PHELPS V. FIREBIRD RACEWAY, INC.: ESTABLISHING EXPRESS ASSUMPTION OF RISK AS A QUESTION OF FACT FOR THE JURY

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INTRODUCTION

Article 18, section 5 of the Arizona Constitution provides, "[t]he 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."[1] In *Phelps v. Firebird Raceway, Inc.*,[2] the Arizona Supreme Court confronted the question of whether this constitutional provision applies to express contractual waivers of liability. In a rare 3-2 vote, the court held the broad language used in Article 18, section 5 encompasses all types of assumption of risk, including express contractual assumption of risk.

I. FACTUAL AND PROCEDURAL BACKGROUND

On July 14, 2001, Charles Phelps, a professional racecar driver, entered a race at Firebird Raceway ("Firebird") in Chandler, Arizona.[3] As a prerequisite to entering the race, Phelps was required to sign both a "Release and Covenant Not to Sue" ("Release") and a "Release and Waiver of Liability, Assumption of the Risk and Indemnity Agreement" ("Waiver").[4] The Release provided, in pertinent part:

> I HEREBY RELEASE, DISCHARGE AND ACQUIT . . . Firebird . . . from any and all liability claims, actions, or demands, including but not limited to [a] claim for death, which I may hereafter have because of my injury, death, or damage while on the track, . . . or when participating in any race activities. . . .
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> I UNDERSTAND that participating in drag racing contains DANGER AND RISK of injury or death, but, nevertheless, I

1. ARIZ. CONST. art. XVIII, § 5.
2. 111 P.3d 1003 (Ariz. 2005).
3. *Id*. at 1004.
4. *Id*. The Release appears to comply with ARIZ. REV. STAT. ANN. § 12-556 (1999) which provides limited liability for owners of closed-course motor sport facilities as long as the facility requires participants to sign a "motor sport liability release." *Id*. at 1018 n.15 (McGregor, J., dissenting).

> VOLUNTARILY ELECT TO ACCEPT THE RISKS connected with my entry into the restricted area and with racing.[5]

The Waiver similarly provided:

> [T]he Undersigned . . . HEREBY RELEASES, WAIVES, DISCHARGES, AND COVENANTS NOT TO SUE [Firebird] . . . FOR ALL LOSS OR DAMAGE . . . ON ACCOUNT OF INJURY TO THE PERSON OR PROPERTY OR RESULTING IN DEATH OF THE UNDERSIGNED, WHETHER CAUSED BY THE NEGLIGENCE OF RELEASEES OR OTHERWISE, while the Undersigned is in or upon the RESTRICTED AREA, and/or competing . . . or for any purpose participating in such event. . . .
>
> EACH OF THE UNDERSIGNED expressly acknowledges that the ACTIVITIES OF THE EVENT ARE VERY DANGEROUS and involve the risk of serious injury and/or death and/or property damage. EACH OF THE UNDERSIGNED also expressly acknowledges the INJURIES RECEIVED MAY BE COMPOUNDED OR INCREASED BY NEGLIGENT RESCUE OPERATIONS OR PROCEDURES OF THE RELEASEES.[6]

Phelps signed both the Release and the Waiver, as he had done on more than 100 prior occasions at the raceway.[7] During the course of the race, Phelps lost control of his vehicle, causing him to crash into a wall.[8] The collision caused Phelps' vehicle to erupt in flames, and he was severely burned.[9]

Phelps subsequently sued Firebird, alleging that the racetrack's employees had acted negligently by failing to rescue him more quickly from the burning vehicle and by providing inadequate emergency medical care.[10] In its defense, Firebird relied on the Release and Waiver signed by Phelps.[11] Phelps filed a motion for partial summary judgment, contending that under Article 18, section 5 of the Arizona Constitution, the defense of assumption of risk is a question of fact to be decided by the jury.[12] Firebird responded with a cross-motion for summary judgment, arguing that Article 18, section 5 does not apply to express contractual waivers of liability.[13] The trial court agreed with Firebird, granted its motion for summary judgment, and dismissed Phelps' claims.[14]

Phelps appealed the trial court's ruling on the grounds that Article 18, section 5 encompasses *all* types of assumption of risk, including express

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5. *Id.* at 1004.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*

assumption of risk.[15] However, the court of appeals was not persuaded by this argument. It ruled:

> [W]hen the drafters of the Constitution discussed "the defense of assumption of the risk," they were referring to an implied assumption of the risk that had developed in the common law of torts . . . . In Article 18, section 5, the framers were not referring to an express contractual assumption of risk governed by contract-law principles.[16]

Based on this understanding of the Arizona Constitution, the court of appeals affirmed the trial court's grant of summary judgment to Firebird because no questions of fact existed regarding the validity of either the Release or the Waiver.[17] Phelps appealed yet again, and the Arizona Supreme Court granted certiorari to determine whether express assumption of risk falls outside the scope of Article 18, section 5.[18]

II. THE DOCTRINE OF ASSUMPTION OF RISK

In its simplest form, the doctrine of assumption of risk provides: "A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm."[19] However, the doctrine has evolved into two primary subsets; express assumption of risk and implied assumption of risk.[20]

Under express assumption of risk, the plaintiff "expressly agrees in advance that the defendant is under no obligation to care for him and shall not be liable for the consequences of conduct that would otherwise be negligent."[21] This express agreement is often memorialized in a contract between the parties, much like the Waiver and Release involved in this case. Such contractual waivers of liability have long been viewed as a form of express assumption of risk.[22]

Implied assumption of the risk, on the other hand, addresses the situation in which the plaintiff "is aware of a risk Already [sic] created by the negligence of the defendant and proceeds to encounter it . . . ."[23] Although the plaintiff has not explicitly agreed to assume the risk associated with the activity, he knows of the risk and nonetheless undertakes the activity.[24] Therefore, the plaintiff is deemed to have relieved the defendant of any duty owed.[25] In *Phelps*, the parties agreed that

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15. *Id*.
16. *Id*. at 1004–05 (citing Phelps v. Firebird Raceway, Inc., 83 P.3d 1090, 1092–93 (Ariz. Ct. App. 2004)).
17. *Id*. at 1005.
18. *Id*.
19. RESTATEMENT (SECOND) OF TORTS § 496A (1965).
20. Hildebrand v. Minyard, 494 P.2d 1328, 1330–31 (Ariz. Ct. App. 1972).
21. *Id*. at 1330.
22. *Id*. (citing the RESTATEMENT (SECOND) OF TORTS § 496B (1965)).
23. *Id*. at 1331.
24. *Id*.
25. *Id*.

the Release and Waiver signed by Charles Phelps constituted an express contractual assumption of risk.[26]

III. ASSUMPTION OF RISK & THE ARIZONA CONSTITUTION

When the framers gathered at the Arizona Constitutional Convention to draft the State's guiding document, "the dominant force among the delegates was 'a tenuous but tenacious alliance' of progressive and labor interests."[27] The delegates distrusted institutions of authority and aspired to make Arizona's government as responsive to the people as possible.[28] It was against this backdrop that Article 18, section 5 emerged, adopted verbatim from Article 23, section 6 of the Oklahoma Constitution.[29] Although included in the section of the Arizona Constitution addressing labor issues, Article 18, section 5 has long been understood to apply outside the context of employment.[30] In *Davis v. Boggs*,[31] the Arizona Supreme Court declared the language of the constitutional provision to be "too broad and comprehensive" to be limited to the labor context.[32]

Shortly after the Arizona Constitution was adopted, the Arizona Supreme Court was called upon in *Inspiration Consolidated Copper Co. v. Conwell*[33] to determine the scope of Article 18, section 5. Describing the provision as "plain and unambiguous," the court declared that "the evident purpose and intent of the provision is to make the jury the sole arbiter of the existence or nonexistence of contributory negligence or assumption of risk in all actions for personal injuries."[34] In the eighty-five years since *Inspiration Consolidated Copper*, the court has consistently upheld this exclusive grant of authority to the jury.[35] However, in *Phelps v. Firebird Raceway, Inc.*, the question arose as to whether the framers intended issues of express contractual assumption of risk to be decided by the jury as well.

IV. PHELPS V. FIREBIRD RACEWAY, INC.

In deciding whether Article 18, section 5 encompasses express assumption of risk, the Arizona Supreme Court was sharply divided. The majority, made up of Justices Ryan, Berch, and Hurwitz, felt that on its face, Article 18,

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26. Phelps v. Firebird Raceway, Inc., 111 P.3d 1003, 1005 (Ariz. 2005).

27. Noel Fidel, *Preeminently a Political Institution: The Right of Arizona Juries to Nullify the Law of Contributory Negligence*, 23 ARIZ. ST. L.J. 1, 8 (1991) (citing John D. Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L.J. 1, 17, 30 (1988)).

28. *Id*.

29. *Phelps*, 111 P.3d at 1007 (citing THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910 881–84 (John S. Goff ed., 1991) [hereinafter Goff]).

30. *Id*.

31. 199 P. 116 (Ariz. 1921), *overruled on other grounds by* S. Pac. Co. v. Shults, 290 P. 152 (Ariz. 1930).

32. *Id*. at 120.

33. 190 P. 88 (Ariz. 1920).

34. *Id*. at 90–91.

35. *See, e.g.*, Ala. Freight Lines v. Phoenix Bakery, 166 P.2d 816, 822 (Ariz. 1946); Layton v. Rocha, 368 P.2d 444, 448 (Ariz. 1962); Heimke v. Munoz, 470 P.2d 107, 108–09 (Ariz. 1970); Brannigan v. Raybuck, 667 P.2d 213, 218 (Ariz. 1983); Estate of Reinen v. N. Ariz. Orthopedics, Ltd., 9 P.3d 314, 319 (Ariz. 2000).

section 5 unambiguously specifies that *all* cases of assumption of risk are questions of fact for the jury.[36] Vice Chief Justice McGregor and Chief Justice Jones, on the other hand, believed that the phrase "assumption of risk" is itself ambiguous, making an investigation into the legislative history of the provision necessary.[37] Based on the legislative history, the dissenting justices argued that Article 18, section 5 was never intended to include express contractual assumptions of risk, and therefore courts can decide as a matter of law whether the defense precludes the plaintiff's recovery.[38]

A. The Majority Decision

Writing for the majority, Justice Ryan declared, "Article 18, Section 5 unambiguously requires that the defense of assumption of risk be a question of fact for the jury in all cases whatsoever and at all times."[39] For that reason, the court indicated that judicial interpretation was prohibited, and the provision was to be given its plain meaning and effect.[40] Addressing the plain meaning of the phrase, "in all cases whatsoever," the court reasoned that the framers clearly intended *all* types of assumption of risk, whether express or implied, to be decided by the jury.[41] Accordingly, the court held that Article 18, section 5 applies to express assumptions of risk.[42]

Despite finding the outcome of the case to be clearly determined by the text of Article 18, section 5, the court proceeded to address the shortcomings of Firebird's arguments, particularly those that formed the basis of the court of appeals' decision.[43] The court focused on the two-part analysis the court of appeals used in reaching the conclusion that Article 18, section 5 is inapplicable to express assumptions of risk.[44] The court of appeals' first conclusion was that because Article 18 generally addresses labor issues, the purpose of section 5 was to protect injured laborers from the defense of implied assumption of risk, which had developed at common law to bar suits against their employers.[45] The court of appeals then concluded that because section 3 of Article 18[46] specifically addresses

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36. *Phelps*, 111 P.3d at 1005.
37. *Id*. at 1014.
38. *Id*.
39. *Id.* at 1005 (internal citations omitted).
40. *Id.*
41. *Id*.
42. *Id*.
43. *Id*. at 1006.
44. *Id*. at 1006–07.
45. *Id*. at 1007.
46. Article 18, section 3 provides:

> It shall be unlawful for any person, company, association, or corporation to require of its servants or employees as a condition of their employment, or otherwise, any contract or agreement whereby such person, company, association, or corporation shall be released or discharged from liability or responsibility on account of personal injuries which may be received by such servants or employees while in the service or employment of such person, company, association, or corporation, by reason of the negligence of such person, company,

the use of express assumption of risk in the employment context, the framers could not have intended section 5 to encompass this type of assumption of risk as well.[47]

The Arizona Supreme Court rejected this analysis, citing three separate grounds. In response to the court of appeals' initial conclusion, the court first pointed out that while Article 18 was drafted to protect the rights of laborers, the court has "long held that Article 18, Section 5 is not restricted to employment cases."[48] It also noted that unlike the majority of the sections in Article 18, sections 5 and 6 make no mention of their applicability to the labor and employment context, thus indicating the framers' intent that these sections be more broadly applied.[49] Lastly, the court dismissed the court of appeals' conclusion that sections 3 and 5 of Article 18 are mutually exclusive.[50] The court clarified, "Section 5 provides that assumption of risk is a question of fact for a jury to decide. Section 3, in contrast, provides that, in the employment context, the defense of an express contractual assumption of risk is unavailable."[51]

After striking down the textual support advanced by Firebird and the Arizona Court of Appeals, the court turned to the reliance they placed on Oklahoma case law for the contention that summary judgment may be granted when *express* assumption of risk is at issue.[52] Because Article 18, section 5 was based on an identical provision in Oklahoma's Constitution,[53] both Firebird and the court of appeals asserted that the Oklahoma court's interpretation of the provision was instructive.[54] The Arizona Supreme Court found this reliance misplaced for three reasons. First, although the Oklahoma Supreme Court has held that summary judgment may be granted on issues of assumption of risk, it has not held that this is specific to express assumption of risk.[55] As the Arizona Supreme Court explained, the Oklahoma court has never distinguished between express and implied assumption of risk in this way.[56] Second, the court maintained that although the constitutional provisions themselves are identical, the two states have interpreted the provision very differently.[57] Oklahoma has interpreted its provision to reflect the general rule that judges are to decide questions of law and juries are to decide questions of fact.[58] On the contrary, under Arizona law, "the purpose of

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> association, corporation, or the agents or employees thereof; and any such contract or agreement if made, shall be null and void.

ARIZ. CONST. art. XVIII, § 3.

47. *Phelps*, 111 P.3d at 1007.

48. *Id.* (citing Davis v. Boggs, 199 P. 116 (Ariz. 1921)).

49. *Id.* at 1008.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 1009.

54. *Id.*

55. *Id.* at 1008–09 (citing Schmidt v. United States, 912 P.2d 871, 875 n.24 (Okla. 1996)).

56. *Id.*

57. *Id.* at 1009.

58. Smith v. Chi. R.I. & P.R. Co., 498 P.2d 444 (Okla. 1972) (holding that the jury be instructed that they "should" or "must" decide in the defendant's favor if they find contributory negligence).

Article 18, § 5 was to modify the common law by making the jury rather than the court the sole arbiter of the existence or non-existence of contributory negligence [and assumption of risk]."[59] Third, the court indicated that the Oklahoma case law is hardly persuasive because it developed *after* Arizona adopted its constitutional provision, and the two states have interpreted their provisions very differently.[60]

The court next rejected the court of appeals' conclusion that implied assumption of risk applies in the tort context while express assumption of risk applies in the context of contract law, declaring it a misstatement of the law.[61] It then turned to whether prior court of appeals' decisions affirming summary judgment on issues regarding the enforcement of contractual waivers of liability indicate the appropriateness of summary judgment for such issues.[62] Answering the question in the negative, the court explained that in these prior cases, the plaintiffs had all failed to argue the applicability of Article 18, section 5.[63] Because of this oversight, the court stated, "Phelps' constitutional argument cannot fail simply because prior litigants did not assert their constitutional rights or because our courts did not address them."[64]

After fully addressing the arguments made by Firebird and the court of appeals, the court responded to the dissent.[65] The majority first challenged the dissent's contention that two proposed constitutional provisions should be considered in determining the scope of Article 18, section 5.[66] Finding the language of Article 18, section 5 ambiguous, the dissent turned to the legislative history of the provision, focusing its attention on Propositions 88 and 50.[67] Proposition 88 would have abolished the defense of assumption of risk, and would have also invalidated contractual waivers of a right to recover damages.[68] Proposition 50 would have prohibited any law "limiting the amount of damages to be recovered for causing the death or injury of any person," and would have invalidated "[a]ny contract or agreement with any employee waiving any right to recover damages for causing the death or injury of any employee . . . ."[69]

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59. *Phelps*, 111 P.3d at 1009 (citing Heimke v. Munoz, 470 P.2d 107, 109 (Ariz. 1970)).
60. *Id*. at 1010.
61. *Id*.
62. *Id*.
63. *Id*. at 1010–11.
64. *Id*.
65. *Id*. at 1011.
66. *Id*.
67. *Id*. at 1014–15 (McGregor, J., dissenting).
68. *Id*. at 1011. Proposition 88 provided, in pertinent part:

> Section 2. No law shall be enacted and no rule of law shall be recognized in the State of Arizona whereby the defense of "fellow servant" or the defense of "assumption of risk" shall be recognized in actions to recover damages in cases of injury or death covered in the first section of this article;
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> Section 3. No waiver by contract of right to recover damages under this Article shall be valid.

Id. at 1015–16 (McGregor, J., dissenting) (citing Goff, *supra* note 29, at 1288).
69. *Id*. at 1016 (McGregor, J., dissenting) (citing Goff, *supra* note 29, at 1147).

Responding to the dissent's reliance on these proposed constitutional provisions, the court indicated that neither proposition was adopted.[70] The delegates of the Constitutional Convention rejected the language of Proposition 88 in favor of the language currently found in Article 18, section 5, and eliminated Proposition 50's invalidation of contractual waivers of liability.[71]

The court then dismissed the dissent's argument regarding the effect that *Lochner v. New York*[72] had on the delegates.[73] The dissent argued that a number of the delegates were concerned that a broad prohibition against contractual waivers of liability would violate the U.S. Supreme Court's decision in *Lochner*.[74] Observing that Article 18, section 3 explicitly voids all contractual waivers of liability in the employment context, the court expressed that it could not conclude that the majority of the framers were concerned about a *Lochner* violation.[75]

Turning back to its own holding, the court suggested that it would have little impact on the number of cases sent to the jury, because in the majority of cases a question of fact regarding the scope of the contractual waiver will exist.[76] Therefore, the court reversed the trial court's grant of summary judgment and remanded the case for further proceedings consistent with its holding that issues regarding express assumption of risk are always to be decided by the jury.[77]

B. The Dissent

Vice Chief Justice McGregor and Chief Justice Jones wrote in dissent to express their objection to the majority's finding that the language used in Article 18, section 5 is unambiguous.[78] Although conceding the clarity of the phrases "in all cases whatsoever," and "at all times," the dissenting justices argued that "assumption of risk" is itself ambiguous because it "carries different and sometimes contradictory meanings."[79] Based on this ambiguity, the dissent turned to the legislative history of Article 18, section 5 to determine the intended effect of the provision.[80] Relying on two of the propositions introduced at the Arizona Constitutional Convention, Propositions 88 and 50, the dissent concluded that the framers intended Article 18, section 5 to apply only to implied assumption of risk.[81]

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70. *Id*. at 1011.
71. *Id.*
72. 198 U.S. 45 (1905) (holding that the right to contract freely in one's business was included in the liberty rights of the Fourteenth Amendment to the United States Constitution).
73. *Phelps*, 111 P.3d at 1011.
74. *Id*.
75. *Id*. at 1012.
76. *Id*. at 1013.
77. *Id*.
78. *Id*. at 1014.
79. *Id*. at 1014–15 (internal quotations omitted).
80. *Id*. at 1015.
81. *Id*. at 1014.

As originally introduced, Proposition 88 included multiple sections.[82] Section 2 would have eliminated the defense of assumption of risk entirely, while section 3 would have prohibited the use of express contractual waivers of liability.[83] The dissent argued that by including both sections 2 and 3, the framers clearly regarded express assumption of risk to be distinct from implied assumption of risk.[84] Proposition 88 was ultimately amended to the language currently found in Article 18, section 5.[85] Nonetheless, the dissent contended that the original language provides guidance on the meaning the framers intended for the language that was eventually adopted.[86]

The dissent also cited Proposition 50, which originally read:

> [N]o law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person. Any contract or agreement with any employee waiving any right to recover damages for causing the death or injury of any employee shall be void.[87]

Like Proposition 88, this too was amended.[88] The sentence that invalidated express contractual waivers of liability was eliminated, so that only the first sentence of the proposition was included in the Arizona Constitution, as Article 2, section 31.[89] The reason for striking the second sentence of Proposition 50 is unknown.[90] However, the dissent speculated that it could have been due to the delegates' concern that an attempt to extend the prohibition against contractual waivers too broadly would violate *Lochner v. New York*.[91] According to the dissent, it was because of these concerns that "the Framers chose to deal with express contractual defenses more cautiously than they dealt with implied assumption of risk."[92] The dissent found further support for its belief that the framers regarded express and implied assumptions of risk as separate and distinct concepts from the inclusion of Article 18, section 3, which specifically addresses contractual waivers of liability in the employment context.[93] Therefore, the dissent argued, Article 18, section 5 confers authority on the jury in cases regarding implied assumption of risk but not in those regarding express assumption of risk.[94]

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82. *Id.* at 1015. See *supra* note 68 for the text of the constitutional provision.
83. *Id.*
84. *Id.* at 1016.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*; Lochner v. New York, 198 U.S. 45 (1905) (held that the right to contract freely in one's business is included in the concept of liberty under the Fourteenth Amendment).
92. *Phelps*, 111 P.3d at 1017.
93. *Id.*
94. *Id.*

Lastly, the dissent asserted that legal precedent suggests Article 18, section 5 excludes contractual waivers of liability.[95] The defense stressed that this constitutional provision has never been applied in the context of an express waiver of liability, and that Arizona courts have determined the enforceability of such contracts as a matter of law.[96] In support of this theory, the dissent cited a number of Arizona Court of Appeals cases in which either summary judgment was granted on the grounds that an express contractual waiver of liability precluded the plaintiff's claim,[97] or in which summary judgment was denied due to remaining questions of fact regarding the waivers of liability.[98] The dissent concluded that the majority had presented "no compelling reason to depart from this established jurisprudence."[99]

V. CONCLUSION

In *Phelps v. Firebird Raceway, Inc.*, the Arizona Supreme Court held that Article 18, section 5 of the Arizona Constitution encompasses express and implied assumption of risk. In both cases, the assumption of risk defense will now be treated as a question of fact to be decided by the jury. Courts will no longer have the authority to grant summary judgment on the enforceability of such contractual waivers of liability; the scope and meaning of these waivers will be left to the jury. The *Phelps* decision will have important implications for entities and individuals seeking to contract out of future liability. After *Phelps*, summary judgment will no longer be granted solely on the existence of a contractual waiver of liability signed by the plaintiff. When the defense is raised, the plaintiff will always be able to submit his case to the jury.

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95. *Id.*

96. *Id.* at 1017–18.

97. *Id.* at 1018 (citing Lindsay v. Cave Creek Outfitters, L.L.C., 88 P.3d 557 (Ariz. Ct. App. 2003); Benjamin v. Gear Roller Hockey Equip., Inc., 11 P.3d 421 (Ariz. Ct. App. 2000); Valley Nat'l Bank v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 736 P.2d 1186 (Ariz. Ct. App. 1987)).

98. *Id.* (citing Morganteen v. Cowboy Adventures, Inc., 949 P.2d 552 (Ariz. Ct. App. 1997); Maurer v. Cerkvenik-Anderson Travel, Inc., 890 P.2d 69 (Ariz. Ct. App. 1994); Sirek v. Fairfield Snowbowl, Inc., 800 P.2d 1291 (Ariz. Ct. App. 1990)).

99. *Id.*