

IN THE SUPREME COURT OF THE STATE OF NEVADA

CAPRIATI CONSTRUCTION CORP.,	)	Supreme Court No: 80107
INC., a Nevada Corporation	)	District Court Case No: A718689
	)	Electronically Filed
Appellant,	)	Mar 05 2020 03:55 p.m.
	)	Elizabeth A. Brown
	)	Clerk of Supreme Court
v.	)	<b>SUPPLEMENTAL RESPONSE</b>
	)	<b>TO ORDER TO SHOW CAUSE</b>
BAHRAM YAHYAVI, an individual,	)	
	)	
Respondent.	)	
_____	)	

This is an appeal from a judgment on a jury verdict and from a post-judgment order in which the district court explained its reasoning for sanctions it had imposed during trial, prior to the matter going to the jury.

The district court entered a judgment on the jury's verdict on October 22, 2019. Then, on November 5, 2019, the district court entered an order explaining why it had imposed certain sanctions at trial prior to the case going to the jury.

On November 18, 2019, defendant filed a motion for a new trial. This is undoubtedly a timely tolling motion. NRAP 4(a)(4). On November 14, 2019, defendant filed a motion to correct or reconsider the decision and order entered on November 5, 2019. Whether this motion qualifies as a tolling motion is open to debate.

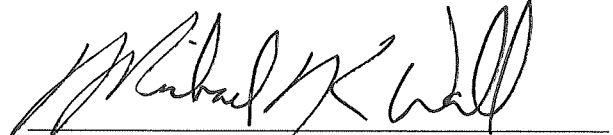
Defendant filed a notice of appeal on November 19, 2019.

On March 3, 2020, the district court entered separate orders denying defendant's motion for a new trial and defendant's motion to correct or reconsider the decision and order entered on November 5, 2019. Exhibits 1 & 2.

Pursuant to NRAP 4(a)(6), defendant's notice of appeal is "considered filed on the date of and after entry of the . . . written disposition of the last-remaining timely motion," *i.e.*, on March 3, 2020. Defendant's notice of appeal is timely and invokes the appellate jurisdiction of this Court.

Respectfully submitted this 5 day of March, 2020.

HUTCHISON & STEFFEN, PLLC

A handwritten signature in black ink, appearing to read "Michael K. Wall", written over a horizontal line.

Michael K. Wall (2098)  
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*Attorney for Appellant*

**CERTIFICATE OF SERVICE**

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date the **SUPPLEMENTAL RESPONSE TO ORDER TO SHOW CAUSE** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

Dennis M. Prince, Esq.  
PRINCE LAW GROUP  
10801 West Charleston Blvd. Ste. 560  
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*Attorney for Respondent Bahram Yahyavi*

DATED this 5<sup>th</sup> day of March, 2020.

A handwritten signature in black ink, appearing to read 'Kayman', is written over a horizontal line.

An employee of Hutchison & Steffen, PLLC

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EXHIBIT PAGE ONLY

## EXHIBIT 1

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HUTCHISON & STEFFEN

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*Steven D. Grierson*

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12 *Bahram Yahyavi*

8 **EIGHTH JUDICIAL DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

11 **BAHRAM YAHYAVI**, an Individual,  
12 Plaintiff,

13 vs.

14 **CAPRIATI CONSTRUCTION CORP.,**  
15 **INC.**, a Nevada Corporation,  
16 Defendant

CASE NO.: A-15-718689-C  
DEPT. NO.: XXVIII

**ORDER DENYING  
DEFENDANT CAPRIATI  
CONSTRUCTION CORP., INC.'S  
MOTION FOR NEW TRIAL**

17  
18 Defendant CAPRIATI CONSTRUCTION CORP., INC.'s Motion for New Trial  
19 was brought for hearing in Department XXVIII of the Eighth Judicial District Court,  
20 before The Honorable Ronald J. Israel, on the 28th day of January, 2020, with Dennis  
21 M. Prince and Kevin T. Strong of PRINCE LAW GROUP, appearing on behalf of Plaintiff  
22 **BAHRAM YAHYAVI**; and David S. Kahn and Mark C. Severino of **WILSON, ELSER,**  
23 **MOSKOWITZ, EDELMAN & DICKER LLP** and Michael K. Wall of **HUTCHISON &**  
24 **STEFFIN, PLLC**, appearing on behalf of Defendant CAPRIATI CONSTRUCTION  
25 **CORP., INC.** The Court having reviewed the pleadings and papers on file herein, having  
26 heard oral argument, and being duly advised in the premises:

27 **THE COURT HEREBY FINDS** that on November 5, 2019, this Court entered  
28 its Decision and Order that set forth various sanctions imposed against Defendant

*Handwritten signature and date 3/2/2020*



1 Capriati Construction Corp., Inc. ("Defendant") resulting from its counsel's willful  
2 misconduct committed during the trial. The misconduct consisted of Defendant's  
3 counsel deliberately eliciting testimony regarding Defendant's bankruptcy from Clifford  
4 Goodrich ("Goodrich"), Defendant's corporate representative. Defense counsel's  
5 misconduct occurred nearly three (3) weeks after trial commenced. The sanctions  
6 imposed by this Court in its Decision and Order consisted of: (1) striking Defendant's  
7 Answer as to liability, (2) striking the testimony of Goodrich during Defendant's case-  
8 in-chief and precluding him from giving further testimony, (3) striking the testimony of  
9 Defendant's remaining witnesses, Kevin Kirkendall CPA, and John Baker, Ph.D., and  
10 (4) reading a curative instruction to redress the harm caused by the misconduct and  
admonishing Defendant's attorney for his misconduct in front of the jury.

11 **THE COURT FURTHER FINDS** that NRCP 59(a) provides the requisite  
12 grounds upon which this Court may order a new trial. The decision to grant or deny a  
13 motion for new trial rests in the sound discretion of this Court and will not be disturbed  
14 absent an abuse of discretion. *Nelson v. Heer*, 123 Nev. 217, 223 (2007).

15 **THE COURT FURTHER FINDS** that the sanctions imposed against Defendant  
16 did not unfairly eliminate Defendant's ability to contest causation and damages during  
17 trial. This Court did not impose sanctions against Defendant until nearly three (3)  
18 weeks after the jury trial commenced. By that time, Plaintiff Bahram Yahyavi's  
19 ("Plaintiff") treating physicians and retained medical expert testified regarding the  
20 extent of Plaintiff's injuries, their causal relationship to the subject collision, and  
21 Plaintiff's need for future medical care. Plaintiff's treating physicians and retained  
22 medical expert also testified about Plaintiff's physical disabilities that prevented him  
23 from working in the future. Plaintiff's retained vocational rehabilitation expert testified  
24 regarding the extent of Plaintiff's vocational losses and damages resulting from his  
25 inability to work due to his permanent physical disability. Plaintiff's retained economist  
26 testified regarding the present value of Plaintiff's total claimed damages. Defendant  
27 received a full and fair opportunity to cross-examine Plaintiff's treating physicians,  
28 retained medical expert, retained vocational rehabilitation expert, and retained  
economist regarding issues of causation and damages.

1       **THE COURT FURTHER FINDS** that the sanctions imposed against Defendant  
2 did not restrict or limit Defendant's retained medical expert, Howard Tung, M.D., from  
3 testifying regarding issues of causation and damages. Dr. Tung testified extensively  
4 about Plaintiff's preexisting degenerative changes in his cervical spine. He also testified  
5 in great detail about Plaintiff's prior neck pain complaint documented in an October  
6 2011 Southwest Medical Associates record, exam findings, a prior cervical spine x-ray  
7 that Plaintiff underwent, and prior treatment recommendations. Dr. Tung testified  
8 about Plaintiff's subsequent medical records from Southwest Medical Associates that  
9 did not indicate any additional prior neck pain complaints. Dr. Tung challenged the  
10 opinions and testimony from Plaintiff's retained medical expert and treating physicians  
11 regarding issues of causation and damages. Dr. Tung's testimony regarding issues of  
12 causation and damages was not limited in any way by a ruling or order issued by this  
Court during trial.

13       **THE COURT FURTHER FINDS** that the sanctions imposed against Defendant  
14 did not strike or exclude Defendant's retained vocational rehabilitation expert, Edward  
15 L. Bennett, M.A., C.R.C.'s, testimony regarding the extent of Plaintiff's damages. Mr.  
16 Bennett specifically testified about the extent of Plaintiff's vocational losses sustained  
17 as a result of the subject collision. He further challenged the opinions of Plaintiff's  
18 retained vocational rehabilitation expert regarding the extent of Plaintiff's vocational  
19 losses. Mr. Bennett was, however, properly restricted from testifying that Plaintiff could  
20 also perform other jobs listed in his report because he never expressly offered the opinion  
21 in his report in accordance with NRCP 16.1(a)(2)(B)(i).

22       **THE COURT FURTHER FINDS** that its decision to strike Defendant's  
23 remaining witnesses, Kevin Kirkendall, CPA, and John Baker, Ph.D. as a sanction for  
24 defense counsel's willful misconduct fell well within its broad discretion under Nevada  
25 law. The exclusion of testimony from Mr. Kirkendall and Mr. Bennett did not eliminate  
26 Defendant's ability to contest causation and damages. Mr. Kirkendall merely supported  
27 the testimony from Dr. Tung and Mr. Bennett, namely that Plaintiff suffered no  
28 calculable vocational loss. Dr. Baker was already precluded from testifying that the  
forces involved in the subject collision were not strong enough to cause Plaintiff's

1 injuries, which comprised the basis for many of his opinions. Therefore, the remainder  
2 of Dr. Baker's testimony was not going to assist the jury.

3 **THE COURT FURTHER FINDS** that Plaintiff did not unfairly elicit a  
4 spoliation determination from the jury. Plaintiff questioned Goodrich regarding  
5 Defendant's investigation of the subject collision and the whereabouts of the employee  
6 file from the negligent forklift operator, Joshua Arbuckle ("Arbuckle"). These were  
7 appropriate areas of inquiry that in no way suggested to the jury that Defendant  
8 willfully destroyed or spoliated evidence. Goodrich simply testified that he did not know  
9 where the employee file was located.

10 **THE COURT FURTHER FINDS** that Goodrich's testimony regarding  
11 Defendant's investigation of the subject collision and the whereabouts of Arbuckle's  
12 employee file did not justify defense counsel's willful decision to elicit testimony from  
13 Goodrich that Defendant filed for bankruptcy in 2015. Defendant's counsel could have  
14 addressed the missing employee file with Goodrich in numerous ways without  
15 specifically referencing Defendant's bankruptcy filing. Defendant's bankruptcy filing is  
16 not even relevant to Defendant's ability to retain business records, including Arbuckle's  
17 employee file. This underscores the willfulness of defense counsel's intent to elicit  
18 testimony from Goodrich regarding Defendant's bankruptcy.

19 **THE COURT FURTHER FINDS** that its decision to impose the sanction of  
20 striking Defendant's Answer as to liability was a proper exercise of this Court's  
21 discretion. This sanction was not of any significant consequence on the issue of liability  
22 because Arbuckle testified during trial that he was at fault for causing the subject  
23 collision. Although Arbuckle also testified that he believes two people are always at  
24 fault in any collision, he was unable to articulate any factual basis to establish how  
25 Plaintiff shared any fault for causing the subject collision. Arbuckle actually testified  
26 that he did not blame Plaintiff in any way for causing the subject collision.

27 **THE COURT FURTHER FINDS** that the curative instruction given to the jury  
28 addressing Defendant's bankruptcy was a proper sanction imposed against Defendant.  
Defense counsel willfully elicited testimony regarding Defendant's bankruptcy, which  
suggested to the jury that Defendant did not have the financial ability to pay or satisfy



1 any damages award issued by the jury. The proposed curative instruction properly  
2 neutralized the adverse impact of Goodrich's testimony that Defendant lacked the funds  
3 to pay any damages award issued by the jury.

4       **THE COURT FURTHER FINDS** Defendant's counsel received the  
5 opportunity to read the proposed curative instruction as drafted by Plaintiff's counsel.  
6 Defendant's counsel specifically told this Court that he had no comment on the curative  
7 instruction. Defendant's counsel made no objection to the curative instruction as written  
8 or offered an alternative when Plaintiff presented it to this Court. Therefore,  
9 Defendant's counsel waived any challenge to the substance of the curative instruction  
10 as a basis to request a new trial. This Court also believes Defendant's counsel's failure  
11 to object to the curative instruction during trial waives the issue for purposes of  
12 appellate review.

13       **THE COURT FURTHER FINDS** that the sanctions imposed against Defendant  
14 were intended to avoid striking the entirety of Defendant's Answer for defense counsel's  
15 willful misconduct. This Court possessed the inherent equitable power and discretion  
16 to impose these lesser sanctions against Defendant. *Emerson v. Eighth Judicial Dist.*  
17 *Court*, 127 Nev. 672, 680 (2011); *Young v. Johnny Ribeiro Bldg.*, 106 Nev. 88, 92 (1990).  
18 Moreover, the imposition of these sanctions did not undermine the reliability of the trial  
19 proceedings or cause the jury to issue an excessive damages award that was inconsistent  
20 with the evidence presented.

21       **THE COURT FURTHER FINDS** that Defendant failed to articulate any factual  
22 or legal basis to justify a new trial in accordance with the legal grounds enumerated in  
23 NRCP 59(a)(1)(A) – (G).

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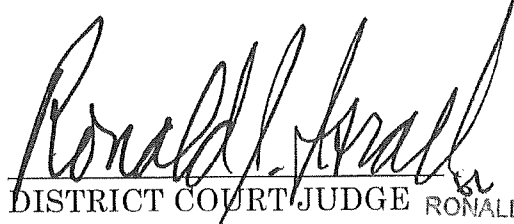
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**ORDER**

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Defendant Capriati Construction Corp., Inc.'s Motion for New Trial is **DENIED** in its entirety.

**IT IS SO ORDERED.**

DATED this 2 day of March, 2020.

  
DISTRICT COURT JUDGE RONALD J. ISRA

DATED this 26<sup>th</sup> day of February, 2020.


DATED this \_\_\_\_ day of February, 2020.

Respectfully Submitted By:

Approved as to Form and Content:

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## EXHIBIT 2

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8 **EIGHTH JUDICIAL DISTRICT COURT**  
9  
10 **CLARK COUNTY, NEVADA**

11 **BAHRAM YAHYAVI, an Individual,**  
12 **Plaintiff,**

13 **vs.**

14 **CAPRIATI CONSTRUCTION CORP.,**  
15 **INC., a Nevada Corporation,**  
16 **Defendant**

CASE NO.: A-15-718689-C  
DEPT. NO.: XXVIII

**ORDER DENYING  
DEFENDANT CAPRIATI  
CONSTRUCTION CORP., INC.'S  
MOTION TO CORRECT OR  
RECONSIDER DECISION AND  
ORDER, ENTERED ON  
NOVEMBER 5, [2019]**

17  
18 Defendant CAPRIATI CONSTRUCTION CORP., INC.'s Motion to Correct or  
19 Reconsider Decision and Order, Entered on November 5, [2019] was brought for hearing  
20 in Department XXVIII of the Eighth Judicial District Court, before The Honorable  
21 Ronald J. Israel, on the 9th day of January, 2020, in chambers. The Court having  
22 reviewed the pleadings and papers on file herein and being duly advised in the premises:

23 **THE COURT HEREBY FINDS** that on November 5, 2019, this Court entered  
24 its Decision and Order that set forth various sanctions imposed against Defendant  
25 Capriati Construction Corp., Inc. ("Defendant") resulting from its counsel's willful  
26 misconduct committed during the trial. The misconduct consisted of Defendant's  
27 counsel deliberately eliciting testimony regarding Defendant's bankruptcy from Clifford  
28 Goodrich ("Goodrich"), Defendant's corporate representative. The sanctions imposed by



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*3/3/2020* *SD*

1 this Court in its Decision and Order consisted of: (1) striking Defendant's Answer as to  
2 liability, (2) striking the testimony of Goodrich during Defendant's case-in-chief and  
3 precluding him from giving further testimony, (3) striking the testimony of Defendant's  
4 remaining witnesses, Kevin Kirkendall CPA, and John Baker, Ph.D., and (4) reading a  
5 curative instruction to redress the harm caused by the misconduct and admonishing  
6 Defendant's attorney for his misconduct in front of the jury.

7 **THE COURT FURTHER FINDS** that NRCP 60(b)(1) governs Defendant's  
8 request for this Court to clarify or reconsider its November 5, 2019 Decision and Order.  
9 NRCP 60(b)(1) allows the trial court to relieve a party from an order due to mistake,  
10 inadvertence, surprise, or excusable neglect.

11 **THE COURT FURTHER FINDS** that a motion for rehearing may only be  
12 granted in rare instances in which new issues of fact or law are raised that contradict  
13 the ruling already imposed. *Moore v. Las Vegas*, 92 Nev. 402, 405 (1976).

14 **THE COURT FURTHER FINDS** that it "may consider a previously decided  
15 issue if substantially different evidence is subsequently introduced or the decision is  
16 clearly erroneous." *Masonry & Tile Contrs. v. Jolley, Urga & Wirth Ass'n*, 113 Nev. 737,  
17 741 (1997).

18 **THE COURT FURTHER FINDS** that Defendant's Motion is based on the  
19 mistaken belief that this Court's Decision and Order incorrectly reflects that Defendant  
20 was allowed to present evidence to the jury regarding issues of causation and damages.

21 **THE COURT FURTHER FINDS** that Defendant was not deprived of the ability  
22 to present evidence and argument regarding issues of causation and damages. The  
23 sanctions imposed by this Court did not take place until nearly three (3) weeks after the  
24 jury trial commenced. By that time, Plaintiff Bahram Yahyavi ("Plaintiff") presented  
25 testimony from his treating physicians and retained medical expert regarding causation  
26 and damages. Plaintiff also presented testimony from his retained vocational  
27 rehabilitation expert regarding the extent of Plaintiff's vocational losses resulting from  
28 his inability to work due to his permanent physical disability. Plaintiff presented  
testimony from his retained economist regarding the present value of Plaintiff's total  
claimed damages. Defendant received a full and fair opportunity to cross-examine



1 Plaintiff's treating physicians and retained experts regarding those issues. Defendant's  
2 retained medical expert, Howard Tung, M.D., provided ample testimony that directly  
3 addressed issues of causation and damages, including testimony that disputed Plaintiff's  
4 treating physicians and retained medical expert's testimony regarding the same.  
5 Defendant's retained vocational rehabilitation expert, Edward L. Bennett, M.A., C.R.C.,  
6 provided testimony that challenged the extent of Plaintiff's vocational losses. Defendant  
7 also received a full and fair opportunity to present closing argument to the jury  
8 regarding issues of causation and damages based on the testimony from Dr. Tung and  
9 Mr. Bennett. The sanctions imposed by this Court did not exclude or limit, in any way,  
10 the testimony and evidence Defendant presented regarding issues of causation and  
damages before the attorney misconduct occurred.

11       **THE COURT FURTHER FINDS** that while there were sufficient grounds to  
12 strike Defendant's Answer in its entirety given the willfulness of the misconduct and  
13 defense counsel's history of prior misconduct, this Court exercised its broad discretion  
14 to impose lesser sanctions. *Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 680  
15 (2011); *Young v. Johnny Ribeiro Bldg.*, 106 Nev. 88, 92 (1990). The lesser sanctions  
16 imposed by this Court did not completely deprive Defendant of the ability or opportunity  
17 to present evidence and argument disputing issues of causation and damages to the jury.

18       **THE COURT FURTHER FINDS** that Defendant fails to provide new issues of  
19 fact or law or other evidence to justify relief from this Court's Decision and Order on the  
20 grounds articulated in NRCP 60(b).

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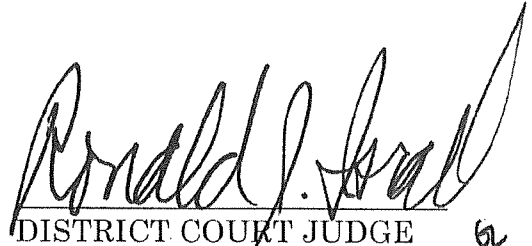
28 ...

**ORDER**

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Defendant Capriati Construction Corp., Inc.'s Motion to Correct or Reconsider Decision and Order, Entered on November 5, [2019] is **DENIED** in its entirety.

**IT IS SO ORDERED.**

DATED this 2 day of March, 2020.

  
DISTRICT COURT JUDGE

RONALD J. ISRAEL

DATED this 26<sup>th</sup> day of February, 2020.

DATED this \_\_\_\_ day of February, 2020.

Respectfully Submitted By:

Approved as to Form and Content:

**PRINCE LAW GROUP**

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