SC97465

IN THE SUPREME COURT OF MISSOURI

EVE SHERRER

Plaintiff/Appellant,

v.

BOSTON SCIENTIFIC CORPORATION and C. R. BARD, INC.

Defendants/Respondents.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
CASE NO. 1216-CV27879

SUBSTITUTE BRIEF OF RESPONDENT C. R. BARD, INC.

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STATEMENT OF FACTS

I. OVERVIEW.

Plaintiff-Appellant Eve Sherrer commenced this action, on October 26, 2012, when she filed claims of medical malpractice against Truman Medical Center ("TMC") and University Physicians Associates ("UPA"). LF 70-76. On May 30, 2013, Plaintiff amended her Petition to add products liability claims against Defendants-Respondents C. R. Bard, Inc. ("Bard") and Boston Scientific Corporation ("Boston Scientific") related to two prescription polypropylene mesh sling medical devices manufactured by the Defendants: Boston Scientific's Solyx Single Incision Sling System implanted by Dr. Peter Greenspan in October 2010; and Bard's Align S Urethral Support System implanted by Dr. Richard Hill in January 2011. LF 84-117. Plaintiff subsequently settled her claims against TMC and UPA. LF 180-181. After two months of trial, involving extensive evidence from all three parties regarding Plaintiff's medical conditions and Defendants' devices, the jury returned a defense verdict for Bard and Boston Scientific. Tr. 8827-8828; LF 7217-7218. After the trial court denied Plaintiff's extensive post-trial motions, Plaintiff filed her appeal.

II. TRIAL.

A. Plaintiff's Case.

On December 2, 2015, the parties gave opening arguments at the trial in this matter, and Plaintiff began presenting evidence the next day. Tr. 586-912, 957-1195. Over the next seven weeks, including a two-week break for the holidays, Plaintiff presented seven live witnesses: (1) Peggy Pence, a regulatory consultant expert witness; (2) treating physician Dr. Erin Carey; (3) Dr. Bruce Rosenzweig, an obstetrician/gynecology expert witness; (4) Bill Teasdale, a Boston Scientific sales representative; (5) Dr. Peter Greenspan, who implanted Plaintiff's Solyx; (6) Dr. Vladimir Iakovlev, a pathologist expert witness; and (7) Plaintiff Eve Sherrer. Tr. 957-1195, 1196-1895, 1896-2663, 2664-3471, 3472-4172, 4173-4947, 4948-5658, 5659-

5928. Plaintiff also played the video depositions of several treating physicians and corporate witnesses. *E.g.,* Tr. 4187, 4193, 5266, 5279, 5286.

On October 28, 2010, Dr. Greenspan implanted the Solyx, a single-incision mini-sling manufactured by Boston Scientific, in Plaintiff. Tr. 1334, 2221. On January 3, 2011, Dr. Hill removed two-thirds of the Solyx, and implanted the Align, a Bard product, which is a multi-incision, midurethral sling that treats stress urinary incontinence. Tr. 1525-1526, 2221. Both products, including their design and label warnings, were reviewed and cleared by the Food and Drug Administration ("FDA") through the 510(k) process. Tr. 1828-1830. On April 25, 2014, Dr. Raz, a urologist, performed several procedures on Plaintiff, including removal of the Align and the remainder of the Solyx. Tr. 2298, 3440-3441, 5153, 5670.

None of the treating physicians or corporate witnesses who testified at trial was critical of the Align. Although Plaintiff's urogynecologist expert witness, Dr. Rosenzweig, expressed some criticisms of the design of the Align and the Solyx, he admitted that the Align was and currently is the standard of care for the treatment of stress urinary incontinence. Tr. 2459-2460, 3255-3257. Dr. Rosenzweig agreed it is appropriate for a doctor to implant an Align, and that many doctors consider midurethral slings like the Align to be the gold standard for the treatment of stress urinary incontinence. Tr. 3257-3258, 3266, 3268. Dr. Rosenzweig testified that Dr. Hill's treatment of Plaintiff was not below the standard of care such that he had no criticisms of Dr. Hill's decision to prescribe and implant the Align. Tr. 3420. Dr. Hill testified in his deposition that the Align is safe and effective, and the standard of care. Tr. 1681-1682. Dr. Rosenzweig also testified that the Align was the lightest weight polypropylene midurethral sling on the market. Tr. 3327. Dr. Rosenzweig conceded that mesh is generally considered to be "heavyweight" if its density is greater than 65 grams per square meter, and the Align's density was between 61 and 64. Tr. 3325-3326.

Plaintiff's regulatory expert, Dr. Pence, agreed that the FDA had considered the safety and effectiveness of the Align during its review of Bard's submissions to the FDA

for clearance of the device. Tr. 1686-1687. Dr. Pence acknowledged that Bard had submitted information to the FDA regarding the Align's material, weight, pore size, stiffness, and biocompatibility tests, and the FDA was satisfied with the information that Bard provided. Tr. 1655, 1657, 1675, 1677, 1685.

In addition to Bard's two 510(k) submissions to the FDA, Dr. Pence admitted that the FDA reviewed the safety and effectiveness of the Align and other midurethral slings as part of the Advisory Committee panel formed in 2011 to investigate mesh devices used to treat stress urinary incontinence and pelvic organ prolapse. Tr. 1569-1570. The Advisory Committee concluded that the safety and effectiveness of multi-incision midurethral slings such as the Align was well established, and the FDA agreed with this conclusion. Tr. 1569-1570. Dr. Pence testified that the FDA has never required a clinical study—either pre-market or post-market—for the Align. Tr. 1677. Dr. Pence conceded she was not providing "any causation opinions." Tr. 1550-1551.

Plaintiff's final expert witness, Dr. Iakovlev, did not testify specifically about the Align's design, and admitted he had not reviewed any of Bard's testing, design, or development documents. Tr. 5157-5158. Despite this, Dr. Iakovlev testified that the polypropylene mesh in the Align and Solyx degrades, based on his review of pathology. Tr. 4954, 5173. No other pathologist in the world has found that polypropylene degrades based on light microscopy. Tr. 5119-5120. Dr. Iakovlev admitted that he did not perform any type of an analysis to rule out all of Plaintiff's other pelvic conditions and non-mesh surgeries that may have contributed to her injuries. Tr. 5003-5005.

B. Boston Scientific's Case.

During its case, Boston Scientific presented corporate witness James Goddard and two expert witnesses: urogynecologist Dr. David Anderson and pathologist and materials expert Dr. Stephen Badylak. None of these witnesses had any criticisms of Bard's Align device. All three testified that polypropylene mesh made from Marlex resin is safe for permanent implantation and that polypropylene slings are the standard of care for the treatment of stress urinary incontinence. Tr. 5935-6455, 6456-6681, 6752-7151, 7152-

7918, 7919-7923. Dr. Anderson further testified that Plaintiff's alleged injuries were not caused by either the Solyx or Align, but instead were caused by her myriad of other medical conditions and Dr. Greenspan's improper placement of the Solyx.

C. Bard's Case.

Bard presented urogynecological expert witness Dr. Michael Kennelly, orthopedic surgeon expert witness Dr. John Heller, materials science expert witness Dr. Maureen Reitman, and Bard employee, Roger Darois. Tr. 7028-7151, 7152-7918, 7924-8124, 8143-8318. These witnesses unequivocally testified that the Align was safe and effective and that Plaintiff's complaints were the result of her pre-existing medical conditions—not the Align.

Dr. Kennelly is board certified in Female Pelvic Medicine and Reconstructive Surgery. Tr. 7028. Dr. Kennelly testified that the Align was safe and effective, that Bard had appropriately warned about potential risks, and that the Align had not caused or contributed to any of Plaintiff's alleged complaints or damages. Tr. 7201, 7234-7235, 7243. Dr. Kennelly testified that the Align is the "gold standard." Tr. 7074, 7144, 7243. Dr. Kennelly reviewed Plaintiff's multiple pre-Align pelvic floor surgeries with the jury. Tr. 7086, 7126-7128. He explained how Plaintiff, in January 1998, had two strips of polypropylene mesh implanted to treat stress urinary incontinence, and at the same time also had a posterior prolapse repair to treat her rectocele. Tr. 7113, 7126, 7169, 7172, 7191-7192. Dr. Kennelly testified about the multiple additional pelvic floor surgeries that Plaintiff had before being implanted with the Align in 2011. Tr. 7194-7201, 7211-7218.

Dr. Kennelly stated an opinion, to a reasonable degree of medical certainty, that Plaintiff's pain and hernia were caused by her severe osteoarthritis of the right hip, her 1998 laparoscopic surgery, her vein stripping surgery, her spinal degeneration and stenosis, and Dr. Raz's unnecessary surgeries without appropriate preoperative evaluation and consent. Tr. 7188, 7219-7231. He ruled out Bard's Align and Boston Scientific's

Solyx as potential causes for Plaintiff's injuries, concluding that the location of her pain complaints was not in the same region as where the Align was implanted. Tr. 7232.

Dr. Kennelly testified that the Align sling is lightweight, macroporous, flexible, and safe for permanent human implantation. Tr. 7255, 7502-7503. He explained that the major urogynecological, urological, and gynecological organizations in the United States support the use of the polypropylene mesh mid-urethral sling, including the American Urogynecologic Society, the American Urological Association, the American Congress of Obstetricians and Gynecologists, and the Society of Urodynamics, Female Pelvic Medicine and Urogenital Reconstruction. Tr. 7505-7506. Dr. Kennelly agreed with the FDA that clinical trials were not necessary for the Align because the device's safety and effectiveness had been established. Tr. 7347-7348.

Several days after Plaintiff rested her case, Bard and Boston Scientific obtained a previously undisclosed medical record showing that Plaintiff had been implanted with polypropylene mesh that was not manufactured by Boston Scientific or Bard in 1998 to treat stress urinary incontinence. Tr. 6457-6458. The discovery of this 1998 implant occurred after Plaintiff's expert, Dr. Rosenzweig, testified that polypropylene mesh had not been used in Plaintiff's 1998 surgery. Tr. 2833-2835. Plaintiff herself had testified that she was "one hundred percent positive I never had mesh put in me before the Solyx," which was implanted in October 2010. Tr. 5741. The only witness who correctly identified the prior mesh placement from Plaintiff's radiology images was Dr. Kennelly. Tr. 7070-7071, 7113.

Bard's next witness was Dr. John Heller, the only orthopedic surgeon to testify at trial. Tr. 7634-7635. Plaintiff's medical expert witness, Dr. Rosenzweig, testified that he would defer to an orthopedic surgeon on issues related to spine and osteoarthritis. Tr. 3292. Dr. Heller reviewed Plaintiff's x-rays and images and testified that Plaintiff suffered from advanced bone-on-bone osteoarthritis of the right hip. Tr. 7748. Dr. Heller testified that Plaintiff's pain and gait disturbance were not caused by the Align or Solyx, but were caused by her advanced osteoarthritis. Tr. 7745, 7751-7752, 7770-7772.

Dr. Heller explained to the jury how Plaintiff's osteoarthritis was evident in x-rays from 2011 and how medical records showed that Plaintiff's treating orthopedic surgeon, Dr. Neilson, diagnosed Plaintiff with advanced osteoarthritis of the right hip in 2014. Tr. 7745, 7763. An x-ray taken of Plaintiff shortly before trial also clearly showed advanced osteoarthritis of the right hip. Tr. 7738-7748. Dr. Heller attributed Plaintiff's groin/inguinal pain, right hip pain, leg pain, buttocks pain, and gait disturbance to her advanced osteoarthritis. Tr. 7745, 7772. Dr. Heller agreed with the recommendation of Plaintiff's treating physician, Dr. Neilson, that Plaintiff needs a total hip replacement and with proper treatment her pain would be alleviated. Tr. 7752-7753.

Bard's final expert witness was Dr. Maureen Reitman, the only witness who had performed tests on the mesh explanted from Plaintiff. Tr. 7931. Dr. Reitman is a world-renowned expert in plastics, and has degrees in Materials Science and Engineering from Massachusetts Institute of Technology. Tr. 7925-7927, 7932-7934. Dr. Reitman testified that the Align mesh did not degrade, based on his testing that included scanning electron microscopy, energy-dispersive x-ray spectroscopy, fourier transform infrared spectroscopy, thermal gravimetric analysis, differential scanning calorimetry, solvent dissolution and film casting, and intentional oxidation chemical and UV. Tr. 8055, 8075, 8085, 8089, 8091-8094. Dr. Reitman testified that none of the additional tests she performed on approximately 16 other Align explants and 40 non-Align mesh explants have shown degradation. Tr. 7970-7972, 7977-7978.

Dr. Reitman concluded: (i) Marlex polypropylene resin is appropriate and safe to use in the human body; (ii) there is no scientific basis or testing for the medical caution language in the material safety data sheet; (iii) the pore size and weight of the Align was appropriate; and (iv) Bard met or exceeded FDA and industry standards in its design and development of the Align. Tr. 8001-8002, 8007, 8009.

Bard also presented the testimony of a Bard employee, Roger Darois, who testified regarding Bard's procurement of raw materials, as well as Bard's successful clinical experience in manufacturing polypropylene surgical mesh devices for permanent human

implantation for more than fifty years and that there was no safer material. Tr. 4212-4842, 4233, 4333-4340. Mr. Darois also explained how the medical application caution was added to the Material Safety Data Sheet ("MSDS") due to litigation concerns and had no bearing on the safety of the finished medical device. Tr. 4366-4370.

D. The 1994 Criminal Conviction.

Prior to trial, Bard moved in limine to preclude any evidence or argument concerning "unrelated business activities, investigations, or alleged 'illegal activity,' including, without limitation, issues alleged in the 1990s." LF 6037-6040. Bard argued that evidence of prior bad acts was irrelevant, inadmissible character evidence, and had no relation to the witnesses or medical device in this case. LF 6038-6039.

After Plaintiff indicated she would seek to admit evidence concerning criminal charges that were brought against Bard "more than 20 years ago as a result of a now defunct division's interactions with the FDA in relation to heart catheter devices," Bard filed a supplement to its initial motion in limine. LF 6401-6409.

The court granted the motion. LF 7641. The court also excluded evidence of Bard's prior felony conviction "unless [Bard] opens the door to the admission of that evidence." LF 7641. The court adhered to that ruling at trial. Tr. 4546-4557, 8327-8329. Plaintiff was allowed to question Bard employee Roger Darois about whether Bard had always been truthful to the FDA. Tr. 4835-4836.

E. Use of Plaintiff's Original Petition.

Plaintiff originally brought claims of medical malpractice against TMC and UPA for her alleged injuries. LF 70-76. Plaintiff thereafter filed her Amended Petition to add products liability claims against Bard and Boston Scientific. LF 84-117. After Plaintiff settled her claims against TMC and UPA, Plaintiff dismissed TMC and UPA from this lawsuit with prejudice. LF 180-181. During trial, the court allowed Defendants to refer to the Original Petition, including during cross-examination of Plaintiff. Tr. 913-919, 923-928, 1340-1342, 3201, 3935, 5485-5487, 5545-5548.

F. Plaintiff's Settlement with TMC and UPA.

Before trial, Plaintiff settled her claims against TMC and UPA, which resulted in their dismissal from this case. LF 180-181. Plaintiff's expert, Dr. Pence, testified on direct examination that TMC and UPA were "dismissed from the original lawsuit" after "discovery was done in this case." Tr. 1765-1766.

Over the course of the trial, Plaintiff and Defendants utilized hundreds of demonstrative PowerPoint slides. Among the numerous demonstrative slides Bard used during cross-examination of Plaintiff, Bard momentarily displayed a PowerPoint slide with a large, detailed timeline with 19 small-sized text boxes, one of which inadvertently referred to Plaintiff's settlement with TMC and UPA. Tr. 5602-5605. This PowerPoint presentation, referred to as "Bard OSP" throughout Plaintiff's Brief, was never received into evidence. *See, e.g.,* Tr. 11-27. The slide remained on the screen for less than one minute—likely no more than 20 seconds—and covered Ms. Sherrer's activities, decisions, and travel from 2012 to 2015. Tr. 5602-5604.

Before any of the numerous attorneys for the three parties even noticed the inadvertent settlement reference, the trial court requested that the slide be taken down. Following the trial court's quick reaction, counsel for Bard stated that the settlement information "wasn't supposed to be up [in the slide]" and that she had asked that it be removed from the timeline. Tr. 5605. When Plaintiff moved for a mistrial, the trial court stated it was "confident" the display of the slide was "inadvertent," and noted it was "taken down immediately." Tr. 5637-5638. The trial court found that there was no evidence that any juror saw the timeline entry, and instructed the jury "not to consider any evidence of prior payments" to Plaintiff. Tr. 5637-5638; LF 7185.

G. The Verdict and Judgment.

The trial court denied Bard's motion for directed verdict and allowed Plaintiff's claims to go to the jury. Tr. 8398-8399. The jury returned a verdict in favor of both Bard and Boston Scientific. LF 7217-7218.

The trial court entered its final judgment on March 18, 2016, and denied Plaintiff's motion for new trial on July 13, 2016. LF 7219-7221, 7661. Plaintiff sought review from the Missouri Court of Appeals, Western District (LF 7662-7666), and after that court issued its opinion, this Court granted transfer.

ARGUMENT

Following a lengthy trial, that occurred over a seven-week period, the jury in this case returned a complete defense verdict. Notwithstanding the jury's decisive findings that Bard (and its co-defendant, Boston Scientific) were not liable for any of Plaintiff's alleged injuries, Plaintiff argues that the trial court made certain discrete evidentiary errors unrelated to the primary issues the jury decided related to Align and Solyx devices. But a review of the record fully establishes that the trial court did not err in its evidentiary rulings and, even if error could be established, Plaintiff has failed to allege sufficiently, much less establish, the necessary level of prejudice to warrant a new trial.

First, the trial court did not abuse its discretion in excluding evidence of Bard's felony conviction—from over 20 years before the trial in this matter, involving products, people, and corporate divisions unrelated to this case—as irrelevant, improper character evidence, and unfairly prejudicial. Specifically, the trial court correctly ruled that Bard's prior conviction could not be introduced under Section 491.050 as that section cannot be construed to create what Plaintiff labels "an *absolute* right to impeach Bard's credibility" with a remote and unconnected prior corporate conviction that is completely unrelated to any witness. The plain language of Section 491.050 discusses the use of a "witness['s]" prior convictions "may be proved to affect his credibility"—nowhere does the statute suggest that a corporation's conviction can automatically be used to impeach a witness merely because the witness happens to be employed by the corporation. Nor do the two statutes to which Plaintiff cites that permit, but do not require, the statutory term "person" to include a corporation create an absolute right from a statute addressing witness credibility to introduce corporate convictions. And even if Section 491.050 could be interpreted to allow corporate convictions to be introduced under certain circumstances, it certainly would not apply here where Bard's conviction is more than 20 years' old, unrelated to any witness or issue in the case, and was to be used with a witness who Plaintiff affirmatively called who was not testifying as a corporate representative.

Section 491.050 simply cannot be so expansively construed so as to strip a trial court of all discretion in admitting a corporate conviction as attenuated as this one.

Second, the trial court did not abuse its discretion in ruling that Bard had not opened the door to the introduction of the otherwise inadmissible prior conviction. The conviction did not speak to any witness's credibility, and none of Bard's witnesses suggested that all devices Bard has manufactured are safe or about Bard's corporate integrity. Rather, the record demonstrates that both Bard's counsel and witnesses focused on the safety of Align's devices. The record demonstrates that Bard closely followed the court's pretrial ruling and that the trial court did not err—let alone abuse its discretion—in determining that Bard's defense of its Align device did not open the door to the severely prejudicial prior conviction that would have created a mini-trial on an immaterial issue and extended an already lengthy trial.

And, even if there was error in preventing Plaintiff from asking a witness a handful of questions regarding the prior corporate conviction, which there was not, any such error did not materially affect the verdict so as to warrant a new trial. Both Defendants presented a plethora of expert and treating physician testimony showing that Plaintiff's injuries were caused by factors other than the Align and Solyx devices. And while Plaintiff's attacks of both devices focused on their polypropylene mesh material, a medical record discovered midway through trial demonstrated that Plaintiff had been implanted with a different polypropylene mesh device nearly a decade before she was implanted with Defendants' devices. Plaintiff has failed to show this Court exactly how, after seven weeks of trial, if the jury had known that Bard had pleaded guilty decades ago, to a charge arising from a different device than the one implanted in Plaintiff, which was manufactured by a corporate division that no longer exists, as to which no witness at the trial had involvement or personal knowledge, that the jury would have found for Plaintiff.

Third, the trial court did not abuse its discretion in allowing Defendants to display and use Plaintiff's Original Petition, which, under Missouri law is an abandoned

pleading. As an abandoned pleading, the statements of fact in the Original Petition are admissible as admissions against interest against Plaintiff, the party who originally filed the pleading. The allegations used at trial here from Plaintiff's Original Petition were admissions against interest and, thus, properly used for impeachment as the trial court determined. But, even if permitting Defendants to use allegations was an abuse of discretion, it was not preserved or prejudicial. Such that, there is no basis for reversal.

Finally, the trial court did not abuse its discretion in denying Plaintiff's mistrial motion based on an inadvertent and momentary display a timeline PowerPoint slide that included among 19 other text boxes one small textbox of a reference to plaintiff's settlement with TMC and UPA. A mistrial is the most drastic remedy for asserted trial error—one that this Court affords the trial court great discretion in deciding whether a mistrial should be granted. Here, the trial court found that a mistrial was not warranted as the inadvertent inclusion of the small textbox reference to the settlement in a detailed timeline demonstrative with 18 other textboxes was not prejudicial—nor was there any evidence that any of the jurors had noticed the reference during the brief display.

Based on the record and the deference that is afforded to the trial court, there is no basis to reverse the trial court's rulings and this Court should affirm the final judgment in all respects.

I. THE TRIAL COURT CORRECTLY EXCLUDED BARD'S 20-PLUS YEAR OLD PRIOR FELONY CONVICTION BECAUSE SECTION 491.050 DOES NOT APPLY TO A CORPORATION AS SO-CALLED "WITNESS" AND, EVEN IF A PRIOR CORPORATE CONVICTION COULD BE ADMISSIBLE, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING BARD'S CONVICTION AS IRRELEVANT, IMPROPER CHARACTER EVIDENCE AND UNFAIRLY PREJUDICIAL.

A. Standard of Review and Preservation of Error.

Plaintiff's first challenge to the trial court's exclusion of Bard's 20-plus year-old conviction is that she had an "absolute right" to elicit the conviction, under Section

491.050, RSMo, when she called John Weiland, Bard's President and Chief Operating Officer ("COO"), by video deposition. Plaintiff recognizes that the overarching standard of review is abuse of discretion, as indeed it is. *E.g.*, *Shallow v. Follwell*, 554 S.W.3d 878, 881 (Mo. banc 2018) (trial court "enjoys considerable discretion in the admission or exclusion of evidence" and evidentiary rulings "will not be grounds for reversal absent a clear abuse of discretion" (citation omitted)). In challenging a ruling within the trial court's discretion, an appellant "bears the burden of showing that there is a 'real probability' that he was prejudiced by the abuse of discretion." *State v. Johnson*, 207 S.W.3d 24, 40 (Mo. banc 2006) (citation omitted).

A trial court "necessarily abuses its discretion where its ruling is based on an erroneous interpretation of the law." *State ex rel. Deckard v. Schmitt*, 532 S.W.3d 170, 174 (Mo. App. W.D. 2017) (citation omitted). The trial court's interpretation of Section 491.050 "is a question of law and is reviewed *de novo*." *Dodson v. Ferrara*, 491 S.W.3d 542, 551 (Mo. banc 2016).

"Judicial discretion is abused when a trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable men 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." *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 804 (Mo. banc 1988). An appellate court "will not reverse a judgment based upon the exclusion of evidence unless a [party] demonstrates that the error resulted in prejudice that would have materially affected the merits of the case." *Aziz ex rel. Brown v. Jack in the Box, E. Div., LP*, 477 S.W.3d 98, 108 (Mo. App. E.D. 2015); *see also* § 512.160.2, RSMo ("No appellate court shall reverse any judgment, unless it believes that error was committed by the trial court against the appellant, and materially affecting the merits of the action."); Rule 84.13(b) (same); *State ex rel. Mo. Highway & Transp. Comm'n v. Pracht*, 801 S.W.2d 90, 93 (Mo. App. E.D. 1990) (prejudice must amount to "a substantial or glaring injustice" for reversal). "Even if the trial court has

abused its discretion in excluding evidence, this Court is loath to vacate a jury's verdict and resulting judgment on such grounds." *Lozano v. BNSF Ry. Co.*, 421 S.W.3d 448, 451 (Mo. banc 2014). Indeed, "exclusion of evidence which has little, if any, probative value is usually held not to materially affect the merits of the case and hence, error in rejecting such evidence is not grounds for reversal." *Id.* (citing *Lewis v. Wahl*, 842 S.W.2d 82, 85 (Mo. banc 1992)).

At trial, Plaintiff preserved *only* the question whether calling Mr. Weiland in her case-in-chief made Bard's prior conviction *automatically* admissible under Section 491.050. The trial court granted Bard's motion *in limine* before trial, ruling that the conviction would be excluded from evidence "unless [Bard] opens the door to the admission of that evidence." LF 6038-6039, 6401-6409, 7641; 11/29 Tr. 41-71.[1] Plaintiff's opposition to Bard's motion preserved nothing for appellate review. *E.g., Evans v. Wal-Mart Stores, Inc.*, 976 S.W.2d 582, 584 (Mo. App. E.D. 1998).

Plaintiff maintained that "the conviction comes in as a matter of right." Tr. 4549-4554. After Mr. Weiland's videotaped testimony was played for the jury (without any reference to the prior conviction), Plaintiff's counsel renewed their objection to excluding the conviction, based on testimony regarding Bard's conduct in submitting the Align device for clearance by the FDA. Tr. 5279-5280, 8328-8329. At no point did Plaintiff assert that Roger Darois—who was a *former* Bard employee at the time of trial and testified in Bard's case—was, as Plaintiff argues here, "the ultimate avatar" or "the

[1] The "11/29 Tr." was the subject of a motion to supplement in the Court of Appeals, and is now part of the record as Transcript Volume XIV.

personification" of Bard, such that the prior conviction should have been admissible to impeach his testimony. Appellant's Substitute Brief at 56-57.[2]

The only properly preserved questions before this Court are: (i) whether Plaintiff was entitled, as a matter of right, to elicit the prior conviction from Mr. Weiland when Plaintiff called him as a witness; or (ii) whether Bard somehow opened the door to the introduction of an otherwise-inadmissible prior conviction (addressed *infra* Point II). *E.g., State v. Johnson*, 524 S.W.3d 505, 513 (Mo. banc 2017) (objection "must be specific and made contemporaneously with the purported error" (citation omitted)); *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 646 (Mo. banc 1997) ("primary reason" for requiring offer of proof after order granting motion in limine "is to include the proposed answer and expected proof in the official record of the trial, so that in case of appeal upon the judge's ruling, the appellate court may understand *the scope and effect of the question and proposed answer* in considering whether the judge's ruling sustaining an objection was proper" (emphasis added; citation omitted)).[3]

B. The Trial Court Correctly Ruled That Plaintiff Did Not Have an Absolute Right to Introduce Bard's Unrelated Prior Corporate Conviction Under Section 491.050.

Plaintiff argues that she had an absolute right under Section 491.050 to introduce Bard's 1994 conviction on its guilty plea to selling unapproved heart catheters when she called Mr. Weiland as a witness, and the trial court had no discretion to exclude that

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[2] The Court of Appeals noted that Mr. Weiland "was the only witness through whom Plaintiff sought to admit evidence of Bard's criminal convictions," and that Plaintiff "never attempted to admit evidence of Bard's conviction through Darois." *Sherrer v. Boston Sci. Corp.*, No. WD80010, 2018 WL 3977539, at *7 & n.15 (Mo. App. W.D. Aug. 21, 2018), *ordered transferred* Dec. 4, 2018.

[3] The Court of Appeals' opinion addresses only the first issue, because the court ruled that Plaintiff had raised a multifarious point on appeal by arguing both bases for admission of the prior conviction in a single point; exercising its discretion, the court elected to review only Plaintiff's argument that she was entitled, as of right, to cross-examine Mr. Weiland with the prior conviction. *Sherrer*, 2018 WL 3977539, at *2.

conviction. Plaintiff's argument for a previously unrecognized absolute right to introduce unrelated corporate convictions cannot be reconciled with the statutory language and purpose of Section 491.050, judicial precedent outlining the circumstances under which convictions are admissible under the statute, and the long-recognized discretion granted to the trial court in excluding prejudicial evidence.

1. Section 491.050 cannot be interpreted to require all corporate convictions to be admissible for impeachment.

Plaintiff recognizes that the threshold issue "is whether § 491.050 applies to impeachment of corporations." Appellant's Substitute Brief at 46.[4] In arguing that Section 491.050 creates an absolute right to introduce all corporate convictions, Plaintiff ignores the plain language of the statute providing for the right to use a witness's prior convictions to impeach a witness's credibility, and misinterprets other statutes providing that the statutory term "person" *may*—not invariably *shall*—be interpreted to include corporations.

Section 491.050 states that "[a]ny person who has been convicted of a crime is, notwithstanding, a competent witness; however, any prior criminal convictions may be proved to affect his credibility in a civil or criminal case. . . . " § 491.050, RSMo. "When statutory language is clear, courts must give effect to the language as written," and "[c]ourts are without authority to read into a statute a legislative intent contrary to the intent made evident by the plain language." *M.A.B. v. Nicely*, 909 S.W.2d 669, 672 (Mo. banc 1995) (rejecting argument that Section 491.050 allows introduction of guilty pleas in civil cases because statute only explicitly makes guilty pleas admissible in criminal cases).

As this Court has recognized, the plain language of section 491.050 creates a right to impeach a witness's credibility with that witness's prior criminal convictions. *Id*. at

[4] Plaintiff spends 11 pages of her brief addressing the irrelevant proposition that, when an individual witness testifies in a civil or criminal trial, a prior conviction may be elicited to impeach the witness. Appellant's Substitute Brief at 35-45.

671 ("This Court has interpreted section 491.050 to confer an absolute right, in both civil and criminal proceedings, to impeach the credibility of any witness . . . with his or her prior criminal convictions."). A corporate conviction, such as Bard's prior conviction, that is entirely unrelated to any witness who testifies at trial cannot satisfy the statutory language, because it is not the *witness's conviction* and thus cannot speak to the *witness's credibility*.

The keystone of Plaintiff's argument to the contrary is Section 1.020(12), RSMo, which states that, "[a]s used in the statutory laws of this state, . . . unless plainly repugnant to the intent of the legislature or the context thereof . . . [t]he word 'person' may extend and be applied to bodies politic and corporate." § 1.020(12), RSMo. Invoking case law on entirely different issues, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342-43 (2010) (First Amendment protects corporations); *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 687-88 (1978) (extending 42 U.S.C. § 1983 to actions against municipalities and local government units), Plaintiff asserts that a corporation is a "person," such that, "when a corporation testifies through its officer or agent, . . . the body corporate's convictions may be proved to affect the *corporate* credibility." Appellant's Substitute Brief at 46 (emphasis in original). But the notion that *any* prior corporate conviction—no matter how remote in time or connection—is *per se* admissible to impeach a corporation in a civil trial, is indeed "plainly repugnant to . . . the context" in which "person" is used in Section 491.050, for two reasons.

First, Section 1.020 cannot be construed to *require* treating a corporation as a statutory "person" in *all* instances. The statutory language is "permissive," *i.e.*, "[t]he word 'person' *may* extend" to corporations. *Mark Twain Cape Girardeau Bank v. State Banking Bd.*, 528 S.W.2d 443, 446 (Mo. App. 1975) (emphasis added; quoting Section 1.020). "Construction of the word 'person' to include 'corporation' is *not* required, but rather 'depends upon the context and the intent with which the term is employed.'" *Id.* (emphasis added; citation omitted); *accord J.S. DeWeese Co. v. Hughes-Treitler Mfg. Corp.*, 881 S.W.2d 638, 643 (Mo. App. E.D. 1994); *see also State v. Wilkins*, 872 S.W.2d

142, 147 (Mo. App. S.D. 1994) ("The use of the word 'may' indicates the legislature intended to make relief under the statute discretionary with the trial court." (citation omitted)).

In construing that "permissive" language in *Mark Twain*, the court held that a banking statute requiring "an examination . . . to ascertain . . . whether the character, responsibility and general fitness of the *persons*" named as bank incorporators barred a corporation from serving as a qualified incorporator:

> When the "character" of "persons" is to be ascertained, clearly the character of individuals is implied. A corporation is an artificial entity. *Had the legislature intended to include corporations among "persons" whose "character" was to be examined we believe the statute would have so specified*.

Mark Twain, 528 S.W.2d at 446 (emphasis added; citation omitted); *cf. Structo Corp. v. Leverage Inv. Enters., Ltd.*, 613 S.W.2d 197, 202-03 (Mo. App. W.D. 1981) (because "the scheme and purpose of an enactment determine whether person encompasses corporate and other artificial agglomerates," statute requiring contractor to give notice to "owner" of unpaid mechanics and materialmen applied equally to individual and corporate owners; "[t]o protect only an actual person from the fraud of a contractor . . . and withhold that concern from a corporate or other comparable entity, not only invidiously constrains the lien remedy, but also misunderstands the reality of contemporary life").

The *Mark Twain* rationale is fully applicable to the construction of Section 491.050. As this Court noted in its first decision addressing Section 491.050's predecessor, the statute's premise is that a criminal conviction necessarily bears on a witness's "good moral *character*." *State v. Blitz*, 71 S.W. 1027, 1030 (Mo. 1903) (emphasis added). That focus on "character" strongly suggests that the word "person," as used in Section 491.050, must necessarily mean only a *natural* person, because "[a] corporation 'without a brain or body, existing only on paper through legislative

command, and incapable of thought or action' does not inherently possess *a good, bad, moral, or immoral 'character*.'" *Mark Twain*, 528 S.W.2d at 446 (emphasis added; citation omitted).

Second, "[w]hen the legislature has used 'person' in a sense broader than 'natural person' it has been *explicit* in its definitions." *Id.* (emphasis added). There are 22 defined terms in Section 1.020—and *only* subsection (12) is phrased permissively, using the word "may," in the context of defining person to include artificial entities. All other definitions are either mandatory or inclusive. § 1.020(1)-(11), (13)-(22), RSMo. Subsection (12) must therefore be construed as permissive, under "the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory." *State ex rel. Robison v. Lindley-Myers*, 551 S.W.3d 468, 474 n.4 (Mo. banc 2018) (quoting *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 672 (Mo. banc 2010)).

Particularly should this be so where, as here, the legislature distinctively has used the word "may" in only *one* statutory subsection, omitting it in *other* subsections. When courts are "engaged in the business of interpreting statutes [courts] presume differences in language . . . convey differences in meaning." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017). "The legislature's use of different terms in the same statute is presumed to be intentional." *Alberici Constructors, Inc. v. Dir. of Revenue*, 452 S.W.3d 632, 638 (Mo. banc 2015).

Finally, Plaintiff also relies on Section 1.030.2, RSMo, which states "[w]hen any . . . party or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, are included." Appellant's Substitute Brief at 46. That provision is facially intended to avoid any confusion when a statute uses the singular number or the masculine gender, and nothing more. *See State v. Hunt*, 451 S.W.3d 251, 259 n.10 (Mo. banc 2014).

Thus, as a matter of law, Section 491.050 cannot be construed to create what Plaintiff labels "an *absolute* right to impeach Bard's credibility" with a remote and

unconnected prior conviction. Appellant's Substitute Brief at 32.[5] And there is no contrary authority in Missouri, as Plaintiff acknowledges (*id.* at 47) or, indeed, in *any* jurisdiction, holding that there is an "absolute right" to impeach a corporate party with a prior corporate conviction.

2. Even if Section 491.050 could be interpreted to allow for the introduction of corporate convictions under appropriate circumstances, the statute cannot be invoked to introduce a remote conviction that is unrelated to any witness's credibility.

There is a fundamental inconsistency in Plaintiff's argument on the prior conviction's admissibility. On the one hand, Plaintiff argues that "[a] corporation, 'though legally constituted, is not "living" and thus has no capacity to function except through the efforts of persons empowered and authorized to do so in its behalf.'" Appellant's Substitute Brief at 51 (quoting *State ex rel. Dewey & LeBoeuf, LLP v. Crane*,

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[5] Plaintiff did not raise the propriety of a trial court's considering remoteness in *either* of her briefs before the court of appeals. She attempted to raise it for the first time in a July 23, 2018 post-briefing letter, which listed "additional authorities not cited" in her briefs. Bard opposed this letter on July 31, 2018, citing Rule 84.13(a) for support, among other authority ("allegations of error not briefed or not properly briefed shall not be considered in any civil appeal"). Yet for the first time in a brief, before this Court, Plaintiff attempts to argue that Missouri courts have dispelled with a remoteness consideration "in favor of admissibility" of convictions. Appellant's Substitute Brief at 42-45. Plaintiff cites to a number of inapposite cases for this belated argument. *E.g., State v. Bridges*, 349 S.W.2d 214, 216 (Mo. 1961) ("remoteness" not raised or addressed; case has never been applied in civil context); *State v. Giffin*, 640 S.W.2d 128, 132 (Mo. 1982) (case had never been applied in civil context prior to Court of Appeals' opinion in *Sherrer*); *Smile v. Lawson*, 506 S.W.2d 400, 402 (Mo. 1974) ("remoteness" not raised or addressed); *State v. Williams*, 603 S.W.2d 562, 568 (Mo. 1980) (case had never been applied in civil context prior to Court of Appeals' opinion in *Sherrer*). Moreover, Plaintiff's argument on remoteness is a red herring. As set forth herein, the question is whether a prior corporate conviction is *per se* admissible when any corporate officer or employee is called by either side to testify. Plaintiff's remoteness argument should thus be dismissed.

332 S.W.3d 224, 232 (Mo. App. W.D. 2010)). More specifically, Plaintiff argues that "a corporation can only speak through its officers" in a trial. Appellant's Substitute Brief at 52-53 (emphasis omitted; quoting *Neuhoff Bros. Packers v. K.C. Dressed Beef Co.*, 340 S.W.2d 193, 196 (Mo. App. 1960)).

On the other hand, Plaintiff argues that prior corporate convictions should be admitted against *corporations* "to affect *their* credibility," regardless whether the witness on the stand had any involvement in—or even any personal knowledge of—the criminal activity. Appellant's Substitute Brief at 53-54 (emphasis added). That argument must be rejected.

As noted earlier in the discussion of Section 491.050, a corporation "does not inherently possess a good, bad, moral, or immoral 'character.'" *Mark Twain*, 528 S.W.2d at 446 (citation omitted). Indeed, a corporation is nothing more than "a collective of *individuals*." *In re IFC Credit Corp.*, 663 F.3d 315, 318 (7th Cir. 2011) (emphasis added). As this Court has stated:

> [S]tatutory entities cannot act except through individuals acting on their behalf. This premise is not a pronouncement of law or policy; it is an acknowledgment of indisputable fact. . . . [I]t simply is not possible for a "legal fiction" to be anywhere or do anything . . . *unless some individual does so on its behalf*.

Naylor Senior Citizens Hous., LP v. Side Constr. Co., 423 S.W.3d 238, 244 (Mo. banc 2014) (emphasis added). "Since a corporation "acts by its officers and agents, *their* purposes, motives, and intent are just as much those of the corporation as are the things done." *Wandersee v. BP Prods. N. Am., Inc.*, 263 S.W.3d 623, 629-30 (Mo. banc 2008) (emphasis added; quoting *N.Y. Cent. & H.R.R. Co. v. United States*, 212 U.S. 481, 492-93 (1909)).

That proposition underpins the Third Circuit's decision in *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506 (3d Cir. 1997), in which plaintiffs who brought an employment-discrimination action in 1992 wished to introduce "Georgia-Pacific's 1991

plea of guilty to tax evasion charges based on a fraudulent appraisal of land . . . in 1984." *Id*. at 522. Invoking Federal Rule of Evidence 609, the plaintiffs sought "to impeach the testimony of individual Georgia-Pacific employee witnesses, none of whom were shown to have any connection to the acts underlying the corporate conviction." *Id*. The court excluded the evidence as "unduly prejudicial." *Id*.

Just as Plaintiff argues here that she had an "absolute right to impeach Bard's credibility with evidence of the convictions" (Appellant's Substitute Brief at 32), the *Walden* plaintiffs invoked "the 'automatic' admission provision" in Federal Rule of Evidence 609(a)(2), under which, "if the prior conviction involved dishonesty or false statements, the conviction is automatically admissible insofar as the district court is without discretion to weigh the prejudicial effect of the proffered evidence against its probative value." *Walden*, 126 F.3d at 522-23. To be sure, there are differences between Rule 609(a) and 4.[6] But those differences have nothing to do with the question whether, under an "automatic admission" provision, such as Section 491.050 and Rule 609(a)(2)—under which there is "automatic admission" of convictions for crimes involving false statements—a *corporate* conviction is admissible without regard to its connection to the witness who is testifying. As will be set forth, the holding in *Walden* turned on a construction of the provision, *not* on a determination of legal relevance under general relevancy principles.

Indeed, the Third Circuit proceeded on the assumption that the defendant's prior conviction for tax evasion was within Rule 609(a)(2)'s proper scope if it had been a conviction of the individual witness who was testifying. The court addressed the very different question "whether prior convictions of a corporation are admissible under Rule 609 generally to impeach the testimony of individual employee witnesses without any

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[6] The Court of Appeals noted that, for example, Rule 609 "requires a trial court to engage in a legal relevance analysis for convictions that are more than ten years old," while there is no such parallel requirement in Section 491.050. *Sherrer*, 2018 WL 3977539, at *11.

evidence that those witnesses participated in the conduct underlying the conviction." *Walden*, 126 F.3d at 523.

The court held that, because "[i]t is only the testifying witness' own convictions that will bear directly on the likelihood that he or she will testify truthfully. . . . it is only the testifying witness' own prior convictions that should be admissible on cross-examination to impeach his credibility." *Id*. Accordingly, "the 1991 Georgia-Pacific conviction must be the individual employee's 'own' in some meaningful fashion." *Id*. That requirement could not be satisfied because "[c]riminal acts are relevant to a witness' credibility only if that witness actually participated in the criminal conduct." *Id*.

The court explained:

> It strains logic to argue that an employee's credibility is properly brought into question by the mere fact that he or she is presently employed by a corporation that in some unrelated manner was guilty of dishonest acts, no matter how egregious those acts may have been. There is no evidence that the individual witnesses who testified at trial had any involvement with Georgia-Pacific's tax evasion scheme, and thus that scheme could not possibly bear on the likelihood that those witnesses would testify truthfully.

Id. at 523-24. "Since there was no evidence of such a connection in the present case, the district court properly excluded the Georgia-Pacific convictions as improper impeachment evidence." *Id*. at 524.[7]

And this was so *despite* Rule 609(a)(2)'s "automatic admission" provision. Construing that rule, the court held: "Only if the witness is directly connected to a prior conviction for a crime involving dishonesty or a false statement does Rule 609(a)(2)'s automatic admission provision apply." *Walden*, 126 F.3d at 524. "To allow Rule

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[7] A subsequent district court decision, *Hickson Corp. v. Norfolk S. Ry. Co.*, 227 F. Supp. 2d 903 (E.D. Tenn. 2002), disagreed with the *Walden* decision's analysis of Rule 609, but, as will be set forth *infra* Point II, the order in that case ultimately turned on the adverse party's having opened the door to character evidence.

609(a)(2) to apply otherwise would be to 'override the fundamental purpose of impeachment evidence, namely, to expose a defect in the witness's credibility.'" *Id.* (citation omitted); *accord Garamendi v. Altus Fin. S.A.*, No. CV 99-2829 AHM, 2005 WL 5995776, at *2 (C.D. Cal. Jan. 31, 2005) (applying *Walden*, court refused to "allow a witness who did not admit to a crime or who did not perform or directly participate in the acts that were the direct basis for his employer's guilty plea to be . . . impeached" with corporate conviction); *Ghadrdan v. Gorabi*, 105 Cal. Rptr. 3d 338, 344 (Cal. Ct. App. 2010) (corporate conviction could not be used to impeach CEO, because "[t]here was no evidence before the trial court that [CEO] committed a crime, personally engaged in any of the charged misconduct, or had any knowledge of such misconduct, much less that he ratified it"); *CGM Contractors, Inc. v. Contractors Envtl. Servs., Inc.*, 383 S.E.2d 861, 865-66 (W. Va. 1989) ("it would seem reasonable to utilize a corporate crime to impeach a corporate official's credibility if the official is connected to the crime," either because witness "held a managerial position at the time occurred such that it may be fairly inferred that he shared responsibility for the criminal act, or have actually participated in the criminal act"); *cf. Commerce Funding Corp. v. Comprehensive Habilitation Servs., Inc.*, No. 01 Civ. 3796(PKL), 2005 WL 1026515, at *8 (S.D.N.Y. 2005) (CEO was "personally named" in charging document; "it is an overwhelmingly reasonable inference that he 'is directly connected to the underlying criminal act' . . . and the conviction reflects on his credibility" (citing *Walden*, 126 F.3d at 510)).[8] So too, here, the purported "automatic admission" of prior convictions under Section 491.050 must be given a rational construction, and Plaintiff's argument that the statute creates an absolute right to introduce corporate convictions must be rejected.

[8] In multi-district litigation against Bard and other corporations, the district judge excluded Bard's prior conviction on deposition of the Bard CEO. Pretrial Order # 127, *In re C. R. Bard, Inc. Pelvic Repair Sys. Prod. Liability Litig.*, No. 2:10-md-02187 (S.D. W. Va. June 30, 2014), ECF No. 956.

Both the circumstances surrounding Bard's 1994 conviction and the manner in which Plaintiff attempted to use that conviction at trial demonstrate why Plaintiff's argument for an absolute right to use corporate convictions with corporate witnesses must be rejected. As in *Walden*, there was *no* connection whatsoever between the prior conviction and Mr. Weiland, the Bard witness through whom Plaintiff sought to elicit the conviction at trial:

- The 1994 conviction related to conduct undertaken by Bard's U.S. Catheter & Instrument Division ("USCI Division") between 1987 and 1990 related to heart catheter devices. LF 6402-6403.
- Mr. Weiland had not been employed by Bard at the time of the conduct giving rise to the criminal charges against Bard or for that matter, at the time of the 1994 conviction. LF 6402-6403.
- Neither Mr. Weiland nor, for that matter, any other Bard witness who was called at trial had personal knowledge about the underlying criminal conduct. LF 6402.
- Bard's USCI Division, which manufactured the coronary catheter devices involved in the criminal case, was separate—both in corporate identity and geographical location—from the Bard Urologic Division, which developed the Align mesh device at issue in this case. LF 6402-6403.
- Bard sold USCI and its coronary catheter business in 1998, nearly a decade before Bard's Align device was released to the market. LF 6402-6403.[9]

Dispensing with any connection between the testifying witness and the conviction would lead to a truly absurd result: Bard's 1994 conviction will be admissible against Bard *in perpetuity*. That is, if Bard were to be sued in 2050, in 2080, or at any point before the end of time, Plaintiff's theory would require the admission of the conviction as

[9] The Court of Appeals recognized as much, ruling that "[t]he conduct that gave rise to the guilty pleas did not involve the mesh sling product at issue in Sherrer's case, and instead involved heart catheter devices manufactured by a division of the company that Bard no longer owns." *Sherrer*, 2018 WL 3977539, at *3.

impeachment whenever *any* Bard witness testified. The conviction's attenuated relationship to Bard will only grow more so with the passage of time, but that reality would make no difference under Plaintiff's position.

Section 491.050 cannot be so construed. It is a fundamental tenet that "construction of a statute should avoid unreasonable or absurd results." *Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1, 4 (Mo. banc 2012). This Court "presumes that the legislature did not intend to enact an absurd law and favors a construction that avoids unjust or unreasonable results." *Care & Treatment of Schottel v. State*, 159 S.W.3d 836, 842 (Mo. banc 2005). The rule set forth in *Walden* makes eminent good sense; even if there could be circumstances in which a corporate conviction might be admissible as impeachment, a trial court properly should exclude an unrelated and unconnected prior conviction.

C. The Trial Court Did Not Abuse Its Discretion in Ruling That Plaintiff Could Not Engineer the Admission of the Prior Conviction By Calling Bard's President and COO as a Witness in Plaintiff's Case.

Finally, all else aside, Plaintiff's attempt to engineer the prior conviction's introduction by calling Mr. Weiland in her case (via video deposition) was properly rejected by the trial court. When Bard moved to exclude the 20-year old conviction (11/29 Tr. 43-50; LF 6037-6040), Plaintiff argued that she was entitled to introduce the conviction as impeachment of the corporation, "if Bard puts up a corporate rep[resentative]" because, if a corporate representative testifies, "that person is speaking on behalf of the corporation." 11/29 Tr. 51-52. On appeal, Plaintiff fails even to acknowledge that, at trial, she offered the prior conviction to impeach Mr. Weiland, as a purported corporate representative—which he was not—or that she did not call Bard's *actual* corporate representative, who was present in the courtroom for the trial. Tr. 577, 826, 833.

Plaintiff argues instead that she was entitled to elicit the prior conviction, despite having called Mr. Weiland in her case, because Bard's counsel questioned Mr. Weiland

on cross-examination and Bard therefore "testified vicariously through [Mr.] Weiland." Appellant's Substitute Brief at 55. Even if Section 491.050 could be construed to allow impeachment of a corporation's "character," a party should not be allowed to engineer the admission of a prior conviction merely by calling an adverse party's corporate officer and then introducing the conviction to "impeach" the corporation.

1. The prior corporate conviction was inadmissible because Mr. Weiland did not testify as a corporate representative.

A corporate representative testifies *as the corporation* when the corporation is subpoenaed for deposition under Rule 57.03(b)(4) "as to matters known or reasonably available" to the corporation. "The testimony of the corporate representative designated pursuant to Rule 57.03(b)(4) is not the testimony of that individual for his or her personal recollections and knowledge but is instead the deposition of the corporate defendant." *State ex rel. Reif v. Jamison*, 271 S.W.3d 549, 551 (Mo. banc 2008) (citation and internal quotation marks omitted). A corporate representative, in short, testifies to the *corporation's* knowledge. *Id*. In contrast, corporate employees who have *not* been designated as corporate representatives may testify "concerning matters within the scope and course of their employment," and their deposition testimony on such matters may be introduced at trial. *Lunceford v. Houghtlin*, 326 S.W.3d 53, 73 (Mo. App. W.D. 2010).

It is undisputed that Mr. Weiland was *not* deposed as a corporate representative and that his testimony was solely as to matters within his own knowledge. 11/29 Tr. 58. Bard did not "testify" through Mr. Weiland. Thus, even if Bard had called Mr. Weiland in *its* case, he would have testified as a corporate employee, to matters within his personal knowledge. Because Bard did not "testify" through Mr. Weiland, Section 491.050 (even if properly applicable to corporations) would not permit introduction of the prior conviction. *State v. Holleran*, 197 S.W.3d 603, 608 (Mo. App. E.D. 2006) ("when a [party] testifies . . . prior criminal convictions . . . may be proved . . . to impeach his or her credibility"; where party does not testify, adverse party cannot introduce prior convictions under Section 491.050).

Any other interpretation of Section 491.050 that would allow using a prior corporate conviction in the manner urged by Plaintiff would only exacerbate the absurdities discussed *supra* Point I.B—because a prior corporate conviction would forever be admissible whenever *any* corporate employee took the stand, for any purpose at all. That is not, and should not be, the law.

2. Plaintiff could not elicit the prior conviction by calling Mr. Weiland in Plaintiff's case.

Plaintiff argues that she was "entitled" to call Mr. Weiland "as a witness and impeach Bard's credibility by use of Bard's prior criminal convictions." Appellant's Substitute Brief at 54. That is, according to Plaintiff, an unrelated and temporally remote prior corporate conviction can be introduced by an adverse party through the simple device of calling a corporate representative—or, as here, *any* corporate employee—and eliciting the conviction. The law does not support that absurd result.

To be sure, it has been established for more than 20 years that a party can impeach its own witnesses with prior inconsistent statements in civil cases—and that such statements are substantively admissible, because the declarant is available for cross-examination. *Rowe v. Farmers Ins. Co.*, 699 S.W.2d 423, 424-28 (Mo. banc 1985); *accord Higgenbotham v. Pit Stop Bar & Grill, LLC*, 548 S.W.3d 323, 330 (Mo. App. E.D. 2018). In the same year that *Rowe* was decided, the Legislature adopted Section 491.074, RSMo, under which "a prior inconsistent statement of any witness testifying in the trial of a criminal offense shall be received as substantive evidence, and the party offering the prior inconsistent statement may argue the truth of such statement." § 491.074, RSMo. *Rowe* thus harmonized the common law that governs in civil cases with the statutory rule for criminal cases. *State v. Clark*, 756 S.W.2d 565, 569 (Mo. App. W.D. 1988).

But impeachment with a *prior conviction* under Section 491.050 stands on a very different footing. Generally, "a party may not impeach its own witness in either a civil or criminal case unless two requirements are met: (1) a showing of surprise at the testimony

the witness gives, and (2) a showing that the testimony in effect makes the witness a witness for the other side." *State v. Phillips*, 940 S.W.2d 512, 520 (Mo. banc 1997); *accord State v. Kellner*, 103 S.W.3d 363, 366 (Mo. App. S.D. 2003). With the advent of Section 491.074 in 1985, this Court dispensed with the requirement of showing "surprise or hostility" as a predicate for impeaching a party's own witness with a prior inconsistent statement in a criminal trial. *State v. Bowman*, 741 S.W.2d 10, 12-13 (Mo. banc 1987); *accord Phillips*, 940 S.W.2d at 520. But the Court was clear in stating that "[w]e have not modified the rule . . . to allow impeachment of one's own witness in a criminal proceeding by proof of prior criminal convictions without a showing of surprise and hostility." *Phillips*, 940 S.W.2d at 520.

Plaintiff reads the above-quoted language to mean that the *Phillips* requirement of showing "surprise and hostility" before impeaching a party's witness with a prior conviction "only applies to criminal actions." Appellant's Substitute Brief at 54. This is so, according to Plaintiff, because Section 491.030, RSMo, "allows a party to a civil action to call an adverse party as a witness and examine that party 'under the rules applicable to the cross-examination of witnesses.'" Appellant's Substitute Brief at 54 (quoting statute).[10] But this Court has never dispensed with the *Phillips* predicate for *civil* cases, *i.e.*, it has never held that an adverse party called by an opponent is automatically subject to impeachment with a prior conviction.

Rather, "[a] party calling an adverse party as a witness may contradict that person's testimony, but may not directly impeach the witness' credibility, except with the witness' prior inconsistent statements." *Waters v. Barbe*, 812 S.W.2d 753, 757 (Mo. App. W.D. 1991) (citations omitted); *accord Howard v. City of Kansas City*, 332 S.W.3d 772, 785 (Mo. banc 2011); *Menschik v. Heartland Reg'l Med. Ctr.*, 531 S.W.3d 551, 561 n.7 (Mo. App. W.D. 2017).

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[10] This argument replicates the opinion of the Court of Appeals. *Sherrer*, 2018 WL 3977539, at *8-9.

Plaintiff mistakenly relies on *Love v. Baum*, 806 S.W.2d 72 (Mo. App. W.D. 1991), to argue for an automatic right to impeach one's own witness with a prior criminal conviction. *Love* holds that eliciting a party's prior convictions when the party is called by an opponent is permissible under Section 491.050 because "in legal contemplation, [the plaintiff] was cross-examining [the defendant] rather than conducting direct examination" and it was therefore "proper for [the plaintiff] to inquire about [the defendant's] criminal convictions." 806 S.W.2d at 74-75. The only reported Missouri decision to have cited *Love* for that proposition is *Giles v. Riverside Transportation, Inc.*, 266 S.W.3d 290 (Mo. App. W.D. 2008), which did so only in *dictum*, because the admissibility of a prior conviction was not at issue in the case. *Id.* at 295. The statement in *Love* is contrary to *Phillips* and *Waters*, neither one of which is even mentioned in the decision.

Moreover, *Love* acknowledges that trial courts must be afforded discretion in determining whether to allow a prior conviction to be elicited in this fashion, because of the concern that "it is unfair to allow a party to call an adverse party as a witness and to immediately bring out criminal convictions." *Love*, 806 S.W.2d at 74. Because "[c]ross-examination is subject to restraint and limitation by the trial court," the court directed such "be handled by the trial court on a case by case basis." *Id*.

Here, the trial court was made aware by Plaintiff's counsel that the primary purpose for calling Mr. Weiland in Plaintiff's case was to prove that that Mr. Weiland had "lied about not seeing" the MSDS attached to an email from Mr. Darois. 11/29 Tr. 55. Mr. Weiland's factual testimony was brief and unremarkable, addressing nothing that was not otherwise presented at trial. Court Exhibit 22. In light of Plaintiff's professed intent to use Mr. Weiland to elicit the prior corporate conviction, the trial court did not abuse its discretion in excluding the conviction.

D. Any Error By the Trial Court in Excluding the Prior Corporate Conviction Does Not Warrant a New Trial.

Even if the trial court had committed error by excluding the prior corporate conviction—which Bard denies—Plaintiff has failed to demonstrate such error warrants a new trial. An appellate court "will not reverse a judgment based upon the exclusion of evidence unless a defendant demonstrates that the error resulted in prejudice that would have materially affected the merits of the case." *Aziz*, 477 S.W.3d at 108; *see also* § 512.160.2, RSMo ("No appellate court shall reverse any judgment, unless it believes that error was committed by the trial court against the appellant, and materially affecting the merits of the action."); Rule 84.13(b) (same); *Pracht*, 801 S.W.2d at 93 (prejudice must amount to "a substantial or glaring injustice" for reversal). This rule is fully applicable to rulings that exclude prior convictions, because excluding a prior conviction that "is unrelated to any issue other than witness credibility is of such little consequence that no reversal of a judgment will be made on that basis." *Lewis*, 842 S.W.2d at 84-85 (trial court's exclusion of prior misdemeanor speeding conviction in personal injury action arising from motor vehicle accident did not warrant reversal under rule that "[t]he exclusion of evidence which has little, if any, probative value is usually held not to materially affect the merits of the case"). Here, the exclusion of Bard's unrelated conviction is arguably even less consequential because, in addition to being unrelated to the substantive issues before the jury, Bard's prior corporate conviction would not have spoken to any individual witness's credibility.

Plaintiff, like any other litigant, was entitled to a *fair* trial, free of *prejudicial* error that materially affected the merits of the action—but not to a *perfect* trial. To warrant reversal of a jury's verdict, Missouri law always has required the appellant to show that the purported error *materially* affected the trial's outcome. *Barron v. Abbott Labs., Inc.*, 529 S.W.3d 795, 798 (Mo. banc 2017); *M.A.B.*, 909 S.W.2d at 673. Here, there is no connection between the purported error and the jury's verdict. If the jury had known that Bard had pleaded guilty some 20-plus years ago to a charge arising from a different

device that was manufactured by a no-longer existing corporate division and as to which no witness at this trial had involvement or personal knowledge, it cannot be reasonably asserted that the jury would then have found for Plaintiff.

For the first time, before this Court, Plaintiff attempts to satisfy this exacting standard by arguing that:

> Use of Bard's criminal convictions was admissible to contradict Bard's evidence. Plaintiff and Bard presented contradictory evidence regarding the safety of Bard's Align, the safety of the polypropylene resin used to manufacture the Align, whether Bard attempted to mislead the suppliers and manufacture of the polypropylene resin used, whether Bard ignored a Material Safety Data Sheet that prohibited the use of certain plastics in medical applications that involved permanent implantation in a human body or permanent contact with internal body fluids or tissues, and whether Bard had sufficiently determined the safety of the Align.

Appellant's Substitute Brief at 69-70. Because all of this put Bard's "credibility at issue," according to Plaintiff, excluding the criminal convictions "was prejudicial error" which "materially affected the merits of this action." Appellant's Substitute Brief at 61. This does not satisfy the exacting standard applied by this Court.

Plaintiff's argument underscores that the trial court's exclusion of Bard's criminal conviction neither prejudiced Plaintiff nor materially affected the trial's outcome. Essentially, Plaintiff argues that "contradictory evidence" as to "Bard's credibility" was placed before the jury throughout the trial, and the jury, as the finder of fact, weighed all the "contradictory" evidence in Bard's favor. That Plaintiff speculates evidence of a remote, unrelated conviction—which had no bearing on the Align product at issue in the trial, and involved a defunct, distinct corporate division—would have tipped the scales in her favor, only bolsters the point that the trial court, which "enjoys considerable discretion in the admission or exclusion of evidence," *Lozano*, 421 S.W.3d at 451,

allowed the parties to place all *relevant*, *admissible* evidence before the jury, and the jury still ruled against Plaintiff.

Plaintiff also fails to demonstrate in her materiality analysis how, *despite* the competing evidence before the jury after a *seven-week* trial, the exclusion of a handful of questions on a remote conviction involving an unrelated heart catheter *materially* impacted the verdict. Ultimately, Plaintiff quibbles with the trial court's gatekeeping role in evidentiary matters, and fails to confront the fact that on appeal, she must actually demonstrate how the exclusion of this irrelevant, remote, unrelated evidence materially affected the jury's verdict.

There is simply no connection between the trial court's purported error and the jury's verdict, much less one that materially affected the jury's verdict. Plaintiff has failed to show this Court exactly how, after seven weeks of trial—which included scores of documentary evidence, as well as testimony from Plaintiff, treating physicians, experts, and fact witnesses—if the jury had known that Bard had pleaded guilty decades ago, to a charge arising from a *different device* than the one implanted in Plaintiff, which was manufactured by a corporate division *that no longer exists*, as to which no witness at the trial had involvement or personal knowledge, that the jury would have found for Plaintiff.

Plaintiff's product-liability claims failed for lack of merit. Bard introduced ample evidence to show that her alleged injuries had been caused by multiple prior pelvic floor surgeries, which included implantation of polypropylene mesh that had been manufactured by neither Boston Scientific nor Bard, and by her ongoing advanced osteoarthritis. Tr. 7086, 7113, 7126-7128, 7169, 7172, 7191-7192, 7194-7201, 7188, 7211-32, 7745, 7751-7752, 7770-7772. In particular, the discovery mid-way through trial of the medical record showing that Plaintiff had been implanted with polypropylene mesh to treat stress urinary incontinence in the 1990s: (1) directly contradicted Plaintiff's primary defect theory of the case that polypropylene mesh was inappropriate for this indication; (2) eviscerated Plaintiff's medical causation argument because, unlike the

earlier mesh implant, both Defendants' mesh products had been removed; and (3) refuted both Plaintiff's and her expert witness's trial testimony that there was no earlier mesh implant. Based on this evidence, the jury also notably returned a verdict in favor of the codefendant Boston, as to which no remote and unrelated criminal convictions were offered.

Accordingly, Plaintiff fails to satisfy her burden to show that the exclusion of Bard's conviction materially affected the jury's verdict, and the Court should reject Plaintiff's Point I.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING THAT BARD HAD NOT OPENED THE DOOR TO THE INTRODUCTION OF THE OTHERWISE-INADMISSIBLE PRIOR CONVICTION.

A. Standard of Review and Preservation of Error.

With Section 491.050 inapplicable to prior corporate convictions, the analysis turns to whether such a conviction may be admitted as otherwise-relevant evidence. A trial court "is accorded considerable discretion when making the subjective determination of relevancy." *Koon v. Walden*, 539 S.W.3d 752, 761 (Mo. App. E.D. 2017) (citation and internal quotation marks omitted). "Unless that discretion is abused, the exclusion of evidence on relevancy grounds is not a basis for reversal," and on appeal, "the issue is not whether the evidence was admissible, it is whether the trial court abused its discretion in excluding the evidence." *Rock v. McHenry*, 115 S.W.3d 419, 420 (Mo. App. W.D. 2003).

Well-established principles govern a trial court's relevancy inquiry:

> "Evidence must be logically and legally relevant to be admissible." Logically relevant evidence "tends to make the existence of a material fact more or less probable." Logically relevant evidence is legally relevant so long as "the probative value of the evidence . . . [outweighs] its costs."

In re Care & Treatment of Braddy, 559 S.W.3d 905, 912 (Mo. banc 2018) (alteration in original; citations omitted). If the costs—meaning "unfair prejudice, confusion of the

issues, misleading the jury, undue delay, waste of time, or cumulativeness"—outweigh probative value, the evidence "should be excluded." *State v. Prince*, 534 S.W.3d 813, 818 (Mo. banc 2017).

A trial court's ruling on whether a party has opened the door to otherwise-inadmissible evidence is reviewed for abuse of discretion. *E.g., State ex rel. Mo. Highways & Transp. Comm'n v. Boer*, 495 S.W.3d 765, 772-73 (Mo. App. S.D. 2016); *Boshears v. Saint-Gobain Calmar, Inc.*, 272 S.W.3d 215, 225 (Mo. App. W.D. 2008). To overturn such a ruling, it must be shown that the ruling was "clearly against the logic of the circumstances, unreasonable, arbitrary, or demonstrates a lack of thoughtful, deliberate consideration." *Lewey v. Farmer*, 362 S.W.3d 429, 432 (Mo. App. S.D. 2012); *Lozano*, 421 S.W.3d at 451.

B. The Trial Court Did Not Abuse Its Discretion In Ruling That Bard Did Not Open the Door to the Introduction of the Prior Conviction.

When Bard called Roger Darois (out of turn, during Plaintiff's case), Plaintiff's counsel argued that certain matters to which Mr. Darois testified had opened the door to introducing the prior conviction. Tr. 4550-54. The trial court adhered to its pretrial ruling, and again did so after Mr. Weiland's deposition was played for the jury. Tr. 4557, 8327-8329.

1. The trial court's opening-the-door ruling is correct.

The trial court's predicate ruling was that the prior corporate conviction would be excluded "unless [Bard] opens the door to the admission of that evidence." LF 7641. That ruling is entirely in accord with the established principle that character evidence "is not admissible in Missouri in a civil case." *Haynam v. Laclede Elec. Co-op., Inc.*, 827 S.W.2d 200, 208 (Mo. banc 1992); *see also Pittman v. Ripley Cty. Mem'l Hosp.*, 318 S.W.3d 289, 296 (Mo. App. S.D. 2010) ("The character of a party is generally irrelevant in a civil action and cannot be inquired into if not put in issue by the nature of the proceeding."). "The reason that evidence on the collateral issue of character is inadmissible is that it comes with too much dangerous baggage of prejudice, distraction

from the issues, and surprise." *Williams v. McCoy*, 854 S.W.2d 545, 558 (Mo. App. S.D. 1993) (citation omitted).[11]

There is an exception to that rule: "where evidence relating to character is introduced then the opposing party may rebut it by other evidence which goes to character." *Cotner Prods., Inc. v. Snadon*, 990 S.W.2d 92, 101 (Mo. App. S.D. 1999). Thus, "a party may contradict matters introduced on direct examination even when they involve issues of character." *Ryburn v. Gen. Heating & Cooling, Co.*, 887 S.W.2d 604, 610 (Mo. App. W.D. 1994). In light of this precedent, Plaintiff cannot—and, indeed, does not—assert that the trial court abused its discretion in ruling that the prior conviction, the quintessential bad-character evidence, could be introduced only if Bard opened the door to that evidence.

2. The trial court properly exercised its discretion in ruling that Bard did not open the door to the prior conviction.

It is well recognized that a trial court has discretion to exclude a prior conviction when any conceivable probative value is outweighed by potential prejudicial impact:

> Appellant cites a number of cases in which impeachment evidence was admitted, but the key to each was *approval of the discretionary authority*

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[11] Courts in other jurisdictions have agreed that such evidence should be excluded. *See, e.g., Goulah v. Ford Motor Co.*, 118 F.3d 1478, 1484 (11th Cir. 1997) (excluding evidence that company destroyed, altered, and withheld documents during 1977-1982 federal investigation regarding a defect to a different product); *Sparks v. Gilley Trucking Co.*, 992 F.2d 50, 51-53 (4th Cir. 1993) (excluding evidence of prior speeding convictions in a civil case alleging that the defendant was speeding as impermissible character evidence and unfairly prejudicial); *Coursen v. A.H. Robins Co.*, 764 F.2d 1329, 1334-35 (9th Cir. 1985) (excluding evidence that manufacturer knowingly exaggerated published data regarding effectiveness of device in preventing pregnancy under Federal Rules of Evidence 403 and 404, because misrepresentations as to effectiveness are not related to the cause of plaintiffs' alleged injury and thus "do[] nothing except generally show defendant in a bad light"), *opinion corrected on other grounds*, 773 F.2d 1049 (9th Cir. 1985); *Kramas v. Sec. Gas & Oil Inc.*, 672 F.2d 766, 772 (9th Cir. 1982) (excluding evidence of a consent decree entered in prior SEC enforcement proceeding).

> *vested in the trial judge* to determine what evidence may be admitted for purposes of impeachment and what may be excluded. In the subject case, the trial judge *exercised his discretion* to exclude the proof that [the witness] had been convicted of a municipal ordinance violation a year earlier. Even assuming for purposes of the point that the evidence was relevant and admissible, the *trial judge was entitled to conclude, in the exercise of his discretion*, that the value of the evidence for impeachment was outweighed by the danger that it would inject a false issue in the case, would confuse the jury and would unduly prejudice the defendants. *We are unwilling to say on the facts of this case that the exclusion of the evidence amounted to an abuse of the court's discretion.*

Hollingsworth v. Quick, 770 S.W.2d 291, 295 (Mo. App. W.D. 1989) (emphasis added).

Plaintiff argues that Bard's conviction should have been admitted "to contradict and rebut Bard's opening statement and evidence at trial impliedly touting Bard's good character and its commitment to following FDA rules." Appellant's Substitute Brief at 64. What Plaintiff is *actually* saying, however, is that Bard defended itself against Plaintiff's allegations—and that merely doing so was enough to justify the introduction of the 20-year old, unrelated conviction.

Bard's defense at trial, supported by expert testimony, focused on the safety of its Align pelvic mesh devices, including that the Align mesh device is the "gold standard" in the industry, that the device is safe and effective for human implant, and that every major urogynecological, urological, and gynecological organization in the United States supports the use of the polypropylene mesh sling. Tr. 7074, 7144, 7201, 7234-7235, 7243, 7255, 7502-7503, 8001-8002, 8007, 8009. Bard also presented Mr. Darois, the former Bard employee, who testified regarding Bard's procurement of raw materials and its 50-plus years of successful clinical experience in manufacturing mesh devices. Tr. 4233, 4333-4340, 4427.

Bard certainly defended itself at trial, but it most assuredly did not place its corporate "character" into evidence, so as to open the door to the otherwise-inadmissible conviction. To the contrary, as Bard's counsel explained to the trial court when Plaintiff raised the issue, "[w]e were very mindful of your ruling" and "very careful not to talk about . . . the benefits and the charity work and all the things about the company." Tr. 4548, 4555. The record bears this out.

In opening statement, Bard's counsel simply walked the jury through what Bard expected the evidence to show in defense of its mesh products. Tr. 823-912. The snippets upon which Plaintiff relies do not show otherwise. If Bard's counsel cannot tell the jury that Bard will show, for example, that "Bard fully complied with the FDA regulations and safety standards," or that its devices are "extensively tested" and intended to be "life enhancing" (Tr. 829, 835, 856, 871)—and then prove exactly that at trial—without opening the door to an attack on its corporate "character," then *any* defense put forward by a corporate defendant would open that same door.

To be sure, "inadmissible evidence can nevertheless become admissible because a party has opened the door to it with a *theory* presented in an opening statement." *State v. Matthews*, 552 S.W.3d 543, 557 (Mo. App. W.D. 2018) (emphasis added; citation omitted). But the only "theory" presented by Bard's counsel in opening statement is that Bard manufactured and distributed safe and effective "life enhancing" medical devices and that its Align device did not cause any injury to Plaintiff. That is a defense to Plaintiff's claims—not an invitation to present "bad character" evidence, any more than in any case in which a manufacturer defends against claims of defective devices. And the purported "impassioned appeal" by Bard's counsel, *i.e.*, that it was "rewarding" for her, "to stand here as a woman and defend . . . this company and to know that these [devices] are helping millions of women" (Tr. 860) was nothing more than a trial lawyer's rhetorical flourish—and a preview of the expert testimony that proved the safety and efficacy of the Bard devices. Tr. 8001-8002, 8007, 8009.

The same analysis applies to the evidence actually introduced at trial. "When a party opens the door to a topic, the admission of rebuttal evidence on that topic becomes permissible." *Howard*, 332 S.W.3d at 785 (citations omitted). The purpose behind that rule "is to prevent a party from eliciting evidence to his favor and then objecting and preventing his opponent from cross-examining and inquiring further into that evidence." *Curl v. BNSF Ry. Co.*, 526 S.W.3d 215, 226 (Mo. App. W.D. 2017). "A party who opens a subject is deemed either estopped from objecting to its further development or deemed to have waived the right to object to further development." *Gallagher v. DaimlerChrysler Corp.*, 238 S.W.3d 157, 169 (Mo. App. E.D. 2007). Nothing that occurred at trial waived Bard's right to object to the conviction.

At trial, the issue arose in a context that can fairly be described as having been manufactured by Plaintiff's counsel. In deposing Mr. Weiland, Plaintiff's counsel questioned the witness about his awareness of the MSDS issued in connection with raw materials from which the slings were manufactured, and Mr. Weiland testified that he had been unaware of the MSDS until the litigation commenced. Court Exhibit 22 p. 24. When shown an email from Mr. Darois, Mr. Weiland acknowledged that Mr. Darois had attached a copy of the MSDS to the email, but testified that he had no recollection of having read it. Court Exhibit 22 p. 20-26.

At the pretrial hearing on Bard's motion *in limine*, Plaintiff's counsel stated that Plaintiff would argue that Mr. Weiland had "lied about not seeing" the MSDS. 11/29 Tr. 55. Anticipating that attack, Bard addressed it during Mr. Darois' testimony, before Mr. Weiland's videotaped deposition was played for the jury. Tr. 4382-4383.[12] Mr. Darois briefly testified that Mr. Weiland is "one of the most upstanding guys I've ever met," and that Mr. Weiland had received the "Horatio Alger Award" in 2012, which is given out "for proven honesty, hard work, and perseverance in the face of adversity."

[12] Mr. Darois was called as a defense witness out of order, during Plaintiff's case, and Mr. Weiland's deposition was thereafter played for the jury as part of Plaintiff's case.

Tr. 4382-4383. Importantly, *all* of Mr. Darois' testimony related to Mr. Weiland's *individual* integrity, not *Bard's* integrity or veracity.

Plaintiff sought reconsideration of the court's pretrial ruling based on this testimony. Tr. 4549-4550. The court ruled that Bard had not opened the door. Tr. 4557, 8327-8328. If any doors were opened in this trial, it was *Plaintiff* who did so, by attacking Mr. Weiland's veracity. The trial court did not abuse its discretion in refusing to allow Plaintiff to use Bard's defense of Mr. Weiland's honesty as an excuse to introduce otherwise-inadmissible—and highly prejudicial—evidence of a prior conviction. The opening-the-door doctrine's purpose is to "*prevent* prejudice," and it therefore "is not to be subverted into a rule for *injection* of prejudice." *State v. Sapien*, 337 S.W.3d 72, 85 (Mo. App. W.D. 2011) (emphasis added; citation omitted). Thus, "the fact that a 'door has been opened' for admission of otherwise inadmissible evidence does not eliminate the need for the court to assess whether the probative value of particular evidence is outweighed by the risk of unfair prejudice." *Matthews*, 552 S.W.3d at 557. "[T]he doctrine should not justify admission of that evidence when it is likely to do more harm in this respect than good." *Id*. (citations omitted).

The authorities upon which Plaintiff relies to argue that the court abused its discretion cannot support a determination that the trial court abused its discretion in ruling that the door had not been opened. In the *Ryburn* case, the corporate defendant's vice president testified—in the *defense* case—that he was "pretty proud" of the defendant and "how well it treats people," as well as that the defendant is "one of the best known distributors in the midwest, and so if you've worked for [the defendant], that looks good on your resume." 887 S.W.2d at 610. The trial court permitted the plaintiff to cross-examine the witness about the corporate defendant's prior guilty plea to mail fraud charges. *Id*. On appeal, the court held that the witness's testimony on direct examination "had been designed to show [the defendant's] good character" and therefore "placed [the defendant's] character in issue," in an "attempt to suggest to the jury that punitive damages would be inappropriate because [the defendant] is a good company of honest,

conscientious people," the court held that the plaintiff "was entitled to introduce evidence of [the defendant's] violation of a criminal statute involving dishonesty." *Id*. Not so here.

The federal district court orders on which Plaintiff relies are much the same. *E.g., Stone v. C.R. Bard, Inc.*, No. 02 CIV 3433 WHP, 2003 WL 22902564, at *1, 3-4 (S.D.N.Y. Dec. 8, 2003) (division president, as corporate representative, testified to Bard's "well deserved" reputation and that "[q]uality, integrity and service are [its] motto"; court ruled that witness, as "living embodiment" of corporation, could be impeached with prior conviction, lest Bard "put its credibility at issue through testimony about its alleged stellar reputation in the industry, without an opportunity for plaintiffs to impeach that credibility"); *Hickson Corp. v. Norfolk S. Ry. Co.*, 227 F. Supp. 2d 903, 907 (E.D. Tenn. 2002) (allowing "use of a corporation's felony conviction to impeach the corporation's vicarious testimony," through corporate representatives, to defendant's "good environmental and safety record"), *aff'd*, 124 F. App'x 336 (6th Cir. 2005). Mr. Weiland's testimony in Plaintiff's case was hardly of the same tenor and effect.

As a federal district court noted, discussing *Stone* and *Hickson*, whether a prior corporate conviction is offered "to impeach the corporation vicariously" or to use a conviction "as substantive evidence of the corporation's purported pattern of dishonest conduct. . . . the evidence of the corporation's conviction must first be *relevant.*" *Sec. Nat'l Bank of Sioux City v. Abbott Labs.*, No. C 11-4017-MWB, 2013 WL 12140998, at *14 (N.D. Iowa Aug. 13, 2013) (emphasis in original). As the court explained—in language that speaks directly to the issue presented here:

> [I]mpeachment of a witness's (or corporation's) character for truthfulness is only appropriate when the witness's (or corporation's) character for truthfulness has been asserted on *direct* examination. . . . To put it another way, until the witness's (or corporation's) character for truthfulness has been asserted on *direct* examination, evidence impeaching that character for truthfulness simply is not relevant. Just because a witness is testifying as a

> witness for a corporation does not make the truth of any statement that the witness may make impeachable with a corporation's conviction for a crime of dishonesty. Rather, a corporation's conviction for a crime of dishonesty simply is not *relevant* until or unless the corporation's character for truthfulness is put at issue.

Id. (emphasis in original; citations omitted). Here, Bard did nothing to put its "character for truthfulness" at issue.

Moreover, evidence of the corporate conviction is yet further irrelevant because past incidents concerning unrelated products have nothing to do with Plaintiff's allegations that Bard failed to warn her of complications associated with its Align products or that the Align products were defective. Introducing a prior conviction to suggest that Bard has a propensity to ignore patient safety is unfairly prejudicial and would be inadmissible character evidence. *E.g.*, *Olinger v. Gen. Heating & Cooling Co*., 896 S.W.2d 43, 49 (Mo. App. W.D. 1994) ("reputation evidence and specific occurrences to prove substantive character are generally inadmissible in a civil proceeding"). Evidence concerning reputation is only admissible if it is connected with the "particular acts for which damages are claimed." *Maugh v. Chrysler Corp*., 818 S.W.2d 658, 663 (Mo. App. W.D. 1991) (citation omitted).

Here, evidence of the prior conviction: (i) would be unrelated to Bard's manufacture of the Align products that are at issue in this case; (ii) involves transactions and alleged misrepresentations of a different kind; and (iii) would open a wide area of proof on collateral matters. There is no connection between the excluded evidence and the acts or omissions at issue in this case, because the prior conviction and underlying acts do not relate to the manufacture and sale of the Align products or mesh products generally.

There is also a significant risk that the jury would have sought to punish Bard, based on actions entirely unrelated to Plaintiff's alleged injuries. And to respond to that evidence, Bard would have been forced to describe the actions it took 20 years ago in

response to the investigation and conviction, including: selling its USCI Division; implementing a new corporate compliance program; hiring a new Vice President for Scientific Affairs with responsibility for medical and regulatory matters; retaining an independent compliance consultant to inspect Bard each year and to report findings and suggestions to both Bard and the FDA; and adopting of additional FDA reporting obligations. LF 6408. Thus, had evidence of the conviction been allowed, a trial that spanned over two months would have been unnecessarily further lengthened to hear evidence regarding issues entirely unrelated to the medical devices at issue.

Any probative value of the excluded evidence is outweighed by the risk of undue prejudice to Bard. *E.g.*, *Guess v. Escobar*, 26 S.W.3d 235, 242 (Mo. App. W.D. 2000) (evidence may be excluded if probative value is substantially outweighed by the "dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time or needless presentation of cumulative evidence" (citation omitted)). The trial court did not abuse its discretion: allowing Plaintiff to use a 20-year-old conviction with no nexus to this case would have unnecessarily jeopardized Bard's right to receive a fair trial.

C. Any Possible Abuse of Discretion in the Exclusion of the Prior Corporate Conviction Does Not Warrant a New Trial.

Bard adopts the arguments set forth *supra* Point I.D., as to the lack of prejudice from the trial court's exclusion of the prior corporate conviction. Even where a trial court indisputably has erred by excluding a prior conviction that is plainly proper impeachment under Section 491.050, the appellant bears the burden of showing that the exclusion "materially affect[ed] the merits of the case." *Lewis*, 842 S.W.2d at 85. Where, as here, the prior conviction "is unrelated to any issue other than witness credibility," and the witness's credibility has nothing to do with the actual issues being tried, "no reversal of a judgment will be made on [the] basis" of the conviction's exclusion. *Id*.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING DEFENDANTS TO DISPLAY AND USE PLAINTIFF'S ORIGINAL PETITION.

A. Standard of Review and Preservation of Issue.

"[T]he admissibility of evidence lies within the sound discretion of the trial court." *Litton v. Kornbrust*, 85 S.W.3d 110, 113 (Mo. App. W.D. 2002) (citation omitted). "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. Kan.*, 240 S.W.3d 175, 184 (Mo. App. W.D. 2007) (citation omitted). A trial court only abuses its discretion if its ruling is "clearly against the logic of the circumstances, and so unreasonable and arbitrary that [it] . . . shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Litton*, 85 S.W.3d at 113 (citation omitted). 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." *Williams v. Daus*, 114 S.W.3d 351, 369 (Mo. App. S.D. 2003) (en banc) (citation 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.* at 366 (alteration in original; citations omitted).

Plaintiff also must show prejudice resulting from the alleged error, as "[m]erely asserting error without making a showing of how that error was somehow prejudicial is not sufficient for reversal." *Furlong Cos. v. City of Kansas City*, 189 S.W.3d 157, 166 (Mo. banc 2006); *see also* § 512.160.2, RSMo; *Pracht*, 801 S.W.2d at 93.

Plaintiff preserved this issue from an evidentiary standpoint, but did not preserve the issue of whether any error from the trial court allowing Defendants to display and use the Original Petition was prejudicial, and, therefore, that issue is waived before this Court.

B. Plaintiff's Original Petition is an Abandoned Pleading.

Plaintiff characterizes the use of the Original Petition as an "inconsistent pleading[]," but under Missouri law, the Original Petition is an abandoned pleading. *State ex rel. Crowden v. Dandurand*, 970 S.W.2d 340, 342 (Mo. banc 1998) (upon filing of an amended petition, "the original petition is abandoned"). In *Crowden*, this Court recognized that once an amended petition is filed, the original petition is "abandoned" and may be used for limited purposes, *id.*, including as an admission against the interest of the pleader, such as the trial court properly allowed here.[13]

In an attempt to avoid this law, Plaintiff argues that the Original Petition is not abandoned, but remains a live pleading directed at abandoned parties. Specifically, Plaintiff argues that because she "reasserted the same allegations contained in paragraphs 17 and 18 of the original Petition in paragraphs 55 and 56 of the First Amended Petition" those paragraphs could not be "evidence against Plaintiff by BSC and Bard." Appellant's Substitute Brief at 78-79. Plaintiff thus mischaracterizes the Original Petition as an "alternative" pleading. *Id.* at 78-81. *See Browning-Ferris Indus. of St. Louis, Inc. v. Landmark Sys., Inc.*, 822 S.W.2d 569, 571 (Mo. App. E.D. 1992) ("[p]arties may . . . plead alternative causes of action in a petition").

Here, Plaintiff sought to exclude evidence of her allegations against TMC and UPA as contained in a different pleading—that is, the abandoned Original Petition—and not her operative Amended Petition, such that Plaintiff's alternative pleading argument fails. In *Evans v. Eno*, 903 S.W.2d 258 (Mo. App. W.D. 1995), the court held that where

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[13] Plaintiff argues that there were "multiple potential tort-feasors" "magnifie[s]" the problem with "interjecting pleadings into trials." Appellant's Substitute Brief at 74-75. To support this proposition, Plaintiff relies on case law that generally addresses "joint tort-feasors," but not in a relevant context, such as the display of an original petition. *E.g., Carlson v. K-Mart Corp.*, 979 S.W.2d 145, 146-47 (Mo. banc 1998) (instruction of a jury where there are multiple causes of injury); *McDowell v. Kawasaki Motors Corp. USA*, 799 S.W.2d 854, 861-63 (Mo. App. W.D. 1990) (permitting joint/several liability once a plaintiff has settled with one of the parties). This law has no bearing on the issues before this Court.

a plaintiff had filed an amended petition that added an additional party and restated one count of the original petition, the original petition was abandoned. *Id*. at 259-60. Thus, Plaintiff's argument that because she repeated two paragraphs in her Amended Petition, her Original Petition is a "live" pleading, is without merit.

Moreover, Plaintiff's description of the Amended Petition as "live" is wrong, because abandonment turns on whether the Original Petition has been superseded, which here it was by the later-filed Amended Petition. *See Carter v. Matthey Laundry & Dry Cleaning Co.*, 350 S.W.2d 786, 791 (Mo. 1961). In *Carter*, the plaintiff argued that the trial court had erred in admitting the original petition into evidence because the amended petition incorporated the subject matter of the original petition. *Id*. The court held that the original petition was properly admitted as an abandoned pleading as it "tended to show that plaintiff's claim with regard to [the new counts] . . . had not occurred to him until sometime after the filing of his original petition and was an afterthought." *Id*. As in *Evans* and *Carter*, the Original Petition here was abandoned once the Amended Petition was filed.

Indeed, *Carter* distinguished *Johnson v. Flex-O-Lite Mfg. Corp*., 314 S.W.2d 75 (Mo. 1958), upon which Plaintiff relies, because *Johnson* presented "live pleadings in which there were multiple pleas," and is therefore "not decisive" on the admissibility of an abandoned pleading. *Carter*, 350 S.W.2d at 791. More to the point, *Johnson* itself states: "We are not here concerned with pleadings abandoned or superseded by amendment or with pleas made by witnesses as parties in other actions. In this case the pleadings offered for impeachment purposes were those upon which the case was being tried." 314 S.W.2d at 79. *Johnson* also specifically distinguished cases discussing abandoned and superseded pleadings "because they do not involve the pleadings on which the case was being tried, but rather abandoned pleadings or pleadings in another case, to which another rule is applicable." *Id*. at 80.

Plaintiff is likewise mistaken in relying on *Macheca v. Fowler*, 412 S.W.2d 462 (Mo. 1967), in which this Court determined that the petition at issue was not an

abandoned pleading because it was the only and original petition. *Id.* at 464-66 (recognizing that an abandoned pleading would be admissible where "a party-witness has testified contrary to a purely factual allegation of his pleadings" (citation omitted)). Plaintiff also relies on *Danneman v. Pickett*, 819 S.W.2d 770, 772-73 (Mo. App. E.D. 1991), but in that case the alternative pleading occurred within the same pleading, which is not the case here. And in *Littell v. Bi-State Transit Development Agency*, 423 S.W.2d 34, 39 (Mo. App. 1967), the court held that the trial court had erred in excluding allegations made in a separate count of a petition against a co-defendant, but did not address an amendment to the pleading, as the issue was not presented.

Plaintiff's reliance on *Lewis* is also misplaced, as that case does not address abandoned pleadings, but instead concerns the use of operative pleadings for impeachment purposes. 842 S.W.2d at 86. Specifically, in *Lewis*, the court stated, "[b]ecause the cross-claim used by plaintiff to impeach defendant . . . was not abandoned and *was a live, active pleading at the time it was used for impeachment*, we need not consider whether and to what extent the rules for the use of pleadings may differ with respect to abandoned pleadings." *Id.* (emphasis added). Similarly, *Manahan v. Watson*, 655 S.W.2d 807 (Mo. App. E.D. 1983), provides no support for Plaintiff as the court expressly acknowledged that abandoned pleadings are admissible in the same trial, but, in that case, the court was not "dealing with abandoned pleadings" as the petition at issue was the *only* and original petition. *Id.* at 809.

C. The Allegations Used at Trial from Plaintiff's Original Petition Were Admissions Against Interest and Properly Used as Impeachment.

Plaintiff also argues her allegations against TMC and UPA in Paragraphs 17 and 18 "were not admissible as inconsistent statements." Appellant's Substitute Brief at 76-81. This argument is without merit.

Missouri courts consistently have held that "abandoned pleadings containing statements of fact are admissible as admissions against interest against the party who originally filed the pleading." *Brandt v. Csaki*, 937 S.W.2d 268, 274 (Mo. App. W.D.

1996); *accord Carter*, 350 S.W.2d at 791 ("An abandoned pleading is admissible in evidence against the party in whose behalf it was originally filed if the pleading contains admissions or statements of fact against the interest of such party."); *Value Lumber Co. v. Jelten*, 175 S.W.3d 708, 713 n.8 (Mo. App. S.D. 2005) (noting that an abandoned pleading "may be used as an admission against the interest of the pleader" (citation and internal quotation marks omitted)); *Lazane v. Bean*, 782 S.W.2d 804, 805 (Mo. App. W.D. 1990) ("Statements of fact contained in abandoned pleadings are admissible as admission against interest."); *DeShon v. St. Joseph Country Club Vill.*, 755 S.W.2d 265, 268 n.1 (Mo. App. W.D. 1988) ("An abandoned pleading does not constitute a judicial admission, but it is evidence admissible against the party on whose behalf it was filed if it contained admissions or statements of fact against the interests of the party.").[14]

Both *Brandt* and *Lazane* addressed the use of abandoned pleadings, as Defendants used the Original Petition. In *Brandt*, the court held that abandoned pleadings may be used for impeachment where the pleadings allege statements of fact that are inconsistent with plaintiff's claim in an amended petition. 937 S.W.2d at 274; *accord Lazane*, 782 S.W.2d at 805-06 (same). *Brandt* allowed the use of plaintiff's allegations asserted against a dismissed doctor for impeachment purposes on cross-examination, holding that the allowed allegations were statements of fact inconsistent with facts pleaded in plaintiff's amended petition. 937 S.W.2d at 274.

Further, it is settled that abandoned (or superseded) complaints are admissible in the proceeding in which those pleadings originally were filed to establish admissions or statements of fact that are against the interest of the party in whose pleadings they appear. *Dean Mach. Co. v. Union Bank*, 106 S.W.3d 510, 518 (Mo. App. W.D. 2003); *Bank of*

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[14] *See also* Rule 57.01(f) (interrogatory answers may be used at trial "to the extent permitted by the rules of evidence"); *Waters v. Barbe,* 812 S.W.2d 753, 759 (Mo. App. W.D. 1991) (admitting interrogatories from prior action as admissions against interest); *McClanahan v. Deere & Co*., 648 S.W.2d 222, 228 (Mo. App. S.D. 1983) (an admission against interest includes "answers to interrogatories made in other cases, even if a statement of an ultimate fact").

Am., N.A. v. Stevens, 83 S.W.3d 47, 56 (Mo. App. S.D. 2002); *Riley v. Union Pac. R.R.*, 904 S.W.2d 437, 442 (Mo. App. W.D. 1995). Here, to the extent that Plaintiff's Original Petition contains statements of fact that are inconsistent with claims she presented at trial, the court did not abuse its discretion in allowing those statements to be used at trial.

Plaintiff fails to acknowledge that her allegations in the Original Petition blamed Plaintiff's physician for improperly placing the Solyx and Align and not following the manufacturer's instructions for use. LF 70-76. Similarly, Plaintiff's interrogatory answers contained factual information about her conversations with her various doctors, the nature of her injuries, and how her doctors treated those alleged injuries. LF 7545-7547. At trial, however, Plaintiff's major theme was the exact opposite of what she had alleged in the Original Petition and interrogatory answers. She argued that purported design defects in the Solyx and Align were the cause of her alleged injuries, going so far as to offer an opinion that her implanting physician properly had placed the medical devices. Accordingly, use of the Original Petition to rebut and impeach the new claims and theories raised by Plaintiff at trial was appropriate as an admission against interest. *See Brandt*, 937 S.W.2d at 274; *Waters*, 812 S.W.2d at 759.

D. Defendants Did Not Use the Original Petition to Present Legal Conclusions.

Plaintiff also argues that Defendants improperly used the abandoned pleading for legal conclusions, not admissions of fact against interest. Missouri law states that while "[a] superseded pleading is admissible against the party in whose behalf it was originally filed if it contains admissions or statements of fact against the interest of such party," *Fahy v. Dresser Indus., Inc.*, 740 S.W.2d 635, 642 (Mo. banc 1987), general allegations as to fault are inadmissible as legal conclusions. *Wors v. Glasgow Vill. Supermarket, Inc.*, 460 S.W.2d 583, 590 (Mo. 1970). But unlike in *Wors*, in which the court ruled that allegations that "[t]he explosion was a direct and proximate result of the negligence of the defendants in the manufacture, distribution and handling of the [product]," 460 S.W.2d at 590, and in *Fahy*, in which the court determined that general statements that "simply state

that plaintiff's damages were caused by some conduct on the part of the defendant . . . are legal conclusions," 740 S.W.2d at 642, here, the *specific* statements of fact contained in Plaintiff's Original Petition are admissible, and are not legal conclusions.

Specifically, the *statements of fact* from the Original Petition used by Defendants include:

- TMC and UPA failed "to make known to Plaintiff that physicians such as Richard Hill, M.D. . . . could have performed the urogynecologic procedure . . . and that urogynecologists such as Dr. Hill had far greater expertise and training in such a urogynecologic procedure." LF 70-76.
- Dr. Kruse performed a "laproscopic (sic) assisted vaginal hysterectomy, transobturator mid-urethral sling, and anterior colporrhaphy" procedure, and the device used for the sling was a Solyx device. LF 70-76.
- Dr. Kruse failed to attach the anchor to the right side of the transvaginal mesh, and, therefore, as a result, the anchor migrated to the "ramus of the pubic bone" cause a "palpable painful pump." LF 70-76.
- Dr. Kruse failed "to follow the manufacturer's instructions in placing the transvaginal mesh." LF 70-76.

Because Plaintiff's Original Petition stated particularized facts, those "statements are not legal conclusions even though they are in the form of conclusions as to the ultimate facts at issue" and are admissible as statements against interest. *Brandt*, 937 S.W.2d at 274 (allowing plaintiff's impeachment with conclusory statements that addressed the ultimate issues of fact). Plaintiff has failed to establish that the trial court abused its discretion in allowing Defendants to use the Original Petition.

E. Even if Permitting Defendants to Use Allegations was an Abuse of Discretion it was not Preserved or Prejudicial.

1. Plaintiff failed to preserve this argument.

Plaintiff argues at length that the Court of Appeals "mistakenly believed that this issue was not preserved" and spends pages addressing where the evidentiary issue was

preserved *in the trial court*. But that argument completely misconstrues the Court of Appeals' finding that Plaintiff's "appellate brief is 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). Specifically, the waiver the Court of Appeals recognized was that Plaintiff failed to set forth any argument on appeal that the decision of the trial court to permit Defendants to use the allegations was *prejudicial*. Plaintiff's argument before this Court—which does not reference the Court of Appeals briefing—establishes Plaintiff's failure to raise prejudice. *Id.* at *17. Waiver of the prejudice point cannot be cured by misdirecting this Court as to the actual basis of the Court of Appeals opinion.

Plaintiff cannot raise prejudice as an issue before this Court as "[w]hen this Court grants transfer of an appeal after briefing in the court of appeals, Rule 83.03 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); *Blackstock v. Kohn*, 994 S.W.2d 947, 953 (Mo. banc 1999) (Supreme Court may not review challenge where appellant "did not raise this claim before the court of appeals"); *Linzenni v. Hoffman*, 937 S.W.2d 723, 726-27 (Mo. banc 1997) (holding that claims not raised in the brief before the Court of Appeals were not preserved for review in this Court).

2. Even if the issue were not waived, Plaintiff has failed to establish prejudice from the use of the Original Petition.

Plaintiff bears the burden of establishing prejudicial error. That is, Plaintiff must explain "why, in the context of her trial, the improper use of the allegations in her Original Petition as admissions against interest material affected the merits of her action." *Sherrer*, 2018 WL 3977539, at *17 (collecting cases). This Court "is not to reverse a judgment unless it believes the error committed . . . materially affected the merits of the action." *Lewis*, 842 S.W.2d at 84-85; *see also* § 512.160.2, RSMo ("No appellate court shall reverse any judgment, unless it believes that error was committed by the trial court

against the appellant, and materially affecting the merits of the action."); Rule 84.13(b) (same).

Before this Court, Plaintiff argues generally that "[i]njecting Plaintiff's allegations against TMC and UPA deprived her of a fair trial on her claims against Bard and BSC" and instead places the burden on Defendants to establish that such references were not prejudicial. Appellant's Substitute Brief at 89-90. This is not sufficient to establish prejudice. Even in *Danneman*, on which Plaintiff so heavily relies, the plaintiff in a negligence action claimed the trial court erred in allowing the defendant to question him about allegations in his original petition that the defendant had acted intentionally. 819 S.W.2d at 772-73. The court found it questionable whether the petition was admissible against plaintiff as an admission, but nevertheless affirmed the judgment for the defendant because even if it were error to admit the petition, plaintiff was not prejudiced by the admission. *Id*. at 773. The court relied on the facts that the petition was never offered into evidence, the defendant only asked one question about the petition, and the plaintiff did not object at the time the question was posed. *Id*. Applying that rationale here, the record here affirmatively establishes that no such prejudice occurred.

On appeal, Plaintiff cites to eight instances where the Original Petition was referenced, but the Court of Appeals noted that each of these instances is "cumulative to other similar evidence about which [Plaintiff] has not complained on appeal" or "not preserved as error." *Sherrer*, 2018 WL 3977539, at *17.

The first reference cited in Plaintiff's brief actually does not reference the Original Petition, but instead cites to a discussion regarding *sworn interrogatory answers*. Tr. 751-752. Contrary to the point Plaintiff attempts to make, this reference demonstrates that the information in the Original Petition was cumulative to other sources introduced into the record, such as Plaintiff's interrogatory answers. "A complaining party is not entitled to assert prejudice if the challenged evidence is cumulative to other related evidence." *Saint Louis Univ. v. Geary*, 321 S.W.3d 282, 292 (Mo. banc 2009) (citation omitted).

The second and third cited references (Tr. 913-919, 923-928), which were made during opening statements, are generally cited without actual reference to the language at issue. Appellant's Substitute Brief at 71. And, even if that were not true, "the opening statement is not evidence." *DeLaporte v. Robey Bldg. Supply, Inc*., 812 S.W.2d 526, 534 (Mo. App. E.D. 1991); *see also Hays v. Mo. Pac. R. Co*., 304 S.W.2d 800, 804 (Mo. 1957) ("[c]ounsel is properly permitted considerable latitude in making the opening statement"); *Giles v. Am. Family Life Ins. Co.*, 987 S.W.2d 490, 493 (Mo. App. W.D. 1999) (same).

Plaintiff also cites to the cross-examination of Plaintiff's expert witness (Tr. 1340-1342) as prejudicial, but a review of the transcript demonstrates that Plaintiff's expert witness simply was asked if she had reviewed Plaintiff's petition, *which the expert had listed as a document to formulate her expert opinions in the case*. *Id.* Under Missouri law, this is an appropriate point for cross-examination. *State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831, 835 (Mo. banc 2000) ("It is appropriate, at deposition or trial, to cross-examine an expert witness as to information provided to the expert that may contradict or weaken the bases for his or her opinion regardless of whether the expert relied upon or considered the information.").

Fifth, Plaintiff claims prejudice from the cross-examination of another expert where one question about the allegation in paragraph 17(e) of the Original Petition was asked. Tr. 3201. The question focused merely on the date of filing of the Original Petition and asked the expert to confirm that the implanter failed to follow the manufacturer's instructions. *Id*. Although Plaintiff did object, she did not do so on the basis raised before this Court (or the Court of Appeals); thus, this argument is waived. *Gamble v. Browning*, 379 S.W.3d 194, 204-05 (Mo. App. W.D. 2012) ("[w]e will not convict the trial court of reversible error based on the admission of evidence . . . [as] to which no objections were made," or where the "argument[] on appeal [is] materially different from the objection[] . . . raised at trial"). Also, Plaintiff's argument fails to acknowledge that immediately following the one question regarding the Original Petition,

the expert was asked numerous questions regarding statements made in the Plaintiff's sworn interrogatory answers; Plaintiff thus cannot complain of or assert prejudice, as the evidence was cumulative. *See Saint Louis Univ.*, 321 S.W.3d at 292.

Similarly, Plaintiff also failed to preserve her sixth alleged instance of prejudice in Boston's cross-examination of Dr. Greenspan. Tr. 3935. During trial, Plaintiff objected that the questioning of Dr. Greenspan was "going on and on" but did not raise an objection to the issue asserted on appeal. Missouri law is clear that appellate courts "will not convict the trial court of reversible error based on the admission of evidence . . . [as] to which no objections were made," or where the "argument[] on appeal [is] materially different from the objection[] . . . raised at trial." *Gamble*, 379 S.W.3d at 204-05.

Finally, Plaintiff points to references made during her cross-examination for the last two references. Tr. 5485-5487. Once again, Plaintiff did not make a proper objection to preserve this issue for appeal. *See Gamble*, 379 S.W.3d at 204-05. Moreover, as the Court of Appeals noted, there is no prejudicial error as the question at issue "was very limited and . . . [Plaintiff's] answers ameliorated any possible prejudice." *Sherrer*, 2018 WL 3977539, at *20. Overall, Plaintiff's answers regarding her sworn interrogatory responses, her responses to requests for admissions and responses to depositions were identical to the allegations of the Original Petition, the mentioning of which use Plaintiff now complains. Such cumulative evidence cannot be the basis of prejudice.

Plaintiff failed to establish that the use of the Original Petition constituted prejudicial error, which affected the merits of her action and created a reasonable probability that without the references, the results of her trial could have been different. Thus, and recognizing that limited use of the Original Petition during a lengthy trial, there is no basis for reversal on this point.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S MISTRIAL MOTION BASED ON AN INADVERTENT AND MOMENTARY DISPLAY OF A SMALL TEXTBOX ON A POWERPOINT SLIDE THAT INCLUDED A REFERENCE TO PLAINTIFF'S SETTLEMENT WITH TMC AND UPA.

A. Standard of Review and Preservation of Issue.

A mistrial is the most drastic remedy for asserted trial error. *Vaughn v. Michelin Tire Corp*., 756 S.W.2d 548, 561 (Mo. App. S.D. 1988); *see also Brownridge v. Leslie*, 450 S.W.2d 214, 216 (Mo. 1970); *Delacroix, v. Doncasters, Inc*., 407 S.W.3d 13, 24 (Mo. App. E.D. 2013) (en banc) (mistrial is "a drastic remedy that should be granted only in exceptional circumstances"); *Ellinwood v. Estate of Lyons*, 731 S.W.2d 23 (Mo. App. E.D. 1987). This Court reviews the denial of a motion for mistrial for abuse of discretion. *Delacroix*, 407 S.W.3d at 24.

This Court affords the trial court great discretion in deciding whether a mistrial should be granted, and the court will reverse a denial of a motion for mistrial only for a "manifest abuse of discretion." *Id.*; *accord Callahan v. Cardinal Glennon Hosp*., 863 S.W.2d 852, 867 (Mo. banc 1993). This is because Missouri courts recognize that the trial court is better positioned to assess the prejudicial effect that improper evidence has on the jury. *Delacroix*, 407 S.W.3d at 24-25. To establish a manifest abuse of discretion, there must be a grievous error where prejudice cannot otherwise be removed. *Id*. "A trial court abuses its discretion only if its ruling 'is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.'" *Fleshner v. Pepose Vision Institute. P.C*., 304 S.W.3d 81, 87 (Mo. banc 2010) (citation omitted).

Plaintiff also must show prejudice resulting from the alleged error as "[m]erely asserting error without making a showing of how that error was somehow prejudicial is not sufficient for reversal." *Furlong Cos.*, 189 S.W.3d at 166; *see also* § 512.160.2, RSMo; *Pracht*, 801 S.W.2d at 93.

Plaintiff did not fully preserve this issue. Specifically, in her brief, Plaintiff argues that "[t]he information that Plaintiff settled with TMC and UPA was displayed to the jury twice" referring to trial transcript at pages 5488 and 5602-5605. Appellant's Substitute Brief at 98. But, as implicitly recognized in her brief, Plaintiff failed to object to the alleged first display of the textbox on a PowerPoint slide that contains a reference, among 18 other textboxes, to TMC and UPA's settlement, at page 5488, as the first point of preservation for this issue listed by Plaintiff is at page 5605. Appellant's Substitute Brief at 91. The failure to object contemporaneously waives this portion of the issue for appeal. *Brown v. Brown*, 530 S.W.3d 35, 44-45 (Mo. App. E.D. 2017) ("Any grounds that are not raised in the objection are considered waived, and a party is prevented from raising such grounds for the first time on appeal."). Moreover, based on Plaintiff's failure to object contemporaneously the first time the slide allegedly was shown, there is no proof or record to support that the version of the slide presented included the inadvertent settlement textbox and the alleged use of the slide including the settlement textbox should not be considered on appeal. *Id*.

B. The Trial Court Did Not Abuse its Discretion in Ruling that the Brief Display of a Reference to TMC and UPA'S Settlement Did Not Warrant a Mistrial.

As to the portion of this argument that is preserved, Defendants do not dispute that a version of a lengthy and detailed timeline, presented for demonstrative purposes, that included a reference to Plaintiff's settlement with TMC and UPA was inadvertently and briefly displayed to the jury. App. A7; Tr. 5602, 5604-5605, 5633. The single-page timeline had multiple entries covering a three-year period in the history of the case, including a textbox that states: "Nov. 15, 2014 Settlement with Truman Medical Center and University Physicians Associates." App. A7. The reference remained on the screen for less than one minute, during which time Plaintiff was testifying about her medical history and trip to China. Tr. 5604-5605. Immediately upon noticing the reference, the trial court directed that the slide be taken down. Tr. 5604-5605. Bard's counsel

explained (outside the presence of the jury) that the settlement textbox "wasn't supposed to be" included on the slide, and that display was unintentional. Tr. 5604-5605. The trial court accepted counsel's explanation:

> I'm not going to say it's not troublesome to me, because it was up there, but I will note for the record that . . . the copy of the timeline that I have in front of me does not contain any reference to the settlement. It was put up there—it was flashed up there during the course of a colloquy between Ms. Cohen and Ms. Sherrer. So I think and I hope that the jury's attention was focused on that colloquy between the two. I noticed it only because I turned up there, and I immediately told them to take it off, they did. There's little doubt in my mind that it was completely inadvertent because it does not match what I have in my hands, what you have in your hands, what . . . Mr. Grant, Mr. Davis, what Ms. Cohen has in her hands, and what we've bandying about in the last afternoon. So I'm confident that it was inadvertent. It was taken down immediately. It was up there for a short period of time. Again, we're in the fifth week of a trial . . . and granting a mistrial . . . is a drastic measure, a drastic remedy. I cannot tell you how reluctant I am to do that, so I'm not . . . [Y]our concerns are shared by me . . . but I think that it was remedied in a relatively short span, a short time.
>
> . . . Any further relief that you're requesting I'll consider. But the granting of a mistrial will be denied.

Tr. 5637-5638.[15] The trial court's finding should be given great weight, as "[t]he trial court is in a better position to assess the prejudicial effect of improper evidence on the jury." *Delacroix*, 407 S.W.3d at 24-25.

C. The Inadvertent Inclusion of the Textbox Reference to the Settlement Was Not Prejudicial, Even if a Juror Had Noticed the Reference During its Brief Display.

While there is no evidence that a juror actually saw the text box referencing the settlement, even if a juror could have seen the slide during its brief display, any conceivable prejudice would have been cured by the trial court's instruction as requested by Plaintiff. Using MAI 34.05, the trial court instructed the jury "not to consider any evidence of prior payments" to Plaintiff. LF 7185. "The jury is presumed to follow the trial court's instructions." *State v. McFadden*, 391 S.W.3d 408, 424 (Mo. banc 2013); *accord Smith v. Kovac*, 927 S.W.2d 493, 498 (Mo. App. E.D. 1996) (it is assumed "that a jury obeys a trial court's directions and follows its instructions" absent exceptional circumstances). To any unproven extent to which any juror might have seen the textbox that was fleetingly displayed, and to any further unproven extent to which any juror may have drawn any inference from it, this was cured by the instruction.

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[15] Plaintiff relies on extensive case law addressing the admissibility of evidence regarding settlement with prior defendants, but while doing so, also concedes that the "settlement information was" simply "displayed to the jury." Appellant's Substitute Brief at 97-98. There is no evidence or argument that the settlement information was "admitted" as an exhibit or before the jury, except as a brief, inadvertent flash. But, even if that were not the case, and even if settlement information had been before the jury, in Missouri, there are circumstances in which a party may use the fact that a witness settled with another party "for the purpose of reflecting [the witness's] credibility and the weight to be given [the witness's] evidence, as an inference of interest or bias may be drawn from such fact." *See Joice v. Missouri-Kansas-Texas R. Co.*, 189 S.W.2d 568, 575 (Mo. 1945); *accord Hackman v. Dandamudi*, 733 S.W.2d 452, 456 (Mo. App. E.D. 1986) ("all settlement agreements . . . are admissible where necessary to show bias on the part of a witness").

Plaintiff attempts to bolster her position by combining her argument on this point with her previously addressed argument that Defendants improperly were permitted to mention the abandoned Original Petition. This argument fails in the first instance because, as set forth *supra* Point III, the trial court did not abuse its discretion in allowing Defendants to point to facts set forth in the Original Petition.

Moreover, Plaintiff should not even be heard to make this argument because Plaintiff's own expert, Dr. Pence, testified that TMC and UPA were "dismissed from the original lawsuit." Tr. 1765-1766. During this exchange, Plaintiff's counsel asked, "[w]ere Boston Scientific and Bard added to the original lawsuit after discovery was done in this case?" to which Dr. Pence stated, "Yes." Tr. 1765-1766. Any prejudice that could have resulted from the momentary display of the timeline, and that was not dissipated by the court's instruction, pales in comparison to the direct testimony elicited by Plaintiff's counsel. The trial court was well within its broad discretion in denying the mistrial motion.

D. This Case Does Not Present "Unusual Circumstances" That "Precluded Normal Efforts to Preserve this issue."

Plaintiff essentially concedes that this issue is not preserved, but argues that her counsel "cannot be faulted for relying on a copy of Bard Exhibit 543 provided by Bard and failing to notice the discrepancy when Bard displayed the improper version of the exhibit to the jury." Appellant's Substitute Brief at 100. Plaintiff then speculates for pages of her brief that the jurors could have seen the settlement information. In making this argument, Plaintiff does not cite to any other potential time—during this extended trial—that Bard inadvertently and momentarily displayed the small textbox on a PowerPoint slide that included a reference to Plaintiff's settlement. Nor does Plaintiff provide any support to overcome the trial court's finding that it was unlikely that the jury saw the reference.

Plaintiff relies on *Rodgers v. Czamanske*, 862 S.W.2d 453, 460 (Mo. App. W.D. 1993), for the proposition that "settlement offers are to be kept from the jury unless there

is a clear and cogent reason for admitting such evidence." Appellant's Substitute Brief at 105. The issue the court in *Rodgers* addressed concerned the admission of a settlement offer into evidence. 862 S.W.2d at 460. That issue was not presented to the trial court here, and it is not the issue in this appeal. It is undisputed that the textbox at issue was not admitted into evidence. It also is undisputed that no questions were asked of Plaintiff about the reference on the PowerPoint slide.

Plaintiff fails to articulate any basis for rejecting the trial court's conclusion that the jury did not see the reference. The trial court was in the best position to assess the prejudicial effect such that deference must be afforded to it. *Payne v. Fiesta Corp*., 543 S.W.3d 109, 123 (Mo. App. E.D. 2018) ("We recognize that the trial court is better positioned to assess the prejudicial effect that improper evidence has on the jury."). Missouri law establishes that the grievous error required to cause prejudice—let alone prejudice that would require a mistrial—is rare at best. In *Payne*, an expert witness was asked about insurance before the trial, which led to a mistrial motion. 543 S.W.3d at 123. The court held that not every improper reference warrants a mistrial or reversal, and when a mistrial is not granted, such errors are not a manifest abuse of discretion. *Id*. at 123-25.

That Plaintiff's own counsel admittedly did not see the textbox during its momentary display supports the trial court's conclusion that it was not noticed by the jury and, therefore, no prejudice occurred.[16] Moreover, Plaintiff acknowledges that the jury was instructed not to consider any evidence of prior payments to her. "The jury is presumed to follow the trial court's instructions." *McFadden*, 391 S.W.3d at 424.

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[16] Plaintiff also argues—without any support—that her counsel "had no ability during trial to determine how many times the improper settlement information was displayed to the jury and whether the jurors observed the settlement information." Appellant's Substitute Brief at 99. This argument shows that the display was not prejudicial and likely went unnoticed by the jurors. The inability to point to any viewing by the jurors equates to an inability to show prejudice.

Based on the record and the deference that is afforded to the trial court, there is no basis to reverse the trial court's denial of a mistrial. Point IV should be denied.

CONCLUSION

This Court should affirm the final judgment in all respects.

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document was served on counsel of record through the Court's electronic notice system on February 19, 2019.

This brief includes the information required by Rule 55.03 and complies with Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 22,921, excluding the cover, signature block, and this certificate.

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/s/ William Ray Price, Jr.