

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SANDRA CARTER : CIVIL ACTION
 :
 v. :
 :
 J.C. PENNEY HAIR SALON : NO. 05-5044

ORDER AND OPINION

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

DATE: December 20, 2006

In this action, Sandra Carter has sued J.C. Penney Corporation, Inc. (“J.C. Penney”, apparently misnamed in the caption, above) for an allegedly harmful application of hair products in its salon which caused her personal injury. Discovery ended in this case on December 1, 2006, and trial is scheduled for January 23, 2007. Defendant J.C. Penney has filed a motion seeking to exclude evidence offered by Kimberly A. Harkins, the stylist who now does Carter’s hair. As discussed below, Harkins will be permitted to offer lay testimony, but not expert testimony.

I. Factual and Procedural Background

Carter alleges that she sustained severe injuries on November 21, 2003, when an employee of J. C. Penney’s hair salon used certain chemicals on her hair despite knowing that she had a skin sensitivity. In a letter dated July 13, 2006, Carter informed J.C. Penney that she would call Kimberly Harkins, her current hairdresser, as a witness at trial. Letter, attached as Exhibit F to J. C. Penney’s motion.

On November 17, 2006, J. C. Penney deposed Harkins. Deposition Transcript, attached as Exhibit B to J. C. Penney’s Motion. At her deposition, Harkins spoke about what she observed regarding Carter’s hair, scalp, and general health, following the allegedly harmful incident.

However, J.C. Penney's attorney also asked Harkins numerous questions about how she would handle a situation similar to the one presented by Carter to the J.C. Penney stylist. Id. at

39-51. This section of testimony is an example:

Q. Okay. Now in situations where you have to change the hair color or hair dye, you said that you had to use one type of chemical or product to remove the existing color, and then a different type [of] chemical to apply the new color; correct?

A. I did say that, although that is what you are supposed to do.

Q. Okay.

A. There are many different ways to achieve the same result. So, it is very common to see different techniques used to achieve that result.

Q. What are the different techniques?

A. There is a chemical color remover that you can use. There's also – you can use a developer.

Q. To remove the color?

A. To just open the cuticle and try to remove some of the color. You can use a bleach or lightener mixed with shampoo, conditioner and developer, and rub that into the hair and remove color that way. You can put lightener full strength on the hair and try to remove the color that way. Those are probably the most common ones I've seen.

Id. at 41-42.

On November 27, 2006, Carter wrote to J. C. Penney: “[P]lease be advised that I will be calling Kimberly Harkins as an expert in this matter.” Letter, attached as Exhibit G to J.C.

Penney's Motion. By letter of November 29, 2006, J.C. Penney responded: “Defendant objects to Plaintiff's designation of Kimberly Harkins as an expert.” Letter, attached as Exhibit C to

Carter's response.

In its motion in limine, J.C. Penney asks that Carter be excluded from “introducing into evidence any and all expert or lay opinion testimony of Kimberly A. Harkins.” Proposed Order, attached to J.C. Penney’s Motion.

II. Legal Principles

A witness’s testimony is characterized as expert testimony where it is based on scientific, technical, or other specialized knowledge. FRE 702. Lay testimony, on the other hand, is not based on such specialized knowledge, but is, instead, rationally based on the perception of the witness. FRE 701. Thus, the essential difference is that the opinion of a lay witness must be based on his or her personal firsthand perception, while an expert may opine in response to hypothetical questions. Asplundh Manufacturing Division v. Benton Harbor Engineering, 57 F.3d 1190, 1202 (3d Cir. 1995).

The same witness can provide both lay and expert testimony in a single case. FRE 701, Advisory Committee Note (2000). However, any part of a witness’s testimony that is based upon her scientific, technical, or other specialized knowledge is governed by the standards of 702 and the corresponding disclosure requirements of the Federal Rules of Civil Procedure. Id.

The Federal Rules of Civil Procedure require that the disclosure of an expert witness must be accompanied by a written report containing, among other things, a complete statement of the opinions to be expressed, and the basis and reasons for those opinions. Fed. R. Civ. Pr. 26(a)(2)(B). This disclosure, absent other instruction from the court, shall be made at least 90 days from the trial date. Fed. R. Civ. Pr. 26(a)(2)(C).

III. Discussion

Undoubtedly, if Harkins were to testify at trial on all of the subjects on which she spoke at her deposition, that portion which relied, not upon her personal observations of Mrs. Carter, but upon her specialized knowledge as a hairdresser, would be expert testimony subject to the requirements of Rule 26(a). This includes any testimony as to what she would have done if she were presented with the same situation as the J.C. Penney stylist.

It is equally clear that Carter has not complied with the Rule 26(a) requirements in identifying Harkins as an expert. The identification was made approximately 60, rather than 90 days in advance of trial, and was not accompanied by an expert report. Accordingly, Harkins' expert testimony is subject to exclusion.

I am authorized to depart from the Rule 26 timing requirements. Here, however, as J.C. Penney has pointed out, the discovery schedule makes that impractical. Discovery closed in this case on December 1, 2006, four days after Harkins was identified as an expert. Trial is scheduled for January 23, 2007. If I were to permit Harkins to testify as an expert, equity would require that I reopen discovery to (a) order Carter to produce an expert report from Harkins; (b) permit J.C. Penney to redepose Harkins; (c) permit J.C. Penney to retain its own expert to evaluate Harkins' report; and (d) permit Carter to depose that expert after he issued a report. It is unlikely that all of this could be accomplished by the time of trial.

Moreover, it seems likely, that as of November 17, 2006, the date of Harkins' deposition, Carter did not plan to retain an expert hairstylist. Although J.C. Penney suggests in its reply memorandum that Carter actually concealed its expert until late in discovery for strategic reasons, it is just as likely that Carter's identification of Harkins as an expert was an attempt to

seize an opportunity offered by fortuitous deposition testimony elicited from Harkins by J.C. Penney's counsel.

In these circumstances, it does not appear that Carter will be unduly harmed by my decision not to permit Harkins to testify as an expert. The issue of what the J.C. Penney stylist did wrong was central to this case from its outset. If Carter had planned to introduce expert testimony from a hairstylist on that subject, she could have identified an expert much earlier than November 27, 2006.

Accordingly, I will permit Harkins to testify only as to matters based on her firsthand perceptions, under FRE 701. Neither party will be permitted to elicit from Harkins testimony based solely on her specialized knowledge as a hairstylist.

ORDER

AND NOW, this 20th day of December, 2006, upon consideration of Defendant's Motion in Limine To Preclude Expert Or Lay Opinion Testimony of Kimberly A. Harkins, filed in this case as Document 19 and the response thereto, it is hereby ORDERED that the motion is GRANTED IN PART AND DENIED IN PART. The motion is GRANTED in that Harkins will not be permitted to testify as an expert witness; it is DENIED in that Harkins is permitted to testify as a lay witness upon matters rationally based upon her perceptions.

BY THE COURT:

/s/Jacob P. Hart

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE