IN THE SUPREME COURT OF THE STATE OF NEVADA

CAPRIATI CONSTRUCTION CORP., INC., a Nevada Corporation Appellant, v. BAHRAM YAHYAVI, an individual, Respondent.	)	Supreme Court No: 80107 District Court Case No: A718689
CAPRIATI CONSTRUCTION CORP., INC., a Nevada Corporation Appellant, v. BAHRAM YAHYAVI, an individual, Respondent.	)	Supreme Court No: 80821

APPELLANT'S REPLY BRIEF

HUTCHISON & STEFFEN, PLLC

Michael K. Wall (2098)
Peccole Professional Park
10080 Alta Drive, Suite 200
Las Vegas, Nevada 89145

Attorney for Appellant

NRAP 26.1 DISCLOSURE

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

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

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

Michael K. Wall (2098)
HUTCHISON & STEFFEN, PLLC
Peccole Professional Park
10080 Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorney for Appellant

-and-

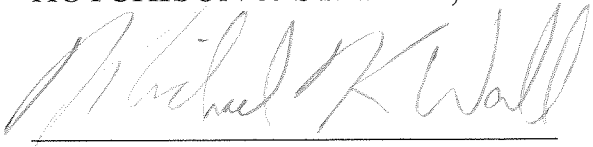
David S. Kahn (7038)
Mark Severino (14117)
WILSON, ELSER, MOSTKOWITZ,
EDELMAN & DICKER LLP
6689 Las Vegas Blvd. South, Suite 200
Las Vegas, NV 89119

Eric Larsen (9423)
LAW OFFICES OF ERIC R. LARSEN
9275 W. Russell Rd., Ste. 205
Las Vegas, NV 89148
Attorneys for Defendant, Capriati Construction Corp. Inc.

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

DATED this 27 day of January, 2021.

HUTCHISON & STEFFEN, PLLC.



Michael K. Wall (2098)
Peccole Professional Park
10080 Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorney for Appellant

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INTRODUCTION

In the answering brief, plaintiff addresses his own version of the facts and ignores the issues raised in the opening brief, preferring rather to respond to strawman issues of his own choosing.

Plaintiff attempts to divert this Court's attention from the district court's errors by focusing on the testimony plaintiff presented, and emphasizing how strong he thinks his case was. Plaintiff takes a "we would have won anyway, so all errors are harmless" approach, but he does not address directly the serious problem that the jury heard only a portion of the evidence on causation and damages. He also underestimates the impact, and the significance of the error of instructing the jury that Capriati was not only insured, but that the insurance carrier–a collateral source–would pay any verdict, no matter how high.

Plaintiff emphasizes how serious the accident was, including a great deal of hyperbole about the severity of the impact, hoping this Court will overlook the fact that most of the defense evidence on this subject was excluded. The theme of the answering brief seems to be that no jury would have believed Capriati's witnesses anyway, so no harm no foul.

Were this an appeal where plaintiff won a verdict fairly and the issue was whether the verdict was supported by substantial evidence, these arguments might

be appropriate. But the issues in this appeal do not go to the strength of the evidence presented; they go to the importance of the evidence excluded, and the legal error of improperly instructing the jury. That plaintiff's witnesses testified the accident was severe, plaintiff was injured, and his medical special damages are relatable is not relevant.

Capriati, through its attorney Kahn and its principal Goodrich, introduced evidence that Capriati had filed for reorganization. The evidence consisted of seven words. The district court sanctioned Capriati severely, not allowing it to present most of its defense, and instructed the jury incorrectly. This Court is asked to determine whether the sanction was too severe in light of the conduct, and whether the instruction, which is wrong as a matter of law, prejudiced Capriati. Arguments about whether there is evidence to support the verdict do not address these legal issues.

It would be impossible in this reply brief to respond to all of plaintiff's misdirections, misstatements and misrepresentations. Only a few arguments in the answering brief warrant response. For all others, Capriati relies on its arguments from the opening brief.

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DISCUSSION

I. The Sanction Was Too Severe.

A. The Bankruptcy Evidence.

Plaintiff argues that Kahn, with nefarious motive, introduced Capriati's bankruptcy and told the jury the bankruptcy was "**ongoing**." RAB 6 (emphasis in original). Plaintiff insists there could be only two possible motives for this conduct; either (1) Kahn was hoping to force a mistrial so he could take advantage of the knowledge he gained of plaintiffs' case at the first trial and do better at a second, or (2) plaintiff was trying to garner sympathy for Capriati by suggesting to the jury that Capriati was impecunious and could not pay a verdict. Kahn asserts that his actual motivation was that he was attempting to respond to plaintiff's improper spoliation of evidence arguments.

Plaintiff argues that Kahn "intentionally"and "by design," with intent to "unfairly influence the true outcome," as part of an "abusive litigation tactic" to "deprive Yahyavi of a fair damages award" told the jury that "Capriati's financial condition was in peril" and an award of damages "could end Capriati's business." RAB 31. "Plaintiff doth protest too much, methinks."[1] Plaintiff has greatly exaggerated the meaning and impact of the seven words Goodrich actually spoke.

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[1]William Shakespeare, *Hamlet*, Act III, scene 2 (paraphrased).

Plaintiff goes so far as to directly accuse both Capriati and Capriati's insurance carrier of a conspiracy to intentionally create a mistrial. This accusation is both baseless and reckless.

As predicted, plaintiff's counsel wasted no time in asserting that he presented no spoliation argument and never used the word spoliation. RAB 3; 35. Of course he never used the word spoliation, he wanted to poison the jury with the spoliation issue without presenting a spoliation argument to the district court for resolution. Plaintiff's counsel did present the concept of failure to preserve documents to the jury, emphasizing both in opening argument and in questioning the first witness that Capriati had lost or destroyed relevant documents after Capriati knew of this lawsuit. The suggestion of spoliation to the jury was palpable and intentional.

Counsel pounded on the lost documents issue, pointing out repeatedly that Capriati destroyed documents it should have preserved. Plaintiff spins this as addressing liability issues, and showing that Capriati had no documents to support its claim that Arbuckle was not driving under the influence, or that Yahyavi shared fault for not having been more careful in a construction zone. But there was never any suggestion or evidence that Arbuckle was impaired, nor were the documents relevant to the defense of comparative fault, which admittedly, was not abandoned

until during trial. No matter how carefully counsel believes he picked his words, he intentionally introduced to the jury the idea that Capriati had destroyed or culpably lost important documents. The implication that these documents would have been damaging to Capriati and that Capriati should be punished for losing the documents was intentionally made. Counsel knew it would inflame the passions of the jurors. With or without the label, the spoliation argument was made to prejudice the jury.

Counsel's words are set forth in the opening brief, so this Court may judge for itself whether this was or was not an improper spoliation argument to the jury. Kahn was responding to this real issue when he attempted an explanation of the missing documents. Whether the method of response was or was not proper, and whether the issue is characterized as a spoliation or a liability argument, the issue regarding the documents was there and was real.

The district court did not accept Kahn's explanation, and this Court may not accept Kahn explanation, but the point is there is another explanation. Plaintiff's insistence there can be only one explanation for the question is incorrect. Kahn swears there were circumstances to which he believed he was responding. In any event, there was only a single question, and a single answer.

Assuming this Court believes the worst of Kahn (and we suggest the truth

lies somewhere else), the question remains whether the sanction was too severe based on the conduct. Put another way, could the conduct have been dealt with in another manner, and the sanction imposed been tailored to correcting the damage actually done, rather than blowing up the entire case.

Capriati believes a proper instruction informing the jury that Capriati was not impecunious and could pay a verdict, and to disregard the bankruptcy, would have been a defensible response. But, instructing the jury to consider Capriati's insurance and giving the jury a blank check was such serious error that it cannot be ignored by this Court.

Plaintiff argues that "the manner in which Kahn elicited the testimony suggested Capriati was still in bankruptcy." RAB 27. There is nothing in either the question or the answer that would support this representation. The answer simply stated "Yes, we filed for reorganization in 2015." AA 2462. Even if this answer could somehow be construed to suggest an ongoing bankruptcy, an instruction that the bankruptcy ended years before trial and that the jury should not consider the bankruptcy for any purpose would have remedied any prejudice from this single question and answer. We must presume jurors capable of following instructions. *See Krause Inc. v. Little*, 117 Nev. 929, 937, 34 P.3d 566, 571 (2001) ("This court presumes that a jury follows the district court's instructions.").

Plaintiff again relies on Kahn's personal notes, which were his work product. Kahn inadvertently left the notes in the courtroom and plaintiff took and exploited them as evidence of Kahn's intent to introduce evidence as to the bankruptcy. The district court recognized that use of Kahn's notes for any purpose was improper. AA 2489. This Court should also reject arguments based on Kahn's notes.

Plaintiff argues at length that evidence of poverty or wealth is not admissible. Kahn's question and the seven word answer hardly qualifies as an attempt to present evidence of wealth or poverty. Kahn's question that lead to Goodrich's answer that told the jury about Capriati's reorganization is no less or more egregious because of speculation that the jury might have inferred Capriati was impecunious. If that implication was there, an instruction that Capriati is not impecunious would have cured any prejudice.

Although plaintiff argues that Kahn's misconduct was extreme, and accuses Capriati of minimizing how serious the misconduct was, Capriati believes the misconduct was not so extreme as to have been irremediable, as plaintiff hyperbolically argues. This Court may review the question and the seven word answer, and determine for itself how severe it considers the misconduct. No amount of hyperbole on the one hand or justification on the other is necessary for

that determination. The record speaks for itself. The question is, given the misconduct that occurred, was the sanction too severe. Plaintiff argues the sanction was "measured and appropriate." RAB 32. Capriati suggests that it was overkill. The district court killed a gnat with a canon.

B. The Sanctions Were Case Ending.

Plaintiff insists that the sanctions were not case ending because the district court did not strike Capriati's answer in its entirety, and "the district court allowed Capriati to contest causation and damages." RAB 34. While both the district court and plaintiff characterize the sanctions imposed as something less than case ending, under the circumstances of this case, they ended the defense.

A primary defense was that Yahyavi was exaggerating both the severity of the impact and his injuries. Because Yahyavi had previously suffered from neck pain,[2] the relatability of the medical special damages was in doubt. Having removed all scientific evidence of the speed of the vehicle and the severity of impact, and all defense evidence regarding Yahyavi's ability to continue working

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[2]Plaintiff questions both the existence of prior neck pain and the strength of the evidence of prior neck pain, but this turned entirely on the credibility of Yahyavi; even his medical providers "tr[ied] to come up with explanations that would allow for that documentation[of prior neck pain]" based solely on Yahyavi's denials. AA 1718-19. The evidence regarding the speed of the vehicle and the severity of the impact also addresses Yahyavi's credibility; had the jury found Yahyavi incredible, it might not have accepted his denial of his prior medical record.

in the future, the jury was left with only Yahyavi's testimony that he was traveling at 30 mph, an obvious but unrefuted falsehood, that the impact was the equivalent of a bomb going off, and the testimony of Yahyavi's treating physicians regarding treatment, severity, relatability, future employability, and damages.

The half defense Capriati was allowed to present was rendered meaningless without the half that would have put it into context. Despite plaintiff's insistence that Capriati was able to put on a damages defense because its "two primary witnesses" on this subject testified, it is not an overstatement of the matter that Capriati was not allowed to present any defense; the defense to causation and damages was eliminated, and the partial defense presented was for all real intents and purposes rendered meaningless.

C. The Exclusion of A Defense Was Prejudicial.

Plaintiff argues that Capriati was allowed to present a defense, but a defense without critical witnesses is not a defense. Plaintiff insists that "Capriati was allowed to call its two most critical experts," RAB 24, before sanctions were imposed. Plaintiff repeatedly refers to Dr. Tung, Capriati's medical causation expert, and Edward Bennett, Capriati's vocational rehabilitation expert, as "Capriati's primary damages experts," as if plaintiff's counsel is in a position to dictate the relative importance of Capriati's witnesses.

Capriati never designated primary vs. secondary experts, nor does it agree with plaintiff's assessment of who its most important experts were. Every expert designated by Capriati was important to the defense. Capriati would not attempt to assess relative importance of any of its witnesses, nor is plaintiff in a position to make such a designation. Dr. Tung and Bennett were causation experts, and they were of course important to that aspect of the damages defense. But the primary defenses were that plaintiff had preexisting conditions, and was misrepresenting the severity of the accident, his medical history, and the relatability of his damages. Of critical importance to the defense, possibly of greatest importance, was Dr. Baker's evidence establishing beyond scientific doubt the possible speed of the vehicle and the severity of the impact, evidence that was corroborated by plaintiff's abandoned rebuttal expert. Equally important was Kirkendall's testimony as to future damages.

These expert's opinions were not more or less important to Capriati's defense than was the testimony of Dr. Tung and Bennett. They all are necessary to present a single, cohesive defense. "You got to present half a defense as to damages, so quit your bellyaching," is hardly a legal response to the argument that evidence critical to the defense was excluded. No matter how plaintiff would like to diffuse the error by misdirection regarding issues not presented in this appeal,

the issue is whether the evidence was properly excluded. If it was not, the potential effect on the verdict cannot be denied, and the only possible result is reversal.

Plaintiff supports his argument that Capriati was allowed to present a defense with the assertion that Capriati cross-examined plaintiff's witnesses. Plaintiff says he has never taken the position that cross-examination is a substitute for expert witness testimony, and follows by making precisely that argument. RAB 64.

Capriati's cross-examination of plaintiff's medical experts (he presented no other experts) is no substitute for excluding Capriati's medical and accident reconstruction experts, no matter the general value of cross-examination in the legal system. That Capriati was allowed to cross-examine plaintiff's witnesses hardly renders harmless the decision to allow it to present only half a defense, which made no sense without the other half.

Plaintiff expends pages on the proposition that Yahyavi's medical special damages were caused by and related to the accident. Although Capriati believes the evidence demonstrated that Yahyavi had serious prior medical conditions, and that the medical specials, for the most part, were exaggerated and not relatable, this is not an issue Capriati has raised on appeal. Plaintiff's experts testified as

expected, and Dr. Tung testified on behalf of Capriati. Had the record not been infused with the error, it would have been up to the jurors, based on the medical testimony, to resolve the causation and damages issues. But the jury was not allowed to perform its duty because the defense was taken from it, the defense witnesses were not allowed to testify, and the jury was instructed to return a verdict in favor of Yahyavi and that the sky was the limit for the damages.

The jurors cannot evaluate the medical testimony in a vacuum. The credibility of the doctors, the correctness of their causation opinions, and the amount of damages are all related to the version of the facts the jury believes. Although there is no doubt that Arbuckle is liable for the accident, the severity of the impact and the reasonableness of all of the claimed damages, including how Yahyavi reported the accident to his medical providers, is inextricably intertwined with the jury's view of the facts. Plaintiff's doctors may well have testified as represented in the answering brief that the accident caused all of the damages, but whether the jury would have accepted that testimony, or rejected it, or discounted it, had it known the facts, can never be known, because critical evidence regarding the facts was withheld. It is not enough to win the medical causation battle; if all the competent evidence regarding the facts is not presented, all the medical causation testimony in the world cannot render the error harmless.

D. The Severity of the Collision.

Plaintiff selected from the accident photos four to include in his brief, which are hard to see as reproduced, and make the severity of the property damage appear greater than it was. This Court may review all of the photographs, RA 155-167, and come to its own conclusion regarding the severity of the impact.

Actually, the windshield was broken, there is some glass on the dashboard, and there is a small dent in the A-Pillar support on the passenger side, indicating a rather less dramatic impact than plaintiff portrays.

But how this Court views that evidence is not critical; how the jury viewed the evidence is what matters. And how the jury might have viewed that evidence had expert explanation been provided is critical. There can be no substantial evidence review if the evidence was excluded, as was the case here. In a review of whether evidence should have been excluded, this Court considers the relevance and admissibility of the evidence, not its weight. The jury gets to consider the weight.

Plaintiff makes the categorical statement that the vehicle was traveling at 25-30 mph, although the physical evidence, as determined by plaintiff's own expert, was that the speed was most likely 10 mph, and as demonstrated by Dr. Baker, was more likely approximately 3 mph. Plaintiff follows by emphasizing

Yahyavi's testimony that when he hit the forklift (despite numerous mischaracterizations by plaintiff that the forklift hit him, the physical evidence demonstrates that he hit the forklift) it was "like a bomb went off," showcasing Yahyavi's penchant for hyperbole. Plaintiff makes other representations regarding facts that are disputed , spinning them to plaintiff's liking, to say the least. These are, for the most part, cited to Yahyavi's own testimony, and to the portions of Arbuckle's testimony that admits liability. Plaintiff concludes with the assertion that "the evidence proved this collision was serious, not minor." RAB 10.

Were this Court called upon to determine the severity of the crash, plaintiff's characterization of the possible inferences from the testimony that was presented might be of significance. But in this case, proving there is evidence in the record from which the conclusion "the accident was serious" can be asserted misses the point. The accident may have been severe. It may have been minor. It was actually somewhere in between these extremes. But these characterizations of the facts, regardless of one's take on them, emphasize why reversal is mandated.

A substantial evidence review is appropriate if all of the relevant evidence was presented and the jury reached a verdict. If provided with all of the evidence, nothing is more securely established than the prerogative of the jury to find the facts. But where key relevant evidence is withheld from the jury, unless that

evidence was properly withheld, the jury's verdict is not supportable.

In this case, the evidence that was excluded went directly to the speed of the vehicle and the severity of the impact. These were critical facts to determination of the credibility of the witnesses, and the necessity and relatability of the medical special damages. The jury could not have weighed these factual issues correctly if it was told the accident happened at 30 mph, when it actually happened at 3 mph. The impact may have been minor, hard, serious or severe, but the jury could not determine that fact fairly if it was told only the facts that support plaintiff's testimony.

At issue in this case was primarily plaintiff's credibility. If he lied as to the speed of the car, he told that same lie to all of his care givers, and to the jury. This impacted the testimony of the medical providers, and the amount of the damages awarded. That is all well and good if the evidence that was excluded was properly excluded. But if it was not, the verdict must be reversed. Either way, the verdict is not a fair representation of the real damages; if there was no legal basis for excluding the evidence, this Court should not countenance an unfair verdict, not even for the purpose of punishing Kahn for his conduct.

Plaintiff emphasizes that Arbuckle admitted the impact was a "**hard impact**," RAB 9 (emphasis in original), repeating this fact as a mantra throughout

the answering brief, as though that admission lays the question of the severity of impact to rest. But Arbuckle's estimation of the severity of the impact is only one piece of evidence. His perception of the impact while sitting on a heavy forklift and hearing the breaking glass is one piece of the puzzle. The term "hard impact" is a matter of opinion, to be weighed by the jury based on the way it was presented, the manner and demeanor of the witness, and all of the other evidence on the issue, including the photographs, the evidence regarding the speed of the vehicles, and the expert's conclusions based on their testing and experience. That Yahyavi described the impact as a bomb and Arbuckle admitted the collision was hard does not render moot all other evidence regarding the subject. Yahyavi may be exaggerating and Arbuckle may be mistaken. Either way, the scientific evidence is critical.

The issue of the speed of the vehicle was not decided nor rendered moot because Arbuckle candidly admitted there was an impact, and adopted the questioner's characterization of that impact as hard. AA 1422. [3] The jury could have weighed that evidence against other evidence of speed and severity of impact, and this would have influenced the verdict, even if it did not eliminate the

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[3]Q. Because it was a hard impact, wasn't it?
A. Yes, sir.

verdict. But this evidence was not presented; the key evidence was excluded. The speed of the vehicle evidence was excluded. The severity of the impact evidence was excluded. The expert evidence that the intrusion of the blades into the passenger compartments of the vehicle was minimal was excluded. The evidence regarding the scratch on the rear view mirror was excluded. The opinion of plaintiff's own expert regarding the physics of how the accident happened was excluded. The evidence regarding Yahyavi's credibility as a witness was excluded. All that was left was plaintiff's self-serving and hyperbolic testimony that he was hit at 30 mph and a bomb went off, coupled with Arbuckle's candid admission that there was an impact.

If the evidence had been excluded based on lack of relevance or any other rule of evidence making it inadmissible, this Court would have no difficulty reviewing the reasons for exclusion, and ruling that the evidence was properly excluded or should have been admitted. But the evidence was relevant.[4] It was

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[4]A portion of Dr. Baker's expert testimony was excluded because the district court considered it to be improper biomechanical evidence. Plaintiff has incorrectly labeled that biomechanical evidence as a medical causation opinion, but this Court has approved of biomechanical evidence in the past. *See Rish v. Simao*, 132 Nev. 189, 195, 368 P.3d 1203, 1208 (2016) (biomechanical evidence can be used if a sufficient foundation exists). Capriati believes the district court's exclusion of biomechanical evidence to have been incorrect as a matter of law. But because of how the case ended, this is not an issue in this appeal. It may be an issue following remand, should this Court agree that remand is required. In this appeal,

not excluded for lack of relevance or any other evidentiary reason. It was excluded as a sanction for Kahn's introduction of Capriati's bankruptcy into the case. The question of whether that sanction in response to a single question and answer was too severe is therefore squarely presented to this Court. If the sanction is too severe, the verdict is unsound, and reversal and remand is mandated. No matter the strength of other evidence in the record, the improper exclusion of critical evidence mandates reversal for a new trial.

E. Evidence of Speed Was Critical.

Plaintiff argues that the speed of the vehicle at impact is not relevant and had no impact on the verdict based on a series of *non sequiturs*. First, he suggests that the jury did not consider Yahyavi's estimate of 30 mph to be exaggerated, and was not impressed with Kahn's cross-examination on this point. Of course, with no counter-evidence on speed, why would the jury question Yahyavi's testimony? Plaintiff then suggest that the photographs of the damage to the vehicle made it unnecessary for Yahyavi to exaggerate his speed to prove the collision was major.

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the testimony of Baker on the speed of the vehicle and the severity of the impact, and related issues, is at issue. This evidence was critical to the defense, and to the case itself viewed from any impartial perspective. It should not have been excluded as a sanction. Had the evidence been presented, the verdict would have been affected.

But a review of all of the photographs shows limited impact damage. Had the jury heard from an expert that the vehicle was traveling at a very low speed, and had that expert explained the photographs, pointing where they showed minimal impact, the jury would have been equipped to make a fair determination of this issue.

Instead, plaintiff pushes the untenable position that, no experts were necessary, the jurors could just look at the pictures. Plaintiff argues that the speed of the impact was not important to Yahyavi's medical providers, who said there was no correlation between speed and their treatment, but the testimony of the doctors is not all that clear, as set forth in the opening brief, and even though it is true that serious injury can result from minor impact, more serious injury may result the more severe the impact.

That Dr. Tung, Capriati's expert, did not discuss speed hardly proves that speed of the vehicles was not a critical consideration to his estimate of injury, and that he admitted there was some injury does not prove that all of the claimed injury existed, or was as severe as plaintiffs claimed, or was relatable to the accident. Dr. Tung testified it was not.

Capriati's other experts would also have testified regarding these matters had they not been excluded, and the fact that plaintiff withdrew Leggett, his expert

witness, at the middle of the trial, would not have kept the information from the jury. Had the jury known that all experts agreed as a matter of physics based on multiple crash tests and other scientific evidence that the impact was at a much slower speed than Yahyavi insisted, the verdict might have been affected in a variety of ways. The argument that speed was not relevant and had no impact on the verdict is sophistic. We cannot know how much impact the additional evidence would have had on the jury, but we can rest assured it would have had an impact.

Plaintiff argues that Capriati's contention that the accident occurred at a very slow speed is inconsistent with Kahn' s opening statement, in which Kahn accused Yahyavi of driving too fast in a construction zone, thus contributing to the accident. Kahn made no such argument. AA 1099-1101. Kahn argued that Yahyavi should have been using more care while driving in a construction zone. *Id.* And even had Kahn implied (which he did not) that Yahyavi should have slowed down if he was traveling at 30 mph, as he claimed, this would not mean the jury should not be told what the scientific evidence established regarding the speed of the impact. Nothing can compensate for the jury not having been told that the mark on the rear view mirror demonstrated that the vehicle was barely moving at the point of impact. Given that Yahyavi testified he did not brake, and

the physical evidence shows he did not brake, and his airbags did not deploy, his estimates of speed are not bad judgment; they show misrepresentation.

Plaintiff essentially argues that the evidence he presented was so strong on liability, severity of impact and causation that the testimony of Baker and Kirkendall would not have convinced the jury otherwise, so the exclusion of the testimony was harmless, even if it was error. The argument ignores that it is the jury that weighs the evidence, not plaintiff, and the representation that the jury would have rejected evidence never presented is nothing more than conjecture.

The jury may have rejected Yahyavi's self-serving testimony entirely had it learned he was lying as to speed. It may have adjusted its view of the extent of the damages, or the relatability. It may have concluded that Yahyavi was prevaricating regarding his ability to do any work at all. Plaintiff's insistence that the jury would not have been persuaded by the evidence is speculation. Regardless of whether there would or would not have been a defense verdict or a plaintiff's verdict based on the evidence presented, whatever verdict was rendered would likely have been different from the present verdict had all the evidence been presented. That makes the verdict insupportable.

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II. The Instruction is Wrong as a Matter of Law.

A. There Was No Waiver Based on a Lack of Objection.

Plaintiff places great emphasis on its assertion that Kahn did not object to the jury instruction, and never proposed an alternative instruction. The characterization of how the matter proceeded, and whether the district court was aware of Capriati's objection to the insurance instruction is one which will depend on this Court's view of the record. Capriati has set forth in the opening brief his argument that Kahn did object, although inartfully, and the record should be read as preserving this issue for appeal. AOB 29-30 n.12; 32; 45-6.

In any event, the error of the insurance instruction is so apparent and shocking as to mandate reversal with or without an objection. *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1005, 194 P.3d 1214, 1219 (2008) (an incorrect instruction requires reversal if the instruction was prejudicial).

Plaintiff quotes out of context two statements by Kahn, five pages apart in the transcript, suggesting that Kahn agreed to the insurance instruction. RAB 50. In both cases, the issue of striking the answer and issuing case terminating sanctions was being discussed. The issue of an instruction on insurance was not being discussed. Although Kahn eventually allowed the instruction on insurance to go to the jury, there is no indication in the record that he approved of it. Indeed,

he informed the court that insurance should not be discussed, but submitted the matter. AA 2537.

There was a great deal of confusion, the issue primarily being discussed was whether to strike the answer and proceed to a prove-up, and discussion of the proposed curative instructions was for the most part lost in the shuffle. Plaintiff argues that he provided the instructions to Kahn "in his sanctions motion," RAB 52, but that motion was filed at 7:59 a.m. on the morning of the hearing that started at 9:00 a.m. Counsel were already en route to court.

While the argument can be made that Kahn should have made a better objection to the insurance instruction, Kahn may have been referring to other parts of the instructions in his comments, and the issues were all being discussed. In light of the seriousness of the issue, and the fact that the instruction is not arguably correct as a matter of law, it would be a serious miscarriage of justice to parse the transcript looking for a waiver, rather than to acknowledge that Kahn did object to the sanctions generally, and the instruction on insurance specifically, as set forth in the opening brief.

B. The Instruction Is Wrong.

No matter how this Court views the manner in which the offending instruction was given, it cannot deny that the instruction is wrong as a matter of

law.

Plaintiff argues that the mere suggestion of bankruptcy necessarily raised the issue of insurance, but the connection is not apparent.[5] Plaintiff argues that instructing the jury there was endless insurance coverage leveled the playing field, "preventing the jurors from rendering a verdict influenced by sympathy for Capriati's seemingly fragile financial condition." RAB 28. Plaintiff exacerbates this incorrect argument by emphasizing that it was the insurance carrier, not Capriati, that would pay the verdict.

The fact that insurance will pay did not make Capriati not the defendant, nor is this situation different from any other where a defendant has insurance; indeed, that the insurer, not the defendant, will pay is the reason for the rule that the jury must not be informed about a defendant's insurance. Plaintiff has stood this established law on its head.

If the issue was leveling the playing field, this could have been accomplished by informing the jurors that the bankruptcy was concluded, and Capriati, the defendant, was not impecunious, coupled with an instruction not to

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[5]Plaintiff argues that every juror knows reorganization means bankruptcy, and suggests that the average juror would deduce from the fact of bankruptcy that if the case was going forward, there must be insurance. Not only is the premise faulty (a matter could go forward following reorganization in the absence of insurance), the average juror in not likely to make any such assumption.

allow sympathy or considerations of defendant's ability to pay to influence the verdict. Telling the jury that Capriati had unlimited insurance that would pay any verdict did not level the playing field; it tilted the playing field dramatically in favor of an excess verdict. The proof is in the pudding, *i.e.*, the excess verdict.[6]

Plaintiff focuses on the fact that the insurer would have paid the verdict, and argues incorrectly that Kahn was counsel for the carrier, not for Capriati.[7] He suggests that Capriati had no stake in the outcome. Plaintiff also argues that the collateral source doctrine applies only to defendants, not to plaintiffs. The collateral source doctrine expressly addresses this situation. In many cases, if not most, the damages will be paid in full or in part by insurance. As a matter of black letter law, the jury is not told that insurance will pay. Instead, the jury is instructed, as this jury was initially before the district court chose to ignore the law, that whether or not the plaintiff or the defendant carries insurance is a matter they are not to consider for any reason. An instruction that Capriati is a profitable company able to respond to a verdict would have been preferable. But an

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[6]Plaintiff argues there is no excess verdict because he asked for the moon, but was given only a star. The amount of the verdict speaks for itself.

[7]The tripartite relationship between attorney, insurance carrier, and client does not mean the attorney does not represent the client. Indeed, the attorney's primary responsibility is to the client. *See State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. 743, 747, 357 P.3d 338, 340 (2015).

instruction that Capriati has insurance that will pay any verdict no matter how high cannot be given, even in the face of serious and repeated misconduct, which does not exist in this case.[8]

Plaintiff argues that the collateral source doctrine prevents juries from reducing damages caused by a negligent party, but "the rule is not designed to prevent juries from increasing a damages award because liability insurance is available." RAB 56. Of course, plaintiff has cited no authority for this preposterous assertion.

Plaintiff argues that because evidence of insurance may come in for issues unrelated to damages, this supports the proposition that it should come in to increase an award. RAB 56. This is nonsense.

Collateral source evidence cannot come in for any purpose. "We now adopt a *per se* rule barring the admission of a collateral source of payment for an injury into evidence for any purpose." *Proctor v. Castelletti*, 112 Nev. 88, 90, 911 P.2d 853, 854 (1996). This applies to evidence intended to decrease an award, as well as evidence intended to increase an award.

In Nevada, the jury must not be informed that the defendant has insurance. *See Silver State Disposal Co. v. Shelley*, 105 Nev. 309, 312, 774 P.2d 1044, 1046

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[8]The district court noted this was the only incident of misconduct. AA 2476.

(1989) (recognizing prejudice to defendants from such information). The standard jury instruction states that insurance is not to be considered for any purpose. *See* NEV. J.I. 1.07 ("You are not to discuss or even consider whether or not the defendant was carrying insurance that would reimburse him for whatever sum of money he may be called upon to pay to the plaintiff," and "Whether or not either party was insured is immaterial, and should make no difference in any verdict you may render in this case.").

Finally, plaintiff cites cases from other jurisdictions recognizing that when the defendant has engaged in "poormouthing" or presented evidence that it is unable to pay a verdict, evidence of insurance may be admitted to counter this. Such a rule is not appropriate here, because Goodrich's seven word answer would not amount to poormouthing sufficient to override Nevada's policies against admission of evidence of insurance. Further, such a rule would be unwise from a policy perspective. A simple instruction that Capriati is able to pay a verdict, without tying it to insurance, is a far better approach, and does not violate this Court's absolute ban on collateral source evidence.

III. The Award of Attorney's Fees Is Unreasonable.

Plaintiff argues that the district court may use any method to calculate a reasonable fee award so long as the amount is reasonable and "in accordance with

the factors enumerated under Nevada law." RAB 30. Capriati does not quibble with this statement of law; it argues that the method used by the district court in this case did not result in a fee reasonable in amount when considering the applicable factors.

Although plaintiff provides this Court with pages of generic discussion of why continent fees are allowed and are a good idea, he does not explain why, as a matter of public policy, an attorney's fee between $2,500 to $5,000 per hour should be imposed as a penalty against a non-party to the contingency agreement for failure to accept an offer of judgment.

Plaintiff's counsel suggests that he should be compensated in this case for his failures in other cases, because that is part of the risk he has assumed, but Capriati should not be required to pay for plaintiff's counsel's business model. Capriati is liable only for the fees that were reasonably incurred in this case after rejection of the offer of judgment, and only if rejection of the offer was grossly unreasonable. Even if this Court accepts plaintiff's argument that a fee of $2.5 million is not facially offensive for a year's worth of work on a single case, this Court should consider that the purpose of the offer of judgment rule is to promote settlement, not to punish the exercise of the right of trial.

An offer of judgment shortly before trial of $3 million is hardly what this

Court envisioned as a triggering event for the promotion of settlement, and it cannot reasonably be concluded that rejection of that offer was grossly unreasonable under the circumstances of this case. The primary purpose of the rule is settlement, not fee shifting. As a matter of public policy, this Court cannot countenance an award as punishment[9] not based on this case alone. The argument that the business practice of taking risk justifies a higher allowance of fees than otherwise would be considered appropriate must be rejected in the context of NRCP 68. An award based on the value of services independent of the contingency would serve the purpose of incentive to settle, without overburdening the constitutional right of trial. It may acceptable to require the plaintiff who agreed to the contingency to pay a higher fee. After all, the lawyer assumed the risk, the plaintiff gets the benefit of representation, and the plaintiff agreed to the fee structure. But these arguments cannot justify requiring the opposing party to pay a fee unrelated to the purposes of the settlement rule, the work actually performed, or any concept of reasonableness.

The remainder of plaintiff's arguments regarding the attorney's fees are

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[9]This Court has used the word punishment regarding the awarding of fees in this context, but Capriati suggests that no party may be punished for exercising the right of trial. Incentive not to unreasonably refuse a settlement offer is what the rule intends. Not punishment. A party who refuses to settle may be subject to the risk of paying fees, but not as punishment for the exercise of a constitutional right.

addressed in the opening brief. Capriati will rely on those arguments. However, Capriati notes that plaintiff has misrepresented *Harrah's Las Vegas, LLC v. Muckridge*, 473 P.3d 1020 (Nev. 2020) (unpublished) as a case where this Court "affirmed a district court's attorney's fee award based solely on a contingency fee agreement." RAB 77. Although the district court awarded attorney's fees based on a contingency agreement, the amount of the award was $42,819.17, and the appellant "[did] not contest the amount of fees awarded but contends that the *Beattie* factors weighed in its favor." *Id.* There is not a word in the unpublished opinion addressing whether the amount of an attorney's fee can be based solely on a contingency agreement, let alone the suggestion that a multi-million dollar award of fees can be based solely on a contingency agreement to which the defendant is not party. This Court addressed the district court's application of the *Beattie* factors, noting specifically that the district court "conducted a mathematical analysis," considering a number of factors to determine the reasonableness of the amount. This Court did not approve the blanket awarding of a contingency regardless of the amount.

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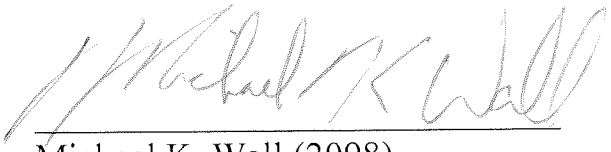
CONCLUSION

The judgment of the district court should be reversed.

DATED this 27 day of January, 2021.

HUTCHISON & STEFFEN, PLLC.



Michael K. Wall (2098)
Peccole Professional Park
10080 Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorney for Appellant

ATTORNEY'S CERTIFICATE

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

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 6,986 words.

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

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

DATED this 21 day of January, 2021.

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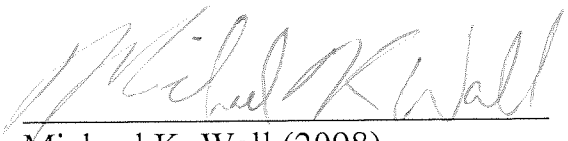

Michael K. Wall (2098)
Peccole Professional Park
10080 Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorney for Appellant

CERTIFICATE OF SERVICE

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

Dennis M. Prince, Esq.
PRINCE LAW GROUP
10801 West Charleston Blvd. Ste. 560
Las Vegas, NV 89135
Tel: (702) 534-7600
Fax: (702) 534-7601

Attorney for Respondent Bahram Yahyavi

DATED this 27th day of January, 2021.

An employee of Hutchison & Steffen, PLLC