

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.

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

APPELLANT'S APPENDIX
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1 BY MR. SEMENZA:

2 Q Do you recall seeing anyone watering any of the
3 plants while you were at the Wynn on February 8th, 2010?

4 A I didn't notice.

5 Q You didn't notice?

6 A I didn't -- I didn't see anybody doing that.

7 Q Okay. I'm sorry, I didn't hear you. I appreciate
8 it. And prior to the break, I had asked you questions about
9 why you think that the green liquid substance was -- came from
10 the plants, and am I correct that you identified that the
11 proximity of the liquid substance to the planter, and because
12 the -- the substance had a green tint; is that correct?

13 A Yes, because it was right up against the plants.

14 Q Okay. Is there anything else that you believe
15 indicates -- or would indicate that it came from the planter?

16 A I believe that if it didn't, that they would have
17 kept the mop with the proof on it. That's what I believe.

18 Q You don't know how long the liquid substance was on
19 the floor, do you?

20 A Oh, sure, I know how long it was on the floor. It
21 was on the floor long enough for at least a three-foot part of
22 it to almost dry, and become sticky, and accumulate
23 footprints. And the whole spill covered at least a seven-foot
24 area, and four feet of it -- at least four feet of it was --
25 still had liquid and it was slippery, but a three-foot part of

1 it was almost dry, so that was on the floor a long time.

2 Q Okay, so how many minutes was it on the floor for?

3 A Well, as many minutes as it takes for that big of a
4 spill to have that three-foot part of it almost dry and
5 accumulate footprints. We could time it, I guess.

6 Q And how long is that?

7 A I haven't timed it.

8 Q How long would it take? You testified that you know
9 how long it would take for that spill to dry, and so --

10 A That's --

11 Q Let me finish my --

12 A I'm sorry, I'm sorry.

13 Q So, I'm asking you, how long in time would it take
14 for that spill to dry?

15 A So, you're asking -- if you're asking in minutes --

16 Q Yes.

17 A -- I don't know the minutes, but it --

18 Q Okay.

19 A The time -- the time that it takes for that big of a
20 spill to have a three-foot part of it almost dry, that's how
21 much time.

22 Q Okay, but you don't know how many minutes it takes,
23 do you?

24 A I don't know how many minutes.

25 Q Thank you. You don't have any training or expertise

1 in determining how quickly liquids dry, do you?

2 A No.

3 Q You testified earlier that the footprints that you
4 saw were yours and the people that had picked you up; is that
5 fair to say?

6 A Yes.

7 Q You don't know specifically how the liquid -- or the
8 liquid substance got on the floor, do you?

9 A I thought that it came from the plants.

10 Q Okay, I understand that's your position, but
11 specifically how did it get on the floor? Was there a leak?
12 Was there -- was it hand watering? How did it get
13 specifically on the floor?

14 A I believe that if they would save the mop --

15 Q No, that's --

16 A -- they'd be able to tell us if it was the water
17 from the plants.

18 Q My question to you is how did the liquid
19 specifically get on the floor?

20 A What I believe is it came off the plants. That's
21 what I believed.

22 Q How did it come off the plants, is what I'm asking
23 you?

24 A The way it came off the plants, or it could have
25 been -- you know, they water by hand; it could have been from

1 that. Like I say, I believe they would have saved the mop to
2 prove that it wasn't water off the plants.

3 Q Okay. You don't know, in fact, how that liquid got
4 onto the floor, do you?

5 A Just what I believe.

6 Q Okay, but you don't know how it got on the floor?

7 A All I -- I can just tell you what I believe.

8 Q Okay.

9 A That's what I believe. And I think they would
10 have --

11 Q But you don't -- okay, go ahead. I didn't mean to
12 cut you off.

13 A I think they could have -- I believed that there
14 would -- this would not be an issue. I believe that they had
15 all the pictures, and that they'd save the mop, and this
16 wouldn't be an issue.

17 THE COURT: Okay, I think I've heard that enough
18 now. Can you move on?

19 MR. SEMENZA: Yes, Your Honor.

20 THE COURT: Because she's saying the same thing.

21 BY MR. SEMENZA:

22 Q You didn't see any running liquid after you fell,
23 did you?

24 A No, just the liquid up against the plants.

25 Q Okay. You didn't see any liquid coming from the

1 planters onto the marble flooring, did you?

2 A No, I didn't see that.

3 Q After your fall in February 2010, did you take a
4 cruise with Mr. Risco?

5 A I went months later.

6 Q When did you go on the cruise?

7 A I believe it was sometime in November or December of
8 2010. Excuse me, sorry.

9 Q Where was the cruise to?

10 A I believe it was the Caribbean. Yeah.

11 Q How did you get to the cruise ship?

12 A We flew.

13 Q Okay, from where to where?

14 A From Las Vegas to Florida.

15 Q And you boarded a cruise ship in Florida?

16 A Yes.

17 Q And went to the Caribbean?

18 A Yes.

19 Q How long was the cruise?

20 A I don't recall exactly. You know, probably a week,
21 but I don't recall.

22 Q And then, after the cruise was over, you returned to
23 Las Vegas?

24 A I believe we met his family there.

25 Q In Florida?

1 A In Florida.

2 Q Did you stay additional time after the cruise in
3 Florida?

4 A I believe we did.

5 Q How long --

6 A Or, I'm sorry, I don't know if we did that first.
7 We went to Disney World and met his family, and we went on a
8 cruise I believe the same -- I forget which was which -- which
9 time.

10 Q Did you have an opportunity to review Mr. Risco's
11 deposition transcript?

12 A No.

13 Q You haven't looked at it?

14 A No.

15 Q Would it surprise you to know that Mr. Risco
16 testified that the fall -- that he believed that your fall
17 brought you two closer together?

18 A I'm sorry?

19 Q Would it surprise you to learn that Mr. Risco
20 testified during his deposition that the fall that you
21 experienced in February 2010 brought the two of you closer in
22 your relationship?

23 A I would have to hear it from him to understand what
24 he's -- what he's saying. I don't know.

25 Q Would you disagree with that?

1 A Well, if he feels that way, then -- I mean, bottom
2 line is we ended up breaking up, so --

3 Q And you attribute --

4 A But if he -- if he feels that way, maybe that's what
5 he thought in the beginning, but ultimately, we broke up. So,
6 I would have to hear him say what he -- and explain to me what
7 he's saying. So, if he felt that, I wouldn't dispute it.

8 Q Did you take any other trips with Mr. Risco other
9 than the cruise prior to your break up in 2011?

10 A Well, we broke up -- right after we -- I fell, we
11 broke up, and then we -- I was able to get back together with
12 him because I really tried hard. And so we got back together,
13 and that's when we went on the cruise. And then I believe it
14 was February for his birthday, then we went to Florida and
15 spent some time with his family, and then we -- then we broke
16 up again, and that was the end of that.

17 Q When was the first time you broke up with Mr. Risco?

18 A A few months after I fell.

19 Q Did Mr. Risco break up with you, or did you break up
20 with him?

21 A Well, I couldn't keep up with him, and so I'm not
22 sure that you could call it mutual or not, but I wasn't able
23 to keep up with him.

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

25 THE COURT: Redirect?

1 MS. MORRIS: Yes, thank you. All right.

2 REDIRECT EXAMINATION

3 BY MS. MORRIS:

4 Q Yvonne, you're quite thorough in your medical
5 reporting, aren't you?

6 A Yes, I am.

7 Q It would say -- it looks like, if you think you have
8 something, you err on the caution of writing it down; would
9 that be fair?

10 A Yeah, I'm a very detail-oriented person.

11 Q And it looks like you've told them everything that's
12 ever happened to you since 1956; is that right?

13 A Yeah, pretty much since I was born.

14 Q Be fair to say you certainly haven't left much out?

15 A No, but -- but that's why I was able to be a dental
16 hygienist and specifically sit there all day long just
17 cleaning underneath the gums. I had to get absolutely
18 everything out, so that's --

19 THE COURT: Ma'am, ma'am.

20 THE WITNESS: Oh, I'm sorry.

21 THE COURT: No narrative responses. Answer her
22 questions.

23 THE WITNESS: I'm sorry.

24 THE COURT: We're on a time table here, okay?

25 THE WITNESS: I'm very sorry.

1 MS. MORRIS: That's okay.

2 BY MS. MORRIS:

3 Q Now, you didn't contact your cousins after you fell;
4 is that right?

5 A Right.

6 Q Okay, and why is that?

7 A Well, because that's just not something I would do.
8 I mean, we got together, had our -- our lunch, and then we
9 went our separate ways, and I didn't even see them for three
10 years after that. They're not people -- they don't live here.
11 I don't spend time with them.

12 Q You don't have that relationship with them?

13 A No.

14 Q And you didn't call Sal on the cruise ship; is that
15 right?

16 A Not that I know of. I usually never did. I mean,
17 if he was gone, I wouldn't call him.

18 Q Back in 2010, did you have any close friends?

19 A Well, I spent most of my time with Sal, and so any
20 friends that we had -- we had a lot of -- a lot of really
21 close acquaintances.

22 Q I want to clarify. You said that you had injured
23 your hand sometime in the past, in the '80s; is that right?

24 A In -- around 1986. That's why -- that's when I
25 stopped playing -- practicing dental hygiene.

1 Q And that injury to your hand, you said someone
2 backed into it or something; is that correct?

3 A Oh, yeah. He just went back up against the wall and
4 my hand was there, and it just swelled up some, but I was back
5 to playing tennis a few days later, so that was that.

6 Q Is that the injury that you're referring to when you
7 write down you injured your hand in the past?

8 A That's it.

9 Q I want to look just quickly at -- it's exhibit --
10 well, it's been entered, sorry, R01. This is your appointment
11 that you had on February 17th of 2010, so approximately nine
12 days after you fell; is that right?

13 A Yes.

14 Q Okay. And you filled all the little squares in on
15 this diagram, right?

16 A Yes.

17 Q Okay. And these are the areas that you were feeling
18 for pain in February of 2010; is that right?

19 A Yes.

20 Q And you indicated your right knee; is that correct?

21 A Yes.

22 Q I also want to show you what's been admitted as
23 P003. This is your visit with Dr. Cash in February. I'm
24 sorry. And let's see (inaudible) records. Let me just look.
25 In March of 2010; is that right?

1 A Yes.

2 Q Okay. And can you read for me that last sentence in
3 your handwritten notes at the top, which starts with
4 "Immediately"?

5 A "Immediately, it hurt to sit on my right side, and
6 my foot hurt. It still" -- do you want me to continue?

7 Q Yes, please.

8 A "It still hurts to sit, and I have been putting all
9 my weight on my left side, so now my left side aches, too."

10 Q And then you filled out another pretty detailed
11 diagram here, huh?

12 A Yes.

13 Q Okay. Looks like you were very specific in what you
14 wanted to indicate was -- what was bothering you; is that
15 right?

16 A Yes.

17 Q Okay. And did you say that your left knee was
18 hurting at that time?

19 A Well, yes, because I'd been limping for well over a
20 month already.

21 Q Well, you put X's on your right knee; is that right?
22 Am I looking at that correctly?

23 A I'm sorry, I'm -- okay. Yes, I have things on my
24 right knee, as well as my left knee.

25 Q What's on your left knee?

1 A What's on my left knee?

2 Q Yep.

3 A It's on my knee -- marks on my knee.

4 Q Are those lines?

5 A Aches. Yeah, lines. Yeah.

6 Q What do lines indicate? Can you see it says
7 "numbness"?

8 A Okay, numbness.

9 Q So, you've got lines all the way down your left leg;
10 is that right?

11 A And -- yes.

12 Q Oh, you're talking about the back?

13 A Correct.

14 Q Yes. Yeah, it was aches and numbness.

15 Q Okay, aches and numbness. And you had reported that
16 now your left side was aching because you were
17 over-compensating; is that right?

18 A Right, from limping.

19 Q Now, I want to look at what was admitted as I0002.
20 Now, this is when you are at Southern Nevada Pain Center in
21 September of 2010, and this is after you said your right knee
22 gave out; is that right?

23 A Yes.

24 Q And then you said your left knee had not been
25 injured before, so now your left knee you considered injured;

1 is that right?

2 A Right.

3 Q So, before you had your right knee give out, your
4 left knee -- well, your left side was aching; is that correct?
5 Aching and numb?

6 A Oh, yes.

7 Q But you hadn't considered it to be injured; is that
8 right?

9 A Right.

10 Q Now, when you went to the doctors and you filled out
11 all these things that we've seen, were you telling the doctors
12 what was wrong with you?

13 A No, I was just telling them that I fell, I had all
14 this pain, and I was trying to tell them I had all this pain.

15 Q When you go to see a doctor and they ask you to fill
16 something out, do you fill it out and put down everything
17 that's bothering you at the time?

18 A Unfortunately, I do. I've got that anal type
19 personality.

20 Q And if there had been more things to add to this,
21 you probably would have put that all down, wouldn't you have?

22 A I put everything I can.

23 Q And even if someone doesn't diagnose you, but tells
24 you you might have something, you write that down, too; isn't
25 that right?

1 A Oh, right. That's what I did.

2 Q So, you didn't get diagnosed with having an ulcer,
3 but someone said you might have one, so you put that down; is
4 that right?

5 A Right.

6 Q And no one diagnosed you with having a hernia. They
7 said they might have -- you might have one, so you write that
8 down, too; is that right?

9 A Everything I could think of.

10 Q You're trying to be extremely thorough?

11 A Yes.

12 Q Why are you so thorough when you're writing your
13 medical records?

14 A It's a real -- it's a bad habit, but like I say,
15 that's why I was able to do the deep scaling. It's -- I'm --
16 yeah, it -- I know it's too much, but I was good at my job.

17 Q You also said that you don't want to take pain
18 medications; is that correct?

19 A I want to take pain medications. I wish I could.
20 I'd like to take pain medications to make this all go away; I
21 can't.

22 Q Do you think pain medications might help?

23 A Maybe briefly, but they're going to cause more
24 problems than they help.

25 Q I want you to take a look at your deposition

1 transcript that's in front of you, and I'd like you to look at
2 page 58. Can you turn to that for me?

3 A Yes. Okay.

4 Q Do you remember Mr. Semenza asking you if it was
5 fair to say at the moment you fell you weren't looking down at
6 where you were walking?

7 A Okay.

8 Q Do you remember telling him, "That's not fair. I
9 was rounding the corner, so I was probably looking closer to
10 where -- the floor"?

11 A Right.

12 Q When you were walking through the atrium before you
13 fell --

14 A Yes.

15 Q -- were you in general looking where you were going?

16 A In general, I was. I was looking at the scenery and
17 at the floor. I went to also see that beautiful floor.

18 Q Were you staring at your feet before you fell?

19 A I was looking at the floor and the scenery.

20 Q Do you generally stare at your feet when you walk?

21 A Stare at my feet? No.

22 Q Now, you said it was hard to see the liquid that was
23 on the floor; is that correct?

24 A Yeah, because it was green and colored tile.

25 Q If you had seen the liquid before you stepped in it,

1 would you have intentionally stepped in it?

2 A Of course not.

3 Q If you had seen the liquid, would you have tried to
4 avoid it?

5 A Absolutely.

6 Q Now, you've told them what you think the liquid came
7 from, but you weren't in the atrium prior to your fall; is
8 that right? You'd just arrived? That was your first time in
9 the atrium that day; is that correct?

10 A Yes.

11 Q You hadn't been there 20 minutes, half-an-hour
12 before; is that right?

13 A Right.

14 Q And you are not in charge of inspecting an area
15 prior to walking into it; is that correct?

16 A Right, and they didn't have any warning signs.

17 Q But would you consider it to have been keeping a
18 safe lookout as you were walking through the atrium that day
19 before you fell?

20 A Well, within reason. I mean, I went to -- I went to
21 see the decorated trees, and the plants, and the flowers, and
22 to see the beautiful walkway. I went to see that.

23 Q Do you think that you're overly anxious about your
24 current health situation?

25 A Oh, absolutely. Now, I am. I never used to be. I

1 mean, I was -- I'm used to being -- I was used to being strong
2 and healthy. Now, I'm the complete opposite.

3 Q You keep saying that you were strong and healthy,
4 and you've written that down in a bunch of medical records; is
5 that correct?

6 A Okay.

7 Q Is that important to you?

8 A Yes.

9 Q What is the difference? What -- how are you
10 different now?

11 A Well, I was strong and healthy, I swing danced, and
12 I had a lot of fun, and I was a totally different person.
13 Now, I'm -- I stay at home most of the time because it's just
14 too hard to get around. It's hard to drive because it's
15 difficult to see, it's hard to turn my neck, and I was -- I'm
16 alone and it's hard for me to take care of myself. And I'm
17 getting older now, but much faster, and I'm in pain all the
18 time. And I don't like being like this, and I didn't think
19 I'd ever end up like this. I'm not this type of person, so
20 this is not who I was before.

21 Q How would you say this has affected you emotionally?

22 A I am worn out, I'm worn down, I'm physically and
23 emotionally just -- I've pretty much had it.

24 Q Before you fell, how were you doing emotionally?

25 A Before I fell?

1 Q Correct.

2 A Oh, I was on top of the world. I had a great life.
3 I had so much fun. Sal and I, we were always out and around
4 people, which I love to be around people, but not when I'm
5 like this, I don't.

6 MS. MORRIS: Thank you.

7 MR. SEMENZA: Just briefly.

8 THE COURT: Okay. Would you check the hall before
9 we start any recross to see if your witness is here? Because
10 that -- "briefly," lawyers say that when they just want to go
11 on. It's the saving grace. We always say that before we go
12 on forever. Still no? Okay, proceed.

13 MR. SEMENZA: Thank you, Your Honor.

14 RECCROSS-EXAMINATION

15 BY MR. SEMENZA:

16 Q I just want to briefly touch on a couple issues. We
17 had talked about this hand injury previously; you remember
18 that?

19 A Yes.

20 Q And this hand injury took place in 1986?

21 A Yes.

22 Q Okay. And this was an exceptionally minor hand
23 injury; is that correct?

24 A Yes.

25 Q Okay. It was just some swelling for a few days?

1 A And I was back to playing tennis in a week.

2 Q Why would you include that event that took place 30
3 years ago, or 25 years ago at the time of the fall at the
4 Wynn, in your medical history?

5 A For the same reason that I included 1955, I believe,
6 my tonsillectomy.

7 Q And -- and you believe that a surgical procedure and
8 a minor hand injury are sort of the equivalent as far as
9 reporting those things to your doctors?

10 A Well, it's that history, and that was my complete
11 history. I'm -- like I said, I have that personality. I'm
12 just detail-oriented, and it's too much, but I was great as a
13 dental hygienist.

14 Q And would you agree with me that you remember the
15 specific events of your fall very distinctly?

16 A I -- there's -- the things that I remember very
17 distinctly, and then some things I had to figure out later
18 based on the things I absolutely was sure about.

19 Q Okay. And but you do have a recollection of where
20 you were, where you fell, where you landed, those sorts of
21 things?

22 A Yeah, there's specific things that I'm positive
23 about.

24 Q Okay. And so, you have a pretty specific
25 recollection of what took place and your fall on that day?

1 A Well, like I said, there's certain things that I'm
2 absolutely positive about, and there's -- there's some things
3 that I had to figure out from that.

4 Q Okay. And you testified earlier that you actually
5 lost consciousness when you fell; is that correct?

6 A What I know is I hit my head. Now I know what I hit
7 it on. I hit it on that divider. And I know -- I know that
8 people woke me up, they were talking to me, and so I know
9 that.

10 Q So, is it fair to say that you lost consciousness?

11 A It's fair to say that I assume I did. I don't know,
12 but it was like people woke me up.

13 Q Okay. Did you -- did faint before you fell?

14 A Faint?

15 Q Yes.

16 A Oh, no.

17 Q Okay. So, the fall and your impact with your head,
18 that's what caused your loss of consciousness?

19 A Yes, because when I was walking through the
20 beautiful walkway, I was in great shape. I was -- I was on my
21 way for a two to three-mile walk on the Strip.

22 Q And obviously, that was very important that you lost
23 consciousness; don't you agree?

24 A I'm sorry, I don't understand what you're asking.

25 Q The fact that you lost consciousness after the fall

1 or at the time of the fall, that's an important detail, isn't
2 it?

3 A In -- in what way?

4 Q Well, it's important to knowing and understanding
5 how the fall took place, for example; is that fair?

6 A I don't know how that would have anything to do with
7 how the fall took place. I'm sorry, I really -- I don't
8 understand what you're saying.

9 Q That's fine, that's fine. You didn't report to
10 Officer Prowell that you had lost consciousness or that you
11 had hit your head?

12 A I know I was dazed, and if I -- and I can't tell you
13 for sure that I also told him that. I just -- I'm positive I
14 was dazed, I know that, and I'm positive I wasn't able -- he
15 asked me to fill out the form; I'm positive I wasn't able to
16 do that. And if I didn't tell him, I don't recall that, but
17 I'm positive I was dazed.

18 Q You were positive you were dazed, but are you now
19 unsure as to whether you lost consciousness?

20 A Oh, no, I thought you were asking if I had told him
21 I was dazed.

22 Q No. Did you ever tell him that you had lost
23 consciousness?

24 A Oh, I didn't know -- I didn't know at the time. I
25 was dazed. I hadn't figured out the whole thing yet. It

1 happened so fast, and I was -- and I was dazed, and I was
2 still trying to figure out what happened. I was in pain.

3 Q When did you come to remember that you had lost
4 consciousness?

5 A I'm not telling you that I lost consciousness. I'm
6 just saying that people woke me up and they were asking me if
7 I could get up, and I couldn't get up. That's what I
8 remember.

9 Q But --

10 A And I don't -- I don't know if you would call that
11 losing consciousness or not.

12 Q Well, you identified that you had to wake up,
13 meaning --

14 A Well --

15 Q -- that you were sleeping or unconscious.

16 A It just -- it's just, I suddenly fell, and the next
17 thing I remembered, that people were around me, asking me if I
18 could get up, and I couldn't. That's what I recall.

19 MR. SEMENZA: Okay, no further questions.

20 THE COURT: All right. Any --

21 MS. MORRIS: Nothing further. Thank you.

22 THE COURT: Thank you. You may rejoin your counsel
23 at --

24 THE WITNESS: Thank you.

25 THE COURT: -- counsel table.

1 MR. SEMENZA: Your Honor, obviously, I'll reserve my
2 right to recall her in my case-in-chief.

3 THE COURT: All right.

4 MS. MORRIS: Your Honor --

5 THE COURT: Oh, wait, jury question. Thank you for
6 reminding me. I've been watching the clock because we're
7 expecting another doctor.

8 THE MARSHAL: Anybody else?

9 THE COURT: Okay, counsel approach.

10 (Off-record bench conference)

11 (Pause in the proceedings)

12 THE COURT: All right, approach.

13 (Off-record bench conference)

14 THE COURT: All right. Ms. O'Connell, first
15 question, have you ever been a party to another lawsuit or
16 made a claim against somebody else without suing?

17 THE WITNESS: Yes.

18 THE COURT: Okay.

19 THE WITNESS: No clarification?

20 THE COURT: Well, that -- not at this time. That
21 was the question that was asked.

22 THE WITNESS: No, nothing like this.

23 THE COURT: Okay.

24 THE WITNESS: It was never anything like this. I
25 paid for insurance --

1 THE COURT: Well, wait a minute.

2 THE WITNESS: Oh, I'm sorry.

3 THE COURT: Counsel would like me to ask follow up
4 questions to that?

5 MS. MORRIS: I can ask follow up questions.

6 THE COURT: The lawyers will ask you follow up
7 questions to that.

8 THE WITNESS: Oh, okay.

9 THE COURT: All right. Okay. All right, next
10 question. Were you diagnosed with anxiety disorder in 1989?

11 THE WITNESS: No.

12 THE COURT: Did you valet park at the Rampart on the
13 day of the fall?

14 THE WITNESS: No.

15 THE COURT: Do you have a handicap parking permit?

16 THE WITNESS: Yes, it's permanent.

17 THE COURT: Which doctor gave it to you?

18 THE WITNESS: Well, Dr. Cash -- wait. Well, the
19 last one -- I got a permanent one from Dr. Dunn, but I had --
20 have had them since I fell, and the orthopedic surgeons have
21 given them to me.

22 THE COURT: Okay. So, which -- which -- so which
23 doctors? You've had -- given -- you've had them give them --

24 THE WITNESS: I've had them since I fell.

25 THE COURT: Okay, which doctors?

1 THE WITNESS: Well, Dr. Dunn gave me the last one,
2 and I'm sorry, right now, I forget who gave them to me before,
3 but Dr. Dunn gave me the last one, and it's a permanent one.

4 THE COURT: That was -- when was that?

5 THE WITNESS: He -- he gave me the last one last
6 year. And I'm sorry, I don't remember if it was my primary
7 doctor that gave me the first one or Dr. Cash, but I've had
8 them since I fell.

9 THE COURT: And is it a placard that you hang on
10 your mirror, or is it a plate on your car?

11 THE WITNESS: Well, I chose to get the -- the
12 placard.

13 THE COURT: All right. Which UMC Quick Care did you
14 drive to from your home? And its cross -- what are the cross-
15 streets?

16 THE WITNESS: There's one closest to my home, and
17 it's -- it's not -- it's like a few blocks away. It's -- it's
18 on Sahara and Fort Apache.

19 THE COURT: Okay. Okay. So, do you recall if your
20 pants were stained after the fall?

21 THE WITNESS: I didn't look.

22 THE COURT: Do you recall, was your hand that hit
23 the floor wet?

24 THE WITNESS: I don't recall that. I'm sorry.

25 THE COURT: Do you recall if you had to wipe off the

1 bottom of your shoes after the fall?

2 THE WITNESS: I -- I was left standing on that
3 drying part that was a little sticky, and when I -- when I
4 limped to the side, I was on carpet. So, there was a little
5 stickiness on my shoes, so I didn't really have to wipe
6 anything off because I wasn't left -- I was left standing on
7 that drying part; the sticky part.

8 THE COURT: And last question. Were you affected in
9 any way, physical or emotional, by Sal breaking up with you?

10 THE WITNESS: I -- I still love him, and I tried to
11 get back together with him this summer, and I tried really
12 hard, but I still wasn't able to -- to keep up with him. I
13 thought because he was older now, that -- but I wasn't able to
14 keep up with him. So, it hurts me very much.

15 THE COURT: Okay, but you don't believe that you
16 were affected physically?

17 THE WITNESS: Physically? I'm -- no. I'm
18 brokenhearted over it, but I love him, so I want him to be
19 happy.

20 THE COURT: Okay. All right. Are there any
21 questions from plaintiff's counsel as a result of these
22 questions?

23 MS. MORRIS: Just a couple of follow up.

24 //

25 //

1 FURTHER REDIRECT EXAMINATION

2 BY MS. MORRIS:

3 Q You had a contract dispute or an issue with the
4 bakery that you owned back in the '80s; is that correct?

5 A Yes.

6 Q And you also had an issue with breach of contract
7 with an insurance company back in the 80s; is that right?

8 A Yes.

9 MR. SEMENZA: Objection, leading. If we can just
10 not do leading questions.

11 THE COURT: Sustained.

12 BY MS. MORRIS:

13 Q The -- have you ever had a claim for a personal
14 injury before this?

15 A No.

16 Q Have you ever had a lawsuit for a personal injury
17 before this?

18 A No.

19 MS. MORRIS: Thank you.

20 MR. SEMENZA: I don't have anything further.

21 THE COURT: All right, thank you. And you may now
22 rejoin your counsel.

23 THE WITNESS: Thank you, Your Honor.

24 THE COURT: Counsel approach.

25 (Off-record bench conference)

1 THE COURT: Ladies and gentlemen, before this next
2 witness testifies, we need to do some -- something outside
3 your presence, and so I'm going to let you have a break here,
4 and we'll call you as soon as we can get back to you. And so,
5 our smokers have time to go to the smoking balcony, although I
6 think the winds might be 60 miles an hour. I'm not sure you
7 want to do that or not, but this is the time to do it.

8 And during this recess, it is your duty not to
9 converse among yourselves or with anyone else on any subject
10 connected with the trial, or to read, watch, or listen to any
11 report of or commentary on the trial by any person connected
12 with the trial, or by any medium of information, including,
13 without limitation, newspaper, television, radio, or internet,
14 and you are not to form or express an opinion on any subject
15 connected with this case until it's finally submitted to you.

16 You'll be in recess until we call you back.

17 THE MARSHAL: All rise for the jurors, please.

18 (Outside the presence of the jury)

19 THE COURT: The record will reflect that the jury
20 has departed the courtroom. Let's bring in Dr. Tingey. There
21 he is.

22 THE MARSHAL: Watch your step, remain standing, face
23 the court clerk, raise your right hand.

24 //

25 //

1 DR. CRAIG TINGEY, PLAINTIFF'S WITNESS, SWORN

2 THE CLERK: You may be seated, and would you please
3 state and spell your first and last name? You may be seated.

4 THE WITNESS: My name is Craig Tingey. T-i -- first
5 name is C-r-a-i-g. Last name, Tingey, T-i-n-g-e-y.

6 THE CLERK: Thank you.

7 THE COURT: Thank you. Mr. Semenza, you may
8 proceed.

9 MR. SEMENZA: Thank you, Your Honor.

10 (Testimony outside the presence of the jury)

11 DIRECT EXAMINATION

12 BY MR. SEMENZA:

13 Q Good afternoon, Mr. Tingey.

14 A Good afternoon.

15 Q Or Dr. Tingey. I apologize.

16 A No problem.

17 Q Where are you currently employed?

18 A Desert Orthopedic Center here in Las Vegas.

19 Q And is Dr. Dunn your partner?

20 A Yes.

21 Q Okay. And how long have you been practicing
22 medicine?

23 A Well, 11 years here in Las Vegas, plus five years of
24 residency.

25 Q Have you been with Desert Orthopedic the entire

1 time?

2 A No, I joined them in 2009.

3 Q Okay. And have you -- do you have any specialties
4 that you -- that you currently perform?

5 A I specialize in treatment of the shoulder, hip, and
6 knee.

7 Q And is that exclusively your practice at this point
8 in time?

9 A Not 100 percent, but the vast majority is shoulder,
10 hip, and knee.

11 Q Have you had occasion to treat Ms. O'Connell --
12 Yvonne O'Connell?

13 A I evaluated her on one occasion.

14 Q Okay. You've seen her one time?

15 A Yes.

16 Q Okay. And what history did Ms. O'Connell provide to
17 you either prior to or during your appointment with her?

18 A She reported that she had a slip and fall. She fell
19 onto her right side, and when she saw me, she was complaining
20 of knee pain, both -- bilateral knee pain.

21 Q And bilateral meaning both?

22 A Both knee pain, yeah.

23 Q And did you review any of her medical history, any
24 of her -- strike that. Did you review any medical records as
25 part of your examination of Ms. O'Connell?

1 A At that time, I don't believe that I did, other than
2 the MRI reports. I've reviewed some of her records since
3 then.

4 Q When did you review those other records?

5 A Last week, and then today, and that consisted of our
6 chart/records at Desert Orthopedic Center.

7 Q Did you bring any of those documents with you here
8 today?

9 A No.

10 Q Did you rely on any of those documents in forming
11 your opinions that you'll be testifying to here today?

12 A Only the documents that were included in the Desert
13 Orthopedic chart with Dr. Martin, because he also saw her for
14 her knee prior to that.

15 Q Okay. So, no -- you didn't rely on any medical
16 records outside of Dr. Martin or the MRI films?

17 A The MRI reports, yes.

18 Q And what did Dr. Martin's medical records indicate?

19 MS. MORRIS: And if I -- I'm sorry to interrupt. I
20 have Dr. Tingey's medical records here. He left his chart in
21 his car, which we can run back and get, but I have his records
22 that are Plaintiff's Proposed Exhibits for him to refer to.

23 THE COURT: Okay.

24 MS. MORRIS: If I can approach.

25 THE COURT: Well, I don't know if those are the ones

1 that he's --

2 MS. MORRIS: Which I can have him look through.
3 They're the Desert Orthopedic with the certificate of --
4 custodian of records on it.

5 THE COURT: Do you want him to look at his --

6 MR. SEMENZA: Not right now.

7 THE COURT: -- records at this point?

8 MR. SEMENZA: No.

9 THE COURT: Yeah, so we don't need him. If he needs
10 to refer to them, then --

11 MS. MORRIS: Okay.

12 THE COURT: -- we'll -- thank you.

13 BY MR. SEMENZA:

14 Q Do you recall the date that you saw Ms. O'Connell?

15 A I don't.

16 Q Do you recall what you diagnosed her with based upon
17 your review of the MRI films and the documents from Dr.
18 Martin?

19 A She had a right knee medial meniscus tear, and a
20 left knee medial and lateral meniscus tears.

21 Q And before you came here today, did you review
22 anything other than the medical records that we talked about
23 before in preparation for your testimony?

24 A No.

25 Q And do you have an opinion as to the causation of

1 Ms. O'Connell's bilateral knee pain?

2 A I do.

3 Q Okay, and what is that opinion as to causation?

4 A My opinion would be that the right knee medial
5 meniscus tear is related to the slip and fall, and the left
6 knee medial and lateral meniscus tears are not related to the
7 fall. And she does have some mild arthritis in either knee,
8 and I would not relate that to the injury.

9 Q And so, the left knee is unrelated; the right knee
10 is related?

11 A That's correct.

12 Q There are, however, arthritic changes in the right
13 knee as well?

14 A Mild, by x-ray findings, yes.

15 Q And what do you base your conclusion that the right
16 knee meniscus tear was caused by the slip and fall on February
17 8th of 2010?

18 A It's based on my understanding that the patient --
19 or that the -- I guess I'll say patient, if that's okay, is --
20 was not having symptoms in that knee prior to her injury, and
21 that the onset of those symptoms were soon thereafter, and
22 that the MRI findings were consistent with a traumatic tear of
23 the meniscus, as opposed to the findings in the left knee.

24 Q Okay. Are you aware of any injuries that Ms.
25 O'Connell may have had after February 8th of 2010 that could

1 relate to or explain that tear in her right knee meniscus?

2 A No.

3 Q Did she ever indicate or explain to you that she did
4 have any right knee injuries after February 8th of 2010?

5 A No, not that I recall.

6 Q Did she ever indicate to you that she fell on July
7 14th of 2010?

8 A She did not.

9 Q And was your conclusion that the right knee meniscus
10 tear related to her fall on February 8th, 2010 based
11 exclusively on her reporting that that's what took place?

12 A Not exclusively, but that has a large factor in my
13 opinion.

14 Q Okay. What else did you -- what else was there that
15 gave you that conclusion, other than her self-reporting?

16 A Like I said, the MRI findings were consistent with
17 that history. The left knee MRI showed tearing of the
18 meniscus on both sides, but they were extruded, meaning that
19 they were squished out of the joint, and that's more of a
20 degenerative type of finding. That's in the left knee. The
21 right knee didn't have those degenerative type findings. It
22 looked more like a typical meniscus tear that would be, you
23 know, consistent with a traumatic history.

24 Q But as for the traumatic episode that may have
25 caused this condition, you don't know whether it was on

1 February 8th, 2010, or sometime thereafter?

2 A That's correct. I mean, by an MRI alone.

3 Q Right.

4 A Yes.

5 Q And so, the conclusion that it was caused by a
6 specific fall on February 8th, 2010 was based upon Ms.
7 O'Connell's self-reporting of that?

8 A That's correct.

9 Q Are you aware of whether Ms. O'Connell has any
10 preexisting conditions that might impact your conclusion that
11 there was causation between the fall and her right knee
12 meniscus tear?

13 A Preexisting conditions of the knee, or other medical
14 conditions?

15 Q Any medical conditions.

16 A No, I'm not aware, other than, like I said, she had
17 mild arthritis of the knee, and I feel that that would likely
18 be preexisting to the fall.

19 Q Mild arthritis in the right knee that would be
20 preexisting to the fall?

21 A That's correct.

22 Q Were you ever informed that she had -- or had been
23 diagnosed with fibromyalgia?

24 A No. Actually, I -- I would need to look at my
25 record to know that. I don't know if I documented that or not

1 in my chart.

2 Q Would a fibromyalgia -- well, strike that. If Ms.
3 O'Connell did in fact have fibromyalgia, might that explain
4 some of her pain symptomology that she has in that right knee?

5 A Her right knee symptoms were consistent with a
6 meniscus tear and were not consistent with fibromyalgia.

7 Q How did Ms. O'Connell describe her pain in her right
8 knee?

9 A May I refer to my clinic note? Or -- or -- thank
10 you. I'm sorry, what was the question?

11 Q Frankly, I've moved on, so [inaudible]. Did she
12 describe -- did Ms. O'Connell describe the pain symptomology
13 she was having relating to her right knee?

14 A Yes.

15 Q Okay, and what was that?

16 A She described it as being located in the anterior
17 medial region of her knee. The pain was worse when twisting,
18 going from sitting to standing, or climbing stairs. She
19 experienced locking and swelling in the knee. She rated her
20 pain as a ten. She experienced clicking, instability,
21 locking, catching, snapping, popping, swelling, and pain with
22 activities.

23 Q Okay. And is it your opinion that none of those
24 pain symptoms would be related to a diagnosis of fibromyalgia?

25 A Taking all those symptoms together, they're very

1 consistent with a meniscus tear, and not fibromyalgia.

2 Q Are there any pain symptoms that you've identified
3 that would be consistent with fibromyalgia on their own?

4 A Not really, other than pain itself, but the locking,
5 the mechanical symptoms, pain with twisting, those are all
6 classic symptoms of a meniscus tear.

7 Q And would you expect that Ms. O'Connell has pain in
8 her right knee 100 percent of the time?

9 A I don't expect that, but that is -- that is possible
10 with a meniscus tear that she has constant pain. That's not
11 uncommon.

12 Q Now, you say you don't expect it. Is it uncommon
13 for someone to have 100 percent of the time pain in a knee
14 with a meniscus tear?

15 A There's a wide variety there with meniscus tear. It
16 could be constant, it could be intermittent, it could be
17 minimal, and a lot of pain. There's no --

18 Q And has Ms. O'Connell followed up with you relating
19 to any future appointments?

20 A No.

21 Q And was it your recommendation that Ms. O'Connell
22 have surgery in both knees?

23 A Yes.

24 Q Would the surgery be the same in both knees?

25 A The difference would be the left knee would involve

1 the medial and lateral meniscus. There's two meniscus in each
2 knee, and both of those were torn in the left knee, so it
3 would be slightly different, but it would -- both would be an
4 arthroscopic procedure.

5 Q Would it be fair to characterize the left knee
6 meniscus tear as more severe than the right knee meniscus
7 tear?

8 A No, it was more degenerative appearing.

9 Q Okay.

10 A In the left knee.

11 Q And there was also the appearance of degenerative
12 changes in the right knee as well?

13 A Not so much in the meniscus. By x-ray, there's very
14 mild findings of degenerative arthritis. That means the joint
15 space was mildly narrowed, but it was minimal, according to my
16 report.

17 Q And that may have given her some pain symptomology;
18 is that correct?

19 A That's possible.

20 Q Would a diagnosis of depression and anxiety affect
21 in your opinion a patient's symptomology of pain?

22 A It can, yes.

23 Q How did you come to treat Ms. O'Connell? Was it
24 through a referral from Dr. Martin, or something else?

25 A I believe it was a referral from Dr. Dunn.

1 Q And is it your understanding that Ms. O'Connell did
2 undertake physical therapy?

3 A Yes, that's my understanding.

4 Q And how did you come to learn that information?

5 A It's documented in my clinic note. She must have
6 reported it to me. I said that she has undergone physical
7 therapy without improvement.

8 Q Okay. As you sit here today, you don't know what
9 that physical therapy was?

10 A No.

11 Q In some of your notes -- well, I can move on.
12 Immediately after the injury, would Ms. O'Connell have
13 experienced severe right knee pain?

14 A That is -- that -- in general, that typically
15 varies. Some people when they suffer a meniscus tear will
16 have immediate pain; other times, it will be a day or two
17 after; other times, it can be a week or two later. But
18 usually, it's within, you know, a couple weeks, they have
19 onset of pain.

20 Q And if Ms. O'Connell had -- well, and your assertion
21 is she did tear a meniscus, but would Ms. O'Connell be able to
22 walk long distances with a torn meniscus in her right knee?

23 A You can, yeah. It just depends on how severe the
24 pain is.

25 Q And the severity of pain is a subjective reporting

1 by the patient?

2 A Yes.

3 THE COURT: Mr. Semenza, I've got --

4 MR. SEMENZA: I'm ready.

5 THE COURT: -- my 4:30 hearing.

6 MR. SEMENZA: Yep.

7 THE COURT: So, are you --

8 MR. SEMENZA: I think I'm done.

9 THE COURT: You're -- oh, you're done. Okay. I've
10 got to take a break, and a short hearing with some other
11 lawyers, so --

12 THE WITNESS: Okay.

13 THE COURT: And then we'll bring the jury --

14 THE WITNESS: Sure.

15 THE COURT: -- back in --

16 THE WITNESS: Oh.

17 THE COURT: -- get you done, all right? Okay. So,
18 we're taking a recess in this case, and then we're going to be
19 calling the next case for a short hearing.

20 (Court recessed at 4:30 P.M. until 4:50 P.M.)

21 (Outside the presence of the jury)

22 THE COURT: All right. So, we are back on the
23 record outside the presence of the jury. Mr. Semenza's
24 completed his voir dire of Dr. Tingey. Mr. Semenza, did you
25 have something outside the presence?

1 MR. SEMENZA: I do, Your Honor. I had a chance to
2 very briefly examine the file that Dr. Tingey had brought with
3 him today, and again, we have the same problem that we did
4 with Dr. Dunn, that there are a whole host of documents that
5 were never produced as part of the records.

6 And in contrast to what Dr. Dunn had said in that,
7 look, he just looked at the documents, he doesn't know when he
8 received additional documents, I believe Dr. Tingey had
9 testified that he had received additional documents about a
10 week-and-a-half ago, if I'm remembering correctly. So, I
11 think it would be improper to allow him to testify here based
12 on these new and additional records that haven't been provided
13 to us.

14 THE COURT: His testimony I thought was that he's
15 not basing his testimony on any of these new documents, but
16 rather, on the MRI, the -- and his evaluation of the patient,
17 Ms. O'Connell, at the time he saw her. I think that's pretty
18 clear.

19 MR. SEMENZA: And I understand that's his testimony,
20 Your Honor. However, obviously, I mean, he has reviewed those
21 additional documents. A number of those documents I haven't
22 seen before. I don't know if that's in any way going to
23 affect any of my questioning. I would like an opportunity
24 obviously to review the entire file, but obviously, we're here
25 and now. So, I would object to allowing him to testify in any

1 capacity at this point in time.

2 THE COURT: Okay. Your response?

3 MS. MORRIS: And it's my -- yeah, sorry. It's my
4 understanding that Dr. Tingey reviewed the medical records
5 which he created and he said that were in the Desert
6 Orthopedic file, which contained the -- the fact that Dr.
7 Martin had seen her before, and that was what he was basing
8 his opinion on is him seeing her, looking at the Desert
9 Orthopedic files.

10 And my understanding is that a week-and-a-half ago,
11 he looked at the file, but he (inaudible) receive new
12 information (inaudible) and was going to testify about that.
13 I didn't hear that at all, and it was not my understanding
14 from his testimony. So, I think he should be permitted to
15 testify in accordance with what he spoke to outside the
16 presence of the jury during voir dire.

17 THE COURT: Well, I'm going to allow him to testify.
18 His testimony from the voir dire, it appeared to me, was based
19 solely -- his opinions were based solely on his examination of
20 the patient, his review of the MRI films of the knees that he
21 had and, of course, her history, as he -- as it was reported
22 to him by her.

23 And beyond that, he didn't refer to anything else;
24 didn't say anything else was significant in his findings. And
25 of course, you may, and I know you will be cross-examining him

1 about the things that he apparently did not know, and you may
2 be able to pose hypothetical question to him. But I think as
3 long as he's not offering to say that he based his opinion
4 upon anything that you didn't have before, he's not offering
5 any testimony about any of those other records, then I'm going
6 to allow it.

7 MR. SEMENZA: I understand, Your Honor.

8 THE COURT: All right. All right, let's bring our
9 jury in.

10 THE MARSHAL: Rise for the jury, please.

11 (In the presence of the jury)

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

13 THE COURT: Thank you. Please be seated. The
14 record will reflect that we're back within the presence of all
15 eight members of the jury, as well as the two alternates. All
16 the parties are present with their respective counsel, and
17 then all officers of the court are present. And you may call
18 your next witness.

19 MS. MORRIS: Thank you. We call Dr. Tingey.

20 THE CLERK: Please remain standing and raise your
21 right hand.

22 (Testimony in the presence of the jury)

23 DR. CRAIG TINGEY, PLAINTIFF'S WITNESS, RESWORN

24 THE CLERK: Please be seated, and then please state
25 and spell your first and last name for the record.

1 THE WITNESS: My name is Craig, C-r-a-i-g; Tingey,
2 T-i-n-g-e-y.

3 DIRECT EXAMINATION

4 BY MS. MORRIS:

5 Q Dr. Tingey, can you tell us what you do?

6 A I'm an orthopedic surgeon.

7 Q Where do you work?

8 A At Desert Orthopedic Center here in Las Vegas.

9 Q How long have you worked at Desert Orthopedic?

10 A Since 2009.

11 Q And are you board certified?

12 A I am.

13 Q When did you become board certified?

14 A In 2006.

15 Q Do you have any speciality in your practice?

16 A I specialize in surgery of the shoulder, hip, and
17 knee.

18 Q Can you give us a little bit of background about
19 your education?

20 A Well, I graduated from high school here in Vegas,
21 and I went to college at Brigham Young University in Utah,
22 then went to medical school in -- Wake Forrest University in
23 North Carolina, and then residency for orthopedic surgery at
24 Loma Linda University in California.

25 Q Where did you -- did you work prior to working at

1 Desert Orthopedic?

2 A I was in a practice with a single other doctor from
3 2004 to 2009, and then he retired, and I joined Desert
4 Orthopedic Center at that time.

5 Q Do you have any privileges in any of the hospitals
6 in Las Vegas?

7 A Yes.

8 Q Do you know which ones?

9 A Centennial Hills Hospital, Mountain View Hospital,
10 and San Martin Hospital.

11 Q Have you ever in your medical career gotten any
12 awards?

13 A Yes.

14 Q Can you tell us about those?

15 A I received what's called the Leonard Marmor Award at
16 Loma Linda University as a senior resident for excellence in
17 orthopedic surgery, and I also received research awards both
18 my junior and senior years. My senior year was the first
19 place research award for the program.

20 Q And do you speak any other languages?

21 A I speak Spanish and Portuguese.

22 Q Now, you have treated Yvonne O'Connell; is that
23 correct?

24 A Yes.

25 Q Can you tell us when you say Yvonne?

1 A I saw her on May 11th, 2015.

2 Q And do you know why Yvonne came to see you?

3 A For bilateral knee pain, or knee pain in both knees.

4 Q And do you know who referred her to come see you?

5 A Dr. Dunn.

6 Q Do you know if Yvonne had treated with any other
7 doctor at Desert Orthopedic in relation to her knees?

8 A She had had two visits with Dr. Martin, who was my
9 partner at the time as well.

10 Q And when Yvonne came to see you, what was she
11 complaining of for pain?

12 A Knee pain in both knees.

13 Q And did you review any imaging when you saw Yvonne?

14 A Yeah. She -- when I saw her, she had an MRI of both
15 the right knee and an MRI of the left knee.

16 Q And did you look at those MRI results?

17 A I did.

18 Q Can you tell us about what the findings were in the
19 MRI of her right knee?

20 A The right knee showed a tear in the medial meniscus.

21 Q And what were the findings from the MRI in the left
22 knee?

23 A The left knee showed a tear in the medial and
24 lateral meniscus.

25 Q And how did Yvonne describe her pain on that date;

1 do you recall?

2 A She indicated that it started after she had a slip
3 and fall on February 8th, 2010. The pain was in the -- we
4 call it the anterior and medial region of the knee, which
5 means on the front and on the inside of the knee. She
6 indicated that she had pain when twisting, pain when climbing
7 stairs, when going from sitting to standing, and then she --
8 she also noted a lot of what we call mechanical symptoms, like
9 popping, locking, catching in the knee.

10 Q Are those complaints consistent with having a
11 meniscus tear?

12 A Yes.

13 Q Did you look at any x-rays of Yvonne's knees?

14 A Yes. Dr. Martin had taken x-rays several months
15 prior, and I looked at those x-rays.

16 Q What did those x-rays show?

17 A For the most part, normal. There was some mild
18 narrowing of the joint space, which means there was some mild
19 arthritis in the knees.

20 Q Can you describe what was going on in Yvonne's left
21 knee?

22 A The left knee looked different from the right knee.
23 The left knee had what we call extrusion of the meniscus, and
24 that's more of a degenerative type of condition. The meniscus
25 actually gets squeezed out of the joint space, and then it

1 will frequently tear.

2 So, she did have tearing of both the medial and
3 lateral meniscus. There's two meniscus in each knee. So,
4 both were torn, but they were also extruded, which leads me to
5 believe that it was more of a degenerative condition of the
6 knee, rather than a traumatic condition.

7 Q And you were able to see that in her MRI; is that
8 correct?

9 A Yes.

10 Q And the arthritis that you could see, you can see
11 that through the x-ray; is that accurate?

12 A Both on x-ray and MRI.

13 Q I want to talk about Yvonne's right knee. Was the
14 imaging different from her left knee than her right knee?

15 A The imaging was -- and MRI, it was the same, but the
16 findings were different.

17 Q Can you tell me what the findings were for her right
18 knee?

19 A The right knee showed a tear in the back part of the
20 medial meniscus, and that's the most common location of where
21 you'll get a traumatic tear is in the -- what we call the
22 posterior horn of the medial meniscus.

23 Q Now, you said in the left knee, there was findings
24 that may lead you to believe it was a degenerative condition;
25 is that correct?

1 A Correct.

2 Q Were those findings in the MRI of her right knee?

3 A No.

4 Q Now, how many patients approximately do you think
5 you've treated who have meniscus tears in your practice?

6 A Many thousands. That's the most common thing I see.
7 It would be -- I probably do -- I probably see 15 or 20 a
8 week.

9 Q And after someone suffers a meniscus tear, when do
10 you first expect them to report complaints of pain?

11 A It varies. Sometimes they have immediate pain after
12 an injury; sometimes it will be a day or two later; sometimes
13 it's a week or two later. I've seen any -- any of those.

14 Q Anything longer than a week or two later?

15 A Well, yeah. I mean, it happens, but typically,
16 it's, you know, within a couple weeks, they start to feel pain
17 in the knee.

18 Q What did you recommend Yvonne do for her knees?

19 A Well, of course we talk about various options, and I
20 believe I reviewed those with her, but the recommended
21 treatment for that and what I recommended for that was
22 arthroscopy, and that's a surgery where you treat the meniscus
23 tear.

24 Q Can you tell us what that surgery entails?

25 A Yeah. It's a surgery -- they're under general

1 anesthesia, but it's an arthroscopy, meaning that you're
2 putting a camera into the knee. So, there's two small
3 incisions on the front of the knee. You put a camera in there
4 so you can see what's going on. And typically with a meniscus
5 tear of this type, you'll do what's called a meniscectomy, and
6 that means removing the torn part of the meniscus, and there's
7 certain instruments that we use to actually take out the
8 cartilage that's torn.

9 Q And is physical therapy required after the surgery?

10 A Sometimes. Often, it is.

11 Q Now, when Yvonne came to you, how did she -- did she
12 rate her pain?

13 A She rated it as a ten on a scale of ten.

14 Q And did that cause you any concern that she was
15 rating her pain at a ten?

16 A No.

17 Q Did you find any indications that Yvonne was lying
18 about her pain?

19 A No.

20 Q Did you see any indications in Yvonne's imaging
21 showing fibromyalgia?

22 A No.

23 Q Is that something that you would see in an MRI?

24 A No, it's not.

25 Q What does the MRI show?

1 A The MRIs show a lot of things. It shows, you know,
2 not only the bone, but soft tissue, cartilage, ligaments. It
3 can show tears. It shows inflammation in the soft tissues.
4 There's a lot of things that you can find on MRI.

5 Q So, if I --

6 A But not -- not fibromyalgia.

7 Q So, if I understand correctly, in her right knee,
8 you found there to be a traumatic tear; is that correct?

9 A There is a tear that's consistent with a history of
10 trauma.

11 Q And why is that tear consistent with a history of
12 trauma? What about it?

13 A A degenerative tear of the meniscus or a
14 degenerative condition will have a different appearance on
15 MRI. You can't say with 100 percent certainty that this
16 happened because of this just looking at the MRI, but you can
17 find -- you can look at findings that are consistent with the
18 trauma.

19 For example, in the left knee, I looked at the MRI,
20 and I felt like it was not consistent with the trauma because
21 of the extrusion of the meniscus. That's a clue that I can
22 look at, and that helps me make my determination.

23 Q Now, you recommended that she have surgery to both
24 knees; is that correct?

25 A Yes.

1 Q And did you schedule an appointment for her to have
2 the surgery?

3 A She said that she would want to consider her options
4 and would contact us if she decided to go forward with the
5 surgery.

6 Q Did Yvonne tell you what kind of medical treatment
7 she had received prior to coming to see you?

8 A Yes. She had said that she had had physical therapy
9 and that didn't give her adequate improvement, and I was aware
10 that she had seen my partner, Dr. Martin, as well.

11 Q And did Yvonne describe to you how the fall occurred
12 in February?

13 A She did, and the way I documented it was that she
14 was walking, and slipped and fell on a liquid. She fell
15 backwards, and she twisted on the right, and fell, striking
16 her body on a raised divider. I'm not sure what type of
17 divider it was.

18 Q Was the fact that when she fell, it was in a
19 twisting motion, have any impact on --

20 A Yes. A kind of typical way of tearing the meniscus
21 is a twisting injury. Not all meniscus tears occur because of
22 a twisting injury, but often, that is the case. So, that also
23 correlates with her history of meniscus tear.

24 Q Can you -- or are you able to describe the type of
25 pain that a patient will experience after they experience a

1 meniscus tear -- having a meniscus tear?

2 A Usually, it hurts in the knee. And a medial
3 meniscus tear will typically hurt in the location she
4 described; in the front and on the medial side. Meniscus
5 tears will often have mechanical symptoms, and that, like I
6 said earlier, was popping, clicking, catching, even locking
7 sometimes, and -- and she described that. That was consistent
8 with a meniscus tear as well.

9 Q If you have a meniscus tear in your knee, does it
10 tend to weaken the knee?

11 A Indirectly. If you have pain in any body part, you
12 tend to use it less, and that leads to atrophy of muscles, and
13 it can lead to weakness.

14 Q Now, you described, I think, the surgery that would
15 occur to her right knee, but you also recommended she have
16 surgery to her left knee; is that correct?

17 A Yes.

18 Q Is it different -- a different type of surgery?

19 A The only difference is that she had the tears of
20 both the medial and lateral meniscus in the left knee, so it
21 would involve treating both sides of the knee.

22 Q But it's your opinion that the left knee was
23 essentially a degenerative tear; is that correct?

24 A That's correct.

25 Q Did you come to opinion as to the causation of the

1 meniscus tear in Yvonne's right knee?

2 A My opinion is that it was related to the slip and
3 fall on February 8th, 2010.

4 Q And is that to a reasonable degree of medical
5 probability?

6 A Yes.

7 Q The surgery that you recommended to her right knee,
8 where would that take place?

9 A Typically, I do it at our surgery center that's at
10 our office on Desert Inn.

11 Q And in the past when you have done a procedure such
12 as the one you recommended to Yvonne's right knee, has it --
13 has it cured the patient's complaints of pain?

14 A Yes.

15 Q Do you have any reason to believe if that -- if
16 Yvonne got the surgery, she wouldn't have relief in her right
17 knee?

18 A That she would not have relief? No.

19 Q Sorry.

20 A I think I --

21 Q Lots of negatives.

22 A I think I understood that correctly.

23 Q Is undergoing the surgery to her right knee -- would
24 that cause her any pain?

25 A Sure.

1 Q What type?

2 A Usually, there's postoperative pain, just related to
3 the surgical procedure itself. The incisions and the
4 procedures can cause some pain that usually lasts a few weeks
5 to a few months after surgery.

6 Q Now, is there any other cure for a meniscus tear
7 such as the one she has in her right knee?

8 A Cure, no. Treatment, yes, but there's no way to fix
9 the tear other than surgery.

10 Q Did you recommend that Yvonne get any other
11 treatment aside from surgery to her right knee?

12 A Well, what I do is discuss the -- the -- all the
13 treatment options, both surgical and non-surgical. So, I will
14 usually review options like physical therapy, cortisone
15 injections, Ibuprofen or some sort of anti-inflammatory
16 medication. Those are all helpful, and I review those, and
17 then I also discuss the surgical options, and then let the
18 patient decide.

19 Q How long does the surgery take?

20 A About a half-an-hour to an hour.

21 Q Aside from the MRI study that you looked at and the
22 x-ray, did you look at any other imaging of Yvonne?

23 A No.

24 Q Would you have needed to do any other testing on her
25 to determine what was ailing her knees?

1 Q And you've testified as an expert witness both
2 relating to -- well, relating to knee pain; is that correct?

3 A Have I before?

4 Q Yes.

5 A Yes, I do.

6 Q And you've seen Ms. O'Connell one time?

7 A Yes.

8 Q And that was in May of 2015?

9 A That's correct.

10 Q How long did you spend with her during that
11 appointment?

12 A I don't remember the appointment itself. I don't
13 know.

14 Q And at that appointment, Ms. O'Connell identified
15 she had ten of ten pain; is that correct?

16 A Yes.

17 Q Did Ms. O'Connell differentiate between what pain
18 she was experiencing in her left knee versus her right knee?

19 A Not that I documented.

20 Q And you were treating her for both her left knee and
21 her right knee during this appointment?

22 A That's right.

23 Q And your conclusion based upon your review of the
24 films, both x-ray and MRI, was that the left knee did not have
25 anything -- that the tear in the meniscus on the left knee was

1 not caused by the fall on February 8th, 2010?

2 A Yes, that's correct.

3 Q And you did note arthritic changes in that left
4 knee?

5 A Very mild in both knees.

6 Q And you did different and note arthritic changes in
7 her right knee?

8 A As well. I documented minimal arthritic changes.

9 Q Do you know whether Ms. O'Connell was experiencing
10 pain related exclusively to the arthritic condition in her
11 right knee?

12 A That's not my opinion. Her pain wasn't -- I mean,
13 it can be difficult to differentiate arthritis pain from a
14 meniscus tear, but again, her -- the findings of arthritis on
15 both the x-ray and the MRI were very mild, and I wouldn't
16 expect that to cause very severe pain at all. Her complaints
17 with the mechanical symptoms and the severe pain are much more
18 consistent with a meniscus tear.

19 Q Is it possible that Ms. O'Connell was in fact
20 experiencing right knee pain as a result of the arthritic
21 condition in her right knee?

22 A It's possible that she had both factors contributing
23 to her pain, but I would say the more severe issues was the
24 meniscus tear. Again, the arthritis was mild.

25 Q And your conclusion that the right knee meniscus

1 tear was a result of the fall on February 8th, 2010 was based
2 upon Ms. O'Connell's assertion that that's when she was
3 injured?

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

6 Q And that history included a fall on February 8th,
7 2010?

8 A Yes, but importantly, what she -- that she reported
9 that she wasn't having symptoms before the fall, and that the
10 symptoms started soon after the fall.

11 Q In your history of -- in taking your history -- Ms.
12 O'Connell's history, did she identify any preexisting
13 conditions?

14 A To her knee?

15 Q To anywhere on her body.

16 A According to the chart note, she indicated she had
17 depression, and that she had a mini stroke two days after the
18 fall.

19 Q And as you sit here today, do you know whether Ms.
20 O'Connell had a mini stroke as identified in her history?

21 A Only that she reported it to me.

22 Q She did identify that she had depression as well?

23 A Yes.

24 Q And can depression play a role in the presentation
25 of pain symptoms?

1 A It can.

2 Q Do you have your notes from her visit with you in
3 May --

4 A Yes, I have it right here.

5 Q Okay. Can I have you turn to page 2?

6 A Okay.

7 Q It identifies below the problem recorded as
8 diagnosis codes; do you see that? It says, "Information
9 obtained by patient via web portal"?

10 A Yes.

11 Q It identifies depression. It also identifies
12 neuropathy; is that correct?

13 A Yes.

14 Q Okay. And could neuropathy exhibit pain symptoms --

15 A It can.

16 Q -- in the -- in the lower limbs?

17 A Lower extremities. Not typically in the knee,
18 isolated.

19 Q It identifies stroke, then mini stroke after
20 accident, not stroke. Do you know what that means?

21 A This is information the patient put into the
22 computer, so I only know what it means from what we're reading
23 here. So, this is what the patient put in; not me.

24 Q Do you know whether Ms. O'Connell might have had
25 injuries to her knees prior to February 8th, 2010?

1 A She did not report any injuries prior to that date.

2 Q And do you know whether Ms. O'Connell had any
3 injuries to her knees after February 8th, 2010?

4 A No.

5 Q You weren't informed of any injuries after February
6 8th, 2010; is that correct?

7 A Well, I mean, we -- I had a question about that
8 earlier, so I'm informed now, but as -- at that time and
9 before today, I wasn't informed of any injuries --

10 Q Okay.

11 A -- other than the one that we documented.

12 Q Do x-rays show meniscus tears?

13 A No.

14 Q It's exclusively an MRI?

15 A Not exclusively, but MRI is the best way to diagnose
16 a meniscus tear. In x-rays, you cannot see the meniscus at
17 all.

18 Q Would you expect that Ms. O'Connell would have had
19 some sort of immediate right knee pain if she had torn her
20 meniscus?

21 A I -- like I said earlier, some people will have
22 immediate pain, and sometimes it comes on after a few days or
23 weeks.

24 Q So, there are circumstances when an individual would
25 tear a meniscus and not know about it for a period of two

1 weeks?

2 A Yes.

3 Q Is that common?

4 A Yes.

5 Q Have you treated Ms. O'Connell at all for her -- for
6 her hips?

7 A No.

8 Q And -- strike that. Outside of your practice,
9 Desert Orthopedics, do you know who Ms. O'Connell saw prior to
10 your treatment of her?

11 A No, I don't.

12 Q And Ms. O'Connell reported that she had undergone
13 physical therapy prior to coming to you?

14 A Yes.

15 Q Okay. Do you know the specifics of that physical
16 therapy?

17 A No.

18 Q You don't know what it entailed?

19 A No.

20 Q Your understanding from her though was that it was
21 unsuccessful?

22 A That she didn't get any improvement with it, so,
23 yes.

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

25 BY MR. SEMENZA:

1 Q Is it fair to say that Ms. O'Connell experiences
2 pain in both knees?

3 A Yes. At the time I saw her, yes.

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

7 A Yes.

8 Q Has Ms. O'Connell scheduled an appointment to
9 conduct the surgery on her knees?

10 A I don't believe so.

11 Q And would there be two separate surgeries? Do you
12 do both knees at the same time, or do you do one knee and then
13 the other?

14 A You could do both knees at the same time.

15 Q Do you know when Ms. O'Connell first sought medical
16 treatment relating to the fall that took place on February
17 8th, 2010?

18 A No.

19 Q Do you know if that first visit -- okay, I --

20 A I -- I -- no, I'm sorry, I don't. I just know when
21 she saw Dr. Dunn for the first time, but I don't know the
22 first visit.

23 Q Do you know whether during that first medical visit
24 after her fall, whether she complained of any knee pain?

25 A I don't.

1 Q Is it unusual for a patient to be diagnosed with a
2 meniscus tear four years after it takes place?

3 A No, it's not.

4 Q It's common?

5 A It's common for people to have meniscus tears -- or
6 knee complaints for a long time, and then they have the -- an
7 MRI, and then it's diagnosed as a meniscus tear.

8 Q Could fibromyalgia play a role in a patient's pain
9 symptomology?

10 A Sure.

11 Q And could that fibromyalgia play a role in a pain's
12 -- a patient's pain symptomology in a knee?

13 A Not typically. Fibromyalgia does not mimic a
14 meniscus tear, and it's usually not on the list of diagnoses
15 that we consider when we're looking at knee pain. It's not --
16 it rarely involves the knee.

17 Q But sometimes it does, correct?

18 A I assume -- I would suppose, yes.

19 MR. SEMENZA: Okay, thank you. No further
20 questions.

21 THE COURT: Redirect?

22 MS. MORRIS: Just a couple quick ones.

23 REDIRECT EXAMINATION

24 BY MS. MORRIS:

25 Q Did you have to take time away from your practice to

1 come here today?

2 A I did.

3 Q Is the -- the fee that you charge to appear in
4 court, is that a fee that you charge everyone?

5 A Yes.

6 Q And you don't charge by the hour; is that correct?
7 You have a mandatory amount for a half-day?

8 A Half-day, yes.

9 Q Why is that?

10 A Because for me to be here, I have to give up seeing
11 patients in the clinic, or give up doing surgeries, and that's
12 -- and I'm still paying my staff right now -- well, it's after
13 5:00, so they're home, but I have overhead that I need to
14 maintain, and I have loss of income if I give up surgeries and
15 give up clinic time.

16 Q Does the fact that you were paid to appear here in
17 court affect your medical opinion in any way?

18 A No.

19 Q Now, you said that Yvonne could get surgery to both
20 knees at the same time; is that right?

21 A Yeah, I would have that discussion with her. The
22 patient needs to be aware of the pros and cons, but it's
23 possible to do both knees.

24 Q Is it difficult -- or any more difficult to recover
25 from having both knees operated on at the same time?

1 A Sure, yeah.

2 Q Why is that?

3 A Well, it's difficult to get around. You know, if
4 you do a meniscus surgery on one knee, you can rely on the
5 other knee for support, but when you do both at the same time,
6 it's going to be more difficult. She'll probably need some
7 sort of support and help at home if that -- if that's the
8 case.

9 Q Now, the tear that Yvonne has in her right knee,
10 would that cause her in any way to over-compensate while
11 walking?

12 A Over-compensate?

13 Q Or compensate on the other side?

14 A If you're -- yes. If you have a meniscus tear, you
15 can -- sometimes you'll limp; sometimes you'll put more of
16 your weight on the opposite limb.

17 Q If you put more of your weight on the opposite limb,
18 and there's degeneration in that limb, could that cause
19 symptoms in the other limb?

20 A It could.

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

22 MR. SEMENZA: Just a couple.

23 THE COURT: Questions -- oh, re -- recross.

24 //

25 //

1 RE-CROSS-EXAMINATION

2 BY MR. SEMENZA:

3 Q You were asked about over-compensating. Do you
4 traditionally find patients over-compensating to one limb or
5 the other when they have double meniscus tears?6 A When you have a meniscus tear, your gait is going to
7 be altered. So, can it exasperate pain in the contralateral
8 limb? Yes, and I see that frequently. But if you have
9 bilateral meniscus tears, you're not -- you're going to be --
10 I mean, it just depends on the situation.11 Q A meniscus tear, regardless of whether it's
12 bilateral or just one limb, is going to cause some mobility
13 issues; is that correct?14 A Mobility issues, limping, gait abnormalities, and
15 that's going to stress both knees.16 Q So, the left knee meniscus tear could have an impact
17 on the right knee meniscus tear?

18 A Sure.

19 Q And vice versa?

20 A Sure.

21 MR. SEMENZA: Thank you.

22 MS. MORRIS: No other questions. Thank you.

23 THE COURT: Questions from the jury?

24 THE MARSHAL: Anybody else?

25 THE COURT: Counsel approach.

1 (Off-record bench conference)

2 THE COURT: All right. Doctor, could a traumatic
3 tear of the medial meniscus occur from an activity like swing
4 dancing?

5 THE WITNESS: Yes.

6 THE COURT: And then I had a question. The -- the
7 MRIs that you reviewed, when were those MRIs taken?

8 THE WITNESS: The MRI of the right knee was done on
9 August 29th, 2014, and the MRI of the left knee, September
10 22nd, 2014.

11 THE COURT: Any questions as a result of my
12 questions?

13 MR. SEMENZA: No, Your Honor.

14 MS. MORRIS: I just have one -- one follow up
15 question. Thank you.

16 FURTHER REDIRECT EXAMINATION

17 BY MS. MORRIS:

18 Q If a person had a meniscus tear, is it possible that
19 they would have pain to the point that they were not able to
20 swing dance?

21 A It is possible, yes.

22 MR. SEMENZA: Thank you.

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

24 MR. SEMENZA: Yes, Your Honor.

25 THE COURT: Thank you very much for your testimony.

1 All right. Ladies and gentlemen, you're getting out. So,
2 it's 5:30, and so we finished an hour earlier than I had
3 originally anticipated. So, as you know, tomorrow is
4 Veteran's Day and a court holiday, so the courthouse is closed
5 tomorrow. We'll resume on Thursday. And counsel approach for
6 a start time.

7 (Off-record bench conference)

8 THE COURT: We're going to start at 8:30. Dr. Dunn
9 is coming back to finish his testimony, so we'll see you at
10 8:30 on Thursday.

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

20 Of course, no research on anything about the case,
21 including, you know, medial meniscus, or anything of that
22 nature. Everything you learn gets -- you hear in the
23 courtroom. We'll be in recess until Thursday morning at 8:30.

24 THE MARSHAL: All rise for the jury.

25 (Outside the presence of the jury)

1 THE COURT: All right, and the record will reflect
2 that the jury has departed the courtroom. I wanted to make a
3 record that I marked all of the last set of jury questions as
4 one court exhibit together, and now I'm handing the clerk the
5 last jury question, which she'll mark as Court Exhibit 3,
6 right?

7 THE CLERK: Yeah.

8 THE COURT: 3, which is the next in order. Any
9 matters outside the presence before we recess?

10 MS. MORRIS: None.

11 THE COURT: All right. Enjoy your day off.

12 MR. SEMENZA: Thank you.

13 MR. KIRCHER: Thank you.

14 (Court recessed at 5:34 p.m. until Thursday,
15 November 12, 2015, at 8:28 a.m.)

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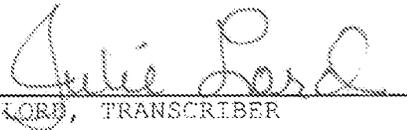
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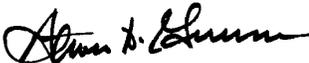
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Exhibit “3”


CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

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

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

JURY TRIAL - DAY 5

THURSDAY, NOVEMBER 12, 2015

APPEARANCES:

FOR THE PLAINTIFF: CHRISTIAN MORRIS, ESQ.
EDWARD J. WYNDER, ESQ.
FOR THE DEFENDANTS: LAWRENCE J. SEMENZA, III., ESQ.
CHRISTOPHER D. KIRCHER, ESQ.

COURT RECORDER:

LARA CORCORAN
District Court

TRANSCRIPTION BY:

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WITNESSES

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***Testimony outside the presence of the jury.**

EXHIBITS

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1 LAS VEGAS, NEVADA, THURSDAY, NOVEMBER 12, 2015, 8:28 A.M.

2 (In the presence of the jury)

3 THE COURT: Case number A-655992, Yvonne O'Connell
4 vs. Wynn Resorts Limited. We're back in the continuation of
5 the trial. We're outside the presence of the jury.

6 This morning, I was informed that Juror number -- in
7 seat number 6, Kelly Harms, had a personal emergency. Her
8 grandmother had an aneurism, and she's at the hospital and has
9 been there since 5:00 this morning, and will not be in. So,
10 we're replacing her with Alternate number 1, Susan Berg, and
11 the marshal's already told -- you know, is already going to
12 tell Susan Berg that she'll take seat number 6 to replace
13 Kelly Harms. That's why we have alternates.

14 All right. What about jury instructions, folks?
15 Have you met and conferred about your jury instructions yet?

16 MR. SEMENZA: I haven't seen the plaintiff's jury
17 instructions, Your Honor.

18 MS. MORRIS: We have a set of them.

19 THE COURT: Have you sent your jury instructions to
20 them?

21 MR. SEMENZA: Yes, they've had them for quite a
22 while.

23 THE COURT: Okay.

24 MS. MORRIS: So, we have discussed them. When he
25 was in my office, I went through, and I told them certain

1 problems or certain issues that I had with his, and said I had
2 certain ones that I'd like to insert. We just haven't had a
3 final meeting about those.

4 THE COURT: Okay. Well, you need to send him your
5 proposed jury instructions, and then you need to confer about
6 that, because you're supposed to be done tomorrow --

7 MS. MORRIS: Correct.

8 THE COURT: -- and I haven't seen any jury
9 instructions that --

10 MS. MORRIS: And we've got copies right here we can
11 certainly hand to them.

12 MR. SEMENZA: And Your Honor --

13 THE COURT: Actually, I did get yours, I believe,
14 because --

15 MR. SEMENZA: Yes.

16 THE COURT: -- they were even on the bright-colored
17 paper, which is new.

18 MR. SEMENZA: We did our best.

19 THE COURT: Thank you.

20 THE CLERK: Colored paper?

21 THE COURT: Yeah, it was my JEA's idea.

22 THE CLERK: Oh.

23 THE COURT: That -- and it works really well, you
24 know, when you're looking through all of them to kind of keep
25 -- get straight as to who has proposed what, and so it was --

1 if you had it, it was great, and if you didn't, you know, we
2 could get by without it, but thank you.

3 MR. SEMENZA: Yes. And Your Honor, I do believe,
4 and I think plaintiff's counsel will agree with me, that we
5 should be done with testimony today.

6 THE COURT: Oh, okay.

7 MS. MORRIS: I don't know. I don't know who he's
8 calling, so I couldn't comment on that.

9 MR. SEMENZA: I would anticipate we'll be done with
10 testimony today. So, as we get further along in the day, then
11 I think we can sit down and talk scheduling as far as ironing
12 out the jury instructions, and closings, and those sorts of
13 things.

14 THE COURT: Okay, very good. So, you're ready to
15 bring the jury in? No other matters outside the presence?
16 Got everybody? All right, let's go.

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

18 (In the presence of the jury)

19 THE COURT: Good morning. Please be seated. And
20 the record will reflect that we've now been rejoined by what
21 is now all eight members of the jury and one alternate.

22 Sadly, one of our -- one of our regular jurors, Ms.
23 Harms in seat number 6, had a family tragedy with her
24 grandmother and is in the hospital attending to her, and so
25 that's what alternates are for, and that's why they're so

1 important. And so, we've replaced Susan Berg, our first
2 alternate, into seat number 6, and we'll proceed with the
3 trial. And where are we now?

4 MS. MORRIS: Dr. Dunn will be here -- well, he
5 should be here, so.

6 THE MARSHAL: He's here.

7 MS. MORRIS: He's here. We call Dr. -- recall Dr.
8 Dunn.

9 THE COURT: Calling Dr. Dunn.

10 THE CLERK: And he'll still be under oath.

11 THE COURT: Take the stand, Doctor, and you're still
12 under oath from before, all right? Have a seat. You may
13 proceed.

14 MS. MORRIS: Thank you.

15 DIRECT EXAMINATION (RESUMED)

16 BY MS. MORRIS:

17 Q Good morning, Dr. Dunn.

18 A Morning.

19 Q When we left off talking, I think you had told us
20 that you had been practicing for 26 years; is that correct?

21 A In private practice since 1992, so that would be 23
22 years.

23 Q And in your time practicing in private practice, do
24 you know approximately how many fusion surgeries you've
25 performed?

1 A Oh, well, I think the best way to say that is,
2 consistently, I think when I looked at my numbers, I perform
3 anywhere -- a little over 200 to 250 spine surgeries a year,
4 and about half of those would be fusions.

5 Q And so, would it be fair to say that you've seen
6 thousands of patients?

7 A Yes.

8 Q Have you seen patients who have come complaining to
9 you for pain as a result of a fall?

10 MR. SEMENZA: Your Honor, I'm going to object that
11 this is outside the scope of the medical chart.

12 THE COURT: Well, approach.

13 (Off-record bench conference)

14 THE COURT: All right. So, the objection is
15 overruled, but I need you to lay the foundation. In other
16 words, we're not -- just what we discussed at the bench --

17 MS. MORRIS: Correct.

18 THE COURT: -- back into it.

19 MS. MORRIS: Yes.

20 THE COURT: Okay.

21 BY MS. MORRIS:

22 Q Dr. Dunn, I'd like to talk to you about your
23 experience in your practice of medicine and --

24 THE COURT: No.

25 MS. MORRIS: -- treating patients.

1 THE COURT: No, no. He has an opinion; what's the
2 basis for his opinion.

3 BY MS. MORRIS:

4 Q Dr. Dunn, you've been practicing for 23 years; is
5 that correct?

6 A Yes.

7 Q And you've seen thousands of patients; is that
8 right?

9 A Yes.

10 Q Have you treated patients who have come to you with
11 complaints of pain as a result of a fall?

12 A I have.

13 Q When a patient -- when a person falls, can they get
14 hurt?

15 A Yes.

16 Q Does age factor into the amount of damage that can
17 happen when a person falls?

18 A Yes.

19 Q Tell me how.

20 A Well, I believe we may have discussed this a bit
21 earlier, but as we age, the musculoskeletal system experiences
22 degenerative changes as a result of that aging. Common terms
23 for that are arthritis; degenerative arthrosis.

24 As it involves the articular structures of the
25 spine, we're talking about two structures, really. The

1 intervertebral discs, which serves as a shock absorber between
2 the vertebrae. And with each intervertebral disc, whether it
3 be in your neck or back, or the thoracic spine, your mid-back,
4 there is an associated pair of joints called the facet joints,
5 otherwise known as swivel joints, and that's what allows the
6 complex motion we have in our necks and backs. And you can
7 compare that to the knee, which is a simple hinge joint.

8 So, these articular structures are susceptible to
9 degeneration. And depending on genetics, occupational
10 activities, accidents throughout one's lifetime, we can
11 develop a wear and tear phenomenon of these structures, and
12 the structure specifically has to do with cartilage, which,
13 unfortunately, in our bodies, does not replenish itself. Some
14 of us, it's hair cells; others, it's neurologic cells; and
15 then cartilage cells don't replenish or heal well.

16 As we age, there's a term that we use called
17 frailty. Our structures become weaker, in a sense, and
18 therefore, more susceptible to injury. And I think it's
19 somewhat intuitive, if you take a fall in a 20-year-old,
20 versus a 30, versus a 40, versus a 50, there are changes that
21 make that older person more susceptible to injury, and hence,
22 that goes along with the term frail or frailty.

23 Q Can you explain to us how a fall in a 58-year-old
24 can injure the spine, especially a degenerative spine?

25 A Yes.

1 MR. SEMENZA: Your Honor, I'm going to object. This
2 is outside the scope of the medical chart.

3 THE COURT: Okay, that's sustained. I think I told
4 you that I need you to talk about Ms. O'Connell, because
5 that's what he needs to talk about as to what his opinion was
6 and why he came to that opinion. But just this overall, I
7 told you not to do that, and you continue. So, don't do it.

8 BY MS. MORRIS:

9 Q How old was Ms. O'Connell when she fell?

10 A 58.

11 Q And at the time she fell, did she have a
12 degenerative spine?

13 A Yes.

14 Q How can a 58-year-old injure a degenerative spine
15 when they fall?

16 A Well, the forces --

17 MR. SEMENZA: Again, Your Honor, this is outside the
18 scope of the medical chart.

19 THE COURT: All right. Doctor, do you have an
20 opinion as to why Ms. O'Connell might have injured her spine
21 in this fall?

22 THE WITNESS: Yes.

23 THE COURT: Okay. What -- what is that?

24 THE WITNESS: I believe that she sustained
25 micro tears to the aged intervertebral discs in her neck.

1 BY MS. MORRIS:

2 Q And why do you believe that?

3 A One, because of the nature and quality of her
4 symptomatology. She relates in her history to me on the
5 initial evaluation that she has been experiencing a consistent
6 quality of neck pain with variable symptoms into her
7 extremities, meaning, sometimes it's in the right arm,
8 sometimes it's in the left arm. But overall, the consistent
9 quality has been what I would describe as chronic axial
10 mechanical neck pain that has persisted at the time that I saw
11 her for almost four-and-a-half years.

12 Q Can you tell us, do you expect the pain to the neck
13 to be immediate upon a fall?

14 MR. SEMENZA: Objection, Your Honor. Again, outside
15 the scope of the medical chart.

16 THE COURT: I'm going to overrule that. Go ahead.

17 THE WITNESS: No.

18 BY MS. MORRIS:

19 Q Why not?

20 A Well, often, an accident results in -- it's a
21 traumatic event to people, and they register pain differently,
22 and although they may experience discomfort in one area,
23 often, it's overridden by injuries to other areas. We call
24 that the Gate Theory of Pain.

25 And the best way to understand that would be, for

1 instance, if you came in and you had some neck pain or
2 soreness, and I took a hammer and I bashed your finger, you're
3 really not going to pay -- your brain is not going to pay much
4 attention to the afferent information from the sensory fibers
5 from the neck; it's going to be overridden by the pain that
6 you're experiencing when I hit your thumb with that hammer.

7 So, many times, when people are injured, they're
8 focused on their main area of complaint, which may be the
9 back, the hip, the knee, whatever it might be, and they might
10 not recognize the full extent of their injuries. So, over the
11 course of days, or even weeks, there becomes a full
12 realization or recognition of pain to the different areas that
13 were injured, so it's not always immediate.

14 Q Is there a certain time frame in which you would
15 expect to see an onset of pain?

16 A I mean, it varies from individual to individual, and
17 it varies on the extent of injuries. I mean, someone who
18 comes in with a pelvis fracture or head injury, you may not
19 recognize it for months. So, it's a very generalized
20 question, but I say, overall, most people who don't have a
21 closed head injury or a serious injury that requires emergent
22 transport and surgery, typically within a couple weeks.

23 Q Now, do you recall Yvonne O'Connell coming in to see
24 you?

25 A Well, my recollection of the details of her visit

1 has to be from my medical records, but I do specifically
2 remember her, yes.

3 Q And when she came in to see you, do you recall her
4 demeanor?

5 A I do remember her, yes.

6 Q And what was her demeanor like?

7 A Well, I remember her uniquely upon seeing her here
8 in court because her personality is not uncommon on many
9 patients I see, and she is very similar to one of my close
10 relatives in that they're very much interested in their
11 ailments and they go to the world wide web. It's called
12 physician by Google.

13 MR. SEMENZA: Your Honor, I'm going to object as
14 outside the scope.

15 THE COURT: All right, sustained. You need to keep
16 this just to Ms. O'Connell so we're -- you know, this isn't
17 about your relatives.

18 BY MS. MORRIS:

19 Q Let's talk about Ms. O'Connell. So, when she came
20 in to see you, she reported she'd had a mini stroke a couple
21 days after the fall; is that correct?

22 A Yes.

23 Q Was that significant in any way to you?

24 A No.

25 Q You said that she was very interested in her health.

1 Can you describe that?

2 A Yes. She's a common patient -- and I'll just refer
3 this to Ms. O'Connell -- who goes to Google and puts in their
4 symptoms. And --

5 MR. SEMENZA: Objection, lack of personal knowledge.

6 THE COURT: Well, there's no foundation, so, I mean,
7 find out if he -- lay a proper foundation for this to -- what
8 did she tell him?

9 BY MS. MORRIS:

10 Q What was it about Ms. O'Connell that led you to
11 understand that she was very interested in her health?

12 A Because she was very knowledgeable, and I know she
13 hasn't gone to medical school and doesn't have a formal
14 medical education, so I know it came by way of the computer.
15 And she was very knowledgeable about many of her medical
16 conditions, but was also very respectful regarding my
17 evaluation of her as it involved her neck and back.

18 Q When she came in to you, was she asking for neck
19 surgery?

20 A Well, she came to me -- I'm a surgeon, so when
21 patients come to me, they're typically wanting to know what
22 their surgical options are. So, yes.

23 Q Did she demand neck surgery?

24 A No.

25 Q Was she in any way demanding toward you about the

1 medical care you were giving her?

2 A No.

3 Q Have you ever treated patients who have multiple
4 complaints or are overly anxious about their health?

5 MR. SEMENZA: Your Honor, I'm going to object.
6 Outside the scope of the medical chart.

7 THE COURT: Sustained.

8 BY MS. MORRIS:

9 Q The demeanor that Ms. -- Ms. O'Connell showed when
10 she came in to see you, did that lead you to think she was
11 overly anxious about her health?

12 A No.

13 Q Is there anything about Ms. O'Connell that you saw
14 that would make you hesitant to perform surgery upon her?

15 A You know, I established a rapport with Ms. O'Connell
16 over three visits and spent a considerable amount of time with
17 her, and that's important as a surgeon, in my opinion, because
18 we're dealing with a subjective complaint of pain, so the
19 objective of the surgery would be to improve that pain.

20 And so, if I'm going to take this patient in a
21 relationship where I'm going to operate on them, I want to be
22 confident at least in my own assessment and abilities to
23 assess this patient that she is being forthright about her
24 complaints of subjective pain.

25 And I noted that there was a history of depression,

1 and that can affect an outcome of surgery. And so, therefore,
2 I would say, upon reevaluation, I may obtain a preoperative
3 psychological clearance, which spine surgeons utilize from
4 time to time. And beyond that, I have no reservations about
5 proceeding to surgery if she requested it.

6 Q And you evaluated Yvonne for her truthfulness; is
7 that correct?

8 MR. SEMENZA: Objection, outside the scope.

9 THE COURT: Sustained. No --

10 BY MS. MORRIS:

11 Q You performed a Waddell -- a Waddell test on her; is
12 that correct?

13 A Yes.

14 Q And the purpose of the Waddell --

15 MR. SEMENZA: Your Honor --

16 MS. MORRIS: -- test is what?

17 MR. SEMENZA: -- I'm going to object to any
18 questions relating to the Waddell, because I don't think
19 they're in the medical chart.

20 THE COURT: Approach.

21 (Off-record bench conference)

22 MS. MORRIS: And can that be the sustained
23 objection?

24 THE COURT: Sustained. This question's been asked
25 and answered about Waddell's last time he testified.

1 BY MS. MORRIS:

2 Q So, the psychological clearance that you would
3 require Yvonne to have before surgery, what does that entail?

4 A Typically --

5 MR. SEMENZA: Objection, Your Honor. That's outside
6 the --

7 THE COURT: Sustained.

8 MR. SEMENZA: -- scope of medical chart.

9 THE COURT: He's not designated as an expert. We've
10 already gone into this, that his -- his testimony's restricted
11 to his medical chart, so he's --

12 MS. MORRIS: But he's testifying as an expert in
13 orthopedic surgery from his 23 years --

14 THE COURT: Yes.

15 MS. MORRIS: -- of practice.

16 THE COURT: And you're asking him about a
17 psychological work-up.

18 MS. MORRIS: I'm asking if he knows what that
19 entails since that's something he requires --

20 THE COURT: No.

21 MS. MORRIS: -- his patients to have.

22 THE COURT: Right. He wasn't designated for that
23 purpose, so the objection's sustained.

24 BY MS. MORRIS:

25 Q Is it within your practice to refer patients for

1 psychological clearance before they have surgery if you
2 believe it to be necessary?

3 MR. SEMENZA: Your Honor, same objection.

4 THE COURT: That's -- that's fine. He's already --
5 it's already been asked and answered. He said he does that,
6 so you can ask him again, but let's not -- let's move along
7 and not ask the same questions.

8 MS. MORRIS: Okay.

9 BY MS. MORRIS:

10 Q So, in an individual like Yvonne where she has a
11 degenerative spine which has been injured, would you expect
12 her pain to resolve --

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

14 THE COURT: Let her finish the question, please. Go
15 ahead.

16 BY MS. MORRIS:

17 Q Would you expect the pain to resolve itself on its
18 own without surgery?

19 MR. SEMENZA: And again, Your Honor, my objection
20 is, "in a patient like Ms. O'Connell." That's improper. It
21 goes outside the scope of the medical chart.

22 THE COURT: With Ms. O'Connell.

23 BY MS. MORRIS:

24 Q With Ms. O'Connell and her spine in the condition
25 that it is, would you expect her pain to resolve without any

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