

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

1 At a stated term of the United States Court of Appeals for the Second Circuit, held
2 at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of
3 New York, on the 23rd day of September, two thousand nine.
4

5 PRESENT:

6 BARRINGTON D. PARKER,
7 RICHARD C. WESLEY,
8 *Circuit Judges,*
9 JANE A. RESTANI,*
10 *Judge.*

11 _____
12
13 Mary Viscusi,

14
15 *Plaintiff-Appellant,*

16
17 v.

**07-3308-cv
Summary Order**

18 P&G – Clairol, Inc.,**
19
20

Defendant-Appellee.

*The Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

**The Clerk of Court is directed to amend the caption.

1
2 FOR APPELLANT: Mary Viscusi, *pro se*, Forest Hills, New York
3
4 FOR APPELLEE: Joseph L. Mooney, Goldberg Segalla L.L.P., Buffalo, New York.
5

6 Appeal from a judgment of the United States District Court for the Eastern District of
7 New York (Irizarry, *J.*).

8 **UPON DUE CONSIDERATION IT IS HEREBY ORDERED, ADJUDGED, AND**
9 **DECREED** that the judgment of the district court be **AFFIRMED**.

10 Appellant Mary Viscusi, *pro se*, appeals from the district court’s grant of P&G – Clairol,
11 Inc.’s (“P&G”) motion for summary judgment on Viscusi’s complaint alleging New York state
12 law claims for strict products liability, negligence, and breach of warranty incident to injuries
13 Viscusi allegedly sustained from her use of P&G’s hair dye product, Nice ‘N Easy. We assume
14 the parties’ familiarity with the underlying facts, the procedural history of the case, and the issues
15 on appeal.

16 We review orders granting summary judgment *de novo* and focus on whether the district
17 court properly concluded that there was no genuine issue as to any material fact and the moving
18 party was entitled to judgment as a matter of law. *See Miller v. Wolpoff & Abramson, L.L.P.*,
19 321 F.3d 292, 300 (2d Cir. 2003). “In determining whether there are genuine issues of material
20 fact, we are required to resolve all ambiguities and draw all permissible factual inferences in
21 favor of the party against whom summary judgment is sought.” *Terry v. Ashcroft*, 336 F.3d 128,
22 137 (2d Cir. 2003) (citation and internal quotations omitted).

23 Under New York law, “[i]t is well settled that, whether [an] action is pleaded in strict
24 products liability, breach of warranty or negligence, it is a consumer’s burden to show that a

1 defect in the product was a substantial factor in causing the injury.” *Fritz v. White Consol.*
2 *Indus., Inc.*, 762 N.Y.S.2d 711, 714 (N.Y. App. Div. 2003) (citation and internal quotations
3 omitted); *see Kosmynka v. Polaris Indus., Inc.*, 462 F.3d 74, 86 (2d Cir. 2006) (“Both negligence
4 and strict products liability . . . require a showing of product ‘defect.’”). Although we assume, as
5 the district court did, that genuine issues of material fact exist as to whether Viscusi sustained an
6 allergic reaction from her use of Nice ‘N Easy, because she failed to present sufficient evidence
7 of a defect in the product, all of her claims failed as a matter of law. Accordingly, summary
8 judgment as to all of Viscusi’s claims was appropriate.

9 Viscusi argues that the district court erred by excluding the testimony of her expert
10 witness, Dr. Leon Weinstein. We review the district court’s decision to admit or exclude expert
11 testimony under Federal Rule of Evidence 702 for abuse of discretion. *Kumho Tire Co. v.*
12 *Carmichael*, 526 U.S. 137, 152 (1999); *United States v. Salameh*, 152 F.3d 88, 129 (2d Cir.
13 1998). Here, Dr. Weinstein admitted that he was a primary care physician who lacked any
14 specialization in dermatology, allergy neurology, or epidemiology, and that he never examined
15 Viscusi’s scalp nor observed any burns, rashes, or blisters.

16 Based on these facts, the district court did not abuse its discretion in determining that,
17 under Rule 702, Dr. Weinstein was unqualified to render an expert opinion, and that his opinion
18 was insufficiently reliable. *See Nimely v. City of New York*, 414 F.3d 381, 395-96 & n.11 (2d
19 Cir. 2005) (to satisfy Rule 702, expert must, *inter alia*, be “qualified as an expert by knowledge,
20 skill, experience, training or education,” whose opinion has “the required indicia of scientific
21 reliability”) (quoting Fed. R. Evid. 702)).

22 Although she argues that she was unable to prove her case because she lacked experts on

1 causation, that issue was not dispositive of her claims. Rather, the district court correctly granted
2 summary judgment to P&G because Viscusi failed to present any evidence of a product defect.

3 We have reviewed Viscusi's remaining claims and find that they are without merit.

4 For the foregoing reasons, the judgment of the district court is hereby **AFFIRMED**.

5
6 FOR THE COURT:
7 Catherine O'Hagan Wolfe, Clerk

8
9 By: _____