IN THE SUPREME COURT OF THE STATE OF NEVADA

WYNN LAS VEGAS, LLC d/b/a WYNN LAS VEGAS, *Appellant*, vs. YVONNE O'CONNELL, an individual, *Respondent*.	Supreme Court Case No.: 70583(L) *Consolidated with Case No.*: 71789 Eighth Jud. Dist. Ct. Case No.: A-12-655992-C
YVONNE O'CONNELL, an individual, *Appellant*, vs. WYNN LAS VEGAS, LLC d/b/a WYNN LAS VEGAS, *Respondent*.	Supreme Court Case No.: 71789

RESPONDENT/APPELLANT'S COMBINED ANSWERING AND OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

-Respondent/Appellant YVONNE O'CONNELL (collectively, "O'Connell") is an individual.

-O'Connell has been previously represented by the law firms Cap & Kudler, Naimi, Dilbeck & Johnson, Chtd., and the Law Office of Richard S. Johnson.

-O'Connell is currently represented by the NETTLES LAW FIRM which consists of attorneys Brian D. Nettles, Christian M. Morris, William R. Killip, Jr., Jon J. Carlston, Edward J. Wynder, and Jennifer Peterson.

DATED this 23rd day of July, 2017.

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JURISDICTIONAL STATEMENT

O'Connell is in agreement with Appellant/Respondent WYNN LAS VEGAS, LLC's ("Wynn") jurisdictional statement found on page one of its Opening Brief and O'Connell supplements as needed.

On November 9, 2016, the *Order Partially Granting and Partially Denying Defendant's Motion to Retax Costs and Plaintiff's Motion to Tax Costs and for Fees, Costs and Post-Judgment Interest* ("Order") (3 RA 570-586) was filed in the district court and the *Notice of Entry of Order* was filed and served on November 10, 2016. 3 RA 587-605. On November 17, 2016, O'Connell filed her *Notice of Appeal* of this Order and therefore her appeal (Case No. 71789) was timely pursuant to NRAP 4(a)(a). This Court has jurisdiction from this Order as a "special order entered after final judgment" pursuant to NRAP 3A(b)(8).

ROUTING STATEMENT

Because this is an appeal from a tort case for a judgment, exclusive of interest, attorney fees, and costs, of $250,000 or less, this case falls within the presumptive jurisdiction of the Court of Appeals pursuant to NRAP 17(b)(2).

ISSUES PRESENTED

1. Did O'Connell present substantial evidence at trial that the Wynn was on constructive notice of this hazard due to its size, its condition, and the Wynn's failure to conduct reasonable and timely inspections?

2. Was the jury instructed correctly regarding Nevada's standard for constructive notice that included an instruction that the Wynn should have

used reasonable care to discover the hazard by performing reasonable inspections at reasonable intervals?

3. Did the district court abuse its evidentiary discretion by permitting O'Connell's treating physician experts to testify?

4. Was the testimony of O'Connell's treating physicians reliable based upon the treatment and examinations they provided, the medical imaging studies, and O'Connell's narrative of her fall and her pre- and post-fall pain complaints?

5. In the absence of pain complaints or a symptomatic health condition, is there a duty to apportion?

6. Was the jury properly instructed at trial regarding the "eggshell plaintiff" doctrine relative to preexisting conditions?

7. Did the district court abuse its discretion by not awarding O'Connell any of her requested attorneys' fees?

STATEMENT OF THE CASE

This is a consolidated appeal from a jury verdict in a personal injury premises liability slip and fall case. The Wynn is appealing the district court's denial of its renewed motion as a matter of law or remittitur (70583), and O'Connell is appealing this district court's order denying and granting in part her post-trial request for attorneys' fees and costs (71789). EIGHTH JUDICIAL DISTRICT COURT, THE HONORABLE CAROLYN ELLSWORTH, District Court Judge.

I.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

A. The facts and circumstances of O'Connell's slip and fall demonstrate that substantial evidence was presented at trial to support the jury's verdict.[1]

Prior to her slip and fall on February 8, 2010,[2] O'Connell had frequented the Wynn on many occasions to stay, dine, gamble, and see shows/concerts, etc. 8 AA 1678. In fact, O'Connell was a member of the Wynn's loyalty program – a "Red Card" member – receiving casino comps such as "free play" and dining vouchers. 8 AA 1678-79. On her visits to the Wynn, O'Connell enjoyed visiting and admiring the Wynn's decorations, specifically its tree, plant, and flower displays in its indoor atrium/garden area ("Atrium") near one of its busy entrances – the "south entrance." 8 AA 1680-81. The Atrium has a marble floor consisting of multi-color mosaic tiles in shades of green, red, blue, cream, and yellow forming various flower patterns. 1 RA 136-139. At the edge of these flower/plant displays, there are raised "curb" dividers separating the flora from the public walkway. Id.

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[1] Prior to trial, the Wynn unsuccessfully moved for summary judgment regarding liability/constructive notice. The Wynn filed its *Motion for Summary Judgment* (1 AA 150-195) on July 13, 2015, and it was fully briefed by the parties. The district court denied its motion at a hearing held September 17, 2015. 4 AA 701-05 (transcript); 5 AA 805-06 (written order).

[2] February 8, 2010, was a Monday – the day after the NFL Super Bowl.

On the day of her fall, O'Connell had eaten at the Wynn's buffet with her cousins who were visiting from California. 8 AA 1679. After eating with her cousins, O'Connell decided to take a walk on the Las Vegas strip to exercise and shop. 8 AA 1680; 9 AA 1800. As O'Connell was walking through the Atrium near a flower/garden display she slipped and fell near one of these planters due to the presence foreign substance. 8 AA 1682. O'Connell described this substance as a "green liquid substance" that was located on top of some of the green mosaic tiles making it more difficult to see. 8 AA 1682-85, 1687-88. She further described it as "sticky" and "seven feet" in length with approximately three feet of it as "almost dry" and having "dirty footprints" on it. Id.

Almost right after the fall, Wynn employees placed a large sweeper machine over the foreign substance. 8 AA 1684, 1689; 1 RA 149. Wynn employee Yanet Elias ("Ms. Elias") – an assistant manager in the Wynn's "Public Areas Department" at the time – responded to the incident. In her written statement attached to the Wynn's incident report (1 RA 144-58), she described the foreign substance as "something like syrup." 1 RA 149. Soon thereafter, for reasons that are not entirely clear, Wynn employees mopped up the foreign substance before security could arrive to take any pictures of the foreign substance. 8 AA 1637, 1689. Further, the Wynn also claimed O'Connell's fall was not captured on any surveillance cameras "Due to the position of the cameras during incident." 1 RA

144. Similarly, the Wynn never produced any surveillance video of the area where O'Connell fell prior to fall to determine when it had last been inspected and/or cleaned, or any video of O'Connell at the Wynn that day whatsoever. 8 AA 1640.

O'Connell was eventually able to limp over to a nearby slot machine and sit where Wynn Security Office Corey Prowell ("S/O Prowell") gathered information from her for the Wynn's incident report. 8 AA 1691; 1 RA 129-43. Due to her injuries, specifically those to her arms and hands, O'Connell was unable to fill out a "Guest Accident or Illness Report" at her own volition, and accordingly S/O Prowell filled it out on her behalf with O'Connell signing it. 1 RA 144, 147-48; 8 AA 1691, 1696. In the answer blank to the question, "If Yes, what did you find that would be a contributing factor in your accident," O'Connell had S/O Prowell write "Lots of Green Liquid." 1 RA 147. She declined medical assistance at the scene stating at trial that she was dazed didn't know how badly she was hurt…that she "didn't know what to do." 8 AA 1692. S/O Prowell also took pictures of the shoes O'Connell was wearing that day – flat soled sneaker-like shoes. 1 RA 140-41; 8 AA 1650.

B. In addition to O'Connell's own testimony, she provides the jury with additional substantial evidence regarding the Wynn's negligence that created an unreasonable risk of harm.

1. The jury heard testimony from the Wynn's own employees that supports the liability verdict.

O'Connell's testimony and the Wynn's incident report were not the only evidence that was presented to the jury regarding liability/constructive notice. The Wynn's own employees testified regarding its negligent policies and procedures that enabled the hazard to exist for an unreasonable length of time. To wit, Wynn employee Ms. Elias offered the following testimony to support an adverse liability verdict:

- Ms. Elias, an assistant manager in the Wynn's "Public Areas Department" working at the Wynn that day, testified she didn't know when the area where O'Connell fell had last been inspected. 8 AA 1538-39.

- She admitted there was no set schedule, aka a "sweep log," for inspecting the area where O'Connell fell. 8 AA 1539. Instead, it depended "on how long it takes the employee to check the north area and return to the south area, because it's all considered one -- one whole area." Id. As much as one hour could pass between inspections. Id.

- She acknowledged that there are not "always two employees assigned to that area. Sometimes, there's only one." Id.

- As an assistant manager, one of her duties was to ensure the other porters were doing their jobs; the presence of debris was indicative of a porter not fulfilling his or her assignment. 8 AA 1539-40.

- Indeed, Ms. Elias acknowledged that even at full staffing levels "it's very difficult to maintain the casino"…that "it's impossible to keep it clean at 100 percent." 8 AA 1540-41.

- Ms. Elias contradicted herself at trial describing the foreign substance "like honey" in contrast to her written statement authored in February 2010 that it was "like syrup." 8 AA 1542; RA 006.

At trial, S/O Prowell offered the following testimony relevant to the jury finding the Wynn negligent:

- He admitted that the Atrium area near the Wynn's south entrance is a "high traffic" area. 8 AA 1632.

- He demonstrated a "hear no evil, see no evil" approach to evidence gathering regarding when the area had last been inspected and/or cleaned prior to O'Connell's fall by not requesting *any* video surveillance of the same. 8 AA 1640. He also did not request *any* video of the Wynn employees cleaning up the spill, or *any* video of O'Connell at the Wynn that day for that matter. 8 AA 1661. (Similarly, the Wynn's "Director of Claim" Trish Matthieu ("Ms. Matthieu") also testified at trial in the Wynn's case-in-chief. 10 AA 2021. Ms. Matthieu testified that the Wynn typically preserves "The incident itself, and then they will usually attempt to clip 30 minutes before and 30 minutes after." 10 AA 2029).

- He also never attempted to speak with the porter assigned to clean the area on the day when O'Connell fell to determine when the area might have been last cleaned and/or inspected prior to the incident. Id.

In sum, the jury heard substantial evidence that was largely uncontroverted to support its adverse liability verdict against the Wynn: a conspicuously large (seven feet) foreign substance syrup-like and green in color in a high traffic area on a marble, multi-colored tile flooring that had been there long enough for part of it

to dry and have footprints on it[3]; no set inspection/cleaning schedule, aka a "sweep log," to determine when the area was last checked; testimony that as much as an hour could pass between inspections and that it was 'impossible' to keep the Wynn '100 clean'; variable and/or insufficient staffing; and the absence of *any* surveillance footage that could have potentially negated these claims.

2. O'Connell's trial testimony dove-tails with the Wynn's own incident report.

As detailed above, the jury heard O'Connell's uncontroverted testimony that the foreign substance was a "sticky green liquid" approximately "seven feet" in length (large enough that a sweeper machine was placed over it) that had been there long enough for approximately three feet of it to "almost dry" and have "dirty footprints" on it. Many of these same details were echoed in the very document – the Wynn's incident report (1 RA 129-143) – that represents the culmination of its investigation and documentation of the same: "I [S/O Prowell] spoke with Manager Elias, who stated upon her arrival, she noticed the liquid substance" (1 RA 129); and Ms. Elias's written statement that "a [sic] employee cover a spill with a Sweeper Machine" and that "when I check [sic] the spill is [sic] something like syrup." 1 RA 149.

[3] It bears mentioning that the jury did find O'Connell 40% comparatively negligent. 11 AA 2277. The implication is that such a large and noticeable foreign substance should have been seen by not just by the Wynn but by O'Connell too.

C. Factual and procedural history regarding O'Connell's injuries/damages and the related substantial evidence presented at trial.

1. The mechanism of injury and O'Connell's immediate pain complaints.

In terms of how she fell, at trial O'Connell stated she "fell back and twisted to right" landing on a "raised planter divider" where "the plants are and tile." 8 AA 1685-86; *cf.* 1 RA 139. Specifically, she stated:

> "**A** Okay. This is a raised divider between the plants and the tile, and right here, this raised part, this triangular part, that's what my right buttocks hit, my right -- and my leg hit the planter -- the divider, and my -- the rest of my body hit it. I landed on that. And my shoulder was just partly in the plants here, and my head hit that. So, my body was on this -- hit that raised divider."

8 RA 1686. O'Connell's body ended up straddling this divider on her right side with her upper body inside the planter and her lower outside on the mosaic marble flooring. 8 AA 1687; *cf.* 1 RA 139. O'Connell reported to the Wynn that day that she had "moderate to severe pain in her right shoulder, right ankle and right buttock." 1 RA 144, 147; 8 AA 1652, 1662. The same week of her fall O'Connell had her boyfriend at the time Sal Risco ("Mr. Risco") take pictures of the bruises on her rear-end her doctor had informed her about to see them for herself. 1 RA 168-70; 9 AA 1721; 10 AA 1950-54.

After her fall, O'Connell, still dazed and confused, spent approximately the next two hours making her way out of the casino to her car parked in self-park. 9 AA 1693. She did so by limping first to the bathroom where she rested for

approximately a half hour, and then by progressing from two different slot machines to simultaneously rest while making progress towards the parking garage. 9 AA 1693-95. She gambled at theses machine to avoid being asked to move along if she wasn't going to play. 9 AA 1694 and 1711.

After she was finally able to leave the Wynn, O'Connell went to the Rampart Casino. At trial, when asked why, O'Connell responded that it was because she didn't want to be alone because "people know me there and I feel safe" in order to "do what I usually do and try to forget about this." 9 AA 1696. She gambled there stating, "because, you know, sometimes that makes you feel better." Id. She didn't want to go home but eventually she knew she had to so she went home and "crawled into bed." Id. The following day – November 9, 2010 – O'Connell stayed in bed in pain. 9 AA 1696. Still in pain and not knowing exactly why, on November 10, 2010, O'Connell first sought medical treatment at a UMC Quick Care. Id.

2. Reliable and substantial evidence regarding O'Connell's injuries was presented at trial via her medical records and her treating physicians' expert testimony consistent with the facts and circumstances of her fall and her pain complaints.

At trial, O'Connell testified that at the time of her fall she sustained injuries to up and down the right side of her body consistent with how she landed on top of the raised planter divider. 8 AA 1686. This is also consistent with the "new patient" medical intake forms (*e.g.*, 17 AA 3620-25 (dated 2/17/2010)) she

completed during her initial treatment after her fall and her testimony at trial regarding her immediate injuries. 9 AA 1748. These are the same areas, specifically her neck, back, and her right knee, that her treating physicians – Dr. Thomas Dunn (neck and spine) and Dr. Craig Tingey (right knee) – would medically relate as injuries she sustained in the fall. Shortly after the fall she began ambulating first with a cane before moving to a walker to cope with limping and to avoid falling. 9 AA 1709. She has used a walker to ambulate ever since.

3. Apportionment: O'Connell was asymptomatic and pain-free before her fall, and thus apportionment did not apply.

a. O'Connell hadn't sustained an injury for 20+ years and lived a healthy and active lifestyle.

O'Connell's last acute/traumatic injury was an injury to her back in 1989 that fully resolved itself shortly thereafter with physical therapy.[4] 9 AA 1706. After her back healed, she estimated she was pain free for "20-some years" until the February 2010 fall. 9 AA 1707, 1745, 1753-54. At the time of her fall she did not have a primary care physician. 9 AA 1698, 1740. She regularly went swing-dancing with her boyfriend and testified that they had gone "a couple of days before the fall." 9 AA 1708. She generally described herself as "happy, healthy, and strong" immediately prior to her fall. 8 AA 1696, 1706; 9 AA 1733-

[4] Ostensibly for the sake of completeness and accuracy, O'Connell fastidiously attempted to list her *entire* medical history that included her tonsillectomy in 1955 or 1956 and an injury to her hands in 1986. 9 AA 1736.

34. She testified that the onset of her pain complaints originated with her fall. 9 AA 1733-35.

b. The Wynn did not have any medical records to support its apportionment argument.

At the time of her fall, O'Connell was 58 years old. At the November 2015 trial, O'Connell testified she hadn't been to a doctor since sometime before 2002 for a breast biopsy. 9 AA 1706. Similarly, during the litigation and at trial, not a single pre-fall medical record was obtained or produced to potentially serve as objective proof that apportionment was necessary. Indeed, the *Independent Medical Record Review* authored by the Wynn's medical expert Dr. Victor Klausner, D.O. ("Dr. Klausner") and dated 4/13/2015 does not reference a single pre-fall medical record, chart, or imaging study. 18 AA 3660-75. Instead, at trial the Wynn solely relied upon certain medical intake forms where O'Connell had attempted to list her entire, amorphous 58 year health history consisting of IBS/constipation, anxiety/stress/depression, GERD, Ehler-Danlos / Marfan syndrome, and fibromyalgia at one time or another as standing for the proposition that she was *per se* required to apportion.

As set forth in more detail below, these health issues were irrelevant and did not require apportionment yet the Wynn is again taking them out of context in an attempt to gin up reversible error. The record below demonstrated the district court addressed and appropriately dismissed this issue as legally out of hand, and

that further the jury was presented with this same information vis-à-vis O'Connell and the parties' medical experts.

D. The district court exercises its evidentiary discretion by finding O'Connell's belated disclosure of her treating medical experts substantially justified and also grants the Wynn significant relief to address its complaints of prejudice.

1. Background overview regarding O'Connell's treating medical experts Dr. Thomas Dunn and Dr. Craig Tingey (Dr. Andrew Martin) out of the *Desert Orthopaedic Center*.

Current counsel first appeared in this case February 2015. On March 16, 2015, O'Connell disclosed to the Wynn her *First Supplement to and Amendment of Initial 16.1 Disclosures* consisting of approximately 716 pages of medical records. 1 AA 52-69; 1 RA 001-046. Notably, this disclosure contains O'Connell's medical records from the *Desert Orthopaedic Center* ("DOC") consisting of her treatment records or "charts" from two of her treating physicians: Dr. Thomas Dunn ("Dr. Dunn") for her neck and back and Dr. Andrew Martin ("Dr. Martin") for her knees (Dr. Dunn referred O'Connell to Dr. Martin). 1 RA 001-046 (PLTF600-627). This disclosure explicitly discloses "Thomas Dunn, M.D., and/or Person Most Knowledgeable/Custodian of Records" from DOC and further states these witness(es) are "expected to testify as a treating physician and as an expert regarding the injuries sustained, past present and future medical treatment and impairment, prognosis, disability, pain and suffering, disfigurement, causation, and the reasonableness and necessity of all care…." 1 RA 009. And while Dr. Martin

was not explicitly disclosed in the body of the pleading (1 RA 009), his treatment records were disclosed. 1 RA 028-035. In other words, by March 16, 2015, while discovery was still open (discovery closed June 12, 2015), the Wynn was on explicit notice that O'Connell had treated at the DOC with Dr. Dunn for her neck and back and Dr. Martin knees. Indeed, on March 28, 2015, the Wynn made its *Ninth Supplement Disclosures Pursuant to NRCP 16.1* consisting of these same records from DOC. 1 RA 047-082 (Wynn-O'Connell01296-0138). In fact, at the hearing held on October 1, 2015, regarding the Wynn's motion to preclude O'Connell's treating experts from testifying, counsel for the Wynn acknowledged, "And Dr. Dunn, again, yes, he was disclosed within the period of time. Yes, we did have medical records relating to Dr. Dunn. But we made decisions not to depose him, okay." 4 AA 769, ll. 19-24; *see also* 4 AA 772, ll. 1-8 ("I have no issue with that at all with regard to Dr. Dunn"…"So with regard to Dr. Dunn, I understand your Honor's ruling. I'm certainly fine with taking that approach.").

In approximately May 2015, Dr. Martin left DOC due to an unrelated criminal matter and O'Connell was referred to a different knee doctor practicing at DOC, Dr. Craig Tingey ("Dr. Tingey"). O'Connell duly sought and obtained these new medical records from DOC/Dr. Tingey at the earliest available opportunity and disclosed them on July 14, 2015, approximately four months before the November 2015 trial. 1 RA 083-128; *see also* 6 AA 1122-23. On September 18,

2015, O'Connell disclosed Drs. Dunn's C.V., fee schedule, and prior deposition/trial testimony list. 4 AA 706-726. On September 28, 2015, O'Connell disclosed Drs. Tingey's C.V., Fee Schedule, and prior Deposition/Trial testimony list. 4 AA 727-748. Further, during this time, the Wynn had at its service its retained medical expert Dr. Victor Klausner, D.O. ("Dr. Klausner"). Dr. Klausner performed an *Independent Medical Record Review* dated 4/13/2015 (18 AA 3660-76) and testified at trial in the Wynn's case-in-chief.

2. After extensive briefing and multiple briefings, the district court finds the belated disclosures were substantially justified and permits Drs. Dunn and Tingey to testify provided they limit their testimony to the information contained in their medical charts. The district court also grants the Wynn's request to voir dire both doctors outside the presence of the jury to remedy any claims of prejudice or surprise.

The district court took the Wynn's claims seriously and did its best to strike a fair balance – the court asked for multiple briefings, held multiple hearings, and conducted substantial independent research regarding these issues. Ultimately, the district court correctly permitted Drs. Dunn and Tingey to testify at trial. A review of the record below highlights the discretion exercised by district court pursuant to its evidentiary gate-keeping role in order to achieve fairness for both sides:

- At the initial hearing on this issue held on October 1, 2015, the district court recognized that these experts' opinions are contained in the medical records they reviewed and/or generated in their treatment of O'Connell, and appropriately limited their trial testimony the medical opinions

contained in these records.[5] 4 AA 763, 765. *Cf.* FCH1, Ltd. Liab. Co. v. Rodriguez, 335 P.3d 183, 189 (Nev. 2014), and NRCP 16.1, drafter's note (September 30, 2012, amendment).

- In light of O'Connell's belated disclosure, the district court permitted the Wynn's medical expert Dr. Klausner to hear Drs. Dunn and Tingeys' live trial testimony before he testified. 4 AA 763-64.

- Concerned by the issues discussed at the October 1, 2015, hearing, the district court ordered the parties to submit additional briefing and set a return hearing for October 29, 2015. By that time, the Wynn had received both Drs. C.V., fee schedules, and prior deposition/trial testimony lists. Further, the district court had reviewed the medical records reviewed and generated by each doctor.

- The district court again canvassed the language in the drafter's note to NRCP 16.1 and the *FCH1* decisions and ultimately concludes the language used in O'Connell's disclosures was sufficient noting that the court had also reviewed the medical records reviewed and generated by each doctor. 6 AA 1116-18. The district court also points out that these doctors could not testify in a rebuttal capacity to Dr. Klausner. Id., 1118.

[5] The district court aptly noted the important distinction between FCH1, Ltd. Liab. Co. v. Rodriguez, 326 P.3d 440 (Nev. 2014) issued June 5, 2014, and FCH1, Ltd. Liab. Co. v. Rodriguez, 335 P.3d 183 (Nev. 2014) issued October 2, 2014, in highlighting that the latter modified the former to excuse a treating physician from preparing a written report and instead permit them to "testify in accordance with his or her medical chart, even if some records contained therein were prepared by another healthcare provider." *See* NRCP 16.1, Drafter's Note (September 30, 2012, amendment). 4 AA 770-71.

- In response to counsel for the Wynn's argument that Dr. Dunn should not be able to testify as to causation based upon what is contained in the medical records, the district court appropriately designates this issue as a cross-examination trial issue. 6 AA 1119.

- The district court grants the Wynn's request to voir dire both doctors outside the presence of the jury. 6 AA 1120, 1127. The district court vets each doctor's testimony and instructs them on multiple occasions to limit their live testimony to the information contained in their charts. 8 AA 1562-63, 1580.

The district court justifiable permitted these experts to testify and remedied any complaints of prejudice or surprise in a meaningful matter. Further, the district went to great lengths to ensure that these doctors appropriately limited their testimony on the witness stand to their treatment and diagnosis of O'Connell.

II.

SUMMARY OF THE ARGUMENT

O'Connell presented the jury with substantial evidence regarding the Wynn's negligence and her damages for past and future pain and suffering. O'Connell's evidence regarding the Wynn's liability included not just her testimony detailing the size of the hazard and for how long it had been there, but also included the Wynn's failure to conduct meaningful and reasonable inspections of its property that could have discovered and prevented the harm. O'Connell did not use an "expanded" definition of constructive notice not recognized in Nevada; the definition used is well-recognized in Nevada and was embodied in a jury

instruction that fits within the negligence finding against the Wynn based upon the facts presented at trial.

O'Connell's damage award was supported by competent and reliable medical expert testimony. O'Connell was not under a duty to apportion as she was pain-free and not symptomatic prior to the February 2010 fall. The jury was properly instructed via the "eggshell plaintiff" instruction and the Wynn had every opportunity to impeach her regarding her "pre-existing" conditions. Her treating physician medical experts properly diagnosed her based upon stated medical history and various diagnostic studies they reviewed.

The district court abused its discretion by not awarded O'Connell *any* attorneys' fees based upon her $49,999 Offer of Judgment made two months before trial. O'Connell's offer was reasonable both in terms of its timing and amount, and the Wynn rejected it in bad faith.

III.

ARGUMENT

Standard of Review – NRCP 50[6]

This Court is to review the Wynn's denied NRCP 50(a) and (b) motions for a judgment as a matter of law using a de novo standard of review that mirrors the

[6] It appears the Wynn has abandoned its request for a new trial and is only seeking a reversal as a matter of law and/or remittitur. Accordingly, O'Connell will not address the Wynn's previous request for a new trial pursuant to NRCP 59 made at the district court.

standard used by the district court: whether the non-moving party [O'Connell] presented sufficient evidence at trial such that the jury *could have* returned a verdict in her favor. Nelson v. Heer, 123 Nev. 217, 222-23, 163 P.3d 420, 424-25 (2007). Indeed, NRCP 50 relief is only proper when "the evidence is so overwhelming for one party that any other verdict would be contrary to the law." Bliss v. DePrang, 81 Nev. 599, 602, 407 P.2d 726, 727-28 (1965). In particular, the non-movant must be given "'the benefit of every reasonable inference' from any substantial evidence supporting the verdict." Ainsworth v. Combined Ins. Co., 105 Nev. 237, 247, 774 P.2d 1003, 1011 (1989) (*citing* Jeffers v. Bob Kaufman Mach., 101 Nev. 684, 685, 707 P.2d 1153 (1985)). Additionally, "neither the credibility of the witnesses nor the weight of the evidence may be considered," and the district court "may only grant the motion if the evidence was such that 'reasonable men would have necessarily reached a different conclusion.'" Id. (*citing* Wilkes v. Anderson, 100 Nev. 433, 434, 683 P.2d 35 (1984)).

A. O'Connell presented substantial evidence at trial that the Wynn was on constructive notice of the hazard by failing to act reasonably under the circumstances.

1. The Wynn is relying upon an erroneous standard for constructive notice premises liability – constructive notice can also be met by proving that the foreign substance was there for an unreasonable length of time by failing to conduct reasonable inspections.

Generally speaking, a property owner "must act as a reasonable person under all of the circumstances including the likelihood of injury to others, the

probable seriousness of such injuries, and the burden of reducing or avoiding the risk." Moody v. Manny's Auto Repair, 110 Nev. 320, 329, 871 P.2d 935, 941 (1994) (*citing* Turpel v. Sayles, 101 Nev. 35, 38, 692 P.2d 1290, 1292 (1985)); *see also* Foster v. Costco Wholesale Corp., 128 Nev. 773, 775, 291 P.3d 150, 152 (2012) ("negligence laws throughout the country have progressed in favor of upholding the general duty of reasonable care."). Stated differently, "a proprietor owes his invited guests a duty to keep the premises in a reasonably safe condition for use – the duty of ordinary care." Asmussen v. New Golden Hotel Co., 80 Nev. 260, 262, 392 P.2d 49 (1964). Section 343 in the Second Restatement of Torts embodies this duty and standard:

> **§ 343 Dangerous Conditions Known to or Discoverable by Possessor**
>
> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Restat 2d of Torts, § 343 (2nd 1979).

The presence of a foreign substance upon a floor is generally not compatible with the standard of ordinary care. Id. However, a business will only be liable in a

slip-and-fall due to a foreign substance if, (a) the foreign substance was on the floor because of actions of the business owner or one of its agents or, (b) if the business had "actual or constructive notice of the condition and failed to remedy it." Sprague v. Lucky Stores, 109 Nev. 247, 249, 849 P.2d 320, 322 (1993); *see also* Linnell v. Carrabba's Italian Grill, LLC., 833 F. Supp. 2d 1235, 1237 (D. Nev. 2011). "Whether [a defendant] was under constructive notice of the hazardous condition is, in accordance with the general rule, a question of fact properly left for the jury." Sprague, 109 Nev. 247, 849 P.2d at 323.

"A defendant may have constructive notice of a hazardous condition if a reasonable jury could determine that based on the circumstances of the hazard the defendant should have known the condition existed." Chasson-Forrest v. Cox Commc'ns Las Vegas, Inc., No. 70264, 2017 Nev. App. Unpub. LEXIS 206, 2017 WL 1328370, at *1 (Nev. App. Mar. 31, 2017). A plaintiff can prove constructive notice by demonstrating that the dangerous condition existed long enough that it would have been discovered had the business exercised reasonable care. Fowler v. Wal-Mart Stores, Inc., No. 2:16-CV-450 JCM (GWF), 2017 U.S. Dist. LEXIS 79926, at *7-8 (D. Nev. May 24, 2017); *see also* Staples v. Wal-Mart Stores, Inc., No. 2:13-cv-1612-GMN-NJK, 2015 U.S. Dist. LEXIS 14440, at *7 (D. Nev. Feb. 4, 2015). Circumstantial evidence regarding the presence of the foreign substance and the property owner's constructive notice thereto may be considered by the trier

of fact to draw any reasonable inferences. Eldorado Club v. Graff, 78 Nev. 507, 510, 377 P.2d 174, 175 (1962); *see also* 61 A.L.R.2d 6 (1958).

Sprague did not establish an exclusive bright line test for proving constructive notice. The Wynn is incorrectly attempting to limit Nevada's standard for constructive notice to only Sprague's "frequently" or "virtually continual" fact-pattern. 109 Nev. at 251, 849 P.2d at 323 (i.e., employee gave deposition testimony that each shift he found debris on the floor in the produce section 30 to 40 times); *cf.* Opening Brief, pg. 30 ("Of course, this is not the law in Nevada" calling O'Connell's constructive notice standard an "expanded standard"). But even *Sprague* recognizes that the crux of premises liability is the failure to use reasonable care under the circumstances: "a jury could conclude that Lucky should have recognized the impossibility of keeping the produce section clean by sweeping…Evidence was also presented that Lucky had knowledge of the availability of skid mats which would minimize the risk to shoppers of slipping and injuring themselves." Id. *Sprague* is best understood as standing for the proposition of what circumstances can be shown to impute the property owner with constructive notice of a particular hazard rather than some type of formulaic algorithm, i.e., "X pieces of debris discovered on the floor per hour equals constructive notice" *See also* Billingsley v. Stockmen's Hotel, 111 Nev. 1033, 1037, 901 P.2d 141, 144 (1995) ("In determining whether a land owner or occupier

has acted reasonably, a court may consider circumstantial factors"). The Wynn's standard patently ignores Nevada's "reasonable under the circumstances" standard for constructive notice premises liability.

2. The district court applied the correct constructive notice standard and the jury was presented with substantial evidence of the Wynn's failure to exercise reasonable care in support of its verdict.

The Wynn's attempt to define constructive notice as narrowly as possible is a transparent attempt to ignore the substantial evidence presented at trial that it should have known about the hazard. The correct inquiry – and the inquiry presented to the jury at trial – was whether the foreign substance had been on the floor for such a length of time that the Wynn in the exercise of ordinary care should have known about it, aka the failure to conduct reasonable inspections at reasonable intervals. Bridgman v. Safeway Stores, Inc., 53 Cal. 2d 443, 447, 2 Cal. Rptr. 146, 148, 348 P.2d 696, 698 (1960) ("it has been held that evidence that an inspection had not been made within a particular period of time prior to an accident may warrant an inference that the defective condition existed long enough so that a person exercising reasonable care would have discovered it."); *see also* Twardowski v. Westward Ho Motels, 86 Nev. 784, 787, 476 P.2d 946, 947-48 (1970) ("the owner or occupier of land has a duty to an invitee to inspect the premises to discover dangerous conditions not known to him and to "take reasonable precautions to protect the invitee from dangers which are foreseeable

from the arrangement or use" *citing* Prosser, Handbook of The Law of Torts 402 (3d ed. 1964)). As for the amount of time is needed to charge the owner with constructive notice, the inquiry depends upon the circumstances of the particular case that may include, *inter alia*, the nature of the danger, the number the number of persons likely to be affected by it, the diligence required to discover or prevent it, opportunity and means of knowledge, the foresight which a person of ordinary care and prudence would be expected to exercise under the circumstances, and the foreseeable consequence of the conditions. 61 A.L.R.2d 6 § 7(b) (1958); *cf.* Forrest v. Costco Wholesale Corp., No. 2:15-cv-00843-RFB-CWH, 2016 U.S. Dist. LEXIS 131395 (D. Nev. Sep. 26, 2016) (discussing the potential lengths of time between inspections to impute constructive notice). The Wynn's reliance upon *Eldorado Club* (Opening Brief, pg. 29) is also misplaced and the case actually supports O'Connell's recitation of the broader standard for constructive notice. *Eldorado Club* addressed an evidentiary issue that evidence of two prior slip and falls was inadmissible to establish notice of a continuous or reoccurring hazardous condition for purposes of establishing constructive notice or "immediate awareness of new peril." 78 Nev. at 511, 377 P.2d at 176. *Eldorado Club* did not address for how long the hazard (a lettuce leaf) needed to be present before a fall to impute notice or whether reasonable inspections of the premises were being conducted.

3. O'Connell presented substantial evidence at trial that the Wynn breached its duty to exercise reasonable care to discover the hazard to prevent the harm it caused O'Connell.

a. Evidence that the foreign substance had been there for a lengthy and therefore unreasonable length of time.

The Wynn instead incorrectly focuses on the potential source of the "green liquid" and whether it was a 'recurrent' or 'continuous' condition (Opening Brief, pgs. 29-30) – liability theories that were based upon its overly reductive definition of constructive notice. The Wynn is impermissibly asking this Court to re-characterize the evidence presented at trial as insufficient or inconsequential. To wit, it repeats the same evidence presented to the jury regarding the spill's size and indicia regarding the length of time it had been there, i.e., that a portion of it had begun to try, that it has become "sticky," and had collected dirty footprints. *See* Opening Brief, pg. 31. While the Wynn is dismissive regarding this evidence, these are appropriate circumstances to consider in determining whether the hazard had been present for unreasonable length of time. The jury heard O'Connell's uncontroverted testimony that the green substance was "sticky" and "seven feet" in length with approximately three feet of it as "almost dry" and having "dirty footprints" on it. 8 AA 1682-85, 1687-88. It was large enough that the Wynn employees were able to place a large sweeper machine over the foreign substance. 8 AA 1684, 1689; RA 006 (employee voluntary statement from Wynn employee Ms. Elias). Ms. Elias wrote in her statement that it was "something like syrup."

RA 006. These details also coincide with details memorialized in the Wynn's incident report prepared contemporaneously with O'Connell's fall that was analyzed in great detail at trial by both parties. RA 001-015.

Further, the Wynn's citation to non-binding case law that the spill's characteristics, e.g., its size and whether it had begun to dry, are not relevant to an inquiry regarding the length of time a spill has been present invades the jury's fact-finding mission depending upon the facts presented in each case. *See* Opening Brief, pgs. 31-32. Indeed, the Wynn's citation to Tidd v. Walmart Stores, Inc. – a Federal District Court in Alabama sitting in diversity jurisdiction – referenced a Alabama Supreme Court decision issue one year prior holding the opposite created factual issue for the jury:

> "Based on these facts, a reasonable person could conclude that the length of time necessary for an amount of Pine-Sol to collect in a pool large enough to saturate the clothing of Mrs. Kenney's back and buttocks area was a sufficient length of time to either put the defendant on constructive notice that the substance was there or make the defendant delinquent in not discovering and removing the substance before Mrs. Kenney slipped and was injured."

Kenney v. Kroger Co., 569 So. 2d 357, 359 (Ala. 1990), Tidd v. Walmart Stores, Inc., 757 F. Supp. 1322, 1324 (N.D. Ala. 1991). Indeed, the so-called "banana peel" cases taught in law school turned on the facts and circumstances of each banana peel, specifically whether there was reliable indicia indicating the peel had been there for an unreasonable length of time. In Goddard v. Boston & M.R. Co.,

the Massachusetts court explained, "the banana skin upon which the plaintiff step and which caused him to slip may have been dropped within a minute by one of the persons leaving the train" – an adverse decision for the plaintiff. 179 Mass. 52 (1901). Approximately a decade later, this same court reasoned as follows regarding a different set of facts also involving a banana peel in finding for the plaintiff:

> "It was described by several who examined it in these terms: it 'felt dry and gritty as if there were dirt upon it,' as if 'trampled over a good deal,' as 'flattened down, and black in color,' every bit of it was black, there wasn't a particle of yellow' and as 'black, flattened out and gritty.'"
> …
>
> "The inference might have been drawn from the appearance and condition of the banana peel that it had been upon the platform a considerable period of time, in such position that it would have been seen and removed by the employees of the defendant if they had performed their duty."

Anjou v. Boston E.R. Co., 208 Mass. 273, 273-74 (1911). In other words, there is no "one size fits all" fact pattern and each case will turn on a specific set of facts regarding indicia that that the foreign object has been there for an unreasonable length of time. As set forth above, the jury was presented with substantial evidence that the foreign substance had been there for an unreasonable length time due to its location, size, and partially dry condition at the time O'Connell fell. Couple this evidence with the Wynn's failure to conduct inspections at reasonable lengths of time for such a large and busy corridor substantially supports the jury's

verdict. But for the Wynn's failure to conduct reasonable inspections it could have discovered the foreign substance and prevented the harm.

b. "Jury Instruction No. 27" supports the jury's verdict finding the Wynn negligent consistent with the constructive notice legal theory of liability presented at trial embodied in this instruction and the general verdict form.

The jury received 43 jury instructions. 11 AA 2278-2320. Counsel for the parties agreed upon these instructions and no objections were preserved on the record. Jury instruction no. 27 guided the jury regarding premises liability – actual and/or constructive notice:

> "The owner of property is not an insurer of the safety of a person on the premises, and in the absence of negligence by the owner, the owner is not liable to a person injured upon the premises.
>
> When a foreign substance of the floor causes a patron to slip and fall, liability will lie only where the business owner or one of its agents caused the substance to be on the floor, or if the foreign substance is the result of actions of persons other than the business or its employees, liability will lie only if the business had actual or constructive notice of the condition and failed to remedy it.
>
> In order for the plaintiff to recover in the absence of proof that the defendant created the condition or actually knew of it, the plaintiff must prove that the defendant had constructive notice. **That means that the defendant, using reasonable care, should have known of the unsafe condition in time to have taken steps to correct the condition or to take other suitable precautions.**
>
> **You may consider whether the defendant inspected the premises on a reasonable basis or in a reasonable way in determining whether the defendant should have known of the unsafe condition. You may consider the length of time the condition may have existed in**

determining whether the defendant should have known of the condition had the defendant used reasonable care."

11 AA 2304 (emphasis added). As previously detailed, the jury was presented with substantial evidence regarding whether the Wynn was on constructive notice of this 'unsafe condition' because it failed use 'reasonable care' taking into account the frequency and manner and timing it inspected its premises and the length of time this condition may have existed. This instruction and the general verdict form used at trial were consistent with each other, and the jury could have based its general verdict upon the highlighted portion of this jury instruction. 11 AA 2277. The Wynn's Opening Brief completely ignores the foregoing jury instruction and now argues O'Connell used an 'expanded standard' of constructive notice that is 'not the law in Nevada.' *See* Opening Brief, pg. 30. This argument ignores the very jury instruction that was given and not objected to at trial.

D. O'Connell sustained her causation/damage burden at trial via the testimony of her treating medical experts who also addressed the Wynn's faulty apportionment/degeneration arguments.

Similar to its efforts at the district court, the Wynn again trots out a host of causation/damage arguments that can be summarized as follows: 1. that O'Connell did not present the jury with competent proximate causation testimony; and 2. that O'Connell was under a duty to apportion her injuries from the fall from her pre-existing health and degenerative conditions. O'Connell will cite to the record below to demonstrate that O'Connell provided the jury with competent causation

evidence and that it was also presented with considerable argument that O'Connell was seeking damages for her prior health or degenerative conditions when in fact its arguments were red-herrings all along. The Wynn's citations to Lastly, it's worth reviewing the district court's analysis and rulings on these issues as the district court has the benefit of seeing the record below first-hand.

1. Drs. Dunn and Tingey testified to a reasonable degree of medical probability that O'Connell's injuries were caused by the fall and that their diagnoses were not solely based upon her "self-reporting."

As a preliminary note, the district court granted the Wynn's request to voir dire both doctors outside the presence of the jury before they took the stand to determine whether they were competent to testify and/or to sufficiently limit their testimony in compliance with *FCH1*,[7] and to remedy the Wynn's complaints of prejudice or surprise. 8 AA 1554-84 (Dr. Dunn); 9 AA 1840-1854 (Dr. Tingey). During the voir dire of each doctor, the district court was presented with sufficient testimony regarding the medical and legal bases for their causation opinions contained in their charts that included multiple imaging studies (MRIs and x-rays) previously produced in the litigation. They were also questioned regarding their O'Connell's "self-reporting," e.g., their knowledge of the mechanism of injury and her pain complaints as relayed to them by her, and the interplay between her pre-existing health and degenerative conditions obtained from O'Connell relative to

[7] FCH1, Ltd. Liab. Co. v. Rodriguez, 335 P.3d 183 (Nev. 2014).

her pain complaints and their diagnoses. Ultimately, both doctors opined that regardless of O'Connell's pre-existing health and degenerative conditions, the lynch-pin inquiry was whether she was symptomatic or not at the time of the February 8, 2010, fall. 8 AA 1577-78; 8 AA 1844. For example, Dr. Dunn summed up the pre-existing health or degenerative condition by noting that naturally a 58 year old woman such as O'Connell would have signs of degeneration prior to her fall, however the applicable inquiry is whether these signs are "clinically relevant" or whether the patient was symptomatic or not. In order to make this determination, it's medically necessarily to obtain this information from the patient as pain complaints and diagnostic imaging are not *per se* correlative. 8 AA 1578-80, e.g., "we don't operate on x-rays, we operate on people." Id., 1579. Dr. Tingey had a similar take. 8 AA

At the conclusion each doctor's voir dire, the Wynn again requested that they be precluded from testifying but the district court was satisfied that these doctors had formed their opinions during the course of treating O'Connell and were otherwise competent to testify before the jury surmising that cross-examination was the Wynn's proper forum to make its points, i.e., "your [the Wynn] argument is, well, it's not enough for a doctor to rely on the patient – the patient history, but the bottom line is, they do rely on the patient history" noting the Wynn was free to bring up this issue and any others on cross-examination. 8

AA 1581; 9 AA 1853-54; *see also* 8 AA 1583, THE COURT: "Pain – but reports of pain are always subjective. They're – you can't visualize pain"…"Doctors do rely on reports [of patient pain]."

a. Dr. Dunn's testimony to the jury.

Dr. Dunn testified on two separate days: November 9, 2015 ("day 3"), and November 11, 2015 ("day 5"). Dr. Dunn is a board certified orthopaedic spine surgeon focusing on the neck and back and is his practice group's "senior spine surgeon." 8 AA 1585. He diagnosed O'Connell's neck and back in 2014 as part of second opinion evaluation due to on-going complaints of pain. 8 AA 1588. At his initial visit with her, he reviewed neck and lumbar spine MRIs taken in 2010. Id. O'Connell relayed to him the details of her fall and that she had neck and back pain since that time. 8 AA 1589-90. At the time of his initial consult with her, he had x-rays of her neck and back performed. 8 AA 1588-89. He also sent her for updated MRIs to review with her at a subsequent visit. 8 AA 1589-90. The medical records from providers other than Dr. Dunn that reviewed during the course of treating O'Connell and those he generated treating her can be found at 1 RA 001-046 and 1 RA 047-082. These were records that both parties obtained/produced during the litigation.

After physically examining O'Connell on multiple occasions and reviewing her medical imaging, Dr. Dunn opined that O'Connell was a surgical candidate for

a three-level fusing to her cervical spine at C4-C5, C5-C6, and C6-C7 followed by physical therapy. 8 AA 1592; 1 RA 035-38, 057-059. He did not recommend surgery to her lumbar spine based upon his reading of her MRIs opining that surgery would not provide her with any pain relief, and instead she would have to "do [her] best to live with it." 8 AA 1593, 1606; 10 AA 1919-20. He also opined that surgery on O'Connell's cervical spine would only take approximately "50 percent of [the] neck pain away" stating that she had a "permanent condition" that could lead to pain and/or complications to other areas of her body. 8 AA 1606; 10 AA 1913, 1915, 1917. He related her injuries to the subject slip and fall stating it was "reasonable mechanism of injury that can cause a previously asymptomatic condition, degeneration, to be become symptomatic." 8 AA 1598; *see also* 9 AA 1904-05. He also addressed the Wynn's pre-existing degenerative condition argument noting that it's expected that a 58 year old women would have a certain degree of degeneration that could become symptomatic or aggravated as a result of a traumatic injury regardless of an actual fracture. 8 AA 1596-97; *see also* 9 AA 1902-03. He also addressed the Wynn's fibromyalgia and depression arguments. 10 AA 1933-34 Dr. Dunn also testified that it was his understanding that O'Connell wasn't experiencing any symptomology prior to the February 2010 fall (10 AA 1926) which is consistent with O'Connell's trial testimony and complete dearth of any prior medical records indicating one way or the other. He also stated

his diagnosis was based upon mix of O'Connell's subjective complaints and the objective findings contained in her medical imaging. 10 AA 1938-39.

b. Dr. Tingey's testimony to the jury.

Dr. Tingey is a board-certified orthopaedic surgeon specializing on shoulders, hips, and knees. 9 AA 1855. He treated her in 2015 pain complaints emanating for both knees. Id., 1857. He referenced two prior consults from 2014 between O'Connell and his partner Dr. Martin before he left their practice group that included MRIs and x-rays of both knees. 9 AA 1857-58. Based upon his reading of each MRI performed in the fall of 2014, he diagnosed O'Connell with medial meniscus tear in her right knee and a medial and lateral meniscus tear in her left knee. 9 AA 1857, 1879. He also obtained from O'Connell her recollection of the fall relative to when her pain complaints began, and how her gait had been affected since that time. 9 AA 1858.

While concluding both knees needed arthroscopic meniscal surgical according to each MRI, he opined that only O'Connell's injury to her right knee was the result of a traumatic event whereas the left knee was "more of a degenerative condition." 9 AA 1858-59, 1862, and 1864. He also medically related the injury to her right knee as caused by subject February 8, 2010, slip and fall. 9 AA 1865. He also stated the only cure for a meniscus tear is surgery and

that the x-rays and MRIs he reviewed were sufficient to support his surgical recommendation. Id., 1866.

Dr. Tingey also opined that the arthritic or degenerative changes to both knees were "very mild" and might not cause any severe pain, and instead her mechanical symptoms and severe pain "are much more consistent with a meniscus tear." 9 AA 1869. On cross-examination, while Dr. Tingey acknowledged O'Connell that she told him she'd fallen and was hurt, he also pointed out that "she reported that she wasn't having any symptoms before the fall" labeling this information as "important." 9 AA 1870; *see also* 1871-72.

Dr. Tingey's testimony was consistent with the findings and diagnoses contained in the medical records previously produced during the litigation. 1 RA 109-12. It was also consistent with O'Connell's trial testimony and with the Wynn's incident report where she described injuries to the *right* side of her body. 1 RA 144-158. Dr. Tingey also pointed out that meniscus tears are generally diagnosed via MRIs as opposed to solely with x-rays, and that physical pain from knee tears can take a few weeks.[8] 9 AA 1872-73. In fact, he testified that it wasn't uncommon for someone to go years in pain and not know they had a meniscal tear until having an MRI. Id., 1875. He also dismissed the idea that fibromyalgia could "mimic a meniscus tear." Id.

[8] O'Connell did not have any MRIs performed contemporaneously with her initial diagnoses back in 2010.

2. The district court duly considers and rejects the same arguments on multiple occasions.

O'Connell directs this Court to the district court's lengthy written order addressing and rejecting these same arguments after a full briefing by the parties that included the transcript from the trial. 17 AA 3530-3543 ("Order Denying Defendant's Motion for Judgment…."); *see also* the related briefing by each party and the transcript and court minutes from the March 4, 2016, hearing. 17 AA 3433-71. To reiterate, the district court found any late disclosure issues was "substantially justified" pursuant to NRCP 37(c) because:

> "O'Connell continued to treat after the close of discovery, treatment records were provided to O'Connell's counsel after the close of discovery, and were provided to Defense counsel soon after their receipt, and because O'Connell had to change treating physicians after Dr. Martin had left the practice. The late disclosed records were only a few pages, the Court permitted the defense to voir dire the doctors outside the presence of the jury before they testified in the presence of the jury, and the Court allowed Wynn's rebuttal expert to sit in the courtroom and listen to the testimony of both Dr. Tingey and Dr. Dunn, allowing him to incorporate his opinions on direct examination. Hence, Wynn was not prejudiced by any late disclosure on O'Connell's part."

17 AA 3480. With respect to the reliability of Drs. Dunn and Tingeys' testimony and the die the Wynn continually tries to cast regarding the alleged impropriety of "self-reporting," the district court also found as follows:

> "O'Connell's self-reporting did not appear to be the sole basis of her experts' testimony. Both doctors testified as to the basis of their opinions, which included not only evaluation of the O'Connell's medical history but also their examination of her, their review of her diagnostic medical tests, and their experience in treating orthopedic conditions and the conditions that

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

17 AA 3480. The district court duly considered these issues and arguments and exercised its discretion in finding them unavailing.

3. Because O'Connell was asymptomatic or "pain-free" before her fall, apportionment did not apply.

Nevada's case law discussing apportionment is generally found in its decisions involving Nevada's industrial insurance framework, i.e., which employer/carrier should bear the claim under the "last injurious exposure rule" in successive employer/successive injury cases. *E.g.*, Grover C. Dils Med. Ctr. v. Menditto, 121 Nev. 278, 112 P.3d 1093 (2005). Generally speaking, the 'last injurious exposure rule' hinges on the medical-legal factual determination whether an "aggravation" or "recurrence/exacerbation" has occurred based upon either a discrete, traumatic event or worsening health condition. Id. An aggravation can be defined as a "subsequent, intervening injury or cause that caused [the injury] to be put into a worse condition than it was put into by the [previous] accident," whereas a "recurrence/exacerbation" can be defined as occurring "when symptoms of the first injury persist and "there is no specific incident that can independently explain the second onset of symptoms." Menditto, 121 Nev. at 286, 112 P.3d at 1099 (2005) (*citing* Titus v. Sioux Valley Hosp., 2003 S.D. 22, 658 N.W.2d 388, 391

(S.D. 2003)). Notably, in Menditto the claimant pointed to two acute, traumatic events that occurred while she was working for her subsequent employer rather than a "general worsening" of her pre-existing conditions occasioned by the performance of her job duties on behalf of this second employer. Id., 121 Nev. at 282, 112 P.3d at 1096; *cf.* Collett Elec. v. Dubovik, 112 Nev. 193, 911 P.2d 1192 (1996) (under the last injurious exposure rule, claimant's last employment bore the required causal relationship to the cause of his disability some pain complaints experienced during his previous employment); *see also* State Indus. Ins. Sys. v. Swinney, 103 Nev. 17, 731 P.2d 359 (1987) (appeals officer's decision that the worker's injury resulted from a subsequent injury and that the original injury was not the precipitating factor in the latest injury as, *inter alia*, the claimant had received no medical treatment for over a year prior to the subsequent traumatic event).

O'Connell's injuries are analogous to the *Menditto*, *Dubovik*, and *Swinney* for a number of reasons. In each case a subsequent precipitating event, aka a discrete traumatic event or specific time-period, was referenced as the injury causing event. Similarly, examination of prior medical records, e.g., discharge records discussing range of motion and signs of tenderness, and the claimant's subjective pain complaints were taken into account in making the determination when a new injury had occurred, and thus which carrier/employer would be

responsible. In O'Connell's case, the Wynn couldn't cite to anything of necessary import warranting apportionment such as a traumatic event close in time to the November 2010 fall, i.e., a prior car accident or slip and fall for which she was still treating for or experiencing pain complaints, or even a medical record stating she had some type of permanent, debilitating condition that may be relevant to the injuries she sustained as result of her fall, i.e., limited range of motion in her neck or knee. In fact, at trial the jury was presented with evidence that the opposite was true; that O'Connell had lived an active and pain-free lifestyle at the November 2010 fall and had done so for the past 20 years. Her boyfriend at the time Sal Risco also confirmed O'Connell's testimony in this regard. O'Connell testified she had no primary care physician at the time and hadn't seen a doctor since sometime around 2002. She testified whatever health conditions she had in the past, i.e., IBS/constipation, were under control. Indeed, for the sake of argument, even if the Wynn is given the benefit of the argument that O'Connell's prior health issues were extant to a notable degree, the Wynn still did not posit any meaningful evidence other than its medical expert's testimony that apportionment was required that the jury found unpersuasive. If anything, the Wynn is baselessly faulting O'Connell for naively attempting to provide her entire medical/health history since her birth i.e., her reference to a tonsillectomy in 1955 and an asymptomatic / fully resolved back injury sustained in 1989, on various healthcare providers "new

patient" intake forms she filled out after her fall irrespective of her actual health immediately prior to her fall.

4. In fact, the Wynn was fortunate to be able to impeach O'Connell with her irrelevant past health history.

A prior injury or preexisting condition may be relevant to the issues of causation and damages in a personal injury action. FGA, Inc. v. Giglio, 128 Nev. 271, 283, 278 P.3d 490, 498 (2012) (*citing* Voykin v. Estate of DeBoer, 192 Ill. 2d 49, 733 N.E.2d 1275, 1279-80, 248 Ill. Dec. 277 (Ill. 2000)). In order for evidence of a prior injury or preexisting condition to be admissible, a defendant must present by competent evidence a causal connection between the prior injury and the injury at issue. Giglio, *supra* (*citing* McCormack v. Andres, 2008 MT 182, 343 Mont. 424, 185 P.3d 973, 977 (Mont. 2008)) ("The party seeking to introduce alternate causation evidence must demonstrate a causal connection between the present symptoms complained of and a prior accident.").

During the litigation and at trial, not a single pre-fall medical record was obtained or produced to potentially serve as objective proof that apportionment was necessary, i.e., pre-fall medical records that O'Connell was actively or had recently treated for any injuries or pain complaints that resulted from her fall. The Wynn impeached O'Connell based solely on her own testimony and information contained in her post-fall medical records. In other words, the Wynn did not have a single pre-fall medical record to lend any credence to its argument that

O'Connell was in pain or symptomatic for any of her prior health issues to require apportionment. At trial, O'Connell testified extensively both on direct and on cross-examination regarding her entire health history, her health immediately before her fall, and her injuries and health after the fall through trial. Essentially, the Wynn threw O'Connell's entire medical history against the wall hoping anything would stick. The jury also heard testimony from the Wynn's medical expert Dr. Victor Klausner, D.O. ("Dr. Klausner") regarding his review of O'Connell's medical records and the facts and circumstances of her fall.

The Wynn advanced this *non-sequitur* argument to the district court at trial on multiple occasions culminating with its *Renewed Motion for Judgment as a Matter of Law* submitted after trial where it had the opportunity to cite to trial transcripts and brief/research the issue once again based upon the evidence presented at trial. The Wynn was given a full opportunity to sew into the jury's mind that O'Connell was seeking damages for any preexisting health conditions she may have experienced during her lifetime. Ultimately, by finding in her favor and awarding her damages, the jury implicitly disregarded the Wynn's causally speculative allegations and found that O'Connell's injuries and pain complaints emanated with the 2010 fall.

The Wynn's strategy of using O'Connell's past medical history to "muddy the waters" by attempting to use O'Connell's medical history is overstated and out

of context. After relying on the argument that at most she sustained some bruising from the fall – an argument the jury rejected at trial when it awarded her significant damages – the Wynn's Opening Brief spends almost three pages (pgs. 8-10) claiming O'Connell spent the next 5+ years of her life "seek[ing] medical treatment for numerous unrelated conditions" by "duping" her medical providers with false pain complaints. For instance, while O'Connell wrote on various medical intake forms that she had fibromyalgia she testified at trial that this "diagnosis" occurred 20 years earlier as possible explanation from some intermittent pain complaints. 9 AA 1745, 1752. Similarly, she described her Ehler-Danlos or Marfan syndrome as merely making her "extra-limber" and only affecting her grip strength. 9 AA 1708. Further, the jury did not hear any testimony at trial that she was treating for these conditions prior to her fall.

At trial, the Wynn also tried to impeach O'Connell regarding an incident that occurred subject February 8, 2010, fall on July 14, 2010. 9 RA 1770-73 The Wynn's Opening Brief labeled it as a "severe injury." Pg. 37, fn. 12. O'Connell testified that at trial her injuries her "right leg hurts so much, it gave out on me" causing her left leg to hit the floor and her right leg to him some furniture. 9 RA 1770. She described it as not a "complete fall," and she did not specifically seek medical treatment as a result. 9 RA 1770. She also attributed it to symptomology she was experiencing from the subject February 2010 fall. Id. O'Connell can only

surmise the Wynn is raising this benign issue to create an issue that isn't there, or because its other arguments lack merit or are unpersuasive.

5. The Wynn's citation to inapplicable case law once again highlights that apportionment was inapplicable.

The Wynn once again trots out inapplicable "apportionment" case law that only applies to successive tortfeasors or plaintiffs who are treating or at least symptomatic for pain at the time of the traumatic event at issue. *See* Opening Brief, pgs. 35-36. Scrutinizing the cases cited by the Wynn emphasizes these fatal flaws. For instance, in Schwartz v. State Farm Mut. Auto. Ins. Co. the decision granting State Farm summary judgment in a UIM first-party insurance bad faith dispute states, "At the time of the accident…Plaintiff had a s**evere arthritic condition** in both knees. However, she claims **that this condition was being successfully treated** with steroid injections, thus minimizing her disability, and that both knees were equally arthritic and troublesome before the accident." However, she claims that this condition was being successfully treated with steroid injections, thus minimizing her disability, and that both knees were equally arthritic and troublesome before the accident." 2009 U.S. Dist. LEXIS 64700, at *2 (D. Nev. July 22, 2009) (*emphasis added*). Rowe v. Munye, a Minnesota Supreme Court case, has a similar fact-pattern to *Schwartz*: "Rowe's preexisting injuries involved back, shoulder, and neck pain and headaches. For about 20 years before the accident with Munye, Rowe had **periodically received chiropractic**

care for chronic neck and back discomfort. Her most recent visit to Dr. Sheehan **was just a few days before the accident**." 702 N.W.2d 729, 733 (Minn. 2005) (*emphasis added*). Kleitz v. Raskin is Nevada's leading case involving successive tortfeasors and shifting the apportionment burden once the plaintiff was injured in the second traumatic event. 103 Nev. 325, 738 P.2d 508 (1987). Rowe v. Munye, 702 N.W.2d 729 (Minn. 2005). Reichert v. Vegholm involved traumatic, injury causing events 24 days apart. 366 N.J. Super. 209, 840 A.2d 942 (Super. Ct. App. Div. 2004). Phennah v. Whalen, involved two car accidents less than three months apart. 28 Wash. App. 19, 621 P.2d 1304 (1980).

6. The Wynn is conflating apportionment with the "eggshell plaintiff doctrine" and Jury Instruction No. 37 adequately addressed this issue.

Having established that O'Connell was asymptomatic and pain-free prior to the subject fall, apportionment was not required and accordingly the Wynn had to take O'Connell "as it found her" which would include her latent frailties and aggravated health conditions relative to her 58 year of age, aka the "eggshell plaintiff doctrine" embodied in this court 1909 decision in Murphy v. S. Pac. Co.:

> "The evidence preponderates to the effect that at the time of the accident plaintiff was **not afflicted with the malady affecting the limb in question**, **but it does appear that shortly thereafter varicose veins appeared and caused plaintiff the intense suffering and injury of which he is now complaining. Every man is differently constituted physically, and what might affect one individual might not have any damaging effect on the other.** And so the jury in the present case, after listening to the medical testimony introduced, and all the evidence and facts adduced, believed, in

> their judgment, that these varicose veins were directly attributable to the accident occasioned by the negligence of the defendant."

(emphasis added). 31 Nev. 120, 134, 101 P. 322, 328 (1909). Jury Instruction No. 37 embodied this fundamental Nevada tort law precept and its countervailing apportionment concept:

> "A person who has a condition at the time of an injury is not entitled to recover damages therefor. However, she is entitled to recover damages for any aggravation of such preexisting condition proximately resulting from the injury.
>
> This is true even if the person's condition made her more susceptible to the possibility of ill effects than a normally healthy person would have been, and even if a normally healthy person probably would not have suffered any substantial injury.
>
> Where a preexisting condition is so aggravated, the damages as to such condition are limited to the additional injury caused by the aggravation."

The foregoing instruction adequately took into account both the "eggshell plaintiff" doctrine and the apportionment doctrine to the extent it's relevant. After that, the jury was free to decide based upon the evidence presented taking into account each witnesses' credibility. While the Wynn thought O'Connell's testimony was not credible – that she was in fact in pain and symptomatic immediately prior to her fall – it was nonetheless the jury's decision to believe it and the Wynn did not have a single medical record to indicate otherwise.

The foregoing jury instruction's "wide birth" coupled with the evidence presented at trial allowed for any number of outcomes. For example, in reversing

the district's order granting a new trial, in Fox v. Cusick this Court touched upon many of these same issues and summed them up as follows:

> "It was for the jury to weigh the evidence and assess the credibility to be accorded the several witnesses. It is impossible for us to know whether the jury found for the defendant Fox because of a belief that he did not proximately cause the collision, or because of a belief that the Cusicks did not truly sustain personal injuries as a result of the collision. With regard to the matter of injury and damage, it was within the province of the jury to decide that an accident occurred without compensable injury. The fact that the weight of the evidence bearing on cause may have been against the verdict returned in the view of the trial judge, does not invest him with authority to order that the cause be tried again."

91 Nev. 218, 221, 533 P.2d 466, 468 (1975). The Wynn impermissibly asks this Court to reweigh competent evidence and reassess witness credibility in a prohibited attempt to understand why the jury found the way it did. In contrast, in Taylor v. Silva, this Court reversed an order denying a motion for a new trial from a verdict when the jury found the defendant negligent yet failed to award any damages noting that, "According to [plaintiff's] unrefuted testimony, she was in perfect physical health prior to the accident." 96 Nev. 738, 741, 615 P.2d 970, 971 (1980).

Quintero v. McDonald is also illustrative of the issues the Wynn argues on appeal. In *Quintero*, this Court upheld the jury's award of $0.00 in damages to a fault-free passenger citing with approval the district court's ruling that, "The jury decision is reasonable in light of facts brought out during trial. [The jurors] were free to conclude that although there was liability, there were no damages." 116

Nev. 1181, 1184, 14 P.3d 522, 523 (2000). Specifically, this Court highlighted that,

> "Although McDonald [the Defendant] did not present expert testimony challenging causation, testimony elicited from Quintero's witnesses on cross-examination controverted Quintero's claim as to the extent of her injuries. Further, cross-examination of Quintero's evidence revealed that Quintero suffered from a pre-existing back injury, which could have caused her symptoms."

116 Nev. at 1184, 14 P.3d at 523. In contrast, at trial the Wynn had its own medical expert challenging causation and there was no testimony that O'Connell was actually *suffering* from any pre-existing condition. Indeed, O'Connell's boyfriend Sal Risco testified that at the time she was in good physical health they often went out swing-dancing.

7. O'Connell's damages for future pain and suffering were supported by expert testimony.

An award of damages for future pain and suffering based upon subjective, i.e., cannot be readily observed by the court and jury, must be substantially supported by expert testimony to serve as an evidentiary basis that future pain and suffering is a probable, and not merely a possible, result. Curti v. Franceschi, 60 Nev. 422, 426, 111 P.2d 53, 55 (1941); Sierra Pac. Power Co. v. Anderson, 77 Nev. 68, 75, 358 P.2d 892, 895 (1961). On the other hand, if evidence of future pain and suffering is objective and can be readily observed by the court and jury, an award for such damages need not necessarily be supported by expert testimony provided the jury otherwise finds from substantial evidence that it is probable.

Sierra Pac. Power Co., *supra*. The application of this subjective versus objective dichotomy does not always fit with precision, and need not be established with the certainty of a "mathematical demonstration." Id. However at a minimum there must be sufficient evidence presented to the jury to enable them to arrive at a supportable conclusion that that the plaintiff will probably suffer such damages in the future. Id.

Various Nevada Supreme Court decisions offer additional guidance regarding what injures may be deemed subjective and thus require expert medical testimony, and what injuries may be deemed objective and not require expert medical testimony. Back pain, mental worry, distress, grief, and mortification are generally considered subjective. Anderson, 77 Nev. at 75, 358 P.2d at 896. A claim of that headaches will occur in the future should be supported by expert medical testimony that they are "probable." Gutierrez v. Sutton Vending Serv., 80 Nev. 562, 397 P.2d 3 (1964). Similarly, subjective symptoms such as future mental suffering, i.e., embarrassment, humiliation, or inconvenience, should be supported likewise. Lerner Shops v. Marin, 83 Nev. 75, 79, 423 P.2d 398, 401 (1967). A torn rotator cuff resulting in a thirty percent permanent disability post-surgery is an objective injury that can be supported solely with medical records. Paul v. Imperial Palace, 111 Nev. 1544, 1548, 908 P.2d 226, 229 (1995). A broken bone is a readily observable injury such that a jury "could estimate the degree of

future discomfort…without necessarily receiving an expert's assistance." Krause Inc. v. Little, 117 Nev. 929, 938-39, 34 P.3d 566, 572 (2001).

Here, it Wynn appears to concede that O'Connell's damages for future pain and suffering was in fact supported by medical expert testimony, i.e., Dr. Dunn's recommendation that she needed a three level surgical fusion but that it would only take away 50 to 60 percent of her pain symptoms and that she would simply have to live with the pain in her lower back, and Dr. Tingey's recommendation that she needs right knee meniscal surgery. Instead, the Wynn tiredly relies on its previous argument that "Because their [Drs. Dunn and Tingey] testimony should have been excluded, O'Connell's claim for these amounts must fail." *See* Opening Brief, pg. 40. O'Connell has previously addressed that the district court found their belated disclosure was substantially justified, and that their testimony was appropriately circumscribed to their treatment and the records they reviewed at time. The jury heard substantial evidence regarding these surgeries and her long-term prognosis for pain and permanent disablement. O'Connell's injures coupled with her treating experts' testimony sufficiently meet the benchmarks discussed in the cases above to adequately support the jury's award of future pain and suffering.

D. The district court abused its discretion in denying outright O'Connell's request for attorneys' fees.

Procedural Background

Based upon the successful jury verdict, O'Connell submitted post-trial requests for attorneys' fees, costs, and pre-judgment interest to which the Wynn opposed.[9] 1 RA 171-200, 1 RA 201-221, 2 RA 246-324, 3 RA 422-435, 3 RA 438-512, 3 RA 513-527 (O'Connell's submissions and briefing); 2 RA 222-245, 2 RA 325 to 3 RA 325-421, and 3 RA 528-559. O'Connell's basis for requesting fees and costs was founded on O'Connell besting her **$49,999.00** *Offer of Judgment* served to the Wynn on September 3, 2015, after the close of discovery and *two months* prior to the November 4, 2015, beginning of trial. 1 RA 186. $49,999.00 is **$190,001** more than the jury's award ($240,000 – $49,999) and **$224,072.34** less the then $274,071.34[10] final judgment ($274,071.34 – $49,999).[11] O'Connell requested $96,000 in attorneys' fees based upon a 40% contingency fee ($240,000 x 40%). 1 RA 190. She requested a total of $26,579.38 in costs. 2 RA 246-51.

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[9] O'Connell is not appealing the district court's interest calculations.

[10] This amount is calculated as follows: $240,000 jury award (11 RA 2277) + $17,190.96 pre-judgment interest award (11 RA 2338-39) + $16,880.38 final award of costs.

[11] *See also* NRS 18.020 **Cases in which costs allowed prevailing party**. "Costs must be allowed…to the prevailing party against any adverse party against whom judgment is rendered."

After a full briefing, the district court entertained oral argument regarding O'Connell's requests for fees and costs and the Wynn's motion to retax at two hearings: the first on March 4, 2016 (17 AA 3433-71) in conjunction with the Wynn's request for judgment as a matter of law, a new trial, or remittitur; and the second on September 13, 2016, regarding the district court's request for supplemental briefing regarding the *Frazier v. Duke* [sic] factors in exceeding NRS 18.005's expert witness fee cap.[12] The district court did not O'Connell *any* attorneys' fees and only awarded her in $16,880.38 in costs from her requested $26,579.38

Standard of Review

District courts may award fees and costs when a rule, contract, or statute authorizes an award. Barney v. Mt. Rose Heating & Air Conditioning, 192 P.3d 730, 733 (2008). This Court reviews the amount of attorney fees awarded by the district court for an abuse of discretion. Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 350, 455 P.2d 31, 33 (1969). An award of fees made pursuant to NRCP 68 or NRS 17.115[13] must address the *Beattie* factors:

> (1) whether the plaintiff's claim was brought in good faith;

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[12] Frazier v. Drake, 2015 Nev. App. LEXIS 12, 357 P.3d 365, 131 Nev. Adv. Rep. 64 (Nev. Ct. App. Sept. 3, 2015).

[13] This statute was repealed effective October 1, 2015.

> (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount;
>
> (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and
>
> (4) whether the fees sought by the offeror are reasonable and justified in amount.

Beattie v. Thomas, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). The *Beattie* test is a balancing test, not a conjunctive one. Yamaha Motor Co., U.S.A. v. Arnoult, 114 Nev. 233, 252 n.16, 955 P.2d 661, 673 n.16 (1998). The district court can base its award of attorney fees on a lodestar amount or a contingency fee so long as it considers the *Brunzell* factors and provides sufficient reasoning and findings to support its determination. 121 Nev. 837, 864-65, 124 P.3d 530, 548-49 (2005). The text found in NRCP 68 and NRS 17.115 does not prohibit an award of fees pursuant to a contingency fee agreement.

1. O'Connell's Offer of Judgment was reasonable and in good faith in both its timing and amount; the Wynn did not have a good faith basis to reject O'Connell's $49,999 Offer of Judgment.

At the time O'Connell made her OOJ, discovery had closed and the parties were preparing for trial in earnest. O'Connell had approximately $38,000 in medical specials and recommendation for surgeries to fuse three levels of her cervical spine and to repair a meniscal tear on her right knee. The Wynn did not have any medical records to refute O'Connell's testimony that she was asymptomatic and pain-free immediately prior to her fall. It also had heard the

damning deposition testimonies of its employees, Yanet Elias and Corey Prowell, regarding the size and condition of the spill as well as the Wynn's complete failure to conduct regular and meaningful inspections of its property in a high-traffic area near a busy entrance. The foregoing facts demonstrate that the Wynn was on notice regarding the weaknesses of its case and the potential for significant exposure if the case proceeded to trial. The Wynn grossly undervalued this case when it made a $3,000 *Offer of Judgment* in May 2014. 1 RA 182-83. The Wynn was fortunate the jury didn't return an even higher verdict against it. When the Wynn considered the Offer of Judgment, it should have considered settling for a known and reasonable amount – $49,999 – rather than take its chances at trial. The Wynn was not constrained by available insurance proceeds or the ability to pay. Its reason for rejecting O'Connell's offer was without a reasonable basis. It chose to reject O'Connell's reasonable offer forcing her to incur thousands of dollars in litigation cost and endure a trial spanning seven days.

2. The district court abused its discretion when it did not award O'Connell *any* attorneys' fees.

The district court appeared to have held against O'Connell the lack "bills setting forth what tasks were performed and the associated hours for those tasks. 3 RA 576. O'Connell explicitly stated she was pursuing her claim pursuant to a 40% contingency fee arrangement. Further, contingency fee arrangements are structured completely differently than hourly fee agreements where "tracking"

hours for billing purposes is necessary and paramount. Hourly and contingency fee arrangements are functionally indistinguishable as they both arrive at what the client is to pay / what the attorney earns. The district court is imposing a double-standard on contingency fee arrangements. Arguably, had this been an hourly fee case, O'Connell's fees would have exceeded $96,000 considering this was a multiple-day jury trial case with many hearings and substantial and significant briefing. O'Connell fee request for fees has received short shrift particularly in light of the excellent result at trial. O'Connell respectfully request that this Court reverse the district court's order denying any fees and remand this case with instructions to award O'Connell her $96,000 contingency fee.

IV.

CONCLUSION

Based upon the foregoing reasons, O'Connell respectfully request that this Court affirm the judgment entered below without remittitur, and that the case be remanded with instructions for the district court to provide an award of attorneys' fees.

DATED this 23rd day of July, 2017.

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AFFIRMATION

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

NRAP 28.2 CERTIFCATION

I hereby certify that this brief complies with the formatting requirements of Rule 32(a)(4)-(6), and either the page- or type-volume limitations stated in Rule 32(a)(7) – Microsoft Word ®, 14-point font, Times New Roman, approximately 13,801 words.

I further certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 23rd day of July, 2017.

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STATEMENT OF RELATED CASES

O'Connell certifies that to her knowledge Appellant's there are no cases or appeals currently pending before this Court related to the present, combined appeal.

DATED this 23rd day of July, 2017.

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CERTIFICATE OF SERVICE

I certify that on the 23rd day of July 2017, I electronically filed **RESPONDENT/APPELLANT'S COMBINED ANSWERING AND OPENING BRIEF** with the Supreme Court of Nevada by using the Court's eFlex electronic filing system to the following parties.

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