SC97465

In The Supreme Court of Missouri

EVE SHERRER
Plaintiff/Appellant

vs.

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

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

APPELLANT'S SUBSTITUTE REPLY BRIEF

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

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

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

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

Attorneys for Appellant

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ARGUMENT[1]

I. Evidence of C.R. Bard's 391 Felony Convictions Was Admissible Pursuant to § 491.050 to Affect Its Credibility

A. Bard Is a "Person" Within the Meaning of § 491.050

As stated in Point I of her Appellant's Substitute Brief ("ASB"), § 491.050 conferred an absolute right on Plaintiff to affect Bard's credibility using its 391 criminal convictions. This right to show criminal convictions to affect the credibility of any person convicted of a crime extends to corporations because "corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell v. Dept. of Soc. Services*, 436 U.S. 658, 687 (1978); ASB at 46. Bard ignores the broad common law context in which the treatment of corporations as persons is firmly established. Instead, it claims that corporations can be treated as persons for purposes of statutory analysis only when the legislature explicitly makes such provision. Bard's Substitute Brief of Respondent ("BSBR"), p. 35.

Bard's position contradicts generally accepted authority. "The common law rule is that the word 'person' in a statute or a constitutional provision includes a corporation whenever this is necessary to give effect to the reason and spirit of the provision." 9 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 4215 (2018).

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[1] As an initial matter, of the eleven exhibits included in BSC's Appendix, only BSC's Exhibit 6606 and Court Exhibit 15 are included in the Record on Appeal and properly before this Court.

"Generally, under state statute … a procedural provision applicable to 'persons' … will include corporations as well, unless the context or some intrinsic quality makes the regulation inapplicable to corporations." *Id*. Stated more succinctly: "Once properly formed, a corporation has existence and becomes a 'person.'" 18 C.J.S. *Corporations* § 2 (2019). Thus, "a corporation is a juridical or an artificial person." *Id.*

The treatment of corporations as persons has been applied across a broad panoply of circumstances. *United States v. Home Insurance Co*., 89 U.S. 99 (1874), considered whether corporations could file suit under Section 3 of the Captured and Abandoned Property Act of 1863, 12 Stat. 820, Reply Appendix A15, which allowed "any person claiming to have been the owner of any such abandoned or captured property" to file a claim in the Federal Court of Claims. Plaintiffs were corporations, and the government argued that they could not sue under the Act because it only provided for suits by *persons*. The Supreme Court rejected that argument because the Act made "no distinction between natural and artificial persons." 89 U.S. at 104.

Missouri law is the same. In *Schneider v. Schneider*, 347 Mo. 102, 146 S.W.2d 584, 589 (1940), this Court described a corporation as an "*artificial person* created by operation of law." (Emphasis added.) In *R.F.C. v. Ball,* 239 Mo.App. 1189, 206 S.W.2d 35 (1947), a corporate plaintiff instituted garnishment proceedings against a judgment debtor pursuant to R.S.Mo. § 1400 (1939), which allowed any "person" holding a judgment against someone who was about to leave the state to have execution issued against the judgment debtor's property. Reply

Appendix A17. The debtor moved to quash the garnishment, claiming that a corporation was not entitled to seek relief under § 1400 since it was not a "person." In reversing the trial court's quashal of the garnishment, the Court held:

> Respondent's suggestion that appellant was not a "person" within the meaning of Section 1400 cannot be sustained in view of Laws of 1943, page 416, which authorize a corporation to sue in any court in this state, and the numerous definitions of a corporation as a person found in our statutes 3 R. S. 1939, Index, Person, and in 31 Mo.R.S.A., Index, Person. A corporation must therefore be held to be a "person", within the meaning of Section 1400, R. S. Mo. 1939, Mo.R.S.A.

The reference to the Laws of 1943 at page 416, Reply Appendix A18, was to a provision that enumerated the powers of corporations as including the power "To sue and be sued, complain and defend in any court of law or equity." *See* § 352.385(2) RSMo (2016).

In *State v. White*, 96 Mo.App. 34, 69 S.W. 684 (1902), the Court considered whether a corporation could violate R.S.Mo. § 9454 (1899), which prohibited "any person or persons" from willfully or knowingly obstructing public roadways. Reply Appendix A19. Although the statute referred to "any person or persons" violating its provisions, the Court held that "[i]t is established law that the corporation itself is subject to indictment for obstructing the road." 69 S.W. at 685.

In *State on Inf. of McKittrick v. American Ins. Co.*, 346 Mo. 269, 140 S.W.2d 36 (1940), a corporation was accused of bribery in violation of R.S.Mo. § 3929 (1929), Reply Appendix A24, which provided that "[e]very person" who provided money, goods, or other valuable consideration to public officers was guilty of bribery. The Attorney

General proved that several corporations conspired to bribe the Missouri Superintendent of Insurance. In a *quo warranto* action this Court observed, *inter alia*, "Conduct of officers and agents of a corporation, which is criminal under the laws of the State, is both a violation of the criminal law by the individual (*and in some instances also by the corporation*), for which there may be prosecution by criminal information or indictment." 140 S.W.2d at 40 (emphasis added). The Court went on to note, "As against corporations, this court years ago established the principle that both ouster and fine could be adjudged against a corporation for acts in violation of the criminal laws of this state." *Id*.

These cases demonstrate that the "default position" of American and Missouri law is that a corporation is a "person," subject to the benefits and burdens of statutes facially applicable to "persons." This is true even if there is no express extension to corporations, unless treating a corporation as a person is repugnant to the legislative intent of the particular section. § 1.020(12); Reply Appendix A21.

Bard only cites *two cases* that declined to include corporations within the meaning of statutes referring to "persons." The first is *Mark Twain Cape Girardeau Bank v. State Banking Board,* 528 S.W.2d 443 (Mo.App.1975), where the issue was whether a corporation could serve as an incorporator under a statute that allowed "five or more persons" to form a banking corporation. In determining whether "persons" included a corporation for purposes of forming a new corporation, the Court of Appeals relied heavily on *Schwab v. E.G. Potter Co.,* 194 N.Y.

409, 87 N.E. 670 (1909), which warned of the potential oppression of minority shareholders inhering in schemes involving corporations incorporating other corporations. 87 N.E. at 672-673. It is hardly surprising that the *Mark Twain* Court held that "persons" in that context should not include corporations as allowing corporations to form other banking corporations ran the risk of oppressing minority shareholders, something that was patently repugnant to the intent of the legislature in regulating banking corporations.

Bard also cites *J.S. DeWeese Co. v. Hughes-Treitler Mfg. Corp.*, 881 S.W.2d 638 (Mo.App.E.D. 1994), where a corporation acting as a sales representative sought to recover a commission pursuant to R.S.Mo. § 407.913 (1986), which provided that, "Any principal who fails to timely pay the sales representative commissions earned by such sales representative shall be liable to the sales representative in a civil action …." Section 407.911 defined two of the terms used in § 407.913:

> (2) "Principal", a person, firm, corporation, partnership or other business entity, whether or not it has a permanent or fixed place of business in this state ….
>
> (3) "Sales Representative", a person who contracts with a principal to solicit wholesale orders and who is compensated, in whole or in part, by commission ….

881 S.W.2d at 643. "[T]he 'stark' contrast in the consecutive subsections of the statute reflect a clear legislative intent that the statute is available only to sales representatives who are natural persons and not corporations." *Id*. Expanding the meaning of "person" under those circumstances would have contravened the clear legislative intent.

Bard argues that when the legislature has used "person" in a sense broader than "natural person," it has been explicit in its definitions, quoting *Mark Twain, supra*, 528 S.W.2d at 446. BSBR at 35. However, the quotation in *Mark Twain* is irreconcilable with cases like *R.F.C. v. Ball, State v. White*, and *American Ins. Co., supra*.

Bard's most peculiar argument is its claim that its absence of character—presumably, a kind of organizational sociopathy—renders it impervious to impeachment. BSBR at 34-35. It relies on a partial quotation out of context from *State v. Blitz*, 71 S.W. 1027, 1030 (Mo. 1903), for the supposed proposition that criminal convictions are admissible to the extent they bear on "good moral character" of witnesses. Of course, convictions do no such thing—they bear on *bad* moral character—but Bard claims it has *no* moral character. However, Bard's credibility is fixed by the pronouncement of the court that convicted it of 391 felonies:

> Bard knowingly and willfully kept adverse information from the FDA, made product changes that affected the safety or effectiveness of angioplasty catheters produced by its USCI Division without the required FDA approval, and illegally did testing on human beings without the required exemption from the FDA.

United States v. C.R. Bard, Inc., 848 F.Supp. 287, 288 (D.Mass. 1994). At another point the Court observed: "Bard made inherently risky procedures more dangerous. … Bard's crimes deprived the FDA, doctors, and their patients of the benefit of crucial information." *Id.* It may very well be that Bard has no good character upon which its 391 felony convictions can bear. There is no doubt, however, that a

reasonable finder of fact could determine that its 391 felony convictions affect its *credibility*.

B. Remoteness

Bard also argues that remote convictions are not admissible. BSBR at 36. Bard fails to address the many cited Missouri cases refusing to impose temporal limits on convictions admissible under § 491.050. ASB p. 42-45. Bard also claims that Plaintiff failed to argue that Missouri does not recognize a "remoteness" limit on evidence of convictions, BSBR, p. 36 n. 5, but it is mistaken. Plaintiff did address this argument in the Court of Appeals, stating: "*Section 491.050* is unique in that it *does not place any time limit* or other restrictions *on the use of a criminal conviction for impeachment*." Appellant's Brief, WD8010, p. 30 (emphasis added).

The balance of Bard's discussion in Point IB2 is irrelevant as addressing the use of a corporate conviction to impeach an individual. The issue in this case is the use of a corporate conviction to affect the credibility of the *corporation*, ASB p. 47-52, which Bard fails to seriously address.

C. Corporate Representative

Bard's argument under Point IC confuses the right of a party under Rule 57.03(b)(4) to require a corporation to designate a representative to testify in a deposition regarding specific topics, with the question of whether a corporate officer or employee testifying at trial is a representative of the corporation. Nothing in Rule 57.03 addresses the issue before this Court, and it is clear that a corporate officer or employee can represent the corporation when testifying at trial.

A corporation, as an artificial person, can ordinarily only speak through its officers or agents. *Neuhoff Bros. Packers v. K.C. Dressed Beef Co*., 340 S.W.2d 193, 196 (Mo.App. 1960). For this reason, a corporate officer can be compelled to testify at trial as an adverse witness. *Id*. Similarly, when a corporation elicits testimony from its officers at trial, it is *the corporation testifying as a vicarious witness. Hickson Corp. v. Norfolk Southern Railway Co.,* 227 F.Supp.2d 903, 907 (E.D.Tenn. 2002). Bard fails to address this portion of *Hickson*. Consequently, since the corporation is a vicarious witness, it follows that the corporation's felony convictions can be used to impeach the *corporation's* vicarious trial testimony. *Stone v. C.R. Bard, Inc*., 2003 WL 22902564 *3 (S.D.N.Y. 2003).

Bard's argument that a corporate representative "testifies to the *corporation's* knowledge," while a non-designated corporate employee only testifies to matters within the scope and course of their employment, BSBR p. 43, is irrelevant to the question involved in this case. Weiland testified as Bard's President, and his testimony was

Bard's vicarious testimony, regardless of who called him. In addition, Bard used portions of Weiland's depositions to elicit testimony to help present its case. Court Exhibits 20 & 21, Trial Exhibits Vol. II & III. As such, it was no different than if Bard had called Weiland to testify at trial during its case in chief. Bard elicited testimony from Weiland and from its consultant and former Vice President, Darois, to present *Bard's* defense. ASB p. 55-60. In particular, Weiland testified, *in response to questions from Bard's counsel*, that:

> [W]e [i.e., Bard] have been in this business for approximately 50 years and have been developing mesh products for about that same period of time, and it would have utilized the same polypropylene grade for a number of those years, and we have tremendous amounts of data, safety data, clinical data, efficacy data in terms of how this product is used, in terms of, in our [Bard's] minds, the safety of our [Bard's] end using product or our [Bard's] end developed product once this material is extruded into string and then eventually makes it into a weaved product in our [Bard] meshes. So we [Bard] have 50 years of various degrees of clinical information, biocompatibility data, animal studies, et cetera, that we [Bard] would utilize in judging the appropriateness of this material used in our [Bard] products.

Court Ex. 21, Trial Exhibits Vol. III p. 158-59 [Depo. 251-252].

Clearly, Weiland testified to more than his personal experience. Weiland had been with Bard for 20 years at the time of his deposition. [2] However, he discussed occurrences 50 years earlier, in approximately 1964, *30 years before he worked at Bard*. To use Bard's language,

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[2] *See* Bard's Respondent's Brief, WD80010, p. 37 ("Indeed, Weiland did not join Bard until *after* the conviction" for the 1994 felonies.).

Weiland testified "to the corporation's knowledge," which it described as the role of a "corporate representative." BSBR p. 43. Stated somewhat differently, Bard was a vicarious witness testifying through its President.

Bard's arguments at BSBR p. 30-31 that Darois' testimony cannot be used as a basis for corporate impeachment fails for multiple reasons. First, Plaintiff was not required to confront Darois regarding the 391 felonies. Second, Plaintiff did not limit its argument in the trial court to the fact that Weiland testified. Regarding the first point, § 491.050 allows prior convictions to be proved through cross-examination or by a record of the convictions; a party may offer evidence of the convictions even if not first raised on cross-examination. *Moe v. Blue Springs Truck Lines, Inc*., 426 S.W.2d 1, 3 (Mo. 1968).

As to the second point, Plaintiff argued that the convictions were admissible if Bard called a corporate representative; her argument was not limited to Weiland.

> With respect to the argument that it's a corporation and not an individual, it doesn't make any sense that a corporation gets protection from its past criminal convictions where an individual does not. *If they put a corporate rep up there, that person is speaking on behalf of the corporation*.

Trans. XIV p. 8937-38 (emphasis added). Plaintiff then cited the trial court to *Hickson Corp.* where "the Court held because a corporation speaks through its officers and other agents, it stands to reason that a corporation can be a vicarious witness." Later she said that, "We have certified copies of the guilty plea," and that, "Absolutely an officer of the company, you can use it." Trans. XIV p. 8940. At another point Plaintiff

provided the trial court a copy of the *Stone* case and said: "So we're talking about the same conviction, the same Defendant. In that case they said *you can use it with any officer or corporate rep in the case*." Trans. XIV p. 8947. Plaintiff never argued that Weiland was the only officer or representative who could provide a basis for impeaching Bard with its convictions.

D. Exclusion of the 391 Felony Convictions Was Prejudicial

As stated in her Appellant's Substitute Brief, the exclusion of Bard's convictions constituted reversible error. In *State v. Meyer*, 473 S.W.2d 374, 376 (Mo. 1971), this Court held that excluding evidence of a witness' conviction violated defendant's constitutional rights. *Meyer* was not an outlier; other cases have recognized the prejudice that inheres in excluding evidence of the conviction of a witness who testified at trial. *See, e.g., State v. Taylor*, 118 Mo. 153, 24 S.W. 449, 451 (1893); *Moe, supra*, 426 S.W.2d at 3 (reversible error to exclude evidence of a prior criminal conviction where the parties present contradictory testimony on a material fact). In the instant cause Plaintiff's witnesses and Weiland and Darois told starkly different versions of the care exercised by Bard and the safety of its product. For example, one of Plaintiff's experts, Dr. Pence, testified that the Material Safety Data Sheet for Marlex (used by both Boston Scientific and Bard), warned against using the material in medical applications involving permanent implantation in the human body. Trans. II p. 1069. She testified that Bard was required to inform the FDA of that information, but failed to do so. Trans. II p. 1150-51. In contrast, Weiland testified that Marlex was

safe, thereby obviating the need to inform the FDA about the Material Safety Data Sheet. Court Exhibit 21, Trial Exhibits Vol. III p. 158 [Depo. p. 250-51]. Dr. Pence said Bard failed to adequately test the Align mesh. Trans. II p. 1187-92. Weiland said it did. Court Exhibit 21, Trial Exhibits Vol. III p. 158-61 [Depo. p. 251-55].

The credibility of Bard—which elicited testimony from Weiland and Darois—was critical in determining those fact issues, for which reason it was prejudicial error to exclude Bard's convictions.

The *only case* Bard cites holding that exclusion of a criminal conviction did not require reversal is *Lewis v. Wahl*, 842 S.W.2d 82 (Mo. 1992), where the court held that a single misdemeanor conviction for speeding did not constitute prejudicial error. It should be self-evident that exclusion of 391 federal felony convictions—some of which arose out of conduct that killed people—is not the equivalent of a single misdemeanor speeding conviction.

Error in the exclusion of Bard's convictions requires reversal.

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

The arguments regarding Point II were adequately addressed in the Appellant's Substitute Brief and will not be repeated here.

III. Use of Plaintiff's Original Petition

A. Inadmissible as Inconsistent Pleadings

The trial court abused its discretion by allowing Defendants to repeatedly use portions of Plaintiff's original Petition. Plaintiff's alternative allegations against TMC and UPA were not admissions against interest and the use of such allegations was highly prejudicial.

General "a pleading on one issue may not be used as an admission upon another issue in the same case." *Macheca v. Fowler*, 412 S.W.2d 462, 465 (Mo. 1967). Such pleadings "do not possess the characteristics inherent in admissions against interest[.]" *Hardwick v. Kansas City Gas Co.*, 335 Mo. 100, 109, 195 S.W.2d 504, 509 (1946). Alternative or inconsistent allegations under Rule 55.10 are only conditionally asserted to be true. *Lewis v. Wahl*, 842 S.W.2d 82, 87 (Mo. 1992).

Contrary to Defendants' arguments, the rule excluding alternative or inconsistent pleadings is not dependent on the allegations being mutually exclusive. This Court has explained:

> where a pleader pleads *alternatively or inconsistently*, as permitted by modern pleading rules, such *inconsistent or alternative* allegations may not be used against the pleader because they do not possess the characteristics inherent in admissions against interest[.]

Macheca, 412 S.W.2d at 465 (internal quotations omitted; emphasis added). This is true because the rules of civil procedure allow alternative pleadings against multiple defendants, regardless of consistency. Rule 55.10.

Additionally, alternative allegations are not converted into admissions simply because an amended pleading is filed. Alternative allegations, especially allegations against multiple defendants, are not admissions when alleged and are not converted into admissions by the filing of an amended pleading. The allegations remain alternative allegations only conditionally asserted as true. The reassertion of the same alternative allegations in an amended pleading reinforces that conclusion. The party has not "abandoned" the alternative allegations which remain alternative allegations only conditionally asserted as true.

"The recognized function of the amendment rule is to enable a party to present evidence that was overlooked or unknown at the time that the original pleading was filed without changing the original cause of action." *Tisch v. DST Systems, Inc.*, 368 S.W.3d 245, 258 (Mo.App.W.D. 2012). A party should not be punished for availing herself of the rights provided in Rule 55.10 and 55.33. As an example, in the present case, Plaintiff was not aware of the product defects existing in Defendants' products at the time the original Petition was filed. Consequently, she filed an Amended Petition to assert claims against these Defendants.

The rule Defendants seek would always allow one defendant to use statements of fact in a petition related to another defendant unless the facts asserted against the two defendants were categorically inconsistent. That rule would punish plaintiffs for including factual statements in petitions, defeat the purpose of alternative pleadings

allowed by Rule 55.10, and discourage amendments to pleadings allowed by Rule 55.33.

The trial court abused its discretion in allowing Defendants to repeatedly use the original Petition.

B. Inadmissible as Legal Conclusions

The allegations in paragraphs 17 and 18 of the original Petition also included inadmissible legal conclusions. Defendants repeatedly displayed and questioned witnesses regarding these paragraphs without any effort to exclude the legal conclusions. Defendants quote select portions of the allegations in their briefs. BSC's brief quotes subparagraph (e) and a portion of subparagraph (f) of paragraph 17. BSC's Substitute Respondent's Brief, p. 53; LF 1 p. 75. Bard's brief quotes or cites portions of paragraph 8 and subparagraphs (b), (e), and (f) of paragraph 17. BSBR, p. 66; LF 1 p. 72, 74-75.

In contrast, Bard's Opening Statement PowerPoint displayed all of subparagraph (f) of paragraph 17 and subparagraphs (a) through (c) of paragraph 18. Bard Opening Statement PowerPoint ("Bard OSP") p. 49 slide 98; Reply Appendix A14. Further, when questioning various witnesses, Defendants displayed entire paragraphs or pages from the original Petition. Trans. III p. 1342 ln. 21-22; Trans. VI p. 3933 ln. 2-4; Trans. XI p. 7487 ln.21-23; Trans. VIII p. 5548-50, 5564-66; Trans. IX p. 5862-64. Defendants' citation to only selective portions of the original Petition in their briefs does not change the fact that Defendants displayed and quoted larger portions of the original Petition at trial, going far beyond any possible factual assertions.

C. Plaintiff Preserved This Issue

As discussed in the Appellant's Substitute Brief, Plaintiff preserved this issue in the trial court. A party is not required to object each time evidence is offered "when testimony on a particular subject is objected to the first time it is offered and the court makes clear that it is rejecting the objection to all evidence of the same type." *Swartz v. Gale Webb Transp. Co.*, 215 S.W.3d 127, 133 (Mo. 2007). "The principle is well established in Missouri that when a party has duly objected to a certain type of evidence and the objection has been overruled, he need not repeat the objection to further evidence of the same type." *State ex rel. State Highway Commission v. Offutt*, 488 S.W.2d 656, 661 (Mo. 1972). Further objections would be futile. *Swartz*, 215 S.W.3d at 133.

Defendants first used the original Petition as evidence during the cross-examination of Dr. Pence. Plaintiff objected that "alternative theories" or "an inconsistent statement" in a petition cannot be used in cross-examination, which objection was overruled. Trans. III p. 1341 ln. 8-12, 16-21, p. 1342 ln. 4, 10. It is clear the trial court intended to continue to allow use of the original Petition. "And my ruling with regard to the petition will remain consistent with what I've been doing throughout. I'll allow you to use factual allegations that are contained in that petition and go from there." Trans. VI p. 3894 ln. 21-25. In those circumstances, further objections would have been futile. *Swartz*, 215 S.W.3d at 133.

Finally, Defendants incorrectly claim that the allegations from the original Petition are cumulative to portions of her interrogatory

answers. The interrogatory answers involve Plaintiff's continued stress urinary incontinence following her initial surgery and her recollection of what Dr. Hill told her about the anchor on the right side not being attached. Defendants' reliance on Plaintiff's recollection of Dr. Hill's comments about a surgery in which he did not participate is misplaced and the interrogatory responses are not the equivalent of the improper use of allegations of negligence in the original Petition.

Further, Plaintiff's continued stress urinary incontinence and the fact that the anchor was not attached at the time of Dr. Hill's examination support Plaintiff's theory that the Solyx would not stay anchored. Dr. Lind, a BSC consultant, informed BSC that "even the simple task of getting the tip of this device in the proper location is not an easy one." Court Exhibit 11, Trial Exhibits Vol. I p. 44 [Depo. p. 38]. The fact that the anchor was found unattached supports Plaintiff's claim and is not the equivalent of improperly admitting conclusions from the original Petition.

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

Plaintiff preserved her objection to use of the allegations from the original Petition by objecting the first time Defendants cross-examined a witness with those allegations. Further, the evidence was not cumulative, the trial court abused its discretion, and Plaintiff was prejudiced by Defendants' repeated and extensive use of those allegations.

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

Plaintiff was prejudiced by Defendants' repeated use of the allegations in her original Petition, and the trial court's error in allowing such use materially affected the merits of this action. BSC and Bard improperly used the allegations of negligence and causation in paragraphs 17 and 18 of the original Petition to support their arguments.

Defendants' use of the original Petition and references to Plaintiff's claims against TMC and UPA were repeated and extensive.

- During opening statements, Defendants repeatedly referenced Plaintiff's claims against TMC and UPA, including displaying the caption of the case showing TMC and UPA as defendants and displaying the allegations in the original Petition. Trans. II p. 782 ln. 23 thru p. 783 ln. 2, p. 851 ln. 3-7, p. 900 ln. 13-19, p. 901 ln. 3-5, p. 903 ln. 11-19; BSC OSP p. 1-2 slides 2-4; Bard OSP p. 49 slide 98; Reply Appendix A2-A3, A14.
- Defendants repeatedly reference the fact that Plaintiff originally sued TMC and UPA throughout their questioning of witnesses. Trans. V p. 3187 ln. 19 thru p. 3188 ln. 10, p. 3190 ln. 35 thru p. 3191

ln. 6; Trans. VI p. 3933 ln. 21-23; Trans. VIII p. 5485 ln. 1-11, p. 5487 ln. 20-22, p. 5488 ln. 6-7, p. 5492 ln. 8-23, p. 5496 ln. 5-17, p. 5527 ln. 1-16, p. 5545 ln. 10-22, p. 5548 ln. 15 thru p. 5549 ln. 11, p. 5550 ln. 16-22, p. 5556 ln. 23 thru p. 5557 ln. 6, p. 5558 ln. 7-8, p. 5560 ln. 2-6, p. 5561 ln. 8-9, p. 5565 ln. 21-24, p. 5602 ln. 24-25, p. 5604 ln. 3-10; Trans. IX p. 5771 ln. 20 thru p. 5773 ln. 3, p. 5861 ln. 25 thru p. 5862 ln. 8, p. 5862 ln. 24 thru p. 5864 ln. 12; Trans. XI p. 7487 ln. 8 thru p. 7488 ln. 20; Court Exhibit 16, Trial Exhibits Vol. I p. 288; Appellant's App. A7.

- Defendants displayed the caption of the case showing TMC and UPA as defendants. Trans. III p. 1340 ln. 3-13.
- Defendants questioned multiple witnesses regarding the allegations against TMC and UPA in the original Petition. Trans. III p. 1342 ln. 21 thru p. 1344 ln. 2; Trans. V p. 3204 ln. 8-23; Trans. VI p. 3933 ln. 21 thru p. 3934 ln. 17, p. 3935 ln. 23 thru p. 3936 ln. 11; Trans. VIII p. 5548 ln. 15 thru p. 5549 ln. 11, p. 5550 ln. 16-22, p. 5564 ln. 17 thru p. 5566 ln. 4; Trans. IX p. 5862 ln. 24 thru p. 5864 ln. 12; Trans. XI p. 7487 ln. 8 thru p. 7488 ln. 20.
- Defendants repeatedly referenced the fact that Plaintiff sued TMC and UPA, including discussing the allegations in the original Petition, during their closing arguments. Trans. XIII p. 8636 ln. 7 thru p. 8637 ln. 17, p. 8702 ln. 9 thru p. 8704 ln. 9.

Defendants' references to Plaintiff's claims against TMC and UPA and the allegations in the original Petition was widespread and invaded the entire trial.

Additionally, the use of Plaintiff's original Petition was not cumulative to other evidence presented during the trial. Evidence is not cumulative:

> where the character of the incompetent evidence is such as to invest it with a high persuasive quality and render it more likely to be impressive to the jury than the evidence properly received.

Eichenberg v. Magidson's Estate, 170 S.W.2d 105, 110 (Mo.App. 1943). A petition is an important pleading, used to initiate litigation and establish the scope of the claims being asserted. A jury could find the allegations in the original Petition to be invested "with a high persuasive quality and render it more likely to be impressive to the jury than the evidence properly received." *Eichenberg*, 170 S.W.2d at 110. The jury could have believed the allegations of negligence against the doctors in Plaintiff's original Petition were the strongest evidence in Defendants' case and there is no basis for finding that the admission of those allegations was not prejudicial to Plaintiff. *See Eichenberg*, 170 S.W.2d at 110.

Further, Plaintiff's arguments regarding this claim are properly before this Court. "The word 'claim' in Rule 83.03 is synonymous with the phrase 'claim of reversible error' in Rule 84.04(d)." *Garland v. Ruhl*, 455 S.W.3d 442, 450 n. 7 (Mo.banc 2015). Plaintiff's *claims of reversible* error raised in this Court were all raised in the Court of Appeals. Plaintiff is not required to assert identical *arguments* regarding those claims of reversible error.

Finally, Plaintiff did assert that she was prejudiced by the improper use of the original Petition. As stated in the briefing in the Court of

Appeals: "[T]he injection of the pleadings of plaintiff against the other defendants deprived plaintiff of a fair trial on the issue of the negligence charged against [these] defendant[s]." *Macheca*, 412 S.W.2d at 466; Appellant's Brief, WD80010, p. 45, 48-49; Reply Brief, WD80010, p. 13, 16. In addition, Plaintiff explained that Defendants improperly used the allegations in the original Petition to support their arguments that the doctors employed by TMC and UPA were to blame for Plaintiff's injuries. Appellant's Brief, WD80010, p. 48. Plaintiff was clearly prejudiced by having her allegations improperly used to bolster Defendants' arguments.

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

IV. Plaintiff's Settlement with TMC and UPA

A. The Jury Was Informed of the Settlement

It is undisputed that information regarding Plaintiff's settlement with TMC and UPA was displayed to the jury. There was nothing preventing the jury from observing that information while it was on display. Contrary Defendants' assertions, the trial court, counsel for Plaintiff, and counsel for Bard all saw the improper settlement information contained on Bard Exhibit 543. After the exhibit had been on display during five questions, the following occurred:

> THE COURT: Take that down for a second, please.
>
> MS. COHEN: Oh, yes.
>
> * * *
>
> MS. COHEN: I know, it wasn't supposed to be up there. I'd asked him to take it off.
>
> THE COURT: Take that off.
>
> MS. COHEN: Yeah, it was supposed to be off.
>
> MR. DAVIS: I saw something up there that's very troubling.
>
> MS. COHEN: It wasn't on --
>
> THE COURT: Take it off.
>
> MR. DAVIS: I want to do this later, but I'm going to make a motion for a mistrial. It's a violation. To say on the record what happened is -- it was a slide that shows that there was a settlement with Truman, and it is a direct violation of the Court's orders. I'll make a better record later.

Trans. Vol. VIII p. 5604-05. This discussion shows that the trial court, Mr. Davis, and Ms. Cohen all saw the settlement information. *See also* Trans. VIII p. 5633 ("So what happened during the testimony, they put that up there, that slide up there, and the Court noticed it, and the

Court called counsel up to the bench, and plaintiff's attorney, Grant Davis, me, noticed it at that time also and came up to the bench."); Trans. VIII p. 5634 ("It was definitely up there a long enough time for the jurors to read, because it was long enough for the Court to read and it was long enough for me to read.").

In addition, the trial court did not find that the jury did not observe the settlement information. Instead, the trial court expressed a "*hope* that the jury's attention was focused on that colloquy between the two." Trans. VIII p. 5637 (emphasis added). The information was displayed on a "20-by-20 screen", making it easy for the jurors to see everything on the timeline, including the settlement information. The trial court had time to read the improper statement about the settlement before it was taken down and there is no logical reason to believe that at least some of the jurors did not read it also.

The slide was displayed the first time while Ms. Cohen asked Plaintiff five questions regarding her deposition and errata sheet, both of which are referenced on Bard Exhibit 543. Trans. VIII p. 5488. Further, the box regarding the settlement information is between the doxes regarding "First deposition" and "Errata sheet." Trial Exhibits, Vol. I p. 288; Appellant's App. A7. The questions asked of Plaintiff directed the jury to the settlement information on the exhibit. Counsel for Bard then had the slide taken down. Trans. VIII p. 5488-89.

The second time page two of Bard Exhibit 543 was displayed to the jury, Plaintiff was again asked five questions related to information on Bard Exhibit 543. Trans. VIII p. 5604. Those questions again directed

the jury's attention to the exhibit which included the improper, highly prejudicial settlement information.

Defendants argue that it is mere speculation to assume that any of the jurors saw the settlement information. Bard Exhibit 543 was displayed on a "20-by-20 screen that [was] in front of [the] jury." Trans. IX p. 5730. Plaintiff was questioned about information contained on Bard Exhibit 543. How long must an exhibit be displayed to the jury before it is presumed the jury saw the exhibit? Thirty seconds? Ten minutes?

It is undisputed that information regarding Plaintiff's settlement with TMC and UPA was displayed to the jury. There was nothing preventing the jury from observing that information while it was on display. The questions asked while the settlement information was on display directed the jury's attention to the slide containing the information. Consequently, there is every reason to believe that at least some of the jurors observed the information regarding the settlement.

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

"The danger of admitting evidence of settlements is that the trier of fact may believe that the fact that a settlement was attempted is some indication of the merits of the case." *State ex rel. Malan v. Huesemann*, 942 S.W.2d 424, 428 (Mo.App.W.D. 1997). That danger is even greater when a settlement with prior defendants is admitted as the jury may believe that the other defendant admitted liability.

The prior settlement is irrelevant and inadmissible with respect to Plaintiff's claims against BSC and Bard. Regardless, the date and fact of the settlement was displayed to the jury twice. The fact that the settlement information was displayed to the jury on two different occasions alone constitutes reversible error. However, the settlement information must also be considered in the context of:

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

Bard acknowledged that the settlement information was not to be presented to the jury and that it was a violation of the trial court's rulings on the issue. Trans. VIII p. 5605, 5635. Displaying the date of Plaintiff's settlement with TMC and UPA led the jury to believe the

doctors admitted they were at fault, and that Plaintiff was already reimbursed for her damages by TMC and UPA.

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

Further, the cases relied upon by BSC in arguing that a mistrial was not necessary are distinguishable. In *Taylor v. Republic Automotive Parts, Inc.*, 950 S.W.2d 318 (Mo.App.W.D. 1997), the plaintiff's attorney stated during closing "it's so easy for people to sit back, *and not fairly settle something*, and then—" *Taylor*, 950 S.W.2d at 324 (emphasis in original). The trial court sustained the objection to the statement and instructed the jury to disregard. *Taylor*, 950 S.W.2d at 324. The attorney's statement suggested that the defendant should have settled the case, not that any settlement or even settlement discussions occurred. In contrast, Bard Exhibit 543 informed the jury that Plaintiff did settle with TMC and UPA, whom Defendants repeatedly blamed for Plaintiff's injuries.

In *Hale v. American Family Mut. Ins. Co.*, 927 S.W.2d 522 (Mo.App.W.D. 1996), a settlement demand letter and other exhibits, marked with post-it notes stating "Don't send to jury", were inadvertently sent to the jury. *Hale*, 927 S.W.2d at 528. "[W]ithin two or three minutes the bailiff returned the improper exhibits to the court advising that the foreperson told him that the jury observed the post-it notes on the exhibits and returned them to the bailiff." *Hale*, 927 S.W.2d at 528. Following the return of the jury's verdict, the court and counsel questioned the jurors regarding the documents, determining that most of the jurors did not know about the exhibits. Further, the jurors indicated they had unanimously agreed on liability in favor of the plaintiff and that damages were at least $300,000 prior to the exhibits entering the jury room. *Hale*, 927 S.W.2d at 529. The Court recognized that the documents should not have been provided to the jury but found that the trial court did not abuse its "discretion by finding a lack of prejudice under the circumstances present here." *Hale*, 927 S.W.2d at 529.

The unusual circumstance in *Hale* allowed the trial court to determine that no prejudice resulted. The same is not true in the present case. The court could not determine whether the settlement information was seen or affected the jury's view of the case without supplying and highlighting the very information the jury should not have had. Further, the settlement information was displayed to the jury before any determination of liability was made. *Hale* and *Taylor* are distinguishable.

Further, Defendants mistakenly rely on cases addressing reversible error resulting from the admission of insurance information. The determination of reversible error based on the injection of insurance into an action for damages generally turns on whether the reference to insurance was done in bad faith. *See Wheeler ex rel. Wheeler v. Phenix*, 335 S.W.3d 504, 514 (Mo.App.S.D. 2011) ("The injection of insurance into a case may constitute reversible error if done in bad faith[.]"); *Beckett v. Kiepe*, 369 S.W.2d 258, 263 (Mo.App. 1963) ("[W]hether the jury should be discharged … depends upon whether there was good or bad faith in the injection of the question of insurance.") (internal quotations omitted).

In contrast, the admission of settlement information violates public policy by discouraging settlements and constitutes reversible error. *Rodgers v. Czamanske*, 862 S.W.2d 453, 460 (Mo.App.W.D. 1993). Settlement agreements are highly prejudicial and, in the absence of a clear and cogent reason to do so, should be kept from the jury. *Mengwasser v. Anthony Kempker Trucking, Inc.*, 312 S.W.3d 368, 376 (Mo.App.W.D. 2010); *Daniel v. Indiana Mills & Mfg., Inc.*, 103 S.W.3d 302, 316 (Mo.App.S.D. 2003). Good or bad faith simply does not matter. "The erroneous admission of evidence of a settlement offer constitutes reversible error." *Rodgers*, 862 S.W.2d at 460.

The information that Plaintiff settled with TMC and UPA was displayed to the jury twice. That information was highly prejudicial to Plaintiff and the grievous nature of that prejudice could only be removed by the granting of a mistrial. The trial court abused its

discretion in failing to grant a mistrial following the improper display to the jury of the settlement information and this Court should reverse and remand for a new trial.

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

Bard is at fault for improperly displaying the settlement information and Defendants cannot properly complain that Plaintiff did not object the first time page two of Bard Exhibit 543 was displayed to the jury or that the record does not show that the version of Bard Exhibit 543 first displayed to the jury contained the settlement information. Such complaints ignore the fact that Bard caused the situation which admittedly contravened the trial court's rulings. Further, Bard's explanations regarding the display of the settlement information make it clear that the settlement information was displayed twice.

At trial, Bard stated: "it wasn't supposed to be up there. I'd asked him to take it off." Trans. VIII p. 5605. Bard also stated: "Obviously our trial technology person inadvertently put up an old version that had it." Trans. VIII p. 5634. While those two explanations are not entirely consistent, it is clear that the settlement information was displayed twice based on either explanation.

First, if the settlement information had not been taken off the electronic version of Bard Exhibit 543, then the settlement information was displayed both times the second page of Bard Exhibit 543 was used. Second, if Bard's trial technology person was using an old version of Bard Exhibit 543, there is no reason to believe the new version was

used the first time Bard Exhibit 543 was displayed and the old version the second time Bard Exhibit 543 was used, just a short time later.

This situation was entirely created by Bard. Bard created two versions of its exhibit, one of which contained settlement information that Bard had no reasonable basis for believing was admissible in questioning Plaintiff. Bard gave one version of the exhibit to the trial court and Plaintiff's counsel and then displayed the other, improper version to the jury. It does not matter whether the information was displayed intentionally or not, the settlement information was highly prejudicial and improper.

Plaintiff and the trial court were presented with paper copies of Bard Exhibit 543 that did not match what was displayed to the jury. As a result, the jury was more likely to notice the settlement information than either the trial court or Plaintiff. Further, neither Plaintiff nor the trial court could determine whether any jurors observed the settlement information without informing the jury of the existence of the settlement. The only uncontested fact is that the improper, highly prejudicial settlement information was displayed to the jury.

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

CONCLUSION

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

Respectfully Submitted,

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

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

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

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

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

I certify that this Appellant's Substitute Reply Brief was served pursuant to Rule 103.08, complies with the limitations contained in Rule 84.06(b), and contains 7,744 words, excluding the cover page, signature blocks, and certificate of compliance.

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

Attorney for Appellant