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Ice Cream Truck Vendor Has Duty of Due Care to Protect His Minor Business Invitees; Whether He Breaches This Duty and, if So, Whether Such Breach Is the Proximate Cause of a Patron's Injury Is a Fact Question, Precluding Summary Judgment.

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TORTS—NEGLIGENCE—ATTRACTIVE NUISANCE—AUTOMOBILES—ICE CREAM TRUCK VENDOR HAS DUTY OF DUE CARE TO PROTECT HIS MINOR BUSINESS INVITEES; WHETHER HE BREACHES THIS DUTY AND, IF SO, WHETHER SUCH BREACH IS THE PROXIMATE CAUSE OF A PATRON'S INJURY IS A FACT QUESTION, PRECLUDING SUMMARY JUDGMENT. *Garza v. Perez*, 443 S.W.2d 855 (Tex. Civ. App.—Corpus Christi 1969, no writ).

Plaintiff brought an action against the owner-operator of an ice cream vending truck to recover damages for the death of the plaintiff's six-year-old daughter who was fatally struck by a passing dump truck as she emerged into the street from behind defendant's truck. Plaintiff alleged that the defendant: (1) failed to provide warning devices, or alternatively, sufficient warning devices, to approaching drivers of motor vehicles; (2) failed to provide any protection for children patronizing, approaching, or departing his ice cream truck; and (3) failed to keep a proper lookout for children of tender years coming to and departing from his ice cream truck. The district court entered a take nothing summary judgment against the plaintiff and he appealed. Held—*Reversed and remanded.* Ice cream truck vendor has duty of due care to protect his minor business invitees; whether he breaches this duty and, if so, whether such breach is the proximate cause of a patron's injury is a fact question, precluding summary judgment.

Since 1965, the ice cream truck vendor, a warmly remembered neighborhood figure of 20th Century American childhood, has become heavily burdened with stringent accountability for his conduct and more readily held responsible for injuries sustained by his young patrons.[1] Not that he has ever enjoyed tort immunity,[2] but in the last half decade he has become almost indefensibly vulnerable to charges of negligence and findings of liability. This vulnerability has resulted from appellate courts determining the vendor's liability by the application of the attractive nuisance doctrine poorly disguised under the mantle of negligent tort principles. In *Mackey v. Spradin*,[3] a landmark case in this area, the court stated: "This is not, of course, an 'attractive nuisance' case. Nevertheless, it is invested with much the same policy considerations the attractive nuisance theory was designed to recognize and

1 *See* Schwartz v. Helms Bakery Limited, 430 P.2d 68 (Cal. 1967); Ellis v. Trowen Frozen Products, Inc., 70 Cal. Rptr. 487 (Cal. App. 1968); Mackey v. Spradlin, 397 S.W.2d 33 (Ky. 1965); Nicosia v. Good Humor Corporation, 170 N.W.2d 164 (Mich. App. 1969); Jacobs v. Draper, 142 N.W.2d 628 (Minn. 1966); Hastings v. Smith, 443 S.W.2d 436 (Tenn. 1969); Vought v. Jones, 139 S.E.2d 810 (Va. 1965).

2 *See* cases collected at Annot., 74 A.L.R.2d 1056 (1960).

3 397 S.W.2d 33 (Ky. 1965).

satisfy. . . . The differences are superficial."[4] A year later, in *Jacobs v. Draper*,[5] the Minnesota Supreme Court would reinforce this contention by repetition. If the differences are superficial so too are the results: liability without fault, a remedy without a wrong, a defenseless position. Now the vendor may be held liable for injuries to his observed or unobserved[6] customers inflicted by others,[7] and this even in the absence of any statutory violation on the seller's part at the time of the accident.[8] This recent trend toward judicial imposition of a liability albatross on the mobile vendor began in early 1965 when Virginia's highest court found a vendor liable for a child's injuries received when he was struck by a passing motorist upon leaving the seller's truck. In *Vought v. Jones*,[9] the court held the vendor had a duty to provide a reasonably safe place[10] for the child who was his business invitee,[11] that he knew, or reasonably should have realized, children would cross streets to buy his product,[12] and that children are to be dealt with differently than adults for children do not realize the possible consequences of their behavior.[13] However, it was *Mackey v. Spradlin*, decided late in the same year by the highest court of Kentucky, that was to be the standard bearer in the camp of liability-prone decisions. Following the tenets of *Vought*, *Mackey* stressed that the vendor had actually *invited* children into an area of danger[14] and therefore owed them a duty of care and a "proportionately higher degree of foresight."[15] The *Mackey* case soon became a landmark decision in this field and a year later this was evidenced by a Minnesota court's statement, "In my opinion by adopting the rule in *Mackey v. Spradlin* . . . , all of the

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4 *Id.* at 37. For other cases holding the attractive nuisance doctrine inapplicable *see*, Molliere v. American Ins. Group, 158 So.2d 279 (La. App. 1963)—*writ ref'd* 159 So.2d 290 (La. 1964); Jacobs v. Draper, 142 N.W.2d 628 (Minn. 1966); Sidders v. Mobile Softee, Inc., 184 N.E.2d 115 (Ohio App. 1961); Mead v. Parker, 340 F.2d 157 (6th Cir. 1965) *aff'g* 221 F. Supp. 601 (E.D. Tenn. 1963) applying Tennessee law.

5 142 N.W.2d 628 (Minn. 1966).

6 Ellis v. Trowen Frozen Products, Inc., 70 Cal. Rptr. 487 (Cal. App. 1968); *accord* Menchaca v. Helms Bakeries, Inc., 67 Cal. Rptr. 775 (Cal. 1968).

7 Schwartz v. Helms Bakery Limited, 430 P.2d 68 (Cal. 1967); Jacobs v. Draper, 142 N.W.2d 628 (Minn. 1966).

8 *See* Mackey v. Spradlin, 397 S.W.2d 33, 37 (Ky. 1965) where the vendor's alleged statutory violation was held "immaterial"; *accord*, Jacobs v. Draper, 142 N.W.2d 628, 634 (Minn. 1966) where the alleged violation was found to be "cumulative with his breach of a common-law duty of due care."

9 139 S.E.2d 810 (Va. 1965).

10 *Id.* at 815.

11 *Id. See* Schwartz v. Helms Bakery Limited, 430 P.2d 68 (Cal. 1967); Hastings v. Smith, 443 S.W.2d 436, 439 (Tenn. 1969) where the court held the child to be a business invitee even though he had no funds with which to make a purchase. "One of the sure tests of whether a person is a licensee or an invitee is whether the owner of the premises is interested in the presence of the visitor."

12 Vought v. Jones, 139 S.E.2d 810 (Va. 1965).

13 *Id.* at 815.

14 Mackey v. Spradlin, 397 S.W.2d 33 (Ky. 1965).

15 *Id.* at 38.

other negligence issues are rendered moot."[16] In this case, *Jacobs v. Draper*, the Minnesota Supreme Court, swayed by *Mackey*, contended that the gist of the negligence on the part of the vendor was that he should have foreseen the danger of just such an accident as did occur—a child being struck by another vehicle upon his leaving the vending truck—with or without some degree of negligence on the part of that passing motorist.[17] For this reason the negligence, if any, on the part of the striking driver is "not a superseding but concurring cause"[18] of the tragedy. Since *Vought, Mackey*, and *Jacobs*, California,[19] Michigan,[20] Ohio,[21] and Tennessee[22] have concurred with and followed those decisions, the last two jurisdictions in direct reversal of an earlier position.[23] Yet other state courts have steadfastly refused to be persuaded by the now majority, basing their holdings on the broader foundations of total law consideration rather than the stringent application of pure tort law. In *Goff v. Carlino*,[24] a Louisiana court, after admitting the foreseeable hazard that a careless child might be injured crossing a street, held:

> . . . selling ice cream from mobile trucks in residential areas is a lawful business with social value; it would be virtually impossible to engage in this business if the ice cream peddler could not park or if he were required to watch out for and to guide children across the streets to and from the truck. Since statistically the chances are very small that harm will thereby be occasioned to children old enough to cross the street to buy ice cream, the utility of the conduct of parking the ice cream truck—necessary to carry on the lawful economic activity of selling in the residential area—thus outweighs the risk of harm to others created by so doing. Under present social conditions, therefore, such parking does not create

16 Jacobs v. Draper, 142 N.W.2d 628, 635 (Minn. 1966), concurring opinion.

17 Jacobs v. Draper, 142 N.W.2d 628 (Minn. 1966).

18 Vought v. Jones, 139 S.E.2d 810, 814 (Va. 1965); *accord*, Mackey v. Spradlin, 397 S.W.2d 33 (Ky. 1965); Hastings v. Smith, 443 S.W.2d 436 (Tenn. 1969). *Contra*, Molliere v. American Ins. Group, 158 So.2d 279 (La. App. 1963)—*writ ref'd* 159 So.2d 290 (La. 1964); Bloom v. Good Humor Ice Cream Co. of Baltimore, 18 A.2d 592 (Md. App. 1941).

19 Schwartz v. Helms Bakery Limited, 430 P.2d 68 (Cal. 1967); Ellis v. Trowen Frozen Products, Inc., 70 Cal. Rptr. 487 (Cal. App. 1968).

20 Nicosia v. Good Humor Corporation, 170 N.W.2d 164 (Mich. App. 1969).

21 Thomas v. Goodies Ice Cream Co., 233 N.E.2d 876 (Ohio App. 1968).

22 Hastings v. Smith, 443 S.W.2d 436 (Tenn. 1969).

23 *See* Sidders v. Mobile Softee, Inc., 184 N.E.2d 115 (Ohio App. 1961) where an Ohio court, in reverence to a vendor, held:

> The defendant is accused of being a sort of modern Pied Piper and as such responsible for any and all mishaps to its young customers. It is not an insurer of the safety of its patrons. Nor is it charged with a violation of law. The operation of an ice cream vending truck attractive to children is admittedly not a nuisance. The Supreme Court has held it is not so closely related to the public health, safety, etc., as to render its elimination by police ordinance constitutional.

Accord, Baker-Evans Ice Cream Company v. Tedesco, 150 N.E. 745 (Ohio 1926). *See*, Mead v. Parker, 340 F.2d 157 (6th Cir. 1965) *aff'g* 221 F. Supp. 601 (E.D. Tenn. 1963) applying Tennessee law.

24 181 So.2d 426 (La. App. 1965)—*writ ref'd* 183 So.2d 653 (La. 1966).

> an unreasonable risk of harm to others so as by itself to be considered negligent conduct.[25]

In 1968, after the *Vought, Mackey,* and *Jacobs* decisions, a Louisiana district court chose to re-evaluate the doctrine as espoused in *Goff* with respect to the vendor's liability.[26] In reversing the lower court, the appellate court in *Hardy v. Bye,*[27] cited the determinative portion of *Goff* and further elaborated:

> Certainly everyone is aware of the arrival of the ice-cream trucks and its well announced presence should serve as adequate notice to other motorists and parents alike. While the ice-cream truck is without question attractive to children it also serves as a danger signal to those who are responsible for the children's safety. . . . We think those responsible for the children should also have taken certain precautions when it is known or anticipated that the children will approach or cross the street.[28]

By mid-1969, a year after *Hardy,* a pattern had formed. A plaintiff would charge the defendant vendor with negligence, the trial court would find for the defendant either by directed verdict, summary judgment, or dismissal in his favor,[29] and the plaintiff would appeal. This left the appellate court to choose either the doctrine of *Mackey* and its fellow travelers or the reasoning best illustrated by the Louisiana decisions. Such was the choice given the Corpus Christi Court of Civil Appeals in *Garza v. Perez.*[30] The court's decision turns this jurisdiction down an oft-traveled road that is nonetheless narrow and ill-cobbled. The decision in *Garza* is not based on Texas law but Kentucky law, buttressed by the plaintiff's allegations and questionable[31] but favorable foreign holdings over a Texas endorsement.[32] The court's extensive reliance on *Mackey* is not enhanced by the uncertainty attached to that 4-3 decision in which the dissent, after drawing attention to the majority opinion's application of attractive nuisance principles, pointed out the Kentucky court's strong tendency "to restrict, rather than to enlarge, the attractive nuisance doctrine."[33] *Garza's*[34] holding on the

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25 *Id.* at 428.
26 Hardy v. Bye, 207 So.2d 198, 202 (La. App. 1968)—*writ ref'd* 209 So.2d 37 (La. 1968).
27 *Id.*
28 *Id.* at 702.
29 Of all cases reported since 1964, only Jacobs was allowed to go to a jury in the trial court.
30 443 S.W.2d 855 (Tex. Civ. App.—Corpus Christi 1969, no writ).
31 The Garza case relies on Thomas v. Goodies Ice Cream Co., 233 N.E.2d 876 (Ohio App. 1968); *but see* Sidders v. Mobile Softee, Inc., 184 N.E.2d 115 (Ohio App. 1961) and Baker-Evans Ice Cream Company v. Tedesco, 150 N.E. 745 (Ohio 1926).
32 Fifty-five per cent of that portion of Garza concerned with the negligence aspects of the case is a direct quotation from the plaintiff's petition, Mackey, or Sidders.
33 Burkett v. Southern Belle Dairy Company, 272 S.W.2d 661, 662 (Ky. 1954).
34 443 S.W.2d 855 (Tex. Civ. App.—Corpus Christi 1969, no writ).

negligence and attractive nuisance issues is identical to *Mackey*, and like the Kentucky court, the Texas court proceeded to emphasize attractive nuisance elements favorable to a finding of negligence while ignoring those elements which mitigate such a determination; for it is a principle of Texas attractive nuisance law "that the demands of ordinary care are to be determined on the basis of *reasonableness* and on the basis of a *just balancing of rights* between those charged with liability on the one hand and indiscreet children on the other."[35] A vendor's liability should bear "a relation . . . to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing, and . . . to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions."[36]

Quick to impose a duty to protect, safeguard, and warn, *Garza*-type decisions are mute in so much as even a suggestion about how to possibly, let alone adequately, discharge such a duty. However, legislative imposition of such a duty as proposed by *Garza* could well take the following form:

> When any person shall vend or peddle from a vehicle in the public streets and places . . . and, in the pursuit of such business or activity, children shall collect, assemble or gather about such vehicle for the purpose of making purchases, such person so vending and peddling, and in the pursuit of such occupation, shall be accompanied by an attendant whose sole duty and occupation shall be to protect and safeguard the children from injury and the hazards of street vehicle traffic and he shall maintain a constant lookout for approaching vehicles and shall warn the children and guard them from injury.[37]

The fate of this ordinance, in fact adopted by Albany, New York in 1956, serves to illustrate the fallacy of applying unadulterated negligence law to such a situation as presented in *Garza*. In declaring this ordinance unconstitutional in *Trio Distributor Corporation v. City of Albany*,[38] the court first noted that itinerant vending was an established occupation, not to be legislated or regulated out of existence,[39] and then pointed out that: (1) "the cost of two men on each truck would be prohibitive;"[40] (2) there was nothing to indicate this second employee

[35] Courtright v. Southern Compress & Warehouse Company, 299 S.W.2d 169, 173 (Tex. Civ. App.—Galveston 1957, no writ); *cf.* Banker v. McLaughlin, 146 Tex. 434, 208 S.W.2d 843 (1948).

[36] Mead v. Parker, 340 F.2d 157 (6th Cir. 1965) *aff'g* 221 F. Supp. 601, 603 (E.D. Tenn. 1963) applying Tennessee law.

[37] Albany city ordinance set out in Trio Distributor Corp. v. City of Albany, 143 N.E.2d 329, 339 (N.Y. 1957).

[38] 143 N.E.2d 329 (N.Y. 1957).

[39] *Id.* at 330.

[40] *Id.* at 331.