

*In the*  
**Supreme Court**  
*for the*  
**State of Nevada**

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

v.

YVONNE O'CONNELL,

*Respondent and Cross-Appellant.*

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*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*

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**APPELLANT'S APPENDIX**  
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1 surgery?

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

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

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

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

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

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

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

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

4 Q What is radicular symptoms?

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

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

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

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

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

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

6 Q Can neck pain cause headaches?

7 A Yes.

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

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

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

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

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

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

22 MS. MORRIS: This is --

23 THE COURT: -- Yvonne and why --

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

1 THE COURT: Okay.

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

4 THE COURT: Right, he --

5 MS. MORRIS: -- within the scope.

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

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

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

14 MS. MORRIS: Okay.

15 THE COURT: What she has, okay?

16 MS. MORRIS: Yeah.

17 BY MS. MORRIS:

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

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

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

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

10 A I believe so, yes.

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

13 A Yes.

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

16 A Yes.

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

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

24 Q And what did that physical examination entail?

25 A Physical examination entails observing the patient,

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

5 Q And how did you assess her neurologic status?

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

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

15 BY MS. MORRIS:

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

18 THE COURT: Hey, hey, hey.

19 MS. MORRIS: Oh.

20 THE COURT: Wait until I rule.

21 MS. MORRIS: Sorry.

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

23 BY MS. MORRIS:

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

1 stretching help her?

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

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

6 THE COURT: Overruled.

7 BY MS. MORRIS:

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

11 A Yes.

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

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

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

17 A That's my assessment, yes.

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

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

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

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

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

14           A     Yes, absolutely.

15           Q     Why is that?

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

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

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

24           THE COURT: Sustained.

25 BY MS. MORRIS:

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

3 A Yes.

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

6 THE COURT: Sustained.

7 MR. SEMENZA: Same objection.

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

11 BY MS. MORRIS:

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

14 A I did.

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

16 A I have not.

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

18 A No.

19 Q Why not?

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

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

24 THE COURT: Sustained.

25 //

1 BY MS. MORRIS:

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

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

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

9 A Yes.

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

13 A Yes.

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

15 THE COURT: Thank you. Cross?

16 MR. SEMENZA: Thank you, Your Honor.

17 CROSS-EXAMINATION

18 BY MR. SEMENZA:

19 Q Good morning, Dr. Dunn.

20 A Good morning.

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

23 A Yes.

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

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

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

3 Q He came after then --

4 A Yes.

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

7 A Yes.

8 Q How much are you being compensated for?

9 A \$5,000.

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

12 A No, that's additional.

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

15 A \$10,000.

16 Q And is that being paid by opposing counsel?

17 A Yes.

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

19 A Yes.

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

22 A Yes.

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

25 A Yes.

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

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

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

7 A Yes.

8 Q How long did you visit with her?

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

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

12 A I doubt it was less than 30 minutes.

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

15 A No.

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

17 A Yes.

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

19 A It would have been less than 30 minutes.

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

22 A No.

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

25 A Yes.

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

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

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

6 A No.

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

9 A Yes, I did.

10 Q And which doctor did you refer her to?

11 A Andrew Martin.

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

13 A No.

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

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

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

21 A Yes.

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

24 A Yes.

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

1 correct?

2 A Yes.

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

5 A Yes.

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

8 A Yes.

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

11 A Yes.

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

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

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

19 A Yes.

20 Q And exclusively came from her statements?

21 A Yes.

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

25 A Yes.

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

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

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

8 A Yes.

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

11 A Correct.

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

14 A Not that I recall.

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

18 A That's fair.

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

21 A That's fair.

22 Q It will get worse over time?

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

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

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

3 A Yes.

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

6 A Yes.

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

9 A Yes.

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

13 A That's fair.

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

15 A No.

16 Q There wasn't a fracture?

17 A No.

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

20 A Typically, no.

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

24 A No.

25 Q And your conclusions regarding causation relating to

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

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

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

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

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

9 A No.

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

11 A Not that I recall.

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

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

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

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

23 Q And those were preexisting conditions?

24 A I believe so, yes.

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

1 experiences and presents pain; is that fair?

2 A It may, yes.

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

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

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

7 A No.

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

9 A No.

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

13 A No.

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

16 A No.

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

19 A Yes.

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

23 A Yes.

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

1 A Yes.

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

4 A Yes.

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

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

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

14 A No.

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

16 A I don't.

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

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

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

3 A I don't believe so, no.

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

6 A I don't recall.

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

9 A Yes.

10 Q And did you prescribe her any pain medication?

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

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

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

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

18 A I mean, I don't recall.

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

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

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

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

2 Q Yes.

3 A Did not pass?

4 Q Correct.

5 A Then, no.

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

8 A Yes.

9 MR. SEMENZA: No further questions.

10 THE COURT: Redirect?

11 MS. MORRIS: Thank you.

12 REDIRECT EXAMINATION

13 BY MS. MORRIS:

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

16 A No. Well --

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

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

21 MR. SEMENZA: Okay.

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

1 BY MS. MORRIS:

2 Q What do you base that opinion on?

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

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

7 A Yes.

8 Q What was that based on?

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

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

13 A No.

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

17 A That's what she reported, yes.

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

20 A It could, yes.

21 Q Why?

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

1 recommendations would be the same.

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

4 A Yes.

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

7 A Yes.

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

10 A Yes.

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

13 A Yes.

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

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

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

22 A That's correct.

23 MS. MORRIS: Thank you.

24 THE COURT: Recross?

25 MR. SEMENZA: Nothing, Your Honor.

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

3 (Off-record bench conference)

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

8 THE WITNESS: She didn't require assistance.

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

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

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

14 THE WITNESS: No.

15 THE COURT: Or a walker?

16 THE WITNESS: No.

17 THE COURT: Any further questions?

18 MR. SEMENZA: I just want to clarify.

19 THE COURT: Okay.

20 RE-CROSS-EXAMINATION

21 BY MR. SEMENZA:

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

23 A I don't believe so, no.

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

25 A Correct.

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

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

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

6 A I don't.

7 Q Do you know whether she drove?

8 A I don't know.

9 MR. SEMENZA: Nothing further.

10 MS. MORRIS: Just a couple follow up.

11 FURTHER REDIRECT EXAMINATION

12 BY MS. MORRIS:

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

15 A Yes.

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

18 A Yes.

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

21 A Typically, no.

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

24 A Yes.

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

1           A     Correct.

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

4           A     Yes.

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

7           A     That's fair.

8           MR. SEMENZA: Nothing further, Your Honor.

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

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

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

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

25           THE COURT: Any questions as a result of my

1 questions?

2 MS. MORRIS: Yes, thank you.

3 FURTHER REDIRECT EXAMINATION

4 BY MS. MORRIS:

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

8 A Yes.

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

11 A Correct.

12 MS. MORRIS: Thank you.

13 THE COURT: Cross?

14 MR. SEMENZA: Briefly.

15 FURTHER RECROSS-EXAMINATION

16 BY MR. SEMENZA:

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

19 A That is defined purely as subjective, yes.

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

23 A Yes.

24 MR. SEMENZA: Thank you.

25 THE COURT: All right.

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

3 THE COURT: All right, go ahead.

4 FURTHER REDIRECT EXAMINATION

5 BY MS. MORRIS:

6 Q Dr. Dunn, can you see pain?

7 A No.

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

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

11 BY MS. MORRIS:

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

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

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

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

21 MS. MORRIS: No further questions.

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

24 (Off-record bench conference)

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

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

3 THE WITNESS: I don't recall.

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

5 MS. MORRIS: Yes.

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

8 MS. MORRIS: We call Salvatore Risco.

9 THE MARSHAL: Right up here.

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

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

13 SALVATORE RISCO, PLAINTIFF'S WITNESS, SWORN

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

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

17 THE CLERK: Can you spell your first name?

18 THE COURT: Spell your first name, please.

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

20 THE COURT: Thank you. You may proceed.

21 MS. MORRIS: Thank you.

22 DIRECT EXAMINATION

23 BY MS. MORRIS:

24 Q Sal?

25 A Hi.

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

2 A Excuse me?

3 Q Can you tell us how old you are?

4 A How old am I? 79.

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

6 Where were you born?

7 A New York.

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

9 A 21 years, 22.

10 Q And you're retired?

11 A Yes.

12 Q What did you used to do for work?

13 A I was in construction.

14 Q Do you have any children?

15 A I have six.

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

17 A Two.

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

19 A I'm sorry?

20 Q When did you retire; do you remember?

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

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

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

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

1 up.

2 THE WITNESS: Oh, okay.

3 THE COURT: Because you tend to --

4 THE WITNESS: I'm sorry.

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

7 THE WITNESS: Okay.

8 THE COURT: -- everything. All right.

9 BY MS. MORRIS:

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

11 A Yes.

12 Q What part of Las Vegas?

13 A Summerlin.

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

15 A Yes.

16 Q How did you come to know Yvonne?

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

19 Q Do you remember where you met her?

20 A At the Rampart.

21 Q Do you remember when you met her?

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

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

1 A Yes.

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

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

6 Q And how long were you married?

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

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

10 A Yes.

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

12 A Yes.

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

15 A Yes.

16 Q And was your relationship a serious relationship?

17 A I'm sorry?

18 Q Was it a serious relationship?

19 A Yes.

20 Q Were you exclusive?

21 A Yes.

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

23 A Yes.

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

25 A Yes.

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

2 A Yes.

3 Q Tell me about those.

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

10 Q And how long did you two date for?

11 A How long did we date for?

12 Q Yeah.

13 A Seven years.

14 Q When did you break up?

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

18 Q May of what year?

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

21 Q So, 2011?

22 A Yeah, yeah.

23 Q Is that fair?

24 A Yeah.

25 Q Does that sound right? Okay.

1 A I was 75.

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

4 A Yes.

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

7 A Oh, on the weekends?

8 Q Yeah.

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

14 Q When did you start dancing?

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

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

18 A Oh, no, I was alone.

19 Q So, you and Yvonne started --

20 A Yes.

21 Q -- taking lessons together?

22 A Right.

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

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

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

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

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

7 Q So, you took lessons?

8 A Yes.

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

11 A I'm sorry?

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

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

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

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

24 Q Until 3:00 A.M.?

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

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

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

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

9 A I'm sorry?

10 Q What other activities would you do, anything?

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

17 Q How was your relationship?

18 A Excuse me?

19 Q How was your relationship?

20 A Great.

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

23 A I went on a cruise.

24 Q Where did you go; do you remember?

25 A I went on a Caribbean.

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

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

4 Q Did you go with anyone on the cruise?

5 A No, by myself.

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

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

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

12 A Oh, no, never.

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

15 A Right.

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

18 A Excuse me?

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

21 A Yes.

22 Q Okay. And did Yvonne pick you up?

23 A Yes.

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

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

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

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

10          Q     And you did that?

11          A     Yes.

12          Q     Okay. I don't know if you have a binder up there.

13          MS. MORRIS: May I approach, Your Honor?

14          THE COURT: Yes.

15          MS. MORRIS: Thank you.

16                         (Pause in the proceedings)

17          MS. MORRIS: And this is Exhibit 6 in Plaintiff's  
18 Proposed Exhibits.

19 BY MS. MORRIS:

20          Q     Sal, I'm showing you a picture here.

21          A     Right.

22          Q     Do you recognize that picture?

23          A     Yes, that -- yes, I took it.

24          Q     And what does that picture represent?

25          A     A behind, black and blue.

1 Q And whose is that?

2 A I don't want to say that. Okay.

3 Q Whose is that? Whose behind --

4 A I took the picture.

5 Q Whose behind is that?

6 A Yvonne's.

7 MS. MORRIS: I'd like to move to admit Proposed  
8 Exhibit 6 into evidence.

9 THE COURT: Any objection?

10 MR. SEMENZA: No objection, Your Honor.

11 THE CLERK: Plaintiff's 6 and 7?

12 MS. MORRIS: 6.

13 THE COURT: 6 you've laid the foundation for, so  
14 we'll admit that.

15 (Plaintiff's Exhibit 6 is admitted)

16 THE COURT: What about 7?

17 MS. MORRIS: 7 is a slightly redacted version, more  
18 appropriate version of the same photo, since it's --

19 THE COURT: Well, are you admitting both?

20 MS. MORRIS: I don't know if I would -- I mean, it's  
21 difficult to see -- I wanted to check with him and see if he  
22 still recognized it in its redacted form.

23 THE COURT: All right. So, 6 is admitted.

24 MR. SEMENZA: Yes.

25 BY MS. MORRIS:

1 Q Photograph 7, do you recognize this photograph?

2 A Yes, I took it.

3 Q And is it similar to Photograph 6?

4 A Yes.

5 Q Okay. And do you recognize who's in that  
6 photograph?

7 A Yes.

8 Q And who's that?

9 A Yvonne.

10 Q And one more here.

11 A I took -- yeah, I took that one, too.

12 Q This is Plaintiff's Proposed Exhibit 9.

13 A Yeah, I took that, too.

14 Q Do you recognize that?

15 A Yeah, my second bathroom.

16 Q And who is that in the photograph?

17 A Yvonne.

18 Q And what was the purpose of taking that photograph?

19 A To show how black and blue she was; how bruised she  
20 was.

21 MS. MORRIS: I'd like to move to enter Proposed  
22 Exhibit 9.

23 THE COURT: Any objection?

24 MR. SEMENZA: Yes, Your Honor. May we approach?

25 THE COURT: Yes.

1 (Off-record bench conference)

2 THE COURT: Okay. So, the offer of 9 is withdrawn?

3 MS. MORRIS: Correct, and Exhibit 8 is proposed to  
4 be admitted.

5 MR. SEMENZA: No objection, Your Honor.

6 THE COURT: And it will be admitted.

7 (Plaintiff's Exhibit 8 is admitted)

8 MS. MORRIS: You stay right there. It's okay.

9 THE WITNESS: I am.

10 BY MS. MORRIS:

11 Q Now, this is the photograph that you took of Yvonne;  
12 is that correct?

13 A Yes.

14 Q And where did you take it; do you remember?

15 A At my house.

16 Q And is that your bathroom?

17 A Yeah, my second bathroom.

18 Q Do you remember how many days after Yvonne fell this  
19 photograph was taken?

20 A She might have -- she had to tell me, but I forgot.

21 Q Do you remember when you came home from the cruise?

22 A The date?

23 Q Yeah.

24 A No, I don't.

25 Q But it was after Yvonne had fallen; is that correct?

- 1 A Right. I was on the cruise, and she fell.
- 2 Q Now, you went back to your house; is that right?
- 3 A Yeah, that's my home.
- 4 Q Okay. And is that when you took the photographs?
- 5 A Yes.
- 6 Q Okay.
- 7 A In the bathroom; my second bathroom.
- 8 Q And you said Yvonne was in pain; is that right?
- 9 A Yes.
- 10 Q How did you know?
- 11 A How did I know?
- 12 Q Yes.
- 13 A She told me she was in pain.
- 14 Q Did she appear to be in pain in any way?
- 15 A Yes, yes, she was hurting.
- 16 Q And is that the other photograph that we've just  
17 talked about?
- 18 A I took that one, too.
- 19 Q And can you see the bruising in this picture?
- 20 A Yes.
- 21 Q Where do you see it?
- 22 A On the behind.
- 23 Q You can actually draw on this picture, if you want.
- 24 A Excuse me?
- 25 Q You can draw on the picture -- the screen --

1 THE COURT: You can draw on the screen with your  
2 finger.

3 THE WITNESS: Oh, oh, oh, I didn't know that. Right  
4 there.

5 (Pause in the proceedings)

6 MS. MORRIS: Yeah. And what we'll do is -- this is  
7 actually a different angle.

8 BY MS. MORRIS:

9 Q Sal, did you take this photograph?

10 A Yes.

11 Q Okay. And is this a photograph of Yvonne?

12 A Yes.

13 MS. MORRIS: I'd move to have Exhibit 4 entered into  
14 -- entered into evidence.

15 MR. SEMENZA: No objection, Your Honor.

16 THE COURT: All right, 4 is admitted.

17 (Plaintiff's Exhibit 4 is admitted)

18 BY MS. MORRIS:

19 Q This is Exhibit 6, and you took this photograph as  
20 well; is that correct?

21 A Yes.

22 Q Can you see the bruising in this photograph?

23 A Yes.

24 Q Can you show us where -- and if you draw on the  
25 screen, it will actually make a mark. You can use your

1 finger.

2 A Okay, right there. All that.

3 Q And is there any bruising at the top of the  
4 photograph in the left? Is that what you're seeing?

5 A Above it, yeah.

6 Q And you took these photographs of Yvonne because she  
7 asked you to?

8 A Yes.

9 Q Do you know why she asked you to? Did she tell you?

10 A Excuse me?

11 Q Did she tell you why she wanted you to take the  
12 photographs?

13 A To take the pictures; I took them.

14 Q Now, did Yvonne stay with you after you came home?

15 A That night? I don't remember. I really don't  
16 remember.

17 Q Did you ever go to any doctor's appointments with  
18 Yvonne?

19 A Yes, I did.

20 Q And do you remember any of those doctor's  
21 appointments?

22 A I went to one doctor with her, I went to -- but the  
23 doctor's name, I don't remember. I'm sorry, I don't remember.

24 Q Before this fall --

25 A Before the fall.

1 Q -- had you ever attended doctor's appointments with  
2 Yvonne before?

3 A Yes. Yeah.

4 Q Tell us when.

5 A When she wasn't feeling well. I don't remember the  
6 days and -- I'm -- I don't remember.

7 Q Do you remember her having an eye infection?

8 A I think so, I think so. You're going back seven,  
9 eight -- I can't remember.

10 Q Did you ever go to a doctor's appointment with  
11 Yvonne because she had pain in her body before she fell?

12 A I don't know. I don't know.

13 Q If --

14 A I don't know.

15 THE COURT: You can't whisper, yeah.

16 THE WITNESS: I don't know.

17 THE COURT: Okay.

18 BY MS. MORRIS:

19 Q But you did go to doctor's appointments with her  
20 after; is that right?

21 A Oh, yeah, I went to doctors with her. Right.

22 Q When you and Yvonne would dance -

23 A Right.

24 Q -- did she ever complain of having pain because she  
25 was dancing?

1 A Not really. If she -- I don't think she did.

2 Q Did you and Yvonne ever go dancing after she fell?

3 A Yeah, we went -- we went out, but she didn't dance.

4 Q Why not?

5 A She had the walker. Oh, she couldn't. She had the  
6 walker.

7 Q Did you and -- but you went to the dancing events?

8 A We went to the -- we still went to like the Rampart,  
9 we went to -- we went to Bally's, but she didn't -- we heard  
10 the music. Something to do. Instead of stay home, went out.

11 Q And did you dance when you went out?

12 A Yeah, by myself. They thought I was crazy.

13 Q Can you -- can you -- can you swing dance by  
14 yourself?

15 A No, we -- no, she was sitting there. No, she was  
16 like right there, and I got up and I was doing -- kidding  
17 around, having fun.

18 Q Do you remember the last time you and Yvonne both  
19 went swing dancing together and Yvonne danced with you?

20 A Well, it had to be before the accident, of course,  
21 before I went away. So, it had to be then. February of 2011  
22 -- 2010, I guess, then.

23 Q You and Yvonne were close; is that correct?

24 A Yes.

25 Q If Yvonne was having medical problems before the

1 fall, would you have known about them?

2 A Like everybody else, you know, no, not -- serious --  
3 no. If she did, I don't remember, and I don't think she did.

4 Q Now, after the fall, you and Yvonne still stayed  
5 together; is that correct?

6 A Yeah, of course, over a year.

7 Q And when you stayed with -- when you were with  
8 Yvonne --

9 A Right.

10 Q -- after the fall --

11 A Right.

12 Q -- was she any different?

13 A Well, she couldn't do -- we couldn't dance, but her  
14 personality, you know, it was her same sweet self. Everything  
15 was great, but we just couldn't go out. We stayed home a lot.  
16 I understood. I -- I understood. I told her, we don't have  
17 to go anywhere. I know you're okay. We can stay home, play  
18 Rummy Tile. We could do -- watch TV. You know, if she wanted  
19 to go, we'd go out. And yeah, we -- she didn't want to stay  
20 home all the time, too, and I didn't want to either, so we  
21 just went to hear the music, and that was it. She didn't  
22 dance.

23 Q Were you with Yvonne when she got her walker?

24 A Yes, yes.

25 Q Tell me about that.

1           A     Oh. Her -- we went to the doctor, and he said have  
2 a cane. So, I went with her and I said, you know, I don't  
3 like a cane. I said, sometimes you get off balance. So, I  
4 said, why don't you try -- there was walkers right there. I  
5 said, why don't you try a walker? You might like it better, I  
6 don't know, but the doctor prescribed a cane. I said, try the  
7 walker.

8                     And so, she had the walker, and she felt more  
9 comfortable with it. She had the cane; she didn't like it. I  
10 said, I think you're better off with the walker. I said --  
11 then she was worried about the prescription because they gave  
12 her a cane. I said, don't worry about it. I said, don't  
13 worry, you're covered, take the walker. I told her, leave the  
14 cane alone.

15           Q     Do you know if Yvonne has more than one walker?

16           A     No, I -- no, she had one walker.

17           Q     When's the last time you and Yvonne have seen each  
18 other?

19           A     When's the last time we seen each other? Okay, we  
20 broke up about five years, more than that. Then, Yvonne  
21 called me this year. Now, you might know better with the  
22 dates, I don't know. She goes, my lawyer wants to call you,  
23 that meant you, and wants to know if it's okay to call you. I  
24 said, of course it's okay. And then you called me, and then  
25 you told me what was going on. Then I called her back, I said

1 you called me, then -- and then I saw her in the casino again,  
2 we went for breakfast one morning, and then we got back  
3 together. That -- that -- I don't know the date. And then we  
4 got back together again. Right.

5 Q And do you remember you had your deposition taken in  
6 this case?

7 A I'm sorry?

8 Q Do you remember having your deposition taken?

9 A Oh, yes.

10 Q Do you remember who took your deposition?

11 A Yeah. Yeah.

12 Q Was it defense counsel?

13 A Yeah.

14 Q And do you remember when that happened?

15 A I'm bad with dates. Please. I don't know. You  
16 know. I don't know what date it was.

17 Q Was it sometime in the last year?

18 A Was it last year, or this --

19 Q Was it sometime in the last year; not last year.

20 A Oh, oh, oh, oh, yeah, yeah.

21 Q Now, you and Yvonne got back together for a little  
22 bit, but then didn't work out?

23 A We broke up again, yeah.

24 Q When you -- and when you and Yvonne were going out,  
25 do you know if she had many close friends?

1           A     Yeah, she had a couple of close girlfriends. They  
2 came here from California. Yeah, yeah.

3           Q     After -- after Yvonne fell, do you know if she had  
4 friends?

5           A     Yeah, friends. Yeah, of course.

6           Q     And you know she had cousins that came from  
7 California?

8           A     Yeah, her cousins came out. I think it was the  
9 Super Bowl. I think that's when she got hurt. I was away. I  
10 think it was the Super Bowl. It had to be February 6th or  
11 7th; I think that's when the Super Bowl was. I think that's  
12 when she got hurt. I'm not sure if that -- and I was away,  
13 but her cousins came. They come every Super Bowl, they stay  
14 here for a week or so, and they see Yvonne, and Yvonne has  
15 lunch with them or whatever. And if I was here, I would have  
16 been with them, too. I met them a few times.

17          Q     Now, aside from what you just said, you and Yvonne  
18 going to breakfast and seeing her, do you see her out  
19 currently? Do you see her at the Rampart? Do you see her --

20          A     No, I -- well, I don't go that often. I did -- I  
21 make a couple of bets, and then I come home. I saw her at the  
22 Rampart a few -- yeah, I see her in the Rampart, but lately, I  
23 haven't -- I haven't been going. I go in the afternoon, I  
24 make a couple of bets, and I go home.

25          Q     When you see Yvonne, or you've seen her, has she

1 been using her walker?

2 A Oh, yes.

3 Q Have you ever seen Yvonne out in public after she  
4 got prescribed the walker not using her walker?

5 A No, no. Matter of fact, I play cards with a couple  
6 of guys from New York, and they tell me, well, we saw Yvonne  
7 at the buffet at the -- and she still has her walker and  
8 everything else. Yeah, they tell me.

9 Q Are you currently dating someone else?

10 A Excuse me?

11 Q Are you currently dating anyone?

12 A Yes, I'm -- yeah, I'm dating somebody else.

13 Q Would you describe Yvonne's health, in your opinion,  
14 before the fall?

15 A Good. It was okay. We were dancing, going out,  
16 going on trips, going away.

17 Q And after the fall, how would you describe Yvonne?

18 A Couldn't do anything that much. Stay home and  
19 relax, just go -- go hear the music, but she didn't dance.  
20 Like I said, she never danced. After the accident, she never  
21 danced. She just had the walker with her, but she came out.  
22 We didn't want to stay home all the time, so we would go out.  
23 She wanted to go out, too, because she didn't want to stay  
24 home either, and I didn't mind her -- I would have stood with  
25 her. Just the walker had -- her accident had nothing to do

1 with me breaking up with her.

2 Q Would you describe Yvonne as ever being worried  
3 about her health after she fell?

4 A Yes, she was worried. Yes, I think she went for a  
5 couple MRIs. I'm not sure. I think she went for a couple  
6 MRIs.

7 MS. MORRIS: I don't have any other questions for  
8 you.

9 THE WITNESS: Thank you.

10 THE COURT: Cross?

11 MR. SEMENZA: Yes, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. SEMENZA:

14 Q Good morning, Mr. Risco.

15 A Sal.

16 Q Sal. I'll call you Sal.

17 A Yeah, please.

18 Q When Ms. Morris was asking you questions, you had  
19 said that the accident had nothing to do with your breakup; is  
20 that correct?

21 A Of course -- no, of course not. I would take care  
22 of her.

23 Q Why did you two break up in May of 2011?

24 A I'm trying to think about it. I'm trying to think.  
25 I'm sorry.

1 Q No, that's okay. Take your time.

2 A Why did we break up. Oh, I think one time -- I  
3 think. Yeah, I'm pretty sure. We went to the pool. I live  
4 in Sun City. I call it God's waiting station. We went to --  
5 we went to the pool, and there were a few women there, and I  
6 wanted to get a lane for her so she could walk, because I  
7 said, the walking's good for you, walking the -- in the pool.

8 And then, there were a few women there, and she  
9 thought, which was not true at all, that I was talking to  
10 those women, when I wasn't. I was talking to one of my  
11 friends, and he was telling me, he -- Sal, if you want this  
12 lane, like in Sun City, you've got to get a lane, and you ask  
13 for it, you got to sign for it. So, I said, yeah.

14 And when I was talking to him, she thought I was  
15 with those women, and I wasn't. I wanted to save that lane  
16 for her. So, when we got out, we went home to my home, we had  
17 a misunderstanding, and that was it. That was one of the  
18 reasons. That happened that day.

19 Q Was it your understanding that Ms. O'Connell was  
20 jealous? Was that the issue?

21 A Of me? Are you kidding? I don't think she's a  
22 jealous -- no, I don't think so.

23 Q Okay. But you had a misunderstanding?

24 A Yes, I think that -- I think, yeah.

25 Q Okay. Do you still love Ms. O'Connell today?

1 A Yes, I do.

2 Q Now, you had talked about her cousins from  
3 California.

4 A Yes.

5 Q Do you remember that?

6 A Yes.

7 Q Okay. And she's close to those cousins?

8 A Yes, she was.

9 Q And they're very good friends?

10 A They're relatives. They're cousins.

11 Q And she enjoys spending time with them?

12 A Excuse me?

13 Q She enjoys spending time with her cousins?

14 A Oh, yes. When they -- when she -- when they came  
15 here, they stay at the Planet Hollywood, they stay at  
16 different casinos, and Yvonne and I, if I was in town, I would  
17 meet them with her.

18 Q And you would consider those her close friends, her  
19 cousins from California?

20 A Yes, I was. She has more than her cousins; she has  
21 a couple of girlfriends, too.

22 Q While you were on the cruise in February of 2010 --

23 A Yes.

24 Q -- did you receive any telephone calls from Ms.  
25 O'Connell?

1 A No.

2 Q Did you leave her any contact information in case  
3 she needed to get a hold of you while you were on the cruise?

4 A Well, she knew the -- I think I went on a Carnival.  
5 I was -- I think I was on a Carnival that time. Yeah, but I  
6 guess if you want to get in touch with me, you had to get in  
7 touch with -- I don't know.

8 Q Okay.

9 A It was never -- we never talked about it.

10 Q And if she needed to get in touch with you, she  
11 would have called the cruise line?

12 A I guess, I guess. I mean --

13 Q Now, after the fall in February of 2010, Ms.  
14 O'Connell was able to drive, right?

15 A Yeah, she picked me -- I was upset with her. I was  
16 really upset with her. I said, you should have never done  
17 this.

18 Q Other than just telling you she slipped and fell at  
19 the Wynn, did she provide any specifics as to how it happened?

20 A No, she said -- no. If she did, I forgot.

21 Q Did she tell you how she slipped and fell?

22 A I think she did, but I forgot. I think she --

23 Q How many doctor's appointments did you go to her  
24 with after the fall (sic)?

25 A Three. I don't know, I don't know. I really don't

1 know. I know I went to a couple.

2 Q Okay. Do you remember who those doctors were?

3 A Oh, no.

4 Q Do you remember what those doctors were treating her  
5 for?

6 A One was the back, I believe. I'm not sure. I think  
7 it was the back, I'm not sure. Her -- her legs, I believe. I  
8 think that -- I think that -- that's about it, I believe.

9 Q Okay. And do you know how long after her fall that  
10 she started complaining of knee pain?

11 A Well, she said her legs were -- her knees were  
12 bothering her, and we didn't do -- you know, like I said, we  
13 just stayed home, watched TV, and went out, hear the music.

14 Q You don't remember specifically when she talked  
15 about her -- her --

16 A No, of course not.

17 Q -- pain in her legs? Okay. Did you take any  
18 pictures of her head or her neck?

19 A No, I believe just her rear-end -- behind. And I  
20 don't know if I took any pictures of her back. I'm not even  
21 sure.

22 Q Okay, but you took pictures of the bruising?

23 A Yes.

24 Q And you got back together at some point this year or  
25 last year?

1 A Yes. Right.

2 Q Okay. And then --

3 A Because of the trial, because Chris wanted to call  
4 me, and Yvonne called me first to let me know that -- if her  
5 lawyer could call me.

6 Q And that's when you started talking again?

7 A Yes.

8 Q And then you went out on --

9 A Yes.

10 Q -- some dates? Were you exclusive during this  
11 period of time?

12 A Yes.

13 Q Okay. And you broke up again?

14 A Yes.

15 Q Okay. Why did you break up again?

16 A God. I'm trying to think.

17 Q Take your time.

18 A We just couldn't get along. Okay.

19 Q You were arguing?

20 A We had a misunderstanding. About what, I forgot.

21 Q Okay. You don't remember right now?

22 A No.

23 Q Okay.

24 A I don't.

25 Q So, how quickly did you guys date most recently?

1 How long was it?

2 A Oh, let's see.

3 Q Just a couple months, or?

4 A When Chris -- I don't know. I forgot the month when  
5 she called me -- her lawyer called me. I forgot that -- what  
6 month that was in the beginning of the year. I think we were  
7 dating -- I forgot. Chris, when she called me, then we got  
8 together again. I don't remember what month it was and what  
9 day it was.

10 Q Was it -- how long -- approximately how long, if you  
11 can recall, that you guys dated most recently? A couple  
12 months?

13 A Oh, about four months. Three, four months, maybe  
14 less.

15 Q And your break up didn't have anything to do with  
16 the fall though?

17 A Oh, no, no. I wanted to take care of her. Oh, no.

18 Q You did want to take care of her?

19 A Of course.

20 Q And was she resistant to that?

21 A I said, I'm here for you, I'll take you to the  
22 doctors, I'll do everything you want me to do. We don't have  
23 to go out, we can stay home, there's no problem. Whatever you  
24 want to do, we do, you know? Like I said, the -- because I  
25 care for her, and I want to take care of her.

1 Q Okay, and she wasn't receptive to that though?

2 A She was, but there's other problems besides.

3 Q Do you remember what those problems were?

4 A No, I don't.

5 Q So, from March -- I'm sorry, May of 2011 until when  
6 you were deposed --

7 A Yeah, when the phone calls. Right.

8 Q Okay, you were broken up?

9 A Yes.

10 Q Okay. You didn't socialize much with her at all?

11 A No, I -- well, if I saw her in the casino, we said  
12 hello to each other.

13 Q But that was it?

14 A That was it.

15 Q So, for that period of time, you don't know --

16 A No.

17 Q -- how she was doing?

18 A No, not at all.

19 Q Okay.

20 MR. SEMENZA: Just a moment, Your Honor.

21 BY MR. SEMENZA:

22 Q Did you go on a cruise with Ms. O'Connell after the  
23 fall?

24 A Yes.

25 Q Okay. How long was that cruise?

1           A     Seven -- ten days -- seven days. I went on a  
2 couple. It was seven days or ten days. She had the walker,  
3 of course.

4           Q     Do you remember where you went?

5           A     The Caribbean, I believe.

6           Q     And do you remember where your port was where you  
7 got on the boat?

8           A     Oh, it was in Florida. I believe it was in Florida.  
9 Fort Lauderdale or -- yeah, Fort Lauderdale or Miami. One of  
10 those two.

11          Q     So, you flew from Las Vegas to Fort Lauderdale or  
12 Miami?

13          A     Right, then -- right. I stayed with my kids, and  
14 then they drive us to the cruise ship, and then that was it.

15          Q     Did you have an enjoyable time?

16          A     Excuse me?

17          Q     Did you enjoy the cruise?

18          A     Oh, yeah, it was great.

19          Q     To your knowledge, did Ms. O'Connell enjoy the  
20 cruise?

21          A     Yeah, I think she did.

22          Q     And then, did you stay in Florida after that for a  
23 period of time?

24          A     Yeah, a couple of days sometimes with my children.  
25 I have three of my children in Florida.

1 Q Okay. And did you enjoy that time with your  
2 children?

3 A I don't know, let me think about it. Of course.

4 Q Did Ms. O'Connell enjoy her time in Florida?

5 A Yes, of course.

6 Q Okay. Did she get along with your kids?

7 A Yvonne?

8 Q Yes.

9 A Of course. Yeah.

10 Q And then you returned to Las Vegas?

11 A Of course.

12 Q Do you remember when that cruise was?

13 A There was a few of them. No, I don't. There was a  
14 few -- there was a few cruises.

15 Q There were a few cruises you went on --

16 A Yeah. What date they were -- it had to be in the  
17 winter, even like February, January, you know, because that's  
18 when all the cruise ships go to the Caribbean. It had to be  
19 one of those months.

20 Q And you went on a few cruises with her after the  
21 fall?

22 A Yes. I think two. Maybe two. I'm not sure.

23 MR. SEMENZA: No further questions.

24 THE WITNESS: Thank you.

25 THE COURT: Redirect?

1 THE WITNESS: Oh, you're back.

2 REDIRECT EXAMINATION

3 BY MS. MORRIS:

4 Q Sal, when you and Yvonne went on that cruise, did  
5 Yvonne express any complaints of pain to you on the flight  
6 over there?

7 A No, she -- no, she -- no, she didn't.

8 Q Did she -- did Yvonne complain a lot?

9 A Excuse me?

10 Q Would you -- would you call Yvonne a complainer?

11 A No.

12 Q Does she tend to hold things in?

13 A Excuse me?

14 Q Does Yvonne tend to hold things in?

15 A Yeah, she's a very private person.

16 Q So, when you wanted to go -- was it you who wanted  
17 to go on the cruise after the fall?

18 A Yeah, we both -- yeah. We went on the cruise the  
19 first time when we were dating, I'm going back before the  
20 fall, and she loved it. She saw the room and she said she  
21 wants to always go on cruises. She enjoyed it.

22 Q And then, after she fell, you went on that cruise;  
23 is that correct?

24 A Excuse me?

25 Q You went on that cruise after she fell?

1 A Yes.

2 Q Did you -- did you go on multiple cruises after she  
3 fell, or just the one?

4 A I think maybe two, if we went that many, or maybe  
5 one or two. I forgot.

6 Q And when you went on the cruise, you had a good  
7 time; is that right?

8 A Excuse me?

9 Q You like cruising? You like to go on cruises?

10 A Yeah, I'm going on one now.

11 Q You got another one planned?

12 A Yeah.

13 Q How many times do you go on cruises per year?

14 A Three, four times a year.

15 Q And Yvonne didn't always go on cruises with you --

16 A No.

17 Q -- is that right?

18 A But she had -- I think -- I'm old. I said, I'm  
19 healthy, I want to go now, I want to be -- something's going  
20 to happen. I said, you're going to have three more boyfriends  
21 after I'm gone. I said, I'm -- I want to -- I have no back  
22 problems, I'm healthy, I want to enjoy myself.

23 Q And so, you go on cruises, but Yvonne wouldn't  
24 always go with you; is that right?

25 A Right.

1 Q Okay. And so, after the fall, you went on that  
2 cruise to Florida -- or you went to Florida and went on a  
3 cruise; is that right?

4 A Yes.

5 Q And you said she brought her walker with her, right?

6 A Of course.

7 Q And you said that she had a good time; is that  
8 right?

9 A Yes.

10 Q If Yvonne was feeling pain at any certain time,  
11 would she express it to you? Would she say --

12 A Yes, I -- yes, she would.

13 Q Did she express her pain all day, every day?

14 A Oh, no, no. Well, it was never -- no, she didn't  
15 say that. No, we never brought that up. No.

16 Q You said Yvonne was a private person. What did you  
17 mean by that?

18 A She's to herself a lot. She's very private.

19 Q Would you consider yourself to be an outgoing  
20 person?

21 A An outgoing person?

22 Q You. Would you consider yourself to be an outgoing  
23 person?

24 A Oh, me?

25 Q Um-hum.

1 A Oh, for sure.

2 Q Would you consider Yvonne to be less outgoing than  
3 you are?

4 A I think a little bit, but it had nothing to do with  
5 me breaking up with her. Her accident or -- that had nothing  
6 to do with it. I wanted to take good care of her. I was  
7 married for 44 years. My wife -- you know, but me going out,  
8 I didn't have to go. If she wanted to stay home, I would have  
9 stayed home with her. It had nothing to do -- I understand  
10 the situation. She fell, she got hurt, she was in pain. We  
11 don't have to go. No, we stay home, watch TV, play Rummy  
12 Tile, do whatever. We don't have to go out.

13 Q But you like to go out, don't you?

14 A Yeah, but it's not necessary. I'd rather be with  
15 her --

16 Q So --

17 A -- if she's comfortable.

18 Q If you wanted to go out, Yvonne would go with you,  
19 right?

20 A Yeah, sometimes, unless she didn't want to go, then  
21 we'd stay home.

22 Q And so --

23 A It was all up to her.

24 Q But you -- you enjoy going out, right? It's --  
25 it's --

1 MR. SEMENZA: Your Honor --

2 THE WITNESS: Yes.

3 MR. SEMENZA: Objection, leading.

4 THE COURT: Sustained. And I think -- I'm not sure  
5 what the relevance of this is, so let's move on.

6 MS. MORRIS: Let me clarify for -- if I could.

7 BY MS. MORRIS:

8 Q Before the accident, before she fell, did you guys  
9 go out a lot more than you did after the accident?

10 A Oh, yes.

11 Q And after the accident, how often would you go out;  
12 do you recall?

13 A Like I said, we went out on -- we still went out on  
14 weekends. We did go to the Rampart on weekends, but we heard  
15 the music, but she didn't dance. And she -- she liked to play  
16 the machines. So, she -- we went there, we had the buffet  
17 there, she got comp, and we had, you know, the buffet, and  
18 then -- because she likes to play the machines. And so, we  
19 went there -- we went there a lot, too, after the accident.  
20 We went out a lot, too, but no dancing.

21 Q Now, you said that the reason that you and Yvonne  
22 broke up the first time was a misunderstanding; is that right?

23 A Yeah.

24 Q Have you ever talked to Yvonne about why she thinks  
25 you broke up?

1           A     I don't understand what you're saying.

2           Q     Have you had a -- do you know why she thinks you  
3 broke up? Is it the same reason? Do you have any idea?

4           A     We had a misunderstanding that day. That's what it  
5 was that particular day, yeah.

6           Q     And if Yvonne thinks it's a different reason, you  
7 wouldn't know that; is that right?

8           A     Well, I think -- I'm not sure now, I'm going to say  
9 that, but I don't know. I think she thinks I broke up with  
10 her because of the accident, and that is not true at all. I  
11 was married to my wife, I was with my wife after she had  
12 operations, and I would never do that.

13                     I made it very clear to her, I go with you, I'm here  
14 for you, take you to the doctor if you have to go. You need  
15 -- you got to go to the store, I -- whatever you want, I got  
16 it. That -- the accident had nothing to do with me and her  
17 breaking up at all, because I -- I went out with her over a  
18 year after the accident, so that --

19           MS. MORRIS: All right. Thank you, Sal.

20           THE WITNESS: You're welcome. Thank you.

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

22           THE COURT: Questions from the jury?

23           THE WITNESS: Is that it?

24           THE COURT: No, the jury has a question, so just a  
25 minute.

1 THE WITNESS: Oh, they're allowed to ask me  
2 questions?

3 THE COURT: Not directly, but in writing. Approach.

4 (Off-record bench conference)

5 THE COURT: So, did Yvonne complain about regular  
6 knee, back, or neck pain back before the fall?

7 THE WITNESS: Neck pains, back pains, I don't think  
8 so. I mean, she wasn't well sometimes, but I don't think had  
9 any back pains or neck pains. I don't think that, you know --

10 THE COURT: Knee pain?

11 MR. SEMENZA: I don't think --

12 THE COURT: Sorry, the -- I didn't hear the last  
13 part.

14 THE WITNESS: I don't know. I don't think so. If  
15 she did, I forgot, but I don't think so.

16 THE COURT: Okay.

17 THE WITNESS: I don't think so.

18 MR. SEMENZA: Nothing further.

19 THE COURT: Any questions as a result of the jury  
20 question? All right.

21 MS. MORRIS: Don't have any.

22 THE COURT: Thank you.

23 MS. MORRIS: No.

24 THE COURT: May he be excused now?

25 MS. MORRIS: Yes.

1 THE WITNESS: Thank you.

2 THE COURT: Thank you so much.

3 THE WITNESS: Thanks a lot.

4 THE COURT: You're welcome.

5 (Pause in the proceedings)

6 THE COURT: Thank you. You may call your next  
7 witness.

8 MS. MORRIS: Plaintiff rests.

9 THE COURT: Okay. The plaintiff has rested, and  
10 counsel approach.

11 (Off-record bench conference)

12 THE COURT: Ladies and gentlemen, we're going to  
13 take a recess here until 10:30. This will be our morning  
14 recess.

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

23 We'll be in recess until 10:30.

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

25 (Outside the presence of the jury)

1 THE COURT: And the record will reflect that the  
2 jury has departed the courtroom. I'm going to take a recess  
3 for all of us to use the restroom, and then we'll come back  
4 and take any matters outside the presence.

5 MR. SEMENZA: Thank you, Your Honor.

6 (Court recessed at 10:13 P.M. until 10:25 P.M.)

7 (Outside the presence of the jury)

8 THE COURT: All right. We're back on the record?  
9 All right. We're back on the record outside the presence of  
10 the jury, and Mr. Semenza indicated he had something outside  
11 the presence.

12 MR. SEMENZA: Yes, Your Honor. I'd like to move for  
13 a directed verdict as to liability in this particular matter.  
14 The only evidence that has been presented in this particular  
15 case relating to liability is Ms. O'Connell's assertion that  
16 the liquid substance came from the plants in the atrium area.  
17 She bases that statement upon two things. First, the  
18 proximity of the liquid substance to the plants; and secondly,  
19 its green color. Those two things are insufficient to send  
20 this case to the jury based upon liability.

21 And Ms. O'Connell did testify that she didn't know  
22 how the mechanism by which that liquid got on the floor, she  
23 didn't know where it came from, specifically, she didn't know  
24 how long it had been there. There were no apparent leaks or  
25 anything of that nature that she noticed. She doesn't know

1 what the horticultural department waters its plants with. So  
2 it's pure speculation on her part that this green substance  
3 came from the plants. She did say that it was sticky and that  
4 there were footprints in it, but she also testified that the  
5 footprints were from her and the individuals that picked her  
6 up.

7 So, there is no evidence to support liability on the  
8 part of Wynn in this particular matter, and we'd move for a  
9 directed verdict as to liability.

10 THE COURT: You're talking about a Rule 50 Motion  
11 for Judgment as a Matter of Law? The directed verdict -- you  
12 know, they've changed it. It's not --

13 MR. SEMENZA: Yes, Your Honor.

14 THE COURT: -- a directed verdict anymore. Okay.  
15 Plaintiff's response?

16 MS. MORRIS: Yes. Everything Mr. Semenza just  
17 addressed was the source of the liquid, and that's certainly  
18 not the issue. The issue is, is that if Wynn had been acting  
19 reasonable, would that liquid still have been on the floor for  
20 such a period of time in such a shape, and size, and length  
21 that part of it would have been able to dry?

22 And the testimony was very clear from Ms. Yvonne --  
23 Ms. O'Connell, is that it was approximately seven feet in  
24 length, and a portion of it had started to dry. There was  
25 also testimony from the employees at Wynn that it was so large

1 that they actually had to place a sweeper machine over it.  
2 Additionally, the testimony is that this is a -- that was from  
3 Yanet Elias.

4           If there's a -- there is -- this is a high traffic  
5 area in which they claim that they are continuously sweeping,  
6 continuously looking through, and that there's employees  
7 there. And if that was the case, if they had been doing that  
8 job as they said, then they should have seen that liquid in  
9 the amount and shape that it was there, and cleaned it up or  
10 warned her of it prior to her coming through and falling in  
11 it. Now, the source --

12           THE COURT: Okay, let me stop you, because the issue  
13 in a premises liability case where there's a foreign substance  
14 on the floor is not whether they should have seen; it's  
15 notice, either actual or constructive notice. So, do you  
16 believe that you've proved actual notice?

17           MS. MORRIS: I do not believe we have actual notice.  
18 This is an issue --

19           THE COURT: What about --

20           MS. MORRIS: -- of constructive notice.

21           THE COURT: Okay. And what's the evidence you  
22 believe that you've brought to show constructive notice?

23           MS. MORRIS: That due to the location, the size, and  
24 the fact that portions of it had started to dry, that if Wynn  
25 had been constantly sweeping as they claimed to have, that

1 they should have seen it. So, it's either knew or should have  
2 known; were they on constructive notice. They have provided  
3 testimony that this is a high traffic area, that it is  
4 important that they try and keep it clean. And due to the  
5 fact it was such a large size and portions of it had started  
6 to dry, then they were on constructive notice that there is a  
7 large pool of green liquid in the atrium area walkway that had  
8 begun to dry, and they should have been able to know of it and  
9 clean it up had they been acting reasonably in the way that  
10 they say that they do.

11 So, I don't believe there's actual, but there is  
12 certainly constructive, and Ms. Elias said she didn't know  
13 what it was. She thought it was maybe a drink, but it was  
14 certainly sticky. It had gotten to the point where it had  
15 been on the floor long enough to actually have dried and  
16 become a different substance. So, we had a liquid part in  
17 which she fell, and there was a dried part. The testimony was  
18 very clear, and Ms. Elias corroborated that.

19 THE COURT: Well, I don't recall that actually she  
20 did, but your client testified to that. What's your response?

21 MR. SEMENZA: The -- my response, Your Honor, is  
22 there's no evidence to suggest we should have known about it,  
23 period, end of story. I mean, we don't know how long it was  
24 there. Any conclusions or testimony that Ms. O'Connell has  
25 offered is pure speculation based upon nothing. Whether it

1 could have been a large spill or a small spill, the point here  
2 is, we don't know how long it was there for.

3           And again, it's pure speculation that Ms. O'Connell  
4 says, well, it started to dry. We don't -- there's no  
5 evidence of that. There's no evidence of it at all, other  
6 than her testimony. And so, again, I don't think that they've  
7 established any sort of constructive notice. They haven't met  
8 their burden in that regard, and I think you have to grant us  
9 a directed verdict in that.

10           THE COURT: All right. Well, again, it's not a  
11 directed verdict.

12           MR. SEMENZA: My apologies, Your Honor.

13           THE COURT: Under Rule 50, it's a judgment as a  
14 matter of law. And the Court has, you know, the option of  
15 either granting the motion or denying the motion and allowing  
16 it to proceed to the jury. And then if the jury returns a  
17 verdict, the -- allowing the side who moves to renew within  
18 ten days and fully brief it.

19           And so, that's the option I'm going to choose at  
20 this time, because right now, I mean, I've got to say that  
21 there is probably -- the -- very, very little evidence  
22 regarding constructive notice, because really, the only  
23 evidence of constructive notice is Ms. O'Connell's testimony  
24 that the substance she slipped in was drying, you know, and  
25 because Ms. Elias, her testimony of what she saw describing

1 the honey, syrup like substance that she saw when they moved  
2 the sweeper machine, you know, she didn't -- she didn't say  
3 she saw anything drying. She didn't describe a seven-foot  
4 spill. The only person who said that has been the plaintiff,  
5 but is -- the question is, is that sufficient?

6 Normally, I would have expected to see an expert  
7 witness who'd come in and talk about what kind of -- you know,  
8 what kind of maintenance you would expect to see in an area  
9 like this, and how long could a substance be on the floor that  
10 would be reasonable, that kind of thing. I mean, obviously,  
11 you can't have somebody following along behind with a sweeper  
12 broom every customer that walks through the place, but there  
13 was no testimony of that.

14 So, the question is, is Ms. O'Connell's testimony  
15 that the substance -- her -- I don't think that her belief  
16 that it was water, you know, would -- would support a finding  
17 that the Wynn put the substance there. I mean, it's -- there  
18 was -- that was nothing. That was just a belief based upon  
19 pure speculation. There's absolutely been no evidence  
20 presented by the plaintiff.

21 So, this is -- this is purely an issue about  
22 constructive notice, and what -- what would it take in terms  
23 of evidence to put somebody on constructive notice, and that's  
24 what I would expect to be briefed.

25 MR. SEMENZA: Okay. Thank you, Your Honor.

1 THE COURT: So, the motion is denied without  
2 prejudice for it to be renewed at the verdict or after the  
3 trial is over, because, of course, it can be renewed whether  
4 -- even if the jury doesn't reach a verdict potentially.

5 MR. SEMENZA: Thank you, Your Honor.

6 THE COURT: All right.

7 MR. SEMENZA: There's one other matter I'd like to  
8 address.

9 THE COURT: Yes.

10 MR. SEMENZA: It is our position, Your Honor, that  
11 the jury is not permitted to consider any of the testimony  
12 from either Dr. Dunn or Dr. Tingey, and the specific reason  
13 being is that neither of those two doctors testified as to the  
14 apportionment of Ms. O'Connell's claimed damages, which they  
15 are required to do.

16 So, for example, Ms. O'Connell identified that she  
17 had a prior back injury in 1989. Dr. Dunn also testified that  
18 she had degenerative disc disease in her back. Dr. Dunn is  
19 obligated, and the plaintiffs are obligated to apportion that  
20 damage and identify percentages of what they attribute the  
21 symptoms that Ms. O'Connell is complaining of, to the fall,  
22 and those symptoms or her prior medical condition, and they  
23 haven't done that in this particular case.

24 And so, I think it would be improper for the jury to  
25 be permitted to consider any evidence from either one of them

1 because they haven't apportioned it. It would be prejudicial  
2 error.

3           The same is true with regard to Dr. Tingey. And  
4 going back to Dr. Dunn, we -- we also have a preexisting  
5 condition of fibromyalgia. And so, again, that plays a role  
6 that Dr. Dunn has to differentiate between all of these things  
7 in coming to his conclusions, which the plaintiff did not have  
8 him do.

9           With regard to Dr. Tingey, Dr. Tingey identified  
10 that Ms. O'Connell did, in fact, have mild right knee  
11 arthritis. He was not informed that Ms. O'Connell had a July  
12 14th, 2010 fall. Ms. O'Connell also has identified that she  
13 does, in fact, have fibromyalgia. And again, these are  
14 preexisting conditions that the plaintiff is obligated to  
15 apportion through their physicians and their testimony, which  
16 wasn't done in this particular case.

17           It's our position, Your Honor, that the jury is not  
18 permitted to consider any of the evidence by these two  
19 particular treating physicians by the failure to properly  
20 apportion the damages in this particular case. Whether it be  
21 special medicals, whether it be pain and suffering in the  
22 past, or whether it's pain and suffering in the future, it  
23 doesn't frankly matter. They haven't apportioned it, and the  
24 jury can't consider it.

25           THE COURT: And you have some case authority to

1 cite?

2 MR. SEMENZA: I do, Your Honor, and that's fine.  
3 And let me quote from this particular case. "In a case where  
4 a plaintiff has a preexisting condition and later sustains an  
5 injury to that area, the plaintiff bears the burden of  
6 apportioning the injuries, treatment, and damages between the  
7 preexisting condition and the subsequent accident." And that  
8 citation is Schwartz vs. State Farm Mutual Auto Insurance  
9 Company. It is a federal district court case out of Nevada,  
10 2009, and it cites Kleitiz or Kleitiz v. Raskin, 103 Nevada 325,  
11 a 1987 case.

12 THE COURT: 103 Nevada 325 is the Nevada --

13 MR. SEMENZA: Yes.

14 THE COURT: -- state court case?

15 MR. SEMENZA: Yes, and it's a -- Schwartz vs. State  
16 Farm is a Lexis cited case and a Westlaw cited case, and I do  
17 have the citations for -- actually, I have a copy of the  
18 opinion, Your Honor. May I approach?

19 THE COURT: Yes.

20 MR. SEMENZA: Your Honor, we also do have a bench  
21 brief, and I know you haven't had an opportunity to review it.

22 THE COURT: Okay. So, I'm going to have to read  
23 that, read this, and the Nevada case -- state court case  
24 that's cited as well.

25 MR. SEMENZA: Yes, Your Honor. May I approach --

1 THE COURT: Yes.

2 MR. SEMENZA: -- with regard to the bench brief?

3 THE COURT: I have read these before, but I need  
4 to --

5 MR. SEMENZA: Thank you.

6 THE COURT: -- read them again. Do you have -- do  
7 you want to be heard on this at this point?

8 MS. MORRIS: I do just briefly. I mean, Dr. Tingey  
9 addressed that she had mild arthritis in her right knee that  
10 he did not believe that had any impact in the injury that was  
11 caused. She had no prior symptoms to her knee, no medical  
12 visits for at all, and he specifically addressed it in his  
13 testimony.

14 As for the back injury, in 1989 that resolved and  
15 there was no further treatment to it. I certainly would not  
16 classify that as a preexisting condition that needed to be  
17 apportioned to what we have 20 years later.

18 The crux of this case and other cases similar to it  
19 is where someone has a prior accident, in a car accident,  
20 maybe they've just finished treating, maybe they had residual  
21 symptoms from it, then they have an additional accident in  
22 which you have to apportion, you know, where's the injury from  
23 that to happen in this case. Or they have symptoms and  
24 they've already had pain, and it's resolved, and they shortly  
25 later have another accident, could it be related. But he's

1 talking about a back injury in 1989 that resolved after some  
2 physical therapy, and no need for it after that.

3           Additionally, Dr. Dunn did address fibromyalgia in  
4 his testimony, and said that it would not change his opinion  
5 as to the need for the neck surgery in the complaints that  
6 she's having, because it's generally not seen there.

7           So, I don't think there is any requirement for  
8 apportionment in this case, and they were very clear in their  
9 testimony what they related to causation and the needs to be.  
10 In addition though, I mean, I would like the opportunity to  
11 review this information as well, you know, and provide a brief  
12 in response.

13           THE COURT: All right. Well, what we'll do is, I'm  
14 going to obviously read the cases again. We've got the jury  
15 waiting, and really, this impacts jury instructions.

16           MR. SEMENZA: Correct, Your Honor.

17           THE COURT: So, we've got time for me to review  
18 this, and in the meantime, you need to put your case on.

19           MR. SEMENZA: Understood, Your Honor.

20           THE COURT: All right, let's bring our jury back.

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

22                           (In the presence of the jury)

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

24           THE COURT: Thank you. Please be seated. And the  
25 record will reflect the presence of all eight members of our

1 jury and our remaining one alternate. Counsel are present  
2 with their respective clients, all officers of the court are  
3 present as well. And the plaintiff has rested. You may call  
4 your first witness.

5 MR. SEMENZA: Thank you, Your Honor. Ms. Macias  
6 should be outside.

7 THE MARSHAL: Remain standing, face the court clerk,  
8 raise your right hand.

9 ARACELI MACIAS, DEFENSE WITNESS, SWORN

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

12 THE WITNESS: Araceli Macias. A-r-a-c-e-l-i. Last,  
13 M-a-c-i-a-s.

14 THE COURT: Thank you. You may proceed.

15 DIRECT EXAMINATION

16 BY MR. SEMENZA:

17 Q Good morning, Ms. Macias. How are you doing?

18 A Good morning. Good, thank you.

19 Q Ms. Macias, where are you employed?

20 A Wynn Resorts.

21 Q And how long have you been employed at Wynn?

22 A Since, April of 2005.

23 Q And what is your current position there?

24 A Supervisor in interior horticulture.

25 Q And can I have you speak up a little bit when you

1 answer?

2 THE COURT: Sorry, I couldn't hear that last part.  
3 Supervisor of what?

4 THE WITNESS: I'm a supervisor in horticulture  
5 interior.

6 BY MR. SEMENZA:

7 Q Can you tell us -- well, first of all, how long have  
8 you held that position?

9 A On and off since 2008.

10 Q And what do your job duties entail as a supervisor  
11 in the horticultural department in the interior?

12 A Start off with -- I pre-shift. I basically have my  
13 crew do their areas. Order plant material, check all the  
14 areas where all the plants are. There's just a lot that I do.

15 Q Do you oversee other employees?

16 A Yes.

17 Q Okay. Who do you supervise?

18 A I supervise my crew, which is a crew of 13. As  
19 well, if exterior needs help as well. All crew members are  
20 under supervisors, which are seven of us, so.

21 Q There's seven supervisors?

22 A Um-hum.

23 Q And you oversee 13 of them?

24 A No, I oversee 13 of my crew members.

25 Q Okay.

1 A Yeah.

2 Q And what does your crew do?

3 A We work at the inside of the casino.

4 Q And specifically, what do you do -- what does your  
5 crew do on the inside of the casino?

6 A Atrium section, we plant, we maintain, detail, we  
7 water, we deconstruct and construct, we carry plant material,  
8 push plant material to the atrium, all sorts of detailing.

9 Q Okay. Do you do any of that work directly, or is it  
10 your crew that undertakes it and you supervise?

11 A They do probably about the -- for sure, 100 percent.  
12 I go in there and do about maybe 20 of it. I mostly  
13 supervise.

14 Q Okay. And did you have any other positions at Wynn  
15 other than being a supervisor?

16 A At the beginning in 2005, I was a floral designer.

17 Q I'm sorry, floral designer?

18 A Designer, um-hum.

19 Q And how long did you hold that position?

20 A Two years, and went -- after that, went into  
21 horticulture as a gardener.

22 Q Are you familiar with the watering that takes place  
23 of the plants --

24 A Yes.

25 Q -- in the atrium area of the Wynn?

1 A Yes.

2 Q And how long have you been familiar with that  
3 watering that's taking place there?

4 A With the watering, since I was gardener, as a  
5 gardener watering myself, familiar with that part and actually  
6 doing the watering. Irrigation-wise, I would say about two  
7 years since I've been a supervisor, just talking with my  
8 irrigation supervisor.

9 Q Who do you directly report to?

10 A My manager.

11 Q And who is your manager?

12 A Freddy Cordon.

13 Q I'm sorry, say that one more time.

14 A Freddy Cordon.

15 Q And what is his title?

16 A He's a manager in horticulture.

17 Q So, they have supervisors, and then managers?

18 A Um-hum.

19 Q Is that a, yes?

20 A And then we have the director as well.

21 Q Okay.

22 A Yes.

23 Q To your knowledge, are there logs kept at the Wynn  
24 identifying the irrigation watering in the atrium area of the  
25 hotel?

1 A In the atrium, and everywhere on the property. Yes.

2 Q And is the watering -- the irrigation that's done in  
3 the atrium area of the Wynn done by computer?

4 A Yes, it is.

5 Q And how long has it been done by computer?

6 A Since opening, 2005.

7 Q And is there a particular program that is used by  
8 the Wynn relating to the irrigation in the atrium area?

9 A Yes, it's called Maxicom.

10 Q And are you familiar with that computer system?

11 A Not 100 percent, but yes, I am somewhat.

12 Q And does that computer program store historical  
13 watering information --

14 A Yes, daily.

15 Q -- that took place at the Wynn?

16 A Yes.

17 Q And would that computer program have historical  
18 watering information relating to the atrium area on February  
19 8th of 2010?

20 A Yes.

21 Q And have you obtained watering information for the  
22 atrium area at the Wynn from February 8th of 2010?

23 A Yes.

24 Q And how did you do that?

25 A Speaking with my irrigation supervisor, I asked him

1 for the papers or the forms.

2 Q And did you accompany him when he pulled up those  
3 records?

4 A Yes.

5 Q And did you see him pulling those records --

6 A Yes.

7 Q -- off the computer?

8 A Um-hum.

9 Q And did he give you a hard copy of those records?

10 A Yes, he did.

11 Q Are those records kept in the ordinary course of  
12 Wynn's business?

13 A Yes.

14 Q And who is the individual that helped you retrieve  
15 this information relating to the historical watering in the  
16 atrium area of the Wynn?

17 A On that day?

18 Q Yes.

19 A Carlos Figueroa. He's the irrigation supervisor.

20 Q And is he the one responsible for the computer  
21 irrigation system in the atrium area?

22 A Yes.

23 Q Do you know how long he's worked there at the Wynn?

24 A Since opening as well. Probably before myself.

25 Q And can I have you turn --

1 MR. SEMENZA: Oh. May I approach, Your Honor?

2 THE COURT: Yes.

3 BY MR. SEMENZA:

4 Q Ms. Macias, I'm showing you what has been marked as  
5 Defendant's Proposed Exhibit Z. It's comprised of a few  
6 pages. Can you look that document over and tell me if that is  
7 the report you printed relating to the irrigation and watering  
8 in the atrium area of the Wynn on February 8th of 2010?

9 A Yes, it is.

10 Q And are you capable of testifying as to its  
11 contents?

12 A Yes.

13 MR. SEMENZA: Your Honor, I would move for the  
14 admission of Defendant's Proposed Z.

15 THE COURT: Any objection?

16 MS. MORRIS: No objection.

17 THE COURT: It will be admitted.

18 (Defense Exhibit Z is admitted)

19 MR. SEMENZA: Thank you, Your Honor.

20 BY MR. SEMENZA:

21 Q Ms. Macias, we're looking at the first page of  
22 Exhibit Z, and what is the title of the document at the top?

23 A It's the flow data for site over in the Wynn atrium.

24 Q Okay. And this would be the plant areas in the  
25 atrium?

1 A Correct.

2 Q Okay. And does it identify a particular date?

3 A It does. It's Monday, February the 8th, 2010.

4 Q Okay. And what does the graph describe?

5 A To the left, if you look at the left corner, that  
6 arrow going up, those are the gallons. And the line at the  
7 bottom, numbers 00 through 23, those are the times that the  
8 water runs.

9 Q Is this a graph of the watering that was conducted  
10 through the irrigation system on February 8th of 2010?

11 A At the atrium, yes.

12 Q Okay. And what does it identify with regard to  
13 hours 6:00 A.M. to 7:00 A.M.?

14 A It identifies the time that they watered the atrium.

15 Q Okay. So, during that period of time, that one-hour  
16 period on February 8th, 2010, from 6:00 A.M. to 7:00 A.M., did  
17 the Wynn water in the atrium area through its irrigation  
18 system?

19 A Correct.

20 Q And then moving to the right, does it also show some  
21 additional watering that was conducted on that day?

22 A Yes, between 11:00 A.M. and just prior to 12:00 P.M.

23 Q All right. Again, that's in the atrium area of the  
24 Wynn --

25 A Correct.

1 Q -- near the south entrance?

2 A Near the south, yes.

3 Q I'm going to have you turn to the third page of the  
4 document. Actually, let me have you turn -- yeah, that's  
5 fine. Let me have you turn to the third page of the document.  
6 Can you identify for the jury what this is?

7 A This here -- okay. The first line says date, and  
8 then second line numbers, it's like the 00s, that's the actual  
9 data. The projected time would be, the projected time, right,  
10 that we may water on that time, but the water's actually on  
11 the next --

12 Q Okay.

13 A -- page.

14 Q So, the column here on the far lefthand side, does  
15 that identify --

16 A The date.

17 Q -- the hours?

18 A Yes. The date, and then the hours.

19 Q Okay. And then the actual -- this column, "actual  
20 data," what does that identify? Does that --

21 A That's the actual watering time. And then, if you  
22 see there to the right, it says "GPM."

23 Q Okay.

24 A Uh-huh, gallons per minute.

25 Q So, if that number is 0.00, does that have any

1 significance to you?

2 A That it did not water yet.

3 Q Okay. So, there was no watering for that particular  
4 time if it's 0.00?

5 A Correct.

6 Q Okay. And so, was there any watering conducted, at  
7 least in this column -- well, let me ask you; the lefthand  
8 column, what time period does that identify?

9 A The very top is 2:49, and that's 2:49 P.M.

10 Q Okay. And the bottom of the lefthand column?

11 A That would be 12:36 P.M.

12 Q Okay. And anywhere on that lefthand column, does it  
13 identify that there was watering in the atrium area of the  
14 Wynn?

15 A No.

16 Q Let's move to the column to the right. What time  
17 period does the column to the right reference?

18 A That would be 12:35 P.M. and -- I'm sorry.

19 Q And then, is there a -- what is the time period  
20 that's referenced in that right column?

21 A I'm sorry. 12:35 P.M.

22 Q Okay. And then, was there -- at the bottom of the  
23 right hand column, is there a time identified?

24 A 11:52 A.M., so it's going backwards.

25 Q Okay.

1 A Um-hum.

2 Q And in this right column, does it identify whether  
3 there was any watering conducted in the atrium area of the  
4 Wynn Las Vegas --

5 A Still --

6 Q -- during this particular time period?

7 A Still not yet, no.

8 Q Okay. So, as of 11:52 A.M. on February 8th, 2010,  
9 was there any watering?

10 A Not yet, no.

11 Q Okay. I'm showing you the fourth page of this  
12 document, and I'm focusing on the lefthand column. Based upon  
13 your review of this, does it identify when the atrium area of  
14 Wynn Las Vegas on February 8th, 2010 was last watered on that  
15 particular day?

16 A Yes.

17 Q Okay, what does it identify?

18 A 11:39 A.M.

19 Q What is your understanding as to -- okay. And how  
20 much -- how long did it water for in the atrium area?

21 A That time, from 11:36 to 11:39, so three minutes.

22 Q Okay, and it shut off at what time?

23 A 11:39 A.M.

24 Q And is it your understanding -- well, what is your  
25 understanding as to whether there was any other watering that

1 was conducted in the atrium area of the Wynn Las Vegas on  
2 February 8th of 2010?

3 A From this log here, 11:08 A.M., in sections -- or in  
4 minutes, should I say, and it ends at 11:39 A.M.

5 Q Based upon your review of this report, was there any  
6 watering conducted in the atrium area of the Wynn Las Vegas on  
7 February 8th, 2010 after 11:39 A.M.?

8 A No.

9 Q Are you aware of any leaks that were reported on  
10 that particular day?

11 A No.

12 Q Now, in addition to watering through the irrigation  
13 system, does Wynn also water in a different way?

14 A Yes. We carry what's called a Tanks-A-Lots. It's a  
15 20-gallon tank with a spigot, and we water.

16 Q And how is that used?

17 A Manually pushed and -- with a hose.

18 Q Is it fair to characterize that as hand watering?

19 A Yes, that's what we call that.

20 Q And when is the atrium area of the Wynn -- during  
21 this period of time around February 8th of 2010, when, if  
22 ever, is it hand watered?

23 A We start watering once we get upstairs. It's -- we  
24 start at 5:00, so about 5:30, we start watering, if needed,  
25 and we pretty much get done by about 11:30, 12:00 --

1 Q Okay.

2 A -- if -- again, if we need to water or hand water.

3 Q You don't know whether there was any hand watering  
4 on that particular day, do you?

5 A No.

6 Q And is your staff trained in any way to make sure  
7 that there aren't any spills or watering outside of the  
8 designated areas?

9 A Yes, we carry towels with us. We place towels on  
10 the floor in case we happen to drip, or the hose happens to  
11 drip. As they're rolling the cart, they're watering and  
12 cleaning.

13 Q Why generally, if you have to hand water, that you  
14 water in that morning time?

15 A Traffic of people. Safer.

16 Q And is the horticultural department staff trained to  
17 do anything if there is any water that might get on a marble  
18 surface outside of the designated atrium --

19 A Yes.

20 Q -- plant area?

21 A We carry radios with us. If there were some type of  
22 a leak, stay there, call us, call somebody. PAD's always  
23 around there as well, so.

24 Q And would the leak or the --

25 THE COURT: What's PAD?

1 THE WITNESS:

2 I'm sorry. PAD would be the floor cleaners, casino cleaners.  
3 They pretty much clean all bios, liquids, anything like that.

4 BY MR. SEMENZA:

5 Q And so, if there is a spill, then it's addressed  
6 generally -- when is it addressed?

7 A Right away.

8 Q Now, what does Wynn water the plants in the atrium  
9 with?

10 A Regular water.

11 Q And is that true back in February of 2010?

12 A Yes.

13 Q Does the Wynn use any additives to what it waters  
14 the plants with?

15 A No.

16 Q Does it use any substances that are green in nature  
17 to water its plants with?

18 A No.

19 MR. SEMENZA: I don't have anything further, Your  
20 Honor.

21 THE COURT: Cross?

22 CROSS-EXAMINATION

23 BY MS. MORRIS:

24 Q Hey, how are you?

25 A Good morning. Well, thank you.

1 Q My name's Christian Morris. Just got a few  
2 questions for you.

3 A Um-hum.

4 Q The system that you use here for the watering, it's  
5 -- is that an extensive system? Is it a large system?

6 A The hand watering, or the computer?

7 Q Irrigation. Thank you.

8 A Irrigation? It's the whole -- the whole outside,  
9 inside, both Encore and Wynn, so it's pretty big.

10 Q Does it pump through like gallons and gallons of  
11 water?

12 A Yes.

13 Q Now, the electronic irrigation system, if I  
14 understand what you said correctly, it's computer operated; is  
15 that right?

16 A Yes, correct.

17 Q So, the computer tells the watering to happen, and  
18 it happens; is that right?

19 A The computer tells it what we tell it to do, yes.

20 Q And is there a person from the horticulture  
21 department out in the areas where the watering is happening  
22 when the computer starts the watering?

23 A All areas that -- we have designated times and areas  
24 so each group knows when it's going to water; so yes, we are  
25 there.

1 Q So, back in February 8th, 2010, who from the  
2 horticulture department was assigned to the atrium area?

3 A Gardeners. I wasn't there that day, but I'm sure  
4 gardeners were there.

5 Q Do you know who was working in the atrium area at  
6 the time the electronic watering happened?

7 A On that day?

8 Q Yes.

9 A No.

10 Q I think you said that the watering occurred from  
11 11:36 to 11:39; is that correct?

12 A Yes.

13 Q How many gallons of water were pumped through in  
14 that three minutes?

15 A Calculator? 25, 15, 5 (indecipherable) the time,  
16 10, 5, 5, we've got 10, 15, 10, and 5, so what, about 60 or  
17 something within those minutes.

18 Q And how does the irrigation system work in the  
19 atrium; are there pipes?

20 A We have what we call a Netafim System. And in the  
21 atrium -- I'm not sure if you're familiar to it, but they're a  
22 hose with holes, and that's our irrigation system. As well,  
23 we have drippers that go into our pots.

24 Q I want to show you a picture, and this is Joint  
25 Exhibit 0011. It's under tab 9. This is a photograph that we

1 have of the atrium area that was taken. Now, can you tell me  
2 if you know, are there those hoses located underneath anything  
3 that we're looking at here?

4 A Underneath, I don't see anything here, but visible,  
5 no.

6 Q Where are those hoses in this photograph, if you  
7 know?

8 A Inside the pots, the flowers. Back then, it was --  
9 the system was used. The green flowers in the middle. Do you  
10 see that?

11 Q Can you -- actually, if you touch the screen, it  
12 makes a mark.

13 A Oh, okay. So, these pots here, oh, and then these  
14 here. So, it would be in the middle of the pot.

15 Q And then the water comes out through holes in the  
16 pipe -- or in the hose?

17 A Well, it's a drip system, so it's -- they're  
18 dripping into the plant.

19 Q And you said that you water only with regular water,  
20 nothing added; is that right?

21 A Right.

22 Q Do you use anything to help fertilize the plants in  
23 the atrium area?

24 A We are that good that we just use water.

25 Q So, it's just dirt and water; is that correct?

1 A Yes.

2 Q And -- and it comes out through pipes, and then you  
3 also --

4 A Hand water.

5 Q -- hand water?

6 A Um-hum.

7 Q Okay. Now, you said you weren't working back on  
8 February 8th, 2010; is that correct?

9 A Not in that area.

10 Q Oh, but you were working that day?

11 A Yes.

12 Q What's your shift? Do you remember what your shift  
13 was back then?

14 A 5:00 to 1:00. By that time, I was at Encore  
15 supervising back and forth.

16 Q And when you say 5:00 to 1:00, what do you mean by  
17 that?

18 A 5:00 in the morning to 1:00 in the afternoon.

19 Q Did you ever see Ms. O'Connell fall in the atrium  
20 area?

21 A No.

22 Q Do you -- did you ever speak to the porter who was  
23 assigned to that area and was supposed to be keeping the floor  
24 clean?

25 A No, ma'am.

1 Q Did you ever speak to the -- or try and discover who  
2 the person was in the horticulture department that was  
3 assigned to the atrium area that day?

4 A No.

5 Q Can you describe for me, or maybe if you know, why a  
6 computer system is used to water?

7 A A lot of plant material for manual watering.  
8 Um-hum.

9 Q And it seems to me that the times and locations of  
10 this watering is carefully monitored; is that right?

11 A Yes.

12 Q Would that be fair to say?

13 A Um-hum.

14 Q That it's -- I mean, you were able to go back this  
15 year and access water records from 2010; is that right?

16 A Yes.

17 Q And you were simply -- you just were able to go into  
18 the computer system and print that out; is that right?

19 A Yes.

20 MS. MORRIS: Thank you.

21 THE WITNESS: Um-hum.

22 THE COURT: Redirect?

23 MR. SEMENZA: Just a couple questions.

24 //

25 //

## 1 REDIRECT EXAMINATION

2 BY MR. SEMENZA:

3 Q I'm showing you what has been -- it's Joint  
4 Stipulated Exhibit 8. Do you know what this photograph  
5 represents?

6 A The atrium.

7 Q Okay.

8 A South.

9 Q And this is part of the atrium area?

10 A Yes.

11 Q And this is part of the area that would be watered  
12 based upon the report that we saw?

13 A Correct.

14 Q Okay. This is just part of the atrium though, isn't  
15 it?16 A This is -- if I'm looking at it right, it's the  
17 south.18 Q And there's -- would you consider the atrium to be  
19 large?

20 A Yes.

21 Q And is there a walkway in the center of the atrium?

22 A Yes, there is.

23 Q And so, there -- where are the plants in the atrium  
24 generally?

25 A Generally, what we call beds is all this right here,

1 in this section over here.

2 Q And are there other portions of the atrium that are  
3 not depicted in this photograph?

4 A The opposite side, I guess, but it's the same.

5 Q Okay. So, okay. And so, there's an opposite side  
6 with an atrium on that portion?

7 A Correct, uh-huh.

8 Q So, this picture would represent a relatively small  
9 amount of the atrium area?

10 A Yes.

11 Q I'm showing you what has been admitted as Joint  
12 Exhibit 9. Do you see that there? There appears to be a  
13 green object on the lefthand side of the photograph; do you  
14 see that?

15 A Yes.

16 Q Do you know what that object is?

17 A That's a speaker. Yeah, speaker. Music.

18 Q Is there -- is there music that is pumped through  
19 the atrium area?

20 A All day.

21 MR. SEMENZA: Nothing further.

22 THE COURT: Any recross?

23 MS. MORRIS: None, thank you.

24 THE COURT: May this witness be excused? Oh, wait.  
25 Jury questions, we've got some. Okay, approach.

1 (Off-record bench conference)

2 THE COURT: All right, so questions from the jury.

3 THE WITNESS: Yes.

4 THE COURT: Okay. First question, what employee  
5 position orders hand watering to be done?

6 THE WITNESS: Supervisor.

7 THE COURT: Are plants ever colored to improve their  
8 looks? In other words, artificially colored?

9 THE WITNESS: No.

10 THE COURT: All right. Okay. So, has the Maxicom  
11 watering system ever malfunctioned during your tenure,  
12 resulting in leaks in the casino?

13 THE WITNESS: Has it malfunctioned? It's gotten  
14 stuck.

15 THE COURT: Okay.

16 THE WITNESS: I guess, yeah.

17 THE COURT: All right. Has it resulted --

18 THE WITNESS: Well, it's --

19 THE COURT: Has that resulted in leaks --

20 THE WITNESS: Actually, it's not the actual --

21 THE COURT: -- into the casino?

22 THE WITNESS: I'm sorry. It's not the actual  
23 computer system, but valves would get stuck. But the computer  
24 system has been fine, to my knowledge.

25 THE COURT: All right, but has that, again, the

1 valves getting stuck resulted in leaks into the casino?

2 THE WITNESS: I have to say not so much into, but  
3 the pipe draining, yeah, but it doesn't -- how can I put this?

4 THE COURT: I don't know, you have to --

5 THE WITNESS: Spout out, I guess.

6 THE COURT: Spout out?

7 THE WITNESS: Yeah.

8 THE COURT: Okay.

9 THE WITNESS: It's more the pipes -- the leaking --  
10 it's like a pipe with a hole. It's dripping down.

11 THE COURT: Okay. Have you ever witnessed any  
12 irrigation slip and falls?

13 THE WITNESS: No.

14 THE COURT: No?

15 THE WITNESS: No.

16 THE COURT: All right. Now, between the flower pots  
17 and the curb area that you were shown in the photograph, the  
18 green area between the --

19 THE WITNESS: That looks like grass?

20 THE COURT: Is that artificial or real plant  
21 material?

22 THE WITNESS: It's real. It's called selaginella.  
23 It's a potted grassy moss. Um-hum.

24 MR. SEMENZA: Your Honor, I have a couple follow  
25 ups.

1 THE COURT: Okay. Go ahead.

2 MR. SEMENZA: No, I don't have any further  
3 questions, Your Honor.

4 MS. MORRIS: Just a couple, briefly.

5 RE-CROSS-EXAMINATION

6 BY MS. MORRIS:

7 Q You said that the supervisor is the one who orders  
8 the hand watering; is that correct?

9 A Yes.

10 Q Do you know when the atrium area was hand watered on  
11 February 8th, 2010?

12 A On that specific date, no.

13 Q Do you know who the supervisor was in 2010 who would  
14 have ordered the hand watering?

15 A Yes.

16 Q Who is that?

17 A Tracey Gonzalez.

18 Q And if I'm clear on your other testimony, you don't  
19 know who was actually working in the atrium area for the  
20 horticulture department that day; is that correct?

21 A On that day, no.

22 Q When did you learn about Yvonne's fall?

23 MR. SEMENZA: Your Honor, I think that's outside the  
24 scope of recross -- or redirect -- I guess recross.

25 THE COURT: All right.

1 MS. MORRIS: It's based on has she ever witnessed a  
2 slip and fall, I think was the question, due to irrigation  
3 system. And I was -- I had thought the question was, had she  
4 ever heard or knew of slip and falls resulting from it, so --

5 THE COURT: The question was, had she ever witnessed  
6 an irrigation --

7 MS. MORRIS: Okay.

8 THE COURT: -- slip and fall.

9 BY MS. MORRIS:

10 Q You didn't witness this one; is that correct?

11 A Correct.

12 Q Okay. And you didn't respond in any way to the area  
13 where Yvonne fell; is that correct?

14 A No.

15 Q And you didn't talk to anyone in the horticulture  
16 department to figure out what had happened on February 8th,  
17 2010; is that correct?

18 A Correct.

19 MS. MORRIS: Thank you.

20 THE WITNESS: Um-hum.

21 THE COURT: Okay. I just have a question to clarify  
22 about the exhibit. This was Z --

23 MR. SEMENZA: Yes, Your Honor.

24 THE COURT: -- that was admitted? On page 1 where  
25 you said it showed the -- it had the graph where it goes up on

1 the side with gallons, and then across horizontally with time.

2 THE WITNESS: Um-hum.

3 THE COURT: So, at the top, it looks like it shows  
4 30 gallons on those two different times on the graph. Is that  
5 for the whole atrium area, or just the part we're looking at  
6 in the pictures?

7 THE WITNESS: I'm sorry, what page would that be?  
8 The one with the 11:00 o'clock one?

9 THE COURT: Do you have that --

10 THE WITNESS: 11:39?

11 THE COURT: -- exhibit for her?

12 MR. SEMENZA: Yes, I do.

13 THE COURT: Again, Z.

14 MR. SEMENZA: It's --

15 THE WITNESS: Oh, that.

16 THE COURT: So, in other words, is -- does this --  
17 this 30 gallons, is that the total for the whole atrium, or  
18 just this one part that we're looking at in the photograph?

19 THE WITNESS: Okay. So, you see the lines with the  
20 little dots going up?

21 THE COURT: Yes.

22 THE WITNESS: Okay. They're all different little  
23 areas in the atrium, but that specific one for that, whatever  
24 that one was, could be the shrubs, could be the tall plant  
25 material, could be the color, we call. That received the 30

1 gallons of water.

2 THE COURT: Okay. So, this graph represents all the  
3 watering in the entire atrium that day?

4 THE WITNESS: In the atrium for that specific area  
5 in the beds. I don't know if that makes sense. So, each bed  
6 -- we call it bed, we have cantuas, tall palms, we have  
7 shorter shrubbery, we have what we call color, and again, we  
8 have shrubbery. So, each section gets watered different  
9 minutes. They're drained about the same time. So, that  
10 specific line there shows what that plant received.

11 THE COURT: So, the bed that's depicted in the  
12 photos that we've -- we're looking at, that's -- that's the  
13 irrigation for that one particular bed?

14 THE WITNESS: For the -- for the whole atrium. So,  
15 there's 1, 2, 3, 4. At the time now, there's five beds.

16 THE COURT: Okay, but this -- at this time --

17 THE WITNESS: Um-hum.

18 THE COURT: -- in 2010?

19 THE WITNESS: Yes.

20 THE COURT: So, this is for the whole atrium; not  
21 just the one part where we can see in the pictures --

22 THE WITNESS: I'm sorry, it's the whole atrium.

23 THE COURT: Okay, that's all I was --

24 THE WITNESS: Oh.

25 THE COURT: -- trying to say.

1 THE WITNESS: I'm sorry.

2 THE COURT: Now --

3 MS. MORRIS: Just one quick --

4 THE COURT: Follow up?

5 MS. MORRIS: -- clarification.

6 FURTHER RECROSS-EXAMINATION

7 BY MS. MORRIS:

8 Q So, is it that every single line we see up here  
9 represents a different portion of the atrium being watered?

10 A Correct.

11 MS. MORRIS: Okay, thank you.

12 MR. SEMENZA: Nothing further.

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

14 MS. MORRIS: Yes.

15 THE COURT: Thank you. You may go.

16 THE WITNESS: Oh.

17 THE COURT: Thank you very much for your testimony.

18 You may call your next witness.

19 MR. SEMENZA: Ms. Matthieu. She should be outside.

20 THE MARSHAL: Watch your step, please. Remain  
21 standing, face the court clerk, raise your right hand.

22 TRISH MATTHIEU, DEFENSE'S WITNESS, SWORN

23 THE CLERK: Please be seated, and then please state  
24 and spell your first and last name for the record.

25 THE WITNESS: Trish, T-r-i-s-h. Matthieu,

1 M-a-t-t-h-i-e-u.

2 THE COURT: You may proceed.

3 MR. SEMENZA: Thank you, Your Honor.

4 DIRECT EXAMINATION

5 BY MR. SEMENZA:

6 Q Good morning, Ms. Matthieu.

7 A Good morning.

8 Q How are you?

9 A Good.

10 Q Where are you currently employed?

11 A Wynn.

12 Q And what is your position?

13 A I'm the Director of Claims.

14 Q And how long have you held that position?

15 A Since March of this year.

16 Q March of 2015?

17 A Yes.

18 Q And what are your duties as a Director of Claims?

19 A I oversee both the guest claims department, as well  
20 as the workman's compensation department.

21 Q What is the guest claims department?

22 A The guest claims department is responsible when  
23 things happen, such as a guest falling, or also property  
24 damage. A server accidentally spilled something on someone's  
25 slacks, they said the valet damaged their car, that type of

1 thing.

2 Q As part of your duties as the Director of Claims, at  
3 times, do you provide training to the security department?

4 A I work very closely with the security department.  
5 We do little mini sessions with them, talking with them about  
6 the types of things that could benefit the guest claims  
7 department in the reports that they write.

8 Q And does some of that training include how to  
9 document an incident?

10 A We talk with them about the types of things that are  
11 needed. So, as an example, how to properly document the guest  
12 information; the phone number, the address, the email address,  
13 ways to contact them. To make sure that they offer the guest  
14 the forms to fill out a statement if the guest wishes to do  
15 so; that type of thing.

16 Q Okay. And prior to becoming the Director of Claims,  
17 what position did you have?

18 A I was the manager of the guest claims department.

19 Q And what were your duties as the manager of the  
20 guest claims department?

21 A Working with the claims representatives and the  
22 administrative assistant, and that would be taking a look at  
23 all of the incidents that happen within the hotel, both Wynn  
24 and Encore, and deciding which ones were actual claims, which  
25 would be things that involve guest property or the guest

1 bodily injury, assigning those to the claims representatives,  
2 and then overseeing the day to day work flow of the  
3 department.

4 Q Okay. And how long did you hold that position?

5 A About five years.

6 Q When did you come to Wynn?

7 A It was June of 2010.

8 Q And are you familiar with the general policies and  
9 procedures that Wynn employs at the scene when a guest reports  
10 an injury?

11 A I am.

12 Q Can you tell us about that?

13 A When you say, a guest reports the injury, can you  
14 repeat the question? I want to make sure that I understood --  
15 are you talking about the security department?

16 Q Yes.

17 A Okay. When an incident happens with a guest, it  
18 would depend on whether it was property or bodily injury. Do  
19 you want me to speak specifically to bodily injury?

20 Q Yes, let's do that.

21 A Okay. The most important thing is to make sure that  
22 the guest is taken care of. That would be guest medical  
23 needs, if an ambulance or anything needed to be called,  
24 paramedics, that type of thing. And also making sure that the  
25 scene is secure, if there were any hazards present, making

1 sure that that gets addressed immediately so we prevent any  
2 further guest injury. And then taking documentation of the  
3 scene itself, as well as working with the guest if the guest  
4 is able to provide statements, talk with the officer to  
5 document everything that they possibly can, and that's if the  
6 guest is available and able to do that.

7 Q And how do you secure the scene?

8 A There's a variety of different ways. It would  
9 depend upon what the incident was. If there was a spill, if  
10 security arrived and the spill was still present, they would  
11 stand over the spill if necessary, get other officers  
12 involved, other people involved. They would notify PAD  
13 immediately. That's if it's still present when the officer  
14 arrives.

15 Q What is PAD?

16 A Oh, I'm sorry. That's the public area department.  
17 They're tasked with keeping the property clean at all times.  
18 We actually all are, but that's specifically the PAD's  
19 responsibility.

20 Q Is it everyone's responsibility to make sure that  
21 the Wynn is kept clean?

22 A We take great pride in the resort. It's a five-star  
23 property, and part of our core values are take personal  
24 responsibility; don't leave it for others. It's really  
25 important that when you're walking through the property, if

1 you see something, that you take care of it, or that you call  
2 for someone to do so. Everyone I know does that.

3 Q And that's something that Wynn employees are trained  
4 to do?

5 A Yes.

6 Q Now, are there times that hazardous conditions are  
7 remedied prior to security arriving?

8 A I would say that's extremely common.

9 Q And why is that?

10 A The moment a hazardous condition is found, it needs  
11 to be addressed. That's of utmost importance. We wouldn't  
12 want someone else to be injured, or anyone to be injured if a  
13 hazardous condition existed.

14 Q And as -- so, when security arrives on scene, is one  
15 of their responsibilities to document what happened?

16 A Yes.

17 Q Okay. And what do they generally do to document  
18 what happened?

19 A It would depend on where the area was, and what the  
20 situation was. Typically, they're speaking with the guest  
21 that experienced the incident, asking them what happened.  
22 They would look around to see if there were any witnesses, and  
23 if there were, they would offer statements for witnesses to  
24 complete, if there were any. They would ask for security  
25 control center, that's SCC. They would call to see if there

1 was camera coverage available, and if there was, that would be  
2 secured. So, there's a variety of different things that they  
3 do.

4 Q Do they sometimes take photographs?

5 A Oh, yes.

6 Q Okay. When are they supposed to take photographs?

7 A It would depend upon the incident. It's pretty much  
8 a decision that the officer is tasked with once they're on  
9 scene, because it would depend upon the scene and what was  
10 going on. If it was a situation where someone needed to be  
11 transported, then that's going to take a back seat.

12 Q It's situational?

13 A Yes.

14 Q Okay. Are Wynn security officers asked to sometimes  
15 take pictures of people's shoes?

16 A They can. It might assist in determining a possible  
17 cause of what may have contributed to the incident.

18 Q And in your experience, do they generally ask for  
19 permission from the guest in order to do that?

20 A It would depend upon the situation. If it's  
21 non-obtrusive, and they're just taking general photos and they  
22 take a photo of the shoe, they may just take a photo of the  
23 shoe. But if they were to ever photograph someone's face, or  
24 if a guest had an injury maybe that was in an unusual area,  
25 something that someone might consider more private, before

1 they would ever even take a picture of anything like that,  
2 they would ask the guest's permission to do so.

3 Q After the Incident Report is taken and statements  
4 are gathered, what happens to that report?

5 A That would be something that then goes to the guest  
6 claims department and it's taken a look at. That was my  
7 previous position as the manager, something that I did was to  
8 look at the incident reports and to see what happened. And  
9 then a claims representative would be assigned that file and  
10 they would take a look at everything that the officer had  
11 done.

12 They would take a look at any of the statements that  
13 were there. They would double-check -- if camera coverage was  
14 available, they would make sure that that had been secured;  
15 they would get a copy of it. If camera coverage was not  
16 available, they would ask the security control center to  
17 double-check one more time to make sure, and then they would  
18 follow up with the guest if the guest provided contact  
19 information.

20 Q Okay. And so, the claims department would  
21 specifically make a second request regarding surveillance  
22 footage?

23 A Yes, if it said that there wasn't any. If there  
24 was, then they would request a copy.

25 Q Do you know whether that was done in this particular

1 case though?

2 A It is always done.

3 Q Does a security officer actually go up and view  
4 video surveillance footage?

5 A It's unusual for them to do that. That's not really  
6 their area of expertise. We have a department specifically  
7 tasked that that is their job; that is what they do all day  
8 long is look at camera coverage. I guess it's possible they  
9 could go up there, but it's not part of their investigation  
10 process. There's a department that does that that's trained  
11 to do that.

12 Q So, would your expectation be that a security  
13 officer that investigates an incident would not be the one to  
14 review camera coverage?

15 A Correct. It would be security control center.

16 Q And so, how would that process work for a security  
17 officer on the floor to make a request to see if there's  
18 camera coverage?

19 A They're normally radioed up. If they're in an area  
20 that for some reason, maybe radio is not working really well,  
21 like they were outside, they were having some difficulty, they  
22 would get to the closest phone they possibly could, and they  
23 would call the security control center and request a coverage  
24 review.

25 Q Okay. Are there multiple numbers to call for the

1 SCC; the security control center?

2 A We have one central phone number. And it's  
3 extremely important, because that one number, it's also a  
4 dispatch and things, so everyone in the casino has one number  
5 that we call.

6 Q If there is camera coverage of a particular  
7 incident, do you have any understanding of what is clipped by  
8 SCC?

9 A The incident itself, and then they will usually  
10 attempt to clip 30 minutes before and 30 minutes after.

11 Q Ms. Matthieu, can I have you turn in that white  
12 binder in front of you to Defense Proposed Exhibit Y, which is  
13 under tab Y?

14 A I have it.

15 Q And it's comprised of multiple pages; is that  
16 correct?

17 A Yes.

18 Q What is this document?

19 A This is a screen shot, this first page, of the  
20 player system called Patron. It shows Ms. O'Connell and her  
21 ratings. It's --

22 Q Without identifying the contents of the document,  
23 generally speaking, what is it?

24 A It's a screen shot of our system that tracks play.

25 Q And the second page?

1 A The same.

2 Q And the third page?

3 A Also.

4 Q And what is Patron?

5 A Patron is a -- Patron is a system that we use. I  
6 think a lot of people are familiar with like a player's card.  
7 We call it a red card. So, when someone is gaming, they can  
8 insert their red card in a slot machine, or if they're at the  
9 tables, they can provide it to the dealer, and it tracks their  
10 play, and it's something that the player can earn comps on.

11 Q And are you familiar with the contents of this  
12 particular three-page document?

13 A Yes.

14 Q And is -- Patron is utilized by the Wynn Casino?

15 A It is.

16 Q And it's utilized in order to track the play of its  
17 patrons?

18 A Correct.

19 Q And to your knowledge, is the information contained  
20 in Proposed Exhibit Y true and correct?

21 A It is.

22 Q Have you had a chance to go through and verify the  
23 accuracy of the information depicted on these pages in  
24 relation to the Patron system itself?

25 A Yes.

1 Q And it is accurate?

2 A Yes.

3 Q And are these screen shots utilized in the ordinary  
4 course of Wynn's business?

5 A Yes.

6 MR. SEMENZA: Your Honor, I've move for the  
7 admission of Defendant's Proposed Exhibit Y.

8 THE COURT: Any objection?

9 MS. MORRIS: Yes, foundation.

10 THE COURT: Overruled. It will be admitted.

11 (Defense Exhibit Y is admitted)

12 MR. SEMENZA: Thank you, Your Honor.

13 BY MR. SEMENZA:

14 Q Let's take a look at the first page of the document.  
15 The upper lefthand corner, does it depict -- is there a  
16 picture there?

17 A Yes.

18 Q Okay. And next to the picture, does it identify  
19 someone's name?

20 A Yes.

21 Q Whose name is that?

22 A Yvonne S. O'Connell.

23 Q Okay. And is there a screen shot to the right of  
24 the picture depicting her license?

25 A Yes.

1 Q And is there another picture below that with a  
2 signature?

3 A Yes.

4 Q Okay. And to the best of your knowledge, is this a  
5 screen shot from Ms. O'Connell's red card or player card?

6 A Yeah, this is from the Patron system. Yes.

7 Q And I'd like you to focus on the box that says,  
8 "Session information." Do you see that?

9 A Yes.

10 Q And does it identify a slot session detail in that  
11 left column?

12 A It does.

13 Q Can you identify the start date and time for us,  
14 please?

15 A February 8th, 2010 at 3:39 P.M. was the start time.  
16 That would be the start of gaming with the card inserted. And  
17 then, the end time of February 8th, 2010 at 4:27 P.M., that  
18 would be when the card was removed.

19 Q What does this information mean to you?

20 A That during that time frame, the card was inserted  
21 and someone was gaming.

22 Q And does it identify what machine was being played?

23 A It does.

24 Q What is it?

25 A That WOF Classic, that's a Wheel of Fortune machine.

1 Q Okay. And does it identify any points that are  
2 earned?

3 A Yes, that's 350 points.

4 Q Does it identify any comps that were earned?

5 A \$18.89.

6 Q And what was the denomination of the machine that  
7 was being played?

8 A That was a penny machine.

9 Q Moving over to the second column, does it identify  
10 how much Ms. O'Connell gambled during that particular session?

11 A Yes.

12 Q What does it identify?

13 A Coin in, coin out, 1,050, and coin out, \$1,105.20.  
14 So, if you subtracted those two, that would be how much she  
15 won. That she played 525 games during that time frame, and  
16 that it was 47 minutes and 51 seconds, and that the average  
17 per minute was \$21.

18 Q Did she win or lose?

19 A She won.

20 Q She won? Coin in versus coin out identifies --  
21 okay, yes, she did win.

22 A Yes.

23 Q How much did she win approximately?

24 A 1,105.20 minus 1,050; the difference between the  
25 two.

1 Q Okay. And the column to the right, what does this  
2 depict?

3 A This column is when someone has credits on their  
4 card, which are sometimes earned from people's play. So, in  
5 this particular one, she did not use any credits, so it was  
6 all currency.

7 Q And so, she put in money into the machine,  
8 essentially?

9 A Yes.

10 Q Okay. Showing you the second page of the same  
11 exhibit, does this identify an additional session where the  
12 red card was used?

13 A Correct.

14 Q Can you identify the start and end dates and times?

15 A Started February 8th, 2010 at 4:30 P.M., and ended  
16 just a few minutes later, February 8th, 2010 at 4:33 P.M.

17 Q And does it identify a particular machine?

18 A It does, a Quick Hits. That's the description.

19 Q And what was the denomination of that machine?

20 A That one was a 5 cent -- a nickle machine.

21 Q Did she earn any points on her red card?

22 A 12 points.

23 Q Did she earn any comps?

24 A \$1.11.

25 Q And in this particular session, does it identify

1 coin in and coin out?

2 A It does.

3 Q Can you identify that for the jury, please?

4 A 67.50 in, and 76.05 out.

5 Q How many games did she play?

6 A 15.

7 Q And how much time did she play?

8 A 2 minutes and 54 seconds.

9 Q In this particular column, did Ms. O'Connell use  
10 free credit during her session?

11 A Yes.

12 Q How much free credit did she use?

13 A \$30.

14 Q And the coin in, coin out -- well, let's talk about  
15 the coin in for a minute. Does that mean that Ms. O'Connell  
16 necessarily put in \$67 and 50 cents?

17 A No, it's total play.

18 MR. SEMENZA: One moment, Your Honor. No further  
19 questions.

20 THE COURT: Cross?

21 MR. SEMENZA: Thank you, Ms. Matthieu.

22 CROSS-EXAMINATION

23 BY MS. MORRIS:

24 Q All right, so I just want to understand this a  
25 little bit better here. This is page 3 of the exhibit.

1 A Um-hum.

2 Q The green is the time in; is that correct?

3 A No, that's out.

4 Q Time out? Okay. And then the white is time in; is  
5 that right?

6 A No, these are two different plays.

7 Q Okay. So, we've got this sheet you have here,  
8 Exhibit 3. So, the first line, the green line, that's the  
9 first play that you said she made, right?

10 A Correct.

11 Q Okay. And then the second one -- I can't tell if  
12 the first one's green or white, but the second one's  
13 definitely green.

14 A The one that's blue?

15 Q Yes, the one that's blue. Is that green or --  
16 should that be green or white?

17 A That would be white. That's just for ease of  
18 reading, so it's white, green, white, green.

19 Q Oh, okay. So, you're saying that she took out  
20 \$1,000 -- \$1,050 and put it in the machine; is that my  
21 understanding of your testimony?

22 A No.

23 Q Did she use her card?

24 A Yes.

25 Q Okay.

1           A     If she didn't use the red card, it wouldn't have  
2 registered here.

3           Q     So, did she have those points on her card?

4           A     Yes, that would have been on the card. The \$30  
5 would have been points on the card. When you're talking --  
6 when -- can you ask the question again, please?

7           Q     Sure. I'm just trying to understand your testimony.  
8 She put her card into the machine; is that correct?

9           A     Correct, both times.

10          Q     Okay. She didn't actually pull money out of her  
11 pocket and put it in the machine; is that accurate?

12          A     No.

13          Q     That's not accurate?

14          A     No.

15          Q     Are you saying that she put \$1,050 into a machine?

16               MR. SEMENZA: Asked and answered, Your Honor.

17               MS. MORRIS: I'm sorry, I'm just trying to clarify.

18               THE COURT: Overruled.

19               THE WITNESS: If you go back to the first one where  
20 she first played, it will show 1,050 in and 1,105 out. So,  
21 when you asked me on the second machine if she put \$1,105 in,  
22 no, she won a small amount there between -- the difference  
23 between the two.

24                       When she went over to the next machine, I don't know  
25 if she put some of the money in her pocket. You know,

1 sometimes people decide to hold back some of their winnings,  
2 they put it in. Then she went to the next machine and she  
3 played \$67.50, and then she kept playing, and she used \$30 in  
4 credit, when she finally cashed out at 76.05. The difference  
5 between 67.50 and 76.05 is what she won from that machine.

6 BY MS. MORRIS:

7 Q Okay, I just want to be clear, how many machines are  
8 you saying she played?

9 A Two.

10 Q Okay, you're saying she only played two machines,  
11 and the first machine, how much did she gamble?

12 A 1,050, and then she won, lost, won, lost, won, lost,  
13 and so it ended with 1,105, so the difference between the two  
14 is how much money she won.

15 Q And you're saying that she was playing a penny  
16 machine that she put the \$1,050 into?

17 A Correct, but when it's a penny machine, it's not  
18 just a penny. Most people play max bet. It could be several  
19 dollars per hand.

20 Q What is the max bet on a -- on a penny machine?

21 A This particular one goes back five years. I don't  
22 know what the max bet at that particular time was. It could  
23 be --

24 Q Did you say --

25 A -- two to three dollars --

1 Q Okay, so --

2 A -- or more.

3 Q And how long did you say she sat at that machine?

4 A Over 47 minutes.

5 Q So, mathematically, if she was max betting on that  
6 machine, how many spins per minute is she playing; do you  
7 know?

8 A I --

9 Q It would be about ten spins per minute, if I have  
10 the math right.

11 A I'm sorry, I don't know how many spins she was  
12 playing per minute. I have no way of knowing that.

13 Q Do -- and you also don't know if she actually  
14 inserted cash into that machine; is that correct?

15 A She would have had to have inserted cash, because  
16 there was no -- the first machine, there was no free credit,  
17 so she had to put cash in.

18 Q Okay, so she put -- that I think was my question  
19 earlier.

20 A Okay.

21 Q So, are you saying that she pulled out \$1,050 and  
22 put it into a penny machine?

23 A I'm saying that while she was sitting there, she was  
24 putting money in the machine, and she played 1,050.

25 Q Okay, and when --

1           A     During the time frame, she used no free credit, so  
2 she would have had to have used currency.

3           Q     When did she leave that first machine?

4           A     Can you go back? She left it at 4:27 P.M., and then  
5 was at the next machine at 4:30.

6           Q     Okay, so when did she start playing that first  
7 machine?

8           A     At 3:39 P.M.

9           Q     And then, you said she cashed out at what time and  
10 left the casino?

11          A     I don't know what time she left the casino.

12          Q     Oh, okay. What's the last time -- what's the second  
13 time she cashed out?

14          A     When she cashed out the last time? 4:33 P.M.

15          Q     So, she cashed out twice, and the last time she  
16 cashed out was at 4:33?

17          A     Yes.

18          Q     And so, from 3:39 to 4:33, she gambled over \$1,000;  
19 is that what you're saying?

20          A     Yes.

21          Q     I also want to look down here further on this sheet  
22 number 3. You've got some more numbers here printed out.  
23 Looks like on February -- or looking down to the February  
24 11th, 2009 date, according to this paper, Yvonne gambled  
25 \$9,525. Am I reading that correctly?

1 A It's difficult for me -- can you --

2 THE COURT: I'm sorry, what was the date you said?

3 MS. MORRIS: February 11th, 2009. It's midway down.

4 THE WITNESS: I would need to see the detail from  
5 another screen shot, which is what these other two are, for  
6 the time that she was there at this particular incident.

7 BY MS. MORRIS:

8 Q Why do you need to see a screen shot if you're  
9 relying on --

10 A Coin in and --

11 Q -- above it, it says 1,050, and that number's  
12 correct?

13 A I don't know if she had any credits.

14 Q So, she could have had credits that would get her up  
15 to \$9,525?

16 A She could have a lot of credits. I don't know.  
17 Some people bank their credits for a really long time; they  
18 don't use them right away.

19 Q But Yvonne gambled twice on the day she fell, and  
20 she used her credits on that day; is that right?

21 A On the second machine, yes, she used credits.

22 Q Looks like you also have her gambling \$6,055 on  
23 January 21st, 2010. Am I reading that correctly?

24 A Ms. O'Connell was a loyal Wynn customer, it appears.

25 Q What do you mean by that?

1           A     Looks like she was here frequently, that she liked  
2 to play, and enjoyed her time at Wynn.

3           Q     This is a printout of her visits; is that correct?

4           A     That would be the printouts of the visits where she  
5 used her red card.

6           Q     Okay. So, on average, it looks like she's at your  
7 casino maybe five times a year; would that be fair? Maybe  
8 more than that; ten times a year?

9           A     I think it depends on the year, it varies a little  
10 bit there, but she has visited with us.

11          Q     And so, sometimes she'll come and she'll gamble \$45,  
12 and then other times, she'll come and gamble \$9,525?

13          A     I don't know if she was involved in any tournaments  
14 or not. I don't know what she was involved in or what she was  
15 gambling. So, if you're asking me about her gambling habits,  
16 I'm sorry, I'm not aware of what -- how many times she  
17 gambled, or, you know, how long she was there, or what machine  
18 -- I mean, I'd have to see a lot of detail if you're going to  
19 get into asking me a lot more questions about her past visits.

20          Q     Then why did you call her a loyal customer?

21          A     Because she's here frequently. Going by this, we  
22 would consider this a loyal Wynn customer; someone who enjoys  
23 coming to Wynn. In comparison, there are times when people  
24 have a red card; it's one time, they've never been back. So,  
25 they've come to visit us one time, and not been back. This is

1 someone who's been here several times. Anyone can see that  
2 she's been here several times and has gamed with us.

3 Q And can you tell from this what type of machine  
4 she's playing?

5 A Not -- I can tell they're all slot machines, but not  
6 on what types of slot machines.

7 Q So, the first slot machine you have her at for the  
8 \$1,050 gamble is a penny machine; is that right?

9 A Yes.

10 Q And then, what was the second machine?

11 A That was the nickel, a five cent machine.

12 Q And do you know where those machines were that she  
13 was gambling at in the casino; where they're located?

14 A They have location codes on them, but I don't know  
15 where those locations were, because those are just numbers.  
16 I'm not familiar with that.

17 Q And do you deal with this Patron system often?

18 A Yes.

19 Q Patron Management?

20 A Yes.

21 Q And how do you interact with this? What do you use  
22 it for?

23 A A variety of different things. In the guest claims  
24 department, sometimes what we do is we offer our guest comps,  
25 things like that. So, sometimes, we'll look to see if someone

1 has been a regular guest of ours, and maybe a small mishap has  
2 happened, something that we want to do something for them. A  
3 lot of times, if someone is a very loyal customer that has a  
4 lot of comps, when we look at the Patron account, we might see  
5 that they're already considered what's called RFB; room, food  
6 and beverage. They already get all of that comped, so that  
7 would be something that we might need to look at something --  
8 doing something different for them.

9 Q Now, you are the manager now in the claims  
10 department; is that correct?

11 A I'm the director.

12 Q The director? Okay. And tell me what your job  
13 duties are as the director.

14 A I oversee both the guest claims and the work comp  
15 departments.

16 Q Are you in charge of the budget for your department?

17 A No.

18 Q Do you receive any bonuses if you keep the  
19 department in a good budget?

20 MR. SEMENZA: Your Honor, I'm going to object.  
21 Outside the scope and not relevant.

22 THE COURT: Overruled.

23 THE WITNESS: No, no.

24 BY MS. MORRIS:

25 Q Nothing?

1 A Nothing, no. That would be impossible.

2 Q Why would it be impossible?

3 A You could never figure out how much a claim is going  
4 to cost every year. You have no idea what's going to happen.

5 Q So, there's no budget?

6 A Not that I'm aware of. It would be impossible to  
7 figure out every year how many people are going to have an  
8 incident that's going to cost money, and how much money that's  
9 going to cost.

10 Q Now, you were -- remind me what your position was  
11 back in 2010. I'm sorry.

12 A Manager.

13 Q Okay.

14 A Of the claims -- guest claims department.

15 Q And as the manager of the guest claims department,  
16 what were your duties back then?

17 A Taking a look at the incident reports that happened  
18 with security, assigning them to the claims representatives in  
19 the department, and then working closely with them to manage  
20 the day to day operations of the claims. So, that might  
21 entail speaking with guests. If a guest wants to speak to a  
22 manager or someone else other than the claims representative,  
23 it would involve looking at the files, reviewing the files,  
24 following up with guests, things like that.

25 Q Now, so you reviewed Yvonne's claim?

1 A Quite a while ago, yes.

2 Q Were you in charge of the investigation of her  
3 claim?

4 A Not at that time. I believe it happened before I  
5 got there. I got there in June of 2010, so it would have been  
6 after that. And I do remember reviewing the file on more than  
7 one occasion and working with the claims representative that  
8 was on the file.

9 Q Okay. Who was the claims representative on the  
10 file?

11 A The very first one was a woman by the name of Nickey  
12 Olson. She hasn't been with the company -- it was shortly  
13 after that that she was no longer with the company. And --

14 MR. SEMENZA: Go ahead.

15 THE WITNESS: And then Kristen Steinbach.

16 MR. SEMENZA: Your Honor, may I approach?

17 THE COURT: Yes.

18 (Off-record bench conference)

19 THE COURT: All right. Overruled to the extent we  
20 discussed at the bench.

21 BY MS. MORRIS:

22 Q I'm sorry, you were saying that the people that you  
23 had worked with on the file were Nickey Olson; is that  
24 correct?

25 A That was the original claims representative, yes.

1 Q And then, who's the other person?

2 A Kristen Steinbach.

3 Q And you said that you've worked on this file as  
4 well; is that correct?

5 A As the manager, it's not unusual for me to be  
6 involved in a lot of the files. And on that particular one,  
7 yes, I did do some work on it. And, yes, I worked with a  
8 claims representative.

9 Q When did you get involved in Yvonne's claim?

10 A Very early on from my initial start date. I don't  
11 remember the exact date.

12 Q When was your initial start date?

13 A June of 2010.

14 Q And when you came on in June of 2010, what  
15 involvement did you have in Yvonne's claim?

16 A Just the initial overall review of it, making sure  
17 that everything was in the file, taking a look at it. I know  
18 that there -- I seem to remember that we didn't have a phone  
19 number for Ms. O'Connell. And we had sent a letter, we didn't  
20 have a response. So, I was reviewing, like the fact that she  
21 never contacted. I think -- I don't remember exactly. It's  
22 been a long time.

23 Q You don't know if Yvonne ever contacted the Wynn, do  
24 you?

25 A From my recollection, she never did.

1 Q What investigation, if you know, was done into  
2 Yvonne's claim?

3 A There was a check with the horticulture department.  
4 PAD, public area department. The --

5 Q And -- oh, sorry.

6 A Go --

7 Q Sorry, go on.

8 A The security report was in there. Photos of the  
9 scene.

10 Q Who was contacted in the horticulture department?

11 A I don't remember the exact person's name. I'm  
12 sorry, it's been five years.

13 Q What information did the horticulture department  
14 provide to the file, if any?

15 A That we don't use any green liquid. There's nothing  
16 green liquid that we use in the watering. And that the time  
17 frame that we watered did not coincide with anything that  
18 could have possibly been wet in the area where she fell at the  
19 time that she fell. So, therefore, whatever it was that she  
20 fell on, could not possibly have been caused by the plants.

21 Q Did you bring the claims file with you? Do you know  
22 if I have a copy of the claims file?

23 A I don't know what you have.

24 Q And so, you're saying this is documented in a claims  
25 file on Yvonne somewhere; is that correct?

1           A     It would probably be in our electronic notes much,  
2 much afterwards. The original file, that the security report  
3 took would not have been in there. It would have been phone  
4 conversations with horticulture, and PAD, and that type of  
5 thing.

6           Q     And you talked to someone in PAD; public area  
7 department?

8           A     Public area department.

9           Q     Who did you --

10          A     And that was just verifying the normal procedure,  
11 that we're constantly cleaning, that we're going through on a  
12 normal basis, that the -- that area, they go back and forth in  
13 quite a bit, and just constantly cleaning.

14               MR. SEMENZA: Your Honor, may we approach again?

15               THE COURT: Yes.

16                       (Off-record bench conference)

17               THE COURT: All right, sustained. It's outside the  
18 scope of direct examination at this point.

19 BY MS. MORRIS:

20           Q     You've reviewed the file in this case; is that  
21 correct?

22           MR. SEMENZA: Objection, Your Honor. We've been  
23 there.

24           MS. MORRIS: I'm moving onto a new question.

25           THE COURT: All right, we'll see.

1 BY MS. MORRIS:

2 Q Was the porter assigned to the area interviewed in  
3 this matter?

4 MR. SEMENZA: Objection, Your Honor, exceeds the  
5 scope.

6 THE COURT: Sustained.

7 BY MS. MORRIS:

8 Q Do you know the identify of the porter --

9 MR. SEMENZA: Objection --

10 MS. MORRIS: -- assigned to the area?

11 THE COURT: Sustained. This is all outside the  
12 scope if you're talking about her review of the file at this  
13 point.

14 BY MS. MORRIS:

15 Q You've stated it's your policy and procedure to  
16 continuously sweep and keep the floors clean; is that correct?

17 MR. SEMENZA: Objection, misstates testimony.

18 MS. MORRIS: Does it? Maybe it does.

19 THE COURT: Well, I don't think that was -- I think  
20 her testimony was that, yeah, that they do continually clean,  
21 so, overruled.

22 THE WITNESS: Our PAD department is tasked with  
23 consistently, every day, all day long, all night long, 24/7  
24 going through the areas and maintaining them, keeping them  
25 properly cleaned.

1 BY MS. MORRIS:

2 Q And in every area that they are -- in every area of  
3 the casino, there is a casino porter assigned; is that  
4 correct?

5 MR. SEMENZA: Objection, exceeds the scope. Lacks  
6 personal knowledge.

7 THE COURT: Sustained.

8 BY MS. MORRIS:

9 Q You've stated it's your policy and procedure to keep  
10 those floors clean. How do you do it?

11 A I'm not -- I do apologize. I don't work for PAD. I  
12 don't know exactly what they do as far as -- you'd be better  
13 ask -- I can tell you that I constantly see them, and that  
14 they use a dry mop in sweeping, they use wet when necessary,  
15 there's big scrubbing units that go through. I've been in the  
16 hotel at 4:00 A.M. before, and they have these great big  
17 pieces of equipment that go through and they clean the  
18 carpets, so spick-and-span is very important.

19 Q Would it be fair to say that because guest safety is  
20 such a high priority, that if something happens with a guest,  
21 a full investigation's conducted?

22 MR. SEMENZA: Objection, vague.

23 MS. MORRIS: This is cross.

24 THE COURT: Well, I don't know that it's vague, so  
25 on that basis, it's overruled.

1 THE WITNESS: I'll answer to the best of my ability.  
2 An investigation takes place when there's a bodily injury.

3 BY MS. MORRIS:

4 Q Okay, and is there an investigation into the cause  
5 of the bodily injury?

6 A To the best of our ability, yes.

7 Q And you said that photographs are sometimes taken,  
8 but not always; is that correct?

9 A Correct.

10 Q Are you aware of the testimony of Yanet Elias who  
11 said that they never move anything until the security can get  
12 there and take pictures of the photograph (sic)?

13 MR. SEMENZA: Objection, misstates testimony.

14 THE COURT: Well, yeah. Sustained.

15 BY MS. MORRIS:

16 Q Are you aware that Yanet Elias -- well, in her  
17 deposition and at trial, because we talked about it, said that  
18 -- that they never clean until security gets there?

19 A I'm not aware of that, and that really surprises me.  
20 I don't know if maybe she misunderstood, because the most  
21 important thing is to maintain a safe environment, and we  
22 would clean something up if there was a hazard present. We  
23 wouldn't have to wait until security got there. Guest safety  
24 is more important than that.

25 Q Now, there's a couple things to do, is that correct,

1 when there's a spill? You can either put cones up around it  
2 or clean; is that correct?

3 MR. SEMENZA: Objection to the extent it exceeds her  
4 knowledge.

5 THE COURT: Sustained. Is the objection foundation?

6 MR. SEMENZA: Yes, Your Honor.

7 BY MS. MORRIS:

8 Q Have you ever, yourself, responded to a guest  
9 injury?

10 A As -- not as it's happened, no. There's too much  
11 going on. They're trying to take care of the guest, they're  
12 trying to take care of the area, do the report. No, that  
13 would -- that would not be proper.

14 Q Why wouldn't it be proper?

15 A If you have a guest that just experienced an injury,  
16 and the first thing that you do is go over there and send a  
17 claims person to say, you know, hi, I'm here, I represent the  
18 claims department, it's just not the five-star service. The  
19 proper thing to do is to just make sure that that guest's  
20 medical needs are taken care of first. We can follow up  
21 afterwards.

22 They need to be taken care of, the area needs to be  
23 secured, the area needs to be taken care of, the officer needs  
24 an opportunity to see if there's camera coverage. There's a  
25 lot of things that take place. But if a guest wanted to meet

1 with me in person, of course, I'm more than happy to. If they  
2 needed someone to speak to them before they departed property,  
3 I've done that, you know, the next day followed up with  
4 someone; I've met with them. I've done that quite frequently.

5 Q But you've seen spills and people falling on video  
6 surveillance; is that correct?

7 A Yes.

8 Q And have you seen situations where they have not  
9 cleaned it up, but simply put up cones around the area?

10 A I'm sorry, I'm trying to remember. I want to make  
11 sure that I'm as truthful as I can be. I've seen where  
12 they've secured the scene, but it's all very fast. So, if  
13 you're talking about cones like sitting there forever, waiting  
14 for security to arrive, no, I have never seen that.

15 Q I'm sorry, say that again. Cones --

16 A If you're -- you were talking about cones. Maybe  
17 I'm misunderstanding you.

18 Q No, I just -- you said, cones sitting there forever  
19 until security arrives?

20 A Yeah.

21 Q Okay.

22 A If I understood the question, it sounded like you  
23 were asking me if I've seen on camera coverage that cones are  
24 securing a scene, waiting for security to get there, that  
25 they're standing there for a long time. I've never seen that.

1 I've seen cones and employees securing a scene, and very  
2 quickly, the scene is cleaned up. It's not waiting for  
3 security ever.

4 Q So, in your experience, that -- in responding to a  
5 guest injury, it's the proper five-star response to ensure  
6 that the guest is first and foremost --

7 A And that it's a --

8 Q -- okay; is that right?

9 A -- safe area. Safety and our guest experience.

10 Q And photographs are taken of the guest; is that  
11 correct?

12 A Sometimes, yes.

13 Q And photographs of their footwear are taken; is that  
14 correct?

15 A Sometimes.

16 Q And the purpose of taking the photographs of the  
17 footwear is to ascertain what might have contributed to the  
18 fall; is that right?

19 A It can help sometimes. It depends upon the  
20 situation. We're a hotel, and a nightclub environment, and  
21 things -- you know, unfortunately, we've seen situations where  
22 someone maybe wearing wedges, or really high heels, and  
23 they've mis-stepped or things like that, and sometimes, the  
24 shoes have contributed to incidents.

25 Q And that's important for your analysis in the claims

1 department; is that right?

2 A It's a piece of the puzzle, but it's not the  
3 determining factor.

4 Q So, in evaluating the claim in the claims  
5 department, a piece of the puzzle is photographs of their  
6 footwear, but there's other factors?

7 MR. SEMENZA: I'm going to object as to outside the  
8 scope.

9 THE COURT: Sustained. It's still beyond the scope  
10 of direct exam.

11 BY MS. MORRIS:

12 Q Have you been in the atrium area where Yvonne fell?

13 A Yes.

14 Q And how many times have you been there do you think  
15 approximately?

16 A Oh, I couldn't even count. It's -- it's a main  
17 thoroughfare where we walk through that frequently. It's a  
18 main area.

19 Q And aren't there in fact multiple security cameras  
20 at the ceiling of the atrium area?

21 A There are multiple cameras in the area, but that  
22 doesn't necessarily mean that they're facing the atrium.

23 Q Now, you said earlier that you try, if possible, to  
24 get clips of 30 minutes before the fall, and 30 minutes after;  
25 is that correct?

1           A     Of the location that it happens, where the fall  
2 happens, yes.

3           Q     And you also make sure -- or try and get photographs  
4 of the guest themselves; isn't that right? Their face?

5           A     No, I never said that. I said they sometimes do  
6 that, but not necessarily, no.

7           Q     Well, they sometimes do it. Do you know why they  
8 sometimes do it?

9           A     I can give you a pretty good example. If a guest  
10 had an incident and they didn't report it at the time, like  
11 maybe they had a small slip, didn't fall completely, and just  
12 departed, they were embarrassed, they didn't want to tell us,  
13 and they just left. And they didn't remember exactly like the  
14 time frame; I don't know, I think I fell at such and such  
15 time, and they come back to property and they tell us, or  
16 maybe they're a registered guest, and they stop by the front  
17 desk or call security the next day.

18                     And then they're telling the officer, well, I was in  
19 the casino, and I was walking through, I was headed towards  
20 the buffet, and I fell kind of in that general area. The  
21 officer might take a photo because it could help the people  
22 doing the camera coverage to try to find that guest and try to  
23 track the incident, especially if we're looking -- people lose  
24 track of time. They don't know if it's 2:00 o'clock in the  
25 afternoon or if it's 4:00, especially if it's an international

1 guest and their time clock is off anyway. So, it can assist  
2 our surveillance team.

3 Q So, the photograph of the guest can be used to try  
4 and locate them in the casino; is that fair?

5 A Yes.

6 MS. MORRIS: Thank you.

7 THE COURT: Redirect?

8 MR. SEMENZA: I'll just be brief, Your Honor. I  
9 want to go back to Y1.

10 REDIRECT EXAMINATION

11 BY MR. SEMENZA:

12 Q Now, is it your testimony that Ms. O'Connell put in  
13 \$1,050 when she sat at the table, or at the slot machine?

14 A No, I said that's the total amount gamed.

15 Q Okay. So, does that mean that each bet that Ms.  
16 O'Connell made over the course of that session would then add  
17 up to the coin in?

18 A Correct.

19 Q Okay, and the same with the coin out?

20 A Correct. So, the difference between the two is what  
21 she won.

22 Q Okay. So, we don't know how much money she actually  
23 put into the machine at that point in time?

24 A No, but I -- all I can tell you is it had to be  
25 currency.

1 Q But the betting, the 525 games that she played  
2 during that session, that betting added up to the coin in?

3 A Correct, and it was during 47 minutes and 51  
4 seconds.

5 Q And that would be consistent with a penny machine; a  
6 small denomination machine?

7 A It just varies. You know, some people bet more than  
8 others; some people push the button more frequently than  
9 others.

10 MR. SEMENZA: Thank you. Nothing further.

11 MS. MORRIS: Just a follow up question.

12 THE COURT: All right.

13 RECROSS-EXAMINATION

14 BY MS. MORRIS:

15 Q I actually think I might understand better based on  
16 what was just said. So, she could have put in \$40 and gambled  
17 that, winning and losing, all the way up and out. You're not  
18 saying she actually put in \$1,050; is that correct?

19 A Correct.

20 MS. MORRIS: Thank you.

21 FURTHER REDIRECT EXAMINATION

22 BY MR. SEMENZA:

23 Q Ms. Morris had showed you a previous chart that  
24 identified other play that Ms. O'Connell had?

25 A Um-hum.

1 Q And she gave you one example of where Ms. O'Connell  
2 had \$9,000 of play?

3 A Correct.

4 Q That would be the coin in, the multiple betting, as  
5 opposed to her playing or putting \$9,000 into a machine?

6 A Correct, along with any credits she had.

7 MR. SEMENZA: Thank you.

8 THE COURT: Any questions from the jury?

9 (Off-record bench conference)

10 THE COURT: All right, question from the jury. So,  
11 can you tell from the document that's been admitted as Exhibit  
12 Y how quick her play was?

13 THE WITNESS: I -- I can't tell how quick it was. I  
14 can tell you that it was averaging about \$21 a minute, and  
15 that during 47 minutes and 51 seconds, she played a total of  
16 525 games. So, I don't know if that helps at all or not.

17 THE COURT: Okay. So, 500 and 20 --

18 THE WITNESS: In other words, she pushed the button  
19 525 times.

20 THE COURT: Okay. And you had previously said this  
21 was a Wheel of Fortune machine. Is that a poker machine, or  
22 is that a --

23 THE WITNESS: No, it's not. It's the one that when  
24 you're walking by, it says, "Wheel of Fortune," and it's got  
25 the great big wheel at the top. And one of the bonuses, if

1 you hit the bonus on it, the wheel at the top spins around,  
2 and then you can earn extra -- so.

3 THE COURT: Okay. But it's not a poker machine?

4 THE WITNESS: It is not a poker machine.

5 THE COURT: So, it's not hands; it's just number of  
6 games? And is it --

7 THE WITNESS: Correct.

8 THE COURT: -- every time you press the button,  
9 that's a new game?

10 THE WITNESS: Correct.

11 THE COURT: Okay. Any questions then as a result of  
12 that?

13 MR. SEMENZA: No, Your Honor.

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

15 MS. MORRIS: Yes.

16 MR. SEMENZA: Yes, Your Honor.

17 THE COURT: Thank you very much for your testimony.

18 THE WITNESS: Thank you.

19 THE COURT: All right. Counsel approach.

20 (Off-record bench conference)

21 THE COURT: All right. Ladies and gentlemen, we  
22 have another witness, a doctor, who will be here at 2:00 P.M.  
23 So, I'm going to give you lunch until 2:00 P.M., and then  
24 we'll resume. So, you'll have a longer lunch break, so you  
25 can leave the building if you like.

1           And during this recess, of course, it is your duty  
2 not to converse among yourselves or with anyone else on any  
3 subject connected with the trial, or to read, watch, or listen  
4 to any report of or commentary on the trial by any person  
5 connected with the trial, or by any medium of information,  
6 including, without limitation, newspaper, television, radio,  
7 or internet, and you are not to form or express an opinion on  
8 any subject connected with this case until it's finally  
9 submitted to you.

10           So, we'll be -- you know, we'll need you back at  
11 2:00 o'clock. Thank you.

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

13                   (Outside the presence of the jury)

14           THE COURT: And the record will reflect the jury has  
15 departed the courtroom. So, I want to have counsel back at  
16 quarter to 2:00, and we'll see where we are on -- I'll in the  
17 meantime read the defendant's bench brief and cases cited  
18 before we come back, and we'll discuss it again when we come  
19 back at quarter to 2:00.

20           MR. SEMENZA: Thank you, Your Honor.

21           THE COURT: Thank you.

22           MS. MORRIS: Thank you.

23                   (Court recessed at 12:20 P.M. until 1:46 P.M.)

24                   (Outside the presence of the jury)

25           MR. SEMENZA: Good afternoon, Your Honor.

1 (Pause in the proceedings)

2 THE COURT: All right. We are back on the record in  
3 case number A-12-655992, Yvonne O'Connell vs. Wynn Las Vegas.  
4 We're outside the presence of the jury.

5 I read the defendant's bench brief regarding expert  
6 medical testimony to apportion damages, as well as the  
7 Schwartz case, which I'd read before, and reading it a second  
8 time refreshed my recollection. But I also went back and  
9 re-read the Nevada case, which again refreshed my recollection  
10 that I've had this case cited to me for the holding -- or the  
11 -- I should say the one part of the case, the Schwartz case,  
12 where it says, "In a case where a plaintiff has a preexisting  
13 condition and later sustains an injury to that area, the  
14 plaintiff bears the burden of apportioning the injuries,  
15 treatment, and damages between the preexisting condition and  
16 the subsequent accident," and that's -- then they cite Kleit  
17 vs. Raskin, the 103 Nevada 325 case, as well as the -- which,  
18 in turn, also relied on Restatement Second Torts.

19 The problem is that the Klietz case doesn't say  
20 that. Nowhere in that case does it say that. And that's -- I  
21 don't -- you know, obviously, this case never went anyplace  
22 for a higher court to review what was said there, but Kleit,  
23 as well as the Restatement Second of Torts, as well as all the  
24 Washington cases that are cited, are cases where you have two  
25 accidents, two separate tortfeasors, and then -- so there's

1 some argument being made as to whose burden it is to apportion  
2 damages.

3           Kleitz said when you have two accidents, that what  
4 happens is, it's the plaintiff's burden to prove that, in the  
5 second accident, the plaintiff was injured. If the plaintiff  
6 does that, then the burden shifts to the defense to apportion  
7 the damages between those two accidents. There's -- and of  
8 course, the Restatement of Second Torts talks about that,  
9 which is why the court cited the Restatement, says that makes  
10 sense, because vis-a-vis joint -- vis-a-vis two separate  
11 tortfeasors, it should be their burden to fight among  
12 themselves as to how the damages for the single injury should  
13 be apportioned between the two of them, and not -- the -- the  
14 burden should not be on the plaintiff.

15           And I realize that the federal court -- trial court  
16 in this bench case cited that case for that proposition. The  
17 problem is, the case doesn't say that. The Nevada case does  
18 not say that, and no one's ever cited me to any Nevada  
19 authority that says anything close to that.

20           So, what we have here is we have -- we have two  
21 doctors, and two -- you know, we have Dr. Dunn saying that  
22 plaintiff had a preexisting degenerative condition in her  
23 neck, which he believes was asymptomatic based upon the  
24 plaintiff's reports that she had no pain in the neck until she  
25 fell. This is his basis for saying that the fall caused the

1 condition in her neck to become symptomatic; i.e, resulting in  
2 pain.

3           And that, as -- so therefore, he believes she needs  
4 this surgery, a three-level anterior fusion, that -- to  
5 address her pain complaints that he believes were asymptomatic  
6 based upon her reports -- subjective reports of pain, and that  
7 she didn't have any pain prior to the accident. So, he -- you  
8 know, he causally connects it, saying, basically, she's the  
9 eggshell plaintiff.

10           Dr. Tingey has -- is looking at two different knees.  
11 He says, on the one hand, the left knee clearly has  
12 degenerative changes with medial meniscus tears on both sides,  
13 and that -- that is not related to the fall, so we don't even  
14 need to -- there's no causal connection, so there's nothing  
15 there.

16           He says the right knee looks like an acute injury,  
17 consistent with her report of a fall, and that he based his  
18 opinion that it was causally connected to the fall based upon,  
19 again, the plaintiff reporting that she -- the only fall she  
20 reported, and that she, you know, had this pain in her knee  
21 after that fall, and he didn't -- he wasn't told about any  
22 other kind of -- any other fall.

23           MR. SEMENZA: Um-hum.

24           THE COURT: And so, based on that, he causally  
25 connects it. But I don't think this is an apportionment issue

1 between two separate accidents.

2           And I know you like to -- because this is not the  
3 first time this Schwartz case has been brought out, you know,  
4 for the proposition. It says right in there, but when you  
5 look at the case they're citing, it doesn't say that in the  
6 case.

7           MR. SEMENZA: And, Your Honor, I think with regard  
8 to Dr. Dunn, we've got a situation where we've had a prior  
9 back injury in 1989. Dr. Dunn acknowledges that there was  
10 degenerative changes in her cervical and lumbar spine  
11 beforehand, and the only thing that has changed between that  
12 time is the plaintiff's subjective complaints of pain.

13           THE COURT: Well, I know in your brief that you say  
14 that, "The uncontroverted evidence at trial proves the  
15 plaintiff suffers from additional preexisting health issues  
16 and conditions, such as fibromyalgia, IBS, anxiety,  
17 depression, Ehlers-Danlos, and Marfan syndrome.

18           Well, first of all, I don't think that the plaintiff  
19 -- that the uncontroverted evidence does prove that she  
20 suffers, frankly, from any of those conditions. I mean, you  
21 can't -- you can't say, okay, well, we're going to believe her  
22 as to some of it, but not all of it, you know? She also --

23           MR. SEMENZA: Well, this is what --

24           THE COURT: She also reports that she --

25           MR. SEMENZA: -- she self-reported.

1 THE COURT: -- you know, suffers from heart  
2 palpitations, and all these other things. But more  
3 importantly, both doctors, right, Dr. Dunn and Dr. Tingey both  
4 said that fibromyalgia, even if they assume she has it, that  
5 it would not -- as for her neck pain -- because remember, Dr.  
6 Dunn says, as far as her lower back, he doesn't think, you  
7 know, that's surgical. And his -- his opinion -- I mean,  
8 nobody has connected up her complaints of back pain, so  
9 there's nothing as to lower back. There's just no causal  
10 connection regarding lower back.

11 Dunn only talks about her neck, because that's all  
12 he looked -- he's -- you know, he's opining, is that she needs  
13 a surgery to her neck, because she's got this stenosis, and he  
14 -- that was, by her report, asymptomatic until the fall.

15 Otherwise, you know, his testimony basically was,  
16 well, if you don't have pain, you could have this condition  
17 and not have any pain, and then you wouldn't have any surgery,  
18 because the only purpose for the surgery is to relieve pain.  
19 It's not -- there's no other reason to do it.

20 So, I just -- you know, I don't think that this  
21 Schwartz case stand -- well, it does stand for the proposition  
22 for what you've cited it, except it's just wrong. I mean, the  
23 cases it cites do not say what it says here. I mean, they --  
24 the Court in the Schwartz case makes a specific statement  
25 immediately followed by a citation to a case. It does not say

1 what the statement says. So --

2 MR. SEMENZA: I mean, if -- and I understand Your  
3 Honor's point in this, but I think it goes to -- frankly, the  
4 broader issue in this particular case is you have doctors who  
5 are opining on causation of pain which is purely subjective in  
6 nature, which I think is improper. I mean, that information  
7 -- I don't think that --

8 THE COURT: Well, I disagree with that. And I  
9 thought we'd already addressed that issue once before earlier  
10 in the case.

11 MR. SEMENZA: I think we did talk about that, yeah.

12 THE COURT: Yeah, because that was -- you tried to  
13 keep it out for that -- keep them from testifying for that  
14 reason, and I told you that I disagreed with that premise.  
15 Doctors do have to rely on plaintiffs' complaints, and  
16 sometimes, they will -- they may causally connect something,  
17 while admitting at the same time, if the report is false,  
18 well, it's false. But it's up to the jury to decide whether  
19 the plaintiff is credible about her complaints, and when they  
20 occurred, and what caused them, as far as that goes.

21 MR. SEMENZA: And I understand Your Honor's point.  
22 I guess my concern is that you overemphasize the -- the  
23 importance of what the doctors are testifying to by virtue of  
24 allowing that evidence in, because all -- you're basically  
25 taking the plaintiff's complaint that says, I'm in pain, the

1 plaintiff is telling that to a doctor, and the doctor is then  
2 basically saying, that's the basis for the causal connection.

3           And I don't think that it would be proper in that  
4 setting, and frankly, I don't think that assists the trier of  
5 fact in this particular case, because it's ultimately her word  
6 as far as the pain she's experiencing. And it certainly  
7 doesn't have any impact upon what the doctor's opinion  
8 necessarily is, because he's saying, look, she reported she's  
9 in pain. I have no objective way -- with the cervical neck;  
10 let's take that for example -- I have no objective way in  
11 order to verify that that pain is the result of this fall,  
12 other than taking the plaintiff's word for it.

13           And so, I think in allowing the doctor to testify,  
14 and allowing that evidence to go to the jury, you  
15 overemphasize that. And I don't think it assists the trier of  
16 fact, because ultimately, if you come back to the point, it's  
17 just her statement, and that's it.

18           THE COURT: Well, he says she has objective findings  
19 in the neck, right? And sometimes, those objective findings  
20 will also come with the patient saying, I have pain;  
21 sometimes, they don't.

22           MR. SEMENZA: Sure.

23           THE COURT: Okay. So, pain can -- is always  
24 subjective, no matter what. And so, a doctor's not going to  
25 recommend surgery if -- if a patient, even though they have

1 some findings on MRI or plain films, they're not going to  
2 suggest surgery if they say, I don't -- I -- I don't have any  
3 pain. There would be no reason.

4 So, doctors always have to make their diagnosis, in  
5 part, based up on the subjective complaints from their  
6 patients. That's the only way they can.

7 MR. SEMENZA: And I understand that, Your Honor, but  
8 -- and I'm not going to --

9 THE COURT: There are going to be times, certainly,  
10 when there are no objective findings, and someone is saying, I  
11 -- my neck hurts, my neck hurts, and plain films and MRI shows  
12 there's nothing there, there's absolutely nothing there, but  
13 that's not what we have here.

14 MR. SEMENZA: But that is what we have in this  
15 particular case, because of the objective findings that Dr.  
16 Dunn talked about were preexisting conditions. So, it's not  
17 like a situation where a patient walks into the doctor's  
18 office and says, I have all this pain, and he can't find  
19 anything related. There's no -- nothing objective in that  
20 setting.

21 And in this particular case, what we have is the  
22 patient walking in and saying, I have all this pain, and Dr.  
23 Dunn says, well, you do have a preexisting degenerative  
24 condition in your back. So, in that sense, there's even less  
25 of a causal connection, because there is preexisting issues

1 that predate the fall in this particular case that would then  
2 impact the determination of whether she's experiencing pain or  
3 not.

4 THE COURT: I know that, but I think that's for the  
5 jury to decide whether they believe the plaintiff or not,  
6 because -- because no one -- Dr. Dunn can't feel her pain, and  
7 he doesn't -- so it's really a question of her credibility on  
8 the totality of the evidence as to whether they believe that  
9 truly she had no pain before, and that now she did, or that it  
10 was -- you know, Dr. Dunn doesn't even see her for five years  
11 after the accident.

12 And so, whether they believe that she was truthful  
13 with him, or forthcoming with him, that's really for the jury  
14 to decide. All he can do -- and he has been very candid about  
15 what he based his opinion on. And if -- and so, I think it's  
16 pretty clear from his testimony that, you know, he's laid all  
17 that out, that --

18 MR. SEMENZA: Right, and I understand that. I mean,  
19 and I think you kind of summarized it well. It's based upon  
20 the believability of the plaintiff. And so, my issue is, then  
21 Dr. Dunn's testimony doesn't assist the trier of fact in  
22 making that determination. I mean --

23 THE COURT: Well, yeah, it does, because -- because  
24 she does have these objective findings that show she has --  
25 you know, she has a condition, that she's not -- that she has

1 a degenerative condition. And he said that, as people age,  
2 and, you know, they all will get degenerative disc disease.  
3 In fact, he said on cross that everyone will get it. You  
4 know, there's no one that escapes.

5           Some people like Sal, here's a good example, bounds  
6 off the stand and runs out of the courtroom at 79, and clearly  
7 is fine. I'm sure that if you took an x-ray or films of his  
8 spine, he would have some degenerative findings, but  
9 obviously, they're not bothering him.

10           And so, it does -- the explanation of what you have  
11 with a person who is potentially an eggshell plaintiff is --  
12 does assist the trier of fact, that she has some objective  
13 findings. She's not -- she's not completely making this up.  
14 The same thing with the right knee, you know? I mean, Dr.  
15 Tingey says the right knee has evidence of an acute tear. So,  
16 that is some corroboration that she actually has something  
17 wrong in her right knee that would -- and that his testimony  
18 was also that the pain that she reports is consistent with --  
19 with a medial meniscus tear like he sees on the findings from  
20 the MRI that was in 2014.

21           Now, when -- when it happened, okay, that goes back  
22 to the other evidence, right? So, he -- and he's not saying,  
23 I can say I know -- I can date from looking at the objective  
24 films. I'm, again, relying on her being truthful. Now, it's  
25 up to the jury to decide whether they think she is or not.

1 MR. SEMENZA: I understand, Your Honor. I've made  
2 the record, so that's fine.

3 THE COURT: All right.

4 MS. MORRIS: I have one issue I'd like to address,  
5 Your Honor.

6 THE COURT: Okay.

7 MS. MORRIS: Now that we know Dr. Klausner is going  
8 to be called, I would like to be able to question him on one  
9 issue that he stated in his report. He indicated that she has  
10 something called symptom magnification syndrome. And symptom  
11 magnification syndrome can only be diagnosed by doing a very  
12 specific clinical interview with a patient in order to  
13 establish -- and he relied on this report. I printed it out  
14 from the basis of his reports.

15 And what I'd like to do is, before he takes the  
16 stand and says she has symptom magnification syndrome, I'd  
17 like to be able to establish whether or not he's actually done  
18 appropriate testing to be able to testify as to that  
19 diagnosis.

20 THE COURT: So, you want to voir dire him to see if  
21 he has the foundation. And I think I -- I ruled before -- I  
22 usually rule this way on this, is if the -- if you can lay the  
23 foundation with the doctor that he has the qualifications to  
24 testify about that area, or any area, really, then you can ask  
25 him about it, so.

1 MR. SEMENZA: That's fine. Let's do that outside  
2 the presence of the jury, and make everyone comfortable.

3 THE COURT: Okay. All right, so he's here?

4 MR. SEMENZA: I will go check and see.

5 THE COURT: Okay.

6 MR. SEMENZA: I do not know the answer to that  
7 question. Let me check my phone. Your Honor, may I step out  
8 a moment?

9 THE COURT: Sure. Is the jury right out there?

10 THE MARSHAL: We have two in the restroom.

11 THE COURT: Okay, so be careful about where you go.

12 (Court recessed at 2:06 P.M. until 2:09 P.M.)

13 (Outside the presence of the jury)

14 THE COURT: All right. We're back on the record,  
15 still outside the presence of the jury.

16 MS. MORRIS: Thank you, Your Honor. Your Honor,  
17 during the deposition of Trish Matthieu, she testified that  
18 there is, in fact, a claims file in this matter, and that  
19 there are certain notes in a claims file regarding  
20 conversations as to the investigation of this incident, and  
21 comments about speaking with the horticulture department  
22 person, and questioning whether there was a green liquid -- or  
23 green liquid was used.

24 We certainly requested in our first Request for  
25 Production of Documents any and all claims file investigation

1 that was done in this matter. The claims file was never  
2 disclosed, certainly no comments regarding speaking with a  
3 horticulture employee regarding green liquid, and no privilege  
4 log was ever disclosed. And so, what I'd like to do is  
5 address that issue and talk about the non-disclosure of that  
6 information and an adverse inference.

7 MR. SEMENZA: They've closed their case. This issue  
8 is now -- I mean, we're in trial, so.

9 THE COURT: Yeah, I -- I mean, we don't know now  
10 whether there is a claim file. I mean --

11 MS. MORRIS: Well, she testified there was a claim  
12 file.

13 THE COURT: I thought you just said -- you said she  
14 testified in her deposition, is what you just said.

15 MS. MORRIS: So, I took the deposition of her as a  
16 30(b)(6) deponent, and it was regarding the investigation of  
17 this matter. And at no time did she say that there was a  
18 claims file that was kept that she had looked through, and  
19 that there was any type of comment in there regarding  
20 horticulture. And so --

21 THE COURT: You asked her those questions?

22 MS. MORRIS: I asked her about -- I think there were  
23 certain topics in the 30(b)(6) that she was designated for,  
24 and I did not designate the claims file adjuster; they just  
25 brought her. And it was regarding video surveillance, so it

1 wasn't a 30(b)(6) regarding it. But I did request in Request  
2 for Production of Documents any and all investigations,  
3 claims, files, questions, anything regarding the case. I have  
4 the Request for Production here, and no such document was  
5 disclosed, nor was there any redacted privilege log.

6 Now, I asked for it. I don't know that it exists,  
7 unless they tell me it exists, and either they don't give it  
8 to me, or they -- you know, they choose -- they choose to give  
9 it to me. However, in this case, neither of those things were  
10 done. And obviously, that's relevant information as to what  
11 could have potentially caused the slip and fall from Yvonne  
12 O'Connell.

13 THE COURT: All right. So, first of all, when --  
14 was something disclosed? Was something produced?

15 MS. MORRIS: No claims file was produced at all.  
16 The only things that were produced relating to what they did  
17 is what we have as joint exhibits, is essentially the Incident  
18 Reports --

19 THE COURT: Did they tell you no claims file  
20 existed?

21 MS. MORRIS: They said they had disclosed all  
22 relevant information in their response to Request for  
23 Production of Documents, and listed the information we have as  
24 our joint exhibit, but certainly not saying there's a claims  
25 file, we're not turning it over, nothing like that.

1 THE COURT: All right. Well, it just seems to me  
2 that that's something you should have addressed long ago with  
3 the Discovery Commissioner, and not --

4 MR. SEMENZA: Correct.

5 THE COURT: -- at the time of trial.

6 MS. MORRIS: Which I agree, if I had known there was  
7 something existing that I didn't have, I certainly would have  
8 gone after it, but if they answer the question, and give me  
9 incident reports and photographs, I am not to assume that they  
10 are withholding information, that there is more out there that  
11 they haven't given me. There was no indication that I should  
12 be looking for something such as a comment about checking with  
13 horticulture and green liquid, and I find it at this point in  
14 time in the trial where it's incredibly prejudicial that that  
15 information just happens to come out that they have it,  
16 they've had it --

17 THE COURT: Well, okay, but --

18 MS. MORRIS: -- and never disclosed it.

19 THE COURT: The thing was, as I recall, it came out  
20 because you solicited it on cross-examination.

21 MS. MORRIS: Yes.

22 THE COURT: So, if it was prejudicial, it was  
23 self-inflicted.

24 MS. MORRIS: It's prejudicial that now we are just  
25 getting that information, and there's been an illusion that it

1 exists when there is no proof that it exists, and if it did  
2 exist, it should have been produced as relevant evidence in  
3 the litigation of this case.

4 THE COURT: All right. Well, and then, when you  
5 didn't get a claims file, which a claims file isn't  
6 photographs that were taken by security. You knew that the  
7 photographs were all taken by security and the -- the  
8 statements were taken by security. You didn't get anything  
9 that looked like a claims file.

10 MS. MORRIS: Correct. I'm assuming they didn't have  
11 one. I didn't know I was supposed to go --

12 THE COURT: All right. Well, okay.

13 MS. MORRIS: -- demand that they create something.

14 THE COURT: So --

15 MR. SEMENZA: Your Honor, they didn't even send out  
16 written discovery. Former counsel -- prior counsel sent out  
17 written discovery. There has been no discovery dispute, there  
18 has been no 2.34, there's been nothing. I mean, that  
19 discovery was responded to in 2000 and -- June of 2014, so  
20 they didn't do anything in regard to it. We did make  
21 objection. I don't have the information -- the specifics in  
22 hand. We did object to producing some things. A claims file  
23 was never specifically asked for, so it hasn't been produced,  
24 if it exists.

25 MS. MORRIS: I specifically have the Request for

1 Production, which asks for, any documents and such files  
2 including, but not limited to reports, incident reports,  
3 correspondence, writing, photographs, log entries, emails,  
4 notes, internal memos, Post-Its, evaluations, diagrams, and  
5 investigations. All of that was requested.

6 THE COURT: All right. So, if you didn't -- you  
7 didn't get anything more then -- so, to me, it's pretty  
8 obvious when you don't get anything besides what security did  
9 that you ask for more than that, especially when you've got  
10 somebody that's a claims -- claims person that ends up getting  
11 designated. You took her deposition. You had the opportunity  
12 to ask at the time you took her deposition, was there a claims  
13 file.

14 MS. MORRIS: In fact, I didn't. I was limited to  
15 the categories in the 30(b)(6).

16 THE COURT: All right. Well, to me, this is too  
17 little, too late. And for me to say, well, now you get an  
18 adverse instruction, well, that's for spoliation; not as a --  
19 you know, a discovery sanction. I mean, this is like way too  
20 late. You've rested your case, and now, no.

21 MR. SEMENZA: Thank you, Your Honor.

22 MS. MORRIS: And just so I can preserve it for the  
23 record; in this case, spoliation of evidence is either  
24 destruction or not disclosing relevant information. And  
25 having a case where there is an allegation that there was a

1 green liquid that could have come from the garden area, and  
2 Wynn did an investigation, and contacted the horticulture  
3 department, and spoke with someone that they absolutely didn't  
4 know, and noted it somewhere in a claims file which they've  
5 had in their possession since 2010, and didn't disclose it at  
6 all in the litigation or in response to Request for Production  
7 of Documents, to me, rises to the level of spoliation of  
8 evidence and withholding it, which creates --

9 THE COURT: Well --

10 MS. MORRIS: -- a prejudice in this case, because  
11 testimony has come out now that was never previously  
12 disclosed, although asked for, and now, it sits out there, and  
13 there is no verification of that information.

14 THE COURT: But her testimony was that some note  
15 indicates that they checked and there was no information.

16 MS. MORRIS: No, they --

17 THE COURT: So that there was an absence of  
18 information.

19 MS. MORRIS: No, they don't use green liquid in the  
20 horticulture department. That was what the quote was.

21 THE COURT: All right, but we have testimony  
22 regarding that from somebody who -- who knows who testified  
23 today.

24 MS. MORRIS: I'd like to know what else is in that  
25 claims file, what other kind of comments, because it certainly

1 would have been relevant in the litigation.

2 THE COURT: Okay. So, to me, it's that you didn't  
3 do an adequate discovery. And to bring up what amounts to a  
4 discovery motion in the middle of trial --

5 MS. MORRIS: We shouldn't have to. I agree.

6 THE COURT: Well --

7 MS. MORRIS: But, I mean, in this case, I asked for  
8 the --

9 THE COURT: If what you're asking for is an adverse  
10 inference instruction based upon this, there's not enough for  
11 me to do that.

12 MS. MORRIS: So, I asked for the information from  
13 Wynn in a written document in which they had the opportunity  
14 to respond to that.

15 THE COURT: Okay. Is there --

16 MS. MORRIS: They did not disclose --

17 THE COURT: Is there --

18 MS. MORRIS: -- that information.

19 THE COURT: Okay. You've already said that.

20 MS. MORRIS: Correct, but --

21 THE COURT: I mean, do you think I'm not  
22 understanding --

23 MS. MORRIS: No, no, I just --

24 THE COURT: -- the words that are coming out of your  
25 mouth?

1 MS. MORRIS: I would like to -- I would just -- I  
2 would like to understand clearly what the Court's decision is,  
3 is that --

4 THE COURT: The Court's decision is --

5 MS. MORRIS: -- I didn't do enough in asking that  
6 question.

7 THE COURT: The Court's decision is, yes, this is --  
8 basically, you've -- what you've said is you're asking the  
9 Court to give an adverse inference instruction, which is based  
10 upon a finding that there has been spoliation of evidence.  
11 And there has been nothing given to me that indicates that any  
12 evidence has been spoliated.

13 You're saying, well, they should have given me  
14 something more out of the claims file. I don't know if that  
15 exists or not, but that is something that you could have  
16 discovered during the -- the lengthy discovery period. I  
17 mean, I don't know when the final discovery cut-off was, but  
18 this case is old. This case is really old.

19 MS. MORRIS: And we did learn today that there is a  
20 claims file. I mean, that was stated under oath.

21 THE COURT: Okay, but you could have asked somebody  
22 before this time. So -- so I'm -- what you asked for is an  
23 adverse inference instruction.

24 MS. MORRIS: Correct.

25 THE COURT: That's denied.

1 MS. MORRIS: Okay. And if I could request an  
2 instruction that the jury may conclude that there -- it's not  
3 a must -- it's not a must instruction, but they may conclude,  
4 because that claims file was never produced, the information  
5 that was just testified about, it that had been withheld could  
6 be -- it's to get an adverse inference, but that was not  
7 truthful testimony.

8 MR. SEMENZA: No.

9 MS. MORRIS: Or --

10 THE COURT: That's -- that's --

11 MS. MORRIS: They can infer that maybe the claims  
12 file doesn't exist with the information in it that it says,  
13 since it was never disclosed.

14 THE COURT: That's denied.

15 MS. MORRIS: Okay.

16 MR. SEMENZA: Thank you. Just a moment, Your Honor.  
17 I believe Dr. Klausner is here.

18 THE COURT: Let's bring our jury in.

19 MR. SEMENZA: I think we're going to voir dire him  
20 outside the presence.

21 THE COURT: Oh, that's right. I'm sorry. Yeah.

22 THE MARSHAL: Face the court clerk, remain standing,  
23 raise your right hand, please.

24 DR. VICTOR KLAUSNER, DEFENSE'S WITNESS, SWORN

25 THE CLERK: Please be seated, and then please state

1 and spell your first and last name for the record.

2 THE WITNESS: Victor B. Klausner. V-i-c-t-o-r.  
3 Middle name, Benjamin. Last name, Klausner, K-l-a-u-s-n-e-r.

4 THE COURT: You may proceed.

5 MS. MORRIS: Thank you.

6 (Testimony outside the presence of the jury)

7 DIRECT EXAMINATION

8 BY MS. MORRIS:

9 Q Dr. Klausner, can you tell us what type of doctor  
10 you are?

11 A I'm board certified in family practice and sports  
12 medicine, and I've practiced occupational medicine in the  
13 State of Nevada for the past 15 years.

14 Q Do you have any education in psychology?

15 A When you say education in psychology, I have  
16 education in terms of my training as a family practice  
17 physician, so part of that is, you know, a diverse background  
18 in basic psychology.

19 Q In this case, you reviewed some medical records of  
20 Yvonne O'Connell's; is that right?

21 A Yes, I did.

22 Q And you created a report as a result?

23 A Yes, I did.

24 Q And in that report, you had an opinion as to symptom  
25 magnification syndrome; is that correct?

1 A Yes.

2 Q And did you diagnose Yvonne O'Connell with having  
3 symptom magnification syndrome?

4 A So, diagnose of that syndrome is basically exactly  
5 what it is. It's a syndrome that's based on observation of a  
6 person's behavior and access of the medical system, and  
7 there's multiple findings which can be extracted from the  
8 medical record.

9 I did not actually meet the claimant, nor did I do  
10 an examination on the claimant. But based on my medical  
11 review of the records, I extracted information out of the  
12 records from multiple -- it wasn't one particular instance,  
13 but it was a pattern of multiple medical providers that were  
14 making observations in the medical record that would lead me  
15 to believe that this claimant was manifesting symptom  
16 magnification.

17 Q Isn't it true that in order to diagnose symptom  
18 magnification, you have to actually meet with the claimant and  
19 go through a clinical interview with them?

20 A Well, it's exactly what it is. It's a syndrome.  
21 So, you're making -- it's basically something that's been  
22 published in the medical records by not just psychologists,  
23 but originally developed out of orthopedic surgery;  
24 observation of certain individuals that did very poorly with  
25 medical intervention.

1           And so, there was certain signs based on physical  
2 examination that could be identified, and then an  
3 identification of a person's specific social situation within  
4 the medical -- the medical interaction with the system and how  
5 they're doing with their medical treatment, and how they're  
6 interacting with the system.

7           So, in terms of what you're saying, yes, there has  
8 to be a thorough evaluation and observation of the individual  
9 that has the syndrome. So, you're asking me, do I personally  
10 have to meet with the individual to make that diagnosis. And  
11 in this particular situation, I used other medical providers,  
12 because it was multiple medical providers from multiple  
13 specialities that made similar observations, and I used their  
14 observations, their clinical examinations, and I identified a  
15 pattern, and based on that pattern, I came to the conclusion  
16 that I did.

17           Q     Now, there's a Leonard Matheson who wrote on the  
18 symptom magnification syndrome; is that correct?

19           A     Yes.

20           Q     And you relied on -- you rely on his literature?

21           A     Yes.

22           Q     Now, he says --

23           A     Oh, not just on his literature. I mean, I relied on  
24 him as something that I referenced as like a basic definition  
25 of symptom magnification syndrome. But I'm relying on, you

1 know, physical examination points that have been identified in  
2 the medical literature in the past. And I think I referenced  
3 the Waddell literature that talks about, you know, things on  
4 examination that would lead to this particular observation.  
5 And I also rely on my own clinical expertise dealing with  
6 people who are recovering from injury, and that's what I do  
7 for a living. I deal, and treat, and diagnose people that are  
8 recovering from traumatic injury, and I've been doing it for  
9 the past 16 years.

10 Q Now, in order to diagnose this symptom magnification  
11 syndrome, isn't it true there has to be a structured interview  
12 that takes place in a room on a one-on-one basis after the  
13 Cornell Medical Index, Beck Depression Inventory, and other  
14 measures of general health and psychological distress have  
15 been completed by the patient, the rapport is established with  
16 the patient and the interviewer, then proceed -- then you  
17 proceed through 14 items in this -- this evaluation, and then  
18 the test is scored, and that's how you determine whether or  
19 not they have symptom magnification syndrome; is that correct?

20 A That's -- the article that I actually referenced  
21 states that from a psychological perspective. This is  
22 somebody who did groundbreaking work. I don't have the  
23 reference in front of me. I think it's here on my review of  
24 when this article was published. I believe it was in the 80s.  
25 Let me see exactly. 1991.

1           And so, this was basically a syndrome that was  
2 identified by orthopedic surgeons from the late 60s, and the  
3 syndrome was being kind of identified in utilizing certain  
4 physical exam signs. And what I did is I referenced an  
5 article in an occupational journal about occupational  
6 claimants that basically are manifesting this syndrome.

7           So, the syndrome itself isn't specifically defined  
8 by what this particular psychologist writes in his article,  
9 although he's trying to develop his own recommendations to the  
10 medical community about one way that a person -- a  
11 practitioner or medical provider can assess a claimant or an  
12 individual as having symptom magnification syndrome. So, he's  
13 writing a journal article about his own work.

14           Does a medical provider absolutely have to use the  
15 particular psychological inventories and have the lengthy  
16 interview to come to a conclusion of symptom magnification  
17 syndrome? No, absolutely not. It's a diagnosis that's based  
18 on observation of a person's behavior, an analysis of how  
19 they're interacting with the medical system, a thorough  
20 physical examination that can identify multiple points, and  
21 based on this, it's like any other medical diagnosis.

22           There's certain diagnosis -- diagnoses and medical  
23 syndromes that have no, quote/unquote, "objective medical  
24 findings" that you can kind of point to, but it's basically a  
25 input of multiple pieces of information that bring you to a

1 conclusion.

2 Q So, this structured interview, this is really the  
3 only structured testing that there is for this syndrome; is  
4 that correct?

5 A No.

6 Q Okay. Did you cite any other information as to any  
7 other structured process that you can go to in order to  
8 determine someone has symptom magnification syndrome?

9 A Yeah, there's physical examination findings that  
10 indicate a predilection of the person to develop any findings  
11 on an exam, like a physical exam, that would make a  
12 practitioner believe that there's inconsistencies in the  
13 person's physical presentation in terms of pain.

14 It's all revolving around pain and a person's  
15 perception of pain, and how they manifest their response to  
16 pain when a practitioner does an examination, or when a person  
17 is involved with performing some sort of physical task or  
18 physical process.

19 So, the -- to answer your question, it's a two-faced  
20 thing. One aspect of it is there's certainly -- in the  
21 community of medicine, there certainly has been an  
22 identification that people who manifest symptom magnification  
23 syndrome have some sort of psychological abnormality. It  
24 doesn't have to be severe, but they're manifesting some sort  
25 of psychological abnormality that makes them experience pain

1 at a much higher level than the average person. Or they may  
2 have a secondary gain issue that makes them report pain at a  
3 higher level than the average person would in a physical exam  
4 or a medical setting. So, that's the psychological aspect.

5           There's a very physical aspect of the diagnosis,  
6 too, and that's -- there's structured examination findings  
7 that lead a practitioner to believe that this person has a  
8 higher degree of probability that they're manifesting symptom  
9 magnification, and the classic example are these Waddell signs  
10 that I identified in --

11           Q     Now, you've never actually done a physical  
12 examination of Yvonne; is that correct?

13           A     Correct.

14           Q     And you've never observed her behavior; is that  
15 correct?

16           A     Correct.

17           Q     You've read through some of her medical records;  
18 isn't that correct?

19           A     Yeah. I read through every piece of medical record  
20 that was given to me. I don't know if that was a complete set  
21 of medical records, but I analyzed it very carefully.

22           Q     And you never actually performed the Waddell test on  
23 Yvonne; is that correct?

24           A     No, I did not.

25           Q     And there were multiple other doctors that did;

1 isn't that correct?

2 A Yes.

3 Q And in 2010, she was tested three times for the  
4 Waddell factors by her pain management doctor, and those came  
5 out negative; isn't that correct?

6 A Which pain management -- is that Dr. Erkulvrawatr?

7 Q Correct.

8 A Is that what you're talking about?

9 Q Yes.

10 A Yes. So, I am going to answer your question, but I  
11 have to comment on that as well, and that is, in order to  
12 elicit Waddell signs, a doctor has to basically take time and  
13 do a very thorough examination of a claimant, and it has to go  
14 beyond a normal orthopedic examination.

15 So, I'm going to tell you the reality of the  
16 situation, and that is, first of all, Dr. Erkulvrawatr  
17 recorded a certain level of degree of pain that was to --  
18 basically, out of proportion with what the, you know,  
19 objective imaging showed, but he documented on his paperwork  
20 that there were no Waddell signs.

21 Now, the reality is, is that doctors frequent -- and  
22 I can't -- I'm speculating, but I can't say for sure, but  
23 Erkulvrawatr -- many doctors use templates for their medical  
24 record reporting. So, he has it documented that the Waddell  
25 signs are negative.

1 I don't know if you put Dr. Erkulvrawatr on the  
2 stand and asked him specifically whether he did those tests or  
3 didn't do those tests. But in order for a doctor to actually  
4 elicit the Waddell signs, you have to observe a person very  
5 carefully. You have to spend time with them, you have to  
6 interview them, you have to basically do a very thorough  
7 examination, and it has to be over a period of time and  
8 multiple areas of testing.

9 So, in the medical community, most of the  
10 practitioners that truly identify symptom magnification are  
11 physical therapists. Why? Because physical therapists are  
12 the ones that spend most of the time with an injured person  
13 that's trying to rehabilitate, and a lot of the time, doctors  
14 rely on physical therapists to come up with these diagnoses,  
15 and there's specific examinations called functional capacity  
16 exams that we rely on to really give us a true essence if a  
17 person has, symptoms that are out of proportion with the  
18 medical findings.

19 And these functional capacity exams have the  
20 questionnaires and the pain questionnaires that you're talking  
21 about, and the inventories, and they do physical testing on a  
22 person. Those exams usually take two to three hours to  
23 complete.

24 So, if you're asking me, did Dr. Erkulvrawatr  
25 actually have a really strong concept of whether this person

1 was -- has Waddell signs, I think you'd have to talk to Dr.  
2 Erkulvrawatr himself, because he'd have to tell you how much  
3 time he spent with that patient, exactly what Waddell tests he  
4 did to elicit it, because you have to be really looking  
5 carefully to make those observations. And that's why physical  
6 therapists and doctors that do lengthy exams are the ones that  
7 really can make the diagnosis clearly.

8 Q So, you can't comment one way or another on whether  
9 Yvonne had, I think you said in your report, criteria for four  
10 out of five Waddell signs?

11 A I elicited that primarily from many pieces of  
12 information from her medical record. I could go through that  
13 with you if you want. And a lot of that information was  
14 primarily extracted from her physical therapists that were  
15 seeing her multiple times, and observing her over, and over,  
16 and over again, and seeing how she reacted to certain  
17 functional exercise, and functional testing, and strength  
18 testing, and sensory testing, and multiple tests that physical  
19 therapists do.

20 And you -- I identified two separate physical  
21 therapists that are very well respected in the community that  
22 have identified this very clearly in the medical record. And  
23 not only that, I would tell you that -- because I deal with  
24 physical therapists a lot. I mean, that's just what I do. I  
25 rehabilitate people. I'm interacting with physical therapists

1 on a daily basis.

2           The amount of times that I see a physical therapist  
3 document symptom magnification in the medical record is very  
4 infrequent, I would say maybe 1 in 100 actually like injured  
5 individuals that I deal with that are going through physical  
6 therapy. I would estimate maybe 1 in 100.

7           So, for someone -- for a physical therapist to come  
8 out and document it outwardly in a medical record, that's  
9 something substantial. And it wasn't just the physical  
10 therapist; there were other doctors that had made the same  
11 observation, that --

12           Q     You can't comment on the veracity of each one of  
13 these medical providers because you don't know how it was  
14 conducted; isn't that correct?

15           A     Explain the term veracity, because I'm not --

16           Q     You said Dr. Erkulvrawatr might have said no, but he  
17 could get on the stand and say something different, and the  
18 truth is, Waddell's facts or signs have to be tested  
19 personally by the doctor, right, in order to make a  
20 determination?

21           A     Doctor, physical therapist, occupational therapist,  
22 you know, nurse practitioner, physician assistant, whoever,  
23 yes, it has to be documented by each individual medical  
24 practitioner. And I would say that it requires a very lengthy  
25 exam and a lot of medical criteria to make those observations.

1           So, I know how the medical system works, and I know  
2 how doctors like myself are very busy. And a lot of times,  
3 we're seeing a claimant -- a patient that's injured, and we're  
4 moving through an orthopedic exam very quickly, and we make  
5 very superficial notes. And we have -- a lot of times -- I'm  
6 not -- like I said, I can't say this for sure, but a lot of  
7 times, doctors have templated notes, so something like Waddell  
8 signs just goes as a template.

9           We don't know for sure -- I don't know if Dr.  
10 Erkulvrawatr has been put under oath and said for sure, but we  
11 don't know for sure that he did those tests or not, or whether  
12 it was just on his medical record.

13           Q     And so, we don't know for sure whether those  
14 physical therapists did it either, if that's -- if we're --

15           A     Yes, we do, because they -- they definitely  
16 documented that they did do those things. You know, Matt  
17 Smith and Scott Pensivy very clearly said that they did  
18 multiple tests on this individual, and there was multiple  
19 inconsistencies involved.

20           Q     So, you're --

21           A     And I'll also -- there was an orthopedic surgeon as  
22 well, Dr. Trainor, that had made the same conclusion. But he  
23 diagnosed her with chronic regional pain syndrome, and I made  
24 very clear in my record why I didn't think this claimant, Ms.  
25 O'Connell, why I felt she didn't have chronic regional pain

1 syndrome, but.

2 Q What training do you have in chronic regional pain  
3 syndrome?

4 A I've trained with a lot of the best physiatrists in  
5 this country; in Chicago, in this town. I deal with  
6 neurologists. I see injured individuals and claimants like  
7 every day of my life for the past 16 years, other than  
8 weekends, treating injured workers. And I have seen multiple  
9 people with chronic regional pain syndrome, and it's a very  
10 clear diagnosis. And the -- and it used to be called reflex  
11 sympathetic dystrophy, used to be the old name for it, and  
12 then they changed it to chronic regional pain syndrome.

13 There's very clear criteria for it. And the  
14 criteria indicates that there has to be observable neuropathic  
15 changes on an examination. So, those changes involve  
16 neuropathic and vascular findings that involve nerve injury.  
17 And it's typically post-surgical, or post nerve injury, or if  
18 -- if an individual has like a very severe untreated  
19 radiculopathy from the spine, that nerve injury creates an  
20 autonomic response in the body that creates pain,  
21 vasodilation, erythema, skin changes, you know, hair loss.

22 You know, these are things that are very observable.  
23 And this situation didn't fit that picture because there was  
24 no evidence that this individual had any neuropathic injury or  
25 autonomic signs in any of the examinations that were done.

1 Q But again --

2 A And also, the EMG nerve testing was completely  
3 normal.

4 Q Again, in order to diagnose this chronic regional  
5 pain syndrome, you have to do a physical examination of the  
6 patient like Dr. Trainor did; is that correct?

7 A Correct, and he -- he didn't document that there was  
8 any neuropathic findings. He -- what he documented is that  
9 this claimant had regional pain in un -- like  
10 non-neuromyotomal region. So, like when a person has regional  
11 tenderness, and regional weakness, and diffuse pain, and  
12 diffuse tenderness in multiple regions, that's one thing. But  
13 to diagnose neuropathic injury and autonomic findings on an  
14 exam, it wasn't in his notes.

15 So, he diagnosed it and he did an exam. I can't  
16 speak for Dr. Trainor either. You'd have to put him under  
17 oath and talk to him about why he came up with that diagnosis,  
18 but I clearly felt that, you know, based on the reasons I just  
19 told you why neuropath -- chronic regional pain syndrome was  
20 an inappropriate diagnosis in this case, and that -- I'm  
21 sorry, I just want to turn off my phone.

22 You know, I can -- again, I did a very thorough  
23 medical record review, and I took Dr. Trainor's notes, and I  
24 did the best I could with them. And I understood why he came  
25 up with the diagnosis he did, because this claimant, if you

1 look at the medical record, she was reporting total body pain,  
2 you know, pain across her whole back, across her whole neck,  
3 across her legs, and her knees. And he was specifically  
4 examining her knees only, but he saw a person that was  
5 suffering with like total body pain.

6           And so, he said, I don't see anything focal. I  
7 can't do anything for this individual as an orthopedic  
8 surgeon. I recommend physical therapy. Now, he made a  
9 diagnosis. As a doctor, my opinion, that diagnosis was  
10 inaccurate.

11           Q     Your training is in family medicine; is that  
12 correct?

13           A     It's much more than family medicine.

14           Q     And you also work in occupational medicine; is that  
15 right?

16           A     Sport -- I'm board certified in sports medicine, I'm  
17 an osteopathic physician, and I -- I utilize that education as  
18 a high -- very high, thorough understanding of anatomy and  
19 physiology of the human body. And I've been practicing  
20 occupational medicine for 16 years.

21                     And not only that, I believe I've earned a high  
22 respect in the community in Las Vegas and Southern Nevada to  
23 actually deal with multiple issues of injured human beings  
24 that aren't getting better in the medical system.

25                     So, actually, my job that I do on a regular basis

1 involves rehabilitation medicine. And a lot of the insurance  
2 companies in Southern Nevada that deal with a lot of injured  
3 workers utilize me as a physiatrist. I'm not board certified  
4 in physiatry, but I -- I basically fit that role as a  
5 rehabilitation specialist.

6 Q And that's in the occupational, getting people back  
7 to work; is that correct?

8 A No, it's getting people healthy that have been  
9 injured.

10 Q What portion of your practice is in occupational?

11 A 90 percent.

12 Q So, if I understand correctly, the only way -- or  
13 only information you used to diagnose her with symptom  
14 magnification syndrome was what you saw in the medical records  
15 that you were provided; is that correct?

16 A Correct.

17 Q And you never actually physically performed the  
18 Waddell test on Yvonne O'Connell?

19 A Correct.

20 MS. MORRIS: May we approach, or?

21 MR. SEMENZA: Sure.

22 THE COURT: Is there -- well, I guess you can.  
23 Sure.

24 MS. MORRIS: Sorry.

25 THE COURT: We're outside the presence, but.

1 (Off-record bench conference)

2 BY MS. MORRIS:

3 Q All right, we're going to back up a little bit, Dr.  
4 Klausner.

5 A Yes.

6 Q Where did you attend medical school?

7 A Can I just give you a copy of my CV, or do you want  
8 me to go through everything?

9 Q I'd like to go through it.

10 A Okay. I went to Chicago College of Osteopathic  
11 Medicine.

12 Q All right. And when did you graduate from there?

13 A 1995.

14 Q And did you get any education past the Chicago  
15 college?

16 A Yes. I did a general medical internship at the  
17 Chicago Osteopathic Hospital, that was 1995 to 1996. And then  
18 I went on to complete my family practice residency at Olympia  
19 Fields Osteopathic Hospital from 1996 to 1998. And then I  
20 completed a sports medicine fellowship from 1998 to 1999, and  
21 passed those certification examinations, and continue to hold  
22 board certification in family practice and sports medicine.

23 Q And what training have you received in how to  
24 diagnose symptom magnification syndrome?

25 A So, in terms of my sports medicine training, I

1 certainly have learned to do very thorough medical evaluations  
2 and orthopedic evaluations on individuals that have suffered  
3 traumatic and musculoskeletal injury. And so, part of that  
4 training in orthopedic literature involves understanding how  
5 different people manifest pain and pain syndromes.

6           During that fellowship, as I said, I was trained in  
7 physiatry clinics, and clinics with doctors who excel in the  
8 research and identification of chronic regional pain syndrome,  
9 and dealing with myofascial pain syndrome and musculoskeletal  
10 injuries that are sometimes very difficult to treat in  
11 rehabilitation medicine.

12           So, part of my training did involve understanding  
13 pain syndromes, Waddell signs, orthopedic exams, how to  
14 identify these different syndromes. But I would have to tell  
15 you that I've been practicing occupational medicine since I  
16 was a family practice resident in Chicago.

17           So, in terms of occupational medicine itself, my  
18 experience probably ranges to about 17 years of being employed  
19 as an occupational physician. And this is one of the specific  
20 arenas of the healthcare system where it's crucial that a  
21 doctor has to understand mechanism of injury, thorough  
22 examination, correct diagnosis, how to interpret medical  
23 testing, imaging, electrodiagnostic studies, and putting all  
24 those pieces of information together to come up with an  
25 accurate diagnosis, rehabilitate a person, help them to get

1 well enough to resume their normal life.

2           And as you said, part of that equation means getting  
3 back to their job. And then, if there's a claim dealing with  
4 the legal issues to help the claim come to a conclusion and  
5 help everything come to, you know, a final medical legal  
6 conclusion, as I said.

7           So, this experience in occupational medicine is  
8 essential to my knowledge as a doctor. I've been doing it for  
9 17 years.

10           So, Counselor, my cousin in Pittsburgh, she's a  
11 lawyer that negotiates union contracts for coal miners. Now,  
12 if I was to ask you what your knowledge of negotiating unions,  
13 and coal miners, and dealing with issues with, you know,  
14 disputes for the coal miners, and medical issues for coal  
15 miners, I'm sure your level of expertise might be little, but  
16 it's not as much as hers. And the same thing for me as a  
17 doctor.

18           I've been practicing occupational medicine for 17  
19 years. I -- I pride myself in my knowledge of human behavior  
20 from people that get injured, the psychological aspects of  
21 disability, what happens to a person when they become injured  
22 and how they manifest pain, and how that disrupts their life.  
23 And what it takes to have a person move forward to try to get  
24 that conclusion where they can resume a normal life. So, it -  
25 - it's more than just what you see on the paper. It requires

1 a lot of expertise and experience.

2           So, if you ask me what my experience is in this,  
3 I've dealt with human beings, actual human beings. It's not  
4 just learning in a classroom. I've dealt with human beings  
5 that have been injured that have manifested pain that's out of  
6 proportion with what the medical testing shows, and I have a  
7 very clear understanding in many cases of why human beings  
8 develop this syndrome called symptom magnification syndrome.

9           I deal with physical therapists that test for it.  
10 I'm very observant. I know how to interpret medical records,  
11 and I believe that I'm extremely qualified to make the  
12 judgment regarding the diagnosis of symptom magnification  
13 syndrome, just based on my experience.

14           Q     Have you received any training in how to diagnose  
15 symptom magnification specifically?

16           A     Yes.

17           Q     What was that?

18           A     Well, let me take you back. I've worked with some  
19 of the best physiatrists or rehabilitation physicians during  
20 my training in sports medicine. And, if you want, I could  
21 tell you where and who they were that trained me.

22                     And these -- and my own preceptor in sports medicine  
23 was a doctor at Olympia Fields Osteopathic Hospital, who also  
24 did a lot of occupational medicine. And he taught me as a  
25 young physician to observe and to identify when somebody's

1 having problems like moving through the medical system, and  
2 when somebody's developing psychological issues with pain that  
3 are out of proportion with the objective medical testing, and  
4 that's the crux of the diagnosis of symptom magnification  
5 syndrome.

6           And I've been taught it formally. I've, like I told  
7 you, practiced it, and I've helped people to deal with it, and  
8 I believe that I'm very qualified.

9           Q     Now, you referenced that article in 1991 by Leonard  
10 Matheson?

11          A     Yes.

12          Q     And that's -- in beginning to diagnose symptom  
13 magnification syndrome, there is a one-on-one interview that  
14 is conducted; isn't that correct?

15          A     Of course.

16          Q     And in this case, you did not conduct any --

17           THE COURT: All right, we've gone --

18           MS. MORRIS: -- one on one interview?

19           MR. SEMENZA: We've been there.

20           THE COURT: We've done that. All right, so you've  
21 been voir diring him for almost an hour. I'm satisfied that  
22 he's qualified to testify in this area. I'm not going to  
23 exclude him from testifying regarding symptom magnification.  
24 However, Doctor --

25           THE WITNESS: Yes.

1 THE COURT: -- speculating about what another doctor  
2 did or didn't do --

3 THE WITNESS: I understand.

4 THE COURT: I don't want to hear that come out of  
5 your mouth.

6 THE WITNESS: Okay.

7 THE COURT: Okay. All right.

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

9 (In the presence of the jury)

10 THE MARSHAL: Jurors are all present.

11 THE COURT: Thank you. Please be seated. The  
12 record will reflect we've been rejoined by all eight members  
13 of the jury, as well as the alternate.

14 Ladies and gentlemen, I apologize that we kept you  
15 waiting for the past hour. I do want you to know that we have  
16 not been having a party; we've been working ever since 2:00  
17 o'clock.

18 And so, we try not to keep the jury waiting, but  
19 sometimes it's required, and it was in this case, and so I  
20 apologize that we had to keep you waiting. We've been pretty  
21 prompt throughout the trial in getting started with you right  
22 on time, but there are times when we can't, and this was one  
23 of them. My apologies, again.

24 So, now we're going to have the doctor sworn. If  
25 you'll please stand.

1 THE CLERK: Can you please stand and raise your  
2 right hand?

3 DR. VICTOR KLAUSNER, DEFENSE'S WITNESS, RESWORN

4 THE CLERK: Please be seated, and then please state  
5 and spell your first and last name for the record.

6 THE WITNESS: Victor Klausner. V-i-c-t-o-r. Last  
7 name, K-l-a-u-s-n-e-r.

8 THE COURT: You may proceed.

9 MR. SEMENZA: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MR. SEMENZA:

12 Q Good afternoon, Dr. Klausner.

13 A Good afternoon.

14 Q Could you tell us a little bit about your education,  
15 please?

16 A I graduated from Chicago College of Osteopathic  
17 Medicine in 1995. I went on to do a family practice residency  
18 in Olympia Fields Osteopathic Hospital 1996 to 1998. I  
19 finished a fellowship in sports medicine from 1998 to 1999.  
20 I'm board certified in family practice and sports medicine.  
21 And for the past 15 years, I've been practicing primarily  
22 occupational medicine and rehabilitation medicine in Southern  
23 Nevada.

24 Q Where did you attend undergrad?

25 A I have a bachelor's degree in genetics from the

1 University of Illinois Champagne Urbana, 1996, and Elmhurst  
2 College, a bachelor's degree in chemistry, 1990.

3 Q And where are you currently licensed to practice  
4 medicine?

5 A I have an active license in the State of Nevada, and  
6 that's been since 1999. And then I have an inactive license  
7 in California.

8 Q Okay. And you are a doctor of osteopathic medicine;  
9 is that correct?

10 A Correct.

11 Q And what is the difference between your  
12 certification and an MD, medical doctor?

13 A So, osteopathic medicine is a fully licensed medical  
14 -- recognized medical practice in the United States in which  
15 an osteopathic doctor has the same rights of practice as a  
16 medical doctor.

17 So, an osteopathic physician has the same board  
18 certification and licensing practice that an M.D. has. The  
19 difference actually lies in the medical training, so where an  
20 MD or a medical doctor spends a lot of their undergraduate  
21 work dealing with like physiology, experimentation, and  
22 certain like, you know, pharmacological experimentation and  
23 things like that, osteopathic doctors spend time in a lab  
24 learning anatomy, and physiology, and human motion and  
25 physiology patterns as a manner of healing.

1           So, as a layperson, you might be familiar with  
2 chiropractic. So, like a chiropractic physician, they're  
3 licensed to primarily do physical medicine and heal a person  
4 through the means of a physical medicine practice.

5           So, an osteopathic doctor has similar education that  
6 a chiropractor would have, like learning like human anatomy  
7 very well, human physiology, the musculoskeletal system  
8 extremely well, and putting that to practice, helping a person  
9 to heal more holistically, but we're also licensed to  
10 prescribe medicine to do surgery to do anything that an M.D.  
11 does.

12           So, I like to say that an osteopathic physician is  
13 the best of both worlds, because an osteopathic physician has  
14 the same credentialing, and should have the same background of  
15 scientific knowledge that a medical doctor has, but they also  
16 have a more holistic approach, understanding the human body  
17 physiologically to help them heal in a more natural way.

18           Q     Thank you for that. And are -- what are -- are you  
19 certified in anything? What are your certifications?

20           A     My board certification?

21           Q     Yes.

22           A     In family practice and sports medicine.

23           Q     Can you tell us about your employment history,  
24 please?

25           A     So, since I graduated from medical school, I did

1 moonlighting in Chicago for an occupational medicine practice  
2 that was out of the hospital in Olympia Fields for two years.  
3 And then, when I came to Southern Nevada, I originally was  
4 hired by an occupational medicine clinic run by Southwest  
5 Medical Associates, and it was a two-doctor practice. I  
6 worked with a physiatrist in the practice, and myself, and we  
7 did pretty much full-time occupational medicine. It was 100  
8 percent occupational medicine in the clinic, and I worked at  
9 Southwest Medical Associates for four years.

10 By the third year, I actually took over the clinic  
11 myself. They actually promoted me to be the medical director  
12 of that clinic. But in 2005, Southwest Medical Associates  
13 made the decision that they didn't want to be involved in that  
14 business of occupational medicine anymore, so they folded the  
15 clinic, and then I opened my own practice in 2005, which is  
16 the Center for Occupational Medicine.

17 Q And that's where you currently work?

18 A Yes, the Center for Occupational Health and  
19 Wellness.

20 Q And have you undertaken any teaching activities  
21 during your career?

22 A Yes, I have.

23 Q Can you tell us a little bit about those?

24 A Well, when I was being trained as a family practice  
25 physician and sports medicine fellow, I was very involved with

1 the teaching and the -- of the osteopathic medicine department  
2 at Chicago College of Osteopathic Medicine. And I developed  
3 multiple curriculums for these areas, teaching medical  
4 students and family practice residents techniques and  
5 understanding of osteopathic medicine.

6           When I came here to Southern Nevada, I was also  
7 involved in teaching interns at Lake Mead Hospital when it was  
8 Lake Mead. It's North Vista now. But Lake Mead had a family  
9 practice residency, and I was involved with teaching them  
10 sports medicine topics.

11           I had a journal club with fellow doctors here in  
12 Southern Nevada to do like a rehabilitation journal club,  
13 where we would get together once a month, and share articles,  
14 and have discussions about orthopedics, you know, physiatry,  
15 sports medicine, you know, different topics about -- that were  
16 pertinent to our treatment at the time.

17           I also was involved with the American Osteopathic  
18 Association lecturing on back pain syndromes, which was a  
19 national lecture that was held here in Las Vegas, and I've  
20 lectured on back pain multiple times in the community to a lot  
21 of occupational medicine organizations. I'm trying to think  
22 if there was anything else that I can think of. Yeah, yeah, I  
23 think that covers it.

24           Q     One question, before I forget. What is a  
25 physiatrist?

1           A     It's a doctor that specializes in physical medicine  
2 and rehabilitation. So that's otherwise known as PM&R,  
3 physical medicine and rehabilitation. So, it's doctors that  
4 treat musculoskeletal injury and rehabilitation.

5                     And you find a lot of physiatrists that treat people  
6 in rehabilitation facilities. Like, so if a person has  
7 surgery, or an orthopedic surgery, and they have to go to a  
8 rehab facility, a lot of times the physiatrist will oversee  
9 their care and deal with physical therapists with  
10 rehabilitation. And physiatrists are also specialists in  
11 rehabilitating musculoskeletal injury.

12           Q     And before we move on, have you had any  
13 publications?

14           A     Yes.

15           Q     Can you tell us just briefly about those?

16           A     I published an article when I was a family practice  
17 resident in 1998, regarding nutritional medicine and impact on  
18 coronary artery disease. It was called, "Nutritional Impact  
19 of Lipid Oxidation in Coronary Artery Disease."

20                     And then, during my family practice -- I'm sorry, my  
21 sports medicine fellowship, I published an article in a  
22 journal called, "The Physician and Sportsmedicine." It's  
23 regarding an ankle syndrome called the sinus tarsi syndrome,  
24 which is a syndrome of the ankle that's commonly seen in  
25 athletes or people that injure their ankle.

1 Q Okay. And did you perform any tasks in relation to  
2 this particular case?

3 A Yes.

4 Q Can you tell us what you did?

5 A Yes. I was asked to do a medical record review. I  
6 submitted this review, it was approximately three months ago,  
7 and -- I'm sorry, no, it was longer than that. This was seven  
8 months ago. I did it in April 2015.

9 And I reviewed all of the medical records up until  
10 that point of April 2015 and rendered my opinion regarding the  
11 medical treatment, the diagnosis of what I felt was the -- the  
12 picture of what the medical treatment provided, and the  
13 claimant herself, what the diagnosis that we were dealing with  
14 at the time -- I mean, in the medical record.

15 Q So, from -- what was the earliest medical record  
16 that you reviewed relating to Ms. O'Connell?

17 A It was February 8th, 2010.

18 Q And then, the latest records that you reviewed were  
19 through which date, or approximate?

20 A Okay, so the -- my written opinion, the last record  
21 that I reviewed was January 14th, 2014. Subsequently, I  
22 reviewed other records that were rendered more recently, but I  
23 don't have a written opinion of that.

24 Q Okay. And did you review the medical records for  
25 Ms. O'Connell from a number of different medical providers?

1 A Yes, I did.

2 Q Can you identify some of those medical providers?

3 A Well, I -- there's a lot. I can summarize. Ms.  
4 O'Connell was seen multiple times by a primary care physician  
5 at UMC Quick Care at multiple locations. The UMC Quick Care  
6 physicians had referred her for treatment with multiple  
7 cardiologists. I also mentioned that I reviewed one record  
8 from a primary care physician that had treated her previously  
9 named Dr. Prabhu at Ascent Primary Care.

10 There were other referrals in the medical record,  
11 including gastroenterologists, orthopedic hand surgeon. There  
12 was an orthopedic spine surgeon, a orthopedic sports medicine  
13 physician, physical therapists at two separate locations, a  
14 pediatricist at a foot and ankle clinic, a pain management  
15 doctor at Southern Nevada Pain Center, and then there was also  
16 imaging studies that I reviewed as well.

17 Q Okay.

18 A There was also a neurologist that did  
19 neurodiagnostic testing. And one last -- there was an ear,  
20 nose, and throat doctor; an otolaryngologist in the medical  
21 record as well.

22 Q Did you actually examine Ms. O'Connell?

23 A No, I did not.

24 Q And you've rendered opinions based upon the medical  
25 records that you've reviewed?

1 A Yes, I did.

2 Q And those medical records cover a number of years?

3 A The medical records were from February 8th, 2010,  
4 and that went all the way to January 14th, 2014, so it was  
5 almost four years.

6 Q And based upon your review of the medical records,  
7 do you have certain opinions relating to Ms. O'Connell's  
8 medical condition?

9 A That's a broad question.

10 Q It is.

11 A So, you know, I think that I can try to summarize,  
12 if you'd like, and that --

13 Q Well, let's walk through them.

14 A Do you want to walk me through, or do you want me to  
15 walk you through?

16 Q Why don't you walk me through?

17 A Okay. So, I -- the best way I can maybe approach  
18 this is tell you how, as a physician, I would look at the  
19 medical record and interpret the data.

20 Q That's fine.

21 A So, I had a report from security personnel from Wynn  
22 Hotel that there was a slip and fall incident. And the  
23 claimant slipped on some sort of liquid on the floor and fell  
24 to the ground. And there was documentation of -- from  
25 photographs that were taken with three areas of ecchymosis or

1 bruising on the right buttocks of the individual, Ms.  
2 O'Connell. And the guest -- the security personnel documented  
3 that the guest refused medical treatment.

4           The first encounter medically that was evaluated was  
5 at UMC Quick Care. And at UMC Quick Care, it was very well  
6 documented there was a slip and fall, and the claimant, Ms.  
7 O'Connell, described bilateral low back pain with contusions  
8 to her right buttocks and hip, and she said there was pain  
9 radiating into her right buttocks and right leg. There were  
10 x-rays of the lumbar spine performed at UMC Quick Care, and  
11 there was a diagnosis of contusions of the lumbar spine and  
12 sacral spine.

13           There was documentation by the physician at UMC  
14 Quick Care that it was an examination of the cervical spine  
15 and chest, and these examinations were normal. And the x-rays  
16 that were done identified disc -- degenerative findings of the  
17 lumbar spine, so there was narrowing of the disc spaces,  
18 calcifications, and so chronic findings of arthritis and disc  
19 degeneration, and Ms. O'Connell received medication.

20           So, this is very important. I went through that  
21 very, very carefully. And the reason why is, like I said, as  
22 a physician in the practice of occupational medicine, my job  
23 is really primarily to understand pathophysiology of an  
24 injured human being.

25           And that is very complex, because it involves like

1 understanding the actual trauma that occurred, how that  
2 individual accessed medical care, what the diagnostic studies  
3 were done, what the examination was that identified that, and  
4 the manifestations of a person's symptoms, and experience of  
5 pain and symptomatology, and how that plays out for any human  
6 being that's involved with trauma and is injured.

7           So, as doctors, we tend to try to identify what we  
8 call mechanism of injury, and then identify an injured body  
9 part, how a person manifests injury, and physiologically what  
10 would be normal for a human being manifesting following an  
11 injury. That's my speciality, because I see people that are  
12 injured all day long. I practice occupational medicine, and I  
13 see people that get injured on the job every day.

14           So, I went through this very carefully, and the  
15 reason why is because that first encounter is extremely  
16 important. This individual, Ms. O'Connell, was seen -- first  
17 of all, fell, and refused medical treatment. So, that's very  
18 indicative in one respect, and that respect is that if a  
19 person is seriously injured to the point where they're having  
20 major medical problems, there's an assumption that they're  
21 going to access medical treatment quickly, within let's say 24  
22 hours. She was seen at a Quick Care two days after the date  
23 of injury.

24           So, the next thing is that I have a general rule of  
25 thumb as a doctor, because I see people that are injured all

1 the time, And there's something that's called like delayed  
2 onset of symptomatology. And especially with the spine, very  
3 commonly, sometimes we see delayed onset of symptoms, but  
4 those symptoms physiologically, based on human anatomy, human  
5 neurophysiology, and how a person normally manifests pain,  
6 there will always, always, always be some level of  
7 manifestation of injury within 48 hours, always. I've never  
8 seen a legitimate situation in my career as a doctor where a  
9 person that manifests delayed onset of pain more than 48  
10 hours.

11 Now, not to say that a person can't experience pain,  
12 but there has to be typically other reasons for it that  
13 usually have other medical conditions that may not be  
14 associated specifically with the mechanism of injury per se.  
15 So, that's a medical truth, and that is that a person within  
16 48 hours will manifest some sort of level of pain based on the  
17 mechanism of injury.

18 So, right here, we see that Ms. O'Connell documented  
19 her pain in her low back, radiating into her right buttocks  
20 and right leg. So, if I'm going to be like very objective  
21 about this, I'm going to tell you that this is the extent of  
22 her injuries wouldn't be involving her low back, right  
23 buttocks, right leg, and then we'll move forward. Then we can  
24 move forward in the medical record.

25 Q And let me stop you there for just --

1 A Yeah.

2 Q -- a moment. Was there any indication that Ms.  
3 O'Connell during this visit had injured her right knee?

4 A There was no documentation of that. I mean, the  
5 documentation was more radiating pain down the right leg.

6 Q Okay. Go ahead.

7 A Then, the next access of medical treatment was a  
8 month later with Ms. O'Connell's primary care physician, Dr.  
9 Prabhu. And Dr. Prabhu had known this individual, Ms.  
10 O'Connell, well based on his previous treatment of her, and he  
11 diagnosed her with lumbago, which is a generic term for back  
12 pain.

13 So, just -- when you see lumbago, it's just back  
14 pain. Chronic fatigue syndrome, Ehlers-Danlos syndrome, which  
15 is a connective tissue disorder. And then he basically took a  
16 history that she had generalized pain. She has a history of  
17 multiple issues of generalized pain, and it was after this  
18 trip and fall a month previous.

19 And he said -- he specifically stated, "Her back  
20 still hurts and she has a history of fibromyalgia,  
21 Ehlers-Danlos syndrome, irritable bowel syndrome, and  
22 depression." So, this is significant in the fact that now  
23 we're already a month out from the injury. And if -- this is  
24 a doctor that's been treating this individual before, has a  
25 rapport with Ms. O'Connell, and she's specifically focusing on

1 her back and generalized pain after the fall, but there's no  
2 specific mention of knee, there's no specific mention of neck,  
3 there's no specific mention of shoulder, there's no specific  
4 mention of specific identification of localized pain.

5           And in this record as well, we get a sense that Ms.  
6 O'Connell has had issues with pain before. She's had issues  
7 with fibromyalgia, which is a generalized pain syndrome, over  
8 the -- throughout the whole body, and she has a connective  
9 tissue disorder, Ehlers-Danlos syndrome.

10           And she has stomach issues, which the term here is  
11 irritable bowel syndrome, which means that a person has an  
12 autonomic problem with just -- problems with potentially  
13 constipation, diarrhea, stomach pain. And then there's  
14 identification of psychological problems, that she has  
15 depression.

16           So, I think that that's very telling, because this  
17 just wasn't an urgent care. This is somebody -- a doctor that  
18 had a rapport with this individual, and there's clear  
19 documentation that she was focusing on her back after a trip  
20 and fall a month after the date of injury.

21           So, he did lab work on her to make sure that she  
22 wasn't having any kind of flare-up of her rheumatologic  
23 disorders, because there's identification that she has Marfan  
24 syndrome and this Ehlers-Danlos syndrome. So, he did  
25 rheumatologic markers and a sed rate, which were normal, to

1 make sure that her pain wasn't coming from those specific  
2 syndromes. So, the -- can I move on?

3 Q Yes, please.

4 A So, the next entry was March 18th, 2010, which was  
5 about six weeks after the date of injury, and here's where  
6 things all the sudden changed in the medical record.

7 "The claimant, six weeks after the date of injury,  
8 is complaining of pain over her entire right side of the body  
9 after a slip and fall. Weakness, fainting, chills, trouble  
10 sleeping, blurred vision, lump on the back of her neck,  
11 dizziness, headaches, chest pain, cough, shortness of breath,  
12 nausea, change in appetite, severe constipation, heartburn,  
13 abdominal pain, neck pain, frequent urination, sexual  
14 dysfunction, depression, anxiety, pain and stiffness in her  
15 hands and wrists, pain in her elbows, pain in her shoulders,  
16 pain in her neck, pain in her back, pain in her hips, pain in  
17 her knees, pain in her toes, pain in her feet, and pain in her  
18 jaw. She describes a history of a fall in 1989" -- "that she  
19 developed chronic pain after a fall in 1989, which led to a  
20 diagnosis of multiple medical problems."

21 She developed irritable bowel syndrome, remember,  
22 like constipation and stomach problems, which can frequently  
23 arise in individuals that are over-treated by the medical  
24 system with medication, because medication can cause a lot of  
25 autonomic problems, and stomach issues, and things like that.

1 She also said that she developed anxiety, stress disorder,  
2 fibromyalgia, and medication dependence with severe  
3 constipation and abdominal pain.

4           So, there's -- this encounter also is very  
5 important. Why? Because all the sudden, six weeks after a  
6 person was injured, which seemed like a very localized low  
7 back pain situation, all the sudden become total body  
8 involvement where there were multiple systems, multiple  
9 orthopedic and musculoskeletal complaints. And there was an  
10 identification of multiple preexisting psychological problems,  
11 and medication dependence problems, and functional problems;  
12 i.e., like fibromyalgia and irritable bowel syndrome.

13           These are like functional medical conditions that  
14 are caused by people who have chronic pain, meaning that  
15 they're not able to cope with their pain, they develop stomach  
16 issues, constipation, functional problems that need specific  
17 attention.

18           So, that was very important in the medical record.  
19 She was referred for x-rays of her neck, her chest, her right  
20 knee, her right hip, and she was referred to a  
21 gastroenterologist and an orthopedic surgeon based on her  
22 complaints.

23           Q     Okay.

24           A     So, then, just real quick, the next day, she went  
25 for medical imaging at Steinberg Diagnostic. The x-rays of

1 her hip and knee were read as normal, which is important, to  
2 make sure she didn't fracture anything when she fell.

3 I mean, she had traumatic injury. So those issues  
4 of lumbar spine, hip, and right knee were taken care of right  
5 then and there in terms of ruling out like fracture, or  
6 obvious like serious traumatic problems.

7 The orthopedic surgeon that she saw was Dr. Cash,  
8 who's an orthopedic spine surgeon, and that was on March 23rd,  
9 2010. So, at this point, I thought that he did a good -- Dr.  
10 Cash saw the claimant at about seven weeks post-accident, and  
11 he described her falling on her right side and left hand,  
12 which wasn't in the original record. And he said she  
13 describes pain over her right buttocks, right leg, right arm,  
14 and bilateral wrist. He said she has neck pain ranging to two  
15 to eight on a ten-point scale, and back pain from three to  
16 eight on a ten-point scale.

17 And I want you to pay attention to that, because  
18 even at this point, this was about seven weeks after the date  
19 of the accident, she was describing a range of pain that was  
20 somewhat reasonable. Like, maybe when she's resting, she's  
21 not in so much pain, but when she's active, maybe her pain  
22 escalates to a higher degree which, I would say, would be a  
23 normal physiologic response to somebody who's in pain. I'm  
24 not even saying that -- related or not related, it's just a  
25 normal human physiologic response to pain.

1           Q     And at some point later in her treatment, did those  
2 numbers change?

3           A     Yes, they did. You know, I would say specifically  
4 when she started accessing more medical treatment and going to  
5 physical therapy, this was April 28th, 2010, so that was  
6 basically two-and-a-half months, she was describing pain  
7 severity at ten out of ten all the time, and that, subsequent  
8 to that, if you look at the pain diagrams in the notes -- and  
9 a lot of times -- you know, I went through this medical record  
10 really thoroughly, and the pain diagrams, the things she was  
11 entering into the record.

12                     She was writing pain diagrams like the whole body.  
13 Like her back, her neck, her legs, her feet, her hands.  
14 Complete pain over her whole body at a level of ten out of ten  
15 repetitively over, and over, and over, and over again.

16                     And this was also documented by the pain management  
17 doctor that saw her. Dr. Erkulvrawatr saw her. He's a pain  
18 management physician. He saw her April 9th, 2010.

19                     So, this was exactly five months following a date of  
20 injury, which you would suspect, just with time and physical  
21 therapy, there would be a progression of healing, a  
22 progression of trying to return to a normal activity level, to  
23 a normal state of function.

24                     Dr. Erkulvrawatr described a subjective interview  
25 with the claimant that said she had bilateral neck and upper

1 extremity pain at a level of ten out of ten, worse in the neck  
2 with movement, and she also states she worsened with physical  
3 therapy, bilateral low back pain radiating into her right leg,  
4 with numbness and weakness in her leg with a severity of ten  
5 out of ten, worse with walking.

6           So, now, as a physician, you'd say, wow, this is  
7 serious, right? Because her pain is like escalating instead  
8 of getting better. So, as a physician, we're trained to  
9 really try to focus on like objective findings, you know,  
10 objective medical evidence.

11           And in this day and age, we're lucky. We're --  
12 doctors are kind of spoiled, and I would say a lot of doctors  
13 over-utilize medical technology, because, as I said, you know,  
14 a good physician that analyzes an injured individual, you have  
15 to do a very good interview, get a sense for a person's  
16 experience of pain, behavior, so on and so forth, what their  
17 other stress factors are in their life. You have to do a  
18 thorough medical examination, and then rely on imaging and  
19 other testing that's done.

20           So, the testing is very objective, meaning, it  
21 doesn't mean Dr. Cash did it, or Dr. Erkulvrawatr did it, or  
22 Dr. Dunn, or whoever was seeing the patient. It's -- the MRI  
23 testing -- or -- is very objective. It is what it is. It  
24 tells a very, very clear story about physiologic injury. Why?  
25 Because an MRI can show a fracture, even a bruise. An MRI can

1 show a bruise in a bone, it could show whether there's  
2 traumatic damage to soft tissue, it could show nerve injury,  
3 it could show ligament injury, it could show tendon injury, it  
4 could show the chronicity of things based on the appearance of  
5 cartilage, the appearance of calcification in certain areas of  
6 the body.

7           So, like I said, in this day and age, in medical --  
8 the medical environment, doctors are very spoiled, because we  
9 have this MRI technology that helps us. And it helps us to  
10 get a very clear picture of what possibly can be causing a  
11 person's pain, right?

12           So, that's why, you know, physicians -- and even in  
13 a medical legal arena, there's a heavy weight on MRI  
14 technology, because it tells us structurally, and  
15 functionally, physiologically what the source of a person's  
16 pain and disability is coming from.

17           And so, a lot of times, it doesn't mean a person  
18 wasn't injured, but a lot of times, it just gives us  
19 information where we can rule out bad things, and we come to a  
20 conclusion of why a person's in pain.

21           And so, I wanted really to pay attention at --  
22 because Dr. Cash ordered MRI imaging of the claimant's  
23 cervical and lumbar spine, and the MRI of the lumbar spine was  
24 performed April 8th, 2010.

25           Q     Okay.

1           A     And it was done at Steinberg Imaging.  And what  
2 those images showed was basically that the claimant had  
3 multiple levels of -- in the spine, the vertebrae of the bone,  
4 and in between the bone, there's little cushions called discs,  
5 which are ligament material filled with fluid.  So, those  
6 discs are -- surround the spinal canal, and then you have the  
7 nerves that exit the spine behind the disc.

8                     And the MRI showed no evidence of traumatic fracture  
9 or subluxation of the joints in the spine, which is very  
10 important.  After a person falls, that's one of the first  
11 things you want to do.  You want to make sure there's no  
12 translation of the vertebrae from traumatic subluxation.

13                    The MRI showed that the discs in her spine from the  
14 bottom, which is L5-S1, then L4-L5, and then up to the middle  
15 disc at L2-L3, they were all desiccated, meaning, they lost --  
16 were losing moisture, bulging, and calcified.  There was  
17 calcification of the discs, which show a pattern of chronic  
18 disc degeneration.  The disc at L2-L3 showed a left  
19 paracentral bulge, meaning that disc was kind of deformed more  
20 to the left than to the right, and it caused a tiny bit -- we  
21 see mild narrowing of -- across the nerve, which is  
22 physiologically insignificant.

23                    So, if this individual is having all right-sided  
24 symptoms down the leg with burning, and weakness, and pain  
25 down the right leg, you -- what we're looking for on the MRI

1 is a disrupted disc, a disc that's torn, a disc that has an  
2 annular disruption, a deformity of the disc that is moving  
3 towards the right, impinging on a nerve that exit into the  
4 person's leg. This was absolutely not there.

5 Q Okay.

6 A It was -- it was specifically documented that she  
7 had these very mild central disc bulges at multiple levels.  
8 And then the -- this left paracentral disc bulge at L3-L4 was  
9 the only one that actually lateralized.

10 And aside from that, her soft tissue was normal.  
11 There was no mass, or edema, or swelling in the soft tissue,  
12 there was no fracture of the sacrum. And so, from this  
13 conclusion, when Dr. Cash interpreted this MRI, he very  
14 specifically recommended that the claimant required a pain  
15 management consult and physical therapy.

16 Q Okay.

17 A So --

18 Q And did she --

19 A There was an MRI of the cervical spine that was  
20 performed also at Steinberg on May 8th, 2010, and that was  
21 evaluated by Dr. Erkulvrawatr, along with the lumbar MRI. And  
22 his interpretation -- so this -- there was a radiologist that  
23 interpreted that MRI, and also Dr. Erkulvrawatr, and he said  
24 she had multi-level disc degeneration at C3-C4, C5-C6, C6-C7,  
25 so three lower discs in her neck had degenerative disc process

1 without any acute injury or disc herniation.

2 Q Okay.

3 A And then, he interpreted the MRI of the lumbar spine  
4 exactly the same way that I just kind of reviewed it. And  
5 what his exam showed, Dr. Erkulvrawatr said that she had  
6 complete regional tenderness of her whole cervical spine and  
7 her whole lumbar spine, she had limited range of motion,  
8 normal neurological exam, normal strength. So --

9 Q What does that tell you?

10 A So, what that tells you is Dr. Erkulvrawatr  
11 concluded that this woman had cervical disc degeneration and  
12 lumbar disc degeneration, and he made a note of lumbar  
13 radiculopathy.

14 Later on, the way you can confirm lumbar  
15 radiculopathy is through nerve testing, like diagnostic nerve  
16 testing, and the diagnostic nerve testing was subsequently  
17 done by a neurologist on March 6th, 2012, Dr. Milford, and  
18 that was approximately two years after the date of injury.

19 And Dr. Milford said that her upper extremity EMG  
20 and nerve conduction testing showed changes in the nerve  
21 velocity, consistent with bilateral carpal tunnel syndrome; no  
22 evidence of lower extremity abnormality; no evidence of upper  
23 extremity radiculopathy coming from the neck; no evidence of  
24 radiculopathy coming from the lumbar spine.

25 So, that's why this gets very complex, but you put

1 that together and you come to the conclusion that there was no  
2 MRI evidence of acute injury of the cervical or lumbar spine.  
3 There was nothing there that could be identified as being an  
4 acute damage to the spine.

5 Q Okay.

6 A The -- that was the specific analysis of the spine  
7 from orthopedic surgery perspective when she was seen by Dr.  
8 Cash, and then also her pain management doctor, Dr.  
9 Erkulvrawatr. She was seen by -- I'm sorry, I skipped this  
10 over. I apologize, I have to go back.

11 She was seen sooner than that by a neurologist, Dr.  
12 Germin, a clinical neurology specialist, sooner. This was  
13 June 10th, 2010. And he did upper and lower extremity  
14 neurodiagnostic testing, and his conclusion was that the  
15 symptoms that she was displaying was neck pain, headaches,  
16 blurred vision, chest pain, difficulty breathing, pain in her  
17 arms, difficulty walking, stomach pain, nausea, frequent  
18 urination, back pain, joint pain, muscle spasm, and decreased  
19 sensation in her hands and feet with trembling. This was four  
20 months after the date of injury.

21 His neurodiagnostic studies, EMG testing, and nerve  
22 conduction testing in the upper and lower extremities, he said  
23 no neurodiagnostic evidence of lower extremity radiculopathy,  
24 peripheral neuropathy, or demyelinating neurologic disease.  
25 So, again, that's two separate neurologists that confirmed

1 that there was no evidence of lower extremity neuropathic  
2 disease; no radiculopathy coming from the spine.

3 Q And radiculopathy is what?

4 A Radiculopathy is when there's a process in the spine  
5 that causes impingement on a nerve, or layman's terms would be  
6 a pinched nerve. So, it could be a chronic process or an  
7 acute process that causes lack of blood flow to a nerve, so  
8 the nerve starts becoming pathologic, and you can get pain,  
9 and weakness, and loss of reflexes in an extremity from a  
10 process happening in the spine. And so, the term for that is  
11 radiculopathy.

12 Q Okay.

13 A So, I want to just go backwards, and go back to the  
14 -- her -- the claimant's first physical therapy assessment.

15 Q Okay.

16 A And this was ordered by Dr. Cash for her to go to  
17 physical therapy. And she was evaluated by Matthew Smith, who  
18 was actually the owner of Matt Smith Physical Therapy. And I  
19 -- I just want you to know, I know and work with a lot of  
20 these people in this medical record, and I have very high  
21 respect for all of these medical practitioners.

22 Q Understood.

23 A You know. So, the initial evaluation from the  
24 physical therapist was April 28th, 2010. So, this was  
25 two-and-a-half months following the date of injury, or

1 basically, two months, three weeks. He said she had a slip  
2 and fall, landing on her right low back and right buttocks on  
3 February 8th, 2010; pain over the lumbosacral area on the  
4 right greater than the left at a level of ten out of ten.  
5 Again, in the record, everything is -- at this point, was  
6 escalating.

7 His assessment was that she was weight-bearing with  
8 a walker, so she was using a rolling walker. She had lower  
9 extremity strength of three-plus out of five, which is --  
10 basically, if a person has full strength, that's five out of  
11 five. If a person has like mild weakness, so if you're trying  
12 to test strength and they're kind of giving away, that's kind  
13 of four out of five. If a person basically has like very  
14 little strength against gravity, so if they can barely move  
15 against gravity, that's three out of five.

16 And so, he said her strength in her lower  
17 extremities was three-plus out of five, and he commented that  
18 she was manifesting Waddell signs. He said that --  
19 specifically, that she was not giving full effort with  
20 strength testing. And we see that -- remember what I said.  
21 Dr. Erkulvrawatr saw this claimant relatively the same period  
22 of time, and he tested her and said she had five out of five  
23 strength, and here at the physical therapist, she's  
24 manifesting three-plus out of five. That's a significant  
25 difference.

1           He said she had diffuse tenderness over her whole  
2 lumbar spine in her gluteal region, the same thing Dr.  
3 Erkulvrawatr documented. Diffuse regional tenderness, meaning  
4 it's not pinpoint; it's like the whole spine. He documented  
5 tenderness in her gluteal region, and her range of motion was  
6 extremely limited.

7           So, if a person is trying to kind of bend at the  
8 waist, if they can go to a perpendicular level, that's 90  
9 degrees. So, he documented that she only could go 20 degrees,  
10 basically, like that. And he documented that she can extend  
11 her spine basically five degrees, like barely moving into  
12 extension, which is extremely limited. He said that she had  
13 no nerve tension signs.

14           And so, he documented what he thought were Waddell  
15 signs, meaning that -- a Waddell sign, I have to clarify that,  
16 is basically, there was a surgeon -- orthopedic surgeon famous  
17 in the late 60s and 70s, and he was an orthopedic spine  
18 surgeon. And Dr. Waddell observed that there was many  
19 individuals that were not recovering normally from surgery.  
20 Like, he identified a problem, he did surgery, and he noticed  
21 they weren't recovering normally.

22           And he identified there were certain things on exam  
23 that a doctor should look for. They're called -- now it's  
24 very famous -- they're called Waddell signs, and there's five  
25 findings on exam that you look for that would identify

1 basically what we would call functional overlay, meaning,  
2 there's something psychologically going on that's making a  
3 person manifest pain that's not normal.

4 Q Okay.

5 A And so, that's what Dr. Matt Smith was identifying  
6 at that time. And he -- on reevaluation in May, basically, he  
7 noticed that her symptoms were not improving. He said she had  
8 inconsistent resistance when he did a strength testing,  
9 similar range of motion. She had the same complaints, and he  
10 wanted to continue treating her.

11 I believe on the discharge summary, she completed 24  
12 sessions of physical therapy from Matt Smith, and she  
13 completed it November 1st, 2010, and that is nine months after  
14 the date of the slip and fall. So, nine months later, after  
15 24 sessions with a very well-known, good physical therapist,  
16 she described continued lumbosacral pain on the right greater  
17 than the left at a level of eight out of ten. Her neck pain  
18 was radiating into her bilateral upper extremity with weakness  
19 and tingling in her hands.

20 She was still walking with a walker. Her upper  
21 extremity strength was still inconsistent and measured from  
22 three to four out of five. She had lumbar flexion that didn't  
23 change at all, just barely moving. And he just -- he  
24 suggested discharge from physical therapy.

25 And then there was -- I want to stick with the