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The Mountain Dew Decision is Hard to Swallow: Sakon v. Pepsico, Inc.

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THE MOUNTAIN DEW DECISION IS HARD TO SWALLOW: *SAKON V. PEPSICO, INC.*

I. INTRODUCTION

In 1985, Pepsico, Incorporated broadcast a commercial targeted at young people on network television to advertise its product, Mountain Dew soft drink.[1] The commercial showed young people riding bicycles off an embankment and landing the bicycles in a body of water without injury.[2] This was done to the encouragement and delight of their peers.[3] The Mountain Dew commercial did not contain a warning that such lake jumping was dangerous or that viewers should not attempt it.[4]

After watching the commercial, Michael Sakon, then fourteen years old, tried to perform the stunt by riding his bicycle off an embankment and into a creek.[5] Instead of landing safely, however, Michael flew over the handlebars, landed head first in the creek, broke his neck[6] and was rendered a quadriplegic.[7]

Michael Sakon[8] and his mother, Glenda Dragovich, filed a tort action against Pepsico in Florida state court,[9] claiming that the corporation had "negligently portrayed the lake jumping activity as safe and [had] failed to warn the targeted audience of immature viewers of the dangers inherent in the activity."[10] Sakon further alleged that "the commercial incited and invited the young Plaintiff not only to purchase the advertised product, but to imitate the activities depicted therein."[11] Based on diversity jurisdiction, Pepsico removed the case to the United States District Court for the Middle District of Florida.[12]

At trial, moving to dismiss for failure to state a claim on which relief

1. Sakon v. Pepsico, Inc., 553 So. 2d 163, 164, 1989 Fla. LEXIS 1181, 2 (Fla. 1989).

2. *Id.* at 164, 1989 Fla. LEXIS at 2. The Florida Supreme Court accepted the Eleventh Circuit's statement of the alleged facts.

3. *Id.*

4. *Id.*

5. *Id.*

6. Sakon v. Pepsico, Inc., 553 So. 2d 163, 164, 1989 Fla. LEXIS 1181, 3 (Fla. 1989).

7. Initial Brief of Appellants in the Supreme Court of Florida at 2, Sakon v. Pepsico, Inc., 553 So. 2d 163, 1989 Fla. LEXIS 1181 (No. 73,258) (Fla. 1989).

8. By and through his natural mother and natural guardian, Glenda Dragovich. Sakon v. Pepsico, Inc., No. 88-3207, slip op. at 1 (11th Cir. Oct. 27, 1988).

9. *Sakon*, 553 So. 2d at 164, 1989 Fla. LEXIS at 1.

10. Initial Brief of Appellants in the United States Eleventh Circuit Court of Appeals at 4-5, Sakon v. Pepsico, Inc., 553 So. 2d 163, 1989 Fla. LEXIS 1181 (No. 88-3207) (Fla. 1989).

11. *Id.*

12. Sakon v. Pepsico, Inc., 553 So. 2d 163, 164, 1989 Fla. LEXIS 1181, 2-3 (Fla. 1989).

could be granted,[13] Pepsico argued that the cause of action was barred by the first amendment to the United States Constitution and that Sakon's "complaint fail[ed] to allege a legal duty owed by defendant to Michael Sakon, a breach of that duty and that any such breach was a proximate or contributing cause to the accident and injury."[14] In granting Pepsico's motion to dismiss, the trial court held that the suit was barred by the first amendment[15] and that Pepsico had no duty to warn.[16] The court also held that Sakon had not alleged that Pepsico breached a duty owed to him.[17] Sakon then amended his complaint to assert that "the Federal Trade Commission ("FTC") has recognized a duty of advertisers to avoid advertisements which would have a tendency to influence children to engage in harmful activities, and that FTC has the obligation to set the standards of duty owed by advertisers."[18]

Pepsico moved to dismiss the amended complaint.[19] When the district court dismissed the amended complaint with prejudice,[20] Sakon appealed the decision on the grounds that the court had abused its discretion.[21] The Florida Supreme Court answered the following certified question of law from the United States Court of Appeals for the Eleventh Circuit:

> [w]hether 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.[22]

In *Sakon v. Pepsico, Inc.*,[23] the Supreme Court of Florida held that the first amendment did not preclude Pepsico's liability and that under the facts of the case, Pepsico could not be held legally liable.[24] The court concluded that Pepsico had not breached a duty and that the fourteen-year-old boy's accident was not a foreseeable result of Pepsico's adver-

13. *Id.*

14. Sakon v. Mountain Dew, No. 86-483, slip op. at 2-4 (M.D. Fla. March 5, 1987).

15. *Id.* at 4.

16. *Id.* at 7.

17. *Id.*

18. Sakon v. Pepsico, Inc., No. 86-483, slip op. at 1 (M.D. Fla. Feb. 26, 1988).

19. *Id.* Pepsico subsequently filed a motion for summary judgment.

20. *Id.* at 2.

21. Initial Brief of Appellants in the Eleventh Circuit Court of Appeals at 5, Sakon v. Pepsico, Inc., (No. 88-3207).

22. *Sakon*, 553 So. 2d at 164, 1989 Fla. LEXIS at 1 (quoting *Sakon*, slip op. at 5); FLA. CONST., art. V, § 3(b)(6) gave the court jurisdiction to answer the certified question.

23. Sakon v. Pepsico, Inc., 553 So. 2d 163, 1989 Fla. LEXIS 1181 (Fla. 1989).

24. *Id.* at 166, 1989 Fla. LEXIS at 7.

tisement.[25] In reaching its decision, the Florida court stated that no previous decision in the United States has imposed liability under facts analogous to those in *Sakon*.[26] However, in *Weirum v. RKO General, Inc.*,[27] the California Supreme Court imposed liability on a radio station for a wrongful death proximately caused by a broadcast which created an undue risk of harm to the decedent.[28]

This note examines the *Sakon* decision in light of *Weirum* and finds its reasoning flawed, policy rationale unsound and conclusion incorrect. As this note will show, the Florida Supreme Court has, in effect, granted broadcast advertisers a license to air commercials in Florida that may create an unreasonable risk of harm to young viewers. Network advertisers must be aware, however, that immunity in Florida will not shield them from liability for negligence in California and other states. This note also suggests that broadcast advertisers do not need special protection; children do. Sound policy rationale suggests that courts should hold broadcast advertisers to the general duty not to create an unreasonable risk of harm to their young viewers and to a duty to warn when an advertiser airs "a commercial depicting a dangerous activity in a manner likely to induce a young viewer to imitate the activity."[29]

II. THE *SAKON* COURT'S DECISION

A. Holding Of The Court

The Supreme Court of Florida held that the first amendment did not preclude Pepsico's liabilty and that under the facts of the case, Pepsico could not be held legally liable.[30] The court concluded that Pepsico had not breached a duty and that the fourteen-year-old boy's accident was not a foreseeable result of Pepsico's advertisement.[31] The court remanded the case to the United States Court of Appeals for the Eleventh Circuit for disposition of the matter.[32]

B. Reasoning Of The Court

1. The First Amendment Did Not Preclude Liability

The Supreme Court of Florida first addressed Pepsico's contention

25. *Id.*, 1989 Fla. LEXIS at 8.
26. *Id.*, 1989 Fla. LEXIS at 9.
27. Weirum v. RKO General, Inc., 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975).
28. *Id.* at 51, 539 P.2d at 42.
29. *Sakon*, 553 So. 2d at 164, 1989 Fla. LEXIS at 1.
30. *Id.* at 166, 1989 Fla. LEXIS at 8.
31. *Id.*
32. *Id.* at 167, 1989 Fla. LEXIS at 12.

that the Mountain Dew advertisement was protected by the free speech clause of the first amendment.[33] Pepsico argued that the free speech clause fully protected the advertisement because it did not fall into any of the seven recognized exceptions to the first amendment.[34] The company claimed that commercial speech is not distinguished from other protected forms of speech under the first amendment,[35] and that except for the seven exceptions, all televised material is protected.[36] Based upon these arguments, Pepsico urged the court to avoid involving itself in a fruitless analysis of the content of all commercial and noncommercial television broadcasts, and to decline to recognize a cause of action in this case.[37]

The court, however, found Pepsico's first amendment arguments "contrary to controlling case law"[38] and unpersuasive.[39] The court stated that the advertisement is not fully protected by the free speech clause.[40] The court noted that although the United States Supreme Court recognized in *Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council,*[41] that the first amendment affords a degree of protection to commercial speech,[42] it did not eliminate the "commonsense" distinction between commercial and noncommercial speech.[43] As the Supreme Court made clear in *Ohralik v. Ohio State Bar Ass'n,*[44] it gave the former only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values

33. *Id.* at 166, 1989 Fla. LEXIS at 3.

34. *Sakon*, 553 So. 2d at 164-65, 1989 Fla. LEXIS at 3. The seven unprotected areas that Pepsico referred to are (1) obscene material, *see* Miller v. California, 413 U.S. 15 (1973); (2) fighting words, *see* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); (3) defamation, *see* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); (4) invasion of privacy, *see* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); (5) disruption of the classroom, *see* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); (6) incitement of imminent lawless activity, *see* Brandenburg v. Ohio, 395 U.S. 444 (1969); and (7) solicitation of illegal activity, *see* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

35. Sakon v. Pepsico, Inc., 553 So. 2d 163, 165, 1989 Fla. LEXIS 1181, 4 (Fla. 1989).

36. *Id.*

37. *Id.*

38. *Id.* at 164-65, 1989 Fla. LEXIS at 5.

39. *Sakon*, 553 So. 2d at 166, 1989 Fla. LEXIS at 7.

40. Sakon v. Pepsico, Inc., 553 So. 2d 163, 165, 1989 Fla. LEXIS 1181, 6 (Fla. 1989).

41. Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council, 425 U.S. 748 (1976).

42. *Sakon*, 553 So. 2d at 165, 1989 Fla. LEXIS at 6.

43. *Id.* (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978)).

44. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

. . . ."[45] Therefore, the Florida court ruled that it did not have to analyze the content of noncommercial television.[46] Using "common sense,"[47] it could easily differentiate between commercial advertisements and entertainment and news programs.[48] The court, therefore, found itself free to address the certified question.

2. The Certified Question of Law

After deciding that the first amendment did not preclude Pepsico's liabilty, the Florida court addressed the certified question of

> [w]hether 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.[49]

In answering the certified question of law, the Supreme Court of Florida adopted the district court's reasoning.[50]

a. The District Court's Reasoning

In order to establish a cause of action based on negligence, the district court noted, Sakon was required to state the following elements:

> (1) a duty or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risk[;]
> (2) a failure on his part to conform to the standard required;
> (3) a reasonable close causal connection between the conduct and the resulting injury;
> (4) active loss or damage resulting to the interest of another.[51]

The district court found that Pepsico owed no duty to Sakon.[52] The court stated that there must be a limit on the types of injuries for which one must compensate another[53] and that holding that Sakon had a cause of action "would provide no standard for the television industry to fol-

45. Sakon v. Pepsico, Inc., 553 So. 2d 163, 165-66, 1989 Fla. LEXIS 1181, 6-7 (Fla. 1989) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978)).

46. *Sakon*, 553 So. 2d at 165, 1989 Fla. LEXIS at 7.

47. *Id.* at 166, 1989 Fla. LEXIS at 7.

48. *Id.*

49. Sakon v. Pepsico, Inc., 553 So. 2d 163, 166, 1989 Fla. LEXIS 1181, 7 (Fla. 1989).

50. *Id.*, 1989 Fla. LEXIS at 9.

51. Sakon v. Mountain Dew, No. 86-488, slip op. at 4 (M.D. Fla. March 5, 1987) (quoting Simon v. Tampa Electric Co., 202 So. 2d 209, 213 (D.C.A. Fla. 1967)).

52. *Sakon*, 553 So. 2d at 167, 1989 Fla. LEXIS at 12 (quoting *Sakon*, slip op. at 6).

53. *Id.* at 167, 1989 Fla. LEXIS at 11 (quoting *Sakon*, slip op. at 6).

low."[54] In response to Sakon's allegation that Pepsico had a duty to warn viewers of the danger of attempting to lake jump,[55] the court asked what warning would suffice to prevent liability.[56] It noted that a warning could be required to specify the depth of the water.[57] If it were too deep, the actor might drown.[58] If it were too shallow, the jumper might hit the bottom.[59] A warning could be required to state the necessity for knowing how to swim or to include instructions in how to prevent the bicycle from injuring the jumper.[60] The court asserted that it "should not undertake to identify or set the standards to be followed by commercials of this nature."[61]

To establish Pepsico's liability, the court must find that Pepsico's action was the proximate cause of Sakon's injuries as a matter of law.[62] According to the court, "[p]roximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred."[63] The court found it no more reasonably foreseeable that Michael Sakon would try to lake jump and be injured than that an observer would attempt to imitate circus actors performing high wire or trapeze acts on television.[64] The court noted that Sakon did not claim that the advertisement suggested that viewers attempt to lake jump.[65] Analogizing the Mountain Dew commercial to ski resort and water skiing advertisements,[66] the court stated that the danger of injury exists for the inexperienced who attempt the sports, but questioned whether the advertiser's failure to warn constituted a breach of duty to the viewer.[67] The court concluded that Sakon had no cause of action for negligence because Pepsico did not have a duty to warn and Sakon had

54. Sakon v. Pepsico, Inc., 553 So. 2d 163, 167, 1989 Fla. LEXIS 1181, 11 (Fla. 1989) (quoting *Sakon*, slip op. at 6) (quoting Zamora v. Columbia Broadcasting System, 480 F. Supp. 199, 202 (S.D. Fla. 1979)).

55. *Id.* (quoting *Sakon*, slip op. at 6).

56. *Id.*

57. *Id.*

58. *Sakon*, 553 So. 2d at 167, 1989 Fla. LEXIS at 11.

59. Sakon v. Pepsico, Inc., 553 So. 2d 163, 167, 1989 Fla. LEXIS 1181, 11 (Fla. 1989).

60. *Id.* (quoting *Sakon*, slip op. at 6).

61. *Id.*

62. *Id.*, 1989 Fla. LEXIS at 10 (citing Sakon v. Mountain Dew, No. 86-488 slip op. at 5-7 (M.D. Fla. March 5, 1987)).

63. *Sakon*, 553 So. 2d at 167, 1989 Fla. LEXIS at 10 (quoting Bryant v. School Board of Duval County, Florida, 399 So. 2d 417, 420 (D.C.A. Fla. 1981)).

64. *Sakon*, 553 So. 2d at 167, 1989 Fla. LEXIS at 10 (quoting *Sakon* slip op. at 5).

65. *Id.*, 1989 Fla. LEXIS at 11.

66. *Id.*, 1989 Fla. LEXIS at 12.

67. *Id.* (quoting *Sakon*, slip op. at 6).

not alleged a breach of duty owed to him.[68]

2. The Supreme Court of Florida's Reasoning

The Supreme Court of Florida, upon finding that "Pepsico breached no duty, and Sakon's accident was not the foreseeable consequence of Pepsico's advertisement,"[69] concluded that "under the facts alleged in this case, Pepsico cannot be held legally liable."[70] The court reasoned that "Pepsico's commercial ha[d] done nothing more than portray young people engaged in a sporting activity which can be dangerous if not done by skilled persons under proper conditions."[71] The court found that Mountain Dew "had nothing to do with the activity"[72] and that the commercial was directed toward encouraging viewers to drink the soda and not "to undertake the sport."[73]

The court stated that the doctrine of proximate cause is based on policy decisions which include "the practical need to draw the line somewhere so that liability will not crush those on whom it is put . . ."[74] and the need to set rules that are both feasible to execute and certain in their results.[75] The court expressed concern that holding Pepsico liable would subject broadcasters and advertisers to liability when children imitated acts of violence which they saw on television.[76] The court also contended that there would be no standard to measure liability.[77]

The Florida court asserted that "[t]here is no decision in the United States which has imposed liability under facts analogous to those in the instant case."[78] The court stated that the cases Sakon had cited were Federal Trade Commission consent orders which did not establish a legal standard of duty or legal precedent.[79] The court further distinguished the cases, noting they "involved alleged advertising problems which were

68. Sakon v. Pepsico, Inc., 553 So. 2d 163, 167, 1989 Fla. LEXIS 1181, 12 (Fla. 1989) (quoting *Sakon*, slip op. at 7).

69. *Sakon*, 553 So. 2d at 166, 1989 Fla. LEXIS at 8.

70. *Id.*

71. *Id.*

72. *Id.*

73. Sakon v. Pepsico, Inc., 553 So. 2d 163, 166, 1989 Fla. LEXIS 1181, 8 (Fla. 1989).

74. *Sakon*, 553 So. 2d at 166, 1989 Fla. LEXIS at 9 (quoting 4 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 20.4, 131-32 (2d ed. 1986)).

75. *Id.*

76. *Id.*, 1989 Fla. LEXIS at 8.

77. *Id. See* Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199 (S.D.Fla. 1979) (rejecting claim that minor plaintiff developed a sociopathic personality by watching violence on television).

78. Sakon v. Pepsico, Inc., 553 So. 2d 163, 166, 1989 Fla. LEXIS 1181, 9 (Fla. 1989).

79. *Id.*

directly related to the *use* of the products themselves."[80] The court then concluded that "[t]he Pepsico commercial cannot be deemed to constitute false, misleading, or deceptive advertising so as to fall within the scope of the Florida laws on deceptive and unfair trade practices."[81]

III. CONTRARY PRECEDENT: *WEIRUM V. RKO GENERAL, INC.*

The Supreme Court of Florida asserted that no decision in the United States had imposed liability under facts analogous to those in *Sakon.*[82] This assertion is inaccurate. In *Weirum v. RKO General, Inc.,*[83] the Supreme Court of California imposed liability on a radio station for a wrongful death proximately caused by a broadcast which created an undue risk of harm to the decedent.[84] Sakon's attorney had cited *Weirum*.[85] Pepsico's attorney had tried to distinguish it.[86] Nevertheless, the Supreme Court of Florida ignored it although the court itself had previously cited *Weirum* in *Griffin v. State of Florida.*[87]

In *Weirum,* KHJ, a Los Angeles radio station with a large teenage audience, initiated a contest in which the first listener who reached the radio station's traveling disc jockey won a prize.[88] The purpose of the contest was to increase advertising revenue by making the station "more exciting;"[89] thus, attracting a larger audience.[90] The station broadcast the disc jockey's various locations.[91]

While pursuing the disc jockey in their cars, two teenagers tried to outmaneuver one another.[92] One of them forced the decedent Weirum's

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80. *Id.* (emphasis in original).

81. *Id.*

82. *Id.*

83. Weirum v. RKO General, Inc., 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975).

84. *Weirum*, 15 Cal. 3d at 51, 539 P.2d at 42. It seems remarkable that the Florida Supreme Court omitted any reference to *Weirum*. Sakon's attorney had relied on the case. Initial Brief of Appellants in the Supreme Court of Florida at 15-16, Sakon v. Pepsico, Inc., 553 So. 2d 163, 1989 Fla. LEXIS 1181 (No. 73,258) (Fla. 1989). Also, the Florida Supreme Court itself had cited *Weirum* in Griffin v. State of Florida, 414 So. 2d 1025, 1028 (1982), in support of their opinion that a judge had acted properly when he recalled the jury for previously omitted instructions four hours after it had begun deliberating.

85. Initial Brief for Appellants in the Supreme Court of Florida at 15-16, Sakon v. Pepsico, Inc., 553 So. 2d 163, 1989 Fla. LEXIS 1181 (No. 73,258) (Fla. 1989).

86. Answer Brief of Appellee in the Supreme Court of Florida at 34-35, Sakon v. Pepsico, Inc., 553 So. 2d 163, 1989 Fla. LEXIS 1181 (No. 73,258) (Fla. 1989).

87. Griffin v. State of Florida, 414 So. 2d 1025, 1028 (Fla. 1982). *See supra* note 84.

88. Weirum v. RKO General, Inc., 15 Cal. 3d 40, 539 P.2d 36, 37, 123 Cal. Rptr. 468 (1975).

89. *Id.* at 44.

90. *Id.*

91. *Id.*

92. *Id.* at 45.

car off the highway, killing him.[93] In a suit filed by the decedent's surviving wife and children, the jury reached a verdict against KHJ and one of the teenagers for $300,000.[94] KHJ appealed.[95]

In contrast to the Supreme Court of Florida's decision in *Sakon,* the Supreme Court of California held that the broadcaster owed the victim a duty of due care.[96] It noted that while the question of duty must be decided on a case-by-case basis,[97] every case is controlled by the general rule that "all persons are required to use ordinary care to prevent others from being injured as a result of their conduct."[98] In concluding that KHJ had created an unreasonable risk of harm to the victim,[99] the court stated that "[r]eckless conduct by youthful contestants, stimulated by the radio station's broadcast, constituted the hazard to which decedent was exposed."[100]

The California court noted that foreseeability of the risk must be considered in establishing duty,[101] but "[w]hile duty is a question of law, foreseeability is a question of fact for the jury."[102] The court's "review of the jury's finding was limited to the determination whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury."[103]

The Supreme Court of California concluded "that the record amply supports the finding of foreseeability."[104] Noting that the contest had been aired during the middle of summer when youths were out of school and responsive to relief from vacation boredom,[105] the court found it foreseeable that the radio station's young listeners, attracted by the

93. Weirum v. RKO General, Inc., 15 Cal. 3d 40, 45, 539 P.2d 36, 39, 123 Cal. Rptr. 468 (1975).

94. *Id.*

95. *Id.* KHJ appealed from the judgment and from an order denying its motion notwithstanding the verdict. *Id.*

96. *Id.* at 46, 49, *Sakon,* 553 So. 2d at 164.

97. *Id.* at 46.

98. Weirum v. RKO General, Inc., 15 Cal. 3d 40, 46, 539 P.2d 36, 41, 123 Cal. Rptr. 468 (1975) (citing Hilyar v. Union Ice Co., 48 Cal. 2d 30, 36, 286 P.2d 21 (1955)).

99. Weirum v. RKO General, Inc., 15 Cal. 3d 40, 47, 539 P.2d 36, 41, 123 Cal. Rptr. 468 (1975).

100. *Id.* at 47.

101. *Id.* at 46 (citing Dillon v. Legg, 68 Cal. 2d 728, 739, 441 P.2d 912, 69 Cal. Rptr. 72 (1968)).

102. Weirum v. RKO General, Inc., 15 Cal. 3d 40, 46, 539 P.2d 36, 40, 123 Cal. Rptr. 468 (1975) (citing Wright v. Arcade School Dist., 230 Cal. App. 2d 272, 277, 40 Cal. Rptr. 812 (1964)).

103. *Weirum,* 15 Cal. 3d at 46, 539 P.2d at 40.

104. *Id.*

105. *Id.*

money and a little, brief notoriety,[106] would ignore highway safety and race to win the prize.[107]

The court stated that "[l]iability is imposed only if the risk of harm resulting from the act is deemed unreasonable—[that is,] if the gravity and likelihood of the danger outweigh the utility of the conduct involved."[108] Using this balancing test, the court decided that the risk of death or serious injury as a result of a high speed car chase outweighed the commercial rewards or entertainment value of the contest.[109] The court found that the broadcaster could have achieved its goals by selecting a format for the contest that would not have created a risk of harm to motorists.[110]

The *Weirum* court was not persuaded that imposing such a duty would "lead to unwarranted extensions of liability."[111] The court distinguished the contest from ordinary business activities as "a competitive scramble in which the thrill of the chase to be the one and only victor was intensified by the live broadcasts which accompanied the pursuit."[112] Rejecting the broadcaster's argument that the contest was protected by the first amendment, the California court stated that "[t]he issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent. The first amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act."[113]

IV. *SAKON* IN LIGHT OF THE *WEIRUM* DECISION

The Supreme Court of Florida, following United States Supreme Court decisions,[114] reversed the district court's first amendment ruling[115] and concluded that the free speech clause did not bar Pepsico's liabil-

106. *Id.* at 47.

107. *Id.*

108. Weirum v. RKO General, Inc., 15 Cal. 3d 40, 47, 539 P.2d 36, 40, 123 Cal. Rptr. 468 (1975) (citing PROSSER, THE LAW OF TORTS (4th ed. 1977) at 146-149).

109. Weirum v. RKO General, Inc., 15 Cal. 3d 40, 48, 539 P.2d 36, 39, 123 Cal. Rptr. 468 (1975).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Sakon v. Pepsico, Inc., 553 So. 2d 163, 165-66, 1989 Fla. LEXIS 1181, 5 (Fla. 1989) (citing Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council, 425 U.S. 748 (1976) and Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978) which summarized the relevant law).

115. Sakon v. Pepsico, Inc., 553 So. 2d 163, 166, 1989 Fla. LEXIS 1181, 7 (Fla. 1989).

ity.[116] When the Supreme Court of Florida addressed the certified question of duty, however, it adopted the district court's negligence analysis.[117] By doing so, it erected an unsound policy barrier to Pepsico's liability.

The court's negligence analysis encompasses three basic flaws. First, the court apparently failed to seriously consider a key fact in the case: the age of the fourteen-year-old victim who was targeted for Pepsico's commercial. Second, the court failed to distinguish between commercial and noncommercial broadcasts in its negligence analysis. Finally, the court failed at times to recognize that the Mountain Dew commercial, and not Mountain Dew soda, was the Pepsico product at issue.

1. The Court Failed to Consider Michael's Age

One flaw in the court's negligence analysis was its failure to seriously consider the age of the fourteen-year-old victim who was targeted for Pepsico's commercial.[118] In finding Pepsico not liable, the court stated that "Pepsico's commercial ha[d] done nothing more than portray young people engaged in a sporting activity which can be dangerous if not done by skilled persons under proper conditions."[119] The phrase, "nothing more than," serves to negate in a conclusory manner the possibility that the activity shown might have created an unreasonable risk of harm to the victim.

Michael was only fourteen years old at the time he saw the commercial[120] and attempted what even the court viewed as a "sporting activity."[121] As a result, he broke his neck and was rendered a quadriplegic.[122] Pepsico had not warned him of the risk[123] and the fourteen-year-old boy had not perceived the danger.[124] Professors Prosser and Keeton noted that "[c]hildren generally do not have the same capacity to perceive, appreciate and avoid dangerous situations which is possessed by the ordinary, prudent adult."[125] Accordingly, a jury might

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 164.
120. Sakon v. Pepsico, Inc., 553 So. 2d 163, 164, 1989 Fla. LEXIS 1181, 2 (Fla. 1989).
121. *Id.* at 166.
122. Initial Brief for Appellants in the Supreme Court of Florida at 1-2, Sakon v. Pepsico, Inc., 553 So. 2d 163, 1989 Fla. LEXIS 1181 (No. 73,258) (Fla. 1989).
123. *Id.*
124. *Id.* at 1.
125. W. PROSSER & W. KEETON THE LAW OF TORTS, 179 n.45 (5th ed. 1984) (quoting Dorais v. Paquin, 98 N.H. 159, 304 A.2d 369, 371 (1973)).

have decided that the risk was reasonably foreseeable but, unlike the Supreme Court of California in *Weirum*, the Florida Supreme Court did not permit the question of foreseeability to go to the jury.[126] The court decided that as a matter of law, "Sakon's accident was not the foreseeable consequence of Pepsico's advertisement."[127]

The California court's reasoning in *Weirum* supports a conclusion that Michael Sakon's attempt to lake jump was foreseeable.[128] The Mountain Dew commercial showed young actors performing the dangerous activity portrayed as an exciting sport accompanied by upbeat music. Additionally, the commercial was aired during times of the day intended to reach and influence young people.[129] The commercial obviously reached and influenced Michael.[130] When attractive peers encouraged young jumpers and cheered their success,[131] they also encouraged Michael, and there was nothing in the commercial to warn him of the risk.[132] Additionally, the dangerous activity was performed on a bicycle. Many American teenagers own bicycles and are skillful riders. Bicycles are familiar possessions that can instill a false sense of security and increase the risk that a youngster might try the "sport" without being aware of its danger. The Florida court itself perceived the dangerous activity as a "sporting activity;"[133] thus, it is foreseeable that a fourteen-year-old boy might do the same. Professors Prosser and Keeton wrote in regard to the functions of court and jury, "[t]he most common statement is that if reasonable persons may differ as to the conclusion to be drawn, the issue must be left to the jury; otherwise it is for the court."[134] Reasonable persons might differ as to the foreseeability of Michael Sakon's attempt to lake jump, but the issue did not go to a jury.

The age of the audience was a key factor in the *Weirum* court's reasoning.[135] The young listeners who were found to have foreseeably ignored highway safety were seventeen and nineteen years old.[136] Both listeners were old enough to drive; one was old enough to vote. Michael

126. Sakon v. Pepsico, Inc., 553 So. 2d 163, 1989 Fla. LEXIS 1181 (Fla. 1989).

127. *Id.*

128. Weirum v. RKO General, Inc., 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975).

129. *Sakon*, 553 So. 2d 163, 164, 1989 Fla. LEXIS 1181 (quoting Sakon v. Pepsico, Inc., No. 88-3207, slip op. at 3-4).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 166.

134. W. PROSSER & W. KEETON, *supra* note 125, at 238.

135. Weirum v. RKO General, Inc., 15 Cal. 3d 43, 46-47, 539 P.2d 36, 40, 123 Cal. Rptr. 468 (1975).

136. *Id.* at 45.

Sakon was only fourteen;[137] he was even less able to perceive the risk.

The duty in *Weirum,* was to a non-listener harmed by the conduct of others which was stimulated by a radio broadcast.[138] Michael Sakon was an actual viewer of the Mountain Dew commercial;[139] his conduct was directly stimulated by the televised advertisement.[140] According to the *Weirum* guidelines, he is clearly a foreseeable plaintiff.[141] Additionally, television is more influential than radio and has a far greater impact.

The *Sakon* court erred in its policy analysis by failing to consider the young victim's interest. The case was decided on policy issues but the rationale was unsound. The Florida court noted that the doctrine of proximate cause is based on policy decisions which include the "practical need to draw the line somewhere so that liability will not crush those on whom it is put"[142] and "the need to work out rules that are feasible to administer, and yield a workable degree of certainty."[143] The Florida court also stated that "there must be some limit on the kinds of injuries for which another must pay compensation."[144] In this case, the court drew the line in the wrong place. The court's policy decision failed to consider the victim's age or society's interest in protecting its young who are less able to protect themselves.[145] The court was concerned that imposing liability might crush Pepsico, but not that a failure to do so might crush the young victim. Michael Sakon's attempt to perform the stunt he saw in Pepsico's commercial physically, economically and emotionally devastated him.

Strong public policy arguments can support a finding that Pepsico owed a duty of due care to Michael Sakon and was liable for breaching that duty. Imposing liability would send a message of responsiblity to corporations and encourage advertisers to broadcast safer commercials. Moreover, it would place the burden on the advertiser, who is better able to spread the risk, instead of on the innocent young plaintiff.[146] It would

137. Sakon v. Pepsico, Inc., 553 So. 2d 163, 164, 1989 Fla. LEXIS 1181 (Fla. 1989).

138. *Weirum*, 15 Cal. 3d at 40, 47, 539 P.2d at 40.

139. *Sakon*, 553 So. 2d at 164, 1989 Fla. LEXIS at 2.

140. *Id.*

141. W. PROSSER & W. KEETON, *supra* note 125, at 284-85.

142. *Sakon*, 553 So. 2d at 166 (quoting 4 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 20.4, 131-32 (2d ed. 1986)).

143. *Id.*

144. *Id.* at 167, 1989 Fla. LEXIS at 9.

145. Sakon argued that "under Florida law that when children are involved, the amount or quality of care owed *is increased* . . . ." Initial Brief of Appellants in the Supreme Court of Florida at 5-6, Sakon v. Pepsico, Inc., 553 So. 2d 163, 1989 Fla. LEXIS 1181 (No. 73,258) (Fla. 1989).

146. This is one of the policy justifications for strict liability in tort. "This can be regarded

afford greater protection to our children who are less able to protect themselves.

If the *Sakon* court had employed the balancing test used in *Weirum,*[147] it might have found that the risk of death or serious injury occurring as a result of an adolescent's trying to perform the dangerous activity outweighed the monetary rewards of using that activity in the commercial. Pepsico could have achieved its goal of selling Mountain Dew soda by portraying a safer activity or by including a warning that the activity was dangerous and viewers should not attempt it. Furthermore, the cost to Pepsico to do so would have been minimal.

Unlike the California court, the Florida court did not employ the balancing test.[148] Although the Florida court admitted that the activity "can be dangerous if not done by skilled persons under proper conditions[,]"[149] it nevertheless declined to find that Pepsico had a duty to warn Michael Sakon of the danger or that it had created an unreasonable risk of harm.[150] Judging from the decision in *Weirum*, had *Sakon* been decided in California, the result might have been different.

a. Advertisements Create A Duty: *F. W. Woolworth v. Kirby*

In *F. W. Woolworth v. Kirby,*[151] a store broadcast thirty-second radio spots and bought newspaper space as part of a promotional advertising scheme[152] in which ping pong balls containing prizes were to be dropped from a plane onto the store's parking lot.[153] Mrs. Kirby, a seventy-year-old woman who went to the store with her small grandson, was injured when someone in the large crowd knocked her to the ground.[154] The Supreme Court of Alabama held that when a storekeeper causes a large crowd to gather as a result of his advertisements:

> that person owes a duty to exercise reasonable care commensurate with foreseeable danger or injury to protect those assembled from injuries resulting from the . . . activities of the crowd or individuals within the crowd; that the foreseeability of danger or injury under such circumstances is for jury determina-

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as a fairness and justice reason of policy." W. PROSSER & W. KEETON, *supra* note 125, at 692-93.

147. 539 P.2d at 40.

148. *See supra* note 108 and accompanying text.

149. Sakon v. Pepsico, Inc., 553 So. 2d 163, 166, 1989 Fla. LEXIS 1181, 8 (Fla. 1989).

150. *Id.*

151. F. W. Woolworth v. Kirby, 302 So. 2d 67 (Ala. 1974).

152. *Id.* at 68.

153. *Id.*

154. *Id.*

> tion; and that reasonable care commensurate with the foreseeability of danger or injury may require greater precautions when children or the elderly are present.[155]

In contrast to the *Sakon* court, the *Woolworth* court found that the advertiser had a duty to its victim under the facts of the case.[156] This holding reflects a sound policy rationale because it afforded substantial protection for Alabama residents while the *Sakon* decision provided none for Florida children.

b. Foreseeability and the Failure to Adequately Warn as Jury Questions: *Haberly v. Reardon Co.*

Haberly v. Reardon Co.,[157] like *Sakon*, involved an injury to a minor and an alleged failure to adequately warn of a risk of harm.[158] In *Haberly*, the Supreme Court of Missouri, sitting *en banc* and interpreting New York law, reached a decision contrary to *Sakon*.[159] The court held that the jury should decide whether a paint manufacturer could have reasonably foreseen that paint was likely to get into the eyes of a user or of his twelve-year-old son who was helping him.[160] The court also held that the jury could decide the necessity for and the adequacy of a warning concerning the paint[161] and the question of whether the manufacturer's failure to adequately warn was, in fact, a cause which contributed to the loss of sight in the boy's eye.[162]

The *Haberly* court's reasoning is applicable to the unusual facts of *Sakon*. The court noted that although the way in which the paint entered the boy's eye might be described as unusual, peculiar, unique, bizarre, or even as a "freak accident,"[163] the jury reasonably could have found the risk foreseeable.[164] The court stated that:

> bizarre accidents are far from unlikely, and recovery cannot be denied because of the uniqueness of the happenings. . . . [I]f we feel the defendant at least somewhat culpable in failing to take

155. *Id.* at 71. The court reversed and remanded the case because the trial court had erred in not allowing testimony as to a collective fact question. *Id.* at 73.

156. F. W. Woolworth v. Kirby, 302 So. 2d 67, 71 (Ala. 1974).

157. Haberly v. Reardon Co., 319 S.W.2d 859 (Mo. 1958).

158. *Id.*

159. *Id.* at 863.

160. *Id.*

161. *Id.* at 868.

162. Haberly v. Reardon Co., 319 S.W.2d 859, 868 (Mo. 1958).

163. *Id.* at 864.

164. *Id.* The boy, responding to his father's call, apparently rose from a kneeling position, swung or stepped toward his father, and started to kneel again to clean a brick. In the process, the boy's eye came in contact with his father's brush. *Id.* at 861.

> the simple step of a warning, then we see no reason to take the case from the jury when the consequences are serious, and, because serious, are unexpected. We think, therefore, that the issue of the defendant's negligence was properly left to the jury.[165]

Application of the *Haberly* court's reasoning regarding the role of the jury is appropriate in *Sakon* because Pepsico was "at least somewhat culpable in failing to take the simple step of a warning . . ."[166] and Michael's injuries were indisputably serious — he was rendered a quadriplegic.[167] Accordingly, the issues of foreseeability and the failure to adequately warn should have gone to a jury.[168]

Furthermore, in affirming the jury's verdict, the *Haberly* court stated that

> [i]f there is some probability of harm sufficiently serious that ordinary men would take precautions to avoid it, then failure to do so is negligence . . . . The test is not of the balance of probabilities, but of the existence of some probability of sufficient moment to induce action to avoid it on the part of a reasonable mind.[169]

Reasonable minds could have found that the Mountain Dew commercial created "some probability of harm sufficiently serious that ordinary men would take precautions to avoid it . . . ."[170] If the Florida court had applied this test, it would not have denied Michael Sakon his cause of action. He would have had his day in court.

2. The Court Failed to Distinguish Between Commercial and Noncommercial Broadcasts

The *Sakon* court's failure to distinguish between commercial and noncommercial broadcasts in its negligence analysis may have contributed to its fear of unlimited liability.[171] It had rejected Pepsico's argument that recognizing a cause of action would involve the court in an analysis of all commercial and noncommercial television broadcasts. The court had asserted that by "using common sense,"[172] it could easily

165. *Id.* at 864-65.
166. *Id.* at 864.
167. Initial Brief of Appellants in the Supreme Court of Florida at 2, Sakon v. Pepsico, Inc., 553 So. 2d 163, 1989 Fla. LEXIS 1181 (No. 73,258) (Fla. 1989).
168. Haberly v. Reardon Co., 319 S.W.2d 859, 864 (Mo. 1958).
169. *Id.* at 865 (quoting Pease v. Sinclair Refining Co., 104 F.2d at 183, 185 [1], 186 [3]).
170. *Id.*
171. *Sakon*, 553 So. 2d at 165-66, 1989 Fla. LEXIS at 8.
172. *Id.* at 166.

differentiate between the two.[173] Nevertheless, the court failed to do so when it concluded that it could not find Pepsico liable because "[t]he logical corollary to recovery in this case would be that advertisers and broadcasters would be subject to liability because children sought to duplicate acts of violence which they saw on television. There would be a total absence of any standard to measure liability."[174] These statements are inaccurate. Recovery in *Sakon* would not subject broadcasters to liability for material depicted in any noncommercial broadcast[175] and it would subject advertisers to liability only when their commercials create an unreasonable risk of harm to their viewers. The court cited *Zamora v. Columbia Broadcasting System*,[176] a case involving noncommercial television in which a claim that a minor plaintiff developed a sociopathic personality by watching violence on television was rejected.[177]

In contrast to the Florida court's statement that there would be no standard to measure liability, the *Weirum* court had no difficulty arriving at a standard when it found the Los Angeles broadcaster liable.[178] In regard to the particular standard of conduct in a case, according to Professors Prosser and Keeton,

> the details of the standard must be filled in in each particular case. The question then is what the reasonable person would have done under the circumstances. Under our system of procedure, this question is to be determined in all doubtful cases by the jury, because the public insists that its conduct be judged in part by the man in the street rather than by lawyers, and the jury serves as a shock-absorber to cushion the impact of the law.[179]

3. The Mountain Dew Commercial: The Pepsico Product at Issue

The Florida court failed to fully appreciate that the Mountain Dew commercial was the Pepsico product at issue in the litigation. When the court reasoned that "[t]he product being advertised had nothing to do

173. *Id.*

174. *Id. See* Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199 (S.D.Fla. 1979). The Florida court also failed to distinguish commercial from noncommercial material when it adopted the trial court's comparison of the foreseeability of Sakon's conduct with the foreseeability of an observer attempting high wire and trapeze acts performed by circus actors on noncommercial television. *Id.* at 167 (quoting *Sakon,* slip opn. at 6).

175. *Id.* at 165-66.

176. Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199 (S.D. Fla. 1979).

177. *Sakon*, 553 So. 2d at 166.

178. Weirum v. RKO General, Inc., 15 Cal. 3d 40, 46, 539 P.2d 36, 40, 123 Cal. Rptr. 468 (1975).

179. W. PROSSER & W. KEETON, *supra* note 125, at 237.

with the activity[,]"[180] it appeared to be focusing on Mountain Dew itself. It would be incorrect to state that the commercial had nothing to do with the activity because the commercial portrayed the activity.[181] The certified question of law referred specifically to the commercial depicting the dangerous activity and did not mention the soda.[182] Sakon had alleged that the commercial depicting the dangerous activity induced him to try to perform the stunt.[183] He never claimed that the soda caused the harm. The statement is also inaccurate if "the product being advertised"[184] refers to the soda because the activity was used to sell the soda.[185]

The court also stated that "the advertisement was not directed toward encouraging viewers to undertake the sport but only to drink 'Mountain Dew.' "[186] It is difficult to understand why the court suggested that the advertisement must be "directed toward encouraging viewers to undertake the sport"[187] for Sakon to state a cause of action based on negligence. Negligence, by definition, is not an intentional tort.[188] It does not require intent.[189] "Negligence is conduct, and not a state of mind."[190] "In most instances, it is caused by heedlessness or inadvertence, by which the negligent party is unaware of the results which may follow from his act."[191] Pepsico directed the commercial at young viewers.[192] Two activities were encouraged in the ad. First, young actors expressly encouraged other young actors to perform the dangerous activity.[193] Second, the commercial presumably encouraged the viewers to drink Mountain Dew soda. It could be argued that Pepsico had negligently, heedlessly or inadvertently encouraged Sakon to perform the dangerous act.

180. Sakon v. Pepsico, Inc., 553 So. 2d 163, 166, 1989 Fla. LEXIS 1181, 8 (Fla. 1989).
181. *Id.* at 164.
182. *Id.*
183. *Id.*
184. *Id.* at 166.
185. Sakon v. Pepsico, Inc., 553 So. 2d 163, 164, 1989 Fla. LEXIS 1181, 2 (Fla. 1989).
186. *Id.* at 166.
187. *Id.*
188. W. PROSSER & W. KEETON, *supra* note 125, at 33, 160-61.
189. *Id.*
190. *Id.* at 169.
191. *Id.*
192. Sakon v. Pepsico, Inc., 553 So. 2d 163, 164, 1989 Fla. LEXIS 1181 (Fla. 1989).
193. *Id.*

V. PROTECTING THE PHYSICAL AND EMOTIONAL WELL-BEING OF A MINOR: UNITED STATES SUPREME COURT DECISIONS

A. Minimizing The Risk To Children: Federal Communications Commission v. Pacifica Foundation

The United Stated Supreme Court has recognized "the government's interest in the 'well-being of its youth' . . . ."[194] In *Federal Communications Commission v. Pacifica Foundation,*[195] the Court held that the Federal Communications Commission ("FCC") had the power to regulate a radio broadcast that used indecent, although not obscene, language at a time of day when children were likely to be listening.[196]

In that case, a New York radio station owned by Pacifica Foundation broadcast a monologue entitled "Filthy Words" at about two o'clock in the afternoon on October 30, 1973.[197] A man complained to the Federal Communications Commission that he had heard the broadcast while driving with his young son.[198] Because the offensive language was " 'broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon),'[199] and . . . was 'deliberately broadcast,' "[200] the Commission held that the words aired were indecent and prohibited.[201]

The Court noted two reasons that broadcasting's first amendment protection is the most limited of all the communications media.[202] The first was that "the broadcast media have established a uniquely pervasive presence on the lives of all Americans."[203] The second is that "broadcasting is uniquely accessible to children . . . ."[204] The Court stated that children's easy access to broadcast material, combined with the concerns expressed in *Ginsberg,*[205] "amply justify special treatment of indecent

194. Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726, 749 (1978) (quoting Ginsberg v. New York, 390 U.S. 629, 639-640 (1968)).

195. Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726 (1978).

196. *Id.* at 750-51.

197. *Id.* at 729-730.

198. *Id.* at 730.

199. Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726, 732 (quoting 56 F.C.C. 2d 94, 99).

200. *Id.* (quoting 56 F.C.C. 2d at 99); also, children often have access when they are not supervised by their parents. *See id.* at 731, n.2 (quoting 56 F.C.C. at 97).

201. Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726, 732 (1978).

202. *Id.* at 748.

203. *Id.*

204. *Id.*

205. *Id.* at 750 (1978) (quoting Ginsberg v. New York, 390 U.S. 629, 639-640 (1968)).

broadcasting."[206] The Court emphasized that their holding was narrow.[207] The time of day the indecent material was broadcast was crucial.[208] Their purpose was to minimize the risk that children would be exposed to indecent language.[209] Surely, protecting children from the risk of physical harm is at least as important as protecting them from indecent language. Nevertheless, the Supreme Court of Florida made no attempt to protect them.

The Florida court was concerned about imposing crushing liability on broadcast advertisers.[210] The economic impact of the Supreme Court's finding in *Pacifica* was potentially far greater on the broadcaster than a finding of liability would have been on Pepsico. *Pacifica* was based on a nuisance rationale.[211] If subsequent complaints were filed, the broadcaster was susceptible to having its license revoked or to having its license renewal denied.[212] If that happened, Pacifica would lose its right to broadcast and the ownership of its stations.[213] It would then be off the air and out of business. Pepsico, on the other hand, would only have had to compensate Michael Sakon for his injuries.

B. The Welfare Of Children Comes First: New York v. Ferber

The United States Supreme Court reaffirmed its concern for the welfare of children in *New York v. Ferber*.[214] The issue in *Ferber* was "the constitutionality of a New York criminal statute which prohibits persons from knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances."[215] Paul Ferber, a Manhattan bookstore owner, had been found guilty of violating the statute by selling to an undercover police officer two films depicting young boys performing sexual acts.[216] The statute did not require proof that the films were obscene.[217] The New York Court of Appeals held that the statute violated the first amendment and reversed

206. Federal Communications Comm'n v. Pacifica Found. 438 U.S. 726, 750 (1978) (citing Ginsberg v. New York, 390 U.S. 629, 639-640 (1968)).

207. Federal Communications Comm'n v. Pacifica Found. 438 U.S. 726, 739 (1978).

208. *Id.*

209. *Id.* at 750 n.28.

210. Sakon v. Pepsico, Inc., 553 So. 2d 163, 166, 1989 Fla. LEXIS 1181, 8 (Fla. 1989).

211. *Pacifica*, 438 U.S. at 750.

212. *Id.* at 730 n.1 (citing 56 F.C.C. at 99).

213. *Id.*

214. New York v. Ferber, 458 U.S. 747 (1982).

215. *Id.* at 749.

216. *Id.* at 751-752.

217. *Id.*

Ferber's conviction.[218]

The United States Supreme Court decided that "[a]s applied to Paul Ferber and to others who distribute similar material, the statute does not violate the First Amendment as applied to the States through the Fourteenth."[219] The Court recognized that laws that prohibit the dissemination of child pornography risk violating the first amendment.[220] Nevertheless, the Court was "persuaded that the States are entitled to greater leeway in the regulation of pornographic depictions of children"[221] for several reasons:

> *First.* It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling."[222] "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens."[223] Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights . . . . The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. [224] That judgment, we think, easily passes muster under the First Amendment.[225]

The Court concluded its discussion of the fifth and final reason for its decision by stating that when the material covered by the statute in question "bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment."[226]

The United States Supreme Court considered the welfare of children so important that a constitutionally protected right gave way.[227] The

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218. *Id.*

219. New York v. Ferber, 458 U.S. 747, 774 (1982).

220. *Id.* at 756.

221. *Id.*

222. *Id.* at 756-57 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).

223. *Id.* at 757 (quoting Prince v. Massachusetts, 321 U.S. 158, 168 (1944)).

224. *Id.* at 758 n.9 (citing S. Rep. No. 95-438, p.5 (1977)).

225. *Id.* at 756-58. The Court supported its decision with four additional reasons.

226. *Id.* at 764.

227. *Id.*

Supreme Court of Florida did not consider the welfare of children in *Sakon.* Their protection gave way.

VI. CONCLUSION

The Supreme Court of Florida erred when it concluded that Pepsico could not be held legally liable.[228] Had the court considered the age of the victim and that of the targeted audience as other courts have done when deciding questions of duty, policy, and foreseeability, it might have rendered a different decision. The Supreme Court of Florida made an unsound policy decision. Sound policy rationale suggests that courts must hold broadcast advertisers to the general duty not to create an unreasonable risk of harm to their young viewers and to a duty to warn when they air "a commercial depicting a dangerous activity in a manner likely to induce a young viewer to imitate the activity."[229] Broadcast advertisers do not need special protection; children do. The Florida Supreme Court has, in effect, granted broadcast advertisers a license to air commercials in Florida that may create an unreasonable risk of harm to young viewers. Network advertisers must be aware, however, that immunity in Florida will not shield them from liability for negligence in California and other states.

*Marilyn Sipes**

228. *Id.*

229. Sakon v. Pepsico, Inc., 553 So. 2d 163, 164, 1989 Fla. LEXIS 1181, 1 (Fla. 1989) (quoting *Sakon*, slip op. at 5).

* The author dedicates this Note to her husband, Don Sipes.