IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 70583
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 PETITION FOR REVIEW BY THE SUPREME COURT

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INTRODUCTION

This Petition presents a question of first impression and seeks clarification on the standard, and evidentiary burden, for constructive notice. *See* NRAP 40B(a). Additionally, it challenges findings by the Court of Appeals regarding constructive notice, and causation, that conflict with prior rulings of this Court. ***Id.***

The underlying appeal centers on a slip and fall case. Respondent/Cross-Appellant Yvonne O'Connell ("O'Connell") sued Appellant/Cross-Respondent Wynn Las Vegas, LLC ("Wynn") for negligence after she fell on a foreign substance while walking on Wynn's floor. At trial, O'Connell conceded she lacked evidence that Wynn had actual knowledge of the substance. Moreover, O'Connell admitted that she lacked any evidence that the substance was a recurrent or continuous condition at Wynn. In fact, she had no idea how long the substance had been on Wynn's floor, where it came from, or what it even was.

In *Sprague v. Lucky Stores*, this Court set the standard for constructive notice. As the Court ruled, "[t]he 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." 109 Nev. 247, 250, 849 P.2d 320, 322 (1993). Thus, for constructive notice to apply, a jury must be provided sufficient evidence to find that an owner or

occupier "knew that [the condition] was ***frequently*** … [or] … ***virtually continual*** [on the floor] …." 109 Nev. at 251, 849 P.2d at 323 (emphasis added).

Despite the clarity of *Sprague*, and O'Connell's failure to provide any evidence of a *frequent* or *continual* condition, the District Court denied Wynn's motions for judgment as a matter of law. Citing a standard of constructive notice that has never been adopted by this Court, the District Court invited the jury to consider any evidence demonstrating how long the condition was present on Wynn's floor, regardless of its frequency or persistence. While the District Court's expansion of *Sprague* ran contrary to precedence, more important for purposes of this appeal is the fact that O'Connell failed to meet the Court's invitation to provide *any* such evidence. Indeed, entirely absent from O'Connell's case is *any* proof of how long the foreign substance sat on Wynn's floor before O'Connell's fall.

Upholding the District Court's denials of judgment as a matter of law, a majority of the Court of Appeals (the "Majority") summarily concluded that the question of constructive notice "is an issue for the trier of fact." (Ex. 1 hereto at pg. 4.) However, missing from the Majority's analysis is any explanation about why it did not hold O'Connell to the "frequent" or "virtually continual" standard set forth in *Sprague* or how, even assuming the specific limitations of *Sprague* are not binding, O'Connell could have possibly met her burden to demonstrate constructive notice

given that she failed to provide *any* evidence demonstrating how long the foreign substance was on the floor.

Citing only a casino security case, and a case law describing the "open and obvious" *defense* doctrine, the Majority summarily concluded that "constructive notice can be based on the *circumstances* of the case." *Id.* at pg. 3. However, the Majority failed to explain whether, or how, it was rejecting the universally-accepted legal precedent that such "circumstances" must include evidence of duration. Indeed, in finding that "there was sufficient evidence that the substance had been on the floor for a *certain* length of time," the Majority confirms that the jury was forced to just guess about what this length of time could have been. *Id.* at pg. 5 (emphasis added).

As Judge Tao thoroughly articulated in his dissenting opinion (the "Dissent"), the Majority's findings impose a strict liability standard on Wynn. The obvious failure in O'Connell's case is that she "presented *no evidence at all* providing the jury with any foundation" to determine whether Wynn acted reasonably and, as such, did "nothing more than invit[e] the jury to take a guess." *Id.* at pg. 21 (emphasis added). As the Dissent explains, "[i]f the Wynn can be found liable for what happened here based upon a record this flimsy, then *Sprague* is no longer good law." *Id.* Thus, the question for the Court is this: "We generally defer to jury verdicts, even when the

jury makes a mountain out of a molehill. But do we defer to juries when their verdict makes a mountain out of nothing at all?" *Id.* at pgs. 13-14.

Additionally, as Wynn demonstrates in its appeal, O'Connell's shortfall does not end with notice. Rather, it extends to the mandatory elements of causation and damages as well. O'Connell's only damages at trial were for past and future pain and suffering. The undisputed testimony proved that O'Connell suffers from various preexisting conditions and suffered from a subsequent fall. Yet, O'Connell knowingly made no effort to distinguish between her pain and suffering from the fall, her pain and suffering caused by her preexisting injuries, and her pain and suffering from a subsequent fall. Of course, this refusal left the jury to again guess as to the actual source of O'Connell's exclusive damages. (10 AA 1992.)

As the Court is aware, a plaintiff 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). Moreover, a plaintiff bears the burden of proof on medical causation. *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 157-58, 111 P. 3d. 1112 (2005).

Thus, O'Connell's refusal to apportion her damages required judgment in favor of Wynn, or alternatively a reduction of O'Connell's damages to zero. Despite this, the Majority again overlooked O'Connell's failure, falling back on a familiar

finding that "it was for the jury to assess the weight and credibility of the testimony." (Ex. 1 hereto at pg. 8.) Should O'Connell be permitted disregard her obligation to apportion damages and force the jury to speculate that her fall at Wynn was the source of all her alleged pain and suffering?

BRIEF FACTUAL OVERVIEW

O'Connell was awarded a $240,000.00 judgment against Wynn for a slip and fall that occurred in Wynn's atrium in February of 2010. According to O'Connell, her fall was caused by a foreign substance on Wynn's floor. After falling, O'Connell refused medical assistance and spent the remainder of the day gambling at Wynn and another casino, returning home on her own accord. During a medical visit two days later, a doctor determined that O'Connell's only injuries from the fall were contusions (*i.e.*, bruising) on her right side. Despite this diagnosis, O'Connell spent the next five years visiting doctor after doctor and self-reporting an ever-expanding list of injuries and conditions that she claimed were related to her fall at Wynn.

After suing Wynn for one claim for negligence, O'Connell engaged in minimal discovery and disclosed no retained medical experts in support of her case. Moreover, O'Connell's only disclosures for her treating medical physicians were both untimely and deficient under Nevada's Rules of Civil Procedure. Despite this, O'Connell's case moved past summary judgment to trial.

A. O'Connell Provides No Evidence To Support Notice.

At trial, O'Connell admitted that she couldn't identify the substance she slipped in, speculating that it was a liquid spill, slightly greenish in color, and covered at least a seven-foot area of the floor in Wynn's atrium. (9 AA 1812-13.) Additionally, O'Connell believed that a three-foot section of the substance had begun to dry, become sticky, and accumulate dirty footprints. *Id.*

Regardless of what the green mystery substance actually was, O'Connell admitted that she had no evidence to show that Wynn caused it to be on the floor or that it had any advance knowledge of the condition before the time of her fall. (9 AA 1813.) Thus, O'Connell's claim against Wynn was based entirely upon an assertion that Wynn somehow had constructive notice of the green mystery substance.

However, O'Connell presented *no evidence* to support such a conclusion. She failed to present any evidence to demonstrate how long the substance had been on the floor before her fall and obviously has no expertise in establishing how long it would take for such substances to dry. O'Connell also presented no evidence demonstrating that liquid spills occurred frequently, or at all, in the area where she fell, or that the frequency of the inspections conducted by Wynn employees were somehow unreasonable.

Instead, O'Connell offered only her own unsubstantiated opinion that Wynn should have known about the mystery substance because of its estimated size and because, she believed, portions of it had begun to dry. However, O'Connell openly conceded that her attempted guesswork was based completely upon pure speculation. (9 AA 1813-14.)

As O'Connell was forced to concede, she has no knowledge or training to make her qualified to tell a finder of fact how long the green mystery substance was on the floor before her fall. *Id.* For all O'Connell knew, the substance was only on the floor a few seconds before the incident.

B. O'Connell Refuses To Apportion Her Alleged Damages.

O'Connell's evidentiary failures at trial did not end with her guesswork about Wynn's notice. Beyond providing no proof of Wynn's liability for her fall, O'Connell also failed to present sufficient evidence in support of her damages. At trial, O'Connell chose to forego any claim for the medical expenses she asserts were incurred as a result of the incident. Thus, the only damages O'Connell sought were for her alleged past and future pain and suffering.

Of course, Wynn cannot be held liable for pain and suffering that O'Connell cannot prove was related to her fall. It is O'Connell's burden to prove causation and damages with the weight of reliable evidence. By the same token, O'Connell also

had the burden to ensure that the jury was not being asked to award damages based upon any of O'Connell's preexisting conditions. However, O'Connell's own witnesses confirmed that she suffered from a myriad of preexisting conditions.

For example, O'Connell's treating physician testified that she suffered from degenerative disk disease of the lumbar and cervical spine that predated the incident at Wynn's property on February 8, 2010. (10 AA 1925-26.) O'Connell herself testified to having a previous back injury before the incident at Wynn's property. (9 AA 1706-07.) In addition, another of her physicians testified that O'Connell has arthritic and/or degenerative changes in her right knee that were unrelated to the incident at Wynn's property. *Id.* at 1869-70.

Furthermore, the uncontroverted evidence at trial established that O'Connell suffers from additional preexisting health issues and conditions, such as fibromyalgia, IBS, anxiety, depression, Ehler Danlos and Marfan syndrome. (9 AA 1728; 1730; 1744-45; 1751.) Despite this, O'Connell made no effort to apportion her damages at trial. Conceding her failure, O'Connell's counsel even argued that, "***I don't think there is any requirement for apportionment in this case***." (10 AA 1992.) (emphasis added).

C. The District Court Rejects Wynn's Requests For Judgment As A Matter Of Law.

Owing to the obvious deficiencies in O'Connell's case for liability and damages, Wynn moved for judgment as a matter of law under NRCP 50(a) at the close of her case. (10 AA 1982.) However, citing O'Connell's testimony as the only evidence to support constructive knowledge, and agreeing that this evidence was "very, very" thin, the District Court rejected Wynn's arguments against O'Connell's case for liability. Additionally, the District Court also rejected Wynn's arguments against O'Connell's case for damages.

Left to guess about the source of O'Connell's green mystery substance, and the actual source of her alleged harm, the jury returned with a verdict in favor of O'Connell and eventually awarded her $240,000.00 in damages. Following final judgment, Wynn renewed its motion for judgment as a matter of law but was denied. This appeal, and subsequent attached Order of Affirmance by the Court of Appeals, followed.

ARGUMENT

A. Wynn's Notice Cannot Be Evaluated Without Evidence Of Duration.

Wynn's duty to its guests is well-settled. As a landowner, Wynn "must exercise reasonable care not to subject others to an unreasonable risk of harm." *Moody v. Manny's Auto Repair*, 110 Nev. 320, 329, 871 P.2d 935, 941 (1994)

(quoting *Turpel v. Sayles*, 101 Nev. 35, 38, 692 P.2d 1290, 1292 (1985)). "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." *Id.*; *Foster*, 128 Nev. at 781, 291 P.3d at 156.

As shown, O'Connell alleges she slipped on a foreign substance. Thus, Wynn may only be held liable if it had actual or constructive notice of the condition and failed to remedy it. *Sprague*, 109 Nev. at 250, 849 P.2d at 322. O'Connell conceded that she had no evidence that Wynn created the foreign substance or had actual notice of it before her fall. As O'Connell's counsel made clear, her only theory of liability is that Wynn had constructive knowledge. Therefore, O'Connell had the burden to prove constructive notice at trial; which she clearly failed to do.

1. O'Connell Cannot Prove Constructive Knowledge Under The Only Standard Articulated By This Court.

While the Majority ignored it, this Court's precedence already mandates evidence of a condition's duration to support constructive notice. 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. at 251, 849 P.2d at 323 (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); *Eldorado Club v. Graff*, 78 Nev. 507, 511, 377 P.2d 174, 176 (1962).

However, O'Connell admittedly presented no evidence at trial that the green mystery substance was a frequent or continual condition at Wynn. Indeed, O'Connell failed to establish how long the substance was on Wynn's floor, what the substance was, or where it came from. During the trial, O'Connell presented *nothing* about the general conditions in Wynn's atrium or any facts about the condition, or cleanliness, of its floors. While O'Connell testified that she thought the substance was water from Wynn's planter beds, she admitted that this was only a guess – a guess that was disproven by the evidence.

Thus, the record was *completely devoid* of any information that could have led the jury to conclude that the green mystery substance was a frequent or continual

condition at Wynn. As such, Wynn should have been granted judgment in its favor as a matter of law.[1]

2. O'Connell Cannot Prove Constructive Knowledge Under Any Standard For Constructive Notice.

Aware that she could not meet the specific limitations of *Sprague*, O'Connell argued for an expanded standard of constructive knowledge during trial. Relying upon centuries-old case law involving dried banana peels and unrelated authority addressing notice of frequent spills on the floors of fast food restaurants, O'Connell claimed that Wynn could be held liable if the jury found the green mystery substance had been left on the floor for an unreasonable amount of time.[2]

While this Court has yet to articulate such a standard, O'Connell's move to expand *Sprague* cannot save her case. Indeed, O'Connell's case fails under *any*

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[1] Relying on Nevada cases setting forth the general duty of businesses to exercise "reasonable care to its patrons," the Majority summarily concluded that "under Nevada caselaw constructive notice can be based on the *circumstances of the case* …." (Ex. 1 at pg. 3) (emphasis added). However, the Majority does not address the specific limitations of *Sprague* or the universally-accepted fact that such "circumstances" must include evidence of duration.

[2] Ignoring even O'Connell's authority cited in her briefing, the Majority relies upon a case involving the reasonableness of a casino when evicting a patron and the "open and obvious" *defense* doctrine. (Ex. 1 hereto at pg. 5 *citing Billingsley v. Stockmen's Hotel, Inc.*, 111 Nev. 1033, 901 P.2d 144 (1995); *Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 291 P.3d 150 (2012)).

standard of constructive notice. Again, O'Connell's only "evidence" was her own testimony that the green mystery substance was about seven feet in size, a portion of it had begun to dry and become sticky, and collect dirty footprints. Wynn's porter also testified that it appeared to be like "honey for pancakes."[3] This testimony formed the exclusive support for O'Connell's claim to constructive knowledge – a fact noted by the District Court and the Majority's Opinion. (Ex. 1 hereto at pgs. 4-5.)

The failure of O'Connell's case is clear and well-articulated by the Dissent. O'Connell did not, and could not, rely on the "mode of operation" approach to infer legal notice by Wynn. *Id.* at pgs. 18-19. "O'Connell was thus required to produce affirmative evidence that Wynn had actual or constructive notice of the hazardous substance. She didn't." *Id.* at pg. 19. As the Dissent agrees, "[t]his isn't some revolutionary idea. Most courts require some affirmative evidence proving how long a foreign substance was on the floor before notice can be legally inferred, and mere proof of the existence of a foreign substance does not itself create such notice." *Id.*; *see generally* case law cited at pgs. 19-21 of Ex. 1 hereto; *see also* Restatement 2d (Torts) § 343 (Reporter's Note, Clause (a)) ("Where the condition is temporary in its

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[3] Struggling with language barriers, Wynn's porter also testified that she didn't see the substance at all.

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); *Cash v. Winn-Dixie Montgomery, Inc.*, 418 So.2d 874, 875 (Ala. 1982).

Because O'Connell "presented no evidence at all providing the jury with any foundation" to determine how long the substance was on Wynn's floor, "she's doing nothing more than inviting the jury to take a guess." (Ex. 1 hereto at pg. 21.) The danger in the Majority's standard is apparent:

> If the sheer existence of the hazard alone, with nothing more having been established, is enough to permit a jury to infer everything else required to establish liability, then every Nevada business is indeed now the insurer for every hazard on the premises, knowable or unknowable, whether there was enough notice or enough time for the business to do something about it or not.

Id. at pgs. 21-22. As such, O'Connell's judgment should be overturned and judgment granted in favor of Wynn.

B. Absent Apportionment, O'Connell's Case For Causation And Damages Fails.

Again, the fundamental flaws with O'Connell's claim against Wynn do not end with liability. O'Connell's case for damages also fails as a matter of law. As shown, O'Connell's only damages at trial were for past and future pain and suffering. The undisputed testimony proved that O'Connell suffers from various

preexisting conditions and suffered from a subsequent fall. Yet, O'Connell knowingly made no effort to distinguish between her pain and suffering from the fall and her pain and suffering caused by her preexisting or otherwise unrelated injuries and conditions.

As the plaintiff, O'Connell bears the burden of proof on medical causation.[4] *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.").

"When an accident involves aggravation of preexisting injuries, [courts] require[] the defendant to pay only for the damages he or she caused over and above the consequences that would have occurred from the preexisting injury if the accident had not occurred." *Rowe*, 702 N.W.2d at 736; *see also Reichert v. Vegholm*,

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[4] With regard to actual causation, at trial "the [plaintiff must] prove that, but for the [defendant's wrongdoing], the [plaintiff's damages] would not have occurred." *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 1481, 970 P.2d 98, 107 (1998) (*overruled in part on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 271, 21 P.3d 11, 15 (2001)). Likewise, the plaintiff must prove proximate causation. Proximate cause "is essentially a policy consideration that limits a defendant's liability to foreseeable consequences that have a reasonably close connection with both the defendant's conduct and the harm which the conduct created." *Id*.

840 A.2d 942, 944 (N.J. Super. 2009) (A defendant should generally be responsible only for 'the value of the interest he [or she] destroyed.'") (citation omitted).

Thus, "[i]n a case where a plaintiff has a pre-existing condition, and later sustains an injury to that area, the Plaintiff 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*., 2009 U.S. Dist. LEXIS 64700, *15-16, 2009 WL 2197370 (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); *see also Reichert*, 840 A.2d at 944.

As courts explain, "'aggravation of a preexisting physical condition' is a measure of damages, not a theory of liability, even if one puts the word 'negligent' in front of the phrase." *Rowe*, 702 N.W.2d at 736 (citation omitted). "Thus, … case law is clear that the burden remains on the plaintiff in cases involving aggravation of a preexisting injury." *Id.*; *Reichert*, 840 A.2d at 944 ("The general rule does not change when plaintiff's injuries or conditions are aggravated by a subsequent accident."). The policy behind this dictate is plain: "[I]n a case involving aggravation of a preexisting injury, the plaintiff is likely to have more knowledge than the defendant of the extent of the preexisting injury." *Rowe*, 702 N.W.2d at

740. "In such a case, it is plaintiff who would best understand how a defendant's tort has affected or is related to prior or subsequent injuries or conditions." *Reichert*, 840 A.2d at 944.

Here, O'Connell's own treating physician admitted that O'Connell suffered from conditions predating her fall at Wynn, testifying that she suffered from degenerative disk disease and lumbar disk disease before the time of her fall. Moreover, O'Connell herself admitted to having a previous back injury before the incident.

Furthermore, the uncontroverted evidence at trial 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, both of O'Connell's treating physicians 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.

In light of this, O'Connell bore the burden of apportioning her injuries, treatment and damages at trial. However, O'Connell conceded that she knowingly failed to do so, leaving the jury to just guess that the actual source of all O'Connell's pain and suffering was her fall. (10 AA 1992.) 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.[5]

Despite the clarity of O'Connell's failure, the Majority affirmed her judgment and damages finding "that there was sufficient evidence for the jury to consider whether O'Connell's injuries were the result of her preexisting conditions, her fall at the Wynn, or her subsequent fall." (Ex. 1 hereto at pg. 8.) However, the Majority's analysis focuses on the examinations of O'Connell's treating physicians and fails to address the fact that her *only damages* were for past and future pain and suffering. *Id.* O'Connell *admittedly* did not apportion the pain and suffering she experienced as a result of her fall at Wynn from her pain and suffering experienced as a result of her pre and post-Wynn injuries and conditions. Thus, her claim for damages fails as a matter of law.

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[5] Alternatively, given O'Connell's failure to apportion, her damages should be reduced to zero.

CONCLUSION

The Majority imposes a strict liability standard on Wynn and overlooks O'Connell's admitted failure to apportion her pain and suffering. Therefore, Wynn respectfully asks this Court to review the Court of Appeals' Order of Affirmance and grant Wynn's appeal.

Dated this 14th day of September 2018.

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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 14th day of September 2018.

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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 40B(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 4,316 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 14th day of September 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2018, 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

EXHIBIT 1

EXHIBIT 1

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WYNN LAS VEGAS, LLC, D/B/A WYNN LAS VEGAS,
Appellant,
vs.
YVONNE O'CONNELL, AN INDIVIDUAL,
Respondent.

No. 70583

FILED

AUG 30 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Wynn Las Vegas, LLC, appeals from a final judgment in a tort action.[1] Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Yvonne O'Connell slipped and fell while walking through the front atrium in Wynn's resort.[2] She later sued Wynn for negligence claiming that Wynn had constructive notice of the substance she slipped on and did not clean it in a timely manner. As a result, O'Connell claimed Wynn was liable for her injuries. A jury trial was held and a verdict was returned in favor of O'Connell for $400,000 with $150,000 for past pain and suffering and $250,000 for future pain and suffering. The jury found Wynn was 60 percent at fault and O'Connell was 40 percent at fault so her award was reduced to $240,000.

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[1]This appeal was consolidated with the appeal in Docket No. 71789 prior to the briefing. We now deconsolidate these appeals for the purposes of disposition only. Accordingly, this order will only be filed within this appeal. The disposition for the appeal in Docket No. 71789 will be entered separately, within that appeal. Otherwise, the appeals remain consolidated for all other appellate purposes.

[2]We do not recount the facts except those necessary to our disposition.

After the verdict, Wynn filed a renewed motion for judgment as a matter of law or, in the alternative, a request for a new trial. The district court denied Wynn's motion and Wynn appeals.

O'Connell provided sufficient evidence for the jury to find Wynn had constructive notice of the substance on its floor

Wynn contends that constructive notice is limited by Nevada law to whether a hazardous condition was a continual or recurring condition at a business. It further argues that regardless of the standard, O'Connell did not provide sufficient evidence to show Wynn had constructive notice. O'Connell argues that Wynn is attempting to too narrowly limit Nevada's standard for constructive notice. She further counters that she provided sufficient evidence to support her claim.

Standard of review

"This court reviews de novo a district court's denial of a motion for judgment as a matter of law." *Wyeth v. Rowatt*, 126 Nev. 446, 460, 244 P.3d 765, 775 (2010). "This court applies the same standard on review that is used by the district court." *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 424 (2007). Thus, this court "must view the evidence and all inferences in favor of the nonmoving party. To defeat the motion, the nonmoving party must have presented sufficient evidence such that the jury could grant relief to that party." *Id.* at 222-23, 163 P.3d at 424 (footnotes omitted).

Nevada's negligence caselaw supports finding constructive notice based on the circumstances

"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." *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322 (1993). "An accident occurring on the premises does not of itself establish negligence." *Id.* "Yet, a business owes its patrons a duty to keep

the premises in a reasonably safe condition for use." *Id.* If the "foreign substance on the floor causes a patron to slip and fall, and the business owner or one of its agents caused the substance to be on the floor, liability will lie, as a foreign substance on the floor is usually not consistent with the standard of ordinary care." *Id.* "Where the foreign substance is the result of the 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." *Id.* at 250, 849 P.2d at 322-23. Whether there was constructive notice of a hazardous condition is "a question of fact properly left for the jury." *Id.* at 250-51, 849 P.2d at 323 (noting that a jury may find a defendant was on constructive notice of a hazardous condition based on "the virtually continual debris on the produce department floor").

Ultimately, a business owner owes a duty of reasonable care to its patrons. *See Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 780-81, 291 P.3d 150, 155-56 (2012). "[T]he overriding factor is whether the land owner or occupier has acted reasonably toward the plaintiff under the circumstances." *Billingsley v. Stockmen's Hotel, Inc.*, 111 Nev. 1033, 1037, 901 P.2d 141, 144 (1995). A land owner may be liable for open and obvious dangerous conditions on the land. *Foster*, 128 Nev. at 781, 291 P.3d at 156. Additionally, a business owner has a duty to inspect for latent defects. *Twardowski v. Westward Ho Motels, Inc.*, 86 Nev. 784, 788, 476 P.2d 946, 948 (1970).

Based on the foregoing, we conclude that under Nevada caselaw constructive notice can be based on the circumstances of the case, which are appropriate to consider in light of whether a business owner exercised its duty of reasonable care to its patrons. *See Foster*, 128 Nev. at 781-82, 291 P.3d at 156-57. Moreover, Nevada caselaw demonstrates that whether a

business had constructive notice is an issue for the trier of fact. *See Sprague*, 109 Nev. at 250, 849 P.2d at 323.[3] Thus, we conclude that the district court did not err by allowing the jury to consider whether Wynn had constructive notice based on the circumstances of this case.[4]

The evidence in this case was sufficient to support the jury's verdict for O'Connell

O'Connell testified that she was walking in Wynn's atrium when she slipped and fell on a liquid substance. During trial, she presented evidence about the character of the substance on the floor. O'Connell testified that it was about seven feet long and about a three foot area of the substance was dried, sticky, and showed dirty footprints.[5] Yanet Elias, an assistant manager for Wynn who responded to O'Connell's fall, also testified

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[3]Our dissenting colleague, like Wynn, cites to a string of out-of-state authorities to argue against the conclusion that Wynn had constructive notice. As Nevada law provides for constructive notice, and ultimately leaves the decision to the jury, we need not consider the approach of other jurisdictions.

[4]The jury instruction regarding constructive notice was objected to by Wynn below, but Wynn specifically notes on appeal that it is not challenging the instruction. Thus, we need not analyze the instruction here. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (concluding that the court does not have to consider claims not cogently argued). Nevertheless, we note that upon review of the record, the instruction appears to be in accord with Nevada caselaw. *See generally Nevada Jury Instructions – Civil* § 8PML.8 (2011).

[5]As we noted earlier, O'Connell was walking through the Wynn's front atrium. The photographic evidence in the record shows that the area where she slipped was surrounded by shops. While the dissent mentions the large size of the resort, the area at issue appears to be in a high traffic spot that requires close attention.

that she saw part of the substance and described it as sticky like honey or syrup.

Wynn pointed out that if the jury did not know what the substance was, it could not determine how long it would take to dry. It is possible that the substance was originally sticky like honey or syrup, and may not have been drying on the floor long enough to put Wynn on constructive notice. On the other hand, the jury can consider the circumstances such as what the substance looked like, its size, and any other indications of its character. *See Billingsley*, 111 Nev. at 1037, 901 P.2d at 144 (stating that when deciding if a landowner "has acted reasonably, a court may consider circumstantial factors"). Also, a pooled or sticky substance seven feet long could be perceived as an open and obvious condition that a business owner has a duty to discover. *See Foster*, 128 Nev. at 782, 291 P.3d at 156.[6]

Thus, we conclude there was sufficient evidence that the substance had been on the floor for a certain length of time, which would be a circumstance to consider in determining whether Wynn should have discovered it.

There was also testimony about whether Wynn conducted a reasonable inspection. Elias testified that she did not know the last time the area was checked. She also testified that she did not know how long it

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[6]Despite the dissent's statements to the contrary, the evidence presented at trial provided facts for the jury to consider and reasonable inferences to be drawn. The assertion that the substance could have been on the floor for only a very brief period of time is but one determination the fact finder could have reached but did not. Moreover, Wynn provided no evidence the spill was on the floor for a brief period of time despite its vast resources. As there are facts to support the jury's decision, the verdict was not based on speculation.

would take a porter to check the atrium, which was part of a larger area that porters were required to inspect. She added that it would depend on whether one or two porters were working that day. Reviewing the evidence in favor of the nonmoving party, O'Connell, we conclude that because Wynn could not say when it last inspected the area nor how often the atrium was checked, there was sufficient evidence for a jury to find Wynn did not conduct a reasonable inspection.

Accordingly, we conclude that based on the circumstances of the partially dried substance and Wynn's lack of evidence of its inspections, there was sufficient evidence for the jury to find Wynn had constructive notice of the substance on its floor.

The district court properly allowed the jury to consider the testimony of O'Connell's treating physicians in assessing damages and causation

In its motion for judgment as a matter of law, Wynn did not raise its issues with O'Connell's treating physicians testifying about causation and damages. Accordingly, we will not review it as part of Wynn's renewed motion for judgment as a matter of law. *See Lehtola v. Brown Nev. Corp.*, 82 Nev. 132, 136, 412 P.2d 972, 975 (1966) (concluding that without a motion for directed verdict, the district court could not consider a post-verdict motion on the matter). Instead, we will consider it as part of Wynn's alternative motion for a new trial. *See* NRCP 59(a)(7) (authorizing a new trial on grounds of "[e]rror in law occurring at the trial and objected to by the party making the motion").

Standard of review

We review "the district court's grant or denial of a motion for a new trial under an abuse of discretion standard." *Krause Inc. v. Little*, 117 Nev. 929, 933, 34 P.3d 566, 569 (2001). We will not overturn the district court's judgment "absent a palpable abuse of discretion." *Id.* "[T]he district

court may grant a new trial if the prevailing party committed misconduct that affected the aggrieved party's substantial rights." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 74, 319 P.3d 606, 611 (2014); *see also* NRCP 59(a)(2). "Additionally, . . . when deciding a motion for a new trial, the district court must make specific findings, both on the record during oral proceedings and in its order, with regard to its application of the standards described [in *Lioce*] to the facts of the case[ ] before it." *Lioce v. Cohen*, 124 Nev. 1, 19-20, 174 P.3d 970, 982 (2008).[7]

The district court did not abuse its discretion by admitting testimony from O'Connell's treating physicians for causation and damages

The evidence apportioned O'Connell's preexisting and subsequent injuries

Wynn argues that O'Connell is not entitled to any damages—past or future pain and suffering—because she did not apportion between her preexisting medical conditions, the injuries from her February 2010 fall at Wynn, and any injuries from a subsequent fall in July 2010.

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[7]Wynn raised its issues with the testimony of O'Connell's treating physicians in its combined renewed motion for judgment as a matter of law and its alternative motion for a new trial. The district court addressed the issues under both motions. As stated above, our review of the record concludes that Wynn did not raise its issues with the testimony of O'Connell's treating physicians in its motion for judgment as a matter of law below, thus we will not consider it under de novo review as part of Wynn's renewed motion for judgment as a matter of law. *See Lehtola*, 82 Nev. at 136, 412 P.2d at 975. Because the order appealed from does not make the distinction, we clarify the record here. Even if a de novo standard of review applied, we conclude that there was sufficient evidence for the jury to distinguish between O'Connell's preexisting conditions, her injuries from her fall at Wynn, and any injuries from the subsequent fall. Additionally, any issues about the basis for the treating physicians' opinions were issues of weight and credibility for the jury's determination. *See Fox v. Cusick*, 91 Nev. 218, 221, 533 P.2d 466, 468 (1975).

In a negligence action, when a plaintiff has preexisting medical conditions and additional injuries occur after the event at issue, causation and damages are a question of weight and credibility left to the jury. *See Fox*, 91 Nev. at 221, 533 P.2d at 468 (concluding that "[i]t was for the jury to weigh the evidence and assess the credibility" when the plaintiff had a prior back injury that caused recurring problems, doctor's testimony stated that the accident aggravated that injury, and there was evidence showing that plaintiff strained his back after the accident at issue and before filing a lawsuit).

Here, on the one hand, Dr. Craig Tingey and Dr. Thomas Dunn both testified that O'Connell had preexisting medical conditions, but that they believed O'Connell's fall at Wynn caused the injuries they examined. On the other hand, on cross-examination, Dr. Dunn testified that there was no evidence of "an acute injury" after O'Connell's fall at Wynn and both doctors testified that they did not know that O'Connell fell again after her fall at Wynn. In contrast, O'Connell testified that the subsequent fall was not "a complete fall" and she did not seek medical attention for it. We conclude that there was sufficient evidence for the jury to consider whether O'Connell's injuries were the result of her preexisting conditions, her fall at the Wynn, or her subsequent fall. Ultimately, it was for the jury to assess the weight and credibility of the testimony.

O'Connell's treating physicians testified according to Nevada's legal standard for medical causation

Wynn also argues that Dr. Tingey's and Dr. Dunn's testimony were unreliable because they based their opinions on O'Connell's statements about when her pain started. Medical expert testimony about "causation must be stated to a reasonable degree of medical probability."

Morsicato v. Sav-On Drug Stores, Inc., 121 Nev. 153, 158, 111 P.3d 1112, 1116 (2005).

Dr. Tingey testified that he relied on MRIs and x-rays to conclude that the tear in O'Connell's right knee was caused by "trauma." He also stated that his opinion that her fall at Wynn caused the tear was to a reasonable degree of medical probability. Dr. Dunn testified that he usually relies about 80 percent on patient history and conducts a physical examination. He also relied on an MRI in his diagnoses of O'Connell. While it is unclear from the record on appeal if Dr. Dunn conducted a physical examination of O'Connell and Dr. Dunn admitted that the MRI showed O'Connell's existing degenerative spine, Dr. Dunn also testified that the fall caused micro tears to O'Connell's degenerative spine. Further, Dr. Dunn testified that his opinion that O'Connell needed cervical surgery because of her fall at Wynn was to a reasonable degree of medical probability.

Accordingly, as both doctors relied on objective bases for their opinions and both satisfied Nevada's standard for medical expert testimony on causation, the district court did not abuse its discretion by allowing the jury to consider that evidence.

O'Connell's treating physicians' testimony showed her future damages were a probable consequence of her injuries

Wynn argues that, at a minimum, there was no evidence to support an award for O'Connell's future pain and suffering and her damages should be reduced accordingly.

"[W]hen an injury or disability is subjective and not demonstrable to others (such as headaches), expert medical testimony is necessary before a jury may award future damages." *Krause*, 117 Nev. at 938, 34 P.3d at 572. "[I]n such cases the claim must be substantially supported by expert testimony to the effect that future pain and suffering

is a probable consequence rather than a mere possibility." *Lerner Shops of Nev., Inc. v. Marin*, 83 Nev. 75, 79-80, 423 P.2d 398, 401 (1967).

Dr. Tingey testified that O'Connell needed surgery to repair the tear to her right knee that was caused by the fall. He stated that surgery was the only fix for the tear. Dr. Dunn also testified that O'Connell needed surgery due to the fall, which he said would improve her condition by 50 to 60 percent. He testified that he did not expect 100 percent recovery because the surgery would alter O'Connell's biomechanics, which would negatively impact other areas of her body. Further, the procedure could result in scar tissue that would be a continual source of pain. He testified that if there are complications, additional surgeries may be required. As of trial, O'Connell had not elected to undergo either surgery. Based on the foregoing, there was substantial evidence to show that O'Connell's future damages were a probable consequence of her injury because O'Connell needed surgeries as a result of her fall at Wynn and even then, she likely would not experience complete relief. Thus, we conclude that the testimony supported a jury awarding O'Connell's future damages.

The district court did not abuse its discretion by admitting the testimony of O'Connell's treating physicians despite late discovery disclosures

Wynn contends that O'Connell's treating physicians should have been barred from testifying because Dr. Tingey was disclosed two months after discovery closed and Dr. Dunn's credentials were disclosed four months after discovery closed. Under NRCP 37, a party who fails to make a Rule 16.1 disclosure or amend an earlier response that is "without substantial justification" cannot use that evidence at trial "unless such failure is harmless." NRCP 37(c)(1).

While Dr. Tingey was disclosed two months after discovery, we conclude there was substantial justification because circumstances beyond O'Connell's control[8] forced her to rely on Dr. Tingey for her medical treatment and lawsuit rather than her previous doctor, Dr. Martin, who was treating her for her knee. *See generally GNLV Corp. v. Serv. Control Corp.*, 111 Nev. 866, 869, 871, 900 P.2d 323, 324-25, 326 (1995) (finding that because there was no evidence of intent or fault of appellants when a physical item of evidence was lost, the district court erred in sanctioning appellants under NRCP 37(b)).

The trial court allowed Wynn to voir dire Dr. Tingey and Dr. Dunn during trial outside the presence of the jury. The court also allowed Wynn's rebuttal expert to listen to both doctors' testimony and incorporate them into his own direct examination. Dr. Tingey's late disclosure included about 15 additional pages of medical records; however, Wynn had all other medical records before discovery closed.

On appeal, Wynn does not argue what additional evidence it would have submitted. *See Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. ___, ___, 396 P.3d 783, 788 (2017) (concluding, in part, that because appellant did not provide proof or explain what other testimony her expert would have provided if a late discovery disclosure was made earlier, "appellant's substantial rights were not materially affected"). Thus, we conclude that based on the circumstances, the late disclosures did "not materially affect[ ]" Wynn's rights. *See id.* Moreover, because of the small amount of additional records disclosed after discovery closed and, because

[8]Dr. Andrew Martin, O'Connell's original treating physician, had to leave his medical practice because of an unrelated legal matter and was not readily available.

Wynn's counsel was allowed to voir dire both doctors before they testified in front of the jury and its expert could listen to the testimony and incorporate them into his own, the late disclosures did not result in unfair surprise to Wynn. *See Washoe Cty. Bd. of Sch. Trs. v. Pirhala*, 84 Nev. 1, 5, 435 P.2d 756, 758 (1968) (quoting *Jeppesen v. Swanson*, 68 N.W.2d 649, 656-57 (Minn. 1955) (stating that the purpose of discovery is to eliminate surprise at trial)).

Accordingly, despite the late discovery disclosures, we conclude the district court did not abuse its discretion by allowing both doctors to testify and not excluding their testimony.

Wynn's additional grounds for a new trial also fail

Wynn argues that O'Connell improperly claimed on two separate occasions at trial that Wynn was controlling the evidence by withholding video surveillance. A review of the record shows that Wynn did not object to these statements during trial. "A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Accordingly, we conclude we need not review this argument. Nevertheless, even if we engaged in a plain error review, we find that there is a plausible explanation for the jury's verdict based on the evidence, so we cannot conclude that Wynn's rights were substantially impaired. *See Gunderson*, 130 Nev. at 75, 319 P.3d at 612 (noting that plain error exists only if there is no reasonable explanation for the jury's verdict and to establish plain error, a party must show its rights were substantially impaired by the error).

Wynn also argued it was entitled to a new trial because O'Connell improperly stated during closing arguments that the jury was "the voice of the conscience of this community." While the statement was

improper in the context of this case, Wynn objected to it, and the district court admonished O'Connell and instructed the jury to disregard the statement. Thus, the district court satisfied the requirements to address attorney misconduct set out by the Nevada Supreme Court. *See id.* at 75, 319 P.3d at 611-12 (directing district courts to sustain an objection, admonish the offending counsel, and instruct the jury to disregard attorney misconduct). As a result, Wynn has the burden to show "that the misconduct is so extreme that the objection and admonishment could not remove the misconduct's effect." *Lioce*, 124 Nev. at 17, 174 P.3d at 981. Wynn summarily concluded below that it was prejudiced and barely raises the argument on appeal. Moreover, it provides no supporting facts or caselaw. *See generally Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Thus, we conclude Wynn has not carried its burden.[9] Accordingly, we

AFFIRM the judgment of the district court.

_____, C.J.
Silver

_____, J.
Gibbons

TAO, J., dissenting:

There's an issue in this case that the Nevada Supreme Court hasn't yet directly addressed, and it's this: We generally defer to jury

[9]All other points raised on appeal are unpersuasive.

verdicts, even when the jury makes a make a mountain out of a molehill. But do we defer to juries when their verdict makes a mountain out of nothing at all?

At trial, O'Connell established that she fell on some kind of unidentified substance on the floor of the Wynn. She didn't prove that the Wynn was actually responsible for putting the substance there. Consequently, in order for the Wynn to be liable for her fall, she must have proved that the substance had been there long enough for the Wynn to have known about it and been able to do something about it. *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322-23 (1993) ("Where a foreign substance is the result of the 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."). But she never did. As far as we can tell from O'Connell's evidence, the substance might have ended up there either many hours before her fall, or only seconds. Her evidence supplies no reason to prefer one alternative over the other. If there's no "reason" to choose one over the other, then by definition making either choice isn't "reasonable," and O'Connell failed to meet her burden of proving everything she needed to prove by a preponderance of the evidence. I would reverse and respectfully dissent.

I.

When a plaintiff is confronted with a pre-trial motion for summary judgment under NRCP 56 contending that there are no triable issues of fact warranting a jury trial, such a motion cannot be defeated by relying upon "the gossamer threads of whimsy, speculation and conjecture" or "general allegations or conclusions." *Wood v. Safeway, Inc.*, 121 Nev. 724,

731, 121 P.3d 1026, 1030 (2005). That means that conjecture and speculation aren't enough to justify going to trial at all; the plaintiff has to have some affirmative evidence to present to the jury to even bother empaneling a jury in the first place. I would say it necessarily follows that if a trial is held, then the jury's verdict cannot legitimately be based upon nothing more than the kind of conjecture or speculation that wouldn't have warranted a trial in the first place. Its decision must be reasonably based on evidence or else it cannot be affirmed.

II.

Here are the facts that O'Connell presented at trial. She slipped and injured herself on a green and "slightly sticky" substance of unknown composition on the floor of the Wynn's atrium. The substance covered an area about seven feet long and three feet wide in a casino whose main floor spans several hundred thousand square feet. Part of the unknown substance was "almost dry" and had some footprints in it, and one witness testified that the substance looked "something like syrup" but was otherwise unidentified.

Here's what O'Connell failed to prove. She didn't present any evidence of what the substance was; how it got there; who dropped it there; how long it had been there before she stepped in it; how much time had elapsed since any Wynn employee had inspected the area; how frequently the Wynn inspected the area; or whether the substance fell on the floor before or after the last inspection of the area. Indeed, all of the witnesses who testified for both parties specifically admitted that they did not know these things.

The gap here is that O'Connell failed to present much of anything showing that the Wynn had any actual or constructive notice of the existence of the substance that she slipped on. Yet O'Connell asks us to conclude that, whatever the substance was and however it got there, a jury could decide that it had been there long enough for the Wynn to become legally liable for her injuries. But that strikes me as nothing more than a guess based upon the utter absence of proof when the reality is that O'Connell bore the affirmative burden to present evidence proving every fact material to her case, or else lose.

O'Connell argues that because the substance was described as "almost dry," the jury could infer that it had been there long enough for the Wynn to have had legal notice of its existence. But of course that depends entirely on what the substance was. If it really was something like pancake syrup (despite being green), then its partial dryness might suggest that it had been there a while. But if it was made of something "almost dry" right out of the jar (say, something with the consistency of putty or dough), then its dryness tells us nothing about how long it had been there. Similarly, O'Connell argues that because she saw footprints in the substance, it must have been there quite a long time. But that's not only speculation, it's speculation layered upon speculation, because knowing nothing about how long the substance had been there means we know even less about when those footprints might have been left in it: maybe hours, maybe minutes, or maybe mere seconds.

So we know that the substance was there, and that O'Connell slipped on it. We know almost nothing else. I would conclude that isn't enough to support the jury's verdict as a matter of law.

III.

Nevada has long held that businesses are not the insurers of the safety of all who enter; a business is only liable for injuries arising from hazards that it knew about and could have done something about it before they injured someone. *See Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322-23 (1993). Thus, Nevada follows the traditional premises liability approach "where a foreign substance causing a slip and fall results from 'the 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.'" *FGA, Inc. v. Giglio*, 128 Nev. 271, 280, 278 P.3d 490, 496 (2012) (quoting *Sprague*, 109 Nev. at 250, 849 P.2d at 322-23). If a business created the hazard itself, or if the hazard had been there long enough that a reasonable business should have known about it with enough time to do something about it, that's on the business. But if a third party such as a customer drops something on the floor and another customer falls on it mere milliseconds later, that's not the fault of the business because even the best-managed business in the nation couldn't reasonably have done anything to prevent the injury. No human being could have. Maybe a superhero could have sprung into action and swept up the mess the instant it happened, but the law is supposed to reflect our reality and not the fictional world of the Avengers (Marvel 2015).

Alternatively, when a business maintains a self-service operation in which the danger of slippery substances falling to the floor is a repeated and inherent part of the operation (as with a casino buffet), the "mode of operation" approach, also referred to as the "recurrent risk" approach, allows courts to infer legal notice from the nature of the business itself. *See FGA*, 128 Nev. at 281, 278 P.3d at 496; *see Fisher v. Big Y Foods,*

Inc., 3 A.3d 919, 928 n. 21 (2010) (stating that 22 jurisdictions have adopted some variation of the mode of operation rule, and that the majority of the jurisdictions adopting it have applied it narrowly). In such types of businesses, "even in the absence of constructive notice, 'a jury could conclude that [the business] should have recognized the impossibility of keeping the [self-service] section clean by sweeping' alone and sufficient evidence was presented 'to justify a reasonable jury in concluding that [the business] was negligent in not taking further precautions, besides sweeping, to diminish the chronic hazard posed by the [self-service] department floor.'" *FGA*, 128 Nev. at 282, 278 P.3d at 497 (quoting *Sprague*, 109 Nev. at 251, 849 P.2d at 323). Essentially, to determine whether owners are liable to injured patrons under the recurrent risk and mode of operation approaches is "whether there was a 'recurrent' or 'continuous' risk on the premises associated with a chosen mode of operation." *Id.* at 281 n.5, 278 P.3d at 497 n.5. *See generally Sheehan v. Roche Bros. Supermarkets*, 863 N.E.2d 1276, 1280-85, 1280 n.3 (Mass. 2007).

But the mode of operation approach doesn't apply to every business. It doesn't apply, for example, to sit-down restaurants where the plaintiff "failed to show that the handling of food in a particular area by employees of [the restaurant] gave rise to a foreseeable risk of a regularly occurring hazardous condition for its customers similar to the condition that caused the injury." *FGA*, 128 Nev. at 282, 278 P.3d at 497 (finding "no reason to extend mode of operation liability to such establishments absent such a showing as their owners have not created the increased risk of a potentially hazardous condition by having their customers perform tasks that are traditionally carried out by employees.").

Here, the fall occurred in the Wynn's atrium, which serves no food, is nothing like a self-service restaurant, and is located nowhere near one (the Wynn buffet being located several hundred feet away from the atrium). So the mode of operation approach doesn't apply. *Cf. Ford v. S. Hills Med. Ctr., LLC*, 127 Nev. 1134, 373 P.3d 914 (2011) (unpublished disposition) (holding that appellant "has not presented any evidence that spills of liquid on the floor of respondent's emergency department were a virtually continuous condition that created an ongoing, continuous hazard, thus providing constructive notice of the condition to respondent"). Even if it somehow could apply, O'Connell presented no proof that the substance (whatever it was) recurrently ends up on the atrium floor as a natural consequence of the Wynn's business.

O'Connell was thus required to produce affirmative evidence that the Wynn had actual or constructive notice of the hazardous substance. She didn't. *See Twardowski v. Westward Ho Motels, Inc.*, 86 Nev. 784, 788, 476 P.2d 946, 948 (1970) (notice could be inferred based upon evidence that "if the motel had made a reasonable inspection of the slide they would have discovered the latent defect which caused [the plaintiff's] injuries."); *Chasson-Forrest v. Cox Commc'ns Las Vegas, Inc.*, No. 70264, 2017 WL 1328370, at *1 (Nev. App. Mar. 31, 2017) ("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.").

This isn't some revolutionary idea. Most courts require some affirmative evidence proving how long a foreign substance was on the floor before notice can be legally inferred, and mere proof of the existence of a foreign substance does not itself create such notice. *See, e.g., Reid v. Kohl's*

Dep't Stores, Inc., 545 F.3d 479, 482 (7th Cir. 2008) ("Absent any evidence demonstrating the length of time that the substance was on the floor, a plaintiff cannot establish constructive notice."); *Clemente v. Carnicon-Puerto Rico Mgmt. Assocs., L.C.*, 52 F.3d 383, 389 (1st Cir. 1995), *abrogated on other grounds by United States v. Gray*, 199 F.3d 547 (1st Cir. 1999) (holding that although appellant offered some evidence of the existence of a foreign substance on the staircase, "it does not in any way demonstrate how long the substance may have been there" and thus a reasonable jury could not have found the hotel had constructive notice); *Kelly v. Stop & Shop, Inc.*, 918 A.2d 249, 256 (Conn. 2007) ("What constitutes a reasonable length of time is largely a question of fact to be determined in the light of the particular circumstances of a case. The nature of the business and the location of the foreign substance would be factors in this determination . . . ." (citation omitted)); *Wal-Mart Stores, Inc. v. Spates*, 186 S.W.3d 566, 567 (Tex. 2006) (noting that constructive notice requires proof that an owner had a reasonable opportunity to discover the defect, which requires "analyzing the combination of proximity, conspicuity, and longevity"); *Ortega v. Kmart Corp.*, 36 P.3d 11, 15-16 (Cal. 2001) ("The plaintiff need not show actual knowledge where evidence suggests that the dangerous condition was present for a sufficient period of time to charge the owner with constructive knowledge of its existence."); *House v. Wal-Mart Stores, Inc.*, 872 S.W.2d 52, 53 (Ark. 1994) (holding that appellant failed to show the substance was on the floor for such a period of time that the store should have reasonably none of its presence, as no one knew when the spill occurred and at most, the evidence presented reflects that it was on the floor for five to six minutes); *Tidd v. Walmart Stores, Inc.*, 757 F. Supp. 1322, 1323-24 (N.D. Ala. 1991) (holding there was no evidence of constructive

notice where the record is silent on the length of time the spill had been on the floor and that the plaintiff's argument that the size of the spill is sufficient to raise a question of fact regarding the length of time the spill had been present lacks merit); *Great Atl. & Pac. Tea Co. v. Berry*, 128 S.E.2d 311, 314 (Va. 1962) ("There are many cases from other jurisdictions holding that the condition of the foreign substance is not sufficient to show that it had been on the floor long enough for the personnel of the store in the exercise of reasonable care to have discovered it." (citing cases)). *See generally* 107 Am. Jur. Proof of Facts 3d 407 (Originally published in 2009); § 49:1.Spill notice requirement, 3 Premises Liability 3d § 49:1 (2017 ed.); § 36:6.Notice requirement, 2 Premises Liability 3d § 36:6 (2017 ed.).

IV.

For all we know and don't know about the substance in this case, it might have fallen on the floor only an instant before O'Connell stepped on it. She nonetheless argues that we must give deference to the possibility that a jury could have concluded that it might have been there much longer than that. But she presented no evidence at all providing the jury with any foundation to reach that conclusion, so she's doing nothing more than inviting the jury to take a guess. That wouldn't be enough to even get to trial under NRCP 56, and it shouldn't be enough here.

If the Wynn can be found liable for what happened here based upon a record this flimsy, then *Sprague* is no longer good law. If the sheer existence of the hazard alone, with nothing more having been established, is enough to permit a jury to infer everything else required to establish liability, then every Nevada business is indeed now the insurer for every hazard on the premises, knowable or unknowable, whether there was

enough notice or enough time for the business to do something about it or not. I cannot join this conclusion and respectfully dissent.

Tao, J.

Tao

cc: Hon. Carolyn Ellsworth, District Judge
Ara H. Shirinian, Settlement Judge
Nettles Law Firm
Semenza Kircher Rickard
Eighth District Court Clerk