

Hearing:
November 16, 1999

Paper No. 15
EWH/MM

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB MAY 31, 00
U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **American Vault & Concrete Products Corp.**

Serial No. 75/168,170

Bernard J. Cantor of **Harness, Dickey & Pierce PLC** for
American Vault & Concrete Products Corp.

Vivian Micznik First, Trademark Examining Attorney, Law
Office 104 (**Sidney Moskowitz**, Managing Attorney).

Before Hanak, Walters and McLeod, Administrative Trademark
Judges.

Opinion by Hanak, Administrative Trademark Judge:

American Vault & Concrete Products Corp. (applicant)
seeks to register EAGLE CORINTHIAN in typed drawing form
for "concrete burial vaults." The application was filed on
September 9, 1996 with a claimed first use date of February
1, 1995.

Citing Section 2(d) of the Trademark Act, the
Examining Attorney has refused registration on the basis

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that applicant's mark, as applied to applicant's goods, is likely to cause confusion with the mark THE CORINTHIAN, previously registered in typed drawing form for "burial caskets." Registration No. 1,351,717.

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs and were present at a hearing held on November 16, 1999.

In any likelihood of confusion analysis, two key considerations are the similarities of the goods and the similarities of the marks. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We will consider first the degree to which concrete burial vaults (applicant's goods) and burial caskets (registrant's goods) are related. In effort to show that the two types of goods are related, the Examining Attorney has made of record seven third-party registrations and stories from the NEXIS database and certain web sites. However, none of this evidence establishes that the same companies manufacture both concrete burial vaults and burial caskets. Five of the seven third-party registrations describe the goods as "combination casket and burial vault." The Examining Attorney has made of record

absolutely no evidence explaining what a combination casket and burial vault is. Accordingly, these five third-party registrations are of no probative value in showing the relationship between concrete burial vaults and burial caskets. The remaining two third-party registrations do not demonstrate that companies market under the same mark both concrete burial vaults and burial caskets, rather they demonstrate that two companies possibly market burial vaults and caskets made of other materials, such as polypropylene.

In contrast, applicant has made of record the declarations of six independent funeral directors not affiliated with applicant. These funeral directors have anywhere from nine years to thirty-four years of experience in the funeral industry. These funeral directors state that the "business of buying and selling concrete burial vaults is separate and distinct from the business of selling caskets ... or combination caskets and vaults." The directors go on to explain that "concrete burial vaults are extremely heavy and bulky and are not kept on the premises at the funeral home. Rather, they are specially ordered for delivery by the manufacturer to the gravesite at a specified time for a specified funeral." In addition, these funeral directors note that the ultimate consumer

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(the family of the deceased) never sees the concrete burial vault, and more importantly, does not directly purchase a concrete burial vault. Rather, the ultimate consumers are asked by the funeral director whether they wish to have a concrete burial vault, and if they do, the funeral director then places the actual order for the concrete burial vault with one of the "small number of concrete vault manufacturers." Finally, these funeral directors indicate that they and their fellow directors are extremely familiar with the various manufacturers of burial caskets as well as with the small number of manufacturers of concrete burial vaults, and that they (the funeral directors) would simply not be confused as to source.

As for the Examining Attorney's NEXIS and web site evidence, suffice it to say that none of this evidence demonstrates that the same companies market under the same marks both burial caskets and concrete burial vaults. Most of the stories submitted by the Examining Attorney are informational in nature and describe the funeral process to ordinary consumers. Some of these stories mention, among many other topics, caskets and burial vaults, including, in a limited number of cases, concrete burial vaults.

In sum, we find that in viewing all of the evidence, the only relationship between concrete burial vaults and

burial caskets is that they both are, obviously, part of the funeral/burial process. However, there is no proof whatsoever that the same companies sell both concrete burial vaults and burial caskets, much less that these companies sell both of the products under the same mark. More importantly, the evidence demonstrates that concrete burial vaults are simply not viewed or purchased by the ultimate consumers, but rather are purchased by sophisticated professionals, namely, funeral directors.

Turning to a consideration of the marks, applicant's mark EAGLE CORINTHIAN and registrant's mark THE CORINTHIAN are obviously somewhat similar in that both share the word CORINTHIAN. Because the evidence demonstrates that the ordinary, ultimate consumers do not select or directly purchase concrete burial vaults, we need not decide whether there would be a likelihood of confusion in the minds of these ordinary, ultimate consumers resulting from the contemporaneous use of EAGLE CORINTHIAN on concrete burial vaults and THE CORINTHIAN on burial caskets. Instead, we find that the two marks are dissimilar enough such that experienced professional buyers (funeral home directors) would distinguish between EAGLE CORINTHIAN concrete burial vaults and THE CORINTHIAN burial caskets, and that these professional funeral directors would not assume that both

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products emanated from a common source. In this case, purchaser "sophistication is important and ... dispositive because sophisticated consumers [the funeral directors] may be expected to exercise greater care." Electronic Design & Sales v. Electronic Data Systems, 954 F.2d 713, 21 USPQ2d 1388, 1392 (Fed. Cir. 1992).

Decision: The refusal to register is reversed.

E. W. Hanak

C. E. Walters

L. K. McLeod
Administrative Trademark
Judges, Trademark Trial and
Appeal Board