

IN THE SUPREME COURT OF THE STATE OF NEVADA

CAPRIATI CONSTRUCTION CORP.,) Supreme Court No: 80107
INC., a Nevada Corporation) District Court Case No: A718689
Appellant,) Electronically Filed
) Aug 12 2020 01:40 p.m.
) Elizabeth A. Brown
v.) Clerk of Supreme Court
)
BAHRAM YAHYAVI, an individual,)
Respondent.)
)
_____)
CAPRIATI CONSTRUCTION CORP.,) Supreme Court No: 80821
INC., a Nevada Corporation)
Appellant,)
)
v.)
)
BAHRAM YAHYAVI, an individual,)
Respondent.)
_____)

**APPENDIX TO
APPELLANT'S OPENING BRIEF
VOLUME 5 of 12**

Appeal from the Eighth Judicial District Court
Case No. A718689

HUTCHISON & STEFFEN, PLLC

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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date the **APPENDIX TO APPELLANT’S OPENING BRIEF VOLUME 5 of 12** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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DATED this 12th day of August, 2020.

/s/ Kaylee Conradi

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1 talks about the fact that you can get costs. This is the legislature in 2019
2 changing the statute. Are you arguing that the offer was beforehand and
3 therefore that doesn't apply?

4 MR. KAHN: Well, yeah, we have ten days to accept the offer
5 under the old rule. The timing's different now. The offer goes back to
6 January 2019. So that's the timeframe where the defendant's decision to
7 not accept the offer --

8 THE COURT: Before the statute --

9 MR. KAHN: -- should come into place.

10 THE COURT: -- took effect?

11 MR. KAHN: I believe that's the case, but ultimately what I'm
12 arguing is there's Nevada case law going back many years against
13 double recovery for anything.

14 THE COURT: Well that I -- I do agree with you on. And I'm
15 troubled because it would appear the legislature, and this is certainly
16 going to be in front of the Supreme Court here or other -- that they
17 wanted to penalize exactly what they said. And the Supreme Court does
18 not favor double recovery. That's absolutely true and they've said it in
19 cases. But this is new. I want to hear, even if -- I want to know if it
20 even applies since this was 20 -- what time that 2019 --

21 MR. KAHN: January 2019. January.

22 MR. PRINCE: Your Honor, just for the record.

23 THE COURT: Well, I'll let you make it.

24 MR. PRINCE: Okay. But I wanted --

25 THE COURT: It was adopted according to --

1 MR. PRINCE: We're relying on the rule that it was in effect.
2 Not the statute.

3 THE COURT: Says amended effect 3-1-19.

4 MR. PRINCE: Your Honor, but what are you looking at?
5 17.115?

6 THE COURT: 68.

7 MR. PRINCE: 68. Well, let me, just two things. One is, we're
8 relying upon the version that existed in – in January of 2019 which was
9 before that amendment. And just for the clarity of thought here, it was
10 adopted by the Supreme Court. So this – it wasn't, it's not, the NRCP is
11 not a legislative function. That is a – those rules are adopted by the
12 Supreme Court of Nevada. And they had the penalty link which as we've
13 set it out on page 5 of our brief, there was – the new changes does not
14 change the language of (f)(2) regarding the penalties. There was – they
15 changed the timing of acceptance and it also allowed for serials of offer
16 of judgment. A subsequent offer of judgment doesn't invalidate an earlier
17 one. So I'm not even –

18 THE COURT: And multiple offers, I get it.

19 MR. PRINCE: That's what I'm talking about.

20 THE COURT: All right.

21 MR. PRINCE: Right. So –

22 THE COURT: Are you done?

23 Let Mr. Kahn.

24 Were you done?

25 MR. KAHN: I was not, Your Honor.

1 THE COURT: Go ahead.

2 MR. KAHN: I just had one more statement and that's
3 essentially at the time the offer was not accepted by the defendant, the
4 rule didn't support a double recovery. And while the legislature made
5 some changes a few months later, the applicable timeframe to look at is
6 January of 2019 and there's no case in Nevada that I know of in that time
7 or any time before saying you get double recovery of cost, whether under
8 an offer of judgment or for any other purpose. And it would be a
9 punishment to the defendant for exercising its constitutional rights in this
10 context for this case given a January '19 offer of judgment.

11 THE COURT: All right.

12 MR. PRINCE: First of all, Your Honor. I want you to be clear
13 in your mind, we are relying upon the language of Rule 68(f) that existed
14 in January 2019. While I understand there is amendments, I happen to
15 be on the committee relating to the rule changes that went into effect
16 March 1st, 2019. The language we're relying upon 68(f)(2) remained
17 unchanged with the amendments by the Supreme Court, not the
18 legislature, by the Supreme Court. So when we're talking about
19 penalties, the penalty language remains precisely as it was before. It
20 does not change your analysis in any manner.

21 THE COURT: Do you know of any case law where they've
22 upheld the double recovery on costs? Because I've not heard –

23 MR. PRINCE: I've not – I've not seen one. But with – okay,
24 with this –

25 THE COURT: Okay.

1 MR. PRINCE: -- in mind, Judge.

2 THE COURT: Yeah.

3 MR. PRINCE: Think about the body of individuals who are
4 adopting this rule. The Nevada Supreme Court is the one who adopts
5 this rule. They are the ones who enforce Rule 68 and Chapter 18. When
6 they created this, they had to have in clear in their mind. It wasn't a
7 legislative body who doesn't enforce these rules. These are talking
8 about the people who enforce these rules and the drafter here, they have
9 to – and you have to rationalize 68 with Chapter 18 and the Supreme
10 Court clearly had, you could, clearly had to have in their mind that, yeah,
11 the penalties we're talking about is the post offer costs and post, and it
12 says applicable interest on the judgment. Think about the words they
13 chose. The judgment. That means the full amount including any future
14 damage award because the way statutory prejudge – interest works
15 would be you only get prejudgment interest on past damages and
16 postjudgment interest on the entirety of the amount of the judgment
17 including future damages. Here they're talking about post applicable
18 interest on the judgment from the time of the offer to the time of the entry
19 of judgment. Those are very specific words chosen by the Nevada
20 Supreme Court who had clearly had to have in mind how interests on
21 judgments work since they're the ones who interpret these statutes and
22 rules. Therefore they must be harmonized. And the only way to
23 harmonize them is the manner which I've done it, because otherwise this
24 really wouldn't be a penalty, right? Because the defendant would owe
25 these items in the ordinary course.

1 THE COURT: I agree with you on that. They are, to me,
2 conflicting. So, --

3 MR. PRINCE: I don't think they're conflict --

4 THE COURT: -- anything else?

5 MR. PRINCE: With regard to fees, it's myopic, narrow-minded
6 to think that the only way you can keep, you award fees is with rate times
7 hour. That's just not the reality of the world, not only personal injury
8 world, but any other case, for that matter. And the fact is, so the record
9 is clear, I've never kept any time records. I typically don't keep,
10 generally, I'd say more than generally, my practice is to not keep time
11 records and contingent fee matters because whatever amount of time I
12 spent is really not pertain to the proportion of the fee or whatever it is .
13 But think about how, in a certain case, how the argument would be
14 different. Let's assume it was a contingent fee case and there was a
15 \$10,000 award. And the lawyers came in arguing, hey, we want
16 \$200,000 in fees. The defense would be saying, hey, we want to know
17 what your contingent fee arrangement is. It may be such that, well, oh,
18 you're only entitled to four grand because your fee structure is 40
19 percent. You know for a certainty that the defense would be arguing that
20 position. And in fact there's going to be times where the percentage fee
21 works to their advantage. You can -- and it doesn't take rocket science to
22 think that. If it was a \$50,000 case and the jury only awards 50 grand
23 and you're here for weeks on end. I guess it will be up to the Court, give
24 them the complexities of the case, the nature of the case, the facts of the
25 case, to decide, hey, this is what you signed up for, plaintiff's counsel,

1 you get 40 percent, that's all you get. We're not giving you 300,000 in
2 fees even though you worked eight weeks straight on the case.

3 So there's going to be time to their advantage, but when
4 Mr. – the disrespect that Mr., this is the other thing. The disrespect that
5 Mr. Kahn shows the litigants in *Connell, O'Connell*, excuse me, that was
6 a dinky little case. I beg to differ.

7 THE COURT: All right. I don't see the --

8 MR. PRINCE: He called it dinky, --

9 THE COURT: It's --

10 MR. PRINCE: -- it's a small case --

11 THE COURT: -- it's a reported case. That's all that --

12 MR. PRINCE: Absolutely with a pronouncement that a
13 contingent fee award is reasonable, fair, and appropriate, even with no
14 time records.

15 THE COURT: All right. Thank you.

16 MR. PRINCE: Okay.

17 THE COURT: As far as the attorney's fees, I'm going to go
18 over all of that. First of all, *Beattie*. Whether the plaintiff's claim was
19 brought in good faith, I don't think even the defendant disputes that.
20 They certainly disagree on the amount but in any event, I think it's
21 clearly, unequivocally brought in good faith. The offers – offer of
22 judgment was brought in good faith. It was not, I don't see any other
23 reasons, it was reasonable in timing and it was reasonable in an amount
24 at the time it was made. Whether the offeree's decision to reject the offer
25 and proceed to trial was grossly unreasonable or in bad faith, I feel, and I

1 sat through, as you all know, the trial, that it was grossly unreasonable to
2 reject the amount of the offer at the time it was made given all of the facts
3 of the case. And let me make it clear, the driver, who apparently had
4 little effect on the defense, testified it was his fault. That was never in
5 dispute. Having the accident reconstruction expert to somehow lay the
6 blame somewhere else seems, as I said, counterintuitive. And to make it
7 clear Mr. Kahn's statements that somehow he was speeding and, I forgot
8 the second part of it, was clearly never – was no one's testimony. The
9 driver only saw him before he made the turn. There was no fast lane.
10 This is all in – it's just not the facts of the case. Other than an attempt to,
11 if you will, diminish the award, which is clearly reasonable to try, the
12 decision to reject the offer, as I said, was grossly unreasonable given the
13 nature of the accident, the severity of the injuries. As we all know from
14 the testimony, this guy was incoherent after the accident and I believe
15 the defendant driver testified to that and certainly other people did.

16 The amount, and this was brought up in the written pleadings
17 that the expert was going to testify that somehow he was exceeding the
18 speed limit, the amount of encroachment into the A pillar and all of this, I
19 don't need to go into all the detail, was significant but it didn't, and I don't
20 think anybody testified that there was no, even from the expert's report,
21 credible that somehow he was exceeding a reasonable speed limit under
22 the circumstances. And, again, we have the driver of the forklift,
23 industrial-size forklift, saying – testifying he pulled the forks into the line
24 of traffic and the vehicle, all of the testimony that I recall was it was like
25 hitting a brick wall. Only it was hitting steel forks.

1 In any event, 4: whether the fees sought by the offer are
2 reasonable and justified in amount.

3 I am awarding the 40 percent contingency fee and here's why.
4 First of all, *O'Connell* does discuss it and says that, yes, it is one way. I
5 had never heard, I've never seen a case where attorneys are required to
6 keep hourly when in fact their fees are based on contingency. This was
7 extremely contested. We had three weeks of trial. And I don't think – I
8 certainly think I can state that there are numerous ways attorney, I have
9 stated, where attorneys charge fees. If we – I couldn't even begin to list
10 all of them. I know in family court, they talk about bundling and
11 unbundling. In these type cases, there's contingency, modified, you
12 name it. Hourly for defense firms. A flat fee for defense firms. A
13 individual can choose their attorney and how they are going to proceed in
14 paying their attorney. There – the Supreme Court has never limited that.
15 In this case, there is no way to reasonably divide a contingency fee. If
16 there had been an offer, say even, well, a hundred thousand, or maybe
17 the second one was two, and they got up to whatever the offer by the
18 defendants, then there potentially could be an apportionment of the
19 amount of the contingency fee between the prior offer and what
20 subsequently was derived from the judgment. In this case, there was no
21 money on the table, if you will, until the trial. And therefore, there was
22 zero until three weeks of trial. Everything that led up to it is really just
23 background to lead to the ultimate roll of the dice which is what a jury trial
24 sometimes can be. And the Supreme Court realizes the contingency
25 fees are based on the fact that the injured person may not have any

1 money for any – to do anything. And certainly they recognize the risks
2 involved. I don't need to go into all of the factors regarding contingency,
3 but it's the plaintiff's side in this case putting out money, time, effort in the
4 hope that the jury will agree with them. So the *Beattie* factors are
5 satisfied.

6 MR. KAHN: Your Honor, before your final ruling, I do have a
7 comment, quick comment. Just so the record's clear.

8 THE COURT: Well, I'm not even nearly done, but okay.

9 MR. KAHN: Understood.

10 THE COURT: Now I need to talk about the *Beattie* factors.
11 They were discussed. They weren't really, if you will, objected to here
12 today, but I certainly need to go over them. The Supreme Court
13 constantly tells us put everything on the record.

14 Quality of the advocate, his ability, his training, education. I
15 don't think that was –

16 THE LAW CLERK: *Brunzell* factor.

17 THE COURT: Oh, what did I say? *Brunzell*? Yes, *Brunzell*
18 factors, sorry.

19 The – Mr. Prince was successful, which is another one of the
20 factors, but he, his ability, his training, his education, which was laid out,
21 is more than adequate.

22 The character of the work to be done, its difficulty. Although
23 this was, if you will, a car accident that I see a lot, and certainly both the
24 plaintiff and the defendant, they – there was a special knowledge
25 regarding the injuries. That was necessary in order to both conduct the

1 direct and the cross-exam regarding the preexisting evidence and the
2 testimony of the treating physicians. There, and I have to say since I do
3 see this, that it isn't something that, quite frankly, the average plaintiff or
4 defense attorney would be successful at without commenting.

5 Unfortunately I see individuals who are not skilled in the specific medical
6 terms that are required, but that is not the case.

7 Number 3, the work actually performed by the lawyer and the
8 skill and time attention. Certainly the plaintiffs were successful in this
9 case and I think that, of course, goes to Number 4. But it – they showed
10 the requisite skill in order to satisfy the *Brunzell* factors.

11 And the last one, of course, the result. They were successful
12 and the benefits derived were the verdict.

13 So, and I said that I don't see any way that the Supreme Court
14 has ever required attorneys to keep hourly and that would be quite
15 candidly a waste of time on 99 percent of contingency cases. Sitting
16 there and – I did defense work. People obviously have forgotten or don't
17 know that I did defense work for a significant period and had to keep
18 hourly and that's the way it is, and billed out hourly. It's a different set of
19 factors.

20 So I think I covered everything I wanted to.

21 Go ahead.

22 MR. KAHN: I just want to be very clear, Your Honor. I didn't
23 put it in our brief and the plaintiffs didn't seem to think it was important
24 either, but I need to be very clear about correcting one thing the Court
25 said that is factually incorrect. There was a seven-figure offer made in

1 this case at mediation long ago. So the notion that the defendants never
2 made an offer and there was zero dollars offered until three weeks before
3 trial, is not correct I don't think Mr. Prince will argue with that. Yes, it
4 was a very low, seven-figure offer, but it wasn't chopped liver. It was a
5 seven-figure offer made to the plaintiff. So –

6 THE COURT: And if –

7 MR. KAHN: -- the Court – the Court's ruling is what –

8 THE COURT: Okay.

9 MR. PRINCE: Right.

10 MR. KAHN: -- it is and I'm not expecting –

11 THE COURT: And I appreciate --

12 MR. KAHN: -- a change.

13 THE COURT: -- that. If that had been an actual offer of
14 judgment, it might, it certainly could be considered in apportioning, which
15 is what you're ask – were asking for, pre and post offer of judgment. But,
16 again, my understanding is you're telling me that there was an offer
17 made at a mediation but it was never done as an offer of judgment. So.

18 Okay. Now, costs.

19 MR. PRINCE: The Rule 6 –

20 MR. KAHN: The final motion.

21 MR. PRINCE: Are you on the –

22 THE COURT: Oh, and yes,

23 MR. PRINCE: -- penalty costs –

24 THE COURT: -- yes, yes, --

25 MR. PRINCE: -- and interests? Okay.

1 THE COURT: -- double, the double recovery –

2 MR. KAHN: Okay.

3 THE COURT: -- portion. I understand the plaintiff's argument
4 that it is supposed to be a penalty and it does clearly, in my mind,
5 contradict prior Supreme Court multiple decisions where they are not or
6 do not agree with double recoveries. It, to me, they do want a penalty
7 but I don't see any way to meld those conflicting principles that the
8 Supreme Court has on multiple occasions in the past expressed. So I
9 am not giving the penalty, if you will, costs. I'm denying that part of the
10 motion.

11 MR. PRINCE: What about the interest?

12 THE COURT: The same with the penalty interest. Interest
13 that is statutory, again, we're going to go to now.

14 Costs and the re-taxing motion and interest. At quarter to 11.

15 MR. KAHN: That was mine, Your Honor.

16 THE COURT: Yes.

17 MR. KAHN: And I think this one, fortunately for everybody is
18 brief as far as the arguments.

19 THE COURT: There's a lot of detail to it. Go on.

20 MR. KAHN: There's a lot of detail and I rely on our motion,
21 but essentially I don't want to go through, you know, a few hundred
22 dollars here, a few thousand dollars there. I'm going to try to hit the high
23 points.

24 MR. PRINCE: Well, I think what I'm going to do for simplicity.
25 I'm just going to sit, except for I'm going to look at my memorandum. I'm

1 going to Forensic Dynamics as to Leggett, Your Honor, just to avoid any
2 issue, I'm going to withdraw the Forensic Dynamics which is \$22,205.09.
3 I'm going to voluntarily withdraw that since we did not call him at the trial
4 so I'm going to – to make this part of it easy, I'm going to withdraw that
5 from our memorandum of costs so we don't have to have any argument
6 on that.

7 THE CLERK: And which one was that?

8 MR. PRINCE: Forensic Dynamics, Inc., Mr. Leggett.

9 THE CLERK: Okay.

10 THE COURT: Okay, thank you. Anything else you --

11 MR. KAHN: Yeah, that leaves --

12 THE COURT: -- want to concede? No, --

13 MR. KAHN: Yes, Your Honor.

14 THE COURT: -- that he wants to concede.

15 MR. KAHN: Well, he's going to concede Leggett so I'm not

16 going to argue Leggett, but there's a --

17 THE COURT: Right, anything --

18 MR. KAHN: -- number of others.

19 THE COURT: -- else you want to -- okay.

20 MR. PRINCE: No.

21 MR. KAHN: Yes, Your Honor, they're seeking for --

22 MR. PRINCE: Oh, I think he's talking about me. And the

23 answer is --

24 THE COURT: He's -- I'm asking if there's --

25 MR. KAHN: Oh, sorry.

1 THE COURT: -- anything else –
2 MR. KAHN: Sorry.
3 THE COURT: -- that'll speed it up that he's going to get rid of.
4 MR. PRINCE: No.
5 THE COURT: Yes or no? Anything?
6 MR. PRINCE: No, no.
7 THE COURT: Okay.
8 MR. PRINCE: Nothing further.
9 THE COURT: Now, go.
10 MR. KAHN: Sorry, Your Honor. I misunderstood.
11 MR. PRINCE: Of course you did.
12 MR. KAHN: The similar issue applies to Dr. Miao, M-I-A-O, in
13 his office. He did not testify at trial. The knee claim was withdrawn at
14 trial. There is no knee claim that was presented to the court. Under the
15 case law in Nevada, if he doesn't testify at trial, then he's limited to
16 \$1500. I don't remember the exact amount, but it's in my pleadings as
17 far as –
18 MR. PRINCE: Your Honor, for the –
19 THE COURT: You know what?
20 MR. PRINCE: -- for the purpose of –
21 THE COURT: Let's – let's deal with that. Because I think
22 that's the case. As far as that so that –
23 MR. PRINCE: I'm going to agree. I'm going to concede the
24 Miao for the purpose of clarity of our record. I will concede to agree with
25 that one. So Desert Orthopedics, Dr. Perry, saw Dr. Miao, 2500 also

1 withdrawn.

2 THE COURT: Okay. So anything –

3 MR. PRINCE: So makes this --

4 THE COURT: -- else you want to withdraw?

5 MR. PRINCE: No. No, no, I --

6 THE CLERK: Is it withdrawn or is –

7 THE COURT: Talk with your --

8 MR. PRINCE: Withdrawn.

9 THE CLERK: -- to 1500? Or 15,000?

10 MR. PRINCE: No, I'm withdrawing the entirety of the amount.

11 THE COURT: Okay.

12 MR. PRINCE: Not even – not even – 15 so I don't want there
13 to be any issue on appeal on this.

14 THE COURT: Okay. Keep going. So that one's out.

15 MR. KAHN: We have a request for Dr. Schifini in this case.

16 He didn't testify at trial either.

17 MR. PRINCE: Yes he did.

18 THE COURT: Sorry. Don't –

19 MR. PRINCE: Yes he did.

20 THE COURT: -- don't interrupt. You'll get your chance.

21 MR. KAHN: Okay, well if he did, then.

22 THE COURT: I seem to recall.

23 MR. KAHN: Yeah, he did testify, sorry. Hold on, I was
24 thinking the other doctor. Doctor – hold on a second. Okay, I'll move on
25 to the next one. The next one is Dr. Kaplan had something like \$12,500

1 that wasn't supported in the plaintiff's cost memo. Something like that,
2 just an unsupported amount. And if they can –

3 THE COURT: Twelve, five, you had put in yours, but you saw
4 their reply.

5 MR. KAHN: Yeah, well, if they justify it in their reply, that's
6 one thing. But they have a time obligation. They're time-barred to just
7 ask for costs later on because we point out to them that they didn't follow
8 the rules. So they didn't timely request the \$12,500. I don't think they
9 get it. That's up to the Court, but that's our position as to Dr. Kaplan.

10 THE COURT: I would tend to agree, but they said it was
11 there. So I'm just trying to speed this up.

12 MR. KAHN: Understood.

13 MR. PRINCE: It's supported.

14 THE COURT: All right. Let's let him – let's go one by one.
15 So.

16 MR. KAHN: Sure.

17 MR. PRINCE: Well, Your Honor, the evidence is that we have
18 all the invoices for Dr. Kaplan for the services he rendered. We had to
19 pay him for his work in the case serving as an expert witness, who's also
20 a treating physician. So we – all the invoices are there for \$26,500.

21 THE COURT: Mr. Kahn.

22 MR. KAHN: Just – same argument that if you don't support it
23 timely, then –

24 THE COURT: Well --

25 MR. STRONG: We did it.

1 MR. KAHN: -- you can't go back later --

2 MR. PRINCE: We did it.

3 MR. KAHN: -- and take a second bite at the apple.

4 MR. PRINCE: We believe it's attached to the memorandum.

5 THE COURT: All right. Well, let's look at the memorandum
6 which -- where is the memorandum -- oh, down here, okay.

7 Somebody give me the page and where it is.

8 MR. PRINCE: Okay.

9 THE COURT: I mean, I see at page 2, you have the twenty-
10 six, five, but oh these aren't numbered. All right. Show me.

11 MR. PRINCE: Hang on.

12 THE COURT: Oh, yeah, they are Bates stamped. Sorry, they
13 are.

14 MR. PRINCE: We have starting at sixty -- 60 for Dr. Kaplan,
15 3,500; 8,000.

16 62, 1,000.

17 63, 14,000.

18 So all those together totaled the \$26,000.

19 THE COURT: 61, 62, 63 --

20 MR. PRINCE: 60 through 63.

21 THE COURT: Yeah.

22 Mr. Kahn?

23 MR. KAHN: Give me one second, if I could, Your Honor.

24 The \$14,000 comes from an undated, handwritten fee
25 schedule invoice. That's with the cost memo and he wasn't deposed in

1 the case and is seeking \$6500 for deposition preparation.

2 THE COURT: That's a trial prep.

3 MR. KAHN: Well, I think it's phrased as prep time day of
4 deposition.

5 MR. PRINCE: Yeah.

6 MR. KAHN: That's what it's listed as so that –

7 MR. PRINCE: But that's –

8 MR. KAHN: -- may be –

9 THE COURT: All right.

10 MR. PRINCE: That invoice is for the meeting for the trial
11 preparation because it's billed with his trial testimony. That invoice has
12 to be read together. He just put it on a prep, like a prep line item but this
13 is what we paid him.

14 THE COURT: All right. The objection was that it wasn't even
15 in the costs memo –

16 MR. PRINCE: It is.

17 THE COURT: -- which it is. If you're saying it's –

18 MR. PRINCE: This is not –

19 THE COURT: I'm going to allow --

20 MR. PRINCE: -- later justified.

21 THE COURT: -- it. It's sufficiently detailed to me if in fact
22 there was – we know he testified at trial and that's exactly what the 7500
23 part. The prep, yes, it does say deposition, but I certainly think he – and
24 it's common practice. He has to prepare for the trial. I'm going to allow
25 that.

1 What's next?

2 MR. KAHN: Next is Dr. Schifini. I'm sorry, I misspoke before,
3 but a significant amount of his expert opinions and testimony in time are
4 again for a knee claim that was withdrawn. And so we don't feel that it's
5 appropriate to award fees for that expert for that portion of his work that
6 was performed that relates to something that plaintiff withdrew at trial.

7 MR. PRINCE: Dr. Schifini, Your Honor, is an interventional
8 pain management physician. His focus was in the interventional work up,
9 was solely related to the cervical spine of Mr. Yahyavi. The presurgical
10 injections and the postcervical – surgical treatment including, you know,
11 recommendations for spinal cord, so he didn't relate to any of the knee
12 claims. That was an orthopedic issue that we withdrew. So the 10,600
13 was solely related to his work as relates to the spine. That was the only
14 issue at the time of the trial was the cervical spine.

15 MR. KAHN: And just to cut it short, I support the same
16 argument goes to Dr. Oliveri, who spent time on both the neck and the
17 knee. The knee got withdrawn so I think there has to be some
18 apportionment under our rules. It's a little convoluted because the rules
19 talk about testifying at trial and here I'm talking about kind of splitting
20 hairs to a degree. They testified at trial about the neck. They didn't
21 testify at trial about the knee. So I'm –

22 THE COURT: All right. What are you suggesting?

23 MR. KAHN: I'd suggest for Schifini and Oliveri to cut them in
24 half other than time spent testifying at trial itself.

25 MR. PRINCE: Your Honor, the knee claim was miniscule. It

1 was a strategic decision. Dr. Oliveri and he did not spend any time. The
2 focus of the case – the sum substance of the case related to the cervical
3 spine looking at the reports, the focus, the entire focus of the case was
4 on the cervical spine. That was the case. The source --

5 THE COURT: I understand.

6 MR. PRINCE: -- of disability.

7 THE COURT: Did he spend any hours evaluating the knee?
8 Either of those two doctors?

9 MR. PRINCE: Schifini, no. Oliveri, what he did is overall
10 arching records review. He probably reviewed some of the orthopedic
11 records so at most it was 10 percent. That's being the most generous
12 you could potentially be. That's part of the, like the initial review. But the
13 focus was always the spine. This was a spinal case.

14 THE COURT: Mr. Kahn, I'll give you the last word.

15 MR. KAHN: Yeah, it was a spinal case a week before trial.
16 Before that, it was a spine and a knee and the knee had surgery. So this
17 wasn't a minor knee claim of aches and pains. This was a surgical case
18 involving a knee and neck until immediately before trial. And the experts
19 spent time on that and they advocated that. It's in their reports. The
20 Court had the reports. And the Court can look and see --

21 THE COURT: In each of their reports, and this is, I agree with
22 you because the trial time that is clearly a hundred percent for the back.
23 But the reports, what did Dr. Schifini's first, initial, or whatever, his report
24 cost. And the same with Dr. Oliveri.

25 MR. PRINCE: Schifini, Your Honor, he only -- he only, he

1 didn't treat the knee and he –

2 THE COURT: Okay.

3 MR. PRINCE: -- didn't – he wasn't an expert. He was a
4 worker's comp physician.

5 THE COURT: Oh, right.

6 MR. PRINCE: So he just – we just paid him for a prep and a
7 trial testimony. So his test –

8 THE COURT: All right. I'm allowing Schifini. That's right,
9 he – I'm allowing Schifini the ten, six. But Dr. Oliveri, if he included it in
10 his initial report –

11 MR. PRINCE: He did include in his initial –

12 THE COURT: -- it should be. So what did his initial report
13 cost in total. It's a cost that should be right – somewhere right easy to
14 get.

15 MR. PRINCE: I'm going to tell you right now. \$11,025.

16 THE COURT: Eleven –

17 MR. PRINCE: And so, so –

18 THE COURT: -- twenty five? Zero.

19 MR. PRINCE: \$11,025.

20 THE COURT: Okay.

21 MR. PRINCE: So he reviewed records of three hours. Face
22 to face evaluation, an hour. A report and preparing the life care plan was
23 seven hours –

24 THE COURT: All right.

25 MR. PRINCE: -- 7.75 hours.

1 THE COURT: I'm going to reduce that by 25 percent. The
2 back, to me, still, even at that time, was, I mean, when you're talking a
3 hundred thousand surgery on the back versus whatever, a knee. So I
4 think 25 percent is reasonable so it would subtract –

5 MR. PRINCE: Okay.

6 THE COURT: -- 25 percent of 11,025.

7 MR. PRINCE: Okay.

8 THE COURT: Whatever that is.

9 MR. PRINCE: And allow the rest.

10 THE COURT: Yes.

11 MR. PRINCE: Okay.

12 THE COURT: All right. What was next, Mr. Kahn?

13 MR. KAHN: Same issue for Mr. Spector that a significant
14 portion of his was spent talking about the knee and the worker's comp
15 issues related to the knee and how the knee itself reduced plaintiff's
16 ability to work, separate and apart from neck pain. So I'd ask for some
17 kind of adjustment there as well. Whatever –

18 MR. PRINCE: Your Honor –

19 MR. KAHN: -- the Court feels is appropriate.

20 MR. PRINCE: The vocational disability solely related to the
21 spine. Nothing related to the knee. Nothing.

22 THE COURT: The question still exists and I don't recall – he
23 didn't testify, correct?

24 MR. PRINCE: Yeah, he did. Mr. Spector did.

25 THE COURT: Oh.

1 MR. PRINCE: He was our vocational expert.

2 THE COURT: Okay. So, as I said, then that \$1500 cap
3 doesn't apply. What about his, again, his initial report? Does he talk
4 about the knee?

5 MR. PRINCE: He's not focused on the knee. His initial
6 report, Your Honor, just for your purposes, is 5 – the initial bill was
7 \$5,235. So the –

8 THE COURT: I've got to ask, how do you get to five two three
9 five?

10 MR. PRINCE: I don't know.

11 THE COURT: Okay.

12 MR. KAHN: And, so, Your Honor, the case, until a week
13 before trial, involved the plaintiff not being able to work. One of the
14 bases for that was the plaintiff was a manager at an auto dealership and
15 he had to walk miles a day. And because of his knees, he couldn't do
16 that. So that was a not an insignificant claim at the time that Mr. Spector
17 was rendering his initial opinions. Yes, plaintiff withdrew those, but we're
18 now being asked to pay for them. So I'd ask for some kind of similar
19 accommodation.

20 THE COURT: I agree. And because – he, this was Spector,
21 on the –

22 MR. PRINCE: His bill, initial bill, Your Honor, is on page 55 of
23 the memorandum. Bate –

24 THE COURT: Thank you.

25 MR. PRINCE: -- 55.

1 THE COURT: Thank you. Let me look at that. Is it just a
2 blanket –

3 MR. PRINCE: No, no --

4 THE COURT: -- five two –

5 MR. PRINCE: -- he detailed by hour. You wondered how he
6 gets there, he bills by the tenth of the hour.

7 THE COURT: Medical case file review. Vocational
8 assessments, and rehab testing.

9 All right. So I'm going to cut that and split it of 50 percent
10 because this is a total – both the knee and the back are implicated
11 equally in a voc rehab. As opposed to the doctor who specifically
12 testifies and treats regarding the back. So I can see how this would be
13 more interrelated to both when you're giving a total. So it's something
14 like 2600. And actually –

15 MR. PRINCE: Okay. So we're going to reduce that invoice
16 by --

17 THE COURT: -- 2617.50.

18 MR. PRINCE: Okay.

19 THE COURT: I can do that in my head.

20 MR. PRINCE: So we're going to reduce his bill by 2617.50.

21 THE COURT: Correct.

22 What else?

23 MR. PRINCE: Okay, then –

24 THE COURT: Mr. Kahn.

25 MR. PRINCE: -- you're allow, excuse me, allow the rest,

1 right?

2 THE COURT: Yes.

3 MR. PRINCE: Okay.

4 MR. KAHN: I think that covers all the experts. The next issue
5 is, is just a very brief one. That's the trial technician. It's a lot of money,
6 \$22,000. And what I had raised in, just to be clear, I think the case law
7 does allow counsel to do what he did, but it's interesting that he had a
8 trial against our firm, the amount was low. Our firm sought trial
9 technician charges of a similar amount. Mr. Prince opposed them and
10 said they're completely improper and no one should ever get them. Now
11 he wins and he wants them. Like I said, I don't think there's a rules thing.
12 He can't do that. In fact, I've done –

13 THE COURT: I appreciate it.

14 MR. KAHN: -- both sides as well. So.

15 THE COURT: We always – we tend to, you change hats. If
16 somebody comes in with a \$10 million PI case, you'd probably take it and
17 change hats. It's happened before. I could give you the names of
18 insurance defense lawyers who have done that and do it. So.

19 MR. KAHN: I'll submit.

20 MR. PRINCE: Your Honor, I guess that's an integral part of
21 the complex case trial presentation. It's necessary for the jury and assist
22 the jury. Both sides had it. I mean, right, I did argue that I in some way
23 to mitigate my former client's potential exposure to the defense, but it is
24 certainly authorized by the rule and well within your discretion. And we
25 ask to award because this is integral to the presentation for both sides

1 actually. So I mean –

2 THE COURT: Yeah. And before I forget, are we skipping the
3 runners, the couriers. We need –

4 MR. PRINCE: Are you just submitting on that?

5 THE COURT: -- to go over all that. All right. As to the
6 whatever the guy's called who assists in trial, times have changed since,
7 I mean, surprisingly, I've been on the bench now ten years, but it is not
8 just common practice, it seems to be every day practice and clearly both
9 sides had it in this case. I think it's, I mean, it certainly costs a lot, but I
10 think it's reasonable and unfortunately juries want to see the video
11 presentations now. Just like in criminal cases, they want to – they almost
12 demand DNA or forensics. They want the CSI. It's our internet society.
13 So I'm going to allow that.

14 MR. KAHN: I did skip one, Your Honor. I'm –

15 THE COURT: Yeah, I know. You skipped --

16 MR. KAHN: -- going back to –

17 THE COURT: -- a couple. So –

18 MR. KAHN: It's Dr. Clauretie.

19 THE COURT: -- go ahead

20 MR. KAHN: Dr. Clauretie, if the Court recalls, he had three
21 different reports. That's the way he operates. One of them was
22 household services. That was actually a lengthy and – the amount
23 wasn't a lot, but it was a significant amount of his efforts. And that was
24 withdrawn at trial as well. So my proposal would that his numbers get
25 reduced by approximately a third.

1 MR. PRINCE: That's fine. I agree to that.

2 THE COURT: Okay. And was there – I thought there was a
3 bunch of little things –

4 MR. KAHN: There are. I'm getting to that, Your Honor

5 THE COURT: -- which I – we have to go over.

6 MR. KAHN: I'm not going to go over every one. The –

7 THE COURT: Well –

8 MR. KAHN: I understand it's at issue, but argument D are
9 some printing costs totally \$1400. I'll just submit that based on the
10 pleadings and the briefs.

11 THE COURT: Wait, wait, wait, wait. So I get it again, where
12 is it?

13 MR. KAHN: It's page 10 of our –

14 MR. PRINCE: Which – what page --

15 MR. KAHN: -- of our --

16 MR. PRINCE: -- what page of the memorandum?

17 MR. KAHN: I don't know. My motion to re-tax, it's page 10.
18 It's costs 85 through 94 –

19 MR. PRINCE: What?

20 MR. KAHN: -- whatever that would be. And the –

21 MR. PRINCE: What are you talking about?

22 MR. KAHN: -- large one, the only one that's really large is
23 Cost 94, CD, cardstock, tabs, binders. And so the issue is, you know,
24 are we paying for their binders and tabs. Can they be reused? Is that
25 within the rule? Obviously, if the Court requests it, you know, everybody

1 needs to have them, but I don't know if that's an office expense or if
2 it's a –

3 MR. PRINCE: No, we deliver them to the Court –

4 THE COURT: All right. Wait, –

5 MR. PRINCE: -- deliver them to the jury –

6 THE COURT: -- let him finish.

7 Are you done with that?

8 MR. KAHN: I don't know if it's an office expense or something
9 that's allowable. It's not in the rule but it, you know, it's been requested,
10 it gets requested sometimes. And our office tends to recycle them, but
11 that doesn't mean everybody has to.

12 MR. PRINCE: Your Honor, –

13 THE COURT: Go ahead.

14 MR. PRINCE: -- we deliver to the Court courtesy copies of
15 the tabs and binders to deposing Counsel, official set, plus one set for us.
16 So this in part and parcel of typical, normal trial preparation. You have to
17 incur these costs and obviously we're not getting things back. So this is
18 not a recycling effort. It's a minimal cost. It's necessary. It's
19 fundamental to the process.

20 THE COURT: What I can't seem to – is that costs –

21 MR. PRINCE: Yeah, it's number 6, --

22 THE COURT: -- 085 --

23 MR. PRINCE: -- 84 through 94.

24 THE COURT: All right.

25 MR. PRINCE: He didn't know the numbers. And those are

1 articulated –

2 THE COURT: And what's the – the total of that?

3 MR. PRINCE: In, well out, depending on which side, I mean,
4 probably 4400 in-house and then outside service looks like around
5 \$4900. So, it's about 8,000.

6 THE COURT: Unfortunately, again, it's, you know, it's going
7 to be an expense we will be avoiding in the future when all of the
8 documents will be on IPADs or something like that. But at this point,
9 even though I know that there – there's a copy for the witness, I have a
10 copy. There's somewhat an overkill, I think it's common practice and it's
11 a reasonable cost so I'm going to award. And I wish you'd recycle and
12 everybody would, but we, at the Court, we do some limited, but not – not
13 as much as I'd like. It's just a comment on our society.

14 Okay, what else, Mr. Kahn?

15 MR. KAHN: Now we have the exception that swallow the rule,
16 the miscellaneous costs. So I'll try to quickly go through a couple of
17 those. Transcript –

18 THE COURT: What page? Where --

19 MR. KAHN: -- charges for Timothy Leggett.

20 THE COURT: -- oh, here it is. Okay.

21 MR. KAHN: Yeah, it's page – it starts at page 10, 11 of our
22 brief.

23 MR. PRINCE: What's the page of the memorandum?

24 MR. KAHN: That I don't know. It's cost –

25 MR. PRINCE: Well, we're dealing with that?

1 MR. KAHN: -- 106 through 124.

2 MR. PRINCE: What is it?

3 MR. KAHN: One-zero-six through one-two-four. They total a
4 little under 5,000. So expert Leggett was deposed twice for about \$1500.
5 He didn't testify while they charged us for -- that's cost 101 and 104.
6 They charged us for videographer fees for almost \$5,000. That's not an
7 allowable cost under the rule. Deposition transcript cost for Dr. Miao of
8 \$365. He was withdrawn. I'm just quickly jumping through these. Court
9 reporting at a 2.67 conference of \$650. We also paid the court reporter
10 to get that. That was plaintiff's choice that it be reported. There's no
11 requirement that it be reported. But we already paid for that once. We're
12 getting to one that's more major here in a second. They have some
13 record retrieval costs of \$8600. These Record Reform costs so I think
14 they had a -- our position is they had a vendor do the equivalent of legal
15 work, kind of a medical records review for a little under \$2,000. There's
16 some kind of lien resolution, \$500 fee, it's unclear what that's for. Trial
17 transcripts \$1700, are requested. Courier/messenger services is minor.
18 Malik Ahmad costs are minor. This is the one I want to address.

19 THE COURT: JAMS.

20 MR. KAHN: Yeah, mediation fees, --

21 THE COURT: I can read your mind.

22 MR. KAHN: -- \$6,082.92. We agreed to mediate. If the
23 Court's going to make the defendant pay after a trial, then the desire to
24 have people mediate is going to be met with resistance if we agree to
25 split it. And that's the agreement going in, which it was. We signed

1 contracts with JAMS and then later they say we want to recover what we
2 agreed we'd split. Especially given the amounts of money that we're
3 talking about here that the Court's already awarded. That one seems a
4 little bit overreaching.

5 MR. PRINCE: What could you agree to?

6 MR. KAHN: I'd agree to we already paid for JAMS and the
7 plaintiff paid for JAMS and that's a decision we both made to go forward
8 and pay JAMS to try to mediate. I don't think it's fair to come after us for
9 it after and there's no provision in the code. So that one, I'd like to start
10 with that one if we want to –

11 THE COURT: Okay. Fine.

12 MR. KAHN: -- discuss any of these.

13 THE COURT: Mr. Prince.

14 MR. PRINCE: I'll agree to withdraw it.

15 THE COURT: Okay. If you had talked before, we could have
16 saved like – well, that was only a minute, but certainly they add up.

17 What's next?

18 MR. KAHN: I think that's it, Your Honor. I've touched on it.
19 I'll submit it on the pleadings and reserve –

20 MR. PRINCE: Yeah.

21 THE COURT: All right.

22 MR. KAHN: -- right to argue.

23 THE COURT: Litigation services trial tech, that was the one
24 you withdrew?

25 MR. PRINCE: No, no. That's you allowed.

1 MR. KAHN: That you ordered.

2 THE COURT: That was the – okay, oh, the guy sitting and –

3 MR. PRINCE: Yeah.

4 THE COURT: -- helping. Yes. So for the record, what – I
5 need to go through these, if they're objected to individual –

6 MR. PRINCE: Again well he – well he talked about, for
7 example, the transcript for Dr. Miao, --

8 THE COURT: Oh.

9 MR. PRINCE: -- who was a treating physician.

10 THE COURT: All right. I can tell you one, the transcript for
11 the 2.67, I'm going to allow that.

12 MR. PRINCE: Yes.

13 THE COURT: It helps in resolving or solidifying what actually
14 took place. So given the importance of it, I think it is appropriate.

15 What else?

16 MR. PRINCE: Dr. Miao's testimony. He was a treating
17 physician. Just because he didn't testify at the trial doesn't mean you
18 can't recover. We paid his deposition cost because he treated him and
19 actually work comp rated him and accepted the knee claim and paid a
20 PPD for part of the knee claim. So Dr. Miao, that deposition.

21 They took the deposition Dr. – Mr. Leggett, who is an
22 appropriately allowed expert at the time. We incurred the cost of that
23 deposition. Just because I strategically later chose not to call him as a
24 witness doesn't mean that there was a reason – unnecessary
25 unreasonable expense. I think you should allow that. We've already

1 withdrew in its entirety Mr. Leggett's expert witness fees, but this
2 deposition of him was incidental to the litigation and at the time that time
3 that was our strategy. Strategy's change. Does it mean –

4 THE COURT: Okay.

5 MR. PRINCE: -- it's the cost that's disallowed.

6 THE COURT: Mr. Kahn, you want any –

7 MR. KAHN: No, Your Honor, it's two – it's two depositions.

8 It's about \$1500. And --

9 THE COURT: I understand. I think that it is reasonable to get
10 the cost for the depos. During a case, you find out things, but certainly at
11 the time to pay for his deposition, you found out, hey, it doesn't – that's
12 reasonable, not his expert. You've said they're not asking for that. So
13 I'm going to grant that. What else?

14 MR. KAHN: There's a Legal Retrieval Service and a Record –

15 MR. PRINCE: The Legal Retrieval --

16 MR. KAHN: -- Reform I think are next.

17 MR. PRINCE: -- Services, Your Honor and Record Reform,
18 those are actually medical records and billings. Its' us ordering through a
19 third-party vendor. What they do, like, use legal retrieval to tell them we
20 want you to go collect the hospital records, the physician records, and it's
21 the – they go collect the records and charge us the 60 cents per page
22 plus their service fees. So that's really medical records and bills –

23 THE COURT: All right. And there was another guy who
24 interpreted it.

25 So Mr. Kahn, do you want to comment on that?

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MR. PRINCE: Who interpreted it?

MR. KAHN: Yeah, the Record Reform.

THE COURT: There's a fee for –

MR. PRINCE: No, Record Reform is the same thing. Oh, no, I think Record Reform, you're right, that's like a summary of the –

THE COURT: The guy --

MR. PRINCE: -- records that we got. True, true.

THE COURT: -- okay. So I'm allowing the people that go and obtain the records. I think that's –

MR. PRINCE: That's Legal Retrieval.

THE COURT: -- that's normal and necessary. The fact that you chose to have somebody summarize them for you which certainly either somebody in your firm could have done and/or more commonly, the expert explains to you so I am not giving –

MR. PRINCE: Okay.

THE COURT: -- the cost for summarizing and interpreting.

MR. PRINCE: Okay.

THE CLERK: And is –

THE COURT: Is there anything else?

THE CLERK: -- is that the Reform?

MR. PRINCE: That is Record Reform, --

THE CLERK: Okay.

MR. PRINCE: -- right. That's disallowed.

THE COURT: Record Reform, \$1,960 I'm not awarding.

MR. KAHN: Next is for trial dailies, \$1710.65. This is at the

1 bottom of page 12 of our –

2 THE COURT: Okay.

3 MR. KAHN: -- of our pleading. I'm mean, that's a choice if
4 you want dailies.

5 MR. PRINCE: Oh.

6 THE COURT: I – okay, go ahead, put on the record, but I –

7 MR. PRINCE: I just feel that those are essential to trial
8 presentation. And at times, part of it was the sanctioning, part of it was
9 critical expert testimony that I wanted to use during the trial whether it be
10 with other witnesses or the closing arguments. So I feel that's an
11 appropriate cost and obviously incurred.

12 THE COURT: I think now-a-days, it's – it may not be crucial
13 or it certainly is common. And in this case, given some of what took
14 place, I certainly think it was appropriate and necessary. So I'm giving
15 those.

16 MR. KAHN: Those are the major ones. We'll submit based
17 on the pleadings as to anything else.

18 THE COURT: I need to know what's left so I can – so it can
19 go in the order. I --

20 MR. PRINCE: Is there anything other than what you talked
21 about today?

22 MR. KAHN: I think I've raised all the major ones. The others
23 are very minor amounts. I don't think worth the Court's time. So.

24 THE COURT: All right. You guys can –

25 MR. PRINCE: Okay.

1 THE COURT: -- either resolve it and –

2 MR. PRINCE: All right. We'll prepare an order –

3 THE COURT: Okay.

4 MR. PRINCE: -- consistent what you did here today and
5 modify.ing

6 MR. KAHN: Oh, Your Honor, I would ask that going forward
7 that Mr. Severino from my office and Mr. Wall from his office be copied
8 on any pleadings, correspondence, communications, just to make sure
9 the defense team has them. Both Mr. Severino and Mr. Wall will be
10 taking a more active role moving forward after today on this case.

11 THE COURT: Any problem.

12 MR. PRINCE: Well, we served the Wilson Elser law firm.
13 They're both partners there. So, okay, --

14 THE COURT: I think the requirement is --

15 MR. PRINCE: -- and Mr. Wall now is going --

16 THE COURT: -- that you deserve –

17 MR. PRINCE: Right.

18 THE COURT: -- and that the –

19 MR. PRINCE: It goes to everybody on the service list.

20 THE COURT: Yeah.

21 MR. KAHN: I'm also – I'm also talking about correspondence,
22 communications. Just I want to – I would just request that they be copied
23 on everything going forward is all.

24 MR. STRONG: Fine.

25 MR. PRINCE: Okay.

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THE COURT: All right. Okay. Thank you.

MR. KAHN: Does the Court – does the Court want defendant
to review the order before –

THE COURT: Yes.

MR. KAHN: -- it's submitted.

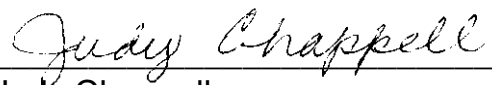
THE COURT: You certainly.

MR. KAHN: Thank you.

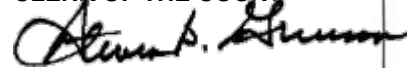
[Hearing concluded at 11:17 a.m.]

* * * * *

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



Judy Chappell
Court Recorder/Transcriber



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12 Attorneys for Plaintiff
13 *Bahram Yahyavi*

DISTRICT COURT
CLARK COUNTY, NEVADA

11 BAHRAM YAHYAVI, an Individual,

12 Plaintiff,

13 vs.

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

16 Defendant

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

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

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

21 DATED this 4 day of March, 2020.

22 **PRINCE LAW GROUP**



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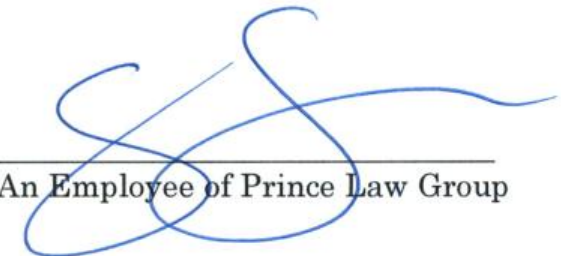
1 CERTIFICATE OF SERVICE

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

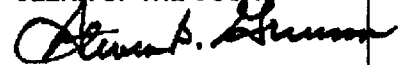
10 David S. Kahn, Esq.
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14 Mark J. Brown, Esq.
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17 Las Vegas, NV 89119

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

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22 An Employee of Prince Law Group
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13 *Bahram Yahyavi*

8 **EIGHTH JUDICIAL DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

11 BAHRAM YAHYAVI, an Individual,
12 Plaintiff,

13 vs.

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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ORDER

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

IT IS SO ORDERED.

DATED this 2 day of March, 2020.


DISTRICT COURT JUDGE RONALD J. ISRA

DATED this 26th day of February, 2020.

DATED this ___ day of February, 2020.

Respectfully Submitted By:

Approved as to Form and Content:

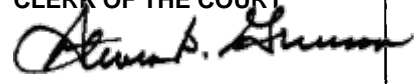
PRINCE LAW GROUP

**WILSON, ELSER, MOSKOWITZ,
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12 Attorneys for Plaintiff
13 *Bahram Yahyavi*

DISTRICT COURT
CLARK COUNTY, NEVADA

11 BAHRAM YAHYAVI, an Individual,
12 Plaintiff,

13 vs.

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

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

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

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

22 ...

23 ...

24 ...

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27 ...

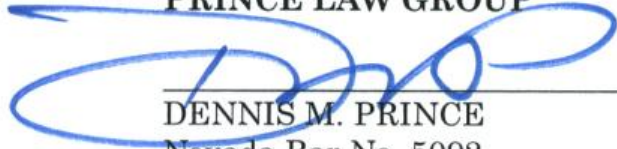
28 ...



1 matter, a copy of which is attached hereto.

2 DATED this 4 day of March, 2020.

3 **PRINCE LAW GROUP**

4 

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7 KEVIN T. STRONG

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11 Attorneys for Plaintiff

12 *Bahram Yahyavi*

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1 CERTIFICATE OF SERVICE

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

11 David S. Kahn, Esq.
12 WILSON, ELSER, MOSKOWITZ, EDELMAN
& DICKER LLP.
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14 Las Vegas, NV 89101

15 Mark J. Brown, Esq.
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Las Vegas, NV 89119

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

20
21
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24 An Employee of Prince Law Group
25
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1 **ORDER**
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5 Nevada Bar No. 12107
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12 Attorneys for Plaintiff
13 *Bahram Yahyavi*

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

11 BAHRAM YAHYAVI, an Individual,
12 Plaintiff,

13 vs.

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

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

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

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

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



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

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

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

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

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

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



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

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

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

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ORDER

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

IT IS SO ORDERED.

DATED this 2 day of March, 2020.



DISTRICT COURT JUDGE

RONALD J. ISRAEL

DATED this ____ day of February, 2020.

DATED this 26th day of February, 2020.

Respectfully Submitted By:

Approved as to Form and Content:

PRINCE LAW GROUP

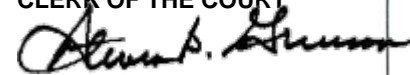
**WILSON, ELSER, MOSKOWITZ,
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12 Attorneys for Plaintiff
13 *Bahram Yahyavi*

DISTRICT COURT
CLARK COUNTY, NEVADA

11 BAHRAM YAHYAVI, an Individual,
12 Plaintiff,

13 vs.

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

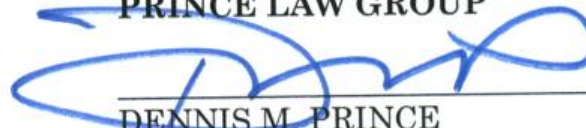
CASE NO.: A-15-718689-C
DEPT. NO.: XXVIII

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

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

21 DATED this 4 day of March, 2020.

PRINCE LAW GROUP



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27 Las Vegas, NV 89135
28 Attorneys for Plaintiff
Bahram Yahyavi



1 **CERTIFICATE OF SERVICE**

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

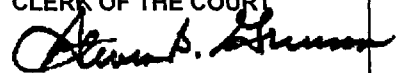
11 David S. Kahn, Esq.
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15 Mark J. Brown, Esq.
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19 *Attorneys for Defendant*
Capriati Construction Corp., Inc.

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23 An Employee of Prince Law Group
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12 Bahram Yahyavi

8 **EIGHTH JUDICIAL DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

11 BAHRAM YAHYAVI, an Individual,
12 Plaintiff,

13 vs.


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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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ORDER

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

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

IT IS SO ORDERED.

DATED this 2 day of March, 2020.



DISTRICT COURT JUDGE RONALD J. ISRAEL

DATED this 26th day of February, 2020.

DATED this ___ day of February, 2020.

Respectfully Submitted By:

Approved as to Form and Content:

PRINCE LAW GROUP

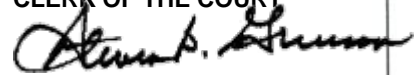
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12 Attorneys for Plaintiff
13 *Bahram Yahyavi*

DISTRICT COURT
CLARK COUNTY, NEVADA

11 BAHRAM YAHYAVI, an Individual,
12 Plaintiff,

13 vs.

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

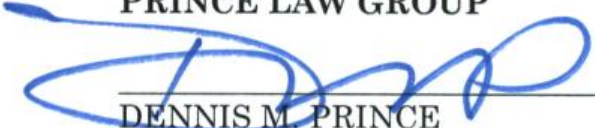
CASE NO.: A-15-718689-C
DEPT. NO.: XXVIII

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

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

21 DATED this 4 day of March, 2020.

22 **PRINCE LAW GROUP**



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28 Las Vegas, NV 89135
Attorneys for Plaintiff
Bahram Yahyavi



1 CERTIFICATE OF SERVICE

2 Pursuant to NRCp 5(b), I certify that I am employee of **PRINCE LAW GROUP**,
3 and that on the 4 day of March, 2020, I caused the foregoing document entitled
4 **NOTICE OF ENTRY OF ORDER GRANTING, IN PART AND DENYING, IN**
5 **PART, PLAINTIFF'S MOTION FOR ATTORNEY'S FEES, COSTS AND**
6 **INTEREST** to be served upon those persons designated by the parties in the E-Service
7 Master List for the above-referenced matter in the Eighth Judicial District Court eFiling
8 System in accordance with the mandatory electronic service requirements of
9 Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules, as
10 follows:

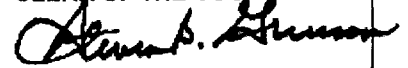
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19 *Attorneys for Defendant*
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12 Attorneys for Plaintiff
13 *Bahram Yahyavi*

8 **EIGHTH JUDICIAL DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

11 BAHRAM YAHYAVI, an Individual,
12 Plaintiff,

13 vs.

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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



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

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

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

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



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

ORDER

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

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

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

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

IT IS SO ORDERED.

DATED this 2 day of March, 2020.


DISTRICT COURT JUDGE *a* RONALD J. ISRAEL

DATED this 20th day of February, 2020.

DATED this ___ day of February, 2020.

Respectfully Submitted By:

Approved as to Form and Content:

PRINCE LAW GROUP

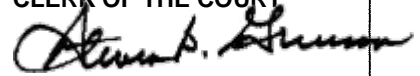
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17
18 **DISTRICT COURT**
19 **CLARK COUNTY, NEVADA**

20	BAHRAM YAHYAVI,)	CASE NO. A-15-718689-C
)	DEPT NO. XXVIII
21	Plaintiff,)	
22	v.)	
23	CAPRIATI CONSTRUCTION CORP., INC.,)	AMENDED
	a Nevada Corporation,)	NOTICE OF APPEAL
24	Defendant.)	
25)	

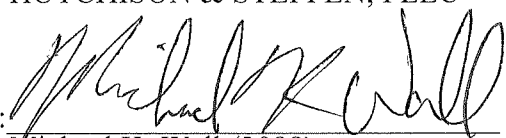
26 Notice is given that Capriati Construction Corp., Inc., Defendant in the above-captioned
27 matter, appeals to the Supreme Court of Nevada from the following Orders:

- 28 1. The District Court's Order of Judgment Upon the Jury Verdict entered in this

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- action on October 22, 2019;
 - 2. The District Court’s post-judgment Decision and Order (for sanctions), entered in this action on November 5, 2019;
 - 3. The District Court’s post-judgment Order denying Defendant’s motion for a new trial, entered in this action on March 3, 2020;
 - 4. The District Court’s post-judgment order granting in part, and denying in part, defendant’s motion to retax costs, entered in this action on March 3, 2020;
 - 5. The District Court’s post-judgment order granting in part, and denying in part, plaintiff’s motion for attorney’s fees, costs, and interest, entered in this action on March 3, 2020; and
 - 6. Any and all orders and judgments rendered appealable by any of the foregoing.
- DATED this 13 day of March, 2020.

HUTCHISON & STEFFEN, PLLC

By: 
Michael K. Wall (2098)
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Appellate counsel for Defendant

1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN,
3 PLLC and that on this 13^m day of March, 2020, I caused the above and foregoing document
4 entitled **NOTICE OF APPEAL** to be served as follows:

- 5 by placing same to be deposited for mailing in the United States Mail, in a
6 sealed envelope upon which first class postage was prepaid in Las Vegas,
7 Nevada; and/or
8 to be sent **via facsimile**; and/or
9 sent electronically via the Court's electronic service system; the date and time of
10 this electronic service is in place of the date and in place of deposit in the mail.
11 to be hand-delivered;

12 to the attorney(s) listed below at the address and/or facsimile number indicated below:

12 Dennis M. Prince, Esq.
13 PRINCE LAW GROUP
14 8816 Spanish Ridge Ave.
15 Las Vegas, NV 89148
16 Tel: (702) 534-7600
17 Fax: (702) 534-7601

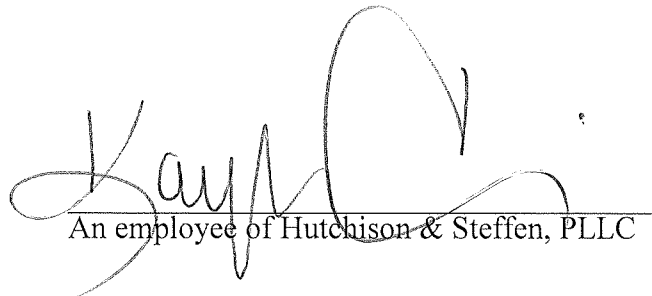
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DISTRICT COURT
CLARK COUNTY, NEVADA

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

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

RECORDER'S PARTIAL TRANSCRIPT OF JURY TRIAL - DAY 5

APPEARANCES:

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

RECORDED BY: JUDY CHAPPELL, COURT RECORDER

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Las Vegas, Nevada, Friday, September 13, 2019

[Case called at 8:39 a.m.]

THE COURT: A-718689. So there's a question regarding you, the Defense had requested that the complaint and the answer be written -- or read, correct?

MR. KAHN: Yeah, unfortunately, I have to ask the court to do that. I haven't had to do it in 28 years either, but --

THE COURT: No, no, that's fine. The problem is there are two answers on file.

MR. KAHN: And the clerk showed me. They appear to be exactly the same. For whatever reason, they were to be refiled. The language appears similar. I just say we should use the last filed one, and Mr. Brown may know. It's before I got in the case.

MR. BROWN: We refiled that answer because of a little ambiguity, and because there was a bankruptcy stay. A little ambiguity in the -- basically the start of our -- so the minutes indicated we filed the exact same answer again.

THE COURT: Okay. So do you have the complaint and answer?

THE CLERK: I do.

THE COURT: All right. And so I have -- these proposed jury instructions, did you agree -- a pretrial instruction; did you agree on these?

MR. PRINCE: Yes.

1 MR. KAHN: We -- as long as my two are in there.

2 MR. PRINCE: Yeah.

3 MR. KAHN: We did, and we've agreed.

4 MR. PRINCE: We sent one yesterday, late in the day, just like
5 do not to consider insurance for any purpose, you know, just like more
6 than the blanket one. I want just to add that to it, as well, just to -- you
7 always give that at the end. I wanted it up front because we're going to
8 be talking about insurance.

9 MR. KAHN: Yeah, that wasn't discussed with me before
10 today.

11 THE COURT: All right. Look these over and make sure they
12 are what you want, and I don't know about the --

13 MR. PRINCE: I'm going to object [indiscernible].

14 MR. KAHN: Then, Your Honor --

15 THE COURT: Well, I don't know about the --

16 MR. KAHN: I am under the weather today, I have some kind
17 of stomach bug, so if I approach --

18 THE COURT: Okay, then don't get close.

19 MR. KAHN: Well, yeah, but if I approach and request a break
20 or two --

21 THE COURT: All right.

22 MR. KAHN: -- out of the ordinary, that's what's going on.

23 THE COURT: All right. Let's -- hope you feel better.

24 MR. PRINCE: Yeah, because I just -- so you're not to be able
25 to discuss whether to the Plaintiff's claim of insurance or for her medical

1 bills, or the damage, can't discuss whether your client was insured,
2 whether anybody was [indiscernible].

3 MR. KAHN: I'd object to that, just because the Worker's
4 Comp., it's confusing.

5 MR. PRINCE: No, no, worker -- no, no, no, the Worker's
6 Comp. is coming in because also other insurance that discussed during --
7 for your client to, and there's health insurance issues, not -- this whole
8 thing wasn't covered by Comp. Health insurance paid for the surgery,
9 so.

10 THE COURT: You're objecting to the --

11 MR. PRINCE: The last one.

12 THE COURT: -- pretrial --

13 MR. PRINCE: The last one. It's the whether anybody was
14 insured is immaterial.

15 MR. KAHN: And I just [indiscernible].

16 THE COURT: All I have is -- on the last page is basically
17 nothing.

18 MR. PRINCE: No, the second to the last page, Judge. That's
19 it.

20 THE COURT: Okay. You are not to discuss or even consider.

21 MR. PRINCE: Yeah.

22 THE COURT: What about --

23 MR. PRINCE: You're giving them Comp. instruction.

24 THE COURT: Yeah.

25 MR. PRINCE: And it's that specific.

1 THE COURT: What about the order? Do you care?

2 MR. PRINCE: I don't, Judge. I don't. I don't care.

3 THE COURT: And is the -- okay. Because there is an --

4 MR. KAHN: Leave it to the Court.

5 THE COURT: -- instruction on that, too, you know,
6 somewhere, that you're not to even -- you know, the order doesn't
7 matter.

8 MR. KAHN: So our two got in, ten-o-five, and ten-o --.

9 MR. PRINCE: Yeah, I'm fine with that.

10 MR. KAHN: Okay. Thank you.

11 THE COURT: All right.

12 MR. KAHN: Ten-o-five and 11, and so these, this is one with
13 and one without. If you look behind them there's copies of that of that if
14 you look. Same ones, there's just two. I'll submit it on the insurance
15 question. I'm not going to argue it.

16 MR. PRINCE: Yeah, I think we could, just to -- for clarity.

17 THE COURT: Yeah, it's like a mandatory one.

18 MR. KAHN: And I do acknowledge counsel's correct, you
19 know, that you are going to give the Comp. instruction, I think, so --

20 MR. PRINCE: Yeah.

21 MR. KAHN: -- within that context, I guess it's fine. So I'll
22 withdraw my objection and make it easy.

23 THE COURT: All right, on instructions. All right. Anything
24 else before we go?

25 MR. KAHN: Not for Defendant, Your Honor. We're ready to

1 roll.

2 THE COURT: Okay.

3 Bring them in, Steve.

4 THE MARSHAL: Judge, I heard yesterday that they weren't
5 given their juror numbers, so after I see them, I'm going to tell them
6 what number they are.

7 THE COURT: All right.

8 THE MARSHAL: And tell them how to put it on the top of
9 their questions.

10 THE COURT: Yeah.

11 [Pause]

12 THE COURT: On Monday we're starting at 1.

13 MR. KAHN: 9 a.m.?

14 THE COURT: No, one

15 MR. KAHN: Oh, one?

16 MR. PRINCE: Okay.

17 THE COURT: I have criminal that probably will go until
18 usually 11 and sometimes later.

19 THE MARSHAL: Please rise for the jury.

20 [Jury in at 8:46 a.m.]

21 [Within the presence of the jury]

22 THE COURT: Dolson, Mitchell, Suarez, Dewindt, Roach --

23 UNIDENTIFIED JUROR: Here.

24 THE COURT: Choi, De Asis, Whipple, Stephens, Harris, and
25 Thomas. That's the order.

1 THE MARSHAL: Okay. You're juror number 1, 2.

2 THE COURT: Be seated.

3 THE MARSHAL: 3, 4, 5, 6, 7, 8, 9, 10, 11. Remember your
4 juror number. If you have a question when the Judge asks, you will
5 write your juror number on the top of the sheet of the paper, your juror
6 number, and use the whole sheet of paper. Don't, you know, give me
7 back a half sheet, so a whole sheet.

8 THE COURT: We had people using like little tiny notes, and I
9 said no. We need to make them part of the court record, so feel free, use
10 a whole sheet.

11 Okay. Good morning, ladies and gentlemen.

12 JURORS: Good morning.

13 THE COURT: So I'm going to tell you later what time we're
14 going to start on Monday. I do have morning calendar, that's for sure, so
15 it's kind of a question of whether we'll start at 11 or one, and I haven't
16 looked at the calendar, so I don't know how long it is, but I will tell you
17 before we leave, actually, probably a couple of times.

18 So before we do opening statements, I'm going to read to
19 you some pretrial instructions. Now, these are not all the instructions
20 that you will likely have at the end of the case, and at the end of the case
21 we will give you each copies to follow along and take back with you to
22 deliberate, but these are just some general, like yesterday, I read to you
23 about some of the evidence, circumstantial and direct evidence. I'm
24 going to read to you some more pretrial instructions, more focused to
25 this particular case. The order that I read them has no effect, it's -- we've

1 basically pushed, you know, put them together this morning, so the
2 order means nothing, and although generally, I try to make them gender-
3 neutral, if I make a mistake, certainly the masculine and the feminine are
4 interchangeable in these instructions.

5 So payment of workman's compensation benefits by the
6 insurer on in the case of claims involving the uninsured employer's claim
7 account, or a subsequent injury account, the administrator, is based
8 upon the fact that a compensable industrial accident occurred and does
9 not depend upon blame or fault. If the Plaintiff does not obtain a
10 judgment in his or her favor in this case, the Plaintiff is not required to
11 repay his or her employer, the insurer, or the administrator, any amount
12 paid to the Plaintiff or paid on the behalf of the Plaintiff by the Plaintiff's
13 employer, the insurer, or the administrator.

14 If you decide that the Plaintiff is entitled to judgment against
15 the Defendant, you shall find damages for the Plaintiff in accordance
16 with the Court's instructions on damages and return your verdict in the
17 Plaintiff's favor in the amount so found without deducting the amount of
18 any compensation benefits paid to or for the Plaintiff. The law provides
19 a means by which any compensation benefits will be repaid from your
20 award.

21 A preponderance of the evidence means such evidence as
22 when considered and compared with that opposed to it, has more
23 convincing force and produced in your mind a belief that what is sought
24 to be proved is more probably true than not true. In determining
25 whether a party had met this burden you will consider all the evidence,

1 whether produced by the Plaintiff or the Defendant.

2 The preponderance or weight of evidence is not necessarily
3 with the greater number of witnesses. The testimony of one witness
4 worthy of belief is sufficient for the proof of any fact that would justify a
5 verdict in accordance with such testimony, even if a number of witnesses
6 have testified in the contrary. If the whole case, considering the
7 credibility of witnesses and after weighing the various factors of
8 evidence, you believe that there is a balance of probability pointing to
9 the accuracy and honesty of the one witness, you should accept his or
10 her testimony.

11 In order to establish a claim of negligence, the Plaintiff must
12 prove the following elements by a preponderance of the evidence; one,
13 that the Defendant was negligent; two, that the Plaintiff sustained
14 damages; and three, that the Defendant's negligence was a proximate
15 cause of damages sustained by the Plaintiff.

16 When I use the word "negligence" in these instructions, I
17 mean the failure to do something which a reasonable, careful person
18 would do, or the doing of something which a reasonable, careful person
19 would not do to avoid injury to themselves or others under
20 circumstances similar to those shown by the evidence. It is the failure to
21 use ordinary or reasonable care.

22 Ordinary or reasonable care is that care which persons of
23 ordinary prudence would use in order to avoid injury to themselves or
24 others under circumstances similar to those shown by the evidence. The
25 law does not say how a reasonable, careful person would act under

1 those circumstances; that is for you to decide. You will note that the
2 persons who conduct we set up as a standard is not the extraordinarily
3 cautious individual, nor the exceptionally skillful one, but a person of
4 reasonable and ordinary prudence.

5 A person who himself is exercising ordinary care has a right
6 to assume that every other person will perform their duty under the law,
7 and in the absence of reasonable cause for thinking otherwise, it is not
8 negligence for such a person to fail to anticipate injury which can come
9 to him or her only from a violation of law or duty by another.

10 It is the duty of a driver of any vehicle to avoid placing
11 himself or herself or others in danger and to use like care to avoid an
12 accident, to keep a proper lookout for traffic and other conditions, to be
13 reasonably anticipated, and to maintain proper control of his or her
14 vehicle.

15 When I use the expression "proximate cause", I mean that a
16 cause which in natural and continuous sequence, unbroken by an
17 efficient intervening cause, produces the injury complained of and
18 without which the result would not have occurred. It may not be the
19 only cause, nor the last or nearest cause. It is sufficient if it concurs with
20 some other cause, acting at the same time which in combination with it
21 causes the injury.

22 In determining the amount of losses, if any, suffered by the
23 Plaintiff as a proximate result of the motor vehicle collision in question,
24 you will take into consideration the nature, extent, and duration of the
25 injuries or damage you believe from the evidence Plaintiff has sustained,

1 and you will decide upon a sum of money sufficient to reasonably and
2 fairly compensate Plaintiff for the following items:

3 The reasonable medical expenses Plaintiff has necessarily
4 incurred as a result of the collision;

5 The reasonable medical expenses you believe the Plaintiff is
6 reasonably certain to incur in the future as a result of the collision;

7 The physical and mental pain, suffering, anguish, and
8 disability endured by the Plaintiff from the date of the collision to the
9 present; and the physical and mental pain, suffering, anguish, and
10 disability which you believe Plaintiff is reasonably certain to experience
11 in the future as a result of the collision;

12 The loss of enjoyment of life and compensation for loss of
13 ability to participate and derive pleasure from the normal activities of
14 daily life, or for the Plaintiff's inability to pursue his or her talents,
15 recreational interests, hobbies, or avocations endured by the Plaintiff
16 from the date of the motor vehicle collision to the present; and

17 The loss of enjoyment of life and compensation for loss of
18 ability to participate and derive pleasure from the normal activities of
19 daily life, or for the Plaintiff's inability to pursue his or her talents,
20 recreational interests, hobbies, or avocations which you believe Plaintiff
21 is reasonably certain in the future as a result of the motor vehicle
22 collision.

23 Damages for pain and suffering compensate Plaintiff for the
24 physical discomfort and emotional response to the sensation of pain
25 caused by the injury itself. On the other hand, damages for loss and

1 enjoyment of life compensate for the limitations resulting from
2 Defendant's negligence on Plaintiff's ability to participate and derive
3 pleasure from the normal activities of daily life, or for Plaintiff's inability
4 to pursue his or her talents, recreational interest, hobbies, or avocations.

5 A person who has a condition or disability at the time of an
6 injury is not entitled to recover damages. However, he is entitled to
7 recover damages for any aggravation of such preexisting condition or
8 disability proximately resulting from the injury. This is true, even if the
9 person's condition or disability made him more susceptible to the
10 possibility of ill effects than a normally healthy person would have been,
11 and even if a normally healthy person probably would not have suffered
12 any substantial injury, where a preexisting condition or disability is so
13 aggravated, the damages as to such condition or disability are limited to
14 the additional injury caused by the aggravation.

15 An employer is legally responsible for the negligent actions
16 of an employee who is acting in the course and scope of employment.
17 You are not to discuss or even consider whether or not the Plaintiff was
18 carrying insurance to cover medical bills or any other damages he or she
19 claims to have sustained. You are not to discuss or even consider
20 whether or not the Defendant was carrying insurance that would
21 reimburse him, her, or them, for whatever sum of money he or she may
22 be called upon to pay to the Plaintiff. Whether or not a party was insured
23 is immaterial and should make no difference in any verdict you may
24 render in this case.

25 No definite standard or method of calculation is prescribed

1 by law by which to fix reasonable compensation for pain and suffering,
2 nor is the opinion of any witness required as to the amount of such
3 reasonable compensation. Furthermore, the argument of counsel as to
4 the amount of damages is not evidence of reasonable compensation. In
5 making an award for pain and suffering you shall exercise your authority
6 with calm and reasonable judgment, and the damages you fix shall be
7 just and reasonable in the light of the evidence.

8 The Court has given you instructions embodying various
9 rules of law to help guide you to adjust a lawful verdict. Whether some
10 of these instructions will apply will depend upon what you find to be the
11 facts. The fact that I've instructed you on various subjects in this case,
12 including that of damages, must not be taken as indicating an opinion of
13 the Court as to what you should find to be the facts or as to which party
14 is entitled to your verdict.

15 Okay. The Clerk is now going to read the complaint, and I
16 explained to you yesterday what a complaint and an answer is.
17 Hopefully, you remember, and so we're going to go. The complaint
18 initiates a lawsuit, and the answer is the Defendant's response. Go
19 ahead.

20 THE CLERK: District Court Clerk, County of Nevada, Bahram
21 Yahyavi, an individual Plaintiff, versus Capriati Construction Corp., Inc., a
22 Nevada corporation Defendant. Complaint for auto negligence, a
23 personal injury.

24 Complaint. This is a civil action seeking monetary damages
25 against Capriati Construction Corporation, Inc., Defendant or CCC, for

1 committing acts or admissions of negligence against Plaintiff or
2 someone employed by them during and in the course of their business
3 or under their control and supervision, comes now Bahram Yahyavi,
4 Plaintiff, and by and through his attorney, Malik W. Ahmad, Esquire, of
5 the law office of Malik W. Ahmad, and sues Capriati Construction
6 Corporation, Inc., Defendant, and for reasons therefore states as follows.

7 One, jurisdiction. Plaintiff is a citizen of the State of Nevada
8 and Defendant is also a citizen of the State of Nevada. Defendant
9 Capriati Construction Corp. Inc. is a business entity and a corporation
10 incorporated in the State of Nevada and doing business as such. The
11 matter in controversy happened in Nevada. As such, Nevada courts
12 have jurisdiction in this matter. Also, Defendant resides in Las Vegas,
13 Nevada. Two, facts.

14 1, Plaintiff is a 51 years old male employed at the time of this
15 accident.

16 2, on June 19th, 2013, Plaintiff was driving a company-owned
17 vehicle when he collided with a forklift when the forks are sticking out
18 from a forklift truck driven by Defendant or his employees.

19 3, while driving, Defendant unexpectedly came in contact
20 with the forklift to Plaintiff's right of way with its forks lifted high in the
21 upright position

22 4, these higher and elevated forks smashed his windshield,
23 hitting his head, body, and general body.

24 5, Plaintiff was seriously injured and transported to UMC in
25 an ambulance.

1 6, later he was transferred to Concentra Medical Center
2 where he underwent medication management and physical therapy
3 without any relief of his pain.

4 7, Plaintiff had serious injuries where an MRI of the cervical
5 spine performed on October 1st, 2013, which showed injuries of neck,
6 cervical strain, cervical spondylosis, including upper extremity radicular
7 symptoms, multi-level cervical degenerative disc diseases, and disc
8 osteophytes.

9 8, Plaintiff's vehicle was a total loss.

10 9, Plaintiff had seen enumerable physicians, conducted
11 MRI's, and generally seen orthopedic surgeons.

12 10, Plaintiff's treatment has included both medications as
13 well as physical therapy.

14 11, prior to this accident, Plaintiff had barely no or none
15 preexisting conditions.

16 12, prior to this accident, Plaintiff had significant income
17 producing abilities and had higher income.

18 13, on July 8th, 2013, Plaintiff was diagnosed with cervical
19 muscle strain, scapular muscle strain, and head injury.

20 14, on July 18th, 2013, Plaintiff was diagnosed with cervical
21 strain and a result, scalp contusion, mild concussion.

22 15, on September 16th, 2013, Plaintiff was diagnosed with
23 neck pain, cervical strain, C6-7 auto fusion, cervical spondylosis, and
24 greater than right upper extremity radicular symptoms.

25 16, that Plaintiff's pain included -- includes cervical and

1 thoracic strain.

2 17, that all the aforementioned injuries also had caused
3 serious issues of sleeplessness.

4 18, that all of the aforementioned injuries had seriously
5 decreased his sexual activities

6 19, that Plaintiff walks with tandem gait and sometimes with
7 the assistance of a cane or walker.

8 20, his medical reports included significant aggravation of
9 symptoms which also led him to go to the emergency room where he
10 was found to have high blood pressure.

11 21, there has been progressive increase in the neck pain, left
12 arm pain and numbness, as well as occipital and frontal headaches
13 associated with these painful episodes.

14 22, it was also found by his orthopedic physician and
15 surgeon that he has spontaneous fusion at C6-7, including multilevel disc
16 protrusions as C3-4, C4-5, C5-6, C6-7, C7-11, and T1-2.

17 23, on the axial images at C3-C4, he has a broad-based disc
18 protrusion as well as uncontrover --

19 MR. PRINCE: Tibrial.

20 THE CLERK: -- tibrial. Thank you. Joint hydrotrophy.

21 MR. PRINCE: Hypertrophy.

22 THE CLERK: Thank you. Resulting in bilateral neural
23 foraminal stenosis.

24 24, that Plaintiff's employment history includes walking,
25 lifting, bending, driving, sitting for a long time, all of which has been

1 significantly reduced after the accident and such regular human activities
2 including walking, lifting, bending at the waist, driving, and other
3 mobility actions.

4 25, that on the occasion in question the Defendant was
5 negligent in the following particulars, among others, to wit: A, failure to
6 keep forklift with its fork in the non-erect position; B, failure to give full
7 time and attention and under supervision or control; C, failure to keep a
8 failure lookout; D, unreasonable operation or parking and station of a
9 vehicle under existing conditions; E, reckless driving.

10 26, that the collision here and above stated was due to the
11 sole negligence of Defendant without any contributory negligence
12 whatsoever by the Plaintiff. 2, first cause of action, negligence. **9:08:02

13 27, the Plaintiff adopts and incorporates all of the facts and
14 allegations set forth above as of fully set forth herein.

15 28, that as a direct and proximate result of the
16 aforementioned collision, the Plaintiff was suddenly thrown against the
17 inside of the automobile, thereby causing the Plaintiff to suffer severe
18 pain and injury, including but not limited to his head, both upper neck,
19 lower neck, thoracic spine, mid-lumbar spine, and lower lumbar spine,
20 all of which have caused her great mental pain and mental anguish.

21 31, that as a further direct and proximate result of the
22 negligence of the Defendant, the Plaintiff has been forced to expend
23 large sums of monies for x-rays, for medicine, and for the treatment of
24 the aforesaid injuries to herself.

25 32, that as a further direct and proximate result of the

1 negligence of the Defendant, the Plaintiff was forced to lose time from
2 his employment and has suffered a loss of wages for which she seeks
3 remuneration.

4 Wherefore the Plaintiff demands judgment against the
5 Defendant in the amount of \$10,000 for damages, together with the cost
6 of this action and such other relief as is deemed just and proper.

7 Prayer for relief. Wherefore Plaintiff prays for judgment
8 against Defendant as follows.

- 9 1, loss of occupancy, expenses for transportation;
- 10 2, negligence;
- 11 3, expenses for medical treatment and hospitalization;
- 12 4, future expenses for medical treatment;
- 13 5, loss of wages;
- 14 6, future loss of wages and earning capacity;
- 15 7, conscious pain and suffering;
- 16 8, future conscious pain and suffering;
- 17 9, permanent injuries to the affected parts;
- 18 10, for pain and suffering, decrease of mobility, bending,
19 lifting, walking, standing for long periods of time, sitting, and
20 sleeplessness;
- 21 11, for increased or no sexual activities -- I'm sorry -- 11, for
22 decreased or no sexual activities;
- 23 12, for reasonable attorney fees according to proof;
- 24 13, for costs of suit here and incurred;
- 25 14, for such other and further relief as the Court may deem

1 proper.

2 The undersigned affirms that this pleading does not contain
3 personal identifying information as defined in NRS 6038.040. Dated this
4 20th of May 2015. Respectfully submitted, Malik Ahmad, Esquire.

5 Do I need to read the declaration?

6 THE COURT: No.

7 THE CLERK: Defendant answer to complaint. Defendant,
8 Capriati Construction Corp. Inc., by and through its attorney, Mark J.
9 Brown, Esquire, of law offices of Eric R. Larsen, as and for its answer to
10 Plaintiff's complaint, admits, denies, and alleges as follow.

11 1, answering paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13,
12 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30 of
13 Plaintiff's complaint, Defendant is without sufficient knowledge or
14 information upon which to base a belief as to the truth of the allegations
15 contained therein, and upon that ground, denies each and every
16 allegation contained therein.

17 2, answering paragraphs 31 and 32 of Plaintiff's complaint,
18 Defendant denies each and every allegation contained therein.

19 Affirmative defenses, first affirmative defense. This
20 answering Defendant states that the allegations contained in the
21 complaint fail to state a cause of action against this Defendant upon
22 which relief can be granted.

23 Second affirmative defense. The liability of any of this
24 answering Defendant must be reduced by the percentage of fault of
25 others including Plaintiff herein.

1 Third affirmative defense. It has been necessary for this
2 answering Defendant to retain counsel to defend this action and it is
3 therefore entitled to an award of reasonable attorney fees.

4 Fourth affirmative defense. The Plaintiff has failed to
5 mitigate its damages, if any in fact exists or were incurred, the existence
6 of which is expressly denied.

7 Fifth affirmative defense. Some of the foregoing affirmative
8 defenses have been pled for purposes of non-waiver. This answering
9 Defendant has not concluded discovery in this matter and specifically
10 reserves the right to amend this answer to include additional affirmative
11 defenses if discovery warrants.

12 Sixth affirmative defense. This answering Defendant alleges
13 that the occurrence referred to in the complaint and all injuries and
14 damages, if any, resulting therefrom, were caused by the acts or
15 omission of a third party over whom this answering Defendant had no
16 control, nor the right, duty, or obligation to control.

17 Seventh affirmative defense. This answering Defendant is
18 not legally liable for Plaintiff's alleged injuries and/or damages, if any,
19 because no act and/or admission on the part of this Defendant
20 proximately and/or legally caused Defendant's claimed injuries and
21 damages as causation for the incident sued upon was that of an
22 intervening and/or superseding nature.

23 Eighth affirmative defense. Pursuant to NRCP 11, all possible
24 affirmative defenses may not have been raised herein as sufficient facts
25 or not available after reasonable inquiry upon the filing of this answer.

1 Therefore, this answering Defendant reserves the right to amend its
2 answer or allege additional affirmative offenses -- I'm sorry -- affirmative
3 defenses if subsequent investigation so warrants.

4 Ninth affirmative defense. This matter is subject to Nevada's
5 mandatory arbitration program.

6 Tenth affirmative defense. Plaintiff has failed to name a
7 necessary party for full and adequate relief essential to this action.

8 Eleventh affirmative defense. Plaintiff has failed to properly
9 and timely effectuate service and this complaint, therefore, must be
10 dismissed.

11 Twelfth affirmative defense. Plaintiff's actions against this
12 answering Defendant are moot because Plaintiff's actions are barred by
13 the applicable statute of limitations, wherefore Defendant prays for
14 judgment as follows:

15 1, that Plaintiff takes nothing by way of this action as to this
16 answering Defendant;

17 2, that this answering Defendant be reimbursed for
18 attorney's fees and costs necessarily incurred as a result of defending
19 this action; and

20 3, such other and further relief as this Court may deem just
21 and proper. Dated this 25th day of April 2018. Law offices of Eric R.
22 Larsen.

23 THE COURT: Thank you.

24 Plaintiff, opening.

25 MR. PRINCE: Your Honor, thank you.

1 PLAINTIFF OPENING STATEMENT

2 BY MR. PRINCE:

3 All right. Good morning.

4 JURORS: Good morning.

5 MR. PRINCE: Happy Friday.

6 JURORS: Thank you.

7 MR. PRINCE: Ready to get started with this case?

8 JURORS: Yes.

9 MR. PRINCE: That's good. I have the pleasure to represent
10 Bahram Yahyavi, and Bahram is -- was from -- was born in Iraq, and like
11 many Persians, the people from Iran, many people are called Persians,
12 during the revolution in the 1970s his family moved to the United States.
13 They moved to San Diego. But before that, Bahram and his siblings and
14 his parents, his dad actually worked for the United States Government,
15 in the embassy in Iran, and when they moved to the United States, his
16 father continued to work for the state department for the United States.

17 And Bahram, he grew up in San Diego, went to high school
18 there, he went to college there, got a master's degree, and for the
19 majority of his career he was in the auto -- in fact, virtually all it. He's
20 always been in the automobile business. He owned his own business,
21 he owned a car lot, used car lot, sold cars, and Bahram is most proud of,
22 he has four adult children, all of which are high school -- excuse, he got a
23 -- college graduates or in college.

24 And in 2008, or around 2008 or 2009, he moved to Las Vegas
25 from San Diego, and from that time on he was working in car sales, and

1 he was doing really well. He led a very active lifestyle. He was an avid
2 skier, he worked out regularly, he owns -- has owned a boat, went
3 waterskiing, an avid water skier, and living an active, full life. Very close
4 with his sons who both live in Las Vegas. You're going to hear from
5 Darian, who was here before probably on Monday or Tuesday.

6 And June 19th is a very -- in 2013, is a very memorable day
7 for Bahram because life changed literally in an instant for him that day.
8 He was driving from his dealership, Chapman Las Vegas Dodge on
9 Sahara and Mohave. He was going to the other Chapman Dodge which
10 on Boulder Highway, the old, the original one.

11 And as he was driving east and making the little turn onto
12 Glen Avenue, as we're going to talk about, an employee of the
13 Defendant, Capriati Construction, who was not authorized to drive a
14 forklift, not certified, had been told not to use it, he wanted to go and
15 drive, get on -- drive it on Glen Avenue without any help or assistance,
16 and he was pulling -- he had -- his vision was blocked, as you're going to
17 learn, by a semi-truck because Capriati was doing a public works project,
18 they were doing some road work.

19 And he came out as Bahram was driving on Glen Avenue, he
20 was making the turn in the roadway. The driver of this forklift, as he was
21 driving, was lifting the forks up and actually drove the forklift directly
22 into the car that Bahram was driving. And from that day and every day
23 since, he's had not only ongoing severe neck pain, limitation, but now is
24 completely disabled from working and is living a lifetime of chronic pain,
25 and that's what brings us here today, and that's why -- that's what we're

1 going to be talking about in this case.

2 I want to tell you this story, but I think we used -- we talked
3 about in the voir dire process roadway safety is paramount, and in fact, if
4 you're working in the construction field, it's safety first, and safety is job
5 number one. And as you're going to learn in this case, the employee of
6 Capriati Construction was not practicing safety first.

7 You're going to hear it from the safety manager who's sitting
8 there at the counsel table right now for the very first time, throughout
9 this case, that this driver should not have even been on the forklift that
10 day, they had other people more qualified, and that this driver wasn't
11 thinking correctly, and drove that forklift into Bahram's car, then that's
12 what brings us here.

13 So June of 2013, we're going to start off with, that's the black
14 Dodge Charger that Bahram was driving on the date of this collision and
15 to the right side of that is the forklift. It's a construction, heavy-
16 equipment forklift, owned and/or leased by Capriati Construction.

17 To the right of the picture you can see the officer speaking to
18 someone from Capriati, you can see it's a construction zone, you can see
19 that Bahram's car is directly in the roadway, and that forklift ran those
20 forks directly into the front A pillar and the front windshield of Bahram's
21 car, causing severe, chronic injuries. And when you don't follow the rules
22 and you're not safe, this is what happens.

23 As a result of this collision, Bahram had a four-level cervical
24 fusion. He is fused and he'll never have that motion back, from C3 to T1.
25 And as a result of that, not only did he have that surgery, unfortunately,

1 he had a complication associated with the surgery with a nerve injury,
2 which has caused significant -- not just physical pain, but nerve pain,
3 which is a little different, we're going to be talking about, and that can't
4 be controlled by opioids, and the burning pain, the numbness, and the
5 tingling that got so much worse after this, now he's got atrophy in his
6 shoulder, atrophy in arm, loss of grip strength.

7 And you see him now, you can see him in a very
8 uncomfortable position, sitting is excruciating, but he wants to be here
9 so that he can look -- you can see him and understand what he's gone
10 through.

11 This is what happens when you don't follow the rules. And
12 so far, Bahram has incurred over \$500,000 in medical expenses alone,
13 for more than six years of medical treatment, pain management
14 treatment, physical therapy, medication, hospitalization, and that's just
15 to-date. It's been a long road since June 2013, and I want to kind of give
16 you an overview of what he's been through and what we're going to be
17 showing you in this case.

18 We start off with before this, Bahram was having no physical
19 problems. He was 51 years old, living an active life, life was going well
20 for him. He had a good job, he was a floor sales manager for Chapman,
21 earning what was more than \$160,000, lived an active life with his sons,
22 and was doing well. But that changed that day and as a result, after this
23 collision happened. He was actually taken to the UNC Trauma Center
24 where they had a full trauma activation because of this.

25 He sought chiropractic treatment. He went to physical

1 therapy visits. He was referred to a spine surgeon because his problems
2 weren't going away. He was referred to a pain management specialist
3 along this road. He had many injections. He had a spinal injection to try
4 to find out what was causing his pain, to try to help reduce his pain.

5 By January 2014, and this is an important date, by every
6 definition medically, he had chronic neck pain and symptoms into his left
7 arm. And chronic means it's likely it's not -- never going away, and it's
8 never gone away, not only from the date of this collision, but it's
9 persistent and consistent and disabling to this minute.

10 In 2014, a Dr. Archie Perry recommended him for surgery,
11 multi-level surgery on his spine, but he didn't want that. He was afraid
12 of that, like many -- most people should be, and so he didn't jump into
13 that, so he tried everything he could.

14 By April 2015, because this was a workers' compensation
15 matter, and we're going to talk about how -- what the effect of that is in
16 this case, he was actually sent for a rating, a permanent partial disability
17 rating and determined that he actually had a permanent impairment in
18 his cervical spine that was not likely to go away as of April 2015.

19 He tried more physical therapy, he went to more chiropractic
20 visits to try to help control his symptoms, he even tried acupuncture. He
21 literally tried everything, and when you see the timeline, how many
22 doctor visits he had, physical therapy visits he had, and these injections
23 he underwent, this has been a long, impressive road for him to try to get
24 better.

25 By September 2016, he stopped working. The pain became

1 simply too much. You're going to learn that after this collision he did go
2 back to work. He tried to push through. You see him. He's got that roll.
3 Every time I've ever seen him, he has that roll. I mean, he would go -- at
4 Chapman Dodge, he would go up to the upstairs in an office and take
5 breaks frequently, and ice down, take time off the floor, and finally, that
6 just became too much.

7 In the midst of this, he's going to literally dozens, if not
8 hundreds of doctors' visits and trying to manage these complaints, and
9 he did it the best he could for years, but by September of 2016, he had to
10 stop working because of being no longer capable of it.

11 So in August of 2017, he seeks another second opinion
12 regarding his neck to see what his options were. And in January of
13 2018 he had that four-level fusion at Valley Hospital that where I showed
14 you the x-rays.

15 And now, sadly for Bahram and many people who have
16 chronic pain there's very limited medical options, so he has no more
17 available surgical options. The only thing they could do, we're going to
18 talk about this, is implants in your body, a foreign device called a spinal
19 cord stimulator, where they put like these little paddles on your spine,
20 they place it on your spine, and these little electrodes, and hopefully, it
21 disrupts the signal between your brain and your body so that you have
22 some peace.

23 But you're going to learn that Bahram lives his life in like two
24 to three hour intervals. He can't sleep at night. The arm pain, the
25 numbness, the tingling, the burning pain is excruciating, wakes him up

1 every two to three hours. This is how he tries to manage his day when
2 you're -- and how this chronic pain cycle really persists in the way of -- if
3 you're -- don't sleep well, you're fatigued, and the fatigue makes the pain
4 symptoms worse, and that's kind of how he lives now, and he really only
5 has like that one option left. So there's no more surgical options, and so
6 now we're left with a lifetime of chronic, severe pain.

7 And that's what we're going to be showing. I'll show you
8 some evidence along the way so that you understand what we're going
9 to be proving to you in this case, and we're going to show you some of
10 the rules that the judge talked about and how they fit into the evidence
11 that you're going to be hearing in his case and guide you to a decision.

12 But first we're going to be talking about accountability and
13 responsibility. First is fault. That's where we start. It's clear and you're
14 going to see from this evidence that the only person at fault was the
15 Capriati employee, that not only shouldn't have been on that forklift that
16 day at all, but he didn't have his -- his vision was blocked, admittedly
17 blocked. The safety manager's going to tell you here in the next hour
18 that he learned that day that this vision of the driver was blocked. So
19 that's the fault.

20 And we're here about accountability, and more importantly,
21 we're here about full responsibility, because to-date, Capriati
22 Construction has never accepted responsibility for one causing -- their
23 employee causing this collision. Never. They just -- Mr. Kahn just had
24 the complaint and answer and it's kind of tedious to read, but they knew
25 who was at fault from day one, but they've never admitted responsibility

1 for causing this collision. They've never admitted that they caused any
2 harm, ever in this case, that it's not their fault. They blamed Bahram for
3 causing this.

4 Let's set the scene. We talked in our opening statement
5 about -- remember in the voir dire about this happening near Boulder
6 Highway and Sahara? This is an aerial Google map of Boulder Highway,
7 and where it meets here, that's the east side of Las Vegas. This is if
8 you're going in this direction, this would actually be east. You can see
9 that with the legend there, but -- and you can see Glen Avenue there to
10 your right. That's a little small street off of Sahara that goes directly to
11 Boulder Highway. It's a one-way street. The collision actually occurred
12 right at the curve, right from where Sahara, you make the turn right onto
13 Glen Avenue.

14 And I want to identify for you where Bahram was going that
15 day. He was working at the Chapman Dodge which is on the left side of
16 your screen which would be west, and he was going to be driving to the
17 Chapman lot which was on Boulder Highway which would be to the
18 right, which would be east.

19 And Capriati Construction was actually doing roadwork or
20 underground utility work as part of a public works project primarily on
21 Boulder Highway and Sahara. They were doing some work, as you're
22 going to note, right here at Glen Avenue, but they also had a storage
23 yard right here on the corner of Glen and Boulder Highway, and that's
24 where the employee, Josh Arbuckle, who was driving the -- that's where
25 he wanted to go lift some material and to get some material. But they

1 also were working right where it says Capriati Construction and right
2 adjacent to Glen because they had some work going on there, as well.

3 So this was Bahram's intended route, less than a half a mile.
4 He actually pulled out of the Chapman Dealership, made a right turn to
5 go east on Sahara, and he -- as he got to Glen, you're going to see that
6 there was cones and he was fully in the travel lane and driving, and
7 wanted to make a right turn into the back lot of Chapman to look at some
8 new cars that arrived. And so this was an aerial view from Google from
9 May of 2013. This is actually making that -- looking east, making a right
10 turn onto Glen Avenue, that little small street, and to the right would be
11 the area where the construction is.

12 That's a view of the same area, kind of looking west so you
13 can kind of orientate yourself. There's actually three travel lanes going
14 east on Sahara, and there would normally be two lanes on Glen Avenue.
15 But in June of 2013 when this happened, as you can see, it's a
16 construction zone.

17 One of the things that Capriati was required to do as part of
18 its work is to hire a traffic control company to place the cones, and that's
19 what they've done here. So they're doing work right along, and this is
20 actually -- would be the right turn lane where you see the large backhoe.
21 That would be the right turn lane to go onto Glen Avenue. You could see
22 the cars in the -- in what would be normally the eastbound lane for
23 Sahara. That's going to route you to right -- to make the right turn onto
24 Glen Avenue.

25 This is now looking west so you can kind of get our

1 orientation. So that's the same area we looked before. That's east-
2 looking. This is west-looking. You can see right here, we're going to
3 zoom in on it for you, that's the same backhoe we were looking at. So
4 that would be the orientation of the roadway on the date of this collision
5 or about the -- on the -- close in time.

6 This is a Taylor forklift that Capriati was using that day. You
7 can see it's a very heavy-duty forklift. The forks are about six -- five to
8 six feet long. It's obviously used to move very large, heavy pallets,
9 concrete, underground utility items. And this is a view actually of the
10 forks. That's the frontal view of Bahram's car, and you could see that he
11 is actually out in the travel lane, and the forks had actually gone beyond -
12 - of the forklift, it'd actually gone beyond the cone and into the travel
13 lane and crashed into the Dodge Charger.

14 Before this, you can see to the left there, there's a semi-truck.
15 Thanks. The vision of the driver was obstructed, it was blocked the
16 whole time. He never saw Bahram's vehicle coming. He had thought he
17 saw it further west and he thought it was going to -- he assumed that it
18 was going to pass and go straight onto Sahara and not make that turn.

19 He did not let Bahram's car clear before he started to pull
20 out, and that's a -- actually, that tractor trailer, that Peterbilt there, it was -
21 - actually has a big trailer on the back and they're loading those big
22 metal plates, they're called trench plates. Those are the things that cover
23 a road if there's like a hole or excavation on the road that you drive over.

24 The actual -- the driver there is actually loading that up, but
25 there's even another obstruction, but you can see from the vantage point

1 of this driver that he has absolutely no -- he had complete obstructed
2 vision. Not only should he not be on the roadway that day without
3 somebody flagging, giving him some safety, some direction, being
4 another set of eyes, he pulled out when his vision was obstructed.

5 And you can see now, here, just how significant the collision
6 was driving the forks of that forklift into the front windshield and the A
7 pillar of the Dodge Charger driven by Bahram. By this point, obviously,
8 the -- in this picture, the driver of the forklift had backed up and removed
9 the forklifts from the front of the vehicle.

10 But I want to show you this picture. It's a different angle.
11 Not only was his vision obstructed by the truck, you see in the back,
12 there's a cement mixer, also. So there's actually two obstructions, not
13 just one, two before he pulled out and he never made sure the traffic was
14 cleared before he made the -- before he pulled out.

15 And again, I'm showing you, this is even the vision of -- from
16 this angle, there's really no effective way, if you're behind that truck and
17 even the cement mixer, there's no way you're going to be able to clear
18 oncoming traffic, particularly when you're sitting six, seven feet behind
19 the front of those forks.

20 And I'm showing you a close-up of the demolished
21 windshield. You're going to see some other damage to the front of the
22 Dodge Charger. But this is the -- we kind of just did a little animation or
23 a little simulation. The truck was there, plus the cement mixer, the
24 forklift driver's view was very limited, had absolutely no -- could not see
25 oncoming traffic, didn't ask for help, resulting in this collision.

1 And I want to -- I'm showing you this photograph here so
2 you can kind of orientate where this accidentally happened. You can see
3 that the officer is speaking to some construction personnel there just
4 west or just to past the yellow barrel, and I want to show you that that
5 actually puts it back there. So you know, that's just right at the apex of
6 that turn, right as the turn starts, that's where this collision happened.

7 As you'll learn from Bahram, he never saw this coming. He
8 felt like an explosion went off. The first notice he had was when the
9 forklift would -- before driving into the front windshield, and after that,
10 he went into a shock.

11 And you can see how this -- how substantial the damage is to
12 the A column, which is one of the strongest parts of the car, actually,
13 because that front post there is designed to avoid the roof collapsing in
14 the event of a rollover. It's designed to prevent you from dying as a
15 result of a -- sorry about that -- of having a crush injury.

16 And that would be from the inside of the Dodge Charger.
17 This, now you can see the significant disruption of the car and all the
18 damage to the A pillar of the right front corner of the passenger
19 compartment of the car. And you can see just how extensive the
20 damage was the -- done to the A pillar there, but also I want to show you
21 here. Look at how significant the roof is deformed. The roof is now
22 completely, like, it has a V in it. It's completely bent. The door's bent.
23 The door frame is bent. That's another kind of a close-up vision of the
24 interior of the Dodge Charger.

25 And really what we're going to be asking you in this case is

1 three questions. One is: Who's at fault? Two is: Was the Plaintiff, was
2 Bahram, was he injured? And three is: How much money is going to be
3 necessary to balance the harms for the lifetime of pain, suffering, and
4 limitation in this case?

5 And really, we're talking about corporate responsibility. We
6 talked about that during the voir dire and everybody had no problem
7 holding a corporation responsible for the actions of its employees. In
8 fact, corporations are legally responsible for the actions of their
9 employees. And corporations are legally responsible for all of the harm
10 and the loss caused by their employees, and that's what we're talking
11 about in this case, because really -- and what I want to do is show you
12 this instruction because this is the rule that the judge gave you, so you
13 don't think it's just my rules.

14 This is the law in the state of Nevada. An employer is legally
15 responsible for the negligent actions of an employee who was acting in
16 the course and scope of his employment. And this particular driver was
17 clearly working for Capriati that day and clearly caused this collision. So
18 who's responsible? Capriati Construction is fully responsible for all of
19 the harms and the losses caused by their employee.

20 Your rules of the road, and we're going to be talking about in
21 this case, is really about the law of negligence, and that's just about --
22 talking about being safe, not being careless. But the judge has given us
23 some instructions, but I want to talk about this one first, the burden of
24 proof.

25 Our burden of proof, and we think we're going to not only

1 meet this, we're going to tip the scales on its side, but all we're required
2 to do is just show it's more probable true than not true, the 51 percent I
3 talked about, and I wanted to show you that in the jury instruction, right
4 at the beginning of the case so that you have that firm in your mind that
5 that's the legal standard that my client is held to, and that's the one we
6 should be using as you receive the evidence in this case.

7 Is it more likely true than not that Capriati's employee caused
8 this, that they caused an injury, that Bahram now has a lifetime of
9 chronic pain, limitation, more than a million dollars in medical expenses
10 in the past, and going into the future, plus all of his wages of more than
11 over a couple of million dollars that he's lost?

12 But what is a negligence claim? We must prove the
13 Defendant was negligent, and we were damaged, and the negligence
14 was the cause of the damage sustained. Very simple. But what it -- it's a
15 very long instruction, but what it means is you have to drive reasonable
16 and safe. If you're doing something unreasonable, that's negligent. If a
17 normal, ordinary person wouldn't do it, that's considered negligence,
18 and that's all we have to prove. Not only was this negligence, it was
19 reckless what this gentleman did. It exceeds that.

20 But also this rule. It's the duty of the driver of any vehicle to
21 avoid placing himself or others in danger, and to use light care to avoid
22 and accident, to keep a proper lookout for traffic and other conditions to
23 be anticipated, and to maintain proper control of his vehicle. Capriati's
24 employee did not do that on June 19th, 2013, by everybody's -- every
25 part of the -- he put the public in danger, he put Bahram in danger, he

1 didn't use care to avoid an accident. He did keep a lookout because he
2 couldn't see. He violated every aspect of that law.

3 But Capriati's going to agree to this because they know the
4 safety rules as a big company. Operators of construction equipment
5 must take all steps necessary to avoid an injury to other motorists.

6 Operators of construction equipment must not enter the
7 roadway unless it's safe. It's clear he entered when it wasn't safe.

8 Operators of construction equipment must not enter the
9 roadway when their vision is obstructed. Not only is it common sense,
10 it's the law.

11 Construction equipment creates special safety hazards on the
12 roadway. Those forks by their nature are dangerous. A vision
13 obstructed, whether you're a car, driving a car, a truck, or a forklift, is
14 dangerous.

15 And entering the roadway when your vision's obstructed can
16 -- is unsafe and can cause serious injury. All of those safety rules were
17 violated by Capriati on June 19th, 2013.

18 What did Capriati know that day? Mr. Goodrich, who I have
19 not spoken to before, but I know from the deposition, this is what -- he
20 was the person designated by the company to speak on their behalf. So
21 we asked him under oath at the very -- in -- during the case, what
22 happened? He said, "My understanding as explained to me by Josh,
23 Josh Arbuckle decided to use the forklift to move some items and tried
24 to --looks -- tried to cross, looks like Glen, his vision was obstructed, and
25 looks like he nosed out into traffic, is what it looks like to me." So he --

1 they knew that that day. They denied in their answer, you just heard -- it
2 was a complicated reading, they denied they were negligent, that they
3 blamed Bahram for this, and other people, not themselves, but they knew
4 that that day.

5 And so we asked him, so in this case, since he was operating
6 the forklift when he nosed out into traffic, obviously, the fork went out
7 into traffic, as well? Correct. And it looks like by the traffic here, by the
8 way this is sitting, there's room, obviously, for a vehicle, not in the travel
9 lane, but because of the vision here, he probably just didn't notice he got
10 that far nosing out. That's not only careless, that's reckless with a
11 forklift.

12 On Monday or Tuesday, Josh Arbuckle, the forklift driver
13 who's going to be coming, you know what he told us? He had an error
14 in his thinking that day. Obviously. And what's interesting is, because
15 now it's going to -- we're going to have evidence that's going to show
16 you, he wasn't even aware that six feet of the forks went into the travel
17 lane at all. He says, "I wasn't aware the forks were sticking outside the
18 cones until after impact." That means he's not paying attention to the
19 roadway in front of him. If he doesn't see that six feet of the forks are in
20 the road, not just a little, not just like a few inches, all of it was in the
21 roadway.

22 And it was a violation of company policy, and why is that a
23 violation of company policy? Because before June of 2013, Josh
24 Arbuckle had been instructed by the safety manager to not operate the
25 forklift. He was the -- he was -- there's two employees out at the job site

1 that day. Josh Arbuckle is a cement finisher, he is not an operator.

2 Capriati employs operators who are hired, certified, and paid
3 to do these jobs. He decided to use that forklift on his own to move
4 material for Capriati's benefit on that jobsite as they were finishing up
5 their work, but he violated the company policy. How do we know that?
6 They told us. The employee had been instructed not to use the forklift by
7 the departed safety manager, Doug Goss.

8 So not only was he going to -- unsafe operating, he's
9 disobeying an order that went -- goes directly to safety. Not just safety
10 for Capriati employees, but safety to the motorists, the public, including
11 our client, Bahram.

12 So why are we here? Because Capriati refuses to accept
13 responsibility for the actions of its employee. That's what your job's
14 going to be. We're going to be asking you to hold them accountable for
15 that.

16 How was this preventable? Because we have to think about
17 how can something like this -- how could this have been avoided?
18 Number one, don't drive the forklift. You're told not to drive it. You're
19 not certified. Two, make sure traffic -- assuming you're going to do that,
20 even though it's against company policy, make sure traffic is clear. And
21 ask for help to make sure the traffic is clear. You had two commercial
22 drivers, they are one driving the Peterbilt truck, the other one with the
23 cement mixer, and another Capriati employee. That's just three that --
24 for sure. Hey, maybe put your hand out, make sure traffic is clear, let me
25 know that I can make the turn safely. None of that was done. Had any of

1 this been done, we're not here today. Bahram goes on with his life just
2 fine and is doing very well for himself.

3 So what else did we learn about Capriati? One, if you can
4 imagine this, number one, there's no OSHA report, no OSHA reporting of
5 the event. They've got no incident report or investigation file of any
6 kind. Nothing. They've got no written statement of Josh Arbuckle. They
7 claim they sent him for a drug test and that he was clean. I think one of
8 the jurors said, you know, that's fine, we'll take you at your word, but
9 want it trust and verified. Well, they don't have one record of that.
10 You're not going to see any of their safety policies and procedures. They
11 didn't produce any of those in this case.

12 They demoted Josh Arbuckle. Told him he's never allowed
13 to operate. They discarded his employment file. They couldn't find that,
14 and he'd been a long-time employee of this company. And more
15 interestingly enough, Mr. Goodrich, he actually came to the scene that
16 day. He saw those events. He never called, no one from Capriati, ever
17 called to check on Bahram, ever. Didn't say sorry, what happened, can
18 we help you, are you okay, never once.

19 So the sole cause is the Capriati employee causing this
20 collision. Hang on one second. This goes at the end. I'm sorry about
21 this. Sorry, we got a little something out of sequence. Sorry about that.
22 Put it after -- put it at the end of that. The end of the earning capacity.
23 Okay. Okay. Ready.

24 So the next question, was the Plaintiff injured? Well, of
25 course, so that -- and what I want to discuss with you in some level of

1 detail what you're going to learn in this case, but first is who is Bahram?
2 He was born in 1961 in Tehran, Iran. He moved at the age of 14 to San
3 Diego where he lived with his mom, his dad, and his sisters, and while
4 he lived in San Diego, he actually had his four children, were all born in
5 San Diego. His two sons, you're going to see Darian, the older one, they
6 actually -- when he moved to Las Vegas, that they actually moved to Las
7 Vegas with him. And so he moved to Las Vegas in 2009.

8 And that's a picture of Bahram. He was an employee of
9 Chapman starting in 2010, and he stayed there until 2016, but the
10 majority of his life, virtually his whole business life was always in auto,
11 the automotive business, including owning his own business, because
12 that's a picture of him actually working at the Chapman dealership.

13 And so he was well-liked, he did a good job, he was a floor
14 sales manager, he was a leader, and moving up within the company.
15 This is Bahram and his children, his pride and joy. He's got and starting
16 on the left there next to Bahram is his son Darian. Darian actually is a
17 very impressive young man. He has not only a bachelor's degree but a
18 master's degree. He wants to go to law school, but he actually played
19 Division One college football. And that's his daughter, Callie, and that's
20 the other one, is Dominique [phonetic], and that's his son, Casey. And
21 you're going to hear from, for certainly, from Darian, and maybe one of
22 the other kids during the course of the trial to talk about their life with
23 him. And there's his kids, the two boys and the two girls.

24 But we need to talk about Bahram's harms, his losses, and
25 his pain, his -- things that he's gone through so far. Frantic. Non-

1 responsive. Lethargic. Slow to respond. Freaking out. Scared. Those
2 are all statements made by people who saw Bahram that day at the
3 scene. That was his initial response. That's why people came to the
4 scene; the employee of Capriati, emergency medical personnel. And he
5 was taken by ambulance, by the fire and rescue department to UMS.

6 And what's important here is some of the documents from
7 the EMTs. It says, "Patient reports he was driving a fork -- was driving
8 and a forklift pulled out in front of him. States he hit his head on
9 something. He says he now has forehead, rear head, neck pain, left
10 bicep pain, lower ribcage pain. And this is the point, note, patient was
11 too altered to be able to write an address or insurance information. This
12 information may be gathered from the hospital after the patient is less
13 altered. Obviously altered level. Obvious soft tissue trauma. Probably
14 skeletal trauma. Patient lethargic and was slow to answer. That's people
15 trained in the field. He had a Glasgow coma score. This is potentially a
16 life-threatening issue because of this. That is a significant field response,
17 that demonstrated just how serious this was for Bahram at the scene.

18 But prior to his, he was pain-free. He was doing well, living
19 an active lifestyle. He was 51, and I guess you have the aches and pains
20 or whatever life of a 51 year old. Was life perfect? No. But was he
21 doing well? Absolutely. The evidence will clearly show that.

22 And so from June 19, 2013 to the present, let's summarize
23 this for a minute. There's been 91 doctor visits, 32 chiropractic visits,
24 137 physical therapy treatments, 17 x-rays, MRI's, 26 spine injections,
25 and one spinal fusion surgery. If you put like this together, it's almost

1 three hours you go to the doctor, by the time you go to a doctor visit,
2 drive there, wait there, do the visit, and leave, that's about three hours.
3 Just the doctor visits alone, that would be like almost a month straight,
4 24 hours a day at a doctor's appointment, almost for a month, I did the
5 calculation. But that's kind of what his life has been, all while trying to
6 work and earn a living for himself, which he did pretty well for a while,
7 until he finally just gave up.

8 But that's his neck now. That's the surgical hardware. He
9 had a surgery from the back. We're going to be talking about that, but
10 that's really what all this culminated into. And our focus of the case is
11 the spine. And the spine is really the -- what makes us homo sapiens, it
12 really is the information superhighway of our body. It really is the most
13 dynamic thing, one of the most dynamic features we have.

14 There's three different sections we talk about of the spine.
15 The cervical, you could see there, there's seven different levels. The
16 thoracic or the mid-back, if you think about that, there's 12 levels. And
17 the green, the lumbar, and that's the bottom level, there's five different
18 levels. We're going to be talking in this case about the cervical levels.

19 And I'm showing you this spine model, and the way I'm
20 orientated, this is actually the front. Do you see the discs here? We're
21 going to be talking about all of the anatomy, but this is actually the front.
22 When you see the bones, this is in the back. You know, the little nubs we
23 have on our back? This, this, so you know, this is the back part of the
24 spine any time we're talking about it. I'll leave that there. So we're
25 going to talk about some anatomy here, and we're going to talk about

1 the anatomy of the spine, the various components of the spine, and
2 things that were injured in Bahram's case.

3 In this case we're going to be only talking about the cervical
4 spine. We're going to be talking about multiple levels of Bahram's
5 cervical spine that has disc pain, facet pain that necessitated his -- all the
6 treatment and the surgery. And there's two components to a spine
7 injury. One is a soft tissue component, and one is a structural
8 component. We're mostly talking about the structural component, the
9 discs.

10 And the problem with Bahram's neck is when you have
11 multilevel discogenic pain, and you have nerve root irritation, that's what
12 we're talking about in Bahram's case, because he had symptoms that go
13 in -- that went into his -- primarily his left arm and into his hand. It
14 actually got worse after the surgery.

15 But let's talk about the cervical spine and its various
16 components. The vertebrae. That's these pieces here. That's actually
17 bone. That's actually bone, and in between the vertebrae are the discs.
18 The discs are the shock absorbers of the spine. This is, like, allow the
19 wear and tear and the compression of the spine, this is what gives it the
20 cushion in our spine. We're also going to be talking about the facet
21 joints. That's these little small knuckle joints on the side that allows us to
22 -- the gliding and sliding motion of the spine. You can bend forward,
23 you can bend side to side. That's what allows us to do that, are these
24 joints called facet joints. And then when those are injured, they can also
25 become very painful, and that's what happened in Bahram's case. So

1 he's going to have two problems, one with the disc and one with the
2 facet joints.

3 And Dr. Oliveri's going to be here today, he's in the
4 courtroom now, that he's going to talk about what a disc is, and here's
5 two parts of it. Disc, it's got a -- the middle part is called the nucleus, and
6 the outer part is called an annulus, and the annulus is like a steel-belted
7 radial tire. It's got all these different layers and it's all interconnected
8 and it's very strong. But the inner part is kind of like a meaty -- like a
9 chicken meat or a crab meat kind of material, the nucleus. And there's
10 nerves in the outer part of the annulus that when that -- a disc gets hurt, it
11 becomes painful.

12 Now that's a top down view of a normal disc. That's if we
13 are looking straight down someone's spine, and you can see that this is
14 how this would be orientated. See that this is to the back. There's your
15 disc space on each side as you're going to see in the model, there are
16 nerves, these yellow things are nerves, and there's nerves that come out
17 of each level, and that's what sends information to different parts of our
18 body, our muscles, our hands, our legs. They're the same on each side,
19 all the way down the spine, from the cervical all the way through the
20 lumbar spine. And when a disc can be hurt or protruded, it's called a
21 disc herniation, and that material can leak out, and can become painful, it
22 can cause nerve root irritation, as you see there. You can see all the red
23 kind of around the nerve root because it's not where it should be.

24 And in Bahram's case, we're only talking about neck pain,
25 but what happens when the disc is injured, pain can be felt down into the

1 arms, numbness, tingling, pain, that sort of thing, that's what Bahram
2 had.

3 And Bahram had a -- in 2013, he had a MRI, he had some disc
4 protrusion, but he also had what they call degeneration, age-related
5 degeneration. Anybody in their 40s, 50s, and beyond, they all have
6 degeneration. It just happens as a natural part of life. And we're not
7 talking -- that's not what was injured here. We're not asking for any
8 money for degeneration. That has nothing to do with this case, and I
9 want to -- what is disc degeneration? It's a normal part of aging.
10 Everybody has it. It's changes in the discs due to regular activities of
11 daily living, normal wear and tear. We all degenerate with time. But
12 degeneration itself is normal and doesn't necessarily cause pain. That's
13 the important part.

14 When did the pain start in this case? And we have different
15 types of discs, and one's a normal disc, and that disc can thin, they can
16 bulge, they can have degeneration, there's like loss of the water with
17 time. They can herniate, so they can be pushed out and touch a nerve or
18 narrow that space. You can have a facet problem. There's different
19 types of degeneration, but degeneration by itself doesn't necessarily
20 mean anything.

21 But what the law does is, because the Defendants are going
22 to say, oh, this is all degeneration. If that was the case, anybody in their
23 50s, 60s, or older, could never be hurt because you could blame
24 everything on degeneration, so the law provides for this, they
25 understand this. So here's an instruction the Court just gave us today,

1 about someone who has a preexisting condition like degeneration, but
2 what happens when it becomes symptomatic, becomes painful?

3 A person -- let's read it together, so you have this firmly in
4 your mind. A person who has a condition or disability at the time of an
5 injury is not entitled to recover damages. However, he is entitled to
6 recover any damages, recover damages for any aggravation of such
7 preexisting condition or disability proximately caused, resulting from the
8 injury. This is true, even if the person's condition or disability made him
9 more susceptible to the possibility of ill effects than a normally healthy
10 person would have had been, and even if a normally healthy person
11 would probably not have suffered any substantial injury, where a
12 preexisting condition or disability is so aggravated the damage as of
13 such condition or disability are limited to the additional injury caused by
14 the aggravation. We're talking about that in this case. His condition
15 became aggravated. It wasn't a problem before and became a serious
16 problem afterward.

17 And the law kind of provides simply, you take the -- a person
18 who causes an injury, they take the victim as they find them. If someone
19 has, like, a hemophiliac, and you cut them, they may bleed out and die.
20 That -- it's not their fault that they're a hemophiliac; you caused that
21 injury, so you have to accept that. For example, a 70 year-old woman
22 who falls down and fractures her hip, there might be a 20 year-old
23 woman who falls down and she's not hurt, and she bounces up and is
24 fine.

25 As you get older, we don't -- our healing response is

1 different, the inflammation response is different, and we can become
2 permanently injured, and that makes -- and you have to take the victim
3 as you find them. They call that the eggshell Plaintiff theory. If you're an
4 eggshell, I mean, it doesn't take as much to make you symptomatic and
5 become problematic, and that's what exactly what the law is
6 contemplating, and specifically and fair in this case.

7 So what was the investigation? How do we know what was
8 going on before? What -- well, let's talk about that. So we want to put
9 on evidence that you -- so you know everything. He went for a physical
10 in October of 7, 2011. He went to Southwest Medical Associates. It says:
11 patient here for a checkup. He's new to there. He has an itchy
12 dermatitis. They did a review of systems. He's got no problems with his
13 neck, back, or anything else, and he had some testing done. And so it
14 was a normal, routine physical, with an adult, he had hypertension, he
15 had high blood pressure, dermatitis of the skin, did some smoking, he
16 had full range of motion of his neck and back.

17 October 25th, 2011, he comes back to check his labs. Says:
18 49 year-old male presents today to the clinic for follow-up, also
19 complains of neck pain for several years. He denies any history of neck
20 surgery, no neck trauma, has a well-healed surgical scar on the back of
21 his head which is from a hair transplant. The examination said supple
22 with full range of motion. This is mild paraspinal discomfort with
23 palpation. No skin changes, no palpable muscle spasm, but he had full
24 range of motion.

25 Bahram's going to tell you he doesn't recall every making

1 that complaint but it's there, and they ordered an x-ray. And it says he
2 has backache. Will try naproxen. Patient says he has not taken anything
3 for pain relief in the past. Will check a plain, which means a plain x-ray
4 to the neck, to look for arthritic changes, which he definitely has, for
5 sure. And -- but after this visit, I'm going to walk you through all the
6 other visits because Bahram himself doesn't recall that. He was working
7 10 to 12 hours a day. He said sometimes I would get stiff just because of
8 working and being out of cars all day, sitting down at a desk, doing deals
9 with customers.

10 But he comes back in March of 2011. Says: Patient in the
11 clinic today, complains of right knee pain. He strained his knee while
12 skiing at Mount Charleston, so neck complaints of any kind the next time
13 he comes back. Obviously, he's living a very active lifestyle.

14 November 2012, one year later. It says: 50 year-old male
15 presents at the clinic today for follow-up on results to discuss lab results,
16 and this is the key part. He states he is feeling well without any physical
17 complaints. They did an exam that says no joint redness, swelling, or
18 pain, no persistent muscular pain, neurological completely normal.

19 One month before the collision, so two years later, he's there
20 and he had some gastrointestinal problem he went to the hospital for to
21 get checked out, and they did an overall examination of him that day.
22 No neck complaints or findings, and this is within less than one month
23 before the collision. That's all the records there are before this accident.
24 It's that one time he reported some neck complaints, he doesn't recall it,
25 but if the records say that, then he must have, but it did not limit him or

1 change anything at all.

2 And you're going to hear from Dr. Oliveri, say that his
3 complaints after this were dramatically different than that. That is not
4 consistent with a disc injury problem or any of the problems he now
5 suffers from. He had no problems into either arm or symptoms in his
6 left hand in particular.

7 But the fact is trauma, and even minor trauma, can cause a
8 degenerated disc to become painful and result in chronic pain, which is
9 what happened in this case. And so we're trying to find out where the
10 pain's coming from and our case is going to be based on medical and
11 clinical correlation, and a patient history is a critical part of that because
12 we want to know when did the pain start, how long has it been going,
13 examination findings by the doctors, how did you respond to treatment,
14 did it get better or worse, diagnostic imaging, x-rays, MRI's, CT scans,
15 pain management injections. So we're going to be using all of these
16 tools to put this clinical picture together to demonstrate how severe
17 Bahram's injuries are.

18 So initially, after the hospital, he went for some chiropractic
19 care, down to The Neck and Back Clinic. There, when he starts off kind
20 of treating people conservatively, like a soft-tissue injury, hopefully that's
21 what happens. He was referred by September of 2013 to Dr. Archie
22 Perry who's a board-certified orthopedic spine surgeon. Dr. Perry
23 ordered an MRI of the neck which we talked about had degeneration, but
24 Dr. Perry knew there was something more than this, so he wanted to
25 have -- find out where is the pain coming from, so he sent Bahram to Dr.

1 Joseph Schifini. This is actually on his -- him in that racecar, it's on his
2 website, so that's a picture I got from -- but he's actually a very good
3 doctor.

4 He's going to testify Tuesday, next week, but Dr. Perry sent
5 Bahram to Dr. Schifini to find out where's the pain coming from by doing
6 these different types of injections. And so we're trying to figure out is
7 this a disc injury or is it more than a soft tissue? Soft tissue is like
8 muscles and ligaments. This case involved both, but what happens is
9 soft tissue injuries resolve over time, and then you're left with a
10 structural issue which is exactly what happened in Bahram's case.

11 And normally, very few patients go on to require surgery.
12 Most patients with a strain, it goes away in a few days, you take some
13 over-the-counter medication. But physical therapy, some injection, but
14 very few patients go on to surgical intervention like Bahram did. He had
15 no surgical problems before, never went for any physical therapy,
16 chiropractic care of anything before this happened, but obviously,
17 afterward, life dramatically changed.

18 So there's two goals of these spine injections. One is
19 where's the source of the pain coming from? They call that the
20 diagnostic part. The second part is the therapeutic part, and can I give
21 you some lasting relief to avoid a surgery. And so I'm going to go --
22 here's -- but I want you to understand the timeline more about what he
23 went through and how he exhausted every available conservative
24 option.

25 His first injection was on December 19th, 2013. They were

1 injecting the left side of his spine which would be into this, there, to try
2 to find out where is the pain coming from, that's coming from the C1
3 which is the lowest level of your cervical spine, or C6-7, or third, the C5-
4 6, the lower three segments of your spine.

5 And what is an epidural injection? What it is, is you go to a
6 surgical center, you have to undergo some sedation, they put you on a
7 table, and they inject a very site-specific injection into those levels to
8 determine, number one, they put an anesthetic like a -- they give, like, a
9 numbing medication. You go to the dentist, like, to kind of numb it up.
10 That's one thing they do. Then they also add a steroid to it. The
11 steroid's for a longer-acting effect, for weeks or months, to see if that
12 helps.

13 And unfortunately, in Bahram's case, it didn't provide any
14 significant long-term relief, but he also underwent injections on January
15 2nd, 2014, another set of them at C3-4, April 2014, July 2014, they
16 repeated it to try to find out where the pain's coming from. On October
17 23rd, 2014, they're now trying to find out, does the pain come from any
18 of these facet joints? So they started some injections of -- on the left side
19 because that's where always his problem was, almost always on the left.
20 They started injecting these joints here to determine if that's a source of
21 the pain, and they verified that that was a source of the pain. So he
22 underwent those on October 23rd, 2014.

23 And an irritated facet can cause pain because there's little
24 nerves in there, and they want to inject medication to numb up that
25 nerve, as well as a steroid. And so they call that a medial branch block,

1 and so these are all kind of images showing you what these injections
2 kind of look like, generally. We'll have the doctors explain them in more
3 detail, but it's ways to fix the problem, isolate the problem to find out
4 where the pain is coming from. And so -- but these numbing agents and
5 the steroids, they don't fix the underlying problem. They just try to help
6 you find the source of the pain and help you control it and hopefully to
7 avoid a surgery which wasn't able to happen in this case.

8 So Bahram underwent injections again in January 2015, he
9 underwent the medial branch blocks of the facet again in March of 2015.
10 He did it again in December of 2016. He went on January 5th of 2017 to
11 find out if the facets were causing pain. Again, went for an epidural
12 steroid injection at C7-T1. April 2017. June 2017, he tried it again. July
13 2017, he tried it again. And then finally he tried trigger points because it
14 also causes muscle flare-ups and pain in your muscles and you have
15 discogenic pain, and trigger points are like specific little injections into
16 the musculature because when you have discogenic pain, you're not
17 moving as much, you're not moving freely, it creates muscle spasm, it's
18 a way to kind of help control and manage the pain.

19 But at that point, by 2017, Bahram not only stopped working,
20 but he was at his wit's end and ultimately agreed to undergo, finally, for
21 any relief, January 30th, 2018, he underwent that four-level fusion
22 surgery by Dr. Stuart Kaplan at Valley Hospital, and as Dr. Kaplan, you're
23 going to hear from Dr. Kaplan who did the surgery, not only because of
24 the neck pain, but also because of all the problems going down into the
25 arm, that's a -- was a major reason for the surgery because of the nerve

1 issue.

2 Dr. Kaplan was actually -- he went to -- he's a Harvard trained
3 neurosurgeon, he went to MIT, he has a fellowship training, as well, from
4 Washington University in St. Louis, one of the most prestigious
5 neurosurgical facilities in the world, actually. He's going to talk to you
6 about the surgery and the surgery that he did, but he actually created a
7 very large incision down the entire back of Bahram's neck, and he had to
8 remove all the muscles and ligaments and pull those away from the
9 body, and he actually removed bone and tried to decompress as much
10 as he could to give him some relief, take some of the pressure off of the
11 nerve, to give some -- and to hopefully reduce some of the pain.

12 And this is his operative note from January 30th, 2013, and
13 he's telling you that he did a C3-4, C4-5, C5-6, C6-7, C7-T1, a five-level
14 surgery, including a fusion, which is what you'll see there. That includes
15 five levels of the spine. So when you see Bahram and his ability and
16 inability to, like, turn his head or move it's because almost every
17 segment of his spine is now fused, other than the top two levels. And
18 that's the incision after the surgery.

19 But he went for almost five years before he underwent that
20 surgery. He tried everything, including acupuncture. And one of the
21 risks of the surgery, what I'm pointing out here is that - of a neurologic
22 injury, and that's important in Bahram's case, when you do a surgery
23 from the back, as you're going to learn, and you come in from the back,
24 you have the potential, because the space is so tight, you can actually
25 cause a nerve injury and make something worse. That's one of the risks,

1 and unfortunately for Bahram, that happened to him.

2 And so he suffered what they call C5 nerve injury in
3 connection with the surgery, and they call -- he developed what they call
4 neuropraxia, which is like this painful, kind of a paralysis, inability to
5 move your arm, function correctly, which he still suffers from to this day.
6 And it says, this is Dr. Kaplan, I agree, he has difficulty raising his arm
7 above his head. Looks like a C5 neuropraxic injury. That's just one of
8 the risks of surgery, but he wanted any relief that he could get, and that's
9 why he finally agreed to undergo the surgery, and he was very resistant
10 to it for some many years.

11 But he had to have trigger points again in May of 2018 to
12 control the inflammation and the spasm. He more again in -- at the end
13 of May 2018. He underwent additional transforaminal epidural steroid
14 injection in June of 2019, just a couple of months ago to find out where's
15 the pain still coming from, what else can we do for you, done by Dr.
16 Schifini, he underwent them again in July 15th, 2019 to find out what's
17 the ongoing issue because the symptoms are ongoing.

18 And so what is the future now for Bahram, medically
19 speaking? He has, like, very limited options. He has no more surgical
20 options, but what he can have is what they call a spinal cord stimulator,
21 and I'm going to show you what one of those spinal -- this spinal cord
22 stimulator is. This is -- let me go back a second. He --

23 THE COURT: Counsel, approach.

24 [Sidebar begins at 10:35 a.m.]

25 THE COURT: Is anybody testifying to that?

1 MR. PRINCE: Dr. Oliveri's going to.

2 MR. KAHN: The one who rated him.

3 THE COURT: All right. Does he put that in his report?

4 MR. KAHN: This is not a disclosed item. No, it's never been
5 disclosed.

6 MR. PRINCE: It's part of his evaluation. He didn't put it in a
7 report --

8 THE COURT: Then I'm sustaining the objection.

9 MR. PRINCE: Okay.

10 MR. KAHN: I would ask that it be stricken, and the jury be
11 admonished.

12 THE COURT: Yes.

13 [Sidebar ends at 10:35 a.m.]

14 THE COURT: I'm sustaining the objection. The jury is
15 instructed to disregard the -- counsel's --

16 MR. PRINCE: So how the clinical correlation of these disc
17 injuries, multiple levels of disc injuries, it's clear the that the forklift event
18 causing the collision, the UMC trauma, all the hundreds of doctor's visits,
19 the pain, the imagine and the aggravation of the underlying conditions,
20 the injection, all of that led to the surgery and the condition that Bahram
21 has. And when you have a serious spinal injury, it's kind of like -- and
22 particularly, someone with degeneration, it's kind of like this domino
23 theory. The minute you start pushing one, all these other things kind of
24 just naturally flow from it.

25 And with time, it's -- time hasn't been on his side, because as

1 you get older, your problems continue to manifest and actually, they
2 worsen with time. If he was young, it might be different. He might be
3 okay for a while. But he's continuing to try to stay strong and exercise
4 and follow the home exercise program. His son, Darian, the football
5 player, he's actually a physical fitness instructor. So he gives him -- and
6 they live together. Actually, Bahram is dependent upon Darian. They
7 have to live together, because Darian helps him with day to day
8 activities, driving.

9 And you're going to learn from Darian he took him to every
10 one of those procedures, where he had those injections in his spine,
11 drove him and took him home. And so now unfortunately for Bahram,
12 he's dependent upon his children in many ways that a father probably
13 wouldn't want to be, particular being only in his mid-50s. But it's a
14 whole cascade of events and when you go down that domino path, you
15 have the disc injury. You need the treatment. Then you have the
16 surgery.

17 Then the surgery creates its own complications. And the
18 time -- as your body continues to degenerate, all of this manifests even
19 greater. And that's what happened in Bahram's case. I think this
20 domino theory is really relevant to our analysis and our discussion in
21 this case because of exactly what happened. Bahram's got an additional
22 24 years of life left and those are -- I call those your golden years. You're
23 having -- you've got life figured out. I mean, those are probably more
24 valuable than your early years. You don't have as many left. And the
25 quality of his life is going to be -- has been dramatically disrupted and

1 him. It's been a long road and he's got a long road ahead of him. So the
2 question for us is and what you're going to be deciding is what's the
3 value of that.

4 And I suggest that it's high, because someone who has
5 chronic pain and has chronic pain syndrome, you're going to learn a lot
6 about that. It affects every facet of your life. If you're in pain, there's
7 medication side effects. It'll hurt your stomach. It affects your
8 mentation, your ability to process, to think. You're anxious, you're
9 depressed, there's no social life. Bahram doesn't work and it's
10 unfortunate, like many people with chronic pain, like his friends stopped
11 calling him to go do things, because he can't, because he has to cancel
12 all the time.

13 So he lives his day, day to day, tries to manage his pain. He
14 does his best. He does his best. And he has hope that he's going to
15 continue to do well. He tries to stay strong. He tries to exercise to be
16 strong and do things when he can. But his life of being active snow
17 skiing, water skiing, working out at the gym, socializing with friends,
18 ability to work and have that interaction with a career that he loved, he
19 doesn't have that anymore. And that creates this level of anxiety and
20 depression. You're going to hear from his son Bahram is a strong, proud
21 man, but he's also vulnerable. And we're going to be talking about
22 what's the value of that.

23 And these chronic pain cycles are -- they're vicious, because
24 once you're in pain, you stop doing things, you're less active. And what
25 you're going to learn is when you don't move, you hurt. But what's

1 interesting in Bahram's case is you're going to see something objective
2 or Dr. Oliveri is going to talk about something objective. He has atrophy
3 now, meaning muscle wasting in his left shoulder area, bicep and the left
4 arm, because of the C-5 nerve injury and not using it.

5 And so it's decreased activity, deconditioned. You avoid
6 certain things and it creates this whole cycle of a syndrome that is hard
7 to get out of, because your whole day, your -- every day from the
8 moment you wake up until you try to get some rest is filled with pain and
9 trying to manage your own pain. To someone in chronic pain, a minute
10 feels like an hour and time is not on their side. And so we're -- those are
11 things that can be important.

12 So the past medical expenses we're talking about in this
13 case, we ask you to award \$507,548.04. And one of the instructions the
14 Court gave you is this one regarding workers compensation. Workers
15 compensation accepted the claim -- rated and accepted it as a permanent
16 injury. But it says here you shall -- if you find the Plaintiff is entitled to
17 your judgment -- if he's entitled to your judgment, you shall find damage
18 for the Plaintiff in accordance with the Court's instructions on damages
19 and return your verdict in the Plaintiff's favor in the amount found.

20 So without deducting the amount of compensation benefits
21 paid to or for the Plaintiff. That means you don't take that into
22 consideration. There's no offset. You don't deduct anything. We're just
23 letting you know that the law provides a way to reimburse workers
24 compensation. You're thinking about what are the reasonable medical
25 expenses in the past and in the future. You're not to worry about where

1 the money comes from or how it gets reimbursed. The Court gave you
2 that instruction.

3 The Court gave you another instruction today. Remember
4 the four walls and the rules they gave you. Don't consider whether
5 anybody has insurance, whether it be Bahram or the Defendant. No one.
6 You're not to consider that at any point, either now or when you're
7 deliberating. What are the future medical needs? They're going to be
8 doctor visits. There's going to be physical therapy to help control pain,
9 improve strength, conditioning, flexibility. There's going to be
10 medications for life. That spinal cord stimulator and the cost of those are
11 \$529,260 over the next 24 years to live through this chronic pain cycle,
12 anxiety, doctor visits, worry.

13 And I think of a quote, "The price of anything is the amount
14 of life you're willing to exchange for it." And I think the price as we think
15 in this case is high, because time is against him. He has less time left, so
16 that makes it more valuable, not less. For example, what would happen
17 if something happened to his right arm? He's at risk if he's overusing his
18 right arm. He's right handed. Then his left arm doesn't function as well.
19 Now he really has a problem. If he injures his lower back, his neck is
20 already bad. Now he's at risk. It's like a war veteran. If you're
21 amputated above the knee on your left, if something happens to your
22 right leg, you're really in a fix. So it really makes his condition more
23 significant.

24 Loss of earning capacity. What does that mean? Well,
25 Bahram was working his whole career in auto sales. He was working at

1 Chapman Dodge, as we talked about and I want to just tell you what his
2 earnings were just before this happened, so you have an idea. He was
3 doing very well as a floor sales manager. His earnings at the end of 2012
4 through Chapman were \$159,714, making almost \$160,000 a year, just
5 the year before.

6 And by the date of this collision, the pay period ending just
7 June 15th, four days before, he'd already made 68,000, almost \$70,000
8 as a floor salesman working his tail off six days a week before this
9 happened. And you're going to watch how dramatic things changed for
10 him. So he initially -- when -- he does go back to work within a few
11 weeks, but he can't work full time, so he couldn't work as a salesman
12 anymore. They didn't have part time sales as Chapman Dodge, so he
13 transferred to Chapman Jeep. The same company but went to work part
14 time.

15 And we're going to talk about his struggles of having to walk
16 the floor, walk the lot, be with customers, have -- just be a salesman and
17 work part time taking breaks and all the breaks he took. He continued to
18 try to push through, but it was very hard. But he ultimately stopped
19 work in September of 2016. He continued to work virtually full time until
20 then, with difficulty.

21 But look at his earnings. He almost made \$160,000 in 2012.
22 2013, the year this happened, \$105,000, 2014, he made 123,000, 2015,
23 97,000. By 2016, he made 55,000 and after that it's been zero, because
24 he stopped working in 2016. So it's been a dramatic income loss for
25 him. And so we had somebody, a vocational expert and Dr. Oliveri is

1 going to talk about why he can't go back to work. And while they've had
2 some exams -- they call it a functional capacity evaluation. It's like a
3 physical therapist tests your abilities and physical ability.

4 Well, he does have physical ability. It's excruciating pain to
5 sit for any length of time, to walk. You're going to hear him tell you --
6 and Dr. Oliveri just sitting here the other day in court for a few hours, the
7 whole next day, he couldn't get out of bed. And so it's -- so he could go
8 to work maybe one day for a few hours, but then he may not be able to
9 come back for another few days. It's the inconsistency, the difficulty
10 concentrating that makes it so hard, but he's now determined to be
11 vocationally disabled.

12 And so as we calculated his loss of earning capacity from
13 September of 2016 until now at \$571,227 and the future loss of earning
14 capacity just to age 67 is -- and capacity is -- we're saying that's at a
15 minimum, because we're using 160,000 as the benchmark. He was
16 doing well and Chapman and that's not even including if he got -- did
17 better or got a promotion. But to calculate for the rest of his earning life
18 which -- his dad lived until he was in 90s and he has family with
19 **10:48:05 long livers, but assuming just the statistical average of
20 around 67, his loss of future earning capacity from the date of
21 September 2016 all the way forward is \$1,885,152.

22 We're going to have our economist, Dr. Terrence Clauretje,
23 an economist from UNLV, come out and testify to how those were
24 calculated as well as a vocational expert to talk about those losses. So
25 this loss of medical expenses are more than a million dollars and his loss

1 of -- his total earnings from the past and the future are \$2,456,379, so it's
2 substantial.

3 And how do we balance these harms and these losses going
4 forward? We submit to you that past and future medical expenses is in
5 excess of one million dollars. The loss of earnings by themselves [sic] is
6 two million for hundred thousand -- that's 3,400,000 alone. Now being
7 completed disabled, dependent upon your children, living the cycle of
8 chronic daily pain in managing this, we believe that it's fair for past loss
9 for pain and suffering and future loss of pain and suffering is in excess of
10 \$10 million for what's been taken from him as a result of this collision.

11 Bahram only has one chance in front of you. We're going to
12 be putting on as much evidence as we can. We think when -- we only
13 have to meet what's more probable than not. The only -- this is the only
14 reason why we're here is because of this collision. The evidence, we
15 believe, will be substantial and overwhelming. And so the final third
16 question is how much is necessary to balance out all of the harms for a
17 lifetime of pain and suffering caused by the Defendant? We believe that
18 those questions have been answered. I thank you very much. I
19 appreciate your time, your patience, your energy, your commitment to
20 this case. I look forward to your verdict. Thank you.

21 THE COURT: Defense, do you wish to make your opening or
22 reserve it?

23 MR. KAHN: Your Honor, just to mark the record, I'm going to
24 reserve any out of the present issues until we take our next break.

25 THE COURT: Okay.

1 MR. PRINCE: Your Honor, can I -- I'm sorry. I wanted to add
2 once piece before he starts. Can I just do that quickly?

3 MR. KAHN: That's fine with me.

4 MR. PRINCE: I'm sorry.

5 THE COURT: Go ahead.

6 MR. PRINCE: I apologize. There's been a technical error in
7 my office, and I want to just address one thing before we go. I don't
8 need any screen. The Defense, I wanted to address this. Their response
9 is that they hired this doctor, Dr. Tung, who is a surgeon from San Diego.
10 And Dr. Tung does, in fact, conclude that Bahram was injured. And he
11 said that Bahram had only a self-limiting soft tissue injury and
12 everything should have been cleared up by June of 2014, one year later.
13 But the problem is all the symptoms continued long after that.

14 And workers compensation with Dr. Oliveri, they accepted a
15 permanent injury caused by this, not limited to a soft tissue injury. They
16 think that everything is all related to degeneration, but the question to
17 you is when those symptoms started, and did they ever go away. And
18 the evidence is going to clearly establish that those symptoms were not
19 only present on the first day, they've continued every day since and
20 there's never been a time period where Bahram has been without pain.

21 The other responses that oh, this really wasn't -- it was a
22 minor collision. They called -- they're going to call this, I think, a minor
23 collision that really no one could have been hurt. It was just something
24 minor. Don't believe what the photographs show you, that this was
25 something minor. And I submit to you, based on the photographs,

1 based upon the medical evidence, that it will be overwhelming this was a
2 significant collision, that he was in an altered state, lethargic, couldn't
3 respond, couldn't provide even his address and basis information. This
4 was substantially more than just a minor glancing event.

5 And finally, I believe they're going to blame Bahram for
6 causing this collision and I don't think you would accept any of that
7 evidence, when their forklift operator shouldn't even have been driving
8 that day and wasn't even authorized by the company and was
9 disobeying their rules. That's their position. We believe none of the
10 evidence is going to support that and we're asking that you just reject
11 those positions. Thank you. That was kept out of our slide deck. I think I
12 removed those inadvertently and so I wanted to go back and address
13 those issues. Thank you.

14 DEFENDANT OPENING STATEMENT

15 BY MR. KAHN:

16 There's too much clutter here. I'm going to move over here
17 closer to you, which I'm allowed to do. All right. Good morning, ladies
18 and gentlemen of the jury.

19 PROSPECTIVE JURORS: Morning.

20 MR. KAHN: My name is David Kahn. I'm the attorney for
21 Capriati Construction. Mr. Cliff Goodrich -- please stand -- is here as a
22 representative of the company this morning. Mr. Goodrich is the safety
23 manager. If I got his title wrong, he's in charge of safety at Capriati's.

24 You can sit down. Thank you.

25 Ladies and gentlemen of the jury, the Plaintiff, counsel, Your

1 Honor, the evidence in the case will show as follows. Before I get into
2 the evidence, Defendant and the Court and Plaintiff, I'm sure, we all
3 thank you for your time here and realize you're taking time away from
4 your families and your friends and your daily lives and everybody joins
5 in saying that.

6 Capriati is a general contractor and some of you may know
7 what that means, but for those that don't, it means they kind of handle
8 bigger projects. In this case, they were working on a large public works
9 project that went down Sahara and went over, as counsel showed you in
10 his images to Boulder High was on the Street Glen when this accident
11 happened. I tend to be lower tech, so I apologize. So Capriati's had
12 people working all around that area on Sahara, Glen, Boulder Highway
13 and off of Sahara, as counsel said, there is a street called Glen, so the
14 way the accident happened is -- and there's no real dispute that there
15 was a collision between a forklift and a car.

16 There's no major dispute about how the vehicles were
17 oriented when they hit and there's really no dispute about the fact that
18 the forklift driver couldn't see beyond the truck, when he pulled the forks
19 into the road. So all those things are going to be easy for you to decide,
20 because you're not going to hear in the Defendant's evidence anybody
21 say those things didn't happen. So Plaintiff is driving a used Dodge
22 Charger for his work from one lot to the other, as Mr. Prince showed you
23 on the map. He's coming eastbound.

24 Joshua Arbuckle, who was a laborer for Capriati's
25 Construction, is driving a forklift out of a large construction zone with

1 trucks and vehicles coming and going and things changing. He pulled
2 out into the road. The forks extended beyond a coned-off right turn land
3 and the fork -- one of the forks from the forklift hit the passenger side A-
4 pillar of the car. The A-pillar is just -- when you're sitting in your driver's
5 seat in your car, that's the two pieces that hold up the roof on either side
6 of the windshield. So the forklift hit that A-pillar.

7 And what you will see from the images you'll see from the
8 accident is that -- and the ones you've already seen now this morning,
9 because we've agreed to admit some items into evidence. So those are
10 all into evidence. All those photos you saw or most of them anyway,
11 they're into evidence, so that's fine. So it looks like a bad accident. The
12 windshield got smashed. But when you look carefully at the A-pillar of
13 the car and you see what did the -- what damage did the forklift do to
14 this car, other than cracking the windshield, that looks bad, it basically
15 put a little kind of dimple or dent in the A-pillar.

16 So it smashed into the piece that's holding up the roof and
17 the windshield on the side of the windshield. It pushed it in a little bit
18 and the car stopped. The car came to a stop. That's what Plaintiff's
19 going to say. That's what the forklift driver is going to say. Yes, it --
20 anytime you have a collision like that, it's going to have, what's called, I
21 think, referred damage. So the roof could bend a little. There might be a
22 little wrinkle in the back, but the main damage to the car was this forklift
23 took out a little chunk, like a little piece, pushed it in on this A-pillar. And
24 smashed the windshield.

25 I mean, that's really it. Pushed the A-pillar. There's some

1 door pieces behind it with weather stripping or whatever you call the
2 little black strip around your doors. You know, that comes out. The door
3 may be moved, but really that's your damage. So we're not talking
4 about a thing where it took the roof off or anything like that. It hit this A-
5 pillar. The car stops. The reason Mr. Arbuckle was driving the forklift at
6 that time is if you remember the map that Mr. Prince showed you, he's
7 taking the forklift and he's going to go across the street to a storage yard
8 to get something heavy.

9 And you'll hear evidence about what it was and why they do
10 that. But apparently, you'll hear evidence later in the case that even with
11 these public works projects, whoever is paying my client to go do all this
12 construction doesn't give them a place to put anything. They have to go
13 and pay for and locate nearby their own storage yard. So they're not
14 given a place to store their materials and their own equipment and all
15 that. They have to go find one nearby where their project is and that's
16 where Mr. Arbuckle was going. They had a storage yard. He was going
17 to pick up some items that were so heavy that it's nothing you could put
18 over your shoulder. It's across the street. That was the orientation
19 geographically of it.

20 But the point is, it wouldn't make practical sense for anybody
21 to go pick up, you know, heavy concrete pieces or bags of concrete or
22 whatever you're going to hear him say he was going to get and
23 somehow put them over their shoulder. These thing weigh -- if you get a
24 bunch of them, can weigh hundreds of pounds. You know, it's not the
25 kind of thing where you're going to put it in a wheelbarrow and wheel it

1 across the street. You pretty much need some kind of heavy equipment
2 to go get this stuff. And so this was in place. The storage yard was in
3 place for a long time.

4 This project lasted for months and like any large construction
5 project -- and everybody who lives here knows this -- things change.
6 You go one day and there's cones over there. You go the next day,
7 there's cones over there. So the project was moving down the street.
8 They were putting in what's called I think, underground items. The
9 thing -- the big pipes that carry the water and the sewage that are under
10 the street that you never see, you hopefully never think about, that's the
11 kind of work they're doing. So they're digging up the streets, putting
12 things in. And they did that all the way kind of down Sahara, around that
13 area and then the boulder highway area, I think they were connecting
14 them. But Mr. Goodrich can speak to that more.

15 Point being, this was a large, longstanding project. Now,
16 why is that important? It's important, because as Mr. Prince showed
17 you, Mr. Yahyavi, the Plaintiff, was working at Chapman and he was
18 driving between those two Chapmans -- you remember the map. Here is
19 his intended route, the little red line. And so he's driving between the
20 one Chapman and the other Chapman. And presumably, this is
21 something he did frequently. He's a sales manager. He's moving cars
22 around. He's going between lots.

23 And that project was there for months. He presumably drove
24 by it for months. So this wasn't like one day he went to drive this path
25 with a company, you know, charger that was a used charger from one lot

1 to another and this thing -- this construction zone magically popped up.
2 This is something he'd probably been driving by for months. And so one
3 of the things that Mr. Prince asked you to consider was this jury
4 instruction about the reasonable personal standard and who's driving
5 reasonably. And the Court instructed you.

6 I'm not going to repeat it, but the point is somebody is
7 driving by a construction project every day or two that's going on for
8 months and months and months knows that it's there, knows that there's
9 trucks coming in and out, knows that there's workers. You'll hear
10 evidence and you already some photos that there were cones in the right
11 lane. So there was a right turn lane. It was coned off, so you couldn't go
12 in that right turn lane. That is, in fact, where the green truck was, the
13 **11:02:13 trench plate truck that Mr. Prince showed you. And that's
14 where the forklift was coming out of.

15 So that means on that part of Sahara, at least -- because this
16 was -- he said it was the apex of the turn between Sahara and Glen, but
17 what Mr. Prince also said was that the Plaintiff -- sorry. Not the Plaintiff.
18 Mr. Arbuckle, the forklift driver, sees the Plaintiff coming before he kind
19 of loses his perspective and vision behind the truck and thinks he's going
20 to go straight. And so Mr. Arbuckle will testify about that when he
21 comes in here to talk to you. He'll testify about Plaintiff's position in the
22 roadway and I don't think there's any dispute there were some signs up
23 already in Mr. Prince's graphics here that -- you know, it says work zone
24 ahead or roadwork ahead. Something like that.

25 So this is a construction zone. There are signs. It's a known

1 thing. As you're driving up and approaching it, you are going to see --
2 and Mr. Yahyavi would have seen these signs. Okay. You're entering a
3 construction zone. You have to be a little careful, whatever the specific
4 sign said. So again, just to emphasize. The Defendant is not saying the
5 forklift didn't stick out into the road. The Defendant is not saying that the
6 forklift didn't collide with the Plaintiff's car.

7 The Defendant's not even saying that the Plaintiff didn't get
8 hurt at all, because as Mr. Prince told you on kind of round two of his
9 opening statement a few minutes ago, even our expert, Dr. Tung says
10 that some of this -- some of the Plaintiff's injuries are attributable to this
11 accident. But Dr. Tung says basically the attributable part is some soft
12 tissue injuries. The treatment for about a year was proper. Going to
13 UMC, taking the ambulance, it's proper to check it out. Getting a little bit
14 of chiropractic treatment the first week or two, proper to do that. Getting
15 some physical therapy for that first year, probably proper. Injections
16 within that first year, maybe also proper.

17 So our expert, Dr. Tung, who also is a neurosurgeon, board
18 certified neurosurgeon and is coming in from San Diego, will say that
19 about 14 months of treatment was proper, but he will attribute most --
20 not all, because he's agreeing there's -- some treatment from this
21 accident was okay. He will attribute most of this to what's called
22 degeneration, degenerative disc disease. And it is something -- and Mr.
23 Prince was open with you. It's something we all get. We all have it. You
24 get to a certain age and you get degenerative disc disease. Some people
25 get it worse than others.

1 So what does Plaintiff do? He's in the accident. He's taken
2 by ambulance to UMC. UMC looks at him and doesn't really find any of
3 these things that are now being claimed. UMC, the level one trauma
4 center hospital in this community, its emergency room doesn't say that
5 his spine is so badly damaged from this accident that he has to
6 immediately go into surgery. Nothing like that. I mean, you heard Mr.
7 Prince say that the Plaintiff works for another three plus years before he
8 decides to stop working. Three years. So Plaintiff goes to UMC. He
9 does some chiropractic care. He begins seeing some doctors.

10 Eventually they filed this suit. You heard the lawsuit being
11 read and you heard the word strain repeatedly. There were several
12 paragraphs where it said in the complaint, he's diagnosed with a strain.
13 Now he's diagnosed with he needs a five -- you know, a multilevel fusion
14 surgery in this neck. Now he's diagnosed with -- he can never work
15 again strain. The same kind of thing that happens if you are in an
16 accident and you treat for a few months and you have -- some people
17 call it whiplash. Some people call it other things. And Defendant's not
18 disputing that Plaintiff went to all these doctors.

19 Now, this accident is over six years ago and so one of the
20 things is the timing. You know, why are we here talking about maybe
21 he's going to get an implantation six years later, that he hasn't gotten
22 and that's worth half a million dollars. So that's something you as a jury
23 are going to have to think about. All of Plaintiff's witnesses will
24 downplay any of his prior problems. That's what's going to come into
25 evidence. All his doctors, all his experts, medical experts, all of them are

1 going to basically say pretty much ignore what was happening to this
2 Plaintiff's neck and upper back, the cervical spine, before this accident
3 occurred. They're going to say he was quote, unquote, asymptomatic.
4 And I don't use the air quotes too often, but he was asymptomatic.

5 So what does that mean? Well, the doctors will explain what
6 it means, but there is a distinction between having medical evidence of
7 some kind of problem with your spine and having someone say, gee, I
8 was in an accident today, but before today, I didn't really have any neck
9 problems. I had no pain. And that's the story that every one of these 20
10 or 30 doctors hears from this Plaintiff. Every doctor says essentially, he
11 comes to me or -- comes to me for treatment and his medical history is
12 taken and his medical history is he had no prior neck problems.

13 He had no history of problems or pain with his neck. And
14 because of that and because he's telling me -- the Plaintiff is telling me
15 the doctor that he had no problems with his neck before, but after this
16 accident, he has all these horrible problems, I'm going to say I'm
17 attributing all these problems to this accident. Now, I'm not talking one
18 doctor or two doctors. I'm talking 10, 15, 20 doctors over years and
19 years and years. And the one thing to look for is did he tell any of those
20 doctors he saw after the accident that he had this neck pain before?

21 And the answer, you're going to find from the evidence, is
22 no. None of these doctors have anything in their records from post-
23 accident that identify any pre-accident or preexisting or prior. There are
24 different words for it. I'm going to use preexisting, because the doctor
25 said to use that. Preexisting cervical spinal damage. So Mr. Prince

1 showed you the spine model. We're talking about the cervical spine
2 that's a portion of those colored things that he showed you were broken
3 down, but it's basically kind of your upper neck. So if I refer to it as a
4 neck problem, I'm referring to cervical spine, okay? It's just easier for me
5 to say neck.

6 Technically it's the cervical spine that doctors will talk about.
7 And then with the spine model, you know, each level of the spine has a
8 different number and a letter. So the cervical is like C. The thoracic is T,
9 the lumbar is L. So every one of these has a designated number for the
10 doctors to look at it. So the doctors will say, well Mr. Prince was talking
11 about C6-7. That's the cervical level between the 6th vertebrae and the
12 7th vertebrae. It's shorthand for the doctors to say you know, oh, if they
13 have a C-7, it's, you know, at this particular point in the spine, so that the
14 other doctors and their staff understand where the problem is.

15 So the doctors that are treating him decide that they are
16 going to render, to some degree, what are caused causation opinions.
17 They're going to blame this accident for all of Plaintiff's problems. But
18 here's the problem for you as the jury. They do that in an absence of any
19 information about the status of his cervical spine or his neck before the
20 accident, because the only information they have is the Plaintiff telling
21 every single one of them for years that he never had a prior neck
22 problem. Never had it.

23 Now, Mr. Prince showing you the records showing that he
24 did. And that's one of the things that our expert's going to talk about.
25 And we don't -- the Defendant doesn't dispute that the Plaintiff may very

1 well have neck problems. The dispute here is what caused them and
2 how much money is attributable to this accident, if you find that
3 Defendants are at fault and responsible as a matter of law, based on the
4 instructions of the Court. And what these records are going to show is
5 that Defendant -- I'm sorry -- the Plaintiff, Mr. Yahyavi, had these same
6 kinds of problems with his cervical spine less than two years before this
7 accident.

8 So I don't have a lot of bells and whistles, but I'm going to
9 show you. So this is -- so give this me a second, but this is the record
10 from Southwest Medical Associates. This is October 25, 2011. You see it
11 up there, okay? October 25, 2011. This accident is June 19th, 2013. So
12 what is that? Thirteen months or whatever it is. It's less than two years.
13 You know, June 19th, 2011 would have been two years. So it's about 21
14 months. So 21 months before this accident, he goes to Southwest
15 Medical Associates. This is before the accident. It has nothing to do
16 with this accident, because the accident hasn't happened. And here's
17 what he tells Southwest Medical Associates. Also complains of neck
18 pain for several years. Not just my neck hurts, not just my neck has hurt
19 for a couple of days, my neck has hurt for years. This is two years, less
20 than two years before.

21 Now when they say he was asymptomatic on the day of the
22 accident, what they're saying is he's telling the doctors that his neck
23 didn't hurt, but that's a -- you will find the evidence to show that's a
24 subjective thing. Now I can tell you I'm in horrible pain right now, and I
25 can tell you I have no pain right now, and not only is there no way for

1 you to check, but there's no way for a doctor to check.

2 If I go to a doctor and I say, hey, my arm hurts, and he does
3 an x-ray and an MRI and checks it out and he doesn't find anything, he
4 doesn't discount the fact that I'm saying, hey, my arm hurts. Well, it's
5 the same thing for this plaintiff and his neck and his cervical spine. If he
6 goes in and he says I didn't have any pain before, they take that as -- at
7 face value. That's what the doctors use. They take a medical history.

8 Every time any of you have gone to a doctor, I'm sure you
9 have had to fill out the forms when you go in the first day. What medical
10 problems do you have? What medications are you taking? Have you
11 had any surgeries? Have you had any problems? And then the doctors,
12 if it's a serious thing, or sometimes even if it's not, will take a verbal
13 history. And they'll ask you, you know, you tell me, what problems have
14 you had, what are you here for?

15 Well, in this case he goes to these people and one of the
16 things he's there for is his neck. Yes, he had other reasons for going to
17 Southwest Medical. He was treating them kind of like a general
18 physician, like his person physician, what's it called? PCP? Anyway, like
19 his general doctor, it's a clinic. And so he had other things that were
20 going on with him, as well, but we're not here about his other problems,
21 we're here because he's going to ask you for millions of dollars because
22 of his neck pain that he claims he didn't have before this accident, that
23 his medical records say he did have before this accident.

24 Could we put up the x-ray? It's the same provider. Oh, let's
25 do this one. So just so you could see. Could you blow up the date, and

1 the -- you can keep them together, the date and that statement?

2 This is the second page of that same record, same visit, less
3 than two years before, about 21 months before. So they say what's the
4 assessment? Back ache. That's one of the things that's going on with
5 him. They call his complaint of I had neck pain for years, backache,
6 which is fine.

7 Are you able to pull up the March 12th one, please?

8 Sorry, this will take a moment. Okay. Well, while he's
9 pulling that up, I'll keep going. So we're going to find you some records,
10 but, so this is October 25th, 2011. Now four, five, six months later he
11 goes back to Southwest Medical on March 12th of 2012. So now we're
12 15 months before the accident and -- hold on one second.

13 [Counsel confer]

14 MR. KAHN: I may have to put up the ELMO, Your Honor. It's
15 -- these two are the next ones.

16 Okay. This is the x-ray from that same rough period of time,
17 October 25th, 2011. Can you blow up the date, first? So this is again,
18 Southwest Medical, this is in their files. So collected 10/25/11, that's the
19 date of the x-ray series on the cervical spine. And now could you -- you
20 can get rid of the date and just blow up the whole -- a couple of
21 paragraphs, if you would? Thanks.

22 Okay. So what are we looking at? Cervical spine series.
23 Same part of his neck that we're here about, that you're being asked to
24 award whatever, millions and millions and millions and millions and
25 millions of dollars for because he was asymptomatic, and he never had

1 problems. This is an x-ray report. This isn't me making this up. This
2 isn't a doctor saying here's what I saw with my eyes, but I couldn't verify
3 it. This is an x-ray report of this Plaintiff about 21 months before this
4 accident.

5 So it talks about moderate marked degenerative disc disease
6 at C6-7. Okay? Moderate, and this is in evidence so you can refer to this,
7 moderate/marked degenerative disc disease at C6-7. This is the thing
8 that the Plaintiffs are telling you really isn't the cause of this, of his
9 problems. That, yeah, maybe he had some degeneration, but it really
10 wasn't a big deal, but this doesn't say mild or minor, it says
11 moderate/marked, so our medical expert will put that in some kind of
12 context for you, but it's not a little thing. Okay?

13 And it isn't just one level. To a lesser degree, mild to
14 moderate degenerative disc disease at C5 to C6, and that's the level
15 below C6-7. C7 to T1, that's the level above C6-7, and to a lesser extent,
16 at C3-4, that's a level below C5-C6. Notice anything about these levels?
17 These are the same levels that end up with the fusion and the metal
18 piece that he showed you in the x-ray.

19 These are all the same parts of his cervical spine that they
20 are asking you to give him millions of dollars for because they claim it
21 was all caused by this accident, had nothing to do with his, you know,
22 aging and other issues with his life. Maybe a little bit, they'll say maybe
23 a tiny bit because they have to admit it because it's in an x-ray report,
24 but our expert's going to say this accident was responsible for a tiny bit,
25 and this that's documented before, is the reason that he had these

1 problems later. The accident didn't help, but we're not saying he wasn't
2 entitled to go treat for a while. We're saying he's not entitled to get ten-
3 plus million dollars and blame all his problems on this accident. That's
4 what we're saying.

5 Multi-level mild to moderate posterior element DJD. So I'm
6 not a doctor, I'll let a doctor tell you what DJD is. Increasing
7 [indiscernible], which again, you're going to see some medical terms
8 when the doctors are here, they'll explain. I'm not going to go for it.
9 Multi-level mild to moderate posterior -- I'm sorry, slight, slight reversal
10 of usual c-spine, lordotic curvature may be due in part to muscle spasm
11 and pain. Muscle spasm and pain. This x-ray doctor, the radiologist is
12 saying in October of 2011, 15 -- 21 months before this accident maybe
13 some of his problems in his neck and cervical spine are due to muscle
14 spasm and pain.

15 Lordotic curvature. So you see this little rise here in the
16 spine? The spine bends, it isn't it straight, that all the doctors agree,
17 there's no mystery about this, and so most people's spines have a typical
18 curvature, and the doctors, all the doctors, orthopedic doctors, your
19 general practitioner doctor, chiropractors, physical therapists, they all
20 know kind of what it's supposed to look like. Different people are
21 different. But when the curve gets flat or reverses, that can cause
22 problems.

23 Well here, they're saying it's already reversed, slight reversal
24 of the usual cervical spine lordotic curvature, maybe due in part to
25 muscle spasm and pain. So his spine has a reversed curve. He has

1 levels C-3 to T-1, are having problems because of the generative disc
2 disease. C-6 to F-C-7 is moderate and marked, so it's flagged as a higher
3 level of problem among all these other problems.

4 Then it says correlate clinically, prevertebral and
5 retropharyngeal soft tissues are within normal limits, which I'll let a
6 doctor explain that one. No other significant osseous lesions. I'll let a
7 doctor explain that one. This one, I think I can explain, the next
8 sentence, anterior osteophytes are seen at the mid and lower c-spine.

9 So what is that word, osteophyte? Now it's not something if
10 you're not a doctor or a lawyer, you don't see it very often. It's not like
11 you pick up the paper and there's a story about osteophytes. So what is
12 it? Osteophytes are calcific growths. It's a -- your body has a growth.
13 Basically, it's a similar thing on the spine to what's called a bone spur.
14 So any of you who played sports in your lives, if somebody on your
15 team had a bone spur, pieces grow off the normal bone.

16 Well, in this gentleman's spine, 21 months before this
17 accident, they're saying that these osteophytes exist. Okay? At the mid
18 and lower cervical spine, so it's not just one level, one place. He's got
19 these calcific growths on his spine 21 months before the accident.

20 Okay. Then they're talking about the next paragraph, oblique
21 images demonstrated by lateral mild to moderate osseous foraminal
22 narrowing, most significant at the mid and lower c-spine. So c-spine's
23 cervical spine, that's what we're here about, what we're talking about.
24 Foraminal narrowing. Again, I'll let the doctors explain it, but the short,
25 simple version is your spine, like Mr. Prince said, the spine is the

1 superhighway of the body.

2 So your spine has all these things going through it, and it has
3 spaced for your nerves and the things that, you know, your body's telling
4 your foot to move, your foot gets -- you get a stubbed toe, it's sending a
5 pain generator to your brain. The spine is a wonderful thing. It's built, it
6 has this area built-in for all these nerves and sensory things to go up to
7 your brain for whatever reasons. And so foraminal narrowing, and I'm
8 not going to get more detailed, is things are -- there's supposed to be
9 spaces in the spine, and for whatever reason, they're narrow. They're
10 squished a little bit or have less space, and so what that does is it can
11 have different effects.

12 The doctors will talk to you about it, but the point for you to
13 remember from this, 21 month before, is that some parts of his spine are
14 identified in an x-ray, and this is an x-ray, this isn't an MRI, which is, you
15 know, a lot, you get more information from an MRI or a CAT scan, this is
16 just an x-ray telling you all this, that he had foraminal narrowing 21
17 months before. Okay?

18 So you'll see some of these things after; narrowing, lordotic
19 curvature, osteophytes, all these things are already there 21 months
20 before. Odontoid process is intact. C-1 lateral masses are normally
21 aligned and both of them are on the view. Visualized lung APC's are
22 clear.

23 I wanted to go through the whole thing so you see it because
24 at the end of the case, if you really want to, the judge will tell you what
25 the rules are for you to see evidence, but you -- some of these things you

1 might find important. You might not see them for three or four days and
2 you might kind of lose track. So to us, to the Defendant, this is
3 important. This is documenting that this Plaintiff had things from C-3 to
4 T-1 21 months before this accident.

5 Do you have the March 12th form?

6 So I tend to keep track of -- hold on a second. I tend to keep
7 track of what the other side is claiming, and so one of the things that
8 they're asking you, you asked us, when did the symptoms start? And
9 Mr. Prince said that on March 12th, 2012, there were no neck complaints
10 of any type. He said that to you an hour ago. Well, here's March 12,
11 2012, Southwest Medical, same provider, and here's this notation:
12 backache, active.

13 So you remember in October of 2011 when they're talking
14 about -- they're writing up what's a diagnosis for the neck, they use the
15 word "backache", and that's why I pointed it out to you, because they
16 don't say neck ache, neck problem, cervical spine, they call it the exact
17 same thing, backache.

18 Now here were are five months or so later and he's still
19 complaining of an active problem, active problem, backache. So Mr.
20 Prince said it magically went away on October 2011, this record says
21 otherwise.

22 Now this is pretty much the last record from Southwest that
23 matters to us before this accident, so it's not like we have a running tally
24 of what's going on with his neck and his back. And so then he's in the
25 accident, eh goes to UMC, he treats with a chiropractor, he treats with

1 the physical therapist, he goes to get some injections, and as I was
2 saying, and then he -- we're kind of off to the races. Now he's seeing
3 pain doctors and orthopedic surgeons, and he's getting surgeries, and
4 he's getting more injections, and he's getting branch blocks, and he's
5 getting all these things you'll hear about medically for years and years
6 and years.

7 But the Defendant's point isn't that he can't do that. He can
8 go do whatever he wants to feel better. The Defendant doesn't have a
9 beef with that. The point is he's blaming it all on this accident only, or
10 almost only, and he's not blaming any of it or very little of it on the
11 problems he had before. And when he goes to his doctors, as I said, he
12 doesn't tell them, oh, I went to -- now we're talking less than two years,
13 okay? This record is 15 months, so this is a year and three months
14 before this accident because the accident's June 19th, 2013, so, you
15 know, add three months, add a year, that's about 15 months.

16 So I -- it's true for all of his doctors, but I've selected just a
17 couple to show you kind of what they say when he comes in to see them
18 for the first time.

19 See if you can find one. Which one?

20 [Counsel confer]

21 MR. KAHN: Okay. So this is Desert Orthopedic Center,
22 September 16th, 2013, this is about three months after the accident,
23 okay? He's going to see these doctors for help because he's claiming
24 he's in pain, he has problems, he wants help for his cervical spine, and
25 when he does his medical history, when he goes in there, what does he

1 tell them? He denied having any history of significant neck pain prior to
2 this accident.

3 Not ten seconds before the accident, not ten days, not ten
4 months, pretty much he tells the doctor I never had neck pain. I deny I
5 had any significant neck pain. Anything I had was insignificant.

6 Now remember, you've seen a record from about two years
7 earlier than this one. He said I have neck pain for years, I've had neck
8 pain for years. But now after the accident, he's going to doctors and he's
9 saying I didn't have any neck pain, I never had neck pain, it was never a
10 problem.

11 And since all the doctors are rendering these causation
12 opinions, they're blaming the problems mostly on this accident, it's
13 important for you to know that none of them even knew about these, the
14 earlier records from Southwest Medical.

15 So could we put the one up again from the no neck pain for
16 several years, please? Oh, sorry, neck pain for several years. Don't
17 worry about the date, just the part here.

18 So it begs the question, if he had neck pain for several years,
19 21 months before the accident, documented in the medical record,
20 indicated in x-rays, and he goes back five months later and they say he
21 still has this backache that's active in March of 2012, 16, 15 months
22 rather, before the accident, why not after the accident is he going to
23 doctor after doctor after doctor and not just mentioning it? Why not
24 mention it? And how could you forget something that's from 15 months
25 ago?

1 So as a result, the doctors do what doctors do, they take his
2 word and they discount the possibility of any prior problems because
3 their patient has told them he didn't have problems, so they don't really
4 look into it.

5 Now, so two things, one is he's not just coming in to treat for
6 an earache or a sore toe, he's coming in to treat for his neck, so you got
7 to believe when the doctors -- when you go into the doctor and you say
8 I've had this neck problem for years, at Southwest at least, that they're
9 going to focus on that, and the same is true after the accident. He's
10 going and he's saying my neck hurts.

11 So you got to believe that doctors will take a general history,
12 but since he's coming in for neck pain and that's his main complaint, you
13 would think they would focus on that. They'd be careful about that. You
14 know? Maybe if they get something wrong about his pinky hurts, it
15 doesn't matter if they're treating him for his neck, but he's there for neck
16 pain. So why is this information from Southwest Medical omitted from
17 every medical record, every single one after this accident? That's what
18 the Defendant wants you to ask yourselves.

19 So the evidence will show that all the Plaintiff's doctors after
20 the accident blame this accident for his problems because they never
21 knew he had this prior neck pain and neck problems. They'll all tell you
22 pretty much that they rely on what their patients tell them, this is what
23 they're trained in medical school, this is what they do every day, this is
24 what happens any time you go to the doctor. You know, where does it
25 hurt, what's wrong, and what are your symptoms, part of what the

1 doctors need to do, to do a good job and be good doctors is get good
2 information from patients.

3 Now none of these doctors, Southwest Medical, yes, they
4 had a relationship with the Plaintiff before the patient, he was going
5 there as like a clinic for general purposes, like his general practitioner
6 doctor. Primary care physician, that's the word, the phrase I was
7 thinking of. But these doctors after the accident, they don't have some
8 preexisting relationship with this Plaintiff. They don't know about this.

9 And so what did doctors do if there is some problem in the
10 past? There's no national database, there's no magic computer
11 program, they don't know. If you had a problem two days before in
12 Chicago, they don't know. They're not going to go check. If you tell
13 them, they might request records if they know the facility, but doctors
14 don't go and do some kind of investigation

15 So after the accident it makes perfect sense, that when he's
16 telling all these doctors here for his injections and his surgery and the
17 spinal cord stimulator and whatever else they want us to pay for,
18 because that's why we're here, why doesn't he tell them about this?
19 Well, you know, that's a good question. But the doctors, to be fair to
20 them, they have no historical context. They don't go checking. There's
21 no way for them to check. They have no idea that this record's out there
22 from less than two years earlier. I'm sure they would have wanted to
23 know.

24 So the doctors ask him what his history is. They rely on the
25 information, and that's how doctors work. There's nothing wrong with

1 that. What the evidence will show and what it's already showing is that
2 Mr. Yahyavi was not an accurate medical historian. So he should have
3 told the doctors when he went in after the accident, you know, two years
4 later, less than two years later, do you have neck pain, did you ever have
5 neck problems, he should have said, yeah, a couple of years ago I went
6 to Southwest Medical, I told them I had neck problems for several years
7 at that point, I had an x-ray, and, you know, they told me whatever they
8 told me, but why not identify that? Why not identify that information to
9 doctors who are treating you for your cervical spine and your neck? Why
10 not just say it?

11 All of the records of the doctors that treated him after this
12 accident, which is all the half a million dollars that you've heard, and the
13 other half a million dollars for the spinal cord stimulator, whatever it is,
14 all lacked this information. None of those records has in here this, that in
15 October 2011, he's saying he had neck pain for several years. None of
16 them.

17 [Counsel confer]

18 MR. KAHN: So Mr. Prince said that Plaintiff went to see Dr.
19 Perry, showed you his picture, here's the pictures of doctors, Dr. Perry,
20 orthopedic surgeon, Archie Perry, M.D. So now this is after the accident.
21 This is November 10th, 2014, and it's Desert Orthopedic Center. So
22 November 10, 2014, Desert Orthopedic Center, Dr. Perry, and so I'd like
23 you to blow up this, just the highlighted part in the middle, please. So
24 what is this? This is six, five -- so it's about 17 months after the accident.

25 Now remember, you're being asked to give the Plaintiff

1 millions of dollars for surgery that he claims was necessary because this
2 accident that my client was involved in, and that he needed it to do
3 better, and his doctors here, that they're going to come in and testify, are
4 going to say, gee, it was very helpful and it was a good thing, but now,
5 gee, he has all these other problems and the shoulder has problems, and
6 now he needs another thing, he needs a spinal cord stimulator, but they
7 can't give him a trial because of his surgery, and that's going to cost a lot
8 of money.

9 Spinal cord stimulators aren't just putting a little thing and
10 that puts an electrode in your neck. You have to have a battery. The
11 batter has to be surgically implanted or changed to some degree. It's a
12 very expensive thing to have on your body because if you have it for the
13 rest of your life, gee, you got to change the batteries every couple of
14 years and that's a fortune. It's tens of thousands of dollars usually.

15 So here's his orthopedic surgeon, Archie C. Perry, M.D.,
16 November 11th, 2014, so like I said, about 15 months, and about 17
17 months after the accident and he says this: In my opinion, I do not feel
18 confident that surgical intervention would result in any significant clinical
19 improvement of this patient. So here's his own doctor five years ago
20 saying don't get surgery, I don't think that will help you.

21 Now -- they're perform surgery under most -- gesundheit --
22 they'll perform surgery under most conditions, but they have an
23 obligation to kind of inform you of the possibilities of success, the
24 problems you could have. This doctor, his own treating doctor, not my
25 expert, not some guy I'm paying to come in here, this is his doctor

1 treating him 17 months after the accident and saying I don't feel
2 confident that surgical intervention would result in any significant clinical
3 improvement. It's not going to make him better. Five years ago, don't
4 get the surgery, it won't make you better.

5 Now he's gotten the surgery and he says he still has horrible
6 pain and he needs more effort, but he can't have any more surgeries, so
7 he wants the spinal cord simulator. They didn't do a trial. They're
8 saying they can't, and Mr. Prince was honest with everybody, that a trial
9 was a standard thing for the spinal cord stimulator. Some people need
10 them. They've been effective for some people, but they're saying don't
11 even give him a trial if he can't get that, just put the thing in there and
12 hope it works.

13 So there are a few other kind of conflicts in what you're
14 being asked to decide. So you heard some information. Was Mr.
15 Yahyavi living an active lifestyle before this accident or was he an
16 eggshell plaintiff, because they're kind of the opposite. Active lifestyle is
17 I'm going around, I'm playing sports, I'm doing stuff. Eggshell plaintiff is
18 gee, my cervical spine and my back has so many problems that if I'm in
19 an accident you're supposed to treat me differently than everybody else
20 because my spine is so weak. So you've heard both things in the
21 opening.

22 I would say generally he led an active life from what I've seen
23 of the evidence and what the evident I think will show you, but I'm not
24 sure what the argument is from Plaintiff. Are they going to say he was
25 active and wasn't an eggshell plaintiff? Or are they going to say he was

1 an eggshell plaintiff meaning he had so many problems that if he's in an
2 accident you're supposed to treat it differently?

3 So I want to talk to you for a minute or two about how this
4 works, okay? The order of the proceedings is like an ancient thing that
5 comes from English law hundreds of years ago. It's a very long,
6 established process. So you've been sworn, the Plaintiff, I said this to
7 some degree in the voir dire, the Plaintiff will present all of its evidence,
8 it's witnesses, it's fact witnesses, medical doctors that treated Plaintiff,
9 expert witnesses to -- experts are allowed to speak in terms of opinions,
10 answer a hypothetical question, things regular witnesses are not allowed
11 to do. The regular witnesses are limited to kind of their five senses and
12 that's it.

13 During this period which is going to last about a week or so,
14 I'm not allowed to put on my own witnesses. That's the rules and that's
15 the way it always works. I can cross examine their witnesses. So when
16 they're done asking questions, I can ask some questions, but I don't get
17 to call my people and have them tell their story for another week or so.

18 And depending on which witnesses Plaintiff's call, he may
19 call some of mine. Mr. Goodrich will probably be called by the Plaintiff
20 today, so you may see a limited version of what he has to say here
21 today, and then he may come back in a week to testify more.

22 And Mr. Arbuckle's being called in their case in chief. He's
23 my client's former employee that drove the forklift, so he's going to start
24 out essentially being cross examined. I don't know if I can even bring
25 him back next week. He doesn't work for our client anymore. He's

1 taking time off work, so we'll have to make arrangements how to do that.
2 But in any event, you'll hear his story probably Monday or so.

3 There's a gentleman named Wade Langstaff. He was what's
4 called an inspector, so his job was to stand out at the -- stand out at this
5 construction site area and make sure everything's copasetic, you know,
6 make sure the signs are up, make sure the cones are right, make sure
7 everybody's doing what they're doing. They're paying him to just kind
8 of check the site all day, every day. I think his testimony's going to be
9 and the evidence will show that he heard this accident, but he didn't
10 necessarily see it occur, but he, you know, was aware of it and went over
11 afterwards.

12 We have the following experts, I know I introduced them
13 generally to you during the -- and here's the names of the witnesses to
14 see if you know them, but I'll explain a little bit about who they are. So
15 Dr. Tung is our only medical expert at this point. He's a board-certified
16 neurosurgeon. He works at the University of California of San Diego.
17 He's done a lot of surgeries. He has the equivalent credentials to several
18 of the Plaintiff's neurosurgical treatment doctors and expert doctors.

19 He's read a lot of the records here. He's read some of the
20 depositions which he's allowed to do, and he's formulating opinions,
21 and the evidence will show that his opinion is basically this case, the
22 claims that are being made for the spinal fusion, the spinal cord
23 stimulator, the SCS, all these things after about a year relate to the
24 Plaintiff's spinal degeneration and not to this accident, and then again,
25 about the first year or 14 months was appropriate care.

1 And I would -- because you don't get to hear from him for
2 another work, I'd ask you to wait until you, you know, hear his testimony
3 before you make up your mind on any of the medicine, because you're
4 going to hear medicine for a week from the Plaintiff, it's kind of like the
5 voir dire process. You're going to have to take all that and then we get
6 our turn, Plaintiff may get another turn, we may get another turn.

7 We have an accident reconstruction and biomechanical
8 expert whose name is John Baker. He's local. He's got a PhD. His role
9 in the case is to kind of give estimates of what happened in the accident
10 and how the damage on the car is -- reflects the speeds of the vehicles
11 and things of that nature. He performed a crash test at a facility in order
12 to figure out, because this is a very unusual accident. He performed a
13 crash test at a facility to figure out if he could simulate the damage on a
14 similar kind of Charger, same frame, same platform, and after smashing
15 a couple of Chargers, and there's videos and photos that have been
16 disclosed, he comes up with essentially an opinion that this is a lower-
17 speed accident.

18 And now this is important, and I'm going to try to -- this
19 opening statement's supposed to give you kind of a roadmap, a guide to
20 what you're going to be hearing for the next couple of weeks so that you
21 can make some sense of it. And again, this is in evidence, I'm telling you
22 what I think the evidence will show, so look for the evidence as it pops
23 up from the witnesses and the documents.

24 But another thing that Plaintiff did after this accident is he
25 told many, most of his doctors that he was going 30 miles an hour,

1 three-zero, 30 miles an hour. Our expert puts the speed much, much
2 lower than that, but what I want you to also consider is that the plaintiff's
3 own expert puts the speed I think at 15 miles an hour. So half what the
4 Plaintiff was telling all his doctors. So he's telling all his doctors for
5 years I was going 30 miles an hour when this accident happens,
6 Plaintiff's hire an expert in this case, a gentleman named Mr. Leggett
7 (phonetic) who happens to reside in Canada, a very nice man, he's going
8 to come in and tell you he thinks the car was going 15.

9 So that raises another issue. If their own expert has
10 determined the car is going 15 miles an hour, why is the Plaintiff telling
11 all his doctors that he was going 30? And that's throughout, scattered
12 throughout many of his medical records. Now my expert puts the speed
13 much lower than the Plaintiff's expert, Mr. Leggett, just so you have
14 some kind of range.

15 So this accident reconstruction of the crash test we
16 performed, so this facility that we went to for the crash test, assuming it
17 comes into evidence, which is my intention to ask that it come into
18 evidence when Mr. Baker's on the witness stand, is kind of a world class
19 facility, it's built about in the last two years, it's got German engineering,
20 it's got German equipment. It's used by kind of auto manufacturers and
21 parts manufacturers. They can crash two cars at 75 miles an hour each,
22 so 150 mile an hour collision. It's very high-tech.

23 But what's important for our purposes is two different
24 Chargers, same kind of body as the one at issue, are smashed into a
25 forklift that's the same make and model as the one that Mr. Prince

1 showed you that was involved in this accident. So our crash test has
2 essentially the exact same forklift crashing into two of the exact same
3 kind of cars to see if we can figure out, can we recreate the damage to
4 the Plaintiff' vehicle in this accident, and then once you do that, okay,
5 how fast were we going?

6 We have a vocational expert. His name is Edward Bennett.
7 The Plaintiffs are going to have this vocational expert. You will probably
8 hear from him either today or Monday. He's scheduled to be this
9 afternoon, and his, he's going to tell you basically Mr. Yahyavi can never
10 work again. That's what he's going to tell you. Mr. Yahyavi can never
11 work again.

12 And so again, the Defense position, we're not saying he
13 shouldn't get treatment, we're not saying he has to work. The Defendant
14 is saying he had this prior degeneration, that's what caused most of his
15 problems, and we can't be asked to pay for all of his problems in his life
16 because of this accident.

17 We have an economic expert named Kevin Kirkendall, so Mr.
18 Prince talked about, so Mr. - their expert inspector kind of goes with our
19 expert Bennett. Their medical experts go with our medical expert, Dr.
20 Tung, the neurosurgeon. They have an expert named Parretti [phonetic]
21 who's an economic expert, he's goes with our expert Kirkendall. And so
22 their, you know, experts say it's -- their economic expert will say it's so
23 much money and here's how I calculated it, and our expert is going to
24 say it's, you know, even taking what you want to do, it's less money, or
25 based on our own other expert.

1 And so while some of the medical evidence in this case is
2 complicated, Defendant's case is fairly simple. We're going to cross
3 examine the Plaintiff's medical experts, and we're going to have our own
4 experts, and we're going to support the position, the evidence will show,
5 the position that the Plaintiff had prior degenerative problems to his
6 cervical spine, as you saw on that blowup, highlighted part from October
7 2011.

8 The x-rays support that, the -- his own statement to his
9 doctor, this is Plaintiff's own statement, I had neck pain for years, that
10 supports that. So he didn't tell them about that and it's completely
11 understandable that his post-accident doctors blame this accident again
12 because they didn't know he'd been to Southwest Medical less than two
13 years before and made these complaints about his cervical spine.

14 The evidence will show that the Plaintiff had a number of
15 problems with his cervical spine, neck before this accident, the
16 degeneration, the osteophytes, remember, kind of like bone spurs, those
17 don't just develop from an accident. You don't have an accident and
18 then you get a bone spur. This is something that takes time to develop
19 in your body, and the fact that they were already there 15 months before
20 went in to Southwest -- or sorry, 21 months before when he got the x-ray
21 at Southwest Medical indicates that he had these before this accident.
22 So osteophytes were already in the cervical spine, they're documented,
23 so that's nothing that my client should be asked to pay for, some bone
24 spur that was growing years before this accident.

25 At the end of the case you'll be asked by the Plaintiff'

1 attorney to award the millions and millions and millions of dollars he
2 was showing you on the screen, or more. You know, obviously, we'll I
3 get our chance to argue. We're not supposed to kind of fully argue right
4 now, this is just kind of a roadmap, but at the end they'll argue, we will
5 argue, and then the Judge will instruct you, and you will go back to the
6 jury room and make some decisions. But it's important that you were
7 read an instruction this morning about aggravation of problems.

8 Remember, the two things that you were read this morning
9 out of all of the sea of jury instructions you got, the pre-instructions, one
10 was about aggravation of problem, so you will read the instruction or
11 hear it from the judge at the end of the case, but pay careful attention to
12 aggravation because what's it's saying essentially is just because he's
13 hurt now, if he was also hurt before, he doesn't get everything
14 compensated as part of a personal injury car accident lawsuit. You're
15 going to have to draw line, what's from before and what's from after,
16 okay? And our position is most of it's from before.

17 Also, there's a thing called proximate cause, and this is a
18 very complicated legal issue. It vexes, it stymies law students in their
19 first year, and --

20 MR. PRICE: Objection. Move to strike that argument
21 regarding proximate cause, Your Honor, and your instruction, how it
22 stymies people, and law students, and --

23 THE COURT: Counsel, approach.

24 [Sidebar begins at 11:54 a.m.]

25 THE COURT: I thought I made it pretty clear, don't make

1 speaking objections unless you're up here. What is it you're objecting?

2 MR. PRICE: No, he's objecting that proximate cause, this --
3 and how it's confusing and that how it stymies law students, and no one
4 knows how to figure it out, no, that's an improper argument to this jury
5 to tell them. The instruction is clear the way it's written. That is the clear
6 statement of Nevada law. It's not him to say that no one understands it
7 and actually stymies law students.

8 THE COURT: Again, what is your objection?

9 MR. PRICE: That it's argument and wrong.

10 THE COURT: Well, it's probably argument.

11 Counsel?

12 MR. KAHN: I'll just move on.

13 THE COURT: All right. Thank you.

14 [Sidebar ends at 10:46 a.m.]

15 THE COURT: I'll sustain the objection. And move on.

16 MR. KAHN: So the Court's going to instruct you on
17 proximate cause and you're going to have to figure out, you know, just
18 focus on the word "cause", you're going to have to figure out what
19 caused the problems that the Plaintiff is asking you to award him
20 millions and millions and millions of dollars for, what caused that. Was
21 it caused by this accident? Because the Defendant' agreeing, their own
22 expert says some of his problems were caused by this accident but it's a
23 small part, that the bulk of his problems were caused by his spinal
24 degeneration and the way his body was before this accident occurred,
25 but that's going to be up all of you in your collective judgment when you

1 go back to the jury room.

2 Okay. Might be one more thing and then I'm almost done.
3 We'll hopefully be done by lunch. Oh. One last thing to put up on the
4 screen and then I'm almost done.

5 So this is Dr. Oliveri, the one who's I guess sitting in the
6 courtroom today, he's going to say that the Plaintiff can never work
7 again, and he rendered an opinion that it's essentially all because of this
8 car accident. Okay? That's what he said so far. This is from April 23rd,
9 2015, so a little less than two years after the accident, now about, what is
10 that, four years ago, okay? And this is body parts requested, cervical
11 spine is one of them, so he's looking at the cervical spine specifically,
12 okay? And when it says preinjury status, again, if you could blow up
13 from preinjury status down to the yellow?

14 This is the Plaintiff's main medical expert. This is what Mr.
15 Yahyavi told him. He also denies prior cervical or thoracic spine pain
16 injury or treatment. So this is hard to get away from and duck.
17 Treatment, okay, you can say we took an x-ray, maybe that's not
18 treatment. Injury you can say maybe they didn't identify any specific
19 traumatic injury. But pain, that word, the word that you're being asked
20 to award millions of dollars for, was clearly in that blowup that I showed
21 you from 21 months before this accident.

22 So when Mr. Yahyavi goes to his treating doctor, Dr. Oliveri,
23 who's now his main and central medical expert that says he can never
24 work again, so he's going to ask you for two million dollars for that, you
25 saw it, two and a-half, whatever it is, he'll never work again, pay him

1 \$160,000 a year for the last six years and the next 24 years, the 30 years
2 of \$160,000 a year, however many millions that is. When Mr. Yahyavi
3 goes to Dr. Oliveri, the one who will testify later today, he denied prior
4 cervical pain. So that's something to consider, not just for Mr. Yahyavi's
5 testimony, but for his medical doctors and his experts.

6 I know I tend to be loud and drone on, and I thank you all for
7 your time an listening. Again, the Defendant may have other individuals
8 who sit at counsel table besides Mr. Goodrich, and if so, I probably won't
9 get a chance to introduce you to them. There's a gentleman whose -- a
10 tall gentleman who's one of the owners of Capriati, he may be here,
11 there may be other people. So again, thank you all for your time and
12 your attention and your service and enjoy your lunch.

13 THE COURT: Thank you. All right. We're going to have you
14 back at 1:15. During this recess, you're admonished, do not talk or
15 converse amongst yourself or with anyone else on any subject
16 connected with this trial or read, watch, or listen to any report of or
17 commentary on the trial, or any person connected with this trial by any
18 medium of information, including without limitation newspapers,
19 television, radio or internet. Do not form or express any opinion on any
20 subject connected with the trial until the case is finally submitted to you.
21 1:15.

22 THE MARSHAL: Please leave your notebook and pens.
23 Rise for the jury. 1:15. I'll be outside if you have any
24 questions.

25 [Jury out at 11:57 a.m.]

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[Outside the presence of the jury]

MR. KAHN: So I have two brief matters, Your Honor, unless you think we should --

THE COURT: Let the door close, at least. All right. We're on the record and outside --

MR. KAHN: I have two brief matters, unless you think we should wait. One is I think -- well, first of all, I thought we were going to exchange any PowerPoints. I don't think we ever received it from the Plaintiff's.

MR. PRICE: No, I have to give it to you now. We'll go provide a copy to the Court after I give it.

MR. KAHN: Right. But I thought we had an agreement to exchange before you -- that was my understanding so --

MR. PRICE: No. That was not our agreement. Our agreement was demonstrative, which I demonstrate, showed you the demonstratives. They're a series of things I'm going to be using, and that's what I provided to you under 2.67. The actual slides and my content, that can't be -- that's my work product

THE COURT: All right.

MR. KAHN: As to one of those slides, I believe it was a photo that was not produced in discovery, the photo that showed the surgical scar of Mr. Yahyavi. I could be wrong because there's a lot of things in this case, but I can tell you --

THE COURT: I didn't --

MR. KAHN: -- I looked through the list of evidence yesterday,

1 I don't believe that photo was every produced or disclosed, and if so,
2 that's a problem.

3 MR. PRICE: Yeah, well, it -- he had the surgery, it was used
4 for a demonstrative purpose only. I had to look through the 16.1
5 disclosures, but regardless, it's not an exhibit, I just used it to show it.
6 He actually has the scar on the back of his neck, and so, I mean, it's really
7 just demonstrating the approach of the surgery.

8 THE COURT: All right. Well, we'll find out if it was, if not, and
9 yes, he can come up and show it to the jury, so I'm not sure what that's
10 about, but other than you should be disclosing -- you should have
11 disclosed everything. What else?

12 MR. KAHN: That was it.

13 THE COURT: That was it?

14 MR. KAHN: Thanks, Judge. All right.

15 THE COURT: Okay.

16 MR. PRICE: It's all the same.

17 THE COURT: I will see you after lunch.

18 MR. KAHN: Want us back at 1 or 1:15?

19 THE COURT: Unless you think there's -- you have
20 something, 1:15.

21 MR. KAHN: Thank you, Your Honor.

22 [Recess taken from 11:59 a.m. to 1:22 p.m.]

23 [Matters continue]

24 /////

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[Testimony of Clifford Goodrich, previously transcribed]

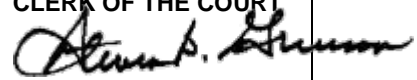
[Testimony of David Oliveri, previously transcribed]

[Proceedings concluded at 4:07 p.m.]

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



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



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RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

BAHRAM YAHYAVI,
Plaintiff,

vs.

CAPRIATI CONSTRUCTION CORP
INC.
Defendant.

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

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

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

APPEARANCES:

For the Plaintiff:

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

For the Defendant:

MARK JAMES BROWN, ESQ.
DAVID S. KAHN, ESQ.

RECORDED BY: JUDY CHAPPELL, COURT RECORDER

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INDEX OF EXHIBITS

FOR THE PLAINTIFF

MARKED

RECEIVED

None

FOR THE DEFENDANT

MARKED

RECEIVED

None

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Las Vegas, Nevada, Friday, September 13, 2019

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

THE COURT: Please be seated.

The parties acknowledge the presence of the jury?

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

MR. KAHN: The Defense does.

THE COURT: Very well. Call your first witness.

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

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

THE CLERK: Raise your hand.

CLIFFORD GOODRICH, PLAINTIFF'S WITNESS, SWORN

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

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

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. PRINCE:

Q Mr. Goodrich, good afternoon?

A Hi.

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

A Yes, sir

1 Q We've never met before, have we?

2 A No.

3 Q You're an employee of Capriati Construction, correct?

4 A Yes, sir.

5 Q You are -- in fact, you are the safety manager for Capriati
6 Construction, correct?

7 A Correct.

8 Q And Capriati Construction is a licensed general contractor in
9 the state of Nevada, correct?

10 A Correct.

11 Q And it was a licensed general contractor in the State of
12 Nevada in June of 2013 --

13 A Yes.

14 Q -- correct? As a licensed contractor in the state of Nevada,
15 Capriati Construction does a lot underground utility related construction,
16 correct?

17 A Correct.

18 Q Can you please tell the jury briefly what underground utility
19 construction is?

20 A Underground utility construction is water, sewer, storm
21 drainpipes that connect to various entities, outlets, or services.

22 Q All right. And Capriati Construction does Public Works
23 projects? For example, we're doing work for Clark County, the city of
24 Las Vegas, Henderson, North Las Vegas, et cetera, correct?

25 A That's correct.

1 Q That's when you actually contract to do work on behalf of a
2 political subdivision, whether it be the city, the county, North Las Vegas,
3 or otherwise, right?

4 A Correct.

5 Q And in 2012 and 2013, when this incident occurred, Capriati
6 was installing sewer drains in the area of Sahara and Boulder Highway,
7 correct?

8 A No.

9 Q Okay. It was doing some underground utility construction in
10 that area?

11 A Correct.

12 Q Okay. Just maybe not sewer drains?

13 A That's correct.

14 Q All right.

15 MR. PRINCE: Let's have demonstrative Number 10, please.

16 MR. KAHN: And, Your Honor, just so I know, does he see
17 the -- does the witness see that on his screen in front of him.

18 THE COURT: He should.

19 THE WITNESS: Yes, I see that.

20 BY MR. PRINCE:

21 Q Do you have that?

22 A I see it now. Okay.

23 Q Okay. And the work that you were performing in June of
24 2013 was generally near East Sahara, near its intersection with Boulder
25 Highway, correct?

1 A Correct.

2 Q This incidence occurred right around -- right around the area
3 of Sahara and Glen Avenue, correct?

4 A Correct.

5 Q Capriati was also doing construction in that area, correct?

6 A Correct.

7 Q And in 2013, Capriati had approximately 200 employees
8 working for them?

9 A Approximately, yes.

10 Q And you've been an employee of Capriati Construction since
11 2000, correct?

12 A Correct.

13 Q And you were the safety manager for Capriati Construction in
14 June of 2013, correct?

15 A Correct.

16 Q And the time you -- of this crash on June 19th, 2013, that
17 we're discussing, you were the acting safety manager that came to the
18 scene, correct?

19 A Correct.

20 Q And in addition to that, you were the designated company
21 representative speaking on behalf of the company when you gave your
22 deposition in December of 2018 related to this incident, Capriati's safety,
23 policies, practices, and procedures, correct?

24 A Correct.

25 Q Okay. Now, as a safety manager, one of your responsibilities

1 is investigating incidents on a job site, whether it involved an employee
2 or a member of the public, correct?

3 A Correct.

4 MR. PRINCE: Just go ahead and put it back up.

5 BY MR. PRINCE:

6 Q And it's your responsibility to make a determination how an
7 incident or a collision or some other injury-causing event could have
8 been avoided, right? That's part of your responsibility?

9 A At times.

10 Q Okay. Do you agree that at Capriati, safety is the number one
11 priority for all work being performed?

12 A Yes, it's one of our top priorities.

13 Q It's one of your top priorities not only for your employees but
14 other members of the public, correct?

15 A That is correct.

16 Q Now, the area that we're talking about where there's road
17 construction, near Sahara and Glen, you understand that Sahara has
18 three eastbound lanes of traffic that could go all the way through to
19 Boulder Highway, correct?

20 A Yes.

21 Q And there's one right turn lane as well to make a turn onto --
22 a dedicated right turn lane to make a turn onto Glen Avenue, correct?

23 A Correct.

24 Q All right. And at the time that this happened, Capriati had
25 hired a traffic control company to create a barricade plan, correct, for this

1 project?

2 A Yes.

3 Q And that's required as part of doing a Clark County Public
4 Works project, correct?

5 A Yes.

6 Q Right. And one of the things they did was shut down the
7 right-hand turn lane, correct? At the time of this incident, it was -- it was
8 closed down?

9 A That's what it appears.

10 Q All right. And that's what you saw the day you went out to
11 that collision, correct?

12 A Correct.

13 Q All right. So -- now, Capriati's responsible for hiring the
14 traffic control company and having that plan approved by the -- the
15 Public Works agency, in this case, Clark County, correct?

16 A Yes.

17 Q All right. And you agree that Capriati was doing work just
18 south -- or to the -- or just to the right-hand side of where this collision
19 occurred?

20 A In that general area, yes.

21 Q All right. And I also have -- there's a piece down there where
22 it says Capriati on that little kind of triangular portion of the property
23 down near Boulder Highway. Do you see that? This area. This piece
24 here.

25 MR. KAHN: Your Honor, I'm sorry to interrupt. Has this been

1 marked at all yet, this --

2 MR. PRINCE: This is a demonstrative exhibit. I can mark it.

3 MR. KAHN: I would ask that it be marked if we're going to
4 have any more testimony on it.

5 THE COURT: Yes. Go ahead.

6 MR. PRINCE: That's fine.

7 [Plaintiff's demonstrative exhibit marked for identification]

8 BY MR. PRINCE:

9 Q Anyway, this -- this piece down here we're talking about, at
10 the end -- corner of Glen and Boulder Highway, that was a staging area
11 for Capriati material and equipment, correct?

12 A Yes. I believe so.

13 Q Okay. And you agree that when you arrived on scene, you
14 learned that one that Capriati Construction's employees, Joshua
15 Arbuckle, drove a forklift into a car that was driving on Glen Avenue,
16 correct?

17 A Yes, sir.

18 Q Okay. You agree that Josh Arbuckle was an employee of
19 Capriati Construction at the time he was driving the forklift and collided
20 with my client's car?

21 A Yes, sir.

22 Q And he was doing -- Josh Arbuckle was doing work related to
23 this Public Works project at the time this incident occurred, correct?

24 A Yes, sir.

25 Q This project was in the final phase or wind-down phase as of

1 June of 2013? Meaning you were almost done with the project?

2 A Correct.

3 Q Just doing some cleanup work, right?

4 A Yes.

5 Q All right. And at the time this collision occurred, Josh was a
6 cement finisher, correct?

7 A Mostly, yes.

8 Q He'd also been a laborer before that?

9 A Correct. And other things.

10 Q Right. But he was not employed as a certified operator to
11 operate construction equipment, including forklifts, was he?

12 A That's an incorrect terminology.

13 Q He was not certified to operate a forklift, was he?

14 A That's incorrect terminology.

15 Q He was certified?

16 A He had previous training --

17 Q Was he --

18 A -- yes.

19 Q -- certified?

20 A That allows him to be certified.

21 Q Was he certified in June 2013? The answer to that's no?

22 A You're --

23 Q Was he?

24 A You're only certified once.

25 Q Right. He was never certified before June of 2013, correct?

1 A Not that I'm aware of.

2 Q You have no record of him ever receiving any sort of
3 vocation from the company, correct?

4 A I guess. Yes.

5 Q All right. And you agree that prior to June 2013, in fact, your
6 predecessor, a gentleman by the name of Doug Goss, the safety
7 manager, had instructed Josh Arbuckle not to operate forklifts, correct?

8 A That's inaccurate.

9 Q That's inaccurate?

10 A That's inaccurate.

11 Q Okay.

12 MR. PRINCE: The Court's indulgence.

13 [Pause]

14 MR. PRINCE: Could I have Goodrich deposition, please?

15 [Pause]

16 MR. PRINCE: Your Honor, I'd like to approach and publish
17 the deposition of Mr. Goodrich.

18 [Counsel confer]

19 MR. PRINCE: Your Honor, may I approach the witness?

20 THE COURT: Yes.

21 MR. PRINCE: Thank you, Your Honor.

22 BY MR. PRINCE:

23 Q Mr. Goodrich, I'm handing you two things. One is a copy of
24 your deposition transcript. Okay? And the other is Defendant's,
25 meaning Capriati Construction's, answers to interrogatories.

1 A Uh-huh.

2 Q Okay? And that gentleman over there, seated to the left, he's
3 got his glasses up on his head, Mr. Brown, he's been your lawyer
4 throughout this proceeding, right?

5 A Correct.

6 Q Okay. And you've worked with him in answering questions
7 that we sent under oath, correct?

8 A Correct.

9 Q All right. So I'm going to have you first look at the answers
10 to interrogatories.

11 A Uh-huh.

12 Q I want you to please go to the last page and verify that you
13 signed the answers to interrogatories. The second to the last page. That
14 you signed those under oath as the safety manager.

15 A Correct.

16 Q What date did you sign those?

17 A It looks like it says June 9th, 2016.

18 Q Of 2016. So three --

19 A Yes.

20 Q -- more than three years ago?

21 A Correct.

22 Q Please turn to answer to interrogatory number 9. There's the
23 question and the answer that you gave.

24 "Please tell us all the certifications and training classes
25 conducted for the subject forklift driver, including all of his

1 safety classes conducted or any type of compliance authority
2 for" -- "or for in-house safety purposes."

3 "The employee has been instructed not to use the forklift by
4 the department safety manager, Doug Goss."

5 Did I read that correctly?

6 A Yes.

7 Q All right. So Doug Goss had instructed him not to use the
8 forklift, right?

9 A It's a generalized statement that requires further answer.

10 Q Well, that was your answer when we asked you the question,
11 right? That's the answer you gave?

12 A I'm sorry. I'm not an attorney. I don't -- a generalized
13 statement might be acceptable --

14 Q Well --

15 A -- to me.

16 Q Well, you had a lawyer help you answer the question, right?
17 Your lawyer, Mr. Brown, he assisted you, right?

18 A No. Those were my answers. He didn't assist me in the
19 answer.

20 Q But he was there to guide you and assist you in answering
21 the questions, right?

22 A At times.

23 Q Right. And that's how you answered it, correct?

24 A That is how it was answered.

25 Q And if you'd go to page 118 of your deposition, please. Now,

1 I want you to look at lines 5 through 14 of your deposition.

2 MR. KAHN: Your Honor, I would ask that the witness go to
3 line 20 for --

4 MR. PRINCE: No, Your Honor. This is --

5 MR. KAHN: -- of inclusion of all --

6 THE COURT: You'll -- I'll let --

7 Counsel, approach.

8 [Sidebar begins at 1:37 p.m.]

9 THE COURT: He's allowed to ask for the totality of it, so --

10 MR. KAHN: Correct.

11 MR. PRINCE: Well, he can do it the way he wants to cross-
12 examine. He can redirect the witness. I want to -- I'm not cutting any of
13 his answer off. I just wanted to go to a certain point. If he wants to do
14 something further on a re-direct, then it's up to --

15 THE COURT: You'll certainly have --

16 MR. PRINCE: Right. Thanks.

17 THE COURT: Well, not redirect, but -- yeah.

18 [Sidebar ends at 1:37 p.m.]

19 MR. PRINCE: All right.

20 THE COURT: All right. Go ahead.

21 BY MR. PRINCE:

22 Q And the question we asked you was,

23 "Q On behalf of Capriati, who told you that Josh was not
24 permitted to use the forklift?

25 "A I know Doug made a statement about that, and I think Mike

1 also."

2 Mike is the owner, correct?

3 A No, Mike is not the owner.

4 Q What was his position?

5 A He's our VP of operations.

6 Q Okay. So he was senior management at Capriati?

7 A That is correct.

8 Q So you think more than one person, actually Doug Goss, the
9 safety manager, and you also believe that the vice president of
10 operations told Josh Arbuckle not to use the forklift, right?

11 A With considerations, yes.

12 Q Right. And so,

13 "Q When did Doug make that statement?"

14 You said,

15 "A I don't know the exact date. I know it was before.

16 "Q Before the incident?

17 "A Yes. I don't recall exactly when."

18 But you do know the statement was made before this collision
19 occurred, correct?

20 A Correct.

21 Q Okay. You agree that following company safety, policies,
22 practices, and procedures are required by Capriati employees, correct?

23 A Yes.

24 Q And one of those procedures is, if you're going to be
25 operating equipment, whether authorized or not, you better do it safely,

1 correct?

2 A Yes.

3 Q All right. And you agree that when company policies,
4 procedures, and directives are not carried out, injuries can occur?

5 Correct?

6 A Yes.

7 Q You agree that had Josh Arbuckle not followed the -- had he
8 followed the instruction of the former safety manager and not driven the
9 forklift that day, we wouldn't be here, correct?

10 MR. KAHN: Objection. Hypothetical.

11 THE COURT: Sustained.

12 BY MR. PRINCE:

13 Q You agree that had Josh Arbuckle not decided to get on the
14 forklift, this collision would not have occurred, involving him, correct?

15 MR. KAHN: Same objection.

16 MR. PRINCE: No.

17 THE COURT: Overruled.

18 THE WITNESS: It's plausible.

19 BY MR. PRINCE:

20 Q What do you mean, plausible? If Josh Arbuckle never gets in
21 the seat of that forklift and starts to drive it out onto the roadway, this
22 doesn't happen if he's not driving it, correct?

23 MR. KAHN: The same.

24 THE COURT: Overruled.

25 Go ahead. Specific --

1 THE WITNESS: Not -- yes.

2 BY MR. PRINCE:

3 Q I'm right, correct?

4 A That's a matter of interpretation of the facts.

5 Q Do you think that one of your certified operators would have
6 drove while his vision was obstructed and drove into car? You're saying
7 that, are you? This would have happened regardless?

8 A I didn't say that.

9 Q Okay.

10 A It's --

11 Q Now, let's talk about some safety rules, and see if you agree.

12 MR. PRINCE: Demonstrative 1.

13 BY MR. PRINCE:

14 Q You agree that each person on a job site is responsible for
15 their safety and the safety of others working around them? Do you agree
16 with that?

17 A Yes.

18 Q Do you think in general that all accidents are preventable?
19 That's something you teach as a safety manager, right? It's something
20 that's commonly used in the construction field?

21 A Well, not all. Some are mechanic failure that cause
22 accidents.

23 Q This wasn't a mechanic failure in this case, right?

24 A That is correct.

25 Q This accident was, in fact, preventable, wasn't it, in this case?

1 MR. KAHN: Objection. Calls for expert opinion.

2 MR. PRINCE: No, it's not.

3 MR. KAHN: Hypothetical.

4 MR. PRINCE: It's from his perspective as a safety manager
5 for this company.

6 THE COURT: I'm going to allow it with -- as to his
7 knowledge.

8 THE WITNESS: I'm sorry. Can you repeat the question?

9 BY MR. PRINCE:

10 Q This collision in this case was preventable, wasn't it?

11 A It could have been, yes.

12 Q By Capriati, correct, and its employees? It's preventable by
13 them?

14 A I guess, yes.

15 Q You agree that if someone that is not trained or authorized to
16 use particular equipment, they shouldn't do it, correct?

17 A Correct.

18 Q You agree that company employees should always follow
19 the rules and the directives of the company?

20 A Correct.

21 Q All right. And they should obey, right, the orders and
22 directives?

23 A I don't like the word obey, but --

24 Q Or follow them?

25 A -- they should -- they should follow them.

1 Q Right. And when using company equipment, all equipment
2 should be used safely and in the proper way, correct?

3 A Yes.

4 Q Because when that's not done, the risk of injury, including
5 serious injury, can happen, right?

6 A It's possible, yes.

7 Q Okay.

8 MR. PRINCE: Let's go to demonstrative slide 15.

9 MR. KAHN: The same thing; I'd ask that it be marked.

10 MR. PRINCE: Well, we're going to --

11 THE COURT: Yes.

12 MR. PRINCE: That's fine.

13 Go ahead.

14 [Plaintiff's demonstrative exhibit marked for identification]

15 BY MR. PRINCE:

16 Q Okay. Do you agree that operators of construction
17 equipment must take all steps necessary to avoid injury or harm to other
18 motorists if they're going to bring it onto the roadway?

19 A Generally, yes.

20 Q All right. Do you agree that operators of construction
21 equipment must enter the -- must not enter the roadway until and unless
22 it is safe to do so?

23 A Generally, yes. Depending on traffic setups, et cetera, yes.

24 Q Right. And you shouldn't bring a forklift onto the road unless
25 it is safe, correct?

1 A Yes.

2 Q You agree that operators of construction equipment must not
3 enter the roadway when their vision is blocked or obstructed, correct?

4 A Yes.

5 Q That's just generally a safe practice, right?

6 A Yeah. And just --

7 Q But --

8 A I'm just analyzing the statement.

9 Q Right. And in particular, when it relates to construction
10 equipment, like a forklift, that has its own special hazards, you shouldn't
11 enter the roadway until it's safe, correct?

12 A Yeah. Correct.

13 Q And you shouldn't enter the roadway with a fork sticking out
14 if your vision is obstructed, correct?

15 A Correct.

16 Q And you agree that construction equipment, like a forklift,
17 creates special safety hazards on the road, correct?

18 A I don't know if it creates special safety hazards, but it -- it can
19 be like any other piece of equipment that goes on the road.

20 Q Well, a forklift is not -- is unique in its design and its
21 characteristics; the way it handles, the way it moves, correct, the way it
22 stops?

23 A Yes and no.

24 Q That's not a common piece of equipment to drive on the
25 road, is it?

1 A On certain projects, yes, it is.

2 Q But it's not common -- I -- I've lived in Clark County my whole
3 life. I've never seen a forklift on the road.

4 A Well, I've lived on -- I've lived in this Valley my entire life as
5 well, and I have seen them on the road.

6 Q Well, you work in construction, right?

7 A Well --

8 Q To -- to an average --

9 A -- yes, I do.

10 Q -- motorist, it may not be?

11 A That may be true.

12 Q Right. And you agree that no matter what, entering the
13 roadway when your vision of -- is obstructed is unsafe and can cause
14 injury, correct?

15 A Yes. That is correct.

16 Q All right. So, in this case, Josh was operating a piece of
17 equipment owned or leased by Capriati for this project, correct?

18 A Correct.

19 Q He was trying to enter the roadway, correct?

20 A Correct.

21 Q Obviously the roadway wasn't clear, correct, because Mr.
22 Yahyavi was driving in it?

23 A Correct.

24 Q His vision -- you know that his vision was obstructed that
25 day, correct?

1 A Correct.

2 Q And you'd learned that a collision occurred, and my client
3 was taken by ambulance from the scene to the hospital, right?

4 A Correct.

5 Q Right. You agree that Josh Arbuckle wasn't being safe that
6 day, was he?

7 A I do not think he used good, safe practices.

8 Q All right. Not practices that you would promote at Capriati
9 Construction, correct?

10 A No.

11 Q And when you arrived on the scene, what you learned was
12 that Josh was attempting to move some items with the forklift, and
13 attempted to pull onto Glen Avenue while his vision was obstructed,
14 resulting in this collision we're discussing, correct? That's what you
15 learned that day?

16 A Pretty much, yes.

17 Q Okay.

18 A I don't know the sequence there.

19 Q Okay. And you further understood on June 19th, 2013, that
20 he got the forks of the forklift past the traffic cones into the travel lane
21 and into the path of travel of my client, Bahram Yahyavi, correct?

22 A That's how it appears.

23 Q Okay. That's what the physical evidence showed you when
24 you arrived on the scene, correct?

25 A That's how it appeared to me, yes.

1 Q Right.

2 MR. PRINCE: All right. If we'd go to -- let's go to Exhibit 55,
3 Bate number 127.

4 BY MR. PRINCE:

5 Q Now, the truck that the -- the tractor-trailer on the left, that
6 was one of the visual obstructions that Josh had that day, correct?

7 A That's how it appears in the photos.

8 Q Right. You're the one who took the photographs, right?

9 A I did not take all of the photos.

10 Q Is this one of the ones you took?

11 A I don't know if this is the one I took or if this was received
12 from the inspector or -- I'm not sure of that.

13 Q Right. But you -- it's clear that it was taken the day of this
14 collision, correct?

15 A Most definitely.

16 Q And you definitely saw that green Peterbilt truck that was
17 loading up the trench plates in that position when you got to the scene,
18 correct?

19 A Correct.

20 Q You got to the scene even while Mr. Yahyavi's car was still
21 there? He was gone to the hospital, but his car was still there, correct?

22 A I can't remember if the car was gone or still there, but --

23 Q Okay. And you agree that --

24 MR. PRINCE: Let's look at -- go to Exhibit Number 62, Bate
25 number 134.

1 Let's wait for it to load. Maybe zoom it in.

2 BY MR. PRINCE:

3 Q In addition to the green semi-truck, there was an additional
4 obstruction in the form of that cement mixer, which is behind the police
5 motorcycle, correct?

6 A Correct.

7 Q And you saw the cement mixer the day you were there as
8 well, correct?

9 A I believe so.

10 Q All right. In looking at this photograph, everything to the left
11 of the cone, that's the construction zone, correct?

12 A That is correct.

13 Q Mr. Yahyavi, his car's actually in the dedicated lane
14 established by Capriati's traffic control company, correct?

15 A Correct.

16 Q So he's in his own proper lane, meaning my client,
17 Mr. Yahyavi?

18 A It looks that way.

19 Q And the forks of that forklift actually went past the
20 construction cone and into the travel lane designated for vehicles,
21 correct?

22 A It appears that way, but the -- I believe the forklift was moved
23 when I got there already.

24 Q Oh, of course, it had backed up, right?

25 A Yeah, they had moved it. I don't know the orientation of the

1 entire accident though.

2 Q No. But my point is, the forks of the forklift went into the
3 travel lane and crashed into my client's car, into his front windshield?

4 A The -- that appears correct, yeah.

5 Q That's obvious, right?

6 A Yeah.

7 Q And then obviously then the forklift driver or somebody
8 backed it up --

9 A Correct.

10 Q -- to that position we're seeing, right?

11 A Correct.

12 Q Right. And so my client was in the travel lane, in the
13 dedicated through lane on Glen Avenue wasn't he?

14 A That's what it appears.

15 Q Right. And so you agree that, from a driving perspective, he
16 had the right-of-way in his own lane, correct?

17 MR. KAHN: I'm going to object. That calls for an expert
18 opinion.

19 MR. PRINCE: That's not an expert. It's like --

20 MR. KAHN: And a legal conclusion.

21 MR. PRINCE: That's --

22 MR. KAHN: And invades the province --

23 THE COURT: I'm going to --

24 MR. KAHN: -- of the jury.

25 THE COURT: I'm going to sustain the objection. I don't --

1 BY MR. PRINCE:

2 Q You're familiar with the rules of the road, right? You have a
3 driver's license?

4 A Correct.

5 Q You obviously took the test in Nevada to get your driver's
6 license, right?

7 A Yes.

8 Q You've heard of rights-of-way, correct?

9 A Correct.

10 Q You're familiar with traffic control plans and planning,
11 correct?

12 A Correct.

13 Q And traffic control planning, including detailed traffic,
14 barricade plans are all about rights-of-way, paths of travel, correct?

15 A Correct.

16 Q And so you're familiar with right-of-way, aren't you?

17 A Yes.

18 Q Right. And so you agree that Mr. Yahyavi in the dedicated
19 travel lane, he was in the right-of-way because that was the dedicated
20 lane at the time, correct?

21 MR. KAHN: Same objections, Your Honor.

22 THE COURT: I'm going to overrule it.

23 THE WITNESS: It appears that way. But, as I stated, I don't
24 know if the vehicle was there when I got there anymore.

25 BY MR. PRINCE:

1 Q Okay. And that photograph that we're --

2 A Right. That's --

3 Q -- showing the jury --

4 A -- the way that it appears in the photograph.

5 Q -- clearly in the right-of-way lane?

6 A That's how it appears in the photograph, yes.

7 Q And so when your driver from Capriati Construction drove
8 with the forklifts past the cone, it entered his right-of-way, correct?

9 A That's how it appears.

10 Q Had Josh Arbuckle waited for Mr. Yahyavi to pass and the
11 road to be clear, this collision could have been avoided, correct?

12 A Correct.

13 Q Right. You're not here saying that Mr. Yahyavi did anything
14 improper in terms of his driving by driving in the dedicated right-of-way?

15 A I wasn't there, so I have no --

16 Q Well, when you came on scene --

17 A -- no statement on that.

18 Q Fair enough. When you came on scene, you did do an
19 investigation, correct?

20 A Correct.

21 Q And you spoke to the driver, correct?

22 A Correct.

23 Q You looked at the vehicles, correct?

24 A Correct.

25 Q You looked at the orientation to determine what happened

1 from the physical evidence standpoint, correct?

2 A But I believe the car was gone when I got there. So it's kind
3 of hard to 100 percent detail that.

4 Q Okay. You think the car was gone when you got there?

5 A I believe they had already taken it to the Chapman dealer.

6 Q Are you certain of that?

7 A I don't know anymore. It was six years ago.

8 Q Right. There was no directive by a supervisor at Capriati for
9 Josh Arbuckle to drive the forklift that day, correct?

10 A No.

11 Q All right. There was nothing urgent for him to drive the
12 forklift that day, correct?

13 A Other than it was to ease his workload.

14 Q So he made a personal decision that he just wanted to use it?

15 A Well, it seems unreasonable to carry bags across 300 feet or
16 so.

17 Q Fair enough. One of the things that Capriati -- you have --
18 you employ people who are operators of construction equipment,
19 correct?

20 A Yes.

21 Q And that -- an operator has a special title, and they actually
22 are paid an operator's wages to operate equipment including forklifts,
23 correct?

24 A Correct.

25 Q And they are more qualified to do that, correct?

1 A That's their main goal.

2 Q That's their goal?

3 A That's their duty as their title.

4 Q Right. And that's one of the reasons why you didn't want
5 Josh -- one reason why you didn't want Josh operating the equipment,
6 because there's other people qualified and paid to do so, correct?

7 A Partially.

8 Q And in addition to that, there was -- Josh described there was
9 another person by the name of Dario [phonetic] onsite working that day
10 at this site. Do you know who Dario is?

11 A It could've been another laborer.

12 Q That's fine. I mean, to your knowledge, Josh didn't ask Dario
13 to come out and hey, make sure traffic is clear while I try to enter the
14 roadway onto Glen?

15 A Not to my knowledge.

16 Q Also, the two people who would've been driving the tractor-
17 trailer and the cement mixer, they obviously would've had to had
18 commercial driver's licenses, correct?

19 MR. KAHN: Objection. Lacks foundation.

20 THE COURT: Overruled.

21 BY MR. PRINCE:

22 Q Go ahead.

23 A I would assume so. But I don't work for those companies, so
24 I can't attest to their practices. But judging by their vehicle size, it -- I
25 would -- I would think so.

1 Q That would certainly be your expectation that someone
2 driving that tractor-trailer, the Peterbilt, would've had a commercial
3 driver's license, right?

4 A I would think so.

5 Q Right. And that would -- and someone driving that cement
6 truck, you agree that that would've also required a commercial driver's
7 license?

8 A I would think so.

9 Q Right. Well, you know that to be true, right, based on your
10 years of experience in construction?

11 A Well, I just can't -- I would think so, but I can't say that that's
12 what they did.

13 Q Okay. Fair enough. Let's just assume they were.

14 A Okay.

15 Q Let's assume those guys were.

16 A Okay. That's fair.

17 Q That's fair. Yeah. I mean, to your knowledge, Josh didn't ask
18 the driver of the Peterbilt, the green truck, to come out and hey, make
19 sure traffic is clear, correct, so I can pull out onto Glen?

20 A That's a possibility. He could have.

21 Q Well, you're not aware of that, right?

22 A No. But you're saying -- I thought you said that he could've
23 asked that.

24 Q He could've. He didn't do that, correct?

25 A Not that I'm aware of.

1 Q Okay. Also, he could've asked the driver of the cement mixer
2 to make sure that traffic was clear before he pulled out onto Glen
3 Avenue, correct?

4 A He could have.

5 Q Right. And to your knowledge, he did not do so, correct?

6 A Not that I'm aware of.

7 Q Now, let's go to 05 -- Exhibit Number 13, 0056 Bates number.
8 What I'm going to show you, Mr. Goodrich, is a daily inspection record
9 from the Clark County Public Works construction management division.
10 You see that?

11 A Uh-huh.

12 Q And the date of it is Jun 18th and 19th of 2013 at the top.
13 And I want to -- let's go down here to work being performed. It talks
14 about a crew, it talks about equipment on site. And it -- do you see there
15 where it says Taylor T200 big red forklift?

16 A Yes.

17 Q In the middle? That piece of equipment, that's what was
18 involved in a collision involving my client, right --

19 A Correct.

20 Q -- that forklift?

21 A Correct.

22 Q A construction grade heavy piece of equipment?

23 A Correct.

24 Q And down there it says flagger. You see the flagger? It says
25 one flagger?

1 A Yes.

2 Q And that -- a flagger is someone who assists with traffic
3 control in construction zones, right?

4 A That's correct.

5 Q Right. And then at the bottom it says traffic incidents, and it
6 describes -- it says something occurred around 10:25 a.m. between
7 Capriati forklift and black Charger; do you see that?

8 A Yes.

9 Q And to your knowledge, Josh Arbuckle didn't call the flagger
10 over and say hey, come over here and control this traffic while I move
11 onto and off of Glen Avenue, correct?

12 MR. KAHN: I'm going to object. That lacks foundation.

13 THE COURT: If he knows.

14 THE WITNESS: That I don't know.

15 BY MR. PRINCE:

16 Q But if a flagger was there, that would've been somebody who
17 he could've asked --

18 A Correct.

19 Q -- for assistance?

20 A Correct.

21 Q And so as of right now, you're not aware of him ever asking
22 for assistance from anyone, correct?

23 A No, I'm not aware of that.

24 Q And that certainly would've been a safer practice had he
25 done that, right?

1 A Yes, it would have been.

2 Q Now, in this case, you were never able to find or locate a
3 written incident report, correct?

4 A No.

5 Q Am I correct?

6 A You are correct.

7 Q And you have no investigation file that you found for this
8 incident, correct?

9 A We don't have an employee file for him.

10 Q Right. You don't have an employee file for Josh Arbuckle,
11 correct?

12 A No.

13 Q He worked there from, like, the late 90s until 2014; more than
14 15 years?

15 A Correct.

16 Q But you don't -- you can't find his employee file?

17 A That's correct.

18 Q What -- now, I have heard it expressed as a term of seven
19 years. But doesn't -- isn't the company supposed to keep records for,
20 like, seven years?

21 A No. That is not correct.

22 Q What is your retention policy?

23 A Three years.

24 Q Three years. Oh okay. My client filed this lawsuit on May
25 20th, 2015; within two years. You're -- according to the documents that

1 the Court read to the jury today, your company filed an answer to this
2 complaint on October 7th, 2015; two years and three months after this
3 collision. So your company was obviously aware of this litigation and
4 participating in it within the three years, right?

5 A It's possible.

6 Q Yeah. And Josh Arbuckle wasn't fired, or didn't -- wasn't
7 fired from the company until 2014, right?

8 A I don't know his date of termination, or when he quit, or
9 whatever happened.

10 Q Well, he quit after this, right?

11 A Yes.

12 Q Or was terminated, or whatever?

13 A Correct.

14 Q Right. And so you don't have his employee file, correct?

15 A It's document records for three years. It doesn't mean
16 employee files though.

17 Q Okay. Well, let's talk about three years for a minute. You
18 knew that this incident someone potentially could be injured, right?

19 Someone was transported to the hospital by ambulance, right?

20 A Yes.

21 Q And within three years, your company was sued, and you
22 filed -- made an appearance in this lawsuit, but yet you don't have any
23 investigation file whatsoever, correct?

24 A Correct.

25 Q Now, a few more questions. After this incident occurred,

1 Josh was demoted, correct?

2 A That's my understanding.

3 Q Okay. And not only was he demoted, he was further
4 instructed to never use a forklift after this?

5 A That's what I believe happened. Yes.

6 Q And your company -- you took those actions because he was
7 operating the forklift without authorization, and he caused a collision
8 where someone could be seriously injured, right?

9 A Because of the second. Yes.

10 Q Right. And obviously were aware of the police department's
11 involvement of the case, and they did an investigation, right?

12 A I believe so.

13 Q They came to the scene. We saw the pictures?

14 A Yeah. Well, he had a ticket number, I believe.

15 Q Yeah. And there's a citation -- I mean, the pictures show the
16 officer at the scene, right?

17 A Correct.

18 Q All right. And so you obviously were aware of my client's
19 name, right?

20 A Yes.

21 Q You never called to speak with him, did you?

22 A I did not call to speak with him, but I did call and speak with
23 his boss.

24 Q You never called to speak with my client, Bahram Yahyavi,
25 did you?

1 MR. KAHN: Objection.

2 THE WITNESS: No, I did not.

3 MR. KAHN: Asked and answered.

4 BY MR. PRINCE:

5 Q And you never called him --

6 THE COURT: Overruled.

7 BY MR. PRINCE:

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

11 A That is incorrect.

12 Q What's that?

13 A That is incorrect.

14 Q You never called my client, Bahram Yahyavi --

15 A You didn't --

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

17 A You didn't ask it that way.

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

20 A I called his employer and asked those questions.

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

23 A I did not.

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

1 A That is correct.

2 Q And you have no documents to show us the results of that,
3 do you?

4 A No, I do not.

5 Q Right. So we can't trust and verify anything you would say,
6 whether it was clean or not clean, correct?

7 A Why not? You're trusting my other information.

8 Q I don't know. One of the jurors said trust and verify is a way
9 to do things. And I'm just asking, we can't verify that statement?

10 A No, we cannot verify it.

11 Q Because you -- the company got rid of the employment file
12 after this lawsuit happened, right?

13 A I don't know the timeframe that it occurred. I just know it's
14 not there.

15 Q Well, Josh Arbuckle testified that he left the company in
16 2014.

17 A I don't know the timeframe when the record --

18 Q No, I'm just -- I want you to assume that.

19 A -- disappeared.

20 Q I want you to assume that. Let's assume that he does testify
21 that he left the company in 2014 and was terminated. Then how long
22 would you keep his file for -- or you should've kept his file?

23 A That I don't know. That's up to HR to decide.

24 Q Well, in general, how long does a company keep a file like
25 that?

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

3 Q Well, who pulled it and removed it?

4 A That I don't know.

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

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

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

11 A That is correct.

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

14 A That's correct.

15 Q And they --

16 A Some people just do things differently.

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

19 A No, I can't.

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

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

24 THE COURT: I'm going to overrule.

25 Counsel, approach.

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[Sidebar begins at 2:04 p.m.]

THE COURT: Just so I'm clear, his 30(b)(6) designation was -- is the safety engineer or what?

MR. PRINCE: Yes.

THE COURT: Where is his 30(b)(6) designation?

MR. PRINCE: It's in the notice. He was the designated --

THE COURT: Can I see?

MR. PRINCE: Oh I'm sorry. Yes.

THE COURT: Number four, any and all information relating to or supporting any of Defendant's affirmative defenses. Did you have an affirmative defense that he contributed?

MR. PRINCE: Yeah. Let me --

MR. KAHN: Mitigation of damages.

MR. PRINCE: No, no. You used alleged comparative negligence. He alleged comparative negligence.

MR. KAHN: That's true.

MR. BROWN: And we actually his testimony is standing. We already have testimony and the evidence is going to come into this case, and it's stated in the complaint. Mr. Yahyavi ran into the forklift. The testimony that will come into this case --

THE COURT: His question was -- called for maybe not an expert opinion, but it called for a conclusion, and you objected. I'm wanting to know if he's A, qualified, and B, more importantly in this case, whether he was designated to testify on those issues. And if one of your defenses was comparative, and it says here he's designated to testify --

1 well, they asked, and so he certainly would have to -- since he appeared
2 as the 30(b)(6) witness, knowledgeable on those areas.

3 MR. BROWN: He can only testify on the information that he
4 has. He cannot testify --

5 THE COURT: Well, sure. If he says I don't know, that's fine.
6 But the -- you're objecting on allowing him to answer. If the answer is I
7 don't know, that's fine.

8 [Sidebar ends at 2:06 p.m.]

9 THE COURT: The objection is overruled.

10 MR. PRINCE: Okay. Thank you.

11 BY MR. PRINCE:

12 Q I'm going to rephrase the question, so you have it firmly in
13 your mind. Okay. I'm just going to first tell you why I'm asking it. The
14 Court read earlier today Capriati Construction, Incorporation's answer to
15 the complaint. And that says -- one of the defenses is that the liability
16 must be reduced by the percentage of negligence or fault of the Plaintiff.
17 Now, I'm asking, you have no information or facts that Mr. Yahyavi
18 engaged in any improper driving that day, correct, you personally?

19 A Not that I witnessed.

20 Q All right. And you have no documents, photographs, or
21 other information that you collected showing that he did anything
22 improper driving that day, correct?

23 A No.

24 Q And you recall when we were at your deposition, one of the
25 things -- one of the areas that you're required to discuss on behalf of the

1 corporation was any and all information relating to or supporting the
2 Defendant's affirmative defenses? Do you remember that was one of
3 your topics?

4 A No.

5 Q Well, you have the -- I know you had the notice with you
6 earlier. You have the notice of your topics, right?

7 A Yes.

8 Q Right. So you -- that was one of the topics -- if it's one of the
9 topics in there, that's what it is, right?

10 A Sure.

11 Q Right. Okay. One of the other defenses that is raised is that
12 this -- let me read it to you first, okay?

13 A Okay.

14 Q This is raised by the Capriati Construction. It says this
15 answering Defendant, meaning Capriati, alleges that the occurrence
16 referred to in the complaint, and all injuries and damages, if any,
17 resulting therefrom, are caused by the acts or omissions of a third-party
18 over whom this answering Defendant has no control, nor the right, duty,
19 or obligation to control. What third-party are you talking about?

20 MR. KAHN: Your Honor, I think that's one of the withdrawn
21 ones from the pretrial.

22 MR. PRINCE: No. We read it today.

23 MR. KAHN: But we read all of them.

24 MR. PRINCE: We read it to this jury today.

25 THE COURT: Counsel, approach.

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

MR. PRINCE: It's not withdrawn.

MR. KAHN: I had withdrawn that number in the last --

MR. PRINCE: You had the jury --

THE COURT: Well, where is it?

MR. PRINCE: Judge, no. You read this to the jury today.

MR. KAHN: That's what I thought.

MR. PRINCE: You read it today at your insistence.

THE COURT: If you read it today, why -- where is this supposedly you withdrew?

MR. PRINCE: What would it matter now?

THE COURT: That's pretty true.

MR. KAHN: I think the last time we approached at trial, I withdrew a bunch of affirmative defenses. I don't have --

MR. STRONG: Then why did you allow him to read it? Then why did you allow him to read it?

MR. PRINCE: Yeah. You wanted -- you asked it to be read, and I'm using it.

THE COURT: I know. I heard. Why is it you didn't make that correction before now that they've read it to the -- you read it to the jury, or asked that it be read to the jury?

MR. KAHN: I'll just withdraw my objection.

THE COURT: It's in there.

MR. KAHN: Yeah, let him ask it.

THE COURT: All right. It's in there. Overruled.

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

THE COURT: Overruled.

MR. PRINCE: Okay.

BY MR. PRINCE:

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

A Okay.

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

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

Q All right.

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

Q Well, he's --

A I understand. I don't know.

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

A That is correct.

Q -- Arbuckle?

A That is correct.

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

MR. KAHN: Objection. Calls for legal conclusion.

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

2 THE COURT: As far as his investigation.

3 THE WITNESS: It appears that way, yes.

4 MR. PRINCE: All right.

5 BY MR. PRINCE:

6 Q And there's no third-party --

7 A Not that I'm aware of.

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

9 A No, not that I'm aware of.

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

11 A No, sir.

12 Q All right.

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

15 BY MR. PRINCE:

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

17 MR. PRINCE: -- strike that.

18 BY MR. PRINCE:

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

22 A That is correct.

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

25 A Yes, we do accept that risk.

1 Q Okay, very good.

2 MR. PRINCE: No additional questions, Judge.

3 THE COURT: Cross?

4 CROSS-EXAMINATION

5 BY MR. KAHN:

6 Q Mr. Goodrich, how long did it take you to get to the accident
7 site after you were notified of the accident?

8 A Fifteen, 20 minutes. Maybe 25, at the most.

9 Q Do you know exactly how quickly you were notified after the
10 accident had occurred?

11 A That, I don't know.

12 Q And in front of you is an Exhibit -- I think it's 62. And that
13 shows the cement mixer. Do you remember talking to Mr. Prince about
14 the cement mixer?

15 A Yes.

16 Q Was the cement mixer there when you arrived?

17 A That, I don't recall.

18 Q Do you know, for sure, that the cement mixer was there, in
19 that location, when the accident occurred?

20 A No.

21 Q You responded to Mr. Prince that you, in fact, did not call Mr.
22 Yahyavi personally; that's correct, right?

23 A That's correct.

24 Q But you did say that you spoke with his manager at Javen
25 Dodge?

1 A That's correct. I had no --

2 Q Did you --

3 A I had no --

4 Q Go ahead.

5 A -- information on how to contact Mr. Yahyavi, so I contacted
6 his employer.

7 Q Did you speak with him on the day of the incident?

8 A To look at the car, yes, and just ask -- inquiry about how he
9 was, and then I called approximately three, maybe four days later, and
10 asked again.

11 Q Okay. So three or four days after the accident, you call back
12 to check with Dodge for the sole purpose of doing what?

13 A Just an update on Mr. Yahyavi.

14 Q And who did you talk to again? You don't remember the
15 gentleman's name, but you remember his title?

16 A It's -- I believe his name is Don, but I don't remember his last
17 name. He's the general manager that you see on the commercials for
18 that location.

19 Q You testified about the fact that Mr. Yahyavi [sic] was not a
20 certified forklift driver, correct?

21 A I'm sorry?

22 Q At the time of the accident -- I'm sorry. Not Mr. Yahyavi. My
23 fault. At the time of the accident, Mr. Arbuckle, your employee, was not
24 a certified forklift driver, correct?

25 A He did not have a piece of paper, a certificate, no --

1 Q Was there any --

2 A -- that I was aware of.

3 Q Was there any requirement that a driver of a commercial
4 forklift, like the Taylor big red T200, had to have some kind of license or
5 certification to do so?

6 A At that time, no.

7 Q So do you believe that Mr. Arbuckle had on-the-job training
8 to drive a forklift?

9 A Yes, he had had on-the-job training.

10 Q And do you believe that not having a certification somehow
11 should have prevented him from operating a forklift that day?

12 A No.

13 Q And at the time, did you have any other individuals in your
14 company whose training and experience was on-the-job training as
15 opposed to certified training for driving heavy equipment?

16 A Yes, there were others.

17 Q Do you know whether there was a flagger present at the time
18 of the accident on the job site?

19 A That, I do not know. That's the first I've seen of that --

20 Q Do you know if the --

21 A -- report.

22 Q -- procedure or what was going on at that site was different
23 at night than it was during the day?

24 A That, I do not know.

25 Q Do you know how many people were present when you

1 showed up from your company at that scene?

2 A There was -- there was Josh, Jay, and I believe the officer.
3 There were a few people from maybe Chapman.

4 Q I'm just asking from your company.

5 A Jay, Josh, and -- I don't know if there was maybe one other
6 person, but I can't recall.

7 Q Jay wasn't present when the accident happened? He came
8 there like you did?

9 A Correct.

10 Q So at the time of the accident, how many people were
11 working on that job site for Capriati?

12 A Two.

13 Q Okay. And --

14 A That I'm aware of.

15 Q And Mr. Arbuckle is one of them, correct?

16 A Correct.

17 MR. KAHN: Can we have the depo portion? Mr. Prince asked
18 you about some portion of your deposition, and I'm going to ask the trial
19 technician to put in a different part. Can you put in both of those pages?
20 This will take a second.

21 THE WITNESS: Sure.

22 BY MR. KAHN:

23 Q Do you remember being asked at your deposition about
24 whether or not Mr. Arbuckle was told not to drive a forklift on the day of
25 the accident, or whether he was instructed at any point never to drive a

1 forklift for the company? Let's start with that.

2 A Correct.

3 Q And is it your testimony that he was instructed by the
4 company after this accident, don't ever drive a forklift again?

5 A After this accident.

6 Q But on the day of the accident, had he been told by anybody,
7 you're never allowed to drive a forklift anywhere, ever, under any
8 circumstances for Capriati?

9 A No.

10 Q So looking at this deposition testimony that's in front of you
11 now, this is page 118, line 15, to 119, line 4. This is following after the
12 portion that Mr. Prince read. Could you read that to yourself for a
13 minute, please, and let me know when you're done?

14 A Okay.

15 Q Does this, in any way, refresh your recollection about what
16 you said at your deposition, additionally, in regard to Mr. Arbuckle's
17 ability to drive a forklift that day?

18 A Yes.

19 Q And what is it that you now remember about what you
20 testified at your deposition that governed or controlled Mr. Arbuckle's
21 driving of the forklift on the date of the incident?

22 A Well, as the company had grown, we were pushing people to
23 more specific areas instead of -- because we had people who had been
24 previously trained, sometimes they would try and go to a higher pay
25 scale and jump on equipment just for the purpose of grabbing a higher

1 paycheck sometimes. So in order to eliminate that, we started specifying
2 more that, hey, you're going to be a cement finisher, you're going to --
3 you know, we're going to have you work here, that person is going to
4 work as an operator, and then we're going to stick with that.

5 Q On the date of the incident, you said there were two people
6 from Capriati working. One of them was Mr. Arbuckle, correct?

7 A Correct.

8 Q Do you know if the other individual had any forklift training
9 or heavy equipment training at all?

10 A I do not.

11 Q And were there any other individuals who were kind of more
12 qualified to drive a forklift for Mr. -- than Mr. Arbuckle that were available
13 to do that, if someone had asked him to do it?

14 A If someone had asked him, yes.

15 Q I'm talking about on the day of the incident.

16 A At the day? No. There was no one there.

17 Q Available on site.

18 A No one was on-site.

19 Q What do you think or Mr. Arbuckle's driving at the time of the
20 accident?

21 A I think he made a mistake.

22 Q And does Capriati Construction take responsibility for the
23 actions of Mr. Arbuckle that day?

24 A Yes.

25 THE COURT RECORDER: Mr. Kahn, I need you by a

1 microphone.

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

4 THE COURT: All right.

5 [Pause]

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

7 REDIRECT EXAMINATION

8 BY MR. PRINCE:

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

12 A Yes, we accept all employees actions.

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

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

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

20 A Correct.

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

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

1 Q Okay.

2 A I just don't.

3 Q Well, when your lawyers answered the complaint where they
4 were alleging that Capriati's driver was negligent, causing this collision,
5 you guys said you didn't have enough knowledge to base a belief as to
6 the truth, and you denied the allegations, and you blamed Mr. Yahyavi,
7 saying it was his fault. So today is the first day then, isn't it? Because
8 your answer was filed back in 2015.

9 A I disagree with that.

10 Q I guess better late than never, right?

11 MR. KAHN: Objection. Argumentative.

12 THE COURT: Sustained.

13 MR. PRINCE: Okay.

14 BY MR. PRINCE:

15 Q Now, we also know -- if we can go to -- if you recall in your
16 deposition -- do you have your deposition? That it was your
17 acknowledgement and understanding that at the time this happened, the
18 mixing truck, as well as the semi-truck, they were both there, correct?

19 A It appears that way.

20 Q Right. And that was the impression and knowledge you had
21 that day when you went to the scene that that was part of the visual
22 obstruction was the cement truck, correct?

23 A I don't know if it was one or both. I can't remember if one
24 had left by the time I got there, or if they were both there, but it appears
25 that way.

1 Q And your understanding from speaking with Josh, and
2 looking at the photographs, and coming to the scene, that there was two
3 obstructions. One, the green Peterbilt, and the other one, the cement
4 mixer. That was the impression you had as the safety manager?

5 A I don't know if it was one or two. I know that there was at
6 least one.

7 Q And regardless of whether someone has a certificate, or he
8 doesn't have a certificate, you need to operate a forklift safe, right?

9 A That is correct.

10 Q While Josh may have had some experience driving it in the
11 yard or on the jobsite, within the construction zone, you don't know
12 about -- anything about his experience driving it on the roadway where
13 other motorists are, right?

14 A I don't, no.

15 Q Right. And you agree that would be unsafe for him?
16 Someone who's not certified to operate and not in that position every
17 day driving a forklift on a roadway. That's not a good practice for him?

18 A Can you repeat that question?

19 Q Right. It wouldn't have been a good practice for Josh or the
20 company to have someone who is not certified, who doesn't operate a
21 forklift regularly, to drive it off of a jobsite, and onto the roadway where
22 other motorists are alone, right?

23 A Once you have the experience, you have the experience to
24 drive the equipment.

25 Q Okay. So whether you have the certification, or you don't

1 have the certification, you don't drive it out on the roadway unless it's
2 clear and safe to do so, correct?

3 A Yes.

4 Q That didn't happen in this case, did it?

5 A Doesn't appear to.

6 Q Very good. Thank you.

7 MR. PRINCE: No more questions.

8 THE COURT: Anything else?

9 MR. KAHN: Your Honor, I'll reserve any further questions for
10 our case-in-chief.

11 THE COURT: Okay.

12 MR. KAHN: And I'd ask that the witness be formally excused.

13 MR. PRINCE: For my purposes, he is.

14 THE COURT: Questions from the jury?

15 MR. KAHN: I don't think we've explained to them yet that
16 they can do that, Your Honor.

17 MR. PRINCE: He did.

18 THE COURT: I did.

19 THE COURT: You were doing the perempts, but I read it; yes.
20 Any questions? No questions. Thank you.

21 JUROR 1679: 1679, Dennis Dewindt. I have a question.

22 THE COURT: You need to write it down.

23 JUROR 1679: Oh, sorry.

24 THE COURT: Okay. I'll repeat what I said before probably
25 twice. If you have anything you want to say to the Court, you need to

1 write it down and put your number on it. Thank you.

2 THE COURT: Counsel, approach.

3 [Sidebar begins at 2:27 p.m.]

4 THE COURT: Yes?

5 MR. PRINCE: I'm fine with that.

6 MR. KAHN: I'm fine, as well.

7 THE COURT: I know, but it was asked.

8 [Sidebar ends at 2:27 p.m.]

9 THE COURT: Okay. Sir, was there a flagman on site to
10 instruct the forklift driver to enter the roadway?

11 THE WITNESS: Not to my knowledge.

12 THE COURT: Follow-up from the Plaintiff, on that question
13 only?

14 MR. PRINCE: I want to help follow-up, help with the juror's
15 question and maybe add some context to it.

16 THE COURT: Sure.

17 MR. PRINCE: Exhibit Number 13, page number P0056. I'm
18 going to show you, again, the daily inspection record from Clark County
19 Public Works Department, okay?

20 THE WITNESS: Uh-huh.

21 MR. PRINCE: I'm just going to go through this just to resolve
22 any outstanding questions.

23 FURTHER REDIRECT EXAMINATION

24 BY MR. PRINCE:

25 Q You believe that in a public --

1 MR. PRINCE: Let me just put my microphone on.

2 BY MR. PRINCE:

3 Q That a Public Works project --

4 A Uh-huh.

5 Q -- there will be an inspector from the county that comes out
6 and inspects the work being performed?

7 A Correct.

8 Q Daily? Typically, right?

9 A Yes. Typically, yes.

10 Q Okay. And so -- and typically, the inspector would come out
11 and inspect the work, and they would create a daily inspector report,
12 correct? Yes?

13 A Yes.

14 Q And if there was any deficiency, just if they wanted
15 something differently, and they saw maybe a deviation of the plan, they
16 could do that, and they could approach the company, and you guys
17 could resolve it, or fix it, or whatever needed to be done, right?

18 A Correct.

19 Q Okay. Because it's their project, right? It's through the
20 owner?

21 A Correct.

22 Q And so -- let me just use this pointer. I haven't used the
23 pointer since, I think, I was in elementary school, but it's cool. So it says,
24 Superintendent Josh Picking [phonetic] -- is that one of your employees
25 or is that from the county?

1 A That is one of our employees. It's actually, I think, the project
2 manager.

3 Q Okay. And then it says here the date, 6/18 and 6/19; do you
4 see that?

5 A Yes.

6 Q That's the date of the inspections. Then it says, traffic control
7 status; do you see that?

8 A Uh-huh.

9 Q It says lane closures through the night shift, including
10 number one lane for southbound Sahara Boulevard between Sahara and
11 Glen, and the number two eastbound lane of Sahara Avenue. That's the
12 road that Mr. Yahyavi was driving on, Sahara, right? The eastbound
13 lane.

14 A Correct.

15 Q Okay. Scroll down. And then let's look at the work being
16 performed. Let's take this whole section. So let's just talk about -- we
17 talked about equipment before. Let's talk about the crew, though.
18 There's three operators; do you see that?

19 A Uh-huh.

20 Q Operators are people who run backhoes, loaders, forklifts,
21 yes?

22 A Yes.

23 Q Those are the people that Capriati hires to do these things?

24 A Correct.

25 Q Right. One laborer, that's Josh, right? He's a laborer?

1 A Yep.

2 Q Right? And then it says one flagger. So during the time,
3 they're supposed to have a flagger out there, right? That's -- so that's
4 the personnel in place. That's the flagger, right?

5 A Depending on the setup for the work. There's different
6 setups according to the different work here.

7 Q Okay. But according to this inspector, it said there's three
8 operators, a laborer, and a flagger.

9 A It's for a nightshift and a dayshift, though.

10 Q Okay, but whatever the shift, they're talking about a flagger.

11 A That may not be accurate. There was just one --

12 Q You're saying --

13 A In both of those instances, there was at least one flagger. It
14 doesn't differentiate between if it was just at night or if it was also during
15 the day.

16 Q Oh, okay.

17 A So we would count them. That's the point I was trying to
18 make.

19 Q Your point is that the flagger might've just been there at
20 night?

21 A Correct.

22 Q They have people standing in the roadway at night, as a
23 flagger, alone?

24 A Depending on the setup, yes, they could.

25 Q Oh, that would be highly unusual to have a flagger at night,

1 right?

2 A No.

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

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

6 Q Okay.

7 A -- does happen at night.

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

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

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

13 A There wasn't one when I got there.

14 Q Okay. Good enough.

15 MR. PRINCE: Thank you.

16 THE COURT: Follow-up from the Defendant?


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

19 THE COURT: Okay. You are excused.

20 THE WITNESS: Thank you, Your Honor.

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

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

24 

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