In the

Supreme Court

for the

State of Nevada

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

v.

YVONNE O'CONNELL,

Respondent and Cross-Appellant

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

APPELLANT/CROSS-RESPONDENT'S OPENING BRIEF

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DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

Wynn Las Vegas, LLC, is a wholly-owned subsidiary of Wynn Resorts Limited. Wynn Resorts Limited is a publicly held company. No publicly held company owns 10% or more of Wynn Resorts Limited's membership interest.

In the course of the proceedings leading up to this appeal, Wynn Las Vegas, LLC was represented by the following attorneys and law firms:

Lawrence J. Semenza, III, P.C.

These representations are made in order that the Justices of the Supreme Court or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Dated this 1st day of May, 2017.

SEMENZA KIRCHER RICKARD

By: /s/ Jarrod L. Rickard
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JURISDICTIONAL STATEMENT

The District Court entered its Judgment on Jury Verdict on December 15, 2015, and Notice of Entry of the Judgment was served that same day. (11 AA 2340.) Wynn Las Vegas, LLC ("Wynn") filed a Renewed Motion for Judgment as a Matter of Law, or Alternatively, Motion for New Trial or Remittitur on December 30, 2015 ("Motion"). (12 AA 2359.) Wynn's Motion was denied in an Order entered May 24, 2016. Notice of Entry of that Order was served on May 25, 2016. *Id.* 3486. Wynn filed its Notice of Appeal on June 8, 2016. (17 AA 3502.)

Thereafter, the Court entered its Order Partially Granting and Partially Denying Defendant's Motion to Retax Costs and Plaintiff's Motion to Tax Costs and for Fees, Costs and Post-Judgment Interest. Yvonne O'Connell filed a Notice of Appeal of that Order on November 17, 2016. Wynn's Appeal was timely. *See* NRAP 4(a). Appellate jurisdiction over Wynn's appeal from the Judgment exists under NRAP 3A(b)(1).

ROUTING STATEMENT

This is an appeal from a judgment, exclusive of interest, attorney's fees, and costs, of less than $250,000.00. Thus, the case falls within the presumptive jurisdiction of the Court of Appeals. *See* NRAP 17(b)(2). However, Wynn requests that the case be retained by the Supreme Court until at least the conclusion of briefing so that the parties may utilize the Supreme Court's electronic filing system.

STATEMENT OF ISSUES

A. Constructive Notice

A landowner must have actual or constructive notice of an unreasonably dangerous condition to be held liable for a patron's fall. O'Connell sued Wynn for negligence after she fell on a foreign substance while walking on Wynn's floor. At trial, O'Connell conceded she lacked evidence that Wynn had actual knowledge of the substance. Moreover, O'Connell's only proof of constructive knowledge was her own testimony about the substance's appearance and her guess that it had begun to dry. However, O'Connell admitted that she lacked any evidence that the substance was a recurrent or continuous condition at Wynn. In fact, she had no idea how long the substance had been on Wynn's floor, where it came from, or what it was. Despite this, the District Court denied Wynn's motions for judgment as a matter of law, citing a standard for constructive notice that has never been adopted by this Court. Did the District Court err when it ignored Nevada's standard for constructive notice and left the jury to guess about whether the foreign substance had been left by Wynn for an unreasonable amount of time?

B. Apportionment Of Damages

Even assuming Wynn could be held liable, O'Connell must prove her damages with reasonable certainty. This burden includes ensuring against any award of damages based upon injuries or conditions unrelated to her fall at Wynn. The

testimony and other evidence at trial established that O'Connell suffered from a myriad of other conditions and injuries unrelated to her fall. However, O'Connell knowingly refused to apportion her damages between her pain and suffering related to the fall and her pain and suffering from injuries or conditions unrelated to Wynn. Despite this, the District Court looked past O'Connell's failure and refused Wynn's requests for judgment as a matter of law. Did the District Court err when it permitted O'Connell to disregard her obligation to apportion damages and forced the jury to speculate that her fall at Wynn was the source of O'Connell's alleged pain and suffering?

C. Future Pain And Suffering

This Court has repeatedly held that a claim for future pain and suffering requires expert testimony if it is based upon a subjective condition, such as headaches or back pain. O'Connell's only claim for damages was based upon her assertion that she suffered from the subjective conditions of back, neck and knee pain from her fall. However, O'Connell failed to disclose any retained medical witnesses and provided deficient and untimely disclosures for her treating physicians. O'Connell's only expert medical testimony came from two of her treating physicians that did not examine her until years after her fall. As these doctors admitted, their conclusion that O'Connell suffered pain and suffering as a result of her fall at Wynn was based entirely upon her own self-reporting. Thus,

their conclusions were unreliable. Did the District Court err when it permitted O'Connell's treating physicians to testify about her damages over Wynn's multiple objections?

SUMMARY OF THE CASE

O'Connell was awarded a $240,000.00 judgment against Wynn for a slip and fall that occurred in Wynn's atrium in February of 2010. According to O'Connell, her fall was caused by a foreign substance on Wynn's floor. After falling, O'Connell refused medical assistance and spent the remainder of the day gambling at Wynn and another casino, returning home on her own accord. During a medical visit two days later, a doctor determined that O'Connell's only injuries from the fall were contusions (*i.e.*, bruising) on her right side. Despite this diagnosis, O'Connell spent the next five years visiting doctor after doctor and self-reporting an ever-expanding list of injuries and conditions that she claimed were related to her fall at Wynn.

After suing Wynn for one claim for negligence, O'Connell engaged in minimal discovery and disclosed no retained medical experts in support of her case. Moreover, O'Connell's only disclosures for her treating medical physicians were both untimely and deficient under Nevada's Rules of Civil Procedure. Despite this, the District Court rejected Wynn's motion in limine that sought to preclude O'Connell from providing any expert medical testimony in support of her damages. During the hearing on Wynn's motion, O'Connell revealed, for the first time, that her

only testifying medical experts would be two of her treating physicians, neither of whom examined O'Connell until years after her fall.

At trial, O'Connell provided no proof that Wynn possessed actual or constructive knowledge of the foreign substance that caused her fall. According to O'Connell, the substance was a liquid spill, about seven feet in size and greenish in color. Additionally, she claimed that three feet of the substance appeared to have begun to dry, become sticky, and accumulate dirty foot prints. However, O'Connell admitted that she had no idea how long the substance had been on Wynn's floor, where it came from, or what it was.

Citing her testimony as the only evidence to support O'Connell's claim that Wynn possessed constructive knowledge, and agreeing that this evidence was "very, very" thin, the District Court rejected Wynn's arguments against O'Connell's case for liability in Wynn's motion for judgment as a matter of law. Additionally, the District Court also rejected Wynn's arguments against O'Connell's case for damages even though O'Connell's only damage claim was for past and future pain and suffering and O'Connell admittedly failed to apportion her damages between her fall at Wynn and her numerous unrelated injuries and conditions.

Left to guess about the source of O'Connell's green mystery substance, and the actual source of her alleged harm, the jury returned with a verdict but failed to decide on an award of damages. Returning to the courtroom just four minutes after

they were sent back to deliberate on damages, the jury awarded O'Connell $400,000.00 – $150,000.00 for past pain and suffering and $250,000.00 for future pain and suffering. This amount was reduced to $240,000.00 in light of the jury's finding that O'Connell was 40% at fault for her fall.

Following final judgment, Wynn renewed its motion for judgment as a matter of law but was denied. This appeal followed.

STATEMENT OF FACTS

A. After Falling In Wynn's Atrium Area, O'Connell Spends The Remainder Of The Day Gambling At Wynn And Another Casino.

On February 8, 2010, at approximately 2:30 p.m., O'Connell allegedly slipped and fell while she was taking one of her frequent walks through the atrium area of Wynn's Las Vegas resort. (8 AA 1679-82.) According to O'Connell, her slip was caused by a foreign substance located on the tile mosaic floor in Wynn's atrium.

After falling, O'Connell declined medical assistance and instead walked herself to Wynn's casino area where she gambled for approximately two more hours, playing about $1,000.00 on various slot machines. (8 AA 1693-95; 9 AA 1711-12.) Leaving Wynn's property on her own accord, O'Connell then drove her own vehicle to the Rampart Casino where she continued to gamble for the remainder of the day and part of the night. (8 AA 1695-96.) O'Connell admits she never sought medical treatment on the day of her fall, or even the day after. *Id.* at 1696.

Two days later, on February 10, 2010, O'Connell visited UMC Quick Care complaining of "pain over the bilateral low back with contusions and pain radiating to the right buttocks and leg." (8 AA 1697.) An x-ray of the spine revealed that O'Connell suffered from preexisting conditions with her back and that there was no evidence of an acute injury: "advanced disc height loss at L-3-L4, L-4-L5, L-5-S1 … [and] [e]ndplate osteophytes are present with multilevel degenerative disc disease of the lumbar spine …." (18 AA 3660.) O'Connell was diagnosed with suffering from a contusion (*i.e.*, bruise) of the lumbar spine and was prescribed medications for pain and inflammation. *Id.* The charges associated with O'Connell's visit to UMC Quick Care totaled $1,425.32. (18 AA 3693-98.)

B. O'Connell Continues To Seek Medical Treatment For Numerous Unrelated Conditions.

As her treatment demonstrated, O'Connell suffered from, at worst, bruising on her right side as a result of her fall at Wynn. However, for reasons discussed more fully below, O'Connell continued to seek out treatment, self-reporting to her doctors each time that she was suffering from additional subjective pain and conditions as a result of her fall.

In particular, on March 8, 2010, approximately one month after her visit to UMC Quick Care, O'Connell visited Ascent Primary Care and Dr. Prabhu. (18 AA 3660.) According to Dr. Prabhu's records, O'Connell reported a "[h]istory of multiple issues with generalized pain after trip and fall four weeks ago. Back still

hurts with history of fibromyalgia, Ehler Danlos syndrome, IBS and depression." *Id.* Dr. Prabhu diagnosed O'Connell with lumbago, chronic fatigue syndrome and Ehler Danlos. *Id.*

Ten days later, on March 18, 2010, O'Connell visited another medical provider, Dr. Subramanyam at UMC Primary Care. There, O'Connell "described a history of back, and hand injury in 1989, which led to diagnosis of IBS, GERD, anxiety, stress disorder, Marfan syndrome, fibromyalgia and medication dependence with severe constipation and abdominal pain." (18 AA 3661.) Dr. Subramanyam diagnosed O'Connell with "IBS, multilevel degenerative disc disease, [and] increased constipation." *Id.*

On March 19, 2010, further x-rays were performed and O'Connell received negative results for her right knee, chest and right hip. The x-ray found; however, straightening of the cervical spine with moderate disk degeneration, which are obviously unrelated to her fall. (18 AA 3661.)

Again, as these x-rays show, it is clear that O'Connell suffered, at most, a contusion as a result of her fall at Wynn. Each of O'Connell's x-rays were negative for an acute injury and her medical providers treated her for a minor injury. Despite these objective findings, O'Connell was not satisfied and continued to seek treatment from numerous medical providers for nearly her entire body over the next five years.

All told, O'Connell visited over twenty medical providers and attributes an ever-expanding laundry list of conditions to her fall at Wynn. These conditions include pain and/or injuries to the entire right side of her body (right buttocks, right leg, right heel, right arm), wrists, hands, neck, head, face, back, spine, chest, abdomen, eyes and heart. (18 AA 3671.) In addition, O'Connell blamed her fall for her IBS, continuing headaches, blurred vision, pain throughout her body, nausea, difficulty breathing, difficulty walking, frequent urination, joint pain, muscle spasms, trembling, decreased sensation in her hands and feet, carpal tunnel syndrome, trigger finger, dropping of her left eyelid, weakness, chills, trouble sleeping, heartburn, sexual dysfunction and heart problems. *Id.*

O'Connell attributed all of these purported health issues to her fall at Wynn even though many of her medical providers found no objective symptoms of an acute injury after performing countless examinations and tests. (9 AA 1723-99.)

C. O'Connell Fails to Disclose Any Retained Medical Experts And Provided Untimely And Insufficient Disclosures For Her Treating Physicians.

Beating the statute of limitations by one day, O'Connell filed her original Complaint, in proper person, on February 7, 2012. (1 AA 1.) After retaining counsel, O'Connell filed a First Amended Complaint on March 20, 2012, wherein she alleged one claim for negligence against Wynn. *Id.* at 24. Thereafter, citing differences of opinion with their client, O'Connell's first, and second, set of attorneys both withdrew from this case.

O'Connell's current counsel noticed their appearance on February 18, 2015. As a result, the parties agreed to continue the initial expert disclosure deadline to April 13, 2015. On that date, O'Connell disclosed only one retained expert; a professional engineer who purportedly performed testing of the floor near the area where O'Connell fell. (1 AA 90.)

Thus, O'Connell disclosed no retained medical experts by the April 13, 2015, deadline. Although O'Connell disclosed many of her treating physicians in her supplements to her NRCP 16.1 disclosures (over twenty in all), she failed to identify any of the information required by subpart (a)(2) of that Rule including, the subject matter on which these physicians were expected to present expert testimony, a summary of the facts and opinions on which they would rely, their qualifications, or a fee schedule.

Instead, O'Connell provided only boilerplate statements that each treating physician would testify "consistent with the medical records related to the treatment of the Plaintiff for the subject incident…." (1 AA 200.) Moreover, nowhere did O'Connell disclose the identity of one of the only two medical experts that she actually called at trial – Doctor Craig Tingey ("Dr. Tingey"). *Id.*

D. The District Court Rejects Wynn's Motion In Limine And Permits O'Connell To Introduce Testimony From Two Of Her Treating Physicians.

Citing O'Connell's deficient disclosures, Wynn filed a Motion in Limine on August 13, 2015, to exclude the vast majority of O'Connell's claim for damages. (18 AA 3639.) The hearing on Wynn's motion went forward on October 1, 2015. Notably, during this hearing, O'Connell's counsel revealed, for the first time, that the only experts O'Connell planned to call at trial were Dr. Tingey and another of O'Connell's treating physicians – Doctor Thomas Dunn ("Dr. Dunn"). Both Dr. Dunn and Dr. Tingey maintain their practices at Desert Orthopedic Center. While Dr. Dunn specializes in neck and spine, Dr. Tingey's focus is the knee.

However, as Wynn pointed out, O'Connell failed to provide the disclosures required by NRCP 16.1(a)(2) for Dr. Dunn and failed to disclose Dr. Tingey, *at all*, until August 27, 2015 – over two months after the discovery deadline and even after Wynn filed its motion in limine. Despite this, the District Court refused to exclude Dr. Dunn and Dr. Tingey from testifying at trial.[1]

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[1] Notably, during the same continued hearing, the District Court rejected an additional request by O'Connell to call a third treating physician during trial because O'Connell failed to provide the disclosures required by NRCP 16.1(a)(2). (6 AA 1129-30.) Of course, O'Connell's disclosure of Dr. Dunn and Dr. Tingey suffered from an identical defect.

E. O'Connell Fails To Present Evidence Establishing Wynn Had Notice Of The Substance That Caused Her Fall.

Trial began on November 4, 2015, and lasted seven days. During trial, O'Connell presented testimony from herself and a total of five other witnesses. These witnesses included Dr. Dunn and Dr. Tingey as well as one of Wynn's porters, the Wynn security officer that wrote O'Connell's accident report, and O'Connell's former boyfriend. None of these witnesses actually witnessed O'Connell fall.[2] Moreover, the Court excluded O'Connell's proposed expert whom had performed testing on the floor near the area where O'Connell fell. (7 AA 1277.)

In describing her actual fall, O'Connell testified that she was admiring the plants and trees in Wynn's atrium, and rounding a corner formed by one of Wynn's planters, at the time. (9 AA 1799-1802.) While she could not recall the exact details of the substance she slipped in, O'Connell testified that it she believed it was a liquid spill, slightly greenish in color, and covered at least a seven-foot area of the floor in Wynn's atrium. *Id.* at 1812-13. Additionally, O'Connell believed that a three-foot section of the substance had begun to dry, become sticky, and accumulate dirty footprints. *Id.*

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[2] At trial, O'Connell repeatedly claimed that all of the evidence was in Wynn's exclusive possession. As Wynn demonstrated to the District Court, these claims were false and highly prejudicial. However, the District Court still permitted them. (8 AA 1534-35; 11 AA 2240; 2269.)

While O'Connell openly speculated that the substance was water from Wynn's planters (guessing that the greenish color came from liquid fertilizer), she admitted that she had no evidence to support her guess.[3] (9 AA 1812.) Thus, the identity of the substance that caused O'Connell's fall remained a mystery during trial. The only other evidence regarding the nature of the green mystery substance was from one of Wynn's porters, Jane Elias ("Elias"). Elias testified that she never touched the substance. (8 AA 1536.) Although Elias initially stated that she also never saw the substance first hand, she later stated that she thought it could have been "like honey for pancakes." *Id.* at 1532; 1542.

Regardless of what the green mystery substance actually was, O'Connell admitted that she had no evidence to show that Wynn caused it to be on the floor or that Wynn had any advance knowledge that it was on the floor before the time of her fall. (9 AA 1813.) Thus, O'Connell's claim against Wynn was based entirely upon an assertion that Wynn somehow had constructive notice of the green mystery substance.

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[3] Although O'Connell testified that she assumed that the substance came from liquid fertilizer used on the surrounding plants, the only evidence presented at trial was that Wynn does not use fertilizer on its plants — only water. (10 AA 2006.) Thus, the green liquid substance could not have come from the planters.

However, O'Connell presented no evidence to support such a conclusion. She failed to present any evidence to demonstrate how long the substance had been on the floor before her fall and obviously has no expertise in establishing how long it would take for such substances to dry. O'Connell also presented no evidence demonstrating that liquid spills occurred frequently, or at all, in the area where she fell, or that the frequency of the inspections conducted by Wynn employees were somehow unreasonable.

Instead, O'Connell offered only her own unsubstantiated opinion that Wynn should have known about the mystery substance because of its estimated size and because, she believed, portions of it had begun to dry. However, O'Connell openly conceded that her attempted guesswork was based completely upon pure speculation:

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

(9 AA 1813-14.)

As O'Connell was forced to concede, she has no knowledge or training to make her qualified to tell a finder of fact how long the green mystery substance was

on the floor before her fall. *Id.* For all O'Connell knew, the substance was only on the floor a few seconds before the incident.[4]

F. O'Connell Intentionally Fails To Apportion Her Damages.

O'Connell's evidentiary failures at trial did not end with her guesswork about Wynn's constructive knowledge. Beyond providing no proof of Wynn's liability for her fall, O'Connell also failed to present sufficient evidence in support of her damages. At trial, O'Connell chose to forego any claim for the medical expenses she asserts were incurred as a result of the incident. Thus, the only damages O'Connell sought were for her alleged past and future pain and suffering.

Of course, Wynn cannot be held liable for pain and suffering that O'Connell cannot prove were related to her fall. It is O'Connell's burden to prove causation and damages with the weight of reliable evidence. By the same token, O'Connell also had the burden to ensure that the jury was not being asked to award damages based upon any of O'Connell's preexisting conditions. However, O'Connell's own witnesses confirmed that she suffered from a myriad of preexisting conditions.

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[4] Citing this same deficiency, Wynn moved for summary judgment in a motion filed July 13, 2015. (1 AA 150.) However, that motion was denied by a senior judge filling in for the regular judge assigned to this case.

For example, Dr. Dunn testified that O'Connell suffered from degenerative disk disease of the lumbar and cervical spine that predated the incident at Wynn's property on February 8, 2010:

> Q. Now, you've diagnosed Ms. O'Connell as having degenerative disk disease in her cervical spine; is that correct?
>
> A. Yes.
>
> Q. And in that sense, it was a preexisting condition; correct?
>
> A. Yes.
>
> Q. You also diagnosed her with lumbar disk disease; is that correct?
>
> A. Yes.
>
> Q. And, again, that diagnosis -- that condition predated February 8, 2010; is that correct?
>
> A. Yes.
>
> Q. And, again, that was a preexisting condition of Ms. O'Connell; correct?
>
> A. Yes.

(10 AA 1925-26.)

O'Connell herself testified to having a previous back injury before the incident at Wynn's property. (9 AA 1706-07.) In addition, Dr. Tingey testified that O'Connell has arthritic and/or degenerative changes in her right knee that were unrelated to the incident at Wynn's property. *Id.* at 1869-70.

Furthermore, the uncontroverted evidence at trial established that O'Connell suffers from additional preexisting health issues and conditions, such as fibromyalgia, IBS, anxiety, depression, Ehler Danlos and Marfan syndrome. (9 AA 1728; 1730; 1744-45; 1751.) During their testimony, both Dr. Dunn and Dr. Tingey conceded that some of these health issues, such as fibromyalgia, anxiety and depression would affect and contribute to O'Connell's pain symptomology and purported injuries. (9 AA 1870-71; 10 AA 1929-31.)

Despite this, O'Connell made no effort to apportion her damages at trial. Conceding her failure, O'Connell's counsel even argued that, "***I don't think there is any requirement for apportionment in this case***." (10 AA 1992.) (emphasis added). As detailed below; however, O'Connell's counsel is plainly wrong.

G. O'Connell's Only Expert Evidence Is Untimely And Unreliable.

Besides ignoring her obligation to apportion damages, O'Connell's case for damages relied on expert testimony that should have been excluded altogether. As shown, O'Connell disclosed no retained medical experts. The only expert medical testimony presented by O'Connell came from Dr. Dunn and Dr. Tingey. As non-reporting experts, Dr. Dunn and Dr. Tingey were limited to testifying about their opinions formed during the course of treatment. However, this treatment did not occur until years after O'Connell's fall.

As Dr. Dunn testified, he did not examine O'Connell until June 16, 2014 – almost four and a half years after her fall. (10 AA 1924.) Moreover, Dr. Tingey's first, and only, examination of O'Connell occurred on May 11, 2015 – over five years after the incident at Wynn. *Id.* at 1868. As her serial medical examinations demonstrated, O'Connell suffered from multiple new and developing health conditions during this intervening time, which are all unrelated to her fall at Wynn. Indeed, the testimony at trial revealed that O'Connell even suffered from a subsequent fall on July 14, 2010, after her incident at Wynn. *Id.* at 1770-73. During this fall, O'Connell injured both her right and left knee. *Id.*

Despite this, Dr. Dunn and Dr. Tingey were permitted to testify as to O'Connell's injuries. However, both Dr. Dunn and Dr. Tingey admitted that their conclusions were based exclusively upon O'Connell's self-reporting. As Dr. Dunn testified:

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

* * *

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

A. Yes.

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

A. Yes.

(10 AA 1926; 1935.)

For his part, Dr. Tingey also confirmed that his opinion was based only upon what O'Connell had told him:

Q. And your conclusion that the right knee meniscus tear was as a result of the fall of February 8, 2010, was based upon Ms. O'Connell's assertion that that's when she was injured?

A. Yes. Well, based on her history she gave to me.

. . .

Q. And the severity of Ms. O'Connell's pain relating to her right knee, your understanding of what that pain is exclusively based on what she reports?

A. Yes.

(9 AA 1869-70; 1874.)

The inherent problem, and danger, with Dr. Dunn and Dr. Tingey's testimony is apparent. They testified as medical experts but provided no substantive medical testimony bearing on O'Connell's claimed injuries. Instead, O'Connell used them as

character witnesses to support her subjective contention that she began experiencing back, neck, and right knee pain after her fall at Wynn and that the fall caused her symptoms. Thus, O'Connell presented no reliable evidence to support her assertions about her level of pain and suffering, or that it was caused by the fall.[5]

As Wynn's retained medical expert – Doctor Victor Klausner ("Klausner") – confirmed, all of O'Connell's multiple complaints, including her alleged back, neck, and right knee pain, "have nothing to do with the slip and fall." (11 AA 2152.) Instead, her actual injuries related to the fall were limited to the bruising on her right side diagnosed during her visit to UMC two days after her fall.

According to Dr. Klausner, O'Connell suffers for "Symptom Magnification Syndrome" whereby she reports pain "out of proportion with normal physiologic response to injury" and that "can't be explained by the objective medical findings" in order to achieve some kind of "secondary gain", like attention or a sense of self-worth. (11 AA 2155-63.) Naturally, this explained O'Connell's constant visits to doctors and ever-expanding list of conditions she blamed on her fall.

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[5] As Dunn testified:

> Q. If she had reports of pain before the fall, that would affect your opinion; is that right?
>
> A. Yes.

(10 AA 1935.)

H. The Jury Returns A Verdict For O'Connell And The Court Denies Wynn's Renewed Motion For Judgment As A Matter Of Law.

Owing to the obvious deficiencies in O'Connell's case for liability and damages, Wynn moved for judgment as a matter of law under NRCP 50(a) at the close of O'Connell's case. (10 AA 1982.) The basis for Wynn's motion was straightforward. Because O'Connell's only proof to show that Wynn possessed constructive notice was her own self-serving, based upon nothing, guess about how long the green mystery substance had been on the floor, O'Connell provided no evidence to support Wynn's liability. Moreover, O'Connell failed to apportion her damages and presented a claim for pain and suffering that was based exclusively on her own statements to her treating physicians. These "experts" did no more than repeat what O'Connell had told them.

While the District Court agreed there was "very, very little evidence regarding constructive notice" and that the "only evidence" was O'Connell's own testimony, it denied Wynn's motion. (10 AA 1986.) With respect to O'Connell's damages and the testimony of Dr. Dunn and Dr. Tingey, the District Court ultimately denied Wynn's motion on these grounds as well. *Id.* at 1992.

Thus, the case went forward and was presented to the jury. Wrongly believing that the District Court would determine the amount of damages after they determined liability, the jury initially returned to the courtroom with a verdict but no decision on the amount of damages. (11 AA 2331-32.) However, after deliberating for just

four additional minutes, the jury returned a verdict for O'Connell, awarding her $400,000.00 in damages – $150,000.00 for past pain and suffering and $250,000.00 for future pain and suffering. *Id.* at 2333-34. This amount was reduced to $240,000.00 in light of the jury's finding that O'Connell was 40% at fault for her fall. *Id.*

Final judgment based on the jury's verdict was entered on December 15, 2015. (11 AA 2338.) Thereafter, Wynn filed its Renewed Motion for Judgment as a Matter of law or, Alternatively, Motion for a New Trial or Remittitur on December 30, 2015. (12 AA 2359.)[6] The District Court denied Wynn's renewed motion in an order entered May 24, 2016. (17 AA 3472.) This appeal followed.

SUMMARY OF THE ARGUMENT

Wynn is entitled to judgment as a matter of law because legal defects infect every element of O'Connell's claim for negligence against Wynn. Alternatively, the Court should reduce O'Connell's judgment to eliminate all her damages or, at a minimum, take out her damages for future pain and suffering.

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[6] In its Motion, Wynn also argued for a new trial. As Wynn showed, multiple issues supported a new trial including, but not limited to, O'Connell's failure to prove liability or damages, O'Connell's repeated false claims that Wynn controlled the evidence, and her counsel's comments to the jury that they are the "conscious of the community."

To begin, O'Connell has not and cannot demonstrate that Wynn's actions fell below the applicable standard of care. Conscious that she provided no evidence that the Wynn knew, or should have known, about the green mystery substance that O'Connell allegedly slipped on, O'Connell resorted to arguing for an expanded standard for constructive knowledge at trial. In particular, O'Connell claimed that rather than show a recurrent or virtually continuous condition, as this Court's precedent requires, she could demonstrate that Wynn possessed constructive knowledge with evidence that the green mystery substance had sat on the floor for an unreasonable amount of time before O'Connell's fall.

While O'Connell is wrong on the law, her legal errors are the least of her problems. Even if this Court accepts O'Connell's assertion that constructive knowledge may be established under O'Connell's expanded standard, O'Connell failed to produce any evidence from which the trier of fact could determine how long the green mystery substance was on Wynn's floor before O'Connell slipped and fell.

Indeed, O'Connell failed to identify even the most basic information about the substance at all, including what it was or how long it was on Wynn's floor. Thus, O'Connell cannot honestly claim that the jury here was capable of making any determinations about duration. Because the law of every jurisdiction, including the only one that matters (Nevada), requires O'Connell to produce actual evidence of

Wynn's constructive knowledge, O'Connell's judgment must be overturned as a matter of law.

Of course, O'Connell's failure does not end with the standard of care. Rather, it extends to the mandatory elements of causation and damages as well. Here, O'Connell admittedly (and intentionally) failed to satisfy her burden of proving that her alleged damages were actually caused by her fall at Wynn. The law is clear that O'Connell must apportion her damages between the pain and suffering that she allegedly suffered as a result of her fall at Wynn in February, 2010, and those related to her preexisting conditions and subsequent fall in July of 2010. Try as she might, O'Connell cannot shift the burden of apportioning onto Wynn. Wynn is the only defendant and O'Connell is in the best position to apportion her injuries. Thus, she could have, and should have, apportioned her new damages from her unrelated conditions. As a result, Wynn is entitled to judgment in its favor on these grounds or O'Connell's damages should be reduced to zero.

Finally, in the event the Court looks past the legal defects in O'Connell's only claim, Wynn is entitled to remittitur reducing O'Connell's damages by the amounts she received for future pain and suffering. As this Court repeatedly holds, future pain and suffering for subjective injuries, such as the ones O'Connell claims here, requires expert testimony.

However, O'Connell tried to replace expert evidence with the speculation of two treating physicians that she failed to disclose until well after the deadline for experts and all discovery. While the fact Wynn did not receive a fair chance to examine or rebut these witnesses before the trial began requires they be excluded, their testimony at trial only proves Wynn's point.

Specifically, these treating physicians did not examine O'Connell until years after her fall at Wynn, and years after she filed this lawsuit. As they conceded at trial, their "knowledge" of O'Connell's injuries (*i.e.*, pain and suffering) is based entirely on O'Connell's own self-serving statements to them about the source of her injuries. As courts universally agree, a plaintiff's self-reporting about the alleged source of injuries and symptoms to treating physicians years after an accident occurred is inadmissible and only serves to mislead the jury.

Without this evidence, O'Connell's case for future pain and suffering damages must fail. Thus, in the event the Court does not overturn the entire judgment, it must at least be reduced to eliminate the $150,000.00 in future pain and suffering damages O'Connell received at trial.

ARGUMENT

A. This Court Reviews The District Court's Rulings On Wynn's Motions De Novo.

The District Court erred when it denied Wynn's original, and renewed, motion for judgment as a matter of law. As the Court is aware, Wynn's motions presented solely a question of law. *Dudley v. Prima*, 84 Nev. 549, 551, 445 P.2d 31, 32 (1968) (citations omitted). Thus, this Court review's the District Court's rulings de novo. *Rd. & Highway Builders, LLC v. Northern Nev. Rebar, Inc.*, 128 Nev. 384, 389, 284 P.3d 377, 380 (2012) (citing *Winchell v. Schiff*, 124 Nev. 938, 947, 193 P.3d 946, 952 (2008)); *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 424 (2007) ("This court applies the same standard on review that is used by the district court.").

B. The Jury's Finding Of Liability Against Wynn Is Clearly Contrary To The Law.

1. To Establish Negligence, O'Connell Must Demonstrate Wynn Actually Did Something Wrong.

As the Court is aware, "[t]he owner or occupant of property is not an insurer of the safety of a person on the premises, and in the absence of negligence, no liability lies." *Sprague v. Lucy Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322 (1993) (citation omitted). To prevail at trial, a defendant need only negate one of the elements of negligence. *Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 777, 291 P.3d 150, 153 (2012) (citing *Harrington v. Syufy Enters.*, 113 Nev. 246, 248, 931 P.2d 1378, 1380 (1997)).

Wynn's duty to its guests is well-settled. As a landowner, Wynn "must exercise reasonable care not to subject others to an unreasonable risk of harm." *Moody v. Manny's Auto Repair*, 110 Nev. 320, 329, 871 P.2d 935, 941 (1994) (quoting *Turpel v. Sayles*, 101 Nev. 35, 38, 692 P.2d 1290, 1292 (1985)). "A [property owner] must act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk." *Id.*; *Foster*, 128 Nev. at 781, 291 P.3d at 156.

As shown, O'Connell alleges she slipped on a foreign substance. Thus, Wynn may only be held liable if it had actual or constructive notice of the condition and failed to remedy it. *Sprague*, 109 Nev. at 250, 849 P.2d at 322. O'Connell conceded that she had no evidence that Wynn created the foreign substance or had actual notice of it before her fall. As O'Connell's counsel made clear, her only theory of liability is that Wynn had constructive knowledge. Therefore, O'Connell had the burden to prove constructive notice at trial; which she clearly failed to do.

2. O'Connell Cannot Prove Constructive Knowledge Under Nevada's Standard.

The standard for demonstrating constructive notice in Nevada is well-settled. As this Court ruled in *Sprague v. Lucky Stores*, constructive notice requires sufficient evidence for a jury to find "that Lucky knew that produce was ***frequently*** on the floor, … [or] … ***virtually continual*** debris on the produce department floor

…." 109 Nev. at 251, 849 P.2d at 323 (emphasis added). Only then, would Lucky be "on constructive notice that, at any time, a hazardous condition might exist which would result in an injury to Lucky customers." *Id.*

While O'Connell tried to bypass this standard during trial, this Court has repeated it time-and-again. *See e.g., FGA, Inc. v. Giglio*, 128 Nev. Adv. Rep. 26, 278 P.3d 490, n. 5 (2012) ("[W]hile they may have different labels, both the 'recurrent risk' and 'mode of operation' approaches involve essentially the same analysis: to determine whether owners are liable to injured patrons by analyzing whether there was a ***'recurrent' or 'continuous'*** risk on the premises associated with a chosen mode of operation.") (emphasis added); *see also Eldorado Club v. Graff*, 78 Nev. 507, 511, 377 P.2d 174, 176 (1962) ("We hold, therefore, that where a slip and fall is caused by the temporary presence of debris or foreign substance on a surface, which is not shown to be ***continuing***, it is error to receive 'notice evidence' of the type here involved for the purpose of establishing the defendant's duty.") (emphasis added); *see also Hammerstein v. Jean Dev. West*, 111 Nev. 1471, 1476, 907 P.2d 975, 978 (1995).

Here, O'Connell admittedly presented no evidence at trial that the green mystery substance was a continuous or recurrent condition at Wynn. Indeed, O'Connell failed to establish how long the substance was on Wynn's floor, what the substance was, or where it came from. During the trial, O'Connell presented *nothing*

about the general conditions in Wynn's atrium or any facts about the condition, or cleanliness, of its floors. While O'Connell testified that she thought the substance was water from Wynn's planter beds, she admitted that this was only a guess – a guess that was disproven by the evidence.

Thus, the record was *completely devoid* of any information that could have led the jury to conclude that the green mystery substance was a continuing or recurrent condition at Wynn. As such, Wynn should have been granted judgment in its favor as a matter of law.

3. O'Connell Cannot Prove Constructive Knowledge Under Any Standard.

Aware that she could not meet the well-established threshold set forth in *Sprague*, O'Connell argued for an expanded standard of constructive knowledge during trial. Relying upon centuries-old case law involving dried banana peels and unrelated authority addressing notice of frequent spills on the floors of fast food restaurants, O'Connell claimed that Wynn could be held liable if the jury found the green mystery substance had been left on the floor for an unreasonable amount of time. Thus, instead of examining whether the substance was a continuous or recurring condition, as required by *Sprague*, O'Connell argued the finder of fact could determine constructive notice by finding that it had simply been left there for too long. Of course, this is not the law in Nevada. Regardless, even if the Court were to adopt O'Connell's expanded standard, her case still fails.

Again, O'Connell's only "evidence" was her own testimony that the green mystery substance was about seven feet in size, a portion of it had begun to dry and become sticky, and collect dirty footprints. Although she admittedly did not know how long it had been there. Wynn's porter (who also testified that she didn't see the substance at all) testified that it appeared to be like "honey for pancakes."[7] This testimony formed the exclusive support for O'Connell's claim to constructive knowledge – a fact noted repeatedly by the District Court.

However, O'Connell's own case law cited in opposition to Wynn's motion for judgment as a matter of law prove the inherent flaw in O'Connell's claim. For example, in *Tidd v. Walmart Stores, Inc.*, an Alabama case cited by O'Connell, the court concluded that the size of a spill is insufficient to raise a question of fact regarding the length of time it had been present. 757 F. Supp. 1322 (N.D. Ala. 1991). As the court observed, "[a] large spill can be as young as a small spill. A large spill can be as sudden as a small spill. … A large, sudden spill gives an invitor no additional notice merely because of its size." *Tidd*, 757 F. Supp. at 1324.

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[7] During trial, it was clear that Wynn's porter, Elias, was suffering from language barriers and misunderstanding about counsels' questions. (8 AA 1529.)

Further, courts universally agree that O'Connell's guess that the green mystery substance had begun to dry and get sticky is insufficient to demonstrate constructive knowledge. As these courts recognize, O'Connell's testimony is worthless without reliable evidence of what the substance was or how long it should take to dry. *See, e.g., Great Atlantic & Pacific Tea Co. v. Berry*, 128 S.E.2d 311 (Va. 1962) (observing that the majority of jurisdictions prohibit evidence of spilled substances as appearing old-looking, dirty, or grimy to establish how long the substances had been on the floor because it would require the jury to purely speculate or guess in order to allow recovery); *Rodriguez v. Kravco Simon Co.*, 111 A.3d 1191, 1193 (Pa. Super. Ct. 2015) ("Without evidence of how long it takes the liquid in question to become sticky or dry, the jury would be unable to determine whether the spill was present for a sufficiently long time to warrant a finding of constructive notice."); *Woods v. Wal-Mart Stores, Inc.*, No. 3:05CV048, 2005 WL 2563178, *8-9 (E.D. Va. Oct. 12, 2005) ("Plaintiff's contention that the spill appeared dirty, drying, and had tracks running through it is not enough under Virginia law to establish when the spill occurred" and, since the plaintiff could not establish when the spill occurred, "she

also cannot establish that the spill had existed for a long enough period of time to charge the Defendant with constructive knowledge.").[8]

Of course, "[t]he duration of the hazard is important because if a hazard only existed for a very short period of time before causing any injury, then the possessor of the land, even 'by the exercise of reasonable care,' would not discover the hazard, and thus would owe no duty to protect invitees from such a hazard." *Craig v. Franklin Mills Assocs., L.P.*, 555 F. Supp. 2d 547, 550 (E.D. Pa. 2008) (citing Restatement (Second) of Torts § 343).

O'Connell's equivocal recollections about the appearance of the green mystery substance are wholly insufficient to support constructive knowledge. Again, O'Connell could not even tell the jury what the substance was.[9] It should go without saying that a finder of fact cannot be tasked with determining the drying time of a substance that is not even identified for them. The jury was left to just guess about

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[8] *See also Adams v. National Super Markets, Inc.*, 760 S.W.2d 139, 141 (Mo. App. 1988) (holding trial court erred by not granting directed verdict a when the only evidence adduced by plaintiff that an ice cream spill had existed for sufficient length of time to constitute constructive notice was that the edges of the ice cream puddle were crusty and hard; a wet cloth was required to clean it; and a white mark was left on the floor).

[9] Following her fall, O'Connell did not have any of the green mystery substance on her shoes or clothes.

Wynn's constructive knowledge. As such, Wynn is entitled to judgment as a matter of law.[10]

C. O'Connell's Case For Damages Also Fails As A Matter Of Law.

Of course, the fundamental flaws with O'Connell's claim against Wynn do not end with liability. As Wynn demonstrated before the District Court, O'Connell's case for damages also fails as a matter of law. As shown, O'Connell's only damages at trial were for past and future pain and suffering. The undisputed testimony proved that O'Connell suffers from various preexisting conditions and suffered from a subsequent fall. Yet, O'Connell knowingly made no effort to distinguish between her pain and suffering from the fall and her pain and suffering caused by her preexisting or otherwise unrelated injuries and conditions.

As the Court is aware, a plaintiff bears the burden of proving both the fact and the amount of damage. *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 955 P.2d 661, 671 (1998). Moreover, a plaintiff bears the burden of proof on medical

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[10] Indeed, if the judgment is permitted to stand, the Court would be imposing what amounts to a strict liability standard holding Wynn liable merely because O'Connell slipped while on Wynn's property. This is clearly contrary to well-settled Nevada law. *See Sprague*, 109 Nev. at 250, 849 P.2d at 322 ("An accident occurring on the premises does not of itself establish negligence."); *Morton v. Wal-Mart Stores, Inc.*, 2013 U.S. Dist. LEXIS 18647, at *11 (D. Nev. Feb. 12, 2013) ("All that [the plaintiff] can point to is evidence to demonstrate mere presence of the hazardous condition, but that is not enough to create constructive notice.").

causation.[11] *Morsicato v. Sav-On Drug Stores, Inc*., 121 Nev. 153, 157-58, 111 P. 3d. 1112 (2005); *Rowe v. Munye*, 702 N.W.2d 729, 730 (Minn. 2005) ("In a negligence action, the plaintiff generally has the burden of proving, by a preponderance of the evidence, damages caused by the defendant.").

"When an accident involves aggravation of preexisting injuries, [courts] require[] the defendant to pay only for the damages he or she caused over and above the consequences that would have occurred from the preexisting injury if the accident had not occurred." *Rowe*, 702 N.W.2d at 736; *see also Reichert v. Vegholm*, 840 A.2d 942, 944 (N.J. Super. 2009) (A defendant should generally be responsible only for 'the value of the interest he [or she] destroyed.'") (citation omitted).

Thus, "[i]n a case where a plaintiff has a pre-existing condition, and later sustains an injury to that area, the Plaintiff bears the burden of apportioning the injuries, treatment and damages between the pre-existing condition and the subsequent accident." *Schwartz v. State Farm Mut. Auto. Ins. Co*., 2009 U.S. Dist.

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

LEXIS 64700, *15-16, 2009 WL 2197370 (D. Nev. July 22, 2009) (citing *Kleitz v. Raskin*, 103 Nev. 325, 327, 738 P.2d 508 (1987) (citing Restatement (Second) of Torts §433(B), and relying on *Phennah v. Whalen*, 28 Wn. App. 19, 621 P.2d 1304, 1309 (Wash. Ct. App. 1980) (stating that the burden to allocate should not be shifted to the defendants where the situation involves the allocation of damages between a plaintiff with a previous injury and a single, subsequent tortfeasor); *see also Reichert*, 840 A.2d at 944.

As courts explain, "'aggravation of a preexisting physical condition' is a measure of damages, not a theory of liability, even if one puts the word 'negligent' in front of the phrase." *Rowe*, 702 N.W.2d at 736 (citation omitted). "Thus, … case law is clear that the burden remains on the plaintiff in cases involving aggravation of a preexisting injury." *Id.*; *Reichert*, 840 A.2d at 944 ("The general rule does not change when plaintiff's injuries or conditions are aggravated by a subsequent accident."). The policy behind this dictate is plain: "[I]n a case involving aggravation of a preexisting injury, the plaintiff is likely to have more knowledge than the defendant of the extent of the preexisting injury." *Rowe*, 702 N.W.2d at 740. "In such a case, it is plaintiff who would best understand how a defendant's tort has affected or is related to prior or subsequent injuries or conditions." *Reichert*, 840 A.2d at 944.

Here, O'Connell's own treating physician, Dr. Dunn, admitted that O'Connell suffered from conditions predating her fall at Wynn. As detailed above, Dr. Dunn testified that O'Connell suffered from degenerative disk disease and lumbar disk disease before the time of her fall. Moreover, O'Connell herself admitted to having a previous back injury before the incident.[12]

Furthermore, the uncontroverted evidence at trial established that O'Connell suffers from additional preexisting health issues and conditions, such as fibromyalgia, IBS, anxiety, depression, Ehler Danlos and Marfan syndrome. While testifying, Dr. Tingey and Dr. Dunn both conceded that some of these health issues, such as fibromyalgia, anxiety and depression would affect and contribute to O'Connell's pain symptomology and purported injuries.

Thus, O'Connell has not and cannot deny that she suffers from numerous preexisting/contributing conditions. As such, she bore the burden of apportioning her injuries, treatment and damages at trial. However, O'Connell conceded that she knowingly failed to do so, leaving the jury to just guess that the actual source of all

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[12] With respect to her right knee, O'Connell conceded during trial that she suffered a severe injury during a fall subsequent to her fall at Wynn. Notably, O'Connell failed to even inform Dr. Tingey about this fall. In addition, Dr. Tingey testified that O'Connell has arthritic and/or degenerative changes in her right knee that were unrelated to the incident at Wynn's property.

O'Connell's pain and suffering was her fall. (10 AA 1992.)[13] Because O'Connell failed to satisfy her burden of establishing that her alleged pain and suffering actually flowed from the incident at Wynn, her claim against Wynn again fails as a matter of law.[14] Alternatively, given O'Connell's failure to apportion, her damages should be reduced to zero.

D. At A Minimum, O'Connell's Judgment Should Be Reduced To Eliminate Her Damages For Future Pain And Suffering.

Finally, even if the Court looks past O'Connell's failure to prove liability, or damages, as a matter of law, Wynn is still entitled to a remittitur reducing the judgment to eliminate O'Connell's damages for future pain and suffering. As shown

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[13] O'Connell's failure to apportion her damages is particularly troubling considering the delay in evaluation by her only testifying medical experts. Dunn and Tingey did not see O'Connell until years after her fall. Thus, there is no way to know if the fall at Wynn or O'Connell's subsequent fall caused her alleged damages.

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

above, the jury awarded O'Connell $250,000.00 for future pain and suffering. Reduced by 40% for her contributory fault, this amount totaled $150,000.00.

1. Damages for Future Pain and Suffering Require Expert Testimony.

As this Court has repeatedly recognized, "when an injury or disability is subjective and not demonstrable to others (such as headaches), expert medical testimony is necessary before a jury may award future damages." *Krause Inc. v. Little*, 117 Nev. 929, 938, 34 P.3d 566 (2001) (citing *Gutierrez v. Sutton Vending Serv.*, 80 Nev. 562, 565-66, 397 P.2d 3, 4-5 (1964)); *Lerner Shops v. Marin*, 83 Nev. 75, 79-80, 423 P.2d 398, 400 (1967) (in cases involving "subjective physical injury, . . . the claim must be substantially supported by expert testimony to the effect that future pain and suffering is a probable consequence rather than a mere possibility").

Injuries that do not require expert medical testimony for future pain and suffering are broken bones or a shoulder injuries causing demonstrably limited range of arm motion because they are "readily observable and understandable by the jury without an expert's assistance." *Id*. at 938-39 (citing *Paul v. Imperial Palace, Inc*., 111 Nev. 1544, 1548, 908 P.2d 226, 229 (1995)). Put differently, these are "objective" injuries which do not require expert medical testimony. *Id*. Injuries that are not demonstrable to others, and require expert testimony, include reinjuring

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

Here, O'Connell's injuries are not objective. In particular, O'Connell claimed she suffered from pain in her neck, back, and right knee as a result of her fall. As Dr. Dunn conceded, O'Connell's alleged pain and suffering from these injuries is purely subjective**:**

> Q. Ms. O'Connell's expression of pain though is based upon her subjective complaints; is that correct?
>
> A. That is defined purely as subjective, yes.

(10 AA 1939.)

Indeed, O'Connell herself conceded that medical expert testimony was required in this case to establish her damages for pain and suffering: "Now, in order to get medical pain and suffering, you can't just rely on [O'Connell] saying, Well, I'm hurt; right? You have to hear from an expert witness." (11 AA 2244.)

Thus, O'Connell's claim for future pain and suffering requires expert medical testimony. However, the only expert medical testimony came from Dr. Dunn and Dr. Tingey, two of O'Connell's treating physicians. Because their testimony should have been excluded, O'Connell's claim for these amounts must fail.

2. O'Connell's Only Medical Experts Should Have Been Rejected as Untimely.

There can be no dispute that O'Connell's only testifying medical experts were not properly disclosed before trial. As shown above, O'Connell failed to disclose Dr. Tingey, *at all*, until August 27, 2015 – over two months after the discovery deadline and even after Wynn filed its motion in limine on August 13, 2015. With respect to Dr. Dunn, O'Connell failed to disclose his CV, fee schedule and trial history until September 18, 2015, five months after the expert disclosure deadline and more than three months after the deadline for discovery.

There can also be no dispute that O'Connell's untimely and deficient disclosure of these witnesses prejudiced Wynn. Wynn had no opportunity to depose Dr. Tingey before trial. Moreover, Wynn's medical expert – Dr. Klausner – did not have an opportunity to review Dr. Tingey's medical records prior to preparing his expert report. It was not until Dr. Tingey and Dr. Dunn were testifying at trial that Wynn was finally provided with an understanding of what their testimony was going to encompass.

Unable to dispute this timing or prejudice, O'Connell made excuses before trial. According to O'Connell, Dr. Tingey replaced her original treating physician in May of 2015, and O'Connell was still receiving treatments until the close of discovery. However, neither of these excuses explains why O'Connell waited until August 27, 2015, to disclose Dr. Tingey. O'Connell admits she was treating with

Dr. Tingey three months earlier, in May of 2015. Moreover, O'Connell's continued treatment until the June 12, 2015, discovery deadline does not excuse the fact that O'Connell waited until over two months to disclose Dr. Tingey.

The Nevada Rules of Civil Procedure required O'Connell to provide her disclosures promptly and "without awaiting a discovery request." NRCP 16.1(a)(1). O'Connell was "not excused from making [her] … disclosures because [she] … ha[d] not fully completed [her] … investigation." *Id.* Thus, O'Connell should have disclosed Dr. Tingey promptly and supplemented her treatment records as they became available.

The consequences of O'Connell's actions are clear. Pursuant to NRCP 37(c)(1), O'Connell should not have been permitted to use Dr. Tingey or Dr. Dunn as witnesses at trial. *See FCH1, LLC v. Rodriguez*, 130 Nev. Adv. Rep. 46, 335 P.3d 183, 190 (2014) ("[E]ven if Dr. Schifini reviewed records from other providers in the course of his treatment of Rodriguez and not in order to form the opinions he proffered, he could only properly testify as to those opinions he formed based on the documents he disclosed to Palms.") (citing NRCP 16.1 drafter's note (2012 amendment); *Washoe Cnty. Bd. of Sch. Trustees v. Pirhala*, 84 Nev. 1, 5, 435 P.2d 756, 758 (1968) (noting that the purpose of discovery is to take the "surprise out of trials of cases so that all relevant facts and information pertaining to the action may

be ascertained in advance of trial")). Thus, O'Connell's only medical experts should have been excluded.

3. The Testimony of Dr. Dunn and Dr. Tingey Was Not Reliable.

Even if the Court looks past the deficient timing and substance of O'Connell's expert disclosures, the opinions offered by Dr. Dunn and Dr. Tingey to support O'Connell's claim for damages were clearly improper. Dr. Dunn and Dr. Tingey treated O'Connell years after her fall and relied exclusively on her self-reporting for their conclusions.

As this Court knows, to testify as an expert witness under NRS 50.275, the witness' specialized knowledge must assist the trier of fact to understand the evidence or to determine a fact in issue. *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). "An expert's testimony will assist the trier of fact only when it is relevant and the product of reliable methodology." *Id.*, 189 P.3d at 651. As courts recognize, "[w]here the sole basis for a physician's testimony regarding causation is the patient's self-reporting that testimony is unreliable and should be excluded." *Hare v. Opryland Hospitality, LLC*, 2010 U.S. Dist. LEXIS 97777, *14 (D. Md. Sept. 17, 2010) (excluding treating physician's testimony as to causation because he failed to conduct a "differential diagnosis" that considered alternative causes for the injury) (citing *Perkins v. United States*, 626 F.Supp.2d 587, n. 7 (E.D. Va. 2009); *see also Goomar v. Centennial Life Ins. Co*., 855 F. Supp. 319, 326 (S.D.

Cal. 1994) (holding that proffered expert testimony concerning a patient's medical condition, based only upon the patient's self-report to the experts was "unsupported speculation").[15]

Here, O'Connell's self-reporting, years after the incident, was the *only* basis for Dr. Tingey and Dr. Dunn's conclusions regarding causation. Thus, their testimony should never have been considered by the jury. Indeed, Dr. Tingey and Dr. Dunn provided no substantive medical testimony bearing on O'Connell's claimed injuries. Instead, they were used as character witnesses for O'Connell to support her subjective contention that she began experiencing pain after her fall in February of 2010 and that the cause of her symptoms was in fact her fall. Because this is plainly improper, O'Connell's only expert support for her future pain and suffering should have been excluded. Therefore, at a minimum, Wynn is entitled to a remittitur eliminating O'Connell's damages for future pain and suffering.

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[15] For example, in *Perkins*, the Virginia federal district court excluded expert testimony regarding causation where a doctor simply took the patient's explanation and adopted it as his opinion. 626 F.Supp.2d at 592. As the court recognized, the treating physician "did not adequately investigate [the plaintiff's] relevant medical history" in determining the cause of her injuries, such as prior accidents and preexisting conditions. *Id*. at 593-94. The treating physician's opinion was unreliable because the treating physician "categorically dismissed or ignored evidence of other preexisting conditions when such evidence was available to him at the time of treatment." *Id*. at 594.

CONCLUSION

For the foregoing reasons, Wynn respectfully asks this Court to overturn the Judgment and remand to the District Court with directions to enter judgment in Wynn's favor on O'Connell's only claim for negligence. In the alternative, the judgment should be reduced to zero or, at a minimum, reduced to eliminate the $150,000.00 O'Connell received for future pain and suffering.

Dated this 1st day of May, 2017.

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AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 1st day of May, 2017.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 9,977 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I

understand that I may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 1st day of May, 2017.

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STATEMENT OF RELATED CASES

Respondent/Cross-Appellant hereby certifies that, to Respondent/Cross-Appellant's knowledge, there are no cases or appeals pending before this Court related to the present appeal.

Dated this 1st day of May, 2017.

LAWRENCE J. SEMENZA, III, P.C.

By: /s/ Jarrod L. Rickard
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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2017, I electronically filed the foregoing with the Supreme Court of Nevada by using the Court's electronic filing system.

I certify that all participants in the case are registered and that service will be accomplished by the Supreme Court of Nevada's electronic filing system.

s/ Kirstin E. Largent