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Attorneys for Appellant
CAPRIATI CONSTRUCTION CORP., INC.

Electronically Filed
Apr 10 2020 03:51 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

CAPRIATI CONSTRUCTION CORP., INC.,
a Nevada Corporation

Appellant,

v.

BAHRAM YAHYAVI, an individual,

Respondent.

Supreme Court No.: 80821
District Court Case No.: A718689

**DOCKETING STATEMENT
CIVIL APPEALS**

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See KDI Sylvan Pools v. Workman*, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District: Eighth Judicial District Court, State of Nevada

Department: 28 County: Clark

Judge: Ronald Israel District Ct. Docket No. A-15-718689-C

2. **Attorney filing this docketing statement:**

Attorney: Michael K. Wall Telephone: (702) 385-2500

Firm: Hutchison & Steffen, PLLC

Address: 10080 W. Alta Dr., Suite 200,
Las Vegas, Nevada 89145

Client(s): Capriati Construction Corp., Inc., Appellant

If this is a joint statement by multiple applicants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement

///

3. **Attorney(s) representing respondent(s):**

Attorney: Dennis M. Prince Telephone: (702) 534-7600

Firm: Prince Law Group

Address: 8816 Spanish Ridge Ave.
Las Vegas, NV 89148

Client(s): Bahram Yahyavi, Respondent

4. **Nature of disposition below (check all that apply):**

Judgment after bench trial	Grant/Denial of NRCP 60(b) relief
Judgment after jury verdict XXX	Grant/Denial of Injunction
Summary Judgment	Grant/Denial of declaratory relief
Default Judgment	Review of agency determination
Dismissal	Divorce Decree
Lack of Jurisdiction	Original Modification
Failure to State a Claim	Other disposition (specify):
Failure to Prosecute	

Other (specify): **XXX** Post-Judgment Order imposing sanctions.
Post-Judgment Order denying Motion for New Trial
Post-Judgment Order granting costs
Post-Judgment Order granting attorney's fees.

5. **Does this appeal raise issues concerning any of the following: No.**

Child custody(visitation rights only)

Venue

Termination of parental rights

///

///

6. **Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

Supreme Court State of Nevada; Capriati Construction Corp., Inc. v. Braham Yahyavi; Case No: 80107. (Pending).

7. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

United States Bankruptcy Court, District of Las Vegas,
Nevada in regards to Capriati Construction Corp., Inc;
Case No: 15-15722-abl. Automatic stay lifted by Court
order on December 22, 2016.

8. **Nature of the action.** Briefly describe the nature of the action and the result below:

This action is a negligence and personal injury dispute arising from the alleged injuries Plaintiff sustained when a Defendant owned forklift collided with Plaintiff's vehicle. The case proceeded to trial on September 9, 2019, through September 27, 2019, where a Judgment upon the Jury Verdict was entered against Defendant on October 22, 2019, in excess of six million dollars. Shortly thereafter on November 5, 2019, the Honorable Judge Israel issued a Decision and Order regarding, among other things, sanctions. Later, the district court entered orders denying tolling motions, including a motion for a new trial, and orders awarding attorney's fees and costs. All appealable orders are combined in this appeal by filing of an amended notice of appeal.

9. **Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

- I. Whether the district court erred or abused its discretion in striking defendant's answer and not allowing defendant's defense witnesses and experts to testify as a sanction for defendant's counsel having elicited a response from a witness that revealed to the jury that defendant had previously filed for bankruptcy reorganization.

- II. Whether the defense-ending sanction imposed by the district court was too severe for the alleged violation.
- III. Whether the jury instruction given by the district court telling the jury that defendant had sufficient insurance to cover any verdict the jury might impose was wrong as a matter of law.
- IV. Whether the district court's changing of its pretrial evidentiary rulings during trial was error, and whether the district court imposed the same standards on both parties regarding the admissibility of evidence of prior medical conditions.
- V. Whether the district court erred in refusing to grant a new trial based on the errors at trial.
- VI. Whether the district court abused its discretion in awarding attorney's fees in the full amount of a contingent fee agreement, rather than basing the award on the reasonable value of the services actually rendered.
- VII. Other issues under investigation.

10. **Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceeding presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket number and identify the same or similar issues raised:

None

11. **Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

N/A ☒ Yes No

If not, explain

12. **Other issues.** Does this appeal involve any of the following: No.

Reversal of well-settled Nevada precedent (on an attachment, identify the case(s))

An issue arising under the United States and/or Nevada Constitutions

A substantial issue of first-impression

An issue of public policy

An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

A ballot question

If so, explain:

13. **Assignment to the Court of appeals or retention in the Supreme Court.**

Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstances(s) that warrant retaining the case, and include an explanation of their importance or significance:

Although no section of NRAP 17 directly addresses the circumstances of this appeal, by negative implication, NRAP 17(b)(5) suggests that this appeal should be retained by the Nevada Supreme Court because the amount in controversy far exceeds the limit of \$250,000 set by that subsection, and the issues in this case have far reaching effect because of the draconian nature of the sanction imposed and the manner in which the trial was conducted.

14. **Trial.** If this action proceeded to trial, how many days did the trial last?

15 days. September 9, 2019 through September 27, 2019.

Was it a bench or jury trial?

Jury Trial

15. **Judicial disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal. If so, which Justice? No.

TIMELINESS OF NOTICE OF APPEAL

16. **Date of entry of written judgment or order appealed from:**

1. The district court's Order of Judgment Upon the Jury Verdict was entered on October 22, 2019;
2. The district court's post-judgment Decision and Order (for sanctions) was entered on November 5, 2019;
3. The district court's post-judgment Order Denying Defendant's Motion for a New Trial was entered on March 3, 2020;
4. The district court's post-judgment Order Granting In Part, and Denying In Part, Defendant's Motion to Retax costs was entered on March 3, 2020; and
5. The district court's post-judgment Order Granting In Part, and Denying In Part, Plaintiff's Motion for Attorney's Fees, Costs, and Interest was entered on March 2, 2020.

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. **Date written notice of entry of judgment or order served:**

1. Notice of entry of the district court's Order of Judgment Upon the Jury Verdict was served on October 22, 2019, via e-service;
2. Notice of entry of the district court's post-judgment Decision and Order (for sanctions) was served on November 5, 2019, via e-service.
3. Notice of entry of the district court's post-judgment Order Denying Defendant's Motion for a New Trial was served on March 4, 2020, via e-service;

4. Notice of entry of the district court's post-judgment Order Granting In Part, and Denying In Part, Defendant's Motion to Retax costs was served on March 4, 2020, via e-service; and
5. Notice of entry of the district court's post-judgment Order Granting In Part, and Denying In Part, Plaintiff's Motion for Attorney's Fees, Costs, and Interest was served on March 4, 2020' via e-service.

18. **If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52 (b), or 59,**

(a) Specify the type of motion, and the date and method of service of the motion, and date of filing.

NRCP 50(b)	Date of filing_____
NRCP 52(b)	Date of filing_____
NRCP 59	Date of filing_____November 18, 2019 _____

A Motion for a New Trial was filed on November 18, 2019. This is a timely tolling motion.

A motion to correct or reconsider decision on sanctions was filed on November 14, 2019, pursuant to NRCP 60 and EDCR 2.24. Under *AA Primo*, this may qualify as a tolling motion.

Note: **Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).**

(b) Date of entry of written order resolving tolling motion: March 3, 2020

(c) Date of written notice of entry of order resolving motion served: March 4, 2020

Was service by delivery electronic service or by mail __e-service__.

19. **Date notice of appeal was filed:** March 13, 2020.

If more than one party has appealed from the judgment or order, list date each notice of appeal was filed and identify by name the party filing the notice of appeal: N/A

20. **Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other:**

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

21. **Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

NRAP 3A(b)(1) XX NRS 38.205
NRAP 3A(b)(2) XX NRS 233B.150
NRAP 3A(b)(3) NRS 703.376
Other (specify) NRAP 3A(b)(8)

Explain how each authority provides a basis for appeal from the judgment or order:

The judgment on jury verdict is a final judgment; the order denying motion for new trial is independently appealable; the other orders are special orders after judgment.

22. **List all parties involved in the action in the district court:**

(a) Parties:

Capriati Construction Corp., Inc., Appellant/Defendant
Bahram Yahyavi, Respondent/Plaintiff

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal *e.g.*, formally dismissed, not served, or other: N/A

23. **Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims or third-party claims, and the date of formal disposition of each claim.**

This was a complaint with a single negligence cause of action arising from an automobile accident. There were no other claims. The complaint was resolved by final judgment on jury verdict on October 22, 2019.

24. **Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below:**

Yes ☒ No ☐

25. **If you answered "No" to question 24, complete the following:**

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b):

Yes ☐ No ☐

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment:

Yes ☐ No ☐

26. **If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):**

27. **Attach file-stamped copies of the following documents:**

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

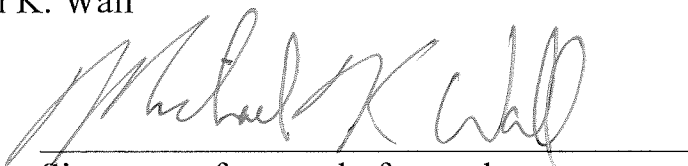
VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Name of Appellant: CAPRIATI CONSTRUCTION CORP., INC.

Name of counsel of record: Michael K. Wall

Date: APRIL 10, 2020


Signature of counsel of record

Clark County, Nevada
State and county where signed

CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date the **DOCKETING STATEMENT CIVIL APPEALS** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

Dennis M. Prince, Esq.
PRINCE LAW GROUP
8816 Spanish Ridge Ave.
Las Vegas, NV 89148
Tel: (702) 534-7600
Fax: (702) 534-7601

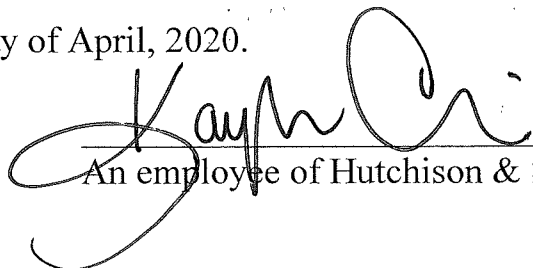
Attorney for Respondent Bahram Yahyavi

A copy was served via U.S. Mail to the below:

Persi J. Mishel
10161 Park Run Dr., Suite 150
Las Vegas, NV 89145

Settlement Judge

Dated this 10th day of April, 2020.


An employee of Hutchison & Steffen, PLLC

DISTRICT COURT CIVIL COVER SHEET

A-15-718689-C

County, Nevada

Case No.

XXVIII

(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone):

BAHRAM YAHYAVI

Defendant(s) (name/address/phone):

CAPRITTI CONSTRUCTION CORP,
INC.ATTN: C/O DAVID ROCKHITO
1020 WIGWAM PARKWAY, Henderson NV
89072

Attorney (name/address/phone):

MALIK W. AHMAD ESQ
LAW OFFICE OF MALIK W. AHMAD
8072 WEST SAHARA AVE, SUITE A
LAS VEGAS, NV 89117

Attorney (name/address/phone):

UNKNOWN (702) 547-1182

II. Nature of Controversy (please select the one most applicable filing type below)**Civil Case Filing Types**

Real Property	Torts	Probate	Construction Defect & Contract	Judicial Review/Appeal
Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input checked="" type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ Civil Writ <input type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ			Other Civil Filing Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters	

Business Court filings should be filed using the Business Court civil coversheet.

5/20/2015

Date

Signature of initiating party or representative

See other side for family-related case filings.


CLERK OF THE COURT

COMP
MALIK W. AHMAD, ESQ.
Nevada State Bar No.: 10305
Law Office of Malik W. Ahmad
8072 W. Sahara Ave., Ste. A
Las Vegas, Nevada 89117
Tel: 702.270.9100 | Fax: 702.233.9103
Email: malik@lasvegaslawgroup.com

Attorney for Plaintiff
Bahram Yahyavi

DISTRICT COURT
CLARK COUNTY, NEVADA

BAHRAM YAHYAVI, an individual)
Plaintiff,)
vs.)
CAPRIATI CONSTRUCTION CORP,)
INC. a Nevada Corporation)
Defendant,)

Case No.: A-15-718689-C
Dept. No.: XXVIII

**COMPLAINT FOR AUTO NEGLIGENCE AND
PERSONAL INJURY**

JURY REQUESTED

COMPLAINT

This is a civil action seeking monetary damages against CAPRIATI CONSTRUCTION CORPORATION, INC. ("Defendant or CCC") for committing acts or omissions of negligence against Plaintiff or someone employed by them during and in the course of their business or under their control and supervision.

COMES NOW BAHRAM YAHYAVI ("Plaintiff"), by and through his attorney, MALIK W. AHMAD, ESQ., OF THE LAW OFFICE OF MALIK W. AHMAD and sues CAPRIATI CONSTRUCTION CORPORATION, INC. ("Defendant"), and for reasons therefore states as follows:

//

//

**I.
JURISDICTION**

Plaintiff is a citizen of the State of Nevada and Defendant is also a citizen of the State of Nevada. Defendant Capriati Construction Corp, Inc. is a business entity and a corporation incorporated in the state of Nevada and doing business as such. The matter in controversy happened in Nevada. As such, Nevada courts have jurisdiction in this matter. Also, Defendant resides in Las Vegas, Nevada.

**II.
FACTS**

1. Plaintiff is a 51 years male employed at the time of this accident.
2. On June 19, 2013, Plaintiff was driving a company owned vehicle when he collided with a fork lift when the forks were sticking out from a fork lift truck driven by Defendant or his employees.
3. While driving Defendant unexpectedly came in contact with a fork lift to Plaintiff's right of way with its forks lifted high in the upright position.
4. These higher and elevated forks smashed his windshield, hitting his head, body and general body.
5. Plaintiff was seriously injured and transported to UMC in an ambulance.
6. Later, he was transferred to Concentra Medical Center where he underwent medication management and physical therapy without any relief of his pain.
7. Plaintiff had serious injuries where an MRI of the cervical spine performed on October 1, 2013 which showed injuries of neck, cervical strain, cervical spondylosis, including upper extremity radicular symptoms, multilevel cervical degenerative disc diseases and disk osteophytes.

1 8. Plaintiff's vehicle was a total loss.

2 9. Plaintiff had seen innumerable physicians, conducted MRI's, and generally seen
3 orthopedic surgeons.

4 10. Plaintiff's treatment has included both medications, as well as physical therapy.

5 11. Prior to this accident, Plaintiff had barely no or none pre-existing conditions.

6 12. Prior to this accident, Plaintiff had significant income producing abilities and had higher
7 income.
8

9 13. On July 8, 2013, Plaintiff was diagnosed with cervical muscle strain, scapular muscle
10 strain, and head injury.

11 14. On July 18, 2013, Plaintiff was diagnosed with cervical strain and a resolved scalp
12 contusion/mild concussion.

13 15. On September 16, 2013, Plaintiff was diagnosed with neck pain, cervical strain, C6-7
14 auto fusion, cervical spondylosis, and greater than right upper extremity radicular symptoms.

15 16. That Plaintiff's pain includes cervical and thoracic strain.

16 17. That all the aforementioned injuries also had caused serious issues of sleeplessness.

17 18. That all of the aforementioned issues had seriously decreased his sexual activities.

18 19. That Plaintiff walks with tandem gait and sometimes with the assistance of a cane or
19 walker.

20 20. His medical reports included significant aggravation of symptoms which also led him to
21 go to emergency room where he was found to have high blood pressure.

22 21. There has been progressive increase in his neck pain, left arm pain, and numbness, as
23 well as occipital and frontal headaches associated with these painful episodes.

24 22. It was also found by his orthopedic physicians and surgeon that he has spontaneous
25
26
27
28

1 fusion at C6-7 including multilevel disk protrusions as C3-4, C4-5, C5-6, C6-7, C7-11, and T-1-2.

2 23. On the axial images, at C3-4, he has a broad-based disk protrusion as well as
3 uncontrovertebrial joint hypertrophy resulting in bilateral neural foraminial stenosis.

4 24. That Plaintiff's employment history includes walking, lifting, bending, driving, sitting for
5 long time, all of which has been significantly reduced after the accident in such regular human
6 activities including walking, lifting, bending at the waist, driving, and other mobility actions.

7 25. That on the occasion in question the Defendant was negligent in the following
8 particulars, among others, to-wit:
9

- 10 a) Failure to keep fork lift with its fork in the non erect position;
11 b) Failure to give full time and attention and under supervision or control;
12 c) Failure to keep a proper lookout;
13 d) Unreasonable operation or parking and station of a vehicle under existing
14 conditions;
15 e) Reckless driving;
16

17 26. That the collision hereinabove stated was due to the sole negligence of Defendant
18 without any contributory negligence whatsoever by the Plaintiff.
19

20 **II.**
21 **FIRST CAUSE OF ACTION**
22 **Negligence**

23 27. The Plaintiff adopts and incorporates all of the facts and allegations set forth above as if
24 fully set forth herein.

25 28. That as a direct and proximate result of the aforesaid collision, the Plaintiff was
26 suddenly thrown against the inside of the automobile, thereby causing the Plaintiff, to suffer
27 severe pain and injury, including but not limited to, his head, both upper neck, lower neck,
28

1 thoracic spine, mid-lumbar spine, and lower lumbar spine, all of which have caused her great
2 pain and mental anguish.

3
4 31. That as a further direct and proximate result of the negligence of the Defendant, the
5 Plaintiff has been forced to expend large sums of money for x-rays, for medicine, and for the
6 treatment of the aforesaid injuries to herself.

7 32. That as a further direct and proximate result of the negligence of the Defendant, the
8 Plaintiff was forced to lose time from his employment and has suffered a loss of wages for
9 which she seeks remuneration.

10
11 **WHEREFORE**, the Plaintiff demands judgment against the Defendant, in the amount of
12 Ten Thousand Dollars (\$10,000.00) for damages, together with the costs of this action and
13 such other relief as is deemed just and proper.

14
15 **PRAYER FOR RELIEF**

16
17 **WHEREFORE**, Plaintiff prays for judgment against Defendant, as follows:

- 18 1. Loss of occupancy, expenses for transportation;
19 2. Negligence;
20 3. Expenses for medical treatment and hospitalization;
21 4. Future expenses for medical treatment;
22 5. Loss of wages;
23 6. Future loss of wages and earning capacity;
24 7. Conscious pain and suffering;
25 8. Future conscious pain and suffering;
26 9. Permanent injuries to the affected parts;
27
28

10. For pain and suffering; decrease of mobility, bending, lifting, walking, standing for long
period of time, sitting and sleeplessness;
11. For decreased or no sexual activities;
12. For reasonable attorney fees according to proof;
13. For costs of suit herein incurred;
14. For such other and further relief as the court may deem proper.

The undersigned affirms that this pleading does not contain personal identifying information as defined in NRS 603A.040.

Dated this 20th day of May, 2015.

Respectfully submitted,

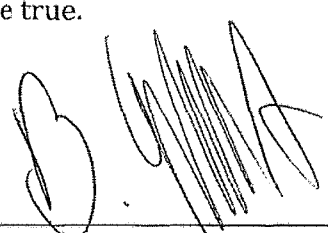
/s/ Malik W. Ahmad
MALIK W. AHMAD, ESQ.
Nevada State Bar No.: 10305
Law Office of Malik W. Ahmad
8072 W. Sahara Ave., Ste. A
Las Vegas, Nevada 89117
Tel: 702.270.9100 | Fax: 702.233.9103
Email: malik@lasvegaslawgroup.com

DECLARATION

STATE OF NEVADA
SS.
COUNTY OF CLARK

I BAHRAM YAHYAVI, being duly sworn, states; that I am the Affiant and am a Plaintiff in the above titled action; that I have read the forgoing Verified Complaint and know the contents thereof; that the same is true and correct to the best of my own knowledge as to all allegations and claims pertaining to them, except as to those matters therein stated on information and belief, and as to those matters they believe them to be true.

Dated this 20 TH day of MAY, 2015.



BAHRAM YAHYAVI



DAVID S. KAHN, ESQ.

Nevada Bar No. 7038

David.Kahn@wilsonelser.com

MARK SEVERINO, ESQ.

Nevada Bar No. 14117

Mark.Severino@wilsonelser.com

WILSON, ELSE, MOSKOWITZ, EDELMAN & DICKER LLP

300 South Fourth Street, 11th Floor

Las Vegas, NV 89101

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Law Offices of ERIC R. LARSEN

ERIC R. LARSEN, Esq.

Nevada Bar No. 009423

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Suite 320, Box 19

Las Vegas, NV 89119

Telephone: (702) 387-8070

Facsimile: (877) 369-5819

Eric.Larsen@thehartford.com

Attorneys for Defendant,

Capriati Construction Corp., Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

BAHRAM YAHYAVI,

Plaintiff,

v.

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

Defendant.

CASE NO.: A-15-718689-C

DEPT.: XXVIII

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

Hearing Requested

Defendant, CAPRIATI CONSTRUCTION CORP., INC. ("Capriati"), by and through its attorneys of record, DAVID S. KAHN, ESQ. and MARK SEVERINO, ESQ. of the law firm of WILSON, ELSE, MOSKOWITZ, EDELMAN & DICKER LLP, and Mark J. Brown, Esq. of the Law Offices of ERIC R. LARSEN, submit its MOTION FOR NEW TRIAL.

I.

INTRODUCTION AND FACTUAL BACKGROUND

Defendant contends, *inter alia*, that its damages case was taken away from it improperly by this Court, and that the trial results are therefore invalid and should result in a new trial. In part, this relates to the striking and exclusion of expert witnesses Kirkendall (economic damages) and Baker (accident reconstruction). Additional issues arise from the striking of the answer based on the Court's position that there is a *per se* prohibition against a witness mentioning a reorganization, and the striking of the balance of that witness's testimony, despite that same witness having testified during Plaintiff's case in chief. Other expert limitation rulings are also challenged here by Defendant, as may certain other pretrial and trial rulings be challenged herein. Finally, the use of a curative jury instruction provided by Plaintiff and read to the jury by the Court that specifically told the jury that there was unlimited insurance is challenged here, as it violated Nevada's collateral source rule and may have resulted in a windfall for Plaintiff. These issues rise to a constitutional dimension.

Defendant was at the inception of its defense case, when its corporate representative gave half of his initial response to a direct question, at which point the trial was stopped, the answer was stricken, and all further defense witnesses, including experts, were excluded. The reason was that the witness said the word "reorganization." While the Court stated that it was not taking away the Defendant's right to address damages before the jury, it is Defendant's position that this is exactly what occurred, regardless of any issues related to liability. Defendant does not yet have transcripts from the entire trial, and any facts referenced below are argued in that context, other than where daily transcript portions or motion hearing transcripts are available to Defendant.

It must also be recalled that the context of the sanctions ruling by this Court was that Plaintiff's counsel was asking that Defendant have no ability to argue damages whatsoever. Plaintiff's counsel suggested the Court should decide liability and then determine damages, all with no input from Defendant. While this Court's decision did not go so far, Defendant contends that the sanctions ruling did prevent Defendant from presenting evidence of its damages case, thus

1 eliminating any full trial on damages. It is true that defense counsel was permitted to argue to the
2 jury at the end of the case, but without certain evidence, such as the low collision speed opinion of
3 defense expert Baker, even that procedure was restricted and artificial.

4 II.

5 LEGAL ARGUMENT

6 A.

7 LEGAL STANDARD

8 "Decisions concerning motions for judgment notwithstanding the verdict ('JNOV') or for a
9 new trial rest within the district court's sound discretion and will not be disturbed absent abuse of
10 that discretion." *Grosjean v. Imperial Palace*, 125 Nev. 349, 362, 212 P.3d 1068, 1077 (2009).
11 Pursuant to NRCP 59(a)(1) a new trial may be granted in several different circumstances.
12 Specifically, NRCP 59(a)(1) states:

13 The court may, on motion, grant a new trial on all or some of the issues
14 — and to any party — for any of the following causes or grounds
materially affecting the substantial rights of the moving party:

- 15 (A) irregularity in the proceedings of the court, jury, master, or adverse
16 party or in any order of the court or master, or any abuse of discretion
by which either party was prevented from having a fair trial;
- 17 (B) misconduct of the jury or prevailing party;
- 18 (C) accident or surprise that ordinary prudence could not have guarded
against;
- 19 (D) newly discovered evidence material for the party making the
motion that the party could not, with reasonable diligence, have
20 discovered and produced at the trial;
- 21 (E) manifest disregard by the jury of the instructions of the court;
- 22 (F) excessive damages appearing to have been given under the
influence of passion or prejudice; or
- 23 (G) error in law occurring at the trial and objected to by the party
making the motion.

24 The arguments advanced by Defendant herein go mainly to subsections (A) and (G) above.
25 To a degree, however, the damages awarded may also fall under subsection (F) above, and
26 Defendant does not restrict the use of any subsection in the relief requested in this Motion.

27 A motion for new trial is favored before a party intends to seek appellate consideration of a
28 disputed issue.

1 A postverdict motion is necessary because “[d]etermination of whether
2 a new trial should be granted or a judgment entered under Rule 50(b)
3 calls for the judgment in the first instance of the judge who saw and
4 heard the witnesses and has the feel of the case which no appellate
5 printed transcript can impart.” *Cone, supra*, at 216, 67 S.Ct. 752.
Moreover, the “requirement of a timely application for judgment after
verdict is not an idle motion” because it “is ... an essential part of the
rule, firmly grounded in principles of fairness.” *Johnson, supra*, at 53,
73 S.Ct. 125.

6 *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 400–01, 126 S. Ct. 980, 985–86, 163
7 L. Ed. 2d 974 (2006). Defendant Capriati files this Motion for New Trial in part as a predicate to
8 any appeal and in order to preserve all of its appellate rights.

9 **B.**

10 **DEFENDANT’S DAMAGES CASE WAS IMPROPERLY ELIMINATED**

11 During this Court’s sanctions considerations, the Court emphasized that Defendant’s
12 damages case was not being eliminated. A recent Order, which is the subject of a separate motion
13 by Defendant, so stated. However, by striking and excluding two (2) expert witnesses, that is exactly
14 what occurred.

15 Defense economic damages expert Kevin Kirkendall was a witness whose only role related
16 to damages. He was a counter to Plaintiff’s economist expert Dr. (Ph.D.) Clauretie. Issues in dispute
17 from this expert included criticisms of the proper damages numbers and methodology used by Dr.
18 Clauretie. The elimination by the Court of this damages-only expert was an abuse of discretion and
19 it was error mandating a new trial.

20 Defense expert John Baker, Ph.D., prepared reports as a biomechanical expert. While he was,
21 during trial, limited to the role of an accident reconstruction expert only (addressed in a separate
22 argument below), he was to be allowed, prior to the sanctions issue, to testify at trial as to accident
23 reconstruction issues. Since his opinion involved a speed of Plaintiff’s vehicle of approximately 5
24 mph, which was much lower than the 30 mph speed testified to by Plaintiff himself (and which was
25 far less than the 15 mph Plaintiff’s withdrawn expert¹ had opined before trial), his opinion went to
26

27 ¹ Because Plaintiff’s expert Leggett lives in Canada and only has a US office in Phoenix, Defendant had no ability to
28 subpoena or to attempt to subpoena the witness at trial, as he has no in-state presence in Nevada. Once Plaintiff
withdrew the witness, his opinion of a speed of Plaintiff’s vehicle of 15 mph was thus removed from consideration by

1 the strength of the collision and thus to damages. For the jury to appreciate Defendant's damages
2 position, including causation of any claimed damages, the speed of the collision was a necessary
3 factual component. This Court's decision, however, took that expert's testimony away from the
4 jury. Having the jury hear only a one-sided version of the speed of Plaintiff's vehicle at the time of
5 the collision was, Defendant asserts, an abuse of discretion requiring a new trial.

6 Defendant contends that simply leaving the defense with a closing argument, using cross-
7 examination and testimony of experts who happened to have been called out of order in Plaintiff's
8 case-in-chief, was not a substitute for the requirement that the jury, and not the Court, decide the
9 case on its merits. This jury did not hear key components of the defense as to damages, based on
10 the ruling of this Court. As a result, a new trial should be granted.

11 By striking damages experts and witnesses Kirkendall (economic damages; CPA) and Baker
12 (accident reconstruction; Ph.D.), this Court went beyond what was approved of by the Nevada
13 Supreme Court in the *Bahena* case. "The district court permitted Goodyear to fully argue and
14 contest the amount of damages, if any, that Bahena could prove to a jury." *Bahena v. Goodyear*
15 *Tire & Rubber Co.*, 126 Nev. 243, 256, 235 P.3d 592, 600 (2010). Here, Defendant Capriati was
16 not permitted to prove its damages position to the jury², due to the striking of two (2) of its experts

17
18 the jury and this Court. Nevertheless, the opinions of defense expert Dr. (Ph.D.) Baker were available at trial, though
19 they were excluded.

20 ² "We must 'assume that the jury believed all [of] the evidence favorable to the prevailing party and drew all
21 reasonable inferences in [that party's] favor.'" *Id.* at 739, 192 P.3d at 252 (alteration in original) (quoting *Bongiovi v.*
22 *Sullivan*, 122 Nev. 556, 581, 138 P.3d 433, 451 (2006))." *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 258,
23 235 P.3d 592, 602 (2010). Here, the damages evidence of Defendant was not permitted to go before the jury, other than
24 as to witnesses taken out of order earlier in the trial. A portion of the dissent of Justice Pickering in the *Bahena* case is
25 also of note here, as follows.

26 "While the majority distinguishes this case from *Nevada Power* by characterizing the sanctions as 'non-case
27 concluding,' the reality is that striking Goodyear's answer did effectively conclude this case. The sanction
28 resulted in a default liability judgment against Goodyear and left Goodyear with the ability to defend on the
amount of damages only. Liability was seriously in dispute in this case, but damages, once liability was
established, were not, given the catastrophic injuries involved. Thus, striking Goodyear's answer was akin to a
case concluding sanction, placing this case on the same footing as *Nevada Power*.

Surprisingly, the majority relies on *Young v. Johnny Ribeiro Building*. What it misses in *Young* is that we
affirmed the claim-concluding sanctions there only because the district 'court treated Young fairly, giving him
a full evidentiary hearing.' 106 Nev. at 93, 787 P.2d at 780 (emphasis added). This case thus is not like *Young*
but rather like *Nevada Power*, in that the district court erred as a matter of law in not holding an evidentiary
hearing."

1 (other than as to expert witnesses who had testified out of order during the Plaintiff's case in chief,
2 earlier in the trial). The jury did not hear from these two experts. As to Dr. Baker, since the Answer
3 was being stricken and liability determined by this Court in any event, having him testify at trial
4 would therefore only have been considered by the jury in the context of damages. As a result,
5 Defendant argues that this Court exceeded what was permitted in the *Bahena* case, and has therefore
6 gone beyond what jurisprudence allows as to its sanction here. The middle ground this Court has
7 created here, between case concluding sanctions and liability only concluding sanctions, is one not
8 identified in any case authority that Defendant could locate.

9 The ruling or rulings at issue constituted an irregularity in the proceeding, an abuse of
10 discretion, as well as an error or errors in law which were objected to by the defense. Thus the
11 request for a new trial here is supported by NRCP 59(a)(1). This decision thus also deprived
12 Defendant of its constitutional right to a jury trial. Nev. Const., Art. I, Section 3 (...“The right of
13 trial by Jury shall be secured to all and remain inviolate forever...”); U.S. Const., Am. 7 (“In suits
14 at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury
15 shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the
16 United States, than according to the rules of the common law.”). It was additionally a denial of
17 Defendant's constitutional right to due process. Nev. Const., Art. I, Section 8 (“No person shall be
18 deprived of life, liberty, or property, without due process of law.”); U.S. Const., Am. 5 (“...nor be
19 deprived of life, liberty, or property, without due process of law...”). For these reasons a new trial
20 should be ordered, in which Defendant is allowed to present its full damages evidence, including
21 testimony and opinions from experts Baker (to the extent his testimony goes to damages) and
22 Kirkendall.

23 At the time of the sanctions dispute, this Court challenged Defendant to find case law stating
24 that the use of bankruptcy evidence could ever be proper in a personal injury trial. The Court's
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26 *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 259, 235 P.3d 592, 602–03 (2010) (footnotes omitted). Clearly
27 Defendant Capriati did not get a full hearing of its position, as its remaining witnesses and experts, including damages
28 experts, were prevented from giving testimony following the sanctions.

1 determination to proceed with a hearing came at or after 5 pm, with a sanctions hearing set for the
2 next morning at approximately 9 am. Defendant was given only the intervening 16 hours or so,
3 outside of business hours, in which to locate any such authority, while also preparing a brief on the
4 issue for filing with the Court, preparing for any further trial proceedings (the nature and schedule
5 of which were uncertain at that point), as well as awaiting whatever Plaintiff's brief would be
6 (Plaintiff's brief was received electronically only a few minutes before defense counsel left the
7 office to attend the hearing in the morning).

8 In at least one personal injury case in Utah, bankruptcy evidence was determined to be
9 harmless where it addressed an issue in dispute. "Based on the evidence at trial, we conclude that
10 any error in the admission of the bankruptcy and gambling evidence at Plaintiff's trial was
11 harmless." *Ereren v. Snowbird Corp.*, 2002 UT App 274.

12 At least one court has held it error not to admit bankruptcy evidence where such evidence
13 was probative as to damages claimed in a civil case, though it was not an injury case. "We are of
14 the opinion that evidence of Jefcoat's bankruptcy was highly probative on the issue of his
15 profitability as a farmer and that a different verdict might have been reached had the jury been aware
16 of his past losses. We, therefore, conclude that refusal to admit Exhibit ID-C constitutes reversible
17 error." *Kaiser Investments, Inc. v. Linn Agriprises, Inc.*, 538 So. 2d 409, 417 (Miss. 1989).

18 Defendant contends that whether the evidenced at issue was admissible or proper is and
19 should have been similar to any other analysis of admissibility. Plaintiff having placed the issue of
20 Defendant's recordkeeping in issue before the jury at the trial of this case, the facts and
21 circumstances surrounding that recordkeeping were probative evidence. "Through her own
22 testimony, and that of other witnesses, the plaintiff had injected into the case the issue as to her
23 earning capacity in support of and in enhancement of her claim for damages. When she did so the
24 subject was opened to full inquiry and made relevant and competent any evidence to the contrary
25 which would dispute or cast doubt on her claims." *Bullock v. Ungricht*, 538 P.2d 190, 192 (Utah
26 1975). "We are of the opinion that evidence of Jefcoat's bankruptcy was highly probative on the
27 issue of his profitability as a farmer and that a different verdict might have been reached had the
28

1 jury been aware of his past losses. We, therefore, conclude that refusal to admit Exhibit ID-C
2 constitutes reversible error.” *Kaiser Investments, Inc. v. Linn Agriprises, Inc.*, 538 So. 2d 409, 417
3 (Miss. 1989). Other courts have addressed these issues in the context of whether the evidence was
4 admissible, and then handled the issue in that context.

5 In another case, bankruptcy evidence was admitted in a personal injury action. “At trial,
6 Kalell presented evidence about his marriages, bankruptcy, failure to pay child support, and filing
7 of late tax returns—the matters which had been the subject of the motion in limine.” *Kalell v.*
8 *Petersen*, 498 N.W.2d 413, 415 (Iowa Ct. App. 1993). Admission of the bankruptcy evidence in
9 that case was held not to be error. “In summary, we conclude the trial court did not err in overruling
10 plaintiff’s motion in limine or allowing the introduction of evidence covered by said motion.” *Kalell*
11 *v. Petersen*, 498 N.W.2d 413, 417 (Iowa Ct. App. 1993).

12 While the case law in the area of the use of bankruptcy evidence in a civil trial appears to be
13 thin, Defendant continues to argue that there is no *per se* bar to such evidence in a personal injury
14 (or any other) type of civil trial, but rather the use of such evidence depends on whether it is
15 admissible and relevant and probative as to issues in the case. The paucity of case law involving
16 the use of bankruptcy evidence in personal injury cases does not stand for the proposition that it is
17 *per se* inadmissible, which is the position taken by this Court and by Plaintiff.

18 Here, while the topic ultimately sought from the witness was reduction in job force, the
19 evidence resulting in the sanctions (striking of answer; striking of defense corporate witness;
20 striking of economic damages expert Kirkendall; striking of accident reconstruction expert Baker)
21 was not *per se* inadmissible. Without it being inadmissible, and with no prior order in place
22 precluding such evidence, an admonition to the jury would have sufficed to cure this issue *if* it were
23 determined to be a problem. While Defendant continues to argue that evidence of job force
24 reduction and any surrounding evidence or testimony was proper and admissible, in any event it
25 was insufficient to result in the wholesale gutting of Defendant’s liability and damages evidence
26 and arguments at trial, which was the end result.

1 Defendant found no law on point in Nevada jurisprudence. One unpublished Nevada
2 Supreme Court decision did consider bankruptcy issues for purposes of summary judgment³,
3 however that case did not involve the use or admissibility of such evidence during a trial.

4 Defendant incorporate the authorities it cited in its brief as to sanctions. All such authorities
5 are incorporate by this reference as if set forth fully herein. The decision not to utilize those same
6 authorities is to allow this Court to review new and different legal cases not previously cited or
7 addressed. But Defendant contends that any testimony by Mr. Goodrich, and issues related to job
8 force reduction and the effect on recordkeeping, was fair evidence to seek to elicit in light of the
9 evidence presented at trial by Plaintiff in regard to its implication that Defendant willfully destroyed
10 relevant records. Defendant also contends that even if the jury could have drawn an improper
11 inference from the testimony of Mr. Goodrich, any potential prejudice was curable by admonition
12 and/or a proper curative instruction. It was not necessary to eliminate Defendant's damages experts,
13 to strike Defendant's Answer, or to advise the jury there was unlimited insurance.

14 Here, no order on any motion in limine was violated, and the allegedly offending testimony
15 was not part of any ongoing or earlier disputed or similar testimony. Defendant further asserts that
16 the standard used in assessing the various sanctions was a discovery-based analysis, using case law
17 involving discovery issues, some of which involved violation of orders in place in those cited cases.
18 This was testimony which occurred live during trial, and for which no order was in place beforehand
19 which prevented Defendant from addressing evidence developed by Plaintiff earlier in the trial. In
20 that context, and with a single question and a 7-word response, or partial response, it could have
21 been cured by an admonition to the jury at that point in the trial.

22
23
24
25 ³ "Here, viewing all evidence in the light most favorable to the nonmoving party, genuine issues of material fact exist
26 regarding whether Powell's non-disclosure of the underlying personal injury matter in her bankruptcy proceedings was
27 intentional. At the time of summary judgment, the evidence submitted showed that Powell did not list her personal
28 injury claim as part of her bankruptcy schedules, and then Powell amended her schedules to include her claim following
Whole Foods' motion for summary judgment. Whole Foods argues that this court can infer deliberate intent to obtain
an unfair advantage from Powell's actions; however, Powell argues no evidence of such intent exists. These are genuine
issues of material fact." *Powell v. WFM-WO, Inc.*, No. 58674, 2013 WL 441746, at *2 (Nev. Feb. 4, 2013).

1 In essence, Defendant was allowed to argue to the jury in closing argument, which was in the
2 nature of a prove-up hearing. This Court failed to conduct the necessary hearing and to make the
3 necessary analysis to eliminate Defendant's damages case. As a result, a new trial should be
4 ordered.

5 C.

6 **DEFENDANT'S LIABILITY CASE WAS IMPROPERLY ELIMINATED**

7 The rationale for this Court's sanctions was a partial response by the first defense witness at
8 the commencement of Defendant's case (other than two experts who had testified earlier due to
9 scheduling issues). After half of the first sentence of the first defense witness, in which the word
10 "reorganization" was stated by the witness (and not the word "bankruptcy"), the trial was stopped,
11 a hearing was held, and, after Plaintiff rejected the Court's offer of a mistrial and a half million
12 dollars in sanctions, all other experts and witnesses were then excluded and prohibited by Court
13 Order.

14 Defense counsel argued that the evidence was in response to evidence adduced by Plaintiff
15 using this same witness in Plaintiff's case-in-chief, in which Plaintiff's counsel implied that
16 Defendant had willfully destroyed certain unspecified documents, which in reality did not occur.
17 The Court considered that there is a *per se* ban on any use of evidence of bankruptcy at trial, which
18 Defendant asserts is not correct. Defendant contends that this ruling again constituted an irregularity
19 in the proceeding, an abuse of discretion, as well as an error or errors in law which were objected
20 to, under NRCP 59(a)(1), and that Defendant's constitutional rights to a jury trial and to due process
21 were eliminated, as per the same authorities cited earlier in this brief.

22 In essence, the Court imposed a *per se* limitation against any mention of a bankruptcy
23 proceeding. Defendant submits this is not the state of the law. In fact, Defendant argued at trial
24 that information as to the reduction in the work force at Capriati was sought as testimony in order
25 to counter testimony elicited from Plaintiff during his case in chief. Defendant also argued that an
26 admonition to the jury would be sufficient to cure any perceived harm.

1 Plaintiff had implied early in the trial that Capriati had willfully or intentionally destroyed
2 relevant evidence, using this same witness from Capriati, Cliff Goodrich⁴. That is of course not the
3 case, but the recordkeeping at Capriati was affected by a significant reduction in its work force. It
4 was this reduction in work force which Defendant intended to focus on during the testimony of Mr.
5 Goodrich, in order to counter the impression left with the jury by Plaintiff's counsel that the records
6 relating to this motor vehicle accident were the victim of some nefarious conspiracy by Defendant
7 corporation.

8 The work force reduction was something that defense trial counsel learned of only minutes
9 before coming to court prior to the commencement of its defense case. Thus this was new
10 information and not something that counsel had any appreciable time to prepare to address.

11 Furthermore, this Court mentioned another unrelated case during this process, stating that in
12 the other case a different judge had declared a mistrial on the first day of that trial. The name of
13 that case, and whether there was an order in place prohibiting such testimony, was never revealed
14 by this Court. Defendant requests that the other un-named trial matter, which was apparently relied
15 upon by this Court in rendering its ruling here, be identified and set forth in a manner that would
16 allow Defendant to investigate its applicability to the facts of this case.

17 Here, however, there was no pretrial order in place to prevent such information from being
18 used by Defendant in response to evidence adduced by Plaintiff. Here there was no pretrial order
19 precluding the use of any evidence of work force reduction, bankruptcy, or reorganization.

20 Defendant violated no order, *in limine* order, or standing order in this case. As the issue had
21 not arisen during the trial, Defendant also was not in violation of any verbal or other Order of this
22 Court at the time this very brief testimony occurred. Defendant contends that the seven (7) words
23 spoken by the witness resulting in the sanctions imposed could have instead been cured by an
24 admonition to the jury, if in fact there was a problem with it.

25
26 ⁴ Defendant notes that despite this Court stating on the record that Mr. Goodrich's testimony was stricken in its
27 "entirety," when Defendant objected to Plaintiff's use of a portion of that testimony during closing argument, the Court
28 altered its ruling, now stating that the earlier testimony obtained during Plaintiff's case in chief would remain and was
not stricken. The alteration of the earlier verbal order is also objected to here by Defendant, and provides further support
for its request for a new trial.

1 The witness said the word "reorganization," and he did not utter the word "bankruptcy." He
2 never reached the testimony as to the work force reduction given the objection of Plaintiff's counsel
3 and the fact that the balance of witness Goodrich's testimony was stricken.

4 The argument advanced by Plaintiff was that the use of bankruptcy testimony would prejudice
5 the jury as to wealth or impoverishment of the Defendant, Capriati. But Capriati never went out of
6 business, and remains in business to this day. No testimony about its financial well-being that would
7 affect any judgment or collection efforts was testified to.

8 In context, Plaintiff and his counsel used tactics at trial which call into question the fairness
9 of the sanctions imposed against Defendant. Plaintiff testified that he had to loot his 401(k)
10 retirement savings to survive. Plaintiff also advanced the argument that he had to rely on his son
11 for support. And the jury was urged in closing argument to put itself in the position of Plaintiff and
12 to consider how they the jury would feel if they had to rely on the largesse of their children to exist.

13 The statement of Mr. Goodrich, or the half statement since he never got to finish his
14 statement and related testimony, was in response to specific testimony elicited by Plaintiff.
15 Plaintiff's counsel placed into the mind of the jury the notion that Defendant Capriati was somehow
16 destroying or hiding available evidence, which was an improper attempt at arousing passion and
17 prejudice against the Defendant as there was absolutely no evidence to support that argument. The
18 truth is that if there were records relating to this incident or the forklift driver, they were not properly
19 maintained or they were destroyed in the ordinary course of business, where they had not been
20 demanded in discovery, and where the business practices of the company as required by applicable
21 law mandated holding onto certain records for only a three (3) year period. Given that the time
22 frame between the accident and the trial was roughly six and a half (6 ½) years, in part due to the
23 bankruptcy stay, there was nothing willful, nefarious, or intentional about any loss of records. But
24 with Plaintiff having put that before the jury, Defendant was attempting to respond. Instead, the
25 entire remaining defense case was eliminated by judicial fiat, which was improper in context.

26 This Court also casually mentioned that it would have favorably considered a motion for
27 spoliation based on the testimony adduced during Plaintiff's case-in-chief. This threat remained
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1 when the testimony of Mr. Goodrich was given in Defendant's case-in-chief, and further supports
2 the need for Defendant to obtain testimony regarding work force reduction and its effect on any
3 records no longer available.

4 What resulted was a witness who was the main representative for Defendant Capriati that
5 was permitted to testify on direct examination for Plaintiff, but was then was not permitted to
6 respond to points raised by Plaintiff during the defense case. Plaintiff's one-sided use of the
7 Defendant's own corporate representative was itself improper, where Defendant was never
8 permitted to have its own witness testify, other than as to the seven (7) words causing the sanctions.

9 **D.**

10 **OTHER EXPERT RULINGS WERE INCORRECT, AND SOME REVERSED EARLIER**
11 **RULINGS OF THIS COURT WITHOUT ANY NEW OR DIFFERENT BASIS TO DO SO**

12 Certain earlier rulings were altered during trial without any new or different information. As
13 a result, Defendant went into trial with certain evidentiary rulings in place, which then morphed and
14 were in effect reversed with defense witnesses on the stand while they were giving live testimony.
15 These involved in part the two (2) defense experts who were permitted to testify, as they were called
16 out of order due to scheduling issues.

17 One example of this is with defense neurosurgeon expert Dr. Tung. He had reviewed some
18 critical preexisting records from Southwest Medical Associates, in which Plaintiff had stated to his
19 doctors some twenty one (21) months before this accident that he had neck pain for years. During
20 trial, Plaintiff testified that he forgot about this medical visit or the X-ray of his cervical spine taken
21 at the same time. These records were reference in Dr. Tung's report or reports⁵, which were timely
22 disclosed. Plaintiff attacked Dr. Tung's ability to use this information in a motion *in limine*, and
23 also in a trial brief. Defendant opposed the trial brief as an untimely motion for reconsideration. In
24 response to both, this Court ruled that Dr. Tung could testify about the Southwest Medical
25 Associates records as they were within the expert's report, timely disclosed, and supported the
26 expert's statement that his review of these records did not change his earlier opinions that Plaintiff's
27 problems were caused mainly by preexisting cervical spinal degeneration.

28 ⁵ It is believed that Dr. Tung's reports were marked as Court Exhibits at trial.

1 But while Dr. Tung was on the witness stand, the position of the Court suddenly changed
2 based on Plaintiff's same argument as advanced previously that the records had no specific
3 comments and were not in the conclusions, and then at that point Dr. Tung was prohibited in being
4 asked about these records and the related information during his direct examination. Again, in
5 context Plaintiff's three (3) medical witnesses did not reference the preexisting cervical problems
6 or records in their reports or medical records, but each was permitted to testify about them during
7 direct examination by Plaintiff's counsel and over objection from Defendant. The disparity between
8 the defense medical expert being precluded from discussing the preexisting records and information
9 despite having placed them into his report or reports, while Plaintiff's experts were allowed to
10 expound on them despite not having them in any reports or treatment records, could not have been
11 more stark.

12 Plaintiff urged the Court to restrict this expert's testimony in a fashion the Court had already
13 ruled on, and the Court did a full reverse of its earlier positions. The jury was thus unable to hear
14 the critical trial testimony during the witness's direct examination, such that any reference to it
15 seemed in context like an afterthought, despite this being the central thrust of the expert's opinions
16 here.

17 A similar experience was encountered with Defendant's vocational expert, Mr. Edward L.
18 Bennett. He had placed into one of his timely disclosed reports⁶ a listing of roughly eleven (11) job
19 titles suitable for Plaintiff. But because he did not reference those specific job titles again in his
20 conclusions, he was not allowed to state that those were possible jobs for Plaintiff. To be clear, the
21 report in its listing of the various job titles indicated some of the job titles were suitable by
22 educational background and others by vocational background, and in the conclusion there was a
23 reference to other jobs suitable by vocational or educational background. But the Plaintiff's
24 argument that the conclusion had to restate the job titles stated earlier in the timely disclosed expert
25 report was sufficient to prevent the necessary testimony before the jury.

26 ///

27
28 ⁶ It is believed that Mr. Bennett's reports were marked as Court Exhibits at trial.

1 E.

2 **THE USE OF A JURY INSTRUCTION ADVISING THE JURY OF**
3 **UNLIMITED INSURANCE MANDATES A NEW TRIAL**

4 Plaintiff submitted and this Court read to the jury the following jury instruction, which was
5 Jury Instruction Number 32 (emphasis added):

6 Plaintiff has the legal right to proceed with his claims against
7 Defendant Capriati Construction Corp., Inc. in this case and recover
8 damages as determined by you in accordance with these instructions.

9 Further, **Defendant has liability insurance to satisfy, in whole**
10 **or part, any verdict you may reach in this case.**

11
12 Defendant contends that the use of this jury instruction was again irregular, improper, error, and an
13 abuse of discretion, along with a denial of Defendant's due process and constitutional rights, as
14 supported by authorities cited earlier in this brief. It also misstates the availability of insurance,
15 given the amount disclosed and Plaintiff's request in closing argument for some \$14.4 million.

16 Furthermore, this jury instruction clearly violated Nevada's collateral source rule. NRS
17 48.135, reads as follows.

18 NRS 48.135 Liability insurance.

19 1. Evidence that a person was or was not insured against liability
20 is not admissible upon the issue whether the person acted negligently or
otherwise wrongfully.

21 2. This section does not require the exclusion of evidence of
22 insurance against liability when it is relevant for another purpose, such
as proof of agency, ownership or control, or bias or prejudice of a
witness.

23 (Added to NRS by 1971, 782)

24 But Nevada case law recognizes a *per se* rule barring the admission of collateral source
25 information for any purpose. "We now adopt a *per se* rule barring the admission of a collateral
26 source of payment for an injury into evidence for any purpose." *Proctor v. Castelletti*, 112 Nev. 88,
27 90, 911 P.2d 853, 854 (1996). "While it is true that this rule eviscerates the trial court's discretion
28 regarding this type of evidence, we nevertheless believe that there is no circumstance in which a

1 district court can properly exercise its discretion in determining that collateral source evidence
2 outweighs its prejudicial effect.” *Proctor v. Castelletti*, 112 Nev. 88, 91, 911 P.2d 853, 854 (1996).
3 Here, that is exactly the type of analysis this Court engaged in to allow and then read the jury
4 instruction at issue to the jury. In the *Proctor* case, a new trial was required due to the use of
5 collateral source evidence. “In *Proctor*, we held that the appellant was entitled to a new trial because
6 the district court’s admission of collateral source evidence affected her ‘right to a fair trial and ... to
7 be fairly compensated for her injuries.’” *Bass-Davis v. Davis*, 122 Nev. 442, 454, 134 P.3d 103,
8 110 (2006). Defendant here similarly argues that a new trial is required due to the use of collateral
9 source information and evidence, which came in the form of a jury instruction.

10 In addition to violating the letter, the intent, and the spirit of the collateral source rule,
11 Defendant asserts that the jury instruction at issue urged the jury to award a higher amount than it
12 otherwise might have awarded. It gave the jury the impression that it could award whatever it liked,
13 since it would have no effect on Defendant. This is exactly why the collateral source rule is in place
14 – to prevent this type of thought process by the jury one way or the other. Defendant contends that
15 the jury instruction pushed a mindset upon the jury that may well have resulted in a higher damages
16 award, or windfall, to Plaintiff.⁷

17 Thus, regardless of the arguments urged by Plaintiff during trial, the inclusion of language in
18 a jury instruction which advised the jury of unlimited insurance for any award they might issue was
19 error, irregular, and in violation of Nevada law. It deprived Defendant of its constitutional rights to
20 due process and a jury trial, per the authorities cited elsewhere in this brief.

21
22 ⁷ See, e.g., this dissent language by Justice Pickering as to awarding a plaintiff more than just compensation, though the
23 decision was later vacated and superseded: “[T]he law of torts attempts primarily to put an injured person in a position
24 as nearly as possible equivalent to his position prior to the tort.” Restatement (Second) of Torts § 901 cmt. a (1979); see
25 also *id.* § 903 cmt. a (“[C]ompensatory damages are designed to place [the plaintiff] in a position substantially equivalent
26 in a pecuniary way to that which he would have occupied had no tort been committed.”). ‘The primary object of an
27 award of damages in a civil action, and the fundamental principle on which it is based, are just compensation or
28 indemnity for the loss or injury sustained by the complainant, and no more.’ *Mozzetti v. City of Brisbane*, 136 Cal.Rptr.
751, 757 (Ct.App.1977). ‘A plaintiff in a tort action is not, in being awarded damages, to be placed in a better position
than he would have been had the wrong not been done.’ *Valdez v. Taylor Automobile Company*, 278 P.2d 91, 98
(Cal.Ct.App.1954).” *Tri-City. Equip. & Leasing, LLC v. Klinke*, No. 55121, 2011 WL 1620634, at *5 (Nev. Apr. 27,
2011), *vacated* (Sept. 12, 2011), *superseded sub nom. Tri-City. Equip. & Leasing v. Klinke*, 128 Nev. 352, 286 P.3d 593
(2012).

1 Plaintiff argued that the strictures of NRS 48.135 could be bypassed here because of bias
2 issues. On this basis, this Court proceeded. Defendant contends that decision was error and resulted
3 in a significant irregularity in the proceedings.

4 In its Motion upon which this Court relied for its decision to utilize the jury instruction at
5 issue, Plaintiff did not cite to any other case, let alone a Nevada case, where a jury was informed of
6 unlimited insurance available to satisfy any verdict. Here, that is exactly what happened. The
7 language of the jury instruction at issue advised the jury that Defendant had unlimited
8 insurance available to satisfy any verdict or award, no matter how high the dollar amount.

9 This is the opposite of standard jurisprudence related to the collateral source rule, and regardless of
10 the testimony by the defense witness such a jury instruction goes well beyond what is permitted in
11 Nevada law.

12 Nevada law requires that reference to insurance result in a limiting instruction. *Stultz v.*
13 *Bellagio, LLC*, 373 P.3d 965 (Nev. 2011) [*“See Foster v. Bd. of Trustees of Butler Cty. Com. Col.,*
14 *771 F.Supp. 1122, 1128 (D.Kan.1991) ([T]he mere mention of the word “insurance” ‘does not*
15 *result in unfair prejudice and can be cured by a limiting instruction) [sic – see footnote⁸]; Safeway*
16 *Stores, Inc. v. Buckmon, 652 A.2d 597, 605 (D.C.1994) ([T]he mere mention of insurance does not*
17 *always require a mistrial if the jury is properly instructed.’).”]. Yet here, the instruction itself is the*
18 *one that mentioned insurance. The jury certainly took it as the gospel that there was unlimited*
19 *insurance, since the other jury instructions and the instructions of the Court generally were that the*
20 *jury was required to follow the law, including as set forth in the jury instructions.*

21 The use of Jury Instruction 32, and its language assuring the jurors that unlimited insurance
22 was available for any award they might make, was improper and violated Nevada’s collateral source
23 rules. The intentional violation of the collateral source rule was both prejudicial and harmful to
24 Defendant here. The rule against collateral source information is a *per se* bar based on authority

25
26 ⁸ The quote from the *Stultz* case in Nevada may be incorrect in its language and form. The case cited reveals the
27 following full quote. “Any prejudicial effect of this insurance evidence (and the court does not believe that the mere
28 mention of the word ‘insurance’ results in unfair prejudice) easily could have been cured by a limiting instruction.”
Foster v. Bd. of Trustees of Butler Cty. Cmty. Coll., 771 F. Supp. 1122, 1128 (D. Kan. 1991).

1 from the Nevada Supreme Court. The use of the insurance information in this fashion in this case
2 was error, irregular, and improper, regardless of the basis or rationale used for doing so. It set the
3 stage for a jury verdict that was potentially higher than it otherwise would have been, in violation
4 of Defendant's due process and jury trial rights. As a result, a new trial must be ordered.

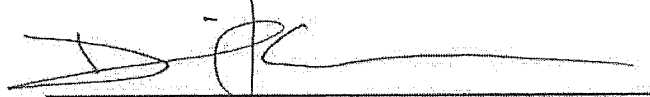
5 **III.**

6 **CONCLUSION**

7 For the foregoing reasons, this Motion should be granted. A new trial should be ordered.

8
9 DATED this 18th day of November, 2019.

10 **WILSON, ELSER, MOSKOWITZ, EDELMAN &
11 DICKER LLP**

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22 *Attorneys for Defendant,*
23 *Capriati Construction Corp., Inc.*

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Wilson Elser Moskowitz Edelman
3 & Dicker LLP, and that on this 18th day of November, 2019, I served a true and correct copy of the
4 foregoing **DEFENDANT CAPRIATI CONSTRUCTION CORP., INC.'S MOTION FOR**
5 **NEW TRIAL** as follows:

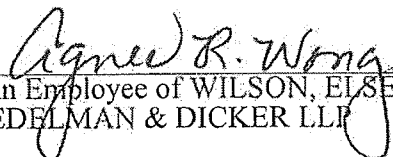
- 6 ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed
7 envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- 8 ☒ via electronic means by operation of the Court's electronic filing system, upon each
9 party in this case who is registered as an electronic case filing user with the Clerk;
10 and/or
- 11 ☐ via hand-delivery to the addressees listed below.

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DISTRICT COURT
CLARK COUNTY, NEVADA

11 BAHRAM YAHYAVI, an Individual,
12 Plaintiff,

13 vs.

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

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

NOTICE OF ENTRY OF ORDER
DENYING DEFENDANT
CAPRIATI CONSTRUCTION
CORP., INC.'S MOTION FOR NEW
TRIAL

17
18 PLEASE TAKE NOTICE that an Order Denying Defendant Capriati
19 Construction Corp, Inc.'s Motion for New Trial was entered on the 3rd day of March, 2020
20 in the above-referenced matter, a copy of which is attached hereto.

21 DATED this 4 day of March, 2020.

PRINCE LAW GROUP

22
23 *[Signature]*
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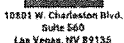
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An Employee of Prince Law Group



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12 *Bahram Yahyavi*

8 **EIGHTH JUDICIAL DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

11 **BAHRAM YAHYAVI, an Individual,**

12 **Plaintiff,**

13 **vs.**

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

16 **Defendant**

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

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

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

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



10801 W. Charleston Blvd.
Suite 560
Las Vegas, NV 89123

Handwritten signature and date 3/3/2020

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

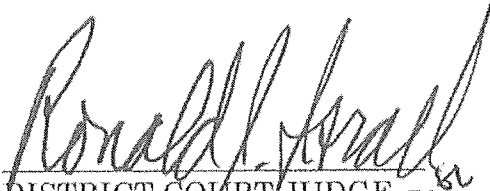
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28 ...

ORDER

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

IT IS SO ORDERED.

DATED this 2 day of March, 2020.


DISTRICT COURT JUDGE RONALD J. ISRA

DATED this 26th day of February, 2020.

DATED this ____ day of February, 2020.

Respectfully Submitted By:

Approved as to Form and Content:

PRINCE LAW GROUP

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24 **DISTRICT COURT**

25 **CLARK COUNTY, NEVADA**

26 **BAHRAM YAHYAVI,**
27
28 Plaintiff,

29 v.
30 **CAPRIATI CONSTRUCTION CORP., INC.,**
31 a Nevada corporation,
32 Defendant.

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

**DEFENDANT CAPRIATI
CONSTRUCTION CORP., INC.'S
MOTION TO CORRECT OR
RECONSIDER DECISION AND ORDER,
ENTERED ON NOVEMBER 5, 2018**

NO HEARING REQUESTED

23 Defendant Capriati Construction Corp., Inc. (hereinafter referred to as "Defendant"), by and
24 through its counsel of record, DAVID S. KAHN, ESQ., of the law firm of WILSON, ELSER,
25 MOSKOWITZ, EDELMAN & DICKER LLP, and ERIC R. LARSEN, ESQ., of THE LAW
26 OFFICES OF ERIC R. LARSEN, hereby moves this Court to Correct or Reconsider its Decision
27 and Order entered herein on November 5, 2019. This motion is made and based upon the pleadings
28 and papers on file herein, the attached Memorandum of Points and Authorities, and any argument

1 that may be adduced at the hearing of this matter.

2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I.**

4 **FACTUAL AND PROCEDURAL BACKGROUND**

5 This Motion seeks correction or reconsideration of an Order for sanctions, as the Order at
6 issue does not accurately reflect what occurred at trial, prior to the signing and entry of the Order.
7 The Order at issue is the Decision and Order signed by the Court on November 5, 2019¹, and filed
8 on November 5, 2019, at 1:41 p.m. (the "Order"). The Notice of Entry of that Order was filed on
9 November 5, 2019, at 4:24 p.m. (the "Notice of Entry"). Judicial Notice is requested of the Order
10 and the Notice of Entry. NRS 47.130 et seq..

11 The sanctions included striking of Defendant's Answer and Affirmative Defenses; striking
12 of the balance of the testimony during the defense case of Defendant corporate representative
13 witness Cliff Goodrich, who had testified at length in Plaintiff's case in chief; striking of the
14 Defendant's economic damages expert Kevin Kirkendall, CPA, and striking of Defendant's accident
15 reconstruction² expert John Baker, Ph.D.. Defendant asserts that as to experts Kirkendall and Baker
16 the Order eliminated the damages portion of Defendant's jury trial, instead limiting Defendant to
17 closing argument only.

18 Defendant contends that the Order, generated and entered long after the conclusion of the
19 jury trial, does not accurately state or reflect what actually occurred during the trial, as Defendant's
20 damages case was not permitted as stated in the Order. In fact, expert Kirkendall who was excluded
21 and stricken was only a damages expert. Moreover, the opinions of Defendant's accident

22 ¹ Defendant objects to the characterization in the Order, which it assumes Plaintiff's counsel prepared, that defense
23 counsel somehow agreed with the Court's actions in sanctioning Defendant. Order, page 5, at lines 19-23. Defense
24 counsel urged that this Court simply admonish the jury as to any statement made by witness Goodrich, which
25 Defendant contended would have been a sufficient remedy. The statement set forth in the Order was in the context of
26 Plaintiff's argument that the Court should determine all damages itself without any ability of Defendant to even argue
27 to the jury. In other words, defense counsel was commenting in this isolated statement in the Order about which of the
28 various disagreed with remedies would be preferable, and not agreeing that any of the Court's sanctions ultimately
applied were valid, as is implied by the language of the current Order.

² This Court had previously excluded and limited this same expert in regard to any biomechanical testimony or opinions,
which were prohibited. Defendant does not concede that issue, but here only addresses the issue of Dr. Baker's limited
role as an accident reconstruction expert related to vehicle speeds, impact analyses, forces imparted, and delta-V, or
change in vehicle velocity, all of which go squarely to the issues of damages and causation and which Defendants
contends the jury should have been able to hear under the language of the current Order at issue.

1 reconstruction expert John Baker, Ph.D., who was excluded, would also have provided the jury with
2 information useful in evaluating the damages and causation of damages issues before them for
3 deliberation. For these reasons, the Order at issue must be corrected, reconsidered, or modified, to
4 reflect what actually occurred.

5 While Defendant was permitted to conduct a closing argument, that is all that Defendant
6 was permitted to do following the sanctions hearing. No further witnesses, evidence, or expert
7 opinions were allowed. Thus the statement in the Order that the parties were allowed to try the case
8 on damages is demonstrably inaccurate, and must be corrected, reconsidered, or modified, to reflect
9 what actually transpired at trial.

10 II.

11 LEGAL ARGUMENT

12 A.

13 LEGAL STANDARD FOR MOTION FOR RECONSIDERATION AND CORRECTION

14 This Court has the inherent authority to reconsider its prior orders. *Trail v. Faretto*, 91 Nev.
15 401, 536 P.2d 1026 (1975) ("[A] court may, for sufficient cause shown, amend, correct, resettle,
16 modify or vacate, as the case may be, an order previously made and entered on the motion in the
17 progress of the cause or proceeding"); *see also, Barry v Lindner*, 119 Nev. 661, 670, 81 P.3d 537,
18 543 (2003). This authority is provided under EDCR 2.24. Re-hearings are appropriate where
19 substantially different evidence is subsequently introduced, or instances in which new issues of fact
20 or law are raised supporting a ruling contrary to the ruling already reached. *See, Masonry & Tile*
21 *Contractors Ass'n of S. Nev. V. Jolley, Uga & Wirth, Ltd.*, 113 Nev. 737, 941 P.2d 486 (1997); *see*
22 *also, Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). The trial judge has
23 great discretion on the question of rehearing. *Harvey's Wagon Wheel, Inc. v. MacSween*, 96 Nev.
24 215, 606 P.2d 1095 (1980).

25 A motion for reconsideration must be filed within 10 days after service of written notice of
26 entry of the order following the original hearing. *See* EDCR 2.24. EDCR 2.24 reads as follows.

27 ///

28 ///

1 **Rule 2.24. Rehearing of motions.**

2 (a) No motions once heard and disposed of may be renewed in the
3 same cause, nor may the same matters therein embraced be reheard,
4 unless by leave of the court granted upon motion therefor, after notice
5 of such motion to the adverse parties.

6 (b) A party seeking reconsideration of a ruling of the court, other
7 than any order which may be addressed by motion pursuant to N.R.C.P.
8 50(b), 52(b), 59 or 60, must file a motion for such relief within 10 days
9 after service of written notice of the order or judgment unless the time
10 is shortened or enlarged by order. A motion for rehearing or
11 reconsideration must be served, noticed, filed and heard as is any other
12 motion. A motion for reconsideration does not toll the 30-day period for
13 filing a notice of appeal from a final order or judgment.

14 (c) If a motion for rehearing is granted, the court may make a final
15 disposition of the cause without reargument or may reset it for
16 reargument or resubmission or may make such other orders as are
17 deemed appropriate under the circumstances of the particular case.

18 This Motion is timely.

19 The Supreme Court has stated that “[o]nly in very rare instances in which new issues of fact
20 or law are raised supporting a ruling contrary to the ruling already made should a motion for
21 rehearing be granted.” *Moore v. City of Las Vegas*, 92 Nev. 402, 405 (1976). Here, the Order at
22 issue does not accurately reflect what occurred at trial, prior to the signing and entry of the Order.

23 Eighth Judicial District Court Rule 2.24(a) provides that a party may move for
24 reconsideration of a motion “once heard and disposed of . . . by leave of the court granted upon
25 motion therefor, after notice of such motion to the adverse parties.” EDCR 2.24(a).
26 “Reconsideration of motions is proper if the district judge to whom the first motion was made
27 consents to a rehearing.” *Harvey’s Wagon Wheel v. MacSween*, 96 Nev. 215, 217, 606 P.2d 1095,
28 1097 (1980). The primary purpose of a petition for reconsideration is to inform the Court that it has
overlooked an important argument or fact, or misread or misunderstood a case or fact in the
record. *See Moore vs. City of Las Vegas*, 92 Nev. 402, 551 P.2d 244 (1976). Here, the record is at
odds with the terms of the written Order recently signed, filed, and noticed, long after the conclusion
of the trial. However, courts have consented to rehearing even where “the facts and the law were
unchanged.” *See Id.* These standards have been followed by our courts for some time.

1 A district court "may reconsider a previously decided issue if substantially different evidence
2 is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n.*
3 *of Southern Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).
4 Thus, if the district court properly determines the earlier decision was clearly erroneous, the trial
5 judge does not err in reconsidering the motion. *Id. Hansen v. Aguilar*, 2016 Nev. App. LEXIS 240,
6 *2 (Nev. Ct. App. 2016).

7 Orders may also be corrected or modified pursuant to NRCP 60. That Rule reads as follows:

8 **Rule 60. Relief From a Judgment or Order**

9 (a) **Corrections Based on Clerical Mistakes; Oversights and**
10 **Omissions.** The court may correct a clerical mistake or a mistake
11 arising from oversight or omission whenever one is found in a judgment,
12 order, or other part of the record. The court may do so on motion or on
its own, with or without notice. But after an appeal has been docketed
in the appellate court and while it is pending, such a mistake may be
corrected only with the appellate court's leave.

13 (b) **Grounds for Relief From a Final Judgment, Order, or**
14 **Proceeding.** On motion and just terms, the court may relieve a party
or its legal representative from a final judgment, order, or proceeding
for the following reasons:

- 15 (1) mistake, inadvertence, surprise, or excusable neglect;
16 (2) newly discovered evidence that, with reasonable diligence,
could not have been discovered in time to move for a new trial under
17 Rule 59(b);
18 (3) fraud (whether previously called intrinsic or extrinsic),
misrepresentation, or misconduct by an opposing party;
19 (4) the judgment is void;
20 (5) the judgment has been satisfied, released, or discharged; it
is based on an earlier judgment that has been reversed or vacated; or
applying it prospectively is no longer equitable; or
21 (6) any other reason that justifies relief.

22 (c) **Timing and Effect of the Motion.**

23 (1) **Timing.** A motion under Rule 60(b) must be made within
a reasonable time — and for reasons (1), (2), and (3) no more than 6
24 months after the date of the proceeding or the date of service of written
notice of entry of the judgment or order, whichever date is later. The
time for filing the motion cannot be extended under Rule 6(b).

25 (2) **Effect on Finality.** The motion does not affect the
judgment's finality or suspend its operation.

26 (d) **Other Powers to Grant Relief.** This rule does not limit a
court's power to:

- 27 (1) entertain an independent action to relieve a party from a
28 judgment, order, or proceeding;

1 (2) upon motion filed within 6 months after written notice of
2 entry of a default judgment is served, set aside the default judgment
3 against a defendant who was not personally served with a summons and
4 complaint and who has not appeared in the action, admitted service,
5 signed a waiver of service, or otherwise waived service; or

6 (3) set aside a judgment for fraud upon the court.

7 (e) **Bills and Writs Abolished.** The following are abolished: bills
8 of review, bills in the nature of bills of review, and writs of coram nobis,
9 coram vobis, and audita querela.

10 [Amended; effective March 1, 2019.]

11 No strict time limit is set forth, other than in reference to after an appeal has been filed, and this
12 Motion is timely. Defendant's request is that the Order at issue be modified, amended, or
13 reconsidered such that it reflects what transpired at the trial, which events occurred before the
14 written Order was signed or entered.

15 B.

16 APPLICATION OF THE LEGAL STANDARD TO THE FACTS BEFORE THIS COURT

17 Here, the Order entered as to the sanctions does not accurately reflect the proceedings during
18 trial, or how that Order was implemented at trial. The effect of the order greatly limited Defendant's
19 damages case, even if that was not the intent. Therefore, the Order itself should be reconsidered, or
20 modified to reflect what occurred. Defendant was in fact not permitted to try its case on damages
21 issues, including causation of damages, as the Order now states. Defendant was not permitted to
22 try the case as to damages, as indicated in the Order (at page 5, lines 17-18; "This Court is striking
23 the defense of liability **and allowing the parties to try the case on damages.**") (emphasis added).
24 Instead, other than as to defense witnesses called out of order prior to the sanctions ruling, Defendant
25 was only permitted to argue before the jury in closing argument. After seven (7) words from its
26 corporate representative, Defendant was not permitted any other witness, regardless of the fact that
27 several of the proposed handful of witnesses were meant to address damages and causation of
28 damages issues either solely (Kirkendall) or primarily (Baker). Defendant submits the limitations
did not allow it to try its case as to damages, as the Order states.

Since expert Kevin Kirkendall was only designated as an expert as to damages, and had no
role whatsoever as to liability, the striking of this witness was a limitation of Defendant's damages

1 case. Kirkendall is a CPA whose opinion was identified to counter Plaintiff's economist expert.
2 Defendant was permitted to argue to the jury, that is true, however no witnesses were permitted
3 Defendant during its defense case. So, in effect, the Defendant was limited to argument without
4 underlying evidentiary support. Expert Kirkendall was only involved and designated to present
5 economic damages testimony, meant to oppose or counter testimony presented by Plaintiff's expert
6 Dr. Clauretie. But since expert Kirkendall was stricken and excluded from any testimony as a result
7 of this Court's Orders during trial, Defendant was deprived of his damages-only testimony before
8 the jury. The Order as currently written is inaccurate and states otherwise.

9 Similarly, expert Dr. Baker was designated to opine and testify as to accident reconstruction
10 issues. In part, he had conducted an expensive crash test by special Order of this Court after the
11 close of discovery, which was done in response to a crash test conducted by Plaintiff after the close
12 of discovery³. This remained at issue as trial commenced (Plaintiff withdrew his accident
13 reconstruction expert during trial), and Plaintiff repeatedly sought to disqualify Dr. Baker for a
14 myriad of reasons. While certain aspects of Dr. Baker's opinions went to liability issues, other much
15 more significant portions of his opinions were squarely related to causation and damages.

16 For example, Dr. Baker intended to render opinions concerning the force of the impact, the
17 speeds of the vehicles, and the amount of force imparted to Plaintiff's vehicle (the Delta-V or change
18 in velocity). Specifically, his opinion would have been that based on science and the crash testing
19 evidence Plaintiff was only going about 5 mph at the time of the accident, which stands in stark
20 contrast to the 30 mph testified to by Plaintiff. From this evidence, the jury easily could have, and
21 perhaps would have, questioned the extent and medical causation of Plaintiff's injuries from such a
22 low-speed accident. This is especially true given the available admitted evidence that Plaintiff had
23 complained to his physician of "neck pain for years" some twenty one (21) months before this
24 accident when he had obtained cervical X-rays to investigate his complaints of neck pain. The
25 elimination of Dr. Baker was again an elimination of Defendant's damages case as it resulted in the

26
27 ³ The Plaintiff's post-close-of-discovery crash test was challenged by defense motion, in part based on its timing, and
28 in part based on its lack of similarity to the collision at issue. That motion was denied, but Defendant was permitted
to conduct its own post-close-of-discovery crash test in response. The results of that testing indicated Plaintiff's car
was going approximately 5 mph at the time of impact, and not the 30 mph which was Plaintiff's testimony to the jury.

1 Defendant having no evidence to counter Plaintiff's claims as to the severity of the impact, which
2 directly went to damages and causation.

3 The disparity in speeds as between the expert's scientific opinions and determinations based
4 on crash testing with the same types of vehicles, as opposed to the Plaintiff's testimony, was also
5 relevant to Plaintiff's overall damages claims. Plaintiff here claims serious cervical problems, and
6 also that he had no preexisting cervical issues or pain. But as stated above, he testified to not
7 recalling a medical visit long before this accident in which he had documented complaints of years
8 of neck pain. Plaintiff's credibility was central to the defense of this case, and it was central to the
9 defense of the damages and causation of damages aspects of Defendant's case. Depriving
10 Defendant of Dr. Baker's testimony allowed Plaintiff's speed testimony to go unchecked, which
11 eliminated a critical credibility argument which Defendant had going into this trial. Impeachment
12 of Plaintiff as to damages, causation of damages, and his contention of no preexisting neck injuries
13 or pain despite medical records to the contrary was thus impaired by the current Order.

14 While Defendant was permitted to argue to the jury, a closing argument does not equate to
15 trying the case as to damages, which Defendant contends must include the ability to present damages
16 evidence before the jury. The Order says otherwise, allowing argument in isolation without the
17 necessary ability to adduce evidence before the jury, and the Order must at this point be harmonized
18 in some fashion with what truly occurred at trial.

19 C.

20 **THIS COURT WENT BEYOND WHAT WAS PERMITTED IN *BAHENA***

21 By striking damages experts and witnesses Kirkendall and Baker, this Court went beyond
22 what was approved of by the Nevada Supreme Court in the *Bahena* case. "The district court
23 permitted Goodyear to fully argue and contest the amount of damages, if any, that Bahena could
24 prove to a jury." *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 256, 235 P.3d 592, 600
25 (2010). Here, Defendant Capriati was not permitted to prove its damages position to the jury⁴, due

26
27 ⁴ "We must 'assume that the jury believed all [of] the evidence favorable to the prevailing party and drew all
28 reasonable inferences in [that party's] favor.'" *Id.* at 739, 192 P.3d at 252 (alteration in original) (quoting *Bongiovi v. Sullivan*, 122 Nev. 556, 581, 138 P.3d 433, 451 (2006))." *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 258, 235 P.3d 592, 602 (2010). Here, the damages evidence of Defendant was not permitted to go before the jury,

1 to the striking of two (2) of its experts (other than as to expert witnesses who had testified out of
2 order during the Plaintiff's case in chief, earlier in the trial). The jury did not hear from these two
3 experts. As to Dr. Baker, since the Answer was being stricken and liability determined by this
4 Court in any event, having him testify at trial would therefore only have been considered by the
5 jury in the context of damages. As a result, Defendant argues that this Court exceeded what was
6 permitted in the *Bahena* case, and has therefore gone beyond what jurisprudence allows as to its
7 sanction here. The middle ground this Court has created here between case concluding sanctions
8 and liability only concluding sanctions is one not identified in any case authority that Defendant
9 could locate.

10 III.

11 CONCLUSION

12 For the foregoing reasons this Motion should be granted. The current Order should be
13 corrected, reconsidered, or, at a minimum, its language should be modified to reflect that Defendant
14 was permitted a closing argument only, and no further witnesses or experts were allowed after the
15 findings of this Court as to sanctions. The Order should set forth which witnesses had been proposed
16 at the time of the sanctions in regard to damages (Kirkendall and Baker). The order acted upon
17 during the trial itself severely truncated Defendant's damages defense. But the Order as currently

18 other than as to witnesses taken out of order earlier in the trial. A portion of the dissent of Justice Pickering in the
19 *Bahena* case is also of note here, as follows.

20 "While the majority distinguishes this case from *Nevada Power* by characterizing the sanctions as 'non-case
21 concluding,' the reality is that striking Goodyear's answer did effectively conclude this case. The sanction
22 resulted in a default liability judgment against Goodyear and left Goodyear with the ability to defend on the
amount of damages only. Liability was seriously in dispute in this case, but damages, once liability was
established, were not, given the catastrophic injuries involved. Thus, striking Goodyear's answer was akin to
a case concluding sanction, placing this case on the same footing as *Nevada Power*.

23 Surprisingly, the majority relies on *Young v. Johnny Ribeiro Building*. What it misses in *Young* is that we
24 affirmed the claim-concluding sanctions there only because the district 'court treated Young fairly, giving
25 him a full evidentiary hearing.' 106 Nev. at 93, 787 P.2d at 780 (emphasis added). This case thus is not like
Young but rather like *Nevada Power*, in that the district court erred as a matter of law in not holding an
evidentiary hearing."

26 *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 259, 235 P.3d 592, 602-03 (2010) (footnotes omitted).
27 Clearly Defendant Capriati did not get a full hearing of its position, as its remaining witnesses and experts, including
damages experts, were prevented from giving testimony following the sanctions.

1 written does not accurately reflect that damages-only expert Kirkendall was stricken and his
2 testimony barred, since he is not mentioned in the Order. The same goes for Dr. Baker's testimony,
3 which would have gone towards damages and causation of damages, as the speed of the vehicles
4 and the forces imparted to Plaintiff's vehicle are items which the jury could have considered as to
5 damages. Dr. Baker's testimony would also have gone towards impeachment and credibility of
6 Plaintiff, since the disparity in speeds based on scientific evidence is something the jury could have
7 taken into consideration for all aspects of the case, though Dr. Baker's testimony would also have
8 gone towards the impact actually suffered by Plaintiff, which opinion was greatly at odds with
9 Plaintiff's testimony as to the collision speed. For these reasons, the Order should be corrected,
10 reconsidered, or modified as requested by Defendant.

11 DATED this 14th day of November, 2019.

12 **WILSON, ELSER, MOSKOWITZ, EDELMAN**
13 **& DICKER LLP**

14 
15 **DAVID S. KAHN, ESQ.**

16 Nevada Bar No. 7038

17 **MARK SEVERINO, ESQ.**

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Eric.Larsen@thehartford.com

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Wilson Elser Moskowitz Edelman
3 & Dicker LLP, and that on this 14th day of November, 2019, I served a true and correct copy of
4 the foregoing **DEFENDANT CAPRIATI CONSTRUCTION CORP., INC.'S MOTION TO**
5 **CORRECT OR RECONSIDER DECISION AND ORDER, ENTERED ON NOVEMBER 5,**
6 **2018** as follows:

- 7 ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed
8 envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
9 ☒ via electronic means by operation of the Court's electronic filing system, upon each
10 party in this case who is registered as an electronic case filing user with the Clerk;
11 and/or
12 ☐ via hand-delivery to the addressees listed below.

13 Dennis M. Prince, Esq.
14 Tracy A. Eglet, Esq.
15 Kevin T. Strong, Esq.
16 **EGLET PRINCE**
17 400 S. 7th Street, 4th Floor
18 Las Vegas, Nevada 89101
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22 *Bahram Yahyavi*

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BAHRAM YAHYAVI

23 BY *Agnes R. Wong*
24 An Employee of WILSON, ELSER, MOSKOWITZ,
25 EDELMAN & DICKER LLP
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Steven D. Grierson

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3 Nevada Bar No. 5092
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12 Attorneys for Plaintiff
13 *Bahram Yahyavi*

DISTRICT COURT
CLARK COUNTY, NEVADA

11 BAHRAM YAHYAVI, an Individual,
12 Plaintiff,

13 vs.

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

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

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

18
19 PLEASE TAKE NOTICE that an Order Denying Defendant Capriati
20 Construction Corp, Inc.'s Motion to Correct or Reconsider Decision and Order, Entered
21 on November 5, [2019] was entered on the 3rd day of March, 2020 in the above-referenced

22 ...

23 ...

24 ...

25 ...

26 ...

27 ...

28 ...



1 matter, a copy of which is attached hereto.

2 DATED this 4 day of March, 2020.

3 PRINCE LAW GROUP

4 
5 DENNIS M. PRINCE

6 Nevada Bar No. 5092

7 KEVIN T. STRONG

8 Nevada Bar No. 12107

9 10801 W. Charleston Blvd., #560

10 Las Vegas, NV 89135

11 Attorneys for Plaintiff

12 *Bahram Yahyavi*



1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b), I certify that I am employee of PRINCE LAW GROUP,
3 and that on the 4 day of March, 2020, I caused the foregoing document entitled
4 NOTICE OF ENTRY OF ORDER DENYING DEFENDANT CAPRIATI
5 CONSTRUCTION CORP., INC.'S MOTION TO CORRECT OR RECONSIDER
6 DECISION AND ORDER, ENTERED ON NOVEMBER 5 [2019] to be served upon
7 those persons designated by the parties in the E-Service Master List for the above-
8 referenced matter in the Eighth Judicial District Court eFiling System in accordance
9 with the mandatory electronic service requirements of Administrative Order 14-2 and
10 the Nevada Electronic Filing and Conversion Rules, as follows:

11 David S. Kahn, Esq.
12 WILSON,ELSER, MOSKOWITZ, EDELMAN
13 & DICKER LLP.
14 300 South Fourth Street, 11th Floor
Las Vegas, NV 89101

15 Mark J. Brown, Esq.
16 LAW OFFICES OF ERIC R. LARSEN
17 750 E. Warm Springs Road
Suite 320, Box 19
Las Vegas, NV 89119

18 *Attorneys for Defendant*
19 *Capriati Construction Corp., Inc.*

20
21
22
23 An Employee of Prince Law Group
24
25
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28



Steven D. Grierson

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12 *Bahram Yahyavi*

8 **EIGHTH JUDICIAL DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

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

13 **vs.**

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

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

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

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

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



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Las Vegas, NV 89125

3/3/2020 *SD*

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

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

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

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

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

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

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

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

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

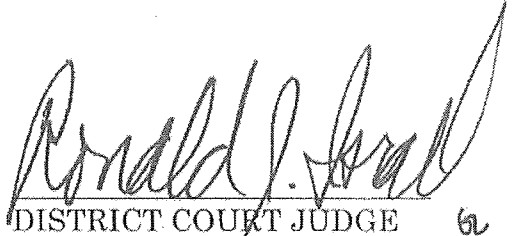
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ORDER

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

IT IS SO ORDERED.

DATED this 2 day of March, 2020.


DISTRICT COURT JUDGE

RONALD J. ISRAEL

DATED this 26th day of February, 2020.

DATED this ____ day of February, 2020.

Respectfully Submitted By:

Approved as to Form and Content:

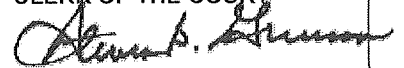
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11 Email: eservice@thedplg.com

12 Attorneys for Plaintiff

13 *Bahram Yahyavi*

14 DISTRICT COURT

15 CLARK COUNTY, NEVADA

16 BAHRAM YAHYAVI, an Individual,

17 Plaintiff,

18 vs.

19 CAPRIATI CONSTRUCTION CORP., INC., a
20 Nevada Corporation,

21 Defendant

CASE NO.: A-15-718689-C

DEPT. NO.: XXVIII

NOTICE OF ENTRY OF JUDGMENT

22 PLEASE TAKE NOTICE that the Judgment Upon the Jury Verdict was entered on October
23 18, 2019, a copy of which is attached hereto.

24 DATED this 22nd day of October, 2019.

25 **PRINCE LAW GROUP**

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Attorneys for Plaintiff

Bahram Yahyavi



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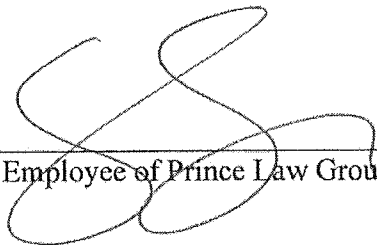
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am employee of PRINCE LAW GROUP, and that on the 22 day of October, 2019, I caused the foregoing document entitled NOTICE OF ENTRY OF JUDGMENT to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules, as follows:

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& DICKER LLP.
300 South Fourth Street, 11th Floor
Las Vegas, NV 89101

Mark J. Brown, Esq.
LAW OFFICES OF ERIC R. LARSEN
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Las Vegas, NV 89119

*Attorneys for Defendant
Capriati Construction Corp., Inc.*



An Employee of Prince Law Group

Steven D. Grierson

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Attorneys for Plaintiff
Bahram Yahyavi

DISTRICT COURT
CLARK COUNTY, NEVADA

BAHRAM YAHYAVI, an Individual,
Plaintiff,

vs.

CAPRIATI CONSTRUCTION CORP., INC., a
Nevada Corporation,
Defendant

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

JUDGMENT UPON THE JURY
VERDICT

This action was brought to trial in front of Department XXVIII of the Eighth Judicial District Court, The Honorable Ronald J. Israel presiding, and the jury. The issues having been duly tried and the jury having duly rendered its verdict:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff BAHRAM YAHYAVI, has and recovers from Defendant CAPRIATI CONSTRUCTION CORP., INC., the following sums:

PAST DAMAGES:

Past Medical and Related Expenses:	\$491,023.24
Past Loss of Wages and Earning Capacity:	+\$300,000.00
Past Pain, Suffering, Disability, and Loss of Enjoyment of Life:	+\$500,000.00
Total Past Damages:	\$1,291,023.24

<input type="checkbox"/> Non-Jury Disposed After Trial Start	<input type="checkbox"/> Jury Disposed After Trial Start
<input type="checkbox"/> Non-Jury Judgment Reached	<input checked="" type="checkbox"/> Jury Verdict Reached
<input type="checkbox"/> Transferred before Trial	<input type="checkbox"/> Other - _____



Prince Law Group
8816 Spanish Ridge
Las Vegas, NV 89148

10/15/19

1 **FUTURE DAMAGES:**

2	Future Medical and Related Expenses:	\$529,260.00
3	Future Loss of Wages and	
4	Earning Capacity:	+\$1,550,000.00
5	Future Pain, Suffering, Disability, and	
6	Loss of Enjoyment of Life:	<u>+\$2,500,000.00</u>
6	Total Future Damages:	\$4,579,260.00

7 **TOTAL DAMAGES:** \$5,870,283.24

8 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that Plaintiff's past
9 damages in the amount of One Million, Two Hundred Ninety-One Thousand, Twenty-Three Dollars
10 and 24/100 Cents (\$1,291,023.24) shall bear prejudgment interest in accordance with *Lee v. Ball*, 121
11 Nev. 391, 395-96, 116 P.3d 64, 67 (2005) at the rate of 7.50% per annum from the date of service of
12 the Summons and Complaint, August 20, 2015, through September 27, 2019, as follows:

13 **PREJUDGMENT INTEREST:**

13	August 20, 2015 THROUGH September 27, 2019 =	\$406,665.00
14	(1500 days x \$271.11 per day)	

15 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that this Judgment is
16 subject to future amendment in accordance with this Court's ruling on any motion brought by Plaintiff
17 for attorney's fees and costs accrued in the action, the amount of which will be determined by this
18 Court at that time.

19 ...

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1 NOW, THEREFORE, Judgment upon the Jury Verdict in favor of Plaintiff BAHRAM
2 YAHYAVI is hereby given for Six Million, Two Hundred Seventy-Six Thousand, Nine Hundred
3 Forty-Eight Dollars and 24/100 Cents (\$6,276,948.24) against Defendant CAPRIATI
4 CONSTRUCTION CORP., INC., which shall bear post-judgment interest at the legal rate until
5 satisfied, plus costs incurred as allowed by law.


6 DATED this 16 day of October, 2019.

7
8 
DISTRICT COURT JUDGE

9 RONALD J. ISRAEL
A-15-718689-C

10 Respectfully Submitted,

11 PRINCE LAW GROUP

12 
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17 Attorneys for Plaintiff
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13 *Bahram Yahyavi*

9 DISTRICT COURT

10 CLARK COUNTY, NEVADA

11 BAHRAM YAHYAVI, an Individual,
12 Plaintiff,

13 vs.

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

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

**NOTICE OF ENTRY OF DECISION
AND ORDER**

17 PLEASE TAKE NOTICE that a Decision and Order was entered on the 5th day of November,
18 2019, a copy of which is attached hereto.

19 DATED this 5th day of November, 2019.

20 **PRINCE LAW GROUP**

21 *[Signature]*
22 DENNIS M. PRINCE, ESQ.
23 Nevada Bar No. 5092
24 KEVIN T. STRONG
25 Nevada Bar No. 12107
26 8816 Spanish Ridge Avenue
27 Las Vegas, NV 89148
28 Attorneys for Plaintiff
Bahram Yahyavi



1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am employee of **PRINCE LAW GROUP**, and that on
3 the 5 day of November, 2019, I caused the foregoing document entitled **NOTICE OF ENTRY**
4 **OF DECISION AND ORDER** to be served upon those persons designated by the parties in the E-
5 Service Master List for the above-referenced matter in the Eighth Judicial District Court eFiling
6 System in accordance with the mandatory electronic service requirements of Administrative Order
7 14-2 and the Nevada Electronic Filing and Conversion Rules, as follows:

8 David S. Kahn, Esq.
9 WILSON,ELSER, MOSKOWITZ, EDELMAN
& DICKER LLP.
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12 Mark J. Brown, Esq.
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Las Vegas, NV 89119

15 *Attorneys for Defendant*
16 *Capriati Construction Corp., Inc.*

17
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19 An Employee of Prince Law Group
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Steven D. Grierson

1 JUDGE RONALD J. ISRAEL
2 EIGHTH JUDICIAL DISTRICT COURT
3 DEPARTMENT 28
4 Regional Justice Center
200 Lewis Avenue, 15th Floor
Las Vegas, Nevada 89155

5
6 DISTRICT COURT
7 CLARK COUNTY, NEVADA

8 Bahram Yahyavi,
9 Plaintiff,

Case No.: A-15-718689-C

Dept.: XXVIII

10 v.

11 Capriati Construction Corp., Inc.,
12 Defendant.
13

14
15 DECISION AND ORDER
16

17 On September 9, 2019 through September 27, 2019, this Court conducted a jury trial
18 in the case of Bahram Yahyavi v. Capriati Construction Corp., Inc. Plaintiff Bahram Yahyavi
19 was represented by Dennis M. Prince and Kevin T. Strong and Defendant Capriati
20 Construction was represented by David S. Kahn and Mark James Brown. On September 26,
21 2019, this Court conducted a hearing to address sanctions for Defense counsel's misconduct
22 during the jury trial.

23 The factual history of this case is as follows: On June 19, 2013, Defendant's
24 employee was driving a fork lift truck with the forks sticking out and collided with Plaintiff
25 who was driving a company-owned vehicle on city streets. Plaintiff filed the complaint on
26 May 20, 2015 and trial commenced on September 9, 2019. On September 25, 2019, during
27 his case in chief, Defense counsel asked Defendant's corporate representative Cliff Goodrich,
28 "Between the date of the accident and today, did anything major happen to your company?"

1 The witness responded, "Yes, we filed for a reorganization in 2015" and Plaintiff's counsel
2 immediately objected. This Court has concluded that Defense counsel intentionally solicited
3 testimony from the witness concerning Defendant's bankruptcy.

4 In the third week of trial, after the same witness who was Defendant's corporate
5 representative testified at length in Plaintiff's case in chief, Mr. Goodrich was called as a
6 witness in Defendant's case. The very first question was "Between the date of the accident
7 and today, did anything major happen to your company?" At that point, Mr. Goodrich's
8 immediate answer was "Yes, we filed for reorganization in 2015." This Court attached as a
9 court's exhibit the JAVS video which clearly shows that the question and answer were
10 prepared in advance.

11 After Plaintiff's counsel objected, the jury was excused and Defense counsel
12 proffered that he thought bankruptcy was a legitimate issue since the file for the employee
13 who drove the forklift that caused the accident was missing possibly due to the bankruptcy.¹
14 This explanation is simply not credible. This is one of the most severe abuses by counsel that
15 this Court has seen.

16 **A. Defense Counsel's Misconduct Warrants a Curative Instruction to the Jury.**

17 The Nevada Supreme Court has held that when an attorney commits misconduct and
18 the opposing party objects, the district court should admonish the jury and counsel about the
19 impropriety of counsel's misconduct and should reprimand counsel for their misconduct.
20 *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 75, 319 P.3d 606, 611-12 (2014). Here,
21 Defense counsel committed misconduct when he intentionally solicited testimony about
22 Defendant's bankruptcy. On February 6, 2018, Defendant filed a motion for final decree in
23 bankruptcy court to close its Chapter 11 case because it "was able to turn itself profitable"
24 and paid all outstanding fees to its debtors. The bankruptcy court granted Defendant's motion
25 in its entirety on March 26, 2018. Now, eighteen months later, Defense counsel chose to
26
27

28 ¹ Although not addressed, it stretches credulity to believe that a bankruptcy would result in the loss of computer records to an ongoing business.

1 bring up the bankruptcy, leading the jury to consider the Defendant's financial position
2 despite its irrelevance and the closing of the bankruptcy.

3 Given Defense counsel's misconduct, this Court found it necessary to admonish the
4 jury about the impropriety of such misconduct and to reprimand Defense counsel.

5 Accordingly, this Court admonished the jury on September 26, 2019:

6 You were instructed to disregard the question and answer, which is hereby
7 stricken from these proceedings. Defendant is no longer in bankruptcy and is
8 now profitable. You are further instructed not to consider whether the
9 Defendant filed for bankruptcy for any reason, and it should have no effect on
10 your verdict. You should not even discuss that when you go back to
11 deliberate. Further by seeking to introduce such irrelevant evidence, counsel
12 for the Defendant, Mr. Kahn, committed willful misconduct. Mr. Kahn is
13 hereby reprimanded for his misconduct and admonished not to engage in any
14 further misconduct.

15 **B. The *Young v. Riblero* Factors Weigh Heavily in Favor of Sanctions for**
16 **Defense Counsel's Misconduct.**

17 The Nevada Supreme Court has stated: "Courts by their nature have 'inherent
18 equitable powers to dismiss actions or enter default judgments...for abusive litigation
19 practices.'" *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990).
20 When a court does not impose ultimate discovery sanctions such as dismissal, it may hold a
21 hearing to consider matters that are important to the imposition of sanctions. *Bahena v.*
22 *Goodyear Tire & Rubber Co.*, 126 Nev. 243, 256, 235 P.3d 592, 600-01 (2010). The district
23 court should exercise its discretion to ensure that there is sufficient information to support
24 these sanctions. *Id.* Further, the district should make its conclusions based on the factors set
25 forth in *Young. Id.*

26 The court in *Young* states which factors are relevant to determine whether to strike an
27 answer. The factors a court might consider include, but are not limited to: 1) the degree of
28 willfulness of the offending party, 2) the extent to which the non-offending party would be
prejudiced by a lesser sanction, 3) the severity of the sanction of dismissal relative to the
severity of the discovery abuse, 4) whether any evidence has been irreparably lost, 5) the
feasibility and fairness alternative, less severe sanctions, 6) the policy favoring adjudication

1 on the merits, 7) whether sanctions unfairly operate to penalize a party for misconduct of his
2 or her attorney, 8) the need to deter both the parties and future litigants from similar abuses.
3 *Young*, 106 Nev. at 93, 787 P.2d at 780.

4 **1. The degree of willfulness of the offending party**

5 Defense counsel's intentional misconduct in soliciting testimony concerning
6 Defendant's bankruptcy is one of the most serious abuses this Court has seen. Defense
7 counsel's question was phrased in a way to elicit testimony from Mr. Goodrich that the
8 Defendant filed for bankruptcy. This case was already two weeks into trial when Defense
9 counsel alerted the jury about Defendant's financial state by soliciting testimony regarding
10 the bankruptcy. Defense counsel's actions lead the Court to believe that Defense counsel
11 wanted to force a mistrial or wanted to influence the jury by way of sympathy for the
12 Defendant.

13 At the hearing for sanctions, Defense counsel stated that the purpose of the question
14 was related to the reduction of workforce to respond to information during Plaintiff's case in
15 chief that the Defendant willfully destroyed documents. The Court does not find this
16 testimony credible. There was no time between the question and the answer for this Court to
17 conclude anything else other than that Defense counsel solicited the testimony about the
18 bankruptcy. Further, Defense counsel is a senior partner at a national firm and should have
19 known that he could not solicit testimony about irrelevant evidence that would prejudice the
20 Plaintiff. It is important to note that liability was never an issue because the forklift driver
21 admitted that he was not authorized to drive the forklift and testified that the accident was his
22 fault. Thus, Defense counsel's actions were willful.

23 **2. The extent to which the non-offending party would be prejudiced by a lesser**
24 **sanction**

25 To sanction Defense counsel's conduct, this Court is striking the answer as to
26 liability, striking witness Mr. Goodrich's testimony about the bankruptcy, and striking
27 Defendant's remaining witnesses. Since liability was not an issue, striking the answer as to
28 liability was no sanction at all, and therefore the additional sanction of excluding Defendant's

1 rebuttal witness was a reasonable and minimal sanction. Further, since the Plaintiff argued it
2 would suffer substantial harm if a mistrial was declared, Plaintiff requested a curative jury
3 instruction that if any damages were awarded there was insurance to cover the verdict.
4 Insurance coverage should generally be excluded and this Court gave the standard jury
5 instruction that jurors are not to consider whether Plaintiff or Defendant have insurance.
6 Nonetheless, this Court felt that the only way to cure the issue was to give the added
7 instruction.

8 This Court is not imposing the ultimate sanction of striking the Defendant's Answer
9 and proceeding to a prove-up hearing. Nonetheless, Plaintiff has been prejudiced because the
10 jury became aware of the Defendant's bankruptcy and Plaintiff cannot make the jurors forget
11 that information. This is a case about damages against a company. The fact that the company
12 underwent bankruptcy is extremely prejudicial to the Plaintiff because it directly impacts the
13 juror's decision regarding the amount of damages to award. Any lesser sanction than what
14 this Court has imposed would further prejudice the Plaintiff and thus the sanctions here are
15 appropriate.

16 **3. The severity of the sanction relative to the abuse**

17 This Court is striking the defense of liability and allowing the parties to try the case
18 on damages. The severity of the sanction is equal to Defense counsel's intentional
19 misconduct when soliciting testimony about Defendant's bankruptcy. Further, Defense
20 counsel concedes that this Court's sanctions against the Defendant are appropriate: "I believe
21 what Mr. Prince has proposed as curative is sufficient, striking the answer. And even if the
22 answer is stricken, I still think Capriati Construction should have the ability to argue
23 damages with these curative instructions." Therefore, Defense counsel's intentional
24 misconduct warrants the severity of the sanctions imposed.

25 **4. Whether any evidence had been irreparably lost**

26 So far as this Court is aware, there is no evidence that has been lost.
27
28

1 **5. The feasibility and fairness of less severe sanctions**

2 This Court is imposing a lesser sanction than striking the answer completely and
3 proceeding to a prove-up hearing. This Court's decision to strike the answer as to liability, to
4 strike the witness who testified about the bankruptcy, and to strike Defendant's remaining
5 witnesses is fair in light of Defense counsel's misconduct.

6 **6. The policy favoring adjudication on the merits**

7 The Supreme Court favors adjudication on the merits but abusive litigation practices
8 must face sanctions. Under these facts of this case any lesser sanctions would encourage
9 further abuse. Defense counsel's misconduct was willful and thus warrants sanctions.

10 **7. Whether sanctions unfairly operate to penalize a party for misconduct of his**
11 **or her attorney**

12 In this case, the sanctions for Defense counsel's misconduct do not unfairly penalize
13 Defendant Capriati Construction because Defendant faces no monetary loss whatsoever. This
14 matter is the subject of an order from the bankruptcy court to lift the stay in order to proceed
15 against the insurance policies. Capriati Construction is only a figurehead in this case and
16 does not face any monetary loss. The fact that the bankruptcy stay has been lifted does not
17 allow the Plaintiff to proceed for money against Capriati Construction. Accordingly, this
18 Court's decision to impose sanctions for Defense counsel's misconduct does not operate to
19 unfairly penalize Defendant.

20 **8. The need to deter both parties and future litigants from similar abuses**

21 Defense counsel's misconduct was intentional and serious; therefore, there must be
22 serious and far reaching sanctions in order to deter Defense counsel from even considering
23 repeating their actions again. Information about the Defendant's financial condition distracts
24 the jury from reaching an impartial decision regarding the amount of damages, if any, to
25 award the Plaintiff in a personal injury trial. A jury must fairly evaluate the evidence
26 presented to them without regard to the financial position of the parties. A party's attempt to
27 secure a verdict not based on the evidence will have major consequences. This Court finds
28

JUDGE RONALD J. ISRAEL

EIGHTH JUDICIAL DISTRICT COURT
DEPARTMENT 28

1 that deterrence is necessary to prevent future abuse and thus the sanctions imposed are
2 necessary and appropriate.

3 IT IS HEREBY ORDERED that Defendant's Answer and Affirmative Defenses on
4 Liability are STRICKEN. The Jury Trial on damages will proceed as scheduled.

5 IT IS FURTHER ORDERED that witness Cliff Goodrich's testimony is STRICKEN
6 and that Defendant's remaining witnesses are STRICKEN.

7
8 DATED November 5 October 2019.



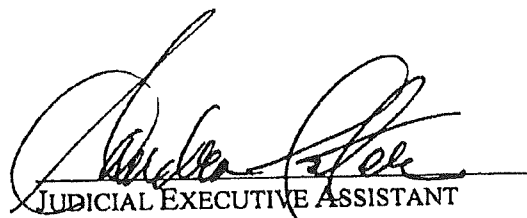
DISTRICT COURT JUDGE

RONALD J. ISRAEL

A-15-718689-C

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of November, 2019, a copy of this **DECISION AND ORDER** was electronically served to all registered parties in the Eighth Judicial District Court Electronic Filing Program per the attached Service Contacts List:



JUDICIAL EXECUTIVE ASSISTANT
SANDRA JETER
A-15-718689-C

File Into Existing Case

Service Contacts: A-15-718689-C				
Case Number	Name	Location	Description	Case Type
A-15-718689-C	Malik W Ahmad	Department 20	Bahram Yahyavi, Plaintiff...	Intelligence - Auto
	▼ Party: Bahram Yahyavi - Plaintiff			
© 2019 Tyler Technologies Version: 2018.1.7.0.80	E Service			
	▼ Party: Capriati Construction Corp Inc - Defendant			
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	Efile Las Vegas			efilelasvegas@wilsonelser.com
	Mark Severino			mark.severino@wilsonelser.com
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	1	10	Items per page	1 - 3 of 3 Items



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12 Attorneys for Plaintiff
13 *Bahram Yahyavi*

14 **DISTRICT COURT**
15 **CLARK COUNTY, NEVADA**

16 **BAHRAM YAHYAVI, an Individual,**
17 **Plaintiff,**

18 **vs.**

19 **CAPRIATI CONSTRUCTION CORP.,**
20 **INC., a Nevada Corporation,**
21 **Defendant**


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

NOTICE OF ENTRY OF ORDER
GRANTING, IN PART AND
DENYING, IN PART, DEFENDANT
CAPRIATI CONSTRUCTION
CORP., INC.'S MOTION TO RE-
TAX COSTS

22 PLEASE TAKE NOTICE that an Order Granting, in Part and Denying, in Part,
23 Defendant Capriati Construction Corp., Inc.'s Motion to Re-Tax Costs was entered on
24 the 3rd day of March, 2020 in the above-referenced matter, a copy of which is attached
25 hereto.

26 DATED this 4 day of March, 2020.

PRINCE LAW GROUP



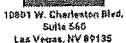
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*Attorneys for Defendant
Capriati Construction Corp., Inc.*

An Employee of Prince Law Group



Steven D. Grierson

1 **ORDER**
2 **DENNIS M. PRINCE**
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5 Nevada Bar No. 12107
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11 Attorneys for Plaintiff
12 *Bahram Yahyavi*

8 **EIGHTH JUDICIAL DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

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

13 **vs.**

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

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

ORDER GRANTING, IN PART
AND DENYING, IN PART,
DEFENDANT CAPRIATI
CONSTRUCTION CORP., INC.'S
MOTION TO RE-TAX COSTS

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

26 **THE COURT HEREBY FINDS** that pursuant to NRS 18.020(3), Plaintiff
27 Bahram Yahyavi ("Plaintiff") shall recover costs incurred as the prevailing party against
28 Defendant Capriati Construction Corp., Inc. ("Defendant").



[Signature]

Order Granting, in Part and Denying, in Part, Defendant's Motion to Re-Tax Costs

1 **THE COURT FURTHER FINDS** that Plaintiff's October 22, 2019
2 Memorandum of Costs and Disbursements shall be re-taxed as follows:

3 1. Plaintiff withdraws the cost incurred for Forensic Dynamics, Inc. in the
4 amount of \$22,205.09.

5 2. Plaintiff withdraws the cost incurred for Desert Orthopedic Center (Dr.
6 Perry/Dr. Miao) in the amount of \$2,500.00.

7 3. Plaintiff withdraws 1/3 (\$975.00) of the cost incurred for Terrence
8 Clauretie, Ph.D. in the amount of \$2,925.00. The total taxable cost Plaintiff shall recover
9 for Dr. Clauretie is \$1,950.00.

10 4. Plaintiff withdraws the cost incurred for JAMS mediation fees in the
11 amount of \$6,082.92.

12 5. David Oliveri, M.D.'s cost of \$41,550.00 shall be reduced by \$2,756.25 (25%
13 off the \$11,025.00 cost for Dr. Oliveri to prepare his first expert report). The total
14 taxable cost Plaintiff shall recover for Dr. Oliveri is \$38,793.75.

15 6. Certified Vocational Rehabilitation's cost of \$14,308.75 shall be reduced by
16 \$2,617.50. The total taxable cost Plaintiff shall recover for Certified Vocational
17 Rehabilitation is \$11,691.25.

18 7. The cost incurred for Record Reform in the amount of \$1,960.00 shall not
19 be recovered as a taxable cost.

20 **THE COURT FURTHER FINDS** that the cost incurred for Stuart Kaplan, M.D.
21 in the amount of \$26,500.00 shall be recovered, in full, by Plaintiff as a taxable cost.

22 **THE COURT FURTHER FINDS** that the cost incurred for in-house
23 photocopying in the amount of \$4,243.40 and outside copying services in the amount of
24 \$4,993.81 shall be recovered, in full, by Plaintiff as a taxable cost.

25 **THE COURT FURTHER FINDS** that the costs incurred for court reporter
26 services in the amount of \$16,144.39 shall be recovered, in full, by Plaintiff as taxable
27 costs.

28 **THE COURT FURTHER FINDS** that the cost incurred for Legal Retrieval
Services in the amount of \$8,613.32 shall be recovered, in full, by Plaintiff as a taxable
cost.

Order Granting, in Part and Denying, in Part, Defendant's Motion to Re-Tax Costs

1 **THE COURT FURTHER FINDS** that the cost incurred for Litigation Services
2 – Trial Tech Support in the amount of \$22,345.00 shall be recovered, in full, by Plaintiff
3 as a taxable cost.

4 **THE COURT FURTHER FINDS** that the total cost for The Record Exchange
5 (trial transcripts) in the amount of \$1,710.65 shall be recovered, in full, by Plaintiff as a
6 taxable cost.

7 **THE COURT FURTHER FINDS** that all the remaining costs listed in
8 Plaintiff's October 22, 2019 Memorandum of Costs and Disbursements shall be
9 recovered, in full, as taxable costs because Defendant did not challenge the value of those
10 costs.

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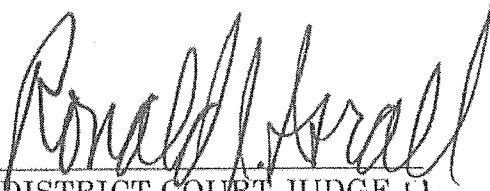
ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant Capriati Construction Corp., Inc.'s Motion to Re-Tax Costs is **GRANTED, IN PART** and **DENIED, IN PART** in accordance with the findings above.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff shall recover costs incurred against Defendant in the total amount of \$159,072.60.

IT IS SO ORDERED.

DATED this 2 day of March, 2020.


DISTRICT COURT JUDGE W RONALD J. ISRAEL

DATED this 26th day of February, 2020.

DATED this day of February, 2020.

Respectfully Submitted By:

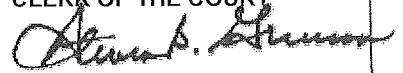
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13 *Bahram Yahyavi*

DISTRICT COURT
CLARK COUNTY, NEVADA

11 BAHRAM YAHYAVI, an Individual,
12 Plaintiff,

13 vs.

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

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

NOTICE OF ENTRY OF ORDER
GRANTING, IN PART AND
DENYING, IN PART, PLAINTIFF'S
MOTION FOR ATTORNEY'S FEES,
COSTS AND INTEREST

17 PLEASE TAKE NOTICE that an Order Granting, in Part and Denying, in Part,
18 Plaintiff's Motion for Attorney's Fees, Costs and Interest was entered on the 3rd day of
19 March, 2020 in the above-referenced matter, a copy of which is attached hereto.

20 DATED this 4 day of March, 2020.

21 PRINCE LAW GROUP



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23 Nevada Bar No. 5092

24 KEVIN T. STRONG

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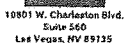
Bahram Yahyavi



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*Attorneys for Defendant
Capriati Construction Corp., Inc.*

An Employee of Prince Law Group



Steven D. Grierson

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12 *Bahram Yahyavi*

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

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

13 **vs.**

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

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

ORDER GRANTING, IN PART
AND DENYING, IN PART,
PLAINTIFF'S MOTION FOR
ATTORNEY'S FEES, COSTS,
AND INTEREST

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

26 **THE COURT HEREBY FINDS** that NRCP 68 allows the prevailing party to
27 recover attorney's fees, costs, and interest if the opposing party rejects an offer of
28 judgment and fails to obtain a more favorable judgment at trial.

[Signature] (B)



Order Granting, in Part and Denying, in Part, Plaintiff's Motion for Attorney's Fees

1 THE COURT FURTHER FINDS that this Court has the discretion to
2 determine the amount of attorney's fees and costs recoverable, but must evaluate the
3 following factors when determining any award of attorney's fees and costs:

4 (1) whether the plaintiff's claim was brought in good faith;

5 (2) whether the offeror's offer of judgment was brought in
6 good faith;

7 (3) whether the offeree's decision to reject the offer and
8 proceed to trial was grossly unreasonable or in bad faith;
9 and

(4) whether fees sought by the offeror are reasonable and
justified in amount.

10 *Beattie v. Thomas*, 99 Nev. 579, 588-89 (1983); see also, *Uniroyal Goodrich Tire Co. v.*
11 *Mercer*, 111 Nev. 318, 323 (1995).

12 THE COURT FURTHER FINDS that the first *Beattie* factor supports this
13 Court to award attorney's fees. Plaintiff Bahram Yahyavi's ("Plaintiff") injury claim was
14 brought in good faith, which Defendant Capriati Construction Corp., Inc. ("Defendant")
15 does not dispute. However, Defendant maintained several affirmative defenses
16 disputing liability throughout the trial that were not brought in good faith because no
17 evidence supported them. These affirmative defenses were that Plaintiff's comparative
18 negligence caused the subject collision and that a third-party over whom Defendant had
19 no control caused or contributed to the subject collision. Defendant's corporate
20 representative, Clifford Goodrich ("Goodrich"), testified at trial that Defendant's forklift
21 operator, Joshua Arbuckle ("Arbuckle"), caused the subject collision. Goodrich further
22 testified that he did not possess any evidence to support Defendant's affirmative
23 defenses.

24 Arbuckle testified at trial that he caused the subject collision. Although Arbuckle
25 testified that he always believes two parties are at fault in a motor vehicle collision, he
26 failed to provide any evidence to establish that Plaintiff was at fault for the collision in
27 any way. Arbuckle's testimony that Plaintiff failed to activate his turn signal at the
28 time of the subject collision to imply that Plaintiff was comparatively negligent was
based on speculation. Arbuckle testified that he was unable to see if Plaintiff's turn
signal was activated before the collision because his vision became obstructed when

Order Granting, in Part and Denying, in Part, Plaintiff's Motion for Attorney's Fees

1 Plaintiff's vehicle was less than four hundred feet away from the intersection where the
2 collision occurred. The evidence provided at trial established that Defendant was liable
3 for the subject collision and that liability should not have been in dispute.

4 **THE COURT FURTHER FINDS** that the second *Beattie* factor supports this
5 Court to award attorney's fees because the offer of judgment was brought in good faith.
6 On January 18, 2019, Plaintiff served his Offer of Judgment to Defendant in the amount
7 of \$4,000,000.00, inclusive of costs of suit, attorney's fees, and pre-judgment interest.
8 At that time, Plaintiff's past medical expenses were over \$400,000.00 and his future
9 medical expenses were over \$87,000.00. Plaintiff's future loss of earning capacity
10 damages exceeded \$2,000,000.00. As such, Plaintiff's Offer of Judgment was reasonable
11 in both timing and amount.

12 **THE COURT FURTHER FINDS** that the third *Beattie* factor supports this
13 Court to award attorney's fees because Defendant's decision to reject Plaintiff's Offer of
14 Judgment was grossly unreasonable given the facts of the case. Defendant disputed
15 liability even though Arbuckle admitted that he caused the subject collision. Defendant
16 also underestimated the nature of the subject collision and the severity of Plaintiff's
17 injuries suffered as a result. Arbuckle testified that Plaintiff was incoherent
18 immediately after the subject collision and that the impact from the collision was hard
19 for Plaintiff, who drove a Dodge Charger. While Defendant relied on Plaintiff's lone
20 prior neck pain complaint to dispute causation, this defense did not justify Defendant's
21 rejection of Plaintiff's January 18, 2019 Offer of Judgment. The unreasonableness of
22 Defendant's rejection is further established by the jury's verdict of \$5,870,283.24, nearly
23 \$2,000,000.00 higher than Plaintiff's Offer of Judgment.

24 **THE COURT FURTHER FINDS** that the fourth *Beattie* factor addresses
25 whether the attorney's fees sought are reasonable and justified in amount. When
26 determining the amount of fees to award, this Court is free to consider any method that
27 provides a reasonable amount, including a contingency fee. *Shuette v. Beazer Homes*
28 *Holdings Corp.*, 121 Nev. 837, 864 (2005). A trial court "can award attorney fees to the
prevailing party who was represented under a contingency fee agreement, even if there

Order Granting, in Part and Denying, in Part, Plaintiff's Motion for Attorney's Fees

1 are no hourly billing records to support the request." *O'Connell v. Wynn Las Vegas, LLC*,
2 429 P.3d 664, 671 (Nev. Ct. App. 2018).

3 This Court will award Plaintiff his forty percent (40%) contingency fee. There is
4 no limitation regarding the method an individual chooses to pay his attorney. Personal
5 injury victims frequently do not have the money to pursue their cases against
6 defendants, who have the benefit of their insurance companies funding their defense.
7 Contingency fee agreements allow personal injury plaintiffs to level the playing field by
8 ensuring that their attorneys can expend the costs necessary to prosecute their cases
9 against defendants. There is also an inherent risk of nonpayment associated with
10 accepting cases on a contingency fee that justifies a contingency fee award when an
11 attorney is successful at trial. This case was a complex matter that not only involved
12 disputes as to causation and damages, but also issues of worker's compensation. The
13 complexities of this case resulted in trial testimony from eight (8) witnesses. There was
14 a substantial amount of money at stake given the cost for Plaintiff's past medical
15 treatment exceeded \$400,000.00, his future medical treatment exceeded \$500,000.00,
16 and his future loss of earnings were in excess of \$2,000,000.00. As a result, it was
17 certainly reasonable that Plaintiff's counsel devoted substantial time and resources to
18 try this case. No method is available for this Court to apportion any attorney's fee award
19 because Defendant never served an offer of judgment for a reasonable amount before
20 trial commenced. All these facts justify a 40% contingency fee award in this matter.

21 **THE COURT FURTHER FINDS** that the factors set forth in *Brunzell v. Golden*
22 *Gate Nat'l Bank*, 85 Nev. 345, 349-50 (1969) establish the reasonableness of the 40%
23 contingency fee amount. The qualities of Plaintiff's counsel, Dennis M. Prince, justify
24 the amount of the requested contingency fee award. Mr. Prince has practiced almost
25 exclusively as a personal injury attorney for 27 years and has tried more than 100 cases
26 to jury verdict. He has achieved a level of success and experience that justifies a 40%
27 contingency fee award in this matter. The character of the work performed by Mr.
28 Prince also supports a 40% contingency fee award. Mr. Prince devoted substantial time,
effort, and skills to fully understand the nature and extent of Plaintiff's injuries suffered
as a result of the subject collision and Plaintiff's care and treatment. Mr. Prince's vast



Order Granting, in Part and Denying, in Part, Plaintiff's Motion for Attorney's Fees

1 knowledge allowed him to comprehensively examine and cross-examine the medical
2 doctors who testified in this case to clarify the medical issues to the jury. The quality,
3 character, and extent of Mr. Prince's work performed in this case culminated in a jury
4 verdict that totaled \$5,870,283.24, nearly \$2,000,000.00 higher than Plaintiff's January
5 18, 2019 Offer of Judgment. The work Mr. Prince performed to achieve the result
6 obtained at trial justifies a 40% contingency fee award, particularly given the
7 complexities of the case.

8 **THE COURT FURTHER FINDS** that Plaintiff shall not recover penalty costs
9 or penalty prejudgment interest pursuant to former NRCP 68(f)(2).¹ Both the former
10 and current version of NRCP 68 allows for the recovery of costs and interest incurred
11 after service of the offer of judgment as a penalty. However, Plaintiff is also allowed to
12 recover those same costs and interest as the prevailing party pursuant to NRS 18.020(3)
13 and NRS 17.130(2), respectively. When read together, NRS 18.020(3), NRS 17.130(2),
14 and NRCP 68 allow Plaintiff to recover all costs and interest incurred after the
15 expiration of the January 18, 2019 Offer of Judgment twice as a penalty. However, such
16 a result contravenes Nevada law prohibiting double recoveries, albeit in contexts that
17 are distinct from this precise issue.

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¹ At the time of Plaintiff's January 18, 2019 Offer of Judgment, the amended Nevada Rules of Civil Procedure were not in effect.

Order Granting, in Part and Denying, in Part, Plaintiff's Motion for Attorney's Fees

ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion for Attorney's Fees, Costs, and Interest is **GRANTED, IN PART** and **DENIED, IN PART**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff shall receive an attorney's fee award in the amount of \$2,510,779.30 (40% contingency fee on the judgment amount of \$6,276,948.24).

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff shall not recover taxable penalty costs, separate and apart from the costs accounted for in Plaintiff's Memorandum of Costs, incurred from January 18, 2019 to October 18, 2019, in the amount of \$105,716.82.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff shall not recover penalty interest in the amount of \$312,968.45.

IT IS SO ORDERED.

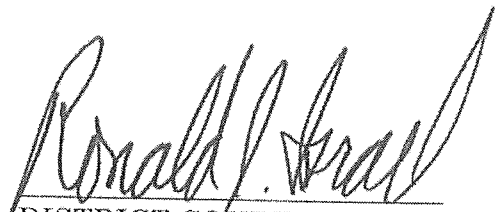

DATED this 2 day of March, 2020.

DATED this 20th day of February, 2020.

Respectfully Submitted By:

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Bahram Yahyavi


DISTRICT COURT JUDGE  RONALD J. ISRAEL

DATED this ____ day of February, 2020.

Approved as to Form and Content:

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