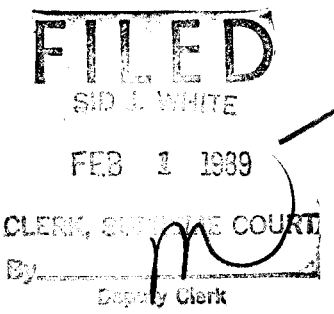
IN THE SUPREME COURT OF FLORIDA



MICHAEL SAKON, by and through his natural Mother and Next Friend, Parent and Natural Guardian, GLENDA DRAGOVICH, and GLENDA DRAGOVICH, individually,

Plaintiffs/Appellants,

vs.

Case No. 73,258

PEPSICO, INC., a foreign corporation,

Defendant/Appellee.
_____/

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Case proceedings:

This lawsuit was originally brought in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida. (R1-*) The case was removed to the United States District Court in and for the Middle District of Florida on May 27, 1986. (R1-3) On March 5, 1987, upon motion of the Defendant, Pepsico, Inc., the district court dismissed the Complaint for failure to state a cause of action. (R1-6) (R1-12)

The Complaint was amended by Plaintiffs and Defendant, PepsiCo, Inc., moved to dismiss Plaintiffs' First Amended Complaint for failure to state a cause of action. (R1-16) (R1-18) Memoranda of Law were submitted by both parties regarding Defendant's Motion to Dismiss. (R1-19) (R1-21)

On February 26, 1988, Judge Richard B. Kellam, Senior United States District Judge sitting by designation, granted Defendant's Motion to Dismiss for failure to state a cause of action and dismissed the action with prejudice. In addition to the reasons for the court's decision contained in the order of February 26, 1988, the court adopted the reasons for dismissing the original Complaint set forth in the opinion of March 5, 1987. (R1-12) (R1-29)

On March 17, 1988, Plaintiffs appealed the order of February 26, 1988. (R1-30)

On October 27, 1988, the United States Court of Appeals for the Eleventh Circuit certified the following question to this Court:

> Whether the law of the State of Florida recognizes a duty owed by a television advertiser to its targeted audience of young viewers when that advertiser has broadcast, without adequate warnings, a commercial depicting a dangerous activity in a manner likely to induce a young viewer to imitate the activity.

Factual Allegations:

Since this appeal is from an order dismissing Plaintiffs' First Amended Complaint with Prejudice, only the factual allegations of Plaintiffs' First Amended Complaint need be considered.

Plaintiffs' First Amended Complaint alleges that Defendant broadcast over commercial network television a commercial advertising the product known as "Mountain Dew" soda pop. The Mountain Dew commercial contained a depiction of a common past-time of children known as "lake jumping." The commercial in question allegedly incited and invited imitation by Plaintiff, Michael Sakon, and created a clear, present and grave danger to him. It is further alleged that Plaintiff, Michael Sakon, incited by the commercial, tried to imitate the act portrayed in the commercial and, in the process, sustained bodily injury. (R1-16, pages 1-3)

Paragraphs 14 through 19 of the First Amended Complaint allege that the Federal Trade Commission has imposed a duty of care on advertisers to avoid advertisements that may have a tendency or capacity to influence children to enage in behavior

leading to unlawful activities. It is alleged that since the FTC has allegedly set some duty upon commercial advertisers regarding advertising to "immature audiences", Defendant knew or should have known that its commercial would result in a reasonable and foreseeable probability that its commercial would invite Plaintiff to imitate the act of "lake jumping." It is further alleged that Defendant breached a duty to the "general public" by failing to warn of the dangers of "lake jumping."

SUMMARY OF THE ARGUMENT

There must be some relationship between the tortfeasor and the injured party which gives rise to a legal duty on the part of the tortfeasor to protect the injured party from the injury of which he complains. In addition, a prerequisite to the imposition of a duty upon a defendant is that the injury be foreseeable. If the injury is not reasonably foreseeable, there can be no recovery.

Under Florida law, harm is deemed foreseeable if (1) the legislature specifies the type of harm for which a tortfeasor is liable, (2) it may be shown that a particular defendant had actual knowledge that the same type of harm had resulted in the past from the same type of negligent conduct or (3) the harm may be of the type that has frequently resulted from the same type of negligence that, in the field of human experience, the same type of result may be expected again.

Plaintiffs have failed to point out any imposition of liability by the legislature. Plaintiffs' attempt to use FTC consent orders as the basis for some duty is not valid. There is no private cause of action for alleged violations of a section of the Federal Trade Commission Act or of regulations established by the Federal Trade Commission. The Federal Trade Commission does not set any standards which could give rise to a duty of care.

Obviously, no legal standard of duty or legal precedent arises from the consent orders relied upon by Plaintiffs. Even

if a standard did arise, the FTC cases cited by Plaintiffs only concern problems with the advertisement directly related to the use of the product itself. The action depicted by the Mountain Dew commercial had nothing to do with the use of the product.

Plaintiffs have tried to impose a duty simply because a minor was injured. Whether the injured person is a minor only goes towards determining whether the tortfeasor acted reasonably under the circumstances and does not, by itself, impose a duty. The duty to use reasonable care to watch over, supervise and protect children from foreseeable hazards and harm applies only to those persons having immediate control and custody of a minor too young to exercise judgment to care for himself. PepsiCo did not have immediate control and custody of the injured Plaintiff and did not come into contact with the injured Plaintiff.

In Florida, a young man of fourteen years of age has sufficient capacity and understanding to be sensible of danger and to have the power to avoid it. In the case sub judice, the injured Plaintiff was fourteen years old at the time the injury occurred.

The duty proposed by Plaintiffs, if adopted, would radically change television broadcasting as we know it today. There would be a severe restriction upon freedom of speech resulting in a sanitization of broadcasted material. Plaintiffs' attempts to limit the duty to a commercial advertisement on television is an artificially drawn line without a reasonable rationale. All commercials, programs, movies and videos are made for the purpose of pecuniary gain.

If Plaintiffs' position is followed, there would be no recognizable standard for the television industry to follow and the judicial system would be overwhelmed by lawsuits based on allegedly misleading or deceptive advertisements and programs.

In the case sub judice, the injury was not directly caused by the Defendant. The person causing the harm and the injured person are the same, namely, the injured Plaintiff. In a situation where someone other than the defendant directly caused the resulting injury, there must be some special relationship the defendant and the person causing the harm, or between the defendant and the injured person in order for a duty to be imposed. Implicit in the special relationship exception is the requirement that the defendant have some right or ability to control the person causing the harm. Obviously, no special relationship existed between the injured Plaintiff and the Defendant and the Defendant was in no position to control the injured Plaintiff's conduct.

A prerequisite to the exercise of discretionary jurisdiction to review a certified question from the United States Court of Appeals is that the answer to the question certified must be dispositive of the cause. Clearly, an answer to the question certified would not be dispositive of the cause because there must also be a determination on the issues of foreseeability, proximate cause and whether the cause of action is barred by the First Amendment. Thus, this court should not exercise its discretionary jurisdiction to answer the certified question, or, alternatively, should review the entire record

determine whether the district court's decision can be upheld under Florida law on foreseeability, proximate cause and/or freedom of speech grounds.

ARGUMENT

I. THE LAW OF THE STATE OF FLORIDA DOES NOT, AND SHOULD NOT, RECOGNIZE A DUTY OWED BY A TELEVISION ADVERTISER TO ITS TARGETED AUDIENCE OF YOUNG VIEWERS WHEN THAT ADVERTISER HAS BROADCAST, WITHOUT ADEQUATE WARNINGS, A COMMERCIAL DEPICTING A DANGEROUS ACTIVITY IN A MANNER LIKELY TO INDUCE A YOUNG VIEWER TO IMITATE THE ACTIVITY.

The United States District Court in and for the Middle District of Florida was correct in dismissing Plaintiffs/ Appellants' First Amended Complaint with prejudice because it failed to state a cause of action recognized under Florida Law. Plaintiffs' First Amended Complaint failed to set forth any recognized duty or obligation owed by PepsiCo, as a television advertiser, to Plaintiffs. The District Court was correct because the law of the State of Florida does not recognize the duty, nor should it recognize the duty allegedly owed by a television advertiser to its targeted audience, even when that audience consists of young viewers and even when the advertiser has broadcast, without adequate warnings, a commercial depicting a dangerous activity in a manner likely to induce the young viewer to imitate the activity.

Contrary to Plaintiffs' claim (Appellants' Initial Brief, pg. 12), whether a duty exists is a question of law to be decided by a court of law and not by a jury. Zamora v. Columbia Broadcasting System, 480 F.Supp. 199 (S.D. Fla. 1979) and Spurlin v. General Motors Corporation, 528 F.2d 612 (5th Cir. 1976).

Before a cause of action can be maintained for negligence, it must be "clear that the plaintiffs' interests are entitled to legal protection against the conduct of the defendant." Bondu v. Gurvich, 473 So.2d 1307, 1312 (Fla. 3d DCA 1984), quoting from Prosser, Torts, Section 1, Pages 3 - 4 (4th Ed. 1971). There must be some relationship between the tortfeasor and the injured party which gives rise to a legal duty on the part of the tortfeasor to protect the injured party from the injury of which he complains. Ankers v. District School Board of Pasco County, 406 So.2d 72 (Fla. 2d DCA 1981) and Rishel v. Eastern Airlines, Inc., 466 So.2d 1136 (Fla. 3d DCA 1985).

In addition, foreseeability of injury is a prerequisite to the imposition of a duty upon a defendant. If the injury is not reasonably foreseeable, there can be no recovery. A foreseeable consequence is one which a prudent man would anticipate as likley to result from an act and is an occurrence that happens so frequently that it may be expected to happen again and is, therefore, a probable consequence. A foreseeable consequence is not one which might possibly occur. Firestone Tire & Rubber Co. v. Lippincott, 383 So.2d 1181 (Fla. 5th DCA 1980), rev. den., 392 So.2d 1376 (Fla. 1980).

Under Florida law, a harm is deemed foreseeable if it is within the scope of danger or risk attributable to defendant's alleged negligent conduct. The harm may be within the scope of danger in three ways. First, the legislature may specify the type of harm for which a tortfeasor is liable. Second, it may be shown that the particular defendant had actual knowledge

that the same type of harm had resulted in the past from the same type of negligent conduct. Finally, the harm may be of the type that has frequently resulted from the same type of negligence that, in the field of human experience, the same type of result may be expected again. Gibson v. Avis Rent-A-Car System, Inc., 386 So.2d 520 (Fla. 1980).

Plaintiffs have stated (Appellants' Initial Brief, pg. 4 - 5) that they are not requesting this court to expand or invent new legal concepts. Nothing could be further from the truth.

Plaintiffs have failed to point out any imposition of liability by the legislature. However, Plaintiffs are asserting that the enabling statute for the Federal Trade Commission, 15 U.S.C. Section 45(a)(1) and (6) and various consent orders of the Federal Trade Commission provide the requisite foreseeablity which gives rise to a duty of care. Plaintiffs' position is unprecedented.

First, there is no private cause of action for alleged violations of a section of the Federal Trade Commission Act or of regulations established by the Federal Trade Commission. It has been held that 15 U.S.C. Section 45 does not provide private litigants with a direct remedy, either explicitly or by implication. Carlson v. Coca-Cola Company, 483 F.2d 279 (9th Cir. 1973) and Alfred Dunhill, Ltd. v. Interstate Cigar Co., Inc., 499 F.2d 232 (2d Cir. 1974). Thus, Plaintiffs cannot rely upon supposed FTC standards to show that some duty existed by Defendant to Plaintiffs since this would be equivalent to establishing a private right of action.

In addition, the Federal Trade Commission does not set any standards for the advertising industry which give rise to a duty of care. The Federal Trade Commission only has the powers and duties given to it by congress. The FTC does not act outside its statutory authority and its rules, regulations and decisions are made according to statutory guidelines set forth in the Federal Trade Commission Act.

Any rulings or decisions of the FTC regarding advertisements allegedly harmful to persons have no bearing on the case sub judice. FTC investigations, discovery and hearings are based on different rules of evidence and law and have no place in determining whether Plaintiffs have established a cause of action for negligence in the broadcast of the subject commercial. The FTC does not concern itself with questions of reasonable care and legal causation. Therefore, references to FTC consent orders, decisions and rulings regarding advertisements of other companies have absolutely no bearing on the subject case. (Even if there was some bearing on the subject case, there has been no allegation that the FTC reviewed and issued any order regarding the commercial in question.)

Plaintiffs have not cited any specific rules or regulations of the FTC which have allegedly been violated. Plaintiffs only cite 15 U.S.C. Section 45 and various FTC cases which were concluded with consent orders. (In re: Uncle Ben's, Inc.; In re: General Foods Corp.; and In re: AMF, Inc.) Obviously, no legal standard of duty is set forth in a consent

order and there is no legal precedent arising from consent order.

Further, the FTC cases cited by Plaintiffs all have one thing in common. The alleged problem with the advertisement was directly related to the use of the product itself. Thus, even if the FTC cases cited by Plaintiffs could set some recognized legal standard, they would not apply to the case sub judice since the action depicted by the Mountain Dew commercial had nothing to do with the use of the product.

Plaintiffs have stated that, "[t]he FTC has been given specific authority to identify and proscribe unfair or deceptive practices in or affecting commerce, particularly when children are involved. 15 U.S.C. Section 45(a)(1), (6) 1976." (Appellants' Initial Brief, pg. 6-7) There is nothing in 15 U.S.C. Section 45 which specifically relates to children.

Plaintiffs also contend that there exists a standard of conduct concerning methods of advertising to youngsters. Other than the consent orders, which have no legal precedential value, Plaintiffs have failed to state from where this standard of conduct arises.

Plaintiffs have failed to show the prerequisite forseeability to the imposition of a duty. In addition to failing to show that the legislature specified the type of harm for which a television advertiser may be liable, Plaintiffs have failed to show (or allege) that PepsiCo had actual knowledge of any other persons sustaining personal injuries as a result of viewing the commercial in question, any similar commercial or, for that matter, any commercial.

Finally, Plaintiffs have failed to show (or allege) that personal injuries have frequently resulted from viewing television commercials and that the type of harm which Plaintiff suffered should have been expected to occur as a result of the broadcasting of the Mountain Dew commercial. Even the FTC cases which Plaintiffs cite do not involve actual incidents in which injuries to persons occurred.

Plaintiffs have cleverly tried to impose a duty simply because a child was injured. The fact that a child has been injured only goes towards determining whether the tortfeasor acted reasonably under the circumstances. The fact that a child has been injured does not, by itself, impose a duty. When a child is involved, persons having immediate control and custody of a child too young to exercise judgment to care for himself have a duty, as ordinary prudent persons, to use reasonable care to watch over, supervise and protect the children from foreseeable hazards and harm. Orlando Sports Stadium, Inc. v. Gerzel, 397 So.2d 370 (Fla. 5th DCA 1981).

Plaintiffs have cited the case of Bagdad Land & Lumber Co. v. Boyette, 104 Fla. 699, 140 So. 798 (1932), as supporting the position that the degree of care owed to children is an increased degree. It must be noted that the minor child in Boyette was an infant about three and one-half years old who was killed when he was run over by a railroad car. While the court discussed the care that must be provided to children by those who have contact with the children, the court also found that the defendant did not fail to exercise such reasonable

care as the circumstances required and was therefore not responsible for the accident. The reason for the court's ruling was that there was nothing in the situation which should have caused defendants, or any other persons, in the exercise of reasonable care and caution, to expect or anticipate that the child would change his position and come toward the moving train.

In the case sub judice, the same reasoning would apply since the injury was not a reasonably foreseeable consequence of the alleged negligence. In addition, Pepsico did not have immediate control and custody of the injured Plaintiff and did not come into contact with the injured Plaintiff.

It should also be noted that there is a presumption that a young man of fourteen years of age has sufficient capacity and understanding to be sensible of danger and to have the power to avoid it. Coons v. Pritchard, 69 Fla. 362, 68 So. 225 (1915). In the case sub judice, the injured Plaintiff was fourteen years old at the time the injury occurred.

Judge Kellam's order of March 5, 1987 distinctly described the lack of foreseeability that Defendant's commercial would cause harm to Michael Sakon:

> Was it reasonably foreseeable by one exercising reasonable care that Michael would undertake to perform a lake jumping and be injured thereby? I think not any more than the showing of high wire walking or trapeze artists swinging and jumping through the air, as shown on T.V., performed by circus actors, would alert one that observers might undertake such an act. (at page 5)
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> There is not the slightest allegation the commercial in any way suggested that the viewers undertake the lake jumping. The foreseeability of Plaintiff's action was no more real than would be the foreseeability that persons attending the circus would undertake performance of acts done by the entertainers, whether on high wires, playing with animals or swallowing a sword. Should the operator of a ski area, when advertising and showing persons skiing, be required to warn viewers or readers they need to take lessons before trying to ski? Should advertisements of water ski areas warn that water skiing is dangerous, and that one should not attempt to ski over a ramp? To be sure, there is danger of injury in the sports by one inexperienced, but does the failure to warn in the advertisement constitute a breach of duty to one who observes it? (at page 6).

If the duty proposed by Plaintiffs is adopted, it would radically change television broadcasting and the entertainment industry as we know it today. Virtually any program or commercial containing action or adventure would be barred from the airways for fear that some young person may be tempted or influenced to imitate what he or she saw. The resultant sanitization of broadcasted material would be unprecedented and would severely restrict freedom of expression of ideas and information.

As an alternative to the complete ban of any program or commercial containing action or adventure scenes, Plaintiffs would require that such a broadcasted program or commercial contain adequate warnings to the young person. This, however, would still subject broadcasters and advertisers to potential liability for <u>inadequate</u> warnings. As Judge Kellam stated in his opinion dated March 5, 1987, (at page 6):

> Plaintiffs alleged that the commercial should have warned all observers of the danger of undertaking such an act. What warning would really suffice in order to avoid liability? For instance, should it specify the depth of the water? If too shallow, the actor might strike the bottom. If too deep, he might drown. Must the actor be warned he must be able to swim? Must he be warned how to prevent the bicycle from injuring him? The court should not undertake to identify or set the standards to be followed by commercials of this nature.

As an example, Plaintiffs' proposed standard of liability would affect such things as sporting event telecasts. The National Football League would be subject to liability for injuries suffered by children in sandlot football games after watching a televised football game. Presumably, Plaintiffs would have future broadcasters constantly warning children of the dangers of football or other sporting activities during the televising of such an event.

Plaintiffs claim that their proposed standard of liability is limited to commercial advertisements. Such a limitation is totally untenable. What is the difference between an advertisement promoting an upcoming television program containing action scenes from the program and an advertisement promoting another type of product or service containing similar action scenes? Both are produced and shown to grab the interest of the viewer. Both are used to sell something and to reap pecuniary gain. Both provide information regarding the product. The United States Supreme Court has recognized that commercials further societal interest in the dissemination of information which assists consumers. Central Hudson Gas &

Electric Corporation v. Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

There is virtually nothing shown on television (other than a public service station) which is not shown for a profit motive. We are all too familiar with the ratings system which emphasizes profits. No matter how good the television program is, if it does not bring in the required ratings, it is taken off the air.

Plaintiffs have cleverly tried to limit this issue to a commercial advertisement on television involving a minor. Clearly, a holding in Plaintiffs' favor would allow lawsuits on every program in every medium by anyone claiming that he or she has imitated something seen on the program. Even commercial movies and commercial videos would be affected. There is no real reason to draw a distinction between a commercial advertisement and a commercial television program, movie or video. They are all made for the purpose of pecuniary gain. They are all commercial in nature.

If the Plaintiffs' position is followed, then the courts will have to scrutinize any broadcasted material brought before it to determine if it is misleading or if it has failed to adequately warn of dangers from imitation. Our judicial system lacks the institutional capacity to regulate the airways in the manner suggested by Plaintiffs. See Zamora v. Columbia Broadcasting System, supra. As pointed out by the Plaintiffs, the United States Congress and the courts have deferred to the Federal Trade Commission to regulate advertising for the

purpose of misleading or deceptive advertisements.

As set forth earlier, Plaintiffs do not set forth any statutory duty or common law duty which has been recognized. Plaintiffs are, in effect, requesting the creation of a new cause of action in favor of Plaintiffs against Defendant. As shown by the above analysis and as pointed out in Zamora, supra, 480 F.Supp at 202:

> A recognition of the "cause" claimed by the Plaintiffs would provide no recognizable standard for the television industry to follow.

In Zamora, the minor plaintiff and his father and mother sued the National Broadcasting Company, Columbia Broadcasting System and American Broadcasting Company for damages. The plaintiffs alleged that the minor plaintiff had become involuntarily addicted to and intoxicated by extensive viewing of television violence broadcasted by the three defendants. The plaintiffs alleged that the defendants breached their duty to plaintiffs by failing to use ordinary care to prevent the minor plaintiff from being incited and instigated to duplicate the atrocities he viewed on television. It was also alleged that the minor plaintiff developed a sociopathic personality, became desensitized to violent behavior and became a danger to himself and others.

The United States District Court for the Southern District of Florida held that there was no such alleged duty owing from the defendants. Stating that there was no presently articulated obligation in the law, the court went on to analyze whether the law of torts in Florida should be expanded. The

court held that such an expansion was not warranted.

In examining the reasons for imposing a new duty, the court quoted Harper & James, "Law of Torts", Volume 2 (1956), page 1132-1133, Section 20.4:

> ... One consideration which is common to all cases under any system is the practical need to draw the line somewhere so that liability will not crush those on whom it is put ....
>
> Another policy consideration which pervades all the cases is the need to work out rules which are feasible to administer and yield a workable degree of certainty.

The district court stated that the court system lacks the legal and institutional capacity to identify isolated depictions of violence, let alone the ability to set the standard for media dissemination of items. The court further stated that the implications of imposing such a standard were awesome. The defendant broadcasters would be charged with anticipating a minor's intake of programming; the parent's acquiescence and the imitation by the minor of the act viewed on television.

Summarizing what was involved in the Plaintiffs' demand for a new duty standard, the district court stated:

> Reduced to basics, the plaintiffs ask the Court to determine that unspecified "violence" projected periodically over television (presumably in any form) can provide the support for a claim for damages where a susceptible minor has viewed such violence and where he has reacted unlawfully. Indeed, it is implicit in the plaintiffs' demand for a new duty standard, that such a claim should exist for an untoward reaction on the part of any "susceptible" person. The imposition of such a generally undefined and undefinable duty would be an unconstitutional exercise

> by this court in any event. To permit such a claim by the person committing the act, as well as his parents, presents an A Fortiori situation which would, as suggested above, give birth to a legal morass through which broadcasting would have difficulty finding its way.

In addition to the above, there can be no imposition of a duty on a television advertiser because there is no special relationship between the viewer and the television advertiser. In a situation where someone other than the defendant directly caused the resulting injury, there must be some special relationship between the defendant and the person causing the harm, or between the defendant and the injured person in order for a duty to be imposed. Garrison Retirement Home Corp. v. Hancock, 484 So.2d 1257 (Fla. 4th DCA 1985) and Vic Potamkin Chevrolet, Inc. v. Horne, 505 So.2d 560 (Fla. 3d DCA 1987). In the case sub judice, the person causing the harm and the injured person are the same, namely, the injured Plaintiff.

Clearly, no special relationship existed between the injured Plaintiff and the Defendant. The special relationship required exists, as examples, between a parent-child, master-servant, land possessor and custodian of a person with dangerous propensities. Garrison Retirement Home Corp., supra, at page 1261.

Implicit in the special relationship exception to the general direct causation rule is the requirement that the defendant has some right or ability to control the person causing the harm. Obviously, the Defendant was in no position to control the injured Plaintiff's conduct. The Defendant did not even know the injured Plaintiff.

The connection between the broadcasting of a commercial advertisement on television and any harm which might come to a viewer of the commercial advertisement is simply too attenuated to impose legal liability on the part of the television advertiser. To impose such a duty on a television advertiser, in a situation similar to the one in the case sub judice, is to require the television advertiser and others (such as the broadcaster) to foresee the happening of unexpected and unimaginable events. Such a duty simply cannot be found to exist.

Finally, Plaintiffs have stated that they have been denied the right of access to the court system for the redress of the injury alleged (Appellants' Initial Brief, pg. 12). Obviously, this has not happened. Plaintiffs had access to the court and the First Amended Complaint was simply dismissed because there was no legal duty alleged, no foreseeability and no proximate cause between the alleged actions of Defendant and the Plaintiff's injury.

Plaintiffs have also stated that they have a right to have a jury decide whether a duty existed (Appellants' Initial Brief, pp. 12). Once again, obviously this is incorrect. Whether a duty exists is a question for the court, not a jury, to decide. Zamora v. Columbia Broadcasting System, supra, and Spurlin v. General Motors Corporation, supra.

II. THIS COURT SHOULD NOT EXERCISE ITS DISCRETIONARY JURISDICTION SINCE THE DISTRICT COURT'S DECISION CAN BE AFFIRMED ON OTHER GROUNDS.

As noted in the certificate of the Eleventh Circuit Court of Appeals, the statement of the question certified is intended only as a guide and is not meant as a restriction as to the inquiry of this court. As stated in Martinez v. Rodriguez, 394 F.2d 156, 159 n.6 (5th Cir. 1968):

> [T]he particular phrasing used in the certified question is not to restrict the Supreme Court's consideration of the problems involved and the issues as the Supreme Court perceives them to be in its analysis of the records certified in this case. This latitude extends to the Supreme Court's restatement of the issue or issues in the manner in which the answers are to be given, whether as a comprehensive whole or in subordinate or even contingent parts.

The district court's decision was not limited to simply finding that there was no duty owed to the injured Plaintiff by Defendant. The district court also dismissed with prejudice Plaintiffs' First Amended Complaint because Plaintiffs failed to sufficiently allege ultimate facts demonstrating that Defendant's alleged breach of duty proximately caused Plaintiff's injuries. There were no allegations that Michael Sakon actually viewed the commercial in question nor were there allegations to indicate a time frame or sequence of events connecting the implied viewing of the commercial to the injury.

The district court also dismissed with prejudice Plaintiffs' First Amended Complaint because the purported cause of action was barred by the First Amendment to the United States Constitution. The First Amendment provides protection to speech unless it falls into certain well-defined and narrowly limited classes of speech. The only category of unprotected speech that could possibly apply to this case is the incitement to imminent lawless activity exception to the First Amendment as set forth in Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). The factual allegations contained in the First Amended Complaint cannot be construed to indicate that the Mountain Dew commercial involved in this case was directed to producing imminent lawless action and was likely to produce such lawless activity.

As already discussed, the district court held that the injury to the Plaintiff was not foreseeable by the Defendant.

A prerequisite to the exercise of discretionary jurisdiction to review a certified question from the United States Court of Appeals is that the answer to the question certified must be dispositive of the cause. Rule 9.150(a) and Greene v. Massey, 384 So.2d 24 (Fla. 1980). Clearly, an answer to the question certified would not be dispositive of the cause because there must also be a determination on the issues of foreseeability, proximate cause and whether the cause of action is barred by the First Amendment. Thus, this court should not exercise its discretionary jurisdiction to answer the certified question, or, alternatively, should review the entire record

and determine whether the district court's decision can be upheld under Florida law upon foreseeability, proximate cause and/or freedom of speech grounds.

A. THE LOWER COURT WAS CORRECT IN DISMISSING WITH PREJUDICE PLAINTIFFS' FIRST AMENDED COMPLAINT BECAUSE THE PURPORTED CAUSE OF ACTION IS BARRED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

This lawsuit was initiated against Defendant, PepsiCo, Inc., seeking to recover damages for bodily injury as the alleged foreseeable result of a television commercial. Plaintiffs' cause of action seeks to impose an impermissible restraint on Defendant's freedom of speech and is thus barred by the First Amendment.

The First Amendment to the Constitution of the United States provides extremely important protection to material communicated by the public media, including the electronic media. Red Lion Broadcasting Company v. FCC, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969). Even if the enterprise is commercial in nature, there is no relaxation of the scrutiny required by the First Amendment nor is there an introduction of any non-speech element. New York Times Company v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). The First Amendment prohibits censorship of material communicated by the electronic media even where the restraint may be designed to protect children. Olivia N. v. National Broadcasting Company, Inc., 178 Cal. Rptr. 888, 126 Cal. App. 488 (Cal. App. 1981 cert. den. 458 U.S. 1108, 102 S.Ct. 3487, 73 L.Ed.2d 1369 (1982), reh. den. 458 U.S. 1132, 103 S.Ct. 17, 73 L.Ed. 1403 (1982).

Although the Plaintiffs in this case do not seek to impose a prior restraint on communication, the asserted cause of action for liability based on traditional negligence concepts would act as a restraint on the exercise of First Amendment rights. Any action which has as its purpose the limitation upon freedom of expression must be viewed with suspicion. Plaintiffs' purported cause of action is barred by the First Amendment, unless Plaintiffs can allege and sustain that the television commercial in question, which is alleged to have caused the injury, falls within a category of unprotected speech. New York Times v. Sullivan, supra, and Zamora v. CBS, supra.

The First Amendment provides protection to speech unless it falls into certain well-defined and narrowly limited classes of speech. The recognized exceptions to constitutionally guaranteed speech include:

(1) Obscene material, Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973);

(2) Fighting words, Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942);

(3) Defamation, Gertz v. Robert Weltz, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974);

(4) Intolerable invasions of privacy, Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1973);

(5) Disruptions of the classroom, Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct.

733, 21 L.Ed.2d 731 (1969);

(6) Incitement to imminent lawless activity and likely to produce such action, Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969); and

(7) Solicitation of illegal activity, Pittsburgh Press Company v. Pittsburgh Commission on Human Rights, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973).

All the reported cases, which have considered lawsuits asserted for liability on account of personal injury allegedly resulting from a television broadcast, have held that the only category of unprotected speech that could possibly apply in such a case is the incitement to imminent lawless activity exception to the First Amendment. Olivia N. v. National Broadcasting Company, Inc., supra; Walt Disney Productions, Inc. v. Shannon, 276 S.E.2d 580 (Ga. 1981) and DeFilippo v. National Broadcasting Company, 446 A.2d 1036 (R.I. 1982). As set forth in Brandenburg, supra, the constitutional guarantees of free speech and free press do not allow proscription of speech unless it is directed to inciting imminent lawless action and is likely to produce such action.

Plaintiffs' First Amended Complaint contains no allegations that the commercial in question contained content that was obscene, constituted fighting words, was defamatory, invaded their privacy, disrupted a classroom or solicited illegal activity. The First Amended Complaint does allege that the commercial incited and invited imitation by Plaintiff. (R1-16, Paragraph 8) The First Amended Complaint additionally alleges that the commercial created a "clear, present and grave

danger to immature audiences." (R1-16, Paragraph 9) Nowhere in the First Amended Complaint is there an allegation that the commercial incited imminent lawless activity. Plaintiffs' First Amended Complaint fails to sufficiently allege any recognized category of unprotected speech.

Further, the factual allegations contained in the First Amended Complaint cannot be construed to indicate that the Mountain Dew commercial involved in this case was directed to producing imminent lawless action and was likely to produce such lawless activity. There are no factual allegations to indicate that the commercial "incited" any particular act. The allegations fail to indicate that the commercial commanded, instructed or directed any particular act or conduct. There are no allegations of overt actions by PepsiCo to direct or to control Michael Sakon's conduct.

In addition, the factual allegations do not indicate that the commercial was directed to bring about imminent conduct. There is no factual allegation that a particular broadcast of the commercial prompted Plaintiff's action. Clearly, from the factual allegations regarding the content of the commercial, there was no direction to any person to perform any act in an imminent or time determinent manner. Nothing in the commercial can be construed as inciting imminent acts of any kind.

It is obvious that the commercial, as alleged, did not in any way whatsoever incite imminent <u>lawless</u> activity. Nowhere in the complaint is there an allegation that the commercial incited "lawless" activity. Further, there are no factual

allegations to indicate that any type of lawless activity occurred. All that Plaintiffs have been able to allege is that the commercial incited "imitation" of the common past-time of lake jumping.

In determining whether a communication fits into one of the exceptions to the First Amendment protection, extreme care must be applied. In particular, extreme care must be applied when determining whether a communication falls into the incitement of lawless activity exception as stated by the Supreme Court of Rhode Island in DeFilippo v. National Broadcasting Company, supra, at page 1042:

> Under the facts of this case, we see no basis for a finding that the broadcast in any way could be construed as incitement. Consequently, the exception set forth in Brandenburg v. Ohio, supra, is inapplicable to the case at bar. In any event, the incitement exception must be applied with extreme care since the criteria underlying its application are vague. Further, allowing recovery under such an exception would inevitably lead to self-censorship on the part of broadcasters, thus depriving both broadcasters and viewers of freedom and choice, for "above all else, the First Amendment means that government has no power to restrict expression because of its content." Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212, 216 (1972).

In Olivia N. v. National Broadcasting Company, supra, plaintiff asserted a negligence liability cause of action to recover damages for physical and emotional injury inflicted by defendants/assailants whose attack on plaintiff imitated a television broadcast of a film drama. The film contained a scene in which a female is "artificially raped." In Olivia N., plaintiff was raped four days after the television drama was

broadcast.

Plaintiff, in that case, alleged that NBC had knowledge of studies on child violence; that NBC should have known that susceptible persons might imitate the crime enacted in the film; that the television drama was particularly likely to cause imitation; that the film was televised without proper warning in an effort to obtain the largest possible viewing audience; and that, as a result of the telecast, plaintiff suffered physical and psychological damage. Plaintiff contended that liability could be imposed on a negligence theory despite absence of proof of incitement as defined in Brandenburg v. Ohio, supra.

California's First District Court of Appeal disagreed with plaintiff and held that the case was controlled by the test for incitement as set forth in Brandenburg v. Ohio, supra. The court recognized the pervasive effect of the broadcasting media and the unique access to children, but held that the test of incitement was the proper test to determine an exception to First Amendment protection. The court stated that the effect of an imposition of liability in such a case could reduce the U.S. adult population to viewing only what is fit for children. The court held that liability based upon negligence could not be recognized under the facts of the case nor in other situations where children had imitated activities portrayed in a television broadcast, absent fulfillment of the incitement requirements of Brandenburg v. Ohio, supra.

In DeFilippo v. National Broadcasting Co., Inc., supra, plaintiffs brought an action to recover under a wrongful death act after their thirteen year old son hanged himself when he attempted to imitate a hanging stunt televised by the defendant broadcasting company. The decedent was found several hours after the broadcast, hanging from a noose in front of the television set, which was still tuned to the channel which broadcasted the program. The complaint alleged negligent failure to warn and negligent broadcasting of the program with malicious and reckless disregard for the viewers' welfare. The Supreme Court of Rhode Island held that, of all the categories of speech which could legitimately be proscribed, such a lawsuit could be sustained only under the exception of incitement to imminent lawless action. The court ruled that, as a matter of law, the broadcast contained no incitement removing it from the protection of the First Amendment. The court observed that allowing plaintiffs' cause of action to stand would invariably lead to self-censorship by broadcasters, with a resultant loss of freedom of expression.

In Walt Disney Production, Inc. v. Shannon, supra, an action was brought on behalf of an eleven year old child against various companies for the broadcast of a children's television program to recover for injuries sustained when the plaintiff imitated a method of producing sound effects. The television program specifically showed young viewers how to make the particular sound effect. In determining whether the communication was entitled to protection of the First Amendment, the Supreme Court of Georgia stated that the only

category of unprotected speech that would apply would be communication that tends to incite an immediate breach of peace, if the words used are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. The Georgia Supreme Court followed the language of Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed.2d 470 (1919) and the language of Brandenburg v. Ohio, supra, as the exception to the First Amendment protection.

The Georgia Supreme Court then went on to discuss the so called "pied piper" cases, which were said to contain two basic elements:

(1) There must be an express or implied invitation extended to the child to do something posing a foreseeable risk of injury; and

(2) The defendant must be chargeable with maintaining or providing the child with the instrumentality causing the injury.

The court found that while the first element was arguably present in that case, the second element was indisputably absent. Although it could be said that what the defendant allegedly invited the child to do in that case posed a foreseeable risk of injury, it could not be said that it posed a "clear and present danger of injury." Walt Disney Productions, supra, at page 583. The court held that liability should not be imposed under a negligence theory unless the invitation to act presented a clear and present danger that

injury would in fact result.

The Georgia Supreme Court also expressed its concern if it were to hold otherwise. The court stated that:

> ... to hold otherwise would, as the saying goes, open the pandora's box; and it would, in our opinion, have a seriously chilling effect on the flow of protected speech through society's mediums of communication.

In Zamora v. Columbia Broadcasting System, supra, the plaintiff alleged that years of viewing television depictions of violence desensitized him toward violent behavior and incited him to duplicate the depictions of violence by shooting and killing an elderly neighbor. The court dismissed plaintiff's complaint with prejudice. In following Hess v. Indiana, 414 U.S. 105, 94 S.Ct. 326, L.Ed.2d 303 (1973), the court ruled that liability could be imposed only if the broadcast was intended to produce and likely to produce imminent disorder. Liability could not be imposed because of a mere tendency to lead to violence. Zamora, supra, at page 206.

In the subject case, in the U.S. District Court for the Middle District of Florida, Plaintiffs relied upon the case of Central Hudson Gas and Electric Corp. v. Service Commission of New York, supra, for the position that "commercial speech" is afforded less protection than other speech and that the lower court should have applied the test set forth therein. Plaintiff argues that the Mountain Dew commercial is "commercial speech" and is "dangerously misleading." As a result, it does not enjoy the absolute protection of the First Amendment.

Central Hudson, supra, involved a challenge to the constitutionality of regulation of the New York Public Service Commission which completely banned promotional advertising by an electric utility. It did not involve a private cause of action for damages based on negligent broadcasting of a commercial.

Central Hudson, supra, sets forth a four-part commercial speech test for detrmining the validity of regulations on that speech. Under this test, (1) commercial speech which concerns a lawful activity and is not misleading is protected under the First Amendment. A restriction on protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

The Central Hudson test is not applicable to the present case since there is no issue regarding the constitutionality of a state or federal regulation or law which restricts commercial speech. The Central Hudson test has not been used to determine whether a television commercial becomes an unprotected form of speech under the First Amendment, thus allowing liability based on negligence.

It is important to note that Justices Stevens and Brennan pointed out in their concurring opinion that the commercial speech concept not be defined too broadly lest speech deserving greater constitutional protection be inadvertently suppressed. Justice Stevens pointed out that the majority opinion had at

first described commercial speech as "expression related soley to the economic interest of the speaker and its audience." 447 U.S. at 2358. Stevens stated that this definition of commercial speech was unquestionably too broad and pointed out that the court had a second definition which was restricted to "speech proposing a commercial transaction." Justice Stevens then went on to state that it was too early to formulate the precise contours of the concept and that he was persuaded that it should not include the entire range of communication that is embraced within the term "promotional advertising." 447 U.S. at 582.

The other problem in applying the Central Hudson test to the case sub judice is that it does not set forth any basis upon which to distinguish a television commercial from a television program. Both the television commercial and the television program are used to sell something of value and to produce monetary gain.

Even if the lower court in this case followed Plaintiffs' theory of liability based on the Central Hudson decision, the Plaintiffs did not allege and could not show that the speech was either misleading or related to unlawful activity. The commercial simply shows an activity called "lake jumping." The commercial does not attempt to portray it as safe or as dangerous. The commercial simply shows the activity of "lake jumping." There is nothing misleading about the commercial, as alleged.

The Plaintiffs also cite the case of Weirum v. RKO General, Inc., 539 P.2d 36 (Cal. 1975) in support of their

position that the purported cause of action is not barred by the First Amendment. The court in Weirum upheld a jury finding that a Los Angeles rock radio station was liable for the wrongful death of a motorist killed by two teenagers participating in a contest sponsored by the station. The radio station raised the First Amendment as a bar to the action. Liability was imposed on the broadcaster because the broadcaster had urged listeners to act in an inherently dangerous manner. The decision must be understood in light of the particular facts of that case. In Weirum, the radio station's broadcast was designed to encourage its youthful listeners to be the first to arrive at a particular location. The broadcast actively and repeatedly encouraged listeners to unlawfully speed in their vehicles to announced locations.

Therefore, Weirum is inapplicable to the case sub judice since there is obviously no way to construe the Mountain Dew commercial as actively and directly urging listeners to act in an inherently dangerous manner. In fact, Plaintiffs' Amended Complaint only alleges that the commercial incited imitation, not that it directly requested or urged anyone to perform any act.

In their brief to the Eleventh Circuit Court of Appeals, Plaintiffs cited the recent district court case of Norwood v. Soldier of Fortune Magazine, Inc., 651 F.Supp. 1397 (W.D. Ark. 1987). In that case, the U.S. District Court denied a Motion for Summary Judgment on behalf of the publisher of a magazine that contained advertisements for mercenary services

entitled "GUN FOR HIRE." The plaintiff sought damages against the defendant publisher because of injuries suffered by him allegedly as a result of attempts by the individual defendants to injure or murder the plaintiff. The individual defendants were contacted through the ads placed in the magazine of the defendant publisher.

The defendant publisher and the plaintiff agreed that the sole question of the case was whether or not the advertisements were a clear and unambiguous solicitation to engage in an illegal transaction. The issue was based on the previously recognized exception to the First Amendment protection enunciated by the Supreme Court in Pittsburgh Press Company v. Pittsburgh Commission on Human Rights, supra.

Ignoring the arguments of both parties regarding the recognized test to be applied, the U.S. District Court attempted to fashion its own exception to First Amendment protection. The exception standard was supposedly related to the alleged "commercial speech" exception to the First Amendment. However, the district court did not cite or follow the Central Hudson, supra, case. The district court talked about a fiduciary duty owed when someone is exercising First Amendment rights and stated that an imposition of a duty of reasonable care would do no violence to the value of freedom of speech, (quoting from authors in 16 Am. Jur. 2d, Constitutional Law Section 506 at 343). At the end of its decision, the district court concluded that "a reasonable juror could find the advertisement such as those described above had a substantial probability of ultimately causing harm to some individual."

651 F.Supp. at 1403. Such a standard is unprecedented and does not consider problems that such a standard would raise. The court did not consider that First Amendment rights are accorded a preferred place in our society and that such a low standard would severely restrain freedom of speech.

The problems with allowing a cause of action based on negligence, which involves First Amendment freedom of speech, has been set forth in the cases previously cited. In addition, the Fifth Circuit Court of Appeals in Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987), cautioned against using a less stringent standard than the Brandenburg test in cases involving speech which has allegedly produced injury. That court stated:

> In the alternative, Herceg and Andy [Plaintiffs] suggest that a less stringent standard than the Brandenburg test be applied in cases involving non-political speech that has actually produced harm. Although political speech is at the core of the First Amendment, the Supreme Court generally has not attempted to differentiate between different categories of protected speech for the purposes of deciding how much constitutional protection is required. Such an endeavor would not only be hopelessly complicated but would raise substantial concern that the worthiness of speech might be judged by majoritarian notions of political and social propriety and morality. If the shield of the First Amendment can be eliminated by proving after publication that an article discussing a dangerous idea negligently helped bring about a real injury simply because the idea can be identified as "bad", all free speech becomes threatened. An article discussing the nature and danger of "crack" usage - or of hang-gliding - might led to liability just as easily. As is made clear in the Supreme Court's decision in Hess the

> "tendency to lead to violence" is not enough. Mere negligence, therefore, cannot form the basis of liability under the incitement doctrine any more than it can under libel doctrine.

814 F.2d at page 1024.

For the above reasons, the Plaintiffs have failed to establish that the Mountain Dew commercial falls within the only applicable and narrow exception to the protection of the First Amendment, namely, incitement under Brandenburg. The lower court was correct in concluding that Plaintiffs' cause of action is barred by the First Amendment and must be dismissed with prejudice.

B. PLAINTIFFS' FIRST AMENDED COMPLAINT FAILED TO SUFFICIENTLY ALLEGE ULTIMATE FACTS DEMONSTRATING THAT DEFENDANT'S ALLEGED BREACH OF DUTY PROXIMATELY CAUSED PLAINTIFF'S INJURIES.

In order for Pepsico to be held liable for the negligent injury of another, Plaintiffs had to allege ultimate facts showing that Defendant's alleged breach of duty proximately caused Plaintiff's injuries. Tuz v. Burmeister, 254 So.2d 569 (Fla. 1st DCA 1971) and Crosby v. Manly Construction Company, 193 So.2d 11 (Fla. 2d DCA 1967). Under Florida law, a plaintiff must allege ultimate facts showing a natural and continuous sequence of events between the alleged breach of duty and the alleged harm. Bryant v. School Board of Duval County, Florida, 399 So.2d 417 (Fla. 1st DCA 1981).

Plaintiffs alleged that Michael Sakon was "incited" by the Mountain Dew commercial. However, the First Amended Complaint did not actually state that Michael Sakon viewed the commercial in question. Further, Plaintiffs' First Amended

Complaitn did not indicate a time frame or sequence of events between the implied observation of the commercial and the injury. Without the allegation of ultimate fact showing causation between viewing the commercial in question and the alleged injury, Plaintiffs' First Amended Complaint failed to sufficiently allege proximate cause in fact.

CONCLUSION

If this Honorable Court decides to exercise its discretionary jurisdiction and answer the question certified, the court must hold that Florida law does not recognize a duty owed by a television advertiser to its targeted audience of young viewers when that advertiser has broadcast, without adequate warnings, a commercial depicting a dangerous activity in a manner likely to induce the young viewer to imitate the activity.

Alternatively, this court should decline to exercise its discretionary jurisdiction because the question certified would not be dispositive of the case, and, it should find that Florida law supports the district court's decision on one of the other issues decided by the district court, namely, foreseeability, proximate cause and/or freedom of speech.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief has been furnished by U.S. Mail to MICHAEL M. O'BRIEN, ESQ., and JAMES R. HOOPER, ESQ., 20 North Orange Avenue, Suite 1207, Orlando, Florida 32801; this 30th day of January, 1989.

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