IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 70583(L)
Consolidated With Case No. 71789

WYNN LAS VEGAS, LLC DBA WYNN LAS VEGAS, a
Nevada Limited Liability Company

Appellant/Cross-Respondent,

v.

YVONNE O'CONNELL, an Individual,

Respondent/Cross-Appellant.

Appeal from Judgment on Jury Verdict entered December 15, 2015, and Order Denying Post-Trial Motions entered May 25, 2016, and all orders made appealable thereby
District Court Case No. A-12-671221-C, Eighth Judicial District Court of Nevada

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APPELLANT/CROSS-RESPONDENT'S COMBINED REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

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DISCLOSURE STATEMENT

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

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

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

Lawrence J. Semenza, III, P.C.

These representations are made in order that the Justices of the Supreme Court or Judges of the Court of Appeals may evaluate possible disqualification or recusal. Dated this 13th day of October 2017.

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INTRODUCTION

O'Connell's Answering Brief does nothing to rebut Wynn's right to judgment notwithstanding the verdict.[1] As Wynn demonstrates, O'Connell's failures infect every single element of her one claim for negligence.

Aware that she cannot prove that Wynn's actions fell below the applicable standard of care, O'Connell stands by her arguments for an expanded standard for constructive knowledge. However, this Court's holding in *Sprague v. Lucky Stores* could not be any clearer. To hold Wynn liable, O'Connell must show a recurrent or virtually continuous condition. As she concedes, O'Connell did not even attempt to meet this standard. Indeed, O'Connell provided no evidence regarding the conditions of Wynn's atrium and failed to identify even the most basic information about substance that she alleges caused her fall. The jury was left to guess about the nature and conditions of Wynn's floor and O'Connell's green mystery substance.

Moreover, as Wynn repeatedly emphasizes in its Opening Brief, O'Connell's legal errors are the least of her problems. Even if the Court accepts O'Connell's

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[1] Wynn has not abandoned its alternative request for a new trial. Wynn is entitled to judgment as a matter of law or, alternatively, a remittitur of O'Connell's damages in the manner specified in the Opening Brief. However, in the event the Court rules that O'Connell's failures require a new trial, Wynn stands behind its NRCP 59(a) request.

assertion that constructive knowledge may be established with proof that a hazard existed for an unreasonable duration, O'Connell has failed to produce *any evidence* from which the trier of fact could determine how long the liquid in question was on Wynn's floor.

Again, O'Connell could not even tell the jury what the substance was or begin to guess how long it had been on Wynn's floor. Painfully aware of her failure, O'Connell now cites the testimony of one of Wynn's porters as "evidence" that Wynn failed to conduct reasonable inspections. However, the actual testimony of this witness reveals the exact opposite. Wynn's porter had little to no recollection about the date in question and her only confident testimony was a confirmation that Wynn's floors are kept clean. Because O'Connell lacks any actual evidence, O'Connell simply cannot meet *any* standard of constructive notice – no matter how strained. Accordingly, O'Connell's case for breach of a duty fails as a matter of law.

Of course, as Wynn has shown, O'Connell's shortfall does not end with the standard of care. Rather, it extends to the mandatory elements of causation and damages as well. Again, O'Connell tries to replace evidence of causation with the speculation of two treating physicians that she failed to disclose until well after the deadline for experts and close of all discovery.

Unable to rebut Wynn's legal authority demonstrating that her delay required exclusion, and that (even if admitted) the testimony of O'Connell's treating experts was not credible, O'Connell seeks to stand on the District Court's findings to admit these witnesses at trial. However, the District Court clearly got it wrong when it ruled that Dr. Dunn and Dr. Tingey's "knowledge" of O'Connell's damages was *not* based solely on O'Connell's own self-serving statements. Both of these witnesses repeatedly admitted under oath during trial that O'Connell's statements were indeed the sole basis for their findings of pain. Because this evidence was neither timely disclosed nor credible, O'Connell's case for damages must fail.[2]

Indeed, even if the Court looks past the timing and content of Dr. Dunn and Dr. Tingey's participation, O'Connell admittedly (and intentionally) failed to satisfy her burden of apportioning her damages between the symptoms and injuries that she allegedly suffered as a result of her slip and fall at Wynn, and those related to her preexisting conditions and subsequent fall in July of 2010.

Here, desperate for authority that suits her needs, O'Connell resorts to relying upon this Court's interpretation of Nevada's "very complex statutory framework for

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[2] Alternatively, and at a minimum, O'Connell's claim for future pain and suffering must be eliminated as O'Connell concedes such claims require expert evidence.

compensating injured Nevada workers." However, the Court is not being asked to review an administrative determination of industrial insurance. And, even if it was, the last injurious exposure rule requires the finder of fact to determine causation, regardless of the onset of symptoms. Like any personal injury plaintiff, O'Connell must demonstrate that her fall at Wynn was the direct and proximate cause of her harm. Despite O'Connell's claims otherwise, her self-serving and otherwise unsupported reports about her onset of symptoms does not absolve her of this burden. Just like a symptomatic condition, "[a]n asymptomatic preexisting condition may well be an independent contributor" to a plaintiff's pain and injury. Thus, O'Connell's burden to apportion her damages is clear. Because she intentionally disregarded this burden at trial, Wynn is entitled to judgment on O'Connell's claim.

Finally, O'Connell has not shown why the Court should even consider overturning the District Court's determinations on her application for attorney's fees. Nevada's fee-shifting in NRCP 68 *requires* the moving party to provide evidence to support the factors laid out in *Beattie v. Thomas* and *Brunzell v. Golden Gate Nat'l Bank*. These factors include, among others, the "*time* and skill required" and the "*time and attention* given to the work" performed by counsel. Here, O'Connell provided the District Court with no evidence demonstrating the time and attention

dedicated by her counsel. Instead, she offered only the terms of the 40% contingency rate that she and her attorneys agreed on months before trial. Because O'Connell refused to provide any of the evidence that the District Court was required to consider before granting fees, the District Court's determination to deny fees must stand.

ARGUMENT

A. Nevada's Standard For Constructive Notice Is Well-Settled.

Try as she might, O'Connell cannot rewrite Nevada law. Regardless of how O'Connell wants to contend that this Court's prior decision-making is "best understood," the Court's holdings are clear. In *Sprague v. Lucky Stores*, the Court ruled that constructive notice requires sufficient evidence for a jury to find "that Lucky knew that produce was ***frequently*** on the floor, … [or] … ***virtually continual*** debris on the produce department floor …." 109 Nev. 247, 251, 849 P.2d 320, 323 (1993) (emphasis added). Only then, would Lucky be "on constructive notice that, at any time, a hazardous condition might exist which would result in an injury to Lucky customers." *Id.*; *see also FGA, Inc. v. Giglio*, 128 Nev. Adv. Rep. 26, 278 P.3d 490, n. 5 (2012) ("[W]hile they may have different labels, both the 'recurrent risk' and 'mode of operation' approaches involve essentially the same analysis: to determine whether owners are liable to injured patrons by analyzing whether there

was a ***'recurrent' or 'continuous'*** risk on the premises associated with a chosen mode of operation.") (emphasis added); *Eldorado Club v. Graff*, 78 Nev. 507, 511, 377 P.2d 174, 176 (1962) ("We hold, therefore, that where a slip and fall is caused by the temporary presence of debris or foreign substance on a surface, which is not shown to be ***continuing***, it is error to receive 'notice evidence' of the type here involved for the purpose of establishing the defendant's duty.") (emphasis added).

Searching about for any local authority to support her expanded standard of constructive notice, O'Connell cites, among others, unpublished case law from the Nevada Federal District Court. However, these cases only confirm Wynn's point. For example, in *Forrest v. Costco Wholesale Corporation*, No. 2:15-cv-00843-RFB-CWH, 2016 WL 5402200 (D. Nev. Sept. 26, 2016), a decision cited by O'Connell, the Nevada Federal District Court specifically recognized this Court's standard set forth in *Sprague* in granting summary judgment against a plaintiff in a slip and fall case. As the *Forrest* court recognized, "***Plaintiff cites to no decision by the Nevada Supreme Court, nor is this Court aware of such, that supports the position that a store may be on notice of liquid hazard by virtue of a substance being on the floor for a certain period of time***, along with a general acknowledgment that foot traffic may increase on the premises during certain days of the week or times of day." *Forrest*, 2016 WL 5402200, at *3 (emphasis added).

Accordingly, the court in *Forrest* recognized "that *Sprague*, which is more directly on point and binding on this Court, requires that the Plaintiff provide some sort of evidence showing that the Defendant was on constructive notice of the hazardous condition." *Id.* "In that case, the Court found a genuine issue of material fact regarding constructive notice ***based on evidence of a.) the impossibility of keeping the grocery floor clean in the produce department; b.) the produce that was constantly dropped all over the floor; and c.) the subsequent continual hazard that the constant debris produced***." *Id.* (citing *Sprague*, 849 P.2d 320) (emphasis added).

Again, the standard is clear. "[W]here a slip and fall is caused by the temporary presence of debris or foreign substance on a surface, ***which is not shown to be continuing***, it is error to receive 'notice evidence' of the type [offered by O'Connell here] for the purpose of establishing the defendant's duty." *Graff*, 78 Nev. at 511, 377 P.2d at 175. O'Connell admittedly presented no evidence at trial that the green mystery substance she allegedly slipped on was a continuous or recurrent condition at Wynn. Indeed, O'Connell presented *nothing* about the general conditions in Wynn's atrium or any facts about the condition, or cleanliness, of its floors.

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

B. Without Evidence, O'Connell Cannot Meet *Any* Standard For Constructive Notice.

Of course, satisfying Nevada's actual standard for constructive notice is far from O'Connell's only problem here. Regardless of whether the Court follows *Sprague* or the 'been on the floor too long' standard now being offered by O'Connell, she failed to provide actual *evidence* for the jury to determine whether Wynn should have known that an unreasonable condition existed on its premises. Indeed, as Wynn has shown, the jury was left to guess about the identity and duration of the substance that O'Connell claims caused her fall.

1. The Court Must Reject O'Connell's Attempt to Impose Strict Liability on Wynn.

Similar to her arguments about how *Sprague* is "best understood," O'Connell's own authorities actually prove Wynn's point. As courts, including this one, universally recognize, "[n]o presumption of negligence arises from the mere fact of injury to the customer. The burden rests upon the plaintiff to show that the injury was proximately caused by the negligence of the storekeeper or one of its

servants or employees." *Cash v. Winn-Dixie Montgomery, Inc.*, 418 So.2d 874, 875 (Ala. 1982) ("There is no evidence in the record whatsoever that the defendant knew the can was on the floor or that the can had been on the floor for such an inordinate length of time as to impute constructive notice."); *Sprague*, 109 Nev. at 250, 849 P.2d at 322 ("The owner or occupant of property is not an insurer of the safety of a person on the premises, and in the absence of negligence, no liability lies.") (citation omitted).

Thus, although O'Connell claims Wynn could be held liable if the jury found that the green mystery substance was left for an unreasonable amount of time, this does not absolve O'Connell from providing the jury a basis to determine how long the substance was actually on the floor and whether that duration was indeed unreasonable. Again, O'Connell's own authorities confirm this point. *See e.g.*, Restatement 2d (Torts) § 343 (Reporter's Note, Clause (a)) ("The plaintiff invitee has the burden of proving that the defendant possessor either knew or had reason to know of the condition, or that by the exercise of reasonable care he would have discovered it. Where the condition is temporary in its nature, this burden may require *proof* that it has existed for a sufficient length of time to permit the inference that reasonable care would have led to its discovery.") (emphasis added); *Staples v. Wal-Mart Stores*, Inc., No. 2:13-cv-1612-GMN-NJK, 2015 WL 476172, at *3 (D. Nev.

Feb. 4, 2015) ("In this case, Plaintiffs have *failed to provide evidence* showing that Wal–Mart had actual or constructive notice of the upturned corner of the floor mat that allegedly caused Ms. Staples' fall.") (emphasis added); *Bridgman v. Safeway Stores, Inc.*, 348 P.2d 696, 697 (Cal. 1960) ("[I]t 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.") (emphasis added).

2. The Jury Was Left to Guess About the Duration of O'Connell's Alleged Condition.

As Wynn has already shown, O'Connell's reliance on case law involving dried banana peels or overturned Pine-Sol bottles is misplaced. To begin, this authority relies in large part on a jury's ability to apply their own "common sense and human experience" regarding the substance in question (*e.g.*, banana peels, ketchup, Pine-Sol etc…). *See e.g., Davis v. Spotsylvania Mall Co.*, 41 Va. Cir. 390, 393 (1997). Moreover, *as O'Connell concedes*, these cases turn "on a *specific set of facts regarding indicia* that the foreign object has been there for an unreasonable length of time." (Ans. Brief at pg. 27) (emphasis added). In other words, a plaintiff must produce "***actual evidence*** of the nature of the substance …" to support constructive notice. *Maddox v. K-Mart*, 565 So.2d 14, 16 (Ala. 1990).

As courts hold, the size of a spill alone is not enough. *Tidd v. Walmart Stores*, Inc., 757 F. Supp. 1322, 1324 (N.D. Ala. 1991) ("A large spill can be as young as a small spill. A large spill can be as sudden as a small spill. … A large, sudden spill gives an invitor no additional notice merely because of its size."). Nor, does O'Connell's own guess that the green mystery substance had begun to 'dry and get sticky' provide reliable evidence by which a jury may determine duration. *See, e.g., Great Atlantic & Pacific Tea Co. v. Berry*, 128 S.E.2d 311 (Va. 1962) (observing that the majority of jurisdictions prohibit evidence of spilled substances as appearing old-looking, dirty, or grimy to establish how long the substances had been on the floor because it would require the jury to purely speculate or guess in order to allow recovery).

Again, O'Connell could not even tell the jury what the substance was, much less how long it should take to dry. Thus, the jury should not have been tasked with determining the drying time of a substance that is not even identified for them. The jury was left to just guess about Wynn's constructive knowledge.

3. Wynn's Porter Provided No Evidence in Support of O'Connell's Expanded Standard.

Well aware of her failure, O'Connell's Answering Brief turns her attention toward the testimony of Wynn's porter, Yanet Elias ("Elias"). Here (for the first time), O'Connell tries to make the case that Elias somehow provided the jury with

evidence that Wynn "fail[ed] to conduct inspections at reasonable lengths of time …." (Ans. Brief at pg. 27.)

However, a review of Elias' actual testimony reveals the opposite. Indeed, Elias testified that she recalled very little about the date and time in question. She did not know how many porters were assigned to the subject area on the date of the incident (8 AA 1539; 1544), what shift she was working, the area where she was assigned on the date of the incident (*id.* at 1541), or whether she left the area before the spill was cleaned up (*id.* at 1549). Nor, did Elias recall what time her shift ended or whether she spoke to O'Connell on the day of the incident. *Id.* at 1532. Indeed, due to language barriers, Elias struggled to explain the contents of even her own written statement from the date of the accident. *Id.* at 1543. In contrast; however, Elias unequivocally confirmed that the porter staff at Wynn she oversees "does a good job" (*id.* at 1544), and that the safety of Wynn's patrons is the "utmost importance" (*id.* at 1544).

Thus, Elias' testimony again provided no evidence to establish whether or not Wynn conducted inspections at "reasonable lengths of time." Nor, does O'Connell even try to the claim that she provided jury with evidence to establish what a "reasonable" inspection schedule would be.

O'Connell's straw-grasping only proves her lack of any actual evidence to establish constructive notice. Rejecting similar arguments, the Nevada Federal District Court in *Forrest* recognized that the plaintiff's "meager and vague" offer of an employee's generalized statements about the condition of the premises was vastly insufficient to establish constructive notice. *Forrest*, 2016 WL 5402200, at *4 (comparing *Sprague*, 849 P.2d at 322) ("Because of the hazard of produce on the floor, all employees in Lucky's produce department were instructed to always keep an eye open for debris on the floor."). Because O'Connell cannot meet any standard of constructive notice, the judgment must be overturned.[3]

C. O'Connell's Self-Serving Claims About Her Onset Of Symptoms Does Not Eliminate Her Burden To Apportion Damages.

1. O'Connell Bears the Burden to Prove Damages Caused by Her Fall.

Unable to dispute her multiple admissions that she knowingly failed apportion her damages, O'Connell also tries to rewrite the law on apportionment. (10 AA 1992.) However, this is not an industrial insurance case. The Court is not

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[3] Jury Instruction Number 27 cannot cure the legal defects in O'Connell's case for notice. Wynn does not appeal the jury instructions. As this Court has recognized, the district court is ultimately responsible for ensuring the jury is "fully and correctly instructed." *Crawford v. State*, 121 Nev. 744, 754-55, 121 P.3d 582, 589 (2005). Additionally, as Wynn has shown, O'Connell's case for notice fails under any standard for constructive notice.

being asked to review the determination of an administrative appeals officer or interpret and apply Nevada's "very complex statutory framework for compensating injured Nevada workers." *Grover C. Dils Medical Center v. Menditto*, 121 Nev. 278, 291, 112 P.3d 1093, 1102 (2005); *see also State Indus. Ins. Sys. v. Swinney*, 103 Nev. 17, 19, 731 P.2d 359, 360 (1987) ("We have adopted the last injurious exposure rule f*or occupational disease, successive employer/carrier cases*.") (emphasis added).

Moreover, even if it was, "when determining whether a claimant with an ongoing condition suffered an 'aggravation' under the last injurious exposure rule, the fact-finder should be concerned with whether the subsequent incident caused the original condition to worsen physically, *not merely whether it merely caused additional pain to manifest itself*." *Menditto*, 121 Nev. at 287-88, 112 P.3d at 1100 (emphasis added). "And generally, [b]ecause an injury is a subjective condition, an expert opinion is required to establish a causal connection between the incident or injury and disability." *Id.* (citations omitted). "Evidence that an injury merely worsened is not sufficient to prove aggravation." *Id.*; *Swinney*, 103 Nev. at 19, 731 P.2d at 360 ("[T]he mere increased severity or exacerbation of symptoms, without more, … does not constitute 'objective symptoms of an injury' under Nevada's workers' compensation law.").

Like any personal injury plaintiff, O'Connell bears the burden of proving both the fact and the amount of damage. *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 955 P.2d 661, 671 (1998). This includes the burden of proof on medical causation. *Morsicato v. Sav-On Drug Stores, Inc*., 121 Nev. 153, 157-58, 111 P. 3d. 1112 (2005); *Rowe v. Munye*, 702 N.W.2d 729, 730 (Minn. 2005) ("In a negligence action, the plaintiff generally has the burden of proving, by a preponderance of the evidence, damages caused by the defendant.").

"'Negligence is not actionable unless, without the intervention of an intervening cause, it proximately causes the harm for which the complaint was made.'" *Van Cleave v. Kietz-Mill Minit Mart,* 97 Nev. 414, 416, 633 P.2d 1220 (1981) (quoting *Thomas v. Bokelman*, 86 Nev. 10, 13, 462 P.2d 1020, 1022 (1970)). "For an act to be the proximate cause of an injury, 'it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.'" *Id.* (quoting *Crosman v. Southern Pacific Co.*, 42 Nev. 92, 108-109, 173 P. 223, 228 (1918)); *Harris v. ShopKo Stores, Inc.*, 308 P.3d 449, 455 (Utah 2013) (Proximate cause is "the overarching and guiding principle in the analysis.").

Thus, in light of her preexisting conditions, O'Connell "bears the burden of apportioning the injuries, treatment and damages between the pre-existing condition

and the subsequent accident." *Schwartz v. State Farm Mut. Auto. Ins. Co.*, No. 2:07–cv–00060–KJD–LRL, 2009 WL 2197370, at *15-16 (D. Nev. July 22, 2009) (citing *Kleitz v. Raskin*, 103 Nev. 325, 327, 738 P.2d 508 (1987) (citing Restatement (Second) of Torts §433(B), and relying on *Phennah v. Whalen*, 28 Wn. App. 19, 621 P.2d 1304, 1309 (Wash. Ct. App. 1980)).

2. The Timing of O'Connell's Symptoms is not Determinative.

Having intentionally disregarded her burden to apportion at trial, O'Connell claims that she should be given a free pass in light of her own self-reporting that she was asymptomatic before her fall at Wynn. However, as courts widely recognize, "whether a preexisting condition is symptomatic or asymptomatic on the date of the accident is ***not the determinative factor***" for apportioning preexisting injuries. *Harris*, 308 P.3d at 456 (citation omitted) (emphasis added); *see also Reed v. Union Pacific R. Co.*, 185 F.3d 712, 717 (7th Cir. 1999) ("Here, the evidence is undisputed that the accident on September 1, 1994 aggravated Reed's otherwise asymptomatic degenerative disk disease. The fact that his condition had previously been asymptomatic is of no consequence."); *Bowler v. Industrial Acc. Commission*, 287 P.2d 562, 565 (Cal. Ct. App. 1955) ("Petitioner's main contention is that under the law of California, an employer who employs a man who has an asymptomatic condition takes him as he finds him, and is responsible for all disability following

an industrial injury which lightens up that condition. But that is not the law."); *Browning v. Ringel*, 995 P.2d 351, 356 (Idaho 2000) ("Browning's argument is without merit. The body of IDJI 940 and a portion of the comments allow for apportionment between a pre-existing condition and damages from an accident even though the pre-existing condition may not have been symptomatic at the time of the accident.").

Of course, "[a]n asymptomatic preexisting condition may well be an independent contributor to a plaintiff's pain and injury, which was also proximately caused to some degree by a tortfeasor's negligence." *Harris*, 308 P.3d at 456. However, O'Connell's "approach would prevent the jury from apportioning damages between the preexisting condition and the negligence simply because the preexisting condition was not symptomatic on the date of the accident." *Id.* As courts hold, "this result is potentially arbitrary and risks holding defendants liable for more than they proximately caused in damages." *Id.*

Thus, in a case involving preexisting injuries, "the jury must have a reasonable basis for apportioning damages, and apportionment may not be based on 'pure speculation.'" *Harris*, 308 P.3d at 458 (quoting *Egbert v. Nissan Motor Co.*, 228 P.3d 737, 746 (Utah 2010)). "[C]ommon experience is a poor substitute for expert guidance." *Id.* at 459. "This is because the average lay juror is ill-equipped

to sift through complicated medical evidence and come to a nonspeculative apportionment decision." *Id.* "In cases like this, expert testimony may be the jury's only guide as to whether apportionment is proper and, if so, to what extent." *Id.*; *see also Emert v. City of Knoxville,* 2003 WL 22734619, at *8-9 (Ct. App. Tenn. Nov. 20, 2003).

Again, O'Connell and her treating physicians admitted at trial that she suffered from conditions predating her fall at Wynn. These included a degenerative disk disease, lumbar disk disease, and a previous back injury before the subject incident. The uncontroverted evidence also established that O'Connell suffers from additional preexisting health issues and conditions, such as fibromyalgia, IBS, anxiety, depression, Ehler Danlos and Marfan syndrome. While testifying, Dr. Tingey and Dr. Dunn both conceded that some of these health issues, such as fibromyalgia, anxiety and depression would affect and contribute to O'Connell's pain symptomology and purported injuries. (8 AA 1574, 1580; 9 AA 1849.)

However, O'Connell concedes that she knowingly failed apportion her damages, leaving the jury to speculate that the actual source of all O'Connell's pain and suffering was her fall. (10 AA 1992.) O'Connell did so despite her own expert's admission that he could have apportioned at least some of her pain from her preexisting injuries with the benefit of "further diagnostic studies …." (8 AA

1581).[4] Because O'Connell failed to satisfy her burden of establishing that her alleged pain and suffering actually flowed from the incident at Wynn, her claim against Wynn again fails as a matter of law. Alternatively, given O'Connell's failure to apportion, her damages should be reduced to zero.

D. O'Connell's Damages For Future Pain And Suffering Must Be Eliminated.

Given the gravity of her failure, O'Connell dedicates remarkably little space in her Answering Brief to addressing her failure to provide timely expert disclosures and her experts' admitted reliance on O'Connell's own self-reporting as their exclusive basis for pain and suffering. Indeed, beyond repeating the District Court's rulings, O'Connell offers little else in response on this topic. As Wynn has shown; however, the District Court erred.

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[4] Despite O'Connell's claims otherwise, Wynn is not conflating the duty to apportion with the 'eggshell plaintiff doctrine.' While Jury Instruction Number 37 is an accurate statement of the law, the "principle, commonly known as the eggshell plaintiff doctrine, in no way bars consideration of other relevant potential sources of a plaintiff's pain in determining the extent of damage proximately caused by the defendant." *Harris*, 308 P.3d at 456. Indeed, Instruction 37 acknowledges as much stating: "Where a preexisting condition is so aggravated, the damages as to such condition *are limited to the additional injury caused by the aggravation*." (Emphasis added). As she concedes, O'Connell ignored her burden to prove the extent of this "additional injury" with substantial evidence.

O'Connell's (way) late disclosures should not have been excused away and her experts openly conceded that they relied on O'Connell's self-reporting as their sole and exclusive basis for pain and suffering. As O'Connell admits, her claim for future pain and suffering requires expert testimony. Thus, even if the Court looks past O'Connell's failure to prove liability, or apportion damages, as a matter of law, Wynn is still entitled to a remittitur reducing the judgment to eliminate O'Connell's damages for future pain and suffering.

1. O'Connell's Expert Disclosures Were Blatantly Untimely.

The timeline of O'Connell's expert disclosure is set forth in Wynn's Opening Brief. As Wynn has shown, O'Connell did not disclose Dr. Tingey as a witness until August 27, 2015 – ***over four months past the expert disclosure deadline*** and over two months past the extended discovery deadline. With respect to Dr. Dunn, O'Connell failed to disclose his CV, fee schedule and trial history until September 18, 2015 – ***over five months past the expert disclosure deadline*** and over three months past the discovery deadline. Therefore, there can be no dispute that Wynn was ***not*** provided with a full and fair opportunity to examine these witnesses before trial and, as a result, could not prepare a rebuttal report or engage in any further discovery in anticipation of the trial.

Unable to dispute this timing or prejudice, O'Connell falls back on the same excuses. While true that Dr. Tingey replaced O'Connell's original treating physician in May of 2015, this does not explain why O'Connell waited until ***August 27, 2015***, to disclose Dr. Tingey. O'Connell admits she was treating with Dr. Tingey ***three months earlier***. Moreover, O'Connell's continued treatment until the June 12, 2015, discovery deadline does not excuse the fact that O'Connell waited until over two months to disclose Dr. Tingey. *See* NRCP 16.1(a)(1) (Requiring disclosures be made promptly and "without awaiting a discovery request.").

O'Connell was "not excused from making [her] … disclosures because [she] … ha[d] not fully completed [her] … investigation." *Id.* Thus, O'Connell should have disclosed Dr. Tingey promptly and supplemented her treatment records as they became available. Pursuant to NRCP 37(c)(1), O'Connell should not have been permitted to present Dr. Tingey or Dr. Dunn as witnesses at trial. *See FCH1, LLC v. Rodriguez*, 130 Nev. Adv. Rep. 46, 335 P.3d 183, 190 (2014) ("[E]ven if Dr. Schifini reviewed records from other providers in the course of his treatment of Rodriguez and not in order to form the opinions he proffered, he could only properly testify as to those opinions he formed based on the documents he disclosed to Palms.") (citing NRCP 16.1 drafter's note (2012 amendment); *Washoe Cnty. Bd. of Sch. Trustees v. Pirhala*, 84 Nev. 1, 5, 435 P.2d 756, 758 (1968) (noting that the

purpose of discovery is to take the "surprise out of trials of cases so that all relevant facts and information pertaining to the action may be ascertained in advance of trial")). Thus, O'Connell's only medical experts, and her proof of future pain and suffering, should have been excluded.

2. O'Connell's Experts Openly Admitted They Relied Solely on O'Connell's Self-Reporting of Pain.

In her Answering Brief, O'Connell stands by the District Court's finding that "O'Connell's self-reporting did not appear to be the sole basis of her experts' testimony." (Ans. Brief at pg. 36 (quoting 17 AA 3480.)) According to the District Court, "[t]here is simply no indication that O'Connell's experts wholly adopted her self-reporting as the sole basis for their opinions as to causation." *Id.* However, as Wynn has shown, the District Court was plainly wrong.

Indeed, both Dr. Dunn and Dr. Tingey *admitted* that their conclusions were based *exclusively* upon O'Connell's self-reporting. As Dr. Dunn testified:

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

Q. And exclusively came from her statements.

A. Yes.

* * *

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

A. Yes.

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

A. Yes.

(10 AA 1926; 1935.)

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

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

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

. . .

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

A. Yes.

(9 AA 1869-70; 1874.)

Therefore, and again, there was more than some "indication" that O'Connell's experts wholly adopted her self-reporting. They repeatedly admitted it on the stand. In light of this, Dr. Dunn and Dr. Tingey's testimony regarding O'Connell's pain should have been excluded. *See e.g., Hare v. Opryland Hospitality, LLC*, 2010 U.S. Dist. LEXIS 97777, *14 (D. Md. Sept. 17, 2010) ("Where the sole basis for a physician's testimony regarding causation is the patient's self-reporting that testimony is unreliable and should be excluded.") (citing *Perkins v. United States*, 626 F.Supp.2d 587, n. 7 (E.D. Va. 2009)).

Given O'Connell's blatantly untimely disclosures and the unreliability of her experts' conclusions, O'Connell's future pain and suffering damages must be eliminated.

CROSS-RESPONDENT'S ANSWERING BRIEF ON CROSS-APPEAL

COUNTER STATEMENT OF THE ISSUE

A. All Fees Must Be Reasonable and Justified

Obtaining fees under Nevada's offer of judgment rule takes much more than just showing a more favorable result. As this Court has held time and again, a movant hoping to shift the burden for fees to an opponent must meet the factors established under *Beattie v. Thomas*. These factors include, among others, proof that the sought-after fees were reasonable and justified. Of course, such proof must

include a showing of the time and attention dedicated by counsel to the case. Here, O'Connell and her counsel intentionally disregarded this burden and sought to stand solely on the 40% contingency rate they agreed to when O'Connell's counsel was retained months before trial. In doing so, O'Connell failed to provide the District Court with the required proof to support fees and failed to account for NRCP 68(f)'s limitation to only *post-offer* fees. Did the District Court abuse its discretion when it denied fees to a plaintiff that openly refused to provide evidence of at least one of the *Beattie* factors?

COUNTER SUMMARY OF THE CASE AND ARGUMENT

The District Court did not abuse its discretion in denying O'Connell's request for attorney's fees. While O'Connell's $240,000.00 award against Wynn is unquestionably larger than her pre-trial offer of judgment, the District Court's rejection of O'Connell's application was the product of extensive deliberation that included supplemental briefing, and multiple hearings, with the parties.

In particular, after the verdict was entered, O'Connell filed her initial Application for Fees, Costs and Pre-Judgment Interest on November 25, 2015. Wynn filed its Opposition on December 7, 2015. Two weeks later, on December 21, 2015, O'Connell filed an Amended Application for Fees. Thereafter, Wynn filed an Opposition to the Amended Application on December 28, 2015, and O'Connell

filed her Reply on January 14, 2016. The Court held hearings regarding O'Connell's Application on March 4, 2016, and August 12, 2016. On November 9, 2016, the Court entered its Order Partially Granting and Partially Denying Defendant's Motion to Retax Costs and Plaintiff's Motion to Tax Costs and For Fees and Costs and Post-Judgment Interest ("Fee Order"). (3 RA 570-86.)

Despite O'Connell's claims to the contrary, the District Court's Fee Order does not "[i]mpose a double-standard on contingency fee agreements." (Ans. Brief at pg. 54.) Ultimately, O'Connell's application for fees failed because she openly refused to provide evidence of the "time … required" or the "time and attention given to the work" by her counsel. As O'Connell now concedes, these are among the mandatory *Brunzell* factors that a Court must consider, even for attorney's fees based upon a contingency arrangement. Despite this, O'Connell sought to stand solely on her counsel's 40% contingency fee rate in support of fees. Because O'Connell provided the District Court with no evidence of the actual time and attention provided by her

counsel, the District Court had no choice but to deny O'Connell's application for attorney fees.

ARGUMENT

A. O'Connell Provided No Proof Of Her Counsel's Time And Attention.

The determination of whether to grant fees to a party under NRCP 68 rests in the sound discretion of the trial court. *Chavez v. Sievers*, 118 Nev. 288, 296, 43 P.3d 1022, 1027 (2002). Thus, "[a]bsent an abuse of discretion, a district court's [determination] of fees and costs will not be disturbed upon appeal." *Parodi v. Budetti*, 115 Nev. 236, 240, 984 P.2d 172, 174 (1999) (citing *Nelson v. Peckham Plaza Partnerships*, 110 Nev. 23, 866 P.2d 1138 (1994)). Under abuse of discretion review, this Court is "not [to] substitute our judgment for that of the district court." *Young v. Johnny Ribeiro Eldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990); *Schouweiler v. Yancey Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (1985) (Such a decision will not be disturbed unless it is arbitrary and capricious.).

As this Court has repeatedly held, district courts must consider several factors when making a fee determination under *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983): (1) whether the plaintiff's claim was brought in good faith; (2) whether the offer was reasonable and in good faith in timing and amount;

(3) whether the decision to reject the offer was grossly unreasonable or in bad faith; and (4) *whether the sought fees are reasonable and justified*. (Emphasis added).

With regard to the last *Beattie* factor, the Court must undergo an analysis of whether claimed fees were reasonable in light of the factors set forth in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). *See Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864, 124 P.3d 530, 549 (2005). These factors include, among others, "the character of the work to be done: its difficulty, its intricacy, its importance, *time* and skill required … [and] the work actually performed by the lawyer: the skill, *time and attention* given to the work …." *Brunzell*, 85 Nev. at 349, 455 P.2d at 33 (quoting *Schwartz v. Schwerin*, 85 Ariz. 242, 336 P.2d 144, 146 (1959) (emphasis added)).

Thus, a trial court must receive evidence of the actual time and attention dedicated by counsel. As courts recognize, "[e]vidence of the existence of a contingent fee contract, without more, is not sufficient to support the award of attorney fees." *Brandenburg v. All–Fleet Refinishing, Inc.*, 555 S.E.2d 508, 512 (Ga. App. 2001) (citation omitted). "An attorney cannot recover for professional services without proof of the value of those services." *Id.* "A contingency fee agreement is … is a gamble for both the lawyer and the client, because the value of the professional services actually rendered by the lawyer may be considerably higher or

lower than the agreed-upon amount, depending on how the litigation proceeds." *Georgia Dept. of Corrections v. Couch*, 759 S.E.2d 804, 816 (Ga. 2014). "While certainly a guidepost to the reasonable value of the services the lawyer performed, the contingency fee agreement is not conclusive, and it cannot bind the court in determining that reasonable value, nor should it bind the opposing party required to pay the attorney fees, who had no role in negotiating the agreement." *Id.*

Here, O'Connell simply failed to introduce any evidence of the time and attention dedicated by her counsel. Instead, she relied exclusively on her 40% contingency fee arrangement. As the District Court confirmed, while O'Connell's "counsel … set forth the qualities of the advocate(s) on this case and, of course, … that a favorable result was obtained … [O'Connell] … [did] not provide[] any bills setting forth what tasks were performed and the associated hours for those tasks." (3 RA 575-76.) "This prevent[ed] the Court from determining whether the fees charged were reasonable in light of the tasks actually performed." *Id.* Thus, O'Connell did not "carr[y] her burden under *Brunzell* …." *Id.*

Because O'Connell failed to provide the Court with evidence to demonstrate whether her fees were reasonable and justified, the District Court clearly did not

abuse its discretion when it denied O'Connell's fee application. O'Connell left the District Court unable to apply the *Beattie* or *Brunzell* factors here.

B. O'Connell Failed To Limit Her Application In Accordance With NRCP 68(f).

O'Connell's refusal to provide the District Court with evidence of her counsel's time and effort was not the only defect with her application for fees. As the Court is aware, NRCP 68 limits fee-shifting to *post-offer* fees and costs. In particular, NRCP 68(f) states that "[i]f the offeree rejects an offer and fails to obtain a more favorable judgment … [then] (2) the offeree shall pay the offeror's reasonable attorney's fees, if any be allowed, actually incurred by the offeror *from the time of the offer*." (Emphasis added).

Here, O'Connell refused to account for NRCP 68(f)'s limitation to post-offer fees. Instead, she sought an award of the entirety of the 40% contingency rate she agreed to with her counsel. However, and again, O'Connell's refusal to provide proof of her counsel's actual time and attention left the District Court unable to apportion between pre and post-offer fees or determine what amount would be *reasonable*. Therefore, and again, the District Court did not error.

CONCLUSION

O'Connell's Answering Brief does nothing to save her case. Thus, Wynn respectfully asks this Court to grant Wynn's appeal and enter judgment in Wynn's

favor notwithstanding the verdict. Alternatively, Wynn should be granted remittitur eliminating O'Connell's damages for future pain and suffering. In the event the Court believes a new trial is warranted, Wynn stands behind its request under NRCP 59(a).

Dated this 13th day of October 2017.

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AFFIRMATION

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

Dated this 13th day of October 2017.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 6,739 words.

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

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conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 13th day of October 2017.

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STATEMENT OF RELATED CASES

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

Dated this 13th day of October 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2017, I electronically filed the foregoing with the Supreme Court of Nevada by using the Court's electronic filing system. I certify that all participants in the case are registered and that service will be accomplished by the Supreme Court of Nevada's electronic filing system.

/s/ Olivia A. Kelly
An Employee of Semenza Kircher Rickard