

IN THE SUPREME COURT OF THE STATE OF NEVADA

CAPRIATI CONSTRUCTION CORP.,)	Supreme Court No: 80107
INC., a Nevada Corporation)	District Court Case No: A718689
Appellant,)	Electronically Filed
)	Aug 12 2020 01:45 p.m.
v.)	Elizabeth A. Brown
)	Clerk of Supreme Court
)	
BAHRAM YAHYAVI, an individual,)	
Respondent.)	
)	
_____)	Supreme Court No: 80821
CAPRIATI CONSTRUCTION CORP.,)	
INC., a Nevada Corporation)	
Appellant,)	
)	
v.)	
)	
BAHRAM YAHYAVI, an individual,)	
Respondent.)	
_____)	

**APPENDIX TO
APPELLANT'S OPENING BRIEF
VOLUME 11 of 12**

Appeal from the Eighth Judicial District Court
Case No. A718689

HUTCHISON & STEFFEN, PLLC

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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 11 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:

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DATED this 12th day of August, 2020.

/s/ Kaylee Conradi

An employee of Hutchison & Steffen, PLLC

1 RTRAN

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3
4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 BAHRAM YAHYAVI,
8 Plaintiff,

) CASE#: A-15-718689-C
)
) DEPT. XXVIII
)

9 vs.

10 CAPRIATI CONSTRUCTION CORP
11 INC.

12 Defendant.
13

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

17 **RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 13**

18 APPEARANCES:

19 For the Plaintiff:

DENNIS M. PRINCE, ESQ.
KEVIN T. STRONG, ESQ.

20 For the Defendant:

21 MARK JAMES BROWN, ESQ.
22 DAVID S. KAHN, ESQ.
23 MARK SEVERINO, ESQ.

24 RECORDED BY: JUDY CHAPPELL, COURT RECORDER
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FOR THE PLAINTIFF

MARKED

RECEIVED

None

FOR THE DEFENDANT

MARKED

RECEIVED

None

1 Las Vega, Nevada, Wednesday, September 25, 2019

2
3 [Case called at 1:11 p.m.]

4 [Outside the presence of the jury]

5 THE CLERK: -- number A-718689, Yahyavi versus Capriati
6 Construction.

7 THE COURT: You ready to go?

8 MR. PRINCE: Yes, Judge.

9 MR. KHAN: Yes, Your Honor. There's one or two items I
10 want to bring to the Court's attention. One is we are -- because this is
11 the Plaintiff testimony we're almost at the end of the case I'm proposing
12 the front page of Exhibit 4-A, is that the subrogation letter as redacted.
13 I'm proposing that be the item that gets placed into evidence according
14 to the statute for Worker's Comp purposes and I'm hoping to use that
15 with the Plaintiff's cross-examination.

16 MR. PRINCE: I'm objecting to it because it's multiple years
17 old; it's not -- we have no idea what's included in that and they don't
18 have a witness identified to testify to that. So I'm not agreeing to it.
19 Mr. Yahyavi certainly is not in a position to comment on amounts paid
20 by Worker's Comp -- because the payments are ongoing. They're more
21 than that. So it's not even an accurate representation.

22 Previously Mr. Khan suggested there's -- well, anyway.
23 There's no -- that's not competent evidence; it multiple --

24 THE COURT: Have you subpoenaed the -- somebody from
25 there? Bring them in.

1 MR. KHAN: No, I can't do that -- from Worker's Comp? I
2 don't even know if they're here or in Reno. The Associated --

3 MR. PRINCE: Right.

4 MR. KHAN: -- Risk Management, I thought they were in
5 Reno.

6 MR. PRINCE: And I have another argument on this.

7 THE COURT: I'm sure, there's somebody here.

8 MR. KHAN: Well I can't just subpoena the Plaintiff's records
9 without an authorization.

10 MR. PRINCE: I want to have another discussion at this point.
11 I think there needs to be further record made. I know the Court's -- I
12 know the language the Court's relying upon from Tri-County, but-- and
13 they, kind of, use this in any action; broadly you can introduce the
14 amounts paid, but to read subsection 10 of 616210 -- 6-1-6-C-2-1-0,
15 subpart 10, it's an action brought by the insurer or Administrator; not by
16 the injured employee.

17 If the insurer or Administrator brings the action of course
18 you're going to include the amount they've actually paid and that makes
19 sense. When the action is brought by the individual injured worker that's
20 why we have the specific jury instruction. So if you read the language
21 extremely carefully that's what it says. I know where they said --

22 THE COURT: What's your point? What are you asking?

23 MR. PRINCE: No, the only time you'd introduce the amount
24 paid -- I'm just making my record -- the amount paid --

25 THE COURT: We did this ad nauseum.

1 MR. PRINCE: No, no. I didn't raise this particular argument --

2 THE COURT: Yes, you did.

3 MR. PRINCE: No, no, no. I don't believe I did. Anyway if I
4 did I'm not trying to repeat myself. I believe that that section only
5 applies to when an action meaning, specifically, a subrogation action is
6 brought by the insurer or Administrator not by the injured worker.
7 Because it's very specific as to who is bringing the action and what
8 happens when you bring the action. If you read the whole statutory
9 language in its entirety it's -- articulates what happens when either the
10 insurer brings the action or when the injured employee brings the action.

11 So, therefore, my -- the way I read the statute -- I understand
12 what *Tri County* says. I believe the narrow statutory construction, that
13 would only apply to amounts paid in the event the action is brought by
14 the insurer or administrator and that's not the case here; it's brought by
15 the injured worker. So that's an additional -- in addition he doesn't even
16 have an accurate amount, so, which is a foundational objection.

17 THE COURT: That was clearly raised before, and *Tri County*
18 is absolutely opposite. Pursuant to NRS 616C.215, (10), in any trial of an
19 action by the injured employee, that's your client, against a person other
20 than the employer -- that's what we have -- or a person in the same
21 employ -- we don't -- the jury must receive proof of the amount of all
22 payments made or to be made by the insurer or the Administrator.

23 So I don't see any interpretation -- I don't agree with it. I
24 think it -- and I've said that the statute, the language for the jury
25 instruction is incredibly -- what's the word? Diffuse -- difficult to

1 understand, but it's the law and so that's what we're going to do. As far
2 as have you contacted the Administrator?

3 MR. KHAN: Well, Your Honor, the document I'm proposing
4 following my review of the --

5 THE COURT: Well let me see what the document is. I have
6 no idea what you're talking about.

7 MR. KHAN: It's just the front page of this exhibit that's
8 already been marked.

9 MR. PRINCE: Let me see the exhibits. I don't know -- the
10 exhibits are so difficult on the Defense side.

11 MR. KHAN: I have four pages, counsel. That's my exhibits;
12 four to five pages. I don't think it's that difficult.

13 MR. PRINCE: No, just the way they're organized and how
14 they've come in is difficult for me.

15 MR. KHAN: Well none have come in and you're not
16 stipulating to the one today, so.

17 MR. PRINCE: You have had exhibits, actually, come in.

18 THE CLERK: There are a few that are admitted.

19 THE COURT: So since -- and this goes to -- was Malik Ahmad
20 his attorney before?

21 MR. KHAN: He still is.

22 THE COURT: Okay. So this is two and a half years old now --

23 MR. KHAN: Right.

24 THE COURT: -- we know the claim has been reopened?

25 MR. KHAN: Well I don't know that we know that. We have

1 representation --

2 THE COURT: Well Dr. Thalgott --

3 MR. KHAN: And subpoenaed.

4 THE COURT: -- has seen him and how in the world that's
5 what he does --

6 MR. KHAN: This record also includes all the knee payments
7 which are now waived, so, I figured that would balance out any new
8 claims that we don't know about. It's probably --

9 THE COURT: Again, why can't you subpoenas somebody
10 from there to appear --

11 MR. KHAN: We have to subpoena these records --

12 UNIDENTIFIED SPEAKER: Mr. Khan, you need turn the mic
13 on, sir.

14 MR. KHAN: We had to subpoena these records twice; that I
15 pulled out of a 1300 page exhibit as what I think is the most accurate,
16 recent identification of Worker's Comp money. Yeah, they're in Carson
17 City. So I don't think we're going to get anybody down here from Carson
18 City tomorrow.

19 THE COURT: Who's in Carson?

20 MR. KHAN: Associated Risk Managers, the company that
21 generated that.

22 I'm not proposing we use any of the provider by provider
23 amounts which was counsel's objection before. I'm proposing we use
24 that one page and I think it's error to not put something in the record in
25 compliance with the statute.

1 MR. PRINCE: Well you have to have appropriate evidence
2 and --

3 THE COURT: Yeah --

4 MR. PRINCE: -- foundation, so.

5 THE COURT: -- I totally agree we have to do it which means
6 we may have to wait until next week and subpoena somebody. This is
7 inaccurate; this doesn't -- this is two years old, and you're telling me --
8 knowing that I decided in, I think you'd say, in your favor that this has to
9 come in. I even said before we started the trial or at the beginning, three
10 weeks ago, subpoena somebody to testify. I don't get it.

11 MR. KHAN: I can see if somebody will be available by Skype.
12 I don't have a valid authorization to obtain his Worker's Compensation
13 records for now. Those are from years ago.

14 MR. PRINCE: Your Honor, if he --

15 MR. KHAN: That's when we had the last authorization. I
16 can't just have people give away Plaintiff's personal information; the
17 Plaintiff has to do that and his counsel.

18 MR. PRINCE: Your Honor, the fact that if the Defense wanted
19 to introduce this evidence there is means and methods to obtain the
20 competent evidence to do it. It's like any other case. If you don't
21 produce the competent and relevant and admissible evidence it's not
22 admissible; it's not admissible for the reasons you've just discussed.

23 That's not a failure on anybody's part. They had the ability to
24 do it; they've been trying to do it the whole time. The fact they can't do it
25 correctly is not your fault nor my fault; that's their fault. And if they can't

1 get the evidence in, they can't get it in irrespective of the relevancy of it.

2 MR. KHAN: There is a custodian of records affidavit for that
3 document and 1300 other pages. So we know it's authenticated. The
4 only question is whether it has sufficient foundation and whether it's
5 admissible and relevant and I submit that it is. And, again, this includes
6 a knee claim that's been withdrawn --

7 THE COURT: Well somebody get a hold of Jodi Johnson, on
8 the phone, or whatever and let's find out what's doing.

9 MR. KHAN: Okay. I'll have my paralegal do that right now.
10 I need to complete my --

11 THE COURT: That's his exhibit.

12 MR. KHAN: Your Honor, I --

13 UNIDENTIFIED SPEAKER: No, that's ours.

14 MR. KHAN: Sorry. I need to complete my record as well
15 briefly and that is --

16 THE COURT: Go ahead.

17 MR. KHAN: -- that I proposed this to Plaintiff's counsel
18 several days ago. So this isn't out of the blue today.

19 MR. PRINCE: That's another issue, Your Honor, about this
20 unrelated body part. It's not unrelated. He was actually -- the knee claim
21 was accepted, paid for, and he was rated for the knee claim. I chose not
22 to present the knee claim as part of the trial. I made that -- so for him to
23 say that it's unrelated to this motor vehicle collision, that's not accurate.
24 Dr. Oliveri rated him for a knee and Work Comp paid for it.

25 THE COURT: All right. What does that have to do with --

1 MR. PRINCE: I'm just only saying -- unrelated --

2 THE COURT: -- that is two and a half years old.

3 MR. PRINCE: Correct.

4 THE COURT: And, more importantly, includes certainly
5 portions that are not part of the case.

6 MR. PRINCE: But my client has to pay those back no matter
7 what.

8 THE COURT: Somebody --

9 MR. PRINCE: Well we can get started.

10 THE COURT: Well I want to -- if you can get a hold of this
11 person tell them why --

12 MR. KHAN: My paralegal will --

13 THE COURT: I think they certainly would be subject to a
14 subpoena and have to come and produce the records in court.

15 MR. KHAN: Well the records are probably just going to be a
16 letter like this.

17 THE COURT: Well --

18 MR. KHAN: Counsel doesn't want the individual provider
19 information in there.

20 THE COURT: -- I get that, but it would be a --

21 MR. PRINCE: That's --

22 THE COURT: -- accurate record --

23 MR. KHAN: Well the individual provider information --

24 THE COURT: -- higher, lower, whatever. It would be
25 accurate.

1 MR. PRINCE: Well the amount paid -- the statute says the
2 amount paid --

3 THE COURT: Yes, we've already --

4 MR. PRINCE: -- not, like, all the adjustments.

5 THE COURT: -- discussed that. That's exact -- I've quoted
6 from you yet again --

7 MR. KHAN: My paralegal will call --

8 THE COURT: -- proof of the amount of all payments made
9 to -- or to be made by the insurer which, again, he's going to be re-rated.
10 Did he have a re-rating?

11 MR. PRINCE: I haven't heard that.

12 MR. KHAN: Not yet.

13 MR. PRINCE: Remember he's -- Dr. Oliveri talked about him
14 -- the need to be re-rated; same with Dr. Schifini.

15 THE COURT: All right.

16 MR. KHAN: There's one other item, Your Honor.

17 THE COURT: And you guys understand, and I should have,
18 well I think I mentioned this three weeks ago, if they're not done on
19 Monday --

20 THE CLERK: Friday.

21 THE COURT: -- Friday, Monday is Rosh Hashanah which is a
22 holiday for me --

23 MR. KHAN: For me as well, Your Honor.

24 THE COURT: Okay. So we're not going to be going on
25 Monday. That leaves Tuesday and Wednesday before I'm out of town. If

1 they're deliberating that's no problem because somebody else can take
2 the verdict, but okay.

3 MR. KHAN: There's one other item, Your Honor.

4 THE COURT: Yeah.

5 MR. KHAN: I just want to make the Court aware. I have
6 requested, from Plaintiff's counsel, that he stipulate to the admission of
7 YY with the additional redaction of removal of a three page, one visit,
8 knee record. Counsel said no so I'll deal with that with the witness. It's a
9 Heart Center record and those do have a custodian certificate on them.

10 MR. PRINCE: Yeah, he has established the medical relevance
11 of -- it's relating to a cardiac evaluation for hypertension. So it's an
12 unrelated issue; not relevant to this case; not relevant to the injuries
13 we're talking about in this case. So those are the reasons why I won't
14 agree to it.

15 THE COURT: Well, there is --

16 MR. KHAN: I'll lay a foundation before I move for --

17 THE COURT: -- I assume there is -- the issue is blood
18 pressure caused -- or his blood pressure went up and one of the doctors
19 said it was because of the pain or it could be because of the pain.

20 MR. KHAN: No, Your Honor. The issue is that the doctor
21 said he should take time off work because of the blood pressure.

22 MR. PRINCE: He didn't take any time off work. He has
23 established that he took time off of work which he hasn't.

24 MR. KHAN: That's the issue.

25 THE COURT: All right. I'll -- we'll wait and see what the

1 testimony is. We ready to go besides that?

2 MR. KHAN: Yes, Your Honor.

3 THE COURT: Bring them in.

4 THE MARSHAL: Please rise for the jury.

5 [Jury in at 1:26 p.m.]

6 [Within the presence of the jury]

7 THE COURT: Please be seated. Good afternoon, ladies and
8 gentlemen.

9 THE JURY: Good afternoon.

10 THE COURT: So tomorrow there is no calendar, right?

11 THE CLERK: Right.

12 THE COURT: So 9:00 a.m., 9:00 a.m.. We went -- you would
13 have had to wait today -- we went past 11:30. So, I guess, it was 50/50
14 and I made the right call.

15 Okay. It's a new day so we're going to swear the witness in
16 again. Parties acknowledge the presence of the jury?

17 MR. PRINCE: Yes.

18 MR. KHAN: Yes, Your Honor.

19 BAHRAM YAHYAVI, PLAINTIFF'S WITNESS, SWORN

20 THE CLERK: Please be seated. Please state your name for
21 the record?

22 THE WITNESS: Bahram Yahyavi.

23 THE CLERK: Thank you.

24 CROSS-EXAMINATION CONTINUED

25 BY MR. KHAN:

1 Q Good afternoon, Mr. Yahyavi.

2 A Good afternoon.

3 Q You recall this accident is more than six years ago, right?

4 A Yes.

5 Q And about three years ago, little over three years ago, you
6 had your deposition taken, correct?

7 A Right.

8 Q And we asked you, during the deposition the Defense did,
9 whether you had ever treated for your neck or back and you said that
10 you had not; isn't that correct?

11 A That is.

12 Q And in response to that question you understood you were
13 under oath three years ago when you said that, right?

14 A Yes.

15 Q And that was the Defendant's opportunity to find out
16 whatever information you had about your neck, right?

17 A Right.

18 Q And you said, specifically, that you had not treated for your
19 neck or back at any time before the accident, right?

20 A Correct.

21 MR. KHAN: Exhibit YY has been marked, and I ask that the
22 witness look at Exhibit YY. I can hand him a revised redacted copy if
23 that's acceptable. If I may approach?

24 THE COURT: Go ahead.

25 BY MR. KHAN:

1 Q Mr. Yahyavi, you may not have seen these and without
2 discussing any of the details these are records from the Heart Center of
3 Nevada; you went to the Heart Center of Nevada, correct, Dr. Fotodar,
4 F-O-T-O-D-A-R?

5 A Oh.

6 Q Fotedar, sorry. F-O-T-E-D-A-R?

7 A He was a customer of ours.

8 Q Say that again, sorry?

9 A He was a customer of ours, Dr. Fotedar.

10 Q Okay. A customer of your dealership?

11 A Yes.

12 Q And you went to him for a cardiac evaluation in
13 October of 2013 about five months after this accident, right?

14 A By his suggestion, yes.

15 MR. KHAN: Your Honor, at this time Defendant would move
16 for the admission of Exhibit YY; it does bear a custodian of records
17 affidavit and the witness has identified that it was a medical visit that he
18 made.

19 MR. PRINCE: Objection. Medical relevance, Your Honor.
20 Nothing to do with --

21 THE COURT: Counsel, approach.

22 [Sidebar begins at 1:30 p.m.]

23 THE COURT: I thought you were going to show the
24 relevance; what is the relevance of -- I've gotten several EKGs.

25 MR. KHAN: Relevance is a heart doctor told him he could

1 take time off of work.

2 MR. PRINCE: Well the --

3 MR. KHAN: [Indiscernible] referencing --

4 THE COURT: Let me see the --

5 MR. PRINCE: No the records don't even say he should --

6 MR. KHAN: The records say.

7 MR. PRINCE: The records don't say he's taken time off work.

8 There's no recommendation he took any time off of work.

9 THE COURT: When is it? When is the record?

10 MR. PRINCE: October 2015.

11 MR. KHAN: Number six.

12 MR. PRINCE: He didn't take any time off of work, and he
13 comes back three weeks later and he's fine.

14 THE COURT: I'll let you ask him if he took time off of work
15 for his high blood pressure. Otherwise, it doesn't come in.

16 MR. KHAN: I'd like to ask him if the cardiologist told him that
17 he's recommending that he take time off work; that's all I want to ask.

18 MR. PRINCE: No, you just asked him if he did take time off of
19 work for that --

20 MR. KHAN: That's not what this record says.

21 MR. PRINCE: -- that's the only -- that's not the relevance of
22 the case. This has no relevance even to the injuries in the case.

23 THE COURT: I'm not allowing it. There's no showing that
24 this is at all related and you got to have somebody say it's related.

25 MR. PRINCE: Correct.

1 MR. KHAN: That's the point, Your Honor. It's not related.
2 It's not related to the neck.

3 THE COURT: And did he take time -- this is October.

4 MR. PRINCE: Right.

5 THE COURT: I don't think he took time off in October.

6 MR. PRINCE: He didn't.

7 MR. KHAN: Exactly, he ignored it. That's my point.

8 Cardiologist told him to take time off work for his blood pressure; he
9 ignored it.

10 THE COURT: No, I'm not allowing it. It's not relevant.

11 MR. KHAN: I want to make sure that we're -- excuse me a
12 second. I want to make --

13 THE COURT: You can attach it as a Court's exhibit.

14 MR. PRINCE: Yeah, I just want to make sure there's no --

15 MR. KHAN: It's already marked, so I'll get you [indiscernible].

16 MR. PRINCE: That's fine.

17 THE COURT: Okay.

18 [Sidebar ends at 1:32: p.m.]

19 BY MR. KHAN:

20 Q Mr. Yahyavi, you had high blood pressure before this
21 accident, right?

22 A I did.

23 Q I'm going to go through some of your medical treatment,
24 hopefully, in chronological order. Okay?

25 A Understood.

1 Q Oh, no. You can put that down.

2 A Okay.

3 Q We've already discussed it, but you're aware of that in
4 October 2011 there's a report from Southwest Medical records that said
5 you had neck pains for years, right?

6 A I don't -- honestly, I don't remember that.

7 Q And same with the X-ray; you don't remember having an
8 X-ray on that same day for your neck; your cervical spine, correct?

9 A I don't remember that, sir.

10 Q And then you went back in March 2012 to Southwest Medical
11 in part because you had some kind of ski accident, I think; is that fair?

12 A Yes.

13 Q And at that time you're aware from the documents that we
14 put in front of the jury that still listed a backache as an active problem?

15 A I don't remember that. I know it was about my knee.

16 Q Okay. The accident happens in June of 2019, correct?
17 June 19th --

18 A The ski accident?

19 Q The accident; June 19th, 2013?

20 A Oh, yeah. Car accident, yes.

21 MR. KHAN: Can we put up Exhibit 86-P-1-6-9, please?

22 BY MR. KHAN:

23 Q Now your testimony is that from the moment of the car
24 accident, the instant it occurred you've had the same horrible constant
25 unrelenting pain up to today, right?

1 A I do.

2 Q And you were unable to move your neck without pain after
3 the accident; is that fair?

4 A Yes.

5 MR. KHAN: Can you blow up under H-E-E-N-T in the middle?

6 BY MR. KHAN:

7 Q You should see it on your screen, Mr. Yahyavi. So this is
8 saying neck is soft and supple with full range of motion; do you see that?

9 A Okay. What's the date of this?

10 Q Yeah, this is the UMC record for the day of the accident. Do
11 you see where it says your neck is soft and supple with full range of
12 motion?

13 A Okay.

14 Q Do you remember them at UMC, the day of the accident ,
15 moving your neck around to see if you could move your neck?

16 A I don't remember that day very well. So I can't tell you.

17 Q Do you dispute that when you got -- do you dispute what's in
18 this record that when you got to UMC after the accident you were able to
19 have a full range of motion with your neck?

20 A I was laying down on the -- I don't remember if I --

21 MR. KHAN: Okay. Can we pull up Exhibit 86-P-1-7-9, please?
22 This is the impression from CT Scan at UMC of the cervical spine. And if
23 you could blow up just the first couple lines?

24 BY MR. KHAN:

25 Q Now when you got to UMC they took a CT Scan of you; do

1 you remember that?

2 A I don't.

3 Q Fair enough. And do you see where it says no traumatic
4 injury to the cervical spine seen degenerative changes as above?

5 A I do see that.

6 Q Do you, for any reason, dispute the validity of this record
7 from UMC?

8 A I don't, no.

9 Q Okay.

10 MR. KHAN: Can you pull up Exhibit 85-P-1-6-0? This is the
11 ambulance record from the day of the incident, and I'm going to ask you
12 to -- about three lines down in the first paragraph under history text, I'm
13 going to ask you to blow up the third line, narrative history text. Right
14 about here. And can you highlight the part that starts with where he
15 does?

16 BY MR. KHAN:

17 Q So, Mr. Yahyavi, in the ambulance, right after the accident,
18 you told the ambulance drivers -- you don't have to hold that just that he
19 does -- sentence.

20 You told the ambulance drivers that you didn't know how
21 fast you were going, correct?

22 A There again, I don't remember. I don't even remember the
23 ambulance.

24 Q Okay. So my question to you is if -- well you don't take issue
25 with this that the -- you don't think the ambulance people worked on

1 something incorrect; do you?

2 A I don't think so.

3 Q And my question to you is when did you decide that you
4 were going 30 miles an hour?

5 A That's a speed I always go in that area.

6 MR. KHAN: Can you go back to Exhibit -- sorry, 114, page
7 1-3-7-1?

8 BY MR. KHAN:

9 Q And now I'm going to put up a workplace item. I'm trying to
10 do this in some type of chronological order just so you know.

11 A Okay.

12 MR. PRINCE: Sorry, what's the exhibit number?

13 MR. KHAN: 1-1-4-P-1-3-7-1.

14 BY MR. KHAN:

15 Q So this is now about nine days after the accident on
16 June 28th, 2013, correct?

17 A Yes.

18 Q And this shows that you quit from Chapman Dodge -- and I
19 think your testimony is you were changing to Jeep?

20 A I was transferred.

21 Q Did that happen nine days after the accident; is that when it
22 happened?

23 A What did happen?

24 Q The transfer from the --

25 A Mean being transferred --

1 Q -- Dodge to the Jeep?

2 A No, I took it -- I think about two days off in between and then
3 that's when the other place called and said, hey, you can transfer here.
4 We'll allow you to work part-time.

5 Q Now when you switched from Dodge to Jeep -- and I want
6 you to think carefully about -- you don't have to look at the document;
7 it's right there -- when you switched from Dodge to Jeep -- and I want
8 you to think carefully about this -- is it your testimony that you went from
9 being a manager to a salesperson?

10 A Yes.

11 Q And do salespeople get draws?

12 A No.

13 Q Okay.

14 MR. KHAN: Give me just a second I have to work with the
15 tech. I'm going to try and pull up the Chapman Dodge records.

16 BY MR. KHAN:

17 Q Now you were explaining the last time --

18 MR. KHAN: It's Exhibit 1-1-4-P-1-3-9-4.

19 BY MR. KHAN:

20 Q Remember Mr. Prince showed you the details from your
21 paystubs essentially showing that you got a draw on your commission at
22 certain times?

23 A Yes.

24 Q Yeah, and so I'm going to show you some of those same
25 items?

1 A Okay.

2 Q First will be Exhibit 114-P-1-3-9-4 and what should come up
3 as a paystub, or paystub detail, ending January 8th, 2014. By
4 January 2014 you were working at Jeep, correct?

5 A Yes, sir.

6 Q And that's the date here up on the top; period ending
7 January 8th, 2014?

8 A Yes.

9 Q And if you look on the left it says commission sales; do you
10 see that?

11 A I do.

12 Q So that's consistent with what you said that you were a
13 commission employee only and not receiving a draw, right? I can ask
14 the question again if you want. There's no draw on this?

15 A Okay.

16 Q You can answer [indiscernible] if you want.

17 A Yeah, I don't see a draw, but --

18 Q And that's the question.

19 A Okay.

20 MR. KHAN: And then if you could pull up P-1-3-9-8 in that
21 same exhibit we'll do the same exercise?

22 BY MR. KHAN:

23 Q Again, this is the period ending February 15th, 2014.
24 Commission sales there is no draw; correct?

25 A Correct.

1 Q And that's consistent with you not being a manager; you're
2 now a salesperson, right?

3 A Well I think, at this time, I was transferring to become a sales
4 manager again.

5 Q Say that again?

6 A At this time?

7 Q Yes.

8 A I was being a sales -- transferring to be a sales manager.
9 They promoted me again to become a sales manager.

10 Q At the Jeep place or at the Dodge place?

11 A At the Jeep place, then, 2014.

12 Q I thought your testimony was you never became a manager
13 again and you scaled back to sales only?

14 A That was for that period after the accident; right after the
15 accident.

16 Q Okay. Let's go to the next one --

17 A For the six, seven months. I'm sorry, for interrupting .

18 Q That's all right.

19 A For six, seven months up to 2014; beginning of 2014.

20 MR. KHAN: Okay. Let's go to P-1-3-9-9. This is the period
21 ending March 1st, 2014.

22 BY MR. KHAN:

23 Q Period ending March 1st, 2014. This does have a draw of
24 \$5,000, correct?

25 A Correct.

1 Q So this is now 10 months after the accident; you're working
2 for Jeep and you're a manager again, right?

3 A Yes, part-time.

4 Q And you're getting a draw of \$5,000 every paycheck which is
5 twice a month which means you get a draw of \$120,000 a year, right?

6 A No, you would only get one draw per month; that's on the
7 5th of each month.

8 Q Okay. Let's look at March 15th, two weeks later, P-1400?

9 A So the total for that draw, just to make sure, was 60,000 per
10 year; not 120.

11 MR. KHAN: You can take that down, the testimony, please.

12 BY MR. KHAN:

13 Q So in 2014 you did become a manager again at Jeep; is that
14 correct?

15 A Yes, early 2014.

16 Q And then you were getting a draw as a manager, so you
17 were, kind of, guaranteed an income at \$60,000 a year with commissions
18 on top if you were able to sell cars?

19 A Not guaranteed, but you do get a draw and you have to
20 cover that by -- off commissions. So there's nothing guaranteed.

21 Q So I had understood your testimony before to be after the
22 accident you quit Dodge; you went to Jeep and you became a
23 salesperson and you never became a manager again. What you're
24 telling us, I think, now is you did become a manager. So were you a
25 manager from early 2014 until you quit towards the end of 2016, two and

1 a half years later?

2 A I was a manager after I came back early 2014. I was
3 promoted, but I -- I continued that to 2000 -- early 2016.

4 Q I'm putting up a demonstrative exhibit; should be a chart of
5 your income for the years that were identified in this lawsuit?

6 A Okay.

7 Q So 2012 you made \$156,000, roughly, correct?

8 A Yes.

9 Q And then 2013 you made approximately \$105,000?

10 A Yes.

11 Q And that's with taking some time off for this accident, right?

12 A Few days.

13 Q You just took a few days off?

14 A Yes, for the accident.

15 Q And then the next year, 2014, you made \$123,000, correct?

16 A 123,000, yes.

17 MR. KHAN: Your Honor, may we approach, briefly, I'd like to
18 make an offer of proof?

19 THE COURT: Yes.

20 [Sidebar begins at 1:48 p.m.]

21 MR. KHAN: I have, pretty much, given up on the trying to get
22 the knee stuff in for whatever reason I said yesterday, but I do want to
23 make the point --

24 THE COURT: The what stuff?

25 MR. KHAN: The knee issue when he took six weeks off?

1 THE COURT: Oh.

2 MR. KHAN: I do want to make the point that he took six
3 weeks off for reasons unrelated to this case. In other words, his income
4 in 2014 would have been, probably, higher had he not taken six weeks --
5 I'd like to --

6 MR. PRINCE: Yeah, no. We took -- he accepted that
7 stipulation; we tailored the entirety of the case around that. We're not
8 making any past -- loss of actual earnings during those years are
9 earnings, past earnings, start at September 2016, so.

10 MR. KHAN: Which is why I let the stipulation --

11 MR. PRINCE: And it does -- violate the stipulation. We
12 removed the entirety of the body part even though it was accepted and
13 rated and part of a PPD for Work Comp. We did it for our own strategic
14 reasons, but he's accepted that. We were careful not to talk about that
15 with all the other witnesses now he wants to introduce it to gain some
16 sort of tactical advantage. And so --

17 MR. KHAN: I don't want to introduce --

18 THE COURT: All right.

19 MR. PRINCE: -- and you said it was your --

20 THE COURT: We're going to take a 10 minute break. We'll
21 talk about this.

22 [Sidebar ends at 1:49 p.m.]

23 THE COURT: All right. Ladies and gentlemen, we're going to
24 take a 10 minute recess. During this recess you're admonished, do not
25 talk or converse amongst yourselves; with anyone else on any subject

1 connected with this trial or read, watch, or listen to any report of or
2 commentary on the trial or any person connected with this trial by any
3 medium of information including, without limitation, newspapers,
4 television, radio or internet. Do not form or express any opinion on any
5 subject connected with the trial until the case is finally submitted to you.
6 We'll take 10 minutes.

7 THE MARSHAL: Please rise for the jury.

8 [Jury out at 1:49 p.m.]

9 [Outside the presence of the jury]

10 THE COURT: All right. We're on the record. We're outside
11 the presence --

12 MR. KHAN: So my offer of proof, Your Honor, is I'd like to
13 just confirm that -- took six weeks off of work in 2014 for reasons
14 unrelated to the claims in this case. I think it's generic enough; it doesn't
15 mention knee; it doesn't say what was going on. I just want -- to be a
16 vacation; doesn't matter, but I want the jury to understand his income
17 excludes six weeks, a month and a half, of time. That's a significant
18 chunk of time when they're showing demonstrative graphs about his
19 income every 10 minutes to the jury.

20 MR. PRINCE: Your Honor, the issue is with regard to the
21 knee. It would be misleading. We never made that -- we haven't even
22 made last -- loss --

23 THE COURT: You can sit down.

24 UNIDENTIFIED SPEAKER: Thank you.

25 MR. PRINCE: -- loss of earnings, actual earnings during from

1 2013 through September 2016 an issue in the case. We won't be making
2 the argument. All of our past loss of earnings is loss of earning capacity
3 starting September 2016. They accepted the stipulation with regard to
4 the withdrawal of the knee claim. I did not put on -- otherwise I would
5 have put on evidence of Dr. Oliveri relating it and rating it and talking
6 about it. So, therefore, it's irrelevant to any contested issue in the case.

7 It's a fact that his income went down because he couldn't
8 perform the job. It's a fact that he's now disabled because of his
9 ongoing neck issue; that's what the evidence has established. These --
10 now trying to interject an unrelated body part, with a withdrawn issue,
11 and trying to, like, mislead the jury in some way after I've already put on
12 my entirety of the case. It looks like I've now been misleading and some
13 other things. So -- otherwise I would have handled it completely
14 differently.

15 MR. KHAN: And I --

16 MR. PRINCE: And we've talked about -- we've redacted the
17 knee from everything so far. So think about that context, Judge. We
18 took it out of the PPD; we removed it for all the costs, the surgery,
19 everything associated with it. Now to interject that --

20 MR. KHAN: Your Honor --

21 THE COURT: Are you saying -- well let me ask a question
22 first. I'll give you whatever time you need. Are you saying you're not
23 asking for wage loss from -- when was the accident?

24 MR. PRINCE: 2013 to 2016; I'm not asking for that. I'm
25 asking --

1 THE COURT: At all? You're not asking for any wage loss?

2 MR. PRINCE: I'm asking for past loss of earning capacity of
3 the last date of work in September 2016. I'm asking from it -- from
4 September 2016 until the current date. I'm asking for that, yes.

5 THE COURT: Oh, okay.

6 MR. PRINCE: But not between 2013 and 2016; that's the time
7 period that Mr. Khan's now wanting to talk about that in early 2014 he
8 had the knee surgery. For that time period we're not making any past
9 lost wage claim at all.

10 THE COURT: And what -- the stipulation was that you
11 were -- what is the stipulation?

12 MR. PRINCE: We withdrew the knee claim; withdrew all the
13 treatment records associated; withdrew all medical expenses associated
14 with that and, therefore, we're not asserting that claim. Including not
15 making a past loss of earnings claim, at all, for that same time period.
16 Otherwise I would have handled it completely differently.

17 THE COURT: I asked the question. Okay. Now, Mr. Khan,
18 whatever you'd like to say.

19 MR. KHAN: I would just like to say this. Two million of their
20 three million dollars in specials is future wage loss. They're using an
21 average that includes several years after the accident and we are
22 using -- our expert uses a different average based on a longer period of
23 time before the accident. Our experts, plural, so this figure -- the annual
24 wages for these years -- affects a two million dollar plus claim in this
25 case.

1 It's not an academic thing that they withdrew. They're using
2 that year, and other years, to identify a statistical average for his income
3 that's extremely high and then they're spreading that out over another
4 10 years or so. It's millions of dollars.

5 MR. PRINCE: Your Honor, so --

6 THE COURT: Okay. But no, no -- all right.

7 MR. PRINCE: I just want -- I want to respond to that.

8 THE COURT: No. Shush. I have a question for him. Like I
9 had a question for you I want to ask him a question.

10 All right. So that your argument, or your what I assume, is
11 he was off work for six weeks due to his knee?

12 MR. KHAN: Correct.

13 THE COURT: Wouldn't that -- and so that diminished, I
14 would imagine, I mean -- well, all right. Let me finish that -- hopefully I'll
15 remember. That diminished his -- the amount he would make --

16 MR. KHAN: Correct, potentially, yes.

17 THE COURT: -- and so if the doctor, or not the doctor, the --
18 you're saying how that affects millions of dollars down the road, but it
19 diminished it -- that would diminish his two million dollars down the
20 road; not increase it.

21 MR. KHAN: Would increase it, exactly.

22 THE COURT: If he had -- if somehow he had made that an
23 extra, let's say 20, \$30,000, then they would be using an extra 20, \$30,000
24 projected out 10 years. In this case -- so how does that make sense and
25 after you answer that, so I don't forget, unfortunately, I assume -- I think I

1 can assume rightly -- neither of you know anything, or much, about
2 Workers Comp because he would be getting temporary total disability,
3 which is part of the number we don't have, or we have part of it, but we
4 don't have -- I don't know what we have -- which would, you know, is
5 something where you're just totally ignoring and I'm saying both of you.

6 So, tell me -- but address that first question. That's --

7 MR. KHAN: So two things. One is the Court's correct; this
8 might work against me that a higher amount would be generated, but
9 number two, the jury needs to have a proper impression of how much
10 this gentleman made the year after his accident. And, yes, he made
11 more money, but he made more money not working six weeks. So
12 he -- probably, had he worked, would have made an even higher amount
13 and I think the jury is entitled to hear that since it was testified to by
14 Mr. Yahyavi, and by their expert, and by our expert and the jury's heard
15 all this, but they need to have a context for he made more money and he
16 would have made even more had he not missed six weeks in that
17 calendar year due to an unrelated issue. And I don't want to mention --

18 MR. PRINCE: I'm not going to call it an unrelated -- you can't
19 call it unrelated.

20 MR. KHAN: -- surgery and I don't want to mention Social
21 Security. I don't want to mention any of that. I just want to say he was
22 off for six weeks and so his income excludes a six week period and that's
23 it.

24 MR. PRINCE: No. Well, Your Honor, let me explain the wage
25 loss claim.

1 THE COURT: All right. Wait, wait, wait.

2 So you can see that his future income would have been
3 exponentially, probably or close to that, higher if they had included that.
4 Even, let's say, only \$20,000 -- is that about a month? He made --

5 MR. KHAN: Something like that.

6 THE COURT: -- 1-6 --

7 MR. KHAN: It's 15.

8 THE COURT: Fifteen, yeah. So, but the 15 over the 10 years
9 now we're talking 150 plus blah, blah, blah. So you're saying I'm correct
10 in that, but you still want to discuss it why?

11 MR. KHAN: To give the jury a context of -- that he made
12 more money the next year even with the six week absence from work,
13 but I'll submit it, Your Honor. It's not that important an issue. I'll just --

14 THE COURT: Well, I -- you know, before I let you talk -- I
15 really try to get things right and try to understand what it is you're
16 asking. That's why I want to take a break and go over this. I mean, you
17 know, this is -- I don't know how many multiple dozens or hundreds of
18 this exact trial, but I will say with the stipulation to exclude an accepted
19 body part -- and I assume you both agree it's an accepted body part?

20 MR. PRINCE: It was. The right knee, it was --

21 MR. KHAN: The knee was an accepted body part, correct.

22 THE COURT: And so we've -- we haven't talked about any of
23 that.

24 MR. KHAN: On purpose and neither have my witnesses.

25 THE COURT: I get it, but -- so now I -- it would -- it is -- it's so

1 out of context with the whole trial. To even say -- I just don't see how
2 we'd do it.

3 MR. KHAN: Okay.

4 THE COURT: Other than he brings back his expert and we go
5 for another two weeks --

6 MR. KHAN: I want to be clear. I'm not suggesting he incur
7 the expense of having an expert return.

8 THE COURT: I get that.

9 MR. PRINCE: He sounds like he's withdrawing the issue now.

10 THE COURT: I wish any of these were, you know --

11 MR. PRINCE: Are you withdrawing the issue now?

12 MR. KHAN: No, I'm letting the Court rule, but I'm submitting
13 it.

14 THE COURT: No, I'm going to -- yes, I'm not going to allow
15 it. I just don't see how we could at this point. Hopefully two days before
16 the end of the third week or if this goes into the fourth week really
17 re-opening. That would absolutely, I don't know if he -- if the Plaintiff
18 would bring back his economist, but it's another 150,000 or something --
19 no, at least that -- at 10 to 15, 000. All right. What else?

20 MR. KHAN: That's it. I'd just like to take a quick break if I
21 could use the bathroom.

22 THE COURT: Absolutely. All right.

23 Where are you guys -- while I'm asking -- are you guys trying
24 to get a hold of somebody? Because I think if they get a call from us
25 saying, me, saying we need you to testify they will, at least by video or --

1 because this is simple. They can do it by court call. All they want is an
2 amount, right?

3 MR. KHAN: With the permission of the Court if Mr. Severino
4 or my paralegal could address the Court; they've checked.

5 THE COURT: Okay. Did you get a hold of anybody?

6 MR. SEVERINO: Yes, Your Honor. We got a hold of the
7 claims adjuster. She told me the total lien at this point is \$185,372.81.
8 She's going to email me that -- it's going to be a personal email not a
9 lien letter since we're on -- you know, I explained the schedule.

10 THE COURT: All right. Mr. Prince, you good with that?

11 MR. PRINCE: I guess we need to figure out how we inform
12 the jury of that.

13 THE COURT: I'll read the lien amount, or you can read the
14 lien amount or just like it says --

15 MR. PRINCE: Well I'm trying to figure out how it comes into
16 evidence. You could, maybe, put it in the form of where the Workers
17 Compensation insurer has paid to date --

18 THE COURT: Pursuant to NRS 616 --

19 MR. PRINCE: Yeah.

20 THE COURT: -- the lien amount in this case is X, Y, Z.

21 MR. PRINCE: It doesn't say lien. It says amount paid.

22 THE COURT: Sorry, yes, yes.

23 MR. KHAN: I --

24 THE COURT: The amounts paid -- I'll read the whole quote.

25 MR. KHAN: Yup. My suggestion be that the Court just read

1 it to the jury and say you are to accept this as a fact or its been stipulated
2 by counsel or --

3 MR. PRINCE: Well I'm not stipulating to it, so.

4 MR. KHAN: Well then I would read it as it's a fact that you
5 must consider or something --

6 MR. PRINCE: I can't stipulate to it, but no it's not a fact you
7 must consider. You know, you could say pursuant to NRS whatever the
8 Workers Compensation has paid, to date, 185,000 whatever the dollar --
9 if that's the number that's the number -- to date. And then that's it and
10 there's nothing more than that because we're going to send -- there's a
11 separate instruction don't make any deductions.

12 THE COURT: Yes.

13 MR. PRINCE: And what I'm argue not to reduce a penny.

14 THE COURT: Yes, I'll say that there -- pursuant to NRS 6-1 --
15 I'm going to quote it -- any trial of an action of an injured employee the --

16 MR. KHAN: Hold on one second because --

17 THE COURT: -- jury must receive proof of the amount, which
18 is blah, blah, blah. You will get further jury instructions at the end of the
19 trial.

20 MR. KHAN: Your Honor, that --

21 MR. PRINCE: Well I don't think you need to include --

22 MR. KHAN: Hold on one second.

23 THE COURT: Yes.

24 MR. KHAN: That includes the knee amounts which are
25 significant because he had surgery. So I'm going to ask that they also

1 ask for a second email if they are able to reduce it and deduct the knee
2 because that is now an amount that's inaccurate.

3 MR. PRINCE: But that's not correct because he still has to
4 pay it back.

5 MR. KHAN: Well the knee isn't an issue in this case.

6 MR. PRINCE: He's still paying it back.

7 THE COURT: Well it's all payments made --

8 MR. PRINCE: All payments made.

9 THE COURT: -- or to be made. So, yes, it needs to be the
10 whole amount.

11 MR. KHAN: Okay.

12 THE COURT: And although there's nothing we can do about
13 that at least inquire as to whether that includes Dr. Thalgott who
14 apparently has at least a couple of bills.

15 MR. PRINCE: But --

16 MR. KHAN: I think it's to today.

17 MR. PRINCE: -- I think it -- just so it's clear, Your Honor, I
18 think you have the question. Mr. Yahyavi is receiving total temporary
19 disability benefits from Workers Comp currently. He just started
20 receiving those earlier this year and they're also paying for all the work
21 up and treatment associated with Dr. Thalgott, Dr. Schifini and the
22 placement of the stim.

23 THE COURT: That's what I'm saying --

24 MR. PRINCE: So that happened -- so the 185 is --

25 THE COURT: And the problem is --

1 MR. PRINCE: -- rightly includes current benefits.

2 THE COURT: -- it says made or to be made and I don't see
3 how you can speculate as to what his PPD rating is going to be if --
4 assuming -- all right. All right. Whatever. Go use the bathroom. We'll
5 deal with that at the next break.

6 MR. KHAN: Thank you, Your Honor.

7 [Recess taken from 2:04 p.m. to 2:12 p.m.]

8 [Outside the presence of the jury]

9 THE COURT: And including legal fees.

10 MR. KHAN: Defense is ready, Your Honor.

11 THE COURT: Okay. Did you notice it says including legal
12 fees? Show it to Mr. Prince. I don't know how they get to include legal
13 fees. I don't think that that's what was contemplated by the case.

14 MR. KHAN: Or the statute.

15 THE COURT: Yeah. Thank you, by the statute.

16 MR. PRINCE: Well, they said total paid, right? That's part of
17 his lien amount, so if that's what he's got to pay then --

18 THE COURT: Well, I'm just going to do it because we've got
19 nothing else. Another issue, someone came, I don't know where, with
20 an A peeler and they wouldn't allow them into the court building unless
21 Steve took the A peeler and brought it up.

22 MR. KHAN: That's Mr. Baker, my expert.

23 THE COURT: Okay. What's that about?

24 MR. KHAN: It's a demonstrative. He used it at his
25 deposition.

1 MR. PRINCE: Well, we're going to have a hearing about what
2 Mr. Baker can and can't testify too, so there's going to be a hallmark
3 proceeding and argument.

4 THE COURT: All right. So, we have your A peeler.

5 MR. KHAN: I don't think it made it up.

6 THE COURT: We have your A peeler. Okay. What else for
7 now?

8 MR. KHAN: That's it.

9 THE COURT: Okay. Bring them in. When would be getting
10 to that expert, tomorrow?

11 MR. KHAN: As soon as this afternoon depending on how
12 long the hearing is or tomorrow morning. I figured end of the day or
13 tomorrow morning, but he's here.

14 THE COURT: How much -- I assume you have another hour?

15 MR. KHAN: At least another 15 to 30 minutes. Maybe an
16 hour.

17 THE COURT: Okay. 30 minutes redirect, an hour?

18 MR. KHAN: And I'm going to put Mr. Goodrich back on for a
19 short period.

20 MR. PRINCE: Well, let's plan for Baker tomorrow then. I
21 want to keep moving, so.

22 THE COURT: I appreciate that. Baker and who else?

23 MR. PRINCE: Well, we're going to have a hearing on Baker,
24 so whatever. It's fine. I'm ready to go on Baker.

25 THE COURT: Who else is there?

1 MR. KHAN: After Mr. Baker and Mr. Kirkendall, the
2 economist, then that's probably it.

3 [Court and clerk confer]

4 THE MARSHAL: Please rise for the jury.

5 [Jury in at 2:16 p.m.]

6 [Within the presence of the jury]

7 THE COURT: Please be seated. Parties acknowledge the
8 presence of the jury?

9 MR. KHAN: Defense does, Your Honor.

10 MR. PRINCE: Yeah.

11 THE COURT: You're still under oath. Go ahead.

12 BY MR. KHAN:

13 Q Mr. Yahyavi, jumping back to the issue of you being the
14 manager of salesperson, I thought your testimony to the jury was you
15 switched from Chapman Dodge to Chapman Jeep because you couldn't
16 perform the functions of a manager. So, how is it that you became a
17 manager at Chapman Jeep?

18 A I was limited on my duties. We agreed on that, so they
19 needed me, so I tried to perform.

20 Q And did you remain a manager until you quit Chapman Jeep
21 two years later?

22 A Early 2016, I think.

23 Q Now, going back to your medical treatment in -- hopefully in
24 some kind of order. Can we pull up Exhibit 88, P216? And I'm going to
25 look at the middle sentence under cervical spinal exam. So, that's

1 Exhibit 88, P216. At some point you went to a Dr. Klausner to do worker's
2 comp, correct?

3 A I don't remember that, but.

4 Q The encounter date at the top is July 18, 2013. Do you
5 remember going to the Center for Occupational Health and Wellness
6 either on Ronchetto [phonetic] or Pecos?

7 A I don't.

8 Q Okay. Can we go to cervical spine exam here, objective
9 cervical spine exam and blow up the whole thing? And one of the things
10 -- you don't deny that you went there, you just don't remember, right?

11 A I followed whatever worker's comp told me to do.

12 Q Okay. And then it says no cervical paravertebral tenderness
13 or muscle spasm; do you see that?

14 A I do.

15 Q And that's under cervical spine exam, right? So, do you
16 dispute that when you went to see this doctor about a month after the
17 accident, almost exactly a month after the accident, that the doctor
18 checked your cervical area and you had no tenderness or muscle spasm?

19 A Okay.

20 Q I'm just asking you, do you dispute that of what's in the
21 doctor's report at that time?

22 A I don't dispute it. I don't remember this, but yes.

23 Q Can we go to Exhibit 91, P286? This would be a record from
24 Desert Orthopedic Center, Dr. Perry, September 16, 2013. Okay. This is
25 now about three months post-accident, correct?

1 A Right.

2 Q And I would ask you to highlight the portion that says he
3 denies and the date. So, while he's doing that, Mr. Perry was your
4 orthopedic surgeon at the time, correct?

5 A Yes.

6 Q And this date, September 16, 2013, you agree that you were
7 seeing him by that point or at least beginning at that date?

8 A Repeat the question.

9 Q Yeah, you were seeing in September after the accident,
10 right?

11 A Yes.

12 Q And then it says the following. "He denies having any history
13 of significant neck pain prior to this accident." Do you see that?

14 A Yes.

15 Q And is it correct that you did not tell Dr. Perry the same thing
16 that was in the other report to Southwest Medical Associates from now it
17 would be less than two years earlier about the years of neck pain?
18 That's correct, you didn't tell Dr. Perry that, right?

19 A I never had neck pain prior to this accident.

20 Q I thought you told us yesterday that you didn't dispute the
21 report from Southwest Medical Associates record that you had neck pain
22 for years, you just didn't remember saying it?

23 A I don't remember saying anything like that at that time.

24 Q Okay. So, I'm not asking you that right now.

25 A Okay.

1 Q I'm just asking you to confirm, you didn't tell Dr. Perry that
2 you had prior neck pain before this accident, right?

3 A Correct.

4 Q And you didn't tell UMC or the ambulance on the day of the
5 incident that you had prior neck pain, correct?

6 A I vaguely remember the accident day in the ambulance and
7 all that, so I don't remember what I told the accident guy or the
8 ambulance guys.

9 Q When you went to the chiropractor at Downtown Neck and
10 Back down in Calloway five days after the accident, you didn't tell her
11 that you had years of neck pain that had reported several years before,
12 correct?

13 A Yeah, correct.

14 Q And when you went to Dr. Oliveri for your rating years later,
15 you didn't tell him that you had reported neck pain for years before this
16 accident, correct?

17 A Correct.

18 Q And when you went to Dr. Schifini, you didn't tell him that
19 you had had neck pain reported for years before this accident, correct?

20 A Correct.

21 Q And the same is true for Dr. Fisher, right?

22 A Yes.

23 Q And Kelly Hawkins Physical Therapy, correct?

24 A Yes.

25 Q And every other doctor and physical therapist and

1 chiropractor that you saw after this accident up to today other than the
2 ones that received it shortly before trial in this case, right?

3 A Right.

4 Q So, I guess I need to ask you, are you changing your
5 testimony from yesterday now and now you're saying you did not tell
6 Southwest Medical Associates that you had neck pain for years?

7 A I just don't remember it, but I know is that I never had neck
8 pain prior to this accident. Otherwise, I would have done something
9 about it.

10 Q So, how do you -- well, you did do something about it. You
11 got an X-ray, a cervical X-ray from Southwest Medical Associates, didn't
12 you?

13 A And that was never an issue as far as medications or
14 treatments or anything like that after that visit. I don't even recall that
15 visit.

16 Q You're not saying that somebody else's X-ray that has the
17 same cervical C3 to P1 degenerative disc disease from October 2011, are
18 you? You're not saying that that's somebody else's X-ray, right?

19 A I don't think so.

20 Q Okay. And if we could go to P287, same exhibit number. I
21 think it's 91. Dr. Perry hasn't testified in this trial as far as you know,
22 right?

23 A Correct.

24 Q And if we could blow up -- that's fine. It says September 17,
25 2013. If you could highlight the number 3 please and blow that up? So,

1 Dr. Perry was identifying the same thing that the other doctors have
2 talked about the C67 auto fusion that preexisted this accident, correct?

3 A Correct.

4 Q Now, if you could pull up Exhibit 91, P291? Also Dr. Perry,
5 November 11, 2013. And then if you could blow up from the fourth line
6 down to the bottom to where it says authorized all the way down to the
7 bottom of that paragraph? And this is something the jury has seen
8 before, Mr. Yahyavi. But it says that you've been to the emergency room
9 on a few occasions and it says, he states, he being you I believe, that he,
10 which is you, has been taken off of work due to high blood pressure. Do
11 you see that?

12 A I do see that.

13 Q Do you remember being taken off of work in November of
14 2013, roughly five months after the accident for high blood pressure?

15 A I was never off work.

16 Q So, this medical record is wrong also, right?

17 A Yes.

18 Q And this is Dr. Perry. He was your treating physician. He's
19 not involved in this litigation, right?

20 A I don't know if he's involved in it.

21 MR. PRINCE: Objection. Move to strike, Your Honor. He is
22 involved in litigation.

23 THE COURT: I'm going to overrule. It's cross-exam. Was
24 that a question?

25 MR. KHAN: Yes, Your Honor.

1 THE COURT: You can answer it.

2 THE WITNESS: Repeat the question please?

3 BY MR. KHAN:

4 Q Yes. Dr. Perry was your treating physician in November 11th
5 of 2013? We'll just leave it at that.

6 A Yes.

7 Q And then you said you blacked out from this accident, you
8 think, right?

9 A At the time of the accident you mean?

10 Q Yes. June 19, 2013 at the collision?

11 A I think I did, because my memory is gone for a period of
12 time. I think I did.

13 Q Was your memory gone only after the accident and not from
14 activities and what you perceived before the accident? Or is your
15 memory gone from a period of time before the accident as well?

16 A It was at the time of the, you know, I don't remember
17 anything after the accident, after I hit the forklift.

18 Q But you remember it before the accident that there were two
19 trucks, right?

20 A I do.

21 Q And you remember you were in the right lane, right?

22 A Yes, closest to the cones.

23 Q And you remember you were signaling right?

24 A Signaling, yes. Making the turn, correct.

25 Q Okay. Can we go to Exhibit 92, P3336, please? And under

1 history of present illness, I'm going to ask you to blow up just a small
2 part. History of present illness it says he had. Just that sentence. Now,
3 that's Dr. Schifini's record from -- this is Dr. Schifini about a little over
4 five months after the accident. Do you know any reason why Dr. Schifini
5 would say you did not lose consciousness in the accident?

6 A I don't.

7 Q And do you dispute this medical record? In other words, you
8 think this is incorrect, right?

9 A I don't. She wrote that so I don't know about it.

10 Q And then can you go to Exhibit 94, P506? I think it goes to
11 506 to maybe 508. There's three pages. This is your nerve conduction
12 study with Dr. Germin. Do you remember going to Dr. Germin and
13 doing what's called a Nerve Conduction Study? They put some
14 electrodes on you. They pricked you with some kind of needle or
15 pinwheel? This would be about five-and-a-half years ago. Dr. Dixon, I
16 remember.

17 Q He did the same kind of a test.

18 A Okay.

19 Q But this is P508. So, this is Dr. Germin doing the nerve
20 conduction study that was requested. And this is saying essentially on
21 February 4, 2014, that you had no radiculopathy as determined by Dr.
22 Germin on that date. Do you dispute that for any reason?

23 A I don't.

24 Q And later on you did a similar test with Dr. Dickson years
25 later, correct?

1 A Yes.

2 Q And they did determine that at that point years later you had
3 radiculopathy, correct, as far as you know or don't know the medicines?

4 A I don't.

5 Q Fair enough. And excuse me, but I'm trying to short circuit
6 some of this so I'm shuffling, so I apologize. Then if you go to Exhibit 91,
7 P299, and in the plan paragraph, I'm going to ask you to blow up a
8 couple sentences in the middle of that. Plan -- and I guess you could just
9 pull up the whole paragraph plan. So, this is November 10, 2014 and
10 this is Dr. Perry saying in my opinion I do not feel confident that surgical
11 intervention would result in any significant medical improvement in this
12 patient. Do you see that?

13 A I do.

14 Q And then he's suggesting -- you don't need to highlight the
15 rest. He's suggesting a follow up of pain management and non-
16 operative treatment, right?

17 A Right.

18 Q And did he tell you that? Did Dr. Perry tell you I don't think
19 surgery is going to help you back in 2014?

20 A I don't remember that.

21 Q And then you were seeing Dr. Schifini at that point still,
22 correct? He was doing some injections for you the first year or year-and-
23 a-half?

24 A Yes.

25 Q Can you pull up -- I'll have to check with the clerk for one

1 second.

2 [Mr. Khan and Clerk confer]

3 BY MR. KHAN:

4 Q Can we please pull up Exhibit IIII?

5 MR. PRINCE: Is it admitted?

6 MR. KAHN: It is admitted according to the Clerk.

7 BY MR. KHAN:

8 Q This is a letter from Dr. Schifini to Dr. Perry; do you see that?

9 A Yes.

10 Q November 4, 2014.

11 A Okay.

12 Q And at that point Dr. Schifini is your pain management
13 doctor, right?

14 A Right.

15 Q And Dr. Perry is your orthopedic surgeon, correct?

16 A Right.

17 Q And then if you could blow up the body of the letter please?

18 So, this is Dr. Schifini telling Dr. Perry about five years ago that you no-
19 called no-show for whatever visit you were supposed to go to in
20 November of 2014, correct?

21 A Correct.

22 Q And you didn't go back to Dr. Schifini for roughly five years
23 after that, right?

24 A Correct.

25 Q So, when you say you've done everything possible to take

1 care of your pain and follow your doctor's instructions, one of the things
2 you did not do is go back to Dr. Schifini who was giving you injections at
3 that point in time?

4 A Correct.

5 Q And you didn't call his office and explain why you didn't
6 show up, you just didn't show up for an appointment and never went
7 back for five years, right?

8 A I don't remember calling them, but.

9 Q And you stopped getting injections from Dr. Schifini and you
10 started getting injections from Dr. Fisher, who is the same kind of doctor,
11 a pain management doctor, right?

12 A Correct.

13 Q And if you could pull up Exhibit 96, 542 please? And again,
14 I'm trying to do this in chronological order because it's been jumbled a
15 while. The date is March 11, 2015. Christopher Fisher, M.D. at the
16 bottom. That's your pain management doctor at the time, right?

17 A Right.

18 Q So, you stopped getting injections from Dr. Schifini. You
19 started getting injections from Dr. Fisher. And then if you could highlight
20 at this point that whole paragraph please? And within a couple months
21 or so, Dr. Fisher decides that there's really not much he can do with
22 injections and your MMI, maximum medical improvement. Do you recall
23 him telling you that, that he's not going to give you more injections,
24 there's really nothing he can do at that point?

25 A I don't recall it, but.

1 Q And then it's talking about sending you for an FCE, a
2 Functional Capacity Evaluation. That's the one who I think is suggesting
3 at the time, but we've talked about that so I'm not going to go back into
4 that.

5 A Okay.

6 Q Functional Capacity Evaluation, the jury has heard a lot on
7 that, so. So, by this point, March of 2015, which is now less than two
8 years after the accident, you stopped seeing Dr. Schifini, correct?

9 A Correct.

10 Q Dr. Perry said don't get a surgery, at least that's what's in his
11 records, right?

12 A Well, okay.

13 Q You went to Dr. Fisher, who is the same kind of doctor as Dr.
14 Schifini was giving you injections, right?

15 A Different kind of injections, branch blocking.

16 Q Okay. And that's fair too. But you see Dr. Fisher and he says
17 he doesn't think injections are going to help you in this letter in March of
18 2015, correct?

19 A Nothing worked, correct.

20 Q Give me just a second, sir. There's two other pages I have to
21 find.

22 A Okay.

23 Q Can we pull up Exhibit 96, P546, Spine Clinic. And actually,
24 can you do P546 again, O547 side-by-side, please? So, this should be an
25 April 8, 2015 record from Nevada Spine Clinic, Dr. Fisher, when it pulls

1 up. And if you could highlight please the date at the top? And Dr. Fisher
2 here on the bottom on the right. And first question is, Dr. Fisher was still
3 your pain management doctor in 2015, correct?

4 A Okay.

5 Q And let's pull up -- highlight this and blow up he denies any,
6 that sentence at the bottom of the paragraph here in the next line. And
7 can you highlight he denies any previous medications? So, this appears
8 to be a record from Dr. Fisher, and this isn't a form that you filled out or
9 somebody just made an error and didn't write it down. This appears to
10 be you telling Dr. Fisher that you never had any prior neck issues. Do
11 you recall telling him that in April of 2015?

12 A I don't recall it, but that is true.

13 Q Well, it's only true if the report to Southwest Medical
14 Associates from October 2011 is false, right?

15 A I don't remember saying anything about the neck issues prior
16 to this.

17 Q Right, but yesterday I started by asking you, are you saying
18 that was incorrect and if it's improperly documented and it's wrong and
19 you said you just don't remember.

20 A Right.

21 Q So you seem today to be changing that and I want to be very
22 clear of what your testimony is, whatever it is?

23 A I'm not changing anything. I just don't remember, and I
24 wasn't there when they put that in that report, so I don't know what
25 happened there, but I know about my condition.

1 Q Okay. Can you highlight on the bottom on the right-side
2 number 6, follow up? And can you highlight that please? Actually,
3 highlight just the three months. So, Dr. Fisher in April of 2015 told you
4 or his office --

5 MR. PRICE: Repeat it. What is the date of the record?

6 MR. KAHN: I'm sorry. Let me just catch up. It's Exhibit 96. I
7 think it's P547. Does that sound right?

8 BY MR. KHAN:

9 Q So, Dr. Fisher, in April of 2015, is to have you follow up in
10 three months, which would be July of 2015; isn't that correct?

11 A Yes.

12 Q And isn't it correct that you never did go back to Dr. Fisher
13 after that point?

14 A I only follow what worker's comp was telling me to do. So, I
15 don't remember that.

16 Q Well, Dr. Fisher, whoever is directing Dr. Fisher, he's telling
17 you as the patient, come back in three months in April of 2015, right?

18 A Okay.

19 Q And you didn't go back in three months or ever again after
20 that, right?

21 A I don't remember.

22 Q I'm going to put up another demonstrative exhibit. All that's
23 happening -- again, you've told the jury on direct that you did everything
24 possible to take care of your pain and work on your neck and one of
25 those things would have been returning to Dr. Fisher. You didn't do that,

1 right?

2 A Okay.

3 Q Now, I'm going to show you a chart that I've made. This is
4 demonstrative. And this shows the amount of money that is in your
5 submitted bills in this case by time. And it appears that from the middle
6 of 2015 to the middle of 2016, you essentially almost have no medical
7 treatment. And can you tell the jury any treatment you remember
8 receiving for that year, mid-2015 to mid-2016, any doctors that you saw
9 and treatment that you had?

10 A Not that I recall, but I was doing my exercises and all that,
11 physical therapy stuff at home.

12 Q Well, I want to be clear. You've also testified during the
13 entire six plus years, you had constant, unrelenting awful pain every
14 single day for six years, right?

15 A I have.

16 Q And that includes this year, right?

17 A Yes.

18 Q From middle of 2015 to middle of 2016?

19 A Yes.

20 Q But you saw no doctors, right?

21 A There was nothing else they could do for me except surgery.

22 Q Well, the surgery you didn't get for another 3-and-a-half
23 years, 2-and-a-half years after this, right?

24 A I wanted to go back and try again to see if I can do anything
25 to get my health back, but I couldn't.

1 Q And then -- could you pull up Exhibit 103, P699? This is now
2 a physical therapy record, and the jury has seen most of this. This is a
3 physical therapy record in early 2017. It's called Desert Valley Therapy,
4 but it's part of ATI, so it could be identified in that whole upper left-hand
5 corner and actually Initial Evaluation Clinic here in the date. You can see
6 the whole top. So, this is now January 2017. This is a physical therapy
7 location you attended, right?

8 A Yes.

9 Q And can you blow up this tiny thing here and make it as big
10 as you can because it's very small? And if you could highlight the word
11 exacerbated and six dash seven months? So, now we're into 2017,
12 about 2-and-a-half years ago. This is your physical therapist at the time,
13 correct?

14 A Okay.

15 Q And they're saying that six or seven months before, which
16 would be somewhere around the summer of 2016 that you had an
17 exacerbation; do you see that?

18 A I do.

19 Q And I think your testimony is your neck got worse in the
20 middle of 2016, but there was no trauma or event or incident. It just felt
21 worse?

22 A Right. There was no trauma after this accident. I haven't
23 endured any trauma.

24 Q But I'm talking this specific timeframe. The summer of 2016,
25 nothing made your neck worse. It just became worse, right?

1 A Yes. From the time from 2013 I haven't had any traumas or
2 accidents until now.

3 Q Right. But you're -- in the middle of 2016 you're still working,
4 right?

5 A Barely. Barely.

6 Q Okay. But you still worked from June of 2013 to some point
7 in the second half of 2016, right?

8 A Very limited. Very limited. I was off more than I was on.

9 Q And so, I thought you made close to \$100,000 in 2015. You
10 made \$97,000 in 2015. And then in 2016 your income declined. So, is
11 that fair?

12 A Yes.

13 MR. KHAN: Okay. You can take that down, please. And then
14 I think HHHH is admitted. Can the clerk check that before we put it up,
15 please?

16 THE CLERK: I'm sorry?

17 MR. KHAN: 4 H's.

18 THE CLERK: Let me double check that.

19 MR. KHAN: If it's not, I won't put it in.

20 THE CLERK: 4 H's, yes that's in.

21 BY MR. KHAN:

22 Q Okay. Can you put that up? This is now kind of fast
23 forwarding to your surgery in early 2018. And I'm going to ask that
24 session two, the first couple sentences be blown up. Actually, just the
25 first two lines is fine. Thanks. And this is now after your surgery, the

1 physical therapist came to your room and wanted to perform physical
2 therapy and you refused. Do you remember that, refusing physical
3 therapy after your surgery?

4 A I was in a lot of pain after the surgery, so I don't remember. I
5 was on morphine. I was on Oxycodone. I can't remember.

6 Q Okay. You don't remember that's fine. You can take that
7 down please. And then if you could go to Exhibit 105, P1023? This is
8 now a couple months after the surgery, Dr. Kaplan. And I'm going to ask
9 you to blow up the bottom two lines. Bottom two lines of the whole
10 thing. And this is March 30, 2018. Just the bottom two lines. Thank
11 you. And this says, "He tells me nothing else happened to his neck apart
12 from this." Do you see that?

13 A Yeah.

14 Q So, you told Dr. Kaplan also that you didn't have neck
15 problems other than from this accident, right?

16 A Correct.

17 Q And then can you go to Exhibit 106, P1049? This is now
18 catching us up to February of this year. This is Dr. Kaplan. And you can
19 just blow up the whole thing, the whole top, yeah. And so, now he's
20 talking about a spinal cord stimulator. We came to a trial. He's
21 discussed it with you. It's Dr. Kaplan. So, the spinal cord stimulator has
22 been out there for at least seven months as a concept, right?

23 A Yes.

24 Q And was it out there earlier? Did you discuss it with other
25 doctors last year in 2018?

1 A No.

2 Q Okay.

3 A What time period are you talking about?

4 Q That was February of 2019, so I'm asking you did they talk to
5 you about a year or a year-and-a-half ago --

6 A No.

7 Q -- the possibility of spinal cord stimulator?

8 A No. It wasn't a year-and-a-half ago. The stimulator only
9 came up after the pain issue persisted or developed.

10 Q And then can you go to Exhibit 92, P358, please? 92, P358.
11 This is Dr. Thalgott from about six months ago. If you could blow up the
12 last two lines on this please? Oh, don't pull that up, sorry. It's similar to
13 what I was going to ask for, but it's different language. So, hold on one
14 second. There was only one portion to this that I want blown up. And it
15 starts with PT at the bottom here and there's only about six or seven
16 words. PT patient needs -- no, no. Don't do the whole thing. Just a
17 patient needs SCS, just that portion. That's fine. Go to the word trial.
18 One more word and then you're good. That's it.

19 Okay. So, this is saying -- this is Dr. Thalgott. It's down here.
20 Thalgott, under vitals. Vitals here it says Thalgott. There you go. So,
21 this is Dr. Thalgott in March of this year, six months ago or so, saying
22 that you will definitely need to have a trial of an SCS or a Spinal Cord
23 Simulator. Did Dr. Thalgott tell you that you would need a trial for the
24 spinal cord stimulator?

25 A I don't recall that, but.

1 Q And if you could go to Exhibit 92, P316. This is from June of
2 this year, so about three months ago, three and a half months ago. This
3 is Dr. Schifini.

4 MR. KAHN: If you can find the date of Dr. Schifini, that would
5 be good. That date's over here. Physician Schifini. And if you could
6 have where -- from the words, "Gave him no relief," and the sentence
7 under it, "Spine surgery was performed," those two lines. "Gave him no
8 relief. Spine surgery was performed." No, not that much. Just go down
9 about three lines. The two lines, "Gave him no relief," and, "Spine
10 surgery was performed." Those two lines. Not the ones you're doing.
11 Go down about three lines, three, four lines. Further down. About two
12 lines. Those two. There you go. One more. That's fine. That's close
13 enough. Okay.

14 BY MR. KAHN:

15 Q Dr. Schifini is saying he gave you five sets of injections and
16 those gave you now relief. He says he referred -- you were referred to
17 Dr. Kaplan, who ordered cervical x-rays. Then Dr. Kaplan performed
18 surgery spine surgery, which resulted in no changes.

19 Do you see that?

20 A Yeah.

21 Q And that's correct, right, that you got the surgery from Dr.
22 Kaplan and you've had no significant reduction in your pain, right?

23 A I developed the arm.

24 Q And you developed the arm problems and the shoulder
25 problems --

1 A Well --

2 Q -- in addition, right?

3 A Well, the arm problem was always there, I just developed
4 more pain in the nerve.

5 Q Now, were you aware that Dr. Tung had written a report, my
6 expert, that did the IME that said in the report years ago, before you go
7 the surgery that he didn't think surgery would be helpful to you?

8 A Did he say that to me, or did he write it in the report?

9 Q Are you aware that he wrote that in the report in this case?

10 A No, I've never seen his report.

11 Q And are you aware that Dr. Tung testified here at the trial -- I
12 don't remember if you heard this or know whether you heard this, but
13 are you aware he testified at the trial that he doesn't think the spinal cord
14 stimulator would help you much, either?

15 A Yes, I remember him saying that.

16 Q You heard him say it at trial, right?

17 A Yes.

18 Q Okay. Now, we heard your son testify a little bit. And your
19 son, Darian, testified that you do some exercises at home, correct?

20 A I do.

21 Q You can drive to some degree, right?

22 A Yes.

23 Q You can cook to some degree?

24 A Yes.

25 Q I'm not saying a 20 course meal, but you're able to cook a

1 little bit for yourself, right?

2 A Yes.

3 Q And you're able to use your cellphone, right?

4 A Yes.

5 Q And you don't take issue with any of the things that Darian
6 said you could do. Is that fair? You're not disputing what he says, right?

7 A No.

8 Q And you were here for his testimony. You heard him testify?

9 A Yes, sir.

10 Q Give me just a second and I think I'm close to done.

11 A Okay.

12 [Pause]

13 BY MR. KAHN:

14 Q Thank you for your time, Mr. Yahyavi.

15 A You're welcome, sir.

16 REDIRECT EXAMINATION

17 BY MR. PRINCE:

18 Q Bahram, how are you doing? Would you like a break before
19 we get started with redirect?

20 A No, I can go on.

21 Q Okay.

22 THE COURT: Are you going to need a break or -- no? Okay.

23 [Pause]

24 BY MR. PRINCE:

25 Q Bahram?

1 A Yes.

2 Q Could you ever in your wildest imagination ever envision
3 that a forklift would drive out into the road and collide with your car?

4 A No.

5 Q Do you wish that never happened to you?

6 A Yes.

7 Q What's it like living the way you do now, because of that?

8 A I don't wish it on my enemies.

9 Q Is there --

10 A It's terrible.

11 Q -- anything you could have done differently that day --

12 A No.

13 Q -- before this collision?

14 A No, I couldn't help this.

15 Q Were you driving in the correct lane?

16 A I was.

17 Q Were you driving within the speed limit?

18 A I was.

19 Q And even though you were familiar with that area, you saw
20 the construction, would you have any reason to believe that anybody
21 with a forklift would pull out and crash and drive it through the front of
22 your car?

23 A Inconceivable, unimaginable.

24 Q Now, I'm going to show you this, since we're there.

25 MR. PRINCE: See if I can do it this way. A couple of

1 photographs of the road. Go to the exhibit. Sorry. Court's indulgence.

2 [Pause]

3 BY MR. PRINCE:

4 Q Here we go. Now, I want to go to Exhibit Number 2, Bate
5 Number 008. Is that what the road looked like that day of the collision?

6 A Pretty much.

7 Q On June of 2013?

8 A Yes.

9 Q Do you see the cars going to the right there? Do you see
10 that?

11 A To the right.

12 Q Yeah. There's a white car. They look like they're going to --

13 A Yeah.

14 Q -- veer off onto Glen?

15 A Yes.

16 Q Okay. That's not like a right turn. That's just like -- this kind
17 of like veers off, almost like an offramp. Wouldn't you say that?

18 A It is.

19 Q Were you driving next to those orange cones there were
20 those cars are?

21 A Yes, sir.

22 Q Was that the dedicated lane that day?

23 A Yes.

24 Q And did you have any reason to believe whatsoever that any
25 kind of construction equipment would be coming from behind one of

1 those parked trucks that day?

2 A No.

3 Q When you're driving, you said you're familiar with that area
4 and you would drive it frequently --

5 A Yes.

6 Q -- between dealerships.

7 A Yes.

8 Q And when you would --

9 MR. PRINCE: Can you show us the route? It's the -- oh 11,
10 demonstrative 11.

11 BY MR. PRINCE:

12 Q Okay. See on the left side is Chapman on the west. That'd
13 be a little bit west of Glen?

14 A Yes, sir.

15 Q And then did you make a right turn out of the dealership?

16 A Yes. Onto Mohave.

17 Q Okay.

18 A And right on Sahara.

19 Q Okay. Did you stay in the right lane the whole time?

20 A Yes.

21 Q And you -- what was your speed limit as you're driving?

22 A 25, 30 miles, soon as I turned.

23 Q Okay. And then when you make that turn, you said you don't
24 apply your breaks as part of -- in order to make -- you take your foot off
25 the accelerator. You just keep it on there, but you're not longer

1 accelerating.

2 A Correct.

3 Q Did you keep about a constant speed to the best of your
4 recall?

5 A Yeah, kept the speed that was necessary to make that --

6 Q Is that the --

7 A -- veer off.

8 Q -- speed you'd normally drive in that --

9 A Yeah.

10 Q Were you in a hurry in any way?

11 A Absolutely not. I do this every day.

12 THE CLERK: And which exhibit is this? I know you said
13 demonstrative --

14 MR. PRINCE: It's a demonstrative picture.

15 THE CLERK: But it's not in --

16 MR. PRINCE: It's in the PowerPoint that you -- that was
17 submitted as part of the Court exhibit.

18 THE CLERK: Okay.

19 MR. PRINCE: Yeah. Uh-huh. And it's part of an aerial
20 photograph of the area.

21 BY MR. PRINCE:

22 Q And so when you get there, after the collision, I mean,
23 people, even including Kevin Mackey, who is your boss, did -- you're
24 aware he came to the scene?

25 A Yes, I saw him --

1 Q And he --

2 A -- glance up --

3 Q -- he described you as dazed and confused and he didn't
4 think you understood what had happened is what he told this jury.

5 A Okay.

6 Q And is that a fair characterization that, you know, you were
7 dazed and confused, and you didn't truly understand what had
8 happened?

9 A I didn't know what had happened. I had no idea what had
10 happened.

11 Q The employee, Arbuckle, said you were frantic. Do you
12 remember being frantic?

13 A I do. I -- well, I didn't know what had hit me, so I was asking
14 anybody, laying down, what -- something hit me. What hit me?

15 Q I want to talk about your neck. I want us to make a few
16 things clear. Did you ever have neck pain that you had -- that caused
17 you any trouble, that required any kind of treatment of any problems
18 whatsoever before June of 2013?

19 A I did not.

20 Q Now, the record we're talking about -- let's kind of go
21 through those records for a minute, because I want to make sure
22 everything's clear -- from Southwest Medical. There is a note that says --
23 and you're there following up for some laboratory results. Reports neck
24 pain for years, right?

25 A Right.

1 Q And I want to make sure -- do you have a specific recall that
2 you had no neck problems for any time in your life. Do you remember
3 that? Is that clear in your life?

4 A Yes.

5 Q With regard to what you don't remember, do you remember
6 the specifics of that visit on October 25th, 2011, those specifics?

7 A I don't remember the specifics of it.

8 Q All right. Now, October 25th, 2011. It says complains of neck
9 pain for several years. Denies any history of neck surgery. No neck
10 trauma. Let's just start with the first. Have you ever injured your neck
11 before this collision?

12 A I have not.

13 Q Have you ever had any treatment directed to your neck
14 before this collision?

15 A I did not.

16 Q Now, there is a note -- the letter that was sent to your house,
17 apparently, talking about the x-ray results. Do you remember that Mr.
18 Kahn showed you that?

19 A I remember the letter now.

20 Q Right. And did you ever go -- let's even assume -- let's
21 assume you get it -- no reason to say you got it -- didn't get it. Did you
22 ever go back in and hey, what's going on with my neck? Do I need any
23 treatment? Did anybody recommended any treatment for your neck
24 after that October 2011 visit?

25 A No.

1 Q Okay. Now, during that -- those few months -- say the six
2 months after. Let's say the winter months of 2011, early 2012. Are you
3 skiing and active during that period of time?

4 A I am.

5 Q How many days a week are you working?

6 A Five to six days, depending.

7 Q Okay. How was your job performance?

8 A Good. No problems.

9 Q Now, the next time you go back to Southwest Medical is on
10 March the 12th, 2012. It's Bate Number 2108 of Exhibit Number 156.

11 A Okay.

12 Q And I'm going to tell you the reason for the visit and your
13 complaints. It says, "fifty year-old male presents to the clinic today with
14 complaints of right knee pains."

15 Is there any document of neck pain that day?

16 A I don't see it.

17 Q Did you have neck pain that day?

18 A I did not. I would have told him.

19 Q You were there -- did they recommend any treatment for
20 your -- did you -- do anything for your knee. They recommended some
21 physical therapy for your knee. Did you even do that?

22 A No.

23 Q Okay. Now, the next visit is November 1st, 2012. That's
24 page number 2106. But I want to go back to one thing. The 2110. That's
25 the day of your -- the October 25th visit, where they talked about your

1 neck pain for years, okay? I want to look at the neck exam.

2 A Okay.

3 Q And it says, "neck supple with full range of motion, mild
4 discomfort with palpation, no muscle spasm." Do you ever remember
5 any limitation to any range of motion ever before this collision?

6 A No. Did not have it.

7 Q Okay. Now, going ahead one year to November 2012 about
8 eight months before this occurred, 2106.

9 MR. PRINCE: And if you could go to the reason for visit and
10 through the subjective.

11 BY MR. PRINCE:

12 Q It says, "Fifty year-old male presents today for the clinic for
13 follow up on results." Number one, do you have a specific recollection
14 of this visit, in fairness?

15 A I don't.

16 Q It says, "States he's feeling well without any physical
17 complaints." That's what the record states.

18 A Okay.

19 Q But do you remember saying that to them that day?

20 A I don't remember that.

21 Q Right. I know you were following up on some lab results for
22 your like, triglycerides or those --

23 A Routine stuff, yes.

24 Q Routine stuff. And -- but is that how you felt and were you
25 having any physical problems in November of 2012?

1 A No.

2 Q Okay. Had anybody ever recommended any -- when you
3 were going back to Southwest Medical for a couple of visits after that
4 one visit showed up, did anybody recommend -- sit you down and say,
5 Bahram, we're recommending physical therapy. You need to do
6 something about your neck?

7 A No.

8 Q Anybody make a referral for any kind of therapy, treatment,
9 pain management or surgery for your neck before this occurred?

10 A No, sir.

11 Q Okay. Now, I want to talk about your work. Did you quit
12 your job? He used the word quit. Did you quit?

13 A No. I did not quit my job. I was transferred to --

14 Q Right.

15 A There was an opening at --

16 Q Tell us why, so the jury's clear, why you couldn't do the job
17 of a floor sales manager at Chapman Dodge.

18 A Very difficult --

19 Q In June of -- go ahead.

20 A Very difficult to -- it was very difficult to walk around. We
21 have a ten acre lot in one location, another ten acre in the other location.
22 You go and check on cars to see what we have received and all that. So
23 if previous customers that you haven't sold to -- this with the sales force.
24 So if a new vehicle comes in that has the options or that we haven't sold
25 to a certain customer before, now we have it and we get familiarized

1 with it. Then we'll go back to the office, make those phone calls, so we
2 can bring the customer back, having new inventory. Then again, that
3 was one aspect.

4 The next is that you have 20, 30 salespeople on the floor and
5 there's a lot of customers out there. So we have to go in on every one of
6 the deals and try to accommodate customers. It's very difficult to sit and
7 talk to them, so in the middle of those, I would have to give up the deal.
8 And you don't get any commission if you --

9 Q Now --

10 A -- give up the deal.

11 Q -- let's talk about the commi -- how you received payment at
12 Chapman.

13 A Okay.

14 Q Was it -- tell us how you got paid.

15 A Well, as a manager, you get a draw and wash on the 20th.

16 Q Explain how that works. Not everybody understands a wash
17 check and how that all works. Can you just basically explain that in
18 simple terms?

19 A Okay. The one month prior, you work for 30 days. And then
20 they close all those deals by the 30th of that month, previous month.
21 Then you get paid for that on the 20th.

22 Q Of the --

23 A However, you get --

24 Q -- following month?

25 A -- the following month.

1 Q Okay.

2 A However, you get \$5,000 to survive until then.

3 Q Okay.

4 A Until you get your check. So that's --

5 Q Would they -- well, let's say you get \$10,000 in commissions.

6 Would they take the 5,000 back from you?

7 A Yes.

8 Q Do they deduct it?

9 A They will -- yes --

10 Q Okay.

11 A -- they would take the money back, the advance money or
12 draw and then they will pay you the difference.

13 Q All right. So it wasn't like you got to keep all of that. You
14 didn't get to keep the 5,000 in addition to commissions?

15 A No, sir. That would be deducted from your check on the 20th
16 of the month.

17 Q Okay. Let's just show the jury an example of that, okay?

18 Let's just use a date in 2012, Feb -- let's go to February 2012, okay?

19 MR. PRINCE: Bate Number 1332. Now, let's use 1330. All
20 right. Okay.

21 BY MR. PRINCE:

22 Q Looks like your draw there was \$4,000 at that time?

23 A Right.

24 Q And then it says commission sales \$10,196.

25 A Right.

1 Q And then the current pay would be \$6,196.41. Do you see
2 that?

3 A Yeah. The difference between the 10,000 and the 4,000 that
4 they had given us.

5 Q Right. So the draw is against the commissions that you had
6 earned?

7 A Yes, sir.

8 Q They would take back the draw they paid you from the
9 commissions that you earned?

10 A Correct.

11 Q They would deduct it?

12 A Correct.

13 Q Okay. So it's not a -- it's a -- while it's a guaranteed
14 minimum, you have to give the money back as part of your overall
15 commission structure?

16 A Yes, sir.

17 Q So this is purely a commission job?

18 A Yes, sir.

19 Q Did you earn commission on deals you helped close for
20 some of the salespeople?

21 A Those were the only commissions.

22 Q That's the only way you made money.

23 A The only way we made money.

24 Q So if you didn't participate with those people, because of
25 appointments, pain, were off the floor for any reason, did you receive

1 portions of those deals that you should have?

2 A You would not.

3 Q Okay. Now, when you went to Chapman Jeep, you're saying
4 that they were able to accommodate you in a better way. How were they
5 able to accommodate you in a better way when you went to Chapman
6 Jeep?

7 A I took a sales position there, not a manager. And I could go
8 in at my own, you know, discretion, basically. If I could work, I'll be
9 there. You know, part time, basically.

10 Q And then at some point, did you become a floor sales
11 manager there?

12 A After six, seven months, we sat down and talked, and I told
13 them I can't do it. It wouldn't be fair to the business. I can't sit for long.
14 And they said okay, well, if you do it on a limited basis, then we'll have
15 somebody help you as well.

16 Q Okay. So you got back -- were you anywhere near the same
17 level where you were working at Chapman Dodge? Even though you
18 had that title, you still were out there on the floor working with the sale
19 people helping deals get closed?

20 A I was. I was --

21 Q Were you anywhere near the same level where you were
22 before?

23 A I was not.

24 Q Were you having to take more time off of the sales floor?

25 A Well, upstairs in the conference room with an ice pack and all

1 that.

2 Q And we talked about that yesterday, right?

3 A Yeah.

4 Q Or a couple days ago?

5 A Yes, sir.

6 Q Now, who referred you to Dr. Perry, the workers
7 compensation doctor?

8 A Yes.

9 Q Okay. Is that -- and Dr. Perry is the surgeon, correct?

10 A Correct.

11 Q Okay. Have you ever before been told that you have a C-6
12 auto-fusion that needed any kind of treatment, therapy, surgery, ever
13 before this?

14 A No.

15 Q Did you ever have ongoing -- the symptoms in your left arm
16 that you've had since this time ever before that? Ever before this
17 collision?

18 A No.

19 Q Okay. Anybody ever recommend you to be treated for some
20 type of auto-fusion, as you've described it?

21 A No.

22 Q One second.

23 A Okay.

24 [Pause]

25 BY MR. PRINCE:

1 Q Now, Dr. Perry recommend a surgery to you, correct?

2 A Yes.

3 Q Right. And you said you're apprehensive about that, correct?

4 A Correct.

5 Q Were you reporting neck and arm symptoms to Dr. Perry the
6 entire time?

7 A Yes.

8 Q And I want to talk about your pain levels, okay?

9 A Yes, sir.

10 Q You said that earlier that the pain has remained about same
11 from right after the accident until about now, right?

12 A Correct.

13 Q Okay. I want to talk a little bit about that and kind of like
14 compare your reported pain levels throughout the entirety of your care,
15 okay?

16 A Okay.

17 Q First is going to be Bate number 191, part of the chiropractic
18 records. Exhibit Number 87. It's right about in the middle of the page
19 under course of treatment injury. I want to keep in mind these pain
20 levels as we go through, okay?

21 A Okay.

22 Q It says your overall pain was 7.5 out of 10. Do you see that?

23 A Yes.

24 Q Does that sound consistent with you?

25 A Yes.

1 Q Do you still have that same now?

2 A I do.

3 Q And I want to go to Exhibit Number 91, which is Dr. Perry's
4 records. Let's look at Bate number 286 of Exhibit 91, part of the history
5 of present illness. Let's look at the pain scoring.

6 MR. PRINCE: In the middle of the bottom third of the history
7 of the present illness, the first paragraph.

8 BY MR. PRINCE:

9 Q Okay. He notes that --

10 MR. PRINCE: Let's maybe move up a little.

11 BY MR. PRINCE:

12 Q He notes that since he had significant -- the aforementioned
13 subject states that at worst, he rates his pain up to 8 or 9 on a scale of 0
14 to 10 over the last three months, which would be from June. He has had
15 some mild improvement. He states current 6 or 7 on a scale of 0 to 10.
16 He describes the pain left greater than the right, extending into your
17 upper back and trapezius are, intermittent pain and paresthesia into your
18 left greater than right arm.

19 Do you see that?

20 A I do.

21 Q Is that consistent with how you recall your symptoms?

22 A Yes.

23 Q After hundreds of doctor's visits, is it hard to remember like a
24 specific visit?

25 A It is.

1 Q Is it almost impossible, in fact?

2 A I think so.

3 Q But do you remember your overall condition?

4 A I do remember.

5 Q So Dr. Perry's got you between 6 and 8 out of 10, right?

6 We're same as the chiropractor. Let's look at Dr. Schifini, what he
7 reported when you first saw him in November 2013.

8 A Yes.

9 Q That's part of Exhibit Number 92, 336. And it's part of the
10 history. The first paragraph. Describes a bunch of things. You've got
11 daily pain, aching, shooting, numbing pain, pain in your head, pain in
12 your arm, pain in your neck. But then it says, "He rates his pain as an
13 average of 7 and a half out of 10 with a high of 9 and a half out of ten."

14 Do you see that?

15 A I do.

16 Q Is that consistent with what you reported to the -- even from
17 the beginning with the chiropractor?

18 A It is.

19 Q Okay. And that's in November of 2013. Now, after that, after
20 you saw Dr. Schifini, the next pain manager you saw was Dr. Fisher,
21 right?

22 A Yes.

23 Q Okay. Now, you last saw Dr. Schifini in November of 2014
24 and according to these records, you saw Dr. Fisher on December 3rd,
25 2014. That's part of Exhibit Number 96.

1 A Okay.

2 MR. PRINCE: Just show us the date and then the pain
3 scoring.

4 MR. KAHN: Bate number, please.

5 MR. PRINCE: Of 530. Excuse me. Show us the date and
6 then says circle the word to describe your pain through the pain score.

7 BY MR. PRINCE:

8 Q Do you see the date at the top, Bahram? It says December
9 3rd, 2014?

10 A I do.

11 Q Okay. So after you stopped going to Dr. Schifini, did workers
12 comp recommend Dr. Fisher for you?

13 A Yes.

14 Q Okay. Is that where you got his name?

15 A Yes.

16 Q Did he try different injections for you?

17 A I don't remember exactly --

18 Q I know there's lots of them.

19 A I think it was called branch blocking, rather than --

20 Q Epidural steroid?

21 A -- epidurals and all that, so --

22 Q Anyway, your pain score as of December 3rd is reported as a
23 7, the same as it was at the chiropractor.

24 A Right.

25 Q And that's a year and a half after the collision?

1 A Yes.

2 Q You went to doctor -- well, let me -- let's talk about this for a
3 minute. Go to Bate number 533. That's the first visit with Dr. Fisher
4 December 3rd, 2014.

5 A Okay. And it says --

6 MR. PRINCE: If you could just give me the chief complaint
7 through the assessment.

8 BY MR. PRINCE:

9 Q Do you need a break?

10 A No, I'm good. Thank you.

11 Q Okay. And it says here -- I can read it to you. December 3rd,
12 2000, says left cervical pain, upper back pain. Talked to Dr. Perry." So
13 Dr. Perry made the referral. He's the one who -- first off, did Dr. Perry
14 refer you to Dr. Schifini?

15 A Yes.

16 Q Is he now referring you to Dr. Fisher?

17 A Yes.

18 Q Okay. So you're trying another pain manager, to see if he
19 can help you in some way?

20 A I wasn't getting any help there.

21 Q Right. So after Dr. Perry said well, you're apprehensive
22 about surgery, I'm not sure if surgery can benefit you, did he make
23 another referral for pain management to see if that could help you?

24 A Yes.

25 Q Okay. And then it says, "52 year-old male presence with neck

1 pain since June 19th, 2013." He talks about you know, the running into a
2 forklift. He says, "He reports difficulty sitting for prolonged periods of
3 time. Denies any previous neck issues. He continues to work six hour
4 shifts." Do you see that?

5 A Yes.

6 Q Is that less time than you worked before June of 2013?

7 A Yes.

8 Q Okay.

9 A Half.

10 Q Even though you were now a quote, unquote floor sales
11 manager at Jeep, are you doing it only half time?

12 A Yes.

13 Q Okay. Was it hard for you?

14 A Very.

15 Q Were you doing your best?

16 A Trying.

17 Q All right. Now, you saw Dr. Oliveri, who's the reigning
18 physi -- well, in fact, let's -- I want to make sure that we close this loop,
19 because I don't want there to be any stone unturned.

20 THE COURT: We might as well take a recess. During this
21 recess, you're admonished do not talk or converse amongst yourselves
22 or with anyone else on any subject connected with this trial or read,
23 watch or listen to any report of or commentary on the trial or any person
24 connected with this trial by any medium of information, including
25 without limitation, newspapers, television, radio or internet. Do not form

1 or express any opinion on any subject connected with the trial until the
2 case is finally submitted to you. We'll take ten minutes.

3 [Jury out at 3:24 p.m.]

4 [Outside the presence of the jury]

5 THE COURT: Okay. We're on the record outside the
6 presence. I have the letter from Associated Risk, one for each of you.
7 And of course, we have more questions.

8 MR. PRINCE: Thank you.

9 THE COURT: Surprisingly how quick it got here.

10 THE MARSHAL: Please be seated.

11 THE COURT: Yeah. Go ahead, be seated. The big question
12 they have incurred and then total lien. There is -- and I don't know --
13 you'll have to -- somehow somebody needs to figure out what that
14 means. Assuming we need to get -- and this was Ms. --

15 MR. KAHN: This has a vocational rehab amount, Your
16 Honor. I've never seen any records or seen anything about vocational
17 rehabilitation.

18 THE COURT: Ms. Johnson on the phone. Voc rehab. That
19 was probably just to have it done. Wasn't there a voc rehab
20 assessment?

21 MR. KAHN: I don't think so.

22 MR. PRINCE: That was us.

23 MR. KAHN: That was Dr. Oliveri rating.

24 MR. PRINCE: I have no idea what that means.

25 MR. KAHN: I've never seen it.

1 THE COURT: Well, we're going to have to get her on the
2 phone to explain. And then what -- so that -- there's the amount, total
3 amount incurred. I didn't add those up to see if that comes to 238. And
4 then why is the lien 50,000 or so less? So we'll have to do that. But take
5 a break. Go ahead. You can take a break.

6 [Recess taken from 3:26 p.m. to 3:39 p.m.]

7 THE COURT: Any ideas of what we're going to do about
8 clarifying. You want to get this woman on the phone?

9 MR. PRINCE: No, I think I understand what is going on here
10 and I'll just do my best to explain. I just learned this right now. When he
11 reopened the claim, they sent him to some kind of a vocational person.
12 He sent he went to a few visits earlier in the spring and the summer.
13 And I don't do that as he didn't tell me who it is. So we don't have any.
14 So they must have paid for some type of voc expense just to assess him.
15 But other than that, that's it.

16 THE COURT: Okay. Well, okay, that's not a big deal.

17 MR. PRINCE: I don't understand what incurred vs. lien, I
18 don't know what that is.

19 THE COURT: That's a big deal. That's a big deal.

20 MR. PRINCE: It looks like they've actually paid the 238, the
21 total lien. I don't know why there's a discrepancy of the lien, so I guess
22 we'll have to find that out.

23 THE COURT: And then did you see -- of course, because this
24 is them writing to the Plaintiff's attorney, as an important reminder on
25 the second page, a case that I don't specifically recall, but anyway the

1 third party designate what portion. It seems to be saying, which I
2 assume you guys would be asking for anyway, a past meds dispute or,
3 you know, a portion future meds expenses and then there's go for the
4 worker's comp.

5 Anyway, I'll let you guys look at that.

6 MR. PRINCE: It says the incurred liability on this claim to
7 date is 238 and they document that's what they paid, so I don't know
8 what the lien is, if they're reducing for some amount for some statutory
9 reason. I just don't know the answer to that question.

10 THE COURT: Well, I'll tell you a lot of times yes, we got them
11 to reduce and here's why. There is the -- crap, I don't remember any
12 more.

13 MR. PRINCE: Well, there's the brain form, but --

14 THE COURT: That's it. The brain --

15 MR. PRINCE: -- there's no -- you've got to give me the
16 supplement now in attorney's fees calculations.

17 THE COURT: But usually they'll -- and I don't think this
18 accounts, but it might be close, usually they'll, you know, say we'll take a
19 third off because they can't calculate bringing any better than anybody
20 else. What's that?

21 MR. PRINCE: That's not for the purpose -- that's only upon
22 resolution of the claim, right.

23 THE COURT: And it's -- you know, I did it for a while and I
24 never -- you know, the calculations, nobody can do the calculations.

25 MR. KAHN: Only John Labrian [phonetic] he was talking to,

1 Your Honor.

2 THE COURT: Yeah. So, okay, we can deal -- do you want to
3 get her on the phone or no? You're okay with 238?

4 MR. PRINCE: Our paralegal tried, Your Honor, and there was
5 -- no one answered.

6 THE COURT: Well, that's not surprising.

7 MR. PRINCE: Well, I guess we're going to put it in the form
8 of jury instructions. We can call tomorrow.

9 THE COURT: All right. What about tomorrow and hopefully
10 jury instructions and --

11 MR. PRINCE: Well, after Mr. Yahyavi I'm going to rest. I
12 checked with the Clerk. All my exhibits will be in. I don't know how long
13 Mr. Goodrich would be, I mean prior to today. Then we still have to have
14 the hearing and discuss regarding the scope or and he be allowed, Mr.
15 Baker's testimony. Then they have the economist and then that's it. So
16 and then we have jury instruction. I don't think we're arguing until
17 Friday morning, so.

18 THE COURT: Well, I think that's a given. What I'm hoping is,
19 it is Friday at some time.

20 MR. KAHN: From my perspective, Mr. Goodrich will be brief.
21 And Mr. Baker's going to be a while, assuming he's allowed to speak.
22 And then Mr. Kirkendall should be relatively brief, too, so I probably just
23 need today, tomorrow, or the rest of the day today and half a day
24 tomorrow, roughly, and then we can work on the jury instructions.

25 We've reviewed what's been proposed and we're -- we can

1 discuss them tomorrow, it probably makes more sense.

2 THE COURT: Okay. Okay.

3 MR. KAHN: Do you know what time we're starting tomorrow
4 or --

5 THE COURT: Yeah, 9:00. We don't have anything tomorrow.

6 MR. KAHN: Okay. So we shouldn't have a problem
7 tomorrow.

8 THE COURT: Okay. Bring them in.

9 [Judge and Clerk confer]

10 THE MARSHAL: Please rise for the jury.

11 [Jury in at 3:44 p.m.]

12 [Within the presence of the jury]

13 THE COURT: Please be seated. Do the parties acknowledge
14 the presence of the jury?

15 MR. PRINCE: Yes, Judge.

16 MR. KAHN: Yes, Your Honor.

17 THE COURT: Mr. Yahyavi, you're still under oath. Proceed.

18 MR. PRINCE: Okay.

19 BY MR. PRINCE:

20 Q Bahram, we were just looking at, just to kind of give
21 ourselves -- thank you for your patience -- orientating ourselves as to
22 time, okay?

23 A Okay.

24 Q Doctor Perry referred you to Doctor Fisher in December of
25 2014 after you were done with Doctor Schifini; do you recall that?

1 A Yes.

2 Q We said your pain was about a seven out of ten, okay. The
3 last visit with Doctor Fisher, which Mr. Kahn briefly touched on, but I
4 want to go through it with you, okay?

5 A Okay.

6 Q Is April 8, 2015.

7 A Okay.

8 Q Just before you saw Doctor Oliveri, the rating physician,
9 okay?

10 A Right.

11 Q All right. That's part of Exhibit Number 96, bate number 547.
12 I want to talk about exactly what he -- his plan, okay?

13 A Okay.

14 Q Let's talk about -- let's go to the plan at that point. It says
15 number one, the patient has moderate to severe pain limiting activities
16 of daily living, work duties, and recreational activities, such as industrial
17 industry -- injury; is that correct?

18 A Yes.

19 Q He says at this point he is at MMI status and has plateaued in
20 terms of his treatment. Were you pain free at that point?

21 A No.

22 Q Was there anything left for him to offer you?

23 A No.

24 Q It's at this point he made follow-up with a rating physician for
25 a PPD rating. Did you follow up with Dr. Oliveri shortly -- I think it's

1 almost a week later?

2 A Yes. I was instructed to.

3 Q In terms of his medications, he's only taking these at night. I
4 would like him to wean these on his own and if he's unable, he may
5 follow up in three months for a recheck and medication management; do
6 you see that?

7 A I do.

8 Q Okay. What were you doing in terms of medications at that
9 point from April 2015?

10 A I was taking medication.

11 Q Okay. And did you need to go back -- when you said -- when
12 he wanted you to wean off of those, did you wean off of those?

13 A I had some left. He told me when they were finished to go
14 ahead and wean yourself off of that and if you need to, just get some
15 over-the-counter medication. So that's what I did.

16 Q Okay. So between -- we're going to talk about that period
17 that you weren't -- that year you weren't really seeking any medical
18 treatment 2015 to 2016?

19 A Right.

20 Q I mean he told you he'd done -- there's nothing really to offer
21 you at this point. And so you're within that year period. Are you taking
22 any prescribed medications during that period or are you just taking
23 over-the-counter?

24 A Just over-the-counter after I finished up a few months after.
25 A few months after he told me that, I finished up my medication.

1 Q How were you doing with no medications, no physical
2 therapy, no injections, none of the treatment; how were you doing
3 during that year?

4 A It was terrible. It was terrible.

5 Q Right. I want to talk about -- I want to stay with the pain
6 scoring because I want to talk about your pain because from my review
7 it's the same throughout. I want to go now to Dr. Oliveri's report. He
8 said he saw you on April 23rd, 2015, about two weeks after your last visit
9 with Doctor Fisher, okay?

10 A Okay.

11 MR. PRINCE: Go to 580. And then it's under the numeric
12 scale as part of Exhibits Number 98.

13 BY MR. PRINCE:

14 Q It says current six to seven, 30 day best five to six, 30 day
15 worst, seven to eight. Is that the same as it was from day one when you
16 went to the chiropractor?

17 A Yes.

18 Q Okay. Now, I want to -- during 2016 when you're not
19 receiving any medications, how were you doing like working with the
20 pain and trying to get through it all, Bahram?

21 A Frustrated. Terrible.

22 Q And just because there's no medical expense going on, are
23 you still trying?

24 A I am.

25 Q What exercise -- you said you're at home doing home

1 exercise. Did the doctors instruct you to try to keep doing exercises, try
2 to keep yourself flexible, things like that?

3 A Besides surgery, that's the only thing you can do. There's
4 nothing else for you.

5 Q Were you doing those things?

6 A I was.

7 Q All right. And what prompted you finally to go back for care?

8 A The pain. I went back to a different doctor.

9 Q Okay. Now, the next record we have was from Doctor Su,
10 November. Peter Su, M.D., November 30, 2016.

11 MR. PRINCE: Just for a reference, just so we're clear on our
12 date for the jury, 590 of Exhibit Number 100. And what I want, just pull
13 the date right at the top.

14 BY MR. PRINCE:

15 Q And I want to compare. When I'm doing is comparing your
16 pain level from when you saw Doctor Oliveri in April 2015 to where you
17 saw Doctor Su in 2016, okay?

18 A Okay.

19 Q All right.

20 MR. PRINCE: So if you can give me the first for the patient
21 being -- if you can kind of maybe --

22 BY MR. PRINCE:

23 Q Do you see where Doctor Su says --

24 MR. PRINCE: And maybe highlight the bottom, the VAS
25 score, that's the visual pain scoring, that's giving -- just put a yellow

1 highlight on it.

2 BY MR. PRINCE:

3 Q It says the patient's VAS score is currently six to seven out of
4 ten, an average six to eight out of ten. Is that the same score you've
5 been reporting to everybody all along?

6 A Yes.

7 Q So when they're saying there's this progression, is there any
8 progression of your symptoms or is it the same, Bahram?

9 A The same.

10 Q Now, we compare that to Doctor Oliveri on the bottom, is it
11 in the same range of symptoms, the pain we've been talking about, for
12 every doctor from the beginning?

13 A Yes.

14 Q Now, in addition to in fairness, Doctor Su recommended
15 some additional injections, right?

16 A He did.

17 Q Did you follow those recommendations?

18 A I did.

19 Q But more than that, did he also recommend physical
20 therapy?

21 A He did.

22 Q Did you follow up with that recommendation?

23 A I did.

24 Q I want to go to the first visit with -- you've only seen -- the
25 jury's only seen a part of the ATR in the Desert Valley therapy record. I

1 want to -- let's so we'll see the whole thing, okay?

2 A Okay.

3 MR. PRINCE: And so that's Exhibit Number for the record,
4 103, bate number P699.

5 BY MR. PRINCE:

6 Q And if you could take the initial evaluation and go through
7 the assessment portion, I want to just -- we're going to do a few things.
8 See the top?

9 A Okay.

10 Q It says the first date of care is January 18, 2017; do you see
11 that?

12 A I do.

13 Q Okay. And it says the referring physician was Peter Su; do
14 you see that?

15 A Yes, sir.

16 Q Okay. It says 55 year old male which presents to physical
17 therapy. His signs and symptoms consistent with physician's diagnosis
18 of cervicalgia, decreased range of motion, strength, and increased pain,
19 as well as impairments with posture and body mechanics. Were you
20 having ongoing pain and difficulty with range of motion of your neck?

21 A I did.

22 Q What was causing the limitation in your neck?

23 A The pain.

24 Q Right. It says these deficits limit the patient's ability to
25 perform tasks, lifting from the floor, lifting overhead, sleeping for longer

1 than six hours. How was your sleeping during that period of time? You
2 can turn this way, sir.

3 A Two to three hours a night I wake up, the same thing.

4 Q Were you fatigued?

5 A Fatigued, yes.

6 Q It says the patient will benefit from skilled therapy to meet
7 some goals. It talks about a few goals. And then it says, primary
8 complaint right there, it says neck pain with left, that's L, upper -- UE is
9 upper extremity radiculopathy into the fourth and fifth digit of the hand.
10 Is that the symptoms you had the whole time?

11 A Yes.

12 Q Okay. Then it says, patient reports limitations, lifting, lifting
13 overhead, sleeping greater than six hours. And it says prior level of
14 function, unlimited with all activities. What are you talking about there?

15 A I was doing fine.

16 Q Before this?

17 A Before this, yes.

18 Q And then it says pain score at rest six to ten, during activity
19 eight to ten. Is that the pain score you've been reporting from the
20 beginning from the chiropractor?

21 A Yes.

22 Q Okay. And then it says --

23 MR. PRINCE: Let's go to the nature of the injury.

24 BY MR. PRINCE:

25 Q It says chronic --

1 MR. PRINCE: Maybe you can zoom that in a little higher.
2 That's the one that Mr. Kahn wanted to spend talking about throughout.
3 Okay.

4 BY MR. PRINCE:

5 Q It says, so chronic since 2013 and exacerbated six, seven
6 months ago and has in the same sentence MRI and it talks about those --
7 the disc degeneration. In 2016 were you not going for care. How was it
8 trying to manage the pain when you were getting no medication, no
9 physical therapy, no chiropractic care, and no injections. How was it to
10 manage your pain?

11 A Unbearable. Terrible.

12 Q Is that what brought you back to Doctor Su in 2016?

13 A Yes.

14 Q Was there any new event, any new injury, anything like that?

15 A No.

16 Q I want to just kind of complete this topic. Did you also try --
17 well, let's stay with physical therapy. Before you went to see Doctor
18 Kaplan in August of 2017 --

19 MR. PRINCE: If you could go to 736.

20 BY MR. PRINCE:

21 Q See at the top?

22 A Yes.

23 Q The date and the visit number. It says you went for 28 visits
24 during that period of time; do you see that?

25 A I do.

1 MR. PRINCE: And go to the subject then.

2 BY MR. PRINCE:

3 Q And it says patient reports dealing with same. Patient states
4 he's feeling about the same. While you went through all those physical
5 therapy sessions, did it improve any great to any significant extent?

6 A No.

7 Q Were you still trying?

8 A I was.

9 Q And that's in August of 2017. Did you also try chiropractic
10 care around that same time?

11 A I don't remember.

12 Q All right. Let me show you the date. I know these dates run
13 together. Do you remember going to Dr. Bahoora, the chiropractor?

14 A Yes, I remember Dr. Bahoora.

15 Q Okay. I'm going to show you a record from June of 2017 in
16 that same fine window.

17 MR. PRINCE: 934 of Exhibit Number 104.

18 BY MR. PRINCE:

19 Q At the bottom there's the dates, it says bottom 622. It says
20 this is June 22nd, 2017. That same window of time you were going to
21 the chiropractor. So reported pain in the right cervical and left cervical,
22 rates the discomfort, five to seven on a scale of ten, ten being the worst.
23 Is that the same since the beginning with the first chiropractor?

24 A No, sir.

25 Q Reported his pain at 76 to 100% of the waking hours. He

1 wakes up every morning with pain in his forearm, especially the left and
2 the last two fingers. Has that been the same from the beginning?

3 A Yes.

4 Q Okay. And, in fact, you still have those symptoms now?

5 A I do.

6 Q Okay. Now, why are you trying all this physical therapy,
7 Bahram?

8 A I don't want the surgery. I didn't want the surgery.

9 Q So I mean you're going -- your last visit, you know, with
10 physical therapy is August 2017. You're going for months of chiropractic
11 care with Dr. Bahooora. You go to Dr. Kaplan on August 11, 2017. What
12 finally led you there?

13 A I was at the end.

14 Q End of what?

15 A I couldn't take it anymore.

16 Q What couldn't you take?

17 A The pain, the discomfort, not being able to do anything.

18 Q When you had the discussion with Dr. Kaplan, what -- were
19 you ready for the surgery?

20 A I was as ready as I could be.

21 Q Now, do you think you exhausted every possible option
22 before going for the surgery?

23 A I did. I tried my best.

24 Q Let's go --

25 [Counsel confer]

1 BY MR. PRINCE:

2 Q I want to look at -- I want to -- I did something with Dr. Tung
3 here. I'm not sure you were here, but I want to go through it with you,
4 okay?

5 A Yes, sir.

6 Q Okay. Dr. Tung kind of said you did your cutoff of 14 months
7 that you were injured, 14 months of your care was reasonable, and he
8 concurs all related to the crash, but nothing after that.

9 A Yes.

10 Q I want to talk about how you were before and how you were
11 after, okay?

12 A Okay.

13 Q In the 14 months before, even using the October date, 2011,
14 did you have any pain in your neck in the 14 months the year before
15 this?

16 A No.

17 Q Any examination findings that you're aware of, anything that
18 anybody recommended to you, valuating for your neck?

19 A No.

20 Q Was there any pain medications during that period of time?

21 A No.

22 Q Was there any physical therapy chiropractic care done in that
23 period of time?

24 A No, sir.

25 Q Was there any MRI's during that period of time?

1 A No, sir.

2 Q Was there any pain management?

3 A No, sir.

4 Q Any surgery recommended for any surgeon for your neck of
5 any kind?

6 A No.

7 Q Were you working full time?

8 A I was.

9 Q Were you earning about \$160,000 per year according to your
10 last -- you made \$159,000 the full year of 2012?

11 A I did.

12 Q Were you living an active life?

13 A I was.

14 Q Okay. And then after this were you -- you left in an
15 ambulance from the scene, right?

16 A I did.

17 Q You went to the UMC trauma unit?

18 A I did.

19 Q You had -- did you have severe neck pain?

20 A I did.

21 Q Is it still constant?

22 A It is still constant.

23 Q Left arm symptoms?

24 A Yeah.

25 Q Physical therapy?

1 A Yeah.

2 Q Talked about chiropractors, multiple rounds of everything,
3 right? X-ray, CT scans, MRI's, pain manager -- multiple pain managers,
4 right, to try?

5 A (No audible response heard)

6 Q Surgical evaluation, right?

7 A Yes.

8 Q Forced to resign from your job, right?

9 A Yes.

10 Q Income loss?

11 A Yes.

12 Q And now you're disabled?

13 A I am.

14 Q All from this?

15 A Yes.

16 Q Do you wish you could go back to work?

17 A I do.

18 Q Can you run a car business from your phone and your
19 house?

20 A No.

21 Q Why not?

22 A Now to touch and feel cars, it's impossible.

23 Q Okay.

24 A You can rotate cars, but you can't conduct business.

25 Q Does the pain and the medication, does it affect your

1 concentration?

2 A Yes.

3 Q How are you doing right now? You've been up there a
4 couple hours. Just --

5 A Trying to make it.

6 Q I know, but how is your pain? I know you're --

7 A Fair. The same. Worse when I sit up.

8 MR. PRINCE: I think that's my notes, Judge. I'm good.

9 BY MR. PRINCE:

10 Q Thank you, Bahram, I have nothing further.

11 A You're welcome.

12 THE COURT: Anything else?

13 MR. KAHN: The Defendant has no follow-up and thanks the
14 witness.

15 THE COURT: Questions from the jury? Dan? Approach.
16 Just the one? Okay.

17 [Sidebar begins at 4:01 p.m.]

18 THE COURT: That was in a question. Any -- no objection?
19 Okay.

20 [Sidebar ends at 4:01 p.m.]

21 THE COURT: Sir, how did your body get under dashboard
22 with your seatbelt on?

23 THE WITNESS: When you don't press on the brake, the
24 seatbelt is loose. That's the only time it locks up, when you press the
25 brake. So I slid underneath because the belt was loose, and it never

1 locked.

2 THE COURT: Follow-up from the Plaintiff on that?

3 BY MR. PRINCE:

4 Q Did you report to the ambulance driver that you were also
5 wearing your seatbelt that day? Well, the records show that. If the
6 records show that you were seatbelted that day, is that consistent with
7 your own recollection of the events?

8 A Yeah.

9 Q And also the emergency records discussed that you were
10 belted. I mean is that consistent with your own recollection of events?

11 A Yes.

12 Q That you were belted?

13 A Yeah, prior to the accident I remember.

14 Q Okay. Thank you.

15 THE COURT: Defense?

16 MR. KAHN: No questions, Your Honor, thank you.

17 THE COURT: Thank you. You may step down.

18 Plaintiff, call your next witness.

19 MR. PRINCE: Your Honor, thank you. The Plaintiff rests.

20 PLAINTIFF RESTS

21 MR. PRINCE: We have no additional witnesses and all of the
22 documents we can offer have been admitted into evidence.

23 THE COURT: Defense?

24 MR. KAHN: Defense calls its first witness, Cliff Goodrich.

25 THE MARSHAL: Remain standing and face the Clerk of the

1 Court. Can you all switch off your lapel mics?

2 THE CLERK: Please raise your right hand.

3 [Cliff Goodrich testimony previously transcribed]

4 [Proceedings concluded at 4:21 p.m.]

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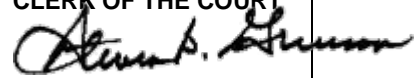
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21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio-visual recording of the proceeding in the above entitled case to the
best of my ability.

23

24 
Maukele Transcribers, LLC

25 Jessica B. Cahill, Transcriber, CER/CET-708



1 RTRAN

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4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 BAHRAM YAHYAVI,
9 Plaintiff,

) CASE#: A-15-718689-C
)
) DEPT. XXVIII
)

10 vs.

11 CAPRIATI CONSTRUCTION CORP
INC.

12 Defendant.
13

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

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

18 APPEARANCES:

19 For the Plaintiff:

DENNIS M. PRINCE, ESQ.
KEVIN T. STRONG, ESQ.

20
21 For the Defendant:

MARK JAMES BROWN, ESQ.
DAVID S. KAHN, ESQ.

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24 RECORDED BY: JUDY CHAPPELL, COURT RECORDER
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WITNESSES FOR THE DEFENDANT

CLIFF GOODRICH

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INDEX OF EXHIBITS

FOR THE PLAINTIFF

MARKED

RECEIVED

None

FOR THE DEFENDANT

MARKED

RECEIVED

None

1 Las Vegas, Nevada, Wednesday, September 25, 2019

2

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

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

6 THE CLERK: Please raise your right hand.

7 CLIFF GOODRICH, DEFENDANT'S WITNESS, SWORN

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

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

11 DIRECT EXAMINATION

12 BY MR. KAHN:

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

15 A Correct.

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

18 A Yes.

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

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

23 A Yes, we filed for reorganization in 2015.

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

1 THE COURT: Yes.

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

3 MR. PRINCE: Wow. What a --

4 MR. KAHN: You saw --

5 THE COURT: What is the --

6 MR. PRINCE: No, are you talking about -- you need to -- I

7 need the jurors excused --

8 MR. KAHN: They reduced --

9 MR. PRINCE: -- this second.

10 MR. KAHN: They reduced by 200 employees --

11 MR. PRINCE: Oh, no, Judge.

12 MR. KAHN: -- during this time.

13 THE COURT: So what?

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

15 MR. PRINCE: No way.

16 MR. KAHN: -- lost documents and --

17 MR. PRINCE: There is no way.

18 MR. KAHN: -- destroyed documents.

19 MR. PRINCE: Judge, there is no -- please excuse this jury.

20 And I'm going to have -- ask you to sanction Mr. Kahn. In fact, I'm --

21 THE COURT: All right.

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

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

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

1 amongst yourselves or with anyone else on any subject connected with
2 this trial, or read, watch, or listen to any report of or commentary on the
3 trial, or any person connected with this trial by any medium of
4 information, including, without limitation, newspapers, television, radio,
5 or internet. Do not form or express any opinion on any subject
6 connected with the trial until the case is finally submitted to you. Fifteen
7 minutes.

8 THE MARSHAL: Please rise for the jury.

9 [Jury out at 4:05 p.m.]

10 [Outside the presence of the jury]

11 MR. KAHN: Can the witness be excused?

12 MR. PRINCE: Yeah, I would like him excused for this, yes.

13 THE COURT: Yeah.

14 MR. KAHN: You've got 15 minutes.

15 MR. PRINCE: Well, you no what, no, I don't want him
16 excused. He's the company's representative.

17 THE COURT: Well, he'll go wait in the anteroom, but is he
18 the corporate representative?

19 MR. PRINCE: Yes, he is.

20 THE COURT: Okay. Then let him stay.

21 MR. PRINCE: Yeah, he should hear this.

22 THE COURT: All right. Go ahead.

23 MR. PRINCE: Your Honor, one, the -- one of the reasons for
24 the delay in this litigation was because the Defendant filed for
25 bankruptcy. We sought and obtained relief from the automatic stay to

1 pursue this litigation up to all the available insurance proceeds and
2 maybe even additional rights beyond that. But that is an absolute
3 irrelevant fact.

4 They demonstrated that so hopefully this jury won't enter a
5 large verdict thinking that they are no longer -- that they are financially
6 unable to pay on some level because of some bankruptcy reorganization,
7 that they've lost files. They continued on as a business. They're still
8 operating as Capriati Construction. It doesn't -- nothing happens to their
9 records.

10 But for Mr. Kahn to talk about what has happened since this
11 litigation, that they filed for a reorganization to infuse this to the jury was
12 purposeful, was to absolutely prejudice my client's rights in this case, to
13 hopefully affect the amount of this verdict, which could potentially be
14 substantial, and finding ways that they may not have the ability to pay,
15 infuse that concept.

16 And that was done purposefully. And the only thing it could
17 be due is to prejudice this jury because it has no relevancy to any of the
18 contested issues in this case. Their ability to pay or satisfy a judgment is
19 not before this jury and that is the only conceivable relevance that they
20 could talk about are filing for reorganization. There is no other valid
21 purpose for that. His concern is because they have poor -- they have
22 poor recordkeeping, and they should have maintained the files.

23 They are an ongoing concern. If you have a plan of
24 reorganization that means you're working through it, and you -- I don't
25 even know what the status is, nor do I care what their status is. It doesn't

1 matter if they're out of business. That wouldn't even be a relevant factor
2 if they're out of business.

3 So I'm asking you one -- to number one, to strike that. I am
4 also asking you to strike their answer. And if you don't feel that that's
5 appropriate, I'm asking you to strike the statement, admonish the jury
6 they're not to consider it, admonish that Mr. Kahn engaged in
7 unprofessional conduct in making that statement, and that he is
8 admonished to not ask irrelevant questions or to elicit irrelevant
9 testimony. And that's in the *Gunderson* case. When a lawyer engages in
10 willful misconduct, not only do you admonish, you actually instruct the
11 jury and admonish the lawyer in front of the jury for doing so.

12 And I want a written -- a carefully drafted curative instruction
13 on this exact issue if you're unwilling to strike because at this point, my
14 client -- we spent hundreds of thousands of dollars pursuing this
15 litigation -- pull it up there -- and I don't want a mistrial, I want you to
16 issue -- direct a curative instruction directed at -- even in their ability to
17 pay or not to consider reorganization, and I'm not even sure that's
18 enough. I just don't even think that's enough.

19 THE COURT: Mr. Kahn.

20 MR. KAHN: Yes, Your Honor. The offer of proof is that
21 because of the bankruptcy, the company went from 250 employees to 60
22 employees, including significant amounts of the office staff. Mr. Prince
23 elicited from Mr. Goodrich when he called him in his case-in-chief and
24 would not let me examine him at that time in a direct fashion, because
25 he insisted that would be improper, so I had to bring him back, that the

1 company hid documents, destroyed documents, lost documents, and I
2 want to explain that to the jury, because they also lost 80 percent of their
3 workforce during that same period. And I think that's proper given what
4 Mr. Prince elicited from the witness during the first part of the trial.

5 I would also indicate that Mr. Prince's representation that
6 there's a bankruptcy limit and that they were allowed to pursue this case
7 to the limits of bankruptcy is true, but his representation that they can
8 get more than that is contrary to the bankruptcy court order, which is --

9 THE COURT: Well, that --

10 MR. KAHN: -- marked as an exhibit in this case.

11 THE COURT: None of that is relevant here.

12 MR. KAHN: Well, I was addressing --

13 THE COURT: Anything else?

14 MR. KAHN: No, Your Honor. I think in the --

15 THE COURT: Mr. Kahn, I'm really shocked because -- I got to
16 say bringing up a bankruptcy, you know that's not admissible evidence.
17 And the fact that they lost the documents or whatever happened to them
18 because of reorganization is their fault. Who else's fault is it? They went
19 from 250 to 60, they're the same company, but I'm surprised you didn't
20 file a motion to strike before because of the spoliation.

21 But to bring up a bankruptcy, how -- that is -- I'm just
22 shocked. I mean you know that's not admissible.

23 MR. KAHN: Well, the Court --

24 THE COURT: You know that's not admissible, and it's highly
25 prejudicial, and all you're trying to show is why the documents that they

1 had possession of are no longer available because the company is now a
2 fourth of that size. All I can say is I'm shocked. Again, I said this to Mr. --
3 you're way better than that. And if he had asked for a mistrial I would be
4 seriously entertaining it and probably taking until tomorrow to decide. I
5 can't believe it.

6 How in the world is that relevant even if the documents --
7 could you have asked him -- could you have said something about, well,
8 you -- the company isn't as big as it used to be and people who handle
9 the documents are gone. There's a thousand things you could have
10 done to avoid bringing up his bankruptcy or their bankruptcy, whatever.

11 MR. PRINCE: I want to --

12 THE COURT: Do you have -- no, Mr. Kahn, do you have
13 anything to bring up --

14 MR. KAHN: No, given the Court's --

15 THE COURT: -- why I shouldn't strike your answer, sanction
16 you, et cetera?

17 MR. KAHN: I would just indicate that was my offer of proof
18 based on what he said. And given the Court's feelings, I apologize, and I
19 think an admonishment of the jury can cure it. I don't think it's
20 sanctionable, and I don't think it's -- I don't think it's a striking the answer
21 offense. I think it can be cured here and now.

22 There was one question. I would also indicate Plaintiff filed
23 21 motions in limine and five trial briefs, this wasn't among them.

24 THE COURT: Well --

25 MR. PRINCE: Oh, okay.

1 THE COURT: Forget it. Forget it. I can't --

2 MR. KAHN: So given --

3 THE COURT: Who would ever have thought you would have
4 tried to bring up a bankruptcy in a personal injury case? I must have
5 done a hundred of these, including cases where bankruptcy has
6 happened. I --

7 MR. KAHN: No.

8 THE COURT: I can't. I'm shaking my head. I'm sure this is
9 on the record -- this -- I can't explain it. I know --

10 MR. KAHN: Well, given the Court's comments, then I
11 apologize and follow my sword and say that there can be an instruction
12 given to the jury to strike the answer, and strike the question. And not
13 the answer to complaint, the question and answer that was just before
14 them, and not to consider it. And that's the curative issue.

15 MR. PRINCE: Oh, no. Well, Your Honor --

16 MR. KAHN: My personal conduct suffered from that. I'm
17 talking about --

18 MR. PRINCE: Oh, not it's not.

19 MR. KAHN: -- I'm talking about on behalf of my client.

20 MR. PRINCE: No, it relates to the representation of the client
21 and under the *Gunderson* case and *Lioce*, it's imputed to the client.

22 And first let me start with this. The state -- he started to think
23 about -- the blaming he started with was that I didn't allow him to ask
24 questions when I brought him during my case-in-chief. That is not true.
25 He had the absolute right to ask any questions he wanted at that time.

1 He could have -- including, he could have even brought him back.

2 THE COURT: I didn't restrict him, but in any event --

3 MR. PRINCE: So, moreover, the *Gunderson v. DR Horton*
4 case, I'm reading from it.

5 THE COURT: I'm well familiar with --

6 MR. PRINCE: When an attorney commits misconduct and
7 opposing party objects, which we have, the District Court should sustain
8 the objection, admonish the jury and counsel, respectively, by advising
9 the jury about the impropriety of counsel's conduct, and reprimanding
10 counsel, and cautioning against further misconduct.

11 That's at a minimum. That's a minimum standard. That's
12 what you have to do. I'm saying we need to go beyond that. Number
13 one, strike this witness and remove him from the witness stand.

14 THE COURT: That was something I --

15 MR. PRINCE: And I think Rule 30 --

16 THE COURT: -- had already --

17 MR. PRINCE: And I think even rule -- further Rule 37
18 sanctions are appropriate because of misconduct during the course of a
19 trial. Rule 37 sanctions are available to you. And I want to think about
20 what those are, because that could include striking of certain witnesses
21 and testimony in the case and -- in addition to my striking request -- I
22 mean striking of the answer, not just of the question and the answer,
23 that's obvious. But what further relief would be available to me and my
24 client for such outrageous behavior.

25 MR. KAHN: May I respond? An admonishment to the jury

1 can cure this. And, again, given the Court's comments to me, I apologize
2 to the Court, and it sounds like I was wrong, but my client should not be
3 punished in this case because they have also spent hundreds of
4 thousands of dollars on this case. It was one question. It wasn't
5 objected to until after the --

6 MR. PRINCE: Oh --

7 MR. KAHN: -- answer was given, and the jury can be cured.
8 They heard one question and answer, that's it.

9 THE COURT: All right.

10 MR. KAHN: And I think *Gunderson* says that.

11 THE COURT: We're going to --

12 MR. KAHN: *Gunderson* says --

13 MR. PRINCE: But, Judge --

14 MR. KAHN: -- *Gunderson* says that it can be cured with an
15 admonishment to the jury.

16 MR. PRINCE: That's one possibility. That's not -- that's the
17 minimum of requirement. To further underscore my point, he didn't ask
18 what has -- and the way he did it was in a backdoor way. He could have
19 come to the Court -- Your Honor, it's my intention to discuss this. I want
20 to give the Court some -- you know, this is where intend to go, get some
21 guidance from the Court, so we at least have that.

22 He backdoored the question, like what has happened to the
23 company since then. I had no idea what was -- I mean I know, of course,
24 they're in bankruptcy. I had no idea this witness was locked and loaded
25 to that.

1 THE COURT: And quite -- yes, I have to agree that --

2 MR. PRINCE: That was the first question.

3 THE COURT: -- he was prepared to answer it in that way.

4 MR. PRINCE: Right. There was no way for me to --

5 THE COURT: All right. We're taking our evening break. Will
6 you tell them to come in at 10:00, because we're going to discuss this in
7 the morning. I'm going to re-read *Gunderson* and decide on appropriate
8 sanctions. I don't know. I just -- I -- to bring up a bankruptcy for no
9 reason other than to somehow say that when they lost the documents it
10 was excusable because they had a bankruptcy, it does -- I have to say,
11 Mr. Kahn, it stretches your credulity, and I'm shocked.

12 And I will say that, yes, he was clearly prepared to say we
13 went through that. That wasn't, well, uh, no. That was -- all right.

14 You guys 9:00 a.m.

15 MR. PRINCE: Well, okay. I want --

16 THE COURT: We'll discuss it at 9:00 a.m. Tell the jury 10:00,
17 they're excused. All right. Three weeks. Three weeks.

18 MR. PRINCE: Wow, that is shocking.

19 MR. KAHN: Thank you, Your Honor.

20 MR. PRINCE: Make sure you report that tonight to the
21 carrier, Mark. Do you need me to email you my cell phone number to
22 discuss resolution? I'll do that. Would you like that? Would you like my
23 cell phone number to call me tonight if there's a necessity to discuss
24 resolution?

25 MR. KAHN: No, just give us your bank account number, and

1 we'll wire all the funds.

2 MR. PRINCE: Well, I don't know, your law firm could be --

3 THE MARSHAL: Folks, don't go out. The jurors are out
4 there. Some of them left some things here in the jury box. So I'm going
5 to --

6 MR. PRINCE: I'm just asking Mark if he wants -- you're the
7 representative, so I'm asking if you want that. If you don't, that's fine, or
8 you can email me if you need it.

9 MR. BROWN: Just send it to me. Do you have my email?

10 THE MARSHAL: You know what, folks, there's a little bit too
11 much stuff to grab, so do me a favor, everybody just stand, nobody say
12 anything. I'm going to get the jurors and let them grab their personal
13 items. It's too much stuff for me to carry out. Okay. So nobody say
14 nothing, not even to each other while I let them come in and get their
15 stuff.

16 THE COURT RECORDER: It's going to be recorded, so
17 everybody stand for the jury.

18 [Jury in at 4:21 p.m. to retrieve their belongings]

19 [Proceedings concluded at 4:21 p.m.]

20

21

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

24 

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

1 RTRAN

2
3
4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 BAHRAM YAHYAVI,
8 Plaintiff,

) CASE#: A-15-718689-C
)
) DEPT. XXVIII
)

9 vs.

10 CAPRIATI CONSTRUCTION CORP
11 INC.

12 Defendant.
13

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

15 **RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 14**

16
17 APPEARANCES:

18 For the Plaintiff:

DENNIS M. PRINCE, ESQ.
KEVIN T. STRONG, ESQ.

19
20 For the Defendant:

MARK JAMES BROWN, ESQ.
DAVID S. KAHN, ESQ.

21
22
23
24 RECORDED BY: JUDY CHAPPELL, COURT RECORDER
25

1 Las Vegas, Nevada, Thursday, September 26, 2019

2
3 [Case called at 9:09 a.m.]

4 [Outside the presence of the jury]

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

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

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

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

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

1 *Anistazi v. Caesars*, and I had certainly never expected this at all to come
2 up. So I also reviewed *Lioce*, and so it's my understanding that Mr.
3 Prince, you're not asking for a mistrial?

4 MR. PRINCE: At this moment, no, because I believe that
5 sanctions under the *Young* case are more appropriate, and I wanted to
6 explain my reasoning and my rationale for why.

7 THE COURT: Well, we're three weeks into a jury trial --

8 MR. PRINCE: Oh, of course, that's --

9 THE COURT: Just so the record is crystal --

10 MR. PRINCE: Correct.

11 THE COURT: -- clear, if I order a mistrial, Mr. Kahn, your firm
12 is going to pay for the entirety of the costs, and the entirety of attorneys'
13 fees, which I'm guessing amounts to a half a million dollars. I said, I
14 can't imagine a -- well, no, I didn't say. I can't -- you're a senior partner
15 with extensive trial experience, and to say you thought somehow this
16 was relevant is beyond my pale.

17 I think a first or second year lawyer would know you cannot
18 -- it's like saying, well, you were convicted of a crime, of a felony or
19 whatever, weren't you? These are things that should be learned in law
20 school, let alone where we are, where we are.

21 I'll note for the record that you hadn't made any serious
22 violations prior to this. I may disagree with some of the things, but even
23 though Mr. Prince asked I think on three occasions for you to be
24 admonished I didn't feel that they rose to that. To me, this absolutely
25 requires admonishment in front of the jury, it is so serious.

1 I don't need an explanation why you'd, three weeks, as I said,
2 into this, hundreds of thousands of dollars expended, I think it goes
3 without saying, well, maybe the Supreme Court wants you to say that
4 when they review it, so go ahead.

5 MR. PRINCE: Your Honor, I kind of want to start with the
6 analysis of the timing of the misconduct. It was, just as you pointed out,
7 three weeks into the trial. They've seen me put on the entirety of my
8 case, which includes my opening statement, my direct examination of all
9 of my expert witnesses. The means and methods by which I crossed
10 their expert witnesses, and because of the timing of it, and the lack of
11 any conceivable relevance of it, there's only one of two reasons why
12 they did that; both of which was to gain a tactical advantage, and it
13 constitutes a form of abusive litigation conduct; that's the only
14 reasonable conclusion.

15 One is, they wanted to cause a mistrial, force a mistrial,
16 because they're dissatisfied with how the evidence has gone for them,
17 and they know that there's momentum in favor of the Plaintiff and a
18 substantial verdict.

19 Secondly, the only other reasons would be, if it wasn't that,
20 they wanted the jury to know that the Defendant has filed bankruptcy
21 and is no longer in similar size, to influence this jury by way of sympathy
22 or other thought process that would have an impact on their ability to
23 satisfy any resulting judgment, including a substantial judgment.

24 And why this is particularly egregious, as I want to go back a
25 little further in time than just Mr. Kahn's first question out of the box. At

1 the end of the cross-examination of Mr. Yahyavi he specifically said, so
2 you heard your lawyer in opening statement ask this jury, that you want
3 13 or \$14 million, whatever it is, to pay for you for all of these losses, you
4 want my client to pay for that. That's at the conclusion of my client's
5 cross-exam, and then to start with the Defendant had filed bankruptcy, is
6 particularly egregious.

7 And what makes this more egregious, Your Honor, is we've
8 attached, and we sent you a courtesy copy of our motion for sanctions,
9 the bankruptcy, just so our record is clear, it was filed October 7th, 2015,
10 two years and four months after the collision, on February -- in February
11 6, 2018, before the bankruptcy court, so a year and a half before the start
12 of this trial, Capriati Construction moved for a final decree and relief
13 under the Bankruptcy Court Rules, saying it was appropriate because
14 they had, number one, reorganized, they fully administered, and they
15 had returned to profitability a year and a half before this and the
16 bankruptcy case was closed, and Mr. Kahn, on behalf of that company is
17 charged with that knowledge.

18 So once he says that it immediately inflicts this jury, because
19 during voir dire some jurors were saying we had to like -- some jurors
20 were removed for cause because they'd be worried about what their
21 verdict would do to a company, when they infuse that the only
22 reasonable belief that you could have, that he would want to use that is,
23 because he wants the jury to know that they are in a weakened financial
24 position, a substantial verdict would either destroy them or put them out
25 business, people would lose jobs, and that the only thing they're trying

1 to do is influence them in an emotional way to not award a substantial
2 verdict to do something contrary to your instructions.

3 The only -- that is to gain a tactical litigation advantage, that
4 is not only not permitted by the rules and violation of *Lioce*, but well-
5 established law universally, that the ability to pay is not admissible. For
6 example, it would be equally irrelevant if we asked about revenues and
7 profits, and whether it would be Microsoft, Capriati Construction or every
8 other defendant about their ability to pay, if they were wealthy; that has
9 no place in the compensatory phase.

10 And I thought long and hard about your question to me of a
11 mistrial, and why I feel that that is to the Defendant's advantage and to
12 the Plaintiff's disadvantage. They've seen the entirety of my case. They
13 saw how I handled my expert witnesses, the theming of my case. I
14 created special PowerPoint presentations, during the cross-examination
15 of their expert witnesses; they now have copies of everything. They saw
16 my manner and method of cross-examining their expert witnesses.

17 So to say -- so in addition too, there's no way this case could
18 get tried likely within the year. There's no way I can come back to trial
19 with the next six months, and you have -- the Court is stacked with trials
20 and trial calendars, it would likely be upwards of a year. So that's just
21 not only the delay, the expense is just part of it. But then they now have
22 the tactical advantage of knowing my litigation strategy, and that had to
23 be one of the reasonable reasons, or plausible reasons why they asked
24 the question in the manner in which they did.

25 The Court in *Young*, and I'm asking the Court to exercise its

1 inherent authority. *Young* describes not only Rule 37 for discovery
2 abuse, but inherent authority to inequitable powers to dismiss actions or
3 enter default judgments for abusive litigation practices; that's precisely
4 what this is. The Court in *Young* warned litigants and attorneys alike
5 should be aware that these powers may permit sanctions for discovery
6 or other litigation abuses, not specifically prescribed by statute.

7 So you have the power, there could not be any more
8 egregious act. You can give curatives, that's one, but it's never going to
9 leave the minds of the jury. I have alternatives if the Court is going to
10 proceed in front of this jury, as what we need to do, because two things
11 need to happen. Number one, if you strike the answer there's going to
12 be a prove-up hearing in front of you, based on what you've already
13 heard.

14 They can argue damages, they can argue based on the
15 record that's been made, that you won't be able to consider their
16 evidence, but you will be able to -- through the cross-examination they
17 can make arguments on damages and causation to you. But if you're
18 going to proceed in front of this jury two things need to happen.

19 One is, you need to give, and under Gunderson I'm
20 specifically relying on the language of Gunderson which is -- includes the
21 framework of *Lioce*, we need to identify the misconduct of Mr. Kahn,
22 specifically. You need to direct the jury not to consider it, and you
23 further need to tell the jury that he engaged in willful misconduct and
24 he's reprimanded for his misconduct; that's one.

25 In addition, there needs to be a curative instruction dealing

1 solely with the bankruptcy itself, that's just to, if we're going to proceed,
2 that's just the resolve and cure misconduct and the irrelevant
3 information they're not to consider; that's curative. But that alone isn't
4 enough, because there's no consequence to that, that's the inherent
5 power, the sanctioning power of the Court.

6 You've already identified one case that was before you
7 concerning the *Wilson Elser Law Firm*. There's another case in front of
8 Judge Sturman, against *7-Eleven*, where multiple lawyers lost their job --

9 THE COURT: I cited it in that case, which is an unpublished
10 opinion, I believe, but --

11 MR. PRINCE: Correct. About abusive litigation tactics by this
12 same law firm. So they have a history, and I'm saying it's a pattern of
13 abusive behavior where this law firm has been sanctioned for similar
14 types of conduct. So this is not a one-off situation. I believe that the
15 only reasonable alternative, Judge, given the timing, the egregiousness
16 and the severity, is to strike the answer.

17 At the end of the day, yesterday, I was cleaning up around
18 here, trying to gather my thoughts and gather my things and I saw a
19 couple of papers up on the lecterns, and I'm going to mark as an exhibit,
20 one of the papers as it turns out is Mr. Kahn's -- apparently he left
21 behind, and therefore disregarded some kind of notes he had for a
22 witness named Cliff, I'm handing it back to him.

23 I want to lodge the Court exhibit, the document that he left
24 behind in the well area of the Court on one of the lecterns, and I want to
25 hand it to the Court, and when I had it to the Court maybe you can mark

1 up for me.

2 MR. KAHN: And Defendant objects to counsel taking my trial
3 work product and now attaching it as an exhibit in this case --

4 MR. PRINCE: Well --

5 MR. KAHN: -- and it's theft.

6 MR. PRINCE: It's not theft, it's --

7 MR. KAHN: And it's client --

8 MR. PRINCE: I didn't know what it was until --

9 THE COURT: I'll attach it as a Court exhibit.

10 MR. PRINCE: And it says, the first is BK, that's the first thing
11 in the note, which underscores the willfulness. It was done
12 intentionally --

13 THE COURT: There was no doubt in my mind that -- if you
14 watch the tape again, which I have, I'd be glad to, that it was absolutely
15 planned.

16 MR. PRINCE: So, I'm --

17 THE COURT: Go on, move on.

18 MR. PRINCE: -- asking you to exercise your inherent
19 authority under *Young* to strike their answer and answer a default
20 judgment and therefore the proceeding will be before you, and you enter
21 a judgment based upon on the evidence that's presented to you. They
22 can give an argument as to the amount of damages, like you would be
23 able to in any other default judgment proceeding.

24 You wouldn't be able to consider evidence that they
25 presented, but they can argue, based on cross-examination of my client,

1 cross-examination of my client's experts, they can argue the evidence
2 that's already been admitted into the case, through the Plaintiff's case in
3 chief, which then still gives them the opportunity to argue damages.

4 But a mistrial, well, you're right, it would not only warrant a
5 new trial, but it would in fact constitute grounds for a mistrial. But when
6 I think through the concept of the mistrial, is what an unbelievable
7 strategic advantage that gives them in the case. There's \$11 million of
8 insurance, the insurance company is paying for the entirety of two law
9 firms defending this case, and all the expenses, a few \$100,000 of a
10 potential \$15 million or more verdict, that seems like a mere -- why not
11 go reload?

12 And would give them another opportunity, Your Honor,
13 would be to go get new trial counsel, which I can tell you right now,
14 given your decision making, that would not only be a possibility, that is a
15 certainty. No insurer -- I would consider myself when I was doing
16 insurance events, one of the most sophisticated defense trial lawyers in
17 the State of Nevada, and I can tell you with certainty they would remove
18 this law firm for this behavior, and they have the basis to do it, because
19 you'd be sanctioning them as well, in the hundreds of thousands.

20 So then they're going to go ahead and get new lawyers,
21 reload, re-theme, they've got my whole presentation, so that's exactly
22 what they wanted to do, because it gives them a start over, so that's an
23 inadequate remedy.

24 THE COURT: All right.

25 MR. PRINCE: And so the only fair thing to do is enter a case

1 terminating sanction, more that -- we're going to go to a default
2 judgment proceeding. You've already heard the evidence. We can have
3 an argument before you, they can argue the amount of damages, past
4 and future, and we'll proceed in that fashion; that's the only reasonable
5 way.

6 I have, also, I put it in my brief, and I feel we need to address
7 this, a lesser sanction would be to strike their expert witnesses, therefore
8 they don't have any experts, because of this. Strike all of them,
9 meaning, Dr. Tung, Mr. Bennett, Mr. Baker and the economist. They're
10 not really losing out on Mr. Bennett, because Mr. Bennett says he
11 doesn't have an economic loss, I rely solely on Dr. Tung, so therefore
12 this nothing.

13 Mr. Kirkendall says, well, you have no economic loss, I'm
14 relying on Dr. Tung, no loss, so therefore that's really not significant, but
15 certainly, Mr. Baker, can't even talk about injury or injury potential, so
16 that's really no loss to them, it's really just Dr. Tung. So really, he's the
17 only witness that would have any significance to the case, and striking all
18 of that, that would be a potentially less, lesser sanction allowed by you
19 under Young, but you would still have to give curatives.

20 And I'm going to propose, I'm going to hand to you an
21 admonishment instruction and a curative, which would be also given at
22 the final, and I'll hand a copy to the counsel.

23 THE COURT: Anything else?

24 MR. PRINCE: Yeah. Hang on, I just want to hand this to you,
25 I'm going to read it for you, so you could --

1 THE COURT: Well, we're going to, I'm sure, take a break.

2 So --

3 MR. PRINCE: Okay.

4 THE COURT: -- at some point.

5 MR. PRINCE: Well, let me just hand you what I -- I'll write on
6 here what each one is. I'm handing you, what I call -- characterize as the
7 curative instruction and an admonishment instruction, only in the event
8 we are to proceed in front of this jury on any of the issues in the case.

9 And so for those reasons, Your Honor, we can talk about
10 what the instructions are, if you decide that a lesser sanction would be
11 appropriate, but for those reasons, Your Honor, we're asking you to
12 enter -- to strike the answer and proceed with a default judgment
13 proceeding under Rule 55(b)(2).

14 THE COURT: Mr. Kahn?

15 MR. KAHN: Yes, Your Honor. I understand the Court has
16 already made its decision in this matter, so it's just more in the nature of
17 a record.

18 THE COURT: Well, my decision as to what I should do to, or
19 with your actions, I am -- as I said, your actions are unequivocal. I
20 haven't, and I have spent the entire night trying to decide as to -- I think
21 what you're saying is, yes, what remedy for your actions? So I would be
22 glad to hear what you feel is appropriate.

23 MR. PRINCE: Well, first of all counsel has proposed curative
24 instructions, admonishments and fixing the question and answer, so that
25 is the most readily available cure to this.

1 Second of all, counsel is now proposing essentially a case
2 terminating sanction for a single question and answer regardless of what
3 it was and what the response was. And that is I think not permitted by
4 our rules. It's not permitted by *Bahina* [phonetic], it's not permitted
5 *Young*, it's not permitted by *Lioce*. This is essentially -- the decision on
6 liability is one thing. Taking the damages away from the jury is another
7 thing.

8 Striking the experts, that's --

9 THE COURT: So I guess your argument would be there's no
10 such thing as a mistrial because that's exactly what happens when
11 something like this takes place.

12 MR. KAHN: No. I'm not saying that, Your Honor.

13 THE COURT: Okay.

14 MR. KAHN: I'm saying Plaintiff's not requesting a mistrial,
15 and neither are we. Plaintiff has proposed curative instructions.

16 THE COURT: Okay.

17 MR. KAHN: I'm just saying the notion of proceeding to
18 damages with the Court without a jury or striking all the experts, these
19 are things that are beyond our law.

20 THE COURT: I disagree, but go on.

21 MR. KAHN: I understand. They would deny the Defendant
22 due process --

23 THE COURT: And I think the Supreme Court disagrees in the
24 opinion they gave on your prior case. And you're familiar since you
25 argued it.

1 MR. KAHN: So 14th amendment due process rights of my
2 client say that they should have some right to try this case. And again, I
3 understand the Court's position, I understand Plaintiff's position.

4 But to be clear for the record, bankruptcy is not per se
5 improper in a case if there is a reason for it to be in the case. And we've
6 cited some cases in our brief this morning.

7 Again, I'm not quibbling with the Court. The Court's already
8 explained its position. But for the record, there are cases where
9 bankruptcy has come in where it's at issue.

10 THE COURT: In a personal injury case?

11 MR. KAHN: I don't remember the nature because this was
12 between 9:00 last night --

13 THE COURT: Okay.

14 MR. KAHN: -- and 5:00 last night --

15 THE COURT: I'm very much -- I'm skeptical.

16 MR. KAHN: But there is no case on all fours with this that we
17 found. So that's clear.

18 THE COURT: Okay.

19 MR. KAHN: I want to be clear with the Court. There is no
20 prior order about this, and the offer of proof was that it was related to
21 the reduction in workforce or downsizing of the Defendant. That was the
22 purpose of the question.

23 It was to respond to information the Plaintiff elicited in their
24 case in chief, implying to the jury that this Defendant, Capriati
25 Construction and somehow willfully and intentionally, maliciously

1 destroyed documents. This wasn't the subject of any kind of discovery
2 motion early on. This is something that manifested at trial, and
3 something that I felt the Defendant had to respond to in some fashion.

4 And the fashion that I intended was to say that they had
5 reduced their workforce by 200 out of 250 people, rough numbers and
6 including office staff.

7 THE COURT: I'll ask you. Are you saying you didn't know he
8 was going to say bankruptcy?

9 MR. KAHN: Yes, that is what I'm saying. I understand the
10 Court's saying it was willful and intention. But Mr. --

11 THE COURT: I think the Court's exhibit, and I didn't really
12 look at it, but I know it says BK.

13 MR. KAHN: That's why -- under the --

14 THE COURT: All right. Thank you. Anything else?

15 MR. KAHN: Yeah, under the rubric of that. Yes. And then
16 under that it says 250 down to 60.

17 And so this notion of taking my trial notes is something that
18 also has to be put in the record. Taking my trial notes --

19 THE COURT: It's in the record.

20 MR. KAHN: I know.

21 THE COURT: It's there.

22 MR. KAHN: My trial notes were taken, then they were put
23 into the record as an exhibit. Now they're put into the record as a Court
24 exhibit. And I don't think taking my client's work product and my trial
25 notes is a proper thing to do, regardless of the situation.

1 The fact that I should have to safeguard every scrap of paper
2 before it gets taken, physically taken, Your Honor. Not copied, not
3 photographed, physically taken and returned to me this morning. That's
4 a problem regardless of what I did.

5 THE COURT: Well, I --

6 MR. KAHN: And I think that needs to be addressed.

7 THE COURT: I agree it's inadmissible for anything. But I
8 already told you that viewing, and the Supreme Court can certainly view
9 the actual videotape, that there's no doubt in my mind that you
10 intentionally solicited that answer.

11 There was no time between the question and the answer
12 where he gave what would be a very unusual answer to that question,
13 had it just been random.

14 So that -- as I said, by clear and convincing evidence, that
15 answer was solicited and I said that, although I made that a Court's
16 exhibit, I said that long before yesterday --

17 MR. KAHN: I do want to --

18 THE COURT: -- it was clear on the record and viewing it at
19 the time that you had discussed that answer. There was no way that was
20 a random answer to what's happened to your company in the last few
21 years. Downsizing, whatever. But, oh, we, you know, we lost
22 government contract -- we did -- no. We filed for bankruptcy or
23 reorganization --

24 MR. KAHN: Reorganization.

25 THE COURT: -- whatever. Okay. Thank you. Anything else?

1 MR. KAHN: Yeah. I want to say two more things. Number
2 one is, since Mr. Prince has now taken my work product and my trial
3 notes and placed them into evidence before the Court, I would indicate
4 to the Court that this is something that came up probably 5 to 10 minutes
5 before we came over here to testify. Something I had not talked to my
6 client about before that time during the entirety of the case.

7 And second of all, I believe what Mr. Prince has proposed as
8 curative is sufficient, striking the answer. And even if the answer is
9 stricken, I still think Capriati Construction should have the ability to argue
10 damages with these curative instructions. Thank you.

11 MR. PRINCE: Okay. Just limited --

12 THE COURT: All right. Thank you. I don't need any. I
13 thought about everything that -- I've spent the night. I didn't sleep well.

14 MR. KAHN: Neither did I.

15 THE COURT: This hasn't -- this has basically only happened
16 twice where it's been so blatant in my 9 years now on the bench.

17 Pursuant to *Ribiero* [phonetic], which I think although its
18 discovery sanctions, they, meaning the Supreme Court, in the decision I
19 told you about regarding your firm said that there is inherent power.
20 And although that was still not in the midst or towards the end of trial, it
21 seems to be as applicable and the standards are the standards here.

22 The factors, and I'm quoting, "May properly consider include,
23 but are not limited to the degree of willfulness of the offending party."

24 As I said, you might as well have said he's a murderer or
25 something else to solicit that testimony. And sorry, but I cannot imagine

1 a senior litigator for a national firm not knowing that soliciting
2 bankruptcy -- and yes, although I didn't remember now, meaning
3 yesterday, I remember over the course of this very old case that there
4 was a stay for the bankruptcy. And certainly that is known.

5 But the willfulness is extreme. The extent to which the non-
6 offending party would be prejudiced by a lesser sanction. There is an
7 admonishment, although I am going to give an admonishment in the
8 curative.

9 That's for *Lioce* where he says or abuses the golden rule, or
10 these are not to the degree that I perceive notifying the jury that a
11 bankruptcy was involved in this case. It is extremely prejudicial.

12 The severity of the sanction of dismissal relative to the
13 severity of the discovery or in this case the trial abuse, whether any
14 evidence has been irreparably lost. That's not -- that's appropriate for
15 that. The feasibility and fairness of alternatives.

16 Less severe sanctions and for the record, or I'm leading up
17 to, I am not going to strike the entirety of their answer and proceed to a
18 prove up. I am going to strike their answer regarding liability. Liability is
19 not -- should not be and potentially would have been the subject of
20 summary judgment in this case, because the first thing the driver said, it
21 was his fault.

22 There's been no testimony whatsoever other than it was his
23 fault. And so I am going to strike the answer and instruct them that
24 liability is not an issue. I am striking this witness. The one who was on.
25 I am striking the liability witness, the accident reconstruction or, I don't

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

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

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

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

10 MR. PRINCE: Right.

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

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

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

1 So there is absolutely no harm for these sanctions against
2 Capriati, the actual Defendant. And then the need to deter parties and
3 future litigants from similar abuses, this is another which I never, ever
4 expected to see. And granted you saw. I was shocked. I said I was
5 shocked that Mr. Khan, your firm and you would engage in what I
6 consider a willful abuse.

7 The sanctions in the prior case, my recollection amounted to
8 something like 75,000 for your firm. It was a total of 150 split between
9 the actual defense and the defendant and your firm. I never could have
10 imagined that this would -- something like this would happen again, and
11 especially in front of me.

12 I seriously can't stop shaking my head because I don't get it.
13 I said in that case that it was the most serious abuse of discovery I'd ever
14 seen. This is not as serious as in that case because there were multiple
15 issues. And so I'm not directly comparing it, it's not appropriate.

16 However, when it comes to that last issue, it has to be taken
17 into consideration. So as I say, I think it's easily appropriate or a
18 conservatively appropriate to strike the rest of whatever other witnesses
19 remain and we will proceed.

20 You've already -- I'm not going to strike Dr. Tung. That
21 would be basically proceeding to the prove up. And I think this is a
22 measured, a very measured and appropriate response to this conduct.

23 And so I am going to do a written decision on this because I
24 certainly have no doubts that it will be reviewed. I did make some notes.

25 Oh, no sanction or admonition to a jury can undo the

1 prejudice regarding the Defendant's bankruptcy. And I did cover my last
2 because, as I said, no sanctions. The sanctions have no effect on and
3 don't diminish Capriati at all. So there is no harm to them. Okay.

4 MR. KAHN: Your Honor?

5 THE COURT: I will have to, as I said, when I do a written
6 decision, and it will be -- unfortunately, because we're in trial and we
7 have another trial after the holidays. Yes?

8 MR. PRINCE: I just wanted --

9 THE COURT: Mr. Kahn? Or who? Okay.

10 MR. KAHN: Oh, I think I stood up first, Your Honor.

11 THE COURT: Go ahead.

12 MR. KAHN: So I think I understand what the Court's saying
13 and with the lack of witnesses, obviously, our case is over, but for
14 argument.

15 THE COURT: Yes.

16 MR. KAHN: Just to be clear, there were no other experts that
17 the Court did not mention, or any other fact witnesses that we intended
18 to call. So I think the only thing left is argument, jury instructions and a
19 verdict form.

20 THE COURT: Well, when I bring them back, I'm going to
21 admonish you in front of the jury, which I've never done --

22 MR. KAHN: Understood, Your Honor.

23 THE COURT: -- in nine years, and I'm very reluctant. I, again,
24 I don't get it. I'm disappointed.

25 MR. PRINCE: Your Honor?

1 THE COURT: Yes?

2 MR. PRINCE: If I could. I appreciate the Court's ruling and
3 I'm asking you to make some additional comments, remain open minded
4 about potentially further relief.

5 You demonstrated the willfulness in your findings, so that is
6 clear. With regard to the strike on liability, I want to talk, we'll work
7 through the consequences of each issue.

8 That really is a limited consequence because they both
9 admitted that the company rep and the driver that, yes, this was
10 preventable. They're responsible. So that has limited consequences.

11 Striking Mr. Baker, the biomechanical engineer. He was
12 never going to be able to talk about injury causation anyway. You've
13 made that clear. He's not qualified to do that. That was going to have
14 no consequence on the injury claim. So that's really of no loss to the
15 Defendant, Capriati.

16 There is, for example, also the striking of Mr. Kirkendall, the
17 economist, that's of really no consequence because he calculated no
18 loss. So there was never going to be any statement by him of a
19 recalculation of loss, that Dr. Clarity, in his calculations, did it wrong. He
20 created no alternative economic loss calculation of any kind. He didn't
21 even do a future value computation of the future medical expenses.

22 So there's no wage recalculation. There's no future medical
23 care costs. So those are very, I guess, limited consequences for the
24 degree of risk now that my client must face going forward with this trial
25 in front of this jury.

1 For the reasons I've outlined, I think a mistrial would actually
2 work to their advantage and a monetary sanction would simply be
3 insufficient.

4 So if you're not going to do that, the only meaningful lesser
5 sanction would be to strike Tung. Because the other three issues, while I
6 respect and I appreciate the Court trying to create and fashion some
7 relief, it's not really doing anything to them. There's nothing to respond
8 to the abusive behavior to deal -- proportionately in some way deal with
9 the consequences my client is left with facing.

10 But moreover, and the reason for the inherent equitable
11 power in the first place is to deter abusive litigation practices. That is
12 one of the underlying principles. Having that inherent and equitable
13 power to do that.

14 And if your position is the other three, those are -- that's very
15 limiting. Striking Dr. Tung for all purposes and the jury not to consider
16 any of his medical testimony, that is an appropriate -- all those experts.
17 Because the three issues you gave on, that's really not a lost to them
18 because they weren't putting up really anything that meaningful anyway.

19 There was a question whether Mr. Baker could even testify at
20 all. That's under a *Hallmark* issue. He can't talk about injury causation at
21 all. And so therefore, that's really of limited consequences.

22 So striking Tung would be the only meaningful in addition to
23 the other things, consequential sanction.

24 But more than that, Your Honor, I'm also asking you to
25 award, and I entered against the Wilson Elser Law Firm, the attorney's

1 fees and costs of my law firm. That is also part of the inherent
2 sanctioning power of this Court. That is part of the -- that is what you
3 have to do. You can include that. And that's something less than a case
4 terminating sanction. And it's well within your discretion. And it's an
5 abusive discretion standard for any level of review.

6 So this lesser sanction with including striking the witnesses
7 you talked about, plus Dr. Tung, because the other witnesses weren't
8 going to do anything for them anyway. They're not losing out. So it
9 really allows them to still argue meaningfully, Dr. Tung, and go
10 offensively against us with Dr. Tung.

11 But also, if the Wilson Elser has to pay all of the cost of the
12 trial and my client's attorney's fees through the trial, that also should be
13 included as a part of a sanction if it's if it's going to be less than case
14 terminating.

15 So that's what I'm asking for in light of the on balance.
16 There's like you said, it's so -- the curatives don't allow the jury to unhear
17 it. It still can be there. We're going to use it. You're going to do the
18 admonishment, which I believe under *Gunderson* is mandated at a
19 minimum anyways. There's not really a sanction and so it's not the
20 remedy.

21 The remedy is what is adequate here? Well, I think a striking,
22 if you want to take a little bit more time to think about it. I understand
23 that you're concerned is too much. But on the other hand, on balance,
24 the striking on liability, it's a non-issue because it's a non-issue because I
25 established it was a non-issue. Baker can't talk about injury, Kirkendall

1 has no calculation of loss.

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

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

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

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

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

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

22 THE COURT: All right.

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

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

25 I submit

1 THE COURT: All right.

2 MR. PRINCE: Okay. Okay. Your Honor, the other issue
3 would be then today, how we proceed today? Obviously, my closing --

4 THE COURT: Well --

5 MR. PRINCE: -- argument isn't complete.

6 THE COURT: No, no.

7 MR. PRINCE: We haven't sent the jury instructions --

8 THE COURT: Here's what we're going to do. I'm reading
9 these. I'm telling them that we're going to be discussing jury
10 instructions and they're going to be here probably 10 minutes and then
11 we're coming back tomorrow.

12 MR. PRINCE: Okay.

13 MR. KAHN: And just so I know, does the Court want me to
14 stand up while the Court's admonishing me in front of the jury? I'm
15 willing to do whatever the Court suggests.

16 THE COURT: I've never done it.

17 MR. PRINCE: I think that's the right thing to do.

18 THE COURT: Okay. Nine years, as I said. There's been a lot,
19 but I've had to declare mistrials. And I'm aware, so you understand, a
20 similar thing happened in a case only the first day. They granted a
21 mistrial immediately and picked another jury when bankruptcy was
22 mentioned.

23 So it's not the first time by a long shot. I don't know the case
24 name and it wasn't my case. But, all right. Let's take a break.

25 MR. KAHN: Thank, Your Honor.

1 [Recess taken from 9:57 a.m. to 10:08 a.m.]

2 [Outside the presence of the jury]

3 THE COURT: All right. Are we on the record?

4 THE COURT RECORDER: Yes.

5 THE COURT: So I am also going to tell the jury, because
6 certainly they're going to know, that I'm striking the answer regarding
7 liability, and --

8 MR. PRINCE: You should tell --

9 THE COURT: -- this witness --

10 MR. PRINCE: You should tell them that they're the sole
11 cause of this accident. They may not know and understand what the
12 word liability is.

13 THE COURT: Well, we're going to have jury instructions, and
14 certainly that's appropriate, given -- but I just want to say so they don't --
15 so they don't think this is normal. I mean, what are they -- you know, all
16 of the sudden, the guy was testifying, and now we're going to be going
17 to -- I'm getting rid -- I'm releasing them and then they're going --

18 MR. PRINCE: Well, I think you should also let them know that
19 you're striking the remainder of the Defendant's witnesses. I'm asking
20 you to inform the jury that, as well, so they understand the relief you're
21 granting, in addition to the curatives, I think you need to let them know
22 that.

23 MR. KAHN: Submitted for Defendant.

24 THE COURT: All right. Strike answer regarding liability, and
25 you're asking that --

1 MR. PRINCE: That you're striking all remaining -- the
2 witnesses up there, and all remaining other witnesses.

3 MR. KAHN: And I'll submit it to the Court without argument.

4 THE COURT: And well, I have to tell them about striking this
5 guy. They're going to wonder. And I need to -- who was on the stand?
6 What's --

7 MR. KAHN: Mr. Goodrich.

8 THE CLERK: Oh, that's what I have, Mr. Goodrich.

9 THE COURT: Goodrich. All right.

10 MR. PRINCE: And then you have my two instructions,
11 Judge?

12 THE COURT: Yes.

13 MR. PRINCE: Okay, very good. Thank you.

14 THE COURT: Not a good way to -- all right. Bring them in.

15 [Pause]

16 THE MARSHAL: Please rise for the jury.

17 [Jury in at 10:11 a.m.]

18 [Inside the presence of the jury]

19 THE COURT: Please be seated. Parties acknowledge the
20 presence of the jury?

21 MR. PRINCE: We do, Judge. Thank you.

22 MR. KAHN: Yes, Your Honor.

23 THE COURT: Good morning, ladies and gentlemen.

24 JURORS: Good morning.

25 THE COURT: So first of all, so you understand, Mr. Goodrich

1 was on the stand yesterday, and I'm striking his testimony in its entirety.
2 I will read you an instruction in a second. In addition, I am striking the
3 Defendant's answer as it regards liability. You'll get an instruction, and
4 by the way, those are tomorrow, regarding that. There are always two
5 parts to a case, liability and damages, so I'm striking their answer
6 regarding that.

7 In addition, I'm striking any remaining witnesses for the
8 Defendants. Defendant, Capriati Construction, Inc., through its counsel
9 introduced -- oh, yeah, sorry -- introduced testimony that the Defendant
10 filed for bankruptcy after the collision on June 19th, 2013. You were
11 instructed to disregard the question and the answer, which is hereby
12 stricken from these proceedings. Defendant is no longer in bankruptcy
13 and is now profitable. You are further instructed not to consider whether
14 the Defendant filed for bankruptcy for any reason, and it should have no
15 effect on your verdict. You should not even discuss that when you go
16 back to deliberate.

17 Further, by seeking to introduce such irrelevant evidence,
18 counsel for Defendant, Mr. Kahn, committed willful misconduct. Mr.
19 Kahn is hereby reprimanded for his misconduct and admonished not to
20 engage in any further misconduct.

21 Thank you. You may sit down.

22 Defendant, Capriati Construction, Inc., introduced evidence
23 that after the June 19th, 2013 collision, it filed for bankruptcy. You shall
24 not consider that Defendant Capriati Construction, Inc., filed for
25 bankruptcy for any purpose. Defendant Capriati Construction, Inc., is no

1 longer in bankruptcy and is now profitable. Plaintiff has the legal right to
2 proceed with his claim against Defendant Capriati Construction, Inc., in
3 this case, and recover damages as determined by you in accordance
4 with these instructions.

5 Further, Defendant has liability insurance to satisfy in whole
6 or part any verdict you may reach in this case. These are instructions
7 which I will also be reading, along with a plethora of additional
8 instructions tomorrow. We are not -- there is no more testimony for
9 today, so you'll get to go home. I understand you're only here for a
10 short period, but that's probably a good thing.

11 We will be doing closings tomorrow. I'll read you the jury
12 instructions. Closing arguments, and then deliberations. That should be
13 it for today. Thank you.

14 THE MARSHAL: Please rise for the jury. Folks, please leave
15 your notebooks and pens in your chairs. Make sure you grab all of your
16 personal items.

17 What time tomorrow, Judge.

18 THE COURT: Tomorrow at 9:00 a.m. 9:00 a.m.

19 THE MARSHAL: Make sure you get your parking validated
20 before you leave today.

21 [Jury out at 10:16 a.m.]

22 [Outside the presence of the jury]

23 THE COURT: Are you ready to start with jury instructions --

24 MR. PRINCE: We are.

25 THE COURT: -- or do you want to do it --

1 MR. KAHN: Defendant is.
2 THE COURT: -- after lunch?
3 MR. KAHN: Court's choice. We're ready.
4 MR. PRINCE: You tell us what you'd like.
5 THE COURT: How many --
6 MR. PRINCE: I need to use the restroom, but --
7 THE COURT: -- are disputed?
8 MR. PRINCE: Well, they dispute, essentially, most of ours, so
9 I think we just need to go one by one. Why don't you give us this --
10 Judge, why don't we take, with the lawyers, a half an hour, just to like
11 meaningfully go through the instructions so we know the piles and then
12 we don't waste your time. We've already --
13 THE COURT: Well --
14 MR. PRINCE: -- given you --
15 THE COURT: -- I appreciate that. Let me tell you. I will be
16 giving, for the most part, the instructions from the Nevada jury
17 instructions, the -- where's -- is this the --
18 MR. PRINCE: That's correct.
19 THE COURT: -- new one? New version. Newer. New-ish, I'll
20 say, version. And this is, as I said already once, this is a regular car
21 accident. I don't see where there's going to be, other than now, some
22 new, unusual instructions. So the standard ones -- and by the way,
23 every time -- the instructions need to be amended so they're up to date,
24 i.e., we can either put in the instruction that it should be taken as gender
25 neutral, or the instructions should be written that way.

1 You're taking, basically, 10 or more year old instructions that
2 just keep getting passed down from generation to generation with all
3 these -- I've seen typos just because they've been retyped. Can we try to
4 get them correct? Last time, they left out an important word in one of
5 the instructions just because they probably retyped it a dozen times. So
6 go through them word by word and try to make sure they're --

7 MR. PRINCE: We will.

8 THE COURT: -- accurate.

9 MR. PRINCE: Your Honor, for a moment, I just went ahead
10 for a second. We now need -- obviously, the negligence instructions,
11 those are going to now be eliminated, right? I mean, so --

12 THE COURT: Yes.

13 MR. PRINCE: -- we have to draft now an instruction
14 consistent with you striking that part of the liability portion of the
15 Defendant's answer. So I'm going to take a few minutes to draft that,
16 and then I'll meet with the Defense counsel, and we can go through the
17 instructions to meaningfully do something before you get here. So we'll
18 let you know we're ready. It'll probably be about 45 minutes to an hour.

19 THE COURT: It'll be an hour.

20 MR. PRINCE: Okay.

21 THE COURT: Or more.

22 MR. PRINCE: I'm going to use the restroom.

23 THE COURT: All right.

24 [Recess at 10:19 a.m., recommencing at 1:42 p.m.]

25 [Outside the presence of the jury]

1 MR. STRONG: We're seeing that now, and I'm not sure what
2 happened.

3 THE CLERK: Yeah. I'm not --

4 MR. STRONG: And I save --

5 THE CLERK: I didn't see cites on anything, but --

6 MR. STRONG: Because I saved separate copies, so --

7 THE CLERK: -- there's copies for each. Yeah.

8 MR. KAHN: Keep going? So 20 we disagree. We'll figure
9 that out. The rest I think are all fine. 21 through 20- --

10 MR. PRINCE: Agreed.

11 MR. KAHN: -- 6.

12 MR. PRINCE: Yeah. Agreed. So we'll have a deal with it
13 separately.

14 MR. KAHN: So that's --

15 MR. PRINCE: Do you have copies of the instructions up
16 there, Judge, for yourself?

17 THE COURT: Yeah.

18 MR. PRINCE: Okay.

19 THE COURT: I have Plaintiff and Defendant's mutual list of
20 jury instructions. I assume --

21 MR. KAHN: We've gone through those.

22 THE COURT: Those are agreed upon, correct?

23 MR. KAHN: No longer.

24 MR. PRINCE: No. We -- no. We went through and we made
25 some changes to them, Judge. So I wanted to --

1 THE COURT: All right. Then what's the -- Plaintiff's jury
2 instructions objected to by Defendant, there's like 30 of those. 32 --

3 MR. PRINCE: Right.

4 THE COURT: -- to be exact.

5 MR. PRINCE: So I thought we could maybe go through
6 those. Let's go -- I think maybe just go one by one.

7 THE COURT: Has the verdict form been agreed to?

8 MR. KAHN: We haven't seen one.

9 THE CLERK: I have --

10 MR. PRINCE: We emailed it to you --

11 THE CLERK: I'm sorry.

12 MR. PRINCE: -- a week ago.

13 THE COURT: All right.

14 MR. KAHN: Yeah, we'd like a little while to look at this.

15 [Counsel confer]

16 MR. KAHN: Your Honor, we've been through the mutual list
17 together. We could at least discuss those, if you would like.

18 THE COURT: Okay. Which is the mutual list?

19 MR. PRINCE: Where it says.

20 MR. STRONG: Where it says mutual list.

21 MR. KAHN: It's about --

22 THE COURT: Well, I thought I just asked, are those agreed
23 to?

24 MR. PRINCE: No. We have an issue. We had need to go
25 through -- I think we just go --

1 THE COURT: All right.

2 MR. PRINCE: -- one by one.

3 MR. KAHN: It's about 26 pages.

4 THE COURT: Can you agree to number 1, ladies and
5 Gentlemen of the jury?

6 MR. PRINCE: Yes. It's actually number 2. On the --

7 THE COURT: In these --

8 MR. PRINCE: On the page on the -- let's just use the page on
9 the bottom so we for now, and then we'll renumber them --

10 THE COURT: All right.

11 MR. PRINCE: -- when we get there.

12 THE COURT: Now, that's page --

13 MR. PRINCE: 2.

14 THE COURT: -- 2. Page 3 is standard instruction. In these
15 instructions.

16 MR. KAHN: It's agreed. Page 4 is the masculine one you had
17 referenced.

18 THE COURT: Right. One of the parties in this case is a
19 corporation --

20 MR. PRINCE: I guess I'm objecting to it in light of what
21 happened earlier today, in light of your sanction that the --

22 MR. KAHN: And Defendant thinks it should remain with --

23 THE COURT: I'm giving it. Yeah. We have --

24 MR. PRINCE: Okay.

25 THE COURT: -- As to liability, et cetera, and, the corporation

1 acts through its employees somewhere.

2 MR. PRINCE: Yeah, we have that in there.

3 THE COURT: Ascertain the truth. Okay. Is that objected to.

4 MR. PRINCE: No.

5 MR. KAHN: No. The next one I had an objection to part of it.

6 THE COURT: The understanding and --

7 MR. PRINCE: Number 7.

8 MR. KAHN: Yeah, page 7.

9 THE COURT: It's a stock instruction. What are you objecting
10 to?

11 MR. KAHN: Line 6 and 7. There are no stipulated facts. So I
12 don't think there's any reason to read that to the jury, not unless --

13 MR. PRINCE: That's a --

14 MR. KAHN: -- the Court thinks --

15 MR. PRINCE: That's a standard --

16 MR. KAHN: -- there are stipulated facts.

17 MR. PRINCE: -- instruction, Judge.

18 THE COURT: There is the part about stipulations? Well, I
19 agree. If it's superfluous, it doesn't need to be.

20 MR. PRINCE: So remove --

21 THE COURT: Was there any stipulations?

22 MR. KAHN: Not that I can recall other than admitting the
23 evidence, which that doesn't really count.

24 MR. PRINCE: No.

25 THE COURT: Statement about evidence -- yeah. To the

1 extent that you stipulated to the evidence, I don't see the harm in that.

2 MR. KAHN: Okay.

3 THE COURT: And it's stock.

4 MR. PRINCE: Right. Okay.

5 THE COURT: There is -- there may be -- unless you can say,
6 absolutely, I don't recall --

7 MR. KAHN: That's fine.

8 THE COURT: -- in our -- what -- 5, 10, 15th day -- 14th day
9 today.

10 MR. PRINCE: Okay.

11 THE COURT: Although you are to consider all the evidence,
12 that's --

13 MR. KAHN: Hold on. Wait. Oh, you're on page 8?

14 MR. PRINCE: 8.

15 THE COURT: Page 8, yeah.

16 MR. KAHN: That's agreed. Page 9 is an issue, Your Honor.

17 THE COURT: You're not to --

18 MR. KAHN: And I'm -- I've asked my office to send the pre-
19 instructions. I don't recall what the -- if the Court pre-instructed on
20 insurance and --

21 MR. PRINCE: It did.

22 MR. KAHN: So there's a pre-instruction from before, there's
23 this morning's instruction --

24 MR. PRINCE: Well, because this morning -- from today,
25 obviously the jury knows the Defendant's insured. You're going to

1 repeat that instruction in here from today. But this -- this -- page number
2 9, it now also covers receiving Social Security disability benefits,
3 et cetera. Meaning -- because we need to add that. You did sustain an
4 objection concerning that. There's been some testimony potentially
5 about that. And so they're not to -- that's a form of a collateral source.

6 MR. KAHN: So Defendant would ask that it remain in or be
7 modified to accommodate this morning's change.

8 MR. PRINCE: We have a separate instruction that you've
9 already given that relates to that.

10 THE COURT: Okay. But -- and, again, we can discuss this,
11 but I can tell you I'm not going to add the part about insurance again in
12 the closing instructions. I think we covered it, and that's enough. So I'm
13 giving this one.

14 MR. PRINCE: Okay.

15 THE COURT: And the one 5107 (indiscernible) or done
16 anything --

17 MR. PRINCE: And that one's okay. 10. No objection.

18 THE COURT: Whenever evidence has been limited to one
19 or -- limited to one or more party.

20 MR. PRINCE: We're going to remove 11 because --

21 MR. KAHN: Correct.

22 MR. PRINCE: -- there's no limited purpose evidence.

23 MR. KAHN: Correct.

24 THE COURT: Yeah.

25 MR. PRINCE: We're agreeing to remove 12.

1 THE COURT: In this case -- okay. That's out?
2 MR. KAHN: Correct.
3 MR. PRINCE: Yeah.
4 MR. KAHN: Because that's just --
5 MR. PRINCE: Because there's no --
6 MR. KAHN: -- a request for admission.
7 THE COURT: Okay.
8 MR. PRINCE: 13, no objections.
9 THE COURT: That's standard.
10 MR. KAHN: 14 --
11 MR. PRINCE: 14, no objections.
12 MR. KAHN: And then 15, there's an issue.
13 MR. PRINCE: Well, we're going -- we have a separate
14 instruction on negligence, and they objected to it. This is the old
15 instruction. We're going to use the new one.
16 THE COURT: Yeah. I'd certainly think that --
17 MR. PRINCE: And you told them, but it's negligence -- that
18 they are negligent, that we then crafted into a separate instruction.
19 THE COURT: All right. There has to be a --
20 MR. PRINCE: We have a separate instruction, and they
21 objected to it --
22 THE COURT: All right. That's --
23 MR. PRINCE: -- regarding elements of negligence.
24 THE COURT: That's out. There has to be something else.
25 Term right-of-way, what's --

1 MR. PRINCE: We don't need -- now we don't need that.
2 That's out based on your ruling this morning.
3 THE COURT: The next one, 17, is out.
4 MR. PRINCE: Remove, yeah. 18, remove. 19, okay.
5 THE COURT: And determine there. All right.
6 MR. KAHN: 20, there's an issue.
7 THE COURT: An issue.
8 MR. PRINCE: Yeah. We're using --
9 THE COURT: Consider all the evidence. Yeah, that's -- okay.
10 MR. PRINCE: Then number 20 is legal --
11 THE COURT: All right. 20 --
12 MR. PRINCE: -- we're using proximate cause, and I don't
13 think you -- you don't give both proximate and legal cause.
14 THE COURT: I haven't.
15 MR. PRINCE: Right.
16 THE COURT: Are you saying you want both?
17 MR. KAHN: I'm saying I want both, yeah. I think they're
18 both --
19 THE COURT: And why?
20 MR. KAHN: Because I think they're both -- they're both
21 properly [sic] elements, which is why there's --
22 MR. PRINCE: Well --
23 MR. KAHN: -- there's two of them in here.
24 MR. PRINCE: Actually --
25 MR. KAHN: The substantial factor language I think is proper

1 even in the context of proximate cause separately.

2 THE COURT: Well, I give --

3 MR. KAHN: Because actual cause proximate --

4 THE COURT: -- one or the other. I don't think --

5 MR. PRINCE: Correct.

6 THE COURT: I think they are synonymous. I've never had
7 an --

8 MR. PRINCE: And he objected to --

9 THE COURT: -- explanation which justifies both. But I'm
10 willing to listen.

11 MR. KAHN: I just --

12 THE COURT: I think even the jury instructions, or the book
13 allows for either one or the other. I think proximate is the better.

14 MR. KAHN: Given the Court's preference of the two, then,
15 yes, I agree proximate cause is --

16 THE COURT: A proximate cause of an injury, damage, loss,
17 or is a cause which is --

18 MR. KAHN: Just for the record, Defendant's position is both
19 are requested, and Defendant understands the Court's ruling.

20 THE COURT: All right. And not that this is a very big
21 sideline, but the rule which I used to quote from Dan Polsenberg, that
22 you need to sign a jury instruction that's rejected is no longer in place.

23 MR. PRINCE: I agree with that.

24 THE COURT: It was a very obscure rule that only
25 Mr. Polsenberg seemed to know about, but it existed. And then he got it

1 removed.

2 MR. KAHN: Now, the rest are agreed to, 21 through 26,
3 Your Honor.

4 THE COURT: Okay.

5 MR. KAHN: So that's -- other than the ones that Mr. Prince
6 is --

7 THE COURT: Right.

8 MR. KAHN: -- going to propose.

9 THE COURT: All right. So Plaintiff's proposed.

10 MR. PRINCE: All right. So -- and --

11 MR. KAHN: Give us one second, if you would.

12 MR. PRINCE: So --

13 [Counsel confer]

14 MR. PRINCE: Well, you're not giving legal cause, right?

15 THE COURT: No.

16 MR. PRINCE: Okay.

17 THE COURT: Well, I'm giving --

18 MR. PRINCE: You're giving proximate. I have proximate in
19 the other one because that's part of the negligence element.

20 MR. KAHN: Hold on one second, if you would.

21 THE COURT: Well, is it the standard --

22 MR. PRINCE: Yes.

23 THE COURT: -- a proximate --

24 MR. PRINCE: Yes. Yes, it's a standard. You'll see --

25 THE COURT: Okay.

1 MR. PRINCE: -- it in a second.

2 MR. KAHN: Hold on. I'm shuffling papers here. Excuse me.

3 MR. PRINCE: Okay.

4 MR. KAHN: Okay. These are the ones that say, Plaintiff's

5 jury instructions objected to by Defendant?

6 THE COURT: Yes.

7 MR. KAHN: About 32 pages? Okay.

8 THE COURT: So -- yes.

9 MR. KAHN: Plaintiff proposed --

10 THE COURT: Let's go to page 2. You're admonished. That's

11 stock. You're objecting to that?

12 MR. KAHN: No, no. I just -- we're looking at these for the

13 first time today. So --

14 THE COURT: Oh.

15 MR. KAHN: -- no. That's fine.

16 MR. PRINCE: So where are we at now? I just want to make

17 sure we're --

18 MR. KAHN: The first page, page 2.

19 THE COURT: The --

20 MR. PRINCE: On the objected to?

21 THE COURT: -- Plaintiff's jury instructions objected to --

22 MR. PRINCE: Okay.

23 THE COURT: -- by Defendant.

24 MR. PRINCE: Right. Number 2, I think -- yeah, that's a pre-

25 instruction. So I --

1 THE COURT: Well, but it's stock that's usually given after.

2 MR. PRINCE: Okay.

3 THE COURT: Partly because --

4 MR. PRINCE: That's fine.

5 THE COURT: -- of the second paragraph more than the first.

6 MR. KAHN: Hold on. I have the --

7 THE COURT: If you want to -- well, the reason that the first is
8 still given is if even during their deliberations they were to say, hey, I
9 now remember, I know that guy, then they're not supposed to tell
10 anybody else, as the instruction says. They're supposed to come --

11 MR. PRINCE: Yeah, no objection to that, Judge.

12 [Court and Clerk confer]

13 MR. PRINCE: I have no objection as it's written. It's fine, just
14 you've got to give it to -- no issues.

15 MR. KAHN: Page 2 is fine.

16 MR. PRINCE: Page 2 is fine. We're both in agreement.

17 THE COURT: Okay. Defendant is legally responsible for the
18 negligence of its employee for causing the subject collision. You're
19 objecting or --

20 MR. KAHN: Which one is this? Hold on.

21 THE COURT: Why don't you take five minutes so you can go
22 through that and look at them, and I will be back.

23 Well, but, so you understand, we have to get these done. I
24 don't have a secretary tomorrow.

25 MR. PRINCE: No. We'll have it done, and we'll --

1 THE COURT: So morning is --

2 MR. PRINCE: -- and we'll make the changes and circulate it.

3 THE COURT: -- is out.

4 [Recess at 1:57 p.m., recommencing at 2:04 p.m.]

5 MR. KAHN: So 31 is new to us and 32 is new to us. And do
6 you have --

7 MR. PRINCE: Yes.

8 MR. KAHN: These have no citations. These are just --

9 MR. PRINCE: This is based on the Court's ruling.

10 MR. KAHN: I understand. I just want to make sure what
11 you're submitting has no citations.

12 MR. PRINCE: Correct. And they won't have them.

13 [Pause]

14 THE COURT: I have some changes to 31.

15 MR. PRINCE: Okay.

16 MR. KAHN: Okay.

17 MR. PRINCE: That's what -- we're on that right now.

18 MR. KAHN: Yeah.

19 THE COURT: All right. The Court has determined that
20 counsel for Defendant, Capriati Construction Corp., Inc., Mr. Kahn,
21 committed willful misconduct during this trial. Then, the Court has
22 determined sanctions were appropriate against Defendant. Then, one,
23 two -- so I made these cross outs. I don't think we need to say it six
24 times.

25 And on 32, the same thing. We're going to paragraph two.

1 You're instructed that Defendant's negligence was the sole cause of the
2 subject collision as a matter of law.

3 MR. PRINCE: So remove the first paragraph?

4 MR. KAHN: Defendant is fine with both of the Court's
5 suggested changes.

6 THE COURT: Now, I assume, but you never should assume --

7 MR. PRINCE: Can we go through these individually, Judge,
8 so we can --

9 THE COURT: We will.

10 MR. PRINCE: Okay.

11 THE COURT: But my question first is -- oh, did you make -- I
12 said I wanted to make this a Court's exhibit. It's a clip, so the supreme
13 court can actually see. We still need to put in the amount from the
14 workers' comp. I assume that's there somewhere. And then the
15 workers' comp statute. My --

16 MR. PRINCE: Well, we have the workers' comp statute in an
17 instruction. But they -- we never -- the case is closed. There's no more
18 evidence. They never determined the amount paid. That's never been
19 determined, and now the evidence is closed.

20 THE COURT: Well, that -- my understanding was that it was
21 the \$238,170.13, and that that was going to be in a jury instruction. I
22 would not allow this letter, but the amount must be, otherwise, we have
23 a mistrial again. That is clear from the case.

24 MR. PRINCE: Your Honor, if the Defense wants to propose
25 an instruction --

1 MR. KAHN: Your Honor, what is the -- what's the total dollar
2 amount you have on the letter?

3 THE COURT: Well, the incurred -- and we never -- that's true,
4 we never -- the -- \$238,170.13.

5 MR. KAHN: That's what they paid.

6 THE COURT: The total lien, and I don't know again, maybe
7 that's a discount, which they shouldn't have done for this purpose,
8 \$178,628.71.

9 UNIDENTIFIED SPEAKER: Judge, I'd ask that Defendant be
10 able to -- at the end of the day, we'll draft something and send it to
11 counsel and the Court, propose something like the Court said just with
12 the numbers somehow tracking the statute because we need to look at
13 that. So -- I have never done this -- workers' comp before.

14 THE COURT: I understand. And the case, once again, says --

15 MR. PRINCE: The language says -- it's -- I acknowledge the
16 language in there, Judge. So if they just come up with some kind of
17 language that as a result of his injuries, you know, the workers'
18 compensation insurer paid on behalf of the Plaintiff x amount of dollars,
19 then I could probably --

20 THE COURT: All right. We need --

21 MR. PRINCE: -- live with that just if it's a simple statement.

22 THE COURT: Well, that's what I foresaw, or --

23 MR. PRINCE: Yeah. So if they want to --

24 THE COURT: Just --

25 MR. PRINCE: -- draft something consistent with that.

1 THE COURT: And then to follow is the full instruction --

2 MR. PRINCE: Correct.

3 THE COURT: -- right out of --

4 MR. PRINCE: We have that in here, Judge.

5 THE COURT: Okay.

6 MR. PRINCE: We have that, 26.

7 THE COURT: All right.

8 MR. KAHN: Would the lien amount be the amount incurred?

9 That would be the amount incurred; that's what the statute says, right?

10 MR. PRINCE: No. They said paid.

11 THE COURT: Well, yes.

12 MR. KAHN: Paid?

13 MR. PRINCE: The statute says paid.

14 THE COURT: It clearly says the jury must receive proof of the
15 amount of all payments made --

16 MR. PRINCE: Right.

17 THE COURT: -- or to be made by the insurer or the
18 administrator. In this case, it's the administrator on behalf of the insurer.

19 MR. KAHN: So I think --

20 THE COURT: Associated risk is just an administrator.

21 MR. KAHN: -- I think the lien amount would be the amount
22 paid or -- the amount paid, at least.

23 MR. PRINCE: Lien is, like, something that you are claiming a
24 right for reimbursement.

25 THE COURT: Well, let's try to get that person on the phone.

1 MR. KAHN: Okay. Okay. The paralegal's going to try.

2 MR. PRINCE: Well, can we finish the other instructions while
3 they're doing that?

4 THE COURT: No. Let's take two minutes to do that because I
5 don't want them to go home.

6 Can you see if you can -- here's the phone number. And
7 Carson, see if you can get them on the conference.

8 [Pause - Clerk places phone call to Jodi Johnson]

9 MS. JOHNSON: Hi, this is Jodi.

10 THE CLERK: Hi, Jodi. Oh, go ahead.

11 THE COURT: Jodi, this is Judge Israel. We're here in court.
12 You're on speakerphone. And I was wondering, you sent a letter, I
13 believe to the defense firm or whatever, regarding Bahram Yahyavi.
14 You're familiar with that?

15 MS. JOHNSON: Yes. I sent a letter.

16 THE COURT: Yeah. I have it in --

17 MS. JOHNSON: I believe it was an updated lien letter.

18 THE COURT: Right. I have it in front of me. And our
19 question -- and as I said, we are in court and this is on the record. We
20 need to know -- and I assume you're familiar with the Tri-County case,
21 regarding the fact that NRS 616(c) 215.10 says that the jury must receive
22 proof of the amount of all payments made or to be made by the insurer
23 or the administrator.

24 So we have your letter. And my question to you, you have a
25 line where it says incurred in the amount of \$238,170.13, and then you

1 have a total lien amount that's almost -- well, \$50,000 less. So what is --
2 what actually complies with that sentence?

3 MS. JOHNSON: So the incurred amount -- because the
4 Plaintiff's still -- it's been reopened, so he is treating again, and medical
5 is being paid out again. The incurred amount is the reserves, as well as
6 what's been paid. It's the little -- the bank account or the reserve account
7 the adjuster has put for spending, as well as what's already been paid.
8 The \$178,628 is part of what's been paid out of the \$238,000. But there's
9 still a remaining amount in that incurred for bills that are coming in.

10 THE COURT: So the \$238,000, that includes bills that have
11 been -- that have come in, but you haven't approved yet, let's say, but
12 they are --

13 MS. JOHNSON: No. It includes the \$158,000 that has been
14 paid.

15 THE COURT: Right.

16 MS. JOHNSON: And it also includes bills that we have not
17 received yet that are -- we're anticipating. The adjuster is anticipating
18 more bills, so there's a reserve.

19 MR. PRINCE: And that's the to be paid language, Judge.

20 THE COURT: Yeah.

21 And that's just, sort of -- I'm familiar with insurance company
22 terms. And is that just a reserve? In other words, it's just a general
23 amount and not a specific? For instance, when I go to the doctor, he
24 sends out a bill, and my insurance company decides how much they're
25 going to pay. So is that a general amount as a reserve, or is that specific

1 amounts that have been billed and not yet paid?

2 MS. JOHNSON: No, it's a general amount.

3 THE COURT: Okay.

4 Do you guys have any questions?

5 MR. KAHN: I do.

6 THE COURT: Sure.

7 MR. KAHN: I'm wondering --

8 THE COURT: Then -- wait. Why don't you come over here,
9 because these are really bad, and --

10 MR. KAHN: So does the incurred amount debt include -- the
11 238 debt includes everything that's to be paid, or it's a reserve that may
12 be different -- may have a higher amount than what is to be paid at this
13 point?

14 MS. JOHNSON: So the incurred amount includes the 178,
15 which has been paid. It -- and then it's a reserve of what is to come in
16 because we know that he's still going for treatment, so we know bills are
17 still coming. And there's an allotted amount. And if the adjuster runs
18 out of that reserve, they have to replenish -- have to put more money in.
19 But they don't know how much until it's over.

20 MR. KAHN: Yeah. I guess what I'm asking is the extra
21 \$80,000, the difference between the 158 and 238, what I think you're
22 telling us is that is --

23 MR. PRINCE: Well, that's the wrong numbers.

24 MR. KAHN: -- an estimated amount of future?

25 MR. PRINCE: That's the wrong numbers.

1 Hi, it's Dennis Prince. I represent the injured worker. I just
2 want to make sure that we're clear. You're anticipating to pie more
3 expenses for medical treatment, correct?

4 MS. JOHNSON: Correct.

5 MR. PRINCE: And the adjuster understands that treatment is
6 ongoing, and so has created a reserve fund for the anticipated expenses
7 to be paid?

8 MS. JOHNSON: Yes.

9 MR. PRINCE: Is that was Associated Risk Management
10 expects to pay on behalf of the injured worker in the future concerning
11 ongoing medical care?

12 MS. JOHNSON: It -- it's -- no. It's not what they expect to
13 pay. It could be more. It --

14 MR. PRINCE: Okay.

15 MS. JOHNSON: So it's just -- there's a level -- because of the
16 nature of the injury, there is a level that -- of reserve they have to keep in
17 the bank in the balance --

18 MR. PRINCE: Right.

19 MS. JOHNSON: -- for bill payment.

20 MR. PRINCE: Right. Now, right now, in addition to the 178,
21 are there bills that have been received, or to -- expenses to be -- that
22 have been received, or any billing received, that you just haven't paid
23 yet, but will be paying?

24 MS. JOHNSON: I don't have that information. The claim
25 adjuster would have that information. She could have bills. They could

1 be somewhere. I have -- there's nothing showing a reserve -- like,
2 payments going out --

3 MR. PRINCE: Okay.

4 MS. JOHNSON: -- in the future.

5 MR. PRINCE: So there's no pending payments right now?

6 MS. JOHNSON: No.

7 MR. PRINCE: Like, for example, can you -- are you at a
8 computer where you can look in the log notes system --

9 MS. JOHNSON: Yeah.

10 MR. PRINCE: -- to see if you've received any bills in the last
11 month or so that you've received --

12 MS. JOHNSON: Yeah.

13 MR. PRINCE: -- just haven't processed yet?

14 MS. JOHNSON: Bills do not -- when bills come in, we don't
15 log them in the system as going to be paid until the adjuster puts them
16 in for funding to send them out. So there's not a --

17 MR. PRINCE: Okay.

18 MS. JOHNSON: -- a check that sits here until --

19 MR. PRINCE: Right. Okay. Okay. Thank you.

20 THE COURT: Did you have anything else, Mr. Kahn?

21 MR. KAHN: No, Your Honor.

22 THE COURT: Okay. Hopefully -- I wouldn't say we've
23 resolved it. But thank you, Ms. Johnson.

24 MS. JOHNSON: All right. Thank you. Bye-bye.

25 THE COURT: Bye.

1 MR. PRINCE: It's, kind of -- that's why I don't think it makes
2 any -- for my own record, this is one part why it doesn't -- this doesn't
3 make any sense because the next instruction would tell them, yeah,
4 don't reduce -- we're going to tell you how much was paid, but don't
5 reduce a penny. So it is what it is. I understand that. So --

6 THE COURT: I have said --

7 MR. PRINCE: -- just pick a number.

8 THE COURT: I have said it makes -- I can't disagree with you.

9 MR. PRINCE: That's why I'm maintaining my --

10 THE COURT: I'm following what exactly is in the case. And
11 what is even more distressing, if you will, the amount paid -- wait, let me
12 quote it -- amount of all payments made, or to be made.

13 MR. PRINCE: That's why I think you include the 238.

14 THE COURT: That's, like, speculative. And -- but --

15 MR. PRINCE: Well, they've reserved an additional almost
16 \$50,000 --

17 THE COURT: I understand. I don't know.

18 MR. PRINCE: -- or excuse me, almost \$60,000.

19 THE COURT: Okay. Mr. Kahn, what number do you want to
20 put in there?

21 MR. KAHN: I'll defer to the Court. I think based on what she
22 told us, if they're thinking that he's going to have another \$50,000 or
23 something, then it's not improper to use the higher number as the
24 current best estimate today, which is the decision of --

25 THE COURT: All right. And you know what --

1 MR. KAHN: -- what is paid and to be paid.

2 THE COURT: -- I actually was going to ask her what voc
3 rehab -- I know what voc rehab is, but what that is a bill for because --
4 but I forgot.

5 THE CLERK: Do you want to call her back?

6 THE COURT: No.

7 Does anybody care?

8 MR. PRINCE: No. I'm fine.

9 THE COURT: Okay.

10 MR. KAHN: No. If it's part of the comp that's included in this
11 number.

12 THE COURT: Okay. So I'm going to go with the 238.

13 MR. PRINCE: They're going to send over an instruction
14 today.

15 THE COURT: And she didn't even discuss -- and I assume
16 that's not her area. We didn't even talk to the actual adjuster. He
17 continues to get TTD or PPD -- he is eligible for potentially a PPD rating,
18 temporary total disability, and currently --

19 MR. PRINCE: Can we say in there that Plaintiff may also be
20 entitled to additional benefits? I mean, right, in fairness, that is what's
21 happening, and there's no projected estimate.

22 THE COURT: I don't want to put in anything speculative, and
23 I want to follow conclusively what our supreme court has said. And
24 again, it's not my favorite thing, but I will do what they tell me. So we'll
25 put in simply that the amount of payments to be made -- or made, or to

1 be made by the administrator is 238 --

2 MR. PRINCE: As of this date. Can we at least say --

3 THE COURT: As of this date's fine. Is \$238,170.13.

4 MR. PRINCE: Okay.

5 THE COURT: And both of you can try your best to explain
6 the statute, which -- or the jury instruction, which is mandatory.

7 MR. PRINCE: Okay.

8 THE COURT: And I say good luck to you.

9 MR. PRINCE: Okay.

10 MR. KAHN: And then Defendant -- I think Defendant had a
11 set of jury instructions --

12 MR. PRINCE: Well, I know. But we still haven't gone through
13 these yet. So we went through the ones at the back. Can we just, kind
14 of, go through the -- these quickly, which we call objected to.

15 THE COURT: Yeah. We need to go through all of them.

16 MR. PRINCE: Let's just go one page. And then what my firm
17 will do tonight is we'll put all these together and put them in an order
18 that makes sense. And then do you want us to make the copies, Judge,
19 at home -- I mean, at our office since you don't have a staff tomorrow?

20 THE COURT: Yeah.

21 MR. PRINCE: Okay.

22 THE COURT: If you're not -- if we're not going to get it done
23 by 5:00 tonight, then --

24 MR. PRINCE: Well, we'll just make them and bring it
25 ourselves. I mean, well, I think we'll get it done.

1 THE COURT: All right. So we started with page 2.
2 Everybody said that's --
3 MR. PRINCE: Okay.
4 THE COURT: -- you're admonished. That's okay. Page 3.
5 MR. PRINCE: Okay.
6 THE COURT: Page 4.
7 MR. PRINCE: Okay.
8 THE COURT: Two kinds --
9 MR. KAHN: Hold on, which were these?
10 MR. PRINCE: What? Are you serious? Our -- the ones you
11 objected to. The ones we've been just talking about.
12 MR. KAHN: Okay. No, I thought we were going --
13 MR. PRINCE: 2 through 32.
14 THE COURT: All right. I'll read a part of it. There are two
15 kinds of evidence -- that's okay, on page 4. That's a stock.
16 MR. PRINCE: Yes.
17 THE COURT: No statement, ruling, or remark by me. That's
18 stock.
19 MR. PRINCE: Agree.
20 THE COURT: That's page 5.
21 MR. KAHN: Your Honor, I think we went through all these up
22 to --
23 MR. PRINCE: No, we didn't. We did not.
24 MR. KAHN: Okay. That's fine.
25 THE COURT: There was the -- no, we haven't gone through

1 these.

2 MR. KAHN: Okay.

3 THE COURT: So 5, everybody is okay with that?

4 MR. PRINCE: Yes.

5 THE COURT: Certain testimony has been read. Yes, we did
6 adapt that.

7 MR. PRINCE: We did that one. It's a little -- that's in, but
8 we'll only do it once obviously.

9 THE COURT: Yes. That's 6.

10 MR. PRINCE: 7.

11 THE COURT: During the course of the trial you've heard
12 reference to interrogatory.

13 MR. KAHN: Agreed.

14 THE COURT: 7, okay. Certain charts and summaries.

15 MR. KAHN: Agreed.

16 THE COURT: An attorney has a right to interview.

17 MR. KAHN: Agreed.

18 THE COURT: A witness who has special knowledge, skill.

19 MR. KAHN: Agreed.

20 THE COURT: An expert witness has --

21 MR. KAHN: Agreed.

22 THE COURT: -- testified.

23 MR. KAHN: Agreed.

24 THE COURT: Hypothetical questions.

25 MR. KAHN: Agreed.

1 THE COURT: Whenever in these instructions I state the
2 burden of proof.

3 MR. KAHN: Agreed.

4 MR. PRINCE: Agree.

5 THE COURT: Preponderance of the evidence.

6 MR. KAHN: Agreed.

7 MR. PRINCE: Agree.

8 THE COURT: Preponderance or weight of evidence.

9 MR. PRINCE: Agree.

10 MR. KAHN: Agreed.

11 THE COURT: Plaintiff seeks to establish a claim of
12 negligence.

13 MR. PRINCE: Agree.

14 THE COURT: I will now instruct you.

15 MR. KAHN: Agreed.

16 THE COURT: In order to establish a claim of negligence.

17 MR. PRINCE: Agree.

18 MR. KAHN: Agreed.

19 THE COURT: When I use the expression proximate cause.

20 MR. KAHN: Agreed.

21 THE COURT: Plaintiff has the right to rely on
22 recommendations of medical doctors.

23 MR. KAHN: Agreed.

24 THE COURT: In determining the amount of losses if any --

25 MR. PRINCE: Agree.

1 MR. KAHN: Agreed. Mr. Prince told me this was a pre-
2 instruction.

3 MR. PRINCE: It was. And 20 -- page 21 on the loss of
4 enjoyment of life, that was also part of a pre-instruction.

5 MR. KAHN: So same thing; agreed.

6 THE COURT: Page 21, loss of employment of -- enjoyment of
7 life and compensation. 22 --

8 MR. PRINCE: Agree.

9 THE COURT: -- no definite standard. That's stock.

10 MR. KAHN: Agreed.

11 MR. PRINCE: 23 is a blank page. I think it was just a copying
12 issue.

13 THE COURT: All right. 24, the law requires that if you find --

14 MR. PRINCE: We agreed on this, 24.

15 MR. KAHN: Yeah. We agree.

16 THE COURT: All right. 24, the law requires a person who
17 has a condition -- that's stock.

18 MR. PRINCE: 25 agree.

19 MR. KAHN: Agree.

20 THE COURT: Page 25.

21 MR. KAHN: 26 is the statute.

22 THE COURT: Okay.

23 MR. KAHN: That's agreed, and I think the Court has already
24 ruled.

25 THE COURT: And, you know, I'm almost inclined to even --

1 because we do, in criminal, put NRS, blah, blah, blah, states --

2 MR. PRINCE: Well, this is the exact -- the wording is --

3 THE COURT: Yeah.

4 MR. PRINCE: -- like taken from the quote from the statute.

5 THE COURT: I get it. You don't want the NRS?

6 MR. PRINCE: No.

7 THE COURT: Okay. What about you? You don't care?

8 MR. KAHN: I think that's fine, just as long as it's kind of the
9 next page.

10 THE COURT: All right. 27, According to a table of mortality --

11 MR. PRINCE: Agreed.

12 MR. KAHN: We agreed on that a while ago.

13 THE COURT: Whether any of these elements have been
14 proven --

15 MR. KAHN: Agreed.

16 MR. PRINCE: Agreed. And 29 and 30 --

17 THE COURT: Defendant Capriati through its counsel --

18 MR. KAHN: These are the two from this morning, 29 and 30.

19 THE COURT: You're instructed that --

20 MR. PRINCE: And those are the --

21 THE COURT: The answer is hereby stricken --

22 MR. KAHN: Defendant just have no comment as to both.

23 MR. PRINCE: Okay. And then you made the changes to 31
24 and 32?

25 MR. KAHN: Correct.

1 MR. PRINCE: We're going to make the changes to 31 and 32.

2 MR. KAHN: And Defendant is not --

3 THE COURT: I think I've said on page 29 -- I've said enough
4 times that he's been sanctioned. I'm taking out the second paragraph.
5 Further by seeking to introduce, we're telling them there's no
6 bankruptcy, and I do say -- well, wait. You've got this twice?

7 MR. PRINCE: Well, one was the --

8 THE COURT: Oh.

9 MR. PRINCE: -- the misconduct, and the other --

10 THE COURT: Yeah.

11 MR. PRINCE: -- one was the curative.

12 THE COURT: All right. I think that Defendant filing for
13 bankruptcy should have no effect -- oh, it's supposed to say, you're not --
14 yeah, okay. You are further instructed not to consider or discuss, it
15 probably should say.

16 MR. KAHN: The bankruptcy? You should only consider or
17 discuss?

18 THE COURT: Yeah, whether the Defendant filed for
19 bankruptcy.

20 MR. PRINCE: Yeah, that's fine.

21 THE COURT: Then the next one, page --

22 MR. PRINCE: That's a [indiscernible] over there.

23 THE COURT: Well, isn't that like mostly the same?

24 MR. PRINCE: No.

25 THE COURT: One was --

1 MR. KAHN: You took out part of --

2 MR. PRINCE: Well, maybe we can just say, Defendant
3 Capriati Corporation, is no longer in bankruptcy and is now profitable.
4 Why don't we just take out the first part of it, like the first two sentences
5 on 30?

6 THE COURT: Don't we say that --

7 MR. PRINCE: You say it in the previous one.

8 THE COURT: In the prior one, Defendant is no longer -- is
9 now profitable.

10 MR. PRINCE: Okay.

11 THE COURT: Page 29. I will give Defendant -- well, I think
12 what should be added is Plaintiff has a legal right to proceed with his
13 claims against Defendant Capriati Construction, Inc., in this case, and
14 recover damages. I think that could go -- well, it doesn't really matter,
15 but it could certainly go as a second paragraph to the prior one. You see
16 what I'm saying? Just skip the first part, which is --

17 MR. PRINCE: Well, yeah. Well let's just leave it kind of -- I
18 think if they're separated, they're simpler. So I'm going to use them
19 separately.

20 THE COURT: Okay, then --

21 MR. PRINCE: So I'll take out the --

22 THE COURT: -- Plaintiff has the legal right to proceed with
23 his claims against Defendant Capriati Construction, Inc., in this case, and
24 recover damages as determined by you in accordance with these
25 instructions. I don't think we need to tell them about insurance, again.

1 MR. PRINCE: Why? Judge, that's --

2 THE COURT: Because --

3 MR. PRINCE: -- part of the sanction you gave earlier, and I
4 think it's --

5 THE COURT: I get it, and they clearly know that now.

6 MR. PRINCE: Well, I don't know that.

7 THE COURT: I --

8 MR. PRINCE: This is the only way -- this was the cure. I don't
9 think you should take that away from him. I'm not going to overly
10 emphasize it, but I definitely need to deal with this to make sure that
11 they're locked into this instruction. I mean, reading is one thing and
12 trying to understand it and process it. I mean, these are instructions
13 you've already given as a matter of law, and while I appreciate the
14 modification to avoid redundancy, that part of it is the cure for the
15 problem.

16 THE COURT: That's why I noticed it, and certainly
17 understood that, again -- and I'm saying this ad nauseum, that's a bell
18 that is not easy to un-ring.

19 Mr. Kahn, what's your comments?

20 MR. KAHN: I'm being advised by others that there shouldn't
21 be more mention of insurance, but I would submit it, based on this
22 morning's proceedings.

23 MR. PRINCE: They had no objection to this instruction earlier
24 today. None.

25 THE COURT: Yes. All right. I'll leave that sentence in.

1 MR. PRINCE: So it'll read, page --

2 THE COURT: Plaintiff has legal rights to --

3 MR. PRINCE: correct.

4 THE COURT: -- proceed with his claims against Defendant
5 Capriati in this case and recover damages as determined by you in
6 accordance with these instructions.

7 MR. KAHN: And which page is this?

8 MR. PRINCE: Thirty.

9 THE COURT: Page 30. I took out the first whole, from
10 Defendant, basically, that's repetitive to, is now profitable.

11 MR. PRINCE: Okay.

12 MR. KAHN: Okay.

13 MR. PRINCE: And then we talked --

14 THE COURT: Then I told you about the changes, but do you
15 want me to go over them again?

16 MR. PRINCE: No, we've got 31 and 32. We got it.

17 THE COURT: And again, for the record, the Supreme Court,
18 and I don't remember the exact case, has said that juries now -- I mean,
19 they're not -- we can't assume they're stupid. They know that everybody
20 in Nevada, it's mandatory to have insurance, and they foresaw the day
21 when we would be -- oh, it's the case where they talk about asking
22 prospective jurors --

23 MR. PRINCE: Right.

24 THE COURT: -- whether they --

25 MR. PRINCE: Right.

1 THE COURT: -- whether they have stock in or know
2 somebody that works for --

3 MR. PRINCE: That's the *Silverstein* case.

4 THE COURT: -- an insurance company.

5 MR. PRINCE: Yeah.

6 THE COURT: So --

7 MR. PRINCE: Well, also, that's *Orth*, too. I mean, they allow
8 you to -- we talked about -- well, that was my case.

9 THE COURT: I would rather, but in this case, I don't see any
10 way around it. It's --

11 MR. KAHN: Yeah. The Defendant had a set of jury
12 instructions that was 11 pages long. Defendant is willing to withdraw all
13 but page seven, and that should be modified.

14 THE COURT: And please show it to me.

15 MR. KAHN: It's -- I hand marked it based on --

16 THE COURT: All right. Is there --

17 MR. PRINCE: Oh, wow.

18 THE COURT: Is it anywhere? Did you email it? Did you --

19 MR. KAHN: We did a --

20 MR. PRINCE: It's a comparative negligence instruction.

21 That's done.

22 THE COURT: Well, let him propose it.

23 MR. PRINCE: Oh.

24 MR. KAHN: I can just read it. It's one sentence.

25 THE COURT: Go ahead and read it.

1 MR. KAHN: As modified, it --

2 THE COURT: Go ahead and read it.

3 MR. KAHN: It would say only this. The Plaintiff has the
4 burden to prove that the Plaintiff sustained damage, and that
5 Defendant's negligence was a proximate cause of the damage sustained
6 by the Plaintiff. That's it.

7 MR. PRINCE: They already have that instruction under the
8 elements of negligence already, the pattern.

9 THE COURT: I agree that's appropriate. I thought we had it.

10 MR. PRINCE: We do.

11 MR. KAHN: It's 3.06, so if we've got it somewhere else --

12 MR. PRINCE: No, that's the old, old -- that's the small blue
13 book. That's from the 1980s.

14 MR. KAHN: So our set that counsel gave us doesn't have
15 citations, so it may be in there, so I need to look.

16 MR. PRINCE: It's here. It's page 17.

17 MR. KAHN: Tell me which page it is.

18 THE COURT: Here. In order to establish claim and
19 negligence, Plaintiffs must prove the following elements by a
20 preponderance of the evidence. Defendant was negligent that Plaintiff
21 sustained damages and that Defendant's negligence was the proximate
22 cause of damage to Plaintiff. Isn't that what you want?

23 MR. KAHN: Yeah, but the only difference in the wording is --

24 THE COURT: Look at --

25 MR. KAHN: -- that instead of --

1 THE COURT: -- page 17.

2 MR. KAHN: Yeah, instead of to Plaintiff, it says, sustained by
3 the Plaintiff. That's fine.

4 MR. PRINCE: What? Okay.

5 MR. KAHN: It's fine.

6 MR. PRINCE: So I guess --

7 MR. KAHN: It's already in. Withdrawn.

8 THE COURT: All right. I --

9 MR. PRINCE: So then Defendant has no objections?

10 MR. KAHN: Correct.

11 MR. PRINCE: What I want to do --

12 MR. KAHN: No --

13 MR. PRINCE: -- is go back, Judge, and modify these, put
14 them in order --

15 MR. KAHN: Wait. Not no objections for the record.

16 MR. PRINCE: No, I know.

17 MR. KAHN: [Indiscernible] jury instructions.

18 MR. PRINCE: I'm talking about --

19 THE COURT: Yeah. Oh, wait. What about the verdict form?
20 Have you had a chance to look at that?

21 MR. KAHN: I would like to look at this later. It doesn't
22 appear to be a problem. We may want a total at the bottom, but --

23 MR. PRINCE: No, I don't want a total because if they do have
24 an addition problem -- there's a specific reason why I don't have a total,
25 because in case they don't add correctly, then we have an issue with the

1 verdict form. You can calculate -- we can do it post-trial.

2 THE COURT: Well, I tell them -- just so you understand, I tell
3 them that I only give them one verdict form. You can put it up on the
4 screen and show them --

5 MR. PRINCE: Oh, I'm going to.

6 THE COURT: I figured. But I tell them I only give them one
7 verdict form for the reason -- and I explain to them, if you make a
8 mistake on it, it's not a problem. Tell us, and we will give you a fresh
9 copy, but we will substitute the old one with the new one so there's not a
10 question as to which is the real form. And in fact, on the last trial, they
11 either -- I can't remember if they spilled something on it.

12 THE CLERK: They wrote on it.

13 THE COURT: They wrote on it. They scribbled on it.

14 MR. PRINCE: Yeah. I think that was that criminal case just
15 before we started.

16 THE CLERK: Yeah.

17 MR. PRINCE: I remember it was --

18 THE COURT: Yeah, so they scribbled on it, and they asked
19 for it -- did you bring them back? Yes. The hand for a hand, so this is the
20 one, shredded it. And it was not a Court's exhibit, by the way, because
21 their thought process is secret and not appropriate, so I shredded it.
22 That's what happened in that one, and it's happened before. So anyway,
23 that's what we do. So take a few minutes -- I really would like to see -- I
24 can tell you, if we don't have -- if there's any corrections at the last
25 minute tomorrow --

1 MR. PRINCE: We'll do it right now, Judge.

2 THE COURT: -- we're totally screwed.

3 MR. PRINCE: No, we'll do it --

4 THE COURT: Yes.

5 MR. PRINCE: -- right now. We'll do it right now.

6 MR. KAHN: Defense is fine. Defense is fine with this.

7 THE COURT: You can email --

8 MR. PRINCE: We were going to --

9 THE COURT: -- with the corrections to --

10 MR. PRINCE: We're going to make changes now. Just so
11 you know, the Defense said the verdict form, they have no objection to
12 the verdict form.

13 MR. KAHN: No objections to the verdict form.

14 THE COURT: Okay. Here's the verdict form.

15 MR. PRINCE: So we're going to make the changes now.

16 THE COURT: Okay. Put it in -- and I'm trashing my copy of
17 the verdict form, so it doesn't get mistaken. And it's up to you --
18 generally speaking, everyone wants them to have jury -- a separate set
19 while they're looking at it. Sometimes they've said no, you read it, we'll
20 put it up and, you know, they -- so it's up to you. You want everybody to
21 have a copy and cut down another tree, I'm fine with that.

22 MR. KAHN: I think that would be good for this case. And
23 then does the Court have any special rules about -- like, I sometimes tell
24 juries they're allowed to look at the evidence, if they wish to, things like
25 that. Is there anything that the Court wants to say is okay or not okay?

1 THE COURT: I'm not sure. Any evidence that's admissible,
2 they get.

3 MR. KAHN: Right.

4 THE COURT: Is that what you're asking?

5 MR. KAHN: Yeah, yeah. I just wanted to make sure.

6 THE COURT: No, they get -- you can tell them, hey, look at
7 page -- that's the admitted evidence, they get.

8 MR. PRINCE: Wait. I want to -- there's an issue with like the
9 Defendant's exhibits. They have very few exhibits actually admitted.
10 There's very few pages. They have lots of binders and stuff. We'll need
11 to remove all of that, so --

12 THE COURT: The ones that aren't admitted won't go back to
13 them.

14 MR. PRINCE: Okay. That's fine.

15 MR. KAHN: I think I have roughly five pages admitted.

16 MR. PRINCE: Yeah, that's fine. And so Kevin is making the
17 changes now to the jury instructions --

18 THE COURT: All right.

19 MR. PRINCE: -- so we can get them done now. The other
20 thing is, while we're talking, you know, with regard to Mr. Kahn -- are
21 you giving the closing argument tomorrow?

22 MR. KAHN: If I make it to tomorrow, I will give closing
23 argument, yes.

24 MR. PRINCE: Okay. That he should not be allowed to be
25 asking for forgiveness or doing anything with respect to this jury, again,

1 in light of your admonishment.

2 MR. KAHN: You mean in regards to the reprimand?

3 MR. PRINCE: Correct.

4 MR. KAHN: Yeah. I'm not intending to bring up the
5 reprimand.

6 THE COURT: I would certainly think we will all stay away
7 from it, and that goes for you, Mr. Prince. We have it in the jury
8 instruction. I don't think there's any need to chastise --

9 MR. PRINCE: I won't, but I'm going to walk them through
10 what the consequences of that are so they --

11 THE COURT: The jury instructions are the jury instructions.

12 MR. PRINCE: I agree.

13 THE COURT: I'm not going to limit you from that, but --

14 MR. PRINCE: Understood, but I won't be chastising.

15 THE COURT: Yeah.

16 MR. KAHN: Should we take a break while counsel --

17 MR. PRINCE: Yeah, yeah, yeah.

18 THE COURT: Sure, take a break. Take a break.

19 THE MARSHAL: Judge, for tomorrow with the jury, are we
20 going to go through lunch with closings, and then take them back and
21 feed them, or are we going to break for lunch?

22 THE COURT: How many days do you think you're going to
23 spend on closings? Let's start with Mr. Prince.

24 MR. PRINCE: I'm hoping my closing will be an hour to an
25 hour and 15 minutes. That's my goal.

1 MR. KAHN: Mine may be longer.

2 THE COURT: Okay.

3 MR. KAHN: Mine may be two hours.

4 THE COURT: We'll just play it by ear. I --

5 MR. PRINCE: Okay.

6 THE COURT: I -- to answer your question generally, I'm
7 going to keep them here during lunch so -- and instruct them, of course,
8 even if they get lunch back there, that they're not to talk until the
9 rebuttal, until everything is done, but it keeps them from going off on the
10 street and talking about this. I think that's the best way. I don't foresee
11 being done by noon, and I will tell you guys with both back and forth,
12 I've had it where we kept them until 1 without feeding them, and one of
13 the jurors had something diabetic, and had to be rushed to the hospital.

14 That was before Steve was here, so I don't keep them
15 without feeding them. If they're here at noon, they're going to eat, or I'll
16 let them go if I -- you know, if we're nowhere near that. In any event, but
17 no, I don't -- I hate to see people taken away in an ambulance, and in that
18 case, the attorney, oh, it's just another 15 minutes, and an hour later,
19 they were sitting there, and I fully think it was due to that, that this juror
20 had some sort of a crisis of some sort. In any event, it's not going to
21 happen. So does that answer your question? I'm sure it's more
22 information than you wanted.

23 Okay. So we'll take a few minutes.

24 MR. KAHN: Maybe 20 minutes?

25 THE COURT: What?

1 MR. KAHN: Maybe 20 minutes?

2 THE COURT: Sure, sure.

3 [Recess taken from 2:56 p.m. to 3:53 p.m.]

4 THE COURT: All right.

5 MR. PRINCE: Your Honor, we have these in order that we've
6 agreed on.

7 MR. KAHN: There's one issue about a paragraph, the
8 Defense had you were moving one paragraph out of one of the sanction
9 orders, and Plaintiff's counsel did not.

10 THE COURT: All right. Which one? Where is it?

11 MR. KAHN: We don't have them numbered yet, so there's --

12 THE COURT: All right.

13 MR. PRINCE: It's -- Judge, it's all the way after the --

14 MR. KAHN: Negligence.

15 MR. PRINCE: -- in order to establish a claim of negligence.

16 MR. KAHN: The negligence elements.

17 MR. PRINCE: And then the negligence elements and then
18 there's the instruction right after. It was part of number 29 of the
19 objected to.

20 THE COURT: All right. Let's go through. I'll number them.
21 I'll read a little bit. I'll number it. If I somehow have it out of order, or
22 incorrect, or whatever, and when I get to that, tell me, and we'll discuss
23 it. So ladies and gentlemen of the jury is number 1.

24 You're admonished is number 2.

25 If in these instructions is number 3.

1 The court has given you instructions is number 4.
2 The masculine form is number 5.
3 If during this trial is number 6.
4 One of the parties in this case is a corporation is 7.
5 The purpose of the trial is 8.
6 The evidence which you are to consider is 9.
7 Although you're to consider only the evidence is 10.
8 The credibility or believability is 11.
9 Discrepancies in a witness' testimony is 12.
10 In determining whether any proposition is 13.
11 Whether any of these elements is 14.
12 No statement, rule or remark is 15.
13 There are two kinds of evidence is 16.
14 Certain testimony has been read is 17.
15 During the course of the trial is 18.
16 Certain charts is 19.
17 An attorney has a right to interview is 20.
18 The witness who has special knowledge is 21.
19 An expert witness has testified is 22.
20 Hypothetical questions is 23.
21 Whenever in these instructions I state that the burden is 24.
22 A preponderance of the evidence is 25.
23 The preponderance or weight of evidence is 26.
24 Plaintiff seeks to establish a claim of negligence is 27.
25 In order to establish a claim is 28.

1 MR. KAHN: The next one is the problem one.

2 THE COURT: Okay, Defendant --

3 MR. KAHN: Defendant had just the whole second paragraph
4 out.

5 MR. PRINCE: What we talked about, Judge, was this is the
6 instruction as you actually gave it this morning. You then -- on the next
7 two instructions you then removed the conduct sort of admonishment
8 language. So this one you left it as is, and you added in, you're not --
9 you're further instructed not to consider or discuss whether Defendant
10 filed for bankruptcy.

11 So we made that change that you requested for this
12 instruction, and then we modified the next two in accordance with the
13 specific direction that you -- the next three that you gave us. So all of
14 those were what you did earlier.

15 MR. KAHN: And from Defendant's perspective we thought
16 you had removed the reprimand, and several of us had that second
17 paragraph just completely removed.

18 THE COURT: Yeah, so I took out, let's see.

19 MR. PRINCE: In the proposed, Judge, it was three
20 referenced, 29 through 32. So the next four go into that.

21 THE COURT: Yeah, I took out the second -- I took out from
22 further on that one. So make that change and then the next one --

23 MR. PRINCE: Okay.

24 THE COURT: -- the Court has determined. That's a different
25 order. All right, so that's -- all right, so are you sending that to--

1 MR. PRINCE: Yeah, we will. We will.

2 THE COURT: 28 -- 27, 28. Okay. So the next one, although
3 it's not numbered, that is correct.

4 MR. PRINCE: Right, so we'll be -- that will be 30 then, right?

5 THE COURT: Well, let's not even go there, but I'm just
6 looking at these to make sure. And yeah, the next one is fine, too. All
7 right. So make that change, and we can keep going.

8 MR. PRINCE: We did.

9 [Pause]

10 THE COURT: Did you send it? She didn't get it.

11 MR. PRINCE: We did. We did.

12 MR. STRONG: I just did.

13 THE COURT: All right. Well, we'll -- I hate to -- I don't want
14 to get out of order, but let's go. That will be 29.

15 MR. PRINCE: Right. We'll just make a place for that.

16 THE COURT: And -- yeah.

17 MR. PRINCE: And then 30 would be the Court has
18 determined.

19 THE COURT: If I can find my pen. I got it, yeah, but I used a
20 different one now. It's all going to be different. All right.

21 [Pause]

22 THE COURT: Okay. Here you go.

23 Defendant Capriati Construction is 29.

24 The Court has determined is 30.

25 MR. KAHN: Hold one second, Your Honor, please.

1 THE COURT: All right.
2 MR. KAHN: Okay. Go. Thank you.
3 THE COURT: So the Court has determined is 30.
4 You're instructed is 31.
5 Plaintiff has the legal right is 32.
6 Defendant is legally responsible is 33.
7 When I used the expression proximate cause is 34.
8 Plaintiff has the right to rely on the recommendation is 35.
9 In determining the amount of losses, if any is 36.
10 The loss or enjoyment of life is 37.
11 No definite standard is 38.
12 The law requires that you find the Defendant is 39.
13 A person who has a condition or disability is 40.
14 Payment of workers' compensation benefits. Well, the first --
15 don't you think the other one should go first?
16 MR. PRINCE: We discussed it, and I think it's better if it goes
17 after this --
18 THE COURT: All right.
19 MR. PRINCE: -- so the jury has the --
20 THE COURT: You agreed to that? That's fine. 41.
21 Then the amount is 42.
22 You're not to discuss is 43.
23 Table of mortality is 44.
24 Whether any of these elements is 45.
25 It is your duty is 46.

1 If during your deliberation is 47.

2 Not a biggie, but we have a recorder, not a reporter. It
3 should read playbacks, et cetera, et cetera --

4 MR. PRINCE: Well, I'm okay with it like it is, Judge.

5 THE COURT: Okay.

6 MR. PRINCE: 47, you okay?

7 MR. KAHN: That's fine.

8 THE COURT: When you retire to consider is 48.

9 And now you will listen is 49.

10 MR. KAHN: And does the Court want to make a copy of
11 these so we're working off the same page? Or is it okay if we're going
12 to -- because I'm sure both sides are going to scan these and use some
13 of them in the closing.

14 MR. PRINCE: Well, I just numbered mine as we went along,
15 so --

16 MR. KAHN: I did as well, I'm just saying, do you want to use
17 the Court set, and have the scanned copies of that.

18 THE COURT: We can make -- I'll make a couple of copies
19 now.

20 MR. PRINCE: Maybe she can -- maybe she can just make a
21 copy and email it to us. Would that be easier, Judge? Let's do that?

22 THE COURT: Either way, we can -- she can make two copies
23 of these --

24 MR. PRINCE: That's fine, Judge.

25 THE COURT: -- for you --

1 MR. KAHN: That's fine.

2 THE COURT: -- to work off of, and then we'll have -- what do
3 we have 10 people left? Ten copies for --

4 MR. PRINCE: Yes.

5 THE COURT: -- tomorrow. I'll have her make these -- just
6 two it doesn't take long.

7 [Pause]

8 THE COURT: So then I think I'm doing that. Is the Plaintiff
9 familiar with the jury instructions?

10 MR. PRINCE: I am, Your Honor.

11 THE COURT: And other than the changes we made, which
12 are on the record, do you agree to the order --

13 MR. PRINCE: Yes.

14 THE COURT: -- of the instructions?

15 MR. PRINCE: I do.

16 THE COURT: And the instructions that I just gave you a copy
17 of?

18 MR. PRINCE: Yes.

19 THE COURT: Is there any additional instructions which you
20 wish to propose?

21 MR. PRINCE: No.

22 THE COURT: Defense, are you familiar with the order of the
23 instructions?

24 MR. KAHN: Yes, Your Honor.

25 THE COURT: Those are agreeable?

1 MR. KAHN: Yes, Your Honor.

2 THE COURT: And as to the instructions themselves, with the
3 objections that we discussed on the record, are you agreeable to these
4 instructions?

5 MR. KAHN: Yes, Your Honor.

6 THE COURT: And the verdict form, I think we already asked
7 that. Both sides are agreeable to that?

8 MR. PRINCE: Yes.

9 MR. KAHN: Yes, and Defendant has no additional
10 instructions to propose.

11 THE COURT: Thank you. Does the Defendant have any
12 additional instructions?

13 MR. KAHN: No, Your Honor.

14 THE COURT: I appreciate that. Okay. It's been a long two
15 days.

16 MR. KAHN: Three weeks, but yeah.

17 THE COURT: I'm talking about the --

18 MR. KAHN: I know.

19 THE COURT: -- the last two days. Okay. Then go forth.
20 We'll see you tomorrow at 9:00 a.m.

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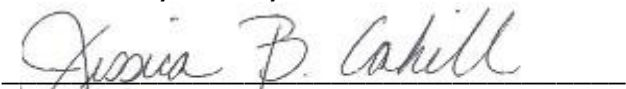
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MR. PRINCE: Okay.

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.



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Jessica B. Cahill, Transcriber, CER/CET-708

1 RTRAN

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 BAHRAM YAHYAVI,
8 Plaintiff,

) CASE#: A-15-718689-C
)
) DEPT. XXVIII
)

9 vs.

10 CAPRIATI CONSTRUCTION CORP
11 INC.

12 Defendant.
13

BEFORE THE HONORABLE RONALD J. ISRAEL
DISTRICT COURT JUDGE
FRIDAY, SEPTEMBER 27, 2019

15 **RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 15**

16
17 APPEARANCES:

18 For the Plaintiff:

DENNIS M. PRINCE, ESQ.
KEVIN T. STRONG, ESQ.

19
20 For the Defendant:

MARK JAMES BROWN, ESQ.
DAVID S. KAHN, ESQ.
MARK SEVERINO, ESQ.

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24 RECORDED BY: JUDY CHAPPELL, COURT RECORDER
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Las Vegas, Nevada, Friday, September 27, 2019

[Case called at 9:13 a.m.]

[Outside the presence of the jury]

THE MARSHAL: -- is now in session. The Honorable Ronald J. Israel presiding.

MR. PRINCE: Good morning, Your Honor.

THE COURT: Good morning.

[Judge and Clerk confer]

THE COURT: Good morning. Okay, good morning. So case 718689. One of the jurors, and I won't say who, got a ticket coming in and asked Steve if I could, you know -- is this the original?

THE CLERK: Yes, sir.

THE COURT: Okay. So if I could do something, which of course I can't, but they probably are unhappy. We're down to the --

MR. KAHN: Well, let them know that I'll handle it for them.

THE COURT: Yeah, I get that. So we could --

MR. KAHN: Are they not here?

THE COURT: No, they're here.

MR. KAHN: Oh, okay.

THE COURT: We could let them go. They're not going to be a happy camper.

MR. KAHN: Defendant would oppose a change for the jury based on a ticket, a parking ticket or a speeding ticket.

THE COURT: I think it was a moving violation.

1 MR. KAHN: Okay. Yeah, I'm fine with that.

2 THE COURT: Even though Steve said no, they insisted that
3 he ask me. So what I'm saying is, it appears they're pissed.

4 THE CLERK: We have that friends and family program.

5 THE COURT: So, anyway, all right. Just figured I'd tell you.

6 MR. KAHN: I do have a few housekeeping items before we
7 begin, Your Honor.

8 THE COURT: Okay. Go ahead.

9 MR. KAHN: First of all, I know that we got in the associated
10 risk management letter and we agreed on the number, but I want to
11 make sure that's a marked exhibit for the court's exhibits, the entirety.
12 And I'd also note that it has reference to vocational rehabilitation, which
13 is something before the date of the letter, September 25th, Defendant
14 was unaware of. We were unaware of it I think when the Plaintiff
15 testified, and we were unaware of it when Mr. Spector, his vocational
16 expert testified. So I'm just asking that that be marked for the record.
17 I'm not moving or making a motion of any type.

18 THE COURT: Did we make it a Court's exhibit?

19 MR. KAHN: I have a copy.

20 THE COURT: I have one.

21 MR. KAHN: If the Clerk wishes to take my copy, that's fine.

22 THE COURT: Make it a court's exhibit. Okay.

23 MR. KAHN: And then given what happened yesterday, again
24 I'm not asking to reargue it, but I would like the reports from the two
25 experts that were stricken, Kevin Kirkendall, the economist, and John

1 Baker, the accident reconstruction of biomechanical. I want to make sure
2 those are marked as exhibits, court exhibits, so they're in the record. I'm
3 not asking for their admission, I'm just asking that they be marked so
4 that the --

5 THE COURT: As Court exhibits, that's fine.

6 MR. KAHN: If I could approach the Clerk.

7 THE COURT: Yes.

8 MR. KAHN: I think I have a copy. Just for the record,
9 Kirkendall's reports are August -- sorry -- July 4, 2018 and August 30,
10 2018. And then the Baker reports I have July 3rd, 2018, December 3rd,
11 2018, and June 20th, 2019. I'll hand those to the Clerk.

12 So that's it, Your Honor.

13 THE COURT: Okay. Anything from the Plaintiff?

14 MR. PRINCE: Nothing, Judge.

15 THE COURT: All right. A substantial amount of reading to
16 do, so get lots of liquid in.

17 I think I told you I had some laser done on my vocal chords,
18 so anyway.

19 THE CLERK: Do you want me to [indiscernible]?

20 THE COURT: No, that's okay. It didn't go over last well or
21 whenever.

22 [Pause]

23 THE COURT: Okay. Bring them in. Now I've got a full thing
24 of water, and I'll -- I must say that I don't know that I've had 48
25 instructions before. It's usually --

1 MR. KAHN: It started at about 75, so be happy.

2 [Jury in at 9:18 a.m.]

3 [Within the presence of the jury]

4 THE COURT: Please be seated. Good morning, ladies and
5 gentlemen.

6 JURY/COLLECTIVELY: Good morning.

7 THE COURT: Let's see now. First of all, the parties
8 acknowledge presence of the jury?

9 MR. PRINCE: Yes, Judge.

10 MR. KAHN: Yes, Your Honor.

11 THE COURT: So we are -- I am going to have jury
12 instructions in front of you. I'm going to be reading those in a minute.
13 You can follow along if you choose to, but if not, you can just listen
14 because you will have those jury instructions to take back with you into
15 the jury deliberation room. And the attorneys will certainly be
16 highlighting the instructions that they choose to.

17 I will be giving you one jury verdict form to take back with
18 you. And, again, they may discuss that in their closing arguments.

19 The reason I only give one is because what happened, I think
20 it was just last trial or maybe it was the trial before that, in any event
21 we've had three in a row, they spilled something on the jury verdict
22 form, they made notes on it, et cetera. And so that isn't what we want to
23 file in the court.

24 So if you spill, don't worry about it. Just tell us. We will
25 exchange hand-to-hand the old one for a clean fresh copy. Don't worry

1 about it, it's not a big deal, but we just don't want multiple copies
2 because it has happened where juries have signed multiple copies and
3 then which one was the one they really meant. These things are
4 important. So that's why we only give you one when you go back there.

5 We will go until sometime around noon. And we will --
6 we've already ordered lunch for you. So you will, if we're done with
7 closings or not, but if we're not done, you are still, I want to admonish
8 you, not allowed to discuss the case until we finish all of the closings and
9 you go back to deliberate.

10 So having said that, I will go ahead and read to you, you all
11 have copies. Again, if you choose to follow along, that's fine.

12 Ladies and gentlemen of the jury, it is now my duty as Judge
13 to instruct you on the law that applies to this case. It is your duty as
14 jurors to follow these instructions and to apply the rules of law to the
15 facts as you find them from the evidence.

16 You must not be concerned with the wisdom of any rule of
17 law stated in these instructions. Regardless of any opinion you may
18 have as to what the law ought to be, it would be a violation of your oath
19 to base a verdict upon any other view of the law than that given in the
20 instructions of the Court.

21 You are admonished that no juror may declare to a fellow
22 juror any fact relating to this case as of his or her own knowledge. And if
23 any juror discovers during the trial or after the jury has retired that he or
24 she or any other juror has personal knowledge of any fact in controversy
25 in this case, he or she shall disclose such situation to myself in the

1 absence of the other jurors. This means that if you learn during the
2 course of the trial or during deliberations that you're acquainted with the
3 facts of this case or the witnesses and you have not previously told me
4 of this relationship, you must then declare that fact to me. You
5 communicate to the Court through the Marshal, the Bailiff Marshal.

6 During the course of this trial the attorneys for both sides
7 and the court personnel, other than the Bailiff Marshal, are not permitted
8 to converse with members of the jury. These individuals are not being
9 antisocial, they are bound by ethics and the law not to talk to you. To do
10 so might contaminate your verdict.

11 You're admonished additionally you're not to visit the scene
12 of any of the acts or occurrences made mention of during this trial unless
13 specifically directed to do so by the Court.

14 You're not to undertake any investigation of the case on your
15 own or endeavor to research legal or factual issues on your own.

16 If in these instructions any rule, direction, or idea is repeated
17 or stated in different ways, no emphasis thereon is intended by me and
18 none may be inferred by you. For that reason you are not to single out
19 any certain sentence or any individual point or instruction and ignore the
20 others. But you are to consider all the instructions as a whole and regard
21 each in the light of all the others. The order in which the instructions are
22 given has no significance as to their relative importance.

23 The Court has given you instructions embodying various
24 rules of law to help guide you to a jury and lawful verdict. Whether
25 some of these instructions will apply, will depend upon what you find to

1 be the facts. The fact that I've instructed you on various subjects in this
2 case must not be taken as indicating an opinion of the Court as to what
3 you should find to be the facts or as to which party is entitled to your
4 verdict.

5 The masculine form as used in these instructions, if
6 applicable, as shown by the text of the instructions and the evidence
7 applies to a female person or a corporation.

8 If during this trial I've said or done anything which has
9 suggested to you that I'm inclined to favor the claims or position of any
10 party, you will not be influenced by any such suggestion. I have not
11 expressed nor intended to express, nor have I intended to intimate any
12 opinion as to which witnesses are or are not worthy of belief, what facts
13 are or are not established, or what inference should be drawn from the
14 evidence. If any expression of mine has seemed to indicate an opinion
15 relating to any of these matters, I instruct you to disregard it.

16 One of the parties in this case is a corporation. A corporation
17 is entitled to the same fair and unprejudiced treatment as an individual
18 would be under the like circumstances. And you should decide the case
19 with the same impartiality you would use in deciding a case between
20 individuals.

21 The purpose of the trial is to ascertain the truth. The
22 evidence which you are to consider in this case consists of the testimony
23 of the witnesses, the exhibits, and any facts admitted or agreed to by
24 counsel.

25 Statements, arguments, and opinions of counsel are not

1 evidence in the case. However, if the attorneys stipulate as to the
2 existence of a fact, you must accept the stipulation as evidence and
3 regard that fact as proved.

4 You must not speculate to be true any insinuations
5 suggested by a question as to a witness. A question is not evidence and
6 may be considered only as it supplies meaning to the answer.

7 You must disregard any evidence to which an objection was
8 sustained by the Court and any evidence ordered stricken by the Court.
9 Anything you may have seen or heard outside the courtroom is not
10 evidence and must also be disregarded.

11 Although you are to consider only the evidence in the case in
12 reaching a verdict, you must bring to the consideration of the evidence
13 your everyday common sense and judgment as reasonable men and
14 women. Thus, you are not limited solely to what you see and hear as the
15 witnesses testify. You may draw reasonable inferences from the
16 evidence which you feel are justified in the light of common experience,
17 keeping in mind that such inferences should not be based on speculation
18 or guess.

19 A verdict may never be influenced by sympathy, prejudice, or
20 public opinion. Your decision should be the product of sincere judgment
21 and sound discretion in accordance with these rules of law.

22 The credibility or believability of a witness should be
23 determined by his or her manner upon the stand, his or her relationship
24 to the parties, his or her fears, motives, interests, or feelings, his or her
25 opportunity to have observed the matter to which he or she testified, the

1 reasonableness of his or her statements, and the strength or weaknesses
2 of his or her recollections.

3 If you believe that a witness has lied about any material fact
4 in the case, you may disregard the entire testimony of that witness or
5 any portion of this testimony which is not proved by other evidence.

6 Discrepancies in a witness' testimony are between his
7 testimony and that of others. If there were any discrepancies, do not
8 necessarily mean that the witness should be discredited. Failure of
9 recollection is a common experience and innocent misrecollection is not
10 uncommon. It is a fact, also, that two persons witnessing an incident or
11 transaction, often will see or hear it differently. Whether a discrepancy
12 pertains to a fact of importance or only to a trivial detail should be
13 considered in weighing its significance.

14 In determining whether any proposition has been proved,
15 you should consider all of the evidence bearing on the question with
16 regard to -- without regard to which party produced it.

17 Whether any of these elements of damages have been
18 proven by the evidence is for you to determine. Neither sympathy nor
19 speculation is a proper basis for determining damages. However,
20 absolute certainty as to the damages is not required. It is only required
21 that Plaintiff prove each item of damages by a preponderance of the
22 evidence.

23 No statement, ruling, remark, or comment which I may make
24 during the course of the trial is intended to indicate my opinion as to
25 how you should decide the case or to influence you in any way in your

1 determination of the facts. At times I may even ask questions of
2 witnesses. If I do, it is for the purpose of bringing up matters which I feel
3 should be brought out and not in any way to indicate my opinion about
4 the facts or to indicate the way I feel you should give to the testimony of
5 the witnesses.

6 I may during the trial take notes of the witness' testimony.
7 You are not to make any inference from that action. I'm required to
8 prepare for legal arguments of counsel during this trial and for that
9 reason I may take notes.

10 There are two kinds of evidence, direct and circumstantial.
11 Direct evidence is direct proof of a fact such as testimony of an
12 eyewitness about what the witness personally saw, heard, or did.
13 Circumstantial evidence is indirect evidence that is proof of a chain of
14 facts from which you could find another fact. The law makes no
15 distinction between the weight to be given either direct or circumstantial
16 evidence. Therefore, all of the evidence presented in the case, including
17 circumstantial evidence, should be considered by you in arriving at your
18 verdict.

19 Certain testimony has been read into evidence from a
20 deposition. A deposition is testimony taken under oath before the trial
21 and preserved in writing. You are to consider that testimony as if it had
22 been given in court.

23 During the course of the trial you have heard references
24 made to the word interrogatory. An interrogatory is a written question
25 asked by one party and another who must answer it under oath in

1 writing. You are to consider interrogatories and the answers to them the
2 same as if the questions had been asked and answered here in court.

3 Certain charts and summaries have been received into
4 evidence to illustrate facts brought out in the testimony of some
5 witnesses. Charts and summaries are only as good as the underlying
6 evidence that supports them. You should therefore give them only such
7 weight as you think the underlying evidence deserves.

8 An attorney has a right to interview a witness for the purpose
9 of learning what testimony the witness will give. The fact that the
10 witness has talked to an attorney and told the attorney what he or she
11 would testify to does not by itself reflect adversely on the truth of the
12 testimony of the witness.

13 A witness who has special knowledge, skill, experience,
14 training, or education in a particular science, profession, or occupation,
15 is an expert witness. An expert witness may give his or her opinions as
16 to any matter in which he or she is skilled. You should consider such
17 expert opinion and weigh the reasons, if any, given for it. You are not
18 bound, however, by such an opinion. Give it the weight to which you
19 deem it entitled, whether that be great or slight. And you may reject it if
20 in your judgment the reasons for it are unsound.

21 An expert witness has testified about his reliance upon
22 books, treatises, articles, or statements that have not been admitted into
23 evidence. Reference by an expert witness to this material is allowed so
24 that the expert witness may tell you what he or she relied upon to form
25 his or her opinion.

1 You may not consider the material as evidence in this case.
2 Rather, you may only consider the material to determine what weight, if
3 any, you will give to the expert's opinion.

4 Hypothetical questions have been asked of expert witnesses.
5 In a hypothetical question the expert witnesses told you to assume the
6 truth of certain facts and the expert witness is asked to give an opinion
7 based upon those assumed facts. You must decide if all the facts
8 assumed in a hypothetical question have been established by the
9 evidence. You can determine the effect of that admission upon the value
10 of the opinion.

11 Whenever in these instructions I state that the burden or the
12 burden of proof rests upon a certain party to prove a certain allegation
13 by him or her, the meaning of such an instruction is this: That unless the
14 truth of the allegation is proved by a preponderance of the evidence, you
15 shall find the same to be not true.

16 A preponderance of the evidence means such evidence as
17 when considered and compared with that opposed to it has more
18 convincing force and produces in your mind a belief that what is sought
19 to be proved is more probably true than not true. In determining
20 whether a party has met this burden, you will consider all the evidence,
21 whether produced by the Plaintiff or the Defendant.

22 The preponderance or weight of evidence is not necessarily
23 with the greater number of witnesses. The testimony of one witness
24 worthy of belief is sufficient for the proof of any fact and would justify a
25 verdict in accordance with such testimony, even if the number of

1 witnesses have testified to the contrary.

2 If from the whole case considering the credibility of
3 witnesses and after weighing the various factors of evidence you believe
4 there is a balance of probability pointing to the accuracy and honesty of
5 the one witness, you should accept his or her testimony.

6 Plaintiff seeks to establish a claim of negligence. I will now
7 instruct you on the law relating to this claim.

8 In order to establish a claim of negligence, Plaintiffs --
9 Plaintiff must prove the following elements by a preponderance of the
10 evidence:

- 11 1. That the Defendant was negligent;
- 12 2. That the Plaintiff sustained damages; and
- 13 3. That the Defendant's negligence was the proximate cause
14 of damage to Plaintiff.

15 Defendant, Capriati Construction Corp., Inc., through its
16 counsel, introduced testimony that Defendant filed for bankruptcy after
17 the collision on June 19, 2013. You are instructed to disregard the
18 question and answer which is hereby stricken from these proceedings.
19 Defendant is no longer in bankruptcy and is now profitable. You are
20 further instructed not to consider or discuss whether the Defendant filed
21 for bankruptcy for any reason and it should have no effect on your
22 verdict.

23 The Court has determined that counsel for the Defendant,
24 Capriati Corp. -- Construction Corp., Inc., Mr. Kahn, committed
25 willfulness to conduct during this trial. The Court has determined

1 sanctions were appropriate against Defendant. Defendant's answer to
2 the complaint, which was read to you in this case relating to liability for
3 causing the June 19, 2013 collision, is hereby stricken. Defendant
4 Capriati Construction Corp., Inc., is solely liable for causing the June 19,
5 2013 collision.

6 As a further result of Defense counsel's willful misconduct,
7 the Court strikes all of the Defendant's remaining witnesses, including
8 the testimony of the Defendant's employee, Clifford Goodrich.

9 You are instructed that Defendant's negligence was the sole
10 cause of the subject June 19, 2013 collision as a matter of law. Further,
11 Plaintiff was not at fault in any way for causing the June 19, 2013
12 collision as a matter of law.

13 You must determine the amount of damages proximately
14 caused by Defendant's negligence in accordance with these instructions.
15 Plaintiff has the legal right to proceed with his claims against Defendant
16 Capriati Construction Corp., Inc. in this case and recover damages as
17 determined by you in accordance with these instructions. Further,
18 Defendant has liability insurance to satisfy in whole or part any verdict
19 you may reach in this case.

20 Defendant is legally responsible for the negligence of its
21 employee, Joshua Arbuckle, for causing the subject collision.

22 When I use the expression proximate cause, I mean that a
23 cause which in natural and continuous sequence unbroken by an
24 efficient intervening cause, produces the injury complained of and
25 without which the result would not have occurred. It may not be the

1 only cause nor the last or nearest cause. It is sufficient if it concurs with
2 some other cause acting at the same time, which in combination with it,
3 causes the injury.

4 Plaintiff has the right to rely on the recommendation of their
5 medical doctors when ordinary care has been exercised in selecting a
6 physician or surgeon.

7 In determining the amount of losses, if any, suffered by
8 Plaintiff as the proximate result of the motor vehicle collision in question,
9 you will take into consideration the nature, extent, duration of the
10 injuries or damages you believe from the evidence Plaintiff has
11 sustained. And you will decide upon a sum of money sufficient to
12 reasonably and fairly compensate the Plaintiff for the following items:

13 The reasonable medical expenses Plaintiff has necessarily incurred as a
14 result of the motor vehicle collision and the medical expenses which you
15 believe Plaintiff is reasonably certain to incur in the future as a result of
16 the motor vehicle collision;

17 Plaintiff's loss of earnings or earning capacity from the date
18 of the motor vehicle collision to the present;

19 Plaintiff's loss of earnings or earning capacity which you
20 believe that Plaintiff is reasonably certain to experience in the future as a
21 result of the motor vehicle collision discounted to the present value;

22 The physical and mental pain, suffering, anguish, and
23 disability endured by Plaintiff from the date of the motor vehicle collision
24 to the present and the physical and mental pain, suffering, anguish, and
25 disability which you believe Plaintiff is reasonably certain to experience

1 in the future as a result of the motor vehicle collision;

2 The loss of enjoyment of life and compensation for loss of
3 ability to participate and derive pleasure from the normal activities of
4 daily life or for Plaintiff's inability to pursue his or her talents,
5 recreational interests, hobbies, or avocations endured by Plaintiff from
6 the date of the motor vehicle collision to the present and the loss of
7 enjoyment of life and compensation for the loss of ability to participate
8 and to derive pleasure from the normal activities of daily life or for
9 Plaintiff's inability to pursue his or her talents, recreational interests,
10 hobbies, or avocations which you believe Plaintiff is reasonably certain
11 to experience in the future as a result of the motor vehicle collision.

12 No definite standard or method of calculation is prescribed
13 by law by which to fix reasonable compensation for pain and suffering.
14 Nor is the opinion of any witness required as to the amount of such
15 reasonable compensation. Furthermore, the argument of counsel as to
16 the amount of damages is not evidence of reasonable compensation.

17 In making an award for pain and suffering, you shall exercise
18 your authority with calm and reasonable judgment and the damages you
19 fix shall be just and reasonable in light of the evidence.

20 The law requires that if you find that Defendant, Capriati
21 Construction Corp., Inc., or its employees caused Plaintiff, Bahram
22 Yahyavi, original injuries, you must also find Defendant, Capriati Corp.,
23 Inc., liable for any subsequent medical services made necessary by that
24 original injury and any further injuries or damages Plaintiff may have
25 suffered as a result of those medical services. Even if those medical

1 services were negligent, even if doctors' opinions were -- are incorrect,
2 Defendant is still liable for those damages because subsequent medical
3 malpractice is a foreseeable consequence of Defendant's negligence.

4 A person who has a condition or disability at the time of an
5 injury is not entitled to recover damages therefor. However, he is
6 entitled to recover damages for any aggravation of such pre-existing
7 condition or disability proximately resulting from the injury. This is true
8 even if the person's condition or disability made him or her more
9 susceptible to the possibility of ill effects than a normally healthy person
10 would have been and even if a normally healthy person probably would
11 have not -- would not have suffered any substantial injury where a pre-
12 existing condition or disability is so aggravated, the damages as to such
13 condition or disability are limited to the additional injury caused by the
14 aggravation.

15 Payment of worker's compensation benefits by the insurer or
16 in the case of claims involving the uninsured employer's claim account
17 or a subsequent injury account, the administrator is based upon the fact
18 that a compensable industrial accident occurred and does not depend
19 upon blame or fault.

20 If the Plaintiff does not obtain a judgment in his or her favor
21 in this case, the Plaintiff is not required to repay his or her employer, the
22 insurer, or the administrator any amount paid to the Plaintiff or paid on
23 behalf of the Plaintiffs by the Plaintiff's employer, the insurer, or the
24 administrator.

25 If you decide that the Plaintiff is entitled to judgment against

1 the Defendant, you shall find damages for the Plaintiff in accordance
2 with the Court's instructions on damages and return your verdict in the
3 Plaintiff's favor in the amount so found without deducting the amount of
4 any compensation benefits paid to or for the Plaintiff. The law provides
5 a means by which any compensation benefits will be repaid from your
6 award.

7 The amount paid or to be paid by the worker's compensation
8 administrator on behalf of the Plaintiff to date is \$238,170.13 cents as a
9 result of the subject collision. You are not to discuss or even consider
10 whether or not the Plaintiff was carrying insurance to cover medical bills
11 or any other damages he or she claims to have sustained. You are not to
12 discuss or even to consider whether the Plaintiff received social security
13 disability benefits, the amount of social security disability benefits the
14 Plaintiff received, or whether the Plaintiff will receive social security
15 disability benefits in the future. This information is immaterial and
16 should make no difference in any verdict you may render in this case.

17 According to a table of mortality, the life expectancy of a
18 male aged 58 is expected to live 23.3 years. This figure is not conclusive.
19 It is an average life expectancy of persons who have reached that age.
20 These figures may be considered by you in connection with other
21 evidence relating to the probable life expectancy of the Plaintiff,
22 including evidence of occupation, health, habits, and other activities,
23 bearing in mind that many persons live longer and many die sooner than
24 average.

25 Whether any of these elements of damage have been proven

1 by the evidence is for you to determine. Neither sympathy nor
2 speculation is a proper basis for determining damages. However,
3 absolute certainty as to the damages is not required. It is only required
4 that Plaintiff prove each item of damage by a preponderance of the
5 evidence.

6 It is your duty as jurors to consult with one another and to
7 deliberate with a view towards reaching an agreement if you can do so
8 without violence to your individual judgment. Each of you must decide
9 the case for yourself, but you do so only after a consideration of the case
10 with your fellow jurors and you should not hesitate to change an opinion
11 when convinced that it is erroneous.

12 However, you should not be influenced to vote in any way on
13 any question submitted to you by the single fact that a majority of the
14 jurors or any of them favor such a decision. In other words, you should
15 not surrender your honest convictions concerning the effects or weight
16 of the evidence for the mere purpose of returning a verdict or solely
17 because of the opinion of the other jurors.

18 Whatever your verdict is, it must be the product of a careful
19 and impartial consideration of all the evidence in the case under the
20 rules of law as given to you by the Court.

21 If during your deliberations you should desire to be further
22 informed on any point of law or hear again portions of the testimony,
23 you must reduce your request to writing, signed by the foreperson. The
24 officer then will return you to court where the information sought will be
25 given to you in the presence of the parties or their attorneys.

1 Read-backs, playbacks of testimony are time consuming and
2 are not encouraged unless you deem it a necessity. Should you require
3 a playback, you must carefully describe the testimony to be played back
4 so that the Court Recorder can arrange her notes. Remember, the Court
5 is not at liberty to supplement the evidence.

6 When you retire to consider your verdict, you must select
7 one of your members to act as a foreperson who will preside over your
8 deliberations and will be your spokesperson here in court.

9 During your deliberations you will have all of the exhibits
10 which were admitted into evidence, these written instructions, and forms
11 of verdict which have been prepared for your convenience.

12 In civil actions three-fourths of the total number of jurors
13 may find and return a verdict. This is a civil action. As soon as six or
14 more of you have agreed upon a verdict, you must have the verdict
15 signed and dated by your foreperson and then return with them to this
16 room.

17 Now you will listen to the argument of counsel, who will
18 endeavor to aid you to reach a proper verdict by refreshing in your
19 minds the evidence and by showing the application thereof to the law.
20 But whatever counsel may say, you will bear in mind that it is your duty
21 to be governed in your deliberations by the evidence as you understand
22 it and remember it to be and by the law as given to you in these
23 instructions and return a verdict which, according to your reason and
24 candid judgment, is just and proper.

25 Plaintiff, you may argue.

1 MR. PRINCE: Thank you, Your Honor.

2 PLAINTIFF'S CLOSING ARGUMENT

3 MR. PRINCE: Okay. Good morning.

4 JURY/COLLECTIVELY: Good morning.

5 BY MR. PRINCE:

6 As I was preparing for the closing argument last night, I was
7 talking to Bahram. And I said what would you like me -- before I get
8 started, what would you like me to say to the jury, is there anything
9 you'd like me to say to the jury today? He paused for a moment and
10 then he said simply, tell them thank you for me and I appreciate them.
11 So on behalf of Bahram I wanted to tell you guys before we get started.

12 About mid-morning June 19, 2013, it was a normal sunny
13 day here in Las Vegas. Bahram was at work doing everything he was
14 supposed to do and following the rules when the unexpected happened;
15 an absolute bomb went off in his life.

16 And I think to truly understand this case, we need to start
17 with the photographs. And when we're going to start with the
18 photographs, we're going to start looking at the pictures from the inside
19 of the car where Bahram was sitting to fully understand the magnitude
20 of what happened here because it was absolutely life changing and with
21 all due respect to my client, it destroyed his life.

22 This is the photograph of the picture taken from the inside of
23 the car from the driver's seat. We can see that there's absolute crushing
24 of the window, complete caving in of the windshield, damage to the
25 front A-pillar on the passenger side when the Defendant's forklift broke

1 through the front of it; because at the end of the day, if somebody drove
2 a forklift through the front of a car, which is not only unheard of, it's
3 outrageous.

4 But if you kind of continue to look at these photographs and
5 see the damage and the complete what Bahram would have been facing
6 that moment in time and why it caused him such disruption in his life,
7 it's shocking that in some respects you think how did somebody not die
8 in this. That's your first thought when you see pictures. They're very
9 disturbing. And why wasn't somebody decapitated or have a permanent
10 brain injury, they're a vegetable of some kind?

11 But as I thought about it more, Bahram in some ways is in a
12 worse position than had he died. He's a prisoner to his own body. He
13 suffers from chronic daily pain; it's constant, it's limiting, it's disabling.
14 He's dependent upon sadly his family members to help him with his life,
15 all starting from this event when he described for you that a bomb went
16 off inside of his car that morning while he was driving at work.

17 And I'm showing you here, as you can now see from the
18 passenger side, the photograph showing the not only the hole that's
19 right -- you can see it right above the steering wheel, that's where one of
20 the forks went through. And we're going to talk about how the forks
21 went through there and they actually almost went to the A-pillar on the
22 driver's side into the way from Bahram's face.

23 This is a picture looking obviously from the outside after
24 Bahram was taken out of the car and the car's back at the dealership, but
25 that's what the car looks like. And we need to look at the damage to this

1 car caused by those forks going through the front of that car, causing it
2 to stop absolutely immediately. Bahram's almost unconscious and
3 what's all bringing us here today.

4 But if you look at these photographs and you see the
5 damage, you can see the severity of the damage to the front A-pillar on
6 the passenger side, the complete almost caving it in, that's there for your
7 protection in case of a rollover so the roof doesn't crush in on you.

8 And I think this picture is very telling because it's not just a
9 little dent, it's almost a complete crushing of that while those forks drove
10 through the front of the car and crossed Bahram.

11 And more significantly look what it did to the roof of the car.
12 It completely altered the damage and it put a V, I mean almost a convex
13 V in the roof itself. It completely damaged the door and the door hinge.

14 And I'm showing you these photographs so that you
15 understand the severity of it, but the collision itself was shocking
16 because this is the testimony of Kevin Mackey. He was the supervisor of
17 Bahram who came to the scene. And when he came to the scene, he
18 wasn't here because his wife was going through chemo, so we had to
19 read his deposition, that's why he didn't come, but he recalled the
20 position of the forklift and said yes, it was elevated and the forks were up
21 at head level for someone driving a motor vehicle and he tells us they
22 were still inserted in the windshield when he gets there. That's shocking.

23 And he says, we asked him, can you describe for us what you
24 saw, because the forklift was obviously right next to the car with the
25 forks through the passenger door. And this is the important part: hitting

1 the driver's side pillar right here. And let me show you what I mean by
2 that. You see the pillar there on the outside? You can now see where
3 I've got it circled. The forks were right across the -- not only the
4 dashboard, but the steering wheel. And now it's causing damage to the
5 pillar on the inside of the car right in front of Bahram's face. When
6 Bahram says it was inches away from my face, this is what he's talking
7 about.

8 And now we see also the damage on the inside of the
9 vehicle, but also the driver's side roof was dented and damaged. And
10 that only happens from a very substantial collision. And obviously the
11 car was declared a total loss.

12 And there's no mistake that Bahram took a hard hit because
13 Kevin Mackey was the first one who really was there on the scene who
14 knew Bahram and he said to say the least, Bahram was dazed and
15 confused. Dazed and confused about what happened. And I don't think
16 he understood what happened. That's been discussed and we're going
17 to be looking at a few records, particularly the ambulance personnel,
18 Bahram's son, who saw him at the hospital said he was out of it, couldn't
19 even answer questions.

20 And I want you to be thinking about Bahram's medical
21 condition as he's leaving the collision that day and the turn of events of
22 his life as a result of this happening.

23 And I'm showing you here, this is part of the ambulance
24 record. I really want to focus on this for a minute because he was totally
25 disoriented. One of the things that an ambulance do, they kind of assess

1 how you're doing mentally. They want to make sure if you have a head
2 injury because they need to telephone in to UMC or another hospital, so
3 they do an assessment in the field.

4 And what they learned was Bahram, he wasn't oriented to
5 place. He didn't know where he was. His eyes were open, but he was
6 confused, he was lethargic, he was slow to answer questions. He was
7 altered and he couldn't even give his address or any insurance
8 information.

9 As you recall, even the Defendant's employee, Joshua
10 Arbuckle, he described Bahram as frantic. Those things are shocking.
11 And that's a significant life changing event for Bahram in this case.

12 And on a construction site safety is supposed to be job
13 number one, priority number one. Not only for people who are working
14 on the site, but others, the members of the public. And the most unsafe
15 thing you could imagine is driving a forklift blind into a travel lane and
16 colliding with another car was outrageously unsafe.

17 So this company, on that day, they clearly weren't following
18 the safety rules at all. But what's more is, they've never accepted
19 responsibility for causing this collision ever before coming into court,
20 ever. So what this has really been is about Bahram's trying to tell his
21 truth.

22 And so I think this instruction is really appropriate.
23 Instruction number eight, the purpose of a trial is to ascertain the truth.
24 Bahram has been fighting for the truth, not only about what happened
25 that day and getting them to accept responsibility, but also

1 acknowledging the consequences to his life. And so this has been a
2 quest for the truth. And that's why it's been thank you for your time and
3 I appreciate your patience, but that's why we pay so much attention to
4 the details so that you understand the magnitude of what's transpired.

5 And as we discuss these instructions, I'm going to go
6 through a bunch of instructions that really are going to guide you to a
7 fair decision, but I don't think these instructions are really going to be at
8 odds with any of your personal beliefs in any way.

9 The laws we're talking about, those are man laws. They've
10 been around for hundreds of years, part of the common law. And the
11 Founding Fathers of our country, they didn't want to leave certain things
12 and enforce some of our core values to chance. Right now I think if we
13 look at the news, seemingly we can't agree on anything.

14 But there are certain core values that we do have as
15 Americans, regardless of your political views or however your position
16 is, that bind us together. And those are hard words, taking
17 responsibility, accepting the consequences of your action, integrity,
18 honesty. Those things matter. And also one of the principles we're
19 talking about is if you harm somebody, you just have to pay for that,
20 whether you damage their property or their person. And those are
21 things they did not want to leave to chance.

22 So what the Founding Fathers did, they created the Seventh
23 Amendment to the Constitution, and they gave the power to decide to
24 the juries because you're the people that didn't want the job in the first
25 place. They didn't want to leave it to a bureaucrat, to a politician to make

1 decisions that affect people's day-to-day lives and enforce these values.

2 And the reason why is when you came here you didn't know
3 what kind of case you're coming in. You don't know us. You don't get to
4 talk to us. We come into court we have to respect your privacy. But
5 what is important is, these cases are important. This is a public
6 proceeding. People, you see people coming and going all the time.
7 These cases matter, they're important because they are enforcing the
8 values of our community. And we give you the power because you now
9 have the power to hold the Defendant accountable. The power is given
10 to you to do that. And we need your help because they refuse to listen
11 to anything so far.

12 So let's talk about your rules of the road. When I say your
13 rules of the road, I'm really talking about the jury instructions. I'll grab
14 my water here.

15 And another thing, going back for a second here, I'm on a
16 committee that deals with how do you improve the jury system. And I
17 heard something that I like to share with juries in that part of the
18 committee, with the Judge in Clark County, is I know it was fair because I
19 was there. The Dutch are the people in Phoenix came up with that, but I
20 like it.

21 And because if there's ever any doubt about your decision,
22 the record is here. Every word that's spoken it's supported by the
23 evidence. And if someone ever wanted to come back and look at this
24 record, it's there for them. You were here, so you know that your
25 outcome will be fair because you were -- all of you were here and it's a

1 record. And that's part of being a Seventh Amendment. That's why it's
2 a public proceeding, because these matters and cases are important, and
3 we have an important responsibility today.

4 What I want to do is talk about the jury instructions because
5 they're going to be important in your decision-making. These are your
6 rules of the road.

7 The first one is jury instruction number one. It really just
8 says it's my duty to instruct you as to the law. It's your duty as jurors to
9 follow the law and apply the rules. So just follow the law, the rules. And
10 if you follow the rules, you'll reach the right decision. And I'm going to
11 help guide you with the evidence and the law so that you clearly
12 understand throughout this process what rules apply to you, how the
13 evidence is going to be applied to it, and what decision you should
14 make.

15 We talked about this in jury selection. What does it mean to
16 have a preponderance of the evidence? That's the burden that we're
17 held to. It just means more likely true than not true.

18 We talked about even during the opening statement, I don't
19 need to do it again here, but a way to kind of like demonstrate to you is a
20 football field. We don't need a touchdown, we don't need a first out, we
21 just need to move it past the 50 yard line. We think, you know, this has
22 been overwhelming, but that's not what the law requires of us. And
23 more importantly, the law does not require -- certainly, instruction 45, it
24 says absolute certainty as to damages is not required. It's only required
25 to prove the damages by a preponderance of the evidence.

1 If you can imagine a situation, we can't -- there's nothing for
2 certain in life other than we're probably going to die at some point.
3 Other than that, there's no certainty. And we couldn't get anything done
4 in court. That's why the preponderance of the evidence standard makes
5 sense. It's applied to every civil case.

6 So as we're going through this, you may have questions.
7 There may be certain pieces of the puzzle that are missing. But as long
8 as you have the big picture of it clearly in your mind, that's all that's
9 required of us.

10 And so I want you to understand that you may have a few
11 questions here or there and a few pieces may be missing, but I think
12 you've all seen the larger picture of what's happened in this case. We
13 see here in this puzzle, and I use this in every case, you can see a few
14 pieces of the puzzle missing, but you can see that that's a puzzle of the
15 earth. I think it illustrates my point.

16 But more importantly, instruction number 10 I think is very
17 invaluable for you here. It says you can bring your everyday common
18 sense to the jury deliberations. I'm going to ask you to check that out. In
19 fact, I mean encourage you to use it because you know exactly what's
20 happened here. I think the evidence is clear in that sense.

21 So we're asking you to use common sense. Exactly what
22 happened to Mr. Yahyavi? What happened to Bahram? Why is his life
23 now turned upside down? So please use it.

24 All right. We are really here because of a complete lack of
25 corporate responsibility. This Defendant, Capriati Construction, they

1 never accepted responsibility. They tried to do it in court for the first
2 time for the one witness who was here, who ended up being stricken at
3 the end of the day. He was here a couple weeks ago.

4 They've never called Bahram to see how he was doing. They
5 never told us that they've accepted responsibility. They even had you
6 read the complaint and the answer where they denied being negligent,
7 they're blaming this on Bahram, blaming it on third parties. And even
8 today, today of all days, the day of reckoning, they're completely
9 indifferent. They don't have one person over there from Capriati
10 Construction, not one. Bahram struggles to get out of bed every day, but
11 he's here because he has to be here. He needs to face you. There's not
12 one person there. They're completely indifferent.

13 And because of their behavior during the course, not only
14 were they not following the rules out there when they caused this
15 collision, they weren't following the rules in court. That team refuses to
16 follow the rules. So what happened was, the Judge has now forced
17 them to take responsibility. That's what happened yesterday.

18 So let's look at this instruction so we have it clearly in mind
19 of what the Judge -- the parameters the Judge said. Instruction 30,
20 because of the willfulness conduct of the lawyers for Capriati, the Court
21 entered sanctions. The answer to the complaint regarding liability
22 means who's at fault and caused the collision, the responsibility for it.
23 Capriati's now been forced to accept that. They're solely responsible.
24 And more than that, all their other witnesses were stricken because of
25 that behavior for not following rules in court. So it's a pattern of events.

1 And further that now the Judge is telling you in instruction
2 31, Capriati was the sole cause. Bahram did nothing to cause this
3 collision. Your now job is to determine how much damage they caused.
4 That's what happened and it's significant. Not only that, you also should
5 be aware that this bankruptcy concept got infused, but they're no longer
6 in bankruptcy. The Court instructed they're profitable and they have
7 insurance to satisfy any verdict that you may render in the case.

8 So that should never be a topic for you as part of your
9 discussion. Your job is just to consider what was the harm to Mr.
10 Yahyavi, to Bahram, and return a verdict and not worry about who's
11 paying, how does it get paid. That's not part of your role. So I want you
12 to have that firmly in your mind as we go through this and you're
13 deliberating.

14 Capriati Construction, the Court says now that they're legally
15 responsible for the actions of their forklift driver, Joshua Arbuckle. And
16 so now to close this loop, they've been forced to be now the sole cause
17 of this collision because they refused to accept that responsibility any
18 time before we came to court.

19 Now, this is where we're really talking about; the harms, the
20 losses, and the damages suffered by Bahram. I want to start with the
21 instruction of approximate cause because these rules help to guide you
22 in this decision. And I'm going to -- there's a number of important ones,
23 but this one is the starting point. It's like it's a sequence of events
24 unbroken that causes an injury complained of that without the event
25 would never happen in the first place. Here, but for this crash, Bahram's

1 injuries would have never occurred, he would have never needed any of
2 his treatments, have a disability, the pain, the discomfort, and complete
3 life disruption that he experiences today if this never happened.

4 So June 19, 2013 to the present. To understand the
5 consequences of the Defendant's conduct, he's had 81 doctors' visits, 32
6 chiropractic visits, 137 physical therapy sessions, 17 x-rays, MRI's and CT
7 scans, 26 spinal injections trying to avoid surgery, one spinal fusion
8 surgery. And the person who's paying the price day in and day out for
9 this is Bahram; because of unsafe practices, refusal to follow the rules,
10 he has to deal with this now. And that's what brings us to court.

11 At the beginning of the case I showed you a roadmap and I
12 want to just talk about this briefly because I believe I've proved to you
13 and I hope I've earned your trust throughout this process by showing
14 you I think an overwhelming amount of evidence.

15 What it was I wanted to show you and I think the road I told
16 you we're going to do down, we did go down. But before this he had no
17 physical problems. He went to the UMC Trauma Center after this, he had
18 chiropractic treatment, physical therapy, referral to a spine surgeon
19 caused by this, pain management specialists, spinal injections, chronic
20 neck pain by January 2014, recommended for neck surgery in the
21 summer of 2014.

22 By April 2015 he has a permanent impairment to his neck,
23 more physical therapy, more chiropractic care, more -- he tried
24 acupuncture. Stopped working and became disabled working. The pain
25 became unbearable because what happens is, when you try to push

1 through it long enough, you can do that for a while, but when your
2 body's had enough, it'll shut you down. And eventually just shut down
3 for Bahram, sadly.

4 August 2017 a second surgical opinion. And by January
5 2018 he had actually a five level fusion. He actually has one medical
6 option left, the spinal stimulators that we're talking about and
7 medications. And he has a lifetime of chronic severe pain. Everyone
8 involved in his care that has testified has confirmed every one of those
9 facts here, the medical records speak to that and all the evidence that
10 you've heard supports everything that we talked about.

11 Now, one of the -- throughout this we've been talking about
12 degeneration and what the effect of that is. But you know what? The
13 law understands that certain people are vulnerable, and they may be
14 more susceptible to injury. And the law provides a way to deal with that
15 and that's this instruction here. It's number 40. Everybody has
16 degeneration, everybody has arthritis. That's just a fact. But what
17 happens when you're in a legal case, you're entitled to recover for
18 damages for any aggravation of such a pre-existing condition or
19 disability caused by the injury. You're entitled to that. It doesn't matter
20 that you have a pre-existing condition. If it's not causing a problem, no
21 one's asking for compensation because he had arthritis. That would be
22 ridiculous. That's not why we're here.

23 We're here because this event, a series -- a sequence of
24 events and put them in motion. It's like this domino theory. The minute
25 you cause this crash, you put the neck pain and the arm pain in place, it

1 had a domino effect. It was a cascade of events that changed his life
2 forever, the complete course of his life. And it's still happening. These
3 dominos, he can't get them to stop from falling.

4 And so when we think about this, I want to even go back to
5 this instruction for a minute. It says this is true even if the condition, the
6 person's condition or disability made him more susceptible to the
7 possibility of injury than a normal healthy person would have been.
8 That's what causes this. That's why we're here. It's this aggravation of
9 the underling condition and new injuries.

10 And I want to -- all of our experts, every one of them
11 confirmed what I'm saying; Dr. Oliveri, Dr. Kaplan, Dr. Schifini, all have
12 been involved with his care for years.

13 But I'm going to show you testimony from actually Dr. Tung.
14 Remember that was the expert who flew out of San Diego, who makes
15 hundreds of millions of dollars doing this business as a kind of an
16 armchair quarterback to come in and say something. But I want to use
17 his testimony. He said degeneration is a fact of life. Anybody in their
18 50s is going to have degeneration. And this is the important question:
19 Don't you agree that degeneration, generally speaking, is asymptomatic,
20 meaning no symptoms or problems, meaning there's no problems
21 associated with it, while essentially using the word generally and then
22 you're not being specific of the question, can it occur? The answer: Yes.

23 But more importantly don't you agree, doctor, that you don't
24 treat degeneration unless it's symptomatic? If there's no symptoms,
25 there's no need for treatment? That would be correct. And you agree

1 that trauma can cause a disc that's degenerated to become
2 symptomatic? That's possible. It's not possible, it's a fact. And trauma
3 can aggravate a pre-existing degeneration causing symptoms and
4 requiring treatment? He agreed that that's also possible.

5 So what about degeneration? What it is, is it makes people,
6 everyone, male or female, in their 40s, 50s, 60s and beyond vulnerable to
7 permanent injury. And this would have been fantastic for him had it
8 been a soft tissue injury and had gone away in a few days, a few weeks,
9 or a few months. That would have been ideal. We're not even talking
10 today. But it didn't.

11 And so what happens is in these cases, think about this for a
12 minute. This degeneration and all of these defenses are a Catch 22. And
13 what do I mean by that? If somebody comes in and they're 40, 50, or 60
14 years old and they have a serious injury, they're going to use that
15 degeneration against them each and every time. It's an easy defense.
16 And if you just looked at that and nothing else, you wouldn't have the
17 whole story. It'd be like looking at the cover of a book, but not reading it.
18 Not reading it all the way through to the end, not going through the
19 clinical correlation we've done in this case.

20 But more importantly watch how this Catch-22 works. If you
21 have pain and you don't go to the doctor, it'd be like oh, if you had real
22 pain, why aren't you going to the doctor more? You go to the doctor like
23 Bahram did and you try these injections over and over to try to avoid a
24 surgery, their argument is, oh, they weren't working, why'd you keep
25 going? See, there's no win in this contra. It's a no win position. It's an

1 easy position to take. That's the easy way out, degeneration.

2 The right thing to do is do a deep dive; do a clinical
3 correlation, a deep medical evaluation of this case because this
4 degeneration and this Catch-22 stuff, it happens in every case. So that's
5 what we overcome in every single case. And quite frankly, it's easy to
6 overcome because degeneration by itself really doesn't do anything; it's
7 medically irrelevant. It's the symptoms, the onset of the symptoms,
8 what are the symptoms like in the duration.

9 And it's kind of like this: As we get older we become more of
10 a fragile egg, as opposed to when we're young a ping pong ball, right?
11 Well, you know, how we bounce off. It's amazing. I may look like a
12 grandfather right now, but I have a five year old. You let him play. Oh,
13 my gosh, you know, if I fell down, I may not walk for a couple days.
14 When he falls down, it's amazing the hits they can take. But as you get
15 older, you can't do that. Your body doesn't recover the same, it doesn't
16 feel the same. The inflammation process is completely different.

17 And I'm going to give you a shortness of a quick story. And I
18 think this -- in law school one of my friends is here I went to law school
19 with. I watched him today. And we talk a bit, we work together. And it's
20 like a chicken farmer who's loaded up all of his eggs and put them in his
21 truck and he was driving to the party he wanted to sell them. And
22 someone ran a stop sign and crashed into the truck and broke all the
23 farmer's eggs. And the farmer goes, hey, you crashed into my truck and
24 not only damaged my truck, you damaged all my eggs and I can't sell
25 them now, I'm going to lose my money, I'm going to lose my income.

1 And the guy's like hey, if you had ping pong balls I wouldn't have to pay
2 for it. You've got eggs, those are fragile. Exactly. You still have to pay.

3 If someone's fragile or vulnerable, you still have to pay for
4 that. And that's this kind of eggshell theory. If you break -- if you crack
5 somebody's shell and start a whole process, the law, you're liable for
6 that. And that's why I showed you that instruction. That's your starting
7 point. All right.

8 Let's talk about the spine in this case, what we're dealing
9 with. We're dealing with two issues. We're dealing with a disc injury at
10 multiple levels of Bahram's spine. We're also dealing with a facet
11 problem. Those are the little joints that allow you to move back and
12 forth, a sliding and gliding joint. Bahram has two issues. And through
13 all those procedures, the injections and all that level of detail we talked
14 about, he's got two pain generators; multiple disc levels and multiple
15 facet joints in his spine as a result of this collision.

16 And what also happens is, like what happened here in
17 Bahram's case, when you have an injury to your disc you could have
18 pain that goes into your arms. And that's exactly what happened with
19 Bahram. Not only did it start the day of this collision as we're going to
20 look at here in a moment, it continues and is persistent each and every
21 day. I think you saw him on the stand, you watched him in court, he's
22 visibly and demonstratively uncomfortable. He's constantly having
23 spasms and sometimes it takes his breath away, his left arm is in
24 excruciating pain and the numbness problem, all caused by this
25 collision.

1 The hat. The Defense is hanging their proverbial hat upon
2 one thing, one thing. And if you believe it, then I guess Bahram is out.
3 But it's more complicated than that. It's not that simple. Because they
4 want you to believe it so that you give them a free pass. So now you
5 limit their consequences to what they've done to him. And that
6 proverbial hat is this degeneration and he was having problems.

7 So they rely on one thing. They rely, and they're going to
8 over and over one sentence; also complains of neck pain for several
9 years. And I guess if you saw that sentence in isolation, you'd say wow,
10 it's a problem, because it would be, right? But it's more complicated
11 than that. That's their proverbial hat.

12 But let's put this pieces of the puzzle together because every
13 one of our doctors, everyone who's involved in his care, says that's
14 irrelevant, it doesn't make any sense medically. It's not clinically
15 correlated, every one of them. Even Dr. Tung, he's admitted that Bahram
16 was injured and required 14 months of treatment. We're going to talk
17 about how much treatment that was. You don't do injections or MRI's
18 and relate hey, if this was there before, then why are you giving him any
19 treatment? It would be zero treatment, right? That would be it. But
20 that's not what happened.

21 So let's put the pieces of the puzzle together. There is an x-
22 ray taken June 25 -- excuse me -- October 25th, 2011. Of course it said
23 degeneration. He's 50-something years old. But here's the magic words
24 here. This radiologist said correlate clinically. So I used that word
25 correlation all throughout the trial. The radiologist is telling you to do

1 that, like I don't know if this is a problem or not, this is what I see on the
2 x-ray. Because if you can't look at an x-ray and say yeah, you've got
3 pain or a problem requiring any kind of treatment just by simply looking
4 at that it is far more advanced. It's a complex analysis.

5 The easy way out, say oh, yeah, this is degeneration, you're
6 out of court. That would be for every person then. But it's more
7 complicated than that. That's why we do this clinical correlation.

8 And let's talk about clinical correlation before June of 2013 to
9 see if this even holds water. So Bahram receives a letter. He doesn't
10 recall receiving a letter. Number one, he's testified clearly, I have never
11 had neck problems before this collision. I don't remember that visit that
12 day. He's been open about that. I don't remember if I was complaining
13 of neck stiffness that day. I may have been, I don't know. But I know I
14 never had neck problems or needed any treatment before this.

15 So look at this letter. It's October 11, 2011. I have reviewed
16 your results . This is the doctor. And I want to provide you with an
17 update. The results of your recent x-rays on the neck show mild to
18 moderate degenerative arthritic changes. Of course. And do not show
19 any fracture or dislocation before. Because he didn't have a problem,
20 he's not going to have a fracture or dislocation.

21 They don't recommend any treatment. They send him a
22 letter. If it was significant they'd say we're going to have you come to
23 the office, we're going to explain what we saw on the x-rays, and we're
24 going to come up with a treatment plan for you. Like what happened
25 here. Nothing ever happened. This was never discussed ever again.