

In the
Supreme Court
for the
State of Nevada

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WYNN LAS VEGAS, LLC d/b/a WYNN LAS VEGAS,
Appellant and Cross-Respondent,

v.

YVONNE O'CONNELL,

Respondent and Cross-Appellant.

*Appeal from Judgment on Jury Verdict,
Eighth Judicial District Court, State of Nevada in and for the County of Clark
District Court Case No. A-12-671221-C · Honorable Jennifer P. Togliatti*

APPELLANT'S APPENDIX
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1 orthopedic side of this. There's other issues with other
2 doctors, specifically, cardiologists that she --

3 Q Why don't you briefly just address that real
4 quickly?

5 A Okay. So, one of the main issues that was coming up
6 when she was following up with UMC Quick Care, as I mentioned
7 before, she had multiple symptoms of dysfunction, and multiple
8 complaints of pain. And one of the big ones that doctors
9 always tune into real quick is chest pain, and she was
10 complaining of a lot of chest pain. And her primary care
11 physician at UMC Quick Care had recommended she go see a
12 cardiologist.

13 So, she was evaluated. And she also saw a
14 gastroenterologist. The gastroenterologist was treating her
15 for constipation, and he diagnosed her with predominant
16 irritable bowel syndrome and constipation.

17 She saw the primary care cardiologist March 29th,
18 2010, and he diagnosed Ms. O'Connell with atypical chest pain.
19 Testing was normal. And she followed up in the clinic at
20 Nevada Heart and Vascular Clinic with Dr. Wesley May 3rd,
21 2010, which was three months following the fall.

22 The discussion that he documented -- or the
23 subjective information that Dr. Wesley documented was a
24 58-year-old Caucasian female, highly anxious, with a history
25 of irritable bowel syndrome, gastroesophageal reflex disease,

1 and atypical chest pain. However, now, she stated that the
2 pain is radiating from her chest to her back. She has a
3 history of possible Marfan syndrome and hypertension, which is
4 well controlled.

5 He did an echocardiogram, which showed normal heart
6 function and normal valvular function. He said she most
7 likely has atypical chest pain from gastroesophageal reflex
8 disease, however, he suggested because of this possible issue
9 with Marfan syndrome, which is -- it's a connective tissue
10 disorder that's genetic, and patients with Marfan syndrome can
11 have valvular abnormalities. And the arteries, especially the
12 aorta, can cause like big dilations.

13 Q Okay.

14 A And so, he wanted to be very careful about that. He
15 asked her to get a CT scan of the chest to look at her
16 thoracic aorta, and she was reluctant to do that and she
17 wanted to follow up with her gastroenterologist, so he
18 recommended that she come back.

19 Q Okay.

20 A So, when she followed up with Dr. Wesley --

21 Q Was that May 7th of 2012?

22 A Yeah, that's what I'm looking for here. Okay, yes.
23 So, she followed up actually April 9th, 2012.

24 Q Okay.

25 A She -- the recommendation was for a full cardiac

1 work-up, because at this point, now you're two years after the
2 date of injury. She had atypical chest pain radiating to her
3 back, shortness of breath, palpitations, like -- we call it
4 presyncopal episode, which means you're getting weak and
5 feeling like you're going to pass out, and dyspnea on
6 exertion, which is shortness of breath on like walking up a
7 flight of stairs or on exertion.

8 So, he recommended full cardiac work-ups, stress
9 test, CT angiogram of her chest, echocardiogram, Holter
10 monitor, which are multiple cardiac tests to check the
11 electrophysiology of her heart, the structure of her heart,
12 and looking at her whole chest to make sure there wasn't any
13 issues of an aneurysm in the aorta.

14 She followed up with Dr. Wesley after a lot of the
15 testing was done on May 7th, 2012. He said, Evaluation for
16 chest pain with normal CT of the chest, normal cardiac Holter
17 monitor, which looks for arrhythmia, and normal
18 echocardiogram. And he said, this concludes an extensive
19 cardiovascular work-up with no objective medical findings to
20 explain her symptoms, which clearly appears to be functional
21 overlay of chronic anxiety. He said she has a final diagnosis
22 of reflex disease, anxiety, and heart palpitations, which are
23 not physiologic.

24 And that in and of itself, a very well respected
25 cardiologist to do full cardiac work-up and to make that

1 statement in a medical chart is saying, this woman has
2 problems that's functional. She has anxiety; she's developing
3 symptoms that a doctor can't explain.

4 She felt she wanted a second opinion. She went to
5 another cardiologist. This was September 7th, 2012. Dr.
6 Fotedar is a cardiologist from the Heart Center of Nevada. He
7 did a second -- he -- he knew what his role was. He said, I'm
8 a second opinion cardiac consultation after a slip and fall
9 two years prior with person describing severe chest pain
10 radiating to her back, shortness of breath, and heart
11 palpitations.

12 Quote from his chart. He said, "This is a
13 61-year-old female with a history of a fall a couple of years
14 ago that has since had multiple cardiac symptoms, including
15 palpitations, chest pain, and shortness of breath. She has
16 had a work-up done with a Holter monitor, echocardiogram, CT
17 of the chest, which are all unremarkable. I had a long
18 discussion with the patient, and basically tried to assure her
19 that everything's normal, that her echocardiogram was normal
20 with physiologic findings.

21 "The patient was not very happy with my conclusion
22 and thought that I wasn't paying attention to her
23 echocardiogram. I spent more than 30 minutes with this
24 individual trying to explain to her that she does not have a
25 significant valvular heart disease based on the echocardiogram

1 and the clinical examination, and maybe her symptoms cannot be
2 explained by these tests. I did recommend that she should
3 have a stress test in the future. At this time, she has not
4 -- the patient said I'm not ready to do a stress test at this
5 time."

6 So, here's a second cardiologist that said, I can't
7 explain this woman's symptoms. She is very adamant that she
8 has physical problems. He can't explain it, and he said he
9 tried to be patient and explain to her maybe what's going on.

10 And so, this is a classic type of situation where a
11 person's dealing with functional symptoms, but there's no
12 medical explanation for it.

13 Q Okay.

14 A And then, I wanted to go back to the orthopedic --

15 Q Okay.

16 A And that is, she saw a second physical therapist,
17 because prior to this cardiac situation, she was evaluated by
18 an orthopedic surgeon who's an orthopedic sports med surgeon,
19 Dr. Trainor, and he saw her on February 10th, 2012. So, that
20 was exactly two years following the slip and fall.

21 And it's -- basically, he said this is a 60-year-old
22 female who injured herself two years ago when she fell on a
23 curb. She states that she never fully healed. She complains
24 of pain along the entire right lateral side of her body, from
25 her buttocks, radiating down the right side of her leg, to her

1 right knee. She describes constant pain.

2 His physical examination showed tenderness to
3 palpation in the upper and lower extremities bilaterally. So,
4 she had tenderness all over the place in bilateral upper and
5 lower extremities. No specific joint tenderness that could
6 show like a localized physiologic exam.

7 There was nothing that he could extract from his
8 exam that was localized on the joint line of her knees, and
9 she -- he said she had no hip pain when he was moving her.
10 But she was complaining of a lot of right-sided hip pain, but
11 when he was moving her on her on the table, she didn't develop
12 or experience hip pain in certain motions that he was doing
13 during his exam.

14 So, he diagnosed her with two conditions; one which
15 we already discussed, fibromyalgia, which is a chronic
16 functional pain syndrome, and complex regional pain syndrome
17 with no obvious organic problems of the hip or knee.

18 So, I want to clarify something. The diagnosis of
19 chronic regional pain syndrome is an organic problem, because
20 the doctors that have actually researched chronic regional
21 pain syndrome have identified that there's an autonomic
22 neurological dysfunction that occurs in a limb when a person
23 has neurologic injury.

24 So, like we talked about, if a person has a pinched
25 nerve or neuropathy -- a lot of people know what carpal tunnel

1 syndrome is, right? It's when the median nerve in your wrist
2 gets compressed from certain diseases like diabetes, or
3 sometimes if a person has trauma to the wrist, or repetitive
4 use, combined with physiologic problems, you develop like
5 peripheral neuropathy, or if a person has a pinched nerve in
6 the spine, or if a person has injury from surgery or trauma, a
7 person can develop neurologic and neuropathic pain that's
8 called chronic regional pain syndrome.

9 So, it's actually a physically organic identifiable
10 syndrome that you can diagnose not just by like imaging to
11 diagnose that there's nerve impingement, but
12 neurodiagnostically. We talked about these neurodiagnostic
13 findings that the claimant four years after -- or I'm sorry,
14 this was three years after the fall, she developed carpal
15 tunnel syndrome, bilaterally. But he was diagnosing it in her
16 lower extremity for her knees. He said she had chronic
17 regional pain syndrome, but we know, based on the
18 neurodiagnostic studies, that she didn't have any neuropathic
19 findings.

20 Not only that, the diagnosis of chronic regional
21 pain syndrome has identifiable factors on exam. You can get
22 redness, or the skin starts changing colors, or you can get
23 the skin that kind of gets purple and white, and then you lose
24 hair, and you develop like physical findings that are
25 associated with neuropathic disease and circulatory disease.

1 And, clearly, that's not the case here.

2 You know, Dr. Trainor didn't identify any neurologic
3 problems, nor did any of the other doctors on the examinations
4 that they did.

5 So, I felt that Dr. Trainor was using a term that
6 may not have been appropriate for this situation. So he
7 diagnosed her with a pain syndrome that I felt was not
8 demonstrated by the medical testing that was done.

9 Again, as doctors, we always go to the objective
10 medical evidence. So, Dr. Trainor tried to make a diagnosis.
11 Personally, my opinion, I felt he was off the mark, that she
12 didn't fit the criteria for chronic regional pain syndrome.
13 But he suggested she should try another physical therapist.

14 So, Dr. Trainor said, because he couldn't figure out
15 anything that was localized or focal, he -- and he had ordered
16 MRIs, as well, he sent her for physical therapy evaluation.
17 She went to a separate physical therapist called Scott
18 Pensivy, who has a smaller type clinic; it's kind of a private
19 practice. He saw her September 18th, 2012.

20 Q Let me stop you for just a moment. Is that commonly
21 known as SPORTS?

22 A Right, because --

23 Q Okay.

24 A Scott Pensivy Orthopedic Rehabilitation Therapy, I
25 think. It's an acronym.

1 Q Okay. Go ahead.

2 A Right. So, Scott Pensivy was a physical therapist.
3 And he was -- referred her regarding right hip pain, right
4 knee pain, although the patient wished to treat her bilateral
5 hand, as well. And bilateral foot pain, low back pain,
6 thoracic pain, neck pain, and headaches.

7 So, out of a lot of the evaluations that were done
8 in the medical record, I thought that this one was a very
9 thorough evaluation and very well documented.

10 So, I'm going to go through my observation of his
11 medical record. He said, the patient has been seen by
12 different physical therapists for 24 separate visits
13 previously. She describes her symptoms as worsening, as the
14 other therapists were possibly too aggressive. He observed
15 that the patient at this time appears to be moderately anxious
16 and seems to be passing out as she talks a lot about her
17 injuries.

18 She has -- difficult for him to ask appropriate
19 questions because she had -- it seems, the way he was saying
20 it, she didn't have a good attention span to what he was
21 saying. He said that he attempted to shake the patient's
22 hand, and the patient refused to shake his hand due to a
23 perception of severe pain.

24 On his examination, he said that she had
25 hypersensitive reaction to palpation over her whole body.

1 Every body region he tested, he couldn't find anywhere that
2 didn't have tenderness to palpation.

3 He said, unfortunately, it's difficult to assess
4 joint function secondary to the patient having severe
5 apprehension of pain throughout passive range of motion;
6 meaning, if he wants to just tell her, okay, relax, relax, I'm
7 just going to move your arm back and forth like this, it's
8 passive range of motion, meaning, she's not contracting any
9 kind of musculature or trying to do any work, he's passively
10 moving her. And he said that she had severe apprehension
11 throughout passive range of motion of her lower extremities.

12 Every motion hurt with the exam, and he said it was
13 difficult for him to assess strength secondary to patient's
14 complaint of pain and apprehension throughout the entire exam.
15 However, we notice multiple other practitioners -- the
16 physical therapist multiple times said he tested her strength,
17 Dr. Erkulvrawatr tested her strength, and they all said that
18 she had some level of resistance or effort on the exam, but he
19 -- he basically said she had no effort on the exam.

20 He said it's difficult to assess her strength due to
21 her complaints of pain and apprehension throughout the exam.
22 Poor functional status with laboring on every mobility of her
23 body. Sensation with decreased -- I'm sorry, the sensation in
24 her dermatomes were decreased without a specific dermatomal
25 pattern.

1 So, we know in the body the nerves innervate a
2 certain region. So, for instance, in the hand, we know like
3 this is the C6 dermatome, this is the C7 dermatome, this is
4 the C5 dermatome here. You know, we know that the certain
5 areas when you test sensation, you're going to test like
6 specific localized nerve patterns and how those patterns can
7 develop into, you know, following an injury. And he said she
8 had decreased sensation completely throughout -- with
9 hypersensitivity in both of her lower extremities.

10 So, we're not even talking carpal tunnel syndrome,
11 which was diagnosed on this individual, which, frankly, is --
12 like I said, carpal tunnel syndrome is a progressive
13 degenerative disorder of a peripheral nerve in the wrist that
14 occurs with age, it occurs with metabolic problems, especially
15 people that have disorders such as Ehlers-Danlos syndrome, or
16 things that cause connective tissue disorders, because a
17 person can get problems with blood flow to their extremities.
18 So, he's saying this was specifically in her lower
19 extremities; had nothing to do with carpal tunnel syndrome.

20 So, at this time -- his conclusion was, at this
21 time, the patient has several pathologies she's complaining
22 of, which includes her entire body. She was diagnosed with
23 chronic regional pain syndrome, as we discussed earlier. At
24 this time, the patient is in such severe pain that physical --
25 this physical therapist feels he is unable to help her. The

1 patient has expressed that other therapists have hurt her with
2 exercise, and this physical therapist is concerned that this
3 may be the wrong type setting to start rehabilitation.

4 The patient complains of too much pain with all
5 motions, and the physical therapist was unable to assess the
6 area of concern with any type of consistency during testing
7 and objective values. He had no objective value to give her
8 an appropriate plan of care.

9 So, I thought that that is a very good description
10 of somebody that was coming to him that had a significant
11 level of pain, to the point where she couldn't even passively
12 move, and she had very diffuse symptoms throughout her whole
13 body. And so, a lot of these findings helped me come to a
14 conclusion. You know, I'm not sure if we want to discuss any
15 other specific doctor notes.

16 Q Why don't you touch on the --

17 THE COURT: Could we --

18 MR. SEMENZA: Yes.

19 THE COURT: I'm sorry to interrupt.

20 THE WITNESS: To the conclusion?

21 THE COURT: Judge --

22 MR. SEMENZA: No, no.

23 THE COURT: Judge needs a restroom break. I'm
24 sorry.

25 THE WITNESS: Yeah, all right.

1 THE COURT: I drank coffee at noon, and so --

2 THE WITNESS: I could take a deep breath.

3 THE COURT: So, ladies and gentlemen, we're going to
4 take a ten-minute recess.

5 And during this recess, it is your duty not to
6 converse among yourselves or with anyone else on any subject
7 connected with the case, or to read, watch, or listen to any
8 report of or commentary on the trial by any person connected
9 with the trial, or by any medium of information, including,
10 without limitation, newspaper, television, radio, or internet,
11 and you are not to form or express an opinion on any subject
12 connected with this case until it's finally submitted to you.

13 We'll be back at 4:15. Thank you.

14 THE MARSHAL: All rise for the jury, please.

15 (Court recessed at 4:06 P.M. until 4:18 P.M.)

16 (In the presence of the jury)

17 THE MARSHAL: Jury's all present, Your Honor.

18 THE COURT: Thank you, and please be seated. The
19 record will reflect we're back within the presence of all
20 eight members of the jury, as well as the alternate. And you
21 may continue.

22 MR. SEMENZA: Thank you, Your Honor.

23 BY MR. SEMENZA:

24 Q When we left off, we were walking through some of
25 the history that you had looked at. Just very briefly, I

1 would like you to address any -- the medical records relating
2 to the Nevada Eye and Ear, just briefly.

3 A Oh, okay. So, Ms. O'Connell had mentioned
4 complaints of visual changes, and also like congestion, jaw
5 pain, facial pain, and -- okay. So, I believe there was an
6 initial consultation at Nevada Eye and Ear. Okay, yeah, here
7 it was. May 9th, 2011.

8 A CT scan was done by Dr. Manthei, who's an
9 otolaryngologist. CT scan of the sinuses were reviewed. He
10 said there's no evidence of sinus disease, polyps. He said
11 she had a mild deviated septum to the right. He recommended
12 conservative treatment with medication for her sinus pain, and
13 he said, maybe in the future, if it continues, consider
14 septoplasty surgery. She saw an ophthalmologist, Dr. Carr,
15 2011. She had mild cataracts and dry eye syndrome, and he
16 said she should get corrective lenses and drops for her eyes.

17 And the subsequent follow up at Nevada Eye and Ear
18 was September 24th, 2012. That's about two-and-a-half years
19 following the fall. He said she had left-sided facial pain
20 and drooping of her left eyelid on and off for one year. On
21 exam, she continues to have no significant findings, other
22 than a deviated septum. "I do not appreciate any drooping of
23 her left eyelid; however, she is adamant that her eyebrows do
24 not match. There's no evidence of facial nerve weakness."

25 And he said he diagnosed her with atypical facial

1 pain, and he recommended an MRI to rule out trigeminal
2 neuralgia, which is a neurologic impingement of a nerve in the
3 face.

4 Q Based upon the records that you reviewed, did Ms.
5 O'Connell have anything -- and this will be in layman's terms,
6 but were her retinas detaching?

7 A No.

8 Q Are you aware of any ocularly injuries that can take
9 place --

10 A Well --

11 Q Well, hold on. With regard to MRIs that are
12 performed?

13 A No. Unless a person has a metal foreign body in
14 their eye -- they screen patients for metal before an MRI, and
15 unless she had metal in her eye, there's no way an MRI can
16 cause ocular injury.

17 Q Okay. And then, based upon --

18 A She was evaluated by an ophthalmologist in August of
19 2011, that was a year-and-a-half after the fall, and he did a
20 thorough exam and said she had mild chronic cataracts and dry
21 eye syndrome.

22 Q But that was it?

23 A That was it.

24 Q Okay. And based upon your review of the records,
25 can you tell us what your opinions in this particular --

1 A All right, yeah --

2 Q -- matter are?

3 A I know that we've well decided -- this is getting
4 long, so I want to like cut to the chase and really kind of
5 summarize everything.

6 But I really feel the medical record is important,
7 because these are doctors that documented things, and those
8 things that those doctors documented tell a picture or story.
9 It's information that's basically medical information; medical
10 evidence. And if you pay attention to the medical evidence,
11 there's certain conclusions that can be drawn.

12 So, I -- I basically had three conclusions, and I
13 touched on some of that already. And the first conclusion I
14 draw is, obviously, there was an incident that occurred. This
15 incident occurred on February 8th, 2010. There was a slip and
16 fall at the Wynn Hotel. The claimant objectively suffered
17 minor contusions to her buttocks, which there was visual
18 photographic evidence of that.

19 And the initial treatment that was given to her two
20 days following the date of injury, she was diagnosed with a
21 lumbosacral contusion. Examination of her cervical spine and
22 her neck was done, and it was normal at that time, two days
23 after the date of injury.

24 So, as a doctor that deals with mechanism of injury,
25 there's a term called, causation, and this is something that's

1 very important. Medical causation. So, if a person says that
2 they have a symptom, can a doctor causally relate A caused B,
3 causing symptoms that are developing in a human being? So,
4 that's called medical causation. And I -- and that's
5 something -- like I said, this is my speciality. I deal with
6 traumatic injury and medical legal causation all the time.

7 I said that there -- based on the medical evidence
8 that was in the chart and her evaluation at the UMC Quick Care
9 two days after the date of injury, the diagnosis that was
10 made, her symptoms that were occurring, the causal
11 relationship of the mechanism of injury would lead us to
12 believe that those symptoms that she was experiencing show she
13 had injured body parts, including her lumbosacral spine, her
14 back, her tailbone, her hip, her buttocks -- her right
15 buttocks --

16 Q That would --

17 A -- that there was contusion injury.

18 Q Okay, that wouldn't include the neck area --

19 A No.

20 Q -- or the cervical area?

21 A No.

22 Q Okay.

23 A That's it.

24 Q Okay.

25 A What was documented, that's in the medical record.

1 Lumbosacral contusion, right buttocks, right hip contusion.

2 Q Okay.

3 A That's conclusion number 1.

4 Q And is that to a reasonable degree of medical
5 probability?

6 A Yes.

7 Q Thank you.

8 A Taking into account everything that we've discussed
9 up until now, you know, don't have to go into it again. So,
10 the second thing that I want to pay attention to is the
11 pattern of the symptoms. This claimant -- and I want to say
12 straight out, I never met the claimant, Ms. O'Connell. I
13 never examined the patient -- the claimant, Ms. O'Connell. I
14 don't know who she is. I wish her the best. I have nothing
15 against her; I'm just doing a medical evaluation and trying to
16 give my best medical opinion.

17 I wanted initially -- and we went through this
18 already. I wanted everybody to look at the pattern of the
19 symptomatology. There was a specific point in time,
20 specifically, two months -- no, I'm sorry. Six weeks after
21 the slip and fall, it was March 18th, 2010, she went to the
22 UMC Quick Care, and all the sudden, there were multiple
23 complaints. I mean, it went from back pain, and pain into the
24 hip and the thigh to multiple complaints.

25 And I'll remind you what that inventory was. Pain

1 over the right -- whole right side of the body, weakness,
2 fainting, chills, trouble sleeping, blurred vision, lump on
3 her neck, neck pain, dizziness, headaches, chest pain, cough,
4 shortness of breath, nausea, change in appetite, severe
5 constipation, heartburn, abdominal pain, neck pain, frequent
6 urination, sexual dysfunction, depression, anxiety, pain and
7 stiffness of her hands, wrists, elbows, shoulders, neck, back,
8 hips, knees, feet, and jaw.

9 So, my conclusion was that this is not normal human
10 behavior. There may be explanations for why she was
11 experiencing these things. Those explanations may be
12 psychological, those explanations may be from preexisting
13 pathology that was bothering the individual for some other
14 reason, but to a reasonable degree of medical probability, all
15 of those complaints have nothing to do with the slip and fall.

16 Q Okay.

17 A No causal relationship, no medical causation, no
18 objective medical information at all that would lead anyone to
19 believe that those complaints were related to the slip and
20 fall, for the reasons I mentioned already, because when a
21 person falls, there's a physiologic development of injury of a
22 normal response to pain that would develop within 48 hours.

23 Q Okay.

24 A So these symptoms are six weeks after the slip and
25 fall.

1 Q Okay.

2 A So, that was conclusion number 2. Then, number 3 is
3 that I focused on the non-orthopedic issues of functional
4 preexisting problems.

5 So, in the medical record, we clearly see that Ms.
6 O'Connell documented a prior injury in 1989 with chronic back
7 pain. So, even the injured body part, there was preexisting
8 pathology of chronic back pain with diagnosis of fibromyalgia,
9 irritable bowel syndrome, reflux disease, constipation,
10 anxiety, stress. And then there was a mention of medication
11 dependance with severe constipation and abdominal pain, and a
12 possible diagnosis of Marfan syndrome.

13 So, I want -- basically, I want to understand, the
14 reason why this is important is because this individual has
15 had issues with chronic functional pain before.

16 Q Okay.

17 A This isn't new. This is something that she's dealt
18 with before in terms of what I'm seeing in the medical record
19 with multiple functional diagnoses. When I mean functional
20 diagnoses, meaning, that a doctor -- when a doctor evaluates
21 somebody, in order to get paid, we have to come up with a
22 diagnosis. Are you familiar with that?

23 That if you just say -- you know, you can't write on
24 the chart, this person has pain, you know, and I'm going to --
25 I have to come up with a diagnosis, so I have to come up with

1 either a sprained back, a contusion, reflux disease,
2 gastritis. Whatever it is, a doctor has to come up with a
3 diagnosis to bill it so you get paid.

4 So, a lot of times, in medical records, you see
5 doctors giving diagnoses based on the symptoms, and that's
6 what we call functional diagnosis. There's no objective
7 medical testing that shows there's a pathologic problem, but
8 we have to define the person's symptoms.

9 So, for instance, a person that has stomach pain
10 that comes and goes, and gets nausea and constipation, but a
11 doctor like Dr. Shaposhnikov, you know, did testing, and
12 imaging, and colonoscopy on this individual, and he didn't
13 find anything pathologic, the diagnosis is irritable bowel
14 syndrome with constipation. That's a functional diagnosis,
15 meaning, I'm going to define this person's symptoms as
16 irritable bowel syndrome because I can't find anything else to
17 explain it. And these syndromes can be treated.

18 So, she had -- another one is fibromyalgia.
19 Fibromyalgia is frequently used as a diagnosis of regional
20 body pain, meaning, a person may have pain problems in their
21 neck, and their back, and their shoulders, and their elbows,
22 and their hands, and their feet, and their knees. And people
23 that frequently develop pain that is unexplainable by medical
24 -- objective medical testing, they get this label of
25 fibromyalgia. That's a functional diagnosis given by where

1 the person's manifesting the pain.

2 And so, she has these diagnoses. And I wanted to
3 just bring that out into the open that she is dealing with
4 multiple functional problems.

5 Dr. Shaposhnikov saw the claimant on March 24th, so
6 that was six weeks after the injury, and he explained that she
7 was having multiple complaints; nausea, constipation,
8 heartburn, abdominal pain. Obviously, we mentioned atypical
9 chest pain, facial pain, jaw pain, dizziness, chest pain,
10 shortness of breath.

11 These are all what we call functional constitutional
12 symptoms that are preexisting and was -- she already had these
13 diagnoses preexisting in her chart. I'm not giving her the
14 diagnoses; these were diagnoses that were in her chart. So,
15 I'm just bringing it out into the forefront what was
16 documented in the chart.

17 Q Okay.

18 A And these conditions are in no way related to the
19 slip and fall.

20 Q Did you also have occasion to render conclusions
21 about whether Ms. O'Connell had something called pain
22 magnification --

23 A Okay, right.

24 Q -- syndrome?

25 A So, that was the last conclusion. I want to save

1 that for the last thing. And then, the last conclusion I came
2 to is, why would it that a person would have like focal pain
3 that was reported for six weeks in her back and her hip, all
4 the sudden six weeks after the fact turn into total body pain?

5 So, in the orthopedic field, there is a syndrome
6 called symptom magnification syndrome. And there's a couple
7 of classic articles that I referenced in my report. I'm sure,
8 you know, the jury and the attorneys all have reference to my
9 notes, so you can read over it there. But the first one that
10 I referenced is the definition of symptom magnification
11 syndrome.

12 So, I used a journal article that was kind of a
13 groundbreaking journal article in 1991 of a doctor that was
14 trying to explain why a person might develop symptoms of pain,
15 or other symptoms. It doesn't have to be pain. It could be
16 -- like we said, it could be nausea, it could be shortness of
17 breath, weakness, other things. Why would a person develop
18 symptoms that are out of proportion with what we would
19 normally expect a human being to experience? So, why would
20 this happen? It's typically identified as a psychological
21 problem, and the psychological problem is defined by this
22 journal article, and the journal article defines symptom
23 magnification syndrome as a self-destructive socially
24 reinforced behavioral response pattern consisting of displays
25 of symptoms which function to control the life and

1 circumstances of the sufferer, meaning, that a person is going
2 to respond with behavior that's controlled by circumstances in
3 their life, or psychological circumstances, and there's three
4 types.

5 The type 3 of the symptom magnification syndrome is
6 what we call the identified patient. This is a person whose
7 symptoms try to ensure survival, or a person develops a role.
8 They take on a role. So, if a person basically has
9 personality issues, psychological issues, and they're getting
10 a lot of attention in a certain arena that helps to reinforce
11 their importance, a lot of times, they'll gravitate towards
12 the attention.

13 And this commonly happens in medicine. It just
14 happens. When a person goes to a doctor, and a doctor pays a
15 lot of attention to them, they feel like they're the center of
16 attention. They feel like they're getting a lot of attention
17 from the physician or the medical professional, and they kind
18 of gravitate towards that arena.

19 And then, the second part of this is -- the
20 identified patient is secondary gain. It's classically
21 pathognomonically defined by secondary gain, meaning, a
22 person's going to get some sort of gain out of manifesting
23 symptoms. So, it could be attention, it could be a sense of
24 self-worth, it could be financial gain. There could be some
25 other issue there, and these are things that cause a person to

1 manifest this symptom magnification syndrome.

2 Now -- and this article was written by a
3 psychologist. He developed pain profiles that a person can
4 take like a survey, and you can -- the person -- the survey
5 will basically say, you know, what levels of pain do you have
6 when you get up out of bed? Can you brush your teeth in the
7 morning? Can you do this? Are you depressed? Do you have
8 anxiety? Does -- you know, what's aggravating your pain?

9 And these pain profiles basically get scored, and a
10 -- there's a normal response to pain that will kind of show up
11 in these profiles, and then there's pain that's out of
12 proportion with normal functional activity that will also show
13 up on these profiles.

14 Obviously, the claimant didn't take these profiles,
15 but the main criteria that I use to come up with a conclusion
16 of chronic -- I'm sorry, of symptom magnification syndrome, is
17 the idea of what we were talking about; that multiple medical
18 professionals in the medical record were identifying symptoms,
19 one, that were not explained by objective medical evidence;
20 symptoms that were out of proportion with the objective
21 medical findings; symptoms that were basically extreme pain.

22 So, if you look in the medical record, the last
23 three entries in the medical record were from UMC Quick Care.
24 Every single time -- this was June of 2013, September of 2013,
25 and January of 2014, four years after the date of injury. Her

1 complaint going to the Quick Care was pain over her whole body
2 at a level of ten out of ten. That's pain that's not normal.
3 That's pain that's out of proportion with normal physiologic
4 understanding of the human body.

5 So, this in and of itself negates the need for the
6 psychological profiles because it's in the medical record. I
7 mean, the pain is out of proportion with normal human behavior
8 and human response to traumatic injury.

9 And not only that, but out of proportion with the
10 diagnoses that she has. A person even with fibromyalgia, or
11 atypical chest pain, or irritable bowel syndrome, or other
12 diagnoses she has shouldn't be walking into a doctor -- and
13 I'm not blaming her. I'm not castigating the claimant. I'm
14 just saying, that's not normal to walk into a doctor's office
15 three visits in a row and say, I have pain over my whole body,
16 and it's ten out of ten. That's abnormal behavior.

17 And then, there's other criteria that were set up by
18 orthopedic surgeons called Waddell signs. And so, these
19 Waddell signs -- I identified a journal article by Dr. Waddell
20 that identifies these five characteristics of things you'll
21 see on a physical examination that will identify a person that
22 is manifesting symptom magnification, or the other term for it
23 is functional overlay, meaning, it's psychological overlay on
24 the actual physiologic injury.

25 And so, these five characteristics is, one,

1 superficial, widespread, tenderness, meaning, wide regions of
2 the body, and non-anatomic tenderness, meaning that if a
3 person has a knee injury, you'd suspect there would be certain
4 areas that are tender, or where a person falls, there would be
5 certain areas that are tender, and not like wide,
6 non-anatomical areas to light touch.

7 So, we've already gone through the medical record.
8 You can understand all the doctors that saw her that
9 identified that she had wide ranges of widespread, whole body,
10 whole spine tenderness, whole limb tenderness from the --
11 specifically, Dr. Trainor, Dr. Erkulvrawatr, the pain
12 management doctor, and both physical therapists documented
13 this in the medical record, one out of five.

14 Two, regional weakness or poor effort or strength.
15 This was clearly documented by both physical therapists. As I
16 mentioned before very specifically, Matt Smith and Scott
17 Pensivy, they both said this woman had very poor effort and
18 regional weakness that wasn't explained by the diagnostic
19 findings. So, two, regional weakness or poor effort on
20 strength testing.

21 Three, distracted straight leg raise testing. This
22 test, I couldn't identify. There was a spine surgeon that
23 said it was negative, so that one, she passed. She didn't
24 display straight leg raise testing or axial rotation.

25 Q Okay.

1 A Four, non-anatomic sensory changes. This was very
2 well documented by the neurologist, Dr. Germin, that saw her,
3 both physical therapists, and it was -- as we discussed
4 before, sensory changes in derma -- in non-anatomic and
5 non-dermatomal patterns, like the whole limb, and the legs,
6 and the feet, and the arms have sensory changes that aren't
7 explained by the neurodiagnostic tests, objective medical
8 evidence. She had neurodiagnostic testing. That was normal.
9 But these therapists that were treating her and orthopedic
10 surgeons were seeing that she had non-dermatomal sensory
11 changes. That's three.

12 The last one -- the last Waddell sign is
13 overreaction to pain out of proportion with exam. So, I
14 really focused on Scott Pensivy's notes, because he really
15 laid that one out very clearly, like, I couldn't even touch
16 this woman she was in so much pain.

17 And there were other mentions of it in the record on
18 that one. Let me just look specifically. I think the
19 orthopedic hand surgeon had mentioned that as well.

20 Okay. So, what we see just from the medical record
21 observing other doctors' notes and conclusions, we see four
22 out of these five Waddell signs. So, in the orthopedic
23 knowledge, we say, if a person is three out of the five,
24 there's a high likelihood that they have symptom magnification
25 on exam and functional overlay.

1 So, based on this, clearly, the claimant has pain
2 out of proportion with normal physiologic response to injury;
3 pain that can't be explained by the objective medical
4 findings.

5 The conclusion clearly is symptom magnification
6 syndrome. That's definitely outlined in the medical record.
7 And this is highly associated with psychological issues. So,
8 we noted that the claimant had prior anxiety, prior
9 depression, prior chronic pain, prior issues with medication,
10 prior utilization of the medical system.

11 So, this all comes to a conclusion. I mean, it's a
12 big picture, and it takes experience to see it, to tease out
13 all these details, but it's very clear.

14 And you know, we talked about the other things
15 besides pain. There was issues with the cardiologist. The
16 cardiologist tried to talk to the claimant about her symptoms
17 of chest pain and symptoms of shortness of breath, and said
18 that that couldn't be explained by his testing.

19 And also, we talked about the ENT doctor, Dr.
20 Manthei, that explained to the patient that she had no
21 identifiable symptoms for facial pain or -- so, I think that
22 that is a good conclusion to -- and like I said, to me,
23 there's a high degree of certainty in my mind that I'm coming
24 to an accurate conclusion with this.

25 Q Okay. And is your conclusion that Ms. O'Connell has

1 symptom magnification syndrome to a reasonable degree of
2 medical probability?

3 A Yes.

4 Q And does your diagnosis that Ms. O'Connell has
5 symptom magnification syndrome -- is that in any way causally
6 related to the fall that she suffered on February 8th, 2010?

7 A No.

8 Q Thank you.

9 THE COURT: Cross?

10 MS. MORRIS: Thank you.

11 CROSS-EXAMINATION

12 BY MS. MORRIS:

13 Q Dr. Klausner?

14 A Yes.

15 Q You said that you did a very thorough review of the
16 medical records; is that right?

17 A Yes.

18 Q And it's very, very important to you to see when
19 there's onset of pain; is that right?

20 A Yes.

21 Q Because that helps you know what's related to this
22 fall; is that correct?

23 A Yes.

24 Q And so, if I understand correctly, the sooner in
25 time those symptoms manifest, the more likely it is in your

1 mind that they would be related to the fall; is that fair?

2 A Sooner, like I said, I mean, I personally make a
3 very fine distinction of 48 hours.

4 Q So, you need it to develop in 48 hours, or to you,
5 it's not related?

6 A Yeah. I think that there's always a reason why
7 things happen. So, for me, 48 hours -- in my experience, I'm
8 a doctor that sees traumatic injury, like I told you, here in
9 Southern Nevada. Fifteen years, I've been dealing with people
10 for traumatic injury. There is no reason why a physiologic
11 injury to the human body should delay pain more than 48 hours.
12 I understand sometimes pain progresses, so sometimes, it might
13 be subtle and progressive, but it should be there within 48
14 hours.

15 Q And that's -- it doesn't matter about the age of the
16 person, the type of injury. As long as it's a trauma, it
17 needs to be there in 48 hours for you --

18 A Correct.

19 Q -- is that correct?

20 A Correct.

21 Q Now, you said that she went to UMC two days after?

22 A Yes.

23 Q And that she had reported pain in her butt and in
24 her back; is that correct? Radiating down her right leg; is
25 that correct?

1 A Correct.

2 Q Now, she -- you said that she didn't report pain in
3 her right knee; is that correct?

4 A Correct.

5 Q I'd like you to, if you could, turn to the binder --
6 do you have the joint proposed binder in front of you? Great.
7 If you could turn to B00062 in that binder.

8 THE COURT: Looking at the wrong --

9 MR. SEMENZA: Yeah.

10 THE COURT: -- binder.

11 MS. MORRIS: Oh, do we not have the joint --

12 THE WITNESS: Oh, wait.

13 MS. MORRIS: -- proposed up there?

14 THE WITNESS: It's on this side. Oh, it's way --

15 THE COURT: It's the --

16 THE WITNESS: -- forward. Okay.

17 THE COURT: It's the black one.

18 MR. SEMENZA: Christian, are you asking defendant's
19 proposed exhibits, or --

20 MS. MORRIS: It's defendant's proposed exhibits.

21 MR. SEMENZA: Okay.

22 THE COURT: Oh, okay.

23 THE WITNESS: I just --

24 THE COURT: Not the joint?

25 MS. MORRIS: Yes.

1 THE WITNESS: -- have to move backwards. B0006.

2 Okay, yeah.

3 BY MS. MORRIS:

4 Q All right, and do you -- did you look at this
5 medical record in preparation for your testimony today and
6 your review of Ms. O'Connell?

7 A There were a lot of records, so I can't tell you
8 specifically that I saw this piece of paper. I definitely had
9 records from UMC Quick Care on that date.

10 Q And this is her visit --

11 A So, I should --

12 Q I'm --

13 A I should --

14 Q Okay.

15 A -- have this, yeah.

16 Q This is from her visit on February 10th, 2010; isn't
17 that correct?

18 MR. SEMENZA: B006?

19 THE WITNESS: No, I don't -- I don't --

20 MS. MORRIS: B0062.

21 BY MS. MORRIS:

22 Q Isn't this the medical --

23 MR. SEMENZA: Oh, 62.

24 MS. MORRIS: -- record you reviewed?

25 THE WITNESS: Yeah, no, this says November 5th,

1 2012.

2 THE COURT: 62.

3 MS. MORRIS: So, B0062. Maybe I could assist you.
4 May I approach?

5 THE WITNESS: Wait, 0062. Is that this?

6 MS. MORRIS: There you go.

7 THE WITNESS: Okay.

8 MS. MORRIS: Okay.

9 THE WITNESS: There it is. Okay.

10 MS. MORRIS: Yes.

11 BY MS. MORRIS:

12 Q If you could read the complaint that Ms. O'Connell
13 had upon arriving there.

14 A Okay. So, she said, fell last Monday, complaining
15 of pain, right knee down to feet. Hurts to sit.

16 Q Okay, so she did complain of pain in her right knee;
17 isn't that correct?

18 A Yes, correct.

19 Q Now, did you go out and gather Ms. O'Connell's
20 medical records, or were they provided to you?

21 A They were provided to me.

22 Q And did you rely on defense counsel to provide you
23 all the relevant records that you would need?

24 A Yes.

25 Q Now, you have a list of all the medical records that

1 you reviewed, and I've looked at that list. It looks like the
2 next visit you have for her is a March 8th, 2010 visit with a
3 Dr. Prabhu.

4 A Yes.

5 Q Would that be accurate?

6 A Correct.

7 Q I'd like you to, if you could, turn to R00001.

8 A Yeah.

9 Q And I'd like you to look at it and tell me if you've
10 ever seen that medical record before.

11 A Nope. I have not.

12 Q Okay, and what's the date on that medical record?

13 A February 17th.

14 Q So, that's now nine days after she's fallen; is that
15 correct?

16 A Yes.

17 Q And you haven't had an opportunity to review this
18 medical record, have you?

19 A No.

20 Q And can you see the areas of pain that Yvonne is
21 complaining of on that date?

22 A Yeah, I see it.

23 Q Okay. And can you tell me what parts of her body
24 she's complaining of?

25 A She's complaining of -- let me just look at this

1 whole thing.

2 MS. MORRIS: I'd actually like to put it up, but I'm
3 missing R001 for some purpose. Could I borrow someone's R001?

4 THE CLERK: R?

5 MS. MORRIS: Yes.

6 THE CLERK: Of defendant's exhibits?

7 MS. MORRIS: Yes. It's just the first page of that.

8 MR. SEMENZA: All right. Well, this is a clean
9 copy, if you want --

10 THE WITNESS: So --

11 MS. MORRIS: And let me just --

12 THE WITNESS: So, first of all --

13 MS. MORRIS: Oh, sorry.

14 THE WITNESS: -- I think it's fair to me to tell me
15 like --

16 MS. MORRIS: Doctor, let me just --

17 THE WITNESS: -- where this comes from.

18 MS. MORRIS: -- ask a question. I'm sorry. If you
19 don't mind.

20 BY MS. MORRIS:

21 Q Okay, so this is a medical record that we've all
22 seen before.

23 A Okay.

24 Q But it's clear, this is the first time you are
25 seeing it; is that correct?

1 A Yes, correct.

2 Q Okay. And this is nine days after the accident, and
3 Yvonne's got reported pain to her neck, her back, her right
4 arm, down her right leg specifically, referencing her knee,
5 too; isn't that correct?

6 A Yes.

7 Q Now, you were provided certain medical records, but
8 you don't know if you were provided all the medical records;
9 isn't that correct?

10 A Correct.

11 Q Specifically, when you were testifying, you
12 mentioned that there was no finding of a traumatic injury in
13 her cervical spine or her lumbar spine; is that correct?

14 A Repeat the question.

15 Q Sorry. When you were testifying, you said that
16 there was no evidence of any kind of traumatic injury to her
17 lumbar or her cervical spine?

18 A Based on the MR -- imaging evidence. That's what I
19 said.

20 Q Okay. Now, you also said that you reviewed medical
21 records --

22 A Well, let me put it this way. I said that I came to
23 a conclusion that there was a lumbar contusion, but I said,
24 beyond that, there was no objective medical evidence of lumbar
25 spine or cervical spine injury.

1 Q Now, you reviewed Dr Cash's medical records, too;
2 isn't that correct?

3 A Yes, I did.

4 Q I'd like you to turn to P0015, please.

5 A I -- I want to bring you to attention to your own
6 medical record here. It says that, "My back was badly injured
7 in --

8 Q Doctor.

9 A -- 1989, and I learned how to keep it healthy. I
10 cannot be manipulated" --

11 Q Doctor, I'm sorry. I've just asked a question and
12 I'd like to move on to it.

13 A You don't want to know about your own medical
14 record?

15 Q We've actually already --

16 A Okay.

17 Q -- read them.

18 A Did you? Okay, okay.

19 Q We had those medical records, and the jury has seen
20 them.

21 A Okay.

22 MR. SEMENZA: Which page, Christian?

23 MS. MORRIS: We are at P00015.

24 THE COURT: 15?

25 MS. MORRIS: 15.

1 THE WITNESS: Got it.

2 BY MS. MORRIS:

3 Q All right, now this is a medical record from Dr.
4 Cash; isn't that correct?

5 A Um-hum, yes.

6 Q And it's an appointment that she had with this
7 orthopedic surgeon on May 18th, 2010.

8 A Correct.

9 Q And according to my review of your medical records,
10 you've never seen this record either?

11 A Nope, didn't have it. I had the MRI, but I didn't
12 have his note.

13 Q And in the recommendations, Dr. Cash says that she
14 has traumatic lumbar radiculopathy, as well as traumatic
15 cervical radiculopathy with positive MRI findings; isn't that
16 correct?

17 A That's what he says, but it's not necessarily true.

18 Q Okay. So, while you don't think Dr. Cash's record
19 is true, it's also true that you never saw this medical record
20 before --

21 A Correct.

22 Q -- isn't that correct?

23 A Yes.

24 Q And you said that the review of the medical record
25 was incredibly important to your diagnosis of Yvonne, because

1 it's really the only thing you've done; isn't that correct?

2 A That's -- that's exactly true.

3 Q So, in order to come to a determination and diagnose
4 a patient, with never seeing them, never touching them, never
5 evaluating them in person, it's important that you have all of
6 her medical records in order to come to a conclusion; isn't
7 that fair?

8 A It's fair to say that I would request to have
9 everything, but if I don't have everything, it doesn't
10 necessarily change my conclusion.

11 Q I want to go back and talk to you about the
12 testimony you said about Dr. Prabhu.

13 A Yes.

14 Q Now, that was that visit she had at Ascent Primary
15 Care on March 8th, 2010.

16 A Um-hum.

17 Q And you made indications that Dr. Prabhu had known
18 her for quite some time. Do you recall that testimony?

19 A Yes.

20 Q Okay. Now, Dr. Prabhu has only seen Yvonne once, so
21 I'm concerned --

22 A I see.

23 Q -- or I'm interested in where you got that
24 information.

25 MR. SEMENZA: Objection --

1 THE WITNESS: Well --

2 MR. SEMENZA: Hold on. Objection, Ms. Morris is
3 testifying. She's making a representation.

4 THE COURT: All right. Sustained, and the jury will
5 disregard the comments of the lawyers. When lawyers make
6 statements, they're not allowed to be witnesses, and you can't
7 -- you know, what -- their questions aren't evidence, and what
8 they say like that, a gratuitous comment, not evidence, so
9 you'll disregard that. Next question.

10 BY MS. MORRIS:

11 Q Dr. Prabhu only has one medical record; is that
12 fair?

13 A Yes, correct.

14 Q Okay. So, in that one medical record from Dr.
15 Prabhu, what about it made you think that he knew her well?

16 A He -- he basically documented her history very well
17 of her chronic preexisting issues.

18 Q Is it solely based on the fact that he had a good
19 documentation of her history that you thought he had seen her
20 before?

21 A Yeah, I think it was the way he documented the
22 record, because, exactly right, you know, he had documented
23 that he had known about this history of multiple issues.

24 Q But you've seen Yvonne's medical records, and she
25 documents her history pretty well to a lot of people; wouldn't

1 that be fair?

2 A Correct, yes.

3 Q And there's some indication you said of a medication
4 dependancy?

5 A Um-hum.

6 Q What medication was she dependant upon?

7 A Yeah, I don't have that information. I just was
8 documenting things that were mentioned by doctors in the
9 medical record.

10 Q So, did you just assume, because she has IBS and
11 constipation, she had a medication dependancy?

12 A No, it's in the medical record.

13 Q What medical record says she has a medication
14 dependancy?

15 A Okay. I will tell you. It basically was UMC Quick
16 Care March 18th, 2010.

17 Q Okay.

18 A She described history of back and hand injury in
19 1989, which led to a diagnosis of irritable bowel syndrome,
20 GERD, anxiety, stress disorder, Marfan syndrome, fibromyalgia,
21 medication dependance with severe constipation and abdominal
22 pain.

23 Q What medication was she dependant upon?

24 A I don't know.

25 Q So, are you assuming it was a pain medication?

1 A I -- I don't make any assumptions. I just --

2 Q You don't make any assumptions?

3 A I just documented what's in the medical record.

4 Q Okay. So, looking a little more closely at what
5 you've evaluated here, you've evaluated medical records from
6 Yvonne after the fall; isn't that correct?

7 A Yes.

8 Q Now, you do a lot of these medical record reviews,
9 you said; is that correct?

10 A I maybe do a medical record review maybe once every
11 six months.

12 Q Isn't it important when you do a medical record
13 review to get any kind of documentation, medical records of
14 preexisting --

15 A Um-hum.

16 Q -- conditions to the patient?

17 A Um-hum. Absolutely, it's very important.

18 Q And in this case, did you request to get any medical
19 documentation of her preexisting conditions?

20 A I felt it was documented in the records, so I didn't
21 necessarily need more. And I didn't know if it was available,
22 so I didn't ask.

23 Q So, you didn't ask to see if there was any prior
24 medical records?

25 A No.

1 Q Generally, when you are given medical records in a
2 med-legal situation --

3 A Yeah.

4 Q -- if there are preexisting medical records, are you
5 provided with those?

6 A Well, I would tell you that when I'm actually in a
7 situation where I'm actually seeing a patient, and I am asked
8 to make conclusions based on medical records, and to do an
9 evaluation of somebody, like a second opinion or an
10 independent medical examination, absolutely, I'm going to want
11 to come to have -- at that appointment, I'm going to want to
12 have preexisting imaging, preexisting records from other
13 doctors. If there's an injury, if the person's seeing a pain
14 management doctor or an orthopedic surgeon, I'm going to want
15 those notes. So, you're right, it's very helpful. But in
16 this situation, I was given what I was given. I didn't ask
17 for more.

18 Q Now, you were given what you were given --

19 A Um-hum.

20 Q -- and you said you relied on what was in those
21 medical records to talk about what she previously had; isn't
22 that right?

23 A I -- yes, I used the medical records to document
24 diagnoses that were documented by the doctors that were seeing
25 her for preexisting problems.

1 Q But all the issues of preexisting conditions came
2 from Yvonne, right? The one that you said, we can't rely on
3 what she's saying?

4 A I don't know why the -- how the doctors got their
5 information. I'm assuming UMC Quick Care maybe has records on
6 Yvonne that they were using to make diagnoses. So, I would
7 say that Yvonne gave a history, but I'm -- you know, again,
8 I'm in the dark, so I don't know where that information came
9 from. It may come from Yvonne, it may come from medical
10 records that show that there's other issues.

11 Q So, if you -- if I were to tell you, well, this is
12 Yvonne's first visit at UMC Quick Care that day that she went
13 on February 10th, 2010 --

14 A Was it? I don't know. I don't know.

15 Q Okay, that's fair. So, you are assuming that there
16 are medical records out there that you didn't need, and didn't
17 want, and --

18 A I didn't say that.

19 Q Okay. Tell me what -- tell me what you said then.

20 A I said I didn't have the records, and I didn't ask
21 for the records.

22 Q But your -- you have diagnosed --

23 A I didn't say I didn't need them, or didn't want
24 them, or couldn't have used them. I'm happy to review
25 anything you give me. Give me the records. Obviously, you

1 don't want to see what's in other records that you showed me.
2 I'm happy to discuss any of them.

3 Q Not that I don't want to see it, sir, but we had
4 already looked at it.

5 A Oh, okay.

6 Q Okay? Now, you have diagnosed her with chronic
7 regional pain syndrome; is that right?

8 A No.

9 MR. SEMENZA: Objection, misstates testimony.

10 THE COURT: Sustained.

11 MS. MORRIS: Okay.

12 THE WITNESS: I didn't diagnose her with chronic
13 regional pain syndrome.

14 BY MS. MORRIS:

15 Q Do you think she has it?

16 A No.

17 Q Okay. What's your opinion about her chronic -- the
18 chronic regional pain syndrome that you spoke -- oh, you're
19 right. Dr. Trainor did that.

20 A Trainor.

21 Q Okay.

22 A That's right.

23 Q And you don't think that's accurate?

24 A No, I do not.

25 Q Okay. You don't think it's accurate because you

1 think she has symptom magnification syndrome?

2 MR. SEMENZA: Your Honor, I'm going to object. May
3 we approach?

4 THE COURT: Yes.

5 (Off-record bench conference)

6 THE COURT: Objection, argumentative, sustained. Go
7 ahead.

8 MS. MORRIS: Okay. I apologize.

9 BY MS. MORRIS:

10 Q You said, chronic regional -- I'm sorry, you said
11 symptom magnification --

12 A Symptom --

13 Q Okay.

14 A Syndrome.

15 Q Syndrome.

16 A Um-hum.

17 Q And you cited some articles in support of that;
18 isn't that right?

19 A Yes.

20 Q Okay. And the articles that you supported, the one
21 that you talked about was that 1991 article; is that right?

22 A Yes.

23 Q That was -- I referenced it. I referenced the
24 article to show the definition of the -- of -- and this was a
25 definition. Obviously, there can be multiple definitions.

1 This was one psychologist's definition of what symptom
2 magnification syndrome --

3 Q Okay.

4 A -- represents, and he --

5 Q Yes.

6 A -- classified it. So, based on his model -- and
7 that's what it is. It's a psychological model of a pain
8 syndrome. So, I used the model to show how a person might fit
9 into that model, yes.

10 Q And Leonard Matheson was the author of it. He's a
11 clinical psychologist and counselor; is that correct?

12 A Correct.

13 Q Okay. And Leonard Matheson says one of the steps to
14 diagnosing this symptom magnification syndrome is it's a
15 clinical interview that's performed in a structured
16 environment, where you have an interviewee who forms a rapport
17 with this person, and after multiple other testing, they go
18 down through 14 different issue areas; is that correct?

19 A Again, this is his model, so that's not necessary to
20 make the diagnosis. That's his model for doing research, and
21 he came up with -- like I explained to you, pain inventories
22 and interview tactics to try to understand why a person has
23 symptom magnification syndrome.

24 The diagnosis of symptom magnification syndrome is
25 basically made by the fact that's displayed by multiple areas.

1 Interview with the patient, could be having pain inventory
2 showing that there's pain out of proportion with the objective
3 medical findings, or just pain that it's experienced
4 psychologically out of proportion with normal behavior.
5 That's what he's getting at. There's pain inventories, a
6 psychological understanding of why a person's experiencing
7 pain.

8 So, you can do that without pain inventories. You
9 just have to show that there's a pattern of pain that's out of
10 proportion with normal behavior and physical observation of
11 what we call functional overlay, or pain that doesn't make
12 sense based on a physical examination, and pain that's not
13 supported by objective medical findings. So, those three
14 things have to be there.

15 Q Okay. So, you have to have observation of their
16 pain behavior; is that correct?

17 A Yes.

18 Q You have to conduct a physical exam of them; is that
19 correct?

20 A Correct.

21 Q And then you have to do this structured interview
22 with them; is that correct?

23 A An interview. It doesn't have to meet -- be the way
24 that this psychologist defines the interview with his pain
25 inventories. It just has to -- an interview where you can get

1 a sense that a person is experiencing pain that's not normal.
2 It's out of proportion with normal behavior.

3 Q And it's fair to say you did not conduct any of
4 those three prongs in order to diagnose her with this symptom
5 magnification syndrome?

6 A Correct. I used other doctors' clinical notes to
7 show the pattern of what was happening.

8 Q So, you read through some of Yvonne's medical
9 records and made a clinical diagnosis of her of having symptom
10 magnification syndrome without completing any of the steps
11 required to do so?

12 A I just told you that your steps are from that
13 article, and that article doesn't -- it's not the defining way
14 to diagnose symptom magnification syndrome. It has to have
15 those three criteria.

16 Q And to be fair, you gave me this article, right?

17 A I gave it to you, yeah.

18 Q Okay. And so, I didn't go out and find it; you
19 provided me with it --

20 A I provided it --

21 Q -- in your report?

22 A -- to show a definition psychologically of how a
23 person and why a person might develop this syndrome of symptom
24 magnification syndrome.

25 Q Now --

1 A As a tool. Doesn't say that this is the Bible; it
2 has to fit exactly this person's model. Symptom magnification
3 syndrome, like, can be made by a physical therapist.

4 Q A physical therapist could?

5 A A physical therapist can made that diagnosis.

6 Q So, a physical therapist could diagnose someone with
7 symptom magnification syndrome?

8 A Yes, they can. And as a matter of fact, it's very
9 recognized as standard of care in the medical community and in
10 the legal community that if a claimant has signs of symptom
11 magnification syndrome, that it can be proven with a test
12 called a functional capacity examination that's done by a
13 physical therapist. They do the interview, they give a person
14 the -- the pain inventories, they do the physical testing,
15 they evaluate the medical records, and then they try to get
16 some information based on the person's functional capacity and
17 how they're manifesting pain.

18 Q And in this case, no one performed a functional
19 capacity examination on Yvonne?

20 A I said that's a tool that's recognized in the
21 community. A doctor can make the diagnosis if they have the
22 criteria to make it. I saw the criteria in this medical
23 record very clearly.

24 Q So, you think it's clear from the medical records
25 without doing any of the other testing that she has --

1 A There was --

2 Q -- symptom magnification syndrome?

3 A There was a lot of testing done. I outlined
4 specific -- and most of -- most of the time, symptom
5 magnification isn't seen very frequently in doctors' notes.
6 Most of the time, it's observed by physical therapists,
7 because the physical therapists are the ones that are
8 observing the patients, talking to the patients, observing
9 their functional behavior, observing them doing a functional
10 capacity exercise, and seeing how they're responding, and if
11 the therapist is seeing something that's not normal, he's
12 going to document it. And you have two separate physical
13 therapists that identified it.

14 Q And you -- you focused on those, about the two
15 physical therapists that identified it, but isn't it true that
16 Dr. Erkulvrawatr back in 2010 tested her three times for
17 Waddell, and they all came back negative?

18 A Yes, and that --

19 Q Thank you.

20 A Yes. At the same time, he -- there were signs that
21 I pointed out on Dr. Erkulvrawatr's notes that showed that she
22 had regional tenderness to palpation, which is one Waddell
23 sign. So, he documented that in his notes, but he said she
24 had zero out of five Waddell sign. So, I understand what he
25 was saying. He didn't get the overall impression that there

1 were Waddell signs, but at the same time, he did document that
2 there were abnormalities on his exam that didn't make sense.

3 Q Now, the documents that you looked at, you reviewed
4 them and you came to a conclusion, and that conclusion is --
5 is that she has symptom magnification syndrome, and there's
6 certain motivations that come with it; is that fair?

7 A Well, there can be motivations, and they could be
8 subconscious or conscious, but they're psychological issues.

9 Q Did you make a determination on what motivations
10 Yvonne has?

11 A No.

12 Q You listed a few of them though; is that correct?
13 You said one of them was secondary gain, financial?

14 A I said -- when I was defining this type 3 symptom
15 magnification syndrome, it's -- I'll read it to you. It says,
16 "The identified patient who is a person whose symptoms ensure
17 survival and maintenance of their role as a patient." And I
18 said, in other words, the person manifests symptoms in order
19 to receive some kind of secondary gain, whether it's avoidance
20 of responsibility, attention, or financial gain. It's a
21 statement of fact about that category of symptom
22 magnification. I'm not making any statement about the
23 claimant's motivations.

24 Q So, you're just stating that she has the syndrome,
25 and you're not sure what motivations come with it?

1 MR. SEMENZA: Objection, argumentative.

2 THE COURT: Overruled.

3 THE WITNESS: I'm stating what the definition of
4 this category of symptom magnification is. If you want to ask
5 me directly my opinion, it's an opinion, you know? I didn't
6 put it in the record because I didn't want to give opinions; I
7 wanted to give medical fact in my determination here. But
8 I've --

9 MS. MORRIS: Well, I --

10 THE WITNESS: I've dealt with many people that
11 manifest symptom magnification syndrome --

12 MS. MORRIS: Okay.

13 THE WITNESS: -- and I, at times, get a very good
14 sense of why a person behaves the way they behave. So I've --

15 MS. MORRIS: So --

16 THE WITNESS: I've evaluated these records, and if
17 you want to ask my opinion, I can give it to you.

18 BY MS. MORRIS:

19 Q Yes, what is your opinion?

20 A Okay. My opinion is that there is an individual --
21 and I don't know her personally, but there's an individual
22 that's involved in a medical legal claim. And that there was
23 obviously an access of care, there was -- two days after the
24 date of the fall -- slip and fall. There was clear medical
25 records of the body parts involved in that claim. So, you're

1 saying that the right knee was involved. There was a little
2 part that she said -- so, okay, I'll accept that, that her
3 right knee was involved on the second day.

4 Q So, are you going to give me the right knee? Is
5 that what you're saying? I mean --

6 A I'm happy to give you the right knee.

7 Q Okay.

8 A So, I can --

9 Q Let's add a body part.

10 A -- agree that the right knee was involved. And
11 then, for some reason, following a reasonable period of time
12 where a person would experience symptoms, her symptoms
13 exploded out of proportion. So, you showed me a note; I
14 believe it was a chiropractor. You showed me a note that said
15 that she had pain all the way up and down the right side of
16 her body, and her limbs, and all the sudden, her symptoms were
17 all over the place, and I believe that note was seven days
18 after the date of injury.

19 Q Nine.

20 A Nine days after the date of injury. And if you ask
21 my opinion, she probably had an encounter with an attorney
22 between the date of UMC Quick Care and that chiropractor note,
23 because that's how it always goes with personal injury claims.

24 Q Okay.

25 A And that somebody's sent to a chiropractor, and the

1 chiropractor elicits a lot of information to help them to
2 manifest a legal case against -- and so, I don't know the
3 chiropractor that saw the claimant. I don't know -- like I
4 said, I don't know the claimant. But there was also -- on
5 that same record, there was also the patient's claim that she
6 has problems getting manipulations, because she's had
7 manipulations in the past, and she's had severe neck problems
8 from the manipulations. It was right there in the record.

9 So, clearly, even the record you showed me showed
10 this patient had serious preexisting problems, and now her
11 symptoms are exploding because she's involved in a claim. So,
12 she's getting attention. There may be financial gain issues.
13 This individual that slipped and fell, like I said, may have
14 felt a sense of attention. There may have been a feeling like
15 that she's getting reinforcement from going to the doctor
16 frequently and listing symptoms. And like I said, it could be
17 subconscious. I don't know. It doesn't have to be conscious.

18 This is -- let me be very clear. It doesn't mean
19 that Ms. O'Connell's manipulating the situation. Could be --
20 because once a person's given that role of being the victim,
21 the victim role perpetuates itself, so.

22 Q So, I'm a little confused on what you just said,
23 because you don't think that she's necessarily manipulating
24 the system, but you said you think probably between the 10th
25 and the 17th, she went out and hired an attorney, and that's

1 why she had all these pain complaints on the 17th? Did I
2 misunderstand you?

3 A No.

4 MR. SEMENZA: Objection, argumentative.

5 THE COURT: Overruled.

6 THE WITNESS: Yeah. So, I'm basically saying that
7 if you're asking my opinion, that I'm making a guess she was
8 sent to a chiropractor probably by an attorney, and that's a
9 supposition. I don't know that as a fact, you know. Don't
10 know. Probably you know, maybe. Why don't you tell me?

11 MS. MORRIS: I actually couldn't.

12 THE WITNESS: Okay.

13 BY MS. MORRIS:

14 Q So, let's talk about why you think that after she
15 might have seen an attorney, she went back and had all kinds
16 -- as you say, all kinds --

17 A I don't know.

18 Q -- of pain complaints.

19 A I really don't know. I mean, like I said, there's
20 preexisting problems that are clearly there. So she -- and
21 I'm not saying Ms. O'Connell didn't experience pain. Don't
22 get me wrong. I believe this woman may be suffering terribly.
23 I don't know.

24 Q So, you think --

25 A But the whole process -- you don't understand. The

1 whole process of this medical legal system that we're in
2 creates people to develop this kind of situation.

3 Q Do you think that the fact that she has litigation
4 has caused her to develop symptom magnification --

5 A No.

6 Q -- syndrome?

7 A I didn't say -- I didn't say that.

8 Q You said that she might be suffering terribly;
9 you --

10 A Yeah.

11 Q -- don't know?

12 A I don't.

13 Q I'd like to talk to you a little bit about the work
14 that you do.

15 A Yes.

16 Q Now, you -- you do a lot of work with -- and I'm
17 probably saying it wrong. Is it -- it's workers'
18 compensation, occupational injuries; is that fair to say?

19 A I see a lot of occupational injuries.

20 Q And that's about 90 percent of your practice --

21 A Yes.

22 Q -- is that correct?

23 A Well, occupational medicine is 90 percent of my
24 practice, so I do a lot of occupational medicine. So, I do
25 pre-employment examinations, I do fit-for-duty examinations, I

1 do routine maintenance -- health maintenance examinations, I
2 -- you know, I'm a medical review officer. I do a lot of
3 things that are occupationally related to help people stay
4 healthy in the workplace, and I also treat occupational
5 injury.

6 Q Now, I didn't see this on your resume, but I think
7 you're on the board of directors for the Nevada Disability
8 Prevention Coalition; is that fair?

9 A Yes.

10 Q Okay, and that the mission statement for that is to
11 benefit managers, employers, work comp adjusters, risk
12 managers, insurance brokers, and doctors; is that fair?

13 A No, that's totally not the definition of that
14 organization. The definition of that organization is
15 basically to help the system of medical treatment, and
16 interface with employees in many facets; FMLA, injuries that
17 have nothing to do with work, injuries that do have to do with
18 work, drug abuse, you know, substance abuse issues. Help
19 people to interface with their employers to keep them employed
20 and not let people become disabled. That's the mission of
21 that organization.

22 Q Now, to be fair, I just went to the website.

23 A Okay.

24 Q The mission statement on top is what I was reading.

25 A I don't know about the -- I didn't make the mission

1 statement, but I know very well what that organization does.

2 Q I think also --

3 A You may have just took a piece of it. I don't know.

4 Q I can show it to you. It's right at the top, if
5 you'd like to see it.

6 A Oh, I'd love to see it, because --

7 Q Don't read my notes --

8 A -- maybe I have to talk to somebody about that.
9 Right. So, again, let's read the whole thing. To be fair,
10 let's read the whole thing. "Nevada Disability Prevention
11 Coalition is an organization that brings awareness to the
12 community about the prevention of needless work disability,
13 and the importance of stay at work and return to work
14 programs. We provide education regarding topics to benefit
15 managers, employers, work comp adjusters, risk managers,
16 insurance brokers, doctors, and others."

17 So, I think that's a statement about helping people
18 to stay at work. I think it's a very noble goal. And it's
19 not necessarily to benefit insurance companies. It -- and I
20 do a lot of work with this organization, and I see a lot of
21 abuses by insurance companies, a lot of abuses, and claim
22 adjusters that are really unfair to people.

23 And the goal of that organization is to make a fair
24 playing field between insurance companies, people that are
25 injured, and potentially can become very seriously disrupted

1 in their life because of the system. That's what I'm saying.
2 I know the system very well, and I try to help people to
3 navigate the system to get healthy and to get well, and that's
4 the name of the game.

5 Q Do you have a good reputation with your patients?

6 A I do.

7 Q Have you ever read reviews of your work online?

8 A Of course. And I think it comes with the business,
9 you know, for doctors that basically practice medicine
10 involved in the occupational field. Of course, my opinions
11 aren't going to always be popular. My opinions aren't popular
12 with you, and you probably would love to go write a review on
13 me online, too. But I'm just -- I'm a very honest person.
14 I'm honest, I'm ethical, I'm straightforward, I'm right down
15 the line, and I tell it like it is. That's it.

16 I take the medical information, and I deal with it,
17 and I help people to kind of move past all of the drama that
18 occurs around the system. And I'm very honest about it, and I
19 help people to get well. And I believe I'm a very good doctor
20 and I help a lot of people. Although the people that go
21 online and write reviews, you know, the two percent of people
22 that are disgruntled about me are the ones that are going to
23 be the most vocal.

24 I constantly have to deal with people going to the
25 medical board saying that I -- and I shouldn't say constantly.

1 I would probably say twice a year, I have to go to the medical
2 board and deal with people that go, because they lost a
3 hearing on a workers' comp claim or something because I gave
4 an opinion, and they're going to run to the medical board
5 saying I'm unethical. I've never, ever, ever had anybody that
6 had a substantial complaint about me with the medical board,
7 ever.

8 Q Now, I mean in your work, you think it's important
9 for people to get back to work; is that fair?

10 A It's essential.

11 Q And I think -- I looked at this -- this thing that
12 you're the board of, this Nevada Disability Prevention
13 Coalition. It says, "Job dissatisfaction has been shown to be
14 one of the highest, strongest statistical predictors of
15 disability." Do you agree with that?

16 A No. I -- what -- and I don't know what -- again,
17 this is maybe out of -- taken out of context. I really don't
18 know where that comes from, but it's a statistic. That's a
19 statistic, because we -- as somebody that deals with injury
20 and recovery from injury, as a good doctor, I have to look at
21 the human being in front of me and get an understanding with
22 them, and I -- I see it all the time. That's a statistic, and
23 it's a very true statistic.

24 A person that has a difficult job, and a person
25 that's kind of burned out with a job and they have an injury,

1 it's very difficult for them to be able to get back to that
2 job, because emotionally, they're not giving their emotional
3 100 percent effort to be back into the workplace to keep them
4 employed, keep -- so, we're human beings, so when we deal with
5 human beings, we have to deal with the big picture. It's not
6 just an injury, and MRIs, and, you know, tests and things like
7 that.

8 There's human beings with emotions, and
9 psychological makeup, and motivations, motivational factors,
10 and to help a person, you have to get a good understanding of
11 that.

12 Q I agree.

13 A Um-hum.

14 Q And in this case, you never met Yvonne O'Connell,
15 did you?

16 A No. But again, the person's motivations and
17 emotional factors have no bearing on what the medical records
18 show. So, again, like I made a conclusion that said this
19 person, to a high degree of medical probability, is
20 manifesting symptom magnification syndrome, I have no reason
21 -- I have no clear explanation why, because like you said, I
22 don't know her, I don't know her motivations, I don't know all
23 the details about what's going on; I could just see the
24 pattern.

25 And when it comes down to it, like I said before, I

1 have nothing against Ms. O'Connell. I'm sure she's a
2 wonderful person. It's just there's a medical reality, and
3 the medical reality has to be dealt with.

4 And a lot of times, when the medical system tries to
5 fix things that aren't broken and find answers for things that
6 aren't there, it just turns into a huge spiral that goes
7 nowhere. And here, we're talking four years after this person
8 was injured.

9 Q I just want to be clear. You keep saying that
10 you're not talking about her motivations, but you stated that
11 her symptoms increased between February 10th to February 17th
12 based on your belief she went out and hired an attorney.

13 A It's a gut feeling, because I'm a doctor that have a
14 gestalt, and I look at the records. And I told you -- that's
15 speculation. Excuse me, Your Honor. I'm sorry that I
16 speculated.

17 THE COURT: No speculation.

18 THE WITNESS: I know, I'm sorry. But you asked me,
19 and I basically just told you my gut feeling. Is it right? I
20 don't know. You asked me my opinion, and I just told you.

21 BY MS. MORRIS:

22 Q Isn't it possible that her pain had just become more
23 realized as the time had gone on, and she was feeling that
24 pain when she went to the doctor and she told them about it?

25 A No.

1 Q Why not?

2 A Because when she went to UMC Quick Care, she was
3 there to deal with the slip and fall, and she's -- when she's
4 there to deal with the slip and fall, she's going to tell the
5 doctor all of her symptoms. Very clearly, as we can see in
6 the medical records, she has no problem telling doctors what's
7 wrong with her.

8 Q Exactly.

9 A And so --

10 Q I agree with you.

11 A Okay.

12 Q We can agree on that.

13 A Okay.

14 Q Now, you looked at these medical records earlier
15 this year; is that right?

16 A Yes.

17 Q And you came to a determination that she had
18 suffered a slip and fall, and that she had suffered injury to
19 her butt and her low back; is that fair?

20 A Yes. I said I think hip, buttocks, low back.

21 Q And then, today, you think that maybe her knee, too,
22 based on what I showed you?

23 A Yeah, it's fair. It's in there. She mentioned it.

24 Q I've gone through the medical records, and there's
25 quite a few that I -- that I don't see that you have

1 reviewed.

2 MR. SEMENZA: Objection --

3 MS. MORRIS: I'd like to look -- I'd like to kind of
4 walk through it.

5 MR. SEMENZA: Okay. Objection, argumentative.

6 THE COURT: Okay. Well, again, you know, just,
7 yeah, direct him to that. Don't -- don't testify.

8 MS. MORRIS: Okay.

9 THE COURT: Okay? So.

10 BY MS. MORRIS:

11 Q Do you have your review in front of you?

12 A Yes.

13 Q Okay. So, I know we've discussed the medical
14 appointment on 2/17 that you hadn't seen; is that correct?

15 A The chiropractor note? Yes, I haven't seen that.

16 Q I also have a visit she had to Quest Diagnostic on
17 March 23rd, 2011. Did you see that record?

18 A No.

19 Q I also have a visit to UMC Primary Care on August
20 13th, 2012. Have you seen that record?

21 A No.

22 Q I have --

23 A August 12th? Oh, no, I'm sorry. I'm in the wrong
24 year. You're way ahead of me.

25 Q I can go back -- you know what, and I should go back

1 to '11, because there's an October 18th, 2011 visit that I
2 also didn't see in your review.

3 A Right. Nope.

4 Q And then, that's just for UMC. I've got another
5 one, August 13th, 2012, and that's specifically UMC.

6 A Okay. You know, those records from UMC, they all
7 look alike, so some of those papers may have been missing, you
8 know? I'm not sure, because they're handwritten notes.

9 Q Then there's a Steinberg Diagnostic visit it looks
10 like on February 22nd, 2010?

11 A Was that the MRI for cervical spine?

12 Q No, you have that from 4/8/2010.

13 A So, I don't know what it is. What was done at
14 Steinberg?

15 Q So, she had multiple imaging done at Steinberg. She
16 had it to her back, her hip, her right knee --

17 A X-rays?

18 Q Yes.

19 A Oh, yeah. I -- I identified the back and the hip.

20 Q Okay.

21 A And --

22 Q Did you see the right knee one?

23 A No, I did not. But I believe it was mentioned in
24 the record by the orthopedic surgeon, so -- but I didn't have
25 it in the record.

1 Q We've talked about Dr. Cash's visit on May 18th,
2 2010.

3 A Yes.

4 Q But there's also a visit to him on June 22nd, 2010.
5 Are you in possession of that record?

6 A No. I think you showed it to me, didn't you?

7 Q That was the May 18th --

8 A Oh.

9 Q -- 2010 one.

10 A Yeah, I didn't have the subsequent -- after that
11 first evaluation, I didn't have his subsequent records.

12 Q And now, I know you said you have -- there's also
13 Edwin Suarez, physical therapist. She saw him looks like
14 February 21st and February 24th. I didn't see that in your
15 medical record review. Do you have that?

16 A 21st -- February 21st of?

17 Q 2012. Sorry.

18 A 2012. So, no, I didn't have that.

19 Q And it looks like she had -- and I don't know if you
20 had the OpenSided MRI that she had on May 8th, 2010 either.

21 A MRI of?

22 Q Let's see. I think that was her cervical spine.

23 A Yeah, that's -- I -- I basically identified the
24 results of that from Dr. Cash's note and Dr. Erkulvrawatr's
25 notes. So, I saw the results of it, but I didn't actually

1 have that OpenSided MRI document in front of me. I -- yeah.
2 I have some subsequent records that I got afterwards, so I do
3 have it actually in front of me right now. Well, you know
4 what --

5 Q Are those maybe Dr. Dunn and Dr. Tingey's records?

6 A Yeah, you know what, these were -- yeah, these were
7 2014. Never mind, I don't have that. Yeah.

8 Q Have you ever actually seen the MRI images from
9 Yvonne's neck or back?

10 A There was no way for anyone to get those to me. I
11 haven't seen them.

12 Q Did you ever see any of the -- the actual MRI film
13 of her right knee?

14 A The MRI of her right knee. When was it done?

15 Q She had multiple ones done.

16 A I see. Okay. I -- I did not see that, but I saw
17 the report after the fact; after I did this review. You know,
18 some of those reports got to me after the fact.

19 Q But they didn't change your opinion?

20 A Oh, absolutely not.

21 Q So, your fee schedule you also provided me with when
22 you gave the report, and it looks like you charge \$500 an hour
23 paid in advance to review records; is that right?

24 A Yes.

25 Q And it looks like, for legal reports, you charge 500

1 payable in advance and require an authorized -- a signed
2 authorization for release of information. Is that like a
3 HIPAA release? Do you require that?

4 A Yeah.

5 Q And -- and is that so you can go out and gather
6 medical records if you'd like?

7 A No, it's just to give me permission to look at the
8 records.

9 Q And you also get a statement of specific questions
10 that you need to address; is that right?

11 A I don't require that, and a lot of times, I don't
12 really give that much weight. I basically kind of get a sense
13 of what the issues are and try to answer the medical
14 questions.

15 Q And how much have you been paid so far?

16 A I don't know. I mean, the money goes to my office
17 manager. I'm a doctor, you know, I'm not an accountant.

18 Q Okay. So, you have no idea how much you've been
19 paid so far?

20 A No. Is it relevant?

21 Q Excuse me?

22 A Is it relevant?

23 Q You know, it is.

24 A It is?

25 Q It is relevant, because I think that motivations

1 that we've been talking about right now --

2 THE COURT: Okay, stop.

3 THE WITNESS: I mean, you charge for your time.

4 THE COURT: Wait. Okay, stop, stop. Here we go.

5 Okay, you don't get to ask her questions, and --

6 THE WITNESS: Okay, I'm sorry, I'm sorry.

7 THE COURT: -- you don't get to argue with him --

8 THE WITNESS: Okay.

9 THE COURT: -- and testify, okay? And I make the
10 decision about what's relevant in this court, okay? Both of
11 you.

12 THE WITNESS: Okay. I'm sorry, Your Honor.

13 THE COURT: Let's go.

14 BY MS. MORRIS:

15 Q Now, I want to talk about Dr. Dunn and Dr. Tingey.
16 You have some of their medical records; is that right?

17 A Yes, I do.

18 Q And you have reviewed them?

19 A Yes.

20 Q Okay. So, Dr. Dunn and Dr. Tingey have both come in
21 here and provided sworn testimony under oath. Are you aware
22 of that?

23 A Yes.

24 Q And are you aware of the substance of their
25 testimony?

1 A No.

2 Q You could have come in and watched their testimony,
3 correct?

4 A I'm busy. I have a business to run, so I have
5 patients to see. I couldn't -- I couldn't be here. I'm
6 sorry.

7 Q Do you know Dr. Dunn in the -- in the medical
8 community?

9 A Yes, I've met him. I have a high respect for him.

10 Q And Dr. Dunn is an orthopedic surgeon; is that
11 correct?

12 A Orthopedic spine surgeon.

13 Q And you don't have any basis for disagreeing with
14 Dr. Dunn's opinion, do you?

15 MR. SEMENZA: I'm going to object. Foundation,
16 yeah.

17 THE COURT: Sustained.

18 BY MS. MORRIS:

19 Q You've read through Dr. Dunn's medical records; is
20 that correct?

21 A Yes.

22 Q And you know that he has recommended that Yvonne
23 undergo a three-level cervical fusion; is that correct?

24 A I believe I did see that in his record.

25 Q And you're not saying --

1 A Maybe you might want to direct me to which date that
2 -- that visit when he gave his recommendations for cervical
3 fusion. Do you know which date that was --

4 Q I can probably find it for you. It was sometime
5 last year.

6 A Wait, let me see here. Okay, yeah, here. Let's
7 see. This was 10/13/2014, so this was like a year ago --
8 about a year ago.

9 Q And Dr. Dunn has said that he believes that Yvonne
10 needs to have this three-level cervical fusion.

11 A Yes, and I totally disagree, completely.

12 Q So, do you believe that Dr. Dunn is performing a
13 medically unnecessary procedure?

14 A No, I --

15 MR. SEMENZA: Objection.

16 THE WITNESS: I didn't say he --

17 THE COURT: Wait, wait, wait. There's an --

18 THE WITNESS: Okay.

19 THE COURT: -- objection, but it hasn't been fully
20 stated. What's the legal objection -- the basis -- legal
21 basis?

22 MR. SEMENZA: I think it's a misrepresentation as to
23 performing an unnecessary surgery. There's never been a
24 surgery performed.

25 THE COURT: Okay, sustained.

1 BY MS. MORRIS:

2 Q Do you believe that if Dr. Dunn performed this
3 three-level cervical fusion, he would be performing a
4 medically unnecessary procedure?

5 A So, unnecessary is kind of not the terminology I
6 would use. Ill-advised, how about that? Because spine
7 surgeons have criteria by which that they do surgery. So in
8 this situation, the MRI that he even evaluated himself
9 basically shows that there's no significant central canal or
10 -- there's no central canal stenosis at multiple levels. And
11 so, she has one level in -- or, I'm sorry, two levels in her
12 spine that show severe neural foraminal stenosis. So, those
13 two levels clearly are a result of chronic disc degeneration
14 and arthritis.

15 So, as a person ages, first of all, you have to look
16 at many factors. We're not talking about, you know, Dr. Dunn
17 going in with like an arthroscope and cleaning up something a
18 little bit with a little incision. We're talking about a huge
19 procedure with plates, pedicle screws, and major disability
20 following the procedure, and long-term pain medication and
21 rehabilitation.

22 So, it's very standard of care for a doctor that
23 recommends this surgery to understand clearly whether that
24 claimant is physically capable of undergoing this huge massive
25 surgery that's going to fuse three levels in her spine, number

1 one.

2 Number two, have clear understanding of the
3 psychological framework of this individual and have a very
4 thorough neuro-psych evaluation to make sure she's
5 psychologically ready for a surgery like this, and that there
6 isn't other issues of functional overlay like we're talking
7 about.

8 So, does Dr. Dunn have those -- that information? I
9 didn't see it. So, I think he better walk on eggshells before
10 he walks into this. I've seen many surgeries destroy people's
11 lives and cause serious pain that's real pain beyond what they
12 were experiencing before. And it can -- if surgery's done
13 unnecessarily or not thought about carefully.

14 So, she is in pain. I get it. Is the surgery --
15 does it have enough predictable outcome -- a good predictable
16 outcome that he can assure her that her pain is going to get
17 better after the surgery? I would say, no, and I'll tell you
18 why, because her neurodiagnostic studies of her upper
19 extremities showed carpal tunnel syndrome, and that's it. It
20 didn't show any radiculopathy, and it didn't show that she has
21 any nerve root problems in the spine.

22 Yes, there's stenosis. It's caused by arthritis.
23 And a human being, as they age, there's a lot of people that
24 have severe stenosis in their spine, and they're not running
25 out and getting fusions. A lot of times, doctors make

1 decisions because a person's in such severe pain that they're
2 at the end of their rope, and it's not good practice to do
3 spine surgery for somebody who's at the end of their rope,
4 because bad things can happen.

5 And for this person, Ms. O'Connell's own benefit, I
6 would say, be very careful. And from what I could see, she's
7 got to do a lot more testing, and a lot more effort to help
8 this person psychologically and physically to get healthier
9 physically and psychologically before he even considers
10 anything.

11 Q So, you disagree with Dr. Dunn that Yvonne should
12 have --

13 A I strongly -- I strongly disagree.

14 MR. SEMENZA: Objection, argumentative.

15 THE COURT: Sustained, and -- sustained.

16 BY MS. MORRIS:

17 Q Do you agree with --

18 A Strongly -- I'd strongly disagree, because -- not
19 because of anything that has to do with legally --

20 MR. SEMENZA: I don't think there's a question
21 posed.

22 THE COURT: Yeah, there's no question pending.

23 THE WITNESS: Okay.

24 BY MS. MORRIS:

25 Q Do you think Dr. Dunn would be committing

1 malpractice by performing --

2 A No.

3 Q -- this three-level cervical fusion?

4 A No, that's what he does. He does surgery. So,
5 she's in pain, he can do the surgery. It's not malpractice.
6 It's just -- sometimes, it's just making the right medical
7 decision. And that's all I'm saying here is that there's pain
8 issues that aren't explained by the objective medical
9 information or the objective medical evidence.

10 There's a lot of ways you could help a person with
11 pain, and it's not always the end of the line surgery, got to
12 fuse three levels. That's not always the medically
13 responsible thing to do. It's not malpractice. And I have
14 these conversations with spine surgeons all the time. He
15 knows me, I know him, I talk to him a lot, and I've cared for
16 a lot of his patients after he's done surgery.

17 Q Would you defer the decision on whether Yvonne
18 O'Connell needs surgery to Dr. Dunn?

19 A No. I would say that there should probably be
20 multiple opinions, because it's very standard of care for
21 somebody that has a fusion surgery, and there's other issues
22 going on, especially in a medical/legal arena, that there's
23 second opinions, and there's neuro-psych testing, and a very,
24 very clear idea of what this person's getting into. She has
25 to be informed of the whole situation, she has to have other

1 opinions, and get multiple medical opinions. Obviously, my
2 opinion is one opinion. Dr. Dunn's opinion's his opinion.

3 Q And Dr. Dunn --

4 A Ms. O'Connell's opinion's her opinion. But all I'm
5 saying is the number one oath I took as a doctor is do no
6 harm, and it should be very, very serious for any doctor that
7 does anything like a procedure like that. Do no harm.

8 Q But Dr. Dunn's actually treated Yvonne. He's
9 actually seen her in person and diagnosed her. You would not
10 defer to her treating physician who's physically evaluated
11 her?

12 A She's seen other spine surgeons, and -- or I should
13 say one that I saw in the record, Dr. Cash. He didn't say he
14 wanted to do fusion surgery, and he saw her closer to the slip
15 and fall. He evaluated her within months of her slip and
16 fall, and he said, send her for injections and physical
17 therapy.

18 Q And you're aware that Dr. Cash referred Yvonne to
19 Dr. Dunn, correct?

20 A Yeah, I saw that Dr. Dunn stated that Dr. Cash
21 referred her, but doctors have many reasons for referring
22 patients. Maybe he didn't want to take the medical legal risk
23 of dealing with it. Maybe he wanted --

24 Q Are you speculating again?

25 A I said maybe.

1 Q What about Dr. Tingey? You -- you're aware that Dr.
2 Tingey has testified in this case; is that correct?

3 A Yes, yes.

4 Q Do you know Dr. Tingey in the legal --

5 A I do.

6 Q -- in the medical community?

7 A Yes, I do.

8 Q Do you have a good respect for him --

9 A Yeah, I have a good --

10 Q -- in the medical community?

11 A -- rapport and a good respect for Dr. Tingey.

12 Q And Dr. Tingey has testified that Yvonne needs
13 surgery to her --

14 A Yes.

15 Q -- right knee. You're aware of that?

16 A Yes.

17 THE COURT: Do you have an objection?

18 MR. SEMENZA: I do, but it's fine. I'll let it go.

19 THE COURT: You're withdrawing.

20 MR. SEMENZA: Thank you.

21 THE COURT: Okay, go ahead.

22 BY MS. MORRIS:

23 Q Do you disagree that Dr. Tingey should be performing
24 this right knee repair for -- for Yvonne?

25 A Is he requesting an arthroscopic meniscectomy --

1 partial meniscectomy? Is that the procedure that he's doing?

2 Q Were you provided with his medical records?

3 A Well, you said repair. I don't know what that
4 means, but let me -- let me kind of look closer. We'll get
5 the real records out, right? Because you've seen these more
6 than I have, yes?

7 Q Yes.

8 A Okay, so this was May 11th, 2015. And he basically
9 said, "After discussion with the patient, I've recommended
10 bilateral knee arthroscopy with partial medial meniscectomy of
11 the right knee, and partial median lateral meniscectomy of the
12 left knee. The surgery is not a guarantee of cure of her
13 symptoms, specifically cannot cure arthritis."

14 Q Dr. Tingey has testified that she needs the -- what
15 did you call it, meniscectomy? To her right knee.

16 A Right. So --

17 Q Do you disagree with Dr. Tingey's opinion that she
18 needs this repair?

19 MR. SEMENZA: Objection, Ms. Morris is testifying.

20 THE COURT: Overruled.

21 THE WITNESS: So, I want to share an article with
22 you. You can take this, you can put it into your list of --
23 that's a medical research study that was recently done. I
24 don't have it to read from, but there's a research study done
25 that shows in patients over the age of 50 with arthritis in

1 their knee, a horizontal medial -- degenerative medial
2 meniscal tear probably will not have a decent outcome with
3 arthroscopic surgery.

4 So, there's evidence to show that when you're
5 dealing with somebody that has an arthritic knee that's of an
6 older age, over the age of 50, and you have a horizontal
7 degenerative tear, that arthroscopic surgery is a questionable
8 procedure in terms of it's efficacy. Evidence based medicine.
9 Not Dr. Tingey's opinion; evidence based medicine.

10 Q So, Dr. Tingey testified he would expect her to have
11 a complete recovery to her right knee. You disagree with
12 that?

13 A I don't know. I mean, again, he's -- he doesn't
14 have a crystal ball. He's done a lot of surgeries that
15 haven't necessarily gotten people better. That's the nature
16 of arthroscopic surgery, especially in patients with
17 arthritis. That's why doctors have to be very careful when a
18 patient has knee arthritis to do -- to do arthroscopic
19 surgery, because when they start -- they don't have a magic
20 wand to give a person new cartilage in the knee.

21 You have to understand, what they do is they go in
22 with a tool that shaves the meniscus, and what they're trying
23 to do is make a better contour for the meniscus. And I deal
24 with a lot of orthopedic surgeons, and not all orthopedic
25 surgeons are so cavalier to go in and do surgery on patients

1 over the age of 50 with arthritis.

2 And the reason why is because if they start shaving
3 cartilage, it can accelerate the arthritic changes in the
4 knee, and then the person can go from having some pain in
5 their knee to severe end-stage arthritis, and then they need a
6 knee replacement.

7 So, you've got to be very careful, you know? I
8 mean, these procedures aren't like curative processes.
9 They're basically trying to clean up the joint surface to make
10 the knee -- the joint mechanically more efficient and more
11 functional.

12 Q So, she has a tear in her knee, and Dr. Tingey --

13 A She has a horizontal degenerative meniscal tear in
14 the posterior horn of her medial meniscus.

15 Q So, it's your opinion that it's degenerative?

16 A Well, I -- I think that if you look at the MRI --
17 let me look at it here. It says there's subchondral changes
18 with chondromalacia, there's marginal osteophyte formation
19 which is with the patella that's related to arthritis.

20 THE COURT: Which knee are we looking at?

21 THE WITNESS: The right knee.

22 THE COURT: Okay.

23 THE WITNESS: This was Las Vegas Radiology, August
24 29th, 2014. Signal is identified within the posterior
25 one-third of the medial meniscus which extends to the surface

1 and is consistent with a tear. The lateral meniscus
2 demonstrates one signal within the anterior one-third and PCL.

3 So, the -- the way that this is defined is that the
4 signal is within the meniscus. That's basically an
5 intrasubstance tear of the posterior horn of the medial
6 meniscus, and it communicates to the surface. So, yes. So,
7 what -- the real way to define this would be an intrasubstance
8 degeneration of the meniscus with a radial tear that
9 communicates with the surface.

10 So, I understand. And I've had a lot of discussions
11 with doctors and orthopedic surgeons about the appropriateness
12 of arthroscopic surgery in this scenario, and they will make
13 the decision based on mechanical symptoms. So, is the
14 person's knee locking? Is the person's knee buckling? Are
15 there mechanical symptoms in the knee? Are there certain
16 findings on exam? And so, the -- the key thing isn't so much
17 what the MRI is showing; it's basically the whole picture.

18 Right, and again, like I said, I can't make the -- I
19 didn't do the exam on Ms. O'Connell. I'm just reading an MRI.
20 But I'm just explaining to you, medicine is not an exact
21 thing. Not every person with this finding on MRI even has
22 symptoms. There's plenty of people walking around with an
23 asymptomatic meniscal tear at the age of 65.

24 And we're talking about this four years after the
25 date of this slip and fall. Ms. -- Ms. O'Connell could have

1 been doing -- doing laundry, and bending down and getting
2 laundry out of the dryer, and twisted her knee and suffered a
3 meniscal tear. There was a lot of time.

4 So, in reality, I think that the whole conversation
5 is kind of a moot point, because there's no way you could take
6 this MRI four years after the fact, this was done 2014,
7 basically four years after the fact, and tell me that that
8 meniscal tear is related to the slip and fall. Impossible,
9 can't do it, no way.

10 Q So, Dr. Tingey testified that it was related to the
11 fall, and you --

12 A How does he know?

13 Q -- disagree with him?

14 A Does he have a crystal ball?

15 Q He looked at the actual MRI imaging and actually --

16 A I think a more --

17 Q -- treated Yvonne.

18 A -- accurate would be to say there's not enough
19 evidence to suggest that, because, again, he -- when did he
20 first evaluate the claimant?

21 Q So, if I --

22 A He evaluated the claimant years after the slip and
23 fall. So, he's not a magician. He doesn't have a crystal
24 ball. He doesn't -- and I'm -- I'm being very honest.
25 There's no way to -- there's no way you can causally relate

1 it. Medically, legally, there's no way to causally relate it.

2 Q So, you think it wasn't the fall at the Wynn; it was
3 maybe when she was getting laundry out of a dryer?

4 A I didn't say that. I said, could happen. There's
5 many ways that people can develop a meniscal tear, and it
6 doesn't even have to be traumatic. A person can turn to the
7 left with a planted foot, and their knee twists, and they
8 develop -- their meniscus tears. I see things medically, and
9 I know how things can go. And I'm just telling you, because I
10 do have expertise in medical causation. You cannot causally
11 -- medically causally relate this to a high degree of
12 certainty to what happened four years prior.

13 Q So, if I -- if I understand correctly, earlier, you
14 gave me the knee, and you just took it back?

15 A No. She may have injured her knee. I didn't say
16 she had -- you have notes in the medical record from a board
17 certified sports medicine orthopedic surgeon, Dr. Trainor,
18 that said this person has no localizable symptoms to her -- to
19 that right knee. He evaluated her knee. He said, her pain's
20 all over the place, there's no way that this is localized, and
21 I'm not going to treat it. He also said, I'm not going to do
22 surgery.

23 Q And Dr. Trainor never looked at an MRI of her knee,
24 did he?

25 A I don't know, because obviously, I didn't see it,

1 so.

2 Q Thank you.

3 A Okay.

4 MR. SEMENZA: Nothing further.

5 THE COURT: Thank you very much for your testimony,
6 Doctor. You're excused.

7 MR. SEMENZA: And --

8 THE COURT: Oh, wait, wait. I'm sorry.

9 MR. SEMENZA: Your Honor --

10 THE COURT: I'm sorry.

11 MR. SEMENZA: Your Honor, I -- may I approach?

12 THE COURT: Oh, yes. Just a minute. We've got a
13 jury question.

14 (Off-record bench conference)

15 THE COURT: Request from counsel for a restroom
16 break.

17 THE WITNESS: Oh.

18 THE COURT: So, you can write your questions out.
19 We'll take a five -- well, actually, we can just go off the
20 record and wait for Mr. Semenza to come back, unless anyone
21 else needs to.

22 THE WITNESS: How come the counsel doesn't get a,
23 everyone rise? No? No?

24 THE COURT: Just the jury.

25 THE WITNESS: Oh, no respect, huh? Not even the

1 doctor --

2 (Off the record at 5:51 P.M. until 5:54 P.M.)

3 (In the presence of the jury)

4 (Pause in the proceedings)

5 THE COURT: All right. Doctor, questions from the
6 jury. Okay. First, did Dr. Dunn in his medical record write
7 what options she had going for her?

8 THE WITNESS: He said she failed non-surgical
9 treatment. He ordered an MRI of the lumbar spine and cervical
10 spine with contrast. And then he immediately said after that,
11 "If she remains symptomatic, I may consider surgery and
12 injection." And then she followed up after the MRI, at which
13 time he reviewed it, and he said that, "She has degenerative
14 disc disease of the cervical spine with cervical
15 radiculopathy, and lumbar disc disease and sciatica, with
16 bilateral carpal tunnel syndrome history." He prescribed her
17 medication and he wanted to refer her for evaluation of her
18 knee to his colleague.

19 And then the third encounter, we do know the
20 identification of the medication is Lovaza, which is a long
21 acting narcotic medication. And so that was one option he
22 offered her is pain medication.

23 And then, the third encounter, he said, "I reviewed
24 the MRI, explanation of reinsurance was provided. I discussed
25 the treatment plan in detail. The patient's questions were

1 answered. I discussed all the treatment options, including
2 non-surgical and surgical intervention."

3 So, he said he had given her treatment options of
4 non-surgical and -- but that's not listed. He said, I've
5 recommended anterior cervical decompression at three levels,
6 with fusion and allograph. I've offered non-operative options
7 consisting of physical therapy, pain management injection,
8 epidural steroid injection. So, there's -- he offered her
9 those options of physical therapy and pain management
10 injection.

11 THE COURT: Okay. Next question. In your review of
12 the medical records, did any of the doctors mention that a
13 preexisting condition of loss of strength in her hands had
14 caused her to stop being a dental hygienist?

15 THE WITNESS: Yeah, I didn't see that in the medical
16 record.

17 THE COURT: Okay. All right. Okay. Is there any
18 difference physically or mentally if a doctor prescribes a
19 cane and the patient uses a walker instead?

20 THE WITNESS: No. You know, a lot of times, an
21 individual is going to try to -- if they have an unsteady gait
22 or an issue with pain, and they may feel like there's weakness
23 or pain that can make their gait unsteady or unstable, a lot
24 of times, if they're not confident with a walker, they'll go
25 out and buy, or ask for -- I'm sorry, if they're unsteady with

1 a cane, a lot of times, they'll ask for like a walker, or
2 something that can give them more stability that they could
3 hold on with both hands.

4 So -- and it also a lot of times has to do with
5 issues in the shoulder, because a lot of times, if a person
6 has like very severe shoulder pain in their dominant hand,
7 crutches or a cane in that hand is very ineffective, so they
8 need kind of more to use both hands. So, I think there's
9 multiple reasons why a patient asks for an assistive device,
10 and I'm not really sure in this case why it is that she chose
11 a walker. Maybe because she was having, you know, pain in her
12 upper extremities. I don't know.

13 THE COURT: All right.

14 MR. SEMENZA: I do have one follow up question to
15 that.

16 THE COURT: Okay.

17 REDIRECT EXAMINATION

18 BY MR. SEMENZA:

19 Q Dr. Klausner --

20 A Yes.

21 Q -- you had mentioned Lovaza?

22 A That was the medication that Dr. Dunn prescribed.

23 Q Is that fish oil, or is that a --

24 A Oh. Oh, Lovaza, right. Yeah, I was thinking of --
25 that's exactly right. Lovaza is fish oil. Thanks for

1 correcting me.

2 Q Okay.

3 A I stand corrected.

4 MR. SEMENZA: Thank you.

5 THE WITNESS: I was thinking of a different
6 medication. I'm sorry.

7 THE COURT: No further from you?

8 MS. MORRIS: I have no questions.

9 THE COURT: Okay. Thank you very much for your
10 testimony, Doctor.

11 THE WITNESS: All right.

12 THE COURT: You're excused.

13 THE WITNESS: Yes.

14 THE COURT: Counsel, approach on scheduling for
15 tomorrow.

16 THE WITNESS: Okay.

17 THE COURT: We're almost there.

18 (Off-record bench conference)

19 THE COURT: All right. Does the defense have any
20 further witnesses in the case?

21 MR. SEMENZA: No, Your Honor, the defense rests.

22 THE COURT: All right. Ladies and gentlemen, the
23 next step in the process is to instruct you on the law in this
24 case, and then the lawyers will do their closing arguments.
25 So, I have to meet with the lawyers to settle the

1 instructions. That's not done with the jury, because it can
2 be lengthy, and there's no role of the jury in that.

3 So, we're not going to have you come in tomorrow
4 until 1:00 o'clock. This will help counterbalance our having
5 run you ragged today. And so, relax, and you don't need to be
6 here until tomorrow at 1:00 o'clock, and I hope that we will
7 be ready for you at 1:00 o'clock.

8 Ladies and gentlemen, during this overnight recess,
9 it is your duty not to converse among yourselves or with
10 anyone else on any subject connected with the trial, or to
11 read, watch, or listen to any report of or commentary on the
12 trial by any person connected with the trial, or by any medium
13 of information, including, without limitation, newspaper,
14 television, radio, or internet, and you are not to form or
15 express an opinion on any subject connected with this case
16 until it's finally submitted to you.

17 I'll see you tomorrow at 1:00.

18 THE MARSHAL: All rise for the jury, please.

19 (Outside the presence of the jury)

20 THE COURT: All right. Have you met and conferred
21 -- now the jury has departed the courtroom, have you met and
22 conferred about the jury instructions yet?

23 MR. SEMENZA: No, Your Honor.

24 THE COURT: Okay.

25 MS. MORRIS: We have a list of everything that we

1 have issues with, then we're going to kind of work those
2 issues out. But we have gone through, and they have our full
3 packet, and what we'd like added and what we'd like modified,
4 but we do need to come to a consent on it.

5 THE COURT: Okay. So, what time do you want to come
6 and see me? I mean, you should have met and conferred so you
7 know what you're agreeing about and what you're not agreeing
8 about, and then -- so that I know.

9 MR. SEMENZA: So we're not wasting your time.

10 THE COURT: Yes, that would be nice.

11 MS. MORRIS: I mean, we --

12 MR. SEMENZA: How --

13 MS. MORRIS: We can meet in the morning, and then
14 meet with you after at maybe 10:30 or 11:00, if you think that
15 will be enough time.

16 MR. SEMENZA: I don't think that will be enough time
17 in order to modify the instructions and then get them
18 presented. Maybe 10:00 o'clock, 10:30.

19 THE COURT: All right. You know, be at my chambers
20 at 10:00 o'clock. And if you have -- bring with you -- so I'm
21 not spending my time sitting at my computer, looking up on
22 Westlaw the cases, so bring me copies of any cases you want to
23 cite so I can look at them then, okay?

24 MR. SEMENZA: And Your Honor, I am going to -- just
25 so you know, I will renew my Rule 50 Motion. And so, to give

1 me enough time, and the Court enough time to address that
2 issue.

3 THE COURT: Okay. Well, remember, the rule got
4 changed, so you get to renew your motion. If for any reason
5 the Court does not grant a motion at the close of all the
6 evidence, the Court is considered to have submitted the action
7 to the jury, subject to the Court's later deciding the legal
8 questions.

9 MR. SEMENZA: Right.

10 THE COURT: So, you've -- you chose to make the
11 motion at the close of the plaintiff's case, so basically, at
12 this point, I would let it go to the jury.

13 MR. SEMENZA: Understood, Your Honor.

14 THE COURT: And you would have the ability to renew
15 that motion ten days after service of the written Notice of
16 Entry of Judgment.

17 MR. SEMENZA: Understood.

18 THE COURT: Okay? All right.

19 MR. SEMENZA: Thank you.

20 THE COURT: You're welcome.

21 MR. SEMENZA: We'll see you tomorrow at 10:00.

22 THE COURT: All right.

23 (Court recessed at 6:07 p.m. until Friday,

24 November 13, 2015, at 1:44 p.m.)

25 * * * * *

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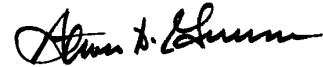
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DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

YVONNE O'CONNELL,	.	CASE NO. A-12-655992-C
	.	
Plaintiff,	.	DEPT. V
	.	
vs.	.	
	.	
WYNN RESORTS LIMITED, et al.,	.	TRANSCRIPT OF
	.	PROCEEDINGS
	.	
Defendants.	.	
.	

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

JURY TRIAL - DAY 6

FRIDAY, NOVEMBER 13, 2015

APPEARANCES:

FOR THE PLAINTIFF:	CHRISTIAN MORRIS, ESQ.
	EDWARD J. WYNDER, ESQ.
FOR THE DEFENDANTS:	LAWRENCE J. SEMENZA, III., ESQ.
	CHRISTOPHER D. KIRCHER, ESQ.

COURT RECORDER:

LARA CORCORAN
District Court

TRANSCRIPTION BY:

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1 LAS VEGAS, NEVADA, FRIDAY, NOVEMBER 13, 2015, 1:44 P.M.

2 (Outside the presence of the jury)

3 THE COURT: Okay. And this is case number
4 A-12-655922, a continuation of Yvonne O'Connell vs. Wynn Las
5 Vegas, LLC. And the record will reflect we are outside the
6 presence of the jury, the parties are present with their
7 respective counsel, and all officers of the court are present.

8 And are counsel familiar with the Court's jury
9 instructions numbered 1 through 43?

10 MS. MORRIS: Yes.

11 MR. SEMENZA: Yes, Your Honor.

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

14 MS. MORRIS: No, Your Honor.

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

17 MS. MORRIS: No, Your Honor.

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

20 MR. KIRCHER: Yes, Your Honor.

21 THE COURT: Okay.

22 MR. KIRCHER: As it relates to jury instruction
23 number 27, the defense is going to object to the last
24 paragraph of the jury instruction. We believe that the
25 totality of the circumstances apply in this type of case, and

1 there's a number of factors that should be considered, not
2 just the inspection of the property, to determine constructive
3 notice and other surrounding circumstances. So, just on that
4 basis, we will object to that jury instruction.

5 THE COURT: Okay.

6 MR. KIRCHER: And then, going to jury instruction
7 number 37, which relates to the aggravation of a preexisting
8 condition, we believe that there's not sufficient evidence and
9 testimony, especially expert testimony, to prove an
10 aggravation of a preexisting condition. And I think we
11 mentioned the Menditto case previously, so we'd object on that
12 basis.

13 And finally -- let's see, we would object to jury --
14 let's see -- instruction number 32. The defense believes that
15 this jury instruction is confusing to the jury, and it's
16 irrelevant to this case because it applies to other cases,
17 such as motor vehicle accidents, and it will confuse the
18 standard as it relates to premises liability cases. So, the
19 defense would object to that one as well, for the record.

20 THE COURT: Okay. And so, would the plaintiff like
21 to address jury instruction number 27 as far as the last
22 paragraph they're objecting to? Why do you want that given?

23 MS. MORRIS: Yes, Your Honor. The last paragraph of
24 jury instruction number 27 simply helps the jury understand
25 the definition of what constructive notice is. Due to the

1 fact actual notice is quite explanatory, we have to provide
2 them with a definition as to what does constructive notice
3 mean and this -- this paragraph here allows them to understand
4 the definition of constructive notice.

5 So, when the -- it gives them factors to determine,
6 that has been based essentially on the evidence that has been
7 presented here, and is incredibly appropriate for a slip and
8 fall case, especially in Nevada, and I think it accurately
9 reflects the Nevada law.

10 THE COURT: So, the reason the Court is doing this
11 is, or giving this instruction, including that last paragraph,
12 is because the rest of the instruction describes the state of
13 premises liability law concerning a foreign substance on the
14 floor. And the most difficult part of that, part of the law,
15 is the constructive notice part. We need to define for the
16 jury what is constructive notice. And the last two paragraphs
17 are an attempt to, in fact, define for the jury what
18 constructive notice means, and this is only by way of example.

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

1 And so, this only goes to what is constructive notice; what
2 types of things may a jury consider.

3 And I think that there is Nevada case law that talks
4 about the inspection of the premises. The Westward Ho case
5 that we discussed in chambers where there was a slide at the
6 hotel. It was -- the railings on the slide were loose, and
7 there was a discussion about constructive notice and whether
8 or not the defendant hotel should have, through reasonable
9 inspection, discovered that, went to the issue of constructive
10 notice. And so, that's why I'm giving that.

11 MR. SEMENZA: And Your Honor, just briefly on the
12 same subject. With regard to the definition of constructive
13 notice, obviously, the Sprague case addresses that particular
14 issue. And I'm simply noting this for the record. I don't
15 need to argue it any further than we've had our discussions
16 about it.

17 But there is an unpublished case. It is Ford vs. S.
18 Hills Med. Ctr., which is an unpublished, from the Nevada
19 Supreme Court, which seems to suggest that the constructive
20 notice standard is that one would have to establish that the
21 hazard was virtually -- a virtually continuous condition and
22 created an ongoing continuous hazard.

23 And so, generally speaking, we'd object to the
24 inclusion of the constructive notice instruction based upon
25 our reading of Sprague and this unpublished opinion which

1 we've discussed.

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

4 MR. SEMENZA: Correct.

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

12 MR. SEMENZA: An ongoing continuous hazard.

13 THE COURT: Right.

14 MR. SEMENZA: Or a virtually continuous condition.

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

25 //

1 So, if you had a landowner who left -- basically,
2 did not attend their floors at all, never did any inspection,
3 and then there was debris all over the floor, but yet there
4 was no proof of a continuous condition, that that might not
5 amount to constructive notice. And so, that was my concern
6 about that.

7 And so, initially, I looked at that case for
8 guidance, but then thought it wasn't necessarily helpful as a
9 be-all and end-all for the definition of constructive notice.
10 So, I suppose this will be the opportunity, if -- perhaps, for
11 the Court to clarify.

12 MR. SEMENZA: Yes, Your Honor. And obviously, our
13 position is, is does -- it does define the standard for
14 constructive notice in this particular state, so.

15 THE COURT: Okay. I think --

16 MR. SEMENZA: I've noted it for the record.

17 THE COURT: Okay, great. I think we've made a good
18 record on that.

19 All right, and number -- let's see. The next one
20 was number 32. The defense is objecting, is that -- as well.
21 That's the person who's exercising reasonable care has a right
22 to assume that every other person will perform his duty under
23 the law. In the absence of reasonable cause for thinking
24 otherwise is not negligence for such person to fail to
25 anticipate injury which can come to her only from a breach of

1 duty by another.

2 And I believe I had stated in chambers the reason I
3 was agreeing to give that was only because the -- well, in
4 part, because the defense is arguing comparative fault, and
5 also arguing that the substance was placed on the floor not by
6 them; not by the Wynn, but by somebody else. In other words,
7 that there is a lack of proof that the Wynn placed any foreign
8 substance on the floor, and so that brings that whole issue.

9 The plaintiff had indicated that they were seeking
10 this instruction because the -- their argument is that the
11 Wynn has breached the duty of reasonable care, and so they
12 felt that that instruction was required.

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

22 And in this case, plaintiff has a right to walk down
23 the aisleway believing that the Wynn is exercising their duty
24 to exercise reasonable care to keep their premises safe so
25 that she shouldn't have to watch every step she was taking,

1 and that's basically the basis for having this in. Is that
2 correct?

3 MS. MORRIS: That's correct.

4 THE COURT: Oh.

5 MS. MORRIS: I don't have anything in addition.

6 THE COURT: Okay. And, let's see. Lastly was
7 number 37. And this was the preexisting condition
8 instruction. "A person who has a condition at the time is not
9 entitled to recover damages, therefore, however, is entitled
10 to recover damages for any aggravation."

11 And the argument by defense is, there's no proof of
12 aggravation. But I think that the jury could reasonably infer
13 from the expert testimony of Dr. Dunn concerning the neck that
14 -- because he testified that she -- yes, she had a preexisting
15 condition. That he testified at length about the difference
16 between younger and older persons, and although he believed
17 and testified that every person as they get older will have
18 degenerative disc disease in their spine, that this makes an
19 older person more susceptible, basically, or have a more
20 difficult time recovering, and so that's what this instruction
21 goes to.

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

1 giving that. Okay.

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

4 THE MARSHAL: All rise for the jury, please.

5 (In the presence of the jury)

6 THE MARSHAL: Jury's all present, Your Honor.

7 THE COURT: Thank you. Please be seated. And the
8 record will reflect that we are back within the presence of
9 all eight members of the jury, as well as the alternate.

10 Once again, ladies and gentlemen, I apologize for
11 keeping you waiting. I feel like I'm constantly apologizing
12 to you. We have been working diligently. I've been working
13 on the jury instructions since 8:00 this morning, and I've
14 been with counsel since 10:00, and we've just only literally
15 30 seconds ago, finished so that we could bring you in.

16 So, we are at the part of the case where I'm going
17 to instruct you on the law. These jury instructions have been
18 carefully prepared, and they're in writing, and that's the
19 reason I'm going to read them to you. Do not worry about
20 taking notes, because you'll have these instructions with you
21 in the jury deliberation room so you can consult them. And
22 so, all you need to do at this point is listen.

23 (Jury Instructions read by Court)

24 THE COURT: And it is plaintiff's first closing
25 argument.

1 (Pause in the proceedings)

2 PLAINTIFF'S CLOSING ARGUMENT

3 MS. MORRIS: We started off in this case being told
4 that Yvonne O'Connell allegedly fell at the Wynn. It's been
5 over five years since she fell. The Wynn argues that she
6 allegedly fell. They also say that she had a comped lunch
7 before she allegedly fell. Maybe that's enough.

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

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

22 This case is about control. There are two kinds of
23 evidence, you've been told. There's direct evidence and
24 there's circumstantial evidence. And in this case, direct
25 evidence, which would be the videotape of the fall, pictures

1 of the substance on the floor, the time that it was last
2 inspected before she fell, pictures of the area before she
3 fell, her wandering the casino after and the condition that
4 she was in, direct evidence. It's not in Yvonne's control,
5 it's in Wynn's control. And when they controlled the
6 evidence, anything like that we didn't see. None of it.

7 We heard from Trish, the -- well, we heard from two.
8 We heard from the horticulture lady. She wasn't in the area
9 that day, she didn't respond to the scene, she never talked to
10 the person who was assigned there, but she took the stand and
11 told us, this is what the reports are. These reports -- they
12 can access water reports, detailed ones that show which gallon
13 went where five years and eight months later. They can bring
14 those because it's helpful.

15 Then we heard from the claims lady. She wasn't
16 there. She didn't go to the scene. She talked to someone who
17 we don't know in the horticulture department that said
18 something that, no, it isn't, and they noted it in the file
19 somewhere. None of the evidence -- none of the direct
20 evidence was provided, because they can control it.

21 Helpful information. Well, Yvonne's red card
22 history; they could pull that and bring that. And in order to
23 find her in the casino, they'd need a picture of her, and
24 there's a picture right there on her red card. They -- Corey
25 testified they can go back, and track and find people. And

1 even the claims lady said, someone comes in, they said they
2 were in this area of the casino, we can go back and, you know,
3 locate them. That's why we take pictures of them.

4 Yvonne has her testimony, that's it. And they made
5 sure of it. She is telling you what she remembers; a large
6 green substance with three feet of it dried. Luckily, at
7 least the instant report tells us that Corey Prowell took the
8 statement from Yanet Elias, and Yanet Elias wrote down she saw
9 a spill and it got covered by a sweeper machine, and told us
10 it was sticky.

11 Circumstantial, that's all we have. But do the
12 pieces fall together? Because the argument is, is that Yvonne
13 O'Connell allegedly fell. But then what do they do? Why are
14 we here? A landowner has a duty to take reasonable care. And
15 Wynn says, come into our atrium area, look at the beautiful
16 designs, look at the flowers. Don't look at the floor, we've
17 got that taken care of.

18 And the law says that Yvonne doesn't have to stare
19 at the floor while she walks. There's a jury instruction
20 right on it. And she has a right to assume that Wynn is doing
21 their duty. She has a right to assume that they are doing
22 their duty and keeping it reasonably safe for her.

23 And so, when she went into the Wynn, and she slipped
24 and fell and landed on that marble with her degenerative
25 spine, they say she allegedly fell, but then they hire a

1 doctor who says, well, she did fall, and I think she has back
2 and butt pain.

3 Now, this doctor came in, and he took the oath, and
4 he took the stand, and he told you, to a high degree of
5 medical certainty, the only thing she injured was her lower
6 back and her butt, and I looked through everything very
7 carefully. But you saw. This man who is telling you how this
8 has affected her life, who's never met her, never touched her,
9 never treated her, came in and said, to a high degree of
10 medical certainty, this is what's wrong with her. I had to
11 point out to him, sir, you actually simply didn't look at the
12 first page of that first visit to see another injury, nor did
13 you look at the one seven days later. He never even saw it.

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

21 I mean, this is a man who literally sat up there and
22 said he wishes her the best, even though he's never met her
23 and he's called her a liar for money, because we're in a civil
24 justice system, and it says you have to ask for money. What
25 else can we ask for? You're not allowed to ask for all of

1 this to have never happened; for people to do certain things.
2 You are asked for money, that's it. You're cornered.

3 And so, you have to look at who the convenient
4 person is in this. Isn't it convenient that anything that
5 would have helped Yvonne show you exactly what had happened,
6 was kept? Isn't it convenient that they hire a man who has no
7 information about her, who is given certain records that they
8 choose to give her (sic), to be told, well, she only wants
9 money, and then I stand up and ask you for it because the
10 civil justice system says it's the only thing I can ask for.

11 So, it's tough, because Yvonne has been exposed.
12 She has been stared at, she has been judged, and she has been
13 called a liar, because she went into the Wynn and she assumed
14 that they were doing their duty, and so she was walking in
15 their atrium and she fell there. And now it doesn't matter,
16 right? Because what happened to her, well, it's just another
17 claim. But for her, it isn't.

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

1 she doesn't handle well, and it is affecting her emotionally.

2 Now, there's one very important fact. On February
3 8th in the morning, before she went to Wynn, she was not the
4 person she is now. And Mr. Semenza is an excellent attorney.
5 If there were prior medical records, any indication that she
6 was going to doctors, writing things down, had all these
7 problems, they would have been right up on the screen in black
8 and white.

9 Yvonne was not the person that she is today. It had
10 been 20 years since she had gone for anything besides a cold,
11 a infection, a lump biopsy. She wasn't who she is.

12 Now, in order to get medical pain and suffering, you
13 can't just rely on her saying, well, I'm hurt, right? You
14 have to hear from an expert witness. Now, we heard from Dr.
15 Dunn, and we heard from Dr. Tingey. Now, these are expert
16 witnesses who have no motivation to just want to help her with
17 her case. They're her treating physicians. They literally
18 have an opinion based on their analysis of her. They came
19 here and told you, this is what we believe in our expert
20 opinion as to what happened to her.

21 Justice isn't trying to get all of her medical bills
22 paid for everything that she's put down and treated for.
23 We're not asking for that. But the law says that when someone
24 has been damaged by another person's negligence, then that
25 negligence needs to be answered for, and it's with pain, and

1 suffering, and mental anguish.

2 And Yvonne has told you she's overwhelmed. She is
3 exhausted. She has pain, and she has mental stress and
4 anxiety that she did not have before. She was a 58-year-old
5 with a degenerative spine that went down on a marble provider
6 -- divider, and they want you to think, maybe it was just soft
7 tissue; no, nothing's wrong with her.

8 The doctor you heard from that was paid by Wynn
9 feeds into what they're saying. Well, we have all these
10 claims and people are just sucking off the system. And he
11 accused doctors of diagnosing for money, but he was paid to
12 look at her records and come to a decision. The man diagnosed
13 her with a syndrome, and that syndrome feeds into -- it's very
14 convenient -- feeds into exactly what the theory is, right?

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

21 Now, in order for there to be a verdict, we have the
22 burden. We have the burden as the plaintiff, and it's a
23 preponderance of the evidence. It is, I am a little bit more
24 right than I am wrong. Is it more likely than not what
25 happened? Is it more likely than not that if Wynn had been

1 doing their due diligence, their core value of guest
2 satisfaction and services, the five-star luxury property; if
3 they had been reasonably careful in doing that, would that
4 liquid have been on the floor long enough that a portion of
5 the liquid had dried and become sticky?

6 They say that they are constantly going through
7 there, constantly, in a high traffic area. Now, if they had
8 been acting reasonably, would it have been on the floor for
9 that period of time? That's the question. Well, it would
10 have been greatly answered by the time that that floor was
11 last inspected. Information that Yanet Elias didn't know.
12 So, it is your job as the jury to infer, if Wynn had been
13 acting with reasonable care, would this have occurred?

14 Now, we also have to show, because it's our burden,
15 is it more likely than not that Yvonne was injured as a result
16 of the fall? Now, they have their doctor's testimony, who
17 says, whatever she had, within 48 hours. And then, if you
18 remember yesterday, he gave me the knee, and then he took it
19 back, right?

20 I mean, he didn't want to -- he has his job to do,
21 and it's very specific what he wants, right? That there's no
22 way that a 58-year-old woman with a degenerative spine, took a
23 crash on marble, and now needs a three-level cervical fusion
24 and has a meniscus tear. There's no way. That's their
25 theory, right?

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

6 Now, here's the catch. After we've gone through all
7 that, and she allegedly fell, defense counsel's going to get
8 up and tell you that if she did fall, it's her fault. That's
9 the next step in the process. That she should have been
10 keeping a better lookout. That she should have seen what they
11 didn't see. That she should have been looking at the floor,
12 seen it, and avoided it, right? In an atrium area where
13 everything is beautiful trees and flowers eye-level that they
14 want you to look around at. That's why they've invited you
15 there. They come there and say take a look at it.

16 And so, they're going to argue that she was at fault
17 for this, that it wasn't their fault. And that is actually
18 their burden. So, because they want to argue that it's her
19 fault, they also have a burden, and it's to say, more likely
20 than not, was it her fault that this occurred?

21 Now, there are some jury instructions that are very
22 important. I'd like to go over them. This is jury
23 instruction 27. And jury instruction 27 says, in pertinent
24 part, "You may consider whether the defendant inspected the
25 premises on a reasonable basis or in a reasonable way in

1 determining whether the defendant knew or should have known of
2 the unsafe condition. You may consider the length of time the
3 condition may have existed in determining whether the
4 defendant should have known of the condition had the defendant
5 used reasonable care."

6 The issue is, were they being reasonably careful?
7 Because they have a duty as a landowner to make sure that
8 anyone who enters their property isn't exposed in any
9 unreasonable way to dangers on their property. And so, in the
10 marble walkway, which is a high traffic area, where they have
11 a bar at the end that serves beverages, and they have admitted
12 they have constantly people roving through, if they were
13 acting reasonably, as they say they would, would that
14 substance have been on the floor?

15 This one. "The testimony of one witness worthy of
16 belief is sufficient for the proof of any fact." You heard
17 the deposition testimony -- or the trial testimony, sorry, of
18 Dr. Dunn and Dr. Tingey. And as much as Victor Klausner -- or
19 Dr. Klausner tried to say that they were wrong, he is not a
20 board certified orthopedic surgeon, and he has never treated
21 Yvonne.

22 And Dr. Dunn and Dr. Tingey, who have been
23 practicing in Las Vegas for many years and who actually
24 treated her are witnesses worthy of belief; not Dr. Klausner
25 who says he's down at the medical board a couple times a year

1 and he's got patients that are mad at him left and right. And
2 I think he said that someone over 60 shouldn't get a meniscus
3 tear repair. They shouldn't do that because it's bad for
4 them; they should just continue on.

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

9 Now, when you consider the evidence and you consider
10 the witnesses, sometimes there are inconsistencies. So, when
11 Yanet Elias took the stand and told us, well, I don't really
12 remember anymore, but then Corey Prowell said, well, she told
13 me exactly what it was, you have to look at those
14 consistencies and say, which one is more likely; the statement
15 that was made on the day it happened, or the statement that
16 she made on the stand five years and eight months later, which
17 contradicts exactly what happened back then?

18 Now, you're going to get two verdict forms, and
19 these are going to go back with you. And the verdict form is
20 one where you decide whether there is a verdict for Yvonne
21 O'Connell, or a verdict for defendant Wynn. And the verdict
22 form for Yvonne O'Connell also has an option of finding her
23 comparatively negligent.

24 Now, if you find Yvonne to be a percentage
25 comparatively negligent, that means that whatever verdict you

1 have found for her is reduced in accordance with that
2 percentage. So, whatever percentage she has, that is less
3 than the verdict. So, for example, if it was \$10, you found
4 her 40 percent negligent, it would be 60 -- it would be \$6
5 left. However, if you find that Yvonne is more than 50
6 percent negligent, 51, then there is no verdict for her; it
7 takes it away from her.

8 Now, when you go back and you decide, and you come
9 to a decision, your verdict might be for Wynn, and it might be
10 the right verdict. But if your reason is because you think
11 there's too many claims, you think there's too many frivolous
12 lawsuits, why should the Wynn have to deal with this, that
13 wouldn't be the right reason. The only reason you could come
14 to a verdict for Wynn, or should, is if they did nothing
15 wrong.

16 Now, also, your verdict might be for Yvonne, and if
17 your verdict is for Yvonne, it might be the right verdict.
18 But if your reason is because you feel bad for her, or she has
19 been damaged, and she has changed as a person, that's still
20 not the right reason. The only reason you could come to a
21 verdict for Wynn -- for Yvonne is if you think Wynn did
22 something wrong. That's the focus.

23 Now, like I said before, this is not a verdict for
24 her medical expenses. She has medical expenses. Clearly,
25 there's a lot of things in her medical records that are not

1 related to this fall; certainly didn't cause things that she's
2 never been diagnosed with. Yvonne writes everything down, as
3 you've seen. Her fingers bent when she was working as a
4 dental hygienist, they told her it might be a connective
5 tissue disorder, she wrote that down. She's having trouble
6 with her divorce, she's feeling anxious, she writes down
7 anxiety. She gets told all these things and writes them all
8 down. But you never know what her actual injuries are until
9 you hear it from a doctor. And so, in this case, we heard
10 from Dr. Dunn and Dr. Tingey.

11 And then there's the element of mental anguish. And
12 I think the mental anguish came out from Yvonne. You heard
13 from Sal. He said that she's a very private person. This
14 process -- this injury has taken a toll on her, and she
15 suffers every day. And unlike what Dr. Klausner wanted us to
16 believe, that she's a pill popper, and that she has all these
17 other reasons, there's none of that. There's no prescriptions
18 in her medical records.

19 I mean, I think the most telling thing was when he
20 tried to call Lovara (sic) a long-lasting narcotic when it's
21 just a fish oil. I mean, anything he can do to bolster his
22 opinion.

23 So when you go back and you have this verdict form
24 -- this is the verdict form for Yvonne -- I ask that you
25 assess her past pain and suffering, this -- what she's gone

1 through since this fall happened, up until today, at 150,000.
2 And then there's future pain and suffering, and that's the
3 suffering that she will continue to have as a result, and at
4 that, I ask a verdict of 250,000 for her past and her future.

5 Is it more likely than not that Yvonne O'Connell was
6 injured and has changed since her fall at the Wynn? That's
7 the standard. Am I a little bit more right than I am wrong?
8 If she was like this the morning of, there would be medical
9 evidence of it, as there has been multitudes of it after, and
10 the one defining factor is that fall on the marble divider at
11 the Wynn because of their negligence.

12 Now, defense counsel is going to get up and he's
13 going to talk to you, and then I have one more opportunity to
14 speak to you. Thank you.

15 THE COURT: Thank you. Defense?

16 MR. SEMENZA: Thank you, Your Honor. Let me make
17 sure my mic is on.

18 MS. MORRIS: Let me turn mine off.

19 DEFENSE'S CLOSING ARGUMENT

20 MR. SEMENZA: Good afternoon. I want to talk to you
21 all for a moment about the specific events on February 8th of
22 2010. What does the evidence in this case show that took
23 place on that particular day? What we know is that Yvonne
24 went to the Wynn to have lunch with two of her cousins. She
25 ate at the buffet.

1 That afternoon, they finished their lunch and her
2 cousins departed. She was going to go take a walk. So she
3 went back to her car, she got her coat and she walked back
4 into the Wynn with the intention of walking through it to go
5 out to Las Vegas Boulevard.

6 She was going to walk a couple miles that particular
7 day. She wasn't paying particular attention to where she was
8 going. She was in the atrium area looking at the flowers, and
9 the plants, and the trees, and the decorations for Chinese New
10 Year, and she slipped and she fell. And Wynn concedes that
11 she slipped and fell. That's not at issue in this case.

12 After Ms. O'Connell fell, she was helped up by a
13 number of individuals. We don't know who those people are.
14 Presumably, patrons at Wynn. And so, at that point in time, a
15 porter, who was working with a sweeper, noticed a commotion
16 and walked on over to her. She needed assistance, and that
17 porter called his supervisor, Ms. Elias.

18 Ms. Elias arrived on the scene and interacted with
19 Ms. O'Connell, and made a determination that security needed
20 to come and assist. In response, Officer Corey Prowell
21 arrived on scene, he assessed Ms. O'Connell's condition, and
22 asked her specifically if she wanted any medical attention,
23 and she declined. That was this document. And although she
24 didn't sign it, Security Officer Prowell did indicate on the
25 document that it was declined by guest. You'll have this

1 document during your deliberations.

2 Officer Prowell, after assessing her condition,
3 started working with her to complete a Guest Accident/Illness
4 Report, and he filled that out for her and she signed it. And
5 again, this is another document that you will have during your
6 deliberations.

7 This is the Guest Accident/Illness Report, and as
8 we've seen numerous times during this trial, Ms. O'Connell
9 identifies only that she hurt her right shoulder, her
10 buttocks, and her right ankle. After Officer Prowell
11 completed these documents, he proceeded to take photographs of
12 the area where Ms. O'Connell fell, and he also took
13 photographs of her shoes, which she consented to.

14 Now, Officer Prowell testified that when he arrived
15 on scene, this sticky green substance that was on the floor at
16 the Wynn had already been cleaned up. He didn't have an
17 opportunity to take photographs of that particular area
18 because it had already been cleaned, and the reason being is
19 that they didn't want to leave a hazardous condition so other
20 people might get hurt.

21 In addition, Officer Prowell gave Ms. O'Connell a
22 guest claims card and said, if you need any assistance, please
23 go ahead and call that number. At that point in time, Ms.
24 O'Connell departed from the scene, and she testified that she
25 walked into the restroom and stayed in the restroom for

1 approximately a half-an-hour, that she didn't know what to do,
2 she was hurting.

3 She didn't make any phone calls though. She didn't
4 call her cousins who had just left her at the buffet. She
5 didn't call people that she knew for assistance. She didn't
6 call anyone. She didn't call Sal. She didn't try and reach
7 Sal while he was on his cruise.

8 After Ms. O'Connell left the bathroom, it's not
9 disputed she gambled. She sat at one of the Wynn slot
10 machines and gambled for approximately an hour. She may have
11 gambled longer, but maybe she didn't use her red card, so Wynn
12 wouldn't have a record of it.

13 In one of the reports or screen shots we saw, she
14 gambled for 48 minutes at one machine and played 525 games.
15 In the second session, she sat there for only three or four
16 minutes and played much fewer, but she played her free credit
17 that she had through her red card.

18 The testimony in this case showed that during that
19 gambling activity at Wynn, Ms. O'Connell bet over \$1,000. She
20 ended up winning a little bit of money, at least on one
21 session. After she was done gambling, she proceeded to her
22 vehicle, where she felt well enough to drive home or drive
23 somewhere else. She got in her car, and instead of going
24 home, if she was feeling bad, she went to the Rampart Casino.
25 She stayed at the Rampart Casino for hours gambling, finally

1 going home sometime that evening.

2 Now, did she go to the doctor the following day?

3 The answer to that was, no. Instead, she waited until
4 February 10th, two days later, to go to a Quick Care facility
5 by her home. From the point in time that she went to that
6 Quick Care facility, to essentially the present, we have this
7 immense medical history where she has seen numerous doctors
8 for a whole bunch of different conditions.

9 In one particular instance, and this I believe in
10 March of 2010, Ms. O'Connell complained of weakness, fainting,
11 chills, trouble sleeping, blurred vision, a lump on the back
12 of her neck, dizziness, headaches, chest pain, cough,
13 shortness of breath, nausea, change in appetite, constipation,
14 heartburn, abdominal pain, neck pain, frequent urination,
15 sexual dysfunction, depression, anxiety, and it goes on, and
16 on, and on, and that's consistent throughout her medical
17 treatment from February of 2010, to sometime in 2014.

18 We also looked at documents where Ms. O'Connell was
19 assessing her own pain levels. Consistently, throughout the
20 documents we looked at, Ms. O'Connell identified her pain
21 levels as ten of ten, the most immense pain imaginable, yet
22 she was driving to these doctors appointments unaccompanied.

23 Some of the other important documents that we looked
24 at -- and I'm putting on the screen, I believe, admitted
25 Exhibit E, which is -- and just the second page of E. E2.

1 Ms. O'Connell identifies at the top of the page she
2 experienced all of these symptoms after February 8th of 2010.

3 We walk through this. Headaches, blurred vision,
4 hay fever, difficulty swallowing, chest pain, pain in the
5 arms, chronic or frequent cough, shortness of breath when she
6 lies down, palpitations, stomach pain, nausea or vomiting,
7 waking during the night to urinate, joint pain, back pain,
8 muscle spasms, loss and change in sensation in hands,
9 loss/change of sensation in feet, trembling in the legs.
10 These were Ms. O'Connell's complaints after the fall. And
11 keep in mind what Ms. O'Connell reported to Officer Prowell,
12 that she hurt her right shoulder, her buttocks, and her right
13 ankle. That's it.

14 And I'm referring to G1, which I believe has been
15 admitted. Let's start with the date. Again, this document is
16 signed by Ms. O'Connell, dated February 21 of 2012, two years
17 after her fall. Again, if you'll note the pain level.
18 Unbearable pain. How much pain has interfered with your
19 normal work? Extremely. She identifies the common checkmarks
20 we've seen on some of her medical records as well.

21 In this document, she also identifies a fall that
22 she had subsequent to the February 8th, 2010 fall. Again,
23 these are her medical records.

24 And I'm referring to I2, which has been admitted
25 into evidence. Yet another document. This is dated September

1 3rd of 2010. We see the common checkmarks. We see her pain
2 level today at ten, and the daily average also at ten. Ms.
3 O'Connell describes her pain as aching, stabbing, tender,
4 nagging, throbbing, gnawing, burning, numb, shooting, sharp,
5 exhausting, and unbearable. In this document, she also makes
6 it clear under number 10 that she fell on July 14th of 2010,
7 injuring her right knee and left knee.

8 And again, I'm not going to go through all of these,
9 but I think they're important.

10 And I'm referring to page P3, which has been
11 admitted into evidence. If you recall, I asked Ms. O'Connell
12 about this chart. And in this particular instance, Ms.
13 O'Connell had issues all over her body, with the exception of
14 the top of her head and her face.

15 And I'm now referring to R3, which has been admitted
16 into evidence. This is yet another medical record. And in
17 this particular document, Ms. O'Connell identifies, back was
18 badly injured in 1989. She testified to a back injury back in
19 1989. All of these documents, all of these medical records
20 that we look at -- that we have looked at show a pattern.

21 In addition to the medical records that show pain
22 levels, the claimed pain she's been experiencing, Ms.
23 O'Connell also identified a whole host of preexisting
24 conditions. Those conditions included fibromyalgia, the
25 severe back injury we just looked at, history of anxiety and

1 depression, Ehlers-Danlos and Marfan Syndrome, and of course
2 the other fall she had back on July 14th of 2010, all of which
3 may explain some or all of her symptomology here that she's
4 claiming.

5 And it doesn't stop there. Ms. O'Connell has also
6 claimed that she damaged her heart valves as a result of her
7 fall. The cardiologists have disagreed with that assertion,
8 saying that basically her heart is healthy and fine. She
9 claimed at one point that her retinas were detaching, that she
10 was having eye problems, and she attributed those eye problems
11 to having undergone MRIs which, I believe, Dr. Klausner
12 addressed and concluded that that couldn't happen.

13 Ms. O'Connell doesn't take any pain medication and
14 claims that she's drug-intolerant, but she hasn't gone to go
15 see a doctor to see if there are other types of pain
16 medication that she can take that aren't going to interfere
17 with her GI or her stomach. Additionally, her
18 gastroenterologists that have seen her have asked her and
19 recommended to her, go get a colonoscopy. But she's so
20 deathly afraid to do that because she believes that they might
21 in fact perforate her bowel. She has not done that.

22 All of these things that we've talked about are
23 important to evaluate Ms. O'Connell's credibility in this
24 particular case, and whether the claimed damages, the pain and
25 suffering that she's asserted, are in any way related to the

1 fall at the Wynn on February 8th of 2010.

2 Now, I want to switch gears a little bit. I want to
3 talk to you about the witnesses in this particular case. You
4 first heard from Ms. Elias, and she's in the PAD department.
5 When she arrived on scene, she identified during her testimony
6 that the substance she saw was sticky, like candy, or syrup,
7 or honey, or something to that effect.

8 Ms. Elias also, I believe, discussed how the atrium
9 area is cleaned, that there's a number of people assigned to
10 the particular area to clean, sometimes two, sometimes one,
11 depending. But they roam around and follow a loose route, and
12 make sure that the Wynn and the atrium area is picked up and
13 clean, and free of hazards.

14 And this is Joint Stipulated Exhibit 6. Ms. Elias
15 also provided a report relating to the incident that took
16 place. And I'm looking here. She spoke to the porter that
17 was assigned to that particular area on that day, and Ms.
18 Elias received a report from her that she had left the area in
19 good condition. At the time the porter left the particular
20 area, there was no problem.

21 There is no evidence that has been presented in this
22 particular case; in part, based upon Ms. Elias's testimony
23 that Wynn should have known that this particular sticky green
24 substance was on the ground just prior to Ms. O'Connell's
25 fall.

1 In addition to Ms. Elias, you also heard from
2 Officer Prowell. Again, he testified that she injured her
3 right shoulder, buttocks, and right ankle. He testified that
4 the spill had been cleaned up before he got there. And he
5 testified that the report that he had created and completed,
6 there was a search conducted by the security control center as
7 to whether there was any video surveillance camera footage of
8 her fall on that particular day, and there wasn't.

9 You heard from Ms. Matthieu in guest claims, and she
10 spoke to the issue of, once a report is completed by security,
11 then the file, if you will, the report is transferred over to
12 claims. And claims' policy is to double-check with the
13 security control center to make sure that there either was or
14 wasn't video footage of the particular incident.

15 She testified that caring for an injured guest is
16 the first priority, and that taking care of the scene is the
17 second priority, and documenting the scene and documenting
18 what happened is further on down that list, and that caring
19 for the people that come to the Wynn is the most important
20 thing that they can do. She confirmed that Wynn employees are
21 vigilant in what they do in making sure that the areas at the
22 Wynn, in the atrium, and in other areas are clean and
23 maintained. And lastly, Ms. Matthieu also testified as to Ms.
24 O'Connell's gambling on that particular day.

25 //

1 You heard from Araceli Macias, the horticulturist,
2 who identified the watering times on February 8th of 2010, and
3 she testified that there wasn't any irrigation after 11:39, I
4 believe, or 11:37 on that particular day. So, this assertion
5 somehow that this substance had come from the plants is just
6 speculation. It's made up.

7 Ms. Macias also identified that when there is hand-
8 watering that is conducted at the Wynn, it's done in the
9 morning time because there's less traffic during that period
10 of time. There were no reports of leaks in the area on that
11 day, so this green liquid substance that Ms. O'Connell says
12 came from the planters, didn't come from the planters.

13 Most importantly, Ms. Macias testified that they
14 don't water with fertilizer; that it's just traditional simple
15 water and that's it. They don't paint the leaves, they don't
16 paint the foliage, and we simply don't know what that
17 substance was that was on the ground on February 8th, 2010.

18 You heard from Dr. Dunn. Dr. Dunn had seen her a
19 total of three times beginning, I believe, in June of 2014,
20 four years after this event took place. He confirmed that her
21 history was not all that complete with what she said to him as
22 far as any preexisting conditions or other things that she had
23 experienced. He acknowledged that she had -- she has
24 arthritis in her back and a degenerative disc disease.

25 //

1 Most importantly, the only reason that he causally
2 connects her fall -- her pain to her fall is by virtue of her
3 reporting that that's what happened. There's nothing
4 objective in the medical records that would tend to indicate
5 that the cervical pain she's claiming, the lower lumbar pain
6 that she is claiming was the result of the fall. Instead,
7 it's her word. It's what she says.

8 I don't believe Dr. Dunn was aware that Ms.
9 O'Connell had a severe back injury in 1989 either.
10 Interestingly, Dr. Dunn did identify that he was aware that
11 she had a history of anxiety, a history of depression, and
12 that before he undertook any surgery on Ms. O'Connell, that he
13 was going to perform some sort of psychological testing on her
14 to make sure she would be an appropriate candidate for that
15 proposed surgery.

16 And we don't know whether she's going to have the
17 surgery. It was -- it's been almost a year -- or more than a
18 year since Ms. O'Connell has seen Dr. Dunn.

19 Now, turning to Dr. Tingey. Ms. O'Connell saw Dr.
20 Tingey one time. She did not tell him about the fall that she
21 suffered in July of 2010 after the fall at the Wynn. And Dr.
22 Tingey also acknowledged that she did, in fact, have mild
23 arthritis in her right knee prior to her fall at the Wynn.

24 He concluded that the left knee has nothing to do
25 with her fall, so I'm not going to discuss that. And again,

1 the only reason Dr. Tingey concludes that there's a causal
2 connection between her right knee injury and the fall at the
3 Wynn is because that's what she says.

4 You heard directly from Ms. O'Connell, and it's up
5 to you to decide whether you believe her to be a credible
6 witness. She acknowledged that she signed the Guest Accident/
7 Illness Report. She acknowledged those were the identified
8 pains that she was experiencing. She acknowledged she gambled
9 at the Wynn, she acknowledged she gambled at the Rampart, she
10 acknowledged she didn't call anyone after her fall. She
11 didn't even call her cousins.

12 She acknowledged she drove home unassisted. She
13 acknowledged that she stayed at the Rampart for hours and
14 gambled. She acknowledged she didn't see a doctor until two
15 days after her fall. She acknowledged, after the fall, she
16 went on a cruise with Sal. They went to Florida, then they
17 boarded the ship, then they went to the Caribbean, and came
18 back. They spent some additional time with Sal's children
19 after that cruise.

20 You heard from Sal, as he wanted to be known as; not
21 Mr. Risco. Sal confirmed that prior to their break-up, they
22 still went out, they still went to Bally's, they still went to
23 the Rampart. That Ms. O'Connell would continue to gamble, the
24 only difference being is that Ms. O'Connell wouldn't get up
25 and dance, and that was Sal sort of doing his thing all by

1 himself.

2 Again, he confirmed they went on cruises. And Sal
3 testified that the breakup had absolutely nothing to do with
4 her fall on February 8th, 2010. In fact, Sal wanted to take
5 care of her. He wanted to nurture her. He was getting older
6 and was more than willing to stay home more than they had in
7 the past.

8 Finally, you heard from Dr. Klausner, and Dr.
9 Klausner's testimony is uncontroverted in this particular
10 case. There is no one to disagree with his opinions as it
11 relates to Ms. O'Connell. Dr. Klausner did not examine Ms.
12 O'Connell, but he did undertake a thorough review of her
13 medical records. It was the big picture stuff that he was
14 looking at, the years and years of medical records, and the
15 number of different doctors that Ms. O'Connell went to over a
16 period of time that assisted in helping him reach his
17 conclusions regarding her symptomology.

18 He concluded that her history of fibromyalgia, her
19 prior back injury, and the degenerative changes in her knee,
20 those might be responsible for her symptomology, her
21 complaints of pain. But Dr. Klausner also focused on
22 something called symptom magnification syndrome as well. He
23 concluded that symptom magnification syndrome had nothing to
24 do with the fall on February 8th, 2010, and it was unrelated.
25 //

1 And as we talked about with Dr. Klausner, symptom
2 magnification syndrome is a self-destructive socially
3 reinforced behavioral response pattern consisting of displays
4 of symptoms which function to control the life and
5 circumstances of the sufferer. The person manifests symptoms
6 in order to receive some kind of secondary gain, whether it's
7 avoidance of responsibility, attention, or financial gain.
8 And that was his conclusion, that Ms. O'Connell suffered from
9 symptom magnification syndrome. Now, he didn't know
10 specifically what that secondary gain may have been, whether
11 it was attention or financial gain.

12 Now, based upon the totality of the evidence
13 presented in this particular case, Wynn isn't responsible for
14 the claimed damages here. Wynn didn't cause the condition, it
15 didn't place this green sticky substance on the ground. And,
16 in fact, Ms. O'Connell's theory doesn't make any sense that it
17 was from the watering of the plants.

18 There's no dispute that Wynn didn't know this green
19 sticky substance was on the floor prior to Ms. O'Connell's
20 fall. And there's no evidence to suggest that Wynn should
21 have known that this green sticky substance was on the floor
22 prior to the fall. We don't know how long it had been there,
23 Ms. O'Connell couldn't identify any time, we don't know what
24 caused it to be there, and we don't know what it was. There's
25 simply no basis to conclude that Wynn should have known that

1 that substance was on the ground prior to Ms. O'Connell
2 falling. And again, Ms. Elias in her statement stated that
3 the area had been cleaned prior.

4 Now, Ms. Morris talked about the verdict form in
5 favor of the plaintiff. This is the verdict form in favor of
6 the defendant, and it's as straightforward as it gets. "We
7 the jury in the above entitled action find for defendant, Wynn
8 Las Vegas, LLC, d/b/a Wynn Las Vegas, and against the
9 plaintiff, Yvonne O'Connell." It requires a date and the
10 foreperson's signature.

11 We believe that the plaintiff has not established
12 that Wynn was liable in this particular case. We believe that
13 the plaintiff has not established her damages that she's
14 seeking in this particular case and we would ask that you find
15 in favor of the Wynn relating to this matter.

16 Thank you for your time.

17 THE COURT: Rebuttal closing?

18 MS. MORRIS: Thank you.

19 PLAINTIFF'S REBUTTAL CLOSING ARGUMENT

20 MS. MORRIS: Yvonne didn't act the way Wynn thinks
21 she should have. She didn't accept their medical attention
22 and she waited two days to go to the doctor, so she's not
23 hurt. In order for her to be hurt, she had to do exactly what
24 they wanted her to do. She couldn't have been hurt; she
25 didn't call her cousins who were headed back to California.

1 She didn't try to get in touch with Sal who's on a cruise ship
2 in the middle of the Caribbean, so she must not have been
3 hurt.

4 Now, remember when Dr. Dunn said, if you hit your
5 thumb with a hammer, you're focused on the thumb and not
6 looking at the other parts? The natural progression and onset
7 of pain in certain areas when you immediately fall, how you
8 feel the next day, how you feel when you start moving around,
9 it is inhuman to think that the body has to act within a
10 certain way and every single solitary thing has to be
11 acknowledged right there. And if you don't take their medical
12 treatment, then they want a waiver signed, we're not
13 responsible. They show up at a scene, this five-star guest
14 service, to make sure they -- the one thing they have is a
15 waiver of their responsibility.

16 Now, Dr. Klausner doesn't have the whole picture.
17 The man took the stand himself and said, well, I'd have to see
18 the whole person, the person in front of me. That's where it
19 matters. And, in fact, during his testimony, he said, she
20 might be terribly hurt, I don't know, because he doesn't know.
21 He has never seen her, period.

22 Yvonne O'Connell's life has changed. She spends
23 most of her days at home. She does not go out and go dancing.
24 She does not have the boyfriend that she had anymore. She
25 goes to the doctors and tells them she's in pain, and she

1 tells them other things.

2 But don't throw the baby out with the bath water.
3 The legitimate injury is the changes to her, what she feels
4 every day, the objective injuries in her body. Don't let
5 those get lost with what the other things are that's going on.
6 Every body is different. Everyone is. You cannot predict how
7 people will react to things. Should she be a two? Should she
8 be a four? Would this be easier for them if she was a five
9 all the time? They want to control how she reacted to this
10 situation.

11 Now, they just said that Yanet Elias called someone,
12 and they said that that area was clean. Wynn Las Vegas knows
13 exactly what's going on in their casinos. They know when
14 watering happens, they know when people are doing things.
15 You're not going to touch a chip and move in there.

16 But conveniently, whoever she might have called who
17 gave her information that it was clean, who is that person?
18 Where are they? They don't know that part. When was it last
19 cleaned? If it was clean, then what was the substance on the
20 floor that Yanet saw? How had it gotten sticky?

21 Now, Yvonne knows what she thought it was. And the
22 jury instruction is clear that in order for the plaintiff to
23 recover, in the absence of proof that the defendant created
24 the condition or actually knew of it, the plaintiff must prove
25 that the defendant had constructive notice.

1 So, if Wynn didn't create the condition, if they
2 didn't put it there themselves, that doesn't prevent them from
3 being responsible and taking reasonable care. That means the
4 defendant using reasonable care should have known of the
5 unsafe condition in time to have taken steps to correct the
6 condition, or to take other suitable precautions, like warn
7 her.

8 Now, they had her on the stand, and they're like,
9 well, what was it, and how long had it been there; information
10 that only they would have. What about the person that cleaned
11 it up? Maybe they could describe what it was. Probably would
12 be the best person for it. How long had it been there,
13 Yvonne? Well, why don't we talk to the person who Yanet
14 called, who we don't know, who said it was a clean condition?
15 It's all very convenient.

16 The amount of liquid on the floor, the fact that a
17 portion of it was wet, and a portion of it, almost three feet,
18 had dried and it was sticky, and a sweeper machine had to be
19 used to cover it up. That is their own information.

20 The sweeper machine wouldn't have been put over the
21 spill if it wasn't large enough to have needed the sweeper
22 machine put over it. Liquid that you can slip on doesn't get
23 sticky unless it has time to dry. That is the information.

24 If they had been acting reasonably with reasonable
25 care in their high traffic area, they would have seen the

1 liquid and cleaned it up before anyone was injured, or they
2 could have put cones up, anything, because in this area,
3 specifically in this area, it's a specialty area. It's an
4 atrium. This is an area where the last thing they want you to
5 look at is your feet. They want you looking at the flowers,
6 they want you looking up and enjoying it and so they are
7 required to make sure that marble floor is free from hazards
8 in a reasonable fashion.

9 Now, Yanet said they can't keep it 100 percent. 100
10 percent is not required. It's reasonable care. And if that
11 hadn't been sticky, and there weren't footprints in it, how
12 could you tell how long it had been there? It had been there
13 long enough to have dried, and that's what's important,
14 because reasonable care says they're doing a reasonable
15 inspection of the areas to ensure it, and a reasonable time
16 doesn't allow liquid in a three-foot area to dry, become
17 sticky, and get footprints in it.

18 Now, they said she wasn't looking out. The law says
19 that, depending on the circumstances, it may be reasonable
20 conduct for a customer of a business establishment to walk,
21 and not constantly look and watch where he or she is going.

22 So, what's reasonable here as she's walking through
23 their atrium? It's reasonable that she should be looking at
24 the flowers. She doesn't have to be constantly looking where
25 she's going, and the law recognizes that.

1 Now, Dr. Dunn testified that Yvonne had a
2 degenerative spine on the day she fell. Now, the law says not
3 everyone is perfect. People have issues. As you go through
4 life, you have them. So, there's no dispute she had a
5 degenerative spine at the time that she fell, and she's not
6 entitled to recover anything for her degenerative spine.
7 However, if it is aggravated, the damages are then for the
8 aggravation.

9 Yvonne O'Connell did not go to the doctor for pain
10 in her spine for 20 years, but she had a degenerative spine.
11 She had it, cervical and lumbar. But until you injure the
12 degenerative spine, it's typically asymptomatic. It doesn't
13 hurt, it doesn't bother you.

14 Dr. Dunn has seen thousands of patients. Thousands
15 of them. He knows what he's looking at and he said he would
16 be comfortable performing surgery on Yvonne. She reported
17 anxiety and depression. She needs a psychological clearance.
18 That is not uncommon. But he knows what he's looking for, and
19 he knows what he's looking at, and he has been doing it for 23
20 years. He is not fooled. He knows what he's looking at, and
21 that is a major surgery.

22 And they are now saying, well, she hasn't had it in
23 a year. It is a major surgery, and it is a long time
24 recovery. And Yvonne lives with her parrot. She's going to
25 need assistance when she has that. This is not an easy

1 decision for her, but she has said she just can't take the
2 neck pain anymore, and she has significant findings in it that
3 would be causing the pain that she has.

4 Dr. Dunn gave an opinion that was both objective and
5 subjective, period. It was not just subjective, like they
6 want you to believe. He said his decision was based on both
7 objective and subjective findings. As jurors, you are the
8 voice of the conscience of this community --

9 MR. SEMENZA: I'm going to object, Your Honor.

10 MS. MORRIS: -- and you will go back there and you
11 will deliberate.

12 THE COURT: Sustained. No, no. The jury will
13 disregard that. Counsel, this is not a punitive damage case.
14 You may not address the -- they are not to be making decisions
15 as the consciousness of the community. You know that is
16 improper argument.

17 MS. MORRIS: No, as members of the community. Is
18 that better?

19 THE COURT: No.

20 MS. MORRIS: Okay. As a jury, you are going to go
21 back there and deliberate and you are going to determine what
22 justice is. You get to make that decision. You take that in,
23 you look at everything, and you look at the preponderance of
24 the evidence. This is not, I am completely convinced beyond a
25 reasonable doubt. It is, is it more likely than not? Am I a

1 little bit more right than I am wrong that Yvonne was injured
2 when she fell at the Wynn and that it changed the person that
3 she is?

4 This is her life. This is -- this is not a multiple
5 claimant; this is her first personal injury. She hasn't filed
6 lawsuits claiming injury left and right, and she certainly
7 hasn't held anything back. If she was putting all this stuff
8 into a medical record because a lawyer told her to like Dr.
9 Klausner said, then she had a bad lawyer.

10 I mean, there's just things in there that no one
11 would ever believe, because it's not related to the fall, and
12 it's subjective, so you have to have an expert testify to say
13 this is what your injuries are, because you can't see them.
14 You can't see her pain. You can only hear what the doctors
15 have to say.

16 And so, when you go back and you decide this, it is
17 a preponderance of the evidence. Am I a little bit more right
18 than I am wrong, that if Wynn had been acting reasonably, that
19 liquid would have been cleaned up or it would have been warned
20 on before she got there? Am I a little bit more right than I
21 am wrong that she was injured as a result of the fall? Am I a
22 little bit more right than I am wrong that this case is about
23 control?

24 It has been a long process, and Yvonne has stood her
25 ground, and it has not been easy, but that is what it takes to

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

5 THE COURT: Thank you. The clerk will now swear the
6 jury -- officers to take charge of the jury and the alternate.

7 OFFICERS SWORN

8 THE CLERK: Thank you.

9 THE COURT: Thank you. All right. Marshal, if
10 you'll escort the jury.

11 THE MARSHAL: All rise for the jury, please. Bring
12 your notebooks, yeah, please.

13 (Outside the presence of the jury)

14 THE COURT: All right, the record will reflect the
15 jury has departed the courtroom. Are there any matters
16 outside the presence?

17 MR. SEMENZA: No, I don't think so.

18 MS. MORRIS: No.

19 THE COURT: Give the clerk your telephone numbers,
20 and we'll call you if we either get a note from the jury or a
21 verdict.

22 (Court recessed at 3:39 p.m. until Monday,
23 November 16, 2015, at 9:47 a.m.)

24 * * * * *

25

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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DISTRICT COURT

CLARK COUNTY, NEVADA

BY: Denise Trujillo
DENISE TRUJILLO, DEPUTY

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

A 655992

YVONNE O'CONNELL, individually,

Plaintiff,

v.

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.

VERDICT FORM

We, the jury in the above entitled action, find for the Plaintiff Yvonne O'Connell ("Plaintiff") and against Defendant Wynn Las Vegas, LLC d/b/a Wynn Las Vegas ("Defendant") and, without reduction for Plaintiff's comparative negligence, if any, assess the total amount of the Plaintiff's damages at \$ 400,000.00, which are assessed as follows:

Past pain and suffering \$ 150,000.00

Future pain and suffering \$ 250,000.00

Having found for the Plaintiff and against the Defendant, we further find:

1. The percentage of negligence on the part of the Plaintiff, which was a proximate cause of the Plaintiff's injury was 40 %

2. The percentage of negligence, on the part of the Defendant, which was proximate cause of the Plaintiff's injury was 60 %

TOTAL 100%

DATED this 16th day of November, 2015.

[Signature]
FOREPERSON

A-12-655992-C
VER
Verdict
4502364



ORIGINAL

NOV 16 2015

DISTRICT COURT
CLARK COUNTY, NEVADA

BY *Denise Trujillo*
DENISE TRUJILLO, DEPUTY

YVONNE O'CONNELL, individually,

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

Plaintiff,

JURY INSTRUCTIONS

v.

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.

JURY INSTRUCTION NO. 1

MEMBERS OF THE JURY:

It is my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the court.

A-12-655992-C
JI
Jury Instructions
4502357



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JURY INSTRUCTION NO. 2

The purpose of the trial is to ascertain the truth.

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JURY INSTRUCTION NO. 3

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

JURY INSTRUCTION NO. 4

The Masculine form as used in these instructions, if applicable as shown by the text of the instruction and the evidence, applies to a female person or a limited liability company.

JURY INSTRUCTION NO. 5

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

JURY INSTRUCTION NO. 6

You must decide all questions of fact in this case from the evidence received in this trial and not from any other source. You must not make any independent investigation of the facts or the law or consider or discuss facts as to which there is no evidence. This means, for example, that you must not conduct experiments or consult reference works for additional information.

JURY INSTRUCTION NO. 7

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

JURY INSTRUCTION NO. 8

One of the parties in this case is a limited liability company. A limited liability company is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and you should decide the case with the same impartiality you would use in deciding a case between individuals.

JURY INSTRUCTION NO. 9

If, during this trial, I have said or done anything which has suggested to you that I am inclined to favor the claims or position of any party, you will not be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are or are not worthy of belief, what facts are or are not established, or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

JURY INSTRUCTION NO. 10

The credibility or "believability" of a witness should be determined by his or her manner upon the stand, his or her relationship to the parties, his or her fears, motives, interests or feelings, his or her opportunity to have observed the matter to which he or she testified, the reasonableness of his or her statements and the strength or weakness of his or her recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of this testimony which is not proved by other evidence.

JURY INSTRUCTION NO. 11

Discrepancies in a witness's testimony or between his testimony and that of others, if there were any discrepancies, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

JURY INSTRUCTION NO. 12

You are admonished that no juror may declare to a fellow juror any fact relating to this case as of his or her own knowledge, and if any juror discovers after the jury has retired to deliberate that he, she or any other juror has personal knowledge of any fact in controversy in this case, he or she shall disclose such situation to myself in the absence of the other jurors.

This means that if you learn, during the course of your deliberations, that you were acquainted with the facts of this case or the witnesses and you have not previously told me of this relationship, you must then declare that fact to me. You communicate to the court through the marshal.

Do not undertake any investigation of the case on your own, perform experiments or endeavor to research legal or factual issues on your own.

JURY INSTRUCTION NO. 13

There are two kinds of evidence, direct and circumstantial. Direct evidence is proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence; that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence. It is for you to decide whether a fact has been proved by circumstantial evidence.

JURY INSTRUCTION NO. 14

Whenever in these instructions I state that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by him, the meaning of such an instruction is this: That unless the truth of the allegation is proved by a preponderance of the evidence, you shall find the same to be not true.

JURY INSTRUCTION NO. 15

The term "preponderance of the evidence" means such evidence as, when weighed with that opposed to it, has more convincing force, and from which it appears that the greater probability of truth lies therein.

Plaintiff is seeking damages based upon her claims. Plaintiff has the burden of proving by a preponderance of the evidence all of the facts necessary to establish her claims.

In determining whether a party has met this burden, you will consider all the evidence, whether produced by the plaintiff or defendant.

JURY INSTRUCTION NO. 16

Whether or not either party was insured is immaterial, and should make no difference in any verdict you may render in this case.

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JURY INSTRUCTION NO. 17

Certain testimony has been read into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing.

You are to consider that testimony as if it had been given in court.

JURY INSTRUCTION NO. 18

An attorney has a right to interview a witness for the purpose of learning what testimony the witness will give. The fact that the witness has talked to an attorney and told that attorney what she would testify to does not, by itself, reflect adversely on the truth of the testimony of the witness.

JURY INSTRUCTION NO. 19

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation is an expert witness. An expert witness may give his or her opinion as to any matter in which he or she is skilled.

You should consider such expert opinion and weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if, in your judgment, the reasons given for it are unsound.

JURY INSTRUCTION NO. 20

An expert witness has testified about his reliance upon books, treatises, articles, and statements that have not been admitted into evidence. Reference by the expert witness to this material is allowed so that the expert witness may tell you what he relied upon to form his opinions. You may not consider the material as evidence in this case. Rather, you may only consider the material to determine what weight, if any, you will give to the expert's opinions.

JURY INSTRUCTION NO. 21

A hypothetical question has been asked of an expert witness. In a hypothetical question, the expert witness is told to assume the truth of certain facts, and the expert witness is asked to give an opinion based upon those assumed facts. You must decide if all of the facts assumed in the hypothetical question have been established by the evidence. You can determine the effect of that admission upon the value of the opinion.

JURY INSTRUCTION NO. 22

The preponderance, or weight of evidence, is not necessarily with the greater number of witnesses.

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary. If, from the whole case, considering the credibility of witnesses, and after weighing the various factors of evidence, you believe that there is a balance of probability pointing to the accuracy and honesty of the one witness, you should accept his or her testimony.

JURY INSTRUCTION NO. 23

The plaintiff seeks to establish a claim of negligence. I will now instruct on the law relating to this claim.

JURY INSTRUCTION NO. 24

The plaintiff has the burden of proving by a preponderance of the evidence all of the facts necessary to establish the following:

1. That defendant, as an owner of land, breached its duty of reasonable care;
2. That defendant's breach was the proximate cause of plaintiff's injuries;
3. That plaintiff suffered damages.

The defendant has the burden of proving by a preponderance of the evidence all of the facts necessary to establish the following:

1. That plaintiff was negligent;
2. That the plaintiff's negligence was a proximate cause of any damage plaintiff may have suffered.

JURY INSTRUCTION NO. 25

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

JURY INSTRUCTION NO. 26

An owner of land must exercise reasonable care not to subject others to an unreasonable risk of harm. An owner of land must act as a reasonable person under all the circumstances.

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.

JURY INSTRUCTION NO. 28

The defendant seeks to establish a defense of comparative negligence. I will now instruct on the law relating to comparative negligence.

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JURY INSTRUCTION NO. 29

The plaintiff may not recover damages if her comparative negligence is greater than the negligence of the defendant. However, if the plaintiff is negligent, the plaintiff may still recover a reduced sum so long as her comparative negligence was not greater than ~~then~~ the negligence of the defendant.

If you determine that the plaintiff is entitled to recover, you shall return by verdict the total amount of damages sustained by the plaintiff without regard to her comparative negligence and you shall indicate the percentage of negligence attributable to each party.

The percentage of negligence attributable to the plaintiff shall reduce the amount of such recovery by the proportionate amount of such negligence and the reduction will be made by the Court.

JURY INSTRUCTION NO. 30

When I use the words "reasonable care," I mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.

JURY INSTRUCTION NO. 31

Depending on the circumstances, it may be reasonable conduct for a customer of a business establishment to walk and not constantly watch where he or she is going.

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JURY INSTRUCTION NO. 32

A person who is exercising reasonable care, has a right to assume that every other person will perform his duty under the law; and in the absence of reasonable cause for thinking otherwise, it is not negligence for such a person to fail to anticipate injury which can come to her only from a breach of duty by another.

JURY INSTRUCTION NO. 33

Whether any of these elements of damage have been proven by the evidence is for you to determine. Neither sympathy nor speculation is a proper basis for determining damages. However, absolute certainty as to the damages is not required. It is only required that plaintiff prove each item of damage by a preponderance of the evidence.

JURY INSTRUCTION NO. 34

In determining the amount of losses, if any, suffered by the plaintiff as a proximate result of the accident in question, you will take into consideration the nature, extent and duration of the damages you believe from the evidence plaintiff has sustained, and you will decide upon a sum of money sufficient to reasonably and fairly compensate plaintiff for the following items:

1. The physical and mental pain, suffering, anguish and disability endured by the plaintiff from the date of the accident to the present; and
2. The physical and mental pain, suffering, anguish and disability which you believe plaintiff is reasonably certain to experience in the future as a result of the accident.

The plaintiff is not seeking any amount for her past or future medical bills or expenses.

JURY INSTRUCTION NO. 35

No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for pain and suffering, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

JURY INSTRUCTION NO. 36

Where plaintiff's injury is clear and readily observable, no expert testimony is required for an award of future pain, suffering, anguish and disability. However, where an injury is subjective and not demonstrable to others, expert testimony is necessary before a jury may award future damages.

JURY INSTRUCTION NO. 37

A person who has a condition at the time of an injury is not entitled to recover damages therefor. However, she is entitled to recover damages for any aggravation of such preexisting condition proximately resulting from the injury.

This is true even if the person's condition made her more susceptible to the possibility of ill effects than a normally healthy person would have been, and even if a normally healthy person probably would not have suffered any substantial injury.

Where a preexisting condition is so aggravated, the damages as to such condition are limited to the additional injury caused by the aggravation.

JURY INSTRUCTION NO. 38

If you find from a preponderance of the evidence that Plaintiff could have avoided harm or mitigated her damages by the use of reasonable effort after the occurrence of the Defendant's negligence, if any, then Plaintiff may not recover for those damages not mitigated.

JURY INSTRUCTION NO. 39

The court has given you instructions embodying various rules of law to help guide you to a just and lawful verdict. Whether some of these instructions will apply will depend upon what you find to be the facts. The fact that I have instructed you on various subjects in this case including that of damages must not be taken as indicating an opinion of the court as to what you should find to be the facts or as to which party is entitled to your verdict.

JURY INSTRUCTION NO. 40

It is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any questions submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors. Whatever your verdict is, it must be the product of a careful and impartial consideration of all the evidence in the case under the rules of law as given you by the court.

JURY INSTRUCTION NO. 41

If, during your deliberation, you should desire to be further informed on any point of law or hear again portions of the testimony, you must reduce your request to writing signed by the foreperson. The officer will then return you to court where the information sought will be given to you in the presence of the parties or their attorneys. Any request for a playback of testimony must carefully describe the portion to be played back so that the court recorder may arrange her notes.

JURY INSTRUCTION NO. 42

When you retire to consider your verdict, you must select one of your number to act as foreperson, who will preside over your deliberation and will be your spokesperson here in court. During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

In civil actions, three-fourths of the total number of jurors may find and return a verdict. This is a civil action. As soon as six or more of you have agreed upon a verdict, you must have it signed and dated by your foreperson, and then return with it to this room.

JURY INSTRUCTION NO. 43

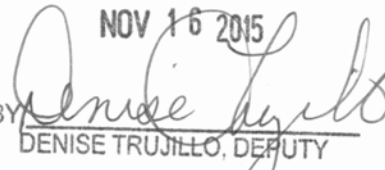
Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence, as you understand it and remember it to be, and by the law as given you in these instructions, and return a verdict which, according to your reason and candid judgment, is just and proper.

Dated this 13th day of Nov., 2015

[Signature]
District Court Judge

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

NOV 16 2015
BY 
DENISE TRUJILLO, DEPUTY

**DISTRICT COURT
CLARK COUNTY, NEVADA**

**YVONNE O'CONNELL,
PLAINTIFF(S)
VS.
WYNN RESORTS LIMITED,
DEFENDANT(S)**

Case No.: A-12-655992-C

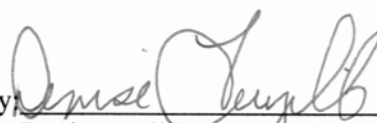
DEPARTMENT 5

VERDICT(S) SUBMITTED TO JURY BUT RETURNED UNSIGNED

Attached hereto are the proposed verdict forms which were submitted to the jury in the above entitled action, but returned unsigned.

DATED: this 16th day of November, 2015.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: 
Denise Trujillo, Deputy Clerk of the Court

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, individually,

Plaintiff,

v.

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

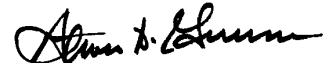
Dept. No. V

VERDICT FORM

We, the jury in the above entitled action, find for Defendant Wynn Las Vegas, LLC d/b/a
Wynn Las Vegas and against the Plaintiff Yvonne O'Connell.

DATED this ____ day of November, 2015.

FOREPERSON



CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

YVONNE O'CONNELL,	.	CASE NO. A-12-655992-C
	.	
Plaintiff,	.	DEPT. V
	.	
vs.	.	
	.	
WYNN RESORTS LIMITED, et al.,	.	TRANSCRIPT OF
	.	PROCEEDINGS
	.	
Defendants.	.	
.	

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

JURY TRIAL - DAY 7

MONDAY, NOVEMBER 16, 2015

APPEARANCES:

FOR THE PLAINTIFF:	CHRISTIAN MORRIS, ESQ.
	EDWARD J. WYNDER, ESQ.
FOR THE DEFENDANTS:	LAWRENCE SEMENZA, III., ESQ.
	CHRISTOPHER D. KIRCHER, ESQ.

COURT RECORDER:

LARA CORCORAN
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC
Englewood, CO 80110
(303) 798-0890

Proceedings recorded by audio-visual recording, transcript
produced by transcription service.

INDEX

VERDICT.. 11

1 LAS VEGAS, NEVADA, MONDAY, NOVEMBER 16, 2015, 9:47 A.M.

2 (Outside the presence of the jury)

3 THE COURT: All right. Case number A-12-655992,
4 Yvonne O'Connell vs. Wynn Las Vegas, LLC. And we are outside
5 the presence of the jury.

6 I received a note from the juror, Benjamin Godfrey,
7 whose badge number is 005 and is in seat position 3. He sent
8 a note that says, "Concern about courtroom. There is a cord
9 that jury walks over that I consider a trip hazard. I have
10 observed the jurist in front of me stumble on -- by it on
11 first day of selection. Her boot had a small heel to it. She
12 has not worn any heeled shoe again."

13 Then -- this is all in black ink. Then he changes
14 to red ink and says parenthetically, "She is today wearing
15 them," close parenthesis. Then he goes on, back to black ink,
16 "It has not been brought up in discussion. It is most likely
17 just me. I feel I can disregard this, as it was not intended
18 by Court. However, if I was party to either side and not
19 satisfied with decision, I would be upset with the Court."

20 So, I called counsel and read them this note, you
21 know, on the telephone, because I've frankly never gotten a
22 note like this and I just -- I don't really know what to make
23 of it. But I'm concerned because he says, I feel I can
24 disregard this. So, I think we need to inquire of Mr. Godfrey
25 outside the presence of the others just exactly why he felt it

1 was so important to bring something up that happened two weeks
2 ago.

3 MR. SEMENZA: I would agree, Your Honor.

4 THE COURT: And so, if we'll bring him in.

5 MR. SEMENZA: And Your Honor, just before he comes
6 in.

7 THE COURT: Okay.

8 MR. SEMENZA: I don't know what Ms. Morris's
9 position is. I don't want to ask the --

10 THE COURT: No.

11 MR. SEMENZA: -- obviously, the juror any questions.

12 THE COURT: I'm going to ask.

13 MR. SEMENZA: And just from my perspective, Your
14 Honor, the two issues are; is he alleging that one of the
15 other jurors is biased based upon this trip that he witnessed?
16 And then, secondly, is this incident somehow affecting his --
17 his deliberations in this particular matter? And I think
18 those are the two subjects that obviously need to be explored.

19 THE COURT: Okay.

20 MR. SEMENZA: Thank you.

21 (In the presence of Juror No. 3)

22 THE COURT: Have a seat. Thank you. Good morning,
23 Mr. Godfrey. How are you?

24 JUROR NO. 3: Good morning. Okay.

25 THE COURT: Okay. I got this note that the marshal

1 brought to me from you. And so I'm a bit concerned about this
2 issue about the Court and the courtroom that somehow you think
3 it's important for me to have known about this vis-a-vis your
4 deliberations. So, why was it that you sent the note? I'm a
5 little not --

6 JUROR NO. 3: I was worried that one side or the
7 other might come back and say, because of being subject to
8 that, that we came up with a bad decision.

9 THE COURT: Okay. So has anyone tried to discuss
10 this cord issue?

11 JUROR NO. 3: No, I didn't discuss it with anybody
12 and nobody's brought it up, anything. It was just my
13 observation.

14 THE COURT: Okay. So --

15 JUROR NO. 3: I don't know if they observed it or
16 not.

17 THE COURT: Okay, so who is "they" when you say --

18 JUROR NO. 3: The plaintiff and the defense.

19 THE COURT: Well, apparently not. We were all
20 surprised, but. So this juror that you're saying was -- is
21 wearing heels today, has she said anything to you about
22 tripping --

23 JUROR NO. 3: No, not at all.

24 THE COURT: -- or almost tripping?

25 JUROR NO. 3: We were just walking in and we made

1 that -- that turn. And right -- I didn't see her step on it,
2 I just saw her stumble. And I don't know if it's because she
3 didn't want to step on the line or she stepped on it. And I
4 don't even know if it affects my decision-making on the thing.

5 THE COURT: Okay, well that's the next question --

6 JUROR NO. 3: Okay.

7 THE COURT: -- because that's really important. So
8 -- and that's the main reason why I brought you in was because
9 I thought that perhaps the reason you wrote this note was
10 because it was somehow entering into your deliberations.

11 JUROR NO. 3: It's not in deliberation. It's in --

12 THE COURT: In your -- your head?

13 JUROR NO. 3: In my thought.

14 THE COURT: Okay. How -- why -- how is it --

15 JUROR NO. 3: And -- and it's not for one side or
16 the other. It is, basically, I'm thinking, oh, man, it has to
17 do with, what did you say? Private property. That I thought
18 it was unjust that this was just for private property, a trip
19 and fall or a slip and fall.

20 THE COURT: All right. So, I don't -- I don't
21 really want to hear about your -- your deliberations, because
22 that's not something that the Court can inquire into as to
23 what deliberations are happening or what your thought process
24 is. It's just that I need to know whether -- this is
25 something that's completely extraneous to the trial.

1 JUROR NO. 3: Okay.

2 THE COURT: It doesn't have anything to do with this
3 trial. And so, I need to know whether though in your mind
4 you're going to let something that you saw -- albeit in the
5 courtroom, it doesn't have -- it's not evidence --

6 JUROR NO. 3: Right.

7 THE COURT: -- in the trial. Is it affecting your
8 ability to deliberate fairly and impartially in this case?

9 JUROR NO. 3: No.

10 THE COURT: All right.

11 JUROR NO. 3: I just wanted them to be aware of --

12 THE COURT: Okay.

13 JUROR NO. 3: I thought maybe they would spot that,
14 you know? One side or the other would spot that and say
15 something afterwards, you know?

16 THE COURT: Okay. So, yeah. No, that doesn't have
17 anything to do with this trial.

18 JUROR NO. 3: Right.

19 THE COURT: Okay, and you can put --

20 JUROR NO. 3: Yeah, I can --

21 THE COURT: -- this out of your mind now?

22 JUROR NO. 3: Yes, yes.

23 THE COURT: All right. And we'll make sure there's
24 no cord when you come back into our courtroom, because we're
25 in this courtroom because I'm next-door and my courtroom is

1 full of people.

2 JUROR NO. 3: Yeah.

3 THE COURT: All right. Counsel approach.

4 (Off-record bench conference)

5 THE COURT: All right. Would you have him -- and
6 please don't discuss this whatsoever with the rest of the
7 jury.

8 JUROR NO. 3: No, I won't say anything.

9 THE COURT: All right, thank you.

10 (Outside the presence of Juror No. 3)

11 THE COURT: All right, and Mr. Godfrey has now
12 departed the courtroom. Counsel?

13 MR. SEMENZA: I think given what he's said here
14 today, I don't think I have a basis to object to him remaining
15 on the panel at this point in time.

16 THE COURT: I have to agree with that. I -- I --
17 he's -- it was a little odd and -- but there's not any basis
18 for removing him at this point if he's saying it's not going
19 to affect his deliberation. And so I think we have to --
20 well, I haven't been allowing them to deliberate until we
21 could find out what was going on with this note. And so, now,
22 Marshal, go ahead and take them back to the jury deliberation
23 room. Sadly, we've lost an hour of deliberation over this,
24 but it is what it is. Thank you. I --

25 MR. SEMENZA: Thank you, Your Honor.

1 THE COURT: -- appreciate your coming down and
2 taking the time, of course. And hopefully, you won't have to
3 come back until there's a verdict, but if there's another
4 note, I will call you.

5 MR. KIRCHER: Thank you.

6 MS. MORRIS: We'll keep our phones on.

7 MR. SEMENZA: Thank you.

8 THE COURT: We'll mark the note as a court exhibit.
9 Thank you.

10 (Court recessed at 9:57 A.M. until 12:03 P.M.)

11 (Outside the presence of the jury)

12 THE COURT: We're ready to bring them in?

13 THE MARSHAL: Yes, we are.

14 THE COURT: All right.

15 THE COURT RECORDER: Yeah, we're on.

16 THE COURT: Okay. So, we're on the record in case
17 A-12-655992, Yvonne O'Connell vs. Wynn Las Vegas, LLC. And
18 we're going to bring the jury in because the Court got word
19 that they have reached a verdict.

20 THE MARSHAL: All rise for the jury, please.

21 (In the presence of the jury)

22 THE MARSHAL: Jury's all accounted for, Your Honor.

23 THE COURT: Thank you. Please be seated. And who
24 is the foreperson? All right, and has the jury reached a
25 verdict, ma'am?

1 JUROR NO. 8: We have.

2 THE COURT: Thank you. If you'll hand it to the
3 marshal. All right. Ladies and gentlemen, you haven't
4 completed the verdict form. Okay. So, counsel approach.

5 (Off-record bench conference)

6 THE COURT: You have to assess -- on this verdict
7 form you have to assess an amount of damages, okay? So, the
8 jury is instructed to return the verdict form and go back to
9 deliberations.

10 Madam Foreperson, without telling me what the
11 deliberations have been, have you discussed damages at all?

12 JUROR NO. 8: Your Honor, there was a
13 misunderstanding that the amount would be calculated by the
14 Court.

15 THE COURT: No. Okay, so you have --

16 JUROR NO. 8: Based on --

17 THE COURT: -- not done that.

18 JUROR NO. 8: Okay.

19 THE COURT: All right. Do you want me to order the
20 jury lunch?

21 JUROR NO. 8: I don't believe so.

22 UNKNOWN MALE SPEAKER: No, let's go.

23 JUROR NO. 8: No.

24 THE COURT: All right. So -- all right, so take
25 them back to the jury room.

1 THE MARSHAL: All rise, please.

2 (Outside the presence of the jury)

3 THE COURT: All right, the jury has departed the
4 courtroom. We'll go off the record.

5 MR. SEMENZA: Thank you.

6 (Court recessed at 12:08 P.M. until 12:12 P.M.)

7 (In the presence of the jury)

8 THE MARSHAL: Jury's all present, Your Honor.

9 THE COURT: Thank you. And would you get the --

10 THE MARSHAL: Yes.

11 THE COURT: -- verdict form? Thank you. Thank you,
12 please be seated. All right.

13 VERDICT

14 THE CLERK: Yvonne O'Connell vs. Wynn Las Vegas,
15 LLC. Case No. A-655992-C. Department 5. Verdict Form.

16 We, the jury in the above entitled action, find for
17 the plaintiff, Yvonne O'Connell, plaintiff, and against
18 defendant Wynn Las Vegas, defendant, and without reduction for
19 plaintiff's comparative negligence, if any, assess the total
20 amount of the plaintiff's damages at 400,000, which are
21 assessed as follows: Past pain and suffering: 150,000.
22 Future pain and suffering: 250,000.

23 Having found for the plaintiff and against the
24 defendant, we further find the percentage of negligence on the
25 part of the plaintiff, which was the proximate cause of the

1 plaintiff's injury, was 40 percent. The percentage of
2 negligence on the part of the defendant, which was the
3 proximate cause of plaintiff's injury, was 60 percent. Total
4 -- total of 100 percent.

5 Dated this 16th day of November 2015. I'm sorry.
6 Susan Kovach. Ladies and gentlemen of the jury, is this your
7 verdict as read?

8 THE JURY: Yes, it is.

9 THE COURT: Would either side like to have the jury
10 polled?

11 MR. SEMENZA: Yes, Your Honor.

12 THE COURT: Poll the jury.

13 THE CLERK: Amanda Wallace, is this your verdict as
14 read?

15 JUROR NO. 1: Yes.

16 THE CLERK: Jacklyn Schumacher, is this your verdict
17 as read?

18 JUROR NO. 2: Yes.

19 THE CLERK: Benjamin Godfrey, is this your verdict
20 as read?

21 JUROR NO. 3: Is this what we agreed to, or what I--

22 THE CLERK: No, is this your verdict as read?

23 THE COURT: Because you don't -- it doesn't have to
24 be a unanimous verdict in a civil case.

25 JUROR NO. 3: Right.

1 THE COURT: So, if you didn't agree, then that's
2 fine.

3 JUROR NO. 3: I did not agree to it.

4 THE COURT: Okay.

5 THE CLERK: Brandon Snyder, is this your verdict as
6 read?

7 JUROR NO. 4: Yes.

8 THE CLERK: Laurie Prince, is this your verdict as
9 read?

10 JUROR NO. 5: Yes.

11 THE CLERK: Susan Berg, is this your verdict as
12 read?

13 JUROR NO. 6: Yes.

14 THE CLERK: Kenneth Mapoy, is this your verdict as
15 read?

16 JUROR NO. 7: Yes.

17 THE CLERK: Susan Kovach, is this your verdict as
18 read?

19 JUROR NO. 8: Yes.

20 THE COURT: All right. Thank you, ladies and
21 gentlemen. You are now released from your admonition that you
22 may not discuss the case. So, if you'd like, you can discuss
23 the case with anyone you want to. You may discuss the case
24 with the lawyers. They often like to speak to the jury to
25 find out how they did in their presentation of the case.

1 Since lawyers are -- practice law, they continue to
2 practice for the duration of their career. And so no matter
3 how long a lawyer's been practicing, they can always use
4 additional pointers on how they could improve their
5 presentation before a jury. So, I'd encourage you to speak to
6 the lawyers if you would like to, although you're not required
7 to.

8 I'm going to have the marshal just escort you back
9 to the jury room so I can thank you, and then find out if any
10 of you'd like to stay and speak with the lawyers, and then --
11 and so, I'll be with you momentarily.

12 THE MARSHAL: All rise for the jury, please. Come
13 on, folks.

14 (Outside the presence of the jury)

15 THE COURT: All right. The record will reflect the
16 jury has departed the courtroom. I'll go and find out if
17 they'd like to speak with you, and I'll be right back.

18 MR. SEMENZA: Thank you.

19 (Court adjourned at 12:16 p.m.)

20 * * * * *

21

22

23

24

25


CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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(303) 798-0890



JULIE LORD, TRANSCRIBER

CLERK OF THE COURT

1 BRIAN D. NETTLES, ESQ.
 2 Nevada Bar No. 7462
 3 CHRISTIAN M. MORRIS, ESQ.
 4 Nevada Bar No. 11218
 5 NETTLES LAW FIRM
 6 1389 Galleria Drive, Suite 200
 7 Henderson, Nevada 89014
 8 Telephone: (702) 434-8282
 9 Facsimile: (702) 434-1488
 10 briannettles@nettleslawfirm.com
 11 christianmorris@nettleslawfirm.com
 12 Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

13 YVONNE O'CONNELL, an individual,
 14 Plaintiff,

CASE NO. A-12-655992-C
 DEPT NO. V

vs.

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

JUDGMENT ON VERDICT

Defendants.

21 This matter having been tried before a jury in Department 5, the Honorable Carolyn
 22 Ellsworth presiding, and having commenced on November 6, 2015. The final arguments of
 23 counsel were presented to the jury on November 12, 2015, and a Verdict awarding Plaintiff
 24 Yvonne O'Connell, \$150,000.00 in past pain and suffering and \$250,000.00 in future pain and
 25 suffering, and having assessed 40% fault to Plaintiff, Yvonne O'Connell, and having assessed
 26 60% fault to Defendant Wynn Las Vegas, LLC dba Wynn Las Vegas, thus reducing Plaintiff's
 27

///

NETTLES LAW FIRM

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

<input type="checkbox"/> Non-Jury	<input type="checkbox"/> Jury
<input type="checkbox"/> Disposed After Trial Start	<input type="checkbox"/> Disposed After Trial Start
<input type="checkbox"/> Non-Jury	<input checked="" type="checkbox"/> Jury
<input type="checkbox"/> Judgment Reached	<input type="checkbox"/> Verdict Reached
<input type="checkbox"/> Transferred before Trial	<input type="checkbox"/> Other -

NETTLES LAW FIRM



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

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

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

5 IT IS FURTHER ORDERED that Plaintiff is awarded pre-judgment interest in the sum
6 of \$17,190.96 (*figured as \$90,000.00 x 5.25% (Prime Rate Plus 2%) ÷ 365 = \$12.945 (Daily Rate) x*
7 *1,328 days [date of service of Summons 3/30/12 to date of verdict 11/16/15]*).

8 DATED this 14th day of December, 2015.

9
10
11 
12 DISTRICT COURT JUDGE
13  CAROLYN ELLSWORTH

12 Submitted by:

13 NETTLES LAW FIRM

14
15 
16 BRIAN D. NETTLES, ESQ.

16 Nevada Bar No. 7462

17 CHRISTIAN M. MORRIS, ESQ.

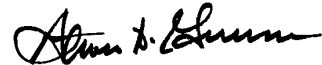
17 Nevada Bar No. 11218

18 NETTLES LAW FIRM

18 1389 Galleria Drive, Suite 200

19 Henderson, Nevada 89014

20 Attorneys for Plaintiff



CLERK OF THE COURT

1 **NEO**
2 BRIAN D. NETTLES, ESQ.
3 Nevada Bar No. 7462
4 CHRISTIAN M. MORRIS, ESQ.
5 Nevada Bar No. 11218
6 NETTLES LAW FIRM
7 1389 Galleria Drive, Suite 200
8 Henderson, Nevada 89014
9 Telephone: (702) 434-8282
10 Facsimile: (702) 434-1488
11 briann@nettlawfirm.com
12 christian@nettlawfirm.com
13 Attorneys for Plaintiff

14 **DISTRICT COURT**
15 **CLARK COUNTY, NEVADA**

16 YVONNE O'CONNELL, an individual,
17
18 Plaintiff,

19 vs.

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

25 Defendants.

CASE NO. A-12-655992-C
DEPT NO. V

**NOTICE OF ENTRY OF
JUDGMENT ON VERDICT**

26 TO: WYNN LAS VEGAS, LLC, Defendant; and

27 TO: CHRISTOPHER D. KIRCHER, ESQ., LAWRENCE J. SEMENZA, III, P.C., Attorneys
28 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)

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

1 which is attached hereto.

2 DATED this 15th day of December, 2015.

3 NETTLES LAW FIRM

4
5 /s/ Christian M. Morris

6 BRIAN D. NETTLES, ESQ.

7 Nevada Bar No. 7462

8 CHRISTIAN M. MORRIS, ESQ.

9 Nevada Bar No. 11218

10 1389 Galleria Drive, Suite 200

11 Henderson, Nevada 89014

12 Attorneys for Plaintiff

13 **CERTIFICATE OF SERVICE**

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

17 Lawrence J. Semenza, III, Esq.

18 Christopher D. Kircher, Esq.

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

20 10161 Park Run Drive, Suite 150

21 Las Vegas, Nevada 89145

22 (702) 835-6803

23 Fax: (702) 920-8669

24 *Attorneys for Defendant*

25 *Wynn Las Vegas, LLC dba*

26 *Wynn Las Vegas*

27
28 
An Employee of Nettles Law Firm

ORIGINAL

Electronically Filed
12/15/2015 11:02:06 AM

Alvin L. Blum
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
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Telephone: (702) 434-8282
Facsimile: (702) 434-1488
briannettles@nettlawfirm.com
christianmorris@nettlawfirm.com
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, an individual,

Plaintiff,

CASE NO. A-12-655992-C
DEPT NO. V

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,

JUDGMENT ON VERDICT

Defendants.

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

///

NETTLES LAW FIRM
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Henderson, NV 89014
(702) 434-8282 / (702) 434-1488 (fax)

<input type="checkbox"/> Non-jury	<input type="checkbox"/> Jury
<input type="checkbox"/> Disposed After Trial Start	<input type="checkbox"/> Disposed After Trial Start
<input type="checkbox"/> Non-jury	<input checked="" type="checkbox"/> Jury
<input type="checkbox"/> Judgment Reached	<input type="checkbox"/> Verdict Reached
<input type="checkbox"/> Transferred before Trial	<input type="checkbox"/> Other -


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

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

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

5 IT IS FURTHER ORDERED that Plaintiff is awarded pre-judgment interest in the sum
6 of \$17,190.96 (figured as $\$90,000.00 \times 5.25\%$ (Prime Rate Plus 2%) $\div 365 = \$12.945$ (Daily Rate) \times
7 1,328 days [date of service of Summons 3/30/12 to date of verdict 11/16/15]).

8 DATED this 14th day of December, 2015.

10
11 
12 DISTRICT COURT JUDGE
13  CAROLYN ELLSWORTH

14 Submitted by:

15 NETTLES LAW FIRM

16 
17 BRIAN D. NETTLES, ESQ.

18 Nevada Bar No. 7462

19 CHRISTIAN M. MORRIS, ESQ.

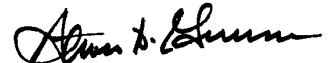
20 Nevada Bar No. 11218

21 NETTLES LAW FIRM

22 1389 Galleria Drive, Suite 200

23 Henderson, Nevada 89014

24 Attorneys for Plaintiff



CLERK OF THE COURT

ORDR

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

Las Vegas, Nevada 89145

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, 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:

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

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

1 **IT IS HEREBY ORDERED** that Dr. Dunn will be allowed to testify at trial, however
2 counsel for Defendant will be first allowed to depose Dr. Dunn on the stand in the absence of the
3 jury.

4 **IT IS HEREBY FURTHER ORDERED** that Dr. Dunn's testimony will be limited to the
5 medical records.

6 **IT IS HEREBY FURTHER ORDERED** that Dr. Tingey will be allowed to testify at
7 trial, however counsel for Defendant will be first allowed to depose Dr. Tingey on the stand in the
8 absence of the jury.

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

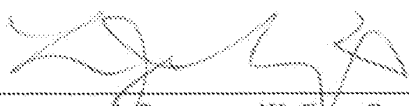
1 **IT IS HEREBY FURTHER ORDERED** that Dr. Tingey's testimony will be limited to
2 the medical records.

3 DATED this 21st ^{December} day of November, 2015.

4
5 
6 DISTRICT COURT JUDGE
7 

8 Respectfully Submitted By:


9 LAWRENCE J. SEMENZA, III, P.C.

10 
11 _____
12 Lawrence J. Semenza, III, Esq., Bar No. 7174
13 Christopher D. Kircher, Esq., Bar No. 11176
14 10161 Park Run Drive, Suite 150
15 Las Vegas, Nevada 89145

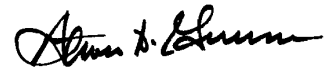
16 Attorneys for Defendant Wynn Las Vegas, LLC d/b/a
17 Wynn Las Vegas

18 Approved as to Form And Content:

19 NETTLES LAW FIRM

20 
21 _____
22 Brian D. Nettles, Esq., Bar No. 7462
23 Christian M. Morris, Esq., Bar No. 11218
24 1389 Galleria Drive, Suite 200
25 Henderson, Nevada 89014

26 Attorneys for Plaintiff Yvonne O'Connell
27
28



CLERK OF THE COURT

1 **NPP**

2 Lawrence J. Semenza, III, Esq., Bar No. 7174

3 Email: ljs@semenzalaw.com

4 Christopher D. Kircher, Esq., Bar No. 11176

5 Email: cdk@semenzalaw.com

6 LAWRENCE J. SEMENZA, III, P.C.

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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, individually,

Plaintiff,

v.

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

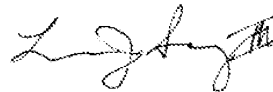
Dept. No. V

**NOTICE OF POSTING SUPERSEDEAS
BOND**

NOTICE IS HEREBY GIVEN THAT Defendant Wynn Las Vegas, LLC d/b/a Wynn Las Vegas is herewith posting a Supersedeas Bond in the amount of \$257,190.96, a true and correct copy which is attached hereto.

DATED this 23rd day of December, 2015.

LAWRENCE J. SEMENZA, III, P.C.



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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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b) and NEFCR 9, I hereby certify that I am an employee with Lawrence J. Semenza, III, P.C., and that on the 23rd day of December, 2015, I caused to be sent through electronic transmission via Wiznet's online system, a true copy of the foregoing **NOTICE OF POSTING SUPERSEDEAS BOND** to the following registered e-mail addresses:

NETTLES LAW FIRM
Christian M. Morris, Esq. - christianmorris@nettleslawfirm.com
Kim Alverson - kim@nettleslawfirm.com
1389 Galleria Drive, Suite 200
Henderson, Nevada 89014

Attorneys for Plaintiff

/s/ Olivia A. Kelly
An Employee of Lawrence J. Semenza, III, P.C.

SUPERSEDEAS BOND

Bond No. 09206619

IN THE District COURT OF Clark
COUNTY OF Clark County STATE OF Nevada

YVONNE O'CONNELL, an Individual
PLAINTIFF

v.

WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, doing business as
WYNN LAS VEGAS; DOES 1 through X; and ROE Corporations 1 through X, inclusive
DEFENDANT(S)

CASE NO. A-12-655992-C

Dept No. V

KNOW ALL MEN BY THESE PRESENTS, That we, WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, doing business as WYNN LAS VEGAS; DOES 1 through X; and ROE Corporations 1 through X, inclusive as Principal, and Fidelity and Deposit Company of Maryland a Maryland corporation, as Surety are held and firmly bound unto District Court Clark County, Nevada

in the amount of Two Hundred Fifty Seven Thousand One Hundred Ninety and 96/100

Dollars (\$ 257,190.96)

for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the said WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, doing business as WYNN LAS VEGAS; DOES 1 through X; and ROE Corporations 1 through X, inclusive has petitioned the District Court Clark County, Nevada for the State of Nevada for an appeal to said court of an action previously decided in District court, wherein the said WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, doing business as WYNN LAS VEGAS; DOES 1 through X; and ROE Corporations 1 through X, inclusive is Defendant, and being numbered N/A on the docket thereof;

NOW THEREFORE, the condition of this obligation is such that if the said WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, doing business as WYNN LAS VEGAS; DOES 1 through X; and ROE Corporations 1 through X, inclusive shall pay all costs, disbursements and judgements incurred by reason of the said appeal proceeding, then this obligation shall be null and void and released, otherwise to remain in full force and effect, provided however, the maximum liability of the surety shall not exceed the penal sum of Two Hundred Fifty Seven Thousand One Hundred Ninety and 96/100

Dollars (\$ 257,190.96).

IN WITNESS WHEREOF, WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, doing business as WYNN LAS VEGAS; DOES 1 through X; and ROE Corporations 1 through X, inclusive as Principal and Fidelity and Deposit Company of Maryland as Surety, have hereunto set our hands this 17th day of December, 2015

ATTEST/WITNESS

By: [Signature]

WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, doing business as WYNN LAS VEGAS; DOES 1 through X; and ROE Corporations 1 through X, inclusive
Principal

By: [Signature]

Fidelity and Deposit Company of Maryland

By: [Signature]

Renata Reyes

Adrienne F. Smith

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

A Notary Public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California

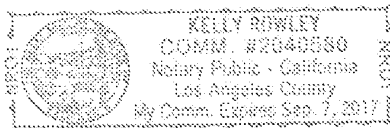
County of Los Angeles

DEC 17 2015

On _____ before me, Kelly Rowley, Notary Public, personally appeared Renato Reyes who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/~~she~~/they executed the same in his/~~her~~/their authorized capacity(ies), and that by his/~~her~~/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

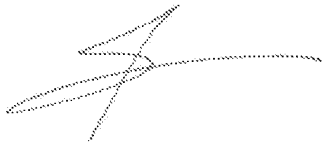


Signature

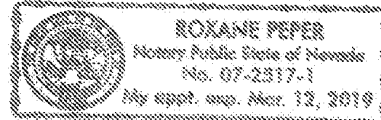
Kelly Rowley
Kelly Rowley, Signature of Notary Public

STATE OF NEVADA)
)
COUNTY OF CLARK)

This instrument was acknowledged before me on December 17, 2015 by
Stacie Michaels.



Notary Signature



Name: Roxane Peper
Address: 3131 Las Vegas Boulevard South
 Las Vegas, NV 89109

Dated: December 17, 2015

ZURICH AMERICAN INSURANCE COMPANY
COLONIAL AMERICAN CASUALTY AND SURETY COMPANY
FIDELITY AND DEPOSIT COMPANY OF MARYLAND
POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS: That the ZURICH AMERICAN INSURANCE COMPANY, a corporation of the State of New York, the COLONIAL AMERICAN CASUALTY AND SURETY COMPANY, a corporation of the State of Maryland, and the FIDELITY AND DEPOSIT COMPANY OF MARYLAND a corporation of the State of Maryland (herein collectively called the "Companies"), by **GERALD F. HALEY, Vice President**, in pursuance of authority granted by Article V, Section 8, of the By-Laws of said Companies, which are set forth on the reverse side hereof and are hereby certified to be in full force and effect on the date hereof, do hereby nominate, constitute, and appoint **Renato REYES, of Los Angeles, California**, its true and lawful agent and Attorney-in-Fact, to make, execute, seal and deliver, for, and on its behalf as surety, and as its act and deed: **any and all bonds and undertakings**, and the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Companies, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the ZURICH AMERICAN INSURANCE COMPANY at its office in New York, New York, the regularly elected officers of the COLONIAL AMERICAN CASUALTY AND SURETY COMPANY at its office in Owings Mills, Maryland, and the regularly elected officers of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND at its office in Owings Mills, Maryland, in their own proper persons

The said Vice President does hereby certify that the extract set forth on the reverse side hereof is a true copy of Article V, Section 8, of the By-Laws of said Companies, and is now in force.

IN WITNESS WHEREOF, the said Vice-President has hereunto subscribed his/her names and affixed the Corporate Seals of the said ZURICH AMERICAN INSURANCE COMPANY, COLONIAL AMERICAN CASUALTY AND SURETY COMPANY, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, this 29th day of June, A.D. 2015.

ATTEST:

ZURICH AMERICAN INSURANCE COMPANY
COLONIAL AMERICAN CASUALTY AND SURETY COMPANY
FIDELITY AND DEPOSIT COMPANY OF MARYLAND



By: _____

Secretary
Michael McKibben

Vice President
Gerald F. Haley

State of Maryland
County of Baltimore

On this 29th day of June, A.D. 2015, before the subscriber, a Notary Public of the State of Maryland, duly commissioned and qualified, **GERALD F. HALEY, Vice President**, and **MICHAEL MCKIBBEN, Secretary**, of the Companies, to me personally known to be the individuals and officers described in and who executed the preceding instrument, and acknowledged the execution of same, and being by me duly sworn, deposed and said, that he/she is the said officer of the Company aforesaid, and that the seals affixed to the preceding instrument are the Corporate Seals of said Companies, and that the said Corporate Seals and the signature as such officer were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporations.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Official Seal the day and year first above written.

Maria D. Adamski

Maria D. Adamski, Notary Public
My Commission Expires: July 8, 2019

POA-F 012-3275R

EXTRACT FROM BY-LAWS OF THE COMPANIES

"Article V, Section 8, Attorneys-in-Fact. The Chief Executive Officer, the President, or any Executive Vice President or Vice President may, by written instrument under the attested corporate seal, appoint attorneys-in-fact with authority to execute bonds, policies, recognizances, stipulations, undertakings, or other like instruments on behalf of the Company, and may authorize any officer or any such attorney-in-fact to affix the corporate seal thereto; and may with or without cause modify or revoke any such appointment or authority at any time."

CERTIFICATE

I, the undersigned, Vice President of the ZURICH AMERICAN INSURANCE COMPANY, the COLONIAL AMERICAN CASUALTY AND SURETY COMPANY, and the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, do hereby certify that the foregoing Power of Attorney is still in full force and effect on the date of this certificate; and I do further certify that Article V, Section 8, of the By-Laws of the Companies is still in force.

This Power of Attorney and Certificate may be signed by facsimile under and by authority of the following resolution of the Board of Directors of the ZURICH AMERICAN INSURANCE COMPANY at a meeting duly called and held on the 15th day of December 1998.

RESOLVED: "That the signature of the President or a Vice President and the attesting signature of a Secretary or an Assistant Secretary and the Seal of the Company may be affixed by facsimile on any Power of Attorney...Any such Power or any certificate thereof bearing such facsimile signature and seal shall be valid and binding on the Company."

This Power of Attorney and Certificate may be signed by facsimile under and by authority of the following resolution of the Board of Directors of the COLONIAL AMERICAN CASUALTY AND SURETY COMPANY at a meeting duly called and held on the 5th day of May, 1994, and the following resolution of the Board of Directors of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND at a meeting duly called and held on the 10th day of May, 1990.

RESOLVED: "That the facsimile or mechanically reproduced seal of the company and facsimile or mechanically reproduced signature of any Vice-President, Secretary, or Assistant Secretary of the Company, whether made heretofore or hereafter, wherever appearing upon a certified copy of any power of attorney issued by the Company, shall be valid and binding upon the Company with the same force and effect as though manually affixed.

IN TESTIMONY WHEREOF, I have hereto subscribed my name and affixed the corporate seals of the said Companies, this ____ day of DEC 17 2015, 20____.





Michael Bond, Vice President

