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Recent Developments: Virgil v. "Kash N'Karry": Circumstantial Evidence Sufficient in Products Liability

Kevin L. Beard

conveying information about legal services that is more conducive to reflection and the exercise of choice on the part of the consumer." *Zauderer*, 105 S.Ct. at 2277.

Ohio argued that a prophylactic rule was needed to prohibit attorneys from using legal advice in false or misleading advertisements. However, the Supreme Court found that the prophylactic ban was not the least restrictive way to secure the state's interests in preventing public deception. The Supreme Court noted that the Federal Trade Commission carries out a similar mission in eliminating unfair or deceptive advertisements in commerce, and found that distinguishing deceptive from nondeceptive legal advertisements would be no more difficult. *Id.* at 2278-80. The Court concluded that an attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of others.

Similarly, the Supreme Court struck down Ohio's restrictions on the use of illustrations in attorney advertisements. The Court noted that "the use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly." *Id.* at 2280. Since commercial illustrations are entitled to the first amendment protection of verbal commercial speech, the state had the burden of showing a substantial government interest justifying the restriction. The Court found that the state's interest that attorneys maintain dignity did not justify the abridgement of their first amendment rights. Furthermore, since advertising could be policed on a case-by-case basis, the prophylactic ban on all illustrations in printed attorney advertisements was unconstitutional.

Zauderer finally challenged the state's disclosure requirements in contingent fee advertisements. Under the Ohio disciplinary rules, an attorney must state that the client may have to bear certain expenses even if he loses. Zauderer felt this compulsion violated his first amendment rights. The Supreme Court found that since commercial speech was principally justified by its value to consumers, Zauderer's protected interest in not providing factual information in his advertising was minimal, and his interest was adequately protected by the requirement that the disclosures be reasonably related to the state's interest in preventing deception of consumers. The Court then found that the Ohio requirement of disclosure in contingent fee ads was rationally related to the state's goals. The Court noted that a layman may not be aware of the distinction between "legal fees" and "costs," and may wrongfully feel that he will entail no expenses. The Court concluded that Ohio's ruling was reasonable enough to support a requirement of disclosure, and did not violate the first amendment.

The Supreme Court's opinion in *Zauderer* protects an attorney's first amendment right to advertise, yet recognizes the state's interest in protecting the public from deception. While the state may no longer issue blanket bans to prevent an attorney from offering legal advice or using illustrations in printed advertisements, the state may evaluate these ads on a case-by-case basis in order to ensure that the ads are not deceptive. The state may also compel the disclosure of specific information to prevent an ad from being deceptive. As attorneys begin to exercise their constitutional rights, they should be aware of the potential of the state to create an advertising review board, and should endeavor to prevent deceptive printed advertisements from entering into the marketplace of ideas.

–Lawrence M. Meister

Virgil v. "Kash N'Karry": CIRCUMSTANTIAL EVIDENCE SUFFICIENT IN PRODUCTS LIABILITY

In a case of first impression, the Court of Special Appeals of Maryland has ruled that circumstantial evidence, in a products liability action, is sufficient to establish the existence of a defect, thereby enabling the case to survive motions for a directed verdict and reach the jury. In *Virgil v. "Kash N'Karry" Service Corporation*, 61 Md. App. 23, 484 A.2d 652 (1984), the court reversed in part a directed verdict, at the close of the claimant's case, entered by the Circuit Court for Howard County Guy J. Cicone, J. in favor of the defendant manufacturer, Aladdin Industries, Incorporated and seller, "Kash N'Karry" Service Corporation. The court reversed the trial court with respect to the implied warranty of merchantability and strict liability in tort counts. The counts sounding in negligence, including failure to warn, were affirmed by the court.

The factual circumstances of the case involved the implosion of a pint-size thermos purchased at "Kash N'Karry" two or three months prior to the accident. Testimony by the plaintiff, Irma Virgil, revealed that the thermos was filled with coffee and a small amount of milk every weekday morning. The thermos was then carried to work, either by its handle or in a bag containing her shoes. On Saturdays, the thermos was carried downstairs to her den, where the plaintiff spent the day studying.

Mrs. Virgil cleaned the thermos by filling it at night with a solution of baking soda and warm water. In the morning, she would wash the thermos with a bottle brush. The label bore the words, "Easy to Keep Clean," but there were no instructions on how to clean the thermos or what constituted a normal manner of cleansing the thermos. One Saturday morning the thermos imploded, causing the hot coffee and glass to be spewn into the face and eye of Mrs. Virgil. Mrs. Virgil testified that she did not drop, misuse, abuse, or damage the thermos in any way, but the plaintiff failed to present any expert "to give any scientific explanation for the implosion." *Id.* at 27, 484 A.2d at 654.

The defendants, during the motion for a directed verdict and the appeal, maintained that the plaintiff had failed to present any evidence that the thermos was defective at the time it was purchased. As the court explained,

> [t]o recover on either theory—implied warranty or strict liability—the plaintiff in a products liability case must satisfy three basics from an evidentiary standpoint: (1) the existence of a defect, (2) the attribution of the defect to the seller, and (3) a causal relation between the defect and the injury.

Id. at 30, 484 A.2d at 656.

Thus, the crux of the case became whether the plaintiff's testimony, with regard to her proper handling of the thermos during the two-to-three month period between purchase and implosion, satisfied the "plaintiff's burden to establish that it is more probable than not that the defect existed at the time of sale." *Id.* at 32, 484 A.2d at 657.

The court held that the plaintiffs met their burden in this case. Initially, the court rejected the defendant's contention that expert testimony was needed to establish a defect stating,

> [e]xpert testimony is hardly necessary to establish that a thermos bottle that explodes or implodes when coffee or milk are poured into it is defective. When a product fails to meet the reasonable expectations of the user, "The inference is that there was some sort of a defect, a precise definition of which is unnecessary."

Id. at 31, 484 A.2d at 656 (citing *Heaton v. Ford Motor Co.*, 248 Or. 467, 435 P.2d 806 (1967)).

The court then discussed the sufficiency of the evidence presented. As stated in *Jensen v. American Motors Corp.*, 50 Md. App. 226, 437 A.2d 242 (1981), proof of a defect must rise above surmise, conjecture or speculation, emphasizing that recovery can not be based on the presumption of the accident happening. Dean Prosser, though, in *The Fall of the Citadel*, 50 Minn. L. Rev. 791, 843-844 (1966), declared that the addition of "very little more in the way of other facts . . . may be enough" to give rise to an inference that product is defective from the mere occurrence of an accident.

With the above analysis in mind, the court held that, "[a]n inference of a defect may be drawn from the happening of an accident, where circumstantial evidence tends to eliminate other causes, such as product misuse or alteration." *Virgil*, 61 Md. App. at 32, 484 A.2d at 657.

The court distinguished the case *sub judice* from *Jensen, supra. Jensen* involved the loss of control of an automobile allegedly due to a defect in the steering mechanism where the only evidence produced was the plaintiffs' testimony that he heard the tires squeal. The court stated that the plaintiffs in *Jensen* failed to negate other causes of the accident.

In the area of products liability, involving the theories of strict liability and implied warranty of merchantibility, the holding in this case has the potential to provide a "windfall" to plaintiffs. The practical effect of the decision will be to shift the essential burden of proof to the defendant. As it stands now, the plaintiff is required to testify that he bought the product and that he did not misuse or alter the product, thus, effectively shifting to the defendant the burden of proving that the causal effect of the accident was not produced by the defendant.

The decision has further eroded the rule of *caveat emptor.* With regard to strict liability, it now appears that in order to reach the jury, who most often will side with the injured plaintiff, evidence of an accident which injured the plaintiff is needed; coupled with the plaintiff's *heartfelt assurances* that he did not misuse, alter or even touch the product (i.e., "all of a sudden, it just blew up") will be sufficient proof. This case takes the position that a plaintiff's testimony will not be self-serving. It may be too much to ask of an injured party.

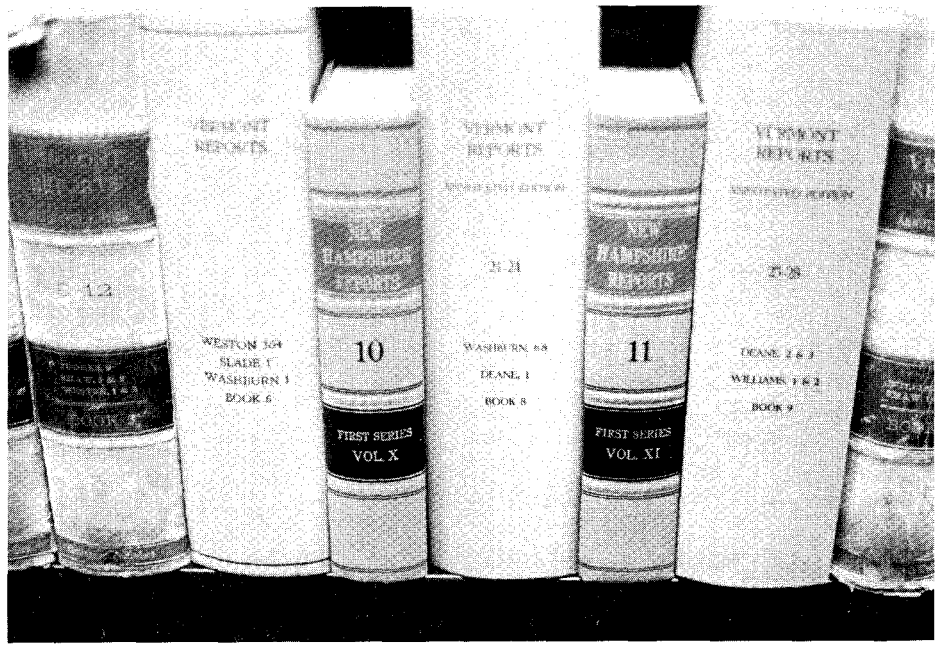
–Kevin L. Beard

New Hampshire v. Piper: OPENS DOORS TO BAR ADMISSION

In *Supreme Court of New Hampshire v. Piper*, 105 S.Ct. 1272 (1985), the United States Supreme Court held that New Hampshire Supreme Court Rule 42, which limits bar admission to state residents, violated the privileges and immunities clause of the United States Constitution, article IV, section 2, clause 1. By this ruling, the Court has affected the residency requirements for lawyers in at least twenty-seven states. Low, *Lawyer Residency Requirement Axed by Supreme Court*, The Daily Record, Mar. 12, 1985 at 4, col. 3. However, Maryland is not one of the states affected by this ruling. *See*, e.g., Rule 10 of Rules Governing Admission to the Bar of Maryland (deleted Jan. 22, 1982).

In *Piper*, the appellee, Kathryn Piper, a resident of a town in Vermont, which was located about 400 yards from the New Hampshire border, passed the New Hampshire bar examination in 1980. She was informed by the New Hampshire Board of Bar Examiners, however, that before she could practice law in the state of New Hampshire she would have to become a resident of New Hampshire pursuant to New Hampshire Supreme Court Rule 42. Appellee requested from the Clerk of the New Hampshire Supreme Court a dispensation from the residency requirement, explaining that her personal situation negated the convenience of becoming a New Hampshire resident. The Clerk denied appellee's request. Piper than petitioned the New Hampshire Supreme Court for permission to become a member of the bar. The New Hampshire Supreme Court denied her request. The appellee filed the present action in the United States District Court for the District of New Hampshire. The court ruled in 1982 that the New Hampshire residency requirement violated the privileges and immunities clause. *New Hampshire v. Piper*, 539 F. Supp. 1064 (D.N.H. 1982). The Court of Appeals for the First Circuit affirmed the ruling. *New Hampshire v. Piper*, 723 F.2d 110 (1st Cir. 1983).

The Court in *Piper* begins by discussing the intent of the privileges and immunities clause. The clause, according to the Court, was intended to "fuse into one Nation a collection of independent, sovereign States." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). Consequently, it is "[o]nly with respect to those 'privileges' and 'immunities' bearing on the vitality of the nation as a single entity that a State must accord residents and nonresidents equal treatment." *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 383 (1978). Therefore, the privileges and immunities clause only protects fundamental rights.



The Court determined that practicing law is a fundamental right protected by that clause. First, one of the purposes of the clause is "to create a national economic union." *Piper*, 105 S.Ct. at 1276. Since "the practice of law is important to the national economy," it is a fundamental right which is protected. *Piper*, 105 S.Ct. at 1277. Second, the practice of law is a fundamental right because in cases where "unpopular federal claims" are raised "representation by nonresident counsel may be the only means available for the vindication of federal rights." *Piper*, 105 S.Ct. at 1277.

In addition, the Court noted that the practice of law does not involve an exercise of state power as in *In re Griffiths*, 413 U.S. 717 (1973), justifying a residency requirement. *Piper*, 105 S.Ct. at 1278. Instead, a lawyer is a private businessman and not "an 'officer' of the State in any political sense." *Piper*, 105 S.Ct. at 1278.

Although the Court determined that practicing law is a fundamental right, the state can still discriminate against nonresidents where: "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Piper*, 105 S.Ct. at 1279. The Court determined, however, that New Hampshire did not show substantial reasons that were substantially related to the state's objective to discriminate against nonresident attorneys. First, "[t]here is no evidence to support the State's claim that nonresidents might be less likely to keep abreast of local rules and procedures." *Piper*, 105 S.Ct. at 1279. Second, "there is no reason to believe that a nonresident lawyer will conduct his practice