

IN THE SUPREME COURT OF THE STATE OF NEVADA

WYNN LAS VEGAS, LLC d/b/a WYNN
LAS VEGAS,

Appellant,

vs.

YVONNE O'CONNELL, an individual,

Respondent.

YVONNE O'CONNELL, an individual,

Appellant,

vs.

WYNN LAS VEGAS, LLC d/b/a WYNN
LAS VEGAS,

Respondent.

Supreme Court Case No.: 70583(L)

Consolidated with Case No.: 71789

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Elizabeth A. Brown
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RESPONDENT/APPELLANT'S REPLY APPENDIX ("RA")
Vol. 2; 2 RA 201-400

Brian D. Nettles, Esq. (7462)
Christian M. Morris, Esq. (11218)
Edward Wynder, Esq. (13991)
NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, Nevada 89014
Telephone: (702) 434-8282
Facsimile: (702) 434-1488
Attorneys for Respondent/Appellant
Yvonne O'Connell

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DATED this 4th day of January, 2018.

NETTLES LAW FIRM

/s/ Christian M. Morris, Esq.
 Brian D. Nettles, Esq. (7462)
 Christian M. Morris, Esq. (11218)
 Edward J. Wynder, Esq. (13991)
Attorneys for Respondent/Appellant
Yvonne O'Connell

CERTIFICATE OF SERVICE

I certify that on the 4th day of January, 2018, I electronically filed **RESPONDENT/APPELLANT'S REPLY APPENDIX** with the Supreme Court of Nevada by using the Court's eFlex electronic filing system to the following parties.

Lawrence J. Semenza, III, Esq.

Christopher D. Kircher, Esq.

Jarrold L. Rickard, Esq.

SEMENZA KIRCHER RICKARD

Attorneys for Appellant/Respondent

WYNN LAS VEGAS, LLC d/b/a WYNN LAS VEGAS

/s/ Jenn Alexy

An employee of the NETTLES LAW FIRM

1 case.

2 THE COURT: All right. So, what that means is that
3 Mr. Semenza may call you when he puts on his case. And now
4 I'm going to ask the jury if they have any questions. Does
5 the jury have any questions? And I see none, and so you're
6 excused. Thank you very much. Call your next witness.

7 MS. MORRIS: We call Dr. Dunn. Well, actually, we
8 have to --

9 THE COURT: Oh, okay, that's right. All right.
10 Ladies and gentlemen, we have to do something outside your
11 presence, so you're going to get a break while we have to
12 continue working. We -- trying to accommodate Dr. Dunn's
13 schedule, we are going to go until 6:00 o'clock today, no
14 later than that.

15 So, use this opportunity to stretch, stroll around,
16 use the restroom, knowing that we're going to go an hour later
17 than we normally go, because we're trying to get this trial
18 done and over, and, you know, we have that intervening
19 Wednesday that we're off because the courthouse is closed for
20 Veteran's Day.

21 So, during this recess, it is your duty not to --
22 it's not a recess for us, but it's a recess for you. And it's
23 your duty not to converse among yourselves or with anyone else
24 on any subject connected with the trial, or to read, watch, or
25 listen to any report of or commentary on the trial by any

1 person connected with the trial, or by any medium of
2 information, including, without limitation, newspaper,
3 television, radio, or internet, and you are not to form or
4 express an opinion on any subject connected with this case
5 until it's finally submitted to you.

6 You know, anticipate at least 15 minutes, probably.
7 It could be longer, but you know, if you're going to leave the
8 floor -- do we have any smokers in our -- no? Okay. So, the
9 marshal will tell you where you can smoke, but make sure you
10 do that in the next 15 minutes so you can get back to the
11 floor in case we need to call you.

12 THE MARSHAL: All rise for the jury, please. Follow
13 me, please.

14 (Outside the presence of the jury)

15 MR. SEMENZA: Your Honor, may I run to the restroom
16 very quickly?

17 THE COURT: Okay. So, we'll go off the record so
18 counsel can use the restroom, and then we'll go right back and
19 get Dr. Dunn on.

20 (Court recessed at 4:27 P.M. until 4:35 P.M.)

21 (Outside the presence of the jury)

22 THE MARSHAL: Follow me, okay? Remain standing,
23 face the clerk, raise your right hand.

24 //

25 //

1 DR. THOMAS DUNN, PLAINTIFF'S WITNESS, SWORN

2 THE CLERK: Please be seated, and then please state
3 and spell your first and last name.

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

5 THE CLERK: Thank you.

6 THE COURT: And you may proceed.

7 MR. SEMENZA: Thank you.

8 (Testimony outside the presence of the jury)

9 DIRECT EXAMINATION

10 BY MR. SEMENZA:

11 Q Good afternoon, Dr. Dunn.

12 A Good afternoon.

13 Q Did you bring any materials with you today?

14 A Yes, I brought my chart.

15 Q May I examine those for a moment?

16 A Sure.

17 (Pause in the proceedings)

18 BY MR. SEMENZA:

19 Q Dr. Dunn, is this the complete medical chart that
20 you have in your possession relating to Ms. O'Connell?

21 A Well, it's the complete file that I have in my
22 possession, but there are, I believe, other doctors at Desert
23 Orthopedic Center have seen her, so I don't believe I have
24 their material in there.

25 Q Okay. When were these documents obtained?

1 A Well, I think my secretary gave them to me last
2 week.

3 Q Okay. And do you know whether she went out and
4 obtained additional documents? And here's --

5 MR. SEMENZA: Your Honor, the documents that he
6 brought with him include other materials outside of what has
7 been produced in this case, so from other doctors, those sorts
8 of things. So, I don't --

9 THE COURT: Yeah, I'm just seeing that -- this is
10 what I have.

11 MR. SEMENZA: And that's what I have as well.

12 THE COURT: And that was produced by the plaintiff
13 of Dr. Dunn's records, so I don't know what you're talking
14 about. I mean, what are you referring to? Do you know
15 specific --

16 MR. SEMENZA: There's a whole host of documents
17 relating to UMC, relating to -- may I -- give me the chart.

18 THE WITNESS: Sure.

19 BY MR. SEMENZA:

20 Q Let me ask you real quickly, Dr. Dunn, do you know
21 when this compilation was undertaken by your staff?

22 A I don't know.

23 MR. SEMENZA: Your Honor, contained within the
24 documents that Dr. Dunn has provided as part of his medical
25 chart, there are documents from the Desert Institute of Spine

1 Care. There are documents from Edson Erkulvrawatr. There are
2 documents from UMC Medical.

3 THE COURT: From what dates?

4 MR. SEMENZA: There's a ton of them, Your Honor.
5 That's the -- I'll identify them for the record. There is a
6 lumbar spine report MRI dated 4/8/2010, which I believe is
7 referenced in Dr. Dunn's medical chart, so that's not at
8 issue. There is also from UMC of Southern Nevada Department
9 of Radiology a LK spine lumbo-sacral limited study that was
10 done, and that is dated February 10th of 2010. I don't know
11 that that was referenced.

12 THE COURT: On films?

13 MR. SEMENZA: Pardon me?

14 THE COURT: On plain films?

15 MR. SEMENZA: Three views of the lumbar spine were
16 obtained. There are five lumbar type vertebrae. Alignment is
17 within normal limits. Marked -- impression marked multilevel
18 degenerative disc disease of the lumbar spine.

19 THE COURT: Okay. So, the doc's saying it's plain
20 film, so x-rays. Okay.

21 MR. SEMENZA: There is a chest radiograph dated
22 March 19th of 2010. There is a medical record from Dr. Andrew
23 Cash at the Desert Institute of Spine Care dated April 19th of
24 2010. There is a Dr. Cash Desert Institute of Spine Care
25 report dated May 18th of 2010. There is a --

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

2 MR. SEMENZA: Yes.

3 THE COURT: May 18th?

4 MR. SEMENZA: There is a Southern Nevada Pain Center
5 report, office visit. It does not -- oh, dated October 15th
6 of 2010. There is a Desert Institute of Spine Care report
7 from Dr. Cash dated September 13th of 2012. There is a
8 Steinberg Diagnostic Medical Imaging Center lumbar spine
9 series dated September 27th of 2011.

10 There is a UMC Authorization to Release Protected
11 Health Information dated May 15th, 2014. There is a UMC chart
12 record dated May 1 of 2014, comprised of two -- three pages.
13 There is a UMC chart dated January 14th, 2014 comprised of
14 three pages. There is a UMC chart dated September 4, 2013
15 comprised of three pages. There is a UMC chart dated June 4th
16 of 2013.

17 THE COURT: What was it? What date?

18 MR. SEMENZA: June 4th of 2013, comprised of three
19 pages. There is a UMC chart dated February 5th of 2013
20 comprised of three pages. There is a document identified as,
21 E-form external document; new problem, low back pain;
22 provider, Dr. Dunn, 6/13 of 2014 that I don't believe I have
23 seen before.

24 There is a second document dated June 13th of 2014
25 from Dr. Dunn that I don't believe I've seen before. There is

1 a third document dated June 13, 2014 from Dr. Dunn that I
2 don't believe I have seen before. There is a fourth document
3 dated June 13, 2014, that I don't believe I have seen before
4 from Dr. Dunn. There is a HIPAA privacy notice for Ms.
5 O'Connell that I have not seen before. There is a document
6 from Dr. Dunn dated June 11, 2014, clinical lists update, that
7 I don't believe I have seen before.

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

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

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

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

1 relating to this particular matter.

2 THE COURT: Dr. Dunn, the -- the MRI from 2010, the
3 x-rays from UMC from 2010, the chest x-ray from 2010, or Dr.
4 Cash's medical records from 2010, when did you get those?

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

12 THE COURT: Okay, but -- and the reason we ask,
13 obviously, is the first report that I have of -- you know,
14 she's coming in to see you, it looks like the first time you
15 see her is June 16th of 2014, referred by Dr. Cash.

16 But these -- you know, what we have is supposed to
17 be your medical chart, and there's nothing in there from Dr.
18 Cash, but now there is a chest x-ray and there's two medical
19 records; one in April, April 19th of 2010, and one in May, May
20 18th of 2010, but you can't say whether you had those at the
21 time you saw her or not?

22 THE WITNESS: Well, I mean, I typically won't
23 document all the records as a treating physician I've
24 reviewed. So, what I did document in here were the relevant
25 records that I did look at. A chest x-ray wouldn't be

1 relevant to me, but an MRI of the neck and back would be, and
2 so those are listed. So, I evidently had those. But anything
3 else, I just don't have a recollection.

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

14 THE WITNESS: I mean, that's fair.

15 THE COURT: All right. But beyond that, all of
16 these other records, they're not mentioned at all. Are you
17 relying on those? Because basically, your testimony has to be
18 limited in this matter to what's in your -- in your chart
19 because of the disclosure.

20 You're a treating physician, and nothing -- the
21 disclosure that was made said you were going to testify in
22 conformance with your chart, and then there was kind of a
23 broad thing that said you were going to relate everything to
24 the accident, but that was the same disclosure that was made
25 to every -- on every single doctor that was disclosed, so your

1 chart doesn't say anything about causation. So --

2 THE WITNESS: I would just answer it this way, Your
3 Honor. The relevant material that I reviewed that would
4 impact my opinions are included in my reports, and that would
5 just be the MRI studies, and I ordered updated MRI studies, so
6 that's why they're included.

7 But the other reports, I don't recall if I saw those
8 or not at the time. I have looked at them recently since I've
9 had this packet there before me, and they really don't impact
10 the opinions that I formulate in my mind from my own records,
11 without even having seen those.

12 MR. SEMENZA: Okay. Your Honor, the prejudice is
13 that I need to know what he's reviewed, and I don't think it's
14 appropriate or fair, to be perfectly honest, that Dr. Dunn
15 does show up with new documents here that I haven't had a
16 chance to review and go through, and to be perfectly honest,
17 then I'm expected to voir dire the witness, and we're supposed
18 to be completed here today by 6:00 P.M.

19 So, I think I'm prejudiced in the sense that there
20 are new documents that have now shown up which I don't believe
21 have ever been produced in this particular case.

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

24 MS. MORRIS: They were produced by other providers.
25 Defense counsel and I both sent the same request, and got the

1 same records, and disclosed the same records, and which, in
2 that, Dr. Dunn has clarified he's going to be testifying in
3 accordance with the information that's contained only within
4 his medical records. I don't see any prejudice. There's not
5 going to be any reference to those records.

6 The records that he has contained in his chart are
7 records that have been disclosed in the litigation. However,
8 he and I both put in requests, and both got the same
9 information.

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

19 THE COURT: No, I don't think that's true. I think
20 that, generally, they copy the whole chart and say, this is,
21 you know, what's in our chart, because a physician's allowed
22 to, if they -- if they've used other physicians' records to
23 form a diagnosis, they need to know that history, and if
24 they've asked for those records and they're part of the chart,
25 they can rely on that.

1 And so, yeah, to say, you should -- I mean, you
2 really should. When you go and you take a deposition, it
3 should have everything that was produced in response to the
4 request to produce the medical records, because it doesn't
5 matter where they're from; it just needs to be -- you know,
6 when you've asked for, produce your chart, it needs to be the
7 whole chart, not --

8 MS. MORRIS: Right, I think --

9 THE COURT: -- just what we think -- you know, we'll
10 pick and choose, and --

11 MS. MORRIS: Well, the custodian of records signs it
12 as to say, these are the Desert Orthopedic medical records
13 related to the treatment of Yvonne O'Connell.

14 THE COURT: Um-hum.

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

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

23 MS. MORRIS: And x-rays as well.

24 THE COURT: -- what it says.

25 MS. MORRIS: Correct.

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

2 MS. MORRIS: It states --

3 THE COURT: Actually --

4 MS. MORRIS: -- previous studies, x-rays, CT scans,
5 MRI.

6 MR. SEMENZA: Where are you looking?

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

8 MR. SEMENZA: Well, where do these come from?

9 MS. MORRIS: It's his chart.

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

12 MS. MORRIS: Correct. Referred by Dr. Cash,
13 previous studies, x-rays, CT scan, MRI.

14 THE COURT: Previous studies performed. That just
15 means that she had previous studies. It doesn't say he's got
16 all them. It does indicate the MRIs on page 3 and 4, which
17 are -- are obviously significant, and they're noted here in
18 some detail. So clearly, he read them, because he couldn't
19 have dictated this dictation unless he had. But I'm going to
20 allow you to go forward and find out what he knows and how he
21 knows it, and then we can make a decision.

22 MR. SEMENZA: Okay.

23 BY MR. SEMENZA:

24 Q And Dr. Dunn, may I grab those from you? Thank you.
25 Dr. Dunn, what kind of doctor are you?

1 A I'm a board certified orthopedic surgeon, fellowship
2 training in spine surgery, and my practice is limited to
3 surgery of the spine.

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

6 A Yes. My specialty is a sub-specialty of
7 orthopedics, which is a specialty of surgery of the muscular
8 skeletal system, and I specialize in the spine.

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

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

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

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

14 Q And was this an office visit?

15 A Yes.

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

18 A Not that I recall, no.

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

21 A Yes. Typically, with these -- the process with
22 electronic medical records, the patient will fill out intake
23 sheets. It's all on the computer. Then we have a person
24 called a roomer who actually rooms the patient, and then goes
25 through a history, and then I sit down with the patient and go

1 through the history that they've obtained.

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

4 A Yes, or at the time for appointment. We have
5 portals in the lobby.

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

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

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

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

15 Q And where is that patient evaluation or history
16 located in your records?

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

19 Q Okay. Is -- is the --

20 MR. SEMENZA: And may I approach?

21 THE COURT: Yes.

22 BY MR. SEMENZA:

23 Q Is the first page of the seven documents that you've
24 brought with you today -- is that the patient history that
25 you've been referring to?

1 A Yes.

2 Q And it's comprised of five pages; the first five
3 pages? I'll let you verify.

4 A Yes.

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

8 THE COURT: Well, do you know if that issue --

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

11 THE COURT: Okay, show her.

12 MR. SEMENZA: Thank you.

13 MS. MORRIS: I can look through our 16.1
14 disclosures. It does look familiar to me. [Inaudible]. I'll
15 look through our 16.1.

16 MR. SEMENZA: And let me take a look as well.

17 MS. MORRIS: Your Honor, I can keep looking if he'd
18 like to go through the questions since --

19 MR. SEMENZA: Well, I may have questions.

20 MS. MORRIS: -- we have a time constraint.

21 MR. SEMENZA: I may have found it, Your Honor.
22 Okay. I think it was produced.

23 THE COURT: Okay.

24 //

25 //

1 BY MR. SEMENZA:

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

4 A Well, according to this document, it says it's a
5 referral by Andrew Cash -- Dr. Cash.

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

8 A I believe it's the second opinion evaluation.

9 Q A second opinion as to what?

10 A Her neck and back pain.

11 Q And when you initially saw Ms. O'Connell on June
12 16th of 2014, did you have the previous doctor's medical
13 history; medical charts?

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

18 Q And at that June 16th, 2014 appointment, what was
19 her chief complaint?

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

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

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

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

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

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

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

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

15 A Yes.

16 Q And can you identify what those studies were?

17 A There is an MRI of the cervical spine that was
18 obtained on May 8th, 2010. There was an MRI of the lumbar
19 spine that was performed on April 8th, 2010. And there were
20 radiographs of the cervical spine, and I believe those perhaps
21 were taken in my office, as well as flexion/extension bending
22 films of the lumbar spine taken in my office.

23 Q Okay. Where are the radiographs referenced?

24 A Right -- unfortunately, it all runs together in this
25 report, but on page 2 at the very bottom of the page, in bold

1 letters, it says, "Magnetic resonance imaging: lumbar." And
2 then I describe what I see. Then right below that, it says
3 "RAD," which stands for radiograph, spine cervical complete
4 minimum views, and then the reading of that is on the next
5 page.

6 And then, right below the reading of the neck, which
7 is identified with the letter C, C5-6, C6-7, there is another
8 indication of RAD, referring to radiographs of the lumbar, LS,
9 which is lumbar spine, with bending views. Then there's --
10 unfortunately, it looks like a double space, and then there's
11 a description of my reading of those radiographs of the lumbar
12 spine, and that would be on page -- it's designated as page 4.

13 Q So, at the top of the page, there are two sets of
14 x-rays that were done at your office on that particular day?

15 A Yes.

16 Q Okay. And then, show me where the prior -- you were
17 referencing on page 2. I lost you on that.

18 A I'm sorry, it's actually page 3. I have magnetic
19 resonance imaging, cervical and lumbar on the bottom of page
20 3.

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

24 A No, no. I reviewed an MRI that was obtained on
25 April 8th, 2010, and in bold letters, it says, "Magnetic

1 resonance imaging, lumbar." And then, below that, I have one
2 sentence where I describe what I see, and then below that, it
3 says "RAD" in capital letters. That's an abbreviation for
4 radiographs of the spine, neck, cervical, complete minimal,
5 four views.

6 And then, on the next page, at the top of four, is
7 listed my reading of those radiographs. Then, immediately
8 before that designation, capital letters RAD, referring to
9 radiographs of the LS spine, which is the lumbar sacral spine,
10 with bending views. And then there's a double space, and
11 again, right at the top of page 4 where I describe what I see
12 there.

13 Q Okay. Other than the MRIs performed on May 8th,
14 2010, and the MRI on 4/8/2010, and then the RAD spine cervical
15 complete at the bottom of page 3, and the RAD spine LS with
16 bending views at the top of page 4, those were the additional
17 records that you reviewed?

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

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

22 A Well, at the first visit, which we just covered, I
23 had recommended MRI studies -- updated MRI studies of the neck
24 and back. So, she returned on July 14th, 2014, approximately
25 a month later, to review those studies, both of which were

1 obtained on June 27th, 2014. Excuse me.

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

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

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

8 A Well, I saw her to review those films, and then I
9 saw her a final visit, which would have been her third visit
10 with me, on October 13th, 2014.

11 Q Okay, so you saw her a total of three times?

12 A Yes.

13 Q Okay, and what was the appointment for the third
14 time relating to?

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

23 Q And has she been back to see you since October 13th
24 of 2014?

25 A No.

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

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

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

7 A Well, I express to my patients, at that point,
8 there's really nothing further I can do for them, short of
9 surgery, so there's no reason to come back and see me unless
10 they've decided to pursue surgery.

11 Q And did you give Ms. O'Connell some non-surgical
12 options as well?

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

22 So, it's basically the recommendation of, do your
23 best to live with this anyway you want to help you with the
24 symptoms and improve your quality of life, and if none of that
25 works and you can't endure the symptoms, then you have that

1 option, which in this case would be the option of last resort.
2 That would be surgery.

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

5 A Yes.

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

8 A No.

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

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

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

18 A No.

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

21 A Now, being fair to the process, I'm just going on my
22 medical records, and I don't have that -- I don't see that
23 documented in my records, no.

24 Q If Ms. O'Connell did have a history of fibromyalgia,
25 might that have affected her pain levels that she was

1 identifying during your appointments?

2 A It may have, yes.

3 Q Are you familiar with something called Marfan
4 Syndrome?

5 A Yes.

6 Q Okay. Do you think that if Ms. O'Connell had a
7 preexisting history of Marfan Syndrome, that that might have
8 affected how she experiences pain?

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

15 Q What about Ehlers-Danlos Syndrome?

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

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

20 A Yes.

21 Q Did you undertake any attempts to differentiate --
22 strike that. Did you look for any other initiating causes of
23 Ms. O'Connell's back pain, other than the claimed fall on
24 February 8th of 2010?

25 A Well, as part of the evaluation of all patients, the

1 history gives us, 80 percent of the time, the diagnosis. It
2 represents typically the largest part of information a
3 physician uses to develop the diagnosis or the cause of their
4 problems. In musculoskeletal medicine, the main categories
5 are degenerative, traumatic, infectious, carcinogenic, and
6 those can interplay. It's not necessarily something that's
7 independent of each other.

8 So, I mean, that goes through your mind when you're
9 sitting and talking to the patient. So, the history comes
10 into play in helping to rule out a lot of those factors, so
11 one is always considering all of those issues.

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

14 A Based on her history, yes.

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

17 A Yes.

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

20 A Well, only -- it was related from her to me, as
21 documented on the June 16, 2014 note, and it simply says,
22 while walking in the Wynn Hotel and Casino, she slipped and
23 fell backwards, twisting to the right, striking her right
24 buttock and leg on a raised divider before hitting the ground.

25 Q And after the first appointment, did you have a

1 diagnosis of Ms. O'Connell's condition?

2 A Yes.

3 Q And what was that?

4 A I noted impressions of degenerative disc disease at
5 the cervical spine with cervical radiculopathy, and lumbar
6 disc disease with sciatica, and bilateral carpal tunnel
7 syndrome per history.

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

12 A Well, that's a radiographic diagnosis, would have --
13 which would have existed prior to her accident, but the
14 critical factor is whether it's symptomatic or not, and by her
15 history, it was not.

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

18 THE COURT: Okay, I'm going to kind of stop you
19 here. I mean, what I'm seeing here is he's saying that he's
20 got radiographic studies, including MRIs, that show she's got
21 degenerative disc disease, and he's saying that -- he's going
22 by what she said, that I didn't have any pain, and that he
23 relied on that in determining that -- you're going to link
24 this up to the fall?

25 THE WITNESS: It's her history, yes.

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

6 THE WITNESS: That's correct.

7 THE COURT: And you know that degenerative disc
8 disease doesn't -- doesn't happen -- I mean, she had this
9 degenerative disc disease; she's just saying that she was fine
10 until this happened?

11 THE WITNESS: Correct.

12 THE COURT: Okay.

13 THE WITNESS: We all do at 58.

14 THE COURT: All right.

15 BY MR. SEMENZA:

16 Q But what I want to understand is she had the
17 condition prior to February 8th, 2010, but your issue is she
18 was asymptomatic until that fall; is that what you're
19 basically saying?

20 THE COURT: By history. That's what you're saying,
21 by history?

22 THE WITNESS: That is my understanding, yes. I
23 mean, this action occurred with this patient when she was 58
24 years of age. That's the sixth decade of life. We all
25 unfortunately deteriorate with time, and that deterioration is

1 what we refer to as degeneration in the medical -- in the
2 musculoskeletal system, or arthritis is another synonym.

3 It is not significantly symptomatic in most
4 patients, and so just the presence of radiographic
5 abnormalities is not necessarily clinically relevant. We
6 really have to see and talk to the patient. And there will be
7 many times where I see some horrible MRIs and radiographs, and
8 talk to the patient, and they're going, really, I don't have
9 that much pain. I did six weeks ago when I got these studies,
10 but I'm actually doing fine. So, we don't operate on x-rays,
11 we operate on people. And I can see normal looking -- well,
12 relatively normal looking films in which patients are very
13 symptomatic.

14 So, it's all part of the diagnostic jigsaw puzzle,
15 but causation comes by talking to the patient and getting a
16 history. So, the radiographic findings that I see here, which
17 really didn't change much in the years between the two studies
18 that I ordered, are simply reflective of her condition that
19 existed prior to this accident. Whether it was symptomatic or
20 not, we have to turn to the patient for that information,
21 unless there's medical records which I didn't review.

22 MR. SEMENZA: Okay.

23 BY MR. SEMENZA:

24 Q I just want to be clear though in my understanding
25 that the condition that Ms. O'Connell had that you've

1 identified in your medical records, the degenerative disc
2 disease, preexisted February 8th of 2010; is that correct?

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

6 Q Okay. And your causation analysis is based upon the
7 symptomology and the expression of pain that Ms. O'Connell has
8 indicated to you during your appointments?

9 A Yes, that's the history of the patient.

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

13 A Yes, it can. I mean, they're distinct issues from
14 discogenic pain to fibromyalgia, but patients with chronic
15 fibromyalgia will have pain issues that can affect the whole
16 person. I'm not just saying that -- I've -- I mean, I have
17 treated patients that have fibromyalgia, and have neck and
18 back injuries, and they're distinct and different, but it
19 complicates the issue.

20 I think the important thing that I've expressed to
21 this patient is, even with surgery, she will continue to have
22 pain. The issue is, if we take 50 percent or 60 percent of
23 that pain away, is that sufficient and satisfactory to improve
24 her quality of life. And many patients who are appropriately
25 set up to the surgery are at a wits end where they would

1 welcome a 50 percent improvement, but it's not curative in
2 which we're going to say you're going to be pain free, and
3 part of that reason could be also her fibromyalgia --

4 Q Okay.

5 A -- if she indeed has it.

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

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

13 Q But the lumbar, it could?

14 A Yes.

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

16 THE COURT: Okay. Well, I mean, I think you need to
17 do this on cross.

18 MR. SEMENZA: Okay.

19 THE COURT: Because I'm not seeing that there's
20 something that he can't testify to that he has here. I mean,
21 your argument is, well, it's not enough for a doctor to rely
22 on the patient -- the patient history, but the bottom line is,
23 they do rely on the patient history.

24 And if you want to get the doctor to explain how it
25 can be affected if she has other issues, psychological issues,

1 other things like that, then that's part of cross-examination,
2 to get him to explain to the jury, if he didn't know about
3 these things, it might change his opinion, et cetera. But I
4 don't see that it's going to prevent him from testifying, from
5 what I've heard today. I mean, there's just --

6 MR. SEMENZA: And further --

7 THE COURT: I disagree with your -- your brief is,
8 well, no doctor should be able to testify based upon the
9 patient history, but the cases that you cited are -- are
10 different, you know, where there was a lot of medical records
11 that were available to the doctor, and we don't have that in
12 this case. In other words, we have --

13 MR. SEMENZA: But there were -- there were a lot of
14 medical records that were potentially available to this
15 particular doctor.

16 THE COURT: Do you have them?

17 MR. SEMENZA: I mean, her entire history, as far as
18 the fibromyalgia, as far as seeing pain doctors, as far as all
19 of those sorts of things, I mean, those documents exist and
20 have been produced in this case. Whether they're used at
21 trial, I don't know. But that's the issue I've got, is
22 there's this whole cornucopia of other stuff out there that
23 obviously Dr. Dunn has not had an opportunity to review.

24 And he testified that his entire basis for the
25 conclusion of causation was based upon what the plaintiff was

1 telling him. That in and of itself I don't believe is
2 sufficient to link the causation in this particular case. He
3 was told X; it may or may not be true. Again, that's coming
4 from the plaintiff herself.

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

11 THE COURT: Pain -- but reports of pain are always
12 subjective. They're -- you can't visualize pain.

13 MR. SEMENZA: Exactly. So --

14 THE COURT: All right, so but doctors have to --

15 MR. SEMENZA: So, that's the point.

16 THE COURT: Doctors do rely on reports. And if you
17 can show him other things, that's cross-examination. I mean,
18 if he wasn't given the proper tools to come up with a proper
19 causal diagnosis of her, you can show that, then do that, but
20 I don't think at this point he is kept from testifying.

21 MR. SEMENZA: But that's -- and Your Honor, I
22 understand your position on --

23 THE COURT: Okay, I've ruled. Let's go. Get this
24 jury back in here. What's your schedule look like for the
25 rest of the week?

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

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

5 THE COURT: Well, okay, but he can come back
6 Thursday, he just told me.

7 MR. SEMENZA: Okay.

8 THE WITNESS: Or Wednesday. Whatever's easy.

9 THE COURT: Wednesday the --

10 THE WITNESS: But Tuesday is --

11 THE COURT: -- the courthouse is closed --

12 THE WITNESS: Oh, okay.

13 THE COURT: -- because of Veteran's Day.

14 THE WITNESS: No problem.

15 THE COURT: We can only go until 6:00.

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

17 (In the presence of the jury)

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

19 THE COURT: Please be seated. And we have called
20 Dr. Thomas Dunn, who has already taken the stand. I'm going
21 to have the clerk swear you in again.

22 THE CLERK: Doctor, can you please stand again?

23 THE WITNESS: Oh, yes.

24 //

25 //

1 THOMAS DUNN, PLAINTIFF'S WITNESS, RESWORN

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

4 THE WITNESS: Thomas --

5 THE CLERK: Please be seated.

6 THE WITNESS: Thomas Dunn.

7 THE COURT: Thank you. Proceed.

8 DIRECT EXAMINATION

9 BY MS. MORRIS:

10 Q Dr. Dunn, can you tell us where you currently work?

11 A I am a partner with Desert Orthopedic Center, and
12 been here since 1995 with that group.

13 Q Tell us, what do you do for work?

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

17 Q Do you have a certain specialty?

18 A Yes. Again, that speciality is orthopedic surgery,
19 and orthopedic surgery is the surgical disorders of the
20 musculoskeletal system, so injuries to the joints and the
21 bones of the body from the neck to the toes. But it -- there
22 are many sub-specialties of orthopedics. For instance, in my
23 group, there are 22 orthopedic surgeons, and we all have our
24 sub-specialities. I'm the senior spine surgeon. There are
25 four spine surgeons. Hand surgeons, sports medicine

1 specialists, total joint specialists. So, my specialty would
2 be spine.

3 Q How long have you worked at Desert Orthopedic?

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

6 Q Thank you. Do you have any privileges at any
7 hospitals in the Las Vegas area?

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

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

14 A Sure. I went to undergraduate studies college at
15 the University of California, San Diego, and received a degree
16 in biology, which is a typical pre-med major, and I was
17 accepted into the University of California, Irvine Medical
18 School, and graduated in 1985 with a medical doctor degree.

19 Upon receiving that degree, one then does an
20 internship and a residency. I did two years of general
21 surgery, and then was accepted into the orthopedic surgery
22 program at the University of California, Irvine. The medical
23 center is actually in Anaheim or Orange.

24 And then I did -- after four years of orthopedic
25 surgery, that's the completion of the residency, I then did an

1 extra year of sub-specialty surgery training in spine, and
2 that's called a fellowship year, and that was done at Rancho
3 Los Amigos Hospital in Downey, California, and that completed
4 my formal training.

5 And then there was board certification, which
6 requires both a written and an oral exam, which I passed. And
7 then, every ten years, we take a written examination for
8 re-certification, and I've done that twice successfully when
9 required.

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

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

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

21 A Yes.

22 Q How many times?

23 A I'll say roughly 20 times.

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

1 THE COURT: The Court doesn't qualify experts. The
2 Court just rules on whether they'll be allowed to testify.
3 But you haven't asked him any -- his opinions, and there's
4 been no objection, so that's how it works.

5 BY MS. MORRIS:

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

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

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

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

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

13 A That was June 16, 2014.

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

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

19 Q Can you tell me how the x-rays of her neck and low
20 back were done?

21 A We have x-ray machines, radiograph machines in the
22 office, and we have three, soon to have four offices in town,
23 and we all have x-rays. So, the patient will just go in the
24 x-ray suite with a tech, and then they will take x-rays of the
25 neck while she's standing; a front view, side view, a flexion

1 extension view from the side of both her neck and back.

2 Q Why did you order those studies be done?

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

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

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

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

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

17 Q Did she tell you about any conservative care that
18 she'd undergone?

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

20 Q During that first visit with Yvonne, had you
21 reviewed her prior imaging before seeing the patient?

22 A No. Typically, I'll just look at the films with the
23 patient and review it with them.

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

25 A Well, at that visit, I had recommended updated MRI

1 studies, since it had been four years since she had had the
2 original studies. And she obtained those studies and returned
3 to see me approximately a month later on July 14, 2014.

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

6 A Well, principally, it was her neck, but it was low
7 back and neck, and she had radiating symptoms into her
8 extremities; numbness, and tingling, and pain.

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

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

15 Q What did you see in her cervical MRI?

16 A Again, I saw changes that we would typically see in
17 a patient of her age. At this time, we are now at a woman
18 who's in her seventh decade of age, early 60s, and she had
19 some typical changes of degenerative -- of degeneration. That
20 would involve her discs, her facet joints, and she had a
21 component of neural foraminal stenosis in her mid-lower neck.

22 The foramen represents the hole through which the
23 nerve travels to go to the upper extremities, and we commonly
24 see a tightness about that anatomy or that foramen, which in
25 Latin means doorway. So, it gets a little tight, and that may

1 give patients some of these upper extremity symptoms that she
2 was having. And the lumbar spine, nothing there that I
3 thought was significant other than some mild neural foraminal
4 stenosis at one level in her back.

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

7 A Yes.

8 Q And did anything else occur on that visit?

9 A I examined the patient, and I let her know that
10 there was -- the main -- I would say the most important
11 information that is obtained from the MRI is to make sure that
12 there's nothing dangerous. Sometimes we'll find a tumor, a
13 cancer that we didn't expect, an infection, something that
14 poses a threat to neurologic status, and I really didn't see
15 that, so the most important information says, hey, let's
16 celebrate, there's nothing dangerous.

17 Therefore, this is about your pain. If you can live
18 with your pain, so be it. If not, we'll look at other
19 options. I suggested she try fish oil. Fish oil at 4,000
20 milligrams a day can serve as a great anti-inflammatory agent.
21 And I instructed her at that time then with that information,
22 just come back as needed.

23 Q Did you see Yvonne again?

24 A I saw her one last time. Her third visit was on
25 October 13, 2014, where she was expressing increasing

1 difficulty enduring symptoms, principally of her neck pain,
2 and she wanted to discuss options of surgery. So, I discussed
3 that with her and told her, hey, there's nothing dangerous.
4 If you can live with this, live with it. If not, then you
5 have the option of surgery as your last resort, and instructed
6 her to return if that was her choice.

7 Q What did you recommend for surgery?

8 A For her, to help improve her neck pain and to
9 improve the symptoms into her arms to open up that foramen or
10 hole. The typical procedure is an anterior, a little incision
11 through the neck, and we would remove three discs, we would
12 open up that space, and fuse it in that proper position. So,
13 that's titled an anterior cervical neck discectomy; removing
14 the disc, and interbody fusion with placement of a plate and
15 screws. The quarterback for the Denver Broncos, Peyton
16 Manning, had that surgery.

17 Q Now, you said that it would -- that type of surgery
18 would help her neck pain; is that correct?

19 A Yes. It's not curative for her problem, but it can
20 take 50 to 60 percent of the pain away. And for people who
21 are having a significant problem dealing with that pain, and
22 it's affecting their quality of life, then it's an option they
23 can choose.

24 Q Is there physical therapy required after a surgery
25 such as the three-level fusion?

1 A It's -- it varies from individual to individual, but
2 typically, anywhere from a month to two months of therapy can
3 be ordered.

4 Q Where would that surgery be conducted? Would it be
5 in your surgery center; in a hospital?

6 A A three-level would be in a hospital.

7 Q Now, did you discuss with Yvonne her lumbar spine on
8 that last visit?

9 A Well, yes. Basically, again, I'm the surgeon. I
10 didn't feel that there was any surgical treatment for her low
11 back, so you basically do your best to live with it.

12 Q When Yvonne came to see you, did she report any
13 preexisting medical conditions to you?

14 A She noted that she had a history of depression.

15 Q Does that have any significance to you?

16 A Well, certainly, it can. Psychological issues like
17 depression can affect one's perception of pain, and can affect
18 one's result from surgery or outcome of surgery. So,
19 typically, if I see that, it's not necessarily unusual, but I
20 may require a psychological evaluation and clearance prior to
21 surgery.

22 Q Did you come to an opinion as to the cause of
23 Yvonne's need for the three-level fusion?

24 A Well, I think, as I share with every patient who
25 comes to see me on their initial visit, as I did today, on

1 many occasions, that there are three things the patients want
2 to know when they see a specialist, or any physician, for that
3 matter.

4 You want to know the cause of your symptoms; that's
5 the diagnosis. We want to make sure that that particular
6 problem is not dangerous, as it involves your neurologic
7 system or life, and then we want to discuss treatment options.
8 So, those are the three things we cover. So, establishing the
9 cause of her symptoms is an important part of her visit. Was
10 that your question, or?

11 Q Yeah. Did you come to a determination as to the
12 cause of Yvonne's need to have the three-level fusion?

13 A Well, the need is based on a number of factors. Her
14 complaints, number one. Establishing that there was nothing
15 dangerous. In other words, I didn't believe that there was
16 any threat to her neurologic status, so again, this becomes an
17 elective option at her choosing; an option of last resort.
18 And then the radiographic findings and physical exam findings.
19 So, all of those lead me to my recommendation of surgery being
20 an option for her. And based on her history, she said it
21 began with this slip and fall accident, so that's how I would
22 relate it to the accident.

23 Q So, is it your opinion to a reasonable degree of
24 medical probability that she's in need of this three-level
25 cervical fusion due to the fall that she had on February 8th,

1 2010?

2 MR. SEMENZA: Objection, Your Honor.

3 THE COURT: State your legal grounds.

4 MR. SEMENZA: That I don't think he can provide that
5 opinion to a reasonable degree of medical certainty.

6 THE COURT: Well, it's an opinion to a reasonable
7 degree of medical probability, but I guess it more seems like
8 you skipped -- you skipped a step. I mean --

9 MR. SEMENZA: May we approach, Your Honor?

10 THE COURT: Yeah.

11 (Off-record bench conference)

12 THE COURT: I'm going to sustain the objection and
13 let you clarify.

14 BY MS. MORRIS:

15 Q Dr. Dunn, we're going to back up a little bit. The
16 findings in Yvonne O'Connell's MRI, those are degenerative, is
17 that correct, in her cervical and lumbar spine?

18 A That's correct.

19 Q And can you describe to us what degenerative means?

20 A Degenerative is what you see before you -- as we
21 age, things wear out. In the musculoskeletal system, we call
22 it arthritis or degenerative disc disease. There are changes
23 in our spine, just like we can have in the rest of the -- the
24 other joints of our body.

25 //

1 The clinical relevance of those changes though is
2 based on your symptomatology as a patient, because we all
3 develop degenerative changes, typically by our third and
4 fourth decade of life. And as we age, we can develop a lot of
5 degenerative changes, but we don't see significant symptoms in
6 the majority of people with degenerative arthritis. And
7 remember, there are different types of arthritis. I'm just
8 talking about the typical wear and tear that we all get.

9 And what I mean by relevant, I mean enough symptoms
10 where you're going to see a doctor and get treatment. Most
11 people can take some Advil, over the counter medications, and
12 they feel fine and they can live with it. So, an x-ray that
13 shows degenerative changes in a 58-year-old -- 62-year-old
14 patient is not necessarily relevant. In other words, I can
15 see a lot of, quote, "abnormalities," but until I speak to the
16 patient, get a thorough history, and do an examination, many
17 of those changes may be irrelevant and don't require
18 treatment.

19 And on the other side of the coin, I can see x-rays
20 and MRIs that are fairly normal looking without much
21 degeneration, and yet patients can have severe pain. And
22 through further diagnostic evaluation, we find the source of
23 that pain that may merit surgical treatment.

24 So, in Ms. O'Connell's case, at the time that I
25 evaluated her, she was 62 years of age and she had radiographs

1 taken after her accident in 2010 that showed typical changes
2 that I would see in a 58-year-old patient. So, the main
3 changes that we look for are fractures, disc herniations,
4 tumors, infection, but I know from doing this for many years
5 that we can see normal changes on MRI and x-rays that don't
6 reflect the injury.

7 So, I think the films that we saw here demonstrated
8 changes that I can attribute to her pain, and yes, those
9 changes were there before she slipped and fell. But her
10 history is that when she slipped and fell, that was when this
11 pain began. And understanding that the mechanism is one of a
12 slip and fall in a 58-year-old, that is not unusual, because
13 we are more frail at 58 than we are at 48, or 38, or 28, and
14 that fall is perilous in the sense that we can sustain
15 injuries to the musculoskeletal system that become chronic.

16 So, the degeneration that I see in her, I would see
17 in everybody that's 58, but all that tells me as an orthopedic
18 specialist is she is more frail because of those changes, and
19 a slip and fall can result in changes that we can't always
20 measure on radiographic films, so her history is critical.

21 Q So, the history is critical because that's when she
22 reported she started feeling pain; is that correct?

23 A Well, I -- well, at the time that I'm seeing her,
24 she has chronic pain. And I define chronic -- and the
25 textbooks define it as at least three months; I define it as

1 six months. So, at 2014 when I saw her, she states that she's
2 had chronic pain that dates back to 2010, and her history is
3 that she had this slip and fall, and that's the reasonable
4 mechanism of injury that can cause a previously asymptomatic
5 condition, degeneration, to become symptomatic.

6 Q Now, in your treatment of Yvonne, did you notice --
7 or did you see any indication of Yvonne malingering or having
8 issues of secondary gain to you?

9 A No.

10 Q Do you know what malingering means?

11 A Yes.

12 Q Can you tell us?

13 A Malingering is a form of what we call secondary
14 gain. In medicine, primary gain is the motive that, hey, I
15 have a problem medically, and I want to be cured or I want to
16 be treated for that condition, so the gain is to become cured
17 or have clinical improvement of the condition. Secondary gain
18 means that, I basically -- this issue of wanting to get better
19 is affected by a motive outside of getting better. I want to
20 get out of work, for instance. That's malingering. Or --

21 MR. SEMENZA: I'm sorry, I'd like to object. I
22 think this is outside the scope of his treating of Ms.
23 O'Connell.

24 THE COURT: All right, that's sustained. There's
25 been -- there's nothing that addresses it in his medical

1 records, and it was not his -- his testimony has been limited
2 previously to his chart. That was the disclosure. So, the
3 jury will disregard the testimony concerning malingering.

4 MS. MORRIS: Let me lay a little foundation.

5 BY MS. MORRIS:

6 Q Do you look for those symptoms when you treat
7 patients?

8 A Yes.

9 Q And if you do note that, would you put it in your
10 medical record?

11 A Yes.

12 Q And did you note anything like that in Yvonne's
13 medical record?

14 A No.

15 Q Do you in your treatment of patients ever perform
16 the Waddell factors?

17 A Yes.

18 Q What is that?

19 A Well, the Waddell factors -- one has to be very
20 careful. I think it's used by too many doctors, and it should
21 only be limited to surgeons. And Waddell signs -- the word
22 "Waddell" is named after --

23 MR. SEMENZA: I'm going to object again, Your Honor.
24 I think he's going far field of his medical chart in this
25 particular case.

1 THE COURT: Well, I think -- did you do that -- you
2 did that test?

3 THE WITNESS: Yes, we do it routinely.

4 THE COURT: Okay. So, he did the test and that's in
5 the chart, so he can explain it to the jury.

6 THE WITNESS: It's -- Gordon Waddell was a Scottish
7 orthopedic surgeon who wrote a paper in 1980 that described
8 these tests that may help surgeons delineate organic sources
9 of pain. Say, a person comes in and says they have arm pain.
10 An organic source would be a fracture, or a contusion, a
11 problem with that arm, referred pain from a pinched nerve,
12 versus say a psychological issue that may be affecting that
13 patient's cause of pain.

14 And so, he developed these certain tests. There's
15 five different tests you do that can be done within a minute,
16 and that may give the surgeon some idea that there may be a
17 psychological contribution to the pain. It doesn't exclude
18 the patient could have that fracture or contusion; it just
19 gives the surgeon information to help them better treat this
20 patient.

21 I think too often that is used erroneously to
22 implicate a patient is not being forthright or honest, and
23 that's the improper use of that test.

24 BY MS. MORRIS:

25 Q Why do you think it should be limited to orthopedic

1 surgeons?

2 A Because the information is predominantly for us
3 offering the patient a surgery that potentially has a major
4 complication and may affect the outcome of that surgery, and
5 we want to optimize the patient's success, and psychological
6 factors can affect that success.

7 So, if we have those tests that may suggest that may
8 be a complicating factor, we would then send the patient for
9 preoperative psychological clearance. And we don't do that
10 for every patient, but those type of tests help the surgeon
11 make that determination.

12 Q How do you perform a Waddell test?

13 A Well, it's just part of the physical examination,
14 and there's five different categories, one of them -- and
15 again, distraction. In other words, I may ask the patient to
16 lay on the table and raise their leg, and they may say, I
17 really can't do it. But if I distract them by examining
18 something else and then have them raise the other leg, they
19 may raise it so I can observe that and say, hey, the patient
20 really can raise it when they're distracted, as opposed to
21 when they're told to do that.

22 Patients who may have symptoms that aren't
23 necessarily -- I forget the category, but numbness and
24 tingling, paresthesias, or deficits that cannot be explained
25 by what we see on radiographic findings, and sometimes, those

1 symptoms then indicate that their sensory examination is off,
2 and that might be a positive Waddell sign. But there are so
3 many disorders that give those type of findings, other than
4 like say a pinched nerve. Inflammation of a nerve can give to
5 those patients. So that's why the Waddell signs are now --
6 have been refuted.

7 There are tests where we can do physical findings
8 that shouldn't create a particular sign. For instance,
9 pushing down on the head shouldn't necessarily cause back
10 pain, but we know that it can, but that could be a potential
11 Waddell sign. Like, if I push down on your head, it shouldn't
12 cause low back pain. If you say it causes low back pain, that
13 potentially could be a positive Waddell sign. And I think
14 there's -- there's five total, but that kind of summarizes.

15 And basically, it's not going black or white. It's
16 me examining, establishing a rapport with a patient, speaking
17 with a patient, understanding that there's trust, do I believe
18 this patient is being forthright, and part of that exam may
19 help me with that assessment.

20 Q And in this case, did you perform the Waddell
21 signs --

22 A It's part of my evaluation of every patient, and I
23 would only note it if I felt that the patient had
24 psychological factors that would affect my diagnosis and
25 treatment.

1 Q Is it possible to perform the Waddell sign test
2 without ever touching the patient?

3 A No, you have to touch the patient. It's part of the
4 physical examination.

5 Q In your treatment of Yvonne, did you ever diagnose
6 her with symptom magnification disorder?

7 A No.

8 Q What is that?

9 MR. SEMENZA: Objection, Your Honor.

10 THE COURT: Over -- I mean, sustained. He didn't
11 diagnose her with it, so it's not relevant.

12 MS. MORRIS: Let me back up.

13 BY MS. MORRIS:

14 Q Is that something that you look for when you see a
15 patient?

16 A Well, I think a lot of those things that we use
17 loosely like symptom magnification can be interpreted a
18 different way. So, what you're asking me, is a patient saying
19 they hurt when they really don't hurt, or are they magnifying
20 their symptoms, you just barely touch them and they're
21 jumping, the interpretation of that has to be very careful and
22 can be prejudicial against patients who have a very low pain
23 tolerance, for example. And everyone has a different pain
24 tolerance, and I see it in all my patients from all walks of
25 life.

1 And -- and so, I don't know about a syndrome or a
2 disorder. It's not. It can be interpreted as a potential
3 psychological problem, or it could be potentially a patient
4 who is feigning illness; faking.

5 Q In this case, do you recall what Yvonne told you her
6 pain levels were in her neck?

7 A Well, again, my recollection is only my medical
8 record. And depending on what day -- for instance, the first
9 day that I saw her, she said her pain -- on a zero to ten
10 scale, zero being no pain and ten being the worst, her pain on
11 that day was a nine, but at times it will be down to a two out
12 of ten, and at worst, it can be a ten, but she feels her
13 average is somewhere around an eight.

14 Q So, she described varying levels of pain to you --

15 A Yes.

16 Q -- would that be fair?

17 A Yes.

18 Q Do you have concerns when a patient comes to you and
19 they claim a pain scale of a ten?

20 MR. SEMENZA: Objection, Your Honor. Again, I think
21 this goes outside the scope of the chart.

22 THE COURT: I'm sorry, state the question again.

23 BY MS. MORRIS:

24 Q Do you have concerns when a patient comes to you and
25 they report a pain scale of a ten, such as was indicated in

1 Yvonne's chart?

2 THE COURT: All right, I'll allow that. Overruled.

3 THE WITNESS: No, because it's so common, and I'm
4 not a big fan of the numeric pain scale. I mean, even myself
5 with injuries, I find it hard to put a number on it, and
6 patients sometimes become fearful that they're not taken
7 seriously unless they give a high number.

8 So, I prefer mild, moderate, and severe. I don't
9 like the number scale so much. But it's so common that
10 patients come in and say they have a ten out of ten pain that,
11 often, it's not realistic, so I don't -- it doesn't concern
12 me. It's the patient's interpretation of that pain and how it
13 affects their quality of life that's important to me.

14 Q Did she tell you the pain that she was feeling in
15 her spine -- her lumbar spine?

16 A Yeah, she complained of ongoing severe back pain,
17 but again, after reviewing her MRIs and studies, I'm the
18 surgeon; I informed her that there's nothing I can do for her
19 regarding her low back.

20 And remember, I'm seeing her four years after this
21 began, so sending her to physical therapy, or chiropractic, or
22 injections, and all these other things are not going to
23 substantially correct anything. Not that she can't do those
24 things to help control the pain, but it would simply be
25 palliative in alleviating some of the pain, but it's not going

1 to correct the underlying problem. So, at this point, she's
2 pretty much seeing the last resort; that's me as the surgeon.

3 Q And you didn't recommend that she have surgery to
4 her lumbar spine; is that correct?

5 A That's correct, no.

6 Q Why not?

7 A Because I don't believe that there was any
8 indications for surgery there that would correct her problem.
9 In fact, it would probably make her worse.

10 Q What indications do you see in her cervical spine
11 that lead you to recommend surgery?

12 A Well, the quality and severity of her neck pain is
13 commonly what I see with patients who have a frail spine that
14 have the degeneration that she does, and also has the degree
15 of foraminal stenosis, and that has symptoms.

16 So, I think her quality of symptoms is very
17 consistent with the problems I see in the lower three discs in
18 her neck. And having done this for 23 years in private
19 practice and having good success with it, I think that I could
20 get her to an appropriate, acceptable success, and that would
21 be defined as taking 50 percent of her neck pain away and
22 preventing any progression of her upper extremity symptoms.

23 Q Where do you get that approximation that it will
24 alleviate her pain approximately 50 percent?

25 A Well, through my own experience of treating these

1 kind of conditions over 23 years in private practice. So, I
2 mean, if I told everyone I could make them 90 percent better,
3 there would be a line from here to Tijuana, but that's not
4 realistic.

5 So, we have to realize that there's surgery for two
6 purposes in the spine. There are the neural compressive
7 lesions where you have a pinched nerve, and that creates
8 severe pain down the extremity. If it's the neck, it's the
9 arm; if it's the back and the leg, but the predominant problem
10 is that arm or leg pain, and those surgeries have great
11 success. We simply take the pressure off the nerve, and
12 patients have 9,900 percent improvement, and those are simple
13 procedures.

14 The problems that deal with what we call axial
15 mechanical spine pain, neck or back pain, those are much more
16 difficult to treat and correct, require much bigger surgeries.
17 But the clinical result realistically is patients can
18 experience 50 to 60 percent improvement, and for those people
19 who are truly desperate, it's a welcome option once they
20 failed other treatments. And given that she's four years out,
21 according to her history, she would be an appropriate
22 candidate for surgery in her neck.

23 Q Now, Yvonne hasn't come back to see you since
24 October; is that correct --

25 A That's correct.

1 Q -- of 2014?

2 A That's correct.

3 Q And does that cause any concern for you?

4 A No, not at all. As part of her last visit, I
5 informed her that -- what our surgical plan would be. And at
6 this point, I informed her that there was nothing dangerous
7 here; nothing that was going to kill her or paralyze her.
8 This was about her pain. If she could learn to endure that
9 pain, then she wouldn't have to consider surgery. There's no
10 guarantees with surgery, and there are major -- potential
11 major complications with surgery, so it's to be avoided. But
12 if you're at wits end and can't live with it, come back and
13 see me and we'll pursue surgical treatment.

14 Q Now, you recommended a three-level cervical fusion;
15 is that correct?

16 A I did.

17 Q Do you do any surgeries that are more extensive than
18 that, such as a four-level or five-level?

19 A Extremely rare.

20 MR. SEMENZA: Objection, Your Honor, outside the
21 scope.

22 THE COURT: Sustained. And how much longer -- it's
23 6:00 o'clock. How much longer do you have on direct?

24 MS. MORRIS: I think I'll have a bit more, and then
25 he'll have cross, so.

1 THE COURT: Okay. All right, let's just call it a
2 day. And you're able to return on Thursday? Is there --

3 THE WITNESS: Yes.

4 THE COURT: -- a time? All right.

5 THE WITNESS: Whatever the preference is here.

6 THE COURT: Okay, so you'll discuss that with, you
7 know, the subpoenaing lawyers, and about -- you're going to
8 come back on Thursday?

9 THE WITNESS: Yes.

10 THE COURT: Okay. All right. Ladies and gentlemen,
11 we're going to take an overnight recess. I'm going to see you
12 tomorrow at 8:30.

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

21 See you tomorrow morning at 8:30.

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

23 (Outside the presence of the jury)

24 THE COURT: All right, thank you. Jury has departed
25 the courtroom. And I think you need to get with Dr. Dunn

1 about when he will come back on Thursday, and let's try and
2 make sure it's not so late that we can't get done. I mean, we
3 need to give him plenty of time for cross. And thank you very
4 much for your testimony. So, you're excused. Anything
5 outside the presence at this point today?

6 MS. MORRIS: No.

7 MR. SEMENZA: No, I don't think so, Your Honor.

8 THE COURT: Okay. All right. 8:30 tomorrow, you
9 have a witness lined up for that?

10 MS. MORRIS: Yes.

11 THE COURT: Okay.

12 MS. MORRIS: Corey, correct?

13 MR. SEMENZA: Yes.

14 MS. MORRIS: Yes, we do.

15 THE COURT: Okay. I will see you tomorrow at 8:30.

16 MS. MORRIS: Thank you.

17 MR. SEMENZA: Thank you, Your Honor.

18 THE COURT: Thank you.

19 MR. KIRCHER: Thank you.

20 (Court recessed at 6:03 p.m. until Tuesday,
21 November 10, 2015, at 8:29 a.m.)

22 * * * * *

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CERTIFICATION

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

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DISTRICT COURT
CLARK COUNTY, NEVADA
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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 5

THURSDAY, NOVEMBER 12, 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:

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District Court

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INDEXWITNESSES

<u>NAME</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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Dr. Thomas Dunn	6	28	39, 43, 45, 46	42, --, 45, --
Salvatore Risco	47	70	80	--

DEFENSE'S WITNESSES:

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****Testimony outside the presence of the jury.***

EXHIBITS

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1 LAS VEGAS, NEVADA, THURSDAY, NOVEMBER 12, 2015, 8:28 A.M.

2 (In the presence of the jury)

3 THE COURT: Case number A-655992, Yvonne O'Connell
4 vs. Wynn Resorts Limited. We're back in the continuation of
5 the trial. We're outside the presence of the jury.

6 This morning, I was informed that Juror number -- in
7 seat number 6, Kelly Harms, had a personal emergency. Her
8 grandmother had an aneurism, and she's at the hospital and has
9 been there since 5:00 this morning, and will not be in. So,
10 we're replacing her with Alternate number 1, Susan Berg, and
11 the marshal's already told -- you know, is already going to
12 tell Susan Berg that she'll take seat number 6 to replace
13 Kelly Harms. That's why we have alternates.

14 All right. What about jury instructions, folks?
15 Have you met and conferred about your jury instructions yet?

16 MR. SEMENZA: I haven't seen the plaintiff's jury
17 instructions, Your Honor.

18 MS. MORRIS: We have a set of them.

19 THE COURT: Have you sent your jury instructions to
20 them?

21 MR. SEMENZA: Yes, they've had them for quite a
22 while.

23 THE COURT: Okay.

24 MS. MORRIS: So, we have discussed them. When he
25 was in my office, I went through, and I told them certain

1 problems or certain issues that I had with his, and said I had
2 certain ones that I'd like to insert. We just haven't had a
3 final meeting about those.

4 THE COURT: Okay. Well, you need to send him your
5 proposed jury instructions, and then you need to confer about
6 that, because you're supposed to be done tomorrow --

7 MS. MORRIS: Correct.

8 THE COURT: -- and I haven't seen any jury
9 instructions that --

10 MS. MORRIS: And we've got copies right here we can
11 certainly hand to them.

12 MR. SEMENZA: And Your Honor --

13 THE COURT: Actually, I did get yours, I believe,
14 because --

15 MR. SEMENZA: Yes.

16 THE COURT: -- they were even on the bright-colored
17 paper, which is new.

18 MR. SEMENZA: We did our best.

19 THE COURT: Thank you.

20 THE CLERK: Colored paper?

21 THE COURT: Yeah, it was my JEA's idea.

22 THE CLERK: Oh.

23 THE COURT: That -- and it works really well, you
24 know, when you're looking through all of them to kind of keep
25 -- get straight as to who has proposed what, and so it was --

1 if you had it, it was great, and if you didn't, you know, we
2 could get by without it, but thank you.

3 MR. SEMENZA: Yes. And Your Honor, I do believe,
4 and I think plaintiff's counsel will agree with me, that we
5 should be done with testimony today.

6 THE COURT: Oh, okay.

7 MS. MORRIS: I don't know. I don't know who he's
8 calling, so I couldn't comment on that.

9 MR. SEMENZA: I would anticipate we'll be done with
10 testimony today. So, as we get further along in the day, then
11 I think we can sit down and talk scheduling as far as ironing
12 out the jury instructions, and closings, and those sorts of
13 things.

14 THE COURT: Okay, very good. So, you're ready to
15 bring the jury in? No other matters outside the presence?
16 Got everybody? All right, let's go.

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

18 (In the presence of the jury)

19 THE COURT: Good morning. Please be seated. And
20 the record will reflect that we've now been rejoined by what
21 is now all eight members of the jury and one alternate.

22 Sadly, one of our -- one of our regular jurors, Ms.
23 Harms in seat number 6, had a family tragedy with her
24 grandmother and is in the hospital attending to her, and so
25 that's what alternates are for, and that's why they're so

1 important. And so, we've replaced Susan Berg, our first
2 alternate, into seat number 6, and we'll proceed with the
3 trial. And where are we now?

4 MS. MORRIS: Dr. Dunn will be here -- well, he
5 should be here, so.

6 THE MARSHAL: He's here.

7 MS. MORRIS: He's here. We call Dr. -- recall Dr.
8 Dunn.

9 THE COURT: Calling Dr. Dunn.

10 THE CLERK: And he'll still be under oath.

11 THE COURT: Take the stand, Doctor, and you're still
12 under oath from before, all right? Have a seat. You may
13 proceed.

14 MS. MORRIS: Thank you.

15 DIRECT EXAMINATION (RESUMED)

16 BY MS. MORRIS:

17 Q Good morning, Dr. Dunn.

18 A Morning.

19 Q When we left off talking, I think you had told us
20 that you had been practicing for 26 years; is that correct?

21 A In private practice since 1992, so that would be 23
22 years.

23 Q And in your time practicing in private practice, do
24 you know approximately how many fusion surgeries you've
25 performed?

1 A Oh, well, I think the best way to say that is,
2 consistently, I think when I looked at my numbers, I perform
3 anywhere -- a little over 200 to 250 spine surgeries a year,
4 and about half of those would be fusions.

5 Q And so, would it be fair to say that you've seen
6 thousands of patients?

7 A Yes.

8 Q Have you seen patients who have come complaining to
9 you for pain as a result of a fall?

10 MR. SEMENZA: Your Honor, I'm going to object that
11 this is outside the scope of the medical chart.

12 THE COURT: Well, approach.

13 (Off-record bench conference)

14 THE COURT: All right. So, the objection is
15 overruled, but I need you to lay the foundation. In other
16 words, we're not -- just what we discussed at the bench --

17 MS. MORRIS: Correct.

18 THE COURT: -- back into it.

19 MS. MORRIS: Yes.

20 THE COURT: Okay.

21 BY MS. MORRIS:

22 Q Dr. Dunn, I'd like to talk to you about your
23 experience in your practice of medicine and --

24 THE COURT: No.

25 MS. MORRIS: -- treating patients.

1 THE COURT: No, no. He has an opinion; what's the
2 basis for his opinion.

3 BY MS. MORRIS:

4 Q Dr. Dunn, you've been practicing for 23 years; is
5 that correct?

6 A Yes.

7 Q And you've seen thousands of patients; is that
8 right?

9 A Yes.

10 Q Have you treated patients who have come to you with
11 complaints of pain as a result of a fall?

12 A I have.

13 Q When a patient -- when a person falls, can they get
14 hurt?

15 A Yes.

16 Q Does age factor into the amount of damage that can
17 happen when a person falls?

18 A Yes.

19 Q Tell me how.

20 A Well, I believe we may have discussed this a bit
21 earlier, but as we age, the musculoskeletal system experiences
22 degenerative changes as a result of that aging. Common terms
23 for that are arthritis; degenerative arthrosis.

24 As it involves the articular structures of the
25 spine, we're talking about two structures, really. The

1 intervertebral discs, which serves as a shock absorber between
2 the vertebrae. And with each intervertebral disc, whether it
3 be in your neck or back, or the thoracic spine, your mid-back,
4 there is an associated pair of joints called the facet joints,
5 otherwise known as swivel joints, and that's what allows the
6 complex motion we have in our necks and backs. And you can
7 compare that to the knee, which is a simple hinge joint.

8 So, these articular structures are susceptible to
9 degeneration. And depending on genetics, occupational
10 activities, accidents throughout one's lifetime, we can
11 develop a wear and tear phenomenon of these structures, and
12 the structure specifically has to do with cartilage, which,
13 unfortunately, in our bodies, does not replenish itself. Some
14 of us, it's hair cells; others, it's neurologic cells; and
15 then cartilage cells don't replenish or heal well.

16 As we age, there's a term that we use called
17 frailty. Our structures become weaker, in a sense, and
18 therefore, more susceptible to injury. And I think it's
19 somewhat intuitive, if you take a fall in a 20-year-old,
20 versus a 30, versus a 40, versus a 50, there are changes that
21 make that older person more susceptible to injury, and hence,
22 that goes along with the term frail or frailty.

23 Q Can you explain to us how a fall in a 58-year-old
24 can injure the spine, especially a degenerative spine?

25 A Yes.

1 MR. SEMENZA: Your Honor, I'm going to object. This
2 is outside the scope of the medical chart.

3 THE COURT: Okay, that's sustained. I think I told
4 you that I need you to talk about Ms. O'Connell, because
5 that's what he needs to talk about as to what his opinion was
6 and why he came to that opinion. But just this overall, I
7 told you not to do that, and you continue. So, don't do it.

8 BY MS. MORRIS:

9 Q How old was Ms. O'Connell when she fell?

10 A 58.

11 Q And at the time she fell, did she have a
12 degenerative spine?

13 A Yes.

14 Q How can a 58-year-old injure a degenerative spine
15 when they fall?

16 A Well, the forces --

17 MR. SEMENZA: Again, Your Honor, this is outside the
18 scope of the medical chart.

19 THE COURT: All right. Doctor, do you have an
20 opinion as to why Ms. O'Connell might have injured her spine
21 in this fall?

22 THE WITNESS: Yes.

23 THE COURT: Okay. What -- what is that?

24 THE WITNESS: I believe that she sustained
25 micro tears to the aged intervertebral discs in her neck.

1 BY MS. MORRIS:

2 Q And why do you believe that?

3 A One, because of the nature and quality of her
4 symptomatology. She relates in her history to me on the
5 initial evaluation that she has been experiencing a consistent
6 quality of neck pain with variable symptoms into her
7 extremities, meaning, sometimes it's in the right arm,
8 sometimes it's in the left arm. But overall, the consistent
9 quality has been what I would describe as chronic axial
10 mechanical neck pain that has persisted at the time that I saw
11 her for almost four-and-a-half years.

12 Q Can you tell us, do you expect the pain to the neck
13 to be immediate upon a fall?

14 MR. SEMENZA: Objection, Your Honor. Again, outside
15 the scope of the medical chart.

16 THE COURT: I'm going to overrule that. Go ahead.

17 THE WITNESS: No.

18 BY MS. MORRIS:

19 Q Why not?

20 A Well, often, an accident results in -- it's a
21 traumatic event to people, and they register pain differently,
22 and although they may experience discomfort in one area,
23 often, it's overridden by injuries to other areas. We call
24 that the Gate Theory of Pain.

25 And the best way to understand that would be, for

1 instance, if you came in and you had some neck pain or
2 soreness, and I took a hammer and I bashed your finger, you're
3 really not going to pay -- your brain is not going to pay much
4 attention to the afferent information from the sensory fibers
5 from the neck; it's going to be overridden by the pain that
6 you're experiencing when I hit your thumb with that hammer.

7 So, many times, when people are injured, they're
8 focused on their main area of complaint, which may be the
9 back, the hip, the knee, whatever it might be, and they might
10 not recognize the full extent of their injuries. So, over the
11 course of days, or even weeks, there becomes a full
12 realization or recognition of pain to the different areas that
13 were injured, so it's not always immediate.

14 Q Is there a certain time frame in which you would
15 expect to see an onset of pain?

16 A I mean, it varies from individual to individual, and
17 it varies on the extent of injuries. I mean, someone who
18 comes in with a pelvis fracture or head injury, you may not
19 recognize it for months. So, it's a very generalized
20 question, but I say, overall, most people who don't have a
21 closed head injury or a serious injury that requires emergent
22 transport and surgery, typically within a couple weeks.

23 Q Now, do you recall Yvonne O'Connell coming in to see
24 you?

25 A Well, my recollection of the details of her visit

1 has to be from my medical records, but I do specifically
2 remember her, yes.

3 Q And when she came in to see you, do you recall her
4 demeanor?

5 A I do remember her, yes.

6 Q And what was her demeanor like?

7 A Well, I remember her uniquely upon seeing her here
8 in court because her personality is not uncommon on many
9 patients I see, and she is very similar to one of my close
10 relatives in that they're very much interested in their
11 ailments and they go to the world wide web. It's called
12 physician by Google.

13 MR. SEMENZA: Your Honor, I'm going to object as
14 outside the scope.

15 THE COURT: All right, sustained. You need to keep
16 this just to Ms. O'Connell so we're -- you know, this isn't
17 about your relatives.

18 BY MS. MORRIS:

19 Q Let's talk about Ms. O'Connell. So, when she came
20 in to see you, she reported she'd had a mini stroke a couple
21 days after the fall; is that correct?

22 A Yes.

23 Q Was that significant in any way to you?

24 A No.

25 Q You said that she was very interested in her health.

1 Can you describe that?

2 A Yes. She's a common patient -- and I'll just refer
3 this to Ms. O'Connell -- who goes to Google and puts in their
4 symptoms. And --

5 MR. SEMENZA: Objection, lack of personal knowledge.

6 THE COURT: Well, there's no foundation, so, I mean,
7 find out if he -- lay a proper foundation for this to -- what
8 did she tell him?

9 BY MS. MORRIS:

10 Q What was it about Ms. O'Connell that led you to
11 understand that she was very interested in her health?

12 A Because she was very knowledgeable, and I know she
13 hasn't gone to medical school and doesn't have a formal
14 medical education, so I know it came by way of the computer.
15 And she was very knowledgeable about many of her medical
16 conditions, but was also very respectful regarding my
17 evaluation of her as it involved her neck and back.

18 Q When she came in to you, was she asking for neck
19 surgery?

20 A Well, she came to me -- I'm a surgeon, so when
21 patients come to me, they're typically wanting to know what
22 their surgical options are. So, yes.

23 Q Did she demand neck surgery?

24 A No.

25 Q Was she in any way demanding toward you about the

1 medical care you were giving her?

2 A No.

3 Q Have you ever treated patients who have multiple
4 complaints or are overly anxious about their health?

5 MR. SEMENZA: Your Honor, I'm going to object.
6 Outside the scope of the medical chart.

7 THE COURT: Sustained.

8 BY MS. MORRIS:

9 Q The demeanor that Ms. -- Ms. O'Connell showed when
10 she came in to see you, did that lead you to think she was
11 overly anxious about her health?

12 A No.

13 Q Is there anything about Ms. O'Connell that you saw
14 that would make you hesitant to perform surgery upon her?

15 A You know, I established a rapport with Ms. O'Connell
16 over three visits and spent a considerable amount of time with
17 her, and that's important as a surgeon, in my opinion, because
18 we're dealing with a subjective complaint of pain, so the
19 objective of the surgery would be to improve that pain.

20 And so, if I'm going to take this patient in a
21 relationship where I'm going to operate on them, I want to be
22 confident at least in my own assessment and abilities to
23 assess this patient that she is being forthright about her
24 complaints of subjective pain.

25 And I noted that there was a history of depression,

1 and that can affect an outcome of surgery. And so, therefore,
2 I would say, upon reevaluation, I may obtain a preoperative
3 psychological clearance, which spine surgeons utilize from
4 time to time. And beyond that, I have no reservations about
5 proceeding to surgery if she requested it.

6 Q And you evaluated Yvonne for her truthfulness; is
7 that correct?

8 MR. SEMENZA: Objection, outside the scope.

9 THE COURT: Sustained. No --

10 BY MS. MORRIS:

11 Q You performed a Waddell -- a Waddell test on her; is
12 that correct?

13 A Yes.

14 Q And the purpose of the Waddell --

15 MR. SEMENZA: Your Honor --

16 MS. MORRIS: -- test is what?

17 MR. SEMENZA: -- I'm going to object to any
18 questions relating to the Waddell, because I don't think
19 they're in the medical chart.

20 THE COURT: Approach.

21 (Off-record bench conference)

22 MS. MORRIS: And can that be the sustained
23 objection?

24 THE COURT: Sustained. This question's been asked
25 and answered about Waddell's last time he testified.

1 BY MS. MORRIS:

2 Q So, the psychological clearance that you would
3 require Yvonne to have before surgery, what does that entail?

4 A Typically --

5 MR. SEMENZA: Objection, Your Honor. That's outside
6 the --

7 THE COURT: Sustained.

8 MR. SEMENZA: -- scope of medical chart.

9 THE COURT: He's not designated as an expert. We've
10 already gone into this, that his -- his testimony's restricted
11 to his medical chart, so he's --

12 MS. MORRIS: But he's testifying as an expert in
13 orthopedic surgery from his 23 years --

14 THE COURT: Yes.

15 MS. MORRIS: -- of practice.

16 THE COURT: And you're asking him about a
17 psychological work-up.

18 MS. MORRIS: I'm asking if he knows what that
19 entails since that's something he requires --

20 THE COURT: No.

21 MS. MORRIS: -- his patients to have.

22 THE COURT: Right. He wasn't designated for that
23 purpose, so the objection's sustained.

24 BY MS. MORRIS:

25 Q Is it within your practice to refer patients for

1 psychological clearance before they have surgery if you
2 believe it to be necessary?

3 MR. SEMENZA: Your Honor, same objection.

4 THE COURT: That's -- that's fine. He's already --
5 it's already been asked and answered. He said he does that,
6 so you can ask him again, but let's not -- let's move along
7 and not ask the same questions.

8 MS. MORRIS: Okay.

9 BY MS. MORRIS:

10 Q So, in an individual like Yvonne where she has a
11 degenerative spine which has been injured, would you expect
12 her pain to resolve --

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

14 THE COURT: Let her finish the question, please. Go
15 ahead.

16 BY MS. MORRIS:

17 Q Would you expect the pain to resolve itself on its
18 own without surgery?

19 MR. SEMENZA: And again, Your Honor, my objection
20 is, "in a patient like Ms. O'Connell." That's improper. It
21 goes outside the scope of the medical chart.

22 THE COURT: With Ms. O'Connell.

23 BY MS. MORRIS:

24 Q With Ms. O'Connell and her spine in the condition
25 that it is, would you expect her pain to resolve without any

1 surgery?

2 A Given that I saw this patient in June of 2014,
3 four-and-a-half years after she stated she had a traumatic
4 event where she fell, which she has told me that marked the
5 onset of her symptoms, and given that she is beyond six months
6 in which the body's capacity to heal itself diminishes, I
7 believe that she has a permanent condition at this point.

8 Q Now, the surgery you recommended, would that take
9 place in a hospital, or at your facility?

10 A I have recommended a three-level cervical fusion,
11 and that would take place in a hospital.

12 Q And aside from yourself, would there be any other
13 medical staff required for this surgery?

14 A Well, yes. As part of the operating room team, we
15 have an anesthesiologist who's responsible for putting the
16 patient to sleep with adequate levels of analgesia so she
17 doesn't feel any pain during surgery. There are circulating
18 nurses. I have a scrub tech that passes me instruments, and
19 then I have an assistant surgeon who assists me in performing
20 the procedure.

21 Q And the pain that Yvonne came to you with, you said
22 it was a radiating pain; is that correct?

23 A Well, her principal complaint was neck and low back
24 pain with the neck pain predominating, but she also had
25 complaints that were radicular in nature; in other words, of

1 nerve root irritation that would give a patient subjective
2 sensations of pain or paresthesias into their extremities, or
3 arms and hands.

4 Q What is radicular symptoms?

5 A Radicular refers to the nerve root, and the nerve
6 emanates from the cervical spinal cord and then goes to the
7 tips of the fingers. And when the nerve is either pressed --
8 has pressure upon it or is irritated by inflammation, the
9 patient may have symptoms from pain to numbness or tingling.

10 Q And would that pain -- would you expect that pain to
11 be consistent in Yvonne, or could it change?

12 A Well, I think what is consistent in Yvonne and
13 what's important in the diagnostic evaluation by a spine
14 surgeon is that her principal complaint that I'm addressing is
15 her neck pain, and that is described as axial mechanical,
16 axial being the center of the body, as opposed to
17 appendicular, which is the extremity.

18 So, the fact that her principal complaint is axial
19 in her neck, that's an orthopedic problem. She does have
20 varying complaints of numbness, or tingling, or pain,
21 depending on the day; may involve the right arm, may involve
22 the left.

23 I understand that inconsistency because it's not due
24 so much to the nerve pressure, but nerve irritation from
25 something called inflammation, and inflammation varies from

1 day to day depending on weather, stress in one's life,
2 physical activities. But I believe if it was only her upper
3 extremity complaints, she would not be seeing a spine surgeon.
4 Her objective is -- and questions to me is what can we do for
5 my neck pain.

6 Q Can neck pain cause headaches?

7 A Yes.

8 Q The -- the neck pain that Yvonne expressed to you, I
9 think you said that surgery would relieve it about 50 percent;
10 is that correct?

11 A I believe -- yes. The realistic expectation with
12 this type of surgery for this type of problem is 50 to 60
13 percent improvement over their preoperative symptoms.

14 Q Do you know why it wouldn't be 100 percent?

15 A Yes. It's not 100 percent. And there are surgeries
16 that give us close, if not 100 percent relief, and that has to
17 do with simple nerve pressure problems, a herniated disc or
18 fracture --

19 MR. SEMENZA: Your Honor, I'm going to go ahead and
20 object. Outside the scope of his medical chart.

21 THE COURT: All right. Let's focus on --

22 MS. MORRIS: This is --

23 THE COURT: -- Yvonne and why --

24 MS. MORRIS: Yes, and Yvonne has been referred to
25 have this surgery, and I'm asking why --

1 THE COURT: Okay.

2 MS. MORRIS: -- it wouldn't be 100 percent recovery
3 from it. I think it's well --

4 THE COURT: Right, he --

5 MS. MORRIS: -- within the scope.

6 THE COURT: But he explained this in his last
7 testimony, I remember from last week -- or earlier.

8 MS. MORRIS: I am elaborating on -- he did say 50
9 percent, but I don't think we got the explanation as to how.

10 THE COURT: Well, we did, because he explained all
11 about this, how surgery on -- you know, if it was pressing on
12 and you could relieve that, it would -- you would get relief.
13 So, now, let's focus on why not in this case.

14 MS. MORRIS: Okay.

15 THE COURT: What she has, okay?

16 MS. MORRIS: Yeah.

17 BY MS. MORRIS:

18 Q Why not in this case would she not experience 100
19 percent, in your opinion?

20 A Well, the fusion results in an immobilization of
21 three segments in her spine that move, so by changing the
22 movement of her neck, I'm altering the biomechanics of her --
23 the way her neck works. So, motion is shared equally amongst
24 the five different disc levels in the neck. If I remove two
25 of those, there's going to be a biomechanical shift of stress

1 to the other levels. And so, therefore, she's going to have
2 pain from other areas that she may not be experiencing pain at
3 this point, or more pain from those other areas. So, we don't
4 get a cure with this type of surgery because of that change in
5 biomechanics. And then, oftentimes with surgery, we also get
6 some scar tissue, and that could be an ongoing source of pain.

7 Q And if Yvonne goes through and has this three-level
8 surgical fusion and feels the relief, will that relief remain
9 for the rest of her life?

10 A I believe so, yes.

11 Q Will -- could there be any potential complications
12 from surgery?

13 A Yes.

14 Q And could those complications lead to need for
15 further surgery?

16 A Yes.

17 Q Now, the -- the neck pain that she was experiencing,
18 when she came in, did she tell you that she had difficulty in
19 range of motion, or did you test her range of motion?

20 A I need to refer to my note to remember that detail.
21 I don't see that she complained to me of a stiff neck, unless
22 I'm missing it here. But on physical examination, she had
23 decreased range of motion, yes.

24 Q And what did that physical examination entail?

25 A Physical examination entails observing the patient,

1 their gait pattern, looking at their neck, palpating the neck,
2 the interscapular, the mid-back region, examining the upper
3 extremities, checking range of motion, and the most important
4 part would be assessing her neurologic status.

5 Q And how did you assess her neurologic status?

6 A It's assessing any weakness on her motor groups in
7 the upper and lower extremities, and we call that manual motor
8 testing. It's a resistance muscle testing. And then checking
9 her dermatomes in the upper extremities and lower extremities
10 for any sensory deficits.

11 MR. SEMENZA: Your Honor, I don't -- I don't know
12 that any of this is in his medical chart. I think he's
13 speaking generally, so I'd object to those statements -- or
14 his response to that question.

15 BY MS. MORRIS:

16 Q Dr. Dunn, did you get that information from your
17 medical record?

18 THE COURT: Hey, hey, hey.

19 MS. MORRIS: Oh.

20 THE COURT: Wait until I rule.

21 MS. MORRIS: Sorry.

22 THE COURT: All right, overruled. Go ahead.

23 BY MS. MORRIS:

24 Q All right. Now, with Yvonne's degenerative spine
25 that had been injured, would you recommend that daily

1 stretching help her?

2 A Sure, I recommend she do anything that provides her
3 any relief.

4 MR. SEMENZA: Objection, Your Honor. That's not in
5 the medical chart.

6 THE COURT: Overruled.

7 BY MS. MORRIS:

8 Q With Yvonne and the spine in the condition it is,
9 would her limiting certain movements help her relieve her
10 pain?

11 A Yes.

12 Q How about Yvonne's back? The condition that her
13 back is, you said it was not surgical; is that correct?

14 A That's correct, it's not surgical.

15 Q And is it your opinion that surgery simply won't
16 help the condition of her back?

17 A That's my assessment, yes.

18 Q What -- in -- what is -- can you tell by looking at
19 the MRI what's causing Yvonne's pain in her back?

20 A The way I have to answer that, just everything that
21 a physician does in evaluation of the patient represents
22 information, and the way I like to describe it is it's a piece
23 of the diagnostic jigsaw puzzle. And there are some parts of
24 that information that are large pieces of the puzzle, and
25 there are others that are small.

1 So, depending on the type of clinical problem we're
2 evaluating, in this sense, the MRI and radiographs are simply
3 there to rule out any obvious neurologic issues. But I know
4 through my exam there are no objective neurologic findings, so
5 I don't expect to see any major neurologic problems, unless I
6 found an occult tumor, which she didn't have.

7 So, the films are there mainly to give me an idea of
8 what's going on, but really represent a small piece of the
9 diagnostic jigsaw puzzle, and are principally there to let me
10 know and inform the patient that there's nothing dangerous, so
11 therefore, all treatment remains optional, including surgery.

12 Q In order to diagnose Yvonne, was it important that
13 you actually meet her?

14 A Yes, absolutely.

15 Q Why is that?

16 A Well, 80 percent of our diagnosis, regardless of the
17 medical condition, comes from seeing and talking to the
18 patient and upwards of 80 percent of that diagnostic jigsaw
19 puzzle is the history and physical examination.

20 Q In your history of treating patients, have you ever
21 had to fire a patient?

22 MR. SEMENZA: Objection, Your Honor, outside the
23 medical scope.

24 THE COURT: Sustained.

25 BY MS. MORRIS:

1 Q You have evaluated thousands of patients; is that
2 correct?

3 A Yes.

4 Q Have you ever treated a patient who you thought was
5 lying to you.

6 THE COURT: Sustained.

7 MR. SEMENZA: Same objection.

8 THE COURT: Sustained. It's the same objection.
9 Don't -- don't just re-ask the same question when I sustain an
10 objection.

11 BY MS. MORRIS:

12 Q You said you saw Yvonne three times; is that
13 correct?

14 A I did.

15 Q And you haven't seen her since; is that right?

16 A I have not.

17 Q Is that uncommon for a patient to not return to you?

18 A No.

19 Q Why not?

20 A Well, again, I'm a sub-specialist as a spine
21 surgeon.

22 MR. SEMENZA: Your Honor, I'm going to object again.
23 It's not contained in the medical chart.

24 THE COURT: Sustained.

25 //

1 BY MS. MORRIS:

2 Q Do you know why Yvonne hasn't returned to see you?

3 A Well, in our last visit, I made it clear that I'm
4 here to treat her from a surgical perspective, and until she
5 is ready to perform surgery, there's really no need to return
6 to me.

7 Q And is it your opinion that the fall that Yvonne
8 sustained at Wynn injured and damaged her degenerative spine?

9 A Yes.

10 Q And because of that fall, it's your opinion to a
11 reasonable degree of medical probability that she needs this
12 three-level surgical fusion; is that correct?

13 A Yes.

14 MS. MORRIS: I don't have any other questions.

15 THE COURT: Thank you. Cross?

16 MR. SEMENZA: Thank you, Your Honor.

17 CROSS-EXAMINATION

18 BY MR. SEMENZA:

19 Q Good morning, Dr. Dunn.

20 A Good morning.

21 Q Now, you're partners with Dr. Tingey; is that
22 correct?

23 A Yes.

24 Q How long have you been partners with Dr. Tingey?

25 A You know, I've been with the Desert Orthopedic

1 Center since 1995, and that's well before he joined the group,
2 but I don't know exactly when.

3 Q He came after then --

4 A Yes.

5 Q -- you had already started? All right. And you're
6 being compensated for being here today?

7 A Yes.

8 Q How much are you being compensated for?

9 A \$5,000.

10 Q And does that include your prior testimony I think
11 on Tuesday?

12 A No, that's additional.

13 Q Okay. So, how much total are you being compensated
14 for your testimony in this particular case?

15 A \$10,000.

16 Q And is that being paid by opposing counsel?

17 A Yes.

18 Q Do you commonly testify as an expert in civil cases?

19 A Yes.

20 Q Both as a treating physician and a non-treating
21 expert physician?

22 A Yes.

23 Q You testified that you had seen Ms. O'Connell three
24 times?

25 A Yes.

1 Q And the last time you saw her was over a year ago;
2 is that correct?

3 A Let me check my document to accurately answer that.
4 That's correct.

5 Q And the first time you saw Ms. O'Connell was on June
6 16th of 2014?

7 A Yes.

8 Q How long did you visit with her?

9 A It could have been anywhere from 30 minutes to an
10 hour.

11 Q It could have been less than that as well?

12 A I doubt it was less than 30 minutes.

13 Q Do you have any independent recollection of how long
14 you met with her?

15 A No.

16 Q And did you meet with her on July 14th of 2014?

17 A Yes.

18 Q How long did you meet with her during that visit?

19 A It would have been less than 30 minutes.

20 Q Do you have an independent recollection of how much
21 time you spent with Ms. O'Connell on that appointment?

22 A No.

23 Q And the last time you saw her was October 13th of
24 2014?

25 A Yes.

1 Q Do you recall how much time you spent with her
2 during that appointment?

3 A I would say it was less than 30 minutes.

4 Q Do you have an independent recollection of how long
5 you actually spent with her?

6 A No.

7 Q Now, relating to the July 14th of 2014 appointment,
8 did you refer her to a different doctor?

9 A Yes, I did.

10 Q And which doctor did you refer her to?

11 A Andrew Martin.

12 Q And he was -- is he still affiliated with you?

13 A No.

14 Q Why did you refer Ms. O'Connell to Dr. Martin?

15 A He was a specialist in knee -- I believe -- well,
16 it's not documented, so I don't recall, but it would have been
17 for an area outside of her spine in orthopedics.

18 Q Okay. Now, you diagnosed Ms. O'Connell as having
19 degenerative disc disease in her cervical spine; is that
20 correct?

21 A Yes.

22 Q That's a condition that predated the date of her
23 slip and fall, which was February 8th, 2010; is that correct?

24 A Yes.

25 Q And in that sense, it was a preexisting condition,

1 correct?

2 A Yes.

3 Q You also diagnosed her with lumbar disc disease; is
4 that correct?

5 A Yes.

6 Q Okay. And again, that diagnosis -- that condition
7 predated February 8th of 2010; is that correct?

8 A Yes.

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

11 A Yes.

12 Q Do you know whether prior to February 8th, 2010, Ms.
13 O'Connell was experiencing any symptomology in her cervical
14 neck; pain symptomology?

15 A It was my understanding that she wasn't.

16 Q Okay. And that understanding that she didn't have
17 any symptom prior to February 8th, 2010 came from her
18 statements, correct?

19 A Yes.

20 Q And exclusively came from her statements?

21 A Yes.

22 Q Okay. So, you were relying on Ms. O'Connell to
23 identify when the source -- when she began experiencing pain;
24 is that correct?

25 A Yes.

1 Q Now, would you agree with me that there are some
2 people in their 60s that don't have degenerative disc disease
3 in their cervical spine?

4 A No, I believe everybody in their 60s has some degree
5 of degenerative disc disease.

6 Q Okay, but that severity differs between people,
7 correct?

8 A Yes.

9 Q And the same would be true for the lumbar area as
10 well?

11 A Correct.

12 Q Do you know whether Ms. O'Connell had a severe back
13 injury prior to February 8th, 2010?

14 A Not that I recall.

15 Q That was something that Ms. O'Connell didn't -- that
16 was something that Ms. O'Connell didn't identify to you, did
17 she?

18 A That's fair.

19 Q And generally speaking, degenerative disc disease is
20 a progressive disease; is that correct?

21 A That's fair.

22 Q It will get worse over time?

23 A Well, the radiographic findings will certainly
24 worsen, but symptoms may not.

25 Q And obviously, I'm not a doctor, but can you

1 characterize or do you characterize degenerative disc disease
2 in layman's term as an arthritic condition?

3 A Yes.

4 Q And so, Ms. O'Connell did in fact have arthritis in
5 her cervical spine prior to February 8th, 2010?

6 A Yes.

7 Q She also had an arthritic condition in her lumbar
8 area prior to February 8th, 2010?

9 A Yes.

10 Q Now, when you saw her, there were no -- there was
11 nothing to indicate an acute injury to her cervical neck, was
12 there?

13 A That's fair.

14 Q Okay. There wasn't any herniated disc?

15 A No.

16 Q There wasn't a fracture?

17 A No.

18 Q Are there other things that might identify whether
19 there was an acute injury relating to her cervical neck?

20 A Typically, no.

21 Q And did you make any findings with regard to her
22 lumbar back that there had been an acute injury such as a
23 herniated disc or fracture?

24 A No.

25 Q And your conclusions regarding causation relating to

1 Ms. O'Connell's expression of pain is based exclusively on
2 what she's telling you; is that correct?

3 A Well, I don't know if I like the word "exclusively",
4 but largely, yes.

5 Q Did she tell you any specifics about the fall?

6 A Well, just as I've recorded in my report here.

7 Q Do you know whether Ms. O'Connell had any falls
8 after February 8th of 2010?

9 A No.

10 Q She didn't report any, did she?

11 A Not that I recall.

12 Q Other than the degenerative disc disease that we've
13 talked about, what other preexisting conditions were you
14 informed of that Ms. O'Connell had?

15 A She had noted history that included diabetes,
16 depression, and a mini stroke.

17 Q Those were the only preexisting conditions that she
18 identified?

19 A Well, she -- under her [inaudible], she noted that
20 she had a history of dizziness and nausea, cold intolerance,
21 issues with nighttime urination, weakness, numbness,
22 headaches.

23 Q And those were preexisting conditions?

24 A I believe so, yes.

25 Q Now, depression can have an effect on how a patient

1 experiences and presents pain; is that fair?

2 A It may, yes.

3 Q And do you know what Ms. O'Connell was referring to
4 when she said she had a mini stroke?

5 A As I sit here, I don't recall.

6 Q Did you treat her in any way for that mini stroke?

7 A No.

8 Q Did you treat her in any way for diabetes?

9 A No.

10 Q During your visits with Ms. O'Connell and the
11 history that was taken, were you ever informed that she had a
12 history of fibromyalgia?

13 A No.

14 Q I know we talked about depression, but were you ever
15 informed that Ms. O'Connell had a history of anxiety?

16 A No.

17 Q Now, would you characterize anxiety as being
18 something different from depression?

19 A Yes.

20 Q And if Ms. O'Connell did in fact have a history of
21 fibromyalgia, that could express itself in pain throughout her
22 body; is that fair to say?

23 A Yes.

24 Q And it could express itself in back pain at some
25 level?

1 A Yes.

2 Q And in fact, fibromyalgia could explain some of her
3 pain symptoms today; is that fair to say?

4 A Yes.

5 Q Now, I just want to be clear on this; when you
6 testified previously, you had talked about this surgery
7 relating to the fusion in her neck. Now, I want to be clear;
8 did you identify that the reduction in pain would be between
9 50 and 60 percent, or just 50 percent?

10 A You know, typically, I will say 50 or 60 percent,
11 generally in that range, improvement. So, they're going to
12 have 40 to 50 percent residual neck pain.

13 Q And Ms. O'Connell has not scheduled her surgery?

14 A No.

15 Q You don't know if she ever will?

16 A I don't.

17 Q Are you recommending that Ms. O'Connell have
18 physical therapy relating to her lumbar spine; her low back?

19 A I don't recall if I recommended therapy,
20 specifically, because I believe at this point where she has
21 expressed symptoms that have persisted for almost
22 four-and-a-half years, that all of those types of treatments,
23 whether it be chiropractic or physical therapy, are mainly
24 going to be palliative. And if it helps her with her pain,
25 then more power to it.

1 Q You didn't specifically recommend physical therapy
2 relating to her lumbar back though?

3 A I don't believe so, no.

4 Q Do you know whether she's ever gone to physical
5 therapy?

6 A I don't recall.

7 Q Do you recall whether during your treatment of Ms.
8 O'Connell, you discussed pain management?

9 A Yes.

10 Q And did you prescribe her any pain medication?

11 A The only thing that I prescribed her was Lovaza,
12 which is a pharmaceutical grade fish oil to reduce
13 inflammation.

14 Q Do you recall specifically having a discussion with
15 Ms. O'Connell relating to prescribing her pain medication?

16 A I don't believe so. I don't recall.

17 Q Do you recall her ever asking for pain medication?

18 A I mean, I don't recall.

19 Q Were you aware that Ms. O'Connell had a history of
20 constipation?

21 A I -- I recall that she had some GI issues, but I
22 don't recall the specifics of that.

23 Q If Ms. O'Connell came back to you and asked for
24 surgery, and you conducted a psychological clearance on her,
25 and she didn't pass that, would you perform surgery on her?

1 A I'm sorry, did you say did not pass?

2 Q Yes.

3 A Did not pass?

4 Q Correct.

5 A Then, no.

6 Q And it's -- well, is it fair to say that Ms.
7 O'Connell's pain symptomology is subjective in nature?

8 A Yes.

9 MR. SEMENZA: No further questions.

10 THE COURT: Redirect?

11 MS. MORRIS: Thank you.

12 REDIRECT EXAMINATION

13 BY MS. MORRIS:

14 Q Dr. Dunn, would the fact that Yvonne O'Connell may
15 have been diagnosed with fibromyalgia affect your opinion?

16 A No. Well --

17 MR. SEMENZA: Your Honor, I think that goes outside
18 the scope of the medical chart.

19 THE COURT: Well, I think you opened the door for
20 it, so it's overruled.

21 MR. SEMENZA: Okay.

22 THE WITNESS: Again, her principal problem was neck
23 pain, and fibromyalgia typically doesn't affect neck pain. It
24 involves extremities in the low back, and I just don't believe
25 that it's involved in her neck complaints to me.

1 BY MS. MORRIS:

2 Q What do you base that opinion on?

3 A My experience in seeing and treating similar
4 conditions over the past 23 years.

5 Q Now, you said you wanted to send her for clearance
6 before surgery; is that right?

7 A Yes.

8 Q What was that based on?

9 A Well, the fact that she mentioned there was a
10 history of depression.

11 Q Was there any other indication that led you to
12 believe you would have to send her for the clearance?

13 A No.

14 Q Now, we talked about the fact that the symptoms she
15 reported to you were symptoms she felt after the fall; is that
16 correct?

17 A That's what she reported, yes.

18 Q And if she had symptoms to her neck and back before
19 the fall, would that affect your opinion?

20 A It could, yes.

21 Q Why?

22 A Well, my understanding is that the pain for which I
23 was evaluating Ms. O'Connell arose with this traumatic event.
24 On the other hand, had she never been involved in any
25 traumatic events and came in with the same complaints, my

1 recommendations would be the same.

2 Q But you base your opinion on the fact that she
3 reported symptoms, started at the fall; is that correct?

4 A Yes.

5 Q So, your opinion as to causation is based on the
6 fact that she told you they started after the fall?

7 A Yes.

8 Q If she had reports of pain before the fall, that
9 would affect your opinion; is that right?

10 A Yes.

11 Q Now, you testified that you have been paid 10,000
12 total; is that right?

13 A Yes.

14 Q Why is it 10,000 and not 5,000?

15 A Well, I mean, I had to come here two days. I do
16 spend time in preparation for trial by reviewing the files,
17 and I'm not in clinic where I'm seeing patients, and I still
18 have to pay overhead.

19 A So, if we had finished your testimony on Monday, you
20 would not have been paid the additional 5,000; is that
21 correct?

22 A That's correct.

23 MS. MORRIS: Thank you.

24 THE COURT: Recross?

25 MR. SEMENZA: Nothing, Your Honor.

1 THE COURT: Questions from the jury? Okay.
2 Approach, please.

3 (Off-record bench conference)

4 THE COURT: Okay. So, Doctor, a question from the
5 jury is, do you know whether she needed assistance entering or
6 leaving on the three times that she came to visit you and you
7 saw her?

8 THE WITNESS: She didn't require assistance.

9 THE COURT: So, you -- you saw her come into your
10 office?

11 THE WITNESS: Yes, and I would have documented if
12 she were like in a wheelchair.

13 THE COURT: Okay. She was not in a wheelchair?

14 THE WITNESS: No.

15 THE COURT: Or a walker?

16 THE WITNESS: No.

17 THE COURT: Any further questions?

18 MR. SEMENZA: I just want to clarify.

19 THE COURT: Okay.

20 RECROSS-EXAMINATION

21 BY MR. SEMENZA:

22 Q So, she wasn't in a walker when she arrived?

23 A I don't believe so, no.

24 Q Okay, and she wasn't in a wheelchair?

25 A Correct.

1 Q Do you know if she came -- or had anyone come with
2 her to your appointments with her?

3 A I don't recall seeing her with anybody. I don't
4 know if somebody brought her or not.

5 Q Do you know how she got to your office?

6 A I don't.

7 Q Do you know whether she drove?

8 A I don't know.

9 MR. SEMENZA: Nothing further.

10 MS. MORRIS: Just a couple follow up.

11 FURTHER REDIRECT EXAMINATION

12 BY MS. MORRIS:

13 Q Doctor, when you see a patient, are they already in
14 the room when you go see them?

15 A Yes.

16 Q And are they generally sitting on a table when you
17 go in and see them?

18 A Yes.

19 Q Do you get into the room and watch them come into
20 the room?

21 A Typically, no.

22 Q And then, once you're done, you leave; is that
23 correct?

24 A Yes.

25 Q You don't watch them leave; is that correct?

1 A Correct.

2 Q So, when you saw Yvonne, you basically saw her in
3 the room while she was sitting on the table; is that correct?

4 A Yes.

5 Q So, you don't know how she actually got into the
6 room; is that fair?

7 A That's fair.

8 MR. SEMENZA: Nothing further, Your Honor.

9 THE COURT: All right. I have a question,
10 basically, a clarification question. So, the attorney, Mr.
11 Semenza, asked you about -- he used the term subjective, that
12 the pain -- complaint was subjective. What does that term
13 mean? Tell the jury.

14 THE WITNESS: Subjective means it's what the patient
15 reports to you.

16 THE COURT: And is there a -- is there any other
17 term that -- where you could see something yourself?

18 THE WITNESS: Yes. I mean, the two terms commonly
19 used are subjective and objective. And subjective purely
20 means what the patient brings to me, and that's information
21 that she's reporting. Objective information is not only me
22 looking at an x-ray, or looking at a study or test that is
23 independent of the patient's input, but also represents my
24 interpretation of the information she gives me.

25 THE COURT: Any questions as a result of my

1 questions?

2 MS. MORRIS: Yes, thank you.

3 FURTHER REDIRECT EXAMINATION

4 BY MS. MORRIS:

5 Q Dr. Dunn, your opinion that you came to in this
6 matter evolving -- revolving Yvonne, was that based on both
7 subjective and objective information?

8 A Yes.

9 Q And so, your opinion involves both components; is
10 that correct?

11 A Correct.

12 MS. MORRIS: Thank you.

13 THE COURT: Cross?

14 MR. SEMENZA: Briefly.

15 FURTHER RECROSS-EXAMINATION

16 BY MR. SEMENZA:

17 Q Ms. O'Connell's expression of pain though is based
18 upon her subjective complaints; is that correct?

19 A That is defined purely as subjective, yes.

20 Q Any objective findings you're relying on are the
21 MRIs, which identify the degenerative disc disease; is that
22 correct?

23 A Yes.

24 MR. SEMENZA: Thank you.

25 THE COURT: All right.

1 MS. MORRIS: One more follow up, if I may, based on
2 his questions.

3 THE COURT: All right, go ahead.

4 FURTHER REDIRECT EXAMINATION

5 BY MS. MORRIS:

6 Q Dr. Dunn, can you see pain?

7 A No.

8 MR. SEMENZA: Objection, Your Honor. Go ahead.

9 THE COURT: Overruled. He can't see pain. Okay,
10 that's fine.

11 BY MS. MORRIS:

12 Q And so, how do you learn if there is pain?

13 A Well, basically, that's part of my assessment.

14 MR. SEMENZA: And Your Honor, I'm going to object.
15 It goes outside the medical chart.

16 THE COURT: Well, it goes beyond the scope of the
17 recross, too. I think he explained it. He relies on what the
18 patient tells him. That's how you -- because you can't see
19 it. So, sustained. We're done. Any -- any further questions
20 from --

21 MS. MORRIS: No further questions.

22 THE COURT: -- the jury as a result of -- okay, we
23 have another question. Approach.

24 (Off-record bench conference)

25 THE COURT: Doctor, did Ms. O'Connell tell you she

1 gave up being a dental hygienist because of not being able to
2 hold the instruments?

3 THE WITNESS: I don't recall.

4 THE COURT: All right. May this witness be excused?

5 MS. MORRIS: Yes.

6 THE COURT: Thank you. Thank you very much for your
7 testimony, Doctor. You may call your next witness.

8 MS. MORRIS: We call Salvatore Risco.

9 THE MARSHAL: Right up here.

10 THE COURT: You can leave your coat there, yeah.

11 THE MARSHAL: Step up to the box, remain standing,
12 raise your right hand, face the court clerk, please.

13 SALVATORE RISCO, PLAINTIFF'S WITNESS, SWORN

14 THE CLERK: Please be seated, and then please state
15 and spell your first and last name.

16 THE WITNESS: Salvatore Risco, R-i-s-c-o.

17 THE CLERK: Can you spell your first name?

18 THE COURT: Spell your first name, please.

19 THE WITNESS: Oh, S-a-l-v-a-t-o-r-e.

20 THE COURT: Thank you. You may proceed.

21 MS. MORRIS: Thank you.

22 DIRECT EXAMINATION

23 BY MS. MORRIS:

24 Q Sal?

25 A Hi.

1 Q Good morning. Sal, can you tell us how old you are?

2 A Excuse me?

3 Q Can you tell us how old you are?

4 A How old am I? 79.

5 Q Sal, can you tell us a little bit about yourself?

6 Where were you born?

7 A New York.

8 Q And how long have you lived in Las Vegas?

9 A 21 years, 22.

10 Q And you're retired?

11 A Yes.

12 Q What did you used to do for work?

13 A I was in construction.

14 Q Do you have any children?

15 A I have six.

16 Q And do any of your children live here in Las Vegas?

17 A Two.

18 Q And when did you retire; do you remember?

19 A I'm sorry?

20 Q When did you retire; do you remember?

21 A '96 -- '95, '96. About 20 [inaudible].

22 MS. MORRIS: Do you want him to speak up a little
23 bit?

24 THE COURT RECORDER: Just, yeah, not trail off.

25 THE COURT: Okay. We need you to keep your voice

1 up.

2 THE WITNESS: Oh, okay.

3 THE COURT: Because you tend to --

4 THE WITNESS: I'm sorry.

5 THE COURT: -- kind of drop your voice at the end of
6 the sentence, and then we lose it, and we're recording --

7 THE WITNESS: Okay.

8 THE COURT: -- everything. All right.

9 BY MS. MORRIS:

10 Q Sal, you currently live in Las Vegas; is that right?

11 A Yes.

12 Q What part of Las Vegas?

13 A Summerlin.

14 Q And you know Yvonne O'Connell; is that right?

15 A Yes.

16 Q How did you come to know Yvonne?

17 A I met her -- I met her through a friend, and then we
18 start dating.

19 Q Do you remember where you met her?

20 A At the Rampart.

21 Q Do you remember when you met her?

22 A 2003 of November. I could be wrong, the month. I
23 think it was November 2003, or October. Could have been
24 October, too. I'm not sure.

25 Q And you two started dating; is that correct?

1 A Yes.

2 Q Okay. Prior to meeting Yvonne, had you ever been
3 married?

4 A Have I been? Yeah, I have six -- yeah, of course.
5 Yes.

6 Q And how long were you married?

7 A I was married 44 years. My wife passed away.

8 Q So, when you met Yvonne, you were a widow; is that
9 correct?

10 A Yes.

11 Q And did you and Yvonne start dating in 2003?

12 A Yes.

13 Q And did you two do any activities together when you
14 were dating?

15 A Yes.

16 Q And was your relationship a serious relationship?

17 A I'm sorry?

18 Q Was it a serious relationship?

19 A Yes.

20 Q Were you exclusive?

21 A Yes.

22 Q Would you guys spend a lot of time together?

23 A Yes.

24 Q Would you stay over at each other's houses?

25 A Yes.

1 Q Okay. Did you two take any trips together?

2 A Yes.

3 Q Tell me about those.

4 A We went on a cruise. We went to California. I went
5 to -- she took me to Newport Beach where she used to live. We
6 went on a couple of cruises. And then she came to Florida
7 with me when my kids had a party for me on my birthday, my
8 75th birthday. She was there with me. We went on cruises,
9 and we went away.

10 Q And how long did you two date for?

11 A How long did we date for?

12 Q Yeah.

13 A Seven years.

14 Q When did you break up?

15 A Right after my -- it had to be right after my party,
16 my 75th birthday. It had to be I think May. I think it was
17 right after -- yeah --

18 Q May of what year?

19 A Five years ago -- four years ago. Yeah, I'll be 80
20 in February.

21 Q So, 2011?

22 A Yeah, yeah.

23 Q Is that fair?

24 A Yeah.

25 Q Does that sound right? Okay.

1 A I was 75.

2 Q So, you two would take trips together and you would
3 spend time with each other; is that correct?

4 A Yes.

5 Q Okay. Where would you guys go? What kind of things
6 would you do?

7 A Oh, on the weekends?

8 Q Yeah.

9 A We used to go -- at the Rampart, we -- there was
10 music there. We'd go to Bally's. If we didn't care for the
11 group at the Rampart, we used to go to Bally's. And we used
12 to dance on the weekends, and we used to go to dance classes
13 on Sunday; swing dancing classes.

14 Q When did you start dancing?

15 A When did we start dancing? When we first met.

16 Q Did you dance before that? Is that something you've
17 been doing?

18 A Oh, no, I was alone.

19 Q So, you and Yvonne started --

20 A Yes.

21 Q -- taking lessons together?

22 A Right.

23 Q And did you only just do the one dance, the swing
24 dance? Is that just one dance?

25 A No, we did -- we did other dances, too. The

1 Foxtrot, Cha-Cha, swing dancing. Right.

2 Q And you said that you had groups that you went to?

3 A We went -- on Sunday, we went to learn to swing
4 dance. And we went to a church, and there was a -- and he
5 taught us. Well, I was -- I don't know where it was; by 15th
6 someplace.

7 Q So, you took lessons?

8 A Yes.

9 Q And then, after you took lessons, did you actually
10 go to events and dance?

11 A I'm sorry?

12 Q You said you went to Bally's, you went to Rampart --

13 A Oh, yeah. Well, we went to Bally's when we didn't
14 like the group at the Rampart, but we always -- mostly, it was
15 the Rampart on the weekends, Friday and Saturdays.

16 Q And where -- in the Rampart, did they have like a
17 room where there was swing dancing?

18 A Yeah, yeah. They had the Addison Lounge, and they
19 have a round bar. There's music there from -- well, now they
20 change it. Now it's from 7:00 to 12:00, and then 11:00 to
21 3:00 in the round bar. And in the lounge, it's from 8:00 to
22 12:00. And in the round bar, it's from 6:30 to 10:30; 11:00
23 to 3:00 in the morning. Right.

24 Q Until 3:00 A.M.?

25 A Yes, 3:00 -- oh, sorry. Yeah, 3:00 o'clock.

1 Q Okay. So, that was at the Rampart, and you said you
2 danced at other places?

3 A When we didn't like the Rampart, we used to go to
4 Bally's which was finding other groups that we do care for and
5 like to dance to, and we used to go to Bally's. Bally's has
6 someplace there. At Paris. At Paris, too.

7 Q And did you do any other activities besides dancing
8 together?

9 A I'm sorry?

10 Q What other activities would you do, anything?

11 A Yeah. Like I said, we went on cruises. We -- she
12 came to my house, we played -- some nights, we played Rummy
13 Tile, it's a game, and she'd stay over. I'd go over to her
14 house on the holidays. We used to decorate her house in the
15 back for the boat show. We went to California, went to
16 Florida, went on cruises.

17 Q How was your relationship?

18 A Excuse me?

19 Q How was your relationship?

20 A Great.

21 Q Now, in February of 2010, you were out of town; is
22 that correct?

23 A I went on a cruise.

24 Q Where did you go; do you remember?

25 A I went on a Caribbean.

1 Q And you didn't take Yvonne with you; is that
2 correct?

3 A No, she didn't want to go. She was busy.

4 Q Did you go with anyone on the cruise?

5 A No, by myself.

6 Q Did you have a cell phone with you on the cruise; do
7 you remember?

8 A No. I have a cell phone, but I never take it with
9 me. I don't -- me and the cell phone don't get along.

10 Q When you were gone on the cruise, do you remember if
11 Yvonne ever called you?

12 A Oh, no, never.

13 Q Now, I want to talk about when Yvonne -- when you
14 came back from the cruise.

15 A Right.

16 Q When you came back from the cruise, you landed at
17 the airport; is that right?

18 A Excuse me?

19 Q You landed at the airport; is that right? After the
20 cruise, you came home?

21 A Yes.

22 Q Okay. And did Yvonne pick you up?

23 A Yes.

24 Q Okay. And did she tell you anything when she picked
25 you up? She tell you she got hurt?

1 A Yeah, she got hurt and she was in pain. And I was
2 -- well, if you got hurt, you shouldn't have come and picked
3 me up. I would have got another ride home. I was upset with
4 her because she was in pain, she was hurting, and she came and
5 picked me up. I was upset with that. But then, after that,
6 we went to my house.

7 Q And what did you do at your house; do you remember?

8 A Oh, she wanted me to take some pictures of her.
9 That's what I did; I took some pictures of her.

10 Q And you did that?

11 A Yes.

12 Q Okay. I don't know if you have a binder up there.

13 MS. MORRIS: May I approach, Your Honor?

14 THE COURT: Yes.

15 MS. MORRIS: Thank you.

16 (Pause in the proceedings)

17 MS. MORRIS: And this is Exhibit 6 in Plaintiff's
18 Proposed Exhibits.

19 BY MS. MORRIS:

20 Q Sal, I'm showing you a picture here.

21 A Right.

22 Q Do you recognize that picture?

23 A Yes, that -- yes, I took it.

24 Q And what does that picture represent?

25 A A behind, black and blue.

1 Q And whose is that?

2 A I don't want to say that. Okay.

3 Q Whose is that? Whose behind --

4 A I took the picture.

5 Q Whose behind is that?

6 A Yvonne's.

7 MS. MORRIS: I'd like to move to admit Proposed
8 Exhibit 6 into evidence.

9 THE COURT: Any objection?

10 MR. SEMENZA: No objection, Your Honor.

11 THE CLERK: Plaintiff's 6 and 7?

12 MS. MORRIS: 6.

13 THE COURT: 6 you've laid the foundation for, so
14 we'll admit that.

15 (Plaintiff's Exhibit 6 is admitted)

16 THE COURT: What about 7?

17 MS. MORRIS: 7 is a slightly redacted version, more
18 appropriate version of the same photo, since it's --

19 THE COURT: Well, are you admitting both?

20 MS. MORRIS: I don't know if I would -- I mean, it's
21 difficult to see -- I wanted to check with him and see if he
22 still recognized it in its redacted form.

23 THE COURT: All right. So, 6 is admitted.

24 MR. SEMENZA: Yes.

25 BY MS. MORRIS:

1 Q Photograph 7, do you recognize this photograph?

2 A Yes, I took it.

3 Q And is it similar to Photograph 6?

4 A Yes.

5 Q Okay. And do you recognize who's in that
6 photograph?

7 A Yes.

8 Q And who's that?

9 A Yvonne.

10 Q And one more here.

11 A I took -- yeah, I took that one, too.

12 Q This is Plaintiff's Proposed Exhibit 9.

13 A Yeah, I took that, too.

14 Q Do you recognize that?

15 A Yeah, my second bathroom.

16 Q And who is that in the photograph?

17 A Yvonne.

18 Q And what was the purpose of taking that photograph?

19 A To show how black and blue she was; how bruised she
20 was.

21 MS. MORRIS: I'd like to move to enter Proposed
22 Exhibit 9.

23 THE COURT: Any objection?

24 MR. SEMENZA: Yes, Your Honor. May we approach?

25 THE COURT: Yes.

1 (Off-record bench conference)

2 THE COURT: Okay. So, the offer of 9 is withdrawn?

3 MS. MORRIS: Correct, and Exhibit 8 is proposed to
4 be admitted.

5 MR. SEMENZA: No objection, Your Honor.

6 THE COURT: And it will be admitted.

7 (Plaintiff's Exhibit 8 is admitted)

8 MS. MORRIS: You stay right there. It's okay.

9 THE WITNESS: I am.

10 BY MS. MORRIS:

11 Q Now, this is the photograph that you took of Yvonne;
12 is that correct?

13 A Yes.

14 Q And where did you take it; do you remember?

15 A At my house.

16 Q And is that your bathroom?

17 A Yeah, my second bathroom.

18 Q Do you remember how many days after Yvonne fell this
19 photograph was taken?

20 A She might have -- she had to tell me, but I forgot.

21 Q Do you remember when you came home from the cruise?

22 A The date?

23 Q Yeah.

24 A No, I don't.

25 Q But it was after Yvonne had fallen; is that correct?

1 A Right. I was on the cruise, and she fell.
2 Q Now, you went back to your house; is that right?
3 A Yeah, that's my home.
4 Q Okay. And is that when you took the photographs?
5 A Yes.
6 Q Okay.
7 A In the bathroom; my second bathroom.
8 Q And you said Yvonne was in pain; is that right?
9 A Yes.
10 Q How did you know?
11 A How did I know?
12 Q Yes.
13 A She told me she was in pain.
14 Q Did she appear to be in pain in any way?
15 A Yes, yes, she was hurting.
16 Q And is that the other photograph that we've just
17 talked about?
18 A I took that one, too.
19 Q And can you see the bruising in this picture?
20 A Yes.
21 Q Where do you see it?
22 A On the behind.
23 Q You can actually draw on this picture, if you want.
24 A Excuse me?
25 Q You can draw on the picture -- the screen --

1 THE COURT: You can draw on the screen with your
2 finger.

3 THE WITNESS: Oh, oh, oh, I didn't know that. Right
4 there.

5 (Pause in the proceedings)

6 MS. MORRIS: Yeah. And what we'll do is -- this is
7 actually a different angle.

8 BY MS. MORRIS:

9 Q Sal, did you take this photograph?

10 A Yes.

11 Q Okay. And is this a photograph of Yvonne?

12 A Yes.

13 MS. MORRIS: I'd move to have Exhibit 4 entered into
14 -- entered into evidence.

15 MR. SEMENZA: No objection, Your Honor.

16 THE COURT: All right, 4 is admitted.

17 (Plaintiff's Exhibit 4 is admitted)

18 BY MS. MORRIS:

19 Q This is Exhibit 6, and you took this photograph as
20 well; is that correct?

21 A Yes.

22 Q Can you see the bruising in this photograph?

23 A Yes.

24 Q Can you show us where -- and if you draw on the
25 screen, it will actually make a mark. You can use your

1 finger.

2 A Okay, right there. All that.

3 Q And is there any bruising at the top of the
4 photograph in the left? Is that what you're seeing?

5 A Above it, yeah.

6 Q And you took these photographs of Yvonne because she
7 asked you to?

8 A Yes.

9 Q Do you know why she asked you to? Did she tell you?

10 A Excuse me?

11 Q Did she tell you why she wanted you to take the
12 photographs?

13 A To take the pictures; I took them.

14 Q Now, did Yvonne stay with you after you came home?

15 A That night? I don't remember. I really don't
16 remember.

17 Q Did you ever go to any doctor's appointments with
18 Yvonne?

19 A Yes, I did.

20 Q And do you remember any of those doctor's
21 appointments?

22 A I went to one doctor with her, I went to -- but the
23 doctor's name, I don't remember. I'm sorry, I don't remember.

24 Q Before this fall --

25 A Before the fall.

1 Q -- had you ever attended doctor's appointments with
2 Yvonne before?

3 A Yes. Yeah.

4 Q Tell us when.

5 A When she wasn't feeling well. I don't remember the
6 days and -- I'm -- I don't remember.

7 Q Do you remember her having an eye infection?

8 A I think so, I think so. You're going back seven,
9 eight -- I can't remember.

10 Q Did you ever go to a doctor's appointment with
11 Yvonne because she had pain in her body before she fell?

12 A I don't know. I don't know.

13 Q If --

14 A I don't know.

15 THE COURT: You can't whisper, yeah.

16 THE WITNESS: I don't know.

17 THE COURT: Okay.

18 BY MS. MORRIS:

19 Q But you did go to doctor's appointments with her
20 after; is that right?

21 A Oh, yeah, I went to doctors with her. Right.

22 Q When you and Yvonne would dance -

23 A Right.

24 Q -- did she ever complain of having pain because she
25 was dancing?

1 A Not really. If she -- I don't think she did.

2 Q Did you and Yvonne ever go dancing after she fell?

3 A Yeah, we went -- we went out, but she didn't dance.

4 Q Why not?

5 A She had the walker. Oh, she couldn't. She had the
6 walker.

7 Q Did you and -- but you went to the dancing events?

8 A We went to the -- we still went to like the Rampart,
9 we went to -- we went to Bally's, but she didn't -- we heard
10 the music. Something to do. Instead of stay home, went out.

11 Q And did you dance when you went out?

12 A Yeah, by myself. They thought I was crazy.

13 Q Can you -- can you -- can you swing dance by
14 yourself?

15 A No, we -- no, she was sitting there. No, she was
16 like right there, and I got up and I was doing -- kidding
17 around, having fun.

18 Q Do you remember the last time you and Yvonne both
19 went swing dancing together and Yvonne danced with you?

20 A Well, it had to be before the accident, of course,
21 before I went away. So, it had to be then. February of 2011
22 -- 2010, I guess, then.

23 Q You and Yvonne were close; is that correct?

24 A Yes.

25 Q If Yvonne was having medical problems before the

1 fall, would you have known about them?

2 A Like everybody else, you know, no, not -- serious --
3 no. If she did, I don't remember, and I don't think she did.

4 Q Now, after the fall, you and Yvonne still stayed
5 together; is that correct?

6 A Yeah, of course, over a year.

7 Q And when you stayed with -- when you were with
8 Yvonne --

9 A Right.

10 Q -- after the fall --

11 A Right.

12 Q -- was she any different?

13 A Well, she couldn't do -- we couldn't dance, but her
14 personality, you know, it was her same sweet self. Everything
15 was great, but we just couldn't go out. We stayed home a lot.
16 I understood. I -- I understood. I told her, we don't have
17 to go anywhere. I know you're okay. We can stay home, play
18 Rummy Tile. We could do -- watch TV. You know, if she wanted
19 to go, we'd go out. And yeah, we -- she didn't want to stay
20 home all the time, too, and I didn't want to either, so we
21 just went to hear the music, and that was it. She didn't
22 dance.

23 Q Were you with Yvonne when she got her walker?

24 A Yes, yes.

25 Q Tell me about that.

1 A Oh. Her -- we went to the doctor, and he said have
2 a cane. So, I went with her and I said, you know, I don't
3 like a cane. I said, sometimes you get off balance. So, I
4 said, why don't you try -- there was walkers right there. I
5 said, why don't you try a walker? You might like it better, I
6 don't know, but the doctor prescribed a cane. I said, try the
7 walker.

8 And so, she had the walker, and she felt more
9 comfortable with it. She had the cane; she didn't like it. I
10 said, I think you're better off with the walker. I said --
11 then she was worried about the prescription because they gave
12 her a cane. I said, don't worry about it. I said, don't
13 worry, you're covered, take the walker. I told her, leave the
14 cane alone.

15 Q Do you know if Yvonne has more than one walker?

16 A No, I -- no, she had one walker.

17 Q When's the last time you and Yvonne have seen each
18 other?

19 A When's the last time we seen each other? Okay, we
20 broke up about five years, more than that. Then, Yvonne
21 called me this year. Now, you might know better with the
22 dates, I don't know. She goes, my lawyer wants to call you,
23 that meant you, and wants to know if it's okay to call you. I
24 said, of course it's okay. And then you called me, and then
25 you told me what was going on. Then I called her back, I said

1 you called me, then -- and then I saw her in the casino again,
2 we went for breakfast one morning, and then we got back
3 together. That -- that -- I don't know the date. And then we
4 got back together again. Right.

5 Q And do you remember you had your deposition taken in
6 this case?

7 A I'm sorry?

8 Q Do you remember having your deposition taken?

9 A Oh, yes.

10 Q Do you remember who took your deposition?

11 A Yeah. Yeah.

12 Q Was it defense counsel?

13 A Yeah.

14 Q And do you remember when that happened?

15 A I'm bad with dates. Please. I don't know. You
16 know. I don't know what date it was.

17 Q Was it sometime in the last year?

18 A Was it last year, or this --

19 Q Was it sometime in the last year; not last year.

20 A Oh, oh, oh, oh, yeah, yeah.

21 Q Now, you and Yvonne got back together for a little
22 bit, but then didn't work out?

23 A We broke up again, yeah.

24 Q When you -- and when you and Yvonne were going out,
25 do you know if she had many close friends?

1 A Yeah, she had a couple of close girlfriends. They
2 came here from California. Yeah, yeah.

3 Q After -- after Yvonne fell, do you know if she had
4 friends?

5 A Yeah, friends. Yeah, of course.

6 Q And you know she had cousins that came from
7 California?

8 A Yeah, her cousins came out. I think it was the
9 Super Bowl. I think that's when she got hurt. I was away. I
10 think it was the Super Bowl. It had to be February 6th or
11 7th; I think that's when the Super Bowl was. I think that's
12 when she got hurt. I'm not sure if that -- and I was away,
13 but her cousins came. They come every Super Bowl, they stay
14 here for a week or so, and they see Yvonne, and Yvonne has
15 lunch with them or whatever. And if I was here, I would have
16 been with them, too. I met them a few times.

17 Q Now, aside from what you just said, you and Yvonne
18 going to breakfast and seeing her, do you see her out
19 currently? Do you see her at the Rampart? Do you see her --

20 A No, I -- well, I don't go that often. I did -- I
21 make a couple of bets, and then I come home. I saw her at the
22 Rampart a few -- yeah, I see her in the Rampart, but lately, I
23 haven't -- I haven't been going. I go in the afternoon, I
24 make a couple of bets, and I go home.

25 Q When you see Yvonne, or you've seen her, has she

1 been using her walker?

2 A Oh, yes.

3 Q Have you ever seen Yvonne out in public after she
4 got prescribed the walker not using her walker?

5 A No, no. Matter of fact, I play cards with a couple
6 of guys from New York, and they tell me, well, we saw Yvonne
7 at the buffet at the -- and she still has her walker and
8 everything else. Yeah, they tell me.

9 Q Are you currently dating someone else?

10 A Excuse me?

11 Q Are you currently dating anyone?

12 A Yes, I'm -- yeah, I'm dating somebody else.

13 Q Would you describe Yvonne's health, in your opinion,
14 before the fall?

15 A Good. It was okay. We were dancing, going out,
16 going on trips, going away.

17 Q And after the fall, how would you describe Yvonne?

18 A Couldn't do anything that much. Stay home and
19 relax, just go -- go hear the music, but she didn't dance.
20 Like I said, she never danced. After the accident, she never
21 danced. She just had the walker with her, but she came out.
22 We didn't want to stay home all the time, so we would go out.
23 She wanted to go out, too, because she didn't want to stay
24 home either, and I didn't mind her -- I would have stood with
25 her. Just the walker had -- her accident had nothing to do

1 with me breaking up with her.

2 Q Would you describe Yvonne as ever being worried
3 about her health after she fell?

4 A Yes, she was worried. Yes, I think she went for a
5 couple MRIs. I'm not sure. I think she went for a couple
6 MRIs.

7 MS. MORRIS: I don't have any other questions for
8 you.

9 THE WITNESS: Thank you.

10 THE COURT: Cross?

11 MR. SEMENZA: Yes, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. SEMENZA:

14 Q Good morning, Mr. Risco.

15 A Sal.

16 Q Sal. I'll call you Sal.

17 A Yeah, please.

18 Q When Ms. Morris was asking you questions, you had
19 said that the accident had nothing to do with your breakup; is
20 that correct?

21 A Of course -- no, of course not. I would take care
22 of her.

23 Q Why did you two break up in May of 2011?

24 A I'm trying to think about it. I'm trying to think.
25 I'm sorry.

1 Q No, that's okay. Take your time.

2 A Why did we break up. Oh, I think one time -- I
3 think. Yeah, I'm pretty sure. We went to the pool. I live
4 in Sun City. I call it God's waiting station. We went to --
5 we went to the pool, and there were a few women there, and I
6 wanted to get a lane for her so she could walk, because I
7 said, the walking's good for you, walking the -- in the pool.

8 And then, there were a few women there, and she
9 thought, which was not true at all, that I was talking to
10 those women, when I wasn't. I was talking to one of my
11 friends, and he was telling me, he -- Sal, if you want this
12 lane, like in Sun City, you've got to get a lane, and you ask
13 for it, you got to sign for it. So, I said, yeah.

14 And when I was talking to him, she thought I was
15 with those women, and I wasn't. I wanted to save that lane
16 for her. So, when we got out, we went home to my home, we had
17 a misunderstanding, and that was it. That was one of the
18 reasons. That happened that day.

19 Q Was it your understanding that Ms. O'Connell was
20 jealous? Was that the issue?

21 A Of me? Are you kidding? I don't think she's a
22 jealous -- no, I don't think so.

23 Q Okay. But you had a misunderstanding?

24 A Yes, I think that -- I think, yeah.

25 Q Okay. Do you still love Ms. O'Connell today?

1 A Yes, I do.

2 Q Now, you had talked about her cousins from
3 California.

4 A Yes.

5 Q Do you remember that?

6 A Yes.

7 Q Okay. And she's close to those cousins?

8 A Yes, she was.

9 Q And they're very good friends?

10 A They're relatives. They're cousins.

11 Q And she enjoys spending time with them?

12 A Excuse me?

13 Q She enjoys spending time with her cousins?

14 A Oh, yes. When they -- when she -- when they came
15 here, they stay at the Planet Hollywood, they stay at
16 different casinos, and Yvonne and I, if I was in town, I would
17 meet them with her.

18 Q And you would consider those her close friends, her
19 cousins from California?

20 A Yes, I was. She has more than her cousins; she has
21 a couple of girlfriends, too.

22 Q While you were on the cruise in February of 2010 --

23 A Yes.

24 Q -- did you receive any telephone calls from Ms.
25 O'Connell?

1 A No.

2 Q Did you leave her any contact information in case
3 she needed to get a hold of you while you were on the cruise?

4 A Well, she knew the -- I think I went on a Carnival.
5 I was -- I think I was on a Carnival that time. Yeah, but I
6 guess if you want to get in touch with me, you had to get in
7 touch with -- I don't know.

8 Q Okay.

9 A It was never -- we never talked about it.

10 Q And if she needed to get in touch with you, she
11 would have called the cruise line?

12 A I guess, I guess. I mean --

13 Q Now, after the fall in February of 2010, Ms.
14 O'Connell was able to drive, right?

15 A Yeah, she picked me -- I was upset with her. I was
16 really upset with her. I said, you should have never done
17 this.

18 Q Other than just telling you she slipped and fell at
19 the Wynn, did she provide any specifics as to how it happened?

20 A No, she said -- no. If she did, I forgot.

21 Q Did she tell you how she slipped and fell?

22 A I think she did, but I forgot. I think she --

23 Q How many doctor's appointments did you go to her
24 with after the fall (sic)?

25 A Three. I don't know, I don't know. I really don't

1 know. I know I went to a couple.

2 Q Okay. Do you remember who those doctors were?

3 A Oh, no.

4 Q Do you remember what those doctors were treating her
5 for?

6 A One was the back, I believe. I'm not sure. I think
7 it was the back, I'm not sure. Her -- her legs, I believe. I
8 think that -- I think that -- that's about it, I believe.

9 Q Okay. And do you know how long after her fall that
10 she started complaining of knee pain?

11 A Well, she said her legs were -- her knees were
12 bothering her, and we didn't do -- you know, like I said, we
13 just stayed home, watched TV, and went out, hear the music.

14 Q You don't remember specifically when she talked
15 about her -- her --

16 A No, of course not.

17 Q -- pain in her legs? Okay. Did you take any
18 pictures of her head or her neck?

19 A No, I believe just her rear-end -- behind. And I
20 don't know if I took any pictures of her back. I'm not even
21 sure.

22 Q Okay, but you took pictures of the bruising?

23 A Yes.

24 Q And you got back together at some point this year or
25 last year?

1 A Yes. Right.

2 Q Okay. And then --

3 A Because of the trial, because Chris wanted to call
4 me, and Yvonne called me first to let me know that -- if her
5 lawyer could call me.

6 Q And that's when you started talking again?

7 A Yes.

8 Q And then you went out on --

9 A Yes.

10 Q -- some dates? Were you exclusive during this
11 period of time?

12 A Yes.

13 Q Okay. And you broke up again?

14 A Yes.

15 Q Okay. Why did you break up again?

16 A God. I'm trying to think.

17 Q Take your time.

18 A We just couldn't get along. Okay.

19 Q You were arguing?

20 A We had a misunderstanding. About what, I forgot.

21 Q Okay. You don't remember right now?

22 A No.

23 Q Okay.

24 A I don't.

25 Q So, how quickly did you guys date most recently?

1 How long was it?

2 A Oh, let's see.

3 Q Just a couple months, or?

4 A When Chris -- I don't know. I forgot the month when
5 she called me -- her lawyer called me. I forgot that -- what
6 month that was in the beginning of the year. I think we were
7 dating -- I forgot. Chris, when she called me, then we got
8 together again. I don't remember what month it was and what
9 day it was.

10 Q Was it -- how long -- approximately how long, if you
11 can recall, that you guys dated most recently? A couple
12 months?

13 A Oh, about four months. Three, four months, maybe
14 less.

15 Q And your break up didn't have anything to do with
16 the fall though?

17 A Oh, no, no. I wanted to take care of her. Oh, no.

18 Q You did want to take care of her?

19 A Of course.

20 Q And was she resistant to that?

21 A I said, I'm here for you, I'll take you to the
22 doctors, I'll do everything you want me to do. We don't have
23 to go out, we can stay home, there's no problem. Whatever you
24 want to do, we do, you know? Like I said, the -- because I
25 care for her, and I want to take care of her.

1 Q Okay, and she wasn't receptive to that though?

2 A She was, but there's other problems besides.

3 Q Do you remember what those problems were?

4 A No, I don't.

5 Q So, from March -- I'm sorry, May of 2011 until when
6 you were deposed --

7 A Yeah, when the phone calls. Right.

8 Q Okay, you were broken up?

9 A Yes.

10 Q Okay. You didn't socialize much with her at all?

11 A No, I -- well, if I saw her in the casino, we said
12 hello to each other.

13 Q But that was it?

14 A That was it.

15 Q So, for that period of time, you don't know --

16 A No.

17 Q -- how she was doing?

18 A No, not at all.

19 Q Okay.

20 MR. SEMENZA: Just a moment, Your Honor.

21 BY MR. SEMENZA:

22 Q Did you go on a cruise with Ms. O'Connell after the
23 fall?

24 A Yes.

25 Q Okay. How long was that cruise?

1 A Seven -- ten days -- seven days. I went on a
2 couple. It was seven days or ten days. She had the walker,
3 of course.

4 Q Do you remember where you went?

5 A The Caribbean, I believe.

6 Q And do you remember where your port was where you
7 got on the boat?

8 A Oh, it was in Florida. I believe it was in Florida.
9 Fort Lauderdale or -- yeah, Fort Lauderdale or Miami. One of
10 those two.

11 Q So, you flew from Las Vegas to Fort Lauderdale or
12 Miami?

13 A Right, then -- right. I stayed with my kids, and
14 then they drive us to the cruise ship, and then that was it.

15 Q Did you have an enjoyable time?

16 A Excuse me?

17 Q Did you enjoy the cruise?

18 A Oh, yeah, it was great.

19 Q To your knowledge, did Ms. O'Connell enjoy the
20 cruise?

21 A Yeah, I think she did.

22 Q And then, did you stay in Florida after that for a
23 period of time?

24 A Yeah, a couple of days sometimes with my children.
25 I have three of my children in Florida.

1 Q Okay. And did you enjoy that time with your
2 children?

3 A I don't know, let me think about it. Of course.

4 Q Did Ms. O'Connell enjoy her time in Florida?

5 A Yes, of course.

6 Q Okay. Did she get along with your kids?

7 A Yvonne?

8 Q Yes.

9 A Of course. Yeah.

10 Q And then you returned to Las Vegas?

11 A Of course.

12 Q Do you remember when that cruise was?

13 A There was a few of them. No, I don't. There was a
14 few -- there was a few cruises.

15 Q There were a few cruises you went on --

16 A Yeah. What date they were -- it had to be in the
17 winter, even like February, January, you know, because that's
18 when all the cruise ships go to the Caribbean. It had to be
19 one of those months.

20 Q And you went on a few cruises with her after the
21 fall?

22 A Yes. I think two. Maybe two. I'm not sure.

23 MR. SEMENZA: No further questions.

24 THE WITNESS: Thank you.

25 THE COURT: Redirect?

1 THE WITNESS: Oh, you're back.

2 REDIRECT EXAMINATION

3 BY MS. MORRIS:

4 Q Sal, when you and Yvonne went on that cruise, did
5 Yvonne express any complaints of pain to you on the flight
6 over there?

7 A No, she -- no, she -- no, she didn't.

8 Q Did she -- did Yvonne complain a lot?

9 A Excuse me?

10 Q Would you -- would you call Yvonne a complainer?

11 A No.

12 Q Does she tend to hold things in?

13 A Excuse me?

14 Q Does Yvonne tend to hold things in?

15 A Yeah, she's a very private person.

16 Q So, when you wanted to go -- was it you who wanted
17 to go on the cruise after the fall?

18 A Yeah, we both -- yeah. We went on the cruise the
19 first time when we were dating, I'm going back before the
20 fall, and she loved it. She saw the room and she said she
21 wants to always go on cruises. She enjoyed it.

22 Q And then, after she fell, you went on that cruise;
23 is that correct?

24 A Excuse me?

25 Q You went on that cruise after she fell?

1 A Yes.

2 Q Did you -- did you go on multiple cruises after she
3 fell, or just the one?

4 A I think maybe two, if we went that many, or maybe
5 one or two. I forgot.

6 Q And when you went on the cruise, you had a good
7 time; is that right?

8 A Excuse me?

9 Q You like cruising? You like to go on cruises?

10 A Yeah, I'm going on one now.

11 Q You got another one planned?

12 A Yeah.

13 Q How many times do you go on cruises per year?

14 A Three, four times a year.

15 Q And Yvonne didn't always go on cruises with you --

16 A No.

17 Q -- is that right?

18 A But she had -- I think -- I'm old. I said, I'm
19 healthy, I want to go now, I want to be -- something's going
20 to happen. I said, you're going to have three more boyfriends
21 after I'm gone. I said, I'm -- I want to -- I have no back
22 problems, I'm healthy, I want to enjoy myself.

23 Q And so, you go on cruises, but Yvonne wouldn't
24 always go with you; is that right?

25 A Right.

1 Q Okay. And so, after the fall, you went on that
2 cruise to Florida -- or you went to Florida and went on a
3 cruise; is that right?

4 A Yes.

5 Q And you said she brought her walker with her, right?

6 A Of course.

7 Q And you said that she had a good time; is that
8 right?

9 A Yes.

10 Q If Yvonne was feeling pain at any certain time,
11 would she express it to you? Would she say --

12 A Yes, I -- yes, she would.

13 Q Did she express her pain all day, every day?

14 A Oh, no, no. Well, it was never -- no, she didn't
15 say that. No, we never brought that up. No.

16 Q You said Yvonne was a private person. What did you
17 mean by that?

18 A She's to herself a lot. She's very private.

19 Q Would you consider yourself to be an outgoing
20 person?

21 A An outgoing person?

22 Q You. Would you consider yourself to be an outgoing
23 person?

24 A Oh, me?

25 Q Um-hum.

1 A Oh, for sure.

2 Q Would you consider Yvonne to be less outgoing than
3 you are?

4 A I think a little bit, but it had nothing to do with
5 me breaking up with her. Her accident or -- that had nothing
6 to do with it. I wanted to take good care of her. I was
7 married for 44 years. My wife -- you know, but me going out,
8 I didn't have to go. If she wanted to stay home, I would have
9 stayed home with her. It had nothing to do -- I understand
10 the situation. She fell, she got hurt, she was in pain. We
11 don't have to go. No, we stay home, watch TV, play Rummy
12 Tile, do whatever. We don't have to go out.

13 Q But you like to go out, don't you?

14 A Yeah, but it's not necessary. I'd rather be with
15 her --

16 Q So --

17 A -- if she's comfortable.

18 Q If you wanted to go out, Yvonne would go with you,
19 right?

20 A Yeah, sometimes, unless she didn't want to go, then
21 we'd stay home.

22 Q And so --

23 A It was all up to her.

24 Q But you -- you enjoy going out, right? It's --
25 it's --

1 MR. SEMENZA: Your Honor --

2 THE WITNESS: Yes.

3 MR. SEMENZA: Objection, leading.

4 THE COURT: Sustained. And I think -- I'm not sure
5 what the relevance of this is, so let's move on.

6 MS. MORRIS: Let me clarify for -- if I could.

7 BY MS. MORRIS:

8 Q Before the accident, before she fell, did you guys
9 go out a lot more than you did after the accident?

10 A Oh, yes.

11 Q And after the accident, how often would you go out;
12 do you recall?

13 A Like I said, we went out on -- we still went out on
14 weekends. We did go to the Rampart on weekends, but we heard
15 the music, but she didn't dance. And she -- she liked to play
16 the machines. So, she -- we went there, we had the buffet
17 there, she got comp, and we had, you know, the buffet, and
18 then -- because she likes to play the machines. And so, we
19 went there -- we went there a lot, too, after the accident.
20 We went out a lot, too, but no dancing.

21 Q Now, you said that the reason that you and Yvonne
22 broke up the first time was a misunderstanding; is that right?

23 A Yeah.

24 Q Have you ever talked to Yvonne about why she thinks
25 you broke up?

1 A I don't understand what you're saying.

2 Q Have you had a -- do you know why she thinks you
3 broke up? Is it the same reason? Do you have any idea?

4 A We had a misunderstanding that day. That's what it
5 was that particular day, yeah.

6 Q And if Yvonne thinks it's a different reason, you
7 wouldn't know that; is that right?

8 A Well, I think -- I'm not sure now, I'm going to say
9 that, but I don't know. I think she thinks I broke up with
10 her because of the accident, and that is not true at all. I
11 was married to my wife, I was with my wife after she had
12 operations, and I would never do that.

13 I made it very clear to her, I go with you, I'm here
14 for you, take you to the doctor if you have to go. You need
15 -- you got to go to the store, I -- whatever you want, I got
16 it. That -- the accident had nothing to do with me and her
17 breaking up at all, because I -- I went out with her over a
18 year after the accident, so that --

19 MS. MORRIS: All right. Thank you, Sal.

20 THE WITNESS: You're welcome. Thank you.

21 MR. SEMENZA: No further questions, Your Honor.

22 THE COURT: Questions from the jury?

23 THE WITNESS: Is that it?

24 THE COURT: No, the jury has a question, so just a
25 minute.

1 THE WITNESS: Oh, they're allowed to ask me
2 questions?

3 THE COURT: Not directly, but in writing. Approach.

4 (Off-record bench conference)

5 THE COURT: So, did Yvonne complain about regular
6 knee, back, or neck pain back before the fall?

7 THE WITNESS: Neck pains, back pains, I don't think
8 so. I mean, she wasn't well sometimes, but I don't think had
9 any back pains or neck pains. I don't think that, you know --

10 THE COURT: Knee pain?

11 MR. SEMENZA: I don't think --

12 THE COURT: Sorry, the -- I didn't hear the last
13 part.

14 THE WITNESS: I don't know. I don't think so. If
15 she did, I forgot, but I don't think so.

16 THE COURT: Okay.

17 THE WITNESS: I don't think so.

18 MR. SEMENZA: Nothing further.

19 THE COURT: Any questions as a result of the jury
20 question? All right.

21 MS. MORRIS: Don't have any.

22 THE COURT: Thank you.

23 MS. MORRIS: No.

24 THE COURT: May he be excused now?

25 MS. MORRIS: Yes.

1 THE WITNESS: Thank you.

2 THE COURT: Thank you so much.

3 THE WITNESS: Thanks a lot.

4 THE COURT: You're welcome.

5 (Pause in the proceedings)

6 THE COURT: Thank you. You may call your next
7 witness.

8 MS. MORRIS: Plaintiff rests.

9 THE COURT: Okay. The plaintiff has rested, and
10 counsel approach.

11 (Off-record bench conference)

12 THE COURT: Ladies and gentlemen, we're going to
13 take a recess here until 10:30. This will be our morning
14 recess.

15 So, during this recess, it is your duty not to
16 converse among yourselves or with anyone else on any subject
17 connected with the trial, or read, watch, or listen to any
18 report of or commentary on the trial by any person connected
19 with the trial, or by any medium of information, including,
20 without limitation, newspaper, television, radio, or internet.
21 You are not to form or express an opinion on any subject
22 connected with this case until it's finally submitted to you.

23 We'll be in recess until 10:30.

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

25 (Outside the presence of the jury)

1 THE COURT: And the record will reflect that the
2 jury has departed the courtroom. I'm going to take a recess
3 for all of us to use the restroom, and then we'll come back
4 and take any matters outside the presence.

5 MR. SEMENZA: Thank you, Your Honor.

6 (Court recessed at 10:13 P.M. until 10:25 P.M.)

7 (Outside the presence of the jury)

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

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

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

1 what the horticultural department waters its plants with. So
2 it's pure speculation on her part that this green substance
3 came from the plants. She did say that it was sticky and that
4 there were footprints in it, but she also testified that the
5 footprints were from her and the individuals that picked her
6 up.

7 So, there is no evidence to support liability on the
8 part of Wynn in this particular matter, and we'd move for a
9 directed verdict as to liability.

10 THE COURT: You're talking about a Rule 50 Motion
11 for Judgment as a Matter of Law? The directed verdict -- you
12 know, they've changed it. It's not --

13 MR. SEMENZA: Yes, Your Honor.

14 THE COURT: -- a directed verdict anymore. Okay.
15 Plaintiff's response?

16 MS. MORRIS: Yes. Everything Mr. Semenza just
17 addressed was the source of the liquid, and that's certainly
18 not the issue. The issue is, is that if Wynn had been acting
19 reasonable, would that liquid still have been on the floor for
20 such a period of time in such a shape, and size, and length
21 that part of it would have been able to dry?

22 And the testimony was very clear from Ms. Yvonne --
23 Ms. O'Connell, is that it was approximately seven feet in
24 length, and a portion of it had started to dry. There was
25 also testimony from the employees at Wynn that it was so large

1 that they actually had to place a sweeper machine over it.
2 Additionally, the testimony is that this is a -- that was from
3 Yanet Elias.

4 If there's a -- there is -- this is a high traffic
5 area in which they claim that they are continuously sweeping,
6 continuously looking through, and that there's employees
7 there. And if that was the case, if they had been doing that
8 job as they said, then they should have seen that liquid in
9 the amount and shape that it was there, and cleaned it up or
10 warned her of it prior to her coming through and falling in
11 it. Now, the source --

12 THE COURT: Okay, let me stop you, because the issue
13 in a premises liability case where there's a foreign substance
14 on the floor is not whether they should have seen; it's
15 notice, either actual or constructive notice. So, do you
16 believe that you've proved actual notice?

17 MS. MORRIS: I do not believe we have actual notice.
18 This is an issue --

19 THE COURT: What about --

20 MS. MORRIS: -- of constructive notice.

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

23 MS. MORRIS: That due to the location, the size, and
24 the fact that portions of it had started to dry, that if Wynn
25 had been constantly sweeping as they claimed to have, that

1 they should have seen it. So, it's either knew or should have
2 known; were they on constructive notice. They have provided
3 testimony that this is a high traffic area, that it is
4 important that they try and keep it clean. And due to the
5 fact it was such a large size and portions of it had started
6 to dry, then they were on constructive notice that there is a
7 large pool of green liquid in the atrium area walkway that had
8 begun to dry, and they should have been able to know of it and
9 clean it up had they been acting reasonably in the way that
10 they say that they do.

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

19 THE COURT: Well, I don't recall that actually she
20 did, but your client testified to that. What's your response?

21 MR. SEMENZA: The -- my response, Your Honor, is
22 there's no evidence to suggest we should have known about it,
23 period, end of story. I mean, we don't know how long it was
24 there. Any conclusions or testimony that Ms. O'Connell has
25 offered is pure speculation based upon nothing. Whether it

1 could have been a large spill or a small spill, the point here
2 is, we don't know how long it was there for.

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

10 THE COURT: All right. Well, again, it's not a
11 directed verdict.

12 MR. SEMENZA: My apologies, Your Honor.

13 THE COURT: Under Rule 50, it's a judgment as a
14 matter of law. And the Court has, you know, the option of
15 either granting the motion or denying the motion and allowing
16 it to proceed to the jury. And then if the jury returns a
17 verdict, the -- allowing the side who moves to renew within
18 ten days and fully brief it.

19 And so, that's the option I'm going to choose at
20 this time, because right now, I mean, I've got to say that
21 there is probably -- the -- very, very little evidence
22 regarding constructive notice, because really, the only
23 evidence of constructive notice is Ms. O'Connell's testimony
24 that the substance she slipped in was drying, you know, and
25 because Ms. Elias, her testimony of what she saw describing

1 the honey, syrup like substance that she saw when they moved
2 the sweeper machine, you know, she didn't -- she didn't say
3 she saw anything drying. She didn't describe a seven-foot
4 spill. The only person who said that has been the plaintiff,
5 but is -- the question is, is that sufficient?

6 Normally, I would have expected to see an expert
7 witness who'd come in and talk about what kind of -- you know,
8 what kind of maintenance you would expect to see in an area
9 like this, and how long could a substance be on the floor that
10 would be reasonable, that kind of thing. I mean, obviously,
11 you can't have somebody following along behind with a sweeper
12 broom every customer that walks through the place, but there
13 was no testimony of that.

14 So, the question is, is Ms. O'Connell's testimony
15 that the substance -- her -- I don't think that her belief
16 that it was water, you know, would -- would support a finding
17 that the Wynn put the substance there. I mean, it's -- there
18 was -- that was nothing. That was just a belief based upon
19 pure speculation. There's absolutely been no evidence
20 presented by the plaintiff.

21 So, this is -- this is purely an issue about
22 constructive notice, and what -- what would it take in terms
23 of evidence to put somebody on constructive notice, and that's
24 what I would expect to be briefed.

25 MR. SEMENZA: Okay. Thank you, Your Honor.

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

5 MR. SEMENZA: Thank you, Your Honor.

6 THE COURT: All right.

7 MR. SEMENZA: There's one other matter I'd like to
8 address.

9 THE COURT: Yes.

10 MR. SEMENZA: It is our position, Your Honor, that
11 the jury is not permitted to consider any of the testimony
12 from either Dr. Dunn or Dr. Tingey, and the specific reason
13 being is that neither of those two doctors testified as to the
14 apportionment of Ms. O'Connell's claimed damages, which they
15 are required to do.

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

24 And so, I think it would be improper for the jury to
25 be permitted to consider any evidence from either one of them

1 because they haven't apportioned it. It would be prejudicial
2 error.

3 The same is true with regard to Dr. Tingey. And
4 going back to Dr. Dunn, we -- we also have a preexisting
5 condition of fibromyalgia. And so, again, that plays a role
6 that Dr. Dunn has to differentiate between all of these things
7 in coming to his conclusions, which the plaintiff did not have
8 him do.

9 With regard to Dr. Tingey, Dr. Tingey identified
10 that Ms. O'Connell did, in fact, have mild right knee
11 arthritis. He was not informed that Ms. O'Connell had a July
12 14th, 2010 fall. Ms. O'Connell also has identified that she
13 does, in fact, have fibromyalgia. And again, these are
14 preexisting conditions that the plaintiff is obligated to
15 apportion through their physicians and their testimony, which
16 wasn't done in this particular case.

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

25 THE COURT: And you have some case authority to

1 cite?

2 MR. SEMENZA: I do, Your Honor, and that's fine.

3 And let me quote from this particular case. "In a case where
4 a plaintiff has a preexisting condition and later sustains an
5 injury to that area, the plaintiff bears the burden of
6 apportioning the injuries, treatment, and damages between the
7 preexisting condition and the subsequent accident." And that
8 citation is Schwartz vs. State Farm Mutual Auto Insurance
9 Company. It is a federal district court case out of Nevada,
10 2009, and it cites Kleitiz or Kleitiz v. Raskin, 103 Nevada 325,
11 a 1987 case.

12 THE COURT: 103 Nevada 325 is the Nevada --

13 MR. SEMENZA: Yes.

14 THE COURT: -- state court case?

15 MR. SEMENZA: Yes, and it's a -- Schwartz vs. State
16 Farm is a Lexis cited case and a Westlaw cited case, and I do
17 have the citations for -- actually, I have a copy of the
18 opinion, Your Honor. May I approach?

19 THE COURT: Yes.

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

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

25 MR. SEMENZA: Yes, Your Honor. May I approach --

1 THE COURT: Yes.

2 MR. SEMENZA: -- with regard to the bench brief?

3 THE COURT: I have read these before, but I need
4 to --

5 MR. SEMENZA: Thank you.

6 THE COURT: -- read them again. Do you have -- do
7 you want to be heard on this at this point?

8 MS. MORRIS: I do just briefly. I mean, Dr. Tingey
9 addressed that she had mild arthritis in her right knee that
10 he did not believe that had any impact in the injury that was
11 caused. She had no prior symptoms to her knee, no medical
12 visits for at all, and he specifically addressed it in his
13 testimony.

14 As for the back injury, in 1989 that resolved and
15 there was no further treatment to it. I certainly would not
16 classify that as a preexisting condition that needed to be
17 apportioned to what we have 20 years later.

18 The crux of this case and other cases similar to it
19 is where someone has a prior accident, in a car accident,
20 maybe they've just finished treating, maybe they had residual
21 symptoms from it, then they have an additional accident in
22 which you have to apportion, you know, where's the injury from
23 that to happen in this case. Or they have symptoms and
24 they've already had pain, and it's resolved, and they shortly
25 later have another accident, could it be related. But he's

1 talking about a back injury in 1989 that resolved after some
2 physical therapy, and no need for it after that.

3 Additionally, Dr. Dunn did address fibromyalgia in
4 his testimony, and said that it would not change his opinion
5 as to the need for the neck surgery in the complaints that
6 she's having, because it's generally not seen there.

7 So, I don't think there is any requirement for
8 apportionment in this case, and they were very clear in their
9 testimony what they related to causation and the needs to be.
10 In addition though, I mean, I would like the opportunity to
11 review this information as well, you know, and provide a brief
12 in response.

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

16 MR. SEMENZA: Correct, Your Honor.

17 THE COURT: So, we've got time for me to review
18 this, and in the meantime, you need to put your case on.

19 MR. SEMENZA: Understood, Your Honor.

20 THE COURT: All right, let's bring our jury back.

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

22 (In the presence of the jury)

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

24 THE COURT: Thank you. Please be seated. And the
25 record will reflect the presence of all eight members of our

1 jury and our remaining one alternate. Counsel are present
2 with their respective clients, all officers of the court are
3 present as well. And the plaintiff has rested. You may call
4 your first witness.

5 MR. SEMENZA: Thank you, Your Honor. Ms. Macias
6 should be outside.

7 THE MARSHAL: Remain standing, face the court clerk,
8 raise your right hand.

9 ARACELI MACIAS, DEFENSE WITNESS, SWORN

10 THE CLERK: Please be seated, and then please state
11 and spell your first and last name.

12 THE WITNESS: Araceli Macias. A-r-a-c-e-l-i. Last,
13 M-a-c-i-a-s.

14 THE COURT: Thank you. You may proceed.

15 DIRECT EXAMINATION

16 BY MR. SEMENZA:

17 Q Good morning, Ms. Macias. How are you doing?

18 A Good morning. Good, thank you.

19 Q Ms. Macias, where are you employed?

20 A Wynn Resorts.

21 Q And how long have you been employed at Wynn?

22 A Since, April of 2005.

23 Q And what is your current position there?

24 A Supervisor in interior horticulture.

25 Q And can I have you speak up a little bit when you

1 answer?

2 THE COURT: Sorry, I couldn't hear that last part.
3 Supervisor of what?

4 THE WITNESS: I'm a supervisor in horticulture
5 interior.

6 BY MR. SEMENZA:

7 Q Can you tell us -- well, first of all, how long have
8 you held that position?

9 A On and off since 2008.

10 Q And what do your job duties entail as a supervisor
11 in the horticultural department in the interior?

12 A Start off with -- I pre-shift. I basically have my
13 crew do their areas. Order plant material, check all the
14 areas where all the plants are. There's just a lot that I do.

15 Q Do you oversee other employees?

16 A Yes.

17 Q Okay. Who do you supervise?

18 A I supervise my crew, which is a crew of 13. As
19 well, if exterior needs help as well. All crew members are
20 under supervisors, which are seven of us, so.

21 Q There's seven supervisors?

22 A Um-hum.

23 Q And you oversee 13 of them?

24 A No, I oversee 13 of my crew members.

25 Q Okay.

1 A Yeah.

2 Q And what does your crew do?

3 A We work at the inside of the casino.

4 Q And specifically, what do you do -- what does your
5 crew do on the inside of the casino?

6 A Atrium section, we plant, we maintain, detail, we
7 water, we deconstruct and construct, we carry plant material,
8 push plant material to the atrium, all sorts of detailing.

9 Q Okay. Do you do any of that work directly, or is it
10 your crew that undertakes it and you supervise?

11 A They do probably about the -- for sure, 100 percent.
12 I go in there and do about maybe 20 of it. I mostly
13 supervise.

14 Q Okay. And did you have any other positions at Wynn
15 other than being a supervisor?

16 A At the beginning in 2005, I was a floral designer.

17 Q I'm sorry, floral designer?

18 A Designer, um-hum.

19 Q And how long did you hold that position?

20 A Two years, and went -- after that, went into
21 horticulture as a gardener.

22 Q Are you familiar with the watering that takes place
23 of the plants --

24 A Yes.

25 Q -- in the atrium area of the Wynn?

1 A Yes.

2 Q And how long have you been familiar with that
3 watering that's taking place there?

4 A With the watering, since I was gardener, as a
5 gardener watering myself, familiar with that part and actually
6 doing the watering. Irrigation-wise, I would say about two
7 years since I've been a supervisor, just talking with my
8 irrigation supervisor.

9 Q Who do you directly report to?

10 A My manager.

11 Q And who is your manager?

12 A Freddy Cordon.

13 Q I'm sorry, say that one more time.

14 A Freddy Cordon.

15 Q And what is his title?

16 A He's a manager in horticulture.

17 Q So, they have supervisors, and then managers?

18 A Um-hum.

19 Q Is that a, yes?

20 A And then we have the director as well.

21 Q Okay.

22 A Yes.

23 Q To your knowledge, are there logs kept at the Wynn
24 identifying the irrigation watering in the atrium area of the
25 hotel?

1 A In the atrium, and everywhere on the property. Yes.

2 Q And is the watering -- the irrigation that's done in
3 the atrium area of the Wynn done by computer?

4 A Yes, it is.

5 Q And how long has it been done by computer?

6 A Since opening, 2005.

7 Q And is there a particular program that is used by
8 the Wynn relating to the irrigation in the atrium area?

9 A Yes, it's called Maxicom.

10 Q And are you familiar with that computer system?

11 A Not 100 percent, but yes, I am somewhat.

12 Q And does that computer program store historical
13 watering information --

14 A Yes, daily.

15 Q -- that took place at the Wynn?

16 A Yes.

17 Q And would that computer program have historical
18 watering information relating to the atrium area on February
19 8th of 2010?

20 A Yes.

21 Q And have you obtained watering information for the
22 atrium area at the Wynn from February 8th of 2010?

23 A Yes.

24 Q And how did you do that?

25 A Speaking with my irrigation supervisor, I asked him

1 for the papers or the forms.

2 Q And did you accompany him when he pulled up those
3 records?

4 A Yes.

5 Q And did you see him pulling those records --

6 A Yes.

7 Q -- off the computer?

8 A Um-hum.

9 Q And did he give you a hard copy of those records?

10 A Yes, he did.

11 Q Are those records kept in the ordinary course of
12 Wynn's business?

13 A Yes.

14 Q And who is the individual that helped you retrieve
15 this information relating to the historical watering in the
16 atrium area of the Wynn?

17 A On that day?

18 Q Yes.

19 A Carlos Figueroa. He's the irrigation supervisor.

20 Q And is he the one responsible for the computer
21 irrigation system in the atrium area?

22 A Yes.

23 Q Do you know how long he's worked there at the Wynn?

24 A Since opening as well. Probably before myself.

25 Q And can I have you turn --

1 MR. SEMENZA: Oh. May I approach, Your Honor?

2 THE COURT: Yes.

3 BY MR. SEMENZA:

4 Q Ms. Macias, I'm showing you what has been marked as
5 Defendant's Proposed Exhibit Z. It's comprised of a few
6 pages. Can you look that document over and tell me if that is
7 the report you printed relating to the irrigation and watering
8 in the atrium area of the Wynn on February 8th of 2010?

9 A Yes, it is.

10 Q And are you capable of testifying as to its
11 contents?

12 A Yes.

13 MR. SEMENZA: Your Honor, I would move for the
14 admission of Defendant's Proposed Z.

15 THE COURT: Any objection?

16 MS. MORRIS: No objection.

17 THE COURT: It will be admitted.

18 (Defense Exhibit Z is admitted)

19 MR. SEMENZA: Thank you, Your Honor.

20 BY MR. SEMENZA:

21 Q Ms. Macias, we're looking at the first page of
22 Exhibit Z, and what is the title of the document at the top?

23 A It's the flow data for site over in the Wynn atrium.

24 Q Okay. And this would be the plant areas in the
25 atrium?

1 A Correct.

2 Q Okay. And does it identify a particular date?

3 A It does. It's Monday, February the 8th, 2010.

4 Q Okay. And what does the graph describe?

5 A To the left, if you look at the left corner, that
6 arrow going up, those are the gallons. And the line at the
7 bottom, numbers 00 through 23, those are the times that the
8 water runs.

9 Q Is this a graph of the watering that was conducted
10 through the irrigation system on February 8th of 2010?

11 A At the atrium, yes.

12 Q Okay. And what does it identify with regard to
13 hours 6:00 A.M. to 7:00 A.M.?

14 A It identifies the time that they watered the atrium.

15 Q Okay. So, during that period of time, that one-hour
16 period on February 8th, 2010, from 6:00 A.M. to 7:00 A.M., did
17 the Wynn water in the atrium area through its irrigation
18 system?

19 A Correct.

20 Q And then moving to the right, does it also show some
21 additional watering that was conducted on that day?

22 A Yes, between 11:00 A.M. and just prior to 12:00 P.M.

23 Q All right. Again, that's in the atrium area of the
24 Wynn --

25 A Correct.

1 Q -- near the south entrance?

2 A Near the south, yes.

3 Q I'm going to have you turn to the third page of the
4 document. Actually, let me have you turn -- yeah, that's
5 fine. Let me have you turn to the third page of the document.
6 Can you identify for the jury what this is?

7 A This here -- okay. The first line says date, and
8 then second line numbers, it's like the 00s, that's the actual
9 data. The projected time would be, the projected time, right,
10 that we may water on that time, but the water's actually on
11 the next --

12 Q Okay.

13 A -- page.

14 Q So, the column here on the far lefthand side, does
15 that identify --

16 A The date.

17 Q -- the hours?

18 A Yes. The date, and then the hours.

19 Q Okay. And then the actual -- this column, "actual
20 data," what does that identify? Does that --

21 A That's the actual watering time. And then, if you
22 see there to the right, it says "GPM."

23 Q Okay.

24 A Uh-huh, gallons per minute.

25 Q So, if that number is 0.00, does that have any

1 significance to you?

2 A That it did not water yet.

3 Q Okay. So, there was no watering for that particular
4 time if it's 0.00?

5 A Correct.

6 Q Okay. And so, was there any watering conducted, at
7 least in this column -- well, let me ask you; the lefthand
8 column, what time period does that identify?

9 A The very top is 2:49, and that's 2:49 P.M.

10 Q Okay. And the bottom of the lefthand column?

11 A That would be 12:36 P.M.

12 Q Okay. And anywhere on that lefthand column, does it
13 identify that there was watering in the atrium area of the
14 Wynn?

15 A No.

16 Q Let's move to the column to the right. What time
17 period does the column to the right reference?

18 A That would be 12:35 P.M. and -- I'm sorry.

19 Q And then, is there a -- what is the time period
20 that's referenced in that right column?

21 A I'm sorry. 12:35 P.M.

22 Q Okay. And then, was there -- at the bottom of the
23 right hand column, is there a time identified?

24 A 11:52 A.M., so it's going backwards.

25 Q Okay.

1 A Um-hum.

2 Q And in this right column, does it identify whether
3 there was any watering conducted in the atrium area of the
4 Wynn Las Vegas --

5 A Still --

6 Q -- during this particular time period?

7 A Still not yet, no.

8 Q Okay. So, as of 11:52 A.M. on February 8th, 2010,
9 was there any watering?

10 A Not yet, no.

11 Q Okay. I'm showing you the fourth page of this
12 document, and I'm focusing on the lefthand column. Based upon
13 your review of this, does it identify when the atrium area of
14 Wynn Las Vegas on February 8th, 2010 was last watered on that
15 particular day?

16 A Yes.

17 Q Okay, what does it identify?

18 A 11:39 A.M.

19 Q What is your understanding as to -- okay. And how
20 much -- how long did it water for in the atrium area?

21 A That time, from 11:36 to 11:39, so three minutes.

22 Q Okay, and it shut off at what time?

23 A 11:39 A.M.

24 Q And is it your understanding -- well, what is your
25 understanding as to whether there was any other watering that

1 was conducted in the atrium area of the Wynn Las Vegas on
2 February 8th of 2010?

3 A From this log here, 11:08 A.M., in sections -- or in
4 minutes, should I say, and it ends at 11:39 A.M.

5 Q Based upon your review of this report, was there any
6 watering conducted in the atrium area of the Wynn Las Vegas on
7 February 8th, 2010 after 11:39 A.M.?

8 A No.

9 Q Are you aware of any leaks that were reported on
10 that particular day?

11 A No.

12 Q Now, in addition to watering through the irrigation
13 system, does Wynn also water in a different way?

14 A Yes. We carry what's called a Tanks-A-Lots. It's a
15 20-gallon tank with a spigot, and we water.

16 Q And how is that used?

17 A Manually pushed and -- with a hose.

18 Q Is it fair to characterize that as hand watering?

19 A Yes, that's what we call that.

20 Q And when is the atrium area of the Wynn -- during
21 this period of time around February 8th of 2010, when, if
22 ever, is it hand watered?

23 A We start watering once we get upstairs. It's -- we
24 start at 5:00, so about 5:30, we start watering, if needed,
25 and we pretty much get done by about 11:30, 12:00 --

1 Q Okay.

2 A -- if -- again, if we need to water or hand water.

3 Q You don't know whether there was any hand watering
4 on that particular day, do you?

5 A No.

6 Q And is your staff trained in any way to make sure
7 that there aren't any spills or watering outside of the
8 designated areas?

9 A Yes, we carry towels with us. We place towels on
10 the floor in case we happen to drip, or the hose happens to
11 drip. As they're rolling the cart, they're watering and
12 cleaning.

13 Q Why generally, if you have to hand water, that you
14 water in that morning time?

15 A Traffic of people. Safer.

16 Q And is the horticultural department staff trained to
17 do anything if there is any water that might get on a marble
18 surface outside of the designated atrium --

19 A Yes.

20 Q -- plant area?

21 A We carry radios with us. If there were some type of
22 a leak, stay there, call us, call somebody. PAD's always
23 around there as well, so.

24 Q And would the leak or the --

25 THE COURT: What's PAD?

1 THE WITNESS:

2 I'm sorry. PAD would be the floor cleaners, casino cleaners.
3 They pretty much clean all bios, liquids, anything like that.

4 BY MR. SEMENZA:

5 Q And so, if there is a spill, then it's addressed
6 generally -- when is it addressed?

7 A Right away.

8 Q Now, what does Wynn water the plants in the atrium
9 with?

10 A Regular water.

11 Q And is that true back in February of 2010?

12 A Yes.

13 Q Does the Wynn use any additives to what it waters
14 the plants with?

15 A No.

16 Q Does it use any substances that are green in nature
17 to water its plants with?

18 A No.

19 MR. SEMENZA: I don't have anything further, Your
20 Honor.

21 THE COURT: Cross?

22 CROSS-EXAMINATION

23 BY MS. MORRIS:

24 Q Hey, how are you?

25 A Good morning. Well, thank you.

1 Q My name's Christian Morris. Just got a few
2 questions for you.

3 A Um-hum.

4 Q The system that you use here for the watering, it's
5 -- is that an extensive system? Is it a large system?

6 A The hand watering, or the computer?

7 Q Irrigation. Thank you.

8 A Irrigation? It's the whole -- the whole outside,
9 inside, both Encore and Wynn, so it's pretty big.

10 Q Does it pump through like gallons and gallons of
11 water?

12 A Yes.

13 Q Now, the electronic irrigation system, if I
14 understand what you said correctly, it's computer operated; is
15 that right?

16 A Yes, correct.

17 Q So, the computer tells the watering to happen, and
18 it happens; is that right?

19 A The computer tells it what we tell it to do, yes.

20 Q And is there a person from the horticulture
21 department out in the areas where the watering is happening
22 when the computer starts the watering?

23 A All areas that -- we have designated times and areas
24 so each group knows when it's going to water; so yes, we are
25 there.

1 Q So, back in February 8th, 2010, who from the
2 horticulture department was assigned to the atrium area?

3 A Gardeners. I wasn't there that day, but I'm sure
4 gardeners were there.

5 Q Do you know who was working in the atrium area at
6 the time the electronic watering happened?

7 A On that day?

8 Q Yes.

9 A No.

10 Q I think you said that the watering occurred from
11 11:36 to 11:39; is that correct?

12 A Yes.

13 Q How many gallons of water were pumped through in
14 that three minutes?

15 A Calculator? 25, 15, 5 (indecipherable) the time,
16 10, 5, 5, we've got 10, 15, 10, and 5, so what, about 60 or
17 something within those minutes.

18 Q And how does the irrigation system work in the
19 atrium; are there pipes?

20 A We have what we call a Netafim System. And in the
21 atrium -- I'm not sure if you're familiar to it, but they're a
22 hose with holes, and that's our irrigation system. As well,
23 we have drippers that go into our pots.

24 Q I want to show you a picture, and this is Joint
25 Exhibit 0011. It's under tab 9. This is a photograph that we

1 have of the atrium area that was taken. Now, can you tell me
2 if you know, are there those hoses located underneath anything
3 that we're looking at here?

4 A Underneath, I don't see anything here, but visible,
5 no.

6 Q Where are those hoses in this photograph, if you
7 know?

8 A Inside the pots, the flowers. Back then, it was --
9 the system was used. The green flowers in the middle. Do you
10 see that?

11 Q Can you -- actually, if you touch the screen, it
12 makes a mark.

13 A Oh, okay. So, these pots here, oh, and then these
14 here. So, it would be in the middle of the pot.

15 Q And then the water comes out through holes in the
16 pipe -- or in the hose?

17 A Well, it's a drip system, so it's -- they're
18 dripping into the plant.

19 Q And you said that you water only with regular water,
20 nothing added; is that right?

21 A Right.

22 Q Do you use anything to help fertilize the plants in
23 the atrium area?

24 A We are that good that we just use water.

25 Q So, it's just dirt and water; is that correct?

1 A Yes.

2 Q And -- and it comes out through pipes, and then you
3 also --

4 A Hand water.

5 Q -- hand water?

6 A Um-hum.

7 Q Okay. Now, you said you weren't working back on
8 February 8th, 2010; is that correct?

9 A Not in that area.

10 Q Oh, but you were working that day?

11 A Yes.

12 Q What's your shift? Do you remember what your shift
13 was back then?

14 A 5:00 to 1:00. By that time, I was at Encore
15 supervising back and forth.

16 Q And when you say 5:00 to 1:00, what do you mean by
17 that?

18 A 5:00 in the morning to 1:00 in the afternoon.

19 Q Did you ever see Ms. O'Connell fall in the atrium
20 area?

21 A No.

22 Q Do you -- did you ever speak to the porter who was
23 assigned to that area and was supposed to be keeping the floor
24 clean?

25 A No, ma'am.

1 Q Did you ever speak to the -- or try and discover who
2 the person was in the horticulture department that was
3 assigned to the atrium area that day?

4 A No.

5 Q Can you describe for me, or maybe if you know, why a
6 computer system is used to water?

7 A A lot of plant material for manual watering.
8 Um-hum.

9 Q And it seems to me that the times and locations of
10 this watering is carefully monitored; is that right?

11 A Yes.

12 Q Would that be fair to say?

13 A Um-hum.

14 Q That it's -- I mean, you were able to go back this
15 year and access water records from 2010; is that right?

16 A Yes.

17 Q And you were simply -- you just were able to go into
18 the computer system and print that out; is that right?

19 A Yes.

20 MS. MORRIS: Thank you.

21 THE WITNESS: Um-hum.

22 THE COURT: Redirect?

23 MR. SEMENZA: Just a couple questions.

24 //

25 //

1 REDIRECT EXAMINATION

2 BY MR. SEMENZA:

3 Q I'm showing you what has been -- it's Joint
4 Stipulated Exhibit 8. Do you know what this photograph
5 represents?

6 A The atrium.

7 Q Okay.

8 A South.

9 Q And this is part of the atrium area?

10 A Yes.

11 Q And this is part of the area that would be watered
12 based upon the report that we saw?

13 A Correct.

14 Q Okay. This is just part of the atrium though, isn't
15 it?

16 A This is -- if I'm looking at it right, it's the
17 south.

18 Q And there's -- would you consider the atrium to be
19 large?

20 A Yes.

21 Q And is there a walkway in the center of the atrium?

22 A Yes, there is.

23 Q And so, there -- where are the plants in the atrium
24 generally?

25 A Generally, what we call beds is all this right here,

1 in this section over here.

2 Q And are there other portions of the atrium that are
3 not depicted in this photograph?

4 A The opposite side, I guess, but it's the same.

5 Q Okay. So, okay. And so, there's an opposite side
6 with an atrium on that portion?

7 A Correct, uh-huh.

8 Q So, this picture would represent a relatively small
9 amount of the atrium area?

10 A Yes.

11 Q I'm showing you what has been admitted as Joint
12 Exhibit 9. Do you see that there? There appears to be a
13 green object on the lefthand side of the photograph; do you
14 see that?

15 A Yes.

16 Q Do you know what that object is?

17 A That's a speaker. Yeah, speaker. Music.

18 Q Is there -- is there music that is pumped through
19 the atrium area?

20 A All day.

21 MR. SEMENZA: Nothing further.

22 THE COURT: Any recross?

23 MS. MORRIS: None, thank you.

24 THE COURT: May this witness be excused? Oh, wait.
25 Jury questions, we've got some. Okay, approach.

1 (Off-record bench conference)

2 THE COURT: All right, so questions from the jury.

3 THE WITNESS: Yes.

4 THE COURT: Okay. First question, what employee
5 position orders hand watering to be done?

6 THE WITNESS: Supervisor.

7 THE COURT: Are plants ever colored to improve their
8 looks? In other words, artificially colored?

9 THE WITNESS: No.

10 THE COURT: All right. Okay. So, has the Maxicom
11 watering system ever malfunctioned during your tenure,
12 resulting in leaks in the casino?

13 THE WITNESS: Has it malfunctioned? It's gotten
14 stuck.

15 THE COURT: Okay.

16 THE WITNESS: I guess, yeah.

17 THE COURT: All right. Has it resulted --

18 THE WITNESS: Well, it's --

19 THE COURT: Has that resulted in leaks --

20 THE WITNESS: Actually, it's not the actual --

21 THE COURT: -- into the casino?

22 THE WITNESS: I'm sorry. It's not the actual
23 computer system, but valves would get stuck. But the computer
24 system has been fine, to my knowledge.

25 THE COURT: All right, but has that, again, the

1 valves getting stuck resulted in leaks into the casino?

2 THE WITNESS: I have to say not so much into, but
3 the pipe draining, yeah, but it doesn't -- how can I put this?

4 THE COURT: I don't know, you have to --

5 THE WITNESS: Spout out, I guess.

6 THE COURT: Spout out?

7 THE WITNESS: Yeah.

8 THE COURT: Okay.

9 THE WITNESS: It's more the pipes -- the leaking --
10 it's like a pipe with a hole. It's dripping down.

11 THE COURT: Okay. Have you ever witnessed any
12 irrigation slip and falls?

13 THE WITNESS: No.

14 THE COURT: No?

15 THE WITNESS: No.

16 THE COURT: All right. Now, between the flower pots
17 and the curb area that you were shown in the photograph, the
18 green area between the --

19 THE WITNESS: That looks like grass?

20 THE COURT: Is that artificial or real plant
21 material?

22 THE WITNESS: It's real. It's called selaginella.
23 It's a potted grassy moss. Um-hum.

24 MR. SEMENZA: Your Honor, I have a couple follow
25 ups.

1 THE COURT: Okay. Go ahead.

2 MR. SEMENZA: No, I don't have any further
3 questions, Your Honor.

4 MS. MORRIS: Just a couple, briefly.

5 RECROSS-EXAMINATION

6 BY MS. MORRIS:

7 Q You said that the supervisor is the one who orders
8 the hand watering; is that correct?

9 A Yes.

10 Q Do you know when the atrium area was hand watered on
11 February 8th, 2010?

12 A On that specific date, no.

13 Q Do you know who the supervisor was in 2010 who would
14 have ordered the hand watering?

15 A Yes.

16 Q Who is that?

17 A Tracey Gonzalez.

18 Q And if I'm clear on your other testimony, you don't
19 know who was actually working in the atrium area for the
20 horticulture department that day; is that correct?

21 A On that day, no.

22 Q When did you learn about Yvonne's fall?

23 MR. SEMENZA: Your Honor, I think that's outside the
24 scope of recross -- or redirect -- I guess recross.

25 THE COURT: All right.

1 MS. MORRIS: It's based on has she ever witnessed a
2 slip and fall, I think was the question, due to irrigation
3 system. And I was -- I had thought the question was, had she
4 ever heard or knew of slip and falls resulting from it, so --

5 THE COURT: The question was, had she ever witnessed
6 an irrigation --

7 MS. MORRIS: Okay.

8 THE COURT: -- slip and fall.

9 BY MS. MORRIS:

10 Q You didn't witness this one; is that correct?

11 A Correct.

12 Q Okay. And you didn't respond in any way to the area
13 where Yvonne fell; is that correct?

14 A No.

15 Q And you didn't talk to anyone in the horticulture
16 department to figure out what had happened on February 8th,
17 2010; is that correct?

18 A Correct.

19 MS. MORRIS: Thank you.

20 THE WITNESS: Um-hum.

21 THE COURT: Okay. I just have a question to clarify
22 about the exhibit. This was Z --

23 MR. SEMENZA: Yes, Your Honor.

24 THE COURT: -- that was admitted? On page 1 where
25 you said it showed the -- it had the graph where it goes up on

1 the side with gallons, and then across horizontally with time.

2 THE WITNESS: Um-hum.

3 THE COURT: So, at the top, it looks like it shows
4 30 gallons on those two different times on the graph. Is that
5 for the whole atrium area, or just the part we're looking at
6 in the pictures?

7 THE WITNESS: I'm sorry, what page would that be?
8 The one with the 11:00 o'clock one?

9 THE COURT: Do you have that --

10 THE WITNESS: 11:39?

11 THE COURT: -- exhibit for her?

12 MR. SEMENZA: Yes, I do.

13 THE COURT: Again, Z.

14 MR. SEMENZA: It's --

15 THE WITNESS: Oh, that.

16 THE COURT: So, in other words, is -- does this --
17 this 30 gallons, is that the total for the whole atrium, or
18 just this one part that we're looking at in the photograph?

19 THE WITNESS: Okay. So, you see the lines with the
20 little dots going up?

21 THE COURT: Yes.

22 THE WITNESS: Okay. They're all different little
23 areas in the atrium, but that specific one for that, whatever
24 that one was, could be the shrubs, could be the tall plant
25 material, could be the color, we call. That received the 30

1 gallons of water.

2 THE COURT: Okay. So, this graph represents all the
3 watering in the entire atrium that day?

4 THE WITNESS: In the atrium for that specific area
5 in the beds. I don't know if that makes sense. So, each bed
6 -- we call it bed, we have cantuas, tall palms, we have
7 shorter shrubbery, we have what we call color, and again, we
8 have shrubbery. So, each section gets watered different
9 minutes. They're drained about the same time. So, that
10 specific line there shows what that plant received.

11 THE COURT: So, the bed that's depicted in the
12 photos that we've -- we're looking at, that's -- that's the
13 irrigation for that one particular bed?

14 THE WITNESS: For the -- for the whole atrium. So,
15 there's 1, 2, 3, 4. At the time now, there's five beds.

16 THE COURT: Okay, but this -- at this time --

17 THE WITNESS: Um-hum.

18 THE COURT: -- in 2010?

19 THE WITNESS: Yes.

20 THE COURT: So, this is for the whole atrium; not
21 just the one part where we can see in the pictures --

22 THE WITNESS: I'm sorry, it's the whole atrium.

23 THE COURT: Okay, that's all I was --

24 THE WITNESS: Oh.

25 THE COURT: -- trying to say.

1 THE WITNESS: I'm sorry.

2 THE COURT: Now --

3 MS. MORRIS: Just one quick --

4 THE COURT: Follow up?

5 MS. MORRIS: -- clarification.

6 FURTHER RECROSS-EXAMINATION

7 BY MS. MORRIS:

8 Q So, is it that every single line we see up here
9 represents a different portion of the atrium being watered?

10 A Correct.

11 MS. MORRIS: Okay, thank you.

12 MR. SEMENZA: Nothing further.

13 THE COURT: All right. May this witness be excused?

14 MS. MORRIS: Yes.

15 THE COURT: Thank you. You may go.

16 THE WITNESS: Oh.

17 THE COURT: Thank you very much for your testimony.

18 You may call your next witness.

19 MR. SEMENZA: Ms. Matthieu. She should be outside.

20 THE MARSHAL: Watch your step, please. Remain
21 standing, face the court clerk, raise your right hand.

22 TRISH MATTHIEU, DEFENSE'S WITNESS, SWORN

23 THE CLERK: Please be seated, and then please state
24 and spell your first and last name for the record.

25 THE WITNESS: Trish, T-r-i-s-h. Matthieu,

1 M-a-t-t-h-i-e-u.

2 THE COURT: You may proceed.

3 MR. SEMENZA: Thank you, Your Honor.

4 DIRECT EXAMINATION

5 BY MR. SEMENZA:

6 Q Good morning, Ms. Matthieu.

7 A Good morning.

8 Q How are you?

9 A Good.

10 Q Where are you currently employed?

11 A Wynn.

12 Q And what is your position?

13 A I'm the Director of Claims.

14 Q And how long have you held that position?

15 A Since March of this year.

16 Q March of 2015?

17 A Yes.

18 Q And what are your duties as a Director of Claims?

19 A I oversee both the guest claims department, as well
20 as the workman's compensation department.

21 Q What is the guest claims department?

22 A The guest claims department is responsible when
23 things happen, such as a guest falling, or also property
24 damage. A server accidentally spilled something on someone's
25 slacks, they said the valet damaged their car, that type of

1 thing.

2 Q As part of your duties as the Director of Claims, at
3 times, do you provide training to the security department?

4 A I work very closely with the security department.
5 We do little mini sessions with them, talking with them about
6 the types of things that could benefit the guest claims
7 department in the reports that they write.

8 Q And does some of that training include how to
9 document an incident?

10 A We talk with them about the types of things that are
11 needed. So, as an example, how to properly document the guest
12 information; the phone number, the address, the email address,
13 ways to contact them. To make sure that they offer the guest
14 the forms to fill out a statement if the guest wishes to do
15 so; that type of thing.

16 Q Okay. And prior to becoming the Director of Claims,
17 what position did you have?

18 A I was the manager of the guest claims department.

19 Q And what were your duties as the manager of the
20 guest claims department?

21 A Working with the claims representatives and the
22 administrative assistant, and that would be taking a look at
23 all of the incidents that happen within the hotel, both Wynn
24 and Encore, and deciding which ones were actual claims, which
25 would be things that involve guest property or the guest

1 bodily injury, assigning those to the claims representatives,
2 and then overseeing the day to day work flow of the
3 department.

4 Q Okay. And how long did you hold that position?

5 A About five years.

6 Q When did you come to Wynn?

7 A It was June of 2010.

8 Q And are you familiar with the general policies and
9 procedures that Wynn employs at the scene when a guest reports
10 an injury?

11 A I am.

12 Q Can you tell us about that?

13 A When you say, a guest reports the injury, can you
14 repeat the question? I want to make sure that I understood --
15 are you talking about the security department?

16 Q Yes.

17 A Okay. When an incident happens with a guest, it
18 would depend on whether it was property or bodily injury. Do
19 you want me to speak specifically to bodily injury?

20 Q Yes, let's do that.

21 A Okay. The most important thing is to make sure that
22 the guest is taken care of. That would be guest medical
23 needs, if an ambulance or anything needed to be called,
24 paramedics, that type of thing. And also making sure that the
25 scene is secure, if there were any hazards present, making

1 sure that that gets addressed immediately so we prevent any
2 further guest injury. And then taking documentation of the
3 scene itself, as well as working with the guest if the guest
4 is able to provide statements, talk with the officer to
5 document everything that they possibly can, and that's if the
6 guest is available and able to do that.

7 Q And how do you secure the scene?

8 A There's a variety of different ways. It would
9 depend upon what the incident was. If there was a spill, if
10 security arrived and the spill was still present, they would
11 stand over the spill if necessary, get other officers
12 involved, other people involved. They would notify PAD
13 immediately. That's if it's still present when the officer
14 arrives.

15 Q What is PAD?

16 A Oh, I'm sorry. That's the public area department.
17 They're tasked with keeping the property clean at all times.
18 We actually all are, but that's specifically the PAD's
19 responsibility.

20 Q Is it everyone's responsibility to make sure that
21 the Wynn is kept clean?

22 A We take great pride in the resort. It's a five-star
23 property, and part of our core values are take personal
24 responsibility; don't leave it for others. It's really
25 important that when you're walking through the property, if

1 you see something, that you take care of it, or that you call
2 for someone to do so. Everyone I know does that.

3 Q And that's something that Wynn employees are trained
4 to do?

5 A Yes.

6 Q Now, are there times that hazardous conditions are
7 remedied prior to security arriving?

8 A I would say that's extremely common.

9 Q And why is that?

10 A The moment a hazardous condition is found, it needs
11 to be addressed. That's of upmost importance. We wouldn't
12 want someone else to be injured, or anyone to be injured if a
13 hazardous condition existed.

14 Q And as -- so, when security arrives on scene, is one
15 of their responsibilities to document what happened?

16 A Yes.

17 Q Okay. And what do they generally do to document
18 what happened?

19 A It would depend on where the area was, and what the
20 situation was. Typically, they're speaking with the guest
21 that experienced the incident, asking them what happened.
22 They would look around to see if there were any witnesses, and
23 if there were, they would offer statements for witnesses to
24 complete, if there were any. They would ask for security
25 control center, that's SCC. They would call to see if there

1 was camera coverage available, and if there was, that would be
2 secured. So, there's a variety of different things that they
3 do.

4 Q Do they sometimes take photographs?

5 A Oh, yes.

6 Q Okay. When are they supposed to take photographs?

7 A It would depend upon the incident. It's pretty much
8 a decision that the officer is tasked with once they're on
9 scene, because it would depend upon the scene and what was
10 going on. If it was a situation where someone needed to be
11 transported, then that's going to take a back seat.

12 Q It's situational?

13 A Yes.

14 Q Okay. Are Wynn security officers asked to sometimes
15 take pictures of people's shoes?

16 A They can. It might assist in determining a possible
17 cause of what may have contributed to the incident.

18 Q And in your experience, do they generally ask for
19 permission from the guest in order to do that?

20 A It would depend upon the situation. If it's
21 non-obtrusive, and they're just taking general photos and they
22 take a photo of the shoe, they may just take a photo of the
23 shoe. But if they were to ever photograph someone's face, or
24 if a guest had an injury maybe that was in an unusual area,
25 something that someone might consider more private, before

1 they would ever even take a picture of anything like that,
2 they would ask the guest's permission to do so.

3 Q After the Incident Report is taken and statements
4 are gathered, what happens to that report?

5 A That would be something that then goes to the guest
6 claims department and it's taken a look at. That was my
7 previous position as the manager, something that I did was to
8 look at the incident reports and to see what happened. And
9 then a claims representative would be assigned that file and
10 they would take a look at everything that the officer had
11 done.

12 They would take a look at any of the statements that
13 were there. They would double-check -- if camera coverage was
14 available, they would make sure that that had been secured;
15 they would get a copy of it. If camera coverage was not
16 available, they would ask the security control center to
17 double-check one more time to make sure, and then they would
18 follow up with the guest if the guest provided contact
19 information.

20 Q Okay. And so, the claims department would
21 specifically make a second request regarding surveillance
22 footage?

23 A Yes, if it said that there wasn't any. If there
24 was, then they would request a copy.

25 Q Do you know whether that was done in this particular

1 case though?

2 A It is always done.

3 Q Does a security officer actually go up and view
4 video surveillance footage?

5 A It's unusual for them to do that. That's not really
6 their area of expertise. We have a department specifically
7 tasked that that is their job; that is what they do all day
8 long is look at camera coverage. I guess it's possible they
9 could go up there, but it's not part of their investigation
10 process. There's a department that does that that's trained
11 to do that.

12 Q So, would your expectation be that a security
13 officer that investigates an incident would not be the one to
14 review camera coverage?

15 A Correct. It would be security control center.

16 Q And so, how would that process work for a security
17 officer on the floor to make a request to see if there's
18 camera coverage?

19 A They're normally radioed up. If they're in an area
20 that for some reason, maybe radio is not working really well,
21 like they were outside, they were having some difficulty, they
22 would get to the closest phone they possibly could, and they
23 would call the security control center and request a coverage
24 review.

25 Q Okay. Are there multiple numbers to call for the

1 SCC; the security control center?

2 A We have one central phone number. And it's
3 extremely important, because that one number, it's also a
4 dispatch and things, so everyone in the casino has one number
5 that we call.

6 Q If there is camera coverage of a particular
7 incident, do you have any understanding of what is clipped by
8 SCC?

9 A The incident itself, and then they will usually
10 attempt to clip 30 minutes before and 30 minutes after.

11 Q Ms. Matthieu, can I have you turn in that white
12 binder in front of you to Defense Proposed Exhibit Y, which is
13 under tab Y?

14 A I have it.

15 Q And it's comprised of multiple pages; is that
16 correct?

17 A Yes.

18 Q What is this document?

19 A This is a screen shot, this first page, of the
20 player system called Patron. It shows Ms. O'Connell and her
21 ratings. It's --

22 Q Without identifying the contents of the document,
23 generally speaking, what is it?

24 A It's a screen shot of our system that tracks play.

25 Q And the second page?

1 A The same.

2 Q And the third page?

3 A Also.

4 Q And what is Patron?

5 A Patron is a -- Patron is a system that we use. I
6 think a lot of people are familiar with like a player's card.
7 We call it a red card. So, when someone is gaming, they can
8 insert their red card in a slot machine, or if they're at the
9 tables, they can provide it to the dealer, and it tracks their
10 play, and it's something that the player can earn comps on.

11 Q And are you familiar with the contents of this
12 particular three-page document?

13 A Yes.

14 Q And is -- Patron is utilized by the Wynn Casino?

15 A It is.

16 Q And it's utilized in order to track the play of its
17 patrons?

18 A Correct.

19 Q And to your knowledge, is the information contained
20 in Proposed Exhibit Y true and correct?

21 A It is.

22 Q Have you had a chance to go through and verify the
23 accuracy of the information depicted on these pages in
24 relation to the Patron system itself?

25 A Yes.

1 Q And it is accurate?

2 A Yes.

3 Q And are these screen shots utilized in the ordinary
4 course of Wynn's business?

5 A Yes.

6 MR. SEMENZA: Your Honor, I've move for the
7 admission of Defendant's Proposed Exhibit Y.

8 THE COURT: Any objection?

9 MS. MORRIS: Yes, foundation.

10 THE COURT: Overruled. It will be admitted.

11 (Defense Exhibit Y is admitted)

12 MR. SEMENZA: Thank you, Your Honor.

13 BY MR. SEMENZA:

14 Q Let's take a look at the first page of the document.
15 The upper lefthand corner, does it depict -- is there a
16 picture there?

17 A Yes.

18 Q Okay. And next to the picture, does it identify
19 someone's name?

20 A Yes.

21 Q Whose name is that?

22 A Yvonne S. O'Connell.

23 Q Okay. And is there a screen shot to the right of
24 the picture depicting her license?

25 A Yes.

1 Q And is there another picture below that with a
2 signature?

3 A Yes.

4 Q Okay. And to the best of your knowledge, is this a
5 screen shot from Ms. O'Connell's red card or player card?

6 A Yeah, this is from the Patron system. Yes.

7 Q And I'd like you to focus on the box that says,
8 "Session information." Do you see that?

9 A Yes.

10 Q And does it identify a slot session detail in that
11 left column?

12 A It does.

13 Q Can you identify the start date and time for us,
14 please?

15 A February 8th, 2010 at 3:39 P.M. was the start time.
16 That would be the start of gaming with the card inserted. And
17 then, the end time of February 8th, 2010 at 4:27 P.M., that
18 would be when the card was removed.

19 Q What does this information mean to you?

20 A That during that time frame, the card was inserted
21 and someone was gaming.

22 Q And does it identify what machine was being played?

23 A It does.

24 Q What is it?

25 A That WOF Classic, that's a Wheel of Fortune machine.

1 Q Okay. And does it identify any points that are
2 earned?

3 A Yes, that's 350 points.

4 Q Does it identify any comps that were earned?

5 A \$18.89.

6 Q And what was the denomination of the machine that
7 was being played?

8 A That was a penny machine.

9 Q Moving over to the second column, does it identify
10 how much Ms. O'Connell gambled during that particular session?

11 A Yes.

12 Q What does it identify?

13 A Coin in, coin out, 1,050, and coin out, \$1,105.20.
14 So, if you subtracted those two, that would be how much she
15 won. That she played 525 games during that time frame, and
16 that it was 47 minutes and 51 seconds, and that the average
17 per minute was \$21.

18 Q Did she win or lose?

19 A She won.

20 Q She won? Coin in versus coin out identifies --
21 okay, yes, she did win.

22 A Yes.

23 Q How much did she win approximately?

24 A 1,105.20 minus 1,050; the difference between the
25 two.

1 Q Okay. And the column to the right, what does this
2 depict?

3 A This column is when someone has credits on their
4 card, which are sometimes earned from people's play. So, in
5 this particular one, she did not use any credits, so it was
6 all currency.

7 Q And so, she put in money into the machine,
8 essentially?

9 A Yes.

10 Q Okay. Showing you the second page of the same
11 exhibit, does this identify an additional session where the
12 red card was used?

13 A Correct.

14 Q Can you identify the start and end dates and times?

15 A Started February 8th, 2010 at 4:30 P.M., and ended
16 just a few minutes later, February 8th, 2010 at 4:33 P.M.

17 Q And does it identify a particular machine?

18 A It does, a Quick Hits. That's the description.

19 Q And what was the denomination of that machine?

20 A That one was a 5 cent -- a nickle machine.

21 Q Did she earn any points on her red card?

22 A 12 points.

23 Q Did she earn any comps?

24 A \$1.11.

25 Q And in this particular session, does it identify