

# HAS THE INTERACTIVITY OF THE INTERNET OPENED THE DOOR TO TORT LIABILITY? : AN ANALYSIS OF THE POTENTIAL TORT LIABILITY FOR VIRAL VIDEO CONTESTS

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## I. INTRODUCTION

The popularity of viral videos increased exponentially with the founding of YouTube in 2005.<sup>1</sup> Less than a year after its creation, YouTube had over 6.1 million videos and over 1.73 billion views.<sup>2</sup> Home videos are no longer being stored in dusty closets but are being uploaded daily on websites that allow viewers to rate and comment on the content. The Internet has become a venue for human interaction, and entrepreneurs are well aware of the potential for profit.<sup>3</sup> With the growth in popularity of viral video websites, owners are struggling to find new ways to draw the most viewers. As a result, some websites are now sponsoring viral video contests with cash prizes as high as \$10,000.<sup>4</sup> The content of these videos ranges from the comedic to the extremely dangerous, and in the nature of the competition, entrants have recognized that the more extreme a video

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\* Juris Doctor, Florida State University College of Law, May 2008. Special thanks to the *Florida State University Law Review* for its helpful suggestions and to my husband and family for their continuing love and support.

1. Jason Feifer, *Video Makers Find a Vast and Eager Audience*, WORCESTER TELEGRAM & GAZETTE, June 11, 2006, <http://www.telegram.com/apps/pbcs.dll/article?AID=/20060611/NEWS/606110552/1011/FEATURES>.

2. Lee Gomes, *Will All of Us Get Our 15 Minutes On a YouTube Video?*, WALL ST. J. ONLINE, Aug. 30, 2006, [http://online.wsj.com/public/article/SB115689298168048904-f92aczYT1CtKrTSiZ8vumR3eZCI\\_20070830.html](http://online.wsj.com/public/article/SB115689298168048904-f92aczYT1CtKrTSiZ8vumR3eZCI_20070830.html).

3. Steven Levy & Brad Stone, *The New Wisdom of the Web*, NEWSWEEK, Apr. 3, 2006, at 47, available at <http://www.newsweek.com/id/45976>.

4. Vidmax.com, How to Enter and Win our Exclusive Video Contest, <http://www.vidmax.com/index.php/pages/rules> (last visited Aug. 25, 2008).

is, the more likely it will win a contest. Thus, in the tradition of MTV's *Jackass*, one can now find numerous videos of adolescents self imposing injury and attempting to perform dangerous stunts like jumping over moving cars.<sup>5</sup>

This Article explores the potential liability of the "stunt site"<sup>6</sup> owners for injuries arising out of the making of these videos and argues that the owners should be held liable for sponsoring such contests. Part II discusses the limitations, if any, the Free Speech Clause of the First Amendment places on a claim against stunt sites. Parts III and IV discuss the procedural concerns of bringing a suit against stunt sites. Part III identifies who potential parties might be, while Part IV addresses the issue of jurisdiction, given that Internet sites can be accessed from homes across the world.

The most common form of tort liability imposed in similar situations is negligence.<sup>7</sup> Therefore, Part V explains how the negligence doctrine might apply in Florida when the plaintiff is an injured contestant, as well as when the plaintiff is an injured third party. Since many of the video makers are adolescents,<sup>8</sup> Part V proposes solutions to help ensure that minors are not allowed to enter or profit from these contests. Lastly, Part VI discusses why litigation might not be the best solution and how legislation might provide a more secure recourse.

It is important to note that these causes of action are fact dependent, and therefore each case will have its own strengths and weaknesses. However, there are basic principles and general tendencies of the law that help determine whether this new genre of cases will meet with success or failure.

## II. PROTECTION UNDER THE FIRST AMENDMENT

Violence in the media is not a new phenomenon. This can be seen in various lawsuits involving children who have been injured after mimicking violent acts in the media.<sup>9</sup> Some cases have even resulted

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5. See Dale Frost Stillman, *Will the Real Jack#@% Please Stand Up?*, THE LEGAL EAGLE, (N.J. State Bar Found., New Brunswick, N.J.) Fall 2002, [http://www.njsbf.org/images/content/1/1/11097/LegalEagle\\_Fall2002.pdf](http://www.njsbf.org/images/content/1/1/11097/LegalEagle_Fall2002.pdf).

6. Internet sites that sponsor these contests tend to be known for their displays of extreme stunts, and because this Article focuses of the dangerousness of paying for these videos, these Internet sites will hereinafter be referred to as "stunt sites." See Vidmax.com, Advertise on Vidmax.com, <http://www.vidmax.com/index.php/pages/advertise> (boasting of its reputation as the "best source for stunt videos") (last visited Aug. 25, 2008).

7. See *infra* Part V.

8. See Jim Avila & Sara Sorcher, *On the Internet, Anyone Can Be a 'Jackass'*, ABC NEWS, Aug. 20, 2007, <http://abcnews.go.com/icaught/Story?id=3502081&page=1>.

9. See, e.g., *James v. Meow Media, Inc.*, 90 F. Supp. 2d 798 (W.D. Ky. 2000) (involving an adolescent who mimicked scenes from a movie and shot and killed other adolescents); *McCollum v. CBS, Inc.*, 202 Cal. App. 3d 989 (Cal. Ct. App. 1988) (involving and adolescent who committed suicide after listening to suicidal lyrics in song); Walt Disney

in death<sup>10</sup> or suicide.<sup>11</sup> The general claim in these “media violence”<sup>12</sup> suits is that the defendant’s television show or video game enticed children to mimic the violence and thereby injure themselves or others.<sup>13</sup> Since the attack is on the defendant’s speech, defendants often claim protection under the Free Speech Clause of the First Amendment.<sup>14</sup> This defense is often successful and, when successful, bars recovery.<sup>15</sup>

An important distinction needs to be made, however, between the claims in media violence suits and the claims against stunt sites. Unlike the defendants in media violence cases, stunt sites are not being held liable for their speech. Rather the claim this Article raises against stunt sites is in regard to their action of providing money to adolescents to engage in dangerous activities. Stunt sites negligently reward individuals for extreme performances without regard for a minor’s or other individual’s safety.<sup>16</sup> One stunt site owner proudly refers to himself as “a modern day P.T. Barnum.”<sup>17</sup>

Stunt sites would have a much stronger defense if plaintiffs performed their stunts simply because they were inspired by what they saw on the website. If a plaintiff were suing the website owner for simply showing this content, there would be a direct attack on the speech produced by the website.<sup>18</sup> However, where the focus is on a stunt site’s negligent actions of paying minors for reckless activity, this should prevent the stunt sites from being sheltered by the First Amendment.

### III. PARTIES

The potential plaintiffs against stunt sites fall into two basic categories, each exhibiting its own unique strengths and weaknesses.

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Prods., Inc. v. Shannon, 276 S.E.2d 580 (Ga. 1981) (child injured after attempting to imitate experiment performed on television).

10. *E.g.*, *James*, 90 F. Supp. 2d 798.

11. *E.g.*, *McCollum*, 202 Cal. App. 3d 989.

12. *See* April M. Perry, Comment, *Guilt by Saturation: Media Liability for Third-Party Violence and the Availability Heuristic*, 97 NW. U. L. REV. 1045 (2003).

13. *Id.*

14. Carolina A. Fornos, Comment, *Inspiring the Audience to Kill: Should the Entertainment Industry be Held Liable for Intentional Acts of Violence Committed by Viewers, Listeners, or Readers?*, 46 LOY. L. REV. 441, 456-65 (2000).

15. *Id.*

16. *See* Avila & Sorcher, *supra* note 8 (explaining that young teens are taking their outrageous stunts to extremes despite the potential brain injuries and broken bones for a potential profit of over \$50,000 a year).

17. *Id.*

18. *E.g.*, *McCollum v. CBS, Inc.*, 202 Cal. App. 3d 989 (Cal. Ct. App. 1988) (singer and related parties sued for suicidal lyrics which led teenager to commit suicide).

The first category is “injured contestants” and the second category is “injured third parties.”<sup>19</sup>

Under the “injured contestant” category fall both adolescent and adult contestants. This Article focuses mainly on adolescent contestants as plaintiffs. The adolescent contestants, as will be explained, present the strongest case, given their status as minors and the high level of care courts require when children are involved.<sup>20</sup> Regardless of whether the contestant is a minor or adult, the potential for injuries from these stunts is great. For example, some of the stunts performed in these videos include hammering nails into arms,<sup>21</sup> sewing lips shut,<sup>22</sup> and snorting chili powder.<sup>23</sup>

A characteristic unique to injured contestants is that they have a closer relationship with the stunt sites than do injured third parties. To become a contestant, an individual must register with the site, put in his or her personal information, and upload videos to the stunt site.<sup>24</sup> If the contestant wins, the contestant engages in communications with the stunt site to receive his or her rewards.<sup>25</sup> As will be discussed later, this relationship helps to establish a duty of care, which is a crucial element in a cause of action for negligence.<sup>26</sup>

An injured contestant’s case is not without its weaknesses. Setting aside the cash prize enticement, contestants willingly and knowingly engage in violent behavior. Stunt sites might argue that their liability should be nullified because the contestants understood the risk of their undertakings. Under Florida law, recovery will be barred if the plaintiffs have “realized and appreciated” the harm to which they voluntarily subject themselves.<sup>27</sup> Consequently, if the plaintiff is an adult, stunt sites have a stronger argument in that the plaintiff had the mental capacity to fully grasp the risk he or she voluntarily took on.

This argument weakens if the contestant is a minor. The *Second Restatement of Torts* states that unless a plaintiff is “a child, the

19. The “injured contestants” category refers to individuals injured while engaging in a stunt performed for the contest. Individuals injured by the contestant’s actions will hereinafter be referred to as “injured third parties.”

20. See *infra* Part V.A.1.

21. Vidmax.com, Kid Drives a Nail Through His Arm and Then Lights it on Fire, <http://www.vidmax.com/index.php/videos/view/375> (last visited Aug. 25, 2008).

22. Vidmax.com, Guy Sews His Lips Shut!, <http://www.vidmax.com/index.php/videos/view/26> (last visited Aug. 25, 2008).

23. Vidmax.com, Guy Snorts Chili Powder Spelling Vidmax.com, <http://www.vidmax.com/index.php/videos/view/3436> (last visited Aug. 25, 2008).

24. How to Enter and Win our Exclusive Video Contest, *supra* note 4.

25. See *id.*

26. See discussion *infra* Part V.A.1.

27. *Mazzeo v. City of Sebastian*, 550 So. 2d 1113, 1116 (Fla. 1989) (finding that a woman who dove into shallow waters did not deliberately expose herself to the dangers so as to bar recovery under doctrine of express assumption of risk).

standard of conduct to which he must conform . . . is that of a reasonable man.”<sup>28</sup> Often responsibility and expectations of a minor are different than that of an adult.<sup>29</sup> The level of care required to be exercised by a minor is that which could “reasonably be expected from a child of like age, intelligence, experience, and training.”<sup>30</sup> For example, in *McGregor v. Marini*, a child and his friend negligently started a fire in their neighbor’s attic after lighting candles and setting fire to a bird’s nest.<sup>31</sup> The lower court granted summary judgment in the neighbor’s favor but the appellate court held that more needed to be known about the child’s intelligence, experience, and training before it could determine what conduct might have been reasonably expected from the child.<sup>32</sup>

The lower standard of care required of children is evidenced in contract law as well. For example, in Florida, a contract signed by a minor is considered voidable.<sup>33</sup> If a lawsuit is filed in an attempt to hold a minor liable to their contract, that contract cannot be legally enforced against the minor.<sup>34</sup> This rule becomes important, as will be discussed later, because stunt sites are beginning to post terms and agreements which attempt to indemnify themselves from liability.<sup>35</sup> Therefore, the distinction between the rights a child can waive and those an adult can waive becomes important.

The second category of plaintiffs includes injured bystanders and parents of the adolescent contestants. As a practical matter, injured third parties will want to sue the stunt site, in addition to the contestant, as the stunt site might have insurance. This would thereby extend the possible sources for recovery.

Unlike the first category of plaintiffs, these potential plaintiffs are not responsible for the resulting injury. Therefore, there is no assumption of risk defense precluding recovery. The plaintiffs do, however, share inherent weaknesses.

The relationship between the injured third party and the stunt site may be attenuated. Some injured third parties may not have even heard of the stunt sites, while others may have only briefly visited them. Stunt sites reach millions<sup>36</sup> and it seems quite a stretch to

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28. RESTATEMENT (SECOND) OF TORTS § 283 (1965).

29. See *McGregor v. Marini*, 256 So. 2d 542, 543 (Fla. 4th DCA 1972).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Dilallo v. Riding Safely, Inc.*, 687 So. 2d 353 (Fla. 4th DCA 1997) (holding that a limited liability contract signed by a minor becomes void upon the minor’s filing of a lawsuit).

34. *Id.*

35. See discussion *infra* Part V.A.3.

36. See Advertise on Vidmax.com, *supra* note 6 (claiming ten million visits per month).

impose a duty of care on the stunt site for the behavior of someone with whom they have never interacted or even anticipated interacting. Given this dilemma, Part V.B. of this Article focuses on liability to injured bystanders so as to fully explore how courts have balanced concern for safety with the concern for limiting excessive litigation.

Determining which category of plaintiffs represents the strongest party to bring an action is only one of the procedural concerns in analyzing this potential suit. Another question of great concern is jurisdiction.

#### IV. JURISDICTION

Jurisdiction presents a complicated issue in all cases involving Internet sites. The global nature of the Internet can make determining jurisdiction difficult. A particular challenge is establishing personal jurisdiction. As this Article focuses on the application of Florida case law, it is important to examine personal jurisdiction to assess the potential for these suits to be heard in a Florida court.

Courts have used multiple approaches to determine whether personal jurisdiction has been established. One method is called the "Zippo Sliding Scale."<sup>37</sup> Under *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."<sup>38</sup> The court described this interaction as a sliding scale.<sup>39</sup> At the higher end of the scale would fall individuals who conduct business over the Internet, such as entering into contracts and knowingly transmitting files over the Internet.<sup>40</sup> At the lower end of the scale would fall individuals who passively post information.<sup>41</sup> The court envisioned that in the middle would be "interactive Web sites where a user can exchange information with the host computer."<sup>42</sup> When cases fall into the middle ground, the potential for personal jurisdiction depends on the "interactivity and commercial nature of the exchange of information."<sup>43</sup>

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37. Louis U. Gasparini, *The Internet and Personal Jurisdiction: Traditional Jurisprudence for the Twenty-First Century Under the New York CPLR*, 12 ALB. L.J. SCI. & TECH. 191, 199 (2001).

38. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

With the growth of technology and especially Web 2.0,<sup>44</sup> websites are becoming highly interactive. Web 2.0 is a concept which views the Internet as a platform.<sup>45</sup> What has been the “central principle behind the success” of this concept is that it has embraced the “power of the web to harness collective intelligence.”<sup>46</sup> This is seen in the popularity of sites like eBay,<sup>47</sup> Amazon.com,<sup>48</sup> and Wikipedia.<sup>49</sup> Users are invited to not only browse the sites but also to interact with them.<sup>50</sup> Users can comment on, post to, and even edit these sites.<sup>51</sup>

Stunt sites provide much of the same level of interactivity.<sup>52</sup> A user’s interaction can be as simple as viewing videos or as involved as uploading videos and rating other users’ content.<sup>53</sup> Furthermore, the stunt sites carry this interaction one step further by sponsoring contests. If a video is entered into the contest, the stunt site will post the video on its homepage to be rated and commented on.<sup>54</sup> Stunt sites are thereby transformed from passive databases for videos to active promoters. Additionally, those that win these contests receive payment from the website.<sup>55</sup> Arguably, this enters into the realm of commerce, as money is transferred both within and across state lines in exchange for goods.

Under *Zippo’s Sliding Scale*, stunt sites would fall on the higher end of the spectrum because they engage in a “knowing and repeated transmission of computer files over the Internet.”<sup>56</sup> Therefore, it is highly likely that stunt sites have generally subjected themselves to Florida’s jurisdiction. This poses a daunting situation for stunt sites.

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44. See Tim O’Reilly, *What Is Web 2.0: Design Patterns and Business Models for the Next Generation of Software*, O’REILLY, Sept. 30, 2005, <http://www.oreilly.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html>.

45. *Id.*

46. *Id.*

47. Ebay, <http://www.ebay.com> (last visited Aug. 25, 2008); see also Ebay, About Ebay, <http://news.ebay.com/about.cfm> (last visited Aug. 25, 2008) (claiming that eBay Inc. provides the Internet platforms of choice for global commerce, payments, and communications).

48. Amazon.com, <http://www.amazon.com> (last visited Aug. 25, 2008) (Amazon.com is a website offering various items for sale).

49. Wikipedia, <http://wikipedia.org> (Wikipedia is a free encyclopedia where Internet users contribute to the website by creating and editing the articles) (last visited Aug. 25, 2008).

50. *E.g.*, Wikipedia, About Wikipedia, <http://en.wikipedia.org/wiki/Wikipedia:About> (last visited Aug. 25, 2008) (discussing the various ways in which a user can edit, update, and add to its website).

51. *Id.*

52. See Vidmax.com, Terms of Use, <http://www.vidmax.com/index.php/pages/terms> (last visited Aug. 25, 2008) (detailing the rights a user has to upload, comment on, and rate video content).

53. *Id.*

54. How to Enter and Win our Exclusive Video Contest, *supra* note 4.

55. *Id.*

56. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

If a plaintiff in Florida can bring a suit, so might another plaintiff injured in any other state in which a contestant is injured. Granted, each case will have a different set of facts and interactions, but it is probable that stunt sites subject themselves to being named in lawsuits across the nation. It is helpful to look at another method courts have used to see if the *Zippo* Sliding Scale proposes the best solution.

Another method courts have used is known as the “effects” test.<sup>57</sup> Under this test, jurisdiction can be imposed where injury could have been reasonably anticipated and a defendant has directed conduct specifically at the forum state by use of the Internet.<sup>58</sup> In *Calder v. Jones*, for example, in a libel suit against a national magazine and its editors, the Court held that because the magazine’s actions were expressly aimed at the forum state, the editors could reasonably anticipate being subject to suit in the forum state.<sup>59</sup> Actions subjecting one to personal jurisdiction under the effects test are not only intentional torts but also “include evidence of sales to the forum, contracts with the plaintiff in the forum, or income received in the forum.”<sup>60</sup> Given the differences between the two methods, which one is the best approach to apply in the stunt sites’ situation?

Despite the different focus of the effects test and *Zippo* Sliding Scale, a court may assert jurisdiction over a stunt site under both methods. It might seem unfair to subject the stunt sites to the potential for liability throughout various states, but the key element is that the stunt sites interact directly in a commercial nature with residents of those states.<sup>61</sup> Stunt sites do not merely allow multiple users to upload videos but go a step further and engage in communication with the winners and send them money.<sup>62</sup> In fact, the reason the stunt sites pay individuals for their videos is to retain exclusive rights over the content.<sup>63</sup> Because these stunt sites have such extensive commercial interactions, they should be subject to liability under the *Zippo* approach.<sup>64</sup> Under the effects test they should also be found liable. The actions performed in the videos are very dangerous and

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57. Richard E. Kaye, Annotation, *Internet Web Site Activities of Nonresident Person or Corporation as Conferring Personal Jurisdiction Under Long-arm Statutes and Due Process Clause*, 81 A.L.R.5th 41 (2007).

58. *Id.*

59. *Calder v. Jones*, 465 U.S. 783, 789-90 (1984).

60. Gasparini, *supra* note 37, at 225 n.184.

61. See *How to Enter and Win our Exclusive Video Contest*, *supra* note 4 (discussing the exchange of money should a contestant win the video contest).

62. *Id.*

63. See *Vidmax.com, Vidmax Featured on The Maury Show Yesterday*, <http://www.vidmax.com/index.php/videos/view/3548> (last visited Aug. 25, 2008).

64. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

the titles of the videos portray this.<sup>65</sup> For example, one video's title explains that a boy "burns his arm and side during burning table stunt and is taken to hospital."<sup>66</sup> Consequently, stunt sites can reasonably anticipate injury occurring in the various states where these videos take place.

Given the viability of asserting jurisdiction over a stunt site in Florida, it remains to be seen whether a plaintiff has a valid cause of action upon which to impose liability.

## V. VIABILITY OF A NEGLIGENCE CLAIM IN FLORIDA

The traditional doctrine of negligence, as commonly employed in media violence cases,<sup>67</sup> appears to be the most promising doctrine upon which to base a claim against stunt sites.

Negligence in general has been defined as a failure to exercise due care under the circumstances and consists of four main 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 risks"; (2) "[a] failure . . . to conform to the standard required"; (3) "[a] reasonably close causal connection between the conduct and the resulting injury"; and (4) "[a]ctual loss or damage resulting to the interests of another."<sup>68</sup>

While the elements tend to be the same nationwide, courts across the United States have interpreted and applied them differently.<sup>69</sup> When courts determine whether someone is acting like a "reasonable" person, they depend on community standards, which vary from state to state.<sup>70</sup> There are two consequences that result from community standards playing a role in the judicial system.<sup>71</sup> First, it makes the negligence standard a flexible standard because it will evolve as community standards evolve.<sup>72</sup> Second, it has the effect of allowing the trier of fact to determine what the norms are and how they should change over time.<sup>73</sup>

The flexibility of community standards is of particular importance in stunt site cases. It is possible that stunt sites might rise in popularity and become just another common form of entertainment. Con-

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65. See, e.g., Vidmax.com, Dude Burns His Arm and Side During Burning Table Stunt and is Taken to Hospital, <http://www.vidmax.com/index.php/videos/view/398> (last visited Aug. 25, 2008).

66. *Id.*

67. Perry, *supra* note 12, at 1048-49.

68. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 146 (West 3d ed. 1964).

69. RESTATEMENT (SECOND) OF TORTS § 291 cmt. d (1965).

70. *Id.*

71. Perry, *supra* note 12, at 1049.

72. *Id.*

73. *Id.*

sider the popularity and attention this violent form of entertainment has already received. One stunt site now boasts of the attention it has received as the “best source for stunt videos” from media giants such as “ABC’s Prime-Time and Good Morning America and Fox News [sic] Bill O’Reilly.”<sup>74</sup> Perhaps negligence liability will one day be viewed as too harsh of a punishment to impose upon stunt sites. At one point in history, humanity viewed deadly “gladiatorial combat” as a form of entertainment for their dinner parties.<sup>75</sup>

Individuals may find stunt videos barbaric, yet some adolescents argue that if they were not doing these stunts they would be on the streets getting in trouble with the law.<sup>76</sup> Therefore, throughout the analysis of negligence it is important to keep in mind the impact societal views can have on the outcome of stunt site cases.

### A. INJURY TO THE CONTESTANT

#### 1. Duty and Breach of Duty

If any one of the four elements of negligence cannot be proven, the entire cause of action fails.<sup>77</sup> Of the four elements, duty of care to the contestant appears to be the most difficult one to prove. In Florida, a duty of care may be imposed by existing statute, regulation, or ordinance; by terms of a contract; by special relationship; or by voluntary assumption of duty.

The Internet sites at the center of this discussion have not voluntarily assumed a duty to protect contestants, nor is there any special relationship or statute upon which to impose duty. Duty must, instead, be based upon existing common law rules.<sup>78</sup> Under common law, everyone has a general duty not to engage in actions that would subject others to an unreasonable risk of harm.<sup>79</sup> Therefore, the duty imposed upon stunt sites is this general duty to the public under the common law.<sup>80</sup>

The contests sponsored by the stunt sites arguably subject impressionable adolescents to an unreasonable risk of harm. Various studies have been conducted evincing a correlation between media violence and teen aggression.<sup>81</sup> The correlation is not only that vio-

74. Advertise on Vidmax.com, *supra* note 6.

75. SISSELA BOK, MAYHEM: VIOLENCE AS PUBLIC ENTERTAINMENT 15 (1998).

76. Avila & Sorcher, *supra* note 8.

77. Cato v. W. Fla. Hosp., Inc., 471 So. 2d 598, 600 (Fla. 1st DCA 1985).

78. See 1-1 Florida Torts §1.02 (2007).

79. Banfield v. Addington, 140 So. 893, 896 (Fla. 1932); accord Gibbs v. Hernandez, 810 So. 2d 1034, 1336-37 (Fla. 4th DCA 2002).

80. See Banfield, 140 So. at 896 (citing the premise that all have a duty not to subject others to unreasonable harm).

81. E.g., Michael D. Slater et al., *Violent Media Content and Aggressiveness in Adolescents: A Downward Spiral Model*, 30 COMM. RES. 713 (2003).

lent media is likely to arouse aggression, but also that adolescents “oriented to aggressiveness and physical and emotional arousal” are drawn to violent media to satisfy their needs.<sup>82</sup> In a study conducted on middle-school adolescents over a two-year period, experimenters found “concurrent” correlations “between the overall tendency toward aggressiveness and toward use of greater violent media content.”<sup>83</sup> The contests put on by stunt sites encourage youths not only to watch violent content but also to become creators of it. In addition, there is a profit to be made off of this extreme behavior.

However, simply engaging in dangerous conduct alone will not subject stunt sites to tort liability. Duty will only be imposed where the defendant’s actions pose a *foreseeable* threat of harm and create a broader “zone of risk.”<sup>84</sup> Put another way, duty exists where the plaintiff’s injury was a probable consequence of the dangerous situation created by the defendant.<sup>85</sup>

There is a strong argument that the contests sponsored by the stunt sites create dangerous situations in which injury is a foreseeable and probable consequence. These Internet sites pride themselves on their extreme nature. As mentioned previously, one site proudly declares that it has been recognized by various talk shows and message boards as “the best source for stunt videos.”<sup>86</sup> Additionally, the stunt sites screen the videos that they post on their homepages<sup>87</sup> and, therefore, are aware of the injuries and likelihood for injuries present in the submissions.

Despite the stunt sites’ focus on stunts, the sites do portray other types of videos. Some are comedic, some are political, and others are artistic.<sup>88</sup> This poses the question of what makes these sites different from shows like America’s Funniest Home Videos (AFV).<sup>89</sup> Is it not a probable consequence that injury will result from the making of these types of home videos and therefore AFV should be held liable for negligence?

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82. Michael D. Slater et al., *Vulnerable Teens, Vulnerable Times: How Sensation Seeking, Alienation, and Victimization Moderate the Violent Media Content-Aggressiveness Relation*, 31 COMM. RES. 642, 643 (2004).

83. *Id.* at 644.

84. *McCain v. Florida Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992).

85. *Stark v. Holtzclaw*, 105 So. 330, 331 (Fla. 1925).

86. Advertise on Vidmax.com, *supra* note 6.

87. See How to Enter and Win our Exclusive Video Contest, *supra* note 4.

88. See Ann Hornaday, *Rules for YouTube: Make Art, Not Bore*, WASH. POST, Feb. 4, 2007, at N01.

89. See ABC.com, America’s Funniest Home Videos, <http://abc.go.com/primetime/afv/index?pn=about> (last visited Aug. 25, 2008) (stating that “‘America’s Funniest Home Videos’ is the longest-running primetime show in ABC history” and explaining that AFV is a television show where viewers submit their comical home videos to compete for cash prizes and other rewards).

This might seem like a noteworthy argument but what is negligent in one circumstance may not be in another. When determining what is negligent, courts look at whether someone acted unreasonably, which depends heavily on the specific facts of each case.<sup>90</sup> The use of a “reasonableness” standard also means that customs and community standards are taken into account.<sup>91</sup> In *Green v. Atlantic Co.*, the Florida Supreme Court held a driver liable for hitting a pedestrian, despite the driver’s use of caution.<sup>92</sup> The court reasoned that, under the circumstances, the defendant needed to exercise more caution because this was a high traffic area.<sup>93</sup> Thus, the jury should have taken into account the customs of the road.<sup>94</sup>

Courts apply these same principles when analyzing the duty of care owed to minors. In instances where children are involved, a heightened sense of safety is required.<sup>95</sup> Therefore, a defendant’s actions may seem reasonable in one situation, but not so reasonable if children are involved. In *Stark v. Holtzclaw*, the Florida Supreme Court held that it was negligent for an electric company to put up an uninsulated power line on a tree close to a school where children played.<sup>96</sup> The court stated that taking into consideration children’s behavior, the electric company should have contemplated that the children would climb the tree and be injured by the wire.<sup>97</sup>

These cases show that not every situation calls for the same application of duty. Applying this principle to the AFV issue, it is evident that not every video contest calls for the same scrutiny. AFV, for example, focuses mainly on the comedic and incidental mishaps of life. The television program is regulated by the Federal Communication Commission and confined to a time slot. Due to the limits of television and time, AFV is limited in the number of videos and content of videos it can show and carefully reviews the videos before they are aired.<sup>98</sup> It is generally perceived as a family show where the winners have ranged from a messy one-year-old eating birthday cake to a dog who can bark “I love you.”<sup>99</sup> When asked “What measures does ABC take regarding violence on television?” the network, which airs AFV, explains that “ABC takes its role as a national broadcaster very seri-

90. *Stark*, 105 So. at 331, 333.

91. *See supra* Part V.

92. *Green v. Atl. Co.*, 61 So. 2d 185 (Fla. 1952).

93. *Id.* at 186.

94. *Id.*

95. *Stark v. Holtzclaw*, 105 So. 330 (Fla. 1925).

96. *Id.* at 331.

97. *Id.*

98. *See* ABC.com, America’s Funniest Home Videos: Submit Your Video, <http://abc.go.com/primetime/afv/index?pn=submissionprocess> (last visited Aug. 25, 2008) (discussing the process by which AFV receives and reviews submitted videos).

99. *See* ABC.com, America’s Funniest Home Videos: Winners, <http://abc.go.com/primetime/afv/index?pn=categories&uid=-1> (last visited Aug. 25, 2008).

ously and [is] equally concerned about the effect television has on our viewers. ABC's goal is to provide a balanced schedule of programming which is suitable for families in early prime-time hours and more adult-oriented programming later in the evening."<sup>100</sup>

Contrast this with stunt site video contests, where there is no censorship,<sup>101</sup> no government regulation,<sup>102</sup> and no limit to the number of videos one can post.<sup>103</sup> On stunt sites, viewers can post as many videos as they would like,<sup>104</sup> thus helping bring out the most extreme, dangerous, or comical. In fact, it is now becoming possible for people to enter these contests as a means of making a living.<sup>105</sup> A myspace.com profile titled "STUNTS4FOOD" explains that "obviously with being a student money is tight so I do stunts and sell them to websites to make enough money to put food on the table."<sup>106</sup> Another group called "We Play Crazy" boasts that it has made \$50,000 in the last year from its stunt videos.<sup>107</sup>

As the risk of harm grows, so does the duty of care "to lessen the risk or see that sufficient precautions are taken to protect others from the harm."<sup>108</sup> Stunt site contests are different entities from the traditional "funny home video" contests. Just as "heavy traffic" in *Green*<sup>109</sup> required a greater exercise of care than normal, the extreme nature of stunt site contests require there to be a greater exercise of care than that required for shows like AFV.

If a duty of care should be applied to these stunt sites, which exact "duties" should be placed on the defendants? How far does the duty of care extend? Courts have said that to the extent that the defendants increase the risk of harm, they have a duty to lessen the risk.<sup>110</sup> It appears in the videos that not all of these contestants are over eighteen years of age and, as seen in *Stark*, courts require greater caution to be exercised when children are potentially involved.<sup>111</sup>

A number of duties seem appropriate in this situation. First is the duty to provide safety warnings on the videos that win and on the

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100. See ABC.com, FAQ: What Measures Does ABC Take Regarding Violence on Television?, <http://abc.go.com/site/faq.html?lid=ABCCOMGlobalFooter&lpos=FAQ#22> (last visited Aug. 25, 2008).

101. 1-8 Law of the Internet § 8.02 (2005).

102. See ICANN, *About ICANN*, <http://icann.org/new.html> (last visited Aug. 25, 2008).

103. Vidmax.com, Terms of Use, *supra* note 52.

104. *Id.*

105. *E.g.*, MySpace.com, STUNTS4FOOD, <http://www.myspace.com/STUNTS4FOOD> (last visited Aug. 25, 2008); see also Avila & Sorcher, *supra* note 8.

106. STUNTS4FOOD, *supra* note 105.

107. Avila & Sorcher, *supra* note 8.

108. *Ziegler v. Tenet Health Sys., Inc.*, 956 So. 2d 551, 554 (Fla. 4th DCA 2007).

109. *Green v. Atl. Co.*, 61 So. 2d 185 (Fla. 1952).

110. *Ziegler*, 956 So. 2d at 554.

111. *Stark v. Holtzclaw*, 105 So. 330 (Fla. 1925).

homepage where the highest rated videos are shown.<sup>112</sup> Second is the duty to ensure that stunt sites do not accept or reward videos submitted by minors. Stunt sites should make clear at registration that minors are not permitted to upload videos of any kind. This would help place more security at the front end to ensure that minors do not by happenstance get rewarded for extreme stunt videos. The third duty that would be appropriate is to ensure that there is no apparent harm to minors in the videos. Lastly, stunt sites should impose consequences when it is discovered that minors uploaded videos or were in a video displaying apparent harm to themselves. One possible solution would be to ban their accounts or require a return of any cash prizes won. Part V.A.4. discusses other possible solutions to ensure that minors do not falsify their ages to partake in the contests.<sup>113</sup>

It is unlikely that courts will be willing to impose duties beyond those described above. Requiring the contests to stop running altogether might be a step the court is not willing to take. Courts take many factors into consideration when assigning duty, and it is reasonable to assume that when adults are performing the stunts, they have made the decision to engage in this behavior, whether enticed by money or not. Therefore, given the adult's assumption of risk, courts might not go as far as to prevent the existence of these sites altogether.

If injured parties can establish this duty and breach of duty, they have merely "open[ed] the courthouse doors."<sup>114</sup> In order to succeed, injured parties must now establish that this failure to warn and protect against harm to minors was the proximate cause of their injuries.<sup>115</sup>

## 2. Causation

The key question in regard to causation is whether minors will perform these extreme stunts in the absence of monetary rewards. Is the ability to post the video on the stunt site incentive enough, or do the contests increase the likelihood of harm to minors?

Arguably, posting videos on the Internet is incentive in and of itself. YouTube, founded in 2005, grew to contain over six million videos in its first year, with the total number of video views exceeding

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112. How to Enter and Win our Exclusive Video Contest, *supra* note 4.

113. See *infra* Part V.A.4 (discussing possible solutions to ensure minors are prevented from entering contests).

114. Clay Elec. Coop., Inc. v. Johnson, 873 So. 2d 1182, 1195 (Fla. 2003).

115. PROSSER, *supra* note 68, at 146.

1.73 billion.<sup>116</sup> Given stunt sites' immense popularity, the fact that posting videos is an incentive must be considered. The stunt site may then argue that regardless of the cash prizes offered, the minors would still have performed the stunts. While this is a valid argument, the enticement created by the large cash prizes<sup>117</sup> cannot be ignored. Therefore, there are two potential causes which might contribute to a minor's injury.

Under Florida law, when there are two or more causes that contribute to a plaintiff's injury, the court implements the "substantial factor" test to determine if the defendant's contribution is significant enough to impose liability.<sup>118</sup>

The substantial factor test asks whether the defendant's actions constituted a "material and substantial factor"<sup>119</sup> in bringing the injury about, or, put another way, whether the conduct was "more likely than not" the cause of the injury.<sup>120</sup> When applied to this situation, the question is whether the stunt sites' monetary reward, failure to post safety warnings and failure to ensure that minors are not involved is a material and substantial factor in enticing the minor to engage in this dangerous behavior.

Granted, the individual circumstances of each case will vary, but the strongest case for a minor plaintiff would be where there is evidence that he or she performed the stunt solely in hopes of winning the cash prize. Another promising case for causation would be where the minor *increased* the danger of the stunt to affect the likelihood of winning. In either of these circumstances it could be argued that the incentive of a cash prize "more likely than not"<sup>121</sup> increased the risk that the plaintiff would not only perform a dangerous stunt but would do so in a fashion that would result in a higher chance for injury.

Even where there is no direct testimony from a minor that he or she did the stunt solely for the money, psychological principles show that whenever behavior is rewarded, the likelihood of continuing this behavior is strengthened.<sup>122</sup> A token economy is a prime example of

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116. Lee Gomes, *Will All of Us Get Our 15 Minutes On a YouTube Video?*, WALL ST. J. ONLINE, Aug. 30, 2006, [http://online.wsj.com/public/article/SB115689298168048904-f92aczYTICtKrTStSiZ8vumR3eZCI\\_20070830.html](http://online.wsj.com/public/article/SB115689298168048904-f92aczYTICtKrTStSiZ8vumR3eZCI_20070830.html).

117. See, e.g., How to Enter and Win our Exclusive Video Contest, *supra* note 4 (stating that cash prizes range from \$500 to \$10,000).

118. 1-2 Florida Torts § 2.20[2] (2007).

119. Loftin v. Wilson, 67 So. 2d 185, 191 (Fla. 1953).

120. Murphy v. Sarasota Ostrich Farm/Ranch, Inc., 875 So. 2d 767, 769 (Fla. 2d DCA 2004).

121. *Murphy*, 875 So. 2d at 769.

122. C.f. Brent D. Wolfe et al., *Effects of a Token Economy System within the Context of Cooperative Games on Social Behaviors of Adolescents with Emotional and Behavioral Disorders*, 37 THERAPEUTIC RECREATION J. 124 (2003).

this. A token economy is essentially a rewards system used to correct behavioral problems.<sup>123</sup> In a token economy, when a child exhibits certain positive behaviors, the guardian provides a “reinforcer,” which is “a stimulus or event that will increase the future probability of a behavior when it is delivered contingent on the occurrence of the behavior.”<sup>124</sup> Thus, one can condition behavior through a system of rewards. It follows that when the opportunity to show one’s stunt videos is combined with a reinforcing monetary reward, the likelihood of engaging in these stunts grows.

The analysis of causation does not stop here, as there are other factors courts look at in determining causation. Florida courts also look at the foreseeability of the injury.<sup>125</sup> Courts are “for good reason . . . most reluctant to attach tort liability” where injuries are “highly unusual, extraordinary, bizarre, or, stated differently, seem beyond the scope of any fair assessment of the danger created by the defendant’s negligence.”<sup>126</sup> In normal circumstances one cannot reasonably anticipate that people will voluntarily subject themselves to pain and injury. For example, in *Cone v. Inter County Telephone & Telegraph Co.*, a vehicle collision caused a gasoline truck to catch fire and burn down nearby telephone lines.<sup>127</sup> Thirty to forty minutes after the collision, a telephone repair man came out to assess the damage.<sup>128</sup> The telephone lines were completely destroyed and there was nothing that the repairman could do at the time.<sup>129</sup> However, in fascination, he decided to get a closer look at the gasoline truck, which was still on fire.<sup>130</sup> He was severely injured when the truck then suddenly exploded.<sup>131</sup> The court held that the defendant truck driver was not liable for the repairman’s injuries, as it was not foreseeable that “an employee of the plaintiff would come on the scene and, without inducement, excuse, or legal justification, voluntarily expose himself to a known and obvious danger and thereby sustain an injury.”<sup>132</sup>

Recall, however, that determination of causation is dependent upon the circumstances. Especially when children are involved, courts have expressed that defendants should anticipate different behavior given the “innocence of danger on a child’s part.”<sup>133</sup> For ex-

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123. *Id.* at 126.

124. *Id.*

125. *E.g.*, *Stahl v. Metro. Dade County*, 438 So. 2d 14 (Fla. 3d DCA 1983).

126. *Id.* at 19.

127. *Cone v. Inter County Tel. & Tel. Co.*, 40 So. 2d 148, 149 (Fla. 1949).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 150.

133. *Green Springs, Inc. v. Calvera*, 239 So. 2d 264, 266 (Fla. 1970) (explaining that, under the doctrine of attractive nuisance, defendants owe a greater duty to a child than an adult partly due to the “innocence of danger on a child’s part”); *see also* *Cusick v. City of*

ample, there are a number of cases where courts have held that, despite the danger involved, it should be anticipated that children will climb trees and potentially fall.<sup>134</sup> Therefore, courts have imposed harsher standards of care to ensure that no harmful objects are posted in or near trees where children are known to play.<sup>135</sup>

Stunt sites should foresee potential injury not only because children are involved but also because it is not uncommon to see videos of minors intentionally hurting themselves.<sup>136</sup> Some of the videos display teens sewing their lips shut, smashing fluorescent bulbs on their backs, and setting off fireworks attached to their bodies.<sup>137</sup> While normally this behavior is unexpected and bizarre, this is arguably what the contest requires. Although, the contest sets out no specific requirements that videos be extreme, this is the inherent nature of the competition.<sup>138</sup> The stunt sites are the ones responsible for picking what submissions are the best to put on their homepages.<sup>139</sup> Therefore, they know what type of videos they are getting and what type of videos they choose to display as winners. It is not unforeseeable that injury will, and in fact does, occur, no matter how bizarre the behavior.

One might argue that while injury is foreseeable, there is no way that stunt sites can foresee the *type* of injury that results. Yet courts have held that it is not necessary for the defendant to foresee the exact type of injury.<sup>140</sup> There are many videos that carry out the unthinkable, but the court has made clear that “it is not necessary that the initial tortfeasor be able to foresee the exact nature and extent of the injuries or the precise manner in which the injuries occur.”<sup>141</sup> All that is required is that the defendant foresee that some injury will likely result as a consequence of his conduct.<sup>142</sup>

Having established duty, breach of duty, and causation, it appears that the plaintiff has a viable claim against these stunt sites. However, it is vital to also consider possible defenses. One important factor in this situation is the plaintiff’s own involvement in procuring his injury. The bizarre acts of the plaintiff may not affect the issue of

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Neptune Beach, 765 So. 2d 175 (Fla. 1st DCA 2000) (finding that a child injured when climbing a tree was owed a duty because the injury was foreseeable despite the obviousness of danger).

134. See *Cusick*, 765 So. 2d 175; see also *Stark v. Holtzclaw*, 105 So. 330 (Fla. 1925).

135. *Cusick*, 765 So. 2d at 175.

136. *Avila & Sorcher*, *supra* note 8.

137. *Id.*

138. See *Advertise on Vidmax.com*, *supra* note 6 (claiming that while Vidmax displays all types of videos, it is well known as the “best source for stunt videos”).

139. See *How to Enter and Win our Exclusive Video Contest*, *supra* note 4.

140. *Crislip v. Holland*, 401 So. 2d 1115 (Fla. 4th DCA 1981).

141. *Id.* at 1117.

142. *Id.*

causation but they do allow the defendant to bring up the defense of express assumption of risk.<sup>143</sup>

### 3. *Express Assumption of Risk*

Understanding the potential success of an express assumption of risk defense is essential to this negligence claim because, if successful, it serves as a bar to recovery.<sup>144</sup> Under Florida law, this defense exists if the plaintiff has entered into a contract that expressly assumes the risk or if the plaintiff voluntarily participates in an inherently dangerous sport.<sup>145</sup> Express contracts have become common in stunt sites, as they require contestants to register with the site before they can upload any viral videos.<sup>146</sup> Buried among the contracts' terms and agreements are age requirement clauses, indemnification clauses, and assumption of risk clauses.<sup>147</sup>

Stunt sites may claim that adolescent contestants have agreed to the terms and agreements by submitting their videos for the contest, whether the adolescents read the contracts or not. This, they may argue, releases the stunt sites of any liability. Despite the stunt sites' efforts, Florida courts might find these terms and agreements unenforceable. For example, where terms are hidden and the plaintiff does not have the legal training to understand what they are waiving, courts have held such agreements to be unenforceable.<sup>148</sup>

Regardless of the contract's enforceability, there is one thing that Florida courts are certain about. Courts have continuously held that a contract signed by a minor is voidable, and the same applies to assumption of risk contracts, such as that seen in *Dilallo v. Riding Safely, Inc.*<sup>149</sup> In *Dilallo*, the court held that a limited liability contract signed by a fourteen-year-old girl was unenforceable.<sup>150</sup> The court explained that the state has a strong policy interest in protecting minors, and this is especially the case when minors contract away their rights to recover damages.<sup>151</sup>

If a minor is unable to legally acquiesce to an assumption of risk contract, can the defendant argue that the minor is bound by his or her *implicit* assumption of risk? The court in *Dilallo* did not ex-

143. See *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977).

144. *Kuehner v. Green*, 436 So. 2d 78 (Fla. 1983).

145. *Blackburn*, 348 So. 2d at 290.

146. *E.g.*, Vidmax.com, Register, <http://www.vidmax.com/index.php/users/register> (last visited Aug. 25, 2008); see also YouTube.com, Terms of Use, <http://www.youtube.com/t/terms> (last visited Aug. 25, 2008).

147. *E.g.*, Register, *supra* note 146; see also YouTube.com, Terms of Use, *supra* note 146.

148. *Romano v. Manor Care, Inc.*, 861 So. 2d 59, 63 (Fla. 4th DCA 2003).

149. *Dilallo v. Riding Safely, Inc.*, 687 So. 2d 353, 354 (Fla. 4th DCA 1997).

150. *Id.*

151. *Id.* at 357.

pressly address this question.<sup>152</sup> While it held that the girl had no legal right to consent by contract,<sup>153</sup> it did not discuss whether this barred her legal capacity to impliedly consent. It is important to take a closer look at the court's policy reasons. In *Dilallo*, the court's main policy concern is protecting the minor.<sup>154</sup> This protection is of utmost importance when a minor is giving up his or her right to recovery.<sup>155</sup> The very core of this policy concern becomes diluted if a minor can void an express agreement but still remains unprotected, because the minor might end up barring his or her recovery implicitly.

One last factor to take into consideration is the minor's age. There is a reason that courts protect minors. Given their limited life experiences, minors cannot fully assess the risks to which they expose themselves.<sup>156</sup> This is especially true when minors are engaging in extreme stunts. A child may subjectively be able to anticipate the danger of sparring in karate,<sup>157</sup> for example, without truly comprehending the likelihood of brain damage or even death.

It is apparent that the plaintiff's status as a minor is a key factor in a negligence suit.<sup>158</sup> Consequently, stunt sites should take some form of precautionary measures to ensure that minors are not submitting entries. However, the Internet allows people to remain faceless and ageless.<sup>159</sup> This arguably poses a hindrance to the success of age verification, as it would make it difficult to verify that people are the age they claim to be. This should not be an excuse for stunt sites, because there are some possible solutions that can lessen the risk of harm posed to adolescents.

#### 4. Possible Solution: Age Verification

Age verification has been an issue in a number of areas, such as the sale of tobacco and pornography.<sup>160</sup> In a study conducted to assess the rate of Internet cigarette sales to minors, researchers discovered that out of eighty-three purchase attempts by minors, seventy-six

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152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. David Horton, *Extreme Sports and Assumption of Risk: A Blueprint*, 38 U.S.F. L. REV. 599, 643 (2004).

157. *Kuehner v. Green*, 436 So. 2d 78 (Fla. 1983).

158. See discussion *supra* Part V.A.1 (discussing the courts' special treatment of minors and its potential impact in a suit brought against a stunt site).

159. See discussion *infra* Part V.A.4 (regarding the ease with which adolescents can buy cigarettes over the Internet).

160. See, e.g., Kurt M. Ribisl et al., *Internet Sales of Cigarettes to Minors*, 290 JAMA 1356 (2003).

(91.6 percent) were successful.<sup>161</sup> A variety of methods for age verification were employed, but most were ineffective.

One commonly proposed means of age verification is the required use of a credit card number.<sup>162</sup> This is not foolproof, as it is not uncommon for adolescents to obtain their own credit cards or to have access to their parents' credit cards.<sup>163</sup> Even Visa has issued a statement admitting that this method of age verification "is not an adequate safeguard."<sup>164</sup>

Self-reporting is another method<sup>165</sup> and seems to be the favored approach of stunt sites.<sup>166</sup> Both YouTube and Vidmax require that registrants type in their birthdates, yet neither one prohibits registering and entering contests by those who indicate that they are under the age of eighteen.<sup>167</sup> Tucked away in their terms and agreements is a provision requiring that one be eighteen years of age but no true precautions are taken.<sup>168</sup>

It is apparent that there needs to be a more reliable means of age verification other than providing a disclaimer that you must be eighteen years old. Despite the questionable success of credit card verification and self-reporting, age verification is not a hopeless endeavor.

One solution is to require proof of identification before any prizes are handed out. The site could require that all contestants submit, either by mail or fax, a copy of a government issued identification. As an additional precaution, if the video involves any deliberate or incidental injuries, then proof of identification should be required for all involved in the video. With the advances of technology and the savvy minds of teenagers, there is no doubt that this verification system might be compromised. Fake identification is not uncommon.<sup>169</sup> However, all that would be required of the stunt sites is that they provide some means to ensure that minors are neither entering the contests nor being harmed in the films. With some additional measures in place, stunt sites will have a much stronger argument that they took reasonable care to ensure that their actions created no risk of harm to adolescents.

161. *Id.* at 1357.

162. 47 U.S.C. § 231(c)(1)(A) (2000) (Child Online Protection Act).

163. Ribisl, *supra* note 160.

164. *Id.* at 1359.

165. *Id.* at 137.

166. *See, e.g.,* Register, *supra* note 146; *see also, e.g.,* YouTube.com, Terms of Use, *supra* note 146.

167. *Id.*

168. *Id.*

169. *See* Ribisl, *supra* note 160.

## B. THIRD PARTIES SEEKING RELIEF

### 1. Duty and Breach of Duty

Contestants are not the only parties that may seek relief. Stunt sites, having incited reckless behavior and having failed to warn of the need for safety, may be liable to injured third parties. The complication is that the defendant stunt site is not the one who directly injured the third party. The argument then becomes that the stunt site should not be held liable for the contestant's negligence. While there is sparse case law in Florida dealing with competitions, other states have directly addressed the issue of a sponsor's liability for a contestant's negligence.<sup>170</sup> Because the relationship between the stunt site and the injured party is more attenuated, the two main elements at the heart of the debate are duty and causation.

*Weirum v. RKO General Inc.*<sup>171</sup> presents facts that are most analogous to the stunt site scenario. In *Weirum*, a "radio station with an extensive teenage audience" held a contest that challenged listeners to locate a disc jockey that was traveling to various locations throughout Los Angeles.<sup>172</sup> After two teens spotted the disc jockey's vehicle, they raced to be the first to arrive at the jockey's destination.<sup>173</sup> In pursuit of the jockey's vehicle, one of the teens negligently ran another vehicle off the road, killing the driver.<sup>174</sup> The "primary question" the court faced was whether the radio station owed a duty to the decedent "arising out of its . . . contest."<sup>175</sup> To analyze this issue, the court first clarified that while duty must be decided on a case-by-case basis, "all persons are required to use ordinary care to prevent others from" an unreasonable risk of harm.<sup>176</sup> This alone will not always impose duty. The "primary consideration" is the foreseeability of the risk of harm created by the defendant.<sup>177</sup>

Florida courts have applied the same analysis.<sup>178</sup> While there is a general duty to exercise ordinary care, a defendant will only be held liable if the plaintiff's injury was "a foreseeable consequence of the danger created by the defendant's negligent act or omission."<sup>179</sup> Es-

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170. See *Weirum v. RKO Gen. Inc.*, 539 P.2d 36 (Cal. 1975).

171. *Id.*

172. *Id.* at 37.

173. *Id.*

174. *Id.*

175. *Id.* at 39.

176. *Id.*

177. *Id.*

178. See, e.g., *Davis v. Dollar Rent A Car Sys., Inc.*, 909 So. 2d 297 (Fla. 5th DCA 2004) (discussing the importance of foreseeability in determining causation).

179. *Stahl v. Metro. Dade County*, 438 So. 2d 14, 21 (Fla. 3rd DCA 1983).

entially, foreseeability serves to define the limits of when this general duty is imposed.<sup>180</sup>

The court in *Weirum* found that the risk of harm to the decedent was foreseeable.<sup>181</sup> The radio station was known to have a large following of teenagers and it was foreseeable that “youthful listeners . . . in their haste would disregard the demands of highway safety.”<sup>182</sup> Comparing this with the stunt site’s contests, and given the extreme nature of the stunts performed by contestants, it is highly likely that injury to others will occur.

In one town, two teenagers set off a homemade bomb that they learned how to make on YouTube and started a brush fire near the city roads.<sup>183</sup> Another popular filmed stunt is called “ghost riding the whip,” which involves a driver dancing on the roof of his car while it is still in motion.<sup>184</sup> This has resulted in many severe injuries and even death.<sup>185</sup> Injury is imminent not only to the driver but also to other drivers and citizens on the road. Yet stunt sites offer no clear safety precautions to entrants of the video contests. At best, stunt sites have buried among their terms and agreements a clause which reads that a submitter shall not submit material that is “harmful of minors in any way, abusive, illegal or harassing, or contain expressions of hatred, bigotry, racism or pornography, or are otherwise objectionable, or that would constitute or encourage a criminal offense, [or] violate the rights of any party.”<sup>186</sup>

What effect does this have on the type of videos that are submitted and entered into the contest? It does not seem to have any effect at all. In flagrant disregard for the stunt site’s own policy, Vidmax entered a video into the contest titled “Wannabe Gangsters Attack Random White Dudes Just Because They Can.”<sup>187</sup> The title is self-explanatory, but in this home video multiple strangers on the street are beaten viciously by various individuals at the encouragement of others.<sup>188</sup> As evidenced by the stunt site’s violation of its own policy, at least one stunt site has breached its duty not only to warn indi-

180. *Grunow v. Valor Corp. of Florida*, 904 So. 2d 551,556 (Fla. 4th DCA 2005).

181. *Weirum*, 539 P.2d at 40.

182. *Id.*

183. Karen Dandurant, *Police: YouTube Helped Kids Make Bomb*, SEACOAST ONLINE, July 13, 2007, <http://www.seacoastonline.com/apps/pbcs.dll/article?AID=/20070713/NEWS/707130435-1/rss18>.

184. Garance Burke, *Hip-Hop Car Stunt Leaves 2 Dead*, BREITBART.COM, Dec. 29, 2006, [http://www.breitbart.com/article.php?id=D8MAMLF00&show\\_article=1](http://www.breitbart.com/article.php?id=D8MAMLF00&show_article=1).

185. *Id.*

186. Vidmax.com, Terms of Use, *supra* note 52.

187. Vidmax.com, Wannabe Gangsters Attack Random White Dudes Just Because They Can, <http://www.vidmax.com/index.php/videos/view/4843> (last visited Aug. 25, 2008).

188. *Id.*

viduals about others' safety but also to ensure that injury to others is not promoted and encouraged.

## 2. Causation

The last element of main concern in third party liability cases is the causation element. The *Weirum*<sup>189</sup> court did not address this issue, but Florida case law has held that a defendant may still be liable for another party's negligent acts if the other party's acts were foreseeable and the acts combined with the defendant's negligence resulted in injury to a third party.<sup>190</sup>

When two causes, which in this case are the stunt sites' negligence and the contestant's negligence, combine to contribute to injury, Florida courts use a substantial factor test.<sup>191</sup> This test helps eliminate liability where the defendant has contributed to the injury, but only in an insignificant manner.<sup>192</sup> An analysis of the stunt site's negligence as a substantial factor was previously discussed at length.<sup>193</sup> Therefore, to avoid redundancy, it is helpful to reemphasize the main point that money can be a huge incentive. One particular contest pays prizes of \$500 each month and has a grand prize of \$10,000 each year for the best clip among the monthly entries.<sup>194</sup> A winner of more than one monthly prize substantially increases his or her chances of winning \$10,000.<sup>195</sup> Ultimately, the amount of damages is a question for the jury to decide,<sup>196</sup> but there is a strong argument that the defendant's actions offer more than an insignificant contribution to the plaintiff's risk of harm.

Lastly, there is one nuance that exists in this situation that was not present when the plaintiff was the contestant. The third party, unlike the contestant, has in no way subjected him- or herself to the harm.<sup>197</sup> In other words, there is no assumption of risk, express or implied, on behalf of the plaintiff. This is important because, as previously emphasized, were a jury to find express or implied assumption of risk, recovery would be lessened or even barred.<sup>198</sup> Therefore, in this respect, the plaintiff has a much stronger claim than does the

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189. *Weirum v. RKO Gen. Inc.*, 539 P.2d 36 (Cal. 1975).

190. *Homan v. County of Dade*, 248 So. 2d 235, 238 (Fla. 3d DCA 1971).

191. *See supra* Part V.A.2.

192. VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS 285 (11th ed. 2005).

193. *See discussion supra* Part V.A.2.

194. *See* How to Enter and Win our Exclusive Video Contest, *supra* note 4.

195. *Id.*

196. *See discussion supra* Part V (discussing the elements of negligence and the jury's role in determining various elements).

197. *See discussion supra* Part III (discussing the various strengths and weaknesses of potential parties).

198. *Supra* Part V.A.3.

adolescent contestant and is likely to receive damages regardless of whether he or she is a minor or adult.

## VI. LEGISLATION AS A RESOLUTION

The seriousness of the injuries resulting from the extreme stunts featured on stunt sites indicates that some protective measures are needed. Whether litigation is the answer remains unknown; however, it can provide some benefits. If stunt sites are found to be negligent, families are provided a way to be compensated for their loss. On the other hand, litigation is an adversarial system and can be risky.<sup>199</sup>

The outcome in litigation depends upon various factors,<sup>200</sup> which could possibly lead to inconsistent results. For example, when determining whether children should be partially liable for their own dangerous actions, the court must consider an individual child's level of maturity, experience, and age.<sup>201</sup> As a result, two children of the same age and with the same injury might vary in their recovery. While one child is granted relief, another might be deemed to be more mature and is left to pay medical bills for the same injury.

Another limitation is that litigation only provides relief to the parties directly involved.<sup>202</sup> Litigation does affect other parties by setting precedent,<sup>203</sup> but stunt sites would only be potentially liable to those individuals that have the time and resources to bring a suit. This may have the effect of weeding out smaller claims and, in turn, would hold stunt sites responsible only for more severe injuries. While this discourages activities that might result in major injuries, it does nothing to ensure that adolescents are not participating in these video contests in the first place. If adolescents are allowed to participate in and are paid for less dangerous stunts, they might be tempted to gradually increase the dangerousness of the stunts.

Lastly, litigation is retrospective.<sup>204</sup> Only after the injury has taken place is there any accountability imposed upon the stunt sites. For parents who may have lost a child, this relief may come too late.

199. Jon O. Newman, Comment, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1647-48 (1985).

200. See discussion *supra* Part V.

201. *McGregor v. Marini*, 256 So. 2d 542, 543 (Fla. 4th DCA 1972).

202. RANSFORD C. PYLE, FOUNDATIONS OF LAW: CASES, COMMENTARY, AND ETHICS 72 (3d ed. 2002).

203. See *id.* at 76.

204. *Id.* at 72.

Given the easy accessibility of stunt sites<sup>205</sup> and the severity of the injuries that may result,<sup>206</sup> perhaps this issue warrants a more secure recourse.

When juxtaposing litigation with legislation, legislation might prove to provide a more complete solution. The characteristics of legislation are exact opposites of litigation.<sup>207</sup> While litigation is limited to the parties involved, legislation has “universal application” and “future effect.”<sup>208</sup>

There are various benefits derived from these characteristics. Arguably, having a statute which specifies what is prohibited or permissible would promote both a consistent application of the law and compliance with the law. With regard to compliance, there is an increased deterrent effect as stunt sites will know in advance the penalties they face for violations.

Regarding consistency, legislation creates a more established set of principles<sup>209</sup> upon which to impose liability. However, in litigation, principles are established but can be modified and extended depending on the case.<sup>210</sup> Consistency puts both stunt sites and injured contestants in a better position. For example, if the statute were to define a minor as a “person under the age of eighteen,” courts would not have to go into the time-consuming evaluation of each child’s mental capacity and maturity. A per se violation of the law would exist were a child under eighteen permitted to enter the contest. Stunt sites would know exactly what the boundaries of their contests should be, and injured victims can rest assured that liability will be imposed.

Legislation appears to be a viable alternative, but it is important to consider whether this issue is appropriate for the legislature to deal with and how it would be carried out.

The legislature, both on a state and national level, is involved in various issues such as public health, employment law, and public housing.<sup>211</sup> On a more local level, legislatures have stepped in to control issues such as public nuisances as well.<sup>212</sup> This type of legislative involvement is seen in neighborhoods where there is a concentration

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205. See Advertise on Vidmax.com, *supra* note 6 (claiming ten million visits per month with twenty-five million pages viewed).

206. See Avila & Sorcher, *supra* note 8.

207. See PYLE, *supra* note 202, at 72-73.

208. *Id.*

209. *Id.*

210. See *Id.*

211. Bruce I. Oppenheimer, *How Legislatures Shape Policy and Budgets*, 8 LEGIS. STUD. Q. 551, 554 (1983).

212. See Shelley Ross Saxer, “Down with Demon Drink!”: *Strategies for Resolving Liquor Outlet Overconcentration in Urban Areas*, 35 SANTA CLARA L. REV. 123, 191 (1994).

of liquor stores.<sup>213</sup> In these neighborhoods, the government increases its enforcement against nuisances that accompany liquor stores.<sup>214</sup> The justification is that while it is legal for liquor stores to exist, there is an associated increase in criminal activity which negatively impacts neighborhoods “saturated” with liquor stores.<sup>215</sup>

An analogy can be made to the virtual world of the Internet. Stunt sights are attractive to and have become popular among adolescents.<sup>216</sup> In addition, the cash prize is a substantial amount of money to entice a youth who likely has no formal source of income.<sup>217</sup> Given the inherent danger of performing these stunts, and given the popularity stunt sites have among youth, it could be argued that stunt sites and the nuisances associated with them have significantly compromised the safety of minors. This compromise of safety not only justifies but bids legislative action.

It is difficult to say exactly what legislation should be enacted. Part of the legislative process would be to investigate this problem and formulate solutions.<sup>218</sup> However, there are basic principles that should be addressed. The main concern presented in this Article is harm to minors and innocent third parties.<sup>219</sup> Therefore, one solution might be to hold stunt sites strictly liable if a known minor is paid for a video showing apparent harm to oneself or another minor. Another suggestion would be to require the stunt site to have a more secure age verification process instead of simple self-reporting. Perhaps requiring multiple age verification methods might be reasonable.<sup>220</sup>

While there is no easy solution that will completely prevent minors from engaging in these contests, whether through legislation or litigation, there are certainly means which can be imposed that can bring about a better resolution than currently exists.

## VII. CONCLUSION

The danger that stunt site contests pose to adolescents is unwarranted. These contests cause adolescents to engage in increasingly extreme behavior and, unfortunately, serious injuries are common. Stunt sites should be concerned not only because they might be subject to tort liability but also because they are purposefully availing themselves of the jurisdiction of many states. Consequently, they

213. *Id.* at 189-90.

214. *Id.*

215. *Id.*

216. *See* Avila & Sorcher, *supra* note 8.

217. *Id.*

218. Oppenheimer, *supra* note 211, at 553.

219. *See* discussion *supra* Part I.

220. *Supra* Part V.A.4.

have the potential of being summoned into courts across the nation, and this could prove more costly than it is worth.

While Florida law has not specifically dealt with the issue of stunt site liability, it is likely that a judge and jury will impose tort liability. Stunt sites unreasonably expose teens to a greater risk of harm and have done little to lessen this risk. Additionally, given the heightened standard of care imposed when children are involved, it is evident that stunt sites should be required to impose a proper method of age verification. This is not an unreasonable requirement, as there are basic steps these sites can take to protect the safety of minors. This Article does not argue that stunt sites should be shut down, but merely that stunt sites be required, whether through litigation or legislation, to ensure that minors are protected.



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