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,

Appellants,

vs.

Case No. 73,258

PEPSICO, INC., a foreign corporation,

Appellee.

Upon Certified Question from the
United States Court of Appeals
for the Eleventh Circuit

INTIAL BRIEF OF APPELLANTS

Michael M. O'Brien, Esq.
James R. Hooper, Esq.
O'Brien and Hooper, P. A.
20 N. Orange Ave., Suite 1207
Orlando, FL 32801
(407) 849-0167

Attorneys for Appellants

TABLE OF CONTENTS

STATEMENT OF THE CASE AND FACTS

APPELLANTS, PLAINTIFFS below, (hereinafter referred to as Plaintiff) accept the statements of the facts and progress of this case as set out in the Opinion and Certification from the United States Court of Appeals for the Eleventh Circuit dated October 27, 1988:

Defendant-appellee PepsiCo, Inc. caused to be broadcast a commercial over network television to advertise its Mountain Dew soda. The use of the commercial was solely for the pecuniary gain of PepsiCo., Inc. The commercial portrayed young people riding their bicycles down a path and up a ramp, placed on an embankment over water, and landing their bicycles safely in the water ("Lake Jumping"), to the delight and encouragement of onlooking peers. PepsiCo, Inc. caused the commercial to be broadcast during times of the day, with upbeat music, and using young actors, all in an effort to attract and influence young people. PepsiCo, Inc. knew or should have known that young people would imitate the stunt. The commercial contained no warning that viewers should not attempt the stunt.

After watching the commercial, plaintiff-appellant Sakon, then a fourteen year-old boy, tried to perform the stunt by riding his bicycle over a ramp built on an embankment some ten to twelve feet above the water. The commercial induced Sakon to attempt the stunt. The water in the creek was only three feet deep. Sakon came over the handlebars and landed head first in the creek,

breaking his neck in the fall [and rendering him a quadriplegic].

The district court dismissed the plaintiffs-appellants' case finding that Florida did not recognize a duty owed by an advertiser to its targeted audience of young viewers to refrain from airing a commercial depicting a dangerous activity likely to be imitated by young viewers without providing any adequate warning.

In the interest of brevity, Plaintiff will focus, in this brief, on the issue certified by the United States Court of Appeals for the Eleventh Circuit, to wit: 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.

SUMMARY OF ARGUMENT

No new concept of tort law must be invented to hold that Florida tort law recognizes a duty owed by advertisers as set out in the question certified. Florida law already recognizes that a party may not conduct himself in a manner which will likely cause injuries to others. There is even a higher standard of care where the welfare of children is involved. In addition, the Federal Trade Commission (FTC), pursuant to its authority, has established a standard of conduct in advertising to children.

Plaintiffs contend that Defendant has breached this duty by failing to adhere to the standard set by the FTC and this failure is considered negligence. Plaintiffs properly stated a cause of action in their suit in federal court and the trial court's dismissal with prejudice was error and denied their right of access to court. This honorable Court should exercise its discretionary juridiction to answer the question certified and hold that, although a novel factual situation may be involved, the Florida law of torts recognizes a duty such as is described by the question certified.

ARGUMENT ON QUESTION CERTIFIED:

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.

At the outset, Plaintiff readily concedes that there is no statute or case law authority in Florida directly on point to the facts in the case at bar: specifically, a lawsuit brought by a minor, by and through a next friend, alleging a duty of a company who directs advertisements to young viewers when the advertisement causes the viewer to imitate a dangerous activity depicted in the advertisement resulting in injury to the young viewer.

Even though the particular factual scenario which exists in the instant case may be novel, Plaintiff submits that there is a recognized duty in the law of Florida in circumstances involving children and respectfully requests that this honorable Court exercise its discretionary juridiction to review the question certified and again hold that such a duty exists. Plaintiff emphasizes, and discusses further below, that merely because a cause of action can not be found in a prior case does not mean a cause of action does not exist; it merely means that no action has yet been filed or discussed in an appellate opinion.

Before any discussion of the facts in this brief, it should be remembered by the Court that this case is not a request for this

Court to expand or invent new legal concepts; rather, the issue before this Court is whether basic tort law, as it involves minors, also covers advertisements when the sole goal of the advertisement is to influence and motivate young children.

In most basic terms, the first element of actionable negligence is the existence of a duty owed by the alleged tort-feasor to the injured party. This duty has been defined in terms of a standard of conduct:

> [w]henever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary skill to avoid such danger.

Smith v. Hinkley, 98 Fla. 132, 137, 123 So. 564, 566 (1929). citation omitted. Negligence arising from the breach of that duty has been likewise defined as a failure to observe, for the protection of another's interest, such care and vigilance as the circumstances justly demand and the want of which caused the injury. Id.

It is clear under Florida law that when children are involved, the amount or quality of care owed is increased:

> Children are necessarily lacking in the knowledge of physical cause and effect which is usually acquired only through age and experience.

> They must be expected to act upon childish instincts and impulses, and must be presumed to have less ability to take care of themselves than adults have. Therefore, in cases where their safety is involved, more care is demanded than toward adults, and all persons who are chargeable with a duty of care and caution towards them must consider this and take precautions accordingly.

Bagdad Land & Lumber Co. v. Boyette, 104 Fla. 699, 704, 140 So. 798, 800 (1932) emphasis added. The public policy behind this increased standard is clear and logical. Obviously greater care is, and should be, afforded to those who require protection --- in this case, children.

The foreseeable danger which gives rise to a duty of care must be such as might reasonably have been expected by a person of ordinary prudence and of ordinary foresight. Stark v. Holtzclaw, 90 Fla. 207, 105 So. 330 (1925). Although not required to give rise to such a duty, one method of showing the existence of a duty is to show that one is required by a standard of law, statute, rule, or regulation to adhere to a certain standard of conduct. Failure to adhere to the standard of conduct can be evidence of negligence. Florida Freight Terminals, Inc. v. Cabanas, 354 So. 2d 1222, (Fla. 3rd DCA 1978), deJesus v. Seaboard Coast Line Railroad Company, 281 So. 2d 198 (Fla. 1973). The absence of reported incidents before the accident at hand does not mean that the danger that existed was not foreseeable. Weirum v. RKO General, 539 P.2d 36 (Cal. 1975).

The 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. §45(a)(1), (6) 1976. Although not formally acted upon here by the Federal Trade Commission (FTC), there existed a standard of conduct concerning methods of advertising to youngsters which the Defendant breached. The Defendant's failure to act in accordance with this standard was negligence and was the proximate cause of injury to the Plaintiff. The failure to adhere to this standard by the Defendant was evidence of negligence since the standard was designed to protect unfairness to children by prohibiting depictions in advertisements of activities which could be harmful if imitated by a child. This is because Plaintiff was a child in the protected class as recognized by various consent orders of the FTC.

The consent orders of the FTC discussed in this brief all illustrate that there are certain activities which, in an advertisement directed towards children, are dangerously misleading and likely to cause harm to children. Under its authority to identify and ban misleading and untruthful advertisements, the FTC has determined that advertisers have a duty not to depict behavior which has a tendency to induce or influence children to mimic or imitate activities which create an unreasonable risk of harm to themselves. Plaintiff in the case at bar is not asking this Court to invent any novel concept of liability. Instead, Plaintiff asks this Court to apply the well-reasoned and correct standards of care as the standards apply to children as regards to advertisements for pecuniary gain.

In In re: Uncle Ben's, Inc., 89 FTC 131 (1977), the

FTC ordered a company to discontinue its advertisement depicting unsupervised children cooking rice. This commercial was considered to be dangerous because children were engaging in activity in an area where foods were in the process of being cooked and it was reasonably foreseeable that the repetition of the commercial would have a tendency or capacity to influence children to imitate the activity in the commercial and, thus, create an unreasonable risk of harm to themselves by cooking without proper supervision.

In In re: General Foods Corp., 86 FTC 831 (1975), the FTC banned an advertisement depicting a character (Euell Gibbons) gathering wild berries to put in his breakfast cereal. The FTC ruled that the commercial had a tendency or capacity to influence children to eat wild plants or their parts. Finding that children typically do not have sufficient knowledge regarding the selection of wild berries, the advertisement was found to have the capacity to encourage children to duplicate this behavior and harm themselves by choosing to eat harmful wild plants. The commercial was misleading by specifically representing that a plant was edible in its natural state.

The FTC has also had an opportunity to comment specifically on an advertisement involving the use of young actors riding bicycles. In In re: AMF, Inc., 95 FTC 310 (1980), an advertisement depicting children riding bicycles in an unsafe manner, specifically by blindly darting out onto streets where there was vehicular traffic, was banned. The FTC prohibited AMF from using the bicycles in this manner in advertisements geared to immature audiences because of the inherent dangers of children operating

bicycles as shown. In other words, AMF had a duty in advertising its product not to depict behavior which had a tendency to induce or influence children to operate their bicyles in a manner which created an unreasonable risk of harm to themselves.

Plaintiff submits that PepsiCo had a similar duty to the general public and to children and Plaintiff Michael Sakon in particular not to advertise its product in a manner which contained depictions of dangerous bicycle stunts, which depictions were misleading and showed the activity as safe and desirable when, in fact, the activity of lake jumping is dangerous and poses a grave risk of bodily harm to children who are led to imitate the stunt. The possibility and probability that one or more of the advertisement's immature viewers would attempt to duplicate the stunt at grave risk of harm was reasonably foreseeable to Pepsico, a veteran advertiser and well aware of FTC standards. If advertisements depicting unsupervised rice-cooking and berry-eating and depicting young bicyles riders failing to follow bicycle operation rules are dangerously misleading to immature viewers who might imitate the activity and harm themselves, how much more dangerously misleading is an advertisement where children are not only not following proper bicycle operation rules but are in fact jumping their bicycles over ramps into bodies of water?

The absence of FTC involvement with this particular commercial does not mean that it was not dangerously misleading and likely to invite imitation and cause harm. Nor does it preclude it from being considered evidence of negligence in a private tort action. For example, is non-compliance with traffic regulations concerning

automobile brake lights not to be considered evidence of negligence in a civil proceeding simply because a police officer had not ticketed the errant driver or set out to prosecute him for the violation before an accident? Certainly not. Defendant's failure to conduct itself according to the standard of care as established by the FTC is simply negligent and Defendant is not absolved of responsibility simply because the FTC had not become involved with this particular commercial.

In Florida Freight Terminal, Inc. v. Cabanas, supra, the trial court was reversed as it erred by refusing to instruct the jury that the violation of applicable FAA regulations was negligence per se. The Supreme Court of Florida in the case of deJesus, supra, exlained that violation of a statute specifically adopted for establishing a stricter duty of care is negligence per se, while violations of other statutes may be either negligence per se or evidence of negligence. The concept of evidence of negligence has been applied to not only statutes, but to safety rules of the Association of American Railroads, and provisions of the South Florida Building Code. St. Louis-San Francisco Railway Company v. Burlison, 262 So. 2d 280 (Fla. 1st DCA 1972), Grand Union Company v. Rocker, 454 So. 2d 14 (Fla. 3rd DCA 1984) Plaintiff submits that the violation of standard set by the FTC in its authority under 15 U.S.C. §45(a)(1), (6) in the case at bar is evidence of negligence and the trial court's dismissal was, therefore, error.

Additionally, Plaintiff submits that because this factual scenario is novel in the state of Florida, it does not

mean that no duty under Florida law exists for this Defendant. This would be clearly incorrect. Under Florida tort law there need not be a specific tort already defined. Instead,

> [a] party may not conduct himself in a manner which will likely cause injuries to others; and if he does so and injury results, then his conduct will be classed as negligence.

Brady v. Kane 111 So. 2d 472, 474 (Fla. 3rd DCA 1959). The foreseeability of the danger that might befall a person if the standard of care is not adhered to is a question for a jury. Nance v. Winn Dixie Stores, Inc., 436 So. 2d 1075 (Fla. 3rd DCA 1983) In Weirum, supra, which involved a radio broadcasters' liability for conducting a dangerous contest, the California Supreme Court analyzed the concept of duty and found that, according to Prosser, although a determination of duty is a matter of law, the question of foreseeability of risk is a primary consideration in establishing duty and foreseeability is a question of fact for the jury. ~~see also~~ Nance v. Winn Dixie Stores, Inc. Because of the existence of well-known FTC standards, it was foreseeable and Defendant was on notice that commercials directed towards immature viewers depicting youngsters performing dangerous activities and in such a manner as to invite or incite imitation were likely to cause injury to the immature viewers the standards are designed to protect. Thus, the conduct of the Defendant in this regard fell below the existing standard and, under the principles of negligence law in the State of Florida, Defendant's breach of this duty was the proximate cause of the injury to Plaintiff

Michael Sakon. The trial court's dismissal with prejudice prohibited Plaintiffs from having their day in court.

Finally, Plaintiff wants to distinguish between advertisements for pecuniary gain and broadcasts for entertainment value. This case does involve a commercial for pecuniary gain. It does not involve a broadcast for entertainment value. To hold an advertiser responsible for its advertisements in no way would affect broadcasts for entertainment value. Any argument or analogies by Defendant that this is a case involving broadcasts for entertainment value is a "red herring" and should not be considered.

As stated above, the dismissal with prejudice by the trial court denied Plaintiffs the right to have the jury decide whether there exists a duty of this advertiser to this young boy when the advertisement in question was undoubtedly the type of commercial which foreseebly would cause children to imitate the dangerous activities depicted therein to their detriment a with a risk of grave bodily harm. Consequently, Plaintiffs were denied their right of access to court for the redress of this injury guaranteed by Art. 1, §21 of the Florida Constitution. Plaintiffs urge this honorable Court to answer the question certified and hold that there does exist a duty in Florida as claimed by Plaintiffs.

CONCLUSION

This honorable Court should exercise its discretionary jurisdiction to respond to the question certified and hold that Florida law does indeed provide that advertisers such as the Defendant in the case at bar have a duty towards their targeted audiences of young viewers not to broadcast commercials depicting dangerous activities in a manner likely to induce a young viewer to imitate the activity. This is because Florida law has long recognized a special standard for children.

Respectfully submitted,

Michael M. O'Brien, Esq.
O'Brien and Hooper, P.A.
20 N. Orange Ave., Suite 1207
Orlando, FL 32801
(407) 849-0167

Attorney for Plaintiffs

James B. Hooper, Esq.
O'Brien and Hooper, P.A.
20 N. Orange Ave., Suite 1207
Orlando, FL 32801
(407) 849-0167

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF OF APPELLANTS has been furnished by regular U.S. Mail this 16 day of December, 1988 to: Jennings L. Hurt, Esq. and Richard S. Womble, Esq. 701 E. South St., Orlando, FL 32801.

Michael M. O'Brien, Esq.
O'Brien and Hooper, P.A.
20 N. Orange Ave., Suite 1207
Orlando, FL 32801
(407) 849-0167

Attorney for Appellants

James R. Hopper, Esq.
O'Brien and Hooper, P.A.
20 N. Orange Ave., Suite 1207
Orlando, FL 32801
(407)00 849-1067

Attorney for Appellants