

IN THE SUPREME COURT OF FLORIDA

MICHAEL SAKON, by and through his
natural mother and Next Friend,
parent and natural guardian,
GLEND A DRAGOVICH and GLEND A
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

REPLY 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

	PAGE(S)
TABLE OF CITATIONS	ii
REPLY TO ARGUMENT	1-3
CERTIFICATE OF SERVICE	4

TABLE OF CITATIONS

	PAGE(S)
<u>IN RE.: GENERAL FOODS CORP.</u> 86 FTC 831 (1975)	3
<u>NANCE V. WINN DIXIE STORES, INC.</u> 436 So. 2d 1075 (Fla. 3rd DCA 1983)	1
<u>WEIRUM V. RKO GENERAL, INC.,</u> 539 P. 2d 36 (Cal. 1975)	1

REPLY TO ARGUMENT

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.

Pepsico urges this Court not to answer the question certified because an answer would not be "dispositive". (Appellee's brief at page 23) Pepsico states that even were this Court to answer the certified question affirmatively, it would not be dispositive of the case since other findings (foreseeability, proximate cause, First Amendment protection) would be required to determine if Plaintiff had sufficiently pled a cause of action.

Plaintiff submits that this Court needs to answer this question and confirm that Florida recognizes the duty to immature audiences. Contrary to assertions made by Pepsico, this would be dispositive of this case because Plaintiff has pled (or can sufficiently plead with amendment) the other elements of his cause of action and can show that his claim is not barred by the First Amendment.

First, Plaintiff does not, as Pepsico claims, assert that the question of duty is not a matter of law. Rather, Plaintiff asserts that while duty may be a question of law, the determination of duty involves a determination of foreseeability and foreseeability is a question of fact for a jury to decide. Nance v. Winn Dixie Stores, Inc., 436 So. 2d 1075 (Fla. 3rd DCA 1983), Weirum v. RKO General, 539 P. 2d 36 (Cal. 1975) By dismissing Plaintiff's complaint with

prejudice, the trial court has prevented any factual determination by a jury. Regarding Plaintiff's alleged failure to sufficiently plead proximate cause or other elements of a cause of action, Plaintiff was likewise denied the opportunity to amend his claim because of the dismissal with prejudice.

As discussed in Plaintiff's briefs before the federal trial and appellate courts, Plaintiff's cause of action is not barred by the First Amendment. Plaintiff does not seek to ban or restrain in any way Pepsico's right to air its advertisements. Plaintiff does seek to hold Pepsico responsible for the foreseeable consequences of its actions.

The issue of Plaintiff's age is clearly irrelevant at this stage, on a motion to dismiss, and in any event would only go to the weight of the evidence at trial or, perhaps, be raised in a summary judgment proceeding. Likewise, the element of control that Pepsico asserts is necessary is clearly not applicable since there is a demonstrated "special relationship" between advertisers and the immature audiences to which they direct their advertising as evidenced by the standards set by the FTC and its actions of banning dangerously misleading advertisements.


At Page 11 of the Appellee's brief, various assertions are made about the FTC's activities. No case law has been cited by Appellee to support these statements. Plaintiff disagrees with Pepsico's assertion that the FTC sets no standards. The very act of seeking out deceptive advertising and banning it sets a standard by which advertisers sell their products. Advertisers become aware of the dangerous effects of their marketing techniques and know they

will not be allowed to air deceptively misleading advertisements. Also, contrary to Pepsico's assertions, the problems with the advertisements may relate not only to the use of the product itself, but to other activities portrayed in the commercial i.e. the eating of wild berries (not the eating of Grape Nuts cereal). In Re.: General Foods Corp. 86 FTC 831 (1975)

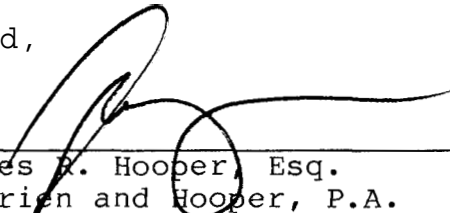
Pepsico complains that allowing Plaintiff's claim would cause a "sanitization" of television. If the FTC's banning of advertisements does not cause television to be "sanitized", It is difficult to see how the mere act of holding an advertiser responsible in tort for an advertisement could cause such an effect.

Plaintiff does not claim to have a private right of action as under the FTC's statutory authority. Plaintiff does not desire to have the advertisement banned. The thrust of Plaintiff's claim is that in Florida there exists a standard in advertising that Pepsico breached. Plaintiff seeks to have Pepsico held responsible for its actions in tort because its breach of duty in its advertising was negligent. Plaintiff submits that he had pled a cause of action in tort for this negligence and respectfully requests this honorable Court answer the question certified in the affirmative.

Respectfully submitted,



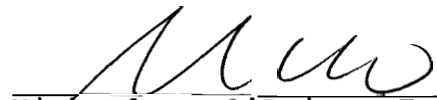
Michael M. O'Brien, Esq.
O'Brien and Hooper, P.A.
20 N. Orange Ave., Suite 1207
Orlando, FL 32801
(407) 849-0167
Attorney for Plaintiff



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

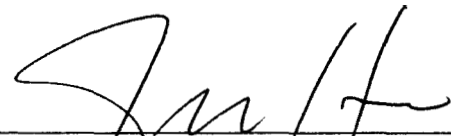
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the fore-
going REPLY BRIEF OF APPELLANTS has been furnished by regular
U.S. Mail this 20 day of February, 1989 to: Jennings L. Hurt,
Esq. and Peter J. Zinaich, Southeast Bank Building, 15th floor,
201 E. Pine 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. Hooper, Esq.
O'Brien and Hooper, P.A.
20 N. Orange Ave., Suite 1207
Orlando, FL 32801
(407) 00 849-1067

Attorney for Appellants