

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

APPEAL FROM COLLETON COUNTY

Court of Common Pleas

The Honorable Perry M. Buckner, Circuit Court Judge

Case No.: 2012-213713

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Emily Williams,

Appellant, **SC Court of Appeals**

v.

L'Oreal USA, Inc.,

Respondent.

**APPELLANT'S RESPONSE IN OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS**

Appellant, Emily Williams, by and through her undersigned counsel, hereby submits her response in opposition to Respondent's Motion to Dismiss. In addition, Appellant reiterates her Initial Brief as support for her opposition to the Motion to Dismiss. For the reasons stated herein, Respondent's Motion to Dismiss should be denied.

PROCEDURAL HISTORY

On April 14, 2010 in the Colleton County Court of Common Pleas, Ms. Emily H. Williams brought this case against L'Oreal USA alleging that because of a warning defect she was injured by the Respondent's product. The respondent answered

Williams's claim alleging that it was user error which caused her injury, and not L'Oreal's product.

The case was heard on November 27, 2012, and the jury found in favor of the defendant. On December 27, 2012 Ms. Williams served the Notice of Appeal on L'Oreal. Respondents have filed a Motion to Dismiss pursuant to Appellate Rule 240.

ARGUMENT

Respondent filed a Motion to Dismiss pursuant to South Carolina Appellate Court Rule 240 on the ground that appellant did not preserve any issue for appellate review. A Motion to Dismiss may not be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the appellant to any relief on the case. The court should not dismiss an appeal merely based upon whether an objection was raised during trial court. It has been established and decided that, "where a substantial right material to his defense...rendered a new trial necessary", and as such, an appeal will lie to this court. Blakely v. Frazier, 11 S.C. 122, 9 (1878). In addition, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him. The Court should be concerned with the substance of the appeal, not technical differences in the issues raised by the exceptions. Mishoe v. Atlantic Coast Line Ry. Co., 186 S.C. 402, 197 S.E. 97 (1938).

As previously stated throughout Appellant's Initial Brief to the Court, the admission of evidence is a matter that is left to the discretion of the trial court, and its ruling will not be disturbed absent a finding of abuse of discretion and probable prejudice. State v. Fripp, 396 S.C. 434, 438, 721 S.E.2d 465, 467 (Ct.App.2012) (*quoting*

State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)). Lay witness opinion testimony *can be* admissible under the South Carolina Rules of Evidence 701 in limited instances. South Carolina Rules of Evidence 701, in pertinent parts, reads:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience, or training.

Although admission is left to the trial judges' discretion, the offered testimony must be rationally based on the "witness' perception" **and** a sufficient factual foundation must be established to support the testimony. Rule 701, SCRE.

Here, the witness Tammy Stewart-Stucky (hereinafter "Witness"), an employee of L'Oreal, was offered by the defense as a witness to render an opinion as to the Defendant's product's application, instructions, and the causation related to the Plaintiff's claim. This was a pure strategic maneuver by the defense to "backdoor" the evidentiary rules in order to get unqualified testimony before the jury. The defense intentionally did not qualify the Witness as an expert in chemistry, or in hair-care product creation, despite her having a Bachelor's Degree in Chemistry, a Master's Degree in Analytical Chemistry, and being employed by the defendant as a "Research and Innovation Manager." (Tr. p. 99 Ln. 24-25; Tr. p. 100 Ln. 1, 8). Instead, the defense solicited broad unqualified testimony about the product at issue's application, causation, and the product instructions. The trial judge abused discretion by allowing the witness to continue testifying knowing that her proffered scientific educational background created a perception to the jury that the Witness was testifying as an expert.

As the Witness was never qualified as an expert, any and all of her testimony was rendered as a lay person. Pursuant to South Carolina Rules of Evidence 701, opinion testimony by a lay person is required to be “rationally based on her perception.” Rule, 701(a), SCRE. In State v. Mitchell, the court found lay witness testimony to be admissible based on the “witness’ perception” where the witness identified the defendant from photograph taken by deer camera. State v. Mitchell, 399 S.C. 410, 416, 731 S.E.2d 889, 893 (Ct.App.2012). In Divine v. Robbins the Court allowed a lay witness to give opinion testimony on “personal observations” and “his own impressions and feelings”, but was not allowed to give his opinion derived from the forensic psychologist’s scientific findings. Divine v. Robbins, 385 S.C. 23, 40, 683 S.E.2d 286, 295 (Ct.App.2009).

The only “rationally based perception” the Witness established related to the chemical makeup of the product and “formulat[ing] new products for the market.” (Tr. p. 100 Ln. 12). The proffered foundation established the Witness’ “perception” could only be derived from her education and work duties. She stated that her education background is in chemistry. (Tr. p. 99 Ln. 24). She received a Bachelor’s Degree in Chemistry and also a Masters in Analytical Chemistry. (Tr. p. 99 Ln. 24; Tr. p. 100 Ln. 1). She is employed as a Research and Innovation Manager for L’Oreal whose daily routine is “taking the raw materials to make a recipe for hair care products.” (Tr. p. 101 Ln. 4-5).

At no time was there a foundation laid to the Witness’ knowledge, ability, training or expertise to apply the products she created to actual human subjects. She did not testify to being a licensed cosmetologist, nor did she establish any first-hand knowledge, based on knowledge, experience or acquired skill, as to the application of the product.

The witness testified that “on-hair evaluations” could be done, however, these evaluations are conducted in a totally separate department (the Part Evaluation Center) from the one she works in daily. (Tr. p. 101 Ln. 12-13).

Despite not having any knowledge of the application process, and no foundation being established to support her testimony, the Trial Court allowed the Witness to testify and to opine as to the product’s application to human hair. (Tr. p. 108 Ln. 15). Allowing this improper lay witness testimony was a clear abuse of discretion when the judge knew she was not qualified to render an opinion as to causation. She was allowed to testify as to the ultimate facts, thus her testimony negatively impacted the jury’s decision.

Secondly, the Trial Court’s error in allowing the improper testimony severely prejudiced the Plaintiff’s case. The Witness offered the only opinion testimony the jury heard on the Defendant’s behalf. As such, the jury’s verdict in favor of the Defendant was predicated on improper testimony which the trial court should have excluded.

Adding to the prejudicial effect of her testimony was the Witness’ litany of degrees. Her extensive chemistry education and background erroneously allowed the jury to infer that her degrees indicated knowledge, experience or training to understand and opine about the causation, and to improperly place substantial weight on her testimony. The Supreme Court of South Carolina has addressed this issue as it relates to experts, but not yet to improper lay witness opinion testimony. In Watson v. Ford Motor Co., 389 S.C. 434, 499, 699 S.E.2d 169, 176 (2010), the Supreme Court admonished, “Trial courts should be cautious in conferring an expert label upon a witness because juries may accord excessive or undue weight to “expert” testimony.”

The South Carolina Supreme Court has a clearly established that expert testimony must be subjected to additional scrutiny. Id. at 446. The Court has set out a three part test that the trial court must subject all expert testimony to before it can be submitted to a jury. Part one requires the trial court to find that the subject matter is beyond the ordinary knowledge of the jury. Id., *Citing State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009). Next, the court must find that the proffered expert has acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Id. Lastly, the court must evaluate the substance of the testimony and determine whether it is reliable. Id.

During the initial trial, the Witness was never offered as an expert but allowed to opine, and to give opinion testimony, outside the scope of her education and background, without the Trial Court making a determination that an ordinary juror would not understand subject matter. Although the Witness had extensive knowledge and skill in chemistry and the chemical composite of the product, she offered no foundation and no support for her rendered opinion testimony as to the application of the perm to human hair. Furthermore, because of the Witness' lack of knowledge, training and expertise regarding application and instructions on warnings, had the court examined the reliability of her testimony, it is likely the court would have found the testimony to be unreliable as it relates to the perm's application.

Therefore, because the Witness was never qualified, or offered as an expert, her testimony was not subjected to the appropriate increased scrutiny. As such, the witness should not have testified as a lay witness to the ultimate facts of the case. This allowed the jury to hear improper testimony, which had it been properly scrutinized, probably

would have been excluded, or only limited to the scope of the witness' education and background. This error was extremely prejudicial to the Plaintiff as her opinions most likely swayed the jury.

CONCLUSION

Therefore, based upon the above, Appellant hereby respectfully request that this court deny Respondent's Motion to Dismiss.

RESPECTFULLY SUBMITTED,

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