



Missouri Court of Appeals
Southern District

In Division

CRYSTAL GRAY, individually and as
NEXT FRIEND of minors C.G., E.G.,
and Connie Gray, as Class I
Beneficiaries of WILLIAM GRAY, et
al.,

Plaintiffs-Appellants,

v.

MODINE MANUFACTURING
COMPANY and HAMILTON
SUNDSTRAND CORPORATION,

Defendants-Respondents.

Case Number SD38369

Filed: April 2, 2026

APPEAL FROM THE CIRCUIT COURT OF CAMDEN COUNTY

Honorable Roger M. Prokes, Special Judge

AFFIRMED

Crystal Gray, individually and as Next Friend of minors C.G. and E.G., and
Connie Gray (collectively, the “Grays”) appeal the judgment of the Circuit Court of
Camden County, Missouri (the “trial court”), following a jury trial on their wrongful
death action against Respondents Modine Manufacturing Company (“Modine”) and

Hamilton Sundstrand Corporation (“Sundstrand”) (collectively, “Respondents”).¹ The Grays assert five points of error challenging various discretionary rulings by the trial court which the Grays claim unfairly prejudiced them at trial. In Points I through III, the Grays allege that the trial court erred in either the admission or exclusion of certain evidence at trial. The Grays claim in Point IV that the trial court erred in failing to correct Respondents’ conduct regarding speaking objections at trial. In their final point on appeal, Point V, the Grays assert the trial court erred in providing limiting instructions to the jury regarding business records admitted at trial. Holding the Grays’ claims to be without merit or unpreserved, we affirm the trial court’s judgment.

Background

The underlying matter involves negligence claims asserted by the Grays against Respondents for allegedly exposing the decedent, William Gray (“Mr. Gray”), to water contaminated by an organic chemical known as trichloroethylene (“TCE”).² Broadly, the Grays allege that 1) Sundstrand failed to properly dispose of or otherwise handle

¹ The Grays comprise some but fewer than all of the plaintiffs in the underlying civil action captioned, *Deborah Monnahan, et al., v. Modine Manufacturing Company, et al.*, Case Number 18CM-CC00218, Circuit Court of Camden County, Missouri. The trial court, in consultation with the parties, ordered a separate trial of all the Grays’ claims against Respondents whereupon a jury returned a complete defense verdict and the trial court entered judgment in favor of Respondents (the “Judgment”) in accordance with the verdict, certifying there was “no just reason for delay” pursuant to Rule 74.01(b). Because the Judgment disposed of all the Grays’ claims in the case as a “single, distinct judicial unit,” it was properly certified as a final judgment and jurisdiction in this Court is therefore proper. *See generally Gibson v. Brewer*, 952 S.W.2d 239, 244-45 (Mo. banc 1997). All references to rules are to Missouri Court Rules (2025).

² TCE is not a substance that naturally occurs in the environment.

substantial quantities of TCE used in its operations at a manufacturing facility (the “Plant”) located in Camdenton, Missouri (the “City” or “Camdenton”), from 1972 through 1990;³ and 2) Modine, upon purchasing the Plant from Sundstrand in 1990, thereafter failed to perform a proper investigation and remediation of the TCE contamination at the Plant site. The Grays claim these instances of alleged misfeasance led to the continuing contamination of certain private and public water sources in the Camdenton area that Mr. Gray had been exposed to, resulting in Mr. Gray developing an autoimmune kidney disease known as IgA Nephropathy (“IgAN”) that ultimately caused his death.

General Facts

Respondents’ Operations in Camdenton

In 1972, Sundstrand purchased the Plant from an entity known as Dawson Metal Products.⁴ Sundstrand utilized TCE as a degreasing solvent in its manufacturing operations at the Plant from approximately 1972 to 1990.⁵ Though the parties dispute the precise extent, means, and corporate policy by which TCE at the Plant was disposed of

³ The alleged tortious acts purportedly occurred under Sundstrand’s corporate predecessor, known as “Sundstrand Tubular Products, Inc.” Because this distinction does not meaningfully affect our review in this case, we collectively refer to the two entities as one and the same.

⁴ Sundstrand continued to operate the Plant under the name “Dawson Metal Products” for a few years following 1972.

⁵ There was evidence at trial that, at some point during 1972 through 1973, a fire at the Plant caused Sundstrand to temporarily shift operations to an off-site facility where TCE was also used and disposed of. However, because this alleged source of contamination is not relevant to the issues on appeal, we do not discuss it further herein.

during this time period, it is not disputed that Sundstrand employees engaged in at least some discharge of TCE waste onto the soil at the Plant, and that wastewater containing TCE was discharged from the Plant by Sundstrand to the nearby Hulett Lagoon (“City Lagoon”) managed by the City. In 1978, inspectors from the Missouri Department of Natural Resources (“MDNR”) noted issues with the layout of the City Lagoon’s piping in addition to concerns as to the general strength of the industrial waste being discharged to the City Lagoon by Sundstrand. In 1981, as part of the City’s application to MDNR to approve, *inter alia*, the City Lagoon as part of the City’s water pretreatment program, Sundstrand disclosed TCE, among other substances, as a potential contaminant in its wastewater discharge to the City Lagoon. In May 1983, upon the advice of MDNR, the City requested testing of the contaminants in Sundstrand’s wastewater, including TCE, to assist in the development of monitoring parameters and limits for the City’s pretreatment program. Following a series of testing by Sundstrand and the City in 1983 and 1984, Sundstrand completed construction of a separate plant facility in April 1986 to treat its wastewater discharge. The City Lagoon was ultimately closed in 1989, with its water being drained and over 2,000 cubic yards of contaminated sludge being removed from the area.⁶

In October of 1990, Modine purchased the Plant from Sundstrand. Modine never utilized TCE in its operations at the Plant. However, subsequent testing of the soil at the Plant in 1991 revealed the presence of numerous contaminants, including TCE.

⁶ Despite these remediation measures, subsequent soil testing at the former City Lagoon site in 1996 showed the continued presence of industrial contaminants including TCE.

Consequently, MDNR required further remedial action by Modine. This remediation in part consisted of drilling a series of monitoring wells at or near the Plant, with Monitoring Wells (“MW”) -3 and -4 being the most pertinent to the case here. MW-3 and -4 were drilled within the immediate vicinity of the Plant in 1995 before being deepened in February 1997 at the request of MDNR due to the wells being chronically dry. When samples could be taken from MW-3 and -4 during 1995 through 2000, the wells showed TCE levels in excess of the U.S. Environmental Protection Agency’s (“EPA’s”) maximum contaminant level (“MCL”) for TCE in public water supplies at the time, five (5) parts per billion (“ppb”). Both MW-3 and -4 were ultimately closed and sealed in November 2001 due to concerns that the 1997 deepening of the wells may have penetrated a semi-permeable, earthen layer separating the contaminated soil and water at the Plant in Camdenton’s perched water zone (“shallow water zone”) from the aquifer in the underlying deep water zone, creating a potential pathway of contamination.

Additionally, located east of the Plant and south of the City Lagoon was a public well known as the Mulberry Well. Up until June 1998, the Mulberry Well supplied 70% to 100% of the City’s public water supply. However, following testing in May and June showing TCE levels of 11.8 and 5.1 ppb, respectively, at the Mulberry Well, the City reduced the amount of water drawn to 40% and further blended the Mulberry water with water sourced from two other wells. The Mulberry Well was thereafter shut down in February 1999. Though the parties dispute the exact source(s) of the Mulberry Well contamination, it was uncontested at trial that the City Lagoon was at least a source contributing to the TCE contamination of the Mulberry Well.

In approximately 2003, Sundstrand commissioned the drilling of a monitoring well known as “MW-19” north of the Plant and northwest of the former City Lagoon. MW-19’s depth reached down to groundwater in the Camdenton deep water zone. From initial sampling to tests conducted as late as 2020, MW-19 exhibited levels of TCE several times over the 5 ppb MCL set by the EPA.

Mr. Gray (Decedent)

Mr. Gray was born in Lebanon, Missouri, on May 27, 1983. During the preceding pregnancy, Connie Gray, Mr. Gray’s mother, resided at a family house then addressed as Route 2, Box 52, Camdenton, Missouri (“Rector Street”), which was located north of the Plant and northwest of the City Lagoon. During this time, all water she used at Rector Street was drawn from a private well dug by Connie Gray’s father (the “Rector Street Well”). The Rector Street Well was ultimately closed up in approximately 2004 before discovery in this case was conducted. Consequently, the Rector Street Well’s exact location, dimensions, and water contents could not be measured by the parties. Nonetheless, evidence adduced at trial placed the Rector Street Well within a lateral distance of approximately 100 feet from the spot where MW-19 was located.

During infancy, Mr. Gray’s diet consisted of baby formula mixed with water from the Rector Street Well. The Gray family continued to live at Rector Street for several years before Connie Gray moved between a series of other residences in the City until 1991. Despite these moves, Mr. Gray himself still continued to stay with his grandparents at Rector Street a majority of the time while Connie Gray worked or attended school.

When at Rector Street, water consumed for personal use continued to be drawn from the Rector Street Well.

From 1991 to 1998, the Gray family moved to and lived in the Kansas City area but continued to return to visit and stay at Rector Street for periods of time ranging from a few days to a few months. During this period, the water they used while at Rector Street continued to be drawn from the Rector Street Well. In January 1998, the family returned to the Camdenton area and thereafter moved between several addresses. Mr. Gray continued visiting Rector Street upon his return. In at least two of these locations, the family received water from the City's water supply which drew water from the Mulberry Well at the time. Thus, during the period of January 1998 through February 1999, Mr. Gray was exposed to at least some amount of TCE-contaminated water from the Mulberry Well as a result of Sundstrand's operation of the Plant. In December 1999, following blood tests and a kidney biopsy, Mr. Gray was diagnosed with IgAN. Mr. Gray died from complications related to IgAN in 2020.

Procedural History

On September 14, 2018, the Grays filed their wrongful death action against Respondents for compensatory and punitive damages in the trial court, asserting one count of negligence (Count I) and one count of strict liability (Count II). The Grays' strict liability claim was ultimately withdrawn, and they proceeded to trial solely on their negligence claim in August 2023. The trial took place over the course of several weeks. Ultimately, the jury returned a complete defense verdict in favor of Sundstrand and

Modine. This timely appeal followed the trial court’s denial of the Grays’ post-trial Motion for New Trial.

Standard of Review

The discretionary rulings of trial courts are “presumed correct[.]” *Anglim v. Mo. Pac. R.R. Co.*, 832 S.W.2d 298, 303 (Mo. banc 1992). “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.” *Lozano v. BNSF Ry. Co.*, 421 S.W.3d 448, 451 (Mo. banc 2014) (internal quotations and citation omitted); *see also Lay v. P & G Health Care, Inc.*, 37 S.W.3d 310, 328 (Mo. App. W.D. 2000) (“We give great deference to the trial court’s evidentiary rulings and will not overturn such decisions absent an abuse of discretion.”).

An abuse of discretion occurs where the trial court’s “ruling is clearly 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.” *Lozano*, 421 S.W.3d at 451 (internal quotations and citation omitted). Significantly, we do not sit as a second trial judge deciding whether we agree with the challenged action taken by the trial court when reviewing for abuse. *Green v. Fleishman*, 882 S.W.2d 219, 222 (Mo. App. W.D. 1994). Rather, our “sole task is to determine whether the trial judge could have reasonably concluded as he did” under “the totality of the circumstances in [the] case.” *Id.* Accordingly, “[i]f 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.” *Lozano*, 421 S.W.3d at 451.

Even where the trial court abuses its discretion, courts of review nonetheless “loathe to vacate a jury’s verdict and resulting judgment on such grounds.” *Id.* Indeed, “[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 against the appellant materially affected the merits of the action.” *Id.* at 451-52 (internal quotations and citation omitted). Reversal is only warranted where the trial court’s error was “outcome-determinative” in the case. *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 768 n.12 (Mo. banc 2011). Consequently, when challenging a discretionary ruling of the trial court, an appellant bears the burden of showing both an abuse of discretion and the prejudice resulting therefrom. *Cotner Prods., Inc. v. Snadon*, 990 S.W.2d 92, 102 (Mo. App. S.D. 1999).

Analysis

Point I

In their first point on appeal, the Grays assert that the trial court “erred in allowing [Modine’s] expert witness Mr. [John] Connor [(“Connor”)] to testify at trial over [the Grays’] objection that TCE[-]contaminated water could not have reached [the Rector Street Well] while [Mr. Gray] was in the womb and as a child” because this testimony constituted a new opinion not previously disclosed in, and contrary to, Connor’s prior testimony at deposition. Specifically, the Grays contend that Connor only expressed general opinions at deposition that TCE contamination in the Camdenton shallow water zone extended northwest from the City Lagoon up to an area in the “close” vicinity of MW-19, and disclaimed having other opinions at the time regarding the specific flow of water in this shallow water zone (where the Rector Street Well was situated). Thus, in the

absence of any seasonable update by Modine regarding Connor's expert opinions, the Grays argue they were unfairly prejudiced in the preparation and presentation of their case by the admission of Connor's testimony regarding the Rector Street Well at trial – *i.e.*, that the testimony amounted to an improper “surprise” expert opinion. We disagree.

Additional Procedural History

Connor was a hydrogeologist retained by Modine as an expert on the “fate and transport of chemicals” to analyze various TCE contamination sites and sources (including the City Lagoon and the Plant) and related remediation activities in the Camdenton area. Prior to trial, Connor produced a report regarding his expert opinions in the case before then being deposed. Connor's report contained no express mention of the Rector Street Well. However, the report did discuss various matters related to the hydrogeological characteristics of the Camdenton area and TCE contamination in the Camdenton groundwater in both the shallow and deep water zones. The report was also accompanied by a series of figures which, among other things, compared the locations and TCE concentrations of various monitoring wells in both the shallow and deep water zones. Additionally, Connor's report included a timeline chart containing a section labeled “Plaintiff's TCE exposure (1983[-]1990)” which overlapped in time with a section labeled “Discharge from [Plant] to [City] Lagoon.”

At deposition, Connor was not specifically questioned about the Rector Street Well. However, in the course of testifying on waterflow patterns in the Camdenton deep water zone, Connor was prompted by the Grays' counsel to opine on the flow of water from the City Lagoon to MW-19. The relevant portion of the exchange was as follows:

[Grays' Counsel:] ... [MW-]19 is what direction from the [City] Lagoon?

....

[Connor:] Northwest.

....

[Grays' Counsel:] So to get [TCE] contamination in [MW-]19, water would need to be moving to the northwest, correct?

[Connor:] **It would – the water from the [City Lagoon] enters the [shallow water] zone and then it would need to move in the [shallow water] zone and go straight down to get there**, so you can't – when you look at these groundwater flow zones, that's the deep [water] zone, right?

....

[Grays' Counsel:] And when you say, "that's", you're talking about [Deposition] Exhibit 1?⁷

[Connor:] Yes. ... [Deposition Exhibit 1] plus the water in the deep [water] zone and that [sic] doesn't give you an adequate understanding how [TCE] would get to [MW-19].

....

[Grays' Counsel:] ... **And so for [TCE] contamination at the [City] Lagoon to get to [MW-]19 at some point that contamination would have to move northwest, wouldn't it?**

[Connor:] **Yes, in some horizon it would, yes.**

[Grays' Counsel:] Okay. Did you do anything to attempt to identify – by "you", I mean your group as a whole – to attempt to identify where it is that the [TCE] contamination makes the northwest movement?

[Connor:] Qualitatively, yes, because the – if you look on Figure 5A ... in our report ... you'll see two side[-]by[-]side images. One is in the [shallow

⁷ Deposition Exhibit 1 consisted of two figures, "7A and 7B," attached to Connor's expert report, which *inter alia* marked the location of MW-19 and depicted the various directions of waterflow in the Camdenton deep water zone.

water zone] and one is in the [deep water zone]. And in the [shallow water zone], you'll see that wells that are on the north side of the [City] Lagoon MW[-]5 and MW[-]25 have some of the highest [TCE] concentrations seen in the area, the highest concentrations. And those are extending north in the direction of MW[-]19. It's not very far to MW[-]19 from there.

So if you look at the location [of] MW[-]19, it's consistent with [the] spreading of the [TCE] contamination within the [shallow water] zone moving down into the deep [water] zone. ... And so [TCE] had to get there through the [shallow water zone] and the [shallow water zone] has contamination that extends up close to end up in [MW-]19. And so [TCE-contaminated water] could spread laterally away from the [City Lagoon] and go down vertically to get into MW[-]19.

....

[Grays' Counsel:] Okay. In regard to these flow maps and things like that, are you relying upon ... somebody else, or did y'all do your own calculations of the flow ranges?

[Connor:] **We did our own calculation of the flow patterns. ... [B]ut we didn't do that for the [shallow water] zone because it's discontinuous. I haven't ... I believe the data was available to support that analysis. It's possible that you could look it up more closely but I haven't done that.**

(Emphasis added.) Towards the conclusion of Connor's deposition, the following exchange also occurred with respect to the scope of his expert opinions:

[Grays' Counsel:] ... **[A]re there any other opinions that we've not covered or that are not expressly set forth in the 17 pages of text in your report that you intend to offer?**

[Connor:] **Not that I can think of right now. We've talked about a lot of things today that aren't on those 17 pages. That was intended to be kind of a framework and an outline.**

[Grays' Counsel:] And I'm just trying to make sure there isn't some opinion you're intending to voice that either isn't set forth here that we haven't spoken about already today.

[Connor:] My understanding is that we've covered that. **There may be certain aspects of it that we haven't talked about, but I think the general scope of what my opinions are we touched upon [sic].**

(Emphasis added.)

At trial, Modine called Connor as an expert witness to give testimony after the Grays concluded their case-in-chief. At the start of Connor's direct examination by Modine, Connor indicated he had prepared a series of slides to accompany his trial testimony ("Exhibit 967").⁸ Modine then distributed copies of Exhibit 967 to the other parties and Connor. Connor authenticated Exhibit 967 as his prepared slides and Modine requested permission from the trial court to publish Exhibit 967 to the jury as a demonstrative exhibit. The Grays stated they had no objection to the first twelve slides of Exhibit 967 at that time, but indicated they would notify the trial court if an objection to the exhibit would be forthcoming. Sundstrand indicated no objection to Exhibit 967. The trial court accordingly granted Modine permission to publish Exhibit 967 as a demonstrative exhibit. The exhibit was displayed to the jury but not admitted into evidence.

Connor's direct examination proceeded. During Modine's examination of Connor, Connor gave opinions regarding the chemical composition of samples taken from the City Lagoon, Plant, and Mulberry Well. Counsel for Modine and the Grays conferred and approached the trial court for a sidebar conference regarding two upcoming slides of Exhibit 967 that had not yet been displayed to the jury nor spoken to by Connor at that point. One slide, titled "No Pathway to Private Well on Rector Street from [the Plant] or

⁸ In the trial transcript, demonstrative Exhibit 967 was sometimes referred to as "Exhibit 976[.]" which we assume was either a misstatement by counsel or a clerical transcription error. The copy of the exhibit contained in the legal file on appeal is not marked.

[City] Lagoon[,]” depicted a topographical map of the Camdenton area marking the locations of MW-19, the City Lagoon, and the Plant. The other slide was titled “Private Well on Rector Street was Shallow and on Creek” and contained a stylized graphic comparing the depths of MW-19 and a “Private Well” side-by-side.

The Grays lodged their objection as follows:

The next few slides [of Exhibit 967] that are coming up are new opinions [Connor] did not express in deposition. What they are and – (inaudible due to paper covering bench microphone.)[.]

[Connor’s] getting ready to express an opinion about there’s no pathway [of TCE contamination] to the private [Rector Street Well]. When [Connor] was deposed, he didn’t have an opinion on that, other than we know there’s a [contamination] path [for TCE] to get to [MW-]19. [Connor] did not have an opinion there’s no [contamination] pathway from – to the Rector Street [W]ell, which would have been pretty important. So those – that’s a new opinion [Connor] didn’t have at his deposition, and we would object to that, especially at this late of the day.

Modine responded that Connor’s prospective opinion regarding the Rector Street Well was not new in that Connor had been disclosed as an expert on the “fate and transport of chemicals[,]” and testified at deposition to the TCE contamination of the area of Camdenton which encompassed, among other things, MW-19 and the Rector Street Well. The Grays replied that Connor had not mentioned the Rector Street Well in any portion of his pre-trial report and deposition, and that such an opinion was not relevant to Modine’s defense in the case. Modine countered that the Grays had purportedly advanced a claim at trial that Modine was responsible for some post-1990 TCE contamination of the Rector Street Well. Modine and Sundstrand both further argued that counsel for the Grays had failed to specifically depose Connor on his opinions about the Rector Street Well prior to trial. The trial court overruled the Grays’ objection. Connor then proceeded

to give a summation of his trial testimony regarding the chemical composition of samples taken from the City Lagoon, Plant, and Mulberry Well.

The following exchange then occurred:

[Modine's Counsel:] Let's transition to the two allegations that have been made in this case. **And the first allegation is that there's a pathway of water from the [Plant] or [City Lagoon] to the Rector Street Well.**

[Connor:] Right.

[Modine's Counsel:] And move to the next slide, and explain for us your opinion.

[Connor:] Well, we've talked a lot about monitoring wells. There's been a lot of studies about monitoring wells. And [Monitoring] Well 19 – [MW-]19 is the one that's closest to the Rector Street Well. It's not the Rector Street Well, but it's pretty close to it.

So one of the most interesting things in this case, to me, is the testimony of Ms. Connie Gray. She was [Mr. Gray's] mother. And she told us a lot of pretty interesting things about the Rector Street Well.

Now, we're looking at a topographic map of the ground surface out here. And you look at where [MW-]19 is, and you see all those contours, this is the land surface, kind of arch up. That's a stream bed. If you follow that up with [sic] those little arch things are, that's the map of a stream. And you follow it down, you'll see – from [MW-]19, follow it with your finger, hitting those little arch things – it flows down and down and it eventually hits a blue line.

Now, that blue line comes straight from the [City Lagoon]. All right? So you see the – go back to the [City Lagoon] and you see that dotted blue line, and it's going down. It's like a little canyon. It flows to the west. And those two little streams join and they flow down. If you go down, you see that 800 down there. Okay. That's how the land surface is contoured out there. It's a hilly place and it has these bottoms. All right?

So Connie Gray talks about growing up out there. She talks about that stream. Her – their house – let's see – you see [MW-]19 and there's that gray line coming in from the right-hand side? That's Rector Street. Okay? That's Rector Street. And [MW-]19 is right on that street.

Now, their houses – when she describes their houses, the house is a little bit – it's west of [MW-]19, and it's up a little bit. Doesn't go all the way to the other gray line, but it's a little bit to the west. There are two or three – there's two houses there. There was her house and her aunt's house.

So now, MW-19, take your finger and push it a little bit to the left – I'm sorry – and there's two house[s]. Now, you're going uphill a little bit. Right? It's going to a higher line. And so their house is perched on a hill a little bit above where Rector Street is.

And what she told us is that her father installed a well himself. And where he installed it, she marked it on a map, is where [MW-]19 is. You go up a little bit to where that other – that brown contour line is, where you see that hump, that was the stream.

And what she told us is that that well was installed at the edge of that stream. He dug that well at the edge of the stream to get to water from the stream. She says it intersected a spring or something from a stream. Okay?

Now, that stream was a losing stream. Right? It's – it's sitting above – remember, that water table is down 200 feet. Now, this stream – when it rains, that stream has water in it, and it will lose it to the groundwater. So if you dig a well right next to that, you'll get water. Okay? There'll be water there. And that's perched water; right? It's perched on top of some layers. And so it's not your best you can get.

And what is a dome well? He put this well in himself. Is it drilled? It's not drilled; it's dug. And then that – there are [a] lot of dug wells in this country. Maybe some of you-all have it. Your yards, if it's – those properties are old enough. I've seen a lot of dugged [sic] wells in my time.

What they are is they're like a – they're like 3-feet wide, and they're cylindrical. Why are they 3-feet wide? Because a man has to stand in it with a shovel and turn and turn and turn and dig that out of there. He'll fill a bucket; he'll take that bucket out to the surface, but that's about as much room as you need to turn around.

And in this particular case, if you go to the edge of that stream and you dig down – I don't know how much soil he had to go through before he hit that rock. Now, when he hit that rock, there's probably water perched on top of that. The water is coming out of the stream; it perches there. So when he digs this shaft down, we'll get water. Right?

She tell [sic] us a couple of other interesting things. She says that her dad told her to stay away from that well.

Why do you want a kid to stay away from the well? Well, it's a 3-foot shaft in the ground.

How deep did he dig that? Well, I've seen them as deep as 30 feet. But if you're standing – you're sitting in a 30-foot shaft, that is really deep. It's three stories high. Normally, a guy gets a little bit nervous when you're down 10, 15 feet and you've got water. Once you hit that water, you're standing in the water.

You can get through that rock by [sic] with a pry bar, hitting it and breaking it can, and shoveling it out. But normally, you're talking 10, 20 feet, is how deep that well would be.

And she says, “Our dad told us to stay away from that well. He built a wooden house over it, and said, ‘Stay out of that.’” You can fall down that shaft if you’re a kid.

The other thing is, it’s an open hole. You can get leaves in there. You can get rainwater in there. You don’t want any kids putting anything in that well because you’re drinking it.

She also told us in the winter it froze. Well, if any of you have a well in your backyard, that’s a drilled well, they’re only about this big around. Right? A kid can’t fall in that. It’s a pipe coming up, and it has a – has a seal on the top with a little pipe coming out. A kid can’t fall down that. You can’t spill anything in it. It’s sealed and it’s registered.

This is an unregistered well she said her dad dug; right? And is [sic] she said it would freeze in the winter. A big open hole, it could freeze. Small pipe, it doesn’t freeze. It’s sealed up. A big open hole can freeze. It froze in the winter, and they had problems.

And so all those things tell us that their well was a shallow well right next to that stream. That’s what she told us. And that makes perfect sense. It’s right near that stream; it’s right where she said it would be, and it fed those houses.

[Modine’s Counsel:] We’ve got MW-19 up on the screen, and you’ve told us about that shallow well, private well in the stream.

Can you go to the next slide and explain to us why there’s a difference between MW-19 and a private well – shallow private well?

[Connor:] Okay. Let’s talk about MW-19 first. And the question is: **Could water from the [City] Lagoon get to MW-19? Well, it could.** Right? It could.

[The City] Lagoon has a lot of water, and it goes down through the [shallow water] zone; it gets into the deep [water] zone, and there’s a component flowing to [sic] northwest towards MW-19.

The MW-19 is drilled at 230 feet, and it has water in it at 165 feet deep. So this is down there. It’s way down there. And that’s the water table; right?

They had to drill that well to 230 before [sic] hit that water. And then the cracks drained into it and filled it up to 165-foot depth. And there’s TCE in that.

Now, the private well that Connie Gray describes to us is very shallow. It’s – it’s not 250 feet deep. It’s not 165 feet deep. That’s not possible.

And the way she describe[d] it, it’s a shallow well dug next to that stream, a losing stream. That well can’t be more than 30 feet deep.

And so you've got TCE coming in horizontally to [MW-19] at least 165 feet deep. Unless you touch that, unless you get down to that level, you cannot get TCE in that well. It's not physically possible to get at deep ground water, go touch a well that's 160 feet above it. It can't happen.

So [the Rector Street Well] could not get water from the [City] Lagoon. Water does not go up, it only goes down.

(Emphasis added.)

Discussion

We presume the trial court's discretionary decision to allow Connor to opine at trial on the TCE contamination of the Rector Street Well was correct and will not disturb the decision absent an abuse of discretion. *Anglim*, 832 S.W.2d at 303. When expert testimony "is introduced and is challenged on the ground that it had not been disclosed in response to appropriate discovery, the trial court has broad discretion and may admit or reject the evidence or determine and impose other appropriate sanctions." *Blake v. Irwin*, 913 S.W.2d 923, 931 (Mo. App. W.D. 1996). It is the Grays' burden on appeal to show that the admission of Connor's expert testimony at trial was "clearly against the logic of the circumstances then before the court" and "so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Lozano*, 421 S.W.3d at 451 (internal quotations and citation omitted).

Missouri law provides that a party intending to use an expert witness has a duty to update the party's adversaries when its expert "has been deposed and he later changes his opinion before trial or bases that opinion on new or different facts from those disclosed in the deposition[.]" *Shallow v. Follwell*, 554 S.W.3d 878, 881 (Mo. banc 2018) (quoting *Washington by Washington v. Barnes Hosp.*, 897 S.W.2d 611, 622 (Mo. banc 1995)).

Nonetheless, this duty “is not intended as a mechanism for contesting every variance between discovery and trial testimony [because] [i]mpeachment of the witness will accomplish that goal.” *Id.* (quoting *Sherar v. Zipper*, 98 S.W.3d 628, 634 (Mo. App. W.D. 2003)) (alterations in original). “Rather, its purpose is to relieve a party ‘who is genuinely surprised at trial.’” *Id.* (quoting *Sherar*, 98 S.W.3d at 628).

Surprise can occur when “an expert witness suddenly has an opinion [on a matter about which] he had none before, renders a **substantially different** opinion than the opinion disclosed in discovery, uses new facts to support an opinion, or newly bases that opinion on data or information not disclosed during the discovery deposition.” *Id.* at 881-82 (quoting *Sherar*, 98 S.W.3d at 634). However, “[s]urprise cannot be manufactured,” and the deposing attorney “must ask for the expert’s opinion and/or the underlying facts or data.” *Beverly v. Hudak*, 545 S.W.3d 864, 870 (Mo. App. W.D. 2018) (quoting *Sherar*, 98 S.W.3d at 634). “A party cannot claim surprise based on ‘new opinions’ as to matters about which the expert witness has not been asked during discovery.” *Id.* The rationale for this rule is to avoid incentivizing a form of sandbagging where deposing counsel “ask[s] general questions regarding the nature of an expert’s opinion, yet refrain[s] from asking ‘ultimate issue’ questions of the expert” only to claim surprise and seek to exclude an unfavorable expert opinion on the ultimate issue at trial. *Id.* (quoting *Sherar*, 98 S.W.3d at 634).

The Western District of this Court’s decision in *Beverly* is instructive here. There, plaintiff sustained a tear to the internal wall layers of his vertebral artery (a “vertebral artery dissection”) placing him at risk of a stroke. *Id.* at 868. Following two emergency

room visits without diagnosis and persistent symptoms, plaintiff sought chiropractic care from defendant treatment provider. *Id.* Following initial treatment, which provided some symptom relief, plaintiff returned to defendant's practice the following day with recurring symptoms. *Id.* at 868-69. When plaintiff began exhibiting signs of a stroke at the appointment, plaintiff was transferred to a hospital where he was diagnosed with a vertebral artery dissection and determined to have suffered four strokes. *Id.* at 869. Plaintiff thereafter brought suit against defendant and his practice, alleging that defendant's treatment had dislodged a blood clot formed as a result of his vertebral artery dissection, causing his strokes. *Id.* The jury returned a verdict in favor of defendant and plaintiff appealed. *Id.* On appeal, plaintiff alleged, *inter alia*, that a defense expert witness had improperly been allowed to give multiple surprise opinions at trial, the most relevant to our discussion in this case being the opinion that plaintiff did not exhibit an eye condition known as nystagmus while receiving treatment from defendant. *Id.* at 869, 871. Rejecting plaintiff's claim that this expert testimony was a surprise opinion, the *Beverly* court noted that while the expert witness had been "generally asked about the causes of nystagmus" at deposition, the expert had not been asked about *plaintiff's* alleged nystagmus. *Id.* at 871. The court concluded, "[i]n order for an expert's testimony to constitute a surprise, the attorney deposing the witness must ask for the expert's opinion and/or the underlying facts or data." *Id.* (quoting *Sherar*, 98 S.W.3d at 634).

Here, the Grays contend they were unfairly surprised at trial by Connor's "new opinion" that TCE-contaminated water could not have reached the Rector Street Well. Our disposition of their claim under Point I therefore turns on whether Connor was asked

about the *Rector Street Well's* contamination at deposition. Our review of Connor's deposition transcript reveals no such questioning – indeed, no mention – regarding the Rector Street Well by the Grays' counsel. We are therefore presented with many of the same circumstances in this case as in ***Beverly*** – Connor was generally asked at deposition about the TCE contamination of the local area in the vicinity of MW-19 (which encompassed the Rector Street Well), but was never specifically asked if he had any opinions regarding the *Rector Street Well's* alleged TCE contamination. Consequently, the Grays may not now claim surprise arising from Connor's Rector Street Well opinion at trial. ***Beverly***, 545 S.W.3d at 870; *see also Blake*, 913 S.W.2d at 931 (trial court did not abuse its discretion in allowing plaintiff's expert to testify at trial to a previously undisclosed opinion on the sectioning of teeth for dental surgery because, *inter alia*, the expert was not “specifically asked at the deposition” if he had an opinion on the subject and defendant knew the sectioning of teeth was an issue in the case).

The absence of any questioning or testimony regarding the Rector Street Well's contamination at Connor's deposition plainly distinguishes the present matter from all the supporting authorities relied upon by the Grays in which expert witnesses expressly testified to aspects of a party's specific injuries at deposition before substantially altering or completely reversing their opinions at trial. *See Ralls v. Soo Line R.R.*, 710 S.W.3d 606, 608-10 (Mo. App. W.D. 2025) (undisclosed non-retained expert explicitly expressed he had no opinion due to lack of data *when asked* about the specific cause of *decedent's* lung cancer in a pre-trial deposition but later testified in his trial deposition that smoking was the sole cause of decedent's cancer); ***Z.R. by & Through T.R. v. Kansas City***

Pediatrics, LLC, 682 S.W.3d 55, 62-63 (Mo. App. W.D. 2023) (trial court had *discretion to order a new trial* where defense expert testified that a proper medical harness would have likely treated *plaintiff's* hip dysplasia at deposition but claimed the harness would have been ineffective for plaintiff at trial due to another condition the expert had not previously disclosed); *Bradford v. BJC Corp. Health Servs.*, 200 S.W.3d 173, 180-81 (Mo. App. E.D. 2006) (trial court had *discretion* to exclude testimony where expert expressly testified *plaintiff's* injury was to the tendon at deposition but then during voir dire at trial testified that the injury was to plaintiff's thigh muscle after reviewing additional evidence); *Pasalich v. Swanson*, 89 S.W.3d 555, 559-61, 564 (Mo. App. W.D. 2002) (trial court had *discretion to grant a new trial* where expert witness testified *plaintiff's* pulmonary edema was “clearly” caused by fluid administration before wholly recanting this opinion at trial); *Whitted v. Healthline Mgmt., Inc.*, 90 S.W.3d 470, 475-77 (Mo. App. E.D. 2002) (trial court had *discretion to award a new trial* where expert was unable to determine whether decedent's death occurred as a result of an electrical or pump problem in the heart *when asked* about cause of death at deposition, but then testified at trial that decedent's death was caused by cell necrosis); *Bailey v. Norfolk & W. Ry. Co.*, 942 S.W.2d 404, 412-15 (Mo. App. E.D. 1997) (trial court had *discretion to instruct the jury to disregard expert's testimony* categorically ruling out plaintiff's work conditions as even a contributing cause of his heart condition where the expert testified at deposition that he could not completely rule out that the work conditions as a partial cause); *Green*, 882 S.W.2d at 220-21 (trial court had *discretion to strike testimony* where expert explicitly stated he had no opinion due to the absence of any data *when questioned*

about plaintiff's blood toxicity levels during out-patient treatment but then testified at trial that plaintiff's blood likely did rise to toxic levels during this period of treatment). Indeed, none of these cited authorities lend us to believe that the trial court's *admission* of Connor's trial opinion regarding the TCE contamination of the Rector Street Well was "clearly against the logic of the circumstances" or "so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Lozano*, 421 S.W.3d at 451 (internal quotations and citation omitted).

The Grays nonetheless argue that, despite never actually being asked if he had an opinion regarding the Rector Street Well's contamination at deposition, Connor in effect implicitly disavowed having such an opinion by virtue of his more general testimony at deposition regarding MW-19, the Camdenton shallow water zone, and the overall scope of his opinions as an expert for Modine. This argument lacks merit. A party cannot invoke Missouri's rule against surprise to exclude "new" expert testimony at trial where the party only "ask[s] general questions regarding the nature of an expert's opinion" at deposition while "refrain[ing] from asking 'ultimate issue' questions of the expert." *Beverly*, 545 S.W.3d at 870 (quoting *Sherar*, 98 S.W.3d at 634). Moreover, while counsel for the Grays propounded various questions at deposition generally asking for all of Connor's opinions in the case, such catchall questions have been held to be insufficient to invoke the protections of surprise.⁹ *Id.* at 870-71 n.2; *Blake*, 913 S.W.2d at 931-32. To

⁹ We note that Connor testified towards the conclusion of his deposition that his report did not necessarily contain the sum-total of his opinions, suggesting that he may have had other relevant opinions to offer *if asked*.

claim surprise, “[t]he attorney deposing the witness must ask for the expert’s opinion and/or the underlying facts or data.” *Beverly*, 545 S.W.3d at 871 (quoting *Sherar*, 98 S.W.3d at 634). Ultimately, any ambiguity in the scope or substance of Connor’s testimony arose from the Grays’ failure to simply inquire into the subject of the Rector Street Well’s TCE contamination – a known issue in the case – at Connor’s deposition. Having not asked Connor for his opinions on the TCE contamination of the Rector Street Well at deposition, the Grays consequently cannot now claim on appeal they were surprised by Connor’s opinions on that subject at trial. The trial court did not abuse its discretion.

Prejudice

Even if the trial court abused its discretion in admitting Connor’s trial testimony (it did not), Point I would still fail as a matter of law because the Grays must show not just mere error by the trial court, but prejudicial error. “A party cannot be prejudiced by the admission of allegedly inadmissible evidence if the challenged evidence is merely cumulative to other evidence admitted without objection.” *Swartz v. Gale Webb Transp. Co.*, 215 S.W.3d 127, 134 (Mo. banc 2007) (quoting *In re Estate of Looney*, 975 S.W.2d 508, 514-15 (Mo. App. S.D. 1998)).

Following direct examination by Modine and cross examination by the Grays at trial, Connor was examined by Sundstrand. During this examination, the following exchange occurred:

[Sundstrand’s Counsel:] **So if you had the Rector Street Well near**

[MW-]19, do you have an opinion whether TCE from the [City Lagoon] could get – would get to that – that Rector Street Well on its way to [MW-]19?

[Connor:] Well, what we talked about today is that – my understanding and my opinion is that the – you can get to [MW-]19 in the deep [water zone], but you couldn't get to the [shallow water] zone at that location. There is some discussion about where the Rector Street Well is and how deep it is.

But my fundamental opinion is, yes, **[TCE] could get to [MW-]19. ... [But] I don't believe [TCE] would be in the [shallow water] zone in that location.**

[Sundstrand's Counsel:] **So if ... the Rector Street Well is in the [shallow water] zone, where [the Grays' expert] had it, would TCE get to the Rector Street Well from the [City Lagoon]?**

[Connor:] **No, I don't believe so.**

(Emphasis added.) The Grays raised no objection during this exchange. Accordingly, by not objecting to each instance where Connor offered the Rector Street Well opinion at trial, the Grays allowed the opinion to be properly admitted into evidence and become cumulative of substantially the same opinion that they contend was improperly admitted over their objection elsewhere. *See Sherrer v. Boston Sci. Corp.*, 609 S.W.3d 697, 714 (Mo. banc 2020) (“A party cannot be prejudiced by the admission of allegedly inadmissible evidence if the challenged evidence is merely cumulative to other evidence admitted without objection.” *Swartz v. Gale Webb Transp. Co.*, 215 S.W.3d 127, 134 (Mo. banc 2007)). Additionally, with respect to Modine in particular, the Grays concede on appeal that any TCE contamination of the Rector Street Well could not have involved Modine. In light of the foregoing, the Grays can show no harm. Point I is denied.

Point II

In their second point on appeal, the Grays allege:

The [trial court] erred in excluding [the Grays'] Exhibit 114, because [Exhibit 114] was admissible under Missouri law as direct evidence, to address issues [Respondents] raised after excluding [Exhibit 114], and to cross examine [] Modine's expert [Connor], in that, (1) [Exhibit 114] was a business record produced by [Respondents] in this case, memorializing a meeting between [Respondents] which contained admissions of party opponents on areas that were inconsistent with positions taken by [Respondents] at trial, (2) the door to this evidence was opened by [Respondents] in raising issues on cross examination of [the Grays'] expert that [Respondents] had excluded during direct examination, and (3) [] Modine on direct examination of [Connor] confirmed he had reviewed Exhibit 114 in reaching his opinions in the case, and thus, [the Grays] were entitled to cross examine [Connor] on [Exhibit 114].

We disagree.

Additional Relevant Facts

In 2001, Sundstrand and Modine were engaged in the midst of then ongoing litigation (the "remediation dispute") – separate from the present lawsuit – over each Respondent's respective responsibilities for the remediation efforts to clean up TCE contamination in the Camdenton area. Said TCE contamination encompassed the TCE contamination the Grays allege was responsible for Mr. Gray's injuries in the current action. Exhibit 114 is a May 2, 2001 letter authored by counsel retained by Sundstrand that was conveyed to retained and corporate counsel for Modine via fax, discussing various aspects of Respondents' respective legal and factual positions regarding the Camdenton TCE contamination within the context of the remediation dispute.

The correspondence set forth in Exhibit 114 was sent on Sundstrand's counsel's firm letterhead and marked "FOR SETTLEMENT PURPOSES ONLY." The preamble of Exhibit 114 indicates the letter was being sent in response to an April 16, 2001 letter from Modine's counsel "regarding settlement possibilities" and makes general note of

several prior discussions between the parties regarding a potential settlement of the remediation dispute. The letter then proceeds to address various purported portions of the April 16, 2001 Modine letter. Of note, Sundstrand's counsel, discussing the TCE contamination of the Mulberry Well, wrote that "[f]or settlement purposes, it is fair to say that both [the City Lagoon and the Plant] are likely contributors[.]" (Emphasis added.) Exhibit 114 further references purported comments by Sundstrand at an unspecified prior meeting between Respondents to the effect that "the only known and undisputed route for TCE contamination from the soil to the deep [water] zone is through MW-3 and MW-4." The letter continues, "[Sundstrand's] records indicate that the Mulberry Well did not show TCE contamination above the MCLs [(maximum contaminant levels)] until after MW-3 and MW-4 were re[-]drilled to the deep [water] zone depth." Exhibit 114 then quotes a portion of a June 10, 1999 MDNR communication purportedly advising Modine that "[t]he open boreholes at the Modine site [(MW-3 and MW-4)] are, in all likelihood, vertical drains with groundwater moving down the well from higher to lower fluid potentials." Thus, Exhibit 114 concludes, "MW-3 and MW-4 are thus the only confirmed pathways of [TCE contamination to the Mulberry Well]."

The next portion of Exhibit 114 proceeds to discuss certain legal aspects of the remediation dispute. In discussing burden of proof in the lawsuit, Sundstrand's counsel wrote that "[a]s a sophisticated environmental operator with national consultants, Modine should have understood the risks of vertically extending MW-3 and MW-4 beyond the confining shale layer without casing the wells." Exhibit 114 also comments on Modine's legal strategy in the remediation dispute, characterizing it as "suspect." Notably,

Sundstrand’s counsel disputed Modine’s claim that “the [City Lagoon] is the primary and perhaps only source of [TCE] contamination [to the deep water zone],” stating that “[w]hile [Sundstrand] will consider *for settlement discussion purposes* that the [City Lagoon] may be a source of [TCE] contamination to the deep [water] zone, *we will contest this vigorously in the litigation.*” (Emphasis added.) Exhibit 114 then references another purported statement by MDNR to Modine that “there is not convincing evidence that the former [City Lagoon] is necessarily the source, or even a source, of the [TCE] groundwater contamination.” The remainder of Exhibit 114 sets forth Sundstrand’s counsel’s view of each of Respondent’s purported responsibilities and risks with respect to the TCE contamination and remediation dispute, ultimately rejecting Modine’s settlement counterproposal and seeking further discussions to explore a possible settlement in light of upcoming discovery deadlines.

Discussion

We presume the trial court’s exclusion of Exhibit 114 at trial to be correct. *Anglim*, 832 S.W.2d at 303. A trial court’s discretion in excluding evidence is considerable. *Lozano*, 421 S.W.3d at 451. This is “particularly” so with respect to admissibility rulings “where a subjective determination of relevancy must be made,” as is the case here. *Reed v. Kansas City Mo. Sch. Dist.*, 504 S.W.3d 235, 240 (Mo. App. W.D. 2016) (quoting *Frazier v. City of Kansas City*, 467 S.W.3d 327, 338 (Mo. App. W.D. 2015)). At the outset, the Grays’ claim on appeal rests upon a flawed legal premise – Point II alleges the trial court wrongly excluded Exhibit 114 because the evidence was “admissible” pursuant to several evidentiary principles. However, the exclusion of merely

“admissible” evidence is not a basis for reversal on appeal.¹⁰ “[W]here evidence is excluded, the issue is not whether the evidence was admissible, but whether the trial court abused its discretion by excluding it.” *Herrera v. DiMayuga*, 904 S.W.2d 490, 493 (Mo. App. S.D. 1995). “We will not find an abuse of discretion in [the trial court] excluding evidence ‘unless the materiality^[11] and probative value of the evidence were sufficiently clear, and the risk of confusion and prejudice so minimal, that we could say that it was an abuse of discretion to exclude it.’” *Reed*, 504 S.W.3d at 244 (quoting *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 872 (Mo. App. E.D. 2009), *overruled on other grounds by Wilson v. City of Kansas City*, 598 S.W.3d 888, 895-96 (Mo. banc 2020)). On appeal, the Grays broadly identify four instances where the trial court is alleged to have erroneously excluded Exhibit 114 at trial. We address each in turn.

First Instance (Exhibit 114)

Exhibit 114 first arose as an issue on the fourth day of trial in the course of direct examination of the Grays’ industry-standards expert, Michael Klein (“Klein”). During his direct examination, Klein was asked to summarize his expert opinions in the case so as to give the jury a preview of his forthcoming trial testimony. As Klein was giving this summation, Sundstrand objected. Respondents argued that Klein was preparing to testify

¹⁰ For reasons discussed below, this evidence was not admissible. “[I]t is well-established that evidence of settlement negotiations is generally inadmissible[.]” *Sherrer*, 609 S.W.3d at 716.

¹¹ “Materiality is the concept of whether the offered item relates in any way to the matters in issue in the litigation.” *Still v. Ahnemann*, 984 S.W.2d 568, 574 n.2 (Mo. App. W.D. 1999) (citing McCormick on Evidence, § 185 (3d ed. 1984)). Relevant evidence “is not only material, but also has some degree of probative value as to a matter in dispute.” *Id.*

that Respondents had “exposed” the local Camdenton environment and community to hazardous chemicals (including TCE), a subject Klein had purportedly denied having opinions on at deposition, and directed the trial court to various portions of Klein’s deposition testimony in support of this contention. The Grays disputed this characterization of Klein’s deposition testimony, arguing that Klein’s “exposure” opinion had been previously disclosed and the portions of Klein’s deposition testimony relied upon by Respondents related to whether he had any specific causation opinions. Respondents proceeded to present the trial court with additional excerpts of portions of Klein’s deposition testimony, again arguing that Klein had disclaimed certain opinions at deposition that he was now preparing to testify on at trial.

Following a brief recess, which allowed the trial court and the Grays time to review the deposition excerpts, Modine, joined by Sundstrand, raised two additional objections. The first objection related to Klein’s “exposure” opinion. In the second objection, they “move[d] to exclude” Klein’s prospective opinion that Modine had violated industry standards by deepening MW-3 and MW-4 and thereby creating a pathway of TCE contamination, a “vertical drain,” to the City water supply (the “vertical drain theory”). One of the stated bases of Respondents’ second objection was that Klein had relied on Exhibit 114 in forming his vertical drain opinion. Respondents argued that Klein had disclaimed having an opinion of pathways of TCE contamination and that Exhibit 114 – as a settlement communication between legal counsel during litigation – was not a proper foundational basis for Klein’s vertical drain opinion.

In response, the Grays argued there were “two separate issues” with respect to Exhibit 114 – the document’s “admissibility” and its use as part of Klein’s opinions in the case. Regarding admissibility, the Grays asserted Exhibit 114 was a party admission by Sundstrand, identifying the “key part” of the letter as the portion stating, “As MDNR advised Modine in June of 1999, ‘[t]he open boreholes at the Modine [site] [(MW-3 and MW-4)] are, in all likelihood, vertical drains with groundwater moving down the well from higher to lower fluid potentials.’” Sundstrand conceded “[Exhibit 114] may be used as an admission against Sundstrand,” but asserted the document could not be used as an admission against Modine. The Grays replied that Exhibit 114 at minimum had “limited admissibility” which Respondents could seek an instruction on but which should not preclude the document’s admission at trial.

The parties then proceeded to argue other aspects of Klein’s vertical drain opinion – namely, whether Klein had any bases for the opinion other than Exhibit 114 and whether those bases had been disclosed in discovery. During this exchange, the trial court, referring to Exhibit 114, commented, “In public interest [sic], I’m not going to allow any settlement letter that was not making admissions by Modine or their agents to be the basis of anything that comes into evidence.” Ultimately, the trial court ruled in the relevant part that, “[a]s far as [Respondents’] second objection, the basis for [Klein’s] opinion on the vertical well, [Klein] cannot reference or is prohibited from using Exhibit 114 as any basis for his opinion based on public policy.”

We conclude the trial court’s ruling was not “clearly against the logic of the circumstances then before the court” nor “so unreasonable and arbitrary that it shocks the

sense of justice and indicates a lack of careful, deliberate consideration.” *Lozano*, 421 S.W.3d at 451 (internal quotations and citation omitted). At the outset, we note that the Grays did not actually move to introduce Exhibit 114 into evidence during the proceedings discussed above, nor did they make an offer of proof regarding Klein’s prospective testimony following the trial court sustaining Respondents’ objection to Klein testifying to Exhibit 114. We further note that Klein was still ultimately able to give testimony on the alleged vertical drain theory. On appeal, the Grays contend the trial court’s ruling was erroneous because Klein “considered [Exhibit 114] in forming his opinions” in the case, and Exhibit 114 was, at minimum, an admissible party admission by Sundstrand. We disagree.

While an expert witness may, in certain circumstances, rely upon inadmissible hearsay in forming the background of his opinions, this does not transform said hearsay into independently substantive evidence that is admissible. *State ex rel. Mo. Highway & Transp. Comm’n v. Delmar Gardens of Chesterfield, Inc.*, 872 S.W.2d 178, 182 (Mo. App. E.D. 1994). Further, a party admission is not automatically admissible. Like other types of evidence, party admissions must still be relevant in order to be admissible. *See Egelhoff v. Holt*, 875 S.W.2d 543, 551 (Mo. banc 1994) (“[Generally, t]he only [practical admissibility] requirement for [a party] admission is that it be a relevant statement of a party offered by the party’s opponent.”). Thus, such evidence remains ultimately subject to the trial court’s discretionary determination as to relevancy. *See Still*, 984 S.W.2d at 572-75 (the trial court did not error in excluding party admissions in the form of excerpts of defendant’s video deposition because the admissions had minimal relevance and

probative value). At issue on appeal here then is whether the Grays demonstrated that Exhibit 114 was so material and probative, and its evidentiary costs so minimal, that the trial court abused its discretion in barring the Grays from admitting Exhibit 114 through Klein's testimony. We conclude the Grays have failed to fulfill this burden.

With respect to Exhibit 114's materiality and probative value, the Grays argue on appeal that Exhibit 114 "directly refuted" Modine's claim at trial that its deepening of MW-3 and -4 did not create a "vertical drain" contributing to the TCE contamination of Camdenton deep water zone and, by extension, the Mulberry Well. We disagree. "[P]roof of causation in cases involving exposure to a toxic substance typically requires a certain degree of scientific expertise." *Brown for Est. of Kruse v. Seven Trails Invs., LLC*, 456 S.W.3d 864, 869 (Mo. App. E.D. 2014). "This is because '[t]he diagnosis of disease induced by environmental factors is essentially a scientific undertaking requiring proof which the scientific community deems sufficient for that causal link.'" *Id.* (quoting *Lewis v. FAG Bearings, Corp.*, 5 S.W.3d 579, 585 (Mo. App. S.D. 1999)). Accordingly, whether the deepening of MW-3 and -4 in fact actually contributed to the TCE contamination of the groundwater in Camdenton was a sophisticated scientific question clearly beyond a layperson's common understanding and thus required expert evidence to establish causation. Here, the Grays do not direct us to any portion of the record where Exhibit 114's author was established as an expert on the technical matters of hydrogeology or chemical contamination in the Camdenton area. Nor do they provide us with any legal authority holding that the conclusory assertions of a layperson regarding

technical, scientific matters can be used as the basis for an expert opinion on such matters, much less be independently admitted to prove the truth of such matters at trial.

Compounding Exhibit 114's lack of probative value is that the statements within were made by Sundstrand's legal counsel, over twenty years prior to the trial of the present case, expressing his client's position at the time on various factual and legal matters for the purpose of negotiating settlement of then ongoing litigation of a separate legal dispute between Respondents. In addition to plainly discussing prior settlement negotiations and offers, the correspondence in Exhibit 114 *inter alia* is marked "FOR SETTLEMENT PURPOSES ONLY" and explicitly adopts factual or legal positions "for settlement [discussion] purposes" at two points in the letter. As further discussed below with respect to Exhibit 114's evidentiary costs, settlement evidence is generally inadmissible in Missouri in part because the factual and legal positions taken up by parties negotiating settlement are not necessarily indicative of their true beliefs on such matters. *See St. Louis Cnty. v. River Bend Ests. Homeowners' Ass'n*, 408 S.W.3d 116, 128 (Mo. banc 2013) (in condemnation action, trial court had discretion to conclude property owner's prior settlement negotiation statement to the administrative commission was not an actual opinion of property value constituting an impeachable prior inconsistent statement or admission against interest).

We additionally note that the evidence adduced at trial in this case evinced that investigation and study of the Camdenton TCE contamination by various entities continued well past 2001 when Exhibit 114 was authored. Indeed, as recited above, Exhibit 114's assertions that MW-3 and -4 were vertical drains and the only known

sources of TCE contamination were essentially parroting the conclusory statements of MDNR in the 1990s. At the trial of the present case, not only were the actual MDNR documents containing the MDNR statements referenced in Exhibit 114 admitted into evidence, further evidence was adduced that MDNR continued to investigate MW-3 and -4 as potential vertical drains for TCE contamination of the Camdenton deep water zone and ultimately concluded the vertical drain theory was “unlikely” in 2018. For the reasons above, we conclude that Exhibit 114 had minimal, if any, probative value on the factual issue of whether Modine’s deepening of MW-3 and -4 actually created a vertical drain which resulted in a pathway of TCE contamination to the Camdenton deep water zone and Mulberry Well.

In contrast to Exhibit 114’s highly questionable probative value, its prospective admission at trial presented a clear risk of confusion and prejudice because of the document’s character as settlement evidence and the Grays’ intended use of said evidence. “In order to further the public policy favoring the settlement of disputes, it is well established that settlement offers are not admissible in a subsequent trial.” *State ex rel. Malan v. Huesemann*, 942 S.W.2d 424, 427 (Mo. App. W.D. 1997); *see also Sherrer*, 609 S.W.3d at 716 (“[I]t is well-established that evidence of settlement negotiations is generally inadmissible[.]”). Notably, this policy extends to “statements made with a clear purpose to resolve the existing dispute ... even though uttered outside the negotiating arena.” *River Bend*, 408 S.W.3d at 128 (internal quotations and citations omitted). Moreover, “[t]his policy also applies in situations involving a completed

settlement with another party in the same or *in a different case*.” **Malan**, 942 S.W.2d at 428 (emphasis added).

“The danger of admitting evidence of settlements is that the trier of fact may believe that the fact that a settlement was attempted is some indication of the merits of the case.” **Id.** Specifically, “[t]he jury could perceive the offering party as admitting guilt or conceding harm” or “be confused by a compromise position acceptable for settlement, but less favorable than the result a party might seek at trial.” **Hancock v. Shook**, 100 S.W.3d 786, 799 (Mo. banc 2003). This has “the natural tendency with the jury to denigrate the defense position at trial.” **River Bend**, 408 S.W.3d at 128. Thus, Missouri’s public policy disfavors the admission of such evidence because “[n]o one would make [settlement] offers if the risk of their being before the jury were a necessary corollary of the offer.” **Id.** (quoting **J.A. Tobin Const. Co. v. State Highway Comm’n of Mo.**, 697 S.W.2d 183, 186 (Mo. App. W.D. 1985)). The default rule is that settlement evidence “should be kept from the jury unless a clear and cogent reason exists for admitting a particular settlement agreement.” **Mengwasser v. Anthony Kempker Trucking, Inc.**, 312 S.W.3d 368, 376 (Mo. App. W.D. 2010) (quoting **O’Neal v. Pipes Enters., Inc.**, 930 S.W.2d 416, 423 (Mo. App. W.D. 1995)).

Here, the contents of Exhibit 114 as described above clearly constitute “statements made with a clear purpose to resolve the [then] existing dispute” between Respondents in 2001, **River Bend**, 408 S.W.3d at 128, and the Grays’ attempts to introduce Exhibit 114 at trial presented the trial court with a “situation[] involving a completed settlement [between Respondents] ... in a different case.” **Malan**, 942 S.W.2d at 428. Consequently,

Exhibit 114 constituted settlement evidence and the Grays bore the burden of presenting the trial court with a “clear and cogent reason” for the document’s admission at trial. Given Exhibit 114’s tenuous probative value as discussed above, we conclude the Grays failed to satisfy this burden. Significantly, the Grays’ intended use of Exhibit 114 went beyond the public policy concerns typically associated with the admission of settlement evidence in that the Grays sought to admit Sundstrand’s prior settlement statements regarding the vertical drain theory in Exhibit 114 not against Sundstrand but against *Modine*. Not only would this risk the jury improperly taking Sundstrand’s statements as evidence of Modine’s liability due to confusion or prejudice, but future parties involved in environmental disputes would certainly be discouraged from engaging in settlement if adverse statements by one party during negotiations could then be admitted against the other party in a subsequent lawsuit for the truth of the matter asserted.

The Grays nonetheless argue on appeal their proposed use of Exhibit 114 at trial fell into an exception to the general prohibition on settlement evidence in that Exhibit 114 contained “admissions,” citing to *Noel v. Roberts*, 449 S.W.2d 572 (Mo. 1970), and *Stan Cushing Const. Co., Inc. v. Cablephone, Inc.*, 816 S.W.2d 293, 295 (Mo. App. S.D. 1991). This reliance is misplaced. In *Noel*, the Supreme Court of Missouri addressed the trial court’s discretion¹² to grant a new trial in a personal injury action in which defendant

¹² “A trial court has great discretion in determining whether to grant a new trial. [] Its decision is presumed to be correct and will be reversed on appeal only for an abuse of discretion.” *Precision Elec., Inc. v. Ex-Amish Specialties, Inc.*, 400 S.W.3d 802, 808 (Mo. App. W.D. 2013) (internal quotations and citations omitted).

was accused of personally assaulting plaintiff. 449 S.W.2d at 572. One of the trial court's grounds for granting a new trial in *Noel* was the exclusion of insurance evidence, offered by defendant, in the form a brief representation letter from plaintiff's counsel to defendant expressly requesting notice to defendant's insurance carrier for assault by "[defendant's] employee." *Id.* at 572-74. On review, the Supreme Court of Missouri held that the representation letter was "admissible" in light of defendant's defense in the case that he was out of town at the time of the alleged assault and because it was defendant himself who offered the evidence of his own insurance.¹³ *Id.* at 574.

Noel is distinguishable from the current matter in several respects. Unlike in *Noel*, where the defendant sought to admit generally inadmissible evidence of his own insurance, *id.*, the Grays in this case sought to admit evidence of Respondents' settlement against Respondents, the very parties whom the general rule against settlement evidence is intended to shield. Moreover, the insurance evidence at issue in *Noel* was a brief notice of representation letter proffered as evidence on the relatively unsophisticated matter of the identity of plaintiff's alleged attacker – defendant's employee as opposed to defendant himself. *Id.* We are unpersuaded that this is at all analogous to the Grays' attempt at trial to offer settlement correspondence containing substantive discussions of Respondents' negotiations and positions on factual and legal matters as direct evidence on technical matters of scientific fact related to the Camdenton TCE contamination that

¹³ "It is considered prejudicial for a plaintiff to indicate that a defendant has liability insurance. However, here it was the defendant who offered the letter suggesting he might have insurance and it does not appear how that could be prejudicial to the plaintiff." *Noel*, 449 S.W.2d at 574.

required expert evidence to prove. Ultimately, the *Noel* court concluded the disputed insurance evidence was “admissible” and that there was no error in the *trial court* exercising its discretion to grant a new trial based on the evidence’s exclusion. *Id.* That is not the procedural posture here. In the present case, the trial court exercised its broad discretion to both exclude Exhibit 114 and deny the Grays’ subsequent request for a new trial. *Noel* does not lend us to believe that the trial court here abused its discretion under such circumstances.

Our decision in *Cushing* is similarly unavailing to aid the Grays’ position here. Our holding there did not turn on the admissibility of “settlement” evidence. Rather, we noted in *dicta* that “[i]f the [excluded] exhibit [was] part of an offer of settlement, and that is not clear,” the evidence would have been “admissible” to show that the defendant in fact had possession of certain corporate property defendant had improperly held in trust. 816 S.W.2d at 295. Even if we were inclined to apply said *dicta* here, it would be distinguishable from the present matter. Similar to *Noel*, the evidence at issue in *Cushing* consisted of “two letters listing [corporate] vehicles and equipment” offered on the relatively unsophisticated matter of defendant’s possession of said property. *Id.* We are again unconvinced that such circumstances are remotely comparable to proffering legal counsel’s substantive settlement negotiations as evidence on the technical matters of the scientific facts at issue in the Grays’ case.

Accordingly, weighing Exhibit 114’s prospective materiality and probative value against the evidentiary cost of introducing prejudice and confusion at trial, we conclude

the trial court did not abuse its discretion in prohibiting Klein from referencing Exhibit 114 or relying on it as the basis of his expert opinions on the vertical drain theory at trial.

Second Instance (Exhibit 114)

The issue of Exhibit 114's admissibility next arose during Klein's re-direct examination on the sixth day of trial. Following Klein's testimony that he was aware of Respondents' prior remediation dispute regarding the Camdenton TCE contamination, the following exchange occurred:

[Grays' Counsel:] All right. And let me hand you what's marked as Exhibit 114.

(Sidebar held.)

[Modine's Counsel:] We object for the same basis that the [trial court] has already rule[d]. There's no way that [Exhibit 114] is coming in.

[Grays' Counsel:] This has been opened up. [Exhibit 114] is a business record in which Sundstrand is claiming that Modine created – here it is.

[(Reciting.)] 'The only hazards and undisputed route for TCE contamination from the soil (inaudible). The [M]ulberry Well did not show TCE contamination above MCLs [(maximum contaminant levels)] until they were revealed to the deep [water] zone.'

[Modine's Counsel:] Number one, [the trial court] already heard that argument and [ruled] that [Exhibit 114] was not coming into evidence. Number [two], [Klein] has testified that the levels were above EPA limits before [MW-3 and MW-4] were deepened, not after, so it's –

[Sundstrand's Counsel:] Also – I'll also just add that what [Sundstrand's] lawyers say is not admissible against [Modine]. It's hearsay. ... What [Sundstrand's] lawyer wrote in a lawyer letter in a dispute in litigation is not admissible against Modine because it's hearsay as to [Modine]. It can't be put in for the truth of the matter that [Sundstrand's] lawyer took a position in litigation.

[Grays' Counsel:] It's admissible against [Sundstrand]. And this has been an issue –

[Sundstrand's Counsel:] But [the Grays] don't have a vertical drain theory against [Sundstrand].

[Grays' Counsel:] In [the prior] lawsuit, Sundstrand was claiming that Modine created all the [TCE] contamination by deepening [MW-3] and [MW-4]. This is information [Klein] relied upon; this is information that contradicts the position he just took in his entire cross-examination.

[Modine's Counsel:] [Exhibit 114] is a settlement communication that the [trial court] has found inadmissible.

[Grays' Counsel:] [Exhibit 114] is not a settlement document.

....

[Modine's Counsel:] Sundstrand's lawyer letter doesn't come in to contradict Modine.

[Trial Court:] I'm going to sustain the objection.

(Sidebar ended.)

The trial court's ruling excluding Exhibit 114 was not "clearly against the logic of the circumstances then before the court" nor "so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Lozano*, 421 S.W.3d at 451 (internal quotations and citation omitted). At the outset, we again note the absence of any offer of proof showing what Klein's testimony regarding Exhibit 114 would have been following the trial court sustaining Modine's objection to Exhibit 114's admission. Nonetheless, turning to the grounds presented to the trial court for Exhibit 114's admission at sidebar, the Grays again argued that Exhibit 114 was admissible as a party admission by Sundstrand and as evidence Klein relied upon in forming his expert opinions. For the same reasons set forth in our discussion above regarding the Grays' first

proffer of Exhibit 114, these arguments had no merit and the trial court rightly rejected them.

The Grays also asserted to the trial court that Exhibit 114 was admissible as a “business record” and that the door to Exhibit 114 had been “opened up.” However, business records and rebuttal evidence – even through an “opened door” – must still be relevant in order to be admissible. See *Rouse Co. of Mo., Inc. v. Justin’s Inc.*, 883 S.W.2d 525, 530 (Mo. App. E.D. 1994) (quoting *Peters v. Johnson & Johnson Prods., Inc.*, 783 S.W.2d 442, 444 (Mo. App. E.D. 1990)) (“‘[T]he bottom line’ regarding the admissibility of the business records is the discretionary determination by the trial court of their trustworthiness.”); *Brummett v. Burberry Ltd.*, 597 S.W.3d 295, 307 (Mo. App. W.D. 2019) (the scope of admissible rebuttal evidence, even following an opened door, “is within the trial court’s discretion, and that discretion will be given deference on appeal”).

With respect to Exhibit 114’s admission as a purported Sundstrand business record, the document’s mere character as such a business record would not cure Exhibit 114’s lack of probative value on technical matters of scientific fact nor the evidentiary costs associated with its admission that we have discussed above. The Grays’ reliance on appeal on the holdings in *Hoodco of Poplar Bluff, Inc. v. Bosoluke*, 9 S.W.3d 701, 703 (Mo. App. S.D. 1999), *Friese v. Mallon*, 940 S.W.2d 37, 40 (Mo. App. E.D. 1997), and *Sigrist By & Through Sigrist v. Clarke*, 935 S.W.2d 350, 353-54 (Mo. App. S.D. 1996), is misplaced. Each of these cases addressed the admissibility of qualified business records *under section 490.680, RSMo*. See *id.* We note that even section 490.680 “does

not make relevant that which is not otherwise relevant, nor make all business and professional records competent evidence regardless of by whom, in what manner, or for what purpose they were compiled or offered[.]” *Kauffman v. Tri-State Motor Transit Co.*, 28 S.W.3d 369, 372 (Mo. App. S.D. 2000) (quoting *Kitchen v. Wilson*, 335 S.W.2d 38, 43 (Mo. 1960)). Moreover, “the party offering [a document as business record under section 490.680] must show, among other things, how the document was prepared and that it was made in the regular course of business at or near the time of the act it records.” *Gemini Cap. Grp., LLC v. Tripp*, 445 S.W.3d 583, 589 (Mo. App. S.D. 2013). Here, the Grays direct us to no portion of the record where they made such showings to the trial court with respect to Exhibit 114. “[W]hen the business record is not of the character comprehended by [section 490.680], it is relegated to the status of hearsay and as such is not admissible in evidence.” *Kauffman*, 28 S.W.3d at 372 (quoting *Kitchen*, 335 S.W.2d at 43); *see also Alberswerth v. Alberswerth*, 184 S.W.3d 81, 101-02 (Mo. App. W.D. 2006) (“A trial court is afforded broad discretion in determining whether the parties complied with section 490.680.”).

Regarding Exhibit 114’s admission as rebuttal or “opened door” evidence, the Grays’ attempt to offer Exhibit 114 as evidence that the deepening of MW-3 and -4 created a vertical drain in fact contributed to the TCE contamination of the Camdenton deep water zone and Mulberry Well suffered from the same relevance issue discussed above – whatever meager probative value Exhibit 114 may have had was clearly outweighed by its evidentiary costs in terms of risking confusion, prejudice, and harm to public policy. The same is true of the Grays’ apparent contention that Sundstrand’s

statements regarding the vertical drain theory in Exhibit 114 was proof positive that, contrary to Sundstrand’s position at trial, the City Lagoon was not in fact the sole or primary source of the Camdenton TCE contamination. The Grays’ reliance on decisions addressing the admission of opened door evidence in *Curl v. BNSF Ry. Co.*, 526 S.W.3d 215, 226 (Mo. App. W.D. 2017), *Union Elec. Co. v. Metro. St. Louis Sewer Dist.*, 258 S.W.3d 48, 57 (Mo. banc 2008), *Yaeger v. Olympic Marine Co.*, 983 S.W.2d 173, 186–87 (Mo. App. E.D. 1998), and *State v. McFall*, 737 S.W.2d 748, 756 (Mo. App. S.D. 1987), is unavailing. The Grays fail to provide any developing analysis applying the purported applicable law from their cited authorities to the specific facts of this case; and, indeed, none of these authorities lead us to believe that the trial court abused its discretion in *excluding* Exhibit 114 as opened door evidence. *See Curl*, 526 S.W.3d at 226 (“When a party opens the door to a topic, the admission of rebuttal evidence on that topic becomes *permissible*.”) (emphasis added.); *Union Elec.*, 258 S.W.3d at 57 (trial court did not err in *admitting* disputed expert testimony because the defendant opened the door);¹⁴ *Yaeger*, 983 S.W.2d at 186-87 (trial court did not abuse its discretion in *admitting* evidence of plaintiff’s prior drinking treatment and habits because plaintiff opened the door); *McFall*, 737 S.W.2d at 756 (in a criminal action, trial court did not err in *admitting* disputed expert testimony pursuant to the invited error doctrine).

¹⁴ “[A] party *may* open the door to otherwise inadmissible testimony from the opposing side if it first introduces such evidence.” *Union Elec.*, 258 S.W.3d at 57 (emphasis added).

The Grays’ nominal reliance on court decisions addressing the application of the adverse inference rule in *Bair v. Faust*, 408 S.W.3d 98, 103 (Mo. banc 2013), *Marchosky v. St. Luke’s Episcopal Presbyterian Hosp.*, 363 S.W.3d 121, 126 (Mo. App. E.D. 2012), *Barnes v. Kissell*, 861 S.W.2d 614, 619-620 (Mo. App. W.D. 1993), and *Calvin v. Jewish Hosp. of St. Louis*, 746 S.W.2d 602, 605 (Mo. App. E.D. 1988), is similarly misplaced. The adverse inference rule allows for “an unfavorable inference to be drawn against a party [or witness], knowledgeable of the facts of the controversy, who *fails* to testify,” except where “the sole reason for the failure to testify was the opponent’s motion to exclude the testimony.” *Bair*, 408 S.W.3d at 103 (quoting *Pasternak v. Mashak*, 428 S.W.2d 565, 568 (Mo. 1967)). Here, we are not presented with a situation where opposing counsel directly commented on the total absence of a witness’s or party’s testimony or presence from trial. The Grays’ cited authorities are therefore inapt.

The trial court did not abuse its discretion in sustaining Modine’s objection to Exhibit 114 during the re-direct examination of Klein.

Third Instance (Exhibit 114)

Exhibit 114’s admission was then raised again during the adjudication of various trial matters in a bench conference outside the presence of the jury at the beginning of the seventh day of trial. In the relevant portion, counsel for the Grays stated the following to the trial court:

Your Honor, one other just small issue. I understand the [trial court]’s ruling on Exhibit 114. [Exhibit 114] is the letter between Sundstrand and Modine’s counsel and that we attempted to introduce yesterday. [Exhibit 114’s] been produced as a business record. Within [Exhibit 114], it identifies what was said between [Respondents] at a

meeting, and those would be admissions of a party opponent that the trouble with us not being able to admit this is that – I mean, [Exhibit 114]’s admissible in evidence. And the problem that it creates is a really significant problem, which is, [Exhibit 114’s exclusion] prevents us from showing the evidence that Sundstrand was saying that Modine created a vertical drain that contaminated the [Camdenton] water supply.

And so [Respondents] then get to come up and act like we’ve made up this theory about the vertical drain causing [TCE] contamination in the [Camdenton] community when that’s what Sundstrand was alleging against [Modine].

So [Exhibit 114’s] admissible as a party opponent that that’s [sic] what Sundstrand was alleging at that time, and the prejudice to us is enormous. Because then [Respondents] get to come in and act like, under this facade, that there was never any – we’ve made this [vertical drain theory] up out of whole cloth.

And that – [the trial court] saw the cross-examination [of Klein] yesterday, and it can really simply be remedied with their business record where they make admissions that that’s what Sundstrand was claiming. And that’s what I told the jury in opening statement, and so there really is significant prejudice in us not being able to admit this business record.

I’ve provided [Exhibit 114] to the [trial court]. I’m not going to reargue it, but I do want the record to be clear on that.

Respondents thereafter each presented arguments in response, each essentially reiterating their respective arguments previously made at trial with respect to Exhibit 114’s admission. In reply, the Grays again identified the portions of Exhibit 114 discussing the alleged TCE contamination of the Camdenton deep water zone via the purported vertical drains of MW-3 and -4. They further argued that Exhibit 114, in addition to being admissible as a party admission by Sundstrand, was admissible for the non-hearsay “purposes of the effect on the listener and subsequent conduct[.]” The trial court ruled “I’m going to stand by my prior rulings.” The jury was then called into the courtroom and the Grays’ redirect examination of their expert Klein resumed.

We determine the trial court's reaffirmed ruling was not "clearly against the logic of the circumstances then before the court" nor "so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Lozano*, 421 S.W.3d at 451 (internal quotations and citation omitted). We have already addressed the Grays' arguments regarding Exhibit 114's admissibility as a Sundstrand party admission or business record and rejected them. With respect to the Grays' contention that Exhibit 114 was admissible at trial for non-hearsay purposes, we note the Grays' failed to provide the trial court with any facts necessary to genuinely evaluate whether Exhibit 114 was indeed admissible for such purposes – *e.g.*, *what* Exhibit 114's supposed effect was on *what* "listener" or "subsequent conduct." On appeal, the Grays in essence contend Exhibit 114 was relevant for the non-hearsay purpose of showing that Sundstrand had given a prior inconsistent statement that the City Lagoon was not a source of the TCE contamination in Camdenton area. Because Sundstrand's position at trial was that the City Lagoon was in fact the sole or primary source of TCE contamination in Camdenton, the Grays argue, Exhibit 114 was admissible to attack Sundstrand's credibility, an issue which is never collateral. We disagree.

The Grays have failed to demonstrate that the trial court was bound to follow their construction of Exhibit 114 as a prior inconsistent statement by Sundstrand. *See River Bend*, 408 S.W.3d at 128 (in condemnation action, trial court had discretion to conclude property owner's prior settlement negotiation statement to the administrative commission was not an actual opinion of property value constituting an impeachable prior inconsistent statement or admission against interest). Their cursory reliance on *Mitchell*

v. Kardesch, 313 S.W.3d 667, 681 (Mo. banc 2010), is misplaced. The Supreme Court of Missouri in *Mitchell* specifically addressed the impeachment of a testifying *witness's* credibility. *See id.* at 679-81. Here, the Grays' proffer of Exhibit 114 at the bench conference occurred during the presentation of their case-in-chief with their expert Klein set to take the stand to continue his redirect examination. Our review of *Mitchell* does not reveal, and the Grays do not direct us to, any holding which stands for the proposition that the Grays were entitled to introduce Exhibit 114 during their case-in-chief as impeachment evidence to attack Sundstrand's credibility without any competent witness for Sundstrand having testified on the witness stand at that point in the trial.

We are also unpersuaded by the Grays' contentions that Exhibit 114 was admissible to rebut purported inferences raised by Respondents at trial regarding the merits and origins of the vertical drain theory. As discussed above with respect to Exhibit 114's prospective probative value versus its evidentiary costs, the trial court's rejection of Exhibit 114 as relevant evidence on the scientific merits of the Grays' vertical drain theory at trial was not an abuse of discretion. The same is true of Exhibit 114's exclusion as evidence on the scientific merits of the City Lagoon as a source of TCE contamination in the Camdenton area.

We also conclude that the trial court's exclusion of Exhibit 114 as evidence on the origins of the vertical drain theory was not an abuse of discretion. As an initial matter, we note that the Grays' conclusory statements to the trial court that Exhibit 114's exclusion had allowed Respondents to "come up and act like [the Grays] made up this theory about the vertical drain" or "come in and act like, under this facade, that ... [the Grays] made

this [vertical drain theory] up out of whole cloth[,]” did not advise the trial court on the particular bases for the Grays’ proffer of Exhibit 114 as rebuttal evidence. On appeal, the Grays specify that it was counsel for Modine’s comments regarding the vertical drain theory during Modine’s opening statement and portions of Modine’s cross-examination of Klein which purportedly opened the door to the introduction of Exhibit 114 as rebuttal evidence on the issue of the origin of the vertical drain theory.

The Grays initially complain that Modine inaccurately commented in opening statement that there was no basis for the theory that MW-3 and -4 acted as vertical drains for TCE contamination and that the Grays had “created” the vertical drain theory for the present lawsuit against Respondents. The Grays contend that Sundstrand’s statements in Exhibit 114 demonstrated that it was instead Sundstrand, not the Grays, who had created the vertical drain theory. We disagree. At the outset, the disputed opening remarks to the jury by Modine were as follows:

[T]he second theory [the Grays] have is that because Modine deepened [MW-3 and -4] on [the Plant], [this] created a dry vertical drain that caused water to go from the higher groundwater level – so there’s groundwater, you know, 100 feet below the ground; there’s groundwater 500 feet below the ground. The [vertical drain] theory is that Modine, by drilling [MW-3 and -4], caused [TCE-contaminated] water to go down in this deep [water zone], and that got into the Mulberry Well. Now, you won’t have a single witness who can actually connect any of that. **It’s just, somebody at MDNR threw [the vertical drain theory] out as a theory one time, and so [the Grays] went with it.**

(Emphasis added.) Thus, contrary to the Grays’ representations on appeal, Modine’s opening statement expressly acknowledged that it was MDNR, not the Grays, who had created the vertical drain theory. Also contrary to the Grays’ representations, Exhibit

114's references and clear reliance on statements by MDNR regarding the vertical drain theory also evidence that it was MDNR, not Sundstrand, who had originated said theory. Consequently, Exhibit 114's admission at trial would not have actually rebutted the portion of Modine's opening statement that the Grays dispute on appeal. This would equally be true with respect to the complained-of portions of Modine's cross-examination of Klein regarding the vertical drain theory. We find no merit in the Grays' complaints that counsel for Modine's reference to the vertical drain theory as "[Klein's] theory" on cross-examination created a false inference that Klein had created the theory. Klein was in fact advancing the vertical drain theory as one of his expert opinions at trial on behalf of the Grays. Given that Klein testified on cross-examination that his vertical drain opinion was solely based on initial findings by MDNR, which MDNR itself later deemed "unlikely[,]," it was not misleading or unfair to characterize the vertical drain theory as Klein's own.

Ultimately, to the extent Exhibit 114 was relevant to the question of who had created the vertical drain theory, any probative value it had at trial was clearly outweighed by its evidentiary costs as set forth above. In light of the foregoing, the trial court did not abuse its discretion in rejecting the Grays' proffer of Exhibit 114 at the bench conference.

Fourth Instance (Exhibit 114)

Following the presentation of the Grays' case-in-chief, the admissibility of Exhibit 114 arose again during the Grays' cross-examination of Modine's expert, Connor, on the 12th day of trial. The relevant portion of the exchange in question was as follows:

[Grays' Counsel:] Did you see that SECOR, that was Sundstrand's expert or consultant out there, did you see that Sundstrand itself had taken the position that the only known [TCE] contamination – or that are the only known and undisputed route for TCE contamination from the soil to the deep groundwater were through [MW-3 and -4?]

[Modine's Counsel:] Object, Your Honor. May we approach[?]

....

(Sidebar begins.)

[Modine's Counsel:] **[Counsel for the Grays] is reading from [Exhibit 114]** [that] the [trial court] has repeatedly excluded and said that [Exhibit 114] should not be –

[Grays' Counsel:] And **I haven't offered [Exhibit 114]**. It's information [Connor] reviewed. And I'm not going to –

[Modine's Counsel:] I told [Connor] not to testify about [Exhibit 114], because the [trial court] has excluded it.

[Grays' Counsel:] But [Connor's] seen [Exhibit 114] and he reviewed it. All I'm asking is, is [Connor] aware that – if everybody else – that Sundstrand identified that the only known source of this water to go from where it was to where it went, was by deepening those two wells.

I'm not offering [Exhibit 114] into evidence. I'm asking about the basis of [Connor's] opinions.

[Sundstrand's Counsel:] I would only add that if [the Grays are] not offering [Exhibit 114] into evidence, an expert can rely upon hearsay, et cetera, but that doesn't make the hearsay admissible. So we shouldn't just read from [Exhibit 114].

[Modine's Counsel:] Can't read hearsay from an inadmissible document.

[Trial Court:] I'm going to sustain the objection.

(Sidebar ended.)

[Grays' Counsel:] All right. I want to move on and ask you a few questions about the [City Lagoon] discharge.

(Emphasis added.)

Again, we determine that the trial court’s ruling was not “clearly against the logic of the circumstances then before the court” nor “so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration.”

Lozano, 421 S.W.3d at 451 (internal quotations and citation omitted). At the outset, we note that Modine’s objection was to the Grays’ counsel attempting to read Exhibit 114’s contents into the record as part of his cross-examination of Connor, and that counsel for the Grays expressly represented he was “not offering [Exhibit 114] into evidence.”

Accordingly, we conclude there was no error in the trial court sustaining Modine’s objection. Again, while an expert witness may, in certain circumstances, rely upon inadmissible hearsay in forming the background of his opinions, this does not transform said hearsay into independently admissible evidence. *Delmar Gardens*, 872 S.W.2d at 182.

On appeal, the Grays nonetheless argue that they were at least entitled to cross-examine Connor regarding the underlying substance of Exhibit 114 because Exhibit 114 – a document Connor reviewed as part of his preparation in the case – “directly contradicted” Connor’s trial testimony regarding the vertical drain theory. We disagree. “[I]t is well established that the extent and scope of cross-examination in a civil action is within the sound discretion of the trial judge” *Miller v. SSM Health Care Corp.*, 193 S.W.3d 416, 421 (Mo. App. E.D. 2006); *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 868-69 (Mo. banc 1993). “This is especially true for cross-examinations of expert witnesses.” *Miller*, 193 S.W.3d at 421. While there is generally “wide latitude” to

test an expert witness's "qualifications, credibility, skill or knowledge" or the "value and accuracy" of his opinion on cross-examination, it is not unfettered. *Id.*; *see generally Holdeman v. Stratman*, 556 S.W.3d 46, 51 (Mo. App. W.D. 2018) (trial court did not abuse its discretion in precluding defendant from introducing pre-trial settlement evidence to impeach plaintiffs' expert witness because said evidence had no logical connection to the expert's conclusions and did not show bias on the expert's part); *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 149-51 (Mo. banc 1998) (trial court did not abuse its discretion in refusing to disclose a pre-trial settlement between some of the parties to case to the jury); *Mitchell*, 313 S.W.3d at 676 ("Cross-examination of a witness on the stand for the purpose of impeaching that witness ... has [long] 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.").

Here, the Grays again argue that Exhibit 114 was "directly relevant" to establish the vertical drain theory as a cause of the Camdenton TCE contamination. However, as discussed above, the fact that Sundstrand's counsel, who was not shown to be a scientific expert, had previously taken a position in Exhibit 114 advancing the vertical drain theory as part of settlement negotiations had little if any probative value on the scientific question of whether a vertical drain had actually contributed to the TCE contamination of the City water supply. Nor did Exhibit 114 contain any prior inconsistent statements by Connor. Thus, the Grays have failed to demonstrate how questioning Connor regarding the Sundstrand's conclusory assertions in Exhibit 114 would have genuinely "tend[ed] to

test [the] accuracy, veracity or credibility” of Connor’s expert opinions on the vertical drain theory. *See generally Mitchell*, 313 S.W.3d at 670.

The Grays’ reliance on *Miller*, *Callahan*, and *State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831, 835 (Mo. banc 2000), is misplaced. Both *Miller* and *Callahan* can be readily distinguished from the case here on their facts. In contrast to the present matter where Connor merely reviewed Exhibit 114 – a settlement negotiation correspondence authored by Sundstrand for a prior remediation dispute that Connor had no involvement in – *Miller* addressed the limited use of an expert witness’s professional censure to impeach his credibility and veracity, 193 S.W.3d at 420-22, while *Callahan* addressed the impeachment of an expert witness using evidence evincing his bias and prejudice arising from pecuniary benefits the expert received from a former party to the lawsuit, 863 S.W.2d at 868-69. With respect to *Dandurand*, while the Supreme Court of Missouri in that case generally recognized that “an expert witness [may be cross-examined] 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[,]” 30 S.W.3d at 835, the Supreme Court’s holding addressed the *discoverability* of a retained expert’s opinions through discovery of all materials provided to him. *Id.* at 834-36 (“All material given to a testifying expert must, if requested, be disclosed.”). *Dandurand*’s statement of law on the general scope of an expert witness’s cross-examination at trial does not demonstrate the trial court here abused its discretion in preventing the Grays from cross-examining Connor on Exhibit 114 at trial because Exhibit 114 did not

genuinely contradict or weaken the basis for Connor’s opinion on the vertical drain theory for the reasons explained above.

Ultimately, the trial court’s exclusion of Exhibit 114 at trial boiled down to balancing the materiality and probative value of the evidence (*i.e.*, Exhibit’s 114 logical relevance) against its risk for prejudice, confusion, and harm to public policy (*i.e.*, Exhibit 114’s legal relevance). See ***State v. Vignolo***, 2025 WL 3706267, *4 (Mo. App. S.D. Dec. 22, 2025) (“Even logically relevant evidence is admissible only if it also is legally relevant, *i.e.*, its probative value outweighs its unfairly prejudicial effect.”). The trial court was in the best position to weigh these considerations, ***Pittman v. Ripley Cnty. Mem’l Hosp.***, 318 S.W.3d 289, 294 (Mo. App. S.D. 2010), and the Grays have failed to show that the trial court abused its “considerable” discretion in making its relevancy determination with respect to Exhibit 114. The trial court’s exclusion of Exhibit 114 at trial was not “clearly against the logic of the circumstances then before the court” nor “so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration.” ***Lozano***, 421 S.W.3d at 451 (internal quotations and citation omitted).

Prejudice

Even if the trial court erred in excluding Exhibit 114 at trial (it did not), we determine no prejudice occurred. “The exclusion of evidence which has little, if any, probative value is usually held not to materially affect the merits of the case and hence, error in rejecting such evidence is not grounds for reversal.” ***Lewis v. Wahl***, 842 S.W.2d 82, 85 (Mo. banc 1992). As discussed above, Exhibit 114 had little if any probative value

to the issues in this case. Additionally, no prejudice exists where “excluded evidence is cumulative to other evidence admitted at trial.” *Baker v. Baker*, 690 S.W.3d 616, 620 (Mo. App. S.D. 2024). As noted above, Exhibit 114’s assertions that MW-3 and -4 were vertical drains and the only known sources of TCE contamination referenced and directly quoted statements by MDNR regarding the vertical drain theory in the 1990s. Again, the actual MDNR documents containing these MDNR vertical drain statements were admitted into evidence at the Grays’ trial. These admitted MDNR documents, like Exhibit 114, further demonstrated that it was MDNR who had originally created the vertical drain theory. Regarding Sundstrand’s prior position that the City Lagoon was not a likely source of TCE contamination as expressed in Exhibit 114, other correspondence by Sundstrand expressing the same position was admitted into evidence at trial. Finally, following the complained-of ruling described above where the trial court prevented the Grays from reading Exhibit 114’s contents into evidence during the their cross-examination of Connor, the trial court subsequently permitted the Grays to cross-examine Connor, over both Respondents’ objections, on the very subject matter the Grays claim they were initially barred from inquiring into – Connor’s knowledge or review of documents regarding Sundstrand’s prior position on the Camdenton TCE contamination. In light of the foregoing, the Grays can show no harm as result of Exhibit 114’s exclusion at trial. Point II is denied.

Point III

The Grays’ third point on appeal contends:

The [t]rial [c]ourt erred in excluding evidence of the cooperation agreement between Modine and Sundstrand regarding the contamination in Camdenton, because such evidence was relevant and admissible on the issues of interest, bias, credibility, and to address issues raised at trial by [Respondents], in that the contractual agreement required the parties to work together to prevent further investigation or remediation of the TCE contamination and included a requirement to coordinate all communications regarding the contamination, which agreement was still in place and in force at the time of trial, and it rebutted issues interjected at trial by [Respondents].

Again, we disagree.

Additional Relevant Facts

The argument section of the Grays' Appellants' Brief for Point III specifies that "evidence of the cooperation agreement between Modine and Sundstrand" refers to a document designated at trial as Exhibit 271. Exhibit 271 is a contractual agreement between Sundstrand and Modine, executed in February 2002, setting forth the terms of settlement for the remediation dispute between Respondents that was discussed above in relation to Exhibit 114. Of note, the settlement agreement set forth in Exhibit 271 contains the following recitals:

... Sundstrand is involved in a voluntary superfund action involving the former [City] Lagoon and Modine is involved in a Hazardous Waste Corrective Action Order [("Consent Order")] with [MDNR] regarding [the Plant] ... (collectively the "Area"), and [Respondents] wish to cooperate with each other to manage more efficiently and effectively future investigative and remedial activity in the Area[.]

... [T]he parties to this Agreement [(Respondents)] wish to settle and compromise all claims set forth in [the remediation dispute] and to resolve and/or plan for potential future issues ... involving known and unknown TCE contamination at the [Plant] ...[.]

In the portion relevant to this appeal, Exhibit 271 sets out the following provisions with respect to “DEEP GROUNDWATER [15] CONTAMINATION”:

Remedial and Investigative Activities. Sundstrand will manage without any financial contribution from Modine, all remedial and investigative actions required of Modine or Sundstrand by any properly authorized government agency, or court of law, or through Sundstrand’s voluntary activities with respect to TCE contamination resulting from prior operational activities at the former [City] Lagoon or at the [Plant] ... in the Area and the surrounding vicinity. ...

Coordination. Modine will coordinate with Sundstrand all activities as much as reasonably practical, pursuant to its current [Consent] Order [with MDNR] and any subsequent [Consent] Orders that could impact Sundstrand’s activities with the Deep Groundwater Modine will not agree, consent, or acquiesce to any Deep Groundwater activities that could impact Sundstrand’s obligations relative to the Deep Groundwater without Sundstrand’s consent, which consent shall not unreasonably be withheld.

Cooperation. Modine will cooperate with Sundstrand with regard to all the above activities relating to the Deep Groundwater, including sharing of information, coordination of communication, claims, or any other activities, including those relative to the City ... and any other third parties. Modine will not have any communication with the City ... or any third party of the variety that reasonably may impact Sundstrand’s activities with respect to the Deep Groundwater.

In the portion relevant to this appeal, Exhibit 271 further sets out the following provisions with respect to “SHALLOW GROUNDWATER CONTAMINATION”:

Cooperation. [Respondents] will cooperate with each other in persuading any regulatory body, including [] MDNR, that no further investigative or remedial work is necessary in regard to the Shallow Groundwater. Modine agrees to keep Sundstrand informed of any material discussions with MDNR or any other government agency regarding the Shallow Groundwater. Modine further agrees that it will not commit to any activity relative to the Shallow Groundwater that will financially impact Sundstrand without Sundstrand’s authorized consent.

....

¹⁵ Under Exhibit 271’s terms, “Deep Groundwater” was defined as “the drinking water aquifer, including but not limited to the Mulberry Well[.]”

Further Work other than at [the Plant]. To the extent that further action is required by any properly authorized government agency, court of law, or through Sundstrand's voluntary activities in the nature of investigative and/or remedial work regarding alleged TCE contamination of Shallow Groundwater in the Area other than at the [Plant], Sundstrand will be responsible, as between it and Modine, and without further financial contribution by Modine, for any and all such actions.

Finally, Exhibit 271 notably contains the following general provisions:

Compliance with Laws. **In complying with [Exhibit 271], Sundstrand and Modine shall adhere to all federal, state and local regulations and laws**, and shall have responsibility for all liabilities and activities associated with their respective activities. ...

Cooperation. In addition to the specific cooperation clauses in [Exhibit 271], Modine and Sundstrand will cooperate with each other in negotiations with any federal, state or local authority, including but not limited to [] MDNR and the City ..., and reasonably will consult with each other regarding their respective activities relative to environmental issues in the Camdenton area at issue in [Exhibit 271].

(Emphasis added.)

Discussion

As with Exhibit 114, we presume the trial court's exclusion of Exhibit 271 to be correct. *Anglim*, 832 S.W.2d at 303. Again, the trial court's discretion in excluding evidence is "considerable" – particularly in making subjective relevancy determinations – and will not be disturbed absent abuse. *Lozano*, 421 S.W.3d at 451; *Reed*, 504 S.W.3d at 240. "We will not find an abuse of discretion in [the trial court] excluding evidence 'unless the materiality and probative value of the evidence were sufficiently clear, and the risk of confusion and prejudice so minimal, that we could say that it was an abuse of discretion to exclude it.'" *Reed*, 504 S.W.3d at 244 (quoting *Williams*, 281 S.W.3d at

872). Here, because the Grays identify four separate instances of alleged error with respect to the exclusion of Exhibit 271 at trial, we address each in turn.

First Instance (Exhibit 271)

At the start of the fifth day of trial, the parties convened on the record outside the presence of the jury for the trial court to take up various offers of proof prior to resuming the direct examination of the Grays' industry-standards expert, Klein. One of those offers involved a proffer of Exhibit 271 by the Grays. At the start of the proffer, counsel for the Grays commented:

We've deposed several witnesses about [Exhibit 271]. [Klein,] who's on the bench[,] would be somebody to talk about what the requirements are in good faith when you're dealing with the government. And [Exhibit 271] has provisions in it ... that have to do with interest bias, and other relevant things that have nothing to do with the purpose of excluding settlement agreements to show liability, lack of liability, fault, something like that.

The Grays' proffer then proceeded to discuss portions of deposition testimony by Modine's corporate representative, Jesse Nickrand ("Nickrand"), in an attempt to show that the terms of Exhibit 271 were still in effect; and, under said terms, Modine 1) would not agree to work related to TCE contamination of the Camdenton deep water zone without Sundstrand's consent; 2) would coordinate all communications with third parties, including the City, related to the Camdenton deep water zone through Sundstrand; and 3) would cooperate with Sundstrand in persuading any regulatory body, including MDNR, that no further investigative or remedial work was necessary with respect to the TCE contamination of the Camdenton shallow water zone (the "persuasion provision"). They also directed the trial court to Nickrand's deposition testimony that Exhibit 271's terms

had not been disclosed to any government regulatory bodies. The Grays further discussed portions of deposition testimony by two of Sundstrand's corporate representatives, Bradley Barquest ("Barquest") and William Leikin ("Leikin"). The Grays argued that Barquest, produced as Sundstrand's corporate representative on the topic of, *inter alia*, communications with government entities related to environmental matters at the Camdenton area, had initially testified at deposition he was not aware of any formal agreement setting forth limitations on how Respondents would communicate and coordinate with government regulators regarding the Camdenton contamination. The Grays also pointed to Leikin's deposition testimony that the terms of Exhibit 271 were still currently in effect.

Thus, the Grays asserted, Exhibit 271 was "admissible because it show[ed] a joint concert of action between [Respondents] who [] spent the entire case claiming that they're two separate entities with separate time frames, [and] separate conduct" The Grays contended that the 2002 settlement agreement between Respondents was "highly probative" on the issues of "bias, credibility, [and] interest[.]" They further argued that Exhibit 271 was relevant to rebut comments by Modine in opening statement to the effect that "[the Grays] [are] not giving MDNR enough credit[;] MDNR knows what they're doing." The Grays contended that the settlement agreement in Exhibit 271 was therefore not being offered to show Respondents had settled or to show the liability or invalidity of a claim, and offered to remove the fact of the settlement from the document to facilitate Exhibit 271's admission.

The Grays' argument to the trial court acknowledged that Respondents did not concur with the Grays' construction of Exhibit 271's terms, though the Grays claimed the meaning of Exhibit 271's contractual provisions was "for the jury to determine." The Grays concluded:

[Exhibit 271] goes to the issue of the knowledge, explains the conduct of failing to remediate. It has issues related for the reprehensibility on punitive damages [against Sundstrand], that they are putting the health and safety of the people in Camdenton at potential risk because of monetary concerns, including what [our expert] Klein has identified earlier about the cost of this.

And so, Your Honor, that we would move that the [trial court] allow us to utilize Exhibit 271 in this case for those purposes.

Respondents disputed the Grays' characterizations of their corporate representatives' deposition testimony and Exhibit 271, broadly arguing the trial court had properly excluded Exhibit 271 in limine. Sundstrand pointed to Nickrand's deposition testimony that he did not recall 1) Exhibit 271's persuasion provision ever actually affecting Modine's conduct, or 2) Sundstrand ever calling upon Modine to take up any particular position on the Camdenton shallow water zone contamination. Sundstrand also noted that, according to Nickrand at deposition, Modine's assent to Exhibit 271's persuasion provision was influenced by the conclusion set forth in a consultant report, prepared prior to Exhibit 271's execution, to the effect that further remediation of TCE contamination in the shallow water zone would be *inter alia* "extremely difficult or impractical because of the lack of persistent water."¹⁶ Sundstrand further indicated there

¹⁶ We also note that the same consultant report indicated there were no known residents drawing water from the shallow water zone at the time.

was no evidence that any investigation or remediation of the TCE contamination at issue had ever been delayed pursuant to the terms of Exhibit 271. Modine asserted it had in fact cooperated with MDNR and there was no evidence to the contrary. Modine further argued Exhibit 271, a 2002 agreement, had no relevance to any alleged acts by Respondents which purportedly contributed to Mr. Grays' IgAN diagnosis in 1999.

In reply, the Grays reiterated their positions that the interpretation of Exhibit 271 was for the jury to decide and that Exhibit 271 was relevant to the issues of credibility, bias, and interest. Ultimately, the trial court ruled that "this agreement, [Exhibit 271], creates more confusion and, potentially, prejudice to the parties than it does probative information for the jury[,] [and] I'm going to stand on [the] ruling [that Exhibit] 271 is ... not admitted in evidence."

We conclude that the trial court's ruling was not "clearly against the logic of the circumstances then before the court" nor "so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Lozano*, 421 S.W.3d at 451 (internal quotations and citation omitted). The Grays have failed to show that Exhibit 271's materiality and probative value were so clear, and the risk of confusion and prejudice from its admission so minimal, that the trial court abused its discretion in excluding it.

At the outset, all the Grays' arguments for Exhibit 271's admission at trial were ultimately predicated upon their interpretation of the document's contractual provisions, and we are unconvinced that said provisions do indeed carry the meaning that the Grays, a non-party to the settlement agreement, assigned to them. The Grays provide us with no

authority supporting the proposition that the trial court was bound to adopt their construction of Exhibit 271's terms or that the interpretation of Exhibit 271 was a matter within the province of the jury. Nor does our own review of Exhibit 271's provisions lead us to believe the document evinces some nefarious agreement by Respondents to "underreport, misrepresent, [or] withhold evidence" from government regulators, as argued by the Grays to the trial court. Thus, Exhibit 271's relevance to the issues in this case was questionable at best.

Moreover, similar to Exhibit 114's lack of probative value to the actual fact of TCE contamination in the Camdenton area, Exhibit 271's provisions to generally engage in nebulous acts of cooperation and persuasion – even interpreted in the manner argued by the Grays – would not logically make the actual fact of any specific prior or future conduct alleged by the Grays in this case more or less likely. We note that neither the Grays' initial proffer of Exhibit 271 at trial, nor their briefing on appeal identifies *any* particular instance, much less any corresponding evidence, where Respondents allegedly obstructed or otherwise interfered with government oversight of the Camdenton TCE contamination. Even if instances of such misfeasance had been alleged or established, the reason why Respondents had engaged in such acts – *e.g.*, pursuant to their purported contractual obligations under Exhibit 271 – would again not be relevant to proving that said acts had actually occurred.¹⁷ It is for this same reason that Exhibit 271 also had little,

¹⁷ To the extent Exhibit 271 may have been relevant to the punitive damages element of the Grays' claims against Sundstrand at trial, no corresponding prejudice can have arisen from Exhibit 271's exclusion because the jury in this case found in favor of Sundstrand on the underlying issue of liability and did not reach the question of punitive damages.

if any, probative value as rebuttal or “opened door” evidence with respect to the issue of Respondents’ cooperation, or lack thereof, with MDNR.

Significantly, the Grays represented at oral argument on appeal that their claims against Sundstrand in this case were for the improper handling and disposal of TCE during the company’s operation of the Plant from 1972 to 1990, while their claims against Modine were for creating a vertical drain by deepening MW-3 and -4 and delaying remediation of TCE contamination in the Camdenton area until 1995. Given this timeframe, we do not see how the 2002 settlement agreement in Exhibit 271 could have been logically related to Respondents’ alleged misfeasance in this case in any way.

The Grays contend that Exhibit 271 was nonetheless admissible at trial to address the always relevant factors of a witness’s “interest, bias, and credibility.” In support of this argument, they overwhelmingly cite to authorities where courts addressed the impeachment of an *opposing* witness’s credibility during said witness’s *cross examination*. See **Davis v. Alaska**, 415 U.S. 308, 315-18 (1974) (addressing a criminal defendant’s Sixth Amendment right to cross-examination); **Mitchell**, 313 S.W.3d at 676-77 (discussing impeachment on cross-examination); **State v. Calmese**, 541 S.W.2d 349, 350-51 (Mo. App. St.L.D. 1976) (criminal defendant alleging improper questioning on

See **Ziolkowski v. Heartland Reg’l Med. Ctr.**, 317 S.W.3d 212, 220 (Mo. App. W.D. 2010) (quoting **Linkogel v. Baker Protective Servs., Inc.**, 659 S.W.2d 300, 305 (Mo. App. E.D. 1983)) (“Since the excluded evidence was admissible only on the issue of punitive damages, and the jury never awarded the prerequisite actual damages, it could not have considered punitive damages. When the jury’s verdict demonstrates that it never reached the issue which is claimed to be the source of prejudice then no prejudice has been demonstrated.”).

cross-examination and rebuttal testimony); *Houfburg v. Kansas City Stock Yards Co. of Maine*, 283 S.W.2d 539, 548-49 (Mo. 1955) (addressing excluded evidence of payments to witness by insurer offered for impeachment purposes on cross-examination); *Long v. St. John's Reg'l Health Ctr., Inc.*, 98 S.W.3d 601, 605-06 (Mo. App. S.D. 2003) (addressing impeachment on cross-examination using a prior inconsistent statement of the witness); *Callahan*, 863 S.W.2d at 868-69 (addressing the extent and scope of cross-examination of an expert witness in a civil action); *Merk v. St. Louis Pub. Serv. Co.*, 299 S.W.2d 446, 449 (Mo. 1957) (addressing cross-examination of witness regarding payment from defendant); *Joice v. Missouri-Kansas-Texas R. Co.*, 189 S.W.2d 568, 575 (Mo. 1945) (discussing permissibility of showing "by cross-examination" an adversary witness' settlement of claim with defendant); *Breitschaft v. Wyatt*, 167 S.W.2d 931, 934 (Mo. App. St.L.D. 1943) (addressing cross-examination of defense witness regarding settlement of her injuries); *Gurley v. St. Louis Transit Co. of St. Louis*, 259 S.W. 895, 898 (Mo. App. St.L.D. 1924) (addressing cross-examination of defense witness regarding payment by defendant); *Sommer v. Cont'l Portland Cement Co.*, 246 S.W. 212, 214 (Mo. banc 1922) (addressing cross-examination of witnesses financial interest in case).

Here, the Grays' proffered Exhibit 271 while their own expert, Klein, was on the witness stand for direct examination, and apparently intended to introduce Exhibit 271 through him. However, noticeably absent from the record is any offer of proof demonstrating what the Grays' questions and Klein's responses regarding Exhibit 271 would have been. In any event, none of the Grays' authorities relied upon on appeal establish that the Grays were entitled to elicit testimony on direct examination from one

of their own witnesses to impeach the credibility of anticipated defense witnesses who had yet to testify at trial. *See id.*; ***Weatherly v. Miskle***, 655 S.W.2d 842, 844 (Mo. App. E.D. 1983) (addressing impeachment evidence offered against *plaintiff's* medical expert); ***McMullin v. Borgers***, 806 S.W.2d 724, 733-34 (Mo. App. E.D. 1991) (holding the trial court did not err in admitting impeachment evidence against plaintiff, but not discussing the circumstances of the proffer); ***State ex rel. Lichtor v. Clark***, 845 S.W.2d 55, 64-65 (Mo. App. W.D. 1992) (addressing the trial court's authority to order *discovery* into an expert witness's objectivity). With respect to using Exhibit 271 to impeach Respondents' witnesses on cross-examination at trial, the Grays' proffer was again made during the presentation of their case-in-chief without any offer of proof as to whom Exhibit 271 would be offered against and what the prospective testimony would actually be. Not having the benefit of specifically knowing when, how, and for what precise purpose Exhibit 271 would be offered for impeachment on cross-examination, the trial court's exclusion of Exhibit 271 at that point in the trial was not "clearly against the logic of the circumstances then before the court" nor "so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." ***Lozano***, 421 S.W.3d at 451 (internal quotations and citation omitted).

In contrast, the costs of introducing Exhibit 271 into evidence were not so speculative. Again, "[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." ***Malan***, 942 S.W.2d at 428. Here, the jury may have perceived Respondents' division of investigative and remedial responsibilities under Exhibit 271 as

“conceding harm” with respect to the subject TCE contamination. *Hancock*, 100 S.W.3d at 799. While the Grays proposed redacting the fact of settlement from Exhibit 271 at trial, we agree with Sundstrand’s contention that removing Exhibit 271’s cooperation and persuasion provisions from the context of the broader settlement agreement would only serve to heighten the risk of confusion and prejudice. Furthermore, the Grays’ arguments to the trial court that the interpretation of Exhibit 271’s contractual provisions should be left to jury were also suggestive of the potential for confusion and prejudice. The admission of Exhibit 271 would also pose the risk of discouraging parties involved in complex, technical disputes from engaging in settlement if the contractual terms of those settlements were subject to subsequent adverse re-interpretation by a jury.

Missouri public policy favors the settlement of disputes. *Malan*, 942 S.W.2d at 427. Settlement agreements “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 (quoting *O’Neal*, 930 S.W.2d at 423). The Grays did not meet this burden. For the reasons discussed above, we conclude Exhibit 271’s probative value was outweighed by its evidentiary costs. The trial court did not abuse its discretion.

Second Instance (Exhibit 271)

The issue of Exhibit 271’s admissibility next arose on the ninth day of trial during the Grays’ re-direct examination of Bob King (“King”). King was a former manager of the Plant under Sundstrand and then Modine. The exchange on King’s re-direct examination relevant to this appeal was as follows:

[Grays' Counsel:] All right. There was a lot of questioning on the follow-up from Modine about MDNR and MDNR's responsibilities and what MDNR did. Do you recall that?

[King:] I do.

[Grays' Counsel:] Now, MDNR, what MDNR does, of course, depends on what MDNR knows; right?

[King:] That would be correct.

[Grays' Counsel:] It depends on what MDNR is told; correct?

[King:] That's a fair statement.

[Grays' Counsel:] And it would – I mean, it would be important to know, if you're going to evaluate what MDNR is doing, whether the companies that are – it's investigating are trying to persuade it one way or the other; right? That would be important to know.

[King:] Okay.

[Grays' Counsel:] I mean, don't you agree?

[King:] That's a fair statement.

[Grays' Counsel:] All right. Don't you think it would be important in evaluating what MDNR does or doesn't do to know whether the parties being investigated were trying to persuade it that no further investigative or remediable work would be necessary? Don't you think that would be important to know?

[King:] Misleading the MDNR would not be correct.

[Grays' Counsel:] Okay. Yeah. And that would seem – that you would kind of fit into that category that perhaps they're trying to mislead MDNR.

[King:] I'm not sure where you're going with that or what you're implying, but ...

[Grays' Counsel:] That would be improper; right?

[King:] That would be improper, yes.

[Grays' Counsel:] It would be important for folks to know if we're going to talk about what is MDNR doing; what are their responsibilities; what did they require of us. You would want to know, are the companies it's investigating trying to persuade it not to do the further investigative or remedial work. You'd want to know that; right?

[King:] As a general statement, yes.

[Grays' Counsel:] All right. Similarly, you would want to know if the companies being investigated had agreed that one of them wouldn't have any communications with the City ... or any other regulatory bodies that may impact the other one's responsibilities. You'd want to know that if they had agreed to cooperate with regard to those things; right?

[King:] I really don't know what you just said.

....

[Grays' Counsel:] ... It would be important to you – because you worked for [Sundstrand] – or you worked for Sundstrand and then you started working for Modine; right?

[King:] That's correct.

[Grays' Counsel:] And of course we talked a lot about what is MDNR's responsibility, and what do they do; correct?

[King:] Correct.

[Grays' Counsel:] And what were they doing and what were they requiring you-all to do?

[King:] Correct.

[Grays' Counsel:] So it would be pretty important in determining what they're going to do or what they did, to know if Modine was agreeing not to have any communications with the City that could negatively impact Sundstrand. You'd want to know that; right?

[Modine's Counsel:] Object, Your Honor. Foundation. I believe we've covered this also.

[Trial Court:] Sustained.

Counsel for the parties then approached the bench for a sidebar. The Grays presented their argument as follows:

So we've clearly opened the door to this settlement agreement in which they agree to try and convince [MDNR] not to investigate, not to remediate. [King] has also laid the foundation for that. That is the settlement agreement, Exhibit 271. They come in, and they're saying, MDNR is doing this; MDNR is doing that. The specific provision in their settlement agreement that says they will agree to try and convince [MDNR] not to investigate and not to perform further remediation. I asked [King] questions that are – mean it's clearly laid the foundation for it. They opened the door.

Modine repeated its position that Exhibit 271 was a 2002 document that could not be relevant to the causation issue for Mr. Gray's IgAN (diagnosed in 1999), that the Grays had not elicited testimony from King opening the door, and that the Grays' characterization of Exhibit 271's contractual terms was inaccurate. The Grays repeated their position that the meaning of Exhibit 271 was for the jury to decide and again offered to redact the fact of settlement from Exhibit 271. The Grays concluded:

[H]ow can they come to [sic] in and make these big things about what MDNR is doing or not doing, and the jury's not entitled to know that these parties reached an agreement to try and persuade MDNR? [King] has laid the foundation, just like anyone would believe. Of course it's relevant, what they're trying to persuade MDNR.

The trial court sustained Modine's objection. We note this ruling was in respect to counsel for the Grays' last *question* to King and there was no offer to introduce Exhibit 271 at this point in the trial. Nonetheless, we conclude there was no error in the trial court's decision. At the outset, the Grays' nebulous assertions at sidebar regarding what Respondents had purportedly said regarding MDNR's activities were not sufficient to

advise the trial court of any facts demonstrating the door had been opened to admit Exhibit 271 into evidence. We have already addressed and rejected the Grays' argument that Exhibit 271 constituted probative evidence on the question of whether Respondents actually obstructed or otherwise interfered with government oversight of the Camdenton TCE contamination. With respect to King's testimony leading up to Modine's objection and the trial court's ruling thereon, we have not located, and the Grays have not directed us to, any authority holding that a party may elicit testimony from a witness to open the door for themselves to otherwise inadmissible subject matter.

Third Instance (Exhibit 271)

Following the examination of the Grays' damages calculation expert, Brooke Liggett, on the 11th day of trial, the trial court dismissed the jury for the day and entered a brief recess. The parties then reconvened on the record to address a trial brief filed by the Grays moving for permission to use Exhibit 271 in the prospective cross-examinations of Respondents' witnesses. Broadly, the Grays reiterated that Respondents' claims that Respondents were cooperating with government regulators and that MDNR knew what it was doing had opened the door to admit Exhibit 271. The Grays further argued that, despite the existence of Exhibit 271, a Sundstrand corporate representative involved in the case, A.J. Gravel ("Gravel"), gave false testimony that "there is no joint defense group or agreement" between Respondents in the case. The Grays also repeated their position that Exhibit 271 was relevant to the issue of interest and bias and that its terms demonstrated a secret arrangement by Respondents to interfere with or otherwise obstruct further investigation or cleanup of the Camdenton TCE contamination. The

Grays additionally asserted that a water test performed by a consultant for Modine had in fact been covertly withheld from MDNR in 1991.

For its part, Sundstrand contended that the Grays were continuing to mischaracterize Exhibit 271's contractual terms and that no evidence had been adduced that anyone, pursuant to Exhibit 271 or otherwise, had obstructed or otherwise interfered with MDNR's oversight over the Camdenton TCE contamination. Sundstrand also noted that Gravel's testimony regarding not having knowledge of any "joint defense group" for the case was accurate. Modine repeated its position that the 2002 settlement agreement in Exhibit 271 had no causal link to Mr. Gray's IgAN diagnosis in 1999. Modine also directed the trial court to a 1999 consent order Modine had entered into with MDNR which identified the 1991 water test referenced by the Grays. Following argument, the trial court ruled, "No relief [to the Grays] is going to be granted."

The trial court's ruling was not "clearly against the logic of the circumstances then before the court" nor "so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Lozano*, 421 S.W.3d at 451 (internal quotations and citation omitted). We have already addressed a majority of the arguments advanced by the Grays on the 11th day of trial. With respect to the alleged withholding of water sampling by Modine, the Grays admitted that this incident purportedly occurred in 1991. Consequently, Exhibit 271, a settlement executed in 2002, had no relevance to this alleged misfeasance by Modine. With respect to the use of Exhibit 271 on cross-examination of Respondents' witnesses, we note that the Grays again raised the issue before any defense witnesses had taken the stand at trial and without an accompanying

offer of proof showing what the prospective testimony would be. Thus, the trial court was again without specific knowledge as to when, how, and for what precise purpose Exhibit 271 would be offered. With respect to Gravel's purported "false" deposition testimony, he was asked as to his "knowledge [of] any joint defense group or agreement" in the present action. Gravel responded he was "not aware of any." Earlier in the deposition, Gravel testified that, in the context of his practice, "joint defense groups are typically groups of entities that are dealing with remediation issues and also other types of environmental legal proceedings, **and ... they're collaborating in a group effort in their defense.**" (Emphasis added.) We are unpersuaded that Gravel's earlier deposition testimony necessitated the conclusion that his subsequent statement – that he was not aware of any "joint defense group or agreement" in this case – was false. We further note that Gravel was not designated as a corporate representative on the topic of the Camdenton remediation or any agreements related thereto,¹⁸ and that the Grays' negligence claim against Sundstrand in this case did not include allegations of tortious conduct by Sundstrand after 1990. The trial court did not abuse its discretion.

Fourth Instance (Exhibit 271)

Following the Grays' case-in-chief, Exhibit 271 arose as an issue during the Grays' cross-examination of Modine's expert, Connor, on the 12th day of trial. The relevant portion of the exchange in question was as follows:

¹⁸ Gravel was designated to testify on the topics of (1) "[u]se and disposal of TCE/TCA at the [Plant]"; (2) "[u]se and disposal of TCE/TCA at other [Sundstrand facilities]"; and (3) "[d]iscontinuation of the use of TCE/TCA at [Sundstrand] facilities[.]"

[Grays' Counsel:] Without answering any further, one of the things you reviewed in this case was Exhibit 271; correct?

[Modine's Counsel:] Objection, Your Honor. May we approach?

....

(Sidebar begins.)

[Modine's Counsel:] [Connor] has said that ^l["I don't know what the original position was"]; ^l["I don't know what the different position was,"] and it's not part of his opinion. And [the Grays' counsel] has now handed [Connor] [Exhibit 271] in an attempt to get around the [trial court's] ruling. That would be [] contrary to [Connor's] testimony; [Connor] said [he] didn't consider it.

[Grays' Counsel:] Well, that's not what [Connor] said. I was being very careful. I said just answering this is something you reviewed in preparation for this, I'm laying the foundation for [Exhibit 271], which is very different than asking [Connor] to cite from it or quote from it or anything like that. I'm just kind of walking through the steps of [Connor] did review this document [sic].

[Modine's Counsel:] Do you have the [deposition] testimony of where [Connor] did review this [sic]?

[Grays' Counsel:] Yeah. [Connor] talked about it.

....

[Grays' Counsel:] And I said [at Connor's deposition], "The settlement agreement entered into between Modine [sic], does play [sic] any role in the opinions you've reached?"

[(Connor.)] "And it only plays a role with regard to the fact that with certain activities, the parties, between themselves, agreed to undertake."

[(Grays' Counsel.)] "So just so I'm clear, are you talking about who was responsible?"

So [Connor] clearly reviewed [Exhibit 271], because he's saying he reviewed it, and he's considering part of the document.

[(Grays' Counsel.)] ["Just so I'm clear, [y]ou're talking about who is responsible for paying for it?"

[(Connor.)] "Yes"

And then I ask [Connor] about his opinions, but he's reviewed [Exhibit 271].

....

[Trial Court:] [Connor] said he reviewed the [Exhibit 271], he also said that wasn't – didn't have anything to do with what he was supposed to be testifying about.

[Grays' Counsel:] And the – hold on. I'll tell you the case.

State Ex Rel. Tracy versus Welch [¹⁹], a case Garner had out of the Supreme Court. They say an expert is not allowed to say, Well, I've got a document that I didn't consider it or I didn't rely on it. In that case, the witness was given attorney-client privileged information, and the Missouri Supreme Court said, Well, it doesn't matter. He got it; he saw it, whether he relied on it or not is irrelevant; you can question him on it.

[Trial Court:] Any ... document for any purpose or does it have to go to his – what he decided his opinion on[?]

[Grays' Counsel:] It doesn't have to be – and the reason the [Supreme] Court said you can question him about it, whether he says it's part of his opinion or not, is because the [Supreme] Court said, oftentimes, things people don't consider are every bit as important or potentially more important than what they say they do want to consider. The reason is, you shouldn't be able to have an expert [] say, Okay, we don't want you to rely upon or consider this piece of evidence.

[Sundstrand's Counsel:] Just because an expert relies on something doesn't mean that you can question them about it. [Exhibit 271] has been excluded by the [trial court], so I'll give you an example. Let's just suppose there was, like, a police report that talked about Mr. Gray's ... use of drugs and you had excluded that. Just because their expert had materials he reviewed, that wouldn't give me leave to go ask about it.

This is the same situation, but not as stark perhaps. But [Exhibit 271] is a document you've excluded multiple times.

[Trial Court:] ... I'm going to sustain [Modine's] objection.

¹⁹ Presumably, *State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831 (Mo. banc 2000).

We conclude the trial court’s sustaining of Modine’s objection was not “clearly against the logic of the circumstances then before the court” nor “so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration.” *Lozano*, 421 S.W.3d at 451 (internal quotations and citation omitted). While an expert witness may, in certain circumstances, rely upon inadmissible hearsay in forming the background of his opinions, this does not transform said hearsay into independently admissible evidence. *Delmar Gardens*, 872 S.W.2d at 182. On appeal, the Grays argue that Exhibit 271 was relevant to impeach Connor’s credibility regarding his testimony on the innocuousness of Modine’s interactions with government regulatory bodies and non-responsive testimony he gave for the benefit of Sundstrand. Setting aside that the Grays did not present this argument to the trial court, we do not see how Exhibit 271, in and of itself, would have actually served to impeach Connor’s opinions on these matters. Without an offer of proof, it is unclear how the mere existence of the cooperation and persuasion provisions set forth in Exhibit 271 would have contradicted any of Connor’s scientific opinions or his opinion that the investigation and remediation process of the Camdenton TCE contamination was “standard” or “normal.” Nor have the Grays demonstrated that Connor’s testimony at trial was somehow biased by Exhibit 271, a settlement agreement he was not shown to have any involvement or interest in. Point III is denied.

Point IV

The Grays’ fourth point on appeal asserts that:

The [t]rial [c]ourt erred in failing to take corrective action in response to [Respondents'] counsel's speaking objections which permeated the entire trial, because speaking objections are improper, disrupt the fair and orderly presentation of evidence, prejudicially influence the jury, and constitute reversible error, particularly when ratified by the [trial c]ourt, in that [Respondents'] speaking objections disparaged counsel and improperly conveyed to the jury that [the Grays'] counsel was misleading the jury, and the speaking objections which recited [Respondents'] arguments in front of the jury placed undue weight on [Respondents'] version of the case, with the unfair prejudice caused by such conduct compounded when the [t]rial [c]ourt repeatedly "sustained" [Respondents'] counsel's speaking objections that disparaged counsel, instructed [the Grays'] counsel to ask questions the way [Respondents] wanted, and allowed [Respondents'] counsel to read entire disparate passages of exhibits into the record in the guise of making an objection.

Point IV substantially fails to comply with the requirements of Rule 84.04,²⁰ preserving nothing for appellate review, and we decline to review it.

Namely, Point IV violates Rule 84.04(d) and (e) in several key respects. The statement that "[t]he [t]rial [c]ourt erred in failing to take corrective action" in response to generalized misconduct of opposing counsel throughout "the entire trial," wholly fails to identify the particular ruling or action of the trial court that the Grays challenge on appeal and is plainly multifarious. The argument portion in Point IV also sheds no light on the specific assignment of error on appeal. The Grays contend they "repeatedly" raised the issue of Respondents' counsels' speaking objections and derogatory statements to the trial court and requested some unspecified "relief," but provide no "specific page references to the relevant portion of the record" supporting these factual assertions in

²⁰ Compliance with Rule 84.04 is mandatory, and we may use our discretion to review all, some, or none of the issues that fail to comply with the rule. *Scott v. King*, 510 S.W.3d 887, 891-93 (Mo. App. E.D. 2017).

their argument as required by Rule 84.04(e). “This [C]ourt should not be expected either to decide the case on the basis of inadequate briefing or to undertake additional research and a search of the record to cure the deficiency.” *Davis v. Coleman*, 93 S.W.3d 742, 743 (Mo. App. E.D. 2002). “[W]e are not permitted to seine the record in an attempt to locate evidence that might support a party’s argument.” *Waldner v. Dexter R-XI Sch. Dist.*, 647 S.W.3d 321, 324 (Mo. App. S.D. 2022). In the one specific instance cited in Point IV’s argument where the issue of speaking objections and derogatory statements was purportedly raised to the trial court, no particular relief was requested by the Grays and no corresponding ruling was made by the trial court for us to review.

The substance of the Grays’ argument in Point IV is also deficient. “To develop a point relied on, ‘the argument should show how the principles of law and the facts of the case interact.’” *Wallace v. Frazier*, 546 S.W.3d 624, 628 (Mo. App. W.D. 2018) (quoting *Kim v. Kim*, 431 S.W.3d 524, 526 (Mo. App. W.D. 2014)). Here, the Grays generalize the facts and holdings from a slew of cases, but fail to connect the cited law to the “specific grounds and facts” in this case that demonstrate the trial court erred. *See Aydin v. Boles*, 658 S.W.3d 223, 227 (Mo. App. W.D. 2022) (argument section of appellant’s brief was defective so as to preclude appellate review where appellant merely recited case and text excerpts regarding the right to trial without connecting them to the specific grounds and facts underlying the trial court’s judgment). Rather, their argument merely rests upon further conclusory generalizations, devoid of any “specific page references” to the record, that Respondents’ counsel and the trial court’s purported actions at trial were analogous to the facts of the authorities relied upon.

In light of the above, “[r]eaching the merits [on Point IV] would require considerable advocacy on our part and would thereby increase the likelihood of reaching the wrong decision and generating questionable precedent.” *Waller v. Shippey*, 251 S.W.3d 403, 407 (Mo. App. W.D. 2008). While we generally prefer to reach the merits of an appeal, here the non-compliant point relied on impedes our review in that engaging Point IV on the merits would require us to improperly assume the role of an advocate in this case. We will not do so. Point IV is denied.

Point V

The Grays claim in Point V:

The trial court erred in providing limiting instructions^[21] in which the [trial] court instructed the jury that business records were irrelevant as to any [Respondent] who did not create the record, because the [trial] court improperly limited significant relevant and admissible evidence which undermined [Respondents’] defenses based on the [trial] court’s misunderstanding of the business records hearsay exception and based on the [trial] court’s legally inaccurate finding that documents created after 1999 were irrelevant, in that that [sic] the business record exception to hearsay is an exception to everyone, not just the party that created the business record, and evidence created after 1999 remained relevant evidence of case issues, including but not limited to such evidence containing party admissions, substantive evidence of contamination, and factual findings bearing directly on contested case issues.

In other words, the Grays contend that the trial court erred in excluding unspecified business records from being admitted against one Respondent or the other on the basis of

²¹ Point V appears to refer to the trial court’s oral instructions to the jury regarding the relevance of items of evidence admitted at trial. These are more precisely the trial court’s “admonition[s] or direction[s] to the jury” rather than instructions. See *Martin v. Durham*, 933 S.W.2d 921, 924 n.1 (Mo. App. W.D. 1996) (citing MAI 4th, 2.01 Committee Comment [1991]).

relevance. Because Point V substantially fails to comply with the requirements of Rule 84.04, it preserves nothing for appeal. We therefore also decline to review it here.

Similar to the Grays' Point IV, Point V violates Rule 84.04(d) and (e) in multiple, interrelated respects. First, Point V fails to specify the particular ruling or action of the trial court that the Grays are challenging on appeal. Such a generalized and multifarious allegation that the trial court erred in excluding evidence is simply insufficient to satisfy the requirements of Rule 84.04. *Love v. Osage Marine Servs., Inc.*, 690 S.W.3d 505, 517 (Mo. App. E.D. 2024). The corresponding argument section of the Grays' brief also provides no illumination on their precise claim on appeal, as it fails to include "specific page references to the relevant portion of the record" for any of the factual assertions made therein in contravention of Rule 84.04(e). Such deficiencies prevent us from identifying the specific ruling complained-of or the point in the trial where the Grays called upon the trial court to take some "affirmative action." See *Thummel v. King*, 570 S.W.2d 679, 685 (Mo. banc 1978) ("The bare allegation that the trial court erred in failing to enforce, require, etc., is plainly inadequate because it does not identify any specific ruling complained of and does not even give any indication of any point in the trial of the case where the trial court was called upon to take such affirmative action."). "We cannot become advocates for an appellant by speculating about facts and arguments that have not been made." *Pearson v. Keystone Temp. Assignment Group, Inc.*, 588 S.W.3d 546, 552 (Mo. App. E.D. 2019).

The Grays also fail to demonstrate "how" any purported exclusion of evidence was preserved at trial in violation of Rule 84.04(e). The Grays' statement of preservation,

merely refers us to the corresponding section of their statement of facts, which provides no statement – much less any specific record citations – indicating that the Grays ever made the necessary offer of proof with respect to any particular item of evidence they claim was erroneously excluded.²² Our review is further complicated by the total lack of compliance with Rule 84.04(e)’s other requirement that the Grays’ argument include and integrate the applicable standard of review. “The applicable standard of review is the guidepost principle of law in considering and resolving every point relied on raised in an appeal.” *Marck Indus., Inc. v. Lowe*, 587 S.W.3d 737, 746 (Mo. App. S.D. 2019). As such, an argument “untethered to that guidepost is nothing more than a collection of abstract legal conclusions unmoored from any coherent legal basis or theory upon which an appellate court can find reversible error.” *Id.*; see also *Burgan v. Newman*, 618 S.W.3d 712, 715 (Mo. App. E.D. 2021) (“To properly brief the alleged error, an appellant ‘must explain why, in the context of the case, the law supports the claim of reversible error by showing how principles of law and the facts of the case interact.’”) (quoting *Midtown Home Improvements, Inc. v. Taylor*, 578 S.W.3d 793, 797 (Mo. App. E.D. 2019)).

While we prefer to decide appeals on the merits and may in some circumstances look past technical briefing deficiencies, the non-compliant Point V in this instance

²² When an objection to evidence is sustained at trial, the proponent of the evidence must make a proper offer of proof to preserve the issue. *Evans v. Wal-Mart Stores, Inc.*, 976 S.W.2d 582, 584 (Mo. App. E.D. 1998). “[We] will not convict a trial court of error on an issue that was never presented to the trial court for its consideration.” *Rapp v. Eagle Plumbing, Inc.*, 440 S.W.3d 519, 524 (Mo. App. E.D. 2014).

renders proper appellate review impossible. Point V effectively invites us to engage in a line-by-line review of the nearly 4,500-page trial transcript in search of every purportedly improper limiting instruction to the jury on the individual relevance of numerous, discrete items of evidence that the Grays have not even fully identified to this Court. We decline to so engage in that feat related to this last Point V after gratuitously doing so to construct our ruling and analysis on the Grays' Points II and III. Point V is denied.

Conclusion

Judgment affirmed.

JENNIFER R. GROWCOCK, C.J. – OPINION AUTHOR

JACK A. L. GOODMAN, J. – CONCURS

BECKY J. WEST, J. – CONCURS