

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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AUG 26 2013
SC COURT OF APPEALS

APPEAL FROM COLLETON COUNTY
Court of Common Pleas
The Honorable Perry M. Buckner, Circuit Court Judge

C/A 2010-CP-15-405

Emily Williams,

Appellant,

v.

L'Oreal USA, Inc.,

Respondent.

INITIAL BRIEF OF RESPONDENT

HAYNSWORTH SINKLER BOYD, PA

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STATEMENT OF ISSUES ON APPEAL

1. Was the trial court correct in allowing the testimony of L'Oreal USA, Inc.'s employee Tammy Stuckey regarding the product at issue in the absence of any objection?

STATEMENT OF THE CASE

This appeal arises from a case in which Emily Williams claims she was injured as a result of an alleged defective warning accompanying L'Oreal USA, Inc.'s ("L'Oreal's") product SoftSheen-Carson Optimum Care ("Optimum Care"). Williams filed a Complaint on April 14, 2010 and an Amended Complaint on August 10, 2010, alleging three causes of action: negligence, strict liability, and breach of implied warranty. (Amended Complaint, R. at ____). L'Oreal filed an Answer to the Amended Complaint on September 2, 2010, denying the allegations and asserting numerous defenses, including failure to state a claim, comparative negligence, and lack of proximate cause because Williams failed to follow the directions within the product's package. (Answer, R. at ____).

By Order dated December 5, 2011, the trial court granted partial summary judgment in L'Oreal's favor with respect to all of Williams's claims, except those relating to "defective or inadequate warning or instructions." (Order, R. at ____). The remaining claim was tried before a jury on November 27, 2012. At the trial, L'Oreal presented the testimony of one witness, Tammy Stuckey. Without any objection, Stuckey testified about the packaging, instructions, and use of the Optimum Care product. (Tr. at 99:7-114:10, R. at ____). She was not presented as an expert to provide opinion testimony, but rather as a L'Oreal employee with personal knowledge of the product. She did not offer any opinion testimony. (*Id.*).

The jury returned a defense verdict. (Tr. at 162:9-17, R. at ____). Williams did not seek a new trial or make any other post-trial motions. (Tr. at 163:23-25, R. at ____). This appeal followed.

FACTS

As reflected in Williams's recitation of the facts, she had been using the Optimum Care product regularly for the six or seven years prior to her injury in April 2007. (Tr. 59:8-14, R. at ____). However, Williams admitted she had not read the warnings on the box even once during that time. (Tr. at 60:3-18, R. at ____). She further testified that it had been "three years ago or so" since she had last read the instructions and warnings inside the Optimum Care box. (Tr. at 62:21-24, R. at ____).

Importantly, she conceded that she did not perform a strand test, which the instructions indicate is required to determine how long the Optimum Care product should be left on the hair and whether the hair is ready for the treatment. (Tr. at 64:25-65:21, R. at ____). She testified she used the product as she normally did (despite not following the express directions), and that she noticed hair loss when she rinsed the product out after eight to ten minutes. (Tr. at 66:23-25, 69:23-70:20, R. at ____).

ARGUMENT

The sole issue on appeal is whether the trial court properly allowed Stuckey to provide opinion testimony on the issue of causation. This argument must fail because it is not preserved and because Stuckey did not give opinion testimony on causation in this case; she merely testified as a fact witness from her personal knowledge about the Optimum Care product and the instructions for its use.

I. Williams never objected to Stuckey's testimony; therefore, the sole issue on appeal is not preserved for this Court's review.

On appeal, this Court will not consider issues not raised to and ruled on by the trial court. *Humbert v. State*, 345 S.C. 332, 338, 548 S.E.2d 862, 865 (2001). To preserve an issue for review, a party must make a contemporaneous objection to the evidence in question. *State v. Wannamaker*, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001). An objection to testimony, "cannot be raised for the first time on review, nor can it be heard on appeal when it is not properly raised by an exception." *Rosamond Enterprises, Inc. v. McGranahan*, 278 S.C. 512, 513, 299 S.E.2d 337, 338 (1983). Further, even if Stuckey had been proffered as an expert, failure to object when an expert witness is presented amounts to a waiver of the issue on appeal. *State v. Schumpert*, 312 S.C. 502, 505, 435 S.E.2d 859, 861 (1993). Here, there was no objection of any kind to Stuckey's testimony; therefore, the sole issue on appeal is not preserved for the Court's review.

II. Stuckey's testimony was limited to matters within her personal knowledge as a L'Oreal employee and, therefore, the trial court was well within its discretion in allowing her to testify.

On appeal, a trial court's evidentiary rulings will be subject to an abuse of discretion standard. *State v. Fripp*, 396 S.C. 434, 438, 721 S.E.2d 465, 467 (Ct. App. 2012). To find an abuse of discretion, this Court must determine that there was an error resulting in prejudice to the appellant. *Crowley v. Spivey*, 285 S.C. 397, 410, 329 S.E.2d 774, 782 (Ct. App. 1985).

In this case, there was no error and there was no prejudice. Stuckey's testimony, which was given without objection, was not expert testimony in disguise. After Stuckey provided some general background about her education and employment, she testified about her work for L'Oreal formulating products for market and reformulating existing

products and how those products are tested and brought to market. (Tr. at 100:6-102:5, R. at ____). She then testified that she was familiar with the Optimum Care product. (Tr. at 102:7-9, R. at ____). From there, she described the product and its instructions. (Tr. at 102:12-109:8, R. at ____). With respect to the strand test, Stuckey testified why the strand test is important. (Tr. at 196:19- 109:8, R. at ____). On cross, Stuckey testified about the pH of the product in response to questions from Williams's attorney. (Tr. at 110:25-113:22, R. at ____). Stuckey did not offer any opinion testimony about whether Williams used the product correctly, nor did she offer any opinion testimony about the cause of Williams's injuries.

Stuckey's testimony was not improper opinion testimony. Instead, it was relevant testimony presented by a competent witness with personal knowledge on the subject matter about which she was testifying. As such, the trial court did not err in allowing her to testify. *See* Rules 401, 402, 601, and 602, SCRE.

"Pursuant to Rule 601, SCRE, every person is competent to be a witness unless otherwise provided by statute or the rules. Rule 602, SCRE, prohibits a witness from testifying to matters unless evidence is introduced sufficient to demonstrate the witness has personal knowledge." *State v. Douglas*, 380 S.C. 499, 501-02, 671 S.E.2d 606, 608 (2009). Here, the testimony shows that Stuckey was familiar with the Optimum Care product and that her testimony was given based on her personal knowledge of the product. As such, she was not required to be qualified as an expert to give her testimony. *Id.*; *see also Divine v. Robbins*, 385 S.C. 23, 41, 683 S.E.2d 286, 295 (Ct. App. 2009).

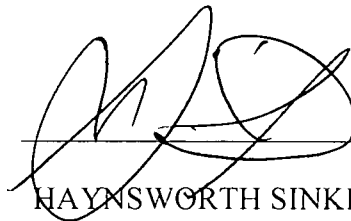
Further, the testimony regarding the instructions and warnings contained in the Optimum Care packaging was cumulative to the packaging itself, which had already been

admitted into evidence and discussed during Williams's testimony. (Pl. Ex. 1 and Pl. Ex. 9, Tr. at 58:22-59:7 and 63:8-21 , R. at ____). The instructions detail the strand test, the purpose of the test, and the risks to the consumer if the Optimum Care product is used incorrectly. Accordingly, the inclusion of Stuckey's testimony was harmless and could not have resulted in any prejudice to Williams. *See Gamble v. Int'l Paper Realty Corp.*, 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996).

CONCLUSION

For the above reasons, L'Oreal submits the sole issue on appeal was not preserved and did not constitute error by the trial court. Accordingly, the jury's verdict in L'Oreal's favor must be affirmed.

Respectfully submitted,



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**DESIGNATION OF MATTER
TO BE INCLUDED IN RECORD ON APPEAL**

In addition to the materials previously designated by the Appellant in this matter, Respondent, L'Oreal USA, Inc., proposes the following matter to be included in the Record on Appeal:

1. Amended Complaint;
2. Answer;
3. Order dated December 5, 2011;
4. Transcript, pp. 57-91, 99-114, 162-63; and
5. Plaintiff's Trial Exhibits 1 and 9.

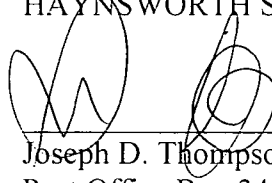
I certify that this designation contains no matter which is irrelevant to this appeal.

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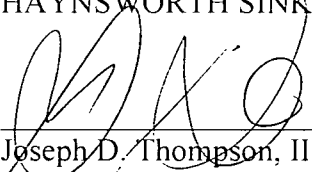
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PROOF OF SERVICE

I certify I have served the Initial Brief of Respondent and Designation of Matter to be Included in Record on Appeal, by depositing a copy of it on August 26, 2013, 2013, addressed to the attorneys of record for Appellant: Eduardo K. Curry, Esq., Curry & Housey, PA, Post Office Box 42270, North Charleston, South Carolina 29423.

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