IN THE SUPREME COURT OF THE STATE OF NEVADA

WYNN LAS VEGAS, LLC, d/b/a WYNN LAS VEGAS, a Nevada Limited Liability Company, Appellant, vs. YVONNE O'CONNELL, an individual, Respondent.	Supreme Court Case No.: 70583 *Consolidated With Case No. 71787*

Appeal from Judgment on Jury Verdict entered December 15, 2015,
Order Denying Post-Trial Motions entered May 25, 2016,
and all orders made appealable thereby
District Court Case No. A-12-671221-C, Eighth Judicial District Court of Nevada

RESPONDENT YVONNE O'CONNELL'S RESPONSE TO PETITION FOR REVIEW

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NRAP 26.1 DISCLOSURE

The law firm representing Appellant Yvette O'Connell in the District Court, in the Court of Appeals, and in the Nevada Supreme Court is the NETTLES LAW FIRM.

Dated this 13th day of December, 2018.

NETTLES LAW FIRM

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Defendant Wynn Las Vegas, LLC, d/b/a Wynn Las Vegas ("Defendant")[1] argues that Plaintiff Yvonne O'Connell ("Plaintiff") seeks to "expand" this Court's holding in *Sprague*[2] to allow a finding of constructive notice based upon evidence that the hazard on which Plaintiff slipped had existed for an unreasonable length of time. *Petition*, 12. Because Plaintiff "presented no evidence at trial that the [substance] was a *frequent or continual condition* at Wynn[ ]" as *Sprague* describes, Defendant claims that it "should have been granted summary judgment in its favor as a matter of law." *Id*. at 11-13 (emphasis added).

Defendants argument is incorrect, of course, because *Sprague* simply introduced a *new* means of showing constructive notice *in addition to the standard that had existed for decades* before *Sprague*—the exact standard that both the District Court and the Court of Appeals majority invoked, and the exact standard Plaintiff argues here. *See* Appellant's Appendix, Vol. 17, Part 1, 3476-77 (the

[1] Pursuant to NRAP 28(d), to promote clarity, the parties are referred to herein by their respective designations in the District Court, *i.e.*, "Plaintiff" and "Defendant."

[2] *Sprague v. Lucky Stores, Inc*., 109 Nev. 247 (1993).

Sprague standard "is not the only way of proving constructive notice[ ]"; "Proof that a foreign substance on the floor had existed for such a length of time that the proprietor in the exercise of ordinary care should have known of it, is another way of proving constructive notice."); *see also Exhibit 1*, 5 ("Thus, [the Court of Appeals majority] conclude[s] there was sufficient evidence that the substance had been on the floor for a certain length of time, which would be a circumstance to consider in determining whether [Defendant] should have discovered it.").[3]

1. Plaintiff's Argument Is Not For An "Expan[sion]" Of *Sprague*; Rather, *Sprague* Itself Was An Expansion Of The Constructive Notice Standard Plaintiff Invokes, Which Pre-Existed *Sprague* By At Least 30 Years.

Defendant's argument gets Nevada law exactly backwards, arguing that Plaintiff seeks to "expand *Sprague*" to permit Plaintiff to establish constructive notice through evidence that the hazard existed for an unreasonable length of time prior to her fall. *Petition*, 12-13. Contrary to Defendant's assertions, *Sprague* itself *expanded* the definition of constructive notice that Plaintiff asserts here—a definition that had existed for at least 30 years before *Sprague* was decided in 1993.

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[3] Even Judge Tao, in dissenting from the Court of Appeals majority, acknowledged that constructive notice may be shown in this way, *i.e.*, that "[i]f a business created the hazard itself, or *if the hazard had been there long enough that a reasonable business should have known about it with enough time to do something about it*, that's on the business." *Exhibit 1*, 17 (Tao, J., dissenting) (emphasis added).

Far from providing the *only* path to constructive notice, as Defendant asserts, *Sprague* instead introduced an *additional* means for a plaintiff to establish constructive notice.

It is evident in *Sprague* that the "virtually continual hazard" standard defined in that case for establishing constructive notice *was unknown until Sprague was decided*. This Court stated that "[i]n connection with the summary judgment motion, deposition testimony was introduced before the district court that Lucky's produce section is a virtually continual hazard." *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 249 (1993). *Despite the introduction of this evidence of a "virtually continual hazard,"* the District Court "granted Lucky's summary judgment motion, finding that Sprague had shown neither that Lucky was responsible for the grape's presence on the floor *nor that Lucky had* actual or *constructive knowledge of the grape's presence on the floor*." *Id.* (emphases added).

This Court reversed, introducing and defining for the first time the "virtually continual hazard" standard for constructive notice. *Id.* at 251 ("A reasonable jury could have determined that the *virtually continual* debris on the produce department floor *put Lucky on constructive notice* that, at any time, a hazardous condition might exist which would result in an injury to Lucky customers.") (emphases added).

Thus, until *Sprague* was decided in 1993, the "virtually continual hazard" standard for constructive notice had not been recognized under Nevada law. *Id.* at 249, 251.

However, the concept of "constructive notice" has been part of Nevada's premises liability law since at least 1962, more than 30 years before 1993's *Sprague* decision.[4] Thus, for at least 30 years prior to 1993, a non-*Sprague* standard for establishing constructive notice existed, as many plaintiffs sued for—and prevailed upon—premises liability claims that (1) required a showing of "constructive notice"; but (2) could not yet be based upon the "virtually continual hazard" standard, which would not be announced until 1993.

That non-*Sprague* standard, of course, is the standard Plaintiff invokes here—and which both the District Court and the Court of Appeals readily recognized and applied—namely, that a Plaintiff may establish constructive notice through (1) evidence that the hazard existed on the floor for an unreasonable length of time prior

[4] In 1962, this Court decided *Wagon Wheel Saloon & Gambling Hall, Inc. v. Mavrogan*, 78 Nev. 126 (1962) and *Eldorado Club, Inc. v. Graff*, 78 Nev. 507 (1962) ("On the other hand, if the presence of the foreign substance was due to the acts of persons other than agents or employees of the defendant, liability may be found only on proof that the defendant had either actual or constructive notice thereof.") (citing *Wagon Wheel*, 78 Nev. at 126; 61 A.L.R.2d 6, 69).

to the fall; *and/or* (2) evidence that the defendant failed to act reasonably in inspecting and/or maintaining the premises prior to the fall.[5]

That standard is not an "expan[sion]" of *Sprague*, but rather is a *separate* and *alternative* (and vastly more common) means for establishing constructive notice where no "virtually continual hazard" exists. *Cf.* Appellant's Appendix, Vol. 17, Part 1, 3476-77 ("Proof that a foreign substance on the floor had existed for such a length of time that the proprietor in the exercise of ordinary care should have known of it, is another way of proving constructive notice.").

While neither this Court nor the Court of Appeals has expressly stated that precept prior to this case,[6] the United States District Court for the District of Nevada

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[5] The first method for establishing constructive notice, a showing that the hazard existed for an "unreasonable length of time," is a *subset* of the second method, the overall "reasonableness" of the premises owner's actions prior to the fall. *Exhibit 1* (Order Of Affirmance by Court of Appeals), 3.

Thus, a showing that the hazard existed for an unreasonable length of time prior to the fall is *one means* of showing that the premises owner failed to act reasonably—but there are additional means of making that showing, *e.g.*, showing that inspections were not conducted, or were conducted in an unreasonable manner or frequency *under the circumstances*. *Id.* at 6 (jury finding of constructive notice may be "based on the circumstances of the partially dried substance and [Defendant]'s *lack of evidence of its inspections*[.]") (emphasis added).

[6] The Court of Appeals in its Order Of Affirmance here expressly acknowledged this standard: "Thus, we conclude that *there was sufficient evidence that the substance had been on the floor for a certain length of time*, which would be a circumstance to consider in determining whether [Defendant] should have discovered it." *Exhibit 1*, 5 (emphasis added).

—sitting in diversity jurisdiction and therefore applying Nevada substantive law—has enunciated this precise standard repeatedly and consistently:

- "Alternatively, Plaintiff could prove constructive notice through *evidence that the foreign substance was on the floor for an unreasonable length of time* before the incident such that [the defendant] should have known about it." *Rios v. Wal-Mart Stores, Inc.*, 2016 WL 5661868, *2 (D. Nev. Sept. 29, 2016) (citing *Eldorado Club, Inc.*, 78 Nev. at 511 ("It would be grossly unfair to demand immediate awareness of new peril.");[7]

- "A plaintiff can show constructive notice by *demonstrating that the dangerous condition existed long enough* that it would have been discovered had the business exercised reasonable care." *Staples v. Wal-Mart Stores, Inc*., 2015 WL 476172, *3 (D. Nev. Feb. 4, 2015);

- "There is no evidence that [the defendant] knew that substances like this were frequently on its floors, or that the substance ordinarily creates a hazard, *or that it was present for any substantial period of time*. [ ] *[The] evidence weighs against a constructive notice showing, since it provides circumstantial evidence that the hazard did not exist long enough to put [the defendant] on constructive notice.*" *Morton v. Wal-Mart Stores, Inc.*, 2013 WL 557309, *4 (D. Nev. Feb. 12, 2013); and

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[7] As these federal cases show, this Court's holding in *Eldorado Club* that "[i]t would be grossly unfair to demand immediate awareness of new peril[ ]" of necessity entails a corollary—*i.e.*, that it is *not* unfair to demand awareness of a peril that is *not* new. *Eldorado Club, Inc*., 78 Nev. at 511; *cf. Rios*, 2016 WL at *2.

- "If the substance is on the floor through acts of third persons, *the time element to establish knowledge or notice to the proprietor is a material factor*. The *case law* strongly supports Defendant's argument that *one-to-four minutes is too short a time to attribute constructive knowledge of a slipping hazard to a retailer*. Four minutes (the longest time period supported by the evidence) is too short to support a finding of constructive knowledge for a small hazard such as a sausage." *Esprecion v. Costco Wholesale Corp.*, 2016 WL 4926424, *2-3 (D. Nev. Sept. 24, 2016).

The consistency with which courts derive this principle from Nevada Supreme Court precedent is not surprising, given that, as explained below, the duty of landowners as defined by this Court *logically requires* that a plaintiff be permitted to establish constructive notice by proffering evidence that the hazard existed for an "unreasonable" length of time prior to the fall.

2. Given A Landowner's Duty To Act "Reasonably," Nevada Supreme Court Precedent *Logically Requires* That A Plaintiff Be Permitted To Establish Constructive Notice By Proffering Evidence That The Hazard Existed For An "Unreasonable" Length Of Time Prior To The Fall.

Defendant notes that Plaintiff "claimed that [Defendant] could be held liable if the jury found the green mystery substance had been left on the floor for an unreasonable length of time[,]" which Defendant asserts is an incorrect statement of Nevada law because "this Court has yet to articulate such a standard." *Petition*, 12. However, courts have consistently acknowledged this method of showing constructive notice (despite no explicit articulation of that standard by this Court)

for one simple reason—that conclusion is *logically mandated* by this Court's precedents in premises liability cases.

It is hornbook law in Nevada that "a business owes its patrons a duty to keep the premises in a *reasonably* safe condition for use." *Sprague*, 109 Nev. at 250 (citing *Asmussen v. New Golden Hotel Co*., 80 Nev. 260, 262 (1964)) (emphasis added). This is the "duty of *reasonable* care." *Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 780-81 (2012) (emphasis added).

Thus, under Nevada law,

> [p]roprietors, like all other persons, have an obligation to act *reasonably* towards other persons. [. . .] [T]he overriding factor is whether the land owner or occupier has acted *reasonably* toward the plaintiff under the circumstances.

Billingsley v. Stockmen's Hotel, Inc., 111 Nev. 1033, 1037 (1995) (emphases added).

As these seminal cases demonstrate, the fundamental inquiry in a premises liability case is whether the landowner (and/or the plaintiff) acted "reasonably under the circumstances." *Foster*, 128 Nev. at 775.

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Because the "overriding factor" in premises liability analysis under Nevada law is now "reasonableness" rather than status or other factors,[8] negligence is almost always a jury question, as the reasonableness of particular conduct *under the circumstances* "should generally be submitted to the trier of fact." *Sims v. Gen. Tel. & Elecs.*, 107 Nev. 516, 522 (1991), *overruled on other grounds by Tucker v. Action Equip. & Scaffold Co.*, 113 Nev. 1349 (1997). The prerogative of the jury to make findings of fact regarding "reasonableness" is well-established, and the reasonableness *vel non* of particular conduct may be decided as a matter of law *only* where "no reasonable jury could reach a contrary conclusion." *Lee v. GNLV Corp.*,

[8] This Court provided a thorough and compelling history of the evolution of the landowner's duty to entrants in *Foster*, 128 Nev. at 774-75 ("In this opinion, we examine the evolution of a landowner's duty of care to entrants on the landowner's property and refine the current status of that duty.").

As the *Foster* decision clearly articulated, the essential inquiry in assigning negligence (and/or contributory negligence by a plaintiff) is the *reasonableness* of the parties' respective conduct. *Id.* (finding that questions of fact remained as to "whether [the defendant] *acted reasonably under the circumstances* by allowing a pallet to impede [the plaintiff]'s path through the aisle without warning, and whether [the plaintiff] failed to *exercise reasonable self-protection* in encountering the pallet."). *Id*. (emphases added).

Thus, Nevada law has abandoned the traditional categories of entrants onto land and varying duties of landowners based on such status, "in favor of upholding the general duty of reasonable care." *Id.* at 775.

117 Nev. 291, 297 (2001) (citing PROSSER AND KEETON ON THE LAW OF TORTS § 37, 237 (W. Page Keeton *et al*. eds., 5th ed. 1984)).

In light of the foregoing, it is ***logically necessary*** under Nevada law that evidence that a hazard existed on the floor for an ***unreasonable*** length of time prior to a plaintiff's fall is sufficient to establish the constructive notice required for a jury to find breach of the landowner's duty.[9] As the Court of Appeals noted in this case, "under Nevada caselaw constructive notice can be based on the circumstances of the case, which are appropriate to consider in light of whether a business owner exercised its duty of reasonable care to its patrons." *Exhibit 1*, 3 (citing *Foster*, 128 Nev. at 781-82). One of those circumstances, the Court of Appeals concludes, was "sufficient evidence that the substance had been on the floor for a certain length of time[.]" *Id.* at 5.

It is crucial to note the interplay between the landowner's duty and a jury finding of constructive notice based on evidence of the duration of the hazard. As stated above, Defendant "owe[d] [Plaintiff] a duty to keep the premises in a ***reasonably*** safe condition for use." *Sprague*, 109 Nev. at 250 (emphases added). Whether Defendant's efforts in this regard were "reasonable" is a question of fact for the jury. *Sims*, 107 Nev. at 522.

[9] Further, the Court of Appeals noted that "Nevada caselaw demonstrates that whether a business had constructive notice is an issue for the trier of fact." *Exhibit 1*, 3-4 (citing *Sprague*, 109 Nev. at 250).

Logically, a finding by the jury that the hazard on which Plaintiff fell existed for "an *unreasonable* length of time" prior to the fall *by definition* equates to a finding that Defendant breached its duty to act "reasonably" in "maintaining the premises." *Sprague*, 109 Nev. at 250. Many courts, including the Court of Appeals here, have stated this principle in terms of what the landlord "should have" discovered *in the exercise of reasonable care*. *Exhibit 1*, 5.

Thus, a jury finding that the pre-accident duration of the hazard was "unreasonable" is *incompatible* with a finding that Defendant acted "reasonably" in maintaining the premises. By definition, if Defendant acted "reasonably" in inspecting and maintaining the premises, as Nevada law requires, no such hazard could exist on its premises for an "unreasonable" length of time.[10]

Phrased aphoristically, a landlord acting "reasonably" in inspecting and maintaining the premises will by definition discover hazards in a "reasonable" time, and a hazard that exists for an "unreasonable" time therefore demonstrates that the landowner failed to act "reasonably" in maintaining the premises. *Cf. Sprague*, 109 Nev. at 250.

[10] As noted previously, this Court's holding in *Eldorado Club* that "[i]t would be grossly unfair to demand immediate awareness of new peril[ ]" of necessity entails a corollary—*i.e.*, that it is *not* unfair to demand awareness of a peril that is *not* new. *Eldorado Club, Inc.*, 78 Nev. at 511; *cf. Rios*, 2016 WL at *2 (citing *id.*).

Therefore, evidence sufficient to persuade a reasonable jury that the hazard existed on Defendant's premises for an "unreasonable" length of time is undeniably sufficient to show that Defendant breached its duty to exercise "reasonable" care. *Foster*, 128 Nev. at 780-81. Either Defendant, in the discharge of its duty, discovered and remedied the hazard in a "reasonable" time, or Defendant breached its duty of "reasonable" care.

Both the reasonableness (or unreasonableness) of the ***duration*** of the hazard and the reasonableness (or unreasonableness) of ***Defendant's actions*** generally present questions for the jury, which may be decided as a matter of law only where "no reasonable jury could reach a contrary conclusion." *GNLV Corp.*, 117 Nev. at 297. Therefore, where a plaintiff proffers evidence sufficient to persuade a reasonable jury that the hazard existed for an unreasonable length of time prior to her fall, genuine issues of material fact exist regarding both of these issues, and summary judgment cannot be granted. *Wood v. Safeway*, 121 Nev. 724, 728-31 (2005); *see also* Nev. R. Civ. P. 56(c) (summary judgment available only where "there is no genuine issue as to any material fact and [ ] the moving party is entitled to a judgment as a matter of law.").

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3. Plaintiff Proffered Sufficient Evidence To Persuade A Reasonable Jury That The Hazard Existed For An "Unreasonable" Length Of Time Prior To Her Fall.

Plaintiff proffered evidence sufficient to persuade a reasonable jury that the hazard existed for an unreasonable length of time, including testimony that the substance was partially dried, that it was sticky, and that it had gathered dirty footprints. *Exhibit 1*, 4. Defendant's own employee testified that the substance was sticky like honey or syrup. *Id*. at 5.

While Defendant (and Judge Tao of the Court of Appeals) argued that this testimony was insufficient because the jury, without knowing what the substance was, "could not determine how long it would take to dry." *Id.*; *see also id.* at 16 (Tao, J., dissenting). Judge Tao even posited that "if [the hazard] was made of something 'almost dry' right out of the jar (say, something with the consistency of putty or dough), then its dryness tells us nothing about how long it had been there." *Id.* at 16 (Tao, J., dissenting).

However, Judge Tao's hypothetical contradicts the evidence, in that Plaintiff testified that, of the seven-foot-long spill, three feet were "almost dry" but "at least a four-foot part of it was *still liquid*." *See* Appellant's Appendix, Vol. 8, 1684 (emphasis added). Moreover, Defendant's own Incident Report reflects the contemporaneous statement of Manager Yanet Elias, who informed the responding Security Officer that, upon arriving at the incident scene, she noticed a "liquid

substance" on the floor. *See* Respondent's Appendix, Vol. 1, 129. A reasonable jury could find that a substance that came "out of the jar" with the "consistency of putty or dough" would presumably not become "liquid" in "mere seconds," as Judge Tao speculates. *Exhibit 1*, 16 (Tao, J., dissenting).[11]

As the Court of Appeals majority concluded, a reasonable jury, receiving testimony that part of a seven-feet-long spill was "almost dry" while the portion Plaintiff slipped on was "still liquid" could reasonably conclude that the substance had been on the floor for some time. *Id.* at 5. Such a finding could be bolstered by Plaintiff's testimony that the spill had existed long enough to gather "dirty footprints." *See* Appellant's Appendix, Vol. 8, 1684-88. Defendant's inability to identify the last time the area had been inspected prior to Plaintiff's fall could further support such a finding. *Exhibit 1*, 5-6.

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[11] Judge Tao dissented based on his belief that Plaintiff "failed to present much of anything showing that [Defendant] had any actual or constructive notice of the existence of the substance that she slipped on." *Exhibit 1*, 16 (Tao, J., dissenting).

However, as the Court of Appeals majority noted, "[d]espite the dissent's statements to the contrary, the evidence presented at trial provided facts for the jury to consider and reasonable inferences to be drawn." *Id.* at 5. The majority noted that, based on the evidence, the jury could have concluded (but did not conclude) that the substance had been on the floor for only a very brief time. *Id.* The majority also noted that there was evidence to support the jury's decision. *Id.*

It was therefore a question for the jury whether Plaintiff's evidence is sufficient to support a finding that the hazard existed for an "unreasonable" length of time prior to Plaintiff's fall, and the denial of Defendant's summary judgment motion, the denial of its NRCP 50(a) motion at the close of Plaintiff's case-in-chief, and the affirmance of those decision by the Court of Appeals were proper.

B. CONTRARY TO DEFENDANT'S ASSERTION, PLAINTIFF WAS NOT REQUIRED TO APPORTION HER DAMAGES.

As both the District Court and the Court of Appeals held, Defendant's argument regarding apportionment of damages is simply incorrect as a matter of law. Citing to a federal case from the United States District Court for the District of Nevada purporting to apply Nevada substantive law (*Schwartz*),[12] Defendant argues that, because Plaintiff had asymptomatic preexisting conditions in some of the areas of her body that were injured in this fall, and also suffered a subsequent fall, Plaintiff bears the burden of presenting evidence to apportion her injuries between the preexisting conditions, the injuries caused by her fall on Defendant's premises, and

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[12] *Schwartz v. State Farm Mut. Auto .Ins. Co.*, 2009 WL 2197370 (D. Nev. July 22, 2009).

the injuries caused by her subsequent fall. *Petition*, 15-16.[13]

As the District Judge noted in denying Defendant's Renewed Motion For Judgment As A Matter Of Law, this "confusion" on the part of Defendant stems from its reliance on *Schwartz*, a Nevada federal case that cites to a Nevada Supreme Court case and a State of Washington Court of Appeals case—neither of which supports the conclusion announced in *Schwartz*.

As the District Judge wrote,

> In [*Schwartz*], [Federal] Judge [Kent] Dawson did indeed hold that "[i]n a case where a plaintiff has a preexisting condition, and later sustains an injury to that area, the Plaintiff bears the burden of apportioning the injuries, treatment and damages between the pre-existing condition and the subsequent accident." [ ] However, the cases cited as precedent by Judge Dawson for that [ ] statement do not support that assertion. *Kleitz v. Raskin*, 103 Nev. 325, 738 P.2d 508 (1987) involved apportioning damages between injuries caused by successive tortfeasors, not apportioning damages between pre-existing conditions and injuries caused by a sole tortfeasor.
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> Judge Dawson also cited the Washington Court of Appeals case of *Phennah v. Whalen*, 621 P.2d 1304 (Wash. App. 1980), but that also involved apportioning damages between successive tortfeasors. The

[13] Defendant repeatedly and inaccurately asserts that Plaintiff "suffered" from various preexisting conditions and also "suffered" from a subsequent fall. Petition, 14, 15, 17, 18. However, Plaintiff's testimony and that of her doctors established (without refuting evidence from Defendant) that, while Plaintiff <u>*had*</u> preexisting conditions and <u>*experienced*</u> a subsequent fall, nothing indicates that she "suffered" from any of this, as she was pain-free and asymptomatic for nearly 20 years before falling on Defendant's premises, sought no medical attention for the subsequent fall, and had gone swing-dancing wither boyfriend shortly before the subject fall. *See* Appellant's Appendix, Vol. 9, 1698; 1706-07; 1740; 1745; 1753-54; 1772-73. Plaintiff testified that the onset of her pain began with the subject fall. *Id.* at 1733-35.

> Restatement (Second) of Torts § 433(b), also relied upon, doesn't even concern successive tortfeasors on its face but rather concerns the "substantial factor" test for determining proximate cause. Here, we do not have successive tortfeasors. Rather, we have a Plaintiff who, admittedly, had various pre-existing mental and physical conditions. ***Therefore, the Schwartz case is in error and is inapplicable to this case.***

See Appellant's Appendix, Vol. 17, Part 1, 3481 (emphasis added) (internal citation omitted).

Thus, because this case involves preexisting conditions and a subsequent fall, but does *not* involve successive *tortfeasors*, the District Judge correctly found that *Schwartz* and *Kleitz* do not apply here, and that instead the "eggshell plaintiff" doctrine applies—under which Defendant "took [Plaintiff] as it found her." *Id.* at 3481-82 (citing *Murphy v. S. Pac. Co.*, 31 Nev. 120 (1909)).

Undeterred, Defendant raised precisely the same argument in the Court of Appeals, still citing to the inapplicable (and non-binding, in any event) federal *Schwartz* case. *Opening Brief*, 16-18. The Court of Appeals drew the same distinction between *Schwartz* (and *Kleitz*) and this case that the District Judge had recognized—that this case does not involve successive tortfeasors, but rather involves preexisting conditions and a subsequent fall. *Exhibit 1*, 8.

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Thus, the Court of Appeals properly distinguished *Schwartz* and *Kleitz* and instead followed the controlling precedent from this Court, *Fox v. Cusick*, 91 Nev. 218 (1975):

> In a negligence action, when a plaintiff has preexisting medical conditions and additional injuries occur after the event at issue, causation and damages are a question of weight and credibility left to the jury. [. . .] We conclude that there was sufficient evidence for the jury to consider whether [Plaintiff]'s injuries were the result of her preexisting conditions, her fall at [Defendant's premises], or her subsequent fall. Ultimately, it was for the jury to assess the weight and credibility of the testimony.

Exhibit 1, 8 (citing *Fox*, 91 Nev. at 221).

Continuing to be undaunted even after the inapplicability of its preferred caselaw has been pointed out by the two lower courts (the latter of which also pointed the way to the actual controlling caselaw from this Court), Defendant nonetheless presents the identical argument here. *Petition*, 16-18.

That argument is still incorrect. Because this case does not involve successive tortfeasors, Plaintiff had no burden to apportion her damages, but instead proffered evidence and testimony to support her claim that all of her damages were caused by the fall at issue in this case. *Exhibit 1*, 8. It was the function of the jury to weigh that evidence and assess the credibility of that testimony, and, as the Court of Appeals noted, Plaintiff proffered "sufficient evidence" to support the findings the jury made. *Id.*

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II. CONCLUSION

The Court of Appeals (and the District Judge) correctly held that Plaintiff proffered sufficient evidence to persuade a reasonable jury that the hazard upon which Plaintiff fell existed for an unreasonable length of time prior to that fall. Defendant's argument that Plaintiff did not prove a "recurring or continual condition" overlooks that this *Sprague* standard is only one way of establishing constructive notice under Nevada law.

The duty of a landowner, as defined by this Court, to act "reasonably under the circumstances" in maintaining its premises *by definition* means that a plaintiff may show constructive notice by proffering evidence that the hazard existed for an "unreasonable" length of time, as such "unreasonableness" is incompatible with "reasonableness" in the landowner's discharge of its duty.

In addition, because this case does not involve successive tortfeasors, Plaintiff had no burden to apportion her damages to her preexisting conditions, the subject fall, and her subsequent fall. Instead, the jury was entitled to weigh and assess the "sufficient evidence" in support of Plaintiff's attribution of her damages to her fall on Defendant's premises.

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Because both of Defendant's arguments are incorrect as a matter of law, Plaintiff respectfully requests that this Court deny Defendant's Petition For Review and permit the Order Of Affirmance by the Court of Appeals, the jury verdict in the District Court, and that Court's denials of Defendant's NRCP 50(a) and post-trial motions on these topics, to stand.

Dated this 13th day of December, 2018.

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II. CERTIFICATE OF COMPLIANCE PER NRAP 28.2 AND NRAP 40B

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word For Mac v. 15.34 (2017), in 14-point Times New Roman type.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40B(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it either:

[x] Is proportionately spaced, has a typeface of 14 points or more, and contains 4,621 words; or

[ ] Does not exceed 10 pages.

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

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

Dated this 13th day of December, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December, 2018, I served the foregoing, **RESPONDENT YVONNE O'CONNELL'S RESPONSE TO PETITION FOR REVIEW**, on counsel by this Court's electronic filing system, to the persons and at the addresses listed below:

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An employee of NETTLES LAW FIRM

Exhibit 1

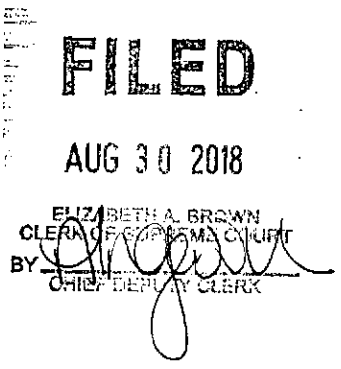
Exhibit 1

Exhibit 1

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WYNN LAS VEGAS, LLC, D/B/A WYNN LAS VEGAS,
Appellant,
vs.
YVONNE O'CONNELL, AN INDIVIDUAL,
Respondent.

No. 70583



ORDER OF AFFIRMANCE

Wynn Las Vegas, LLC, appeals from a final judgment in a tort action.[1] Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Yvonne O'Connell slipped and fell while walking through the front atrium in Wynn's resort.[2] She later sued Wynn for negligence claiming that Wynn had constructive notice of the substance she slipped on and did not clean it in a timely manner. As a result, O'Connell claimed Wynn was liable for her injuries. A jury trial was held and a verdict was returned in favor of O'Connell for $400,000 with $150,000 for past pain and suffering and $250,000 for future pain and suffering. The jury found Wynn was 60 percent at fault and O'Connell was 40 percent at fault so her award was reduced to $240,000.

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[1]This appeal was consolidated with the appeal in Docket No. 71789 prior to the briefing. We now deconsolidate these appeals for the purposes of disposition only. Accordingly, this order will only be filed within this appeal. The disposition for the appeal in Docket No. 71789 will be entered separately, within that appeal. Otherwise, the appeals remain consolidated for all other appellate purposes.

[2]We do not recount the facts except those necessary to our disposition.

18-901953

After the verdict, Wynn filed a renewed motion for judgment as a matter of law or, in the alternative, a request for a new trial. The district court denied Wynn's motion and Wynn appeals.

O'Connell provided sufficient evidence for the jury to find Wynn had constructive notice of the substance on its floor

Wynn contends that constructive notice is limited by Nevada law to whether a hazardous condition was a continual or recurring condition at a business. It further argues that regardless of the standard, O'Connell did not provide sufficient evidence to show Wynn had constructive notice. O'Connell argues that Wynn is attempting to too narrowly limit Nevada's standard for constructive notice. She further counters that she provided sufficient evidence to support her claim.

Standard of review

"This court reviews de novo a district court's denial of a motion for judgment as a matter of law." *Wyeth v. Rowatt*, 126 Nev. 446, 460, 244 P.3d 765, 775 (2010). "This court applies the same standard on review that is used by the district court." *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 424 (2007). Thus, this court "must view the evidence and all inferences in favor of the nonmoving party. To defeat the motion, the nonmoving party must have presented sufficient evidence such that the jury could grant relief to that party." *Id.* at 222-23, 163 P.3d at 424 (footnotes omitted).

Nevada's negligence caselaw supports finding constructive notice based on the circumstances

"The owner or occupant of property is not an insurer of the safety of a person on the premises, and in the absence of negligence, no liability lies." *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322 (1993). "An accident occurring on the premises does not of itself establish negligence." *Id.* "Yet, a business owes its patrons a duty to keep

the premises in a reasonably safe condition for use." *Id.* If the "foreign substance on the floor causes a patron to slip and fall, and the business owner or one of its agents caused the substance to be on the floor, liability will lie, as a foreign substance on the floor is usually not consistent with the standard of ordinary care." *Id.* "Where the foreign substance is the result of the actions of persons other than the business or its employees, liability will lie only if the business had actual or constructive notice of the condition and failed to remedy it." *Id.* at 250, 849 P.2d at 322-23. Whether there was constructive notice of a hazardous condition is "a question of fact properly left for the jury." *Id.* at 250-51, 849 P.2d at 323 (noting that a jury may find a defendant was on constructive notice of a hazardous condition based on "the virtually continual debris on the produce department floor").

Ultimately, a business owner owes a duty of reasonable care to its patrons. *See Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 780-81, 291 P.3d 150, 155-56 (2012). "[T]he overriding factor is whether the land owner or occupier has acted reasonably toward the plaintiff under the circumstances." *Billingsley v. Stockmen's Hotel, Inc.*, 111 Nev. 1033, 1037, 901 P.2d 141, 144 (1995). A land owner may be liable for open and obvious dangerous conditions on the land. *Foster*, 128 Nev. at 781, 291 P.3d at 156. Additionally, a business owner has a duty to inspect for latent defects. *Twardowski v. Westward Ho Motels, Inc.*, 86 Nev. 784, 788, 476 P.2d 946, 948 (1970).

Based on the foregoing, we conclude that under Nevada caselaw constructive notice can be based on the circumstances of the case, which are appropriate to consider in light of whether a business owner exercised its duty of reasonable care to its patrons. *See Foster*, 128 Nev. at 781-82, 291 P.3d at 156-57. Moreover, Nevada caselaw demonstrates that whether a

business had constructive notice is an issue for the trier of fact. *See Sprague*, 109 Nev. at 250, 849 P.2d at 323.[3] Thus, we conclude that the district court did not err by allowing the jury to consider whether Wynn had constructive notice based on the circumstances of this case.[4]

The evidence in this case was sufficient to support the jury's verdict for O'Connell

O'Connell testified that she was walking in Wynn's atrium when she slipped and fell on a liquid substance. During trial, she presented evidence about the character of the substance on the floor. O'Connell testified that it was about seven feet long and about a three foot area of the substance was dried, sticky, and showed dirty footprints.[5] Yanet Elias, an assistant manager for Wynn who responded to O'Connell's fall, also testified

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[3]Our dissenting colleague, like Wynn, cites to a string of out-of-state authorities to argue against the conclusion that Wynn had constructive notice. As Nevada law provides for constructive notice, and ultimately leaves the decision to the jury, we need not consider the approach of other jurisdictions.

[4]The jury instruction regarding constructive notice was objected to by Wynn below, but Wynn specifically notes on appeal that it is not challenging the instruction. Thus, we need not analyze the instruction here. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (concluding that the court does not have to consider claims not cogently argued). Nevertheless, we note that upon review of the record, the instruction appears to be in accord with Nevada caselaw. *See generally Nevada Jury Instructions – Civil* § 8PML.8 (2011).

[5]As we noted earlier, O'Connell was walking through the Wynn's front atrium. The photographic evidence in the record shows that the area where she slipped was surrounded by shops. While the dissent mentions the large size of the resort, the area at issue appears to be in a high traffic spot that requires close attention.

that she saw part of the substance and described it as sticky like honey or syrup.

Wynn pointed out that if the jury did not know what the substance was, it could not determine how long it would take to dry. It is possible that the substance was originally sticky like honey or syrup, and may not have been drying on the floor long enough to put Wynn on constructive notice. On the other hand, the jury can consider the circumstances such as what the substance looked like, its size, and any other indications of its character. *See Billingsley*, 111 Nev. at 1037, 901 P.2d at 144 (stating that when deciding if a landowner "has acted reasonably, a court may consider circumstantial factors"). Also, a pooled or sticky substance seven feet long could be perceived as an open and obvious condition that a business owner has a duty to discover. *See Foster*, 128 Nev. at 782, 291 P.3d at 156.[6]

Thus, we conclude there was sufficient evidence that the substance had been on the floor for a certain length of time, which would be a circumstance to consider in determining whether Wynn should have discovered it.

There was also testimony about whether Wynn conducted a reasonable inspection. Elias testified that she did not know the last time the area was checked. She also testified that she did not know how long it

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[6]Despite the dissent's statements to the contrary, the evidence presented at trial provided facts for the jury to consider and reasonable inferences to be drawn. The assertion that the substance could have been on the floor for only a very brief period of time is but one determination the fact finder could have reached but did not. Moreover, Wynn provided no evidence the spill was on the floor for a brief period of time despite its vast resources. As there are facts to support the jury's decision, the verdict was not based on speculation.

would take a porter to check the atrium, which was part of a larger area that porters were required to inspect. She added that it would depend on whether one or two porters were working that day. Reviewing the evidence in favor of the nonmoving party, O'Connell, we conclude that because Wynn could not say when it last inspected the area nor how often the atrium was checked, there was sufficient evidence for a jury to find Wynn did not conduct a reasonable inspection.

Accordingly, we conclude that based on the circumstances of the partially dried substance and Wynn's lack of evidence of its inspections, there was sufficient evidence for the jury to find Wynn had constructive notice of the substance on its floor.

The district court properly allowed the jury to consider the testimony of O'Connell's treating physicians in assessing damages and causation

In its motion for judgment as a matter of law, Wynn did not raise its issues with O'Connell's treating physicians testifying about causation and damages. Accordingly, we will not review it as part of Wynn's renewed motion for judgment as a matter of law. *See Lehtola v. Brown Nev. Corp.*, 82 Nev. 132, 136, 412 P.2d 972, 975 (1966) (concluding that without a motion for directed verdict, the district court could not consider a post-verdict motion on the matter). Instead, we will consider it as part of Wynn's alternative motion for a new trial. *See* NRCP 59(a)(7) (authorizing a new trial on grounds of "[e]rror in law occurring at the trial and objected to by the party making the motion").

Standard of review

We review "the district court's grant or denial of a motion for a new trial under an abuse of discretion standard." *Krause Inc. v. Little*, 117 Nev. 929, 933, 34 P.3d 566, 569 (2001). We will not overturn the district court's judgment "absent a palpable abuse of discretion." *Id.* "[T]he district

court may grant a new trial if the prevailing party committed misconduct that affected the aggrieved party's substantial rights." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 74, 319 P.3d 606, 611 (2014); *see also* NRCP 59(a)(2). "Additionally, . . . when deciding a motion for a new trial, the district court must make specific findings, both on the record during oral proceedings and in its order, with regard to its application of the standards described [in *Lioce*] to the facts of the case[ ] before it." *Lioce v. Cohen*, 124 Nev. 1, 19-20, 174 P.3d 970, 982 (2008).[7]

The district court did not abuse its discretion by admitting testimony from O'Connell's treating physicians for causation and damages

The evidence apportioned O'Connell's preexisting and subsequent injuries

Wynn argues that O'Connell is not entitled to any damages—past or future pain and suffering—because she did not apportion between her preexisting medical conditions, the injuries from her February 2010 fall at Wynn, and any injuries from a subsequent fall in July 2010.

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[7]Wynn raised its issues with the testimony of O'Connell's treating physicians in its combined renewed motion for judgment as a matter of law and its alternative motion for a new trial. The district court addressed the issues under both motions. As stated above, our review of the record concludes that Wynn did not raise its issues with the testimony of O'Connell's treating physicians in its motion for judgment as a matter of law below, thus we will not consider it under de novo review as part of Wynn's renewed motion for judgment as a matter of law. *See Lehtola*, 82 Nev. at 136, 412 P.2d at 975. Because the order appealed from does not make the distinction, we clarify the record here. Even if a de novo standard of review applied, we conclude that there was sufficient evidence for the jury to distinguish between O'Connell's preexisting conditions, her injuries from her fall at Wynn, and any injuries from the subsequent fall. Additionally, any issues about the basis for the treating physicians' opinions were issues of weight and credibility for the jury's determination. *See Fox v. Cusick*, 91 Nev. 218, 221, 533 P.2d 466, 468 (1975).

In a negligence action, when a plaintiff has preexisting medical conditions and additional injuries occur after the event at issue, causation and damages are a question of weight and credibility left to the jury. *See Fox*, 91 Nev. at 221, 533 P.2d at 468 (concluding that "[i]t was for the jury to weigh the evidence and assess the credibility" when the plaintiff had a prior back injury that caused recurring problems, doctor's testimony stated that the accident aggravated that injury, and there was evidence showing that plaintiff strained his back after the accident at issue and before filing a lawsuit).

Here, on the one hand, Dr. Craig Tingey and Dr. Thomas Dunn both testified that O'Connell had preexisting medical conditions, but that they believed O'Connell's fall at Wynn caused the injuries they examined. On the other hand, on cross-examination, Dr. Dunn testified that there was no evidence of "an acute injury" after O'Connell's fall at Wynn and both doctors testified that they did not know that O'Connell fell again after her fall at Wynn. In contrast, O'Connell testified that the subsequent fall was not "a complete fall" and she did not seek medical attention for it. We conclude that there was sufficient evidence for the jury to consider whether O'Connell's injuries were the result of her preexisting conditions, her fall at the Wynn, or her subsequent fall. Ultimately, it was for the jury to assess the weight and credibility of the testimony.

O'Connell's treating physicians testified according to Nevada's legal standard for medical causation

Wynn also argues that Dr. Tingey's and Dr. Dunn's testimony were unreliable because they based their opinions on O'Connell's statements about when her pain started. Medical expert testimony about "causation must be stated to a reasonable degree of medical probability."

Morsicato v. Sav-On Drug Stores, Inc., 121 Nev. 153, 158, 111 P.3d 1112, 1116 (2005).

Dr. Tingey testified that he relied on MRIs and x-rays to conclude that the tear in O'Connell's right knee was caused by "trauma." He also stated that his opinion that her fall at Wynn caused the tear was to a reasonable degree of medical probability. Dr. Dunn testified that he usually relies about 80 percent on patient history and conducts a physical examination. He also relied on an MRI in his diagnoses of O'Connell. While it is unclear from the record on appeal if Dr. Dunn conducted a physical examination of O'Connell and Dr. Dunn admitted that the MRI showed O'Connell's existing degenerative spine, Dr. Dunn also testified that the fall caused micro tears to O'Connell's degenerative spine. Further, Dr. Dunn testified that his opinion that O'Connell needed cervical surgery because of her fall at Wynn was to a reasonable degree of medical probability.

Accordingly, as both doctors relied on objective bases for their opinions and both satisfied Nevada's standard for medical expert testimony on causation, the district court did not abuse its discretion by allowing the jury to consider that evidence.

O'Connell's treating physicians' testimony showed her future damages were a probable consequence of her injuries

Wynn argues that, at a minimum, there was no evidence to support an award for O'Connell's future pain and suffering and her damages should be reduced accordingly.

"[W]hen an injury or disability is subjective and not demonstrable to others (such as headaches), expert medical testimony is necessary before a jury may award future damages." *Krause*, 117 Nev. at 938, 34 P.3d at 572. "[I]n such cases the claim must be substantially supported by expert testimony to the effect that future pain and suffering

is a probable consequence rather than a mere possibility." *Lerner Shops of Nev., Inc. v. Marin*, 83 Nev. 75, 79-80, 423 P.2d 398, 401 (1967).

Dr. Tingey testified that O'Connell needed surgery to repair the tear to her right knee that was caused by the fall. He stated that surgery was the only fix for the tear. Dr. Dunn also testified that O'Connell needed surgery due to the fall, which he said would improve her condition by 50 to 60 percent. He testified that he did not expect 100 percent recovery because the surgery would alter O'Connell's biomechanics, which would negatively impact other areas of her body. Further, the procedure could result in scar tissue that would be a continual source of pain. He testified that if there are complications, additional surgeries may be required. As of trial, O'Connell had not elected to undergo either surgery. Based on the foregoing, there was substantial evidence to show that O'Connell's future damages were a probable consequence of her injury because O'Connell needed surgeries as a result of her fall at Wynn and even then, she likely would not experience complete relief. Thus, we conclude that the testimony supported a jury awarding O'Connell's future damages.

The district court did not abuse its discretion by admitting the testimony of O'Connell's treating physicians despite late discovery disclosures

Wynn contends that O'Connell's treating physicians should have been barred from testifying because Dr. Tingey was disclosed two months after discovery closed and Dr. Dunn's credentials were disclosed four months after discovery closed. Under NRCP 37, a party who fails to make a Rule 16.1 disclosure or amend an earlier response that is "without substantial justification" cannot use that evidence at trial "unless such failure is harmless." NRCP 37(c)(1).

While Dr. Tingey was disclosed two months after discovery, we conclude there was substantial justification because circumstances beyond O'Connell's control[8] forced her to rely on Dr. Tingey for her medical treatment and lawsuit rather than her previous doctor, Dr. Martin, who was treating her for her knee. *See generally GNLV Corp. v. Serv. Control Corp.*, 111 Nev. 866, 869, 871, 900 P.2d 323, 324-25, 326 (1995) (finding that because there was no evidence of intent or fault of appellants when a physical item of evidence was lost, the district court erred in sanctioning appellants under NRCP 37(b)).

The trial court allowed Wynn to voir dire Dr. Tingey and Dr. Dunn during trial outside the presence of the jury. The court also allowed Wynn's rebuttal expert to listen to both doctors' testimony and incorporate them into his own direct examination. Dr. Tingey's late disclosure included about 15 additional pages of medical records; however, Wynn had all other medical records before discovery closed.

On appeal, Wynn does not argue what additional evidence it would have submitted. *See Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. ___, ___, 396 P.3d 783, 788 (2017) (concluding, in part, that because appellant did not provide proof or explain what other testimony her expert would have provided if a late discovery disclosure was made earlier, "appellant's substantial rights were not materially affected"). Thus, we conclude that based on the circumstances, the late disclosures did "not materially affect[ ]" Wynn's rights. *See id.* Moreover, because of the small amount of additional records disclosed after discovery closed and, because

[8]Dr. Andrew Martin, O'Connell's original treating physician, had to leave his medical practice because of an unrelated legal matter and was not readily available.

Wynn's counsel was allowed to voir dire both doctors before they testified in front of the jury and its expert could listen to the testimony and incorporate them into his own, the late disclosures did not result in unfair surprise to Wynn. *See Washoe Cty. Bd. of Sch. Trs. v. Pirhala*, 84 Nev. 1, 5, 435 P.2d 756, 758 (1968) (quoting *Jeppesen v. Swanson*, 68 N.W.2d 649, 656-57 (Minn. 1955) (stating that the purpose of discovery is to eliminate surprise at trial)).

Accordingly, despite the late discovery disclosures, we conclude the district court did not abuse its discretion by allowing both doctors to testify and not excluding their testimony.

Wynn's additional grounds for a new trial also fail

Wynn argues that O'Connell improperly claimed on two separate occasions at trial that Wynn was controlling the evidence by withholding video surveillance. A review of the record shows that Wynn did not object to these statements during trial. "A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Accordingly, we conclude we need not review this argument. Nevertheless, even if we engaged in a plain error review, we find that there is a plausible explanation for the jury's verdict based on the evidence, so we cannot conclude that Wynn's rights were substantially impaired. *See Gunderson*, 130 Nev. at 75, 319 P.3d at 612 (noting that plain error exists only if there is no reasonable explanation for the jury's verdict and to establish plain error, a party must show its rights were substantially impaired by the error).

Wynn also argued it was entitled to a new trial because O'Connell improperly stated during closing arguments that the jury was "the voice of the conscience of this community." While the statement was

improper in the context of this case, Wynn objected to it, and the district court admonished O'Connell and instructed the jury to disregard the statement. Thus, the district court satisfied the requirements to address attorney misconduct set out by the Nevada Supreme Court. *See id.* at 75, 319 P.3d at 611-12 (directing district courts to sustain an objection, admonish the offending counsel, and instruct the jury to disregard attorney misconduct). As a result, Wynn has the burden to show "that the misconduct is so extreme that the objection and admonishment could not remove the misconduct's effect." *Lioce*, 124 Nev. at 17, 174 P.3d at 981. Wynn summarily concluded below that it was prejudiced and barely raises the argument on appeal. Moreover, it provides no supporting facts or caselaw. *See generally Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Thus, we conclude Wynn has not carried its burden.[9] Accordingly, we

AFFIRM the judgment of the district court.

_____, C.J.
Silver

_____, J.
Gibbons

TAO, J., dissenting:

There's an issue in this case that the Nevada Supreme Court hasn't yet directly addressed, and it's this: We generally defer to jury

[9]All other points raised on appeal are unpersuasive.

verdicts, even when the jury makes a make a mountain out of a molehill. But do we defer to juries when their verdict makes a mountain out of nothing at all?

At trial, O'Connell established that she fell on some kind of unidentified substance on the floor of the Wynn. She didn't prove that the Wynn was actually responsible for putting the substance there. Consequently, in order for the Wynn to be liable for her fall, she must have proved that the substance had been there long enough for the Wynn to have known about it and been able to do something about it. *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322-23 (1993) ("Where a foreign substance is the result of the actions of persons other than the business or its employees, liability will lie only if the business had actual or constructive notice of the condition and failed to remedy it."). But she never did. As far as we can tell from O'Connell's evidence, the substance might have ended up there either many hours before her fall, or only seconds. Her evidence supplies no reason to prefer one alternative over the other. If there's no "reason" to choose one over the other, then by definition making either choice isn't "reasonable," and O'Connell failed to meet her burden of proving everything she needed to prove by a preponderance of the evidence. I would reverse and respectfully dissent.

I.

When a plaintiff is confronted with a pre-trial motion for summary judgment under NRCP 56 contending that there are no triable issues of fact warranting a jury trial, such a motion cannot be defeated by relying upon "the gossamer threads of whimsy, speculation and conjecture" or "general allegations or conclusions." *Wood v. Safeway, Inc.*, 121 Nev. 724,

731, 121 P.3d 1026, 1030 (2005). That means that conjecture and speculation aren't enough to justify going to trial at all; the plaintiff has to have some affirmative evidence to present to the jury to even bother empaneling a jury in the first place. I would say it necessarily follows that if a trial is held, then the jury's verdict cannot legitimately be based upon nothing more than the kind of conjecture or speculation that wouldn't have warranted a trial in the first place. Its decision must be reasonably based on evidence or else it cannot be affirmed.

II.

Here are the facts that O'Connell presented at trial. She slipped and injured herself on a green and "slightly sticky" substance of unknown composition on the floor of the Wynn's atrium. The substance covered an area about seven feet long and three feet wide in a casino whose main floor spans several hundred thousand square feet. Part of the unknown substance was "almost dry" and had some footprints in it, and one witness testified that the substance looked "something like syrup" but was otherwise unidentified.

Here's what O'Connell failed to prove. She didn't present any evidence of what the substance was; how it got there; who dropped it there; how long it had been there before she stepped in it; how much time had elapsed since any Wynn employee had inspected the area; how frequently the Wynn inspected the area; or whether the substance fell on the floor before or after the last inspection of the area. Indeed, all of the witnesses who testified for both parties specifically admitted that they did not know these things.

The gap here is that O'Connell failed to present much of anything showing that the Wynn had any actual or constructive notice of the existence of the substance that she slipped on. Yet O'Connell asks us to conclude that, whatever the substance was and however it got there, a jury could decide that it had been there long enough for the Wynn to become legally liable for her injuries. But that strikes me as nothing more than a guess based upon the utter absence of proof when the reality is that O'Connell bore the affirmative burden to present evidence proving every fact material to her case, or else lose.

O'Connell argues that because the substance was described as "almost dry," the jury could infer that it had been there long enough for the Wynn to have had legal notice of its existence. But of course that depends entirely on what the substance was. If it really was something like pancake syrup (despite being green), then its partial dryness might suggest that it had been there a while. But if it was made of something "almost dry" right out of the jar (say, something with the consistency of putty or dough), then its dryness tells us nothing about how long it had been there. Similarly, O'Connell argues that because she saw footprints in the substance, it must have been there quite a long time. But that's not only speculation, it's speculation layered upon speculation, because knowing nothing about how long the substance had been there means we know even less about when those footprints might have been left in it: maybe hours, maybe minutes, or maybe mere seconds.

So we know that the substance was there, and that O'Connell slipped on it. We know almost nothing else. I would conclude that isn't enough to support the jury's verdict as a matter of law.

III.

Nevada has long held that businesses are not the insurers of the safety of all who enter; a business is only liable for injuries arising from hazards that it knew about and could have done something about it before they injured someone. *See Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322-23 (1993). Thus, Nevada follows the traditional premises liability approach "where a foreign substance causing a slip and fall results from 'the actions of persons other than the business or its employees, liability will lie only if the business had actual or constructive notice of the condition and failed to remedy it.'" *FGA, Inc. v. Giglio*, 128 Nev. 271, 280, 278 P.3d 490, 496 (2012) (quoting *Sprague*, 109 Nev. at 250, 849 P.2d at 322-23). If a business created the hazard itself, or if the hazard had been there long enough that a reasonable business should have known about it with enough time to do something about it, that's on the business. But if a third party such as a customer drops something on the floor and another customer falls on it mere milliseconds later, that's not the fault of the business because even the best-managed business in the nation couldn't reasonably have done anything to prevent the injury. No human being could have. Maybe a superhero could have sprung into action and swept up the mess the instant it happened, but the law is supposed to reflect our reality and not the fictional world of the Avengers (Marvel 2015).

Alternatively, when a business maintains a self-service operation in which the danger of slippery substances falling to the floor is a repeated and inherent part of the operation (as with a casino buffet), the "mode of operation" approach, also referred to as the "recurrent risk" approach, allows courts to infer legal notice from the nature of the business itself. *See FGA*, 128 Nev. at 281, 278 P.3d at 496; *see Fisher v. Big Y Foods,*

Inc., 3 A.3d 919, 928 n. 21 (2010) (stating that 22 jurisdictions have adopted some variation of the mode of operation rule, and that the majority of the jurisdictions adopting it have applied it narrowly). In such types of businesses, "even in the absence of constructive notice, 'a jury could conclude that [the business] should have recognized the impossibility of keeping the [self-service] section clean by sweeping' alone and sufficient evidence was presented 'to justify a reasonable jury in concluding that [the business] was negligent in not taking further precautions, besides sweeping, to diminish the chronic hazard posed by the [self-service] department floor.'" *FGA*, 128 Nev. at 282, 278 P.3d at 497 (quoting *Sprague*, 109 Nev. at 251, 849 P.2d at 323). Essentially, to determine whether owners are liable to injured patrons under the recurrent risk and mode of operation approaches is "whether there was a 'recurrent' or 'continuous' risk on the premises associated with a chosen mode of operation." *Id.* at 281 n.5, 278 P.3d at 497 n.5. *See generally Sheehan v. Roche Bros. Supermarkets*, 863 N.E.2d 1276, 1280-85, 1280 n.3 (Mass. 2007).

But the mode of operation approach doesn't apply to every business. It doesn't apply, for example, to sit-down restaurants where the plaintiff "failed to show that the handling of food in a particular area by employees of [the restaurant] gave rise to a foreseeable risk of a regularly occurring hazardous condition for its customers similar to the condition that caused the injury." *FGA*, 128 Nev. at 282, 278 P.3d at 497 (finding "no reason to extend mode of operation liability to such establishments absent such a showing as their owners have not created the increased risk of a potentially hazardous condition by having their customers perform tasks that are traditionally carried out by employees.").

Here, the fall occurred in the Wynn's atrium, which serves no food, is nothing like a self-service restaurant, and is located nowhere near one (the Wynn buffet being located several hundred feet away from the atrium). So the mode of operation approach doesn't apply. *Cf. Ford v. S. Hills Med. Ctr., LLC*, 127 Nev. 1134, 373 P.3d 914 (2011) (unpublished disposition) (holding that appellant "has not presented any evidence that spills of liquid on the floor of respondent's emergency department were a virtually continuous condition that created an ongoing, continuous hazard, thus providing constructive notice of the condition to respondent"). Even if it somehow could apply, O'Connell presented no proof that the substance (whatever it was) recurrently ends up on the atrium floor as a natural consequence of the Wynn's business.

O'Connell was thus required to produce affirmative evidence that the Wynn had actual or constructive notice of the hazardous substance. She didn't. *See Twardowski v. Westward Ho Motels, Inc.*, 86 Nev. 784, 788, 476 P.2d 946, 948 (1970) (notice could be inferred based upon evidence that "if the motel had made a reasonable inspection of the slide they would have discovered the latent defect which caused [the plaintiff's] injuries."); *Chasson-Forrest v. Cox Commc'ns Las Vegas, Inc.*, No. 70264, 2017 WL 1328370, at *1 (Nev. App. Mar. 31, 2017) ("A defendant may have constructive notice of a hazardous condition if a reasonable jury could determine that based on the circumstances of the hazard the defendant should have known the condition existed.").

This isn't some revolutionary idea. Most courts require some affirmative evidence proving how long a foreign substance was on the floor before notice can be legally inferred, and mere proof of the existence of a foreign substance does not itself create such notice. *See, e.g., Reid v. Kohl's*

Dep't Stores, Inc., 545 F.3d 479, 482 (7th Cir. 2008) ("Absent any evidence demonstrating the length of time that the substance was on the floor, a plaintiff cannot establish constructive notice."); *Clemente v. Carnicon-Puerto Rico Mgmt. Assocs., L.C.*, 52 F.3d 383, 389 (1st Cir. 1995), *abrogated on other grounds by United States v. Gray*, 199 F.3d 547 (1st Cir. 1999) (holding that although appellant offered some evidence of the existence of a foreign substance on the staircase, "it does not in any way demonstrate how long the substance may have been there" and thus a reasonable jury could not have found the hotel had constructive notice); *Kelly v. Stop & Shop, Inc.*, 918 A.2d 249, 256 (Conn. 2007) ("What constitutes a reasonable length of time is largely a question of fact to be determined in the light of the particular circumstances of a case. The nature of the business and the location of the foreign substance would be factors in this determination . . . ." (citation omitted)); *Wal-Mart Stores, Inc. v. Spates*, 186 S.W.3d 566, 567 (Tex. 2006) (noting that constructive notice requires proof that an owner had a reasonable opportunity to discover the defect, which requires "analyzing the combination of proximity, conspicuity, and longevity"); *Ortega v. Kmart Corp.*, 36 P.3d 11, 15-16 (Cal. 2001) ("The plaintiff need not show actual knowledge where evidence suggests that the dangerous condition was present for a sufficient period of time to charge the owner with constructive knowledge of its existence."); *House v. Wal-Mart Stores, Inc.*, 872 S.W.2d 52, 53 (Ark. 1994) (holding that appellant failed to show the substance was on the floor for such a period of time that the store should have reasonably none of its presence, as no one knew when the spill occurred and at most, the evidence presented reflects that it was on the floor for five to six minutes); *Tidd v. Walmart Stores, Inc.*, 757 F. Supp. 1322, 1323-24 (N.D. Ala. 1991) (holding there was no evidence of constructive

notice where the record is silent on the length of time the spill had been on the floor and that the plaintiff's argument that the size of the spill is sufficient to raise a question of fact regarding the length of time the spill had been present lacks merit); *Great Atl. & Pac. Tea Co. v. Berry*, 128 S.E.2d 311, 314 (Va. 1962) ("There are many cases from other jurisdictions holding that the condition of the foreign substance is not sufficient to show that it had been on the floor long enough for the personnel of the store in the exercise of reasonable care to have discovered it." (citing cases)). *See generally* 107 Am. Jur. Proof of Facts 3d 407 (Originally published in 2009); § 49:1.Spill notice requirement, 3 Premises Liability 3d § 49:1 (2017 ed.); § 36:6.Notice requirement, 2 Premises Liability 3d § 36:6 (2017 ed.).

IV.

For all we know and don't know about the substance in this case, it might have fallen on the floor only an instant before O'Connell stepped on it. She nonetheless argues that we must give deference to the possibility that a jury could have concluded that it might have been there much longer than that. But she presented no evidence at all providing the jury with any foundation to reach that conclusion, so she's doing nothing more than inviting the jury to take a guess. That wouldn't be enough to even get to trial under NRCP 56, and it shouldn't be enough here.

If the Wynn can be found liable for what happened here based upon a record this flimsy, then *Sprague* is no longer good law. If the sheer existence of the hazard alone, with nothing more having been established, is enough to permit a jury to infer everything else required to establish liability, then every Nevada business is indeed now the insurer for every hazard on the premises, knowable or unknowable, whether there was

enough notice or enough time for the business to do something about it or not. I cannot join this conclusion and respectfully dissent.

Tao, J.

Tao

cc: Hon. Carolyn Ellsworth, District Judge
Ara H. Shirinian, Settlement Judge
Nettles Law Firm
Semenza Kircher Rickard
Eighth District Court Clerk