense . . . of assumption of risk.” Because the phrase “assumption of risk” undisputedly has

multiple meaning, the language in Article 18, section 5 on this issue is not clear and unambiguous and requires judicial construction. That is precisely what the court of appeals did -- and did correctly.

II. AMICI CURIAE'S REASONS TO ACCEPT REVIEW ARE UNPERSUASIVE.

In an effort to make this case appear worthy of review, amicus curiae Arizona Trial Lawyers Association ("AzTLA") argues that if the court of appeals decision stands, "the number of cases involving the application of such releases to bar recovery by an injured plaintiff are [sic] likely to increase." (Amicus Brief at 4). That argument is clearly wrong.

The court of appeals decision does not plow new ground. It is consistent with what the reported decisions in Arizona have always held. When there are disputes as to the scope and application of the release agreement or issues of material fact, the effect of the release agreement is left to the jury to decide.

On the other hand, in those unusual cases (like this one) in which there are no disputed issues, the court may grant summary judgment as a matter of law. *See Benjamin v. Gear Roller Hockey Equipment, Inc.*, 198 Ariz. 462, 464 ¶ 8, 466 ¶ 24, 11 P.3d 421, 423, 425 (App. 2000) (affirming summary judgment because "Arizona allows parties to agree in advance that one party shall not be liable to the

other for negligence.”).¹ Indeed, this Court has acknowledged that, under certain conditions, “our courts will enforce the bargain [of an express release agreement], even if it turns out to have been a bad bargain for one party or the other.” *Salt River Project Agricultural Improvement and Power District v. Westinghouse Electric Corp.*, 143 Ariz. 368, 385, 694 P.2d 198, 215 (1984) (emphasis added); see also *Estate of Reinen v. Northern Arizona Orthopedics, Ltd.*, 198 Ariz. 283, 289 n.2, 9 P.3d 314, 320 n.2 (2000) (distinguishing *Valley National Bank v. National Association For Stock Car Auto Racing, Inc.*, 153 Ariz. 374, 736 P.2d 1186 (App. 1987), because it “dealt with the validity of express, general releases of any and all liability arising out of the negligence of the defendants, which we do not have here.”).

Thus, the court of appeals decision in this case does not effect any change to existing Arizona law. Consequently, the suggestion that the court of appeals decision will cause an increase in the use of express release agreements has no basis. Accordingly, review should be denied.

¹ In its brief, AzTLA erroneously states that in *Benjamin*, the court of appeals “reverse[d] summary judgment on [a] fact issue.” (Amicus Brief at 6). In fact, the court of appeals did just the opposite; it affirmed the trial court’s grant of summary judgment, based on the trial court’s construction of a written release agreement as a matter of law.

AzTLA also suggests that review is warranted because Arizona courts have “been inconsistent in their treatment of whether the jury should resolve express assumption of risk issues.” (Amicus Brief at 5). Again, this argument is clearly wrong.

Arizona courts have been perfectly consistent on this issue. Just as in any other kind of civil litigation, when there are no disputed issues of fact, the courts have granted summary judgment as a matter of law. *See Benjamin, supra*. And when fact issues have existed, the courts have uniformly left the issues for the jury to decide. *See Morganteen v. Cowboy Adventures, Inc.*, 190 Ariz. 463, 949 P.2d 552 (App. 1997) (reversing summary judgment because issues of fact existed). Moreover, there is not a single reported decision in which an express release agreement was sent to the jury based on Article 18, section 5.² Accordingly, there is no inconsistency in the lower courts that requires this Court’s attention.

² AzTLA erroneously asserts the court of appeals was incorrect when it stated that “Article 18, § 5 has never been applied in a context of an express contractual assumption of risk.” (Amicus Brief at 5, n.1 (quoting *Phelps v. Firebird Raceway, Inc.*, 207 Ariz. 149, 151 ¶ 7, 83 P.3d 1090, 1092 (App. 2004)). That the court of appeals is correct and the AzTLA is wrong is demonstrated by the fact that none of the briefs in this case (including AzTLA’s) identifies a single case in which Article 18, section 5 was applied to an express release agreement.

III. THE COURT OF APPEALS DECISION IS CORRECT.

Finally, AzTLA asserts that the court of appeals incorrectly analyzed the scope of Article 18, section 5. However, the arguments offered in support of that assertion have no merit.

First, AzTLA argues that the court of appeals “erred by disregarding the framers’ mandate that juries, not judges, get to decide assumption of risk issues.” (Amicus Brief at 6). However, that argument begs the question of whether the framers intended written release agreements to be included in the term “defense . . . of assumption of risk.” If they did not, then the court of appeals was correct, no matter how emphatically the framers may have stated that the “defense . . . of assumption of risk shall, in all cases whatsoever . . . be left to the jury.”

Second, AzTLA admits that the framers’ concern underlying Article 18, section 5 was to protect laborers, but then argues that this concern favors its interpretation that the “defense . . . of assumption of risk” includes written release agreements. (Amicus Brief at 11). The logic of this argument fails when viewed in light of Article 18, section 3. In that provision, the framers fully protected laborers from written release agreements by declaring them “null and void” altogether. It makes no sense to declare written release agreements completely “null and void” in section 3 and then declare in section 5 “who” should decide whether to give effect to such agreements. Thus, the admission that the framers’

concern underlying Article 18, section 5 was to protect laborers weighs heavily in favor of the court of appeals' interpretation, not Phelps'.

Third, AzTLA argues that “there is nothing about the tort/contract distinction that, in an of itself,” would lead the framers not to include express release agreements in the term “defense . . . of assumption of risk,” as used in Article 18, section 5. (Amicus Brief at 11). Nothing could be further from the truth.

As this Court discussed in *Salt River Project*, the issue of whether parties may contractually allocate risk of loss “is at the intersection of tort and commercial contract law, implicating principles of both fields.” *Id.* at 375, 694 P.2d at 205. This Court further noted that tort and contract law have very different underlying policies and objectives, and, in the end, may yield very different results. *Id.* at 376, 694 P.2d at 206 (citing with approval *Arrow Leasing Corp. v. Cummins Arizona Diesel, Inc.*, 136 Ariz. 444, 666 P.2d 544 (App. 1983)). Thus, there are any number of very good reasons why the framers may have chosen to treat express release agreements differently from the classic common law tort principle of implied assumption of risk.

Indeed, it is beyond dispute that the framers actually **did** treat express release agreements differently, at least with respect to such agreements in the employment context. Again, Article 18, section 3 makes such agreements

completely “null and void,” but Article 18, section 5 leaves implied assumption of risk to the jury to decide.

That contract/tort distinction was consistent with the reformation of assumption of risk which English courts were beginning to implement at the time Arizona’s Constitution was adopted. While American courts were still giving free rein to employers with respect to both express release agreements and implied assumption of risk, English courts had finally started to provide some protections to laborers. Bohlen, *Voluntary Assumption of Risk*, 20 Harv. L. Rev. 14 (pt. 1) and 91, 115 (pt. 2) (1906). However, English courts made important distinctions between tort and contract situations. Thus, even under English reforms, the application of the defense of assumption of risk was for the jury to decide **unless the plaintiff expressly consented to waive the employer’s liability, in which case the issue was to be decided by the court.** *Id.* at 99.

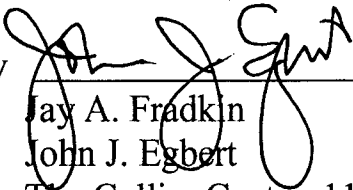
Not surprisingly, when the framers insisted on reforms to assumption of risk principles, they similarly made distinctions along the tort/contract division. While they clearly intended to prevent courts from usurping the role of juries, they did not intend for the pendulum to swing so far as to give juries functions and responsibilities that properly reside with the courts -- such as construing contracts as a matter of law. The court of appeals decision properly balances and preserves this difference, and no review by this Court is needed.

CONCLUSION

The petition for review should be denied.

DATED this 24th day of June, 2004.

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CERTIFICATE OF SERVICE

The original and six copies of the foregoing FIREBIRD'S RESPONSE TO BRIEFS OF AMICI CURIAE were filed by hand-delivery with the:

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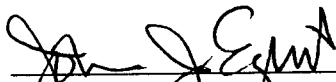
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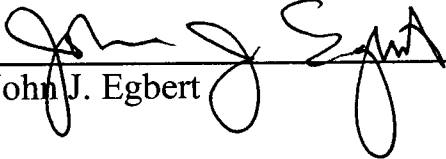
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(B), A.R.C.A.P., I certify that the FIREBIRD'S RESPONSE TO BRIEFS OF AMICI CURIAE is proportionately spaced, has a typeface of 14 points or more and contains 2555 words.

Dated this 24th day of June, 2004.



John J. Egbert