MondayMonday

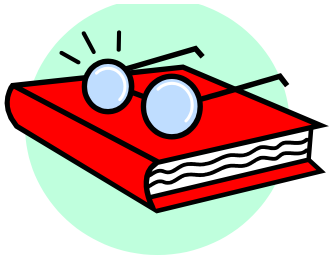
Myopic Vision On Eagle Street

February 24, 2014

In a world where Big Pharma can sell any pill or device it desires in whatever manner it wants thanks to the moribund Food and Drug Administration; in a society in which "Consumer Support" is a euphemism for a third world hiring program for non-English speakers; and in a City where making a left turn during daylight hours requires a passport and a visa, it's nice to have something you can rely on, like your lawyer.

Lawyer advertising makes the delivery of legal services fast and available to almost everyone. As in the days of Lincoln, lawyer advertising helps not only the big law firms, but the single practitioner and the small firm as well. While there is no question that lawyer advertising needs to be regulated to ensure that ethical precepts are not violated and that the profession continues to earn the public's respect, we must also understand that everything a lawyer says or does in public is not advertising.

Enter the Florida Bar, who at the beginning of this year amended its rules to make websites subject to the general rules controlling lawyer advertising. That means, we fear, that lawyer comments on blogs and



public listservs are also to come under such control. Under the Florida rules, this means that such statements must by "objectively verifiable" before they may be made.

Can a client state on a firm's website that the firm is "the best law firm that anyone could ask for"? Is that statement "objectively verifiable?" The law firm of Searcy Denney is challenging just that question in a suit against the Florida Bar in federal court. We wish them well and commend their courage, so long as we don't have to objectively verify those feelings. The First Amendment requires no more.

In *Fabrizi v. 1095 Avenue of the Americas, LLC*, 2014 NY Slip Op 01206 (2/20/14), Judge Pigott, writing for a divided Court, affirms dismissal after finding it clear that a set-screw coupling that could have prevented a 60-80 pound piece of pipe from falling and hitting plaintiff's hand was not a safety device. Instead, the Court holds that such a device is just that, a basic coupling and not a safety device contemplated under 240(1). That an inferior compression clamp was holding the pipe is immaterial under 240(1).

The Chief Judge, accompanied by Judge Rivera, disagrees, finding it just as clear that plaintiff established his right to summary judgment under 240(1) because his injury was gravity-related and was proximately caused by defendants' failure to provide an adequate safety device. "It requires little imagination," suggests the Chief Judge, "to include that a tool capable of stabilizing the conduit pipe—whether brace, clamp, coupling, or otherwise—would be precisely the sort of device contemplated by section 240(1)." To focus, instead, "myopically on whether couplings fall under the statute, the majority loses sight of defendants' burden on summary judgment." It's not that a particular device can be excluded from those mentioned in 240(1), but instead that defendants must show either a lack of a gravity-related risk or, where elevation is apparent, "deficient causal nexus" between failure of the device and the injury.

The majority, however, puts all its weight on the definition of a safety device in 240(1). Whatever it is, it's not a screw coupling, inviting a cornucopia of decisions that will now rewrite 204(1) via footnotes, "frustrat[ing] the Labor Law's salutary purpose of ensuring worker protection." [dissent]