

# Fire in the Hole!

## A cautionary tale of ear-candling tort litigation.

by Kevin Underhill<sup>1</sup>

In 2008, Anne Danaher sued Karen Kenney, alleging that Kenney negligently injured her during an ear candling. Danaher also sued Wild Oats Markets, alleging that the ear candle it had sold her was defective.

I guess I should stop for a second and make sure you know what “ear candling” is.

It’s basically what the name implies: the sticking of candle A into ear B, followed by the lighting of said candle, generally while the candle-ee lies on his or her side. Since this was a negligence case, you might be thinking that this was an unintentional candling, but you would be wrong. In fact, Danaher requested it. Why? Good question.

Advocates of ear candling (sometimes called “ear coning,” because of the shape of the candle) say that the process helps remove ear-wax blockages through the combination of (1) the heat of the flame and (2) the suction created by hot air rising up through the candle, which, I should have mentioned, is hollow. Detractors like me say that makes absolutely no sense at all, because ear wax is not going to magically travel up the inside of a hollow candle no matter how much hot air said candle generates. In fact, it seems much more likely that hot melted candle wax is going to come *down*. And indeed it does.

One of the points illustrated by this case is the fact that even intelligent people may believe some ridiculous things.

For example, I emailed a friend of mine about this case, a man who is an attorney and personally known by me to be an intelligent person. (I’ll call him “David,” because that’s his name.) To my surprise, “David” wrote back to offer a slightly sheepish defense of the procedure, saying he had actually performed it on his wife (also smart) and, though he admitted he found it somewhat “creepy,” they believed it had “worked.”

I asked “David” *how* he thought it worked, and he said this:

*1) I am not a doctor; 2) I am not a scientist; 3) I really don’t know, but will tell you how I think it works: You light the large end of the cone. I believe the cone dynamic (again, the actual physics are way beyond me) then results in heat transmitting down the cone, which has the effect of softening the wax. I believe the heat also creates some kind of pressure dynamic which draws the softened wax into the tip of the cone.*

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I responded:

*I am not a doctor, but I am enough of a scientist to call you out on your novel “cone dynamic” theory. In theory, the flame could create the pressure dynamic you refer to by heating air, causing it to rise out of the hollow cone, and (if the ear seal was air-tight, which does not seem likely) creating an area of low pressure inside the cone that could cause air from inside the ear to be drawn into it. Rising hot air is one thing; but I don’t see how it could bring melted ear wax along with it.*

*I am not trying to talk you out of ear-candling your wife, if that is something the two of you enjoy. I’m just saying I’m skeptical of the value of thermal-auricular therapy.*

That’s what some people apparently call it: “thermal-auricular therapy,” something that is more impressive-sounding than “the hot-ear treatment” but no more effective. Ear candling has been said to offer benefits ranging from clearing the sinuses to “aligning the chakras,” but actual studies examining the practice have found no evidence at all that it does these things. In fact, one study found that the pressure needed to get ear wax to come out would probably rupture the eardrum, which I assume is not part of the plan. True, these studies actually *have* found wax inside ear candles after the procedure in a number of cases. Can you guess what kind? (Hint: it is the kind of wax commonly used to make candles.)

Anne Danaher does not seem to have researched the procedure much, if at all, before buying two ear candles at Wild Oats Markets in Kansas City in 2003. The candles sat unused until 2006, when Danaher hired Kenney, an employee at a different health-food store, to come over and candle her. In the course of that procedure, Danaher alleged, she suffered a burn to her right inner ear that resulted in hearing loss. She sued the candle’s manufacturers and the retailer for selling her an allegedly defective candle, and sued the candler for negligent candling.

Danaher’s defect claim suffered from a number of problems, chief among them being that she needed to find a qualified expert witness who knew something about ear candling. And since the sentence you just read is probably the only one that’s ever included both “qualified expert” and “ear candling” (except for this one), it may not be surprising that she was unable to do this.

She did find a qualified otolaryngologist, who was prepared to testify that “ear candles and the practice of ear candling are of no use or benefit in the treatment of any condition or illness involving the human ear” (or, presumably, any other part of the body). But the court found that Federal Rule 702 was not satisfied because the doctor simply had no experience with ear candles. He had never inspected one, had never been involved in any research involving them, and certainly had “no formal training in terms of classes or education in the design, manufacture or construction of ear candles,” if there is such a thing. His testimony on ear candles was therefore excluded.

Not surprisingly, given this result, the defendants all filed summary judgment motions.

Kenney argued that with no expert testimony Danaher could not demonstrate the proper duty of care, which, she argued, was not ordinary care but rather “that degree of learning and skill ordinarily possessed and used by members of the ear candling profession and that school of ear candling in the community in which [the defendant] practiced, or in similar communities, and under like standards.” Problem: there is no “school of ear candling” and ear candling is not a “profession.” Kenney really did not claim otherwise, as the court pointed out:

*Kenney does not consider herself an expert on ear candling.... Having reviewed the summary judgment record, the Court finds there is no evidence that Kenney has a career in ear candling, that she is a professional ear candler, or that she otherwise has any specialized knowledge in ear candling.... Kenney’s only guidance on how to perform the ear candling procedure came from her mother, an employee of The Herb Garden [health-food store], and an instruction pamphlet handed out at The Herb Garden. The Court concludes that this evidence falls far from demonstrating that Kenney is a professional [ear candler].*

The “instruction pamphlet” is worth a mention. According to the court, it was titled “A History of Ear Candles” and purported to be merely telling the story of how the “ancients” used these devices. “These authentic reproductions of the ancient so-called ‘ear candles’ are sold as novelty items only,” the pamphlet read. “They make amusing birthday candles. The user is fully responsible for the use of the product, which is harmless when properly handled [on birthdays].” Did the ancients have any safety procedures that they would have wanted future pamphlet-writers to pass on to their descendants? Turns out they did:

*Users kept water handy, because hot ash or sparks could fly from the top of the cone, which is one reason an assistant would observe while the cone burned. It was safer to lay the head on a table, or to lie down on a hard surface rather than on a bed or carpet, while using the cones.... Ear candles were handled with the same care and common sense people used with any candle or flame.*

It’s not clear which sensible ancient people are being referred to here. For some reason, the Hopi tribe is frequently cited as being the source of the practice itself, but for the record they have flatly denied this. In any event, if Kenney hoped to benefit from the received wisdom of the ancient ear-candlers, she was going to have to explain it to the jury at trial.

The other defendants argued that the plaintiff could not succeed against them because she could not establish that ear candles are “defective.” Basically, the court agreed that

Danaher did not have any evidence to support a design-defect claim, but held that she could get to a jury on failure to warn. This seems to have been because discovery had shown that the manufacturer did in fact prepare written warnings and instructions that it included with its ear candles. These “direct[ed] the user to keep the head upright during the ear candling procedure, with the ear candle basically parallel to the ground and at a slightly upward angle,” rather than having the user on his or her side with the candle raised to the vertical. While upright candling would seem to reduce if not eliminate the risk, it also seems to eliminate the (theoretical) benefit, while also making it much more likely that someone will see you with a burning candle in your ear. As far as a failure-to-warn claim was concerned, though, Danaher’s testimony that these instructions had not been included with the candles she bought persuaded the judge that this claim could go to a jury.

It got to trial, anyway, but never actually got to the jury. Danaher in fact testified at trial only that she “could not recall” whether the warnings above or any others had been provided at the time of purchase, and (likely because the plaintiff in a failure-to-warn case has the burden to prove that someone failed to warn her) the judge held that was not good enough. Her claims also failed because the evidence showed at most that the proximate cause of the injury was the conduct of the ear-candler, not the candle itself. The court therefore granted Wild Oats’s motion for judgment as a matter of law, and the docket shows that candler and candle-ee settled shortly thereafter.

So, what have you learned during the otherwise billable time you spent reading this? I think there are a number of lessons:

- Ear candling doesn’t work and may be risky, depending how it’s done.
- The risk that you will look ridiculous during the procedure is 100 percent. Doesn’t matter how it’s done.
- There are not likely to be any “professional ear-candlers,” which will make finding an expert witness difficult.
- On the other hand, expert testimony may not be necessary in such a case.
- Finally, never stick a novelty item in your ear, especially if it is on fire.