IN THE SUPREME COURT OF THE STATE OF NEVADA

CAPRIATI CONSTRUCTION CORP., INC., a Nevada Corporation Appellant, v. BAHRAM YAHYAVI, an individual, Respondent.	)	Supreme Court No: 80107 District Court Case No: A718689
CAPRIATI CONSTRUCTION CORP., INC., a Nevada Corporation Appellant, v. BAHRAM YAHYAVI, an individual, Respondent.	)	Supreme Court No: 80821

APPENDIX TO
APPELLANT'S OPENING BRIEF
VOLUME 4 of 12

Appeal from the Eighth Judicial District Court
Case No. A718689

HUTCHISON & STEFFEN, PLLC

Michael K. Wall (2098)
Peccole Professional Park
10080 Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorney for Appellant

Chronological Index

Doc No.	Description	Vol.	Bates Nos.
1	Complaint; filed 05/20/2015	1	AA000001-AA000008
2	Answer; filed 10/07/2015	1	AA000009-AA000012
3	Demand for Jury Trial; filed 10/07/2015	1	AA000013-AA000014
4	Mtn for an Order Terminating Automatic Stay; filed 10/25/2016	1	AA000015-AA000020
5	Order Granting Motion and Modifying Automatic Stay; filed 12/22/2016	1	AA000021-AA000022
6	Notice of Appearance; filed 02/21/2018	1	AA000024-AA000025
7	Notice of Refiling of Answer; filed 04/25/2018	1	AA000026-AA000027
8	Refiled Answer; filed 04/25/2018	1	AA000028-AA000031
9	Baker Initial Report; dated 07/03/2018	1	AA000032-AA000035
10	Kirkendall Initial Report; dated 07/04/2018	1	AA000036-AA000038
11	Leggett Initial Report; dated 08/20/2018	1	AA000039-AA000054
12	Kirkendall Supplemental Report; dated 08/30/2018	1	AA000055-AA000067
13	Baker Supplemental Report; dated 12/03/2018	1	AA000068-AA000092
14	Leggett Transcript 1; conducted 12/05/2018	1	AA000093-AA000095
15	Baker Transcript; conducted 12/20/2018	1	AA000096-AA000102

16	Leggett Supplemental Report; dated 01/15/2019	1	AA000103-AA000119
17	OOJ to Defendant; served 01/18/2019	1	AA000120-AA000122
18	Leggett Transcript 2; conducted 05/09/2019	1	AA000123-AA000126
19	Baker Supplemental Report; dated 06/20/2019	1	AA000127-AA000137
20	Def. Trial Exhibit A. Southwest Medical Associates, Inc. Records; dated 10/25/2011	1	AA000138-AA000139
21	De-designation of expert Leggett; filed 09/20/2019	1	AA000140-AA000141
22	Plaintiff Motion for Sanctions; filed 09/26/2019	1	AA000142-AA000189
23	Jury Instructions	1	AA000190-AA000194
24	Verdict; filed 09/27/2019	1	AA000195
25	NEO of Judgment; filed 10/22/2019	1	AA000196-AA000200
26	Plaintiff Memo of Costs; filed 10/22/2019	1, 2	AA000201-AA000481
27	Plaintiff Motion for Attorney's Fees; filed 10/22/2019	3	AA000482-AA000542
28	NEO - Decision and Order; filed 11/05/2019	3	AA000543-AA000553
29	Defendant Motion Correct Reconsider Decision; filed 11/14/2019	3	AA000554-AA000564
30	Defendant Motion for New Trial; filed 11/18/2018	3	AA000565-AA000583
31	Notice of Appeal; filed 11/19/2019	3, 4	AA000584-AA000752
32	Plaintiff Opp Motion Correct or Reconsider Decision; filed 12/16/2019	4	AA000753-AA000763

			AA001938
50	Trial Transcript - Day 10; dated 09/20/2019	9, 10	AA001939-AA002167
51	Trial Transcript - Day 11; dated 09/23/2019	10	AA002168-AA002296
52	Trial Transcript - Day 12; dated 09/24/2019	10	AA002297-AA002357
53	Trial Transcript - Day 13 - Part 1; dated 09/25/2019	11	AA002358-AA002459
54	Trial Transcript - Day 13 - Part 2; dated 09/25/2019	11	AA002460-AA002473
55	Trial Transcript - Day 14; dated 09/26/2019	11	AA002474-AA002555
56	Trial Transcript - Day 15; dated 09/27/2019	11, 12	AA002556-AA002706

Alphabetical Index

Doc No.	Description	Vol.	Bates Nos.
41	Amended Notice of Appeal; filed 03/13/2020	5	AA001027-AA001029
2	Answer; filed 10/07/2015	1	AA000009-AA000012
9	Baker Initial Report; dated 07/03/2018	1	AA000032-AA000035
13	Baker Supplemental Report; dated 12/03/2018	1	AA000068-AA000092
19	Baker Supplemental Report; dated 06/20/2019	1	AA000127-AA000137
15	Baker Transcript; conducted 12/20/2018	1	AA000096-AA000102
1	Complaint; filed 05/20/2015	1	AA000001-AA000008

21	De-designation of expert Leggett; filed 09/20/2019	1	AA000140-AA000141
29	Defendant Motion Correct Reconsider Decision; filed 11/14/2019	3	AA000554-AA000564
30	Defendant Motion for New Trial; filed 11/18/2018	3	AA000565-AA000583
33	Defendant Reply Motion Correct Reconsider Decision; filed 12/24/2019	4	AA000764-AA000779
35	Defendant Reply Motion New Trial; filed 01/22/2020	4	AA000911-AA000924
20	Def. Trial Exhibit A. Southwest Medical Associates, Inc. Records; dated 10/25/2011	1	AA000138-AA000139
3	Demand for Jury Trial; filed 10/07/2015	1	AA000013-AA000014
23	Jury Instructions	1	AA000190-AA000194
10	Kirkendall Initial Report; dated 07/04/2018	1	AA000036-AA000038
12	Kirkendall Supplemental Report; dated 08/30/2018	1	AA000055-AA000067
11	Leggett Initial Report; dated 08/20/2018	1	AA000039-AA000054
16	Leggett Supplemental Report; dated 01/15/2019	1	AA000103-AA000119
14	Leggett Transcript 1; conducted 12/05/2018	1	AA000093-AA000095
18	Leggett Transcript 2; conducted 05/09/2019	1	AA000123-AA000126
4	Mtn for an Order Terminating Automatic Stay; filed 10/25/2016	1	AA000015-AA000020
28	NEO - Decision and Order; filed 11/05/2019	3	AA000543-AA000553
25	NEO of Judgment; filed 10/22/2019	1	AA000196-

			AA000200
37	NEO - Order Denying Def Motion for New Trial; filed 03/04/2020	5	AA000998-AA001005
38	NEO - Order Denying Def Motion to Correct or Reconsider; filed 03/04/2020	5	AA001006-AA001012
39	NEO - Order re Def Motion Re-Tax Costs; filed 03/04/2020	5	AA001013-AA001018
40	NEO - Order re Plaintiff Motion Atty Fees; filed 03/04/2020	5	AA001019-AA001026
31	Notice of Appeal; filed 11/19/2019	3, 4	AA000584-AA000752
6	Notice of Appearance; filed 02/21/2018	1	AA000024-AA000025
7	Notice of Refiling of Answer; filed 04/25/2018	1	AA000026-AA000027
17	OOJ to Defendant; served 01/18/2019	1	AA000120-AA000122
5	Order Granting Motion and Modifying Automatic Stay; filed 12/22/2016	1	AA000021-AA000022
26	Plaintiff Memo of Costs; filed 10/22/2019	1, 2	AA000201-AA000481
27	Plaintiff Motion for Attorney's Fees; filed 10/22/2019	3	AA000482-AA000542
22	Plaintiff Motion for Sanctions; filed 09/26/2019	1	AA000142-AA000189
32	Plaintiff Opp Motion Correct or Reconsider Decision; filed 12/16/2019	4	AA000753-AA000763
34	Plaintiff Opp Motion New Trial; filed 01/10/2020	4	AA000780-AA000910
8	Refiled Answer; filed 04/25/2018	1	AA000028-AA000031
36	Transcript Post-Trial Motions, dated 01/28/2020	4, 5	AA000925-AA000997

43	Trial Transcript - Day 5 - Part 2, dated 09/13/2019	5	AA001133-AA001191
44	Trial Transcript - Day 5 - Part 3; dated 09/13/2019	6	AA001192-AA001254
44	Trial Transcript - Day 5 - Part 3; dated 09/13/2019	6	AA001192-AA001254
45	Trial Transcript - Day 6; dated 09/16/2019	6, 7	AA001255-AA001444
46	Trial Transcript - Day 7 - Part 1; dated 09/17/2019	7	AA001445-AA001510
47	Trial Transcript - Day 7 - Part 2; dated 09/17/2019	7	AA001511-AA001649
48	Trial Transcript - Day 8; dated 09/18/2019	8	AA001650-AA001792
49	Trial Transcript - Day 9; dated 09/19/2019	8, 9	AA001793-AA001938
50	Trial Transcript - Day 10; dated 09/20/2019	9, 10	AA001939-AA002167
51	Trial Transcript - Day 11; dated 09/23/2019	10	AA002168-AA002296
52	Trial Transcript - Day 12; dated 09/24/2019	10	AA002297-AA002357
53	Trial Transcript - Day 13 - Part 1; dated 09/25/2019	11	AA002358-AA002459
54	Trial Transcript - Day 13 - Part 2; dated 09/25/2019	11	AA002460-AA002473
55	Trial Transcript - Day 14; dated 09/26/2019	11	AA002474-AA002555
56	Trial Transcript - Day 15; dated 09/27/2019	11, 12	AA002556-AA002706
24	Verdict; filed 09/27/2019	1	AA000195

CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date the **APPENDIX TO APPELLANT'S OPENING BRIEF VOLUME 4 of 12** 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
Las Vegas, NV 89135
Tel: (702) 534-7600
Fax: (702) 534-7601

Attorney for Respondent Bahram Yahyavi

DATED this 12th day of August, 2020.

/s/ Kaylee Conradi

An employee of Hutchison & Steffen, PLLC

DISTRICT COURT
CLARK COUNTY, NEVADA

Negligence - Auto	**COURT MINUTES**	**September 25, 2019**

A-15-718689-C Bahram Yahyavi, Plaintiff(s)
vs.
Capriati Construction Corp Inc, Defendant(s)

September 25, 2019 **1:00 PM** **Jury Trial** **Jury Trial (3-4 weeks)**

HEARD BY: Israel, Ronald J. **COURTROOM:** RJC Courtroom 15C

COURT CLERK: Kathy Thomas

RECORDER: Judy Chappell

REPORTER:

PARTIES PRESENT:

Brown, Mark James	Attorney
Kahn, David S.	Attorney
Prince, Dennis M	Attorney
Severino, Mark C	Attorney
Strong, Kevin T.	Attorney
Yahyavi, Bahram	Plaintiff

JOURNAL ENTRIES

- Also present Mr. Cliff Goodrich, a representative of Capriati Construction Corp.

OUTSIDE THE PRESENCE OF THE JURY: Mr. Kahn proposed the front page of the

OUTSIDE THE PRESENCE OF THE JURY: Arguments by Counsel regarding proposed AAAA exhibit/final lien, with log of workers compensation payments by provider (03/02/17). Court directed Mr. Kahn to bring a log from the worker compensation. Colloquy regarding NRD 616C.215 (10). Upon Mr. Kahn provided a 1 page document sent from workman s compensation, Mr. Prince objected and stated the document is inaccurate. Court noted counsel may need to subpoena someone from workman s compensation to testify. Mr. Kahn further proposed and offered redacted exhibit YY (Heart Center of Nevada) and Mr. Prince objected to the admission.

JURY PRESENT: Counsel acknowledged the presence of the jury. Testimony and exhibits presented.

(See worksheets).

Mr. Kahn gave an offer of proof regarding the offered exhibit YY and stated the Plaintiff's income amounts. Mr. Prince argued the amounts the Plaintiff did make per year and noted it was down because of the accident. Court denied counsel's request to admit the exhibit. Court noted both parties stipulated to exclude an accepted body part. Mr. Severino provided another spreadsheet from workman s compensation with breakdowns and total amount, that he just received. Mr. Prince noted the Plaintiff receives total disability this year. Colloquy regarding amounts reduced and vocational rehabilitation noted. Court noted the calculation is difficult.

JURY PRESENT: Testimony continued. (See worksheets). Plaintiff Rested. Testimony continued.

OUTSIDE THE PRESENCE OF THE JURY: Mr. Prince argued the Deft. stated they had filed bankruptcy and would request the Defendant's answer be stricken or to have a curative instruction regarding willful misconduct. Mr. Kahn noted an offer of proof, and stated there were 250 employees and now down to 60 employees and it was elicited from the witness. Court admonished Mr. Kahn and noted bankruptcy is not admissible because of reorganization, it is their fault. Mr. Kahn apologized. Colloquy regarding sanctions. Mr. Prince noted he did not want a mistrial. Court directed Counsel to appear tomorrow at 9:00 AM and the Court will re-read Gunderson and decide on the appropriate sanctions.

Evening recess.

09/26/19 10:00 AM JURY TRIAL

DISTRICT COURT
CLARK COUNTY, NEVADA

Negligence - Auto	**COURT MINUTES**	**September 27, 2019**

A-15-718689-C Bahram Yahyavi, Plaintiff(s)
vs.
Capriati Construction Corp Inc, Defendant(s)

September 27, 2019 9:00 AM Jury Trial

HEARD BY: Israel, Ronald J. **COURTROOM:** RJC Courtroom 15C

COURT CLERK: Jill Chambers
Elizabeth Vargas

RECORDER: Judy Chappell

REPORTER:

PARTIES PRESENT:

Brown, Mark James	Attorney
Kahn, David S.	Attorney
Prince, Dennis M	Attorney
Yahyavi, Bahram	Plaintiff

JOURNAL ENTRIES

- OUTSIDE THE PRESENCE OF THE JURY

Mr. Kahn moved to have his experts' reports admitted as Court's exhibits. Court admitted the expert reports.

JURY PRESENT

Court read the jury's instructions. Closing arguments by counsel.

The jury retired to deliberate.

Courtroom Clerk, Elizabeth Vargas, now present.

JURY PRESENT: At the hour of 7:40 p.m. the jury returned with a Verdict for the Plaintiff (See

Verdict on file herein). Jury polled. Court thanked and excused the jurors.

EXHIBIT(S) LIST

Case No.: **A718689**

Dept. No.: **XXVIII**

PLAINTIFF'S: **Bahram Yahyavi**

vs.

DEFENDANT'S: **Capriati Construction Corp. Inc.**

Trial Date: 09/09/19

Judge: Ronald J. Israel

Court Clerk: Kathy Thomas

Recorder: Judy Chappell

Counsel for Plaintiff: Dennis Prince, Esq. & Brandon Verde, Esq.

Counsel for Defendant: David Kahn, Esq. & Mark Severino, Esq.

TRIAL BEFORE THE COURT

PLAINTIFF'S EXHIBITS

Exhibit Number	Exhibit Description	Date Offered	Objection	Date Admitted
	see attached			

PLAINTIFF'S EXHIBIT LIST TRIAL DATE: SEPTEMBER 9, 2019

Case No. A-15-718689-C	Court Clerk: Kathy Thomas
Dept. XXVIII Ronald J. Israel	**Recorder:**
Pltf(s): BAHRAM YAHYAVI, an Individual **v.** **Deft(s):** CAPRIATI CONSTRUCTION CORP., INC., a Nevada Corporation	**Plaintiff's Counsel:** DENNIS M. PRINCE, ESQ. **Defendants' Counsel:** DAVID S. KAHN, ESQ.

Exhibit #	Description	Date Offered	Objection	Date Admitted	
1.	Las Vegas Metropolitan Police Department's State of Nevada Traffic Accident Report (P00001-P000007)	9/12/19	stp	9/12/19	BS
2.	Google Map Photo of Accident Area with Backhoe (P0000008)				BS
3.	Google Map Photo of Accident Area with Construction Barriers (P0000009)				BS
4.	Google Map Photo of Accident Area of Glen Avenue (P0000010)				BS
5.	Google Map Photo of Accident Area of Sahara Avenue with Chapman Sign (P0000011)				BS
6.	Google Earth Aerial View of Scene of Accident (P0000012)				BS
7.	Google Earth Aerial View of Scene of Accident with streets (P0000013)				BS
8.	Exhibits from deposition of Defendant Arbuckle (P000014-P0000021)	9/12/19	stp	9/12/19	BS

9.	Defendant Capriati Construction Letter to CH2M: Notice of Intent to Claim for Traffic Control (P000022-P000048)	9/12/19	Stp	9/12/19	BB
10.	CH2M Letter to Defendant Capriati Construction: Traffic Control Plan Not Submitted or Approved (P0000049)				BB
11.	CH2M Letter to Defendant Capriati Construction Punch List Notice (P0000050-P0000054)				BB
12.	Williams Brother, Inc. Letter to Clark County Public Works: Request for Change Specification Phasing Plan (P0000055)				BB
13.	Clark County Department of Public Works Daily Inspection Report for Defendant (P000056)				BB
14.	Clark County Department of Public Works Non-Compliance Report (P00000057)				BB
15.	Department of Transportation Additional Conditions to the City of Las Vegas (P000058-P000064)	9/12/19	Stp	9/12/19	BB
16.	Department of Transportation Violation Notice to Clark County Public Works (P000065-P0000066)	Returned			
17.	Department of Transportation Traffic Control Plans Phase 2 Submittal 101 (P000067-P0000071)	9/12/19	Stp	9/12/19	BB
18.	Department of Transportation Traffic Control Plans Phase 2 Submittal 104 (P000072-P000075)	9/12/19	Stp	9/12/19	BB

19.	Department of Transportation Traffic Control Plans Phase 3 Submittal 109 (0000076-0000081)	9/12/19	Stp	9/12/19	BB
20.	Department of Transportation Traffic Control Plans Phase 4 Submittal 143 (0000082-0000092)				BB
21.	Color Photograph of Forklift Sideview (00000093)				BB
22.	Color Photograph of Forklift with Forks Down (00000094)				BB
23.	Color Photograph of Forklift with Serial Number (00000095)				BB
24.	Color Photograph of Forklift from Front (0000096)				BB
25.	Color Photograph of Forklift Tires (00000097)				BB
26.	Color Photograph of Forklift Forks (00000098)				BB
27.	Color Photograph of Forklift Front (00000099)				BB
28.	Color Photograph of Plaintiff's Vehicle Front Passenger Side (0000100)				BB
29.	Color Photograph of Plaintiff's Vehicle from Front (P00000101)				BB
30.	Color Photograph of Plaintiff's Vehicle Right Driver Side (P0000102)				BB
31.	Color Photograph of Plaintiff's Vehicle with Man Looking In (P0000103)	9/12/19	Stp	9/12/19	BB

32.	Color Photograph of Plaintiff's Vehicle With inspection of Interior (P0000104)	9/12/19	Stp	9/12/19	BS
33.	Color Photograph of Plaintiff's Vehicle from Driver side with Driver Door Open (P000105)				BS
34.	Color Photograph of Plaintiff's Vehicle from Rear With driver Door Open (P0000106)				BS
35.	Color Photograph of Plaintiff's Vehicle Interior Windshield (P0000107)				BS
36.	Color Photograph of Plaintiff's Vehicle Full Interior Windshield (P0000108)				BS
37.	Color Photograph of Plaintiff's Vehicle Interior (P00000109)				BS
38.	Color Photograph of Plaintiff's Vehicle Full Interior Windshield (P00000110)				BS
39.	Color Photograph of Plaintiff's Vehicle from Rear (P00000111)				BS
40.	Color Photograph Plaintiff's Vehicle from Rear with Man Looking In (P00000112)				BS
41.	Color Photograph of Plaintiff's Vehicle Partial Rear (P0000113)				BS
42.	Color Photograph of Plaintiff's Vehicle Driver's Side Rear Panel (P0000114)				BS
43.	Color Photograph of Plaintiff's Vehicle from front of windshield (P0000115)	9/12/19	Stp	9/12/19	BS

44.	Color Photograph of Plaintiff's Vehicle from Passenger Sideview (P0000116)	9/12/19	Stp	9/12/19	
45.	Color Photograph of Plaintiff's Vehicle Entire Vehicle (P0000117)				
46.	Color Photograph of Plaintiff's Vehicle with man (P0000118)				
47.	Color Photograph of Plaintiff's Vehicle Right Panel (P0000119)				
48.	Color Photograph of Plaintiff's Vehicle Right Side (P0000120)				
49.	Color Photograph of Plaintiff's Vehicle of Entire Vehicle (P00000121)				
50.	Color Photograph of Plaintiff's Vehicle Rear Left (P0000122)				
51.	Color Photograph of Plaintiff's Vehicle Windshield (P0000123)				
52.	Color Photograph of Plaintiff's Vehicle Windshield (P0000124)				
53.	Color Photograph of Plaintiff's Vehicle Roof (P0000125)				
54.	Color Photograph of Accident Scene Forklift Forks Raised (P0000126)				
55.	Color Photograph of Accident Scene with Truck and Forklift (P0000127)				
56.	Color Photograph of Accident Scene with Plaintiff's Vehicle and Partial View of Fire Truck (P00000128)	9/12/19	Stp	9/12/19	

57.	Color Photograph of Accident Scene of Windshield of Plaintiff's Vehicle (P0000129)	9/12/19	Stp	9/12/19	
58.	Color Photograph of Accident Scene with Rearview of Plaintiff's Vehicle (P0000130)				
59.	Color Photograph of Accident Scene with Tires of Forklift (P0000131)				
60.	Color Photograph of Accident Scene with Skid Marks in Dirt (P0000132)				
61.	Color Photograph of Accident Scene with Raised Forks of Forklift and Construction cone (P00000133)				
62.	Color Photograph of Accident Scene with Front View of Plaintiff's vehicle (P00000134)				
63.	Color Photograph of Accident Scene with Forklift (P0000135)				
64.	Color Photograph of Accident Scene with Forks Raised and Side of Plaintiff's Vehicle (P00000136)				
65.	Color Photograph of Accident Scene with Firetruck, Raised forks and Partial View of Plaintiff's Vehicle (P0000137)				
66.	Color photographs of accident scene with Plaintiff's vehicle and fire truck (P00000138)				
67.	Color photograph of accident scene with forks raised, construction worker and partial view of Plaintiff's vehicle (P00000139)	9/12/19	Stp	9/12/19	

68.	Color Photograph of Accident Scene with raised forks of forklift (P0000140)	9/12/19	Stp	9/12/19	
69.	Color photograph of accident scene with skid marks in dirt (P0000141)				
70.	Color photograph of accident scene with forks down and partial view of Plaintiff's vehicle (P000000142)				
71.	Color Photograph of Accident Scene with Forks Down of Forklift and Partial View of Plaintiff's Vehicle (P00000143)				
72.	Color Photograph of Accident Scene with construction cones (P00000144)				
73.	Color Photograph of Accident Scene with forks up, Plaintiff's vehicle and construction cone (P000000145)				
74.	Color Photograph of Accident Scene with tires of forklift (P000000146)				
75.	Color photograph of accident scene with skid marks in dirt (P00000147)				
76.	Color photograph of accident scene with forks up, truck and Plaintiff's vehicle (P000148)				
77.	Color photograph of accident scene with Plaintiff's vehicle and fire truck (P000149)				
78.	Color photograph of accident scene with rear of Plaintiff's vehicle (P000150)	9/12/19	Stp	9/12/19	

79.	Color photograph of accident scene with Plaintiff's vehicle and cone (P000151)	9/12/19	stp	9/12/19	
80.	Color photograph of accident scene with construction cones (P000152)				
81.	Color photograph of accident scene with construction cones (P000153)				
82.	Color photograph of accident scene with forks down, cone and Plaintiff's vehicle (P000154)				
83.	Color photograph of accident scene with Chapman sign (P000155)				
83a.	Color photographs of accident scene taken by Defendant (P0001992-P0002054)	9/12/19	stp	9/12/19	
84.	Past Medical Expenses of Plaintiff (P000156-P00157)	9/18/19	stp	9/18/19	
85.	Las Vegas Fire Rescue, medical records (P000158-P000161)	9/12/19	stp	9/12/19	
86.	University Medical Center, ER medical records (P000162-P000190)				
87.	Downtown Neck and Back Clinic, medical records (P000191-P000212)				
88.	Center for Occupational Health, medical records (P000213-P000229)				
89.	Kelly Hawkins Physical Therapy, medical records (P000230-P000277)	9/12/19	stp	9/12/19	

90.	Radar Medical Group, medical records (P000278-P000285)	9/12/19	Stp	9/12/19	
91.	Desert Orthopaedic Center, medical records (P000286-P000307)				
92.	Joseph Schifini, M.D., medical records (P000308-P000402)				
93.	Las Vegas Surgery Center, medical records (P000403-P000502)				
94.	Clinical Neurology Specialists, medical records (P000503-P000513)				
95.	Lok Acupuncture Clinic, medical records (P000514-P000528)				
96.	Nevada Spine Clinic, medical records (P000529-P000555)				
97.	Smoke Ranch Surgery, medical records (P000556-P000577)				
98.	David Oliveri, MD, medical records (P000578-P000588)				
99.	Shield Radiology Consultants, medical records (P000589)				
100.	Southern Nevada Pain Center, medical records (P000590-P000632)				
101.	Single Day Surgery, medical records (P000633-P000669)				
102.	Steinberg Diagnostic Imaging, medical records (P000670-P000690)	9/12/19	Stp	9/12/19	

103.	ATI Physical Therapy, medical records (P000691-P000933)	9/12/19	stp	9/12/19	
104.	Mountain West Chiropractic, medical records (P000934-P0001010)				
105.	Western Regional Center for Brain and Spine, medical records (P001011-P0001038)				
106.	Las Vegas Neurosurgical Institute, medical records (P0001039-P0001059)				
107.	Neurology Center of Nevada, medical records (P0001060-P0001063)				
108.	Valley Hospital, relevant medical records (P0001064-P0001075)				
109.	Las Vegas Neurosurgery Orthopedics & Rehabilitation, medical records (P0001076-P0001108)				
110.	Nevada Comprehensive Pain Center, medical records (P0001109-P0001149)				
111.	Center for Disease and Surgery of the Spine, medical records (P0001150-P0001164)	9/12/19	stp	9/12/19	
112.	W2s of Plaintiff 2008 - 2016 (P0001165-P0001176)	Returned			
113.	1040 Tax Returns of Plaintiff 2006 – 2017 (P00001177-P0001279)				
114.	Employment records for Chapman Dodge (P0001280-P0001484)	9/12/19	stp	9/12/19	

115.	Commission Statements of Plaintiff for Integrity Chrysler Jeep Dodge Plaintiff from 2009 (P0001485-P0001488)	Returned			
116.	Las Vegas Fire and Rescue, billing (P0001489)	9/18/19	stp	9/18/19	
117.	University Medical Center, billing (P0001490-P0001491)				
118.	EMP of Clark UMC, billing (P0001492-P0001493)				
119.	Desert Radiologists, billing (P0001494-P0001495)				
120.	Downtown Neck and Back Clinic, billing (P0001496-P0001497)				
121.	Center for Occupational Health, billing (P0001498)				
122.	Radar Medical Group, billing (P0001499)				
123.	Kelly Hawkins Physical Therapy, billing (P0001500-P0001504)				
124.	Desert Orthopaedic Center, billing (P0001505-P0001508)				
125.	Joseph Schifini, M.D., billing (P0001509-P0001510)				
126.	Clinical Neurology Specialists, billing (P0001511)				
127.	Las Vegas Surgery Center, billing (P0001512-P0001518)				
128.	Lok Acupuncture Clinic, billing (P0001519)	9/18/19	stp	9/18/19	

129.	Nevada Spine Clinic, billing (P0001520-P0001522)	9/18/19	stp	9/18/19	
130.	Smoke Ranch Surgery, billing (P0001523-P0001526)				
131.	Shield Radiology, billing (P0001527)				
132.	Southern Nevada Pain Center, billing (P0001528-P0001532)				
133.	Single Day Surgery Center, billing (P0001533-P0001534)				
134.	Steinberg Diagnostic Imaging, billing (P0001535-P0001537)				
135.	ATI Physical Therapy, billing (P0001538-P-0001552)				
136.	Mountain West Chiropractic, billing (P0001553-P0001557)				
137.	Western Regional Center for Brain and Spine, billing (P0001558-P0001568)				
138.	Las Vegas Neurosurgical Institute, billing (P0001569-P0001570)				
139.	Neurology Center of Nevada, billing (P0001571-P0001578)	9/18/19	stp	9/18/19	
140.	Surgical Anesthesia Services, billing (P0001579-P0001580)	9/18/19	stp	9/18/19	
141.	Valley Hospital, billing (P0001581-P0001590)	"	"	"	
142.	Las Vegas Neurosurgery Orthopedics & Rehab, billing (P0001591)	9/18/19	stp	9/18/19	

143.	Nevada Comprehensive Pain Center, billing (P0001592-P0001594)	9/18/19	stp	9/18/19	
144.	Center for Diseases and Surgery of the Spine, billing (P0001595-P0001597)	"	"	"	
145.	CVS prescription billing (P0001598-P0001613)	"	"	"	
146.	Walmart prescription billing (P0001614-P0001619)	9/18/19	stp	9/18/19	
147.	Valley Hospital, entire chart on CD (P0001620-P0001922)	Returned			
148.	Life Expectancy Table (P0001923-P0001986)	9/12/19	stp	9/12/19	
149.	University Medical Center, diagnostic studies on CD (P0001987)	9/18/19			
150.	Desert Radiologists, diagnostic studies on CD (P0001988)				
151.	Steinberg Diagnostic Imaging, diagnostic studies on CD (P0001989)				
152.	Desert Orthopedic Center, diagnostic studies on CD (P0001990)				
153.	SW Medical Associates, diagnostic studies on CD (P0001991)				
154.	Notice of Taking Videotaped Deposition of Cliff Goodrich as the NRCP 30(b)(b) Witness of Defendant Capriati Construction (P002055-P002059)	9/12/19	obj	9/12/19	
155.	Earnings chart (P0020060-P002065)	9/12/19	stp	9/12/19	

156.	Southwest Medical Associates, medical records from 2011 (P002066-P002128)	9/12/19	Stp	9/12/19

EXHIBIT(S) LIST

Case No.: **A718689**

Dept. No.: **XXVIII**

PLAINTIFF'S: **Bahram Yahyavi**

vs.

DEFENDANT'S: **Capriati Construction Corp. Inc.**

Trial Date: 09/09/19

Judge: Ronald J. Israel

Court Clerk: Kathy Thomas

Recorder: Judy Chappell

Counsel for Plaintiff: Dennis Prince, Esq. & Brandon Verde, Esq.

Counsel for Defendant: David Kahn, Esq. & Mark Severino, Esq.

TRIAL BEFORE THE COURT

DEFENDANT'S EXHIBITS

Exhibit Number	Exhibit Description	Date Offered	Objection	Date Admitted
	See attached			

DEFENDANT'S EXHIBIT LIST

Case No: A-15-718689-C

Dept. No: XXVIII

Trial Date: September 9, 2019

Judge: Honorable Ronald J. Israel

Court Clerk: Kathy Klein

Recorder: Judy Chappell

PLAINTIFFS: Bahram Yahyavi

Counsel for Plaintiffs:

Dennis M. Prince, Esq.
Dennis Prince Law Group
8816 Spanish Ridge Ave.
Las Vegas, NV 89148

Mailk W. Ahmad, Esq.
Law Office of Malik W. Ahmad
8072 W. Sahara Ave., Suite A
Las Vegas, NV 89117

vs.

DEFENDANTS: Capriati Construction Corp., Inc.

Counsel for Defendant:

David S. Kahn, Esq.
Mark C. Severino, Esq.
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
300 South Fourth Street, 11th Floor
Las Vegas, NV 89101

Mark J. Brown, Esq.
Law Offices of Eric Larsen
750 E. Warm Springs Road
Suite 320, Box 19
Las Vegas, NV 89119

JURY TRIAL

DEFENDANT'S EXHIBITS

Exhibit Number	Exhibit Description	Bates Numbers	Date Offered	Objection	Date Admitted
A.	Southwest Medical Record 10/25/2011 – Adult Medicine Profess Note	SWM0057-SWM0058			
B.	Excerpted Information from Exhibit A	B0001			
C.	Southwest Medical Records 10/25/2011 – Radiology Diagnostic Report/ Cervical Spine	SWM0006			
D.	Excerpted Information from Exhibit C	D0001			

Returned

Exhibit Number	Exhibit Description	Bates Numbers	Date Offered	Objection	Date Admitted
E.	UMC Trauma Center Report – 06/19/2013	UMC0030-UMC0031			
F.	Defendants Crash Test Data (Digital Format)	F0001			
G.	Defendant Crash Test Vendor Report 06/21/2019	CALSPAN0001-CALSPAN0004			
H.	Southwest Medical Letter to Plaintiff 10/28/11	SWM0063			
I.	UMC Brain CT -10/06/2013	UMC0115			
J.	UMC Cervical CT – 06/19/2013	UMC0026-UMC0027			
K.	UMC – Trauma Resuscitation Nursing Flow Sheet – 06/19/2013	UMC0032			
L.	Southwest Medical – Results – Cervical X-Rays – 10/25/2011	SWM0066			
M.	Plaintiff's Complaint	COM0001-COM0008			
N.	Defendants Answer to Plaintiff's Complaint	ANS0001-ANS0004			
O.	Claim File of Chynoweth, Hill and Leavitt, LLC	CHL0001-CHL0091			
P.	Claim File of Associated Risk Management	ARM0001-ARM1362			
Q.	Police Report	TAR0001-TAR0010			
R.	Photos of Incident	POI0001-POI0064			
S.	Plaintiff's related social media	RSM0001-RSM0254			
T.	Plaintiff's Employment Records	CER0001-CER0206			
U.	Chapman Dodge records regarding 2012 Dodge Charger	CHAP0001-CHAP0013			
V.	Defendant Capriati Construction's Order Granting Motion and Modifying Automatic Stay in Bankruptcy Case Number 15-15722-abl entered 12/22/2016.	CAP0001-CAP0003			
W.	Grant, Bargain, Sale Deed for property at commonly known address: 112 Quail Run Road, Henderson, NV 89014	Deed000001-Deed000005			
X.	Bahram Yahyavi social media and corporate information	PSM0001-PSM0011			
	MEDICAL RECORDS:				

Exhibit Number	Exhibit Description	Bates Numbers	Date Offered	Objection	Date Admitted
Y.	Clinical Neurology Specialists	CNS0001-CNS0014			
Z.	Desert Orthopedic Center	DOC0001-DOC0167			
AA.	Radar Medical Group (Dipti Shah, MD)	RMG0001-RMG0080			
BB.	Downtown Neck and Back Clinic	DNB0001-DNB0052			
CC.	Joseph Schifini, MD	JSMD0001-JSMD0103			
DD.	Kelly Hawkins Physical Therapy	KHPT0001-KHPT0095			
EE.	Kinex Medical Company Medical and Billing Records	KMC0001-KMC0009			
FF.	Matt Smith Physical Therapy	MSPT0001-MSPT0124			
GG.	Nevada Spine Clinic	NSC0001-NSC0030			
HH.	PBS Anesthesia	PBS0001-PBS0011			
II.	Smoke Ranch Surgery Center	SRSC0001-SRSC0026			
JJ.	University Medical Center	UMC0001-UMC0121			
KK.	National Pharmaceutical Services	NPS0001-NPS0022			
LL.	Shadow Emergency Physicians	SEP0001-SEP0080			
MM.	Steinberg Diagnostic Medical Imaging	SDMI0001-SDMI0335			
NN.	Shanker Dixit, MD	SDMD0001-SDMD0022			
OO.	Single Day Surgical Center	SDSC0001-SDSC0099			
PP.	Mountain West Chiropractic	MWC0001-MWC0099			
QQ.	Stuart S. Kaplan MD	SSK0001-SSK0268			
RR.	Southwest Medical	SWM0001-SWM0103			
SS.	Southern Nevada Pain Center	SNPC0001-SNPC0098			
TT.	Desert Valley Therapy	DVT0001-DVT0322			
UU.	Valley Hospital Medical Center	VHMC0001-VHMC0310			

Returned

Exhibit Number	Exhibit Description	Bates Numbers	Date Offered	Objection	Date Admitted
VV.	Center for Occupational Health & Wellness	COH0001-COH0013			
WW.	CVS Pharmacy	CVS0001-CVS0006			
XX.	David Oliveri, M.D.	DJO0001-DJO0319			
YY.	Heart Center of Nevada	HCN0001-HCN0012	9/25/19	obj	
ZZ.	Zotec Partners	ZPH0001-ZPH0005			
AAA.	Summerlin Hospital Medical Center	SHMC0001-SHMC0576			
BBB.	Desert Radiologists	DRAD0001-DRAD0291			
	CERTIFICATE OF NO RECS				
CCC.	Southwest Medical, Eastern	SWE0001-SWE0007			
	DISCOVERY RELATED				
DDD.	Plaintiff's answers to Capriati Construction Corp., Inc.'s First Set of Interrogatories	DDD0001-DDD0012			
EEE.	Plaintiff's answers to Capriati Construction Corp., Inc.'s Second Set of Interrogatories	EEE0001 – EEE0003			
FFF.	Plaintiff's answers to Capriati Construction Corp., Inc.'s Third Set of Interrogatories	FFF0001-FFF0005			
GGG.	Plaintiff's responses to Capriati Construction Corp., Inc.'s First Set of Requests for Admission	GGG0001-GGG0006			
HHH.	Plaintiff's responses to Capriati Construction Corp., Inc.'s Second Set of Requests for Admission	HHH0001-HHH0004			
III.	Plaintiff's responses to Capriati Construction Corp., Inc.'s First Set of Requests for Production of Documents	III0001 - III00005			
JJJ.	Plaintiff's responses to Capriati Construction Corp., Inc.'s Second Set of Requests for Production of Documents	JJJ0001 – JJJ0030			
KKK.	Plaintiff's responses to Capriati Construction Corp., Inc.'s Third Set of Requests for Production of Documents	KKK0001-KKK0065			
	EXPERTS/REPORTS				
LLL.	Edward Bennett, M.A. Report(s) and Job File Materials, CV, Fee Schedule, Testimonial History	LLL0001-LLL0029			
MMM.	Howard Tung, M.D. Report(s) and Job File Materials, CV, Fee Schedule, Testimonial History	MMM0001-MMM0018			
NNN.	John E. Baker, M.D. Report(s) and Job File Materials, CV, Fee Schedule, Testimonial History	NNN0001-NNN0008			

returned

Exhibit Number	Exhibit Description	Bates Numbers	Date Offered	Objection	Date Admitted
OOO.	Kevin Kirkendall, MBA Report(s) and Job File Materials, CV, Fee Schedule, Testimonial History	OOO0001-OOO0006			
PPP.	Archie Perry, M.D. Report(s) and Job File Materials, CV, Fee Schedule, Testimonial History	PPP0001-PPP0007			
QQQ.	Christopher Fisher, M.D. Report(s) and Job File Materials, CV, Fee Schedule, Testimonial History	QQQ0001-QQQ0004			
RRR.	David Oliveri, M.D. Report(s) and Job File Materials, CV, Fee Schedule, Testimonial History	RRR0001-RRR0014			
SSS.	Ira Spector, M.S. Report(s) and Job File Materials, CV, Fee Schedule, Testimonial History	SSS0001-SSS0010			
TTT.	Jaswinder Grover, M.D. Report(s) and Job File Materials, CV, Fee Schedule, Testimonial History	TTT0001-TTT0011			
UUU.	Joseph Schifini, M.D. Report(s) and Job File Materials, CV, Fee Schedule, Testimonial History	UUU0001-UUU0011			
VVV.	Peter Su, M.D. Report(s) and Job File Materials, CV, Fee Schedule, Testimonial History	VVV0001-VVV0005			
WWW.	Stuart Kaplan, M.D. Reports(s) and Job File Materials, CV, Fee Schedule, Testimonial History	WWW0001-WWW0023			
XXX.	Terrence M. Clauretie, Ph.D. Report(s) and Job File Materials, CV, Fee Schedule, Testimonial History	XXX0001-XXX0032			
YYY.	Timothy Leggett, P.E. Report(s) and Job File Materials, CV, Fee Schedule, Testimonial History	YYY0001-TTT0006			
	ADDITIONAL RECORDS				
ZZZ.	Southwest Medical Record dated March 12, 2012	SWM0067-SWM0068			
AAAA.	Final Subrogation Lien, with log of workers compensation payments by provider 03/02/17	ARM0418-ARM0425			
BBBB.	Prehospital Care Report 06/19/13	ARM0054-ARM0056			
CCCC.	Department of Administration Hearings Division 10/15/13	ARM0094			
DDDD.	Employee Separation/Termination Checklist 06/28/13	ARM0030			
EEEE.	Southwest Medical Associates, Inc. 03/12/12 (with knee issues redacted)	SWM0055-SWM0056			
FFFF.	Western Regional Center for Brain & Spine Surgery	SSK0252-SSK0253	9/20/19	stp	9/20/19
GGGG.	Valley Hospital Medical Center – Selected Patient History and Assessment Records	VHMC0194 VHMC0218	9/16/19	stp	9/16/19
HHHH.	Valley Hospital Medical Center – Selected Rehabilitation Services Records	VHMC0302	9/16/19	stp	9/16/19
IIII.	Letter from Schifini to Perry 11/4/14	00062	9/17/19	stp	9/17/19
JJJJ.					

returned

Exhibit Number	Exhibit Description	Bates Numbers	Date Offered	Objection	Date Admitted
KKKK.					
LLLL.					
MMMM.					
NNNN.					
OOOO.					
PPPP.					
QQQQ.					
RRRR.					
SSSS.					
TTTT.					
UUUU.					
VVVV.					

Amended Jury List 10/7/19

Exhibit Number	Exhibit Description	Bates Numbers	Date Offered	Objection	Date Admitted
VV.	Center for Occupational Health & Wellness	COH0001-COH0013			
WW.	CVS Pharmacy	CVS0001-CVS0006			
XX.	David Oliveri, M.D.	DJO0001-DJO0319			
YY.	Heart Center of Nevada	HCN0001-HCN0012	9/25/19	obj	have
ZZ.	Zotec Partners	ZPH0001-ZPH0005			
AAA.	Summerlin Hospital Medical Center	SHMC0001-SHMC0576			
BBB.	Desert Radiologists	DRAD0001-DRAD0291			
	CERTIFICATE OF NO RECS				
CCC.	Southwest Medical, Eastern	SWE0001-SWE0007			
	DISCOVERY RELATED				
DDD.	Plaintiff's answers to Capriati Construction Corp., Inc.'s First Set of Interrogatories	DDD0001-DDD0012			
EEE.	Plaintiff's answers to Capriati Construction Corp., Inc.'s Second Set of Interrogatories	EEE0001 – EEE0003			
FFF.	Plaintiff's answers to Capriati Construction Corp., Inc.'s Third Set of Interrogatories	FFF0001-FFF0005			
GGG.	Plaintiff's responses to Capriati Construction Corp., Inc.'s First Set of Requests for Admission	GGG0001-GGG0006			
HHH.	Plaintiff's responses to Capriati Construction Corp., Inc.'s Second Set of Requests for Admission	HHH0001-HHH0004			
III.	Plaintiff's responses to Capriati Construction Corp., Inc.'s First Set of Requests for Production of Documents	III0001 - III00005			
JJJ.	Plaintiff's responses to Capriati Construction Corp., Inc.'s Second Set of Requests for Production of Documents	JJJ0001 – JJJ0030			
KKK.	Plaintiff's responses to Capriati Construction Corp., Inc.'s Third Set of Requests for Production of Documents	KKK0001-KKK0065			
	EXPERTS/REPORTS				
LLL.	Edward Bennett, M.A. Report(s) and Job File Materials, CV, Fee Schedule, Testimonial History	LLL0001-LLL0029			
MMM.	Howard Tung, M.D. Report(s) and Job File Materials, CV, Fee Schedule, Testimonial History	MMM0001-MMM0018			
NNN.	John E. Baker, M.D. Report(s) and Job File Materials, CV, Fee Schedule, Testimonial History	NNN0001-NNN0008			

Returned

EXHIBIT(S) LIST

Case No.: **A718689**

Trial Date: 09/09/19

Dept. No.: **XXVIII**

Judge: Ronald J. Israel

Court Clerk: Kathy Thomas

PLAINTIFF'S: **Bahram Yahyavi**

Recorder: Judy Chappell

Counsel for Plaintiff: Dennis Prince, Esq. & Brandon Verde, Esq.

vs.

DEFENDANT'S: **Capriati Construction Corp. Inc.**

Counsel for Defendant: David Kahn, Esq. & Mark Severino, Esq. / Mark Brown, Esq

TRIAL BEFORE THE COURT

COURT'S EXHIBITS

Exhibit Number	Exhibit Description	Date Offered	Objection	Date Admitted	
1	Π - Custodian of Records Certificates			9/11/19	
2	Jury Seating Chart			9/12/19	
3	Juror Question (asked)			9/13/19	
4	Π Opening Statement Power Point			9/16/19	
5	3 - Reports by Dr Kaplan			9/16/19	
6	Juror #5 question for (w) Arbuckle Asked			9/16/19	
7	Juror #11 question for (w) 11 Asked			9/16/19	
8	Juror #6 question for the Court (Answered)			9/18/19	
9	unredacted Π Exh 92 bate # 354			9/18/19	
10	unredacted Π Exh 92 bate # 354 (2ND AMD)			9/19/19	
11	~~Experts~~ Reports of Edward Lee Bennett #1			9/23/19	
12	~~Experts~~ Reports of Edward Lee Bennett #2			9/23/19	
13	Π Expert Disclosure			9/23/19	
14	Dr Tungs California Depo Vol 1			9/24/19	
15	Juror # question for Δ Witness Dr Tung Asked			9/24/19	
16	Dr Tungs 6 - Reports			9/25/19	
17	Demonstrative use by Π for Dr Tung			9/25/19	

EXHIBIT(S) LIST

A718689

Bahram Yahyavi VS. **Capriati Construction Corp. Inc.**

COURT'S EXHIBITS

Exhibit Number	Exhibit Description	Date Offered	Objection	Date Admitted	
18	Juror #1 question for (W) Yahyavi Bahram ASKED			9/25/19	BG
19	Attorney note found in Courtroom			9.26.19	BG
20	JAVS recording of question to Mr Goodrich			9.26.19	BG
21	Expert report — Dr. Baker			9.27.19	BG
22	Expert report - Kirkendall Consulting			9.27.19	BG
23	Updated Subrogation Lien			9.27.19	BG
24	Plaintiff's closing powerpoint			9.27.19	BG
25	Defendant's closing powerpoint			9.27.19	BG

EIGHTH JUDICIAL DISTRICT COURT CLERK'S OFFICE

NOTICE OF DEFICIENCY

ON APPEAL TO NEVADA SUPREME COURT

MICHAEL K. WALL, ESQ.
10080 W. ALTA DR., STE 200
LAS VEGAS, NV 89145

DATE: November 21, 2019
CASE: A-15-718689-C

RE CASE: BAHRAM YAHYAVI vs. CAPRIATI CONSTRUCTION CORP, INC.

NOTICE OF APPEAL FILED: November 19, 2019

YOUR APPEAL HAS BEEN SENT TO THE SUPREME COURT.

PLEASE NOTE: DOCUMENTS **NOT** TRANSMITTED HAVE BEEN MARKED:

☒ $250 – Supreme Court Filing Fee (Make Check Payable to the Supreme Court)**
- If the $250 Supreme Court Filing Fee was not submitted along with the original Notice of Appeal, it must be mailed directly to the Supreme Court. The Supreme Court Filing Fee will not be forwarded by this office if submitted after the Notice of Appeal has been filed.

☐ $24 – District Court Filing Fee (Make Check Payable to the District Court)**

☒ $500 – Cost Bond on Appeal (Make Check Payable to the District Court)**
- NRAP 7: Bond For Costs On Appeal in Civil Cases

☐ Case Appeal Statement
- NRAP 3 (a)(1), Form 2

☐ Order

☐ Notice of Entry of Order

NEVADA RULES OF APPELLATE PROCEDURE 3 (a) (3) states:

"The district court clerk must file appellant's notice of appeal despite perceived deficiencies in the notice, including the failure to pay the district court or Supreme Court filing fee. **The district court clerk shall apprise appellant of the deficiencies in writing**, and shall transmit the notice of appeal to the Supreme Court in accordance with subdivision (e) of this Rule with a notation to the clerk of the Supreme Court setting forth the deficiencies. Despite any deficiencies in the notice of appeal, the clerk of the Supreme Court shall docket the appeal in accordance with Rule 12."

Please refer to Rule 3 for an explanation of any possible deficiencies.

***Per District Court Administrative Order 2012-01, in regards to civil litigants, "...all Orders to Appear in Forma Pauperis expire one year from the date of issuance." You must reapply for in Forma Pauperis status.*

Certification of Copy

State of Nevada
County of Clark } **SS:**

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; DEFENDANT'S CASE APPEAL STATEMENT; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; JUDGMENT UPON THE JURY VERDICT; NOTICE OF ENTRY OF JUDGMENT; DECISION AND ORDER; NOTICE OF ENTRY OF DECISION AND ORDER; DISTRICT COURT MINUTES; EXHIBITS LIST; NOTICE OF DEFICIENCY

BAHRAM YAHYAVI,

Plaintiff(s),

vs.

CAPRIATI CONSTRUCTION CORP, INC.,

Defendant(s),

Case No: A-15-718689-C

Dept No: XXVIII

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto Set my hand and Affixed the seal of the Court at my office, Las Vegas, Nevada This 21 day of November 2019.

Steven D. Grierson, Clerk of the Court

Amanda Hampton, Deputy Clerk

OPPS
DENNIS M. PRINCE
Nevada Bar No. 5092
KEVIN T. STRONG
Nevada Bar No. 12107
PRINCE LAW GROUP
8816 Spanish Ridge Ave.
Las Vegas, NV 89148
P: (702) 534-7600
F: (702) 534-7601
Email: eservice@thedplg.com
Attorneys for Plaintiff
Bahram Yahyavi

DISTRICT COURT

CLARK COUNTY, NEVADA

BAHRAM YAHYAVI, an Individual, Plaintiff, vs. CAPRIATI CONSTRUCTION CORP., INC., a Nevada Corporation, Defendant	CASE NO.: A-15-718689-C DEPT. NO.: XXVIII **PLAINTIFF'S OPPOSITION TO DEFENDANT CAPRIATI CONSTRUCTION CORP., INC.'S MOTION TO CORRECT OR RECONSIDER DECISION AND ORDER ENTERED ON NOVEMBER 5, 2018** Hearing Date: January 9, 2020 Hearing Time: In-Chambers

Plaintiff BAHRAM YAHYAVI, by and through his attorneys of record, Dennis M. Prince and Kevin T. Strong of PRINCE LAW GROUP, hereby submits his *Opposition to Defendant Capriati Construction Corp., Inc.'s Motion to Correct or Reconsider Decision and Order Entered on November 5, 2018* [SIC].

. . .

. . .

. . .

. . .

. . .

. . .

This Opposition is based upon the pleadings and papers on file in this action and the Memorandum of Points and Authorities set forth herein.

DATED this 16th day of December, 2019.

Respectfully Submitted,

PRINCE LAW GROUP

DENNIS M. PRINCE
Nevada Bar No. 5092
KEVIN T. STRONG
Nevada Bar No. 12107
8816 Spanish Ridge Avenue
Las Vegas, Nevada 89148
Attorneys for Plaintiff
Bahram Yahyavi

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Defendant Capriati Construction Corp., Inc. ("Defendant") believes the November 5, 2019 Decision and Order that this Court drafted does not accurately reflect the effect of the sanctions imposed against Defendant.[1] Defendant believes this Court incorrectly states that the parties were allowed to try the case as to damages solely because this Court struck two of Defendant's experts as part of its sanctions. Striking these two experts did not somehow preclude Defendant from actually presenting a defense as to causation and damages in this case. Defendant conveniently overlooks that its retained medical expert, Howard Tung, M.D., was allowed to testify as to medical causation and damages. Defendant also disregards that it was afforded the opportunity to cross-examine all of Plaintiff Bahram Yahyavi's ("Plaintiff") treating physicians and retained experts, including his retained damages experts. Defendant characterizes this Court's imposition of sanctions as equivalent to a total striking of Defendant's Answer, which is simply not correct. The Decision and Order properly reflects this Court's imposition of sanctions on September 26, 2019 that stemmed from

[1] Defendant incorrectly assumes that Plaintiff Bahram Yahyavi's counsel drafted the Decision and Order.

defense counsel's willful misconduct. Accordingly, Defendant fails to provide this Court with the requisite factual basis necessary to correct, reconsider or modify its November 5, 2019 Decision and Order as a matter of law.

II.

FACTUAL BACKGROUND

On September 9, 2019, a jury trial commenced in this matter. Over the course of the next several weeks, Plaintiff presented his case-in-chief to the jury and called several witnesses, including his treating physicians and retained experts to testify. Defendant also called its lone retained medical expert, Howard Tung, M.D., to testify. On September 25, 2019, Defendant re-called its corporate representative, Clifford Goodrich, a witness who previously testified as part of Plaintiff's case-in-chief on September 13, 2019. The first substantive question that Defendant's counsel asked Mr. Goodrich was deliberately intended to elicit testimony that Defendant filed for bankruptcy:

> Q. Between the date of the accident and today, ***did anything major happen to your company?***
>
> A. ***Yes, we filed for reorganization in 2015.***

See Day 13 Partial Trial Transcript, at 3:19-23.

Following defense counsel's willful misconduct to elicit testimony regarding Defendant's ability to pay or satisfy a potential judgment entered in this case, Plaintiff appropriately filed his Motion for Sanctions against Defendant. On September 26, 2019, this Court heard argument from both Plaintiff and Defendant regarding the nature and extent of sanctions imposed against Defendant as a result of the willful misconduct. Plaintiff requested this Court to admonish defense counsel for his willful misconduct in front of the jury and to provide a curative instruction to the jury to neutralize the prejudice Plaintiff suffered as a direct result of Defendant presenting evidence of its bankruptcy. In addition, Plaintiff requested this Court to strike Defendant's Answer in its entirety. Alternatively, Plaintiff requested this Court to impose the lesser sanction of striking Defendant's retained expert witnesses' testimony and evidence in their entirety. Ultimately, this Court decided to impose various sanctions against Defendant that consisted of:

> (1) reading Plaintiff's proposed admonishment of defense counsel and proposed curative instruction to the jury;
>
> (2) striking Defendant's Answer as to liability;

Prince Law Group
8816 Spanish Ridge
Las Vegas, NV 89148

(3) striking the testimony of Clifford Goodrich, Defendant's corporate representative, regarding the bankruptcy and precluding him from giving further testimony; and

(4) striking the testimony of Defendant's remaining expert witnesses: Kevin Kirkendall, CPA and John Baker, Ph.D.

This Court permitted Defendant to rely on evidence that was already presented regarding causation and damages. This Court permitted Defendant to present argument to the jury regarding causation and damages based on this evidence. This underscores precisely why there is no basis to reconsider or modify the November 5, 2019 Decision and Order.

III.

LEGAL ARGUMENT

Although Defendant cites to EDCR 2.24 in support of the underlying motion, NRCP 60 is actually the applicable rule. EDCR 2.24 allows for the reconsideration of a court ruling, other than any order that may be addressed by motion pursuant to NRCP 60. NRCP 60(b) outlines various grounds upon which a party may seek relief from a final judgment or order:

> (b) **Grounds for Relief from a Final Judgment, Order or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceedings for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;

Defendant argues in that this Court mistakenly states in its November 5, 2019 Decision and Order that Defendant was able to try this case on damages in light of the sanctions imposed. Therefore, this Court should analyze Defendant's Motion pursuant to NRCP 60(b)(1).

"A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contrs. v. Jolley, Urga, & Wirth Ass'n*, 113 Nev. 737, 741 (1997). "Only in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." *Moore v. Las Vegas*, 92 Nev. 402, 405 (1976). "The 'mistake' portion of the provision encompasses excusable mistakes on the part of a litigant or counsel, or substantive errors of law or fact in a district court's judgment or order." *Quintero v. Palmer*, No. 3:13-cv-00008-MMD-VPC, 2016 U.S. Dist. LEXIS 183030, at *9-10 (D. Nev. Aug. 16, 2016). As detailed below Defendant's Motion is based on the fallacy that this Court's imposed sanctions precluded Defendan

DP LG
Prince Law Group
8816 Spanish Ridge
Las Vegas, NV 89148

from presenting any evidence regarding the issue of causation and damages at trial. This contention is not only grossly exaggerated, but unsupported by the evidence presented at trial. Thus, this Court's November 5, 2019 Decision and Order does not need to be modified or corrected in any form or fashion.

A. Defendant Was Not Deprived of the Ability to Present Evidence Regarding Causation and Damages During Trial and to Argue Causation and Damages to the Jury

Defendant asserts that this Court's imposition of sanctions did not permit Defendant to try its case on issues of damages as stated in the November 5, 2019 Decision and Order. Such argument is overly narrow and defies logic, given the timeframe in which the sanctions were imposed. Defendant overlooks that its counsel committed willful misconduct on September 25, 2019, nearly three weeks after trial commenced on September 9, 2019. On September 26, 2019, the date this Court imposed sanctions against Defendant, Plaintiff already presented his case-in-chief regarding issues of liability and damages. As to causation and damages, Plaintiff called his retained medical expert, David J. Oliveri, M.D. and his treating physicians, Stuart Kaplan, M.D. and Joseph J. Schifini, M.D. In turn, Defendant was able to to fully and completely cross-examine these witnesses regarding their opinions on medical causation and damages in an attempt to refute Plaintiff's claims before the jury. Similarly, Defendant was able to cross-examine Plaintiff's retained vocational rehabilitation expert, Ira Spector, M.S., C.R.C., regarding Plaintiff's loss of earning capacity damages resulting from his total vocational disability. Defendant cross-examined Plaintiff's retained economist, Terrence M. Clauretie, Ph.D., regarding his opinions concerning the present value of Plaintiff's economic damages. "Cross-examination serves a useful purpose in testing the credibility of evidence." *Hunter v. Bozeman*, 216 Mont. 251, 256, 700 P.2d 184, 188 (Mont. 1985). Cross-examination of a party's witnesses can effectively controvert a plaintiff's injury claims. *See Quintero v. McDonald*, 116 Nev. 1181, 1184 (2000) ("Although McDonald did not present expert testimony challenging causation, testimony elicited from Quintero's witnesses on cross-examination controverted Quintero's claim as to the extent of her injuries"). Defendant was not precluded in any way from cross-examining Plaintiff's retained experts regarding causation and damages because such evidence was presented ***before*** this Court imposed any sanctions in this matter. Defendant's cross-examination of Plaintiff's witnesses was a vehicle available to challenge Plaintiff's claims regarding causation and damages. This Court never instructed the jury to disregard such evidence or cross-examination as part of the sanctions

Prince Law Group
8816 Spanish Ridge
Las Vegas, NV 89148

imposed. As such, Defendant was given the opportunity to substantively try the issue of causation and damages to the jury.

Defendant also fails to even mention that its lone retained medical expert, Howard Tung, M.D., testified about medical causation and damages ***before*** sanctions were imposed. Dr. Tung offered opinions that Plaintiff was not as injured as he claimed to be as a result of the subject collision. Dr. Tung testified that Plaintiff's ongoing pain complaints were causally related to his ongoing and progressive degenerative changes in his cervical spine, not the subject collision. He also testified that Plaintiff did not require any future medical care or treatment as a result of the subject collision. Dr. Tung's sole purpose for testifying at trial was to challenge Plaintiff's claim that the subject collision caused his injuries and damages associated thereto. Defendant was also able to call its vocational rehabilitation expert, Edward L. Bennett, M.A., C.R.C., to challenge Plaintiff's vocational losses based on Dr. Tung's testimony that Plaintiff was not disabled as a result of his injuries from the subject collision. Therefore, Defendant was able to present two retained experts to dispute medical causation and the extent of Plaintiff's claimed future medical treatment damages and vocational loss damages. These were the only economic damages, along with past medical expenses, that Plaintiff suffered as a result of the subject collision. Defendant was not deprived of the ability to challenge damages and this Court's November 5, 2019 Decision and Order accurately reflects that.

For Defendant to now say that he was prohibited from trying the issue of damages in this case simply because this Court struck two experts from testifying as part of its sanctions order is flagrantly inaccurate. If this Court intended to forbid Defendant from challenging the issue of causation and damages, it would have struck Defendant's Answer in its entirety and instructed the jury, at a minimum, to disregard the testimony of Dr. Tung. In actuality, this Court declined to strike Dr. Tung's testimony, which was part of the lesser sanctions Plaintiff requested in his Motion for Sanctions. As a result, there is no legitimate reason for this Court to change or modify its November 5, 2019 Decision and Order because Defendant was able to try its case on damages. The mere exclusion of two so-called "damages experts" did not alter what took place during the trial ***before*** the sanctionable conduct occurred.

. . .

. . .

. . .

Prince Law Group
8816 Spanish Ridge
Las Vegas, NV 89148

B. This Court Properly Struck Defendant's Remaining Expert Witnesses and Such Sanction Did Not Preclude Defendant from Trying the Issue of Damages on the Merits

Defendant repeatedly asserts that the Court-imposed sanction to strike its remaining expert witnesses deprived Defendant of the opportunity to try its damages case. However, Defendant also contends that striking its retained economist, Kevin Kirkendall, "was a limitation of Defendant's damages case." *See* Defendant's Motion, at 6:26 – 7:1. This inconsistency underscores precisely why this Court made no error in its November 5, 2019 Decision and Order that Defendant was able to try this case on damages in spite of the sanctions imposed. In fact, this Court's decision to strike the remaining experts did not eliminate Defendant's ability to try its case on damages to the jury given the scope of their expected trial testimony.

Mr. Kirkendall, Defendant's economist, was only going to testify that Plaintiff suffered no economic loss as a result of the subject collision based on the opinions from Dr. Tung. Mr. Kirkendall never even provided any alternative loss calculations in his reports. Thus, Mr. Kirkendall's testimony would not have provided any substantive evidence for Defendant to present to the jury, particularly because Defendant was able to question Plaintiff's retained economist regarding his opinions. As a result, striking Mr. Kirkendall's testimony did not deprive Defendant from trying the issue of damages to the jury.

Similarly, this Court's decision to strike John E. Baker, Ph.D.'s testimony did not somehow preclude Defendant from challenging the issue of causation and damages. As a biomechanical engineer, this Court already precluded Dr. Baker from presenting any testimony that the forces involved in the subject collision were not strong enough to cause Plaintiff's injuries. In effect, this ruling, which was issued before sanctions were imposed, undermined any persuasive value of Dr. Baker's testimony about speed and velocity change if presented to the jury. Defendant's retained medical expert, Dr. Tung, opined that Plaintiff suffered an injury as a result of the subject collision, which also undermined Dr. Baker's testimony regarding speed and forces. Even the driver of the subject forklift, Joshua Arbuckle, testified that the impact was hard:

Q. ***Because it was a hard impact, wasn't it?***

A. ***Yes, sir.***

Q. And even to you on that forklift, it appeared to be a hard or heavy impact, right?

Prince Law Group
8816 Spanish Ridge
Las Vegas, NV 89148

A. I didn't really feel it on the -- on the forklift. The forklift is a big piece of steel, so you wouldn't feel it much.

Q. ***But you -- for the Charger, it would've been a hard impact, right?***

A. ***Correct.***

See Day 6 Transcript of Jury Trial, at 168:14-22 (emphasis added).

Mr. Arbuckle's testimony actually supported Plaintiff's testimony about the speed of the vehicles and the strength of the impact. Without the ability to explain the significance of the speed and changes in velocity in relation to mechanism of injury, Dr. Baker's testimony would not have impacted the jury's decision in any appreciable manner. Thus, Defendant was not deprived of the ability to challenge the issue of causation and damages by striking Dr. Baker.

C. <u>This Court's Decision and Order to Impose Sanctions is Supported by Nevada Law</u>

Oddly, Defendant argues beyond the scope of the requested relief in his Motion and contends this Court improperly struck the testimony of Dr. Baker and Mr. Kirkendall as a sanction under Nevada law. Defendant's argument is based on the ill-conceived notion that merely because the Nevada Supreme Court has not addressed a case in which experts were struck as a sanction, such a sanction is not permissible. This Court has broad discretion and inherent equitable powers to impose sanctions for trial misconduct. *Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 680 (2011); *Young v. Johnny Ribeiro Bldg.*, 106 Nev. 88, 92 (1990). There is no limitation on the type of lesser imposed sanctions a trial court may impose against a party for abusive litigation practices, which is consistent with the broad discretion afforded to a trial court to impose sanctions. This Court is not somehow limited in any way by *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243 (2010) as Defendant suggests because the cases are not even analogous. In *Bahena*, the trial court struck the Answer as to liability and damages. 126 Nev. at 247. Here, this Court only struck the Answer as to liability, which was not that significant given Mr. Arbuckle admitted fault during trial:

> THE COURT: All right. And because these sanctions or that sanction of striking on liability is really no sanction at all --
>
> MR. PRINCE: Right.
>
> THE COURT: -- since liability is, in my mind, a closed door, et cetera. I'm striking the last witness as a sanction for what I consider outrageous. The policy adjudicating on the merits. We are going to the -- the jury will decide that.

See Day 14 Transcript of Jury Trial, at 19:8-14.

DP LG
Prince Law Group
8816 Spanish Ridge
Las Vegas, NV 89148

Defendant was still able to not only argue damages, but to present evidence that directly challenged the issue of damages except for the testimony of Mr. Kirkendall and Dr. Baker. The willfulness of defense counsel's misconduct certainly justified the imposition of sanctions in this matter. Defense counsel understood the severity of his misconduct as he never even challenged the language of the admonition and curative instruction Plaintiff provided and that this Court ultimately gave:

> THE COURT: All right, thank -- we're done. I've stated what I'm going to do. I think that's appropriate. I agree that I will read that to introduce is irrelevant. It's committed willful misconduct. I'm going to be telling the jury that Mr. Kahn is reprimanded. I think that along with the curative and the other is appropriate.
>
> Yeah. I agree and I said that they haven't gotten it and I don't understand. So let's take a short break and Mr. Kahn can review these.
>
> MR. KAHN: I think they were attached as exhibits to his briefs. I've already seen it.
>
> THE COURT: All right.
>
> . . .
>
> MR. KAHN: ***Sorry. I have no comment on them. That's fine. I submit.***

See Day 14 Transcript of Jury Trial, at 25:13-25 (emphasis added).

Mr. Kahn expressed his contention that Defendant should still be afforded the ability to argue damages in light of the sanctions imposed. Not only was Defendant allowed to argue damages to the jury, but the testimony from Dr. Tung and Mr. Bennett supporting such arguments was considered by the jury without limitations. The Court's imposition of sanctions only ***limited*** the availability of testimonial evidence for Defendant to present to the jury. The sanctions order ***did not*** prohibit Defendant from trying the issues of causation and damages. Therefore, this Court's November 5, 2019 Decision and Order, as written, is accurate and does not need to be modified or reconsidered.

. . .

. . .

. . .

. . .

. . .

. . .

Prince Law Group
8816 Spanish Ridge
Las Vegas, NV 89148

IV.

CONCLUSION

Based upon the foregoing facts, law, and analysis, Plaintiff respectfully requests this Honorable Court to **DENY** Defendant Capriati Construction Corp., Inc.'s Motion to Correct or Reconsider Decision and Order, Entered on November 5, 2018 [SIC].

DATED this 16th day of December, 2019.

Respectfully Submitted,

PRINCE LAW GROUP

DENNIS M. PRINCE
Nevada Bar No. 5092
KEVIN T. STRONG
Nevada Bar No. 12107
8816 Spanish Ridge Avenue
Las Vegas, Nevada 89148
Attorneys for Plaintiff
Bahram Yahyavi

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of **PRINCE LAW GROUP**, and that on the 10 day of December, 2019, I caused the foregoing document entitled **PLAINTIFF'S OPPOSITION TO DEFENDANT CAPRIATI CONSTRUCTION CORP., INC.'S MOTION TO CORRECT OR RECONSIDER DECISION AND ORDER ENTERED ON NOVEMBER 5, 2018** to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court E-Filing System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

David S, Kahn, Esq.
Mark Severino, Esq.
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
300 S. Fourth Street, 11th Floor
Las Vegas, Nevada 89101

Eric R. Larsen, Esq.
LAW OFFICES OF ERIC R. LARSEN
750 E. Warm Springs Road, Suite 320, Box 19
Attorneys for Defendant
Capriati Construction Corp., Inc.

An Employee of PRINCE LAW GROUP

DP LG
Prince Law Group
8816 Spanish Ridge
Las Vegas, NV 89148

RPLY
DAVID S. KAHN, Esq.
Nevada Bar No. 7038
David.Kahn@wilsonelser.com
MARK SEVERINO, ESQ.
Nevada Bar No. 14117
Mark Severino@wilsonelser.com
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
300 South Fourth Street, 11th Floor
Las Vegas, NV 89101
Telephone: (702) 727-1400
Facsimile: (702) 727-1401

LAW OFFICES OF ERIC R. LARSEN
ERIC R. LARSEN, ESQ.
Nevada Bar No. 009423
750 E. Warm Springs Road
Suite 320, Box 19
Las Vegas. NV 89119
Telephone: (702) 387-8070
Facsimile: (877) 369-5819
Eric.Larsen@thehartford.com

Attorneys for Defendant,
Capriati Construction Corp., Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

BAHRAM YAHYAVI,

Plaintiff,

v.

CAPRIATI CONSTRUCTION CORP., INC., a Nevada corporation,

Defendant.

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

DEFENDANT CAPRIATI CONSTRUCTION CORP., INC.'S REPLY IN SUPPORT OF ITS MOTION TO CORRECT OR RECONSIDER DECISION AND ORDER, ENTERED ON NOVEMBER 5, 2019

Hearing: January 14, 2020
Time: 9:00 a.m.

Defendant Capriati Construction Corp., Inc. (hereinafter referred to as "Defendant"), by and through its counsel of record, DAVID S. KAHN, ESQ., of the law firm of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, and ERIC R. LARSEN, ESQ., of THE LAW OFFICES OF ERIC R. LARSON, hereby submits its Reply to Plaintiff's Opposition to Defendant's Motion to Correct or Reconsider Decision and Order, Entered on November 5, 2019. This reply is made and based upon the pleadings and papers on file herein, the attached Memorandum of Points

and Authorities, and any argument that may be adduced at the hearing of this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff's argues in his Opposition that cross-examination can supplant the use of a party's own witnesses. This is not the case, and the case law is not in support of such an absurd premise.

Here, the defense economist expert Kirkendall was stricken, and precluded from testifying. He was only a damages witness. Cross-examining his counterpart was not the equivalent of utilizing defendant's own expert at trial.

Similarly, defense expert Baker was going to opine that plaintiff was traveling some 5 mph, contrary to plaintiff's testimony of a 30 mph collision speed. Notably, plaintiff's own accident reconstruction expert, Tim Leggett, opined that plaintiff was going 15 mph (after first opining he was going only 10 mph). That expert was withdrawn during trial by plaintiff and his counsel. Defense forklift driver Arbuckle testified to his view of plaintiff's vehicle being obstructed. Thus defense expert Baker was the only witness aside from plaintiff himself to provide a collision speed estimate, which, given the distinction in velocity, could have easily convinced the jury that plaintiff's testimony was unrealistic. Moreover, it would have further impeached plaintiff's credibility.

The crash test performed by defendant followed a challenge to plaintiff's crash test, performed after discovery was concluded, and performed without prior notice to defendant or the court. Defendant's crash test was conducted at a cost of roughly $50,000, and showed conclusively using video and scientific evidence that the same damage was replicated at some 5.5 mph. Thus plaintiff's testimony defied science, and the cross-examination of his medical experts is irrelevant to the defendant's ability to utilize expert Baker, his opinions, and the crash test evidence at trial.

As for the contention by plaintiff, repeated in multiple motion pleadings, that defendant admitted all fault in this accident, plaintiff ignores some of the relevant trial testimony.

The following is some of the testimony over defense objection from Mr. Arbuckle, the forklift driver, from day 6 of the jury trial, September 16, 2019, at pages 184-186:

Q You accept full responsibility for causing this? Can't look at your lawyer.
A I don't even know how to answer that question, to tell you the truth.
Q I mean, you're solely at fault here.
A I know that I was at fault. Yes, I was at fault, if that's what you're asking.
Q I am asking that.
A Yes, sir.
Q So you agree your solely at fault for this?
MR. PRINCE: No, I'm --
MR. KAHN: Objection. Calls for legal conclusion. Invades the province to the jury.
THE COURT: Overruled.
BY MR. PRINCE:
Q Go ahead.
A I don't believe solely. No, sir.
Q You think he's also at fault?
A I believe --
Q You believe Mr. Yahyavi's also at fault?
A When there is two parties involved. I believe fault belongs to both parties.
Q That's what I want to make sure. So even though you're saying you're accepting responsibility, you're blaming him at least partially to being at fault for causing this, not just yourself, right?
A I'm not blaming anybody. No, sir.
Q Well, we're here today --
A I'm accepting the responsibility that belongs to me. I can't do anything for him.
Q Respectfully, I'm not going to ask you to do anything for him. I'm just saying since you were the only other person there involved, other Mr. Yahyavi who's obviously in a different position today, are you blaming him for saying to this jury that he is at fault in part for causing this collision?
A Yes.
Q What did he do wrong?
A I don't know what he did wrong. I know what I did wrong.
Q So you're just saying just because there was two people involved, both people must be at fault?
A That's my belief.
Q But it's nothing specific, any facts or information you can give me, you just feel since another party was involved, that responsibly should be shared, that's just your general view?
A Correct.
Q So you don't accept full responsibility then, do you?
A On my part, I do. Yes, sir.
Q But only whatever that part is?
A Correct.
Q What part? How much is it? Because if it's less than a hundred percent, what part are you? 90 percent?
MR. KAHN: Same objection.
BY MR. PRINCE:
Q What are you?
A It's 100 percent of what I did. I can't -- there's a boundary between me and

Mr. Yahyavi. I can't own his responsibility. I can only own mine

Thus Mr. Arbuckle's trial testimony does not, as plaintiff contends over and over, admit to all liability. It admits to some liability, and additional testimony about the actions of plaintiff himself were sufficient to allow the jury to make a determination of less than 100% liability as to defendant. The *Quintero* case cited by plaintiff in his Opposition should support that notion.

What Mr. Arbuckle did testify to was that plaintiff was in the fast lane and not signaling, when last Mr. Arbuckle saw plaintiff before the parked truck blocked Mr. Arbuckle's view.

> What about his blinker; what did you observe with his blinker at that time?
> A There was no blinker.
> Q Did that factor into your decision to pull onto the roadway?
> A Yes.
> Q So just to be clear about the lanes, there was a coned off lane with the cones where the trench plate truck was in, right?
> A Correct.
> Q Then there was another lane. Was Mr. Yahyavi in that lane?
> A No, sir.
> Q Then there was a lane past that, another eastbound lane, correct?
> A Correct.
> Q Was he in that lane?
> A Yes, sir.
> Q Okay. So when you observed him, he was not in the rightmost lane that was open? Not the one next to the cones; he was one lane away, correct?
> A Correct.
> Q And he wasn't signaling?
> A He was not.

Trial transcript, day 6, September 16, 2019, page 173.

The testimony of Mr. Goodrich, the representative for defendant in charge of company safety, was much more limited, given his lack of probative evidence of the accident since he wasn't there.

> THE COURT: The objection is overruled.
> MR. PRINCE: Okay. Thank you.
> BY MR. PRINCE:
> Q I'm going to rephrase the question, so you have it firmly in your mind. Okay. I'm just going to first tell you why I'm asking it. The Court read earlier today Capriati Construction, Incorporation's answer to the complaint. And that says -- one of the defenses is that the liability must be reduced by the percentage of negligence or fault of the Plaintiff. Now, I'm asking, you have no information or facts that Mr. Yahyavi engaged in any improper driving that day, correct, you personally?
> A Not that I witnessed.

Trial transcript, day 5, September 13, 2019, page 40. Therefore, Mr. Goodrich did not comment one way or the other as to plaintiff's liability, other than to point out that he did not witness the

accident. The combined testimony of Mr. Goodrich and Mr. Arbuckle was therefore to point out some issues with the position and lack of signal by plaintiff, and not to admit liability. Additionally, such questioning was objected to by defense counsel.

II.

LEGAL ARGUMENT

A.

Cross-Examination is Not The Same as a Party's Own Witness Testifying at Trial

Plaintiff contends that cross-examination is the equivalent of presenting a party's own witnesses or expert witnesses. "Thus, Mr. Kirkendall's testimony would not have provided any substantive evidence for Defendant to present to the jury, particularly because Defendant was able to question Plaintiff's retained economist regarding his opinions." Opposition, page 7, lines 12-14.

Case law, the concept of which is ignored by plaintiff on this point in his Opposition, takes issue with such a laughable argument.

> The opportunity to discredit an expert witness on cross examination is not the equivalent of the right to introduce affirmative evidence to rebut that expert's opinion. *Meunier's Case,* 319 Mass. at 427. Moreover, that doctors seldom change opinions in these circumstances is an agonizing truism to those who have attempted to accomplish it. *See Basciano v. Herkimer,* 605 F.2d 605, 611 (2nd Cir. 1978) ("... the value of cross examination to discredit a professional medical opinion at best is limited.").

Barbara O'BRIEN, Plaintiff/Appellant, v. ST. PAUL FIRE & MARINE INSURANCE COMPANY, and L. Scott Harshbarger, as He is Attorney General of the Commonwealth of Massachusetts, Defendants-Appellees., 1996 WL 33686137 (Mass.), 38.[1] The restriction of defendant's trial

[1] That same case went on to find a violation of due process of constitutional dimension, saying that the concept of prohibiting opposing expert reports and evidence "...should be declared unconstitutional; its failure to guarantee worker's compensation litigants the right to submit their own relevant medical evidence at the final de novo hearing constitutes a deprivation of property without due process of law." *Barbara O'BRIEN, Plaintiff/Appellant, v. ST. PAUL FIRE & MARINE INSURANCE COMPANY, and L. Scott Harshbarger, as He is Attorney General of the Commonwealth of Massachusetts, Defendants-Appellees.*, 1996 WL 33686137 (Mass.), 40-41.

witnesses, experts, and evidence, cannot now be argued as being somehow duplicative of cross-examination.

"But a cross -examination is not the same as conflicting testimony from witnesses." *State v. Becktel*, No. 77149-3-I, 2019 WL 2092694, at *5 (Wash. Ct. App. May 13, 2019), *review denied,* 194 Wash. 2d 1008, 451 P.3d 343 (2019). Here, plaintiff's argument is essentially that because defendant had the opportunity to ask questions of the plaintiff's experts, who are professional witnesses with significant experience testifying and who authored written reports and created medical records they would always stick to, that is the equivalent of defendant being able to call its own expert witnesses as to damages. The weakness of that argument advertises how thin such an argument is, added on top of which is the lack of any legal authority for such a proposition.

One California court, in analyzing the use of reconstructed evidence, simply assumed that a position similar to the one here asserted by defendant is true. "New contends, however, that 'cross -examination of reconstructed evidence is NOT the same as the ability to present and develop contrary original evidence.' Assuming that this is true . . ." *People v. New*, 163 Cal. App. 4th 442, 464, 77 Cal. Rptr. 3d 503, 519 (2008). In the instant case, defendant contends that plaintiff cannot know what the impact of the expert (Kirkendall and Baker) opinions and testimony would have been on the jury's evaluation and analysis of damages. All that can be known is that these experts did not testify, so the jury was not permitted to hear their evidence. Anything further is rank speculation.

Plaintiff argues that stricken defense experts, including one solely opining as to damages, "did not eliminate Defendant's ability to try its case on damages to the jury …" Defendant's true damages case was never fully presented due to the striking of its experts, and plaintiff's version of what the defense damages case should have been reduced to is an insufficient substitute for a real defense using real experts and real witnesses before the jury. The jury did not get the benefit of the defendant's expert testimony as to damages.

Plaintiff cites only the *Quintero* case in support of his argument that cross-examination is somehow a substitute for the use of one's own witnesses. Opposition, page 5, lines 20-24. *Quintero* involved a case with medical expenses of $1885.00, a far cry from what is being alleged here. *Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000). In fact plaintiff argues that cross-examination can controvert injury claims[2]. Opposition, page 5, line 21. It doesn't say that cross-examination is somehow a substitute for utilizing one's own witnesses and evidence, and it certainly does not stand for that proposition in a case that plaintiff himself in other motions (such as the pending motion for attorneys fees) describes as complicated, medically complex, involving voluminous medical records, utilizing multiple medical treaters and experts as witnesses, etc.. Moreover, the lack of defense experts in *Quintero* was a choice made by the defendant in that case, which involved under $2000 in special damages. In part, the Supreme Court noted that the defendant in that case "did not controvert her damage evidence with independent witnesses..." *Quintero v. McDonald*, 116 Nev. 1181, 1184, 14 P.3d 522, 524 (2000). The language of the *Quintero* case does not identify whether the cross-examination referenced was of treatment providers, experts, the plaintiff, or other types of witnesses.

In other words, the *Quintero* case does not stand for the proposition that stripping a defendant of its damages experts in a case like this one is in any way cured by allowing some cross-examination, as plaintiff urges. What it does appear to stand for relative to this discussion is that if a defendant elects not to call a witness to controvert a plaintiff's witnesses or their theory of causation, a jury is supported in making determinations based solely on cross-examination. Here, defendant made no such election or tactical decision not to call experts, and instead defendant's damages experts were stricken at the commencement of defendant's case in chief. Notably, any cross-examination of the plaintiff's witnesses or experts here was in the context of defendant

---

[2] It is believed that the following brief quote is what plaintiff is referring to in his Opposition. "Although McDonald did not present expert testimony challenging causation, testimony elicited from Quintero's witnesses on cross-examination controverted Quintero's claim as to the extent of her injuries. Further, cross-examination of Quintero's evidence revealed that Quintero suffered from a pre-existing back injury, which could have caused her symptoms." *Quintero v. McDonald*, 116 Nev. 1181, 1184, 14 P.3d 522, 523 (2000).

anticipating that it would have the opportunity to present its own damages expert witnesses, Kirkendall and Baker. As a result, trial decisions about cross-examining plaintiff's experts, and lines of questioning of those experts, were shaped with the notion that defendant's own experts would present controverting evidence, and not that defendant would solely utilize cross-examination of the plaintiff's experts, as was the case in *Quintero*.

Effective cross-examination is simply not the equivalent of substantive evidence. While plaintiff makes that argument in his Opposition, he cites no case law to support such a position. This Court's refusal to allow defendant to respond to plaintiff's version of the speed of the accident, as well as his presentation of economic damages, allowed plaintiff's version of this critical evidence before the jury to appear as unchallenged. Plaintiff cannot now say that defendant was given the same damages defense as if defendant's experts in economics and accident reconstruction had testified.

Furthermore, since plaintiff withdrew his accident reconstruction expert at trial, there was no plaintiff expert on that topic to cross examine. Thus plaintiff's testimony, which defied science as to the collision speed (given defendant's crash test **as well as** the opinions of plaintiff's own withdrawn accident reconstruction expert), could not be adequately countered by cross-examination alone. Dr. Baker's exclusion from the case meant that plaintiff's testimony at trial identified a collision speed **twice** that testified to by his own expert, and greater than **five times** that which Dr. Baker was prepared to testify to. The jury had no other way to hear this evidence, and cross-examination is certainly not an adequate substitute for this specific evidence here.

B.

Plaintiff's Spin on Defense Expert Baker's Impact on the Jury is Speculation

Plaintiff states that, had he been allowed to testify, expert "Baker's testimony would not have impacted the jury's decision in any appreciable manner." Opposition, page 8, lines 7-8. This statement must be taken in its proper context. Plaintiff himself put his speed at 30 mph. During discovery, plaintiff's accident reconstruction expert Tim Leggett first put plaintiff's speed at 10

mph. Later, following a post-close-of-discovery crash test (which was unsuccessfully challenged by the defense, in part due to its timing), Mr. Leggett changed plaintiff's speed to 15 mph. Defense expert Baker would have put the plaintiff's speed at about 5 mph. Thus plaintiff's own expert identified a speed at odds with plaintiff's testimony under oath, but as Mr. Leggett resides in Canada defendant had no procedural method to call him as a witness at trial.

But defendant still had Mr. Baker as an expert witness, until he was stricken. Plaintiff's contention that a jury would have ignored a reputable expert saying plaintiff's testimony about his accident speed was six times the actual speed is pure speculation and conjecture. In fact, the jury could very well have take such testimony as information that the accident speed was much lower than plaintiff's testimony indicated. More than that, however, the defense of this case was premised to a large degree on challenging the veracity of plaintiff in regard to his prior complaints of serious neck injuries, among other things. The opinion and testimony of defense expert Baker would have worked hand in glove with that defense theory.

Instead, he was prevented from testifying. The result was that the jury heard only one version of the accident – the plaintiff's. Plaintiff has argued over and over that the truck obstructed the view of defense forklift driver Joshua Arbuckle. Without the testimony and opinions of Dr. Baker, defendant was left without any witnesses to contradict the speed of the collision, which speed goes direct to the damages alleged by plaintiff, since at a lower speed his significant medical treatment and surgeries would seem out of place. But the issue is not the ultimate determination of that – the issue here is whether the jury would have had the opportunity to consider differing evidence of damages. Defendant contends that is the case, and as such the striking of expert Baker went to damages. The Order says otherwise, and should be altered or reconsidered.

C.

Defendant Did Not Accept Liability

Over objection, plaintiff utilized the reptile theory at trial, attempting to require defense witnesses to agree to liability. While defendant maintains such questioning was improper as

violative of defendant's right to a jury trial and as it invaded the province of the jury, such testimony was in fact elicited from both Mr. Goodrich and Mr. Arbuckle at trial.

Plaintiff makes much of an argument that liability was uncontested and admitted to. That is incorrect. While plaintiff was permitted to question the defense witnesses as to "responsibility," the witnesses may have taken responsibility for their actions and those of defendant's employees, which does not equate with wholesale admission to liability. As set forth above in detail in the factual portion of this brief, Mr. Goodrich, the Safety Manager for defendant, clearly testified to a lack of personal knowledge of the accident. Mr. Arbuckle, whose view of the plaintiff's vehicle was blocked immediately before the accident, testified to seeing plaintiff's vehicle in the fast lane of the roadway and without any blinkers on, before Mr. Arbuckle's view was obstructed by a truck.

Mr. Arbuckle's testimony, as cited in the facts section of this brief, shows him admitting responsibility for his actions and any problems with those actions. It does not, however logically result in any type of stipulation to liability. Far from it – the jury could have found plaintiff partially at fault for driving in the fast lane and without signaling to change lanes, a short distance from the right turn he took in a construction zone.

D.

At Issue Here is the Order Itself

The propriety of the Order as not being reflective of the trial proceedings is what is at issue here. What happened at trial has already occurred, and a Notice of Appeal has been filed to address any trial issues. What is at issue in the instant Motion is the terms of the sanctions Order. Defendant contends that the Order, received weeks after the conclusion of the trial, does not accurately reflect either what occurred at trial or the evidence that defendant was permitted to utilize. It cannot be left unclear that expert witnesses for the defendant, one of which was a damages only economic expert (Kirkendall) and the other of which had opinions bearing on the severity and causation of the plaintiff's damages (Baker), were not permitted to testify. The Order as currently on file would indicate otherwise, as its terms state that defendant is permitted to litigate damages. That did not occur in an unfettered manner, and as such the Order does not reflect the verbal Order at trial or the

exclusion of the defense damages experts. For these reasons the Order must be revised.

E.

The Sanctions Here Were Akin to Case Terminating Sanctions, Other Than Closing Argument

The sanctions in this case did in fact strike certain damages evidence, specifically the testimony and supporting evidence of two (2) timely disclosed experts. While closing argument was allowed, and while cross-examination of plaintiff experts was allowed before it could be known that defense experts would be stricken, there can be no question but that defendant's damages case was impaired and limited. Plaintiff's argument would be much stronger if no defense damages evidence had been excluded.

> In addition, Francis contends that the district court "eviscerated" his evidence, affirmative defenses, and counterclaims as a sanction for his invocation of the privilege. He asserts that this was an improper discovery sanction under the factors set forth in *Young v. Johnny Ribeiro Building,* 106 Nev. 88, 93, 787 P.2d 777, 780 (1990). Francis's premise is fundamentally flawed. **The district court did not exclude any evidence**—indeed, Francis never offered any evidence. Nor did the district court strike any of Francis's defenses or counterclaims.

Francis v. Wynn Las Vegas, LLC, 127 Nev. 657, 664, 262 P.3d 705, 710 (2011) (emphasis added).

Here, there can be no dispute that certain expert damages evidence of defendant was excluded. Expert Kirkendall was a damages-only expert. Expert Baker had opinions as to vehicle speed that defendant relied upon in formulating its trial strategy and its defense. Cross-examination of the plaintiff and his treaters and experts, in the absence of knowledge that defendant would not be able to present its own evidence and expert witnesses, is no substitute. Defendant's rights to a jury trial were impaired and diminished. Regardless of the propriety of the sanction, the current Order does not reflect accurately what occurred at trial. In point of fact, defendant had damages expert witnesses, along with their testimony and evidence, excluded at trial.

As to Dr. Baker, the underlying evidence supporting his opinions and anticipated testimony

is of special significance. Due to conducting a crash test, defendant had a large number of videos and photographs showing that a 5.5 mph crash simulated and duplicated almost exactly the damage to plaintiff's vehicle in the subject accident. Moreover, the crash testing was conducted with the same make and model of vehicle, and the same exact type of forklift. As plaintiff withdrew his own accident reconstruction expert (who himself only opined plaintiff was going 15 mph [after earlier opining of a10 mph speed]), the jury would have been left with a very stark contrast as between the collision speed testified to by plaintiff of 30 mph and that of the defense expert of 5.5 mph. Given plaintiff's withdrawal of his foreign expert in the middle of trial, this left defendant with no way to demonstrate the true speed of the crash, which information goes directly to how the jury processed the plaintiff's damages as well as causation of damages. If a trial is truly a search for the truth, as the jury instruction used in this case states, then the jury was deprived of its opportunity to hear the actual truth.

What the jury heard instead was only the plaintiff's version of the truth as to damages and causation of damages. That is not what is set forth in the Order, and it does not reflect that defendant was not truly permitted to litigate and defend itself as to damages and causation of damages. If the Order itself is not reconsidered, then it should be corrected to accurately reflect what occurred at trial.

Defendant was not permitted to utilize its economic damages expert Kevin Kirkendall following the sanctions Order. He was not permitted to testify, his opinions were not allowed in as evidence, and it was too late to attempt to use plaintiff's economist Dr. Clauretie for any similar purpose by way of cross-examination (as argued by plaintiff, but which defendant contends is not a reasonable substitute for its own expert) as he had already testified and been cross-examined.

Dr. Baker was not allowed to opine, as he had in timely disclosed expert reports and in deposition, that plaintiff was traveling 5.5 mph at the time of the collision, and not at the 30 mph speed that plaintiff (alone) imparted to the jury. A lower collision speed could easily have been used by the jury to arrive at a lower damages amount, to consider more of plaintiff's problems the

result of his degeneration as documented in pre-accident reporting to his physician, and to attribute less of plaintiff's problems to this accident. All of this could have led the jury to a much lower damages amount. Additionally, plaintiff's credibility was at issue, as he did not recall telling his doctor about years of neck pain some twenty one (21) months before this accident, and the discrepancy in accident speeds could have been considered by the jury in regard to impeachment and credibility as well.

Where damages are limited, a higher standard is required.

> When a district court imposes case-ending sanctions, we apply "a somewhat heightened standard of review." *Id.* However, sanctions are not considered case ending when, as here, the district court strikes a party's answer thereby establishing liability, but allows the party to defend on the amount of damages. *Bahena v. Goodyear Tire & Rubber Co.,* 126 Nev. 243, 249, 235 P.3d 592, 596 (2010).

Valley Health Sys., LLC v. Estate of Doe by & through Peterson, 134 Nev. 634, 638–39, 427 P.3d 1021, 1027 (2018), *as corrected* (Oct. 1, 2018). While it is true that defendant was allowed to give a closing argument, and while it is true that defense witnesses who had already testified were not stricken, this does not diminish the reduction in defendant's case that the sanctions wrought. First, a damages only expert (Kirkendall) was stricken and excluded. Second, an accident reconstruction expert (Baker) whose opinions went in part to damages and causation of damages was stricken and excluded. This argument as to Dr. Baker ignores for now his earlier exclusion as a biomechanical expert. The loss of these two experts was not made up for by cross-examination, as plaintiff argues, as the correspondence cross-examinations had already been completed, unlike the *Quintero* case cited by plaintiff.

F.

Defendant Contends the Denial of a Damages Case Reaches a Constitutional Dimension

Defendant contends that denial of its ability to use as witnesses its properly disclosed damages experts (Kirkendall and Baker) deprived it of its constitutional rights to a jury trial under state and federal law.

> The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action, and to render decrees without any hearing whatever, is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

Hovey v. Elliott, 167 U.S. 409, 413–14, 17 S. Ct. 841, 843, 42 L. Ed. 215 (1897). In that same case, the U.S. Supreme Court went on to look to English law, and then said the following.

> ...Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

Hovey v. Elliott, 167 U.S. 409, 414, 17 S. Ct. 841, 843, 42 L. Ed. 215 (1897). The Supreme Court then went on to quote a wide variety of sources, including canonical law, to demonstrate the underpinnings of due process.

Defendant contends that is was denied a full and proper jury trial in this instance. The Order reads that damages can be litigated by defendant for the trial and its balance. But in practice defendant was not afforded what is ordinarily considered a damages defense, as defendant's damages experts were excluded. The jury did not hear defendant's damages defense. Earlier cross-examination of experts and witnesses for plaintiff is not the equivalent of a true defense at trial by defendant. Either the Order should be reconsidered to reflect upon that, or it should be corrected to properly state what occurred at trial. Given the timing of the receipt of the Order, which was transmitted to defendant only weeks after trial, defendant did not have the opportunity to address this issue prior to this time.

///

///

III.

CONCLUSION

For the foregoing reasons this Motion should be granted. The Order at issue should be reconsidered and altered, or it should otherwise be corrected to reflect that certain damages witnesses of defendant were stricken and excluded, and that defendant was not permitted to elicit all intended damages testimony, opinions, and evidence, or to utilize timely disclosed expert witnesses as to damages issues. Defendant does not dispute that it was allowed a closing argument and that earlier testifying expert witnesses (who testified out of order during plaintiff's case in chief due to scheduling) were not stricken. But cross-examination of plaintiff's experts, before defendant was aware it would not be permitted to use corresponding experts, is not a substitute for using timely disclosed defense experts. The Order should reflect what occurred at trial, which was at best a hybrid between case-ending sanctions and the striking of liability, and which was at worst exactly what is prohibited under these circumstances – case-ending sanctions.

DATED this 24th day of December, 2019.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

DAVID S. KAHN, ESQ.
Nevada Bar No. 7038
MARK SEVERINO, ESQ.
Nevada Bar No. 14117
300 South Fourth Street, 11th Floor
Las Vegas, NV 89101
Telephone: (702) 727-1400
Facsimile: (702) 727-1401
Attorneys for Defendant,
Capriati Construction Corp., Inc.

LAW OFFICES OF ERIC R. LARSEN
ERIC R. LARSEN, ESQ.
750 E. Warm Springs Road
Suite 320, Box 19
Las Vegas. NV 89119
Telephone: (702) 387-8070
Facsimile: (877) 369-5819
Eric.Larsen@thehartford.com

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on this 24th day of December, 2019, I served a true and correct copy of the foregoing **DEFENDANT CAPRIATI CONSTRUCTION CORP., INC.'S REPLY IN SUPPORT OF ITS MOTION TO CORRECT OR RECONSIDER DECISION AND ORDER, ENTERED ON NOVEMBER 5, 2019** as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk; and/or

☐ via hand-delivery to the addressees listed below.

Dennis M. Prince, Esq.
Tracy A. Eglet, Esq.
Kevin T. Strong, Esq.
EGLET PRINCE
400 S. 7th Street, 4th Floor
Las Vegas, Nevada 89101
Tel: (702) 450-5400
Fax: (702) 450-5451
Attorney for Plaintiff, Bahram Yahyavi

Eric R. Larsen, Esq.
LAW OFFICES OF ERIC R. LARSEN
750 E. Warm Springs Road
Suite 320, Box 19
Las Vegas. NV 89119
Telephone: (702) 387-8070
Facsimile: (877) 369-5819
Eric.Larsen@thehartford.com
Attorney for Defendant, Capriati Construction, Inc.

Malik W Ahmad, Esq.
LAW OFFICE OF MALIK W. AHMAD
8072 W. Sahara Ave., Ste A
Las Vegas, NV 89117
Telephone: (702) 270-9100
Facsimile: (702) 233-9103
Attorney for Plaintiff, Bahram Yahyavi

BY Agnes R. Woong
An Employee of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

1552845v.1

OPPS
DENNIS M. PRINCE
Nevada Bar No. 5092
KEVIN T. STRONG
Nevada Bar No. 12107
PRINCE LAW GROUP
10801 West Charleston Boulevard
Suite 560
Las Vegas, Nevada 89135
Tel: (702) 534-7600
Fax: (702) 534-7601
Email: eservice@thedplg.com
Attorneys for Plaintiff
Bahram Yahyavi

DISTRICT COURT

CLARK COUNTY, NEVADA

BAHRAM YAHYAVI, an Individual, Plaintiff, vs. CAPRIATI CONSTRUCTION CORP., INC., a Nevada Corporation, Defendant	CASE NO.: A-15-718689-C DEPT. NO.: XXVIII **PLAINTIFF'S OPPOSITION TO DEFENDANT CAPRIATI CONSTRUCTION CORP., INC.'S MOTION FOR NEW TRIAL** Hearing Date: January 28, 2020 Hearing Time: 9:00 a.m.

Plaintiff BAHRAM YAHYAVI, by and through his attorneys of record, Dennis M. Prince and Kevin T. Strong of PRINCE LAW GROUP, hereby submits his *Opposition to Defendant Capriati Construction Corp., Inc.'s Motion for New Trial.*

. . .

. . .

. . .

. . .

. . .

. . .

. . .

. . .

. . .

This Opposition is based upon the pleadings and papers on file in this action and the Memorandum of Points and Authorities set forth herein.

DATED this 10th day of January, 2020.

Respectfully Submitted,

PRINCE LAW GROUP

DENNIS M. PRINCE
Nevada Bar No. 5092
KEVIN T. STRONG
Nevada Bar No. 12107
8816 Spanish Ridge Avenue
Las Vegas, Nevada 89148
Attorneys for Plaintiff
Bahram Yahyavi

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Defendant Capriati Construction Corp., Inc.'s ("Capriati") attorney committed willful misconduct when he deliberately elicited testimony from Capriati's corporate representative regarding Capriati's previously filed bankruptcy. Undoubtedly, the sole motivation for eliciting this testimony was to garner sympathy from the jury given the nature and severity of the underlying collision and the substantial injuries Plaintiff Bahram Yahyavi ("Mr. Yahyavi") sustained. Now, Capriati requests this Court to order a new trial because the sanctions this Court imposed as a result of this deliberate misconduct were allegedly too severe. Specifically, Capriati asserts this Court improperly: (1) struck its Answer as to liability; (2) struck its damages case; and (3) allowed an instruction informing the jury that Capriati carried liability insurance. All three of these arguments are predicated on factual and legal fallacies regarding the consequences of the sanctions imposed and this Court's legal authority to impose them.

Capriati contends this Court unfairly struck its Answer as to liability even though the forklift operator, Joshua Arbuckle ("Arbuckle"), admitted that he caused the subject collision. Capriati's safety manager/corporate representative, Clifford Goodrich ("Goodrich"), also accepted

responsibility for Arbuckle's negligence. These admissions undermine the alleged severity of the Court's decision to strike Capriati's Answer as to liability because the jury heard sufficient testimony necessary to deem Capriati liable. Capriati also asserts the Court improperly struck its so-called "damages" witnesses and the liability defense because evidence of its bankruptcy is not *per se* inadmissible. Of course, Capriati does not cite to any Nevada law in support of this assertion. Capriati fails to appreciate the substantial prejudice that resulted to Mr. Yahyavi by suggesting that Capriati may have lacked money to satisfy a judgment. The prejudicial impact of this bankruptcy testimony was particularly strong given that the jury had no idea that liability insurance was even available when the testimony was given. Capriati simply wanted to leave the jury with the impression that the bankruptcy was ongoing, and that Capriati was in financial distress. No other conclusion can be drawn given the context in which the question was asked the testimony given.

Capriati's suggestion that reference to its bankruptcy was intended to combat the inference that it willfully destroyed relevant documents lacks all credibility given the context in which the testimony was made. Further, the substantive testimony from Capriati's stricken damages experts was duplicative of evidence that was already presented to the jury or that otherwise would have had no appreciable impact on the outcome. Ultimately, this Court possessed broad authority under Nevada law to impose sanctions for willful attorney misconduct and acted appropriately in this action. Therefore, a new trial is not warranted.

Also, this Court did not make any legally incorrect expert rulings as Capriati feebly tries to suggest. Capriati's retained medical expert, Howard Tung, M.D., was in no way restricted from offering testimony about Mr. Yahyavi's prior lone neck pain complaint. In fact, Dr. Tung extensively discussed the prior medical records during Mr. Yahyavi's cross-examination. Capriati also misrepresents that its retained vocational rehabilitation expert, Edward L. Bennett, was restricted from offering opinions regarding Mr. Yahyavi's ability to perform other types of jobs. Mr. Bennett only listed other types of jobs in his report without offering any opinion that Mr. Yahyavi could perform such jobs. Therefore, this Court properly restricted Mr. Bennett's trial testimony.

Finally, Capriati inexplicably asks for a new trial because this Court gave the jury a curative instruction wherein it referenced that Capriati carried liability insurance. Capriati was expressly given the opportunity to review this curative instruction and made ***no objection*** to the instruction as written. As a result, Capriati waived any ability to challenge the substance of that instruction in its request for

DP LG
10801 W. Charleston Blvd.
Suite 560
Las Vegas, NV 89135

a new trial. The instruction also did not imply that Capriati carried unlimited insurance to somehow sway the jury to issue an award not supported by the evidence. In fact, the jury actually provided an award that fell well within Capriati's $11,000,000.00 in insurance coverage. This is precisely why the instruction stated that the verdict could be satisfied, ***in whole or in part***, by the liability insurance.

Capriati's Motion amounts to nothing more than a feeble attempt to try this case for a second time ***solely*** to receive a more favorable outcome and to avoid the consequences of its counsel's deliberate misconduct. The substance of this motion underscores precisely how Capriati continually fails to acknowledge its attorney's willful misconduct and the impact such misconduct would have had on the outcome had this Court not imposed sanctions. Capriati in no way meets the burden necessary to establish this Court abused its discretion or imposed unfair sanctions that justify a new trial under Nevada law.

II.

FACTUAL BACKGROUND

This matter arises from a motor vehicle collision that occurred on June 19, 2013. Mr. Yahyavi was driving a company-owned vehicle for Las Vegas Chapman Dodge, his employer, eastbound on Sahara Avenue. As Mr. Yahyavi attempted to turn right onto Glenn Avenue, suddenly and without warning, Arbuckle, while operating a forklift with its forks raised and sticking outward, crashed into Mr. Yahyavi's vehicle. The evidence established that Arbuckle's view was obstructed as he attempted to enter the intersection where he struck Mr. Yahyavi's vehicle. The force of the impact brought Mr. Yahyavi's vehicle to an immediate stop. Capriati denied that Arbuckle, its employee, caused the subject collision and denied its liability for the subject collision during the nearly four year that preceded the trial.

On September 9, 2019, the jury trial commenced. Over the course of the next several weeks, Mr. Yahyavi presented his case-in-chief to the jury and called several witnesses, including his treating physicians and retained experts to testify. Capriati also called its lone retained medical expert, Howard Tung, M.D., to testify. On September 25, 2019, Capriati re-called its corporate representative, Goodrich, a witness who previously testified as part of Mr. Yahyavi's case-in-chief nearly two weeks earlier. The first substantive question that Capriati's counsel asked Goodrich was deliberately intended to elicit testimony that Capriati filed for bankruptcy:

DP LG
10801 W. Charleston Blvd.
Suite 560
Las Vegas, NV 89135

Q. Between the date of the accident and today, ***did anything major happen to your company?***

A. ***Yes, we filed for reorganization in 2015.***

See Partial Trial Transcript Excerpt – Day 13, at 3:19-23, attached as **Exhibit "1."**

Following defense counsel's willful misconduct to elicit testimony regarding Capriati's ability to pay or satisfy a potential judgment entered in this case, Mr. Yahyavi immediately filed his Motion for Sanctions against Capriati to seek appropriate relief from this Court. On September 26, 2019, this Court heard extensive argument from both Mr. Yahyavi and Capriati regarding the nature and extent of sanctions to be imposed against Capriati resulting from its counsel's willful misconduct. Mr. Yahyavi requested this Court to admonish defense counsel for his willful misconduct in front of the jury. Mr. Yahyavi further requested this Court to provide the jury with a curative instruction to neutralize the jury's mistaken belief that Capriati was financially unable to pay any judgment amount. Finally, Mr. Yahyavi requested this Court to strike Capriati's Answer in its entirety. Alternatively, Plaintiff requested this Court to impose the lesser sanction of striking Capriati's retained expert witnesses' testimony and evidence in their entirety. Ultimately, this Court decided to impose various sanctions against Capriati, some of which were lesser sanctions than Mr. Yahyavi requested:

> (1) reading Mr. Yahyavi's proposed admonishment of defense counsel and proposed curative instruction to the jury;
>
> (2) striking Capriati's Answer as to liability;
>
> (3) striking the testimony of Clifford Goodrich, Capriati's corporate representative, regarding the bankruptcy and precluding him from giving further testimony as part of Capriati's case; and
>
> (4) striking the testimony of Capriati's remaining expert witnesses: Kevin Kirkendall, CPA and John Baker, Ph.D.

This Court permitted the jury to consider the evidence Capriati already presented regarding medical causation and damages, including the testimony of Dr. Tung and Mr. Bennett. This Court permitted Capriati to present argument to the jury regarding causation and damages based on this evidence. Following a 15-day trial, the jury found for Mr. Yahyavi, and against Capriati, in the amount of $5,870,283.24. On October 22, 2019, the Judgment Upon the Jury Verdict was entered in the amount of $6,276,948.24.

. . .

DP LG
10801 W. Charleston Blvd.
Suite 560
Las Vegas, NV 89135

III.

LEGAL ARGUMENT

NRCP 59(a) governs the grounds upon which a party may request the district court to order a new trial. "The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court, and this court will not disturb that decision absent palpable abuse." *Nelson v. Heer*, 123 Nev. 217, 223 (2007) (*quoting Edwards Indus. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1036 (2007)). To determine whether an abuse of discretion occurred, the appellate court must view the evidence and all inferences most favorably to the party against whom the motion was made. *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 366 (2009). "To justify a new trial, as opposed to some other sanction, unfair prejudice affecting the reliability of the verdict must be shown . . . ." *BMW v. Roth*, 127 Nev. 122, 132 (2011).

On November 19, 2019, one day after the filing of the underlying motion, Capriati filed its Notice of Appeal. A perfected appeal generally divests a district court of jurisdiction to review issues pending before the Nevada Supreme Court, except for those "collateral to or independent from the appealed order." *Foster v. Dingwall*, 126 Nev. 49, 52 (2010); *see also, Huneycutt v. Huneycutt*, 94 Nev. 79, 80-81 (1978). In considering such motions, the district court has jurisdiction to "direct briefing on the motion, hold a hearing regarding the motion, and enter an order denying the motion...." *Foster*, 126 Nev. at 53. The district court, however, lacks the jurisdiction to enter an order granting the motion. *Id.* The same is true regarding motions that do not address collateral or independent issues, namely that the district court has jurisdiction to deny those motions, but cannot grant them. *Id.* Rather, the district court may only certify its intent to grant the relief requested." *Id.*

Given that the underlying motion addresses issues that are currently pending before the Nevada Supreme Court, this Court lacks the legal authority to grant the subject motion. Instead, this Court may deny the motion or certify its intent to grant the relief requested. However, as explained below, Capriati fails to provide the requisite factual or legal basis necessary to receive a new trial.

A. Striking Capriati's Damages Experts Did Not Unfairly Eliminate Capriati's Damages Case Because Capriati Presented Sufficient Evidence to Dispute Causation and Damages

Capriati has incessantly argued to this Court in multiple motions that striking Kevin Kirkendall, its retained CPA, and John E. Baker, Ph.D., its retained accident reconstructionist/biomechanical engineer, exceeded the type of sanctions allowed under Nevada law.

DP LG
10801 W. Charleston Blvd.
Suite 560
Las Vegas, NV 89135

This argument is based on a gross misunderstanding of Nevada law regarding the district court's ability to impose a wide range of sanctions in response to attorney misconduct. This argument is further flawed because the sanction did not completely eliminate Capriati's damages case given the extent of evidence that the jury considered.

This Court enjoys broad discretion and inherent equitable powers to impose sanctions for trial misconduct. *Emerson v. Eighth Judicial Dist. Court*, 127 Nev, 672, 680 (2011); *Young v. Johnny Ribeiro Bldg.*, 106 Nev. 88, 92 (1990). "Litigants and attorneys alike should be aware that these powers may permit sanctions for discovery and other litigation abuses not specifically proscribed by statute." *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 252 (2010); *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92 (1990). Thus, the Nevada Supreme Court has not expressly imposed any limitation on the type of lesser-imposed sanctions available for a trial court to issue against a party for attorney misconduct. Notably, other less severe sanctions need not precede the sanction of dismissal. *Bahena*, 126 Nev. at 252; *Young*, 106 Nev. at 92.

Capriati's attempt to somehow portray the sanctions imposed by this Court as excessive considering the Nevada Supreme Court's analysis in *Bahena* is confounding. In *Bahena*, the trial court initially struck Goodyear's answer as to liability and damages as sanctions based upon its discovery abuses. 126 Nev. at 247. The trial court reconsidered its decision and issued reduced sanctions that consisted of striking Goodyear's answer as to liability only. *Id.* Here, this Court also struck Capriati's Answer as to liability and did ***not*** strike Capriati's Answer as to damages. Capriati's contention that striking its remaining expert witnesses was akin to striking its Answer as to damages disregards the testimony and evidence Capriati presented to the jury that directly challenged damages. Capriati acts as though Mr. Kirkendall and Dr. Baker were the only experts retained to dispute Mr. Yahyavi's damages claim, which is simply not true. In fact, the value of the purported testimony from Mr. Kirkendall and Dr. Baker as to the issue of damages was miniscule given the substance of their opinions.[1]

---

[1] Capriati cites to Justice Pickering's dissent in *Bahena* to somehow further support its characterization of the sanctions this Court imposed as "case-concluding." Justice Pickering stated that striking Goodyear's Answer as to liability effectively concluded the case because liability was seriously in dispute and that damages were not given the catastrophic nature of the injuries suffered by the plaintiff. *Bahena*, 126 Nev. at 259 (Pickering, J. dissent). The consequences of striking Capriati's Answer as to liability are distinguishable given that Capriati's forklift operator, Arbuckle, admitted

DP LG
10801 W. Charleston Blvd.
Suite 560
Las Vegas, NV 89135

1. Mr. Kirkendall's testimony and opinions to be offered at trial

Mr. Kirkendall authored two reports in this case. *See* 7/4/18 and 8/30/18 Kirkendall reports, collectively attached as **Exhibit "5."** Mr. Kirkendall opined that Mr. Yahyavi did not sustain any future medical damages as a result of his injuries from the subject collision. *Id.* at 7/4/18 report, p. 2. Mr. Kirkendall solely relied on the opinions of Capriati's retained medical expert, Dr. Tung, to support the opinion:

> In his report dated August 26, 2016, Dr. Tung opined that "Cervical surgery is not recommended. Should surgery be contemplated or completed in the future, this would be unrelated to the subject motor vehicle accident and most substantially related to Mr. Yahyavi's pre-existing degenerative cervical spine disease/spondylosis. Mr. Yahyavi is not disabled from work." . . . To the extent Dr. Tung's . . . opinions are more likely than not, Mr. Yahyavi will have no future medical needs. ***Accordingly, it is my opinion that Mr. Yahyavi will suffer no economic damages relating to future medical expenditures as a result of the subject incident.***

Id. at 7/4/18 report, p. 2 (emphasis added).

In Mr. Kirkendall's supplemental report, he spent most of his time disputing the loss of household services calculation made by Mr. Yahyavi's retained economist, Terrence M. Clauretie, Ph.D. *Id.* at 8/30/18 report, pp. 4-10. Mr. Yahyavi withdrew this component of his damages claim before trial commenced. As to Mr. Yahyavi's loss of earning capacity claim, Mr. Kirkendall, once again, opined that Mr. Yahyavi suffered no loss of earning capacity because of the opinion given by Edward L. Bennett, M.A., C.R.C., Capriati's retained vocational rehabilitation expert:

> In a report dated July 27, 2018, Edward L. Bennett, MA, CRC, stated, "In this counselor's view, nothing precludes plaintiff from returning to his usual and customary occupation of automobile sales representative/manager." To the extent Mr. Bennett's opinion is more likely correct than not, Mr. Yahyavi's future post-incident annual earnings will not differ from his pre-incident annual earnings and benefits.
>
> Accordingly, it is my opinion that Mr. Yahyavi will suffer no future economic damages relating to lost earnings and benefits.

---

fault. *See* Trial Transcript Excerpts - Day 6, at 169:20-25, attached as **Exhibit "2."** Goodrich, Capriati's corporate representative/safety manager, also admitted that his investigation established Arbuckle as the at-fault driver. *See* Trial Transcript Excerpts – Day 5, at 43:23 – 44:4, attached as **Exhibit "3."** Even this Court acknowledged that liability was a "closed door." *See* Trial Transcript Excerpts – Day 14, at 19:8-14, attached as **Exhibit "4."** Thus, striking Capriati's Answer as to liability was not akin to a "case terminating" sanction because the issues of causation and damages were fully disputed by Capriati at trial. Justice Pickering's dissent actually undermines Capriati's arguments.

DP LG
10801 W. Charleston Blvd.
Suite 580
Las Vegas, NV 89135

Id. at 8/30/18 report, pp. 8-9.

In response to Dr. Clauretie's calculation of Mr. Yahyavi's lost earnings capacity calculation, Mr. Kirkendall never offered any alternative calculations. Mr. Kirkendall never directly questioned the methodology Dr. Clauretie utilized to determine the calculation. Rather, he simply indicated that Dr. Clauretie appeared to use annual earnings figures that were inconsistent with the figures provided by Mr. Yahyavi's retained vocational rehabilitation expert, Ira Spector, M.S., C.R.C. *Id.* at 8/30/18 report, p. 3. The quality of such testimony would not have made any appreciable difference to Capriati's damages case because Mr. Kirkendall never articulated what Mr. Yahyavi's actual lost earnings capacity damages would be if Dr. Clauretie used Mr. Spector's figures. Mr. Kirkendall never determined whether Dr. Clauretie should have used other more accurate figures. Mr. Kirkendall even conceded that Dr. Clauretie's figures may not actually be inaccurate: "***To the extent Mr. Spector's opinions are more likely accurate than not***, Dr. Clauretie has significantly overstated the earnings and benefits to Mr. Yahyavi." *Id.* at 8/30/18 report, p. 3 (emphasis added). Ultimately, the speculative nature of Mr. Kirkendall's alleged criticism of Dr. Clauretie's lost earnings calculation nullifies the evidentiary value of his testimony related to Mr. Yahyavi's economic damages. Mr. Bennett testified that Mr. Yahyavi was able to return to work and, therefore, did not suffer a loss of earnings capacity. The testimony of Mr. Kirkendall would have merely been cumulative and, therefore, of no value to Capriati's damages case.

2. Dr. Baker's testimony and opinions to be offered at trial

Dr. Baker's anticipated testimony similarly had insignificant value as to Capriati's damages case such that the exclusion of his testimony did not eviscerate Capriati's ability to challenge damages. Dr. Baker specifically analyzed the deceleration of Mr. Yahyavi's vehicle and the dynamics of the impact to offer his ultimate opinion regarding injury causation:

> 3. That braking with or without the friction marks, the deceleration of the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi would have been between 0.55 and 0.70 Gs. Without braking, the forced deceleration of the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi was substantially less.
>
> 4. In order to travel 7 feet past the POI, the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi would have had to be travelling at a speed of 5.61 miles per hour with no braking and rolling drive train resistance only (as Bahram Yahyavi states), or 12.12 mpg with full braking. However, the 2012 Dodge Charger's traveling 7 feet past the POI necessitates the Forklift forks traveled through the entire

DP LG
10801 W. Charleston Blvd. Suite 560 Las Vegas, NV 89135

> travel compartment of that vehicle. Neither scenario is consistent with the post-collision position of the forks.
>
> 5. Despite the two major technical inconsistencies, at these levels of deceleration of (.55 to .70 or less), there are no possible hyperflexion mechanisms of injury.

See 7/3/18 Baker report, at pp. 3-4, attached as **Exhibit "6."**

This Court excluded Dr. Baker's testimony and opinions that the forces involved in the subject collision were not strong enough to cause Mr. Yahyavi's injuries based on his lack of qualifications. This ruling nullified the persuasive value of Dr. Baker's analysis of the deceleration and forces involved in the subject collision because the relevancy of this information was solely tied to whether Mr. Yahyavi was injured as a result of the subject collision. The only expert Capriati retained who was qualified to offer medical causation testimony at trial, Dr. Tung, opined that Mr. Yahyavi was injured as a result of the subject collision. *See* Trial Transcript Excerpts – Day 12, at 6:9 – 7:4, attached as **Exhibit "7."** Dr. Tung opined the treatment Mr. Yahyavi underwent during the 14 months after the subject collision was reasonable and appropriate to treat his injuries. *Id.* Dr. Tung's testimony further invalidated the viability of Dr. Baker's opinions regarding forces and deceleration to dispute Mr. Yahyavi's damages claim because Capriati accepted that Mr. Yahyavi was injured from the subject collision. Therefore, the forces and the deceleration of Mr. Yahyavi's vehicle were a non-factor regarding the contested issue of whether Mr. Yahyavi was injured as a result of the subject collision.

Capriati also believes that Dr. Baker's opinion regarding the speed of Mr. Yahyavi's vehicle at impact, which was lower than the speed Mr. Yahyavi testified to, would have made a difference to its damages case. This belief is fraught with speculation. Once again, the purported difference in speed estimations would only be relevant if Capriati claimed that Mr. Yahyavi was not injured as a result of the subject collision. This was not the case. While Capriati likely wanted to introduce Dr. Baker's testimony regarding speed allow the jury to speculate regarding the strength of the force of the collision, such testimony would have directly contradicted Arbuckle's testimony:

> Q. ***Because it was a hard impact, wasn't it?***
>
> A. ***Yes, sir.***
>
> Q. And even to you on that forklift, it appeared to be a hard or heavy impact, right?
>
> . . .

DP LG
10801 W. Charleston Blvd.
Suite 560
Las Vegas, NV 89135

A. I didn't really feel it on the -- on the forklift. The forklift is a big piece of steel, so you wouldn't feel it much.

Q. ***But you -- for the Charger, it would've been a hard impact, right?***

A. ***Correct.***

See **Exhibit "2,"** at 168:14-22 (emphasis added).

Arbuckle's testimony was totally consistent with Mr. Yahyavi's testimony that the impact was significant, and the substantial damage demonstrated by the photographs of Mr. Yahyavi's vehicle, post-collision. Without the ability to explain the significance of the speed and forces involved in relation to the mechanism of injury, Dr. Baker's testimony would not have impacted the jury's decision in any appreciable manner regarding Mr. Yahyavi's damages. The only contested issue as to damages was not whether Mr. Yahyavi sustained damages as a result of the subject collision, but the ***extent*** of those damages. Accordingly, this Court's decision to strike Mr. Kirkendall and Dr. Baker came nowhere close to effectively eliminating Capriati's ability to contest damages.

B. Capriati Meaningfully Challenged Mr. Yahyavi's Alleged Damages During Trial and Closing Argument because the Sanctions Did Not Eliminate the Evidence Capriati Already Presented

Capriati contends that the inability to present two experts at trial somehow eliminated its entire damages case. This argument is flawed because Mr. Kirkendall and Dr. Baker were not the only experts Capriati retained to allegedly offer testimony regarding damages. Capriati conveniently overlooks that its primary expert regarding causation and damages, Dr. Tung, was able to fully testify regarding his medical causation opinions without any limitation. Specifically, Dr. Tung testified that Mr. Yahyavi was not as injured as claimed to be as a result of the subject collision. He testified that Mr. Yahyavi's ongoing cervical spine pain complaints were causally related to his ongoing and progressive degenerative changes in his cervical spine. He also testified that Mr. Yahyavi did not require any future medical care or treatment as a result of the subject collision. This testimony was not impacted in any way by this Court's sanctions order, which means the jury was able to fully consider and evaluate it during deliberations.

Capriati also called its vocational rehabilitation expert, Mr. Bennett, to testify before the jury regarding Mr. Yahyavi's loss of earning capacity claim. Mr. Bennett testified extensively about his opinion that Mr. Yahyavi was vocationally able to return to work as a car salesman based on the

DP LG
10801 W. Charleston Blvd.
Suite 560
Las Vegas, NV 89135

medical opinions of Dr. Tung. This testimony directly challenged the damage opinions provided by Mr. Yahyavi's retained vocational rehabilitation expert, Ira Spector, who offered testimony about Mr. Yahyavi's vocational losses.

Capriati's failure to acknowledge that two of its primary damage experts were able to testify undermines any suggestion that it was somehow deprived of the constitutional right to a jury trial. Such argument is more than an overreach and actually invalidates the credibility of Capriati's legal arguments and position. Capriati directly challenged issues of medical causation and the extent of Mr. Yahyavi's alleged damages by also cross-examining all of Mr. Yahyavi's retained experts and treating physicians who testified. Although Capriati discounts the value of cross-examination in other briefing filed with this Court, Capriati cannot dispute that cross-examination of Mr. Yahyavi's witnesses was a component of its ability to challenge damages. Mr. Yahyavi has never taken the position that cross-examination is the equivalent of presenting a party's witnesses. Rather, Capriati's ability to cross-examine witnesses allowed the jury to evaluate the reliability and credibility of Mr. Yahyavi's damages witnesses. Thus, Capriati was never completely precluded from challenging Mr. Yahyavi's damages claim despite the sanctions issued and its counsel's egregious conduct.

This Court's decision to strike Mr. Kirkendall and Dr. Bennett as a sanction did not cause any irregularity in the trial proceedings necessary to deprive Capriati of a fair trial. Capriati simply seeks to avoid the repercussions that resulted from its counsel's deliberate attempt to undermine the fairness of the trial by introducing evidence of Capriati's ability to pay or satisfy a judgment. A new trial is not warranted on this basis.

C. Capriati's Reference to Case Law Regarding Bankruptcy Evidence is Not Relevant to this Court's Inquiry and is Not Even Applicable to the Circumstances Surrounding Capriati's Bankruptcy Reference

Capriati wishes to use its Motion for New Trial to rehash whether its counsel committed willful misconduct when he elicited testimony about Capriati's bankruptcy filing. Capriati's claim that it lacked sufficient time to locate case law during the trial to address the admissibility of such evidence is laughable considering Capriati was the one that wrongfully created the issue in the first place. Nonetheless, Capriati was unable to present any case law that allowed the introduction of bankruptcy evidence in a personal injury case at that time and is still unable to provide such case law now.

. . .

DP LG
10801 W. Charleston Blvd.
Suite 560
Las Vegas, NV 89135

In *Ereren v. Snowbird Corp.*, 2002 Utah App. LEXIS 427, 2002 UT App. 274 (Utah Ct. App. 2002), the Court of Appeals did not actually conclude that evidence of the personal injury plaintiff's bankruptcy was relevant and admissible. Rather, it determined that the introduction of the evidence was harmless because there was other evidence introduced during the trial that undermined the validity of the plaintiff's personal injury claim, not just the bankruptcy. *Id.* at *4-5. Thus, *Ereren* does not even stand for the proposition that bankruptcy evidence is probative and admissible in a personal injury case. *Ereren* is also distinguishable because it was not the defendant's bankruptcy that was at issue, which is significant.

Capriati also relies upon a case in which evidence of a bankruptcy was relevant to determine a party's claimed damages of lost profits arising from a breach of contract claim. *Kaiser Invest., Inc. v. Linn Agriprises, Inc.*, 538 So.2d 409, 416-17 (Miss. 1989). The Mississippi Supreme Court asserted that the prior bankruptcy was relevant because a factor in considering a claim for lost profits was the claimant's proof of past profits. *Id.* Here, the bankruptcy evidence related to Capriati, the party responsible for any damage award, not the party claiming damages. Furthermore, the claimed damages of lost profits were clearly not at issue in this case.

Capriati's citation to *Bullock v. Ungricht*, 538 P.2d 190, 192 (Utah 1975) also has no applicability to this action. In *Bullock*, the injury claimant's bankruptcy became relevant because she introduced evidence of her earning capacity and the motivations behind that were called into question. *Id.* Unlike *Bullock*, evidence of the defendant's bankruptcy, not the injury claimant's bankruptcy, was introduced at trial. This evidence was not introduced to cast doubt or dispute Mr. Yahyavi's damages claim. Rather, it was introduced to curry favor from the jury regarding Capriati's financial difficulties to pay or satisfy a judgment.

Finally, *Kalell v. Petersen*, 498 N.W.2d 413, 415 (Iowa Ct. App. 1993) involved the admissibility of evidence of a personal injury plaintiff's bankruptcy. However, the court provided no meaningful analysis as to why such evidence was relevant. *Id.* at 416. Assuredly, it is obvious that such reasons are not applicable here because Capriati's bankruptcy was at issue and was intended to elicit sympathy about its ability to pay or satisfy a judgment, ***not*** to undermine Mr. Yahyavi's damages claim.

. . .

. . .

DP LG
10801 W. Charleston Blvd.
Suite 560
Las Vegas, NV 89135

D. Capriati Did Not Elicit Testimony Referencing Capriati's Bankruptcy to Somehow Refute its Failure to Maintain Relevant Records Regarding the Subject Collision

Capriati's excuse for deliberately eliciting testimony from Goodrich about its "reorganization" completely lacks credibility given the circumstances in which the testimony was introduced. Capriati somehow believes that reference to its reorganization was solely intended to address Mr. Yahyavi's implication that Capriati willfully destroyed relevant records regarding the subject collision. Yet, when questioned about the documents, Goodrich admittedly had no idea where the documents were and why they could not be found:

> Q. Now, you claim that -- the company claims that you took Josh for drug testing, correct?
>
> A. That is correct.
>
> Q. And you have no documents to show us the results of that, do you?
>
> A. No, I do not.
>
> Q. Right. So we can't trust and verify anything you would say, whether it was clean or not clean, correct?
>
> A. Why not? You're trusting my other information.
>
> Q. I don't know. One of the jurors said trust and verify is a way to do things. And I'm just asking, we can't verify that statement?
>
> A. No, we cannot verify it.
>
> Q. Because you -- the company got rid of the employment file after this lawsuit happened, right?
>
> A. ***I don't know the timeframe that it occurred. I just know it's not there.***
>
> . . .
>
> Q. I want you to assume that. Let's assume that [Arbuckle] does testify that he left the company in 2014 and was terminated. Then how long would you keep his file for – or you should've kept his file?
>
> A. ***That I don't know. That's up to HR to decide.***
>
> Q. Well, in general, how long does a company keep a file like that?
>
> A. Approximately three years. ***I don't know if they moved it, whatever. It wasn't in the HR office or in the other areas that we looked.***
>
> Q. Well, who pulled it and removed it?
>
> A. ***That I don't know.***

DP LG
10801 W. Charleston Blvd.
Suite 560
Las Vegas, NV 89135

Q. Did you ask HR what happened to the file?

A. Well, when this occurred, we had different HR people for that, ***so I don't know.***

Q. Well, the company's records are what the records are, right? I mean, they -- the company maintains the records regardless of what personnel is there?

A. That is correct.

Q. I mean, employees come and go, they retire, they hire new ones, we expand, we let people go for a variety of reasons, right?

A. That's correct.

. . .

Q. Right. And so you can't explain why the employee file was discarded, can you?

A. ***No, I can't.***

See **Exhibit "3,"** at 36:24 – 37:14; 37:20 – 38:14; 38:17-19 (emphasis added).

Mr. Yahyavi's counsel never asked Goodrich whether Capriati deliberately destroyed Arbuckle's employee file. Mr. Yahyavi's counsel never suggested that Capriati deliberately destroyed the file documents to hide relevant evidence. Mr. Yahyavi's counsel merely asked Goodrich why Capriati was unable to locate the employee file. He was unable to provide any reliable information in response. Goodrich's admitted lack of knowledge regarding the whereabouts of the employee file established that he could not reliably testify about the employee file in any capacity.

When Capriati's counsel re-called Goodrich to testify, he made no attempt to lay any foundation about the whereabouts of Mr. Yahyavi's employee file. Of course, Capriati was unable to do that because Goodrich admitted that he had no idea where the employee file was or why it was missing. Therefore, Capriati had no basis to even attempt to question Goodrich further regarding a topic for which he had no knowledge.

Even if Goodrich had the knowledge to answer questions about the location of Arbuckle's employee file or why it was missing, questions about Capriati's bankruptcy or reorganization were not related in any manner to why documents were discarded. If Capriati's counsel intended to obtain information regarding the company's reduction in its workforce to somehow justify its failure to retain Arbuckle's employee file, then he should have tried to ask a specific question about that topic. Even testimony related to a reduction in workforce, in this context, would have improperly signaled to the jury that Capriati was in financial peril. As this Court is well-aware, Capriati was not in financial

DPLG
10801 W. Charleston Blvd.
Suite 560
Las Vegas, NV 89135

peril at all during the pendency of this trial. In fact, Capriati closed its Chapter 11 bankruptcy nearly 16 months before trial began and represented to the bankruptcy court that it "was able to turn itself profitable." *See* 2/6/18 Motion for Final Decree, at p. 2, ¶¶ 4-6, attached as **Exhibit "8."** Yet, Capriati's counsel intentionally wanted the jury to inaccurately believe that Capriati's bankruptcy was still ongoing and that it was financially unable to pay a judgment. Capriati's bankruptcy was not even relevant to its ability to retain documents or records because Capriati continued to operate its business during the pendency of its Chapter 11 bankruptcy. "The legislative purpose of Chapter 11 is the speedy rehabilitation of financially troubled businesses." *In re Bryan*, 69 B.R. 421, 423 (Bankr. D. Mont. 1987) (*quoting In re 312 West 91st Street Co., Inc.*, 35 B.R. 346, 347 (Bankr. S.D.N.Y. 1983)). "[A] voluntary Chapter 11 debtor remains in possession of property of its bankruptcy estate and . . . has the rights, powers, and duties, of a bankruptcy trustee . . . ." *In re Cwnevada LLC*, 602 B.R. 717, 726 (Bankr. D. Nev. 2019). In other words, the bankruptcy filing had no impact on Capriati's ability to retain documents or records, which undermines the credibility of the purpose for which the question was even asked. The number of employees similarly had no impact on Capriati's ability to retain documents because documents can be kept even when a company goes out of business. In other words, a certain number of employees is not needed for a company to maintain documents.

Capriati's attempt to now somehow justify questioning Goodrich about its bankruptcy because Mr. Yahyavi's testified about using his 401k to support himself as a result of his disability is predictable. Capriati never made any contemporaneous objection to this testimony when it was elicited. The same is true regarding his allegation that Mr. Yahyavi's counsel made improper closing argument to the jury. *See* Capriati's Motion, at 12:10-12. Capriati never objected to the closing argument of Mr. Yahyavi's counsel, which was required to preserve the issue for this motion and for appeal. *See Lioce v. Cohen*, 124 Nev. 1, 17-18 (2008). Of course, Capriati now wants to make it an issue to somehow distract from its counsel's willful misconduct. None of this argument is relevant to the inquiry before this Court and should be summarily disregarded.

It also bears repeating that the first substantive question Capriati's counsel asked Goodrich was whether anything ***"major"*** happened to the company. *See* **Exhibit "1,"** at 3:19-23. This clearly signaled to Goodrich that he should testify about Capriati's bankruptcy. Defense counsel's question about the bankruptcy was intentionally designed to obtain sympathy from the jury about Capriati's financial condition. Capriati's counsel was fully aware that the jury did not know that Capriati carried

DP LG
10801 W. Charleston Blvd.
Suite 560
Las Vegas, NV 89135

liability insurance when he asked the question, which strengthened the prejudice that Mr. Yahyavi would have suffered in the absence of the sanctions imposed. "[T]he financial condition of the parties is irrelevant and oftentimes prejudicial as it appeals to the sympathy of the jury, which presumably will favor those least able to bear the loss." *McHale v. W.D. Trucking, Inc.*, 39 N.E.2d 595, 610-11 (Ill. Ct. App. 2015). This nullifies any argument that there was no pretrial order in place precluding evidence of the bankruptcy because such evidence related solely to the ability to pay, which is irrelevant and inadmissible. *See* Nev. Rev. Stat. 48.015 ("relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence"). Capriati never intended to refer to its past bankruptcy filing to explain the absence of the Arbuckle employee file no matter how many times it makes the argument to this Court. Accordingly, the sanctions imposed by this Court were justified and well within its broad discretion as a matter of law.

E. Capriati's Liability Case was Not Unfairly Eliminated Because Arbuckle and Goodrich Established Capriati's Liability

During trial, Goodrich, on behalf of Capriati, accepted responsibility for Arbuckle's negligent and unsafe driving that ultimately caused the subject collision:

> Q. Okay. So, let me see if I get this right. Capriati Construction, today, September 13th, 2019, accepts the responsibility for the actions of Josh Arbuckle causing this collision; am I correct in that?
>
> A. ***Yes, we accept all employees' actions.***
>
> Q. Before today, isn't it true, Capriati Construction has never accepted responsibility for causing this collision, before today?
>
> A. I'm not arguing about justification of cause. I'm just saying we accept his actions.
>
> Q. Right. They were negligent, right? He was unsafe that day. And you're accepting the responsibility for those unsafe actions that day, correct?
>
> A. ***Correct.***

See **Exhibit "3,"** at 51:9-20 (emphasis added).

Arbuckle admitted that he caused the subject collision with Mr. Yahyavi's vehicle because his view was obstructed before he entered the intersection with the forks of his forklift raised and sticking outward:

. . .

DP LG
10801 W. Charleston Blvd.
Suite 580
Las Vegas, NV 89135

Q. Right. As you started to move, you started to elevate the forks, correct?

A. ***Correct.***

Q. And while you're driving you thought that Mr. Yahyavi was going to go straight, and you never saw him obviously clear before you entered the roadway, correct?

A. ***Correct.***

Q. And that truck was obstructing your view the entire time, correct -- up until the moment of the collision, correct?

A. ***Correct.***

Q. Right. And in fact, at no point, before this collision were you even aware that the forks went out into the travel lane, correct?

A. ***Correct.***

. . .

Q. Right. And you agree that this accident occurred because of an error in your thinking, in your words?

A. ***Yes.***

Q. It was preventable, wasn't it, by you?

A. ***Most accidents are. Yes, sir.***

. . .

Q. Okay. And I mean, with all due respect to you, you caused this collision, didn't you?

A. ***Yes, sir.***

Q. Okay. And you caused it while you were driving a forklift owned by Capriati, correct?

A. ***Correct.***

See **Exhibit "2,"** at 163:10-22; 165:5-9; 169:20-25 (emphasis added).

Goodrich testified that his investigation confirmed that Arbuckle caused the subject collision. *See* **Exhibit "3,"** at 43:23 – 44:4. Capriati's liability was clearly established before this Court struck the answer as to liability as part of the sanctions order. Capriati will inevitably attempt to somehow create a liability dispute based on Arbuckle's testimony that Mr. Yahyavi did not have a right turn signal on before the subject collision. Such testimony is not reliable and actually misleading.

DP LG
10801 W. Charleston Blvd.
Suite 560
Las Vegas, NV 89135

Arbuckle admitted that he did not know if Mr. Yahyavi's right turn signal was on when Mr. Yahyavi was near the intersection as opposed to several hundred feet away because his view was obstructed:

> Q. Yeah. My point is, is that before that, after you see him 3, 400 plus feet up, then you start to move forward. Then it starts to become an obstruction, right?
>
> A. Correct.
>
> Q. And then as you're moving forward, it remains an obstruction, correct?
>
> A. Correct.
>
> Q. ***So you're not saying that Mr. Yahyavi didn't turn a turn signal on before he turned, you're just saying, I don't know. I didn't see it when he was 400 feet away and then I had an obstruction. So I never saw if he turned it on or not, right? That's really what the situation is, isn't it?***
>
> A. I'm saying I never saw one on. Yes sir.
>
> Q. ***Doesn't mean he never turned it on, correct?***
>
> A. ***Correct.***
>
> Q. ***Right. And you're not here blaming him in any way for causing this, are you?***
>
> A. ***No, not at all.***

See **Exhibit "2,"** at 183:4-21 (emphasis added).

Although Arbuckle later stated his belief that two parties are always at fault in a car accident, he was unable to articulate any factual basis to justify that Mr. Yahyavi shared fault for the subject collision. *Id.* at 185:16-19. There is no dispute that both Arbuckle and Goodrich's testimony established Capriati's liability for causing the subject collision. Thus, the decision to strike Capriati's Answer as to liability was not even a substantially severe sanction that impacted the proceedings in any manner to justify a new trial pursuant to NRCP 59. This underscores Capriati's failure to persuasively justify a new trial.

F. <u>This Court Did Not Reverse any of its Prior Rulings Because Capriati's Retained Experts Were Able to Fully Offer Testimony in Accordance with the Contents of Their Reports</u>

Capriati generally argues this Court somehow limited Dr. Tung from testifying about Mr. Yahyavi's lone prior Southwest Medical Associates record in which he complained of neck pain. This argument is confounding in large part because Capriati fails to provide specific examples in the record of any such limitation. Capriati fails to provide those specific examples because none of these limitations occurred in any way at trial. Capriati extensively questioned Dr. Tung about Mr.

DP LG
10801 W. Charleston Blvd.
Suite 580
Las Vegas, NV 89135

Yahyavi's prior 2011 Southwest Medical Associates record. Mr. Yahyavi's counsel even extensively questioned Dr. Tung about the prior 2011 Southwest Medical Associates records during both his cross-examination and re-cross of Dr. Tung. *See* **Exhibit "7,"** at 116:19 – 118:18; 120:20 – 125:21. Mr. Yahyavi's counsel questioned Dr. Tung about the significance, or lack thereof, of the prior Southwest Medical Associates records to undermine the reliability of his opinions regarding the prior neck pain. There was no alleged disparity regarding the extent of questioning of Dr. Tung concerning the prior medical records. Dr. Tung completely testified in accordance with the opinions and bases contained within his report. Capriati tries to imply that this Court somehow ruled in favor of Mr. Yahyavi on the admissibility of the prior 2011 records, which is simply not true. Mr. Yahyavi very specifically asked for those records to be excluded, and this Court denied the request. This further undermines the notion that Dr. Tung was somehow limited in his testimony at trial.

The same is true for Mr. Bennett. Capriati contends that Mr. Bennett should have been allowed to offer testimony about eleven jobs in his report that were allegedly suitable for Mr. Yahyavi to perform. This argument fails because Mr. Bennett did not specifically state this opinion in his report. Rather, he merely listed the job titles:

V. Transferability of Skills

A. Based upon Educational Achievement

Broker

Banker

Credit Manager

Labor Relations Manager

Market Research Analyst

Sales Manager

B. Based Upon Vocational History

Owner/Operator, Automobile Used Car Dealership

Automobile Broker

Automobile Salesperson

Sales Manager
Internet Automobile Sales

DP LG
10801 W. Charleston Blvd.
Suite 560
Las Vegas, NV 89135

See 7/27/18 Bennett Report, at p. 11, attached as **Exhibit "9."**

Contrary to Capriati's assertion, Mr. Bennett was precluded from testifying about these job titles because he never opined that Mr. Yahyavi could perform these jobs. In fact, Mr. Bennett opined that Mr. Yahyavi can "return to his usual and customary occupation of **Automobile Sales Representative/Manager.**" *Id.* at p. 22. If Mr. Bennett believed that Mr. Yahyavi could also perform other jobs based on his transferability of skills, then he should have stated that. However, such an opinion was not necessary because he opined that Mr. Yahyavi could return to his original job. Capriati's simplistic argument that Mr. Bennett was precluded from offering an opinion about the job titles because they were not listed in his conclusions misses the mark. Capriati fails to realize that Mr. Bennett was required to expressly opine that Mr. Yahyavi could also perform these jobs because he was not disabled and possessed the skills to do so. He did not do that in his report and, therefore, was appropriately limited from offering this new opinion at trial. *See* Nev. R. Civ. P. 16.1(a)(2)(B)(i).

G. Capriati's Failure to Object to Mr. Yahyavi's Curative Instruction Constituted Consent to the Instruction as Written and a Waiver of any Issue Regarding the Same

As part of Mr. Yahyavi's sanctions motion filed with the district court, Mr. Yahyavi proposed a curative jury instruction to alleviate the harm caused by Capriati's reference to its bankruptcy:

> Defendant Capriati Construction Corp., Inc. introduced evidence that after the June 19, 2013 collision, it filed for bankruptcy. You shall not consider that Defendant Capriati Construction Corp., Inc. filed for bankruptcy for any purpose. Plaintiff has the legal right to proceed with his claims against Defendant Capriati Construction Corp., Inc. in this case and recover damages as determined by you in accordance with these instructions.
>
> Further, Defendant has liability insurance to satisfy, in whole or part, any verdict you may reach in this case.

The district court explicitly gave Capriati's counsel the opportunity to review the language of the curative instruction and admonition he gave regarding the misconduct to provide any objection to the same. Capriati's counsel ***never*** objected to the language of the curative instruction:

> THE COURT: All right, thank -- we're done. I've stated what I'm going to do. I think that's appropriate. I agree that I will read that to introduce is irrelevant. It's committed willful misconduct. I'm going to be telling the jury that Mr. Kahn is reprimanded. I think that along with the curative and the other is appropriate.
>
> Yeah. I agree and I said that they haven't gotten it and I don't understand. So let's take a short break and Mr. Kahn can review these.
> MR. KAHN: I think they were attached as exhibits to his briefs. I've already seen it.

DP LG
10801 W. Charleston Blvd.
Suite 580
Las Vegas, NV 89135

THE COURT: All right.

. . .

MR. KAHN: ***Sorry. I have no comment on them. That's fine. I submit.***

See **Exhibit "4,"** at 25:13-25 (emphasis added).

"A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Bowers v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 479 (2009). "[P]arties may not raise a new theory for the first time on appeal, which is inconsistent or different from the one raised below." *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 437 (2010). An objection to a jury instruction is preserved when the party ***clearly objects to the instruction,*** even if the party submits a less stringent instruction on the issue. *First Transit, Inc. v. Chernikoff*, 135 Nev. ___, 445 P.3d 1253, 1256 (2019) (*citing United States v. Squires*, 440 F.2d 859, 862 (2d Cir. 1971)). Here, Capriati's counsel was expressly given the opportunity by this Court to review ***both*** the curative instruction and the admonition. Capriati's counsel affirmatively stated that he already saw them and had no comment on them. Capriati's counsel ***never*** objected to the language of the curative instruction. Capriati's counsel ***never*** proposed an alternative instruction. Thus, he consented to the curative instruction as written. The time for Capriati's counsel to object to the substance of the curative instruction was at the time that Mr. Yahyavi presented it to the Court. His failure to do so invalidates his argument now that the instruction caused an irregularity in the proceedings to justify a new trial.

The jury instruction did not give the jury the impression to award an amount higher than it otherwise might have awarded. Such argument is completely speculative and overlooks that the instruction merely stated that Capriati carried insurance. There was no reference to the amount of insurance or that Capriati had the ability to satisfy a substantially large judgment. The instruction very clearly stated that such liability insurance might be enough to satisfy all, or part of whatever judgment was rendered. As it turned out, the jury's verdict fell well within the $11,000,000.00 in coverage that Capriati carried at the time of the subject collision. Capriati also disregards that Mr. Yahyavi's past medical expenses, future medical expenses, past loss of wages, and future loss of earning capacity damages totaled nearly $3,500,000.00. Thus, the jury's verdict of $5,870,283.24

DP LG
10801 W. Charleston Blvd.
Suite 560
Las Vegas, NV 89135

was certainly reflective of the damages Mr. Yahyavi suffered as well as the pain and suffering he endured, irrespective of the availability of liability insurance.

Conspicuously absent from Capriati's Motion is that NRS 48.135, which governs liability insurance, allows evidence of insurance against liability in specific circumstances:

> 1. Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.
>
> 2. This section does not require the exclusion of evidence of insurance against liability when it is ***relevant for another purpose***, such as proof of agency, ownership or control, ***or bias or prejudice of a witness*** (emphasis added).

The statute very clearly limits evidence of insurance as to the issue of whether a person acted negligently or wrongfully. The curative instruction given by the Court did not inform the jury that liability insurance was available to establish Capriati's liability for the subject collision. Arbuckle and Goodrich's testimony already established that. Rather, the curative instruction's reference to insurance was intended to neutralize the prejudice Mr. Yahyavi suffered from the jury learning through Capriati's corporate representative that it filed for "reorganization." Capriati's motivation to elicit such testimony, namely to garner sympathy from the jury, was clear given that Capriati's counsel prepared the witness to mention the "reorganization." Such testimony left the jury with the impression that Capriati's bankruptcy was ongoing and that it had no ability to pay a judgment. The curative instruction was the only way to redress the prejudice that resulted from this harmful testimony.

Capriati's attempt to characterize reference to liability insurance as part of the Nevada Supreme Court's ban on evidence of collateral sources of payment is not persuasive given the language of NRS 48.035. The collateral source rule prohibits evidence of an injured party's receipt of payment for his injuries "from a source wholly independent of the tortfeasor . . . ." *Proctor v. Castelletti*, 112 Nev. 88, 90 n.1 (1996). This rule does not prohibit evidence of liability insurance carried by a tortfeasor. Even if liability insurance carried by a tortfeasor was deemed a collateral source, the curative instruction did not create any prejudice *per se* because no evidence of Capriati's liability insurance was admitted. *Id.* The jury did not learn the amount of coverage Capriati carried. The insurance declarations page was not admitted into evidence for the jury to review. As such, the curative instruction was an appropriate sanction levied against Capriati for its counsel's willful misconduct.

DP LG
10801 W. Charleston Blvd.
Suite 580
Las Vegas, NV 89135

Capriati's characterization of Mr. Yahyavi's intentional violation of the collateral source rule defies logic. The curative instruction was solely intended to address the prejudice Mr. Yahyavi suffered as a result of Capriati's willful misconduct. Capriati simply wishes to escape the consequences of its actions by now making arguments that should have been made ***prior to*** the reading of the curative instruction to the jury. The arguments Capriati now asserts were readily available at the time of trial. Yet, Capriati chose not to make them and a motion for new trial is not the appropriate vehicle to make arguments that were waived. As a result, Capriati fails to justify a new trial pursuant to NRCP 59.

IV.

CONCLUSION

Based upon the foregoing facts, law, and analysis, Plaintiff respectfully requests this Honorable Court to **DENY** Defendant Capriati Construction Corp., Inc.'s Motion for New Trial.

DATED this 10th day of January, 2020.

Respectfully Submitted,

PRINCE LAW GROUP

DENNIS M. PRINCE
Nevada Bar No. 5092
KEVIN T. STRONG
Nevada Bar No. 12107
8816 Spanish Ridge Avenue
Las Vegas, Nevada 89148
Attorneys for Plaintiff
Bahram Yahyavi

DP LG
10801 W. Charleston Blvd.
Suite 560
Las Vegas, NV 89135

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of **PRINCE LAW GROUP**, and that on the 10th day of January, 2020, I caused the foregoing document entitled **PLAINTIFF'S OPPOSITION TO DEFENDANT CAPRIATI CONSTRUCTION CORP., INC.'S MOTION FOR NEW TRIAL** to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court E-Filing System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

David S, Kahn, Esq.
Mark Severino, Esq.
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
300 S. Fourth Street, 11th Floor
Las Vegas, Nevada 89101

Eric R. Larsen, Esq.
LAW OFFICES OF ERIC R. LARSEN
750 E. Warm Springs Road, Suite 320, Box 19
Attorneys for Defendant
Capriati Construction Corp., Inc.

An Employee of PRINCE LAW GROUP

10801 W. Charleston Blvd.
Suite 560
Las Vegas, NV 89135

EXHIBIT 1

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

BAHRAM YAHYAVI, Plaintiff, vs. CAPRIATI CONSTRUCTION CORP INC. Defendant.	CASE#: A-15-718689-C DEPT. XXVIII

BEFORE THE HONORABLE RONALD J. ISRAEL
DISTRICT COURT JUDGE
WEDNESDAY, SEPTEMBER 25, 2019

RECORDER'S PARTIAL TRANSCRIPT OF JURY TRIAL - DAY 13
TESTIMONY OF CLIFF GOODRICH

APPEARANCES:

For the Plaintiff:	DENNIS M. PRINCE, ESQ. KEVIN T. STRONG, ESQ.
For the Defendant:	MARK JAMES BROWN, ESQ. DAVID S. KAHN, ESQ.

RECORDED BY: JUDY CHAPPELL, COURT RECORDER

INDEX

INDEX OF EXHIBITS

FOR THE PLAINTIFF	MARKED	RECEIVED
None		

FOR THE DEFENDANT	MARKED	RECEIVED
None		

Las Vegas, Nevada, Wednesday, September 25, 2019

[Designation of testimony begins at 4:03 p.m.]

THE MARSHAL: Watch your step, sir. Remaining standing and face the Clerk of the Court. Will you all switch off the lapel mic?

THE CLERK: Please raise your right hand.

CLIFF GOODRICH, DEFENDANT'S WITNESS, SWORN

THE CLERK: Please be seated. Please state your name and spell it for the record.

THE WITNESS: It's Cliff Goodrich, C-L-I-F-F G-O-O-D-R-I-C-H.

DIRECT EXAMINATION

BY MR. KAHN:

Q Mr. Goodrich, you've testified in this trial already once, correct?

A Correct.

Q But that was under the Plaintiff's cross-examination at the start of the case, right?

A Yes.

Q And I'm going to ask you a couple questions on direct that I didn't have the opportunity to ask you before.

Between the date of the accident and today, did anything major happen to your company?

A Yes, we filed for reorganization in 2015.

MR. PRINCE: Oh, objection, Your Honor. We need to approach.

THE COURT: Yes.

[Sidebar begins at 4:04 p.m.]

MR. PRINCE: Wow. What a --

MR. KAHN: You saw --

THE COURT: What is the --

MR. PRINCE: No, are you talking about -- you need to -- I need the jurors excused --

MR. KAHN: They reduced --

MR. PRINCE: -- this second.

MR. KAHN: They reduced by 200 employees --

MR. PRINCE: Oh, no, Judge.

MR. KAHN: -- during this time.

THE COURT: So what?

MR. KAHN: So he's alleged that they --

MR. PRINCE: No way.

MR. KAHN: -- lost documents and --

MR. PRINCE: There is no way.

MR. KAHN: -- destroyed documents.

MR. PRINCE: Judge, there is no -- please excuse this jury. And I'm going to have -- ask you to sanction Mr. Kahn. In fact, I'm --

THE COURT: All right.

[Sidebar ends at 4:04 p.m.]

THE COURT: Ladies and gentlemen, we're going to take a break.

During this recess you're admonished do not talk or converse

EXHIBIT 2

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

BAHRAM YAHYAVI, Plaintiff, vs. CAPRIATI CONSTRUCTION CORP INC. Defendant.	CASE#: A-15-718689-C DEPT. XXVIII

BEFORE THE HONORABLE RONALD J. ISRAEL
DISTRICT COURT JUDGE
MONDAY, SEPTEMBER 16, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 6

APPEARANCES:

For the Plaintiff:	DENNIS M. PRINCE, ESQ. KEVIN T. STRONG, ESQ.
For the Defendant:	MARK JAMES BROWN, ESQ. DAVID S. KAHN, ESQ.

RECORDED BY: JUDY CHAPPELL, COURT RECORDER

INDEX

INDEX OF EXHIBITS

FOR THE PLAINTIFF	MARKED	RECEIVED
None		

FOR THE DEFENDANT	MARKED	RECEIVED
None		

I'd ask to go get my witness. I'd like to get him started today if possible.

THE COURT: Well, I mean, any questions from the jury, raise your hand? No questions.

Thank you. You may step down.

THE MARSHAL: Watch your step. Remain standing. Face the clerk of the court.

THE CLERK: Please raise your right hand.

JOSHUA ARBUCKLE, PLAINTIFF'S WITNESS, SWORN

THE CLERK: Please be seated. Please state your name and spell it for the record.

THE WITNESS: My name is Joshua Arbuckle, J-O-S-H-U-A A-R-B-U-C-K-L-E.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. PRINCE:

Q Mr. Arbuckle, good afternoon.

A Good afternoon.

Q My name is Dennis Prince, and I represent Mr. Yahyavi, who was the driver of the black Charger involved in the collision with your forklift. We've never met before, correct?

A No, sir.

Q Well, thank you for your patience and being here today. I have a few questions for you. Before you -- were you aware that Clifford Goodrich, the safety manager for Capriati testified last Friday? Were you

saw him.

Q I'm not asking that.

A Okay.

Q I'm asking when you came into contact with him with your fork to that forklift, he was in the dedicated travel lane, correct?

A Correct.

Q You didn't see him in that dedicated travel lane, did you --

A No.

Q -- before the impact?

A No, sir.

Q I'm just asking you -- so when this impact occurred, the fork to that forklift were actually in the roadway --

A Correct.

Q -- dedicated for travel, correct?

A Correct.

Q So initially --

MR. PRINCE: Let's go back to the aerial.

BY MR. PRINCE:

Q Initially you saw Mr. Yahyavi, he was traveling on Sahara Avenue, correct?

A Correct.

Q He was going east, correct?

A Correct.

Q That obviously would have been west or to the left of Glen Avenue, correct?

THE COURT: The jury can decide. They've heard the testimony.

MR. PRINCE: Right.

BY MR. PRINCE:

Q In looking at Exhibit 64 -- excuse me -- yeah, Exhibit 64, Bates Number 136, you agree that the fork to that forklift went out into the roadway and collided with that truck, correct -- I mean, with Mr. Yahyavi's car?

A Correct.

Q Right. As you started to move, you started to elevate the forks, correct?

A Correct.

Q And while you're driving you thought that Mr. Yahyavi was going to go straight, and you never saw him obviously clear before you entered the roadway, correct?

A Correct.

Q And that truck was obstructing your view the entire time, correct -- up until the moment of this collision, correct?

A Correct.

Q Right. And in fact, at no point, before this collision were you even aware that the forks went out into the travel lane, correct?

A Correct.

Q So as you're driving and you're moving forward, you're lifting the forks up, right -- at the same time?

A Right.

Q A significant portion was in the roadway, right?
A Correct.
Q That you didn't even know was there, right?
A Correct.
Q Right. And you agree that this accident occurred because of an error in your thinking, in your words?
A Yes.
Q It was preventable, wasn't it, by you?
A Most accidents are. Yes, sir.
Q I'm just talking about this one, respectfully. This accident was preventable by you, correct?
MR. KAHN: Objection. Hypothetical.
THE COURT: Overruled.
BY MR. PRINCE:
Q Right.
A Yes, sir.
Q Right. You didn't asked Dario [phonetic] to come out and help and make sure traffic was clear? You have a co-worker, correct?
A Correct.
Q You didn't ask the driver of that Peterbilt, hey, can you please make sure traffic is clear, I want to pull out onto Glen; you didn't do that either, correct?
A No, sir.
Q Right. And you didn't go ask the flagger, who was onsite, to come over and help you, because you wanted to drive the forklift out

happens. That's your first sign even of Mr. Yahyavi's car again, right?

A Can you repeat that, please?

Q Sure. The collision was your first indication that Mr. Yahyavi was trying to pull onto Glen, correct?

A Correct.

Q And obviously, it was very scary to you when this happened, correct?

A Correct.

Q And you got off the forklift, correct?

A Correct.

Q Because you were worried about a severe injury or serious injury to Mr. Yahyavi, correct?

A Correct.

Q Because it was a hard impact, wasn't it?

A Yes, sir.

Q And even to you on that forklift, it appeared to be a hard or heavy impact, right?

A I didn't really feel it on the -- on the forklift. The forklift is a big piece of steel, so you wouldn't really feel it much.

Q But you -- for the Charger, it would've been a hard impact, right?

A Correct.

Q Right. And when you got to Mr. Yahyavi, he was frantic in the car, wasn't he?

A Yes, sir.

Q Those are your words; frantic. Tell us what -- tell the jury what he was doing in the car.

A From what I remember, all Mr. Yahyavi kept saying was something hit me. And I -- and I was just trying to talk to him and see if he was okay and keep him talking because I didn't -- I didn't know if he had any type of head injury. And the way he was acting, I just wanted to make sure that he wouldn't go unconscious. So I kept talking to him and making sure he was fine.

Q He didn't appear to be fine, did he?

A He was shaken up.

Q Right. He didn't appear to be fine, did he?

A I -- there was nothing visible that looked bad. But the way he was acting didn't seem normal.

Q Right. I mean, it looked like somebody who had went through a traumatic experience of some kind, right?

A Yes, sir.

Q Right. And you're there, obviously, to try to assist until emergency medical personnel get there. You're just helping out, right?

A Correct.

Q Okay. And I mean, with all due respect to you, you caused this collision, didn't you?

A Yes, sir.

Q Okay. And you caused it while you were driving a forklift owned by Capriati, correct?

A Correct.

car if it has a turn signal on or not, right? Because you're obstructed.

A Once you're at the obstruction. But I started way before the obstruction, my view.

Q Yeah. My point is, is that before that, after you see him 3, 400 plus feet up, then you start to move forward. Then it starts to become an obstruction, right?

A Correct.

Q And then as you're moving forward, it remains an obstruction, correct?

A Correct.

Q So you're not saying that Mr. Yahyavi didn't turn a turn signal on before he turned, you're just saying, I don't know. I didn't see it when he was 400 feet away and then I had an obstruction. So I never saw if he turned it on or not, right? That's really what the situation is, isn't it?

A I'm saying I never saw one on. Yes, sir.

Q Doesn't mean he never turned it on, correct?

A Correct.

Q Right. And you're not here blaming him in any way for causing this, are you?

A No, not at all.

Q He's not at fault, is he?

A I believe an accident, there's always two at fault.

Q Are you blaming it on him, part on him?

A I'm not blaming it on him.

We're in recess.

THE MARSHAL: Please leave your notebooks and pens. Rise for the jury.

[Jury out at 5:27 p.m.]

[Outside the presence of the jury.]

THE COURT: All right. Anything?

MR. KAHN: Not on my part.

THE COURT: Okay.

MR. PRINCE: No.

MR. KAHN: 10:15, Your Honor.

THE COURT: Yup.

[Proceedings concluded at 5:28 p.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.

Jessica B. Cahill

Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708

EXHIBIT 3

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

BAHRAM YAHYAVI, Plaintiff, vs. CAPRIATI CONSTRUCTION CORP INC. Defendant.	CASE#: A-15-718689-C DEPT. XXVIII

BEFORE THE HONORABLE RONALD J. ISRAEL
DISTRICT COURT JUDGE
FRIDAY, SEPTEMBER 13, 2019

RECORDER'S PARTIAL TRANSCRIPT OF JURY TRIAL - DAY 5
TESTIMONY OF CLIFFORD GOODRICH

APPEARANCES:

For the Plaintiff: DENNIS M. PRINCE, ESQ.
KEVIN T. STRONG, ESQ.

For the Defendant: MARK JAMES BROWN, ESQ.
DAVID S. KAHN, ESQ.

RECORDED BY: JUDY CHAPPELL, COURT RECORDER

INDEX

INDEX OF EXHIBITS

FOR THE PLAINTIFF	MARKED	RECEIVED
None		

FOR THE DEFENDANT	MARKED	RECEIVED
None		

Las Vegas, Nevada, Friday, September 13, 2019

[Designated testimony begins at 1:23 p.m.]

THE COURT: Please be seated.

The parties acknowledge the presence of the jury?

MR. PRINCE: We do, Your Honor. Thank you.

MR. KAHN: The Defense does.

THE COURT: Very well. Call your first witness.

MR. PRINCE: Your Honor, the first witness will be Mr. Clifford Goodrich.

THE MARSHAL: Watch your step. Please remain standing, face the Clerk of the Court.

THE CLERK: Raise your hand.

CLIFFORD GOODRICH, PLAINTIFF'S WITNESS, SWORN

THE CLERK: Please have a seat, and state and spell your name for the record.

THE WITNESS: It's Clifford Goodrich, C-L-I-F-F-O-R-D G-O-O-D-R-I-C-H.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. PRINCE:

Q Mr. Goodrich, good afternoon?

A Hi.

Q My name is Dennis Prince, and I represent Bahram Yahyavi.

A Yes, sir

MR. KAHN: Objection.

THE WITNESS: No, I did not.

MR. KAHN: Asked and answered.

BY MR. PRINCE:

Q And you never called him --

THE COURT: Overruled.

BY MR. PRINCE:

Q -- to see how he was doing, is there something that you could do to help, or answer any questions or anything like that? You never did that, did you, on behalf of the company?

A That is incorrect.

Q What's that?

A That is incorrect.

Q You never called my client, Bahram Yahyavi --

A You didn't --

Q -- to ask how he was doing, did you?

A You didn't ask it that way.

Q And you never called Bahram Yahyavi to ask what you could do, to express your condolence about what had happened, did you?

A I called his employer and asked those questions.

Q Right. You didn't call my client, the person who is now sitting over here --

A I did not.

Q -- in this position? Now, you claim that -- the company claims that you took Josh for drug testing, correct?

A That is correct.
Q And you have no documents to show us the results of that, do you?
A No, I do not.
Q Right. So we can't trust and verify anything you would say, whether it was clean or not clean, correct?
A Why not? You're trusting my other information.
Q I don't know. One of the jurors said trust and verify is a way to do things. And I'm just asking, we can't verify that statement?
A No, we cannot verify it.
Q Because you -- the company got rid of the employment file after this lawsuit happened, right?
A I don't know the timeframe that it occurred. I just know it's not there.
Q Well, Josh Arbuckle testified that he left the company in 2014.
A I don't know the timeframe when the record --
Q No, I'm just -- I want you to assume that.
A -- disappeared.
Q I want you to assume that. Let's assume that he does testify that he left the company in 2014 and was terminated. Then how long would you keep his file for -- or you should've kept his file?
A That I don't know. That's up to HR to decide.
Q Well, in general, how long does a company keep a file like that?

A Approximately three years. I don't know if they moved it, whatever. It wasn't in the HR office or in the other areas that we looked.

Q Well, who pulled it and removed it?

A That I don't know.

Q Did you ask HR what happened to the file?

A Well, when this occurred, we had different HR people for that, so I don't know.

Q Well, the company's records are what the records are, right? I mean, they -- the company maintains the records regardless of what personnel is there?

A That is correct.

Q I mean, employees come and go, they retire, they hire new ones, we expand, we let people go for a variety of reasons, right?

A That's correct.

Q And they --

A Some people just do things differently.

Q Right. And so you can't explain why that employee file was discarded, can you?

A No, I can't.

Q And you're not here stating that my client engaged in any improper driving that caused this collision, correct?

MR. KAHN: I'm going to object. Lacks foundation. Invades the province of the jury. Calls for a legal conclusion.

THE COURT: I'm going to overrule.

Counsel, approach.

[Sidebar ends at 2:09 p.m.]

THE COURT: Overruled.

MR. PRINCE: Okay.

BY MR. PRINCE:

Q So I'm going to state the question, so you have it firmly in your mind, okay?

A Okay.

Q In the sixth affirmative defense raised by your company, it says that, all the injuries and damages were caused by the acts or admissions of a third-party, over whom Capriati had no control or right to control. What third-party are you talking about here?

A I don't know. I would assume --

Q All right.

A -- maybe they're -- that was referencing Josh Arbuckle. I don't know.

Q Well, he's --

A I understand. I don't know.

Q There's only two people involved in this collision, right? Mr. Yahyavi and Josh --

A That is correct.

Q -- Arbuckle?

A That is correct.

Q Josh Arbuckle caused this collision, didn't he? Don't you agree with that?

MR. KAHN: Objection. Calls for legal conclusion.

MR. PRINCE: It's based on his investigation.

THE COURT: As far as his investigation.

THE WITNESS: It appears that way, yes.

MR. PRINCE: All right.

BY MR. PRINCE:

Q And there's no third-party --

A Not that I'm aware of.

Q -- that caused it? That you're aware of?

A No, not that I'm aware of.

Q Even six years later, you're not aware of one, right?

A No, sir.

Q All right.

MR. PRINCE: Your Honor, thank you. I don't have any additional questions. Well, hang on.

BY MR. PRINCE:

Q You understand, I mean, as a company --

MR. PRINCE: -- strike that.

BY MR. PRINCE:

Q You understand, as a safety manager for a construction company that the corporation is responsible or legally responsible for all of the actions of its employees, right?

A That is correct.

Q Okay. So that's something you know, and you guys accept that risk?

A Yes, we do accept that risk.

microphone.

MR. KAHN: I'm sorry. I wandered away from the microphone. No further questions.

THE COURT: All right.

[Pause]

MR. PRINCE: Court's indulgence. I'm just trying to find a --

REDIRECT EXAMINATION

BY MR. PRINCE:

Q Okay. So let me see if I get this right. Capriati Construction, today, September 13th, 2019, accepts the responsibility for the actions of Josh Arbuckle causing this collision; am I correct in that?

A Yes, we accept all employees actions.

Q Before today, isn't it true, Capriati Construction has never accepted responsibility for causing this collision, before today?

A I'm not arguing about justification of cause. I'm just saying we accept his actions.

Q Right. They were negligent, right? He was unsafe that day. And you're accepting the responsibility for those unsafe actions that day, correct?

A Correct.

Q Right. But I'm asking, before today, when did Capriati make that decision to do that, that they're accepting the responsibility for his actions? Because I've never heard it before today, so I'm surprised. That's why I'm --

A I don't recall you asking that question to me before.

right?

A No.

Q You don't think it's more typical to have a daytime flagger than a --

A It's more typical, but yes, it --

Q Okay.

A -- does happen at night.

Q Okay. You would have somebody -- okay. Nevertheless, whether it be -- there was a flagger whenever this inspector inspected?

A For a portion of that work, yes, it looks like it.

Q Okay. And so when Josh was operating this, there's -- we don't know if you had a flagger on site or didn't have a flagger on site?

A There wasn't one when I got there.

Q Okay. Good enough.

MR. PRINCE: Thank you.

THE COURT: Follow-up from the Defendant?

MR. KAHN: No, Your Honor. Again, I'll reserve. I would ask the witness be excused.

THE COURT: Okay. You are excused.

THE WITNESS: Thank you, Your Honor.

[End of designated testimony at 2:33 p.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.

Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708

EXHIBIT 4

Electronically Filed
9/27/2019 8:52 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

BAHRAM YAHYAVI, Plaintiff, vs. CAPRIATI CONSTRUCTION CORP INC. Defendant.	CASE#: A-15-718689-C DEPT. XXVIII

BEFORE THE HONORABLE RONALD J. ISRAEL
DISTRICT COURT JUDGE
THURSDAY, SEPTEMBER 26, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 14

APPEARANCES:

For the Plaintiff: DENNIS M. PRINCE, ESQ.
KEVIN T. STRONG, ESQ.

For the Defendant: MARK JAMES BROWN, ESQ.
DAVID S. KAHN, ESQ.

RECORDED BY: JUDY CHAPPELL, COURT RECORDER

Case Number: A-15-718689-C

Las Vegas, Nevada, Thursday, September 26, 2019

[Case called at 9:09 a.m.]

[Outside the presence of the jury]

THE MARSHAL: Remain seated, and come to order, Department 28 is again in session. The Honorable Judge Ronald J. Israel presiding.

THE CLERK: Case number A-718689, Bahram Yahyavi v. Capriati Construction Corporation.

THE COURT: All right. So we left off yesterday afternoon. I, for your edification, I reviewed *Young v. Ribeiro*. I have a copy of the video, which I normally, because the video is not the official record, I'll state first of all that my comments yesterday were, in my mind, absolutely correct. You can review it -- I'll go back to that, but Mr. Kahn, your mention that he didn't object, he popped up like a bunny and instantaneously objected and asked for a sidebar, so you were wrong in that.

An objection like that, to go back to my first point, there's no doubt in my mind by clear and convincing evidence that you had solicited, intentionally solicited, that statement regarding the bankruptcy, and that calls for a mistrial. Any judge in this building would, unfortunately, have no choice. In addition, I do have the transcript, although it's only first few lines, the rest is our discussion at the bench.

I reviewed a decision of mine, *Wilson Elser Moskowitz v. the Eighth Judicial District Court*, it's number 74711, regarding the case of

know if he's a biomechanical witness that is -- I think he's only in accident reconstruction expert, that was to take place.

And was there any other witnesses proposed for today or tomorrow?

MR. PRINCE: Yeah, there's another one. They're economists who basically says there's no loss. So Kirkendall. Kevin Kirkendall is the additional damage expert.

THE COURT: All right. And because these sanctions or that sanction of striking on liability is really no sanction at all --

MR. PRINCE: Right.

THE COURT: -- since liability is, in my mind, a closed door, et cetera. I'm striking the last witness as a sanction for this what I consider outrageous. The policy adjudicating on the merits. We are going to go to -- the jury will decide that.

Oh, and I had whether sanctions unfairly operate to penalize a party for the misconduct of his attorney. Mr. Khan mentioned that yesterday and I think it's important for the Supreme Court to note, although I think they could certainly understand that without me saying it. This matter is the subject of an order from the bankruptcy court to lift the stay in order to proceed against the insurance policies.

Capriati is only here as a figurehead regarding the case. They face no monetary loss whatsoever. Unless I totally misunderstand bankruptcy and I know from having been appointed under these similar facts, that lifting the stay does not allow the Plaintiff to proceed for one penny against Capriati.

has no calculation of loss.

So Tung is the consequence. He needs to be the consequence of this power. So I'm asking you respectfully in the interest of my client to please, if you're not going to enter a default judgment and proceed to a prove up, strike Dr. Tung as well and order attorney's fees and costs for what's happened during this trial to deter litigation abuse.

You've cited other incidents this specific law firm doing this. They obviously have not learned. Have not learned. And it's not just minimal abuse, as you characterize it, it's severe. And that's the only way you can send the appropriate message, Your Honor.

So in addition, strike Tung and award the fees and costs if you're unwilling to strike the answer and move towards a prove up.

THE COURT: All right, thank -- we're done. I've stated what I'm going to do. I think that's appropriate. I agree that I will read that to introduce is irrelevant. It's committed willful misconduct. I'm going to be telling the jury that Mr. Khan is reprimanded. I think that along with the curative and the other is appropriate.

Yeah. I agree and I said that they haven't gotten it and I don't understand. So let's take a short break and Mr. Khan can review these.

MR. KAHN: I think they were attached as exhibits to his briefs. I've already seen it.

THE COURT: All right.

MR. PRINCE: Your Honor, just if we're --

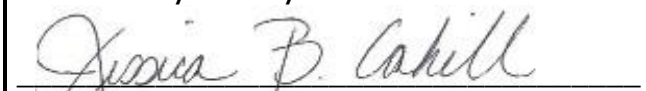
MR. KAHN: Sorry. I have no comment on them. That's fine. I submit

MR. PRINCE: Okay.

MR. KAHN: Thank you, Your Honor.

[Proceedings concluded at 4:16 p.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.



Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708

EXHIBIT 5

Kirkendall Consulting Group, LLC
1522 West Warm Springs Road, Henderson, NV 89014 • Telephone: 702-313-1560 • Fax: 702-313-1617

July 4, 2018

David S. Kahn, Esq.
Wilson Elser Moskowitz Edelman & Dicker, LLP
300 South 4th Street - 11th Floor
Las Vegas, Nevada 89101-6014

Mark J. Brown, Esq.
Law Offices of Eric R. Larsen
750 East Warm Springs, Suite 320
Las Vegas, Nevada 89119

RE: **Yahyavi, Bahram v. Capriati Construction Corp., et al.**
Clark County District Court Case No.: A-15-718689-C

Dear Mr. Kahn and Mr. Brown,

At your request, I am providing you with this report of my opinions concerning economic damages alleged by Mr. Yahyavi. The following sections of this report set forth my understanding of the background of this matter, the documents I have relied upon in arriving at my opinions and my analysis and opinions. Accompanying this report, you will find a copy of my current CV, fee schedule and my expert trial and deposition testimony listing.

Background

It is my understanding that Mr. Yahyavi is alleging injuries and economic damages relating to an Automobile/forklift accident which took place in Clark County, Nevada, on June 19, 2013. Economic damages alleged as of this writing include lost wages, future medical expenditures and future lost wages/earning capacity. At the time of the subject incident Mr. Yahyavi was employed as an Automobile Sales Manager. Subsequent to the subject incident Mr. Yahyavi returned to his pre-incident employment although the extent to which he continued to tork is not yet known.

Documents Reviewed

Documents utilized and/or reviewed by me in the preparation of my opinions in this matter include the documents noted below:

1. Independent Medical Evaluation Report by Howard Tung, MD, August 26, 2016
2. Complaint for Auto Negligence and Personal Injury

3. Defendants Answer to Plaintiff's Complaint
4. Defendants Designation of Expert Witness
5. Stipulation and Order to Extend Discovery Deadlines and Continue Trial
6. Review of Medical Records Report by John E Herr, M.D., September 7, 2016

Opinions

As noted above, Mr. Yahyavi has alleged damages in the forms of lost wages, future medical expenditures and future lost wages/earning capacity. Economic damages relating to lost earnings and benefits are generally calculated as the present value of the plaintiff's pre-incident earnings and benefits less the present value of the plaintiff's post-incident earnings and benefits. Economic damages relating future medical expenditures are generally calculated as the projected medical costs, discounted to present value. While Mr. Yahyavi has alleged these forms of economic damages, calculations of these damages utilizing generally accepted methodologies and evidentiary documentation do not appear in the documents received and reviewed as of the date of this report. In the event such calculations and related documentation are produced/provided, I reserve the right to update this report and comment as appropriate.

Damages

In his report dated August 26, 2016, Dr. Tung opined that "Cervical surgery is not recommended. Should surgery be contemplated or completed in the future, this would be unrelated to the subject motor vehicle accident and most substantially related to Mr. Yahyavi's pre-existing degenerative cervical spine disease/spondylolysis. Mr. Yahyavi is not disabled from work."[1] In his report dated September 7, 2016, Dr. Herr stated, "Assuming injury to the right knee on June 19, 2013, Mr. Yahyavi does not require any future healthcare for his right knee in association with June 19, 2013 incident."[2] To the extent Dr. Tung's and Dr. Herr's opinions are more likely than not, Mr. Yahyavi will have no future medical needs. Accordingly, it is my opinion that Mr. Yahyavi will suffer no economic damages relating to future medical expenditures as a result of the subject incident.

The above opinions are based upon analyses performed to date. I reserve the right to update this report based on information and/or events which may occur or become known to me in connection with the above referenced litigation proceedings. Such documentation and/or events may impact my analysis and that impact

[1] See Independent Medical Evaluation Report by Howard Tung, M.D., August 26, 2016, p. 14.
[2] See Review of Medical Records Report by John E. Herr, M.D., September 7, 2016, p. 7.

may be material. Thank you for the opportunity to serve you in this matter. If you have any questions concerning this report of my opinions, please call me.

Sincerely,

Digitally signed by Kevin B. Kirkendall, MBA, CPA-CGMA, CFE
DN: cn=Kevin B. Kirkendall, MBA, CPA-CGMA, CFE gn=Kevin B. Kirkendall, MBA, CPA-CGMA, CFE c=United States l=US o=Kirkendall Consulting Group, LLC e=Kevin@KirkendallConsulting.com
Reason: I am the author of this document
Location: Henderson, Nevada
Date: 2018-07-04 15:54-07:00

Kevin B. Kirkendall, MBA, CPA, CFE
Kirkendall Consulting Group, L.L.C.

Kirkendall Consulting Group, LLC
1522 West Warm Springs Road, Henderson, NV 89014 • Telephone: 702-313-1560 • Fax: 702-313-1617

August 30, 2018

David S. Kahn, Esq.
Wilson Elser Moskowitz Edelman & Dicker, LLP
300 South 4th Street - 11th Floor
Las Vegas, Nevada 89101-6014

RE: **Yahyavi, Bahram v. Capriati Construction Corp., et al.**
Clark County District Court Case No.: A-15-718689-C

Dear Mr. Kahn,

At your request I am providing you with this report of my opinions concerning economic damages alleged by Bahram Yahyavi. The following sections of this report set forth my understanding of the background of this matter, the documents I have relied upon in arriving at my opinions and my analysis and opinions. Accompanying this report, you will find a copy of my current CV, fee schedule and my expert trial and deposition testimony listing.

Background

It is my understanding that Mr. Yahyavi is alleging injuries and economic damages relating to an automobile/forklift accident which took place in Clark County, Nevada, on June 19, 2013. Economic damages alleged as of this writing include lost earnings and benefits, future medical expenditures and future lost earnings and benefits. At the time of the subject incident Mr. Yahyavi was employed as an Automobile Sales Manager. Subsequent to the subject incident Mr. Yahyavi returned to his pre-incident employment.

Documents Reviewed

Documents utilized and/or reviewed by me in the preparation of my opinions in this matter include the documents noted below:

1. Independent Medical Evaluation Report by Howard Tung, MD, August 26, 2016
2. Complaint for Auto Negligence and Personal Injury
3. Defendants Answer to Plaintiff's Complaint
4. Defendants Designation of Expert Witness
5. Stipulation and Order to Extend Discovery Deadlines and Continue Trial

6. Review of Medical Records report by John E Herr, M.D., September 7, 2016
7. Plaintiff's Expert Disclosure and Supplemental NRCP 16.1 Pre-Trial Disclosures
8. Comprehensive Medical Evaluation, David J. Oliveri, MD, April 24, 2018
9. Report on Present Value of Future Medical Costs, Terrence M. Clauretie, PhD, April 30, 2018
10. Vocational Assessment and Loss of Earnings Capacity Evaluation, Ira I. Spector, MS, CRC, May 21, 2018
11. Report on the Loss In Earning Capacity, Terrence M. Clauretie, Ph.D, May 23, 2018
12. Report of Stuart S. Kaplan, MD, FACS, April 12, 2018
13. Plaintiff's Responses To Defendant's Third Set Of Requests For Production of Documents
14. Preliminary Forensic Vocational Evaluation/Life Care Plan Rebuttal, Edward L. Bennett, MA, CRC, CDMS, July 3, 2018
15. Record Reviews
16. Report on Present Value of Future Medical Costs, Terrence M. Clauretie, Ph.D., June 14, 2018
17. Report on the Loss in the Value of Household Services, Terrence M. Clauretie, Ph.D., June 21, 2018
18. Comprehensive Medical Evaluation Subsequent Visit and First Supplemental Report, David J. Oliver, MD, June 26, 2018
19. Forensic Vocational Evaluation & Life Care Plan Rebuttal, Edward L. Bennett, MA, CRC, July 27, 2018
20. Review of Medical Records/Supplemental Report, Howard Tung, MD, August 2, 2018
21. U.S. Individual Income Tax Returns of Bahram Yahyavi, 2008 - 2017

Analyses

In a report dated May 23, 2018, Terrence M. Clauretie, Ph.D., opines that the present value of lost earnings and benefits to Mr. Yahyavi totaling $2,114,781. This figure is based upon the difference between pre-injury earnings and benefits of $2,386,459 and post-injury earnings and benefits of $271,678. Pre-incident earnings and benefits are based upon annual earnings and benefits of $184,178. This figure is comprised of annual earnings of $163,650 and employer-paid benefits totaling $20,528. The annual earnings figure is based upon Mr. Spector's opinion of pre-incident earning capacity for Mr. Yahyavi of $163,650. Post-incident earnings are based upon Mr. Spector's opinion that Mr. Yahyavi will only be able to work part-time and Dr. Clauretie's opinion that part-time is represented as half the 90th percentile earnings for a customer service representative of $24,815. Employer-paid benefits are calculated that the 7.5% of this annual earnings figure for total earnings and benefits of $26,676.

In his report Mr. Spector, referring to earnings for automobile sales persons, stated, "Mr. Yahyavi worked solely as an Automobile Salesman in 2009 through 2010. It is this rehabilitation counselor's understanding that the surveyed earnings for automobile sales persons do not reflect commissions earned and therefore are

not full and complete representations of what automobile sales persons earn annually. Using the automobile sales data income directly from Mr. Yahyavi's experienced and personal earnings history provides a more personally representative analysis of what his earning capacity would be in that position."[1] Given Mr. Spector's opinion, it is not clear why Dr. Clauretie chose to utilize 50% of the customer service representative earnings or $24,815 instead of 50% of Mr. Yahyavi's average annual earnings of $68,479. Had Dr. Clauretie utilized what appears, in Mr. Spector's opinion, to provide a more personally representative analysis of Mr. Yahyavi's earning capacity as an automobile salesperson, annual earnings utilized would have been $34,240 plus employer-paid benefits of $2,568. The 2009-2010 average provided by Mr. Spector was stated in nominal dollars. Utilization of nominal annual earnings (earnings not adjusted for inflation), results in an understatement of post-incident earnings and benefits and an overstatement of lost earnings and benefits. Mr. Yahyavi's average annual earnings for 2009 and 2010, stated in current dollars, is $75,755. Utilizing current dollars and employer-paid benefits of 7.5%, the correct annual earnings and benefits figure would be $41,793. This figure is $15,117 or 57% higher than the annual earnings and benefits figure utilized by Dr. Clauretie. To the extent Mr. Spector's opinions are more likely accurate than not, Dr. Clauretie has significantly overstated lost earnings and benefits to Mr. Yahyavi.

As noted previously, Mr. Spector opines that Mr. Yahyavi's pre-incident annual earning capacity is $163,650 based upon the 90th percentile average annual earnings for sales managers as reported by the Occupational Employment Survey. Reference to the sales manager job description indicates a number of responsibilities that arguably are not part of an automobile sales manager's position. Responsibilities such as "assigns sales territory to sales personnel", "analyzes sales statistics to formulate policy and to assist dealers in promoting sales", "directs product simplification and standardization to eliminate unprofitable items from sales line" and "may direct sales for manufacturer, retail store, wholesale house, jobber, or other establishment", indicates, at a minimum, that not all survey respondents were automobile sales managers. Given Mr. Spector's opinion concerning the components of a personally representative analysis of an individual's earning capacity and given the OES Sales Manager survey most likely is comprised of many non-automobile sales managers, it is not clear why Mr. Spector chooses to rely upon the OES in assessing Mr. Yahyavi's pre-incident annual earning capacity. It appears that Mr. Yahyavi's actual earnings data is a far better representation of his annual earning capacity. Mr. Yahyavi's average annual earnings, stated in 2018 dollars, is $141,503. Average annual earnings and benefits, including employer-paid benefits at 12.54% of annual earnings, are $159,246.

[1] Vocational Assessment and Loss of Earnings Capacity Evaluation, Ira I. Spector, MS, CRC, May 21, 2018

It appears that Mr. Yahyavi returned to work in May of 2018 as a counselor/advisor to AAII Holding, LLC. To the extent Mr. Yahyavi is earning an income in this position, such income would properly be deducted from the present value of pre-incident earnings and benefits.

In an additional report dated May 23, 2018, Dr. Clauretie opines that the value of Mr. Yahyavi's lost ability to perform household services is $94,491. This figure is calculated as the estimated pre-incident value of household services for a non-disabled male of Mr. Yahyavi's age, employment status (employed), marital status (not married), and presence of children in the home (none), of $267,148 less the estimated value of household services for a male with the same age, employment and familial characteristics and a severe mobility disability of $172,657. These figures are based, in part, upon data obtained from the American Time Use Survey ("ATUS"). The ATUS gathers data concerning time spent performing household services for employed and not employed men and women within certain age cohorts. Dr. Clauretie's pre-incident and post-incident figures of $267,148 and $172,657, respectively, are utilized as surrogates for Mr. Yahyavi's pre-incident and post-incident values of household services.

In his pre-injury and post-injury calculations Dr. Clauretie generalizes from statistical data to . Utilizing an equation derived by Joseph T. Crouse in his paper "The Impact of Disability on Household Services: Evidence From the American Time Use Survey" (Crouse), Dr. Clauretie predicts the number of minutes per day that Mr. Yahyavi will be able to perform household services with no disability and with a severe mobility disability, respectively. The difference between the pre-incident hours and post-incident hours per day that Dr. Clauretie estimates Mr. Yahyavi is no longer able to perform household services is ascribed a market value, adjusted for estimated growth, discounted to present value and imputed to Mr. Yahyavi as economic damages. For each year of Yahyavi's life expectancy from age 52 through age 80, Dr. Clauretie's model calculates a reduction in the hours per year Mr. Yahyavi is able to spend performing household services. In arriving at this figure Dr. Clauretie relies upon no independent medical and/or vocational opinion indicating that Mr. Yahyavi has a decreased ability to perform household services.

The key independent variable in the statistical model from which Dr. Clauretie obtains his household services data, is disability. In estimating the extent to which Mr. Yahyavi can no longer perform household services, Dr. Clauretie first determines or concludes that he has a severe mobility disability. Utilizing the equation from Crouse, Dr. Clauretie then calculates the estimated decrease in time performing household services noted above. Respondents to the ATUS are selected from respondents to the Current Population Survey ("CPS"). Crouse and ATUS then segregates/classifies individuals into "disability groups" based

upon their responses to the following questions from the American Community Survey ("ACS") and the CPS.[2]

1. Is this person deaf or does he/she have serious difficulty hearing?
2. Is this person blind or does he/she is serious difficulty seeing even when wearing glasses?
3. Because of a physical, mental or emotional condition, does this person have serious difficulty concentrating, remembering, or making decisions?
4. Does this person have serious difficulty walking or climbing stairs?
5. Does this person have difficulty dressing or bathing?
6. Because of a physical, mental, or emotional condition, does this person have difficulty doing errands alone such as visiting a Dr.'s office or shopping?

For purposes of the subject analysis, data relied upon by Dr. Clauretie regarding Mr. Yahyavi's "severe mobility disability" and its effect upon his ability to perform household services is taken from CPS/ATUS survey respondents who answered "yes" to question 4 and also "yes" to questions 1, 2 and or 3. No questions are asked of the CPS/ATUS respondents concerning the extent to which any difficulties affect their ability to perform household services. All that is known about the individual respondents is that they answered "yes" to the question concerning serious difficulty walking or climbing stairs. Generalization from data obtained from survey respondents about whom nothing is known concerning the extent to which any particular difficulties hinder their ability to perform household services, to a particular plaintiff about whom such data can be known is purely speculative. In other words, the CPS/ATUS data, cannot be utilized to obtain data relevant to Mr. Yahyavi because, by design, the CPS/ATUS surveys do not collect data concerning any specific disabilities of the survey respondents.

Obtaining particular facts about the plaintiff from medical and/or vocational experts concerning a decrease in the Plaintiff's ability to perform household services is required if an economist's estimates are to be based upon anything other than generalization, conjecture or assumption. Dr. Clauretie's methodology of generalizing from the statistical averages to Mr. Yahyavi allows for consideration of no variables other than age group, gender, marital status, employment status and the presence of children in the home and with reference to the post-incident calculations, disability status. Multiple other variables could have an effect upon a person's pre-incident and post-incident abilities and propensities to perform household services. Dr. Clauretie's methodology is founded upon generalization with no reference to any particular facts relating to Mr. Yahyavi. In fact, Dr. Clauretie's methodology does not allow for consideration of particular facts

[2] The Impact of Disability on Household Services: Evidence from the American Time Use Survey, Joseph T. Crouse, "The Rehabilitation Professional", 22 (4), p. 218 – 219

concerning Mr. Yahyavi's pre-incident and post-incident abilities to perform household services as it is based upon the implicit assumption that Mr. Yahyavi is average.

Dr. Clauretie's opinions, based upon the ATUS data, concerning the pre-incident and the post-incident values of household services would be exactly the same for any other person with the same age, gender, familial and employment status characteristics. Because the data utilized by Dr. Clauretie in calculating the pre-incident and post-incident values of Mr. Yahyavi's abilities to perform household services has no particular connection or relation to Mr. Yahyavi, that data is irrelevant for the estimation of damages to Mr. Yahyavi. Dr. Clauretie's methodology of generalizing from data which has no relation to the plaintiff is unreliable as it is based upon irrelevant data and does not allow for consideration of relevant data.

Dr. Clauretie's methodology requires the trier-of-fact to utilize the figure for a statistically average non-disabled male as the starting point or as the pre-incident value. Dr. Clauretie has no idea concerning how well or if at all this figure represents the plaintiff's particular situation and again, generalization from the statistically average male, absent evidence that Mr. Yahyavi is average, is speculative.

Consideration of particular facts with regard to the plaintiff is required of an expert if his opinion is to be considered relevant and reliable. The Nevada Supreme Court stated in Hallmark that "An expert's testimony will assist the trier-of-fact only when it is relevant and the product of reliable methodology." In determining whether an expert's opinion is based upon a reliable methodology the court in Hallmark stated, in part, that the opinion should be "(5) based more on particularized facts rather than assumption, conjecture or generalization." Dr. Clauretie's methodology is based upon the unfounded assumption that Mr. Yahyavi's pre-incident and post-incident abilities to perform household services are average. His methodology favors assumption, conjecture and generalization over consideration of any particular facts regarding Mr. Yahyavi and comparison of those facts to the statistical averages utilized in his calculations. In other words, Dr. Clauretie's methodology does not first establish that Mr. Yahyavi was an average male in terms of performing household services prior to the subject accident. Dr. Clauretie has failed to provide any evidence that his pre-incident or post-incident calculations of the value of household services are in any way relevant to the matter at hand.

In performing his calculations Dr. Clauretie relies upon data and a regression equation taken from the Crouse paper. As part of his regression analyses Crouse sets forth the R^2, otherwise known as the coefficient of correlation, for the cognitive, mobility, severe cognitive and severe mobility disability categories. Crouse's paper attempts to predict the extent to which an individuals' ability to perform household services will

decrease as the result of various disabilities classified as a "hearing", "vision", "cognitive", "mobility", "self-care", "going outside home", "severe cognitive" or "severe mobility." Utilizing certain variables Crouse attempts to estimate the decrease in minutes per day an individual will spend based upon his/her age, employment status, marital status and the presence of children under the age of 18 in the home. The R^2 statistic measures the extent to which these independent variables explain the variance or change in the dependent variable, disability. The lower the R^2, the less the variance in the dependent variable is explained by the independent variables. In this particular case the mobility R^2 figure is .0698. The meaning of this particular statistic is that only 6.98% of the variance in the dependent variable is explained by the independent variables noted above. The corollary to this is that 93.02% of any variance in minutes per day spent performing household services relates to other variables not considered by the Crouse model. The model upon which Dr. Clauretie bases his calculation of the plaintiff's decreased minutes per day performing household services is deeply flawed and extremely speculative.

This point is further developed by reference to the ATUS data utilized by Dr. Crouse. That data includes multiple additional variables which may have an effect on an individuals' propensity to perform household services. Specific variables for which data is available but not used by Dr. Crouse include education, employment status of a spouse, income, race and the number of children in the home. Failure to consider other relevant variables results in understatements or overstatements of time lost performing household services.

A significant flaw present in Dr. Crouse's analyses relates to the timing of the ATUS data collections. 50% of the ATUS data is collected on week-ends with the remaining 50% being collected on week-days. Dr. Crouse's analyses treat all days of the week as equal when more household services are performed on week-end days for employed individuals. Reliance upon Dr. Crouse's data results in a failure to account for more time spent performing household services on week-ends which leads to an overstatement of lost time relating to the "disabilities" sustained by the survey respondents

In his report Dr. Clauretie states that the basis for his household services damages calculations is the statistical analysis from the ATUS "...**AND** information from the report of Mr. Ira Spector, a vocational expert."[3] Dr. Clauretie is apparently making this statement due to past criticisms of his methodology wherein he has relied solely upon generalization from the ATUS data/analyses to injured plaintiff's in assessing the value of a decreased ability to perform household services. Specific criticisms and a criticism repeated here

[3] Report on the Loss in the Value of Household Services, Terrence M. Clauretie, Ph.D., June 21, 2018. p. 3.

is that Dr. Clauretie's calculations are based upon generalization from the ATUS and from representations made by the plaintiff concerning the amount of post-incident time he can no longer performing household services. Dr. Clauretie's opinions have no medical and/or vocational opinion concerning the extent to which any injuries impact the plaintiff's ability to perform household services. Mr. Spector does not opine concerning the impact of the subject incident on the plaintiff and instead notes Mr. Yahyavi's representation that "... He would require 4 -5 hours of household services assistance per week... .[4] In fact, Mr. Spector defers to medical practitioners when he says, "Although the identification and report of having difficulty while performing household services is reported and obtained directly from the examinee, this counselor defers to the physicians in this case to either support or not support the fact that the performance of the identified household service makes medical sense and are justified when considering the injuries and resulting symptomatologies sustained in the subject accident."[5] The only reference to household services in the reports of Drs. Herr, Tung, Kaplan or Oliveri is on page 4 of Dr. Oliveri's Future Medical Costs report wherein he. states, "Given his injury, Mr. Yahyavi may benefit from an assessment of his household chores and need for replacement services. I defer to an economist or similarly qualified expert to assess and calculate such." While this author is neither a medical or vocational expert, it does not appear that Dr. Oliveri's reference to household chores constitutes the type of support or lack of support concerning the performance of household services.

Dr. Clauretie has failed to base his analyses upon any evidence specific to Mr. Yahyavi indicating that the pre-incident calculation of the value of household services is in any way relevant to the matter at hand. Accordingly, any deduction therefrom in an attempt to value Mr. Yahyavi's alleged lost ability to perform household services cannot reasonably be relied upon. In a similar manner, Dr. Clauretie's post-incident value of household services has no independent object evidentiary foundation. Dr. Clauretie presents and relies upon no independent objective evidence that Mr. Yahyavi has a decreased ability to perform household services as a result of the subject incident.

Damages

In a report dated July 27, 2018, Edward L. Bennett, MA, CRC, stated, "In this counselor's view, nothing precludes plaintiff from returning to his usual and customary occupation of automobile sales representative/manager.[6] To the extent Mr. Bennett's opinion is more likely correct that not, Mr. Yahyavi's future post-incident annual earnings will not differ from his pre-incident annual earnings and benefits.

[4] Vocational Assessment and Loss of Earnings Capacity Evaluation, Ira I. Spector, MS, CRC, May 21, 2018, p. 17.
[5] Ibid.
[6] Forensic Vocational Evaluation & Life Care Plan Rebuttal, Edward L. Bennett, MA, CRC, July 27, 2018, p. 22.

Accordingly, it is my opinion that Mr. Yahyavi will suffer no future economic damages relating to lost earnings and benefits.

Concerning future medical expenditures Mr. Bennett stated, "Based upon contact with defense forensic medical experts, this counselor is still of the opinion that there are no future medical needs based on this instant case."[7] Assuming Mr. Bennett's opinions are more likely correct than not, Mr. Yahyavi will require no future medical expenditures as a result of the subject incident. Accordingly, it is my opinion that Mr. Yahyavi will suffer no economic damages relating to future medical expenditures as a result of the subject incident.

The above opinions are based upon analyses performed to date. I reserve the right to update this report based on information and/or events which may occur or become known to me in connection with the above referenced litigation proceedings. Such documentation and/or events may impact my analysis and that impact may be material. Thank you for the opportunity to serve you in this matter. If you have any questions concerning this report of my opinions, please call me.

Sincerely,

Digitally signed by Kevin B. Kirkendall, MBA, CPA-CGMA, CFE
DN: cn=Kevin B. Kirkendall, MBA, CPA-CGMA, CFE gn=Kevin B. Kirkendall, MBA, CPA-CGMA, CFE c=United States l=US o=Kirkendall Consulting Group, LLC e=Kevin@KirkendallConsulting.com
Reason: I am the author of this document
Location: Henderson, Nevada
Date: 2018-08-30 03:03-07:00

Kevin B. Kirkendall, MBA, CPA, CFE
Kirkendall Consulting Group, L.L.C.

[7] Ibid.

Appendix

Exhibit	Description
Exhibit A	Earnings Calculations
Exhibit B	Earnings and CPI Growth Rates

Yahyavi, Bahram v. Capriati Construction Corp., et al.
Personal Injury Economic Analysis
Earnings Calculations
Exhibit A

Note: The following analyses includes Mr. Yahyavi's annual earnings stated in 2018 doll and the calculation of various averages, stated in 2018 dollars.

Actual Earnings

	Per Tax Returns		
Year	Annual Earnings (1)	Historical CPI Growth Rates (2)	Stated in 2018 Dollars
2008	30,786	4.09%	34,352.52
2009	76,733	-0.67%	84,635.78
2010	60,225	2.07%	66,875.68
2011	101,703	3.56%	109,008.66
2012	156,355	2.10%	174,205.21
2013	105,863	1.37%	115,522.83
2014	123,683	1.50%	133,144.79
2015	97,509	-0.41%	103,417.21
2016	55,217	0.96%	58,803.77
2017	5,277	2.76%	5,566.35
2018	-	2.65%	-

Average Annual 2009 - 2010 Earnings	$	75,755.73
Average Annual 2008 - 2012 Earnings	$	93,815.57
Average Annual 2011 - 2012 Earnings	$	141,606.93
Average Annual 2015 - 2016 Earnings	$	81,110.49

Pre-Incident Overstatement

Spector Pre-incident Earning Capacity	$	163,650.00
Mr. Yahyavi's Average Annual Earnings: 2011 - 2012		141,606.93
Overstatement		22,043.07

Post-Incident Understatement

Spector Indicated Post-Incident Earning Capacity	$	37,877.86
Clauretie Calculated Post-Incident Earning Capacity		24,815.00
Understatement		13,062.86

Note:
(1) See the U.S. Individual Income Tax Returns of Bahram Yahyavi, 2008 - 2017.
(2) See Exhibit B.

Yahyavi, Bahram v. Capriati Construction Corp., et al.

Personal Injury Economic Analysis

Earnings & CPI Growth Rates

Exhibit B

Note: Historical growth rate are the average annual wage growth rates reported in the 2017 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Disability Insurance Trust Funds. Growth rates for future periods are the estimated growth rates in the same report. Specifically, see the intermediate assumptions for the average annual wage in covered employment for the corresponding years. Table V.B1., Principal Economic and Assumptions.

Past Rates

Year	Wage Growth Rate	CPI
2002	0.68%	1.38%
2003	2.52%	2.22%
2004	4.69%	2.61%
2005	3.71%	3.52%
2006	4.74%	3.19%
2007	4.49%	2.88%
2008	2.41%	4.09%
2009	-1.59%	-0.67%
2010	2.58%	2.07%
2011	3.12%	3.56%
2012	3.35%	2.10%
2013	1.13%	1.37%
2014	3.44%	1.50%
2015	2.74%	-0.41%
2016	2.66%	0.96%

Future Rates

Year	Growth Rate	CPI	Year	Growth Rate	CPI
2017	4.86%	2.76%	2039	3.80%	2.60%
2018	4.82%	2.65%	2040	3.80%	2.60%
2019	4.46%	2.60%	2041	3.80%	2.60%
2020	4.28%	2.60%	2042	3.80%	2.60%
2021	4.23%	2.60%	2043	3.80%	2.60%
2022	4.07%	2.60%	2044	3.80%	2.60%
2023	3.98%	2.60%	2045	3.80%	2.60%
2024	4.04%	2.60%	2046	3.80%	2.60%
2025	3.93%	2.60%	2047	3.80%	2.60%
2026	3.89%	2.60%	2048	3.80%	2.60%
2027	3.89%	2.60%	2049	3.80%	2.60%
2028	3.89%	2.60%	2050	3.80%	2.60%
2029	3.89%	2.60%	2051	3.80%	2.60%
2030	3.89%	2.60%	2052	3.80%	2.60%
2031	3.80%	2.60%	2053	3.80%	2.60%
2032	3.80%	2.60%	2054	3.80%	2.60%
2033	3.80%	2.60%	2055	3.80%	2.60%
2034	3.80%	2.60%	2056	3.80%	2.60%
2035	3.80%	2.60%	2057	3.80%	2.60%
2036	3.80%	2.60%	2058	3.80%	2.60%
2037	3.80%	2.60%	2059	3.80%	2.60%
2038	3.80%	2.60%			

EXHIBIT 6

John E. Baker, Ph.D., P.E.
FORENSIC ENGINEER

7380 S. EASTERN AVENUE; SUITE 124 - 142
LAS VEGAS, NEVADA 89123
(702) 334-9033
(866) 611-9909 (FAX)
e-mail: jebakerphd@aol.com

July 3, 2018

Mr. Mark J. Brown
Senior Staff Attorney
Law Offices of Eric R. Larsen
Subsidiary of The Hartford Financial Services Group, Inc.
750 E. Warm Springs Rd., Ste. 320, Box 19
Las Vegas, NV 89119

Re: Bahram Yahyavi v. Capriati Construction Corp., Inc.
DOI: June 19, 2013

Dear Mr. Brown:

You have requested that I evaluate and opine on a two vehicle collision occurring on June 19, 2103 at approximately 10:25 A.M. on Sahara Avenue 2 feet north of the intersection of Glen Avenue.

As indicated in the State of Nevada Traffic Accident Report #LVMPD-130619-1450 authored by 5316 E. Grimmesey:

where: V1 = 2007 Forklift Truck driven by Joshua Adom Arbuckle

V2 = 2012 Dodge Charger 4-Door driven by Bahram Yahyavi

"V2 was travelling eastbound Sahara, West of the Y intersection at Glen in T2 of 2. V1 was a large construction forklift working on the S/W corner of Sahara/ Glen. This area has active construction in progress. The south side of Sahara has orange pylons lining the south shoulder which continues along to the south side of Glen. The shoulder line by the cones is 18 feet wide. There was a semi-truck with a flatbed trailer parked facing eastbound on Sahara, west of Glen.

In the closed shoulder, V2 was making a right turn along the cone pattern when it was struck by V1. V1 was travelling N/B from the sidewalk though the closed shoulder in front of the semi-truck. The forks of V1 were sticking out approximately 3 feet into T2 about 4 feet off the ground past the cone pattern. V1's forks stuck the right side of V2's windshield.

There were no pre-impact skid marks. V1 was moved prior to my arrival. W1 who is an inspector said he saw V1 driving into the roadway and said the forklift operator didn't see V2 coming. D2 was interviewed at UMC hospital. D2 said he was going east. And was going to turn onto Glen. When he saw the blades coming at him. D2 said the forklift wouldn't stop.

D1 said he was trying to go onto Sahara, to another part of the jobsite and he didn't see V2 coming. D1 was determined to be at fault in the accident and was cited for full attention to driving. D2 was transported for claimed injuries. The AIC was 2 N/S and 13 E/W determined by V1s post-impact tire marks. V1 and V2 were unregistered and did not have proof of insurance."

Presented below are my observations and opinions regarding

CURRICULUM VITAE
Attached

LIST OF VERBAL TESTIMONIES GIVEN IN PREVIOUS 10 YEARS
Attached

FEE SCHEDULE
Attached

DOCUMENTS REVIEWED

1. Retention Letter - June 25, 2018 (1 page).
2. State of Nevada Traffic Accident Report #LVMPD-130619-1450 authored by 5316 Eric Grimmesey (12 pages):
3. Las Vegas Fire and Rescue Pre-Hospital Care Report Summary (3 pages).
4. Deposition transcript of Bahram Yahyavi (62 pages).
5. UMC - reports and records regarding Bahram Yahyavi (23 pages).
6. Deposition transcript of Eric Grimmesey (47 pages).
7. Deposition transcript exhibits of Eric Grimmesey (11 Full page photo exhibits):
8. [43] Accident Scene color photographs.

PRELIMINARY OBSERVATIONS and OPINIONS

1. The State of Nevada Traffic Accident Report indicates that the Point of Rest (POR) of the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi was seven feet past the Point of Impact (POI). At the Point of Impact, the Forklift's forks struck the windshield and the right side of the A-pillar. In fact, the forks reportedly initially penetrated into the vehicle travel compartment and penetrated approximately 3 inches past the initial strike into the windshield and exterior of the vehicle. Therefore, the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi did not, in fact, travel 7 feet past the initial Point of Impact.

2. Both the passenger's-side A-pillar and the laminated windshield glass of the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi are not load-bearing. As loud and violent as it may have appeared to the driver Bahram Yahyavi, the forks' striking, intercepting, or penetrating the A-pillar and laminated glass windshield components caused those components to break, but did not have any influence on the deceleration of the forward movement of the 3962-pound 2012 Dodge Charger.

3. In his deposition transcript (Page 40, Line 25), Bahram Yahyavi stated that he never did brake. However, if the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi traveled 7 feet past the A.I.C. (Area of Initial Contact – or POI), and with the A-pillar and windshield were not able to slow the moving vehicle, all deceleration of the 2012 Dodge Charger 4-Door would have had to be due to braking by the driver. That braking with or without tire friction marks, the deceleration of the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi would have been between 0.55 and 0.70 G's. Without braking, the

forced deceleration of the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi was substantially less.

4. In order to travel 7 feet past the POI, the 2012 Dodge Charger 4-Door driven by Bahram Yahyavi would have had to be travelling at a speed of 5.61 mph with no braking and rolling drivetrain resistance only (as Bahram Yahyavi states), or 12.12 mph with full braking . However, the 2012 Dodge Charger's traveling 7 feet past the POI necessitates the Forklift forks traveled through the entire travel compartment of that vehicle. Neither scenario is consistent with the post-collision position of the forks.

5. Despite the two major technical inconsistencies, at these levels of deceleration of (.55 to .70 or less), there are no possible hyperflexion mechanisms of injury. Without direct contact with the forks of other fixed object, it is unclear how Bahram Yahyavi could have experienced a traumatic head-strike injury or a deformed lower left rib with a possible separation from sternum. Depending on the three-dimensional geometry of the driver with respect to the travel compartment envelope, there can have been incidental direct contact of the knees with the lower dashboard. However this incidental level of contact is not consistent with the sudden changes of direction common in ACL tears. The small laceration inside Bahram Yahyavi's lower lip was most likely due to flying bits of crumbled laminated glass.

These preliminary opinions have been stated to a reasonable degree of Accident Reconstruction, Biomechanics, and Human Factors Engineering certainty.

Given the substantial levels of technical inconsistencies in the State of Nevada Traffic Accident Report and the deposition of Bahram Yahyavi, I request the opportunity to supplement or amend these preliminary observations and opinions on receipt of additional discovery material – specifically including medical reports and records. If you have any questions regarding these preliminary observations and opinions, please do not hesitate to contact me.

Sincerely,

John E. Baker (Signed electronically).

John E. Baker, Ph.D., P.E.

EXHIBIT 7

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

BAHRAM YAHYAVI, Plaintiff, vs. CAPRIATI CONSTRUCTION CORP INC. Defendant.	CASE#: A-15-718689-C DEPT. XXVIII

BEFORE THE HONORABLE RONALD J. ISRAEL
DISTRICT COURT JUDGE
TUESDAY, SEPTEMBER 24, 2019

RECORDER'S PARTIAL TRANSCRIPT OF JURY TRIAL - DAY 12
HOWARD TUNG (CROSS-EXAMINATION, RECROSS EXAMINATION, AND JUROR QUESTION/ANSWER)

APPEARANCES:

For the Plaintiff:	DENNIS M. PRINCE, ESQ. KEVIN T. STRONG, ESQ.
For the Defendant:	MARK JAMES BROWN, ESQ. DAVID S. KAHN, ESQ.

RECORDED BY: JUDY CHAPPELL, COURT RECORDER

INDEX

INDEX OF EXHIBITS

FOR THE PLAINTIFF	MARKED	RECEIVED
None		

FOR THE DEFENDANT	MARKED	RECEIVED
None		

Las Vegas, Nevada, Tuesday, September 24, 2019

[Designated testimony begins at 11:05 a.m.]

THE MARSHAL: Please rise for the jury.

[Jury in at 11:05 a.m.]

[Inside the presence of the jury]

THE COURT: Please be seated. The parties acknowledge the presence of the jury?

MR. PRINCE: We do, Judge.

MR. KAHN: Yes, Your Honor.

MR. PRINCE: We were in the --

THE COURT: All right. Go ahead.

MR. PRINCE: -- cross-examination of Dr. Tung.

THE COURT: Dr. Tung.

THE CLERK: Please remain standing. Raise your right hand.

DR. HOWARD TUNG, DEFENDANT'S WITNESS, SWORN

THE CLERK: Please be seated. Please state your name, again, for the record.

THE WITNESS: Howard Tung, T-U-N-G.

THE CLERK: Thank you.

CROSS-EXAMINATION

BY MR. PRINCE:

Q Dr. Tung, good morning. Did you fly in from San Diego this morning?

A Yes.

A It's not uncommon.

Q Yeah. We're going to go back now and talk and kind of recap for a moment.

THE WITNESS: Thank you.

THE MARSHAL: You're welcome.

MR. PRINCE: One second. We're loading something now. Very good.

BY MR. PRINCE:

Q We talked last week that you agree that my client was injured in this collision of June 19th, 2013, correct?

A I think that was asked and answered, yes.

Q Right. You also testified that my client suffered neck and related symptoms as a result of this motor vehicle collision, correct?

A I also think that was asked and answered, yes.

Q And you testified also -- I'm summarizing so we can catch up, because we had other witnesses yesterday -- that 14 months, or to the end of August 2014 of care was reasonable, appropriate, to treat the symptoms and injuries suffered in this motor vehicle collision, correct? That's what you said?

A I think that was asked and answered.

Q So I'm --

A Yes.

Q -- correct in summarizing that, right?

A I believe I answered the question, yes.

Q Okay. And the treatment was reasonable and appropriate. It

also included the injections on the surgical consultations, correct? Because that was during the 14-month period.

A There are more surgical consultations, but if you're applying the 14-month period, yes.

Q Okay.

A Asked and answered.

Q I'm implying that.

A Yes. Thank you.

Q That's what I'm exactly saying. What I want to do -- okay. You also talked about degeneration; do you remember that? With Mr. Kahn on Friday, you talked about degeneration?

A Yes.

Q Degeneration is a fact of life, correct?

A It occurs, yes.

Q Right. And in fact, someone in their -- either male or female, someone in their 50s, you're going to expect to see degeneration in their spine, correct?

A Yes.

Q And don't you agree that degeneration, generally speaking, is asymptomatic, meaning there's no symptoms or problems associated with it?

A Well, since you're using the word generally and then you're not being specific about the question, can it occur, the answer is yes.

Q Yeah.

A I mean, because you're being non-specific.

curvature of the spine. Some people just may have a natural straightening of that, right?

A Could, yes.

Q Some people it could be positional?

A Yes, I guess. But --

Q Or could be related to a spasm --

A Could be --

Q -- or any combination of any of that, right?

A Could be anything.

Q Right. Don't you agree that like a straightening of the lordotic curve or the lordosis to occur, that's a relatively -- it's a very soft finding?

A No. In this particular instance it would not be and here's the reason. Is because there are other degenerative changes that explain, I mean that's the medicine. I mean, you have to kind of put the picture together.

Q Okay. Well, there's no --

A But all those other things that you mentioned are correct.

Q Okay. So I want to finish with this. You read the Southwest medical records in detail, correct?

A Yeah, I read them.

Q They were supplied to you?

A Yeah. They were supplied to me.

Q Yes. And there's nothing in there that Mr. Yahyavi needed any work restrictions, correct?

A That's correct.
Q There was never any physical limitation imposed on him for any neck related problems, correct?
A Correct.
Q Never any treatment plan for neck -- alleged neck symptoms, correct?
A Yes.
Q Never any recommendations or for him to lifting restrictions, workplace restrictions, disability, time off work, nothing like that before this, correct?
A Yes.
Q After this accident there was time off, he was -- there was workplace restriction imposed upon him, right?
A Well --
Q After this collusion.
A I think the question's vague as to time. What -- like after --
Q For a year, more than a year.
A Well, afterward there are no restrictions after the accident. There were several notes that say no work restrictions.
Q I thought there --
A But at a later time yes. Restrictions then were imposed, but for some point --
Q They took him off work for the first couple of weeks, right? There's workplace restrictions that don't go to work.
A There are other notes that --

Q I'm only asking right after the accident --

A Well, you didn't say that. That's why I asked. It was vague as to time. So there are times after the accident where there are notes that say there are no work restrictions. So I'm just asking you what timeframe are you asking me to answer the question with?

Q Well, Doc, none of the records in any -- from Southwest Medical document any limitations in Mr. Yahyavi's life, correct?

A And now we're talking before the accident because yeah.

Q Correct, before.

A Southwest was all before. Yeah. I agree with you.

Q No work -- no activities of daily living limitations, right?

A I've already agreed with you sir.

Q All right. He was skiing, working full-time?

A Yeah. He had -- in fact he had an accident going skiing.

Q Right. So he's functionally doing well, right?

A There are no work restrictions, I agree.

Q And things change after this collision, right, for him?

A There are changes that occurred, yes. After the surgery too.

Q Okay.

MR. PRINCE: Thank you, Your Honor. No additional questions.

THE COURT: Redirect.

MR. PRINCE: Oh, you know what? I just need to finish up one area.

BY MR. PRINCE:

A Well, we know it's degenerative spine disease, which includes degenerative disc --

Q Uh-huh.

A -- osteophytes, you know, et cetera.

Q Those are things you see on x-rays?

A Facet hypertrophy. So, I mean I don't know of those three things or multiple things that are ingulfed in degenerative cervical spine disease or cervical spondylosis, what exactly it was, then I would agree with you, sir.

Q But it also could be a muscular issue, right?

A It could have been.

Q Yeah.

A That means he had a muscular issue for several years. It's a little unusual.

Q Well, you're saying he had a muscular issue for 14 months, right?

A I think he had --

Q That's what you're saying?

A Sure.

Q Yeah. Well, I want to make sure that you're being fair. Okay. When you reviewed the Southwest medical records, you -- strike that. Let me back up a second.

When you review medical records, you pull out of them what you think is clinically important to you, right?

A I don't know how to answer that.

Q When you summarize them. When you summarize them.
A I review the records and I report what I think is important I guess.
Q Yeah. Yeah, yeah. What you have here is you have this -- you do this thing called a medical records review, right? You kind of do a chronology. You kind of summarize the various medical records, right?
A Yes, sir.
Q Well, you don't do it all yourself. You have somebody that helps you, yeah?
A I have assistants.
Q Yeah. So you pay someone to help you do this chronology, right?
A Well, I don't know anyone who works for free, but yes.
Q Okay. And so what you'd want to make sure is you're doing is you're documenting things that are accurate from the notes, right? In a fair and unbiased way.
A Yes, sir.
Q Okay. Do you have your December 13, 2018 report?
A December 13th, right?
Q Yes.
A Yes, sir.
Q Yes. Okay. Let's first look at the October 25th, 2011, your summary of that. You write, patient presents complaining of neck pain for the last several years. That what you write, don't you?
A Yes.

Q But that's really -- that was really a -- the reason for the visit was for a follow up for his labs, right? That was really the reason for the visit?

A I guess, I mean --

Q Well, that's what the record says, right?

A Okay.

Q And in addition to that, let's look at the neck. P2110 of Exhibit 156. The neck exam. Keep your report in mind. It says that the findings on exam were supple with full range of motion, mild discomfort of palpation, no palpable muscle spasms, do you see that?

A Yes.

Q In your note of October 25th, 2011, you don't document that he has full pain free range of motion, do you, in your summary?

A No. A summary is not meant to be a reiteration of the medical records.

Q But you didn't even pull out that significant -- that's significant finding. You didn't even document that, did you?

A I'd refer to the document. If the reader wants to go to the original document, which I list, but basically, I don't think I'm misrepresenting anything.

Q Right.

A I wrote that the patient presents complaining of neck pain for the last several years. I think we've highlighted that many, many times over.

Q Okay.

A I don't think there's anything at issue.

Q Okay. Well, the reason for doing a medical chronology review is so that you can look back and look at, hey, what's medically significant in my analysis of these medical records that support your opinion, right?

A Well --

Q Isn't that true? That's one of the reasons.

A It could be. But let me just say, the medical record review is not meant to be the medical records.

Q Right.

A It's a review of the records.

Q But you didn't even document that significant finding, full pain free range of motion, no muscle. You don't document it in your report, correct? That's a yes or no?

A Correct.

Q Okay, fair enough. Now, let's go to the November 1st, 2012 of your report. Tell me when you're there.

A I have it.

Q You write down your summary of that notice, impression, hypertension, essential, hyper triglycerides and impaired fasting glucose, do you see that? That's what you wrote?

A Right.

Q So that was your summary of that note, correct?

A Sure.

Q Okay. Let's look at the actual record.

A Okay.

Q 2106.

MR. PRINCE: Show me the subjective. Subjective.

BY MR. PRINCE:

Q It says, 50 year old male presents to discuss lab results, states that he is feeling well without any physical complaints. Do you see that?

A I do.

Q You don't document that in your summary of that note, do you?

A I don't document subjective complaints almost anywhere. I mean, I wrote --

Q Yes, you --

A If we go down to the bottom --

Q Excuse me. Hang on.

A -- it's going to say what it has. You're arguing about my --

Q Yeah. I'm arguing about your summary, yes.

A -- summary, and I just explained --

Q Yes.

A -- to you, this is not meant to be the medical record. It's meant to be a review and that's what a review is.

Q When you documented the October 25th, 2011 report, you said he has neck complaints for last several years. You documented that, correct?

A Correct.

Q Because that favored the Defense, right?
A Incorrect. He got --
Q Okay. Now --
A -- a cervical spine x-ray that day. Why'd he --
Q Well, now --
A So we have to understand why he got a cervical spine x-ray that day.
Q Okay.
A Okay. So why don't I --
Q Let's look at --
A Okay. Let's go forward.
Q Now, when he says he's feeling well and has no physical complaints, you don't even document that at all and you're note, do you?
A It's not in my medical record review.
Q Right. Right. In addition to that, where it's talking about the musculoskeletal and neurologic exam that he has no persistent muscular pain, no extremity numbness or paresthesia or weakness, you don't document that either, do you, as part of your summary, correct?
A No. We're been through --
Q Am I correct?
A We've been through these records. The answer is, no.
Q You don't document that. So to a reader of your records, it would be like those things didn't exist, right?
A That's not true.
Q Now, one of the things that patients do is when they go to an

THE COURT: Thank you. There was no other questions, right? Thank you, doctor. You may step down.

THE WITNESS: Okay. Thank you.

[Designated testimony concludes at 3:31 p.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.

Jessica B. Cahill

Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708

EXHIBIT 8

A.J. Kung, Esq.
Nevada Bar No. 7052
Brandy Brown, Esq.
Nevada Bar No. 9987
KUNG & BROWN
214 South Maryland Parkway
Las Vegas, Nevada 89101
(702) 382-0883 Telephone
(702) 382-2720 Facsimile
E-Mail:ajkung@ajkunglaw.com
bbrown@ajkunglaw.com
Attorneys for Capriati Construction Corp. Inc.

KUNG & BROWN
214 South Maryland Parkway
Las Vegas, Nevada 89101
Tel: (702) 382-0883 / Fax: (702) 382-2720

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

*** * ***

In re: CAPRIATI CONSTRUCTION CORP. INC. Debtor.	Case No.: BK-15-15722-abl Chapter 11 Hearing Date: March 21, 2018 Hearing Time: 1:30pm

MOTION FOR FINAL DECREE PURSUANT TO 11 U.S.C. § 350, RULE 3022 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE AND RULE 3022 OF THE LOCAL RULES OF BANKRUPTCY PRACTICE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

Capriati Construction Corp., Inc. the above-captioned Debtor and Debtor in possession (the Debtor), by and through its attorneys, KUNG & BROWN ("K&B"), files this motion (the "Motion") seeking a final decree pursuant to section 350 of 11 U.S.C. § 101, et seq. (the "Bankruptcy Code"), Rule 3022 of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") to request their Chapter 11 Case be closed pursuant to a final decree. In support of the Motion, the Debtor respectfully represents as follows:

. . .

. . .

KUNG & BROWN
214 South Maryland Parkway
Las Vegas, Nevada 89101
Tel: (702) 382-0883 / Fax: (702) 382-2720

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider the matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157 (b) venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

PROCEDURAL AND FACTURAL BACKGROUND

2. Debtor filed a Voluntary Petition under Chapter 11 of the United States Bankruptcy Code, Case Number 15-15722 on October 7, 2015. Debtor continues to manage itself as Debtor-in-Possession.

3. On April 22, 2015, the Debtor filed its Third Amended Plan of Reorganization (the "Plan") and its related Amended Third Amended Disclosure Statement (the "Disclosure Statement"). By order dated May 13 2016, the Court approved the Disclosure Statement and solicitation of the acceptance of the Plan.

4. Through the Plan, the Debtor was able to turn itself profitable.

5. On December 5, 2016, this Court confirmed the Plan.

6. In accordance with section 5.2 of the Plan, all fees payable pursuant to section 1930 of title 28 of the United States Bankruptcy Code (the "Trustee's Fees"), as determined by the Bankruptcy Court at the hearing on the Plan, were paid by the Debtors on or before the Effective Date. The Trustee's Fees continued to be paid to the Office of the United States Trustee ("UST") and the Debtor is current with their Trustee's Fees.

RELIEF REQUESTED

7. By this Motion, the Debtor seeks entry of a final decree that closes its Chapter 11 Case, effective as of the date of which the Court enters such final decree.

KUNG & BROWN
214 South Maryland Parkway
Las Vegas, Nevada 89101
Tel: (702) 382-0883 / Fax: (702) 382-2720

APPLICABLE AUTHORITY

8. Section 350(a) of the Bankruptcy Code provides that "after an estate is fully administered and the Court has discharged the Trustee, the court shall close the case". 11 U.S.C. § 350(a) Rule 3022 of the Bankruptcy Rules, pursuant to which section 350 is implemented, provides that "[a]fter an estate is fully administered in a Chapter 11 reorganization case, the Court, on its own motion of a party in interest, shall enter a final decree closing the case". Fed. R. Bank. P. 3022.

9. The Bankruptcy Code fails to define "fully administered". The Courts however, have looked to the following factors in deciding whether a final decree shall be issued:

- Whether the order confirming the plan had become final;
- Whether deposits required by the plan have been distributed;
- Whether the property proposed by the plan to be transferred has been transferred;
- Whether the Debtor of the successor of the Debtor under the plan has assumed the business of the management of the property dealt with by the plan;
- Whether payments under the plan have been commenced; and
- Whether all motions, contested matters, and adversary proceedings have been resolved.

1991 Advisory Comm. Note to Fed. R. Bankr. P. 3022 (the "Advisory Committee Note").

10. Although Courts should apply and weigh the factors set forth by the Advisory Committee Note no one factor is dispositive. *See, In Re Kliegl Bros.*, 238 B.R. 531 (Bankr. E.D.N.Y. 1999); and *In Re JMP-Newcor Intern., Inc.*, 225 B.R. 462 (Bankr. N.D. Ill. 1998). Rather, the six factors act as mere guidelines to aid a court in its determination. *See, In Re Mold Makers, Inc.*, 124 B.R. 766 (Bankr. N.D. Ill. 1990). Such a fluid formula has produced widely

varying results. "At one extreme, and estate could be fully administered, when a Chapter 11 Plan is confirmed and the estate is dissolved... [a]t the other extreme, an estate could be fully administered when all that is called under a plan occurs". *Id*.at 768.

11. In this case, a final decree, as requested herein, is appropriate in the Debtor's Chapter 11 Case.

12. The Confirmation Order is final and non-appealable. The Plan has been substantially consummated and the Debtor continues making payments under the Plan. (Moreover, all pending Motions are resolved, and there are no pending motions, or contested matters. There is a pending Adversary (16-01037-abl). However, pursuant to *In Re Valence Technology, Inc.*, No. 12-11580 (Bankr. W.D. Tex. 10/17/14) an Adversary can be pending while a final decree is entered. Accordingly, the right of Creditors will not be adversely affected by the closing of the Debtor's Chapter 11 Case).

13. Furthermore, the Debtor is incurring Trustee's Fees and will continue to incur such fees until their Chapter 11 Case is closed. Absent of an order closing the Debtor's Chapter 11 Case, the Debtor will be forced to incur the substantial and ongoing burden of paying Quarterly Fees to the United States Trustee. Entry of the final decree requested herein will avoid the considerable administrative costs and expense associated with maintaining the Debtor's Chapter 11 Plan.

. . .

. . .

. . .

. . .

. . .

. . .

KUNG & BROWN
214 South Maryland Parkway
Las Vegas, Nevada 89101
Tel: (702) 382-0883 / Fax: (702) 382-2720

CONCLUSION

WHEREFORE, based on the foregoing, the Debtor respectfully requests that the Court Grant Debtor's Motion.

DATED this 6th day of February, 2018.

KUNG & BROWN

By: */s/ Brandy Brown, Esq.*
A.J. Kung, Esq.
Nevada Bar No. 7052
Brandy Brown, Esq.
Nevada Bar No. 9987
214 South Maryland Parkway
Las Vegas, Nevada 89101
Attorneys for Capriati Construction Corp. Inc.

KUNG & BROWN
214 South Maryland Parkway
Las Vegas, Nevada 89101
Tel: (702) 382-0883 / Fax: (702) 382-2720

EXHIBIT 9

Exhibit "I"

Law Offices of
ERIC R. LARSEN
750 E. Warm Springs Rd.
Suite 320, Box 19
Las Vegas, NV 89119
Telephone: (702) 387-8070
Facsimile: (877) 369-5819

FORENSIC VOCATIONAL EVALUATION & LIFE CARE PLAN REBUTTAL

YAHYAVI, Bahram vs. Capriati Construction Corp. Inc.

Date of Report
7/27/18

Prepared by

Edward L. Bennett, M.A., C.R.C., C.D.M.S.
Diplomate, American Board of Vocational Experts

COAST REHABILITATION SERVICES, INC.

TABLE OF CONTENTS

Coast Rehabilitation Services, Inc.

Mail all correspondence to the Santa Barbara office
■ 5290 Overpass Road, Suite 118, Santa Barbara, CA 93111 • (805) 692-1823
• Fax (805) 692-1827 • E-mail: info@coastrehabservicesinc.com

FORENSIC VOCATIONAL EVALUATION & LIFE CARE PLAN REBUTTAL

RE	:	YAHYAVI, Bahram vs. Capriati Construction Corp. Inc.
COURT VENUE	:	Clark County Superior Court, State of Nevada
COURT CASE NO.	:	A-15-718689
DATE OF ALLEGED INCIDENT	:	6/19/13
OCCUPATION PRE-/POST-DOI	:	Automobile Sales Representative/Manager
DATE STOPPED WORK POST-DOI	:	*Per Plaintiff's Experts:* 9/16 (*3/26/18 Dr. Oliveri*) *Per SSA Records:* 11/16.
PERIOD OF WORK POST-DOI	:	7/8/13 – 11/16 (3.3 years)
DATE APPLIED FOR SSI	:	3/10/17
ONSET DATE OF SSI DISABILITY	:	11/1/16 (*3/30/17 P's SSI Application*)
TIME ELAPSED SINCE DOI	:	5.1 years
DATE OF REPORT	:	7/27/18

Reason for Referral

The file of Bahram Yahyavi was referred to the office of Coast Rehabilitation Services by Mark Brown, Esq., of the Law Offices of Eric R. Larsen, initially via the phone on 5/11/18.

The purpose of the initial referral was for this office to perform a Preliminary Forensic Vocational Evaluation & Life Care Plan Rebuttal.

The preliminary evaluation was based upon review of the record as provided at that time, this counselor's file reviews 1-6, as follows:

1) 5/3/16 Deposition of Plaintiff (received 7/2/18)
2) 1/17/18 Designation of Expert Witnesses (received 7/2/18)
3) 6/7/18 Plaintiff's Expert Disclosures & Supplemental Pre-Trial Disclosures (received 7/2/18)
4) 6/16/18 Plaintiff's Response to Defendant's Requests for Production, Set 3 (received 7/2/18)
5) 6/11/18 Plaintiff's Response to Defendant's Requests for Production, Set 4 (received 7/2/18)
6) Records of Kevin Kirkendal (received 7/24/18).

Summary of This Counselor's Preliminary Report

In the preliminary report, based upon functional limitations imposed by 8 physicians as reviewed by this counselor as of date of report submission, the following opinions/conclusions were indicated:

With Respect to the Vocational Evaluation—

- With regard to the work classifications of positions plaintiff had performed in the past, **Sales Manager** is considered ►**sedentary work** and **Automobile Salesperson** is considered ►**light work**.
- Plaintiff's pre-incident educational achievement prepared him for ►**sedentary work**.
- Based on restrictions imposed by treaters and defense forensic medical experts, plaintiff is ►**able to continue to perform same or similar duties, with or without reasonable accommodations**.

With Respect to the Life Care Plan—

- Both defense forensic medical experts, Dr. Tung and Dr. Herr, have indicated that ►**no additional medical treatment is necessary as a result of this instant case**.

Reason for Re-Referral

Subsequent to submission of this counselor's Preliminary Forensic Vocational Evaluation & Life Care Plan Rebuttal, this counselor was requested to provide further comments or rebuttals of various experts' opinions and/or conclusions based upon review of additional material received, as follows:

1) 5/21/18 Vocational Assessment/Mr. Ira Spector, including Mr. Spector's review of medical reports not previously reviewed by this counselor, which outline additional functional limitations (as discussed in more detail in the **Functional Limitations** section of this report). The additional reports reviewed by Mr. Spector consist of the following:

   --6/19/13 Dr. Callaway
   --9/24/13 Dr. Miao
   --11/11/13 Dr. Perry
   --1/9/14 Dr. Miao
   --1/10/14 Smith PT
   --6/9/14 Dr. Miao
   --6/25/14 Dr. Miao
   --7/7/14 Smith PT
   --8/19/14 Dr. Miao
   --3/26/18 Dr. Oliveri

This counselor's opinions and/or conclusions based on all records provided to date are as follows.

I. Vitals

A.	Date of birth:	**12/21/61**
B.	Place of birth:	**Tehran, Iran**
C.	Age at DOI:	**51.45 years**
D.	Current age:	**56.56 years**
E.	Marital status:	**Married**
F.	Children:	**4 children**
G.	Educational achievement:	**--1979 high school graduation.** **--1983, Bachelor's in Business Administration** **--2004, Master's in International Business**

II. Household-Related Chores & Duties

A. Per Plaintiff's Experts

1. 5/23/18 Report by Terrence Clauretie Ph.D.

Mr. Clauretie undertook a statistical analysis of plaintiff's loss of ability to perform household duties.

Utilizing the American Time Use Survey (ATUS) and relying upon the report by plaintiff's expert, Mr. Spector, he opined that as a conservative estimate, plaintiff would perform ►**38.57 minutes/day** ►**less in housework because of** ►**injuries sustained in this instant case**. He further indicated that the ►**present value of household services** ►**with disability is** ►**$172,657**, with the difference between the 2 tables being ►**$94,491**.

He also indicated that per Mr. Spector, plaintiff **may require about a ►half-hour daily of ►outside help to do the things he can presently no longer do as a result of pain and discomfort**, suggesting that the amount per ATUS, with no further calculations, would equal a **loss of value of ►$94,491**.

Ambiguities/Inconsistencies:

1) Mr. Clauretie relies upon Mr. Spector, who is not a medical provider, for information relative to plaintiff's functional limitations as they relate to performance of household-related chores and duties.

2) Per research by this counselor relative to plaintiff's listed residence at **112 Quail Run Road, Henderson, Nevada** (in order to gain a perspective on the extent of household-related duties that would be required for upkeep),

this home was ►**sold as of** ►**3/16/15**, approximately ►**1.75 years post-DOI of 6/19/13**. It is **unclear if plaintiff was the purchaser of this home in 3/16/15**, or **if he was the seller and has subsequently moved to another residence**, which would be important to know in terms of household-related chores and duties required from a post-incident standpoint.

3) **Rather than relying upon ►physicians for functional limitations**, Mr. Clauretie had plaintiff fill out a form entitled ►**Difficulties with Household Duties & Services**. Response categories were as follows: **1 (prior to injury without pain)**, **2 (prior to injury with pain)**, **3 (after injury without pain)**, and **4 (after injury with pain)**.

   A review of same is confusing and conflicting, but nonetheless relies only upon **plaintiff's ►subjective complaints** rather than ►**objective functional limitations imposed by physicians**. It should be pointed out that **in the past, when plaintiff underwent a ►Physical Capacities Evaluation**, he was **deemed to be ►unreliable**. Thus, in this counselor's opinion, **reliance upon ►plaintiff for ►functional limitations is ►flawed**.

4) Mr. Clauretie's allegation that plaintiff would do ►**38.57 minutes/day ►less housework** because of his injuries is in this counselor's view without merit, as it is ►**not based on objective criteria** and ►**does not specify the ►types of duties he would be unable to do**.

   As an example, according to ATUS, there are various classifications of household duties that Mr. Clauretie did not discuss, such as **Inside Housework**; **Food Cooking & Cleanup**); **Pets, Home & Vehicles**; **Household Management**; **Shopping**; **Obtaining Goods & Services**; and **Traveling for Household Activities**.

5) Mr. Clauretie's ►**reliance upon Mr. Spector**, who ►**relied upon plaintiff's ►subjective complaints**, is ►**inconsistent with the ►plethora of objective medical records that indicate plaintiff ►could return to his regular work**.

6) **Nothing reviewed by this counselor** indicates that either ►**Mr. Clauretie or ►Mr. Spector gave ►credence or consideration** to plaintiff's ►**preexisting ACL injury and ►surgical intervention**, and ►**functional limitations as a result thereof**, if any, in terms of his **performance of household-related duties from a ►pre-incident standpoint**.

7) **Nothing reviewed by this counselor** indicates that ►**functional limitations have been placed upon plaintiff as a result of this instant case** that would ►**impede or impair his ability to** ►**continue to perform the various household-related chores and duties he performed from a** ►**pre-incident standpoint**.

III. Work History

A. Pre-Alleged Incident

Relying upon Mr. Spector with regard to plaintiff's pre-incident work history, and assuming he is accurate, note the following:

- **Mid-1980's and 1990's**, ►**Owner** of **Alpine Automotive**, a **used car lot** in San Diego, CA. He **purchased and sold vehicles out of his own dealership**.
- ►**2000 – 2003 or 2004**, ►**Independent Contractor/**►**Automobile Broker** for **People's Chevrolet** in San Diego, CA. In that capacity, he **financed and purchased used cars** in order to fill the dealership's lot with used cars. He earned a **$500 commission**.
- ►**2003 or 2004 (for ~1 year)**, ►**Independent Contractor/**►**Automobile Broker** for **Father & Son Auto** in National City, CA. In that capacity, he **financed and purchased used cars** in order to fill the dealership's lot with used cars. He earned a **$500 commission**.
- ►**2008 – 2010**, ►**Sales Manager** for **Findley Lincoln**.
- ►**2010 (for only** ►**3 months)**, ►**Sales Manager** at **Towbin Dodge** and **Towbin Prestige**.
- **12/21/10**, began working for ►**Chapman Chrysler-Jeep** as an ►**Automobile Salesperson**; by ►**2011**, he became ►**Automobile Sales Manager**.

No other information is provided relative to work history.

Ambiguities/Inconsistencies:

It is noted that in Mr. Spector's work history, for reason unknown, there is ►**no information provided relative to employment from** ►**2004 through 2008**.

B. **Post-Alleged Incident**

1. Per Plaintiff's Expert/Mr. Spector

Relying upon Mr. Spector with regard to plaintiff's post-incident work history, and assuming he is accurate, note the following:

Plaintiff initially returned to work for ►**Chapman Chrysler-Jeep** in the positions of ►**Automobile Sales Manager** and ►**Automobile Sales Representative**. He was subsequently ►**off work for ►1.5 months after his ►1/14 ACL surgery to the right knee**. In ►**2014**, he RTW'd again for ►**Chapman Chrysler-Jeep** in the position of ►**Sales Representative** on a ►**part-time basis** until ►**8/16 or 9/16**, when he **left due to symptoms related to the subject accident**.

He earned approximately **$160,000 - $170,000 on an annual basis** and received **medical, dental, and vision insurance**, as well as the **company's matching participation in a 401(k)**.

2. Per This Counselor's Research

Per research by this counselor, plaintiff's LinkedIn profile lists his employment from ►**5/18 to present (►3 months)** as ►**Counselor/►Advisor** to ►**AAII Holding LLC**, in Las Vegas, Nevada.

Ambiguities/Inconsistencies:

It is of interest to note that there is ►**no information provided by Mr. Spector in his report of ►5/21/18** relative to this particular position that **began in ►5/18**. Thus, he apparently did not know, did not ask, and/or was not informed by plaintiff of this new position.

This counselor reserves the right to make further comment if additional information is obtained relative to the current employment listed in his LinkedIn profile.

IV. Earnings History

A. Pre-Alleged Incident

1. Demonstrated Earnings

a) 5/21/18 Vocational Assessment/Mr. Ira Spector

2008, **$30,786**
2009, **$76,733**
2010, **$60,225**
2011, **$101,703**
2012, **$156,355**

Average Earnings Per This Counselor's Calculations:

Based on income reported by Mr. Spector, in the ►**5 unencumbered years prior to DOI**, plaintiff demonstrated average earnings of ►**$85,160/year**. [*Math:* $30,786 + $76,733 + $60,225 + $101,703 + $156,355 = $425,802 ÷ 5 = $85,160.40]

2. Pre-Incident Earnings Potential

a) 5/21/18 Vocational Assessment/Mr. Ira Spector

Mr. Spector speculates that if plaintiff had been able to continue to work as an **Automobile Sales Manager**, he **would have continued to earn at a capacity that met or exceeded his 2012 (pre-incident) and 2014 (post-incident) earnings**, since he was working for a high-volume dealership.

He stated that plaintiff felt very strongly that **the acknowledgement he had received as a successful Automobile Sales Manager** would have **propelled him to higher earnings** as well as **promotions** to a position such as ►**General Sales Manager**, which plaintiff apparently indicated produces earnings of ►**$200,000 to $300,000/year**.

Lastly, Mr. Spector opined that conservatively, plaintiff's most probable level of earnings would have been at the ►**90th percentile** for ►**General Sales Managers** which, as certified by the Bureau of Labor Statistics for the Metropolitan Statistical Area of **Las Vegas/Henderson**,

is commensurate with plaintiff's demonstrated earnings of ►**$163,650/year**.

Ambiguities/Inconsistencies:

1) Notwithstanding Mr. Spector's speculations with regard to plaintiff's earnings potential, it should be pointed out that from a ►**pre-incident** standpoint, plaintiff's **average earnings for the ►5 unencumbered years prior to DOI** was ►**$85,160**, whereas plaintiff actually achieved his **highest earnings ►post-incident**, in ►**2014**, of ►**$178,603**.

2) Mr. Spector's indication that ►**but for this case**, plaintiff **would have achieved earnings at the ►90th percentile, or ►$163,650/year**, is ►**pure speculation** and ►**contrary to his ►demonstrated earnings history from a pre-incident standpoint**, although plaintiff was able to demonstrate earnings above and beyond that from a post-incident standpoint, in 2014.

3) Plaintiff allegedly told Mr. Spector that **Chapman Chrysler-Jeep is one of the ►highest volume dealerships in Las Vegas** (apparently as his rationale for listing an earnings potential above and beyond his demonstrated earnings). Notwithstanding same, note the following:

   Research by this counselor of the ►**top 150 dealerships in the U.S. does ►not support this contention**. In fact, ►**2 other dealerships in the Las Vegas area** are **listed in that top 150 group**: ►**Finley Automotive Group, ranked #22**; and ►**Fletcher Jones Automotive, ranked #25**. (*Source:* 3/16/15, Automotive News: Largest Auto Retail Groups Based in the U.S., Ranked by Unit Sales of New Vehicles)

   Counselor Comment:

   Once again, Mr. Spector **relies upon ►plaintiff for information rather than relying on an ►objective source**, and the **information relied upon is ►flawed**.

4) It is of interest to note that while **Mr. Spector alleges plaintiff ►would have achieved a ►high level of earnings ►but for this instant case**, per his testing, plaintiff's aptitude scores for ►**verbal reasoning** and ►**language usage** were ►**very low**, and his score on

►**word knowledge** was ►**average**. These **test results do ►not support the contention that he has ►above-average aptitudes for ►Sales/Management**.

b) Per Research by This Counselor

(1) 5/17 Bureau of Labor Statistics, Metropolitan and Non-Metropolitan Area Occupational Employment & Wage Estimates for **Las Vegas-Henderson-Paradise, Nevada**

SOC Code: 11-2031
Job Title: **Sales Manager**

►**No earnings listed**. BLS indicates that **estimates have not been released for the above-stated geographic area**.

(2) 5/17 Bureau of Labor Statistics, Metropolitan and Non-Metropolitan Area Occupational Employment & Wage Estimates for **Carson City, Nevada**

SOC Code: 11-2031
Job Title: **Sales Manager**

Mean annual ►**$145,808**

(3) 5/17 Bureau of Labor Statistics, Metropolitan and Non-Metropolitan Area Occupational Employment & Wage Estimates for **Reno, Nevada**

SOC Code: 11-2031
Job Title: **Sales Manager**

Mean annual ►**$117,083**

(4) 5/17 Bureau of Labor Statistics, Metropolitan and Non-Metropolitan Area Occupational Employment & Wage Estimates for **South Nevada**

SOC Code: 11-2031
Job Title: **Sales Manager**

Mean annual ►**$95,326**

Averaging the aforementioned earnings equals ►**$119,405.67/year**. [*Math:* $145,808 + $117,083 + $95,326 = $358,217 ÷ 3 = $119,405.67]

Ambiguities/Inconsistencies:

Although Mr. Spector alleges that his research of earnings per BLS for **General Sales Managers** in the **Las Vegas-Henderson** geographic area indicated a potential earnings capacity of **$163,650/year**, this counselor was unable to locate same, as indicated above. In fact, there was indication that the **information had not yet been published**.

B. **Post-Alleged Incident**

1. **Demonstrated Earnings**

a) 5/21/18 Vocational Assessment/Mr. Ira Spector

2013, **$105,863**
2014, **$178,603**
2015, **$97,509**
2016, **$55,217**
2017, **$5,277**

Counselor Comment:

It is of interest to note that **post-incident**, for calendar year ►**2014**, plaintiff ►**made more money than he had ever made prior to DOI**, which **does ►not seem to go to the weight of inability to perform his usual and customary occupation** as a result of this instant case.

In the following year, ►**2015**, plaintiff demonstrated substantially less earnings of only ►**$97,509**, which is still ►**more than his average demonstrated earnings for the ►5 unencumbered years prior to this instant case**.

V. Transferability of Skills

A. Based Upon **Educational Achievement**

- **Broker**
- **Banker**
- **Credit Manager**
- **Labor Relations Manager**
- **Market Research Analyst**
- **Sales Manager**

B. Based Upon **Vocational History**

- **Owner/Operator, Automobile Used Car Dealership**
- **Automobile Broker**
- **Automobile Salesperson**
- **Sales Manager**
- **Internet Automobile Sales**

VI. Other, State, Private, Federal, or Third Party Involvement

A. **Post-Alleged Incident**

1. **Social Security Disability**

a) Per Plaintiff

(1) *Alleged Onset of Disability:* ►**11/1/16**.* *Onset Conditions Claimed:* (a) **crippling neck pain**; (b) **crippling back pain**; (c) **crippling shoulder pain**; (d) **crippling knee injuries**; (e) **constant radiating pain**; (f) **numbness of fingers**; (g) **inability to stand or sit longer than a few minutes**; (h) **inability to perform regular functions of job**. (*3/30/17 P's Application for SSI*)

*Plaintiff's **DOI is ►6/19/13**, which is ►**3 years 4.5 months ►prior to onset of disability**.

(2) **4/17**, **SSI benefits commenced at $1,460.70/month**. (*Notice of Approval of SSI Benefits*)

Comparison of Onset Conditions Claimed for SSI to Injuries Incurred in This Instant Case (6/19/13 MVA):

This counselor reviewed records relative to plaintiff's Social Security Disability Claim.

It should be pointed out that this counselor has been under contract with the Social Security Administration since 1978. He has appeared in some 2,000 hearings and has represented individuals in their Social Security hearings as a non-attorney representative in approximately 250 cases.

With regard to plaintiff's claim for Social Security benefits as outlined above, please note the following with regard to the various onset conditions he is claiming:

Relative to Complaint of ►***Crippling Neck Pain***—

- 6/19/13 C-Spine CT Scan: *Impression:* ►**No traumatic injury to cervical spine seen**. ►**Degenerative changes noted**.

- 9/16/13 Orthopedic Consult/Dr. Perry: *Dx:* ►**Cervical spondylosis with** ►**preexisting C6-7 autofusion**.

- 10/1/13 C-Spine MRI/Desert Radiology: Straightening and minimal reversal of normal cervical lordosis with ►**multi-level discogenic disease** and ►**multilevel degenerative changes throughout C-spine**; ►**multi-facet arthrosis** with ►**severe right-sided facet arthrosis C7 to T1**.

- 11/25/13 Dr. Schifini: *Dx:* **Multilevel cervical disc osteophyte complex**; **multi-level cervical DDD**. X-rays appear to indicate ►**spontaneous fusion at C6-7**.

- 8/26/16 Dr. Tung: Treated at the ER of University Medical Center with complaints of **neck pain**. Patient has undergone a **CT scan and MRI of the cervical spine** depicting ►**cervical spondylosis** and ►**degenerative changes are noted throughout the c-spine**. The **degenerative findings were** ►**more likely than not present and** ►**preexisted the subject MVA of 6/19/13**. Patient demonstrated ►**signs and of symptom** ►**magnification** as noted in the Functional Capacity Evaluation.

- 4/24/18 Dr. Oliveri: The **first cervical MRI obtained ►10/1/13** references ►**multilevel degenerative changes** with **varying levels of disc osteophyte changes**, **mild central stenosis**, and **multi levels of foraminal narrowing**. Granted, the ►**age-related degenerative changes identified would ►occur over many years** and ►**predated the subject accident**.

Relative to Complaint of ►***Crippling Back Pain***—

- 6/19/13 Las Vegas Fire & Rescue: ►**No discussion of back pain** is an issue.

- 8/26/16 Dr. Tung: Patient ►**denies any ►mid back or ►low back pain**.

- 4/24/18 Dr. Oliveri: *Present complaints:* ►**No discussion of back pain** as an issue. *Dx:* **Lumbar spine pain ►resolved**. *L-Spine Exam:* Inspection reveals **normal lumbar lordosis without scars, deformity, or abnormalities**. **No tenderness**. **No spasms to palpitation**. *Special Testing:* **Straight leg raising negative in sitting and lying positions**.

Relative to Complaint of ►***Crippling Shoulder Pain***—

- 8/26/16 Dr. Tung: *Current Symptoms:* ►**No discussion of ►shoulder pain** as an issue, other than as related to the cervical spine. *Dx:* ►**No discussion of ►shoulder injury or pain is an issue**.

- 4/24/18 Dr. Oliveri: ►**No discussion of ►shoulder injury or pain** as an issue. *Projected Future Medical Care:* ►**No projected future medical care for ►shoulders** as an issue.

- ►**No imaging studies conducted of the ►shoulder**, i.e., plane x-rays, MRI, or CT scans.

Relative to Complaint of ***Crippling Knee Injury***—

- **6/19/13 ER Record**/Dr. Parker: *Dx:* ►**No mention of ►knee injury**.

- 12/10/13 Right Knee MRI/Desert Radiology: Findings consistent with ►**chronic ACL tear** with subsequent ►**scarring along intercondylar notch**; peripheral vertical tear of the posterior horn of the medial meniscus extending to the posterior body segments known to be associated with ►**chronic ACL tear**.

- 1/7/14 Dr. Miao/Desert Orthopedic Center: *Pre-Op Dx:* ►**Right knee ACL tear**; ►**arthritis**; ►**medial meniscus tear**. *Plan:* Right knee arthroscopy.

- 1/9/14 Dr. Miao/Institute of Orthopedic Surgery: Right knee arthroscopic-assisted ACL reconstruction; ATT allograft; arthroscopic partial medial meniscectomy.

- 1/10/14 Jared Marasco PT: *Dx:* (1) splaying of cruciate ligament; (2) joint pain left leg. *Plan:* PT treatments to right knee.

- 2/4/14 Dr. Miao: Post-op visit. Knee pain 4/10. Performed injection into right knee.

- 8/19/14 Dr. Miao: Continuous clicking and pain with sports and activities. Has a hard time walking; can't squat or kneel down.

- 8/26/16 Dr. Tung: *Current Symptoms:* ►**No complaints of** ►**knee pain**. *Past Surgical:* Right knee arthroscopy.

- 9/7/16 Dr. Herr/Orthopedist: ►**Tear of ACL sustained on 6/19/13 has** ►**not been documented in medical records** which I reviewed regarding the patient. I believe to a reasonable degree of medical probability that plaintiff **did** ►**not sustain a traumatic tear of the anterior cruciate ligament ACL of his right knee as a result of the 6/19/13 incident**. On ►**6/24/13** [►**5 days post-DOI**], Dr. Callaway documented an ►**anterior posterior drawer test of the right knee as** ►**negative**. This was to test the ►**integrity of the ACL**. A ►**negative test indicates that the ligament is** ►**intact**. Therefore, ►**as of the date of that exam of the right knee by Dr. Callaway, the** ►**right knee ligament was** ►**normal**. At worst, assuming an injury was sustained as a result of this instant case, it would likely be a contusion to the anterior aspect of right knee. *Additional Rationale for Opinions and Observations:* See pages 2-6 of the doctor's report. *Summary:* **Assuming plaintiff sustained an injury to the** ►**right knee on** ►**6/19/13**, ►**at worst** I believe to a ►**reasonable degree of medical probability** that it would have been limited to a ►**contusion to the anterior aspect of the right knee**.

- 6/20/17 Dr. Brennan: Experiencing ►**mild to severe right knee pain** that is ►**frequent**.

- 4/24/18 Dr. Oliveri: *Current Complaints:* Intermittent right knee pain. *Dx:* Right knee anterior cruciate ligament tear status post ACL reconstruction with allograft and partial medial meniscectomy on 1/9/14. ►*Causation:* ►**Deferred**. ►*Preexisting Conditions:* ►**Remote history of ►left ACL injury and surgery**. *Impairment Rating:* 4% for the right knee.

- 5/21/18 Vocational Assessment/Ira Spector: *Subjective Complaints: Plaintiff alleges* ►**balance problems particularly when his right knee becomes weakened; it clicks and pops**. ►**Stair climbing is particularly difficult** in that regard. **Average daily pain in his ►right knee over a week's time ranges from ►3-4/10**; ►**at worst 6-7/10**. ►**Right knee pain** is **worse in ►colder weather** and **when he performs ►walking or ►standing**.

Relative to Complaint of ►***Finger Numbness***—

- 1/30/14 EMG-NCV/Dr. Germin: *Impression:* ►**Moderate to severe ►CTS in left upper extremity**. No evidence of CTS on right. Moderate to severe ulnar neuropathy at the elbow on the right. No evidence of ulnar neuropathy at the elbow on the left. Needle exam deferred due to inability of patient to wait for test. Will perform at a follow-up visit.

- 2/4/14 EMG-NCV/Dr. Germin: ►**Moderate to severe ►CTS on the left**. Moderate to severe ulnar neuropathy at the elbow on the right. No evidence of ulnar neuropathy at the elbow on the left.

- 8/26/16 Dr. Tung: Nerve conduction and EMG studies were absent of any cervical radiculopathy although ►**positive for carpal tunnel syndrome on the left**. Patient has occasional symptoms involving the left arm which can involve the third, fourth, and fifth fingers of the left hand. Patient denies right arm symptoms.

- 5/15/17 Dr. Su: Symptoms include ►**numbness in ►bilateral upper extremity**, ►**weakness in ►bilateral upper extremities**.

- 6/16/17 Dr. Su: **Pain radiates into ►bilateral upper extremities** and into ►**4th and 5th digits**. This is a ►**chronic** and ►**worsening** complaint.

- 8/22/17 Dr. Su: ►**Numbness in ►bilateral upper extremities**, ►**weakness in ►bilateral upper extremities**. ►**Worsening factors** include ►**movement, ►reaching, ►bending, ►twisting, and ►lifting activities**.

- 10/5/17 Dr. Dixit/Neurology Center of Nevada: EMG-NCV of upper extremities shows ►**bilateral median nerve sensory neuropathy**, ►**mild demyelinating left ulnar nerve sensory neuropathy**, ►**mild ameliorating nerve sensory neuropathy**, ►**mild demyelinating right radial nerve motor neuropathy**, and ►**mild axonal issues**.

- 4/24/18 Dr. Oliveri: ►**Grip strength** per Jamar is ►**left 30/33/30 lbs**; ►**right 93/94/93 lbs**. Patient experiences ►**left upper extremity** ►**pain and** ►**numbness** and has ►**severe pain radiating into the** ►**left upper extremity** with ►**numbness and tingling primarily in the** ►**4th and 5th digits of the** ►**left hand**.

Counselor Comment:

1) On ►**11/1/16** (►**3 years 4.5 months** ►**post-DOI of 6/19/13**), plaintiff applied for **Social Security Disability** alleging ►**various onset conditions** which, per review of records, were ►**not injuries related to this instant case**, i.e. to the ►**C-spine**, ►**L-spine**, ►**shoulder**, and ►**knee**.

   Thus, plaintiff **achieved** ►**disability status under Social Security criteria** as a result of ►**conditions that do** ►**not appear to be related to this instant case**.

2) An issue that is ►**not mentioned in his Social Security Disability application** and is ►**not related to this instant case** is ►**high blood pressure** for which plaintiff had been **taken** ►**off work as of** ►**11/11/13**.

VII. Functional Limitations

Above and beyond ►**functional limitations as listed in this counselor's** ►**preliminary report** (attached as **Exhibit A**), a subsequent review of records indicates ►**additional functional limitations** as follows:

A. Pre-Alleged Incident

1. 6/19/13 Dr. Callaway: This report notes a ►**2001 surgery to the** ►**left knee ACL** as a result of an ►**MVA in 1998**.

   Ambiguities/Inconsistencies:

   Although **plaintiff** ►**denied any residual symptoms after the** ►**2001 left ACL surgery**, Mr. Spector ►**failed to seek any objective information relative**

to limitations imposed as a result of this pre-incident ACL repair as an issue. It has been this counselor's experience that limitations are usually imposed because this is such a severe injury.

B. **Post-Alleged Incident**

1. 9/24/13 Dr. Miao: Patient seen for a ►**new problem** and presents for evaluation of the ►**right knee**. After a work-related injury on 6/19/13, his **right knee symptoms have been present for 3 months**, due to his right knee allegedly hitting the dashboard. He may **RTW without restrictions relative to the right knee**.

2. 11/11/13 Dr. Perry: Patient states he has been **taken off work due to ►high blood pressure**. This implies that **his high blood pressure is related to the patient's pain symptoms**. For now, he should **remain on limited-duty restrictions**.

3. 1/9/14 Dr. Miao: Right knee arthroscopic-assisted ACL reconstruction; ATT allograft; arthroscopic partial medial meniscectomy.

4. 1/10/14 Smith PT: Discusses ►**right knee surgery** including **ACL repair and meniscectomy**. He has **lost motion and stiffness to a moderate degree** and **weakness to a moderate degree**. He is ►**unable to work due to this [►right knee] injury**. He is ►**unable to perform ►balancing on the involved leg** and ►**unable to perform ►squatting bilaterally**; ►**unable to ►walk more than a ►quarter-mile**.

   Counselor Comment:

   Records **do ►not indicate an injury to the ►right knee** as a result of this instant case, and thus his **difficulties and restrictions** as indicated by the physical therapist are ►**not related to this instant case** and have a ►**substantial bearing on plaintiff's ►ability to work and/or ►file for and obtain Social Security benefits**.

5. 6/9/14 Dr. Miao: **Released to work as of ►6/9/14** with ►**no lifting over ►25 lbs** and ►**no pushing or pulling over ►50 lbs**.

6. 6/25/14 Dr. Miao: Patient is ►**24 weeks status post ►right knee arthroscopy and ►ACL reconstruction**. He ►**may RTW ►without restrictions**.

7. 7/7/14 Smith PT: He is ►**independent** although ►**with difficulty**, and is **working ►fulltime**. His chief complaint is **pain rated ►2/10 [in the ►right knee]**. He has ►**lost motion and ►stiffness to a slight degree** and ►**weakness to a slight degree**.

8. 8/19/14 Dr. Miao: Patient is ►**28 weeks status post ►right knee surgery**. Continues to have clicking and pain with activities. Has a ►**hard time walking**; ►**can't squat or kneel**. He is ►**on his feet all day long** and is in pain. He **may ►RTW ►full duty, with ►no restrictions**.

   Ambiguities/Inconsistencies:

   Although Dr. Miao indicates that plaintiff has a ►**hard time walking** and ►**can't squat or kneel**, he nonetheless releases plaintiff to ►**RTW full duty** and provides ►**no functional limitations**, for reason and agenda unknown.

9. **3/26/18** Dr. Oliveri: Patient has worked as an **Auto Salesperson and Manager at Chapman's since 2010**. He **returned to work one week post-incident** and **worked through 7/13**. He ►**quit because he says the ►sitting was causing increased ►neck and ►upper back pain**. About ►**a month later**, he ►**returned to work ►part-time in Auto Sales at a ►different location for a ►few months**, until he **underwent ►knee surgery in ►1/14**. After his knee surgery, he ►**returned to work but continued to have ►difficulty with ►sitting due to ►neck and ►upper back pain**. He **worked until about ►9/16** when he states he ►**could no longer tolerate it** He is ►**in the process of applying for ►Social Security Disability**. *Restrictions:* When I performed my impairment evaluation on **4/23/15**, I noted on page 8 of my report that per a ►**right knee** MRI, the **radiologist considered the ►ACL tear to be ►chronic** but noted that this was ►**still being treated as part of the initial ►industrial claim**. Since that time, I acknowledged that the record review and report of opinion of Dr. Herr reviewed the deposition of **treating orthopedic surgeon ►Dr. Miao**, who **does ►not appear to relate the ►ACL tear to the ►subject accident**. I ►**defer to the ►orthopedic surgeon on any and all issues with respect to the medical ►causation of the ►right ACL tear**. *Work Capacity/Disability:* I do acknowledge the ►**invalid Functional Capacity Evaluation** in conjunction with his worker's compensation industrial treatment. It is my opinion that an ►**invalid Functional Capacity Evaluation and testing should ►not be equated to an individual who is somehow feigning their complaints or injuries**. The validity of a Functional Capacity Evaluation is set up to identify inconsistencies with grip testing and lifting which can and do occur in the population of patients who continue to have unresolved pain complaints and diagnoses that have not undergone definitive treatments such as plaintiff.

Furthermore, I do not see the invalid Functional Capacity Evaluation as negative. I understand that the type of work the patient performs would be expected to be in a sedentary to light physical capacity category. I would expect him, from a medical perspective, to have significant difficulties in performing fulltime work. The fact that he returned to work after his knee surgery until approximately 9/16 speaks to his level of determination. It also speaks to the worsening of his condition. In my opinion, missed work time has been reasonably medically explained based upon the cervical spine injury. It is possible he will have some further improvement in his condition where he can return to some type of gainful employment. However, my preliminary opinion is 2 scenarios: (1) **He will remain sedentary with permanent and total disability going forward on permanent basis**; or (2) **he will improve somewhat to the point where he can return to sedentary or light physical demands category of work on a part-time basis**. The total time period necessary for determination would be **another 3 months**. I would be happy to see him thereafter.

Ambiguities/Inconsistencies:

In the past, on other cases, **this counselor has known Dr. Oliveri to ►recommend and ►rely upon Functional Capacity Evaluations**, but for reason unknown, **in this case he ►does not rely upon same and considers it to be ►invalid**.

Per this counselor's research, according to a **1/18/13 Functional Capacities Evaluation post by Rob Wolinski, P.T., Kelly Hawkins Physical Therapy**, who oversees a dozen functional capacity evals [FCE's] each week as requested by physicians and adjustor in administering Nevada workers' compensation claims, **even when it is ►obvious to a treating doctor that the worker ►cannot return to his old occupation**, the **doctor ►may want a functional capacities eval so that the ►vocational counselor knows the kind of ►retraining programs that one can develop**. When asked **how one determines whether an ►FCE is valid or not**, Mr. Wolinski indicated that about **►30% of the evaluations he does each week are ►invalid**. He states that an **injured worker must pass ►70% of the validity criteria built into the test** in order to have a valid test. The **validity criteria tells the evaluation whether the worker is ►honestly trying his best to do the various physical tasks required during the evaluation**. The validity criteria was developed over many years from several sources. **FCE results are sent to treating physicians for a statement of permanent work restrictions**. **►Most physicians ►do rely up FCE results**.

Mr. Wolinski states that an **invalid FCE can cause serious problems for an injured worker**, for a treating doctor who reviews an invalid FCE report may now believe that the patient is trying to fake a more serious injury. ►**Most doctors release the patient to** ►**full duty** ►**without any restrictions when they see an** ►**invalid FCE result**.

10. 5/21/18 Vocational Assessment/Mr. Spector

With regard to **post-incident functional impairments**, Mr. Spector indicates in his report that as of ►**4/23/18**, plaintiff experienced a ►**new and additional problem with his** ►**left shoulder**, for which he saw Dr. Shannon. At that time, the condition was ►**worsening**. Dr. Shannon made a new diagnosis of **neurapraxia** and had plaintiff under **injections**. The doctor noted that it is ►**very possible he will have to undergo** ►**shoulder surgery in the future if injections do not work**. This **could lead to** ►**paralysis of his left arm**. [It should be noted that the aforementioned information is apparently third-party, provided by plaintiff.] Based upon the aforementioned, Mr. Spector concluded that **as it stands at this point, it appears that plaintiff does** ►**not have the** ►**physical integrity to comfortably** ►**alternate between** ►**sitting and** ►**standing** due to the unrelenting pain he is currently experiencing based on a **neurapraxia flare-up and other symptoms he is facing**. Thus, unfortunately, ►**Dr. Oliveri's scenario #1 is** ►**most probably accurate**.

From a **vocational perspective**, Mr. Spector alleged that **physicians are under pressure from insurers to release workers to work quickly**, and opines that plaintiff was ►**on occasion released to RTW on a** ►**premature basis,** ►**prior to a** ►**full medical work-up of** ►**all body parts that he had complained about**.

Lastly, Mr. Spector indicates that as of **12/17**, **plaintiff has been accepted by the Social Security Administration as being totally disabled** and **eligible for Social Security benefits**. Mr. Spector indicates that **plaintiff received benefits after his first request** and it is his understanding that the **Social Security Administration reviews medical testimony and full medical records** in order to make such a determination.

Counselor Comment:

1) Although **Dr. Oliveri indicates that the** ►**time plaintiff missed from work can be explained by his** ►**cervical spine injury**, he also indicates that plaintiff had a ►**chronic knee injury which** ►**required surgery** and was ►**not related to this instant case**. Thus, ►**at least part of the missed time**

from work is ►**not related to the cervical spine injury allegedly sustained in this instant case**.

2) It is of interest to note that **Dr. Oliveri, in the past, has ►never restricted plaintiff from ►engaging in work** as an issue, **nor ►restricted him to ►part-time work**, other than ►**after he had discontinued work activities** and ►**applied for Social Security Disability** with ►**multiple onset conditions**, ►**many of which are ►not related to this instant case**.

3) It should also be pointed out that on ►**11/11/13**, Dr. Perry indicated that plaintiff should be kept on ►**limited duty restrictions**, noting that he had been in the ER a few times since his last visit and had been **taken ►off work due to ►high blood pressure**.

4) Notwithstanding the ►**8 doctors who have imposed restrictions**, Mr. Spector opines that plaintiff is ►**unable to return to the labor force**.

5) Although Mr. Spector feels that **plaintiff does ►*not* have the ability to withstand ►fulltime, gainful employment**, it is this counselor's view based upon review of records that **plaintiff's condition has in fact ►medically improved to the point where he ►can perform ►part-time work**, which is ►**in line with Dr. Oliveri's scenario #2**.

6) For reasons unknown, Mr. Spector **relies ►only on Dr. Oliveri** and **does ►not give consideration to the ►preponderance of evidence** which indicates that **plaintiff, overall, from a ►functional standpoint, ►is capable of returning to work** and in fact **has ►demonstrated the ability to work for a period of ►3.3 years post-incident**.

7) Mr. Spector has **rendered an opinion that is ►not based upon the facts of this case**, i.e., that ►**physicians are under pressure from insurers to ►release workers to work quickly**, thus violating their ethical requirements in these types of administrative proceedings within the Nevada workers' compensation system. **This counselor gives ►little credence to the aforementioned opinion**.

8) Although Mr. Spector comments that the Social Security Administration has deemed plaintiff to be totally disabled, he **does ►not discuss** the ►**multiple onset conditions** that plaintiff asserts in his Social Security Disability application, ►**many of which are ►not related to this instant case** (i.e., ►**C-spine**, ►**L-spine**, ►**shoulder**, and ►**knee**; as well as ►**high blood pressure** as an issue), and many of which Mr. Spector has documented in his

report. Please see the **Other, State, Private, Federal or Third-Party Involvement** section of this report relative to this particular issue.

VIII. Present Vocational Potential, Occupational Receptivity, and Earnings Capacity, Taking into Consideration Current Sequelae

A. Vocational Potential

In this counselor's view, nothing precludes plaintiff from returning to his usual and customary occupation of **Automobile Sales Representative/Manager**.

B. Occupational Receptivity

As demonstrated.

C. Earning Capacity

As demonstrated.

IX. Vocational Potential with Training Enhancement

Not necessary.

X. Life Care Plan

Based upon contacts with defense forensic medical experts, this counselor is still of the opinion that there are ►**no future medical needs based on this instant case**.

XI. Loss of Earnings

According to Mr. Spector, plaintiff was ►**off work for a period of** ►**1.5 months after his** ►**1/14 ACL surgery to the right knee**. Because this is ►**not related to this instant case**, it **does** ►**not appear to relate to loss of earnings as an issue**.

Furthermore, Mr. Spector indicated that plaintiff worked on a ►**part-time basis after his knee surgery** (thus from approximately ►**mid-2/14 to** ►**8/16 or 9/16**), but it is ►**unclear** if his ►**part-time employment** was **due to** ►**injuries alleged in this instant case** or **due to problems with** ►**other body parts that plaintiff claimed in his** ►**Social Security Disability application**. Thus, once again, it is ►**unclear** if this is a ►**loss of earnings related to this instant case**.

Additionally, it is this counselor's view, based upon the ►**preponderance of functional limitations imposed**, that after plaintiff left his employment as of 8/16 or 9/16, he would suffer ►**no loss of earnings** because he is ►**not disabled from his usual and customary position** ►**as a result of this instant case**.

Lastly, it appears from plaintiff's LinkedIn profile that from ►**5/18 to present** he has been a ►**Counselor/►Advisor** to **AAII Holding LLC** in Las Vegas, Nevada, and ►**additional information is needed relative to ►earnings from that venture** if there is a claim for loss of earnings beyond 9/16.

Report submitted by:

Edward L. Bennett, M.A.
Certified Rehabilitation Counselor
Certified Disability Management Specialist
Diplomate, American Board of Vocational Experts

ELB:ck

Attachments: Exhibit A Functional Limitations as Listed in This Counselor's Preliminary Report (pages 2-3)

Exhibit A

Functional Limitations as Listed in This Counselor's Preliminary Report (pages 2-3)

1. 5/3/16 Deposition of Bahram Yahyavi
2. 1/17/18 Designation of Expert Witness
3. 6/7/18 Plaintiff's Expert Disclosure and Supplemental Pre-Trial Disclosures
4. 6/16/18 Plaintiff's Responses to Defendant's Third Set of Request for Document Production
5. 6/22/18 Plaintiff's Responses to Defendant's Fourth Set of Request for Document Production

1. Preliminary opinion Vocational

Nothing precludes plaintiff from returning to usual and customary occupation

Rationale for opinion

7/2/13 Dr. Shah, evaluated 6/25/13 and due to condition will be unable to return to work until 7/15/13

7/8/13 to 7/18/13 Dr. Klausner, may return to modified duty as of 7/8/13 to 7/18/13, should wear a collar while at work

7/8/13Dr. Goodstein, PAC., released modified duty from 7 /8/13, work restrictionsand need to wear collar while at work

7/15/13 Dr. Shah, patient currently employed as sales manager

7/18/13 Dr. Klausner, may return to full Duty as of 7/18/13

9/24/13 Dr. Miao, may return to work without restrictions with his knee

11/11/13 Dr. Perry, neurology evaluation, I will keep him with limited duty restrictions, has been off work due to high blood pressure

6/9/14 Dr. Miao released to work with lifting restrictions of 25 lb and pushing and pulling limited to 50 lb

6/24/14 can return to work without restrictions

8/11/14 Dr. Perry, weight lifting only up to 25 lb and pushing pulling limit 25 lb

8/19/14 Dr. Miao, patient may return to full duty without restrictions

9/22/14 Dr. Perry, will continue to work full Duty, and restrictions lifting up to 30 lb pushing pulling limited to 60 lb

11/10/14 Dr. Perry as far as employment we've discussed the option of functional capacity evaluation; the patient knows his job is Auto Sales and it's not too physically demanding for the most part; what is

disabling working greater than 6 to 8 hours; in the interim will keep him on physical activity restrictions

12/3/14 Dr. Fisher indicates status work light duty

2/11/15 Dr. Fisher, work status light duty

4/1/15 Dr. Fisher, work status light duty

4/8/15 Dr. Fisher, work status full Duty

8/26/16 forensic independent medical evaluation Dr. Tung, is not disabled from work

9/7/16 defense forensic Dr. Herr, Orthopedist, indicated that his right knee joint injury would have been limited to a contusion to the anterior aspect of the right knee

Counselor's comment: The positions that the plaintiff has performed in the past, manager sales, is considered sedentary work; the position of automobile sales worker is considered light work; and his educational achievement prepares him for sedentary work. It is this counselor's view that in light of restrictions imposed based upon treaters and defense forensic medical experts that plaintiff could continue to perform same and similar duties with and or without reasonable accommodations.

2. Preliminary opinion Life Care Plan

Per both defense forensics Dr. Tung and Dr. Herr, no additional medical treatment is necessary relative to this instant case.

Rationale for opinion

Review of reports by Dr. Tung and Dr. Herr.

Report submitted by:

Edward L. Bennett, M.A.
Certified Rehabilitation Counselor
Certified Disability Management Specialist
Diplomate, American Board of Vocational Experts

Attachments: Exhibit A File Reviews 1-5

ELB:krs

RPLY
DAVID S. KAHN, Esq.
Nevada Bar No. 7038
David.Kahn@wilsonelser.com
MARK SEVERINO, ESQ.
Nevada Bar No. 14117
Mark Severino@wilsonelser.com
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
300 South Fourth Street, 11th Floor
Las Vegas, NV 89101
Telephone: (702) 727-1400
Facsimile: (702) 727-1401

LAW OFFICES OF ERIC R. LARSEN
ERIC R. LARSEN, ESQ.
Nevada Bar No. 009423
750 E. Warm Springs Road
Suite 320, Box 19
Las Vegas. NV 89119
Telephone: (702) 387-8070
Facsimile: (877) 369-5819
Eric.Larsen@thehartford.com

Attorneys for Defendant,
Capriati Construction Corp., Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

BAHRAM YAHYAVI, Plaintiff, v. CAPRIATI CONSTRUCTION CORP., INC., a Nevada corporation, Defendant.	CASE NO.: A-15-718689-C DEPT.: XXVIII **DEFENDANT CAPRIATI CONSTRUCTION CORP., INC.'S REPLY IN SUPPORT OF ITS MOTION FOR NEW TRIAL** **Hearing: January 28, 2020** **Time: 9:00 a.m.**

Defendant Capriati Construction Corp., Inc. (hereinafter referred to as "Defendant"), by and through its counsel of record, DAVID S. KAHN, ESQ., of the law firm of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, and ERIC R. LARSEN, ESQ., of THE LAW OFFICES OF ERIC R. LARSON, hereby submits its Reply to Plaintiff's Opposition to Defendant's Motion for a New Trial. This reply is made and based upon the pleadings and papers on file herein, the attached Memorandum of Points and Authorities, and any argument that may be adduced at the hearing of this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff argues that defendant was allowed to present damages evidence at trial. This is a far cry from defendant being permitted to utilize all of its damages evidence at trial, which includes testimony of lay witnesses, documents, and expert opinions. Defendant was not permitted to present its full damages case at trial, which is what the instant Motion addresses.

For background, plaintiff's claim that defendant was permitted to fully argue damages is simply incorrect. Defendant's experts were in some instances limited by in limine rulings (such as expert Baker, whose biomechanical opinions were excluded at that stage). Then, during the trial itself, other defense damages opinions were not permitted, despite those opinions having been presented in timely disclosed expert reports by defendant. An example of that is when Dr. Tung, the defendant's medical expert, was prevented at trial from discussing during direct examination the critical damages and causation of damages evidence, relating to plaintiff's report to his doctor some twenty one (21) months before this accident of years of neck pain. Despite that information being in Dr. Tung's reports and thus incorporated into his opinions, and despite this issue being ruled on favorably to defendant during in limine motions and later in response to plaintiff's trial briefs, once Dr. Tung took the witness stand this Court essentially reversed its earlier rulings and would not let Dr. Tung discuss this critical issue. While it is true that during cross-examination plaintiff's counsel opened up some of these issues, that is not the same as permitting defendant to present its evidence during the direct testimony of its expert. Another similar example is when defendant's vocational expert Ed Bennett attempted to discuss alternative jobs available to plaintiff, he was prevented from doing so at trial, despite the list of jobs being in timely disclosed expert reports. So the notion that defendant was allowed to present its full damages case through the two (2) experts that did testify before the jury is simply fallacious. The later exclusion of the two (2) damages experts (Kirkendall and Baker) was in the context of earlier exclusion and limitation of defendant's damages expert testimony and opinions, and resulting in severe limitation of what was already a defense of damages issues limited at and before trial by this Court.

II.

LEGAL ARGUMENT

A.

THE DAMAGES CASE PERMITTED TO DEFENDANT WAS NOT A FULL DAMAGES CASE

Plaintiff contends that cross-examination is essentially the equivalent of presenting a party's own witnesses or expert witnesses. Case law, the concept of which seems to be ignored by plaintiff on this point, takes issue with such an argument.

> The opportunity to discredit an expert witness on cross examination is not the equivalent of the right to introduce affirmative evidence to rebut that expert's opinion. *Meunier's Case,* 319 Mass. at 427. Moreover, that doctors seldom change opinions in these circumstances is an agonizing truism to those who have attempted to accomplish it. *See Basciano v. Herkimer,* 605 F.2d 605, 611 (2nd Cir. 1978) ("... the value of cross examination to discredit a professional medical opinion at best is limited.").

Barbara O'BRIEN, Plaintiff/Appellant, v. ST. PAUL FIRE & MARINE INSURANCE COMPANY, and L. Scott Harshbarger, as He is Attorney General of the Commonwealth of Massachusetts, Defendants-Appellees., 1996 WL 33686137 (Mass.), 38.[1] The restriction of defendant's trial witnesses, experts, and evidence, cannot now be argued as being somehow duplicative of cross-examination.

"But a cross -examination is not the same as conflicting testimony from witnesses." *State v. Becktel*, No. 77149-3-I, 2019 WL 2092694, at *5 (Wash. Ct. App. May 13, 2019), *review denied,* 194 Wash. 2d 1008, 451 P.3d 343 (2019). Here, plaintiff's argument is essentially that because defendant had the opportunity to ask questions of the plaintiff's experts, who are professional witnesses with significant experience testifying and who authored written reports and

[1] That same case went on to find a violation of due process of constitutional dimension, saying that the concept of prohibiting opposing expert reports and evidence "...should be declared unconstitutional; its failure to guarantee worker's compensation litigants the right to submit their own relevant medical evidence at the final de novo hearing constitutes a deprivation of property without due process of law." *Barbara O'BRIEN, Plaintiff/Appellant, v. ST. PAUL FIRE & MARINE INSURANCE COMPANY, and L. Scott Harshbarger, as He is Attorney General of the Commonwealth of Massachusetts, Defendants-Appellees.*, 1996 WL 33686137 (Mass.), 40-41.

created medical records they would always stick to, that is the equivalent of defendant being able to call its own expert witnesses as to damages. The weakness of that argument advertises how thin such an argument is, added on top of which is the lack of any legal authority for such a proposition.

One California court, in analyzing the use of reconstructed evidence, simply assumed that a position similar to the one here asserted by defendant is true. "New contends, however, that 'cross -examination of reconstructed evidence is NOT the same as the ability to present and develop contrary original evidence.' Assuming that this is true . . ." *People v. New*, 163 Cal. App. 4th 442, 464, 77 Cal. Rptr. 3d 503, 519 (2008). In the instant case, defendant contends that plaintiff cannot know what the impact of the expert (Kirkendall and Baker) opinions and testimony would have been on the jury's evaluation and analysis of damages. All that can be known is that these experts did not testify, so the jury was not permitted to hear their evidence. Anything further is rank speculation. For purposes of the instant Motion, the Court should allow for all inferences in defendant's favor.

Plaintiff argues that stricken defense experts, including one solely opining as to damages, did not eliminate Defendant's ability to try its case on damages. Defendant's true damages case was never fully presented due to the striking of its experts (in addition to earlier limitations placed upon the testimony of those experts). Plaintiff's version of what the defense damages case should have been reduced to is an insufficient substitute for a real defense using real experts and real witnesses before the jury. The jury did not get the benefit of the defendant's expert testimony as to damages, including, based on evidentiary rulings and motion practice rulings, the two (2) witnesses that did testify before the others were stricken.

Plaintiff has at times cited to the *Quintero* case in support of his argument that cross-examination is somehow a substitute for the use of one's own witnesses. *Quintero* involved a case with medical expenses of $1885.00, a far cry from what is being alleged here. *Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000). In fact plaintiff argues that cross-

examination can controvert injury claims[2]. It doesn't say that cross-examination is somehow a substitute for utilizing one's own witnesses and evidence, and it certainly does not stand for that proposition in a case that plaintiff himself in other motions (such as the pending motion for attorneys fees) describes as complicated, medically complex, involving voluminous medical records, utilizing multiple medical treaters and experts as witnesses, etc.. Moreover, the lack of defense experts in *Quintero* was a choice made by the defendant in that case, which involved under $2000 in special damages. In part, the Supreme Court noted that the defendant in that case "did not controvert her damage evidence with independent witnesses..." *Quintero v. McDonald*, 116 Nev. 1181, 1184, 14 P.3d 522, 524 (2000). Here, this defendant did attempt to do so, but that attempt was thwarted by an Order of this Court which precluded damages expert testimony, evidence, and opinions. As an aside, the language of the *Quintero* case does not identify whether the cross-examination referenced was of treatment providers, experts, the plaintiff, or other types of witnesses.

In other words, the *Quintero* case does not stand for the proposition that stripping a defendant of its damages experts in a case like this one is in any way cured by allowing some cross-examination, as plaintiff urges. What it does appear to stand for relative to this discussion is that if a defendant elects not to call a witness to controvert a plaintiff's witnesses or their theory of causation, a jury is supported in making determinations based solely on cross-examination. Here, defendant made no such election or tactical decision not to call experts, and instead defendant's damages experts were stricken at the commencement of defendant's case in chief. Notably, any cross-examination of the plaintiff's witnesses or experts here was in the context of defendant anticipating that it would have the opportunity to present its own damages expert witnesses, Kirkendall and Baker. As a result, trial decisions about cross-examining plaintiff's experts, and lines of questioning of those experts, were shaped with the notion that defendant's own experts

[2] It is believed that the following brief quote is what plaintiff has referred to. "Although McDonald did not present expert testimony challenging causation, testimony elicited from Quintero's witnesses on cross-examination controverted Quintero's claim as to the extent of her injuries. Further, cross-examination of Quintero's evidence revealed that Quintero suffered from a pre-existing back injury, which could have caused her symptoms." *Quintero v. McDonald*, 116 Nev. 1181, 1184, 14 P.3d 522, 523 (2000).

would present controverting evidence, and not that defendant would solely utilize cross-examination of the plaintiff's experts, as was the case in *Quintero*.

Effective cross-examination is simply not the equivalent of substantive evidence. While plaintiff makes that argument, he cites no case law to support such a position in respect to the facts and procedural posture here. This Court's refusal to allow defendant to respond to plaintiff's version of the speed of the accident, as well as his presentation of economic damages, allowed plaintiff's version of this critical evidence before the jury to appear as unchallenged. Plaintiff cannot now say that defendant was given the same damages defense as if defendant's experts in economics and accident reconstruction had testified.

Furthermore, since plaintiff withdrew his accident reconstruction expert at trial, there was no plaintiff expert on that topic to cross examine. Thus plaintiff's testimony, which defied science as to the collision speed (given defendant's crash test, as well as the opinions of plaintiff's own withdrawn accident reconstruction expert), could not be adequately countered by cross-examination alone. Dr. Baker's exclusion from the case meant that plaintiff's testimony at trial identified a collision speed twice that testified to by his own expert, and greater than five times that which Dr. Baker was prepared to testify to. The jury had no other way to hear this evidence, and cross-examination is certainly not an adequate substitute for this specific evidence here. Again, allowing defendant to have the most favorable inferences here would result in a jury having evidence from which a very different damages calculation could have been conducted.

The sanctions in this case did in fact strike certain damages evidence, specifically the testimony and supporting evidence of two (2) timely disclosed experts. While closing argument was allowed, and while cross-examination of plaintiff experts was allowed before it could be known that defense experts would be stricken, there can be no question but that defendant's damages case was impaired and limited. The exclusion Order was in addition to earlier limiting Orders.

Plaintiff's argument would be much stronger if no defense damages evidence had been excluded.

> In addition, Francis contends that the district court "eviscerated" his evidence, affirmative defenses, and counterclaims as a sanction for his invocation of the privilege. He asserts that this was an improper discovery sanction under the factors set forth in *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990). Francis's premise is fundamentally flawed. **The district court did not exclude any evidence**—indeed, Francis never offered any evidence. Nor did the district court strike any of Francis's defenses or counterclaims.

Francis v. Wynn Las Vegas, LLC, 127 Nev. 657, 664, 262 P.3d 705, 710 (2011) (emphasis added).

Here, there can be no dispute that certain expert damages evidence of defendant was excluded. Expert Kirkendall was a damages-only expert. Expert Baker had opinions as to vehicle speed that defendant relied upon in formulating its trial strategy and its defense. Cross-examination of the plaintiff and his treaters and experts, in the absence of knowledge that defendant would not be able to present its own evidence and expert witnesses, is no substitute. Defendant's rights to a jury trial were impaired and diminished. Regardless of the propriety of the sanction, the current Order does not reflect accurately what occurred at trial. In point of fact, defendant had damages expert witnesses, along with their testimony and evidence, excluded at trial.

As to Dr. Baker, the underlying evidence supporting his opinions and anticipated testimony is of special significance. Due to conducting a crash test, defendant had a large number of videos and photographs showing that a 5.5 mph crash simulated and duplicated almost exactly the damage to plaintiff's vehicle in the subject accident. Moreover, the crash testing was conducted with the same make and model of vehicle, and the same exact type of forklift. As plaintiff withdrew his own accident reconstruction expert (who himself only opined plaintiff was going 15 mph [after earlier opining of a10 mph speed]), the jury would have been left with a very stark contrast as between the collision speed testified to by plaintiff of 30 mph and that of the defense expert of 5.5 mph. Given plaintiff's withdrawal of his foreign expert in the middle of trial, this left defendant with no way to demonstrate the true speed of the crash, which information goes directly to how the jury processed the plaintiff's damages as well as causation of damages. If a trial is truly a search for the truth, as the jury instruction used in this case states, then the jury was deprived of its opportunity to hear the actual truth.

What the jury heard instead was only the plaintiff's version of the truth as to damages and causation of damages. Defendant submits that information coming out in cross-examination of its experts only, or information coming out from cross-examination of plaintiff's experts, is not a substitute for real trial evidence.

Defendant was not permitted to utilize its economic damages expert Kevin Kirkendall following the sanctions Order. He was not permitted to testify, his opinions were not allowed in as evidence, and it was too late to attempt to use plaintiff's economist Dr. Clauretie for any similar purpose by way of cross-examination as he had already testified and been cross-examined.

Dr. Baker was not allowed to opine, as he had in timely disclosed expert reports and in deposition, that plaintiff was traveling 5.5 mph at the time of the collision, and not at the 30 mph speed that plaintiff (alone) imparted to the jury. A lower collision speed could easily have been used by the jury to arrive at a lower damages amount, to consider more of plaintiff's problems the result of his degeneration as documented in pre-accident reporting to his physician, and to attribute less of plaintiff's problems to this accident. All of this could have led the jury to a much lower damages amount, and defendant submits that allowing for all favorable inferences that is what would have occurred. Additionally, plaintiff's credibility was at issue, as he did not recall telling his doctor about years of neck pain some twenty one (21) months before this accident, and the discrepancy in accident speeds could have been considered by the jury in regard to impeachment and credibility as well.

As Dr. Baker's counterpart on the plaintiff's side was withdrawn, there was no way to elicit any similar evidence by cross-examining plaintiff's corresponding expert, since there was no such person at trial. Thus, as with other aspects of defendant's argument, plaintiff's evidence stood needlessly opposed as to damages by the exclusion of Dr. Baker's opinions and testimony.

Where damages are limited, a higher standard is required.

> When a district court imposes case-ending sanctions, we apply "a somewhat heightened standard of review." *Id.* However, sanctions are not considered case ending when, as here, the district court strikes a party's answer thereby establishing liability, but allows the party to

> defend on the amount of damages. *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 249, 235 P.3d 592, 596 (2010).

Valley Health Sys., LLC v. Estate of Doe by & through Peterson, 134 Nev. 634, 638–39, 427 P.3d 1021, 1027 (2018), *as corrected* (Oct. 1, 2018). While it is true that defendant was allowed to give a closing argument, and while it is true that defense witnesses who had already testified were not stricken, this does not diminish the reduction in defendant's case that the sanctions wrought. First, a damages only expert (Kirkendall) was stricken and excluded. Second, an accident reconstruction expert (Baker) whose opinions went in part to damages and causation of damages was stricken and excluded. This argument as to Dr. Baker ignores for now his earlier exclusion as a biomechanical expert. The loss of these two experts was not made up for by cross-examination, as plaintiff argues, as the correspondence cross-examinations had already been completed, unlike the *Quintero* case cited by plaintiff.

All in all, defendant was not given the opportunity to present its damages case. Despite an Order saying otherwise, and despite being able to give a closing argument to the jury, defendant was deprived of its ability to present a full and true damages case. Moreover, the analysis argued by plaintiff, including the notion that somehow despite the exclusions and limitations defendant had been permitted a full damages defense, is not borne out by the evidence adduced at trial. The evidence presented at trial in fact indicates otherwise, and inferences favorable to the defendant allow for a new trial as a result.

B.

ARGUMENT OF DAMAGES IS NOT THE SAME AS EVIDENCE OF DAMAGES

Defendant disagrees with plaintiff's position that closing argument is a valid substitute for trial evidence. This is especially the case when such evidence would have been presented by expert witnesses, one of which (Baker) was unopposed by plaintiff, and whose testimony would have further placed plaintiff's credibility at issue. Ultimately, plaintiff's loss of memory as to reporting years of neck pain to his doctor almost two years before this accident was a theme central to this case, placing plaintiff's credibility at issue. Allowing for all favorable inferences to the defendant yields a situation where plaintiff's credibility as to damages and causation of damages could have

been impaired, thus creating a lower verdict amount.

C.

THE EXCLUSION OF EXPERT KIRKENDALL MEANS THE JURY DID NOT HEAR FROM A WITNESS THAT THE PLAINTIFF'S DAMAGES WERE $0

Plaintiff argues that defense expert Kirkendall had little to say, since his opinions followed those of the two experts who did testify before the jury. Because Kirkendall would have said low damages, or zero damages after the initial year and a half of treatment, plaintiff contends that his opinions were of little value. In fact, the opposite is true.

By excluding Kirkendall's testimony and opinions, the jury was not allowed to hear the damages impact of the opinions of expert Kirkendall. The economic result of Dr. Tung's opinions and Ed Bennett's vocational opinions was denied to the jury in considering the value of this case. Moreover, plaintiff's expert Dr. Clauretie was allowed to have his opinions presented to the jury without challenge. It is the province of this type of economic expert to assign dollar values to these issues. Kirkendall's exclusion prevented that exercise, thus giving the jury only a picture of all of the money claimed by plaintiff (by Dr. Clauretie's testimony and opinions). While testimony as to lesser amounts could have been considered by the jury in the abstract, they had no evidence to consider in this regard. Economic testimony was outside the scope of the opinions and disclosures of experts Dr. Tung and Ed Bennett, in part as they understood that a separate economist was to cover these issues at trial. Thus favorable inferences to the defendant would yield a lower verdict amount had Kirkendall been permitted to testify.

D.

BANKRUPTCY ISSUES ARE RELEVANT

Plaintiff argues that the new case authority cited by defendant is irrelevant. However, given that defendant had from the end of one court day until before the morning of the next court day to brief its position, it is important that defendant has provided additional legal citations and authorities to support its position.

/ / /

Additionally, this Court referenced a different case in which a mistrial resulted from bankruptcy being mentioned. But that case was never identified. If, for example, that mistrial was based on violation of an in limine order (no such order was in place in the instant case), then that bears on how that other case should have been used by this Court in rendering its decision here. At a minimum, defendant should have the right to have that case identified, as this Court mentioned it in support of its ruling here.

E.

PLAINTIFF WRONGFULLY RAISED A DISCOVERY ISSUE BEFORE THE JURY

The testimony resulting in the sanction was from the same witness through which plaintiff insinuated to the jury that there was a willful destruction of relevant evidence. Defendant contends that plaintiff's effort justified a response, and that no order was in place preventing such testimony. But defendant also contends that plaintiff's attempt to have the jury determine a complex discovery issue at trial, instead of raising it with the Court, was itself improper.

During plaintiff's case, evidence had been presented through defense employee Cliff Goodrich that defendant had failed to produce certain documents. The implication or insinuation was that relevant evidence had been purposefully and willfully destroyed by defendant, which was not the case. This trial evidence was itself improper, as it sought to have the jury, and not the court, impose sanctions against defendant for improper discovery conduct. *See, e.g., Matsuura v. E.I. du Pont De Nemours & Co.*, No. CB 00-00328 SOM-LEK, 2006 WL 8436369, at *3 (D. Haw. Oct. 25, 2006). It was in response to this improper referral of a discovery dispute to the jury that defendant elicited the evidence causing the sanction Order, and thus the testimony at issue in the sanctions Order must be seen in its proper context.

F.

DEFENDANT DID NOT ADMIT LIABILITY AS PLAINTIFF CLAIMS

Defendant's witnesses did "take responsibility" for their actions and those of the entity defendant's employee, which was the focus of a full week of voir dire by plaintiff. But that is not the same as admitting full liability, which is what plaintiff asserts. Instead, both Mr. Arbuckle and

Mr. Goodrich were clear that if plaintiff was proceeding in the fast lane without a turn signal and then somehow quickly moved into the right turn lane shortly before the accident occurred, this may have provided some liability on the part of plaintiff himself. To the extent the defense witnesses agreed that Mr. Arbuckle's actions were imperfect on the date of the accident, that does not eliminate the possibility that plaintiff could have borne some percentage of fault as well. NRS 41.141.

G.

THE CURATIVE INSTRUCTIONS

Defense counsel's failure to comment on curative instructions that are violative of Nevada law is not an acceptance or waiver of that problem. By that point in the trial, it was clear that defendant would be punished for attempting to respond to plaintiff's evidence to the jury of some type of spoliation, and that the Court and plaintiff's counsel were fashioning a presentation for the jury that would allow for the jury to target defendant with a judgment. It was also clear that the defendant would not be permitted a full damages case, and that, in defendant's view, the actions being taken by the Court and being promoted by plaintiff's counsel were well outside of the norm of what was permissible.

The real issue for this Court to decide in regard to the curative instructions it read to the jury is whether doing so requires a new trial. Nevada law is clear that collateral source references are banned at trial, regardless of the reason.

> "The collateral source rule provides that if an injured party received some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." *Proctor v. Castelletti,* 112 Nev. 88, 90 n. 1, 911 P.2d 853, 854 n. 1 (1996) (internal quotation marks omitted). This court has also created "a *per se* rule barring the admission of a collateral source of payment for an injury into evidence for *any purpose.*" *Id.* at 90, 911 P.2d at 854 (second emphasis added).

Khoury v. Seastrand, 132 Nev. 520, 538, 377 P.3d 81, 93–94 (2016) (emphasis in original). This recent Nevada case endorses the notion that sources of recovery outside of a party's ability to pay,

such as in this case insurance, is per se barred from admission at trial. A per se bar seems clear and without exception, but like other actions defendant takes issue with it was imposed upon defendant at trial. The fact that the Court and plaintiff decided to give an instruction violative of this long established rule, which was done on very short notice that actions were being considered at the end of one day and again with almost no time to brief these issues or to review plaintiff's proposals which arrived shortly before this Court's decision on sanctions early the next morning (with no intervening business hours), is not the fault of defendant, nor did defendant in any way waive objections to same.

III.

CONCLUSION

For the foregoing reasons this Motion should be granted.

DATED this 22nd day of January, 2020.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

DAVID S. KAHN, ESQ.
Nevada Bar No. 7038
MARK SEVERINO, ESQ.
Nevada Bar No. 14117
300 South Fourth Street, 11th Floor
Las Vegas, NV 89101
Telephone: (702) 727-1400
Facsimile: (702) 727-1401
Attorneys for Defendant, Capriati Construction Corp., Inc.

LAW OFFICES OF ERIC R. LARSEN
ERIC R. LARSEN, ESQ.
Nevada Bar No. 009423
750 E. Warm Springs Road
Suite 320, Box 19
Las Vegas. NV 89119
Telephone: (702) 387-8070
Facsimile: (877) 369-5819
Eric.Larsen@thehartford.com

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on this 22nd day of January, 2020, I served a true and correct copy of the foregoing **DEFENDANT CAPRIATI CONSTRUCTION CORP., INC.'S REPLY IN SUPPORT OF ITS MOTION FOR NEW TRIAL** as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk; and/or

☐ via hand-delivery to the addressees listed below.

Dennis M. Prince, Esq.
Tracy A. Eglet, Esq.
Kevin T. Strong, Esq.
EGLET PRINCE
400 S. 7th Street, 4th Floor
Las Vegas, Nevada 89101
Tel: (702) 450-5400
Fax: (702) 450-5451
Attorney for Plaintiff, Bahram Yahyavi

Eric R. Larsen, Esq.
LAW OFFICES OF ERIC R. LARSEN
750 E. Warm Springs Road
Suite 320, Box 19
Las Vegas. NV 89119
Telephone: (702) 387-8070
Facsimile: (877) 369-5819
Eric.Larsen@thehartford.com
Attorney for Defendant, Capriati Construction, Inc.

Malik W Ahmad, Esq.
LAW OFFICE OF MALIK W. AHMAD
8072 W. Sahara Ave., Ste A
Las Vegas, NV 89117
Telephone: (702) 270-9100
Facsimile: (702) 233-9103
Attorney for Plaintiff, Bahram Yahyavi

David R. Koch, Esq.
Steven B. Scow, Esq.
KOCH & SCOW LLC
11500 s. Eastern Avenue, #210
Henderson, NV 89052
Telephone: (702) 318-5040
Facsimile: (702) 318-5039
Attorneys for Third-Party Lienholders Robert E. Duggan and Laura T. Duggan

BY Agnes R. Wong
An Employee of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

Electronically Filed
2/4/2020 3:12 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

BAHRAM YAHYAVI, Plaintiff, vs. CAPRIATI CONSTRUCTION CORP, INC., Defendant.	CASE#: A-15-718689-C DEPT. XXVIII

BEFORE THE HONORABLE RONALD J. ISRAEL, DISTRICT COURT JUDGE

TUESDAY, JANUARY 28, 2020

RECORDER'S TRANSCRIPT OF HEARING
DEFENDANT CAPRIATI CONSTRUCTION CORP., INC.'S MOTION FOR NEW TRIAL
PLAINTIFF'S MOTION FOR ATTORNEY'S FEES, COSTS, AND INTEREST
DEFENDANT CAPRIATI CONSTRUCTION CORP., INC.'S MOTION TO RE-TAX COSTS

APPEARANCES (see page 2)

RECORDED BY: JUDY CHAPPELL, COURT RECORDER

APPEARANCES:

For the Plaintiff:	DENNIS M. PRINCE, ESQ. KEVIN T. STRONG, ESQ.
For the Defendant:	DAVID S. KAHN, ESQ. MARK C. SEVERINO, ESQ. MICHAEL K. WALL, ESQ.

Las Vegas, Nevada, Tuesday, January 28, 2020

[Case called at 9:18 a.m.]

THE CLERK: Case Number A718689, Yahyavi versus Capriati Construction.

MR. KAHN: Good morning, Your Honor.

THE COURT: Good morning. Counsel, state your appearance. Let's go, plaintiffs.

MR. PRINCE: Your Honor, good morning and thank you. Dennis Prince and Kevin Strong for the plaintiff, Bahram Yahyavi.

MR. KAHN: David Kahn of the Wilson Elser firm with Mark Severino also from the Wilson Elser firm for defendant. And appellate counsel's here.

MR. WALL: Michael Wall for the defense.

THE COURT: Good morning. Let's start with defendant's motion for a new trial.

MR. KAHN: Yes, Your Honor.

THE COURT: I've read this stuff. Do you have anything to add?

MR. KAHN: I would like to just go over the high points and make a record, if I could, Your Honor.

THE COURT: Well, okay, everything you filed is in the record. I hear this all the time. Oral arguments which only are allowed mostly in southern Nevada aren't even allowed in Reno. So if you have something

that I haven't spent over an hour – several hours on all the costs to go through, go ahead. But if you're going to reiterate, everything in your written pleadings, and I'm not picking on you, I hear this all the time, that is the record. So go ahead.

MR. KAHN: I understand, Your Honor. That would probably cut about 75 percent of my arguments and this is, as the Court will recall, a request for roughly $8 million or more in awards and fees. So I will try to hit the high points as to things we haven't discussed before –

THE COURT: Okay.

MR. KAHN: -- based on what the Court just said.

So one of those is, I've cited a case in my reply brief on page 11, *Matsuura* case, from Hawaii that references a Kawamata Farms case, also in Hawaii, that discusses the notion of at trial asking a jury to decide a spoliation issue, which was the genesis of this entire sanctions issue in our trial, that that is in and of itself improper. That a trial counsel's not permitted to ask the jury to make spoliation awards which is what plaintiff's counsel did the first day of this testimony at trial with Mr. Goodrich, who you will recall is the individual who said the seven words and then the sanctions were issued. So that's one new item.

Another issue that we've essentially said in the pleadings but I want to make it clear is that our position is the damages case of the defendant was, if not eliminated, significantly impaired. And this Court's analysis of how to handle the sanctions was based on striking liability but the notion that damages was left intact. That is, our position is that is in fact not what happened, that taking away Mr. Kirkendall, who is a

damages only expert, and Mr. Baker's testimony, which could have gone to both damages and veracity of the plaintiff, was an impairment of the defendant's damages case.

Also in the plaintiff's brief, they've said a couple things that I think need to be straightened out here in oral argument. One is that our experts that did testify before our case in chief commenced with Mr. Goodrich and the sanctions was defendant was allowed full damages testimony. That's not the case. Dr. Tung testified during his direct and wanted to reference the preexisting medical problems of the plaintiff in his neck that were central to the defense, despite motion in limine orders in our favor, and trial brief orders in our favor, and oral motion trial arguments in our – orders in our favor, up to that point. When Dr. Tung took the stand, the Court essentially reversed its ruling and wouldn't let him discuss preexisting neck issues during his direct testimony.

Similarly, Mr. Bennett was not the subject of pretrial orders about his eleven different alternative job vocations that the plaintiff was qualified for. His reports were very thin, we're talking ten or twenty pages of total reports, timely disclosed. And, again, these were listed in his report. He was not allowed to talk about that during his direct testimony.

So the defendant's position is it was not allowed to have its experts that did testify talk about certain things and that by removing Mr. Kirkendall, plaintiffs claim that's no big deal because he would have said zero dollars. Well Dr. Tung and Mr. Bennett were not qualified as experts to say zero dollars. So essentially, while we had this other testimony supporting it, the end of the logical line was supposed to be

Mr. Kirkendall saying zero damages after fourteen months. That was not allowed. So the plaintiff had the position where my damages experts weren't allowed to say what they said in their reports when they got to trial and then by removing Mr. Kirkendall, the jury was not allowed to hear our position as to how that translated into dollars and cents. And that – essentially that was a removal of our damages case and that the Court's analysis at this time of the sanctions tracked the liability striking of an answer, did not track the damages issue.

What the plaintiff submitted to the Court for the – for the, and this is another thing we didn't really talk about at trial for the curative instruction, I'd submitted it without comment. But what the plaintiff submitted, if you put a couple of dots in between some of the words was, this Court told the jury that the defendant, and then there's some dots, has insurance to satisfy any verdict. Again, removing some words, but literally that's what the – that's what the verdict form said to the jury. The defendant has insurance to satisfy any verdict. That's not only encouraging the jury to make a higher award against defendant, but it could be interpreted by the jurors as the Court's sanctioning or permitting or encouraging such an award.

THE COURT: How – what about the fact that by your telling them that he – they were bankrupt, it's just the opposite. That there's no way anybody can get anything. Don't award any damages to them because they don't have any money.

MR. KAHN: I understand that was plaintiff's position and the Court's position, but the Nevada –

THE COURT: I think that's clearly the law.

MR. KAHN: Well the Nevada case law in collateral source is pretty clear as well. The *Khoury* case very clearly says there's no exception for a per se bar of any collateral source issue. The jury was handed a collateral source issue so if the Court's carving out an exception –

THE COURT: But you brought up a collateral source by saying they don't have any money. Okay. I –

MR. KAHN: I understand that's –

THE COURT: -- understand your argument. I just – and I think I've said this at the trial, et cetera, during, when we went two or three times. But, okay, go on.

MR. KAHN: Plaintiff's position in its opposition that our ability as the defense to cross-examine their experts is the equivalent of our ability to put on our own experts is a farcical notion. I've cited case law in our reply that says other courts have addressed this. That's not the case. The case law's held the opposite.

So reading through my notes, there were other points I wanted to make, but given the Court's instruction to me --

THE COURT: Well if there --

MR. KAHN: -- to try to limit it --

THE COURT: -- if, if you think that you haven't or somehow, go ahead.

MR. KAHN: I think that – I think –

THE COURT: I mean, I –

MR. KAHN: -- that taking in –

THE COURT: -- I didn't –

MR. KAHN: -- in conjunction with our pleadings, I think that's sufficient. I've raised the newer issues. I will say one other thing and that is – just to put it back in context, I know it's a few months ago, but the testimony of Mr. Goodrich arouse in the afternoon. The Court sent us back to our office at roughly 5:30 to come back for a 9 o'clock hearing. We had something on the order of 18 or 19 hours to brief this. We got the plaintiff's brief at 8:30 in the morning. So some of the information on the case law we presented on bankruptcy cases and no per se bar is new. We have submitted a few new cases based on the additional time to research. But essentially – oh, there was one other thing. This Court referenced another case during the trial. The Court did not identify the name of that case, the court, the number. But the Court indicated that it was supportive of the courts, another case in this courthouse where, I think, the Court's words were to the effect of there was a mention of bankruptcy and there was a mistrial on the first day of trial.

THE COURT: No, not at all.

MR. KAHN: Okay. I remember that being in the transcript. We don't have the trial transcript yet, but.

THE COURT: No, what it was, was there was an, for the record, and I'll get the case, I thought we discussed it. But your firm represented I believe it was 7-11 and sanctions, there was a sanctions hearing, there was evidence that was – there were problems. Your firm, I believe, and/or the attorney were sanctioned and it was settled before the

order was signed. In my case, and you know that case because you were the attorney, there was somewhat similar misconduct and, as you are more than aware, the Supreme Court – or you argued that it wasn't fair to give reputational sanctions. The Supreme Court disagreed under those facts.

This is, at least the second time for me, I ruled and I told you I thought your actions were intentional. There was no doubt in my mind regarding the mistrial. And so that was the third. Prior to that, I thought, you know, it was a, if you will, clean trial. But, so, yes, it was never anything to do with taxes in that first case. It was in front of Judge Sturman. Every – all the judges were clearly aware. And I can get you the case name, if you don't have it.

MR. KAHN: No, no, I have those. I --

THE COURT: Okay.

MR. KAHN: -- was not referencing either of those.

THE COURT: Okay but there --

MR. KAHN: -- But I re --

THE COURT: -- was nothing. No, it was never anything to do with taxes.

MR. KAHN: I recall the Court referencing another case that was unnamed about there was a mistrial on the first day because bankruptcy was raised. And it wasn't any of the ones the Court just mentioned and I was hoping because the Court made that statement, I recall it being made during the trial. If there was such a case, I'd ask that it be identified so we can go back and look, did that case have a pretrial

motion in limine order preventing that evidence. You know, what was the circumstances because it seemed to be supportive of the Court's ruling. If the Court doesn't recall it, that's fine. We'll go back and comb –

THE COURT: I don't --

MR. KAHN: -- through the trial transcript. But I – I recall –

THE COURT: You're right, it has been a couple of months and I've done two or three trials including another two- or three-week one. Anything else?

MR. KAHN: That's it, Your Honor. Thanks.

THE COURT: Okay. Plaintiff.

MR. PRINCE: Your Honor, thank you and good morning. I'm going to solely respond to what Mr. Kahn said here today. I think –

THE COURT: I appreciate it.

MR. PRINCE: -- our briefing articulates –

THE COURT: We still have --

MR. PRINCE: -- our position.

THE COURT: -- several other motions to go.

MR. PRINCE: With respect to this spoliation issue, that is a new issue that's never been raised before. In fact, we've never asked the jury to make any fully spoliation findings. We never encourage them to make any spoliation rulings. Of course only the Court can make those types of rulings because they result in evidentiary sanction. The quest – since liability was disputed, the question was asked of Mr. Goodrich of the investigation file and the employment file for Mr. Arbuckle and those could not be located. And I wanted to know the

result of the investigation and what those – what that consisted of, and that was appropriate area of cross-examination – of examination. There was never even an objection timely made. You didn't instruct the jury on spoliation. I didn't ask for any spoliation sanction. And so when Mr. Kahn says, disingenuously, that's the genesis of Mr. Arbuckle's testimony was this – these record-keeping type of questions, that goes to the willfulness and the lack of credibility of their argument, not only on that issue, but certainly every issue, because record keeping has nothing to do with ongoing business operations. Capriati filed for Chapter 11 reorganization. They stayed in business. Whether they downsized, grew, or otherwise, their record-keeping practices have nothing to do with that. So for them to try to elicit financially-driven testimony that, hey, we're at bankruptcy to kind of hopefully influence the jury to award less in damages, that's the only reasonable input which you've already made.

With respect to this notion that Dr. Tung was in some manner limited and his testimony is equally wrong. Throughout the trial, Mr. Kahn with, along with Dr. Tung, they specifically spoke about Mr. Yahyavi's preexisting degenerative condition. They spoke about the prior Southwest Medical record. We went exhaustively through the prior Southwest Medical records regarding complaints, exam findings, treatment recommendations, a prior x-ray. There was at no point any order limiting Dr. Tung's testimony by you. They had a full and fair opportunity to present that evidence not only through Dr. Tung, but through cross-examination of our experts, evidence presented in the court by way of the record, cross-examination of Mr. Yahyavi and

argument to this jury without limitation by you.

Now with regard to your order on the sanction for the willful misconduct by Mr. Kahn and Wilson Elser Law Firm, you never referenced another case where as allegedly during opening statement bankruptcy was mentioned. You mentioned the *7-11* case which was a specific lawyer-misconduct issue regarding Attorney Kim Cushing, a lawyer Kevin Smith and sanctioning the Wilson Elser law firm. You also referenced the case that was before Your Honor that Mr. Kahn personally argued and the Nevada Supreme Court later affirmed where willful misconduct was alleged to have taken place by the lawyer. You stated that. Had I requested a mistrial that not only would you grant the mistrial, you would sanction Mr. Kahn and the law firm of Wilson Elser for abusive litigation tactics. That's the basis for your findings.

Now with respect to the liability sanction, that was really no sanction at all and you previously expressed that. You indicated that had it been before you, you would have likely granted summary judgment on the issue of liability. But nevertheless, the defense argued liability throughout the trial. They never conceded liability at any point. However, during my case in chief, I got Mr. Arbuckle, the forklift driver, as well Mr. Goodrich, the Safety Director for Capriati, to admit that the driver of the forklift, he was responsible for causing this collision. So liability, striking – that really wasn't the significant sanction. With regard to, by that point, Dr. Tung had already testified, and it's important to understand contextually what he'd already testified to, that Mr. Yahyavi had an injury, it was primarily soft tissue, it was for 14 months. He had no vocational

disability that he could return back as normal job duties that any disability or impairment was not related to this collision. That was the basis for Mr. Bennett, the vocational rehabilitation expert's testimony that Mr. Yahyavi had no economic loss. Further, Mr. Bennett testified to this jury that there was other job opportunities available to Mr. Yahyavi, given his limitations, that he could go back to. So they did have a full and fair opportunity to discuss all aspects of damages.

With respect to Mr. Kirkendall, that relates in this way, Your Honor, and they're all linked to one another in this manner. Dr. Tung testified that Mr. Yahyavi could go back to his normal job duties and wasn't impaired as a result of this loss. Mr. Bennett, in reliance upon Dr. Tung said he had no vocational loss or disability. And in turn, Mr. Kirkendall, in reliance upon Mr. Bennett, said, he had no calculable loss. So therefore that wasn't going to add, that's really wasn't a significant sanction in and of itself. Mr. Baker, he was going to testify that this was a minor impact and potentially there was a limited potential for injury. You indicated that you were not going to allow him to testify to injury causation in any event. But Dr. Tung, by that point, had already testified that Mr. Yahyavi was in fact injured. And what did in fact require medical care, and did in fact suffer chronic pain for 14 months as a result of the subject collision. So Mr. Baker wasn't going to assist the jury. So that – that was not a substantial sanction. They got to make all of the arguments that they otherwise would have. So therefore, that's not a basis for it, either.

With respect to the curatives, Your Honor, the sole goal of

Mr. Kahn was to avoid having the entirety of the answer struck. You, and your – with using your inherent equitable power and discretion, you imposed a lesser sanction, meaning that you struck it only on the issue of liability, which really, not even a strike, really was that liability could no longer be contested. That's really an evidentiary issue. Secondly, you testified that any remaining experts couldn't testify which was only Kirkendall and Baker. They already got Dr. Tung which wasn't limited. You didn't give a limiting instruction to the jury on any of the prior expert testimony.

Then when it came to the curative instruction, at that time, Your Honor, it was the obligation of the defense to raise an objection to the content. Before you gave the instruction, Mr. Kahn specifically said I've read them, I have no comment on them. They didn't propose an alternative, they didn't say they were wrong, they didn't say they improperly influenced this jury. They didn't, there was no statement. This is just a Hail Mary at this point that there's unlimited insurance to satisfy a judgment. And Mr. Kahn, frankly, at this point, if he doesn't have the transcript is incredulous. They've already filed notice of appeal and he's arguing off of a vague recollection which is quite frankly factually wrong. Nowhere in that jury instruction, the curative, does it say there's unlimited insurance. He goes, like, well, he's trying to essentially rewrite it. Well, you can go, dot, dot, dot, insurance will satisfy the whole judgment. That's not what it says. It's in response to their statements and why there's a whole – the misconduct issue in the first place that they filed for bankruptcy and therefore these inferences, they don't have

money to satisfy a large judgment. That was the curative once they introduced the ability to pay type of evidence. So that was reasonable, fair, and appropriate.

And, again, there was no objection or alternative offered to you. If Mr. Kahn thought that that was so inflammatory, there should have been a timely and contemporaneous objection. There should have been a proposal of another curative. They could – you could have told them, all right, we took the time, he could have asked for more time to say we want to create another one. We could have sat down together, we could have crafted additional language or done something. He gave you every indicator that there was no objection to the instructions at all. Therefore, that is waived. Not only waived for the purpose of this motion for a new trial, but to be clear, because the appellate counsel's here, that is waived for appellate purposes. And I want you to make a finding today so the Nevada Supreme Court is clear for your verdict to uphold it and affirm it, that there was no timely objection made to any of the curative instructions offered.

THE COURT: Isn't that in the record?

MR. PRINCE: Not –

THE COURT: I don't need to make it.

MR. PRINCE: They didn't make an objection, but I want you to make that finding. And there's – that's fair to uphold your ruling. That's not, yeah, we're going beyond that, but that's – the record is supportive of that.

THE COURT: The record is the record. I'm sure –

MR. PRINCE: I understand that. And --

THE COURT: -- they'll have it. All right. Anything –

MR. PRINCE: -- so lastly, I mean, Mr. Kahn, again, I don't know if he doesn't understand or just trying to mislead you. I'm hoping it's not trying to purposely mislead you, but I don't think he understands collateral source. That only applies to the plaintiff. That's a rule that only applies to a plaintiff in a personal injury matter, meaning like you have health insurance, disability insurance, or otherwise. It does not relate to insurance by defendant and liability insurance is admissible for a variety of evidentiary issues. Only – it's only not admissible on the issue of negligence or fault. But it is admissible as it relates to bias or to overcome a prejudice, if necessary. And that was necessary in this case as part the curative.

So for all those reasons, Your Honor, you've already affirmed your sanctioning order. That's truly the basis of the motion for a new trial. There's no timely objection.

THE COURT: All right. Now you're repeating yourself.

MR. PRINCE: I know, I am. So anyway, I rest on that.

THE COURT: Mr. Kahn.

MR. KAHN: Yes, Your Honor, the sentence in the curative instruction is, is quote, and this is on page 15 of our motion.

THE COURT: Well I'll ask you directly. You didn't object. You didn't offer an alternate. You didn't do anything. Isn't he right that it's waived?

MR. KAHN: No, I don't think you can waive –

THE COURT: I mean –

MR. KAHN: -- something that the Nevada Supreme Court says has a per se bar.

THE COURT: Okay. Well, I disagree, but not with – not with the, I disagree that it's per se barred. And you have that in my prior ruling where I don't even remember how many pages we laid out all of that. But go ahead.

Any rebuttal?

MR. KAHN: Two things. I mean, the *Khoury* case, I cited the language somewhere on the *Khoury* case, which cites other cases. It essentially says there's a per se bar on reference to collateral source. I don't agree with Counsel that it only is – it's a one-sided rule. There's a reason that the jury doesn't hear about insurance. In this case, with the exception of the worker's comp issues which is a little bit unusual. But there's a reason why in the ordinary case, the doesn't hear anything about insurance except in voir dire.

As far as this notion that we had the full opportunity to litigate the case, my point is a technical one. Yes, Dr. Tung at some point started talking about some of the pre-existing issues because it came out on cross-examination. However, I had several hours with him on direct and I disagree with Mr. Prince. We can go back to the transcript, it says what it says, but I disagree with Mr. Prince. This Court did limit Dr. Tung to not talk about preexisting records from Southwest Medical Associates during my direct examination. The fact that it may have come in later is different. I had one opportunity to present my case. It was very limited

and very brief compared to plaintiff's week of voir dire and two weeks, a week and a half of trial testimony. I had several hours of testimony that I was trying to get in. The main defense of the whole case was this preexisting neck problems that were reported to Southwest Medical and my recollection is this Court's ruling limited Dr. Tung during direct when I was trying to take him through our position for the jury, him, Dr. Tung, being a primary witness, I was limited in doing so.

Thank you.

THE COURT: All right. Thank you. First of all, since that was your last – I, the record will speak for itself. I don't recall limiting Dr. Tung in any way regarding – we went over ad nauseam, we spent with him, certainly with your cross on their doctors about the preexisting. As I said, I don't remember anything about limiting Dr. Tung to not testifying about the preexisting. He – his opinion was that it wasn't related. He made that extremely clear. Jury did what the jury did, but, again, that's my recollection. You'll have the transcript.

Oh, as to the spoliation arguments to the jury, again, I disagree that that was an issue that they were allowed or required or suggested they would be making. The fact that the driving records of or the entire file for the driver was not available did come out. The driver testified it was his fault. The only thing caveat was where he said well there's in any case or every case, there is always two people at fault. I think, candidly, that that was detrimental. But in any event, that was his testimony that he voluntarily brought out. There were no spoliation findings. There were none requested, there were none made. The jury

was not asked or in any manner to make findings.

As to the actual Rule 59, I don't find any irregularities, et cetera, under A other than the – what we discussed as being certainly sanctionable which was the whole issue. And I – there was no objection to the jury instructions that were given at the end of the case. So my understanding is the Supreme Court, not only is it waived and that's certainly their ruling for appeal, but they have since expanded that and talked about even in discovery disputes if the objection isn't made in front of the Discovery Commissioner. So they have expanded that all the way down, if you will, not that the Discovery Commissioner, but, you know, aids us and we certainly can disagree so I guess we're above the Discovery Commissioner. But they have applied that rule now all the way to the discovery. If you don't make the objection, it is waived. Again, that'll be for them to decide.

There was no misconduct of the jury or the prevailing party. That's B.

C, no accident, surprise, no newly discovered. I don't see this is at all.

E being manifest – the jury manifestly disregarded.

F, the damages were based on what the jury felt was reasonable given the testimony and I don't, certainly I don't agree that there was any error in law. I set out the reasoning in detail. At least I think it was in detail regarding why it was sanctionable conduct. I set out under the rules and the case law why the sanction was appropriate. I set out in my order specifically that I was taking a lesser sanction of entirely

striking, given the – given what took place on, I think it was the day before the last day of trial at, in the afternoon. The reasons initially, and those are all in the transcript which I don't have either, initially brought up, I believe by defense counsel, I didn't know it was improper and then it was to explain why the file for the driver was missing. As – since I did hear all of the argument, I think an argument that because of a bankruptcy, a driver's file was missing, makes no sense. It isn't, unless maybe -- maybe there would or something testimony that the IRS, although this isn't even the IRS. The bankruptcy court came in and took their computers, took their computers, took their files, took their backups, seems somewhat – I don't know, is the word incredulous. It seems difficult to believe. I don't know if that's where you intended, Mr. Kahn, to go but it certainly wasn't appropriate. And even if that's where you intended to go, you could have gone there with a thousand different ways without bringing out bankruptcy. So the person that kept these files no longer works there, whatever it might be. To do that was, as I stated, intentional and it was grossly unfair and I did say, I remember specifically, I was going to grant a mistrial and make the defendant and defense counsel pay the entirety which would have been several hundred thousand dollars in costs, in time. In the third week of trial. It, to me, you saw the video which I attached as a Court's exhibit, I was shocked that this would happen or could happen. And I still can't explain it, but that's neither here nor there.

So I am denying the motion for new trial based on all of that. I believe I covered everything that I had want to. Certainly the Supreme

Court will have my order which I believe incorporates everything. I hope incorporates all the reasons that I made that, including going through the grounds and the – for sanctioning, and the fact that I didn't use the ultimate sanction. I didn't feel that that was necessary, et cetera.

Okay, we're done with that.

Let's go to fees. Plaintiff's motion for fees.

MR. PRINCE: Yeah.

THE COURT: Cost is going to –

MR. PRINCE: We'll do the motion to --

THE COURT: -- even be more --

MR. PRINCE: Right. Your Honor –

THE COURT: -- detailed, if you will.

MR. PRINCE: Certainly. I want to start off with the basic premise about Rule 68.

THE COURT: All right. My –

MR. PRINCE: Rule 68 –

THE COURT: -- just what I said to Mr. Kahn –

MR. PRINCE: No, I understand.

THE COURT: -- please.

MR. PRINCE: But I'm going to make an argument that I think is why we win today.

THE COURT: Okay.

MR. PRINCE: It's not only just to promote settlement, but it's also the drafter's intent that there's going to be consequences for not accepting what would otherwise be a reasonable offer of settlement

enforcing people under the posture of having to go to trial and to verdict. And Rule 68(f) talks about these as penalties. These are penalties. And there's penalties that come to the plaintiff in these types of cases, and there are penalties for the defense. And in this particular case, it's no question that an offer of judgment was served after full and a fair opportunity to complete discovery, understanding the ramifications of the case, the severity of the injury, the surgery, the neuropraxic injury, the disability of Mr. Yahyavi, after a mediation in January of 2019 for $4 million, what they chose to reject and therefore forced Mr. Yahyavi to go to trial.

Gone are the days, Your Honor, that the only way that lawyers are compensated is by the hour. While the defense mentality is typically it's just the rate times the amount of hours, that doesn't apply to every case or every context. There's a variety of fee arrangements which include hourly billing, it can include hourly billing with a cap, hourly billing with a contingent fee or a hybrid, hourly fee with a bonus or a success fee. It can be flat fee and therefore in most consumer-related litigation and personal injury cases, a contingent fee. Mr. Yahyavi and people like Mr. Yahyavi who suffered catastrophic personal injuries, they don't have the resources to litigate the case on their own with their own finances. In this case, Mr. Yahyavi was vocationally disabled, completely impaired, had no earning potential, is being evicted from his home. So the only way he can have a lawyer is by hiring one who's willing to accept it on a contingent fee basis. I know the Court has substantial experience not only on the bench, but before you took the bench, you practiced primarily

in the area of personal injury. Contingent fee structures are reasonable and common in personal injury cases. And in fact, it would be a very, I mean, a very small percentage. I can't even, even with my level of experience, I can't think of a personal injury case involving an individual physically injured where that person paid by the hour.

So in *O'Connell*, the Nevada Supreme Court recognized – the Court of Appeals recognized that a contingent fee arrangement in a personal injury case is an appropriate basis for the Court to award a contingent fee. Because there is substantial risks to the plaintiff and their lawyer by pursing these cases because as you've seen here, we not only expended years of litigation, but hundreds of thousands of dollars in costs and there's no way to predict what the outcome of these cases is going to be. And so you have the benefit now of the *O'Connell* case empowering a court to utilitze a contingent fee structure for the purposes of awarding fees. And in this case, we're asking that you do that. We're asking that you award the amount, the full fee on 40 percent, even though Mr. Yahyavi now – now there's –

THE LAW CLERK: Right there.

THE COURT: Hold on a second.

THE LAW CLERK: It's the packet right there.

THE COURT: Which packet?

THE LAW CLERK: That one right there to your left, where your hand. That one.

THE COURT: Okay. These are – were clipped wrong so I wanted to make sure I had that in front of me.

MR. PRINCE: Okay.

THE COURT: Okay, go ahead.

MR. PRINCE: And while *Beattie*, it was decided in 1983, talks about factors, I think – think about contextually the type of litigation involved. If there was a business dispute among two corporations or maybe an individual, significant resources, the hourly rate times hour fee analysis, may be appropriate.

Here, however, in a consumer-based case, personal injury case, it is not only common, it's customary, it's more than usual. It's in fact, I could say, almost the rule that these cases are prosecuted on a contingent fee basis. There is simply no question that the $4 million was a reasonable offer. The special damages themselves exceeded almost 3, or nearly $3 million. We recovered almost – the verdict was almost 6 million, two million more than the offer itself. That demonstrates that the number was reasonable.

Using the *Beattie* factors, whether the plaintiff's claim was brought in good faith, there is no reasonable dispute that when a forklift drove through the front of his Dodge Charger that day, caused the significantly disabling injury, that that claim was brought in good faith. Was the offer of judgment brought in good faith? Of course. It was after years of litigation, it was after a mediation. It was after he was vocationally disabled and the defendant fully knew the extent and the nature of the damages being claimed.

What's important to underscore here is who is the decision maker? Because, as you know, Your Honor, Capriati filed for

bankruptcy, and as the defense Counsel was plainly aware of before the trial started, we can't pursue any assets of Capriati. We are limited to the available insurance coverage. So it was clear – and not only is it always the case, but in this case, the insurer, which is the Hartford insurance company, they were the sole decision maker. Because Capriati wasn't coming out of pocket one cent for this verdict. So who was making the decision to reject the offer? So that's Item 3 under the *Beattie* factor. The offeree's decision, which I – in this case, has to be the Hartford, by order of the court, bankruptcy court, and proceed – that was grossly unreasonable in this case, $4 million was a – was not that substantial for a case like this. We – the defense wants you to believe that, oh, Mr. Prince asked for $14 million at the trial, look, he only got 6. Yeah, but you know what, we beat the offer of judgment by $2 million. It wasn't even a close call. Oh, and during the course of the trial, he made an oral offer of 10 million. That's true. Because we strategically made the offer of judgment for 4 million in January of 2019. But since the defense wants to talk about post-offer conduct, I think it's important, and I want to hand to you, make a record today, my client served an offer of judgment when it was only believed that there was $1 million in available insurance coverage and Hartford knew that there was 10 – a $10 million excess. An offer of judgment for $990,000 in January of 2017 which was also rejected. And I want to hand this to Court and mark it. I'm going to hand it to Counsel. We can mark it as a court exhibit for today.

Here's one – here's one for the Court, courtesy copy.

MR. KAHN: And I would just note that our firm and myself

were not involved in the case –

MR. PRINCE: Well --

MR. KAHN: -- at that point.

MR. PRINCE: -- but Hartford was. And that's the decision maker.

THE COURT: Well, I understand. I was – do not agree that Counsel should bring up oral discussions after. I'm not sure –

MR. PRINCE: The only –

THE COURT: -- that this has much to do with it, but it was – was, yes, it is filed so it's there. All right.

MR. PRINCE: And the reason why I bring it up to Your Honor is because, of course, you have to look at, make your deci –

THE COURT: And It was served, correct?

MR. PRINCE: Correct.

THE COURT: Okay.

THE CLERK: So it's not an exhibit, then.

THE COURT: No, we'll make it an exhibit.

THE CLERK: We will. Okay.

MR. PRINCE: Yeah, court exhibit for today.

THE COURT: Court's exhibit.

MR. PRINCE: And the reason why I bring it up is because defense is arguing my client's post-offer conduct, settlement discussions during the trial does somehow ameliorate their lack of reasonableness in rejecting the $4 million offer. And so therefore, that – I think that discussion, they've opened that door to become relevant and that's why I

bring it to your attention just to demonstrate the reasonableness of Mr. Yahyavi's settlement position leading up to the time of the trial which Hartford forced him to trial because there was no reasonable offer. There is no reasonable conclusion other than this was a grossly unreasonable decision not to accept. Mr. Yahyavi, going to the fourth doctor, whether the fees sought by, they are reasonable and justified.

In, I think, this is what I talk about being contextual. In consumer-base litigation personal injury cases whether the individuals' class action cases, because the people lack the resources to fight large companies and put large insurance companies like Mr. Yahyavi did in this case, the resources, they have to employ someone on a contingent fee basis. Forty percent after litigation is not – is the standard within the community. Mister – now because Mr. Wall's involved and they filed a notice of appeal, Mr. Yahyavi has to have to pay 50 percent now. There's a fee escalation. We're only asking you to award a 40 percent fee. Mr. Yahyavi, no matter what, if you impose an hourly fee, then he's penalized. That's not a penalty to these defendants and a sophisticated insurer, like the Hartford, who's the decision maker here, not the client, not the Capriati, they know these cases impose a risk. They know that these cases require someone like Mr. Yahyavi to have a lawyer who's going to spend hundreds of thousands of dollars so that's how we level the playing field. And now they know, uniquely know, that these personal injury cases are brought on a contingent fee basis. So when it comes to these cases, a 40 percent fee is reasonable. They do not – I've practiced in this community for 27 years, virtually exclusively in the area of

personal injury law, one third before litigation, 40 percent after litigation is usual, customary and almost the rule. So therefore 40 percent of the full verdict amount, the fees on that are $2,510,779, Your Honor. You are empowered under the *O'Connell* case, the *Beattie* case, and the exercise of your reasonable discretion to award fees of that amount.

Let me talk about costs.

THE COURT: Well.

MR. PRINCE: Penalty costs.

THE COURT: Okay.

MR. PRINCE: Unless you want to have the argue on fees and we'll go – because there's two different types of costs.

THE COURT: Yes.

MR. PRINCE: These are penalty costs. The drafters had to realize, and think about how the rule functions, I mean Rule 68, had to realize and have realized, even with the most recent amendments, where you could consider several offers of judgment, you go back to the lowest one. So that's this, as an aside, anecdotal. But when they talk about a penalty, they talk about post offer costs. Any prevailing party under Chapter 18 is going to be entitled to their costs as allowed by statute. So when you're talking about a penalty, you're talking about you're going to get an addition to that, the cost that happened after, they were incurred after the service of the offer of judgment. In this case, after – costs after service of the offer of judgment were $105,716. Those are the penalty costs. Otherwise the rule would make no sense. You can't even argue well that's a double recovery. It's not entitled, it's not – it's different

because as the rule states, this is a penalty. For example, why this is reciprocal and why this rule construction not only makes sense but is the based upon the plain language. If, for example, Mr. Yahyavi didn't beat any defense offer of judgment, he would not be entitled to costs at all. He wouldn't be entitled to Chapter 18 costs. He wouldn't be entitled to prejudgment interest. And, in fact, the defense would be entitled to costs and potentially fees after the service of the offer of judgment. So that's – the rule function as a true penalty. And it really has lots of teeth and empowers you to make these types of decisions.

Secondly, as it relates to penalty interest, Mr. Yahyavi was always going to get under the statute for prejudgment interest, interest on the past damages. Rule 68(f), subpart 2, talks about the allowance of interest from the date on the entirety of the judgment, applicable interest on the judgment from the time of the offer to the time of entry of judgment. So that's in addition to the prejudgment interest. We've calculated the prejudgment, or excuse me, the penalty interest on the entirety of the judgment amount for $312,968. And that – those aspects combined relate to the penalties for not accepting the $4 million offer of judgment. In the defense papers, they don't offer any other reasonable construction of Rule 68 and it's in a relationship with Chapter 18, at least the cost or even prejudgment interest for that matter. And at some level, this whole argument of well this is a double recovery. You know what? In effect, it is. It's not really a double recovery, it's the penalty for not accepting the offer of judgment and this is the way that the drafters of Rule 68 have encouraged, ,because that's the stated purpose, have

encouraged parties to settle and when they don't settle, there's certain penalties that can be and should be invoked. We're entitled, as a matter of right, to post offer cost. We are entitled as a matter of right to the post offer interest as penalty. The only discretionary aspect is the fees. So there's no discretion as it relates to costs and interests. Those have – the penalty cost and the penalty interest only in discretion would relate to the fees. And I believe under the *O'Connell* case, you have the discretion and power to award the full 40 percent contingent fee.

THE COURT: Thank you.

Mr. Kahn.

MR. KAHN: Well given that Counsel has gone on for a long time and not limited himself to new issues, I'm going to try to –

THE COURT: I would tend to agree --

MR. KAHN: -- go through my notes this time.

THE COURT: -- so go ahead.

MR. KAHN: First of all –

THE COURT: I tried.

MR. KAHN: I understand. First of all, let's cut to the chase here. What Counsel's now telling the Court seems to be that the plaintiff should end up with $9 million and Mr. Prince and his office should get half of that. That's what he's saying to the Court. He says the plaintiff now owes him 50 percent. He's asking for millions of dollars on top of the verdict of costs and fees. If he ends up with $9 million and he gets half, it's four and a half million dollars. Is the plaintiff also getting more money? Is the plaintiff sharing attorney's fees now?

Based on this notion of the *O'Connell* case, let's talk about that for a second. The *O'Connell* case was a very small case where a lawyer said I worked hundreds of hours and I kept no time records. The Supreme Court was very clear – not the Supreme Court, the Court –

THE COURT: The Appeals Court, yeah.

MR. KAHN: -- of Appeals that rendered the decision was very clear. It said in this case, we'll allow the attorney to get some fees with the representation that he didn't keep time records. And he worked hundreds of hours. Mr. Prince now apes that language. I worked hundreds of hours, my firm worked hundreds of house, quote, unquote, in a case worth millions of dollars. And it's essentially seeking about $500,000 an hour. Mr. Prince didn't say one word in the last 20 or 30 minutes about what are reasonable fees by the hour because he's trying to ignore that. But that's what *Beattie* and *Brunzell* and Supreme Court direct this Court to do. You can't just ignore that the offer of judgment is from January, that he had eight months in the case. That it's close to $300,000 a month in fees he's seeking. That he didn't represent at any time that the Eglet Prince office doesn't keep time records of any sort. That the other firms that worked on this don't keep time records of any sort. And the Supreme Court was clear, the better practice is to keep time records. So *O'Connell* was – and not the Supreme Court, sorry, the Court of Appeals. So *O'Connell* was in the nature of an exception to the rule. And so now if you do what plaintiff is asking here, you are essentially setting a precedent, whatever the number is, multiply it by .4. And guess what? Even if we have time records and can keep estimates,

we're just going to say we've worked hundreds or hours and empower you to multiply everything by .4 or .5 or .33, whatever the simple math is.

But what the Supreme Court requires you do, if you, in your discretion, you award attorney's fees, is to identify a reasonable amount of fees. And I submit to the Court, the defendant submits to the Court, that $5,000 an hour or $2500 an hour or whatever hundreds of hours divided by eight months and the amount of money he's seeking divided by two and half million dollars that boils down to, is not a reasonable fee. There's no precedent in Nevada or anywhere else for awarding Mr. Prince $5,000 an hour or $2500 an hour. And where I'm coming up with this is, his representation is I worked hundreds of hours because that's – he used the language from the *O'Connell* case. So if you take the hour limit of that, 999 hours and you divide two and half million dollars by 999 hours, because he didn't say he worked thousands of hours, you come up with these fees that are astronomical. There's no case in Nevada that authorizes a court to award anybody $2500 an hour, three, four thousand dollars an hour, or $5,000 an hour which his argument could be. It also encourages plaintiffs firms half the bar in civil cases on PI cases to simply ignore keeping any kind of time records. And I don't think that's what this Court sees in other cases when people seek fees. I don't think it's something we want to encourage. I don't think you want to take a $20,000 case that's an exception in the Court of Appeals, and apply to a $6 million verdict and do this multiplication of .4 or .5 or .33. That's what's being asked. And the numbers for hourly rate for Mr. Prince or the Eglet Prince firm is astronomically high by a factor

of, you know, 5 or 10 of what any hourly rate award is other than in a patent context or extremely – extremely sophisticated in each practice areas. Also –

THE COURT: What about, let me ask you, just – what about where and I don't know the case name, but you're certainly aware of cases where they've awarded $200,000 in attorney's fees when they were fighting over $10,000. And the Supreme Court has upheld those saying, you know, if you have to go to battle over 10,000 et cetera, and you're – why is that any different?

MR. KAHN: Because they're saying I worked X hours and I charge $300 an hour and that's the total. Plaintiffs not saying that. Plaintiffs not giving you an hourly rate and he's not identifying what time he spent. He's just saying, hey, I worked hundreds of hours, give me millions of dollars. That's not –

THE COURT: My question is and I don't know of – where's there a case that says you have to do hourly. I don't know what your fee is and maybe – and I know that sometimes there's, you know, what do they call it, a set amount, even.

MR. PRINCE: Flat fee.

THE COURT: Flat, thank you, flat fee in some cases. Some firms on the defense side have flat fee arrangement. Them certainly have hourly. So I guess what you're saying is I would have to, or the Supreme Court has to say, all attorneys have to keep hourly records.

MR. KAHN: No, what I'm saying is the *O'Connell* case was a dinky little case and you can't take a $20,000 case and apply it to a

$10 million case, which is what's being asked here. Footnote 2 to our opposition on page 5 has a quote from the *O'Connell* case. It says, quote: we note that the better, but not required, practice in a contingency fee case is for an attorney to keep hourly statements or timely billing records to later justify the requested fees.

Period, end quote, and there's other cases cited. So if the Court does what plaintiff asks, the Court is going to be telling the plaintiffs bar in this city, in this state, that it's perfectly fine to ignore that directive from the *O'Connell* court and simply just say, hey, I worked hundreds of hours because then it's real easy to multiply everything by .4. *O'Connell* was a very small case. And, like I said, Mr. Prince was partner with Mr. Eglet. There's never been a representation that they didn't track time spent on a case. That's never been said. What Mr. Prince is saying is I worked hundreds of hours. He didn't tell you the Eglet – when he was partners with Mr. Eglet that they didn't track every second he spent. All he's doing is not telling you exactly how many hours or giving you any kind of estimate. And so, yes, in the situation where it's a business dispute or it's a different kind of dispute, and the attorney says I worked X number of hours at Y fee, then you get a total. Maybe it's more than the amount at issue, but that's not what's being done here. What's being done here is a trick to try to utilize this *O'Connell c*ase and say, hey, for every case I win, multiply by .4. Or .5. And that's not what the court, but even the *O'Connell* court intended.

Also this – there's a difference between awarding the plaintiff money under the rule or the statute and punishing the defendant for

attempting to exercise its constitutional rights to a jury trial, which has also been, in essence, argued by the plaintiff here. The defendant shouldn't have defended the case. The defendant shouldn't have argued that the plaintiff had one percent of liability which, if you give the inferences to the defendant, the jury could have found some minimal percentage of liability based on the plaintiff being in the fast lane and not signaling before the turn.

The plaintiff is also seeking potentially fees because there's no breakdown of the time spent before the offer of judgment. The offer of judgment's in January, eight months before the trial. How do you distinguish between what's being sought for the hundreds of hours Mr. Prince is asking for, for two and a half million dollars after the offer of judgment and whatever time was spent before? How do I know they're not going to divvy that up among the other lawyers that were in the case before the offer of judgment? Mr. Eglet, Malik Ahmad, who's been disbarred, and David Sampson, all of whose names were on this case at one point and presumably have some interest or lien in the recovery here.

Also the same as to costs. There's no real definition of when these costs were incurred in relation to the offer of judgment and I rely upon my opposition pleading to identify that a number of the costs predate the offer of judgment date. I've been detailed in the opposition and that's what you have to do in these motions to re-tax or oppositions to have the motion re-taxed. But oppositions to cost and fees, you have to kind of be detailed and go through each one. That's the last motion

before the court that's still pending, the motion to re-tax. But in essence, the plaintiff is seeking an astronomically high hourly rate. The plaintiff is purposefully not identifying any kind of breakdown with time spent other than the most vague, general method that was used in this *O'Connell* case, I worked hundreds of hours. And the plaintiff has sought a number of costs and fees predating the offer of judgment, including, and we'll talk about that for the later motion, a number of expert fees for experts that the plaintiff withdrew or partially withdrew. Which is – that's a separate issue –

THE COURT: And, yes, we'll --

MR. KAHN: -- for the other motion, but still.

THE COURT: -- get to that. We're going to –

MR. KAHN: The point is, it's piling on. That's the point.

THE COURT: Okay. What about, and your opposition doesn't really address, the fact that it would appear or you could argue under 68 that it is a double recovery, but it also appears, and this is 2019, that they fully intended to penalize when there's an offer of judgment.

MR. KAHN: Yes, penalized by an increased expert allowance above the $1500. Yes, penalized for extra costs and fees and interest where they otherwise might not be awarded under NRS 68. Double recovery of costs? No. The legislature did not say double recovery of costs. The courts did not say that. There's no case that says that. Again, it's piling on. We --

THE COURT: I agree, but the case before 2019 – what's the one on costs, talks about the fact that, what is the name of it. Anyway,