IN THE SUPREME COURT OF THE STATE OF NEVADA

CAPRIATI CONSTRUCTION CORP., INC., a Nevada Corporation Appellant, v. BAHRAM YAHYAVI, an individual, Respondent.	)	Supreme Court No: 80107 District Court Case No: A718489
CAPRIATI CONSTRUCTION CORP., INC., a Nevada Corporation Appellant, v. BAHRAM YAHYAVI, an individual, Respondent.	)	Supreme Court No: 80821

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(1), and must be disclosed:

Appellant Capriati Construction Corp, has no parent company and is not publically traded. There is no publically traded company that owns more than 10% of the stock of Capriati Construction Corp.

The attorneys who have appeared on behalf of appellant/respondent in this Court and in district court are:

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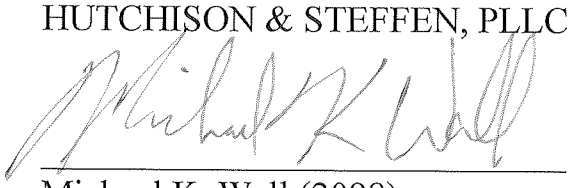
These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 12 day of August, 2020.

HUTCHISON & STEFFEN, PLLC.



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JURISDICTIONAL STATEMENT

Docket No. 80107 is an appeal from a final judgment on a jury verdict, entered on October 22, 2019. AA 198. It is appealable as under NRAP 3A(b)(1). *Id.*

Docket No. 80107 is also an appeal from a post-judgment decision and order for sanctions, entered on November 5, 2019. AA 545. This order does not impose sanctions; the sanctions were imposed during trial. But this order purports to explain the reasons the sanctions were imposed, and is the only written order regarding the sanctions. *Id.* This order was entered post-judgment and purports to impose sanctions; thus, it appears to qualify as a special order after final judgment. NRAP 3A(b)(8).

Appellant Capriati Construction Corporation, Inc. ("Capriati") filed a notice of appeal from the final judgment and from the post-judgment order on November 26, 2019. AA 584

On November 18, 2019, Capriati filed a motion for a new trial. AA 565. This qualifies as a timely tolling motion. NRAP 4(a)(4). On November 14, 2019, Capriati filed a motion to correct or reconsider the decision and order entered on November 5, 2019. AA 554. Whether this motion qualifies as a tolling motion is open to debate. There is, however, no need to resolve this issue, because it is not relevant.

On March 3, 2020, the district court entered separate orders denying Capriati's motion for a new trial and Capriati's motion to correct or reconsider the decision and order entered on November 5, 2019. AA 1000; 1009.

Pursuant to NRAP 4(a)(6), Capriati's notice of appeal filed November 26, 2019, is timely and invokes the appellate jurisdiction of this Court with respect to the final judgment, and the post-judgment order entered on November 5, 2019. NRAP 4(a)(1).

On March 3, 2020, the district court entered orders resolving two additional post-judgment motions regarding attorney's fees and costs. AA 1015; 1021. The entry of the four orders of March 3, 2020, commenced the running of the time to appeal from the final judgment, as well as from the appealable post-judgment orders. Notices of entry of these orders were served on Capriati electronically on March 4, 2020. AA 998; 1006; 1013; 1019.

On March 13, 2020, appellant filed an amended notice of appeal from the final judgment, and included in that notice all other orders that are appealable at this time. AA 1027. Specifically, plaintiff has appealed from the following judgments and orders:

1. Final judgment on the jury verdict; October 22, 2019.

2. Post-judgment decision and order (for sanctions); November 5, 2019.[1]

3. Post-judgment order denying motion for a new trial; March 3, 2020. NRAP 3A(b)(2).

4. Post-judgment order granting and denying motion to retax costs; March 3, 2020. NRAP 3A(b)(8).

5. Post-judgment order granting and denying motion for attorney's fees; March 3, 2020. NRAP 3A(b)(8).

The amended notice of appeal was separately docketed as Case No. 80821. The notice of appeal is timely pursuant to NRAP 4(a).

On May19, 2020, this Court consolidated these appeals for all appellate purposes.

ROUTING STATEMENT

No section of NRAP 17(a) or (b) applies directly to this appeal. By negative implication, NRAP 17(b)(5) suggests that this case should be retained by this Court. Although this appeal arises from a personal injury action resulting from an automobile accident, with fees and costs, the amount of the judgment exceeds $8

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[1]If this order is not appealable as a special order after final judgment, NRAP 3A(b)(8), it is nevertheless reviewable at this time because (1) although entered after final judgment, it explained and made final an oral order that was carried into effect before entry of the final judgment, and is integral to the final judgment; (2) it was again reviewed by the district court pursuant to the motion to correct, and was confirmed; and (3) it was entered prior to the time the final judgment became final and appealable due to tolling motions. *See Mardian v. Greenberg Family Tr.*, 131 Nev. 730, 733, 359 P.3d 109, 111 (2015) (this Court reviews in appeal from final judgment all prejudgment orders that led to final judgment).

million. The jury's verdict in this case was the result of a mid-trial sanction for alleged attorney misconduct. Three weeks into the trial, based on a single question and answer, the district court partially struck Capriati's answer, did not allow Capriati to present its case-in-chief, and gave the case to the jury on a directed verdict. A jury instruction is erroneous as a matter of law, and contributed to the size of the verdict. Thus, this case involves primarily legal issues for resolution by this Court. More importantly, this case addresses a policy issue of first impression in this Court. The Court of Appeals has partially addressed the issue, but Capriati suggests a decision from this Court is needed.

STATEMENT OF THE CASE

These are consolidated appeals from a final judgment and from several appealable post-judgment orders, including a post-judgment order awarding attorney's fees and costs. Eighth Judicial District Court, Clark County, Department XXVIII, the Honorable Ronald J. Israel, District Judge.

INTRODUCTION

Although this case involves some complicated legal issues and a large verdict, the underlying litigation is a routine motor vehicle accident. Plaintiff was driving a car from one car lot to another. As he rounded a curve making a right turn on a road that is an access way between major streets, he ran into at least one of the forks of an industrial forklift driven by Joshua Arbuckle, an employee of

Capriati. The fork had intruded past the construction cones into the travel lane; Arbuckle caused the accident.

The collision resulted in alleged personal injuries, the severity and relate-ability of which were the subject of a jury trial. At issue was the credibility of plaintiff, who claimed never to have suffered neck pain before the accident, and that he was traveling 30 miles per hour.

When the trial began, plaintiff questioned Clifford Goodrich, Capriati's corporate representative, as to the loss or destruction of certain personnel files and related documents that had not been produced in discovery, suggesting that they were purposely withheld. No pretrial discovery issue had been raised regarding these documents, and no spoliation motion was ever filed. Plaintiff will claim that it never raised a spoliation issue at trial, and strictly speaking, this is true. Plaintiff merely raised the issue of the lost documents and planted in the minds of the jurors that Capriati had destroyed them, placing the issue before the jurors without the necessity of allowing the district court to rule on its spoliation issue in the first instance.

Capriati felt it needed to respond to set the record straight that the documents were lost during Capriati's bankruptcy, when the company was greatly reduced in manpower, or were disposed of in the ordinary course of business, so as to dispel the argument that the documents had been withheld. Capriati recalled

Goodrich as its first witness in its case in chief, and asked the single question of whether something big had happened to the company between the time of the accident and trial. Goodrich answered that the company "had petitioned for reorganization." Plaintiff objected.

The district court rejected Capriati's explanation that it brought up the reorganization to inform the jury of the reduction in personnel and the consequent innocent loss of documents. The district court concluded that Capriati's counsel asked the question intentionally to introduce the issue of bankruptcy in an effort to suggest that Capriati could not pay a verdict. The district court struck Capriati's answer as to liability, refused to allow Capriati to present its defense witnesses, and proceeded directly to closing arguments. The district court instructed the jury that Capriati had enough insurance to cover any verdict it might impose, no matter how high, and sent the jury to deliberate on the amount of damages only. The jury retruned a multimillion dollar verdict.

The district court's sanction was disproportional to counsel's conduct. The single mention of a reorganization could easily have been cured with a reprimand and an instruction to the jury to disregard the question and answer, and that the completed bankruptcy was not relevant to any issue in the case. The refusal to allow Capriati to present a defense as to damages was case-ending. To add to the error, the district court instructed the jury that Capriati's insurance would cover

any verdict. That instruction is wrong.

STATEMENT OF THE ISSUES

I. Whether the district court abused its discretion in striking Capriati's answer and not allowing Capriati's defense witnesses to testify.

II. Whether the defense-ending sanction imposed by the district court were too severe.

III. Whether the insurance instruction was wrong as a matter of law.

IV. Whether the District Court Abused Its Discretion in Awarding Attorney's Fees.

STATEMENT OF FACTS

I. Note on Trial Issues.

This matter involves an accident between a car and an industrial forklift. Although there was no issue as to who was at fault (Arbuckle was), there were issues as to the damages, and more particularly whether Yahyavi's medical special damages were caused by the accident.[2]

Yahyavi had informed a doctor at Southwest Medical less than two years

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[2]It is not the purpose of this brief to argue the causation and damages issues as to the evidence to support plaintiff's claims, except to the extent that the dispute gives context to the legal issues raised herein. This is not an appeal about whether the jury's verdict is supported by substantial evidence. This appeal presents only legal issues about whether the district court erred so severely as to render the verdict unreliable and void.

before this accident that he had suffered from neck pain for years.[3] But Yahyavi never informed any of his treating doctors of his prior neck pain, and because (in Capriati's view) Yahyavi had misrepresented the severity of the accident to his treating physicians and to the jury, Yahyavi's credibility was a primary issue. Indeed, it was the lynchpin of Capriati's defense.

The facts of the accident are agreed upon by both sides and are not in doubt. A forklift's fork impacted the passenger side of the vehicle driven by Yahyavi. The forces imparted, the causal connection between the accident and Yahyavi's medical claims, and Yahyavi's claim that the accident ended his ability to work in any capacity, were strongly disputed.

II. Factual Background

Capriati is a Las Vegas contractor. AA 3. On June 19, 2013, Capriati was conducting construction activities on Sahara Avenue and Glen Avenue (a small road that provides access between Sahara and Boulder Highway). *Id.*

Plaintiff Bahram Yahyavi was working as a sales manager for Chapman Dodge. AA 1956. At approximately 10:25 a.m., Yahyavi was driving a Dodge Charger belonging to the dealership from one car lot to another along a route he had driven many times. AA 1966. Yahyavi was traveling eastbound on Sahara,

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[3]Defendant's Trial Exhibit A. AA 138.

and had just turned right onto Glen. AA 1966-69; 2330-32.

At the same time, Capriati's employee, Joshua Arbuckle, was driving a rented forklift. AA 1412. Arbuckle caused the forks of the forklift to enter the roadway on Glen. AA 1415. At least one of the forks from the forklift came into contact with the passenger side A-pillar (metal roof support next to the windshield) and windshield of Yahyavi's car. AA 1417. Plaintiff suffered personal injuries. AA 3.

Yahyavi's airbags did not deploy. AA 2336. Yahyavi claims to have slipped forward under his seatbelt, injuring his knee (the knee claim was abandoned immediately before trial). AA 1703; 2352. That means the seatbelt failed to catch. These facts are relevant to the experts' estimates of the speed of the vehicle, an issue critical to Capriati's defense.

Plaintiff treated inconsistently for alleged injuries–including neck surgery–worked for three years, stopped working, and incurred medical expenses. The severity and relate-ability of Yahyavi's injuries were hotly contested at trial, but are not the focus of the issues in this appeal. Therefore, the medical evidence will not be discussed in this brief. Suffice it to say Capriati contested the causation and damages issues below in a trial where liability was clear, so the purpose of the trial was to limit the damages to those caused by the accident.

III. Pretrial Procedural Facts.

On May 20, 2015, Yahyavi filed his complaint for personal injuries, naming Capriati as defendant. AA 1. The complaint alleged Yahyavi suffered injuries, including to his neck, which became the focus of the trial. *Id.*

On October 7, 2015, Capriati answered.[4] AA 9. Also on October 7, 2015, Capriati filed a voluntary petition for bankruptcy protection. On October 25, 2016, plaintiff moved the bankruptcy court to terminate the automatic stay. AA 15. On December 22, 2016, the bankruptcy court lifted the stay, allowing the state court lawsuit to proceed for a determination of liability, fault, damages and entry of a judgment. AA 21-23. Collection against Capriati on the judgment remained stayed. *Id.* The stay was also lifted to allow Yahyavi to pursue insurance coverage under the policies. *Id.*

Yahyavi told his medical providers that he was traveling roughly 30 mph when the accident occurred. *See* Defendant's Trial Exhibits. At trial, Yahyavi reconfirmed that he was traveling at about 30 mph when "a bomb went off" as he impacted the forklift. AA 1970. All of Yahyavi's testimony might be viewed by a

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[4]On April 25, 2018, Capriati re-filed its answer at the direction of the district court. AA 28. The re-filed answer is identical to the original answer. The reason for refiling is not clear from the record, but it appears it was because the bankruptcy was filed on the same day as the original answer, and there was a question of the validity of the original filing because of the bankruptcy stay.

jury as somewhat exaggerated. Yahyavi's credibility was a primary issue.

After Capriati obtained an opinion from its accident reconstruction expert that the Dodge was moving much slower, possibly only a few miles per hour, Yahyavi retained an accident reconstruction expert who identified his speed as around 10 mph at the time of impact. Regardless of the speed, forces, delta-V, or biomechanical implications of the accident reconstruction evidence, it calls into question Yahyavi's veracity, as well as the causation opinions of his treating medical providers, whose opinions were based in part on information as to speed provided by Yahyavi. Therefore, the accident reconstruction discovery is critical.[5]

On July 3, 2018, Capriati timely disclosed Dr. John E. Baker, PhD., P.E., as a biomechanical and accident reconstruction expert, along with his report. AA 32. Among other things, Dr. Baker opined based on his examination of all of the physical evidence and documents that there was significant variance between Yahyavi's testimony regarding the accident and the physical evidence, but that taking everything into account, if Yahyavi did not brake as he claimed, the speed of the vehicle was 5.61 mph at impact, and if he applied full braking, the speed of the vehicle was 12.12 mph at impact. AA 35.

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[5]The expert reports of Baker and Kirkendall were specifically made a part of the record during the trial below. AA 2559-60. Leggett's reports were attached to pretrial motions.

Yahyavi did not disclose an initial accident reconstruction expert.

On August 20, 2018, Yahyavi disclosed Tim S. Leggett, P.Eng., P.E., as a rebuttal expert. AA 39. After being critical of Dr. Baker's opinions, Leggett "performed simulations" and opined: "With the Dodge's delta-v being 10 mph or less, Mr. Yahyavi would most likely have been traveling at 10 mph or less at the time of the collision." AA 52.

At his deposition on December 5, 2018, Leggett testified: "And so typically for this type of vehicle with a seat belted occupant the air bag would deploy at around 16 miles per hour. So we're not anywhere near that nor does the damage – does the damage present as a 16 mile an hour Delta-V." AA 94. Leggett confirmed his opinion that the speed of the accident was "at or around 10 miles per hour." AA 95.

At his deposition on December 20, 2018, Dr. Baker clarified that because of the size and weight of the forklift, and the size and weight of the Dodge, the impact of the forks on the A-Pillar and windshield of the Dodge had no impact on the car's deceleration. AA 97. The deceleration therefore came entirely from Yahyavi braking (which he denies), or from the impact of the Dodge with the immovable forklift. *Id.* Dr. Baker testified:

> Q. So I guess my question is, if the A-pillar, the rearview mirror -- or the side mirror, and the windshield did not have any influence on the deceleration of the vehicle, then how did it stop?

A. Well, it approaches -- this particular collision -- at a very low speed. And I'll tell you how I know that now.

Q. Okay.

A. All right. If you take a close -- very close look -- and that's why I've blown this up several times -- at the top of the mirror.

Q. And we're back to the Charger crush photos, 3 Exhibit 5; correct?

A. Right.

Q. Okay. Go ahead.

A. You see a scrape mark on the top of the mirror.

Q. Uh-huh.

A. Then you see crush of the A-pillar, approximately -- yeah. I'd say it's probably six inches above that top surface of the mirror.

Q. Uh-huh.

A. All right. So given that, we've got the bottom surface of the fork on the mirror. And we've got the middle of that fork contacting the A-pillar. The distance there, in which there was no damage, is three to four inches. There's no damage. This is referred. This was pushed in. This was no longer a straight line. This area that you see in a little bit of an enlargement, there's no contact. The contact's above an area in which the fork is elevated from the top of the mirror to the point of contact.

Q. You're talking about just on the A-pillar; correct?

A. Correct.

Q. Because there is damage -- observable damage on the windshield --

A. Correct.

AA 98-100.

. . . .

A. Okay. So is that consistent with a ten-mile per hour velocity? It's not.

And the reason is because, if this were at ten-miles per hour, there would have been this scrape. And the damage to the A-pillar would have been lower without this area of no contact. There would have been no time to have the fork rise.

So given that, there would have been an impression into the A-pillar right at the same level as the top of the mirror.

And, again, if there were two inches, it would be where I'm drawing right now. That's where it would be.

But, instead, it's had time to go up. That means this vehicle's not proceeding very quickly. If it were, it would be lower.

Q. Okay.

A. And that's the basis of why I believe this is a very low speed collision.

Q. Okay. What speed?

A. It's at one- to two-miles an hour.

AA 101-02.

In a nutshell, the damage on the A-Pillar and the damage to the mirror demonstrate that the forks were being lifted at the time of impact, and had time to rise 4 inches between the impact at the A-Pillar and the impact at the mirror. This puts the forklift at an angle away from the Dodge (the Dodge hit the side of the

fork, not the front of the fork), and the impact was very slow. *Id.*

On the eve of trial, without notice to Capriati and after the close of discovery, Yahyavi conducted crash tests to try to prove the accident happened at a faster speed. AA 103. Leggett submitted a supplemental expert report in which he opined based on the crash tests that "the subject collision was much greater than 9.1 mph and may have been as much as 14.7 mph or more." AA 115. In response to Capriati's motion objecting on grounds of timeliness, the district court allowed Capriati to conduct a crash test of its own, and to depose Leggett regarding Yahyavi's crash tests.[6]

At his second deposition on May 9, 2019, Leggett testified that the accident occurred "with a delta-V of less than 16 miles per hour because the airbag didn't deploy." AA 124. Leggett repeated his testimony that the speed he believed "was probably the upper limit" was 10 mph. AA 125. But based on the crash tests, Leggett opined that the speed was between 9.1 mph and 16 mph, with his best guess being 13 mph. AA 126. Even with this higher estimate of speed, Leggett's opinion would call into question Yahvavi's ability to correctly perceive the facts, and/or his veracity on this issue, since Yahyavi put his speed at two to three times that opined by his own expert.

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[6]Discovery documents have not been included in the appendix because no discovery issues are raised.

On June 20, 2019, Dr. Baker submitted a supplemental report in which he described crash tests he conducted on behalf of Capriati, and concluded that Yahyavi was traveling at less than 5 mph at the time of the collision. AA 134. Therefore, no matter whose expert the jury believed, Yahyavi was not traveling at 30 mph.

On the tenth day of trial, Yahyavi de-designated Leggett as an expert. AA 140.

The jury might not have believed Dr. Baker's testimony regarding the speed of the vehicle (had it been presented), and Yahyavi may contest it, but that should have been for the jury to decide.

IV. The Trial.

Jury selection commenced on September 9, 2019.[7] After jury selection, the trial began on September 13, 2019. AA 1030. Prior to opening statements the jury was instructed at Yahyavi's request:

> You are not to discuss or even consider whether or not the Plaintiff was carrying insurance to cover medical bills or any other damages he or she claims to have sustained. You are not to discuss or even consider whether or not the Defendant was carrying insurance that would reimburse him, her, or them, for whatever sum of money he or she may be called upon to pay to the Plaintiff. Whether or not a party was insured is immaterial and should make no difference in any verdict you may render in this case.

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[7]The jury selection portions of the trial transcript are not included in the Appendix.

AA 1042. The district court would later give the jury a contradictory instruction on the issue of insurance.

During his opening statement, counsel for Yahyavi, Dennis Prince, stated:

> So what else did we learn about Capriati? One, if you can imagine this, number one, there's no OSHA report, no OSHA reporting of the event. They've got no incident report or investigation file of any kind. Nothing. They've got no written statement of Josh Arbuckle. They claim they sent him for a drug test and that he was clean. I think one of the jurors said, you know, that's fine, we'll take you at your word, but want it trust and verified. Well, they don't have one record of that. You're not going to see any of their safety policies and procedures. They didn't produce any of those in this case.
>
> They demoted Josh Arbuckle. Told him he's never allowed to operate. They discarded his employment file. They couldn't find that, and he'd been a long-time employee of this company.

AA 1069. Yahyavi never raised a discovery or spoliation issue prior to trial, and he claimed below, and will claim on appeal, that he never raised a spoliation argument at trial. But counsel intended to try the spoliation issue to the jury from the first moments of the trial, when he suggested to the jurors that Capriati had withheld and destroyed documents, knowing this would inflame the passions of the jurors.

During his opening argument, counsel for Capriati, David Kahn, stated:

> So [plaintiff is] telling all his doctors for years I was going 30 miles an hour when this accident happens, Plaintiffs hire an expert in this

case, a gentleman named Mr. Leggett (phonetic) who happens to reside in Canada, a very nice man, he's going to come in and tell you he thinks the car was going 15.

So that raises another issue. If their own expert has determined the car is going 15 miles an hour, why is the Plaintiff telling all his doctors that he was going 30?

AA 1123. Because no testimony regarding speed was allowed, including defense experts to contradict Yahyavi's estimate, Kahn did not keep his promise. This prejudiced Capriati before the jury.

The first witness was Clifford Goodrich, Capriati's safety manager.

AA 1135-36. The following exchanges took place:

Q. Now, in this case, you were never able to find or locate a written incident report, correct?
A. No.
Q. Am I correct?
A. You are correct.
Q. And you have no investigation file that you found for this incident, correct?
A. We don't have an employee file for him.
Q. Right. You don't have an employee file for Josh Arbuckle, correct?
A. No.
Q. He worked there from, like, the late 90s until 2014; more than 15 years?
A. Correct.
Q. But you don't -- you can't find his employee file?
A. That's correct.
Q. What -- now, I have heard it expressed as a term of seven years. But doesn't -- isn't the company supposed to keep records for, like, seven years?
A. No. That is not correct.
Q. What is your retention policy?
A. Three years.

Q. Three years. Oh okay. My client filed this lawsuit on May 20th, 2015; within two years. You're -- according to the documents that the Court read to the jury today, your company filed an answer to this complaint on October 7th, 2015; two years and three months after this collision. So your company was obviously aware of this litigation and participating in it within the three years, right?
A. It's possible.
Q. Yeah. And Josh Arbuckle wasn't fired, or didn't -- wasn't fired from the company until 2014, right?
A. I don't know his date of termination, or when he quit, or whatever happened.
Q. Well, he quit after this, right?
A. Yes.
Q. Or was terminated, or whatever?
A. Correct.
Q. Right. And so you don't have his employee file, correct?
A. It's document records for three years. It doesn't mean employee files though.
Q. Okay. Well, let's talk about three years for a minute. You knew that this incident someone potentially could be injured, right? Someone was transported to the hospital by ambulance, right?
A. Yes.
Q. And within three years, your company was sued, and you filed -- made an appearance in this lawsuit, but yet you don't have any investigation file whatsoever, correct?
A. Correct.

AA 1165-66.

. . . .

Q. Now, you claim that -- the company claims that you took Josh for drug testing, correct?
A. That is correct.
Q. And you have no documents to show us the results of that, do you?
A. No, I do not.
Q. Right. So we can't trust and verify anything you would say, whether it was clean or not clean, correct?
A. Why not? You're trusting my other information.

Q. I don't know. One of the jurors said trust and verify is a way to do things. And I'm just asking, we can't verify that statement?
A. No, we cannot verify it.
Q. Because you -- the company got rid of the employment file after this lawsuit happened, right?

AA 1165-66.

From the opening argument and the opening witness, counsel was establishing his spoliation theme. Although he may argue he made no spoliation argument, the above is a spoliation argument. Counsel was planting that argument in the minds of the jurors from the minute the trial commenced.

Capriati conducted a limited cross-examination of Goodrich at that time, but preserved its questioning to the time of direct examination during its case-in-chief. AA 1177; 1186.

For the following eight days of trial, Yahyavi presented his case-in-chief, including his own testimony, the testimony of other witnesses, his medical witnesses and experts. Most of this testimony is not relevant to the issues on appeal, but some highlights are included herein.

Dr. Kaplan, M.D., performed surgery on Yahyavi's cervical spine. AA 1278. On cross examination, Dr. Kaplan testified:

Q. Okay. Now the Plaintiff told you that he was going 30 miles an hour at the time of this accident; didn't he?
A I didn't -- I'd have to look at my first note there. I think--

. . . .

Q. Okay. So as part of his documentation to your office, he represented

to you that he was going 30 miles an hour when this accident happened, correct?

A. That's -- that's what it says.

AA 1359-60; *see* AA 1383.

Yahyavi never told Dr. Kaplan he had prior neck pain. AA 1383-84. But there was a medical record from Southwest Medical from 21 months before the accident, where Yahyavi's doctor reported: "Also complains of neck pain for several years." AA 138. Dr. Kaplan testified:

Q. He also told you nothing else ever happened to his neck, didn't he?

A. That's my understanding.

AA 1364.

Q. So if this patient -- this Plaintiff, Mr. Yahyavi, had pain in his neck for years, before this accident, 21 months before this accident to be precise, he would have had chronic pain prior to this accident; isn't that correct?

A. Based on your -- what you're describing, yes.

AA 1369.

Dr. Oliveri, M.D., testified:

Q. And when you issued all six of your written reports, and rendered all of your written opinions to worker's compensation and/or for this case, you didn't know that there were Southwest Medical Associates' records 21 months before this accident, saying that the Plaintiff's neck hurt him for years, correct?

A. Correct.

AA 1716.

A. Mr. Yahyavi has maintained to me that he has no recollection of having neck pain for years. He has no recollection of telling

somebody that. So if his history in that regard is correct, then I'm trying to come up with explanations that would allow for that documentation.[8]

Q. Don't you think it would be extremely unusual for a patient to go to a medical facility, not report cervical neck pain for years, have the facility document that the patient has neck pain for years, and send the patient to a set of x-rays, because you would agree he got a set of x-rays that same day or that same week, right?

A. Yes.

Q. Don't you think that would be unusual?

A. It would be unusual, yes.

AA 1718-19.

Q. Well, we don't have that information from Southwest Medical, correct?

A. Agreed.

Q. And the Plaintiff is telling you, either he forgot it, or he never said it, right?

A. Something along those lines, yes.

AA 1749.

Dr. Joseph Schifini, M.D., testified that on the date of the accident, the trauma center doctors determined there was no traumatic injury. AA 1602-03. This, combined with the fact that Yahyavi never told Dr. Schifini about any prior neck pain, AA 1598-99, might have given the jury reason to be skeptical. Dr. Schifini testified:

Q. And during that entire process, you had no awareness of whether or not Mr. Yahyavi had any prior complaints of neck pain; is that correct?

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[8]There's a Freudian admission.

A. My understanding was that he did not based on my interactions with him. So that was my understanding at the time I authored all of my reporting.

AA 1617.

Yahyavi testified:

Q. Approximately how fast are you going?
A. About 25 to 30 miles an hour. Normal speed.

AA 1968.

. . . .

Q. And as you make that turn, what do you remember next after making that turn onto Glen?
A. A bomb went off.
Q. When you say, "a bomb went off," what do you mean by that?
A. Just came to a halt.

AA 1970.[9]

Yahyavi testified further:

Q. [Y]ou're aware that in this trial there's been a use of medical records from Southwest Medical Associates about 21 months before the accident, and the records say that you said you had neck pain for years?
A. I've seen that, yes.
Q. And am I correct that it's your -- was your testimony during your direct examination with Mr. Prince that you don't remember saying that?

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[9]If the jury believed Yahyavi was traveling near 30 mph and hit an immovable forklift, this testimony might not seem overstated, but if the jury were informed that plaintiff was barely moving at the point of impact, which is the truth, it may have considered this testimony to be exaggerated.

A. I don't recall that, no.
Q. And are you saying that you didn't say it or are you just saying you don't remember it?
A. I just don't remember it.

AA 2325-26.

Q. Now you told the jury you thought you were going 25 to 30 miles an hour; is that correct?
A. That is correct.
Q. And at your deposition if you said 30 miles an hour would you recall saying that or not?
A. Sure, and I'm incorrect.
Q. We showed the jury at one point a document from one of your doctors and you wrote a -- hand-wrote a diagram that said I was in an accident, and showed the forks, the forklift, and showed the diagram, and said you were going 30 miles an hour. Do you remember telling one or more of your doctors that you were going 30 miles an hour when the accident happened?
A. I don't remember it, but I -- that's a statement I may have made, could have made.

AA 2332-33.

Yahyavi testied that he did not brake, AA 2334, and that the airbags did not deploy. AA 2336. All of this testimony is critical, because if it is true that Yahyavi did not brake and the airbags did not deploy, as a matter of physics based on the testimony of all of the experts, Yahyavi was not traveling 30 mph at the point of impact. He may have been traveling as slow as one to two mph. But Yahyavi testified:

Q. And what you're saying is you went from 30 miles an hour to zero in a very short period of time, right?
A. Yes. Correct.

Q. And the airbags did not deploy, correct?
A. No.

AA 2336.

Q. So you had your seat belt on, and you went from 30 to zero, the air bags did not deploy, and you somehow slid under the dashboard, correct?
A. Correct.

AA 2339.

Had there been expert testimony regarding the actual speed of the vehicle, and pointing out the relatively minor damage to the vehicle, and addressing the inconsistencies as to the braking, the seat belt tensioner, and the airbags, the jury may have had more difficulty swallowing Yahyavi's story.

Capriati's medical expert, Dr. Howard Tung, M.D., a neurological surgeon, testified out of order due to scheduling issues. AA 2016. He testified that based on his examination of Yahyavi and of all of the medical records that Yahyavi likely sustained straining injuries to his spine, and that some of the treatment he underwent for those injuries was reasonable. Yahyavi reached maximum medical improvement by the summer of 2014. AA 2047048. Dr. Tung opined that most of Yahyavi's injuries and complaints were due to degenerative spine disease, and had not been caused by this accident. *Id.* He noted that Yahyavi had taken a functional capacity exam and had not been truthful, making the results of the exam unreliable. Dr. Tung felt that Yahyavi got no benefit from the many injections he

received, and that the injections were not indicated by the medical records. *Id.* Nerve conduction tests showed no radiculopathy, so neck surgery was not indicated and would give no relief, which was born out by the fact that Yahyavi got no relief from the surgery. *Id.* Dr. Tung testified that the Southwest Medical record showing neck pain was consistent with and solidified his opinion that the cause of Yahyavi's pain was degenerative. AA 2053.

On the thirteenth day of trial, plaintiff rested. AA 2458. By this time, it had been twelve calendar days since Yahyavi had planted the suggestion that Capriati had destroyed or hidden documents from plaintiff and from the jury. *Id.* Capriati anticipated that this issue would feature prominently in Yahyavi's closing argument.

Capriati's first witness on Wednesday September 25, 2019, at 4:00 p.m. was Goodrich, who had also been the first witness in the case. AA 2462. The first question to Goodrich was:

> Mr. Kahn: And I'm going to ask you a couple questions on direct that I didn't have the opportunity to ask you before. Between the date of the accident and today, did anything major happen to your company?
>
> A. Yes, we filed for reorganization in 2015.
>
> Mr. Prince: Oh, objection, Your Honor. We need to approach.

Id.

The jury was excused. Prince argued that Kahn had purposely introduced

Capriati's bankruptcy[10] in order to suggest to the jurors that Capriati did not have sufficient funds to pay a verdict. AA 2464-65. Prince asked that the comment be stricken, that Capriati's answer be stricken, that the jury be instructed to disregard the commment, and that Kahn be admonished before the jury. AA 2466. Prince also asked for a curative instruction. *Id.* Prince specifically asked that there be no mistrial. *Id.* Later, Prince would accuse Kahn and Capriati of having conspired to orchestrate a mistrial to get an advantage at a new trial where they would know Yahyavi's case and strategies. AA 2479.

Kahn responded that because of the bankruptcy, Capriati went from a company of 250 employees to 60. Kahn noted that Prince had presented testimony suggesting that Capriati had hidden, destroyed or lost documents, and he wanted to explain to the jury that because of the reduction in the size of the company, the documents had been lost. He wanted to tell the jurors that there had been no intentional withholding, loss or destruction of documents. AA 2466-67.

The district court expressed shock at the introduction of the bankruptcy, wondered out loud why Yahyavi had not brought its spoliation argument before trial, and indicated that the loss of documents was Capriati's fault regardless of their reduction in manpower, because it was still the same company. AA 2467.

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[10]The word "bankruptcy" was not used. One might argue whether or not the jurors would have equated "filed for reorganization" with bankruptcy.

The district court stated that had Yahyavi asked for a mistrial, the request would have been seriously entertained. AA 2468. The district court asked why the requested sanction should not be imposed, and Kahn responded that an admonishment to the jury would be sufficient to cure the error, and that striking the answer was too harsh. *Id*; *see* AA 2469-70. The district court needed to consider the matter overnight. AA 2472.

The following morning, the district court informed Kahn that there was no question in the court's mind that the statement regarding bankruptcy was "intentionally solicited" and called for a mistrial. AA 2475. After confirming that Prince did not want a mistrial, the district court stated, "Well, we're three weeks into a jury trial. Just so the record is crystal clear, if I order a mistrial, Mr. Kahn, your firm is going to pay for the entirety of the costs, and the entirety of attorney's fees, which I'm guessing amounts to a half a million dollars." AA 2476. Prince argued that sanctions under *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92, 787 P.2d 777, 780 (1990), would be more appropriate because plaintiff did not want a mistrial. *Id.*

After noting that there had been no prior serious violations during the trial, the district court concluded that "this absolutely requires admonishment in front of the jury, it is so serious." AA 2476.

Prince followed with a long argument regarding the sanctions that should be

imposed. AA 2476-85. During that argument, Prince presented over objection a page of hand-written notes Kahn had inadvertently left in the courtroom the previous night as evidence that the mention of bankruptcy was intentional. AA 2482.[11] Prince provided to the district court proposed curative instructions. AA 2485.

Kahn argued what he thought the penalty should be, seeing that the district court has already determined that there must be sanctions. *Id.* Kahn objected to the sanctions proposed by Prince, which included the proposed instructions. AA 2485-86.[12] Kahn argued that sanctions striking Capriati's experts and

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[11]The district court eventually stated that the note was "inadmissible for anything," AA 2489, but only long after allowing Prince to present it and make arguments regarding it. The note had "BK" at the top. *Id.* The note also clearly indicated the reduction in manpower suffered by Capriati after its bankruptcy reorganization, which was the reason Kahn introduced the subject. Kahn advised the court that the work force reduction issue had been discussed with Goodrich for the first time in the few minutes prior to departing for court that morning.

[12]Immediately following the extended arguments on the sanction and the proposed instructions, which Kahn opposed at length, after the district court had stated what the penalty would be and that he would admonish Kahn before the jury (which was a clear indication that he would give the proposed instructions), following additional argument by Prince, Kahn stated "Submitted for Defendant," AA 2500, clearly meaning he was not going to make further argument, but rely on the arguments he had just made. The district court indicated that it would strike all of Capriati's remaining witnesses, and Kahn responded: "And I'll submit it to the Court without argument." AA 2501.

Plaintiff has argued that because Kahn did not object at this specific time to the instructions, Capriati waived its challenges to the instructions, but Kahn

preventing Capriati from presenting a damages defense would be case ending. Kahn then submitted the issue at the end of lengthy argument. *Id.* Kahn explained why he had asked the question as follows:

> MR. KAHN: I want to be clear with the Court. There is no prior order about this, and the offer of proof was that it was related to the reduction in workforce or downsizing of the Defendant. That was the purpose of the question.
>
> It was to respond to information the Plaintiff elicited in their case in chief, implying to the jury that this Defendant, Capriati Construction had somehow willfully and intentionally, maliciously destroyed documents. This wasn't the subject of any kind of discovery motion early on. This is something that manifested at trial, and something that I felt the Defendant had to respond to in some fashion.
>
> And the fashion that I intended was to say that they had reduced their workforce by 200 out of 250 people, rough numbers and including office staff.
>
> THE COURT: I'll ask you. Are you saying you didn't know he was going to say bankruptcy?

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objected to the sanctions and put his reasons on the record immediately before the instructions were given. At this point, Kahn was embattled after the initial comments of the court and the requirement that the issue be briefed by early the next morning, and the court had already indicated its intentions by the time it decided how it would handle the jury instructions and sanctions. Although Kahn did not specifically object to the insurance language, because of how the arguments transpired, he did object to the severity of the penalty. Prince's argument that Capriati "had no objection to this instruction earlier today" is not fair. AA 2537. There was objection and argument to all of the sanctions plaintiff requested. It is simply not fair to say that no objection was made on the record before this Court. The issues of the correctness and necessity of the instructions have been adequately preserved for appeal.

MR. KAHN: Yes, that is what I'm saying.

AA 2487-88.

The district court stuck Capriati's answer as to liability. AA 2490. The district court struck the remainder of Goodrich's testimony, *id.*, and the remainder of Capriati's defense witnesses, which would have been two experts. AA 2492-93.[13] Also, the district court indicated it would admonish Kahn before the jury. AA 2494.

The jury returned, and the district court admonished Kahn and instructed the jury. AA 2501. Among other instructions, the district court instructed the jury:

> Plaintiff has the legal right to proceed with his claim against Defendant Capriati Construction, Inc., in this case, and recover damages as determined by you in accordance with these instructions.
>
> Further, Defendant has liability insurance to satisfy in whole or part any verdict you may reach in this case.

AA 2503.

While the district court was settling the instructions, it indicated that it did

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[13]The district court indicated that it would do a written order memorializing its decision as to sanctions. AA 2494. That order was entered by the district court on November 5, 2019, two weeks after the final judgment on the jury verdict was entered. AA 543. Because the order was entered after the final judgment, Capriati has included it in its notice of appeal separately. Because it is a part of the proceeding that led to the judgment, it is either reviewable as part of the review of the final judgment, or it is a special order after the final judgment, because it affects and explains the rights of the parties growing out of the final judgment. In any event, its content is reflected in the transcript of the trial.

not intend to repeat the instruction on insurance, but Prince argued that the court should give that instruction again so the jury would have it in writing. AA 2536-37. The district court responded with "that's a bell that is not easy to un-ring. Mr. Kahn, what's your comments?" Kahn responded: "I'm being advised by others that there shouldn't be more mention of insurance, but I would submit it, based on this morning's proceedings." AA 2537.[14]

The following day, the jury was instructed, and the offending instruction was repeated. Specifically, the jury was instructed: "You are not to discuss or even consider whether or not the Plaintiff was carrying insurance to cover medical bills or any other damages he or she claims to have sustained," AA 2575,[15] but was also given the instruction: "Defendant has liability insurance to satisfy in whole or

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[14]Yahyavi argued below that this was a waiver of any challenge to the insurance instruction because Kahn submitted it without using the work objection. On the contrary, Kahn noted that the repeated instruction on insurance should not be allowed, but based on the district court's prior rejection of his challenges to the sanctions, he would not argue further at that time, *i.e.*, he would submit the issue to the decision of the district court based on the prior arguments that had been made. This is no waiver, and it is not a failure to object. Indeed, it is expressly an objection to "more mention of insurance," and a request for a ruling.

[15]Only a portion of the standard jury instruction regarding insurance was given. Not given were the instructions: "You are not to discuss or even consider whether or not the defendant was carrying insurance that would reimburse him for whatever sum of money he may be called upon to pay to the plaintiff," and "Whether or not either party was insured is immaterial, and should make no difference in any verdict you may render in this case." NEV. J.I. 1.07.

part any verdict you may reach in this case." AA 2571, ln. 17.

During closing argument, plaintiff took advantage of the gift that had been presented. Prince argued: "The Court instructed they're profitable and they have insurance to satisfy any verdict that you may render in the case." AA 2588.

The jury returned its verdict. AA 2703. The district court entered a judgment on the jury's verdict on October 22, 2019. AA 196. The post-judgment motions and procedure have been set forth in the Jurisdictional Statement section of this brief, *supra*. The facts regarding the award of attorney's fees and costs will be set forth in that section of the brief, *infra*.

SUMMARY OF ARGUMENT

The jury was informed that Capriati had previously filed for reorganization. Assuming (but not conceding) this was misconduct, the district court's response was extreme, and amounted to an abuse of discretion.

Goodrich did not even use the word "bankruptcy," and even though the jurors may have known "filed for reorganization" meant bankruptcy, a curative instruction and a reprimand should have been a sufficient response.

The initial and correct response of the district court was to instruct the jury to ignore the question and answer, and to reprimand counsel. But the district court followed this by striking Capriati's answer as to all liability defenses, and although the district court purportedly allowed the damages defenses to go forward, he did

not allow the defense to present damages witnesses. In essence, the district court imposed defense-case-ending sanctions.

The exclusion of Capriati's witnesses render the verdict unreliable.

The district court instructed the jury, twice, that Capriati "has liability insurance to satisfy, in whole or in part, any verdict you may reach in this case," inviting the jury to award any amount because there is sufficient insurance to cover it. AA 194; Instruction 32. This instruction is facially erroneous.

It is well-established that the existence or lack of insurance is an issue that must not come before the jury. Plaintiff will argue that the mention of bankruptcy may have alerted the jurors to the fact that there was insurance (we do not see how), so the issue of insurance had been raised. But even adopting this dubious proposition, a standard jury instruction informs the jurors they are *not* to consider whether or not there is insurance. Such an instruction would have cured any problem as to this issue.

Instruction 32 directly contradicts the well-established law reflected in the standard instruction that insurance is not to be considered for any purpose. Indeed, the jury was so instructed at the request of Yahyavi at the commencement of the trial. The later instruction instead tells the jurors to consider not only the fact of insurance, but that the insurance is high enough to cover any possible award. That allows the jurors to feel that Capriati is not going to pay anyway, so

the sky is the limit.[16]

Whether this jury instruction is a correct statement of the law is reviewed by this Court *de novo*, with no deference to the district court.

Finally, the district court erred in awarding attorney's fees based on Yahyavi's contingency fee agreement with his attorneys. This Court has not previously approved fees on that basis, and for sound policy reasons should not do so now.

DISCUSSION–Docket No. 80107

I. Standard of Appellate Review.

This Court reviews sanctions for abuse of discretion. *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1119, 197 P.3d 1032, 1043 (2008). Nevertheless, legal questions must be review *de novo*, and in imposing sanctions for litigation errors, this Court said, when the penalty is case-ending:

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[16]At trial, Yahyavi argued that Capriati is not prejudiced because it has no liability; based on the bankruptcy, Yahyavi can pursue the insurance proceeds only. AA 2492. This contradicts basic law on insurance. *See Silver State Disposal Co. v. Shelley*, 105 Nev. 309, 312, 774 P.2d 1044, 1046 (1989). Capriati paid for the insurance and is protected by it. Any payment by the insurance carriers is on behalf of Capriati. The fact that a defendant is insured and will not pay out of pocket is the basis for our rules not allowing the existence of insurance to come before the jury. If the jury knows that fact, it may increase an award on the belief that the defendant is not hurt by any amount, because he or she has insurance. The bankruptcy order and the fact that Capriati would not be responsible for any excess verdict does not change this concern, it heightens it.

"[W]hile dismissal need not be preceded by other less severe sanctions, it should be imposed only after thoughtful consideration of all the factors involved in a particular case." *Romo v. Keplinger*, 115 Nev. 94, 97, 978 P.2d 964, 966 (1999) (quoting *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92, 787 P.2d 777, 780 (1990)).

The legal question of whether a jury instruction is a correct statement of the law is reviewed *de novo*. *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1003, 194 P.3d 1214, 1217 (2008).

II. The Sanction Is Too Severe.

Although the district court has authority to impose sanctions for litigation violations, this Court has not allowed such sanctions to stand when the penalty imposed is unduly harsh. *See Fortunet, Inc. v. Playbook Publ'g, LLC*, 443 P.3d 546 (Nev. 2019) (unpublished). In *Fortunet*, the exclusion of a key witness for a violation of the witness exclusion rule was considered by this Court to be too harsh a penalty. The same is true here. The violation was not serious enough to warrant defense ending sanctions. A warning, reprimand in front of the jury, and an instruction to disregard the question and answer, and not to consider wealth or insurance, would have been sufficient.

This Court has stated that "dismissal with prejudice is a harsh remedy to be utilized only in extreme situations." *Moore v. Cherry*, 90 Nev. 390, 393, 528 P.2d

1018, 1020 (1974). "It must be weighed against the policy of law favoring the disposition of cases on their merits." *Id.* "Because dismissal with prejudice is the most severe sanction that a court may apply . . . its use must be tempered by a careful exercise of judicial discretion." *Id.* at 394, 528 P.2d at 1021 (alteration in original) (internal quotation marks omitted) (quoted with approval in *Hunter v. Gang*, 132 Nev. 249, 260, 377 P.3d 448, 455–56 (Nev. App. 2016).

In *Blanco v. Blanco*, 129 Nev. 723, 729, 311 P.3d 1170, 1174 (2013), this Court determined that when the ultimate penalty is imposed, heightened scrutiny by this Court is appropriate. Although the sanctions in this case did not take the case from the jury, they gave the case to the jury without allowing a defense, which is essentially the same. Thus, heightened scrutiny by this Court is warranted.

Yahyavi relied on *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 614–15, 245 P.3d 1182, 1187–88 (2010), for the proposition that striking an answer is proper. But the misconduct in *Bahena* was serious discovery abuse affecting the plaintiff's ability to present its case. This Court upheld the discovery sanction partly because the damages case was still presented to jury; in this case, the damages case did not go to the jury.

III. Kahn Asked the Question to Address the Issue of Spoliation.

After half an answer to the first question to the first defense witness, the

trial was stopped, a hearing was held, Yahyavi rejected an offered mistrial, and all remaining defense experts and witnesses were excluded.

Kahn asked the question to demonstrate that documents were lost because of a significant reduction in workforce. This issue of withheld documents was showcased by Yahyavi. Yahyavi told the jury that Capriati had willfully destroyed documents, which in reality never occurred. The record keeping at Capriati was affected by a significant reduction in its work force. If the issue had been properly addressed there, the explanation would have been that they were lost or destroyed in the ordinary course of business based on the business practice of the company as required by applicable law of keeping records for three years.[17] The issue could have been properly handled before trial, instead of by ambush at trial.

The work force reduction was something Kahn learned of only minutes before coming to court. Thus, this new information was not something he had any appreciable time to prepare to address. There was no pretrial order to prevent evidence of the work force reduction and reorganization. The issue arose during trial. The seven words that resulted in the sanctions could have been cured by an

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[17]Given that the time frame between the accident and the trial was roughly six and a half years, in part due to the bankruptcy stay, there was nothing willful, nefarious, or intentional about any loss of records.

admonition to the jury.[18]

IV. The Sanctions Were Defense-Ending.

Yahyavi disingenuously argues that the sanctions were not defense ending, arguing that Capriati got to present two witnesses out of turn,[19] to cross-examine plaintiff's witnesses, and to make closing arguments. But without damages witnesses, these represent only a pointless exercise.

Defense economic damages expert Kirkendall's sole role related to damages. He was Capriati's counter to Yahyavi's economist, Dr. Clauretie. With no response to Dr. Clauretie's inaccurate and overstated damages estimates, the jury had nothing on which to base a fair award. The jury did not hear from a witness that Yahyavi's damages were $0. They did not hear from a witness testimony that would have put into context the testimony of Dr. Tung. Defense expert Baker, Ph.D., prepared reports as a biomechanical expert. His biomechanical opinions were excluded by a pretrial order, which would have

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[18]"In his argument to the jury, plaintiff's attorney referred to defendant as 'this rich dairyman'. Counsel for appellant immediately objected and the court at once admonished the jury to disregard this reference. The statement should not have been made, but in view of the prompt admonition to the jury, we cannot hold that it constituted prejudicial misconduct." *Handley v. Lombardi* (1932) 122 Cal.App. 22, 33 [9 P.2d 867]. In this case, an admonition would have sufficed.

[19]In addition to Dr. Tung, Capriati's vocational expert testified out of turn during Yahyavi's case-in- chief.

become a significant issue on appeal had the matter proceeded differently. But his accident reconstruction opinions would have been received by the jury, including the opinion that the impact was approximately five mph. Yahyavi had no rebuttal expert, having withdrawn Leggett. This testimony would have had an impact on the verdict. Instead, the jury was told that Yahyavi was traveling at 30 mph, and was involved in an "explosion" on impact.

For the jury to appreciate Capriati's damages defense, including causation of the claimed medical specials, the speed of the collision was a necessary factual component. The district court took that critical issue away from the jury.

Plaintiff argued that cross-examination is essentially the equivalent of presenting a party's own witnesses or expert witnesses. But the opportunity to discredit an expert witness on cross examination is not the equivalent of the right to introduce affirmative evidence to rebut that expert's opinion. *See Meunier's Case, 319 Mass.* 421, 426, 66 N.E.2d 198, 202 (1946) (where the facts are established by a report the party affected has no ability to challenge with evidence of his or her own, the process violates due process). Moreover, that doctors seldom change opinions in these circumstances is an agonizing truism to those who have attempted to accomplish it. *See Basciano v. Herkimer*, 605 F.2d 605, 611 (2nd Cir. 1978) ("the value of cross examination to discredit a professional medical opinion at best is limited."). A cross-examination is not the same as

conflicting testimony from witnesses. *State v. Becktel*, 2019 WL 2092694, at *5 (Wash. Ct. App. May 13, 2019).

Yahyavi cannot know the impact the opinions of Kirkendall and Baker would have had on the jury's evaluation and analysis of damages. All that can be known is that these experts did not testify, so the jury was not permitted to hear their evidence.

Yahyavi's medical treatment morphed over the years. He was treated by multiple different physicians, with periods of no treatment and significant changes to the symptoms and treatments. Years after the accident, and after several of Yahyavi's treating physicians had opined that surgery was not a viable option, Yahyavi had a 5-level cervical fusion. He got no relief; in fact, his condition post-surgery was worse. Most of Yahyavi's damages were based on his claim that he can never work again, although this was inconsistent with his work history for three years following the accident.

Capriati's case rested on its ability to negate Yahyavi's claim that he was asymptomatic, pain free, and without medical problems before the accident. Yahyavi and his treaters and experts provided explanations for the inconsistencies, but Capriati felt it could convince the jury that the lion's share of Yahyavi's damages were overstated, and unrelated. The lynchpin of that defense was to demonstrate that the accident happened at a very slow speed, calling into question

the testimony and evidence presented by Yahyavi. Capriati felt it could easily establish this with expert Baker, using the crash test evidence it had developed following Yahyavi's untimely crash test.

The question of the speed of the vehicle would have been one for the jury, but the evidence would have come in. The speed of the vehicle would not only have been important to the jury's analysis of the severity of the impact and its effect on plaintiff and his injuries, it would have had an impact on the jury's view of Yahyavi's credibility. And it would have impacted the opinions of his doctors, all of whom where told that the speed of the impact was 30 mph, and all of whom based their causation opinions to a greater or lesser degree on that understanding.

While the differences in the testimony may be rationalized in argument to the jury, the evidence demonstrates the fact that Yahyavi either has no ability to estimate speed, does not really remember how fast he was traveling, or is lying. This is an issue for the jury to decide; the jury cannot decide the issue if the evidence is not presented. Capriati does not propose to revisit the verdict of the jury based on the evidence that was presented; Capriati proposes to revisit that decision based on the evidence that was precluded.

V. The Instruction on Insurance is Incorrect.

Because a witness mentioned "reorganization" once, Capriati was deprived of the standard instructions on insurance and of the policy protections the

instructions represent. The insurance instruction was ostensibly given to address the alleged prejudice that Kahn's question and Goodrich's answer implied that Capriati had insufficient funds to pay a verdict. Instructing the jury not to consider bankruptcy or insurance for any purpose would have protected Yahyavi from any prejudice from the single mention of the word "reorganization." Instead, the district court blew the case up by telling the jury that Capriati's insurer, not Capriati, would be paying the bill, and giving the jury a blank check against the unlimited funds of the insurer. The district court's error is far more palpable than was counsel's mistake in asking the question that evoked the unhappy response that so shocked the district judge. A more shocking instruction can hardly be imagined. An instruction that Capriati had insurance sufficient to pay any verdict no matter how high was obvious and palpable error.[20]

NRS 48.135(1) reads:

> Evidence that a person was or was not insured against liability is not

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[20]Yahyavi justified the instruction because he was limited by the bankruptcy order to seeking recovery from the insurance policies only, so the jury should know there was insurance coverage. This is a non-sequitur. Had the jury not been informed of the reorganization, the fact that plaintiff could only recover from the insurers would not have been explained to the jury. The jury's extremely limited knowledge of Capriati's past bankruptcy did not change the policy considerations that would have kept the insurance information from them. The district court could and should have addressed the bankruptcy issue in terms of Capriati's ability to pay (the alleged prejudice), not the amount of Capriati's insurance coverage.

admissible upon the issue whether the person acted negligently or otherwise wrongfully.

Nevada recognizes a *per se* rule barring the admission of collateral source information for any purpose. "We now adopt a *per se* rule barring the admission of a collateral source of payment for an injury into evidence for any purpose." *Proctor v. Castelletti*, 112 Nev. 88, 90, 911 P.2d 853, 854 (1996).

While collateral source in a strict sense is evidence that the plaintiff's damages have been paid by some other source, telling the jury that the plaintiff's damages *will* be paid by insurance, anyone's insurance, raises the same concerns. Whether the jury is told the plaintiff has no damages because insurance has already paid, or that plaintiff's damages are unlimited because the defendant's insurance will pay, the liabilities of the parties are substituted for a third party who pays, affecting a true determination of actual damages. That is why the black letter law of Nevada is that the jury must not be informed about insurance, anyone's insurance.

In Nevada, the jury must not be informed that the defendant has insurance. *See Silver State Disposal Co. v. Shelley*, 105 Nev. 309, 312, 774 P.2d 1044, 1046 (1989) (recognizing prejudice to defendants from such information). The instruction in this case not only informed the jury that any verdict would be paid by insurance, it urged the jury to award a higher amount than it otherwise might

have awarded. It gave the jury a blank check, because the verdict would have no effect on Capriati. The collateral source rule is intended to prevent this type of thought process by the jury one way or the other.

Yahyavi will not cite to any case where a jury was informed of unlimited insurance to satisfy any verdict, no matter how high. This stands standard jurisprudence on its head, and goes well beyond what is permitted.

The jury certainly took it as the gospel that there was unlimited insurance. The jury verdict is evidence of that fact. This Court can never know, in light of the erroneous instruction that was given, what a properly instructed jury would have done. The verdict is fatally defective.

An incorrect instruction requires reversal if the instruction was prejudicial. *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1005, 194 P.3d 1214, 1219 (2008). The prejudice in this case is apparent.

Finally, Kahn made his arguments against the sanctions, including instructing the jury as requested by Prince, immediately before the instruction was orally given as a sanction, and before the final instructions were given, including the offending instruction. Kahn never agreed to the instruction when in response to the Court he submitted his argument. By that point in the trial, it was clear that Capriati would be punished for further argument on the issue. It was also clear that Kahn considered the sanctions the court had already indicated it would

impose, including the instructions, to be unnecessarily harsh and outside of the bounds of the district court's discretion. Any argument that Capriati has waived its appellate challenge to the instruction by failure of objection should fall on deaf ears. *See Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1001, 194 P.3d 1214, 1216 (2008) (no specific form of objection is required; the issue must be presented for the district court's consideration).

DISCUSSION–Docket No. 80821

I. Standard of Appellate Review.

"'An award of attorney fees is reviewed for an abuse of discretion.' *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016). A decision made 'in clear disregard of the guiding legal principles can be an abuse of discretion.' *Id.*" *N. Nevada Homes, LLC v. GL Constr., Inc.*, 134 Nev. 498, 422 P.3d 1234, 1236 (2018). A district court must support its analysis by considering the factors enumerated in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969). *See Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549 (2005).

II. Facts.

The sole basis for the award of attorney's fees in this case is NRCP 68 (offer of judgment rule). The complaint was filed on May 20, 2015. AA 1. On January 18, 2019, Yahyavi served the operative offer of judgment in the amount of

$4,000,000.[21] AA 120. The offer was not accepted. Thus, only fees actually incurred after January, 2019, can be awarded. NRCP 68.

On March 3, 2020, the district court awarded Yahyavi $2,510,779.30 in attorney's fees, which is exactly 40% of the judgment amount, and equals Prince's claimed contingent fee. AA 1019. It is just a percentage; it represents no further analysis.

III. Yahyavi's Motion Fails Under *Beattie*.

The third Beattie[22] factor is that the decision to reject the offer was grossly unreasonable or in bad faith. It is not sufficient to merely inquire, as the district court did in this case, whether the decision turned out to be incorrect. Rather, "grossly unreasonable or bad faith rises to a much higher level than poor judgment or incorrect tactical decisions." *Assurance Co. of Am. v. Nat'l Fire & Marine Ins. Co.*, No. 2:09-CV-1182 JCM PAL, 2012 WL 6626809, at *3 (D. Nev. Dec. 19, 2012). Hindsight is not required. *Id.* Under the circumstances of this case, it cannot be argued that Capriati's rejection of a late and unreasonably high offer

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[21]On January 19, 2017, Yahyavi served a prior offer of judgment. Yahyavi's offer of judgment of January 18, 2019, superceded the prior offer. This Court has stated: "[w]e conclude the better rule is that the most recent offer of judgment extinguishes all prior offers of judgment." *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 424, 132 P.3d 1022, 1032 (2006). Any reference to the prior offer is improper.

[22]*Beattie v. Thomas*, 99 Nev. 579, 588-89 (1983).

was grossly unreasonable.

In Nevada district courts, this factor is often given lip service only, but it should be the most important factor. The purpose of the rule is to foster settlement, not to shift fees. Were the factor not to be given serious consideration, this Court would not have used the words "grossly unreasonable."

To apply this factor, the district court must give consideration to the strength of the defendant's case, the amount in controversy, the stage of the litigation, and other factors that weigh on whether a party should be compelled to forgo its right of trial by jury. As recognized by the Court of Appeals, an offer of judgment must not be "transformed into a vehicle to pressure offerees into foregoing legitimate claims in exchange for unreasonably low offers of judgment."[23] *Frazier v. Drake*, 131 Nev. 632, 643–44, 357 P.3d 365, 373 (Nev. App. 2015). It should not be the policy of this state to force a party to forego litigation or face unfair consequences.

Central to the defense was Yahyavi's credibility. This included the speed he was traveling, and the medical records indicating Yahyavi had preexisting

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[23]Although the amount of the offer is not unreasonably low in this case (being an offer from a plaintiff, not a defendant), the policy should apply to any offer that is unreasonable and unfairly places a party in a position of having to forgo legitimate claims or defenses, or face an unfair penalty. Thus, only a grossly unreasonable refusal should warrant the penalty.

cervical spine issues. Yahyavi conveniently forgot all about his prior neck pain and a cervical X-ray before this accident. He insisted he was traveling 30 mph. At the time the offer was made, Yahyavi's own expert had opined that Yahyavi's speed could not have been more than 10 mph. Many of Yahyavi's medical conditions were unrelated to the accident, surgery had not been recommended but was performed years after the accident, there were huge gaps in treatment, Yahyavi worked for years but then quit, claiming he could do no work of any kind based on the accident, and etc. This was not a bad faith defense. It was not unreasonable for Capriati to exercise its right to have a jury decide the amount of damages, rather than to pay Yahyavi's demand.

Further, the amount of the eventual verdict cannot be used as evidence that the offer was reasonable, or that rejection of it was in bad faith. The jury awarded less than half the amount requested (Yahyavi requested $14.4 million and received $5.9 million, a difference of $8.5 million). That the verdict was more than the offer is a factor of the exclusion of Capriati's defense rather than an indication that the case had a value so high at the time of the offer that rejection was grossly unreasonable. The amount alone does not take into consideration the strength of the defense that was not presented, the factors that led Capriati not to forgo its Constitutional right to a trial, or the unreliability of the verdict.

In evaluating the offer, Capriati contemplated that it would be permitted to

present both a liability and a damages defense. Neither of those things occurred in full. Capriati was not permitted to present it economic expert, who was solely a damages expert. Capriati was not permitted to present its accident reconstruction expert. This testimony could have affected the verdict, as to Yahyavi's veracity, the severity of his injuries, and the relate-ability of the medical specials.

Capriati must not be penalized for proceeding with a defense at trial. If the factors are not carefully applied, especially the factor that gives meaning to an offeree's right of trial, a penalty for not accepting an offer violates Capriati's constitutional rights to challenge Yahyavi's allegations as to liability, damages, and causation of damages. In this case, the award amounts to a denial of due process, U.S. Const., Am. V, Am. IV; Nevada Const. Art. I, §8.5, and to a jury trial. U.S. Const., Am. VII; Nevada Const., Art. I, §3 .

III. Yahyavi's Motion Fails Under *Brunzell.*

Although the district court gave lip service to *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), in the complete absence of evidence of the work done after the offer (and in the absence of evidence of what work was done before the offer), the *Brunzell* factors cannot be applied in any effective manner. Citing the factors does not establish evidence to support them.

This Court has emphasized that an effective analysis of the *Brunzell* factors is not optional:

> [T]he court must continue its analysis by considering the requested amount in light of the factors enumerated by this court in *Brunzell v. Golden Gate National Bank*, namely, the advocate's professional qualities, the nature of the litigation, the work performed, and the result.

Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 865, 124 P.3d 530, 549 (2005). Although the district court may have been in a position to analyze the qualities of the advocate and to some degree the nature of the litigation, it had no basis on which to evaluate the work performed *after the offer was made*, or to evaluate the result because the jury verdict is unreliable as a matter of both law and fact. Not knowing what work was done and when, the number of hours, and the reasonableness of those hours, the district court could not have evaluated the *Brunzell* factors fairly.

IV. The Amount of the Attorney's Fee Award is Unreasonable.

Capriati recognizes that this Court has given the district court broad discretion in awarding attorney's fees, and in the methods of determining such an award. *Shuette v. Beazer Homes*, 121 Nev. 837, 124 P.3d 530, 549 (2005); *see also University of Nevada v. Tarkanian*, 110 Nev. 581, 591, 879 P.2d 1180, 1188 (1989). Nevertheless, regardless of the method selected, the award must be reasonable under all of the circumstances. *Id.* Although Yahyavi will cite opinions from the Court of Appeals suggesting that a plaintiff has no duty to present evidence of hours worked, but can rely solely on the amount of a

contingency agreement as a basis for an award of fees, this Court has never so held.

The burden is on the movant to prove that the amount sought is reasonable. In some cases, that amount may be influenced by the amount of a contingency agreement, and a lode star amount may be appropriate because of the risks taken by counsel. But this Court should never hold that every contingency amount is reasonable simply because the plaintiff agreed to it. To date, this Court's opinions have all been tied to a reasonable hourly amount, adjusted by some reasonable factor based on the existence of a contingency. As a matter of public policy, this Court should never adopt an approach that allows the award of a contingency on the strength of the existence of the contingency alone.

This case was prosecuted for many years, but only the time period after the offer of judgment is at issue. Yahyavi and his counsel have been awarded more than $2.5 million in attorney's fees based on just over eight months of work. On its face, the award is unreasonable, and places such a chill on the right of trial by jury in any case where the possibility of high damages exists as to cry out for relief. In every case where a jury awards a seven figure verdict, the argument will be made that the contingency standing alone justifies a penalty for presenting a defense, no matter the strength of the defense or the unreliability of the verdict. This is not the law.

Yahyavi has been awarded fees for work performed before the January offer. There was 3½ years of litigation before Prince became counsel, and before the offer of judgment. The vast majority of time spent on legal work was well before the offer, but the district court simply multiplied the judgment by 40%. This has provided Yahyavi an award for a significant time period before the offer.

Below, Prince claimed he worked "hundreds" of hours after the offer was made. But other than his assertion, he provided no proof of any kind as to the hours worked, or the work done. The Court of Appeals has discouraged contingency fee attorneys from taking this approach. *See O'Connell v. Wynn Las Vegas*, LLC, 134 Nev. 550, 562, 429 P.3d 664, 673, fn. 7 (Nev. App. 2018) (stating that the better practice is to keep records, citing numerous authorities).[24]

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[24]The Court of Appeals said the keeping of records is not required, but there is no case from this Court on which to base that assertion. The party seeking fees must justify an award; without documentation as to what was done and when, this burden cannot be carried. The ruling of the Court of Appeals would reward poor record keeping and vague requests for attorney's fees, and will become the standard if it is adopted as the law of Nevada.

For example, a lawyer enters into a contingency agreement. He immediately sends an offer that is not accepted. Later, the case settles for slightly more than the offer without the lawyer doing any substantial work. An award of a 40% contingency would not be fair. If the lawyer claims he worked hundreds of hours, but has no evidence to support that claim, how can the court weigh the factors and make an award that is reasonable and fair? If there were more than one attorney in the case, how can the court enter an award without evidence as to the work done by each? The answer is simple. It cannot. Without evidence of time spent and an explanation of the work done, there is no method to determine an

Specifically, Prince did not provide any record of his work, nor did he identify whether any records exist from any of the three prior firms that represented Yahyavi. Without such records, it is not possible to evaluate what work was done, let alone when that work was done.

Taking even the outer limit of Prince's representation at 999 hours, and dividing $2.5 million by that amount, results in an hourly fee of roughly $2500/hour. Using half the hours (roughly 500 hours for an 8 ½ month period, which is still "hundreds" of hours) would double the fee to $5000/hour. Such a fee is exorbitant, extravagant, and excessive.

There is no case in Nevada awarding attorneys fees at anywhere near this amount, nor can Yahyavi submit any authority for allowing such high hourly rates.

Even at $500/hour, which is an amount higher than is appropriate here, simple division puts the amount of hours that would represent at approximately 5000 hours. That would be two and one half years of full time work, doing no other activity.

These numbers are presented only to show how ridiculous the district court's award is. When a defendant rejects an offer of judgment, the defendant

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appropriate hourly rate, or a reasonably fair amount.

risks paying a reasonable attorney's fee, not paying any fee to which the plaintiff has agreed. Appellate courts that allow a contingency to be considered do so to apply a fair lodestar amount, *i.e.*, a fair amount to increase a base fee based on the fact of contingency.[25] No lodestar amount could be approved that would result in the numbers set forth above. And no Nevada policy could support awarding such an amount as a penalty for not settling, where the purpose of the rule is settlement, not extortion.

The policy of this state has always been the American Rule for fees; a rule to promote settlement should not obliterate that policy in a blind application only justified by gamesmanship and fee shifting, and not on the commendable goal of fostering reasonable settlement. Federal courts have abandoned offers of judgment with respect to attorney's fees because of just such abuse. FRCP 68. This Court should not allow Rule 68 to become a method of extorting windfalls in personal injury actions. A time will come (if it is not already here) when

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[25]"Once a district court has determined that attorney's fees should be awarded, it must use the lodestar method to determine the appropriate amount. *Wegner v. Standard Ins. Co.*, 129 F.3d 814, 822 (5th Cir.1997). The lodestar method requires the district court to 'determine the reasonable number of hours expended on the litigation and the reasonable hourly rates for the participating attorneys, and then multiply the two figures together to arrive at the 'lodestar.'" *Id.* This Court should adopt a similar method of applying a contingency in Nevada. In order to do so, a prevailing market rate must be determined. There was no evidence or consideration of such a rate in this case. The district court just awarded the contingency.

defending a personal injury action will be so expensive and fraught with danger that the right of a trial will be guaranteed to plaintiffs only.

Prince was Yahyavi's fourth law firm. Certainly, there has been great overlap in the work performed. Yahyavi is not entitled to attorneys fees for predecessor counsel. "Additionally, we note that O'Connell did not retain the same counsel from the beginning of the case until the end, and thus her current counsel is not automatically entitled to fees based on the entire litigation. *Cf Van Cleave v. Osborne, Jenkins & Gamboa, Chtd.*, 108 Nev. 885, 888, 840 P.2d 589, 592, fn 8. (1992) (awarding attorney's fees to the firm that more efficiently resolved a matter, regardless of the length of time of its representation, in comparison to the prior firm that litigated the same case for six years without resolution)." *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 562, 429 P.3d 664, 673 (Nev. App. 2018). Here, Yahyavi is not entitled to fees based on the entire litigation, though that is what he requested, and what the district court awarded.

Yahyavi should be required to identify the hours worked, the work done, and appropriate hourly rates. Yahyavi and his counsel identified no evidence from which such amounts could be determined. Given the failure of Yahyavi to identify the work done, any relationship between the excessive hourly rates sought and actual rates in the community, or any basis other than the contingent agreement

itself, this Court should establish a realistic rate. Awarding $2.5 million for 8 ½ months of work is excessive and unreasonable, and an hourly rate of $5000 or $2500 is excessive.[26]

V. A Blanket Award Based Solely on the Amount of a Contingency Is Unreasonable as a Matter of Law.

Of course, the district court did not award a fee based on any hourly amount, and Capriati believes that leaves the award without basis. The district court instead simply concluded that an award in the amount of a contingency is proper in Nevada, regardless of the obscenity of the amount. This Court should decide that although the fact and amount of a contingency may be considered as a factor in determining the amount of an attorney's fee, the district court cannot simply award the contingency amount.

Below Yahyavi relied on a recent Court of Appeals case for the proposition that a contingent fee may be awarded under NRCP 68. *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 553, 429 P.3d 664, 667 (Nev. App. 2018). The Court of Appeals did uphold an award of attorney's fees in the amount of a contingency agreement, but the circumstances of that case were different from this case, and

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[26]Below, Capriati provided a wealth of case law addressing what is a reasonable rate in Nevada. AA 780. To be brief, however, Capriati will not repeat that discussion here, because the hourly rates the district court granted are facially absurd.

the Court considered all of the factors, not just the amount of the contingency. There, an attorney sought $96,000 in attorney's fees. The Court there stated "it was evident that her request for $96,000 in attorney fees was 'reasonable.'" *Id.* Here, the award is over twenty five times that amount, which is *per se* unreasonable for 8 ½ months of work.

At least one federal trial court has specifically criticized the use of a contingency fee amount in the context of an offer of judgment issue. In *Texarkana Nat. Bank v. Brown*, 920 F. Supp. 706, 711-12 (E.D. Tex. 1996), the court stated:

> Additionally, the offer of judgment rule is intended to be "an effective mechanism for encouraging settlement and forcing parties to take a realistic view of their cases." *Friends of the Earth, Inc.,* 885 F.Supp. at 939. The offer of judgment rule and its underlying policy would be frustrated if parties, like TNB, had to face the uncertainty and risk of having to pay the opposing party's contingency fee. Although an offeree-party of an offer of judgment is expected to assume the risk of reasonable attorney's fees should the offeror-party prevail at trial, an offeree-party cannot be expected to know the nature of the fee agreement between the opposing party and its counsel. Most importantly, the offeree-party should not bear a substantial risk created by the opposing counsel's contingency fee agreement with its client. If the opposing counsel, in entering into a contingency fee agreement with a client, assumes the risk of nonpayment, then any compensation that opposing counsel may ultimately receive on account of the contingency should be paid by the client–not the opposing party that did not prevail at trial. Similarly, when the prevailing client assumed the risk of having to pay its counsel a large contingency fee rather than payment by the hour, the risk assumed by the client cannot equitably be shifted to the party that did not prevail at trial. After all, it was the client that struck the contingency fee agreement with its counsel, not the party that lost at trial.

This rationale is equally valid here. In Nevada, attorney's fees are not recoverable unless authorized by statute, rule, or agreement between the parties. *See First Interstate Bank of Nevada v. Green*, 101 Nev. 113, 116, 694 P.2d 496, 498 (1985); *see also, U.S. Design & Const. Corp. v. Int. Broth. of Elec. Workers*, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002). This is the American Rule. Even with this authorization, "the method upon which a reasonable fee is determined is subject to the discretion of the court . . . tempered only by reason and fairness." *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864, 124 P.3d 530, 548 (2005). The exorbitant amount awarded here was tempered by neither reason nor fairness.

A court may consider a variety of approaches or methods rationally designed to calculate a reasonable amount. *Id.* This Court has emphasized that whichever method is the starting point, a court must support its analysis by considering the factors enumerated in *Brunzell*. *Id.* Those factors are an attempt to insure reasonableness. *See* NRCP 54(d)(2)(B) (fees must be reasonable).

Yahyavi contracted with Prince to allow for a contingency fee recovery of 40%. Yahyavi was willing to give up the lion's share of his own compensatory damages in order not to have to pay Prince hourly. But that does not make Prince's share reasonable as an amount to award as fees for the refusal of an offer of judgment. Capriati did not agree to that risk, and Capriati did not agree to

spend Yahyavi's compensatory damages. Whatever one's view of the desirability of a system that allows contingency fees, the amount of that fee is no measure or indication of what a fair attorney's fee is in a particular case.[27]

In this case, it seems apparent that Yahyavi agreed with each of his four lawfirms to allow them to be compensated out of his recovery (no agreements were provided, so we can only suppose). The straight contingency fee of 40% undeniably awards attorneys fees for time and years prior to the offer of judgment. This is not permitted.

Yahyavi did not place the contingency fee agreement (his or any prior agreements) before the district court in support of his motion, as was the case in *O'Connell*. The district court had only counsel's affidavit to rely on. And it is unclear exactly how any division of money as between Yahyavi and his counsel would occur. Based on the lack of documentation, the district court could not possibly have determined what amount of fees was incurred after the offer, and what amount preceded the offer. The district court could not have even considered, let alone determined, what amount of fees is reasonable in this particular case. Instead, the district court concluded that the full continency fee

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[27]That counsel is taking a risk of loss and may lose in other cases is no justification for imposing fees on Capriati to cover losses in other cases. The Rule allows reasonable fees in this case alone.

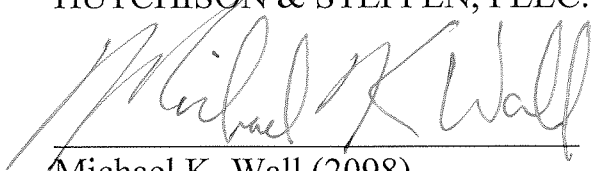
was warranted because contingency fees are good and Yahyavi won, not based on an application of the *Beattie* and *Brunzell* factors to the circumstances of this case. The award of a straight contingency fee, without any documentation in regard to the *Brunzell* and *Beattie* factors, is unreasonable, and not justified by what Yahyavi submitted. A more palpable abuse of discretion can hardly be imagined.

CONCLUSION

This Court should reverse the district court's judgment and vacate the award of attorney's fees and costs.

DATED this 12 day of August, 2020.

HUTCHISON & STEFFEN, PLLC.



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ATTORNEY'S CERTIFICATE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect X4 in 14 point Times New Roman font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 15,103 words.

3. Finally, I certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event the

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 12 day of August, 2020.

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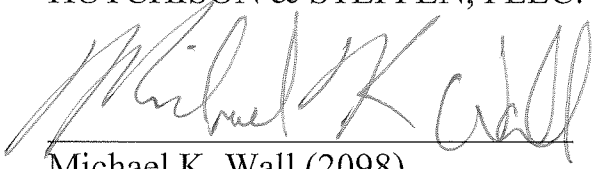

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CERTIFICATE OF SERVICE

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

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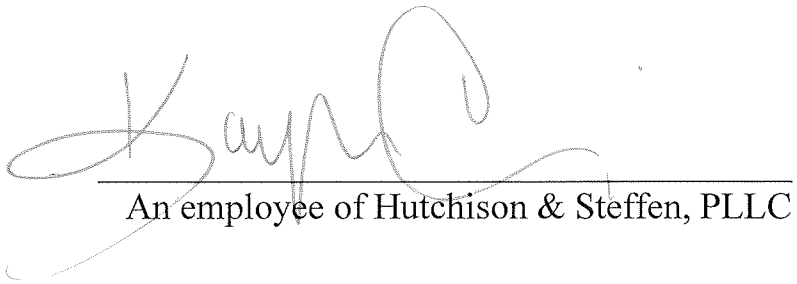

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