2013 IL App (1st) 120023-U

SECOND DIVISION
June 4, 2013

No. 1-12-0023

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BRENDA LASH-PEREZ, Individually, and as Mother and Next Friend of BRYANT F. LASH-PEREZ, a Minor, Plaintiffs-Appellants, v. HENKEL CORPORATION, a Foreign Corporation (n/k/a HENKEL LOCTITE CORPORATION), Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County No. 03 L 6380 Honorable Elizabeth Budzinski Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Justices Quinn and Connors concurred in the judgment.

O R D E R

¶ 1 *HELD*: The circuit court did not err by granting defendant's motion to strike allegations from plaintiff's complaint regarding defendant's alleged failure to adequately test Loctite 620 and evaluate its dangers because such allegations were not relevant to plaintiff's strict liability claim. The court did not abuse its discretion by determining that plaintiff was not prejudiced by defense counsel's improper comments during opening statement because the court sustained the objections to the comments and struck those portions of defense counsel's opening statement and any residual prejudice was cured by the court's response to the jury's note during deliberations. The court did not abuse its discretion by denying plaintiff's request for a missing-witness instruction because the testimony of the missing

witness would have been cumulative of the testimony of other witnesses and would not have lent support to the testimony of plaintiff's expert witness. Any error in allowing evidence of heptane does not constitute reversible error because that evidence did not affect the outcome of the case.

¶ 2 Plaintiff, Brenda Lash-Perez, individually and as the mother and next friend of her minor son, Bryant Lash-Perez, appeals from orders of the circuit court of Cook County entering judgment on a jury verdict in favor of defendant, Henkel Corp., and denying plaintiff's posttrial motion for a new trial. On appeal, plaintiff contends that she is entitled to a new trial because the circuit court erred by granting defendant's motion to strike certain allegations from her complaint, she was prejudiced by defense counsel's improper comments during opening statement, the court erred by refusing to provide the jury with a missing-witness instruction, and the court erred by denying her motion *in limine* to bar all evidence of and reference to heptane. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 On May 29, 2003, plaintiff filed a complaint alleging multiple claims against numerous parties in connection with the birth of her son, Bryant, on July 9, 2000, without a left arm or left kidney and with a cleft lip and palate, a malformed left shoulder and chest, and only one umbilical artery. Plaintiff subsequently settled with all parties except defendant and filed a third amended complaint alleging a negligence claim and a strict liability claim against defendant. Plaintiff subsequently filed a fourth amended complaint withdrawing the negligence claim and proceeded to trial on a sole claim of strict liability against defendant.

¶ 5 Plaintiff asserted in her complaint that beginning on June 14, 1999, she worked for Paslode, a division of Illinois Tool Works, Inc., as an assembler on a production line assembling

nail guns. Plaintiff conceived Bryant while working at Paslode and continued to work as a nail gun assembler while she was pregnant. In assembling the nail guns, plaintiff applied Loctite 620, a high temperature retaining compound produced by defendant, to numerous driver blades and spread the Loctite 620 on the blades with her fingers. Plaintiff also hand-dipped assembly screws into Loctite 620 and secured those screws, by hand, into the frame of the nail gun. Plaintiff alleged that the Loctite 620 she handled was unreasonably dangerous and defective because defendant failed to provide adequate warnings of the dangers associated with it, failed to adequately test it and evaluate its dangers, and knew or should have known that it was harmful. Plaintiff alleged that as a direct and proximate result of the dangerous conditions posed by Loctite 620, Bryant was exposed to Loctite 620 in utero and suffered severe and permanent injuries.

¶ 6 Prior to trial, defendant filed a motion under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2002)) to strike the allegations regarding a failure to test Loctite 620 and evaluate its dangers from plaintiff's complaint. Defendant asserted that such allegations were irrelevant because plaintiff's sole claim was based on a theory of strict liability. Plaintiff responded that the allegations regarding defendant's failure to test Loctite 620 were relevant to the issue of whether defendant knew or should have known of its dangers. Following argument, the court granted defendant's motion to strike.

¶ 7 Also, plaintiff filed a motion *in limine* to bar all evidence of and reference to heptane, a liquid found in a cleaning product plaintiff used while assembling nail guns. Plaintiff asserted that such evidence would only be relevant if it showed that heptane was the sole proximate cause

of Bryant's injuries and that it was irrelevant because there was no evidence showing that heptane was the sole proximate cause of Bryant's injuries. The court denied plaintiff's motion and stated that the defense could present evidence regarding heptane and that the court would determine at the trial's conclusion whether to give the jurors an instruction directing them to enter a verdict in favor of defendant if they decided that the sole proximate cause of plaintiff's injury was something other than defendant's conduct. The court subsequently decided not to provide the jury with such an instruction because the expert witnesses did not testify that heptane was the sole proximate cause of Bryant's birth defects.

¶ 8 At trial, plaintiff testified that she began working for Paslode as a nail gun assembler in June 1999, became pregnant with Bryant in October 1999, and continued working for Paslode until she went on maternity leave in June 2000. While working at Paslode, plaintiff used Loctite 620 on a daily basis, as she hand-dipped screws into Loctite 620 and sprayed Loctite 620 onto fan blades and evened it on the blade with her finger. Although gloves were available, plaintiff did not wear them because they would slow down production. Plaintiff noticed that the other workers did not wear gloves either. Plaintiff testified that she would have worn gloves if there was a warning on the bottle of Loctite 620 instructing her to do so or informing her that Loctite 620 caused reproductive harm to pregnant women. Plaintiff sometimes cut her hands and fingers on the equipment while working and developed a rash on her hands, wrists, and forearms. The rash would go away on the weekends, when plaintiff did not work, and plaintiff only experienced such rashes while she was working at Paslode. Plaintiff also testified that Bryant was examined by a geneticist and that the genetic testing did not show that he suffered from any congenital

genetic abnormalities.

¶ 9 On cross-examination, plaintiff stated that the label on the bottle of Loctite 620 indicated that Loctite 620 was an eye irritant and may cause an allergic skin reaction and that although the label also directed users to read the material safety data sheet for Loctite 620, she never read the material safety data sheet. Plaintiff also stated that she used a degreaser, which was identified as heptane, while she worked at Paslode. Plaintiff sprayed between 250 and 300 driver blades with heptane from an aerosol can per day, and a nearby fan often blew heptane onto her skin. On redirect examination, plaintiff testified that she came in contact with Loctite 620 more often than heptane.

¶ 10 Robert Moriarty, a chemistry professor at the University of Illinois-Chicago, testified that Loctite 620 is a liquid adhesive and that its predominant component is aromatic dimethacrylate ester, which is a trade name for what is properly called Bisphenol A ethoxy dimethacrylate. The primary component of Bisphenol A ethoxy dimethacrylate is Bisphenol A (BPA), an industrial chemical used widely in plastics, and Bisphenol A ethoxy dimethacrylate is reduced to BPA by the metabolizing process when it enters the body. Professor Moriarty also testified that BPA is a teratogen, which is an agent or chemical that has an adverse effect on fetal development and interrupts the normal development of an embryo, and that BPA and diethylstilbestrol (DES) shared similar chemical structures and an estrogenic biological activity. DES was marketed as a substitute for estradiol, an estrogen, until it was found to cause birth defects. Professor Moriarty further testified that if BPA is present in the bloodstream of a pregnant woman, it will reach the fetus and act like DES.

¶ 11 Professor Moriarty opined to a reasonable degree of scientific certainty that BPA could cause or contribute to birth defects and that Loctite 620 was an unreasonably dangerous product because it contained a teratogen. Professor Moriarty also opined that defendant should have provided warnings that Loctite 620 was harmful to human health and pregnant women and that defendant did not correctly identify all the major ingredients of Loctite 620 on its label or in its material safety data sheet and did not provide a warning that Loctite 620 could cause birth defects.

¶ 12 On cross-examination, Professor Moriarty stated that heptane is a teratogen and that it can enter the body through inhalation and come in contact with the fetus after having been distributed through the bloodstream. Professor Moriarty also stated that he employed a four-condition test in determining whether a connection exists between exposure to a chemical and a physiological outcome, such as a birth defect, and that while he had not shared those conditions with anyone in the medical community and was not aware of anyone else who used that four-condition test, the fact that the test was a good idea was self-evident. Professor Moriarty did not know how much aromatic dimethacrylate ester could enter the placenta through the bloodstream or how much BPA would need to enter a pregnant woman's bloodstream to cause a birth defect. Professor Moriarty was not aware of any peer-reviewed medical literature relating that either aromatic dimethacrylate ester or Bisphenol A ethoxy dimethacrylate were teratogens. Professor Moriarty also stated that there was no data showing that Bisphenol A ethoxy dimethacrylate is reduced to BPA when it is metabolized and that it would be impossible to run a human experiment to prove that Bisphenol A ethoxy dimethacrylate is reduced to BPA in the human body because it would

be unethical to expose a person to Bisphenol A ethoxy dimethacrylate for that purpose. On redirect examination, Professor Moriarty testified that in determining whether a chemical could cause birth defects, he considered whether the subject was exposed to the chemical, the extent to which the subject was exposed to the chemical, and whether the birth defect was reasonably connected to the chemical based on the chemical's structure and activity.

¶ 13 Mary Lynn Burke, the director of regulatory affairs for North America for defendant, was called as an adverse witness by plaintiff and testified that she was responsible for ensuring that defendant's products were compliant with the relevant chemical control regulations and preparing documents, such as warning labels and material safety data sheets, which disclosed the hazards associated with those products. Burke testified that a product's predominant hazard must be put on its warning label and that a direction to wear gloves may be placed on its material safety data sheet. The warning label on a bottle of Loctite 620 did not include an instruction that a person using the product must wear gloves and did not reference a risk of reproductive harms or birth defects. Burke acknowledged that a material safety data sheet for Loctite 620 stated that "this product contains chemicals known to the State of California to cause cancer and birth defects or other reproductive harm," but stated that she disagreed with the proposition that Loctite 620 could cause reproductive harm. Burke also said that she occasionally referred work to Susan Sundstrom and that she and Sundstrom looked at the material safety data sheets of a product's raw materials and searched for peer-reviewed literature on those materials to determine if the product posed a health hazard.

¶ 14 On direct examination by defense counsel, Burke testified that there was no evidence to

suggest that Loctite 620 or any of its raw materials caused birth defects. Burke also testified that only the State of California required a reference to birth defects in the material safety data sheet for Loctite 620. Burke explained that the reference to birth defects was required because one of the raw materials in Loctite 620 may have contained trace amounts of a teratogen and California requires the disclosure of all chemicals that may cause reproductive harm regardless of how little of the chemical is present in the product.

¶ 15 Dr. Marc Schenker testified that he was board-certified in internal medicine, pulmonary disease, and preventative medicine and that he had done research for 30 years on occupational and environmental respiratory and reproductive hazards and taught classes on occupational and environmental epidemiology. Dr. Schenker testified that aromatic dimethacrylate ester is the primary ingredient in Loctite 620 and is part of a family of chemicals that are known to cause birth defects. Plaintiff was exposed to Loctite 620 and heptane during her pregnancy while working at Paslode. While Loctite 620 primarily entered plaintiff's bloodstream through her skin, plaintiff also inhaled its fumes into her lungs and likely ingested some of it by eating while on the production line. Once Loctite 620 entered plaintiff's bloodstream, it could pass through the blood system and into the placenta and the fetus, where it could interrupt fetal development.

¶ 16 Dr. Schenker also testified that the material safety data sheet for Loctite 620 that was in effect at the time plaintiff was pregnant with Bryant did not include a warning regarding possible reproductive harms and that defendant should have included such a warning in the material safety data sheet for Loctite 620. Dr. Schenker further testified that both Loctite 620 and heptane contributed to Bryant's birth defects and opined to a reasonable degree of medical certainty that

Loctite 620 caused or contributed to Bryant's birth defects.

¶ 17 On cross-examination, Dr. Schenker stated that heptane is an organic solvent and that it is similar to other organic solvents that have been found to cause birth defects and interfere with normal fetal development. Dr. Schenker also stated that he was not aware of any studies showing that aromatic dimethacrylate ester caused birth defects, any data regarding the amount of Loctite 620 that can get through a person's skin and into her bloodstream, or any medical literature on the health effects of Loctite 620. Dr. Schenker further stated that he did not know the quantity of Loctite 620 to which plaintiff was exposed and that he did not conduct a physical examination of plaintiff. On redirect examination, Dr. Schenker testified that the amount of Loctite 620 plaintiff was exposed to by dipping her fingers in it on a daily basis was a sufficient amount to cause birth defects.

¶ 18 Susan Sundstrom, a board-certified toxicologist, testified for the defense that she was an independent consultant and that she had occasionally evaluated chemicals for health effects for defendant by reviewing relevant peer-reviewed literature so defendant could develop warnings for its products. Sundstrom testified that she reviewed scientific literature regarding Loctite 620 and its ingredients and opined to a reasonable degree of scientific certainty that neither Loctite 620 nor any of its ingredients were capable of causing birth defects. Sundstrom also testified that aromatic dimethacrylate ester, the primary ingredient in Loctite 620, is a very reactive compound, which means that it tends to react to or bind with the first substance it comes in contact with, and opined that aromatic dimethacrylate ester could not pass through a person's skin because it is too big and too reactive. Aromatic dimethacrylate ester could not pass through a person's skin even

if the person had cuts or scratches on her skin because it is too big and too reactive, and it could only pass through the skin if the person had a severe injury, such as a large and severe burn. In addition, aromatic dimethacrylate ester could not enter a person's bloodstream through inhalation because it is too volatile to get into the air and could not enter the bloodstream through ingestion because it would cause a local reaction in the person's mouth or tongue.

¶ 19 Sundstrom opined to a reasonable degree of scientific certainty that BPA is not capable of causing birth defects and testified that there was no peer-reviewed scientific literature showing that BPA caused birth defects. Sundstrom also testified that even if reports showing that BPA caused birth defects existed, such reports would not show that Loctite 620 or aromatic dimethacrylate ester caused birth defects because BPA is not an ingredient of Loctite 620 and BPA and aromatic dimethacrylate ester are different chemicals. Sundstrom further testified that a chemical's structure, by itself, does not provide sufficient information to allow for a prediction of the chemical's toxicity because small changes in chemical structure can lead to large changes in toxicity.

¶ 20 On cross-examination, Sundstrom stated that while the chemical structure of the middle portion of the aromatic dimethacrylate ester molecule resembles the chemical structure of a BPA molecule, there are no studies showing that aromatic dimethacrylate ester metabolizes in the body. Sundstrom also stated that Loctite 620 has a molecular weight of about 450 daltons and that it is unlikely that any molecule with a molecular weight greater than 400 daltons could go through the skin, but acknowledged that halobetasol and clobetasol were ointments designed to penetrate the skin and had molecular weights of greater than 450 daltons.

¶ 21 Dr. Brad Angle, a medical geneticist board-certified in pediatrics and clinical genetics, testified for the defense that he reviewed the results of the chromosomal testing performed on Bryant. While the testing did not detect any chromosomal abnormalities, Dr. Angle could not rule out the possibility that Bryant's birth defects were caused by a chromosomal abnormality because the testing technology had improved substantially since Bryant was tested in 2000 and could not rule out the possibility that Bryant's birth defects were caused by an underlying genetic disorder because not all genetic disorders are caused by chromosomal abnormalities. Dr. Angle also believed that Bryant's birth defects could have been caused by a vascular disruption.

¶ 22 Dr. Angle also testified that there was no medical or scientific evidence to support the conclusion that Loctite 620 or any of its ingredients are capable of causing birth defects or caused or contributed to Bryant's birth defects and that he considered the relevant evidence in light of Shepard's criteria, the generally accepted criteria among geneticists for determining whether a substance has caused a birth defect, in reaching his conclusion. Dr. Angle testified that a clinical geneticist would not use the structural relationship approach employed by Professor Moriarty to determine whether a substance is a teratogen because medical criteria require human evidence to establish that a chemical is a teratogen. Dr. Angle further testified that BPA is not an ingredient of Loctite 620 and that there is no medical or scientific evidence to support the conclusion that BPA is capable of causing birth defects.

¶ 23 On cross-examination, Dr. Angle stated that he did not consider the interaction between Loctite 620 and heptane in forming his opinions and that it was possible a chemical could cause a vascular disruption. Dr. Angle also stated that he could not say to a reasonable degree of medical

certainty that Bryant's birth defects were caused by a chromosomal defect.

¶ 24 Following closing arguments, the jury returned a verdict in favor of defendant and against plaintiff and responded to a special interrogatory by finding that at the time the Loctite 620 at issue left defendant's control, defendant did not know or should have known that Loctite 620 could cause birth defects.

¶ 25 ANALYSIS

¶ 26 I. Motion to Strike

¶ 27 Plaintiff contends that the circuit court erred by granting defendant's motion to strike the allegations from her complaint regarding defendant's failure to adequately test Loctite 620 and evaluate its dangers because such allegations were relevant to the issue of whether defendant knew or should have known that Loctite 620 could cause birth defects. Defendant responds that such allegations are irrelevant to plaintiff's claim because a strict liability claim focuses on the alleged inadequacy of the warning, rather than defendant's conduct. This court reviews an order granting a motion brought under section 2-615 of the Code of Civil Procedure *de novo*. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006).

¶ 28 A failure to warn of a product's dangerous propensities may serve as the basis for holding a manufacturer or seller of the product strictly liable in tort. *Woodill v. Parke Davis & Co.*, 79 Ill. 2d 26, 29 (1980). To establish a failure to warn claim based on strict liability, the plaintiff must plead and prove that the defendant knew or should have known of the danger that caused the injury and that the defendant failed to warn the plaintiff of that danger. *Id.* at 35. The inquiry in such a case focuses on the nature of the product and the adequacy of the warning, rather than

the defendant's conduct. *Id.*

¶ 29 In this case, plaintiff brought a claim of strict liability against defendant and alleged that defendant knew or should have known that Loctite 620 was harmful and that defendant failed to provide adequate warnings of the dangers associated with it. Plaintiff also alleged that defendant failed to adequately test Loctite 620 and evaluate its dangers. However, evidence of defendant's failure to test Loctite 620 would not show that defendant knew of the dangers allegedly posed by Loctite 620 and, in fact, could only show that defendant did not know of any dangers that would have become apparent through testing. In addition, because evidence of defendant's failure to test Loctite 620 would not reflect what the results of such testing would have been, the evidence would not demonstrate that defendant would have known of the dangers posed by Loctite 620 had it tested the product and, therefore, does not help establish that defendant should have known of any such dangers. As such, plaintiff's allegations that defendant failed to adequately test Loctite 620 and evaluate its dangers are not relevant to her strict liability claim, causing us to conclude that the circuit court did not err by striking those allegations from plaintiff's complaint.

¶ 30 In reaching that conclusion, we have considered plaintiff's reliance on *Baylie v. Swift & Co.*, 283 Ill App. 3d 421 (1996), and determined that it is distinguishable from this case. In *Baylie*, this court held that evidence relating to the defendant's failure to test the substance at issue could be presented at trial on the plaintiff's negligent failure to warn claim because the defendant's duty to test was intertwined with its duty to warn as the evidence showed that the defendant did not test the substance despite having the capability to do so and that testing would have revealed that the substance constituted a severe explosion hazard. *Id.* at 434. In this case,

however, plaintiff's failure to warn claim is based in strict liability rather than negligence, and there is no evidence that testing would have revealed that Loctite 620 causes birth defects. As such, *Baylie* does not affect our conclusion that the circuit court did not err by striking allegations from plaintiff's complaint regarding defendant's failure to test Loctite 620 and evaluate its dangers.

¶ 31 II. Opening Statement

¶ 32 Plaintiff next contends that she was denied a fair trial where defense counsel made improper comments during the opening statement and those remarks may have had a bearing on the jury's finding that defendant did not know that Loctite 620 could cause birth defects. The purpose of an opening statement is to inform jurors of the nature of the action and to provide an outline of what counsel expects the admissible evidence at trial will show so the jurors can better understand the testimony they will hear during trial. *Auten v. Franklin*, 404 Ill. App. 3d 1130, 1153 (2010). An attorney's remarks during opening statement are not improper if they are made in good faith and with reasonable grounds to believe that the evidence which is the subject of the comments is admissible, even if the evidence is subsequently excluded. *Hilgenberg v. Katzen*, 305 Ill. App. 3d 197, 210 (1999). However, counsel should not comment about matters which counsel cannot prove or does not intend to prove (*Nassar v. County of Cook*, 333 Ill. App. 3d 289, 304 (2002)), and opening remarks are improper if they are not made in good faith and are prejudicial (*Auten*, 404 Ill. App. 3d at 1153).

¶ 33 In this case, defense counsel commented during opening statement that "despite decades of worldwide use, global use by hundreds of thousands of people, this case is the one and only

time anyone has ever claimed that [Loctite 620] causes birth defects, the only time." Counsel for plaintiff objected to the remark, and the court sustained the objection and struck that portion of the opening statement. Defense counsel later commented that "you are going to hear from Mary Lynn Burke about the extensive use of [Loctite 620], the global worldwide use of this product, and there have been no reports of birth defects." Counsel for plaintiff objected to the remark, and the court sustained the objection and struck that portion of the opening statement.

¶ 34 Plaintiff asserts that the challenged comments are improper because defendant could not prove and did not intend to prove that there were no cases or reports of birth defects caused by Loctite 620. Defendant responds that defense counsel had a good faith basis for stating that the evidence would show that defendant was not aware of any reports showing that Loctite 620 could cause birth defects. Defense counsel's comments, however, concerned the issue of whether cases or reports of birth defects caused by Loctite 620 existed, rather than whether defendant was aware of any such reports. For evidence of the absence of prior accidents or occurrences to be admissible, the party wishing to present the evidence must show a similarity of circumstance between the prior use and the occurrence that caused the injury at issue. *Schaffner v. Chicago & North Western Transportation Co.*, 129 Ill. 2d 1, 40 (1989). As defendant did not present such evidence or attempt to do so, defense counsel's comments regarding the nonexistence of cases or reports regarding birth defects caused by Loctite 620 were improper.

¶ 35 Defendant asserts that even if defense counsel's comments were improper, plaintiff is not entitled to a new trial because she cannot establish that she suffered any prejudice as a result of those comments. An attorney's improper comments during opening statement do not constitute

reversible error unless they have resulted in substantial prejudice to the aggrieved party. *Nassar*, 333 Ill. App. 3d at 304. The circuit court's determination regarding the prejudicial effect of such remarks will not be overturned absent an abuse of discretion. *Simmons v. Garces*, 198 Ill. 2d 541, 568 (2002).

¶ 36 Defendant maintains that plaintiff was not substantially prejudiced by defense counsel's comments because the circuit court cured any prejudice caused by the comments by sustaining counsel for plaintiff's objections and striking the challenged remarks. Defendant also maintains that it is unlikely that two isolated comments could deprive plaintiff of a fair trial in light of the lengthy trial which ensued. A court may generally cure any prejudice caused by an attorney's improper comments by sustaining a timely objection to the remarks and instructing the jury to disregard the improper comments. *Willaby v. Bendersky*, 383 Ill. App. 3d 853, 862 (2008).

¶ 37 The record shows that plaintiff for counsel objected to both of defense counsel's improper comments and that the circuit court sustained the objections and struck those portions of defense counsel's opening statement. In its order denying plaintiff's posttrial motion for a new trial, the court determined that plaintiff was not prejudiced by defense counsel's improper remarks because the court struck those comments and instructed the jury to disregard them and it was unlikely that defense counsel's isolated remarks could cause substantial prejudice.

¶ 38 Plaintiff maintains that she has established that she was substantially prejudiced by the comments because the jurors demonstrated an interest in possible cases or reports of birth defects caused by Loctite 620 in a note sent to the court during deliberations and the jury's answer to the special interrogatory shows that its verdict was based on its finding that plaintiff did not establish

that defendant knew or should have known that Loctite 620 could cause birth defects. The record shows that during deliberations, the jury sent a note to the court asking "[c]ould the attorneys have brought up other cases?" The court then sent a note to the jury in which it responded "[n]o. You have received all of the relevant evidence for this case."

¶ 39 The jury is presumed to follow the instructions given by the circuit court. *McDonnell v. McPartlin*, 192 Ill. 2d 505, 535 (2000). Therefore, even if the jury's note demonstrates that the jurors were thinking about defense counsel's comments when they commenced deliberations, any residual prejudice caused by the comments was cured by the court's response to the note. In addition, the court would have been aware of the jury's note and its response to the note when it denied plaintiff's posttrial motion for a new trial and determined that plaintiff was not prejudiced by defense counsel's comments. Such determinations will not be overturned absent a clear abuse of discretion (*Simmons*, 198 Ill. 2d at 568), and we conclude that no abuse of discretion occurred in this case.

¶ 40 In reaching that conclusion, we have considered *Gillson v. Gulf, Mobile & Ohio R.R. Co.*, 42 Ill. 2d 193 (1969), cited by plaintiff, and determined that it distinguishable from this case. In *Gillson*, our supreme court held that counsel made a number of improper comments during the opening statement by relating the contents of documents with disregard for their subsequent inadmissibility and made an improper and inflammatory comment regarding the defendant's motive about which counsel did not possess any supporting evidence. *Id.* at 200. While opposing counsel objected to each of the improper remarks, the circuit court only sustained the objection to the inflammatory comment regarding the defendant's motive and ordered that

comment stricken. *Id.* The supreme court concluded that although the circuit court struck the one remark and instructed the jury to disregard it, the combination of that inflammatory comment and the other statements relating to the contents of inadmissible documents were "so obviously prejudicial that the impression conveyed to the jury could not be adequately removed by the trial court's admonition." *Id.* In this case, defense counsel only made two improper comments, the comments were not inflammatory in nature, and the circuit court sustained counsel for plaintiff's objections to both comments and struck them from the opening argument. As such, *Gillson* does not affect our conclusion that the court did not abuse its discretion by determining that plaintiff was not prejudiced by defense counsel's improper comments during opening statement.

¶ 41 III. Missing-Witness Instruction

¶ 42 Plaintiff next contends that the circuit court committed reversible error by refusing her request for a missing-witness jury instruction. Prior to trial, defendant disclosed that it would be calling Viresh Rawal, a chemistry professor at the University of Chicago, as a controlled expert witness and that Professor Rawal would testify as to the opinions set forth in his report and deposition and would rebut the opinions expressed by Professor Moriarty. Defendant also related that Professor Rawal would opine that there was no scientific evidence to support the conclusion that Loctite 620 or any of its ingredients have teratogenic effects, that BPA was not an ingredient of Loctite 620, and that the primary ingredient of Loctite 620 was distinct from BPA and did not release BPA into the body when it was metabolized. During trial, defense counsel informed the court that Professor Rawal would not be testifying because his testimony would be cumulative. At the jury instruction conference, counsel for plaintiff requested a missing-witness instruction

regarding Professor Rawal, and the court denied that request, finding that his testimony would have been cumulative. In denying plaintiff's posttrial motion for a new trial, the court determined that a missing-witness instruction was not warranted because plaintiff was not prejudiced by the jury's inability to hear Professor Rawal's testimony and that his testimony that Loctite 620 does not cause birth defects would have been cumulative because Burke and Dr. Angle testified to that same opinion.

¶ 43 A missing-witness instruction, Illinois Pattern Jury Instructions, Civil, No. 5.01 (2008), instructs the jurors that they may infer that the testimony of a missing witness would be adverse to the party that has failed to call the witness. Such an instruction is given if the court determines that a party, in all likelihood, would have produced a witness unless the testimony of the witness would have been unfavorable to that party. *Montgomery v. Blas*, 359 Ill. App. 3d 83, 87 (2005). A missing-witness instruction is generally available when:

> "(1) the missing witness was under the control of the party to be charged and could have been produced by reasonable diligence; (2) the witness was not equally available to the opposing party; (3) a reasonably prudent person would have produced the witness if he believed that the testimony would be favorable; and (4) there is no reasonable excuse shown for the failure to produce the witness." *Taylor v. Kohli*, 162 Ill. 2d 91, 97 (1994).

However, a missing-witness instruction is not warranted if the testimony of the witness that has not been produced is merely cumulative of facts that have already been established. *Kersey v. Rush Trucking, Inc.*, 344 Ill. App. 3d 690, 696 (2003). The decision of whether to give the jury a

missing-witness instruction rests within the sound discretion of the circuit court and will not be reversed absent a clear abuse of that discretion. *Id.*

¶ 44 Defendant does not dispute that Professor Rawal satisfies the first two requirements for a missing-witness instruction as Professor Rawal was an expert witness hired by defendant and, therefore, was under defendant's control and was not equally available to plaintiff. *Montgomery*, 359 Ill. App. 3d at 87. Defendant maintains, however, that the court did not abuse its discretion by refusing to issue a missing-witness instruction because Professor Rawal's testimony would have been cumulative as he would have testified that Loctite 620 did not cause birth defects and Burke, Sundstrom, and Dr. Angle all provided that same opinion in their testimony. Plaintiff asserts that a missing-witness instruction was appropriate because some of Professor Rawal's testimony would not have been cumulative and would have lent support to Professor Moriarty's testimony where Professor Rawal would have testified that Professor Moriarty was a "highly regarded" scientist and that he used the same methodology as Professor Moriarty in reaching his opinions in this case.

¶ 45 Professor Rawal opined to a reasonable degree of scientific certainty in his report and at his deposition that there was no evidence to support the conclusion that Loctite 620 caused birth defects. Professor Rawal testified in his deposition that he had met Professor Moriarty and read some of his publications and believed that Professor Moriarty was a "highly regarded" scientist. Professor Rawal also testified that he identified the components of Loctite 620 and examined the chemical structure and reviewed the scientific literature of each ingredient. Professor Rawal also reviewed the scientific literature of various molecules that comprise aromatic dimethacrylate

ester, the primary component of Loctite 620, thinking that he might indirectly learn something about the properties and effects of aromatic dimethacrylate ester by doing so. He explained, however, that "I don't believe you can predict with certainty that a particular compound would have specific properties in a complex organism like a human being" solely on the basis of its molecular structure. Professor Rawal also testified that Loctite 620 did not contain free-standing BPA and that while the central portion of the aromatic dimethacrylate ester molecule contained a BPA component, aromatic dimethacrylate ester and BPA were completely different compounds. Professor Rawal further testified that he was "puzzled" by Professor Moriarty's methodology, that Professor Moriarty performed a "cursory assessment" of the effects of aromatic dimethacrylate ester, and that Professor Moriarty did not provide scientific literature to support his conclusions.

¶ 46 As Professor Rawal would have testified that it was his opinion to a reasonable degree of scientific certainty that there was no evidence to support the conclusion that Loctite 620 caused birth defects, his testimony would have been cumulative of the testimony of Burke, Sundstrom, and Dr. Angle, who all testified to the same opinion. Also, Professor Rawal's testimony that a chemical's structure, by itself, does not provide sufficient information to allow for a prediction of the chemical's effect on the human body and that aromatic dimethacrylate ester and BPA were completely different compounds would have been cumulative of Sundstrom's testimony as to those same matters. To the extent Professor Rawal would have testified that Professor Moriarty was a "highly regarded" scientist and that he reviewed the literature of various molecules that comprise aromatic dimethacrylate ester in reaching his opinion, such testimony would not have supported Professor Moriarty's testimony because Professor Rawal disagreed with Professor

Moriarty's opinion and criticized his methodology. As such, we conclude that the circuit court did not abuse its discretion by denying plaintiff's request for a missing-witness instruction.

¶ 47 IV. Heptane

¶ 48 Plaintiff further contends that the circuit court erred by denying her motion *in limine* to bar all evidence of and reference to heptane because it was clear there was no evidence showing that plaintiff's exposure to heptane was the sole proximate cause of Bryant's birth defects. A longstanding common law principle provides that a plaintiff's injury can have multiple causes and that a defendant is liable for its tortious conduct, regardless of whether it contributed wholly or partly to the plaintiff's injury, so long as it was one of the proximate causes of the injury. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 92-93 (1995). In light of that principle, when a defendant's conduct is a proximate cause of the plaintiff's injury, evidence of another proximate cause of the injury is irrelevant as to the issue of the defendant's liability. *Nolan v. Weil-McLain*, 233 Ill. 2d 416, 437 (2009). A defendant, however, has the right to attempt to establish "that the conduct of a third person, or some other causative factor, is the sole proximate cause of plaintiff's injuries" and, if the evidence is sufficient, the defendant is entitled to a jury instruction on that theory. *Leonardi*, 168 Ill. 2d at 101. The decision of whether to admit certain evidence lies within the sound discretion of the circuit court and will not be reversed absent a clear abuse of that discretion. *Gill v. Foster*, 157 Ill. 2d 304, 312-13 (1993).

¶ 49 Prior to trial, plaintiff filed a motion to bar any evidence of or reference to heptane and the court denied that motion, finding that the defense could present evidence regarding heptane and that it would determine whether to provide the jury with a sole proximate cause instruction at

the close of trial. The court subsequently decided not to give the jury a sole proximate cause instruction because none of the expert witnesses testified that heptane was the sole proximate cause of Bryant's birth defects. In denying plaintiff's posttrial motion for a new trial, the court determined that defendant had a reasonable basis to pursue a sole proximate cause defense based on evidence that heptane caused birth defects and that plaintiff was not prejudiced by the heptane evidence because the jury's answer to the special interrogatory demonstrated that such evidence did not affect the jury's verdict.

¶ 50 Defendant asserts that it was entitled to attempt to establish that plaintiff's exposure to heptane was the sole proximate cause of Bryant's injuries and it had a reasonable basis to pursue such a defense. Defendant also asserts that any error in admitting evidence of heptane is not reversible error because such evidence did not affect the jury's verdict where the jurors related in their answer to the special interrogatory that they found that defendant did not know or should have known that Loctite 620 could cause birth defects. A party is not entitled to reversal based upon an erroneous evidentiary ruling unless the error was substantially prejudicial and affected the outcome of the case. *Bosco v. Janowitz*, 388 Ill. App. 3d 450, 462-63 (2009). As the jury's finding that defendant did not know or should have known that Loctite 620 could cause birth defects was alone sufficient to support its verdict in favor of defendant, we conclude that any error in allowing evidence of heptane would not constitute reversible error because that evidence did not affect the outcome of the case.

¶ 51 CONCLUSION

¶ 52 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 53 Affirmed.