In the
Missouri Court of Appeals
Western District

EVE SHERRER,	)	
	)	
Appellant,	)	**WD80010**
	)	
v.	)	**OPINION FILED: August 21, 2018**
	)	
BOSTON SCIENTIFIC CORPORATION AND C.R. BARD, INC.,	)	
	)	
Respondents.	)	

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

Before Division Four: Karen King Mitchell, Chief Judge, Presiding, Cynthia L. Martin, Judge and Jeff Harris, Special Judge

Eve Sherrer ("Sherrer") appeals from a judgment entered in conformity with jury verdicts in favor of Boston Scientific Corporation ("Boston Scientific") and C.R. Bard, Inc. ("Bard") (collectively "Defendants") following a multi-week products liability trial. Sherrer raises several claims of error involving the admission or exclusion of evidence and the trial court's failure to grant a mistrial. Because the trial court committed reversible error in excluding evidence relevant to impeach Bard, the judgment in favor of Bard and

against Sherrer is reversed, and this matter is remanded for a new trial as to Bard. The judgment in favor of Boston Scientific is affirmed.

Factual and Procedural Background[1]

Sherrer filed suit on October 26, 2012 against Truman Medical Center ("TMC") and University Physicians Associates ("UPA") alleging medical malpractice in connection with Dr. Peter Greenspan's ("Dr. Greenspan") October 28, 2012 implantation of the Solyx, a single-incision mesh mini-sling manufactured by Boston Scientific, to treat stress urinary incontinence ("Original Petition"). On May 30, 2013, Sherrer filed an amended petition which repeated the allegations of medical malpractice against TMC and UPA, and which added product liability claims against medical device manufacturers Boston Scientific and Bard ("Amended Petition"). Bard manufactured the Align, a multi-incision, midurethral mesh sling, which was implanted in Sherrer on January 3, 2011, by Dr. Richard Hill ("Dr. Hill") who, at the same time, removed two-thirds of the Solyx mesh sling manufactured by Boston Scientific. On April 25, 2014, Dr. Shlomo Raz ("Dr. Raz"), performed several additional procedures on Sherrer, including the removal of the Align and the remainder of the Solyx.

Prior to trial, Sherrer settled her medical malpractice claims with TMC and UPA. Sherrer's product liability claims against Boston Scientific and Bard proceeded to jury trial on November 30, 2015, and continued through February 2, 2016.[2] The jury returned

[1]We view the evidence and all reasonable inferences therefrom in the light most favorable to the trial court's order, following the trial court's denial of a motion for new trial in a case tried to a jury. *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 39-40 (Mo. banc 2013).

[2]A two-week break was taken from mid-December 2015 through early January 2016.

verdicts in favor of the Defendants on February 2, 2016. The trial court entered its judgment in conformity with the jury's verdicts on March 18, 2016 ("Judgment"). Plaintiff's motion for new trial was denied by the trial court on July 13, 2016.

This appeal followed.[3] Other facts will be discussed as relevant to Sherrer's points on appeal.

Summary of Points on Appeal and Standard of Review

Sherrer raises four points on appeal involving either the admission or exclusion of evidence at trial, or the trial court's failure to grant a mistrial. Summarized, Sherrer complains about the trial court's exclusion of impeachment evidence in the form of Bard's prior felony convictions (point one); about the Defendants' references to Sherrer's allegations in the Original Petition (point two); about the trial court's failure to grant a mistrial when a demonstrative power point slide mistakenly included reference to Sherrer's settlement with TMC and UPA (point three); and about the trial court's exclusion of other complaints involving the Defendants' mesh products (point four).

The standard of review for the admission or exclusion of evidence, (applicable to points one, two, and four), is for an abuse of discretion. "A trial court 'enjoys considerable discretion in the admission or exclusion of evidence, and, absent clear abuse of discretion, its action will not be grounds for reversal.'" *Cox v. Kansas City Chiefs Football Club, Inc*., 473 S.W.3d 107, 114 (Mo. banc 2015) (quoting *Moore v. Ford Motor Co*., 332 S.W.3d 749, 756 (Mo. banc 2011)). "A ruling constitutes an abuse of discretion when it is 'clearly

[3] Sherrer's initial notice of appeal was not timely filed. By order, this court extended Sherrer's time to file a notice of appeal pursuant to Rule 81.07.

against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration.'" *Id.* (quoting *Lozano v. BNSF Ry. Co.*, 421 S.W.3d 448, 451 (Mo. banc 2014)). "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *In re Care & Treatment of Donaldson*, 214 S.W.3d 331, 334 (Mo. banc 2007).

If an evidentiary ruling is determined to be an abuse of discretion, an appellate court remains "loathe to vacate a jury's verdict and resulting judgment on such grounds." *Lozano*, 421 S.W.3d at 451 (citing *Lewis v. Wahl*, 842 S.W.2d 82, 84-85 (Mo. banc 1992 ("question of error does not resolve the question of whether reversal is mandated")). "Instead, '[b]y both statute and rule, an appellate court is not to reverse a judgment unless it believes the error committed by the trial court . . . materially affected the merits of the action.'" *Id.* at 451-52 (quoting *Lewis*, 842 S.W.2d at 84-85); *see* section 512.160.2[4] ("[n]o 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)[5] (same).

The standard of review following denial of a motion for mistrial, (applicable to point three), is for manifest abuse of discretion. *Peel v. Credit Acceptance Corp*., 408 S.W.3d 191, 215 (Mo. App. W.D. 2013). "A mistrial is a drastic remedy." *Id.* (citing *Brown v. Bailey*, 210 S.W.3d 397, 411 (Mo. App. E.D. 2006)). "A manifest abuse of discretion

[4]All statutory references are to RSMo 2016 as amended unless otherwise duly noted.
[5]All references to rules are to *Missouri Court Rules, Volume I--State, 2018* unless otherwise noted.

occurs only when the error is so grievous that the prejudice cannot be removed." *Id.* (citing *Brown*, 210 S.W.3d at 411); *see also Seabaugh v. Milde Farms, Inc*., 816 S.W.2d 202, 208 (Mo. banc 1991) ("Mistrials are a most drastic remedy and should be reserved for the most grievous error where prejudice cannot otherwise be removed."). "We recognize that the trial court is better positioned to assess the prejudicial effect that improper evidence has on the jury." *Payne v. Fiesta Corp*., 543 S.W.3d 109, 123 (Mo. App. E.D. 2018) (citing *Delacroix v. Doncasters, Inc*., 407 S.W.3d 13, 24 (Mo. App. E.D. 2013)).

Analysis

Point One: The Exclusion of Evidence of Bard's Criminal Convictions Offered to Impeach Bard's Credibility

Sherrer's first point on appeal claims that the trial court abused its discretion in excluding evidence of Bard's criminal convictions because the evidence was admissible as a matter of right pursuant to section 491.050, and because the evidence became admissible during the course of trial to contradict evidence of Bard's good corporate character. Sherrer's point on appeal is multifarious, as it argues two distinct bases for the admission of evidence of Bard's criminal convictions.[6] "'Multifarious points relied on are noncompliant with Rule 84.04(d) and preserve nothing for review.'" *Griffitts v. Old Republic Ins. Co.*, No. SC96740, 2018 WL 3235859, at *3 n.6 (Mo. banc July 3, 2018) (quoting *Kirk v. State*, 520 S.W.3d 443, 450 n.3 (Mo. banc 2017) (holding that point on appeal arguing that trial court erroneously declared and applied the law was impermissibly

[6]"'Impeachment means an attack on a witness' general credibility, whereas contradiction means an attack on the accuracy of a witness' testimony and, unlike impeachment, usually adds factual evidence.'" *Giles v. Riverside Transp., Inc*., 266 S.W.3d 290, 295 (Mo. App. W.D. 2008) (quoting *Waters v. Barbe*, 812 S.W.2d 753, 757 (Mo. App. W.D. 1991)).

multifarious in violation of Rule 84.04 because "it groups together multiple, independent claims rather than a single claim of error")). We exercise our discretion, however, to review only the first of the two claims raised in Sherrer's multifarious point. *Griffitts*, 2018 WL 3235859, at *3; *Spence v. BNSF Ry. Co.*, 547 S.W.3d 769, 779 n.12 (Mo. banc 2018) (electing to review only the first of multiple claims in a multifarious point relied on). Resolution of the first claim raised in Sherrer's multifarious point is sufficient to permit us to conclude that it was reversible error to exclude evidence of Bard's criminal convictions to impeach Bard.

(i) The trial court's rulings addressing the exclusion of Bard's criminal convictions

In 1994, Bard entered a plea of guilty to 391 counts of conspiracy, mail fraud, false statements, and adulterated product/failure to file medical device report in the United States District Court for the District of Massachusetts, requiring it to pay criminal fines in the amount of $30,500,000. The 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.

Bard argued in a motion *in limine* that all evidence or argument concerning unrelated business issues, investigations, alleged bad acts, or alleged illegal activity should be excluded. Bard later supplemented this motion *in limine* to argue in particular that all evidence and argument regarding its 1994 criminal convictions should be excluded. Bard argued that evidence of the 1994 criminal convictions: (i) was logically irrelevant character evidence; (ii) could not be used for impeachment under Missouri law because section

491.050 applies only to natural persons convicted of a crime; and (iii) was legally irrelevant because the probative value of the evidence was substantially outweighed by its prejudicial value.

Bard's motion *in limine* was argued on November 29, 2015, the Sunday before trial. The parties generally stipulated that evidence of Bard's unrelated business issues, investigations, alleged bad acts, or alleged illegal activity would be excluded, but could not agree about the admissibility of evidence of Bard's criminal convictions. Bard and Sherrer disagreed about whether section 491.050, which permits a "person" who appears as a witness to be impeached by the person's criminal convictions, applies to corporations. They also disagreed about whether the statutory right to use criminal convictions to impeach is absolute or remains subject to the trial court's discretion to exclude highly prejudicial evidence. The parties also argued about whether the criminal convictions could independently be admitted to contradict evidence of Bard's good corporate character.

On November 30, 2015, the first day of trial, the trial court entered a lengthy pre-trial order reflecting its disposition of all of the motions *in limine* the parties had filed. With respect to Bard's motion *in limine* addressing unrelated business activities and bad acts, the trial court's order provided:

> Granted by agreement of the parties. . . ***as to Defendant's felony convictions -- said motion is granted unless Defendant opens the door to the admission of that evidence***.

(Emphasis in original.) The effect of the trial court's pre-trial order was to exclude Bard's criminal convictions to impeach pursuant to section 491.050, and to admit Bard's criminal

convictions to contradict evidence of good corporate character should that door be opened by Bard.

The trial court's *in limine* ruling preserved nothing, however, for appellate review. "[W]hen a motion *in limine* is granted, the proponent of the evidence, in order to preserve the issue for appellate review, must attempt to present the excluded evidence at trial, and if an objection to the proffered evidence is sustained, the proponent must then make an offer of proof." *Evans v. Wal-Mart Stores, Inc.*, 976 S.W.2d 582, 584 (Mo. App. E.D. 1998). "There are two main purposes for the offer of proof at trial. The first is to preserve the record for appeal so the appellate court understands the scope and effect of the questions and proposed answers in considering whether the trial judge's ruling was proper." *Id.* (citing *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 646 (Mo. banc 1997)). "The second is to permit the trial judge to further consider the claim of inadmissibility." *Id.* (citing *Wilkerson*, 943 S.W.2d at 646). "If the evidence is still excluded upon offer of proof at trial, then the proponent may predicate error on the exclusion." *Id.* at 584-85 (citing *Sullivan v. Spears*, 871 S.W.2d 75, 76 (Mo. App. W.D. 1994)).

Sherrer's appellate brief contends[7] that she preserved her claim of error with respect to the trial court's exclusion of the evidence of Bard's criminal convictions "through an offer of proof involving the videotaped deposition of John Weiland, [("Weiland")] the president and COO of Bard, and the offer of a certified copy of the Judgment in a Criminal Case," and by raising the claim of error in her motion for new trial. [Sherrer's Brief, p. 28]

[7]Rule 84.04(e) provides that "[f]or each claim of error, the argument shall . . . include a concise statement describing whether the error was preserved for appellate review; if so, how it was preserved; and the applicable standard of review."

Weiland was deposed by Sherrer on December 2, 2015, after Sherrer's trial commenced.[8] Sherrer's counsel asked Weiland about Bard's 1994 convictions during that deposition, subject to Bard's objections. After Weiland's December 2, 2015 deposition was taken, and while Sherrer's trial was underway, Sherrer and Bard submitted the designations from Weiland's deposition transcripts[9] that each sought to admit into evidence. The trial court considered and ruled on the proposed designations on January 4, 2016.[10] Sherrer's proposed designations included questions which asked Weiland to identify a copy of the record of Bard's criminal convictions, which asked Weiland to confirm the nature of the convictions, and which inquired about some of the factual findings in the judgment of conviction. The trial court's notations on the proposed deposition designations indicate that as of January 4, 2016, the trial court had ruled admissible the portions of the deposition where Weiland was asked to confirm the record of Bard's 1994 criminal convictions and the nature of the convictions, but had ruled inadmissible the portions of the deposition where Weiland was asked about factual findings in the judgment of conviction.

On January 5, 2016, Bard's counsel questioned why the trial court had ruled any of Sherrer's designations discussing Bard's criminal convictions admissible in light of the trial court's pretrial ruling that the convictions would not be admitted into evidence "unless the

[8]Weiland was also deposed in 2014 in connection with federal multidistrict litigation pending against Bard.

[9]*See supra* note 8.

[10]After all of the parties rested, and before the Defendants' motion for directed verdict was argued, the parties offered various exhibits into the record, including: (i) deposition transcripts for several witnesses with proposed designations to be admitted at trial, and the trial court's rulings with respect to the designations, noted on the transcripts, and (ii) "run reports" reflecting the actual deposition designations played by videotape for the jury for each witness. Specifically, Sherrer placed into the record without objection Court Exhibit 20, (the transcripts from both of Weiland's depositions, which noted each parties' proposed designations to be admitted into evidence in Sherrer's trial, and the trial court's initial rulings with respect to the proposed designations), and Court Exhibit 21, (the "run report" reflecting the Weiland deposition designations actually played by videotape for the jury).

door had been opened." In response, Sherrer's counsel argued, as he had in connection with Bard's motion *in limine*, that Bard's convictions are admissible as a matter of right under Missouri law, referring to section 491.050. Sherrer alternatively argued that in any event, the door had been opened to admit the criminal convictions to contradict good corporate character comments made during Bard's opening statement, and by former Bard employee Roger Darois ("Darois") who was called to testify by Bard out-of-turn during Sherrer's case-in-chief.

The trial court advised the parties that it recalled the *in limine* ruling had been to permit admission of the fact and nature of Bard's convictions, while excluding anything extraneous, just as with individual witnesses. Bard responded by presenting the trial court with a copy of its written *in limine* rulings. The trial court considered the written *in limine* rulings, and then advised that it would abide by its pre-trial ruling, and "[a]s indicated, unless I find that the door was opened, that old conviction will remain out." As a result, all of the designations in Weiland's deposition referring to Bard's 1994 convictions were ruled inadmissible except to contradict admitted good corporate character evidence.[11] The

[11]At the same time Sherrer placed Court Exhibits 20 and 21 into the record (*see supra* note 10), Sherrer also placed Court Exhibits 22 and 23 into the record without objection. Court Exhibit 22 was the "run report" reflecting the ***excluded*** Weiland deposition designations, limited to questions asking about the fact and nature of Bard's convictions. Court Exhibit 23 was the record of Bard's criminal convictions shown to Weiland during his deposition. Placing Court Exhibits 22 and 23 into the record after the close of all of the evidence, without objection, satisfied the essential purpose of an offer of proof to "preserve the record for appeal so the appellate court understands the scope and effect of [excluded evidence] in considering whether the trial judge's ruling was proper." *Evans*, 976 S.W.2d at 584. The January 4, 2016 trial court rulings on the parties' proposed deposition designations, reflected in Court Exhibit 20, the January 5, 2016 on-the-record discussions about the trial court's rulings on Weiland's deposition designations, and the "run report" showing the portions of Weiland's depositions actually played by videotaped for the jury (Court Exhibit 21), are sufficient to satisfy the other essential purpose of an offer of proof "to permit the trial judge to further consider the claim of inadmissibility." *Id.* Though the preferred practice would have been for Sherrer to admit Court Exhibits 20, 21, 22 and 23 into the record ***before*** the close of the evidence, Bard did not object to Sherrer's placement of these exhibits into the record after the close of the evidence.

trial court advised Sherrer's counsel to "show me what you've got that you think indicates that the door was opened and I'll look at it tonight." Sherrer has not directed this court to any place in the record where any further attempt was made to persuade the trial court that the door had been opened to admit evidence of Bard's criminal convictions to contradict evidence of Bard's good corporate character.

On January 11, 2016, Sherrer's approved designations from Weiland's depositions were played for the jury during Sherrer's case-in-chief, with Bard responding by playing its approved designations from Weiland's depositions.

In her motion for new trial, Sherrer argued that the trial court erred in not permitting her "to impeach the Corporate Representative of Bard with the admission of Bard's criminal conviction." Sherrer argued that section 491.050 permits the admission of a witness's prior criminal conviction to impeach the witness's credibility, and that Bard was a witness through its corporate representatives such that its criminal convictions should have been admitted.

(ii) The trial court abused its discretion in excluding evidence of the fact and nature of Bard's convictions to impeach Bard pursuant to section 491.050

The first claim of error raised in Sherrer's multifarious point on appeal, and the only claim we need address, is that the trial court erroneously excluded evidence of Bard's criminal convictions because admission of that evidence is permitted by section 491.050 to impeach any witness who testifies at trial.

Section 491.050 provides, in relevant part:

> Any person who has been convicted of a crime is, notwithstanding, a competent witness; however, any prior criminal convictions may be proved to affect his credibility in a civil or criminal case . . . . Such proof may be either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer.

Bard and Sherrer disagree about whether the term "person" in section 491.050 is limited to natural persons, or includes corporations. No Missouri case has addressed this issue. However, section 1.020(12) provides:

> As used in the statutory laws of this state, unless otherwise specifically provided or unless plainly repugnant to the intent of the legislature or to the context thereof:
>
> . . .
>
> (12) The word "**person**" may extend and be applied to bodies politic and corporate, and to partnerships and other unincorporated associations.[12]

Because "person" is not defined in section 491.050, we are thus directed by section 1.020(12) to include corporations within the scope of section 491.050 unless to do so would be "plainly repugnant to the intent of the legislature or to the context thereof."

Section 491.050 was enacted in 1895. *See* 1895 Mo. Laws section 8944b, p. 284. The provisions relevant to this case have remained materially unchanged since that time. The enabling statute removed the common law disqualification of a person convicted of a crime as a witness. *Forbis v. Associated Wholesale Grocers, Inc.*, 513 S.W.2d 760, 764 (Mo. App. 1974), *overruled on other grounds by Lewis v. Wahl*, 842 S.W.2d 82, 85 (Mo.

[12]Consistently, section 1.030.2 provides that "[w]hen any . . . person is described or referred to by words importing the . . . masculine gender, . . . females as well as males, and bodies corporate as well as individuals, are included."

banc 1992). At the same time, the statute made "'a very material alteration in the rules of evidence'" which had previously only permitted a witness's prior conviction of an "infamous crime" to be used to impeach the witness's credibility. *Id.* (quoting *State v. Blitz*, 71 S.W. 1027, 1030-31 (Mo. 1903)). In *Blitz*, the Supreme Court noted that the statute is "applicable to all witnesses who may testify in a case, and does not undertake to designate the class of witnesses to which its provisions apply." 71 S.W. at 1030.[13]

It is plain, therefore, that the legislature's purpose in enacting what is now section 491.050 was to permit the credibility of *any* witness who testifies in a civil or criminal trial to be impeached by *any* criminal conviction. Bard offers no argument to explain why it would be repugnant to the intent of the legislature, or to the context of section 491.050, to conclude that the term "person" includes corporations who appear as a witness at trial. Rather, we believe it would be repugnant to exclude corporations from the scope of section 491.050 when they are otherwise competent to be named as parties to a lawsuit and to testify as witnesses. We conclude, therefore, that section 491.050 applies to any witness in a civil or criminal trial, whether the witness is a natural person, or a corporate entity testifying through duly authorized agents or representatives.[14]

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[13]The Supreme Court in *Blitz* questioned the wisdom of the statute's supposition that every criminal offense, whether or not "infamous," bears on a witness's "good moral character." 71 S.W. at 1030. The Supreme Court observed:

> While we doubt very seriously the wisdom of this sudden and apparently unnecessary change of the long-established rules of evidence, which have been uniformly followed for so many years, doubtless on account of their being based upon that most appropriate foundation of reason and justice, yet, if this change is unwise and was ill-considered, the more strictly it is enforced the sooner its defects will appear, and the sooner will the power that created it bring about its destruction.

Id. at 1030-31. The Court's expressed disdain for section 491.050, notwithstanding, "[s]ince the decision in *Blitz*, the Supreme Court of this state has uniformly and consistently held that the statute confers an absolute right to show prior convictions and the nature thereof for the purposes of impeaching a witness, both in criminal and civil cases." *Forbis*, 513 S.W.2d at 764.

[14]"A corporation is an artificial being and it can act only through its agents." *Molasky Enters., Inc. v. Carps, Inc*. 615 S.W.2d 83, 87 (Mo. App. E.D. 1981). If a corporation testifies at trial, it does so through an

Bard argues that even if the term "person" as used in section 491.050 includes corporations within its scope, a corporation's criminal convictions cannot be admitted to impeach the corporation unless the corporation testifies through a designated corporate representative. Bard argues that Bard did not testify at trial through a designated corporate representative, and that Bard was thus not subject to impeachment by its criminal convictions pursuant to section 491.050. To address this argument, we need only concern ourselves with Weiland, Bard's president and chief operating officer at the time of trial, as Weiland was the only witness through whom Sherrer sought to admit evidence of Bard's criminal convictions.[15]

Sherrer did not take advantage of Rule 57.03(b)(4) when she noticed Weiland's deposition for December 2, 2015. Rule 57.03(b)(4) permits a party to notice a corporation as a deponent while describing the matters on which examination is requested, at which point the corporate deponent must designate which of its officers, directors, managing agents, or other persons will testify on its behalf about the identified matters. *See State ex rel. Reif v. Jamison*, 271 S.W.3d 549, 550-51 (Mo. banc 2008). However:

> Rule 57.03(b)(4) merely provides that a party *may* name a corporate entity as a deponent in a notice or subpoena and may designate matters about which the corporate entity is to designate a representative to speak on its behalf.

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authorized agent. In that case, the criminal convictions admissible to impeach the corporation witness pursuant to section 491.050 would obviously be limited to the corporation's (and not the agent's) criminal convictions.

[15]In Bard's appellate brief, Bard claims that Sherrer abandoned any claim of error that Bard's criminal convictions should have been admitted through Weiland pursuant to section 491.050, and claims that the only section 491.050 discussion in Sherrer's brief involves the right to admit the evidence through Darois, a former Bard employee. [Bard's Brief, pp. 31, 33] Bard's argument, which cites to pages 30-34 of Sherrer's brief, is simply inaccurate. On page 33 of Sherrer's brief, Sherrer argues that "Bard testified vicariously through its president and COO," necessarily referring to Weiland, who identified himself as Bard's president and chief operating officer in his deposition. Shortly thereafter, Sherrer's brief explains that the offer of proof preserving the issue for appellate review was Weiland's deposition testimony. [Sherrer's Brief, p. 33] Sherrer's brief does not argue that it was error pursuant to section 491.050 to refuse to permit Sherrer to ask Darois about Bard's convictions. Review of the transcript reveals, in fact, that Sherrer never attempted to admit evidence of Bard's convictions through Darois.

> This does not mean, however, that the only mechanism for taking testimony from an agent of a corporation is through a deposition requiring that the agent be designated as a corporate representative. . . . Corporate employees are free to testify within the scope and course of their employment concerning matters within the scope and course of their employment.

Lunceford v. Houghtlin, 326 S.W.3d 53, 72-73 (Mo. App. W.D. 2010) (citing *State ex rel. Pitts v. Roberts*, 857 S.W.2d 200, 202 (Mo. banc 1993); *Standard Meat Co. v. Taco Kid of Springfield, Inc*., 554 S.W.2d 592, 595 (Mo. App. 1977)). Consistent with this fact, "[i]n order to be binding upon a corporation, statements made in depositions must be made by a corporate officer who is so employed at the time he is deposed." *Penberthy v. Nancy Transp., Inc*., 804 S.W.2d 404, 408 (Mo. App. E.D. 1991) (citing *German v. Kansas City*, 512 S.W.2d 135, 145-46 (Mo. banc 1974) (holding that "[a] substantial trend favors admitting statements [of corporate employees to bind the corporation] related to a matter within the scope of the agency or employment")).

Here, Bard does not argue (nor could it) that Weiland was not employed by Bard at the time he was deposed by Sherrer. Nor does Bard argue that it was outside the scope and course of Weiland's employment as the president and chief operating officer of Bard to verify the fact of Bard's criminal convictions, or to confirm the nature of the convictions.[16] To this point, it is noteworthy that Bard did not object to the admission of any other designations from Weiland's deposition on the basis that Weiland was not an authorized

[16]Bard does complain that the convictions predate Weiland's employment, but offers no persuasive argument to explain how that would render its president and chief operating officer any less an authorized representative to simply confirm the fact and nature of the convictions. It is settled that pursuant to section 491.050, all that is to be admitted is the fact and nature of the convictions. *State v. Henderson*, 669 S.W.2d 573, 575 (Mo. App. E.D. 1984) (holding that use of prior conviction to impeach pursuant to section 491.050 is limited to proof of "the fact of conviction, the nature of the charge, [and the] place and date of the occurrence and sentence imposed," and holding that questions addressing details of the crime or dwelling on the conviction are not permitted).

representative whose testimony could bind Bard. We find that Weiland, Bard's president and chief operating officer at the time of his deposition, was Bard's corporate representative when he testified in his deposition, and that as a result, Bard testified as a witness at trial through the admission of Weiland's deposition designations.

Bard argues that even if Bard testified at trial through Weiland, section 491.050 is limited in its application to the *cross-examination* of a witness, and Weiland was not being cross-examined when Sherrer asked about Bard's convictions. Instead, according to Bard, Sherrer played Weiland's deposition testimony during her case-in-chief, making Weiland (and thus Bard) Sherrer's own witness. Bard argues that it is settled law that a party cannot use a criminal conviction to impeach her own witness at trial, citing *State v. Phillips*, 940 S.W.2d 512 (Mo. banc 1997).

Phillips restates the general rule that "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." 940 S.W.2d at 520. *Phillips* noted that this general rule has been modified "***in criminal proceedings*** to allow a party to impeach his own witness with a prior inconsistent statement without a showing of surprise and hostility," aligning Missouri case law with section 491.074, which allows a prior inconsistent statement of any witness in any criminal proceeding to be introduced as substantive evidence. *Id.* (emphasis added). The Court in *Phillips* went on to find that:

> We have not modified the rule, however, to allow impeachment of one's own witness ***in a criminal proceeding*** by proof of prior criminal convictions without a showing of surprise and hostility, and Phillips offers no persuasive

> argument to do so now. Accordingly, the trial court committed no error, plain or otherwise, in refusing to allow Phillips to impeach her own witness with evidence of his prior criminal convictions.

Id. (emphasis added).

At first blush, the general rule described in *Phillips*, which is applicable to civil and criminal cases, might appear to be controlling in the instant case. It is not, however. In describing recognized exceptions to the general rule, *Phillips*' discussion was limited to ***criminal*** proceedings. Moreover, the witness in *Phillips w*as not an adverse party. *Id*. at 516, 520. These distinctions are material.

Section 491.030 addresses adverse party witnesses in ***civil*** actions, and provides:

> Any party ***to any civil action or proceeding*** may compel any adverse party, or any person for whose immediate and adverse benefit such action or proceeding is instituted, prosecuted or defended, to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses; provided, that the party so called to testify may be examined by the opposite party, ***under the rules applicable to cross-examination of a witness***.

(Emphasis added.) By its plain terms, section 491.030 applies only to civil actions or proceedings, and even then, only to adverse parties called as witnesses in civil actions or proceedings. Section 491.030 was thus not relevant to the analysis in *Phillips*. Thus, *Phillips*' description of the limited exceptions recognized in criminal cases to the general rule regarding impeachment of one's own witness does not preclude the possibility of other or additional exceptions in civil cases.

This observation is demonstrated by the holding in *Love v. Baum*, 806 S.W.2d 72 (Mo. App. W.D. 1991), where the interplay between section 491.030 and section 491.050 was addressed. In *Love*, a party to a vehicular negligence action called the other party as

an adverse party witness in the first party's case-in-chief pursuant to section 491.030. *Id.* at 73. The first party was then permitted to ask the adverse party witness about prior criminal convictions in order to impeach the adverse party's credibility pursuant to section 491.050. *Id.* On appeal, the adverse party claimed that "it was error to allow counsel to examine him concerning criminal convictions when counsel had called [him] as a witness." *Id.* at 74. This court disagreed. Though lengthy, the analysis in *Love* is set forth in its entirety, as it is highly relevant to Sherrer's case:

> Under [section 491.030 and section 491.050] when Baum was called by Love as a witness, counsel examined Baum under the rules applicable to the cross-examination of witnesses. In *Hungate v. Hudson*, 185 S.W.2d 646, 649 (Mo. 1945), the court discussed the role of cross-examination and stated "[i]ts purpose is to sift, modify or explain what has been said, to develop new or old facts in a view favorable to the cross-examiner or to discredit the witness."
>
> When Love's counsel examined Baum, even though the examination was actually direct examination, under [section 491.030] it was conducted under the rules of cross-examination. As stated in *Hungate*, the role of cross-examination is to discredit the witness. Thus, in legal contemplation, Love was cross-examining Baum rather than conducting direct examination. Section 491.050 provides that conviction of a criminal offense may be shown to affect the credibility of the witness. That section further provides that the conviction may be shown either by the record or by the cross-examination of the witness. In this case Love was in legal effect cross-examining Baum under the provisions of [section] 491.030, thus, it was proper for Love to inquire about Baum's criminal convictions even though the examination had the appearance of being a direct examination.
>
> Baum makes the further argument that it is unfair to allow a party to call an adverse party as a witness and to immediately bring out criminal convictions. *Hungate* held that cross-examination is subject to restraint and limitation by the trial court and the discretion exercised by the trial court in this regard is subject to review. Here, Love examined Baum fully about the facts of the accident and obtained Baum's version about how the accident occurred. It was only after such questions that Love inquired about Baum's criminal convictions. The fear expressed by Baum can be handled by the trial court

> on a case by case basis, but there is no manifestation of that fear in this case because Baum was fully examined about the facts of the accident before the question of criminal convictions was brought up.
>
> When Love called Baum as a witness he examined Baum under the rules of cross-examination and, therefore, in reality the examination of Baum was cross-examination rather than direct examination. Section 491.050 permits criminal convictions to be brought out in cross examination to affect the credibility of the witness. Because examination of Baum is considered cross-examination, it was proper for Love to bring out Baum's criminal convictions in this case.

Id. at 74-75.

Love thus effectively concluded that regardless of the general rule limiting the ability to impeach one's own witness in a civil action to cases of demonstrated surprise and hostility, where an adverse party is called as a witness, the general rule must yield to the statutory exception created by sections 491.030 and 491.050. *Phillips* analogously recognized that the general rule limiting the ability to impeach one's own witness in a criminal action absent demonstrated surprise and hostility must yield to the statutory exception for prior inconsistent statements created by section 491.074. 940 S.W.2d at 520.

We find, therefore, consistent with *Love*, that the general rule described in *Phillips*, which prohibits impeachment in a civil or criminal case of one's own witness absent a showing of surprise and hostility, is subject to exception when the witness is an adverse party in a civil action who is thus subject to the rules of cross-examination pursuant to section 491.030, and who is thus subject to being impeached with the adverse party's criminal convictions pursuant to section 491.050. *See Giles v. Riverside Transp., Inc.*, 266 S.W.3d 290, 295 (Mo. App. W.D. 2008) ("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. [*See* section 491.074.] A second exception is that a[n] [adverse party] witness' prior criminal convictions may also be used to impeach witness credibility." (citing section 491.050; *Love,* 806 S.W.2d at 74) (internal quotation marks and citation omitted)).[17]

Love is indistinguishable from the instant case. When Sherrer played a portion of Weiland's deposition during her case-in-chief, Sherrer was permissibly calling Bard, an adverse party, as a witness pursuant to section 491.030. Sherrer was thus examining Weiland in his capacity as Bard's authorized representative pursuant to the rules of cross-examination, which had the practical effect of rendering Sherrer's direct examination of Weiland a cross-examination. Pursuant to section 491.050, Sherrer was thus entitled to impeach Bard by cross-examining Weiland, Bard's authorized corporate representative, about the fact and nature of Bard's criminal convictions.

Bard next argues that even if Sherrer's examination of Weiland about Bard's criminal convictions was admissible because it was logically relevant cross-examination of an adverse party witness pursuant to sections 491.030 and 491.050, the trial court was nonetheless authorized to exclude the evidence because it was not legally relevant. Specifically, Bard argues that its criminal convictions were more than twenty years old,

[17]The premise underlying section 491.030, and addressed in *Love* is not novel, and in practical parlance simply recognizes that when an adverse party is called as a witness in the opposite party's case-in-chief, it is foolhardy to suggest that the adverse party is a witness whose credibility is being vouched for by the opposite party. (See *Rowe v. Farmers Insurance Co., Inc.*, 699 S.W.2d 423, 423-25 (Mo. banc 1985), for an interesting discussion of the origin of the general rule prohibiting the impeachment of one's own witnesses, and explaining the argument for rejecting the orthodox rule.). Certainly, general rules prohibiting impeachment have long viewed adverse parties differently, using language to suggest that an adverse party witness is not the opposite party's "own witness." *See, e.g., Conner v. Neiswender,* 232 S.W.2d 469, 473 (Mo. 1950) (holding that "as a general rule the introduction of a deposition or a part thereof by a party for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party, ***unless the deponent is the adverse party***") (emphasis added).

involved a product unrelated to the Align mesh sling, and involved the conduct of a separate corporate division, such that the probative value of the convictions was substantially outweighed by their prejudicial effect.

It is generally true that to be admissible, all forms of evidence must be both logically and legally relevant. *Cox*, 473 S.W.3d at 116. "'Evidence is logically relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, or if it tends to corroborate evidence which itself is relevant and bears on the principal issue of the case.'" *Id.* (quoting *State v. Tisius*, 92 S.W.3d 751, 760 (Mo. banc 2002)). "The legal relevance analysis requires the trial court to balance 'the probative value of the proffered evidence against its prejudicial effect on the jury.'" *Id.* (quoting *Tisius*, 92 S.W.3d at 760). "Therefore, when determining the legal relevance of evidence a court must do so in light of the logical relevance, or probativeness, of the evidence." *Id.* at 122.

However, "'[a]s a general proposition, the credibility of witnesses is always a relevant issue in a lawsuit.'" *Mitchell v. Kardesch*, 313 S.W.3d 667, 675 (Mo. banc 2010) (quoting *State v. Smith*, 996 S.W.2d 518, 521 (Mo. App. W.D. 1999)). "Impeachment provides a tool to test a witness's perception, credibility, and truthfulness, which is essential because a jury is free to believe any, all, or none of a witness's testimony." *Id.* For this reason:

> "It has long been the rule in Missouri that on cross-examination a witness may be asked any questions which tend to test his accuracy, veracity or credibility or to shake his credit by injuring his character. He may be compelled to answer any such question, however irrelevant it may be to the

> facts in issue, and however disgraceful the answer may be to himself, except where the answer might expose him to a criminal charge."

Id. (quoting *Sandy Ford Ranch, Inc. v. Dill*, 449 S.W.2d 1, 6 (Mo. 1970). Thus, "[*c*]*ross-examination* of a witness on the stand for the purpose of impeaching that witness through each of the methods [recognized in Missouri] long has been permitted in Missouri, subject to the court's discretion in limiting ***or, in rare instances, precluding such evidence entirely so as to avoid undue prejudice."*** *Id.* at 676 (second emphasis added).

Here, as we have already established, evidence of a witness's criminal convictions is deemed admissible by section 491.050, and is thus logically relevant to impeach the credibility of a witness. It can thus be safely said that in light of section 491.050, evidence of the fact and nature of a witness's criminal convictions is neither immaterial nor collateral, the most common bases for upholding the exclusion of impeachment evidence. *See, e.g.*, *State v. Donovan*, 539 S.W.3d 57, 71 (Mo. App. E.D. 2017) (holding that the exclusion of impeachment evidence that is immaterial or collateral is not an abuse of discretion). It is for this reason that the Supreme Court in *Mitchell* observed that it is universally acceptable to cross-examine a witness about prior convictions "***even though the prior convictions do not involve similar facts***," because when a witness testifies, "his credibility [is] in issue and he may be impeached by prior criminal convictions." 313 S.W.3d at 676 (emphasis added) (citing section 491.050). In an analogous vein, the Eastern District rejected a claim of error premised on the alleged legally irrelevant nature of evidence of a medical doctor's censure, noting that "the jury was entitled to know about the censure because it might have

affected [the doctor's] credibility as an expert witness." *Miller v. SSM Health Care Corp.*, 193 S.W.3d 416, 421 (Mo. App. E.D. 2006).

Based on this precedent, we conclude that it would have been an abuse of discretion for the trial court to exclude evidence of Bard's convictions based on Bard's arguments that the convictions were legally irrelevant as they involved a dissimilar product manufactured by a different corporate division.

That leaves, however, Bard's argument that its criminal convictions were too remote to be legally relevant. Though not cited by Bard, we are aware of older Missouri cases which have held that a "trial court has . . . discretion as to whether a certain conviction was so remote as not to bear upon the credibility of a witness." *Fisher v. Gunn*, 270 S.W.2d 869, 876 (Mo. 1954) (citing *State v. Dalton*, 23 S.W.2d 1, 6 (Mo. 1929)). *Fisher* held that "[a]side from the question of 'remoteness,' we find no case indicating that the right to show a conviction to affect credibility is within the discretion of the trial court." *Id.* However, though *Fisher* held that remoteness is the only basis available to permit exclusion of an otherwise admissible criminal conviction pursuant to section 491.050, we have not located a single Missouri case that has relied on remoteness to conclude that a criminal conviction is not admissible pursuant to section 491.050 because it is legally irrelevant. Instead, later Missouri cases have aligned themselves with *Fisher's* seemingly inconsistent acknowledgment that "while a trial court may generally control cross-examination within proper bounds, still the *right* of cross-examination is an *absolute right* and the *bounds of cross-examination*, in so far as concerns one's right to show a prior conviction, ***have been fixed by statute***." *Id.* (final emphasis added).

In fact, the plain language of section 491.050 dispels "remoteness" as a basis for excluding evidence of a criminal conviction to impeach, as it provides that "***any*** prior criminal conviction may be proved to affect [the witness's] credibility in a civil or criminal case," without temporal reference or limitation. (Emphasis added.) Consistent with the plain language of section 491.050, more recent Missouri cases have rejected remoteness as a basis for excluding prior criminal convictions offered to impeach a witness. In *State v. Giffin*, our Supreme Court rejected the argument that cross-examination concerning prior convictions was error because the convictions "were too remote in time to have any probative value as to [the witness's] truth or veracity." 640 S.W.2d 128, 132 (Mo. 1982). The Supreme Court held that section 491.050 "provides that any person convicted of an offense is competent to testify, but the conviction may be proved to affect his credibility. . . . This Court has interpreted [this] statute[] as conferring an absolute right to show prior convictions and the nature thereof for the purpose of impeachment." *Id.* (citing *State v. Busby*, 486 S.W.2d 501 (Mo. 1972); *State v. Rice*, 603 S.W.2d 83 (Mo. App. E.D. 1980)). *Giffin* was cited with approval in *M.A.B. v. Nicely*, 909 S.W.2d 669, 671 (Mo. banc 1995), for the proposition that "[t]his Court has interpreted section 491.050 to confer an absolute right, in both civil and criminal proceedings, to impeach the credibility of any witness, including the accused, with his or her prior criminal convictions." (Emphasis omitted.)

Bard does not address these Missouri cases. Instead, Bard relies on federal cases to argue that criminal convictions otherwise admissible to impeach a witness may nonetheless be excluded if they are legally irrelevant given the remoteness of the conviction. These cases are of no precedential value. The admissibility of criminal convictions to impeach

witnesses in federal cases is not controlled by section 491.050, and is instead controlled by the Federal Rules of Evidence, Rule 609. Rule 609 expressly requires a trial court to engage in a legal relevance analysis for convictions that are more than ten years old. Rule 609(b). Section 491.050 has no similar provision. *State v. Givens*, 851 S.W.2d 754, 759 (Mo. App. E.D. 1993) (finding no error in the use of forty year old convictions to impeach a criminal defendant despite the defendant's due process argument that relied on the Federal Rules of Evidence, Rule 609(b)'s ten-year limit for the use of prior convictions to impeach, noting that section 491.050 "places no limit on the age of convictions used for impeachment," and "declin[ing] to add to the statute a time limit, as any such change should come from the legislature") (citing *State v. Williams*, 603 S.W.2d 562, 568 (Mo. 1980) (noting that section 491.050 confers an absolute right to show prior convictions solely to affect credibility, and that any change to the statute must be left to the General Assembly)).

We conclude that it would have been an abuse of discretion for the trial court to rely on the remoteness of Bard's criminal convictions to exclude them as legally irrelevant to impeach Bard pursuant to section 491.050.

Finally, Bard argues that a trial court always retains the discretion to exclude logically relevant evidence it believes is unduly prejudicial. Bard cites *Hollingsworth v. Quick*, which observed that the trial court was "entitled to conclude, in the exercise of . . . discretion, that the value of the evidence [of a municipal ordinance violation] 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." 770 S.W.2d 291, 295 (Mo. App. W.D. 1989). This discussion is *dicta*, as it follows a determination that the municipal ordinance

violation at issue in *Hollingsworth* was not admissible because it was not a "criminal conviction" for purposes of section 491.050. *Id.* at 294-95. Moreover, *Hollingsworth* cited no authority for its *obiter dictum* observation, and failed to address Supreme Court precedent which had concluded that section 491.050 creates an absolute right to impeach by criminal conviction. The *obiter dictum* observation in *Hollingsworth* is neither binding nor persuasive. Impeachment evidence is by its very nature highly prejudicial. As we have explained, neither the lack of similarity of a criminal conviction to the circumstances of a case, nor the remoteness of a conviction, can serve as a legitimate basis for excluding a conviction offered to impeach pursuant to section 491.050. Though section 491.050 impeachment evidence may theoretically remain subject to exclusion altogether to avoid undue prejudice in "rare instances," *Mitchell*, 313 S.W.3d at 676, ***no*** Missouri court has affirmed the exclusion of a conviction offered to impeach pursuant to section 491.050 based on undue prejudice. This will not be the first case to do so.

In summary, the trial court abused its discretion when it excluded from evidence the portions of Weiland's deposition where Weiland was asked by Sherrer about the fact and nature of Bard's criminal convictions. [Court Exhibit 22.] Pursuant to section 491.050, read in concert with section 491.030, Sherrer had the absolute right to impeach adverse party Bard's credibility by cross-examining Weiland, Bard's corporate representative, about the fact and nature of Bard's prior criminal convictions.[18]

[18]We nonetheless express reservation about the admissibility of Court Exhibit 23, the record of Bard's convictions. Although a record of conviction is expressly admissible pursuant to section 491.050, the ability to impeach pursuant to section 491.050 is limited to the fact and nature of a conviction. *Henderson*, 669 S.W.2d at 575 (holding that pursuant to section 491.050, it is not proper to go into the details of a prior conviction or to dwell on the conviction). Exhibit 23 includes a record of the fact and nature of Bard's convictions, but it also includes factual findings and other content that extend well beyond the fact and nature of Bard's convictions.

iii. **The trial court's abuse of discretion constituted reversible error.**

If an evidentiary ruling is determined to be an abuse of discretion, an appellate court remains "loathe to vacate a jury's verdict and resulting judgment on such grounds." *Lozano*, 421 S.W.3d at 451 (citing *Lewis*, 842 S.W.2d at 84-85). In *Lewis*, the Supreme Court held that presumed error in excluding a prior misdemeanor conviction to impeach a witness pursuant to section 491.050 did "not resolve the question of whether reversal is mandated." 842 S.W.2d at 84. The Court noted that although there is an absolute right afforded a party by section 491.050 to impeach a witness with any prior criminal conviction, "equally compelling language of [section] 512.160.2 and Rule 84.13(b) forbid[s] appellate courts from reversing judgments for errors that do not materially affect the outcome of a case." *Id.* at 85 (overruling *Forbis*, 513 S.W.2d 760 to the extent it held that the exclusion of evidence contrary to the absolute right to impeach afforded by section 491.050 requires reversal as a matter of law).

Lewis concluded that the "exclusion of a single misdemeanor conviction of speeding 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" in a vehicular negligence case. *Id.* The opposite conclusion was reached in *Moe v. Blue Springs Truck Lines, Inc.*, where the Court held that it was prejudicial error to exclude evidence of a party's prior criminal conviction when the "determining fact issues" in the case (whether a traffic light was red or green, and whether the plaintiff's vehicle was thus properly waiting for a red light to turn green when the plaintiff was struck by the defendant) depended on credibility. 426 S.W.2d 1, 2-3 (Mo. 1968). In *Aziz by & through Brown v. Jack in the Box, Eastern Division, LP*,

the Eastern District cited *Moe*, and held that "a trial court commits reversible error if it excludes evidence of a prior criminal conviction where the parties present contradictory testimony on a material fact, putting [the] witness['s] credibility at issue." 477 S.W.3d 98, 108-09 (Mo. App E.D. 2015). Applying this principle, *Aziz* held that where an expert witness provided testimony about a plaintiff's injuries and diagnosis that was not rebutted by the defendant through any contradictory evidence, the defendant could not "show that exclusion of [the expert witness's] conviction [for fraud] prejudiced it by materially affecting the outcome of the trial or the damage award." *Id*. at 109.

In the instant case, the witness Sherrer would have impeached was Bard, an adverse party, as in *Moe*. Bard's testimony through Weiland's deposition designations framed contested material issues regarding the Align, including: whether Bard was using a polypropylene resin supplied by a company who counseled against using the material to manufacture medical products; whether Bard misled or hid from material suppliers that the resin it was purchasing was being used to manufacture medical implants; whether Bard knew of or 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 assessed the safety of the Align before bringing it to market. Plainly, the parties presented contradictory evidence on these and other matters relevant to Bard's liability, putting Bard's credibility at issue. As in *Moe*, it was prejudicial error to exclude evidence of Bard's prior criminal convictions when material fact issues depended for their resolution on Bard's credibility. 426 S.W.2d at 2-3; *see also Mitchell*, 313 S.W.3d at 682-83 (analogously

holding that it was prejudicial error to exclude impeachment evidence of a defendant doctor's false sworn interrogatory answer where the defendant doctor's credibility with respect to whether medical care was provided within the standard of care was a matter for the jury to determine; and holding that it would be error to declare that excluded impeachment evidence would have had no result or legal effect on a matter within the exclusive province of the jury to determine).

The trial court committed reversible error when it refused to permit Sherrer to cross-examine adverse party witness Weiland, Bard's corporate representative, about Bard's prior criminal convictions as permitted by section 491.050. Point one on appeal is granted. The trial court's Judgment is reversed insofar as it entered judgment in favor of Bard and against Sherrer.

The trial court's reversible error in excluding impeachment evidence on the issue of Bard's credibility has no bearing, however, on the judgment in favor of Boston Scientific and against Sherrer. As such, we are required to address Sherrer's remaining points on appeal.

Point Two: The Admission of Allegations in the Original Petition as Admissions Against Sherrer's Interest

Sherrer's second point on appeal alleges that the trial court abused its discretion when it permitted Bard and Boston Scientific to refer to allegations in her Original Petition as admissions against Sherrer's interest. We agree that it was an abuse of discretion to permit allegations that had not been abandoned by Sherrer to be used to impeach Sherrer.

However, Sherrer has not established that the trial court's abuse of discretion resulted in prejudicial error requiring reversal.

(i) **The trial court abused its discretion by permitting the Defendants to use allegations in Sherrer's Original Petition as admissions against interest**

On a few occasions during trial, Boston Scientific and Bard referred to Sherrer's Original Petition, specifically to the allegations in paragraphs 17(b), (e), and (f), and 18(a)[19] of the Original Petition. Those paragraphs alleged, respectively: (i) that Sherrer had not been told by TMC and UPA that Dr. Hill, a urogynecologist, and thus a specialist with greater expertise and training, could have performed the procedure to implant the Solyx; (ii) that TMC and UPA failed to follow the manufacturer's instructions in placing the Solyx; (iii) that the doctor who performed the Solyx implantation procedure[20] failed to attach the anchor to the right side of the Solyx allowing the anchor to migrate and cause a palpable painful bump; and (iv) that Sherrer sustained substantial physical and mental pain and suffering because of incontinence after the Solyx was implanted and because of severe ongoing pelvic pain.

The issue of causation was contested at trial, as the Defendants alleged that Sherrer's injuries were solely caused by the implantation of the Solyx or by other acts or omissions outside their control, and not by alleged defects in the Solyx or Align or by the Defendants' alleged failure to warn about the products. Under Missouri law, evidence and argument that a non-party (including a settling non-party) was the ***sole*** cause of a plaintiff's injuries

[19]Boston Scientific referred to the allegations in paragraphs 17(e) and (f) during trial. Bard referred to the allegations in paragraphs 17(b) and 18(a) during trial.

[20]The Original Petition alleged this to be Dr. Kristin Kruse ("Dr. Kruse"), but it was later determined to be Dr. Greenspan.

is generally admissible to defeat causation as to a named defendant. *Mengwasser v. Anthony Kempker Trucking, Inc*., 312 S.W.3d 368, 372-75 (Mo. App. W.D. 2010). The parties dispute, however, whether allegations in the Original Petition offered by the Defendants on the issue of causation[21] could be used as admissions against Sherrer's interest.

As a general rule, "[i]t is clear . . . that a pleading filed by an attorney on behalf of his client is a statement of the client for purposes of using the pleading as an inconsistent statement." *Lewis*, 842 S.W.2d at 86 (citing *Helton v. Huckeba*, 276 S.W.2d 78, 82 (Mo. banc 1955); Lawson, *Admissibility of Pleadings into Evidence in Missouri*, 27 MO. L. REV. 258, 260 (1962)). "If the client did not have knowledge of the pleading or did not expressly authorize his attorney to file it, he may inform the jury of this fact as an explanation for the inconsistency between the pleading and his testimony, but this explanation is for the jury to consider and does not bear on admissibility." *Id.*

This general rule is not without exceptions. "There are two basic limitations on the use of pleadings as an inconsistent statement . . . ." *Id.* at 87. "First, pleadings consisting of legal conclusions may not be used; only statements of operative facts may be used." *Id.* "Second, inconsistent pleadings may not be used to impeach." *Id.* With respect to the latter exception:

> Rule 55.10 authorizes the pleading of inconsistent claims or defenses. Where the trial testimony of a party supports one version of an inconsistent pleading,

[21]During oral argument, counsel for Boston Scientific urged that use of Sherrer's allegations in the Original Petition was not limited to the issue of sole causation, and instead was also relevant to negate the theme of Sherrer's case against the Defendants--that Sherrer was injured by a defective product as to which insufficient warnings were provided. This argued purpose for use of the allegations is indistinguishable from arguing sole causation. As we explain, *infra*, it is improper as a matter of law to use inconsistent allegations in a pleading to impeach on the issue of sole causation.

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

Id. *Lewis* noted that there are "two types of inconsistent pleadings which may not be used for impeachment." *Id.* The first type of inconsistent pleading which may not be used for impeachment is relevant to this case.

"[W]here there are multiple defendants, a party's pleading cannot be used . . . to impeach . . . . A plaintiff is entitled to plead that the negligence of each defendant was the sole cause of plaintiff's damage." *Id.* (citing *Johnson v. Flex-O-Lite Mfg. Corp*., 314 S.W.2d 75 (Mo. 1958)).

> Such a pleading is inconsistent because if any single defendant were the sole cause of the injury, then the negligence of the other defendants would not be causal. Under the rule prohibiting the use of inconsistent pleadings to impeach, a party alleging negligence against two or more defendants whose testimony at trial evidences only the negligence of a single defendant may not be impeached by the use of his pleading alleging that the other defendants caused the injury.

Id.

Sherrer argues that the Defendants' use of allegations in her Original Petition to impeach her on the issue of causation violates the inconsistent pleading exception to the general rule which otherwise permits allegations in a pleading to be used to impeach.[22] She

[22]Sherrer also argues that at least in part, the Defendants' use of the identified allegations from her original Petition violates the exception to the general rule prohibiting the use of legal conclusions in a pleading as admissions against interest. As we explain, *infra* note 24, we need not address this additional argument.

argues that although the Original Petition did not assert inconsistent claims or allegations, her Amended Petition did, as it reiterated the medical malpractice claims from the Original Petition while adding product liability claims against defendants Boston Scientific and Bard.

A comparison of the two pleadings confirms that the allegations that appear as paragraphs 17(b), (e), and (f) and 18(a) in the Original Petition are restated as paragraphs 55(b), (e), and (f) and 56(a) in the Amended Petition. Plainly, if Sherrer's Original Petition had asserted all of the claims asserted in the Amended Petition, the Original Petition would have been an inconsistent pleading, and the allegations in paragraphs 17(b), (e), and (f) and 18(a) could not have been used to impeach Sherrer on the issue of causation.

Of course, the Defendants did not refer at trial to Sherrer's Amended Petition. They referred to her Original Petition. The Original Petition was not an inconsistent pleading, and the allegations therein did not become inconsistent allegations until they were later reiterated in the Amended Petition. The Defendants argue that this rendered the allegations in the Original Petition fair game for use to impeach because the Original Petition became an abandoned pleading when the Amended Petition was filed, and allegations in an abandoned pleading can be used to impeach as admissions against interest.

It is true that "[w]hen an amended petition is filed, the original petition is abandoned by the subsequent filing." *Brandt v. Csaki*, 937 S.W.2d 268, 273 (Mo. App. W.D. 1997) (citing *Evans v. Eno*, 903 S.W.2d 258, 260 (Mo. App. W.D. 1995)). And it is true that "Missouri courts have consistently held that abandoned pleadings containing statements of

fact are admissible as admissions against interest[23] against the party who originally filed the pleading. *Id.* at 274 (citing *Carter v. Matthey Laundry & Dry Cleaning Co.*, 350 S.W.2d 786, 791 (Mo. 1961); *Lazane v. Bean*, 782 S.W.2d 804, 805 (Mo. App. W.D. 1990); *DeShon v. St. Joseph Country Club*, 755 S.W.2d 265, 268 n.1 (Mo. App. W.D. 1988)). Defendants therefore reason that when the Original Petition was abandoned, its allegations could be used as admissions against Sherrer's interest, notwithstanding that the allegations were reiterated in the Amended Petition, an inconsistent pleading, where the allegations could not be used to impeach.

Though no Missouri case has addressed whether allegations in an abandoned original petition remain admissible admissions against interest if reiterated in an inconsistent amended petition, we conclude that they do not. It defies logic to characterize an original petition as abandoned when the allegations therein are reiterated in an amended petition. It defies logic to permit a party to impeach with allegations in an original petition on the premise that the allegations have been abandoned when the allegations have plainly not been abandoned because they are reiterated in an amended petition. And it defies logic to permit impeachment with allegations from an original petition, when the same

[23]The rules we have been addressing to this point regarding the use of pleadings to impeach refer to the ability to use pleadings as inconsistent statements. The rule addressing the effect of abandoned pleadings refers to the ability to impeach with admissions against interest. Prior inconsistent statements and admissions against interest are two different concepts. Prior inconsistent statements refer to inconsistent positions or statements made or taken by ***any witness***, and are expressly admissible not simply to impeach, but as well for the truth of the matter. Section 491.074. "Admissions against interest are those made by a ***party*** to the litigation . . . and [are] admissible whether or not the declarant is available as a witness." *St. Louis Cty. v. River Bend Estates Homeowners' Ass'n*, 408 S.W.3d 116, 126 n.7 (Mo. banc 2013) (quotation omitted). As relates to the use of a party's allegations in a pleading, the distinction between these concepts is without meaning, however, as an admission against interest in the form of a factual assertion in a pleading is usually only relevant to the extent the factual assertion is inconsistent with a position taken at some other time. *See generally St. Louis Cty.*, 408 S.W.3d at 126-27 (using the terms prior inconsistent statement and admission against interest somewhat interchangeably where a party has made two different statements about a material factual matter).

allegations appear in an inconsistent amended petition where they could not be used to impeach. We hold, as a matter of first impression, that allegations in an original petition that are reiterated in an inconsistent amended petition are not abandoned, and are therefore inadmissible as inconsistent statements or admissions against interest.

The Eastern District lent tacit support to the conclusion we reach today in *Danneman v. Pickett*, 819 S.W.2d 770 (Mo. App. E.D. 1991). In *Danneman*, the court noted that an original petition pleaded an intentional tort, while count I of the amended petition "reiterated the allegations of the original petition and pleaded a second count in the alternative." *Id.* at 773. The court observed in *dicta* that "[b]ecause the amended petition did not supplant the original petition, it is questionable whether the original petition was abandoned and therefore admissible against plaintiff as an admission." *Id.* Even in *Brandt*, the case so heavily relied on by the Defendants, it is noteworthy that this court emphasized that the allegations in the original petition were admissible admissions against interest *because they were not reiterated in the amended petition*. 937 S.W.2d at 273 (observing that Brandt "abandoned her claim against Dr. Schwegler by omitting him from her amended petition").

It was an abuse of discretion for the trial court to permit the Defendants to refer to the allegations in paragraphs 17(b), (e), and (f) and 18(a) of the Original Petition as admissions against Sherrer's interest.[24]

[24]Because we conclude that the allegations in Sherrer's Original Petition were inadmissible admissions against interest, we need not address Sherrer's additional argument that the allegations in the Original Petition were also inadmissible admissions against interest because they expressed legal conclusions and not statements of operative facts.

ii. Sherrer has not sustained her burden to establish that the Defendants' use of allegations in the Original Petition as admissions against interest resulted in prejudicial error

As previously noted, it is not enough for Sherrer to establish that the trial court abused its discretion in permitting the Defendants to use allegations in her Original Petition as admissions against interest. Sherrer must "also show that [s]he was prejudiced by the rulings [found] to be erroneous." *Danneman*, 819 S.W.2d at 773 (citing *Bayer v. Am. Mut. Cas. Co*., 359 S.W.2d 748, 755 (Mo. 1962). An appellate court is "loathe to vacate a jury's verdict and resulting judgment" based on an abuse of discretion in the admission of evidence. *Lozano*, 421 S.W.3d at 451 (citing *Lewis*, 842 S.W.2d at 84-85). In fact, we are prohibited from doing so unless we "'believe[] the error committed by the trial court . . . materially affected the merits of the action.'" *Id.* (quoting *Lewis*, 842 S.W.2d at 84-85); *see* section 512.160.2; Rule 84.13(b). To hold otherwise would be to improvidently suggest that parties are entitled to a perfect trial. *Fleshner v. Pepose Vision Instit., P.C.*, 304 S.W.3d 81, 87 (Mo. banc 2010) (holding that parties are not entitled to a perfect trial, and are only entitled to a fair trial).

Sherrer'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. Though she cites *Manahan v. Watson*, 655 S.W.2d 807, 809 (Mo. App. E.D. 1983), where the court found it was reversible error to allow a defendant "to read before the jury certain alternative pleadings directed to dismissed parties," *Manahan* did not hold, nor could it have held in light of section 512.160.2 and Rule 84.13(b), that an abuse of discretion in admitting impeachment evidence requires reversal. *See Lewis*, 842 S.W.2d at 84 (analogously holding that

presumed error in excluding impeachment evidence did "not resolve the question of whether reversal is mandated").

Sherrer bears the burden of establishing prejudicial error, which means that Sherrer bears the burden of explaining why, in the context of her trial, the improper use of allegations in her Original Petition as admissions against interest materially affected the merits of her action. *Matter of J.D.B.*, 541 S.W.3d 662, 674 (Mo. App. E.D. 2018) (holding that party claiming prejudice in the admission of evidence "bears the burden of establishing prejudice"); *see also S.F.M.D. v. F.D.*, 477 S.W.3d 626, 636 (Mo. App. W.D. 2015) (holding that evidentiary error merits reversal only if prejudice is demonstrated, measured by whether the complaining party establishes that there is a reasonable probability that such error affected the trial's outcome (citing *State v. Forrest*, 183 S.W.3d 218, 224 (Mo. banc 2016) ("Trial court error is not prejudicial unless there is a reasonable probability that the trial court's error affected the outcome of the trial.")).

Sherrer's failure to address the subject of prejudicial error in her brief is sufficient on its own to permit us to deny her second point on appeal without further discussion. But even if we overlook Sherrer's failure to address an issue as to which she bears the burden, we would reach the same conclusion. Sherrer cannot sustain her burden to establish prejudicial error because the Defendants' improper use of allegations in her Original Petition as admissions against interest were very limited, were often not preserved as error, and were cumulative to other similar evidence about which Sherrer has not complained on appeal.

Sherrer's appellate brief identifies eight occasions where she claims she preserved error because the Original Petition was improperly used to impeach Sherrer. [Sherrer's Brief, p. 39] The first occasion Sherrer identifies, Tr. II, pp. 751-52, does not, however, involve any reference to the Original Petition, and is instead a discussion during Boston Scientific's opening statement of Sherrer's *sworn interrogatory answers* where Sherrer recounts her report of bad incontinence to Dr. Greenspan during a post-operative visit, and that Dr. Greenspan found "the mesh/sling [to be] very loose, that it had not been tightened up at all like it was supposed to." [Tr. II, pp. 751-53] This reference to the trial transcript does not support Sherrer's claim of error at all, and instead demonstrates that information cumulative to that captured by the allegations in paragraphs 17(f) and 18(a) of the Original Petition was introduced into the record through Sherrer's sworn interrogatory answers. "'A complaining party is not entitled to assert prejudice if the challenged evidence is cumulative to other related evidence.'" *Freight House Lofts Condo Ass'n v. VSI Meter Servs., Inc.*, 402 S.W.3d 586, 593 (Mo. App. W.D. 2013) (quoting *Saint Louis Univ. v. Geary*, 321 S.W.3d 282, 292 (Mo. banc 2009)). "'Cumulative evidence is additional evidence that reiterates the same point.'" *Id.* (quoting *Saint Louis Univ.*, 321 S.W.3d at 292).

The second and third occasions identified by Sherrer are references to Sherrer's arguments in the midst of opening statements to the effect that the Defendants had improperly referenced earlier pleadings. [Tr. II, pp. 913-19; 923-28] However, Sherrer did not identify during this argument any specific references that had been made to the Original Petition, and has not afforded this court with any citations to improper references

to the Original Petition during opening statement. And even had she, "opening statement is not evidence." *DeLaporte v. Robey Bldg. Supply, Inc*., 812 S.W.2d 526, 534 (Mo. App. E.D. 1991).

The fourth occasion identified by Sherrer refers to Boston Scientific's cross-examination of Dr. Peggy Pence ("Dr. Pence"), one of Sherrer's expert witnesses. [Tr. III, pp. 1340-42] At the location in the transcript identified by Sherrer, Boston Scientific asks Dr. Pence if she reviewed Sherrer's petition. Sherrer objected that it was not proper cross-examination of an expert to refer to a party's alternative allegations in a pleading. Boston Scientific responded that it was proper cross-examination because Dr. Pence had identified Sherrer's petition as a document she reviewed to form her expert opinions in the case. Sherrer's objection was overruled. The cross-examination of Dr. Pence resumed:

> Q: When you reviewed Ms. Sherrer's Petition in this case, you saw that it was stated by her concerning the physicians which placed her sling, the doctors who did her Solyx surgery that Ms. Sherrer stated, they -- one of their acts of negligence was failing to follow the manufacturer's instructions in placing the mesh. Do you see that?
>
> A. Yes, I see that.
>
> Q: And that would have been something that you would have reviewed when you saw this document, correct?
>
> A: Yes, I would have seen that, yes.
>
> Q: And you would have also seen that Ms. Sherrer claimed in her Petition that the physicians failed to attach the anchor of the Solyx, correct?
>
> A: Well, this says Dr. Kruse failed to attach the anchors. It's my understanding that Dr. Kruse did not actually do the implantation of the Solyx, but it was Dr. Greenspan. So this -- to the best of my understanding, this was a Petition that was done earlier, and over the course of discovery

> and time, more information has been discerned. As I say, it's my understanding that Dr. Kruse did not actually implant the Solyx.
>
> Q: You would agree with me when a doctor fails to follow the manufacturer's directions on how to do the surgery and fails to attach the anchor on the Solyx that unintended consequences can occur, right?
>
> A: If the doctor has not been trained in one way or another, either by attending a training session where that information has been presented or has not read the Instructions For Use, then, yes, that would be the case.

"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." *State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831, 835 (Mo. banc 2000). Boston Scientific's reference to the Original Petition during Dr. Pence's cross-examination was proper cross-examination of an expert witness since Dr. Pence confirmed she had been given the Original Petition to review in advance of forming her expert opinions in the case.

The fifth occasion identified by Sherrer involved Boston Scientific's cross-examination of Dr. Bruce Rosenzweig ("Dr. Rosenzweig"), an urogynecologic expert. [Tr. V, p. 3201] Boston Scientific's counsel sought advance permission from the trial court to ask Dr. Rosenzweig one question about the allegation in paragraph 17(e) of the Original Petition where Sherrer alleged that the doctor who implanted the Solyx failed to follow manufacturer's directions. Sherrer objected that it was "improper cross-examination" to use a legal pleading to cross-examine an expert witness. The trial court overruled this objection. Boston Scientific proceeded to cross-examine Dr. Rosenzweig by showing him the Original Petition, by asking him to confirm that it was filed on October 25, 2012, and

by asking him to confirm that it included the allegation in paragraph 17(e) that the doctor who implanted the Solyx failed to follow the manufacturer's instructions in placing the transvaginal mesh. [Tr. V, p. 3204]

Sherrer's objection that it is improper to cross-examine an expert witness with a legal pleading did not preserve the error about which she complains in her second point on appeal. "We 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 v. Browning*, 379 S.W.3d 194, 204-05 (Mo. App. W.D. 2012). And in any event, it is not *per se* improper to cross-examine an expert with a legal pleading to test the expert's opinions if the pleading was given to the expert to review in advance of forming his expert opinions in a case. We do note that unlike the cross-examination of Dr. Pence, where the transcript references identified by Sherrer happened to establish that Dr. Pence was provided with the Original Petition in advance of forming her opinions in the case, the transcript references identified by Sherrer involving Dr. Rosenzweig's cross-examination do not clarify whether he had been provided with the Original Petition before forming his opinions in this case. The answer to that question would inform whether Dr. Rosenzweig was properly cross-examined with the allegation from the Original Petition. But the answer to that question would not cure the fact that Sherrer did not object to use of the Original Petition during Dr. Rosenzweig's cross-examination on the basis asserted as error in her point relied on.

Even affording Sherrer the benefit of treating her objection as sufficient to preserve the claim of error she raises on appeal, Sherrer fails to account for the fact that the limited

inquiry of Dr. Rosenzweig about one allegation in the Original Petition was followed immediately by several pages of inquiry regarding Sherrer's statements in her sworn interrogatories. [Tr. V. pp. 3187-3200] Specifically, Dr. Rosenzweig, who testified favorably about Dr. Greenspan's implantation of the Solyx, was asked about the following statements Sherrer made in her interrogatories: (i) that Sherrer was told by Dr. Hill that the right-side carrier (anchor) of the Solyx was never attached [Tr. V, p. 3187]; (ii) that Sherrer blamed TMC and UPA for her injuries [Tr. V, pp. 3190-91]; (iii) that during a post-operative visit a nurse acted startled about Sherrer's reported summary of her surgery and commented that the treating doctor didn't usually perform those types of surgeries [Tr. V, p. 3192]; (iv) that Dr. Greenspan looked shocked when Sherrer reported during a post-operative visit that she was experiencing horrible incontinence, and noted that the mesh/sling was loose and had not tightened up at all like it was expected to [Tr. V, p. 3199]; and (v) that Dr. Hill told Sherrer that the hard knot he felt when he did Sherrer's pelvic exam was because the anchor for the mesh on the right side had never been attached and had been digging its way through the vaginal wall [Tr. V, p. 3200]. Though some of this testimony was admitted over Sherrer's objection, none of the testimony regarding Sherrer's sworn interrogatory answers has been raised as a claim of error on appeal. The testimony is plainly cumulative of the complained of references to Sherrer's allegations in the Original Petition, including paragraph 17(e) referred to during Dr. Rosenzweig's cross-examination. "'A complaining party is not entitled to assert prejudice if the challenged evidence is cumulative to other related admitted evidence.'" *Freight House Lofts Condo Ass'n*, 402 S.W.3d at 593 (Mo. App. W.D. 2013) (quoting *Saint Louis Univ.*, 321 S.W.3d at 292).

This conclusion is only reinforced by the fact that even before Dr. Rosenzweig was asked about Sherrer's sworn interrogatory answers, he was asked about a questionnaire Sherrer completed in connection with her visit with Dr. Raz, who removed the Align implanted by Dr. Hill and what remained of the Solyx implanted by Dr. Greenspan. In that questionnaire, Sherrer was asked to "describe in [her] own words the date and onset of your illness, symptoms, treatment, and the physicians you have consulted." [Tr. V, p. 3185] In her response, Sherrer wrote that she was incontinent immediately after the surgery to implant the Solyx, and that Dr. Hill told her that the "right-side anchor of [the Solyx] mesh was never attached." [Tr. V, p. 3186] Sherrer did not object to the admission of this evidence at trial, and has not raised any claim of error regarding this evidence on appeal. Testimony about Sherrer's questionnaire responses was repeated, without objection, during Boston Scientific's cross-examination of Sherrer, where she identified and confirmed what she had written on the questionnaire. [Tr. IX, pp. 5864-65] The evidence admitted through the questionnaire is also cumulative of the allegations in Sherrer's Original Petition about which Sherrer now complains on appeal.

The sixth occasion identified by Sherrer occurred during Boston Scientific's cross-examination of Dr. Greenspan. [Tr. VI, p. 3935] Sherrer objected that the questioning of Dr. Greenspan was "going on and on," after Dr. Greenspan had been asked, *without objection*, about the fact that Sherrer had alleged that a doctor in his medical group (UPA) failed to properly place the Solyx anchor, and failed to follow manufacturer's instructions, resulting in the anchor migrating to the ramus of the pubic bone and causing a palpable painful bump. [Tr. VI, pp. 3929-34] Sherrer's objection that Dr. Greenspan's questioning

was going on and on did not preserve the error at issue in her second point on appeal. "We 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. We will not find reversible error when "[o]ur review of the trial transcript indicates that, in many of the instances about which [Sherrer] complains, [s]he failed to make timely objections to the testimony or statements [s]he now challenges." *Id.* at 204.

Finally, the seventh and eight occasions identified by Sherrer occurred during Bard's cross-examination of Sherrer. [Tr. VIII, pp. 5485-87; 5545-48] On pages 5485-87, the only discussion relevant to the issue on appeal was Sherrer's counsel's reminder that any references to the Original Petition (none of which had yet occurred) should be limited to factual and not legal assertions, to which Bard's counsel assured that her questioning would be constrained to factual assertions. This was not an objection, nor an example where the Original Petition was improperly used to impeach. The discussion on pages 5485-87 lends nothing to our assessment of whether prejudicial error occurred in this case.

On pages 5545-48, Bard's counsel referred Sherrer to her Original Petition. Sherrer approached the bench to get an idea of Bard's intent with respect to use of the Original Petition. Bard advised of its intent to refer Sherrer to the allegation in paragraph 17(b) that she had never been told that Dr. Hill, a urogynecologist, could have implanted the Solyx and had more expertise in doing so, and to the allegation in paragraph 18(a) that she suffered significant incontinence and severe ongoing pelvic pain after the Solyx was implanted. Sherrer's only objection to this identified line of questioning was that the

referenced allegations were not factual assertions. The trial court overruled that objection--a ruling we do not find to be an abuse of discretion. Sherrer did not object that the intended line of questioning was inadmissible because the allegations in the inconsistent Amended Petition could not be used to impeach. Once again, "[w]e will not convict the trial court of reversible error based on the admission of evidence" where the "argument[] on appeal [is] materially different from the objection[] . . . raised at trial." *Gamble*, 379 S.W.3d at 204-05.

Even if we afford Sherrer the benefit of having preserved an objection that the intended line of questioning was improper impeachment with an inconsistent pleading, we would not find prejudicial error because the questioning was very limited and because Sherrer's answers ameliorated any possible prejudice. After the aforesaid discussion about Bard's intended line of questioning, Sherrer was asked about the allegation in paragraph 17(b). She testified that she had never before seen the allegation and did not really know much about Dr. Hill, to whom she had been referred by Dr. Greenspan. [Tr. VIII, pp. 5549-50] Bard moved on immediately, and then simply asked Sherrer to confirm the allegation in paragraph 18(a). This brief inquiry, even if deemed to be preserved error, did not yield reversible error.

Our conclusion is reinforced by the fact that our independent review of Sherrer's extensive cross-examination reveals that on numerous occasions, Sherrer was asked about her sworn interrogatory responses, her responses to requests for admissions, and her responses during depositions on subjects that are either identical or virtually identical to the allegations of her Original Petition at issue on appeal. In light of the fact that there

were only two limited references to the Original Petition during Sherrer's cross-examination, and in light of the fact that the limited references to the Original Petition were cumulative of a substantial volume of other similar evidence that came in through Sherrer's cross-examination, and about which Sherrer does not complain on appeal, we do not find prejudicial error.

Sherrer has not sustained her burden to establish that the Defendants' limited objectionable references to the Original Petition materially affected the merits of her action by creating a reasonable probability that without the references, the result of her trial would have been different. *See Riley v. Union Pac. R.R.*, 904 S.W.2d 437, 443 (Mo. App. W.D. 1995) (holding that error in permitting reference to allegations in a petition that were legal and not factual assertions was not prejudicial, reversible error).

Point two on appeal is denied.

Point Three: The Denial of Sherrer's Request for a Mistrial

In her third point on appeal, Sherrer argues that it was an abuse of discretion for the trial court to deny her request for a mistrial following Bard's display of a power point slide that included a reference to her settlement with TMC and UPA. As we have already noted, our standard of review is not simply for abuse of discretion, but for a manifest abuse of discretion, which requires grievous error such that a mistrial is the only way to remove the prejudice. *Peel*, 408 S.W.3d at 215. Because the trial court found that it was unlikely the jury saw the reference to Sherrer's settlement on the briefly displayed power point slide, the trial court found no prejudice warranting a mistrial. This was not a manifest abuse of discretion.

During Bard's cross-examination of Sherrer, Bard displayed a power point slide marked as exhibit 543 that summarized some of Sherrer's activities and decisions between 2012 and 2015. [Tr. VIII, p. 5604] The demonstrative timeline was not admitted into evidence, and was used solely as an aid to the jury. The timeline charted "medical/life events" from April 2012 to November 30, 2015, with each event on the timeline described in a "text box." The text boxes above the timeline described medical activities, and the text boxes below the timeline described legal activities. A paper copy of the timeline was provided to counsel and the trial court. The timeline was displayed to the jury by use of a power point slide.[25] *See* attached Appendix A.

Bard asked Sherrer a few questions about her time in China between June 2012 and April 2014, related to entries on the top left side of the timeline. [Tr. VIII, p. 5604] After a few brief questions, the trial court directed Bard's counsel to "[t]ake that down for a second, please," referring to the power point. [Tr. VIII, p. 5604] Bard's counsel immediately responded "oh, yes." When counsel approached the bench, Bard's counsel stated "I know, it wasn't supposed to be up there. I'd asked him to take it off." [Tr. VIII, p. 5605] Bard's counsel was referring to the fact that the power point slide included a text box on the bottom right side that identified an event dated "Nov. 15, 2014" described as "Settlement with Truman Medical Center and University Physicians Associates." Bard's counsel explained that the power point slide was an older, incorrect version of the second

[25]The timeline marked as Exhibit 543 was comprised of two pages, and thus two power point slides. The first page/slide addressed activities up to early 2012. The second page/slide addressed activities between early 2012 and the beginning of trial in November 2015. Sherrer's third point on appeal involves only the second power point slide.

slide that comprised exhibit 543 that had not been corrected by Bard's technology team to remove the reference to settlement. Sherrer's counsel advised the trial court that she intended to request a mistrial, and that she would make a better record later, so that the proceedings with the witness on the stand could resume.

At the next available opportunity, the parties addressed Bard's mistaken inclusion of reference to Sherrer's settlement on the power point slide. Sherrer moved for a mistrial, arguing that the displayed reference to Sherrer's settlement was inadmissible; that inclusion of the reference to settlement on the displayed power point slide violated the trial court's *in limine* and other trial rulings excluding any reference to settlements; and that the prejudicial effect of the reference to Sherrer's settlement was magnified by the fact that the Defendants had been permitted during trial to discuss the fact that Sherrer filed suit against TMC and UPA. Bard's counsel responded that the paper copy of demonstrative exhibit 543 did not include the text box referring to Sherrer's settlement, and that the inclusion of the text box on the version of the power point slide that was displayed was an inadvertent mistake. Bard's counsel argued that the power point was "a busy slide," and that she was "not sure anybody else saw" the settlement reference. Bard argued that the inadvertent and brief display of the slide was not grounds for a mistrial. Boston Scientific did not take a position on Sherrer's request for a mistrial.

After considering the arguments of counsel, the trial court ruled:

> 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 -- first of all 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 [Bard's counsel] and . . . 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 [Bard's counsel] -- [Sherrer's counsel] . . . [have] in your hands, and what we've been 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, that incidentally was supposed to go two and a half weeks, and granting a mistrial, again, as I said before, is a drastic measure, a drastic remedy. I cannot tell you how reluctant I am to do that, so I'm not. My concerns -- your concerns are shared by me. And I mean -- but I think that it was remedied in a relatively short span, a short time.
>
> So, yeah, I'm going to make a record. We'll get a copy of the exhibit [referring to the power point slide]. We'll mark that as a Court Exhibit, . . . and we'll add it to the Court's file. Any further relief that you're requesting I'll consider. But the grant of a mistrial will be denied.

[Tr. VIII, pp. 5637-38] Sherrer did not ask the trial court for any further relief at that time beyond her request for a mistrial.

Sherrer argues that the trial court's denial of her request for a mistrial was a manifest abuse of discretion. Sherrer correctly notes that evidence of settlement discussions or agreements is plainly inadmissible as a matter of public policy in Missouri.

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

Mengwasser, 312 S.W.3d at 376 (quotation omitted). The application of this general rule usually arises in the context of settlement negotiations, where it is recognized that "[t]he 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). However, the same "policy also applies in situations involving a completed settlement with another [joint tortfeasor] in the same or in a different case." *Id.*

Here, however, exhibit 543 was not admitted into evidence, and no questions were asked of Sherrer about the reference to settlement on the power point slide. This is not a case, therefore, of error in the admission of evidence. Instead, this is a case where inadmissible information was inadvertently and briefly displayed on a demonstrative exhibit. The trial court assessed the situation, and concluded based on all of the circumstances that it did not think the jury saw the reference to settlement on the power point slide. The trial court thus concluded that there was no prejudice warranting a mistrial.

Though Sherrer correctly argues that the admission of evidence of settlement discussions or agreements can be highly prejudicial, her argument presumes the jury saw the reference to settlement on the briefly displayed power point--a presumption that is contrary to the trial court's conclusion. Sherrer has not challenged the trial court's conclusion that based on the circumstances, the jury likely did not see the settlement reference on the displayed power point slide. Sherrer thus has not articulated any reasoned basis for rejecting the trial court's conclusion. The trial court was best positioned to assess the prejudicial effect of improper evidence on the jury. *Payne*, 543 S.W.3d at 123 (citing *Delacroix*, 407 S.W.3d at 24-25). Given the deference we are required to afford the trial court's assessment of the prejudicial effect on the jury (if any) of the briefly displayed reference to settlement, Sherrer's silence on this critical subject is problematic. In any

event, it has not escaped this court's attention that at the time the power point slide was displayed, Sherrer's counsel did not notice the reference to Sherrer's settlement. Rather, it was the trial court who brought the matter to the parties' attention. This lends credence to the trial court's conclusion that the reference to settlement briefly displayed on the power point slide was not likely noticed by the jury, and therefore did not yield prejudice that required a mistrial. The trial court's unchallenged conclusion is not a manifest abuse of discretion.[26]

Moreover, it is not only Sherrer's burden to demonstrate that the jury likely saw and was prejudiced by the briefly displayed power point slide (a topic ignored in Sherrer's brief), but as well it is Sherrer's burden to demonstrate that prejudice could not be removed except by mistrial. Sherrer has not sustained this burden. The trial court expressly invited Sherrer to request further curative relief after her request for a mistrial was denied. Sherrer sought no other curative relief at that time.

However, Sherrer did submit a jury instruction on the issue of damages, MAI 4.01, that was modified by MAI 34.05. The MAI 34.05 modification to the standard MAI 4.01 damage instruction advised the jury that "[i]n determining the total amount of plaintiff Eve

[26]In her appellate brief, Sherrer argues for the first time that the second power point slide of Exhibit 543 was displayed to the jury on two occasions--the first being at Tr. VIII, p. 5488, and the second being at Tr. VIII, p. 5604, when the trial court noticed the reference to settlement. However, we have no way of verifying that the version of the second power point slide displayed at Tr. VIII, p. 5488 was the same version displayed at Tr. VIII, p. 5604, particularly as comments made by Bard's counsel after the erroneous settlement reference was noticed suggest that the version of the slide displayed when the trial court caught the error was an older version of the slide. [Tr. VIII, p. 5635] Regardless, Sherrer's newly asserted argument preserves nothing for our review, as she did not advise the trial court during trial or in her motion for new trial that she believed the problematic slide had been displayed twice. *Zundel v. Bommarito*, 778 S.W.2d 954, 957 (Mo. App. E.D. 1989) (holding that claim of error not raised at trial and not raised in motion for new trial is not preserved for appellate review). And even if the problematic slide was displayed twice, the fact that neither counsel nor the trial court caught the reference to settlement on the first occasion the slide was displayed lends support to the trial court's conclusion that the jury likely did not notice the settlement reference.

Sherrer's damages you are not to consider any evidence of prior payments to her. The judge will consider any such payment and make an adjustment if required by law."

"MAI 34.05 is an addendum to a damage instruction to be given upon request of any party '[i]f the jury has knowledge, from the evidence ***or a trial incident***, of an advance payment, a partial settlement, or a collateral source payment.'" *Wallace v. May,* 822 S.W.2d 471, 472 (Mo. App. E.D. 1991) (emphasis added) (quoting MAI 34.05). MAI 34.05 is designed to serve as a curative remedy for precisely the type of trial incident that occurred in this case.

Sherrer argues that MAI 34.05 did not sufficiently remediate the prejudice that resulted from erroneous reference to settlement on the displayed power point slide because the jury could have used that information to consider an issue other than damages. Specifically, Sherrer argues that the jury could have used the reference to Sherrer's settlements to conclude that TMC and UPA admitted responsibility for Sherrer's damages. [Sherrer's Reply Brief, p. 22]

Although we agree that use of MAI 34.05 to modify a damage instruction would not appear to remediate error that has the potential to misdirect the jury on an issue other than damages, Sherrer's argument improperly presumes that the jury saw the briefly displayed reference to settlement, a presumption that is at odds with the trial court's unchallenged finding to the contrary. Further, Sherrer's argument depends on Sherrer's claim that brief display of the settlement reference synchronically combined with other alleged trial errors to prejudicially infect the trial. However, the other alleged trial errors referenced by Sherrer have not been established as such. First, Sherrer points to the Defendants'

references to allegations in Sherrer's Original Petition, the topic of Sherrer's second point on appeal. We have already explained, however, that although it was not proper to use Sherrer's allegations from the Original Petition as admissions against interest, Sherrer did not suffer prejudicial error from the very limited occasions when that occurred, particularly in light of substantial cumulative evidence that was admitted on the subjects addressed in the allegations. Second, Sherrer points to the Defendants' references to the fact that Sherrer sued TMC and UPA. However, Sherrer has not claimed error on appeal with respect to these references, and in any event, she has not provided this court with any citations to the record, legal argument, or authority in support of her bare assertion. Finally, Sherrer points to the Defendants' trial strategy of blaming the doctors employed by TMC and UPA for her injuries and damages. However, the Defendants had every right to admit evidence that tended to show that Sherrer's doctors employed by TMC and UPA were the sole cause of her injuries.[27] *Mengwasser*, 312 S.W.3d at 374.

In summary, Sherrer has not established that grievous error occurred in her case causing prejudice at all, let alone prejudice that could only be removed by mistrial. In fact, Sherrer has not referred us to a single Missouri case where a trial court's denial of a motion for mistrial in a civil action was found to be a manifest abuse of discretion. In contrast, we have located several cases were evidence admitted in direct conflict with settled law or a

[27]We express no opinion about the evidence that can be properly admitted for this purpose, or about whether evidence admitted for this purpose at trial and not subject to a claim of error in this appeal, was properly admitted for that purpose.

trial court's *in limine* ruling did not result in a finding that the trial court manifestly abused its discretion by denying a request for a mistrial.[28]

In *Payne v. Fiesta Corp*., the issue of insurance was injected by a leading question asked of an expert witness. 543 S.W.3d at 123. Noting that not every improper reference to insurance warrants reversal, and noting that a trial court is better positioned to determine whether an improper issue has been injected in bad faith or was prejudicial, the court found that the trial court's denial of a request for a mistrial was not a manifest abuse of discretion. *Id.* at 123-25. In *Delacroix*, evidence of other incidents similar to the airplane crash involved in the case was elicited despite the trial court's *in limine* ruling excluding the evidence. 407 S.W.3d at 25. Yet, the trial court's denial of a request for a mistrial was affirmed. *Id.* at 26. In *Wheeler ex rel. Wheeler v. Phenix*, evidence about insurance coverage was injected by a witness's answer to a question, though "'it is improper to inject the issue of . . . liability insurance into an action for damages.'" 335 S.W.3d 504, 514-15 (Mo. App. E.D. 2011) (quoting *Woods v. Friendly Ford, Inc*., 248 S.W.3d 665, 675 (Mo. App. S.D. 2008)). Yet, the trial court's denial of a request for a mistrial was affirmed because the appellant failed to demonstrate that the single, brief reference to insurance

[28]Our research did locate a case in Missouri where a trial court was found to have abused its discretion in denying a request for mistrial. In *City of Springfield v. Thompson Sales Co*., 71 S.W.3d 597 (Mo. banc 2002), the City's improper suggestion during *voir dire* that a condemnation award could result in an increase in taxes resulted in a request for a mistrial, which was denied. *Id.* at 599-600. The Supreme Court noted the settled prohibition against referring "in argument to the burden a verdict might impose on taxpayers." *Id.* at 600. The Supreme Court found that although similar error in other cases was sufficiently remediated by a contemporaneous rebuke of counsel and a directive that the jury disregard the comment about taxes, here that remedy was insufficient because the City's suggestion that taxes would increase was more inflammatory than a general reference to the burden of a verdict on taxpayers, and because the trial court did not contemporaneously admonish the jury to disregard the remark. *Id.* at 601. *City of Springfield* is distinguishable from Sherrer's case because the trial court in Sherrer's case found that it was unlikely the jury saw the reference to settlement. Thus, there was no determined prejudice to be cured in Sherrer's case. Under the circumstances, an admonition to ignore a reference to settlement the jury was determined not to have seen would have injected, not resolved, prejudice.

"was injected in bad faith or that [the appellant] suffered prejudice requiring a mistrial." *Id.* at 515. In *Brown v. Bailey*, evidence of a medical doctor's prior litigation was elicited "in direct conflict with the trial court's ruling on [a] motion in limine." 210 S.W.3d 397, 411 (Mo. App. E.D. 2006). Yet, the trial court's denial of a request for a mistrial was affirmed. *Id.* at 412. In *Cole ex rel. Cole v. Warren County R-III School District*, evidence of the plaintiff's inability to pay for required medical treatment was elicited in direct conflict with the trial court's grant of a motion *in limine* to exclude the plaintiff's financial condition. 23 S.W.3d 756, 759 (Mo. App. E.D. 2000). Yet, the trial court's denial of a request for a mistrial was affirmed. *Id.* In *Hale v. American Family Mutual Insurance Co.*, a settlement demand letter marked with a post-it note stating "Don't send to jury" was inadvertently sent to the jury during deliberations, an error that was caught within moments. 927 S.W.2d 522, 528 (Mo. App. W.D. 1996). Yet, we affirmed the trial court's denial of a request for a mistrial. *Id.* at 529.

These cases, and others like them, are of particular value to us because they emphasize the deference we are required to afford to the trial court's assessment of prejudice on a jury and to its judgment about the means by which determined prejudice should be removed. These cases are also of value because in each of them, it is unassailable that the jury actually heard inadmissible, excluded evidence, yet we nonetheless deferred to the trial court's assessment of prejudice and its determination of a proper remedy. In stark contrast, in Sherrer's case, the trial court found it unlikely that the jury saw the inadmissible reference to settlement, and thus found it unlikely that Sherrer was prejudiced, a finding Sherrer has not challenged. The facts in Sherrer's case present an even more

compelling rationale for deferring to the trial court's assessment that prejudice warranting a mistrial did not occur.

The trial court did not manifestly abuse its discretion in denying Sherrer's request for a mistrial. Point Three on appeal is denied.

Point Four: The Exclusion of Other Similar Complaints Evidence

In her fourth point on appeal, Sherrer argues that it was an abuse of discretion to exclude evidence regarding the number of complaints concerning mesh slings because the evidence was proper rebuttal to evidence admitted by the Defendants, and alternatively, because the evidence was admissible under the doctrine of curative admissibility. As is the case with Sherrer's first point on appeal, Sherrer's fourth point on appeal is impermissibly multifarious, as it claims error in the exclusion of evidence on two distinct bases. "'Multifarious points relied on are noncompliant with Rule 84.04(d) and preserve nothing for review.'" *Griffitts*, 2018 WL 3235859, at *3 n.6 (quoting *Kirk*, 520 S.W.3d at 450 n.3).

Even were we to overlook the multifarious nature of Sherrer's point on appeal, we would otherwise find that neither of Sherrer's alternative assertions of error has been preserved for our review.

> To properly preserve a challenge to the trial court's exclusion of evidence "[t]he proponent of the evidence must attempt to present the excluded evidence at trial," and if the evidence remains excluded, then the proponent is required to make an offer of proof.

Payne, 543 S.W.3d at 122 (quoting *Hancock v. Shook*, 100 S.W.3d 786, 802 (Mo. banc 2003)). As we have previously noted in this opinion, "'[t]he purpose of an offer of proof

is twofold: (1) to educate the trial judge on the admissibility of the evidence with the hope that he or she will reconsider; and (2) to preserve the issue for appellate review.'" *Id.* (quoting *Bradley v. State*, 440 S.W.3d 546, 556 (Mo. App. W.D. 2014)). "'A proper offer of proof demonstrates: 1) what the evidence will be; 2) the purpose and object of the evidence; and 3) each fact essential to establishing the admissibility of the evidence.'" *Id.* (quoting *Bradley*, 440 S.W.3d at 556).

Sherrer is required by Rule 84.04(e) to include in the argument portion of her brief for each claim of error "a concise statement describing whether the error was preserved for appellate review; if so, how it was preserved; and the applicable standard of review." In an effort to comply with this Rule, Sherrer's appellate brief cites to several different transcript references, though our review of the transcript references reveals that the subject of admitting other mesh complaints was only raised by Sherrer on two occasions: during a lengthy side bar after opening statements [Tr. II, pp. 929-45], and during a lengthy side bar while Dr. Pence was testifying in Sherrer's case-in-chief [Tr. III, pp. 1733-60]. On both occasions, Sherrer made essentially the same argument: that comments made by Bard and Boston Scientific ***during opening statements*** opened the door to permitting the admission of evidence of other complaints related to all of the Defendants' mesh products. On both occasions, the trial court ruled that the Defendants' opening statements did not open the door to the admission of evidence of other complaints related to all of Defendants' mesh products.

Though Sherrer generally argued that the door had been opened to permit her to offer evidence of other complaints, Sherrer never "'attempt[ed] to present the excluded

evidence at trial,'" the first essential requirement to preserving her claim of error on appeal. *Payne*, 543 S.W.3d at 122 (quoting *Hancock*, 100 S.W.3d at 802). Because Sherrer never attempted to present evidence of other complaints, and only sought a ruling about whether the door had been opened to permit her to attempt to do so, the trial court never ruled that the evidence was inadmissible.

Even if we could characterize the aforesaid side bar discussions as sufficient to constitute an attempt to present evidence that was then excluded, Sherrer also failed to "make an offer of proof," the second essential requirement to preserving her claim of error on appeal. *Id.* (quoting *Hancock*, 100 S.W.3d at 802). Sherrer never explained to the trial court what the evidence would be, and never identified the facts essential to establishing the admissibility of the evidence. *Id.* Sherrer's failure to make an offer of proof thus precluded the trial court from being educated on the exact evidence Sherrer wanted to admit with the hope the trial court would reconsider, the first purpose of an offer of proof. *Id.* And Sherrer's failure to make an offer of proof precludes effective appellate review, the second purpose of an offer of proof. Because there is no record of the actual evidence Sherrer wanted to admit, we cannot effectively review whether the trial court's conclusion that the door was not opened was an abuse of discretion. We cannot effectively review whether exclusion of the evidence, even if logically relevant to rebut through an opened door, was nonetheless properly excluded because it was not legally relevant. We cannot effectively review whether Sherrer could have established all facts essential to admitting the evidence, including foundation and other evidentiary requirements. And we cannot

effectively review whether, if it was an abuse of discretion to exclude the evidence, the error was prejudicial requiring reversal.

Because Sherrer has not properly preserved a challenge to the trial court's exclusion of evidence only broadly described as other complaints about Defendants' mesh products, point four on appeal is denied.[29]

Conclusion

For the reasons explained in this Opinion, the trial court's Judgment in favor of Bard and against Sherrer is reversed, and the trial court's Judgment in favor of Boston Scientific and against Sherrer is affirmed. This matter is remanded to the trial court for a new trial on Sherrer's claims against Defendant Bard as asserted in Sherrer's Amended Petition.[30]

Cynthia L. Martin

Cynthia L. Martin, Judge

All concur

[29]The alternative multifarious argument in Sherrer's fourth point on appeal claims error because the Defendants' reference to an AUGS Position Statement during opening and on cross-examination of "multiple witnesses" permitted Sherrer to admit otherwise inadmissible evidence about other complaints based on the rule of curative admissibility. [Sherrer's Brief, p. 64] "The rule of curative admissibility permits the admission of otherwise inadmissible evidence because the door has been opened to do so by the other party's admission of improper evidence." *State v. Ellis*, 512 S.W.3d 816, 826 n.f7 (Mo. App. W.D. 2016). Sherrer never argued the rule of curative admissibility at trial, and certainly not after the AUGS Position Statement was supposedly referred to during the cross-examination of "multiple witnesses." This further underscores Sherrer's failure to properly preserve for our review the claims of error raised in her fourth point on appeal.

[30]Though we do not find reversible error in connection with Sherrer's second point on appeal addressing the use of allegations in Sherrer's Original Petition as admissions against interest, on remand for re-trial, the trial court should be guided by our discussion with respect to the inadmissibility of the allegations for that purpose. We have expressed no opinion about the admissibility of other similar cumulative evidence offered in the form of Sherrer's interrogatory responses, responses to requests for admission, or responses in depositions. This Opinion should not be read to endorse, or to comment one way or the other, about the admissibility of evidence that was admitted at trial, but about which no claim of error has been asserted on appeal.