

Case No. 80107/Case No. 80821

In the Supreme Court of the State of Nevada

Electronically Filed
Nov 25 2020 08:22 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

CAPRIATI CONSTRUCTION CORP., INC., a Nevada Corporation

Appellant,

v.

BAHRAM YAHYAVI, an individual

Respondent.

RESPONDENT'S ANSWERING BRIEF

Appeal from the Eighth Judicial District Court
Clark County, Nevada
The Honorable Ronald J. Israel, District Judge
Case No. A-15-718689-C

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made so that the judges of this Court may evaluate for possible disqualification or recusal.

1. Respondent Bahram Yahyavi is an individual.
2. Identify all parent corporations and any publicly held company that owns 10% or more of the parties' stock:

NONE

3. Names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

Dennis M. Prince – PRINCE LAW GROUP

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4. If any litigant is using a pseudonym, disclose the litigant's true name:

NONE

DATED this 25th day of November, 2020.

/s/ Kevin T. Strong

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I. JURISDICTIONAL STATEMENT

Respondent Bahram Yahyavi (“Yahyavi”) agrees with Respondent Capriati Construction Corp., Inc.’s (“Capriati”) Jurisdictional Statement.

II. ROUTING STATEMENT

Pursuant to NRAP 17(b)(5), this case is assignable to the Nevada Court of Appeals. This Court has properly retained jurisdiction over this matter given the size of the judgment, which is in excess of \$9,000,000.00.

III. ISSUES PRESENTED

1. By failing to timely object to the curative instruction, did Capriati waive its arguments regarding the instruction on appeal?

2. Did the district court abuse its discretion by instructing the jury that Capriati was no longer in bankruptcy and carried liability insurance to potentially satisfy a judgment to combat the prejudice that Capriati filed for bankruptcy?

3. Did the district court abuse its discretion by imposing sanctions resulting from the willful misconduct of Capriati’s counsel?

4. Was the district court’s 40% contingency fee award reasonable and justified in amount under Nevada law?

IV. STATEMENT OF THE CASE

Yahyavi agrees with Capriati's Statement of the Case.

V. STATEMENT OF FACTS

On June 19, 2013, a forklift driven by Joshua Arbuckle ("Arbuckle"), a Capriati employee, crashed into the front windshield of a vehicle driven by Yahyavi. AA001409, AA001415, Photos. The damage to Yahyavi's vehicle was significant.



RA0155-0167.

Before trial, Capriati never stipulated or admitted liability. RA0010-0013. During opening statements, Capriati's counsel, David Kahn ("Kahn") informed the jury liability was disputed. AA001099-001100. During trial, both Arbuckle and Capriati's safety manager, Clifford Goodrich ("Goodrich"), admitted fault. AA001423, AA001175-001176. Yahyavi also refuted Capriati's baseless liability defense through Goodrich's admission that Capriati was unable to locate documents related to its investigation of the collision. AA001165-001166, AA001169-001170. Yahyavi never used the term "spoliation" and never requested spoliation sanctions. *Id.* Yet, Kahn under the guise of explaining the absence of records, purposefully introduced testimony from Goodrich that Capriati filed bankruptcy. AA002462.¹ This was a blatant attempt to unfairly influence the jury to render a verdict based on sympathy for Capriati's financial difficulties to satisfy a substantial judgment. Capriati was not even financially responsible for any verdict pursuant to the bankruptcy court's order, which underscored Kahn's

¹ In his opening statement, Yahyavi's counsel told the jury he sought damages in excess of \$13,000,000.00. AA001092-001093.

intent to harm Yahyavi. In response, the district court imposed appropriate sanctions against Capriati. AA000543-000549.

The evidence at trial established Yahyavi suffered a serious cervical spine injury resulting in surgery and total disability. AA001209, AA001684. Capriati's lone retained medical expert, Howard Tung, M.D. ("Dr. Tung"), confirmed Yahyavi was injured in the collision. AA002129. Dr. Tung testified Yahyavi's cervical injury required 14 months of treatment, including invasive injections and a surgical consultation. AA002137, RA0251-0252.

Capriati distorts the record to mislead this Court that Capriati was somehow deprived of the ability to present a defense to damages at trial.

A. Capriati's Bankruptcy Filing Absolved Capriati Of Personal Financial Responsibility For Any Judgment Entered

Yahyavi filed this personal injury action on May 20, 2015. AA000002. On October 7, 2015, Capriati filed for Chapter 11 bankruptcy, which imposed an automatic stay on the case. AA000017, AA000157. Yahyavi moved for relief from the automatic stay, which the bankruptcy court granted. AA000015-000021. Based upon the relief from the stay order, Yahyavi's **sole** recovery is against Capriati's insurance. AA000022. Even though Capriati emerged from bankruptcy, its assets

were **never** at risk given the terms of the bankruptcy court order. *Id.* Thus, Kahn was, in reality, trial counsel for Capriati's insurers, not Capriati. *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 123 Nev. 44, 51 (2007) (counsel represents both the insured and insurer and owes duties to them both).

By introducing evidence of the bankruptcy, Kahn deliberately suggested Capriati was financially unable to pay a judgment knowing Capriati would never be personally liable for the judgment in the first place. AA002458-002462.

B. The Trial

Trial commenced on September 13, 2019. AA001030. Capriati's liability was already established at trial. AA001175-001176, AA001423. Yahyavi presented compelling evidence to the jury detailing the severity of his cervical spine injury, \$491,023.24 in past medical expenses, \$529,260.00 in future medical expenses, and \$2,456,379.00 in loss of wages and future earning capacity. AA001209, AA001280, AA001563, AA001579, AA001592-001593, AA001679, AA001691-001697, AA001818-001819, AA001911-001913, AA002622. Sensing the momentum in Yahyavi's favor, Kahn deliberately introduced evidence of

Capriati's bankruptcy and that the bankruptcy was **ongoing**. AA002462. The only logical conclusion is Kahn intended to: (1) force a mistrial because he was dissatisfied with the direction of trial or (2) garner jury sympathy for Capriati.

1. Yahyavi Drove Eastbound on Sahara Avenue to Another Chapman Dealership

On June 19, 2013, Yahyavi worked at Chapman's dealership located on East Sahara. AA001964-001965. RA0183-0184. Chapman also owned the Value Center, which was located at the corner of Glen Avenue and Boulder Highway. AA001965, RA0183-0184.

Yahyavi drove a company-owned Dodge Charger to the Value Center, which was only a half mile away. AA001965-001966, RA0184. Yahyavi drove between dealerships frequently. *Id.* Yahyavi's route began eastbound on Sahara. AA001968. Sahara naturally veered to the right onto Glen from a dedicated right turn lane. AA001967-001968, RA0184-0185. There was no stop sign that controlled Yahyavi's ability to turn onto Glen. AA001967. There was one dedicated through lane on Glen. *Id.*

On June 19, 2013, road construction on Sahara blocked the dedicated right turn lane onto Glen. AA001967, RA0178. The far-right

travel lane became the right turn lane that veered onto Glen. AA001967-001968, RA0178. Yahyavi was driving approximately 25 to 30 mph on Sahara. AA001968.

Yahyavi activated his right turn signal before he turned onto Glen. AA001969. There was no traffic in front of him. *Id.* When Yahyavi arrived to Glen, he saw a cement truck and a tractor-trailer sitting on the far-right portion of the travel lane. AA001968-001969, RA0172. Yahyavi was unable to see what was behind the tractor-trailer. AA001968-001969.

2. Arbuckle Crashed the Forklift into Yahyavi's Car

Yahyavi described the impact he felt when Arbuckle crashed his forklift into him like a “bomb went off.” AA001970, RA0169-0177.

At the time of the collision, Arbuckle worked for Capriati as a cement finisher. AA001406. Capriati, a licensed general contractor, was finishing a public works project near Sahara and Boulder Highway. AA001136-001137. Completion of this project required the closure of the far-right lane on Sahara Avenue that veered onto Glen. AA000140, RA0178. Arbuckle was assigned to assist with the cleanup and completion of the project. AA001142, AA001409.

Arbuckle was not certified to operate a forklift before June 2013. AA001142-001143, RA0168. Prior to June 2013, Capriati's senior management instructed Arbuckle to not operate a forklift. AA001407. Arbuckle failed to follow these instructions. AA001410.

As Arbuckle began to drive the forklift, he saw Yahyavi driving eastbound on Sahara. AA001415 Arbuckle admitted his view of Glen became obstructed by the tractor-trailer parked on Glen. AA001412, RA0170, RA0172, RA0175.

Even though Arbuckle knew it was unsafe to enter Glen because his vision was obstructed and he could not see Yahyavi, he entered Glen anyways with the forks extended. AA001412, AA001415-001418, RA0174. Arbuckle failed to appreciate how far the forks extended before the collision. AA001418. The forks extended into the roadway and struck Yahyavi's vehicle almost fully entering the windshield in front of Yahyavi's face. AA001418-001419 AA002286-002287. The significant damage to the windshield, roof, and passenger's side door of Yahyavi's car illustrate just how far the forks extended into his lane of travel when the collision occurred. RA0155-0167. At the time of the collision, Yahyavi's vehicle was in the dedicated travel lane. AA001415.

Yahyavi never saw Arbuckle's forklift before impact. AA001970. Arbuckle admitted he was worried Yahyavi suffered a severe injury because Yahyavi's vehicle suffered a "**hard impact.**" AA001422 (emphasis added). Arbuckle's admission Yahyavi experienced a substantial impact from the collision is in sharp contrast to Capriati's description to this Court.

3. Yahyavi was in a Scared and Frantic State Immediately After the Collision

Yahyavi's recollection about what happened immediately after the collision is limited, but he recalled feeling scared. AA001971. Yahyavi remembered Arbuckle apologized to him and explained he did not see him. *Id.*

Arbuckle was also very scared after the collision because Yahyavi appeared frantic. AA001422-001423. Arbuckle talked to Yahyavi to make sure he did not lose consciousness. *Id.* Arbuckle admitted Yahyavi did not appear to be fine. AA001423.

Minutes after the collision, Kevin Mackey ("Mackey"), Yahyavi's co-worker, rushed to the scene. AA002284. Mackey saw the forks penetrated the front passenger door and extended all the way to the driver's side. AA002286-002287. Mackey described Yahyavi as dazed

and confused in an “almost state of unconsciousness.” AA002285. According to paramedics, Yahyavi “was too altered to be able to provide an address or insurance information.” RA0179-0181. The evidence proved this collision was serious, not minor.

4. Capriati Disputed Liability from the Beginning

Capriati suggests this trial was only about issues of causation and damages. This is false. From the inception of this case, Capriati disputed liability and took affirmative steps to ensure the jury understood it. Capriati insisted the district court read Yahyavi’s Complaint and Capriati’s Answer to the jury. AA001032. In its Answer, Capriati denied Arbuckle was negligent. AA000009. The jury also heard Capriati’s affirmative defenses that Yahyavi was comparatively negligent and the collision was caused by a third-party or intervening cause. AA001049-001050.

During his opening statement, Kahn described Capriati’s liability defense centered on comparative negligence. AA001099-001100. Kahn implied that because Yahyavi knew about the construction project for months, he should have anticipated the forklift or other construction vehicles might enter Glen. *Id.* By making this statement, he invited the

jury to infer Yahyavi must have been speeding or driving unsafely because he failed to anticipate the forklift. This sharply contrasts with Capriati's suggestion to this Court that liability was not at issue. Otherwise, Kahn would have articulated to the jury Arbuckle and Capriati, his employer, were solely at fault for the collision. Arbuckle and Goodrich's respective testimony ended any liability dispute.

a. Goodrich's trial testimony

Capriati's acting safety manager, Goodrich, was responsible for investigating incidents. AA001138-001139. Goodrich agreed a forklift operator should not enter the roadway until it is safe and should not enter the roadway with the forks sticking out. AA001152.

As soon as Goodrich arrived to the scene, he determined Arbuckle failed to use good safety practices. AA001154. Goodrich identified both the tractor-trailer and a cement mixer both obstructed Arbuckle's vision. AA001155-001156, RA0172. Goodrich confirmed Yahyavi's car was in the dedicated travel lane when the collision occurred. AA001156. Goodrich admitted Arbuckle caused the collision. AA001175-001176.

b. Arbuckle's trial testimony

At trial, Arbuckle admitted he caused the collision. AA001423. Arbuckle conceded he could have prevented the collision from happening in a number of ways. *Id.* Kahn attempted to justify Arbuckle's decision to enter Glen because Arbuckle believed Yahyavi was not turning onto Glen. AA001426. Arbuckle based his belief on Yahyavi's alleged failure to activate his blinker. *Id.* This testimony invited the jury to infer Yahyavi was also partially at fault for the collision. This theory was debunked when Arbuckle admitted Yahyavi may have activated his blinker after Arbuckle's view became obstructed. AA001437. In the end, Arbuckle did not "blame [Yahyavi] in any way" for causing the collision. *Id.*

c. Capriati's unsupported liability defenses

The jury heard Capriati's affirmative defenses to liability before receiving any evidence. AA001049-001050. Unsurprisingly, Goodrich was unable to offer any factual bases whatsoever to prove: (1) Yahyavi contributed to the collision in any way or (2) a third-party caused the collision. AA001172-001176. This is why Capriati conveniently changed course and elicited testimony from Goodrich that Capriati "takes

responsibility for the actions of Mr. Arbuckle that day.” AA001182. Capriati’s questionable decision to dispute liability established the relevancy of its failure to retain records detailing its investigation of the collision.

5. The Evidence Proved Yahyavi’s Injuries were Entirely Caused by the Collision

Capriati overstates the medical significance of Yahyavi’s alleged prior chronic neck pain to bolster its tenuous argument that testimony from its retained accident reconstructionist, John E. Baker, Ph.D. (“Dr. Baker”) would have somehow made a difference to the jury. This is unconvincing given Capriati’s sole medical expert, Dr. Tung, admitted Yahyavi was injured as a result of the collision. AA002129.

a. Yahyavi did not suffer from chronic neck pain before the collision

Before trial commenced, Capriati’s singular basis to dispute medical causation stemmed from one lone prior medical record. Kahn acknowledged during the parties’ EDCR 2.67 conference that the prior medical records “are my case.” AA000537. While Capriati received a full and fair opportunity to present Yahyavi’s prior medical records to

challenge medical causation, the evidence established those records were medically and clinically insignificant.

Yahyavi was a patient at Southwest Medical Associates (“SWMA”) before the collision from October 7, 2011 through May 23, 2013. RA0061-0076. Yahyavi complained of neck pain only **once** on October 25, 2011. *Id.* That record states Yahyavi “[a]lso complains of neck pain for several years” even though he had no history of neck surgery or trauma.² RA0064. Yahyavi presented with mild neck discomfort upon palpation, but had full range of motion. *Id.* Yahyavi underwent an x-ray on the same date, which showed mild to moderate degenerative changes. RA0067. Yahyavi was prescribed naproxen for his neck pain. RA0065. Yahyavi never previously took pain medication, which strongly suggested Yahyavi never experienced neck pain for years, let alone severe neck pain.³ *Id.*

² At Yahyavi’s first visit to SWMA on October 7, 2011, no neck pain complaints were made, and he presented with full range of motion in his neck. AA001236-001238.

³ In fact, at Yahyavi’s next visit to Southwest Medical Associates on March 12, 2012, he was told to discontinue Naproxen. AA002153, RA0070.

None of Yahyavi's other prior SWMA records document neck pain leading up to the collision. AA001240, RA0061-0076. Yahyavi's SWMA providers never referred Yahyavi to treatment of any kind for his neck. AA001247-001248, AA002151. At the May 23, 2013 visit to SWMA, less than one month before the collision, Yahyavi reported no neck pain just as he did for nearly two years beforehand. AA001246, RA0075-0076.

Capriati produced no other medical records documenting Yahyavi's supposed prior neck pain for years before the collision. AA002142. There were no prior records showing Yahyavi suffered prior left arm pain, numbness, or paresthesia, which Dr. Tung admitted. AA001222, AA002160.

Yahyavi's retained physical medicine and rehabilitation expert, David Oliveri, M.D. ("Dr. Oliveri"), detailed the clinical insignificance of the prior SWMA records because Yahyavi suffered no constant neck pain and underwent no treatment for it before the collision. AA001247.

Yahyavi's treating neurosurgeon, Stuart Kaplan, M.D. ("Dr. Kaplan"), also deemed the prior SWMA records medically irrelevant. AA001393 He explained, in depth, that if Yahyavi suffered severe neck

pain before the collision, he would have undergone an MRI and multiple types of conservative care. *Id.*

Yahyavi's treating pain management physician, Joseph Schifini, M.D., ("Dr. Schifini") verified Yahyavi's lone neck complaint in 2011 was inconsistent with multilevel disc pain and facet pain that Yahyavi suffered after the collision. AA001635.

Capriati's retained medical expert, Dr. Tung, who reviewed the SWMA records, **never** opined Yahyavi suffered ongoing chronic neck pain in the days, weeks, or months before the collision. AA002133-002134. He never opined Yahyavi required medical treatment for his neck before the collision. AA002137. Yet, Dr. Tung was adamant Yahyavi's chronic neck pain complaints and need for treatment after September 2014 were causally related to pre-existing degeneration.⁴ AA001765, AA002320.

Yahyavi had no recollection of neck pain prior to the collision. AA001988-001989, AA002325-002326. While Capriati sought to impeach

⁴ Dr. Oliveri testified pain is chronic if it has been constant for more than six months. AA001230. Dr. Tung agreed. AA002079-002080. Dr. Tung never opined Yahyavi's disc degeneration was symptomatic before the collision. AA002136.

Yahyavi's credibility on this point, Yahyavi had no reason to conceal any alleged prior neck pain from his doctors. The prior records established Yahyavi never suffered chronic neck pain like he did **after** the collision. RA0061-0076.

b. Yahyavi's neck pain and radiating left arm pain and paresthesia were chronic and required extensive treatment

By contrast, after this collision, Yahyavi complained of persistent chronic neck pain **and** arm symptoms, as recognized by **all** medical experts. AA001221, AA001231, AA001289-001291, AA001588, AA001564. Dr. Tung acknowledged Yahyavi reported neck symptoms beginning from the ambulance ride after the collision all the way through 2019 at every medical visit. RA0334. Dr. Tung acknowledged Yahyavi made complaints of radiating left arm pain in 2013, 2014, 2015, and 2016, which directly contradicted his report. RA0280-0285.

The medical evidence firmly established the character, quality, extent, and severity of Yahyavi's neck pain. From the moment after the collision occurred in 2013 to the first day of trial on September 13, 2019, Yahyavi's medical treatment consisted of: (1) 81 doctor visits, (2) 32 chiropractic visits, (3) 137 physical therapy treatments, (4) 17 x-

rays/MRIs, (5) 26 spine injections, and (6) one spine fusion surgery. RA0187. He did not undergo any of this treatment before the collision. RA0061-0076. Dr. Oliveri, Dr. Kaplan, and Dr. Schifini each concluded all of Yahyavi's treatment was reasonable, appropriate, and causally related to the collision. AA001280, AA001563, AA001579, AA001592-001593, AA001679, AA001698-001699. Yahyavi's cervical spine injury was accepted by the worker's compensation insurer and continued to be accepted at the time of trial, for which they asserted a lien under Nevada law. AA001523-001524, AA002574-002575.

c. Yahyavi suffered a permanent injury resulting from his cervical spine surgery

Dr. Oliveri diagnosed Yahyavi with motion segment injuries to multiple discs and the associated facet joints that were solely caused by the collision. AA001209. After exhausting conservative care, Dr. Kaplan performed a four-level cervical spine fusion.⁵ AA001228, AA001280, AA001312-001314, AA001318 AA001999. Unfortunately, Yahyavi suffered a C5 neuropraxic injury due to the surgery. AA001318-001319.

⁵ In October 2013, Yahyavi's treating orthopedic spine surgeon, Archie Perry, M.D., also recommended Yahyavi undergo a multilevel cervical spine fusion as a result of his injury. AA001353.

The neuropraxic injury caused Yahyavi to suffer symptoms of left arm weakness and atrophy of the muscles. AA001326. Yahyavi's neck pain remains chronic and severe even after the surgery.⁶ AA001679, AA001684, AA002001. Yahyavi has now been recommended for implantation of a spinal cord stimulator to alleviate his symptoms. AA001336, AA001590-001591.

d. Yahyavi's total and permanent disability

Yahyavi worked tirelessly as a floor sales manager for Chapman Dodge. AA001957. Yahyavi worked five to six days a week, ten to twelve hours a day. AA001959. Yahyavi suffered no prior physical limitations that prevented him from working. *Id.* Yahyavi's yearly income at the end of 2012 totaled almost \$160,000.00. *Id.*

Notwithstanding his severe pain, Yahyavi was motivated to continue working as a floor sales manager. AA001976-001977. All four of his children were financially dependent upon him. AA001977. Despite his valiant efforts, Yahyavi was unable to physically perform his job duties because of his pain. AA001978. By June 28, 2013, less than two

⁶ Dr. Oliveri and Dr. Schifini both opined it was reasonable for Yahyavi to undergo the cervical fusion surgery. AA001563, AA001679.

weeks after the collision, Yahyavi ceased working as a floor sales manager. AA001979. Yahyavi then transitioned into a part-time sales position at the Chapman Jeep dealership, but his pain caused him to take breaks throughout the day. AA001980-001982. Yahyavi worked in this position from July 2013 until September 2016. AA001991. Except for 2014, Yahyavi's income declined from \$156,000.00 in 2012 to \$55,000.00 in 2016. AA001996. Yahyavi was forced to borrow all the money from his 401(k) because of financial need. AA001996. Yahyavi was exhausted from the severe pain he suffered on a daily basis and even felt like a burden to his children. AA001997-001998.

In April 2015, Dr. Oliveri performed an impairment evaluation of Yahyavi as part of the worker's compensation claim.⁷ AA001663. Yahyavi complained of moderate to high levels of neck pain, upper back pain, and left arm pain. AA001230 AA001664. During the evaluation, Dr. Oliveri did not observe exaggerating by Yahyavi. AA001678. The "invalid" results from Yahyavi's 2014 functional capacity evaluation did

⁷ At the time of Dr. Oliveri's 2015 impairment evaluation, he was not retained as a medical expert in connection with this litigation as a lawsuit had not yet been filed. AA001208-001209, AA001213.

not invalidate Dr. Oliveri's examination in any way.⁸ AA001670. Dr. Oliveri determined Yahyavi suffered a permanent injury to his cervical spine as a result of the collision. AA001671. He placed an eight percent whole person impairment rating on Yahyavi. AA001671-001672, AA001677.

In March 2018, Dr. Oliveri again saw Yahyavi. AA001678. By that time, Yahyavi underwent his cervical fusion surgery. AA001678. Yahyavi presented with constant neck pain, pain in the left scapula, pain traveling down his left arm, and numbness in his hand. AA001679. Dr. Oliveri observed atrophy on Yahyavi's left upper arm, which he did not have in April 2015. AA001680. Yahyavi's grip strength in his left arm was also substantially weaker. *Id.* It became clear to Dr. Oliveri that, at best, Yahyavi's condition could improve to allow him to return to some type of work on a part-time basis. AA001682. At worst, Yahyavi's condition would not significantly improve and he would be deemed permanently disabled from working. *Id.*

⁸ Dr. Oliveri, who has been certified in Nevada to perform impairment ratings for worker's compensation matters, testified an invalid functional capacity evaluation does not mean someone is dishonest. AA001670.

Dr. Oliveri saw Yahyavi on October 31, 2018 and he still had not made any significant improvement nearly ten months after surgery. AA001684. At that time, Dr. Oliveri concluded Yahyavi was permanently and totally disabled due to his injuries. *Id.* The Social Security Administration also deemed Yahyavi disabled. AA001685.

6. Yahyavi's Speed at the Time of the Collision Had No Impact on the Verdict

Capriati incorrectly suggests the jury did not consider Yahyavi's testimony that he traveled 30 mph when the forklift suddenly struck his vehicle. In fact, the jury heard this evidence and did not find it somewhat or remotely exaggerated when Kahn tried to impeach Yahyavi's credibility on this point. AA002334-002336. The property damage photographs undermined the very notion that Yahyavi needed to even exaggerate his speed to prove the collision was major. RA0155-0167.

Capriati falsely states the speed of Yahyavi's vehicle was relevant to the medical causation opinions of Yahyavi's treating physicians. This is precisely why no citation to the record is provided. In fact, Dr. Kaplan directly dismissed any correlation between Yahyavi's speed and the injuries he suffered from the collision. AA001287-001288. Dr. Oliveri and Dr. Schifini were never asked at trial about the speed of Yahyavi's

vehicle. AA001193-001253, AA001659-001790, AA001513-001649. Capriati's sole medical expert, Dr. Tung, expressed no opinion at trial that: (1) speed was a factor in his opinions or (2) Yahyavi could not have been injured because of a "low impact." AA002016-002163, AA002301-002321. This underscores the irrelevance of Yahyavi's speed as to medical causation and the opinions of Capriati's retained accident reconstructionist, Dr. Baker.

Capriati highlights opinions from Yahyavi's retained accident reconstructionist, Tim S. Leggett, P.E. regarding Yahyavi's speed. Yahyavi formally de-designated Leggett as an expert witness and did not call him as a witness at trial. AA000140-000141. Yahyavi's counsel never even mentioned Leggett during opening statements. AA001052-001095. This renders Leggett's opinions inconsequential because they were never introduced into evidence.

As to Dr. Baker, Yahyavi filed a trial brief to exclude his testimony and opinions. RA0188-0245. The district court excluded Dr. Baker's medical causation opinion, disguised as a biomechanical opinion, that Yahyavi suffered no injury as a result of the collision. AA002174-002176. The district court's ruling only permitted Dr. Baker to testify regarding

his crash testing and the speeds he calculated. *Id.* He was precluded from using that information to opine as to injury causation. *Id.* Of course, such testimony would have directly contradicted Dr. Tung's opinion that Yahyavi was injured. AA002129. Such testimony was also inconsistent with Kahn's suggestion during his opening statement that Yahyavi was driving too fast in a construction zone when the collision occurred. AA001099-001100. Ultimately, Dr. Baker's proposed testimony was severely limited before the district court eventually struck him as a witness due to Kahn's willful misconduct. AA002491-002493.

7. Capriati's Primary Damages Experts were Called Out of Order

Dr. Tung was called out of order by Capriati during Yahyavi's case-in-chief. AA002015-002016. Dr. Tung's testimony was the cornerstone of Capriati's medical causation and damages defense. Capriati also called its vocational rehabilitation expert, Edward Bennett ("Bennett") during Yahyavi's case-in-chief. AA002177. Bennett was Capriati's primary expert who relied upon Dr. Tung's opinions to conclude Yahyavi was able to work and had no vocational or income loss. AA002213. Thus, Capriati was allowed to call its two most critical experts to directly dispute Yahyavi's damage claim before sanctions were imposed.

8. The Verdict and Relevant District Court Rulings

The jury trial in this matter lasted 15 days. AA002556. The jury found in favor of Yahyavi and against Capriati and awarded Yahyavi \$5,870,283.24 in damages. AA000195.

a. The district court imposed sanctions against Capriati as a result of Kahn's willful misconduct

After Yahyavi rested his case, Kahn willfully elicited testimony from his first witness, Goodrich, that Capriati filed for bankruptcy in 2015. AA002462. Yahyavi's counsel immediately objected. *Id.* After the district court characterized Kahn's conduct as willful abuse and considered Yahyavi's request to enter case-terminating sanctions, the district court issued its own lesser sanctions:

- (1) Admonishing Kahn before the jury for his willful misconduct pursuant to *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 75 (2014);
- (2) Reading a curative instruction to the jury to alleviate the harm caused by Capriati's direct reference to its bankruptcy and the jury's knowledge of it;
- (3) Striking Capriati's Answer as to liability only;
- (4) Striking Goodrich's testimony regarding the bankruptcy and striking him as a witness for Capriati's case; and

(5) Striking Capriati's remaining witnesses, Kevin Kirkendall ("Kirkendall") and Dr. Baker from testifying at trial.

AA002491-002492, AA002502-002503.

b. The district court granted Yahyavi's motion for attorney's fees

At the conclusion of trial, Yahyavi moved for attorney's fees and costs pursuant to NRCP 68. AA000483-000542. Yahyavi specifically moved for a contingency fee award. *Id.* The district court granted the motion and ordered Yahyavi his forty percent (40%) contingency fee. AA001019-001026.

VI. SUMMARY OF THE ARGUMENT

On the thirteenth day of trial, after Yahyavi rested his case and the jury heard from Capriati's two primary damages experts, the evidence established Capriati negligently caused the collision and Yahyavi's significant injuries. Understanding a large verdict from the jury was likely, Kahn became desperate and coordinated with Goodrich to testify Capriati filed for bankruptcy in 2015. AA002462. "Filing" for "reorganization" only means one thing: bankruptcy. *Id.* When large corporations in America file for Chapter 11 bankruptcy, all major news outlets report this as "filing for reorganization." It was reasonable to

infer the jury knew reorganization is synonymous with bankruptcy. The manner in which Kahn elicited the testimony suggested Capriati was still in bankruptcy even though Capriati's bankruptcy ended long before trial. AA000162-000163. Kahn knew Capriati faced no personal financial exposure for any judgment. Yet, Kahn purposefully introduced evidence of Capriati's bankruptcy to influence the jury to render a smaller verdict.

A district court is afforded broad discretion to impose sanctions for attorney misconduct and litigation abuse. The district court imposed far less severe sanctions than what Yahyavi requested, which reflects an appropriate exercise of discretion. The district court admonished Kahn and read a curative instruction to accurately inform the jury Capriati: (1) was no longer in bankruptcy, (2) was profitable, and (3) had liability insurance to satisfy, in whole or in part, any verdict rendered. AA002502-002503. Kahn **never** objected to the curative instruction before it was given to the jury. AA002498. Kahn **never** proposed an alternative instruction, either. *Id.* By failing to do so, Capriati has waived any challenge to the substance of the curative instruction as a matter of law.

The curative instruction's reference to liability insurance prevented jurors from rendering a verdict influenced by sympathy for Capriati's seemingly fragile financial condition and to level the evidentiary playing field. There is no *per se* ban on the introduction of liability insurance under Nevada law and, in light of the substantial prejudice that resulted from Kahn's willful misconduct, the curative instruction was an appropriate use of the district court's discretion.

Striking Capriati's Answer as to liability and striking two of its four retained experts was not case-terminating. The evidence presented already established Capriati's liability for the collision, which substantially reduced any resulting harm caused by the sanction. Similarly, striking Dr. Baker and Kirkendall from testifying did not prevent Capriati from presenting defenses against Yahyavi's claimed damages. Before sanctions were imposed, Capriati presented testimony from Dr. Tung, who provided testimony directly challenging the extent of Yahyavi's injuries and their causal relationship to the collision. AA002016-002114, AA002301-002321. Capriati presented testimony from Bennett to refute Yahyavi's earnings capacity claim. AA002178-002228. Striking Dr. Baker's testimony did not impair Capriati's ability

to challenge damages because Dr. Baker was already precluded from testifying that the forces in the collision were insufficient to cause injury. AA002174-002176. For this reason, Dr. Baker's expert testimony regarding speed or other accident dynamics would not have assisted the jury. His testimony would not have influenced the jury's decision concerning Yahyavi's credibility about speed because Arbuckle's testimony, coupled with the damage photographs, proved the collision was severe. AA001423, RA0155-0167. Striking Kirkendall was not unfairly severe because his testimony merely reaffirmed the opinions of Dr. Tung and Bennett, namely that Yahyavi suffered no damages for future medical care and loss of earnings. AA002047-002048, AA002054, AA002213-002214. Even if striking Dr. Baker and Kirkendall was an error, such error was harmless given the limited evidentiary value of their testimony.

The district court did not abuse its discretion by awarding attorney's fees equal to his 40% contingency fee agreement. Submitting hourly billing records is not a prerequisite for a district court to award attorney's fees under Nevada law. Hourly billing is not the only method to charge a client. A district court may use any method to calculate a

reasonable fee award so long as amount is reasonable in accordance with the factors enumerated under Nevada law. The district court fully considered evidence of the substantial work performed by Yahyavi's counsel to conclude the 40% contingency fee award was reasonable under Nevada law. Affirming the contingency fee award will not signal to district courts that awards of contingency fees will always be allowed because fee awards remain discretionary under NRCF 68.

VII. ARGUMENT

The issues on appeal relate to Kahn's abusive litigation misconduct and the sanctions imposed by the district court. "A trial judge is under a duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop . . . professional misconduct." *Young v. Ninth Judicial Dist. Court*, 107 Nev. 642, 818 P.2d 844, 846 (1991). This is why district courts "have inherent equitable powers" to impose sanctions for "litigation abuses not specifically proscribed by statute." *Young v. Johnny Ribeiro Bldg.*, 106 Nev. 88, 92 (1990). District courts "have broad discretion to impose sanctions for professional misconduct at trial." *Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 680 (2011). The imposition of sanctions will only be overturned if the district court abused

its discretion in doing so. *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 249 (2010).

The district court properly concluded Kahn intentionally elicited testimony from Goodrich regarding Capriati's bankruptcy to unfairly influence the true outcome. AA000546-000549. By design, the testimony was presented to suggest Capriati's financial condition was in peril and a substantial damage award could end Capriati's business. Kahn's misconduct was an abusive litigation tactic to intentionally deprive Yahyavi of a fair damage award reflected by the evidence, which justified the district court imposing sanctions pursuant to *Johnny Ribeiro Bldg.*, 106 Nev. at 92. The district court was not limited in the number or kind of sanctions available to impose against Capriati given its broad discretion and inherent powers. *Id.*

Capriati falsely argues the district court instituted case-concluding sanctions. Although Yahyavi requested the district court to impose case-terminating sanctions or alternative, lesser sanctions, the district court rejected Yahyavi's requests. AA002491-002492, AA000546-000551. Instead, the district court imposed its own less severe sanctions based on

a complete evaluation of the factors set forth in *Johnny Ribeiro Bldg.*, 106 Nev. at 93. AA002490-002493.

A. The Sanctions Imposed By The District Court Were Measured And Appropriate

Capriati incessantly argues the sanctions imposed by the district court were overly harsh. Capriati's argument is flawed for two primary reasons: (1) Capriati mischaracterizes the character of the sanctions as case-terminating, and (2) Capriati minimizes the extent of counsel's misconduct.

When a district court enters case-concluding sanctions, this Court applies "a somewhat heightened standard of review." *Bahena*, 126 Nev. at 249. Sanctions do not qualify as case ending when the district court strikes a party's answer to establish liability, but allows the party to defend itself on the amount of damages. *Valley Health Sys., LLC v. Estate of Doe*, 134 Nev. ___, 427 P.3d 1021, 1027 (2018).

Capriati does not comprehend the distinction between case-concluding sanctions and the sanctions the district court actually imposed. The district court deliberately imposed less severe sanctions after meaningful consideration of the misconduct and arguments. After the jury was excused, Yahyavi requested the district court impose case-

terminating sanctions by striking Capriati's Answer. AA002465-002466. Yahyavi also requested the district court admonish Kahn for willful misconduct and issue a curative instruction. *Id.* Yahyavi memorialized the same request for case-terminating sanctions, the admonishment and curative instruction by motion. AA000142-000189. Alternatively, Yahyavi requested the lesser sanction to strike **all** of Capriati's retained experts along with the admonishment and curative. AA000152-000153. The district court decided to issue its sanctions ruling the following day. AA002472.

The district court independently reviewed the relevant trial video and determined, by clear and convincing evidence, Kahn willfully elicited this testimony. AA002475, AA002489. The district court deemed Kahn's misconduct willful and sufficient to warrant a mistrial. AA002475. Ultimately, the district court did not strike Capriati's Answer in its entirety, which automatically disqualifies the sanction as case-terminating. AA002491. The district court did not strike all of Capriati's retained experts as requested by Yahyavi. AA002491-002493. Instead, the district court struck Capriati's Answer as to liability, which was insignificant because liability was already established by Arbuckle and

Goodrich. AA001423, AA001175-001176. The district court understood this by stating liability could have been resolved through summary judgment. AA002491.

The district court allowed Capriati to contest causation and damages. AA002491-002493. By striking Dr. Baker and Kirkendall only, the district court did not preclude Capriati from mounting a defense against Yahyavi's damage claim. AA002491-002492. Capriati was still allowed to rely on the testimony given by its primary damages expert, Dr. Tung, to dispute medical causation and Bennett, to dispute Yahyavi's loss of earning capacity damages. AA002493.

Moreover, the curative instruction given by the district court was specifically tailored to lessen the impact resulting from Capriati referring to its 2015 bankruptcy filing and its weakened financial position. No matter how many times Capriati says it challenged the substance of the curative instruction to the district court, it did not object to the instruction. AA002498. It defies logic and commonsense that Capriati now, for the first time, maintains the curative instruction should not have referenced insurance. This argument was never raised at trial and is waived. *Id.*

The decision by Kahn to undermine the fundamental fairness of trial was a desperate ploy to avoid liability for the full extent of Yahyavi's damages. Capriati's reference to its bankruptcy was not made for any legitimate or relevant purpose at trial.

1. There was no Issue of Spoliation of Documents Presented to the Jury

Capriati argues referring to its bankruptcy was necessary to overcome the notion that it destroyed relevant records. This belief is predicated on the false notion that Yahyavi elicited testimony from Goodrich suggesting Capriati willfully destroyed the records at issue.

Goodrich testified he investigated the collision. AA001159. Since Capriati made liability a trial issue, Yahyavi questioned Goodrich to confirm Capriati possessed no documents related to his investigation. AA001165. Goodrich was unable to explain where the incident report or employee file were located or why they were lost because human resources decided how long to keep records. AA001169-001170. As a result of the missing records, Goodrich was unable to confirm the results of Arbuckle's alleged drug test. AA001168-69.

To start the trial, Capriati disputed liability. AA001049-001050. Arbuckle's admission that he caused the collision, coupled with the lack

of documentary evidence, demonstrated Capriati had no evidence to support a liability defense. AA001423, AA001165. Yahyavi never argued Capriati spoliated evidence. AA002578-002605, AA002610-002634. Yahyavi never sought spoliation sanctions. *Id.* Yahyavi's counsel never referred to the missing records as part of any "spoliation theme." AA001052-001095.

Capriati argues Yahyavi told the jury Capriati willfully destroyed documents. This is patently false. During his opening statement, Yahyavi's counsel accurately stated Capriati did not possess any documentary evidence to support its defenses. AA001068-001069. He further explained Arbuckle's employee file was discarded and could not be found. *Id.* Yahyavi used the lack of documentation to highlight the absurdity of Capriati's liability defenses. *Id.*

Capriati's own witnesses admitted fault for causing the collision. AA001423, AA001175-001176. This rendered the absence of these records meaningless on the issue of liability. Yet, Capriati expects this Court to believe it was necessary to inform the jury of its bankruptcy filing to justify its failure to retain the relevant records. This argument is illogical.

2. Capriati's Bankruptcy was Irrelevant to the Loss or Destruction of the Records

“Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence.” Nev. Rev. Stat. 48.015. By the time Capriati recalled Goodrich to testify, his testimony established Capriati’s liability for the collision. AA001175-001176. There was no legitimate reason to call Goodrich to testify again for that very reason. Yet, Capriati somehow argues Goodrich’s testimony was needed to overcome the false narrative that it willfully destroyed records even though Yahyavi never sought spoliation sanctions. If Capriati were so concerned about its record retention, there was nothing precluding Kahn from addressing it with Goodrich earlier on cross-examination. Instead, Kahn waited until after Yahyavi rested his case-in-chief on day 13, when the jury knew the full extent of Yahyavi’s damages.

To understand the absurdity of Capriati’s position that Goodrich’s testimony regarding its bankruptcy was necessary, the entirety of Kahn’s questioning is relevant:

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

A. Correct.

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

A. Yes.

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

A. Yes, we filed for reorganization in 2015.

AA002462 (emphasis added).

A witness may not testify to a matter unless sufficient evidence is introduced to establish the witness has personal knowledge of the matter. Nev. Rev. Stat. 50.025(1)(a). Goodrich previously admitted his complete lack of knowledge regarding the whereabouts of the records and why Capriati did not retain them. AA001169-001170. Goodrich had no reliable foundation upon which to explain why Capriati no longer possessed Goodrich's employee file or the incident report. AA001169-001170. Yet, Capriati invited Goodrich to speculate the documents must have been lost because Capriati filed for bankruptcy in 2015. This is absurd.

Capriati also stretches the bounds of credibility by suggesting reference to its bankruptcy was relevant to inform the jury that a reduction in its workforce affected Capriati's recordkeeping. Capriati filed for bankruptcy under Chapter 11 of the U.S. Bankruptcy Code. AA000877. The purpose of Chapter 11 is to "reorganize" a financially troubled business while it continues to operate and provide jobs in the hopes of regaining profitability. *United States v. Whiting Pools*, 462 U.S. 198, 203, 103 S. Ct. 2309, 2313 (1983).

"[A] voluntary Chapter 11 debtor remains in possession of property of its bankruptcy estate" *In re Cwnevada, LLC*, 602 B.R. 717, 726 (Bankr. D. Nev. 2019). As a debtor-in-possession, Capriati maintained sole and exclusive control to preserve business records as part of its continued business operations during its bankruptcy. This delegitimizes the notion that Capriati's bankruptcy filing caused the relevant records to be lost.

Any contention that a reduction in employees resulting from the bankruptcy somehow precluded Capriati from preserving records is tenuous. A company's ability to preserve business records is dependent upon sufficient physical space to house hard copies of the records or,

alternatively, sufficient space to electronically store the records. Irrespective of the method chosen, there is no magic number of employees needed for a business to preserve records or files. Even businesses that completely cease operations still preserve records for years without employees, and often do so.

Capriati asserts further testimony from Goodrich would have explained Arbuckle's employee file and the incident report were destroyed as part of its business practice to lawfully keep records for only three years. If Capriati's ordinary business practice was to destroy records after three years, then the number of employees had no bearing on this practice whatsoever. Neither did its bankruptcy. Goodrich could have given this explanation without referencing the bankruptcy. This explains why the district court disregarded Kahn's excuse to invite testimony about Capriati's bankruptcy:

Defense counsel proffered that he thought bankruptcy was a legitimate issue since the file for the employee who drove the forklift that missed the accident was missing possibly due to the bankruptcy. **This explanation is simply not credible.**

AA000546 (emphasis added).

Capriati's suggestion Kahn only learned of the work force reduction minutes before coming to court and had no time to prepare reinforces just how reprehensible his conduct was. "[A]ll doubtful questions of evidence or procedure should not be proposed or discussed in the presence of the jury." *State v. Jordan*, 26 P.2d 558, 561 (Or. 1933). Kahn knew evidence of Capriati's bankruptcy presented a question of admissibility. The more respectful and cautious practice is to bring a potentially significant evidentiary issue to the court's attention to receive guidance. The district court could have then rendered a ruling regarding the admissibility of the bankruptcy outside the presence of the jury, which is required pursuant to NRS 47.080. The absence of a pretrial order excluding Capriati's bankruptcy was irrelevant because this did not absolve Capriati from seeking a ruling regarding its admissibility beforehand. Kahn's attempted offer of proof should have been made **before** reference to the bankruptcy was made, not afterwards. The recklessness and irresponsibility displayed by Kahn demonstrates his failure to appreciate the prejudice that resulted from introducing evidence of the bankruptcy and misleading the jury about it.

3. Evidence of Capriati's Bankruptcy was Unduly Prejudicial

The first substantive question Kahn asked Goodrich was if something “**major**” happened to Capriati between the date of the collision and the date of his testimony. AA002462. By framing the question in this manner, Kahn **knew** Goodrich intended to refer to Capriati’s bankruptcy and invited him to do so.⁹

Kahn inexplicably left his notes outlining topics to explore with Goodrich behind on the court podium in the courtroom’s public domain. AA000189. “BK” was written at the very top of those notes, which further underscored Kahn’s intent to ensure Goodrich informed jurors of Capriati’s bankruptcy. *Id.* While Kahn easily could have elicited testimony to explain the loss of the records without implying Capriati was in financial peril, he chose to refer to the bankruptcy. This was a calculated move designed to improperly influence the jury.

Evidence of the poverty or wealth of a party is inadmissible in a negligence action. *Cleveland v. Peter Kiewit Sons’ Co.*, 624 F.2d 749, 757

⁹ Capriati’s suggestion jurors did not know reorganization meant bankruptcy is implausible because it is speculative. By characterizing the event as “**major**,” and stating the company “**filed**” for reorganization, Capriati clearly meant bankruptcy.

(6th Cir. 1980). “Interjection of the wealth or poverty of any party has been consistently held by the courts to be irrelevant to the issue of compensatory damages in a personal injury case.” *Chin v. Caiaffa*, 42 So. 3d 300, 308 (Fla. Dist. Ct. App. 2010). This evidence is irrelevant and inadmissible because it appeals to the sympathy of the jury to “favor those least able to bear the loss.” *McHale v. W.D. Trucking, Inc.*, 39 N.E.3d 595, 610-11 (Ill. App. Ct. 2015).

This Court concluded evidence of personal injury plaintiffs’ financial distress caused by medical bills is inadmissible at trial. *Meagher v. Garvin*, 80 Nev. 211, 219 (1964). This Court also concluded it is attorney misconduct to reference a defendant’s wealth during closing argument. *Canterino v. Mirage Casino-Hotel*, 117 Nev. 19, 25 (2001). The same danger of inflaming the passion or prejudice of jurors remains present when a corporate defendant seeks to introduce evidence that it is in dire financial condition.

A deliberate attempt by counsel to appeal to social or economic prejudices of the jury, including the wealth or poverty of litigants, is **misconduct** where the asserted wealth or poverty is not relevant to the issues of the case.

McKissick v. Frye, 876 P.2d 1371, 1381 (Kan. 1994) (emphasis added).

By the time Goodrich was re-called by Kahn, the jury understood Yahyavi sustained severe injuries for which he sought damages in excess of 13 million dollars. AA002326. Kahn made this abundantly clear to the jury when he questioned Yahyavi about his damages the day before Goodrich referenced Capriati's bankruptcy. AA002297, AA002326. Jurors knew from the district court's pre-instructions they were forbidden from considering Capriati's liability insurance. AA001042.¹⁰

Goodrich's testimony invited jurors to disregard the evidence establishing Yahyavi's damages and to instead render a damages award in a low amount because they felt sorry for Capriati. Alternatively, this testimony created the potential for jurors to believe rendering a substantial damage award was pointless because Capriati could never pay it. While this, by itself, caused substantial prejudice to Yahyavi and ultimately justified the sanctions imposed, Kahn also misled the jury about Capriati's financial state.

By limiting the timeframe to when the collision occurred and the date of Goodrich's testimony, Kahn implied the collision was a factor in

¹⁰ The district court provided this pattern instruction without objection. AA001033-001034.

filing for bankruptcy. AA002462. He also falsely implied Capriati's bankruptcy was still ongoing. *Id.* On February 6, 2018, Capriati filed its Motion for Final Decree in which it asked the bankruptcy court to close its bankruptcy because it “**was able to turn itself profitable.**” AA000146 (emphasis added).

On March 26, 2018, the bankruptcy court granted the motion and entered a final order terminating Capriati's bankruptcy. AA000162-63. Nearly 16 months **before** trial began, Capriati was no longer in bankruptcy and was profitable. *Id.*

“All parties are entitled to a fair trial on the merits of the case, uninfluenced by appeals to passion and prejudice.” *Van Buren v. Minor*, 247 So. 3d 1040, 1051 (La. Ct. App. 2018). Yahyavi deserved an objective evaluation of the evidence from jurors that was free of bias, passion, or prejudice. With liability admitted to by Capriati's witnesses, Kahn deliberately attempted to deprive Yahyavi of a fundamentally fair trial on damages. Given the significance of the prejudice Kahn caused, the district court's sanctions were a reasonable exercise of its equitable powers.

B. The Curative Instruction

To suggest the adverse impact Yahyavi suffered was minimal because reorganization was uttered once is not rooted in commonsense. Reorganization did not have to be repeated multiple times for jurors to appreciate Capriati's financial condition was so dire that it filed for bankruptcy **after** the collision. The district court determined "by clear and convincing evidence" Goodrich's answer regarding bankruptcy was "intentionally solicited" by Kahn. AA002475. The district court characterized Kahn's misconduct as "one of the most **severe** abuses by counsel that this Court has seen." AA000546 (emphasis added).¹¹ The district court fully appreciated the prejudice suffered by this direct reference to Capriati's bankruptcy:

Nonetheless, Plaintiff has been prejudiced because the jury became aware of the Defendant's bankruptcy and Plaintiff cannot make the jurors forget that information. This is a case about damages against a company. The fact that the company underwent bankruptcy is extremely prejudicial to the Plaintiff because it directly impacts the juror's

¹¹ Kahn's law firm, Wilson Elser Moskowitz Edelman & Dicker, LLP, has been the subject of attorney misconduct and abusive litigation practices. *Wilson Elser v. Eighth Judicial Dist. Court*, No. 74711, 2019 Nev. Unpub. LEXIS 106 (Jan. 31, 2019).

decision regarding the amount of damages to award.

AA000549 (emphasis added).

When the opposing party objects to attorney misconduct, the district court should sustain the objection and admonish the jury and counsel. *Gunderson*, 130 Nev. at 75. The district court properly admonished Kahn in front of the jury because Yahyavi's counsel timely objected. AA002462, AA002502. Capriati did not object to the admonishment. AA002498. Capriati does not appeal the admonishment.

As part of its inherent equitable powers to impose sanctions, the district court read the following curative instruction to the jury to remedy the prejudice from the bankruptcy reference:

Defendant Capriati Construction Inc. introduced evidence that after the June 19, 2013 collision, it filed for bankruptcy. You shall not consider that Defendant Capriati Construction Inc. filed for bankruptcy for any purpose. Defendant Capriati Construction Inc. is **no longer** in bankruptcy and is now profitable. Plaintiff has the legal right to proceed with his claim against Defendant Capriati Construction, Inc. in this case, and recover damages as determined by you in accordance with these instructions.

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

AA002502-002503 (emphasis added).

1. Capriati Waived any Argument on Appeal Regarding the Substance of the Curative Instruction

The district court gave the curative instruction proposed by Yahyavi. AA000149. Capriati's convoluted explanation Kahn formally objected to the curative instruction is unsupported by the record.

“Curative instructions are a settled and necessary feature of our judicial process and one of the most important tools by which a court may remedy errors at trial.” *State v. Harmon*, 956 P.2d 262, 271 (Utah 1998).

“A trial judge's prompt curative instructions are presumed to cure error and adequately direct the jury to disregard improper matters for consideration.” *McNair v. State*, 990 A.2d 398, 403 (Del. 2010).

“Inadmissible testimony by a witness may be cured by proper instruction by the district court, since the presumption is that jurors will understand and comply with the instructions of the court.” *State v. Smith*, 736 S.E.2d 847, 853 (N.C. Ct. App. 2013).

NRCP 51 governs objections to jury instructions:

(c) Objections.

(1) How to Make. A party who objects to an instruction or the failure to give an instruction **must do so on the record, stating distinctly**

the matter objected to and the grounds for the objection (emphasis added).

“The failure to object to or request special instruction to the jury precludes appellate consideration.” *Etcheverry v. State*, 107 Nev. 782, 784 (1991). Indeed, this Court recently reaffirmed a litigant waives any challenges on appeal to a jury instruction by failing to object to it or to offer an alternative instruction. *First Transit v. Chernikoff*, No. 70164, 2020 Nev. Unpub. LEXIS 844, at *2 (Sep. 11, 2020) (unpublished disposition); *see also, Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 613 (2000). In *Chernikoff*, this Court concluded First Transit waived its challenge on appeal to two different jury instructions. 2020 Nev. Unpub. LEXIS 844 at *3. This Court reasoned First Transit failed to preserve an appellate challenge to one instruction because it “did not show that the instruction was unwarranted based on the facts or that it misstated the law such that the district court would have had reason to reject the instruction.” *Id.* First Transit also failed to propose an alternative instruction. *Id.*

Here, Capriati’s failure to object to Yahyavi’s proposed curative instruction or provide an alternative instruction is more pronounced. Only now Capriati suggests, for the first time, that an instruction to

disregard the question and answer and not to consider wealth or insurance was sufficient. None of these arguments were made to the district court when the curative instruction was proposed.

Kahn spent nearly his entire argument suggesting reference to the bankruptcy was not improper because it was relevant to show Capriati reduced its workforce to explain the loss of records. AA002486-002488. Kahn then argued, at length, about the use of his trial notes. AA002488-002489. During his argument, Kahn never objected to the curative instruction as drafted:

MR. [KAHN]:¹² Well, first of all counsel has proposed curative instructions, admonishments, and fixing the questions and answer, so that is the **most readily available to cure this.**

...

MR. KAHN: And second of all, **I believe what Mr. Prince has proposed as curative is sufficient**, striking the answer. And even if the answer is stricken, I still think Capriati Construction should have the ability to argue damages **with these curative instructions.** Thank you.

AA2485, 2490 (emphasis added).

¹² Although the trial transcript indicates Yahyavi's counsel made this comment, the context of the trial transcript clearly establishes Mr. Kahn set forth this argument on behalf of Capriati.

Suggesting Kahn set forth any coherent argument objecting to the substance of the proposed curative instruction has no basis in reality. It is merely a desperate attempt to somehow raise the issue for the first time before this Court. Kahn solely focused on precluding any sanctions that prohibited Capriati from contesting damages at trial. AA002485-002490. Even when the district court gave Kahn the full opportunity to read the proposed curative instruction and comment on it, he made no challenge at all:

THE COURT: I've stated what I'm going to do. I think that's appropriate. I agree that I will read that to introduce is irrelevant. It's committed willful misconduct. I'm going to be telling the jury that Mr. Kahn is reprimanded. **I think that along with the curative and the other is appropriate.**

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

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

...

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

AA002498 (emphasis added).

Yahyavi attached the curative instruction to his sanctions motion, which was filed before the district court imposed sanctions. AA000142, AA000184-000187. Kahn read the instructions, was given an opportunity to object, but failed to do so. AA002498. He did not offer an alternative curative instruction, either. *Id.* In fact, Kahn had no comment. *Id.* As a result, Capriati failed to preserve any appellate challenges to the instruction.

Capriati references his counsel's alleged objection to the district court reading the curative instruction to the jury for a second time as if that somehow preserved appellate review. AA002537. This so-called objection was made after the district court already provided the curative instruction to the jury, which effectively rendered it superfluous. *Id.*

Objections to jury instructions “must give the district court the opportunity to correct the potential error by focusing the court’s attention on the alleged error.” *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1001 (2008). The factual record demonstrates Kahn made no attempt to substantively object to the jury instruction or propose an alternative instruction before it was given. Therefore, this Court must

not consider any of the arguments Capriati makes regarding the curative instruction or its alleged prejudicial effect.

2. The Curative Instruction Accurately Instructed Jurors

This Court reviews a district court's decision to admit a jury instruction for abuse of discretion. *D & D Tire, Inc. v. Ouellette*, 131 Nev. 462, 470 (2015). This is the appropriate standard of review as Capriati does not challenge on appeal whether the curative instruction accurately states Nevada law. *Id.* Instead, Capriati argues the district court's curative instruction should have advised jurors not to consider bankruptcy or insurance for any purpose. Once again, this alternative instruction should have been raised to the district court, not to this Court for the first time. *Chernikoff*, 2020 Nev. Unpub. LEXIS 844 at *3.

Capriati repeatedly suggests the district court's curative instruction informed the jury there was unlimited insurance available to pay any amount of damages. This is false and emblematic of Capriati's blatant disregard of the factual record. The plain language of the curative instruction stated, in part, that Capriati "carries liability insurance to satisfy, **in whole or in part**, any verdict you may reach in this case." AA002503 (emphasis added). The jury was never informed of

the amount of liability insurance Capriati carried when the collision occurred. AA002503. The instruction did not invite the jury to suspect Capriati had enough insurance to pay any verdict no matter the amount. AA002503.

The jury was in no conceivable way swayed by Capriati's liability insurance given its verdict. Yahyavi asked the jury to award him \$14,476,662.24 in damages. AA002622-002633. The jury awarded Yahyavi \$5,870,283.24, which was approximately 40% of the amount requested. AA000195. If the jury truly believed there was unlimited insurance available, it would have awarded Yahyavi the entire amount requested. Instead, the jury did not allow its knowledge of liability insurance to unfairly influence its verdict and prejudice Capriati. The jury chose to reduce the damage awards for Yahyavi's loss of earning capacity, which shows that it considered the evidence, not the liability insurance. AA000195. \$3,000,000.00 for past and future pain and suffering is certainly not an outrageous amount that shocks the conscience given the extent of Yahyavi's injuries. *Id.* The jury properly exercised its discretion by weighing the evidence to reach its verdict. *Reed v. Bethel*, 2 N.E.3d 98, 115 (Ind. Ct. App. 2014) ("Because the jury's

verdict can be explained on other reasonable grounds, we will not deem it to be the result of improper considerations [of liability insurance]”).

Capriati’s belief that the jury’s knowledge of liability insurance grossly inflated the verdict is incomprehensible. The verdict reached by the jury reflected the evidence presented. For that reason, even if the district court committed error by allowing a broad reference to liability insurance, the error was harmless. *Serpa v. Porter*, 80 Nev. 60, 69 (1964) (even if the district court’s order is considered to be error, the judgment should not be disturbed if such error does not affect the substantial rights of the parties); *see also*, Nev. R. Civ. P. 61. Capriati bears the burden to prove that, but for the error, a different outcome would have resulted. *Hallmark v. Eldridge*, 124 Nev. 492, 505 (2008). Considering the verdict was not shocking in amount given the evidence presented, Capriati cannot legitimately prove a different result absent the liability insurance reference.

Capriati desperately attempts to draw a parallel between collateral source evidence and liability insurance to suggest there is a *per se* bar on the admission of liability insurance. This argument is not legally tenable. The *per se* bar is strictly limited to evidence of payments to an injury

victim “from a source wholly independent of the tortfeasor” *Proctor v. Castelletti*, 112 Nev. 88, 90 n.1 (1996). The rule is intended to prevent juries from reducing damages caused by the negligent party. *Id.* The rule is not designed to prevent juries from increasing a damages award because liability insurance is available. These are completely distinct legal concepts, which underscores the weakness of Capriati’s position. Unlike collateral sources of payment for personal injuries, there is no *per se* bar on the admission of liability insurance under Nevada law:

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

Nev. Rev. Stat. 48.135(2).

Here, insurance was not used to establish negligence (*i.e.* liability) as that was already clear. AA001175-001176, AA001423. Instructing the jury Capriati carried liability insurance was necessary to neutralize the prejudice that resulted from Kahn’s willful misconduct to introduce testimony regarding Capriati’s bankruptcy. This renders any analogy with the *per se* bar on collateral source evidence for personal injury plaintiffs baseless. Even under NRS 48.135(2), reference to Capriati’s

liability insurance was proper to cure the harm caused given the district court's equitable power to impose sanctions.

Evidence of liability insurance is admissible when a defendant invites a jury to infer it is stricken by poverty:

Should the nature of defendant's proofs be such that the jury might infer defendant's inability to pay a judgment, evidence that defendant has liability insurance may become admissible as an exception to the general prohibition of insurance evidence contained in Fed.R.Evid. 411.

Bernier v. Board of County Rd. Comm'rs, 581 F. Supp. 71, 78 (W.D. Mich. 1983);¹³ see also, *Younts v. Baldor Elec. Co.*, 832 S.W.2d 832, 834 (Ark. 1992).

Introducing evidence of liability insurance to combat a defendant's "poormouthing" is known as "curative admissibility" and "has garnered support in both the judiciary and academia." *DSC Communs. Corp. v. Next Level Communs.*, 929 F. Supp. 239, 248 (E.D. Tex. 1996). Curative admissibility ensures the playing field is leveled if a defendant chooses to mislead the jury by pleading poverty.

As a condition to lift the bankruptcy stay to allow the personal injury lawsuit to proceed, Yahyavi's recovery was limited to Capriati's

¹³ FRE 411 is substantially similar to NRS 48.135.

insurance. AA000022. Yahyavi was forbidden from pursuing Capriati's personal assets. *Id.* The jury was unaware of this fact. This magnified the resulting prejudice because the jury was left to believe Capriati's financial ability to pay a judgment was severely impaired. Kahn was motivated to mislead the jury about Capriati's inability to pay to reduce the verdict the insurer would have to pay. The curative instruction as drafted was the only reasonable means available to neutralize the harm caused by the misconduct.

C. The Sanctions Imposed By The District Court Did Not Deprive Capriati Of The Ability To Contest Damages

Capriati's brief is replete with falsehoods that it was not allowed to present damage witnesses. The district court's decision to strike Capriati's remaining expert witnesses, Kirkendall and Dr. Baker, did not end Capriati's damage defense. Before the sanctions, Capriati presented testimony from its primary damages expert, Dr. Tung and retained vocational expert, Bennett. AA002015-002016, AA002177. As a result, Capriati overstates the value of Dr. Baker and Kirkendall's anticipated testimony to somehow claim they were unable to dispute damages.

1. Dr. Tung's Testimony Disputed the Extent of Yahyavi's Damages

Although Yahyavi requested the district court to strike Dr. Tung's testimony, the district court declined to impose this sanction. AA002493. Capriati conveniently ignores this fact to somehow bolster its claim that the district court took away its damages defense.

Dr. Tung testified Yahyavi sustained straining injuries to his neck and back as a result of the collision. AA002057-002058. He testified Yahyavi's medical treatment through early September 2014 was reasonable and caused by the collision. AA002065-002066. He clarified all of Yahyavi's chronic neck pain thereafter was causally related to a progression of pre-existing degenerative disc disease. AA002064-002068. Dr. Tung told the jury Yahyavi's need for additional medical treatment, including his cervical spine surgery, was not related to the collision. AA002047-002049, AA002052-002053, AA002074-002075, AA002111-002112. He explained the cervical spine injections Yahyavi underwent after the summer of 2014 were not beneficial. AA002077. Dr. Tung even detailed why Yahyavi was not a good surgical candidate. AA002055.

Dr. Tung extensively testified regarding Yahyavi's alleged complaint of neck pain for years that was documented in the prior SWMA

record. AA002053. He specifically testified in detail about the record and the cervical spine x-ray Yahyavi underwent. AA002093-002101.

Finally, Dr. Tung disputed Yahyavi's future medical treatment recommendations by telling the jury that implantation of a spinal cord stimulator was not related to the collision and would not benefit Yahyavi. AA002054. Dr. Tung explained, in detail, that Yahyavi is not disabled from working. AA002046-002048, AA002311-002314, AA002320.

Capriati downplays the extent and significance of Dr. Tung's testimony. Dr. Tung's testimony disputing the extent of Yahyavi's injuries and his treatment was not restricted or limited by the district court in any significant manner. The jury was given a full and fair opportunity to consider Dr. Tung's testimony when determining what damages to award Yahyavi. Kahn contested Yahyavi's damages based on Dr. Tung's testimony, the lone prior SWMA record, and Bennett's testimony during closing argument. AA002368-002687.

2. Capriati Overstates the Importance of Dr. Baker's Testimony

Capriati somehow believes Dr. Baker's accident reconstruction opinions could have altered the jury's verdict. Dr. Baker opined Yahyavi's speed at impact was 5.61 mph. AA00858. Dr. Baker used his

opinion about the dynamics of the collision to suggest the collision was not strong enough to cause Yahyavi to sustain a hyperflexion injury. AA00858. The district court correctly excluded Dr. Baker's opinions regarding injury causation because he lacked the qualifications to offer opinions regarding medical causation as a biomechanical engineer. AA002174-002176; *see also, Williams v. Eighth Judicial Dist. Court*, 127 Nev. 518, 521 (2011).¹⁴ As recognized by this Court, even low impact collisions can cause serious injuries. *Rish*, 132 Nev. at 197.

Dr. Tung testified Yahyavi injured his cervical spine and required medical treatment. AA002129, AA002137. Dr. Tung's opinion rendered Dr. Baker's expected testimony regarding the speed of Yahyavi's car and the forces in the collision inconsequential. None of the medical doctors acknowledged the relevance of Yahyavi's speed to medical causation. AA001193-001253, AA001287-001288, AA001513-001699, AA002016-002113, AA002301-002321. The persuasive value of Dr. Baker's testimony was directly tied to the notion that Yahyavi could not have

¹⁴ This Court has cited, with approval to decisions from other jurisdictions that did not allow biomechanical engineers, like Dr. Baker, to provide medical causation opinions. *Rish v. Simao*, 132 Nev. 197 (2016).

been injured in the collision. Striking Dr. Baker as a sanction did not alter or change this outcome because his opinions would not have assisted the jury as to damages. *Hallmark*, 124 Nev. at 500.

Capriati's suggestion the lynchpin of its case was that the collision happened at a slow speed and was minor is not credible. Arbuckle invalidated this theory when he confirmed the impact was strong. AA001422. The damage photographs also proved the impact was not minor. RA0155-0167. Capriati cannot satisfy its burden that a different result would have occurred if Dr. Baker testified. *Carr v. Paredes*, No. 60318, 2017 Nev. Unpub. LEXIS 56, at *4 (Jan. 13, 2017). Therefore, any error in striking Dr. Baker from testifying was also harmless.

3. Kirkendall's Proposed Testimony was Insignificant

Capriati misstates how the exclusion of Kirkendall's testimony adversely impacted its damages defense. Kirkendall opined Yahyavi suffered no economic damages for future treatment because Dr. Tung opined Yahyavi did not require it. AA000840. The jury heard Dr. Tung testify Yahyavi did not need future medical care for his injuries. AA002047-002048, AA002054. Thus, Kirkendall's testimony would not have made any difference to the jury.

The same is true regarding Kirkendall's loss of earning capacity opinions. Dr. Tung testified Yahyavi can return to work. AA002046-002048, AA002311-002314, AA002320. Based on Dr. Tung's opinion, Bennett, the vocational expert, testified Yahyavi suffered no loss from the collision. AA002193, AA002213. Kirkendall merely relied on Bennett, who relied on Dr. Tung, to conclude Yahyavi suffered no loss of earning capacity. AA000849-000850. Striking Kirkendall's testimony was not truly a meaningful sanction because Capriati already received the benefit of the opinion through its other experts' testimony.

Kirkendall provided no opinions of any independent value the jury needed to consider. Kirkendall made no alternative calculations for Yahyavi's loss of earnings capacity. AA000842-000850. He never questioned the methodology Yahyavi's retained economist, Dr. Clauretje, used to calculate the present value of Yahyavi's loss of earning capacity damages. *Id.* Kirkendall never provided an alternative loss of earnings value. AA000850.

Ultimately, the jury knew from Dr. Tung and Bennett that: (1) Yahyavi required no future medical treatment and (2) Yahyavi was not disabled from working. AA002047-002048, AA002054, AA002213-

002214. Kirkendall's proffered testimony did not bolster those opinions in any meaningful way. Therefore, any error in excluding his testimony was harmless. *Wyeth v. Rowatt*, 126 Nev. 446, 465 (2010); *Carr*, 2017 Nev. Unpub. LEXIS 56, at *4.

4. Capriati's Cross-examination of Yahyavi's Witnesses

Capriati's tedious argument Yahyavi equates cross-examination with expert witness testimony is confounding. Yahyavi has never taken this position. Nonetheless, Cross-examination of Yahyavi's witnesses afforded Capriati a separate vehicle to directly dispute Yahyavi's damages claim in this action. Capriati sharply criticizes the value of cross-examination even though its value to dispute evidence cannot reasonably be questioned. *Flo-Bend v. Pullam*, 570 P.2d 1165, 1167 (Okla. 1977) ("Cross-examination is a safeguard to truthfulness and accuracy and may be used to discredit a witness or develop facts favorable to the cross-examining party"); *Hunter v. Bozeman*, 700 P.2d 184, 188 (Mont. 1985).

Ultimately, Capriati challenged Yahyavi's alleged damages through the presentation of two retained experts, cross-examination of

Yahyavi's experts, and closing argument. Suggesting Capriati's damages defense was eliminated demonstrates the weaknesses of its arguments.

D. The District Court's Attorney's Fee Award Based On A Contingency Fee Agreement Was Proper Under Nevada Law

An award of attorney's fees pursuant to NRCP 68 is reviewed for an abuse of discretion. *Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 562 (2009). This Court will affirm an award of attorney's fees that is supported by substantial evidence. *Logan v. Abe*, 131 Nev. 260, 266 (2015). The district court enjoys broad discretion to award attorney's fees, which is guided by specific factors outlined in *Beattie v. Thomas*, 99 Nev. 579, 588-89 (1983).

On January 18, 2019, Yahyavi served his Offer of Judgment to Capriati for \$4,000,000.00. AA000504-000505. Capriati rejected the offer.¹⁵ At the conclusion of trial, Yahyavi moved for an award of attorney's fees and costs pursuant to the former version of NRCP 68(f)(2),

¹⁵ On January 19, 2017, Yahyavi served an offer of judgment for \$990,000.00, which Capriati rejected. AA000490. While Yahyavi's \$4,000,000.00 offer of judgment governs under former NRCP 68(f)(2), Capriati received multiple opportunities to resolve Yahyavi's case.

which permitted the recovery of attorney's fees if the offeree rejects an offer and fails to obtain a more favorable judgment.¹⁶

NRCP 68 functions to “facilitate and encourage a settlement by placing a risk of loss on the offeree who fails to accept the offer, with no risk to the offeror, thus encouraging offers and acceptance of offers.” *Mendenhall v. Tassinari*, 133 Nev. ___, 403 P.3d 364, 374 (2017). NRCP 68 penalizes an offeree who “rejects the offer, proceeds to trial, and fails to obtain a more favorable judgment.” *Waddell v. L.V.R.V., Inc.*, 122 Nev. 15, 24 (2006).

On March 3, 2020, the district court awarded attorney's fees to Yahyavi totaling \$2,510,779.30. AA001021-001026. The district court issued this award pursuant to the factors set forth in *Beattie and Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349 (1969). *Id.* The district court's attorney's fee award reflected Yahyavi's 40% contingency fee agreement with his counsel, Prince Law Group (“Prince”), that is part of the factual record. AA001021-001026, P0677.

¹⁶ The current version of NRCP 68(f)(1)(B) is substantially similar to former NRCP 68(f)(2).

Capriati contends attorney's fees should not have been awarded because its decision to reject Yahyavi's Offer of Judgment was not grossly unreasonable or in bad faith. Capriati also claims the amount of attorney's fees awarded is unreasonable. Both arguments fail.

1. Capriati's Decision to Reject the Offer of Judgment was Grossly Unreasonable

Capriati's challenge under *Beattie* focuses on one factor: whether its decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith. 99 Nev. at 588-89. All defendants who lose at trial and are faced with the penalties imposed by Rule 68 make this argument. None of the *Beattie* factors "are outcome determinative, however, and thus, each should be given appropriate consideration." *Frazier v. Drake*, 131 Nev. 632, 642 (Nev. Ct. App. 2015) (citing *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252 n.16 (1998)). "Unless the district court's exercise of discretion is arbitrary or capricious, this Court will not disturb the lower court's ruling on appeal." *Yamaha Motor Co.*, 114 Nev. at 252.

Capriati inaccurately characterizes Yahyavi's Offer of Judgment as late and unreasonably high. Trial commenced on September 13, 2019, nearly eight months after the offer of judgment was made. AA001030.

By the time the offer was made, the parties completed discovery. RA0001-0009. Yahyavi's special damages were nearly \$3,000,000.00 when the offer was made. AA000948. Given the extent of Yahyavi's injuries and damages, \$4,000,000.00 was not an unreasonable offer. The timing of Yahyavi's offer was reasonable because Capriati possessed all the evidence supporting Yahyavi's claimed damages and its defenses to fully assess the risk of rejecting the offer.

Capriati insinuates when it evaluated the offer of judgment, it reasonably believed liability would be disputed at trial. Yet, Capriati now states there was no issue as to who was at fault. These contradictory positions demonstrate Capriati failed to consider liability was not an issue when the offer of judgment was made. Nevertheless, Capriati rejected the offer of judgment and insisted the district court read the pleadings denying liability and blaming others. AA001032. As soon as trial began, Capriati's liability defenses were discredited by its own witnesses. AA001175-001176, AA001423. Goodrich possessed no facts Yahyavi improperly drove his vehicle at the time of the collision. AA001172. He knew of no third parties who caused or contributed to the collision. AA001175-001176.

Capriati also attempted to dispute liability by suggesting Yahyavi's turn signal was not activated. AA001426. This was complete speculation because Arbuckle's vision of Yahyavi was obstructed up to the moment of impact. AA001436-001437. Capriati proceeded to trial on liability defenses with no basis in fact. The state of the evidence establishing Capriati's liability never changed from the moment Yahyavi served his Offer of Judgment. Yet, Capriati chose to perpetuate meritless liability defenses at trial. These facts demonstrate Capriati's rejection of Yahyavi's offer to dispute liability at trial was unreasonable.

Capriati's decision to proceed to trial to dispute medical causation and damages was similarly unreasonable. Capriati's primary evidentiary basis to dispute medical causation was one prior SWMA medical record in which Yahyavi allegedly complained of neck pain for years. AA000537, RA0064-0065. The entire factual record, however, demonstrated the medical and clinical insignificance of the lone SWMA record as a basis to legitimately dispute medical causation. Capriati never possessed any other prior medical records documenting medical treatment of any kind for Yahyavi's alleged neck pain for years. AA001240, AA002142. Dr. Tung never opined Yahyavi suffered neck

pain in the days, weeks, or months before the collision. AA002133-002134. Dr. Tung knew Yahyavi never complained of radiating left arm pain any time before the collision. AA001222, AA002160. By contrast, following the collision, Yahyavi consistently reported neck pain and radiating left arm pain AA001221, AA001231 AA001289-001291. He also underwent numerous types of conservative treatment before finally undergoing cervical spine surgery. RA0187. Yahyavi underwent no extensive treatment like this before the collision. RA0061-0076. Yahyavi's permanent cervical spine injury was accepted by the worker's compensation insurer. AA001211. Capriati knew any medical causation defense based on Yahyavi's preexisting cervical spine pain was not tenable, but still proceeded anyways.

Even Capriati's reliance on Dr. Tung's medical causation opinions was misguided. Dr. Tung testified Yahyavi only suffered a sprain to his cervical spine from the collision. AA002057-002058. He opined Yahyavi's need for medical treatment after the arbitrary date of September 2014 was causally related to degeneration only. AA002064-68. By September 2014, even under Dr. Tung's analysis, Yahyavi's pain and suffering was chronic and severe. AA002079-002080. Dr. Tung

conveniently disregarded Yahyavi's degenerative changes to his cervical spine were **asymptomatic** for nearly two years before the collision. RA0061-0076. This nullified the reliability of Dr. Tung's opinion and further eroded the reasonableness of Capriati's defense to medical causation.

Capriati tries to legitimize its medical causation defense through unfounded factual claims without citation to the record. There were no huge gaps in Yahyavi's care. Yahyavi did not treat from the middle of 2015 to the middle of 2016 because surgery was his only remaining treatment option left and he was scared to undergo it. AA001984, AA002411. Capriati generally alludes to Yahyavi's attempt to continue working for a few years after the collision to somehow bolster the viability of its damages defense. Both Dr. Oliveri and the Social Security Administration deemed Yahyavi totally and permanently disabled from working as a result of his injuries. AA001684-001685. Capriati never truly appreciated the risk of proceeding to trial based on its attenuated liability and damages defenses.

Capriati's assertion that the district court was not allowed to consider the verdict amount to determine whether Yahyavi was entitled

to attorney's fees under the *Beattie* factors is nonsensical. Rule 68 specifically contemplates the comparison of the offer of judgment with the verdict amount as a threshold matter to even award attorney's fees. The amount a verdict exceeds an offer of judgment has never been formally excluded as part of a district court's consideration of the *Beattie* factors. *Yamaha Motor Co., U.S.A.*, 114 Nev. at 252 (district court considered that verdict exceeded the offer of judgment by 1.1 million dollars to determine rejection of the offer was made in bad faith). Although the *Yamaha Motor Co.* Court reversed the district court's attorney's fee award, the reversal stemmed from the district court's failure to consider the intricacy of the liability issues and Yamaha's successful outcome on two substantive claims set forth by the plaintiff. *Id.* Here, Capriati was not successful on any of Yahyavi's claims. AA000195. Instead, the jury properly evaluated the evidence and rendered a verdict that was reasonable in amount given the extent of Yahyavi's claimed special damages and his ongoing pain and suffering. *Id.*

Capriati's failure to contemplate that two of its experts would be stricken and its Answer would be stricken as to liability when it rejected

the offer of judgment is irrelevant. Capriati seemingly wishes to benefit from Kahn's willful misconduct by claiming its liability and damages defenses became unreasonable solely because of the sanctions imposed. Before sanctions were imposed, Capriati's liability and damages defenses were not strong enough to justify its decision to reject Yahyavi's reasonable Offer of Judgment.

The decision to reject a plaintiff's offer of judgment and proceed to trial requires the district court to consider the feasibility of the defendant's defenses in relation to the amount of the offer of judgment. *Beattie*, 99 Nev. at 588-89. The district court presided over a trial that lasted nearly three weeks and fully considered the nature of Capriati's defenses. Based on the state of the evidence known to Capriati when the offer of judgment was made, the district court reasonably exercised its discretion to award Yahyavi his attorney's fees under *Beattie*. AA001019-001026. The district court's evaluation of the *Beattie* factors was not arbitrary or capricious, but based upon substantial evidence. *Id.*

2. The Contingency Fee Award is Supported by Nevada Law and Reasonable in Amount

In determining the amount of fees to award, the [trial] court is not limited to one specific approach; its analysis may begin with any method rationally

designed to calculate a reasonable amount, so long as the requested amount is reviewed in light of the *Brunzell* factors.

Logan, 131 Nev. at 266.

The various methods a district court may use to determine the amount of fees to award includes a contingency fee. *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864 (2005). When exercising its discretion to the amount of fees to award, the district court is required to consider the attorney's professional qualities, nature of the litigation, work performed, and the result. *Brunzell*, 85 Nev. at 349. Although the district court is required to consider the *Brunzell* factors, specific findings addressing each factor are not required to properly exercise its discretion.

Logan, 131 Nev. at 266.

The amount of attorney's fees awarded is reviewed for an abuse of discretion. *Id.* A district court's fee award will be deemed reasonable "as long as the court provides sufficient reasoning and findings in support of its ultimate determination." *Shuette*, 121 Nev. at 865.

a. Contingency fees are regularly used in personal injury cases

It has long been recognized that contingent fee agreements are customary when prosecuting a tort or personal injury suit. *Wood v.*

McGovern, 213 Cal. Rptr. 498, 503 (Cal. Ct. App. 1985); *Johnson v. Westhoff Sand Co.*, 135 P.3d 1127, 1137 (Kan. 2006) (“A contingent fee arrangement is customary in personal injury cases”); *In re Estate of Harnetiaux*, 234 N.E.2d 81, 84 (Ill. Ct. App. 1968); *Merritt v. Faulkner*, 823 F.2d 1150, 1155 (7th Cir. 1987) (Posner, J., concurring); *In re Horenstein*, 810 F.2d 73, 75 (6th Cir. 1986). The Nevada Rules of Professional Conduct expressly recognize the availability of contingent fee agreements to secure legal services. Nev. R. Prof. Conduct 1.5(c).

Contingency fee agreements are commonly used by attorneys who prosecute personal injury claims. Capriati’s counsel routinely litigates personal injury and other tort matters. AA000540-000542. Capriati’s insurer, which managed the entirety of litigation on Capriati’s behalf, routinely litigates personal injury cases. *Ripepi v. American Ins. Cos.*, 234 F. Supp. 156, 158 (W.D. Pa. 1964) (an insurance company is a professional litigant which is in the business of litigation). Both Capriati and Kahn were uniquely aware of the possibility Yahyavi would recover a contingency fee award if he beat the rejected offer of judgment.

The importance of contingency fee agreements cannot be overstated because of the unique purpose they serve for individual litigants.

[C]ontingency fees provide access to counsel for individuals who would otherwise have difficulty obtaining representation. Sadly, a plaintiff sometimes has little to offer a lawyer other than his personal plight. . . . [I]n the absence of contingency fees a client may not have any thing else to give, and without the aid of the matter in the contest, he can never sue for his right, not having otherwise the means to employ counsel.

In re Abrams & Abrams, P.A., 605 F.3d 238, 245 (4th Cir. 2010)

“Ignoring reasonable contingent fee agreements or automatically reducing them would impair claimants’ ability to secure representation.”

Wells v. Sullivan, 907 F.2d 367, 371 (2d Cir. 1990). This is particularly true given the substantial risks facing attorneys who provide legal services on a contingency fee. *Sutch v. Roxborough Mem. Hosp.*, 142 A.3d 38, 70 (Pa. Super. Ct. 2016). The risks attorneys take by accepting contingency fee agreements have been recognized as an additional reason to award attorney’s fees. *King v. Fox*, 851 N.E.2d 1184, 1191-92 (N.Y. 2006). When payment is contingent on success, an attorney should receive a larger overall fee than when payment is guaranteed regardless of outcome. *Rendine v. Pantzer*, 661 A.2d 1202, 1228 (N.J. 1995).

Based on the legal principles outlined above, the Nevada Court of Appeals expressly recognized that a district court “cannot deny attorney

fees because an attorney, who represents a client on a contingency fee basis, does not submit hourly billing records.” *O’Connell v. Wynn Las Vegas, LLC*, 134 Nev. ___, 429 P.3d 664, 666 (Nev. Ct. App. 2018). In other words, a district court can award attorney’s fees based on a contingency fee so long as the *Brunzell* factors are weighed to test the reasonableness of the fee. This Court recently affirmed a district court’s attorney’s fee award based solely on a contingency fee agreement. *Harrah’s Las Vegas v. Muckridge*, Case No. 78678, 2020 Nev. Unpub. LEXIS 959, at *15-16 (Oct. 1, 2020). The availability of awarding attorney’s fees based on a contingency fee agreement cannot reasonably be questioned.

b. The district court properly awarded a 40% contingency fee

“A district court is not confined to authorizing an award of attorney fees exclusively from billing records or hourly statements.” *O’Connell*, 429 P.3d at 671 (*citing Shuette*, 121 Nev. at 864-65). No matter how many times Capriati argues Yahyavi should have provided billing records to support his fee request, he was not required to do so under Nevada law. Other reliable factors are available to consider when determining a reasonable attorney’s fee besides hourly billing, including:

time taken away from other work, case-imposed deadlines, how long the attorney worked with the client, the usual fee and awards in similar cases, if the fee was contingent or hourly, the amount of money at stake, and how desirable the case was to the attorneys involved.

O'Connell, 432 P.3d at 672.

A district court may also consider “the type of case, the length of trial, the difficulty of the case, and the numbers and types of witnesses.”

O'Connell, 432 P.3d at 671.

The district court considered Prince’s contingency fee agreement, which states Prince’s fee shall be “Forty Percent (40%) of all amounts recovered for the claim by settlement, judgment, or award after suit. P0677. This percentage is usual and customary for personal injury lawsuits in Clark County, which Capriati has never disputed. AA000542. Instead, Capriati claims the district court awarded Yahyavi attorney’s fees pursuant to the 40% contingency fee only. Capriati ignores the detailed findings the district court made pursuant to the *Brunzell* factors to support its 40% contingency fee award. AA001023-001024.

Yahyavi provided considerable evidence detailing the time and work Prince spent on this case to justify the 40% contingency fee award. After the January 18, 2019 offer of judgment was served, Prince and his

associate attorneys prepared 30 separate briefings to motions in limine filed by both parties.¹⁷ P0665-0666. Prince attended two separate hearings to argue the parties' motions in limine. P0666. Prince filed a motion to pre-instruct the jury and supporting reply brief. *Id.*

During the weeks before trial, Prince, and his associate, Kevin Strong ("Strong") reviewed thousands of pages of Yahyavi's medical records to coherently understand the complexities of his cervical spine injury and constellation of symptoms. AA000494, P0666. Yahyavi underwent extensive and different medical treatments, the necessity of which needed to be explained to the jury. *Id.* To further complicate the medical picture, Yahyavi suffered a C5 neuropraxic injury from his spine surgery. AA001318-001319. Prince had to address the clinical insignificance of Yahyavi's alleged prior neck pain based on the lone SWMA record. RA0061-0076. A comprehensive review of all the medical records was necessary for Prince, as lead trial counsel, to present the medical evidence to the jury in a clear and accurate manner. P0666. A deliberate review of numerous medical expert reports was also necessary

¹⁷ Prince has served as lead counsel for Yahyavi February 21, 2018 while working for his former law firm. This work was properly considered by the district court.

for Prince and Strong to prepare Dr. Oliveri, Dr. Kaplan, and Dr. Schifini for their respective trial testimony. Prince similarly had to perform substantial work to convey Yahyavi's damages for past and future loss of earning capacity. The multiple facets of Yahyavi's claimed damages demonstrate the work Prince and Strong performed just to prepare Yahyavi's case-in-chief was immeasurable.

Prince and Strong also extensively reviewed the expert reports from Dr. Tung, Capriati's only medical expert. This allowed Prince to identify the underlying weaknesses of Dr. Tung's medical causation opinions to effectively undermine the reliability of those opinions through cross-examination. The same was true for Capriati's other retained experts, Bennett, Dr. Baker, and Kirkendall. Although Kahn's misconduct caused Dr. Baker and Kirkendall to be stricken, Yahyavi anticipated numerous experts to testify on behalf of Capriati and prepared accordingly.

Finally, Prince and Strong synthesized all the evidence to be presented into an effective opening statement that provided a roadmap for the jury to easily follow. They also had to prepare a detailed closing argument to persuade the jury to award Yahyavi extensive damages. The character of the work performed to prepare Yahyavi's case for trial, which

Prince detailed to the district court in an affidavit, cannot reasonably be questioned. AAA000540-000542. Hourly bills were not needed to demonstrate the quality of the work performed given the demands of preparing the case for trial to justify a contingency fee award.

The significant amount of time and effort expended to prepare Yahyavi's case culminated in a trial that lasted three weeks. Over the course of those three weeks, eight witnesses testified. AA000541, P0666. Strong drafted four trial briefs and a motion for sanctions during the course of trial. P0666. Prince had to navigate the complexities that arose from Yahyavi's treatment through the worker's compensation system. This presented its own set of unique challenges to address with the jury not ordinarily present in a personal injury trial.

Capriati suggests there must have been overlap in the work performed because Prince was Yahyavi's fourth law firm. This is factually inaccurate as Prince was actually the third attorney to represent Yahyavi. P0665. Moreover, Yahyavi detailed to the district court that the work prior counsel conducted before Prince's representation began was limited in scope. *Id.* Under these circumstances, the possibility of any duplication of work performed by

Prince or Strong was nonexistent. There is no agreement to compensate any of Yahyavi's prior firms and for Capriati to make such an assertion is unsurprising given the rampant falsities throughout its briefing.

The risks Prince faced by taking Yahyavi's case to trial were properly considered by the district court. A substantial amount of money was at stake given the amount of Yahyavi's claimed damages. Yahyavi's counsel incurred costs of nearly \$200,000.00 to retain experts and proceed to trial. RA0382-0385. If Yahyavi did not obtain a successful outcome at trial, Prince would have been financially responsible for the costs incurred in the action. It was not unreasonable for the district court to consider these risks as a basis to award the 40% contingency fee. *O'Connell*, 429 P.3d at 671.

The result Yahyavi secured at trial provided further evidence to justify the 40% contingency fee award. The verdict amount of \$5,870,283.24 exceeded the offer of judgment by nearly \$2,000,000.00. AA000502-000505. This is no small amount and reflects the extensive time and quality of work performed. The district court was best positioned to appreciate Prince's work because it presided over a three-week trial. The district court witnessed firsthand Prince's efforts to

overcome baseless liability defenses and to undermine the reliability of Dr. Tung's medical causation opinions. The district court observed Kahn engage in deliberate misconduct near the close of trial to unfairly influence the jury's verdict for the benefit of Capriati. Yahyavi's ability to overcome all of these obstacles and secure a verdict that dwarfed the offer of judgment was no small feat and justified the 40% contingency fee award. The district court properly weighed the *Brunzell* factors and exercised its broad discretion to award Yahyavi the 40% contingency fee. AA001019-001026.

c. There was no blanket fee award

Contrary to Capriati's unfounded assertion, Yahyavi never suggested that he can rely solely on the contingency fee agreement as a basis to award fees. This is precisely why Yahyavi provided the district court with substantial evidence detailing the character and quality of the work his counsel performed. AA000482-000542, P0663-0691.

The source of Capriati's frustration stems from the amount of fees Yahyavi was awarded. Capriati suggests that awarding a contingency fee can never be appropriate under Nevada law. Rest assured, however, that if a contingency fee were less than the fee resulting from any other

method of calculation, a defendant, like Capriati, would argue the fee award should be limited to the contingency fee. For example, if a judgment amount of \$1,000,000.00 beat the rejected offer of judgment, Capriati would argue Prince should recover only attorney's fees of \$400,000.00 even if the reasonable value of work spent after the offer of judgment was served exceeded that amount. This illustrates Capriati's arguments are based solely on the circumstances of this case, which undermines its position that a district court can never fairly award a contingency fee under Nevada law. Capriati also suggests this Court should consider a contingency fee only when a lodestar method is applied. This Court specifically disavowed any requirement to apply a lodestar method when considering a contingency fee award. *Shuette*, 121 Nev. at 864 n.99.

Capriati overlooks the safeguards under both *Beattie* and *Brunzell* prevent a district court from just simply issuing a contingency fee award. Capriati downplays the significance of its own failure to reasonably evaluate the risks of rejecting the offer of judgment. As a result, Capriati accepted the risk of a substantial verdict. By rejecting the offer of judgment, Capriati exposed itself to the penalty provisions of NRCP 68.

The district court properly weighed each of the *Beattie* and *Brunzell* factors necessary to support its contingency fee award to Yahyavi. AA001019-001026.

VIII. CONCLUSION

Based on the foregoing, Respondent Bahram Yahyavi respectfully requests this Honorable Court to affirm the judgment and award of attorney's fees and costs in this matter.

DATED this 25th day of November, 2020.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 Business, in 14-point, double-spaced Century Schoolbook font.

2. I further certify that this brief exceeds the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 15,433 words.

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

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

DATED this 25th day of November, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed electronically with the Supreme Court of Nevada on the 25th day of November, 2020.

Electronic service of the foregoing document entitled **RESPONDENT'S**

ANSWERING BRIEF shall be made in accordance with the Master

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