


CLERK OF THE COURT

Electronically Filed
Jun 16 2016 11:20 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

1 **NOAS**
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14 Attorneys for Defendant Wynn Las Vegas, LLC
15 d/b/a Wynn Las Vegas

16 **DISTRICT COURT**
17 **CLARK COUNTY, NEVADA**

18 YVONNE O'CONNELL, individually,

19 Plaintiff,

20 v.

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

25 Defendants.

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

NOTICE OF APPEAL

26 Notice is hereby given that Defendant Wynn Las Vegas, LLC d/b/a Wynn Las Vegas
27 ("Defendant") hereby appeals to the Supreme Court of Nevada from the Judgment on Jury
28 Verdict entered in this action on the 15th day of December, 2015, and the Order Denying
Defendant's Renewed Motion for Judgment as a Matter of Law or, Alternatively, for a New Trial

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1 or Remittitur entered in this action on the 24th day of May, 2016, as well as any orders,
2 judgments and rulings made appealable by the foregoing, including but not limited to any award
3 of costs and/or interest to the Plaintiff in this case.

4 DATED this 8th day of June, 2016.

5 LAWRENCE J. SEMENZA, III, P.C.

6
7 /s/ Christopher D. Kircher

8 Lawrence J. Semenza, III, Esq., Bar No. 7174
9 Christopher D. Kircher, Esq., Bar No. 11176
10 Jarrod L. Rickard, Esq., Bar No. 10203
11 10161 Park Run Drive, Suite 150
12 Las Vegas, Nevada 89145

13 Attorneys for Defendant Wynn Las Vegas, LLC
14 d/b/a Wynn Las Vegas
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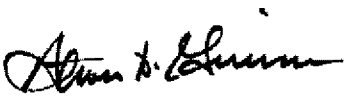
CERTIFICATE OF MAILING

Pursuant to Nev. R. Civ. P. 5(b) and NEFCR 9, I hereby certify that I am an employee with Lawrence J. Semenza, III, P.C., and that on the 8th day of June, 2016, I caused to be sent via Wiznet's online filing system, a true copy of the foregoing **NOTICE OF APPEAL** to the following registered e-mail addresses:

NETTLES LAW FIRM
Christian M. Morris, Esq., christianmorris@nettleslawfirm.com
Edward Wynder, Esq., Edward@nettleslawfirm.com
Jenn Alexy, jenn@nettleslawfirm.com

Attorneys for Plaintiff

/s/ Olivia A. Kelly
Employee of Lawrence J. Semenza, III, P.C.


CLERK OF THE COURT

1 **ASTA**
2 LAWRENCE J. SEMENZA, III, ESQ., Bar No. 7174
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14 Attorneys for Defendant Wynn Las Vegas, LLC
15 d/b/a Wynn Las Vegas

16 **DISTRICT COURT**
17 **CLARK COUNTY, NEVADA**

18 YVONNE O'CONNELL, individually,

19 Plaintiff,

20 v.

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

25 Defendants.

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

CASE APPEAL STATEMENT

26 1. Name of appellant filing this case appeal statement: **Wynn Las Vegas, LLC d/b/a**
27 **Wynn Las Vegas ("Defendant").**

28 2. Identify the judge issuing the decision, judgment, or order appealed from: **The**
Honorable Judge Carolyn Ellsworth of the Eighth Judicial District Court of Nevada.

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

3. Identify each appellant and the name and address of counsel for each appellant:

Wynn Las Vegas, LLC d/b/a Wynn Las Vegas
c/o LAWRENCE J. SEMENZA, III, P.C.
Lawrence J. Semenza, III, Esq., Bar No. 7174
E-mail: ljs@semenzalaw.com
Christopher D. Kircher, Esq., Bar No. 11176
Email: cdk@semenzalaw.com
Jarrod L. Rickard, Esq., Bar No. 10203
Email: jlr@semenzalaw.com
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145

4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel):

Yvonne O'Connell ("Plaintiff")
c/o NETTLES LAW FIRM
Brian D. Nettles, Esq., Bar No. 7462
Email: brian@nettleslawfirm.com
Christian M. Morris, Esq., Bar No. 11218
Email: christianmorris@nettleslawfirm.com
1389 Galleria Drive, Suite 200
Henderson, Nevada 89014

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission): **All of the attorneys listed above are licensed to practice law in the State of Nevada.**

6. Indicate whether appellant was represented by appointed counsel in the district court: **Lawrence J. Semenza, III, P.C. was not appointed, but retained by the Defendant in this case.**

7. Indicate whether appellant is represented by appointed counsel on appeal: **Lawrence J. Semenza, III, P.C. was not appointed, but retained by the Defendant for the appeal.**

1 8. Indicate whether appellant was granted leave to proceed in forma pauperis, and
2 the date of entry of the district court order granting such leave: **N/A**

3 9. Indicate the date the proceedings commenced in the district court (e.g., date
4 complaint, indictment, information, or petition was filed): **February 7, 2012.**

5 10. Provide a brief description of the nature of the action and result in the district
6 court, including the type of judgment or order being appealed and the relief granted by the district
7 court:

8 **Plaintiff alleges that on or about February 8, 2010, she was a guest at Defendant's**
9 **property and allegedly slipped and fell on a foreign substance present on the floor.**
10 **Defendant denies that it was negligent in any manner. Pursuant to Plaintiff's Amended**
11 **Complaint, she alleged a single claim of Negligence against Defendant.**

12 **After a jury trial, Plaintiff was awarded damages of \$150,000.00 in past pain and**
13 **suffering and \$250,000.00 in future pain and suffering. The jury, however, found Plaintiff**
14 **to be 40% at fault and Defendant to be 60% at fault. As a result, Plaintiff's award was**
15 **reduced to \$240,000.00 due to her own comparative negligence. The Jury Verdict was filed**
16 **in open court on November 16, 2015. Plaintiff was also awarded pre-judgment interest in**
17 **the sum of \$17,190.96. Accordingly, the District Court entered a Judgment on Jury Verdict**
18 **in favor of Plaintiff in the amount of \$257,190.96.**

19 **Defendant timely filed a Renewed Motion for Judgment as a Matter of Law or,**
20 **Alternatively, for a New Trial or Remittitur, which was subsequently denied by the District**
21 **Court. The Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law**
22 **or, Alternatively, for a New Trial or Remittitur was entered on May 24, 2016, and the**
23 **Notice of Entry of Order was filed and served on May 25, 2016.**

24 **Defendant appeals from the Judgment on Jury Verdict and the denial of Defendant's**
25 **Renewed Motion for Judgment as a Matter of Law or, Alternatively, for a New Trial or**
26 **Remittitur, which were both issued in error, as well as any orders, judgments and rulings**
27 **made appealable by the foregoing, including but not limited to any award of costs and/or**
28 **interest to the Plaintiff in this case.**

11. Indicate whether the case has previously been the subject of an appeal to or original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding: **This matter has not previously been the subject of an appeal or original writ proceeding to the Supreme Court.**

12. Indicate whether this appeal involves child custody or visitation: **This appeal does not involve a child custody or visitation issue.**

13. If this is a civil case, indicate whether this appeal involves the possibility of settlement: **This is a civil case, but the Defendant does not believe that there is a possibility of settlement at this time.**

DATED this 8th day of June, 2016.

LAWRENCE J. SEMENZA, III, P.C.

/s/ Christopher D. Kircher

Lawrence J. Semenza, III, Esq., Bar No. 7174
Christopher D. Kircher, Esq., Bar No. 11176
Jarrod L. Rickard, Esq., Bar No. 10203
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145

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

CERTIFICATE OF MAILING

Pursuant to Nev. R. Civ. P. 5(b) and NEFCR 9, I hereby certify that I am an employee with Lawrence J. Semenza, III, P.C., and that on the 8th day of June, 2016, I caused to be sent via Wiznet's online filing system, a true copy of the foregoing **CASE APPEAL STATEMENT** to the following registered e-mail addresses:

NETTLES LAW FIRM
Christian M. Morris, Esq., christianmorris@nettleslawfirm.com
Edward Wynder, Esq., Edward@nettleslawfirm.com
Jenn Alexy, jenn@nettleslawfirm.com

Attorneys for Plaintiff

/s/ Olivia A. Kelly
An Employee of Lawrence J. Semenza, III, P.C.

DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C

Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

§
§
§
§
§

Location: **Department 5**
Judicial Officer: **Ellsworth, Carolyn**
Filed on: **02/07/2012**
Case Number History:
Cross-Reference Case Number: **A655992**

CASE INFORMATION

Statistical Closures
12/15/2015 Verdict Reached

Case Type: **Negligence - Premises Liability**
Subtype: **Slip and Fall**
Case Flags: **Appealed to Supreme Court**
Arbitration Exemption Granted

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number	A-12-655992-C
Court	Department 5
Date Assigned	02/17/2016
Judicial Officer	Ellsworth, Carolyn

PARTY INFORMATION

Plaintiff

O'Connell, Yvonne

Lead Attorneys

Nettles, Brian D.
Retained
7024348282(W)

Defendant

Wynn Las Vegas LLC

Semenza, Lawrence, III
Retained
702-835-6803(W)


Wynn Resorts Limited

DATE


EVENTS & ORDERS OF THE COURT

INDEX


02/07/2012

 Complaint
Filed By: Plaintiff O'Connell, Yvonne


03/20/2012

 Amended Complaint
Filed By: Plaintiff O'Connell, Yvonne
Amended Complaint


04/04/2012

 Summons
Filed by: Plaintiff O'Connell, Yvonne
Summons

11/19/2012

 Motion for Withdrawal
Filed By: Plaintiff O'Connell, Yvonne
Motion to Withdraw as Attorney of Record














11/20/2012

 Certificate of Mailing
Filed By: Plaintiff O'Connell, Yvonne
Certificate of Mailing re Motion to Withdraw as Attorney of Record


12/19/2012

Motion to Withdraw as Counsel (3:00 AM) (Judicial Officer: Ellsworth, Carolyn)















DEPARTMENT 5
CASE SUMMARY
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	<i>Motion to Withdraw as Attorney of Record</i>
12/19/2012	 Supplement Filed by: Plaintiff O'Connell, Yvonne <i>Supplement to Motion to Withdraw as Attorney of Record</i>
12/21/2012	 Order Filed By: Plaintiff O'Connell, Yvonne <i>Order</i>
12/24/2012	 Notice of Entry of Order Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Entry of Order</i>
05/14/2013	 Notice of Appearance Party: Plaintiff O'Connell, Yvonne <i>Notice of Appearance</i>
06/25/2013	 Default Filed By: Plaintiff O'Connell, Yvonne <i>(Set Aside 07-24-13) Default</i>
07/24/2013	 Initial Appearance Fee Disclosure Filed By: Defendant Wynn Las Vegas LLC <i>Initial Appearance Fee Disclosure</i>
07/24/2013	 Stipulation and Order Filed by: Defendant Wynn Las Vegas LLC <i>Stipulation and Order to Set Aside Default</i>
07/24/2013	 Answer to Amended Complaint Filed By: Defendant Wynn Las Vegas LLC <i>Answer to Amended Complaint</i>
07/24/2013	 Notice of Entry of Stipulation and Order Filed By: Defendant Wynn Las Vegas LLC <i>Notice of Entry of Stipulation and Order to Set Aside Default</i>
08/21/2013	 Commissioners Decision on Request for Exemption - Granted <i>Commissioner's Decision on Request for Exemption</i>
08/22/2013	CANCELED Status Check: Dismissal (3:00 AM) (Judicial Officer: Ellsworth, Carolyn) <i>Vacated - per Secretary</i>
11/20/2013	 Joint Case Conference Report Filed By: Plaintiff O'Connell, Yvonne <i>Joint Case Conference Report</i>
11/25/2013	 Scheduling Order Filed By: Plaintiff O'Connell, Yvonne <i>Scheduling Order</i>
12/05/2013	 Order Setting Civil Non-Jury Trial <i>Order Setting Civil Non-Jury Trial and Calendar Call</i>

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CASE SUMMARY
CASE NO. A-12-655992-C

09/10/2014	 Association of Counsel Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Association of Counsel</i>
09/22/2014	 Stipulation to Extend Discovery Party: Plaintiff O'Connell, Yvonne <i>Stipulation and Order to Extend Discovery and Continue Trial (First Request)</i>
09/29/2014	 Notice of Entry of Stipulation and Order Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Entry of Stipulation and Order to Extend Discovery and Continue Trial</i>
10/01/2014	 Amended Order Setting Jury Trial <i>Amended Order Setting Civil Jury Trial and Calendar Call</i>
12/29/2014	 Motion to Withdraw As Counsel Filed By: Plaintiff O'Connell, Yvonne <i>Motion to Withdraw as Counsel of Record</i>
01/26/2015	 Notice of Non Opposition Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Non-Opposition</i>
01/27/2015	 Affidavit in Support Filed By: Plaintiff O'Connell, Yvonne <i>Affidavit of J. Scott Dilbeck, Esq. in Support of Motion to Withdraw</i>
02/10/2015	 Order to Withdraw as Attorney of Record Filed by: Plaintiff O'Connell, Yvonne <i>Order Granting Motion to Withdraw</i>
02/11/2015	 Notice of Entry of Order Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Entry of Order Granting Motion to Withdraw</i>
02/13/2015	CANCELED Motion to Withdraw as Counsel (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) <i>Vacated</i> <i>Motion to Withdraw as Counsel of Record</i> <i>01/30/2015 Continued to 02/13/2015 - At the Request of Counsel - Wynn Las Vegas LLC</i>
02/18/2015	 Notice of Appearance Party: Plaintiff O'Connell, Yvonne <i>Notice of Appearance</i>
03/06/2015	CANCELED Calendar Call (10:00 AM) (Judicial Officer: Ellsworth, Carolyn) <i>Vacated - per Commissioner</i>
03/16/2015	CANCELED Bench Trial (1:30 PM) (Judicial Officer: Ellsworth, Carolyn) <i>Vacated - per Commissioner</i>
04/21/2015	 Proof of Service Filed by: Plaintiff O'Connell, Yvonne <i>Proof of Service of Subpoena Documents on Salvatore Risco</i>








DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C

04/23/2015	 Proof of Service Filed by: Defendant Wynn Las Vegas LLC <i>Proof of Service</i>
05/13/2015	 Disclosure of Expert Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Disclosure of Rebuttal Expert Witness and Report Pursuant to NRCP 26(E)</i>
06/03/2015	 Notice of Hearing <i>Notice of Rescheduling of Hearing</i>
07/13/2015	 Motion for Summary Judgment Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Motion for Summary Judgment</i>
07/13/2015	 Initial Appearance Fee Disclosure Filed By: Defendant Wynn Las Vegas LLC <i>Initial Appearance Fee Disclosure for Motion for Summary Judgment Filing</i>
07/27/2015	 Opposition Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Opposition to Defendant's Motion for Summary Judgment</i>
07/31/2015	 Motion Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Motion for Protective Order and for Order Shortening Time</i>
08/04/2015	 Opposition to Motion For Protective Order Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Opposition to Defendant's Motion for Protective Order and for Order Shortening Time</i>
08/07/2015	 Motion for Protective Order (9:30 AM) (Judicial Officer: Bulla, Bonnie) <i>Def't Motion for Protective Order and for OST</i>
08/11/2015	 Errata Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Errata to Opposition to Defendant's Motion for Summary Judgment</i>
08/11/2015	 Order Setting Settlement Conference <i>Order Setting Settlement Conference</i>
08/13/2015	 Motion in Limine Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Motion In Limine [#1] To Exclude Purported Expert Gary Presswood</i>
08/13/2015	 Motion in Limine Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Motion In Limine [#2] To Exclude Unrelated Medical Conditions and Damages Claimed By Plaintiff</i>
08/13/2015	 Motion in Limine

DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C

	Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Motion In Limine [#3] To Exclude Any Reference Or Testimony of Defendant's Alleged Failure To Preserve Evidence</i>
08/13/2015	 Omnibus Motion In Limine Filed by: Plaintiff O'Connell, Yvonne <i>Plaintiff's Omnibus Motions in Limine</i>
08/18/2015	 Affidavit Filed By: Plaintiff O'Connell, Yvonne <i>Supplemental Affidavit and Declaration of Christian M. Morris to Plaintiff's Omnibus Motions in Limine</i>
08/27/2015	 Opposition to Motion in Limine Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Opposition to Wynn's Motion in Limine [#1] to Exclude Purported Expert Witness Gary Presswood</i>
08/27/2015	 Opposition to Motion in Limine Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Opposition to Wynn's Motion in Limine [#2] to Exclude Unrelated Medical Conditions and Damages Claimed by Plaintiff and Motion for Sanctions for Violation of HIPPA Protected Information</i>
08/27/2015	 Opposition to Motion in Limine Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Opposition to Wynn's Motion in Limine [#3] to Exclude any Reference or Testimony or Defendant's Alleged Failure to Preserve Evidence</i>
08/31/2015	 Opposition to Motion in Limine Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Opposition to Plaintiff's Omnibus Motions in Limine</i>
09/03/2015	 Affidavit Filed By: Plaintiff O'Connell, Yvonne <i>Supplemental Affidavit and Declaration of Christian M. Morris to Plaintiff's Omnibus Motions in Limine</i>
09/03/2015	 Settlement Conference (9:00 AM)
09/09/2015	 Motion Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Motion to Re-Open Discovery for the Limited Purpose of Taking Defendant's 30(b)(6) Deposition and for Order Shortening Time</i>
09/10/2015	 Opposition to Motion Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Opposition to Plaintiff's Motion to Reopen Discovery for The Limited Purpose of Taking Defendant's 30(B)(6) Deposition and for Order Shortening Time</i>
09/10/2015	 Reply in Support Filed By: Defendant Wynn Las Vegas LLC <i>Reply In Support of Defendant's Motion for Summary Judgment</i>
09/10/2015	 Reply in Support

DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C

	Filed By: Defendant Wynn Las Vegas LLC <i>Reply In Support of Defendant's Motion in Limine [#1] to Exclude Purported Expert Witness Gary Presswood</i>
09/10/2015	 Reply in Support Filed By: Defendant Wynn Las Vegas LLC <i>Reply In Support of Defendant's Motion in Limine [#3] to Exclude Any Reference or Testimony of Defendant's Alleged Failure to Preserve Evidence</i>
09/10/2015	 Reply in Support Filed By: Defendant Wynn Las Vegas LLC <i>Reply In Support of Defendant's Motion in Limine [#2] to Exclude Unrelated Medical Conditions; Opposition to Plaintiff's Motion for Sanctions</i>
09/17/2015	 Motion for Summary Judgment (9:00 AM) (Judicial Officer: Thompson, Charles) <i>Defendant's Motion for Summary Judgment</i>
09/17/2015	 Reply to Opposition Filed by: Plaintiff O'Connell, Yvonne <i>Plaintiff's Reply to Defendant's Opposition to Plaintiff's Omnibus Motions in Limine</i>
09/18/2015	 Motion (9:00 AM) (Judicial Officer: Bulla, Bonnie) <i>Pltf's Motion to Re-Open Discovery for the Limited Purpose of Taking Deft's 30(b)(6) Deposition and for OST</i>
09/18/2015	CANCELED Status Check: Compliance (11:00 AM) (Judicial Officer: Bulla, Bonnie) <i>Vacated - per Commissioner</i>
09/23/2015	 Discovery Commissioners Report and Recommendations Filed By: Plaintiff O'Connell, Yvonne <i>Discovery Commissioner Report and Recommendations</i>
09/24/2015	 Notice of Entry of Order Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Entry of Discovery Commissioner Report and Recommendations</i>
09/28/2015	 Pre-trial Memorandum Filed by: Plaintiff O'Connell, Yvonne <i>Joint Pre-Trial Memorandum</i>
10/01/2015	Motion in Limine (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) Events: 08/13/2015 Motion in Limine <i>Defendant's Motion In Limine [#1] To Exclude Purported Expert Gary Presswood</i>
10/01/2015	Motion in Limine (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) Events: 08/13/2015 Motion in Limine <i>Defendant's Motion In Limine [#2] To Exclude Unrelated Medical Conditions and Damages Claimed By Plaintiff</i>
10/01/2015	Motion in Limine (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) Events: 08/13/2015 Motion in Limine <i>Defendant's Motion In Limine [#3] To Exclude Any Reference Or Testimony of Defendant's Alleged Failure To Preserve Evidence</i>
10/01/2015	Omnibus Motion in Limine (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) Events: 08/13/2015 Omnibus Motion In Limine <i>Plaintiff's Omnibus Motions in Limine</i>








DEPARTMENT 5
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CASE NO. A-12-655992-C

10/01/2015	 All Pending Motions (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) <i>All Pending Motions: 10/1/15</i>
10/01/2015	Calendar Call (10:00 AM) (Judicial Officer: Ellsworth, Carolyn)
10/09/2015	 Order Denying Motion Filed By: Plaintiff O'Connell, Yvonne <i>Order Denying Defendant's Motion For Summary Judgment</i>
10/12/2015	 Recorders Transcript of Hearing <i>Transcript of Proceedings Defendants' Motions in Limine/Plaintiff's Omnibus Motions in Limine/Calendar Call October 1, 2015</i>
10/12/2015	 Notice of Entry of Order Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Entry of Order Denying Defendant's Motion for Summary Judgment</i>
10/16/2015	CANCELED Status Check: Compliance (11:00 AM) (Judicial Officer: Bulla, Bonnie) <i>Vacated - per Commissioner</i>
10/26/2015	 Order Shortening Time Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Emergency Motion to Continue Trial and for Sanctions on Order Shortening Time</i>
10/27/2015	 Supplemental Filed by: Defendant Wynn Las Vegas LLC <i>Defendant's Supplemental Brief to Exclude Plaintiff's Treating Physician Expert Witnesses</i>
10/27/2015	 Pre-Trial Disclosure Party: Defendant Wynn Las Vegas LLC <i>Defendant's Pretrial Disclosures</i>
10/27/2015	 Proposed Voir Dire Questions Filed By: Defendant Wynn Las Vegas LLC <i>Defendant Wynn Las Vegas, LLC d/b/a Wynn Las Vegas' Proposed Voir Dire Questions</i>
10/27/2015	 Proposed Verdict Forms Not Used at Trial Party: Defendant Wynn Las Vegas LLC <i>Defendant Wynn Las Vegas, LLC d/b/a Wynn Las Vegas' Proposed Verdict Forms</i>
10/27/2015	 Supplement Filed by: Plaintiff O'Connell, Yvonne <i>Supplement</i>
10/28/2015	 Pre-Trial Disclosure Party: Plaintiff O'Connell, Yvonne <i>Plaintiff's Pretrial Disclosures</i>
10/28/2015	 Proposed Voir Dire Questions Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Proposed Voir Dire Questions</i>
10/28/2015	 Miscellaneous Filing













DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C

	Filed by: Plaintiff O'Connell, Yvonne <i>Plaintiff's Proposed Verdict Forms</i>
10/28/2015	 Opposition Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Opposition to Plaintiff's Motion to Continue Trial and For Sanctions on an Order Shortening Time</i>
10/29/2015	 All Pending Motions (3:00 AM) (Judicial Officer: Ellsworth, Carolyn) <i>All Pending Motions: 10/29/15</i>
10/29/2015	Hearing (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) <i>Hearing: Supplemental Brief on Motion in Limine</i>
10/29/2015	Motion to Continue Trial (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) <i>Plaintiff's Emergency Motion to Continue Trial and for Sanctions on Order Shortening Time</i>
11/02/2015	 Order Filed By: Defendant Wynn Las Vegas LLC <i>Order on Plaintiff's Omnibus Motions in Limine</i>
11/02/2015	 Order Filed By: Defendant Wynn Las Vegas LLC <i>Order Granting Defendant's Motion in Limine [#1] to Exclude Purported Expert Witness Gary Presswood</i>
11/02/2015	 Order Denying Motion Filed By: Defendant Wynn Las Vegas LLC <i>Order Denying Without Prejudice Defendant's Motion in Limine [#2] to Exclude Unrelated Medical Conditions and Damages Claimed by Plaintiff</i>
11/02/2015	 Order Denying Motion Filed By: Defendant Wynn Las Vegas LLC <i>Order Denying Defendant's Motion in Limine [#3] to Exclude Any Reference or Testimony of Defendant's Alleged Failure to Preserve Evidence</i>
11/04/2015	 Jury Trial (1:30 PM) (Judicial Officer: Ellsworth, Carolyn) 11/04/2015-11/05/2015, 11/09/2015-11/10/2015, 11/12/2015-11/13/2015, 11/16/2015
11/05/2015	 Notice of Entry of Order Filed By: Defendant Wynn Las Vegas LLC <i>Notice of Entry of Order</i>
11/05/2015	 Notice of Entry of Order Filed By: Defendant Wynn Las Vegas LLC <i>Notice of Entry of Order</i>
11/05/2015	 Notice of Entry of Order Filed By: Defendant Wynn Las Vegas LLC <i>Notice of Entry of Order</i>
11/05/2015	 Notice of Entry of Order Filed By: Defendant Wynn Las Vegas LLC <i>Notice of Entry of Order</i>

DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C

11/05/2015	 Order Granting Motion Filed By: Plaintiff O'Connell, Yvonne <i>Order Granting Plaintiff's Oral Motion for Demand of Jury Trial</i>
11/05/2015	 Notice of Entry of Order Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Entry of Order Granting Plaintiff's Oral Motion for Demand of Jury Trial</i>
11/09/2015	 Brief Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Brief Regarding Causation Testimony by Drs. Dunn and Tingey</i>
11/09/2015	 Jury List <i>Jury List</i>
11/09/2015	 Brief Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Brief as to Testimony Regarding Future Pain and Suffering</i>
11/09/2015	 Jury List
11/10/2015	 Brief Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Bench Brief Regarding Future Pain and Suffering</i>
11/10/2015	 Brief Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Bench Brief Regarding Exclusion of Plaintiff's Treating Physician Testimony Solely Based On Plaintiff's Self-Reporting</i>
11/12/2015	 Brief Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Bench Brief Regarding Expert Medical Testimony to Apportion Damages</i>
11/12/2015	 Jury List <i>Amended Jury List</i>
11/12/2015	 Brief Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Brief As To Constructive Notice</i>
11/16/2015	 Jury Instructions
11/16/2015	 Verdict
11/16/2015	Verdict (Judicial Officer: Ellsworth, Carolyn) Debtors: Wynn Las Vegas LLC (Defendant) Creditors: Yvonne O'Connell (Plaintiff) Judgment: 11/16/2015, Docketed: 11/18/2015 Total Judgment: 240,000.00
11/16/2015	 Verdict Submitted to the Jury But Returned Unsigned


DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C

11/17/2015	 Discovery Commissioners Report and Recommendations Filed By: Plaintiff O'Connell, Yvonne <i>Discovery Commissioner Report and Recommendations</i>
11/17/2015	 Notice of Entry Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Entry of Discovery Commissioner Report and Recommendations</i>
11/17/2015	 Notice of Entry of Order Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Entry of Discovery Commissioner Report and Recommendations</i>
11/25/2015	 Brief Filed By: Defendant Wynn Las Vegas LLC <i>Defendant Wynn Las Vegas, LLC's Trial Brief</i>
11/25/2015	 Application Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Application for Fees, Costs and Pre-Judgment Interest</i>
12/07/2015	 Opposition Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Opposition to Plaintiff's Application for Fees, Costs and Pre-Judgment Interest and Motion to Relax Costs</i>
12/15/2015	 Judgment Upon Jury Verdict Filed By: Plaintiff O'Connell, Yvonne <i>Judgment on Verdict</i>
12/15/2015	 Notice of Entry of Judgment Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Entry of Judgment on Verdict</i>
12/15/2015	Judgment Plus Interest (Judicial Officer: Ellsworth, Carolyn) Debtors: Wynn Las Vegas LLC (Defendant) Creditors: Yvonne O'Connell (Plaintiff) Judgment: 12/15/2015, Docketed: 12/22/2015 Total Judgment: 257,190.96
12/21/2015	 Motion Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Amended Application for Fees, Costs and Pre-Judgment Interest - Amended and Resubmitted As - Plaintiff's Motion and Notice of Motion to Tax Costs and for Fees and Post-Judgment Interest</i>
12/21/2015	 Memorandum of Costs and Disbursements Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Amended Verified Memorandum of Costs (First Submission attached as Exhibit 5 to Plaintiff's Application for Fees, Costs and Pre-Judgment Interest)</i>
12/23/2015	 Notice of Posting Bond Filed By: Defendant Wynn Resorts Limited <i>Notice of Posting Supersedeas Bond</i>
12/23/2015	 Order

DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C


Filed By: Defendant Wynn Las Vegas LLC
Order on Supplemental Briefing Relating to the Proposed Testimony of Dr. Dunn and Dr. Tingey

12/23/2015

 Order Denying Motion


Filed By: Defendant Wynn Las Vegas LLC
Order Denying Plaintiff's Emergency Motion to Continue Trial

12/28/2015

 Supplement


Filed by: Defendant Wynn Las Vegas LLC
Defendant's Supplement to Motion to Retax Costs and Opposition to Plaintiff's Amended Application for Fees, Costs and Pre-Judgment Interest

12/28/2015

 Notice of Entry of Order


Filed By: Defendant Wynn Las Vegas LLC
Notice of Entry of Order

12/28/2015

 Notice of Entry of Order


Filed By: Defendant Wynn Las Vegas LLC
Notice of Entry of Order

12/30/2015

 Motion for Judgment


Filed By: Defendant Wynn Las Vegas LLC
Defendant Wynn Las Vegas, LLC's Renewed Motion for Judgment as a Matter of Law, or, Alternatively, Motion for New Trial or Remittitur

01/12/2016

 Recorders Transcript of Hearing


Transcript of Proceedings: Plaintiff's Emergency Motion to Continue Trial and for Sanctions on Order Shortening Time; Supplemental Brief on Motion in Limine -- 10-29-15

01/12/2016

 Recorders Transcript of Hearing


Transcript of Proceedings: Jury Trial - Day 1 -- 11-4-15

01/12/2016

 Recorders Transcript of Hearing


Transcript of Proceedings: Jury Trial - Day 2 -- 11-5-15

01/12/2016

 Recorders Transcript of Hearing


Transcript of Proceedings: Jury Trial - Day 3 -- 11-9-15

01/12/2016

 Recorders Transcript of Hearing


Transcript of Proceedings: Jury Trial - Day 4 -- 11-10-15

01/12/2016

 Recorders Transcript of Hearing


Transcript of Proceedings: Jury Trial - Day 5-- 11-12-15

01/12/2016

 Recorders Transcript of Hearing


Transcript of Proceedings: Jury Trial - Day 6 -- 11-13-15

01/12/2016

 Recorders Transcript of Hearing









Transcript of Proceedings: Jury Trial - Day 7 -- 11-16-15

01/14/2016

 Opposition to Motion

Filed By: Plaintiff O'Connell, Yvonne
Plaintiff's Opposition to Defendant's Motion to Retax Costs and Reply to Defendant's

DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C

	<i>Opposition to Plaintiff's Motion and Notice of Motion to Tax Costs and for Fees and Post-Judgment Interest</i>
01/19/2016	 Opposition to Motion Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Opposition to Defendant's Renewed Motion for Judgment as a Matter of Law and Motion for New Trial</i>
01/28/2016	 Reply in Support Filed By: Defendant Wynn Las Vegas LLC <i>Defendant Wynn Las Vegas, LLC's Reply in Support of Renewed Motion for Judgment as a Matter of Law, Or, Alternatively, Motion for New Trial or Remittitur</i>
02/15/2016	Case Reassigned to Department 14 <i>Reassigned From Judge Ellsworth - Dept 5</i>
02/17/2016	Case Reassigned to Department 14 <i>Reassignment From Judge Ellsworth - Dept 5</i>
02/17/2016	Case Reassigned to Department 5 <i>Case Retained by Judge Ellsworth</i>
03/03/2016	 Notice Filed By: Defendant Wynn Las Vegas LLC <i>Notice of Related Authorities In Support Of Defendant Wynn Las Vegas, LLC's Renewed Motion for Judgment as a Matter of Law, or, Alternatively, Motion for New Trial or Remittitur</i>
03/04/2016	Motion for Fees (8:30 AM) (Judicial Officer: Ellsworth, Carolyn) <i>Plaintiff's Amended Application for Fees, Costs and Pre-Judgment Interest - Amended and Resubmitted As - Plaintiff's Motion and Notice of Motion to Tax Costs and for Fees and Post-Judgment Interest</i>
03/04/2016	Motion for Judgment (8:30 AM) (Judicial Officer: Ellsworth, Carolyn) <i>Defendant Wynn Las Vegas, LLC's Renewed Motion for Judgment as a Matter of Law, or, Alternatively, Motion for New Trial or Remittitur</i>
03/04/2016	 All Pending Motions (8:30 AM) (Judicial Officer: Ellsworth, Carolyn) <i>All Pending Motions: 3/4/16</i>
05/24/2016	 Order Denying Motion Filed By: Plaintiff O'Connell, Yvonne <i>Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law or Alternatively for a New Trial or Remittitur</i>
05/25/2016	 Notice of Entry of Order Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Entry of Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law or Alternatively for a New Trial or Remittitur</i>
06/08/2016	 Notice of Appeal Filed By: Defendant Wynn Las Vegas LLC <i>Notice of Appeal</i>
06/08/2016	 Case Appeal Statement Filed By: Defendant Wynn Las Vegas LLC <i>Case Appeal Statement</i>
DATE	FINANCIAL INFORMATION

DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C

Defendant Wynn Las Vegas LLC

Total Charges 447.00

Total Payments and Credits 447.00

Balance Due as of 6/10/2016 0.00

Plaintiff O'Connell, Yvonne

Total Charges 270.00

Total Payments and Credits 270.00

Balance Due as of 6/10/2016 0.00



CIVIL COVER SHEET

CLARK County, Nevada

Case No. _____

(Assigned by Clerk's Office)

A-12-655992-C

I. Party Information

Plaintiff(s) (name/address/phone): YVONNE O'CONNELL, an individual, IN PROPER PERSON

8764 Captains Place, Las Vegas, NV 89117

(702) 228-4424

Attorney (name/address/phone):

Defendant(s) (name/address/phone): WYNN RESORTS, LIMITED, a Nevada corporation, d/b/a WYNN LAS VEGAS; DOES I through X, inclusive; and ROE BUSINESS ENTITIES I through X, inclusive

3131 Las Vegas Boulevard South, Clark County, State of Nevada,

Attorney (name/address/phone):

II. Nature of Controversy (Please check applicable bold category and applicable subcategory, if appropriate)

☐ Arbitration Requested

Civil Cases

Real Property	Torts	
<input type="checkbox"/> Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Title to Property <input type="checkbox"/> Foreclosure <input type="checkbox"/> Liens <input type="checkbox"/> Quiet Title <input type="checkbox"/> Specific Performance <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property <input type="checkbox"/> Partition <input type="checkbox"/> Planning/Zoning	<input type="checkbox"/> Negligence <input type="checkbox"/> Negligence - Auto <input type="checkbox"/> Negligence - Medical/Dental <input checked="" type="checkbox"/> Negligence - Premises Liability (Slip/Fall) <input type="checkbox"/> Negligence - Other	<input type="checkbox"/> Product Liability <input type="checkbox"/> Product Liability/Motor Vehicle <input type="checkbox"/> Other Torts/Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Torts/Defamation (Libel/Slander) <input type="checkbox"/> Interfere with Contract Rights <input type="checkbox"/> Employment Torts (Wrongful termination) <input type="checkbox"/> Other Torts <input type="checkbox"/> Anti-trust <input type="checkbox"/> Fraud/Misrepresentation <input type="checkbox"/> Insurance <input type="checkbox"/> Legal Tort <input type="checkbox"/> Unfair Competition

Probate

Other Civil Filing Types

Estimated Estate Value: _____ <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside Estates <input type="checkbox"/> Trust/Conservatorships <input type="checkbox"/> Individual Trustee <input type="checkbox"/> Corporate Trustee <input type="checkbox"/> Other Probate	<input type="checkbox"/> Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> General <input type="checkbox"/> Breach of Contract <input type="checkbox"/> Building & Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Other Contracts/Acct/Judgment <input type="checkbox"/> Collection of Actions <input type="checkbox"/> Employment Contract <input type="checkbox"/> Guarantee <input type="checkbox"/> Sale Contract <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Civil Petition for Judicial Review <input type="checkbox"/> Foreclosure Mediation <input type="checkbox"/> Other Administrative Law <input type="checkbox"/> Department of Motor Vehicles <input type="checkbox"/> Worker's Compensation Appeal	<input type="checkbox"/> Appeal from Lower Court (also check applicable civil case box) <input type="checkbox"/> Transfer from Justice Court <input type="checkbox"/> Justice Court Civil Appeal <input type="checkbox"/> Civil Writ <input type="checkbox"/> Other Special Proceeding <input type="checkbox"/> Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Conversion of Property <input type="checkbox"/> Damage to Property <input type="checkbox"/> Employment Security <input type="checkbox"/> Enforcement of Judgment <input type="checkbox"/> Foreign Judgment - Civil <input type="checkbox"/> Other Personal Property <input type="checkbox"/> Recovery of Property <input type="checkbox"/> Stockholder Suit <input type="checkbox"/> Other Civil Matters
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III. Business Court Requested (Please check applicable category; for Clark or Washoe Counties only.)

<input type="checkbox"/> NRS Chapters 78-88 <input type="checkbox"/> Commodities (NRS 90) <input type="checkbox"/> Securities (NRS 90)	<input type="checkbox"/> Investments (NRS 104 Art. 8) <input type="checkbox"/> Deceptive Trade Practices (NRS 598) <input type="checkbox"/> Trademarks (NRS 600A)	<input type="checkbox"/> Enhanced Case Mgmt/Business <input type="checkbox"/> Other Business Court Matters
--	---	---

FEBRUARY 6, 2012
Date

Yvonne O'Connell
Signature of initiating party or representative

Alvin L. Lavin

CLERK OF THE COURT

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

DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, an individual,

Plaintiff,

vs.

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

Defendants.

CASE NO. A-12-655992-C
DEPT NO. V

JUDGMENT ON VERDICT

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

///

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

<input type="checkbox"/> Non-Jury Disposed After Trial Start	<input type="checkbox"/> Jury Disposed After Trial Start
<input type="checkbox"/> Non-Jury Judgment Reached	<input checked="" type="checkbox"/> Jury Verdict Reached
<input type="checkbox"/> Transferred before Trial	<input type="checkbox"/> Other

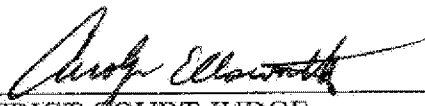
NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, NV 89014
(702) 434-8282 / (702) 434-1488 (fax)

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

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

5 IT IS FURTHER ORDERED that Plaintiff is awarded pre-judgment interest in the sum
6 of \$17,190.96 (*figured as \$90,000.00 x 5.25% (Prime Rate Plus 2%) ÷ 365 = \$12.945 (Daily Rate) x*
7 *1,328 days [date of service of Summons 3/30/12 to date of verdict 11/16/15]*).

8 DATED this 14th day of December, 2015.


DISTRICT COURT JUDGE
CAROLYN ELLSWORTH

12 Submitted by:

13 NETTLES LAW FIRM


16 BRIAN D. NETTLES, ESQ.

Nevada Bar No. 7462

17 CHRISTIAN M. MORRIS, ESQ.

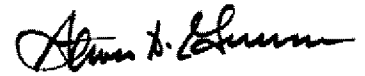
Nevada Bar No. 11218

18 NETTLES LAW FIRM

1389 Galleria Drive, Suite 200

Henderson, Nevada 89014

20 Attorneys for Plaintiff



CLERK OF THE COURT

1 **NEO**
2 **BRIAN D. NETTLES, ESQ.**
3 Nevada Bar No. 7462
4 **CHRISTIAN M. MORRIS, ESQ.**
5 Nevada Bar No. 11218
6 **NETTLES LAW FIRM**
7 1389 Galleria Drive, Suite 200
8 Henderson, Nevada 89014
9 Telephone: (702) 434-8282
10 Facsimile: (702) 434-1488
11 briann@nettleslawfirm.com
12 christian@nettleslawfirm.com
13 Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

12 YVONNE O'CONNELL, an individual,
13
14 Plaintiff,

14 vs.

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

19 Defendants.

CASE NO. A-12-655992-C
DEPT NO. V

**NOTICE OF ENTRY OF
JUDGMENT ON VERDICT**

21 TO: WYNN LAS VEGAS, LLC, Defendant; and

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

24 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the *Judgment on*
25 *Verdict* was entered in the above-entitled matter on the 15th day of December, 2015, a copy of
26

27

28

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

1 which is attached hereto.

2 DATED this 15th day of December, 2015.

3 NETTLES LAW FIRM

4
5 /s/ Christian M. Morris

6 BRIAN D. NETTLES, ESQ.

7 Nevada Bar No. 7462

8 CHRISTIAN M. MORRIS, ESQ.

9 Nevada Bar No. 11218

10 1389 Galleria Drive, Suite 200

11 Henderson, Nevada 89014

12 Attorneys for Plaintiff

13 **CERTIFICATE OF SERVICE**

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

17 Lawrence J. Semenza, III, Esq.

18 Christopher D. Kircher, Esq.

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

20 10161 Park Run Drive, Suite 150

21 Las Vegas, Nevada 89145


22 (702) 835-6803

23 Fax: (702) 920-8669

24 *Attorneys for Defendant*

25 *Wynn Las Vegas, LLC dba*

26 *Wynn Las Vegas*

27
28

An Employee of Nettles Law Firm

ORIGINAL

Electronically Filed
12/15/2015 11:02:06 AM


CLERK OF THE COURT

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

DISTRICT COURT
CLARK COUNTY, NEVADA

YVONNE O'CONNELL, an individual,

Plaintiff,

CASE NO. A-12-655992-C
DEPT NO. V

vs.

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

JUDGMENT ON VERDICT

Defendants.

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

///

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Henderson, NV 89014
(702) 434-8282 / (702) 434-1488 (fax)

<input type="checkbox"/> Non-Jury Disposed After Trial Start	<input type="checkbox"/> Jury Disposed After Trial Start
<input type="checkbox"/> Non-Jury Judgment Reached Transferred before Trial	<input checked="" type="checkbox"/> Jury Verdict Reached

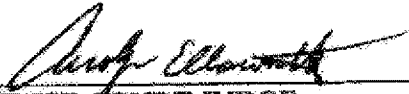
NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, NV 89014
(702) 434-8282 / (702) 434-1486 (fax)

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

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

5 IT IS FURTHER ORDERED that Plaintiff is awarded pre-judgment interest in the sum
6 of \$17,190.96 (figured as $\$90,000.00 \times 5.25\% \text{ (Prime Rate Plus 2\%)} \div 365 = \$12.945 \text{ (Daily Rate)} \times$
7 $1,328 \text{ days [date of service of Summons 3/30/12 to date of verdict 11/16/15]}$).

8 DATED this 1st day of December, 2015.

9
10
11 
12 DISTRICT COURT JUDGE
13 (JC) CAROLYN ELLSWORTH

12 Submitted by:

13 NETTLES LAW FIRM

14
15 
16 BRIAN D. NETTLES, ESQ.

17 Nevada Bar No. 7462

18 CHRISTIAN M. MORRIS, ESQ.

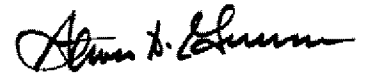
19 Nevada Bar No. 11218

20 NETTLES LAW FIRM

21 1389 Galleria Drive, Suite 200

22 Henderson, Nevada 89014

23 Attorneys for Plaintiff
24
25
26
27
28



CLERK OF THE COURT

BRIAN D. NETTLES, ESQ.
Nevada Bar No. 7462
CHRISTIAN M. MORRIS, ESQ.
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Facsimile: (702) 434-1488
briann@nettlslawfirm.com
christian@nettlslawfirm.com
Attorneys for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

YVONNE O'CONNELL, an individual,

Plaintiff,

vs.

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

Defendants.

CASE NO. A-12-655992-C
DEPT NO. V

**ORDER DENYING DEFENDANT'S
RENEWED MOTION FOR
JUDGMENT AS A MATTER OF LAW
OR ALTERNATIVELY FOR A NEW
TRIAL OR REMITTITUR**

On March 4, 2016, the Court held a hearing on Defendant's Renewed Motion for Judgment as a Matter of Law or Alternatively for a New Trial or Remittitur. Christian Morris, Esq., and Edward J. Wynder, Esq., of NETTLES LAW FIRM appeared for the Plaintiff. L.J. Semenza, III, Esq., and Christopher D. Kircher., Esq., of LAWRENCE J. SEMENZA, III, P.C., appeared for the Defendant. The Court, having reviewed the pleadings and papers on file, and having heard the arguments of Counsel, and good cause appearing therefor, **HEREBY ORDERS AS FOLLOWS:**

I. FACTUAL BACKGROUND

1 This is a personal injury action resulting from Plaintiff's slip and fall at Defendant's
2 casino. A jury trial was held and the jury found in favor of Plaintiff on November 16, 2015. The
3 jury awarded Plaintiff \$150,000 for past pain and suffering and \$250,000 for future pain and
4 suffering, finding her to be 40% at fault. Accounting for Plaintiff's comparative fault, her total
5 award was \$240,000. Defendant (hereinafter "Wynn"), having moved for judgment under NRCP
6 50 at the close of Plaintiff's case, filed a renewed motion for judgment as a matter of law or,
7 alternatively, a motion for new trial or remittitur.

8 At trial, Plaintiff (hereinafter "O'Connell") testified that she fell after slipping on what was
9 described as a pale green, sticky, liquid substance on the floor. There was no evidence presented
10 by O'Connell that Wynn had caused the foreign substance to be on the floor. While O'Connell
11 speculated that the substance may have been water from the irrigation system in the atrium area
12 where she fell, she presented no evidence that such was the case. Rather, O'Connell called, in
13 her case in chief, an employee of Wynn who testified that she responded to the area of the fall
14 immediately after the fall and she observed a substance on the floor which had been covered by a
15 sweeper machine brought to clean up the area. She described the substance as looking "a little
16 sticky—like honey." Trial Transcript ("TT"), Vol. 3 at 71:23-72:4. On cross-examination, the
17 witness, when confronted with her previous deposition testimony, agreed that she had described
18 the liquid substance as "something like a syrup, like a drink, like something like that." *Id.* at
19 76:6-10. Additionally, O'Connell presented no evidence that Wynn had actual notice of the
20 foreign substance on the floor, and her counsel argued that it was in fact a constructive notice
21 case, not an actual notice case.

22 DISCUSSION

23 A. Legal Standards and Applicable Statutes

24 NRCP 50 provides in pertinent part:

25 (a) Judgment as a matter of law.

26 (1) If during a trial by jury, a party has been fully heard on an issue
27 and on the facts and law a party has failed to prove a sufficient
28 issue for the jury, the court may determine the issue against that

party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(b) Renewing motion for judgment after trial; alternative motion for new trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after service of written notice of entry of judgment and may alternatively request a new trial or join a motion for new trial under Rule 59. In ruling on a renewed motion the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law.

NRCP 59(a) provides:

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1) Irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial; (2) Misconduct of the jury or prevailing party; (3) Accident or surprise which ordinary prudence could not have guarded against; (4) Newly discovered evidence material for the party making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial; (5) Manifest disregard by the

1 jury of the instructions of the court; (6) Excessive damages appearing to
2 have been given under the influence of passion or prejudice; or, (7) Error
3 in law occurring at the trial and objected to by the party making the
4 motion.

5 "The standard for granting a motion for judgment as a matter of law is based on the
6 standard for granting a motion for involuntary dismissal under former NRCP 41(b). In applying
7 that standard and deciding whether to grant a motion for judgment as a matter of law, the district
8 court must view the evidence and all inferences in favor of the nonmoving party. To defeat the
9 motion, the nonmoving party must have presented sufficient evidence such that the jury could
10 grant relief to that party." *Nelson v. Heer*, 123 Nev. 217, 222, 163 P.3d 420,424 (2007).

11 **B. Analysis**

12 Defendant presents several distinct arguments in support of its Motion for Judgment as a
13 Matter of Law. These are: (1) there was insufficient evidence presented at trial for a finding that
14 Defendant owed Plaintiff a duty of care; (2) the testimony of Dr. Tingey and Dr. Dunn was
15 improper and prejudiced Defendant; and (3) Plaintiff had a burden to apportion the amount of
16 damages attributable to Defendant and those attributable to prior injuries, but failed to do so.
17 Defendant also argues, in the alternative, that even if it is not entitled to judgment as a matter of
18 law, it is entitled under NRCP 59 to a new trial or remittitur because the jury's award of future
19 pain and suffering was unsupported, Plaintiff posed improper questions to Defendant's
20 witnesses, and Plaintiff's counsel made prejudicial comments to the jury. Each of these
21 arguments will be addressed in turn.

22 *1. Whether there was sufficient evidence produced at trial such that a reasonable*
23 *jury could find that Defendant had notice of the foreign substance on the floor.*

24 The law concerning negligence in relation to a foreign substance on the floor is, in some
25 respects, well settled. Where the business owner or its agent caused the substance to be on the
26 floor, liability will lie, as a foreign substance on the floor is not consistent with reasonable care.
27 However, where the business owner or his agent did not cause the foreign substance to be on the
28 floor, a plaintiff must prove actual or constructive knowledge of the floor's condition, and a

1 failure to remedy it. *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322-323
2 (1993). As stated above, O'Connell produced no evidence that Wynn caused the substance to be
3 on the floor, or that it had actual notice. Thus, the question at issue here was whether sufficient
4 evidence was presented for a jury to find that Wynn was on constructive notice of the spill.

5 Whether a business owner was under constructive notice of the hazardous condition is a
6 question of fact properly left for the jury, *id.*, but this does not relieve the plaintiff from having to
7 admit evidence at trial of constructive notice. In *Sprague*, the Supreme Court noted that "a
8 reasonable jury could have determined that the virtually continual debris on the produce
9 department floor put Lucky on constructive notice that, at any time, a hazardous condition might
10 exist which would result in injury to Lucky customers." *Id.* at 251, 849 P.2d at 323. Nevada case
11 law has caused some confusion in differentiating between constructive notice and the "mode of
12 operation approach," the latter of which is specifically discussed in cases decided subsequent to
13 *Sprague*. The fact that there is a difference is made clear in *FGA v. Giglio*, 128 Nev. Adv. Op.
14 26, 278 P.3d 490, 497 (2012), where the court noted that the *Sprague* court had implicitly
15 adopted the mode of operation approach when it "stated that **even in the absence of**
16 **constructive notice**, 'a jury could conclude that Lucky should have recognized the impossibility
17 of keeping the produce section clean by sweeping' alone." (emphasis added). With the mode of
18 operation approach, **which is not applicable in this case**, a plaintiff satisfies the notice
19 requirement (actual or constructive) by establishing that an injury was attributable to a
20 reasonably foreseeable dangerous condition on the owner's premises that is related to the
21 owner's self-service mode of operation.¹

22 While evidence of a continuous or recurring condition might amount to constructive
23 notice under *Sprague*, *supra*, and *Ford v. Southern Hills Medical Center*, 2011 WL 6171790
24 (Nev. 2011), that is not the only way of proving constructive notice.² Proof that a foreign
25

26 ¹ No argument was made that the condition was the result of self-service, nor was the jury
27 instructed on this inapplicable area of the law.

28 ² *Ford* stated that "the standard under *Sprague* to prove constructive notice is a virtually
continuous condition." Of course, *Sprague* does not actually say that—*Sprague* did not establish
a bright line test for what will establish constructive notice, since to have done so would amount

1 substance on the floor had existed for such a length of time that the proprietor in the exercise of
2 ordinary care should have known of it, is another way of proving constructive notice. What
3 would amount to sufficient time to warrant holding that the proprietor had constructive notice
4 generally depends on the circumstances of the particular case and involves consideration of the
5 nature of the danger, the number of persons likely to be affected by it, the diligence required to
6 discover or prevent it, opportunity and means of knowledge, the foresight which a person of
7 ordinary care and prudence would be expected to exercise under the circumstances, and the
8 foreseeable consequence of the conditions. *See* 61 A.L.R.2d 6 §7(b).

9 Moreover, Nevada has made clear that an innkeeper may be found on constructive notice
10 of latent defects upon their premises if a reasonable inspection would have revealed such a
11 danger. *See Twardowski v. Westward Ho Motels, Inc.*, 86 Nev. 784, 476 P.2d 946 (1970). In
12 *Twardowski*, the court held that if a reasonable inspection of its pool slide would have revealed
13 the defective handrails, the Westward Ho would be charged with constructive notice of the latent
14 defect, but that whether the defect would have been discovered by a reasonable inspection was a
15 jury question. The court further noted that “[c]onstructive knowledge of a latent defect can be
16 established by circumstantial evidence.” *Id.* at 788, 476 P.2d at 948. The over-arching theme of
17 a negligence case has been, and is, foreseeability.

18 [T]here is no liability for harm resulting from conditions from which no
19 unreasonable risk was to be anticipated, or those which the occupier did
20 not know and could not have discovered with reasonable care. The mere
21 existence of a defect or danger is not enough to establish liability, unless it
22 is shown to be of such a character or of such a duration that the jury may
23 reasonably conclude that due care would have discovered it.

24 Prosser, *Law of Torts* 393 (4th ed. 1980). Whether reasonable care has been exercised is almost
25 always a jury question, as was made clear by the Nevada Supreme Court in *Foster v. Costco*
26 *Wholesale Corp.*, 128 Nev. Adv. Op. 71, 291 P.3d 150 (2012). Abrogating the holding in

27
28 to an extreme departure from the common law on this subject, including Nevada’s own case law,
and *Ford*, as an unpublished opinion, is not binding precedent upon this Court.

1 *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 370 P.2d 682 (1962), the Nevada Supreme Court
2 adopted the position of the Restatement (Third) of Torts concerning the duty of a landowner.
3 "Thus, under the Restatement (Third), landowners bear a general duty of reasonable care to all
4 entrants. . . . The 'duty issue must be analyzed with regard to foreseeability and gravity of harm,
5 and the feasibility and availability of alternative conduct that would have prevented the harm."
6 *Foster*, 291 P.3d at 156 (citations omitted).

7 Here, during O'Connell's case in chief, Yanet Elias, whose job was that of an assistant
8 manager in the public areas department at Wynn, testified that, "It's very difficult to maintain the
9 casino, you know, completely clean, because it's a job for 24 hours. There are people -- a lot of
10 people walking through, a lot of children, they're carrying things. So, it's impossible to keep it
11 clean at 100 percent." TT Vol. 3 at 70:22-71:1. Additionally, Ms. Elias testified that she did not
12 know when the area where O'Connell fell had last been inspected prior to her fall, and when
13 asked about how often the area is checked, she testified, "It depends on how long it takes the
14 employee to check the north area and return to the south area, because it's all considered one --
15 one whole area. And there aren't always two employees assigned to that area. Sometimes,
16 there's only one." TT Vol. 3 at 69:5-11. While she repeatedly answered questions posed by both
17 counsel by stating that she did not recall, Ms. Elias was also repeatedly impeached with her
18 earlier deposition testimony. At one point she admitted that one of the signs that a porter is not
19 doing their job is that there is debris on the floor. *Id.* at 70:3-6)

20 O'Connell also called Corey Prowell in her case in chief, Wynn's assistant security
21 manager who at the time of the incident was a security report writer. Mr. Prowell responded to
22 the subject incident and eventually wrote a report. He described the scene of the fall as a high
23 traffic area with marble flooring and indicated that upon his arrival, he was told by Ms. Elias that
24 the liquid on the floor had already been cleaned up, and that he was told by another employee
25 that the employee had seen O'Connell being helped up by four other guests. He also testified
26 that O'Connell told him that when she had recovered from her fall, she saw a green liquid on the
27 floor. During her testimony at trial, O'Connell described the "spill" as "at least seven feet" with
28 one side measuring about four feet still in a liquid state, and a three foot portion as "almost dry,"

1 "a little sticky" with "footprints on it." TT, Vol. 3 at 59:19-24. She described the liquid as
2 having "just a hint of green," TT, Vol. 3 at 59:12, and elaborating about the footprints she said:

3 They looked like, you know, they were – they looked like mine that I was
4 making, and I'm sure they were from the people that were standing around
5 and helped me up . . . [k]ind of like dirty footprints that you leave after
6 you've mopped your floor and you step on it, you walk on it, that's kind of
7 how it looked.

8 TT, Vol. 3 at 62:19 – 63:2.

9 Wynn argues that "the record is completely devoid of any evidence regarding the length
10 of time the foreign substance had been on the floor." Mot. at 15-17. While it is true that
11 O'Connell could not testify as to how long the substance had been on the floor, she did testify
12 that a three-foot section of the seven-foot spill was already dry and drying. While the defense
13 seems to suggest that expert testimony would be required, presumably to testify as to the relative
14 humidity within the casino and its relation to the rate of evaporation, common experience would
15 allow a jury to infer that the spill had been in place longer than just a few minutes. As pointed
16 out by O'Connell's Opposition, there was ample other evidence from which the jury could have
17 found that Wynn had constructive notice of the substance of the floor. Opp. at 11-13. This
18 evidence includes: (1) testimony that the atrium where the substance was located was highly
19 trafficked; (2) testimony that it is impossible for Wynn's employees to keep the casino floor
20 entirely clean; and (3) testimony that Defendant Wynn had no floor inspection schedule, did not
21 maintain inspection logs, and could not say with certainty when the floor was last inspected prior
22 to O'Connell's injury. This testimony was elicited from Defendant Wynn's own employees.

23 "A non-moving party can defeat a motion for judgment as a matter of law if it present[s]
24 sufficient evidence such that the jury could grant relief to that party." *D&D Tire, Inc. v.*
25 *Ouellette*, 131 Nev. Adv. Op. 47, 352 P.3d 32, 35 (2015) (internal quotations and citations
26 omitted). All of the aforementioned testimony, taken together and drawing all reasonable
27 inferences in favor of the Plaintiff was sufficient to establish that Wynn was on constructive
28 notice of the dangerous condition upon its floor.

1 2. *Whether the testimony of Dr. Tingey and Dr. Dunn was improper*

2 Wynn next makes the argument that the testimony of O'Connell's experts, Dr. Tingey
3 and Dr. Dunn, was improper. Mot. at 19-21. Wynn first argues that the Court improperly
4 admitted their testimony because O'Connell disclosed them as expert witnesses beyond the
5 disclosure deadline. Mot. at 18-19. Wynn argues that its rebuttal expert was unable to review
6 their records and incorporate them into his report. Mot. at 18. However, late production was
7 substantially justified under NRCP 37(c) because O'Connell continued to treat after the close of
8 discovery, treatment records were provided to O'Connell's counsel after the close of discovery,
9 and were provided to Defense counsel soon after their receipt, and because O'Connell had to
10 change treating physicians after Dr. Martin had left the practice. The late disclosed records were
11 only a few pages, the Court permitted the defense to voir dire the doctors outside the presence of
12 the jury before they testified in the presence of the jury, and the Court allowed Wynn's rebuttal
13 expert to sit in the courtroom and listen to the testimony of both Dr. Tingey and Dr. Dunn,
14 allowing him to incorporate his opinions on direct examination. Hence, Wynn was not
15 prejudiced by any late disclosure on O'Connell's part.

16 Wynn also argues that both doctors lacked a sufficient basis for their opinions because
17 they were only based upon Plaintiff's self-reporting. Mot. at 19. In support, Wynn cites to the
18 federal case of *Perkins v. United States*, 626 F. Supp. 2d 587 (E.D. Va. 2009). Notwithstanding
19 the fact that *Perkins* is a federal case,³ it is not on point to the facts here. In *Perkins*, the court
20 found that expert testimony as to medical causation should be excluded because the expert's
21 opinion was based *solely* on the patient's self-reporting – that the expert had merely adopted the
22 patient's explanation *as his own opinion*. *Id.* at 592-593. Here, however, O'Connell's self-
23 reporting did not appear to be the *sole* basis of her experts' testimony. Both doctors testified as to
24 the basis of their opinions, which included not only evaluation of the O'Connell's medical
25 history but also their examination of her, their review of her diagnostic medical tests, and their

26 _____
27 ³ Although not addressed here, this could be significant because Nevada courts do not follow the
28 same procedure for determining whether expert testimony should be allowed as do federal courts
(i.e., Nevada has not adopted the *Daubert* standard).

1 experience in treating orthopedic conditions and the conditions that would result from a slip and
2 fall. There is simply no indication that O'Connell's experts wholly adopted her self-reporting as
3 the sole basis for their opinions as to causation. Moreover, Dr. Tingey was candid in his opinion
4 that he would not attribute all of O'Connell's knee problems to the subject fall because the MRI
5 indicated a degenerative disease process in the left knee as opposed to the right knee.

6 3. *Whether there is legal basis for a finding that Plaintiff bears a burden to*
7 *apportion damages between pre-existing conditions and the harm caused by*
8 *Defendant*

9 Wynn next argues that O'Connell had the burden of apportioning her damages between
10 pre-existing injuries and those injuries caused by her slip and fall at the Wynn but failed to do so.
11 Mot. at 21-25. This is a familiarly incorrect argument (and, indeed, was raised and rejected
12 during trial for the same reasons as it is now) because the legal premises upon which it rests are
13 infirm. The main cause of confusion in this and other cases is the federal case of *Schwartz v.*
14 *State Farm Mut. Auto. Ins. Co.*, 2009 WL 2197370 (D. Nev. July 22, 2009).

15 In that case, Judge Dawson did indeed hold that "[i]n a case where a plaintiff has a pre-
16 existing condition, and later sustains an injury to that area, the Plaintiff bears the burden of
17 apportioning the injuries, treatment and damages between the pre-existing condition and the
18 subsequent accident." *Id.* at *6. However, the cases cited as precedent by Judge Dawson for that
19 statement do not support that assertion. *Kleitv. Raskin*, 103 Nev. 325, 738 P.2d 508 (1987)
20 involved apportioning damages between injuries caused by successive tortfeasors, not
21 apportioning damages between pre-existing conditions and injuries caused by a sole tortfeasor.

22 Judge Dawson also cited the Washington Court of Appeals case of *Phennah v. Whalen*,
23 621 P.2d 1304 (Wash. App. 1980), but that also involved apportioning damages between
24 successive tortfeasors. The Restatement (Second) of Torts § 433(b), also relied upon, doesn't
25 even concern successive tortfeasors on its face but rather concerns the "substantial factor" test
26 for determining proximate cause. Here, we do not have successive tortfeasors. Rather, we have a
27 Plaintiff who, admittedly, had various pre-existing mental and physical conditions. Therefore,
28 the *Schwartz* case is in error and is inapplicable to this case. Wynn took ~~the~~ O'Connell as it

1 found her and is liable for the full extent of her injuries, notwithstanding her pre-existing
2 conditions. See *Murphy v. Southern Pac. Co.*, 31 Nev. 120, 101 P. 322 (1909).

3 4. *Whether the Defendant is entitled to a new trial or remittitur.*

4 In *Canterino v. The Mirage Casino-Hotel*, 117 Nev. 19, 24, 16 P.3d 415, 418 (2001),
5 *opinion reinstated on reh'g* (Oct. 2, 2001), *opinion modified on reh'g sub nom, Canterino v.*
6 *Mirage Casino-Hotel*, 118 Nev. 191, 42 P.3d 808 (2002), the Supreme Court addressed the issue
7 of when a trial court may grant a new trial or issue a conditional order of remittitur reducing an
8 award of damages by a jury. The court stated:

9 This court has held that damages for pain and suffering are
10 peculiarly within the province of the jury. In *Stackiewicz v. Nissan*
11 *Motor Corporation*, 100 Nev. 443, 454, 686 P.2d 925, 932 (1984),
12 this court stated that the trial court cannot revisit a jury's damage
13 award unless it is "flagrantly improper." "In actions for damages in
14 which the law provides no legal rule of measurement it is the special
15 province of the jury to determine the amount that ought to be
16 allowed, so that a court is not justified in reversing the case or
17 granting a new trial on the ground that the verdict is excessive,
18 unless it is so flagrantly improper as to indicate passion, prejudice or
19 corruption in the jury.... The elements of pain and suffering are
20 wholly subjective. It can hardly be denied that, because of their very
21 nature, a determination of their monetary compensation falls
22 peculiarly within the province of the jury.... We may not invade the
23 province of the fact-finder by arbitrarily substituting a monetary
24 judgment in a specific sum felt to be more suitable." *Stackiewicz*,
25 100 Nev. at 454-55, 686 P.2d at 932 (quotations and citations
26 omitted). The mere fact that a verdict is large is not conclusive that
27 it is the result of passion or prejudice. *Id.* (citing *Beccard v. Nevada*
28 *National Bank*, 99 Nev. 63, 66 n. 3, 657 P.2d 1154, 1156 n. 3
(1983)).

22 Here, it must be noted that O'Connell was prevented from presenting evidence of her
23 medical special damages due to discovery and evidentiary issues. Thus, she sought only pain
24 and suffering damages. She testified that she had been suffering with her knee and her neck and
25 back since the fall five years earlier and could no longer engage in the activities that she could
26 prior to the fall, including the swing dancing she had done regularly before the accident. This
27 testimony was corroborated by her former boyfriend and dance partner. She often described her
28 pain throughout her medical records as 10 out of 10. While the defense may have thought that

1 this testimony would be unbelievable to a jury, it was nonetheless the jury's choice to believe it.
2 Additionally, Dr. Tingey testified that he had recommended surgery for O'Connell's
3 traumatically injured knee and that she would, if she chose the surgery, have post-operative pain,
4 but that typically the result after surgery would be a complete relief of the symptoms. On the
5 other hand, Dr. Dunn testified that due to O'Connell's continued complaints of pain in her neck
6 and symptoms in her arms, he recommended an anterior cervical neck discectomy and an
7 interbody 3-level fusion with placement of a plate and screws. He described this surgery as non-
8 curative, but rather taking away 50 to 60 percent of the pain which O'Connell had described as
9 terrible. While Dr. Dunn attributed the changes to O'Connell's spine to a degenerative disease
10 process, he attributed the pain, which he believed to be previously asymptomatic, to the fall –
11 describing the quintessential egg-shell plaintiff.

12 Wynn argues in the alternative to the motion for judgment as a matter of law, that a new
13 trial should be had or remittitur issued for several reasons. The first is that O'Connell failed to
14 establish future pain and suffering damages as required by Nevada law. Mot. at 25 (citing
15 *Krause, Inc. v. Little*, 117 Nev. 929, 938, 34 P.3d 566 (2001) (holding that Nevada law requires
16 that "when an injury or disability is subjective and not demonstrable" expert medical testimony
17 is required)). The basis for this argument, however, is the same as above – that Plaintiff's
18 medical experts lacked a reliable basis for their opinion and that O'Connell failed to carry her
19 burden to apportion damages between pre-existing conditions. Mot. at 26:3-7. For the same
20 reasons as outlined above, then, this argument should be rejected.

21 Wynn next argues that O'Connell was improperly allowed to question defense witnesses.
22 Specifically, Wynn points to O'Connell's counsel questioning witnesses on the lack of video
23 coverage of the incident and references in her closing arguments that Wynn controlled the
24 evidence. Mot. at 26. One of the statements cited by Wynn, on examination of Corey Prowell,
25 does not appear to have been objected to by defense counsel and so that objection is now
26 untimely.⁴ The other statements cited by Wynn were in Plaintiff's counsel's closing or rebuttal

27
28 ⁴ A complete transcript of this portion of the trial was not provided, but upon reviewing the full transcript on file, no objection appears to have been lodged following the questioning.

1 arguments. Defendant also did not object to those statements and, in any event, had the
2 opportunity to make arguments rebutting those statements in its own closing. Therefore, no
3 prejudice resulted.

4 Wynn last argues that it is entitled to a new trial because O'Connell's counsel made an
5 improper statement in rebuttal as to damages. The statement in issue is: "As jurors, you are the
6 voice of the conscience of this community." Defendant lodged a timely objection, which was
7 immediately sustained by this Court. The Court also admonished counsel for making the
8 statement and instructed the jury to disregard it. The Court stated:

9 Sustained. No, no. The jury will disregard that. Counsel, this is not a
10 punitive damage case. You may not address the – they are not to be
11 making decisions as the conscience of the community. You know that is
12 improper argument. (TT Vol. 6 at 46:12-16)

13 The problem with such a statement is that it allows the jury to punish the defendant, e.g.,
14 with punitive damages, which was not a part of Plaintiff's case here. *See Florida Crushed Stone*
15 *Co. v. Johnson*, 546 So.2d 1102, 1104 (1989).

16 The Nevada Supreme Court has made clear, however, that a new trial is warranted only
17 where "the [comment] is so extreme that the objection and admonishment could not remove the
18 [comment's] effect." *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008). This amounts to
19 an analysis of whether no other reasonable explanation could exist for the jury's verdict.
20 *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364, 212 P.3d 1068, 1079 (2009). Here, there
21 was ample evidence presented at trial, as outlined above and in Plaintiff's Opposition, to support
22 the jury verdict. Wynn's timely objection was quickly sustained and a limiting instruction was
23 given immediately. In light of the evidence presented at trial, it cannot be said that the jury's
24 verdict was so unreasonable as to make the statement prejudicial. *CF Lioce*, 124 Nev. at 17, 174
25 P.3d at 981. (finding that the trial testimony supported the jury's verdict and the district court
26 sustained the defendant's objections to misconduct, so a new trial was not warranted).

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1 Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion for Judgment as a
2 Matter of Law or Alternatively for a New Trial or Remittitur be **DENIED**.

3 DATED this 20th day of ^{May} ~~April~~, 2016.

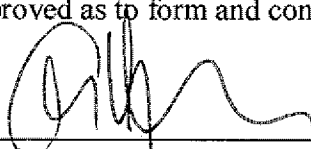
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6 DISTRICT COURT JUDGE
(JC)

7 Submitted by:

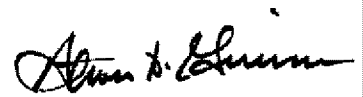
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25
26 O'Connell v. Wynn – Case No. A-12-655992-C
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28



CLERK OF THE COURT

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14 **DISTRICT COURT**
15 **CLARK COUNTY, NEVADA**

16 YVONNE O'CONNELL, an individual,
17
18 Plaintiff,

19 vs.

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

25 Defendants.

CASE NO. A-12-655992-C
DEPT NO. V

**NOTICE OF ENTRY OF
ORDER DENYING DEFENDANT'S
RENEWED MOTION FOR
JUDGMENT AS A MATTER OF LAW
OR ALTERNATIVELY FOR A NEW
TRIAL OR REMITTITUR**

26 TO: WYNN LAS VEGAS, LLC, Defendant; and

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

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1 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an *Order Denying*
2 *Defendant's Renewed Motion for Judgment as a Matter of Law or Alternatively for a New*
3 *Trial or Remittitur* was entered in the above-entitled matter on the 24th day of May, 2016, a copy
4 of which is attached hereto.

5 DATED this 25th day of May, 2016.

6 NETTLES LAW FIRM



7
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12 1389 Galleria Drive, Suite 200

13 Henderson, Nevada 89014

14 *Attorneys for Plaintiff*

15 **CERTIFICATE OF SERVICE**

16 Pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26, I certify that on this 25 day of
17 November, 2015, I served the foregoing **NOTICE OF ENTRY OF ORDER DENYING**
18 **DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR**
19 **ALTERNATIVELY FOR A NEW TRIAL OR REMITTITUR** to the following parties by
20 electronic transmission through the Wiznet system:

21 **Semenza Kircher Rickard**

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CLERK OF THE COURT

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

YVONNE O'CONNELL, an individual,

Plaintiff,

vs.

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

Defendants.

CASE NO. A-12-655992-C
DEPT NO. V

**ORDER DENYING DEFENDANT'S
RENEWED MOTION FOR
JUDGMENT AS A MATTER OF LAW
OR ALTERNATIVELY FOR A NEW
TRIAL OR REMITTITUR**

On March 4, 2016, the Court held a hearing on Defendant's Renewed Motion for Judgment as a Matter of Law or Alternatively for a New Trial or Remittitur. Christian Morris, Esq., and Edward J. Wynder, Esq., of NETTLES LAW FIRM appeared for the Plaintiff. L.J. Semenza, III, Esq., and Christopher D. Kircher., Esq., of LAWRENCE J. SEMENZA, III, P.C., appeared for the Defendant. The Court, having reviewed the pleadings and papers on file, and having heard the arguments of Counsel, and good cause appearing therefor, **HEREBY ORDERS AS FOLLOWS:**

I. FACTUAL BACKGROUND

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

1 This is a personal injury action resulting from Plaintiff's slip and fall at Defendant's
2 casino. A jury trial was held and the jury found in favor of Plaintiff on November 16, 2015. The
3 jury awarded Plaintiff \$150,000 for past pain and suffering and \$250,000 for future pain and
4 suffering, finding her to be 40% at fault. Accounting for Plaintiff's comparative fault, her total
5 award was \$240,000. Defendant (hereinafter "Wynn"), having moved for judgment under NRCP
6 50 at the close of Plaintiff's case, filed a renewed motion for judgment as a matter of law or,
7 alternatively, a motion for new trial or remittitur.

8 At trial, Plaintiff (hereinafter "O'Connell") testified that she fell after slipping on what was
9 described as a pale green, sticky, liquid substance on the floor. There was no evidence presented
10 by O'Connell that Wynn had caused the foreign substance to be on the floor. While O'Connell
11 speculated that the substance may have been water from the irrigation system in the atrium area
12 where she fell, she presented no evidence that such was the case. Rather, O'Connell called, in
13 her case in chief, an employee of Wynn who testified that she responded to the area of the fall
14 immediately after the fall and she observed a substance on the floor which had been covered by a
15 sweeper machine brought to clean up the area. She described the substance as looking "a little
16 sticky—like honey." Trial Transcript ("TT"), Vol. 3 at 71:23-72:4. On cross-examination, the
17 witness, when confronted with her previous deposition testimony, agreed that she had described
18 the liquid substance as "something like a syrup, like a drink, like something like that." *Id.* at
19 76:6-10. Additionally, O'Connell presented no evidence that Wynn had actual notice of the
20 foreign substance on the floor, and her counsel argued that it was in fact a constructive notice
21 case, not an actual notice case.

22 DISCUSSION

23 A. Legal Standards and Applicable Statutes

24 NRCP 50 provides in pertinent part:

25 (a) Judgment as a matter of law.

26 (1) If during a trial by jury, a party has been fully heard on an issue
27 and on the facts and law a party has failed to prove a sufficient
28 issue for the jury, the court may determine the issue against that

1 party and may grant a motion for judgment as a matter of law
2 against that party with respect to a claim or defense that cannot
3 under the controlling law be maintained or defeated without a
4 favorable finding on that issue.

5 (b) Renewing motion for judgment after trial; alternative motion for new
6 trial. If, for any reason, the court does not grant a motion for judgment as a
7 matter of law made at the close of all the evidence, the court is considered
8 to have submitted the action to the jury subject to the court's later deciding
9 the legal questions raised by the motion. The movant may renew its
10 request for judgment as a matter of law by filing a motion no later than 10
11 days after service of written notice of entry of judgment and may
12 alternatively request a new trial or join a motion for new trial under Rule
13 59. In ruling on a renewed motion the court may:

14 (1) if a verdict was returned:

15 (A) allow the judgment to stand,

16 (B) order a new trial, or

17 (C) direct entry of judgment as a matter of law.

18 NRCP 59(a) provides:

19 A new trial may be granted to all or any of the parties and on all or part of
20 the issues for any of the following causes or grounds materially affecting
21 the substantial rights of an aggrieved party: (1) Irregularity in the
22 proceedings of the court, jury, master, or adverse party, or any order of the
23 court, or master, or abuse of discretion by which either party was
24 prevented from having a fair trial; (2) Misconduct of the jury or prevailing
25 party; (3) Accident or surprise which ordinary prudence could not have
26 guarded against; (4) Newly discovered evidence material for the party
27 making the motion which the party could not, with reasonable diligence,
28 have discovered and produced at the trial; (5) Manifest disregard by the

1 jury of the instructions of the court; (6) Excessive damages appearing to
2 have been given under the influence of passion or prejudice; or, (7) Error
3 in law occurring at the trial and objected to by the party making the
4 motion.

5 "The standard for granting a motion for judgment as a matter of law is based on the
6 standard for granting a motion for involuntary dismissal under former NRCP 41(b). In applying
7 that standard and deciding whether to grant a motion for judgment as a matter of law, the district
8 court must view the evidence and all inferences in favor of the nonmoving party. To defeat the
9 motion, the nonmoving party must have presented sufficient evidence such that the jury could
10 grant relief to that party." *Nelson v. Heer*, 123 Nev. 217, 222, 163 P.3d 420,424 (2007).

11 **B. Analysis**

12 Defendant presents several distinct arguments in support of its Motion for Judgment as a
13 Matter of Law. These are: (1) there was insufficient evidence presented at trial for a finding that
14 Defendant owed Plaintiff a duty of care; (2) the testimony of Dr. Tingey and Dr. Dunn was
15 improper and prejudiced Defendant; and (3) Plaintiff had a burden to apportion the amount of
16 damages attributable to Defendant and those attributable to prior injuries, but failed to do so.
17 Defendant also argues, in the alternative, that even if it is not entitled to judgment as a matter of
18 law, it is entitled under NRCP 59 to a new trial or remittitur because the jury's award of future
19 pain and suffering was unsupported, Plaintiff posed improper questions to Defendant's
20 witnesses, and Plaintiff's counsel made prejudicial comments to the jury. Each of these
21 arguments will be addressed in turn.

22 *1. Whether there was sufficient evidence produced at trial such that a reasonable*
23 *jury could find that Defendant had notice of the foreign substance on the floor.*

24 The law concerning negligence in relation to a foreign substance on the floor is, in some
25 respects, well settled. Where the business owner or its agent caused the substance to be on the
26 floor, liability will lie, as a foreign substance on the floor is not consistent with reasonable care.
27 However, where the business owner or his agent did not cause the foreign substance to be on the
28 floor, a plaintiff must prove actual or constructive knowledge of the floor's condition, and a

1 failure to remedy it. *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322-323
2 (1993). As stated above, O'Connell produced no evidence that Wynn caused the substance to be
3 on the floor, or that it had actual notice. Thus, the question at issue here was whether sufficient
4 evidence was presented for a jury to find that Wynn was on constructive notice of the spill.

5 Whether a business owner was under constructive notice of the hazardous condition is a
6 question of fact properly left for the jury, *id.*, but this does not relieve the plaintiff from having to
7 admit evidence at trial of constructive notice. In *Sprague*, the Supreme Court noted that "a
8 reasonable jury could have determined that the virtually continual debris on the produce
9 department floor put Lucky on constructive notice that, at any time, a hazardous condition might
10 exist which would result in injury to Lucky customers." *Id.* at 251, 849 P.2d at 323. Nevada case
11 law has caused some confusion in differentiating between constructive notice and the "mode of
12 operation approach," the latter of which is specifically discussed in cases decided subsequent to
13 *Sprague*. The fact that there is a difference is made clear in *FGA v. Giglio*, 128 Nev. Adv. Op.
14 26, 278 P.3d 490, 497 (2012), where the court noted that the *Sprague* court had implicitly
15 adopted the mode of operation approach when it "stated that **even in the absence of**
16 **constructive notice**, 'a jury could conclude that Lucky should have recognized the impossibility
17 of keeping the produce section clean by sweeping' alone." (emphasis added). With the mode of
18 operation approach, **which is not applicable in this case**, a plaintiff satisfies the notice
19 requirement (actual or constructive) by establishing that an injury was attributable to a
20 reasonably foreseeable dangerous condition on the owner's premises that is related to the
21 owner's self-service mode of operation.¹

22 While evidence of a continuous or recurring condition might amount to constructive
23 notice under *Sprague*, *supra*, and *Ford v. Southern Hills Medical Center*, 2011 WL 6171790
24 (Nev. 2011), that is not the only way of proving constructive notice.² Proof that a foreign
25

26 ¹ No argument was made that the condition was the result of self-service, nor was the jury
27 instructed on this inapplicable area of the law.

28 ² *Ford* stated that "the standard under *Sprague* to prove constructive notice is a virtually
continuous condition." Of course, *Sprague* does not actually say that—*Sprague* did not establish
a bright line test for what will establish constructive notice, since to have done so would amount

1 substance on the floor had existed for such a length of time that the proprietor in the exercise of
2 ordinary care should have known of it, is another way of proving constructive notice. What
3 would amount to sufficient time to warrant holding that the proprietor had constructive notice
4 generally depends on the circumstances of the particular case and involves consideration of the
5 nature of the danger, the number of persons likely to be affected by it, the diligence required to
6 discover or prevent it, opportunity and means of knowledge, the foresight which a person of
7 ordinary care and prudence would be expected to exercise under the circumstances, and the
8 foreseeable consequence of the conditions. *See* 61 A.L.R.2d 6 §7(b).

9 Moreover, Nevada has made clear that an innkeeper may be found on constructive notice
10 of latent defects upon their premises if a reasonable inspection would have revealed such a
11 danger. *See Twardowski v. Westward Ho Motels, Inc.*, 86 Nev. 784, 476 P.2d 946 (1970). In
12 *Twardowski*, the court held that if a reasonable inspection of its pool slide would have revealed
13 the defective handrails, the Westward Ho would be charged with constructive notice of the latent
14 defect, but that whether the defect would have been discovered by a reasonable inspection was a
15 jury question. The court further noted that “[c]onstructive knowledge of a latent defect can be
16 established by circumstantial evidence.” *Id.* at 788, 476 P.2d at 948. The over-arching theme of
17 a negligence case has been, and is, foreseeability.

18 [T]here is no liability for harm resulting from conditions from which no
19 unreasonable risk was to be anticipated, or those which the occupier did
20 not know and could not have discovered with reasonable care. The mere
21 existence of a defect or danger is not enough to establish liability, unless it
22 is shown to be of such a character or of such a duration that the jury may
23 reasonably conclude that due care would have discovered it.

24 Prosser, *Law of Torts* 393 (4th ed. 1980). Whether reasonable care has been exercised is almost
25 always a jury question, as was made clear by the Nevada Supreme Court in *Foster v. Costco*
26 *Wholesale Corp.*, 128 Nev. Adv. Op. 71, 291 P.3d 150 (2012). Abrogating the holding in

27
28 to an extreme departure from the common law on this subject, including Nevada’s own case law,
and *Ford*, as an unpublished opinion, is not binding precedent upon this Court.

1 *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 370 P.2d 682 (1962), the Nevada Supreme Court
2 adopted the position of the Restatement (Third) of Torts concerning the duty of a landowner.
3 "Thus, under the Restatement (Third), landowners bear a general duty of reasonable care to all
4 entrants. . . . The 'duty issue must be analyzed with regard to foreseeability and gravity of harm,
5 and the feasibility and availability of alternative conduct that would have prevented the harm."
6 *Foster*, 291 P.3d at 156 (citations omitted).

7 Here, during O'Connell's case in chief, Yanet Elias, whose job was that of an assistant
8 manager in the public areas department at Wynn, testified that, "It's very difficult to maintain the
9 casino, you know, completely clean, because it's a job for 24 hours. There are people -- a lot of
10 people walking through, a lot of children, they're carrying things. So, it's impossible to keep it
11 clean at 100 percent." TT Vol. 3 at 70:22-71:1. Additionally, Ms. Elias testified that she did not
12 know when the area where O'Connell fell had last been inspected prior to her fall, and when
13 asked about how often the area is checked, she testified, "It depends on how long it takes the
14 employee to check the north area and return to the south area, because it's all considered one --
15 one whole area. And there aren't always two employees assigned to that area. Sometimes,
16 there's only one." TT Vol. 3 at 69:5-11. While she repeatedly answered questions posed by both
17 counsel by stating that she did not recall, Ms. Elias was also repeatedly impeached with her
18 earlier deposition testimony. At one point she admitted that one of the signs that a porter is not
19 doing their job is that there is debris on the floor. *Id.* at 70:3-6)

20 O'Connell also called Corey Prowell in her case in chief, Wynn's assistant security
21 manager who at the time of the incident was a security report writer. Mr. Prowell responded to
22 the subject incident and eventually wrote a report. He described the scene of the fall as a high
23 traffic area with marble flooring and indicated that upon his arrival, he was told by Ms. Elias that
24 the liquid on the floor had already been cleaned up, and that he was told by another employee
25 that the employee had seen O'Connell being helped up by four other guests. He also testified
26 that O'Connell told him that when she had recovered from her fall, she saw a green liquid on the
27 floor. During her testimony at trial, O'Connell described the "spill" as "at least seven feet" with
28 one side measuring about four feet still in a liquid state, and a three foot portion as "almost dry,"

1 “a little sticky” with “footprints on it.” TT, Vol. 3 at 59:19-24. She described the liquid as
2 having “just a hint of green,” TT, Vol. 3 at 59:12, and elaborating about the footprints she said:

3 They looked like, you know, they were – they looked like mine that I was
4 making, and I’m sure they were from the people that were standing around
5 and helped me up . . . [k]ind of like dirty footprints that you leave after
6 you’ve mopped your floor and you step on it, you walk on it, that’s kind of
7 how it looked.

8 TT, Vol. 3 at 62:19 – 63:2.

9 Wynn argues that “the record is completely devoid of any evidence regarding the length
10 of time the foreign substance had been on the floor.” Mot. at 15-17. While it is true that
11 O’Connell could not testify as to how long the substance had been on the floor, she did testify
12 that a three-foot section of the seven-foot spill was already dry and drying. While the defense
13 seems to suggest that expert testimony would be required, presumably to testify as to the relative
14 humidity within the casino and its relation to the rate of evaporation, common experience would
15 allow a jury to infer that the spill had been in place longer than just a few minutes. As pointed
16 out by O’Connell’s Opposition, there was ample other evidence from which the jury could have
17 found that Wynn had constructive notice of the substance of the floor. Opp. at 11-13. This
18 evidence includes: (1) testimony that the atrium where the substance was located was highly
19 trafficked; (2) testimony that it is impossible for Wynn’s employees to keep the casino floor
20 entirely clean; and (3) testimony that Defendant Wynn had no floor inspection schedule, did not
21 maintain inspection logs, and could not say with certainty when the floor was last inspected prior
22 to O’Connell’s injury. This testimony was elicited from Defendant Wynn’s own employees.

23 “A non-moving party can defeat a motion for judgment as a matter of law if it present[s]
24 sufficient evidence such that the jury could grant relief to that party.” *D&D Tire, Inc. v.*
25 *Ouellette*, 131 Nev. Adv. Op. 47, 352 P.3d 32, 35 (2015) (internal quotations and citations
26 omitted). All of the aforementioned testimony, taken together and drawing all reasonable
27 inferences in favor of the Plaintiff was sufficient to establish that Wynn was on constructive
28 notice of the dangerous condition upon its floor.

1 2. *Whether the testimony of Dr. Tingey and Dr. Dunn was improper*

2 Wynn next makes the argument that the testimony of O'Connell's experts, Dr. Tingey
3 and Dr. Dunn, was improper. Mot. at 19-21. Wynn first argues that the Court improperly
4 admitted their testimony because O'Connell disclosed them as expert witnesses beyond the
5 disclosure deadline. Mot. at 18-19. Wynn argues that its rebuttal expert was unable to review
6 their records and incorporate them into his report. Mot. at 18. However, late production was
7 substantially justified under NRC 37(c) because O'Connell continued to treat after the close of
8 discovery, treatment records were provided to O'Connell's counsel after the close of discovery,
9 and were provided to Defense counsel soon after their receipt, and because O'Connell had to
10 change treating physicians after Dr. Martin had left the practice. The late disclosed records were
11 only a few pages, the Court permitted the defense to voir dire the doctors outside the presence of
12 the jury before they testified in the presence of the jury, and the Court allowed Wynn's rebuttal
13 expert to sit in the courtroom and listen to the testimony of both Dr. Tingey and Dr. Dunn,
14 allowing him to incorporate his opinions on direct examination. Hence, Wynn was not
15 prejudiced by any late disclosure on O'Connell's part.

16 Wynn also argues that both doctors lacked a sufficient basis for their opinions because
17 they were only based upon Plaintiff's self-reporting. Mot. at 19. In support, Wynn cites to the
18 federal case of *Perkins v. United States*, 626 F. Supp. 2d 587 (E.D. Va. 2009). Notwithstanding
19 the fact that *Perkins* is a federal case,³ it is not on point to the facts here. In *Perkins*, the court
20 found that expert testimony as to medical causation should be excluded because the expert's
21 opinion was based *solely* on the patient's self-reporting – that the expert had merely adopted the
22 patient's explanation *as his own opinion*. *Id.* at 592-593. Here, however, O'Connell's self-
23 reporting did not appear to be the *sole* basis of her experts' testimony. Both doctors testified as to
24 the basis of their opinions, which included not only evaluation of the O'Connell's medical
25 history but also their examination of her, their review of her diagnostic medical tests, and their

26 _____
27 ³ Although not addressed here, this could be significant because Nevada courts do not follow the
28 same procedure for determining whether expert testimony should be allowed as do federal courts
(i.e., Nevada has not adopted the *Daubert* standard).

1 experience in treating orthopedic conditions and the conditions that would result from a slip and
2 fall. There is simply no indication that O'Connell's experts wholly adopted her self-reporting as
3 the sole basis for their opinions as to causation. Moreover, Dr. Tingey was candid in his opinion
4 that he would not attribute all of O'Connell's knee problems to the subject fall because the MRI
5 indicated a degenerative disease process in the left knee as opposed to the right knee.

6 3. *Whether there is legal basis for a finding that Plaintiff bears a burden to*
7 *apportion damages between pre-existing conditions and the harm caused by*
8 *Defendant*

9 Wynn next argues that O'Connell had the burden of apportioning her damages between
10 pre-existing injuries and those injuries caused by her slip and fall at the Wynn but failed to do so.
11 Mot. at 21-25. This is a familiarly incorrect argument (and, indeed, was raised and rejected
12 during trial for the same reasons as it is now) because the legal premises upon which it rests are
13 infirm. The main cause of confusion in this and other cases is the federal case of *Schwartz v.*
14 *State Farm Mut. Auto. Ins. Co.*, 2009 WL 2197370 (D. Nev. July 22, 2009).

15 In that case, Judge Dawson did indeed hold that "[i]n a case where a plaintiff has a pre-
16 existing condition, and later sustains an injury to that area, the Plaintiff bears the burden of
17 apportioning the injuries, treatment and damages between the pre-existing condition and the
18 subsequent accident." *Id.* at *6. However, the cases cited as precedent by Judge Dawson for that
19 statement do not support that assertion. *Kleitv v. Raskin*, 103 Nev. 325, 738 P.2d 508 (1987)
20 involved apportioning damages between injuries caused by successive tortfeasors, not
21 apportioning damages between pre-existing conditions and injuries caused by a sole tortfeasor.

22 Judge Dawson also cited the Washington Court of Appeals case of *Phennah v. Whalen*,
23 621 P.2d 1304 (Wash. App. 1980), but that also involved apportioning damages between
24 successive tortfeasors. The Restatement (Second) of Torts § 433(b), also relied upon, doesn't
25 even concern successive tortfeasors on its face but rather concerns the "substantial factor" test
26 for determining proximate cause. Here, we do not have successive tortfeasors. Rather, we have a
27 Plaintiff who, admittedly, had various pre-existing mental and physical conditions. Therefore,
28 the *Schwartz* case is in error and is inapplicable to this case. Wynn took ~~the~~ O'Connell as it

1 found her and is liable for the full extent of her injuries, notwithstanding her pre-existing
2 conditions. *See Murphy v. Southern Pac. Co.*, 31 Nev. 120, 101 P. 322 (1909).

3 4. *Whether the Defendant is entitled to a new trial or remittitur.*

4 In *Canterino v. The Mirage Casino-Hotel*, 117 Nev. 19, 24, 16 P.3d 415, 418 (2001),
5 *opinion reinstated on reh'g* (Oct. 2, 2001), *opinion modified on reh'g sub nom, Canterino v.*
6 *Mirage Casino-Hotel*, 118 Nev. 191, 42 P.3d 808 (2002), the Supreme Court addressed the issue
7 of when a trial court may grant a new trial or issue a conditional order of remittitur reducing an
8 award of damages by a jury. The court stated:

9 This court has held that damages for pain and suffering are
10 peculiarly within the province of the jury. In *Stackiewicz v. Nissan*
11 *Motor Corporation*, 100 Nev. 443, 454, 686 P.2d 925, 932 (1984),
12 this court stated that the trial court cannot revisit a jury's damage
13 award unless it is "flagrantly improper." "In actions for damages in
14 which the law provides no legal rule of measurement it is the special
15 province of the jury to determine the amount that ought to be
16 allowed, so that a court is not justified in reversing the case or
17 granting a new trial on the ground that the verdict is excessive,
18 unless it is so flagrantly improper as to indicate passion, prejudice or
19 corruption in the jury.... The elements of pain and suffering are
20 wholly subjective. It can hardly be denied that, because of their very
21 nature, a determination of their monetary compensation falls
22 peculiarly within the province of the jury.... We may not invade the
23 province of the fact-finder by arbitrarily substituting a monetary
24 judgment in a specific sum felt to be more suitable." *Stackiewicz*,
25 100 Nev. at 454-55, 686 P.2d at 932 (quotations and citations
26 omitted). The mere fact that a verdict is large is not conclusive that
27 it is the result of passion or prejudice. *Id.* (citing *Beccard v. Nevada*
28 *National Bank*, 99 Nev. 63, 66 n. 3, 657 P.2d 1154, 1156 n. 3
(1983)).

22 Here, it must be noted that O'Connell was prevented from presenting evidence of her
23 medical special damages due to discovery and evidentiary issues. Thus, she sought only pain
24 and suffering damages. She testified that she had been suffering with her knee and her neck and
25 back since the fall five years earlier and could no longer engage in the activities that she could
26 prior to the fall, including the swing dancing she had done regularly before the accident. This
27 testimony was corroborated by her former boyfriend and dance partner. She often described her
28 pain throughout her medical records as 10 out of 10. While the defense may have thought that

1 this testimony would be unbelievable to a jury, it was nonetheless the jury's choice to believe it.
2 Additionally, Dr. Tingey testified that he had recommended surgery for O'Connell's
3 traumatically injured knee and that she would, if she chose the surgery, have post-operative pain,
4 but that typically the result after surgery would be a complete relief of the symptoms. On the
5 other hand, Dr. Dunn testified that due to O'Connell's continued complaints of pain in her neck
6 and symptoms in her arms, he recommended an anterior cervical neck discectomy and an
7 interbody 3-level fusion with placement of a plate and screws. He described this surgery as non-
8 curative, but rather taking away 50 to 60 percent of the pain which O'Connell had described as
9 terrible. While Dr. Dunn attributed the changes to O'Connell's spine to a degenerative disease
10 process, he attributed the pain, which he believed to be previously asymptomatic, to the fall --
11 describing the quintessential egg-shell plaintiff.

12 Wynn argues in the alternative to the motion for judgment as a matter of law, that a new
13 trial should be had or remittitur issued for several reasons. The first is that O'Connell failed to
14 establish future pain and suffering damages as required by Nevada law. Mot. at 25 (citing
15 *Krause, Inc. v. Little*, 117 Nev. 929, 938, 34 P.3d 566 (2001) (holding that Nevada law requires
16 that "when an injury or disability is subjective and not demonstrable" expert medical testimony
17 is required)). The basis for this argument, however, is the same as above -- that Plaintiff's
18 medical experts lacked a reliable basis for their opinion and that O'Connell failed to carry her
19 burden to apportion damages between pre-existing conditions. Mot. at 26:3-7. For the same
20 reasons as outlined above, then, this argument should be rejected.

21 Wynn next argues that O'Connell was improperly allowed to question defense witnesses.
22 Specifically, Wynn points to O'Connell's counsel questioning witnesses on the lack of video
23 coverage of the incident and references in her closing arguments that Wynn controlled the
24 evidence. Mot. at 26. One of the statements cited by Wynn, on examination of Corey Prowell,
25 does not appear to have been objected to by defense counsel and so that objection is now
26 untimely.⁴ The other statements cited by Wynn were in Plaintiff's counsel's closing or rebuttal

27
28 ⁴ A complete transcript of this portion of the trial was not provided, but upon reviewing the full
transcript on file, no objection appears to have been lodged following the questioning.

1 arguments. Defendant also did not object to those statements and, in any event, had the
2 opportunity to make arguments rebutting those statements in its own closing. Therefore, no
3 prejudice resulted.

4 Wynn last argues that it is entitled to a new trial because O'Connell's counsel made an
5 improper statement in rebuttal as to damages. The statement in issue is: "As jurors, you are the
6 voice of the conscience of this community." Defendant lodged a timely objection, which was
7 immediately sustained by this Court. The Court also admonished counsel for making the
8 statement and instructed the jury to disregard it. The Court stated:

9 Sustained. No, no. The jury will disregard that. Counsel, this is not a
10 punitive damage case. You may not address the – they are not to be
11 making decisions as the conscience of the community. You know that is
12 improper argument. (TT Vol. 6 at 46:12-16)

13 The problem with such a statement is that it allows the jury to punish the defendant, e.g.,
14 with punitive damages, which was not a part of Plaintiff's case here. *See Florida Crushed Stone*
15 *Co. v. Johnson*, 546 So.2d 1102, 1104 (1989).


16 The Nevada Supreme Court has made clear, however, that a new trial is warranted only
17 where "the [comment] is so extreme that the objection and admonishment could not remove the
18 [comment's] effect." *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008). This amounts to
19 an analysis of whether no other reasonable explanation could exist for the jury's verdict.
20 *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364, 212 P.3d 1068, 1079 (2009). Here, there
21 was ample evidence presented at trial, as outlined above and in Plaintiff's Opposition, to support
22 the jury verdict. Wynn's timely objection was quickly sustained and a limiting instruction was
23 given immediately. In light of the evidence presented at trial, it cannot be said that the jury's
24 verdict was so unreasonable as to make the statement prejudicial. *CF Lioce*, 124 Nev. at 17, 174
25 P.3d at 981. (finding that the trial testimony supported the jury's verdict and the district court
26 sustained the defendant's objections to misconduct, so a new trial was not warranted).

NETTLES LAW FIRM


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

1 Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion for Judgment as a
2 Matter of Law or Alternatively for a New Trial or Remittitur be **DENIED**.

3 DATED this 20th day of ^{May}~~April~~, 2016.

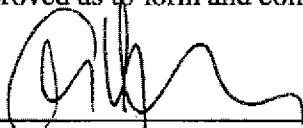
4
5 
6 DISTRICT COURT JUDGE
(JC)

7 Submitted by:

8 NETTLES LAW FIRM
9
10 

11 BRIAN D. NETTLES, ESQ.
12 Nevada Bar No. 7462
13 CHRISTIAN M. MORRIS, ESQ.
14 Nevada Bar No. 11218
15 NETTLES LAW FIRM
16 1389 Galleria Drive, Suite 200
17 Henderson, Nevada 89014
18 *Attorneys for Plaintiff*

19 Approved as to form and content:

20 
21 Lawrence J. Semenza, III, Esq.
22 Christopher D. Kircher, Esq.
23 Lawrence J. Semenza, III, P.C.
24 10161 Park Run Drive, Suite 150
25 Las Vegas, Nevada 89145
26 *Attorneys for Defendant,*
27 *Wynn Las Vegas, LLC dba*
28 *Wynn Las Vegas*

O'Connell v. Wynn – Case No. A-12-655992-C

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

December 19, 2012

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

**December 19, 2012 3:00 AM Motion to Withdraw as
Counsel**

HEARD BY: Ellsworth, Carolyn **COURTROOM:**

COURT CLERK: Denise Trujillo

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- MOTION TO WITHDRAW

As supplemental affidavit with pertinent information was filed, there being no opposition, COURT ORDERED, Motion GRANTED.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

August 07, 2015

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

August 07, 2015	9:30 AM	Motion for Protective Order	Deft's Motion for Protective Order and for OST
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HEARD BY: Bulla, Bonnie

COURTROOM: RJC Level 5 Hearing Room

COURT CLERK: Jennifer Lott

RECORDER: Francesca Haak

REPORTER:

PARTIES

PRESENT:	Kircher, Christopher D.	Attorney
	Morris, Christian	Attorney

JOURNAL ENTRIES

- Commissioner stated the 30(b)(6) Notice was not timely served. Arguments by counsel. Case involved a slip and fall in 2010, no one saw the fall, and the spill was cleaned before Security arrived (no video surveillance). Commissioner suggested a Mandatory Settlement Conference; Ms. Morris to coordinate with Dept. 30 within 30 days, then contact the Senior Judge Dept.

COMMISSIONER RECOMMENDED, motion is GRANTED but WITHOUT PREJUDICE for Pltf to move to re-open discovery to set a Rule 30(b)(6) deposition; submit a 2.35 Stipulation, or bring a Motion on OST. However, Commissioner advised counsel to try and work out the parameters, and Commissioner suggested five topic areas.

Ms. Morris to prepare the Report and Recommendations, and Mr. Kircher to approve as to form and content. A proper report must be timely submitted within 10 days of the hearing. Otherwise, counsel will pay a contribution. Ms. Morris to appear at status check hearing to report on the Report and Recommendations.

9/18/15 11:00 a.m. Status Check: Compliance

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

September 03, 2015

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

September 03, 2015 9:00 AM Settlement Conference

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- Settlement conference held, matter NOT SETTLED.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

September 17, 2015

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

**September 17, 2015 9:00 AM Motion for Summary
Judgment**

HEARD BY: Thompson, Charles **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Lara Corcoran

REPORTER:

PARTIES

PRESENT: Kircher, Christopher D. Attorney
 Morris, Christian Attorney

JOURNAL ENTRIES

- DEFT'S MOTION FOR SUMMARY JUDGMENT

Arguments by counsel. COURT ORDERED, Motion DENIED, Pltf's to prepare the order.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

September 18, 2015

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

**September 18, 2015 9:00 AM Motion Pltf's Motion to Re-
Open Discovery for
the Limited Purpose
of Taking Deft's
30(b)(6) Deposition
and for OST**

HEARD BY: Bulla, Bonnie

COURTROOM: RJC Level 5 Hearing Room

COURT CLERK: Jennifer Lott

RECORDER: Francesca Haak

REPORTER:

PARTIES

PRESENT: Kircher, Christopher D. Attorney
 Morris, Christian Attorney

JOURNAL ENTRIES

- Case is three years old, Trial date is 10/12/15, and Commissioner cannot move the Trial date. Ms. Morris stated the case will likely be tried the end of October. COMMISSIONER RECOMMENDED, motion is GRANTED within parameters for relevant topics; complete deposition by 10/2/15, or as otherwise agreed to by counsel; set deposition on five business days notice with the understanding that Defense counsel and the Deponent must be available.

COMMISSIONER RECOMMENDED, Commissioner has no problem with Topics 1, 2, 3; Topic 4 is MODIFIED to date of incident in the Wynn Atrium area; Topic 5 and 6 - 30(b)(6) addresses policies and procedures for spills in a public area; narrow and answer Topic 7; include another Topic to identify employees working on the day in question (duties, responsibilities, documents they filled out, and knowledge); everything else is PROTECTED.

COMMISSIONER RECOMMENDED, Topic 10 - individuals working in the area the day in question, job duties for this area, and checking the floor; Topic 11 is the Investigator (Ms. Morris will switch out with Topic 5); if information becomes known that was not reasonably known before, the lawyers are INSTRUCTED to raise a Trial continuance with the District Court Judge.

Ms. Morris to prepare the Report and Recommendations, and Mr. Kircher to approve as to form and content. A proper report must be timely submitted within 10 days of the hearing. Otherwise, counsel will pay a contribution. Ms. Morris to appear at status check hearing to report on the Report and Recommendations.

10/16/15 11:00 a.m. Status Check: Compliance

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

October 01, 2015

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

October 01, 2015 9:00 AM All Pending Motions

HEARD BY: Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Debbie Winn

REPORTER:

PARTIES

PRESENT: Kircher, Christopher D. Attorney
 Morris, Christian Attorney
 Semenza, Lawrence, III Attorney

JOURNAL ENTRIES

- PLTF'S OMNIBUS MTNS IN LIMINE...DEFT'S MTN IN LIMINE #1 TO EXCLUDE PURPORTED EXPERT GARY PRESSWOOD...DEFT'S MTN IN LIMINE #2 TO EXCLUDE UNRELATED MEDICAL CONDITIONS & DAMAGES CLAIMED BY PLTFF...DEFT'S MTN IN LIMINE #3 TO EXCLUDE ANY REFERENCE OR TESTIMONY OF DEFT'S ALLEGED FAILURE TO PRESERVE EVIDENCE...CALENDAR CALL

After arguments of counsel, COURT ORDERED, Pltf's Omnibus Motion rulings are as follows:

1. Admit pleadings and discovery: DENIED, counsel can stipulate to authenticity, but that is different than admissibility.
2. Exclude argument & evidence re: 3rd party negligence: DENIED with the caveat that all arguments must be supported by evidence.
3. Preclude argument Pltf's injuries are unrelated to fall: DENIED, may argue if supported by evidence properly admitted.
4. Preclude references to prior accidents, etc.: GRANTED IN PART, to the extent of prior accident, if in a previous lawsuit she had a permanent disability, that could be relevant. FURTHER, only relevant to pre-existing complaints when met with treating physician after accident.

5. Exclude evidence & reference to Pltf's medical bills paid by insurance: GRANTED.
6. Limit defense experts opinions to their reports: If foundation is laid, Deft's will qualify their witness as an expert at time of trial, and Pltf's can object at trial if not qualified, and ORDERED, DENIED WITHOUT PREJUDICE.
7. Excluding evidence / references regarding Pltf's recovery is subject to income tax; GRANTED as no opposition.
8. Admit all properly disclosed medical records as authentic; previously DENIED.
9. Adverse inference instruction; DENIED WITHOUT PREJUDICE.

After arguments of counsel, COURT ORDERED, Deft's Motions in Limine rulings are as follows:

1. Exclude purported expert witness Gary Presswood; GRANTED.
2. Exclude unrelated medical conditions and damages claimed by Pltf.; DENIED WITHOUT PREJUDICE as to Dr. Dunn; and counsel to submit supplemental briefing as to Dr. Tingey.
3. Excluding reference or testimony as to Wynn's failure to preserve evidence; DENIED WITHOUT PREJUDICE.

FURTHER, all motions for sanctions and fees are DENIED. Counsel to submit their supplemental brief's as to Dr. Tingey no later than 10/27/15 for everything. FURTHER, trial date SET, and Motion in Limine as to Dr. Tingey reset. Counsel to call chambers after they have their settlement conference and advised Court whether or not case has resolved.

10/29/15 9 AM SUPPLEMENTAL BRIEF ON MOTION IN LIMINE

11/4/15 1:30 PM JURY TRIAL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

October 29, 2015

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

October 29, 2015 3:00 AM All Pending Motions

HEARD BY: Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER:

REPORTER:

PARTIES

PRESENT: Kircher, Christopher D. Attorney
 Morris, Christian Attorney
 Semenza, Lawrence, III Attorney

JOURNAL ENTRIES

- HEARING: SUPPLEMENTAL BRIEF ON MOTION IN LIMINE...PLTF'S EMERGENCY MOTION TO CONTINUE TRIAL

COURT reviewed pleadings and indicated she is not inclined to grant the motion as there is no basis. Arguments by counsel. COURT stated findings and ORDERED, Motion DENIED. COURT advised counsel upon reviewing file she noticed there was no jury demand filed in this case, and it was set for jury trial by a clerical error. Ms. Morris moved for Jury Trial. Arguments by counsel. COURT ORDERED, Motion GRANTED, Ms. Morris to prepare order. COURT noted there are no orders for other rulings in this case and they need to be filed immediately. Court advised she received supplemental briefing on outstanding Motions in Limine. Arguments by counsel. COURT ORDERED, Dr. Dunn WILL be allowed to testify. Arguments by counsel as to Dr. Tingy. COURT ORDERED, Dr. Tingy will be allowed to testify, however, defense counsel will be allowed to depose him on the stand in the absence of the jury. Mr. Semenza inquired if those were the only doctors counsel was going to call. Ms. Morris advised she had one more. Arguments by counsel. Ms. Morris conceded she will not call other doctor listed on her 16.1.

11/4/15 1:30 PM JURY TRIAL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

November 04, 2015

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

November 04, 2015 1:30 PM Jury Trial

HEARD BY: Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Lara Corcoran

REPORTER:

PARTIES

PRESENT:	Kircher, Christopher D.	Attorney
	Morris, Christian	Attorney
	Nettles, Brian D.	Attorney
	O'Connell, Yvonne	Plaintiff
	Rickard, Jarrod L.	Attorney
	Semenza, Lawrence, III	Attorney
	Wynn Las Vegas LLC	Defendant

JOURNAL ENTRIES

- JURY TRIAL

IN THE ABSENCE OF THE JURY VENIRE. Mr. Semenza advised there is an issue with Mr. Prowell, security officer, arising after floor has been cleaned up. Arguments by counsel. COURT advised counsel to make appropriate adjustments. As to the second issue, Mr. Semenza wants to make sure Pltf's don't go beyond damages on collection of evidence. Arguments by counsel. Court advised she wants further briefing on this issue. Counsel stipulated to joint exhibits being admitted. IN THE PRESENCE OF THE JURY VENIRE. Venire sworn, and jury selection commenced.

EVENING RECESS

CONTINUED TO: 11/5/15 11:00 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

November 05, 2015

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

November 05, 2015 11:00 AM Jury Trial

HEARD BY: Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Billie Jo Craig

RECORDER: Lara Corcoran

REPORTER:

PARTIES

PRESENT: Kircher, Christopher D. Attorney
 Morris, Christian Attorney
 O'Connell, Yvonne Plaintiff
 Semenza, Lawrence, III Attorney

JOURNAL ENTRIES

- Attorney Edward Wynder present on behalf of Plaintiff.

OUTSIDE THE PRESENCE OF THE PROSPECTIVE JURY PANEL: Ms. Morris requested Badge No. 29 Becnel be questioned further regarding her work in a law firm as she had an E-mail with her name on it regarding another Wynn case. Mr. Semenza objected to her being excused. Ms. Becnel brought in and was questioned further by Court and counsel. Arguments by counsel. Court stated its findings, and ORDERED, Badge No. 29 Becnel is EXCUSED. Ms. Morris requested Badge No. 14 Herbert be excused as he worked at the golf course. Arguments by counsel. Court stated its findings, and ORDERED, Badge No. 14 Herbert is EXCUSED. Mr. Semenza requested Badge No. 1 Torres and Badge No. 7 De Madrigal be excused due to language problems. The Court advised it did not want to consider this now but counsel can ask qualifying questions during individual voir dire.

PROSPECTIVE JURY PANEL PRESENT: Voir dire continues. OUTSIDE THE PRESENCE OF THE PROSPECTIVE JURY PANEL: Court noted more Jurors coming at 2:00 PM. Colloquy regarding scheduling of witnesses. The Court advised it would be as accommodating as possible.

PROSPECTIVE JURY PANEL PRESENT: Voir dire continues. Peremptory Challenges. The Court thanked and excused the remaining prospective Jurors in the audience. The Court thanked and excused the remaining prospective Jurors. Jury chosen. EVENING RECESS. OUTSIDE THE PRESENCE OF THE JURY: Court noted it would swear in the Jury on Monday.

CONTINUED TO: 11/9/15 1:30 PM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

November 09, 2015

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

November 09, 2015 1:30 PM Jury Trial

HEARD BY: Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Lara Corcoran

REPORTER:

PARTIES

PRESENT: Morris, Christian Attorney
 Nettles, Brian D. Attorney
 Rickard, Jarrod L. Attorney
 Semenza, Lawrence, III Attorney

JOURNAL ENTRIES

- JURY TRIAL

IN THE PRESENCE OF THE JURY PANEL. Jurors sworn. Court instructed jury as to trial procedure. Opening statements by counsel. Testimony and exhibits per worksheets. IN THE ABSENCE OF THE JURY. Arguments by counsel regarding whether Dr. Dunn will be testifying to future medical procedures. Court noted it does not appear that Pltf's intend to ask that question. IN THE PRESENCE OF THE JURY. Testimony and exhibits continued. IN THE ABSENCE OF THE JURY. Dr. Dunn sworn and testified in the absence of the jury. Arguments by counsel. COURT believes testimony has been limited to what in his own charges that he reviewed. Further arguments. COURT will allow Dr. Dunn to go on what he knows and how he knows it. IN THE PRESENCE OF THE JURY. Testimony and exhibits continued.

EVENING RECESS

11/10/15 8:30 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

November 10, 2015

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

November 10, 2015 8:30 AM Jury Trial

HEARD BY: Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Lara Corcoran

REPORTER:

PARTIES

PRESENT:	Morris, Christian	Attorney
	Nettles, Brian D.	Attorney
	O'Connell, Yvonne	Plaintiff
	Rickard, Jarrod L.	Attorney
	Semenza, Lawrence, III	Attorney
	Wynn Las Vegas LLC	Defendant

JOURNAL ENTRIES

- JURY TRIAL

IN THE PRESENCE OF THE JURY. Testimony and exhibits per worksheets. IN THE ABSENCE OF THE JURY. Dr. Tingy sworn and testified in the absence of the jury. Mr. Semenza stated there are a whole bunch of medical records that were not provided and objects to Dr. Tingey testifying. Arguments by counsel. COURT will allow him to testify as to his own opinions based on files, is evaluation and history provided by Pltf. IN THE PRESENCE OF THE JURY. Testimony and exhibits per worksheets.

EVENING RECESS

CONTINUED TO: 11/12/15 8:30 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

November 12, 2015

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

November 12, 2015 8:30 AM Jury Trial

HEARD BY: Ellsworth, Carolyn

COURTROOM: RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Lara Corcoran

REPORTER:

PARTIES

PRESENT:	Morris, Christian	Attorney
	Nettles, Brian D.	Attorney
	O'Connell, Yvonne	Plaintiff
	Rickard, Jarrod L.	Attorney
	Semenza, Lawrence, III	Attorney

JOURNAL ENTRIES

- JURY TRIAL

IN THE ABSENCE OF THE JURY. Court advised counsel, that juror #6 called this morning and she has a family emergency, and noted she will put alternate #1 in juror #6's place. IN THE PRESENCE OF THE JURY. Alternate juror #1 sworn. Testimony and exhibits per worksheets. Pltf. rested. IN THE ABSENCE OF THE JURY. Mr. Semenza requested directed verdict as to liability. Arguments by counsel. COURT stated findings and ORDERED, Motion DENIED and advised counsel he can re-new motion in writing within 10 days after verdict, with full briefing. Mr. Semenza advised that jury should be instructed they can not consider the testimony of either doctor and provided Court with bench briefs. Court advised she will read these but believes this is better handled with jury instructions. IN THE PRESENCE OF THE JURY. Testimony resumed. IN THE ABSENCE OF THE JURY. COURT advised she read briefs offered by counsel, state findings, and ORDERED, Motion DENIED. IN THE PRESENCE OF THE JURY. Testimony and exhibits resumed. JURY EXCUSED for the evening.

EVENING RECESS

CONTINUED TO: 11/13/15 9:00 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

November 13, 2015

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

November 13, 2015 8:30 AM Jury Trial

HEARD BY: Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Andrea Natali

RECORDER: Lara Corcoran

REPORTER:

PARTIES

PRESENT:	Kircher, Christopher D.	Attorney
	Morris, Christian	Attorney
	O'Connell, Yvonne	Plaintiff
	Semenza, Lawrence, III	Attorney

JOURNAL ENTRIES

- APPEARANCES CONTINUED: Edward Wynder, Esq. present on behalf of the Plaintiff. Kristen Steinbach, Representative for Wynn Las Vegas LLC, present.

OUTSIDE THE PRESENCE OF THE JURY: Jury instructions settled off the record. Arguments by counsel as to the relevance of Jury Instructions 27, 32, and 37. COURT stated FINDINGS as to relevance of the Jury Instructions.

IN THE PRESENCE OF THE JURY: Court read the jury instructions. Ms. Morris presented closing arguments on behalf of Plaintiff; Mr. Semenza presented closing arguments on behalf of Defendant. Marshal and Law Clerk Sworn to take charge of the Jury and the Alternate. Jury retired at the hour of 3:39 P.M. to begin deliberations. COURT ORDERED, trial CONTINUED for Jury Deliberations. Jury instructed to return Monday at the given time.

CONTINUED TO: 11/16/15 9:00 A.M.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

November 16, 2015

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

November 16, 2015 9:00 AM Jury Trial

HEARD BY: Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Lara Corcoran

REPORTER:

PARTIES

PRESENT:	Kircher, Christopher D.	Attorney
	Morris, Christian	Attorney
	Nettles, Brian D.	Attorney
	O'Connell, Yvonne	Plaintiff
	Semenza, Lawrence, III	Attorney

JOURNAL ENTRIES

- JURY TRIAL

At 9 AM, this date, jury returned for continued deliberations. At 9:45 juror #3 gave note to the Marshal during break. All counsel present. Court advised that juror stated they are concerned about the cord on the floor in the courtroom. Juror #3, present with Court and counsel, in the absence of the remaining jurors. Upon Court's inquiry, Juror #3 explained he was afraid someone was going to trip on the cord. Conference at the bench. Jury returned to deliberations, including juror #3. Counsel advised they have no objection to juror remaining on the jury. At 12:10 PM this date, jury returned with a verdict. Court reviewed verdict. Conference at the bench. COURT advised jury that they did not completely fill out the verdict, and sent jury back to deliberations. AT 12:15 PM this date, jury returned with a verdict in FAVOR of Pltf. and AGAINST the Deft. COURT thanked and excused the jury.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

March 04, 2016

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

March 04, 2016 8:30 AM All Pending Motions

HEARD BY: Ellsworth, Carolyn COURTROOM: RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Lara Corcoran

REPORTER:

PARTIES

PRESENT:	Kircher, Christopher D.	Attorney
	Morris, Christian	Attorney
	Semenza, Lawrence, III	Attorney
	Wynder, Edward J.	Attorney

JOURNAL ENTRIES

- PLTF'S AMENDED APPLICATION FOR FEES, COSTS & PRE-JUDGMENT INTEREST - AMENDED & RESUBMITTED AS PLTF'S MTN TO TAX COSTS & FOR FEES AND POST-JUDGMENT INTEREST...DEFT. WYNN LAS VEGAS, LLC'S RENEWED MTN FOR JUDGMENT AS A MATTER OF LAW, OR, ALTERNATIVELY MTN FOR NEW TRIAL OR REMITTITUR

Prior to hearing, counsel provided following tentative as to Deft's Motion as follows: This is a personal injury action resulting from Pltf. s slip and fall at Deft. s casino. A jury trial was held and the jury found in favor of Pltf. on November 16, 2015. The jury awarded Pltf. \$150,000 for past pain and suffering and \$250,000 for future pain and suffering, finding her to be 40% at fault. Accounting for Pltf. s comparative fault, her total award was \$240,000. Deft. (hereinafter Wynn), having moved for judgment under NRCP 50 at the close of Pltf. s case, filed a renewed motion for judgment as a matter of law or, alternatively, a motion for new trial or remittitur. At trial, Pltf. (hereinafter O Connell) testified that she fell after slipping on what was described as a pale green, sticky, liquid substance on the floor. There was no evidence presented by O Connell that Wynn had caused the foreign substance to be on the floor. While O Connell speculated that the substance may have been

water from the irrigation system in the atrium area where she fell, she presented no evidence that such was the case. Rather, O Connell called, in her case in chief, an employee of Wynn who testified that she responded to the area of the fall immediately after the fall and she observed a substance on the floor which had been covered by a sweeper machine brought to clean up the area. She described the substance as looking a little sticky like honey. Trial Transcript (TT), Vol. 3 at 71:23-72:4. On cross-examination, the witness, when confronted with her previous deposition testimony, agreed that she had described the liquid substance as something like a syrup, like a drink, like something like that. Id. at 76:6-10. Additionally, O Connell presented no evidence that Wynn had actual notice of the foreign substance on the floor, and her counsel argued that it was in fact a constructive notice case, not an actual notice case.

A. Legal Standards and Applicable Statutes

NRCP 50 provides in pertinent part:

(a) Judgment as a matter of law.

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

(b) Renewing motion for judgment after trial; alternative motion for new trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after service of written notice of entry of judgment and may alternatively request a new trial or join a motion for new trial under Rule 59. In ruling on a renewed motion the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law.

NRCP 59(a) provides: A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1) Irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial; (2) Misconduct of the jury or prevailing party; (3) Accident or surprise which ordinary prudence could not have guarded against; (4) Newly discovered evidence material for the party making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial; (5) Manifest disregard by the jury of the instructions of the court; (6) Excessive damages appearing to have been given under the influence of passion or prejudice; or, (7) Error in law occurring at the trial and objected to by the party making the motion. The standard for granting a motion for judgment as a matter of law is based on the standard for granting a motion for involuntary dismissal under former NRCP 41(b). In applying that standard and deciding whether to grant a motion for judgment as a matter of law, the district court must view the evidence and all inferences in favor of the nonmoving party. To defeat the motion, the nonmoving party must have

presented sufficient evidence such that the jury could grant relief to that party. *Nelson v. Heer*, 123 Nev. 217, 222, 163 P.3d 420,424 (2007). Deft. presents several distinct arguments in support of its Motion for Judgment as a Matter of Law. These are: (1) there was insufficient evidence presented at trial for a finding that Deft. owed Pltf. a duty of care; (2) the testimony of Dr. Tingey and Dr. Dunn was improper and prejudiced Deft. ; and (3) Pltf. had a burden to apportion the amount of damages attributable to Deft. and those attributable to prior injuries, but failed to do so. Deft. also argues, in the alternative, that even if it is not entitled to judgment as a matter of law, it is entitled under NRCP 59 to a new trial or remittitur because the jury's award of future pain and suffering was unsupported, Pltf. posed improper questions to Deft.'s witnesses, and Pltf.'s counsel made prejudicial comments to the jury. Each of these will be addressed in turn.

1. Whether there was sufficient evidence produced at trial such that a reasonable jury could find that Deft. had notice of the foreign substance on the floor.

The law concerning negligence in relation to a foreign substance on the floor is, in some respects, well settled. Where the business owner or its agent caused the substance to be on the floor, liability will lie, as a foreign substance on the floor is not consistent with reasonable care. However where the business owner or his agent did not cause the foreign substance to be on the floor, a Pltf. must prove actual or constructive knowledge of the floor's condition, and a failure to remedy it. *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322-323 (1993). As stated above, O Connell produced no evidence that the Wynn caused the substance to be on the floor, or that it had actual notice. Thus, the question remains as to whether sufficient evidence was presented for a jury to find that Wynn was on constructive notice of the spill. Whether a business owner was under constructive notice of the hazardous condition is a question of fact properly left for the jury, *Sprague, id.*, but this does not relieve the Pltf. from having to admit evidence at trial of constructive notice. In *Sprague*, the Supreme Court noted that a reasonable jury could have determined that the virtually continual debris on the produce department floor put Lucky on constructive notice that, at any time, a hazardous condition might exist which would result in injury to Lucky customers. *Id.*, 109 Nev. at 251, 849 P.2d at 323. Nevada case law has caused some confusion in differentiating between constructive notice and the mode of operation approach, the latter of which is specifically discussed in cases decided subsequent to *Sprague*. The fact that there is a difference is made clear in *FGA v. Giglio*, 128 Nev. Adv. Op. 26, 278 P.3d 490, 497 (2012), where the court noted that the *Sprague* court had implicitly adopted the mode of operation approach when it stated that even in the absence of constructive notice, a jury could conclude that Lucky should have recognized the impossibility of keeping the produce section clean by sweeping alone. (emphasis added). With the mode of operation approach, which is not applicable in this case, a Pltf. satisfies the notice requirement (actual or constructive) by establishing that an injury was attributable to a reasonably foreseeable dangerous condition on the owner's premises that is related to the owner's self-service mode of operation. While evidence of a continuous or recurring condition might amount to constructive notice under *Sprague, supra* and *Ford v. Southern Hills Medical Center*, 2011 WL 6171790 (Nev. 2011), that is not the only way of proving constructive notice. 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. What would amount to sufficient time to warrant holding that the proprietor had constructive notice generally depends on the circumstances of the particular case and involves consideration of the nature of the danger, the

number of persons likely to be affected by it, the diligence required to discover or prevent it, opportunity and means of knowledge, the foresight which a person of ordinary care and prudence would be expected to exercise under the circumstances, and the foreseeable consequence of the conditions. See 61 A.L.R.2d 67(b). Moreover, Nevada has made clear that an innkeeper may be found on constructive notice of latent defects upon their premises if a reasonable inspection would have revealed such a danger. See *Twardowski v. Westward Ho Motels, Inc.*, 86 Nev. 784, 476 P.2d 946 (1970). In *Twardowski*, the court held that if a reasonable inspection of its pool slide would have revealed the defective handrails, the Westward Ho would be charged with constructive notice of the latent defect, but that whether the defect would have been discovered by a reasonable inspection was a jury question. The court further noted that [c]onstructive knowledge of a latent defect can be established by circumstantial evidence. *Id.*, 86 Nev. at 788, 476 P.2d at 948. The over-arching theme of a negligence case has been, and is, foreseeability. [T]here is no liability for harm resulting from conditions from which no unreasonable risk was to be anticipated, or those which the occupier did not know and could not have discovered with reasonable care. The mere existence of a defect or danger is not enough to establish liability, unless it is shown to be of such a character or of such a duration that the jury may reasonably conclude that due care would have discovered it. *Prosser, Law of Torts* 393 (4th ed. 1980). Whether reasonable care has been exercised is almost always a jury question as was made clear by the Nevada Supreme Court in *Foster v. Costco Wholesale Corp.*, 128 Nev. Adv. Op. 71, 291 P.3d 150 (2012). Abrogating the holding in *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 370 P.2d 682 (1962), the Nevada Supreme Court adopted the position of the Restatement (Third) of Torts concerning the duty of a landowner. Thus, under the Restatement (Third), landowners bear a general duty of reasonable care to all entrants. The duty issue must be analyzed with regard to foreseeability and gravity of harm, and the feasibility and availability of alternative conduct that would have prevented the harm. *Foster*, 291 P.3d at 156 (citations omitted). Here, during O'Connell's case in chief, Yanet Elias, whose job was that of an assistant manager in the public areas department at Wynn, testified that, It's very difficult to maintain the casino, you know, completely clean, because it's a job for 24 hours. There are people a lot of people walking through, a lot of children, they're carrying things. So, it's impossible to keep it clean at 100 percent. TT Vol. 3 at 70:22-71:1. Additionally, Ms. Elias testified that she did not know when the area where O'Connell fell had last been inspected prior to her fall, and when asked about how often the area is checked, she testified, It depends on how long it takes the employee to check the north area and return to the south area, because it's all considered one one whole area. And there aren't always two employees assigned to that area. Sometimes, there's only one. TT Vol. 3 at 69:5-11. While she repeatedly answered questions posed by both counsel by stating that she did not recall, Ms. Elias was also repeatedly impeached with her earlier deposition testimony. At one point she admitted that one of the signs that a porter is not doing their job is that there is debris on the floor. *Id.* at 70:3-6) O'Connell also called Cory Prowell in her case in chief, Wynn's assistant security manager who at the time of the incident was a security report writer. Mr. Prowell responded to the subject incident and eventually wrote a report. He described the scene of the fall as a high traffic area with marble flooring and indicated that upon his arrival, he was told by Ms. Elias that the liquid on the floor had already been cleaned up, and that he was told by another employee that the employee had seen O'Connell being helped up by four other guests. He also testified that O'Connell told him that when she had recovered from her fall, she saw a green liquid on the floor. During her testimony at trial, O'Connell

described the spill as at least seven feet with one side measuring about four feet still in a liquid state, and a three foot portion as almost dry, a little sticky with footprints on it. TT Vol. 3 at 59:19-24. She described the liquid as having just a hint of green, Id. at 59:12, and elaborating about the footprints she said, They looked like, you know, they were they looked like mine that I was making, and I m sure they were from the people that were standing around and helped me up [k]ind of like dirty footprints that you leave after you ve mopped your floor and you step on it, you walk on it, that s kind of how it looked. Id. at 62:19 63:2. Wynn argues that the record is completely devoid of any evidence regarding the length of time the foreign substance had been on the floor. Mot. at 15-17. While it is true that O Connell could not testify as to how long the substance had been on the floor, she did testify that a three foot section of the 7 foot spill was already dry and drying. While the defense seems to suggest that expert testimony would be required, presumably to testify as to the relative humidity within the casino and its relation to the rate of evaporation, common experience would allow a jury to infer that the spill had been in place longer than just a few minutes. As pointed out by Pltf. s Opposition, there was ample other evidence from which the jury could have found that Wynn had constructive notice of the substance of the floor. Opp. at 11-13. This evidence includes: (1) testimony that the atrium where the substance was located was highly trafficked; (2) testimony that it is impossible for Wynn s employees to keep the casino floor entirely clean; and (3) testimony that Deft. had no floor inspection schedule, did not maintain inspection logs, and could not say with certainty when the floor was last inspected prior to Pltf. s injury. This testimony was elicited from Deft. s own employees. A non-moving party can defeat a motion for judgment as a matter of law if it present[s] sufficient evidence such that the jury could grant relief to that party. D&D Tire, Inc. v. Ouellette, 131 Nev. Adv. Op. 47, 352 P.3d 32, 35 (2015) (internal quotations and citations omitted). All of the aforementioned testimony, taken together and drawing all reasonable inferences in favor of the Pltf. was sufficient to establish that Wynn was on constructive notice of the dangerous condition upon its floor.

Whether the testimony of Dr. Tingey and Dr. Dunn was improper. Deft. next makes the argument that the testimony of Pltf. s experts, Dr. Tingey and Dr. Dunn, was improper. Mot. at 19-21. Deft. first argues that the Court improperly admitted their testimony because Pltf. disclosed them as expert witnesses beyond the disclosure deadline. Id. at 18-19. Deft. argues that its rebuttal expert was unable to review their records and incorporate them into his report. Id. at 18. However, late production was substantially justified under NRCP 37(c) because O Connell continued to treat after the close of discovery, treatment records were provided to O Connell s counsel after the close of discovery, and were provided to Defense counsel soon after their receipt, and because O Connell had to change treating physicians after Dr. Martin had left the practice. The late disclosed records were only a few pages, the Court permitted the defense to Voir dire the doctors outside the presence of the jury before they testified in the presence of the jury, and the Court allowed Deft. s rebuttal expert to sit in the courtroom and listen to the testimony of both Dr. Tingey and Dr. Dunn, allowing him to incorporate his opinions on direct examination. Hence, Deft. was not prejudiced by any late disclosure on Pltf. s part. Wynn also argues that both doctors lacked a sufficient basis for their opinions because they were only based upon Pltf. s self-reporting. Id. at 19. In support, Deft. cites to the federal case of Perkins v. United States, 626 F. Supp. 2d 587 (E.D. Va. 2009). Notwithstanding the fact that Perkins is a federal case, it is not on point to the facts here. In Perkins, the court found that expert testimony as to medical causation should be excluded because the expert s opinion was based

solely on the patient's self-reporting that the expert had merely adopted the patient's explanation as his own opinion. 626 F. Supp. 2d at 592-593. Here, however, Pltf.'s self-reporting did not appear to be the sole basis of her experts' testimony. Both doctors testified as to the basis of their opinions, which included not only evaluation of the Pltf.'s medical history but also their examination of her, their review of her diagnostic medical tests, and their experience in treating orthopedic conditions and the conditions that would result from a slip and fall. There is simply no indication that O'Connell's experts wholly adopted her self-reporting as the sole basis for their opinions as to causation. Moreover, Dr. Tingey was candid in his opinion that he would not attribute all of O'Connell's knee problems to the subject fall because the MRI indicated a degenerative disease process in the left knee as opposed to the right knee.

2. Whether there is legal basis for a finding that Pltf. bears a burden to apportion damages between pre-existing conditions and the harm caused by Deft. Deft. next argues that Pltf. had the burden of apportioning her damages between pre-existing injuries and those injuries caused by her slip and fall at the Wynn but failed to do so. Mot. at 21-25. This is a familiarly incorrect argument (and, indeed, was raised and rejected during trial for the same reasons as it is now) because the legal premises upon which it rests are infirm. The main cause of confusion in this and other cases is the federal case of *Schwartz v. State Farm Mut. Auto. Ins. Co.*, 2009 WL 2197370 (D. Nev. July 22, 2009). In that case, Judge Dawson did indeed hold that "[i]n a case where a Pltf. has a pre-existing condition, and later sustains an injury to that area, the Pltf. bears the burden of apportioning the injuries, treatment and damages between the pre-existing condition and the subsequent accident. Id. at *6. However, the cases cited as precedent by Judge Dawson for that statement do not support that assertion. *Kleitz v. Raskin*, 103 Nev. 325, 738 P.2d 508 (1987) involved apportioning damages between injuries caused by successive tortfeasor, not apportioning damages between pre-existing conditions and injuries caused by a sole tortfeasor. Judge Dawson also cited the Washington Court of Appeals case of *Phennah v. Whalen*, 621 P.2d 1304 (Wash. App. 1980), but that also involved apportioning damages between successive tortfeasor. The Restatement (Second) of Torts 433(b), also relied upon, doesn't even concern successive tortfeasor on its face but rather concerns the substantial factor test for determining proximate cause. Here, we do not have successive tortfeasor. Rather, we have a Pltf. who, admittedly, had various pre-existing mental and physical conditions. Therefore, the *Schwartz* case is in error and is inapplicable to this case. Deft. took the Pltf. as it found her and is liable for the full extent of her injuries, notwithstanding her pre-existing conditions. See *Murphy v. Southern Pac. Co.*, 31 Nev. 120, 101 P. 322 (1909).

Whether the Deft. is entitled to a new trial or remittitur.

In *Canterino v. The Mirage Casino-Hotel*, 117 Nev. 19, 24, 16 P.3d 415, 418 (2001), opinion reinstated on reh'g (Oct. 2, 2001), opinion modified on reh'g sub nom, *Canterino v. Mirage Casino-Hotel*, 118 Nev. 191, 42 P.3d 808 (2002), the Supreme Court addressed the issue of when a trial court may grant a new trial or issue a conditional order of remittitur reducing an award of damages by a jury. The court stated:

This court has held that damages for pain and suffering are peculiarly within the province of the jury. In *Stackiewicz v. Nissan Motor Corporation*, 100 Nev. 443, 454, 686 P.2d 925, 932 (1984), this court stated that the trial court cannot revisit a jury's damage award unless it is flagrantly improper. In actions for damages in which the law provides no legal rule of measurement it is the special province

of the jury to determine the amount that ought to be allowed, so that a court is not justified in reversing the case or granting a new trial on the ground that the verdict is excessive, unless it is so flagrantly improper as to indicate passion, prejudice or corruption in the jury.... The elements of pain and suffering are wholly subjective. It can hardly be denied that, because of their very nature, a determination of their monetary compensation falls peculiarly within the province of the jury.... We may not invade the province of the fact-finder by arbitrarily substituting a monetary judgment in a specific sum felt to be more suitable. *Stackiewicz*, 100 Nev. at 454 55, 686 P.2d at 932 (quotations and citations omitted). The mere fact that a verdict is large is not conclusive that it is the result of passion or prejudice. *Id.* (citing *Beccard v. Nevada National Bank*, 99 Nev. 63, 66 n. 3, 657 P.2d 1154, 1156 n. 3 (1983)). Here, it must be noted that O Connell was prevented from presenting evidence of her medical special damages due to discovery and evidentiary issues. Thus, she sought only pain and suffering damages. She testified that she had been suffering with her knee and her neck and back since the fall five years earlier and could no longer engage in the activities that she could prior to the fall, including the swing dancing she had done regularly before the accident. This testimony was corroborated by her former boyfriend and dance partner. She often described her pain throughout her medical records as 10 out of 10. While the defense may have thought that this testimony would be unbelievable to a jury, it was nonetheless the jury's choice to believe it. Additionally, Dr. Tingey testified that he had recommended surgery for O Connell's traumatically injured knee and that she would, if she chose the surgery, have post-operative pain, but that typically the result after surgery would be a complete relief of the symptoms. On the other hand, Dr. Dunn testified that due to O Connell's continued complaints of pain in her neck and symptoms in her arms, he recommended an anterior cervical neck discectomy; removal of the disc and an inter-body 3 level fusion with placement of a plate and screws. He described this surgery as non-curative, but rather taking away 50 to 60 percent of the pain which O Connell had described as terrible. While Dr. Dunn attributed the changes to O Connell's spine to a degenerative disease process, he attributed the pain, which he believed to be previously asymptomatic, to the fall describing the quintessential egg-shell Pltf. . Wynn argues in the alternative to the motion for judgment as a matter of law, that a new trial should be had or remittitur issued for several reasons. The first is that O Connell failed to establish future pain and suffering damages as required by Nevada law. Mot. at 25 (citing *Krause, Inc. v. Little*, 117 Nev. 929, 938, 34 P.3d 566 (2001) (holding that Nevada law requires that when an injury or disability is subjective and not demonstrable expert medical testimony is required)). The basis for this argument, however, is the same as above that Pltf. 's medical experts lacked a reliable basis for their opinion and that O Connell failed to carry her burden to apportion damages between pre-existing conditions. Mot. at 26:3-7. For the same reasons as outlined above, then, this argument should be rejected. Wynn next argues that O Connell was improperly allowed to question defense witnesses. Specifically, Deft. points to Pltf. 's counsel questioning witnesses on the lack of video coverage of the incident and references in her closing arguments that Wynn controlled the evidence. Mot. at 26. One of the statements cited by Wynn, on examination of Corey Prowell, does not appear to have been objected to by defense counsel and so that objection is now untimely. The other statements cited by Wynn were in Pltf. 's counsel's closing or rebuttal arguments. Deft. also did not object to those statements and, in any event, had the opportunity to make arguments rebutting those statements in its own closing. Therefore, no prejudice resulted. Wynn last argues that it is entitled to a new trial because O Connell's counsel made an improper statement in rebuttal as to damages. The statement in

issue is: As jurors, you are the voice of the conscience of this community. Deft. lodged a timely objection, which was immediately sustained by this Court. The Court also admonished counsel for making the statement and instructed the jury to disregard it. The Court stated: Sustained. No, no. The jury will disregard that. Counsel, this is not a punitive damage case. You may not address the they are not to be making decisions as the conscience of the community. You know that is improper argument. TT Vol. 6 at 46:12-16). The problem with such a statement is that it allows the jury to punish the Deft. , e.g., with punitive damages, which was not a part of Pltf. s case here. See *Florida Crushed Stone Co. v. Johnson*, 546 So.2d 1102, 1104 (1989). The Nevada Supreme Court has made clear, however, that a new trial is warranted only where the [comment] is so extreme that the objection and admonishment could not remove the misconduct's effect. *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008). This amounts to an analysis of whether no other reasonable explanation could exist for the jury s verdict. *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364, 212 P.3d 1068, 1079 (2009). Here, there was ample evidence presented at trial, as outlined above and in Pltf. s Opposition, to support the jury verdict. Deft. s timely objection was quickly sustained and a limiting instruction was given immediately. In light of the evidence presented at trial, it cannot be said that the jury s verdict was so unreasonable as to make the statement prejudicial. Cf. *Lioce*, supra (finding that the trial testimony supported the jury s verdict and the district court sustained the Deft. s objections to misconduct, so a new trial was not warranted). Based on the foregoing, then, Deft. s Motion should be denied.

Arguments by counsel. COURT stated findings and ORDERED, Motion DENIED.

As to Pltf's motion, tentative ruling submitted as follows: This is a personal injury action resulting from Pltf. s slip and fall at Deft s casino. A jury trial was held and the jury found in favor of Pltf. on November 16, 2015. The jury awarded Pltf. \$150,000 for past pain and suffering and \$250,000 for future pain and suffering, finding her to be 40% at fault. Pltf. s total award was \$240,000. After the verdict was entered, Pltf. filed an Application for Attorneys Fees and Costs, attaching a Memorandum of Costs as an exhibit. Pltf. then filed an Amended Application for Fees and Costs to address identified deficiencies in the first Application. Deft. has moved to Re-Tax the Costs and is opposing the request for fees in a Supplement to its opposition to Pltf. s first Application.

A. Legal Standards and Applicable Statutes:

Pltf. moves for fees and costs under both NRCP 68 and NRS 18.010. NRCP 68(f) provides:

If the offeree [of an offer of judgment] rejects an offer and fails to obtain a more favorable judgment, (1) the offeree cannot recover any costs or attorney s fees and shall not recover interest for the period after the service of the offer and before the judgment; and

(2) the offeree shall pay the offeror s post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney s fees, if any be allowed, actually incurred by the offeror from the time of the offer. If the offeror s attorney is collecting a contingent fee, the amount of any attorney s fees awarded to the party for whom the offer is made must be deducted from that contingent fee.

NRS 17.115(4) similarly provides, in relevant part:

Except as otherwise provided in this section, if a party who rejects an offer of judgment fails to obtain a more favorable judgment, the court:

(c) Shall order the party to pay the taxable costs incurred by the party who made the offer; and

(d) May order the party to pay to the party who made the offer (3) Reasonable attorney's fees incurred by the party who made the offer for the period from the date of service of the offer to the date of entry of the judgment. If the attorney of the party who made the offer is collecting a contingent fee, the amount of any attorney's fees awarded to the party pursuant to this subparagraph must be deducted from that contingent fee. Additionally, NRS 18.010(2)(b) provides that fees may be awarded to the prevailing party [w]ithout regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. NRS 18.110(1)-(2) provides that whenever a party claims costs, she must file a verified memorandum setting forth those costs within 5 days of entry of the judgment and that witness fees are recoverable costs, regardless of whether the witness was subpoenaed, if the witness testified at trial. NRS 18.110(4) allows the opposing party to file a motion to re-tax claimed costs within 3 days of service of a copy of the memorandum of costs. As a preliminary note, Deft's first argument is that Pltf. improperly and unilaterally filed an Amended Application for Fees and Costs after reading Deft's Opposition, so the Court should only consider the first Application. Here, judgment was entered on December 15, 2015. Pltf. filed the first Application well before this, on November 25, 2015. She also filed her Amended Application for Costs on December 21, 2015, which is within the time limit set forth in the rule (note that under EDCR 1.14(a), the period for filing is five judicial days from entry of judgment). However, Deft's Motion to Re-Tax as to the first Application was due on December 2, 2015, but it was not filed until December 7, 2015 and was thus untimely. Deft's Motion to Re-Tax as to the Amended Application was timely, though. It is true that generally, supplemental briefing is allowed only by leave of court. See EDCR 2.20(i). However, given that Deft's first opposition was untimely, it would seem that it would be willing to waive its first argument in opposition to Pltf.'s Amended Application. In order for the penalties associated with the rejection of an offer of judgment to apply, the offeree must not have obtained a more favorable judgment. NRCP 68(f); NRS 17.115(4). To determine whether the offeree of a lump-sum offer of judgment obtained a more favorable judgment, the amount of the offer must be compared to the amount of the offeree's pre-offer, taxable costs. *McCrary v. Bianco*, 122 Nev. 102, 131 P.2d 573, 576, n. 10 (2006) (stating that NRCP 68(g) must be read in conformance with NRS 17.115(5)(b)). Here, Pltf. offered to settle the case for \$49,999.00 on September 3, 2015. The verdict was in favor of Pltf. for a total of \$240,000.00. It seems that this may be a more favorable judgment, although Pltf. has neglected to specifically set forth her pre-offer taxable costs. On the other hand, Pltf.'s total claimed costs were \$26,579.38 (whether pre- or post-offer) and that, together with the offer, amounts to \$76,578.38. Pltf.'s jury recovery was well above this - \$240,000.00 - so it appears that Pltf. has met the threshold requirement to show entitlement to fees and costs under Rule 68. The determination of whether to grant fees to a party under NRCP 68 rests in the sound discretion of the trial court. *Chavez v. Sievers*, 118 Nev. 288, 296, 43 P.3d 1022, 1027 (2002). Such a decision will not be disturbed unless it is arbitrary and capricious. *Schouweiler v. Yancey Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (1985). District courts must consider several factors when making a fee determination under *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1963): (1) whether the Pltf.'s claim was brought in good faith; (2) whether the offer was reasonable and in good faith in timing and amount; (3) whether the decision to reject the offer was grossly unreasonable or in bad faith; and (4) whether the sought fees are reasonable and justified. However,

where the Deft. is the offeree of an offer of judgment, the first factor changes to a consideration of whether the Deft s defenses were litigated in good faith. See *Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998). As to the first factor, whether Deft s defenses were litigated in good faith, Pltf. argues that Deft s defense that it had no notice of the liquid on the casino floor was in bad faith because it failed to make an inquiry into the last time the floor was checked before Pltf. slipped. Am. App. at 5-6. Pltf. also argues that Deft s defense that there was no causation here was unreasonable because it relied upon expert testimony that lacked a basis in modern science. Id. at 6. Deft s Motion to Retax does not address whether its defenses were maintained in good faith. However, this Court has already highlighted in its Tentative Ruling on Deft s Renewed Motion for Judgment as a Matter of Law that Nevada case law surrounding constructive notice is, at best, confusing. This is not a case where the law is black and white. Based on that and the evidence presented at trial, it was not bad faith for Deft. to contend that it lacked notice of the condition on the floor and Pltf. in fact so concedes. Furthermore, Pltf. s evidence of constructive notice may have been enough to escape the granting of a Rule 50 motion, but it was by no means overwhelming. Additionally, Pltf. s damages claims were reasonably disputed by expert testimony of a defense witness. That the jury was not persuaded by this expert does not translate to bad faith by the Deft.. Thus, the first factor therefore weighs in favor of the Deft.. As to the second factor, Deft. argues that the offer was unreasonable in amount because Pltf. had no basis for its offer and that due to Pltf. s gamesmanship, Deft. could not sufficiently evaluate the offer. Opp. at 5-7. Here, discovery closed on June 12, 2015. Pltf. was unable to submit proof of special medical damages at the time of trial because the Court precluded them on the basis that they were not properly disclosed in discovery. This made it extremely difficult for the Defense to evaluate a potential value of the case. An offer made at a time when Pltf. has not properly provided a calculation of damages is unreasonable. Thus, the second factor weighs in favor of Deft.. In ascertaining whether Deft s decision to reject the offer was grossly unreasonable or in bad faith, a pertinent consideration is whether enough information was available to determine the merits of the offer. *Trustees of the Carpenters for S. Nev. Health & Welfare Trust v. Better Building Co.*, 101 Nev. 742, 746, 710 P.2d 1379, 1382 (1985). Here, discovery closed on June 12, 2015. The offer of judgment was made three months later, on September 3, 2015. Given that at the time of the offer, Deft. had available all the materials obtained during discovery, including witness depositions, Deft s decision to reject the offer was well-informed. Furthermore, the issues surrounding notice were not necessarily clear cut, as evidenced by the parties pre-trial and post-trial motions on that issue. Overall, it is unlikely that Deft s rejection of the offer was grossly unreasonable or in bad faith, and in the end weighs in favor of Deft.. With regard to the last Beattie factor, the Court must undergo an analysis of whether claimed fees were reasonable in light of the factors set forth in *Brunzell v. Golden Gate Nat l Bank*, 85 Nev. 345, 249, 455 P.2d 31, 33 (1969). Pltf. has addressed some, but not all, of these factors. Pltf. s counsel has set forth the qualities of the advocate(s) on this case and, of course, we know that a favorable result was obtained. However, Pltf. has not provided any bills setting forth what tasks were performed and the associated hours for those tasks. This prevents the Court from determining whether the fees charged were reasonable in light of the tasks actually performed. Therefore, because Pltf. has not carried her burden under *Brunzell*, this factor weighs in favor of Deft.. On the whole, all of the factors set forth in *Beattie* (as modified by *Yamaha*, supra) weigh in favor of Deft. in this case and Pltf. s Amended Application for Fees should be denied. Although NRCP 68 costs are only for post-offer costs, NRS 18.020(3) mandates awarding

all costs to Pltf. since she prevailed in seeking damages in an amount more than \$2,500. NRS 18.110(1) requires the filing of a memorandum of costs by the party in whose favor judgment is rendered, including a verification of the party, the party's attorney, or an agent of the party's attorney that the costs are correct and were necessarily incurred. The amount of awarded costs rests in the sole discretion of the trial court. *Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 565 66 (1993). The court also has discretion when determining the reasonableness of the individual costs to be awarded. *U.S. Design & Constr. Corp. v. I.B.E.W. Local 357*, 118 Nev. 458, 463, 50 P.3d 170, 173 (2002). Claimed costs must be actual and reasonable, rather than a reasonable estimate or calculation of such costs. *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 86 (1998) (internal quotations omitted). The Supreme Court has also indicated that claimed costs must be supported by documentation and itemization. *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 971 P.2d 383 (1998). Deft. only challenges certain specific fees, each of which will be addressed in turn.

1. Expert Witness Fees

Deft. argues that the amounts for expert witnesses should be reduced because they are well over the statutory limit of \$1,500.00 per expert and the additional amounts are not necessary and reasonable. Mot. at 6-8. NRS 18.005(5) provides that recoverable costs include [r]easonable fees of not more than five expert witnesses in an amount of not more than \$1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee. Allowing fees above the statutory maximum requires this Court to determine whether those fees were necessary and reasonable. *Arnold v. Mt. Wheeler Power Co.*, 101 Nev. 612, 615, 707 P.2d 1137, 1139 (1985). Granting fees in excess of the statutory maximum may be necessary and reasonable where the expert witness testimony constituted most of the evidence. *Gilman v. Nevada State Bd. of Veterinary Med. Examiners*, 120 Nev. 263, 273, 89 P.3d 1000, 1006-07 (2004), disapproved of on other grounds by *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. Adv. Op. 27, 327 P.3d 487 (2014). Here, the testimony of Dr. Dunn and Dr. Tingey was important but did not constitute most of the evidence. Pltf. herself testified, as well as other witnesses and employees of Deft.. On the other hand, Pltf. outlined in her Amended Application and Opposition to Deft's Motion to Re-Tax that the nature of their testimony was fairly complex and required several hours of file review. Even though Drs. Dunn and Tingey were Pltf.'s treating physicians, as Deft. points out, this does not necessarily make an increased fee unnecessary or unreasonable. Pltf. requests a total fee of \$6,000 for Dr. Tingey, \$10,000 for Dr. Dunn, and \$3,699 for Gary Presswood. Dr. Tingey's fee seems to be reasonable, for the reasons identified by Pltf. in her Amended Application. As to Dr. Dunn, Deft. does point out that half of the claimed amount is for the second day of testimony, which lasted less than an hour and was done to accommodate his own schedule. Mot. at 8. Hence, Dr. Dunn should be allowed only \$5,000. As to Mr. Presswood, his testimony was not used at trial because this Court ruled that his testimony would be unreliable. Since his testimony was clearly inadmissible under the Hallmark standard, as reflected in this Court's prior pre-trial ruling, his fees should not be awarded. Hence, as to the expert fees, Deft's Motion should be granted in part.

2. Service Fees

NRS 18.005(7) allows recovery of service fees. Deft. next challenges the service fees claimed by Pltf. in serving Yanet Elias, Corey Prowell, and Salvatore Risco. Mot. at 8-9. Pltf. acknowledges that all costs must be both reasonable and necessary. As to Yanet Elias and Corey Prowell, each was an employee of Deft. and Deft. points out that it had accepted service for those persons. Defense counsel

should be prepared to address whether he agreed that these witnesses would be produced for trial without a subpoena at the time of oral argument. If so, the service fee was unnecessary, but if not, agreement that service can be made upon counsel instead of the witness does not eliminate the need to serve and the fees would be necessary. As to Mr. Risco, Deft. argues that the service fees were unnecessary and unreasonable because Pltf. s counsel had good communication with him. However, unlike the other two employee-witnesses, Mr. Risco was not a party to this case or an agent of a party to this case, so service of a subpoena upon him was necessary. Additionally, Pltf. has outlined sufficient reasons for the amount of the claimed charge that show it to be reasonable and she should be granted those fees, subject to the same question posed above.

3. Jury Fees

NRS 18.005(3) specifically allows an award of jury fees as an element of costs. Deft. next argues it should not be responsible for the jury fees because Pltf. failed to request a jury trial within the time allowed. Mot. at 9. Deft. essentially only argues that because Pltf. s demand for a jury trial was untimely and this should have been a bench trial, it should not have to pay for the jury fees. However, those arguments are premised on challenging this Court s grant of Pltf. s request for a jury trial and the time for reconsidering that decision has long since passed. Moreover, both parties had prepared this entire case under the assumption that it was going to be tried by jury, so Deft. was not prejudiced by the Court s ruling in any event. Since the jury fees were actually incurred and reasonable, Deft s Motion as to those fees should be denied, and Pltf. should be allowed the jury fees incurred.

4. Parking Fees

NRS 18.005(17) allows the court to award any other reasonable costs actually incurred. This would, of course, include costs incurred in parking for hearings and the like. Deft. argues that there were other, free, places Pltf. could have parked. Mot. at 9. This may or may not be true, but Deft s argument is conclusory in any event. Because Pltf. actually incurred the parking costs, they should be awarded.

5. Skip Trace Fees

Deft. lastly argues that Pltf. s request for skip trace/investigative fees for Terry Ruby were unreasonable and unnecessary. Mot. at 9. Terry Ruby is a former employee of Deft. and was the first to respond to Pltf. s fall. Opp. at 8. It is clear why Pltf. would have a need to locate and depose Mr. Ruby. A \$150.00 fee for that service is not unreasonable, given the extreme costs associated with reporting services like Accurant. Therefore, Deft s Motion as to the skip trace fee should be denied, and Pltf. should be allowed that amount as a cost.

6. Remaining Fees

Deft. does not challenge the remaining requested fees. Pltf. has attached back-up documentation for each claimed cost and they all seem to be reasonable and within the going market rate for each associated service. Pltf. has therefore carried her burden under Berossini and the remaining costs requested should be awarded. Therefore, Pltf. s Amended Application as to costs should be granted, as set forth herein.

Arguments by counsel. Upon Court's inquiry, Pltf. advised costs have been paid in full. COURT stated findings and ORDERED, Deft's Motion is GRANTED in part, noting calendar is in error as it state's Pltf's Motion. Pltf's Motion for fees and costs is DENIED, and for attorney fees is DENIED. Defense to prepare the order and join it all in one.

PLAINTIFF'S PROPOSED EXHIBITS

YVONNE O'CONNELL vs. WYNN LAS VEGAS, LLC					
Case Number A-12-655992					
	Description	Bate Numbers	Offered	Objected	Admitted
1	Picture of Plaintiff (far right) with her Cousins – pre- accident	00001			
2	Picture of Plaintiff (far left) with her nephew and his family – pre- accident	00002			
3	Picture of Plaintiff (far left) with her nephew and his family – pre- accident	00003			
4	Unredacted photograph of Plaintiff's buttocks showing bruising from fall	00004	11/12	NO	11/12/15
5	Redacted photograph of Plaintiff's buttocks showing bruising from fall	00005			
6	Unredacted photograph of Plaintiff's buttocks showing bruising from fall	00006	11/12	NO	11/12/15
7	Redacted photograph of Plaintiff's buttocks showing bruising from fall	00007			
8	Unredacted photograph of Plaintiff's buttocks showing bruising from fall	00008	11/12/15	NO	11/12/15
9	Redacted photograph of Plaintiff's buttocks showing bruising from fall	00009	11/12	withdrawn obj	
10	Unredacted photograph (close-up) of Plaintiff's buttocks showing bruising from fall	00010			
11	Redacted photograph (close-up) of Plaintiff's buttocks showing bruising from fall	00011			
12	Curriculum Vitae; Fee Schedule and Trial Testimony List – Thomas Dunn, M.D.	00012 - 00015			

YVONNE O'CONNELL vs. WYNN LAS VEGAS, LLC

Case Number A-12-655992

13	Plaintiff's Medical Records and Billing Statement for treatment rendered by Thomas Dunn, M.D.	00016 - 00048			
14	Curriculum Vitae; Fee Schedule and Trial Testimon List – Craig T. Tingey, M.D.	00049 – 00056			
15	Plaintiff's Medical Records and Billing Statement for treatment rendered by Craig T. Tingey, M.D.	00057 – 00076			
16	Wynn Las Vegas, LLC Answer to Amended Complaint	00077 – 00082			
17	Wynn Las Vegas Dust Mop/Damp Mop Policy dated 1/28/2005	0083 – 00084			
18	Wynn Las Vegas Dust Mop/Damp Mop Policy dated 8/1/07	00085 – 00086			
19	Wynn Las Vegas Dust Mopping/Damp Mopping Power Point Presentation – undated	00087 – 00090			
20	Wynn Las Vegas Wet Floor Signs and Spills Power Point Presentation – undated	00091 – 0092			
21	Wynn Las Vegas Wet Floor Signs & Spills Policy	00093			
22	Wynn Las Vegas Signs and Spills Power Point – undated	00094 - 00095			
23	Wynn Las Vegas Marble Care Policy	00096 - 00097			
24	Wynn Las Vegas Marble Care Power Point Presentation – undated	00098 - 00099			
25	Affidavit/Declaration of Custodian of Records for Desert Orthopedic/Dr Tingey	00100 - 00101			

YVONNE O'CONNELL vs. WYNN LAS VEGAS, LLC
Case No. A-12-655992-C, Dept. No. V

Wynn's Proposed Exhibit List

<u>EX No.</u>	<u>DOCUMENT/BATES NUMBERS</u>	<u>OFFERED</u>	<u>OBJECTED</u>	<u>ADMITTED</u>
A. (1-11)	Color Pictures of Incident and Guest Statements WYNN-O'CONNELL 00001 - 00011			
B. (1-66)	UMC Records WYNN-O'CONNELL 00012, 00016, 00024, 00032, 00039 - 00040, 00047 - 00053, 00060 - 0067, 00075 - 00077, 00079 - 00080, 00090, 00099 - 00101, 00111, 00120 - 000122, 00126, 00135 - 00138, 00150, 00163, 00168 - 00169, 00175, 00184, 00193, 00201 - 00203, 00214, 00216, 00230, 00232, 00234 - 00235, 00239, 00241 - 00244, 00252, 00254 - 00258			
C. (1-11)	Apache Foot & Ankle Specialist (Lee Wittenberg DPM) WYNN-O'CONNELL00262 - WYNN-O'CONNELL00272			
D.	Ascent Primary Care (Suresh Prahbu MD) WYNN-O'CONNELL00277 - WYNN-O'CONNELL00278			
E. (1-5)	Clinical Neurology Specialists (Leo Germin MD) WYNN-O'CONNELL 00290 - 00291, 00296 - 00298			
F.	Desert Institute of Spine Care - Dr. Cash WYNN-O'CONNELL00302 - WYNN-O'CONNELL00303			
G. (1-15)	Ed Suarez WYNN-O'CONNELL 00307 - 00321			
H.	Matt Smith PT 5/3/10 WYNN-O'CONNELL00398 - WYNN-O'CONNELL00399			

YVONNE O'CONNELL vs. WYNN LAS VEGAS, LLC**Case No. A-12-655992-C, Dept. No. V****Wynn's Proposed Exhibit List**

<u>Ex No.</u>	<u>DOCUMENT/BATES NUMBERS</u>	<u>OFFERED</u>	<u>OBJECTED</u>	<u>ADMITTED</u>
I. (1-4)	Southern Nevada Pain Center WYNN-O'CONNELL 00418, 00420, 00426 -00427	11/10/15	NO	11/10/15
J. (1-12)	Steinberg Diagnostic WYNN-O'CONNELL 00428 - 00438, 00442			
K.	Yanet Elias Statement WYNN-O'CONNELL00481			
L. (1-19)	Wynn Las Vegas Policies WYNN-O'CONNELL 00483 - 00489, 00491 - 00502			
M.	Incident Report WYNN-O'CONNELL00511 - WYNN- O'CONNELL00513			
N. (1-5)	Advanced Ortho - Timothy Trainor WYNN-O'CONNELL 00522 - 00526			
O.	Minimally Invasive Hand Institute 3/8/12 WYNN-O'CONNELL00548 - WYNN- O'CONNELL00550			
P. (1-18)	Dr. Cash intake form 3/23/10 WYNN-O'CONNELL 00562 - 00571, 00586-588, 00593 - 00597			
Q.	Silver State Neurology (Christopher Millford MD) WYNN-O'CONNELL00599			
R. (1-6)	Desert Oasis Clinic 2/17/10 WYNN-O'CONNELL00607 - WYNN- O'CONNELL00612	11/10/15	NO	11/10/15

YVONNE O'CONNELL vs. WYNN LAS VEGAS, LLC**Case No. A-12-655992-C, Dept. No. V****Wynn's Proposed Exhibit List**

<u>Ex No.</u>	<u>DOCUMENT/BATES NUMBERS</u>	<u>OFFERED</u>	<u>OBJECTED</u>	<u>ADMITTED</u>
S.	Apache Foot & Ankle Specialist (Lee Wittenberg DPM) WYNN-O'CONNELL 00621 - 00623			
T.	Ascent Primary Care (Suresh Prahu MD) WYNN-O'CONNELL 00638 - 00639			
U. (1-16)	Southern Nevada Pain Center WYNN-O'CONNELL 00774 - 00789			
V. (1-4)	Dr. Yakov Shaposhnikov, M.D., Gastrointestinal and Liver Diseases Medical Records/Bills WYNN-O'CONNELL 01192 - 01195			
W.	Dr. Enrique Lacayo, M.D. Medical Records WYNN-O'CONNELL 01210 - 01211			
X. (1-11)	Yvonne O'Connell Player Report for Wynn Las Vegas WYNN-O'CONNELL 01225 - 01235			
Y. (1-3)	Yvonne O'Connell Patron Information for Wynn Las Vegas WYNN-O'CONNELL 01236 - 01238	11/12/15	obj	11/12/15
Z. (1-10)	Wynn Las Vegas Atrium Log WYNN-O'CONNELL 01239 - 01248	11/12/15	NO	11/12/15
AA. (1-2)	Color Photos of Bruising PLTF000720- 000721			
BB.	Defendant's Disclosure of Initial Expert Witness and Report Pursuant to NRCP 26(e) - Victor B. Klausner, D.O. filed on 4/13/15 DEFT. EXPERT01 (1 DOCUMENT-25 PAGES)			

YVONNE O'CONNELL vs. WYNN LAS VEGAS, LLC
Case No. A-12-655992-C, Dept. No. V

Wynn's Proposed Exhibit List

<u>Ex No.</u>	<u>DOCUMENT/BATES NUMBERS</u>	<u>OFFERED</u>	<u>OBJECTED</u>	<u>ADMITTED</u>
CC.	Defendant's Disclosure of Rebuttal Expert Witness and Report Pursuant to NRCP 26(e) - Neil D. Opfer filed on 5/13/15 DEFT. EXPERT02 (1 DOCUMENT – 96 PAGES)			
DD. (1-13)	Deposition Transcript of Corey Powell DEFT. DEPO01			
EE. (1-24)	Deposition Transcript of Yanet Elias DEFT. DEPO02			
FF. (1-78)	Deposition Transcripts of Plaintiff Yvonne O'Connell (and Exhibit 1 Pages 1-4) DEFT. DEPO03			
GG. (1-53)	Deposition Transcript of Sal Risco DEFT. DEPO04			
HH. (1-24)	Deposition Transcripts of NRCP 30(b)(6) Witnesses DEFT. DEPO05			
II. (1-15)	Plaintiff's Responses to Defendant's First Set of Interrogatories with Verification DEFT. DISC01			
JJ. (1-7)	Plaintiff's Responses to Defendants' First Set of Requests for the Production of Documents DEFT. DISC02			
KK.	Plaintiff's Amended Complaint DEFT. PLDG01 (1 DOCUMENT – 4 PAGES)			
LL.	Defendant's Answer to Amended Complaint DEFT. PLDG02 (1 DOCUMENT – 5 PAGES)			

Deft's.

EXHIBITS

CASE NO.

A 658992

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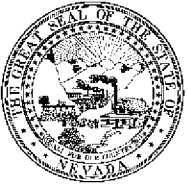
JOINT STIPULATED EXHIBITS OF THE PARTIES

YVONNE O'CONNELL vs. WYNN LAS VEGAS, LLC					
Case Number A-12-655992					
	Description	Bate Numbers	Offered	Objected	Admitted
1	Wynn Incident File Full Report	JOINT STIPULATED EXHIBIT 001 - 003		<i>Stip</i>	NOV - 4 2015
2	Wynn Guest Accident or Illness Report - Yvonne O'Connell	JOINT STIPULATED EXHIBIT 004			
3	Wynn - Guest Refusal of Medical Assistance	JOINT STIPULATED EXHIBIT 005			
4	Wynn- Guest/Employee Voluntary Statement - Yanet Elias	JOINT STIPULATED EXHIBIT 006			
5	Wynn - Guest/Employee Voluntary Statement - Terry M. Ruby	JOINT STIPULATED EXHIBIT 007			
6	Wynn - File Photograph Of Area of Incident - #2152-8	JOINT STIPULATED EXHIBIT 008			
7	Wynn - File Photograph Of Area of Incident - #2152-3	JOINT STIPULATED EXHIBIT 009			
8	Wynn - File Photograph Of Area of Incident - #2152-7	JOINT STIPULATED EXHIBIT 010			
9	Wynn - File Photograph Of Area of Incident - #2152-5	JOINT STIPULATED EXHIBIT 011			
10	Wynn - File Photograph Of Area of Incident - #2152-2	JOINT STIPULATED EXHIBIT 012			
11	Wynn - File Photograph Of Area of Incident - #2152-1	JOINT STIPULATED EXHIBIT 013			
12	Wynn - File Photograph Of Area of Incident - #2152-6	JOINT STIPULATED EXHIBIT 0014			
13	Wynn - File Photograph Of Area of Incident - #2152-4	JOINT STIPULATED EXHIBIT 015		<i>✓</i>	NOV - 4 2015

Casey's Exhibits

CASE NO. *A658992*

[illegible]



EIGHTH JUDICIAL DISTRICT COURT CLERK'S OFFICE
NOTICE OF DEFICIENCY
ON APPEAL TO NEVADA SUPREME COURT

LAWRENCE J. SEMENZA, III, ESQ.
10161 PARK RUN DR., SUITE 150
LAS VEGAS, NV 89145

DATE: June 10, 2016
CASE: A-12-655992-C

RE CASE: YVONNE O'CONNELL vs. WYNN LAS VEGAS, LLC DBA WYNN LAS VEGAS

NOTICE OF APPEAL FILED: June 8, 2016

YOUR APPEAL HAS BEEN SENT TO THE SUPREME COURT.

PLEASE NOTE: DOCUMENTS **NOT TRANSMITTED HAVE BEEN MARKED:**

- ☒ **\$250 – Supreme Court Filing Fee (Make Check Payable to the Supreme Court)****
 - If the \$250 Supreme Court Filing Fee was not submitted along with the original Notice of Appeal, it must be mailed directly to the Supreme Court. The Supreme Court Filing Fee will not be forwarded by this office if submitted after the Notice of Appeal has been filed.
- ☐ **\$24 – District Court Filing Fee (Make Check Payable to the District Court)****
- ☒ **\$500 – Cost Bond on Appeal (Make Check Payable to the District Court)****
 - NRAP 7: Bond For Costs On Appeal in Civil Cases
- ☐ **Case Appeal Statement**
 - NRAP 3 (a)(1), Form 2
- ☐ **Order**
- ☐ **Notice of Entry of Order**

NEVADA RULES OF APPELLATE PROCEDURE 3 (a) (3) states:

"The district court clerk must file appellant's notice of appeal despite perceived deficiencies in the notice, including the failure to pay the district court or Supreme Court filing fee. **The district court clerk shall apprise appellant of the deficiencies in writing**, and shall transmit the notice of appeal to the Supreme Court in accordance with subdivision (e) of this Rule with a notation to the clerk of the Supreme Court setting forth the deficiencies. Despite any deficiencies in the notice of appeal, the clerk of the Supreme Court shall docket the appeal in accordance with Rule 12."

Please refer to Rule 3 for an explanation of any possible deficiencies.

****Per District Court Administrative Order 2012-01, in regards to civil litigants, "...all Orders to Appear in Forma Pauperis expire one year from the date of issuance." You must reapply for in Forma Pauperis status.**

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; JUDGMENT ON VERDICT; NOTICE OF ENTRY OF JUDGMENT ON VERDICT; ORDER DENYING DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY FOR A NEW TRIAL OR REMITTITUR; NOTICE OF ENTRY OF ORDER DENYING DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY FOR A NEW TRIAL OR REMITTITUR; DISTRICT COURT MINUTES; EXHIBITS LIST; NOTICE OF DEFICIENCY

YVONNE O'CONNELL,

Plaintiff(s),

vs.

WYNN LAS VEGAS, LLC DBA WYNN LAS VEGAS,

Defendant(s),

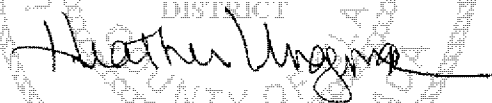
Case No: A-12-655992-C

Dept No: V

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 10 day of June 2016.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk