SC97465

In The Supreme Court of Missouri

EVE SHERRER
Plaintiff/Appellant

vs.

BOSTON SCIENTIFIC CORPORATION and
C. R. BARD, INC.
Defendants/Respondents

Appeal from the Circuit Court of
Jackson County, Missouri
Case No. 1216-CV27879

APPELLANT'S SUBSTITUTE BRIEF

Grant Davis, MO Bar #34799
Davis Bethune & Jones LLC
1100 Main, Suite 2930
Kansas City, MO 64105
816-421-1600
gdavis@dbjlaw.net

Michael W. Manners, MO Bar #25394
Langdon & Emison
911 Main St., PO Box 220
Lexington MO 64067
(660) 259-9910
mike@lelaw.com

Thomas P. Cartmell, MO Bar #45366
Wagstaff & Cartmell LLP
4740 Grand Ave, Ste 300
Kansas City, MO 64112
816-701-1100
tcartmell@wcllp.com

Richard L. Rollings, Jr.
MO Bar #40650
379 West Lake Park
Camdenton, MO 65020
573-873-6060
Rick@RRollings.com

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES 4
JURISDICTIONAL STATEMENT 10
STATEMENT OF FACTS 11
I. Background and Procedural History 11
II. Defendant C.R. Bard, Inc.'s Criminal Convictions 15
III. Use of Plaintiff's Original Petition 18
IV. Plaintiff's Settlement with TMC and UPA 22
V. Complaints Regarding Mesh Slings 24
POINTS RELIED ON 29
ARGUMENT 32
I. Defendant C.R. Bard, Inc.'s Criminal Convictions Were Admissible Pursuant to § 491.050 32
A. Standard of Review and Preservation of Error 32
B. Defendant Bard's Criminal Convictions 34
C. Admissibility Under § 491.050 35
D. Applicability of § 491.050 to Corporations 46
II. Defendant C.R. Bard, Inc.'s Criminal Convictions Were Admissible to Contradict and Rebut Its Evidence 63
A. Standard of Review and Preservation of Error 63
B. Admissible to Contradict Bard's Claim of Good Character 64
III. Use of Plaintiff's Original Petition 71
A. Standard of Review and Preservation of Error 71
B. Procedural History and Use of Plaintiff's Original Petition 72

C. The General Inappropriateness of Interjecting Pleadings into Trials 74
D. Inadmissible as Inconsistent Pleadings 76
E. Inadmissible as Legal Conclusions 82
F. Plaintiff Preserved This Issue 84
G. The Use of Plaintiff's Original Petition Was Prejudicial 88
IV. Plaintiff's Settlement with TMC and UPA 91
A. Standard of Review and Preservation of Error 91
B. The Jury Was Informed of the Settlement 92
C. The Evidence of the Settlement Was Inadmissible and Highly Prejudicial 95
D. The Unusual Circumstances Precluded Normal Efforts to Preserve This Issue 99
CONCLUSION 106
CERTIFICATE OF COMPLIANCE 108

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Cases

Amador v. Lea's Auto Sales & Leasing, Inc., 916 S.W.2d 845 (Mo.App.S.D. 1996) 83

Anuhco, Inc. v. Westinghouse Credit Corp., 883 S.W.2d 910 (Mo.App.W.D. 1994) 82

Batek v. Curators of University of Missouri, 920 S.W.2d 895 (Mo. 1996) 37

Beetschen v. Shell Pipe Line Corp., 248 S.W.2d 66 (Mo.App. 1952) 51

Black v. State, 151 S.W.3d 49 (Mo. 2004) 88

Bohrn v. Klick, 276 S.W.3d 863 (Mo.App.W.D. 2009) 32

Boland v. Saint Luke's Health System, Inc., 471 S.W.3d 703 (Mo. 2015) 45

Callaway v. Lilly, 605 S.W.2d 155 (Mo.App.E.D. 1980) 82

Carlson v. K-Mart Corp., 979 S.W.2d 145 (Mo. 1998) 75

Cisson v. C.R. Bard, Inc., 86 F.Supp.3d 510 (S.D.W.Va. 2015) 56, 57

Citizens United v. Federal Election Com'n, 558 U.S. 310 (2010) 47

City of St. Joseph v. Village of Country Club, 163 S.W.3d 905 (Mo. 2005) 33

Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985) 51

Countess v. Strunk, 630 S.W.2d 246 (Mo.App.W.D. 1982) 78

Daniel v. Indiana Mills & Mfg., Inc., 103 S.W.3d 302 (Mo.App.S.D. 2003) 97

Danneman v. Pickett, 819 S.W.2d 770 (Mo.App.E.D. 1991) 80, 81

Fahy v. Dresser Industries, Inc., 740 S.W.2d 635 (Mo. 1987) 89
Fisher v. Gunn, 270 S.W.2d 869 (Mo. 1954) 38
Forbis v. Associated Wholesale Grocers, Inc., 513 S.W.2d 760 (Mo.App. 1974) 42
Gaines v. Property Serv. Co., 276 S.W.2d 169 (Mo. 1955) 75
Giles v. Riverside Transport, Inc., 266 S.W.3d 290 (Mo.App.W.D. 2008) 54
Global BTG LLC v. National Air Cargo, Inc., 2013 WL 12121982 (C.D. Cal. 2013) 66
Goerlitz v. City of Maryville, 333 S.W.3d 450 (Mo. 2011) 37
Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989) 50
Hamilton v. Missouri Petroleum Products Co., 428 S.W.2d 197 (Mo. 1969) 89
Hansen v. Ritter, 375 S.W.3d 201 (Mo.App.W.D. 2012) 51
Hardwick v. Kansas City Gas Co., 335 Mo. 100, 195 S.W.2d 504 (1946) 76
Hickson Corp. v. Norfolk Southern Ry. Co., 124 Fed.Appx. 336 (6th Cir. 2005) 30, 66, 69
Hickson Corp. v. Norfolk Southern Ry. Co., 227 F.Supp.2d 903 (E.D. Tenn. 2002) 29, 48, 49, 51
Johnson v. Flex-O-Lite Mfg. Corp., 314 S.W.2d 75 (Mo. 1958) ... 76, 77, 78
Kesler-Ferguson v. Hy-Vee, Inc., 271 S.W.3d 556 (Mo. 2008) 32
Kolar v. First Student, Inc., 470 S.W.3d 770 (Mo.App.E.D. 2015) 45
Lewis v. Wahl, 842 S.W.2d 82 (Mo.banc 1992) ..... passim

Littell v. Bi-State Transit Development Agency, 423 S.W.2d 34 (Mo.App. 1967) 30, 74, 78, 79
Love v. Baum, 806 S.W.2d 72 (Mo.App.W.D. 1991) 54, 55
M.A.B. v. Nicely, 909 S.W.2d 669 (Mo. 1995) 40
Macheca v. Fowler, 412 S.W.2d 462 (Mo. 1967) ..... passim
Manahan v. Watson, 655 S.W.2d 807 (Mo.App.E.D. 1983) .. 30, 79, 81, 90
Maugh v. Chrysler Corp., 818 S.W.2d 658 (Mo.App.W.D. 1991) 29, 64, 65, 69
McDowell v. Kawasaki Motors Corp. USA, 799 S.W.2d 854 (Mo.App.W.D. 1990) 75
Mengwasser v. Anthony Kempker Trucking, Inc., 312 S.W.3d 368 (Mo.App.W.D. 2010) 31, 96
Mitchell v. Kardesch, 313 S.W.3d 667 (Mo.banc 2010) 35, 47
Monell v. Dept. of Soc. Services of City of New York, 436 U.S. 658 (1978) 47
Nelson v. Waxman, 9 S.W.3d 601 (Mo. 2000) 32, 63, 71
Neuhoff Bros. Packers v. K.C. Dressed Beef Co., 340 S.W.2d 193 (Mo.App 1960) 51, 52
Nolte v. Ford Motor Company, 458 S.W.3d 368 (Mo.App.W.D. 2014) 32
O'Neal v. Pipes Enters., Inc., 930 S.W.2d 416 (Mo.App.W.D. 1995) 96
People v. Gilmore, 118 Ill.App.2d 100, 254 N.E.2d 590 (1969) 40
Riley v. Union Pacific R.R., 904 S.W.2d 437 (Mo.App.W.D. 1995) 82
Rodgers v. Czamanske, 862 S.W.2d 453 (Mo.App.W.D. 1993). 31, 97, 105, 106

Ryburn v. General Heating & Cooling, Co., 887 S.W.2d 604 (Mo.App.W.D. 1994) 30, 65, 66, 69
Security National Bank of Sioux City, Iowa v. Abbott Laboratories, 2013 WL 12140998 (N.D. Iowa 2013) 66
Smile v. Lawson, 506 S.W.2d 400 (Mo. 1974) 42
State ex rel. Dewey & Leboeuf, LLP v. Crane, 332 S.W.3d 224 (Mo.App.W.D. 2010) 51
State ex rel. Malan v. Huesemann, 942 S.W.2d 424 (Mo.App.W.D. 1997) 31, 96
State ex rel. Reif v. Jamison, 271 S.W.3d 541 (Mo. 2008) 52, 53
State ex rel. Tracy v. Dandurand, 30 S.W.3d 831 (Mo. 2000) 85, 87
State v. Blitz, 171 Mo. 530, 71 S.W. 1027 (1903) 36, 37, 42
State v. Bridges, 349 S.W.2d 214 (Mo. 1961) 42
State v. Campbell, 166 Mo.App. 589, 149 S.W. 1173 (1912) 41
State v. Cantrell, 775 S.W.2d 319 (Mo.App.E.D. 1989) 44
State v. Giffin, 640 S.W.2d 128 (Mo. 1982) 42
State v. Givens, 851 S.W.2d 754 (Mo.App.E.D. 1993) 44, 60
State v. Hoopingarner, 845 S.W.2d 89 (Mo.App.E.D. 1993) 41
State v. Meyer, 473 S.W.2d 374 (Mo. 1971) 29, 41, 45
State v. Morris, 460 S.W.2d 624 (Mo. 1970) 38, 40, 44
State v. Phillips, 940 S.W.2d 512, 520 (Mo. 1997) 54
State v. Pylypczuk, 527 S.W.3d 96 (Mo.App.W.D. 2017) 33
State v. Simmons, 825 S.W.2d 361 (Mo.App.E.D. 1992) 41, 44
State v. Swain, 977 S.W.2d 85 (Mo.App.E.D. 1998) 32
State v. Taylor, 266 S.W. 1017 (Mo.App. 1924) 43, 63, 71

State v. Taylor, 742 S.W.2d 625 (Mo.App.E.D. 1988) 104
State v. Torrey, 225 Mo.App. 966, 33 S.W.2d 130 (1930) 104
State v. Warden, 591 S.W.2d 170 (Mo.App.E.D. 1970) 41
State v. West, 285 Minn. 188, 173 N.W.2d 468 (1969) 38, 39, 40
State v. Williams, 603 S.W.2d 562 (Mo. 1980) 43, 44
Stone v. C.R. Bard, Inc., 2003 WL 22902564 (S.D.N.Y. 2003) ..... passim
Talley v. Richart, 353 Mo. 912, 185 S.W.2d 23 (1945) 65
Thorpe v. Davol, Inc., 2011 WL 470613 (D.R.I. 2011) 56
Toppins v. Miller, 891 S.W.2d 473 (Mo.App.E.D. 1994) 31, 97
United States v. C.R. Bard, Inc., 848 F.Supp. 287 (D. Mass. 1994) passim
Walden v. Georgia Pacific Corp., 126 F.3d 506 (3rd Cir. 1997) .. 47, 48, 49, 50
Wheeler ex rel. Wheeler v. Phenix, 335 S.W.3d 504 (Mo.App.S.D. 2011) 91
Williams v. McCoy, 854 S.W.2d 545 (Mo.App.S.D. 1993) 66
Wise v. C.R. Bard, Inc., 2015 WL 521202 (S.D.W.Va. 2015) 56
Wors v. Glasgow Village Supermarket, Inc., 460 S.W.2d 583 (Mo. 1970) 82

Other Authorities

§ 1.020 RSMo 2016 ..... 29, 32, 46
§ 1.030 RSMo 2016 ..... 29, 32, 46
§ 491.030 RSMo 2016 ..... 52, 54, 55
§ 491.050 RSMo 2016 ..... passim
§ 8944b 36
K. Forsyth, 22A MISSOURI PRACTICE, MISSOURI EVIDENCE § 629:1 (July 2018 Update) 40, 42

M.S.A. § 595.07 38
Rule 55.10 ..... 76, 78
Rule 609, F.R.Ev. 43, 44, 48, 49
Rule 84.13 ..... 61, 69, 88

JURISDICTIONAL STATEMENT

This case involves product liability claims asserted by Plaintiff/Appellant against Defendants/Respondents. This action was filed in the Circuit Court of Jackson County, Missouri, which entered Judgment on March 10, 2016. The Missouri Court of Appeals, Western District, issued its Order on September 7, 2016 allowing Plaintiff ten days within which to file a notice of appeal. Plaintiff filed her Notice of Appeal, Appeal No. WD80010, to the Missouri Court of Appeals, Western District, on September 16, 2016.

At the time this appeal was filed, the matter was not within the exclusive jurisdiction of this Court as provided in Article V, Section 3 of the Missouri Constitution. In addition, Jackson County is within the jurisdiction of the Western District of the Court of Appeals. Therefore, that Court had initial jurisdiction over this appeal.

The Court of Appeals issued its Opinion on August 21, 2018. This Court granted Respondent C.R. Bard, Inc.'s Application for Transfer on December 4, 2018. Since this Court has granted transfer, it may "finally determine" all issues in this cause, "the same as on original appeal." Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

I. Background and Procedural History

Plaintiff Eve Sherrer had a mesh product called a Solyx mini-sling, manufactured by Defendant Boston Scientific Corporation, "BSC", implanted in her vagina during a surgery in October 2010 to address her stress urinary incontinence, "SUI." Trans. II p. 748, 754. Due to the failure of the Solyx mesh product, Plaintiff underwent a second surgery in January 2011 in which a portion of the Solyx was removed and a second mesh product called Align, manufactured by Defendant C. R. Bard, Inc., "Bard", was implanted in its place. Trans. II p. 749-50, 757, 826.

Both the Solyx and Align are made from Marlex polypropylene. Trans. II p. 607, 699, 703, 755-56, 887. The Material Safety Data Sheet on Marlex polypropylene indicates it should not be used for permanent implantation in the human body. Trans. II p. 593-94; LF 5 p. 842; App. A12.

Plaintiff underwent an additional surgery in April 2014 in which the surgeon attempted to completely remove both the Solyx and Align products. Trans. II p. 790, 794, 830, 846.

Plaintiff filed her original Petition for Damages against Truman Medical Center, Inc., "TMC", and University Physician Associates, "UPA", on October 26, 2012. LF 1 p. 1, 70. Plaintiff filed her First Amended Petition for Damages on May 29, 2013, adding BSC and Bard as defendants. LF 1 p. 2-3, 83, 84.

The allegations of negligence and causation asserted against TMC and UPA in the original Petition were also asserted against those defendants in the First Amended Petition. LF 1 p. 74-75, 99-100. Plaintiff entered into a settlement with TMC and UPA, who were dismissed from this action on November 18, 2014. LF 1 p. 13, 180-81.

Plaintiff's theories against BSC and Bard are that the Solyx failed, the Marlex polypropylene used in both devices should not be permanently implanted in the body, the mesh used in both devices is too heavy, the pores in the mesh are too small, it is impossible to completely remove the mesh, the mesh causes permanent pain and disability, and the anchor of the Solyx is too difficult to properly place. Trans. II p. 587, 590-93, 612-13, 629-30.

In addition, Defendants' products were cleared by the Food and Drug Administration, "FDA," through a shortened procedure, known as the 510(k) process, rather than undergoing a full-blown FDA approval process. Trans. II p. 991-94. The FDA issued a 522 Order[1] regarding BSC's Solyx, stating: "FDA is concerned with potential safety risks as evidenced by adverse events reported to the FDA. In addition, FDA is concerned with potential published literature indicating a lack of added clinical benefit without reduced rates of repeat surgery[.]" Trans. III p. 1213-18. The FDA letter further stated: "Accordingly … we are ordering

---

[1] A "522 Order" is an order issued by the FDA, directing manufacturers of medical devices to conduct a post-marketing study of the device, i.e. a clinical trial that is done after the product is marketed, rather than prior to marketing. Trans. III p. 1213.

you to conduct a postmarket [sic] surveillance study of your device[.]" Trans. III p. 1218. BSC still had not completed a post-market surveillance study as of the beginning of this trial on December 2, 2015. Trans. III p. 1250.

Lawrence Lind, a BSC consultant, informed BSC regarding the Solyx that: "I feel that the rush to bring any needle-less sling [i.e. mini-sling] to market has resulted in a device which I do not feel will have as good an efficacy … and that the permanent head piece will lead to complications." Plaintiff's Exhibit 1, Trial Exhibits Vol. V p. 8; Court Exhibit 11, Trial Exhibits Vol. I p. 27 [Depo p. 6-7], p. 44-45 [Depo p. 38-39].

Plaintiff asserts that she continues to suffer significant pain because of the removal surgery, which "takes nerve, muscle, and tissue with it." Trans. II p. 627. Plaintiff's evidence indicated that the mesh contributed to caused her to have groin pain, vaginal nerve pain, vaginal scarring, a shortened and nonfunctioning vagina, worsening back issues, decreased bladder sensation, and pelvic floor tension myalgia. Trans. IV p. 2009-16.

This case proceeded to a jury trial against BSC and Bard beginning on December 2, 2015 and continuing until February 1, 2016. Trans. I p. 3-10. The jury returned its verdict, finding for Defendants, on February 2, 2016. Trans. XIII p. 8827-28; LF 38 p. 7217; App. A1. Judgment was entered on March 10, 2016. LF 1 p. 67; LF 38 p. 7219-21; App. A3-A5. Plaintiff's Motion for New Trial and Suggestions in Support was filed April 11, 2016. LF 1 p. 67-68; LF 38 p. 7222.

The trial court denied Plaintiff's Motion on July 15, 2016. LF 1 p. 68; LF 40 p. 7661. Plaintiff filed her initial Notice of Appeal to the Missouri Court of Appeals, Western District, on July 25, 2016. LF 1 p. 68; LF 40 p. 7662. The Court of Appeals dismissed that appeal as untimely, LF 40 p. 7670, but on September 7, 2016, the Court of Appeals entered its Order sustaining Appellant's Motion for Leave to File Notice of Appeal Out of Time. LF 40 p. 7671. Plaintiff filed the current appeal on September 16, 2016. LF 1 p. 69; LF 40 p. 7672.

On August 21, 2018, the Court of Appeals handed down its Opinion reversing the judgment of the trial court as to Bard for excluding evidence of Bard's criminal convictions, but affirming the balance of the trial court's judgment. On December 4, 2018, this Court sustained Bard's Application for Transfer.

II. Defendant C.R. Bard, Inc.'s Criminal Convictions

In 1994, Bard pled guilty to, and was convicted of, 391 felonies involving the safety of angioplasty catheters produced by its USCI Division, including conspiracy, mail fraud, submitting false statements to the FDA, shipping adulterated medical devices, shipping medical devices from an unapproved facility, shipping products that had been changed without the required FDA approval, shipping devices for human testing where such testing had not been approved, and failing to submit required reports to the FDA. *United States v. C.R. Bard, Inc.*, 848 F.Supp. 287, 288 (D. Mass. 1994); Court Exhibit 23, Trial Exhibits Vol. IV p. 5, 9.

Bard's criminal violations were all "committed intentionally", with many of the violations being committed either "knowingly and willfully" or "with the intent to defraud or mislead." *C.R. Bard, Inc.*, 848 F.Supp. at 289; Court Exhibit 23, Trial Exhibits Vol. IV p. 11. The plea agreement and conviction imposed a sentence requiring Bard to pay $61,000,000 in criminal fines and a civil settlement. *C.R. Bard, Inc.*, 848 F.Supp. at 288, 291, 293-94; Court Exhibit 23, Trial Exhibits, Vol. IV p. 5, 11, 20-21.

At trial, Plaintiff sought to introduce evidence of Bard's criminal convictions to affect its credibility pursuant to § 491.050, but the trial court ruled that the criminal convictions could not be admitted unless Bard "opened the door" by presenting evidence "about … how great the company was." Trans. VII p. 4548, 4557; see also Trans. XII p. 8328-29.

Plaintiff sought to prove Bard's criminal conviction through the videotaped deposition of John Weiland, President and Chief Operating Officer, "COO", of Bard, and through a certified copy of the Judgment in a Criminal Case. Court Exhibit 21, Trial Exhibits Vol. III p. 114 [Depo p. 7-8]; Trans. XII p. 8327-29; Court Exhibits 20-23, Trial Exhibits Vol. II-IV. The trial court excluded the evidence regarding the criminal convictions. Trans. VII p. 4546-57; Trans. VIII p. 5279-80; Court Exhibit 21, Trial Exhibits Vol. III. Plaintiff's offer of proof included both the deposition testimony of Weiland, which confirmed the details regarding Bard's plea and conviction for 391 felonies, and a certified copy of the Judgment in a Criminal Case. Court Exhibit 22, Trial Exhibits Vol. III p. 166-69 [Depo, p. 142-58]; Court Exhibit 23, Trial Exhibits Vol. IV.

Bard asserted in its opening statement that:

- "Bard fully complied with the FDA regulations and safety standards in bringing the Align to market." Trans. II p. 829.
- "Bard makes devices that are life improving, life enhancing, life saving in different types." Trans. II p. 835.
- "They make the surgical products we're talking about, like the Align that help enhance the quality of life." Trans. II p. 835.
- "Bard extensively tested the Align for safety." Trans. II p. 856.
- "[T]he FDA set the guidelines and the rules and Bard fully complied." Trans. II p. 856.
- "Bard complied with all the FDA regulations and standards." Trans. II p. 871.

- "But to be able to stand here as a woman and defend this product and defend this company and to know that these are helping millions of women is really rewarding." Trans. II p. 860.

Bard attempted to establish through cross-examination of Dr. Peggy Pence that Bard complied with all FDA requirements regarding the Align. Trans. III p. 1592, 1629-30, 1635, 1644, 1646-48, 1672-73, 1675, 1684-85. Roger Darois, a retired employee of Bard, testified that Bard follows FDA guidelines for surgical mesh devices and the ISO standards for biocompatibility. Trans. VII p. 4212-13, 4235.

The manufacturer of Marlex polypropylene resin refused to sell it to companies for use in medical devices intended for implantation in the human body. When discussing the possibility that Bard would be unable to obtain a supply of polypropylene resin because the resin was not approved for use in the human body, Darois testified that the issue was not just about revenue but was about taking "away almost a million devices a year that are used by general surgeons in millions of patients." Trans. VII p. 4426. He then stated:

> I'm telling you, surgeons need these products. They're trained on these products. They depend on these products. So if they have to use some other device they're not trained on or familiar with, it could impact patient safety in those situations.

Trans. VII p. 4427; *see also* Trans. II p. 4789.

Darois also testified that Weiland, Bard's President and COO, is "one of the most upstanding guys I've ever met" and the recipient of the Horatio Alger Award. Trans. VII p. 4381, 4382-83; Court Exhibit 21, Trial Exhibits Vol. III p. 114 [Depo p. 7-8].

Weiland testified that Bard, "acting responsibly and with the safety of patients in mind," "would always do our own independent testing, yes." Court Exhibit 21, Trial Exhibits Vol. III p. 160 [Depo p. 253]. Bard's President also testified that he takes telling the truth very seriously, believes telling the truth is "an important thing in business", and that he "think[s] it's important for everyone to be truthful and honest." Court Exhibit 21, Trial Exhibits Vol. III p. 116-17 [Depo p. 13-16].

III. Use of Plaintiff's Original Petition

BSC displayed the caption of the case showing TMC and UPA as defendants during its opening statement, to which Plaintiff objected but the objection was overruled, and BSC twice referenced the fact that Plaintiff sued TMC. Trans. II p. 751-54, 782-83.

Bard stated during its opening statement: "Now, in October 2012, … she filed a lawsuit against Truman and University Physicians." Trans. II p. 851. Bard also displayed and discussed portions of paragraphs 17 and 18 of the original Petition during its opening statement. Trans. II p. 900 ln. 13 thru p. 901 ln. 5. Paragraphs 17 and 18 allege:

> 17. Defendant TMC, by and through its servants, employees and/or agents, actual or ostensible, including, but not limited to, Dr. Kruse, and Defendant UPA, by and through its servants, employees and/or agents, actual or ostensible, including, but not limited to, Dr. Kruse and Dr. Kruse failed to possess and use that degree of skill and learning ordinarily used under the same or similar circumstances by members of their respective professions in the care, evaluation and treatment of Plaintiff in the following respects:

(a) In allowing Dr. Kruse to perform urogynecologic procedures at Truman Medical Center-Lakewood which included the implantation of transvaginal mesh material which she lacked the requisite degree of skill and learning ordinarily used by physicians doing said urogynecologic procedures with said transvaginal mesh; and

(b) In failing to make known to Plaintiff that physicians such as Richard Hill, M.D., who was and is a urogynecologist, could have performed the urogynecologic procedure which involved the implantation of the transvaginal mesh, and that urogynecologists such as Dr. Hill had far greater expertise and training in such a urogynecologic procedure than Dr. [sic];

(c) in failing to obtain adequate informed consent from Plaintiff by advising her of the risks and benefits of having a transvaginal mesh product implanted into her on October 28, 2010, and by failing to discuss with her alternative methods of treatment that did not include the implantation of transvaginal mesh, or which included having the procedure done by a urogynecologist who had greater expertise in implanting transvaginal mesh than Dr. Kruse;

(d) In failing to disclose to Plaintiff the amount of experience and/or training Dr. Kruse had with regard to performing gynecologic transvaginal mesh procedures;

(e) In failing to follow the manufacturer's instructions in placing the transvaginal mesh; and

(f) In negligently performing the procedure of October 28, 2010, including, but not limited to, the fact that Dr. Kruse failed to attach the anchor to the right side of the transvaginal mesh, and, therefore, as a result, the anchor migrated to the "ramus of the pubic bone" causing a "palpable painful bump."

18. As a direct and proximate result of the negligence and carelessness of the Defendants, and each of them, as set out above, Plaintiff has sustained the following damages:

(a) She has sustained substantial physical and mental pain and suffering to date because of significant incontinence after the

October 28, 2010 procedure and because of severe ongoing pelvic pain;

(b) She has sustained substantial medical bills to date because of the treatment following the October 28, 2010 procedure which included the January 2011 procedure by Dr. Hill, and medical care for her ongoing discomfort and pain since;

(c) She will, in the future, be caused to suffer substantial physical and mental pain and suffering;

(d) She will, in the future, sustain substantial future economic damages for treatment for her discomfort and pain which may require another urogynecologic procedure; and

(e) She has sustained substantial loss of earnings to date, and will sustain substantial loss of earnings in the future.

LF 1 p. 74-75. Bard then informed the jury that Bard and BSC were not originally named in this lawsuit. Trans. II p. 901-03.

BSC again displayed the original caption of the case when preparing to question Dr. Pence, despite the trial court's prior instruction not to show it. Trans. III p. 1340-42. Over Plaintiff's objection that "alternative theories" or "an inconsistent statement" in a petition cannot be used in cross-examination, BSC questioned Dr. Pence regarding the allegations in paragraph 17 of the original Petition. Trans. III p. 1341 ln. 8-12, 16-21, p. 1342 ln. 4, 10, p. 1343-44. BSC also questioned Dr. Bruce Rosenzeig regarding the allegations in paragraph 17(e) of the original Petition. Trans. V p. 3204.

The parties and the trial court had an extensive discussion, outside the presence of the jury and prior to defendants' cross-examination of Dr. Greenspan, regarding BSC's intention to present additional evidence that Plaintiff initially sued TMC and UPA, which the trial

court allowed over Plaintiff's objection. Trans. VI p. 3891-3906. BSC also cross-examined Dr. Greenspan regarding the allegations in paragraph 17 of the original Petition. Trans. VI p. 3932-36.

Bard cross-examined Plaintiff regarding when her petition against TMC and UPA was filed, that Dr. Hill was never a defendant, and that Bard and BSC were not originally named as defendants. Trans. VIII p. 5485, 5492, 5496, p. 5527. Bard also cross-examined Plaintiff regarding allegations in paragraphs 17 and 18 of the original Petition. Trans. VIII p. 5548-50, 5556-58, 5560-61, 5564-66.

BSC likewise cross-examined Plaintiff about suing TMC and UPA, Trans. IX p. 5771-73, 5862, followed by cross-examination as to when the original Petition was filed against TMC and UPA and interrogation about the allegations in paragraph 17 of the original Petition. Trans. IX p. 5862-64.

Bard questioned Dr. Kennelly during redirect examination regarding allegations in paragraphs 17 and 18 of the original Petition as well as the fact that BSC and Bard were not named defendants in that petition. Trans. XI p. 7487-88.

BSC's closing argument included discussion of the allegations against TMC and UPA in the original Petition. Trans. XIII p. 8636-37, 8666. Bard's closing argument discussed the fact that Plaintiff initially sued TMC and UPA, not BSC and Bard, and the damages alleged prior to BSC and Bard being sued. Trans. XIII p. 8702-04.

IV. Plaintiff's Settlement with TMC and UPA

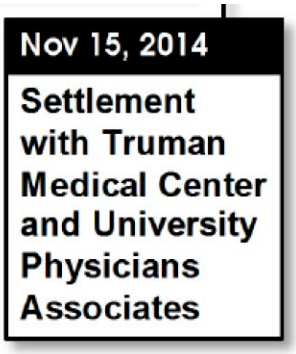
During cross-examination of Plaintiff, Bard displayed a slide to the jury that stated: "Nov 15, 2014 Settlement with Truman Medical Center and University Physicians Associates[.]" Court Exhibit 16, Trial Exhibits Vol. I p. 288; App. A7; Trans. VIII p. 5602, 5604-05, 5633. Bard acknowledged that the settlement information was not to be presented to the jury. Trans. VIII p. 5605, 5635.

The exhibit containing the settlement information was labeled Demonstrative 543, hereinafter Bard Exhibit 543, and was first used during cross-examination of Plaintiff. Court Exhibit 16, Trial Exhibits Vol. I p. 287-88; App. A6-A7; Trans. VIII p. 5487. There were two versions of Bard Exhibit 543. The version displayed to the jury contains a reference to Plaintiff's settlement with TMC and UPA. Court Exhibit 16, Trial Exhibits Vol. I p. 288; App. A7; Trans. VIII p. 5605, 5633, 5635. The paper versions of the exhibit provided to the trial court and counsel for Plaintiff did not include any reference to the settlement. Trans. VIII p. 5635, 5637-38.

Bard Exhibit 543 was labeled "Ms. Sherrer's Activities and Decisions (2010-2012)" on the first page and "Ms. Sherrer's Activities and Decisions (2012-2015)" on the second page. Court Exhibit 16, Trial Exhibits Vol. I p. 287-88; App. A6-A7. Both pages included a timeline across the middle of the page, with the top portion labeled "Medical / Life Events" and the bottom portion labeled "Legal Events." Court Exhibit 16, Trial Exhibits Vol. I p. 287-88; App. A6-A7. Both pages included a box dated October 25, 2012 stating "Original Petition for

Damages[.]" Court Exhibit 16, Trial Exhibits Vol. I p. 287-88; App. A6-A7. The second page of the exhibit included a box dated June 7, 2013 stating "First Amended Petition adding Boston Scientific and Bard[.]" Court Exhibit 16, Trial Exhibits Vol. I p. 288; App. A7.

The second page of Bard Exhibit 543 included a box dated November 15, 2014 stating: "Settlement with Truman Medical Center and University Physicians Associates[.]" Court Exhibit 16, Trial Exhibits Vol. I p. 288; App. A7.



Bard Exhibit 543 was initially displayed to the jury at page 5487 of the Transcript. Trans. VIII p. 5487. The second page of Bard Exhibit 543, containing the reference to the settlement, was then displayed to the jury at page 5488. Trans. VIII p. 5488. After five questions, counsel for Bard had the slide taken down. Trans. VIII p. 5488-89. The trial court and Plaintiff's counsel did not notice the reference to the settlement at that time.

The first page of Bard Exhibit 543 was again displayed to the jury starting at page 5602 of the Transcript. Trans. VIII p. 5602. The second page of Bard Exhibit 543 was then displayed starting on page 5604. Trans. VIII p. 5604. Bard asked Plaintiff five questions, before the trial court instructed that the exhibit be taken down because the court

noticed the settlement information on the exhibit. Trans. VIII p. 5604. During a brief discussion at the bench, Plaintiff made a record regarding information on the slide about the settlement and requested a mistrial. Trans. VIII p. 5604-05.

Plaintiff made a detailed record and again requested a mistrial following conclusion of the testimony for that day. Trans. VIII p. 5633-36. The trial court denied the request for a mistrial. Trans. VIII p. 5638. Plaintiff also provided the trial court with a copy of the version of Bard Demonstrative Exhibit 543 that was displayed to the jury. VIII p. 5657-58; Court Exhibit 16, Trial Exhibits Vol. I p. 287-88; App. A6-A7. Plaintiff made an additional record the following day. Trans. IX p. 5730-31.

V. Complaints Regarding Mesh Slings

Plaintiff sought to introduce evidence regarding the number of complaints concerning polypropylene mesh slings used to treat SUI, "mesh slings", some of which are also called midurethral slings or "MUS". Plaintiff offered this evidence in response to various statements and evidence presented by Defendants. Plaintiff sought to introduce evidence about the number of complaints based on: the number of lawsuits, without saying lawsuits; information available from the FDA medical device website; or public filings by Defendants regarding the number of claims. Trans. II p. 934; Trans. III p. 1754. Plaintiff argued at trial that this evidence was admissible in response to statements and evidence presented by Defendants. Trans. II p. 929-35; Trans. III p. 1750-54.

Plaintiff filed a motion in limine seeking to exclude any evidence or reference to the "AUGS Position Statement", which is a position statement regarding mesh slings published by the American Urogynecologic Society, "AUGS". LF 24 p. 4529, 4531-36, 4563-67; BSC Exhibit 6606, Trial Exhibits Vol. I; App. A8. The Conclusion in the AUGS Position Statement asserts that mesh slings have "helped millions of women[.]" LF 36 p. 6878; BSC Exhibit 6606, Trial Exhibits Vol. I; App. A10. The trial court denied the motion in limine, "subject to adequate foundation and context[.]" LF 40 p. 7625.

The AUGS Position Statement was labeled BSC Exhibit 6606, Bard Exhibit 12155, and Plaintiff's Exhibit 190. None of those exhibits were admitted in evidence, but they were displayed to the jury at various times as discussed below.

AUGS stated that the purpose of the Position Statement "is to support the use of the midurethral sling[.]" LF 36 p. 6876; BSC Exhibit 6606, Trial Exhibits Vol. I; App. A8. The AUGS Position Statement expresses concern regarding litigation and media reports, stating:

> Lawyers have publicly advertised their services, targeting women with transvaginal mesh placed for both pelvic organ prolapse and stress urinary incontinence (SUI), and the media has reported on the pelvic organ prolapse mesh litigation. We are concerned that the multimedia attention has resulted in confusion, fear, and an unbalanced negative perception regarding the midurethral sling as a treatment for SUI. This negative perception of the MUS is not shared by the medical community and the overwhelming majority of women who have been satisfied with their MUS. Furthermore, the FDA website states that: "The safety and effectiveness of multi-incision slings is well-established in clinical trials that followed patients for up to one-year."

LF 36 p. 6876 (endnote omitted); BSC Exhibit 6606, Trial Exhibits Vol. I; App. A8.

The safety of using Marlex polypropylene or mesh in permanent medical implants were issues in this case. E.g. Trans. Trans. VI p. 3492-93 (Marlex polypropylene is "nonmedical grade"); VII p. 4447 ("There's no such thing as medical grade polypropylene, in my opinion."); Trans. X p. 6856 ("national epidemic of mesh problems"). Marlex is a specific type of polypropylene and the makers of Marlex ultimately refused to sell Marlex to Bard or BSC for use in medical devices intended for implantation in the human body. Trans. X p. 6859-61, 6884, 6954-55. BSC admitted that no one in the United States, including the manufacturer, would sell it Marlex. Trans. X p. 5954-55. Bard and BSC tried to obtain Marlex without disclosing its intended use. E.g. Trans. VII p. 4424-26; Trans. X p. 6928, 6935-54, 7003-08; Plaintiff's Exhibits 57, 58, Trial Exhibits Vol. V.

BSC had an "urgent demand to try to get more Marlex resin[.]" Trans. X p. 6928. It obtained uncertified Marlex from China despite being unable to verify its source or original paper work. Trans. X p. 6938-39, 6941, 6943, 6944-47. A BSC internal email stated: "'If it is caught by custom, we will be in trouble.'" Trans. X p. 6943.

The AUGS Position Statement asserts that "Polypropylene material is safe and effective as a surgical implant" because it had allegedly been used in most surgical specialties for more than five decades and in millions of patients. LF 36 p. 6877; BSC Exhibit 6606, Trial Exhibits Vol. I; App. A9. The Statement asserts that mesh slings are "standard

of care for the surgical treatment of SUI", "the leading treatment option and current gold standard", and "[o]ver 3 million MUS have been placed worldwide[.]" LF 36 p. 6877; BSC Exhibit 6606, Trial Exhibits Vol. I; App. A9.

The Conclusion in the AUGS Position Statement asserts that mesh slings have "helped millions of women with SUI regain control of their lives by undergoing a simple outpatient procedure" and that "[o]ne of the unintended consequences of this polypropylene mesh controversy has been to keep women from receiving any treatment for SUI." LF 36 p. 6878; BSC Exhibit 6606, Trial Exhibits Vol. I; App. A10.

BSC and Bard displayed and discussed the AUGS Position Statement during their opening statements. Trans. II p. 801-03, 839, 858-60.

BSC cross-examined Dr. Erin Carey regarding the AUGS Position Statement. Trans. IV p. 2119-27; BSC Exhibit 6606, Trial Exhibits Vol. I; App. A8; LF 36 p. 6875-79. Defendants also cross-examined Dr. Rosenzweig regarding the AUGS Position Statement. Trans. V p. 3022-23, 3265-66, 3272-73.

Dr. Carey testified that the AUGS Position Statement is "medical opinion[.]" Trans. IV p. 2363. Dr. Rosenzweig testified that the it is a position statement, not a peer-reviewed paper. Trans. V p. 2707, 3011-12. He also said that the AUGS Position Statement "is not scientific treatises or review article" and did not apply to the Solyx, a mini-sling. Trans. V p. 3012-15. Finally, he identified the authors of the AUGS Position Statement as all being paid consultants for medical device

companies, including at least one author who was a paid consultant for BSC. Trans. V p. 3015-17. BSC testified that one of the authors, Dennis Miller, receives royalties and research grants from BSC and is a paid consultant of BSC. Trans. X p. 6882.

POINTS RELIED ON

I. The trial court erred in excluding evidence of Bard's criminal convictions, because under §§ 491.050, 1.020(12), and 1.030.2, the Plaintiff had an absolute right to impeach Bard's credibility with evidence of the convictions, in that Bard testified vicariously through its corporate representatives.

Hickson Corp. v. Norfolk Southern Ry. Co., 227 F.Supp.2d 903 (E.D. Tenn. 2002)

State v. Meyer, 473 S.W.2d 374 (Mo. 1971)

Stone v. C.R. Bard, Inc., 2003 WL 22902564 (S.D.N.Y. 2003)

U.S. v. C.R. Bard, Inc., 848 F.Supp. 287 (D. Mass. 1994)

§ 491.050 RSMo 2016

§ 1.020(12) RSMo 2016

§ 1.030.2 RSMo 2016

II. The trial court erred in excluding evidence of Bard's criminal convictions, because the trial court abused its discretion and the convictions were admissible to affect Bard's credibility, in that the criminal convictions were admissible to contradict and rebut Bard's opening statements and evidence at trial asserting Bard's good corporate character.

Maugh v. Chrysler Corp., 818 S.W.2d 658 (Mo.App.W.D. 1991)

Ryburn v. General Heating & Cooling, Co., 887 S.W.2d 604 (Mo.App.W.D. 1994)

Hickson Corp. v. Norfolk Southern Ry. Co., 124 Fed.Appx. 336 (6th Cir. 2005)

III. The trial court erred by abusing its discretion when it allowed Defendants to use portions of Plaintiff's original Petition during opening statements and in questioning witnesses, because the allegations against TMC and UPA were not admissions against interest, and the use of such allegations was highly prejudicial, in that the allegations that TMC and UPA were negligent and caused Plaintiff's damages were inconsistent pleadings and legal conclusions.

Lewis v. Wahl, 842 S.W.2d 82 (Mo.banc 1992)

Littell v. Bi-State Transit Development Agency, 423 S.W.2d 34 (Mo.App. 1967).

Macheca v. Fowler, 412 S.W.2d 462 (Mo. 1967)

Manahan v. Watson, 655 S.W.2d 807 (Mo.App.E.D. 1983)

IV. The trial court erred and abused its discretion in failing to grant a mistrial following Bard's display of information regarding Plaintiff's settlement with TMC and UPA, because a mistrial was the only way to remedy the prejudice Plaintiff suffered, in that Plaintiff was prejudiced as a result of the jury being informed that she had settled her claims against TMC and UPA.

Mengwasser v. Anthony Kempker Trucking, Inc., 312 S.W.3d 368 (Mo.App.W.D. 2010)

Rodgers v. Czamanske, 862 S.W.2d 453 (Mo.App.W.D. 1993)

State ex rel. Malan v. Huesemann, 942 S.W.2d 424 (Mo.App.W.D. 1997)

Toppins v. Miller, 891 S.W.2d 473 (Mo.App.E.D. 1994)

ARGUMENT

I. Defendant C.R. Bard, Inc.'s Criminal Convictions Were Admissible Pursuant to § 491.050

The trial court erred in excluding evidence of Bard's criminal convictions, because under §§ 491.050, 1.020(12), and 1.030.2, the Plaintiff had an absolute right to impeach Bard's credibility with evidence of the convictions, in that Bard testified vicariously through its corporate representatives.

A. Standard of Review and Preservation of Error

"If it applies the correct standard, a trial court has broad discretion to admit or exclude evidence and [appellate courts] review only for a clear abuse of discretion." *State v. Swain*, 977 S.W.2d 85, 86 (Mo.App.E.D. 1998). However, whether the court applied the correct legal standard in ruling on the admissibility of the evidence is a question of law that is reviewed *de novo*. *Nolte v. Ford Motor Company*, 458 S.W.3d 368, 379 (Mo.App.W.D. 2014); *Kesler-Ferguson v. Hy-Vee, Inc.*, 271 S.W.3d 556, 558 (Mo. 2008). Accordingly, a "trial court has no discretion in applying the appropriate legal standard to decide a question of admissibility." *Swain*, 977 S.W.2d at 86. Stated somewhat differently:

> While "[t]he admissibility of evidence lies within the sound discretion of the trial court and will not be disturbed absent abuse of discretion," *Nelson v. Waxman*, 9 S.W.3d 601, 603 (Mo. 2000), the trial court necessarily abuses its discretion where its ruling is based on an erroneous interpretation of the law.

Bohrn v. Klick, 276 S.W.3d 863, 865 (Mo.App.W.D. 2009).

In this connection the admissibility of evidence to impeach Bard depended on the applicability of a statute, *viz*. § 491.050. It is clear beyond peradventure that statutory construction is "strictly a matter of law[.]" *City of St. Joseph v. Village of Country Club*, 163 S.W.3d 905, 907 (Mo. 2005). "Questions of law are matters for the independent judgment of this Court." *City of St. Joseph*, 163 S.W.3d at 907. It follows that on an issue of statutory construction, "the lower court's ruling … is not a matter of judicial discretion." *State v. Pylypczuk*, 527 S.W.3d 96, 99 (Mo.App.W.D. 2017).

Plaintiff preserved this error through an offer of proof involving the videotaped deposition of John Weiland, Bard's President and COO, and the offer of a certified copy of the Judgment in a Criminal Case. Court Exhibit 22, Trial Exhibits Vol. III p. 165-69 [Depo, p. 142-58]; Court Exhibit 23, Trial Exhibits Vol. IV; Trans. VII p. 4546-57; Trans. XII p. 8327-29.

This claim of error was then raised in Plaintiff's Motion for New Trial. LF 38 p. 7226, 7262-64.

B. Defendant Bard's Criminal Convictions

In 1994, Bard pled guilty to 391 felonies, including conspiracy, mail fraud, submitting false statements to the FDA, shipping adulterated medical devices, shipping medical devices from an unapproved facility, shipping products that had been changed without the required FDA approval, shipping devices for human testing where such testing had not been approved, and failing to submit required reports to the FDA. *United States v. C.R. Bard, Inc.*, 848 F.Supp. 287, 288 (D. Mass. 1994); Court Exhibit 23, Trial Exhibits Vol. IV p. 5, 9.

> In essence, Bard knowingly and willfully kept adverse information from the FDA, made product changes that affected the safety or effectiveness of angioplasty catheters produced by its USCI Division without the required FDA approval, and illegally did testing on human beings without the required exemption from the FDA.
>
> There were reports of product malfunction, injuries, and deaths associated with the catheters identified in the Information.

C.R. Bard, Inc., 848 F.Supp. at 288; Court Exhibit 23, Trial Exhibits Vol. IV p. 9.

Bard committed each of the criminal violations "intentionally" and committed many of the criminal violations either "knowingly and willfully" or "with the intent to defraud or mislead." *C.R. Bard, Inc.*, 848 F.Supp. at 289; Court Exhibit 23, Trial Exhibits Vol. IV p. 11. "The people at Bard who had responsibility for making products important to the care of seriously ill patients failed in their responsibility to comply with these laws." *C.R. Bard, Inc.*, 848 F.Supp. at 289; Court Exhibit 23, Trial Exhibits Vol. IV p. 10. "Bard made inherently risky procedures

more dangerous." *C.R. Bard, Inc.*, 848 F.Supp. at 289; Court Exhibit 23, Trial Exhibits Vol. IV p. 10.

C. Admissibility Under § 491.050

Bard testified vicariously through its President and COO, John Weiland. Trans. III p. 5279-80; Court Exhibit 21, Trial Exhibits Vol. III p. 114 [Depo, p. 7-8]. Pursuant to § 491.050, Bard's prior criminal convictions were admissible to affect Bard's credibility, and the trial court erred in excluding that evidence.

"It has long been the rule in Missouri that on cross-examination a witness may be asked any questions which tend to test his accuracy, veracity or credibility[.]" *Mitchell v. Kardesch*, 313 S.W.3d 667, 670 (Mo. 2010) (internal quotation marks and citation omitted).

> "As a general proposition, the credibility of witnesses is always a relevant issue in a lawsuit." *State v. Smith*, 996 S.W.2d 518, 521 (Mo.App.1999). Impeachment provides a tool to test a witness's perception, credibility, and truthfulness, which is essential because a jury is free to believe any, all, or none of a witness's testimony.

Mitchell, 313 S.W.3d at 675. "The most commonly recognized methods of impeaching a witness include … admission of evidence of prior convictions[.]" *Mitchell*, 313 S.W.3d at 675. By statute, Missouri allows admission of evidence of prior criminal convictions of a person testifying in a civil case for purposes of impeachment. Section 491.050 provides:

> Any person who has been convicted of a crime is, notwithstanding, a competent witness; however, *any prior criminal convictions may be proved to affect his credibility in a civil or criminal case* and, further, any prior pleas of guilty, pleas of nolo contendere, and findings of guilty may be proved to affect

> his credibility in a criminal case. Such proof may be either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer.

§ 491.050 RSMo (emphasis added).[2]

This statute was originally enacted in 1895 as § 8944b and made "a very material alteration in the rules of evidence." *State v. Blitz*, 171 Mo. 530, 71 S.W. 1027, 1030 (1903). Before enactment of the statute, it was the "settled law of this state that the only convictions of a witness admissible for the purpose of impeachment were those for a felony or petit larceny" also known as "infamous crimes." *Blitz*, 71 S.W. at 1030. *Blitz* was very critical of the change made by the statute, describing it as a "sudden and apparently unnecessary change of the long–established rules of evidence, which have been uniformly followed for so many years, doubtless on account of their being based upon that most appropriate foundation of reason and justice[.]" *Blitz*, 71 S.W. at 1030. The *Blitz* Court was confident that the defects in the statute would soon lead to its repeal. *Blitz*, 71 S.W. at 1030-31. But the Court also noted

---

[2] When this section was originally enacted in 1895, it provided:

> Any person convicted of a criminal offense is, notwithstanding, a competent witness; but the conviction may be proved to affect his credibility, either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer.

App. A22. The law was amended in 1981 to add language allowing guilty pleas, nolo contendere pleas, and findings of guilt to be used in criminal cases to affect credibility.

that the statute was "applicable to all witnesses who may testify in a case, *and does not undertake to designate the class of witnesses to which its provisions apply*." *Blitz*, 71 S.W. at 1030 (emphasis added).

This holding—recognizing the validity of the statute as written, even while questioning its wisdom—was congruent with this Court's traditional fidelity to the doctrine of separation of powers mandated by Article II, Section 1 of the Missouri Constitution. Thus, this Court more recently held that:

> The rules of statutory interpretation are not intended to be applied haphazardly or indiscriminately to achieve a desired result. Instead, the canons of statutory interpretation are considerations made in a genuine effort to determine what the legislature intended. This Court's primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue.

Goerlitz v. City of Maryville, 333 S.W.3d 450, 455 (Mo. 2011). A corollary to the foregoing is that this Court defers to "the time-honored principle of separation of powers and the recognition that policy decisions such as presented in this case are within the providence of the legislature." *Goerlitz*, 333 S.W.3d at 455. This is so because "[i]t is not the Court's province to question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature's determination." *Batek v. Curators of University of Missouri*, 920 S.W.2d 895, 899 (Mo. 1996).

While this Court may have been dubious about the wisdom of the statute in 1905, consistent with the foregoing principles, for more than a century Missouri Courts have continued to follow what this Court

described as "the arbitrary rule of the statute," allowing impeachment by proof of conviction of a felony or a misdemeanor. *Fisher v. Gunn*, 270 S.W.2d 869, 876 (Mo. 1954). The latter case held that, "while a trial court may generally control cross-examination within proper bounds, still the *right* of cross-examination is an *absolute right* and the *bounds of the cross-examination*, in so far as concerns one's right to show a prior conviction, have been fixed by the statute." *Fisher*, 270 S.W.2d at 876 (emphasis in original).

In *State v. Morris*, 460 S.W.2d 624 (Mo. 1970), the defendant claimed that "it is not mandatory under the statute that proof of prior felonies be received and that the admission of such evidence rests in the sound discretion of the trial court." *Morris*, 460 S.W.2d at 627. Defendant relied on the language in § 491.050 that says "prior criminal convictions *may* be proved to affect" the credibility of a witness, which (defendant argued) afforded the trial court discretion in deciding whether to admit such evidence (emphasis added).

In a scholarly opinion by Judge Finch, this Court examined decisions in three states which had statutes identical, or similar, to § 491.050, all of which "held that the statute makes mandatory the admission of evidence of prior convictions to impeach a witness." *Morris*, 460 S.W.2d at 628. One of the cases cited by *Morris* was *State v. West*, 285 Minn. 188, 173 N.W.2d 468 (1969), involving M.S.A. § 595.07, which provided that the criminal conviction of a witness "may be proved for the purpose of affecting the weight of his testimony[.]" (This language was described in *Morris* as "almost identical" to § 491.050. *Morris*, 460 S.W.2d at 638.)

In *West*, the defendant argued that the use of the word "may" meant the trial court had discretion to exclude evidence of a prior conviction, *West*, 173 N.W.2d at 472. The Minnesota Supreme Court rejected this argument.

> [T]he word "may" in the foregoing statute does not refer, as defendant argues, to the discretion of the trial judge but rather to the discretion given to counsel for the prosecution to determine whether to bring before the jury evidence that the witness has done something criminally wrong, resulting in a conviction. The statute has been construed to require the defendant in a criminal case, as well as any other witnesses, to answer the inquiry by counsel.

West, 173 N.W.2d at 472. *West* goes on to hold that, "under the plain language of § 595.07 the current law in this state remains that the prosecutor has a right to cross-examine regarding the fact of conviction, the nature of the offense, and the identity of the defendant." *West*, 173 N.W.2d at 473. Additionally, the Minnesota Supreme Court held that it was bound by the language of the statute:

> The members of this court have noted and given some attention to the recent trend of leaving to the trial court the question of whether the particular conviction raised against defendant as a witness in his own behalf substantially affects his credibility. It is our suggestion, however, that revising § 595.07 to conform to the emerging state of the law should be left to the legislature. It is not for the courts to make, amend, or change the statutory law, but only to apply it. If its language embodies a definite meaning which involves no absurdity or contradiction, the statute is its own best expositor.

West, 173 N.W.2d at 474, cited in *Morris*, 460 S.W.2d at 628-29.[3] This Court came to the same conclusion in *Morris*:

> [While] some textwriters have criticized the rule which is embodied in § 491.050, we nevertheless conclude that *the section does confer an absolute right to show prior convictions* solely to affect credibility. If any change therein is to be made, it is up to the General Assembly to do so.

Morris, 460 S.W.2d at 629 (emphasis added).

This holding has been repeated many times by Missouri Appellate Courts. See: K. Forsyth, 22A MISSOURI PRACTICE, MISSOURI EVIDENCE § 629:1 (July 2018 Update).[4] The most recent exposition of the rule by this Court appears in *M.A.B. v. Nicely*, 909 S.W.2d 669 (Mo. 1995): "This Court has interpreted section 491.050 to confer an absolute right, in both civil and criminal proceedings, to impeach the credibility of any witness, including the accused, with his or her prior criminal *convictions*." *M.A.B.*, 909 S.W.2d at 671 (emphasis in original).

The absolute nature of the right to show prior convictions bestowed by the statute is antithetical to the notion that the trial court retains

---

[3] This Court also cited to *People v. Gilmore*, 118 Ill.App.2d 100, 254 N.E.2d 590 (1969), where the Court discussed an Illinois statute that is nearly identical to § 491.050, stating that "we too hold that 'may' does not grant discretion to the court to receive or reject the proof of a prior conviction. When properly presented it is mandatory that the court receive evidence of defendant's prior conviction." *Gilmore*, 254 N.E.2d at 593, cited in *Morris*, 460 S.W.2d at 629.

[4] Judge Forsyth cites ten cases by this Court and the Court of Appeals in support of an "absolute right to show prior convictions." 22A MISSOURI PRACTICE, MISSOURI EVIDENCE § 629:1 n. 2.

discretion to exclude such evidence. Thus, in *State v. Simmons*, 825 S.W.2d 361 (Mo.App.E.D. 1992), the Court held:

> The trial court has *no discretion* to prevent the use of prior criminal convictions to impeach the credibility of a witness or the accused. In a criminal trial, the state has an absolute right to demonstrate a defendant's prior convictions and the nature and time thereof for the purposes of impeachment.

Simmons, 825 S.W.2d at 364 (emphasis added). *Accord: State v. Hoopingarner*, 845 S.W.2d 89, 94 (Mo.App.E.D. 1993); and *State v. Warden*, 591 S.W.2d 170, 172 (Mo.App.E.D. 1970) (rejecting claim that trial court has discretion to exclude evidence of prior criminal convictions of a witness). The exclusion of evidence of a conviction admissible under the statute is reversible error.

> This Court has interpreted § 491.050, *supra*, to mean that … while a trial court may generally control cross-examination within proper bounds, still the right of cross-examination is an absolute right and the bounds of the cross-examination, in so far as concerns one's right to show a prior conviction, have been fixed by the statute.

State v. Meyer, 473 S.W.2d 374, 376 (Mo. 1971). Accordingly, in *Meyer* this Court held that the trial court's refusal to allow cross-examination of a witness about his criminal conviction meant that defendant's "right of cross-examination was prejudicially restricted by the trial court, and that appellant must be given a new trial. Art. 1, § 18(a), Const. of Mo. …" *Meyer*, 473 S.W.2d at 376. *Accord*: *State v. Campbell*, 166 Mo.App. 589, 149 S.W. 1173, 1174 (1912) (reversible error for trial court to prohibit defendant from cross-examining prosecution witness about his

misdemeanor convictions for public drunkenness, disturbing the peace, and smuggling whisky into a jail).

"Some early Missouri decisions suggested that a trial court might have some discretion to bar inquiries into convictions so remote in time that they do 'not bear on the present character or credibility of the witness.'" MISSOURI EVIDENCE, *supra*, § 629:2, citing *Forbis v. Associated Wholesale Grocers, Inc.*, 513 S.W.2d 760, 765 (Mo.App. 1974).[5] But any doubt on that score has long since been resolved in favor of admissibility, regardless of when the conviction occurred. As Judge Forsyth notes: "More recently, however, the Missouri courts have consistently held that prior convictions may be used to impeach a witness no matter how remote those convictions are in time." MISSOURI EVIDENCE, *supra*, § 629:2. Among the cases so holding are:

- *State v. Bridges*, 349 S.W.2d 214, 219 (Mo. 1961) (18-year-old conviction properly admitted).
- *Smile v. Lawson*, 506 S.W.2d 400, 402 (Mo. 1974) (evidence of five vagrancy convictions in 1950 and 1951 properly admitted at 1971 trial).
- *State v. Giffin*, 640 S.W.2d 128, 132 (Mo. 1982) (Court rejects claim that trial court erred in permitting cross-examination about prior

---

[5] *Forbis* observes that, "Since the decision in *Blitz* the Supreme Court of this state has uniformly and consistently held that the statute confers an absolute right to show prior convictions and the nature thereof for the purpose of impeaching a witness, both in criminal and civil cases." *Forbis*, 513 S.W.2d at 764.

convictions "that were too remote in time to have any probative value" since § 491.050 confers "an absolute right to show prior convictions and the nature thereof for the purpose of impeachment").

- *State v. Williams*, 603 S.W.2d 562, 568 (Mo. 1980) (Court declines to follow ten-year rule in Federal Rules of Evidence, since there is no time limit in § 491.050, and because the statute confers "an absolute right to show prior convictions solely to affect credibility").
- *State v. Taylor*, 266 S.W. 1017, 1018 (Mo.App. 1924) (Court of Appeals rejects claim that State should not have been permitted to cross examine defendant about his 12-year-old conviction, in light of statute allowing proof of prior convictions when defendant testifies).

In the Court of Appeals and in its Application for Transfer filed with this Court, Bard argued that the decision to exclude evidence of a conviction had to be reviewed under an abuse-of-discretion standard. Moreover, it argued that the age of the conviction—20 years before the trial—militated against its admission because federal cases decided under Rule 609 of the Federal Rules of Evidence have deemed old convictions to lack legal relevance.

The short answer to this argument is that Rule 609, F.R.Ev., and § 491.050 are not the same. Rule 609(b) allows the admission of evidence of a conviction more than ten years old only if the trial court determines that "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect." Rule 609(b), F.R.Ev. No such limitation appears in the plain language of § 491.050 RSMo, which says that "*any* prior criminal conviction may be

proved to affect [the witness'] credibility[.]" (Emphasis added.) This Court has repeatedly construed as meaning that "it is mandatory that the court receive evidence" of a prior conviction if properly presented, *Morris*, 460 S.W.2d at 629, so that the trial court had no discretion to apply an incorrect legal standard to prevent use of a criminal conviction under § 491.050. *Simmons*, 825 S.W.2d at 364. Indeed, in *State v. Cantrell*, 775 S.W.2d 319 (Mo.App.E.D. 1989), the Court said there was no time limitation to prevent evidence at trial of a burglary conviction that was over 20 years old:

> Unlike Federal Rule of Evidence 609, the Missouri statute allowing use of prior offenses to impeach a witness does not place any time limit on the offenses. § 491.050, RSMo 1986. Appellant claims that such an application is unconstitutional and requests that we judicially adopt the time limitations of Federal Rule 609. The Missouri Supreme Court was presented with and failed to accept this claim nine years ago. *State v. Williams*, 603 S.W.2d 562, 568 (Mo.1980). In addition, this court recently denied a similar claim of error, stating that "[a]ny departure from § 491.050 is a job for the legislature, not the courts." *State v. Jesse*, 738 S.W.2d 597, 598 (Mo.App.1987). We have not changed our position. If Missouri is, as appellant claims, "in the backwater of the law," we will not join the main stream unless the legislature indicates this is the preferable course.

Cantrell, 775 S.W.2d at 321. *Accord: State v. Givens*, 851 S.W.2d 754, 759 (Mo.App.E.D. 1993) (in holding that a 40-year-old conviction for robbery was admissible to impeach defendant, the Court declined "to add to the statute a time limit, as any such change should come from the legislature").

Since its enactment in 1895, § 491.050 was amended in 1981 by H.B. 554, which added language allowing the use of guilty pleas, nolo

contendere pleas, or findings of guilt to impeach witnesses in criminal cases, but left undisturbed the original language of the statute, which says "convictions may be proved to affect his credibility in a civil or criminal case[.]" § 491.050 RSMo. When § 491.050 was amended in 1981, it is presumed "that the legislature acted with a full awareness and complete knowledge of the present state of the law," *Boland v. Saint Luke's Health System, Inc.*, 471 S.W.3d 703, 713 (Mo. 2015), including judicial precedents. *Kolar v. First Student, Inc.*, 470 S.W.3d 770, 777 (Mo.App.E.D. 2015). Such awareness would include the judicial precedents noted above, antedating the 1981 amendment. The legislature could have chosen to impose time limits on what convictions may be proved, or it could have granted trial courts discretion in excluding evidence of convictions; it did neither. *Boland* suggests that this Court should respect that choice, made with awareness of the "absolute right" language repeatedly articulated by the appellate courts of this state. *Boland*, 471 S.W.3d at 713.

This Court reviews whether the trial court applied the correct legal standard *de novo*. The refusal to allow evidence of a prior conviction is reversible error. *Meyer*, 473 S.W.2d at 376. Under the case law noted above, recognizing the absolute right conferred by the statute to show convictions, no matter how remote in time, Plaintiff had a right to show Bard's guilty pleas to 391 federal felonies, regardless of when the convictions occurred.

D. Applicability of § 491.050 to Corporations

In light of the foregoing, the critical issue is whether § 491.050 applies to impeachment of corporations. Section 491.050 is applicable to a corporation that testifies through its officers or agents because Missouri treats corporations the same as natural persons. "As used in the statutory laws of this state, … unless plainly repugnant to the intent of the legislature or the context thereof … [t]he word 'person' may extend and be applied to bodies politic and corporate[.]" § 1.020(12) RSMo 2016. Moreover, § 1.030 provides:

> *When any* subject matter, *party or person* is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and *bodies corporate as well as individuals, are included*.

§ 1.030.2 RSMo 2016 (emphasis added).

In the context of the instant cause, the portion of § 491.050 at issue is this clause: "any prior convictions may be proved to affect *his* credibility[.]" § 491.050 (emphasis added). Section 1.030.2 instructs us that when the word "his" is used in this statute, bodies corporate are included. Hence, when a corporation testifies through its officer or agent, then the body corporate's convictions may be proved to affect the *corporate* credibility.

Such an interpretation of § 491.050 is consistent with the broader principle of law that "corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell v. Dept. of Soc. Services of City of New York*, 436 U.S. 658, 687

(1978). This includes, for example, recognition "that First Amendment protection extends to corporations." *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 342 (2010).

Consequently, a corporation's prior criminal convictions are admissible to affect the credibility of the corporation. The credibility of a corporate party to a civil action, not just the credibility of its officers and agents, is a proper subject for impeachment. It follows that § 491.050 makes prior corporate criminal convictions admissible when a corporation testifies the only way possible: through its officers and agents. A contrary rule would mean a corporation could avoid the consequences to its credibility resulting from criminal convictions simply by ensuring that the officers and agents that testify on its behalf were not directly involved in the criminal activity. That result would provide corporations with an unfair advantage over individuals, who can be impeached under § 491.050, even when a prior conviction does not involve facts similar to the matter before the court. *Mitchell*, 313 S.W.3d at 676.

There have been no Missouri cases—other than the opinion of the Western District *sub judice*—that have addressed this issue, and only a few cases in foreign jurisdictions. The first case Plaintiff located on the question was *Walden v. Georgia Pacific Corp.*, 126 F.3d 506 (3rd Cir. 1997), where the plaintiffs sought to introduce evidence that the Georgia Pacific Corporation had pled guilty to tax evasion in order to impeach *its employees* testifying at trial, none of whom had anything to do with the facts giving rise to the conviction. *Walden*, 126 F.3d at 522.

The Third Circuit recognized that, under Rule 609(a)(2), F.R.Ev., a conviction involving dishonesty or false statements is automatically admissible (just as *all* convictions for felonies or misdemeanors are automatically admissible under § 491.050), but the court held that the issue before it was "whether prior convictions of a corporation are admissible under Rule 609 generally to impeach the testimony of individual employee witnesses without any evidence that those witnesses participated in the conduct underlying the conviction." *Walden*, 126 F.3d at 523. The Court held that they were not.

> Criminal acts are relevant to a *witness' credibility* only if that witness actually participated in the criminal conduct. It strains logic to argue that an employee's credibility is properly brought into question by the mere fact that he or she is presently employed by a corporation that in some unrelated manner was guilty of dishonest acts, no matter how egregious those acts may have been.

Walden, 126 F.3d at 523-524 (emphasis added).

Walden has been distinguished by later cases. In *Hickson Corp. v. Norfolk Southern Railway Co.*, 227 F.Supp.2d 903 (E.D.Tenn. 2002), Norfolk Southern called employees as witnesses who testified about its good safety and environmental record. Plaintiff sought to impeach that testimony by showing defendant's felony conviction. In holding that *Norfolk Southern* could be impeached, the court observed:

> The Court has not found case law applying Rule 609 to a corporation. This dearth of precedent is not surprising, of course, given that an inanimate corporation cannot itself be a witness. Because a corporation speaks through its officers, employees, and other agents, however, it stands to reason *a corporation can be a vicarious witness*. The Court concludes, therefore, Rule 609 allows

> the use of a corporation's felony conviction to impeach the *corporation's vicarious testimony*.

Hickson Corp., 227 F.Supp.2d at 907 (emphasis added). The court went on to note that plaintiff's "apparent intent was to impeach Norfolk Southern, not a particular witness." *Hickson Corp.*, 227 F.Supp.2d at 908. The court distinguished *Walden* by observing: "The situation in *Walden*, however, involved the use of a corporate conviction to impeach an employee—not the employee's employer." *Hickson Corp.*, 227 F.Supp.2d at 907. The court went on to observe that if, as defendant suggested, Rule 609 could never be applied to corporations because they cannot be witnesses, "the self-professed credibility of a corporation for a particular character trait could never be impeached with evidence of past felonious malfeasance." *Hickson Corp.*, 227 F.Supp.2d at 907 n. 5.

The Court that accepted Bard's plea agreement adopted a similar rationale to *Hickson*, recognizing that corporations can only act through their representatives: "A corporation is a legal fiction. Individuals act for a corporation." *C.R. Bard, Inc.*, 848 F.Supp. at 289-90.

The reasoning in *Hickson* was expressly followed in *Stone v. C.R. Bard, Inc.*, 2003 WL 22902564, *3-4 (S.D.N.Y. 2003), which involved the issue of whether the trial court should allow use of Bard's 1994 convictions to impeach Bard's corporate credibility. Because *Stone* is in many respects similar to the case at bar, it is useful to review its facts and its holding in some detail.

In *Stone* the plaintiffs were a group of doctors and venture capitalists who sued Bard for fraud. Bard called Burt Mirsky, the President of Bard's Urological Division ("BUD"), during its case in chief. The *Stone*

Plaintiffs sought to cross-examine Mirsky about the same 1994 convictions that Plaintiffs sought to admit at bar. As was noted earlier, those convictions arose out of angioplasty catheters produced by Bard's USCI Division and involved counts for mail fraud, false statements to the FDA, shipping adulterated medical devices, and shipping devices that had been changed without the approval of the FDA. Because the 1994 prosecution included *crimen falsi* convictions, the district court had no discretion to exclude evidence of those convictions. *Stone*, 2003 WL 22902564, *2, *citing Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 525-526 (1989).

Citing *Walden*, Bard argued that the evidence of its felonies was inadmissible because Mirsky could not be impeached by the convictions of Bard. (Mirsky was never convicted of anything and worked in a different division than the one involved in the 1994 convictions.) The District Court disagreed, holding that the convictions impeached *Bard* rather than *Mirsky*. *Stone*, 2003 WL 22902564, *3. The Court explained that Mirsky's testimony was really that of Bard:

> [Mirsky] is the president of BUD, the Bard division at the heart of this action, and was defendants' first witness on their direct case. By questioning Mirsky about the 1994 conviction, plaintiffs are seeking to impeach Bard, not Mirsky, as *Mirsky is a living embodiment of Bard in the eyes of the jury*. Therefore, his testimony concerning Bard's reputation in the industry for "quality, integrity and service," is fairly considered the testimony of Bard itself, and is therefore subject to impeachment by Bard's prior felony convictions. Any other result would permit Bard, through its agent Mirsky, to put its credibility at issue through testimony about its alleged stellar reputation in the industry, without an opportunity for plaintiffs to impeach that credibility.

Stone, 2003 WL 22902564, *3 (emphasis added).

The premises underlying *Hickson* and *Stone* are consistent with Missouri law. A corporation, "though legally constituted, is not 'living' and thus has no capacity to function except through the efforts of persons empowered and authorized to do so on its behalf." *State ex rel. Dewey & Leboeuf, LLP v. Crane*, 332 S.W.3d 224, 232 (Mo.App.W.D. 2010), *citing Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985). In *Beetschen v. Shell Pipe Line Corp.*, 248 S.W.2d 66 (Mo.App. 1952), the Court said:

> *A corporation, being an artificial entity, a mere creature of the law, cannot think, speak or act otherwise than by and through the thoughts, speech and action of human beings.* [Citations omitted.] Under the statutes which authorize its existence and prescribe its form and structure the powers of a corporation are administered and its responsibilities are discharged by an officiate of human beings consisting of a board of directors and certain designated officers such as president, vice-president, secretary, etc. Their thoughts, knowledge, words and acts in the exercise of corporate functions within the scope of its charter powers are the thoughts, knowledge, words and deeds of the corporation.

Beetschen, 248 S.W.2d at 73 (emphasis added). In *Hansen v. Ritter*, 375 S.W.3d 201 (Mo.App.W.D. 2012), the Court noted the ancient line of cases holding that when an employer selects an employee to fulfill the duty of the employer, "then such servant becomes the master's alter ego as to that particular duty." *Hansen*, 375 S.W.3d at 209.

Neuhoff Bros. Packers v. K.C. Dressed Beef Co., 340 S.W.2d 193 (Mo.App 1960), is illustrative of these principles. In that case, the plaintiff was permitted to call and cross-examine a corporate officer as a witness, even though he was not a party to the action.

> [T]estimony, from some one of defendant's officers and agents in position of authority and who had knowledge of the fact, was an important element of plaintiff's case. It was proper for it to ask him leading questions, as in cross-examination, for he was an adverse party. Sections 491.030 (adverse party statute) and 1.030 RSMo 1949, V.A.M.S.; 9 FLETCHER CYCLOPEDIA CORPORATIONS, Section 4215, Pages 17–18. * * * In *United States Tire Co. v. Keystone Tire Sales Co.*, 153 S.C. 56, 150 S.E. 347, 349, 66 A.L.R. 1264 [1929], it was held that *a corporation can only speak through its officers*, and that its officers, may be compelled to testify under the adverse party statute.

Neuhoff Bros. Packers, 340 S.W.2d at 196 (emphasis added). Section 491.030 permits a party to call an adverse party to testify as a witness "provided, that the party so called to testify may be examined by the opposite party, under the rules applicable to the cross-examination of witnesses." § 491.030 RSMo. Thus, the Court in *Neuhoff Bros.* held that a corporate officer could be called and examined pursuant to § 491.030, even though the officer was not a party. That holding recognized the reality that a corporate officer can serve as a vicarious witness—as a sort of avatar—for a corporate party since the only way the corporation can testify is through its agents.

This concept is further amplified by *State ex rel. Reif v. Jamison*, 271 S.W.3d 541 (Mo. 2008). That case involved the portion of Rule 57.03(b)(4) which allows a party to require a corporation to designate one or more "officers, directors, or managing agents, or other persons who consent to testify on its behalf" to testify on designated matters. In discussing that rule, *Reif* teaches that:

> The purpose of Rule 57.03(b)(4) is to permit a party to depose an opposing corporation's representative under circumstances in

> which the statements made by the witness on the identified topics will be admissible against and binding on the corporate party. This procedure places natural persons and corporations on a level playing field in the taking of the depositions of parties. *In other words, the testimony of the corporate representative designated pursuant to Rule 57.03(b)(4) is not the deposition of that individual for his or her personal recollections or knowledge but is instead the deposition of the corporate defendant.*

State ex rel. Reif, 271 S.W.3d at 551 (citations and quotation marks omitted; emphasis added).

In Missouri when a corporation selects an employee to speak on its behalf, the witness becomes the corporation's alter ego. When he is the corporation's alter ego, supplying it with the capacity to testify in court, evidence of corporate convictions do not impeach the employee; they impeach the corporate employer.

Bard's criminal convictions were all the product of acts "committed intentionally", with many of the violations being committed either "knowingly and willfully" or "with the intent to defraud or mislead." *C.R. Bard, Inc.*, 848 F.Supp. at 289; Court Exhibit 23, Trial Exhibits Vol. IV p. 11. The convictions related to its truth and veracity, went directly to its corporate credibility, and are admissible pursuant to § 491.050.

Under both Missouri law and the United States Constitution, corporations are treated the same as natural persons for many purposes. Since they enjoy many of the same benefits as natural persons, such as First Amendment protections, simple justice demands they must also be subject to the same consequences for their actions as

natural persons, including having criminal convictions admitted at trial to affect their credibility.

Additionally, Plaintiff was entitled to call Weiland as a witness and impeach Bard's credibility by use of Bard's prior criminal convictions. Bard has previously relied upon a rule that only applies to criminal actions. *See State v. Phillips*, 940 S.W.2d 512, 520 (Mo. 1997) ("We have not modified the rule, however, to allow impeachment of one's own witness in a criminal proceeding by proof of prior criminal convictions without a showing of surprise and hostility[.]") (emphasis added).

Missouri allows a party to a civil action to call an adverse party and impeach that party by use of a prior criminal conviction. The general rule in civil actions is that "[a] party calling an adverse party as a witness may contradict that person's testimony, but may not directly impeach the witness' credibility, except with the witness' prior inconsistent statements." *Giles v. Riverside Transport, Inc.*, 266 S.W.3d 290, 295 (Mo.App.W.D. 2008) (quotation marks and citation omitted). One exception to that rule "is that a witness' prior criminal convictions may also be used to impeach witness credibility." *Giles*, 266 S.W.3d at 295.

This exception exists because § 491.030 allows a party to a civil action to call an adverse party as a witness and examine that party "under the rules applicable to the cross-examination of witnesses." § 491.030 RSMo. In *Love v. Baum*, 806 S.W.2d 72 (Mo.App.W.D. 1991), the Court recognized that a party to a civil action may call an adverse

party and impeach that party's credibility using a prior criminal conviction.

> When Love's counsel examined Baum, even though the examination was actually direct examination, under the statute it was conducted under the rules of cross-examination.… Section 491.050 provides that conviction of a criminal offense may be shown to affect the credibility of the witness. That section further provides that the conviction may be shown either by the record or by the cross-examination of the witness. In this case Love was in legal effect cross-examining Baum under the provisions of § 491.030, thus, it was proper for Love to inquire about Baum's criminal convictions even though the examination had the appearance of being the direct examination.

Love, 806 S.W.2d at 74.

Plaintiff called Weiland, Bard's President and COO, as the corporate representative of Bard, an adverse party. Consequently, Bard testified vicariously through its top corporate officer, regardless of which party called Weiland as a witness. Section 491.030 allowed Plaintiff to examine Weiland "under the rules applicable to the cross-examination of witnesses." § 491.030 RSMo. "Section 491.050 provides that conviction of a criminal offense may be shown to affect the credibility of the witness." *Love*, 806 S.W.2d at 74.

Although Plaintiff called Weiland as an adverse witness, on its "cross-examination" of Weiland, Bard elicited testimony designed to express and support Bard's defense in the case. As a consequence, Bard testified vicariously through Weiland. In that role, Weiland testified that the MSDS was irrelevant because its conclusion that Marlex should not be used in medical applications involving permanent implantation in the human body was not supported by scientific data or

studies. Court Exhibit 21, Trial Exhibits Vol. III p. 158 [Depo. p. 250-51]. He emphasized that an MSDS had nothing to do with finished medical products. Court Exhibit 21, Trial Exhibits Vol. III p. 159 [Depo. p. 252-53]. He also testified that Bard had over 50 years of experience in developing mesh products and had accumulated "tremendous amounts of data, safety data, clinical data, efficacy data in terms of how this product is used, in terms of, in our minds, the safety of our end using product[.]" Court Exhibit 21, Trial Exhibits Vol. III p. 158-59 [Depo. p. 251-252]. Weiland also claimed that Bard always did its own testing. Court Exhibit 21, Trial Exhibits Vol. III p. 159 [Depo. p. 252-253]. He also pledged that "all of these products have been extensively tested from a biocompatibility standpoint, animal study standpoint, effectiveness standpoint, effectiveness standpoint and is appropriate for use in medical devices." Court Exhibit 21, Trial Exhibits Vol. III p. 160 [Depo. p. 253].

Even more than Weiland, Darois was the ultimate avatar of Bard. Darois has repeatedly testified as a witness for Bard, including in *Cisson v. C.R. Bard, Inc.*, 86 F.Supp.3d 510, 520 (S.D.W.Va. 2015), *Wise v. C.R. Bard, Inc.*, 2015 WL 521202, *22, *23 (S.D.W.Va. 2015), and *Thorpe v. Davol, Inc.*, 2011 WL 470613, *25, *28-*29 (D.R.I. 2011). In the present case, Bard elicited testimony from Darois that the prohibition in the MSDS on permanent implantation in the human body did not apply to finished products and was instead "intended for people in laboratories that might come in contact with chemicals and certain materials, people who work in factories, warehouses where the material

might be stored, processed, shipped." Trans. VII p. 4363.[6] Darois also testified in the present case that Davol, a division of Bard, had done extensive biocompatibility testing on hernia mesh which proved, he claimed, that it was safe for implantation in the human body. Trans. VII. p. 4272-4373, 4377.

Darois' testimony in the instant cause clearly demonstrates that he is the personification of Bard. Starting in 1979, Darois worked for the Davol Division of Bard for thirty-four or thirty-five years before retiring. Trans. VII. p. 4213, 4221, 4225. He became a member of the Davol Management Board, "basically kind of steering the ship," in 1995. Trans. VII p. 4222-23. In 1997 he became Vice President of Research and Development. Trans. VII p. 4222. Later he was promoted to his last position with the company, Vice President of Research and Advanced Technologies, "looking at new innovations that *we* [i.e., Bard] could bring to the marketplace related to the research work." Trans. VII p. 4223 (emphasis added). Despite retiring, he continued to work for Bard as a consultant, represented by the same counsel representing Bard at trial. Trans. VII p. 4225-27.[7]

Darois explained that the Davol Division collaborated with and supported the Bard Urological Division in developing the Align device. Trans. VII p. 4229. He claimed, based on his 30 years at Bard, that no

---

[6] Darois said the same thing in *Cisson*, 86 F.Supp.3d at 520, another vaginal mesh case.

[7] The identity of Darois' counsel was elicited by Bard's attorney on his direct examination.

other company had more surgical mesh experience than Bard. Trans. VII p. 4231. Darois also testified:

> Bard is the market leader around the world in mesh. So *we* [i.e., Bard] certainly have enough technology to support that statement, that we are very well versed in mesh, surgical mesh development.

Trans. VII p. 4230 (emphasis added). Darois played a key role in that development. When he became head of Research and Development, Darois conducted or exercised oversight over tests on surgical mesh products "on a continuous basis[.]" Trans. VII p. 4233. According to Darois:

> Well, there's a whole series of tests that are done. Some of them are mechanical tests to test the strength. So *we* pull on the mesh and find out how strong it is. *We* have burst tests that -- to simulate a hernia, on how much force it would take to bulge through the mesh.
>
> *We* test biocompatibility to see how safe the product is in use in tissue. *We* test chemical properties. *We* test packaging. *We* test -- *we* do ship testing on products to make sure it can withstand trucking and air shipments, to make sure the product arrives at the customer in the way it left the factories.
>
> *We* also test aging tests. The FDA requires us to expiration date all of our products, and *we* have to do stability or aging tests to make sure the product at the end of its five-year life can perform the same as it did the day it was shipped out of our factory.

Trans. VII p. 4233-4234 (emphasis added).

Darois testified that in 1997 Phillips informed Bard that Phillips did not want the Marlex name associated with surgical mesh because of liability concerns. Trans. VII p. 4358-4359. Bard was forced to purchase

Marlex through another company called Red Oak, beginning in 1998. *Id*. at p. 4338.

Darois testified about an e-mail he sent which expressed concern about what might happen if material suppliers learned that their materials would be used in medical devices. Trans. VII p. 4436-37. Another e-mail warned that manufacturers should not be informed that resin was being used in medical devices: "In fact, I would advise purchasing the resin through a third party, not the resin supplier to avoid a supply issue once the medical application is discovered." Trans. VII p. 4347.

Darois became aware of the Phillips MSDS for Marlex in 2007, but he claimed that Bard did not attempt to conceal its use of Marlex in surgical mesh from Phillips. Trans. VII p. 4348-49.

In 2007, Bard purchased a surgical product called Sepramesh from Genzyme Biosurgery. Trans. VII p. 4377. Shakespeare provided the Marlex resin monofilament used in Sepramesh. Trans. VII p. 4377-78. Darois testified that at that time, Shakespeare's parent company became aware of the Phillips MSDS and instructed Shakespeare not to supply any more monofilament for use in Sepramesh. Trans. VII p. 4379. Darois explained that losing access to the monofilament meant that surgeons would no longer be able to "use this on their patients." Trans. VII p. 4380. On cross-examination Darois volunteered this was a patient-safety concern for Bard, rather than a concern about lost corporate revenue:

> I'm telling you, surgeons need these products. They're trained on these products. They depend on these products. So if they have to

> use some other device they're not trained on or familiar with, it could impact patient safety in those situations.

Trans. VII p. 4427. This concern for patient safety is why, Darois claimed, Bard purposefully tried to keep Phillips Sumika from knowing that it was using Marlex in meshes that were being permanently implanted in humans. Trans. VII p. 4424-27.

Darois and Weiland were the instruments Bard used to transmit the company's position to the jury. The facts they testified about were sharply disputed, so the credibility of Bard was squarely on the line insofar as the efforts of the corporation were concerned. That is precisely why Darois couched his testimony in terms of what "we" did when describing its testing regime. The composite knowledge he acquired as the supervisor of efforts by other corporate employees constituted the information he imparted to the jury.

Because of the testimony elicited by defense counsel, Darois and Weiland were each "a living embodiment of Bard in the eyes of the jury." *Stone*, 2003 WL 22902564, *3.

Bard must be treated the same as a natural person testifying at trial, and its criminal convictions are admissible to affect its credibility. Evidence of Bard's criminal convictions is admissible by either the record of the conviction or by cross-examination. § 491.050; *Givens*, 851 S.W.2d at 759 ("Proof of prior criminal convictions may be either by the record of the conviction or by cross-examination[.]"). The trial court erred in denying Plaintiff's offers of proof that included evidence of both. Court Exhibit 22, Trial Exhibits Vol. III p. 165-69 [Depo, p. 142-58];

Court Exhibit 23, Trial Exhibits Vol. IV; Trans. XII p. 8327-29; *see also* Trans. VII p. 4546-57.

Plaintiff was prejudiced thereby, and the exclusion of Bard's criminal convictions materially affected the merits of the action. *See* Rule 84.13(b). Use of Bard's criminal convictions was admissible to impeach Bard, one of the defendants in this action. Plaintiff and Bard presented contradictory evidence regarding the safety of Bard's Align, the safety of the polypropylene resin used to manufacture the Align, whether Bard attempted to mislead the suppliers and manufacture of the polypropylene resin used, whether Bard ignored a Material Safety Data Sheet that prohibited the use of certain plastics in medical applications that involved permanent implantation in a human body or permanent contact with internal body fluids or tissues, and whether Bard had sufficiently determined the safety of the Align. The contradictory evidence presented during this extended trial regarding Bard's liability put Bard's credibility at issue. It was prejudicial error to exclude evidence of Bard's prior criminal convictions and that exclusion materially affected the merits of this action. The jury's evaluation of the evidence depended on the jury's determinations regarding Bard's credibility and Plaintiff was entitled to present evidence of the criminal convictions to address that issue.

Bard's criminal convictions were highly relevant to its credibility. "Ideally, a company which makes medical instruments should be the institutional embodiment of a reverence for life. In this case, Bard exhibited an institutional ethic of greed and indifference to life." *C.R.*

Bard, Inc., 848 F.Supp. at 291; Court Exhibit 23, Trial Exhibits Vol. IV p. 15. The evidence regarding Bard's criminal convictions also affected BSC's credibility as Bard and BSC coordinated their defenses and trial strategies.

Bard and BSC worked together to defeat Plaintiff. Both used Marlex mesh and both used the same arguments and strategies to try to convince the jury the Material Safety Data Sheet prohibition on permanent implantation in the human body did not mean anything. Bard and BSC coordinated the order in which Defendants questioned witnesses. Each referenced and agreed with arguments made by the other Defendant. Consequently, any evidence affecting the credibility of one Defendant affected the other Defendant and the erroneous exclusion of Bard's criminal convictions should require reversal as to both Defendants.

The jury was entitled to know Bard was convicted of 391 felonies. The trial court materially erred in excluding evidence of its convictions, and this Court should reverse and remand for a new trial as to both Defendants.

II. Defendant C.R. Bard, Inc.'s Criminal Convictions Were Admissible to Contradict and Rebut Its Evidence

The trial court erred in excluding evidence of Bard's criminal convictions, because the trial court abused its discretion and the convictions were admissible to affect Bard's credibility, in that the criminal convictions were admissible to contradict and rebut Bard's opening statements and evidence at trial asserting Bard's good corporate character.

A. Standard of Review and Preservation of Error

"The admissibility of evidence lies within the sound discretion of the trial court and will not be disturbed absent abuse of discretion." *Nelson v. Waxman*, 9 S.W.3d 601, 603 (Mo. 2000). Hence, trial court decisions involving admission of evidence are "reviewed for an abuse of discretion." *State v. Taylor*, 298 S.W.3d 482, 492 (Mo. 2009).

Plaintiff preserved this error through an offer of proof involving Weiland's videotaped deposition and a certified copy of the Judgment in a Criminal Case. Court Exhibit 22, Trial Exhibits Vol. III p. 165-69 [Depo, p. 142-58]; Court Exhibit 23, Trial Exhibits Vol. IV; Trans. VII p. 4546-57; Trans. XII p. 8327-29.

This claim of error was then raised in Plaintiff's Motion for New Trial. LF 38 p. 7226, 7262-64.

B. Admissible to Contradict Bard's Claim of Good Character

The trial court incorrectly ruled that Bard's criminal convictions were only admissible if Bard opened the door by presenting evidence of its good character. But even if it was correct, evidence of Bard's convictions was admissible to contradict and rebut Bard's opening statement and evidence at trial impliedly touting Bard's good character and its commitment to following FDA rules.

Bard's opening statement asserted that Bard c*omplies with FDA regulations* and provides life-enhancing and life-saving devices. Bard's President and COO, Weiland, testified that truthfulness is important for a business. Bard also elicited evidence of a humanitarian award received by Weiland, *that Bard follows FDA rules and regulations*, and that it would never put profits over patient safety. Bard's criminal convictions involved untruthfulness, the failure to comply with FDA regulations, and unsafe products. That evidence is directly relevant to contradict Bard's assertions of its good corporate character.

Missouri courts recognize that parties are entitled to rebut an adverse party's evidence through any competent evidence that explains, repels, *contradicts*, or *disproves* the adverse party's proof. *Maugh v. Chrysler Corp.*, 818 S.W.2d 658, 661 (Mo.App.W.D. 1991). "Impeachment is directed to a witness' credibility and ordinarily furnishes no additional factual evidence at trial." *Maugh*, 818 S.W.2d at 661. In contrast, "contradiction is directed to the accuracy of the witness' testimony and supplies additional factual evidence, yet can also

be used as a method of impeachment other than the usual attack on credibility." *Maugh*, 818 S.W.2d at 661.

It is axiomatic that a "party is entitled to introduce evidence to rebut that of his adversary, and for this purpose any competent evidence to explain, repel, counteract, or disprove the adversary's proof is admissible." *Talley v. Richart*, 353 Mo. 912, 185 S.W.2d 23, 26 (1945). Contradiction is allowed regarding *any* matter brought out on direct examination, including collateral matters. *Maugh*, 818 S.W.2d at 661. A party has "the *right* to contradict an adversary's evidence with even 'collateral' evidence." *Maugh*, 818 S.W.2d at 661 (emphasis added); *Ryburn v. General Heating & Cooling, Co.*, 887 S.W.2d 604, 610 (Mo.App.W.D. 1994) ("a party may contradict matters introduced on direct examination even when they involve issues of character."). The exclusion of evidence contradicting an adversary's direct testimony is an abuse of discretion. *Maugh*, 818 S.W.2d at 661.

In *Ryburn*, the Court recognized that the "plaintiff was entitled to introduce evidence of [the corporation's] violation of a criminal statute involving dishonesty" in response to the corporation's direct evidence of its "excellent reputation" and "good character." *Ryburn*, 887 S.W.2d at 610. In that case, a corporate vice-president testified "he was 'pretty proud of'" the company, "that it is 'one of the best known distributors in the midwest,'" that working for it "'looks good on your resume.'" *Ryburn*, 887 S.W.2d at 610. The Western District found the testimony was designed to show the corporation's good character and placed its character in issue. *Ryburn*, 887 S.W.2d at 610. Consequently, "plaintiff

was entitled to introduce evidence of [the corporation's] violation of a criminal statute involving dishonesty" to contradict the corporation's character evidence. *Ryburn*, 887 S.W.2d at 610.

Ryburn cited to *Williams v. McCoy*, 854 S.W.2d 545 (Mo.App.S.D. 1993), where the plaintiff testified on direct about his church activities, which the Court described as tending to "bolster his credibility before the jury or enhance his character." *Williams*, 854 S.W.2d at 558. Defendant cross-examined plaintiff about a meretricious relationship in which he was involved. On appeal plaintiff argued this was erroneous character evidence, but the Southern District disagreed: "The defendant had the right to impeach or contradict Dwight on those collateral matters raised by [plaintiff] on direct examination." *Williams*, 854 S.W.2d at 558.

Other courts have recognized that "if a corporate witness's testimony places the company's credibility at issue, a corporate conviction can be used to impeach the corporation's representations." *Global BTG LLC v. National Air Cargo, Inc.*, 2013 WL 12121982, *4 (C.D. Cal. 2013); *also Hickson Corp. v. Norfolk Southern Ry. Co.*, 124 Fed.Appx. 336, 342-43 (6th Cir. 2005). Further, a corporation opens the door to evidence of a guilty plea for failing to comply with statutory, regulatory, or other legal requirements when the company claims to have always followed such requirements. *See Security National Bank of Sioux City, Iowa v. Abbott Laboratories*, 2013 WL 12140998, *15 (N.D. Iowa 2013).

Bard asserted in its opening statement that:

- "Bard fully complied with the FDA regulations and safety standards in bringing the Align to market." Trans. II p. 829.
- "Bard makes devices that are life improving, life enhancing, life saving in different types." Trans. II p. 835.
- "They make the surgical products we're talking about, like the Align that help enhance the quality of life." Trans. II p. 835.
- "Bard extensively tested the Align for safety." Trans. II p. 856.
- "[T]he FDA set the guidelines and the rules and Bard fully complied." Trans. II p. 856.
- "Bard complied with all the FDA regulations and standards." Trans. II p. 871.

Significantly, Bard's counsel made this impassioned appeal: "But to be able to stand here as a woman and defend this product and defend this company and *to know that these are helping millions of women is really rewarding*." Trans. II p. 860 (emphasis added).

Weiland testified that, "acting responsibly and *with the safety of patients in mind*," Bard "would always do our own independent testing, yes." Court Exhibit 21, Trial Exhibits Vol. III p. 159 [Depo p. 253] (emphasis added). Weiland testified that he takes telling the truth very seriously, believes telling the truth is "an important thing in business", and that he "think[s] it's important for everyone to be truthful and honest." Court Exhibit 21, Trial Exhibits Vol. III p. 116-17 [Depo p. 13-16].

Darois testified that Weiland is:

> one of the most upstanding guys I've ever met. I've known him for 20 years. In fact, *he won the Horatio Alger Award in 2012*. That's an award given to 10 or 12 distinguished Americans for proven *honesty, hard work, and perseverance in the face of adversity*. The award's given to folks like the founder of Hallmark, Dwight Eisenhower, Ronald Reagan, Oprah Winfrey, Hank Aaron. A lot of famous people have won this award and it's based on honesty, hard work and perseverance.

Trans. VII p. 4382-83 (emphasis added). Bard thereby inverted the logical fallacy of guilt by association into virtue by association.

Darois also sought to convince the jury that Bard is concerned with ensuring its products are available out of a concern for patient safety as much as revenue. He stated:

> I'm telling you, *surgeons need these products*. They're trained on these products. *They depend on these products*. So if they have to use some other device they're not trained on or familiar with, *it could impact patient safety* in those situations.

Trans. VII p. 4427 (emphasis added); *see also* Trans. II p. 4789.

Bard put its character at issue in this case. Bard repeatedly told the jury that its products are *life-enhancing and life-saving*, that it *always complies* with FDA rules and regulations, that its President and COO was like Ronald Reagan and Oprah Winfrey, that it values truthfulness, and that it helps *millions* of women. These statements and evidence were intended to bolster *Bard's credibility*. Bard intended these arguments and evidence to convince the jury that it would not provide an unsafe product and that Plaintiff's injuries could not have been its fault.

Bard's claim of its good corporate character—demonstrated by the effusive praise of Darois for the sterling qualities of its President—

opened the door to contradiction. Bard's criminal convictions for conspiracy, mail fraud, submitting false statements to the FDA, shipping adulterated medical devices, and the like were all relevant to contradict Bard's self-serving testimony praising its corporate character.

Excluding evidence of Bard's felony convictions "left the jury with only part of the picture" concerning things like its purported faithful adherence to FDA Regulations and candor. *Hickson Corp.*, 124 Fed.Appx. at 342. Plaintiff had "the right to contradict an adversary's evidence with even 'collateral' evidence." *Maugh*, 818 S.W.2d at 661 (emphasis added); *Ryburn*, 887 S.W.2d at 610 ("However, a party may contradict matters introduced on direct examination even when they involve issues of character."). The exclusion of Bard's criminal convictions to contradict Bard's direct testimony was an abuse of discretion. *Maugh*, 818 S.W.2d at 661. The exclusion of the evidence prejudiced Plaintiff, and, as in *Maugh*, constituted reversible error.

As discussed above, Plaintiff was prejudiced by the exclusion of Bard's criminal convictions, which materially affected the merits of this action. *See* Rule 84.13(b). Use of Bard's criminal convictions was admissible to contradict Bard's evidence. Plaintiff and Bard presented contradictory evidence regarding the safety of Bard's Align, the safety of the polypropylene resin used to manufacture the Align, whether Bard attempted to mislead the suppliers and manufacture of the polypropylene resin used, whether Bard ignored a Material Safety Data Sheet that prohibited the use of certain plastics in medical applications

that involved permanent implantation in a human body or permanent contact with internal body fluids or tissues, and whether Bard had sufficiently determined the safety of the Align.

The evidence regarding Bard's criminal convictions also affected BSC's credibility as Bard and BSC coordinated their defenses and trial strategies. Bard and BSC worked together to defeat Plaintiff. Both used Marlex mesh and both used the same arguments and strategies to try to convince the jury the Material Safety Data Sheet prohibition on permanent implantation in the human body did not mean anything. Bard and BSC coordinated the order in which Defendants questioned witnesses. Each referenced and agreed with arguments made by the other Defendant. Consequently, any evidence affecting the credibility of one Defendant affected the other Defendant and the erroneous exclusion of Bard's criminal convictions should require reversal as to both Defendants.

The jury was entitled to see the whole picture about Bard, including the part showing it was convicted of 391 felonies. The trial court materially erred in excluding evidence of its convictions, and this Court should reverse and remand for a new trial as to both Defendants.

III. Use of Plaintiff's Original Petition

The trial court erred by abusing its discretion when it allowed Defendants to use portions of Plaintiff's original Petition during opening statements and in questioning witnesses, because the allegations against TMC and UPA were not admissions against interest, and the use of such allegations was highly prejudicial, in that the allegations that TMC and UPA were negligent and caused Plaintiff's damages were inconsistent pleadings and legal conclusions.

A. Standard of Review and Preservation of Error

"The admissibility of evidence lies within the sound discretion of the trial court and will not be disturbed absent abuse of discretion." *Nelson v. Waxman*, 9 S.W.3d 601, 603 (Mo. 2000). Hence, trial court decisions involving admission of evidence are "reviewed for an abuse of discretion." *State v. Taylor*, 298 S.W.3d 482, 492 (Mo. 2009).

This issue was preserved by Plaintiff's repeated objections to Defendants' use of portions of the original Petition, Trans. II p. 913-19, 923-28; Trans. III p. 1340-42; Trans. V p. 3201-04; Trans. VI p. 3935; Trans. VIII p. 5485-87, 5545-48, and was raised in Plaintiff's Motion for New Trial. LF 38 p. 7222-7223, 7229-41; Trans. XIII p. 8833-42.

B. Procedural History and Use of Plaintiff's Original Petition

Plaintiff filed her original Petition against TMC and UPA on October 26, 2012. LF 1 p. 1, 70. She filed her First Amended Petition for Damages on May 30, 2013, LF 1 p. 3, adding BSC and Bard as defendants. LF 1 p. 3, 84. The allegations of negligence and causation asserted against TMC and UPA in the original Petition were contained in paragraphs 17 and 18, which are set out verbatim in Section III of the Statement of Facts.

The same allegations of negligence and causation against TMC and UPA were reasserted in the First Amended Petition for Damages. LF 1 p. 74-75 ¶ 17-18, p. 99-100 ¶ 55-56. Plaintiff settled with TMC and UPA before trial, and they were dismissed from this cause. LF 1 p. 13, 180-81.

During trial, Bard and BSC repeatedly displayed portions of paragraphs 17 and 18 of the original Petition to the jury and questioned Plaintiff and her witnesses regarding the contents of those paragraphs. Bard stated during its opening statement: "Now, in October 2012, … she filed a lawsuit against Truman and University Physicians." Trans. II p. 851. Bard also displayed and discussed portions of paragraphs 17 and 18 of the original Petition during its opening statement. Trans. II p. 900 ln. 13 thru p. 901 ln. 5.

BSC displayed the original caption of the case when preparing to question Dr. Pence, despite the trial court's prior instruction not to show it. Trans. III p. 1340-42. Over Plaintiff's objection that "alternative theories" or "an inconsistent statement" in a petition

cannot be used in cross-examination, BSC questioned Dr. Pence regarding the allegations in paragraph 17 of the original Petition. Trans. III p. 1341 ln. 8-12, 16-21, p. 1342 ln. 4, 10, p. 1343-44. BSC also questioned Dr. Bruce Rosenzeig regarding the allegations in paragraph 17(e) of the original Petition. Trans. V p. 3204.

The parties and the trial court had an extensive discussion, outside the presence of the jury and prior to Defendants' cross-examination of Dr. Greenspan, regarding BSC's intention to present additional evidence that Plaintiff initially sued TMC and UPA, which the trial court allowed over Plaintiff's objection. Trans. VI p. 3891-3906. Even though the evidence was allowed, the trial court expressed frustration over Defendants' constant efforts to dredge up other, inconsistent claims. Trans. VI p. 3894; *see also* Trans. VI, p. 3896. BSC also cross-examined Dr. Greenspan regarding the allegations in paragraph 17 of the original Petition. Trans. VI p. 3932-36.

Bard cross-examined Plaintiff regarding when her petition against TMC and UPA was filed, that Dr. Hill was never a defendant, and that Bard and BSC were not originally named as defendants. Trans. VIII p. 5485, 5492, 5496, p. 5527. Bard cross-examined Plaintiff regarding allegations in paragraphs 17 and 18 of the original Petition. Trans. VIII p. 5548-50, 5556-58, 5560-61, 5564-66.

BSC likewise cross-examined Plaintiff about suing TMC and UPA, Trans. IX p. 5771-73, 5862, followed by cross-examination as to when the original Petition was filed against TMC and UPA and interrogation

about the allegations in paragraph 17 of the original Petition. Trans. IX p. 5862-64.

Bard questioned Dr. Kennelly during redirect examination regarding allegations in paragraphs 17 and 18 of the original Petition as well as the fact that BSC and Bard were not named defendants in that petition. Trans. XI p. 7487-88.

BSC's closing argument included discussion of the allegations against TMC and UPA in the original Petition. Trans. XIII p. 8636-37, 8666. Bard's closing argument discussed the fact that Plaintiff initially sued TMC and UPA, not BSC and Bard, and the damages alleged prior to BSC and Bard being sued. Trans. XIII p. 8702-04.

C. The General Inappropriateness of Interjecting Pleadings into Trials

The concept of discussing or displaying pleadings in front of the jury is generally regarded as odious in this state. As the Court held in *Littell v. Bi-State Transit Development Agency*, 423 S.W.2d 34 (Mo.App. 1967):

> Pleadings are addressed to the court, not the jury. It is said that pleadings are generally inadmissible in evidence in the same case because "they do not possess the characteristics inherent in admissions against interest." *Johnson v. Flex-O-Lite Mfg. Corp.*, Mo., 314 S.W.2d 75 (1—6) [1958], citing 4 WIGMORE ON EVIDENCE, p. 5. The mischief of bringing trial pleadings before the jury is readily apparent: if one pleading is read, another could be read in explanation of it and utter confusion would result.

Littell, 423 S.W.2d at 39. There are exceptions to this rule—for example, abandoned pleadings—but they are not apposite in this case.

The problem is magnified when there are multiple potential tort-feasors. It is axiomatic that a plaintiff need not prove a tort-feasor's

actions were the sole proximate cause to prevail. As this Court held in *Carlson v. K-Mart Corp.*, 979 S.W.2d 145 (Mo. 1998):

> "The general rule is that if a defendant is negligent and his negligence combines with that of another, or with any other independent, intervening cause, he is liable, although his negligence was not the sole negligence or the sole proximate cause, and although his negligence, without such other independent, intervening cause, would not have produced the injury."

Carlson, 979 S.W.2d at 147 (quoting *Gaines v. Property Serv. Co.*, 276 S.W.2d 169, 173-74 (Mo. 1955)). Thus, where the actions of more than one tort-feasor combine to cause injury to the plaintiff, she can sue one or more of them in the same action.

> Where concurrent or successive negligent acts or omissions of two or more persons, although acting independently of each other, are, in combination, the direct and proximate cause of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury, even though his act alone might not have caused the entire injury, or the same damage might have resulted from the act of the other tort-feasor, and the injured person may at his option institute suit for the resulting damages against any or more of such tort-feasors separately, or all of them jointly.

McDowell v. Kawasaki Motors Corp. USA, 799 S.W.2d 854, 861 (Mo.App.W.D. 1990).

Thus, it is entirely possible for a plaintiff to blame more than one actor for her injury, and to the extent a defendant claims that blame attached to one defendant exonerates other defendants, it misstates the law. To the extent a defendant is permitted to parade around pleadings meant for the court, articulating claims that join concurrent or

successive tort-feasors, it increases exponentially the likelihood that the legal issues will become confused. It is even worse when the plaintiff—as is her right, Rule 55.10—files inconsistent or alternative claims.

D. Inadmissible as Inconsistent Pleadings

Paragraphs 17 and 18 of the original Petition alleged negligence against TMC and UPA. Consequently, those paragraphs constituted both inconsistent pleadings and legal conclusions and were not admissible as inconsistent statements. The trial court abused its discretion in allowing Defendants' repeated use of those allegations.

"In Missouri the general rule has been applied that, in cases involving multiple pleas, a pleading on one issue may not be used as an admission upon another issue in the same case." *Macheca v. Fowler*, 412 S.W.2d 462, 465 (Mo. 1967). "The reason such pleas are not admissible, as a general rule, is that they do not possess the characteristics inherent in admissions against interest, rather than that they are not statements of fact against interest." *Hardwick v. Kansas City Gas Co.*, 335 Mo. 100, 109, 195 S.W.2d 504, 509 (1946); quoted in *Johnson v. Flex-O-Lite Mfg. Corp.*, 314 S.W.2d 75, 79 (Mo. 1958).

This Court has explained:

> Where the trial testimony of a party supports one version of an inconsistent pleading, allowing the opponent to impeach with a corresponding inconsistent allegation of the pleading would, at the least, inhibit the utilization of Rule 55.10. Therefore, inconsistent pleadings may not be used as impeaching statements. *This rule is logical as well as practical because inconsistent statements in a pleading are, by definition, only conditionally asserted to be true, i.e., one or the other is true, not necessarily both. Where the facts in the pleading were asserted under these circumstances, testimony*

which conforms to one fork of the inconsistent allegation but not to the other is, in fact, not inconsistent.

Lewis v. Wahl, 842 S.W.2d 82, 87 (Mo. 1992) (emphasis added). *Lewis* goes on to illustrate the rationale for this rule by discussion of the *Flex-O-Lite* case:

> *Flex-O-Lite* also holds that where a party alleges disjunctive specifications of negligence, each such specification of negligence is an alternative to the other and may not be used to impeach. In *Flex-O-Lite*, plaintiff's petition claimed that the driver of the automobile in which plaintiff was a passenger was negligent in operating his automobile at a high and dangerous rate of speed under the circumstances; that he failed to keep his automobile under control; and that he failed to stop his automobile. Even though plaintiff's ultimate testimony in *Flex-O-Lite* failed to assert fault on the part of the driver of the vehicle in which plaintiff was a passenger, he may not be impeached with the disjunctive claims of negligence set forth in his petition. In so ruling, we said, "*Proof of an averment, made hopefully or with undue optimism at pleading time, sometimes fails to develop at the trial, but a party is not required to prove every fact issue alleged, ... under pain of being impeached and discredited.*" *Flex-O-Lite*, 314 S.W.2d at 80. *This aspect of Flex-O-Lite is really an acknowledgment that in pleading disjunctive allegations of negligence or fault, we recognize that the pleader is merely stating that at this early stage of the litigation, it is an expectation and hope that the evidence will show negligence or fault in one or more of the following respects; there is really no assertion that all or even any of the allegations will ultimately prove to be true.* Failure of the pleader's testimony to live up to the expectations of his pleading is not an inconsistency and may not be used to impeach.

Lewis, 842 S.W.2d at 88 (emphasis added).

The rules prohibiting use of inconsistent pleadings to impeach a witness apply when the inconsistent pleadings related to claims against multiple defendants. "[A] plea against one defendant may not be used in

evidence against the plaintiff by the other defendant." *Littell*, 423 S.W.2d at 39. *Lewis* explains the reason for this rule:

> First, where there are multiple defendants, a party's pleading cannot be used against one defendant to impeach that party's testimony against another defendant. A plaintiff is entitled to plead that the negligence of each defendant was the sole cause of plaintiff's damage. Such a pleading is inconsistent because if any single defendant were the sole cause of the injury, then the negligence of the other defendants would not be causal. Under the rule prohibiting the use of inconsistent pleadings to impeach, a party alleging negligence against two or more defendants whose testimony at trial evidences only the negligence of a single defendant may not be impeached by the use of his pleading alleging that the other defendants caused the injury.

Lewis, 842 S.W.2d at 87. This is true even when the allegations concern a defendant that has since been dismissed from the action. *Littell*, 423 S.W.2d at 39-40.

"The basis for receiving in evidence the pleading admission, later abandoned, is its inconsistency with the position taken at trial." *Countess v. Strunk*, 630 S.W.2d 246, 254 (Mo.App.W.D. 1982). Such inconsistency does not exist when dealing with inconsistent or alternative pleadings allowed by Rule 55.10. "Hopeful or optimistic averments in a pleading which fail to develop at trial do not subject a party to being discredited because a party is not required to prove every fact alleged under pain of impeachment." *Countess*, 630 S.W.2d at 254, *citing Flex-O-Lite*.

In the present case, paragraphs 17 and 18 of Plaintiff's original Petition involved inconsistent or alternative pleadings asserted against TMC and UPA. Plaintiff reasserted the same allegations contained in

paragraphs 17 and 18 of the original Petition in paragraphs 55 and 56 of the First Amended Petition for Damages. LF 1 p. 74-75 ¶ 17-18, p. 99-100 ¶ 55-56. Consequently, Plaintiff's allegations of negligence and causation against TMC and UPA became Count I of the First Amended Petition for Damages, LF 1 p. 98-101, while her claims against BSC and Bard were asserted in Counts II through VII. LF 1 p. 101-16.

"[A] pleading on one issue may not be used as an admission upon another issue in the same case." *Macheca*, 412 S.W.2d at 465. Further, "*a plea against one defendant may not be used in evidence against the plaintiff by the other defendant*." *Littell*, 423 S.W.2d at 39 (emphasis added). *Macheca* and *Littell* establish a clear prohibition against the use of paragraphs 17 and 18 as evidence against Plaintiff by BSC and Bard.

It makes no difference that TMC and UPA were dismissed before trial.

> [W]e are not here dealing with abandoned pleadings, but pleadings directed to abandoned parties. Appellant's counts against the dismissed parties were permissible multiple pleas, and a plea against one defendant may not be used in evidence against the plaintiff by another defendant.

Manahan v. Watson, 655 S.W.2d 807, 809 (Mo.App.E.D. 1983). Plaintiff had the right to try her case against Bard and BSC "without regard for the charges previously made against the two voluntarily dismissed defendants." *Manahan*, 655 S.W.2d at 809-10. Allowing one defendant "to read before the jury certain alternative pleadings directed to dismissed parties" constituted reversible error. *Manahan*, 655 S.W.2d at 809, 810.

"[T]he injection of the pleadings of plaintiff against the other defendants deprived plaintiff of a fair trial on the issue of the negligence charged against [these] defendant[s]." *Macheca*, 412 S.W.2d at 466. The trial court in the present case abused its discretion by allowing Defendants to repeatedly use the allegations in paragraphs 17 and 18 against Plaintiff. This Court should reverse the trial court's judgment and remand for a new trial.

Defendants' characterization of the original Petition as abandoned at trial ignored the rule prohibiting the use of inconsistent pleadings; it also ignored the fact that the allegations were not abandoned because the same allegations were made in Plaintiff's First Amended Petition. While Missouri cases are not entirely clear on this issue, the basis for the rule prohibiting the use of alternative pleadings does not change when an amended pleading is filed. "[W]hen the pleader pleads alternatively or inconsistently, as permitted by Rule 55.10, such inconsistent or alternative allegations may not be used against the pleader because *they do not possess the characteristics inherent in admissions*." *Danneman v. Pickett*, 819 S.W.2d 770, 772 (Mo.App.E.D. 1991) (emphasis added).

This Court has repeatedly stated that a plaintiff is entitled to proceed on the claim against one defendant without being impeached by the claims of negligence asserted against other defendants.

> Here, plaintiff charged the three defendants with acts of "combined and concurring negligence." The failure of his charges against the other two defendants did not defeat his right to continue to assert against the defendant here the matters alleged as negligence on this defendant's part. Plaintiff had the right to

> try his case on the issues made against this defendant without regard for the charges previously made against the two involuntarily dismissed defendants.

Macheca, 412 S.W.2d at 465.

Further, allegations in an earlier pleading are not abandoned when included in a subsequent amended pleading.

> In the instant action, plaintiff's original petition pleaded an intentional tort. Count I of the amended petition reiterated the allegations of the original petition and pleaded a second count in the alternative. Because the amended petition did not supplant the original petition, it is questionable whether the original petition was abandoned and therefore admissible against plaintiff as an admission.

Danneman, 819 S.W.2d at 773. Plaintiff's allegations against TMC and UPA were not abandoned because those allegations were reasserted in her Amended Petition.

Regardless of whether the original Petition was abandoned, Plaintiff had the right to try her case against Bard and BSC "without regard for the charges previously made against the two voluntarily dismissed defendants." *Manahan*, 655 S.W.2d at 809-10. "[T]he injection of the pleadings of plaintiff against the other defendants deprived plaintiff of a fair trial on the issue of the negligence charged against [these] defendant[s]." *Macheca*, 412 S.W.2d at 466. *Accord: Lewis*, 842 S.W.2d at 89 (use of an inconsistent claim to impeach is prejudicial error). The trial court abused its discretion by allowing Defendants to repeatedly use the allegations in paragraphs 17 and 18 against Plaintiff. This Court should reverse the trial court's judgment and remand for a new trial.

E. Inadmissible as Legal Conclusions

The allegations in paragraphs 17 and 18 of the original Petition also included inadmissible legal conclusions. Consequently, the trial court abused its discretion by allowing Defendants to repeatedly display to the jury and question Plaintiff and various witnesses regarding the allegations in paragraphs 17 and 18. The improper use against Plaintiff of legal conclusions from Plaintiff's pleadings deprived her of a fair trial.

"A party's factual admissions are admissible as admissions against the interest of that party, but a party's legal conclusions are not." *Anuhco, Inc. v. Westinghouse Credit Corp.*, 883 S.W.2d 910, 930 (Mo.App.W.D. 1994). Even when dealing with abandoned pleadings, a party is only allowed to use factual allegations, not legal conclusions. "An admission, however, must be an assertion of fact, not a conclusion of law." *Riley v. Union Pacific R.R.*, 904 S.W.2d 437, 442 (Mo.App.W.D. 1995).

Allegations that a party was negligent are inadmissible legal conclusions. *Wors v. Glasgow Village Supermarket, Inc.*, 460 S.W.2d 583, 590 (Mo. 1970); *Callaway v. Lilly*, 605 S.W.2d 155, 158 n. 2 (Mo.App.E.D. 1980) ("The fact is that defendant's abandoned pleading should not have been referred to at all. It contained only a legal conclusion as to negligence. As such, it was inadmissible as an admission against interest."). Likewise, "[g]eneral allegations that simply state that plaintiff's damages were caused by some conduct on the part of defendant ... are legal conclusions, not admissions of fact." *Riley*, 904 S.W.2d at 442 (internal quotation marks and citation

omitted); *Amador v. Lea's Auto Sales & Leasing, Inc.*, 916 S.W.2d 845, 850 (Mo.App.S.D. 1996). Assertions that a defendant's actions were responsible for the plaintiff's injuries are at least a mix of legal conclusions and facts, if not pure legal conclusions. *Amador*, 916 S.W.2d at 850.

Paragraph 17 of the original Petition alleges negligence against TMC and UPA, asserting that they "failed to possess and use that degree of skill and learning ordinarily used under the same or similar circumstances by members of their respective professions[.]" LF 1 p. 74 ¶ 17. Subparagraph 17(f) specifically alleges that TMC and UPA were at fault "[i]n *negligently* performing the procedure of October 28, 2010[.]" LF 1 p. 75 ¶ 17(f).

Paragraph 18 alleges: "As a direct and proximate result of the *negligence* and carelessness of the Defendants, and each of them, as set out above, *Plaintiff has sustained the following damages*[.]" LF 1 p. 75 ¶ 18 (emphasis added). Assertions that a defendant's actions were responsible for the plaintiff's injuries are at least a mix of legal conclusions and facts, if not pure legal conclusions. *Amador*, 916 S.W.2d at 850.

Paragraphs 17 and 18 of the original Petition included legal conclusions in addition to any possible factual assertions. BSC and Bard repeatedly displayed these paragraphs to the jury and questioned witnesses regarding these paragraphs without any effort to exclude the legal conclusions. Trans. II p. 900; Trans. III p. 1343-44; Trans. VI p.

3932-36; Trans. XI p. 7487-88; Trans. VIII p. 5548-50, 5560-61, 5564-66; Trans. IX p. 5862-64.

Finally, BSC and Bard both discussed the allegations in paragraphs 17 and 18 of the original Petition extensively during closing arguments. Trans. XIII p. 8636-37, 8666, 8702-04.

The allegations from the original Petition were inadmissible and the trial court abused its discretion in allowing Defendants to repeatedly use those allegations against Plaintiff. Injecting Plaintiff's allegations against TMC and UPA deprived her of a fair trial on her claims against Bard and BSC. *Macheca*, 412 S.W.2d at 466. This Court should reverse the trial court's judgment and remand for a new trial.

F. Plaintiff Preserved This Issue

The Western District mistakenly believed that this issue was not preserved for various reasons. In fact, Plaintiff did preserve this issue by proper objection, the fact that Plaintiff's expert witnesses reviewed the original Petition did not make the allegations in the Petition admissible, and the fact that Plaintiff made similar statements in interrogatory answers likewise does not make the allegations in the Petition admissible.

Dr. Peggy Pence was asked by BSC if she had "an opportunity to review" the "Complaint" [*sic*] that was filed by Ms. Sherrer and her attorneys. Trans. III p. 1338-39. As an initial matter, BSC did not clarify if the "Complaint" referred to was the original Petition or the First Amended Petition. Plaintiff believes that Dr. Pence only reviewed the First Amended Petition, not the original Petition. Regardless,

Plaintiff then objected, among other things, that: "You can't take that -- you know, something that's said in a petition with regard to alternative theories." Trans. III p. 1341. Plaintiff's objection was overruled. Trans. III p. 1342.

Even if Dr. Pence reviewed the original Petition, that fact does not make the allegations in the original Petition admissible. This Court, in addressing the discoverability of materials provided to an expert witness, has stated:

> It is appropriate, at deposition or trial, to cross-examine an expert witness as to information provided to the expert that may contradict or weaken the bases for his or her opinion regardless of whether the expert relied upon or considered the information. Removing the privilege from the documents provided to the expert *does not necessarily make the documents admissible at trial*. As with other non-privileged documents, the law of evidence applies.

State ex rel. Tracy v. Dandurand, 30 S.W.3d 831, 835 (Mo. 2000) (emphasis added).[8] Consequently, an expert witness's review of a petition alone does not make the contents of that petition admissible.

---

[8] The statement that it is appropriate to cross-examine an expert at trial as to information provided to the expert, "regardless of whether the expert relied upon or considered the information," is dicta. The issue in *Tracy* was whether such information was *discoverable*. Since the case had not yet been tried, the issue of whether matters *discoverable* will always be *admissible* was not before this Court. It is questionable that they will since, in the same paragraph, the Court says, "Removing the privilege from the documents provided to the expert *does not necessarily make the documents admissible at trial*. As with other non-privileged documents, the law of evidence applies." In any event, "[a]ny reported opinion should be read in the light of the facts of that particular case, and it would be unfair as well as improper to give permanent and

First, alternative allegations in a petition do not contradict or weaken the bases for an expert opinion. The fact that allegations in the original Petition were "only conditionally asserted to be true" removes any adverse effect on the expert's opinion because the expert's opinion "is, in fact, not inconsistent." *Lewis*, 842 S.W.2d at 87.

Further, even if it was proper to question Dr. Pence regarding Plaintiff's allegations against the doctors, Dr. Pence could have been cross-examined regarding those allegations without improperly displaying the original Petition to the jury. Dr. Pence could have been asked if she had seen that Ms. Sherrer had, in the past, claimed that the physicians failed to attach the anchor of the Solyx. That question would have accomplished the same purpose without improperly admitting the allegations of the Petition. Jurors could give different weight and treatment to a prior statement by the Plaintiff than to an allegation included in a petition filed with the court. This difference is why Defendants went to great lengths to repeatedly display the allegations in the original Petition to the jury in this matter.

During BSC's cross-examination of Dr. Bruce Rosenzweig, it proposed to question Dr. Rosenzweig regarding portions of the original Petition, to which Plaintiff objected:

> This is entirely improper cross-examination for this. He's using a *legal pleading* with a urogynecologist expert. He's talking about

---

controlling effect to casual statements outside the scope of the real inquiry." *State on the Information of Dalton v. Miles Laboratories*, 365 Mo. 350, 282 S.W.2d 564, 573 (*en banc*. 1955).

> the date of filing. None of this is proper with this. He can do that if he wants with a fact witness if he wants but it's not appropriate with this witness.

Trans. V p. 3201 (emphasis added). BSC's response included:

> Here I have a pleading, and I'm not reading any *legalese*, but it's saying that the doctors are being accused of failing to follow the manufacturer's instructions in placing the vaginal mesh. It's brief impeachment on that point.
>
> * * *
>
> The law that we covered in the motions in limine was you can put into evidence *factual allegations, not legal allegations*, and that's why I'm using this language, Failing to follow the manufacturer's instructions in placing the transvaginal mesh.

Trans. V p. 3202-03 (emphasis added). While Plaintiff's objection could have been stated more artfully, the parties and the trial court had already repeatedly addressed the use these allegations from the original Petition. Plaintiff's objection and BSC's response make clear that the parties and the trial court understood that one of the objections to the use of the original Petition was that Defendants were using legal conclusions. Consequently, this issue was preserved.

Further, BSC failed to establish that Dr. Rosenzweig had reviewed the original Petition. The original Petition was, therefore, not a proper subject for attempting to contradict or weaken Dr. Rosenzweig's opinion. Regardless, as discussed, even if Dr. Rosenzweig reviewed the original Petition, that fact alone did not necessarily make the original Petition admissible. *Tracy*, 30 S.W.3d at 835.

Finally, the fact that portions of Plaintiff's interrogatory responses were admitted in evidence does not make the allegations in the original

Petition cumulative and non-prejudicial. "Evidence is said to be cumulative when it relates to a matter so fully and properly proved by other testimony as to take it out of the area of serious dispute." *Black v. State*, 151 S.W.3d 49, 56 (Mo. 2004) (internal quotes and citation omitted). Evidence is not "cumulative when it goes to the very root of the matter in controversy or relates to the main issue, the decision of which turns on the weight of the evidence." *Black*, 151 S.W.3d at 56 (internal quotes and citation omitted).

A critical issue in this case is whether Plaintiff's injuries and damages were caused by Defendants' defective products or solely by the negligence of the doctors. The jury's determination of that issue turned on the weight of the evidence presented by the parties. The allegations contained in the original Petition claiming the doctors were negligent were not cumulative. Those allegations, pled in the alternative and containing legal conclusions, "go[] to the very root of the matter in controversy" and the jury's decision turned on the weight of the evidence. *Black*, 151 S.W.3d at 56. Consequently, as discussed below, Plaintiff was prejudiced by the improper use of the original Petition and this Court should reverse and remand for a new trial.

G. The Use of Plaintiff's Original Petition Was Prejudicial

Plaintiff was prejudiced by Defendants' repeated use of the allegations in her original Petition, and the trial court's error in allowing such use materially affected the merits of this action. *See* Rule 84.13(b). BSC and Bard tried this case on the theory that the doctors employed by TMC and UPA were to blame for Plaintiff's injuries and

damages. BSC and Bard improperly used the allegations of negligence and causation in paragraphs 17 and 18 of the original Petition to support their arguments.

BSC and Bard further supported their theory that TMC and UPA were to blame by displaying the first page of the Petition with the original style of the case to the jury, repeatedly emphasizing the fact that TMC and UPA were originally sued by Plaintiff, and that BSC and Bard were not. The trial court had to instruct Defendants multiple times to not display the original caption of the case. Despite those admonitions, BSC and Bard continued to discuss those claims. These actions exacerbated the prejudice Plaintiff suffered because of Defendants' improper use of the original Petition.

"It has uniformly been held that incompetent evidence on a material issue is presumed to be prejudicial, unless clearly shown to be otherwise, and the burden of so showing is on the respondent." *Hamilton v. Missouri Petroleum Products Co.*, 428 S.W.2d 197, 201 (Mo. 1969). In the instant cause, the great unanswered question for the jury was this: If TMC and UPA were originally sued, why were they not at trial? The danger of demonstrating their previous status as Defendants to this cause was that the jury would infer that they had settled with Plaintiff, c.f. *Fahy v. Dresser Industries, Inc.*, 740 S.W.2d 635, 642 (Mo. 1987). The prejudice inhering in informing the jury of a partial settlement is discussed, *infra*.

Allowing one defendant "to read before the jury certain alternative pleadings directed to dismissed parties" constitutes reversible error.

Manahan, 655 S.W.2d at 809, 810. "[T]he injection of the pleadings of plaintiff against the other defendants deprived plaintiff of a fair trial on the issue of the negligence charged against [these] defendant[s]." *Macheca*, 412 S.W.2d at 466.

Not surprisingly, the trial court expressed frustration regarding the repeated references to the allegations against TMC and UPA, stating:

> I don't know why this case can't be tried and litigated and determined based upon Ms. Sherrer's alleged injuries as they relate or don't relate to Bard and Boston Scientific.
>
> You guys want to get into the other defendants, the other lawsuits, you guys want to get into other claims. Why can't we just try this thing according to the merits of what we got in front of us?

Trans. VI p. 3894; *see also* Trans. VI, p. 3896. Despite the trial court's admonitions, Defendants continually highlighted the fact that Plaintiff initially sued TMC and UPA and alleged that their doctors were negligent. The improper use of the allegations from Plaintiff's original Petition were used to support Defendants' assertions that the doctors were negligent and deprived Plaintiff of a fair trial based on the evidence relating to these Defendants.

The allegations from the original Petition were inadmissible and the trial court abused its discretion in allowing Defendants to repeatedly use those allegations against Plaintiff. Injecting Plaintiff's allegations against TMC and UPA deprived her of a fair trial on her claims against Bard and BSC. *Macheca*, 412 S.W.2d at 466. This Court should reverse the trial court's judgment and remand for a new trial.

IV. Plaintiff's Settlement with TMC and UPA

The trial court erred and abused its discretion in failing to grant a mistrial following Bard's display of information regarding Plaintiff's settlement with TMC and UPA, because a mistrial was the only way to remedy the prejudice Plaintiff suffered, in that Plaintiff was prejudiced as a result of the jury being informed that she had settled her claims against TMC and UPA.

A. Standard of Review and Preservation of Error

"A mistrial is a drastic remedy, and the decision to grant one for misconduct or the introduction of prejudicial evidence is largely within the trial court's discretion." *Wheeler ex rel. Wheeler v. Phenix*, 335 S.W.3d 504, 514 (Mo.App.S.D. 2011). The denial of a motion for mistrial is only reversed for a manifest abuse of discretion, which requires a grievous error such that a mistrial is the only way to remove the prejudice. *Wheeler*, 335 S.W.3d at 514.

Plaintiff made a detailed record and requested a mistrial following the testimony on the day on which the settlement information was displayed to the jury. Trans. VIII p. 5633-36; *see also* Trans. VIII p. 5605, 5657-58; Trans. IX p. 5723-25, 5730-31. The trial court denied the request for a mistrial, Trans. VIII p. 5638, and the issue was raised in Plaintiff's Motion for New Trial. LF 38 p. 7224, 7243-46; Trans. XIII p. 8842-46.

B. The Jury Was Informed of the Settlement

During cross-examination of Plaintiff, Bard showed the jury a timeline which included this statement: "Nov 15, 2014 *Settlement with Truman Medical Center and University Physicians Associates*[.]" Court Exhibit 16, Trial Exhibits Vol. I p. 288 (emphasis added); App. A7;

Trans. VIII p. 5602, 5604-05, 5633. Bard acknowledged that the settlement information was not to be presented to the jury and was a violation of the trial court's rulings on the issue. Trans. VIII p. 5605, 5635.

There were two versions of Bard Exhibit 543. The version displayed to the jury contains the reference to Plaintiff's settlement with TMC and UPA. Court Exhibit 16, Trial Exhibits Vol. I p. 288; App. A7; Trans. VIII p. 5605, 5633, 5635. The paper versions of the exhibit provided to the trial court and counsel for Plaintiff did not include any reference to the settlement. Trans. VIII p. 5635, 5637-38.

The second page of Bard Exhibit 543, containing the reference to Plaintiff's settlement with TMC and UPA, was displayed to the jury twice. The second page of Bard Exhibit 543 was first displayed to the jury at page 5488 of the Transcript. Trans. VIII p. 5488. Immediately after page two was put on display, counsel for Bard stated: "And again,

we'll go through this as we go, but you have looked at, I think you said earlier, your deposition transcripts, right?" Trans. VIII p. 5488 (emphasis added). The statement that "we'll go through this as we go" is a reference to the timeline contained on page two of Bard Exhibit 543, *which contained the reference to the settlement*. That comment would have directed the jury's attention to the displayed exhibit.

In addition, counsel for Bard asked five questions concerning Plaintiff's deposition transcripts and an errata sheet. Trans. VIII p. 5488. The box improperly including the settlement information was in close proximity to boxes for "First deposition" and "Errata sheet[.]" Court Exhibit 16, Trial Exhibits Vol. I p. 288; App. A7. Counsel for Bard then had the slide taken down. Trans. VIII p. 5488-89.

Bard Exhibit 543 was again displayed to the jury starting at page 5602 of the Transcript. Trans. VIII p. 5602. The second page of Bard Exhibit 543 was then displayed starting on page 5604. Trans. VIII p. 5604. Bard asked Plaintiff five questions before the trial court instructed that the exhibit be taken down because it contained information regarding the settlement. Trans. VIII p. 5604. The trial court had time to read the improper statement about the settlement before it was taken down and there is no logical reason the jurors did not have time to read it also.

Immediately upon the second page of Bard Exhibit 543 being displayed to the jury for the second time, counsel for Bard stated: "2012 to 2014, you were in China, right?" Trans. VIII p. 5604. That statement was a direct reference to one of the boxes on page two of Bard Exhibit

543, which was labeled: "Jun 2012 to Apr 2014 To China[.]" Court Exhibit 16, Trial Exhibits Vol. I p. 288; App. A7. Again, that comment would have directed the jury's attention to the displayed exhibit. In addition, the following four questions all related to Plaintiff's visits to China.

Both times page two of Bard Exhibit 543 was displayed to the jury, counsel for Bard made comments that would have directed the jury's attention to the exhibit. Further, all the questions and comments made during both times page two of Bard Exhibit 543 was being displayed related to items included on the exhibit. This would have directed and focused the jury's attention on that exhibit. Bard Exhibit 543 was displayed on a "20-by-20 screen that [was] in front of [the] jury." Trans. IX p. 5730. The trial court "hoped" that the jury's attention was focused on the colloquy between counsel and Plaintiff rather than on the exhibit. Instead, the colloquy would have directed attention to the exhibit. In addition, the trial court and Plaintiff were not aware that the settlement information had been displayed to the jury *twice*.

Bard's questions asked while page two of Bard Exhibit 543 was displayed to the jury make it very likely that some or all the jurors would have noticed the box stating: "Nov 15, 2014 *Settlement with Truman Medical Center and University Physicians Associates*[.]" Court Exhibit 16, Trial Exhibits Vol. I p. 288 (emphasis added); App. A7. That box is one of the two largest boxes on the bottom half of the timeline, Court Exhibit 16, Trial Exhibits Vol. I p. 288; App. A7, again increasing the likelihood of the jurors noticing it. The information was displayed

on a "20-by-20 screen", making it easy for the jurors to see everything on the timeline, including the settlement information. The trial court had time to read the improper statement about the settlement before it was taken down and there is no logical reason the jurors did not have time to read it also.

It is undisputed that information regarding Plaintiff's settlement with TMC and UPA was displayed to the jury. There was nothing preventing the jury from observing that information while it was on display. The settlement information was displayed long enough for the trial court to read it and recognize that it was a violation of the court's prior ruling. The questions asked of Plaintiff while the settlement information was being displayed related to items on the same slide as the settlement information. Consequently, there is every reason to believe that at least some of the jurors observed the information regarding the settlement.

C. The Evidence of the Settlement Was Inadmissible and Highly Prejudicial

Evidence regarding settlements or settlement offers is generally inadmissible because it is considered highly prejudicial. Evidence that Plaintiff settled with TMC and UPA is especially prejudicial in the present case since Defendants repeatedly informed the jury that Plaintiff sued TMC and UPA prior to adding BSC and Bard as defendants. Further, BSC and Bard asserted that the doctors employed by TMC and UPA were to blame for Plaintiff's injuries. Defendants improperly used allegations from Plaintiff's original Petition to support

such assertions. Consequently, evidence of a settlement with TMC and UPA suggested to the jury that not only were those entities to blame, they had admitted fault by settling and had already reimbursed Plaintiff for her damages.

Evidence regarding settlements with prior defendants is highly prejudicial and only admissible in exceptional circumstances.

> "The basic rule, in Missouri and elsewhere, is that evidence of settlement agreements is not admissible. This is because *settlement agreements tend to be highly prejudicial* and, thus, should be kept from the jury unless a clear and cogent reason exists for admitting a particular settlement agreement."

Mengwasser v. Anthony Kempker Trucking, Inc., 312 S.W.3d 368, 376 (Mo.App.W.D. 2010) (emphasis added; quoting *O'Neal v. Pipes Enters., Inc.*, 930 S.W.2d 416, 423 (Mo.App.W.D. 1995)). "The danger of admitting evidence of settlements is that the trier of fact may believe that the fact that a settlement was attempted is some indication of the merits of the case." *State ex rel. Malan v. Huesemann*, 942 S.W.2d 424, 428 (Mo.App.W.D. 1997). "No one would make offers if the risk of their being before the jury were a necessary corollary of the offer." *State ex rel. Malan*, 942 S.W.2d at 428 (internal quotation marks and citation omitted).

"This policy also applies in situations involving a completed settlement with another party in the same or in a different case." *State ex rel. Malan*, 942 S.W.2d at 428.

> Evidence of a prior settlement with a joint tortfeasor is not relevant to the determination of the remaining defendant's negligence. Neither the fact that a joint tortfeasor settled to avoid

> trial nor the details of that settlement tend to make the negligence of the remaining defendant more or less probable.

Toppins v. Miller, 891 S.W.2d 473, 475 (Mo.App.E.D. 1994). Evidence of this type of settlement is more prejudicial as the jury may believe that the other defendant admitted liability.

The prior settlement is irrelevant and inadmissible with respect to Plaintiff's claims against BSC and Bard. Regardless, the date and fact of the settlement was displayed to the jury twice. "Settlement agreements are *highly prejudicial* and should not be admitted in evidence unless there is a clear and cogent reason to do so." *Daniel v. Indiana Mills & Mfg., Inc.*, 103 S.W.3d 302, 316 (Mo.App.S.D. 2003) (emphasis added). "The erroneous admission of evidence of a settlement offer constitutes reversible error." *Rodgers v. Czamanske*, 862 S.W.2d 453, 460 (Mo.App.W.D. 1993).

The fact that the settlement information was displayed to the jury on two different occasions alone constitutes reversible error. However, the settlement information regarding TMC and UPA was not an isolated event. The settlement information must be considered in the context of:

- BSC and Bard's improper use of Plaintiff's allegations against TMC and UPA;
- BSC and Bard's repeated references to the fact the Plaintiff sued TMC and UPA; and
- BSC and Bard's trial strategy of blaming the doctors employed by TMC and UPA for Plaintiff's injuries and damages.

It does not matter whether the settlement information was displayed to the jury intentionally or inadvertently. The harm is the same either

way. Information regarding a completed settlement is highly prejudicial. This issue was avoidable as there was no reasonable basis for believing the settlement information was admissible. Therefore, the settlement information should never have been included on Bard's exhibit.

BSC and Bard tried this case on the theory that the doctors employed by TMC and UPA were to blame for Plaintiff's injuries and damages. BSC and Bard, in opening statements, while questioning witnesses, and in closing arguments, used the allegations in paragraphs 17 and 18 of the original Petition to support their arguments.

Bard acknowledged that the settlement information was not to be presented to the jury and that it was a violation of the trial court's rulings on the issue. Trans. VIII p. 5605, 5635. Displaying the date of Plaintiff's settlement with TMC and UPA led the jury to believe the doctors admitted they were at fault, and that Plaintiff was already reimbursed for her damages by TMC and UPA.

The information that Plaintiff settled with TMC and UPA was displayed to the jury twice. That information was highly prejudicial to Plaintiff and the grievous nature of that prejudice could only be removed by the granting of a mistrial. The trial court abused its discretion in failing to grant a mistrial following the improper display to the jury of the settlement information and this Court should reverse and remand for a new trial.

D. The Unusual Circumstances Precluded Normal Efforts to Preserve This Issue

Plaintiff and the trial court were presented with paper copies of Bard Exhibit 543 that did not match what was displayed to the jury. As a result, the jury was more likely to notice the settlement information than either the trial court or Plaintiff. Further, neither Plaintiff nor the trial court could determine whether any jurors observed the settlement information without informing the jury of the existence of the settlement. Consequently, despite the trial court's "hope" that the jury's attention was focused elsewhere, Plaintiff had no ability during trial to determine how many times the improper settlement information was displayed to the jury and whether the jurors observed the settlement information. The only uncontested fact is that the improper, highly prejudicial settlement information was displayed to the jury.

Parties are expected to provide copies of trial exhibits for use by opposing parties and the trial court. This practice facilitates the conduct of trials and ensures that the parties and the court are able to properly make and rule objections to the exhibits and normally avoids having admittedly inadmissible information displayed to the jury without a prior opportunity to object. When the exhibit displayed to the jury is not the same as the copies provided to opposing parties and the trial court, even if inadvertently, the opposing parties and the trial court are deprived of the normal opportunity to address the issue and avoid exposing the objectionable information to the jury.

Plaintiff should not be penalized because her counsel, while listening to Bard's cross-examination of Plaintiff and focusing on ensuring the necessary objections to any questions were raised, failed to notice that the copy of Bard Exhibit 543 displayed to the jury was different than the copy of Bard Exhibit 543 provided to Plaintiff. Plaintiff cannot be faulted for relying on a copy of Bard Exhibit 543 provided by Bard and failing to notice the discrepancy when Bard displayed the improper version of the exhibit to the jury. The Transcript suggests that everyone immediately noticed the settlement information *as soon as they looked* at the copy of Bard Exhibit 543 being displayed to the jury.

The trial court stated: "I noticed it only because I turned up there, and I immediately told them to take it off, they did." Trans. VIII p. 5637-38. This suggests that the trial court *immediately* noticed the settlement information upon looking at the copy being displayed to the jury.

The Transcript following the trial court's instruction to take the slide down indicates that the attorneys for both Bard and Plaintiff also immediately noticed the settlement information in the short time before the slide was taken down. After the exhibit had been on display during five questions, the following occurred:

> THE COURT: Take that down for a second, please.
>
> MS. COHEN: Oh, yes.
>
> (Counsel approach the bench and the following discussion was had:)
>
> MS. COHEN: I know, it wasn't supposed to be up there. I'd asked him to take it off.

THE COURT: Take that off.

MS. COHEN: Yeah, it was supposed to be off.

MR. DAVIS: I saw something up there that's very troubling.

MS. COHEN: It wasn't on --

THE COURT: Take it off.

MR. DAVIS: I want to do this later, but I'm going to make a motion for a mistrial. It's a violation. To say on the record what happened is -- it was a slide that shows that there was a settlement with Truman, and it is a direct violation of the Court's orders. I'll make a better record later.

Trans. Vol. VIII p. 5604-05. This brief discussion shows that Ms. Cohen and Mr. Davis both saw the settlement information as soon as the trial court directed their attention to the slide and in the short time before the slide was taken down.

Further, the settlement information was so obviously the subject of the discussion that the trial court, Ms. Cohen, and Mr. Davis all made multiple comments without specifically articulating that they were discussing settlement information. The word "settlement" was not used until Mr. Davis was making his request for a mistrial and attempting to clarify the record. Ms. Cohen asserted that the information "wasn't supposed to be up there" and the trial court directed her to "Take that off" without either every saying the word "settlement."

It is also important to note that the trial court did not make a finding that the jury did not see the settlement information. The court did note that the settlement information "was up there for a short period of time." Trans. Vol. VIII p. 5638. The court's only comment addressing whether the jury observed the information was:

> It was put up there -- it was flashed up there during the course of a colloquy between Ms. Cohen and Ms. Sherrer. So *I think and I hope* that the jury's attention was focused on that colloquy between the two.

Trans. Vol. VIII p. 5637 (emphasis added). The trial court did not find that the jury did not observe the slide. The information was displayed on a "20-by-20 screen", making it easy for the jurors to see everything on the timeline, including the settlement information. The trial court had time to read the improper statement about the settlement before it was taken down and there is no logical reason to believe that at least some of the jurors did not read it also. The trial court saw the settlement information immediately upon looking at the slide and Ms. Cohen and Mr. Davis both saw the settlement information as soon as the trial court directed their attention to the slide. There is no reason to believe the jurors read slower than the trial judge and counsel for the parties.

The trial court's hope is not supported by the record. As discussed above, it is undisputed that information regarding Plaintiff's settlement with TMC and UPA was displayed to the jury. There was nothing preventing the jury from observing that information while it was on display. All the questions and comments made during both times page two of Bard Exhibit 543 was displayed related to items included on the exhibit. This would have directed the jury's attention to that exhibit. Bard Exhibit 543 was displayed on a "20-by-20 screen that [was] in front of [the] jury." Trans. IX p. 5730.

Bard's questions asked while page two of Bard Exhibit 543 was displayed to the jury make it very likely that some or all the jurors would have noticed the settlement information. That settlement box is one of the two largest boxes on the bottom half of the timeline, Court Exhibit 16, Trial Exhibits Vol. I p. 288; App. A7, again increasing the likelihood of the jurors noticing it. The information was displayed on a "20-by-20 screen", making it easy for the jurors to see everything on the timeline, including the settlement information.

It is undisputed that information regarding Plaintiff's settlement with TMC and UPA was displayed to the jury. There was nothing preventing the jury from observing that information while it was on display. The settlement information was displayed long enough for the trial court to read it and recognize that it was a violation of the court's prior ruling. The questions asked of Plaintiff while the settlement information was being displayed related to items on the same slide as the settlement information. Consequently, there is every reason to believe that at least some of the jurors observed the information regarding the settlement.

In addition, there was no practical way for Plaintiff to establish whether the jury observed the settlement information on Bard Exhibit 543. Asking the jury if it saw the settlement information would have informed the jury of the settlement and amplified the harm caused by improperly displaying the settlement information. The jury, likewise, could not be instructed to ignore the settlement information without informing the jury of the settlement.

There was also no practical way to cure the prejudice resulting from displaying the settlement information to the jury. The giving of MAI 34.05 did not cure the prejudice that resulted from informing the jury regarding Plaintiff's settlement with TMC and UPA. Instruction No. 14 was the damages instruction and provided: "*In determining the total amount of plaintiff Eve Sherrer's damages* you are not to consider any evidence of prior payments to her." LF 38 p. 7185 (emphasis added). The instruction did not tell the jury to disregard settlement information for other purposes. The jury could have considered TMC and UPA's settlement with Plaintiff as admissions of guilt by TMC and UPA. The instruction regarding damages did not cure the prejudice resulting from the improper display to the jury of the settlement information.

Plaintiff was faced with a situation created by Defendant Bard, whether intentionally or inadvertently, in which highly prejudicial settlement information was displayed to the jury, but no one could prove or disprove that the jury observed the information and no effective method existed to mitigate the prejudicial effect absent a mistrial. Requesting other relief would have been futile and the law does not require the doing of a futile act. *State v. Taylor*, 742 S.W.2d 625, 628 (Mo.App.E.D. 1988); *State v. Torrey*, 225 Mo.App. 966, 33 S.W.2d 130, 133 (1930).

This is not simply a case where irrelevant information was inadvertently displayed to the jury and the trial court had discretion to determine if the information displayed was prejudicial. Settlement information is not just irrelevant, it is highly prejudicial because jurors

may perceive settlements or offers as admissions of liability or weakness in a party's position. The admission of settlement information also violates the public policy of encouraging settlements. For these reasons, the improper admission of settlement information has been held to be reversible error.

> Due to the highly prejudicial effect evidence of a settlement offer may have upon the jury, settlement offers are to be kept from the jury unless there is a clear and cogent reason for admitting such evidence. [Citation omitted]. Admission of settlement offers at trial serves no purpose but to deter litigants from seeking settlement compromises and, thus, frustrates the public policy which encourages settlements. [Citation omitted]. The erroneous admission of evidence of a settlement offer constitutes reversible error.

Rodgers, 862 S.W.2d at 460.

The question in this case is not whether the settlement information displayed to the jury was prejudicial. Settlement information is presumed prejudicial. It is also undisputed that the settlement information was displayed to the jury. Additionally, the context in which the information was displayed makes it likely that at least some of the jurors observed the settlement information. The question for this Court is whether Plaintiff will be denied a fair trial because she could not prove that the jurors observed the settlement information Defendant Bard improperly displayed to them.

It does not matter if the settlement information was displayed to the jury intentionally or unintentionally. It does not matter if the settlement information was shown because a technical assistant made a mistake. The harm is the same. It is undisputed that the settlement

information was displayed to the jury. "The erroneous admission of evidence of a settlement offer constitutes reversible error." *Rodgers*, 862 S.W.2d at 460.

The information that Plaintiff settled with TMC and UPA was displayed to the jury twice. That information was highly prejudicial to Plaintiff and the grievous nature that prejudice could only be removed by the granting of a mistrial. The trial court abused its discretion in failing to grant a mistrial following the improper display to the jury of the settlement information and this Court should reverse and remand for a new trial.

CONCLUSION

The trial court erred in excluding evidence of Bard's criminal convictions, allowing Defendants to improperly use portions of the original Petition, and failing to declare a mistrial following the display to the jury of information regarding Plaintiff's settlement with TMC and UPA. These errors prejudiced Plaintiff and this Court should reverse and remand for a new trial.

Respectfully Submitted,

/s/ Grant Davis
Grant Davis, MO #34799
Davis Bethune & Jones LLC
1100 Main, Suite 2930
Kansas City, MO 64105
816-421-1600
816-472-5972 Facsimile
gdavis@dbjlaw.net

/s/ Michael W. Manners
Michael W. Manners, MO #25394
Langdon & Emison
911 Main St., PO Box 220
Lexington MO 64067
(660) 259-9910
mike@lelaw.com

/s/ Richard Rollings Jr.
Richard L. Rollings, Jr.
Missouri Bar No. 40650
379 West Lake Park
Camdenton, MO 65020
(573) 873-6060
(877) 871-0299 FAX
Rick@RRollings.com

Thomas P. Cartmell, MO #45366
Wagstaff & Cartmell LLP
4740 Grand Avenue, Suite 300
Kansas City, MO 64112
816-701-1100
816-531-2372 Facsimile
tcartmell@wcllp.com

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

I certify that this Appellant's Substitute Brief was served pursuant to Rule 103.08, complies with the limitations contained in Rule 84.06(b), and contains 25,993 words.

/s/ Richard Rollings Jr.
Richard L. Rollings, Jr.
Missouri Bar No. 40650
379 West Lake Park
Camdenton, MO 65020
(573) 873-6060
(877) 871-0299 FAX
Rick@RRollings.com

Attorney for Appellant