IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

WYNN LAS VEGAS, LLC d/b/a WYNN LAS VEGAS,
Appellant,
v.
YVONNE O'CONNELL, an individual,
Respondent.

No. 70583

DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

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

WARNING

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

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

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

1. Judicial District Eighth Department V

County Clark Judge Carolyn Ellsworth

District Ct. Case No. A-12-655992-C

2. Attorney filing this docketing statement:

Attorney Lawrence J. Semenza, III, Esq. Telephone 702-835-6803

Firm Lawrence J. Semenza, III, P.C.

Address 10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145

Client(s) Appellant WYNN LAS VEGAS, LLC d/b/a WYNN LAS VEGAS

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

3. Attorney(s) representing respondents(s):

Attorney Christian M. Morris, Esq. Telephone 702-434-8282

Firm NETTLES LAW FIRM

Address 1389 Galleria Drive, Suite 200
Henderson, Nevada 89014

Client(s) Respondent YVONNE O'CONNELL

Attorney _____ Telephone _____

Firm _____

Address

Client(s) _____

(List additional counsel on separate sheet if necessary)

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

- ☐ Judgment after bench trial
- ☒ Judgment after jury verdict
- ☐ Summary judgment
- ☐ Default judgment
- ☐ Grant/Denial of NRCP 60(b) relief
- ☐ Grant/Denial of injunction
- ☐ Grant/Denial of declaratory relief
- ☐ Review of agency determination
- ☐ Dismissal:
  - ☐ Lack of jurisdiction
  - ☐ Failure to state a claim
  - ☐ Failure to prosecute
  - ☐ Other (specify): _____
- ☐ Divorce Decree:
  - ☐ Original ☐ Modification
- ☒ Other disposition (specify): Rule 50/59 Motion

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

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

None

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

None

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

Respondent alleges that on or about February 8, 2010, she was a guest at Appellant's property and slipped and fell on a foreign substance. Appellant denies that it was negligent. Respondent alleged a single claim of Negligence. After a jury trial, Respondent was awarded damages of $150,000.00 in past pain and suffering and $250,000.00 in future pain and suffering. The jury found Respondent to be 40% at fault and Appellant to be 60% at fault. As a result, Respondent's award was reduced to $240,000.00 due to her own comparative negligence. Respondent was also awarded pre-judgment interest in the sum of $17,190.96. The District Court entered a Judgment on Jury Verdict in favor of Respondent in the amount of $257, 190.96. Appellant filed a Renewed Motion for Judgment as a Matter of Law or, Alternatively, for a New Trial or Remittitur, which was denied by the District Court. Appellant appeals from the Judgment on Jury Verdict and the denial of the Renewed Motion for Judgment as a Matter of Law or, Alternatively, for a New Trial or Remittitur, which were both issued in error, and any orders, judgments and/or rulings made appealable by the foregoing including but not limited to any award of costs and/or interest to the Respondent.

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

(1) Did the District Court err by not granting Appellant's motions for judgment as a matter of law due to the utter lack of evidence that Wynn had constructive notice of the foreign substance that allegedly caused the Respondent to fall on Wynn's property?

(2) Did the District Court err by failing to correctly instruct the jury the law related to constructive notice of the allegedly hazardous condition required for Respondent to prove her negligence claim?

(3) Did the District Court err by permitting Respondent's treating physicians to testify at trial after they were untimely and/or improperly disclosed?

(4) Did the District Court err by permitting Respondent's treating physicians to testify as expert witnesses?

CONTINUED ON ATTACHED PAGE

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

None.

WYNN LAS VEGAS, LLC V YVONNE O'CONNELL – SUPREME COURT NO. 70583

ATTACHMENT PAGE TO QUESTION #9

(6) Did the District Court err by permitting the jury to consider future pain and suffering damages when Respondent failed to provide any scientific evidence in support of her alleged damages and she failed to apportion her damages between her pre-existing, subsequent and contributing injuries?

(7) Did the District Court err by permitting Respondent to question Appellant's witnesses about the lack of video surveillance in this case and permitting Respondent to argue that Appellant "controlled the evidence" in this case?

(8) Did the District Court err by not granting a new trial based on upon the statements of Respondent's counsel that the jury is the "voice of the conscience of the community" during closing arguments?

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

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

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

☐ A substantial issue of first impression

☐ An issue of public policy

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

☐ A ballot question

If so, explain:

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

Under NRAP 17(b), this matter should presumptively be assigned to the Court of Appeals because it is an appeal from a judgment, exclusive of interest, attorney fees, and costs, of $250,000 or less in a tort case. However, Appellant believes that the Supreme Court should retain this case due to: (1) the apparent ambiguity under Nevada law related to what places a property owner on constructive notice of a hazardous condition and (2) the lack of Nevada law related to whether a plaintiff who has a preexisting condition and later sustains an injury to that area bears the burden of apportioning his or her injuries, treatment and damages between the preexisting condition and the subsequent accident. These issues regularly arise and litigants should have guidance on what their duties are under the law.

14. Trial. If this action proceeded to trial, how many days did the trial last? 7

Was it a bench or jury trial? Jury Trial

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from December 15, 2015

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

17. Date written notice of entry of judgment or order was served December 15, 2015

Was service by:

☐ Delivery

☒ Mail/electronic/fax

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

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

☒ NRCP 50(b) Date of filing December 30, 2015

☐ NRCP 52(b) Date of filing _____

☒ NRCP 59 Date of filing December 30, 2015

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

(b) Date of entry of written order resolving tolling motion May 25, 2016

(c) Date written notice of entry of order resolving tolling motion was served May 25, 2016

Was service by:

☐ Delivery

☒ Mail

19. Date notice of appeal filed June 8, 2016

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

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

NRAP 4(a)(1)

SUBSTANTIVE APPEALABILITY

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

(a)

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

(b) Explain how each authority provides a basis for appeal from the judgment or order:
(1) Respondent alleged a claim for Negligence due to a slip and fall on Appellant's property. A final judgment was entered in favor of Respondent after a jury trial.

(2) Appellant moved for a new trial and for judgment as a matter of law and the District Court subsequently entered an order denying the motion for a new trial and for judgment as a matter of law.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Plaintiff - Appellant WYNN LAS VEGAS, LLC d/b/a WYNN LAS VEGAS

Defendant - Respondent YVONNE O'CONNELL

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

N/A

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

Respondent alleged a claim for Negligence due to a slip and fall on Appellant's property. This claim was resolved with a judgment following a jury verdict entered on December 15, 2015.

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

☒ Yes

☐ No

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

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

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

☐ Yes

☒ No

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

☐ Yes

☒ No

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

The final judgment and order denying a motion for new trial are independently appealable under NRAP 3A(b).

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

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

VERIFICATION

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

Wynn Las Vegas, LLC
Name of appellant

Jul 6, 2016
Date

Nevada, Clark County
State and county where signed

Lawrence J. Semenza, III, Esq.
Name of counsel of record

Signature of counsel of record

CERTIFICATE OF SERVICE

I certify that on the 6th day of July, 2016, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

NETTLES LAW FIRM
Christian M. Morris, Esq.
1389 Galleria Drive, Suite 200
Henderson, Nevada 89014
Attorneys for Respondent Yvonne O'Connell

Ara H Shirinian - Settlement Judge
10651 Capesthorne Way
Las Vegas, NV 89135

Dated this 6th day of July, 2016

Signature

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CLERK OF THE COURT

ACOM
DONALD C. KUDLER, ESQ.
Nevada Bar No. 005041
CAP & KUDLER
3202 W. Charleston Boulevard
Las Vegas, Nevada 89102
(702) 878-8778
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, an individual, Plaintiff, vs. WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, doing business as WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X; inclusive, Defendants.	CASE NO.: A-12-655992-C DEPT NO.: V

AMENDED COMPLAINT

Plaintiff YVONNE O'CONNELL, by and through her attorney of record, DONALD C. KUDLER, ESQ., of the law offices of CAP & KUDLER, and for her causes of action against Defendant WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, doing business as WYNN LAS VEGAS, alleges as follows:

I.

At all times herein mentioned, Plaintiff, YVONNE O'CONNELL, was a resident of Las Vegas, Clark County, State of Nevada.

II.

At all times mentioned herein, Defendant, WYNN LAS VEGAS, LLC, is a Nevada Limited Liability Company, doing business as WYNN LAS VEGAS, and is authorized to do business in the State of Nevada.

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III.

The true names and capacities of the Defendants designated herein as a DOE or ROE CORPORATION are presently unknown to Plaintiff, who, therefore, sues said Defendants by said fictitious names. Defendants designated as DOES I through X and/or ROE CORPORATIONS I through X are the owners, agents, employers, employees, lessors, lessees, successors and/or predecessors in interest, contractors, subcontractors, assigns, distributors or manufacturers of materials or other individuals otherwise in possession and/or control of the business or premises herein alleged, including construction, maintenance, inspection, safety, design, supervision, hiring, training, and care of the business and premises as stated herein. Plaintiff is informed, believes and thereon alleges that each of the Defendants designated as a DOE or ROE CORPORATION is in some manner responsible for the events and happenings referred to herein and caused damages directly or proximately to Plaintiff as herein alleged. Plaintiff will ask leave of Court to amend her Amended Complaint to insert the true names and capacities are ascertained.

IV.

That on or about the 8th day of February, 2010, Plaintiff YVONNE O'CONNELL was a customer and invited guest of Defendant WYNN LAS VEGAS located at 3131 Las Vegas Boulevard South, Las Vegas, Nevada, for purposes of gambling and dining.

V.

The on or about the 8th day of February, 2010, Plaintiff YVONNE O'CONNELL was walking on the shadowed, multi-colored tile floor located near the south entrance of the casino when she suddenly and unexpectedly slipped and fell on a non-visible liquid substance present on the floor.

VI.

At said time and place, the Defendants, and each of them, negligently maintained and controlled said real property and premises and, further, negligently permitted a dangerous condition, not obvious or apparent to the Plaintiff, to exist thereon and further, did:

a. negligently cause a dangerous condition to exist to wit: allowed liquid to be present on the tile floor near the south entrance of the casino;

b. negligently allow said dangerous condition to remain in existence, as aforesaid, for an unreasonable length of time; and

c. negligently failed to warn the Plaintiff of the presence of said dangerous condition.

VII.

As a proximate result of the aforesaid negligence of the Defendants, and each of them, Plaintiff, YVONNE O'CONNELL, did slip and fall on the said dangerous condition on the premises of the Defendants, and each of them, thereby causing Plaintiff's body to twist and fall backward striking the raised planter and floor with her body, thereby sustaining the injuries and damages as hereinafter set forth.

VIII.

Prior to the fall of the Plaintiff, the dangerous condition of said premises was known by, or should have been known by, the Defendants, and each of them, in the exercise of reasonable care.

IX.

That by reason of the premises and as a direct and proximate result thereof, Plaintiff, YVONNE O'CONNELL, sustained injuries to her head, neck, back, bodily limbs, organs and systems all or some of which conditions may be permanent and disabling in nature, all to her general damage in a sum in excess of $10,000.00.

X.

That by reason of the premises and as a direct and proximate result of the aforementioned negligence of the Defendant, and each of them, Plaintiff, YVONNE O'CONNELL, was required to and did receive medical and other treatment for her injuries received in an expense all to her damage in a sum in excess of $10,000.00. That said services, care and treatment are continuing and shall continue in the future, all to her damage in a presently unascertainable amount, and Plaintiff will amend her Amended Complaint accordingly when same shall be ascertained.

XI.

That prior to the injuries complained of herein, Plaintiff, YVONNE O'CONNELL, was an able-bodied person, healthy and coordinated, without limitations, who exercised daily and would

swing dance four to six hours weekly, and was physically capable of engaging in all other activities for which she was otherwise suited.

XII.

That is has become necessary for Plaintiff to retain the services of an attorney to prosecute this action and, therefore, Plaintiff should be awarded reasonable attorney's fee incurred in this matter.

WHEREFORE, Plaintiff YVONNE O'CONNELL, expressly reserving her right to amend her Amended Complaint prior to or at the time of trial of this action to insert those items of damages not yet fully ascertainable, prays judgment as follows:

1. For general damages sustained by Plaintiff in an amount in excess of $10,000.00;

2. For costs of medical care and treatment and other expenses incurred thereto when same are fully ascertained;

3. For attorney's fees and costs of suit incurred herein; and

4. For such other and further relief as the Court may deem just and proper in the premises.

DATED this 20th day of March, 2012.

CAP & KUDLER

DONALD C. KUDLER, ESQ.
Nevada Bar No. 005041
3202 W. Charleston Boulevard
Las Vegas, Nevada 89102
Attorney for Plaintiff

ORIGINAL

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CLERK OF THE COURT

BRIAN D. NETTLES, ESQ.
Nevada Bar No. 7462
CHRISTIAN M. MORRIS, ESQ.
Nevada Bar No. 11218
NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, Nevada 89014
Telephone: (702) 434-8282
Facsimile: (702) 434-1488
briannettles@nettleslawfirm.com
christianmorris@nettleslawfirm.com
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, an individual, Plaintiff, vs. WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, doing business as WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO. A-12-655992-C DEPT NO. V **JUDGMENT ON VERDICT**

This matter having been tried before a jury in Department 5, the Honorable Carolyn Ellsworth presiding, and having commenced on November 6, 2015. The final arguments of counsel were presented to the jury on November 12, 2015, and a Verdict awarding Plaintiff Yvonne O'Connell, $150,000.00 in past pain and suffering and $250,000.00 in future pain and suffering, and having assessed 40% fault to Plaintiff, Yvonne O'Connell, and having assessed 60% fault to Defendant Wynn Las Vegas, LLC dba Wynn Las Vegas, thus reducing Plaintiff's

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NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, NV 89014
(702) 434-8282 / (702) 434-1488 (fax)

☐ Jury Disposed After Trial Start
☒ Jury Verdict Reached
☐ Other - _____

☐ Non-Jury Disposed After Trial Start
☐ Non-Jury Judgment Reached
☐ Transferred before Trial

total award to $240,000.00, was filed in open court on November 16, 2015.

IT IS ORDERED that Plaintiff Yvonne O'Connell is awarded $150,000.00 in past pain and suffering and $250,000.00 in future pain and suffering, to be reduced by a finding of 40% fault to Plaintiff, Yvonne O'Connell, thus reducing Plaintiff's total award to $240,000.00.

IT IS FURTHER ORDERED that Plaintiff is awarded pre-judgment interest in the sum of $17,190.96 (*figured as $90,000.00 x 5.25% (Prime Rate Plus 2%) ÷ 365 = $12.945 (Daily Rate) x 1,328 days [date of service of Summons 3/30/12 to date of verdict 11/16/15]*).

DATED this 14th day of December, 2015.

DISTRICT COURT JUDGE
CAROLYN ELLSWORTH

Submitted by:

NETTLES LAW FIRM

BRIAN D. NETTLES, ESQ.
Nevada Bar No. 7462
CHRISTIAN M. MORRIS, ESQ.
Nevada Bar No. 11218
NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, Nevada 89014
Attorneys for Plaintiff

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NEO
BRIAN D. NETTLES, ESQ.
Nevada Bar No. 7462
CHRISTIAN M. MORRIS, ESQ.
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, an individual, Plaintiff, vs. WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, doing business as WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO. A-12-655992-C DEPT NO. V **NOTICE OF ENTRY OF JUDGMENT ON VERDICT**

TO: WYNN LAS VEGAS, LLC, Defendant; and

TO: CHRISTOPHER D. KIRCHER, ESQ., LAWRENCE J. SEMENZA, III, P.C., Attorneys for Defendant:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the ***Judgment on Verdict*** was entered in the above-entitled matter on the 15th day of December, 2015, a copy of

....

....

NETTLES LAW FIRM
1389 Galleria Dr. Suite 200
Henderson, NV 89014
702-434-8282 / 702-434-1488 (fax)

which is attached hereto.

DATED this 15th day of December, 2015.

NETTLES LAW FIRM

/s/ Christian M. Morris
BRIAN D. NETTLES, ESQ.
Nevada Bar No. 7462
CHRISTIAN M. MORRIS, ESQ.
Nevada Bar No. 11218
1389 Galleria Drive, Suite 200
Henderson, Nevada 89014
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26, I certify that on this 15th day of December, 2015, I served the foregoing ***Notice of Entry of Judgment on Verdict*** to the following parties by electronic transmission through the Wiznet system:

Lawrence J. Semenza, III, Esq.
Christopher D. Kircher, Esq.
Lawrence J. Semenza, III, P.C.
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
(702) 835-6803
Fax: (702) 920-8669
Attorneys for Defendant
Wynn Las Vegas, LLC dba
Wynn Las Vegas

An Employee of Nettles Law Firm

NETTLES LAW FIRM
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Henderson, NV 89014
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CLERK OF THE COURT

BRIAN D. NETTLES, ESQ.
Nevada Bar No. 7462
CHRISTIAN M. MORRIS, ESQ.
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, an individual, Plaintiff, vs. WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, doing business as WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO. A-12-655992-C DEPT NO. V **JUDGMENT ON VERDICT**

This matter having been tried before a jury in Department 5, the Honorable Carolyn Ellsworth presiding, and having commenced on November 6, 2015. The final arguments of counsel were presented to the jury on November 12, 2015, and a Verdict awarding Plaintiff Yvonne O'Connell, $150,000.00 in past pain and suffering and $250,000.00 in future pain and suffering, and having assessed 40% fault to Plaintiff, Yvonne O'Connell, and having assessed 60% fault to Defendant Wynn Las Vegas, LLC dba Wynn Las Vegas, thus reducing Plaintiff's

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☐ Jury Disposed After Trial Start ☒ Jury Verdict Reached ☐ Other
☐ Non-Jury Disposed After Trial Start ☐ Non-Jury Judgment Reached ☐ Transferred before Trial

MJUD
Lawrence J. Semenza, III, Esq., Bar No. 7174
Email: ljs@semenzalaw.com
Christopher D. Kircher, Esq., Bar No. 11176
Email: cdk@semenzalaw.com
LAWRENCE J. SEMENZA, III, P.C.
10161 Park Run Drive, Suite 150
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Telephone: (702) 835-6803
Facsimile: (702) 920-8669

Attorneys for Defendant Wynn Las Vegas, LLC
d/b/a Wynn Las Vegas

DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, an individual,

Plaintiff,

vs.

WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, doing business as WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Defendants.

Case No.: A-12-655992-C
Dept. No.: V

DEFENDANT WYNN LAS VEGAS, LLC'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR, ALTERNATIVELY, MOTION FOR NEW TRIAL OR REMITTITUR

LAWRENCE J. SEMENZA, III, P.C.
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
Telephone: (702) 835-6803

Defendant Wynn Las Vegas, LLC d/b/a Wynn Las Vegas ("Wynn"), by and through its attorneys of record, Lawrence J. Semenza, III, Esq. and Christopher D. Kircher, Esq., of Lawrence J. Semenza, III, P.C., hereby moves the Court to set aside the Judgment entered in this case in favor of Plaintiff Yvonne O'Connell ("O'Connell") on December 15, 2015 (the "Judgment") and enter judgment in favor of Wynn as a matter of law. Wynn alternatively moves the Court for a new trial or remittitur.

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This Motion is made pursuant to NRCP 50(b) and 59 and is supported by the following Memorandum of Points and Authorities, the attached exhibits, the papers and pleadings on file herein, and any oral argument as may be permitted by the Court at the hearing on this Motion.

DATED this 30th day of December, 2015.

LAWRENCE J. SEMENZA, III, P.C.

/s/ Lawrence J. Semenza, III
Lawrence J. Semenza, III, Esq., Bar No. 7174
Christopher D. Kircher, Esq., Bar No. 11176
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145

Attorneys for Defendant Wynn Las Vegas, LLC d/b/a Wynn Las Vegas

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NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned counsel will appear at the Regional Justice Center, located at 200 Lewis Avenue, Las Vegas, Nevada 89155, Eighth Judicial District Court, Las Vegas, Nevada, on the 04 day of Feb., 2016, at 9:00 a.m., before Department V, or as soon thereafter as counsel may be heard, for a hearing on **DEFENDANT WYNN LAS VEGAS, LLC'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR, ALTERNATIVELY, MOTION FOR NEW TRIAL OR REMITTITUR**.

DATED this 30th day of December, 2015.

LAWRENCE J. SEMENZA, III, P.C.

/s/ Lawrence J. Semenza, III
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On November 16, 2015, the jury rendered what can only be described as a shocking verdict and awarded O'Connell $240,000.00 in compensatory damages, after reducing the total award by 40% to reflect her own comparative negligence.[1] A Judgment based on the verdict was filed approximately one month later, on December 15, 2015.[2] Simply put, the jury's verdict and the subsequent Judgment are wholly unsupportable given the evidence presented at trial and must be set aside. Therefore, a judgment must be entered in favor of Wynn as a matter of law, or, alternatively, the Court should grant Wynn a new trial or remittitur.

There are several grounds upon which this Court must grant Wynn the relief it requests and they are addressed in turn below. Perhaps the most obvious of which is the lack of evidence that Wynn had constructive notice of the green sticky liquid substance that O'Connell claims she slipped on – a prerequisite for liability under Nevada law.[3] Although O'Connell claims that the unidentified liquid was large and had begun to dry, her testimony does not establish that Wynn had constructive notice.

In Nevada, to establish constructive notice, a plaintiff must show that there was a virtually continuous or recurrent hazardous condition, which O'Connell has not done in this case. Even if this was not the law in Nevada and a more expansive definition of constructive notice was appropriate, which it is not, O'Connell still has not established that Wynn had constructive notice of the liquid substance before the incident.

Specifically, the size of the alleged spill has no bearing on the issue at hand. Instead, the only relevant evidence as to whether Wynn should have known about the substance on the floor is

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[1] O'Connell orally moved for a jury trial, as opposed to a bench trial, for the first time on October 29, 2015, more than 2 and ½ years after filing her Complaint and less than one week prior to trial.

[2] O'Connell never provided Wynn with a draft of the Judgment for review and comment prior to its submission to the Court.

[3] At the close of O'Connell's case, she conceded there was no evidence that Wynn had actual notice of the liquid substance and that this is a constructive notice case. (Trial Transcript from Tuesday, November 10, 2015 at 10:36 a.m., 5:22-23, 6:17-18, a true and correct copy of which is attached hereto as Exhibit 1.)

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how long it had been there prior to O'Connell's fall. And importantly, there was no evidence presented during the trial of that time period. O'Connell claimed that she thought portions of the spill were drying or had dried, which is not evidence of how long it existed and she admittedly has no expertise to make any such conclusion. Because the drying time of this unidentified liquid substance is undoubtedly outside the scope of the jury's common knowledge, O'Connell was required to present admissible and competent evidence on the issue of how long the liquid was on the floor prior to her fall, which she did not do.

In addition, although O'Connell presented the testimony of Dr. Craig Tingey and Dr. Thomas Dunn at trial, which Wynn asserts was prejudicial and improper, neither physician apportioned any of O'Connell's claimed damages between her preexisting conditions and injuries and a subsequent fall that took place after her fall at the Wynn. Because of O'Connell's failure to apportion, she cannot recover any of her claimed past or future pain and suffering damages in this case.

Further, rather than producing evidence supporting her claim, O'Connell instead pointed her finger and blamed Wynn for her failure to meet her evidentiary burdens. For instance, O'Connell improperly elicited testimony from Wynn's employees that Wynn did not have surveillance camera coverage of her fall and repeatedly stated that Wynn controlled the evidence in the case, improperly suggesting that Wynn failed to preserve evidence and that had there been video surveillance coverage it would have supported O'Connell's claims.

Lastly, O'Connell's counsel made an improper and prejudicial statement during rebuttal closing arguments. Specifically, she stated that the jury was the conscience of the community, which implied that the jury should disregard the jury instructions given in the case and instead render a verdict based on public opinion.

Notwithstanding the jury's verdict, this Court has an independent obligation to ensure the legal sufficiency of O'Connell's claim. Accordingly, O'Connell's claims against Wynn fail as a matter of law and judgment must be entered in favor of Wynn, or, alternatively, the Court should grant Wynn a new trial or a remittitur.

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II. STATEMENT OF FACTS

A. Wynn Did Not Have Constructive Notice of the Alleged Hazard

On February 8, 2010 at approximately 2:30 p.m., O'Connell was walking through the atrium area of Wynn Las Vegas. As she was walking and not paying attention where she was going, O'Connell slipped on a liquid foreign substance that was located on the flower mosaic tile floor in Wynn's atrium. O'Connell claims the liquid substance was green in color and sticky.

O'Connell admitted during trial that she had no evidence Wynn caused the liquid substance to be present on the floor or that Wynn had actual knowledge of it prior to her fall. (Exhibit 1, 5:22-23, 6:17-18.)[4] Thus, the only theory of liability in this case was based entirely on a claim that Wynn had constructive notice of the alleged hazard.

There was, however, no evidence presented at trial supporting a conclusion that Wynn had constructive notice of the sticky liquid substance. In fact, at the close of O'Connell's case, Wynn made an oral motion for judgment as a matter of law. (*Id.*, 3:7-9:17.) The Court denied the motion without prejudice and directed counsel to renew the motion after the conclusion of the trial. (*Id.*, 9:13-17.)

O'Connell did not present any evidence that liquid spills have occurred frequently, or at all, in the area where she fell that otherwise might have provided Wynn with constructive notice. Additionally, there was no evidence presented that the frequency of the inspections conducted by Wynn employees were somehow unreasonable.

The only testimony remotely related to the issue of constructive notice came from O'Connell herself. It was her unsubstantiated opinion that Wynn should have known about the green sticky liquid substance because of its size and because she claimed that portions of it had

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[4] The trial transcripts attached as exhibits hereto were transcribed on an expedited basis by a local Court Reporter here in Las Vegas. Counsel for Wynn repeatedly attempted to obtain an expedited copy of the official trial transcript but the request was refused. Counsel for Wynn was informed by Julie Lord, the assigned transcriptionist, that she could not provide the official transcript prior to the deadline to file the instant Motion.

begun to dry.[5] Such statements, however, are wholly insufficient to create a triable issue of fact as to Wynn's liability in this case. Thus, there was no evidence presented whatsoever as to how long the green liquid substance was on the floor prior to O'Connell's fall. The liquid substance could have, for example, been on the floor for mere seconds before O'Connell fell. And, O'Connell even conceded that she did not know how long it had been on the floor prior to her falling. (Exhibit 2, 162:3-20.)

Moreover, there was no evidence presented as to what the green sticky liquid substance was, which would be necessary to establish that the liquid substance had in fact begun to dry. While O'Connell testified that she assumed that the substance came from liquid fertilizer used on the surrounding plants, the only evidence presented at trial was that Wynn does not use fertilizer on its plants — only water. Thus, the green liquid substance could not have come from the planters.

Based on these facts, O'Connell did not, as a matter of law, establish that Wynn had constructive notice of the alleged hazard.

B. Dr. Tingey and Dr. Dunn's Testimony at Trial Confused and Misled the Jury, Both Doctors Failed to Apportion O'Connell's Preexisting Conditions and Subsequent Injuries After Her Fall at Wynn and/or Their Testimony Was Insufficient to Establish an Award for Future Pain and Suffering

It is important to note that O'Connell did not seek the recovery of any medical expenses she asserts were incurred as a result of her fall at Wynn. In fact, the only damages O'Connell sought recovery of were for her alleged past and future pain and suffering.

First, Dr. Tingey and Dr. Dunn were never timely disclosed as witnesses in this case and never should have been permitted to testify. In addition, because O'Connell was not seeking recovery of her alleged past and future medical expenses and her symptoms were entirely subjective in nature, their testimony had no relevance to the case and, instead, confused and mislead the jury. This is especially true given that Dr. Tingey and Dr. Dunn first treated O'Connell years after her fall.

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[5] O'Connell conceded that she did not recall if her clothes or hands were wet from the liquid substance. (O'Connell Trial Testimony, 187:12-18, the relevant portions of which are attached hereto as Exhibit 2.)

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Second, Dr. Tingey and Dr. Dunn's testimony regarding causation was based exclusively on O'Connell's self-reporting of her alleged symptoms and injuries.[6] Neither doctor offered any substantive medical testimony regarding causation and instead concluded that because O'Connell represented to them that she was injured as a result of the fall, it must be true. This again served to confuse and mislead the jury, to the prejudice of Wynn. As the Court is aware, expert testimony should only be permitted if such testimony will assist the trier of fact. In this case, neither Dr. Tingey and Dr. Dunn's testimony assisted the trier of fact in deciding the factual issues presented.

Third, Dr. Tingey and Dr. Dunn were required to apportion the damages between O'Connell's preexisting medical conditions, her subsequent fall in July of 2010 and her fall at Wynn in February of 2010, which they did not do.[7] The jury should never have been permitted to consider their testimony given this failure. The reason that medical experts are required to apportion damages in cases where there are preexisting conditions and/or subsequent injuries is to assist in determining what percentage of the claimed injuries are directly attributable to a defendant's negligence and what percentage of the injuries are wholly unrelated. It goes directly to causation and damages. Again, because Dr. Tingey and Dr. Dunn failed to apportion the alleged damages in this case, Wynn is entitled to one of the following remedies: 1) a judgment as a matter of law; 2) the damages awarded to O'Connell should be reduced to zero; or 3) the Court should order a new trial.

Lastly, and alternatively, because of the completely subjective nature of O'Connell's claimed injuries, expert testimony was required to establish her claim for future pain and suffering. As set forth above, neither Dr. Tingey nor Dr. Dunn apportioned O'Connell's preexisting conditions and her subsequent fall, in relation to her fall at the Wynn in February of 2010. Thus, there was insufficient evidence presented as a matter of law to establish an award to

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[6] Wynn's expert medical witness attributed her numerous medical conditions to preexisting pathology, subsequent injury and/or symptom magnification syndrome. As set forth in his expert report, a "person manifests symptoms in order to receive some kind of secondary gain, whether it is avoidance of responsibility, attention or financial gain."

[7] Wynn argued this issue before the Court immediately following its request for a judgment as a matter of law. (Exhibit 1, 9:18-14:14.)

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O'Connell of future pain and suffering damages. Thus, at a minimum the Judgment should be reduced by the amount of future pain and suffering damages awarded by the jury after taking into account O'Connell's comparative negligence.

C. O'Connell Was Permitted to Question Wynn's Employees Regarding the Availability of Video Surveillance Coverage of the Incident and Represented that Wynn "Controlled the Evidence" in the Case, Which Prejudiced the Jury into Believing that Wynn Failed to Preserve Evidence

Wynn filed a Motion in Limine to Exclude Any Reference or Testimony of Defendant's Alleged Failure to Preserve Evidence prior to trial. The Court denied the motion.

During trial, O'Connell questioned Wynn's various witnesses regarding whether video surveillance captured O'Connell's fall at the Wynn. (Corey Prowell Trial Testimony, 15:15-16:15, 37:18-25 the relevant portions of which are attached hereto as Exhibit 3.) In addition, O'Connell's counsel made repeated statements to the jury that Wynn "controlled the evidence" in the case. (O'Connell's Closing Argument, 4:9-20, 5:9-21, 7:23-8:1, attached hereto as Exhibit 4; Rebuttal Closing Argument, 5:7-16, 6:10-13, attached hereto as Exhibit 5.) All of these statements were entirely improper and created, in effect, an inference that Wynn failed to preserve evidence. Based on this improper questioning and conduct by O'Connell's counsel, Wynn should be given a new trial in this matter.

D. Plaintiff's Counsel Inappropriately Argued to the Jury that It Was the Community's Conscience During Closing Argument

During closing argument, Plaintiff's counsel made the following representation to the jury, "As jurors, you are the voice of the conscience of this community. And you will go back there --". (Exhibit 5, 9:10-12.) Wynn's counsel made an objection that was sustained:

> MR. SEMENZA: Objection, Your Honor.
>
> THE COURT: Sustained. That – the jury will disregard that. Counsel. This is not a punitive damage case you may not address the – they are not to be making decisions as the consciousness of the community. You know that. It's improper argument.
>
> MS. MORRIS: As members of the community. Is that better?
>
> THE COURT: No.

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(*Id.*, 9:13-21.) Based on the statement given by O'Connell's counsel, Wynn has been materially prejudiced and should be given a new trial. In making the statement, O'Connell's counsel invited the jury to disregard the instructions given by the Court and instead render its decision, not based on the evidence presented, but instead based on perceived public opinion.

III. ARGUMENT

NRCP 50(a) provides, in pertinent part, "If during a trial by jury, a party has been fully heard on an issue and on the facts and law a party has failed to prove a sufficient issue for the jury, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue."

NRCP 50(b) allows a party to renew a motion for judgment as a matter of law, notwithstanding the verdict, after trial. Such motions present solely a question of law for the court. *Dudley v. Prima*, 84 Nev. 549, 551, 445 P.2d 31, 32 (1968) (citations omitted). A renewed motion for a judgment as a matter of law may be entered when the verdict obtained is clearly "contrary to the law." *M.C.* Multi-*Family Development, LLC v. Crestdale Assoc., Ltd.*, 193 P.3d 536, 542 (Nev. 2008) (quoting *Bliss v. DePrang*, 81 Nev. 599, 602, 407 P.2d 726, 727-28 (1965)). "Thus, a court may direct a verdict in the moving party's favor . . . if, as a matter of law, the jury could not have reached the conclusion that it reached." *Grosjean v. Imperial Palace, Inc.*, 212 P.3d 1068, 1077 (Nev. 2009) (citing *Fox v. Cusick*, 91 Nev. 218, 220, 533 P.2d 466, 467 (1975)).

NRCP 50(b) goes on to state, in part "The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after service of written notice of entry of judgment and may alternatively request a new trial or join a motion for new trial under Rule 59. In ruling on a renewed motion, the court may: (1) if a verdict was returned: (A) allow the judgment to stand, (B) order a new trial, or (C) direct entry of judgment as a matter of law. . . ."

With regard to the Court ordering a new trial, NRCP 59(a) states:

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1)

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> Irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial; (2) Misconduct of the jury or prevailing party; (3) Accident or surprise which ordinary prudence could not have guarded against; (4) Newly discovered evidence material for the party making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial; (5) Manifest disregard by the jury of the instructions of the court; (6) Excessive damages appearing to have been given under the influence of passion or prejudice; or, (7) Error in law occurring at the trial and objected to by the party making the motion. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Based on NRCP 59(a), a court may grant a motion for a new trial where there is plain error in the record, a showing of manifest injustice, or the verdict is clearly erroneous when viewed in light of all the evidence presented. *Frances v. Plaza Pacific Equities, Inc.*, 109 Nev. 91, 94, 847 P.2d 722, 724 (1993). The Court need not hesitate to grant a new trial where there is no substantial conflict in the evidence on any material point and the verdict or decision is manifestly contrary to the evidence. *Avery v. Gilliam*, 97 Nev. 181, 183, 625 P.2d 1166, 1168 (1981).

A. Because Wynn Did Not Create the Alleged Hazardous Condition or Have Actual or Constructive Notice of It, Wynn Is Entitled to a Judgment as a Matter of Law

"The owner or occupant of property is not an insurer of the safety of a person on the premises, and in the absence of negligence, no liability lies." *Sprague v. Lucy Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322 (1993) (citation omitted). Accordingly, to recover on a claim for negligence in Nevada, the plaintiff has the burden of establishing: "(1) that the defendant had a duty to exercise due care with respect to the plaintiff; (2) that the defendant breached this duty; (3) that the breach was both the actual and proximate cause of the plaintiff's injury; and (4) that the plaintiff was damaged." *Joynt v. California Hotel & Casino*, 108 Nev. 539, 542, 835 P.2d 799, 801 (1992) (citation omitted); *see also Turner v. Mandalay Sports Entertainment, LLC*, 124 Nev. 213, 217, 180 P.3d 1172, 1175 (2008). To prevail at trial, a defendant need only negate one of the elements of negligence. *Foster v. Costco Wholesale Corp.*, 2012 Nev. LEXIS 123, *8, 291 P.3d

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150 (Dec. 27, 2012) (citing *Harrington v. Syufy Enters.*, 113 Nev. 246, 248, 931 P.2d 1378, 1380 (1997)).

Wynn did not breach any duty to O'Connell. Property owners, such as Wynn, "must exercise reasonable care not to subject others to an unreasonable risk of harm. A [property owner] must act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk." *Moody v. Manny's Auto Repair*, 110 Nev. 320, 329, 871 P.2d 935, 941 (1994); *Costco Wholesale Corp.*, 2012 Nev. LEXIS at *16 (The "duty issue must be analyzed with regard to foreseeability and gravity of harm, and the feasibility and availability of alternative conduct that would have prevented the harm.") (citation omitted). When persons other than the business or its employees are the cause of the foreign substance, liability will only lie if the business had actual or constructive notice of the condition and failed to remedy it. *Sprague,* 109 Nev. at 250, 849 P.2d at 322.

As set forth above, O'Connell conceded that she presented absolutely no evidence during trial that Wynn created the foreign substance or had actual notice of the foreign substance before the incident.[8] Therefore, O'Connell had the burden to prove at trial that Wynn had constructive notice of the foreign substance, which she clearly failed to do.

1. O'Connell Presented No Evidence that the Foreign Substance Was a Recurrent Condition that Would Place Wynn on Constructive Notice under Nevada Law

Under *Sprague*, the seminal case on premise liability in Nevada, the standard to prove constructive notice is a virtually continuous or recurrent condition because that places the property owner on notice that the specific hazardous condition will likely occur again. *Sprague*,

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[8] Wynn objected to the inclusion of Jury Instruction 27 at trial. (Trial Transcript of Argument Relating to Jury Instructions on November 10, 2015, attached hereto as Exhibit 6; Jury Instruction 27, attached hereto as Exhibit 7.) First, there was no basis to include any reference to Wynn having created the hazardous condition or having actual notice of it because there was no evidence presented at trial supporting such a conclusion. Second, the last paragraph of Instruction 27 identified what the jury could consider relating to the issue of constructive notice. The language utilized in the instruction, however, is not based on Nevada law and should never have been given to the jury. Thus, for this additional reason Wynn should be granted a new trial.

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109 Nev. at 250, 849 P.2d at 322; *see also FGA, Inc. v. Giglio*, 278 P.3d 490, 497 (Nev. 2012). In *Sprague*, the plaintiff claimed to have slipped and fallen on a grape in the produce section of the defendant's grocery store. *Sprague,* 109 Nev. at 248, 849 P.2d at 321. In opposing summary judgment, the plaintiff provided deposition testimony that the produce section was "a virtually continuous hazard" because people dropped produce on the floor six or seven times per hour. *Id.* In reversing the district court's granting of summary judgment, the Nevada Supreme Court found that a jury could have found the defendant knew that produce was frequently on the floor and created an ongoing, continuous hazard for its customers. *Id.*, 109 Nev. at 250, 849 P.2d at 322. That being so, a "reasonable jury could have determined that the virtually continual debris on the produce department floor put [the defendant] on constructive notice that, at any time, a hazardous condition might exist which would result in an injury to [its] customers." *Id.*, 109 Nev. at 251, 849 P.2d at 322.

In another case, the Nevada Supreme Court affirmed the granting of summary judgment in favor of the defendant after the plaintiff failed to present any evidence that liquid spills "were a virtually continuous condition that created an ongoing, continuous hazard, thus providing constructive notice of the condition to [the defendant]." *Ford v. S. Hills Med. Ctr., LLC*, 2011 Nev. Unpub. LEXIS 1326, *3, 2011 WL 6171790 (Nev. Dec. 9, 2011) (unpublished). In *Ford*, the plaintiff slipped and fell on a clear liquid on the floor of the emergency department of defendant's hospital. *Id.* at *1. The plaintiff "provided no evidence that the [defendant] or one of its agents caused the liquid to be on the floor of the emergency department, or that [defendant] or its employees had actual notice of the presence of the liquid." *Id.* at *3. That being so, the plaintiff argued constructive notice under *Sprague* based on the testimony of the defendant's employee that spills occurred in the emergency department waiting room. *Id.* In affirming summary judgment, the Nevada Supreme Court determined that is not enough to prove constructive notice. *Id.*

The Nevada Supreme Court's requirement that a virtually continuous or recurrent condition is necessary to place a defendant on constructive notice of the hazardous condition is not a new concept. *See Eldorado Club v. Graff*, 78 Nev. 507, 377 P.2d 174 (1962). In *Eldorado*

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Club, the plaintiff slipped on a lettuce leaf on a ramp leading from an alley to the defendant's receiving room. *Id.*, 78 Nev. at 508. During the trial, a witness was permitted to testify to two separate occasions when he had slipped and fallen on the ramp due to wet spots and lettuce leaves. *Id.*, 78 Nev. at 509. The trial court permitted the testimony for the limited purpose of establishing notice to the owner of the dangerous condition of the ramp when wet or with refuse upon it. *Id.* In reversing the trial court's judgment and remanding the case for a new trial, the Nevada Supreme Court held that such notice evidence is inadmissible to prove constructive notice unless the slip and fall is caused by the temporary presence of debris or foreign substance that was shown to be ***continuing***. *Id.*, 78 Nev. at 511.

Eldorado Club is aligned with the constructive notice analysis in *Sprague* and *Ford* because a rare or single event by a third party creating a hazardous condition is not enough to place a defendant on constructive notice of the hazard under Nevada law. Stated differently, the specific hazardous condition must be recurrent in order to place the defendant on constructive notice that it may occur again.[9]

Here, O'Connell presented no evidence at trial that the foreign substance was a continuous or recurrent hazardous condition that Wynn should have been aware of. Further, O'Connell presented no evidence at trial regarding the length of time the foreign substance was present on the floor or how often foreign substances are spilled in Wynn's atrium, if any, before this incident.[10] In fact, O'Connell could not establish what the foreign substance was or where it came

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[9] *See also Hammerstein v. Jean Dev. West*, 111 Nev. 1471, 1476, 907 P.2d 975, 978 (1995) (after the plaintiff was injured exiting the property due to a false fire alarm, the Nevada Supreme Court reversed summary judgment in favor of the defendant when the property owner had past issues with its malfunctioning fire alarm making it reasonably foreseeable that someone may be injured in the future trying to escape).

[10] While reviewing the jury instructions with the parties, the Court discussed the case *Kelly v. Stop & Shop*, Inc., 281 Conn 768, 918 A.2d 249 (Conn. 2007), a Connecticut case that cites to *Sprague*. In *Kelly*, the Court stated that, in regards to constructive notice, the question is "whether the condition had existed for such a ***length of time*** that the [defendant's] employees should, in the exercise of due care, have discovered it in time to have remedied it." *Id.* at 777 (emphasis added). The notice "must be notice of the very defect which occasioned the injury and not merely of conditions naturally productive of that defect . . . ." *Id.* at 776. In this case, O'Connell did not present any evidence regarding the length of time the foreign substance was present or how often foreign substances such as this occur in Wynn's atrium. Therefore, O'Connell failed to meet her burden in establishing constructive notice as a matter of law.

from. By failing to present any such evidence at trial, O'Connell failed to meet her burden to establish that Wynn was on constructive notice of the foreign substance and failed to remedy it or appropriately warn her. Put differently, the record is devoid of any evidence that Wynn through the exercise of reasonable care should have known about the foreign substance before O'Connell's fall. As such, if the judgment is permitted to stand, the Court would be imposing what amounts to a strict liability standard merely because O'Connell slipped on a foreign substance on Wynn's property, which is clearly contrary to well-settled Nevada law. *See Sprague*, 109 Nev. at 250, 849 P.2d at 322 ("An accident occurring on the premises does not of itself establish negligence.").

2. O'Connell's Testimony that the Foreign Substance Was Large and Parts of It Had Begun to Dry Does Not Establish Constructive Notice

As set forth above, in order to establish that Wynn had constructive notice of the foreign liquid substance on the floor, O'Connell would need to present evidence that there was an ongoing and continuous spill hazard in the area, which she has not done in this case. Even if the Court were to accept a more generalized definition of constructive notice, not based on Nevada law, O'Connell still presented no evidence at trial whatsoever supporting a finding that Wynn had constructive notice of the liquid substance.

O'Connell's testimony that the foreign substance was large, sticky and portions of it appeared to be drying does not, as a matter of law, place Wynn on constructive notice.

As a preliminary matter, it is absurd to conclude that the size of the alleged spill could establish how long the foreign substance was on the ground or that Wynn should have known that it was there. Courts have concluded that constructive notice cannot be established by the size of the foreign substance on the ground without additional evidence to prove the property owner should have known of its presence. For instance, in a case cited by O'Connell, a federal court in Alabama concluded that the size of a spill is insufficient to raise a question of fact regarding the length of time the spill had been present, "A large spill can be as young as a small spill. A large spill can be as sudden as a small spill. Anyone who has held a burping baby knows that a large spill can occur with lightning speed. A large, sudden spill gives an invitor no additional notice

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merely because of its size." *Tidd v. Walmart Stores, Inc.*, 757 F. Supp. 1322, 1324 (N.D. Ala. 1991).[11]

Further, O'Connell's uncorroborated trial testimony that portions of the foreign substance was drying is similarly not evidence of how long the foreign substance was on the floor. *See, e.g., Great Atlantic & Pacific Tea Co. v. Berry*, 203 Va. 913, 128 S.E.2d 311 (Va. 1962) (observing that the majority of jurisdictions prohibit evidence of spilled substances as appearing old-looking, dirty, or grimy to establish how long the substances had been on the floor because it would require the jury to purely speculate or guess in order to allow recovery); *Rodriguez v. Kravco Simon Co.*, 111 A.3d 1191, 1193 (Pa. Super. Ct. 2015) ("Without evidence of how long it takes the liquid in question to become sticky or dry, the jury would be unable to determine whether the spill was present for a sufficiently long time to warrant a finding of constructive notice."); *Woods v. Wal-Mart Stores, Inc.*, No. 3:05CV048, 2005 U.S. Dist. LEXIS 45404, *8-9, 2005 WL 2563178 (E.D. Va. Oct. 12, 2005) (holding that "Plaintiff's contention that the spill appeared dirty, drying, and had tracks running through it is not enough under Virginia law to establish when the spill occurred" and, since the plaintiff could not establish when the spill occurred, "she also cannot establish that the spill had existed for a long enough period of time to charge the Defendant with constructive knowledge.").

In *Adams v. National Super Markets, Inc.*, 760 S.W.2d 139, 141 (Mo. App. 1988), the appellate court held that the trial court erred by not granting the defendant's motions for directed verdict and for judgment notwithstanding the verdict when the only evidence adduced by plaintiff that an ice cream spill had existed for sufficient length of time to constitute constructive notice was that the edges of the ice cream puddle were crusty and hard; a wet cloth was required to clean it; and a white mark was left on the floor. *Id.* at 141-142. The Court found that the "time necessary for the ice cream to get into the condition described by [the plaintiff] was not established, and any estimate would be purely 'speculative and uncertain.'" *Id.* at 141 (citing *Grant v. National Super Markets, Inc.*, 611 S.W.2d 357, 359 (Mo. App. 1980)). To establish

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[11] O'Connell cited this case in her Trial Brief regarding Constructive Notice filed on November 12, 2015.

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constructive notice, "evidence must be presented that the defect has existed for a sufficient length of time to constitute notice, or, in other words, to show defendant should reasonably have known of it." *Id.* at 141 (citations and quotations omitted).

Thus, attempting to determine the length of time the foreign substance was on the floor based on its size and whether it may have been drying is nothing more than pure speculation and insufficient as a matter of law to establish constructive notice. The liquid substance could have been on the floor only seconds before the incident took place and O'Connell has not presented any evidence to establish how long the liquid substance was on the floor, conceding this point at trial:

> Q. So I'm asking you how long in time would it take for that spill to dry?
>
> A. So you're asking -- if you're asking me in minutes, I don't know the minutes. . . .
>
> . . .
>
> Q. But you don't know how many minutes it takes, do you?
>
> A. I -- I don't know how many minutes.

(Exhibit 2, 162:7-16.)

The record is completely devoid of any evidence regarding the length of time the foreign substance had been on the floor. "The duration of the hazard is important because if a hazard only existed for a very short period of time before causing any injury, then the possessor of the land, even 'by the exercise of reasonable care,' would not discover the hazard, and thus would owe no duty to protect invitees from such a hazard." *Craig v. Franklin Mills Assocs., L.P.*, 555 F. Supp. 2d 547, 550 (E.D. Pa. 2008) (citing Restatement (Second) of Torts § 343). Without presenting any evidence regarding the length of time the foreign substance was on the floor prior to the incident, O'Connell failed, as a matter of law, to establish that Wynn had constructive notice of it. Thus, Wynn is entitled to a judgment as a matter of law in this case.

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B. Dr. Tingey and Dr. Dunn Should Not Have Been Permitted to Testify at Trial and Their Testimony Materially Prejudiced Wynn by Confusing and Misleading the Jury

1. O'Connell's Untimely Disclosure of Dr. Tingey and Dr. Dunn Severely Prejudiced Wynn

There is no dispute that Dr. Tingey and Dr. Dunn were not timely and/or properly disclosed as witnesses in this case. The following timeline establishes that O'Connell did not timely disclose Dr. Tingey:

Extended Expert Disclosure Deadline	April 13, 2015
Extended Rebuttal Expert Deadline	May 13, 2015
Extended Discovery Deadline	June 12, 2015
Plaintiff's Disclosure of Dr. Tingey's Medical Records	July 14, 2015
Plaintiff's Disclosure of Dr. Tingey as a Witness	August 27, 2015
Plaintiff's Disclosure of Dr. Tingey's CV, Fee Schedule and Trial History	September 28, 2015

In fact, O'Connell did not disclose Dr. Tingey until well after Wynn filed its motions in limine on August 13, 2015. With regard to Dr. Dunn, O'Connell disclosed his CV, Fee Schedule and Trial History on September 18, 2015, which was untimely by more than five months from the expert disclosure deadline and by more than three months from the discovery deadline. Due to O'Connell's untimely disclosure of Dr. Tingey and Dr. Dunn, the Court should not have permitted them to testify at trial.[12]

O'Connell's untimely and deficient disclosure of these witnesses clearly prejudiced Wynn. For instance, Wynn's medical expert, Dr. Victor Klausner, did not have an opportunity to review Dr. Tingey's medical records prior to preparing his expert report and it was not until Dr. Tingey and Dr. Dunn were testifying at trial that Wynn was finally provided with an understanding of

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[12] Wynn hereby incorporates its Motion in Limine [#2] to Exclude Unrelated Medical Conditions and Damages Claimed by the Plaintiff filed on August 13, 2015, its Reply thereto filed on September 10, 2015 and its Supplemental Brief to Exclude Plaintiff's Treating Physician Expert Witnesses filed on October 27, 2015.

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what their testimony was going to encompass. Additionally, Wynn did not have an opportunity to present additional rebuttal witnesses, had it chosen to do so.

2. Dr. Dunn and Dr. Tingey Were Not Expert Witnesses as Contemplated by Nevada Law, but Improperly Testified as Character Witnesses for O'Connell

Additionally, because O'Connell did not seek the recovery of any medical expenses purportedly incurred as a result of her fall the Wynn and she self-reported the cause of her claimed injuries and what those alleged injuries were, Dr. Tingey and Dr. Dunn's testimony had no relevance to this case whatsoever. (Dr. Dunn Trial Testimony on November 9, 2015, attached hereto as Exhibit 8; Dr. Dunn Trial Testimony on November 12, 2015, attached hereto as Exhibit 9; Dr. Tingey Trial Testimony, attached hereto as Exhibit 10.) To testify as an expert witness under NRS 50.275, the witness' specialized knowledge must assist the trier of fact to understand the evidence or to determine a fact in issue. *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). "An expert's testimony will assist the trier of fact only when it is relevant and the product of reliable methodology." *Id.*, 189 P.3d at 651. Here, Dr. Tingey and Dr. Dunn provided no substantive medical testimony bearing on O'Connell's claimed injuries. Instead, they were used as character witnesses for O'Connell to support her subjective contention that she began experiencing pain after her fall in February of 2010 and that the cause of her symptoms was in fact her fall. The presentation of Dr. Tingey and Dr. Dunn in this capacity was wholly improper and served to confuse and mislead the jury.

More specifically, "[w]here the sole basis for a physician's testimony regarding causation is the patient's self-reporting that testimony is unreliable and should be excluded." *Hare v. Opryland Hospitality, LLC*, 2010 U.S. Dist. LEXIS 97777, *14 (D. Md. Sept. 17, 2010) (excluding treating physician's testimony as to causation because he failed to conduct a "differential diagnosis" that considered alternative causes for the injury) (citing *Perkins v. United States*, 626 F.Supp.2d 587, n. 7 (E.D.Va. 2009); *see also Goomar v. Centennial Life Ins. Co.*, 855 F. Supp. 319, 326 (S.D. Cal. 1994) (holding that proffered expert testimony concerning a patient's

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medical condition, based only upon the patient's self-report to the experts was "unsupported speculation").

In *Perkins*, the court excluded expert testimony regarding causation where a doctor simply took the patient's explanation and adopted it as his opinion. *Perkins*, 626 F.Supp.2d at 592. The treating physician "did not adequately investigate [the plaintiff's] relevant medical history" in determining the cause of her injuries, such as prior accidents and preexisting conditions. *Id*. at 593-94. The treating physician's opinion was unreliable because the treating physician "categorically dismissed or ignored evidence of other preexisting conditions when such evidence was available to him at the time of treatment." *Id*. at 594. Specifically, the treating physician did not explain how osteoarthritis in the same areas of her body as her alleged injuries was not the cause, or partial cause, of the plaintiff's current symptoms. *Id*. The treating physician's "failure to adequately account for the obvious alternative explanation creates a fatal analytical gap in his testimony." *Id*. (citation omitted). The Court found that "[b]y selectively ignoring the facts that would hinder the patient's status as a litigant, [the treating physician] reveals himself as the infamous 'hired gun' expert." *Id*. at 595.

Thus, given that O'Connell's self-reporting was the only basis for Dr. Tingey and Dr. Dunn's conclusions regarding causation – making them essentially character witnesses – their testimony should never have been considered by the jury. Dr. Dunn, for example, testified to the following:

> Q. Do you know whether prior to February 8, 2010, Ms. O'Connell was experiencing any symptomology in her cervical neck, pain symptomology?
>
> A. It was my understanding that she wasn't.
>
> Q. Okay. And that understanding that she didn't have any symptoms prior to February 2010 came from her statements; correct?
>
> A. Yes.
>
> Q. And exclusively came from her statements.
>
> A. Yes.

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(Exhibit 9, 32:21-33:9.) Dr. Tingey testified to the following:

> Q. Okay. And your conclusion that the right knee meniscus tear was as a result of the fall of February 8, 2010, was based upon Ms. O'Connell's assertion that that's when she was injured?
>
> A. Yes. Well, based on her history she gave to me.
>
> . . .
>
> Q. And the severity of Ms. O'Connell's pain relating to her right knee, your understanding of what that pain is is exclusively based on what she reports?
>
> A. Yes.

(Exhibit 10, 24:6-11, 28:15-19.) Moreover, the fact that O'Connell had both pre-existing conditions and a subsequent fall supports a conclusion that Dr. Tingey and Dr. Dunn's opinions were not based on any appropriate medical or scientific methodology. Thus, Wynn was materially prejudiced by their testimony.

C. O'Connell Had an Obligation to Apportion Her Damages, Which She Failed to Do, Requiring the Court to Enter a Judgment as a Matter of Law in Wynn's Favor

A plaintiff bears the burden of proving both the fact and the amount of damage. *See Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 955 P.2d 661, 671 (1998). Moreover, a plaintiff bears the burden of proof on medical causation.[13] *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 157-58, 111 P. 3d. 1112 (2005). In this situation, proving causation is too complex and beyond the capability of a layperson to decide and, thus, expert testimony is required. *Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 288, 112 P.3d 1093, 1100 (2005); *see also*

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[13] With regard to actual causation, at trial "the [plaintiff must] prove that, but for the [defendant's wrongdoing], the [plaintiff's damages] would not have occurred." *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 1481, 970 P.2d 98, 107 (1998) (*overruled in part on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 271, 21 P.3d 11, 15 (2001)). Likewise, the plaintiff must prove proximate causation. Proximate cause "is essentially a policy consideration that limits a defendant's liability to foreseeable consequences that have a reasonably close connection with both the defendant's conduct and the harm which the conduct created." *Id.*

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Cunningham v. Riverside Health Sys., 33 Kan. App. 2d 1, 199 P.3d 133 (Kan. Ct. App. 2003) (affirming the lower court's decision that the complexity of the patient's medical situation, as well as her preexisting condition of osteoporosis, required expert testimony to establish a disputed material fact that the defendant caused the injury). Importantly, O'Connell conceded that medical expert testimony was required in this case to establish her damages for past and future pain and suffering, "Now, in order to get medical pain and suffering, you can't just rely on [O'Connell] saying, Well, I'm hurt; right? You have to hear from an expert witness." (Exhibit 4, 9:11-13.)

"In a case where a plaintiff has a pre-existing condition, and later sustains an injury to that area, the Plaintiff bears the burden of apportioning the injuries, treatment and damages between the pre-existing condition and the subsequent accident." *Schwartz v. State Farm Mut. Auto. Ins. Co.*, 2009 U.S. Dist. LEXIS 64700, *15-16, 2009 WL 2197370 (D. Nev. July 22, 2009) (citing *Kleitz v. Raskin*, 103 Nev. 325, 327, 738 P.2d 508 (Nev. 1987) (citing Restatement (Second) of Torts §433(B), and relying on *Phennah v. Whalen*, 28 Wn. App. 19, 621 P.2d 1304, 1309 (Wash. Ct. App. 1980) (stating that the burden to allocate should not be shifted to the defendants where the situation involves the allocation of damages between a plaintiff with a previous injury and a single, subsequent tortfeasor); *see also Valentine v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 54722, *15-16 (D. Nev. Apr. 27, 2015).

Dr. Dunn conceded during his trial testimony that O'Connell suffered from degenerative disk disease of the lumbar and cervical spine that predated the incident at Wynn's property on February 8, 2010:

> Q. Now, you've diagnosed Ms. O'Connell as having degenerative disk disease in her cervical spine; is that correct?
>
> A. Yes.
>
> Q. And in that sense, it was a preexisting condition; correct?
>
> A. Yes.
>
> Q. You also diagnosed her with lumbar disk disease; is that correct?

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A. Yes.

Q. And, again, that diagnosis -- that condition predated February 8, 2010; is that correct?

A. Yes.

Q. And, again, that was a preexisting condition of Ms. O'Connell; correct?

A. Yes.

(Exhibit 9, 32:1-20.)

Dr. Dunn further testified that there was not any indication of an acute injury to Plaintiff's neck or back from the incident. (*Id.*, 34:21-35:11.) In addition, O'Connell testified to having a previous back injury before the incident at Wynn's property. (Exhibit 2, 78:6-8.) Thus, it is clear that O'Connell had a preexisting back condition well before she fell in February of 2010.

Regarding O'Connell's alleged right knee injury, O'Connell conceded during trial that she suffered a severe right knee injury on July 10, 2010 during a fall (subsequent to her fall at Wynn) and O'Connell failed to inform Dr. Tingey of this subsequent fall.[14] (Exhibit 2, 110:5-115:11; Exhibit 10, 26:13-21.) In addition, Dr. Tingey testified that O'Connell has arthritic and/or degenerative changes in her right knee that were unrelated to the incident at Wynn's property.

Q. And did you note arthritic changes in her right knee?

A. As well. I documented minimal arthritic changes.

. . .

Q. Is it possible that Ms. O'Connell was, in fact experiencing right knee pain as a result of arthritic condition in her right knee?

A. It's possible that she had both factors contributing to her pain.

. . .

(Exhibit 10, 23:9-12, 23:24-24:3; *see also* 11:21-24.)

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[14] Despite asserting before trial that she was seeking damages related to her left knee, Dr. Tingey testified that her purported injury to her left knee was completely unrelated to the incident at Wynn.

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Furthermore, the uncontroverted evidence at trial established that O'Connell suffers from additional preexisting health issues and conditions, such as fibromyalgia, IBS, anxiety, depression, Ehler Danlos and Marfan syndrome. While testifying, Dr. Tingey and Dr. Dunn both conceded that some of these health issues, such as fibromyalgia, anxiety and depression may affect and contribute to O'Connell's pain symptomology and purported injuries. (*Id.*, 25:4-21; Exhibit 9, 36:1-37:20.)

Because O'Connell indisputably suffers from these numerous preexisting/contributing conditions and had a subsequent fall, she has the burden of apportioning her injuries, treatment and damages between, on the one hand, the incident at Wynn's property and, on the other hand, her preexisting and contributing health conditions and the subsequent fall on July 10, 2010. She did not do so, however. O'Connell's counsel even conceded that Dr. Tingey and Dr. Dunn had not apportioned damages in this case by stating that "So I don't think there is any requirement for apportionment in this case." (Exhibit 1, 13:23-24.) O'Connell's treating physician witnesses merely testified (unconvincingly for that matter) that her right knee, neck and back injuries were all related to the incident at Wynn because she told them it was. (Exhibit 9, 32:21-33:9; Exhibit 10, 24:6-11, 28:15-19.) To be clear, Dr. Tingey and Dr. Dunn did not apportion her claimed injuries, treatment and damages between the incident at Wynn's property and her numerous preexisting/contributing conditions and subsequent injuries.[15]

Accordingly, the jury should not have been permitted to consider O'Connell's alleged injuries when determining an award of damages. Simply put, O'Connell has the burden to apportion damages between the incident at Wynn's property, her preexisting conditions and her July 10, 2010 fall, but she failed to do so with expert medical testimony, which was required. Without the requisite expert testimony, the jury was not permitted to make any determination as to the amount of damages she allegedly suffered as a result of the incident at Wynn's property short

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[15] Even if O'Connell had attempted to apportion her damages during her testimony, which she did not, it would not be competent evidence to support her claim of damages. *See Behr v. Diamond*, 2015 Nev. App. Unpub. LEXIS 504, *2-4 (Nev. Ct. App. 2015) (a plaintiff's own testimony is not competent evidence to support damages for subjective injuries).

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of pure speculation.[16] Simply put, Nevada law does not permit the resulting judgment against Wynn.

D. O'Connell, Alternatively, Is Not Entitled to an Award of Future Pain and Suffering Damages

"Damages for future pain and suffering must be established with reasonable certainty." *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988); *Scognamillo v. Herrick*, 106 Cal.App.4th 1139, 1151, 131 Cal. Rptr. 2d 393 (2003) ("do not award a party speculative damages, which means compensation for future loss or harm which, although possible, is conjectural or not reasonably certain") (citation omitted).

The Nevada Supreme Court "has held that when an injury or disability is subjective and not demonstrable to others (such as headaches), expert medical testimony is necessary before a jury may award future damages." Krause *Inc. v. Little*, 117 Nev. 929, 938, 34 P.3d 566 (2001) (citing *Gutierrez v. Sutton Vending Serv.*, 80 Nev. 562, 565-66, 397 P.2d 3, 4-5 (1964)); *Lerner Shops v. Marin*, 83 Nev. 75, 79-80, 423 P.2d 398, 400 (1967) (in cases involving "subjective physical injury, . . . the claim must be substantially supported by expert testimony to the effect that future pain and suffering is a probable consequence rather than a mere possibility"). Injuries that do not require expert medical testimony for future pain and suffering are broken bones or a shoulder injuries causing demonstrably limited range of arm motion because they are "readily observable and understandable by the jury without an expert's assistance." *Id.* at 938-39 (citing *Paul v. Imperial Palace, Inc.*, 111 Nev. 1544, 1548, 908 P.2d 226, 229 (1995)). Put differently, these are "objective" injuries which do not require expert medical testimony. *Id.* Injuries that are not demonstrable to others, and require expert testimony, include reinjuring a back, low-back

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[16] Expert testimony is required because the "trier of fact must separate pre-existing injuries from the new injury and award damages only for the injury." *Emert v. City of Knoxville*, 2003 Tenn. App. LEXIS 813, *8-9, 2003 WL 22734619 (Ct. App. Tenn. Nov. 20, 2003) (citing *Baxter v. Vandenheovel*, 686 S.W.2d 908, 912 (Tenn. Ct. App. 1985), *Haws v. Bullock*, 592 S.W.2d 588 (Tenn. Ct. App. 1979)). The fact-finder should focus on whether the "subsequent incident caused the original condition to worsen physically, not merely whether it merely caused additional pain to manifest itself." *Menditto*, 121 Nev. at 288, 112 P.3d at 1100. In cases such as the one at hand, a layperson cannot apportion damages because, among other things, they lack the requisite skill, training and experience.

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pain, mental worry, distress and grief. *Sierra Pac. Power Co. v. Anderson*, 77 Nev. 68, 75, 358 P.2d 892, 896 (1961).

As set forth above, because Dr. Tingey and Dr. Dunn failed to offer any medical or scientific evidence in support of O'Connell's claimed damages (their opinions were based exclusively on O'Connell's self-reporting), or apportion O'Connell's preexisting conditions and her subsequent fall with her *fall* at Wynn, there is insufficient evidence to establish any award for future pain and suffering damages. As a result, the judgment should at a minimum be reduced by the amount of future pain and suffering damages awarded by the jury.

E. O'Connell Never Should Have Been Permitted to Question Wynn's Witnesses About the Lack of Video Coverage of the Incident or that Wynn "Controlled the Evidence" in the Case

As set forth above, O'Connell attempted to create an issue at trial as to whether Wynn failed to preserve video surveillance footage of the incident and repeatedly asserted that Wynn controlled the evidence in the case. This was entirely improper and created an impression in the jury's mind that Wynn had done something inappropriate.

O'Connell questioned Corey Prowell, among other witnesses, regarding whether video surveillance captured O'Connell's fall at the Wynn. (Exhibit 3, 15:15-16:15, 37:18-25.) Additionally, O'Connell's counsel made repeated statements to the jury that Wynn "controlled the evidence" in the case. (Exhibit 4, 4:9-20, 5:9-21, 7:23-8:1, Exhibit 5, 5:7-16, 6:10-13.) Again, O'Connell's conduct materially prejudiced Wynn, warranting a new trial. As an illustration, O'Connell's counsel stated:

> This case is about control. There are two kinds of evidence you've been told. There's direct and evidence and there's circumstantial evidence. . . . It's not in Yvonne's control. It's in Wynn's control. And when they control the evidence, anything like that, we didn't see it. None of it. . . . Yvonne has her testimony. That's it. They made sure of it.

(Exhibit 4, 4:9-11, 4:17-20, 5:20-21.) These kinds of statements are clearly improper and warrant an appropriate remedy.

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F. O'Connell's Counsel Made Improper Statements to the Jury About Its Role in the Case to the Prejudice of Wynn

During rebuttal closing argument, O'Connell's counsel referenced that the jury was the conscience of the community. "As jurors, you are the voice of the conscience of this community. And you will go back there --". (Exhibit 5, 9:10-12.) This statement was entirely improper and unfair, as evidenced by the fact that Wynn's counsel's objection was sustained by the Court. (*Id.*, 9:13-21.) The statement invited the jury to disregard the instructions given in the case, which it clearly did in rendering its verdict. "Whether an attorney's comments are misconduct is a question of law subject to de novo review. Still, we give deference to the district court's factual findings and to how it applied the standards to those facts. Although counsel 'enjoys wide latitude in arguing facts and drawing inferences from the evidence,' counsel nevertheless may not make improper or inflammatory arguments that appeal solely to the emotions of the jury." *Grosjean*, 212 P.3d at 1078-1079 (internal citations omitted). Again, the statements by O'Connell's counsel warrants a new trial based on the irreparable prejudice that it created.

IV. CONCLUSION

Based on the foregoing, Wynn respectfully requests that the Court grant its Motion and enter judgment as a matter of law in its favor. In the alternative, Wynn requests that it be granted a new trial or remittitur, reducing or eliminating altogether O'Connell's award of damages.

DATED this 30th day of December, 2015.

LAWRENCE J. SEMENZA, III, P.C.

/s/ Lawrence J. Semenza, III

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b) and NEFCR 9, I certify that I am an employee of Lawrence J. Semenza, III, P.C., and that on this 30th day of December, 2015 I caused to be sent through electronic transmission via Wiznet's online system, a true copy of the foregoing **DEFENDANT WYNN LAS VEGAS, LLC'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR, ALTERNATIVELY, MOTION FOR NEW TRIAL OR REMITTITUR** to the following registered e-mail addresses:

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EXHIBIT 1

EXHIBIT 1

CASE NO. A-12-655992-C

DEPT. NO. 30

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

YVONNE O'CONNELL, individually,

Plaintiff,

vs.

WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company d/b/a WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Defendants.

PARTIAL TRANSCRIPT

OF

JURY TRIAL

BEFORE THE HONORABLE CAROLYN ELLSWORTH

DEPARTMENT V

DATED TUESDAY, NOVEMBER 10, 2015

TRANSCRIBED BY: KRISTY L. CLARK, RPR, NV CCR #708, CA CSR #13529

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* * * * * * * *

LAS VEGAS, NEVADA, TUESDAY, NOVEMBER 10, 2015;

10:36 A.M.

P R O C E E D I N G S

* * * * * * *

THE COURT: All right. Back on the record? All right. We're back on the record outside the presence of the jury, and Mr. Semenza indicated he had something outside the presence.

MR. SEMENZA: Yes, Your Honor. I'd like to move for a directed verdict as to liability in this particular matter. The only evidence that has been presented in this particular case relating to liability is Ms. O'Connell's assertion that the liquid substance came from the plants in the atrium area. She bases that statement upon two things. First, the proximity of the liquid substance to the plants; and secondly, its green color. Those two things are insufficient to send this case to the jury based upon liability.

And Ms. O'Connell did testify that she didn't know how -- the mechanism by which that liquid got on the floor. She didn't know where it came from specifically. She didn't know how long it had been there. There were no apparent leaks or anything of

that nature that she noticed. She doesn't know what the horticultural department waters its plants with. So it's pure speculation on her part that this green substance came from the plants.

She did say that it was sticky and that there were footprints in it. But she also testified that the footprints were from her and the individuals that picked her up. So there -- there is no evidence to support liability on the part of Wynn in this particular matter. And we would move for a directed verdict as to liability.

THE COURT: You're talking about a Rule 50 motion for judgment as a matter of law. That directed verdict, you know, they changed it. It's not a --

MR. SEMENZA: Yes, Your Honor.

THE COURT: -- directed verdict. Okay.

Plaintiff's response?

MS. MORRIS: Yes. Everything Mr. Semenza just addressed was the source of the liquid, and that's certainly not the issue. The issue is -- is that if Wynn had been acting reasonable, would that liquid still have been on the floor for such a period of time in such a shape and size and length that part of it would have been able to dry? And the testimony was very clear from Mrs. Yvonne -- or Ms. O'Connell is that

it was approximately 7 feet in length and a portion of it had started to dry.

There was also testimony from the employees at Wynn that it was so large that they actually had to place a sweeper machine over it. Additionally, the testimony is -- is that this is -- that was from Ynet Elias. If there's -- there is -- this is a high-traffic area in which they claim that they are continuously sweeping, continuously looking through, and that there's employees there. And if that was the case, if they had been doing that job, as they said, then they should have seen that liquid in the amount and shape that was there and cleaned it up or warned her of it prior to her coming through and falling in it. Now, the source --

THE COURT: Let me stop you. Because the issue in a premise liability case where there's a foreign substance on the floor is not whether they should have seen, it's notice, either actual or constructive notice. So do you believe that you've proved actual notice?

MS. MORRIS: I do not believe we have actual notice. This is an issue of constructive notice.

THE COURT: Okay. And what's the evidence you believe that you've brought to show constructive

notice?

MS. MORRIS: That due to the location, the size, and the fact that portions of it had started to dry, that if Wynn had been constantly sweeping, as they claim to have, that they should have seen it. So it's either knew or should have known. Were they on constructive notice? They have provided testimony that this is a high-traffic area, that it is important that they try to keep it clean, and due to the fact it was such a large size, and portions of it had started to dry, then they were on constructive notice that there is a large pool of green liquid in a -- the atrium area walkway that had begun to dry. And they should have been able to know of it and clean it up had they been acting reasonably in the way that they say that they do.

So I don't believe there's actual, but there is certainly constructive. And Ms. Elias said she didn't know what it was. She thought it was maybe a drink, but it was certainly sticky. It had gotten to the point where it had been on the floor long enough to actually have dried and become a different substance. So we had a liquid part in which she fell, and there was a dry part. The testimony was very clear, and Ms. Elias corroborated that.

THE COURT: Well, I don't recall that actually she did. But your client testified to that.

What's your response?

MR. SEMENZA: My response, Your Honor, is there's no evidence to suggest we should have known about it, period, end of story. I mean, we don't know how long it was there. Any conclusions or testimony that Ms. O'Connell has offered is pure speculation and based upon nothing. Whether it could have been a large spill or a small spill, the point here is, we don't know how long it was there for.

And, again, it's pure speculation that Ms. O'Connell said, Well, it started to dry. There's no evidence of that. There's no evidence of it at all other than her testimony. And -- and -- and so, again, I don't think that they've established any sort of constructive notice. They haven't met their burden in that regard. And -- and I think you have to grant us a directed verdict in that.

THE COURT: All right. Well, again, it's not a directed verdict. Under Rule 50, it's a judgment as a matter of law. And the Court has, you know, the option of either granting the motion or denying the motion and allowing it to proceed to the jury. And then if the jury returns a verdict, the -- allowing the

side who lose to renew within ten days and fully brief it. And so that's the -- the option I'm going to choose at this time.

Because right now, I mean, I've got to say that there is probably the -- very, very little evidence regarding constructive notice. Because really, the only evidence of constructive notice is Ms. O'Connell's testimony that the substance she slipped in was drying, you know.

And because Ms. Elias, her testimony of what she saw, describing the honey, syrup like substance that she saw when they moved the sweeper machine, you know, she didn't -- she didn't say she saw anything drying. She didn't describe a 7-foot spill. The only person who said that has been plaintiff. But is -- the question is is that sufficient? Normally I would have expected to see an expert witness who would come in and talk about what kind of -- you know, what kind of maintenance you would expect to see in -- in an area like this. And how long could a substance be on the floor that would be reasonable, that kind of thing. I mean, obviously you can't have somebody following along behind with a sweeper broom every customer that walks through the place. But there was no testimony of that.

So the question is: Is Ms. O'Connell's

testimony that the substance -- her -- I don't think that her belief that it was water, you know, would -- would support a finding that -- that Wynn put the substance there. I mean, it's -- it was -- that was nothing. That was just a belief based upon pure speculation. There's absolutely been no evidence presented by the plaintiff. So this is -- this is purely an issue about constructive notice. And what -- what would it take in terms of evidence to put somebody on constructive notice? And that's what I would expect to be briefed.

MR. SEMENZA: Thank you, Your Honor.

THE COURT: So the motion is denied without prejudice for it to be renewed if a verdict -- or after the trial is over. Because, of course, it can be renewed -- even if the jury doesn't reach a verdict potentially.

MR. SEMENZA: Thank you, Your Honor. There's one other matter I would like to address.

THE COURT: Yes.

MR. SEMENZA: It is our position, Your Honor, that the jury is not permitted to consider any of the testimony from either Dr. Dunn or Dr. Tingey. And the specific reason being is that neither of those two doctors testified as to the apportionment of

Ms. O'Connell's claimed damages which they are required to do.

So, for example, Ms. O'Connell identified that she had a prior back injury in 1989. Dr. Dunn also testified that she had degenerative disk disease in her back. Dr. Dunn is obligated and the plaintiffs are obligated to apportion that damage and identify percentages of what they attribute the symptoms that Ms. O'Connell is complaining of to the fall and those symptoms or -- or her prior medical condition. And they haven't done that in this particular case.

And so I think it would be improper for the jury to be permitted to consider any evidence from either one of them because they haven't apportioned it. It would be prejudicial error. The same is true with regard to Dr. Tingey. And going back to Dr. Dunn, we also have a preexisting condition of fibromyalgia. And so again, that plays a role that Dr. Dunn has to differentiate between all of these things in coming to his conclusions, which the plaintiff did not have him do.

With regard to Dr. Tingey, Dr. Tingey identified that Ms. O'Connell did in fact have mild right knee arthritis. He was not informed that Ms. O'Connell had a July 14th, 2010, fall.

Ms. O'Connell also has identified that she does in fact have fibromyalgia. And, again, these are preexisting conditions that the plaintiff is obligated to apportion through their physicians and their testimony which wasn't done in this particular case.

It's our position, Your Honor, that the jury is not permitted to consider any of the evidence by these two particular treating physicians by the failure to properly apportion the damages in this particular case whether it be special medicals, whether it be pain and suffering in past, or whether it's pain and suffering in the future. It doesn't frankly matter. They haven't apportioned it. And the jury can't consider it.

THE COURT: And you have some case authority to cite?

MR. SEMENZA: I do, Your Honor. And that's fine. Let me quote from this particular case. "In a case where a plaintiff has a preexisting condition and later sustains an injury to that area, the plaintiff bears the burden of apportioning the injuries, treatment, and damages between the preexisting condition and the subsequent accident." And that citation is Schwartz versus State Farm Mutual Auto Insurance Company. It is a federal district court case

out of Nevada, 2009, and it cites Klitz or Kleitz v. Raskin, 103 Nev. 325, 1987 case.

THE COURT: 103 Nev. 325 is the Nevada state court case.

MR. SEMENZA: Yes. And it's Schwartz versus State Farm. It is a Lexis cited case and a Westlaw cited case. And I do have those citations for you. Actually, I have a copy of the -- the -- the opinion, Your Honor. May I approach?

THE COURT: Yes.

MR. SEMENZA: Your Honor, we also do have a bench brief, and I know you haven't had an opportunity to review it.

THE COURT: Okay. So I'm going to have to read that and read this, and the Nevada case -- state court case that is cited as well.

MR. SEMENZA: Yes, Your Honor. May I approach?

THE COURT: Yes. I have read these before, but I need to read -- read them again.

Do you have -- do you want be heard on this at this point?

MS. MORRIS: I do just briefly. I mean, Dr. Tingey addressed that she had mild arthritis in her right knee, but he did not believe it had any impact in

the injury that was caused. She had no prior symptoms to her knee, no medical visits for -- at all, and he -- he specifically addressed it in his testimony.

As for the back injury in 1989, that resolved and there was no further treatment to it. I certainly would not classify that as a preexisting condition that needed to be apportioned to what we have 20 years later. The crux of this case and other cases similar to it is where someone has a prior accident and a car accident, maybe they have just finished treating, maybe they had residual symptoms from it, and they have an additional accident in which you have to apportion. You know, where's the injury from that to happen in this case? Or they have symptoms and they have already had pain and it's resolved and they shortly later have another accident. Could it be related? But he's talking about a back injury in 1989 that resolved after some physical therapy and no need for it after that.

Additionally, Dr. Dunn did address fibromyalgia in his testimony and said that it would not change his opinion as to the need for the neck surgery and the complaints that she's having because it's generally not seen there. So I don't think there is any requirement for apportionment in this case. And they were very clear in their testimony what they

related the causation in the knees to be.

In addition, I would like the opportunity to review this information as well and provide a brief in response.

THE COURT: All right. Well, what we'll do is I'm going to obviously read the cases again. We've got the jury waiting, and really this impacts jury instructions.

MR. SEMENZA: Correct, Your Honor.

THE COURT: So we've got time for me to review this. And in the meantime, put your case on.

MR. SEMENZA: Understood, Your Honor.

THE COURT: All right. Let's bring our jury back.

TRANSCRIBER'S CERTIFICATE

STATE OF NEVADA)
) SS
COUNTY OF CLARK)

I, Kristy L. Clark, a Nevada Certified Court Reporter and Registered Professional Reporter, do hereby certify:

That I listened to the recorded proceedings and took down in shorthand the foregoing.

That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript is a complete, true and accurate transcription of my said shorthand notes to the best of my ability to hear and understand the audio file.

I further certify that I am not a relative or employee of an attorney or counsel involved in said action, nor a person financially interested in said action.

IN WITNESS WHEREOF, I hereby certify this transcript in the County of Clark, State of Nevada, this 28th day of December, 2015.

_____
Kristy L. Clark, RPR, CCR # 708

EXHIBIT 2

EXHIBIT 2

CASE NO. A-12-655992-C

DEPT. NO. 30

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

YVONNE O'CONNELL, individually,

Plaintiff,

vs.

WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company d/b/a WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Defendants.

PARTIAL TRANSCRIPT

OF

JURY TRIAL

BEFORE THE HONORABLE CAROLYN ELLSWORTH

DEPARTMENT V

DATED TUESDAY, NOVEMBER 10, 2015

TRANSCRIBED BY: KRISTY L. CLARK, RPR, NV CCR #708, CA CSR #13529

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* * * * * * *

I N D E X

LAS VEGAS, NEVADA, TUESDAY, NOVEMBER 10, 2015;

9:25 A.M.

P R O C E E D I N G S

* * * * * * *

THE COURT: May this witness now be excused?

MS. MORRIS: Yes.

MR. SEMENZA: Yes, Your Honor, with the caveat I reserve to call him in my case.

THE COURT: So the defense may recall you in their case, but you're excused.

THE WITNESS: Thank you, Your Honor.

THE COURT: You may call your next witness.

MS. MORRIS: We call Yvonne O'Connell.

THE COURT: Okay.

THE CLERK: Please remain standing, raise your right hand.

You do solemnly swear the testimony you're about to give in this action shall be the truth, the whole truth, and nothing but the truth, so help you God.

THE WITNESS: I do.

THE CLERK: You may be seated. Can you please state and spell your first and last name?

Q. Well, do you attribute it to the fall or not?
A. I was healthy, and then I fell and immediately had these. That's all I can say.
Q. Can I have you turn to R6, please.
A. (Witness complies.)
Q. And under 17, you identify your severe back injury from 1989?
A. Yes.
Q. You felt it was important enough to mention your back injury, which was 25 years ago, in this health questionnaire; is that correct?
A. Well, all of them ask you to -- to write your history, so I also put down my tonsillectomy that I had in 1955.
Q. But did you feel that it was important to identify your back injury as part of your history in this document?
A. That was part of my history, so I was trying to -- to be as accurate as possible.
Q. And you also identified that you had injured your hands; is that correct?
A. Yes.
Q. Okay. How did you injure your hands?
A. Well, as I explained before, when I -- around 1986, I had to stop practicing dental hygiene because

Defendant's Exhibit I.

(Whereupon, Defendant's Exhibit I was admitted into evidence.)

BY MR. SEMENZA:

Q. Can I have you turn to Tab I, Ms. O'Connell.

A. (Witness complies.) Okay.

Q. And -- and just go to the first page, I1.

Again, is that your -- well, I don't know if it's your signature or your name. Is that -- which is it at the top of the page?

A. That's my name.

Q. And it's dated what?

A. October -- or, 10/15/10.

Q. And did you treat at the Southern Nevada Pain Center for a period of time?

A. Yes.

Q. And directing your attention to Item No. 2, you identified your pain on that particular day as 10 of 10; is that correct?

A. Um, well, I put -- I circled 10, but I didn't -- it wasn't -- it's not -- it wasn't 100 percent of the time, but that was the most pain I'd get --

Q. You do identify --

A. -- for me.

Q. I'm sorry. I didn't mean to cut you off.
A. I'm sorry.
Q. You do identify, however, that the daily average was 10; is that correct?
A. Yes.
Q. Is that true? Is that a true statement, that your daily average of pain during this period of time was 10 of 10?
A. Well, what I'm saying here is that I would get the most pain that I had ever had in a day. But I'm not necessarily saying it's 100 percent of the time. If I let it go, if I don't do what I need to do to make the pain subside, the pain just keeps getting worse, and it will -- it will get to that extreme now.
But now I know what causes it, and I know how to -- what to do to -- to keep it from going there. So I'm just saying here that -- that -- that it reached that, but this is when I didn't even know how to -- how to deal with it.
Q. Okay. And so what I just understood you to say is that you've been able to deal with your pain over time; is that fair to say?
A. I've learned the things that I need to do to keep it from -- from getting out of control.
Q. You learned to control it? Is that fair to

say?

A. Well, as much as I can. I mean, I'm in pain every day, but I now know that there's certain moves that I can't -- if I move wrong or if I'm in the wrong position, that will cause a lot -- lot of pain. And if I keep doing it, it just gets worse. So now I know a lot of things that I'm not supposed to do.

Q. Okay. And so you avoid those kinds of turns or bends or those sort of things?

A. Yes, I -- I avoid them.

Q. And that has reduced your pain level over time; is that fair to say?

A. That will reduce it, but -- but like sometimes I -- it's out of my control, and I can't do what I need to -- like -- like, I'd have to lie down and -- and sometimes just can't do that.

Q. Okay. And under Item No. 3, you identified that your pain -- did you -- you circled everything in this particular section, didn't you?

A. Yes.

Q. Okay. You identified aching, stabbing, tender, nagging, throbbing, gnawing, burning, numb, shooting, sharp, exhausting, and unbearable; correct?

A. Yes. I'd had pain for quite a while then, and I was worn down and I just hurt.

Q. Turning to page 2 of the document, do you see what this document is dated?

A. 9/3/10.

Q. And so that's -- this predates the first page that we saw; correct?

A. Yes.

Q. Okay. And, again, you identify on here under Section No. 2 that you have 10 of 10 pain; correct?

A. Yes. Same thing, same explanation.

Q. And that's your daily average that you identify there as 10?

A. Yes. And -- and you'll note that they're in the -- the same areas. When I fell that day, I had immediate pain in certain areas which, you know, I still get. And so those are the areas that I was -- I was having that in.

Q. And, again, under No. 3, you circled all of those entries; correct?

A. Yes.

Q. I want to direct your attention to No. 10. And that question states, What treat -- "What treatments seem to help you the most in relieving your pain?"

Did I read that correctly?

A. Yes.

Q. Would you receive -- read your handwritten response to that question, please, out loud.

A. I had more pain after last visit and tried to continue physical therapy. I fell on 7/14/10. My right leg hurt so much it gave out on me and my right knee hit furniture, left knee, floor. Knees and hands injured more. Left knee had not been injured before.

Q. Okay. So prior to September -- well, the date you identified here is July 14th of 2010; is that correct?

A. Yes.

Q. Okay. You had a fall on that day, didn't you?

A. Well, my leg gave out on me, which is why I use a walker. One of the reasons is because my leg and my knees give out on me. So it -- I wasn't a complete fall, but my leg gave out on me, and so ...

Q. Okay. You do identify in your own words that you fell; correct?

A. Yes, but what I'm saying is, I -- I explained it here when -- also in writing. I wrote my leg gave out on me. And that's -- that's what it does still. I'll walk around my house, my leg and my knees give -- give out on me, and I don't have a complete fall. So it's the same thing.

Q. Okay. And you identified here, it says, "My right leg hurts so much"; is that correct?

A. Yes.

Q. "It gave out on me"; right?

A. Yes. So which -- which is -- that's what it does. That's -- it hurts when I walk. So I start limping and then -- then I start hurting more, and then my leg and my knees give out on me.

Q. And you say in here your right knee hit furniture; is that correct?

A. Yes.

Q. And you said your left knee had not been injured before; is that correct?

A. Yes.

Q. So as of July 14th of 2010, your left knee had not been injured.

A. It had not been injured. I -- I had had the pain on the left side because I had been limping.

Q. So I understand what you're saying is because you were experiencing pain in your right leg, you began limping which affected your left leg?

A. Yes.

Q. And your left knee?

A. Yes.

Q. But you had never injured your left knee

Q. And how long is that?
A. I haven't timed it.
Q. How long would it take? You testified that you know how long it would take for that spill to dry. And so I'm -- let me finish.
A. I'm sorry.
Q. So I'm asking you how long in time would it take for that spill to dry?
A. So you're asking -- if you're asking me in minutes, I don't know the minutes, but it -- the time -- the time that it takes for that big of a spill to have a 3-foot part of it almost dry, that's how much time.
Q. But you don't know how many minutes it takes, do you?
A. I -- I don't know how many minutes.
Q. Thank you.
You don't have any training or expertise in determining how quickly liquids dry, do you?
A. No.
Q. You testified earlier that the footprints that you saw were yours and the people that had picked you up; is that fair to say?
A. Yes.
Q. Okay. You don't know specifically how the

Dr. Cash. But I have had them since I fell.

THE COURT: And is it a placard that you hang on your mirror, or is it a plate on your car?

THE WITNESS: Well, I chose to get the -- the placard.

THE COURT: All right. All right. Which UMC Quick Care did you drive to from your home and its -- what are the cross streets?

THE WITNESS: There's one closest to my home. And it's -- it's not -- it's like a -- a few blocks away. It's a -- it's on Sahara and Fort Apache.

THE COURT: Okay. So do you recall if your pants were stained after the fall?

THE WITNESS: I didn't look.

THE COURT: Do you recall, was your hand that hit the floor wet?

THE WITNESS: I don't recall that. I'm sorry.

THE COURT: Do you recall if you had to wipe off the bottom of your shoes after the fall?

THE WITNESS: I -- I was left standing on that drying part that was a little sticky. And when I walk -- when I limped to the side, I was on carpet. So there was a little stickiness on my shoes, so I -- I didn't really have to wipe anything off because I

correct?

A. Yes.

Q. And you also had an issue with breach of contract with insurance company back in the '80s; is that right?

A. Yes.

MR. SEMENZA: Objection. Leading. If we can just not do leading questions.

THE COURT: Sustained.

BY MS. MORRIS:

Q. Have you ever had a -- a claim for personal injury before this?

A. No.

Q. Have you ever had a lawsuit for personal injury before this?

A. No.

MS. MORRIS: Thank you.

MR. SEMENZA: I don't have anything further.

THE COURT: All right. Thank you. And you may now rejoin your counsel.

THE WITNESS: Thank you, Your Honor.

TRANSCRIBER'S CERTIFICATE

STATE OF NEVADA)
) SS
COUNTY OF CLARK)

I, Kristy L. Clark, a Nevada Certified Court Reporter and Registered Professional Reporter, do hereby certify:

That I listened to the recorded proceedings and took down in shorthand the foregoing.

That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript is a complete, true and accurate transcription of my said shorthand notes to the best of my ability to hear and understand the audio file.

I further certify that I am not a relative or employee of an attorney or counsel involved in said action, nor a person financially interested in said action.

IN WITNESS WHEREOF, I hereby certify this transcript in the County of Clark, State of Nevada, this 28th day of December, 2015.

_____
Kristy L. Clark, RPR, CCR # 708

EXHIBIT 3

EXHIBIT 3

CASE NO. A-12-655992-C

DEPT. NO. 30

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

YVONNE O'CONNELL, individually,

Plaintiff,

vs.

WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company d/b/a WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Defendants.

PARTIAL TRANSCRIPT

OF

JURY TRIAL

BEFORE THE HONORABLE CAROLYN ELLSWORTH

DEPARTMENT V

DATED TUESDAY, NOVEMBER 10, 2015

TRANSCRIBED BY: KRISTY L. CLARK, RPR, NV CCR #708, CA CSR #13529

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LAS VEGAS, NEVADA, TUESDAY, NOVEMBER 10, 2015;

8:32 A.M.

P R O C E E D I N G S

* * * * * * *

MS. MORRIS: Call Corey Prowell.

THE MARSHAL: Remain standing and raise your right hand, please.

THE CLERK: You do solemnly swear the testimony you're about to give in this action shall be the truth, the whole truth, and nothing but the truth, so help you God.

THE WITNESS: I do.

THE CLERK: You may be seated. And could you please state and spell your first and last name?

THE WITNESS: Yes. Corey C-o-r-e-y Prowell P, like Paul, r-o-w-e-l-l.

THE CLERK: Thank you.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MS. MORRIS:

Q. Good morning, Mr. Prowell. How are you?

A. Good morning.

Q. And in this case, you documented certain injuries that Ms. O'Connell was claiming; isn't that correct?

A. Yes.

Q. And do you recall in this incident that you actually wrote the guest incident report for Yvonne?

A. The guest accident report, yes.

Q. But you did obtain her signature on it; isn't that right?

A. Yes.

Q. So Yvonne wasn't able to fill out the incident report, but she was able to sign it; isn't that right?

A. That's correct.

Q. Now, there are video surveillance cameras in the atrium area where Yvonne fell; correct?

A. I don't -- I don't work in the dispatch, but vaguely, I'm assuming there is cameras in that area.

Q. Now, you have checked with video surveillance, the video surveillance department, didn't you?

A. Yes.

Q. And you were informed that there were no -- there was no video surveillance of Yvonne's fall; isn't that correct?

A. That's correct.

Q. And there's no video surveillance of Yvonne in the casino; isn't that correct?

A. In the casino, I'm not aware. When we contacted our dispatch, we concentrated on the accident area.

Q. And did you request to get video surveillance of the area prior to Yvonne's fall?

A. No.

Q. Did you request to get any video surveillance of the area as it was being cleaned up?

A. No.

Q. So the only thing you requested from video surveillance was the actual fall; is that accurate?

A. Yes.

Q. Now, you didn't speak with the porter who was assigned to that area on the day -- on the day she fell; isn't that correct?

A. No, I did not.

Q. You didn't take any kind of report from the person who was responsible for that area in -- in the atrium; isn't that correct?

A. No.

Q. So the only statements you took were from Terry Ruby and Ynet Elias and Ms. O'Connell; is that

this spill?

A. To my knowledge, no.

Q. Thank you.

THE COURT: Redirect.

MS. MORRIS: Yes, just briefly.

DIRECT EXAMINATION

BY MS. MORRIS:

Q. So, Corey, you said that you've done approximately 4,000 reports; is that right?

A. Yes.

Q. And it's been a variety of things you've responded to; is that right?

A. Yes.

Q. And you mentioned some of them are criminal; is that correct?

A. Yes.

Q. And in each of these incidents that you respond to, do you always check to see if there's video surveillance of anything involving that incident?

A. Yes.

Q. And isn't it true that the video surveillance cameras in the casino can actually follow people through the casino?

A. That's correct.

the jury question?

MR. SEMENZA: No, Your Honor.

MS. MORRIS: I have none.

THE COURT: Thank you. Give this to the clerk to mark as a Court exhibit.

THE MARSHAL: I think we have one more question. We have one more question.

THE COURT: Okay. Are there any other questions? Because this is your last opportunity. You know, we don't keep going. All right. Thank you.

Counsel, approach.

(A discussion was held at the bench, not reported.)

THE COURT: Sorry. So the next question was already asked and answered. So it won't be asked again and will be marked as court exhibit. All right. And may this witness now be excused?

MS. MORRIS: Yes.

MR. SEMENZA: Yes, Your Honor, with the caveat I reserve to recall him in my case.

THE COURT: Okay. And so the defense may call you in their case, but you're excused.

THE WITNESS: Thank you, Your Honor.

THE COURT: You may call your next witness.

TRANSCRIBER'S CERTIFICATE

STATE OF NEVADA)
) SS
COUNTY OF CLARK)

I, Kristy L. Clark, a Nevada Certified Court Reporter and Registered Professional Reporter, do hereby certify:

That I listened to the recorded proceedings and took down in shorthand the foregoing.

That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript is a complete, true and accurate transcription of my said shorthand notes to the best of my ability to hear and understand the audio file.

I further certify that I am not a relative or employee of an attorney or counsel involved in said action, nor a person financially interested in said action.

IN WITNESS WHEREOF, I hereby certify this transcript in the County of Clark, State of Nevada, this 28th day of December, 2015.

_____
Kristy L. Clark, RPR, CCR # 708

EXHIBIT 4

EXHIBIT 4

CASE NO. A-12-655992-C

DEPT. NO. 30

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

YVONNE O'CONNELL, individually,

Plaintiff,

vs.

WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company d/b/a WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Defendants.

PARTIAL TRANSCRIPT

OF

JURY TRIAL

BEFORE THE HONORABLE CAROLYN ELLSWORTH

DEPARTMENT V

DATED FRIDAY, NOVEMBER 13, 2015

TRANSCRIBED BY: KRISTY L. CLARK, RPR, NV CCR #708, CA CSR #13529

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* * * * * * *

LAS VEGAS, NEVADA, FRIDAY, NOVEMBER 13, 2015;

2:25 P.M.

P R O C E E D I N G S

* * * * * * *

THE COURT: And it is plaintiff closing argument.

CLOSING ARGUMENT

MS. MORRIS: All good? Can you hear me?

We started off in this case being told that Yvonne O'Connell allegedly fell at the Wynn. Over five years since she fell. The Wynn argues that she allegedly fell. They also say that she had a comped lunch before she allegedly fell. Maybe that's enough.

The statements written by their own employees, Terry said he saw her being picked up by four guests in the garden area. Corey Prowell had no reason to write down anything different from what he was reported on that day. Ynet Elias said, I came over. There was a green film, and it got covered up by a sweeper machine. Large enough that it needed to be covered, portions of it, by a sweeper machine.

Now, she came in here and said she doesn't really know. It was something sticky. It was honey. She didn't know. Not quite sure what she knows, but we know what she told Corey Prowell and he put into the report, she fell on a green liquid, and it got covered by a sweeper machine in the atrium area. But it's five years, eight months later, and she still just allegedly fell.

This case is about control. There are two kinds of evidence you've been told. There's direct and evidence and there's circumstantial evidence. And in this case, direct evidence, which would be the videotape of the fall, pictures of the substance on the floor, the time that it was last inspected before she fell, pictures of the area before she fell, her wandering the casino after the condition that she was in, direct evidence. It's not in Yvonne's control. It's in Wynn's control. And when they control the evidence, anything like that, we didn't see. None of it.

We heard from Trish -- well, we heard from two. We heard from the horticulture lady. She wasn't in the area that day. She didn't respond to the scene. She never talked to the person who was assigned there. But she took the stand and told us, this is what the

reports are. These reports, they can access water reports, detailed ones that show which gallon went where five years and eight months later. They can bring those because it's helpful. Then we heard from the claims lady. She wasn't there. She didn't go to the scene. She talked to someone who we don't know in the horticulture department that said something that, no, it isn't, and they noted in the file somewhere.

None of the evidence -- none of direct evidence was provided because they can control it. Helpful information. Well, Yvonne's red card history, they could pull that and bring that. And in order to find her in the casino, they'd need a picture of her. And there's a picture right there on her red card. They -- Corey testified they can go back and track and find people. And even the claims lady said, someone comes in, they said they were in this area of the casino, we can go back and, you know, locate them. That's why we take pictures of them.

Yvonne has her testimony. That's it. They made sure of it. She is telling you what she remembers, a large green substance with 3 feet of it dried. Luckily, at least the incident report tells us that Corey Prowell took the statement from Ynet Elias and Ynet Elias wrote down she saw a spill and it got

covered by a sweeper machine, and told us it was sticky. Circumstantial, that's all we have.

But do the pieces fall together? Because the argument is is that Yvonne O'Connell allegedly fell. But then, what do they do? Why are we here? A landowner has a duty to take reasonable care. And Wynn says, Come into our atrium area. Look at the beautiful designs. Look at the flowers. Don't look at the floor. We've got that taken care of. And the law says that Yvonne doesn't have to stare at the floor while she walks. There's a jury instruction right on it.

And she has a right to assume that Wynn is doing their duty. She has a right to assume that they are doing their duty in keeping it reasonably safe for her. And so when she went into the Wynn and she slipped and fell and landed on that marble with her degenerative spine -- they say she allegedly fell. But then they hire a doctor who says, Well, she did fall, and I think she has back and butt pain.

Now, this doctor came in and he took the oath and he took the stand and he told you to a high degree of medical certainty only thing she injured was her lower back and her butt. And I looked through everything very carefully. But you saw this man who is telling you how this has affected her life, who has

never met her, never touched her, never treated her, came in and said to a high degree of medical certainty, this is what's wrong with her. I had to point out to him, sir, you actually simply didn't look at the first page of that first visit to see another injury, nor did you look at the one 7 days later. He never even saw it.

That's what the Wynn puts their -- all their eggs are in that basket. Well, all right, if they think she fell, she wasn't really hurt. She was just hurt this way and this way. And this is a man who took the stand and told you, If you don't feel something in 48 hours, it doesn't matter who you are, how old you are, what kind of injury you had, it doesn't exist.

I mean, this is a man who literally sat up there and says he wishes her the best even though he has never met her and he's called her a liar for money. Because we're in a civil justice system. And it says you have to ask for money. What else can we ask for? You're not allowed to ask for all of this to have never happened or people to do certain things. You are asked for money. That's it. You're cornered.

And so you have to look at who the convenient person is in this. Isn't it convenient that anything that would have helped Yvonne show you exactly what had

happened was kept? Isn't it convenient that they hire a man who has -- has no information about her, who has given certain records that they choose to give her to be told, well, she only wants money and then I stand up and ask you for it?

Because the civil justice system says it's only thing I can ask for. So it's tough because Yvonne has been exposed. She has been stared at. She has been judged. And she has been called a liar because she went into the Wynn, and she assumed that they were doing their duty. So she was walking in their atrium. And she fell there. And now it doesn't matter; right? Because what happened to her, well, it's just another claim. But for her it isn't.

Now, there is a big issue about what she puts in her medical records. There is one thing Yvonne sure isn't hiding anything when she puts anything in her medical records. She puts down everything. She writes down things that they say she could have had or maybe she did. I mean, she didn't have testing for the ulcer or for the hiatal hernia, and she's marking it down. She's marking it down. She has not handled this emotionally. She has injuries to her body and pain that she doesn't handle well. And it is affecting her emotionally.

Now, there's one very important fact. On February 8th, in the morning, before she went to Wynn, she was not the person she is now. And Mr. Semenza's an excellent attorney. If there were prior medical records, any indication that she was going to doctors, or writing things down, having all these problems, they would be right up on the screen in black and white. Yvonne was not the person that she is today. It had been 20 years since she had gone for anything besides a cold, infection, a lump biopsy. She wasn't who she is.

Now, in order to get medical pain and suffering, you can't just rely on her saying, Well, I'm hurt; right? You have to hear from an expert witness. Now, we heard from Dr. Dunn and we heard from Dr. Tingey. Now, these are expert witnesses who have no motivation to just want to help her with her case. They're her treating physicians. They literally have an opinion based on their analysis of her. They came here and told you this is what we believe, in our expert opinion, as to what happened to her. Justice isn't trying to get all of her medical bills paid for, everything that she's put down and treated for. We're not asking for that. But the law says that when someone has been damaged by another person's negligence, then that negligence needs to be answered

for. And it's with pain and suffering and mental anguish. And Yvonne has told you she's overwhelmed. She is exhausted. She has pain and she has mental stress and anxiety that she did not have before.

She was a 58-year-old with a degenerative spine that went down on a marble provider -- or divider. And they want you to think maybe it was just soft tissue. No, nothing's wrong with her. The doctor you heard from, that was paid by Wynn, feeds into what they're saying; well, we have all these claims and people are just sucking off the system. And these doctors are diagnosing for money. But he was paid to look at her records and come to a decision. The man diagnosed her with a syndrome, and that syndrome feeds into -- it's very convenient. Feeds into exactly what the theory is; right?

But in order to diagnose that symptom, magnification syndrome, you have to do a physical evaluation of the patient. You have to watch their cognitive behavior. And then you have to do a structured interview with them in order to come to this. The man skimmed through some of her medical records and conveniently came to it because it fits the story.

Now, in order for there to be a verdict, we

have the burden. We have the burden as the plaintiff. And it's a preponderance of the evidence. It is, I am a little bit more right than I am wrong. Is it more likely than not what happened. Is it more likely than not that if Wynn had been doing their due diligence, their core value of guest satisfaction and services, the five-star luxury property, if they had been reasonably careful in doing that, would that liquid have been on the floor long enough that the portion of the liquid had dried and become sticky? They say that they are constantly going through there. Constantly. In a high-traffic area.

Now, if they had been acting reasonably, would it have been on the floor for that period of time? That's the question. Well, it would have been greatly answered by the time that floor was last inspected, information that Ynet Elias didn't know. So it is your job as the jury to infer if Wynn had been acting with reasonable care, would this have occurred?

Now, we also have to show -- it's our burden, is it more likely than not that Yvonne was injured as a result of the fall? Now, they have their doctor's testimony who says, whatever she had within 48 hours. And then if you remember yesterday, he gave me the knee and then he took it back. Right? He didn't want to --

he has this job to do. And it's very specific what he -- what he wants; right? That there's no way that a 58-year-old woman with degenerative spine took a crash on a marble and now needs a three-level cervical fusion and has a meniscus tear. There's no way. That's their theory; right?

But is it more likely than not that that fall on the marble did the damage to Yvonne's body that her doctors say it does? And is it more likely than not that Yvonne still suffers pain and she has physical and mental anguish? That's the burden.

Now, here's the catch: After we have gone through all that, and she allegedly fell, defense counsel's going to get up and tell you that if she did fall, it's her fault. That's the next step in the process. That she should have been keeping a better lookout. That she should have seen what they didn't see. That she should have been looking at the floor, seen it, and avoided it. Right? In an atrium area where everything is beautiful trees and flowers, eye level, they want you to look around. That's why they have invited you there, to come there and take a look at it. And so they're going to argue that she was at fault for this. That it wasn't their fault. And that is actually their burden. So because they want to

argue that it's her fault, they also have a burden. And it's to say, more likely than not, was it her fault that this occurred?

Now, there are some jury instructions that are very important. I would like to go over them. This is Jury Instruction 27. Jury Instruction 27 says, in pertinent part, "You may consider whether the defendant inspected the premises on a reasonable basis or in a reasonable way in determining whether the defendant knew or should have known of the unsafe condition. You may consider the length of time the condition may have existed in determining whether the defendant should have known of the condition had the defendant used reasonable care. The issue is, were they being reasonably careful? Because they have a duty as a landowner to make sure that anyone who enters their property isn't exposed in any unreasonable way to danger on their property.

So in the marble walkway, which is a high-traffic area, where they have a bar at the end that serves beverages, and they have admitted they have constantly people roaming through, if they were acting reasonably, as they say they would, would that substance have been on the floor? This one, the testimony of one witness worthy of belief is sufficient

for the proof of any fact. You heard the deposition testimony or the trial testimony of, sorry, Dr. Dunn and Dr. Tingey. And as much as Victor Klausner or Dr. Klausner tried to say that they were wrong, he is not a board-certified orthopedic surgeon. And he has never treated Yvonne.

And Dr. Dunn and Dr. Tingey, who have been practicing in Las Vegas for many years, and who actually treated her, are witnesses worthy of belief, not Dr. Klausner who says he's down on the medical board a couple of times a year and he's got patients that are mad at him left and right. And I think that he said that someone over 60 shouldn't get a meniscus tear repaired. They shouldn't do that because it's bad for them. They should just continue on.

You have to look at the credibility of the witnesses who are giving you the information. Because that's what you need to decide. That's what you go back and look at the evidence. Well, was that witness worthy of belief?

Now, when you consider the evidence, and you consider the witnesses, sometimes there are inconsistencies. So when Ynet Elias took the stand and told us, Well, I don't really remember anymore. But Corey Prowell says, She told me exactly what it was.

You have to look at those inconsistencies and say, What was more likely: The statement that was made on the day it happened or the statement she made on the stand, five years and eight months later, which contradicts exactly what happened back then?

Now, you're going to get two verdict forms. These are going to go back with you. And the verdict form is one where you decide whether there's a verdict for Yvonne O'Connell or a verdict for Defendant Wynn. And the verdict form for Yvonne O'Connell also has an option of finding her comparatively negligent. Now, if you find Yvonne to be a percentage comparatively negligent, that means that whatever verdict you have found for her is reduced in accordance with that percentage. So whatever percentage she has, that is less than the verdict.

So, for example, if it was $10, you found her 40 -- 40 percent negligent, it would be 60 -- it would be $6 left. However, if you find that Yvonne is more than 50 percent negligent, 51, then there is no verdict for her. It takes it away from her. Now, when you go back and you decide and you come to a decision, your verdict might be for Wynn. And it might be the right verdict. But if your reason is because you think there's too many claims, you think there's too many

frivolous lawsuits, why should the Wynn have to deal with this, that wouldn't be the right reason. The only reason you could come to a verdict for Wynn or should is if they did nothing wrong.

Now, also your verdict might be for Yvonne. And if your verdict is for Yvonne, it might be the right verdict. But if your reason is because you feel bad for her or she has been damaged and she has changed as a person, that's still not the right reason. The only reason you could come to a verdict for Wynn -- for Yvonne is if you think Wynn did something wrong. That's the focus now. Like I said before, this is not a verdict for her medical expenses. She has medical expenses. Clearly there's a lot of things in her medical records that are not related to this fall. Certainly didn't cause things that she's never been diagnosed with. Yvonne writes everything down, as you've seen. Her fingers bent when she was working as a dental hygienist. They told her it might be a connective tissue disorder. She wrote that down. She's having trouble with her divorce. She has -- feeling anxious, she writes down anxiety. She gets told all these things and writes them all down. But you never know what her actual injuries are until you hear it from a doctor. And so in this case, we heard

from Dr. Dunn and Dr. Tingey. And then there's the element of mental anguish, and I think the mental anguish came out from Yvonne. You heard from Sal. He said that she's a very private person. This injury has taken a toll on her. And she suffers every day.

And unlike what Dr. Klausner wanted us to believe that she's a pill popper and that she's all these other reasons, there's none of that. There's no prescription in her medical records. I mean, I think the most telling thing is when he tried to call Lovaza a long lasting narcotic when it's just a fish oil. I mean, anything he can do to bolster his opinion. So when you go back and have this verdict form, this is the verdict form for Yvonne. I ask that you assess her past pain and suffering, what she's gone through since this fall happened up until today, at 150,000.

And then there's future pain and suffering. And that's the suffering that she will continue to have as a result. And at that I ask a verdict of 250,000 for her past and her future. Is it more likely than not that Yvonne O'Connell was injured and has changed since her fall at the Wynn? That's the standard. Am I a little bit more right than I am wrong? If she was like this the morning of, there would be medical evidence of it as there has been multitudes of it

after. And the one defining factor is that fall on the marble divider at the Wynn and because of their negligence. Now defense counsel is going to get up, and he's going to talk to you, and then I have one more opportunity to speak to you. Thank you.

THE COURT: Defense.

TRANSCRIBER'S CERTIFICATE

STATE OF NEVADA)
) SS
COUNTY OF CLARK)

I, Kristy L. Clark, a Nevada Certified Court Reporter and Registered Professional Reporter, do hereby certify:

That I listened to the recorded proceedings and took down in shorthand the foregoing.

That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript is a complete, true and accurate transcription of my said shorthand notes to the best of my ability to hear and understand the audio file.

I further certify that I am not a relative or employee of an attorney or counsel involved in said action, nor a person financially interested in said action.

IN WITNESS WHEREOF, I hereby certify this transcript in the County of Clark, State of Nevada, this 28th day of December, 2015.

_____
Kristy L. Clark, RPR, CCR # 708

EXHIBIT 5

EXHIBIT 5

CASE NO. A-12-655992-C

DEPT. NO. 30

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

YVONNE O'CONNELL, individually,	)
Plaintiff,	)
vs.	)
WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company d/b/a WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X, inclusive,	)
Defendants.	)

PARTIAL TRANSCRIPT

OF

JURY TRIAL

BEFORE THE HONORABLE CAROLYN ELLSWORTH

DEPARTMENT V

DATED FRIDAY, NOVEMBER 13, 2015

TRANSCRIBED BY: KRISTY L. CLARK, RPR, NV CCR #708, CA CSR #13529

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LAS VEGAS, NEVADA, FRIDAY, NOVEMBER 13, 2015;

3:25 P.M.

P R O C E E D I N G S

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THE COURT: Rebuttal closing.

MS. MORRIS: Thank you.

REBUTTAL CLOSING ARGUMENT

MS. MORRIS: Yvonne didn't act the way Wynn thinks she should have. She didn't accept their medical attention, and she waited two days to go to the doctor. So she's not hurt. In order for her to be hurt, she had to do exactly what they wanted her to do. She couldn't have been hurt, she didn't call her cousins who were headed back to California. She didn't try to get in touch with Sal who's on a cruise ship in the middle of the Caribbean. So she must not have been hurt.

Now, remember when Dr. Dunn said, When you hit your thumb with a hammer, you're focused on the thumb and not looking at the other parts. The natural progression and onset of pain in -- in certain areas

when you immediately fall, how you feel the next day, how you feel when you start moving around, it is inhuman to think the body has to act within a certain way and every single solitary thing has to be acknowledged right there. And if you don't take their medical treatment, then they want a waiver signed. We're not responsible. They show up at a scene, this five-star, guest service to make sure they -- the one thing they have is a waiver of their responsibility.

Now, Dr. Klausner doesn't have the whole picture. The man took the stand himself and said, Well, I'd have to see the whole person, the person in front of me. That's where it matters. And, in fact, during his testimony, he said, She might be terribly hurt; I don't know. Because he doesn't know. He has never seen her. Period.

Yvonne O'Connell's life has changed. She spends most of her days at home. She does not go out and go dancing. She does not have the boyfriend that she had anymore. She goes to the doctors and tells them she's in pain. And she tells them other things. But don't throw the baby out with the bathwater. The legitimate injuries, the changes to her, what she feels every day, the objective injuries in her body, don't let those get lost with -- with the other things are

that's going on. Everybody is different. Everyone is. You cannot predict how people will react to things. Should she be a 2? Should she be a 4? Would this be easier for them if she was a 5 all the time? They want to control how she reacted to this situation.

Now, they just said that Ynet Elias called somebody and they said that area was clean. Wynn Las Vegas knows exactly what's going on in their casinos. They know when watering happens. They know when people are doing things. You're not going to touch a chip and move in there. But conveniently whoever she might have called who gave her information that it was clean, who is that person? Where are they? They don't know that part? When was it last cleaned? If it was clean, then what was the substance on the floor that Ynet saw? How had it gotten sticky?

Now, Yvonne knows what she thought it was. And the jury instruction is clear that in order for the plaintiff to recover in the absence of proof that the defendant created the condition or actually knew of it, the plaintiff must prove that the defendant had constructive notice. So if Wynn didn't create the condition, if they didn't put it their themselves, that doesn't prevent them from being responsible and taking reasonable care. That means the defendant, using

reasonable care, should have known of the unsafe condition in time to have taken steps to correct the condition or to take other suitable precautions, like warn her.

Now, they had her on the stand, and they're like, Well, what was it? And how long had it been there? Information only they would have. What about the person that cleaned it up? Maybe they could describe what it was. Probably be the best person for it. How long it had been there, Yvonne. Well, why don't we talk to the person who Ynet called, we don't know, who said it was a clean condition. It's all very convenient. The amount of liquid on the floor, the fact that a portion of it was wet, and a portion of it, almost 3 feet, had dried. And it was sticky. And the sweeper machine had to be used to cover it up. That is their own information. The sweeper machine wouldn't have been put over the spill if it wasn't large enough to have needed the sweeper machine put over it. Liquid that you can slip on doesn't get sticky unless it has time to dry. That is the information. If they had been acting reasonably with reasonable care in their high-traffic area, they would have seen the liquid and cleaned it up before anyone was injured. Or they could have put cones up. Anything. Because in this area,

specifically in this area, in this specialty area, it's an atrium. This is an area where the last thing they want you to look at is your feet. They want you looking at the flowers. They want you looking up and enjoying it. And so they are required to make sure that marble floor is free from hazards in a reasonable fashion.

Now, Ynet said they can't keep it 100 percent. One hundred percent is not required. It's reasonable care. And if that hadn't been sticky, and there weren't footprints in it, how could you tell how long it had been there? It had been there long enough to have dried. And that's what's important. Because reasonable care says they're doing a reasonable inspection of the areas to ensure it. And a reasonable time doesn't allow liquid in a 3-foot area to dry, become sticky, and get footprints in it.

Now, they said she wasn't looking out. The law says that depending on the circumstances, it may be reasonable conduct for a customer of a business establishment to walk and not constantly look and watch where he or she is going. So what's reasonable here? As she walking through their atrium, it's reasonable that she should be looking at the flowers. She doesn't have to be constantly looking where she's going. And

the law recognizes that.

Now, Dr. Dunn testified that Yvonne had a degenerative spine on the day she fell. Now, the law says not everyone is perfect. People have issues. As you go through life, you have them. So there's no dispute she had a degenerative spine at the time that she fell. And she's not entitled to recover anything for her degenerative spine. However, if it is aggravated, the damages are then for the aggravation. Yvonne O'Connell did not go to the doctor for pain in her spine for 20 years, but she had a degenerative spine. She had it. Cervical and lumbar. But until you injure the degenerative spine, it's typically asymptomatic. It doesn't hurt. It doesn't bother you.

Dr. Dunn has seen thousands of patients. Thousands of them. He knows what he's looking at. And he said he would be comfortable performing surgery on Yvonne. She reported anxiety and depression. She needs a psychological clearance. That is not uncommon. But he knows what he's looking for and he knows what he is looking at, and he has been doing it for 23 years. He is not fooled. He knows what he's looking at. And that is a major surgery. And they are now saying, Well, she hasn't had it in a year. It is a major surgery and it is a long time recover.

And Yvonne lives with her parent. She's going to need assistance when she has that. This is not an easy decision for her. But she has said, she just can't take the neck pain anymore. And she has significant findings in it that would be causing the pain that she has. Dr. Dunn gave an opinion that was both objective and subjective. Period. It was not just subjective like they want you to believe. He said his decision was based on both objective and subjective findings. As jurors, you are the voice of the conscience of this community. And you will go back there --

MR. SEMENZA: Objection, Your Honor.

THE COURT: Sustained. That -- the jury will disregard that. Counsel. This is not a punitive damage case you may not address the -- they are not to be making decisions as the consciousness of the community. You know that. It's improper argument.

MS. MORRIS: As members of the community. Is that better?

THE COURT: No.

MS. MORRIS: As a jury, you are going to go back there and deliberate. And you are going to determine what justice is. You get to make that decision. You take that in, you look at everything,

and you look at the preponderance of the evidence. This is not I am completely convinced beyond a reasonable doubt. It is, is it more likely than not? Am I a little bit more right than I am wrong that Yvonne was injured when she fell at the Wynn? And that it changed the person that she is.

This is her life. This is -- this is not a multiple claimant. This is her first personal injury. She hasn't filed lawsuits claiming injury left and right. And she certainly hasn't held anything back. If she was putting all this stuff into a medical record because a lawyer told her to like Dr. Klausner said, then she had a bad lawyer. I mean, there's just things in there that no one would ever believe because it -- it's not related to the fall. And it's subjective. So you have to have an expert testify to say this is what your injuries are because you can't see them. You can't see her pain. You can only hear what the doctors have to say.

And so when you go back and you decide this, it is a preponderance of the evidence. Am I a little bit more right than I am wrong? If Wynn had been acting reasonably, that liquid would have been cleaned up or it would have been warned of before she got there. Am I a little bit more right than I am wrong

that she was injured as a result of the fall? Am I a little bit more right than I am wrong that this case is about control? It has been a long process. And Yvonne has stood her ground, and it has not been easy. But that is what it takes to get justice.

And so when you go in there and you deliberate, I want you to remember that this is about making a decision as to who is a little bit more right than they are wrong. Thank you.

TRANSCRIBER'S CERTIFICATE

STATE OF NEVADA)
) SS
COUNTY OF CLARK)

I, Kristy L. Clark, a Nevada Certified Court Reporter and Registered Professional Reporter, do hereby certify:

That I listened to the recorded proceedings and took down in shorthand the foregoing.

That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript is a complete, true and accurate transcription of my said shorthand notes to the best of my ability to hear and understand the audio file.

I further certify that I am not a relative or employee of an attorney or counsel involved in said action, nor a person financially interested in said action.

IN WITNESS WHEREOF, I hereby certify this transcript in the County of Clark, State of Nevada, this 28th day of December, 2015.

_____
Kristy L. Clark, RPR, CCR # 708

EXHIBIT 6

EXHIBIT 6

CASE NO. A-12-655992-C

DEPT. NO. 30

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

YVONNE O'CONNELL, individually,

Plaintiff,

vs.

WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company d/b/a WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Defendants.

PARTIAL TRANSCRIPT

OF

JURY TRIAL

BEFORE THE HONORABLE CAROLYN ELLSWORTH

DEPARTMENT V

DATED TUESDAY, NOVEMBER 10, 2015

TRANSCRIBED BY: KRISTY L. CLARK, RPR, NV CCR #708, CA CSR #13529

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BY: LAWRENCE J. SEMENZA, III, ESQ.
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* * * * * * *

LAS VEGAS, NEVADA, FRIDAY, NOVEMBER 13, 2015;

1:45 P.M.

P R O C E E D I N G S

* * * * * * *

THE COURT: Okay. And this is Case No. A-12-655922, continuation of Yvonne O'Connell versus Wynn, LLC. And the record will reflect we are outside the presence of the jury. Parties are present with their respective counsel, and all officers of the court are present. And are counsel familiar with the Court's jury instructions numbered 1 through 43?

MS. MORRIS: Yes.

MR. SEMENZA: Yes, Your Honor.

THE COURT: And does the plaintiff object to the giving of any of the instructions?

MS. MORRIS: No, Your Honor.

THE COURT: And does the plaintiff have any additional instructions to propose?

MS. MORRIS: No, Your Honor.

THE COURT: Does the defense have any objection to instructions 1 through 43?

MR. KIRCHER: Yes, Your Honor. As it relates to Jury Instruction No. 27, the defense is going to

object the last paragraph of the jury instruction. We believe that the totality of the circumstances apply to this type of case. And there's a number of factors that should be considered and not just the inspection of the property to determine constructive notice and other surrounding circumstances.

So just on that basis, we will object to that jury instruction. And then going to Jury Instruction No. 37, which relates to the aggravation of her preexisting condition, we believe that there's not sufficient evidence and testimony, especially expert testimony to prove an aggravation of a preexisting condition. And I think we mentioned the DeVito case previously so we would object on that basis.

And finally, we would object to Jury Instruction No. 32. Defense believes that this jury instruction is confusing to the jury, and it's irrelevant to this case because it applies to other cases such as motor vehicle accidents, and it will confuse the standard as it to relates to liability cases. So the defense would object to that one for the record.

THE COURT: Okay. And so would the plaintiff like to address Jury Instruction No. 27 as far as the last paragraph they're objecting to? Why do you want

that given?

MS. MORRIS: Yes, Your Honor. The last paragraph of Jury Instruction No. 27 simply helps the jury understand the definition of what constructive notice is. Due to the fact actual notice was quite explanatory, we have to provide them with a definition as to what does constructive notice mean. And this paragraph here allows them to understand the definition of constructive notice. So when the -- it gives them factors to determine that has been based essentially on the evidence that has been presented here and is incredibly appropriate for a slip-and-fall case, especially in Nevada, and I think it accurately reflects the Nevada law.

THE COURT: So the reason the court is -- is doing this is -- or giving this instruction, including that last paragraph, is because the rest of the instruction describes the state of premises liability law concerning a foreign substance on the floor. And the most difficult part of that part of the law is the constructive notice part. We need to define for the jury what is constructive notice.

And the last two paragraphs are an attempt to, in fact, define for the jury what constructive notice means. And this is only by way of example. The

defense concern that -- that they won't be able to take into account all the circumstances, certainly that wouldn't be true because you could still, of course, argue about all of the circumstances, including the fact that even if someone was on constructive notice, there's the additional element. Once notice has been shown, then did the -- did the defense -- defendant failure -- fail to act reasonably to address the situation?

And so this -- this only goes to what is constructive notice. What types of things may a jury consider. And I think that there is Nevada case law that talks about the inspection of -- of premises. The Westward Ho case that we discussed in chambers where there was a slide at the hotel. It was -- the railings on the slide were loose, and there was a discussion about constructive notice and whether or not the defendant hotel should have, through reasonable inspection, discovered that went to the issue of constructive notice. So that's why I'm giving that.

MR. SEMENZA: And, Your Honor, just briefly on the same subject. With regard to the definition of constructive notice, obviously the Sprague case addresses that particular issue. And I'm simply noting this for the record. I don't need to -- to argue it

any further than we've had our discussions about it. But there is a unpublished case. It is Ford vs. Hills Medical Center which is an unpublished from the Nevada Supreme Court which seems to suggest that the constructive notice standard is that one would have to establish that the hazard was virtually -- a virtually continuous condition and created an ongoing continuous hazard.

And so generally speaking, we'd object to the inclusion of the -- of the constructive notice instruction based upon our reading of Sprague and this unpublished opinion which we have discussed.

THE COURT: All right. And I know you're not citing that case as precedent, but rather --

MR. SEMENZA: Correct.

THE COURT: -- rather as guidance. And the Court, of course, looks sometimes to unpublished opinion for guidance. And I did read that opinion, of course, and brought it to your attention. My concern there is the Court's emphasis on saying that the standard in Lucky Sprague -- in the Lucky Sprague case was that there was this continuous -- what was the wording again? Continuous and --

MR. SEMENZA: And ongoing continuous hazard.

THE COURT: Right.

MR. SEMENZA: For a virtually continuous condition.

THE COURT: Right. So that would, then, necessarily leave out the situation where you might have a situation where the evidence theoretically could support, and it could be argued in this case, because of plaintiff's testimony, that a condition was on the floor for a lengthy period of time. And that given all the circumstances, it was -- they should have been through a -- through a reasonable inspection that they were on constructive notice of that. And that more narrow discussion in that unpublished opinion seems to leave that whole possibility out.

So if you had a landowner who left -- basically did not attend their floors at all nor did any inspection and there was debris all over the floor, but yet there was no proof of a continuous condition, that that might not amount to constructive notice. And so that was my concern about that. And so initially, I looked at that case for guidance, but then thought it wasn't necessarily helpful as -- as a be-all and end-all for the definition of constructive notice. So this will be the opportunity if -- perhaps for the court to clarify.

MR. SEMENZA: Yes, Your Honor. And

obviously, our position is that it does -- it does define the standard for constructive notice in this particular state.

THE COURT: Okay.

MR. SEMENZA: I noted it for the record.

THE COURT: Great. I think we have made a good record on that.

All right. And number -- let's see. Next one was No. 32. The defense is objecting. Is that -- as well. That's the person who's exercising reasonable care has a right to assume that every other person will perform his duty under the law, and the absence of reasonable cause for thinking otherwise is not negligence for such person to fail to anticipate injury which can come to her only from a breach of duty by another.

And I believe I had stated in chambers the reason I was agreeing to give that was only because -- well, in part because the defense is arguing comparative fault and also arguing that the substance was placed on the floor not by them, not by the Wynn but by somebody else. In other words, there is a lack of proof that the Wynn placed any foreign substance on the floor. And so that brings that whole issue. The plaintiff had indicated that they were seeking this

instruction because their argument is that the Wynn has breached the duty of reasonable care and so that they felt that instruction was required.

And I understand the defense that normally this is more typically seen in the -- in the setting of, like, an automobile accident where a -- you know, there's an argument that I was going down the road and obeying the law, and I have a right to say that I shouldn't have to be on a constant lookout for somebody running a red light, which is a violation of law and clearly a breach of their duty. And so the fact that I didn't maintain that -- that I had a right to believe that everybody would be following the law.

And in this case, plaintiff has a right to walk down the aisleway, believing that the Wynn is exercising a -- their duty to exercise reasonable care to keep their premises safe so that she shouldn't have to watch every step she was taking. And that's basically the basis for having this in; is that correct?

MS. MORRIS: That's correct. I don't have anything in addition.

THE COURT: Okay. And let's see. Lastly was No. 37. And this was the preexisting condition instruction. A person who has a condition at the time

is not entitled to recover damages; therefore, however, is entitled to recover damages for any aggravation. And the argument by defense is there's no proof of aggravation. But I think that the jury could reasonably infer from the expert testimony of Dr. Dunn concerning the neck that because he testified that she -- yes, she had a preexisting condition, but he -- he testified at length about the difference between younger and older persons. And although, he believed and testified that every person as they get older will have degenerative disk disease in their spine, that this makes an older person more susceptible basically or -- or have a more difficult time recovering, and so that's what this instruction goes to.

So although the evidence, you know, may -- may not be as clear as we'd like it, there is some. And so I think the plaintiff's entitled to the instruction because there is some evidence from Dr. Dunn in that regard. That's why I'm giving that one. Okay.

All right. Oh, I'm sure the jury has been waiting patiently for the last hour, so let's bring them in.

TRANSCRIBER'S CERTIFICATE

STATE OF NEVADA)
) SS
COUNTY OF CLARK)

I, Kristy L. Clark, a Nevada Certified Court Reporter and Registered Professional Reporter, do hereby certify:

That I listened to the recorded proceedings and took down in shorthand the foregoing.

That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript is a complete, true and accurate transcription of my said shorthand notes to the best of my ability to hear and understand the audio file.

I further certify that I am not a relative or employee of an attorney or counsel involved in said action, nor a person financially interested in said action.

IN WITNESS WHEREOF, I hereby certify this transcript in the County of Clark, State of Nevada, this 28th day of December, 2015.

_____
Kristy L. Clark, RPR, CCR # 708

EXHIBIT 7

EXHIBIT 7

JURY INSTRUCTION NO. 27

The owner of property is not an insurer of the safety of a person on the premises, and in the absence of negligence by the owner, the owner is not liable to a person injured upon the premises.

When a foreign substance of the floor causes a patron to slip and fall, liability will lie only where the business owner or one of its agents caused the substance to be on the floor, or if the foreign substance is the result of actions of persons other than the business or its employees, liability will lie only if the business had actual or constructive notice of the condition and failed to remedy it.

In order for the plaintiff to recover in the absence of proof that the defendant created the condition or actually knew of it, the plaintiff must prove that the defendant had constructive notice. That means that the defendant, using reasonable care, should have known of the unsafe condition in time to have taken steps to correct the condition or to take other suitable precautions.

You may consider whether the defendant inspected the premises on a reasonable basis or in a reasonable way in determining whether the defendant should have known of the unsafe condition. You may consider the length of time the condition may have existed in determining whether the defendant should have known of the condition had the defendant used reasonable care.

EXHIBIT 8

EXHIBIT 8

CASE NO. A-12-655992-C

DEPT. NO. 30

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

YVONNE O'CONNELL, individually,	)
Plaintiff,	)
vs.	)
WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company d/b/a WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X, inclusive,	)
Defendants.	)

PARTIAL TRANSCRIPT

OF

JURY TRIAL

BEFORE THE HONORABLE CAROLYN ELLSWORTH

DEPARTMENT V

DATED MONDAY, NOVEMBER 9, 2015

TRANSCRIBED BY: KRISTY L. CLARK, RPR, NV CCR #708, CA CSR #13529

APPEARANCES:

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I N D E X

WITNESS:	PAGE
THOMAS DUNN, M.D.	
Voir Dire Examination by Mr. Semenza	4
Direct Examination by Ms. Morris	37

LAS VEGAS, NEVADA, MONDAY, NOVEMBER 9, 2015;

4:36 P.M.

P R O C E E D I N G S

* * * * * * *

THE CLERK: You do solemnly swear the testimony you're about to give in this action shall be the truth, the whole truth, and nothing but the truth, so help you God.

THE WITNESS: Yes, I do.

THE COURT: Please be seated, and would you please state and spell your first and last name.

THE WITNESS: Thomas Dunn, T-h-o-m-a-s, and D-u-n-n.

THE CLERK: Thank you.

THE COURT: And you may proceed.

MR. SEMENZA: Thank you.

VOIR DIRE EXAMINATION

BY MR. SEMENZA:

Q. Good afternoon, Dr. Dunn.

A. Good afternoon.

Q. Did you bring any materials with you today?

A. Yes, I brought my chart.

Q. May I examine those for a moment.
A. Sure.
Q. Dr. Dunn, is this the complete medical chart that you have in your possession relating to Ms. O'Connell?
A. Well, it's the complete file that I have in the possession, but there -- I believe other doctors at Desert Orthopaedic Center have seen her, so I didn't -- I don't believe I have their material in there.
Q. When were these documents obtained?
A. Well, I think my secretary gave them to me last week.
Q. Okay. And do you know whether she went out and obtained additional documents? And here's --
MR. SEMENZA: Your Honor, the documents that he brought with him include other materials outside of what he has produced in this case, so from other doctors, those sorts of things. So I don't --
THE COURT: Yeah, just seeing the -- this is what I have.
MR. SEMENZA: And -- and that's what I have as well.
THE COURT: And that was produced by the plaintiff was Dr. Dunn's records, so I don't know what you're talking about. I mean, what are you referring

to? Do you know?

MR. SEMENZA: There's a whole host of documents relating to UMC, relating to -- may I?

THE WITNESS: Sure.

BY MR. SEMENZA:

Q. Let me -- let me ask you really quickly, Dr. Dunn, do you know when this compilation was undertaken by your staff?

A. I don't know.

Q. Okay.

MR. SEMENZA: Your Honor, contained within the documents that Dr. Dunn has provided as part of his medical charts, there are documents from Desert Institute of Spine Care. There are documents from Edson (inaudible). There are documents from UMC Medical.

THE COURT: And what dates?

MR. SEMENZA: There's a ton of them, Your Honor.

I'll identify them for the record. There is a lumbar spine report MRI dated 4/8/2010 which I believe is referenced in -- in Dr. Dunn's medical chart. So that's not an issue. There is also from UMC of Southern Nevada Department of Radiology, a LK spine, lumbosacral limited study that was done, and that is

dated February 10th of 2010. I don't know that that was referenced.

THE COURT: Plain films?

MR. SEMENZA: Pardon?

THE COURT: Plain films?

MR. SEMENZA: Three views of the lumbar spine were obtained. There are five lumbar type vertebrae. Alignment is within normal limits. Marked -- Impression: Marked multi level degenerative disk disease of the lumbar spine.

THE COURT: Okay. So the doc's saying it's plain films, so X rays. Okay.

MR. SEMENZA: There is a chest radiograph dated March 19th of 2010. There is a medical record from Dr. Andrew Cash at the Desert Institute and Spine Care dated April 19th of 2010. There is a Dr. Cash Desert Institute and Spine Care report dated May 18th of 2010. There is a --

THE COURT: That's from Dr. Cash as well --

MR. SEMENZA: Yes.

THE COURT: -- May 18th?

MR. SEMENZA: There's a Southern Nevada Pain Center report office visit that does not -- oh, dated October 15th of 2010. There is a Desert Institute of Spine Care report from Dr. Cash dated September 13th of

2012. There is a Steinberg Diagnostic Medical Imaging Center lumbar spine series dated September 27th, 2011. There is a UMC authorization to release protected health information dated May 15th, 2014. There is a UMC chart record dated May 1 of 2014 comprised of two -- three pages. There is a UMC chart dated January 14th, 2014, comprised of three pages. There is a UMC chart dated September 4, 2013, comprised of three pages. There is a UMC chart dated June 4th of 2013 --

THE COURT: What was it? What date?

MR. SEMENZA: June 4th of 2013 comprised of three pages. There is a UMC chart dated February 5th of 2013 comprised of three pages. There is a document identified as E form external document, new problem, low back pain, provider, Dr. Dunn, 6/13 of 2014 that I don't believe I've seen before. There is a second document dated June 13th of 2014 from Dr. Dunn that I don't believe I've seen before. There is a third document dated June 13th, 2014, from Dr. Dunn that I don't believe I have seen before. There is a fourth document dated June 13th, 2014, that I don't believe I have seen before from Dr. Dunn. There is a HIPAA privacy notice for Ms. O'Connell that I have not seen before. There is a document from Dr. Dunn dated June 11, 2014, clinical lists update, that I don't

believe I have seen before. There is an internal other portal enrollment dated June -- June 11th, 2014, from Dr. Dunn that I don't believe I have seen before. There is a document that appears to be a service ledger for Dr. Dunn and Dr. Tingey that has additional charges that were not previously disclosed. There's a medical records request that is two pages dated September 10th, 2014, from Dr. Martin.

THE COURT: To who? It's from Dr. Martin to?

MR. SEMENZA: It just identifies the practitioner as Dr. Martin, and it's comprised of one page. And a second medical records request that does not identify the practitioner dated October 20th of 2014 that I don't recall having been produced.

So, Your Honor, if you'd like to examine the documents. I mean, obviously, Your Honor, I'm objecting on the basis that Dr. Dunn has reviewed and received additional medical documents that were not produced to us as part of his file. So I would ask that Dr. Dunn's testimony be stricken relating to this particular matter.

THE COURT: Dr. Dunn, the -- the MRI from 2010, the X rays from UMC from 2010, the chest X ray from 2010 were Dr. Cash's medical records from 2010? When did you get those?

THE WITNESS: You know, as I sit here, I -- I don't recall. It's usual and customary practice of my medical assistants to get all the medical documents that I -- are typically relevant for me, and that would be radiographic reports, other spine physicians or pain management physicians who have seen the patient. And typically those are done at the time that I evaluate the patient.

THE COURT: Okay. But the reason we ask, obviously, is the first report that I have of, you know, she's coming in to see you, looks like the first time you see her is June 16th of 2014 referred by Dr. Cash. But these -- you know, what we have is supposed to be your medical chart, and there's nothing in there from Dr. Cash. But now there is a chest X ray and there's two medical records, one in -- in April, April 19th of 2010, and one in May, May 18th of 2010.

But you can't say whether you had those at the time you saw her or not?

THE WITNESS: Well, I -- I mean, I typically won't document all the records as a treating physician I have reviewed. So what I did document in here were the relevant records that I did look at. A chest X ray wouldn't be relevant to me, but an MRI of the neck and back would be. And so those are listed. So I

evidently had those. But to anything else, I just don't have a recollection.

THE COURT: All right. So, I think his testimony needs to be limited to what's documented in his own chart as to -- to what he reviewed because, I mean, it does indicate here, for instance, that you had the MRI, this is in that same visit on page 3, that was performed May 8th, 2010, as well as the MRI from April 8th, 2010. I wonder if that's a typo. I don't know why they would do MRIs a month apart, but -- exactly on the same day. Let me see here.

But it couldn't -- is it true that it couldn't be in your report here if you hadn't seen it?

THE WITNESS: I mean, that's fair.

THE COURT: But beyond that, all of these other records, they're not mentioned at all. Are you relying on those? Because basically your testimony has to be limited in this matter to what's in your -- in your chart because of the disclosure. You're a treating physician and nothing -- the disclosure that was made said you were going to testify in -- in conformance with your chart. And then there was kind of a broad thing that said you were going to relate everything to the accident, but that was the -- the same disclosure that was made to every -- on every

single doctor that was disclosed, so your chart doesn't say anything about causation.

THE WITNESS: I would just answer it this way, Your Honor: The relevant material that I reviewed that would impact my opinions aren't put in my reports. And that would just be the MRI studies. And I ordered updated MRI studies, so that's why they're included. But the other reports, I don't recall if I saw those or not at the time. I have looked at them recently since I've had this packet here before me, and they really don't impact the opinions that I formulated in my mind from my own records without even having seen those.

MR. SEMENZA: Okay. Your Honor, the prejudice is that I need to know what he's reviewed, and I don't think it's appropriate or fair, to be perfectly honest, that if Dr. Dunn does show up with new documents here that I haven't had a chance to review and go through and, to be perfectly honest, then I'm expected to voir dire the witness, and we're supposed to be completed here today by 6:00 p.m. So I think I'm prejudiced in the sense that there are new documents that have now shown up which I don't believe have ever been produced in this particular case.

THE COURT: Does the plaintiff believe you've produced these other records?

MS. MORRIS: They were produced by other providers. Defense counsel and I both sent the same requests and got the same records and disclosed the same records and which in that, Dr. Dunn has clarified he's going to be testifying in accordance with the information that's contained only within his medical records. I don't see any prejudice. There's not going to be any reference to those records. The records that he has contained in his chart are records that have been disclosed in the litigation. However, he and I both put in requests and both got the same information.

Now, generally, when you depose a doctor during litigation, you show up to the deposition, they have different information in their charts aside from what's disclosed with their custodian of records which says these are the -- the records that we created and maintained in the course and scope of our practice and it was made close in time and time we saw her. They don't sign custodian of records for other people's medical records. That is standard. So there is no prejudice. He's not --

THE COURT: I don't -- I don't think that's true. I think that generally they copy the whole chart and say, this is, you know, what's in our chart. Because a -- a physician's allowed to if they -- if

they've used other physicians' records to form a diagnosis, they need to know that history. And if they've asked for those records and they're part of the chart, they can rely on that. And so, yeah, to say you should -- I mean, you really should when you go and you take a deposition, it should have everything that was produced in response to the request to produce the medical records, because it doesn't matter where they're from, it just needs to be -- you know, when you've asked for produce your chart, it needs to be the whole chart not what we think we'll pick and choose and --

MS. MORRIS: Well, the custodian of records sign for this to say these are the Desert Orthopaedic medical records related to the treatment of Yvonne O'Connell.

THE COURT: Mm-hmm.

MS. MORRIS: In this case, I think Dr. Dunn has been very clear that he -- he noted the relevant ones that he used in coming to his diagnosis, and it's stated right there, he looked at prior MRIs and X rays. He was referred by Dr. Cash. That's what he's going to be testifying about. I don't see any prejudice.

THE COURT: He looked at -- he looked at the prior MRI studies. That's --

MS. MORRIS: And X rays as well.

THE COURT: No, it doesn't say --

MS. MORRIS: It -- it states previous studies, X rays, CT scans, MRI.

MR. SEMENZA: Where are you looking?

MS. MORRIS: Page 1 from the office visit of 6/16/2014.

MR. SEMENZA: Where did these come from?

MS. MORRIS: It's his chart.

THE COURT: Office visit of 6/16 you're talking about, page 1?

MS. MORRIS: Correct. Referred by Dr. Cash. Previous studies, X rays, CT scan, MRI.

THE COURT: Previous studies performed. That just means that she had previous studies. Doesn't say he's got all of them. It does indicate that MRIs on page 3 and 4, which are -- are obviously significant, and they're noted here in some detail. So clearly he read them, because he couldn't have dictated this dictation unless he had.

But I'm going to allow you to go forward and find out what he knows and how he knows it, and then we can make a decision.

MR. SEMENZA: Okay.

/////

BY MR. SEMENZA:

Q. Dr. Dunn, may I grab those from you? Thank you.

Dr. Dunn, what kind of doctor are you?

A. I'm a board-certified orthopedic surgeon, fellowship trained in spine surgery, and my practice is related to surgery of the spine.

Q. And do you have a specialty of the body? Is it back?

A. Yes. My specialty is a subspecialty of orthopedics which is a specialty of surgery of the musculoskeletal system and I specialize in the spine.

Q. And do you recall when Ms. O'Connell first came to you?

A. Well, June of 2014. June 16th I believe it was.

Q. And on June 16th, 2014, what did you see her for?

A. I was evaluating her for neck and low back pain.

Q. And was this an office visit?

A. Yes.

Q. Prior to this appointment with Ms. O'Connell, did you have any patient history?

A. Not that I recall, no.

Q. During this appointment on June 16th of 2014, did you or anyone from your staff take a patient history?

A. Yes. Typically with these -- the process with electronic medical records, the patient will fill out intake sheets, so on the computer. Then we have a person called a roomer who actually rooms the patient and then goes through a history. And then I sit down with the patient and go through the history that they've obtained.

Q. And where does the -- does the patient input into the computer prior to her appointment?

A. Yes. Right at the time of her appointment. We have portals in the lobby.

Q. And do you know if that was done in this particular case?

A. No. I -- I mean, it was done. I don't know if she did it at home, online, or if she did it in the lobby. I don't know.

Q. Do you know whether it was done before or after your initial appointment with her on June 16th, 2014?

A. It wouldn't have been done after. It's done before I see her.

Q. And where is that patient evaluation or

history located in your records?

A. It's -- it's in our computer, and it's this document I have before me of June 16th, 2014.

Q. Okay. Is -- is the --

MR. SEMENZA: And may I approach, Your Honor?

THE COURT: Yes.

BY MR. SEMENZA:

Q. Is the first page of this set of documents that you brought with you today, is that the patient history that you've been referring to?

A. Yes.

Q. And it's comprised of five pages, the first five pages. Why don't you verify.

A. Yes.

MR. SEMENZA: And, again, Your Honor, I don't think that's ever been produced in this particular case. But I understand you would like us to move on.

THE COURT: Well, do you know if the --

MS. MORRIS: I don't know what he's talking to -- about. I haven't seen it.

THE COURT: Okay. Show her.

MR. SEMENZA: Thank you.

MS. MORRIS: I can look through our 16.1 disclosures. It does look familiar to me.

(Inaudible.)

MR. SEMENZA: Let me take a look as well.

MS. MORRIS: Your Honor, I can keep looking if you would like to go with the questions (inaudible.)

MR. SEMENZA: Well, I may have questions.

I may have found it, Your Honor. I think it was produced.

THE COURT: Okay.

BY MR. SEMENZA:

Q. And how did you come to treat Ms. O'Connell? Was it through referral?

A. According to this document, it says it's a referral by Andrew Cash, Dr. Cash.

Q. And do you have an understanding as to why Dr. Cash was referring you this patient?

A. I believe it's a second opinion evaluation.

Q. A second opinion as to what?

A. Her neck and back pain.

Q. And when you initially saw Ms. O'Connell on June 16th of 2014, did you have the previous doctor's medical history, medical charts?

A. Again, I don't recall. May have. Typically when I see patients, my medical staff will obtain records of that physician's visit as well as injections or radiographic studies.

Q. And at that June 16th, 2014, appointment,

what was her chief complaint?

A. She was complaining of pain in the low back radiating to the butt and right leg to the heel, and pain in the neck radiating to both arms down to the hands. And she was also having pain in the chest area.

Q. And did she provide an explanation as to what she believed the source of that pain was?

A. When you -- I don't quite understand. What do you mean "the source"?

Q. Did she provide a history as to the basis of why she was having these pains?

A. Yes. She said it developed after a slip-and-fall injury on February 8th, 2010.

Q. And prior to seeing her on June 16, 2014, other than the history that was taken and provided by Ms. O'Connell, was there anything else that you had in your possession relating to her prior care and treatment?

A. Again, I only referenced her MRI study, so I -- I don't recall if I looked at anything else at the time.

Q. As of June 16th of 2014, the first appointment, did you in fact have prior MRI studies of her?

A. Yes.

Q. And can you identify what those studies were.

A. There was an MRI of the cervical spine that was obtained on May 8th, 2010. There was an MRI of the lumbar spine that was performed on April 8th, 2010. And there were radiographs of the cervical spine. I believe those, perhaps, were taken at my office, as well as flexion/extension, bending films of the lumbar spine taken at my office.

Q. Okay. Where are the radiographs referenced?

A. Right -- unfortunately, it all runs together in this report. But on page 2 at the very bottom of the page in bold letters, it says, Magnetic resonance imaging lumbar. And then I describe what I see. Then right below that, it says RAD, which stands for radiograph spine, cervico complete minimum views. And then the reading of that is on the next page. And then right below the reading of the (inaudible) the letter C, C5-6, C6-7, there's another indication of RAD, referring to radiographs of the lumbar, LS, which is lumbar spine, with bending views. Then there's, unfortunately, it looks like a double space. And then there's a description of my reading of those radiographs of the lumbar spine. That would be on page -- it's designated as page 4.

Q. So at the top page, there are two sets of

X rays that were done at your office on that particular day?

A. Yes.

Q. Okay. And then show me where the prior -- you were referencing on page 2 (inaudible).

A. I'm sorry. It's actually page 3. I have magnetic resonance imaging, cervical and lumbar, on the bottom of page 3.

Q. Okay. So below the bolded magnetic resonance imaging cervical performed on 5/8/2010, there's another MRI that you did on that particular day?

A. No, no. I -- I reviewed an MRI that was obtained on April 8th, 2010. And in bold letters, it says magnetic resonance imaging lumbar. And then below that I have one sentence where I describe what I see. And then below that it says, RAD in capital letters. That's an abbreviation for radiographs of the spine, neck, cervical, complete minimum, four views.

And then on the next page at the top of 4 is listed my reading of those radiographs. Then immediately before that (inaudible) designation capital letters RAD, referring to radiographs of the LS spine, which is the lumbosacral spine with bending views. And then there's a double space, and again, we're at the top of page 4, where I describe what I see there.

Q. Okay. Other than the MRIs performed on May 8th, 2010, and the MRI on 4/8/2010, and then the RAD spine cervical complete at the bottom of page 3, and the RAD spine LS with bending views at the top of page 4, those were the additional records that you reviewed?

A. Well, those are studies that I actually reviewed. I don't believe they were records. I believe they're actual studies -- I mean, actual films.

Q. And when was the next time you saw Ms. O'Connell?

A. Well, I -- I -- the first visit, which we just covered, I had recommended MRI studies, updated MRI studies of the neck and back. So she returned on July 14th, 2014, approximately a month later, to review those studies, both of which were obtained on July -- June 27th, 2014. Excuse me.

Q. And those -- what were those studies that were performed prior to the appointment on June -- July 14th of 2014 that you had ordered updated?

A. Yes. That was an MRI of the cervical spine and also of the lumbar spine.

Q. And did you see Ms. O'Connell again?

A. Well, I saw her to review those films, and then I saw her a final visit, which would have been a

third visit with me, on October 13th, 2014.

Q. Okay. So you saw her a total of three times?

A. Yes.

Q. Okay. And what was the appointment for the third time related to?

A. Again, we were -- it was for neck and back. And depending on the visit, one problem area would predominate over the other. At that visit, she was having a flare-up of her back pain. But she said overall the neck pain predominates with the associated symptoms of numbness and tingling and pain radiating down her arm. Could be right arm some days, left on others. And so at that point, I discussed surgical options with her.

Q. And has she been to actually see you since October 13th of 2014?

A. No.

Q. Has she made any determination as to whether she's going to have surgery with you?

A. Again, not with me. Again, beyond that last date in October, there's been no communication.

Q. Do you have any understanding as to why there's been no communication since October 13th, 2014?

A. Well, I express to my patients at that point, there's really nothing further I can do for them short

of surgery. So there's no reason to come back and see me unless they've decided to pursue surgery.

Q. And did you give Ms. O'Connell some nonsurgical options as well?

A. Well, basically at this point, based on her history, we're dealing with a chronic condition that has persisted for greater than six months, and according to her history, it dates back to this slip-and-fall accident in 2010, February. So at that point, pretty much the capacity of the human body to correct this problem is -- is in the area of what we call miracles. So anything we do at this point is palliative. In other words, it's just going to alleviate some of her symptoms, but it's not going to correct the problem.

So it's basically the recommendation of do your best to live with this any way you want to help you with the symptoms and improve your quality of life. And if none of that works and you can't endure the symptoms, then you have that option, which in this case, would be the option of last resort. That would be surgery.

Q. Is your knowledge about the slip and fall that Ms. O'Connell alleges that she had exclusively coming from her?

A. Yes.

Q. Are you aware of any other traumatic injuries that Ms. O'Connell may have suffered after February 8th of 2010?

A. No.

Q. Are you aware of whether Ms. O'Connell had any preexisting conditions prior to February 8th, 2010, that might impact your treatment of her?

A. Well, she had noticed in her past medical history that she had a history of depression, so that's a psychological condition that may impact her outcome with surgery.

Q. Any other preexisting conditions that Ms. O'Connell identified?

A. No.

Q. To your knowledge, did she ever identify that she had a history of fibromyalgia?

A. No. Being fair to the process, I'm just going by my medical records, and I don't have that -- I don't see that document in my records, no.

Q. If Ms. O'Connell did have a history of fibromyalgia, might that have affected her pain levels that she was identifying during your appointment?

A. May have, yes.

Q. Are you familiar with something called Marfan

syndrome?

A. Yes.

Q. Do you think that if Ms. O'Connell had a preexisting history of Marfan syndrome that that might have affected how she experiences pain?

A. Well, Marfan's disorder, we believe Abraham Lincoln may have had that, is a collagen disorder that can affect the large blood vessels such as the aorta that are under pressure. So it's unusual for a patient with that disorder to live into their sixth decade of life, but it would not impact her pain.

Q. What about Ehlers-Danlos syndrome?

A. Again, another collagen disorder. It would not affect her pain.

Q. But fibromyalgia would have an effect on her pain levels?

A. Yes.

Q. Did you undertake any attempts to differentiate -- strike that.

Did you look for any other initiating causes of Ms. O'Connell's back pain other than the claimed fall on February 8th of 2010?

A. Well, as part of the evaluation of all patients, the history gives us 80 percent of the time a diagnosis. It represents typically the largest part of

information a physician uses to develop the diagnosis or the cause of their problems. In musculoskeletal medicine, the main categories are degenerative, traumatic, infectious, carcinogenic, and those can interplay. It's not necessarily something that's independent of each other.

So I mean, that goes through your mind when you're sitting and talking to patients. So the history comes into play in helping to allot a lot of those factors. So one is always considering all of those issues.

Q. Is it your opinion that the back problems that Ms. O'Connell has relate to a traumatic injury?

A. Based on her history, yes.

Q. And her history is coming exclusively from her; is that correct?

A. Yes.

Q. Now, do you know what portions of Ms. O'Connell's body were impacted in this alleged fall?

A. Well, only as it was related from her to me as documented on the June 16th, 2014, note. And it simply says, While walking in the Wynn Hotel and Casino, she slipped and fell backwards twisting to the right striking her right buttock and leg on a raised

divider before hitting the ground.

Q. And after the first appointment, did you have a diagnosis of Ms. O'Connell's condition?

A. Yes.

Q. What was that?

A. I noted impressions of degenerative disk disease of the cervical spine with cervical radiculopathy, and lumbar disk disease with sciatica, and a bilateral carpal tunnel syndrome per history.

Q. And is that a -- the degenerative disk disease of the cervical spine that you identified here, do you know whether that was a condition Ms. O'Connell had prior to February 8th, 2010?

A. Well, that's a radiographic diagnosis which would have existed prior to her accident. But the critical factor is whether it's symptomatic or not. And by her history, it was not.

Q. Okay. What do you mean by radiographic history? So are you -- in a sense --

THE COURT: I -- I'm going to kind of stop here. I mean, what I'm seeing here is he's saying that he's got radiographic studies, including MRIs, that show she's got degenerative disk disease. And he's saying that he's going by what she said that I didn't have any pain, and -- and that he relied on that in

determining.

But you're going to link this up to the fall?

THE WITNESS: That's her history.

THE COURT: And it's based only on her. So if she lied to you about whether she was symptomatic before, then of course if you knew that, that would change your opinion? So it's really based upon how credible the patient is because you -- you have no way of knowing.

THE WITNESS: That's correct.

THE COURT: And you know that degenerative disk disease doesn't -- doesn't happen -- I mean, she had this degenerative disk disease. She's just saying that she was fine until this happened.

THE WITNESS: Correct.

THE COURT: Okay.

THE WITNESS: We all do at 58.

THE COURT: All right.

BY MR. SEMENZA:

Q. But what I want to understand is she had the condition prior to February 8th, 2010, but your issue is she was asymptomatic until that fall.

Is that what you're basing --

THE COURT: On history? That's what you're saying by history?

THE WITNESS: That is my understanding, yes. I mean, this accident occurred with this patient when she was 58 years of age. That's the sixth decade of life. We all, unfortunately, deteriorate with time. And that deterioration is what we refer to as degeneration in the medical -- in the musculoskeletal system, or arthritis is another synonym. It is not significantly symptomatic in most patients.

And so just the presence of radiographic abnormalities is not necessarily clinically relevant. We really have to see and talk to the patient. There will be many times where I see some horrible MRIs and radiographs, and talk to the patient and they go, No, I don't have that much pain. I did six weeks ago when I got these studies, but I'm actually doing fine. So we don't operate on X rays. We operate on people. And I can see normal looking -- well, relatively normal looking films in which patients are very symptomatic. So it's all part of the diagnostic jigsaw puzzle. But causation comes by talking to the patient and getting a history.

So the radiographic findings that I see here, which really didn't change much in the years between the two studies that I ordered, are -- are simply reflective of her condition that existed prior to this

accident. Whether it was symptomatic or not, we have to turn to the patient for that information. Unless there's medical records, which I didn't review.

BY MR. SEMENZA:

Q. Okay. I just want to be clear, though, in my understanding, that the condition that Ms. O'Connell had that you've identified in your medical records, the degenerative disk disease, preexisted February 8th of 2010; is that correct?

A. I would answer it this way: The radiographic findings that I see on these films more likely than not existed the day before she was injured, yes.

Q. Okay. And your causation analysis is based upon the symptomatology and the expression of pain that Ms. O'Connell has indicated to you during her appointments.

A. Yes. That's the history of the patient.

Q. And you had testified earlier that fibromyalgia might in fact impact that expression of pain that Ms. O'Connell was having.

A. Yes. It can. I mean, they're distinct issues from discogenic pain to fibromyalgia, but patients with chronic fibromyalgia will have pain issues that can affect the whole person. I'm not just saying that I -- I mean, I have treated patients that

have fibromyalgia and had neck and back injuries. And they're distinct and different, but it complicates the issue.

I think the important thing that I've expressed to this patient is even with surgery, she will continue to have pain. The issue is if we take 50 percent or 60 percent of that pain away, is that sufficient and satisfactory to improve her quality of life? And many patients who are appropriately set up with the surgery are at a wit's end where they would welcome a 50 percent improvement. But it's not curative in which we're going to say you're going to be pain free. And part of that reason could be also her fibromyalgia, if she indeed has it.

Q. Do you know what percentage of her pain might be attributable to fibromyalgia, if she has it, versus the degenerative back issues that she has?

A. I think with her back, it can be confusing. And I would want further diagnostic studies to help sort that out. As far as her neck's concerned, I don't believe the fibromyalgia confuses that picture, in my opinion.

Q. But the lumbar, it could?

A. Yes.

Q. Just a couple quick follow-ups to move on.

THE COURT: Okay. Well, I mean, I think you need to do this on cross. Because I'm not seeing that there's something that he can't testify to that he has here. I mean, your -- your argument is, well, it's not enough for a doctor to rely on the patient's -- the patient history. But the -- the -- the bottom line is, they do rely on the patient history. And if you want to get the doctor to explain how it can be affected if she has other issues, psychological issues, other things like that, then that's part of cross-examination to get him to explain to the jury if he didn't know about these things, it might change his opinion, et cetera. But I don't see that it's going to prevent him from testifying from what I've heard today.

I mean, there's just -- I -- I disagree with your -- your brief is well, no doctor should be able to testify based upon the patient history. But the cases that you cited are -- are different, you know, where there was a lot of medical records that were available to the doctor. We don't have that in this case. In other words, we have --

MR. SEMENZA: There were -- there were a lot of medical records that were potentially available to this particular doctor.

THE COURT: Do you have them?

MR. SEMENZA: I -- I mean, her entire history as far as the fibromyalgia, as far as seeing pain doctors, as far as all those sorts of things. I mean, those documents exist and have been produced in this case. Whether they're used at trial, I don't know. But that's the issue I've got is this whole cornucopia of other stuff out there that obviously Dr. Dunn has not had an opportunity to review. And he testified that his entire basis for the confusion of causation was based upon what the plaintiff was telling him. That in and of itself I don't believe is sufficient to link the causation in this particular case. He was told X. It may or may not be true. Again, that's coming from the plaintiff herself.

And what he did say is that there are essentially objective findings that she had the physical condition prior to the fall. And so it's a function of symptomatology, again, which is even further back, which is subjective in nature as far as what she's experiencing and what she isn't. And so I don't think it's appropriate --

THE COURT: But pain -- reports of pain are always subjective. They're -- you can't visualize pain.

MR. SEMENZA: Exactly. So --

THE COURT: All right. So -- but doctors have to -- doctors do rely on reports. And if you can show him other things, that's cross-examination. I mean, if he wasn't given the proper tools to come up with a proper causal diagnosis and you can show that, then -- then do that. But I don't think at this point he is kept from testifying.

MR. SEMENZA: So that's -- and, Your Honor, I understand your ruling.

THE COURT: Okay. I've ruled. Let's go. Get this jury back in here.

What's your schedule look like for the rest of the week?

THE WITNESS: Well, tomorrow I'm in surgery, but any other day of the week, I'm open.

MR. SEMENZA: And I can tell you I'm not going to be done, Your Honor.

THE COURT: Well, okay. But he can come back Thursday he just told me.

MR. SEMENZA: Okay.

THE WITNESS: Or Wednesday. Whatever's easy, but Tuesdays --

THE COURT: Wednesday the courthouse is closed.

THE WITNESS: No problem.

THE MARSHAL: All rise for the jury, please.

(The following proceedings were held in the presence of the jury.)

THE MARSHAL: Jury is all present, Your Honor.

THE COURT: Thank you. Please be seated.

And we've called Dr. Thomas Dunn who has already taken the stand. I'm going to have the clerk swear you in again.

THE CLERK: Doctor, can you please stand.

THE WITNESS: Oh, yes.

THE CLERK: You do solemnly swear the testimony you're about to give in this action shall be the truth, the whole truth, and nothing but the truth, so help you God.

THE WITNESS: Yes, I do.

THE CLERK: Thank you. Would you please state your name for the record.

THE WITNESS: Thomas -- Thomas Dunn.

THE COURT: Thank you.

Proceed.

DIRECT EXAMINATION

BY MS. MORRIS:

Q. Dr. Dunn, can you tell us where you currently

work.

A. I am a partner with Desert Orthopaedic Center and have been here since 1995 with that group.

Q. Tell us what you do for work.

A. I am a board-certified orthopedic spine surgeon, which means I limit my care and treatment of patients with neck and back problems.

Q. Do you have a certain specialty?

A. Yes. Again, that specialty is orthopedic surgery, and orthopedic surgery is the surgical disorders of the musculoskeletal system, so injuries to the joints and the bones of the body from the neck to the toes. But it -- there are many subspecialties of orthopedics. For instance, in my group there are 22 orthopedic surgeons and we all have our subspecialties. I'm the senior spine surgeon. There are four spine surgeons, hand surgeons, sports medicine specialists, total joint specialists, so my specialty would be spine.

Q. How long have you worked at Desert Orthopaedic?

A. I came to Las Vegas from San Diego in 1995 at their invitation, and they've been here since 1969.

Q. Thank you.

Do you have any privileges at any hospitals

in the Las Vegas area?

A. Over the years, I've been at most of the hospitals. But as I -- at this stage in my career, I limit my practice to either Spring Valley Hospital or Southern Hills Hospital, and also, I'll go to Valley Hospital.

Q. Can you give us a little background about your education?

A. Sure. I went to undergraduate studies college at the University of California San Diego and received a -- a degree in biology which is a typical premed major. And I was accepted into the University of California Irvine Medical School and graduated in 1985 with a medical doctor degree.

Upon receiving that degree, one then does an internship and a residency. I did two years of general surgery and then was accepted into the orthopedic surgery program at University of California Irvine. The medical center is actually in Anaheim or Orange, and then I did -- after four years of orthopedic surgery, that's the completion of the residency, I then did an extra year of subspecialty surgery training in -- in spine. And that's called a fellowship year. And that was done at Rancho Los Amigos Hospital in Downey, California. And that completed my formal

training. And then there was board certification, which requires both a written and an oral exam, which I passed. And then every ten years we take a written examination for recertification, and I've done that twice successfully when required.

Q. What kind of training do you need to become board certified?

A. Board certified, you have to complete an accredited residency program in this country, and then one has to take a written examination upon completion of that residency training. And then after two years of clinical practice, one is then eligible to sit for the oral board examinations. All this takes place in Chicago. And then upon passing both of those tests, you're then board certified.

Q. Have you ever testified in court as an expert in the field of orthopedic medicine?

A. Yes.

Q. How many times?

A. I will say roughly 20 times.

MS. MORRIS: Your Honor, I ask that Dr. Dunn be qualified as an expert in the field of orthopedic medicine.

THE COURT: The court doesn't qualify experts. The Court just rules on whether they'll be

allowed to testify, but you haven't asked him his opinions, and there's been no objection, so that's how it works.

BY MS. MORRIS:

Q. Dr. Dunn, can you tell us how you came to treat Yvonne O'Connell.

A. Yvonne O'Connell was referred to me by Dr. Andrew Cash on June 16, 2014.

Q. And what was the reason that Yvonne came to see you?

A. I was evaluating her for neck and low back pain.

Q. And when's the first date you saw Yvonne?

A. That was June 16th, 2014.

Q. And at that time, did you have any imaging studies of Yvonne O'Connell?

A. Yes. I had MRIs that were taken in 2010 of both her neck and lumbar spine. And we also -- we, my office also took radiographs, X rays of her neck and low back.

Q. Can you tell me how the X rays of her neck and low back were done.

A. We have X ray machines, radiograph machines in the office, and we have three, soon to have four, offices in town, and we all have X rays. So the

patient will just go in the X ray suite with a tech, and then they will take X rays of the neck while she's standing, a front view, side view, a flexion/extension view from the side of both her neck and back.

Q. Why did you order those studies be done?

A. Those are important diagnostic studies. Radiographs allow me to see the condition of the joints and bones in her neck and back and provide additional diagnostic information.

Q. During that first visit with Yvonne, did she tell you the reason why she was having pain?

A. She related that her neck and low back pain began with a slip-and-fall injury on February 8th, 2010.

Q. Did you receive any history as to what treatment she had received prior to coming to you?

A. She states that two days later, she went to UMC Quick Care. She had a primary care physician. She'd seen a neurologist, a spine surgeon, a pain management physician, and she had previously had X rays, a CAT scan, and MRI studies.

Q. Did she tell you about any conservative care she had undergone?

A. I'm sure she did, but I didn't list it here.

Q. During that first visit with Yvonne, had you

reviewed her prior history before seeing the patient?

A. No. Typically I just look at the films with the patient and review it with them.

Q. When's the next time you saw Yvonne?

A. Well, at that visit, I had recommended updated MRI studies since it had been four years since she had had the original studies. And she obtained those studies and returned to see me approximately a month later on July 14, 2014.

Q. When Yvonne came and saw you on that first visit, did she tell you specifically what was hurting?

A. Well, principally, it was her neck, but it was low back and neck, and she had radiating symptoms into her extremities. Numbness and tingling and pain.

Q. Tell me about that second visit you had with Yvonne.

A. At that point, I reviewed the MRIs with her. Her symptoms persisted and -- which isn't surprising since they had been going on, according to her, since 2010. And, again, I just reviewed the MRIs. And, in my opinion, there were no significant changes.

Q. What did you see in her cervical MRI?

A. Again, I saw changes that we would typically see in a patient of her age. At this time, we are now -- in a -- in a woman who's in her seventh decade

of age, early 60s, and she had some typical changes of degenerative -- of degeneration that would involve her disks, her facet joints, and she had a component of neuroforaminal stenosis in her mid and lower neck. The foramen represents the hole through which the nerve travels to go to the upper extremities. And we commonly see a tightness about that anatomy or that foramen, which in Latin means doorway. So it gets a little tight, and that may give patients some of these upper extremity symptoms that she was having.

And the lumbar spine, nothing there that I thought was significant other than some mild neuroforaminal stenosis at one level in her back.

Q. During that second visit on July 14th, you reviewed the MRIs, you said; is that correct?

A. Yes.

Q. And did anything else occur on that visit?

A. No. I examined the patient, and I let her know that there was -- the main -- I would say the most important information that is obtained from the MRI is to make sure that there's nothing dangerous. Sometimes you'll find a tumor or cancer that we didn't suspect, an infection, something that poses a threat to her neurologic status. And I really didn't see that. So the most important information, I says, hey, let's

celebrate, there's nothing dangerous. Therefore, this is about your pain. If you can live with your pain, so be it. If not, we'll look at other options.

I suggested she try fish oil. Fish oil at 4,000 milligrams a day can serve as a great anti-inflammatory agent. And I -- and I -- I instructed her at that time, then, with that information, just come back as needed.

Q. Did you see Yvonne again?

A. I saw her one last time. Her third visit was on October 13th, 2014, where she was expressing increasing difficulty during symptoms, principally of her neck pain. And she wanted to discuss options of surgery, so I discussed that with her and told her, hey, there's nothing dangerous. If you can live with this, live with it. If not, then you have the option of surgery as your last resort, and instructed her to return if that was her choice.

Q. What did you recommend for surgery?

A. For her, to help improve her neck pain and to improve the symptoms into her arms, to open up that foramen or hole. The typical procedure is an anterior. We -- a little incision through the neck, and we would remove three disks. We would open up that space and fuse it in that proper position. So that's titled an

anterior cervical neck diskectomy, removing the disk, and interbody fusion with the placement of a plate and screws. Quarterback for the Denver Broncos, Peyton Manning, had that surgery.

Q. Now, you said that type of surgery would help her neck pain; is that correct?

A. Yes. It's not curative for her problem, but it can take 50 to 60 percent of the pain away. And for people who are having a significant problem dealing with that pain, that's affecting their quality of life, then it's an option they can choose.

Q. Okay. Is there physical therapy required after a surgery such as the three-level fusion?

A. It's -- it varies from individual to individual, but typically anywhere from a month to two months of therapy can be ordered.

Q. Where would that surgery be conducted? Would it be in your surgery center or the hospital?

A. A three level would be in a hospital.

Q. Now, did you discuss with Yvonne her lumbar spine on that last visit?

A. Well, yes. Basically, again, I'm the surgeon. I didn't feel that there was any surgical treatment for her low back, so you basically do your best to live with it.

Q. When Yvonne came to see you, did she report any preexisting medical conditions to you?

A. She noted that she had a history of depression.

Q. Does that have any significance to you?

A. Well, certainly it can. Psychological issues like depression can affect one's perception of pain and can affect one's result from surgery or outcome of surgery.

So typically if I see that, it's not necessarily unusual, but I may require a psychological evaluation and clearance prior to surgery.

Q. Did you come to an opinion as to the cause of Yvonne's need for the three-level fusion?

A. Well, I think, as I share with every patient who comes to see me on their initial visit, as I did today on many occasions, that there are three things patients want to know when they see a specialist, or any physician for that matter. You want to know the cause of your symptoms. That's the diagnosis. We want to make sure that that particular problem is not dangerous as it involves your neurologic system or life. And then we want to discuss treatment options. Those are the three things we cover.

So establishing the cause of her symptoms is

an important part of her visit. Was that your question?

Q. Yeah. Did you come to a determination as to the cause of Yvonne's need to have the three-level fusion?

A. Well, the -- the need is based on a number of factors. Her complaints, No. 1. Establishing that there was nothing dangerous. In other words, I didn't believe that there was any threat to her neurologic status. So, again, this becomes an elective option at her choosing, an option of last resort. And then the radiographic findings and physical exam findings. So all of those lead me to my recommendation of surgery being an option for her. And based on her history, she said it began with the slip-and-fall accident. So that's how I would relate it to the accident.

Q. So is it your -- your opinion to a reasonable degree of medical probability that she's in need of this three-level cervical fusion due to the fall she had on February 8th of 2010?

MR. SEMENZA: Objection, Your Honor.

THE COURT: State your legal grounds.

MR. SEMENZA: I don't think he can provide that opinion to a reasonable degree of medical certainty.

THE COURT: Well, it's an opinion to a reasonable degree of medical probability. But I guess, it -- it more seems like skipped -- you skipped a step. I mean --

MR. SEMENZA: May we approach, Your Honor?

THE COURT: Yeah.

(A discussion was held at the bench, not reported.)

THE COURT: I'm going to sustain the objection and let you clarify.

BY MS. MORRIS:

Q. Dr. Dunn, we're going to back up a little bit.

The findings in Yvonne O'Connell's MRI, those are degenerative, is that correct, in her cervical and lumbar spine?

A. That's correct.

Q. And can you describe to us what degenerative means.

A. Degenerative is what you see before you right here. As we age, things wear out. In the musculoskeletal system, we call it arthritis, or degenerative disk disease. There are changes in our spine just like we can have in the rest of the -- the other joints of our body.

The clinical relevance of those changes, though, is based on your symptomatology as a patient, because we all develop degenerative changes typically by our third and fourth decade of life. And as we age, we can develop a lot of degenerative changes, but we don't see significant symptoms in the majority of people with degenerative arthritis. And remember, there are different types of arthritis. I'm just talking about the typical wear and tear that we all get. And what I mean by relevant, I mean enough symptoms where you're going to see a doctor and get treatment. Most people can take some Advil, over-the-counter medications and they feel fine and they can live with it.

So an X ray that shows degenerative changes in a 58-year-old, 62-year-old patient is not necessarily relevant. In other words, I can see a lot of, quote, abnormalities, but until I speak to the patient, get a thorough history and do an examination, many of those changes may be irrelevant and don't require treatment. And on the other side of the coin, I can see X rays and MRIs that are fairly normal looking without much degeneration, and yet patients can have severe pain, and through further diagnostic evaluation, we find the source of that pain that may

merit surgical treatment.

So in Ms. O'Connell's case, at the time that I evaluated her, she was 62 years of age, and she had radiographs taken after her accident in 2010 that showed typical changes that I would see in a 58-year-old patient. So the main changes that we look for are fractures, disk herniations, tumors, infection. But I know from doing this for many years that we can see normal changes on MRI and X rays that don't reflect the injury.

So I think the films that we saw here demonstrated changes that I can attribute to her pain, and yes, those changes were there before she slipped and fell. But her history is that when she slipped and fell, that was when this pain began. And understanding that the mechanism is one of a slip and fall in a 58 year old, that is not unusual, because we are more frail at 58 than we are at 48 or 38 or 28. And that fall is perilous in the sense that we can sustain injuries to the musculoskeletal system that become chronic.

So the degeneration that I see in her, I would see in everybody that's 58. But all that tells me is as an orthopedic specialist is that she is more frail because of those changes, and a slip and fall can

result in changes that we can't always measure on radiographic films, so her history is critical.

Q. So the history is critical because that's when she reported she started feeling pain; is that correct?

A. Well, I -- well, at the time that I'm seeing her, she has chronic pain. And I define chronic, and the textbooks define it as at least three months. I define it as six months. So at 2014 when I saw her, she states that she's had chronic pain that dates back to 2010, and her history is that she had the slip and fall. And that's a reasonable mechanism of injury that can cause a previously asymptomatic condition, degeneration, to become symptomatic.

Q. Now, in your treatment of Yvonne, did you notice or did you see any indication of Yvonne malingering or having issues of secondary gain?

A. No.

Q. Do you know what malingering means?

A. Yes.

Q. Can you tell us.

A. Malingering is a form of what we call secondary gain. In medicine, primary gain is the motive that, hey, I -- I -- I have a problem medically, and I want to be cured or I want to be treated for that

condition. So the gain is to become cured or have clinical improvement of a condition.

Secondary gain means that I -- basically this issue of wanting to get better is affected by a motive outside of getting better. I want to get out of work, for instance. That's malingering, or --

MR. SEMENZA: Objection, Your Honor. I'm sorry. I have to object. I think this is outside the scope of his treating of Ms. O'Connell.

THE COURT: All right. That's sustained. There's been -- there's nothing that addresses it in his medical records, and it was not -- his -- his testimony has been limited previously to his chart. That was the disclosure.

So the jury will disregard the last -- the testimony concerning malingering.

BY MS. MORRIS:

Q. Let me lay a little foundation.

Do you -- do you look for those symptoms when you treat patients?

A. Yes.

Q. And if you do note that, would you put it in your medical record?

A. Yes.

Q. And did you note anything like that in -- in

Yvonne's medical record?

A. No.

Q. Do you in your treatment of patients ever perform the Waddell factors?

A. Yes.

Q. What is that?

A. Well, the Waddell factors, one has to be very careful. I think it's used by too many doctors, and it should only be limited to surgeons. And Waddell signs -- the word Waddell is named after --

MR. SEMENZA: I'm going to object, again, Your Honor. He's going far afield of his medical chart in this particular case.

THE COURT: Well, I -- I think -- did you do that -- you did that test?

THE WITNESS: Yes, we did.

THE COURT: So he did the test and that's in the chart, so he can explain it to the jury.

THE WITNESS: It -- it's -- Gordon Waddell was a Scottish orthopedic surgeon who wrote a paper in 1980 that described these tests that may help surgeons delineate organic sources of pain. Say, a person comes in and says they have arm pain. An organic source would be a fracture or a contusion, a problem with that arm, referred pain from a pinched nerve versus, say, a

psychological issue that may be affecting that patient's cause of pain. And so he developed these certain tests. There's five different tests you do that can be done within a minute, and that may give the surgeon some idea that there may be a psychological contribution to the pain. Doesn't exclude the patient could have that fracture or contusion. It just gives the surgeon information to help them better treat his patient. I think too often that is used erroneously to implicate a patient that's not being forthright and honest, and that's the improper use of that test.

BY MS. MORRIS:

Q. Why do you think it should be limited to orthopedic surgeons?

A. Because the information is predominantly for us offering the patient a surgery who potentially has a major complication and may affect the outcome of that surgery. And we want to optimize the patient's success, and psychological factors affect that success. So if we have those tests that may suggest that may be a complicating factor, we would then send the patient for preoperative psychological clearance. And we don't do that for every patient, but those type of tests help the surgeon make that determination.

Q. How do you perform a Waddell test?

A. Well, it's just part of the physical examination, and there's five different categories. One of them -- and, again, going on, distraction. In other words, I may ask the patient to lay on the table and raise their leg, and they may say, I really can't do it. But if I distract them by examining something else and then have them raise the other leg, they may raise it so I can observe that and say, hey, the patient really can raise it when they're distracted as opposed to when they're told to do that.

Patients may have symptoms that aren't necessarily -- I forget the category, but numbness and tingling, paresthesias, or deficits that cannot be explained by what we see on radiographic findings. And sometimes those symptoms then indicate that their sensory examination is -- is off, and that might be a positive Waddell sign.

But there are so many disorders that give those types of findings other than like, say, a pinched nerve, inflammation of a nerve can give those patients. So that's why the Waddell signs are now -- have been refuted. There are tests where we can do physical findings that shouldn't create a particular sign. For instance, pushing down on the head shouldn't necessarily cause back pain, but we know that it can,

but that could be a potential Waddell sign. Like, if I pushed down on your head, it shouldn't cause low back pain. If you say it causes low back pain, that potentially could be a positive Waddell sign.

And I think there's -- there's five total, but that kind of summarizes. And -- and basically, it's not going black or white. It's me examining, establishing a rapport with the patient, speaking with the patient, understanding that there's trust, do I feel this patient is being forthright, and part of that exam may help me with that assessment.

Q. In this case, did you perform the Waddell sign?

A. It's part of my evaluation of every patient. And I would only note it if I felt that the patient had psychological factors that would affect my diagnosis and treatment.

Q. Is it possible to perform the Waddell sign tests without ever touching the patient?

A. No. You have to touch the patient. It's part of the physical examination.

Q. In your treatment of Yvonne, did you ever diagnose her with symptom magnification disorder?

A. No.

Q. What is that?

MR. SEMENZA: Objection, Your Honor.

THE COURT: Over -- I mean, sustained. He didn't diagnose her with it, so it's not relevant.

BY MS. MORRIS:

Q. Let me back up.

Is that something that you are -- you look for when you see a patient?

A. Well, I think that's one of those things that we use loosely. Like symptom magnification can be interpreted a different way. So what you're asking me is a patient saying they hurt when they really don't hurt, or they're magnifying their symptoms. You just barely touch them and they're jumping. The interpretation of that must be very careful and can be prejudicial against patients who have a very low pain tolerance, for example. And everyone has a different pain tolerance. And I see it in all my patients from all walks of life.

And -- and so what I don't know about a syndrome or disorder. It's not -- it can be interpreted as a potential psychological problem, or it could be potentially a patient who is feigning illness, faking.

Q. In this case, do you recall what Yvonne told you her pain levels were in her neck?

A. Well, again, my recollection is only my medical record. And depending on what day for instance, the first day that I saw her, she said her pain on a 0 to 10 scale, 0 being no pain and 10 being the worst, her pain on that day was a 9, but at times it will be down to a 2 out of 10. And at its worst, it can be a 10, but she feels her average is somewhere around an 8.

Q. So she described varying levels of pain to you.

A. Yes.

Q. Is that fair?

A. Yes.

Q. Do you have concerns when a patient comes to you and they claim a pain scale of a 10?

MR. SEMENZA: Objection, Your Honor. Again, I think this goes outside the scope of the chart.

THE COURT: I'm sorry. State the question again.

MS. MORRIS: Do you have concerns when a patient comes to you and they report a pain scale of a 10 such as was indicated in Yvonne's chart?

THE COURT: All right. I'll allow that. Overruled.

THE WITNESS: No, because it's so common and

I'm not a big fan of the numeric pain scale. I mean, even on myself injuries, I find it hard to put a number on it. And patients sometimes become fearful that they're not taken seriously unless they give a high number. So I prefer mild, moderate, and severe. I don't like the number scale so much. But it's so common that patients come in and say they have a 10 out of 10 pain, but often it's not realistic. So I don't -- it doesn't concern me. It's the patient's interpretation of that pain and how it affects their quality of life that's important to me.

BY MS. MORRIS:

Q. Did she tell you the pain that she was feeling in her spine, her lumbar spine?

A. Yes, she complained of ongoing severe back pain. But, again, after reviewing her MRIs and studies, I'm the surgeon. I informed her that there's nothing I can do for her regarding her low back. And -- and remember, I'm seeing her four years after this began. So sending her to physical therapy or chiropractic or injections and all these other things are not going to substantially correct anything. Not that she can't do those things to help control the pain, but it would simply be palliative in alleviating some of the pain, but it's not going to correct the

underlying problem. So at this point, she's pretty much seeing the last resort. That's me as a surgeon.

Q. And you didn't recommend that she have surgery to the lumbar spine; is that correct?

A. That's correct. No.

Q. Why not?

A. Because I don't believe that there's any indications for surgery there that would correct her problem. In fact, it would probably make her worse.

Q. What indications do you see in her cervical spine that leads you to recommend surgery?

A. Well, the quality and severity of her neck pain is commonly what I see with patients who have a frail spine, that have the degeneration that she does, and also has the degree of foraminal stenosis and that has symptoms. So I think her quality of symptoms is very consistent with the problems I see in the lower three disks in her neck. And having done this for 23 years in private practice and having good success with it, I think that I could get her to an appropriate, acceptable success. And that would be defined as taking 50 percent of her neck pain away and -- and preventing any progression of her upper extremity symptoms.

Q. Where do you get that approximation that it

will alleviate her pain approximately 50 percent?

A. Well, through my own experience of treating these kind of conditions over 23 years in private practice. So I mean, if I told everyone I could make them a hundred percent better, there'd be a line from here to Tijuana. But that's not realistic.

So we have to realize that there's surgeries for two purposes in the spine. There are the neural compressive lesions where you have a pinched nerve, and that creates severe pain down the extremity. It's the neck, it's the arm, it's the back and the leg, but the predominant problem is that arm or leg pain. And those surgeries have great success. We simply take the pressure off the nerve, and the patients have 90 -- 900 percent improvement. Those are simple procedures.

The problems that deal with what we call axial mechanical spine pain, neck or back pain, those are much more difficult to treat and correct, require much bigger surgeries. But the clinical result realistically is patients can experience 50 to 60 percent improvement. And for those people who are truly desperate, it's a welcome option once they failed other treatments. And given that she's four years out, according to her history, she would be an appropriate candidate for surgery in her neck.

Q. Now, Yvonne hasn't come back to see you since October; is that correct?

A. That's correct.

Q. (Inaudible.)

A. That's correct.

Q. And does that cause any concern for you?

A. No, none at all. As part of her last visit, I informed her that -- what our surgical plan would be. And at this point I informed her that there was nothing dangerous here, nothing that was going to kill her or paralyze her. This was about her pain. If she could learn to endure that pain, then she wouldn't have to consider surgery. There's no guarantees with surgery. And there are major -- potential major complications with surgery. So it's to be avoided. But if you're at wit's end and you can't live with it, come back and see me, and we'll pursue surgical treatment.

Q. Okay. Now, you recommended a three-level cervical fusion; is that correct?

A. I did.

Q. Do you do any surgeries that are more extensive than that, four level or five level?

A. Extremely rare.

MR. SEMENZA: Your Honor, outside the scope.

THE COURT: Sustained.

And how much longer? It's 6:00 o'clock. How much longer do you have on direct?

MS. MORRIS: I have a bit more, and then he'll have cross.

THE COURT: So let's just call it a day.

And you're able to return on Thursday?

THE WITNESS: Yes. Whatever the preference is here.

THE COURT: Okay. So you'll discuss that with the subpoenaing lawyers, and -- about you're going to come back on Thursday. Okay. All right.

Ladies and gentlemen, we're going to take an overnight recess. Going to see you tomorrow at 8:30.

And during this recess, it's your duty not to converse among yourselves or with anyone else on any subject connected with the trial, or to read, watch, or listen to any report of or commentary on the trial by any person connected with the trial or by any medium of information including, without limitation, newspaper, television, radio, or Internet. You are not to form or express any opinion on any subject connected with this case till it's finally submitted to you.

See you tomorrow morning at 8:30.

THE MARSHAL: All rise for the jury, please.

/////

(The following proceedings were held outside the presence of the jury.)

THE COURT: All right. Thank you. Jury has departed the courtroom, and I think you need to get with Dr. Dunn about when he will come back on Thursday. And let's try and make sure it's not so late that we can't get done. We need to give them plenty of time for cross.

And thank you very much for your testimony. So you're excused.

Anything outside the presence at this point today?

MS. MORRIS: No.

MR. SEMENZA: No, I don't think so, Your Honor.

THE COURT: All right. 8:30 tomorrow. You have a witness lined up for that?

MS. MORRIS: Yes. Corey, correct?

MR. SEMENZA: Yes.

MS. MORRIS: Yes, we do.

THE COURT: I will see you tomorrow at 8:30.

MR. SEMENZA: Thank you.

MS. MORRIS: Thank you.

TRANSCRIBER'S CERTIFICATE

STATE OF NEVADA)
) SS
COUNTY OF CLARK)

I, Kristy L. Clark, a Nevada Certified Court Reporter and Registered Professional Reporter, do hereby certify:

That I listened to the recorded proceedings and took down in shorthand the foregoing.

That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript is a complete, true and accurate transcription of my said shorthand notes to the best of my ability to hear and understand the audio file.

I further certify that I am not a relative or employee of an attorney or counsel involved in said action, nor a person financially interested in said action.

IN WITNESS WHEREOF, I hereby certify this transcript in the County of Clark, State of Nevada, this 28th day of December, 2015.

_____

Kristy L. Clark, RPR, CCR # 708

EXHIBIT 9

EXHIBIT 9

CASE NO. A-12-655992-C

DEPT. NO. 30

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

YVONNE O'CONNELL, individually,

Plaintiff,

vs.

WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company d/b/a WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Defendants.

PARTIAL TRANSCRIPT

OF

JURY TRIAL

BEFORE THE HONORABLE CAROLYN ELLSWORTH

DEPARTMENT V

DATED THURSDAY, NOVEMBER 12, 2015

TRANSCRIBED BY: KRISTY L. CLARK, RPR, NV CCR #708, CA CSR #13529

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I N D E X

LAS VEGAS, NEVADA, THURSDAY, NOVEMBER 12, 2015;

8:32 A.M.

P R O C E E D I N G S

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THE MARSHAL: All rise for the jury, please.

(The following proceedings were held in the presence of the jury.)

THE COURT: Good morning. Please be seated. And the record will reflect that we have now been rejoined by what is now all eight members of the jury and one alternate. Sadly, one of our -- one of our regular jurors, Ms. Harms, in Seat No. 6 had a family tragedy with her grandmother and is -- is in the hospital attending to her. And so that's what alternates are for, and that's why they're so important. And so we've replaced Susan Bird, our first alternate, into Seat No. 6, and we'll proceed with the trial.

And where are we now?

MS. MORRIS: Dr. Dunn, will be here -- well, he should be here, so ...

He's here. We call -- recall Dr. Dunn.

THE COURT: Calling Dr. Dunn. Take the

stand, Doctor, and you're still under oath from before. All right? Have a seat. You may proceed.

DIRECT EXAMINATION

BY MS. MORRIS:

Q. Good morning, Dr. Dunn.

A. Good morning.

Q. When we left off talking, I think you had told us that you had been practicing for 26 years; is that correct?

A. In private practice, since 1992. So it would be 23 years.

Q. And in your time practicing in private practice, do you know approximately how many fusion surgeries you've performed?

A. Well, I -- I think the best way to say that is consistently, I think, when I looked at my numbers, I perform anywhere -- a little over 200 to 250 spine surgeries a year, and about half of those will be fusions.

Q. And so would it be fair to say that you've seen thousands of patients?

A. Yes.

Q. Have you seen patients who have come complaining to you for pain as a result of a fall?

MR. SEMENZA: Your Honor, I'm going to object. This is outside the scope of the medical charts.

THE COURT: Well, approach.

(A discussion was held at the bench, not reported.)

THE COURT: All right. So the objection is overruled, but I need you to lay the foundation. In other words, we're not -- just what we discussed at the bench, back into it.

MS. MORRIS: Yes.

BY MS. MORRIS:

Q. Dr. Dunn, I'd like to talk about your experience in your practice of medicine.

THE COURT: No, no, no. He has an opinion. What's the basis of his opinion?

BY MS. MORRIS:

Q. Dr. Dunn, you've been practicing for 23 years; is that correct?

A. Yes.

Q. And you've seen thousands of patients; is that right?

A. Yes.

Q. Have you treated patients who have come to you with complaints of pain as a result of a fall?

A. I have.

Q. When a patient -- when a -- when a person falls, can they get hurt?

A. Yes.

Q. Does age factor into the amount of damage that can happen when a person falls?

A. Yes.

Q. Tell us how.

A. Well, I believe we may have discussed this a bit earlier, but as we age, the musculoskeletal system experiences degenerative changes as a result of that aging. Common terms for that are arthritis, degenerative arthrosis. As it involves the articular structures of the spine, we're talking about two structures, really, the intervertebral disks which serves as a shock absorber between the vertebra, and with each intervertebral disk, whether it be in your neck or back or the thoracic spine, your mid back, there's an associate -- associated pair of joints called the facet joints, otherwise known as swivel joints. And that's what allows the complex motion we have in our necks and backs. And you can compare that to the knee which is a simple hinge joint.

So these articular structures are susceptible to degeneration, and depending on genetics,

occupational activity, accidents throughout one's lifetime, we can develop a wear-and-tear phenomenon of these structures. And the structure specifically has to do with cartilage which, unfortunately, in our bodies does not replenish itself. Some of us, it's hair cells, other it's neurologic cells, and then, cartilage cells don't replenish or don't -- or heal well.

As we age, there's a term that we use called frailty. Our structures become weaker in a sense and, therefore, they're more susceptible to injury. And I think it's somewhat intuitive if you take a fall in a 20 year old versus a 30 versus a 40 versus a 50, there are changes that make that older person more susceptible to injury and, hence, that goes along with the term frail or frailty.

Q. Can you explain to us how a fall in a 58 year old can injure the spine, especially degenerative spine.

A. Yes.

MR. SEMENZA: I'm going to object. It's outside the scope of the medical chart.

THE COURT: Okay. That's sustained. I think I had told you that I need you to talk about Ms. O'Connell because that's what he needs to talk

about as to what his opinion was and why he came to that opinion. But just this overall, I told you not to do that, and you continue. So don't do it.

BY MS. MORRIS:

Q. How old was Ms. O'Connell when she fell?

A. Fifty-eight.

Q. And at the time she fell, did she have a degenerative spine?

A. Yes.

Q. How can a 58 year old with a degenerative spine fall?

A. Well, the forces --

MR. SEMENZA: Your Honor, this is outside the scope of the medical chart.

THE COURT: All right. Doctor, do you have an opinion as to why Ms. O'Connell might have injured her spine in this fall?

THE WITNESS: Yes.

THE COURT: Okay. What -- what is that?

THE WITNESS: I believe that she sustained microtears to the aged intervertebral disks in her neck.

BY MS. MORRIS:

Q. And why do you believe that?

A. One, because of the nature and quality of her

symptomatology, she relates in her history to me on the initial evaluation that she has been experiencing a consistent quality of neck pain with variable symptoms into her extremities, meaning sometimes it's to the right arm, sometimes it's in the left arm. But overall, the consistent quality has been what I would describe as chronic axial mechanical neck pain that has persisted at the time that I saw her for almost four and a half years.

Q. Can you tell us, do you expect the pain to the neck to be immediate upon a fall?

MR. SEMENZA: Objection, Your Honor. Again, outside the scope of the medical chart.

THE COURT: I'm going to overrule that.

Go ahead.

THE WITNESS: No.

BY MS. MORRIS:

Q. Why not?

A. Well, often an accident results and it -- it's a traumatic event to people, and they register pain differently. Although they may experience discomfort in one area, often it's overridden by injuries to other areas. We call that the gate theory of pain. And the best way to understand that would be, for instance, if you came in and you had some neck pain

or soreness and I took a hammer and I bashed your finger, you're really not going to pay -- your brain is not going to pay much attention to the afferent information from the sensory fibers from the neck. It's going to be overridden by the pain that you're experiencing when I hit your thumb with that hammer.

So many times when people are injured, they're focused on their main area of complaint which may be the back, the hip, the knee, whatever it might be, and they might not recognize the full extent of their injuries. So over the course of days or even weeks, there becomes a full realization or recognition of pain to the different areas that were injured. So it's not always immediate.

Q. Is there a certain time frame in which you would expect to see an onset of pain?

A. I mean, it varies from individual to individual. And it varies on the extent of injuries. I mean, someone comes in with a pelvis fracture or a head injury, you may not recognize it for months. So it's a very generalized question. But I say overall, most people who don't have a closed head injury or a serious injury that requires emergent transport and surgery, typically within a couple of weeks.

Q. Now, do you recall Yvonne O'Connell coming in

to see you?

A. Well, my recollection of the details of her visit has to be from my medical records. But I do specifically remember her, yes.

Q. And when she came in to see you, do you recall her?

A. I do remember her, yes.

Q. And what was her demeanor like?

A. Well, I remember her uniquely upon seeing her here in court because her personality is not uncommon on many patients I see, and she is very similar to one of my close relatives in that they're -- they're very much interested in their ailments, and they go to the worldwide web. It's called physician by Google.

MR. SEMENZA: I'm going to object. It's outside the scope.

THE COURT: All right. Sustained. You need to keep this just to Ms. O'Connell. So, you know, this isn't about your relatives.

BY MS. MORRIS:

Q. Let's talk about Ms. O'Connell.

So when we came to see you, she reported she had a mini stroke a couple days after the fall; is that correct?

A. Yes.

Q. Is that significant in any way to you?
A. No.
Q. You said that she was very interested in her health.
Can you describe that.
A. Yes. She is a common patient, and I'll just refer this to Ms. O'Connell, who goes to Google and puts in their symptoms and --
MR. SEMENZA: Objection. Lack of personal knowledge.
THE COURT: Well, there's no foundation. So I mean, find out if he -- lay a proper foundation for this. What did she tell him?
BY MS. MORRIS:
Q. What was it about Ms. O'Connell that led you to understand that she was very interested in her health?
A. Because she was very knowledgeable, and I know she hasn't gone to medical school and doesn't have a formal medical education. So I know that it came by way of the computer. And she was very knowledgeable about many of her medical conditions, but was also very respectful regarding my evaluation of her as it involved her neck and back.
Q. When she came in to you, was she asking for

neck surgery?

A. Well, she came to me. I'm -- I'm a surgeon. So when patients come to me, they're typically wanting to know what their surgical options are, so yes.

Q. Did she demand a neck surgery?

A. No.

Q. Was she in any way demanding toward you about the medical care you were giving her?

A. No.

Q. Have you ever treated patients who have multiple complaints or are overly anxious about their health?

MR. SEMENZA: Your Honor, I'm going to object. Outside the scope of the medical chart.

THE COURT: Sustained.

BY MS. MORRIS:

Q. The demeanor that Ms. Yvonne -- Ms. O'Connell showed when she came to see you, did that lead you to think she was overly anxious about her health?

A. No.

Q. Is there anything about Ms. O'Connell that you saw that would make you hesitant to perform surgery upon her?

A. You know, I established a rapport with Ms. O'Connell over three visits and spent a

considerable amount of time with her. And that's important as a surgeon, in my opinion, because we're dealing with a subjective complaint of pain. So the objective of the surgery would be to improve that pain. And so if I'm going to take this patient in a relationship where I'm going to operate on them, I want to be confident, at least in my own assessment and abilities to assess this patient, that she is being forthright about her complaints of subjective pain.

And I noted that there was a history of depression, and that can affect an outcome of surgery. And so, therefore, I would say upon reevaluation, I may obtain a preoperative psychological clearance, which spine surgeons utilize from time to time. And beyond that, I -- I have no reservations about proceeding to surgery if she requests it.

Q. And you evaluated Yvonne for (inaudible); is that correct?

MR. SEMENZA: Objection. Outside the scope.

THE COURT: Sustained. No --

BY MS. MORRIS:

Q. Do you recall the Waddell -- Waddell testing; is that correct?

A. Yes.

Q. And the purpose of the Waddell --

MR. SEMENZA: Your Honor, I'm going to object to any questions relating to Waddell because I don't think they're in the medical chart.

THE COURT: Approach.

(A discussion was held at the bench, not reported.)

THE COURT: Sustained. Question has been asked and answered about Waddell's last time he testified.

BY MS. MORRIS:

Q. So the psychological clearance tests that you required Yvonne have before the surgery, what does that entail?

A. Typically --

MR. SEMENZA: Objection, Your Honor.

THE COURT: Sustained.

MR. SEMENZA: That's not in the medical chart.

THE COURT: He's not designated as an expert. We've already gone into this, that his -- his testimony is restricted to his medical chart, so he's --

MS. MORRIS: He's testifying as an expert about orthopedic surgery from his 23 years of practice.

THE COURT: And you're asking him about a psychological workup?

MS. MORRIS: I'm asking if he knows what that entails because that's something he requires the patients to have.

THE COURT: Right. He wasn't designated for that purpose. So the objection's sustained.

BY MS. MORRIS:

Q. Is it within your practice to refer patients for a psychological clearance before they have surgery if you believe it to be necessary?

MR. SEMENZA: Your Honor, same objection.

THE COURT: That's -- that's fine. He's already -- it's already been asked and answered. He said he does that. So you can ask him again. But let's not -- let's move along. Let's not ask the same questions.

BY MS. MORRIS:

Q. Okay. So in an individual like Yvonne where she has a degenerative spine which has been injured, would you expect --

MR. SEMENZA: Objection, your Honor.

THE COURT: Let her finish the question, please.

Go ahead.

BY MS. MORRIS:

Q. -- would you expect the pain to resolve

itself on its own without surgery?

MR. SEMENZA: Again, Your Honor, my objection is in a patient like Ms. O'Connell. That's improper. It goes outside the scope of the medical chart.

THE COURT: With Ms. O'Connell.

BY MS. MORRIS:

Q. With Ms. O'Connell and her spine in the condition that it is, would you expect her pain to resolve without any surgery?

A. Given that I saw this patient in -- in June of 2014, four and a half years after she stated she had a -- a traumatic event where she fell, which she has told me that marked the onset of her symptoms, and given that she is beyond six months in which the body's capacity to heal itself diminishes, I believe that she has a -- a permanent condition at this point.

Q. Now, the surgery you recommended, would that take place in a hospital or at your facility?

A. I have recommended a three-level cervical fusion, and that would take place in a hospital.

Q. And aside from yourself, would there be any other medical staff required for this surgery?

A. Well, yes. As part of the operating room team, we have an anesthesiologist who's responsible for putting the patient to sleep with (inaudible) and

analgesias so she doesn't feel any pain during surgery. There are circulating nurses. I have a scrub tech that passes me instruments, and then I have an assistant surgeon who assists me in performing the procedure.

Q. And the pain that Yvonne came to you with, you -- you said it was a radiating pain; is that correct?

A. Well, her principal complaint was neck and low back pain, with the neck pain predominating. But she also had complaints that were radicular in nature. In other words, the nerve root irritation that would give a patient subjective sensations of pain or paresthesias into their extremities, or arms and hands.

Q. What is radicular symptoms?

A. Radicular refers to the nerve root, and the nerve emanates from the cervical spinal cord and then goes to the tips of the fingers. And when the nerve is either press -- has pressure upon it or is irritated by inflammation, the patient may have symptoms from pain to numbness or tingling.

Q. And would that pain -- would you expect that pain to be consistent in Yvonne or could it change?

A. Well, I think what is consistent in Yvonne and what's important in the diagnostic evaluation by a spine surgeon is that her principal complaint that I'm

addressing is her neck pain. And that is described as axial mechanical. Axial being the center of the body as opposed to appendicular which is the extremity.

So the fact that her principal complaint is axial, in her neck, that's an orthopedic problem. She does have varying complaints of numbness or tingling or pain. Depending on the day, may involve the right arm, may involve the left. I understand that inconsistency because it's not due so much to the nerve pressure but nerve irritation from something called inflammation. And inflammation varies from day to day depending on weather, stress in one's life, physical activities.

But I believe if it was only her upper extremity complaints, she would not be seeing a spine surgeon. Her -- her objective is -- and question to me is, What can we do for my neck pain?

Q. Can neck pain cause headaches?

A. Yes.

Q. The -- the neck pain that Yvonne expressed to you, I think you said that surgery would relieve about 50 percent; is that correct?

A. I believe -- yes. The realistic expectation with this type of surgery for this type of problem is 50 to 60 percent improvement over their preoperative symptoms.

Q. Do you know why it wouldn't be 100 percent?
A. Yes. It's not 100 percent and there are surgeries that give us close, if not 100 percent relief. And that has to do with simple nerve pressure problems. A herniated disk or fracture --
MR. SEMENZA: Your Honor, going to object. Outside the scope of his medical chart.
THE COURT: All right. Let's focus on --
MS. MORRIS: This is --
THE COURT: -- Yvonne and why.
MS. MORRIS: Yes, and Yvonne is going to have this surgery and so that's why I asked about 100 percent.
THE COURT: Right, but he explained this in his last testimony, I remember, from last week.
MS. MORRIS: I am allowed to -- he did say 50 percent, and I don't think we got an explanation as to how.
THE COURT: Well, we did, because he explained all about this, how surgery on -- on -- you know, if it was pressing on, you could relieve that, it would -- you would get relief. So now let's focus on why not in this case.
MS. MORRIS: Okay.
THE COURT: What she has. Okay?

MS. MORRIS: Okay.

BY MS. MORRIS:

Q. Why not, in this case, would she not experience 100 percent, in your opinion?

A. Well, the fusion results in an immobilization of three segments in her spine that move. So by changing the movement of her neck, I'm altering the biomechanics of her -- the way her neck works. So motion is shared equally amongst this -- five different disk levels in the neck. If I remove two of those, there's going to be a biomechanical shift of stress to the other levels. And so, therefore, she's going to have pain from other areas that she may not be experiencing pain at this point or more pain from those other areas.

So we don't get a cure with this type of surgery because of that change in biomechanics. And then oftentimes with surgery, we also get some scar tissue, and that could be an ongoing source of pain.

Q. In -- if Yvonne goes through and has this three-level cervical fusion and feels the relief, will that relief remain for the rest of her life?

A. I believe so, yes.

Q. Would -- could there be any potential complications of the surgery?

A. Yes.

Q. And could those complications lead to need for further surgery?

A. Yes.

Q. Now, the -- the neck pain that she was experiencing when she came in, did she tell you that she had difficultly in range of motion or did you test her range of motion?

A. I need to refer to my note to remember that detail. I don't see that she complained to me of a stiff neck unless I'm missing it here. But on physical examination, she had decreased range of motion, yes.

Q. And what did that physical examination entail?

A. Physical examination entails observing the patient, their gait pattern, looking at their neck, palpating the neck, the interscapular, the mid back region, examining the upper extremities, checking range of motion, and the most important part would be assessing her neurologic status.

Q. And how did you assess her neurologic status?

A. It's assessing any weakness on her motor groups in the upper and lower extremities. And we call that manual motor testing. It's a resistance muscle testing. And then checking her dermatomes in the upper

extremities and lower extremities for any sensory deficits.

MR. SEMENZA: Your Honor, I don't -- I don't know that any of this is in his medical chart. I think he's speaking generally. So I'd object to those statements or -- or his response to that question.

BY MS. MORRIS:

Q. Dr. Dunn, did you get that information from your medical chart?

THE COURT: Wait till I rule. All right? Overruled.

Go ahead.

BY MS. MORRIS:

Q. All right. Now, with Yvonne's degenerative spine that had been injured, would you recommend that daily stretching help her?

A. Sure. I recommend she do anything that provides her any relief.

MR. SEMENZA: Objection, Your Honor. That's not in the medical chart.

THE COURT: Overruled.

BY MS. MORRIS:

Q. With Yvonne and the spine and the condition it is, would her limiting certain movements help her relieve her pain?

A. Yes.

Q. How about Yvonne's back? The condition of her back, as you said, it was not surgical; is that correct?

A. That's correct, it's not surgical.

Q. And it's your opinion that surgery simply won't help the condition of her back?

A. That's my assessment, yes.

Q. What -- in what is -- can you tell by looking at the MRI what's causing Yvonne's pain in her back?

A. I think the way I have to answer that, just everything that a physician does in evaluation of the patient represents information. The way I like to describe it is it's a piece of the diagnostic jigsaw puzzle. And there's some parts of that information that are large pieces of the puzzle, and there are others that are small. So depending on the type of clinical problem we're evaluating, in this sense, the MRI and radiographs are simply there to rule out any obvious neurologic issues. But I know through my exam there are no objective neurologic findings, so I don't expect to see any major neurologic problems unless I found an occult tumor, which she didn't have.

So the films are there mainly to give me an idea of what's going on, but really represent a small

piece of the diagnostic jigsaw puzzle, and are principally there to let me know and inform the patient that there's nothing dangerous so, therefore, all treatment remains optional, including surgery.

Q. In order to diagnose Yvonne, was it important that you actually meet her?

A. Yes, absolutely.

Q. Why is that?

A. Well, 80 percent of our diagnosis regardless of the medical condition comes from seeing and talking to the patient, and upwards of 80 percent of that diagnostic jigsaw puzzle is the history and physical examination.

Q. In your history of treating patients, have you ever had to fire a patient?

MR. SEMENZA: Objection, Your Honor. It's outside the medical scope.

THE COURT: Sustained.

BY MS. MORRIS:

Q. You have evaluated thousands of patients; is that correct?

A. Yes.

Q. Have you ever treated a patient who you thought was lying to you?

MR. SEMENZA: Same objection.

THE COURT: Sustained. Sustained. It's the same objection. Don't -- don't just reask the same question when I sustain an objection.

BY MS. MORRIS:

Q. You said you saw Yvonne three times; is that correct?

A. I did.

Q. And you haven't seen her since; is that right?

A. I have not.

Q. Is that uncommon for a patient to not return to you?

A. No.

Q. Why not?

A. Well, again, I'm a subspecialist as a spine surgeon --

MR. SEMENZA: Your Honor, I'm going to object. Again, it's not contained within the medical chart.

THE COURT: Sustained.

BY MS. MORRIS:

Q. Do you know why Yvonne hasn't returned to you?

A. Well, on our last visit, I made it clear that I'm here to treat her from a surgical perspective, and

until she is ready to perform surgery, there's really no need to return to me.

Q. And is it your opinion that the fall that Yvonne sustained at Wynn injured and damaged her degenerative spine?

A. Yes.

Q. And because of that fall, it's your opinion to a reasonable degree of medical probability that she needs this three-level cervical fusion; is that correct?

A. Yes.

MS. MORRIS: I have nothing further.

THE COURT: Thank you.

Cross?

MR. SEMENZA: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SEMENZA:

Q. Good morning, Dr. Dunn.

A. Good morning.

Q. Now, you're partners with Dr. Tingey; is that correct?

A. Yes.

Q. How long have you been partners with Dr. Tingey?

A. You know, I've been with Desert Orthopaedic Center since 1995, and that's well before he joined the group, but I don't know exactly when.

Q. He came after that.

A. Yes.

Q. You had already started; right?

And you're being compensated for being here today?

A. Yes.

Q. How much are you being compensated?

A. $5,000.

Q. And does that include your prior testimony I think on Tuesday?

A. No. That's additional.

Q. Okay. So how much total are you being compensated for your testimony in this particular case?

A. $10,000.

Q. And is that being paid by opposing counsel?

A. Yes.

Q. Do you commonly testify as an expert in civil cases?

A. Yes.

Q. Both as a treating physician and nontreating expert physician?

A. Yes.

Q. You testified that you had seen Ms. O'Connell three times?
A. Yes.
Q. And the last time you saw her was over a year ago; is that correct?
A. Let me check my document and accurately answer that. That's correct.
Q. And the first time you saw Ms. O'Connell was on June 16th of 2014?
A. Yes.
Q. How long did you visit with her?
A. It could have been anywhere from 30 minutes to an hour.
Q. It could have been less than that as well?
A. I doubt it was less than 30 minutes.
Q. Do you have any independent recollection of how long you met with her?
A. No.
Q. And did you meet with her on July 14th, 2014?
A. Yes.
Q. How long did you meet with her during that visit?
A. It would have been less than 30 minutes.
Q. Do you have an independent recollection of how much time you spent with Ms. O'Connell on that

appointment?

A. No.

Q. And the last time you saw her was October 13th of 2014?

A. Yes.

Q. Do you recall how much time you spent with her during that appointment?

A. I would say it was less than 30 minutes.

Q. Do you have an independent recollection of how long you actually spent with her?

A. No.

Q. Now, relating to the July 14th of 2014 appointment, did you refer her to a different doctor?

A. Yes, I did.

Q. And which doctor did you refer her to?

A. Andrew Martin.

Q. And he was -- is he still affiliated with you?

A. No.

Q. Why did you refer Ms. O'Connell to Dr. Martin?

A. He was a specialist in knee. I believe -- it's not documented, so I don't recall, but it would have been for an area outside of her spine in orthopedics.

Q. Now, you've diagnosed Ms. O'Connell as having degenerative disk disease in her cervical spine; is that correct?

A. Yes.

Q. That's a condition that predated the date of her slip and fall, which was February 8th, 2010; is that correct?

A. Yes.

Q. And in that sense, it was a preexisting condition; correct?

A. Yes.

Q. You also diagnosed her with lumbar disk disease; is that correct?

A. Yes.

Q. And, again, that diagnosis -- that condition predated February 8th of 2010; is that correct?

A. Yes.

Q. And, again, that was a preexisting condition of Ms. O'Connell; correct?

A. Yes.

Q. Do you know whether prior to February 8th, 2010, Ms. O'Connell was experiencing any symptomatology in her cervical neck, pain symptomatology?

A. It was my understanding that she wasn't.

Q. Okay. And that understanding that she didn't

have any symptoms prior to February 2010 came from her statements; correct?

A. Yes.

Q. And exclusively came from her statements.

A. Yes.

Q. So you were relying on Ms. O'Connell to identify when the source of -- or when she began experiencing pain; is that correct?

A. Yes.

Q. Now, would you agree with me that there are some people in their 60s that don't have degenerative disk disease in their cervical spine?

A. No. I believe everybody in their 60s has some degree of degenerative disk disease.

Q. But that severity differs between people; correct?

A. Yes.

Q. And the same would be true for the lumbar area as well.

A. Correct.

Q. Do you know whether Ms. O'Connell had a severe back injury prior to February 8th, 2010?

A. Not that I recall.

Q. That was something that Ms. O'Connell didn't -- that was something that Ms. O'Connell didn't

identify to you, did she?

A. That's fair.

Q. And generally speaking, degenerative disk disease is a progressive disease; is that correct?

A. That's fair.

Q. It will get worse over time?

A. Well, the radiographic findings will certainly worsen, but symptoms may not.

Q. Okay. And obviously I'm not a doctor, but can -- can you characterize or do you characterize degenerative disk disease in laymen's terms as an arthritic condition?

A. Yes.

Q. And so Ms. O'Connell did in fact have arthritis in her cervical spine prior to February of 2010.

A. Yes.

Q. And she also had an arthritic condition in her lumbar area prior to February 8th, 2010.

A. Yes.

Q. Now, when you saw her, there were no -- there was nothing to indicate an acute injury to her cervical neck, was there?

A. That's fair.

Q. Okay. There wasn't any herniated disk?

A. No.
Q. There wasn't a fracture?
A. No.
Q. Are there other things that might identify whether there was an acute injury relating to her cervical neck?
A. Typically, no.
Q. And did you make any findings with regard to her lumbar back, that there had been an acute injury such as a herniated disk or fracture?
A. No.
Q. And your conclusions regarding causation relating to Ms. O'Connell's expression of pain is based exclusively on what she's telling you; is that correct?
A. Well, I don't know if I like the word "exclusively." But largely, yes.
Q. Did she tell you any specifics about the fall?
A. Well, just as I've recorded in my report here.
Q. Do you know whether Ms. O'Connell had any falls after February 8th, 2010?
A. No.
Q. She didn't report any, did she?
A. Not that I recall.

Q. Other than the degenerative disk disease that we've talked about, what other preexisting conditions were you informed of that Ms. O'Connell had?

A. She had noted a history that included diabetes, depression, and a mini stroke.

Q. Those are the only preexisting conditions she identified?

A. Well, she had -- under her Review of Systems, she noted that she had history of dizziness and nausea, (inaudible) intolerance, issues with nighttime urination, weakness, numbness, headaches.

Q. And those were preexisting conditions?

A. I believe so, yes.

Q. Now, depression can have an effect on how a patient experiences and presents pain; is that fair?

A. It may, yes.

Q. And do you know what Ms. O'Connell was referring to when she said she had a mini stroke?

A. As I sit here, I don't recall.

Q. Did you treat her in any way for that mini stroke?

A. No.

Q. Did you treat her in any way for diabetes?

A. No.

Q. During your visits with Ms. O'Connell and the

history that was taken, were you ever informed that she had a history of fibromyalgia?

A. No.

Q. And I know we talked about depression.

Were you ever informed that Ms. O'Connell had a history of anxiety?

A. No.

Q. Now, would you characterize anxiety as being something different from depression?

A. Yes.

Q. And if Ms. O'Connell did in fact have a history of fibromyalgia, that could express itself in pain throughout the body; is that fair to say?

A. Yes.

Q. And could express itself in back pain at some level.

A. Yes.

Q. In fact, fibromyalgia could explain some of her pain symptoms today; is that fair to say?

A. Yes.

Q. Now, I just want to be clear on this. When -- when you testified previously, you had talked about this surgery relating to the fusion in her neck.

Now, I want to be clear. Did you identify that the reduction in pain would be between 50 and

60 percent or just 50 percent?

A. You know, typically I will say 50 or 60 percent, generally in that -- in that range improvement. So they're going to have 50 -- 40 to 50 percent residual neck pain.

Q. And Ms. O'Connell has not scheduled her surgery.

A. No.

Q. You don't know if she ever will.

A. I don't.

Q. Are you recommending that Ms. O'Connell have physical therapy relating to her lumbar spine, her low back?

A. I don't recall if I recommended therapy specifically because I believe at this point where she has express symptoms that have persisted for almost four and a half years, that all of those types of treatments, whether it be chiropractic or physical therapy, are mainly going to be palliative. And if it helps her with her pain, then more power to it.

Q. You didn't specifically recommend physical therapy relating to her lumbar back, though?

A. I don't believe so, no.

Q. And do you know whether she's ever gone to physical therapy?

A. I don't recall.

Q. Do you recall whether during your treatment of Ms. O'Connell you discussed pain management?

A. Yes.

Q. And did you prescribe her any pain medication?

A. The only thing that I prescribed her was Lovaza, which is a pharmaceutical grade fish oil to reduce inflammation.

Q. Do you recall specifically having a discussion with Ms. O'Connell relating to prescribing her pain medication?

A. I don't believe so. I don't recall.

Q. Do you recall her ever asking for pain medication?

A. I mean, I don't recall.

Q. Were you aware that Ms. O'Connell had a history of constipation?

A. I -- I recall that she had some GI issues, but I don't recall the specifics of that.

Q. If Ms. O'Connell came back to you and asked for surgery and you conducted a psychological clearance on her and she didn't pass that, would you perform surgery on her?

A. I'm sorry. Did you say did not pass?

Q. Yes.
A. Did not pass?
Q. Correct.
A. Then, no.
Q. And it's -- well, is it fair to say that Ms. O'Connell's pain symptomatology is subjective in nature?
A. Yes.
MR. SEMENZA: No further questions.
THE COURT: Redirect.
MS. MORRIS: Thank you.

REDIRECT EXAMINATION

BY MS. MORRIS:
Q. Dr. Dunn, would the fact that Yvonne O'Connell was diagnosed with fibromyalgia affect your opinion?
A. No.
MR. SEMENZA: Well --
BY MS. MORRIS:
Q. Why not?
MR. SEMENZA: Your Honor, I think that goes outside the scope of the medical chart.
THE COURT: Well, I think you opened the door for it, so it's overruled.

MR. SEMENZA: Okay.

BY MS. MORRIS:

Q. Why not?

A. Again, her principal problem was neck pain, and fibromyalgia typically doesn't affect neck pain. It involves extremities in the low back, and I just don't believe that it -- it's involved in her neck complaints to me.

Q. What do you base that opinion on?

A. My experience in seeing and treating similar conditions over the past 23 years.

Q. Now, you said you wanted to send her for clearance before surgery; is that right?

A. Yes.

Q. What was that based on?

A. Well, the fact that she mentioned there was a history of depression.

Q. Was there any other indication that led you to believe you would have to send her to get a clearance?

A. No.

Q. Now, we talked about the fact that the systems she reported to you were symptoms she felt after the accident; correct?

A. That's what she reported, yes.

Q. And if she had symptoms to her neck and back before the fall, would that affect your opinion?

A. It could, yes.

Q. Why?

A. Well, my understanding is that the pain for which I was evaluating Ms. O'Connell arose with this traumatic event. On the other hand, had she never been involved in any traumatic events and came in with the same complaints, my recommendations would be the same.

Q. But you base your opinion on the fact that she reported symptoms started at the fall; is that correct?

A. Yes.

Q. So your opinion as to causation is -- is based on the fact that she told you they started after the fall?

A. Yes.

Q. If she had reports of pain before the fall, that would affect your opinion; is that right?

A. Yes.

Q. Now, you testified that you have been paid 10,000 total; is that right?

A. Yes.

Q. Why is it 10,000 and not 5,000?

A. Well, I mean, I had to come here two days. I

do spend time in preparation for trial by reviewing the files, and I'm not in clinic where I'm seeing patients and I still have to pay overhead.

Q. So if we had finished your testimony on Monday, you would not have needed the additional 5,000; is that correct?

A. That's correct.

THE COURT: Recross?

MR. SEMENZA: Nothing, Your Honor.

THE COURT: Questions from the jury?

Okay. Approach, please.

(A discussion was held at the bench, not reported.)

THE COURT: Okay. So, Doctor, question from the jury was -- is: If -- do you know whether she needed assistance entering or leaving on the three times that she came to visit you when you saw her?

THE WITNESS: She didn't require assistance.

THE COURT: So you -- you saw her come into your office?

THE WITNESS: Yes. And I would have documented if she were, like, in a wheelchair.

THE COURT: Okay. She was not in a wheelchair.

THE WITNESS: No.

THE COURT: Or walker?

THE WITNESS: No.

THE COURT: Any questions -- further questions?

MR. SEMENZA: Just one to clarify.

THE COURT: Okay.

RECROSS-EXAMINATION

BY MR. SEMENZA:

Q. So she wasn't in a walker when she arrived?

A. I don't believe so. No.

Q. Okay. And she wasn't in a wheelchair?

A. Correct.

Q. Do you know if she came or had anyone come with her to your appointments with her?

A. I don't recall seeing her with anybody. I don't know if somebody brought her or not.

Q. Do you know how she got to your office?

A. I don't.

Q. Do you know whether she drove?

A. I don't know.

MR. SEMENZA: Nothing further.

MS. MORRIS: Just a couple follow-up.

/////

FURTHER REDIRECT EXAMINATION

BY MS. MORRIS:

Q. Doctor, when you see a patient, are they already in the room when you go see them?

A. Yes.

Q. And are they generally sitting on a table when you go in to see them?

A. Yes.

Q. Do you get into the room and watch them come into the room?

A. Typically, no.

Q. And then once you're done, you leave; is that correct?

A. Yes.

Q. You don't watch them leave; is that correct?

A. Correct.

Q. So when you saw Yvonne, you basically saw her in the room while she was sitting on the table; is that correct?

A. Yes.

Q. So you don't know how she actually got into the room; is that fair?

A. That's fair.

MR. SEMENZA: Nothing further, Your Honor.

THE COURT: All right. I have a question,

basically a clarification question so that the attorney, Mr. Semenza asked you about -- he used the term "subjective," that the pain complaint was subjective.

What does that term mean? Tell the jury.

THE WITNESS: Subjective means it's what the patient reports to you.

THE COURT: And is there a -- a -- is there any other term that -- where you can see something yourself?

THE WITNESS: Yes. I mean, the two terms commonly used are subjective and objective. And subjective purely means what the patient brings to me, and that's information that she's reporting. Objective information is not only me looking at an X ray or looking at a study or test that is independent of the patient's input, but also represents my interpretation of the information she gives me.

THE COURT: Any questions as a result of my questions?

MS. MORRIS: Yes. Thank you.

FURTHER REDIRECT EXAMINATION

BY MS. MORRIS:

Q. Dr. Dunn, your opinion that you came to in --

in this matter involving -- involving Yvonne, was that based on both subjective and objective information?

A. Yes.

Q. And so your opinion involves both components; is that correct?

A. Correct.

MS. MORRIS: Thank you.

THE COURT: Cross?

MR. SEMENZA: Quickly.

FURTHER RECROSS-EXAMINATION

BY MR. SEMENZA:

Q. Ms. O'Connell's expression of pain, though, is based upon her subjective complaints; is that correct?

A. That is defined purely subjective, yes.

Q. And objective findings you're relying on are the MRIs which identify the degenerative disk disease; is that correct?

A. Yes.

Q. Thank you.

THE COURT: All right.

MS. MORRIS: One more follow-up.

THE COURT: Based on his question? All right. Go ahead.

FURTHER REDIRECT EXAMINATION

BY MS. MORRIS:

Q. Dr. Dunn, can you see pain?

A. No.

MR. SEMENZA: Objection, Your Honor. Go ahead.

THE COURT: Overruled. He can't see pain. Okay.

BY MS. MORRIS:

Q. So how do you learn if there is pain?

A. Well, basically that's part of my assessment.

MR. SEMENZA: And, Your Honor, I'm going to object. It goes outside the medical chart.

THE COURT: Well, it goes beyond the scope of the recross too. I think he's explained it. He relies on what the patient tells him. That's -- I guess you can't see it. So sustained. We're done.

Any questions -- any further questions from the jury as a result of -- okay. We have another question.

Approach.

(A discussion was held at the bench, not reported.)

THE COURT: Doctor, did Ms. O'Connell tell

you she gave up being a dental hygienist because of not being able to hold the instruments?

THE WITNESS: I don't recall.

THE COURT: All right. May this witness be excused?

MS. MORRIS: Yes.

THE COURT: Thank you. Thank you very much for your testimony, Doctor.

TRANSCRIBER'S CERTIFICATE

STATE OF NEVADA)
) SS
COUNTY OF CLARK)

I, Kristy L. Clark, a Nevada Certified Court Reporter and Registered Professional Reporter, do hereby certify:

That I listened to the recorded proceedings and took down in shorthand the foregoing.

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IN WITNESS WHEREOF, I hereby certify this transcript in the County of Clark, State of Nevada, this 28th day of December, 2015.

_____

Kristy L. Clark, RPR, CCR # 708

EXHIBIT 10

EXHIBIT 10

CASE NO. A-12-655992-C

DEPT. NO. 30

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

YVONNE O'CONNELL, individually,

Plaintiff,

vs.

WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company d/b/a WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Defendants.

PARTIAL TRANSCRIPT

OF

JURY TRIAL

BEFORE THE HONORABLE CAROLYN ELLSWORTH

DEPARTMENT V

DATED TUESDAY, NOVEMBER 10, 2015

TRANSCRIBED BY: KRISTY L. CLARK, RPR, NV CCR #708, CA CSR #13529

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LAS VEGAS, NEVADA, TUESDAY, NOVEMBER 10, 2015;

4:13 P.M.

P R O C E E D I N G S

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THE COURT: So we are back on the record outside the presence of the jury. Mr. Semenza's completed his voir dire of Dr. Tingey. Mr. Semenza, did you have something outside the presence?

MR. SEMENZA: I do, Your Honor. I had a chance to very briefly examine the file that Dr. Tingey had brought with him today. And again, we have the same problem that we did with Dr. Dunn that there are a whole host of documents that were never produced as part of the records. And in contrast to what Dr. Dunn had said in that book, he just looked at the documents, he doesn't know when he received additional documents. I believe Dr. Tingey had testified that he had received additional documents about a week and a half ago, if I'm remembering correctly. So I think it would be improper to allow him to testify here based on these new and additional records that haven't been provided to us.

THE COURT: But his testimony I thought was

that he's not basing his testimony on any of these new documents but rather on the MRI the -- and his evaluation of the patient, Ms. O'Connell, at the time he saw her. I think that's pretty clear.

MR. SEMENZA: And I understand that's his testimony, Your Honor. However, I obviously -- I mean, he has reviewed those additional documents and read those documents I haven't seen before. I don't know if that's in any way going to affect any of my questioning. I would like an opportunity obviously to review the entire file, but obviously, we're here and now. So I would object to allowing him to testify in any capacity at this point in time.

THE COURT: Okay. Your response?

MS. MORRIS: It was my understanding that Dr. Tingey reviewed the medical records in which he created and said that were in the Desert Orthopaedic file which contained the -- the fact that Dr. Martin had seen her before. And that was what he was basing his opinion on was him seeing her looking at the Desert Orthopaedic files. And my understanding is that a week and a half ago, he looked at the file and received brand new information, and he was going to testify about that. I didn't hear that at all, and it was not my understanding from his testimony. So I think he

should be permitted to testify in accordance with what he spoke to outside the presence of the jury during voir dire.

THE COURT: Well, I'm going to allow him to testify. His testimony from the voir dire appeared to me was based solely -- his opinions were based solely on his examination of the patient, his review of the MRI films of the knees that he had, and, of course, her history as he -- as it was reported to him by her.

And beyond that, he didn't refer to anything else. Didn't see anything else was significant in his findings. And, of course, you may and I -- I know you will be cross examining him about the things that he apparently did not know and may be able to pose hypothetical question to him. But I -- I think as long as -- he's not offering to say that he based his opinion upon anything that you didn't have before, he's not offering any testimony about any of those other records, then I'm going to allow it.

MR. SEMENZA: I understand, Your Honor.

THE COURT: All right. All right. Let's bring our jury in.

THE MARSHAL: All rise for the jury, please.

(The following proceedings were held in the presence of the jury.)

THE MARSHAL: Jury is all present, Your Honor.

THE COURT: Thank you. Please be seated. And the record will reflect we're back in the presence of all eight members of the jury as well as the alternates. All parties are present with their respective counsel, and all officers of the court are present.

And you may call your next witness.

MS. MORRIS: Thank you. We call Dr. Tingey.

THE CLERK: Please remain standing, raise your right hand.

You do solemnly swear the testimony you're about to give in this action shall be the truth, the whole truth, and nothing but the truth, so help you God.

THE WITNESS: Yes.

THE CLERK: Please be seated and please state and spell your first and last name for the record.

THE WITNESS: My name is Craig C-r-a-i-g T-i-n-g-e-y.

DIRECT EXAMINATION

BY MS. MORRIS:

Q. Dr. Tingey, can you tell us what you do?

A. I'm an orthopedic surgeon.
Q. Where do you work?
A. At Desert Orthopaedic Center here in Las Vegas.
Q. How long have you worked at Desert Orthopaedic?
A. Since 2009.
Q. And are you board certified?
A. I am.
Q. When did you become board certified?
A. 2006.
Q. Do you have any specialty in your practice?
A. I specialize in surgery of the shoulder, hip, and knee.
Q. Can you give us a little bit of background about your education?
A. Well, I graduated from high school here in Vegas and went to college at Brigham Young University in Utah. Then went to medical school in wake -- Wake Forest University in North Carolina. And then residency for orthopedic surgery at Loma Linda University in California.
Q. Where did you -- did you work prior to working at Desert Orthopaedic?
A. I was in a practice with a single other

doctor from 2004 to 2009, and then he retired, and I joined Desert Orthopaedic Center at that time.

Q. Do you have any privileges at any of the hospitals in Las Vegas?

A. Yes.

Q. Do you know which ones?

A. Centennial Hills Hospital, MountainView Hospital, and San Martin Hospital.

Q. Have you ever in your -- your medical career gotten any awards?

A. Yes.

Q. Can you tell us about those?

A. I received what's called the Leonard Marmor award at Loma Linda University as a senior resident for excellence in orthopedic surgery. And I also received research awards both my junior and senior years. My senior year was the first place research award for the program.

Q. And do you speak any other languages?

A. I speak Spanish and Portuguese.

Q. Now, you have treated Yvonne O'Connell; is that correct?

A. Yes.

Q. Can you tell us when you saw Yvonne?

A. I saw her on May 11th, 2015.

Q. And do you know why Yvonne came to see you?
A. For bilateral knee pain or knee pain in both knees.
Q. And do you know who referred her to come see you?
A. Dr. Dunn.
Q. Do you know if Yvonne had treated with any other doctor at Desert Orthopaedic in relation to her knees?
A. She had had two visits with Dr. Martin who was my partner at the time as well.
Q. And when Yvonne came to see you, what was she complaining of at the time?
A. Knee pain in both knees.
Q. And did you review any imaging when you saw Yvonne?
A. Yeah. When I saw her, she had an MRI of both the right knee and an MRI of the left knee.
Q. And did you look at those MRI results?
A. I did.
Q. Can you tell us what the findings were in the MRI of her right knee?
A. The right knee showed a tear in the medial meniscus.
Q. And what were the findings from the MRI of

the left knee?

A. The left knee showed a tear in the medial and lateral meniscus.

Q. And how did Yvonne describe her pain on that day? Do you recall?

A. She indicated that it started after she had a slip and fall on February 8th, 2010. The pain was in the -- we call it the anterior and medial region of the knee which means on the front and on the inside of the knee. She indicated that she had pain when twisting, pain when climbing stairs, when going from sitting to standing, and then she also noted a lot of what we call mechanical symptoms: Popping, locking, catching in the knee.

Q. Are those complaints consistent with having a meniscus tear?

A. Yes.

Q. Did you look at any X-rays of Yvonne's knees?

A. Yes. Dr. Martin had taken X-rays several months prior, and I looked at those X-rays.

Q. What did those X-rays show?

A. For the most part, normal. There was some mild narrowing of the joint space which means there's some mild arthritis in the knees.

Q. Can you describe what was going on in

Yvonne's left knee?

A. The left knee looked different from the right knee. The left knee had what we call extrusion of the meniscus, and that's more of a degenerative type of condition. The meniscus actually gets squeezed out of the joint space, and -- and then it will frequently tear. So she did have tearing of both the medial and lateral meniscus. There's two meniscuses in each knee. So both were torn, but they were also extruded which leads me to believe that it was more of a degenerative condition of the knee rather than a traumatic condition.

Q. And you were able to see that in her MRI; is that correct?

A. Yes.

Q. And the arthritis that you could see, you can see that through the X ray; is that correct?

A. Both on X ray and MRI?

Q. I want to talk about Yvonne's right knee. Was the imaging different from her left knee than her right knee?

A. The imaging -- an MRI it was the same, but the findings were different.

Q. Can you tell me what the findings were for here right knee?

A. The right knee showed a tear in the back part of the medial meniscus. And that's the most common location where you'll get a traumatic tear is in what we call the posterior horn of the medial meniscus.

Q. And you said in the left knee there was findings that lead you to believe it was a degenerative condition; is that correct?

A. Correct.

Q. Were those findings in the MRI of her right knee?

A. No.

Q. Now, how many patients approximately do you think you have treated who have meniscus tears in your practice?

A. Many thousands. That's the most common thing I see. It would be -- I probably do -- I probably see 15 or 20 a week.

Q. And after someone suffers a meniscus tear, when do you first expect them to report complaints of pain?

A. It varies. Sometimes they have immediate pain after an injury. Sometimes it will be a day or two later. Sometimes it's a week or two later. I've seen any -- any of those.

Q. Anything longer than a week or two later?

A. Well, yeah. I mean, it happens. But typically, it's, you know, within a couple of weeks they start to feel pain in the knee.

Q. What did you recommend Yvonne do for her knees?

A. Well, of course we talked about various options. And I believe I reviewed those with her. But the recommended treatment for that, and what I recommended for her was arthroscopy. And that's a surgery where you treat the meniscus tear.

Q. Can you tell us what that surgery entails?

A. Yeah, it's a surgery. They're under general anesthesia, but it's an arthroscopy, meaning you're putting a camera into the knee. So there's two small incisions on the front of the knee. You put a camera in there so you can see what's going on. And typically with a meniscus tear of this type, you'll do what's called a meniscectomy, and that means removing the torn part of the meniscus. And there's certain instruments we use to actually take out the cartilage that's torn.

Q. And is physical therapy required after the surgery?

A. Sometimes. Often it is.

Q. Now, when Yvonne came to you, how did -- what did she rate her pain?

A. She rated it as a 10 on a scale of 10.

Q. And did that cause any concern that she was rating her pain at a 10?

A. No.

Q. Did you find any indications that Yvonne was lying about her pain?

A. No.

Q. Did you see any indications in Yvonne's imaging showing fibromyalgia?

A. No.

Q. Is that something that you would see in an MRI?

A. No, that's not.

Q. What does the MRI show?

A. The MRI show a lot of things. It shows, you know, not only the bone, but soft tissue, cartilage, ligaments. It can show tears. It shows inflammation in the soft tissues. There's -- there's a lot of things you can find on MRI.

Q. So if --

A. But not fibromyalgia.

Q. So if I understand correctly, in her right knee, you found there to be a traumatic tear; is that correct?

A. There's a tear that's consistent with a

history of trauma.

Q. And why is that tear consistent with a history of trauma? What about it?

A. A degenerative tear of the meniscus or a degenerative condition will have a different appearance on MRI. You can't say with 100 percent certainty that this happened because of this, just looking at the MRI, but you can find -- you can look at findings that are consistent with the trauma. For example, on the left knee, I looked at the MRI, and I felt like it was not consistent with a trauma because of the extrusion of the meniscus. That's a clue that I can look at, and that helps me make my determination.

Q. Now, you recommended that she have surgery to both knees; is that correct?

A. Yes.

Q. And did you schedule an appointment for her to have the surgery?

A. She said that she would want to consider her options and would contact us if she decided to go forward with the surgery.

Q. Did Yvonne tell you what kind of medical treatment she had received prior to coming to see you?

A. Yes. She had said that she had had physical therapy, and that didn't give her adequate improvement.

And I was aware that she had seen my partner, Dr. Martin, as well.

Q. And did Yvonne describe to you how the fall occurred in February?

A. She did. And the way I documented it is that she was walking and slipped and fell on a liquid. She fell backwards and she twisted on the right and fell, striking her body on a raised divider. I'm not sure what type of divider it was.

Q. Was the fact that when she fell it was in a twisting motion have any impact on her?

A. Yes. A kind of typical way of tearing meniscus is a twisting injury. Not all meniscus tears occur because of a twisting injury, but often that is the case. So that also correlates with her history of meniscus tear.

Q. Can you -- or are you able to describe the type of pain that a patient will experience after they experience meniscus tear, have a meniscus tear?

A. Usually it hurts in the knee. And a medial meniscus tear will typically hurt in the location she described, in the front and on the medial side. Meniscus tears will often have mechanical symptoms. And that, like I said, earlier was popping, clicking, catching, even locking sometimes. And -- and she

described that. That was consistent with the meniscus tear as well.

Q. If you have a meniscus tear in your knee, does it tend to weaken the knee?

A. Indirectly. If you have pain in any body part, you tend to use it less, and that leads to atrophy of muscles and it can lead to weakness.

Q. Now, you described, I think, the surgery that would occur to her right knee, but you also recommended she have surgery to her left knee; is that correct?

A. Yes.

Q. Is it a different type of surgery?

A. Only difference is that she had tears of both the medial and lateral meniscus on the left knee. So it would involve treating both sides of the knee.

Q. But it's your opinion that the -- the left knee had -- was -- was essentially a degenerative tear; is that correct?

A. That's correct.

Q. Did you come to opinion as to the causation of the meniscus tear in Yvonne's right knee?

A. My opinion is that it was related to the slip-and-fall on February 8, 2010.

Q. And is that to a reasonable degree of medical probability?

A. Yes.
Q. The surgery that you recommended to her right knee, where would that take place?
A. Typically I do it at our surgery center. That's at our office on Desert Inn.
Q. And in the past, when you have done a procedure such as the one you recommended to Yvonne's right knee, has it caused -- has it cured the patient's complaints of pain?
A. Yes.
Q. Do you have any reason to believe if Yvonne got surgery she wouldn't have relief in her right knee?
A. That she would not have relief? No.
Q. Sorry.
A. I think I --
Q. That was a double negative.
A. I think I understood that correctly.
Q. Is undergoing the surgery to her right knee, would that cause her any pain?
A. Sure.
Q. What type?
A. Usually, there's post-operative pain just related to the surgical procedure itself, the incisions, and the -- the procedures can cause some pain that usually lasts a few weeks to a few months

after surgery.

Q. Now, is there any other cure for a meniscus tear such as the one she has in her right knee?

A. Cure, no. Treatment, yes. But there's no way to fix the tear other than surgery.

Q. Did you recommend that Yvonne get any other treatment aside from surgery to her right knee?

A. Well, what I do is discuss the -- all the treatment options, both surgical and nonsurgical. So I will usually review options like physical therapy, cortisone injections, Ibuprofen, or some sort of anti-inflammatory medication. Those are all helpful. And I review those, and then I also discuss the surgical options and then let the patient decide.

Q. How long does the surgery take?

A. About a half an hour to an hour.

Q. Aside from the MRI study that you looked at and the X ray, did you look at any other imaging of Yvonne?

A. No.

Q. Would you have needed to do any other testing on her to determine what was ailing her knees?

A. No. X ray and MRI are -- are what we typically rely on for this diagnosis.

MS. MORRIS: Thank you.

THE COURT: Cross.

MR. SEMENZA: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SEMENZA:

Q. Good afternoon, Dr. Tingey. Now good evening.

A. Good evening.

Q. You're currently a partner with Dr. Dunn; is that correct?

A. Yes. Yes, I am.

Q. And are you being compensated for being here today?

A. Yes.

Q. And how much are you being compensated?

A. I believe it's 5,000 per half-day charge.

Q. And who is paying that fee?

A. I assume it's the plaintiff's attorney's office.

Q. And have you received that payment yet?

A. That, I don't know.

Q. Okay. And you commonly testify as an expert witness; is that true?

A. Yeah, I do.

Q. And how long have you been doing that?

A. Since I started. So I have been in practice 11 years.

Q. And you've testified as an expert witness both relating to -- well, relating to knee pain; is that correct?

A. Have I before? Yes, I do.

Q. And you've seen Ms. O'Connell one time.

A. Yes.

Q. And that was in May of 2015.

A. That's correct.

Q. How long did you spend with her during that appointment?

A. I don't remember the appointment itself. I don't know.

Q. And at that appointment, Ms. O'Connell identified she had 10 of 10 pain; is that correct?

A. Yes.

Q. Did Ms. O'Connell differentiate between what pain she was experiencing in her left knee versus her right knee?

A. Not that I documented.

Q. And you were treating her for both her left knee and her right knee during this appointment.

A. That's right.

Q. And your conclusion based upon your review of

the films, both X-rays, and MRI was that the left knee did not have anything that -- that the tear in the meniscus on the left knee was not caused by the fall on February 8th, 2010?

A. Yes. That's correct.

Q. And you did note arthritic changes in that left knee?

A. Very mild in both knees.

Q. And you did document and note arthritic changes in her right knee?

A. As well. I documented minimal arthritic changes.

Q. Do you know whether Ms. O'Connell was experiencing pain related exclusively to the arthritic condition in her right knee?

A. That's not my opinion. Her pain wasn't -- I mean, it can be difficult to differentiate arthritis pain from a meniscus tear. But, again, her -- the findings of arthritis on both the X ray and the MRI were very mild. And I wouldn't expect that to cause very severe pain at all. Her -- her complaints with the mechanical symptoms and the severe pain are much more consistent with the meniscus tear.

Q. Is it possible that Ms. O'Connell was, in fact, experiencing right knee pain as a result of the

arthritic condition in her right knee?

A. It's possible that she had both factors contributing to her pain. But I would say the more severe issue was the meniscus tear. Again, the arthritis was mild.

Q. Okay. And your conclusion that the right knee meniscus tear was as a result of the fall of February 8, 2010, was based upon Ms. O'Connell's assertion that that's when she was injured?

A. Yes. Well, based on her history that she gave to me.

Q. And that history included a fall on February 8th, 2010.

A. Yes. But importantly, what she -- that she reported that she wasn't having symptoms before the fall and that the symptoms started soon after the fall.

Q. In your history of -- in taking your history -- Ms. O'Connell's history, did she identify any preexisting conditions?

A. To her knee?

Q. To anywhere on her body.

A. According to the chart note, she indicated she had depression, and that she had a mini stroke two days after the fall.

Q. And as you sit here today, do you know

whether Ms. O'Connell had a mini stroke as identified in her history?

A. Only that she reported it to me.

Q. She did identify that she had depression as well?

A. Yes.

Q. And can depression play a role in the presentation of pain symptoms?

A. It can.

Q. Do you have your notes from her visit with you on May?

A. Yes, I have it right here.

Q. Okay. Can I have you turn to page 2?

A. (Witness complies.) Okay.

Q. It identifies below the problem recorded as diagnosis code. Do you see that? It says, "information obtained by patient via web portal."

A. Yes.

Q. It identifies depression. It also identifies neuropathy; is that correct?

A. Yes.

Q. And could neuropathy exhibit pain symptoms?

A. It can.

Q. In the -- in the lower limbs?

A. Lower extremities not typically in the knee,

isolated.

Q. It identifies "stroke," then "mini stroke after accident, not stroke." Do you know what that means?

A. This is information the patient put into the computer. So I only know what it means from what we're reading here. So this is what the patient put in, not me.

Q. Do you know whether Ms. O'Connell might have had injuries to her knees prior to February 8th, 2010?

A. She did not report any injuries prior to that date.

Q. And do you know whether Ms. O'Connell had any injuries to her knees after February 8th, 2010?

A. No.

Q. You weren't informed of any injuries after February 8th, 2010; is that correct?

A. Well, I mean, we -- we -- I had a question about that earlier. So I'm -- I'm informed now, but as -- at that time and before today, I wasn't informed of any injuries other than the one that we documented.

Q. Do X-rays show meniscus tears?

A. No.

Q. It's exclusively an MRI?

A. Not exclusively, but MRI is the best way to

diagnose a meniscus tear. In X-rays, you cannot see the meniscus at all.

Q. Would you expect that Ms. O'Connell would have had some sort of immediate right knee pain if she had torn her meniscus?

A. Like I said earlier, some people will have immediate pain. Sometimes it comes on after a few days or weeks.

Q. So there are circumstances when an individual would tear a meniscus and not know about it for a period of two weeks?

A. Yes.

Q. Is that common?

A. Yes.

Q. Have you treated Ms. O'Connell at all for her -- for her hips?

A. No.

Q. And -- strike that.

Outside of your practice, Desert Orthopaedics, do you know who Ms. O'Connell saw prior to your treatment of her?

A. No, I don't.

Q. And Ms. O'Connell reported that she had undergone physical therapy prior to coming to you?

A. Yes.

Q. Okay. Do you know the specifics of that physical therapy?

A. No.

Q. You don't know what it entailed?

A. No.

Q. Your understanding from her, though, was that it was unsuccessful?

A. That she didn't get any improvement with it, so yes.

MR. SEMENZA: Just a moment, Your Honor.

BY MR. SEMENZA:

Q. Is it fair to say Ms. O'Connell experiences pain in both knees?

A. Yes. At the time I saw her, yes.

Q. And the severity of Ms. O'Connell's pain relating to her right knee, your understanding of what that pain is is exclusively based upon what she reports?

A. Yes.

Q. Has Ms. O'Connell scheduled an appointment to conduct the surgery on her knees?

A. I don't believe so.

Q. And would there be two separate surgeries? Do you do both knees at the same time? Or do you do one knee and then the other?

A. You could do both knees at the same time.

Q. Do you know when Ms. O'Connell first sought medical treatment relating to the fall that took place on February of 2010?

A. No.

Q. Do you know if at her first visit -- okay.

A. No, I'm sorry, I don't. I just know when she saw Dr. Dunn for the first time, but I don't know the first visit.

Q. Do you know whether during that first medical visit, after her fall, whether she complained of any knee pain?

A. I don't.

Q. Is it unusual for a patient to be diagnosed with a meniscus tear four years after it takes place?

A. No, it's not.

Q. It's common?

A. It's common for people to have meniscus tears or knee complaints for a long time, and then they have an MRI and then it's diagnosed as a meniscus tear.

Q. Could fibromyalgia play a role in a patient's pain symptomatology?

A. Sure.

Q. And could that fibromyalgia play a role in a pain -- a patient's pain symptomatology in a knee?

A. Not typically. Fibromyalgia does not mimic a meniscus tear. And it's usually not on the list of diagnoses that we consider when we're looking at knee pain. It's not -- it rarely involves the knee.

Q. But sometimes it does; correct?

A. I assume -- I would suppose, yes.

MR. SEMENZA: Okay. Thank you. No further questions.

THE COURT: Redirect.

MS. MORRIS: Yes. Just quick ones.

REDIRECT EXAMINATION

BY MS. MORRIS:

Q. Did you have to take time away from your practice to come here today?

A. I did.

Q. Is the fee that you charge to appear in court, is that -- is that a fee that you charge everyone?

A. Yes.

Q. And you don't charge by the hour; is that correct? You have a mandatory amount for a half day?

A. Half day, yes.

Q. Why is that?

A. Because for me to be here, I have to give up

seeing patients in clinic or give up doing surgeries. And that's -- and I'm still paying my staff right now. Well, it's after 5:00 so they're home. But I have overhead I need to maintain. And I have loss of income if I give up surgeries and give up clinic time.

Q. Does the fact that you were paid to appear here in court affect your medical opinion in any way?

A. No.

Q. Now, you said that Yvonne could get surgery to both knees at the same time; is that right?

A. Yeah, I would have that discussion with her. The patient needs to be aware of the pros and cons, but it's possible to do both knees.

Q. Is it difficult or any more difficult to recover from having both knees operated on at the same time?

A. Sure. Yes.

Q. Why is that?

A. Well, it's difficult to get around. You know, if you do a meniscus surgery on one knee, you can rely on the other knee for support. But when you do both at the same time, it's going to be more difficult. She'll probably need some sort of support and -- and help at home if that -- if that's the case.

Q. Now, the tear that Yvonne has in her right

knee, would that cause her in any way to overcompensate while walking?

A. Overcompensate?

Q. Or compensate on the other side.

A. If you're -- yes, if you have a meniscus tear, you can -- sometimes you'll limp. Sometimes you'll put more of your weight on the opposite limb.

Q. If you put more of your weight on the opposite limb and there's degeneration in that limb, could that cause symptoms in the other limb?

A. It could.

MS. MORRIS: I don't have any other questions.

MR. SEMENZA: Just a few.

THE COURT: Questions? Oh, recross.

RECROSS-EXAMINATION

BY MR. SEMENZA:

Q. You were asked about overcompensating. Do you traditionally find patients overcompensating to one limb or the other when they have double meniscus tears?

A. When you have a meniscus tear, your gait is going to be altered. So can it exacerbate pain in the contralateral limb? Yes. And I see that frequently. But if you have bilateral meniscus tears, you're not --

you're going to be -- I mean, it just depends on the situation.

Q. Meniscus tear regardless of whether it's bilateral or just one limb is going to cause some mobility issues; is that correct?

A. Mobility issues, limping, gait abnormalities. And that's going to stress both knees.

Q. So the left knee meniscus tear could have an impact on the right knee meniscus tear?

A. Sure.

Q. And vice versa?

A. Sure.

MR. SEMENZA: Thank you.

MS. MORRIS: No other questions.

THE COURT: Questions from the jury?

THE MARSHAL: Anybody else?

THE COURT: Counsel approach.

(A discussion was held at the bench, not reported.)

THE COURT: All right. Doctor, could a traumatic tear of the medial meniscus occur from an activity like swing dancing?

THE WITNESS: Yes.

THE COURT: And I had a question. The MRIs that you reviewed, when were those MRIs taken?

THE WITNESS: The MRI of the right knee was done on August 29th, 2014. And the MRI of the left knee, September 22nd, 2014.

THE COURT: Any questions as a result of my questions?

MR. SEMENZA: No, Your Honor.

MS. MORRIS: I just had one, Your Honor. One follow-up question. Thank you.

FURTHER REDIRECT EXAMINATION

BY MS. MORRIS:

Q. If a person had a meniscus tear, is it possible that they would have pain to the point that they were not able to swing dance?

A. It is possible, yes.

THE COURT: All right. May this witness be excused?

MR. SEMENZA: Yes, Your Honor.

THE COURT: Thank you very much for your testimony.

All right. Ladies and gentlemen, we're getting out.

TRANSCRIBER'S CERTIFICATE

STATE OF NEVADA)
) SS
COUNTY OF CLARK)

I, Kristy L. Clark, a Nevada Certified Court Reporter and Registered Professional Reporter, do hereby certify:

That I listened to the recorded proceedings and took down in shorthand the foregoing.

That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript is a complete, true and accurate transcription of my said shorthand notes to the best of my ability to hear and understand the audio file.

I further certify that I am not a relative or employee of an attorney or counsel involved in said action, nor a person financially interested in said action.

IN WITNESS WHEREOF, I hereby certify this transcript in the County of Clark, State of Nevada, this 28th day of December, 2015.

_____
Kristy L. Clark, RPR, CCR # 708

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DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, an individual,

Plaintiff,

vs.

WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, doing business as WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Defendants.

Case No.: A-12-655992-C

Dept. No.: V

NOTICE OF RELATED AUTHORITIES IN SUPPORT OF DEFENDANT WYNN LAS VEGAS, LLC'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR, ALTERNATIVELY, MOTION FOR NEW TRIAL OR REMITTITUR

Attached hereto as Exhibit "1" are the related authorities being presented to the Court in anticipation of the hearing, currently set to be heard on March 4, 2016 at 8:30 a.m., on Defendant Wynn Las Vegas, LLC d/b/a Wynn Las Vegas' Renewed Motion for Judgment as a Matter of

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Law, or, Alternatively, Motion for New Trial or Remittitur.

DATED this 3rd day of March, 2016.

LAWRENCE J. SEMENZA, III, P.C.

/s/ Lawrence J. Semenza, III
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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b) and NEFCR 9, I certify that I am an employee of Lawrence J. Semenza, III, P.C., and that on this 3rd day of March, 2016 I caused to be sent through electronic transmission via Wiznet's online system, a true copy of the foregoing **NOTICE OF RELATED AUTHORITIES IN SUPPORT OF DEFENDANT WYNN LAS VEGAS, LLC'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR, ALTERNATIVELY, MOTION FOR NEW TRIAL OR REMITTITUR** to the following registered e-mail addresses:

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An Employee of Lawrence J. Semenza, III, P.C.

EXHIBIT 1

EXHIBIT 1

Rowe v. Munye

Supreme Court of Minnesota

August 18, 2005, Filed

A03-465

Reporter
702 N.W.2d 729; 2005 Minn. LEXIS 478

Cheryl Rowe, Appellant, vs. Mohamed Munye, Respondent, Employers Insurance Company/Dakota Fire Insurance Company, Defendants.

Prior History: [**1] Court of Appeals. Office of Appellate Courts. LOWER COURT JUDGE: Hon. LaJune T. Lange.
Rowe v. Munye, 674 N.W.2d 761, 2004 Minn. App. LEXIS 162 (2004).

Disposition: Affirmed.

Core Terms

damages, aggravation, apportionment, preexisting injury, injuries, tortfeasor, burden of proof, jury instructions, cases, pre-existing, pre existing condition, shifting the burden, disability, apportioned, eggshell, situations, causes, combined, innocent, jointly, severally liable, tortious conduct, district court, misstates, harm to the plaintiff, court of appeals, sentence, neck, apportioning damages, indivisible injury

Case Summary

Procedural Posture
Plaintiff appealed the judgment from the Court of Appeals (Minnesota), which reversed the trial court's judgment in her favor in her personal injury suit against defendant driver and remanded the matter for a new trial.

Overview
The driver rear-ended a car driven by plaintiff, who sued the driver for negligence. She successfully requested a Minn. Jury Instructions Civ. No. 91.40 instruction on aggravation, contending that her injuries from the accident aggravated injuries to her back that preexisted the accident. The driver successfully appealed. On review, the court found that there were three policies woven through Minnesota case law: (1) protecting the innocent plaintiff over the tortfeasor, ensuring that the defendant was responsible only for the damages that he caused, and (3) placing the burden on the party with the greater amount of information. The court then concluded that extending the rationales of Matthews and Canada by Landy to aggravation cases that involved only one defendant, as here, could tend to overcompensate plaintiffs. The court concluded that No. 91.40 blurred distinctions among a plaintiff with a preexisting injury, a plaintiff injured by joint and several tortfeasors, and the eggshell plaintiff doctrine. Because of this potential confusion, the court could not determine the impact of the erroneous instruction, therefore, the driver was entitled to a new trial on damages.

Outcome
The court affirmed the judgment from the court of appeals.

LexisNexis® Headnotes

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN1 The court reviews a district court's decision on jury instructions under an abuse of discretion

standard. District courts generally have "considerable latitude" in choosing jury instructions. But a court errs if it gives a jury instruction that materially misstates the law.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Evidence > Burdens of Proof > General Overview

Torts > Remedies > Damages > General Overview

Torts > Negligence > General Overview

HN2 In a negligence action, the plaintiff generally has the burden of proving, by a preponderance of the evidence, damages caused by the defendant. The plaintiff must demonstrate with reasonable certainty the nature and probable duration of the injuries sustained.

Torts > Remedies > Damages > General Overview

HN3 When an accident involves aggravation of preexisting injuries, the Supreme Court of Minnesota has required the defendant to pay only for the damages he or she caused over and above the consequences that would have occurred from the preexisting injury if the accident had not occurred.

Torts > Remedies > Damages > General Overview

HN4 A person who has a preexisting disability is entitled to recover damages for an aggravation of that condition even though the particular consequences would not have followed absent his prior disability, recovery being limited, however, to the additional injury over and above the consequences which normally would have followed from the preexisting condition absent defendant's negligence.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Burdens of Proof

Evidence > Burdens of Proof > General Overview

Torts > Remedies > Damages > General Overview

HN5 In aggravation cases, the burden of proof remains on the plaintiff because aggravation is not an affirmative defense which shifts the burden to the defendant. Aggravation of a preexisting physical condition is a measure of damages, not a theory of liability, even if one puts the word "negligent" in front of the phrase. Thus, Minnesota case law is clear that the burden remains on the plaintiff in cases involving aggravation of a preexisting injury.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN6 The use note to Minn. Jury Instructions Civ. No. 91.40 no longer claims that the instruction has a basis in Canada by Landy.

Torts > Remedies > Damages > General Overview

HN7 In determining damages in personal injury cases, there are three policies woven through Minnesota case law: (1) the policy of protecting the innocent plaintiff over the tortfeasor, (2) the policy of ensuring that the defendant is responsible only for the damages that he or she caused, and (3) the policy of placing the burden on the party with the greater amount of information.

Torts > Remedies > Damages > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN8 Extending the rationales of Mathews and Canada by Landy to aggravation cases that involve only one defendant could have the tendency to overcompensate the plaintiff. A critical fact of both Mathews and Canada by Landy was that there were multiple defendants who were jointly and severally liable for 100 percent of the harm. Jointly and severally liable defendants already bear the risk of failure of proof because, if they are not able to prove that the damages can be apportioned, they are each liable for all of the damages.

Torts > Remedies > Damages > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN9 In a case involving aggravation of a preexisting injury, the plaintiff is likely to have more knowledge

than the defendant of the extent of the preexisting injury. But, where there are multiple tortfeasors and injuries that are closely related in time, the plaintiff and the defendant will start at approximately the same point of knowledge. In the former circumstances, to require the defendant to separate the new injury from the preexisting injury improperly places the burden on the party with the lesser amount of information and again might have the tendency to overcompensate the plaintiff.

Evidence > Burdens of Proof > General Overview

Torts > Remedies > Damages > General Overview

HN10 The eggshell plaintiff doctrine states that where a tort is committed, and injury may reasonably be anticipated, the wrongdoer is liable for the proximate results of that injury, although the consequences are more serious than they would have been, had the injured person been in perfect health. The eggshell plaintiff doctrine is not a mechanism to shift the burden of proof to the defendant; rather, it makes the defendant responsible for all damages that the defendant legally caused even if the plaintiff was more susceptible to injury because of a preexisting condition or injury. Under this doctrine, the eggshell plaintiff still has to prove the nature and probable duration of the injuries sustained.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Torts > Remedies > Damages > General Overview

HN11 The Minnesota Supreme Court recognizes that it is conceivable that a person could have both an injury that involves aggravation of a preexisting injury and an injury that was more severe because the plaintiff was more susceptible to injury.

Torts > Remedies > Damages > General Overview

HN12 A defendant should be responsible for the harm that the defendant caused even if the harm is more severe because the plaintiff is more susceptible to injury, the eggshell plaintiff doctrine. But it does not follow, in a case involving aggravation of a preexisting injury, that a defendant should also pay for the preexisting injury.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Torts > Remedies > Damages > General Overview

HN13 A plaintiff should not be undercompensated when a jury has difficulty separating the plaintiff's injuries caused by the defendant from her preexisting injuries, but Minn. Jury Instructions Civ. No. 91.40 is not the proper solution. Minn. Jury Instructions Civ. No. 91.40 tries to do too much by casting a wider net than just those cases where apportionment is not possible.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Torts > Remedies > Damages > General Overview

HN14 When confusing or conflicting testimony, jury indecision, or juror disagreement could lead to the jury's inability to separate damages, rather than placing all uncertainty on the defendant, the better option is for the jury to make a rough apportionment so that the plaintiff receives fair compensation for her injuries.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Evidence > Burdens of Proof > General Overview

Torts > Remedies > Damages > General Overview

HN15 Minn. Jury Instructions Civ. No. 91.40, as presently written, misstates Minnesota law on the defendant's burden of proof in a case involving one defendant and aggravation of the plaintiff's preexisting injury or condition.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Legal Issues

Torts > Remedies > Damages > General Overview

HN16 There is another potential danger in Minn. Jury Instructions Civ. No. 91.40. The third sentence instructs the jury, "if you cannot separate damages caused by the preexisting disability or medical condition from those caused by the accident, then (defendant) is liable for all of the damages." In instructing the jury to determine whether the damages can be apportioned, No. 91.40 improperly usurps the domain of the judge. Whether the injury is capable of apportionment is a question of law. Once the trial court finds that the harm can be apportioned, the question of actual apportionment is a question of fact for the jury.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN17 A complainant will not receive a new trial for errors in jury instructions unless the error was prejudicial.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Civil Procedure > Appeals > Standards of Review > General Overview

HN18 In determining whether erroneous instructions resulted in prejudice, the Minnesota Supreme Court must construe the instructions as a whole from the standpoint of the total impact on the jury. The court will, however, give the complainant the benefit of the doubt by granting the complainant a new trial if the effect of the erroneous instruction cannot be determined.

Syllabus

CIVJIG 91.40, which instructs the jury to find the defendant liable for all damages when the jury is unable to apportion the plaintiff's injuries between the injuries caused by the defendant and the plaintiff's preexisting injuries, misstates Minnesota law; therefore, the district court erred when it instructed the jury using CIVJIG 91.40.

Because we cannot determine the prejudice to the defendant as a result of the district court erroneously instructing the jury using CIVJIG 91.40, the defendant is entitled to a new trial on damages.

Counsel: FOR APPELLANT: Michael D. Tewksbury, Darin S. Wieneke, Tewksbury, Kerfeld, Zimmer, Minneapolis, MN.

FOR RESPONDENT: Terrence R. Peterson, Corrine L. Evenson & Associates, St. Paul, MN.

FOR AMICUS CURIAE MN DEFENSE LAWYERS ASS'N: William M. Hart, Damon L. Highly, Meagher & Geer, PLLP, Minneapolis, MN.

Judges: Anderson, Paul H., J. Concurrence, Anderson, Russell A., J. Dissenting, Meyer and Page, JJ. Took no part, Blatz, C.J.

Opinion by: Anderson, Paul H.

Opinion

[*732] Heard, considered, and decided by the court en banc.

ANDERSON, Paul H., Justice.

In [**2] the case before us, we must determine whether using CIVJIG 91.40 to instruct a jury on aggravation of a preexisting injury or condition improperly shifts to the defendant the burden of apportioning a plaintiff's automobile accident injuries and her preexisting injuries. The subject of this action is an automobile accident that occurred when a vehicle driven by Mohamed Munye rear-ended Cheryl Rowe's vehicle. Claiming that she suffered injuries from this accident, Rowe sued Munye for negligence. At trial, Rowe requested CIVJIG 91.40 to instruct the jury on aggravation because she claims her injuries from the accident aggravated injuries that preexisted the accident. Munye objected, contending that CIVJIG 91.40 misstates Minnesota law and impermissibly shifts

the burden of proof from Rowe to him. The Hennepin County District Court granted Rowe's request and included CIVJIG 91.40 in its instructions to the jury. The jury then awarded Rowe damages for medical expenses, pain, disability, and emotional distress. Munye moved for [*733] a new trial, arguing that CIVJIG 91.40 was an improper and prejudicial instruction. The court denied Munye's motion and he appealed. The Minnesota Court of Appeals [**3] reversed and remanded for a new trial on damages. *Rowe v. Munye, 674 N.W.2d 761 (Minn. App. 2004)*. We affirm the court of appeals.

On November 21, 1999, as appellant Cheryl Rowe was making a left turn, respondent Mohamed Munye hit her vehicle from behind with his car. Munye initially claimed that he hit Rowe only because an unidentified vehicle pushed him into Rowe's car. Rowe claimed that she suffered neck and shoulder injuries from this accident and sued Munye for negligence. Because Munye asserted that the unidentified vehicle caused the accident, Rowe also initially sued her insurance company, Employers Mutual Insurance Company/Dakota Fire Insurance Company, under the unidentified/uninsured driver terms of her policy. The district court subsequently dismissed Munye's defense with prejudice when Munye repeatedly failed to cooperate with court instructions and discovery orders. Munye eventually conceded that he "bore complete and undisputed liability" for the accident. Thus, the only issue left for the jury to decide was the issue of damages.

At trial, Rowe testified about the accident and her resulting injuries. She testified that immediately after the accident, [**4] she had a headache and a sore neck, which continued to worsen. Rowe also claimed that as a result of the accident she developed a persistent numbness in her arm and hand. She testified that chiropractic treatment from Dr. Kelly Sheehan has provided some relief from her symptoms. An MRI scan taken in April 2000 showed a herniated disc in her neck. In June 2000, neurologist Dr. Ronald Tarrel examined Rowe and told her that surgery was not necessary, but that she could continue the chiropractic treatments. Rowe continued treatments with Dr. Sheehan about once a month.

Dr. Sheehan testified that he believes Rowe suffers from permanent injuries to her neck and upper back because of the accident and will need continuing supportive care at an annual cost of approximately $ 1,950. He testified that while some of Rowe's x-rays show a preexisting degenerative joint disease, her back problems before the accident would not have been permanent. He did testify, however, that Rowe would have probably needed continued "maintenance" care based on her pre-accident injuries. Dr. Sheehan concluded that Rowe's injuries were both caused by and aggravated by the accident with Munye.

Neurologist Dr. Imran [**5] Altafullah, who independently examined Rowe on February 19, 2002, testified for Munye. Dr. Altafullah stated that he believes the accident did not cause Rowe to suffer from either a permanent injury or a permanent aggravation of a preexisting injury and that her degenerative back changes had developed over a long period of time. He did say, however, that he believes that the accident might have caused Rowe to suffer temporary aggravating injuries. He based his opinion on the nature of the accident, Rowe's symptoms and improvement over time, and his examination, which, he said, did not reveal any objective findings of permanent injury.

Rowe's preexisting injuries involved back, shoulder, and neck pain and headaches. For about 20 years before the accident with Munye, Rowe had periodically received chiropractic care for chronic neck and back discomfort. Her most recent visit to Dr. Sheehan was just a few days before the accident. In 1975, Rowe had been in a car accident, in which she [*734] was thrown against the windshield and broke two of her teeth. She also fell off a motorcycle in 1965. Rowe stated, however, that she suffered no lingering injuries from either of those earlier accidents. [**6] Despite her previous medical treatment for her back and neck, she testified that for a couple of weeks before the accident with Munye

occurred, she had "felt really great" and "better than [she] had in a long time."

Rowe also testified that her injuries from the accident with Munye have caused her to limit her involvement in activities and that she believes her life is more limited than it was before the accident. She claimed that, since the accident, she tires more quickly and has had to significantly curtail her volunteer work. Munye tried to show that Rowe's injuries did not limit her activities and he attempted to prove that Rowe's injuries were not severe because the impact from the accident was only a jolt and it did not cause her to hit anything inside her car. Rowe requested $ 79,000 in damages: $ 6,000 for past medical expenses; $ 15,000 for past pain, disability, and emotional distress; $ 52,000 for future pain, disability, and emotional distress; and $ 6,000 for future medical expenses.

Rowe requested CIVJIG 91.40 because she claimed that the accident aggravated her previous back and neck problems. 4A Minn. Dist. Judges Ass'n, *Minnesota Practice, Jury Instruction* [**7] *Guides--Civil*, CIVJIG 91.40 (4th ed. 1999 & Supp. 2005).[1] She did not claim that her aggravated injuries were not apportionable from her preexisting injuries. Munye did not submit any proposed jury instructions, but just before jury deliberations, he objected to Rowe's request for CIVJIG 91.40, stating that he believed the instruction misstates Minnesota law. Munye argued that the instruction's third sentence impermissibly shifts the burden of proving Rowe's injuries to him. Instead of CIVJIG 91.40, Munye requested that the court give the now replaced 1986 CIVJIG 163 to the jury because the former instruction did not impermissibly shift the burden of proof to the defendant. 4 Minn. Dist. Judges Ass'n, *Minnesota Practice, Jury Instruction Guides--Civil*, CIVJIG 163 (3d ed. 1986). CIVJIG 163 was the jury instruction on aggravation from the Third Edition of the civil jury instruction guide and was replaced by CIVJIG 91.40 in the Fourth Edition.

[**8] The district court granted Rowe's request and instructed the jury using the exact language of CIVJIG 91.40, only adding Rowe's and Munye's names. The court's instructions on aggravation read as follows:

> There is evidence that Cheryl Rowe had a pre-existing disability or medical condition at the time of the accident.
>
> Mohamed Munye is liable only for any damages that you find to be directly caused by the accident.
>
> If you cannot separate damages caused by the pre-existing disability or medical condition from those caused by the accident, then Mohamed Munye is liable for all of the damages.

[*735] The jury found that Rowe had sustained a permanent injury and a 60-day disability as a result of the accident, but not medical expenses in excess of $ 4,000. It awarded her $ 24,300: $ 7,500 for past pain, disability, and emotional distress; $ 13,000 for future pain, disability, and emotional distress; and $ 4,000 for future health care costs and expenses. On November 14, 2002, the district court entered judgment for Rowe.

Munye moved for a new trial, claiming that the district court erred when it gave CIVJIG 91.40 because the instruction caused him prejudice. He objected to [**9] CIVJIG 91.40, arguing that it (1) misstates Minnesota law pursuant to a court of appeals decision, *Blatz v. Allina Health Sys., 622 N.W.2d 376 (Minn. App. 2001)*, rev. denied *2001 Minn. LEXIS 323 (Minn. May 16, 2001)*; and (2) unfairly prejudices his right to a fair trial by

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[1] The *Jury Instruction Guides--Civil* is a volume of civil jury instructions that have been discussed and reviewed by a group of approximately 30 trial judges and published under the guidance of the Minnesota District Judges' Association. The First Edition was published in 1963, the Second in 1974, the Third in 1986, and the Fourth in 1999. The jury instruction guides have been created so that trial judges have an available resource, written in language understandable by lay juries, to instruct juries on the substantive law. The guide, however, explicitly states that it is only a guide and that judges should not rely on it as their exclusive source for substantive law.

impermissibly shifting to him the burden of proving apportionment of damages. The court denied Munye's motions and he appealed.

The court of appeals reversed the district court, concluding that CIVJIG 91.40 "impermissibly imposes on an at-fault defendant the burden of proving that he did *not* cause the portion of plaintiff's damages attributable to a pre-existing disability or condition." *Rowe, 674 N.W.2d at 767-68*. The court went on to conclude that it could not determine whether the erroneous instruction influenced the jury in the award of damages. *Id. at 770*. Therefore, the court of appeals remanded for a new trial, but limited the scope of the trial to a determination of the amount of damages that Rowe sustained from the accident over and above the damages that normally would have followed from her preexisting condition. *Id.*

Rowe appeals to our court, contending that [**10] CIVJIG 91.40 is appropriate because it clearly and accurately states Minnesota law and ensures consistent jury instructions. Alternatively, she contends that CIVJIG 91.40 did not prejudice Munye because the jury appropriately separated the preexisting injury from the aggravation of that injury. Munye requests that we affirm the court of appeals' decision to grant him a new trial on damages. He also requests that we conclude that CIVJIG 91.40 constitutes prejudicial error when given to the jury in a case with one liable defendant and a plaintiff who asserts aggravation of a preexisting injury.

I.

HN1 We review a district court's decision on jury instructions under an abuse of discretion standard. *Hilligoss v. Cargill, Inc., 649 N.W.2d 142, 147 (Minn. 2002)*. District courts generally have "considerable latitude" in choosing jury instructions. *Morlock v. St. Paul Guardian Ins. Co., 650 N.W.2d 154, 159 (Minn. 2002)*. But a court errs if it gives a jury instruction that materially misstates the law. *State v. Kuhnau, 622 N.W.2d 552, 556 (Minn. 2001)*.

We begin our analysis with a brief summary of our case law on the burden of proof and aggravation [**11] of preexisting injuries. *HN2* In a negligence action, the plaintiff generally has the burden of proving, by a preponderance of the evidence, damages caused by the defendant. *Canada by Landy v. McCarthy, 567 N.W.2d 498, 507 (Minn. 1997)*; *see also* 4A Minn. Dist. Judges Ass'n, *Minnesota Practice, Jury Instruction Guides--Civil*, CIVJIG 90.15 (4th ed. 1999) ("A party asking for damages must prove the nature, extent, duration, and consequences of his or her (injury) (harm)."). The plaintiff must demonstrate with reasonable certainty the nature and probable duration of the injuries sustained. *Canada by Landy, 567 N.W.2d at 507*.

HN3 [*736] When an accident involves aggravation of preexisting injuries, we have required the defendant to pay only for the damages he or she caused over and above the consequences that would have occurred from the preexisting injury if the accident had not occurred. *See, e.g., Nelson v. Twin City Motor Bus Co., 239 Minn. 276, 280, 58 N.W.2d 561, 563 (1953)*. In *Schore v. Mueller*, we said:

> Our rule is that *HN4* a person who has a preexisting disability is entitled to recover damages for an aggravation of that condition [**12] even though the particular consequences would not have followed absent his prior disability, recovery being limited, however, to the additional injury over and above the consequences which normally would have followed from the preexisting condition absent defendant's negligence.

290 Minn. 186, 189, 186 N.W.2d 699, 701 (1971).

HN5 In aggravation cases, we have also indicated that the burden of proof remains on the plaintiff because aggravation is not an affirmative defense which shifts the burden to the defendant. *See Leubner v. Steiner, 493 N.W.2d 119, 122 (Minn. 1992)*. We have said, "'aggravation of a preexisting physical condition' is a measure of damages, not a theory of liability, even if one puts the word 'negligent' in front of the phrase." *Id.* Thus, our case

law is clear that the burden remains on the plaintiff in cases involving aggravation of a preexisting injury.

A limited situation where we have shifted the burden to the defendant involves the single indivisible injury rule set forth in *Mathews v. Mills*, 288 Minn. 16, 178 N.W.2d 841 (1970). In *Mathews*, we said that multiple defendants are jointly and severally [**13] liable when they, through independent consecutive acts of negligence closely related in time, cause indivisible injuries to the plaintiff. *Id.* at 20-21, 178 N.W.2d at 844. In *Mathews*, the plaintiff was injured in a highway chain collision involving multiple defendants. *Id.* at 18-19, 178 N.W.2d at 842-43. We held that where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the defendants seeks to limit his or her liability by claiming that the harm is capable of apportionment, the burden of proving the apportionment is on the defendant(s). *Id.* at 22, 178 N.W.2d at 845. We recently applied *Mathews* in *Canada by Landy*, where we placed the burden of proving apportionment on a jointly and severally liable landlord who caused lead poisoning injuries to a child. *Canada by Landy*, 567 N.W.2d at 507-08. Our holdings in *Mathews* and *Canada by Landy* are consistent with the Restatement (Second) of Torts, which only shifts the burden of proof to the defendant in situations that involve the combined tortious conduct of two or more actors who are seeking [**14] to limit their liability for the harm they have caused the plaintiff. [3] *Restatement (Second) of Torts* § 433 B (1965); [*737] *see also Morlock*, 650 N.W.2d at 165.

[**15] It is within this contextual framework that we need to examine CIVJIG 91.40. CIVJIG 91.40 is designed to be given in cases involving aggravation of preexisting injuries. It reads:

> There is evidence that (plaintiff) had a pre-existing disability or medical condition at the time of the accident.
>
> (Defendant) is liable only for any damages that you find to be directly caused by the accident.
>
> *[If you cannot separate damages caused by the pre-existing disability or medical condition from those caused by the accident, then (defendant) is liable for all of the damages.]*

CIVJIG 91.40 (emphasis added). The parties disagree on whether the instruction's third sentence misstates Minnesota law because it shifts the burden of separating damages to the defendant. The third sentence instructs the jury to find the defendant liable for all damages when the jury is unable to apportion the plaintiff's injuries between the injuries caused by the defendant and the plaintiff's preexisting injuries.

Because Munye believes the third sentence of CIVJIG 91.40 misstates Minnesota law, he requested that the district court instruct the jury using the Third Edition's instruction [**16] on aggravation, CIVJIG 163, which reads:

> A person who has a defect or disability at the time of an accident is nevertheless entitled to damages for any aggravation of such pre-existing condition, even though the particular results would not have followed if the injured person had not been subject to such pre-existing condition. Damages are limited, however, to

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[3] *Restatement (Second) of Torts* § 433 B (1965) provides:

> (1) Except as stated in Subsections (2) and (3), the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff.
>
> (2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.
>
> (3) Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.

> those results which are over and above those which normally followed from the pre-existing condition, had there been no accident.

4 Minn. Dist. Judges Ass'n, *Minnesota Practice, Jury Instruction Guides--Civil*, CIVJIG 163 (3d ed. 1986). We have previously cited CIVJIG 163 as a proper statement of Minnesota law. *Leubner, 193 N.W.2d at 122*. CIVJIG 91.40 and CIVJIG 163 conflict to the extent that CIVJIG 91.40 places the burden to apportion the damages on the defendant. CIVJIG 163 does not provide any explicit default rule when the jury cannot apportion damages; thus, under CIVJIG 163, the burden of proof remains on the plaintiff.

We previously looked at CIVJIG 91.40 in *Morlock*, when we determined that the district court erred when it gave CIVJIG 91.40 to the jury because neither party's theory [**17] of the case required the jury to distinguish between a preexisting condition and any aggravation caused by the defendant's negligence. *630 N.W.2d at 161*. The plaintiff had contended that a car accident caused all of his injuries and the defendant argued that the accident caused none of the plaintiff's ongoing injuries. *Id. at 156-58*. We therefore did not decide whether CIVJIG 91.40 misstated Minnesota law, but we suggested that "it may be possible that CIVJIG 91.40 could be inappropriate in a situation where a plaintiff is seeking both 'new' damages and damages for aggravation of an admitted to preexisting condition." *Id. at 161-62*. In this case, Rowe's theory is that she was injured in the November 1999 accident with Munye and that these injuries aggravated her preexisting back problems. Unlike *Morlock*, Rowe's theory requires the jury to distinguish between new and preexisting injuries; therefore, we now must decide whether CIVJIG 91.40 is a correct statement of law.

[*738] Rowe argues that CIVJIG 91.40 is a better statement of law than CIVJIG 163 because "it ensures that parties support their theories and/or defenses." She claims that [**18] CIVJIG 91.40 still requires the plaintiff to satisfy her burden of proof, but it "does not allow the defendant to simply muddy the issues and/or confuse the jury in hope of preventing a recovery." Rowe asserts that the burden for the failure to prove damages should not fall on the innocent plaintiff, but rather on the at-fault defendant. She maintains that the underlying rationale of CIVJIG 91.40 should not be limited to cases where multiple tortfeasors are jointly and severally liable; rather, the reasoning of *Mathews* and *Canada by Landy* should be extended to include the situation before us. In those two cases involving jointly and severally liable tortfeasors, we placed the burden on the defendant to prove apportionment of damages. Rowe asserts that the standard for the jury should be the same whether the accident involved jointly and severally liable tortfeasors or whether it involved a single tortfeasor and an innocent cause, such as a preexisting injury. She claims that there is no basis or justification for the different standards.

Munye, however, argues that CIVJIG 91.40 misstates Minnesota law because it erroneously combines joint and several liability rules with [**19] aggravation of preexisting injury rules and improperly shifts the burden of proving damages from the plaintiff (Rowe) to the defendant (Munye). He claims that Minnesota law requires that a plaintiff who asserts aggravation of a preexisting injury must prove that the defendant caused damage over and above the preexisting injury and that CIVJIG 91.40 "completely erases the plaintiff's burden of proof in aggravation cases by shifting that burden to the defendant."

Munye also claims that Minnesota law has never shifted the burden of proof to the defendant in cases involving a single defendant who caused aggravation of a preexisting injury, as is the case here. He states that only one exception allows the burden of proof to be shifted from the plaintiff to the defendant. For this exception, Munye relies on the court of appeals decision in *Blatz* for two requirements: (1) joint and several tortfeasors, and (2) single indivisible damages. *See 622 N.W.2d at 369*. He contends that *Blatz* was correctly decided and asserts that the policy reason for this exception-

-that the plaintiff should not be prejudiced for failing to know the precise apportionment of damages caused [**20] by multiple tortfeasors--is not present in aggravated injury cases. Moreover, he claims that in an aggravated injury case, the plaintiff is in the best position to know the extent of the preexisting injuries and the degree of aggravation. We agree that our case law supports Munye's position.

In cases where the jury cannot apportion the plaintiff's new injuries from the plaintiff's preexisting injuries, CIVJIG 91.40 shifts the burden of proving the extent of the new injuries to the defendant. Thus far, we have shifted the burden to the defendant only in cases involving multiple tortfeasors who were jointly and severally responsible for a single injury to the plaintiff. *See Mathews, 288 Minn. at 21, 178 N.W.2d at 844; Canada by Landy, 367 N.W.2d at 507-08.* The case before us today, however, does not trigger the single indivisible injury rule set forth in *Mathews*. Here, only one defendant is involved and the injuries were not closely related in time.

We do not agree with the assertion that CIVJIG 91.40 finds its basis for support in *Canada by Landy*, an application of the [*739] rule in *Mathews*. [3] In *Canada by Landy*, a child had suffered repeated [**21] lead poisoning at multiple dwellings owned by different defendants. *367 N.W.2d at 499.* The appellant/defendant in *Canada by Landy* had been negligent in performing lead abatement cleanup. *Id. at 508.* We held that, when the district court determined that the child's lead poisoning injuries could be divided between two different points in time, the defendant had the burden to prove that his acts did not cause the plaintiff's injuries. *Id. at 507-08.* In reaching our decision, we followed *Mathews*, and placed on the defendant, who was jointly and severally liable for the damages, the burden of proving that the plaintiff's injuries could be apportioned. *Id.* We further noted that, under "the facts of this case," the defendant also had the burden of apportioning damages related to aggravation of the child's preexisting injuries. *Id. at 508.* To the extent that Rowe reads *Canada by Landy* to place the burden of proof on the defendant in *all* cases involving aggravation of a preexisting injury, her reading is too broad. Thus, for us to conclude that CIVJIG 91.40 is an appropriate statement of the law in this case, [**22] we would need to extend the rationale of *Mathews* and *Canada by Landy* to all cases involving aggravation where the jury needs to apportion the plaintiff's injuries.

[**23] If we were to extend the law to follow Rowe's arguments, Minnesota courts and juries would no longer need to distinguish between aggravation of a preexisting injury and the single indivisible injury rule with multiple tortfeasors. In each of these cases, the defendant would have the burden to prove that he or she had not caused all of the damages to the plaintiff. Essentially, we would "let the tie go to the plaintiff" to ensure that the plaintiff is not undercompensated and we would treat a plaintiff with preexisting injuries the same as a plaintiff who is injured by jointly and severally liable tortfeasors.

But treating the plaintiffs the same in these situations ignores differences that become important when viewed in light of *HN7* three policies woven through our case law: (1) the policy of protecting the innocent plaintiff over the tortfeasor, *Mathews, 288 Minn. at 22, 178 N.W.2d at 845*; (2) the policy of ensuring that the defendant is responsible only for the damages that he or she caused, *Leubner, 493 N.W.2d at 122*; and (3) the policy of placing the

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[3] *HN6* The use note to CIVJIG 91.40 no longer claims that the instruction has a basis in *Canada by Landy*. Although we declined to decide the correctness of CIVJIG 91.40 in *Morlock*, the Committee on Jury Instruction Guides subsequently modified CIVJIG 91.40 and rewrote the accompanying use note. *See* 4A Minnesota District Judges Association, *Minnesota Practice, Jury Instruction Guides--Civil*, CIVJIG 91.40 (4th ed. Supp. 2005). It appears that the committee surrounded the last sentence of CIVJIG 91.40 with brackets to reflect the fact that we had not definitively decided the issue of burden of proof in cases where there is no basis for apportionment and because the court of appeals had determined that the third sentence of CIVJIG 91.40 misstates Minnesota law. *See id.* Previously, the use note stated that "the burden of apportioning damages appears to be with the defendant." The basis cited for this earlier language was our decision in *Canada by Landy, 367 N.W.2d at 498*. *See* CIVJIG 91.40.

burden on the party with the greater amount of information, Morlock, 650 N.W.2d at 165; [**24] see also Mathews, 288 Minn. at 24, 178 N.W.2d at 846. Placing the burden on the defendant in all situations where the jury is unable to separate the damages would further the first policy, but would disregard the other two.

We conclude that *HN8* extending the rationales of *Mathews* and *Canada by Landy* to aggravation cases that involve only one defendant could have the tendency to overcompensate [*740] the plaintiff. A critical fact of both *Mathews* and *Canada by Landy* was that there were multiple defendants who were jointly and severally liable for 100% of the harm. Jointly and severally liable defendants already bear the risk of failure of proof because, if they are not able to prove that the damages can be apportioned, they are each liable for all of the damages. *See* Dan B. Dobbs, *The Law of Torts* § 170 at 412-14 (2000). The single defendant does not bear the same risk in an aggravation case, where the defendant is liable only for the damages that he or she caused. Schore, 290 Minn. at 189, 186 N.W.2d at 701.

Placing the burden of apportionment on the plaintiff when multiple defendants are jointly and severally liable would serve no [**25] purpose because in that situation, the defendants are jointly liable for 100% of the harm and are only trying to reduce their individual liability relative to other defendants. In a case of a single defendant and aggravation of a preexisting injury, however, the allocation must be between the defendant and the plaintiff. *See* Mayer v. N. Arundel Hosp. Ass'n, 145 Md. App. 235, 802 A.2d 483, 494 (Md. Ct. Spec. App. 2002). Because there is no presumption that the defendant caused 100% of the plaintiff's damage, shifting the burden to the defendant could force the defendant to pay for damages he did not cause. Thus, CIVJIG 91.40 is not the next logical step after Canada by Landy because different concepts are involved. [4]

[**26] Additionally, *HN9* in a case involving aggravation of a preexisting injury, the plaintiff is likely to have more knowledge than the defendant of the extent of the preexisting injury. But, where there are multiple tortfeasors and injuries that are closely related in time, the plaintiff and the defendant will start at approximately the same point of knowledge. We conclude that, in the former circumstances, to require the defendant to separate the new injury from the preexisting injury improperly places the burden on the party with the lesser amount of information and again might have the tendency to overcompensate the plaintiff.

The dissent claims support for its argument that the burden of proof should be shifted to the defendant under CIVJIG 91.40 by using cases involving the eggshell plaintiff doctrine. *See, e.g.*, Wolbers v. Finley Hosp., 673 N.W.2d 728 (Iowa 2003). [5] [**28] But the eggshell plaintiff [*741] doctrine and CIVJIG 91.40, which shifts the burden to the

[4] It appears that the dissent misreads Restatement (Second) of Torts § 433 B(2), cmt. d, in stating that the Restatement shifts the burden or that the majority concedes any shifting of the burden to the defendant in single-defendant aggravation situations. Comment d provides the policy reason for shifting the burden to defendants when "two or more actors" are involved in the tortious conduct. *See id.*; *see also* Eggiman v. Des Moines Bowl-O-Mat, Inc., 545 N.W.2d 589, 594 (Iowa 1996) (discussing the inapplicability of § 433 B to situations involving only one tortfeasor). Moreover, the dissent's interpretation that § 433B (2) applies to situations involving a single tortfeasor and aggravation of preexisting injuries would lead to odd results because, in order to fulfill the "two or more actors" requirement that is explicit in § 433 B(2), the burden of proof could be shifted to the defendant who caused the aggravation only where the preexisting injury was caused by a second tortfeasor. But not all preexisting injuries will have been caused by a second tortfeasor. The dissent's reading would therefore allow the defendant to be "given a break" in situations where the preexisting injury did not involve a second tortfeasor. Thus, the most logical and consistent reading of comment d is as an application of the *Mathews* single indivisible injury rule involving *multiple* defendants who are jointly and severally liable.

[5] Although there is support for the dissent's position in case law from other jurisdictions, the dissent overstates that support. First, the dissent overstates the authority by saying that "Minnesota chooses a path rejected by every court but Iowa and Maryland." Some states have not decided the issue; courts cannot reject what they have not decided. Second, the dissent has overstated the degree of support for its position in the cases it cites. For example, the Supreme Court of Hawaii determined that the jury should make a rough apportionment of damages and did not place all the responsibility on the defendant. *See* Montalvo v. Lapez, 77 Haw. 282, 884 P.2d 345, 363 (Haw. 1994). Moreover, the Supreme Court of Alaska stated that it would only place

defendant, involve distinguishable concepts. [6] *HN10* The eggshell plaintiff doctrine states that "where a tort is committed, and injury may reasonably be anticipated, the wrongdoer is liable for the proximate results of [**27] that injury, although the consequences are more serious than they would have been, had the injured person been in perfect health." *Ross v. Great N. Ry. Co., 101 Minn. 122, 123, 111 N.W. 951, 953 (1907)*. The eggshell plaintiff doctrine is not a mechanism to shift the burden of proof to the defendant; rather, it makes the defendant responsible for all damages that the defendant legally caused even if the plaintiff was more susceptible to injury because of a preexisting condition or injury. Under this doctrine, the eggshell plaintiff still has to prove the nature and probable duration of the injuries sustained. *Cf. Canada by Lamb, 367 N.W.2d at 307*. We note that other courts also recognize that the two concepts are different. Iowa recognizes the eggshell plaintiff doctrine, but does not shift the burden of proving apportionment to the single defendant in injury aggravation cases. *See Wails v. United Fire & Cas. Co., 572 N.W.2d 565, 577 (Iowa 1997); Poppia v. Des Moines Bowl-O-Mat, Inc., 543 N.W.2d 889, 893-94 (Iowa 1996)*. Our decision today in no way changes our case law on the eggshell plaintiff doctrine.

HN11 We recognize that it is conceivable that a person could have both an injury that involves aggravation of a preexisting injury and an injury that was more severe because the plaintiff was more susceptible to injury. [7] In fact, this was the case in *Wails*, where the Iowa Supreme Court held that a jury could receive instructions on both the eggshell plaintiff doctrine and on aggravation of a preexisting injury. *572 N.W.2d at 578*. But, in recognizing the difference between the concepts, the Iowa court properly required that the jury be provided [**29] additional guidance on how to [*742] interpret both instructions. *Id. Wails* illustrates that the eggshell plaintiff doctrine and the burden-shifting mechanism of CIVJIG 91.40 should not be confused.

We agree that *HN12* a defendant should be responsible for the [**30] harm that the defendant caused even if the harm is more severe because the plaintiff is more susceptible to injury--the eggshell plaintiff doctrine. But it does not follow, in a case involving aggravation of a preexisting injury, that a defendant should also pay for the preexisting injury. The defendant should pay for the aggravation, but not for the preexisting injury or condition. *See* Dobbs, supra, § 188 at 465. It is incorrect to assert that the defendant is "given a break" when the plaintiff is held to prove the extent and nature of her injuries. This is traditionally where we have placed the burden of proof under our tort law. Moreover, it would be improper to make the defendant responsible for proving any apportionment between the preexisting injury and the new injury when the plaintiff has superior knowledge of the preexisting injury.

We share the dissent's concerns that *HN13* the plaintiff not be undercompensated when a jury has

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the entire burden on the defendant upon a showing of "compelling injustice" to the plaintiff because it is such an "extreme measure" to place the burden on the defendant. *LaMoureaux v. Totem Ocean Trailer Express, Inc., 632 P.2d 539, 541 (Alaska 1981)*. In *LaMoureaux*, the court did not find that a compelling injustice had occurred and therefore did not place the burden on the defendant in that case. *Id.*

[6] We note that while some courts have combined discussions of the eggshell plaintiff doctrine with shifting the burden of proving apportionment to the defendant when apportionment between new injuries and a preexisting condition is not possible, *see, e.g., Newbury v. Vogel, 151 Colo. 520, 379 P.2d 811, 813 (Colo. 1963)*, at least one court has also placed the burden on the plaintiff to prove that the apportionment is impossible. *See McDonald v. United Airlines, Inc., 785 F.2d 592, 594 (8th Cir. 1986)*.

[7] We are expressing no opinion on whether the eggshell plaintiff doctrine was inapt in this case because that issue is not before us. Rowe did not claim that she was an eggshell plaintiff. The dissent, however, is incorrect to state conclusively that Rowe did not continue to suffer from back and neck problems before the accident with Munye--in fact, Rowe sought chiropractic treatment only a few days before the accident. Moreover, Rowe's theory suggests that her injury involves an aggravation of a preexisting injury. If she had been entirely asymptomatic, we would not have the issue before us. *See Morlock, 630 N.E.2d at 161* (determining that deciding CIVJIG 91.40 issue was not ripe because no party claimed aggravation of a preexisting injury).

difficulty separating the plaintiff's injuries caused by the defendant from her preexisting injuries, but we conclude that CIVJIG 91.40 is not the proper solution. CIVJIG 91.40 tries to do too much by casting a wider net than just those cases where [**31] apportionment is not possible. The third sentence of CIVJIG 91.40 attempts to address the situation when the jury "cannot separate damages caused by the pre-existing disability or medical condition from those caused by the accident" and is not intended to shift the burden to the defendant in every case. But, *HN14* when confusing or conflicting testimony, jury indecision, or juror disagreement could lead to the jury's inability to separate damages, we believe, rather than placing all uncertainty on the defendant, the better option is for the jury to make a rough apportionment so that the plaintiff receives fair compensation for her injuries. *See Montalvo v. Lopez, 77 Haw. 282, 884 P.2d 345, 363 (Haw. 1994)* (concluding that the jury should be instructed to roughly apportion between injuries a plaintiff received in separate accidents). We agree with the court of appeals that "it would be the exceptional case in which there is no reasonable basis for apportionment." *Rowe, 674 N.W.2d at 768; see also* Dobbs, supra, § 174 at 425 (noting that surprising bases for apportionment can be found).

To sum up our analysis, we conclude that CIVJIG 91.40 creates confusion [**32] for the jury and blurs the distinctions among a plaintiff with an aggravation of a preexisting injury, a plaintiff injured by joint and several tortfeasors, and the eggshell plaintiff doctrine. Adoption of CIVJIG 91.40 would change our case law and would shift the burden of proving apportionment to the defendant in cases involving a single defendant and aggravation of a preexisting injury. We choose not to do so. The defendant should be responsible only for the injuries that are legally caused by the defendant's negligence. CIVJIG 91.40 goes too far by making the defendant responsible for injuries that he did not cause. We therefore hold that the district court erred in giving CIVJIG 91.40 to the jury and that *HN15* CIVJIG 91.40, as presently written, misstates Minnesota law on the defendant's burden of proof in a case involving one defendant and aggravation of the plaintiff's preexisting injury or condition. [8]

[**33] [*743] II.

Our conclusion that the district court erroneously gave the jury an instruction that misstates the law does not end our analysis in this case. *HN17* A complainant will not receive a new trial for errors in jury instructions unless the error was prejudicial. *Lewis v. Equitable Life Assurance Soc'y of the U.S., 389 N.W.2d 876, 885 (Minn. 1986)*. Therefore, we must determine whether Munye was prejudiced by the giving of this instruction. *HN18* In determining whether erroneous instructions resulted in prejudice, we must construe the instructions as a whole from the standpoint of the total impact on the jury. *Kroning v. State Farm Auto. Ins. Co., 567 N.W.2d 42, 48 (Minn. 1997)*. We will, however, give the complainant the benefit of the doubt by granting the complainant a new trial if the effect of the erroneous instruction cannot be determined. *See Morlock, 650 N.W.2d at 159*.

Rowe argues that, if the district court erred in giving CIVJIG 91.40, the error was not prejudicial to Munye because (1) the jury's finding of permanent injury to Rowe refutes the defendant's argument that Rowe suffered no permanent injury; and (2) the jury did not have [**34] to rely on the last sentence of CIVJIG 91.40 because it "clearly apportioned the damages." Rowe contends that, because the jury awarded her only a portion of the damage award she requested, the jury did "in fact separate the pre-existing from the aggravation injuries" and Munye

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[8] *HN16* We further note another potential danger in CIVJIG 91.40. The third sentence of CIVJIG 91.40 instructs the jury, "if *you* cannot separate damages caused by the preexisting disability or medical condition from those caused by the accident, then (defendant) is liable for all of the damages." (Emphasis added.) In instructing the jury to determine whether the damages can be apportioned, CIVJIG 91.40 improperly usurps the domain of the judge. "Whether the injury is capable of apportionment is a question of law. Once the trial court finds that the harm can be apportioned, the question of actual apportionment is a question of fact for the jury." *Canada by Lamb, 567 N.W.2d at 507-08* (internal citations omitted); *see also Restatement (Second) of Torts § 433A(1)(b)*.

suffered no prejudice.

Munye argues that CIVJIG 91.40 caused him substantial prejudice because this instruction misstated his burden of proof. He contends that any argument that the jury may have apportioned the damages between the new damages and those that existed before the accident "is purely speculative." As a result, he asserts that because the total impact of CIVJIG 91.40 on the jury cannot be determined, he is entitled to a new trial.

We conclude that Munye has the stronger argument. Because the jury was not properly instructed on aggravation of injuries caused by the accident over Rowe's preexisting injuries, we cannot determine how the jury decided the question of damages. Although Rowe did not explicitly argue that her new injuries were not apportionable from her preexisting injuries, because of the potential confusion created by CIVJIG 91.40, we cannot necessarily conclude that the jury did not [**35] rely on CIVJIG 91.40's third sentence. The award could reflect that the jury did not apportion the damages, but found that Rowe's claimed damages were excessive, or it could reflect that the jury did apportion Rowe's injuries. The jury verdict does not specify which of these options is correct. We therefore hold that because we cannot determine the total effect of CIVJIG 91.40 based on the information before this court, Munye is entitled to a new trial on damages.

Affirmed.

BLATZ, C.J., took no part in the consideration or decision of this case.

Concur by: Anderson, Russell A.

Concur

CONCURRENCE

[*744] Anderson, Russell A., Justice (concurring).

I concur in the result but write separately to express my view of the underlying principles that support the conclusion that CIVJIG 91.40 not only improperly permits application of collective liability principles in single plaintiff/single tortfeasor cases but also allocates to the jury the determination of divisibility of harms, a judicial function.

In Minnesota the defendant is liable only for the extent to which his conduct has aggravated the preexisting condition. *Watson v. Kinderknecht, 82 Minn. 235, 238, 84 N.W. 798, 799 (1901);* [**36] *Schore v. Mueller, 290 Minn. 186, 189, 186 N.W.2d 699, 701 (1971)* (plaintiff with a preexisting condition is entitled to recover damages for an aggravation of that condition, "recovery being limited, however, to the additional injury over and above the consequences which normally would have followed from the preexisting condition absent defendant's negligence."). The burden has long been upon the plaintiff to distinguish harm caused by the defendant "over and above" the original condition. *Watson, 82 Minn. at 238, 84 N.W. at 799* (burden was upon the plaintiff "to show in what respect, and to what extent, his present condition could be attributed to the assault and battery, and what could be more properly established as the result of his army experience.").

For over 30 years our pattern jury instruction summarized the law related to the measure of damages for an aggravation of a preexisting condition as limited to the additional injury caused by the defendant's conduct. 4 Minn. Dist. Judges Ass'n, *Minnesota Practice--Jury Instruction Guides, Civil*, CIVJIG 163 (3d ed. 1986). [1] [**38] But the

[1] From 1963 through 1999, CIVJIG 163 covered damages in cases of preexisting conditions:

> A person who has a defect or disability at the time of an accident is nevertheless entitled to damages for any aggravation of such pre-existing condition, even though the particular results would not have followed if the injured person had not been subject to such pre-existing condition. Damages are limited, however, to those results which are over and above those which normally followed from the pre-existing condition, had there been no accident.

current pattern jury instruction, CIVJIG 91.40, [2] permits [**37] allocation of liability to the defendant for harm for which the defendant was in no way responsible. The original commentary to CIVJIG 91.40 suggested that the instruction was derived from *Canada by Landy v. McCarthy*, 567 N.W.2d 496 (Minn. 1997). I read *Canada*, however, as involving a unique application of collective liability principles in which joint and several liability was imposed upon multiple tortfeasors. *Canada*, 567 N.W.2d at 507-08. [3]

[*745] The rule of joint and several liability "results in the [**39] imposition of liability on multiple defendants whose fault combined to cause a single, indivisible injury or damage to the plaintiff." Michael K. Steenson, *Joint and Several Liability Minnesota Style*, 15 Wm. Mitchell L. Rev. 969 (1989). The justification for joint and several liability "rested on two factual premises: (1) that each defendant had caused the loss; and (2) the absence of any basis for dividing the harm among the defendants." Gerald W. Boston, *Apportionment of Harm in Tort Law: A Proposed Restatement*, 21 U. Dayton L. Rev. 267, 273 (1996). Professor Wigmore believed such wrongdoers should not "go scot free" and proposed the following rule:

> Whenever two or more persons by culpable acts, whether concerted or not, cause a single general harm, not obviously assignable in parts to the respective wrongdoers, the injured party may recover from each for the whole. In short, wherever there is any doubt at all as to how much each caused, take the burden of proof off the innocent sufferer; make any one of them pay him for the whole, and then let them do their own figuring among themselves as to what is the share of blame for each.

John [**40] H. Wigmore, *Joint-Tortfeasors and Severance of Damages: Making the Innocent Party Suffer Without Redress*, 17 Ill. L. Rev. 458, 459 (1923) (emphasis omitted). [4] Minnesota adopted joint-and-several liability principles in *Flaherty v. Minneapolis & St. Louis Ry. Co.*, 39 Minn. 328, 329, 40 N.W. 160, 160-61 (1888). This common-law rule has been incorporated into our comparative negligence statute in modified form. Minn. Stat. § 604.02, subd. 1 (2004). [5]

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4 Minn. Dist. Judges Ass'n, *Minnesota Practice--Jury Instruction Guides, Civil*, CIVJIG 163 (3d ed. 1986).

[2] The current pattern jury instruction, CIVJIG 91.40, provides:

> There is evidence that (plaintiff) had a pre-existing disability or medical condition at the time of the accident.
>
> (Defendant) is liable only for any damages that you find to be directly caused by the accident.
>
> [If you cannot separate damages caused by the pre-existing disability or medical condition from those caused by the accident, then (defendant) is liable for all of the damages.]

4A Minn. Dist. Judges Ass'n, *Minnesota Practice, Jury Instruction Guides--Civil*, JIG 91.40 (4th ed. 1999 & Supp. 2004).

[3] *Canada* involved successive lead-paint poisonings suffered by the minor plaintiff at separate rental properties. The trial court determined that plaintiff's injuries were divisible, a ruling not challenged on appeal, and went on to instruct the jury to apportion among multiple tortfeasors damages between pre-July 1992 lead poisoning and damages occurring after that time. *Canada*, 567 N.W.2d at 505 n.1 (Minn. 1997).

[4] Professor Prosser believed that the difficulties of proof

> may have been overstated. The courts quite reasonably have been very liberal in permitting the jury to award damages where the uncertainty as to their extent arises from the nature of the wrong itself, for which the defendant, and not the plaintiff, is responsible.

William L. Prosser & W. Page Keeton, *Prosser and Keeton on the Law of Torts* § 52, at 350 (W. Page Keeton et al. eds., 5th ed. 1984).

[5] *Minnesota Statutes § 604.02, subdivision 1* provides:

> When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award:
>
> (1) a person whose fault is greater than 50 percent;
>
> (2) two or more persons who act in a common scheme or plan that results in injury;
>
> (3) a person who commits an intentional tort; or
>
> (4) a person whose liability arises under chapters 18B - pesticide control, 115 - water pollution control, 115A -

[**41] A "necessary corollary" to the rule of holding each defendant liable for the entire harm was "that when the harm can be apportioned on some rational basis, then liability should be proportionate only." Boston, supra, at 284. Apportionment principles were incorporated in the *Restatement (Second) of Torts §§ 433A, 433B* (1965). These apportionment principles apply to all contributing causes of a single harm and divisible harms. *Id. § 433A*. [6] Preexisting conditions are divisible [*746] harms. *Id. § 433A cmt. e*. "Pre-existing conditions can be apportioned from the incremental harm attributable to the defendant's tortious conduct. * * * The touchstone of apportionment is reliance on the contribution that causes the ultimate harm and *not* to some actual division of the harm itself." Boston, supra, at 301. Joint and several liability applies to situations involving one "innocent" cause and two or more culpable causes, where either culpable cause would have been sufficient to cause the harm or where both are essential to the harm. *Restatement (Second) of Torts § 433A cmt. i*.

[**42] *Restatement (Second) of Torts § 433B(1)* states that the plaintiff has the burden of proving that the defendant's tortious conduct caused the harm. *Sections 433B(2)* and *(3)*, exceptions to the rule stated in subsection (1), provide for burden-shifting in two situations: when the tortious conduct of two or more defendants has combined to bring about harm to the plaintiff, the defendant seeking to limit liability has the burden as to apportionment; and when the plaintiff sues two or more tortfeasors and proves that at least one of them has caused harm to the plaintiff but there is uncertainty as to which one has caused it, the burden is on the defendant to prove that he had not caused the harm. [7] Comment "e," in reiterating that subsection (2) is an exception to the general rule on burden of proof "where the tortious conduct of two or more actors combines to bring about the harm," indicates that burden-shifting only applies in multiple tortfeasor situations. *Restatement (Second) of Torts § 433A cmt. e*.

[**43] *Restatement (Second) of Torts § 434* spells out the functions of the court and jury. The court determines whether the evidence meets the causation threshold and whether the harm is divisible. *Restatement (Second) of Torts § 434(1)(a), (b)*. If the harm is divisible, the jury determines the apportionment. *Id. § 434(2)(b)*. [8]

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waste management, 115B - environmental response and liability, 115C - leaking underground storage tanks, and 299J - pipeline safety, public nuisance law for damage to the environment or the public health, any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01.

[6] *Restatement (Second) of Torts § 433A* provides for the apportionment of harm to causes:

> (1) Damages for harm are to be apportioned among two or more causes where
>
> (a) there are distinct harms, or
>
> (b) there is a reasonable basis for determining the contribution of each cause to a single harm.
>
> (2) Damages for any other harm cannot be apportioned among two or more causes.

[7] *Restatement (Second) of Torts § 433B* provides:

> (1) Except as stated in Subsections (2) and (3), the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff.
>
> (2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.
>
> (3) Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.

[8] *Restatement (Second) of Torts § 434* provides:

> T(1) It is the function of the court to determine
>
> (a) whether the evidence as to the facts makes an issue upon which the jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to the plaintiff;
>
> (b) whether the harm to the plaintiff is capable of

[**44] [*747] We adopted the rationale of Restatement (Second) of Torts § 433B(2) in Mathews v. Mills, 288 Minn. 16, 178 N.W.2d 841 (1970):

> We feel that the rule adopted in Restatement [Second of Torts] § 433B(2), is the one by which we should be governed. This section provides:
>
> "Where the tortious conduct of two or more actors has been combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor."
>
> Thus, in a multiple-impact situation, the burden of proving that the harm can be separated falls on those defendants who contend that it can be apportioned.

Id. at 22, 178 N.W.2d at 845.

We also embraced the rationale of Restatement (Second) of Torts § 434(b)(1):

> Having decided that the burden of establishing that the injuries in a multiple-accident situation are capable of apportionment rests upon the defendants so claiming, we further hold [**45] that it is the function of the trial court to determine whether such burden has been met. Whether or not the harm to the plaintiff is capable of apportionment among two or more causes is a question of law. Once the trial court determines that the harm is capable of apportionment, the question of actual apportionment of damages among several causes becomes one of fact to be determined by the jury.

Mathews, 288 Minn. at 23, 178 N.W.2d at 845 (citing Restatement (Second) of Torts § 434 cmt. d).[9] In that the question of whether the harm is capable of apportionment is a legal one, CIVJIG 91.40's instruction (advising the jury that if it cannot separate the damages then the defendant is liable for all of the damages) improperly assigns the legal question to the jury.

[**46] In taking the position that collective liability principles extend to aggravations of preexisting conditions, the dissent relies on Dan B. Dobbs, *The Law of Torts* § 174, at 425 (2000) (citing the *Newbury* line of cases).[10] [**47] There is, however, well-regarded authority to the contrary. 1 J.D. Lee & Barry A. Lindahl, *Modern Tort Law: Liability & Litigation* § 6:6 (2d. ed. 2002) ("Where the aggravation of a preexisting injury is involved, generally the plaintiff has the burden of proof on apportioning the injuries which are a result of the preexisting condition and those which are a result of the aggravation of the condition.");[11] Prosser & Keeton, supra, § 52 at [*748] 351 (W. Page Keeton,

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> apportionment among two or more causes; and
>
> (c) the questions of causation and apportionment, in any case in which the jury may not reasonably differ.
>
> (2) It is the function of the jury to determine, in any case in which it may reasonably differ on the issue,
>
> (a) whether the defendant's conduct has been a substantial factor in causing the harm to the plaintiff, and
>
> (b) the apportionment of the harm to two or more causes.

[9] Restatement (Second) of Torts § 434 cmt. d reads as follows:

> The question whether the harm to the plaintiff is capable of apportionment among two or more causes is a question of law, and is for the decision of the court in all cases. Once it is determined that the harm is capable of being apportioned, the actual apportionment of the damages among the various causes is a question of fact, which is to be determined by the jury, unless the evidence is such that reasonable men could come to only one conclusion.

[10] *See, e.g.*, Newbury v. Vogel, 151 Colo. 520, 379 P.2d 811, 813 (Colo. 1963) (stating that "plaintiff was entitled to an instruction advising the jury that if they could not apportion the disability between the pre-existing arthritis and the trauma then the defendant was liable for the entire damage resulting from the disability."); Lovely v. Allstate Ins. Co., 658 A.2d 1091, 1092 (Me. 1995) (applying *Newbury* single injury rule); Tingey v. Christensen, 1999 UT 68, 199 Utah 68, 987 P.2d 588, 591-92 (Utah 1999) (recognizing *Newbury* rule).

[11] Lee & Lindahl note the rule may be different in medical malpractice cases, citing Fosgate v. Corona, 66 N.J. 268, 330 A.2d 355, 385 (N.J. 1974). Lee & Lindahl, *supra*, § 6:6 n.7.

et al. eds., 5th ed. 1984) (citing the *Newbury* line of cases as well as other cases rejecting the idea of shifting the burden of proof to the defendant). [12] [**48] I believe that CIVJIG 91.40 holds a defendant responsible for a portion of damages suffered by the plaintiff which were due to an innocent cause, a proposition which is contrary to the philosophy of our *Watson/Schore* line of cases. [13]

Dissent by: MEYER; PAGE

Dissent

DISSENT

MEYER, Justice (dissenting).

The position espoused by the majority, that CIVJIG 91.40 misstates Minnesota law, utterly fails to answer the essential question raised by CIVJIG 91.40: what happens if the jury simply cannot apportion damages caused by the preexisting injury and those caused by the accident, even after all the evidence has been presented? The majority leaves the plaintiff in that case completely uncompensated. A plaintiff with a symptomatic [**49] preexisting injury whose symptoms are significantly aggravated by a tortfeasor is left to bear the fault of the tortfeasor. This result is contrary to our policy of allowing fair compensation to injured plaintiffs. This result is also contrary to the law of the vast majority of states that have considered this issue.

It has long been recognized that a tortfeasor is liable for all injuries proximately caused by the tortfeasor's negligence, even if such injuries could not have been anticipated. *Dellwo v. Pearson, 259 Minn. 452, 455, 107 N.W.2d 859, 861 (1961); Christianson v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 67 Minn. 94, 96-97, 69 N.W. 640, 641 (1896).* In the context of preexisting physical conditions, this principle is called the eggshell (or thin skull) plaintiff doctrine, and is fundamental to tort law. *See, e.g., Restatement (Second) of Torts § 461; Purcell v. St. Paul City Ry. Co., 48 Minn. 134, 139, 50 N.W. 1034, 1035 (1892)* ("Any one injured by the negligence must be entitled to recover to the full extent of the injury so caused, without regard to whether, owing to his previous [**50] condition of health, he is more or less liable to injury."). The primary policy reason for this doctrine is that as between the innocent victim and the negligent tortfeasor, the tortfeasor should answer for his or her negligent actions. Dan B. Dobbs, *The Law of Torts* § 124 at 425 (5th ed. 2000).

The issue raised by this case is slightly different, in that rather than a preexisting [*749] condition caused by a disease or a congenital propensity, the plaintiff had a preexisting condition caused by a previous injury. But why should tortfeasors be "given a break" if a plaintiff's preexisting condition was caused by injury rather than a congenital propensity? I find no rational reason for such a distinction.

I believe that the policy reason for holding a tortfeasor liable in an eggshell plaintiff situation--that the liability for injury should rest with the tortfeasor and not the innocent victim--is equally

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[12] Of interest is the experience of the Hawaii Supreme Court which adopted the *Newbury* rule, only to repudiate the rule 23 years later. *Montalvo v. Lapez, 77 Haw. 282, 884 P.2d 345, 357-58, 362 (Haw. 1994). Montalvo* involved a plaintiff with a preexisting back condition who was also injured in unrelated accidents prior to the one for which he brought suit and alleged post-accident aggravations of the same injuries. The Hawaii Supreme Court held that if, on remand, the jury found that the preexisting condition was not fully resolved or not dormant or latent at the time of the sued-upon accident, apportionment was required, if "even roughly"; but if that failed, then in equal shares among the various causes. *Id. at 363.* Professor Boston believes that "*Montalvo* represents modern authority that is driven by a sense of fairness to all the parties and a preference for a single proceeding in which all responsible parties are joined." Boston, *supra*, at 341.

[13] I do not believe that the rule taking the plaintiff's preexisting condition into account in assessing damages is inconsistent with the "thin skull" rule that holds the defendant liable for the unforeseeable aggravation of a preexisting condition. The rule that the "defendant takes his victim as he finds him * * * simply means that the extent of the victim's actual injury from the accident need not have been reasonably foreseeable." Joseph H. King, Jr., *Causation, Valuation and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 Yale L.J. 1353, 1361 (1981).

applicable to aggravation of a preexisting injury. The majority makes much of the distinction between the eggshell plaintiff doctrine and aggravation of preexisting injuries, minimizing the considerable overlap between the two. Existing case law illustrates the vast gray area consisting [**51] of injury to plaintiffs with preexisting conditions such as osteoarthritis or degenerative disc disease. The eggshell plaintiff doctrine has been applied to plaintiffs with such conditions as respiratory troubles caused by smoking (*Walbers v. Finley Hosp., 673 N.W.2d 728, 735-36 (Iowa 2003)*); atrophied muscle (*Grebusch v. State, 2003 Iowa App. LEXIS 990, No. 01-1712, 2003 WL 22697266 at * 4-5 (Iowa Ct. App. Nov. 17, 2003)*); degenerative disc disease (*McDevitt v. Wenger, 2003 Ohio 6096, 2003 WL 22700533 at * 3 (Ohio Ct. App. 2003)*); and osteoarthritis (*Smith v. Color, 330 Ark. 222, 953 S.W.2d 576, 578 (Ark. 1997)*). These are conditions that qualify equally well as preexisting injuries. In the instant case, the evidence shows that Rowe had degenerative joint disease before the accident, but that her prior neck and back problems had resolved to the point that she "felt really great" and "better than [she] had in a long time." How does her preexisting condition differ from that of the eggshell plaintiff with osteoarthritis? I believe that it does not.

The majority deems this position an impermissible extension of existing Minnesota [**52] law, claiming that it would tend to overcompensate the plaintiff and run counter to our policy of ensuring that the defendant is responsible only for the damages that he or she caused. However, the majority's position runs counter to our equally important policy of protecting the innocent victim over the wrongdoer. *See, e.g., Rose v. Great N. Ry. Co., 101 Minn. 122, 125, 111 N.W. 951, 953 (1907)* ("Where a tort is committed * * *, the wrongdoer is liable for the proximate results of that injury, although the consequences are more serious than they would have been, had the injured person been in perfect health."). The majority arbitrarily makes a decision that sacrifices one public policy for another. Rather than pick and choose among competing policies, I believe the better approach is to ask whether placing the burden of apportionment on the defendant in this situation is reasonable, and whether it has support in case law from other jurisdictions.

A leading treatise on tort law has adopted the position that the defendant should bear the burden of apportionment. It is generally accepted that when an indivisible injury is caused by two or more tortfeasors, courts [**53] impose joint and several liability, holding each tortfeasor liable for the entire injury. Dobbs, supra, § 174 at 423. However, "the principle is not limited to cases of two tortfeasors, but can apply whenever the injury inflicted by the tortfeasor combines with another condition to produce an indivisible harm." *Id.* § 174 at 425. Ideally, the tortfeasor will be held liable only for any aggravation of the preexisting condition. *Id.* "But if the tortious harm combines with the existing condition to leave the plaintiff with an indivisible injury, courts may impose liability for the whole injury upon the defendant unless [*750] he can show grounds for apportionment." *Id.*

There is also support for this position in Restatement (Second) of Torts, which provides:

> Where the tortious conduct of two or more actors has combined to bring about harm * * *, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

Restatement (Second) of Torts § 433B(2) (1965). An official comment makes it clear that this [**54] section may be applied to single-defendant situations where some preexisting harm is aggravated:

> The reason for the exceptional rule placing the burden of proof as to apportionment upon the defendant or defendants is the injustice of allowing a proved wrongdoer who has in fact caused harm to the plaintiff to escape liability

merely because the harm which he has inflicted has combined with similar harm inflicted by other wrongdoers, and the nature of the harm itself has made it necessary that evidence be produced before it can be apportioned. * * * *As between the proved tortfeasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm caused should fall upon the former.*

Restatement (Second) of Torts § 433B cmt. d (emphasis added). The majority implicitly concedes that this comment correctly advocates shifting the burden to the defendant in situations where a preexisting condition was caused by a previous tortfeasor, and that the defendant should not be "given a break" in these situations. But the majority's holding disregards these situations, which [**55] highlights the arbitrariness of the majority's decision to abandon our policy of protecting the innocent injured person over the wrongdoer.

Of the states that have considered this issue, the vast majority have held that if the jury cannot apportion damages between a preexisting and an aggravating injury, the defendant is liable for the total injury. *LaMoureaux v. Totem Ocean Trailer Express, Inc., 632 P.2d 539, 545 (Alaska 1981)*; *Newbury v. Vogel, 151 Colo. 520, 379 P.2d 811, 813 (Colo. 1963)*; *Mayer v. Powell, 488 So. 2d 568, 570 (Fla. Dist. Ct. App. 1986)*; *Bushong v. Kamiah Grain, Inc., 96 Idaho 659, 534 P.2d 1099, 1101 (Idaho 1975)*; *Lovely v. Allstate Ins. Co., 658 A.2d 1091, 1092 (Me. 1995)*; *McNabb v. Green Real Estate Co., 62 Mich. App. 500, 233 N.W.2d 811, 819-20 (Mich. Ct. App. 1975), superseded by statute on other grounds, Mich. R. Evid. 404*; *Brake v. Speed, 605 So. 2d 28, 33 (Miss. 1992)*; *David v. DeLeon, 230 Neb. 109, 547 N.W.2d 726, 730 (Neb. 1996)*; *Klotz v. Raskin, 103 Nev. 325, 738 P.2d 508, 509 (Nev. 1987)*; *Pang v. Minch, 53 Ohio St. 3d 186, 559 N.E.2d 1313, 1324-25 (Ohio 1990)* [**56] (relying on *Restatement (Second) of Torts § 433B cmt. d*); *Howe v. Bullock, 592 S.W.2d 588, 591 (Tenn. Ct. App. 1979)*; *Tingey v. Christensen, 1999 UT 68, 199 Utah 68, 987 P.2d 588, 592 (Utah 1999)*; *Phennah v. Whalen, 28 Wn. App. 19, 621 P.2d 1304, 1309 (Wash. Ct. App. 1980)*; *Bigler v. Craven, 769 P.2d 892, 898 (Wyo. 1989)*. [1] Only two [*751] states considering the issue of indivisible injury have rejected this approach. *See Foggia v. Des Moines Bowl-O-Mat, Inc., 543 N.W.2d 889, 893-94 (Iowa 1996)*; *Mayer v. N. Arundel Hosp. Ass'n, Inc., 145 Md. App. 235, 802 A.2d 483, 494 (Md. Ct. Spec. App. 2002)*. Two states have determined that if the jury is unable to apportion, then the damages are divided equally among the various causes. *Montalvo v. Lapez, 77 Haw. 282, 884 P.2d 345, 357-58 (Haw. 1994)*; *Card v. State, 57 Conn. App. 134, 747 A.2d 32 (Conn. 2000)*. By adopting the majority's holding, Minnesota chooses a path rejected by every court but Iowa and Maryland.

[**57] In each of the states placing the burden on the defendant, the court recognized the importance of holding the tortfeasor responsible only for the aggravation of a preexisting injury, but recognized that when apportionment is impossible, the tortfeasor should bear the burden of uncertainty in the determination of damages. *See, e.g., Tingey, 987 P.2d at 592*. This proposition follows from several legal principles: a tortfeasor takes an accident victim as he or she finds them; a tortfeasor bears the burden of unpredictability in the extent of the damage to a victim; and a tortfeasor should not escape liability for damage caused by the tortfeasor because the damages cannot be proved with precision. *Id.*

CIVJIG 91.40 follows the reasoning laid out in *The Law of Torts* and case law from the various jurisdictions cited above. It does not place the

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[1] The Supreme Court of New Jersey has held that "In a situation where * * * malpractice or other tortious act aggravates a preexisting disease or condition, * * * the burden of proof should be shifted to the culpable defendant who should be held responsible for all damages unless he can demonstrate that the damages * * * are capable of some reasonable apportionment." *Scafidi v. Seiler, 119 N.J. 93, 574 A.2d 398, 408 (N.J. 1990)*. The supreme court has not rejected the application of this rule to negligence cases other than medical malpractice.

burden of apportionment on the defendant in all situations. The plaintiff still has the burden of showing that the accident caused an aggravation of a preexisting condition, thus furthering the policy of placing the burden on the party with the greater amount of information. CIVJIG 91.40 clearly states that the defendant [**58] is "liable only for any damages that you [the jury] find to be directly caused by the accident." This directly addresses the majority's concern for not overcompensating the plaintiff. The tortfeasor is only held liable for the entire injury in the rare case where the jury, upon all the evidence produced by both plaintiff and defendant, is unable to separate the harm caused by the tortfeasor from the plaintiff's preexisting injury. [2] This part of the instruction emphasizes the importance of protecting the innocent victim over the wrongdoer. Thus, CIVJIG 91.40 encourages holding the defendant liable only for the damages he or she caused, but also recognizes the need to *balance* this policy with that of protecting the innocent plaintiff, rather than disregarding one or the other.

[**59] For the reasons stated, I would adopt the following holding:

> Where a preexisting disease or condition exists, and where a tortfeasor causes aggravation of the condition and disability and pain results, and no apportionment of the damage between that caused by the preexisting condition and that caused by the tortfeasor can be made, the tortfeasor is responsible for the entire damage.

I would reverse the court of appeals and uphold the award of damages to the plaintiff.

[*782] PAGE, Justice (dissenting).

I join in the dissent of Justice Meyer.

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[2] The majority argues that CIVJIG 91.40 tries to do too much by sweeping in cases where apportionment is possible. This is manifestly not the case. CIVJIG 91.40 expressly instructs the jury to shift the burden only in instances where apportionment is impossible. As the majority notes, citing the court of appeals, "it would be the exceptional case in which there is no reasonable basis for apportionment." Rowe v. Maye, 671 N.W.2d 761, 768 (Minn. App. 2003). The majority appears to have little confidence in the ability of a jury to do its job, when it worries that "confusing or conflicting testimony" could lead to inability to separate damages.

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DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, an individual, Plaintiff, vs. WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, doing business as WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO. A-12-655992-C DEPT NO. V **ORDER DENYING DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY FOR A NEW TRIAL OR REMITTITUR**

On March 4, 2016, the Court held a hearing on Defendant's Renewed Motion for Judgment as a Matter of Law or Alternatively for a New Trial or Remittitur. Christian Morris, Esq., and Edward J. Wynder, Esq., of NETTLES LAW FIRM appeared for the Plaintiff. L.J. Semenza, III, Esq., and Christopher D. Kircher., Esq., of LAWRENCE J. SEMENZA, III, P.C., appeared for the Defendant. The Court, having reviewed the pleadings and papers on file, and having heard the arguments of Counsel, and good cause appearing therefor, **HEREBY ORDERS AS FOLLOWS**:

I. FACTUAL BACKGROUND

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This is a personal injury action resulting from Plaintiff's slip and fall at Defendant's casino. A jury trial was held and the jury found in favor of Plaintiff on November 16, 2015. The jury awarded Plaintiff $150,000 for past pain and suffering and $250,000 for future pain and suffering, finding her to be 40% at fault. Accounting for Plaintiff's comparative fault, her total award was $240,000. Defendant (hereinafter "Wynn"), having moved for judgment under NRCP 50 at the close of Plaintiff's case, filed a renewed motion for judgment as a matter of law or, alternatively, a motion for new trial or remittitur.

At trial, Plaintiff (hereinafter "O'Connell) testified that she fell after slipping on what was described as a pale green, sticky, liquid substance on the floor. There was no evidence presented by O'Connell that Wynn had caused the foreign substance to be on the floor. While O'Connell speculated that the substance may have been water from the irrigation system in the atrium area where she fell, she presented no evidence that such was the case. Rather, O'Connell called, in her case in chief, an employee of Wynn who testified that she responded to the area of the fall immediately after the fall and she observed a substance on the floor which had been covered by a sweeper machine brought to clean up the area. She described the substance as looking "a little sticky—like honey." Trial Transcript ("TT"), Vol. 3 at 71:23-72:4. On cross-examination, the witness, when confronted with her previous deposition testimony, agreed that she had described the liquid substance as "something like a syrup, like a drink, like something like that." *Id.* at 76:6-10. Additionally, O'Connell presented no evidence that Wynn had actual notice of the foreign substance on the floor, and her counsel argued that it was in fact a constructive notice case, not an actual notice case.

DISCUSSION

A. Legal Standards and Applicable Statutes

NRCP 50 provides in pertinent part:

> (a) Judgment as a matter of law.
>
> > (1) If during a trial by jury, a party has been fully heard on an issue and on the facts and law a party has failed to prove a sufficient issue for the jury, the court may determine the issue against that

party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(b) Renewing motion for judgment after trial; alternative motion for new trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after service of written notice of entry of judgment and may alternatively request a new trial or join a motion for new trial under Rule 59. In ruling on a renewed motion the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law.

NRCP 59(a) provides:

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1) Irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial; (2) Misconduct of the jury or prevailing party; (3) Accident or surprise which ordinary prudence could not have guarded against; (4) Newly discovered evidence material for the party making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial; (5) Manifest disregard by the

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> jury of the instructions of the court; (6) Excessive damages appearing to have been given under the influence of passion or prejudice; or, (7) Error in law occurring at the trial and objected to by the party making the motion.

"The standard for granting a motion for judgment as a matter of law is based on the standard for granting a motion for involuntary dismissal under former NRCP 41(b). In applying that standard and deciding whether to grant a motion for judgment as a matter of law, the district court must view the evidence and all inferences in favor of the nonmoving party. To defeat the motion, the nonmoving party must have presented sufficient evidence such that the jury could grant relief to that party." *Nelson v. Heer*, 123 Nev. 217, 222, 163 P.3d 420,424 (2007).

B. Analysis

Defendant presents several distinct arguments in support of its Motion for Judgment as a Matter of Law. These are: (1) there was insufficient evidence presented at trial for a finding that Defendant owed Plaintiff a duty of care; (2) the testimony of Dr. Tingey and Dr. Dunn was improper and prejudiced Defendant; and (3) Plaintiff had a burden to apportion the amount of damages attributable to Defendant and those attributable to prior injuries, but failed to do so. Defendant also argues, in the alternative, that even if it is not entitled to judgment as a matter of law, it is entitled under NRCP 59 to a new trial or remittitur because the jury's award of future pain and suffering was unsupported, Plaintiff posed improper questions to Defendant's witnesses, and Plaintiff's counsel made prejudicial comments to the jury. Each of these arguments will be addressed in turn.

1. Whether there was sufficient evidence produced at trial such that a reasonable jury could find that Defendant had notice of the foreign substance on the floor.

The law concerning negligence in relation to a foreign substance on the floor is, in some respects, well settled. Where the business owner or its agent caused the substance to be on the floor, liability will lie, as a foreign substance on the floor is not consistent with reasonable care. However, where the business owner or his agent did not cause the foreign substance to be on the floor, a plaintiff must prove actual or constructive knowledge of the floor's condition, and a

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failure to remedy it. *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322-323 (1993). As stated above, O'Connell produced no evidence that Wynn caused the substance to be on the floor, or that it had actual notice. Thus, the question at issue here was whether sufficient evidence was presented for a jury to find that Wynn was on constructive notice of the spill.

Whether a business owner was under constructive notice of the hazardous condition is a question of fact properly left for the jury, *id.*, but this does not relieve the plaintiff from having to admit evidence at trial of constructive notice. In *Sprague*, the Supreme Court noted that "a reasonable jury could have determined that the virtually continual debris on the produce department floor put Lucky on constructive notice that, at any time, a hazardous condition might exist which would result in injury to Lucky customers." *Id.* at 251, 849 P.2d at 323. Nevada case law has caused some confusion in differentiating between constructive notice and the "mode of operation approach," the latter of which is specifically discussed in cases decided subsequent to *Sprague*. The fact that there is a difference is made clear in *FGA v. Giglio*, 128 Nev. Adv. Op. 26, 278 P.3d 490, 497 (2012), where the court noted that the *Sprague* court had implicitly adopted the mode of operation approach when it "stated that **even in the absence of constructive notice**, 'a jury could conclude that Lucky should have recognized the impossibility of keeping the produce section clean by sweeping' alone." (emphasis added). With the mode of operation approach, **which is not applicable in this case**, a plaintiff satisfies the notice requirement (actual or constructive) by establishing that an injury was attributable to a reasonably foreseeable dangerous condition on the owner's premises that is related to the owner's self-service mode of operation.[1]

While evidence of a continuous or recurring condition might amount to constructive notice under *Sprague*, *supra*, and *Ford v. Southern Hills Medical Center*, 2011 WL 6171790 (Nev. 2011), that is not the only way of proving constructive notice.[2] Proof that a foreign

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[1] No argument was made that the condition was the result of self-service, nor was the jury instructed on this inapplicable area of the law.

[2] *Ford* stated that "the standard under *Sprague* to prove constructive notice is a virtually continuous condition." Of course, *Sprague* does not actually say that—*Sprague* did not establish a bright line test for what will establish constructive notice, since to have done so would amount

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substance on the floor had existed for such a length of time that the proprietor in the exercise of ordinary care should have known of it, is another way of proving constructive notice. What would amount to sufficient time to warrant holding that the proprietor had constructive notice generally depends on the circumstances of the particular case and involves consideration of the nature of the danger, the number of persons likely to be affected by it, the diligence required to discover or prevent it, opportunity and means of knowledge, the foresight which a person of ordinary care and prudence would be expected to exercise under the circumstances, and the foreseeable consequence of the conditions. *See* 61 A.L.R.2d 6 §7(b).

Moreover, Nevada has made clear that an innkeeper may be found on constructive notice of latent defects upon their premises if a reasonable inspection would have revealed such a danger. *See Twardowski v. Westward Ho Motels, Inc.*, 86 Nev. 784, 476 P.2d 946 (1970). In *Twardowski*, the court held that if a reasonable inspection of its pool slide would have revealed the defective handrails, the Westward Ho would be charged with constructive notice of the latent defect, but that whether the defect would have been discovered by a reasonable inspection was a jury question. The court further noted that "[c]onstructive knowledge of a latent defect can be established by circumstantial evidence." *Id.* at 788, 476 P.2d at 948. The over-arching theme of a negligence case has been, and is, foreseeability.

> [T]here is no liability for harm resulting from conditions from which no unreasonable risk was to be anticipated, or those which the occupier did not know and could not have discovered with reasonable care. The mere existence of a defect or danger is not enough to establish liability, unless it is shown to be of such a character or of such a duration that the jury may reasonably conclude that due care would have discovered it.

Prosser, Law of Torts 393 (4th ed. 1980). Whether reasonable care has been exercised is almost always a jury question, as was made clear by the Nevada Supreme Court in *Foster v. Costco Wholesale Corp.*, 128 Nev. Adv. Op. 71, 291 P.3d 150 (2012). Abrogating the holding in

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to an extreme departure from the common law on this subject, including Nevada's own case law, and *Ford*, as an unpublished opinion, is not binding precedent upon this Court.

Gunlock v. New Frontier Hotel, 78 Nev. 182, 370 P.2d 682 (1962), the Nevada Supreme Court adopted the position of the Restatement (Third) of Torts concerning the duty of a landowner. "Thus, under the Restatement (Third), landowners bear a general duty of reasonable care to all entrants. . . . The 'duty issue must be analyzed with regard to foreseeability and gravity of harm, and the feasibility and availability of alternative conduct that would have prevented the harm." *Foster*, 291 P.3d at 156 (citations omitted).

Here, during O'Connell's case in chief, Yanet Elias, whose job was that of an assistant manager in the public areas department at Wynn, testified that, "It's very difficult to maintain the casino, you know, completely clean, because it's a job for 24 hours. There are people – a lot of people walking through, a lot of children, they're carrying things. So, it's impossible to keep it clean at 100 percent." TT Vol. 3 at 70:22-71:1. Additionally, Ms. Elias testified that she did not know when the area where O'Connell fell had last been inspected prior to her fall, and when asked about how often the area is checked, she testified, "It depends on how long it takes the employee to check the north area and return to the south area, because it's all considered one – one whole area. And there aren't always two employees assigned to that area. Sometimes, there's only one." TT Vol. 3 at 69:5-11. While she repeatedly answered questions posed by both counsel by stating that she did not recall, Ms. Elias was also repeatedly impeached with her earlier deposition testimony. At one point she admitted that one of the signs that a porter is not doing their job is that there is debris on the floor. *Id.* at 70:3-6)

O'Connell also called Corey Prowell in her case in chief, Wynn's assistant security manager who at the time of the incident was a security report writer. Mr. Prowell responded to the subject incident and eventually wrote a report. He described the scene of the fall as a high traffic area with marble flooring and indicated that upon his arrival, he was told by Ms. Elias that the liquid on the floor had already been cleaned up, and that he was told by another employee that the employee had seen O'Connell being helped up by four other guests. He also testified that O'Connell told him that when she had recovered from her fall, she saw a green liquid on the floor. During her testimony at trial, O'Connell described the "spill" as "at least seven feet" with one side measuring about four feet still in a liquid state, and a three foot portion as "almost dry,"

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"a little sticky" with "footprints on it." TT, Vol. 3 at 59:19-24. She described the liquid as having "just a hint of green," TT, Vol. 3 at 59:12, and elaborating about the footprints she said:

> They looked like, you know, they were – they looked like mine that I was making, and I'm sure they were from the people that were standing around and helped me up . . . [k]ind of like dirty footprints that you leave after you've mopped your floor and you step on it, you walk on it, that's kind of how it looked.

TT, Vol. 3 at 62:19 – 63:2.

Wynn argues that "the record is completely devoid of any evidence regarding the length of time the foreign substance had been on the floor." Mot. at 15-17. While it is true that O'Connell could not testify as to how long the substance had been on the floor, she did testify that a three-foot section of the seven-foot spill was already dry and drying. While the defense seems to suggest that expert testimony would be required, presumably to testify as to the relative humidity within the casino and its relation to the rate of evaporation, common experience would allow a jury to infer that the spill had been in place longer than just a few minutes. As pointed out by O'Connell's Opposition, there was ample other evidence from which the jury could have found that Wynn had constructive notice of the substance of the floor. Opp. at 11-13. This evidence includes: (1) testimony that the atrium where the substance was located was highly trafficked; (2) testimony that it is impossible for Wynn's employees to keep the casino floor entirely clean; and (3) testimony that Defendant Wynn had no floor inspection schedule, did not maintain inspection logs, and could not say with certainty when the floor was last inspected prior to O'Connell's injury. This testimony was elicited from Defendant Wynn's own employees.

"A non-moving party can defeat a motion for judgment as a matter of law if it present[s] sufficient evidence such that the jury could grant relief to that party." *D&D Tire, Inc. v. Ouellette*, 131 Nev. Adv. Op. 47, 352 P.3d 32, 35 (2015) (internal quotations and citations omitted). All of the aforementioned testimony, taken together and drawing all reasonable inferences in favor of the Plaintiff was sufficient to establish that Wynn was on constructive notice of the dangerous condition upon its floor.

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2. Whether the testimony of Dr. Tingey and Dr. Dunn was improper

Wynn next makes the argument that the testimony of O'Connell's experts, Dr. Tingey and Dr. Dunn, was improper. Mot. at 19-21. Wynn first argues that the Court improperly admitted their testimony because O'Connell disclosed them as expert witnesses beyond the disclosure deadline. Mot. at 18-19. Wynn argues that its rebuttal expert was unable to review their records and incorporate them into his report. Mot. at 18. However, late production was substantially justified under NRCP 37(c) because O'Connell continued to treat after the close of discovery, treatment records were provided to O'Connell's counsel after the close of discovery, and were provided to Defense counsel soon after their receipt, and because O'Connell had to change treating physicians after Dr. Martin had left the practice. The late disclosed records were only a few pages, the Court permitted the defense to voir dire the doctors outside the presence of the jury before they testified in the presence of the jury, and the Court allowed Wynn's rebuttal expert to sit in the courtroom and listen to the testimony of both Dr. Tingey and Dr. Dunn, allowing him to incorporate his opinions on direct examination. Hence, Wynn was not prejudiced by any late disclosure on O'Connell's part.

Wynn also argues that both doctors lacked a sufficient basis for their opinions because they were only based upon Plaintiff's self-reporting. Mot. at 19. In support, Wynn cites to the federal case of *Perkins v. United States*, 626 F. Supp. 2d 587 (E.D. Va. 2009). Notwithstanding the fact that *Perkins* is a federal case,[3] it is not on point to the facts here. In *Perkins*, the court found that expert testimony as to medical causation should be excluded because the expert's opinion was based *solely* on the patient's self-reporting – that the expert had merely adopted the patient's explanation *as his own opinion. Id.* at 592-593. Here, however, O'Connell's self-reporting did not appear to be the *sole* basis of her experts' testimony. Both doctors testified as to the basis of their opinions, which included not only evaluation of the O'Connell's medical history but also their examination of her, their review of her diagnostic medical tests, and their

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[3] Although not addressed here, this could be significant because Nevada courts do not follow the same procedure for determining whether expert testimony should be allowed as do federal courts (i.e., Nevada has not adopted the *Daubert* standard).

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experience in treating orthopedic conditions and the conditions that would result from a slip and fall. There is simply no indication that O'Connell's experts wholly adopted her self-reporting as the sole basis for their opinions as to causation. Moreover, Dr. Tingey was candid in his opinion that he would not attribute all of O'Connell's knee problems to the subject fall because the MRI indicated a degenerative disease process in the left knee as opposed to the right knee.

3. Whether there is legal basis for a finding that Plaintiff bears a burden to apportion damages between pre-existing conditions and the harm caused by Defendant

Wynn next argues that O'Connell had the burden of apportioning her damages between pre-existing injuries and those injuries caused by her slip and fall at the Wynn but failed to do so. Mot. at 21-25. This is a familiarly incorrect argument (and, indeed, was raised and rejected during trial for the same reasons as it is now) because the legal premises upon which it rests are infirm. The main cause of confusion in this and other cases is the federal case of *Schwartz v. State Farm Mut. Auto. Ins. Co.*, 2009 WL 2197370 (D. Nev. July 22, 2009).

In that case, Judge Dawson did indeed hold that "[i]n a case where a plaintiff has a pre-existing condition, and later sustains an injury to that area, the Plaintiff bears the burden of apportioning the injuries, treatment and damages between the pre-existing condition and the subsequent accident." *Id.* at *6. However, the cases cited as precedent by Judge Dawson for that statement do not support that assertion. *Kleitz v. Raskin*, 103 Nev. 325, 738 P.2d 508 (1987) involved apportioning damages between injuries caused by successive tortfeasors, not apportioning damages between pre-existing conditions and injuries caused by a sole tortfeasor.

Judge Dawson also cited the Washington Court of Appeals case of *Phennah v. Whalen*, 621 P.2d 1304 (Wash. App. 1980), but that also involved apportioning damages between successive tortfeasors. The Restatement (Second) of Torts § 433(b), also relied upon, doesn't even concern successive tortfeasors on its face but rather concerns the "substantial factor" test for determining proximate cause. Here, we do not have successive tortfeasors. Rather, we have a Plaintiff who, admittedly, had various pre-existing mental and physical conditions. Therefore, the *Schwartz* case is in error and is inapplicable to this case. Wynn took the O'Connell as it

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found her and is liable for the full extent of her injuries, notwithstanding her pre-existing conditions. *See Murphy v. Southern Pac. Co.*, 31 Nev. 120, 101 P. 322 (1909).

4. Whether the Defendant is entitled to a new trial or remittitur.

In *Canterino v. The Mirage Casino-Hotel*, 117 Nev. 19, 24, 16 P.3d 415, 418 (2001), *opinion reinstated on reh'g* (Oct. 2, 2001), *opinion modified on reh'g sub nom, Canterino v. Mirage Casino-Hotel*, 118 Nev. 191, 42 P.3d 808 (2002), the Supreme Court addressed the issue of when a trial court may grant a new trial or issue a conditional order of remittitur reducing an award of damages by a jury. The court stated:

> This court has held that damages for pain and suffering are peculiarly within the province of the jury. In *Stackiewicz v. Nissan Motor Corporation,* 100 Nev. 443, 454, 686 P.2d 925, 932 (1984), this court stated that the trial court cannot revisit a jury's damage award unless it is "flagrantly improper." "In actions for damages in which the law provides no legal rule of measurement it is the special province of the jury to determine the amount that ought to be allowed, so that a court is not justified in reversing the case or granting a new trial on the ground that the verdict is excessive, unless it is so flagrantly improper as to indicate passion, prejudice or corruption in the jury.... The elements of pain and suffering are wholly subjective. It can hardly be denied that, because of their very nature, a determination of their monetary compensation falls peculiarly within the province of the jury.... We may not invade the province of the fact-finder by arbitrarily substituting a monetary judgment in a specific sum felt to be more suitable." *Stackiewicz,* 100 Nev. at 454–55, 686 P.2d at 932 (quotations and citations omitted). The mere fact that a verdict is large is not conclusive that it is the result of passion or prejudice. *Id.* (citing *Beccard v. Nevada National Bank,* 99 Nev. 63, 66 n. 3, 657 P.2d 1154, 1156 n. 3 (1983)).

Here, it must be noted that O'Connell was prevented from presenting evidence of her medical special damages due to discovery and evidentiary issues. Thus, she sought only pain and suffering damages. She testified that she had been suffering with her knee and her neck and back since the fall five years earlier and could no longer engage in the activities that she could prior to the fall, including the swing dancing she had done regularly before the accident. This testimony was corroborated by her former boyfriend and dance partner. She often described her pain throughout her medical records as 10 out of 10. While the defense may have thought that

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this testimony would be unbelievable to a jury, it was nonetheless the jury's choice to believe it. Additionally, Dr. Tingey testified that he had recommended surgery for O'Connell's traumatically injured knee and that she would, if she chose the surgery, have post-operative pain, but that typically the result after surgery would be a complete relief of the symptoms. On the other hand, Dr. Dunn testified that due to O'Connell's continued complaints of pain in her neck and symptoms in her arms, he recommended an anterior cervical neck discectomy and an interbody 3-level fusion with placement of a plate and screws. He described this surgery as non-curative, but rather taking away 50 to 60 percent of the pain which O'Connell had described as terrible. While Dr. Dunn attributed the changes to O'Connell's spine to a degenerative disease process, he attributed the pain, which he believed to be previously asymptomatic, to the fall – describing the quintessential egg-shell plaintiff.

Wynn argues in the alternative to the motion for judgment as a matter of law, that a new trial should be had or remittitur issued for several reasons. The first is that O'Connell failed to establish future pain and suffering damages as required by Nevada law. Mot. at 25 (citing *Krause, Inc. v. Little*, 117 Nev. 929, 938, 34 P.3d 566 (2001) (holding that Nevada law requires that "when an injury or disability is subjective and not demonstrable" expert medical testimony is required)). The basis for this argument, however, is the same as above – that Plaintiff's medical experts lacked a reliable basis for their opinion and that O'Connell failed to carry her burden to apportion damages between pre-existing conditions. Mot. at 26:3-7. For the same reasons as outlined above, then, this argument should be rejected.

Wynn next argues that O'Connell was improperly allowed to question defense witnesses. Specifically, Wynn points to O'Connell's counsel questioning witnesses on the lack of video coverage of the incident and references in her closing arguments that Wynn controlled the evidence. Mot. at 26. One of the statements cited by Wynn, on examination of Corey Prowell, does not appear to have been objected to by defense counsel and so that objection is now untimely.[4] The other statements cited by Wynn were in Plaintiff's counsel's closing or rebuttal

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[4] A complete transcript of this portion of the trial was not provided, but upon reviewing the full transcript on file, no objection appears to have been lodged following the questioning.

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arguments. Defendant also did not object to those statements and, in any event, had the opportunity to make arguments rebutting those statements in its own closing. Therefore, no prejudice resulted.

Wynn last argues that it is entitled to a new trial because O'Connell's counsel made an improper statement in rebuttal as to damages. The statement in issue is: "As jurors, you are the voice of the conscience of this community." Defendant lodged a timely objection, which was immediately sustained by this Court. The Court also admonished counsel for making the statement and instructed the jury to disregard it. The Court stated:

> Sustained. No, no. The jury will disregard that. Counsel, this is not a punitive damage case. You may not address the – they are not to be making decisions as the conscience of the community. You know that is improper argument. (TT Vol. 6 at 46:12-16)

The problem with such a statement is that it allows the jury to punish the defendant, e.g., with punitive damages, which was not a part of Plaintiff's case here. *See Florida Crushed Stone Co. v. Johnson*, 546 So.2d 1102, 1104 (1989).

The Nevada Supreme Court has made clear, however, that a new trial is warranted only where "the [comment] is so extreme that the objection and admonishment could not remove the [comment's] effect." *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008). This amounts to an analysis of whether no other reasonable explanation could exist for the jury's verdict. *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364, 212 P.3d 1068, 1079 (2009). Here, there was ample evidence presented at trial, as outlined above and in Plaintiff's Opposition, to support the jury verdict. Wynn's timely objection was quickly sustained and a limiting instruction was given immediately. In light of the evidence presented at trial, it cannot be said that the jury's verdict was so unreasonable as to make the statement prejudicial. *CF Lioce,* 124 Nev. at 17, 174 P.3d at 981. (finding that the trial testimony supported the jury's verdict and the district court sustained the defendant's objections to misconduct, so a new trial was not warranted).

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Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion for Judgment as a Matter of Law or Alternatively for a New Trial or Remittitur be **DENIED.**

DATED this 20th day of ~~April~~ May, 2016.

DISTRICT COURT JUDGE

Submitted by:

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DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, an individual, Plaintiff, vs. WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, doing business as WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO. A-12-655992-C DEPT NO. V **NOTICE OF ENTRY OF ORDER DENYING DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY FOR A NEW TRIAL OR REMITTITUR**

TO: WYNN LAS VEGAS, LLC, Defendant; and

TO: CHRISTOPHER D. KIRCHER, ESQ., LAWRENCE J. SEMENZA, III, P.C., Attorneys for Defendant:

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YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an ***Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law or Alternatively for a New Trial or Remittitur*** was entered in the above-entitled matter on the 24th day of May, 2016, a copy of which is attached hereto.

DATED this 25th day of May, 2016.

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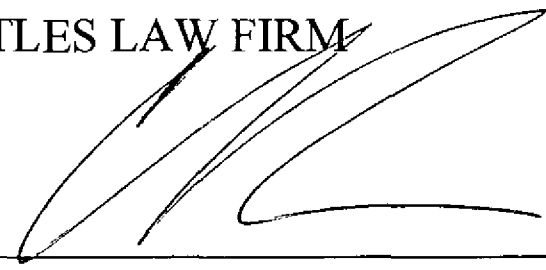

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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26, I certify that on this 25 day of November, 2015, I served the foregoing **NOTICE OF ENTRY OF ORDER DENYING DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY FOR A NEW TRIAL OR REMITTITUR** to the following parties by electronic transmission through the Wiznet system:

Semenza Kircher Rickard

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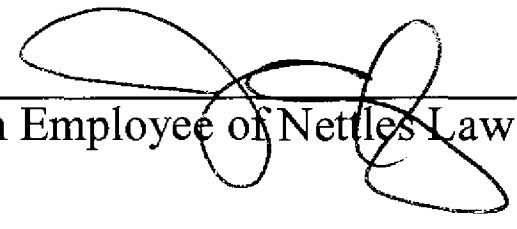

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DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, an individual,

Plaintiff,

vs.

WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, doing business as WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Defendants.

CASE NO. A-12-655992-C
DEPT NO. V

ORDER DENYING DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY FOR A NEW TRIAL OR REMITTITUR

On March 4, 2016, the Court held a hearing on Defendant's Renewed Motion for Judgment as a Matter of Law or Alternatively for a New Trial or Remittitur. Christian Morris, Esq., and Edward J. Wynder, Esq., of NETTLES LAW FIRM appeared for the Plaintiff. L.J. Semenza, III, Esq., and Christopher D. Kircher., Esq., of LAWRENCE J. SEMENZA, III, P.C., appeared for the Defendant. The Court, having reviewed the pleadings and papers on file, and having heard the arguments of Counsel, and good cause appearing therefor, **HEREBY ORDERS AS FOLLOWS**:

I. FACTUAL BACKGROUND

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This is a personal injury action resulting from Plaintiff's slip and fall at Defendant's casino. A jury trial was held and the jury found in favor of Plaintiff on November 16, 2015. The jury awarded Plaintiff $150,000 for past pain and suffering and $250,000 for future pain and suffering, finding her to be 40% at fault. Accounting for Plaintiff's comparative fault, her total award was $240,000. Defendant (hereinafter "Wynn"), having moved for judgment under NRCP 50 at the close of Plaintiff's case, filed a renewed motion for judgment as a matter of law or, alternatively, a motion for new trial or remittitur.

At trial, Plaintiff (hereinafter "O'Connell) testified that she fell after slipping on what was described as a pale green, sticky, liquid substance on the floor. There was no evidence presented by O'Connell that Wynn had caused the foreign substance to be on the floor. While O'Connell speculated that the substance may have been water from the irrigation system in the atrium area where she fell, she presented no evidence that such was the case. Rather, O'Connell called, in her case in chief, an employee of Wynn who testified that she responded to the area of the fall immediately after the fall and she observed a substance on the floor which had been covered by a sweeper machine brought to clean up the area. She described the substance as looking "a little sticky—like honey." Trial Transcript ("TT"), Vol. 3 at 71:23-72:4. On cross-examination, the witness, when confronted with her previous deposition testimony, agreed that she had described the liquid substance as "something like a syrup, like a drink, like something like that." *Id.* at 76:6-10. Additionally, O'Connell presented no evidence that Wynn had actual notice of the foreign substance on the floor, and her counsel argued that it was in fact a constructive notice case, not an actual notice case.

DISCUSSION

A. Legal Standards and Applicable Statutes

NRCP 50 provides in pertinent part:

> (a) Judgment as a matter of law.
>
> > (1) If during a trial by jury, a party has been fully heard on an issue and on the facts and law a party has failed to prove a sufficient issue for the jury, the court may determine the issue against that

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> party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(b) Renewing motion for judgment after trial; alternative motion for new trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after service of written notice of entry of judgment and may alternatively request a new trial or join a motion for new trial under Rule 59. In ruling on a renewed motion the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law.

NRCP 59(a) provides:

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1) Irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial; (2) Misconduct of the jury or prevailing party; (3) Accident or surprise which ordinary prudence could not have guarded against; (4) Newly discovered evidence material for the party making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial; (5) Manifest disregard by the

> jury of the instructions of the court; (6) Excessive damages appearing to have been given under the influence of passion or prejudice; or, (7) Error in law occurring at the trial and objected to by the party making the motion.

"The standard for granting a motion for judgment as a matter of law is based on the standard for granting a motion for involuntary dismissal under former NRCP 41(b). In applying that standard and deciding whether to grant a motion for judgment as a matter of law, the district court must view the evidence and all inferences in favor of the nonmoving party. To defeat the motion, the nonmoving party must have presented sufficient evidence such that the jury could grant relief to that party." *Nelson v. Heer*, 123 Nev. 217, 222, 163 P.3d 420,424 (2007).

B. Analysis

Defendant presents several distinct arguments in support of its Motion for Judgment as a Matter of Law. These are: (1) there was insufficient evidence presented at trial for a finding that Defendant owed Plaintiff a duty of care; (2) the testimony of Dr. Tingey and Dr. Dunn was improper and prejudiced Defendant; and (3) Plaintiff had a burden to apportion the amount of damages attributable to Defendant and those attributable to prior injuries, but failed to do so. Defendant also argues, in the alternative, that even if it is not entitled to judgment as a matter of law, it is entitled under NRCP 59 to a new trial or remittitur because the jury's award of future pain and suffering was unsupported, Plaintiff posed improper questions to Defendant's witnesses, and Plaintiff's counsel made prejudicial comments to the jury. Each of these arguments will be addressed in turn.

1. Whether there was sufficient evidence produced at trial such that a reasonable jury could find that Defendant had notice of the foreign substance on the floor.

The law concerning negligence in relation to a foreign substance on the floor is, in some respects, well settled. Where the business owner or its agent caused the substance to be on the floor, liability will lie, as a foreign substance on the floor is not consistent with reasonable care. However, where the business owner or his agent did not cause the foreign substance to be on the floor, a plaintiff must prove actual or constructive knowledge of the floor's condition, and a

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failure to remedy it. *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322-323 (1993). As stated above, O'Connell produced no evidence that Wynn caused the substance to be on the floor, or that it had actual notice. Thus, the question at issue here was whether sufficient evidence was presented for a jury to find that Wynn was on constructive notice of the spill.

Whether a business owner was under constructive notice of the hazardous condition is a question of fact properly left for the jury, *id.*, but this does not relieve the plaintiff from having to admit evidence at trial of constructive notice. In *Sprague*, the Supreme Court noted that "a reasonable jury could have determined that the virtually continual debris on the produce department floor put Lucky on constructive notice that, at any time, a hazardous condition might exist which would result in injury to Lucky customers." *Id.* at 251, 849 P.2d at 323. Nevada case law has caused some confusion in differentiating between constructive notice and the "mode of operation approach," the latter of which is specifically discussed in cases decided subsequent to *Sprague*. The fact that there is a difference is made clear in *FGA v. Giglio*, 128 Nev. Adv. Op. 26, 278 P.3d 490, 497 (2012), where the court noted that the *Sprague* court had implicitly adopted the mode of operation approach when it "stated that **even in the absence of constructive notice**, 'a jury could conclude that Lucky should have recognized the impossibility of keeping the produce section clean by sweeping' alone." (emphasis added). With the mode of operation approach, **which is not applicable in this case**, a plaintiff satisfies the notice requirement (actual or constructive) by establishing that an injury was attributable to a reasonably foreseeable dangerous condition on the owner's premises that is related to the owner's self-service mode of operation.[1]

While evidence of a continuous or recurring condition might amount to constructive notice under *Sprague*, *supra*, and *Ford v. Southern Hills Medical Center*, 2011 WL 6171790 (Nev. 2011), that is not the only way of proving constructive notice.[2] Proof that a foreign

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[1] No argument was made that the condition was the result of self-service, nor was the jury instructed on this inapplicable area of the law.

[2] *Ford* stated that "the standard under *Sprague* to prove constructive notice is a virtually continuous condition." Of course, *Sprague* does not actually say that—*Sprague* did not establish a bright line test for what will establish constructive notice, since to have done so would amount

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substance on the floor had existed for such a length of time that the proprietor in the exercise of ordinary care should have known of it, is another way of proving constructive notice. What would amount to sufficient time to warrant holding that the proprietor had constructive notice generally depends on the circumstances of the particular case and involves consideration of the nature of the danger, the number of persons likely to be affected by it, the diligence required to discover or prevent it, opportunity and means of knowledge, the foresight which a person of ordinary care and prudence would be expected to exercise under the circumstances, and the foreseeable consequence of the conditions. *See* 61 A.L.R.2d 6 §7(b).

Moreover, Nevada has made clear that an innkeeper may be found on constructive notice of latent defects upon their premises if a reasonable inspection would have revealed such a danger. *See Twardowski v. Westward Ho Motels, Inc.*, 86 Nev. 784, 476 P.2d 946 (1970). In *Twardowski,* the court held that if a reasonable inspection of its pool slide would have revealed the defective handrails, the Westward Ho would be charged with constructive notice of the latent defect, but that whether the defect would have been discovered by a reasonable inspection was a jury question. The court further noted that "[c]onstructive knowledge of a latent defect can be established by circumstantial evidence." *Id.* at 788, 476 P.2d at 948. The over-arching theme of a negligence case has been, and is, foreseeability.

> [T]here is no liability for harm resulting from conditions from which no unreasonable risk was to be anticipated, or those which the occupier did not know and could not have discovered with reasonable care. The mere existence of a defect or danger is not enough to establish liability, unless it is shown to be of such a character or of such a duration that the jury may reasonably conclude that due care would have discovered it.

Prosser, Law of Torts 393 (4th ed. 1980). Whether reasonable care has been exercised is almost always a jury question, as was made clear by the Nevada Supreme Court in *Foster v. Costco Wholesale Corp.*, 128 Nev. Adv. Op. 71, 291 P.3d 150 (2012). Abrogating the holding in

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to an extreme departure from the common law on this subject, including Nevada's own case law, and *Ford*, as an unpublished opinion, is not binding precedent upon this Court.

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Gunlock v. New Frontier Hotel, 78 Nev. 182, 370 P.2d 682 (1962), the Nevada Supreme Court adopted the position of the Restatement (Third) of Torts concerning the duty of a landowner. "Thus, under the Restatement (Third), landowners bear a general duty of reasonable care to all entrants. . . . The 'duty issue must be analyzed with regard to foreseeability and gravity of harm, and the feasibility and availability of alternative conduct that would have prevented the harm." *Foster*, 291 P.3d at 156 (citations omitted).

Here, during O'Connell's case in chief, Yanet Elias, whose job was that of an assistant manager in the public areas department at Wynn, testified that, "It's very difficult to maintain the casino, you know, completely clean, because it's a job for 24 hours. There are people – a lot of people walking through, a lot of children, they're carrying things. So, it's impossible to keep it clean at 100 percent." TT Vol. 3 at 70:22-71:1. Additionally, Ms. Elias testified that she did not know when the area where O'Connell fell had last been inspected prior to her fall, and when asked about how often the area is checked, she testified, "It depends on how long it takes the employee to check the north area and return to the south area, because it's all considered one – one whole area. And there aren't always two employees assigned to that area. Sometimes, there's only one." TT Vol. 3 at 69:5-11. While she repeatedly answered questions posed by both counsel by stating that she did not recall, Ms. Elias was also repeatedly impeached with her earlier deposition testimony. At one point she admitted that one of the signs that a porter is not doing their job is that there is debris on the floor. *Id.* at 70:3-6)

O'Connell also called Corey Prowell in her case in chief, Wynn's assistant security manager who at the time of the incident was a security report writer. Mr. Prowell responded to the subject incident and eventually wrote a report. He described the scene of the fall as a high traffic area with marble flooring and indicated that upon his arrival, he was told by Ms. Elias that the liquid on the floor had already been cleaned up, and that he was told by another employee that the employee had seen O'Connell being helped up by four other guests. He also testified that O'Connell told him that when she had recovered from her fall, she saw a green liquid on the floor. During her testimony at trial, O'Connell described the "spill" as "at least seven feet" with one side measuring about four feet still in a liquid state, and a three foot portion as "almost dry,"

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"a little sticky" with "footprints on it." TT, Vol. 3 at 59:19-24. She described the liquid as having "just a hint of green," TT, Vol. 3 at 59:12, and elaborating about the footprints she said:

> They looked like, you know, they were – they looked like mine that I was making, and I'm sure they were from the people that were standing around and helped me up . . . [k]ind of like dirty footprints that you leave after you've mopped your floor and you step on it, you walk on it, that's kind of how it looked.

TT, Vol. 3 at 62:19 – 63:2.

Wynn argues that "the record is completely devoid of any evidence regarding the length of time the foreign substance had been on the floor." Mot. at 15-17. While it is true that O'Connell could not testify as to how long the substance had been on the floor, she did testify that a three-foot section of the seven-foot spill was already dry and drying. While the defense seems to suggest that expert testimony would be required, presumably to testify as to the relative humidity within the casino and its relation to the rate of evaporation, common experience would allow a jury to infer that the spill had been in place longer than just a few minutes. As pointed out by O'Connell's Opposition, there was ample other evidence from which the jury could have found that Wynn had constructive notice of the substance of the floor. Opp. at 11-13. This evidence includes: (1) testimony that the atrium where the substance was located was highly trafficked; (2) testimony that it is impossible for Wynn's employees to keep the casino floor entirely clean; and (3) testimony that Defendant Wynn had no floor inspection schedule, did not maintain inspection logs, and could not say with certainty when the floor was last inspected prior to O'Connell's injury. This testimony was elicited from Defendant Wynn's own employees.

"A non-moving party can defeat a motion for judgment as a matter of law if it present[s] sufficient evidence such that the jury could grant relief to that party." *D&D Tire, Inc. v. Ouellette*, 131 Nev. Adv. Op. 47, 352 P.3d 32, 35 (2015) (internal quotations and citations omitted). All of the aforementioned testimony, taken together and drawing all reasonable inferences in favor of the Plaintiff was sufficient to establish that Wynn was on constructive notice of the dangerous condition upon its floor.

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2. Whether the testimony of Dr. Tingey and Dr. Dunn was improper

Wynn next makes the argument that the testimony of O'Connell's experts, Dr. Tingey and Dr. Dunn, was improper. Mot. at 19-21. Wynn first argues that the Court improperly admitted their testimony because O'Connell disclosed them as expert witnesses beyond the disclosure deadline. Mot. at 18-19. Wynn argues that its rebuttal expert was unable to review their records and incorporate them into his report. Mot. at 18. However, late production was substantially justified under NRCP 37(c) because O'Connell continued to treat after the close of discovery, treatment records were provided to O'Connell's counsel after the close of discovery, and were provided to Defense counsel soon after their receipt, and because O'Connell had to change treating physicians after Dr. Martin had left the practice. The late disclosed records were only a few pages, the Court permitted the defense to voir dire the doctors outside the presence of the jury before they testified in the presence of the jury, and the Court allowed Wynn's rebuttal expert to sit in the courtroom and listen to the testimony of both Dr. Tingey and Dr. Dunn, allowing him to incorporate his opinions on direct examination. Hence, Wynn was not prejudiced by any late disclosure on O'Connell's part.

Wynn also argues that both doctors lacked a sufficient basis for their opinions because they were only based upon Plaintiff's self-reporting. Mot. at 19. In support, Wynn cites to the federal case of *Perkins v. United States*, 626 F. Supp. 2d 587 (E.D. Va. 2009). Notwithstanding the fact that *Perkins* is a federal case,[3] it is not on point to the facts here. In *Perkins*, the court found that expert testimony as to medical causation should be excluded because the expert's opinion was based *solely* on the patient's self-reporting – that the expert had merely adopted the patient's explanation *as his own opinion. Id.* at 592-593. Here, however, O'Connell's self-reporting did not appear to be the *sole* basis of her experts' testimony. Both doctors testified as to the basis of their opinions, which included not only evaluation of the O'Connell's medical history but also their examination of her, their review of her diagnostic medical tests, and their

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[3] Although not addressed here, this could be significant because Nevada courts do not follow the same procedure for determining whether expert testimony should be allowed as do federal courts (i.e., Nevada has not adopted the *Daubert* standard).

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experience in treating orthopedic conditions and the conditions that would result from a slip and fall. There is simply no indication that O'Connell's experts wholly adopted her self-reporting as the sole basis for their opinions as to causation. Moreover, Dr. Tingey was candid in his opinion that he would not attribute all of O'Connell's knee problems to the subject fall because the MRI indicated a degenerative disease process in the left knee as opposed to the right knee.

3. Whether there is legal basis for a finding that Plaintiff bears a burden to apportion damages between pre-existing conditions and the harm caused by Defendant

Wynn next argues that O'Connell had the burden of apportioning her damages between pre-existing injuries and those injuries caused by her slip and fall at the Wynn but failed to do so. Mot. at 21-25. This is a familiarly incorrect argument (and, indeed, was raised and rejected during trial for the same reasons as it is now) because the legal premises upon which it rests are infirm. The main cause of confusion in this and other cases is the federal case of *Schwartz v. State Farm Mut. Auto. Ins. Co.*, 2009 WL 2197370 (D. Nev. July 22, 2009).

In that case, Judge Dawson did indeed hold that "[i]n a case where a plaintiff has a pre-existing condition, and later sustains an injury to that area, the Plaintiff bears the burden of apportioning the injuries, treatment and damages between the pre-existing condition and the subsequent accident." *Id.* at *6. However, the cases cited as precedent by Judge Dawson for that statement do not support that assertion. *Kleitz v. Raskin*, 103 Nev. 325, 738 P.2d 508 (1987) involved apportioning damages between injuries caused by successive tortfeasors, not apportioning damages between pre-existing conditions and injuries caused by a sole tortfeasor.

Judge Dawson also cited the Washington Court of Appeals case of *Phennah v. Whalen*, 621 P.2d 1304 (Wash. App. 1980), but that also involved apportioning damages between successive tortfeasors. The Restatement (Second) of Torts § 433(b), also relied upon, doesn't even concern successive tortfeasors on its face but rather concerns the "substantial factor" test for determining proximate cause. Here, we do not have successive tortfeasors. Rather, we have a Plaintiff who, admittedly, had various pre-existing mental and physical conditions. Therefore, the *Schwartz* case is in error and is inapplicable to this case. Wynn took the O'Connell as it

found her and is liable for the full extent of her injuries, notwithstanding her pre-existing conditions. *See Murphy v. Southern Pac. Co.*, 31 Nev. 120, 101 P. 322 (1909).

4. Whether the Defendant is entitled to a new trial or remittitur.

In *Canterino v. The Mirage Casino-Hotel*, 117 Nev. 19, 24, 16 P.3d 415, 418 (2001), *opinion reinstated on reh'g* (Oct. 2, 2001), *opinion modified on reh'g sub nom*, *Canterino v. Mirage Casino-Hotel*, 118 Nev. 191, 42 P.3d 808 (2002), the Supreme Court addressed the issue of when a trial court may grant a new trial or issue a conditional order of remittitur reducing an award of damages by a jury. The court stated:

> This court has held that damages for pain and suffering are peculiarly within the province of the jury. In *Stackiewicz v. Nissan Motor Corporation,* 100 Nev. 443, 454, 686 P.2d 925, 932 (1984), this court stated that the trial court cannot revisit a jury's damage award unless it is "flagrantly improper." "In actions for damages in which the law provides no legal rule of measurement it is the special province of the jury to determine the amount that ought to be allowed, so that a court is not justified in reversing the case or granting a new trial on the ground that the verdict is excessive, unless it is so flagrantly improper as to indicate passion, prejudice or corruption in the jury.... The elements of pain and suffering are wholly subjective. It can hardly be denied that, because of their very nature, a determination of their monetary compensation falls peculiarly within the province of the jury.... We may not invade the province of the fact-finder by arbitrarily substituting a monetary judgment in a specific sum felt to be more suitable." *Stackiewicz,* 100 Nev. at 454–55, 686 P.2d at 932 (quotations and citations omitted). The mere fact that a verdict is large is not conclusive that it is the result of passion or prejudice. *Id.* (citing *Beccard v. Nevada National Bank,* 99 Nev. 63, 66 n. 3, 657 P.2d 1154, 1156 n. 3 (1983)).

Here, it must be noted that O'Connell was prevented from presenting evidence of her medical special damages due to discovery and evidentiary issues. Thus, she sought only pain and suffering damages. She testified that she had been suffering with her knee and her neck and back since the fall five years earlier and could no longer engage in the activities that she could prior to the fall, including the swing dancing she had done regularly before the accident. This testimony was corroborated by her former boyfriend and dance partner. She often described her pain throughout her medical records as 10 out of 10. While the defense may have thought that

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this testimony would be unbelievable to a jury, it was nonetheless the jury's choice to believe it. Additionally, Dr. Tingey testified that he had recommended surgery for O'Connell's traumatically injured knee and that she would, if she chose the surgery, have post-operative pain, but that typically the result after surgery would be a complete relief of the symptoms. On the other hand, Dr. Dunn testified that due to O'Connell's continued complaints of pain in her neck and symptoms in her arms, he recommended an anterior cervical neck discectomy and an interbody 3-level fusion with placement of a plate and screws. He described this surgery as non-curative, but rather taking away 50 to 60 percent of the pain which O'Connell had described as terrible. While Dr. Dunn attributed the changes to O'Connell's spine to a degenerative disease process, he attributed the pain, which he believed to be previously asymptomatic, to the fall – describing the quintessential egg-shell plaintiff.

Wynn argues in the alternative to the motion for judgment as a matter of law, that a new trial should be had or remittitur issued for several reasons. The first is that O'Connell failed to establish future pain and suffering damages as required by Nevada law. Mot. at 25 (citing *Krause, Inc. v. Little*, 117 Nev. 929, 938, 34 P.3d 566 (2001) (holding that Nevada law requires that "when an injury or disability is subjective and not demonstrable" expert medical testimony is required)). The basis for this argument, however, is the same as above – that Plaintiff's medical experts lacked a reliable basis for their opinion and that O'Connell failed to carry her burden to apportion damages between pre-existing conditions. Mot. at 26:3-7. For the same reasons as outlined above, then, this argument should be rejected.

Wynn next argues that O'Connell was improperly allowed to question defense witnesses. Specifically, Wynn points to O'Connell's counsel questioning witnesses on the lack of video coverage of the incident and references in her closing arguments that Wynn controlled the evidence. Mot. at 26. One of the statements cited by Wynn, on examination of Corey Prowell, does not appear to have been objected to by defense counsel and so that objection is now untimely.[4] The other statements cited by Wynn were in Plaintiff's counsel's closing or rebuttal

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[4] A complete transcript of this portion of the trial was not provided, but upon reviewing the full transcript on file, no objection appears to have been lodged following the questioning.

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arguments. Defendant also did not object to those statements and, in any event, had the opportunity to make arguments rebutting those statements in its own closing. Therefore, no prejudice resulted.

Wynn last argues that it is entitled to a new trial because O'Connell's counsel made an improper statement in rebuttal as to damages. The statement in issue is: "As jurors, you are the voice of the conscience of this community." Defendant lodged a timely objection, which was immediately sustained by this Court. The Court also admonished counsel for making the statement and instructed the jury to disregard it. The Court stated:

> Sustained. No, no. The jury will disregard that. Counsel, this is not a punitive damage case. You may not address the – they are not to be making decisions as the conscience of the community. You know that is improper argument. (TT Vol. 6 at 46:12-16)

The problem with such a statement is that it allows the jury to punish the defendant, e.g., with punitive damages, which was not a part of Plaintiff's case here. *See Florida Crushed Stone Co. v. Johnson*, 546 So.2d 1102, 1104 (1989).

The Nevada Supreme Court has made clear, however, that a new trial is warranted only where "the [comment] is so extreme that the objection and admonishment could not remove the [comment's] effect." *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008). This amounts to an analysis of whether no other reasonable explanation could exist for the jury's verdict. *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364, 212 P.3d 1068, 1079 (2009). Here, there was ample evidence presented at trial, as outlined above and in Plaintiff's Opposition, to support the jury verdict. Wynn's timely objection was quickly sustained and a limiting instruction was given immediately. In light of the evidence presented at trial, it cannot be said that the jury's verdict was so unreasonable as to make the statement prejudicial. *CF Lioce,* 124 Nev. at 17, 174 P.3d at 981. (finding that the trial testimony supported the jury's verdict and the district court sustained the defendant's objections to misconduct, so a new trial was not warranted).

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Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion for Judgment as a Matter of Law or Alternatively for a New Trial or Remittitur be **DENIED.**

DATED this 20th day of ~~April~~ May, 2016.

DISTRICT COURT JUDGE

Submitted by:

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DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, an individual, Plaintiff, vs. WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, doing business as WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO. A-12-655992-C DEPT NO. V **ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Defendant's Motion for Summary Judgment having come on for hearing before Honorable Judge Thompson at 9:00 a.m. on September 17, 2015, with Christian Morris, Esq., of NETTLES LAW FIRM appearing for the Plaintiff and Christopher Kircher, Esq., of LAWRENCE J. SEMENZA, III, P.C., appearing for the Defendant. Having considered the record and pleadings, and oral argument by Counsel, this Court finds:

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment is

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....

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DENIED.

DATED this 6th day of October, 2015.

DISTRICT COURT JUDGE

Submitted by:

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d/b/a Wynn Las Vegas

DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, individually,

Plaintiff,

v.

WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, d/b/a WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X; inclusive;

Defendants.

Case No. A-12-655992-C
Dept. No. V

ORDER DENYING WITHOUT PREJUDICE DEFENDANT'S MOTION IN LIMINE [#2] TO EXCLUDE UNRELATED MEDICAL CONDITIONS AND DAMAGES CLAIMED BY PLAINTIFF

On October 1, 2015, the Court held a hearing on Defendant Wynn Las Vegas, LLC's d/b/a Wynn Las Vegas ("Defendant") Motion in Limine [#2] to Exclude Unrelated Medical Conditions and Damages Claimed by Plaintiff (the "Motion"). Plaintiff Yvonne O'Connell ("Plaintiff") filed an Opposition to the Motion as well as a Motion for Sanctions for Violation of HIPAA Protected Information. Defendant filed a Reply brief and an Opposition to Plaintiff's Motion for Sanctions, seeking an award of its attorney's fees and costs relating to Plaintiff's Motion for Sanctions. Christian Morris, Esq. of the Nettles Law Firm appeared on behalf of Plaintiff and Lawrence J. Semenza, III, Esq. and Christopher D. Kircher, Esq. of Lawrence J. Semenza, III, P.C. appeared on behalf of Defendant.

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The Court, having reviewed the papers and pleadings on file and the oral argument of counsel at the hearing in the matter, finds as follows:

1. Plaintiff has identified that she intends to call at trial two of Plaintiff's treating physicians, Dr. Dunn and Dr. Tingey;

2. The Court has not reviewed the medical records from Dr. Dunn or Dr. Tingey related to the Plaintiff;

3. The parties dispute whether Dr. Tingey was properly disclosed;

4 Therefore, at this time the Court does not have sufficient information before it to make a ruling on Defendant's Motion.

Based on the foregoing, with good cause appearing:

IT IS HEREBY ORDERED that Defendant's Motion in Limine [#3] to Exclude Unrelated Medical Conditions and Damages Claimed by Plaintiff is hereby DENIED without prejudice as it relates to Dr. Dunn. The Court will defer any decision on the issues raised in Defendant's Motion until after it hears Dr. Dunn's proposed testimony outside the presence of the jury at the trial in this matter.

IT IS HEREBY FURTHER ORDERED that the Court will continue the hearing as it relates to Dr. Tingey until October 29, 2015 at 9:00 a.m. The parties may file supplemental briefs related to Dr. Tingey by no later than October 27, 2015.

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IT IS HEREBY FURTHER ORDERED that Plaintiff's Motion for Sanctions for Violation of HIPAA Protected Information is hereby DENIED and Defendant's countermotion for attorney's fees and costs is DENIED.

DATED this 29th day of October, 2015.

DISTRICT COURT JUDGE

Respectfully Submitted By:

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DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, individually,

Plaintiff,

v.

WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, d/b/a WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X; inclusive;

Defendants.

Case No. A-12-655992-C
Dept. No. V

ORDER DENYING DEFENDANT'S MOTION IN LIMINE [#3] TO EXCLUDE ANY REFERENCE OR TESTIMONY OF DEFENDANT'S ALLEGED FAILURE TO PRESERVE EVIDENCE

This matter having come before the Court on October 1, 2015, with Christian Morris, Esq. of the Nettles Law Firm appearing on behalf of Plaintiff Yvonne O'Connell ("Plaintiff") and Lawrence J. Semenza, III, Esq. and Christopher D. Kircher, Esq. of Lawrence J. Semenza, III, P.C. appearing on behalf of Defendant Wynn Las Vegas, LLC d/b/a Wynn Las Vegas ("Defendant"), regarding Defendant's Motion in Limine [#3] to Exclude Any Reference or Testimony of Defendant's Alleged Failure to Preserve Evidence (the "Motion"), with Plaintiff having filed an Opposition to the Motion and Defendant having filed a Reply thereto.

The Court, having reviewed the records and pleadings on file as well as the oral argument of counsel, with good cause appearing, hereby orders as follows:

IT IS HEREBY ORDERED that Defendant's Motion in Limine [#3] to Exclude Any Reference or Testimony of Defendant's Alleged Failure to Preserve Evidence is hereby DENIED without prejudice.

DATED this 27 th day of October, 2015.

DISTRICT COURT JUDGE

Respectfully Submitted By:

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DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, individually,

Plaintiff,

v.

WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company d/b/a WYNN LAS VEGAS; DOES I through X; and ROE CORPORATIONS I through X; inclusive;

Defendants.

Case No. A-12-655992-C
Dept. No. V

ORDER ON SUPPLEMENTAL BRIEFING RELATING TO THE PROPOSED TESTIMONY OF DR. DUNN AND DR. TINGEY

On October 29, 2015, the Court held a hearing in response to the Parties' Supplemental Briefing related to the hearing this Court conducted on October 1, 2015 on Defendant Wynn Las Vegas, LLC d/b/a Wynn Las Vegas' ("Defendant") Motion in Limine [#2] to Exclude Unrelated Medical Conditions and Damages Claimed by Plaintiff (the "Motion"). Plaintiff filed an Opposition and Supplement and Defendant filed a Reply and Supplement. Christian Morris, Esq. of the Nettles Law Firm appeared on behalf of Plaintiff and Lawrence J. Semenza, III, Esq. and Christopher D. Kircher, Esq. of Lawrence J. Semenza, III, P.C. appeared on behalf of Defendant.

The Court, having reviewed the records and pleadings on file as well as the oral argument of counsel, with good cause appearing, hereby orders as follows:

IT IS HEREBY ORDERED that Dr. Dunn will be allowed to testify at trial, however counsel for Defendant will be first allowed to depose Dr. Dunn on the stand in the absence of the jury.

IT IS HEREBY FURTHER ORDERED that Dr. Dunn's testimony will be limited to the medical records.

IT IS HEREBY FURTHER ORDERED that Dr. Tingey will be allowed to testify at trial, however counsel for Defendant will be first allowed to depose Dr. Tingey on the stand in the absence of the jury.

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IT IS HEREBY FURTHER ORDERED that Dr. Tingey's testimony will be limited to the medical records.

DATED this 24th day of November, 2015.

DISTRICT COURT JUDGE

Respectfully Submitted By:

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