

In the
Supreme Court
for the
State of Nevada

Electronically Filed
May 01 2017 01:00 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

v.

YVONNE O'CONNELL,

Respondent and Cross-Appellant.

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

APPELLANT'S APPENDIX
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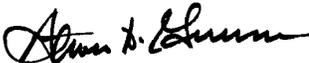
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CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

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

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

JURY TRIAL - DAY 3

MONDAY, NOVEMBER 9, 2015

APPEARANCES:

FOR THE PLAINTIFF: CHRISTIAN M. MORRIS, ESQ.
EDWARD J. WYNDER, ESQ.

FOR THE DEFENDANTS: LAWRENCE J. SEMENZA, III. ESQ.
CHRISTOPHER D. KIRCHER, ESQ.

ALSO PRESENT:

Renee Ocougne de Gascon
Spanish Interpreter

COURT RECORDER:

LARA CORCORAN
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC
Englewood, CO 80110
(303) 798-0890

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

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<u>NAME</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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PLAINTIFF'S WITNESSES:

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***Testimony with Spanish Interpreter**
****Testimony outside the presence of the jury**

EXHIBITS

<u>DESCRIPTION</u>	<u>ADMITTED</u>
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(No exhibits admitted)

1 LAS VEGAS, NEVADA, MONDAY, NOVEMBER 9, 2015, 1:33 P.M.

2 (In the presence of the jury)

3 THE MARSHAL: Jury's all accounted for, Your Honor.

4 THE COURT: Thank you. Please be seated. All
5 right. Good afternoon. And this is the continuation of case
6 number A-12-655992, Yvonne O'Connell vs. Wynn Resorts Limited.

7 And the record will reflect the presence of the
8 parties with their respective counsel, all officers of the
9 court are present, and the individuals who were selected as
10 jurors and alternate jurors last week during jury selection
11 are present, and we are now going to swear them in as jurors
12 and alternate jurors.

13 THE CLERK: Could everyone rise, except the two
14 alternates, and raise your right hand?

15 JURORS SWORN

16 THE CLERK: You may be sweated. Would the
17 alternates please rise and raise your right hand?

18 ALTERNATE JURORS SWORN

19 THE CLERK: Please be seated.

20 THE COURT: Thank you. All right. All right,
21 ladies and gentlemen, I'm going to now give you a few pre
22 instructions just to let you know kind of how the case is
23 going to flow and what to expect as we proceed through the
24 week. So, you know, this is just an informal briefing to you,
25 and you're going to get at the end of the trial very specific

1 instructions as to the law in this matter. And those will be
2 in writing, and I will read those to you, so those
3 instructions will come at the end, and these are just some
4 things to let you know what to expect.

5 Now, this is a civil trial, of course, and it is the
6 plaintiff's burden of proof in a civil trial to prove their
7 case by a preponderance of the evidence, which basically means
8 that it's more likely than not that their case is as they
9 claim it to be.

10 Now, the way cases get started in a civil matter is
11 that a plaintiff files a Complaint, and the defense -- that
12 Complaint states what their claims are against the other side.
13 The defense reads that and files an Answer either admitting,
14 denying, or saying that they're denying because they don't
15 have enough information to form a belief as to the truth of
16 the allegations in the Complaint. Those are the documents
17 that start the case.

18 Now, during the trial, I wanted to admonish you from
19 the outset here that no juror may declare to a fellow juror
20 any fact relating to this case of that juror's own knowledge.
21 So, if any juror discovers during the trial or after the jury
22 has retired that that juror or any other juror has personal
23 knowledge of any fact or controversy in the case, then you
24 shall disclose that situation to me in the absence of the
25 other jurors.

1 So, what does that mean? Because that's a statutory
2 requirement that I admonish you. It means that if you learn
3 during the course of the trial that you're acquainted with the
4 facts of the case or the witnesses in the case -- and we had
5 previously asked you that, and you thought you weren't, but
6 sometimes, additional information comes up and you discover
7 something like that, and you hadn't previously told us about
8 it, then you need to let me know. You always do that by
9 letting the marshal know.

10 And then we would bring you, if you were the juror
11 in question, in, outside the presence of the other jurors to
12 make a determination, and that would be with the lawyers
13 present and the Court, to make a determination as to whether
14 you could continue to serve as a juror or not. This doesn't
15 happen often, it's just occasionally, but if it does, you need
16 to know what to do.

17 The other thing that might happen is if you're
18 deliberating and another juror has violated the Court's
19 previous orders that you're not to investigate or do anything
20 on your own -- this has happened in the past where a juror has
21 violated such a court order and then tries to tell all the
22 other jurors about it during deliberation.

23 If that should happen, then your responsibility as
24 jurors is to say, nope, stop, do not say another word, and to
25 immediately summon the marshal, who will be sitting outside

1 the door, guarding your deliberations, and let them know that
2 you -- that -- you know, if it's -- if it's a person that is
3 trying to do this, then it would be the foreperson, generally,
4 who would bring this to my attention. But again, it would be
5 something where we would bring the foreperson in if it was
6 another juror other than the foreperson that was doing this,
7 and find out what the circumstances were, and see what extent
8 there had been prejudice, if any, okay?

9 So, if something like that happens, you know what to
10 do. You contact the marshal, and the marshal will bring it to
11 my attention, I notify the lawyers of this, and we all are
12 present to figure out what happens next. All right.

13 I think I've told you before that during the course
14 of the trial, your contact with the Court is through the
15 marshal. Now, does that mean you can discuss the case with
16 the marshal? Absolutely not. You can discuss things with the
17 marshal like, during deliberations, you've run out of coffee
18 and you need to make another pot. And so, if you don't have
19 the ability, you know, or materials to do that, you let the
20 marshal know.

21 You know -- you know, if you've got some personal
22 issue or something that you think you're going to be late for,
23 you know, court, or something where you need to let the
24 marshal know, because he's going to need to bring that to my
25 attention, and I, in turn, the lawyers. That is something you

1 can talk to the marshal about.

2 You may never talk to the marshal about the case,
3 ask the marshal his opinion about the case, nothing about the
4 case. The marshal is more your contact for making sure your
5 stay in the courthouse runs smoothly, that your parking is
6 covered, and that, you know, the temperature of the room --
7 you can complain to him about the temperature of the room.
8 Sadly, I can't really do anything about that. The -- what
9 appear to be thermostats on the wall don't appear to be
10 connected to anything.

11 So, maybe there is someone who controls the
12 temperature in the building, but I don't know who that person
13 is. So, basically, layered -- the layered approach is the
14 best. Then you can -- if you're too warm, you can take your
15 jacket off, but if you're too cold, you can put it back on.
16 And it's oftentimes chilly in the courtroom, but you never
17 know. It's like that -- doesn't matter what the season
18 outside is, the courthouse is usually cold, except when it's
19 hot. So, again, I will do my best to keep you comfortable,
20 but some things are kind of outside my control.

21 Now -- and I think I told you last week, but I'll
22 just remind you again that if you pass any of the lawyers or
23 court personnel outside in the halls, please don't try and
24 engage them in conversation so they don't feel bad about
25 having to be rude and not responding to you. They're not

1 allowed to contact you at all outside the courtroom.

2 Even in the courtroom, they have to be very careful
3 about how they interact with the jury, because, otherwise, it
4 is -- can be seen as improper contact with the jury, trying to
5 curry favor with the jury, whereas their presentations are
6 supposed to be based on the evidence. And so, don't try and
7 have any contact with them outside in the halls if you should
8 pass them, because it will just make them feel bad.

9 Now, also, if you do while you're out in the halls
10 see a witness that's outside -- I mean, we don't have holding
11 areas for witnesses and holding areas for the jury. So, if
12 you see somebody that you think was a witness because maybe
13 their testimony had started, and then we took a break, stay
14 away from that person if that -- just, you know, if you see
15 them and they're talking to somebody, you don't want to
16 overhear anything they're saying, so just go to the other end
17 of the hall and try and keep from tainting what your
18 deliberations will be based upon, which they will be based
19 upon what you hear and see in this courtroom.

20 So, witnesses on the stand who will be under oath
21 testifying from the witness stand in this courtroom, and any
22 evidence that is admitted by the Court here at the time court
23 is in session.

24 Okay. Now, I told you last week, don't visit the
25 scene. That remains. Don't try and visit the scene or do any

1 research.

2 Now, during the trial, a lawyer may object, and of
3 course, that's their job, is when a lawyer voices an objection
4 to evidence in the trial, it's because -- they're doing that
5 for a reason; because they believe it violates the piece of
6 evidence, or the question asked violates the rules or the law,
7 and so it's their obligation to make an objection. In fact,
8 if they don't make an objection, it's not preserved, and so
9 they have to do that. So, you should not hold it against a
10 lawyer because an objection is made.

11 Now, if I sustain an objection, that means then --
12 to a question, for instance, then that means that you must
13 disregard that question as if it hadn't been asked. Don't try
14 and figure out or guess what the answer might have been to a
15 question. Questions aren't evidence; questions only are --
16 give meaning to an answer.

17 And so, if I sustain an objection, that the question
18 can't be asked, then you should completely disregard that,
19 because that's what that means; the evidence can't be
20 received. Same would be if evidence is offered, a piece of
21 evidence, physical evidence, a document, and there's an
22 objection which I sustain, the evidence can't come in.

23 And occasionally, I might tell you that I'm striking
24 some kind of evidence and you should disregard it. So, if I
25 do that, and you've been taking notes of that -- that

1 evidence, strike through that in your notes so you know later
2 when you go back you're not to consider that, because you've
3 been told you have to disregard that. If I overrule an
4 objection, then that means the question can be asked, the
5 answer can be had, or the evidence could be received.

6 Okay. So, if at any time you can't hear what the
7 witness is testifying to, then please raise your hand and say,
8 I can't hear, and don't be shy about it. It's really
9 important. You are the fact-finders in this trial, and you're
10 the ones who will decide what the facts are, and then use
11 those facts, apply them to the law, and by that method, come
12 up with a verdict in the case.

13 So, since you're the fact-finders, you need to hear
14 everything. So, if you can't hear either the question, if the
15 lawyer's voice is too low or what have you, and you can't hear
16 -- or a witness, then you need to bring that to the Court's
17 attention. Because sometimes I think I can hear it, and I'm
18 assuming you can hear it, and maybe you can't. Other times,
19 sometimes, I can tell, but if I don't, then you need to be
20 affirmative about saying that you couldn't hear, and we'll
21 have that question re-asked.

22 As I said, you're allowed to take notes in this
23 matter, and that's what the pads are for. So, all I can say
24 about that is don't let the note-taking distract you from
25 listening, because sometimes when we take notes and we are so

1 involved in making our note, we stop listening, and then the
2 problem is you're taking this note about something that
3 happened six questions ago, and you've missed all of the
4 questions and answers after that. So, don't let note-taking
5 distract you from your listening. Try and keep your note-
6 keeping, you know, to a minimum so that it doesn't distract
7 you from listening.

8 As well, you'll be given the opportunity to ask
9 questions of the witnesses after the lawyers have asked
10 questions. You don't get to just ask them questions and
11 practice your -- you know, being a lawyer. You have to write
12 your questions out in writing and submit them. They'll be
13 brought to the bench by the marshal, the lawyers and I will
14 confer and determine whether the question may be asked,
15 whether it's a proper question under the rules of evidence and
16 whatnot.

17 Sometimes the question has to be rephrased because
18 it's -- it's not articulated in a proper manner or what have
19 you. I may rephrase it if it doesn't -- you know, it can't be
20 just read. At any rate, the method of doing it is writing the
21 question. So, again though, don't let your -- don't let
22 yourself get preoccupied by writing out the question so that
23 then you're not listening to the other testimony, because
24 while you're writing out this question, what you may find is
25 the question has already been asked and answered, and if it

1 has been, I'm not going to re-ask the question, so don't do
2 that.

3 That has happened in the past where jurors decide
4 that they want to ask all the questions, and they're so busy
5 writing their question out that they don't listen to what all
6 the examination by the lawyers is, and they don't hear the
7 question -- the very question that they want asked that got
8 asked.

9 So, the method we'll use is, at the end of the
10 questioning -- so, you know, if you have a question, just
11 write a bare minimum about what you want your question. Then
12 I'll give you the opportunity to write the question down in a
13 manner that is legible and can be given to me, and then we'll
14 discuss it, and it will be dealt with in that fashion. So,
15 don't feel that you won't have adequate time.

16 Also, please remind me -- sometimes, you know, if
17 you want a question -- if you have a question and I -- we
18 finish, and I start saying, well, may this witness be excused,
19 and I haven't asked you affirmatively, say, I have a question
20 to remind me, because sometimes, we're moving along and we're
21 moving through the witnesses, I forget that the jury hasn't
22 had their opportunity, and that's because this questioning
23 thing by juries is relatively new in the scheme of my law
24 practice, which goes back 40 years.

25 So, okay, let's see. Now, the trial's going to

1 proceed in the following order. The -- first, the plaintiff
2 has the opportunity to make an opening statement. And the
3 purpose of an opening statement is to give you an overview of
4 what they expect to show through their witnesses during the
5 trial. It's not a closing argument. They're not going to be
6 arguing their case to you. And if they start arguing their
7 case to you, if either side does that in opening statements,
8 I will say, counsel, this is not argument.

9 So, but the purpose of it is this. You know, when
10 witnesses come in and testify, they're like pieces in a jigsaw
11 puzzle, so you have to take each of those pieces and see the
12 big picture. So, the purpose of an opening statement is to
13 kind of give you what the big picture is first so you know
14 where all of these pieces of evidence fits in to form that big
15 picture that they believe their case will show. So, that's
16 the purpose of an opening statement, and each side gets the
17 opportunity.

18 The plaintiff gets to go first. The defense may, if
19 they wish to, immediately follow the plaintiff's opening
20 statement with the defense opening statement, but they don't
21 have to make that opening statement immediately. They can
22 reserve it for the close -- after the close of the plaintiff's
23 case and before they begin their case. So, it's their option,
24 and the lawyer makes that decision at the relevant time
25 period.

1 So, now, after opening statements or statement are
2 concluded, then the plaintiff may call witnesses and put on
3 evidence for their case-in-chief, and so witnesses are called.
4 The plaintiff gets to go first with their witness -- their
5 witness. They ask questions first of the witness. Then the
6 defense may cross-examine those witnesses.

7 After the plaintiff's case has been put on, and the
8 plaintiff's case has rested, then the defense may then put on
9 a case if they wish to. It's of course the plaintiff's burden
10 of proof to prove their case, so the defense doesn't have to
11 put on a case, but generally does, and they proceed the same
12 way. They may call witnesses. If they call witnesses, then
13 the plaintiff may cross-examine those witnesses.

14 Close of the defense case. If it's appropriate, the
15 plaintiff might have a rebuttal case, and we won't know that
16 until the time comes. At the close of all of the evidence,
17 then you will be instructed on the law, and then you will hear
18 closing arguments from the lawyers.

19 Now, the trial, of course, is recorded. You won't
20 have the opportunity to get a transcription of the trial, so
21 it's really important to listen and pay attention. You have
22 the ability to take notes, as everyone will. And you'll be
23 able to share during your deliberations your thoughts and your
24 notes, but don't be overly swayed by notes of another juror.
25 Remember, you know, you should mainly rely on your

1 recollection of what occurred, and the notes are only to
2 enhance your recollection.

3 Occasionally, I might find it necessary to admonish
4 a lawyer to remind them about the rules of evidence, or the
5 rules of, you know, when they're examining a witness, or
6 whatever it is about, you know. But if I do that, it's for a
7 reason; to make sure that the trial is being handled in a fair
8 and impartial manner, and that they're following the rules.
9 So, you're not to hold that against a client just because of
10 -- either side, just because I've had to admonish a lawyer.
11 It happens, and it's kind of routine, so don't worry about
12 that.

13 All right. So, there are two types of evidence in a
14 trial; direct evidence and circumstantial evidence. So,
15 direct evidence is testimony by a witness on the stand that is
16 about something that they personally saw, or heard, or did, or
17 otherwise sensed, smelled even. And circumstantial evidence
18 is proof of a chain of facts from which you could infer
19 another fact.

20 You probably over the years have heard on television
21 or the movies, well, it was just a circumstantial case, or it
22 was only circumstantial evidence. Well, that -- that implies
23 that circumstantial evidence isn't good evidence, and in fact,
24 it is. The law recognizes both kinds of evidence in the same
25 way, circumstantial evidence and direct evidence.

1 So, let me give you an example of circumstantial
2 evidence as opposed to direct evidence. So, say you walked
3 out of your house this morning and you saw -- as you stepped
4 out, you know, you opened your door and you stepped out on the
5 porch, you saw that there was water dripping from the eaves of
6 your house. And as you looked out, you saw water running down
7 the gutters in the street. And you looked, and as far as you
8 could see, the streets appeared to be wet, and you looked the
9 other way, and the streets appeared to be wet and smelled like
10 rain.

11 Well, that's circumstantial evidence that it may
12 have rained during the night. You didn't see it yourself, so
13 you're taking these other facts that you did see, and you're
14 deducing. You're inferring from those facts a logical fact to
15 be drawn from that. That's circumstantial evidence.

16 Direct evidence would be, say you were awakened
17 during the night, and you thought you heard something, so you
18 opened the door and looked out, and looked up at the sky, and
19 you saw there were clouds in the sky and there was water
20 falling from the sky, and it fell on your face and/or on your
21 hands, and you saw that it was water, and you know from your
22 own experience living in this world that it was raining.
23 That's direct evidence that it was raining.

24 And that's the difference between circumstantial and
25 direct evidence. But as I say, the law gives equal weight to

1 both kinds of evidence, but as to any kind of evidence, you
2 are the ones who decide how much weight or importance to give
3 to any piece of evidence.

4 Now, there are some times that, you know, people may
5 forget things. And you -- so, when you're deciding whether or
6 not to believe a person's testimony, because you can make your
7 decision about whether to believe a person's testimony based
8 on all kinds of things; their demeanor on the stand, whether
9 they have a motive to fabricate, whether they said or did
10 anything before the trial that is contrary to what they're
11 saying while they're testifying, all these things that you can
12 assess in determining whether a witness is telling the truth
13 or not.

14 And you can believe everything a witness says, none
15 of what a witness says, or some of what a witness says. If
16 you think, well, this was proved by other evidence, it
17 corroborates what the witness said, you can choose any of
18 those options.

19 But if you're trying to decide whether or not
20 someone's telling the truth about a particular thing, then you
21 need to remember that sometimes people do forget things, and
22 that you should concentrate on thinking, well, is this an
23 important fact that someone should have remembered, and
24 therefore, if they're testifying contrary to what they said
25 before, it's likely that they were being untruthful, or is it

1 just a trivial matter that isn't of any consequence? And so,
2 again, it's always your decision as to how much weight you
3 give to any testimony as to whether you believe it or
4 disbelieve it.

5 I talked to you about not talking about the case,
6 and that remains throughout the trial. Also, don't make up
7 your mind about the verdict until you've heard all the
8 evidence. It's really important throughout the trial that you
9 keep an open mind, because you hear an opening statement, you
10 hear then some witnesses, and you start formulating opinions.
11 It's just natural, but don't -- don't close your mind.

12 Keep an open mind, knowing that you need to hear
13 everything before you make a decision, because you're going to
14 have that opportunity, and then you're going to have the
15 opportunity to deliberate with your fellow jurors and come up
16 with a decision. So, you should never make up your mind until
17 you've -- you have heard everything and you've had that
18 opportunity.

19 And again, please pay close attention, because
20 although we do have the ability to play back testimony, it is
21 time-consuming to do that, and if it's not necessary then --
22 because you're listening, that's the better way than to have
23 to replay lengthy testimony on our video and audio recording
24 system.

25 All right. So -- all right. Having given you those

1 preliminary instructions, we'll ask the plaintiff if they're
2 ready to deliver opening statement.

3 MS. MORRIS: Yes. Thank you.

4 THE COURT: All right. You may proceed.

5 MS. MORRIS: Is the microphone working? Thanks.
6 Good afternoon. Let's see if I can get this to work.

7 PLAINTIFF'S OPENING STATEMENT

8 MS. MORRIS: Wynn Las Vegas. You're going to learn
9 that Yvonne O'Connell used to love to go to Wynn Las Vegas.
10 She had been going there since it opened back in 2005. She's
11 going to tell you that she loved that casino. In fact, aside
12 from the Rampart Casino, it was her favorite casino to go to.
13 She loved that it was a luxurious property, that it was high
14 tech, state-of-the-art. She loved the name brand luxury
15 stores.

16 You're going to learn that she had a red card, a
17 player's card there, and because she was -- she had a player's
18 card, she got promotions from there. She would get free
19 buffets, she would get free slot play, and she would get
20 invited to play in their poker tournaments. You're going to
21 learn that, before February 8th, 2010, Yvonne O'Connell liked
22 the Wynn and never had any problems.

23 Now, back in February 2008, in the atrium area,
24 which is in the south entrance of the Wynn Casino, they were
25 celebrating the Chinese New Year. You can see the decorations

1 that are in this picture. Now, these photographs were taken
2 by security. You're going to hear from an Officer Corey
3 Prowell, and he took this photograph after Yvonne fell in the
4 area, showing where she fell, which I'll get you closer
5 photographs, but it's right here in this area.

6 Now, also on February 8th, 2010, aside from these
7 decorations, and before this photograph was taken, you're
8 going to learn that there was approximately a seven-foot spill
9 of a green liquid, and the evidence is going to show that that
10 liquid had been there long enough that three feet of it,
11 approximately that, had started to dry and had accumulated
12 footprints. You're also going to learn that above the area
13 where Yvonne fell were security cameras.

14 Now, also at the Wynn on February 8th, 2010 was
15 Yvonne. She had gone there to meet her cousins who were in
16 town visiting from California, and she had gone and eaten at
17 the buffet with them. Now, back in 2010, Yvonne had a
18 boyfriend named Sal, and at the time, Sal was out of town; he
19 got on a cruise.

20 And so, Yvonne will tell you that on February 8th,
21 her plan was to eat at the buffet with her cousins, and then
22 she was going to walk the Strip. She was doing that so she
23 could get exercise, she liked to sight see, look through the
24 shops, and then she was going to come back and gamble a little
25 at the Wynn. She'll tell you she plays video poker; the card

1 poker.

2 Now, this is a closer photograph of the area where
3 Yvonne fell, and she is going to show you that right in this
4 area was where the green liquid was, and this area over here
5 to the left was where the dried part of it was. And Yvonne's
6 going to tell you that after she left the buffet, she went and
7 got her coat and was headed to walk the Strip, but like she
8 usually does, she went to the atrium area because she liked to
9 see what the decorations were, and take a look, and see if the
10 displays had changed.

11 And she was walking down through the right side of
12 the atrium, and she slipped in the green liquid and landed on
13 her right side, right here on this marble curve. And so, she
14 was halfway in the garden area, and halfway on the marble
15 floor.

16 Now, these are guest reports that were created as a
17 result of her fall. It's -- this is a guest accident or
18 illness report. It was filled out by Corey Prowell because
19 Yvonne will tell you she was unable to write due to the
20 injuries she had to her arm, and so he filled it out for her.

21 MR. SEMENZA: Your Honor, I'm going to object. May
22 we approach for a moment?

23 THE COURT: Yes.

24 (Off-record bench conference)

25 THE COURT: Okay, proceed.

1 MS. MORRIS: Thank you. So, Corey filled this out
2 for Yvonne, showing that February 8th, 2010 at approximately
3 2:00 o'clock was when the incident happened.

4 Now, questions which were listed on the Incident
5 Report were what, if any, alcoholic beverages have you had to
6 drink, and which the response is, no. Did you examine the
7 premises of the area of your accident, in which she said, yes.
8 If yes, what did you find to be the contributing factor of
9 your accident, in which he wrote down for her, lots of green
10 liquid. Whom do you consider to be at blame for the accident,
11 and which she writes, the green liquid. And down here, what
12 if any injuries did you sustain, and she put right shoulder,
13 right ankle, and buttocks.

14 Now, you're also going to see this report, which was
15 written by a Terry Ruby, and Terry Ruby wrote, "I was
16 vacuuming the pathway carpet, going past Blush toward the
17 south entrance. When I was approaching the south entrance, I
18 noticed a group of people, approximately four, helping a guest
19 up that had fallen in the plants. I went to see if she was
20 okay, and she asked me to call for help. I called dispatch,
21 who then notified security. I" -- it's hard to read, but I --
22 "I informed our guest that someone would come and take a
23 report. I apologized to our guest for her mishap, and when my
24 supervisor arrived, I went back to work."

25 You're also going to hear from and you're going to

1 see the report of Yanet Elias. And at the time back in 2010,
2 Yanet Elias was an assistant manager in the public areas
3 department. And Yanet's going to tell you that she got a call
4 at approximately 2:30 on Monday, February 8th, and she
5 received a call from one public area employee "to let me know
6 that a lady fell into the south entrance between Cartier and
7 Chanel store. I go to see what happened, and I see a lady
8 stand up close to the garden area, and an employee cover a
9 spill with a sweeper machine."

10 Now, you're also going to hear from Officer Prowell.
11 He is the security officer who responded. And here is a
12 portion of his report. I've just given you the whole report,
13 and then this is a closer up version so we can read it. It
14 says, "On February 8th, 2010 at approximately 14:35," 2:35,
15 "I, Security Officer Prowell, an employee, responded to the
16 front atrium adjacent to Dior in regards to a guest injury.
17 Upon arrival, I met with public area manager Yanet Elias, who
18 was assisting non-guest Yvonne O'Connell." The category is
19 guest injury; the type of injury is medical.

20 This is another portion of his report. "Ms.
21 O'Connell stated, while rounding the corner of the front
22 atrium, she slipped and fell into the indoor landscaping.
23 After she recovered, she noticed a large liquid substance on
24 the floor, appearing to be green in color. Ms. O'Connell
25 stated she had moderate to severe pain in her right shoulder,

1 right ankle, and right buttocks. I was unable to observe Ms.
2 O'Connell's injury due to restrictive clothing; however, I
3 noticed Ms. O'Connell appeared to have limited mobility in her
4 right arm."

5 He also wrote, "I spoke with Manager Elias, who
6 stated, upon her arrival, she noticed the liquid substance on
7 the floor. She immediately assigned attendant to clean up the
8 area in order to prevent further incidents of the area --
9 incidents. The area was cleaned by attendant Terry Ruby.
10 Upon my observation of the scene after it was cleaned, I
11 noticed no unsafe conditions. Pictures attached."

12 And those are the pictures that I've shown you. The
13 pictures that Corey Prowell took are of the floor after it had
14 been cleaned, and after that, he observed no unsafe condition.

15 He also took photographs of Yvonne's shoes that she
16 had on that day. So, here are a couple of photographs of her
17 shoes. Here's one a little bit closer up. You're going to
18 learn that Corey took those after he sat down and took the
19 report from Yvonne.

20 Now, the atrium area by the south entrance is
21 inspected and cleaned by a porter. And you're going to learn
22 from Wynn that that porter is responsible for making sure that
23 the marble floor in that area is clean and safe from debris.
24 But that porter isn't assigned just to the atrium area. That
25 porter is assigned from the north entrance of Wynn where the

1 Ferrari dealership is, all the way down through the Parasol
2 Bar, which is the circular bar in the middle, all the way down
3 through the atrium area and to the south entrance.

4 And you're going to learn that that porter has
5 responsibilities, and their responsibility is to make sure
6 that all of the glass doors on the north entrance, of which
7 you're going to hear there are quite a few, are meant to --
8 they have to make sure that they're clean. And then it's that
9 porter's job to make sure that all of the marble floors from
10 that north entrance is clean and free of debris.

11 And they don't just walk straight. This porter
12 walks all the way around, kind of like in a zigzag, making
13 sure that there's nothing on the marble floor. And that
14 porter's also responsible for making sure that they refill
15 their supplies, and if they come across any spills whatsoever,
16 that they immediately clean them up.

17 And if they don't come across anything, and they are
18 able to just get all the way down through the atrium area, all
19 the way to the south entrance, it takes them about --
20 approximately 20 minutes. So, you're going to learn that that
21 porter is responsible for the north entrance all the way down
22 through the Parasol Bar, all the way through the south
23 entrance.

24 Now, you're also going to hear that that porter's
25 responsibility to make sure that floor is clean is important,

1 and you're going to learn that they have an assistant manager
2 who's over them, and that assistant manager's job is to make
3 sure that the porter is doing their job, because you're going
4 to learn that the porter doesn't fill out any kind of
5 paperwork, he doesn't -- or she doesn't fill out any kind of
6 sweep log, nothing to say, I've been here, I've done this.
7 But an assistant manager is assigned to kind of walk around
8 and ensure that that porter is doing the job that they need to
9 be doing.

10 And you're going to hear from Yanet Elias, assistant
11 manager at the time, and she'll tell you, the one indication
12 that a porter hasn't done the job that they need to is that
13 there's debris on the floor.

14 You're also going to learn that the south entrance
15 where the atrium area is is considered a high traffic area.
16 And the reason it's a high traffic area is because it's one of
17 the only two entrances to the casino from the Strip. And
18 you're going to learn that it's such a high traffic area that
19 if there's a spill in that area, it needs to be immediately
20 cleaned up, because they know that it poses risks to guests.

21 Now, you're going to learn about Yvonne O'Connell.
22 You're going to learn that Yvonne is from California; that
23 she's from a small town called Tehachapi where -- she grew up
24 there. She's got four brothers. Her father was the mayor
25 there, and her father actually passed when she was 13 from

1 cancer.

2 You're going to learn that Yvonne went to
3 Bakersfield Junior College because she got interested in
4 dental hygiene, and you're going to learn she graduated there,
5 and that she went to UC San Francisco, and UC San Francisco
6 was one of the schools at the time that offered a program in
7 dental hygiene.

8 You're going to learn that when she went up there,
9 she loved going to school. She liked working while she was in
10 school. She graduated and started working for a periodontist,
11 and at 25, she bought her first house and she met her first
12 husband, Barney. He was a dental student. You're going to
13 learn that she and Barney got married, and that they moved
14 down to the Southern California area.

15 And when they were down there, they're both working,
16 but eventually, she and Barney opened a dental practice, and
17 she was the dental hygienist and he was the dentist. You're
18 going to learn that she worked for about five to six years
19 with that dental practice.

20 It was doing good, but Yvonne actually couldn't hold
21 the tools for the deep cleanings that she was doing. She had
22 -- she has flexible fingers that couldn't hold the tools, so
23 she stopped working as a dental hygienist. And Yvonne will
24 tell you, at the time, she wanted to start a family, but
25 Barney did not want to start a family, and so Yvonne got back

1 in the workforce, and that she met -- she bought a franchise,
2 so she started a bakery company, and she ended up having a
3 wholesale bakery company for about three years.

4 And then you're going to learn that she and Barney
5 got divorced, and she met John O'Connell, who is the reason
6 that she moved here to Las Vegas.

7 So, John O'Connell was actually a law professor who
8 had taught one of her brothers. And so, she'd known him for
9 years, but they met after she divorced Barney, and he was
10 older, and he was winding down his career, and he wanted to
11 move out here to Las Vegas to retire.

12 So, in about 1996, they moved out here to Las Vegas,
13 and while he was still working a little bit, Yvonne worked as
14 his assistant. And she'd help him with his paperwork, and
15 drive him back and forth to California, because he was still
16 doing a little bit of teaching, and that's how Yvonne came to
17 Las Vegas. And they lived out here happily until about 2002
18 when John fell ill. And they were home one night, and he
19 passed away with her, and they got a chance to say goodbye.

20 And you'll learn that Yvonne mourned for about a
21 year, but then, after a year, she started to get back and get
22 out. And you'll learn that she got a flyer to go to the
23 Rampart Casino for a buffet, and she'll tell you she'll never
24 turn down a good meal. And when she was there, she met Sal
25 Risco, who you're going to hear from.

1 Now, Sal Risco, he's -- he'll tell you he's almost
2 80 but he doesn't act like it, and they started dating in
3 2003. And Sal will tell you that he and Yvonne had a great
4 time together. That they actually started taking swing
5 dancing lessons at a place on the 215 and Charleston, and that
6 they would spend most of their time swing dancing on the
7 weekends. They either went swing dancing at Suncoast, or they
8 also had it at Rampart, sometimes they would go to Bally's;
9 that they went out together, they went to dinners, they used
10 to go on cruises.

11 And Sal's going to help you understand the person
12 that Yvonne was before this fall. See, Yvonne will tell you
13 that she was used to being a strong, healthy person, and that
14 after this fall, her body stopped cooperating with her.

15 See, after the fall, when she had recovered from it,
16 she didn't admit to herself how hurt she was. And you'll hear
17 that she slowly got her way out of the Wynn Casino, and it
18 didn't take her a short period of time. She sat down and
19 would wait to feel better, and then moved to the next machine,
20 and sit down and wait to feel better. And Yvonne will tell
21 you she did not want to admit she was as hurt as she thought
22 -- as she actually was.

23 Now, Sal was out of town, so after she left Wynn,
24 she went to the Rampart and she sat there, and she said --
25 this is what she'll tell you. She just started to feel the

1 pain all over, and she went home. And you'll learn that
2 Yvonne didn't get out of bed the next day. And then, the day
3 after that, on the 10th, she got herself out of bed and she
4 went to UMC, and she told them about the pain that she's
5 having all the way down the right side of her body. Her knee,
6 her neck, her back, and her hands were hurting. And she'll
7 tell you that UMC ordered her some x-rays, they sent her for
8 some prescriptions, and that she went back home and hoped to
9 feel better.

10 Now, Sal came home from his cruise, and he'll tell
11 you that Yvonne actually came to pick him up from the airport,
12 and he was furious at her for coming out because he could tell
13 that she was in a lot of pain. And he'll tell you that she
14 had deep bruising down her backside, her arm, and her leg.

15 And back in February, she went back to the doctor.
16 She went on the 18th, and she told the doctor the pain that
17 she was feeling down the right side of her body, and that she
18 was having difficulty; feeling weakness in her right hand.
19 She's going to tell you that they ordered her more x-rays and
20 that they sent her for more prescriptions. But you're going
21 to learn that Yvonne doesn't take pain medication because she
22 has irritable bowel syndrome. She has constipation, so she
23 cannot take pain medication.

24 You're going to learn that in March, she got
25 referred to see Dr. Andrew Cash, who's a spine surgeon, and

1 that Dr. Cash ordered MRIs of her neck and her back, and he
2 prescribed her a cane to walk with.

3 MR. SEMENZA: Objection, Your Honor.

4 THE COURT: Approach.

5 (Off-record bench conference)

6 THE COURT: All right, continue.

7 MS. MORRIS: And you're going to learn that Yvonne
8 went and saw a nerve conduction doctor who did a nerve test on
9 her, and that she got sent to multiple physical therapists.
10 You'll learn that Yvonne O'Connell went to three different
11 physical therapists for months, and you're going to learn that
12 she finally got referred to Desert Orthopedic.

13 And her doctors at Desert Orthopedic are Dr. Thomas
14 Dunn, and he is a board certified orthopedic surgeon, and he
15 is treating Yvonne for the pain she has in her neck and her
16 back, and he's going to talk to you about the imaging that is
17 on her cervical and lumbar spine.

18 And you're also going to hear from Dr. Tingey. Dr.
19 Tingey is also a board certified orthopedic surgeon, and he is
20 treating Yvonne for the injuries to her knees, and he's going
21 to tell you what her imaging shows and the treatment he's
22 giving her.

23 You're also going to hear from a Victor Klausner.
24 Now, Victor Klausner has never seen Yvonne O'Connell. He's
25 never met her. He was hired by Wynn Casino, not in 2010 --

1 MR. SEMENZA: Objection, Your Honor.

2 MS. MORRIS: -- not in 2011 --

3 MR. SEMENZA: This is argument.

4 THE COURT: All right, sustained. Move on. I mean,
5 you don't know whether you're going to call him at this point.
6 It's not your -- your case. Go ahead.

7 MS. MORRIS: Well, wait a second. Sorry.

8 THE COURT: All right, approach.

9 (Off-record bench conference)

10 MS. MORRIS: You're also going to learn that there's
11 certain evidence you won't see in this case. We will never --

12 MR. SEMENZA: Objection, Your Honor.

13 THE COURT: All right, approach.

14 (Off-record bench conference)

15 THE COURT: The objection's overruled, according to
16 our discussion at the bench, so you know where to go.

17 MS. MORRIS: You're going to learn that there are no
18 medical records showing that Yvonne O'Connell treated for any
19 type of pain in her body for almost 20 years before she fell
20 in 2010. You're going to learn that --

21 MR. SEMENZA: Objection, Your Honor. I think we
22 were just talking about this. Can we approach again?

23 THE COURT: Okay.

24 (Off-record bench conference)

25 THE COURT: Proceed.

1 MS. MORRIS: You're going to learn that there are no
2 medical records that Yvonne O'Connell ever had any pain in her
3 body that she went for treatment for from 1990 to 2010.

4 Yvonne's going to tell you that she was healthy.
5 That in 2002, she had a lump biopsied, and that prior to the
6 fall, she had an infection of like pink eye that she went to
7 the doctor and got an antibiotic for. The last time Yvonne
8 O'Connell ever went and treated for pain was back in 1989.
9 She had an injury to her back. And at that 1989 visit, they
10 said, you need to go and get some therapy, which she did.
11 They said, it might be fibromyalgia, but she went and did the
12 treatment and didn't have any pain in her back after she
13 finished her treatment with a physical therapist back then.

14 What you also won't see is any photographs of the
15 substance that was on the floor. The photographs that we have
16 are the photographs of the floor after it was cleaned. You
17 also will hear from Corey Prowell that he checked the video
18 surveillance, and there was no video surveillance of this
19 incident at all.

20 You're also going to learn that we will never know
21 when that floor was last inspected by Wynn prior to the fall.
22 We will never know when that marble was last checked to make
23 sure there was nothing on it before Yvonne O'Connell walked
24 over it.

25 //

1 You're also going to hear that not only was Yvonne
2 O'Connell injured physically, she's going to tell you that she
3 has struggled as a result of this fall. And you're going to
4 learn from Sal Risco that the person Yvonne was before the
5 fall isn't the person that she is now.

6 Sal and Yvonne went out from 2003 until about 2011,
7 and they've since broken up, and Yvonne will tell you it's
8 because she just couldn't keep up with Sal anymore. But Sal
9 is going to help us understand, and he's going to talk to you
10 about the person that Yvonne was before, the things they used
11 to do, and the changes that he's seen in her.

12 See, Yvonne has struggled, and she'll tell you that
13 she has depression, as well as the injuries she feels in her
14 body. She feels them mentally as well, and she's going to
15 tell you that she's had a hard time with what has happened to
16 her in the way that she's changed, and that she has become
17 overly anxious about her health. That she wonders what her
18 body is going to do next; that she feels as though this has
19 taken from her the security and the stability that she used to
20 feel when she was happy, and healthy, and secure.

21 And Yvonne will tell you that she has become overly
22 detailed about everything that goes on in her body, and she
23 writes down -- maybe the -- maybe this fall caused her heart
24 to tear; maybe it's done something to her eyes. But you're
25 going to hear from Yvonne's treating physicians who are

1 looking at the imaging in her MRIs, and they're going to tell
2 you the analysis that they've done and the treatment that
3 Yvonne is going to need.

4 And at the conclusion of this case and all of the
5 evidence that you're going to hear, you are going to see that
6 even though what Wynn didn't do was intentional, but the
7 negligence of allowing that liquid to remain on the floor for
8 so long that a portion of it, almost three feet, started to
9 dry, posed a risk in a high traffic area where guests were
10 walking, and it should have been cleaned up. And at the end
11 of this, I will ask you to render a verdict for justice.
12 Thank you.

13 THE COURT: And how's my jury doing? You're still
14 -- anybody need a bathroom break? Everybody's good? Okay.
15 Would the defense like to make their opening statement?

16 MR. SEMENZA: I would, Your Honor. Thank you.

17 THE COURT: Thank you.

18 MR. SEMENZA: Let me make sure my mic is on.

19 DEFENSE'S OPENING STATEMENT

20 MR. SEMENZA: Good afternoon, everyone. Once again,
21 I'm L.J. Semenza. I represent the Wynn. I want to take a
22 moment to, again, thank you for your service. I know you have
23 other obligations, other commitments in your personal lives,
24 and certainly, we appreciate you being here, and we appreciate
25 your serious consideration of the evidence that will be

1 presented in this particular case.

2 I want to start with a couple quick things. First
3 of all, I think this is a relatively simple, straightforward
4 slip and fall case. And let me be the first to say that Wynn
5 does sympathize with Ms. O'Connell.

6 MS. MORRIS: Your Honor, may we approach?

7 THE COURT: Yes.

8 (Off-record bench conference)

9 THE COURT: Admonished not to repeat that type of
10 statement.

11 MR. SEMENZA: Let me move on. As I said before,
12 this case involves a slip and fall that took place at the Wynn
13 Hotel and Casino on February 8th of 2010 around 2:00 P.M. in
14 the afternoon. That's over five years from -- from now. Ms.
15 O'Connell was on the property on that particular day, having
16 lunch with her cousins. She was comped her meal and was
17 eating at the buffet at the Wynn.

18 At the conclusion of their meal, Ms. O'Connell
19 separated from her cousins, went back to her car to retrieve
20 her jacket -- her coat, and then reentered the Wynn with the
21 intention of going out on the Strip and walking. As she was
22 walking, she walked through the atrium area of the Wynn, and
23 alleges that she slipped and fell on a green sticky substance
24 -- liquid substance.

25 //

1 The evidence in this particular case will establish
2 that Ms. O'Connell was not paying very much attention to where
3 she was walking. She was viewing the plants in the atrium
4 area and was not focused on the ground in front of her.
5 Otherwise, she might have had the opportunity to avoid what
6 she perceived to be this alleged hazard.

7 MS. MORRIS: Can I approach, Your Honor?

8 THE COURT: Do you have an objection?

9 MS. MORRIS: I do.

10 THE COURT: All right, approach.

11 (Off-record bench conference)

12 THE COURT: Overruled. Proceed.

13 MR. SEMENZA: And again, after -- well, when Ms.
14 O'Connell was walking through the atrium area, she alleges
15 that she slipped and fell on a portion near the planter where
16 -- in the atrium area of the Wynn. After Ms. O'Connell fell,
17 she was assisted by a porter that arrived on scene with a
18 sweeper. The testimony and the evidence that will be elicited
19 will establish that that porter called essentially his
20 assistant manager, who arrived on scene, and that assistant
21 manager thereupon asked for security to come and assist Ms.
22 O'Connell.

23 Officer Corey Prowell did arrive on the scene and
24 assisted to Ms. O'Connell's needs. During his interaction
25 with Ms. O'Connell, he checked to make sure that she was doing

1 okay, and evaluated whether, in fact, she was injured in any
2 particular fashion. And I need to use the Elmo.

3 (Pause in the proceedings)

4 MR. SEMENZA: As part of Officer Prowell's
5 assistance to Ms. O'Connell, she was asked to execute a --
6 well, Officer Prowell asked Ms. O'Connell whether she wanted
7 any medical attention, whether it be emergency services, or
8 hospital, or anything like that. And as part of that
9 discussion with Ms. O'Connell, she did in fact decline any
10 medical attention that Officer Prowell was willing to provide.

11 In response to that, Officer Prowell completed this
12 document, where he notes that Ms. O'Connell did decline any
13 medical treatment at the scene. The document reads -- the
14 typewritten portion of the document reads, "I, the
15 undersigned, have been offered emergency medical services and
16 understand that refusal of such care and/or transport to a
17 hospital facility could result in death or impair my health by
18 increasing the opportunity for consequences or complications.
19 I refuse to accept emergency medical care and assume all risks
20 and consequences resulting from my decision, and release Wynn
21 Resorts and all personnel directly or indirectly involved in
22 my care from any and all liability resulting from my refusal.
23 I was given the opportunity to ask questions I felt necessary
24 to provide this informed refusal. The reason for this refusal
25 is as follows," and then it goes blank.

1 The evidence in this particular case will establish
2 that at the time immediately after Ms. O'Connell fell or
3 alleges to have fallen, she did in fact decline any medical
4 attention offered by the Wynn.

5 And I'm putting up Joint Stipulated Exhibit 4. This
6 document has also been admitted into evidence. In addition to
7 the refusal of medical treatment form, Officer Prowell
8 assisted Ms. O'Connell in completing this particular form.
9 Ms. O'Connell did not provide the handwritten portions of this
10 document. It was completed by Officer Prowell, but at the
11 bottom of the document on the right hand side, it does in fact
12 bear Ms. O'Connell's signature. She did verify the
13 correctness of the information that was provided in the
14 document.

15 And again, I know Ms. Morris spent a bit of time
16 walking through the document. The document does identify
17 where the alleged fall took place, and the pertinent part that
18 I would like to discuss with you relates to the line that
19 says, "What if any injuries did you suffer?"

20 In response to this written statement or written
21 question, there are three noted injuries. The first is to Ms.
22 O'Connell's right shoulder, the second is to Ms. O'Connell's
23 buttocks, and the third is to her right ankle. Those are the
24 only injuries Ms. O'Connell identified after the fall that
25 took place at the Wynn. There were no other injuries

1 identified at this point in time. And those injuries would be
2 consistent with her assertion that she fell on her right side
3 in that atrium area.

4 Importantly -- and just going back to that one
5 document, it also identifies that Ms. O'Connell alleges she
6 slept on -- slipped on a green liquid substance, and that's
7 important to keep in mind. In addition to completing the
8 forms that we've looked at, Officer Prowell did take
9 photographs of her shoes, and did take photographs of the
10 general scene so there would be a reference point in the
11 future as to the location where Ms. O'Connell fell.

12 A short time later, Ms. O'Connell departed from the
13 scene and went into -- the evidence will show she decided she
14 would go into the restroom. Her testimony will be that she
15 stayed in the restroom for approximately 30 minutes. In her
16 possession, she had her cell phone, and did not attempt to
17 reach out to call anyone relating to the fall. She didn't
18 pick up the phone and call her cousins that had just -- she
19 had left from the buffet. She didn't call anyone else for
20 assistance at that point in time.

21 After Ms. O'Connell departed the restroom, the
22 evidence in this particular case will show that she stayed on
23 the property for approximately another two hours, and during
24 that period of time, Ms. O'Connell in fact gambled. So, she
25 was sitting at a slot machine gambling during this period of

1 time. And the evidence will show in this particular case that
2 Ms. O'Connell gambled approximately \$1,000 after the slip and
3 fall, and before she departed the Wynn on that particular day.
4 Instead of going --

5 MS. MORRIS: Can we approach?

6 THE COURT: All right. Is there -- there's an
7 objection, I take it?

8 MS. MORRIS: There's an objection.

9 THE COURT: Okay.

10 (Off-record bench conference)

11 MR. SEMENZA: As I mentioned earlier -- a moment
12 ago, the testimony and evidence in this case will establish
13 that Ms. O'Connell did in fact gamble at the Wynn after her
14 slip and fall on February 8th of 2010.

15 At the conclusion of her gambling activities, she
16 went to the parking garage, got in her vehicle, felt well
17 enough and strong enough to drive, and then departed the Wynn.
18 Instead of going home, she went to the Rampart Casino, and
19 while at the Rampart Casino, she gambled as well. She will
20 testify that she stayed there for what she believed to be a
21 number of hours.

22 After her time at the Rampart Casino, she then went
23 ahead and drove back to her home. She did not seek medical
24 treatment the following day on February 9th of 2010. It was
25 not until two days later on February 10th, 2010 that Ms.

1 O'Connell finally went to seek medical care at UMC Quick Care.

2 Now, I want to talk a little bit about Ms.

3 O'Connell's claimed injuries and her medical care. After her
4 fall on February 8th of 2010, Ms. O'Connell sought treatment
5 for a whole host of medical ailments and medical complaints
6 that, at various times, she has asserted are in fact related
7 to her fall at the Wynn on February 8th of 2010.

8 Some of those ailments and complaints include the
9 following. Irritable bowel syndrome and constipation that she
10 attributes to the fall -- or has attributed to the fall at the
11 Wynn on February 8th, 2010. She has sought treatment for an
12 alleged stroke that she believed she had as a result of the
13 fall at the Wynn, which resulted, she alleges, in her eyelid
14 drooping.

15 She has sought treatment for sinus problems after
16 the fall. She has sought treatment for a claim that the --
17 her retinas in her eyes are detaching, and has asserted at
18 various times that that is related to the fall that took place
19 on February 8th of 2010. She sought treatment for knee pain,
20 she sought treatment for back pain, she sought treatment for
21 hip pain, she sought treatment for carpal tunnel syndrome as
22 well, which she has asserted is related to the fall on
23 February 8th of 2010.

24 She also claims to have developed a whole host of
25 other ailments and conditions, which include cough, neck pain,

1 headaches, blurred vision, chest pain, difficulty breathing,
2 pain in her arms, difficulty walking, stomach pain, nausea,
3 frequent urination, back pain, joint pain, muscle spasm,
4 decreased sensations in her hands and her feet, trembling,
5 fainting, problems sleeping, weakness, chills, a lump that
6 developed on the back of her neck, sexual dysfunction, and
7 depression, that at various times she has all related to her
8 fall at the Wynn on February 8th of 2010.

9 In addition to those ailments, those conditions that
10 she claims a relationship to the fall with, when she has
11 sought medical treatment, she has consistently identified that
12 her pain level is a ten of ten when going to the doctor, ten
13 of ten pain being the most extreme pain imaginable. That pain
14 she claims to be -- have experienced throughout her entire
15 body, and in areas not limited to her right shoulder, her
16 buttocks, and her right ankle.

17 She has seen numerous doctors since February of 2010
18 -- I'm sorry, 2010. In some of the medical records, Ms.
19 O'Connell has been described as tangential with a number of
20 her symptoms, and the symptoms that she experiences are
21 subjective in nature; not objective in nature. In at least
22 one instance, a physical therapist declined to treat her as a
23 result of this objective symptomology that she was
24 experiencing.

25 //

1 Regardless of what medical conditions at this point
2 in time Ms. O'Connell may be seeking compensation for in this
3 particular case, the medical care and the medical conditions
4 that she alleges she has suffered go directly to Ms.
5 O'Connell's truthfulness and credibility in this particular
6 case.

7 In addition to that, Ms. O'Connell has identified a
8 whole host of preexisting conditions in her medical charts --
9 or in the medical records. Some of those preexisting
10 conditions include irritable bowel syndrome. GERD, which is
11 an esophageal issue. She had disclosed that she had a prior
12 back injury. She had been diagnosed with depression in the
13 past, she had been diagnosed with anxiety in the past. She
14 had been diagnosed with stress disorder, fibromyalgia, Marfan
15 Syndrome, and Ehlers-Danlos Syndrome, all of these before her
16 fall.

17 We will establish in this particular case that Ms.
18 O'Connell's complaints, her symptoms, are either the result of
19 a preexisting condition, are unrelated to the fall, or are
20 related to something called symptom magnification syndrome.
21 And in a nutshell, symptom magnification syndrome is a
22 manifestation of symptoms in order to receive something in
23 return, and that something might very well be avoidance of
24 responsibility, attention, or financial gain.
25 //

1 The evidence in this particular case will establish
2 that the alleged slip and fall that Ms. O'Connell had on
3 February 8th, 2010 was extremely minor, as evidenced in part
4 by the fact that she didn't immediately seek medical care.
5 She declined medical care from the Wynn. She drove home that
6 particular day, she gambled at the Wynn, and thereafter,
7 gambled at the Rampart Casino.

8 The evidence in this particular case will establish
9 that Wynn is not responsible for Ms. O'Connell's fall. We
10 believe that the evidence will establish that there will be no
11 evidence -- let me back up.

12 There will be no evidence in this particular case
13 establishing that Wynn caused the sticky green liquid
14 substance to be present on the floor at that particular time
15 on that particular day just before Ms. O'Connell's alleged
16 fall. Ms. O'Connell will be unable to establish that Wynn
17 knew or had actual knowledge of the sticky liquid green
18 substance immediately before Ms. O'Connell's fall. And
19 lastly, Ms. O'Connell will be unable to establish at trial
20 that Wynn should have known of the presence of this sticky
21 green liquid substance.

22 And in conclusion, Ms. O'Connell will not be able to
23 establish that Wynn is in any way responsible for the fall
24 that she suffered or alleged to have suffered on February 8th
25 of 2010, and at the conclusion of this particular case, we'll

1 ask that you enter a verdict in Wynn's favor. Thank you.

2 THE COURT: Thank you. All right. How about my
3 jury now? Ready for a restroom break? No -- yes, okay. All
4 right. Oh, I've got a bunch of camels on my hands here. All
5 right, ladies and gentlemen. I'm like that, so.

6 During this recess, and we're going to take a recess
7 until 3:00, 3:10, so 15 minutes, it is your duty not to
8 converse among yourselves or with anyone else on any subject
9 connected with the trial, or read, watch, or listen to any
10 report of or commentary on the trial by any person connected
11 with the trial, or by any medium of information, including,
12 without limitation, newspaper, television, radio, or internet,
13 and you are not to form or express an opinion on any subject
14 connected with this case until it's finally submitted to you.
15 We'll be in recess until ten minutes after 3:00.

16 THE MARSHAL: All rise for the jury. Go ahead and
17 leave your notebooks in the chairs.

18 (Outside the presence of the jury)

19 THE COURT: And the record will reflect the jury has
20 departed the courtroom. Any matters outside the presence
21 before we have you -- let you have your recess, too?

22 MR. SEMENZA: No, Your Honor. Before you hop off
23 the bench, can I confer with Ms. Morris for a moment about --

24 THE COURT: Sure.

25 MR. SEMENZA: -- one potential issue?

1 (Pause in the proceedings)

2 MR. SEMENZA: Your Honor, I think that there are a
3 couple of issues that will need to be addressed before Dr.
4 Dunn takes the stand. I know that opposing counsel submitted
5 a brief to you today. I know that we submitted a couple of
6 briefs relating to the issue of the doctor's proposed
7 testimony.

8 I want to make sure, from a scheduling standpoint,
9 that we don't create more problems by not addressing those
10 issues either now or before Dr. Dunn takes the stand. And
11 obviously, however Your Honor would like to address those
12 briefs that we've submitted.

13 THE COURT: All right. Well, let's take a break so
14 staff can use the restroom, and we'll come back after the
15 break's over, which is now only about ten minutes.

16 MR. SEMENZA: That's fine.

17 THE COURT: And we'll address those.

18 MR. SEMENZA: Thank you.

19 (Court recessed at 2:59 P.M. until 3:16 P.M.)

20 (Outside the presence of the jury)

21 THE COURT: Okay. We're back on the record outside
22 the presence of the jury. Plaintiff's present with their
23 counsel. Defendant is present through their representative
24 and through counsel. And there are some matters you wanted me
25 to decide before Dr. Dunn gets here, so what is it you want to

1 talk about?

2 MR. SEMENZA: Well, I think that there are issues
3 regarding the scope of what he's going to be permitted to
4 testify to in front of the jury. I -- I think those issues
5 are essentially, is he going to be permitted to testify to any
6 future medical specials? I want to -- I believe the answer to
7 that is no, and I don't believe that plaintiff's counsel is
8 going to introduce any evidence relating to that. So, again,
9 I don't think that that is an issue, but I do want to confirm
10 that it is in fact not an issue.

11 THE COURT: Okay. Well, on the break, I read
12 through Dr. Dunn's medical records. The -- so, what I did
13 note is there's nothing in his medical records regarding
14 causation.

15 MR. SEMENZA: Correct.

16 THE COURT: You know, he doesn't opine -- make any
17 -- he doesn't say, I don't think it was -- he doesn't say
18 anything about causation. What he does say is that she has,
19 as confirmed of course by the MRIs that were done back in
20 2010, she has degenerative disc disease --

21 MR. SEMENZA: Correct.

22 THE COURT: -- and that -- in her back at --
23 particularly, at the areas that they looked at in the imaging,
24 at the cervical and lumbar regions, and that he ultimately
25 recommends to her a fusion surgery, and that's all.

1 I mean, there's nothing in here that talks about the
2 cost of that surgery; just that he's discussed with her the
3 options she's got available, surgical and non-surgical, but
4 interestingly, he doesn't seem to be advocating for the non-
5 surgical -- let me see. Let me find it here.

6 It's at Plaintiff's Bates stamp 619. After
7 discussion with the patient, I have recommended the anterior
8 cervical decompression and fusion at C4-C5, C5-C6, and C6-C7,
9 so a three-level fusion with allograft, and I have offered
10 non-operative options consisting of physical therapy, pain
11 management, and epidural steroid injections.

12 So, it seems like he's saying, I'm recommending that
13 she have a three-level fusion, but I've also told her she --
14 she could have physical therapy, pain management, and steroid
15 injections, none of which he seems to have tried before
16 recommending a three-level fusion.

17 But, so, I mean, I really don't know what he's going
18 to testify to at this point. I can say this. There was
19 nothing in the disclosures that said that he was going to --
20 you said he was going to testify in accordance with his
21 medical record. That's what it says in the disclosure. So,
22 that's the subject matter of -- of his treatment.

23 And then, as to the substance of the testimony, you
24 say he's going to relate -- or you say this is to all of them,
25 but I assume that it's based on something; that he's going to

1 say that it was caused by the fall.

2 MR. MORRIS: That's correct. And Dr. Dunn -- I
3 think it will be helpful when you have him on the stand. As
4 he testifies, he's going to explain to you his medical
5 records, and he does believe he states the causation in there.
6 She comes to see him following --

7 THE COURT: Does not.

8 MS. MORRIS: -- the trip and fall --

9 THE COURT: I've read these now three times.

10 MS. MORRIS: And that his --

11 THE COURT: He never states that he believes, nor
12 would there -- he's seeing her --

13 MS. MORRIS: It's right there in the first
14 paragraph.

15 THE COURT: -- four years after the fact, and when
16 he goes to see -- first, you know, he's looking at MRIs so he
17 can do a comparison. So, there's the MRI of the cervical
18 spine done three months after the accident, and there's the
19 lumbar that was done two months after the accident, and both
20 of those show, you know, the cervical spondylosis at C4
21 through C7 without significant neural compression.

22 And then there's a change in the intervening four
23 years, which is consistent with the disease, of course. It's
24 a degenerative condition. It doesn't get better; it only gets
25 worse. And when you -- and -- oh. The other -- the other

1 imaging shows severe disc space narrowing at C4-5, C5-6,
2 C7-T1, and severe facet joint arthritis at C4-5, C5-6, and
3 C6-7. That's all just the cervical.

4 So, then he goes back and he does another MRI in
5 2014, so four years -- more than four years after the
6 accident, and he sees mild central canal stenosis, which,
7 okay, now just means that this narrowing is starting to
8 impinge at C3-4, mild central canal stenosis at C4-5 with
9 severe bilateral neural foraminal stenosis, and moderate canal
10 -- central canal stenosis at C5-C6 with severe bilateral
11 (indecipherable) -- neural foraminal stenosis, and mild
12 central canal stenosis at C6-C7 with mild bilateral neural
13 foraminal stenosis again. So --

14 MS. MORRIS: Your Honor, if I might, this is the
15 third time we've addressed this, and --

16 THE COURT: Yeah.

17 MS. MORRIS: -- every single time, it has come down
18 to, let's do voir dire of Dr. Dunn to determine his -- his
19 analysis of her, and when he determined causation, as the FCH1
20 Palms case says, and make a determination on whether, as an
21 expert treating physician, he made that during his diagnosis
22 and treatment of her.

23 THE COURT: Okay. And so, you're going to -- you're
24 going to take him on voir dire --

25 MR. SEMENZA: Well --

1 THE COURT: -- and --

2 MR. SEMENZA: Yes, Your Honor, but the --

3 THE COURT: He can testify about his medical
4 records, what he saw, and --

5 MR. SEMENZA: Your Honor, there's -- there's -- and
6 I understand the point, but the first issue that I -- I still
7 want to make sure and get some clarification on is that they
8 are not going to seek to recover in this particular case any
9 future special damages, because they were not disclosed in the
10 16.1 disclosures. That's the first issue.

11 And so, they should be precluded from any testimony,
12 any damages relating to future specials. That's the first
13 issue. We addressed that last time, and I still don't quite
14 have an answer from opposing counsel as to whether --

15 THE COURT: Well, I got the impression from last
16 week that she was saying, well, we're not going to seek the
17 special -- future special damages and have the doctor testify
18 about the cost of those damages, but we're going to have him
19 testify that she needs this surgery. Okay, well that's --
20 that is in his records, that he thinks she needs surgery.

21 MR. SEMENZA: I understand that. So, the first
22 issue is whether they're seeking future medical specials. I
23 think the answer to that is no, but I want to confirm that.

24 Then, secondly, in the brief that they filed or
25 submitted today, now they want to get into the cost of the

1 future medical treatment, which I think is entirely improper
2 because they're not seeking future medical damages relating to
3 this case, and there's nothing in the medical chart talking
4 about cost, and it's not relevant for purposes of this case.

5 What they're trying to do is bootstrap a cost of
6 surgery argument into a pain and suffering argument, and they
7 can't do that. That's not permitted.

8 THE COURT: All right. Well, when I read your
9 papers, there was some argument about, well, the cost is
10 relevant to the pain and suffering because -- that how complex
11 it is is related to the cost. I disagree with that. I mean,
12 how doctors, you know, lay a cost on or assign a cost to a
13 particular procedure, I don't frankly know, but you didn't
14 ever disclose that you were seeking future medical specials,
15 so you can't do that. You can't now do it. That's -- that
16 was what we decided last week, and you agreed to that.

17 MS. MORRIS: Correct. And my understanding was the
18 briefing was to establish that the need for surgery in fact
19 necessitates an award for future pain and suffering. And so,
20 there doesn't have to be a cost applied to that -- that
21 surgery, but the fact that there is a surgery is in fact the
22 establishment that there will be future pain and suffering.
23 And there's a case directly on point, which I put in the
24 briefing. My understanding, that was the need for the
25 briefing and the clarification of the issue.

1 THE COURT: Right. So, your argument is you want
2 the doctor to be able to testify about what this surgery would
3 entail?

4 MS. MORRIS: Correct.

5 THE COURT: Okay.

6 MR. SEMENZA: I understand that is part of their
7 argument, but in their brief, they say, the cost of future
8 medical care is relevant though and could be --

9 THE COURT: Right.

10 MR. SEMENZA: -- helpful to determine --

11 THE COURT: Yeah.

12 MR. SEMENZA: -- future pain and suffering.

13 THE COURT: And I disagree with that.

14 MR. SEMENZA: Okay.

15 THE COURT: Okay.

16 MR. SEMENZA: Understood.

17 THE COURT: So, I disagree with that, but he did
18 during his treatment recommend that she have surgery. And so,
19 he can testify that he recommends this surgery, and he can say
20 what it's for and how it's done, and the jury can -- you know.
21 I mean, obviously, you're not going to be able to prove up the
22 cost of the surgery, but you're -- you're saying you want to
23 be able to argue pain and suffering going forward either for
24 -- because she hasn't committing to having the surgery. She
25 hasn't. She was told she needed it in -- more than a year

1 ago, and she hasn't had it.

2 MS. MORRIS: Right.

3 THE COURT: So, it's either, what pain is she
4 suffering you're going to argue about, because she isn't going
5 to have the surgery, she's decided she's not going to have the
6 surgery, she's just going to endure her -- her pain, or that
7 she's going to have this surgery, and she'll have recovery
8 pain and suffering from this surgery, and maybe she'll have a
9 -- she'll have a successful surgery, and maybe she won't.
10 Maybe she'll have failed back syndrome, and --

11 MR. SEMENZA: Well, that's all speculative.
12 That's --

13 THE COURT: That's all speculation.

14 MR. SEMENZA: Exactly.

15 THE COURT: So, I don't know what -- but Dr. -- the
16 doctor, if he's honest, can't say what the result. I'm sure
17 if questioned about that subject of what he told Ms. O'Connell
18 about the surgery would be that he can't guarantee what the
19 result would be. It may be -- it may help, and it may not.

20 MR. SEMENZA: The other issue, Your Honor -- and I
21 understand that I'm going to have an opportunity to voir dire
22 Dr. Dunn, and that's fine. The other issue that we've
23 identified is that nowhere in Dr. Dunn's medical records,
24 medical chart is there anything related to causation as you've
25 identified. And the exclusive and sole basis for causation,

1 if Dr. Dunn is in fact going to testify to causation, is based
2 upon the subjective complaints of Ms. O'Connell saying, I
3 slipped and fell on February 8th, 2010.

4 And so, if he gets up there and argues causation
5 based upon Ms. O'Connell's statements, that's improper. And
6 we've cited case law that says that, because it's not based
7 upon any education, training, et cetera. It's basically based
8 on a subjective complaint identified by Dr. Dunn's patient.

9 THE COURT: Well, okay, so --

10 MS. MORRIS: I mean, that's the purpose --

11 THE COURT: -- not necessarily.

12 MS. MORRIS: Is that what the voir dire is for?

13 THE COURT: Possibly. I mean, you're going to have
14 the opportunity to voir dire him on that, but, I mean, he has
15 physical objective findings about her spine?

16 MR. SEMENZA: Correct.

17 THE COURT: And you'll be able to cross-examine him
18 in front of the jury about, you know, well, didn't she have
19 all these things at the time?

20 MR. SEMENZA: But that's the point, Your Honor.

21 THE COURT: You know, and these things don't happen
22 overnight --

23 MR. SEMENZA: Right.

24 THE COURT: -- Doctor. I mean, that's
25 cross-examination.

1 MR. SEMENZA: Right.

2 THE COURT: The cases that you cited -- well, first
3 of all, they're federal cases where they're looking at the
4 Daubert standard, and the whole plethora of federal case law
5 that analyzes the Daubert standard and how that's approached.
6 And our Supreme Court has declined to adopt Daubert and has
7 instead adopted this Hallmark, which, really, then they've
8 kind of backed away from more and more as time goes on,
9 saying, essentially, it's really just will -- will it assist
10 the trier of fact, and is it based upon something that's --
11 that's there and can be shown. And we won't know that until
12 you voir dire.

13 MR. SEMENZA: And that's fine. As long as I can --
14 at the conclusion of voir dire, we can discuss these issues,
15 that's fine. Okay.

16 THE COURT: All right, so can we bring the jury back
17 in then?

18 MR. SEMENZA: Yes.

19 THE COURT: Okay, let's do it.

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

21 (In the presence of the jury)

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

23 THE COURT: Thank you. Please be seated. And the
24 record will reflect the presence of all eight members of the
25 jury, as well as the two alternates. And all parties are

1 present by and through their counsel, and of course the
2 plaintiff is present, and the representative of Wynn is
3 present, both in the flesh. All officers of the court are
4 present. You may call your first witness.

5 MS. MORRIS: I call Yanet Elias.

6 (Pause in the proceedings)

7 THE MARSHAL: Step up, remain standing, and face the
8 court clerk. Raise your right hand, please.

9 YANET ELIAS, PLAINTIFF'S WITNESS, SWORN

10 THE CLERK: You may be seated. Please state and
11 spell your first and last name for the record.

12 THE WITNESS: Yanet Elias. Y-a-n-e-t, E-l-i-a-s.

13 THE CLERK: Thank you.

14 THE COURT: Thank you. You may proceed.

15 DIRECT EXAMINATION

16 BY MS. MORRIS:

17 Q Hi, Yanet.

18 A Hello.

19 Q Yanet, do you remember I took your deposition
20 earlier this year on March 24th, 2015?

21 A Yes.

22 Q And do you recall the deposition took approximately
23 an hour-and-a-half?

24 A I don't recall exactly how long.

25 Q Do you remember that I asked you questions about the

1 fall that Yvonne had at the Wynn on February 8th, 2010?

2 A Yes.

3 Q And today you have a translator with you, but at the
4 time I took your deposition, you did not have a translator; is
5 that correct?

6 A Yes.

7 Q Now, back in March of 2010, the deposition testimony
8 you gave me, that was your sworn testimony under oath; is that
9 correct?

10 A Yes.

11 Q And are you comfortable with the deposition
12 testimony that you gave me back in March of this year?

13 A That's why I requested an interpreter. I didn't
14 feel very comfortable with some of the questions because of
15 the legal terminology that is used in some of the questions.

16 Q Do you remember earlier this year when I took your
17 deposition, I asked you if you were comfortable giving your
18 sworn testimony in English?

19 A Yes.

20 Q And do you remember telling me that you were
21 comfortable giving me your sworn testimony in English?

22 A Yes.

23 Q Do you remember that I told you several times that
24 if you did not understand any question that I had, I wanted
25 you to let me know so I could ask it again?

1 A Yes.

2 Q And do you remember telling me that you would tell
3 me if you didn't understand something?

4 A Yes.

5 Q And you know that the oath that you just took in
6 court today, it's the same oath that you took when you gave
7 your deposition?

8 A Yes.

9 Q Isn't it true you've lived in Las Vegas for 26
10 years?

11 A Yes.

12 Q And you've worked at Wynn for approximately ten
13 years; is that correct?

14 A Yes.

15 Q You also worked at the Golden Nugget for about 16
16 years; is that right?

17 A Yes.

18 Q Back in 2010, isn't it true that you were an
19 assistant manager in the public areas department at Wynn?

20 A Yes.

21 Q Isn't it true that after that, in May, you got
22 promoted to be a shift manager at the public area department?

23 A I don't recall the year, but yes, I was promoted.

24 Q Isn't it true that your job as an assistant manager
25 at Wynn in the public areas department was to ensure that the

1 employees working on the casino floor were doing their job?

2 A Yes.

3 Q And at the time Yvonne fell, you weren't assigned to
4 the atrium area; is that correct?

5 A I don't recall.

6 Q Isn't it true that you were assigned to another area
7 of the casino --

8 THE COURT: Let's stop for a minute. We're going to
9 get the interpreter a chair. I thought maybe she didn't want
10 a chair, and that's why we didn't have one for her, but we
11 would want you to sit. Thank you.

12 THE MARSHAL: I apologize.

13 THE COURT: Then you don't have to lean over. Very
14 good. All right, sorry. Proceed.

15 BY MS. MORRIS:

16 Q Isn't it true you were assigned to another area of
17 the casino on that day?

18 A I don't recall. We work throughout the whole
19 casino.

20 Q Were you assigned to the atrium area that day?

21 A I don't recall.

22 Q Do you remember telling me back -- back in March
23 that you were not assigned to the atrium area that day?

24 A I don't recall what I answered.

25 Q Do you remember telling me that you received a call

1 that a woman had fallen in the atrium area, and so you went
2 over there?

3 A I -- they did not send it to my. They sent it to
4 any of the assistants who might answer.

5 Q Didn't you get a call from dispatch saying that a
6 lady had fallen in the atrium area?

7 A The dispatch tells us that, you know, any manager
8 who's available should answer the call.

9 Q Did you go over to the atrium area after you heard
10 that call?

11 A Yes.

12 Q And when you got over to the atrium area, did you
13 see that a sweeper machine had been put over a part of a green
14 liquid on the floor?

15 A I recall seeing the machine, but not what was under
16 the machine.

17 Q Did you see a green spill on the marble floor?

18 A Not a green liquid.

19 Q Did you see a spill on the floor?

20 A No.

21 Q I'd like to refer to the exhibit, which is the black
22 binder, and it's going to be Exhibit 4 in front of you.

23 A Should I open it?

24 Q Yes, please.

25 MS. MORRIS: Is this --

1 MR. SEMENZA: What is it?

2 MS. MORRIS: It's the --

3 MR. SEMENZA: Okay.

4 MS. MORRIS: Is the Elmo on?

5 BY MS. MORRIS:

6 Q Yanet, are you at Exhibit 4?

7 A Yes.

8 Q Is this your handwriting?

9 A Yes.

10 Q Now, looking at this handwritten statement, have you
11 seen this statement before?

12 A Yes.

13 Q Did you look at it back before I took your
14 deposition in March of this year?

15 A Can you repeat, please?

16 Q Did you look at this exhibit before I took your
17 deposition back in March of this year?

18 A Yes.

19 Q And do you see in this exhibit in your handwriting,
20 on the 5th line down, you stated that you saw an employee
21 cover a spill with the sweeper machine?

22 A Um-hum.

23 Q Do you see that sentence there?

24 A Yes.

25 Q Now, isn't it true that there are video surveillance

1 cameras above the area in the atrium where Yvonne fell?

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

3 THE COURT: Okay. Approach.

4 (Off-record bench conference)

5 THE COURT: The objection -- foundation was the
6 objection at the bench. That's sustained. Proceed. You can
7 lay a foundation if you can.

8 BY MS. MORRIS:

9 Q Yanet, you've worked at Wynn for ten years; is that
10 correct?

11 A Yes.

12 Q And you -- for the entire time you've worked at
13 Wynn, you've worked in the public areas department; is that
14 correct?

15 A Yes.

16 Q Do you remember telling me in March that you spend
17 about 90 percent of your time on the actual casino floor?

18 A Yes.

19 Q And are you familiar with the atrium area, which is
20 in the south entrance of the casino?

21 A Yes.

22 Q Could you tell me approximately how many times a day
23 you walk through the atrium area in the south entrance?

24 A I couldn't tell you exactly how many because the
25 casino's very big. And I'm not the only supervisor who is at

1 the casino.

2 Q Would you consider yourself to be familiar with the
3 atrium area?

4 A Yes.

5 Q And isn't it true that there are video surveillance
6 cameras on the ceiling in the atrium area?

7 A There's cameras all over the casino. Where they are
8 exactly, I do not.

9 Q Have you ever seen a video surveillance camera
10 directly above the atrium area?

11 A No.

12 Q Do you know if there are video surveillance cameras
13 in the atrium area?

14 A I believe there should be.

15 Q Now, it's my understanding that you never touched
16 the spill that was on the floor; is that correct?

17 A I don't recall.

18 Q Do you remember back in March of this year when I
19 took your deposition, you told me that you never touched the
20 liquid on the floor?

21 A I don't recall exactly.

22 MS. MORRIS: I have her original deposition. I'd
23 like to publish it.

24 THE COURT: All right. Publish the deposition.

25 //

1 BY MS. MORRIS:

2 Q And Yanet, I'm looking at page 15 of your deposition
3 transcript from March of this year.

4 MR. SEMENZA: What page, Christian? 15.

5 MS. MORRIS: Page 15.

6 BY MS. MORRIS:

7 Q Question, "Okay. Did you physically touch what was
8 on the floor?" And your response was, "No."

9 Now, you also stated that you never saw who cleaned
10 up the substance; is that correct?

11 A When I arrived, there was no liquid.

12 Q Yanet, I'm going to again refer you to Exhibit 4,
13 which we've looked at before, and you said this is in your
14 handwriting; is that correct?

15 A Yes.

16 Q And do you remember writing this statement back on
17 February 8th, 2010?

18 A Um-hum.

19 Q Is that a yes?

20 A Yes, I'm sorry.

21 Q And isn't it true, back on February 8th, 2010, you
22 said, "I go to see what happened. I see a lady stand up close
23 to the garden area, and an employee cover a spill with a
24 sweeper machine"?

25 A I put that it was a spill here because that's what

1 the -- what dispatch told us that it was. When she's called
2 to tell her something is going on, when -- you know, it could
3 be food, it could be a glass that has fallen; they always say
4 that it's a spill.

5 Q Yanet, isn't it true that you arrived at the scene
6 and waited there for security to come, and you made sure the
7 liquid wasn't cleaned up until security saw it; isn't that
8 correct?

9 A Yes.

10 Q So, looking here at your deposition transcript
11 again, I'm on page 42. You said, "I don't remember if
12 security is there, because I have to call security to come to
13 the area."

14 I said, "Do you know, when security arrived, had the
15 liquid been cleaned up yet, or the substance been cleaned up
16 yet?"

17 You responded to me, "They not clean, they not
18 clean. They never clean nothing until security come and
19 inspect the area."

20 A Yes.

21 Q Isn't it true that the procedure is to preserve the
22 area until security gets there to inspect the cause of the
23 fall; isn't that correct?

24 MR. SEMENZA: Objection, foundation.

25 THE COURT: Sustained.

1 THE INTERPRETER: What does that mean?

2 THE COURT: No, she can't answer that. I sustained
3 the objection.

4 BY MS. MORRIS:

5 Q Yanet, isn't it true that you told me that the
6 policy is not to clean anything until security comes and
7 inspects the area?

8 A Depending -- depending on what happens in the area
9 and the call.

10 Q Yanet, I'm going to look again at your deposition
11 transcript here on page 43. Isn't it true you told me, "They
12 never clean nothing until security coming and inspect the
13 area"? Wasn't that your deposition testimony under oath?

14 A Yes.

15 Q Isn't it true that you don't know when the south
16 entrance atrium area was last checked for spills prior to
17 Yvonne falling?

18 MR. SEMENZA: Objection. I'm sorry, go ahead. I'll
19 withdraw the objection.

20 MS. MORRIS: Okay.

21 THE WITNESS: No, I didn't.

22 BY MS. MORRIS:

23 Q Do you know -- you don't know when the area was last
24 inspected; is that correct?

25 MR. SEMENZA: Objection, vague as to time.

1 MS. MORRIS: Prior to Yvonne's fall.

2 THE COURT: All right.

3 THE WITNESS: No.

4 BY MS. MORRIS:

5 Q Isn't it true that you can't say how often an area
6 is checked, whether it be every hour or every 30 minutes?

7 A It depends on how long it takes the employee to
8 check the north area and return to the south area, because
9 it's all considered one -- one whole area. And there aren't
10 always two employees assigned to that area. Sometimes,
11 there's only one.

12 Q And in fact, back on February 8th, 2010, there was
13 only one porter; isn't that correct?

14 A I don't recall.

15 Q Isn't it true that one sign of a porter not doing
16 their assignment is that you find debris and things on the
17 floor?

18 A The person's work?

19 Q Excuse me?

20 A The -- the work done by the person at their station?

21 Q Yanet, isn't it your job to make sure that the
22 porters are doing their tasks in each assigned area?

23 A Yes.

24 Q Back in 2010, as an assistant manager, wasn't that
25 your task, was to ensure that the porters were doing their job

1 in their assigned areas?

2 A Yes.

3 Q And isn't it true that you told me that one of the
4 signs of a porter not doing their job is that there's debris
5 on the floor?

6 A Yes.

7 Q And isn't it true you don't know who the assistant
8 manager was who was assigned to the atrium area on February
9 8th, 2010?

10 THE INTERPRETER: Interpreter needs repetition,
11 please.

12 MS. MORRIS: Sorry.

13 BY MS. MORRIS:

14 Q Isn't it true that you don't know who the assistant
15 manager was who was assigned to the atrium area on February
16 8th, 2010?

17 A No, I don't recall.

18 Q And in your time as an assistant manager at Wynn, do
19 you remember testifying earlier this year that you claim
20 you've never discovered a porter not doing his or her
21 assignment in all of your time working at Wynn?

22 A It's very difficult to maintain the casino, you
23 know, completely clean, because it's a job for 24 hours.
24 There are people -- a lot of people walking through, a lot of
25 children, they're carrying things. So, it's impossible to

1 keep it clean at 100 percent.

2 Q Yanet, I want to talk to you briefly about your
3 shift back in 2010.

4 A Okay.

5 Q What shift were you working on February 8th, 2010?

6 A I don't -- I don't recall, because I used to work on
7 different shifts. What I understood is that, you know, what
8 shift I worked, and I told you that from 3:00 A.M. to 11:00
9 A.M.

10 Q So, your shift back in February was 3:00 in the
11 morning until 11:00 in the morning?

12 A In February of what year?

13 Q 2010.

14 A Yes.

15 Q Do you know what time Yvonne's fall happened?

16 A No.

17 Q You didn't actually see Yvonne fall, did you?

18 A No.

19 Q You got there after she fell and saw the spill
20 covered up with a sweeper; is that correct?

21 A I arrived when we were called. I saw the sweeper,
22 but I didn't see liquid.

23 Q Isn't it true that you saw a green substance on the
24 floor?

25 A When the employee moved the sweeper a little bit,

1 there was a substance that looked like honey.

2 Q You just said that it was a substance that looked
3 like honey?

4 A A little sticky like -- like honey.

5 Q Yvonne (sic), is this description you're saying,
6 "like honey," is this something that you just remembered?

7 A No.

8 Q How come you didn't tell me about honey back in
9 March of this year when I asked you about the spill?

10 A I think that I -- I told you something, that it was
11 like the honey for pancakes. What's it called?

12 Q I'm going to show you Exhibit 1, which is in your
13 binder in front of you. Now, this is the report made by Corey
14 Prowell after Yvonne fell. You've seen this report before?

15 A No.

16 Q Looking at the fourth paragraph down of Exhibit 1,
17 isn't it true it says, "I spoke with Manager Elias, who
18 stated, upon her arrival, she noticed the liquid substance on
19 the floor"?

20 A I don't recall this.

21 MS. MORRIS: Thank you for your help.

22 THE COURT: Cross?

23 MR. SEMENZA: Yes, Your Honor. I'm going to show
24 her Joint Stipulated Exhibit 6.

25 //

CROSS-EXAMINATION

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BY MR. SEMENZA:

Q Do you recall when you completed this statement, Ms. Elias?

A No.

Q And is English your native language?

A No.

Q What is your native language?

A Spanish.

Q And did you complete your statement in English or in Spanish?

A In English.

Q And did you do the best you could do in completing your statement in English?

A Yes.

Q And did you try and be honest and accurate?

A I tried.

Q Did you do your best?

A Yes.

Q Do you recall how many porters were assigned to the atrium area of the Wynn around 2:00 o'clock on February 8th, 2010?

A I don't recall.

Q Do you know whether there were one or two porters assigned to the atrium area on February 8th, 2010 in or around

1 2:00 o'clock P.M.?

2 A I don't recall.

3 Q Generally speaking, do you think the porter staff at
4 Wynn Las Vegas that you oversee does a good job?

5 A Yes.

6 Q And do you have any involvement from time to time in
7 training the porter staff?

8 A Yes.

9 Q Do you know how many porter staff that you currently
10 supervise?

11 A During the day, there's about 55, but it's -- I
12 don't do it alone.

13 Q And at the time of Ms. O'Connell's fall, do you know
14 how many porters you supervised?

15 A No, I don't recall.

16 Q As you sit here today, do recall whether this spill
17 that we've been talking about was cleaned up prior to the
18 arrival of the security officer?

19 A It is possible that if it was a big water spill, as
20 it was mentioned, that they have started cleaning, because
21 it's a matter of security; safety.

22 Q And is the safety of Wynn's patrons of the utmost
23 importance to you?

24 A Of course.

25 Q Do you recall whether you left the scene prior to

1 the alleged spill being cleaned up?

2 A I don't recall.

3 Q And how did you first receive the call that there
4 had been a spill on this particular day, February 8th, 2010?

5 A Like I said, you know, when someone or a person
6 realize that there has been a spill or liquid, they call the
7 number that we use for dispatch and they let us know. Can I
8 say something?

9 Q Yes.

10 THE COURT: You have to wait for a question.

11 BY MR. SEMENZA:

12 Q Do you have your deposition testimony in front of
13 you?

14 A It's -- is it this?

15 MR. SEMENZA: May I approach, Your Honor?

16 THE COURT: Yes.

17 MR. SEMENZA: I just want to see if she has a copy.
18 No, you have the original. Can I approach?

19 THE COURT: Yes.

20 BY MR. SEMENZA:

21 Q Ms. Elias, I'd like you to turn to page 45 of your
22 deposition, please. Are you there?

23 A Yes.

24 Q Do you recall being asked a question, "So, do you
25 disagree with that statement that you reported seeing a liquid

1 substance on the floor"?

2 A I don't see it.

3 Q It's on page 45, line 10. Do you recall being asked
4 that question?

5 A Yes.

6 Q And do you recall giving the following answer? "The
7 liquid is not like water. It's like I told you, it's
8 something like sticky, because it's not something like a
9 really, really -- like a water. It's like something like a
10 syrup, like a drink, like something like that, but not like
11 they go more than a little space."

12 A Yes.

13 Q You remember giving that statement?

14 A Yes.

15 Q Thank you.

16 MR. SEMENZA: One moment, Your Honor.

17 (Pause in the proceedings)

18 MR. SEMENZA: No further questions, Your Honor.

19 THE COURT: Thank you. Any --

20 MS. MORRIS: Briefly.

21 THE COURT: -- redirect?

22 MS. MORRIS: Yes.

23 REDIRECT EXAMINATION

24 BY MS. MORRIS:

25 Q Yanet, I just want to clarify your testimony. The

1 handwritten statement that we've been looking at here, it's in
2 your handwriting; is that correct?

3 A Yes.

4 Q And you wrote that there was a spill; isn't that
5 correct?

6 A Yes.

7 Q And Corey Prowell's report states that you told him
8 there was a spill.

9 A When I wrote down a spill -- that there had been a
10 spill, it's because that's was what I had been told when I was
11 called to the area.

12 Q And do you recall who told you there was a spill?

13 A The person at dispatch.

14 Q And when you got there, there was a substance on the
15 floor, wasn't there?

16 A Yes.

17 Q And that substance, part of it had been covered up
18 by a sweeper machine; is that right?

19 A Yes.

20 Q After you got there, you called security and had
21 them come over; is that correct?

22 A We told dispatch to call security.

23 Q And do you recall why you had security come over?

24 A Because whenever there's an accident or something
25 happened, security must come.

1 Q I want to look back at your statement here. Isn't
2 it true that you wrote down here that you called security
3 because she wanted to make a report, Yvonne, because she had
4 pain in her arm? Do you remember writing that?

5 A Yes.

6 Q Isn't it true that you didn't stay and wait for the
7 liquid to get cleaned up?

8 A I don't recall.

9 Q Do you remember telling me in your deposition that
10 your shift was over, and so you left and didn't wait for the
11 liquid to get cleaned up?

12 A Like I said when you asked me, I thought that you
13 referred to my schedule. I thought you were talking about the
14 schedule that I was working that day.

15 Q Okay. I'm going to grab your deposition transcript
16 back from you, if that's okay.

17 THE COURT: Do you have a copy so she can have a
18 copy? I mean, that's normally the way you do it.

19 MS. MORRIS: Right, I apologize.

20 MR. SEMENZA: Your Honor, it is -- it's also located
21 in Defendant's Proposed EE, if that helps. You should have a
22 copy of --

23 (Pause in the proceedings)

24 THE COURT: Okay. I'm going to hand the interpreter
25 the copy --

1 MS. MORRIS: Thank you.

2 THE COURT: -- of the deposition so you can follow
3 along with the questions that the lawyer is asking.

4 THE WITNESS: Okay, yes.

5 (Pause in the proceedings)

6 MS. MORRIS: Sorry, I'm almost there. Hold on,
7 Yanet. Sorry.

8 (Pause in the proceedings)

9 MS. MORRIS: Give me two more minutes and I'll get
10 it.

11 THE COURT: You got one.

12 MS. MORRIS: One? All right, I'll take it.

13 (Pause in the proceedings)

14 MS. MORRIS: Maybe I'll save this then as soon as I
15 -- if I can find it.

16 BY MS. MORRIS:

17 Q Yanet, did you see the liquid get cleaned up off the
18 floor?

19 A I don't recall.

20 Q Do you remember if you left the area before the
21 liquid was cleaned up?

22 A Except there wasn't liquid.

23 Q The substance that you saw on the floor, was that
24 still on the floor when you left the area?

25 A I don't recall.

1 Q And do you recall how that was cleaned up?

2 A No.

3 Q Do you remember when your shift ended that day?

4 A No.

5 Q Do you remember speaking with Yvonne O'Connell?

6 A No.

7 Q Do you recall what Ms. O'Connell said was hurting
8 her?

9 A No.

10 Q Did you check to see if there was any video
11 surveillance of the fall?

12 MR. SEMENZA: Objection, foundation. Your Honor?

13 THE COURT: I'm sorry, I'm choking --

14 MR. SEMENZA: Oh.

15 THE COURT: -- on some water. Excuse me, I'm sorry.

16 MR. SEMENZA: No.

17 THE COURT: Okay, would you restate the question
18 again?

19 BY MS. MORRIS:

20 Q Did you check to see if there was any video
21 surveillance of the fall?

22 MR. SEMENZA: And I objected based on foundation,
23 Your Honor.

24 THE COURT: Okay. Sustained.

25 //

1 BY MS. MORRIS:

2 Q Yanet, is it your job to check to see if there's
3 video surveillance of an incident after a guest is injured at
4 Wynn?

5 A No.

6 Q Do you know whose job it is?

7 A Security.

8 MS. MORRIS: Thank you. I don't have any other
9 questions.

10 THE COURT: Counsel approach.

11 (Off-record bench conference)

12 THE COURT: All right. One more question, and then
13 we're going to ask the jury if they have any questions.

14 RE-CROSS-EXAMINATION

15 BY MR. SEMENZA:

16 Q Do you know what the hours for day shift are for the
17 Wynn?

18 A Right now, or before?

19 Q Well, let's -- February 8th, 2010.

20 A From 8:00 to 5:00.

21 Q And if you were working day shift that particular
22 day, would you be working 8:00 to 5:00?

23 A Yes.

24 MR. SEMENZA: I have no further questions, Your
25 Honor. I would like to reserve recalling the witness in my

1 case.

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

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

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

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

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

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

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

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

14 (Outside the presence of the jury)

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

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

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

21 (Outside the presence of the jury)

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

24 //

25 //

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

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

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

5 THE CLERK: Thank you.

6 THE COURT: And you may proceed.

7 MR. SEMENZA: Thank you.

8 (Testimony outside the presence of the jury)

9 DIRECT EXAMINATION

10 BY MR. SEMENZA:

11 Q Good afternoon, Dr. Dunn.

12 A Good afternoon.

13 Q Did you bring any materials with you today?

14 A Yes, I brought my chart.

15 Q May I examine those for a moment?

16 A Sure.

17 (Pause in the proceedings)

18 BY MR. SEMENZA:

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

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

25 Q Okay. When were these documents obtained?

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

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

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

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

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

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

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

18 THE WITNESS: Sure.

19 BY MR. SEMENZA:

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

22 A I don't know.

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

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

3 THE COURT: From what dates?

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

12 THE COURT: On films?

13 MR. SEMENZA: Pardon me?

14 THE COURT: On plain films?

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

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

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

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

2 MR. SEMENZA: Yes.

3 THE COURT: May 18th?

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

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

17 THE COURT: What was it? What date?

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

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

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

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

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

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

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

1 relating to this particular matter.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 MS. MORRIS: Right, I think --

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

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

14 THE COURT: Um-hum.

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

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

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

24 THE COURT: -- what it says.

25 MS. MORRIS: Correct.

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

2 MS. MORRIS: It states --

3 THE COURT: Actually --

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

6 MR. SEMENZA: Where are you looking?

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

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

9 MS. MORRIS: It's his chart.

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

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

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

22 MR. SEMENZA: Okay.

23 BY MR. SEMENZA:

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

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

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

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

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

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

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

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

14 Q And was this an office visit?

15 A Yes.

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

18 A Not that I recall, no.

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

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

1 through the history that they've obtained.

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

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

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

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

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

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

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

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

19 Q Okay. Is -- is the --

20 MR. SEMENZA: And may I approach?

21 THE COURT: Yes.

22 BY MR. SEMENZA:

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

1 A Yes.

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

4 A Yes.

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

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

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

11 THE COURT: Okay, show her.

12 MR. SEMENZA: Thank you.

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

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

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

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

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

21 MR. SEMENZA: I may have found it, Your Honor.

22 Okay. I think it was produced.

23 THE COURT: Okay.

24 //

25 //

1 BY MR. SEMENZA:

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

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

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

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

9 Q A second opinion as to what?

10 A Her neck and back pain.

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

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

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

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

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

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

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

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

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

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

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

15 A Yes.

16 Q And can you identify what those studies were?

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

23 Q Okay. Where are the radiographs referenced?

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

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

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

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

15 A Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 A Yes.

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

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

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

25 A No.

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

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

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

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

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

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

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

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

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

5 A Yes.

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

8 A No.

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

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

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

18 A No.

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

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

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

1 identifying during your appointments?

2 A It may have, yes.

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

5 A Yes.

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

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

15 Q What about Ehlers-Danlos Syndrome?

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

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

20 A Yes.

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

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

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

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

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

14 A Based on her history, yes.

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

17 A Yes.

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

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

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

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

2 A Yes.

3 Q And what was that?

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

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

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

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

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

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

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

6 THE WITNESS: That's correct.

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

11 THE WITNESS: Correct.

12 THE COURT: Okay.

13 THE WITNESS: We all do at 58.

14 THE COURT: All right.

15 BY MR. SEMENZA:

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

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

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

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

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

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

22 MR. SEMENZA: Okay.

23 BY MR. SEMENZA:

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

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

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

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

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

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

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

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

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

4 Q Okay.

5 A -- if she indeed has it.

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

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

13 Q But the lumbar, it could?

14 A Yes.

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

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

18 MR. SEMENZA: Okay.

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

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

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

6 MR. SEMENZA: And further --

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

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

16 THE COURT: Do you have them?

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

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

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

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

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

13 MR. SEMENZA: Exactly. So --

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

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

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

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

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

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

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

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

7 MR. SEMENZA: Okay.

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

9 THE COURT: Wednesday the --

10 THE WITNESS: But Tuesday is --

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

12 THE WITNESS: Oh, okay.

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

14 THE WITNESS: No problem.

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

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

17 (In the presence of the jury)

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

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

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

23 THE WITNESS: Oh, yes.

24 //

25 //

1 THOMAS DUNN, PLAINTIFF'S WITNESS, RESWORN

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

4 THE WITNESS: Thomas --

5 THE CLERK: Please be seated.

6 THE WITNESS: Thomas Dunn.

7 THE COURT: Thank you. Proceed.

8 DIRECT EXAMINATION

9 BY MS. MORRIS:

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

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

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

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

17 Q Do you have a certain specialty?

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

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

3 Q How long have you worked at Desert Orthopedic?

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

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

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

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

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

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

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

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

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

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

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

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

21 A Yes.

22 Q How many times?

23 A I'll say roughly 20 times.

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

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

5 BY MS. MORRIS:

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

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

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

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

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

13 A That was June 16, 2014.

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

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

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

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

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

2 Q Why did you order those studies be done?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 Q What did you see in her cervical MRI?

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

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

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

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

7 A Yes.

8 Q And did anything else occur on that visit?

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

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

23 Q Did you see Yvonne again?

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

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

7 Q What did you recommend for surgery?

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

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

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

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

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

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

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

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

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

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

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

15 Q Does that have any significance to you?

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

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

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

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

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

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

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

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

1 2010?

2 MR. SEMENZA: Objection, Your Honor.

3 THE COURT: State your legal grounds.

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

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

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

10 THE COURT: Yeah.

11 (Off-record bench conference)

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

14 BY MS. MORRIS:

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

18 A That's correct.

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

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

25 //

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

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

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

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

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

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

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

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

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

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

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

9 A No.

10 Q Do you know what malingering means?

11 A Yes.

12 Q Can you tell us?

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

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

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

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

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

5 BY MS. MORRIS:

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

8 A Yes.

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

11 A Yes.

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

14 A No.

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

17 A Yes.

18 Q What is that?

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

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

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

3 THE WITNESS: Yes, we do it routinely.

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

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

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

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

24 BY MS. MORRIS:

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

1 surgeons?

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

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

12 Q How do you perform a Waddell test?

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

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

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

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

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

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

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

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

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

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

7 A No.

8 Q What is that?

9 MR. SEMENZA: Objection, Your Honor.

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

12 MS. MORRIS: Let me back up.

13 BY MS. MORRIS:

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

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

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

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

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

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

15 A Yes.

16 Q -- would that be fair?

17 A Yes.

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

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

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

23 BY MS. MORRIS:

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

1 Yvonne's chart?

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

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

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

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

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

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

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

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

5 A That's correct, no.

6 Q Why not?

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

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

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

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

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

25 A Well, through my own experience of treating these

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

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

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

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

25 A That's correct.

1 Q -- of 2014?

2 A That's correct.

3 Q And does that cause any concern for you?

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

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

16 A I did.

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

19 A Extremely rare.

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

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

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

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

3 THE WITNESS: Yes.

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

5 THE WITNESS: Whatever the preference is here.

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

9 THE WITNESS: Yes.

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

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

21 See you tomorrow morning at 8:30.

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

23 (Outside the presence of the jury)

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

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

6 MS. MORRIS: No.

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

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

10 MS. MORRIS: Yes.

11 THE COURT: Okay.

12 MS. MORRIS: Corey, correct?

13 MR. SEMENZA: Yes.

14 MS. MORRIS: Yes, we do.

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

16 MS. MORRIS: Thank you.

17 MR. SEMENZA: Thank you, Your Honor.

18 THE COURT: Thank you.

19 MR. KIRCHER: Thank you.

20 (Court recessed at 6:03 p.m. until Tuesday,

21 November 10, 2015, at 8:29 a.m.)

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CERTIFICATION

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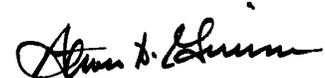
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d/b/a Wynn Las Vegas

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

**DEFENDANT'S BENCH BRIEF
REGARDING FUTURE PAIN AND
SUFFERING**

Defendant Wynn Las Vegas, LLC d/b/a Wynn Las Vegas ("Wynn"), by and through its attorneys of record, Lawrence J. Semenza, III, Esq. and Christopher D. Kircher, Esq., of Lawrence J. Semenza, III, P.C., hereby submits the following Bench Brief regarding future damages for pain and suffering.

It is axiomatic that the plaintiff bears the burden of proving both the fact and the amount of damage. *See Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 955 P.2d 661, 671 (1998). Furthermore, "[d]amages for future pain and suffering must be established with reasonable certainty." *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988); *Scognamillo v. Herrick*, 106 Cal.App.4th 1139, 1151, 131 Cal. Rptr. 2d 393 (2003) ("do not award a party

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1 speculative damages, which means compensation for future loss or harm which, although
2 possible, is conjectural or not reasonably certain") (citation omitted).

3 The Nevada Supreme Court "has held that when an injury or disability is subjective and
4 not demonstrable to others (such as headaches), expert medical testimony is necessary before a
5 jury may award future damages." *Krause Inc. v. Little*, 117 Nev. 929, 938, 34 P.3d 566 (2001)
6 (citing *Gutierrez v. Sutton Vending Serv.*, 80 Nev. 562, 565-66, 397 P.2d 3, 4-5 (1964)); *Lerner*
7 *Shops v. Marin*, 83 Nev. 75, 79-80, 423 P.2d 398, 400 (1967) (in cases involving "subjective
8 physical injury, . . . the claim must be substantially supported by expert testimony to the effect
9 that future pain and suffering is a probable consequence rather than a mere possibility"). Injuries
10 that do not require expert medical testimony for future pain and suffering are broken bones or a
11 shoulder injuries causing demonstrably limited range of arm motion because they are "readily
12 observable and understandable by the jury without an expert's assistance." *Id.* at 938-39 (citing
13 *Paul v. Imperial Palace, Inc.*, 111 Nev. 1544, 1548, 908 P.2d 226, 229 (1995)). Put differently,
14 these are "objective" injuries which do not require expert medical testimony. *Id.* Injuries that
15 are not demonstrable to others, and require expert testimony, include reinjuring a back, low-back
16 pain, mental worry, distress and grief. *Sierra Pac. Power Co. v. Anderson*, 77 Nev. 68, 75, 358
17 P.2d 892, 896 (1961).

18 In this case, Plaintiff Yvonne O'Connell ("Plaintiff") must provide expert medical
19 testimony if she intends to seek damages for future pain and suffering for claimed injuries that
20 are subjective. Her injuries are completely subjective. Without expert medical testimony, the
21 jury would be forced to speculate as to her alleged future damages for pain and suffering.

22 Furthermore, the Court should exclude any argument or testimony regarding damages for
23 future pain and suffering related to any purported future surgeries. Plaintiff did not disclose any
24 future medical expenses in her Rule 16.1 disclosures related to any alleged future surgeries.

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1 To claim pain and suffering damages related to these alleged surgeries, without a basis
2 for or seeking such future medical expenses, would confuse the jury and be unduly prejudicial to
3 Wynn. The jury would be purely speculating as to the amount of damages for future pain and
4 suffering without any evidence related to the expenses for such alleged surgeries.

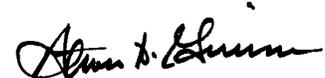
5 DATED this 9th day of November, 2015.

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

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d/b/a Wynn Las Vegas

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

**DEFENDANT'S BENCH BRIEF
REGARDING EXCLUSION OF
PLAINTIFF'S TREATING PHYSICIAN
TESTIMONY SOLELY BASED ON
PLAINTIFF'S SELF-REPORTING**

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Defendant Wynn Las Vegas, LLC d/b/a Wynn Las Vegas ("Wynn"), by and through its attorneys of record, Lawrence J. Semenza, III, Esq. and Christopher D. Kircher, Esq., of Lawrence J. Semenza, III, P.C., hereby submits the following Bench Brief regarding the exclusion of any unreliable expert medical testimony from Plaintiff Yvonne O'Connell's ("Plaintiff") treating physicians, Dr. Thomas Dunn and Dr. Craig Tingey.

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.* at 651.

1 "Where the sole basis for a physician's testimony regarding causation is the patient's self-
2 reporting that testimony is unreliable and should be excluded." *Hare v. Opryland Hospitality,*
3 *LLC*, 2010 U.S. Dist. LEXIS 97777, *14 (D. Md. Sept. 17, 2010) (excluding treating physician's
4 testimony as to causation because he failed to conduct a "differential diagnosis" that considered
5 alternative causes for the injury) (citing *Perkins v. United States*, 626 F. Supp. 2d 587, n. 7
6 (E.D.Va. 2009); see also *Goomar v. Centennial Life Ins. Co.*, 855 F. Supp. 319, 326 (S.D. Cal.
7 1994) (holding that proffered expert testimony concerning a patient's medical condition, based
8 only upon the patient's self-report to the experts, was "unsupported speculation").

9 In *Perkins*, the court excluded expert testimony regarding causation where doctor simply
10 took the patient's explanation and adopted it as his opinion.¹ *Perkins*, 626 F.Supp.2d at 592. The
11 treating physician "did not adequately investigate [the plaintiff's] relevant medical history" in
12 determining the cause of her injuries, such as prior accidents and preexisting conditions. *Id.* at
13 593-94. The treating physician's opinion was unreliable because the treating physician
14 "categorically dismissed or ignored evidence of other preexisting conditions when such evidence
15 was available to him at the time of treatment." *Id.* at 594. Specifically, the treating physician did
16 not explain how osteoarthritis in the same areas of her body as her alleged injuries was not the
17 cause, or partial cause, of the plaintiff's current symptoms. *Id.* The treating physician's "failure to
18 adequately account for the obvious alternative explanation creates a fatal analytical gap in his
19 testimony." *Id.* (citation omitted). The Court found that "[b]y selectively ignoring the facts that
20 would hinder the patient's status as a litigant, [the treating physician] reveals himself as the
21 infamous 'hired gun' expert." *Id.* at 595.

22 In this case, it is anticipated that Dr. Dunn and Dr. Tingey's testimony will be unreliable
23 because they will solely base their conclusions on Plaintiff's self-reporting in determining the
24 cause of her alleged injuries and conditions. Tellingly, their medical records omit any reference
25 to reviewing Plaintiff's prior medical history, such as her preexisting conditions and other
26 incidents that may have caused or contributed to her alleged injuries and/or medical conditions.

27 _____
28 ¹ Attached as Exhibit "1" hereto is *Perkins v. United States*, 626 F. Supp. 2d 587 (E.D.Va. 2009).

EXHIBIT 1

EXHIBIT 1

Perkins v. United States

United States District Court for the Eastern District of Virginia, Norfolk Division

June 4, 2009, Decided

Action No. 4:08cv50

Reporter

626 F. Supp. 2d 587; 2009 U.S. Dist. LEXIS 51041

LAILA ROSE PERKINS, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

Subsequent History: Objection overruled by, Accepted by, Adopted by Perkins v. United States, 626 F. Supp. 2d 587, 2009 U.S. Dist. LEXIS 50597 (E.D. Va., June 16, 2009)

Core Terms

injuries, causation, reliability, motor vehicle accident, treating physician, expert testimony, written report, deposition, pain, expert opinion, patient's, prognosis, neck, district court, argues, causes, fails, knee

Counsel: **[**1]** For Laila Rose Perkins, Plaintiff: James Patrick St. Clair, LEAD ATTORNEY, Norris & St. Clair PC, Virginia Beach, VA.

For United States of America, Defendant: Kent Pendleton Porter, LEAD ATTORNEY, United States Attorney Office, Norfolk, VA.

Judges: Tommy E. Miller, UNITED STATES MAGISTRATE JUDGE.

Opinion by: Tommy E. Miller

Opinion

[*589] OPINION & ORDER

After a review of the memoranda submitted by the parties and the applicable statutory and case law, and for the reasons set forth below, the Court

GRANTS Defendant's Motion in Limine to Exclude or Limit Testimony of Dr. Harold Cloud [Doc. 9], and GRANTS Defendant's Second Motion in Limine to Exclude Plaintiff's Expert Dr. Wardell Under *Daubert v. Merrell Dow Pharmaceuticals* [Doc. 16].

I. Factual and Procedural History

This case arises from a motor vehicle accident on I-64, in Hampton, Virginia. On June 8, 2005, the vehicle of Plaintiff Laila Rose Perkins ("Perkins") collided with a vehicle driven by an employee of the Federal Bureau of Investigations ("FBI"). (Compl. [Doc. 1],

5-7.) On June 14, 2005, Perkins signed a retainer agreement with an attorney, Tim Hankins, ¹ to represent her in any lawsuit related to the accident. (Def.'s First Br., Ex. 2.) ² The next day, Perkins **[**2]** began treatment with Dr. Harold Cloud ("Dr. Cloud") to address any injuries arising from the accident. (Def.'s First Br., Ex. 5.) In addition to Dr. Cloud and several other physicians, Perkins also received treatment from Dr. Arthur Wardell ("Dr. Wardell"), an orthopaedic specialist, beginning on September 9, 2005. (Def.'s Second Br., Ex. 2.) ³

On April 22, 2008, Perkins filed a Complaint

¹ Perkins Complaint was filed by James P. St. Clair, Esq., as Tim Hankins was discharged prior to filing suit.

² All citations to Defendant's *First* Brief refer to Defendant's Memorandum in Support of Motion in Limine to Exclude or Limit Testimony of Dr. Harold Cloud [Doc. 10].

³ All citations to Defendant's *Second* Brief refer to Defendant's Memorandum in Support of its Second Motion in Limine to Exclude Plaintiff's Expert Dr. Arthur Wardell [Doc. 17].

LAWRENCE SEMENZA

against the United States in this Court, alleging that the FBI employee had negligently and recklessly changed lanes on I-64, struck Perkins' vehicle, and proximately caused Perkins "to sustain serious and permanent injuries." (Compl.

7-8.) The United States timely filed an Answer on June 27, 2008. [Doc. 5.] On January 16, 2009, the United States filed a [**3] Motion in Limine to Exclude or Limit Testimony of Dr. Harold Cloud. ("Def.'s First Br." [Doc. 9.]) On January 27, 2009, Perkins responded to the motion ("Pl.'s First Br." [Doc. 11]), and January 30, 2009, the United States filed its reply [Doc. 13]. Thus, the first Motion in Limine is fully briefed and ripe for adjudication.

[*590] On April 8, 2009, the United States filed the Second Motion in Limine to Exclude Plaintiff's Expert Dr. Wardell Under *Daubert v. Merrell Dow Pharmaceuticals*. ("Def.'s Second Br." [Doc. 16.]) On April 20, 2009, Perkins responded to the motion ("Pl.'s Second Br." [Doc. 18]), and on April 24, 2009, the United States filed its reply [Doc. 19]. Accordingly, the second Motion in Limine is also fully briefed and ripe for adjudication.

Finally, on June 4, 2009, the Court heard oral argument on both motions. James P. St. Clair, Esq., represented the Plaintiff, and Kent P. Porter, Esq. represented the Defendant. Paul McManus was the Official Court Reporter.

II. Analysis

A. Defendant's Motion to Exclude Testimony of Dr. Cloud

Dr. Harold Cloud ("Dr. Cloud") began treating Perkins on June 15, 2005, one week after Perkins' motor vehicle accident. Dr. Cloud expects to testify at trial [**4] that the physical injuries observed during his treatment of Perkins were caused by the accident. (Def.'s First Br., Ex. 2 at 52-53.) During discovery, Perkins disclosed Dr. Cloud as an expert pursuant to Federal Rule of Civil Procedure ("Rule") 26(a)(2)(A), but did not provide an expert report from Dr. Cloud under Rule 26(a)(2)(B). Defendant contends that Dr. Cloud is subject to the

written report requirement of Rule 26(a)(2)(B), and further argues that Dr. Cloud's testimony should be excluded entirely, or in the alternative, limited to exclude any opinion regarding the causation of Plaintiff's injuries.

The federal rules require that the disclosure of an expert witness "must be accompanied by a written report--prepared and signed by the witness--if the witness is one *retained or specially employed* to provide expert testimony in the case. . . ." Fed.R.Civ.P. 26(a)(2)(B)(emphasis added). Perkins argues that Dr. Cloud, the treating physician, "was in no way specially retained to provide expert opinion" in this case. (Pl.'s First Br. at 1.) Thus, the central issue is "when does a treating physician become a specially retained expert as defined in [Rule] 26(a)(2)(B) so that an expert written [**5] report must be prepared." *Hall v. Sykes*, 164 F.R.D. 46, 48 (E.D. Va. 1995).

In general, a treating physician is not a specially retained expert. This Court has recognized, for example, that an expert written report is not necessarily required when a treating physician receives compensation for their time in attending a deposition, writing a letter summarizing treatment, or testifying at trial. *Id.* Furthermore, if a treating physician forms an opinion of the causation of an injury during the *ordinary* treatment of the patient, then the physician may express this opinion without disclosing a written report. *Id.* When an attorney refers a client to a physician, however, "[s]uch a reference . . . raises the appearance that the physician was specially retained to provide expert opinion." *Id. at 49.* In *Hall v. Sykes*, counsel provided his client, the plaintiff, with a list of chiropractors, and the plaintiff went to one of these chiropractors for treatment. This Court held that the chiropractor must produce an expert written report, "because . . . when an attorney selects the physician for treatment as well as testimony, it is presumed that the physician was selected for expert testimony." *Id.*

Although [**6] Perkins denies that her attorney

referred her to Dr. Cloud,⁴ the [*591] evidence overwhelmingly indicates that Dr. Cloud was specially retained for litigation. First, the timing raises suspicion. The accident took place on June 8, 2005, but Perkins did not begin treatment with Dr. Cloud until June 15, 2005, the day after she signed a retainer agreement with her attorney.⁵ Second, Perkins executed a written agreement with Dr. Cloud, which established that (a) Dr. Cloud was not Perkins' primary care physician, (b) Dr. Cloud was only treating Perkins for the injuries sustained in the motor vehicle accident, and (c) litigation was pending. (Def.'s First Br., Ex. 5.) Furthermore, Dr. Cloud did not bill Perkins or a medical insurance provider, but rather, billed Perkins' attorney directly.⁶ (Def. First Br., Ex. 4 at 129-30.) These facts, therefore, clearly "raise[] the appearance that [Dr. Cloud] was specially retained to provide expert opinion." *Sykes, 164 F.R.D. at 49*. Accordingly, the failure of Dr. Cloud to provide an expert report constitutes a violation of Rule 26(a)(2)(B).

Finally, Perkins cites the wrong legal standard to determine whether the exclusion of Dr. Cloud is appropriate. Perkins argues that Anderson v. Foundation for Advancement, Education, and Employment of American Indians mandates a four-part factor analysis, including consideration of the absence or presence of bad faith, but the Anderson case did not involve the failure to provide an expert report under Rule 26(a)(2)(B). *155 F.3d 500 (4th Cir. 1998)*. Instead, the Federal Rules of Civil Procedure, [*8] in relevant part, provide:

⁴In her deposition, Perkins claims that she picked Dr. Cloud out of the Yellow Pages. (Def.'s First Br., Ex. 3 at [*7] 118-20.)

⁵Perkins cites no authority to support the claim that the substitution of counsel, Mr. St. Cloud for Mr. Hankins, somehow cleanses Dr. Cloud of his status as a specially retained expert. As the Defendant points out, not only does this argument contradict the plain language of Rule 26(a)(2)(B)(report required "if the witness is one retained or specially employed to provide expert testimony *in the case*")(emphasis added), but Perkins' proposed rule would also create an intolerable loophole for curing discovery violations.

⁶In fact, during the period 2003 - 2008, Dr. Cloud had billed and received \$ 269,779.11 from Tim Hankins, in connection with multiple patients. (Def.'s First Br., Ex. 6.)

If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was *substantially justified or is harmless*.

Fed.R.Civ.P. 37(c)(1)(emphasis added). In order to determine if the failure to satisfy Rule 26(a) was "substantially justified" or "harmless," a district court should consider the following five factors: "(1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence." *S. States Rack And Fixture, Inc. v. Sherwin-Williams Co., 318 F.3d 592, 597 (4th Cir. 2003)*. Consideration of bad faith, specifically, is not a factor in the analysis. *Id. at 597-98*.

The burden is on the plaintiff to prove either substantial justification or harmlessness, *Id. at 596*, and Perkins fails to meet this burden. Although Perkins argues that Dr. Cloud's deposition [**9] cured any surprise or prejudice, Dr. Cloud equivocated on facts that should have been presented in an expert written report (Def.'s First Br., Ex. 4), and belabored the deposition to the tune of \$ 1,250 (Def.'s First Br., Ex. 7). Perkins does not address the third and fourth factors, and most importantly, does not provide a justifiable explanation [*592] for the omission of the expert written report. As the Fourth Circuit has stated:

Rule 26 disclosures are often the centerpiece of discovery in litigation that uses expert witnesses. A party that fails to provide these disclosures unfairly inhibits its opponent's ability to properly prepare, unnecessarily prolongs litigation, and undermines the district court's management of the case. For this reason, we give particularly wide latitude to the

district court's discretion to issue sanctions under Rule 37(c)(1).

Carr v. Deeds, 453 F.3d 593, 604 (4th Cir. 2006)(internal quotations and citations omitted). We find that Perkins' violation of Rule 26(a)(2)(B) hindered Defendant's ability to prepare for the deposition and, without valid justification, undermined the integrity of the discovery process. Accordingly, the Court ORDERS that Dr. Cloud's testimony, [**10] in its entirety, shall be excluded for all purposes.

B. Defendant's Motion to Exclude Testimony of Dr. Wardell

Dr. Arthur Wardell ("Dr. Wardell"), an orthopedic surgeon, began treating Perkins on September 9, 2005. Although Dr. Wardell did not produce a formal written report pursuant to Rule 26(a)(2)(B), he sent a letter to Perkins' attorney, Tim Hankins, on November 8, 2007, outlining Perkins' injuries, the causation of these injuries, and the estimated cost of these injuries going forward. (Def.'s Second Br., Ex. 2.) At his deposition on December 10, 2008, Dr. Wardell testified in accord with his letter to Mr. Hankins. (Def.'s Second Br., Ex. 3.) Defendant moves to exclude Dr. Wardell's testimony as unreliable under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) and its progeny.

Under Federal Rule of Evidence 702, as interpreted by the U.S. Supreme Court in Daubert, a district court assumes a "gatekeeping role" to "ensure that any and all ⁷ scientific testimony or evidence

⁷ Despite argument by Perkins to insulate treating physicians from a traditional examination of reliability under Daubert (Pl.'s Second Br. at 8-9), the plain language of the Daubert decision extends the threshold requirement of reliability to "any and all" medical testimony, including that of treating physicians. Daubert, 509 U.S. at 589. See also Turner v. Iowa Fire Equip. Co., 228 F.3d 1202, 1207 (8th Cir. 2000) ("A treating physician's expert opinion on causation is subject to the same standards of scientific reliability that govern the expert opinions of physicians hired solely for purposes of [**12] litigation.") (citing Kumbo Tire Co. v. Carmichael, 526 U.S. 137, 151, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)).

admitted is not only relevant, but reliable." Id. at 589, 597. When a party seeks to enter expert testimony into evidence, the trial judge must conduct a "preliminary assessment of whether the reasoning [**11] or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Id. at 592-93. Furthermore, the burden of establishing the reliability of the expert testimony is on the proponent, Perkins. Cooper v. Smith & Nephew, Inc., 259 F.3d 194, 199 (4th Cir. 2001) (citing Daubert, 509 U.S. at 592 n.10). With respect to the causation of Perkins' injuries and the prognosis of future medical costs, Perkins has failed to establish that Dr. Wardell's testimony is reliable. The reasons for this failure are manifold.

First, Dr. Wardell's opinion on the causation of Perkins' injuries is based solely on Perkins' self-report that the injuries were caused by the motor vehicle accident. (Def.'s Second Br., Ex. 3.) In Bowers v. Norfolk Southern Corp., a federal district [**593] court found that "Dr. Wardell simply took Plaintiff's word for what happened and adopted that explanation as his own opinion on causation." 537 F. Supp. 2d 1343, 1357 (M.D. Ga. 2007). In supporting its decision to exclude Dr. Wardell's testimony, the Bowers court held that merely adopting a patient's theory of causation fails the fourth of the factors laid out by the notes of the Advisory Committee to the 2000 Amendments to Rule 702 of the Federal Rules of Evidence: "Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting." ⁸ Id. at 1351, 1358 (internal quotations omitted). Likewise, in the present case, Dr. Wardell's exclusive reliance on a patient's self-report fails to employ "the same level of intellectual rigor that characterizes the practice of an expert in

⁸ Although [**13] Perkins presents Dr. Wardell as a treating physician, Dr. Wardell knew from the outset of treatment that he would be involved in litigation to render an expert opinion. (Def.'s Second Br., Ex. 3 at 80.) Dr. Wardell further admitted that an opinion on causation is a legal conclusion, more "driven by the legal aspects of the case than by the medicine." Id. at 67.

the relevant field." Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

Second, Dr. Wardell did not adequately investigate Perkins' relevant medical history. According to the Fourth Circuit, "[a] reliable differential diagnosis typically . . . is performed after physical examinations, the taking of medical histories, and the review of clinical tests, including laboratory tests." Cooper, 259 F.3d at 200. By taking Perkins' self-report at face value, and not developing an accurate medical history for his patient, Dr. Wardell neither knew nor considered Perkins' history of prior trauma and injury. For example, at the time of forming his medical opinion of Perkins, Dr. Wardell was not aware of the following incidents involving Perkins:

- (a) two prior motor vehicle accidents, in 1980 and around 1995, which resulted in injuries and emergency room treatment;
- (b) knee and back injury, resulting from falling [**14] off a ramp in 1997, which resulted in ongoing neck and back pain;
- (c) another fall at work, in 2000, injuring head and back, resulting in continued neck and back pain;
- (d) injury to right arm and trapezius muscle, resulting from picking up a heavy bag in 2004; and
- (e) on May 4, 2005, one month prior to the motor vehicle accident alleged in the present case, Perkins visited the emergency room complaining of left knee pain and swelling.

(Def.'s Second Br., Ex. 1 at 2, _6 and 20-21.) Even if the medical profession does not fault Dr. Wardell for his reliance on Perkins' self-report, and in turn, his ignorance of Perkins's prior trauma and treatment, the law still demands that his expert testimony be reliable. When asked during his deposition if these injuries would be "important to

know and potentially alter what conclusions you had [on the causation of Perkins' current complaints]," Dr. Wardell answered, "Yes." (Def.'s Second Br., Ex. 3 at 34.) Thus, by Dr. Wardell's own admission, the quality of his conclusions is undermined by the existence of unknown prior trauma. Furthermore, Dr. Wardell did not know Perkins' prior history of medication and did not review the hospital records of June [**15] 2005, which included the emergency physicians' findings, diagnoses, and recommendations for treatment. Id. at 67-68. Again, Dr. Wardell admitted that knowledge of whether Perkins complied with the hospital physicians' recommendations for treatment "would never be not important," Id. at 28-29, or in demystified terms, would always be important. [**594] Therefore, Dr. Wardell failed to consider a wealth of "important" information in making conclusions on the causation of Perkins' latest injuries, and as a result, the reliability of these conclusions is substantially weakened.

Third, and perhaps most importantly, Dr. Wardell failed to consider alternative explanations for Perkins' injuries. Although the alternative causes raised by a defendant typically do not preclude the admissibility of a plaintiff's expert's testimony:

[A] differential diagnosis that fails to take serious account of other potential causes may be so lacking that it cannot provide a reliable basis for an opinion on causation. . . . Thus, if an expert utterly fails to consider alternative causes or fails to offer an explanation for why the proffered alternative cause was not the sole cause, a district court is justified in excluding [**16] the expert's testimony.

Cooper, 259 F.3d at 202 (citations omitted). In Cooper, the defendant offered alternative explanations for plaintiff's nonunion of vertebrae following spinal surgery, including the plaintiff's long history of smoking. The plaintiff's expert physician denied that smoking was a cause of the injury. The Fourth Circuit affirmed the exclusion of plaintiff's expert physician, because the physician

"did not identify specifically how he ruled out smoking and other potential causes of the nonunion." *Id.* at 203. Moreover, "[i]n the face of the medical literature and Cooper's own records, [the physician] categorically dismissed any suggestion that Cooper's smoking was the cause of the nonunion." *Id.* at 202.

Under *Cooper*, Dr. Wardell's causation opinion is further unreliable, because Dr. Wardell either "categorically dismissed" or ignored evidence of other preexisting conditions when such evidence was available to him at the time of treatment. In particular, Dr. Wardell does not explain how he ruled out osteoarthritis as a cause, or a partial cause, of Perkins' current symptoms. Osteoarthritis, a degenerative joint disease that causes pain, is present in Perkins' "neck, lower **[**17]** back, left knee and right foot, all areas purportedly injured in the accident." (Def.'s Second Br., Ex. 1 at 2-3, _7.) During his deposition, Dr. Wardell testified that the degenerative joint disease is a preexisting condition unrelated to the motor vehicle accident, and that this disease can cause pain and swelling. (Def.'s Second Br., Ex. 3 at 69-76.) Despite the presence of this pain-inducing disease in Perkins' neck, back, and joints, however, Dr. Wardell reiterates his conclusion "that her left knee, her neck, her upper and lower back, her left hip, her right foot and her left leg complaints [of pain] were due to the [motor vehicle] accident." *Id.* at 66. Furthermore, discussion of a preexisting degenerative joint disease is conspicuously absent from Dr. Wardell's letter opinion to Perkins' attorney. (Def.'s Second Br., Ex. 2.) Thus, as was the case in *Bowers*, "Dr. Wardell's failure to adequately account for this obvious alternative explanation creates a fatal analytical gap in his testimony." *537 F. Supp. 2d at 1356*.

This "fatal analytical gap" is compounded by Dr. Wardell's failure to address the issue of obesity. Defendant frames the issue as follows:

Insofar as Dr. Wardell acknowledges **[**18]** plaintiff is obese, [(Ex. 3 at 59)], and "[o]bese people have significantly more

problems with back and neck pain, as well as knee and foot problems," [(Ex. 1 at 3, _8)], it would reasonably follow that plaintiff's obesity might amplify the likelihood of pain from plaintiff's extensive osteoarthritis in her weight bearing joints. Again, any reference to plaintiff's obesity is notably absent from Dr. Wardell's report of his physical examination, or anywhere else in his expert opinion letter. [(Ex. 2.)]

[*595] (Def.'s Second Br. at 14)(footnote omitted). Dr. Wardell's diagnosis of Perkins is driven by willful blindness to plausible, perhaps even probable, alternative explanations for his patient's symptoms and injuries. By selectively ignoring the facts that would hinder the patient's status as a litigant, Dr. Wardell reveals himself as the infamous "hired gun" expert.

Thus, even without Dr. Robert S. Neff's detailed description of how Dr. Wardell "failed to employ the clinical decision making process that is standard practice in the medical profession," (Def.'s Second Br., Ex. 1 at 2, _5), the record clearly indicates that Dr. Wardell's opinion on the causation of Perkins' injuries lacks **[**19]** sufficient reliability, and therefore, is inadmissible.

Similarly, for the reasons state above, the Court also excludes Dr. Wardell's prognosis of future medical costs for Perkins. According to the evidence before the Court, the prognosis is nothing beyond a guess. Dr. Wardell does not provide any methodological basis for the prognosis. Perkins argues that such a deficiency would go to the weight, not admissibility, of the evidence, but "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Cooper*, *259 F.3d at 203* (quoting *Kumho Tire*, *526 U.S. at 157*).

In sum, the Court ORDERS that Dr. Wardell's testimony is not admissible regarding (1) the causation of Perkins' injuries and (2) the prognosis

of future medical costs. Dr. Wardell may testify at trial, but only to his treatment of Perkins.

regarding (1) the causation of Perkins' injuries and (2) the prognosis of future medical costs.

III. Order

The Court GRANTS Defendant's Motion in Limine to Exclude or Limit Testimony of Dr. Harold Cloud [Doc. 9], and ORDERS that Dr. Cloud's testimony, in its entirety, shall be excluded for all purposes. The Court also GRANTS Defendant's Second Motion in Limine to Exclude [**20] Plaintiff's Expert Dr. Wardell Under *Daubert v. Merrell Dow Pharmaceuticals* [Doc. 16], and ORDERS that Dr. Wardell may testify at trial only to his treatment of Perkins, and that Dr. Wardell shall not testify

The Clerk shall mail a copy of this Order to all counsel of record.

/s/

Tommy E. Miller

UNITED STATES MAGISTRATE JUDGE

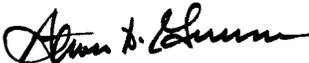
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2009

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CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

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

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

JURY TRIAL - DAY 4

TUESDAY, NOVEMBER 10, 2015

APPEARANCES:

FOR THE PLAINTIFF: CHRISTIAN M. MORRIS, ESQ.
EDWARD J. WYNDER, ESQ.

FOR THE DEFENDANTS: LAWRENCE J. SEMENZA, III. ESQ.
CHRISTOPHER D. KIRCHER, ESQ.

COURT RECORDER:

LARA CORCORAN
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC
Englewood, CO 80110
(303) 798-0890

Proceedings recorded by audio-visual recording, transcript
produced by transcription service.

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WITNESSES

<u>NAME</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RE CROSS</u>
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Yvonne O'Connell	44	85	194/213	204
Craig Tingey (<i>Voir Dire by Mr. Semenza</i>)	215*			
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***Testimony outside the presence of the jury.**

EXHIBITS

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<u>DEFENSE EXHIBITS:</u>	
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1 LAS VEGAS, NEVADA, TUESDAY, NOVEMBER 10, 2015, 8:29 A.M.

2 (In the presence of the jury)

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

4 THE COURT: Thank you. Please be seated. All
5 right. And this is a continuation of case number A-12-655992,
6 Yvonne O'Connell vs. Wynn Resorts Limited. The record will
7 reflect the presence of the jury, the two alternates, all the
8 parties are here with their respective counsel, and all
9 officers of the court. Good morning, ladies and gentlemen.
10 Thank you for --

11 UNKNOWN JUROR: Good morning.

12 THE COURT: -- being so prompt. And it's a good
13 thing we're all under cover since the wind's really kicking up
14 out there. And we're going to get started, and be done -- I'm
15 planning on recessing for lunch about noon, depending on where
16 we are with the witnesses, and being out of here by 5:00
17 o'clock today, so.

18 THE CLERK: No, today --

19 THE COURT: No, Thursday is our -- Thursday.

20 THE CLERK: No, today we have another doctor
21 (inaudible).

22 THE COURT: Thursday, I thought, was our doctor.

23 MS. MORRIS: No.

24 THE COURT: Today?

25 MS. MORRIS: Dr. Dunn's coming back on Thursday

1 morning.

2 THE COURT: Oh. Okay, I made my schedule wrong
3 then. All right, so it's possible that we'll go late then
4 today, like 6:30 or so. All right. Which means, if we do
5 that, I'm going to give you a longer lunch, because you'll
6 need to get your strength up. All right, let's call the next
7 witness.

8 MS. MORRIS: We call Corey Prowell.

9 THE MARSHAL: Follow me up to the witness stand,
10 please. Watch your step. Remain standing, face the court
11 clerk, raise your right hand, please.

12 COREY PROWELL, PLAINTIFF'S WITNESS, SWORN

13 THE CLERK: You may be seated. And could you please
14 state and spell your first and last name?

15 THE WITNESS: Yes. Corey, C-o-r-e-y. Prowell, P
16 like Paul, r-o-w-e-l-l.

17 THE CLERK: Thank you.

18 THE COURT: You may proceed.

19 DIRECT EXAMINATION

20 BY MS. MORRIS:

21 Q Good morning, Mr. Prowell. How are you?

22 A Good morning.

23 Q I took your deposition earlier this year; do you
24 recall that?

25 A Yes.

1 Q And can you tell us what you do currently at Wynn?

2 A As of right now, I'm the assistant security manager.

3 Q And you've worked at Wynn since approximately 2006;
4 isn't that correct?

5 A Yes.

6 Q And can you tell us what you -- your position --
7 what position you held back in 2010?

8 A Security report writer.

9 Q And you were trained how to create reports by a
10 senior report officer prior to becoming a report officer; is
11 that correct?

12 A That's correct.

13 Q And is it important that you are thorough and
14 accurate in your report writing?

15 A Yes, it is.

16 Q Is it important that you gather all the information
17 that would be helpful to the claims department in analyzing
18 each guest injury that you respond to?

19 A Yes.

20 Q Is it your job to investigate and gather the
21 information as to the cause and reason for a guest injury?

22 A Yes.

23 Q In this case, you responded to a guest incident
24 involving Yvonne O'Connell; is that correct?

25 A Yes.

1 Q I'd like you to take a look at -- and it's in your
2 black binder in front of you. And if you would turn to the
3 first page of it, which would be your Incident Report.

4 A Okay.

5 Q Are you -- are you with me?

6 A Yes.

7 Q Okay. And you've seen this Incident Report before;
8 isn't that correct?

9 A Yes.

10 Q And this is an Incident Report that you created as a
11 result of your response to Ms. O'Connell's fall at the Wynn;
12 is that correct?

13 A That's correct.

14 Q You -- you respond to calls of guests injury, and
15 you bring certain things with you when you respond to those
16 calls; isn't that correct?

17 A Yes, that's correct.

18 Q What do you bring with you?

19 A Normally, a camera. Documents that's in relation to
20 the incident; in this case, a slip and fall. So, a Guest
21 Accident Report, along with cameras, pens, things like that.

22 Q Do you also bring with you a Guest Waiver of Medical
23 Care?

24 A Yes.

25 Q Okay, and is that a form that you standardly bring

1 with you to a report of a guest injury?

2 A Yes.

3 Q And is it your job to get that form signed by the
4 guest if they refuse medical care?

5 A Yes.

6 Q And is that a form that was provided to you by Wynn
7 as part of a way to do your job?

8 A Yes.

9 Q Now, this Incident Report here involving Yvonne, you
10 created it after you responded to the scene and gathered all
11 the relevant information; is that correct?

12 A That's correct.

13 Q And the area where Ms. O'Connell fell, do you
14 remember where she fell?

15 A Vaguely, yes. Yes.

16 Q Was it in the atrium area?

17 A It was in the atrium area.

18 Q And is that the south entrance to the casino?

19 A Yes, it's closest to the south entrance.

20 Q And is that one of the entry points to the casino?

21 A Yes.

22 Q Would you consider that to be a high traffic area?

23 A Yes.

24 Q Isn't it true that the flooring in the casino area
25 of the south entrance is a marble flooring?

1 A Yes.

2 Q Isn't it true that the policy at Wynn is to
3 immediately clean up spills in the atrium area, the high
4 traffic south entrance area, in order to prevent posing risks
5 to other guests?

6 MR. SEMENZA: Objection, foundation.

7 THE COURT: Overruled.

8 MR. SEMENZA: I'm not aware of any policies with the
9 -- with the cleaning department -- public area department.

10 BY MS. MORRIS:

11 Q Your job is to respond to incidents and gather
12 information; is that right?

13 A Yes.

14 Q Okay. And it's the public areas department that's
15 responsible for cleaning up spills; is that accurate?

16 A That's correct.

17 Q You took a statement from a Terry Ruby; isn't that
18 correct?

19 A Yes.

20 Q Okay. And I want to put Mr. Ruby's statement up in
21 front of you, but I'll direct it to you. It's in front of you
22 on page 5 in your binder. Are you with me?

23 A Yes, I'm there.

24 Q You took this statement from a Terry Ruby when you
25 responded to the scene of Ms. O'Connell's fall; isn't that

1 correct?

2 A Yes.

3 Q And in his report, he stated that four guests were
4 helping Yvonne up after she fell; isn't that correct?

5 A Yes.

6 Q And it also says that he apologized to the guest for
7 her mishap. Do you see that in the -- in his statement?

8 A Yes.

9 Q And to your knowledge, he was just reporting what he
10 had seen; isn't that right?

11 A That's correct.

12 Q You didn't have any reason to disbelieve what Terry
13 Ruby had written down, did you?

14 A No.

15 Q It's also part of your policy and procedures to take
16 photographs of any substance that's on the floor that may have
17 caused the guest fall; isn't that accurate?

18 MR. SEMENZA: Objection --

19 THE WITNESS: Yes -- oh.

20 MR. SEMENZA: -- foundation.

21 THE COURT: Overruled.

22 THE WITNESS: There's no written policy -- written
23 policy that I'm aware of. This is what we're instructed when
24 we went through our training, to take pictures of everything
25 within the accident scene.

1 BY MS. MORRIS:

2 Q Okay, so there's nothing written down at Wynn, but
3 you're trained that's how to do your job; is that correct?

4 A Yes.

5 Q And isn't it part of that training to not clean up
6 any substance until security has gotten there and had an
7 opportunity to take photographs of the -- of the substance?

8 MR. SEMENZA: Objection --

9 THE WITNESS: Again, I'm -- yeah. I'm sorry.

10 MR. SEMENZA: I'm sorry.

11 THE COURT: What's the objection?

12 MR. SEMENZA: Objection as to foundation.

13 THE COURT: All right. So, sustained. Lay a little
14 better foundation about his training.

15 BY MS. MORRIS:

16 Q In your training, isn't it true that you -- you take
17 photographs of the substance that caused or may have caused
18 the guest to fall; isn't that correct?

19 A Yes.

20 Q And that's one of the reasons why you bring your
21 camera with you when you respond to an incident; isn't that
22 correct?

23 A Yes.

24 Q And the goal is to be able to take photographs of
25 the substance in the area where she fell at a far distance, a

1 mid-distance, and a small distance; isn't that correct?

2 A That's correct.

3 Q And you're also instructed to take photographs of
4 the guest; isn't that correct?

5 A Yes.

6 Q And that's only if the guest is -- gives you
7 permission to take photographs; isn't that correct?

8 A That's correct.

9 Q And you take photographs of the guest for multiple
10 purposes; isn't that right?

11 A Yes.

12 Q And one of those is so that the claims department
13 has a photograph of the guest and can potentially identify
14 them later in video surveillance; isn't that accurate?

15 A Yes.

16 Q And in this case, Yvonne O'Connell didn't refuse to
17 allow you to take her photograph, did she?

18 A No, she did not.

19 Q But you did take photographs of Yvonne, correct?

20 A Yes.

21 Q But you only took photographs of her feet; isn't
22 that right?

23 A That's correct.

24 Q Now, in this case, you didn't take any photographs
25 of the substance that was on the floor that Yvonne fell on;

1 isn't that right?

2 A That's correct.

3 Q And the reason you didn't is because when you got to
4 the scene, it had already been cleaned up; is that correct?

5 A That's correct.

6 Q When you got to the scene though, you spoke with
7 Yanet Elias, a manager in the public areas department; isn't
8 that right?

9 A Yes.

10 Q Now, I want to go back to your report that you
11 created here, which is on -- which is Exhibit 1 again. All
12 right. It states here that you spoke with Ms. Elias as soon
13 as you -- when you responded to the area where Yvonne fell;
14 isn't that correct?

15 A Yes.

16 Q Okay. And you reported that Ms. Elias had told you
17 that the liquid had been cleaned up before you got there;
18 isn't that right?

19 A That's correct.

20 Q And you documented that conversation with Ms. Elias
21 in your report; isn't that correct?

22 A Yes.

23 Q And you had no reason to disbelieve any of the
24 statements that Ms. Elias made to you on that day, correct?

25 A No.

1 Q And you reported the information because you
2 believed it to be accurate; is that correct?

3 A Yes.

4 Q And you trusted the information that Ms. Elias gave
5 you?

6 A Ms. Elias? Yes.

7 Q Now, Yvonne also told you that she had -- when she
8 recovered from the fall, she saw a green liquid on the floor;
9 isn't that correct?

10 A Yes.

11 Q And you didn't have any reason to disbelieve Ms.
12 O'Connell, did you?

13 A No.

14 Q You didn't knowingly put anything inaccurate in your
15 report, did you?

16 A No.

17 Q I mean, it's basically your job to go to a scene,
18 gather all the information, submit it to the claims
19 department, and keep going onto any other incidents that
20 occur; isn't that right?

21 A That's correct.

22 Q It's not your job to analyze the information, it's
23 simply to gather it; isn't that correct?

24 A That's correct.

25 Q You're also trained to document any injuries that

1 are reported; isn't that correct?

2 A Yes.

3 Q And you document those injuries on -- on forms;
4 isn't that right?

5 A Yes.

6 Q And in this case, you documented certain injuries
7 that Ms. O'Connell was claiming; isn't that correct?

8 A Yes.

9 Q And do you recall in this incident that you actually
10 wrote the Guest Incident Report for Yvonne?

11 A The Guest Accident Report, yes.

12 Q But you did obtain her signature on it; isn't that
13 right?

14 A Yes.

15 Q So, Yvonne wasn't able to fill out the Incident
16 Report, but she was able to sign it; isn't that right?

17 A That's correct.

18 Q Now, there are video surveillance cameras in the
19 atrium area where Yvonne fell, correct?

20 A I don't -- I don't work in the dispatch, but
21 vaguely. I'm assuming there is cameras in that area.

22 Q Now you checked with video surveillance -- the video
23 surveillance department, didn't you?

24 A Yes.

25 Q And you were informed that there were no -- there

1 was no video surveillance of Yvonne's fall; isn't that
2 correct?

3 A That's correct.

4 Q And there was no video surveillance of Yvonne in the
5 casino; isn't that correct?

6 A In the casino, I'm not aware. When we contacted our
7 dispatch, we concentrated on the accident area.

8 Q And did you request to get video surveillance of the
9 area prior to Yvonne's fall?

10 A No.

11 Q Did you request to get any video surveillance of the
12 area as it was being cleaned up?

13 A No.

14 Q So, the only thing you requested from video
15 surveillance was the actual fall; is that accurate?

16 A Yes.

17 Q Now, you didn't speak with the porter who was
18 assigned to that area on the day of -- on the day she fell;
19 isn't that correct?

20 A No, I did not.

21 Q You didn't take any kind of report from the person
22 who was responsible for that area in the -- in the atrium;
23 isn't that correct?

24 A No.

25 Q So, the only statements that you took were from

1 Terry Ruby, and Yanet Elias, and Ms. O'Connell; is that
2 accurate?

3 A That's correct.

4 Q Have you ever worked in the video surveillance
5 department at Wynn?

6 A No.

7 Q So, you've always worked in the security department;
8 is that correct?

9 A Yes.

10 Q So, you really just rely on Wynn to tell you whether
11 or not there's video surveillance; is that correct?

12 A Yes.

13 Q Did you actually go to the video surveillance area
14 and look to see if there's coverage yourself?

15 A No.

16 Q So, you were just told there was no coverage?

17 A That is correct.

18 Q Now, we've been hearing that Ms. O'Connell allegedly
19 fell. Do you have any reason to disbelieve that Ms. O'Connell
20 fell at the Wynn?

21 A No.

22 Q Now, you took photographs of Yvonne's feet; is that
23 correct?

24 A That's correct.

25 Q And is it part of your training to take photographs

1 of the guests' feet?

2 A Yes.

3 Q And that's to determine what their footwear is; is
4 that accurate?

5 A That's correct.

6 Q So, the one thing that Wynn was able to document
7 here is the shoes that Yvonne was wearing; is that correct?

8 A Yes.

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

10 THE COURT: Cross?

11 MR. SEMENZA: Thank you, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. SEMENZA:

14 Q Good morning, Mr. Prowell.

15 A Good morning.

16 Q Going back briefly to your employment history,
17 you've been employed at Wynn for how long?

18 A As of now, nine-and-a-half years.

19 Q And how long of that nine-and-a-half years have you
20 been an assistant -- a security assistant manager?

21 A About one-and-a-half.

22 Q And what are your duties generally as a security
23 assistant manager?

24 A As of now, training, motivating the security
25 officers under my staff, respond to calls, of course, and

1 follow up with the report writers on any incidents, any events
2 that occur on the property.

3 Q How many security officers, if any, do you
4 supervise?

5 A Normally, between 55 and 60.

6 Q And how do you come up with that number?

7 A That's with our scheduling; with our compendium; our
8 set amount of officers that we have for our shift.

9 Q And that's 55 or 60 officers per shift?

10 A Total officers.

11 Q Total --

12 A Total officers.

13 Q And what shift do you currently work?

14 A Day shift.

15 Q And what are the hours for day shift?

16 A 6:00 A.M. to 2:00 P.M.

17 Q And on day shift, how many officers are generally
18 present that you oversee?

19 A About 45.

20 Q Now, what were you originally hired as when you
21 became employed by the Wynn?

22 A A security officer.

23 Q And then, at some point in time, did you become a
24 report writer?

25 A That's correct.

1 Q Do you recall how many -- or when you become a
2 report writer after you began your employment at the Wynn?

3 A About a month-and-a-half after I started at Wynn.

4 Q And as a report writer, do you also have the
5 traditional duties as a security officer?

6 A Yes.

7 Q Do you currently train any security officers?

8 A No.

9 Q Who's responsible for training security officers at
10 Wynn?

11 A We have a training department that oversees the
12 training and development of security officers.

13 Q And is that something that you're part of, or not
14 part of at all?

15 A No, I'm not part of that.

16 Q Tell us generally what training you received to
17 become a report writer.

18 A The initial training just comprised of meeting with
19 a -- a senior report writer; somebody who's been writing
20 reports for an extended amount of time. We meet with that
21 person. They'll give you the basics of the system that we
22 use, the forms that we use, equipment that we use for any --
23 for any incidents.

24 After that, that trainee goes with that senior
25 report writer on certain calls and learns the basics of report

1 writing, how to gather information, collecting evidence.
2 After that, the trainee will actually go on some -- some of
3 the reports and gets active in some of the investigation while
4 the senior report writer observes. After that training on how
5 to put the information into the report, document the
6 information in the report, and get everything archived and
7 prepared for approval.

8 Q And how long generally does that training take?

9 A Normally, about two weeks.

10 Q And are there circumstances where that training
11 takes longer than that?

12 A Yes.

13 Q What might those circumstances be?

14 A If they don't grasp certain areas of the training,
15 sometimes they'll go through like a little bit of a remedial
16 training, maybe extended for about a week.

17 Q And is the training to become a report writer
18 different than the training given by Wynn, if any, to become a
19 security officer?

20 A Yes.

21 Q And to become a security officer, or as a security
22 officer at Wynn, what kind of training does Wynn provide?

23 A As a security officer?

24 Q Yes.

25 A Prior history. Military, police force experience is

1 always helpful.

2 Q But as far as when that employee begins their
3 employment at Wynn, what kind of training do they receive as a
4 security officer? Do you know?

5 A They'll go through an initial academy for
6 approximately two weeks.

7 Q And did you go through that academy?

8 A Yes.

9 Q And what did it entail?

10 A General knowledge of the property, all its
11 amenities, guest services, five-star service, some of which
12 had to do what you would do at an accident scene, or how to
13 report to your supervision on certain things.

14 Q Okay. When you first encountered Ms. O'Connell, do
15 you recall what you did?

16 A Vaguely, yes.

17 Q What do you recall?

18 A I recall responding to the scene and speaking with
19 Ms. O'Connell, and she told me that she had slipped and fell
20 in the landscape area of the atrium. She said when she was --
21 when she recovered from her fall, she noticed a green type
22 substance on the floor, and she -- and then she indicated
23 where her injuries were.

24 Q Did you make any effort to make sure that she was
25 okay?

1 A Yes.

2 Q Do you recall any of the specifics of what you might
3 have asked her?

4 A I offered her medical assistance with paramedics,
5 and she initially declined. And while speaking with her, I
6 offered her a wheelchair, just in case she wasn't able to move
7 on her own power, and she declined that as well.

8 Q Did she ever accept medical care or attention from
9 Wynn?

10 A To my knowledge, no.

11 Q I'm showing you Joint Stipulated Exhibit 5. So, go
12 ahead and turn to tab 5 in your booklet.

13 MR. SEMENZA: I apologize, I think that is Joint
14 Exhibit 3, not -- it's identified at the bottom as Joint
15 Stipulated Exhibit 5, but it is in fact Exhibit 3.

16 BY MR. SEMENZA:

17 Q Do you recognize this document, Mr. Prowell?

18 A Yes.

19 Q And what is it?

20 A It's a Guest Refusal of Medical Assistance Form.

21 Q And did you have occasion to present this to Ms.
22 O'Connell?

23 A Yes.

24 Q And did she refuse medical assistance?

25 A Yes.

1 Q Did she sign this document?

2 A No.

3 Q Okay. Is that your handwritten handwriting at the
4 top of the document?

5 A Yes.

6 Q Okay. What is the -- what are the words that were
7 handwritten?

8 A "Declined by guest."

9 Q And did that indicate that Ms. O'Connell was
10 refusing any medical care or treatment?

11 A That's correct.

12 Q Okay. And you had this form on you prior to
13 arriving on the scene?

14 A That's correct.

15 Q Are there instances where guests that have been
16 involved in incidents or have been injured on property do in
17 fact accept medical care from the Wynn?

18 A Yes.

19 Q Have you had occasion to contact emergency services
20 or paramedics to arrive at the Wynn?

21 A Through our security dispatch, yes.

22 Q If Ms. O'Connell had indicated that she wanted a
23 wheelchair, what would you have done?

24 A I would have either -- I would have either gotten
25 one myself, or probably called through radio dispatch to have

1 an officer go and retrieve one and bring it to the scene to
2 assist the guest out, either to a vehicle or to a cab.

3 Q Okay. And does the Wynn have wheelchairs on-site?

4 A Yes.

5 Q And at times, those are provided to guests that
6 might have been injured?

7 A Yes.

8 MR. SEMENZA: Pardon me a moment.

9 (Pause in the proceedings)

10 MR. SEMENZA: I'm just trying to get a better copy.

11 (Pause in the proceedings)

12 MR. SEMENZA: Your Honor, I'm going to show Mr.
13 Prowell a copy -- a better copy of Stipulated Exhibit 2 so
14 that it's easier for everyone to see.

15 THE COURT: Okay.

16 BY MR. SEMENZA:

17 Q Mr. Prowell, do you recognize what I've shown on the
18 screen?

19 A Yes.

20 Q And what is this?

21 A It's what we refer to as our Guest Accident or
22 Illness Report.

23 Q And did you have this document in your possession
24 prior to interacting with Ms. O'Connell?

25 A Yes.

1 Q And is the handwriting on this document yours or
2 someone else's?

3 A That is mine.

4 Q And why did you fill out the document?

5 A Ms. O'Connell stated that she was in too much pain
6 to complete the form herself.

7 Q And so, you went ahead and did it for her?

8 A Yes.

9 Q And did you ask her questions in order to complete
10 the form?

11 A Yes.

12 Q And did you, to the best of your ability, accurately
13 complete the form as per her information that she was
14 providing?

15 A That's correct.

16 Q At the top of the document, does it identify her
17 name?

18 A Yes.

19 Q Does -- somewhere on the form, does it identify the
20 date of the accident?

21 A Yes.

22 Q And what date is that on?

23 A 2/8/2010.

24 Q Does the document also identify the time of the
25 accident?

1 A Yes.

2 Q What -- what time does it identify?

3 A 2:00 P.M.

4 Q And does it identify the location of the accident?

5 A Yes.

6 Q What is that?

7 A The atrium area by one of the venues, Christian
8 Dior.

9 Q Okay. In response to the statement, "Please state
10 in your own words what you were doing at the time of your
11 accident," what was written there?

12 A "Rounding corner, passing directional sign. Slipped
13 and fell. Noticed a green liquid substance."

14 Q And going down, Ms. O'Connell identified that she
15 had not consumed any alcoholic beverages?

16 A That's correct.

17 Q And you checked a box "Yes" relating to the
18 question, "Did you examine the premises in the area of your
19 accident"?

20 A Yes.

21 Q And did you understand that Ms. O'Connell did
22 examine the area?

23 A Yes.

24 Q And moving down, "If yes, what did you find that
25 would be a contributing factor in your account?" And what was

1 written here?

2 A "Lots of green liquid."

3 Q And this sentence -- or this question asked, "Whom
4 do you consider the blame for the accident?" And what is
5 written there?

6 A It says, "The green liquid."

7 Q Okay, and is that the information that Ms. O'Connell
8 provided to you?

9 A Yes.

10 Q And moving down, it says, "What if any injuries did
11 you sustain?" Do you see that?

12 A Yes.

13 Q And what is written there?

14 A "Right shoulder, right ankle, and buttocks."

15 Q Okay. And is that the information that Ms.
16 O'Connell related to you concerning her injuries?

17 A Yes.

18 Q If there had been additional injuries she had
19 identified, would you have listed them here on this form?

20 A That is correct.

21 Q Is it your understanding that Ms. O'Connell
22 exclusively and only identified that she had injured her right
23 shoulder, right ankle, and buttocks?

24 A That's correct.

25 Q And lastly, moving down, it says, "What if any

1 property damage did you sustain?" And it's identified as
2 what?

3 A No.

4 Q At the bottom of the form, there's a signature on
5 the lefthand side. Whose signature is that?

6 A That's my signature.

7 Q And to the right, there's another box with another
8 signature. Whose signature is that?

9 A That would be Ms. O'Connell's signature.

10 Q And did you witness Ms. O'Connell sign this
11 document?

12 A Yes.

13 Q And did she date the document, or did she date to
14 the right of her signature?

15 A Yes.

16 Q What -- can you identify what date that is?

17 A It appears to be a "2" and "8."

18 Q Mr. Prowell, did you give Ms. O'Connell any type of
19 card prior to you two leaving the scene?

20 A Yes.

21 Q What card did you give her?

22 A It's called a Guest Claims Card.

23 Q And what is on that Guest Claims Card?

24 A It normally has their case number relative to that
25 incident, and a number to contact guest claims department for

1 any follow up.

2 Q Do you know specifically where that telephone --
3 well, strike that. Was there a telephone number listed on
4 that Guest Claims Card?

5 A Yes.

6 Q And do you know where that telephone number goes to;
7 what department?

8 A It goes to our guest claims department.

9 Q Do you know who in guest claims answers that
10 telephone number?

11 A It's not specific to any person. Normally, it just
12 goes to the department as a -- as a whole.

13 Q And would there have been someone to answer that
14 phone to the best of your knowledge at around 2:00 P.M. to
15 4:00 P.M. on February 8th of 2010?

16 A To the best of my knowledge, yes.

17 Q And if Ms. O'Connell needed additional assistance,
18 would she have been able to use that number to call?

19 A Yes.

20 MR. SEMENZA: I'll show the witness Stipulated
21 Exhibit 6.

22 BY MR. SEMENZA:

23 Q Go ahead and turn to tab 6 in your booklet. Are you
24 at tab 6?

25 A Yes.

1 Q Okay. And do you recognize this document?

2 A Yes.

3 Q What is it?

4 A This was the photo of the accident scene, indicated
5 by Ms. O'Connell.

6 Q And was this a photograph that you took of the
7 scene?

8 A Yes.

9 Q And to your knowledge, was the sign -- the gold sign
10 there present when you arrived on the scene?

11 A Yes.

12 Q Did you take just one photograph of the scene, or a
13 whole host of photographs?

14 A I took multiple photos of the area.

15 Q And were -- did you include those photographs in
16 your report?

17 A Yes.

18 Q Can I have you turn to tab 10? This is Exhibit --
19 Joint Stipulated Exhibit 10.

20 A Okay.

21 Q Do you recognize this document?

22 A Yes.

23 Q And what is it?

24 A This was a photo of Ms. O'Connell's footwear.

25 Q And did you take this photograph?

1 A Yes.

2 Q And do you recall noting any liquid substance on any
3 of her clothing while you were interacting with her?

4 A To my knowledge, no.

5 Q Do you know what's between her legs or feet?

6 A I believe that was her purse.

7 Q And to the best of your knowledge, was the liquid
8 substance that we've been talking about -- that was cleaned up
9 before your arrival on the scene?

10 A Yes.

11 Q And had that substance been present at the scene
12 when you arrived, do you have a belief as to what you would
13 have done? Would you have photographed it?

14 A I would have photographed the substance.

15 Q Did you feel that Ms. O'Connell had recovered
16 sufficiently from her fall so that it was safe for her to
17 leave the scene?

18 A Yes.

19 Q When you arrived on the scene, do you recall whether
20 there was some sort of sweeper machine present?

21 A No.

22 Q Do you have any understanding of what this liquid
23 substance may have been?

24 A No.

25 Q Do you have any understanding as to how this liquid

1 substance may have gotten on the floor?

2 A No.

3 Q Now, we had talked earlier. Ms. Morris had asked
4 you about a report you had written; do you recall that?

5 A Yes.

6 Q And do you recall when you prepared that report in
7 relation to when the incident took place?

8 A After I collected all the information and gathered
9 the photos. After that, went downstairs to our report desk to
10 complete the report.

11 Q Do you recall whether you completed the report on
12 February 8th, 2010, or sometime later?

13 A It was on that day.

14 Q Can you estimate for me how many reports you've
15 written during your career at Wynn?

16 A Probably over 4,000.

17 Q And can you estimate for me in February of 2010 how
18 many reports you had written?

19 A No.

20 Q You believe generally as you sit here today that
21 about 4,000 reports?

22 A Yes.

23 MR. SEMENZA: Showing the witness Joint Stipulated
24 Exhibit 1. It's under tab 1.

25 BY MR. SEMENZA:

1 Q Is there any reference in your report relating to
2 whether there was video surveillance coverage of the incident?

3 A Yes, there was a reference.

4 Q Okay. Would you read that reference?

5 A "Due to the position of the cameras during the
6 incident, a video review was met with negative results."

7 Q So, there was an attempt to retrieve, to the best of
8 your knowledge, any video surveillance footage of what took
9 place?

10 A Yes.

11 Q Was the Wynn your first security officer job?

12 A No.

13 Q Did you work as a security officer somewhere prior
14 to Wynn?

15 A Yes.

16 Q And where did you work?

17 A Hard Rock Hotel and Casino.

18 Q And how long did you do that for?

19 A Seven years.

20 Q Do you know approximately what year that was that
21 you began your employment as a security officer at Hard Rock?

22 A 1999.

23 Q Starting with 1999, how long have you been involved
24 in the security -- "business" is a poor word, I guess, but as
25 a security officer, or providing security at the hotels and

1 casinos?

2 A In casinos total, almost 20 years.

3 Q In drafting your report, did you attempt to be as
4 accurate as you could?

5 A Yes.

6 Q The 4,000 reports you've taken, have some of them
7 related to slip and falls?

8 A Yes.

9 Q What other types of reports have you taken during
10 your career?

11 A Criminal reports. Missing property reports.
12 Informational reports whenever we assist an outside agency,
13 either Metro Police or paramedics. Counterfeit note reports,
14 if they ever come to us, which would probably go into criminal
15 report category.

16 Q Reporting on all sorts of events that take place at
17 the Wynn?

18 A All sorts of events, yes.

19 MR. SEMENZA: One more moment, Your Honor.

20 (Pause in the proceedings)

21 BY MR. SEMENZA:

22 Q To your knowledge, Mr. Prowell, prior to Ms.
23 O'Connell reporting that she had fallen, to your knowledge,
24 were there any other reports relating to this spill?

25 A To my knowledge, no.

1 MR. SEMENZA: Thank you.

2 THE COURT: Redirect?

3 MS. MORRIS: Yes, just briefly.

4 REDIRECT EXAMINATION

5 BY MS. MORRIS:

6 Q So, Corey, you said that you've done approximately
7 4,000 reports; is that right?

8 A Yes.

9 Q And it's been a variety of things that you've
10 responded to; is that right?

11 A Yes.

12 Q Now, you mentioned some of them are criminal; is
13 that correct?

14 A Yes.

15 Q And in each of these incidents that you respond to,
16 do you always check to see if there's video surveillance of
17 anything involving that incident?

18 A Yes.

19 Q And isn't it true that the video surveillance
20 cameras in the casino can actually follow people through the
21 casino?

22 A That's correct.

23 Q And it's important in security to maintain the
24 entrances to the casino in a safe fashion; is that right?
25 Would that be fair?

1 A Yes.

2 Q Because that's the exit and entry point to this
3 casino; is that right?

4 A Yes.

5 Q So, it's important to make sure that there is
6 security and surveillance in those areas; is that right?

7 A Yes.

8 Q Now, in this case, you just asked to see if there
9 was any surveillance of the -- of Ms. O'Connell's fall; is
10 that right?

11 A Yes.

12 Q And due to the position of the camera, it was met
13 with negative results. That's what you were told; is that
14 right?

15 A Yes.

16 Q But isn't it true that you didn't ask to see any
17 other surveillance of the area, like the mopping up of the
18 liquid, or the sweeper machine being put over it, or anything
19 like that?

20 A No.

21 Q Did you ask to see any of the surveillance of Yvonne
22 in the casino after the fall?

23 A No.

24 Q So, Ms. O'Connell didn't sign the Guest Waiver
25 Report -- the Waiver of Medical Treatment; is that correct?

1 A That's correct.

2 Q She declined; is that -- is that accurate?

3 A Yes.

4 Q Now, you have had in the past, I'm assuming, other
5 guests who have claimed injury, but also declined medical
6 assistance; is that right?

7 A Yes.

8 Q And just because they decline the medical assistance
9 doesn't mean they're not injured; is that right?

10 A That's -- that's correct, yeah.

11 Q And in this case, Ms. O'Connell told you she was
12 injured; isn't that right?

13 A Yes.

14 Q And she reported to you that it was her arm, her
15 ankle, and her buttocks. That's what you wrote down; is that
16 right?

17 MR. SEMENZA: Objection, misstates testimony.

18 THE COURT: Sustained.

19 BY MS. MORRIS:

20 Q Do you recall what she told you was hurting?

21 A Yes.

22 Q Okay, what was that?

23 A She indicated -- well, I know she indicated her
24 buttocks and her right ankle and shoulder --

25 Q Do you --

1 A -- to my recollection.

2 Q Do you recall that she told you that she was having
3 limited mobility?

4 A Yes.

5 Q Okay. So, you didn't write that down, but you do
6 recall that she also told you she had limited mobility?

7 A Yes.

8 Q Now, the -- the Incident Report that you created,
9 we'll turn again -- it's Exhibit 1, if you're not already
10 there.

11 A Yeah.

12 Q Now, on that report, it states that it was
13 approximately 14:35, or 2:35 when you received a call to go to
14 the front atrium; is that correct?

15 A Yes.

16 Q And Ms. O'Connell fell at approximately 2:00; is
17 that right?

18 A Yes.

19 Q Now, at the bottom of the report, there is a -- it's
20 called a synopsis, and in that synopsis, it says that,
21 "Officer Prowell, en route to the south entrance, reported the
22 guest that slipped and fell. Officer on scene at 14:24."
23 That's 2:00 -- 2:24; is that right?

24 A Yes.

25 Q But that's different from what you said up here.

1 Why is that?

2 A The synopsis is what the security dispatch -- that's
3 their log entry. That's their daily log.

4 Q But the 2:35, that's yours; isn't that correct?

5 A 2:35 is the time that -- the approximate time that I
6 responded.

7 Q So, that's the time that you trust, the time that
8 you put down; is that right?

9 A Yes.

10 Q I want to look one last time at the -- the guest
11 refusal of medical assistance, which is number 3. Now, it's
12 your training that if a guest refuses medical treatment, you
13 get them to sign this form; is that right?

14 A Yes.

15 Q And the form says that, if they refuse to accept
16 medical treatment, then they release Wynn Resorts and all
17 personnel directly or indirectly involved in their care from
18 any liability resulting from their refusal; is that correct?

19 A Yes, that's what the report indicates.

20 Q And at the bottom of it, there is a place where
21 there's a refusal to sign; is that right?

22 A That's correct.

23 Q Now, if the guest refuses to sign, do you sign that
24 line, or does the guest sign that line?

25 A That would be the guest.

1 Q But in this case, Ms. O'Connell didn't sign
2 anything; is that right?

3 A No, she did not sign.

4 Q The only thing she signed was her Incident Report;
5 is that right?

6 A That's correct.

7 MS. MORRIS: I don't have any other questions for
8 you.

9 MR. SEMENZA: Just briefly, Your Honor.

10 THE COURT: Recross.

11 RE CROSS-EXAMINATION

12 BY MR. SEMENZA:

13 Q Mr. Prowell, do you have an understanding as to
14 whether there are fixed cameras at the Wynn?

15 A Yes.

16 Q Do you have an understanding as to whether there are
17 pan/tilt/zoom cameras -- video cameras at the Wynn?

18 A Yes.

19 Q Okay. Do you know where each particular camera is?

20 A No.

21 Q Do you know where those cameras might be in the
22 atrium?

23 A No.

24 Q Do you have any understanding or reason to doubt
25 that there was no video coverage of this particular incident?

1 A No.

2 Q Would it have been your expectation that if Ms.
3 O'Connell had needed medical attention, that she would have
4 accepted it at the time that it was offered?

5 A Yes.

6 MR. SEMENZA: No further questions.

7 THE COURT: Any questions from the jury?

8 MS. MORRIS: Just -- just on that last question.

9 FURTHER REDIRECT EXAMINATION

10 BY MS. MORRIS:

11 Q Ms. O'Connell told you she was hurt; is that
12 correct?

13 A Yes.

14 Q And she told you all the parts that were hurting,
15 and she also told you she had limited mobility; is that
16 correct?

17 A Yes.

18 Q And it's your job just to gather that information;
19 is that right?

20 A That's correct.

21 Q It's not your job to determine whether they do in
22 fact need immediate medical attention; is that correct?

23 A No.

24 MS. MORRIS: Thank you.

25 THE WITNESS: Okay.

1 THE COURT: Any questions of the jury? All right,
2 do you have it written down yet? Counsel approach.

3 (Off-record bench conference)

4 THE COURT: So, Officer, do you recall what the --
5 what Ms. O'Connell's demeanor was after -- when you were
6 interacting with her?

7 THE WITNESS: No, Your Honor, I don't.

8 THE COURT: Do you recall observing her reading the
9 Incident Report she signed?

10 THE WITNESS: Yes.

11 THE COURT: How about do you recall her reading the
12 Waiver of Medical Attention Report?

13 THE WITNESS: Yes.

14 THE COURT: Any questions as a follow up of the jury
15 question?

16 MR. SEMENZA: No, Your Honor.

17 MS. MORRIS: I have none.

18 THE COURT: Thank you. And we'll give this to the
19 clerk to mark as a court exhibit.

20 THE MARSHAL: I think we have one more question.

21 THE COURT: A what?

22 THE CLERK: One more question.

23 THE MARSHAL: We have one more question.

24 THE COURT: Okay, are there any other questions?
25 Because this is your last opportunity. We don't, you know,

1 keep going. Okay. All right, thank you. Counsel approach.

2 (Off-record bench conference)

3 THE COURT: Oops, sorry. So, the next question was
4 already asked and answered, so it won't be asked again, and
5 they'll be marked as a court exhibit. All right. And may
6 this witness now be excused?

7 MS. MORRIS: Yes.

8 MR. SEMENZA: Yes, Your Honor, with the caveat that
9 I reserve to recall him in my case.

10 THE COURT: All right. And so, the defense may
11 recall you in their case, but you're excused.

12 THE WITNESS: Thank you, Your Honor.

13 THE COURT: Thank you. You may call your next
14 witness.

15 MS. MORRIS: We call Yvonne O'Connell.

16 THE COURT: Thank you.

17 THE CLERK: Please remain standing. Raise your
18 right hand.

19 YVONNE O'CONNELL, PLAINTIFF'S WITNESS, SWORN

20 THE CLERK: You may be seated. And please state and
21 spell your first and last name.

22 THE WITNESS: My name is Yvonne O'Connell.

23 THE CLERK: Please spell it.

24 THE WITNESS: Y-v-o-n-n-e, O., apostrophe,
25 C-o-n-n-e-l-l.

1 THE COURT: You may proceed.

2 MS. MORRIS: Thank you.

3 DIRECT EXAMINATION

4 BY MS. MORRIS:

5 Q Yvonne, how old are you?

6 A I'm 64.

7 Q Can you tell us how long you've lived in Las Vegas?

8 A Since 1996.

9 Q Can you tell us a little bit about yourself; your
10 background? Where did you grow up?

11 A Yes. I -- I'm from Tehachapi, California. It's a
12 small town in -- up in the mountains. When I lived there,
13 there were about 4,000 people. And I had four brothers. My
14 dad worked in the cement plant as a mechanic, and at the same
15 time, he was the Mayor of Tehachapi for 15 years, and my mom
16 took care of our -- her five children and our home. And when
17 I was 13, my dad passed away. He had had cancer for three
18 years.

19 Q Did you go to high school?

20 A I went to Tehachapi High School, and I had to work.
21 I worked in the prison for -- as a clerk typist, and I worked
22 at the drive-in, and I worked at the Tehachapi News, and then
23 I -- I graduated from high school.

24 Q Did you get any education after high school?

25 A Then I went to Bakersfield Junior College and got a

1 job, and I worked in a dental office while I worked my way
2 through school.

3 Q And did you get any other education aside from the
4 junior college?

5 A Yes. Then I was lucky to get in at UC San
6 Francisco, and I got several jobs and worked myself through
7 school. And then I graduated in 1974 with a bachelor's degree
8 in dental hygiene, and -- yeah.

9 Q Did you start working after you graduated?

10 A Yes. I worked for a periodontist first; they're
11 oral -- or gum surgeons. And then I got -- took another
12 course so I could be licensed to do more and do deep
13 cleanings.

14 Q So, what year was that that you started working
15 after school?

16 A Around 1974, after I graduated, and -- and then I
17 bought my first house in 1976, and then I rented out rooms to
18 roommates.

19 Q Have you ever been married?

20 A I was married twice.

21 Q Okay. Who was your first husband?

22 A My first husband was a dental student, freshman, and
23 his name is Barney Streit, and then -- we met in 1976. Then,
24 we got married in 1979, he finished school, and then we moved
25 to Upland, California.

1 Q And when you were in Upland, California, did you
2 work?

3 A Well, not at first there. I -- I had one of the
4 best jobs in San Francisco, and it was hard for me to leave.
5 So I flew back and forth for about eight to nine months; one
6 week on, one week off. And then, finally, I -- I stayed in
7 Southern California and got a job in Claremont. And then, in
8 1981, my husband Barney and I opened our dental practice
9 together. We started that together, but then -- oh, yeah, so
10 that was 1981.

11 Q Why did you move to Upland?

12 A Barney's family is from there, and I wanted a
13 family, so I thought that he'd be happy there.

14 Q And the dental practice you said started in 1981.
15 How long did you work there?

16 A In 1986 -- so from 1981 to 1986. 1986, I started
17 having trouble holding my instruments while I was doing deep
18 cleaning, because that's mainly what I did. I just cleaned
19 underneath the gums, so it was -- it was hard on them. So, I
20 started having trouble holding the instruments while I was
21 doing the deep cleaning, so I stopped dental hygiene then.

22 Q And do you know why you were having trouble holding
23 the instruments?

24 A Yeah. Something about my -- my fingers were bending
25 backwards, bending too far. They were too limber, and I just

1 couldn't hold the instruments anymore, just when I was
2 cleaning; just when I was doing the deep scaling.

3 Q And what kind of instruments would you be holding to
4 do the scaling?

5 A Well, the dental instruments, they're -- you know,
6 when you go under the gums and -- well, curettes. They're
7 just the special ones that -- you know, you use the ultrasonic
8 scaler and -- and anyway, you go under the gums, and you're
9 just -- I'm sitting there, doing that all day long, so my
10 fingers started -- I was having trouble holding them for that
11 long.

12 Q Did you do any work after you stopped working as a
13 dental hygienist?

14 A Well, after I stopped dental hygiene, I really
15 wanted to start a family, and Barney just didn't want to. He
16 didn't want a family. So I bought into a franchise bakery,
17 and I opened my first store in the mall.

18 Q What was the name of the bakery?

19 A Oh. Well, that one was called Treats, but it didn't
20 -- I had trouble getting people in there. It was in a bad
21 location. So, then I started a wholesale bakery while I was
22 there, and that took off. So, then we -- it grew so fast, so
23 I went out of the mall and I opened up a wholesale bakery, and
24 that was called Muffin Artistry, and then I had three trucks
25 delivering my baked goods daily.

1 Q Did you like to bake?

2 A Oh, it was fun.

3 Q What year is this that you had Muffin Artistry?

4 A Well, I opened the business -- the bakery in the
5 mall around 1986, and not -- and then Muffin Artistry, started
6 there. And then, once I moved out -- I'm so sorry, did -- did
7 you ask me when I -- I'm sorry.

8 Q That's okay. When did you own Muffin Artistry; do
9 you remember?

10 A Yeah, it was -- I owned it in the mall, and then I
11 moved it -- called it Muffin Artistry there, then I moved it,
12 and then probably went full force in 1989.

13 Q Was Barney still working as a dentist?

14 A Yes. He still was working in the dentist's, and I
15 had my business. But then things fell apart between us. We
16 weren't working together anymore, and I really wanted a
17 family, so we filed for divorce. And -- and it was really
18 hard on both of us, so we ended up selling our businesses.

19 Q Did you get married again?

20 A Yes, I did.

21 Q Do you need any water?

22 A I think I do. I'm sorry.

23 Q Are you okay?

24 A I'm really sorry. Well, why do I need it?

25 THE COURT: Marshal, would you give her some water,

1 please?

2 MS. MORRIS: Just a little bit to sip on --

3 THE WITNESS: Okay.

4 MS. MORRIS: -- to help you with your mouth.

5 THE WITNESS: I'm sorry. Thank you so much.

6 THE MARSHAL: You're welcome.

7 THE COURT: Thank you, Marshal.

8 THE MARSHAL: You're welcome.

9 THE WITNESS: Excuse me.

10 BY MS. MORRIS:

11 Q All right, so you were telling us about -- well, I
12 asked you, have you been married again?

13 A Yes. I married John O'Connell in 1993.

14 Q And had you known John O'Connell before you got
15 married to him?

16 A Yeah, we -- we had met years before. He was
17 actually a friend of my brother Arnold's. And then, later, we
18 both went to a Thanksgiving dinner with my family, and he had
19 lost his wife, and I had been -- gone through the divorce, and
20 we were both alone, so we started going out and having a lot
21 of fun. And it -- we just had so much fun together, and then
22 we got married, and we actually got married here in Las Vegas.

23 Q And were you working at the time you married John?

24 A No, I had just -- we -- I'd already sold my
25 business, and so, no.

1 Q Was John working when you guys got married?

2 A He -- okay. John was winding down as a law
3 professor. And he -- he -- he was -- I was so proud to be
4 with him. He was so -- he had so many stories. He had been
5 in the Air Force, and he had been a law professor, and he
6 wrote a book called, Remedies in a Nutshell, and every law
7 student reads it. In fact, you were excited when I told you
8 that he wrote that book.

9 Q I was, yes.

10 A And he -- he was just an amazing husband, and I was
11 very proud of him. And he was Irish, and he was very funny.

12 Q Was he working though when you two got married?

13 A Yes. He was still -- well, he was winding down as a
14 law professor, and he was still writing.

15 Q And you said you moved to Las Vegas in 1996; is that
16 right?

17 A Yes.

18 Q Why?

19 A John wanted to retire, but -- but he actually
20 didn't. He kept working in a court -- a law -- correspondence
21 law school, and so I drove him back and forth to California to
22 attend his conferences, and so he did -- did that for a few
23 years.

24 Q And how long did you guys do this commuting back and
25 forth to California?

1 A Well, for several years, but in -- around 1998, we
2 -- we kind of settled. He was still writing, but we settled
3 in Las Vegas, and we bought a couple of dogs and a beautiful
4 talking parrot named Sheena. And -- and we were just having a
5 lot of fun.

6 Q Do you still have Sheena?

7 A Yes, I do, and we talk to each other every day.

8 Q How old is Sheena?

9 A She's a teenager. She's -- she's around -- got her
10 1998, so.

11 Q How long do parrots live?

12 A They're like humans.

13 Q So -- so, you settled here, you bought a house, and
14 then were you essentially kind of retired out here?

15 A I was kind of retired. I worked as John's
16 assistant. I did his paperwork, and I drove him back and
17 forth to California. I focused on John and his projects.

18 Q And eventually, John passed away; is that correct?

19 A Yes. He -- we were enjoying retirement, and -- and
20 one day, we were -- we were at home getting ready to watch a
21 movie, and he called -- called me, and called my name, and I
22 was able to get to him to say goodbye. So, he passed away in
23 2002.

24 Q What did you do after John passed?

25 A Well, I mourned for a year -- over a year, and then

1 I had to -- I knew I had to get back out to society. So, the
2 Rampart sent me a flier for a buffet. I can't pass up food,
3 so I went. And I was lucky. I met Sal Risco there, and he
4 became my companion.

5 Q Did you and Sal start dating?

6 A We -- yes, we started dating, and we took swing
7 dance lessons, we went on a lot of cruises. We had a lot of
8 fun. We stayed on the Strip a lot, and we danced at the
9 Rampart -- swing danced at the Rampart almost every weekend,
10 and we also swing danced at the Suncoast. But after I fell,
11 we broke up, and then we tried to get back together again a
12 couple of times, but I can't keep up with him.

13 Q Before you met Sal, had you ever been swing dancing
14 before?

15 A No.

16 Q How did you learn?

17 A Well, shortly after we met, we took the swing dance
18 lessons together.

19 Q Do you remember the last time you went swing
20 dancing?

21 A Yes. We went swing dancing a couple of days before
22 -- before I fell, and in fact, we had gone swing dancing at
23 least three times within that week.

24 Q Are you dating anyone now?

25 A No.

1 Q When's the last time that you went to the Wynn
2 Casino?

3 A The day I fell. February 8th, 2010.

4 Q But you had been to the Wynn before; isn't that
5 right?

6 A Oh, yes. When they first started opening, that's
7 when we started going. We went many times. We stayed at --
8 we stayed there a few times, and used to eat there often. And
9 I -- we went to shows, we went to concerts there, and they --
10 I had a red card, and they invited me to their slot
11 tournaments. And I loved to go see their decorations, and so
12 we went many times. I liked it.

13 Q You -- when you went to the Wynn, would you gamble?

14 A Of course.

15 Q What do you -- what did you like to play?

16 A I only like to play video poker.

17 Q And do you gamble anywhere else besides -- or did
18 you gamble anywhere else besides the Wynn in 2010?

19 A At that time?

20 Q Correct.

21 A Well, I like the Rampart Casino.

22 Q And what kind of promotions would you get with your
23 red card?

24 A Oh, the -- the shows, and the -- well, the food, and
25 the -- you know, I get free play.

1 Q What's free play?

2 A They give you a certain amount of money to play
3 with. They put it on -- well, they let -- they give you money
4 to play with -- to gamble with.

5 Q Do they actually hand you money?

6 A No, they put it on -- on -- on your account -- on
7 your card.

8 Q So, when you put your card in the machine, that
9 shows your --

10 A Yes.

11 Q -- your play?

12 A Yes.

13 Q Now, you said the last time you went to the Wynn
14 Casino was February 8th, right; the day you fell?

15 A Yes.

16 Q Why did you go to the Wynn Casino that day?

17 A Well, that day, I went to meet my cousins at the
18 buffet. They're from Bakersfield, California, and originally
19 from Tehachapi. So, they were in town, so I met them at the
20 buffet. And we ate at the buffet, we visited, and we even had
21 a picture taken of us.

22 Q And was Sal in town at the time?

23 A I had -- no. I had taken him to the airport the day
24 before because he went on a cruise. He went to Florida.

25 Q When you went to Wynn, you ate at the buffet; is

1 that right?

2 A Yes.

3 Q What had you done before -- earlier that day?

4 A Oh, well, I -- I've gotten up, showered, done my
5 hair, and then taken off in the late morning to meet my
6 cousins.

7 Q And what was your plan for after you met with your
8 cousins?

9 A Oh, then I was going to go walk on the Strip and go
10 through my favorite stores.

11 Q And had you ever -- had you ever been to the atrium
12 area in the south entrance of the Wynn before February 8th?

13 A Oh, I always -- I always went through there. That
14 was one of the main things I liked about the Wynn. They
15 decorate. There's a beautiful walkway through their gardens,
16 and they decorate it on a regular basis. So, I always go and
17 look -- or I always did go through there and look at that.

18 Q Now, I want to -- I want you to tell us what
19 happened after you left the buffet.

20 A So, after we got the picture, we left, and we left
21 each other there. I walked out to my car to get my coat,
22 because I wanted to walk on the Strip first. But -- but
23 before I -- well, I came back in, and I went to -- I headed to
24 the indoor gardens first.

25 Q And did you walk down through the indoor gardens;

1 the atrium area?

2 A Oh, yes. I walked through there, and it's a
3 beautiful walkway. I was looking at the decorated trees, and
4 the plants, and the flowers.

5 Q And where were you headed?

6 A I -- I -- after I walked through there, I was going
7 to go to the Strip and go to my favorite stores like Cache and
8 Marshall-Rousso.

9 Q Now, I'm going to put up --

10 MS. MORRIS: And it should show on her screen. This
11 is Joint Proposed Exhibit 7.

12 BY MS. MORRIS:

13 Q Now, can you see that on your screen in front of
14 you?

15 A Yes.

16 MR. SEMENZA: Christian, what exhibit is it? I'm
17 sorry.

18 MS. MORRIS: 7.

19 MR. SEMENZA: Thank you.

20 MS. MORRIS: All right.

21 BY MS. MORRIS:

22 Q This is a photograph of the -- what you call the
23 garden area, but the atrium area at the Wynn; is that right?

24 A Yes.

25 Q And is this what it looked like on February 8th,

1 2010?

2 A Yes. Yes.

3 Q And this was after -- these photographs were taken,
4 we understand, after you fell; is that right?

5 A Yes.

6 Q Is -- does this photograph show the area where you
7 fell?

8 A Yes.

9 Q Now, if you touch the screen, it should make a mark.
10 I want you to, if you can, make a circle around where you --
11 where the green liquid substance was that you fell on. And
12 you can actually touch the screen and it makes the mark.

13 A Well, after I came through the -- the walkway here,
14 I was rounding this corner, and I believe the -- where I
15 slipped and fell --

16 Q Yvonne, hold on, because the jury can't see what
17 you're doing. Would it be easier if you used the screen over
18 here?

19 A Sure, that's good.

20 MS. MORRIS: Your Honor, is it --

21 THE WITNESS: We can do that.

22 MS. MORRIS: -- all right if she points on the --

23 THE COURT: Well, I'd rather she mark on the screen,
24 because then I can see, because I can't see that screen at all.

25 MS. MORRIS: Okay.

1 THE COURT: So, I'd like to be able to see.

2 MS. MORRIS: Can she mark where the liquid is, but
3 then show --

4 THE COURT: Sure.

5 MS. MORRIS: -- her route of travel on the larger
6 screen?

7 THE COURT: You can actually mark your route of
8 travel, and then we'll clear it after she does that. So, use
9 your finger on the screen and show us where you were coming
10 from.

11 THE WITNESS: Okay. I started at the other end.

12 BY MS. MORRIS:

13 Q You actually have to touch it, Yvonne.

14 A Oh, okay. I started at this end by that bar, and I
15 walked down this way, and I was rounding the corner like that,
16 and then I suddenly slipped on this liquid around here.

17 THE COURT: Put an X where you -- where you said you
18 slipped.

19 THE WITNESS: Oh, where the -- where I first slipped
20 was around here, right on that green tile.

21 BY MS. MORRIS:

22 Q Okay, so you slipped on the -- a green substance on
23 a green tile?

24 A Right.

25 Q Okay. Now, I'd like you to draw for us a circle

1 around where all the green liquid substance was that you saw.
2 So, can we clear the screen and redo it? So, I'd like you to
3 draw for us where you saw the green liquid after you got up,
4 and all of it.

5 Q Well, after I got up, I was standing about here.
6 They left me standing there. And to my -- this was to my
7 right at the time. I was standing, facing this way. Around
8 here, extending that way, there was at least three feet that
9 side, but that was almost dry.

10 And then, the -- there was a sweeper placed over
11 about here. So, that part here was drying, and then it
12 extended over there somewhere. But when I was standing, I
13 couldn't really see to my left, because it was on the green
14 and colored tile. So, I couldn't see that, but I could see
15 where he placed his sweeper machine was at least four feet
16 away from me.

17 Q So, when you slipped, you slipped on the -- the wet
18 part; is that correct?

19 A Yes. The spill was at least seven -- at least seven
20 feet. So, this side over here, it was liquid -- still liquid.
21 At least a four-foot part of it was still liquid. And then,
22 this side over here, at least a three-foot part of it was
23 almost dry and had footprints on it, and it was a little
24 sticky.

25 Q And when you stood up, you were able to see this

1 green liquid; is that right?

2 A Right. When I stood up, they left me standing on
3 it. I looked down and I was standing on it, but it wasn't
4 slippery because that part of it was almost dry. And then I
5 looked to my right, and I saw the footprints, and -- and then
6 to the left it was still liquid. That's from the other side
7 that I had already slipped on. It was still liquid.

8 Q Do you know what the liquid was?

9 A Well, I thought it was water, and it should be on
10 their mops. I thought it was water from the plants.

11 Q Why did you think it was water if it was green?

12 A Oh, no, it was just a slight hint of green. I mean,
13 it wasn't a solid green, just a hint of green, and it was
14 right up against the planter. And so, I thought they were
15 watering their plants.

16 Q So, when you slipped and you fell, describe how you
17 fell.

18 A As I was approaching that right corner at the end of
19 that walkway, I just suddenly slipped on liquid, and I
20 couldn't see it, because it was on that green and colored
21 tile. So, I slipped on the liquid, and I -- I think that I
22 took at least one or two steps trying to get out of the
23 liquid, but it happened suddenly. I fell back and twisted to
24 the right, and then I landed on this -- this here right here
25 is a -- a raised planter divider. Right here where the plants

1 are and the tile, that's raised like a curb.

2 Q I'm going to change the picture for you, okay?

3 A Oh, okay.

4 Q Thanks.

5 MS. MORRIS: And can you clear the screen? Thanks.

6 And I'm going to put up what is Joint Proposed 9.

7 MR. SEMENZA: It's stipulated.

8 MS. MORRIS: It's tab 9. It's 11, but it's under
9 tab 9.

10 THE COURT: It's -- these are all admitted, because
11 you've -- you stipulated to admit them, so they're admitted.

12 MR. SEMENZA: Right.

13 BY MS. MORRIS:

14 Q Now, Yvonne, this is another picture that Corey took
15 on February 8th. Do you recognize this area?

16 A Yes.

17 Q Okay. Tell us what this is.

18 A Okay. This is a raised divider between the plants
19 and the tile, and right here, this raised part, this
20 triangular part, that's what my right buttocks hit, my right
21 -- and my leg hit the planter -- the divider, and my -- the
22 rest of my body hit it. I landed on that. And my shoulder
23 was just partly in the plants here, and my head hit that. So,
24 my body was on this -- hit that raised divider.

25 Q And were you actually in the garden, or were you on

1 the marble when you fell?

2 A Well, a large part of me was on that divider, and
3 just my right shoulder -- part of my right shoulder was a
4 little bit on the plants there.

5 Q And were you able to get up after you fell?

6 A No. In fact, people woke me up. They woke me up,
7 asking me if I could get up. And I couldn't -- I couldn't get
8 up, and I was in a lot of pain, so they had to pick me up.

9 Q And who picked you up; do you know?

10 A Some men.

11 Q Were they employees of Wynn; do you know?

12 A No, no, they were probably just tourists.

13 Q So, after they helped you up, what did you do?

14 A Well, I stood there. I was in pain, I was dazed, I
15 was alone, embarrassed, and afraid. So, I'm standing there,
16 and that's when I looked down and I saw that I was -- they
17 left me standing on that -- the drying part of the liquid.
18 And that's when I saw -- well, there were the footprints.
19 They looked like, you know, they were -- they looked like mine
20 that I was making, and I'm sure they were from the people that
21 were standing around me and that helped me up.

22 Q Now, the part you were standing on, you said it was
23 sticky; is that right?

24 A A little sticky, and it had that hint of greenish
25 color and it had the footprints. Kind of like dirty

1 footprints that you leave after you've mopped your floor and
2 you step on it, you walk on it, that's kind of how it looked.

3 Q Did anyone else come over to you while you were
4 standing there?

5 A Well, I was standing there, so to my left --

6 Q Do you want another picture?

7 A Yeah. Would that be good? I think that's probably
8 good.

9 Q Do you want a far away one?

10 A Sure.

11 Q Okay.

12 A The one that shows the -- or, I know it's --

13 Q How about this? It's number 7.

14 THE COURT: This is Exhibit --

15 MS. MORRIS: It's Exhibit 004, but it's under tab 7
16 of the Joint Proposed Exhibits. Thank you.

17 THE COURT: So, they're

18 THE WITNESS: That's a good one.

19 THE COURT: -- not proposed. I just --

20 MS. MORRIS: Joint stipulated. I'm sorry about
21 that.

22 THE COURT: It's Exhibit 7.

23 MS. MORRIS: Exhibit 7.

24 THE WITNESS: Okay.

25 BY MS. MORRIS:

1 Q Is that better?

2 A Yes.

3 Q Okay.

4 A That's very good.

5 Q Okay. So, they left me standing -- the people left
6 me standing right here. And from this side over here, a Wynn
7 employee came with a really large sweeper machine. And he
8 came to me, and came over here where I was standing, and I
9 told him I needed help. And so then he saw that there was
10 liquid all over, so he went and placed his big sweeper machine
11 around there. It was at -- well, it's hard to tell here, but
12 it was at least four feet away from me that way.

13 Q Did anyone else come over to you?

14 A Yes. So, he's standing there, and then a short -- a
15 little short lady came with a mop from about over here, and
16 she started mopping the liquid between me and the sweeper
17 machine. His -- I know his name is Terry. And so she started
18 mopping.

19 And then, Ms. -- well -- well, these two people are
20 there. Then, Ms. Elias came and talked to me, and she saw
21 what I was standing on, and she saw the cleaning lady, because
22 I told her, well, she's already been mopping up that liquid,
23 and she saw Terry with the machine standing over here. So,
24 she went and looked over here where they were, and --

25 Q How do you know it was -- how do you know it was Ms.

1 Elias?

2 A Well, I know that now. She was -- I know that now.

3 Q Just from seeing her testify?

4 A Yes, and I did see her report.

5 Q Now, did you take any photographs of the liquid on
6 the floor?

7 A I wanted to take pictures, but I was in a lot of
8 pain. My arms and hands hurt so much, I couldn't get my
9 camera out of my purse. So, after Ms. Elias was over here
10 with these two people, another employee who had the same type
11 of uniform as she did, he -- I didn't get his name, but I can
12 describe him.

13 And he came up to me, and I told him what had
14 happened, and I said, and I want pictures, please, and, you
15 know, because I wasn't able to do it. And he said, oh, don't
16 worry, we have it all on camera, and then he pointed up above
17 me over here. Up here somewhere, there was a camera, and he
18 said, see, we have it all on camera. And I looked up, and I
19 could see the camera from where I was standing.

20 Q Was that Corey Prowell that you're talking about?

21 A Oh, no, that -- no, no. He -- the man I'm talking
22 about had the same type of uniform that Ms. Elias had. And he
23 was stocky, dark-complected, and he had a big mustache.

24 Q Did anyone aside from those people come over to you
25 while you were standing there?

1 A No, those are the people who came to me while I was
2 standing. Now --

3 Q How long did -- I'm sorry. How long did you stand
4 there; do you know?

5 A Well, long enough for all of that to happen.

6 Q Then what did you do?

7 A Well, then I was standing there, and nobody was
8 helping me, and so I couldn't stand any longer. So, I had to
9 limp over here -- over here is the casino part, way over here.
10 There's a machine, they start their -- you know, there are
11 gambling machines over here. So, I had to limp over here and
12 sit at the closest machine -- it's off the picture over there,
13 you can't see it -- and waited.

14 Q Okay. What were you waiting for?

15 A Well, for help. And then, so that's when Security
16 Officer Corey Prowell came to me. He came to me, and then Ms.
17 Elias came, and then Terry came over with his report.

18 Q And did Officer Prowell ask you what happened?

19 A He asked me what happened, and he wanted me to fill
20 out his report, and I told him I couldn't because my arms and
21 hands were hurting. And also, I had hit -- I hit my head on
22 that divider. I was dazed. And he said -- so he filled out
23 the Incident Report for me because I couldn't do it. And he
24 asked me to fill out that other form, which I didn't do.

25 Q That was the Waiver of Medical Assistance; is that