Appeal No. SC97465

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IN THE SUPREME COURT OF MISSOURI

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EVE SHERRER,
Plaintiff/Appellant,

vs.

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

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On Appeal from the Circuit Court of Jackson County, Missouri
Honorable Robert M. Schieber

Case No. 1216-CV27879

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# SUBSTITUTE BRIEF OF RESPONDENT BOSTON SCIENTIFIC CORPORATION

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## STATEMENT OF FACTS

Appellant/Plaintiff Eve Sherrer ("Appellant") appeals a judgment in favor of Respondents/Defendants Boston Scientific Corporation ("BSC") and C.R. Bard, Inc. ("Bard") (collectively "Respondents"). LF38 at 7219-20.[1] Appellant claimed she sustained injuries from two polypropylene mesh medical devices manufactured by Respondents to treat stress urinary incontinence: BSC's Solyx Single Incision Sling System ("Solyx"), placed in October 2010; and Bard's Align S Urethral Support System ("Align"), placed in January 2011. LF1 at 84-117. After a lengthy two-month trial, involving extensive evidence from both sides about Appellant's medical conditions and Respondents' products, the jury returned verdicts for Respondents. LF38 at 7217.

Appellant appealed the verdicts to the Missouri Court of Appeals for the Western District ("Court of Appeals"). In its opinion, the Court of Appeals affirmed the judgement in favor of BSC and reversed the judgment in favor of Bard. *Sherrer v. Boston Scientific Corporation, et al.*, 2018 WL 3977539 at *26 (Mo. Ct. App. Aug. 21, 2018). Appellant did not seek transfer as to the affirmed judgment in favor of BSC; rather, Bard applied for transfer to this Court, and this Court accepted Bard's application.

[1] This Substitute Brief cites the Legal File by volume and page number (LF[Vol] at [page]); the trial transcript by volume and page number (Tr.[Vol] at [page]); trial exhibits by their identification number and page number ([Ct., Plf., BSC, or Bard] [exhibit number] at [page]); Appellant's Substitute Brief by page number (ASB at [page]); and BSC's Appendix by page number (App. at [page]).

Appellant filed her Substitute Brief on January 7, 2019. In her Substitute Brief, Appellant divided former Point Relied on No. 1 (relating to Bard's 1994 criminal convictions on unrelated heart catheter devices) into two separate Points Relied On – Nos. 1 and 2.[2] ASB at 2, 29, 32-70. In addition, Appellant now argues – **for the first time** – that the Court of Appeals' reversal as to Bard's 1994 criminal convictions warrants reversal **as to BSC.** ASB at 61, 70. Appellant's third and fourth Points Relied On relate, respectively, to the use of allegations in Appellant's Original Petition (Point 3) and the trial court's denial of a mistrial for the brief, inadvertent reference by counsel for Bard to Appellant's settlement with former defendants (Point 4).

In response to these points, pursuant to Rule 84.04(f), BSC provides its own Statement of Facts to provide the Court with the full context of the two-month trial at which these evidentiary rulings were made and, in contrast to Appellant's Substitute Brief, recite the facts in a light favorable to the verdicts.[3]

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[2] The Court of Appeals found Appellant's first Point Relied On "multifarious" and, therefore, "noncompliant with Rule 84.04(d) and preserve[d] nothing for review." *Sherrer*, 2018 WL 3977539 at *2 (citing *Griffitts v. Old Republic Ins. Co.*, No. SC96740, --S.W.3d--, 2018 WL 3235859, at *3, n.6). However, the Court of Appeals exercised its discretion to "review only the first of the two claims raised in Sherrer's multifarious point." *Id.*

[3] *Mengwasser v. Anthony Kempker Trucking, Inc.*, 312 S.W.3d 368, 370 n.1 (Mo. Ct. App. 2010) (appellate court views facts in light most favorable to the jury's verdict).

## I. PROCEDURAL BACKGROUND

### A. The Claims and Defenses

Appellant commenced this lawsuit, entitled *Eve Sherrer vs. Truman Medical Center, Inc. & University Physician Associates*, by filing her Petition for Damages (hereinafter "Original Petition") on October 26, 2012. LF1 at 70-76. The Original Petition asserted medical-malpractice claims sounding in negligence against Truman Medical Center, Inc. ("TMC") and University Physician Associates ("UPA") relating to the informed consent process and performance of multiple "urogynecologic procedures" on October 28, 2010 – one of which included placement of BSC's Solyx. *Id*. Regarding the Solyx procedure, Paragraphs 17(e) and 17(f) of the Original Petition factually alleged that Appellant's surgeon "fail[ed] to follow the manufacturer's instructions in placing the [Solyx] transvaginal mesh" and "failed to attach the [Solyx] 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.'"[4] LF1 at 74-75.

On May 28, 2013, Appellant moved for leave to file a First Amended Petition for Damages (hereinafter "Amended Petition") to file "product liability" claims against BSC

[4] Appellant had multiple surgical procedures on October 28, 2010. In both the Original Petition and Amended Petition, Appellant inaccurately alleged that Dr. Kristin Kruse placed the Solyx. LF1 at 74-75, 99-100. Although Dr. Kruse performed some of the surgical procedures on October 28, 2010, Dr. Peter Greenspan performed the Solyx procedure.

and Bard. LF1 at 81. The trial court granted leave on May 29, 2013 (LF1 at 83), and the Amended Petition was filed. The Amended Petition did not adopt or incorporate by reference the Original Petition but, instead, alleged its own facts, reasserted the medical malpractice claims against TMC and UPA, and added new product liability claims against BSC and Bard. LF1 at 84-117. As was the case with the Original Petition, no counts, claims or allegations were pled "hypothetically," "in the alternative" or "based on information and belief." *Id.* Against BSC, Appellant sought compensatory and punitive damages based on various product liability claims for alleged defects in the design, manufacture, and warnings of the Solyx and the polypropylene used in the device. LF1 at 101-16. BSC denied liability and alleged various defenses, including that the conduct of others, including others' misuse of the product, caused Appellant's injuries, not any defect in the Solyx. LF1 at 138-62. Appellant asserted similar product liability claims against Bard, which likewise denied liability and alleged defenses. LF1 at 101-36.

On November 18, 2014, Appellant dismissed TMC and UPA with prejudice pursuant to a settlement. LF1 at 180-81; Tr.XIII at 5633.

**B. Trial and Post-Trial**

Trial began on November 30, 2015, and continued through February 2, 2016.[5] LF38 at 7219. Appellant asked the jury to return verdicts that Respondents' products were defectively designed and accompanied by inadequate warnings, and these defects, not her doctor's negligence or her other medical conditions, were the cause of her

[5] Appellant rested on January 13, 3016. Tr.IX at 5928.

claimed injuries. LF38 at 7178-83. Importantly, to support her product liability claims against BSC, Appellant presented substantial evidence and argument that Dr. Greenspan **properly placed** the Solyx on October 28, 2010. Tr.II at 617; Tr.V at 2956-2957; Tr.VI at 3876, 4136-37, 4148; Tr.IX at 5897; Tr.XII at 8491-92, 8532. Appellant presented this evidence to show that, after Dr. Greenspan **properly placed** the Solyx, it later "detached" or "dislodged" due to alleged defects, resulting in further incontinence, symptoms, and surgical procedures. Tr.II at 616-17, 812, 816, 821, 1129-1130; Tr.IV at 2568-69; Tr.V at 3183.

Respondents refuted Appellant's claims about their products and presented evidence—consistent with Appellant's factual allegations in her Original Petition—that Dr. Greenspan did not place the Solyx properly during the October 28, 2010 surgery, which resulted in worsened SUI and the need for additional surgery. *E.g.*, Tr.IX at 5864-65, 6353; Tr.X at 6643; Tr.XI at 7256-57, 7544-45. Respondents also presented evidence that Appellant's other medical conditions, including her diagnosed osteoarthritis, hernia, and back problems, were the source of the pain she attempted to attribute to Respondents' medical devices. *E.g.*, Tr.X at 6642-43, 6679, 7125-26.

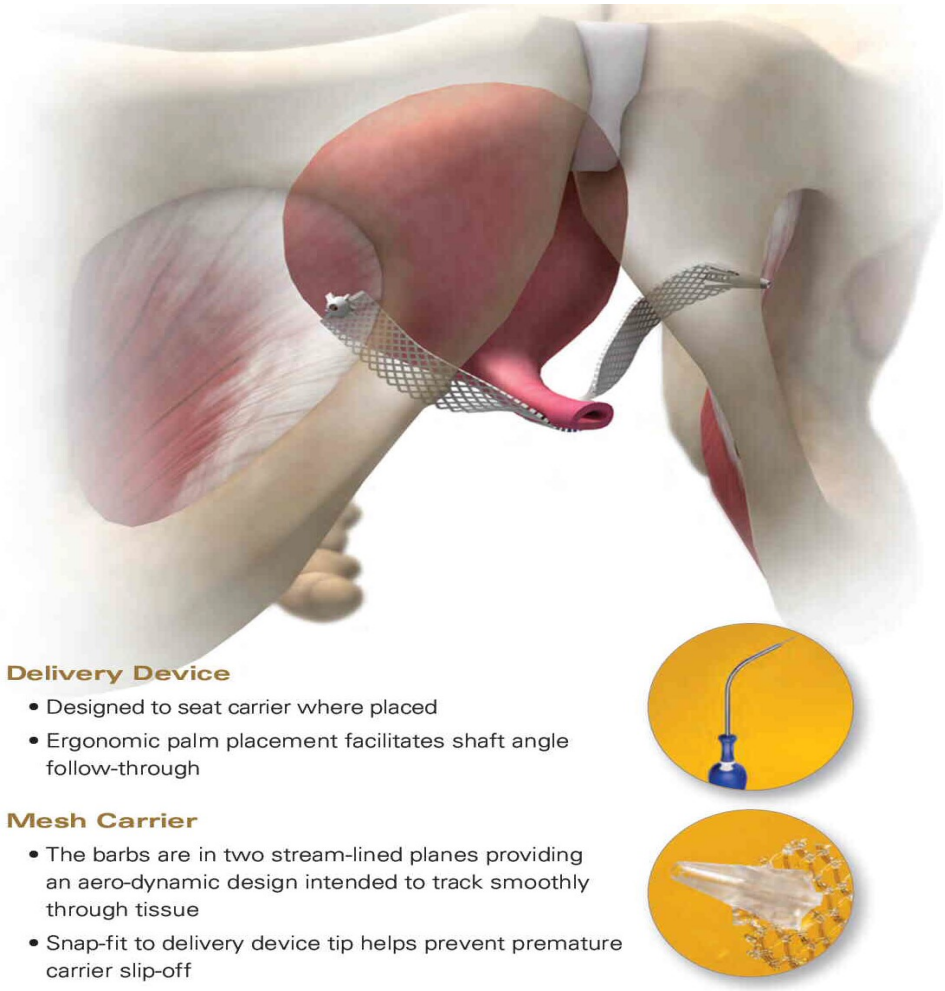
The jury returned verdicts for BSC and Bard, finding them not liable for Appellant's claimed injuries. LF38 at 7217. The trial court accordingly entered judgment in favor of Respondents and against Appellant as to all counts and claims. LF38 at 7219-20.

Appellant filed a Motion for New Trial. LF38 at 7222-66. Respondents opposed the motion. LF38 at 7267-318; LF39 at 7319-511; LF40 at 7512-660. After hearing oral argument, the trial court denied Appellant's motion. LF40 at 7661. This appeal followed.

## II. FACTUAL BACKGROUND

### A. BSC's Solyx

The Solyx is a prescription medical device designed to treat stress urinary incontinence ("SUI"). Tr.VI at 3575, 3705, 4099. SUI is a progressive medical condition in which women leak urine when they cough, laugh, exercise, or engage in similar activities. Tr.VI at 3704-3705; Tr.VIII at 5377. The Solyx is a single-incision, mid-urethral sling, made of polypropylene mesh, that is surgically placed under the urethra to support it, thereby treating symptoms of SUI. Tr.IX at 6256-60. A depiction of the Solyx *in vivo* is below.




P. Ex. 196-002, App. at A2. As demonstrated, the Solyx is approximately 9 centimeters in length and has two "carriers" or "anchors" on each side. Tr.IX at 6282-83; P. Ex. 196, App. at A2. Doctors place the Solyx by making a vaginal incision (which provides access to the urethra), affixing one Solyx carrier to a delivery device (shaped like a trocar), and inserting the Solyx carrier into the obturator internus muscles on each side of the urethra. Tr.IX at 6248-50, 6259, 6262, 6270-72; P. Ex. 196-004, App. at A2-A4. Once placed, the Solyx resides underneath the urethra and treats SUI by providing support (described as a "hammock effect") to the urethra during times of "stress," such as coughing, sneezing, exercising, etc. Tr.IX at 6272, 6314-15.

The polypropylene material used in the Solyx (and Bard Align) has been used in medical devices for over 60 years. Tr.IX at 5955. Thus, years before the Solyx came to market, long-term clinical data existed regarding the safety and effectiveness of polypropylene mesh slings based on prior mid-urethral slings, as well as hernia mesh and other BSC products made from polypropylene. Tr.IX at 5956-57; Tr.X at 6768-69, 6829.

The jury heard about numerous position statements and peer-reviewed literature that deem polypropylene mid-urethral slings, like Respondents' products, safe and effective. Bard Ex. 12155, App. at A5-A8; BSC Ex. 6606, App. at A9-A12; Tr.IV at 2093-2096, 2102-2105, 2119-2121. Medical societies recognize polypropylene mid-urethral slings as the "gold standard" and "worldwide standard of care" for the treatment of SUI. Tr.IV at 2119-20; Tr.V at 3062, 3265-66. Medical experts also agree that polypropylene mesh slings are an appropriate treatment for SUI. Tr.IV at 2067-68, 2103-04; Tr.V at 3115.

In 2008, the U.S. Food & Drug Administration ("FDA") cleared BSC to market the Solyx pursuant to the 510(k) process, finding it was "substantially equivalent" to—*i.e.*, at least "as safe and effective" as—a predicate device already legally marketed. Tr.II at 1026; Tr.X at 6771, 6828. The FDA also reviewed and cleared the Solyx's Directions for Use ("DFU"), which detailed the procedural steps for placing the device and identified potential complications for physicians. Tr.III at 1317-1318; Tr.X at 6827. BSC began marketing the Solyx in 2009. Tr.X at 6765.

### B. Appellant's Medical Conditions and Treatment

On October 20, 2010, Appellant presented to Dr. Kristin Kruse with a diagnosis of pelvic organ prolapse ("POP") and SUI. LF1 at 87; Tr.IV at 2178. Appellant had been diagnosed with POP about six months earlier, for which she had used a pessary and considered getting a hysterectomy. Tr.VIII at 5374-77, 5381. Appellant had been experiencing SUI since the 1990s, for which she had undergone a laparoscopic Burch procedure. Tr.VIII at 5377; Tr.X at 6457, 6462-63.

At trial, where Appellant claimed **all** of her alleged injuries were due to Respondents' mesh in her body, Appellant disclosed (for the first time) the location of her prior, 1998 surgery for SUI. Accordingly, Respondents were finally able to obtain the pertinent medical records regarding the 1998 surgery six weeks into trial. Tr.VIII at 5483-85, 5522-23; Tr.IX at 6362-69; Tr.X at 6457. Those records showed that, during that 1998 SUI procedure, Appellant had polypropylene mesh implanted in her pelvis (but not under her urethra like the Solyx and Align). Tr.X at 6457-60. Unbeknownst to Respondents before trial, this other, undisclosed mesh was placed in 1998 and remained in Appellant's pelvis during the trial of this case. Tr.X at 6679.

By October 2010, Appellant's POP and SUI conditions had become so severe that she decided to proceed with additional surgery. On October 28, 2010, Dr. Kruse

performed a hysterectomy and a surgical repair to address Appellant's POP.[6] Tr.IV at 2179; App. at A143-A146. Dr. Peter Greenspan then implanted the Solyx to treat Appellant's SUI. Tr.VI at 3844. App. at A143-A146 Before this surgery, Appellant had never met Dr. Greenspan. Tr.VI at 3859. Dr. Greenspan placed the Solyx to show Dr. Kruse how to perform the procedure. Tr.VI at 3859-60.

Immediately after Dr. Greenspan implanted the Solyx, Appellant experienced complete incontinence and leaked urine constantly. Tr.III at 1867-68; Tr.VI at 3862-63, 3868; Tr.X at 6624-25; BSC Exs. 5070-3, App. at A13; 5070-4, App. at A22; 5070-6, App. at A30; 5076-2, App. at A32; LF40 at 7546. In other words, her incontinence became worse. *Id.* Appellant also experienced pain in the right lower quadrant of her body. Tr.III at 1868. According to Respondents' experts, Appellant's medical records, and the allegations in Appellant's Original Petition, these problems were due to the improper placement of the Solyx. BSC's urologist expert Dr. David Anderson opined that Dr. Greenspan did not properly place the Solyx. Tr.IX at 6337-38, 6353; Tr.X at 6474-75, 6564, 6624. Specifically, Dr. Anderson testified the Solyx's right-side carrier was not placed properly into the obturator muscle (i.e., it was not attached to the muscle), which was consistent with Appellant's post-operative, clinical presentation and explained why she became **immediately and completely** incontinent after the Solyx procedure

[6] Appellant had second-to-third degree uterine and bladder prolapse, meaning her organs were protruding out of her vagina. Tr.IV at 2193-94. To address it, Dr. Kruse performed a surgical repair. Tr.IV at 2207. The Solyx was not placed to treat POP.

(which was intended to treat SUI, not make it worse). Tr.IX at 6337-38, 6352-53; Tr.X at 6643, 6624-6626. Bard's urogynecology expert, Dr. Michael Kennelly, similarly opined that the sling was not placed properly on the right side, and the medical records supported this opinion. Tr.XI at 7256-57. He also testified that Appellant's continued, post-operative incontinence further demonstrated the Solyx was not placed correctly by Dr. Greenspan. Tr.XI at 7544-45.

On January 3, 2011, 67 days after Dr. Greenspan placed the Solyx, Appellant underwent a revision surgery performed by Dr. Richard Hill. Tr.III at 1868, Tr.VI at 3867-68; P. Ex. 81, App. at A55. Dr. Hill removed the right-side portion of the Solyx, because the anchor on that side had not been placed properly, and he then placed another polypropylene mesh sling, Bard's Align. Tr.IV at 2221; Tr.IX at 6353. Notably, during the procedure, Dr. Hill observed that the Solyx carrier on the right side "was laid right on the ramus of the pubic bone" – i.e., and not in the obturator muscle where it should be located. P. Ex. 81, App. at A55. Although Dr. Hill's placement of the Bard Align mostly corrected the urine leakage that Appellant experienced after Dr. Greenspan implanted the Solyx, it allegedly did not correct the right-sided pain. Tr.III at 1868; Ct. Ex. 15 at 25, App. at A65.

Appellant underwent a second revision surgery on April 25, 2014. Tr.III at 1868-69; Tr.IV at 2298. She had presented to Dr. Shlomo Raz with complaints of right-sided vaginal pain, POP, mixed incontinence, voiding dysfunction, and a history of mesh-augmented reconstructive surgery. Ct. Ex. 15 at 17, App. at A62. Dr. Raz removed the remaining Solyx (on the left side) and the entire Bard Align. Ct. Ex. 15 at 18-19, App. at

A63. Despite removal of the Solyx and Align mesh, Appellant continued to have urine leakage and right lower quadrant pain. Tr.III at 1868-69. At that time, the only mesh that remained in Appellant was the undisclosed polypropylene mesh from the 1998 Burch procedure. Tr.X at 6679.

At trial, Appellant testified she no longer experiences SUI, but still experiences urine leakage and has vaginal scarring, pain, and a change in gait. Tr.VIII at 5413-14, 5436-37; Tr.IX at 5774-75, 5893. Appellant testified that Respondents' mesh slings—not Dr. Greenspan's failure to follow BSC's directions in placing the Solyx—caused these symptoms. Tr.VIII at 5433; Tr.IX at 5905. Because this claim – and **many others** like it by Appellant's other witnesses (e.g., Drs. Rosenzweig and Greenspan) – directly contradicted the factual allegations Appellant made in her Original Petition, Respondents used that pleading to contradict and impeach her and her witnesses. Tr.III at 1343-44; Tr.V at 3201, 3204; Tr.VI at 3932-36, 3933-34; Tr.IX at 5863-64. Respondents also presented evidence that Appellant's right-sided symptoms were due to a combination of other causes, including worsening bone-on-bone osteoarthritis in her right hip, a hernia, vaginal atrophy, spinal issues with nerve impingement, bone anchors from the 1998 procedure, a substantial amount of undisclosed mesh from the 1998 procedure, and other procedures performed in the vaginal area completely unrelated to Respondents' mesh. Tr.X at 6642-43, 7125-26; Tr.XI at 7697, 7731.

### C. The Jury Rejected Appellant's Design Defect Claim

Appellant attempted to prove that Respondents' products were defective because they were made using polypropylene. Appellant's regulatory expert, Dr. Peggy Pence,

opined that the polypropylene in these slings had not been evaluated or tested to confirm its suitability for implantation in the human body. Tr.II at 1040, 1077-79. Appellant's medical expert, Dr. Bruce Rosenzweig, opined that polypropylene mesh slings are allegedly defective and unsafe because polypropylene is not intended to be placed in the human body. Tr.IV at 2459-60, 2535-36. He also testified that, once placed, the polypropylene mesh triggers a chronic, foreign body reaction and shrinks and degrades inside the body. Tr.IV at 2477-80, 2533-36. Appellant's pathology expert, Dr. Vladimir Iakovlev, also opined that polypropylene degrades and becomes stiff, which contributed to Appellant's symptoms. Tr.VII at 4914-18, 4928-30.

Further, with regard to the Solyx in particular (not the Bard Align), Appellant elicited opinion testimony that the Solyx was defective because it was a "fixed length" sling, meaning it could not be adjusted to accommodate the anatomies of different patients. Tr.IV at 2459, 2536, 2605-07; Tr.VI at 3540-41, 3584-85. Appellant also claimed the Solyx's anchoring system was defective and unreasonably dangerous. Tr.IV at 2577, 2583-84. Thus, even when **properly placed**, the Solyx had a propensity to "dislodge" or "detach" after placement. Tr.IV at 2459, 2536, 2605-07; Tr.VI at 3540-41, 3584-85.

Appellant also introduced significant evidence about other complaints and problems concerning mesh slings. For example, Dr. Erin Carey testified at length about mesh "complications" and treatment of those complications, including excisions and explants of mesh. Tr.IV at 1983-88, 2353-56. Appellant also elicited testimony about a "national epidemic of mesh problems," and she referred to this so-called "national

epidemic" in her opening statement. Tr.II at 620-21; Ct. Ex. 11 at 57-60, 217-19, Appellant's Trial Exhibits, Vol. 2. In addition, Dr. Pence extensively discussed Solyx field assessment reports that included adverse event reports from other patients. Tr.II at 1128-34. Dr. Rosenzweig testified extensively about mesh complications in other patients, including those he has treated. Tr.IV at 2414-19. And Dr. Raz testified that pain was a "very common" finding in his other patients with mesh and in his experience removing mesh. Ct. Ex. 15 at 32, App. at A68.

The jury, however, found Respondents' evidence about the safety and effectiveness of polypropylene mesh slings more persuasive. This included Dr. Badylak's testimony that polypropylene mesh devices are the gold standard treatment for SUI, and no other biomaterial has been used so widely used in so many applications for 60 years. Tr.IX at 5955-56. Dr. Badylak also testified that the Solyx polypropylene mesh does not degrade, and he has no concerns with using polypropylene resin in permanently implanted medical devices. Tr.IX at 5953-54, 5991, 6004, 6020. Dr. Badylak further testified that, contrary to Appellant's claims, polypropylene mesh does not shrink and has adequate pore size, weight, and stiffness. Tr.IX at 5974-75, 5990-91, 5998, 6004.

Dr. Anderson similarly testified that he has no concerns about using polypropylene mesh devices because, in his clinical experience, they have been successful. Tr.IX at 6288-89. He testified that mesh removal is generally not necessary because of any problem or defect in the material but, rather, due to complications specific to the patient, such as preexisting surgeries, obesity, or an inability to heal. Tr.IX at 6289-90. After

placing over 500 polypropylene mesh slings, Dr. Anderson has not seen any systemic problem with polypropylene mesh shrinking, contracting, or causing chronic pain. Tr.IX at 6295-96. Dr. Kennelly similarly testified that he has not seen polypropylene mesh degrade, and polypropylene slings are the best treatment for SUI. Tr.X at 7070, 7147.

After weighing all evidence, the jury found for Respondents. LF38 at 7217.

### D. The Jury Also Rejected Appellant's Inadequate Warnings Claim

To support Appellant's failure-to-warn claims, Dr. Pence offered a list of additional warnings she believes BSC should have included in the Solyx DFU. Tr.III at 1240-43, 1246. Among other things, Dr. Pence stated that BSC should have included a warning that the Solyx anchors may "migrate" after placement due to their "failure to properly lodge in the patient's tissue." Tr.III at 1242. Dr. Rosenzweig opined that the Solyx DFU should have warned about the caution statement in the Material Safety Data Sheet ("MSDS") for the polypropylene resin, that BSC did not perform long-term studies on the Solyx or its anchoring system, that complete removal of the Solyx may not be possible, that chronic pain may result, and Solyx mesh can degrade. Tr.IV at 2458-60; Tr.V at 2808, 2817, 2820-21. Appellant also called Dr. Greenspan as a witness. Dr. Greenspan repeatedly testified he **would not have used** the Solyx if he had been warned about the use of Marlex polypropylene, the MSDS and its medical application caution, "a history of the [Solyx] anchors not holding in place," the alleged lack of clinical trials, the weight and pore size of the mesh, and the FDA's 522 order relating to alleged "adverse events" in the Solyx. Tr.VI at 3878-80, 3882, 3888-89, 4138, 4140-41.

Once again, the jury found Respondents' evidence more persuasive. On behalf of BSC, Dr. Anderson testified the Solyx DFU provided an appropriate warning of the risks associated with the Solyx. Tr.IX at 6301-02. Indeed, the DFU was developed according to industry and FDA guidelines and was reviewed by the FDA before it cleared the Solyx and its DFU. Tr.X at 6826-29. After weighing all the evidence supporting and opposing Appellant's failure-to-warn claims, the jury found for Respondents. LF38 at 7217.

## ARGUMENT

### I. RESPONSE TO POINTS 1 AND 2: NO ABUSE OF DISCRETION OCCURRED, AND A NEW TRIAL IS NOT REQUIRED (PARTICULARLY AS TO BSC), BASED ON THE TRIAL COURT'S PROPER EXCLUSION OF IRRELEVANT AND UNFAIRLY PREJUDICIAL EVIDENCE OF BARD'S DECADES-OLD CONVICTIONS ON UNRELATED MEDICAL DEVICES.

The trial court did not err or abuse its discretion in excluding evidence of Bard's convictions because the convictions were irrelevant and unfairly prejudicial in that they were decades old and were irrelevant to any issue in this case. Further, as discussed below, Appellant's latest effort to drag BSC into these two points of error must fail: these 1994 convictions involving Bard's heart catheter products have **no relevance** to BSC or any current or former BSC products. In short, Bard's convictions are meaningless as to BSC or its "credibility." Therefore, this Court's ruling with regard to Points 1 and 2 should not affect the judgment in favor of BSC.

Appellant argues that Bard's 1994 convictions involving heart catheter products (not mesh slings) were admissible, their exclusion prejudiced her, and reversal is required. BSC disagrees.[7] Missouri trial courts should be granted discretion to exclude such inflammatory, irrelevant, and unfairly prejudicial evidence. *Hollingsworth v. Quick*, 770 S.W.2d 291, 295 (Mo. Ct. App. 1989); *Fisher v. Gunn*, 270 S.W.2d 869, 876 (Mo. 1954).

Appellant also has not established that precluding evidence of these remote, collateral matters had a material effect on the outcome of this two-month trial. Rule 84.13(b). In short, reversible error did not occur. To the contrary, even if Appellant had introduced the small portion of John Weiland's videotaped deposition that addressed the 1994 convictions regarding heart catheter products, a different verdict would not have been reached. *Richcreek v. Gen. Motors Corp.*, 908 S.W.2d 772, 778 (Mo. Ct. App. 1995); *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 170 (Mo. Ct. App. 1997) (reversal requires "a grievous error where prejudice cannot otherwise be removed"); Rule 84.13(b). Indeed, given the staggering amount of evidence presented by Appellant in her case-in-chief, it belies logic to suggest that a few additional minutes of video would have changed the jury's verdict. To find otherwise is sheer speculation.

Lastly, Appellant argues – for the first time – that the trial court's purported errors as to Points 1 and 2 warrant reversal as to BSC. ASB at 61, 70. **This is preposterous.**

[7] Because this issue pertains to Bard only, BSC is presenting an abbreviated argument and refers the Court to Bard's Substitute Brief for a full response to Points 1 and 2.

As a threshold matter, Appellant may not make this new argument because "Rule 83.08 prohibits the appellant from asserting claims of reversible error in this Court that were not asserted in the court of appeals." *Garland v. Ruhl*, 455 S.W.3d 442, 450 n.7 (Mo. banc 2015). Arguments not raised in the brief before the court of appeals "are not properly before the Court and will not be addressed." *Barkley v. McKeever Enters., Inc.*, 456 S.W.3d 829, 839 (Mo. banc 2015). "A party may not raise claims for the first time in this Court[.]" *J.A.R. v. D.G.R.*, 426 S.W.3d 624, 629 (Mo. banc 2014); *see also Blackstock v. Kohn*, 994 S.W.2d 947, 953 (Mo. banc 1999). Accordingly, the Court should not entertain Appellant's new argument that reversal on Points 1 and 2 warrants reversal as to BSC.

This conclusion is particularly true where, as here, Appellant's counsel **admitted** that reversal as to Bard's 1994 convictions **should not affect** the judgment in favor of BSC. A few months ago at oral argument before the Court of Appeals, Appellant's counsel stated:

> Q [from the Court of Appeals]: …Even assuming that we saw merit in that point [relating to the exclusion of Bard's 1994 criminal convictions], would that impact the judgment with respect to Boston Scientific?
>
> A [from Appellant's counsel]: **Probably not. I wish I could tell you that it would, but I haven't thought of a good reason why it would.**

*See* oral argument audio at 8:50 – 9:12. (emphasis added). Mr. Manners (arguing for Appellant) was correct: no "good reason" exists to find that exclusion of Bard's remote criminal convictions on heart catheter products should disturb the judgment in favor of

BSC. The reasons are obvious. Bard and BSC are different companies with different people, who make different products. BSC had no involvement in the issues surrounding the heart catheter products. To be sure, admission of Bard's 1994 criminal convictions would provide no evidence, let alone probative evidence, regarding BSC's credibility.[8]

Based on the facts, briefing, and concessions at oral argument, the Court of Appeals properly found that exclusion of "impeachment evidence on the issue of Bard's credibility has **no bearing**, **however, on the judgment in favor of Boston Scientific** and against Sherrer." *Sherrer*, 2018 WL 3977539 at *13 (emphasis added). The Court of Appeals correctly decided this issue, and Appellant's contradictory, last-ditch effort to drag BSC into these points should be rejected.

In sum, while BSC believes the trial court properly excluded this evidence (and trial courts should be granted the discretion to do so), any ruling as to Appellants' Points Relied on Nos. 1 and 2 should not affect the judgment as to BSC.

[8] In fact, Appellant's new argument that Bard's convictions are somehow relevant to BSC demonstrates another reason why trial courts should maintain discretion to exclude this type of evidence. In particular, if Appellant tried to state or suggest at trial that Bard's 1994 convictions on heart catheters were somehow relevant to BSC's credibility, BSC would have a valid objection to the evidence.

## II. RESPONSE TO POINT 3: NO ABUSE OF DISCRETION OCCURRED, AND A NEW TRIAL IS NOT REQUIRED, BASED ON RESPONDENTS' PROPER USE OF APPELLANT'S FACTUAL ALLEGATIONS IN HER ORIGINAL PETITION AS ADMISSIONS AGAINST INTEREST.

The trial court did not err or abuse its discretion because it permitted Respondents to use Appellant's Original Petition in that it is proper to use the factual allegations in an abandoned pleading as admissions against interest.

### A. Introduction

Appellant did not preserve for appellate review most of the cited instances of Respondents' use of the Original Petition. The Court should decline to review those alleged errors. Further, Respondents appropriately used Appellant's factual admissions in her abandoned pleading to rebut and impeach the contrary factual positions she took at trial. Established Missouri law allows parties to use an opposing party's abandoned (and even live) pleadings for that very purpose. At trial, Appellant **repeatedly** told the jury that Dr. Greenspan **properly placed** the Solyx and followed BSC's directions, and the Solyx carrier later detached due to product defects. However, in her abandoned Original Petition, Appellant said the factual opposite—that Dr. Greenspan improperly placed the Solyx and failed to follow BSC's directions to placement of the device. Appellant has no basis to complain about being impeached with her prior factual admissions. The trial court did not err—much less abuse its broad discretion—in allowing this proper use of Appellant's Original Petition.

Regardless, Appellant suffered no prejudice and was not denied a fair trial. The statements in the Original Petition are **Appellant's** statements, and prejudicial error did not occur when the jury heard the statements she made in that pleading. Further, Respondents' use of the Original Petition was limited and well-focused on rebutting contrary facts and argument introduced by Appellant. It was also cumulative of other evidence in this two-month trial, with a transcript spanning nearly 9,000 pages. For example, the jury heard substantially the same facts from Appellant's interrogatory answers (e.g., BSC Ex. 5103, App. at A136-A138; LF40 at 7546-7547) and medical records (e.g., BSC Ex. 5076-2, App. at A132). Appellant also had ample opportunity—through multiple witnesses—to explain her changed factual position, and she did so. That the jury nevertheless found against her does not establish prejudicial error. This Court should affirm.

### B. Standard of Review

BSC agrees the standard of review for this Point is whether the trial court abused its discretion in managing the presentation of evidence. "A ruling within the trial court's discretion is presumed correct, and the appellant bears the burden of showing abuse of discretion and prejudice." *Kearbey v. Wichita Se. Kansas*, 240 S.W.3d 175, 184 (Mo. Ct. App. 2007). An abuse of discretion occurs "when the ruling offends the logic of the circumstances or was so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration." *Williams v. Daus*, 114 S.W.3d 351, 366 (Mo. Ct. App. 2003) (citations omitted). "[I]f reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its

discretion." *Id.* When determining whether the trial court abused its discretion, the appellate court "indulge[s] every reasonable inference in favor of the trial court's ruling." *Id.* at 369.

In addition to proving an abuse of discretion, Appellant must also establish "the error was so prejudicial that it deprived the appellant of a fair trial." *Anuhco, Inc. v. Westinghouse Credit Corp.*, 883 S.W.2d 910, 928 (Mo. Ct. App. 1994); *see also Alberswerth v. Alberswerth*, 184 S.W.3d 81, 100 (Mo. Ct. App. 2006) (reversal requires "a substantial and glaring injustice"). To establish prejudice warranting reversal, Appellant must demonstrate the alleged error "materially affect[ed] the merits of the action," § 512.160.2 RSMo. 2016; Rule 84.13(b), and "changed the result reached," *Richcreek*, 908 S.W.2d at 778; *Letz*, 975 S.W.2d at 170.

### C. The Court of Appeals' Opinion

The Court of Appeals held the trial court abused its discretion in permitting "allegations that had not been abandoned by Sherrer to be used to impeach Sherrer." *Sherrer*, 2018 WL 3977539 at *13. BSC respectfully disagrees with this holding. In fact, in reviewing the occasions where the Original Petition was used with witnesses at trial, the Court of Appeals found three occasions where its use was **appropriate**, or the trial court's rulings could **not** be deemed an abuse of discretion. *See id.* at *18 (stating "Boston Scientific's reference to the Original Petition during Dr. Pence's cross-examination **was proper cross-examination** of an expert witness since Dr. Pence confirmed she had been given the Original Petition to review in advance of forming her expert opinions in the case.") (emphasis added); *id.* (stating with respect to Dr.

Rosenzweig, "[a]nd in any event, **it is not *per se* improper to cross-examine an expert with a legal pleading** to test the expert's opinions in if the pleading was given to the expert to review in advance of forming his opinions in the case.") (emphasis added); *id.* at *20 (finding that, with regard to Ms. Sherrer's examination, "the trial court overruled that objection [i.e., that "the references allegations were not factual assertions"] – **a ruling we do not find to be an abuse of discretion.**") (emphasis added).

The Court of Appeals also held that Appellant was not prejudiced by the use of the Original Petition because its use was "very limited," "often not preserved as error," and "cumulative to other similar evidence about which Sherrer has not complained on appeal." *Id.* at *17. In fact, the Court of Appeals properly recognized that "Sherrer's appellate brief [was] devoid of *any* analysis regarding the effect of the trial court's abuse of discretion on the merits of her action." *Id.* at * 17 (emphasis in original). BSC agrees with these findings. BSC further notes that Appellant has now included an argument regarding purported prejudice in her Substitute Brief (ASB at 88-90), and this new argument is improper under Rule 83.08 because it was not made in the Court of Appeals. Rule 83.08; *Garland*, 455 S.W.3d at 450 n.7; *Barkley*, 456 S.W.3d at 839; *J.A.R.*, 426 S.W.3d at 629; *Blackstock*, 994 S.W.2d at 953. Thus, the Court should not consider this new argument. Regardless, Appellant's new argument fails on its merits.

### D. Appellant Did Not Preserve Objections on this Point

As recognized by the Court of Appeals, Appellant did not preserve most objections to the use of the Original Petition. *Id.* at *17-20. BSC agrees. Appellant first complains about Bard's use of the Original Petition in opening statement. ASB at 72

(*citing* Tr.II at 900, l. 13 – 901, l. 5). However, Appellant did not object to this portion of Bard's opening statement, and this objection is not preserved. *Quilty v. Fischer*, 393 S.W.3d 130, 132 (Mo. Ct. App. 2013). Appellant has also changed her argument because, as noted by the Court of Appeals, "Sherrer did not identify during this argument any specific references that had been made to the Original Petition, and has not afforded this court with any citations to improper references to the Original Petition during opening statement." *Sherrer* 2018 WL 3977539 at *17. Either way, the objection to Bard's opening statement is not preserved for review. *Id.*; *see also Gamble v. Browning*, 379 S.W.3d 194, 204-05 (Mo. Ct. App. 2012).

Appellant also complains about BSC's use of the Original Petition with Dr. Rosenzweig. ASB at 73 (*citing* Tr.V at 3204). Once again, the Court of Appeals observed that "Sherrer did not object to the use of the Original Petition during Dr. Rosenzweig's cross-examination on the basis asserted as error in her point relied on." *Sherrer* 2018 WL 3977539 at *18. This conclusion is accurate, as counsel objected on the basis that it was improper to cross-examine an expert with a legal pleading. Tr.V at 3201. In addition to being incorrect (i.e., an expert may be cross-examined with a pleading), this objection is different than the error asserted here. Thus, Appellant's objection to use of the Original Petition with Dr. Rosenzweig is not preserved for review. *Gamble*, 379 S.W.3d at 204-05.

Appellant references the use of the Original Petition with Dr. Greenspan. ASB at 73 (*citing* Tr.VI at 3932-36). As noted by the Court of Appeals, the only objection Appellant made was that "the questioning of Dr. Greenspan was 'going on and on' after

Dr. Greenspan had been asked, *without objection,* about [Appellant's allegations in her Original Petition regarding Solyx placement]." *Sherrer* 2018 WL 3977539 at *19 (emphasis in original); *see also* Tr.VI at 3935. As this shows, Appellant did not object to the use of the factual allegations in the Original Petition, and the subsequent objection (i.e., "the questioning … was 'going on and on'") is different than the allegation of error presented in this point.[9] Thus, Appellant did not preserve her objection to use of the Original Petition with Dr. Greenspan. *Gamble*, 379 S.W.3d at 204-05.

Appellant also complains about Bard's cross-examination of Ms. Sherrer. ASB at 73. The Court of Appeals recognized that counsel's statements at Tr.VIII 5485-87 were simply a "reminder that any references to the Original Petition (none of which had yet occurred) should be limited to factual and not legal assertions[.]" *Sherrer*, 2018 WL 3977539 at *19. This "reminder" is not an objection, occurred prior to the use of the Original Petition, and preserves nothing for review. *Quilty*, 393 S.W.3d at 132.

Appellant also cites BSC's cross-examination of Ms. Sherrer. ASB at 73-74 (*citing* Tr.IX at 5771-73, 5862-64). No objections were made to the questions at these portions of the transcript, and Appellant did not preserve any error with respect to BSC's questioning of Ms. Sherrer. *Quilty*, 393 S.W.3d at 132.

Appellant complains about Bard's questioning of Dr. Kennelly. ASB at 74 (citing Tr.XI at 7487-88). Once again, no objections were made, and error is not preserved. *Quilty*, 393 S.W.3d at 132.

[9] The basis of the objection is also unclear and insufficient to preserve error.

Lastly, Appellant complains about references to the Original Petition during closing argument by BSC and Bard. ASB at 74 (*citing* Tr.XIII 8636-37, 8666, 8702-04). No objections were made during these portions of closing arguments, and no claim of error is preserved. *Quilty*, 393 S.W.3d at 132.

For these reasons, Appellant did not preserve the vast majority of her claims of error with regard to use of the Original Petition, and the Court should decline to review these alleged instances of error and affirm the ruling of the Court of Appeals.

### E. No Abuse of Discretion Occurred in Allowing Respondents to Use Appellant's Factual Admissions in Her Original Petition

#### 1. Context Is Important

Appellant's criticisms of BSC's and Bard's use of the Original Petition are devoid of important factual context. Appellant has **always alleged** that Dr. Greenspan improperly placed the Solyx anchor, and he failed to follow BSC's procedural instructions with regard to placing the device. LF1 at 74-75, 100. Once trial started, Appellant's position changed dramatically. At trial, Appellant repeatedly claimed that Dr. Greenspan properly placed the device, and the Solyx anchor later "dislodged" or "detached" due to alleged defects. *See* § E.4., *infra* (discussing references at trial).

The reason Appellant changed her position was obvious: if Dr. Greenspan improperly placed the device, proving her product liability claims against BSC became much more difficult because the Solyx anchor did not "detach" due to purported defects in the device. Rather, the anchor was never "attached" from the start due to Dr. Greenspan's improper placement. Moreover, when Appellant called Dr. Greenspan

as a witness in her case-in-chief, it was patently obvious that Dr. Greenspan had been convinced to testify favorably to Appellant and adversely to BSC. Indeed, Appellant's counsel asked numerous objectionable questions of Dr. Greenspan that elicited opinion testimony that, if Dr. Greenspan had known of alleged defects in the Solyx, he never would have used the device. Tr.VI at 3878-80, 3882, 3888-89, 4138, 4140-41. Dr. Greenspan's willingness to offer this testimony became clear on cross-examination when he disclosed that he had met in person and conferred telephonically on multiple occasions with Appellant's counsel **during trial** and was told about the parties' positions. Tr.VI at 3912-13, 3921-27. In fact, Dr. Greenspan was informed that, as part of its trial strategy, BSC was blaming Dr. Greenspan for Ms. Sherrer's outcome.[10] Tr.VI at 3921-22.

In summary, Appellant has always claimed that Dr. Greenspan did not place the Solyx anchor into tissue, and it was "dislodged" or "detached" from the start. Once trial started, that position changed completely. Rather than blaming Dr. Greenspan, Appellant met with him during trial, informed him of the parties' trial positions, and convinced him to testify adversely to BSC. And he did so as a **friendly** witness to Appellant. Under this set of facts, BSC properly used the factual allegations in the Original Petition (Paragraphs

[10] After discovering that Dr. Greenspan had conferred and met with Appellant's counsel during trial, BSC and Bard moved to strike Dr. Greenspan's testimony on the basis that Appellant violated a pre-trial order regarding sequestration of witnesses. LF34 at 6456-6485.

17(e) and 17(f) in particular) as admissions against interest or for purposes of impeachment.

### 2. Using Pleadings at Trial is Not "Odious"

Appellant argues that using pleadings at trial is inappropriate and "generally regarded as odious in this state." ASB at 74. This argument overlooks the "general rule" that "allegations or admissions of fact contained in pleadings upon which a case is tried are binding on the pleader." *Mays-Maune & Associates, Inc. v. Werner Brothers, Inc.*, 139 S.W.3d 201, 206-07 (Mo. Ct. App. 2004) (*citing Sayers v. Bagcraft Corp. of Am., Inc.*, 597 S.W.2d 280, 282 (Mo. Ct. App. 1980). The Court of Appeals also recognized this "general rule." *Sherrer*, 2018 WL 3977539 at *14 (stating, "[a]s a general rule, 'it is clear … that a pleading filed by an attorney on behalf of his client is a statement of the client for purposes of using the pleading as an inconsistent statement."). For these reasons, Missouri law has long recognized **the right** to use pleadings at trial, subject to exceptions discussed below. Thus, if a party says one thing in her pleadings but, at trial, says the exact opposite (as here), her opponent is generally entitled to show the discrepancy to the jury. And, doing so is not "odious."

### 3. The Original Petition Is an Abandoned Pleading

Once Appellant filed her Amended Petition, the Original Petition became abandoned. This position is well-supported by established Missouri law, and no reason exists to rule this issue as a "matter of first impression" and depart from that settled law. *Sherrer*, 2018 WL 3977539 at *16.

Under Missouri law, "[w]hen an amended petition is filed, the original petition is abandoned by the subsequent filing." *Brandt v. Csaki*, 937 S.W.2d 268, 274 (Mo. Ct. App. 1996) (*citing Evans v. Eno*, 903 S.W.2d 258, 260 (Mo. Ct. App. 1995)). And, contrary to the Court of Appeals' belief that this case presented an issue of "first impression," this Court considers an original petition abandoned **even if** the amended petition reasserts some allegations in the original petition. For instance, in *Carter v. Matthey Laundry & Dry Cleaning Co.*, 350 S.W.2d 786, 791 (Mo. 1961), this Court found the original petition was an abandoned pleading, admissible as an admission against interest, even though the "subject matter of the original petition was incorporated as Count 1 in an amended petition and other counts were added[.]" In fact, this Court stated in *Carter*:

> [t]he original petition tended to show that Appellant's claim with regard to customer accounts and good will had not occurred to him until sometime after the filing of his original petition and **was an afterthought**. For this reason, it was properly admitted in evidence.

*Id.* (emphasis added); *see also Trimble v. Pracna*, 51 S.W.3d 481, 491 (Mo. Ct. App. 2001) (the original petition is an "abandoned pleading" upon the filing of an amended petition, and "[i]t matters not that the amended petition duplicated allegations that had been in the earlier petition").

It is undisputed that BSC and Bard used Appellant's Original Petition on a limited basis with certain witnesses. Under established Missouri law, Appellant abandoned her Original Petition once she filed her Amended Petition. The inclusion of the Counts

against TMC and UPA in the Amended Petition does not change this analysis or warrant a "first impression" holding that departs from settled Missouri law.

**4. Abandoned – And Even Live – Pleadings May Be Used as Admissions Against Interest or for Impeachment**

"Missouri courts have consistently held that abandoned pleadings containing statements of fact are admissible as admissions against interest against the party who originally filed the pleading." *Brandt*, 937 S.W.2d at 274; *see also Bledsoe v. Northside Supply & Dev. Co.*, 429 S.W.2d 727, 730 (Mo. 1968) ("The original pleading is admissible against the pleader in the proceeding in which it was filed, as evidence of admissions against interest contained therein.") (quotation marks omitted); *Carter*, 350 S.W.2d at 791 (affirming admission of abandoned pleading from the same case); *Knorp v. Thompson*, 175 S.W.2d 889, 899 (Mo. 1943) (same). Factual admissions in abandoned pleadings constitute "competent evidence" that can be used at trial "even though in the form of conclusions as to the ultimate fact at issue." *Brandt*, 937 S.W.2d at 274 (quoting *DeArmon v. City of St. Louis*, 525 S.W.2d 795, 803 (Mo. Ct. App. 1975)). "Even admissions that touch incidentally on a fact in an action serve as admissible evidence." *Waters v. Barbe*, 812 S.W.2d 753, 759 (Mo. Ct. App. 1991).

A party may also use factual admissions against interest in an opponent's abandoned pleading "to impeach that party's testimony or other evidence." *Id.* (citing *Jimenez v. Broadway Motors, Inc.*, 445 S.W.2d 315, 317 (Mo. 1969)). For example, in *Lazare v. Bean*, 782 S.W.2d 804, 805-06 (Mo. Ct. App. 1990), the court held no error occurred in allowing cross-examination of a plaintiff with factual allegations in his

abandoned petition, which were inconsistent with the plaintiff's allegations at trial about a dismissed co-defendant. Likewise, in *Hoffman v. Illinois Terminal Railroad Co.*, 274 S.W.2d 591, 594 (Mo. Ct. App. 1955), the court held the trial court improperly **restricted** defendant's cross-examination of plaintiff "concerning certain allegations in the petition which were at variance with his testimony." *Id.* In so holding, the court stated, "[t]he variance between plaintiff's pleading and plaintiff's testimony bore directly on plaintiff's credibility as a witness. The subject of the proposed cross-examination was relevant, competent and material." *Id.* Further, the court characterized the ability to cross-examine "with respect to apparent discrepancies between the allegations of her pleadings and her testimony at trial" as a **"right."** *Id.* (emphasis added) (quoting *Kroger Grocery & Bakery Co. v. Stewart*, 164 F.2d 841, 844 (8th Cir. 1947)).

Lastly, Missouri cases have also addressed these considerations in connection with "live" pleadings, and not just abandoned pleadings. For instance, in *Wehrli v. Wabash Railroad Co.*, 315 S.W.2d 765, 773-74 (Mo. 1958), this Court addressed the use of portions of a petition and amended answer and stated, "this much being generally conceded, it follows that a *party may* at any and all times *invoke the language of his opponent's pleading on that particular issue* as rendering certain facts *indisputable*." (emphasis in original). Ultimately, the Court concluded that prejudicial error did not occur with the use of these pleadings. *Id.* at 773. *See also Bank of America, N.A. v. Stevens*, 83 S.W.3d 47, 56 (Mo. Ct. App. 2002) (stating, "[f]or active pleadings, the general rule is that one may use an active pleading to impeach[.]").

Indeed, even the cases cited by Appellant address the use of "live" pleadings, and not abandoned pleadings. *See Lewis v. Wahl*, 842 S.W.2d 82, 86-89 (Mo. banc 1992), (addressing use of a live cross-claim); *Johnson v. Flex-O-Light Mfg. Corp.,* 314 S.W.2d 75, 79 (Mo. 1958) (noting, "[in] this case the pleadings offered for impeachment were those upon which the case was being tried."); *Macheca v. Fowler*, 412 S.W.2d 462, 464 (Mo. 1967) (addressing use of the active petition).[11] Given these cases, one commentator has stated:

> [a]s a practical matter, however, **the use of abandoned allegations as evidence does not appear to be substantively different than the use of allegations in active pleadings.** Factual allegations can be used as evidence but conclusions of law cannot. It is suggested that the only real difference in the use of abandoned and active pleadings in trial is that the current pleadings define the issues before the court, while abandoned

[11] Indeed, *Macheca* states, "[t]here are admissions in pleadings which are conclusively binding upon the party making them. There are other such admissions of a milder character which are not conclusive but **which are proper evidence as constituting statements against interest.** The latter class of admissions in pleadings occupies the same place in a trial as other admissions against interest no matter how made." *Id.* at 464 (emphasis added) (*quoting Stolte v. Larkin*, 110 F.2d 226, 233 (8th Cir. 1940)). The Court in *Macheca* then addressed whether the admissions at issue fell into these categories.

pleadings do not. Factual allegations in both may be admitted into evidence.

15 Mo. Prac., Civil Rules Practice § 55.01:2 (2018) (citing cases) (emphasis added). In light of the above, it is clear that Missouri authorities have permitted use of both abandoned and live pleadings at trial.[12]

Here, Appellant's operative pleading at trial was her Amended Petition. By filing that pleading, Appellant abandoned her Original Petition. *See Brandt*, 937 S.W.2d at 273 ("When an amended petition is filed, the original petition is abandoned by the subsequent filing."). In the Original Petition, Appellant alleged in Paragraphs 17(e) and 17(f) that Dr. Greenspan "fail[ed] to follow the manufacturer's instructions in placing the [Solyx] transvaginal mesh" and "failed to attach the [Solyx] anchor to the right side of the

[12] This is another reason why the Court of Appeals' "first impression" holding is contrary to law. *Sherrer*, 2018 WL 3977539 at *16. In other words, the Court of Appeals found, as a matter of first impression, "that allegations in an original petition that are reiterated in an inconsistent amended petition are not abandoned, and are therefore inadmissible as inconsistent statements or admissions against interest." *Id.* This holding is inconsistent with *Carter*, 350 S.W.2d at 791, as well as other Missouri cases that permit use of allegations in live pleadings. Under these cases, BSC could have used the same allegations in Appellant's Amended Petition for impeachment and/or admissions against interest.

transvaginal mesh, and, therefore, as a result, the anchor migrated to the 'ramus of the pubic bone' causing a 'palpable painful bump.'" LF1 at 74-75.

At trial, however, Appellant **repeatedly** said the exact opposite:

- Starting in opening statement, Appellant argued that Dr. Greenspan followed BSC's directions to properly implant the Solyx. Tr.II at 617-18.
- Appellant asked her retained medical expert, Dr. Rosenzweig, the following:

  Q: Based on your review of the actual records that are kept at the time and your experience and the testimony in this case, do you have an opinion regarding whether or not Dr. Greenspan misplaced the Solyx device?

  A: Yes. I do not think he misplaced the Solyx device. Tr.V at 2956.
- In follow-up to this testimony, Dr. Rosenzweig opined that the Solyx anchor detached "following surgery[.]" Tr.V at 2956-57.
- In Dr. Greenspan's direct examination, he testified that, during the Solyx procedure, he "saw that the mesh was properly placed in either side in the obturator fascia on both sides of the pelvis and stayed in place." Tr.VI at 3876.
- On re-direct examination, Dr. Greenspan was asked many questions about his opinion that the Solyx anchor was properly placed and migrated after it was placed. Tr.VI at 4136-37.
- Later in re-direct examination, Dr. Greenspan was asked:

Q: (By Mr. Davis) All right. Now, is that true or false that the physician who put in the Solyx put it in incorrectly?

A. That's false. I definitely put it in correctly. Tr.VI at 4148.

- After seeing Dr. Greenspan testify, Ms. Sherrer volunteered on direct examination that Dr. Greenspan's "sincerity" and "authenticity … took away that doubt in [her] mind" that Dr. Greenspan "put it [the Solyx] in the way he was trained to[.]" Tr.IX at 5897.
- In closing argument, Appellant reiterated Dr. Greenspan's testimony that he "put that thing in there just the way they [BSC] taught me, just the way I learned." Tr.XII at 8491-92, 8532. Appellant even attacked BSC for taking a contrary position, arguing "[b]ut how dare he say he put that thing in there right. How dare he say that. And they attacked him. They attacked him that whole time he was on there." Tr.XII at 8532.

Thus, from start to finish, Appellant argued and elicited testimony that was directly at odds with the allegations in her Original (and Amended) Petition. And, she did so in an undisclosed effort to embrace Dr. Greenspan and fix liability on BSC. Tr.II at 616-17, 812, 816, 821, 1129-1130; Tr.IV at 2568-69; Tr.V at 3183.

Under these circumstances, BSC had a "right" to show the jury the dramatic discrepancy between Appellant's position at trial and the allegations in her Original Petition. *Hoffman,* 274 S.W. 2d at 594. Thus, the trial court did not abuse its discretion in allowing Respondents to use the factual allegations in Appellant's Original Petition for this legally-authorized purpose. *See, e.g.*, *Bledsoe*, 429 S.W.2d at 730 (affirming use of

abandoned pleading); *Carter*, 350 S.W.2d at 791 (same); *Knorp*, 175 S.W.2d at 899 (same); *Brandt*, 937 S.W.2d at 274 (same); *Lazare*, 782 S.W.2d at 805-06 (same); *see also Wehrli,* 315 S.W.2d at 773-74 (permitting use of live pleading); *Hoffman*, 274 S.W.2d at 594 (finding the trial court erred in limiting cross-examination with a live pleading).

### 5. The Use of the Original Petition Did Not Impede Appellant's Procedural Rights Under Rule 55.10

To avoid the general rule and the effect of **her statements** in the Original Petition, Appellant tries to pigeon-hole Paragraphs 17(e) and 17(f) of the Original Petition into the two exceptions to the general rule – specifically, that use of the Original Petition impeded her rights under Rule 55.10, and the subjects of Paragraphs 17(e) and 17(f) stated legal conclusions. Both arguments fail, and BSC will address each in turn.

Appellant contends that Paragraphs 17 and 18 of that pleading are "inconsistent pleadings." ASB at 76. In making this argument, Appellant simply assumes the factual assertions in the medical negligence claims against TMC and UPA are inconsistent with the product liability claims against BSC and Bard because they are contained in separate counts in the Original Petition. The fact that the malpractice claims were pled in separate counts, however, does not make them "inconsistent" with the product liability claims.

This point was demonstrated in *Luyties Pharmacal Co. v. Frederic Co., Inc. v. Western Casualty and Surety Co.*, 716 S.W.2d 831 (Mo. Ct. App. 1986). There, the appellant argued that "an admission made by it in Count I [was] not admissible against it on an issue raised in Count III." *Id.* at 833. Appellant made the same argument

presented here: that "where inconsistent counts or defenses are pleaded, the admissions in one of them cannot be used to destroy the effect of the other." *Id.* (emphasis omitted) (*citing Jenkins v. Simmons*, 472 S.W.2d 417 (Mo. 1971)). The court of appeals rejected this argument, noting that "Count I [was] based on a breach of contract theory and Count III [was] based on a negligence theory. **The two theories of recovery are neither inconsistent nor mutually exclusive."** *Id.* (emphasis added). The court also noted "[a]n allegation of fact in an answer is binding on the pleader and precludes the party from afterwards maintaining a contrary or inconsistent position." *Id.* (*citing E.C. Robinson Lumber Co. v. Ladman*, 255 S.W.2d 72, 78 (Mo. Ct. App. 1953)). While *Luyties* did not involve the use of a pleading at trial, it demonstrates the fallacy of Appellant's assumption that her medical negligence claims are inconsistent with product liability claims against BSC and Bard relating to alleged defects in the Solyx and Align devices.

Similarly, in *City of Dardenne Prairie v. Adams Concrete and Masonry, LLC*, 529 S.W.3d 12 (Mo. Ct. App. 2017), the court of appeals found that Rule 55.10 did not preclude "judgment as a matter of law … based on the allegations asserted by the City in its pleadings." *Id.* at 17. After evaluating Rule 55.10, the court stated:

> We find no basis in the record to release the City from the legal effect of its express factual assertion that the Board did not approve Exhibit 1 [a contract between the City and Adams Concrete] by ordinance. We are not persuaded that the City was pleading the facts relating to Exhibit 1 in the alternative. The City argues on appeal that the Board approved Exhibit 1 by ordinance as applied to Count VI of its petition, but the Board did *not*

> approve Exhibit 1 as it applied to Adams Concrete's counterclaim. **We find this argument disingenuous and not supported by the record. The City cannot, in good faith and based on genuine doubt, have it both ways**. The City was in the position to know, or easily find out, whether or not its own Board approved Exhibit 1. We are not persuaded that the City has genuine doubt as to whether its own Board approved Exhibit 1 by ordinance.

*Id.* at 18 (emphasis added). Likewise, Appellant cannot "have it both ways." Either Dr. Greenspan properly placed the Solyx (and followed BSC's instructions), or he did not. As in *City of Dardenne Prairie*, Appellant cannot in good faith and under the guise of "inconsistency" claim that Dr. Greenspan improperly placed the Solyx and did not follow BSC's instructions, and later at trial state the exact opposite in a calculated, undisclosed effort to fix liability on BSC. Appellant is bound by her factual allegations on this point.

Likewise, in *Rauch Lumber Co. v. Medallion Development Corp.*, 808 S.W.2d 10, 12-13 (Mo. Ct. App. 1991), the court addressed whether the trial court erred in admitting an "alternative cross-claim … as an admission against interest[.]" *Id.* at 12. In upholding the trial court's ruling, the court stated that "alternative fact allegations that are not based on genuine doubt may be considered admissions against interest." *Id.* Indeed, the court observed that "[s]uch a holding is consistent with Rule 55.03, which states that an attorney, by singing a pleading, certifies that 'to the best of his knowledge, information, and belief,' the pleadings are 'well grounded in fact,' and not interposed 'to cause unnecessary delay or needless increase in the cost of litigation." *Id.* Because there was

no genuine doubt regarding the allegations in the cross-claim, such allegations were properly used at trial. *Id.* at 13.

Here, the medical negligence claims against TMC and UPA were not "inconsistent or alternative pleadings[.]" ASB at 78. The negligence claims against TMC and UPA were founded on alleged acts and omissions that preceded, or occurred during, Appellant's October 28, 2010 surgeries. On the other hand, the product liability counts against BSC and Bard related entirely to alleged defects in the Solyx and Align devices and the polypropylene material used in the devices. To support the product liability claims, and over the course of the two-month trial, Appellant introduced weeks of evidence of corporate conduct, medical literature relating to polypropylene mid-urethral slings, FDA regulation of the devices at issue (both pre-market and post-market), medical device reports on the devices in issue, statements in Material Safety Data Sheets, purported "national epidemic[s] of mesh problems," and opinion testimony from multiple doctors whether such mesh devices were appropriate to place in the human body and treat SUI. **Importantly, none of this evidence had <u>any</u> relationship to the medical negligence claims, which were founded on the conduct of a specific doctor (Dr. Greenspan) on a specific date (October 28, 2010). Thus, just as in *Luyties Pharmacal Co.*, the medical negligence claims were "neither inconsistent nor mutually exclusive" with the product liability claims.** *Luyties Pharmacal Co.*, 716 S.W.2d at 833.

Other facts support this point. Appellant never claimed prior to trial that her medical negligence counts were "alternative," "inconsistent," or "based on genuine

doubt." *Rauch Lumber Co.*, 808 S.W.2d at 12. To the contrary, as required by Missouri law, Appellant's counsel executed an affidavit stating that the claims were supported by expert opinion. LF1 at 77-79. Both the Original Petition and Amended Petition were signed by counsel pursuant to Rule 55.03, which means the claims have factual support. To be sure, Appellant's argument that the medical negligence claims were "inconsistent" occurred only after she took a different position at trial (i.e., Dr. Greenspan properly placed the Solyx and followed BSC's procedural instructions) and was confronted with the opposite facts in her Original Petition. To now claim inconsistency is "disingenuous." *City of Dardenne Prairie*, 529 S.W.3d at 18.

In summary, this is not a situation where the use of the Original Petition at trial impeded Appellant's right to inconsistent pleading under Rule 55.10. The medical negligence and product liability claims were founded on entirely different facts and involved different theories of recovery. The claims were not inconsistent or mutually exclusive. And, Appellant never claimed (or pled) that the medical negligence theories were alternative, inconsistent, or based on genuine doubt. Those arguments occurred only after Appellant took a different position at trial – all in an effort to further her product liability claims and impose liability on BSC and Bard.

### 6. Factual Admissions Against Interest, Not Legal Conclusions.[13]

Appellant argues the allegations Respondents highlighted from her Original Petition were legal conclusions, not factual admissions. "General allegations that simply state that a plaintiff's damages were caused by some conduct on the part of defendant...are legal conclusions, not admissions of fact." *Anuhco*, 883 S.W.2d at 930-31 (quoting *Fahy v. Dresser Indust., Inc.*, 740 S.W.2d 635, 642 (Mo. banc 1987)). But that principle is inapplicable here. The allegations which Respondents used in Paragraphs 17(b), (e), and (f) and 18(a) of Appellant's Original Petition are not the type of generalized, unelaborated allegations that the defendant's conduct caused the plaintiff's damages, which the *Fahy* and *Anuhco* courts found to be legal conclusions and not assertions of fact.

For example, during trial, BSC focused on Paragraphs 17(e) and 17(f) of the Original Petition, which allege specific facts contradicting those Appellant advanced at trial. Starting in opening statement, Appellant argued that her surgeon followed BSC's directions to properly implant the Solyx. Tr.II at 617-18. Drs. Rosenzweig and Greenspan both testified that Dr. Greenspan placed the Solyx in the correct location. Tr.V at 2956-57; Tr.VI at 3876, 4136-37, 4148. Even Appellant testified "emphatically" there was "absolutely no question in [her] mind" that her surgeon properly placed the

[13] BSC addresses this issue because it is raised in Appellant's Substitute Brief. ASB at 82-84. The Court of Appeals, however, did not address this argument in its Opinion. *Sherrer*, 2018 WL 3977539 at *15-16, n. 22 and n. 24.

Solyx "exactly" the way he was instructed to and ensured "both sides were in there firmly." Tr.IX at 5867, 5897.

BSC recognized—and advised the trial court—that Appellant opened the door to being impeached with prior inconsistent factual statements. Tr.II at 754, 920. BSC then cross-examined witnesses with two specific factual statements in Appellant's abandoned Petition:

- Her surgeon "fail[ed] to follow the manufacturer's instructions in placing the transvaginal mesh"; and
- Her surgeon "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.'"

LF1 at 74-75; Tr.III at 1343-44; Tr.V at 3201, 3204; Tr.VI at 3932-36, 3933-34; Tr.IX at 5863-64.

These detailed allegations of particular facts are fundamentally different from general allegations of 'my injury was caused by defendant's negligence' that constitute inadmissible legal conclusions. The allegations in Paragraphs 17(b) and 18(a) of the Original Petition, which Bard used, were likewise detailed factual allegations, not general assertions of negligence causing harm. Tr.II at 900-01; Tr.VIII at 5466-50, 5564-66; Tr.XI at 7487-88. The trial court correctly allowed Respondents to use these factual admissions against interest in Appellant's abandoned pleading to impeach and contradict her attempt to prove contrary facts at trial.

Apparently recognizing the factual nature of the portions of the Original Petition at issue, Appellant also argues the allegations were "at least a mix of legal conclusions and facts" and should have been excluded. ASB at 83 (*citing Amador v. Lea's Auto Sales & Leasing, Inc.*, 916 S.W.2d 845 (Mo. Ct. App. 1996)). This is incorrect. First, as discussed, the particular allegations that Respondents used concerned specific facts; Respondents did not focus the jury on general conclusions of negligence. Second, *Amador* explained that whether to allow use of mixed allegations of facts and legal conclusions is ultimately a discretionary call by the trial judge. *Id.* at 850. Given the nature of the allegations Respondents highlighted, the circumstances of this case, and for all of the reasons expressed herein, the trial judge did not abuse his discretion in allowing Respondents to impeach the facts underlying Appellant's case with factual admissions against interest in her Original Petition.[14]

For the above reasons, Respondents' limited use of the Original Petitions with certain witnesses did not fall into any exceptions to the general rule that use of pleadings may be used at trial for purposes of impeachment and/or admissions against interest.

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[14] Further, if Appellant truly believed certain allegations were legal conclusions, she could have requested redaction. In fact, at one point during trial, the court ruled that BSC should redact references to the lawsuit against TMC and UPA, but Appellant declined and allowed BSC to introduce the un-redacted document. Tr.VI at 3891, 3903. By not requesting redaction, Appellant waived the right to complain about the jury hearing similar un-redacted allegations from her original petition regarding her doctor's conduct.

### F. No Prejudice Resulted from Respondents' Limited Use of Appellant's Original Petition

Even if the Court accepts Appellant's (erroneous) position that the trial court abused its discretion, the Court still cannot reverse because Appellant cannot establish prejudice—*i.e.*, that the claimed error materially affected the merits of the action, changed the result, and thereby amounted to a substantial and glaring injustice that denied Appellant a fair trial. To the contrary, if error occurred, it was harmless.

#### 1. This New Argument Should Not Be Considered

As noted, the Court of Appeals observed that "Sherrer's appellate brief [was] devoid of *any* analysis regarding the effect of the trial court's abuse of discretion on the merits of her action." *Sherrer*, 2018 WL 3977539 at *16 (emphasis in original). The Court of Appeals was correct: Appellant did not make this argument in the court below. That being the case, Appellant may not make it now. *Garland*, 455 S.W.3d at 450 n.7; *Barkley*, 456 S.W.3d at 839; *J.A.R.*, 426 S.W.3d at 629; *Blackstock*, 994 S.W.2d at 953. Accordingly, this new argument should not be considered. *See* ASB at 88-90.

#### 2. Appellant Cannot Establish Unfair Prejudice

Appellant's new argument also fails in substance for multiple reasons. First, the factual allegations in the Original Petition regarding Dr. Greenspan's placement of the Solyx (and whether he followed BSC's placement instructions) were highly relevant to issues injected into the case by **Appellant herself**. In other words, this is not a case where the use of the Original Petition injected a collateral, irrelevant, and/or unfairly prejudicial matter into the trial. To the contrary, the factual admissions in Appellant's

Original Petition were relevant to a critical issue at trial: whether Dr. Greenspan improperly placed the Solyx on October 28, 2010 (i.e., the Solyx carriers were not "attached" from the start), or whether the Solyx carriers later detached due to alleged defects in the device. Even Appellant recognizes the importance of this issue. *See* ASB at 88 (stating, "[a] critical issue in this case is whether Appellant's injuries and damages were caused by Respondents' defective products or solely by the negligence of the doctors.").

Indeed, the importance of this issue is why Appellant repeatedly argued and elicited testimony that Dr. Greenspan properly placed the Solyx. It is disingenuous to argue, as Appellant does, that BSC and Bard cannot present contrary evidence, particularly when that evidence came from **Appellant herself** in the form of admissions in an abandoned pleading. *City of Dardenne Prairie*, 529 S.W.3d at 18. Simply put, Appellant created this issue by taking a contrary position at trial relative to her pleadings – all in an effort to prove her product liability claims and distance Dr. Greenspan from blame. That being the case, Appellant is not prejudiced by BSC's and Bard's limited use of her abandoned pleadings that show inconsistencies in her positions.[15]

Second, as noted by the Court of Appeals, multiple uses of the Original Petition were proper cross-examination or, alternatively, could not be deemed an abuse of

[15] The trial court also recognized that use of Appellant's abandoned Petition focused on this factual inconsistency: "I think again that the references to the prior pleading was simply to highlight or point out the inconsistent positions." Tr.II at 928.

discretion. *Sherrer*, 2018 WL 3977539 at *18 (noting the three occasions where the Original Petition was used with Drs. Pence and Rosenzweig and Appellant). In other words, if BSC (and Bard) could properly use the Original Petition in cross-examination of Drs. Pence and Rosenzweig and Appellant herself, reversible error cannot occur because the same challenged evidence was properly before the jury. *St. Louis Univ. v. Geary*, 321 S.W.3d 282, 292 (Mo. 2009) ("A complaining party is not entitled to assert prejudice if the challenged evidence is cumulative to other related admitted evidence.") (*quoting Rinehart v. Shelter Gen. Ins. Co.,* 261 S.W.3d 583, 590 (Mo. Ct. App. 2008)).

Third, as noted by the Court of Appeals, both BSC's and Bard's use of the Original Petition was "very limited" in scope. *Id.* at *17. This statement is accurate. Further, this trial lasted two months, with Appellant's case-in-chief taking the vast majority of that time. It cannot be said (without speculating) that "very limited" use of the Original Petition had any meaningful – let alone material – impact on the verdict reached in this two month trial.

No prejudice occurred to Appellant by Respondent's limited use of allegations in her pleading – all of which occurred in direct rebuttal to contrary positions taken by Appellant at trial.

### 3. The Original Petition's Allegations Were Cumulative

Appellant dedicates only two paragraphs to this issue. ASB at 87-88. In those two paragraphs, she does not analyze or discuss the specific evidence that the Court of Appeals found to be "cumulative to other similar evidence about which Sherrer has not

complained on appeal" – specifically her interrogatory answers and a medical questionnaire completed by Appellant. *Sherrer*, 2018 WL 3977539 at *17.

Appellant does not contend that Respondents' use of her sworn interrogatory answers was error. Nor could she, as Respondents had a legal right to use those answers at trial. Rule 57.01(f); *McClanahan v. Deere & Co.*, 648 S.W.2d 222, 229 (Mo. Ct. App. 1983). Through Appellant's interrogatory sworn answers (and also medical records), the jury heard that, immediately after Dr. Greenspan placed the Solyx, Appellant and Dr. Greenspan discussed how her SUI still "was bad," that she "was [still] leaking urine horribly," and how – during a post-operative exam – Dr. Greenspan found the Solyx "was very loose, that it had not tightened up at all like it was expected to." BSC Ex. 5103, App. at A137; LF40 at 7546; Tr.V at 3199-200; *see also* BSC Exs. 5070-3, 5070-4, and 5070-6, App. at A13, A22, A30 (post-operative visits referencing continued SUI). The reason Appellant continued to experience SUI (despite just having a surgery to correct SUI) was revealed in the same interrogatory answer, which recited Appellant's discussion with a another treating doctor (Dr. Hill) that **"the anchor for the [Solyx] mesh (used to support my bladder) on the right side <u>had never been attached</u> [by Dr. Greenspan]**, and had begun digging its way through the vagina wall." BSC Ex. 5103, App. at A138; LF40 at 7547; Tr.V at 3200 (emphasis added). Thus, Appellant's signed interrogatory answer said **the exact same thing** that her Original Petition said – i.e., that Dr. Greenspan had not "attached" the Solyx anchor (a/k/a carrier) during the surgery.

Appellant made similar statements in a handwritten medical questionnaire provided to one of her treating doctors. D. Ex. 5076-2, App. at A32. In particular, in

summarizing her medical history prior to a doctor's visit in 2013, Appellant wrote that the "right side anchor of mesh was **never attached**." *Id.*; *see also* Tr.IX at 5864-65 (emphasis added). This handwritten entry in Appellant's medical records is consistent with – and cumulative of – the interrogatory answers and Original Petition. In each of these documents, Appellant said the same thing: that Dr. Greenspan did not "attach" the Solyx carrier. Thus, even if the trial court abused its substantial discretion in permitting use of the Original Petition (it did not), BSC's limited use of that pleading was "merely cumulative" of other evidence that established the same points and does "not constitute reversible error." *Anuhco*, 883 S.W.2d at 928 (quoting *State v. Johnson*, 753 S.W.2d 576, 588 (Mo. Ct. App. 1988)); *St. Louis Univ.* 321 S.W.3d at 292.

In sum, the jury heard from multiple sources (other than the Original Petition) that the Solyx anchor was never attached and not properly placed by Dr. Greenspan. That being the case, and as the Court of Appeals found, prejudicial error did not occur through the use of the Original Petition.

#### 4. Appellant Explained and Downplayed the Original Petition's Allegations, Curing Any Possible Prejudice

Importantly, the factual admissions in Appellant's abandoned Original Petition "are not judicial admissions binding on [Plaintiff]." *Hall v. Denver-Chicago Intern., Inc.*, 481 S.W.2d 622, 628 (Mo. Ct. App. 1972). These factual admissions "can be weighed by the trier of fact in the same manner as any other admission made by a party. Such an admission is not conclusive but is to be considered along with the other facts and circumstances attending the case." *Id.* "The trier of fact has discretion to determine

whether statements are admissions and the weight and value to be accorded to them." *McClanahan*, 648 S.W.2d at 228-29. Given (1) the non-binding, non-conclusive nature of the admissions in Appellant's abandoned Petition, (2) their limited and factually-focused use during argument and with select, appropriate witnesses, (3) the fact that the Original Petition was not entered into evidence, and (4) the fact that the admissions must be considered along with all of the voluminous evidence actually admitted during this two-month trial, no material prejudice occurred. *See, e.g.*, *Riley v. Union Pacific R.R.*, 904 S.W.2d 437, 443 (Mo. Ct. App. 1995) (finding harmless error from limited use of original petition never admitted into evidence); *Danneman v. Pickett,* 819 S.W.2d 770, 773 (Mo. Ct. App. 1991), 819 S.W.2d at 773 (same).

In fact, the voluminous evidence before this jury included evidence from Appellant that attempted to explain and rebut her admissions against interest in her Original Petition. For example, Appellant elicited testimony from her expert Dr. Pence that the allegations in her Original Petition against TMC and UPA were made "early in the case," before "discovery…research, if you will," and that, "after discovery," BSC and Bard were "added" and the doctors/hospital were "dismissed." Tr.III at 1764-66. This line of questioning was misleading because it left the jury with the false impression that TMC and UPA were dismissed following "research" and "discovery," which revealed the proper defendants to be BSC and Bard. Tr.VI at 3899-3901. Regardless, the testimony illustrates how Appellant used the allegations in the Original Petition to her benefit and to point the finger at BSC and Bard.

Appellant's own testimony similarly ameliorated any possible prejudice. She testified on direct examination that she "had no idea what had happened or why" at the time her Original Petition was filed, and she had never looked at "the legal documents that lawyers filed that started this lawsuit." Tr.VIII at 5469-70. Appellant provided the same testimony on cross and redirect examination—distancing herself from the allegations in the Original Petition that was prepared and filed by her lawyers, and not Appellant. Tr.IX at 5862-64, 5883-84. The jury was free to accept her explanation that these were not **her admissions** and thereby disregard the allegations in her abandoned Petition when considering the totality of the evidence.[16] That the jury found against her does not prove unfair prejudice.

In summary, the trial court did not abuse its discretion in allowing BSC and Bard to use Appellant's Original Petition. But even if it did, Appellant has not established—

[16] In its opinion, the Court of Appeals stated, "[i]f the client did not have knowledge of the pleading or did not expressly authorize his attorney to file it, he may inform the jury of this fact as an explanation for the inconsistency between the pleading and his testimony, but this explanation is for the jury to consider and does not bear on admissibility." *Sherrer*, 2018 WL 3977539 at *14 (*citing* Lawson, *Admissibility of Pleadings in Evidence in Missouri*, 27 Mo. L. Rev. 258, 260 (1962)). This is exactly what Appellant did in her efforts to distance herself from the statements in the abandoned petition.

and cannot establish—any prejudice, much less a substantial and glaring injustice that denied Appellant a fair trial.

## III. RESPONSE TO POINT 4: THE TRIAL COURT DID NOT MANIFESTLY ABUSE ITS DISCRETION IN DENYING A MISTRIAL BASED ON SPECULATION THAT JURORS SAW A REFERENCE TO A SETTLEMENT WITH OTHER PARTIES ON A BUSY DEMONSTRATIVE TIMELINE USED BRIEFLY ON CROSS-EXAMINATION BY COUNSEL FOR BARD.

The trial court did not err or abuse its discretion in refusing to grant a mistrial due to Bard's brief and inadvertent display of settlement information on a busy timeline used during cross-examination of Appellant, in that it is pure speculation that jurors saw any reference to settlement or that it materially affected the verdict.

### A. Introduction

No irreparable prejudice occurred due to Appellant's speculation that jurors may have read one of nineteen (19) boxes on a busy demonstrative timeline, inadvertently displayed for a brief period of time by Bard's counsel, that referenced a settlement with TMC and UPA. Appellant's counsel did not even notice the reference, yet boldly asserts "there is every reason to believe that at least some of the jurors observed the information regarding the settlement." ASB at 95. The trial judge, who noticed the reference, was in the best position to judge whether a mistrial was required. The trial court did not manifestly abuse its discretion in denying a mistrial for what it found was an inadvertent

reference, which was on the screen briefly and likely never seen by the jury, and which was remedied by appropriate jury instructions.

Notably, the Court of Appeals agreed with the trial court's conclusion "that the reference to settlement briefly displayed on the power point slide was not likely noticed by the jury, and therefore did not yield prejudice that required a mistrial. The trial court's unchallenged conclusion is not a manifest abuse of discretion." *Sherrer*, 2018 WL 3977539 at 22. This Court should affirm.

**B. Standard of Review**

BSC agrees with Appellant that a decision to grant or deny a mistrial is largely within the trial court's discretion and should not be reversed unless Appellant establishes not just an abuse of discretion, but a manifest abuse of discretion. *See Wheeler ex rel. Wheeler v. Phenix*, 335 S.W.3d 504, 514 (Mo. Ct. App. 2011); *see also* ASB at 91.

**C. Appellant Failed to Preserve One of Her Appellate Arguments**

In her Substitute Brief, Appellant complains about two instances in which she alleges Bard's counsel displayed a demonstrative timeline containing a reference to settlement: one on page 5488 of the trial transcript (ASB at 92); and one on page 5604 (ASB at 93). However, during trial and in her Motion for New Trial, Appellant objected to the timeline being displayed only once (on page 5604). Tr.VIII at 5605, 5633-37; LF39 at 7243-46. The Court should not consider Appellant's expanded argument concerning this other supposed instance of displaying the timeline with the settlement reference, as Appellant "is not permitted to broaden the scope of [her] objection on appeal beyond that made in the trial court." *Dyer v. Globe-Democrat Pub. Co.*, 378

S.W.2d 570, 582 (Mo. 1964); *Blanks v. Fluor Corp.*, 450 S.W.3d 308, 384 (Mo. Ct. App. 2014) (appellant may not "alter or broaden the scope of the objection voiced at trial"); *State v. Pierce*, 932 S.W.2d 425, 430 (Mo. Ct. App. 1996) (same).

At trial, no one noticed the other alleged instance of displaying a settlement reference (at Tr.VIII at 5488); Appellant did not object or otherwise complain about the reference; and no record was made that the demonstrative timeline actually included the settlement reference. Appellant thus failed to preserve for appeal any argument that this occurred, and it denied her a fair trial. Rule 84.13(a) ("[A]llegations of error not presented to or expressly decided by the trial court shall not be considered in any civil appeal from a jury tried case."); *Central Trust Bank v. Graves*, 495 S.W.3d 797, 801 (Mo. Ct. App. 2016) ("A point is preserved for appeal only if it is based on the same theory presented at trial.") (quoting *Blanks*, 450 S.W.3d at 834); *Gallagher v. DaimlerChrysler Corp.*, 238 S.W.3d 157, 168 (Mo. Ct. App. 2007) (appellants "must maintain a consistent theory of objection" and have not preserved a point for appeal when they "seek to advance a different argument on appeal than that advanced in the trial court").

The Court of Appeals agreed with this assessment, stating:

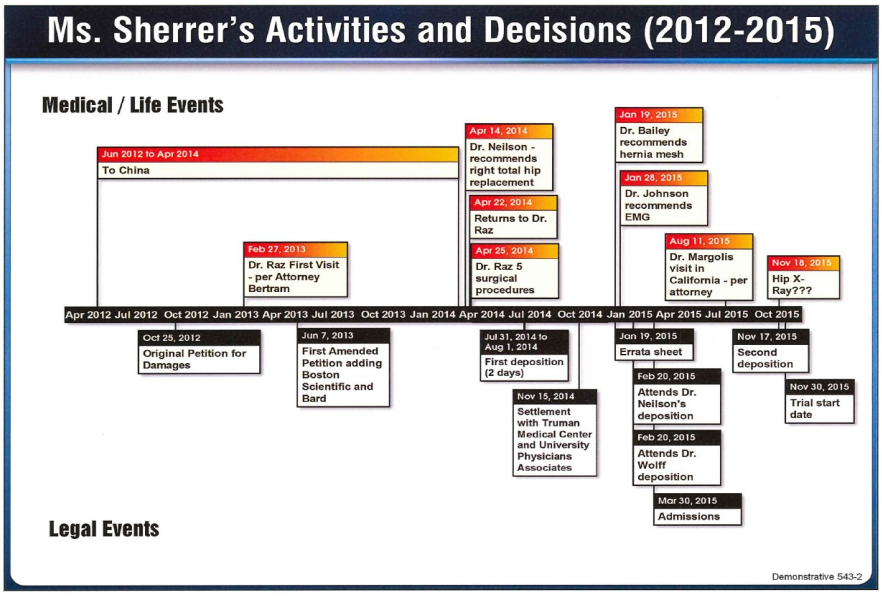
> "[w]e have no way of verifying that the version of the second power point slide displayed at Tr.VIII, p. 5488 was the same version displayed at Tr.VIII, p. 5604, particularly as comments made by Bard's counsel after the erroneous settlement reference was noticed suggest that the version of the slide displayed when the trial court caught the error was an older version of the slide [Tr.VIII, p. 5635]. Regardless, Sherrer's newly asserted argument

> preserves nothing for our review, as she did not advise the trial court during trial or in her motion for new trial that she believed the problematic slide had been displayed twice…. And even if the problematic slide was displayed twice, the fact that neither counsel nor the trial court caught the reference to the settlement on the first occasion the slide was displayed lends support to the trial court's conclusion that the jury likely did not notice the settlement reference.

*Sherrer*, 2018 WL 3977539 at *22, n. 26 (internal citation and quotation omitted). For these reasons, the Court should consider only the argument presented by Appellant as to the events on page 5604 of the transcript. Regardless, even if the Court considers the alleged reference at page 5488 of the transcript, prejudicial error warranting a new trial did not occur for the same reasons outlined herein and in the Court of Appeals' opinion.

**D. No Manifest Abuse of Discretion in Refusing to Grant a Mistrial**

During Bard's cross-examination of Appellant, the trial judge noticed that one box on the second page of a busy demonstrative timeline displayed on the video screen included text referencing a November 2014 settlement with TMC and UPA. Below is the full slide at issue, which was displayed only briefly while Bard's counsel asked questions unrelated to the settlement (Tr.VIII at 5604):

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The trial judge appropriately handled the situation. He immediately asked that the slide be taken down, Bard's counsel agreed, and a side bar discussion ensued. Tr.VIII at 5604-05. As Bard's counsel explained, that box had been removed from her hardcopy of the timeline, which she had provided to the trial judge and Appellant's counsel, and was also supposed to have been removed from the electronic version displayed on the video screen. Tr.VIII at 5605, 5635-37. The trial court accepted the explanation and found Bard's use of the slide "completely inadvertent." Tr.VIII at 5637-38; Tr.IX at 5731-32.

Furthermore, contrary to the hypothesis in Appellant's Substitute Brief that it is "very likely that some or all the jurors would have noticed the box" (ASB at 94), the trial noted the reference was briefly "flashed up there … for a short period of time" and found it unlikely the jury noticed the settlement reference. Tr.VIII at 5637-38. While Appellant attacks the trial court's "hope" that the jury's attention was "focused on [the]

colloquy" between Bard's counsel and Appellant (*see* ASB at 94), the fact remains that the record contains **no proof whatsoever** that any juror saw the timeline, much less read the one of nineteen boxes on the busy slide that included the settlement reference. In fact, the record reveals that Appellant's counsel – and there were **three** at counsel table – did not notice the settlement reference. If they had, counsel for Appellant would have assuredly made their objection known before the trial judge asked that the slide be taken down. The Court should not accept Appellant's speculation that jurors saw the settlement reference when her own counsel did not.[17]

Again, the trial court observed that the busy slide was "flashed up there during the course of a colloquy[,]" and "the jury's attention was focused on that colloquy." Tr.VIII at 5637. The judge noticed the reference because he "turned up there[,]" and then "[i]t was taken down immediately." Tr.VIII at 5637-38. "It was up there for a short period of time." Tr.VIII at 5638. Given these findings, in context with all of the other evidence the jury heard, the trial court and Court of Appeals correctly found no basis for granting a mistrial during the fifth week of an ultimate two-month trial. Tr.VIII at 5638; Tr.IX at 5731-32. The trial judge was in the best position to make this call. *St. Louis County v. Seibert*, 634 S.W.2d 590, 592 (Mo. Ct. App. 1982) ("Mistrial is a drastic remedy. The trial court is in the best position to determine whether the trial has been so poisoned with prejudice as to require a mistrial.").

[17] Even greater speculation is required to find the brief reference had a material effect on the verdict.

To establish the trial judge committed a manifest abuse of discretion, Appellant offers nothing but conjecture. She speculates that since the trial judge saw the box and Bard's counsel said things that potentially directed jurors to other parts of the busy slide, "there is no logical reason the jurors did not have time to read it also." ASB at 95. That guesswork cannot justify granting a mistrial, and is certainly insufficient to establish a manifest abuse of discretion in denying a mistrial. At bottom, Appellant has no proof any juror saw the slide at all, much less focused on one of nineteen boxes that was briefly displayed on the screen during a handful of questions having nothing to do with that box. Tr.VIII at 5604.

Further, even if Appellant's speculation were true and a juror saw the small box referencing settlement, Appellant requested and the court gave Missouri Approved Instructions 2.07 and 34.05. Tr.XII at 8457-59; LF38 at 7185-86, 7206-07. Pursuant to these instructions, the jury was prohibited from considering anything it heard about insurance benefits, right or obligation of repayments, or prior payments to Appellant. This cured any prejudice Appellant believes resulted from the settlement reference possibly leading the jury to believe that TMC and UPA had admitted fault and already reimbursed Appellant for her damages. "[T]he jury is bound to follow the trial court's instruction, and we presume that it will even to the extent of ignoring counsel's argument." *Callaway v. Lilly*, 605 S.W.2d 155, 159 (Mo. Ct. App. 1980); *see also*

*Trimble*, 51 S.W.3d at 497 ("The jury is presumed to have followed the trial court's instructions.").[18]

Finally, even **if** the jury saw the box referencing settlement on the 19-box slide briefly flashed up on the screen, even **if** the jury read and understood its applicability, and even **if** MAI 2.07 and/or 34.05 did not cure any possible prejudice, the trial court still did not abuse its discretion in denying a mistrial. Such a limited, inadvertent settlement reference in the context of all the other evidence in this two-month trial simply does not rise to the level of requiring a new trial. *See, e.g.*, *Taylor v. Rep. Auto. Parts, Inc.*, 950 S.W. 2d 318, 324 (Mo. Ct. App. 1997) (references to settlement efforts did "not necessarily mandate a mistrial"; "the appropriate remedy was to instruct the jury to disregard the statement"); *Hale v. Am. Family Mut. Ins. Co.*, 927 S.W. 2d 522, 528 (Mo. Ct. App. 1996) (that settlement letter was inadvertently sent back with jury during deliberations did not require a mistrial); *see also, e.g.*, *Wheeler*, 335 S.W.3d at 514-15 (affirming denial of mistrial after improper reference to insurance because insurance was referenced only once, was not done in bad faith, and was not shown to have caused prejudice requiring a mistrial); *Payne v. Fiesta Corp.*, 543 S.W.3d 109, 123 (Mo. Ct. App. 2018) (denial of mistrial after insurance was injected into the case did not constitute a manifest abuse of discretion); *Delacroix v. Doncasters, Inc.*, 407 S.W.3d 13, 25-26

[18] If MAI 2.07 and/or 34.05 were not enough, the trial court invited Appellant to request additional remedies: "Any further relief that you're requesting I'll consider." Tr.VIII at 5638. Appellant did not accept this invitation.

(Mo. Ct. App. 2013) (affirming denial of mistrial despite injection of other incidents, contrary to *in limine* ruling); *Brown v. Bailey*, 210 S.W.3d 397, 411 (Mo. Ct. App. 2006) (affirming denial of mistrial despite injection of a doctor's prior litigation, contrary to *in limine* ruling); *Cole ex rel. Cole v. Warren County R-III School District*, 23 S.W.3d 756, 759 (Mo. Ct. App. 2000) (affirming denial of mistrial when evidence of plaintiff's inability to pay for medical treatment was introduced, despite *in limine* ruling); *Hale v. American Family Mutual Ins. Co.*, 927 S.W2d 522, 528 (Mo. Ct. App. 1996) (affirming denial of mistrial when a settlement demand letter marked with a note stating "[d]on't send to jury" was inadvertently sent to the jury during deliberations).

No manifest abuse of discretion occurred in denying a mistrial and, even if there was, it was harmless. The Court should affirm on this Point.

## IV. CONCLUSION

No evidentiary error, let alone an abuse of discretion, occurred here. After a hard-fought two-month trial, jurors arrived at a verdict that the evidence fully supports. Appellant has not shown any grounds to disturb the verdict in favor of BSC.

In conclusion, Appellant received a fair trial, and the Court should affirm the judgment in favor of BSC. *Fleshner v. People Vision Instit., P.C.*, 304 S.W.3d 81, 87 (Mo. 2010).

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the limitations contained in Rule 84.06(b). This brief was prepared using Microsoft Word and contains 16,210 words, not including those portions of the brief exempted by Rule 84.06(b). The font is Times New Roman, double spaced, 13-point type. Further, the brief includes the information required by Rule 55.03 of the Missouri Rules of Civil Procedure.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of February, 2019, Respondent's Substitute Brief was e-filed and sent via the Court's E-filing system to:

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