

NOTICE  
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2013 IL App (4th) 120997-U

NO. 4-12-0997

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED  
November 15, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

CAROLYN GARRELTS,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	McLean County
HONEYWELL INTERNATIONAL, INC.; PNEUMO	)	No. 11L121
ABEX, LLC; OWENS-ILLINOIS, INC.; AND	)	
JOHN CRANE, INC.,	)	Honorable
Defendants-Appellees.	)	Scott Drazewski,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.  
Presiding Justice Steigmann and Justice Turner concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* (1) To survive a motion for summary judgment, a plaintiff alleging a civil conspiracy and presenting only circumstantial evidence as proof must present sufficient facts, when viewed in the light most favorable to the plaintiff, from which a jury could find the existence of the conspiracy by clear and convincing evidence.
- (2) The Illinois Supreme Court's decision in *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 720 N.E.2d 242 (1999), is binding on this court; plaintiff's argument the clear-and-convincing standard of proof requirements for civil conspiracies should be limited to conspiracies involving public officials thus failed.
- (3) Plaintiff failed to establish defendants' conduct, when viewed the prism of a breach-and-pay anticipatory scheme, did not amount to parallel conduct or conduct as capable of innocent explanation as the existence of a conspiracy, sufficient to prove the existence of a conspiracy by clear and convincing evidence.
- (4) Plaintiff forfeited the argument the trial court erroneously concluded her "new evidence" was not clear and convincing evidence of a conspiracy by not raising it until her reply brief.

(5) Plaintiff did not establish the trial court committed reversible error in its decisions limiting or prohibiting certain testimony at trial.

¶ 2 Plaintiff, Carolyn Garrelts, diagnosed with mesothelioma in June 2011, initiated this suit against various defendants, including manufacturers and distributors of asbestos and asbestos-containing products. Carolyn maintained her mesothelioma was caused by exposure to asbestos through direct means, her employment at Chanute Air Force Base, and through indirect means, by laundering her husband's Kraft Foods uniform.

¶ 3 Carolyn sought recovery from three defendants, Honeywell International, Inc. (Honeywell), Pneumo Abex, LLC (Abex), and Owens-Illinois, Inc. (Owens) (collectively summary-judgment defendants), on the theory these defendants were involved in a civil conspiracy to conceal the dangers of asbestos, which contributed to her injuries. Carolyn sought recovery from other defendants, including John Crane, Inc. (JCI), and Honeywell, on theories of product exposure-negligence and willful-and-wanton failure to warn of the hazards of asbestos-containing products.

¶ 4 In February 2012, the trial court entered summary judgment on the conspiracy claims, finding the evidence insufficient to go to a jury on the issue of whether there was clear and convincing evidence of the existence of a conspiracy. The court also granted summary judgment on the product-exposure claims made against Honeywell. Carolyn's case against JCI went to trial. JCI argued, in part, Carolyn had insufficient exposure to cause mesothelioma and Carolyn had not proved she was exposed to asbestos from its products. A jury returned a general verdict in favor of JCI.

¶ 5 Carolyn appeals the summary judgment orders and the entry of judgment on the

verdict. Regarding the orders for summary judgment, Carolyn contends the trial court (1) improperly applied a higher standard than required under Illinois law when considering the summary judgment motions; and (2) erroneously concluded the defendants' conduct is capable of an innocent explanation. Regarding the trial verdict, Carolyn argues the trial court improperly limited or denied admissible trial evidence, causing her gross prejudice and entitling her to a new trial. We affirm.

¶ 6

## I. BACKGROUND

¶ 7

### A. The Parties

¶ 8 In 1963, Kraft Foods hired Carolyn's husband, Albert Garrelts (Al), to work in the maintenance department at its plant in Champaign, Illinois. At some point, Al was promoted to the position of mechanical maintenance supervisor. In the Kraft Foods buildings, maintenance personnel maintained and replaced packing around exposed steam pipes. When Carolyn and Al divorced in 1979, Al was still working at the Kraft Foods plant. Carolyn and Al did not have an amicable divorce; the two spoke only once after the divorce. In her complaint, Carolyn alleged she developed mesothelioma through exposure to asbestos brought home on Al's work uniform, which she laundered.

¶ 9

After the divorce, in 1980, Carolyn went to work as a clerk typist at Chanute Air Force Base (Chanute). She worked in a building known as White Hall, which had exposed piping. At times, while Carolyn was working, the pipes were renovated. Carolyn worked at Chanute until she retired when the base closed in 2010. Her exposure allegations, however, are limited to her employment from September 1980 until December 1, 1980.

¶ 10

In June 2011, Carolyn was diagnosed with mesothelioma. That same month, she

filed her complaint, alleging her mesothelioma was caused by indirect exposure when asbestos fibers were brought into her home via Al's Kraft Foods uniform and from direct exposure during her employment at Chanute. In the claims involved in this appeal, Carolyn alleges defendants are liable because they either (1) supplied asbestos-containing products to which she was exposed and did not warn of the dangers of those products, under theories of willful-and-wanton misconduct or negligence (JCI), or (2) conspired with other asbestos suppliers and manufacturers to conceal the dangers of exposure to asbestos (Honeywell, Pneumo Abex, and Owens-Illinois). The other defendants listed in the complaint settled with Carolyn before trial.

¶ 11 JCI, before 1980, manufactured asbestos- and non-asbestos-containing packing for use in steam lines. At trial, Carolyn alleged JCI's packing was used to insulate steam pipes at Kraft Foods and at Chanute and produced testimony establishing asbestos fibers were released when JCI's packing was cut and removed. Carolyn contends exposure to JCI's asbestos-containing materials contributed substantially to her mesothelioma.

¶ 12 Honeywell is the successor by merger to the Bendix Company (Bendix), which, over the years, manufactured asbestos-containing automotive brake linings. Carolyn initially sought recovery from Honeywell based on exposure and failure-to-warn theories. The trial court, however, granted summary judgment to Honeywell on those theories upon finding Carolyn failed to sufficiently prove she was exposed to any asbestos-containing product manufactured, distributed, or sold by Bendix or Honeywell. In this appeal, Carolyn does not challenge that finding, but continues to assert Honeywell is liable as a participant in the alleged civil conspiracy.

¶ 13 Owens-Illinois is primarily a glass company. From the 1940s until April 1958,

Owens-Illinois manufactured and sold an asbestos-containing thermal insulation product known as Kaylo. In April 1958, Owens-Illinois sold its Kaylo division to Owens Corning Fiberglas Corporation (Owens Corning) and stopped manufacturing the asbestos-containing insulation. Initially, Carolyn brought exposure and failure-to-warn claims against Owens-Illinois. At the hearing on summary judgment, however, Carolyn dropped those claims. Carolyn continues to assert Owens-Illinois is liable for her mesothelioma under the civil conspiracy theory under two theories: (1) the three summary judgment defendants conspired with other entities, and (2) Owens-Illinois conspired with Owens Corning, a nonparty.

¶ 14 Abex, predominantly a foundry company, manufactured asbestos-containing brake linings. Only the conspiracy count in Carolyn's complaint includes Abex.

¶ 15 B. Summary Judgment

¶ 16 In January 2012, defendants each moved separately for summary judgment based largely on this court's decision in *Rodarmel v. Pneumo Abex, LLC*, 2011 IL App (4th) 100463, 957 N.E.2d 107, and our supreme court's decision in *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 720 N.E.2d 242 (1999). In the motions, defendants argued the evidence was insufficient for a jury to reasonably conclude they conspired with others to suppress the hazards of asbestos and, as a result of that conspiracy, they caused or contributed to Carolyn's injuries.

¶ 17 In opposing the motions, Carolyn pointed to evidence from other Fourth District asbestos cases and "additional facts not before this Court in any prior appeal involving these defendants." The evidence from other cases relied upon by Carolyn, evidence this court deemed *insufficient* to establish the existence of a conspiracy, includes defendants' assertions it was safe

to work with asbestos and defendants' suppression of the harmful effects of asbestos (*Rodarmel*, 2011 IL App (4th) 100463, ¶¶ 105-18, 957 N.E.2d 107 (overruling the decision in *Dukes v. Pneumo Abex Corp.*, 386 Ill. App. 3d 425, 440-45, 900 N.E.2d 1128, 1140-44 (2008), that found such evidence sufficient); shared information and position papers from the asbestos industry, defendants' memberships in the same trade organizations, and shared members of the boards of directors (*Rodarmel*, 2011 IL App (4th) 100463, ¶ 100, 957 N.E.2d 107); and documents discussing the dangers of asbestos and showing Bendix knew of the presence of unsafe levels of asbestos fibers in the workplace (*Menssen v. Pneumo Abex Corp.*, 2012 IL App (4th) 100904, ¶ 32, 975 N.E.2d 345).

¶ 18 In her statement of facts, Carolyn points to new evidence in relation to Abex and Honeywell, not to Owens-Illinois. Regarding Abex, plaintiff cites the following facts: (1) "medical expert testimony and documentary exhibits establishing that a 1948 report of a study conducted on mice that concluded there is a link between cancer and asbestos exposure ('the Saranac Report') was not flawed, which [r]eport certain of the conspiracy defendants successfully sought to suppress"; and (2) "testimony from Owens-Corning's former chief medical officer that removal of the cancer results from publication was wrong." Regarding Honeywell, plaintiff cites the following: (1) "purchase orders, memos, bills of lading, and rebranding between Bendix and three other alleged conspirators as early as 1937"; (2) "documents that show Bendix was knowingly exposing its workers at a time when it knew of the hazards of asbestos exposure"; and (3) "documents that show that as early as 1958 Bendix was aware of the hazards of asbestos and that it had an obligation to tell its workers."

¶ 19 In February 2012, the trial court granted Honeywell's, Abex's, and Owens-

Illinois's summary judgment motions on the conspiracy claims. Initially, the court addressed the standard it would apply on summary judgment review. The court observed no direct evidence of conspiracy existed and Carolyn relied solely on circumstantial evidence to prove her civil conspiracy claim. The court, citing *Lozman v. Putnam*, 379 Ill. App. 3d 807, 828, 884 N.E.2d 756, 774 (2008), thus found the heightened standard of clear and convincing evidence was implicated. The court further reasoned, to determine whether a genuine issue of material fact exists, it must consider the clear-and-convincing standard of proof. The court further observed "any activity that is just as consistent with innocence as with guilt is not proof by clear and convincing evidence of an implied conspiratorial agreement."

¶ 20 As to Abex, the trial court found evidence of parallel conduct by Abex as to its knowledge of whether asbestos could cause disease and about whether Abex failed to warn of the dangers of asbestos or adequately protect its employees. Regarding the additional documents, the court found these documents insufficient to establish by clear and convincing evidence Abex engaged in a civil conspiracy. The court found the agreement, if one existed, to conceal information about mice was not an agreement to perform an unlawful act. The court found: "It's not unlawful to suppress information that is devoid of significance."

¶ 21 As to Honeywell, the trial court acknowledged much of the evidence related to Honeywell and Bendix was considered and rejected in *Rodarmel* as insufficient to clearly and convincingly establish the existence of a civil conspiracy. The court went on to consider whether the additional evidence provided by Carolyn was sufficient to create a genuine issue of material fact. The court concluded "[t]he additional evidence over and above that is referred to, in essence, by the plaintiff that they have as it relates to defendant Bendix or Honeywell, is

information relating to first purchasers and suppliers." The court found "one cannot convincingly argue that Bendix's purchase of bags and asbestos from Johns-Manville supports an inference that Bendix and Johns-Manville entered into an agreement \*\*\* to conceal the dangers of asbestos." The court found these to be parallel conduct.

¶ 22 The trial court further addressed four categories of evidence provided by Carolyn regarding Honeywell and Bendix: (1) "purchase orders, memos, bills of lading, and re-branding between Bendix, UNARCO and Raybestos dating back to 1937"; (2) evidence showing "Bendix knowingly exposed workers to asbestos at a time that they knew was hazardous"; (3) miscellaneous evidence of a "Bendix stockholder's meeting, a patent for brake shoes, dust counts and the New York Department of Labor documents"; and (4) "claims made against Bendix for workers' compensation by employees and/or memoranda relating to interoffice communications as it relates to those claims." The court found these categories evidence of "independent activity" and "parallel conduct" that does not indicate an agreement with another company to misrepresent or suppress the dangers of asbestos.

¶ 23 Regarding Owens-Illinois, the trial court noted two conspiracy claims were made by Carolyn against Owens-Illinois. The first is that Owens-Illinois, like Honeywell and Abex, conspired with a group of other entities in suppressing the dangers of asbestos exposure. The second is that Owens-Illinois conspired with Owens Corning. The trial court found, regarding Owens-Illinois, the additional exhibits fell into one or more of the categories for which both *Rodarmel* and *McClure* held insufficient as a matter of law to establish a civil conspiracy, because plaintiff could not establish the existence of the conspiracy by clear and convincing evidence.

¶ 24

## C. Trial

¶ 25

### 1. *Plaintiff's Expert Testimony*

¶ 26 In February and March 2012, an eight-day jury trial was held on Carolyn's claims against JCI. Extensive testimony was heard. Because Carolyn, on appeal, does not argue the jury's verdict was against the manifest weight of the evidence, we need not exhaustively restate the evidence here. A summary of evidence and testimony necessary to frame Carolyn's claims against JCI and to resolve her claims of evidentiary error follows.

¶ 27 At trial, Arthur Frank, M.D. and Ph.D., an expert witness, testified mesothelioma is a cancer that has one cause—exposure to asbestos—and no cure. The time between a mesothelioma diagnosis until death spans from months to a few years. The average latency period between asbestos exposure and the onset of mesothelioma symptoms is approximately 35 years.

¶ 28 According to Dr. Frank, exposure to only a few fibers can cause mesothelioma. He acknowledged the mere presence of asbestos in a product does not mean that product caused or contributed to a person's disease. Dr. Frank opined dust containing asbestos fibers will be released in the air when persons who work directly with asbestos-containing products manipulate those products. Asbestos may not only be inhaled but can also settle on a worker's apparel and hair and be transported into the worker's home. Once the fibers exist in the home, they can settle into carpeting and furniture. Asbestos fibers may remain suspended in the air for days. Once the fibers settle, they may be disturbed by a breeze and will become airborne again. Asbestos fibers may remain in a home for decades. Not everyone exposed to asbestos fibers develops mesothelioma.

¶ 29 Dr. Frank examined Carolyn's personal history and medical records and determined Carolyn developed a malignant pleural mesothelioma. Dr. Frank opined Carolyn's mesothelioma was caused by asbestos exposure, and JCI packing materials were a substantial contributing cause to her disease.

¶ 30 Richard Hatfield testified his company performed tests on asbestos-containing materials to ascertain fiber release. As part of this work, Hatfield performed a study on JCI asbestos-containing packing materials used in valves and measured the total fiber release that occurred when packing was removed from a valve and replaced with JCI asbestos-containing packing.

¶ 31 Hatfield testified the JCI packing study was performed in an exposure characterization laboratory, which was 20-feet long, 8-feet high, and sealed. Inside the laboratory, two sampling devices were used. One sampled air within a one-foot radius of the person performing the work. A second device measured samples 6 to 8 feet from the work. During the procedure, a worker removed old packing in a valve using a packing hook, cut new JCI asbestos-containing packing, and then placed it in the valve. Following the procedure, test samples showed the level of fibers on the assistant was approximately 4,000 times higher than the background. A portion of the assistant's work clothing was also analyzed, showing approximately 150 million asbestos fibers per square foot of material.

¶ 32 On cross-examination, Hatfield testified his study measured the total concentration of asbestos fibers, as opposed to determining the time weighted average (TWA), which was used to measure permissible exposure limits under the Occupational Safety And Health Administration's (OSHA) guidelines for workplace asbestos exposure. Under the TWA,

Hatfield's test results show the fiber release in his studies were 1/1000th of the permissible exposure level in effect in 1980. Hatfield confirmed the further an individual is from the work with asbestos-containing products, the lower the potential concentration levels of asbestos.

¶ 33 Barry Castleman, Ph.D., who worked in the field of toxic substance control, testified the damaging effects of the inhalation of asbestos fibers had been known to medicine for decades before Carolyn was exposed to it. According to Castleman, the issue was first discussed in an English language report in 1898. Beginning in 1917 and 1918, United States publications began discussing the hazards of asbestos. A 1935 government study demonstrated no level of asbestos was safe. By 1960, a published report indicated 32 cases of mesothelioma had occurred due to asbestos exposure.

¶ 34 *2. Plaintiff's Other Testimony*

¶ 35 Al testified by videotaped deposition. He began working at the Kraft Foods plant in 1963 and continued to work there after his divorce from Carolyn in 1979. Al could not recall using or cutting JCI gaskets or packing during his employment in maintenance from 1963 until 1979. Al admitted he spoke to Carolyn's counsel in the fall of 2011 and was asked if he recalled telling Carolyn's counsel he used gasket sheet material at Kraft Foods and cut gaskets. To this question, Al responded, "I mentioned that, and I kept thinking, and I don't know if I told him, I—it could have been at Mobil when I worked there." Al further stated "the only gaskets I remember at Kraft was like in their pumps, they had a Teflon gasket or a—I can't remember the other material, it was white, that they used in the pumps, and they had to use it because of the food that was passing through those pumps."

¶ 36 Al testified he saw his coworker, David Walters, replace a single gasket during

those 16 years. At the time, Walters was at least 30 feet in the air and as far as 75 feet away from Al. Al did not know the manufacturer of the gasket Walters was working with.

¶ 37 According to Al, he performed office work approximately half of his time at the plant. He further testified, because of the nature of food processing occurring at Kraft Foods, the plant was not dusty. Sanitation crews worked nightly until morning. Kraft Foods also used air purifiers throughout the plant. When dusty work would be performed, tarps and other sanitation efforts were used. Al did not remember his clothing being dusty when he returned home. Carolyn occasionally cleaned his clothing.

¶ 38 David Walters, who worked with Al at Kraft Foods, testified the Champaign plant was steam-heated. The pipes carrying the steam and transporting hot and cold water were exposed throughout the facility. The piping contained stem valves. When leaks occurred, old packing would be replaced with new packing by maintenance personnel. Maintenance personnel would remove old packing and replace it with packing that had to be cut to fit the diameter of the pipe. JCI produced the replacement packing. Kraft Foods supplied it to the maintenance workers.

¶ 39 According to Walters, packing would be replaced at some place in the building at least once a month. It took approximately 45 minutes to cut the new packing and replace the old. Walters testified Al, as a maintenance supervisor, was present or in the area when packing was being replaced. Walters did not see Al use packing associated with JCI. He also did not see Al around when he used JCI packing. Walters further testified he could not swear the packing he used at Kraft Foods was a JCI product, and JCI was not the only manufacturer of packing he used. Walters did not recall seeing JCI on the packaging, but assumed he was using JCI packing

because others used that name. Walters did not remember seeing any dust as he removed or installed packing.

¶ 40 Carolyn testified, when Al returned from work his uniform would be dusty, dirty, and greasy. Sometimes Al changed his clothes immediately. Other times, Al stayed in his uniform while the family ate supper or until he showered in the evening. After removing his uniform, Al placed it in a hamper separate from the other clothes. Carolyn would shake out Al's uniform before laundering it. At times, when the uniform was left on the floor, Carolyn would vacuum the carpet on which it was left.

¶ 41 Carolyn stated her divorce from Al was not amicable. They spoke only once since the divorce. After the divorce, in September 1980, Carolyn began working as a clerk typist at Chanute, in a building known as White Hall. The building was very large with piping running through it. At times, while Carolyn worked, renovation on the piping occurred. Carolyn's allegations of JCI's negligence cover the period from when she began work at Chanute in September 1980 to December 1980.

¶ 42 While working at Chanute, Carolyn did not participate in renovation work. She could not describe the pipes worked on or the products used on the pipes at that time.

¶ 43 In June 2011, Carolyn saw a physician because she had experienced shortness of breath, chest discomfort, and "mild to moderate exertion associated with a cough with whitish sputum" for almost a week. She was diagnosed with mesothelioma.

¶ 44 Douglas Caraker, Carolyn's son-in-law, testified he worked in 1973-74 for his father's construction company, Carico Construction. Carico Construction performed construction projects at Chanute, including working on the pipes inside White Hall. Douglas worked

primarily as a "gofer." He did not work on the steam lines or any pipe valves at White Hall. In his job, Douglas handed the packing for use in valve pipes to his father and a plumber, who would install the packing. Carico Construction used JCI packing. Douglas recalls handing his father JCI packing in the steam pits, which were located outside the building. Douglas did not observe any dust come off the packing. The JCI boxes contained no warning or notice regarding asbestos exposure. Other companies performed work at Chanute at the same time as Carico Construction. Douglas did not know what type of packing those companies used.

¶ 45 John Ciffone, an employee of JCI, testified he began working for JCI in November 1976. According to Ciffone, JCI had been in business since 1917. Ciffone did not know the date JCI began using asbestos in its products, but he knew asbestos was used by JCI before he began working there. JCI sold asbestos-containing packing before 1980. The packing was used in steam pipes, which were compressed around the stem on the valve, to prevent leaks. JCI also manufactured asbestos-containing gaskets, which would be bolted between the metal facings of two pipes to form a seal.

¶ 46 George Springs, JCI's corporate representative, testified JCI first learned asbestos was harmful in 1970. JCI was aware the Occupational Safety and Health Act was passed into law that year. JCI knew OSHA imposed regulations on manufacturers or producers of products containing asbestos regarding asbestos exposure. JCI received an OSHA citation for allowing individuals to eat where asbestos was manufactured, but had not received OSHA citations for exceeding exposure limits.

¶ 47 According to Springs, JCI did not provide written information related to the possible harms from asbestos exposure to its employees. JCI took no action in the 1970s to

ascertain whether its products created situations resulting in dangerous levels of asbestos exposure. Springs did not know if JCI put warnings or information labels on its packages during the 1950s, 1960s, or 1970s. JCI began placing labels on its products indicating its gaskets and packing contained asbestos in 1983.

¶ 48

### 3. *JCI's Expert Testimony*

¶ 49

JCI presented the testimony of Dr. Peter Barrett, a board-certified diagnostic radiologist. Dr. Barrett testified there were no articles in the medical literature linking the use of packing with mesothelioma. Dr. Barrett testified he reviewed Carolyn's medical records and deposition testimony and opined Carolyn's mesothelioma was idiopathic. Dr. Barrett explained idiopathic mesothelioma is a type of mesothelioma that develops without exposure to asbestos. He stated 60% of women who develop mesothelioma do so without any asbestos exposure. Dr. Barrett opined, to attribute mesothelioma to asbestos exposure, certain criteria must be met, including large exposures to asbestos over a long period of time and other indicia of asbestos exposure, such as pleural plaques or asbestosis. When these criteria are not present, such as in Carolyn's case, the proper diagnosis is idiopathic mesothelioma.

¶ 50

JCI also presented the expert testimony of Dr. Amy Madl, a board-certified toxicologist, who testified about a study published in the *Journal of Toxicology and Environmental Health*. According to the study, handling asbestos-containing gaskets and packing materials would not produce significant airborne asbestos concentrations and would be below occupational exposure limits. Dr. Madl testified to no observed adverse effect caused by exposure to chrysotile asbestos, the type used in JCI packing materials, unless a person is exposed to 15 to 500 fibers per cubic centimeter per year. Dr. Madl testified that amount

translates on the low end to a person needing to be exposed to one fiber per cubic centimeter of air for eight hours a day for 50 weeks for 15 years. Dr. Madl testified she assessed Carolyn's exposure and opined there was no evidence establishing Carolyn had that kind of exposure either through exposure to Al's clothing or while working at Chanute.

¶ 51 Dr. Madl opined, given the testimony by Carolyn, Al, and Al's coworkers, there was no risk Carolyn was exposed to asbestos in concentrations great enough to cause her disease.

¶ 52 *4. Evidentiary Rulings*

¶ 53 Four evidentiary rulings are involved in this appeal. First, the trial court barred Carolyn from introducing evidence of JCI's conduct occurring after December 1, 1980, the last date on which Carolyn could have been exposed to asbestos. The court, however, permitted Carolyn's counsel to request admission and show proper basis for admitting such evidence as the trial progressed. The court specifically prevented Carolyn from introducing specific testimony of Arthur Knight, a former chief executive officer (CEO) of JCI, on his understanding of the risks of asbestos and decisions by JCI regarding removing asbestos from its products or to label its asbestos-containing products after December 1, 1980.

¶ 54 Second, the trial court denied Carolyn's request under Illinois Supreme Court Rule 237(b) (eff. July 1, 2005) for the deposition of Terrence McNamara. Carolyn wanted to solicit from McNamara testimony about his role in answering interrogatories in a prior, unrelated case that resulted in sanctions against JCI. The trial court found irrelevant this testimony about prior trials.

¶ 55 Third, the trial court granted JCI's request to limit the evidence deposition designations of Al, to preclude his testimony about being contacted by unnamed defense

attorneys. Carolyn argued Al's testimony was influenced by these contacts, in which he was allegedly told by two attorneys Carolyn was suing him. JCI argued, as the only remaining defendant, the jury would be left with the improper inference JCI's counsel contacted Al. The court found the prejudicial nature of this testimony outweighed any potential probative value and barred it.

¶ 56 Fourth, the trial court granted JCI's motion *in limine* limiting Carolyn's cross-examination of JCI's expert, Madl. This order barred Carolyn from asking questions regarding the profits of Madl's employer, ChemRisk, or the money made by specific colleagues at ChemRisk by performing asbestos-related work. Carolyn was permitted to cross-examine Madl on how much money she made testifying in this case and her history of testifying for defendants in exposure cases.

¶ 57 *5. The Verdict and Notice of Appeal*

¶ 58 The jury entered a general verdict in JCI's favor. Carolyn did not request special interrogatories. The trial court entered judgment on the verdict.

¶ 59 Carolyn moved for a judgment notwithstanding the verdict (JNOV) and, alternatively, for a new trial. After the trial court denied Carolyn's motions, this appeal followed.

¶ 60 II. ANALYSIS

¶ 61 A. Summary Judgment Order

¶ 62 1. *Standard of Appellate Review*

¶ 63 Our review of an order granting summary judgment is *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102, 607 N.E.2d 1204, 1209 (1992).

¶ 64 2. *The Standard for Resolving Defendants' Motions for Summary Judgment*

¶ 65 The parties agree there are no published decisions in Illinois in which a court affirmed the summary judgment dismissal of asbestos claims based on allegations of civil conspiracy. The decisions in which courts have found a plaintiff's evidence insufficient to establish the existence of a conspiracy by clear and convincing evidence, *e.g.*, *Rodarmel* and *McClure*, are appeals of decisions either granting or denying JNOV motions.

¶ 66 As they did before the trial court, the parties dispute the standard that applies to defendants' summary judgment motions. Defendants argue, and the trial court agreed, a court, when applying summary judgment law, must determine whether sufficient facts exist, when viewed in the light most favorable to the nonmovant, from which a jury could find clear and convincing evidence of a conspiracy. If not, defendants maintain, they are entitled to summary judgment. In contrast, Carolyn argues nonmovants should not be held to such a high burden. Citing *Kleiss v. Bozdech*, 349 Ill. App. 3d 336, 350, 811 N.E.2d 330, 340 (2004), Carolyn contends she only needs to provide "some factual basis," when viewed in the light most favorable to her as the nonmoving party, establishing genuine issues of material fact to be resolved at trial. She contends the addition of the "clear and convincing" requirement effectively caused her to prove her claims on paper, in contradiction to the requirement she need only provide "some factual basis."

¶ 67 In deciding the proper standard to apply, the trial court cited the First District decision of *Lozman*. In *Lozman*, the court observed, "[i]f a party relies solely on circumstantial evidence to prove a conspiracy claim, the heightened 'clear and convincing' standard is implicated by the summary judgment motion." *Lozman*, 379 Ill. App. 3d at 828, 884 N.E.2d at 774. The court, however, further noted "the standard of proof is not an issue before this court"

and "plaintiffs do not dispute the fact that their proof consisted of circumstantial evidence, thus triggering the heightened standard." *Lozman*, 379 Ill. App. 3d at 828, 884 N.E.2d at 775.

Because of the lack of a dispute over the standard, the subsequent lack of analysis on the issue, and the fact *Lozman* is not binding, we look to the laws and principles of summary judgment, and the holdings in *Rodarmel* and *McClure*, to ascertain what standard should be applied.

¶ 68           The purpose of summary judgment is to ascertain "if triable questions of fact exist." *Pielet v. Pielet*, 2012 IL 112064, ¶ 53, 978 N.E.2d 1000. A triable issue exists "where the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Williams v. Manchester*, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 9 (2008). Summary judgment should be granted when the moving party's right to judgment is "clear and free from doubt" (*id.*)—when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" (735 ILCS 5/2-1005(c) (West 2010)). If a plaintiff fails to establish just one element of the cause of action, summary judgment in defendant's favor is proper. *Williams*, 228 Ill. 2d at 417, 888 N.E.2d at 9.

¶ 69           When a party moves for summary judgment, it satisfies the initial burden of production by either showing some element of the case must be resolved in the movant's favor or by identifying the absence of evidence supporting the nonmovant's position. *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill. App. 3d 351, 355, 726 N.E.2d 1171, 1174-75 (2000). The burden then shifts to the nonmovant to "come forward with evidentiary material that establishes a genuine issue of fact." *Goodrich Corp. v. Clark*, 361 Ill. App. 3d 1033, 1044, 837

N.E.2d 953, 962 (2005) (quoting *Weil, Freiburg & Thomas, P.C. v. Sara Lee Corp.*, 218 Ill. App. 3d 383, 394, 577 N.E.2d 1344, 1352 (1991)). If there is no genuine issue of fact, it is not triable. See *Pielet v. Pielet*, 2012 IL 112064, ¶ 53, 978 N.E.2d 1000.

¶ 70 In this case, to ultimately recover on her civil conspiracy claims, Carolyn must prove at trial the following: (1) two or more persons, including a conspiracy defendant, knowingly agreed to commit an unlawful act or a lawful act in an unlawful manner; (2) a member of the parties to the agreement committed an act, tortious or unlawful in character, in furtherance of the agreement; and (3) the act proximately caused her injuries. See *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 63-64, 645 N.E.2d 888, 894-95 (1994). As she admits, Carolyn lacks direct evidence of the conspiracy. Because of this, she must prove the conspiracy by clear and convincing evidence in order to recover. *McClure*, 188 Ill. 2d at 151, 720 N.E.2d at 267; see also *Gillenwater v. Honeywell International, Inc.*, 2013 IL App (4th) 120929, ¶ 82. Thus, for a verdict to stand, a jury would have to reasonably conclude, without conjecture or speculation, Carolyn proved by clear and convincing evidence the alleged conspirators *knowingly agreed* to commit an unlawful act or a lawful act in an unlawful manner. See *McClure*, 188 Ill. 2d at 151, 720 N.E.2d at 267; *Adcock*, 164 Ill. 2d at 64, 645 N.E.2d at 894-95.

¶ 71 Because the defendants each argued Carolyn could not recover because she lacks evidence to establish a triable issue on the existence of a conspiracy, Carolyn then has the burden to show a triable issue on her civil conspiracy claim. She must produce, at a minimum, "some evidence," which, when viewed in the light most favorable to her, shows a *triable* issue. An issue is not "triable" where, when the material facts are undisputed, reasonable persons may not draw different inferences from those facts. *Williams*, 228 Ill. 2d at 417, 888 N.E.2d at 9.

¶ 72 Carolyn contends she can meet this burden by only showing a genuine issue of material fact, without explaining the process of doing so. Following the above stated summary judgment rules, she cannot state a genuine issue of material fact if she does not show she has a triable issue. In her civil conspiracy claims, which is where *clear and convincing evidence* comes in—what types of facts are sufficient to create a triable issue? Under well-established civil conspiracy, asbestos-related law, proof tending toward only a preponderance of the evidence, such as proof of "parallel conduct," does not create a triable issue on the element of knowing agreement. As *Rodarmel* and *McClure* establish, proof of only parallel conduct does not allow reasonable persons to draw different inferences of a knowing agreement, "if the facts and circumstances relied upon are as consistent with innocence as with guilt." *McClure*, 188 Ill. 2d at 140-41, 720 N.E.2d at 261; see also *Rodarmel*, 2011 IL App (4th) 100463, ¶ 113, 957 N.E.2d 107. Absent proof beyond parallel conduct, proof from which reasonable persons could conclude—without speculation—a knowing agreement existed, plaintiff cannot establish the element of her cause of action and summary judgment would be proper. See *Williams*, 228 Ill. 2d at 417, 888 N.E.2d at 9.

¶ 73 The question in ruling on this summary judgment motion is whether the evidence, taken in the light most favorable to the plaintiff, could support a reasonable jury finding, by clear and convincing evidence, that a civil conspiracy existed. Plaintiff cannot overcome the summary judgment motion where the evidence, even when considered in the light most favorable to plaintiff, only shows parallel conduct by defendants. We do not require plaintiff to prove her case at the summary judgment stage. *Thompson v. Gordon*, 241 Ill. 2d 428, 438, 948 N.E.2d 39, 45 (2011). The trial court required plaintiff to present evidence of more than parallel

conduct—evidence from which a reasonable jury could find a civil conspiracy. The court concluded she did not, and we agree. If a jury would not without speculation or conjecture be able to reasonably find the existence of the agreement, summary judgment for defendant is required.

¶ 74 Removing consideration of the clear and convincing standard from this analysis, as Carolyn urges this court to do, would violate summary judgment law and permit cases, with no hope of recovery, to proceed through lengthy and expensive litigation only to be subject to JNOV motions after trial, as in *Rodarmal*, *Gillenwater*, and *McClure*.

¶ 75 We find the cases upon which Carolyn relies are not convincing. Most simply state part of summary judgment law without considering the implications of the clear-and-convincing standard at trial. See, e.g., *Pielet v. Pielet*, 2012 IL 112064, ¶ 53, 978 N.E.2d 1000 ("If the undisputed material facts could lead reasonable observers to divergent inferences, or where there is a dispute as to a material fact, summary judgment should be denied \*\*\*.").

¶ 76 In others, the same issue was developed and addressed. For example in *Falcon Funding, LLC v. City of Elgin*, 399 Ill. App. 3d 142, 159, 924 N.E.2d 1216, 1230 (2010), a nonbinding Second District decision, the court simply *noted in dicta* "petitioner is correct that equitable estoppel must be established by clear and convincing evidence[,] \*\*\* [but] such proof is not necessary to survive a summary judgment motion." This notation occurred in response to the defendant's summary judgment motion, seeking summary judgment on its equitable-estoppel claim—one that requires clear and convincing proof. *Falcon Funding*, 399 Ill. App. 3d at 159, 924 N.E.2d at 1230. The court denied the motion on other grounds, upon finding the defendant did not adequately plead two elements of estoppel. *Falcon Funding*, 399 Ill. App. 3d at 159, 924

N.E.2d at 1231. Tellingly, the case includes language highlighting "[t]he purpose of summary judgment is \* \* \* to determine whether a triable issue of fact exists." *Falcon Funding*, 399 Ill. App. 3d at 159, 924 N.E.2d at 1230 (quoting *Luu v. Kim*, 323 Ill. App. 3d 946, 952, 752 N.E.2d 547, 552 (2001)).

¶ 77 In *Schrager v. North Community Bank*, 328 Ill. App. 3d 696, 709, 767 N.E.2d 376, 386 (2002), a First District decision, the court reversed a summary judgment order in favor of the defendants. The plaintiff brought a fraudulent-misrepresentation claim. The defendants maintained, in part, the plaintiff failed to prove "by clear and convincing evidence" the defendants had a duty to speak that arose from a confidential or fiduciary relationship. *Schrager*, 328 Ill. App. 3d at 707, 767 N.E.2d at 385. The court "note[d]" the question was not whether the plaintiff proved the requisite relationship by clear and convincing evidence, as that was a question of fact. *Schrager*, 328 Ill. App. 3d at 708, 767 N.E.2d at 385. While the *Schrager* decision appears more on point than *Falcon Funding*, it remains distinguishable given the decision contains no detailed analysis of summary judgment law and the record does not contain facts, such as evidence of parallel conduct in civil conspiracy law, that courts have repeatedly held insufficient to satisfy the clear-and-convincing standard.

¶ 78 3. *The Trial Court's Finding Defendants' Behavior Is Capable of Innocent Construction*

¶ 79 Carolyn next argues, even assuming the trial court applied the correct standard in granting the summary judgment motions, its holding defendants' behavior is capable of innocent construction is erroneous. She maintains the trial court erred in ruling the facts she would produce at trial demonstrate the defendants' conduct was nothing more than parallel conduct engaged in "ordinary commerce," capable of innocent construction.

¶ 80 Carolyn recognizes our supreme court, in *McClure*, 188 Ill. 2d at 140, 720 N.E.2d 261, held "more than proof of mere parallel conduct in civil conspiracy cases involving manufacturers of the same or similar product is necessary to make certain that there is a reasonable basis for inferring an agreement." The *McClure* court reasoned such standard would ensure "a manufacturer's responsibility for the actions of a competitor is based on more than speculation and conjecture." *Id.* at 142. The court held "while mere parallel conduct may serve as circumstantial evidence of an agreement under the civil conspiracy theory, it cannot, in itself, be considered clear and convincing evidence of such an agreement among manufacturers of the same or similar products." *Id.* Thus more than evidence of parallel conduct is required to prove an agreement. "[I]f the facts and circumstances relied upon are as consistent with innocence as with guilt it is the duty of the court to find that the conspiracy has not been proved." *Id.* at 140-41. This court refers to this last statement as the "innocent-explanation rule." *Gillenwater*, 2013 IL App (4th) 120929, ¶ 126.

¶ 81 In her argument, Carolyn challenges the *McClure* holding on two grounds. First, she contends the *McClure* court, when implementing the innocent-explanation rule, relied upon the holding in *Tribune Co. v. Thompson*, 342 Ill. 503, 529, 174 N.E. 1561, 572 (1930). Carolyn contends, in part, *Tribune Co.* involved allegations of civil conspiracy against a public official. She maintains the clear-and-convincing standard should apply in the circumstances of *Tribune Co.* and not here, where no public official is accused of wrongdoing. Carolyn concludes public officials are protected by the presumption they have acted honestly and in good faith, whereas the private-company defendants do not have that presumption and the preponderance-of-the-evidence standard should apply.

¶ 82 In *Gillenwater*, this court addressed the same argument and rejected it. See *Gillenwater*, 2013 IL App (4th) 120929, ¶ 128. The same analysis applies here: "[t]he short answer to this argument is we have no power to review decisions of the supreme court." *Id.* We must follow *McClure*.

¶ 83 Second, Carolyn acknowledges her evidence establishes "a pattern of parallel conduct." She contends, however, this pattern of parallel conduct, when viewed in the light most favorable to her and "through the prism of a breach[-]and[-]pay anticipatory legal strategy," such conduct is "not conduct capable of innocent construction." Carolyn contends the trial court did not view her evidence in the light most favorable to a nonmovant. She asks this court to find this "parallel conduct" sufficient to satisfy the clear and convincing standard under this new theory.

¶ 84 Carolyn, in great length, discusses the "efficient breach doctrine" or "breach[-]and[-]pay anticipatory legal strategy." Under this strategy, companies survey the legal environment and determine whether laws can be violated with little cost. Companies willing to risk a legal penalty may then intentionally breach legal duties in order to achieve economic benefit. Despite the effects of such conduct, particularly in the asbestos context, this practice would be deemed "commercially reasonable."

¶ 85 In making her argument, Carolyn makes broad statements regarding the evidence she presented to show, when viewed in the light most favorable to her, the conduct of the alleged conspirators was not innocent:

"Carolyn's evidence shows that long before 1963, when Al went to work at Kraft, the Conspiracy Defendants knew, or should have known, that their asbestos-containing products posed serious

health risks to persons from exposure, they remained silent and concealed that information. Some even took steps to prevent publication of the results of the Saranac Study, results the validity of which are the subject of conflicting evidence. Additionally, the membership of their boards of directors was cross-pollinated as members of one company's board sat on another company's board; many of these companies and their officers and directors belonged to the same trade associations; they engaged in rebranding of one another's products; and they shared information and position papers regarding what information to give to employees and the public about asbestos."

These strategies, according to Carolyn, deemed "ordinary commerce" by the trial court were necessary to ensure the profitability of asbestos products, and if one corporation broke rank and revealed the dangers of asbestos, all "bottom lines" of the conspirators would be affected.

Carolyn acknowledges her evidence is circumstantial, but when considered with the cause and effect of defendants' conduct, "it is not conduct capable of innocent construction."

¶ 86 As we understand her argument, Carolyn concludes because of the noninnocent nature of the breach-and-pay doctrine due to the harm inflicted for profit, the parallel conduct alleged here is not capable of an innocent explanation and is thus clear and convincing evidence of a knowing agreement.

¶ 87 We find Carolyn's argument flawed on several grounds. First, this argument misconstrues the innocent-explanation rule. Innocence in the context of a conspiracy does not

mean the alleged conspirator is necessarily innocent of all wrongdoing, such as a corporation's decision to conceal the dangers of its products. *Gillenwater*, 2013 IL App (4th) 120929, ¶ 126 (citing *McClure*, 188 Ill. 2d at 140, 720 N.E.2d at 261). The statement means innocent in terms of forming a conspiracy. *Id.*

¶ 88 In addition, even assuming for the purposes of this appeal there exists a reasonable inference from the evidence the defendants engaged in a breach-and-pay anticipatory scheme, Carolyn points to no evidence the defendants did so as part of a conspiracy. Such act establishes no more than parallel conduct that is "as consistent with innocence [from conspiracy] as with guilt." *McClure*, 188 Ill. 2d at 140, 720 N.E.2d at 261. In her brief, Carolyn admits the purpose of employing a breach-and-pay strategy is to gain economic benefit or to increase profit. This admission places the alleged conduct within the four categories of parallel conduct the *McClure* court deemed insufficient to establish a conspiracy by clear and convincing evidence and held does not tend to exclude the possibility the defendants acted independently. See *McClure*, 188 Ill. 2d at 136, 146, 720 N.E.2d at 259, 264.

¶ 89 Moreover, Carolyn's argument does not establish the trial court did not consider the evidence in the light most favorable to Carolyn when resolving defendants' summary judgment motions. The trial court applied the evidence before it as required by *McClure* and found the evidence consistent with parallel conduct and as capable of an innocent explanation as a guilty one. The analysis regarding parallel conduct and the innocent-explanation rule of *McClure* was performed "in the light most favorable to the opponent" when the *McClure* court determined parallel-conduct evidence was insufficient to establish a conspiracy and directed JNOV in the defendants' favor. *McClure*, 188 Ill. 2d at 132, 154, 720 N.E.2d at 257, 268.

¶ 90 We observe Carolyn, in her opening brief, did not challenge the trial court's finding the "additional evidence" it offered comprised evidence no greater than parallel conduct or conduct capable of innocent explanation. Carolyn briefly referred to such evidence in her statement of facts in bullet points. She cited not to the evidence itself, but to arguments made at summary judgment. In her argument section, Carolyn briefly touched on this evidence—with no citation to the record—when arguing the parallel-conduct evidence was sufficient when viewed through the prism of a breach-and-pay anticipatory legal scheme. For the first time, in her reply brief, Carolyn argued new evidence regarding the Saranac study (the study discussed in a number of cases including *Gillenwater* and *Rodarmel*) provided the evidence she needed from which a jury could reasonably conclude a conspiracy existed. Carolyn also, for the first time, called the conduct of the defendants "parallel and interactive." Her argument does not comply with the supreme court rules regarding briefing: "Points not argued are waived and shall not be raised in the reply brief." Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). This procedure denied the court a fully briefed issue for review on a complex matter. Carolyn has forfeited her argument.

¶ 91 We affirm the orders of summary judgment in favor of Honeywell, Abex, and Owens-Illinois.

¶ 92 B. Evidentiary Rulings by the Trial Court

¶ 93 1. *Standard of Review*

¶ 94 In general, questions regarding the admissibility of evidence are vested in the trial court's sound discretion. *Lovell v. Sarah Bush Lincoln Health Center*, 397 Ill. App. 3d 890, 900, 931 N.E.2d 246, 254 (2010). We will not reverse an evidentiary ruling of the trial court absent an abuse of that discretion. *Id.* This court will find an abuse of discretion when "the ruling is

arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court." *Id.* An error in an evidentiary ruling does not warrant reversal unless the aggrieved party can prove the error was substantially prejudicial and affected the outcome of the case. See *Simmons v. Garces*, 198 Ill. 2d 541, 566-67, 763 N.E.2d 720, 736 (2002).

¶ 95           2. *The Propriety of the Trial Court's Order Prohibiting Carolyn from Introducing Evidence of JCI's Conduct After December 1980*

¶ 96           Carolyn contends the trial court abused its discretion in barring her from introducing evidence of JCI's post-December 1980 evidence. Carolyn contends the court should have allowed her to introduce the following evidence at trial: (1) JCI's conduct in placing warning labels on its product after December 1, 1980; (2) testimony by Knight, a former CEO of JCI, regarding his knowledge of the risks of asbestos, and his involvement in the decisions to stop selling asbestos-containing products and add warning labels after 1980; and (3) a 1985 JCI memorandum stating JCI "will no longer manufacture \* \* \* any product containing asbestos," but the remaining inventory of asbestos-containing product "will be offered to our affiliated companies, in other countries where asbestos is not considered hazardous to the extent it is" in the United States. Carolyn further maintains the prejudice resulting from the court's order was compounded when the trial court refused to allow her to inquire regarding postexposure conduct after George Springs, JCI's corporate representative, opened the door to that evidence.

¶ 97           Carolyn first argues evidence of JCI's postexposure conduct regarding the labeling of its products should have been admitted under an impeachment exception to the Illinois rule prohibiting evidence of remediation. Carolyn acknowledges, under *Herzog v. Lexington Township*, 167 Ill. 2d 288, 301-03, 657 N.E.2d 926, 932-33 (1995), impeachment evidence is inadmissible when the sole value of the impeachment rests on the same impermissible inference

of prior negligence. She contends, however, *Herzog* allows such evidence when "the defendant goes beyond stating that the original condition was safe or adequate, and attempts to make exaggerated claims that the condition was the 'safest possible.'" *Herzog*, 167 Ill. 2d at 302-03, 657 N.E.2d at 933. Carolyn maintains JCI, not explicitly stating its products were the "safest possible," implicitly maintained so throughout the trial by advocating its products were incapable of causing disease. Carolyn points to JCI's opening statement in which counsel stated the following: "There will be evidence that asbestos fiber released from packing is so small that it does not cause disease and that it does not increase your risk of developing disease. \*\*\* [Y]ou'll hear evidence \*\*\* of epidemiological studies that there is no evidence that anyone that was solely exposed to packings can develop mesothelioma."

¶ 98 In Illinois, "[e]vidence of post-accident remedial measures is not admissible to prove prior negligence." *Herzog*, 167 Ill. 2d at 300, 657 N.E.2d at 932. Reasons for this rule include a strong public policy favoring improvements for public safety, the fact subsequent remedial measures are not sufficiently probative of earlier negligence, and a general concern a jury may see such behavior as an admission of negligence. *Id.* There are, however, exceptions to this rule, such as when subsequent remedial measures are used for impeachment purposes. *Herzog*, 167 Ill. 2d at 301, 657 N.E.2d at 932. One such exception is when a "defendant goes beyond stating that the original condition was safe or adequate, and attempts to make exaggerated claims that the condition was the 'safest possible.'" *Herzog*, 167 Ill. 2d at 302-03, 657 N.E.2d at 933. In that circumstance, fairness may require evidence of such conduct be admissible. *Herzog*, 167 Ill. 2d at 303, 657 N.E.2d at 933.

¶ 99 Here, we find no error in the trial court's decision not to invoke the impeachment

exception of *Herzog*. The court did not abuse its discretion in finding JCI's assertion there is no proof its product causes disease is not the same as "safest possible." JCI did not argue it was impossible to make its product safer—it simply said it was safe.

¶ 100 Carolyn next contends the trial court erroneously excluded "designated prior testimony" of Knight, a former CEO of JCI, that warning labels were added because "several of our customers including several government agencies specify in their purchase orders that such a label be affixed to all asbestos-containing products." Citing *Millette v. Radosta*, 84 Ill. App. 3d 5, 19, 404 N.E.2d 823, 834 (1980), Carolyn contends the postinjury labeling should not have been excluded because the conduct was not voluntary but mandated by the government.

¶ 101 We do not find this argument convincing. In *Millette*, the First District found admissible a postaccident recall letter regarding an allegedly defective automobile part. *Millette*, 84 Ill. App. 3d at 19, 404 N.E.2d at 834. The *Millette* court found the letter admissible for multiple reasons, including finding (1) the recall was involuntary, mandated by federal statute; and (2) evidence of postaccident repairs is admissible in products-liability cases. *Id.* In this case, the trial court did not abuse its discretion in determining the request by "customers[,] including several government agencies," to affix such labels is not a mandate by federal statute. Knight's testimony establishes several government agencies (as well as other customers) specify in their purchase orders a label is to be affixed. This indicates, at best, a mandate those labels appear on items purchased by those customers. Carolyn has not cited any federal regulation mandating labels on the asbestos-containing products purchased by Kraft Foods or Chanute contain such labels.

¶ 102 We are also not persuaded by Carolyn's argument in her reply brief that it is

irrelevant who required the remedial measures, but that the measures were not undertaken voluntarily. Carolyn cites no authority that a decision to comply with a customer's prerequisites for JCI purchases is not a voluntary decision to complete a transaction with that customer. Instead, the case she cites after making this assertion explicitly states the postoccurrence conduct was not voluntarily undertaken but was required by "governmental authority." See *LoCoco v. XL Disposal Corp.*, 307 Ill. App. 3d 684, 693, 717 N.E.2d 823, 830 (1999). This argument fails.

¶ 103 Moreover, Knight had no contact with JCI until 1982. The trial court did not abuse its discretion in concluding the conduct of JCI occurring after December 1, 1980, had no relevance to what JCI knew or should have known before that time.

¶ 104 Carolyn next argues the 1985 memo, Plaintiff's exhibit No. JC222, should have been admitted under Illinois Rule of Evidence 803(3) (eff. April 26, 2012) as showing JCI's intent, plan, or motive. Carolyn contends this evidence shows JCI was aware of the hazards of asbestos, but continued to sell its products in markets with less governmental regulation. Carolyn contends this shows JCI's state of mind toward the continued use of asbestos products.

¶ 105 We find no abuse of discretion in the trial court's decision to exclude this exhibit. The memo was written in 1985—nearly five years *after* Carolyn's last possible exposure. There is no error in the decision JCI's stance in 1985 was irrelevant to whether JCI knew or should have known of the hazards of an asbestos-containing product before December 1, 1980.

¶ 106 Last, Carolyn argues George Springs' testimony opened the door to the evidence of postexposure labeling measures. Carolyn points to the following exchange that occurred during her examination of Springs at trial:

"Q. At any time whether before 1980, did [JCI] warn that

asbestos dust caused serious disease and death?

A. We never warned about our products until 1983."

Carolyn maintains this response by JCI's corporate representative opened the door to additional inquiry into the reasons for the warning, but the trial court improperly refused to allow Carolyn to question JCI further on the matter. Carolyn contends this permitted the jury to speculate whether JCI warned because it was a good citizen or because it was under threat of jail.

¶ 107 During trial, after Springs made the statement, Carolyn asked the trial court to permit her to inquire into the reasons for the decision to warn about JCI products in 1983. The trial court denied the request, upon finding the statement was inadvertent and upon concluding the door had not been opened to further questioning.

¶ 108 We find a reasonable person could have adopted the same position as the trial court and thus find no abuse of discretion. See *Lovell*, 397 Ill. App. 3d at 900, 931 N.E.2d at 254. JCI did not elicit this testimony. JCI's representative accidentally included it in an answer—in response to a question asked by Carolyn. The trial court properly refused Carolyn's request to use this slipup as a means to inquire about matters deemed inadmissible.

¶ 109 Carolyn's cases on this issue are distinguishable. In both *Hamrock v. Henry*, 222 Ill. App. 3d 487, 488, 495, 584 N.E.2d 204, 210 (1991), and *Boland v. Kawasaki Motors Manufacturing Corp., USA*, 309 Ill. App. 3d 645, 650, 722 N.E.2d 1234, 1239 (2000), the parties "opened the door" when deliberately questioning their own witnesses and touching on barred topics. Neither involved an inadvertent statement made during opposing counsel's questioning.

¶ 110 3. *The Order Quashing Plaintiff's Rule 237(b) Notice to Terrence McNamara*

¶ 111 Before trial, Carolyn served notice pursuant to Supreme Court Rule 237(b) (eff.

July 1, 2005) to compel Terrence McNamara, the current treasurer and assistant secretary of JCI, to testify. Carolyn maintained McNamara began working for JCI in 1999 as the comptroller and became an officer in 2002. JCI moved to quash the notice, arguing McNamara lacked relevant knowledge because he did not start working at JCI until after December 1, 1980. The trial court granted JCI's motion, holding McNamara's testimony was tangential, collateral, and irrelevant. The court concluded McNamara's opinion in other prior cases was not related to what JCI knew or should have known before December 1, 1980.

¶ 112 Carolyn contends this holding is erroneous. Carolyn argues McNamara's past duties included signing discovery served on JCI in asbestos litigation. Carolyn asserts, even though McNamara had not worked for JCI before December 1980, McNamara had been involved in asbestos litigation and was aware of JCI's knowledge at the time. McNamara testified at a 2003 trial, stating asbestos was hazardous to health and could cause cancer. Carolyn contends in this case, where JCI contends its products were safe and did not pose risk of disease, McNamara's testimony would have contradicted that defense. Carolyn further contends McNamara would have testified "that in having seen Material Datasheets as [JCI's] corporate signer, he knows that [JCI's] asbestos products posed a risk to users of developing asbestos disease."

¶ 113 JCI argues the trial court's finding was not an abuse of discretion. We agree. The record shows the trial court's decision was not arbitrary or fanciful. McNamara's testimony cited above by Carolyn was based on data collected in 1981—after Carolyn's last possible date of exposure. In addition, while McNamara had been involved in other litigation, he was not involved in the discovery of this case. The trial court properly concluded McNamara's testimony

was irrelevant to the issues in this case.

¶ 114 JCI also argues Carolyn made no attempt to show the outcome of the trial was affected by this holding. We agree. Springs, JCI's representative, was involved in the discovery of the case and testified at trial, informing the jury of JCI's pre-1980 knowledge of the hazards of asbestos. Other witnesses also testified regarding the hazards of asbestos, rendering any such opinion by McNamara duplicative and irrelevant. Carolyn has not shown reversible error.

¶ 115 *4. The Trial Court's Order Excluding Portions of Al's Deposition*

¶ 116 In January 2012, Al participated in a videotaped evidentiary deposition. This testimony was played for the jury at trial. At his deposition, Al testified he spoke to Carolyn's counsel in the fall of 2011. Al was asked if he recalled telling Carolyn's counsel he used gasket sheet material at Kraft Foods and cut gaskets. Al responded, "I mentioned that, and I kept thinking, and I don't know if I told him, I—it could have been at Mobil when I worked there." Al further stated "the only gaskets I remember at Kraft was like in their pumps, they had a Teflon gasket or a—I can't remember the other material, it was white, that they used in the pumps, and they had to use it because of the food that was passing through those pumps." As of the date of his deposition, Al testified he did not "remember cutting any gaskets there or have—watching anybody." Al stated he did not want to lie; he just did not recall whether his work was at Mobil or at Kraft Foods.

¶ 117 Al testified between the time he spoke with Carolyn's counsel and the date of his deposition, he received voicemail messages from "Mike DeBeers" and "Dennis Dobbels," attorneys in the case. The callers left names, a phone number, and a message stating Carolyn was suing him. The messages upset him. Neither called him back to tell him the statement was false.

Al did not think Carolyn was suing him. He did not "know why she would after all these years."

Al testified he "would say" the big piping jobs done on the steam pipes were performed by outside contractors.

¶ 118 Carolyn sought to have Al's testimony regarding the voicemail messages played for the jury. Carolyn argued the testimony was relevant to Al's "bias, hostility, motive" and to explain the change in his statements.

¶ 119 JCI objected, arguing any probative value would be outweighed by its prejudicial effect. JCI argued since it was the only remaining defendant in the case, the jury would be left to infer its attorneys left the messages.

¶ 120 The trial court permitted the inconsistent statements to be shown to the jury, but denied Carolyn's request to show Al's testimony regarding the voicemail messages. The court stated it understood Carolyn's contentions regarding "potentiality of bias, interest, hostility or motive on" Al's part to testify in a certain way, but found there would be no way to clean up the prejudice resulting from letting the jury hear this evidence.

¶ 121 On appeal, Carolyn cites a number of cases showing that evidence tending to show bias or improper motive is admissible (see, *e.g.*, *Sears v. Rutishauser*, 102 Ill. 2d 402, 407, 466 N.E.2d 210, 212 (1984); *Chicago City Railway Co. v. Handy*, 208 Ill. 81, 83, 69 N.E. 917, 918 (1904); *People v. Thompson*, 75 Ill. App. 3d 901, 904, 394 N.E.2d 422, 425 (1979)). These cases, however, do not show the trial court abused its discretion. Even admissible and relevant evidence "may contain drawbacks of sufficient importance to call for its exclusion, including unfair prejudice." *Maffett v. Bliss*, 329 Ill. App. 3d 562, 574, 771 N.E.2d 445, 455 (2002). The decision of whether evidence should be excluded as unduly prejudicial is reviewed under the

abuse-of-discretion standard. See *Lucht v. Stage 2, Inc.*, 239 Ill. App. 3d 679, 694, 606 N.E.2d 750, 760 (1992).

¶ 122 We find no abuse of discretion in the trial court's determination evidence of non-JCI attorneys was unduly prejudicial, as we find a reasonable person could adopt the trial court's view. We understand Carolyn's argument she needed to establish she was exposed to asbestos and Al's arguable backtracking was problematic. But the jury heard the inconsistent statements. The jury also heard other evidence of bias, including testimony his divorce from Carolyn was not amicable, minimizing the probative value of the stricken testimony. Further minimizing the probative value is Al's own testimony he did not think Carolyn was suing him, lessening his motive to lie. The unfair prejudice of allowing a jury to infer JCI lawyers were involved in unethical behavior, when no such evidence exists, outweighs the probative value of the evidence to Carolyn.

¶ 123 *5. The Order Limiting Cross-Examination of Dr. Madl*

¶ 124 Carolyn next argues the trial court erroneously limited her ability to cross-examine JCI's expert, Dr. Amy Madl. Carolyn contends she sought to introduce articles from medical literature showing ChemRisk, Dr. Madl's employer, had been paid tens of millions of dollars to reach opinions and publish articles favoring asbestos defendants. Carolyn contends this evidence is highly relevant as to the level of Dr. Madl's bias. Carolyn maintains she was prejudiced by this ruling, emphasizing JCI's closing statements comparing Dr. Madl to plaintiff's experts, Dr. Frank (who receives no compensation for his work), Hatfield, and Dr. Castleman, and arguing they were the same.

¶ 125 When ruling on JCI's motion, the trial court authorized questioning as to Dr.

Madl's bias, but barred questions regarding the profits of ChemRisk, its employees, and principals:

"[T]he areas where you can't go, plaintiff's counsel, would be the profits of ChemRisk, the revenues of ChemRisk, other employees or principals of ChemRisk. You can go ahead and go into the other areas that we have talked about and you can go into the firm as a whole or the entity as a whole, to the extent that such an individual would have knowledge as to the number of times that other employees have testified in asbestos-related cases for the plaintiff or for the defendant if you're seeking to establish bias, but not specific individuals within the firm, and obviously, you can explore her individual bias to your heart's content."

¶ 126 At trial, consistent with this order, Carolyn elicited testimony regarding Dr. Madl's bias. Dr. Madl testified she billed \$375 per hour and was a salaried employee of ChemRisk. Dr. Madl agreed her job responsibilities included testifying as an expert witness. While she stated it was not necessarily true part of her salary was determined based on what she brought into ChemRisk, she agreed she would probably not have a job at ChemRisk if she did nothing all day. In 2009, 10% of Dr. Madl's time was spent on asbestos-related projects. In the year before her testimony, 60% of her time was spent on asbestos-related projects. She first testified in asbestos litigation in 2010. Dr. Madl provided expert testimony for JCI, as well as for other valve and gasket manufacturers, in asbestos litigation. Dr. Madl's expert testimony was not limited to asbestos-exposure cases; she testified on behalf of defendant companies in cases

involving benzene exposure and chlorine gas exposure. Dr. Madl had never testified on behalf of plaintiffs in exposure cases.

¶ 127 We need not decide whether the trial court abused its discretion because we find, given the extensive questioning as to Dr. Madl's bias and motive, Carolyn cannot establish the outcome of the trial was affected by the court's ruling. The jury was aware of sufficient facts from which it could conclude Madl was biased and had a motive to opine in favor of company defendants in exposure cases. Carolyn was not prejudiced by the absence of additional evidence, which only cumulatively establishes that same potential bias.

¶ 128 III. CONCLUSION

¶ 129 We affirm the trial court's judgment.

¶ 130 Affirmed.