

YVONNE O'CONNELL vs. WYNN LAS VEGAS, LLC**Case No. A-12-655992-C, Dept. No. V****Wynn's Proposed Exhibit List**

<u>Ex No.</u>	<u>DOCUMENT/BATES NUMBERS</u>	<u>OFFERED</u>	<u>OBJECTED</u>	<u>ADMITTED</u>
I. (1-4)	Southern Nevada Pain Center WYNN-O'CONNELL 00418, 00420, 00426 -00427	11/10/15	NO	11/10/15
J. (1-12)	Steinberg Diagnostic WYNN-O'CONNELL 00428 - 00438, 00442			
K.	Yanet Elias Statement WYNN-O'CONNELL00481			
L. (1-19)	Wynn Las Vegas Policies WYNN-O'CONNELL 00483 - 00489, 00491 - 00502			
M.	Incident Report WYNN-O'CONNELL00511 - WYNN- O'CONNELL00513			
N. (1-5)	Advanced Ortho - Timothy Trainor WYNN-O'CONNELL 00522 - 00526			
O.	Minimally Invasive Hand Institute 3/8/12 WYNN-O'CONNELL00548 - WYNN- O'CONNELL00550			
P. (1-18)	Dr. Cash intake form 3/23/10 WYNN-O'CONNELL 00562 - 00571, 00586-588, 00593 - 00597			
Q.	Silver State Neurology (Christopher Millford MD) WYNN-O'CONNELL00599			
R. (1-6)	Desert Oasis Clinic 2/17/10 WYNN-O'CONNELL00607 - WYNN- O'CONNELL00612	11/10/15	NO	11/10/15

YVONNE O'CONNELL vs. WYNN LAS VEGAS, LLC**Case No. A-12-655992-C, Dept. No. V****Wynn's Proposed Exhibit List**

<u>Ex No.</u>	<u>DOCUMENT/BATES NUMBERS</u>	<u>OFFERED</u>	<u>OBJECTED</u>	<u>ADMITTED</u>
S.	Apache Foot & Ankle Specialist (Lee Wittenberg DPM) WYNN-O'CONNELL 00621 - 00623			
T.	Ascent Primary Care (Suresh Prahu MD) WYNN-O'CONNELL 00638 - 00639			
U. (1-16)	Southern Nevada Pain Center WYNN-O'CONNELL 00774 - 00789			
V. (1-4)	Dr. Yakov Shaposhnikov, M.D., Gastrointestinal and Liver Diseases Medical Records/Bills WYNN-O'CONNELL 01192 - 01195			
W.	Dr. Enrique Lacayo, M.D. Medical Records WYNN-O'CONNELL 01210 - 01211			
X. (1-11)	Yvonne O'Connell Player Report for Wynn Las Vegas WYNN-O'CONNELL 01225 - 01235			
Y. (1-3)	Yvonne O'Connell Patron Information for Wynn Las Vegas WYNN-O'CONNELL 01236 - 01238	11/12/15	obj	11/12/15
Z. (1-10)	Wynn Las Vegas Atrium Log WYNN-O'CONNELL 01239 - 01248	11/12/15	NO	11/12/15
AA. (1-2)	Color Photos of Bruising PLTF000720- 000721			
BB.	Defendant's Disclosure of Initial Expert Witness and Report Pursuant to NRCP 26(e) - Victor B. Klausner, D.O. filed on 4/13/15 DEFT. EXPERT01 (1 DOCUMENT-25 PAGES)			

YVONNE O'CONNELL vs. WYNN LAS VEGAS, LLC
Case No. A-12-655992-C, Dept. No. V

Wynn's Proposed Exhibit List

<u>Ex No.</u>	<u>DOCUMENT/BATES NUMBERS</u>	<u>OFFERED</u>	<u>OBJECTED</u>	<u>ADMITTED</u>
CC.	Defendant's Disclosure of Rebuttal Expert Witness and Report Pursuant to NRCP 26(e) - Neil D. Opfer filed on 5/13/15 DEFT. EXPERT02 (1 DOCUMENT – 96 PAGES)			
DD. (1-13)	Deposition Transcript of Corey Powell DEFT. DEPO01			
EE. (1-24)	Deposition Transcript of Yanet Elias DEFT. DEPO02			
FF. (1-78)	Deposition Transcripts of Plaintiff Yvonne O'Connell (and Exhibit 1 Pages 1-4) DEFT. DEPO03			
GG. (1-53)	Deposition Transcript of Sal Risco DEFT. DEPO04			
HH. (1-24)	Deposition Transcripts of NRCP 30(b)(6) Witnesses DEFT. DEPO05			
II. (1-15)	Plaintiff's Responses to Defendant's First Set of Interrogatories with Verification DEFT. DISC01			
JJ. (1-7)	Plaintiff's Responses to Defendants' First Set of Requests for the Production of Documents DEFT. DISC02			
KK.	Plaintiff's Amended Complaint DEFT. PLDG01 (1 DOCUMENT – 4 PAGES)			
LL.	Defendant's Answer to Amended Complaint DEFT. PLDG02 (1 DOCUMENT – 5 PAGES)			

Deft's.

EXHIBITS

CASE NO.

14655992

[illegible]

JOINT STIPULATED EXHIBITS OF THE PARTIES

YVONNE O'CONNELL vs. WYNN LAS VEGAS, LLC					
Case Number A-12-655992					
	Description	Bate Numbers	Offered	Objected	Admitted
1	Wynn Incident File Full Report	JOINT STIPULATED EXHIBIT 001 – 003		<i>stip</i>	NOV - 4 2015
2	Wynn Guest Accident or Illness Report – Yvonne O'Connell	JOINT STIPULATED EXHIBIT 004			
3	Wynn – Guest Refusal of Medical Assistance	JOINT STIPULATED EXHIBIT 005			
4	Wynn- Guest/Employee Voluntary Statement – Yanet Elias	JOINT STIPULATED EXHIBIT 006			
5	Wynn – Guest/Employee Voluntary Statement – Terry M. Ruby	JOINT STIPULATED EXHIBIT 007			
6	Wynn – File Photograph Of Area of Incident - #2152-8	JOINT STIPULATED EXHIBIT 008			
7	Wynn – File Photograph Of Area of Incident - #2152-3	JOINT STIPULATED EXHIBIT 009			
8	Wynn – File Photograph Of Area of Incident - #2152-7	JOINT STIPULATED EXHIBIT 010			
9	Wynn – File Photograph Of Area of Incident - #2152-5	JOINT STIPULATED EXHIBIT 011			
10	Wynn – File Photograph Of Area of Incident - #2152-2	JOINT STIPULATED EXHIBIT 012			
11	Wynn – File Photograph Of Area of Incident - #2152-1	JOINT STIPULATED EXHIBIT 013			
12	Wynn – File Photograph Of Area of Incident - #2152-6	JOINT STIPULATED EXHIBIT 0014			
13	Wynn – File Photograph Of Area of Incident - #2152-4	JOINT STIPULATED EXHIBIT 015		<i>✓</i>	NOV - 4 2015

COURT'S EXHIBITS

CASE NO. A655992

[illegible]

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; ORDER PARTIALLY GRANTING AND PARTIALLY DENYING DEFENDANT'S MOTION TO RETAX COSTS AND PLAINTIFF'S MOTION TO TAX COSTS AND FOR FEES, COSTS AND POST-JUDGMENT INTEREST; NOTICE OF ENTRY OF ORDER; DISTRICT COURT MINUTES; EXHIBITS LIST

YVONNE O'CONNELL,

Plaintiff(s),

vs.

WYNN LAS VEGAS, LLC dba WYNN LAS VEGAS,

Defendant(s),

Case No: A-12-655992-C

Dept No: V

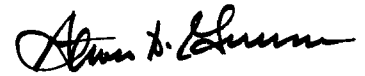
now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 28 day of November 2016.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk



CLERK OF THE COURT

Electronically Filed
Nov 30 2016 09:34 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

1 **NOAS**
2 BRIAN D. NETTLES, ESQ.
3 Nevada Bar No. 7462
4 CHRISTIAN M. MORRIS, ESQ.
5 Nevada Bar No. 11218
6 JON J. CARLSTON, ESQ.
7 Nevada Bar No. 10869
8 **NETTLES LAW FIRM**
9 1389 Galleria Drive, Suite 200
10 Henderson, Nevada 89014
11 Telephone: (702) 434-8282
12 Facsimile: (702) 434-1488
13 brian@nettleslawfirm.com
14 christian@nettleslawfirm.com
15 jon@nettleslawfirm.com
16 *Attorneys for Plaintiff*

11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13 YVONNE O'CONNELL, an individual,
14
15 Plaintiff,

Case No.: A-12-655992-C
Dept. No.: V

16 vs.

NOTICE OF APPEAL

17 WYNN LAS VEGAS, LLC, a Nevada
18 Limited Liability Company, doing business as
19 WYNN LAS VEGAS; DOES I through X;
20 and ROE CORPORATIONS I through X,
inclusive,

21 Defendants.

22 **NOTICE IS HEREBY GIVEN**, that Plaintiff, YVONNE O'CONNELL ("Plaintiff"),
23 appeals to the Supreme Court of Nevada the district court's order titled *Order Partially Granting*
24 *and Partially Denying Defendant's Motion to Retax Costs and Plaintiff's Motion to Tax and for*
25 *Fees, Costs and Post-Judgment Interest* entered in the above-captioned case on the 9th day of
26
27
28

NETTLES LAW FIRM

1389 Galleria Dr. Suite 200
Henderson, NV 89014
702-434-8282 / 702-434-1488 (fax)

November 2016, as well as an orders, judgments, and rulings made appealable by the foregoing.

DATED this 17th day of November, 2016.

NETTLES LAW FIRM

/s/ Jon J. Carlston, Esq.

BRIAN D. NETTLES, ESQ.

Nevada Bar No. 7462

CHRISTIAN M. MORRIS, ESQ.

Nevada Bar No. 11218

JON J. CARLSTON, ESQ.

Nevada Bar No. 10869

1389 Galleria Drive, Suite 200

Henderson, Nevada 89014

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26, I certify that on this 17th day of November, 2016, I served the foregoing **NOTICE OF APPEAL** to the following parties by electronic transmission through the Wiznet system:

Semenza Kircher Rickard

Contact

Email

Christopher D. Kircher

cdk@skrlawyers.com

Jarrod L. Rickard

jlr@skrlawyers.com

Jennifer A. Bidwell

jab@skrlawyers.com

Lawrence J. Semenza, III

ljs@skrlawyers.com

Olivia Kelly

oak@skrlawyers.com

/s/ Jenn Alexy

An Employee of NETTLES LAW FIRM


CLERK OF THE COURT

1 **ASTA**
2 BRIAN D. NETTLES, ESQ.
3 Nevada Bar No. 7462
4 CHRISTIAN M. MORRIS, ESQ.
5 Nevada Bar No. 11218
6 JON J. CARLSTON, ESQ.
7 Nevada Bar No. 10869
8 **NETTLES LAW FIRM**
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12 Facsimile: (702) 434-1488
13 brian@nettleslawfirm.com
14 christian@nettleslawfirm.com
15 jon@nettleslawfirm.com
16 *Attorneys for Plaintiff*

11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13 YVONNE O'CONNELL, an individual,
14
15 Plaintiff,

Case No.: A-12-655992-C
Dept. No.: V

16 vs.

CASE APPEAL STATEMENT

17 WYNN LAS VEGAS, LLC, a Nevada
18 Limited Liability Company, doing business as
19 WYNN LAS VEGAS; DOES I through X;
20 and ROE CORPORATIONS I through X,
inclusive,

21 Defendants.

22 1. Name of appellant filing this case appeal statement:

23 Plaintiff YVONNE O'CONNELL.

24 2. Identity of the judge issuing the decision, judgment, or order appealed from:

25 The Honorable Judge Carolyn Ellsworth of the Eighth Judicial District of Nevada.
26
27
28

NETTLES LAW FIRM

1389 Galleria Dr. Suite 200
Henderson, NV 89014
702-434-8282 / 702-434-1488 (fax)

3. Identity of each appellant and the name and address of counsel for each appellant:

YVONNE O'CONNELL (Plaintiff)
c/o THE NETTLES LAW FIRM
Brian D. Nettles, Esq., Nevada Bar No. 7462
Christian M. Morris, Esq., Nevada Bar No. 11218
Jon J. Carlston, Esq., Nevada Bar No. 10869
1389 Galleria Drive, Suite 200
Henderson, Nevada 89014
Telephone: (702) 434-8282
Facsimile: (702) 434-1488
brian@nettleslawfirm.com
christian@nettleslawfirm.com
jon@nettleslawfirm.com

4. Identity of each respondent and the name and address of appellate counsel, if known, for each respondent:

WYNN LAS VEGAS, LLC, a Nevada Limited Liability Company, doing business as
WYNN LAS VEGAS (Defendant)
c/o LAWRENCE J. SEMENZA, III, P.C.
Lawrence J. Semenza, III, Esq., Bar No. 7174
E-mail: ljs@semenzalaw.com
Christopher D. Kircher, Esq., Bar No. 11176
Email: cdk@semenzalaw.com
Jarrod L. Rickard, Esq., Bar No. 10203
Email: jlr@semenzalaw.com
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145

5. Whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42:

Not applicable.

6. Whether appellant was represented by appointed or retained counsel in the district court:

Retained – THE NETTLES LAW FIRM.

7. Whether appellant is represented by appointed or retained counsel on appeal:

Retained – THE NETTLES LAW FIRM.

1 8. Whether appellant was granted leave to proceed in forma pauperis, and the date of entry of
2 the district court order granting such leave:

3 Not applicable.

4 9. The date the proceedings commenced in the district court (e.g., date complaint, indictment,
5 information, or petition was filed):

6 February 7, 2012.

7 10. A brief description of the nature of the action and result in the district court, including the
8 type of judgment or order being appealed and the relief granted by the district court:

9 This is a personal injury action – premise liability, slip and fall. On February 8, 2010,
10 while visiting the Wynn Hotel & Casino (“Defendant”) as a guest/patron, Plaintiff YVONNE
11 O’CONNELL (“Plaintiff”) slipped and fell inside the casino on a “green, sticky, syrup-like”
12 substance on the floor approximately seven feet long of unknown origin. Plaintiff sustained
13 injuries as a result of her fall.

14 In November 2015 this case was tried as a jury trial. The jury awarded Plaintiff damages
15 in the amount of \$400,000 consisting of \$150,000 in past pain and suffering and \$250,000 in
16 future pain and suffering, however the jury found her 40% comparatively negligent thus reducing
17 this award down to net \$240,000 (\$400,000 reduced by 40%). Plaintiff was also awarded
18 \$17,190.96 in pre-judgment interest for a total award of \$257,190.96 (\$240,000 plus
19 \$17,190.96). Defendant has already appealed the jury’s verdict – *see* Nevada Supreme Court
20 Case No. 70583 referenced below.

21 After trial, Plaintiff filed motions/applications seeking costs in the amount of \$26,579.38
22 and attorneys’ fees in the amount of \$96,000 (40% of the jury’s net \$240,000 verdict pursuant to
23 a contingency fee agreement) as the prevailing party and pursuant to NRCP 68 / NRS 17.115’s
24 offer of judgment provisions. After a full briefing and hearings held on March 4, 2016, and
25 August 12, 2016, regarding Plaintiff’s requests and Defendant’s motion to retax, the district court
26 awarded Plaintiff \$16,880.38 in costs and zero (\$0.00) in attorneys’ fees. *See Order Partially*
27 *Granting and Partially Denying Defendant’s Motion to Retax....”* filed November 9, 2016
28 *(Notice of Entry of Order* filed November 10, 2016). **Plaintiff is appealing the district court’s**

award of costs and fees as a “special order entered after final judgment” pursuant to Nevada Rule of Appellate Procedure 3(b)(9).

11. Whether the case has previously been the subject of an appeal to or original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding:

WYNN LAS VEGAS, LLC, D/B/A
WYNN LAS VEGAS,
Appellant,

vs.

YVONNE O'CONNELL, AN
INDIVIDUAL,

Supreme Court No. 70583
District Court Case No. A-12-655992-C

12. Whether this appeal involves child custody or visitation:

Note applicable.

13. If this is a civil case, whether this appeal involves the possibility of settlement:

Not at this time. The parties have already participated in the Nevada Supreme Court's Settlement Program on August 30, 2016, with Mediator Ara H. Shirinian, Esq., without resolution as part of Supreme Court Case No. 70583.

DATED this 17th day of November, 2016.

NETTLES LAW FIRM

/s/ Jon J. Carlston, Esq.

BRIAN D. NETTLES, ESQ.

Nevada Bar No. 7462

CHRISTIAN M. MORRIS, ESQ.

Nevada Bar No. 11218

JON J. CARLSTON, ESQ.

Nevada Bar No. 10869

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26, I certify that on this 17th day of November, 2016, I served the foregoing **CASE APPEAL STATEMENT** to the following parties by electronic transmission through the Wiznet system:

Semenza Kircher Rickard		
Contact		Email
Christopher D. Kircher		cdk@skrlawyers.com
Jarrod L. Rickard		jlr@skrlawyers.com
Jennifer A. Bidwell		jab@skrlawyers.com
Lawrence J. Semenza, III		ljs@skrlawyers.com
Olivia Kelly		oak@skrlawyers.com

/s/ Jenn Alexy
An Employee of NETTLES LAW FIRM

DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C

Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

§
§
§
§
§
§

Location: **Department 5**
Judicial Officer: **Ellsworth, Carolyn**
Filed on: **02/07/2012**
Case Number History:
Cross-Reference Case Number: **A655992**
Supreme Court No.: **70583**

CASE INFORMATION

Statistical Closures
12/15/2015 Verdict Reached

Case Type: **Negligence - Premises Liability**
Subtype: **Slip and Fall**
Case Flags: **Appealed to Supreme Court**
Arbitration Exemption Granted

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number	A-12-655992-C
Court	Department 5
Date Assigned	02/17/2016
Judicial Officer	Ellsworth, Carolyn

PARTY INFORMATION

Plaintiff **O'Connell, Yvonne**

Lead Attorneys
Nettles, Brian D.
Retained
7024348282(W)

Defendant **Wynn Las Vegas LLC**






Semenza, Lawrence, III
Retained
702-835-6803(W)

Wynn Resorts Limited














DATE

EVENTS & ORDERS OF THE COURT

INDEX












02/07/2012	 Complaint Filed By: Plaintiff O'Connell, Yvonne	
03/20/2012	 Amended Complaint Filed By: Plaintiff O'Connell, Yvonne <i>Amended Complaint</i>	
04/04/2012	 Summons Filed by: Plaintiff O'Connell, Yvonne <i>Summons</i>	
11/19/2012	 Motion for Withdrawal Filed By: Plaintiff O'Connell, Yvonne <i>Motion to Withdraw as Attorney of Record</i>	
11/20/2012	 Certificate of Mailing Filed By: Plaintiff O'Connell, Yvonne <i>Certificate of Mailing re Motion to Withdraw as Attorney of Record</i>	

DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C

12/19/2012	Motion to Withdraw as Counsel (3:00 AM) (Judicial Officer: Ellsworth, Carolyn) <i>Motion to Withdraw as Attorney of Record</i>
12/19/2012	 Supplement Filed by: Plaintiff O'Connell, Yvonne <i>Supplement to Motion to Withdraw as Attorney of Record</i>
12/21/2012	 Order Filed By: Plaintiff O'Connell, Yvonne <i>Order</i>
12/24/2012	 Notice of Entry of Order Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Entry of Order</i>
05/14/2013	 Notice of Appearance Party: Plaintiff O'Connell, Yvonne <i>Notice of Appearance</i>
06/25/2013	 Default Filed By: Plaintiff O'Connell, Yvonne <i>(Set Aside 07-24-13) Default</i>
07/24/2013	 Initial Appearance Fee Disclosure Filed By: Defendant Wynn Las Vegas LLC <i>Initial Appearance Fee Disclosure</i>
07/24/2013	 Stipulation and Order Filed by: Defendant Wynn Las Vegas LLC <i>Stipulation and Order to Set Aside Default</i>
07/24/2013	 Answer to Amended Complaint Filed By: Defendant Wynn Las Vegas LLC <i>Answer to Amended Complaint</i>
07/24/2013	 Notice of Entry of Stipulation and Order Filed By: Defendant Wynn Las Vegas LLC <i>Notice of Entry of Stipulation and Order to Set Aside Default</i>
08/21/2013	 Commissioners Decision on Request for Exemption - Granted <i>Commissioner's Decision on Request for Exemption</i>
08/22/2013	CANCELED Status Check: Dismissal (3:00 AM) (Judicial Officer: Ellsworth, Carolyn) <i>Vacated - per Secretary</i>
11/20/2013	 Joint Case Conference Report Filed By: Plaintiff O'Connell, Yvonne <i>Joint Case Conference Report</i>
11/25/2013	 Scheduling Order Filed By: Plaintiff O'Connell, Yvonne <i>Scheduling Order</i>
12/05/2013	 Order Setting Civil Non-Jury Trial















DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C

Order Setting Civil Non-Jury Trial and Calendar Call

09/10/2014	 Association of Counsel Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Association of Counsel</i>
09/22/2014	 Stipulation to Extend Discovery Party: Plaintiff O'Connell, Yvonne <i>Stipulation and Order to Extend Discovery and Continue Trial (First Request)</i>
09/29/2014	 Notice of Entry of Stipulation and Order Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Entry of Stipulation and Order to Extend Discovery and Continue Trial</i>
10/01/2014	 Amended Order Setting Jury Trial <i>Amended Order Setting Civil Jury Trial and Calendar Call</i>
12/29/2014	 Motion to Withdraw As Counsel Filed By: Plaintiff O'Connell, Yvonne <i>Motion to Withdraw as Counsel of Record</i>
01/26/2015	 Notice of Non Opposition Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Non-Opposition</i>
01/27/2015	 Affidavit in Support Filed By: Plaintiff O'Connell, Yvonne <i>Affidavit of J. Scott Dilbeck, Esq. in Support of Motion to Withdraw</i>
02/10/2015	 Order to Withdraw as Attorney of Record Filed by: Plaintiff O'Connell, Yvonne <i>Order Granting Motion to Withdraw</i>
02/11/2015	 Notice of Entry of Order Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Entry of Order Granting Motion to Withdraw</i>
02/13/2015	CANCELED Motion to Withdraw as Counsel (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) <i>Vacated</i> <i>Motion to Withdraw as Counsel of Record</i> 01/30/2015 Continued to 02/13/2015 - At the Request of Counsel - Wynn Las Vegas LLC
02/18/2015	 Notice of Appearance Party: Plaintiff O'Connell, Yvonne <i>Notice of Appearance</i>
03/06/2015	CANCELED Calendar Call (10:00 AM) (Judicial Officer: Ellsworth, Carolyn) <i>Vacated - per Commissioner</i>
03/16/2015	CANCELED Bench Trial (1:30 PM) (Judicial Officer: Ellsworth, Carolyn) <i>Vacated - per Commissioner</i>
04/21/2015	 Proof of Service Filed by: Plaintiff O'Connell, Yvonne

DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C









Proof of Service of Subpoena Documents on Salvatore Risco

04/23/2015	 Proof of Service Filed by: Defendant Wynn Las Vegas LLC <i>Proof of Service</i>
05/13/2015	 Disclosure of Expert Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Disclosure of Rebuttal Expert Witness and Report Pursuant to NRCP 26(E)</i>
06/03/2015	 Notice of Hearing <i>Notice of Rescheduling of Hearing</i>
07/13/2015	 Motion for Summary Judgment Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Motion for Summary Judgment</i>
07/13/2015	 Initial Appearance Fee Disclosure Filed By: Defendant Wynn Las Vegas LLC <i>Initial Appearance Fee Disclosure for Motion for Summary Judgment Filing</i>
07/27/2015	 Opposition Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Opposition to Defendant's Motion for Summary Judgment</i>
07/31/2015	 Motion Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Motion for Protective Order and for Order Shortening Time</i>
08/04/2015	 Opposition to Motion For Protective Order Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Opposition to Defendant's Motion for Protective Order and for Order Shortening Time</i>
08/07/2015	 Motion for Protective Order (9:30 AM) (Judicial Officer: Bulla, Bonnie) <i>Deft's Motion for Protective Order and for OST</i>
08/11/2015	 Errata Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Errata to Opposition to Defendant's Motion for Summary Judgment</i>
08/11/2015	 Order Setting Settlement Conference <i>Order Setting Settlement Conference</i>
08/13/2015	 Motion in Limine Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Motion In Limine [#1] To Exclude Purported Expert Gary Presswood</i>
08/13/2015	 Motion in Limine Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Motion In Limine [#2] To Exclude Unrelated Medical Conditions and Damages Claimed By Plaintiff</i>
08/13/2015	 Motion in Limine



DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C

	Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Motion In Limine [#3] To Exclude Any Reference Or Testimony of Defendant's Alleged Failure To Preserve Evidence</i>
08/13/2015	 Omnibus Motion In Limine Filed by: Plaintiff O'Connell, Yvonne <i>Plaintiff's Omnibus Motions in Limine</i>
08/18/2015	 Affidavit Filed By: Plaintiff O'Connell, Yvonne <i>Supplemental Affidavit and Declaration of Christian M. Morris to Plaintiff's Omnibus Motions in Limine</i>
08/27/2015	 Opposition to Motion in Limine Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Opposition to Wynn's Motion in Limine [#1] to Exclude Purported Expert Witness Gary Presswood</i>
08/27/2015	 Opposition to Motion in Limine Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Opposition to Wynn's Motion in Limine [#2] to Exclude Unrelated Medical Conditions and Damages Claimed by Plaintiff and Motion for Sanctions for Violation of HIPPA Protected Information</i>
08/27/2015	 Opposition to Motion in Limine Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Opposition to Wynn's Motion in Limine [#3] to Exclude any Reference or Testimony or Defendant's Alleged Failure to Preserve Evidence</i>
08/31/2015	 Opposition to Motion in Limine Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Opposition to Plaintiff's Omnibus Motions in Limine</i>
09/03/2015	 Affidavit Filed By: Plaintiff O'Connell, Yvonne <i>Supplemental Affidavit and Declaration of Christian M. Morris to Plaintiff's Omnibus Motions in Limine</i>
09/03/2015	 Settlement Conference (9:00 AM)
09/09/2015	 Motion Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Motion to Re-Open Discovery for the Limited Purpose of Taking Defendant's 30(b)(6) Deposition and for Order Shortening Time</i>
09/10/2015	 Opposition to Motion Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Opposition to Plaintiff's Motion to Reopen Discovery for The Limited Purpose of Taking Defendant's 30(B)(6) Deposition and for Order Shortening Time</i>
09/10/2015	 Reply in Support Filed By: Defendant Wynn Las Vegas LLC <i>Reply In Support of Defendant's Motion for Summary Judgment</i>
09/10/2015	 Reply in Support











DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C

	Filed By: Defendant Wynn Las Vegas LLC <i>Reply in Support of Defendant's Motion in Limine [#1] to Exclude Purported Expert Witness Gary Presswood</i>
09/10/2015	 Reply in Support Filed By: Defendant Wynn Las Vegas LLC <i>Reply In Support of Defendant's Motion in Limine [#3] to Exclude Any Reference or Testimony of Defendant's Alleged Failure to Preserve Evidence</i>
09/10/2015	 Reply in Support Filed By: Defendant Wynn Las Vegas LLC <i>Reply In Support of Defendant's Motion in Limine [#2] to Exclude Unrelated Medical Conditions; Opposition to Plaintiff's Motion for Sanctions</i>
09/17/2015	 Motion for Summary Judgment (9:00 AM) (Judicial Officer: Thompson, Charles) <i>Defendant's Motion for Summary Judgment</i>
09/17/2015	 Reply to Opposition Filed by: Plaintiff O'Connell, Yvonne <i>Plaintiff's Reply to Defendant's Opposition to Plaintiff's Omnibus Motions in Limine</i>
09/18/2015	 Motion (9:00 AM) (Judicial Officer: Bulla, Bonnie) <i>Pltf's Motion to Re-Open Discovery for the Limited Purpose of Taking Deft's 30(b)(6) Deposition and for OST</i>
09/18/2015	CANCELED Status Check: Compliance (11:00 AM) (Judicial Officer: Bulla, Bonnie) <i>Vacated - per Commissioner</i>
09/23/2015	 Discovery Commissioners Report and Recommendations Filed By: Plaintiff O'Connell, Yvonne <i>Discovery Commissioner Report and Recommendations</i>
09/24/2015	 Notice of Entry of Order Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Entry of Discovery Commissioner Report and Recommendations</i>
09/28/2015	 Pre-trial Memorandum Filed by: Plaintiff O'Connell, Yvonne <i>Joint Pre-Trial Memorandum</i>
10/01/2015	Motion in Limine (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) Events: 08/13/2015 Motion in Limine <i>Defendant's Motion In Limine [#1] To Exclude Purported Expert Gary Presswood</i>
10/01/2015	Motion in Limine (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) Events: 08/13/2015 Motion in Limine <i>Defendant's Motion In Limine [#2] To Exclude Unrelated Medical Conditions and Damages Claimed By Plaintiff</i>
10/01/2015	Motion in Limine (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) Events: 08/13/2015 Motion in Limine <i>Defendant's Motion In Limine [#3] To Exclude Any Reference Or Testimony of Defendant's Alleged Failure To Preserve Evidence</i>
10/01/2015	Omnibus Motion in Limine (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) Events: 08/13/2015 Omnibus Motion In Limine <i>Plaintiff's Omnibus Motions in Limine</i>















DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C

10/01/2015	 All Pending Motions (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) <i>All Pending Motions: 10/1/15</i>
10/01/2015	Calendar Call (10:00 AM) (Judicial Officer: Ellsworth, Carolyn)
10/09/2015	 Order Denying Motion Filed By: Plaintiff O'Connell, Yvonne <i>Order Denying Defendant's Motion For Summary Judgment</i>
10/12/2015	 Recorders Transcript of Hearing <i>Transcript of Proceedings Defendants' Motions in Limine/Plaintiff's Omnibus Motions in Limine/Calendar Call October 1, 2015</i>
10/12/2015	 Notice of Entry of Order Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Entry of Order Denying Defendant's Motion for Summary Judgment</i>
10/16/2015	CANCELED Status Check: Compliance (11:00 AM) (Judicial Officer: Bulla, Bonnie) <i>Vacated - per Commissioner</i>
10/26/2015	 Order Shortening Time Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Emergency Motion to Continue Trial and for Sanctions on Order Shortening Time</i>
10/27/2015	 Supplemental Filed by: Defendant Wynn Las Vegas LLC <i>Defendant's Supplemental Brief to Exclude Plaintiff's Treating Physician Expert Witnesses</i>
10/27/2015	 Pre-Trial Disclosure Party: Defendant Wynn Las Vegas LLC <i>Defendant's Pretrial Disclosures</i>
10/27/2015	 Proposed Voir Dire Questions Filed By: Defendant Wynn Las Vegas LLC <i>Defendant Wynn Las Vegas, LLC d/b/a Wynn Las Vegas' Proposed Voir Dire Questions</i>
10/27/2015	 Proposed Verdict Forms Not Used at Trial Party: Defendant Wynn Las Vegas LLC <i>Defendant Wynn Las Vegas, LLC d/b/a Wynn Las Vegas' Proposed Verdict Forms</i>
10/27/2015	 Supplement Filed by: Plaintiff O'Connell, Yvonne <i>Supplement</i>
10/28/2015	 Pre-Trial Disclosure Party: Plaintiff O'Connell, Yvonne <i>Plaintiff's Pretrial Disclosures</i>
10/28/2015	 Proposed Voir Dire Questions Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Proposed Voir Dire Questions</i>
10/28/2015	 Miscellaneous Filing













DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C

	Filed by: Plaintiff O'Connell, Yvonne <i>Plaintiff's Proposed Verdict Forms</i>
10/28/2015	 Opposition Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Opposition to Plaintiff's Motion to Continue Trial and For Sanctions on an Order Shortening Time</i>
10/29/2015	 All Pending Motions (3:00 AM) (Judicial Officer: Ellsworth, Carolyn) <i>All Pending Motions: 10/29/15</i>
10/29/2015	Hearing (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) <i>Hearing: Supplemental Brief on Motion in Limine</i>
10/29/2015	Motion to Continue Trial (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) <i>Plaintiff's Emergency Motion to Continue Trial and for Sanctions on Order Shortening Time</i>
11/02/2015	 Order Filed By: Defendant Wynn Las Vegas LLC <i>Order on Plaintiff's Omnibus Motions in Limine</i>
11/02/2015	 Order Filed By: Defendant Wynn Las Vegas LLC <i>Order Granting Defendant's Motion in Limine [#1] to Exclude Purported Expert Witness Gary Presswood</i>
11/02/2015	 Order Denying Motion Filed By: Defendant Wynn Las Vegas LLC <i>Order Denying Without Prejudice Defendant's Motion in Limine [#2] to Exclude Unrelated Medical Conditions and Damages Claimed by Plaintiff</i>
11/02/2015	 Order Denying Motion Filed By: Defendant Wynn Las Vegas LLC <i>Order Denying Defendant's Motion in Limine [#3] to Exclude Any Reference or Testimony of Defendant's Alleged Failure to Preserve Evidence</i>
11/04/2015	 Jury Trial (1:30 PM) (Judicial Officer: Ellsworth, Carolyn) 11/04/2015-11/05/2015, 11/09/2015-11/10/2015, 11/12/2015-11/13/2015, 11/16/2015
11/05/2015	 Notice of Entry of Order Filed By: Defendant Wynn Las Vegas LLC <i>Notice of Entry of Order</i>
11/05/2015	 Notice of Entry of Order Filed By: Defendant Wynn Las Vegas LLC <i>Notice of Entry of Order</i>
11/05/2015	 Notice of Entry of Order Filed By: Defendant Wynn Las Vegas LLC <i>Notice of Entry of Order</i>
11/05/2015	 Notice of Entry of Order Filed By: Defendant Wynn Las Vegas LLC <i>Notice of Entry of Order</i>

DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C

11/05/2015	 Order Granting Motion Filed By: Plaintiff O'Connell, Yvonne <i>Order Granting Plaintiff's Oral Motion for Demand of Jury Trial</i>
11/05/2015	 Notice of Entry of Order Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Entry of Order Granting Plaintiff's Oral Motion for Demand of Jury Trial</i>
11/09/2015	 Brief Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Brief Regarding Causation Testimony by Drs. Dunn and Tingey</i>
11/09/2015	 Jury List <i>Jury List</i>
11/09/2015	 Brief Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Brief as to Testimony Regarding Future Pain and Suffering</i>
11/09/2015	 Jury List
11/10/2015	 Brief Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Bench Brief Regarding Future Pain and Suffering</i>
11/10/2015	 Brief Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Bench Brief Regarding Exclusion of Plaintiff's Treating Physician Testimony Solely Based On Plaintiff's Self-Reporting</i>
11/12/2015	 Brief Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Bench Brief Regarding Expert Medical Testimony to Apportion Damages</i>
11/12/2015	 Jury List <i>Amended Jury List</i>
11/12/2015	 Brief Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Brief As To Constructive Notice</i>
11/16/2015	 Jury Instructions
11/16/2015	 Verdict
11/16/2015	Verdict (Judicial Officer: Ellsworth, Carolyn) Debtors: Wynn Las Vegas LLC (Defendant) Creditors: Yvonne O'Connell (Plaintiff) Judgment: 11/16/2015, Docketed: 11/18/2015 Total Judgment: 240,000.00
11/16/2015	 Verdict Submitted to the Jury But Returned Unsigned


DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C

11/17/2015	 Discovery Commissioners Report and Recommendations Filed By: Plaintiff O'Connell, Yvonne <i>Discovery Commissioner Report and Recommendations</i>
11/17/2015	 Notice of Entry Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Entry of Discovery Commissioner Report and Recommendations</i>
11/17/2015	 Notice of Entry of Order Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Entry of Discovery Commissioner Report and Recommendations</i>
11/25/2015	 Brief Filed By: Defendant Wynn Las Vegas LLC <i>Defendant Wynn Las Vegas, LLC's Trial Brief</i>
11/25/2015	 Application Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Application for Fees, Costs and Pre-Judgment Interest</i>
12/07/2015	 Opposition Filed By: Defendant Wynn Las Vegas LLC <i>Defendant's Opposition to Plaintiff's Application for Fees, Costs and Pre-Judgment Interest and Motion to Retax Costs</i>
12/15/2015	 Judgment Upon Jury Verdict Filed By: Plaintiff O'Connell, Yvonne <i>Judgment on Verdict</i>
12/15/2015	 Notice of Entry of Judgment Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Entry of Judgment on Verdict</i>
12/15/2015	Judgment Plus Interest (Judicial Officer: Ellsworth, Carolyn) Debtors: Wynn Las Vegas LLC (Defendant) Creditors: Yvonne O'Connell (Plaintiff) Judgment: 12/15/2015, Docketed: 12/22/2015 Total Judgment: 257,190.96
12/21/2015	 Motion Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Amended Application for Fees, Costs and Pre-Judgment Interest - Amended and Resubmitted As - Plaintiff's Motion and Notice of Motion to Tax Costs and for Fees and Post-Judgment Interest</i>
12/21/2015	 Memorandum of Costs and Disbursements Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Amended Verified Memorandum of Costs (First Submission attached as Exhibit 5 to Plaintiff's Application for Fees, Costs and Pre-Judgment Interest)</i>
12/23/2015	 Notice of Posting Bond Filed By: Defendant Wynn Resorts Limited <i>Notice of Posting Supersedeas Bond</i>
12/23/2015	 Order

DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C

Filed By: Defendant Wynn Las Vegas LLC
Order on Supplemental Briefing Relating to the Proposed Testimony of Dr. Dunn and Dr. Tingey

12/23/2015

 Order Denying Motion

Filed By: Defendant Wynn Las Vegas LLC
Order Denying Plaintiff's Emergency Motion to Continue Trial

12/28/2015

 Supplement

Filed by: Defendant Wynn Las Vegas LLC
Defendant's Supplement to Motion to Retax Costs and Opposition to Plaintiff's Amended Application for Fees, Costs and Pre-Judgment Interest

12/28/2015

 Notice of Entry of Order


Filed By: Defendant Wynn Las Vegas LLC
Notice of Entry of Order

12/28/2015

 Notice of Entry of Order

Filed By: Defendant Wynn Las Vegas LLC
Notice of Entry of Order

12/30/2015

 Motion for Judgment

Filed By: Defendant Wynn Las Vegas LLC
Defendant Wynn Las Vegas, LLC's Renewed Motion for Judgment as a Matter of Law, or, Alternatively, Motion for New Trial or Remittitur

01/12/2016

 Recorders Transcript of Hearing

Transcript of Proceedings: Plaintiff's Emergency Motion to Continue Trial and for Sanctions on Order Shortening Time; Supplemental Brief on Motion in Limine -- 10-29-15

01/12/2016

 Recorders Transcript of Hearing


Transcript of Proceedings: Jury Trial - Day 1 -- 11-4-15

01/12/2016

 Recorders Transcript of Hearing

Transcript of Proceedings: Jury Trial - Day 2 -- 11-5-15

01/12/2016

 Recorders Transcript of Hearing


Transcript of Proceedings: Jury Trial - Day 3 -- 11-9-15

01/12/2016

 Recorders Transcript of Hearing

Transcript of Proceedings: Jury Trial - Day 4 -- 11-10-15

01/12/2016

 Recorders Transcript of Hearing

Transcript of Proceedings: Jury Trial - Day 5-- 11-12-15

01/12/2016

 Recorders Transcript of Hearing


Transcript of Proceedings: Jury Trial - Day 6 -- 11-13-15

01/12/2016

 Recorders Transcript of Hearing

Transcript of Proceedings: Jury Trial - Day 7 -- 11-16-15

01/14/2016

 Opposition to Motion

Filed By: Plaintiff O'Connell, Yvonne
Plaintiff's Opposition to Defendant's Motion to Retax Costs and Reply to Defendant's

DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C

Opposition to Plaintiff's Motion and Notice of Motion to Tax Costs and for Fees and Post-Judgment Interest

01/19/2016



Opposition to Motion

Filed By: Plaintiff O'Connell, Yvonne

Plaintiff's Opposition to Defendant's Renewed Motion for Judgment as a Matter of Law and Motion for New Trial

01/28/2016



Reply in Support

Filed By: Defendant Wynn Las Vegas LLC

Defendant Wynn Las Vegas, LLC's Reply in Support of Renewed Motion for Judgment as a Matter of Law, Or, Alternatively, Motion for New Trial or Remittitur

02/15/2016

Case Reassigned to Department 14

Reassigned From Judge Ellsworth - Dept 5

02/17/2016

Case Reassigned to Department 14

Reassignment From Judge Ellsworth - Dept 5

02/17/2016

Case Reassigned to Department 5

Case Retained by Judge Ellsworth

03/03/2016



Notice

Filed By: Defendant Wynn Las Vegas LLC

Notice of Related Authorities In Support Of Defendant Wynn Las Vegas, LLC's Renewed Motion for Judgment as a Matter of Law, or, Alternatively, Motion for New Trial or Remittitur

03/04/2016

Motion for Fees (8:30 AM) (Judicial Officer: Ellsworth, Carolyn)

Plaintiff's Amended Application for Fees, Costs and Pre-Judgment Interest - Amended and Resubmitted As - Plaintiff's Motion and Notice of Motion to Tax Costs and for Fees and Post-Judgment Interest

03/04/2016

Motion for Judgment (8:30 AM) (Judicial Officer: Ellsworth, Carolyn)

Defendant Wynn Las Vegas, LLC's Renewed Motion for Judgment as a Matter of Law, or, Alternatively, Motion for New Trial or Remittitur

03/04/2016



All Pending Motions (8:30 AM) (Judicial Officer: Ellsworth, Carolyn)

All Pending Motions: 3/4/16

05/24/2016



Order Denying Motion

Filed By: Plaintiff O'Connell, Yvonne

Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law or Alternatively for a New Trial or Remittitur

05/25/2016



Notice of Entry of Order

Filed By: Plaintiff O'Connell, Yvonne

Notice of Entry of Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law or Alternatively for a New Trial or Remittitur

06/08/2016



Notice of Appeal

Filed By: Defendant Wynn Las Vegas LLC

Notice of Appeal

06/08/2016














Case Appeal Statement

Filed By: Defendant Wynn Las Vegas LLC

Case Appeal Statement

DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C

06/29/2016	 Minute Order (3:00 AM) (Judicial Officer: Ellsworth, Carolyn)
07/13/2016	 Supplemental Brief Filed By: Plaintiff O'Connell, Yvonne <i>Supplemental Brief Regarding Deviating Above NRS 18.005(5)'s Expert Witness Statutory Cap Pursuant to the Frazier v. Duke Factors</i>
07/18/2016	 Errata Filed By: Plaintiff O'Connell, Yvonne <i>Errata to Supplemental Brief Regarding Deviating above NRS 18.005(5)'s Expert Witness Statutory Cap Pursuant to the Frazier v. Drake Factors</i>
07/26/2016	 Supplement Filed by: Defendant Wynn Las Vegas LLC <i>Defendant's Supplemental Response Brief Regarding Frazier v. Duke</i>
08/12/2016	 Hearing (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) <i>Hearing: Retax Costs</i>
09/13/2016	 Recorders Transcript of Hearing <i>Transcript Re: All Pending Motions -- 3-4-16</i>
09/13/2016	 Recorders Transcript of Hearing <i>Transcript Re: Hearing: Retax Costs 8-12-16</i>
11/09/2016	 Order Filed By: Defendant Wynn Las Vegas LLC <i>Order Partially Granting and Partially Denying Defendant's Motion to Retax Costs and Plaintiff's Motion to Tax Costs and for Fees, Costs and Post-Judgment Interest</i>
11/09/2016	Order (Judicial Officer: Ellsworth, Carolyn) Debtors: Wynn Las Vegas LLC (Defendant) Creditors: Yvonne O'Connell (Plaintiff) Judgment: 11/09/2016, Docketed: 11/16/2016 Total Judgment: 16,880.38
11/10/2016	 Notice of Entry of Order Filed By: Defendant Wynn Las Vegas LLC <i>Notice of Entry of Order</i>
11/17/2016	 Notice of Appeal Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Appeal</i>
11/17/2016	 Case Appeal Statement Filed By: Plaintiff O'Connell, Yvonne <i>Case Appeal Statement</i>

DATE	FINANCIAL INFORMATION
	Defendant Wynn Las Vegas LLC
	Total Charges 447.00
	Total Payments and Credits 447.00
	Balance Due as of 11/28/2016 0.00

DEPARTMENT 5
CASE SUMMARY
CASE NO. A-12-655992-C

Plaintiff O'Connell, Yvonne

Total Charges

294.00

Total Payments and Credits

294.00

Balance Due as of 11/28/2016

0.00

Defendant Wynn Las Vegas LLC

Appeal Bond Balance as of 11/28/2016

500.00

Plaintiff O'Connell, Yvonne

Appeal Bond Balance as of 11/28/2016

500.00



CIVIL COVER SHEET

CLARK County, Nevada

Case No. A-12-655992-C
(Assigned by Clerk's Office)

I. Party Information

Plaintiff(s) (name/address/phone): YVONNE O'CONNELL, an individual, IN PROPER PERSON8764 Captains Place, Las Vegas, NV 89117(702) 228-4424

Attorney (name/address/phone):

Defendant(s) (name/address/phone): WYNN RESORTS, LIMITED, a Nevada corporation, d/b/a WYNN LAS VEGAS; DOES I through X, inclusive; and ROE BUSINESS ENTITIES I through X, inclusive3131 Las Vegas Boulevard South, Clark County, State of Nevada.

Attorney (name/address/phone):

II. Nature of Controversy (Please check applicable bold category and applicable subcategory, if appropriate)

☐ Arbitration Requested

Civil Cases

Real Property

- ☐ **Landlord/Tenant**
- ☐ Unlawful Detainer
- ☐ **Title to Property**
- ☐ Foreclosure
- ☐ Liens
- ☐ Quiet Title
- ☐ Specific Performance
- ☐ **Condemnation/Eminent Domain**
- ☐ **Other Real Property**
- ☐ Partition
- ☐ Planning/Zoning

Torts

- ☐ **Negligence**
- ☐ Negligence - Auto
- ☐ Negligence - Medical/Dental
- ☒ **Negligence - Premises Liability**
(Slip/Fall)
- ☐ Negligence - Other

- ☐ **Product Liability**
- ☐ Product Liability/Motor Vehicle
- ☐ Other Torts/Product Liability
- ☐ **Intentional Misconduct**
- ☐ Torts/Defamation (Libel/Slander)
- ☐ Interfere with Contract Rights
- ☐ **Employment Torts** (Wrongful termination)
- ☐ **Other Torts**
- ☐ Anti-trust
- ☐ Fraud/Misrepresentation
- ☐ Insurance
- ☐ Legal Tort
- ☐ Unfair Competition

Probate

Estimated Estate Value: _____

- ☐ **Summary Administration**
- ☐ **General Administration**
- ☐ **Special Administration**
- ☐ **Set Aside Estates**
- ☐ **Trust/Conservatorships**
- ☐ Individual Trustee
- ☐ Corporate Trustee
- ☐ **Other Probate**

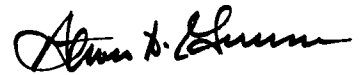
Other Civil Filing Types

- ☐ **Construction Defect**
- ☐ Chapter 40
- ☐ General
- ☐ **Breach of Contract**
- ☐ Building & Construction
- ☐ Insurance Carrier
- ☐ Commercial Instrument
- ☐ Other Contracts/Acct/Judgment
- ☐ Collection of Actions
- ☐ Employment Contract
- ☐ Guarantee
- ☐ Sale Contract
- ☐ Uniform Commercial Code
- ☐ **Civil Petition for Judicial Review**
- ☐ Foreclosure Mediation
- ☐ Other Administrative Law
- ☐ Department of Motor Vehicles
- ☐ Worker's Compensation Appeal
- ☐ **Appeal from Lower Court** (also check applicable civil case box)
- ☐ Transfer from Justice Court
- ☐ Justice Court Civil Appeal
- ☐ **Civil Writ**
- ☐ Other Special Proceeding
- ☐ **Other Civil Filing**
- ☐ Compromise of Minor's Claim
- ☐ Conversion of Property
- ☐ Damage to Property
- ☐ Employment Security
- ☐ Enforcement of Judgment
- ☐ Foreign Judgment - Civil
- ☐ Other Personal Property
- ☐ Recovery of Property
- ☐ Stockholder Suit
- ☐ Other Civil Matters

III. Business Court Requested (Please check applicable category; for Clark or Washoe Counties only.)

- ☐ NRS Chapters 78-88
- ☐ Investments (NRS 104 Art. 8)
- ☐ Enhanced Case Mgmt/Business
- ☐ Commodities (NRS 90)
- ☐ Deceptive Trade Practices (NRS 598)
- ☐ Other Business Court Matters
- ☐ Securities (NRS 90)
- ☐ Trademarks (NRS 600A)

FEBRUARY 6, 2012
DateYvonne O'Connell
Signature of initiating party or representative



CLERK OF THE COURT

ORDR

Lawrence J. Semenza, III, Esq., Bar No. 7174

Email: ljs@semenzalaw.com

Christopher D. Kircher, Esq., Bar No. 11176

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LAWRENCE J. SEMENZA, III, P.C.

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Las Vegas, Nevada 89145

Telephone: (702) 835-6803

Facsimile: (702) 920-8669

Attorneys for Defendant Wynn Las Vegas, LLC

d/b/a Wynn Las Vegas

DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, individually,

Plaintiff,

v.

WYNN LAS VEGAS, LLC, a Nevada
Limited Liability Company d/b/a WYNN
LAS VEGAS; DOES I through X; and ROE
CORPORATIONS I through X; inclusive,

Defendants.

Case No. A-12-655992-C

Dept. No. V

**ORDER PARTIALLY GRANTING
AND PARTIALLY DENYING
DEFENDANT'S MOTION TO RETAX
COSTS AND PLAINTIFF'S MOTION
TO TAX COSTS AND FOR FEES,
COSTS AND POST-JUDGMENT
INTEREST**

**Dates and Times of Hearings: March 4,
2016 at 8:30 a.m. and August 12, 2016 at
9:00 a.m.**

On March 4, 2016, the Court held a hearing on (1) Plaintiff Yvonne O'Connell's ("Plaintiff") Amended Application for Fees, Costs and Pre-Judgment Interest, amended and resubmitted as Plaintiff's Motion to Tax Costs and for Fees and Post-Judgment Interest (the "Amended Application for Fees") and on (2) Defendant Wynn Las Vegas, LLC's d/b/a Wynn Las Vegas ("Defendant") Motion to Re-tax Costs and Supplement to its Motion to Re-tax Costs (together "Motion to Re-tax"). Christian Morris, Esq. and Edward J. Wynder, Esq. of the Nettles Law Firm appeared on behalf of Plaintiff and Lawrence J. Semenza, III, Esq. and Christopher D. Kircher, Esq. of Lawrence J. Semenza, III, P.C. appeared on behalf of Defendant.

The Court, having reviewed the records and pleadings on file, as well as the oral argument of counsel, hereby rules as follows:

This is a personal injury action resulting from Plaintiff's slip and fall at Defendant's casino. A jury trial was held and the jury found in favor of Plaintiff on November 16, 2015. The jury awarded Plaintiff \$150,000 for past pain and suffering and \$250,000 for future pain and suffering, finding her to be 40% at fault. Plaintiff's total award was \$240,000. After the verdict was entered, Plaintiff filed her initial Application for Fees, Costs and Pre-Judgment Interest (the "Initial Application") on November 25, 2015, attaching a Memorandum of Costs as an exhibit. On December 7, 2015, Defendant filed its Opposition to the Initial Application and a Motion to Re-tax Costs. On December 21, 2015, Plaintiff filed an Amended Verified Memorandum of Costs and the above-described Amended Application for Fees. On December 28, 2015, Defendant filed its Supplement to its Motion to Re-tax Costs and Opposition to the Amended Application for Fees. On January 14, 2016, Plaintiff filed an Opposition to the Motion to Re-tax and Reply in support of her Amended Application for Fees.

On June 29, 2016 this Court issued a minute order for counsel to file supplemental briefs regarding the factors for awarding expert fees above \$1,500 outlined in *Frazier v. Duke*, 357 P.3d 365, 131 Nev. Adv. Op. 64 (Nev. Ct. App. 2015).

A. Legal Standards and Applicable Statutes

Plaintiff moves for fees and costs under both NRCP 68 and NRS 18.010. NRCP 68(f) provides:

1 If the offeree [of an offer of judgment] rejects an offer and fails to
2 obtain a more favorable judgment,

3 (1) the offeree cannot recover any costs or attorney's fees and shall
4 not recover interest for the period after the service of the offer and
5 before the judgment; and

6 (2) the offeree shall pay the offeror's post-offer costs, applicable
7 interest on the judgment from the time of the offer to the time of
8 entry of the judgment and reasonable attorney's fees, if any be
9 allowed, actually incurred by the offeror from the time of the offer.
10 If the offeror's attorney is collecting a contingent fee, the amount of
11 any attorney's fees awarded to the party for whom the offer is made
12 must be deducted from that contingent fee.

13 NRS 17.115(4) similarly provides, in relevant part:

14 Except as otherwise provided in this section, if a party who rejects
15 an offer of judgment fails to obtain a more favorable judgment, the
16 court:

17 (c) Shall order the party to pay the taxable costs incurred by the
18 party who made the offer; and

19 (d) May order the party to pay to the party who made the
20 offer...(3) Reasonable attorney's fees incurred by the party
21 who made the offer for the period from the date of service of
22 the offer to the date of entry of the judgment. If the attorney of
23 the party who made the offer is collecting a contingent fee, the
24 amount of any attorney's fees awarded to the party pursuant to
25 this subparagraph must be deducted from that contingent fee.

26 Additionally, NRS 18.010(2)(b) provides that fees may be awarded to the prevailing party
27 "[w]ithout regard to the recovery sought, when the court finds that the claim, counterclaim, cross-
28 claim or third-party complaint or defense of the opposing party was brought or maintained
without reasonable ground or to harass the prevailing party."

NRS 18.110(1)-(2) provides that whenever a party claims costs, she must file a verified
memorandum setting forth those costs within 5 days of entry of the judgment and that witness
fees are recoverable costs, regardless of whether the witness was subpoenaed, if the witness
testified at trial. NRS 18.110(4) allows the opposing party to file a motion to re-tax claimed costs
within 3 days of service of a copy of the memorandum of costs.

1 As a preliminary note, Defendant's first argument is that Plaintiff improperly and
2 unilaterally filed the Amended Application for Fees after reading Defendant's Opposition, so the
3 Court should only consider the Initial Application. Here, judgment was entered on December 15,
4 2015. Plaintiff filed the Initial Application well before this, on November 25, 2015. She also
5 filed her Amended Application for Fees on December 21, 2015, which is within the time limit set
6 forth in the rule (note that under EDCR 1.14(a), the period for filing is five *judicial* days from
7 entry of judgment). However, Defendant's Motion to Re-tax Costs as to the Initial Application
8 was due on December 2, 2015,¹ but it was not filed until December 7, 2015, and was thus
9 untimely.² Defendant's Motion to Re-tax as to the Amended Verified Memorandum of Costs was
10 timely, though. It is true that generally, supplemental briefing is allowed only by leave of court.
11 See EDCR 2.20(i). However, given that Defendant's first Motion to Re-tax Costs was untimely, it
12 would seem that it would be willing to waive its first argument in opposition to Plaintiff's
13 Amended Application for Fees.

14 **B. Analysis: Fees under NRCP 68**

15 In order for the penalties associated with the rejection of an offer of judgment to apply, the
16 offeree must not have obtained a more favorable judgment. NRCP 68(f); NRS 17.115(4). To
17 determine whether the offeree of a lump-sum³ offer of judgment obtained a more favorable
18 judgment, the amount of the offer must be compared to the amount of the offeree's *pre-offer*,
19 *taxable costs*. *McCrory v. Bianco*, 122 Nev. 102, 131 P.2d 573, 576, n. 10 (2006) (stating that
20 NRCP 68(g) must be read in conformance with NRS 17.115(5)(b)). Here, Plaintiff offered to
21 settle the case for \$49,999.00 on September 3, 2015. The verdict was in favor of Plaintiff for a
22 total of \$240,000.00. It seems that this may be a more favorable judgment, although Plaintiff has
23 neglected to specifically set forth her pre-offer taxable costs. On the other hand, Plaintiff's total
24

25 ¹ Plaintiff served the Initial Application on November 25, 2015.

26 ² Defendant argues that Plaintiff never actually served the initial Memorandum of Costs, but this is
27 disingenuous because Plaintiff did in fact serve her Initial Application that attached a Memorandum of
28 Costs as an Exhibit.

³ A lump-sum offer of judgment is one that includes all damages, legal costs, and attorneys' fees.

1 claimed costs were \$26,579.38 (whether pre- or post-offer) and that, together with the offer,
2 amounts to \$76,578.38. Plaintiff's jury recovery was well above this – \$240,000.00 – so it
3 appears that Plaintiff has met the threshold requirement to show entitlement to fees and costs
4 under Rule 68.

5 The determination of whether to grant fees to a party under NRCP 68 rests in the sound
6 discretion of the trial court. *Chavez v. Sievers*, 118 Nev. 288, 296, 43 P.3d 1022, 1027 (2002).
7 Such a decision will not be disturbed unless it is arbitrary and capricious. *Schouweiler v. Yancey*
8 *Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (1985). District courts must consider several factors
9 when making a fee determination under *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268,
10 274 (1963): (1) whether the plaintiff's claim was brought in good faith; (2) whether the offer was
11 reasonable and in good faith in timing and amount; (3) whether the decision to reject the offer was
12 grossly unreasonable or in bad faith; and (4) whether the sought fees are reasonable and justified.
13 However, where the defendant is the offeree of an offer of judgment, the first factor changes to a
14 consideration of whether the defendant's defenses were litigated in good faith. *See Yamaha Motor*
15 *Co. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998).

16 As to the first factor, whether Defendant's defenses were litigated in good faith, Plaintiff
17 argues that Defendant's defense that it had no notice of the liquid on the casino floor was in bad
18 faith because it failed to make an inquiry into the last time the floor was checked before Plaintiff
19 slipped. (Am. App. at 5-6.) Plaintiff also argues that Defendant's defense that there was no
20 causation here was unreasonable because it relied upon expert testimony that lacked a basis in
21 modern science. (*Id.* at 6.) Defendant's Motion to Re-tax and Opposition to the Amended
22 Application for Fees does not address whether its defenses were maintained in good faith.
23 However, Nevada case law has caused some confusion in differentiating between constructive
24 notice and the "mode of operation approach," the latter of which is specifically discussed in cases
25 decided subsequent to *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322-33
26 (1993). This is not a case where the law is black and white. Based on that and the evidence
27 presented at trial, it was not bad faith for Defendant to contend that it lacked notice of the
28 condition on the floor and Plaintiff in fact so concedes.

1 Furthermore, Plaintiff's evidence of constructive notice may have been enough to escape
2 the granting of a Rule 50 motion, but it was by no means overwhelming. Additionally, Plaintiff's
3 damages claims were reasonably disputed by expert testimony of a defense witness. That the jury
4 was not persuaded by this expert does not translate to bad faith by the Defendant. Thus, the first
5 factor therefore weighs in favor of the Defendant.

6 As to the second factor, Defendant argues that the offer was unreasonable in amount
7 because Plaintiff had no basis for its offer and that due to Plaintiff's "gamesmanship," Defendant
8 could not sufficiently evaluate the offer. (Opp. at 5-7.) Here, discovery closed on June 12, 2015.
9 Plaintiff was unable to submit proof of special medical damages at the time of trial because the
10 Court precluded them on the basis that they were not properly disclosed in discovery. This made
11 it extremely difficult for the Defense to evaluate a potential value of the case. An offer made at a
12 time when Plaintiff has not properly provided a calculation of damages is unreasonable. Thus, the
13 second factor weighs in favor of Defendant.

14 In ascertaining whether Defendant's decision to reject the offer was grossly unreasonable
15 or in bad faith, a pertinent consideration is whether enough information was available to
16 determine the merits of the offer. *Trustees of the Carpenters for S. Nev. Health & Welfare Trust*
17 *v. Better Building Co.*, 101 Nev. 742, 746, 710 P.2d 1379, 1382 (1985). Here, discovery closed
18 on June 12, 2015. The offer of judgment was made three months later, on September 3, 2015.
19 Given that at the time of the offer, Defendant had available all the materials obtained during
20 discovery, including witness depositions, Defendant's decision to reject the offer was well-
21 informed. Furthermore, the issues surrounding notice were not necessarily clear-cut, as evidenced
22 by the parties' pre-trial and post-trial motions on that issue. Overall, it is unlikely that Defendant's
23 rejection of the offer was grossly unreasonable or in bad faith, and in the end weighs in favor of
24 Defendant.

25 With regard to the last *Beattie* factor, the Court must undergo an analysis of whether
26 claimed fees were reasonable in light of the factors set forth in *Brunzell v. Golden Gate Nat'l*
27 *Bank*, 85 Nev. 345, 249, 455 P.2d 31, 33 (1969). Plaintiff has addressed some, but not all, of
28 these factors. Plaintiff's counsel has set forth the qualities of the advocate(s) on this case and, of

1 course, we know that a favorable result was obtained. However, Plaintiff has not provided any
2 bills setting forth what tasks were performed and the associated hours for those tasks. This
3 prevents the Court from determining whether the fees charged were reasonable in light of the
4 tasks actually performed. Therefore, because Plaintiff has not carried her burden under *Brunzell*,
5 this factor weighs in favor of Defendant. On the whole, all of the factors set forth in *Beattie* (as
6 modified by *Yamaha, supra*) weigh in favor of Defendant in this case and Plaintiff's Amended
7 Application for Fees should be **denied**.

8 **C. Analysis: Award of Costs**

9 Although NRCF 68 costs are only for post-offer costs, NRS 18.020(3) mandates awarding
10 all costs to Plaintiff since she prevailed in seeking damages in an amount more than \$2,500. NRS
11 18.110(1) requires the filing of a memorandum of costs by the party in whose favor judgment is
12 rendered, including a verification of the party, the party's attorney, or an agent of the party's
13 attorney that the costs are correct and were necessarily incurred.

14 The amount of awarded costs rests in the sole discretion of the trial court. *Bergmann v.*
15 *Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 565-66 (1993). The court also has "discretion when
16 determining the reasonableness of the individual costs to be awarded." *U.S. Design & Constr.*
17 *Corp. v. I.B.E.W. Local 357*, 118 Nev. 458, 463, 50 P.3d 170, 173 (2002). Claimed costs must be
18 "actual and reasonable, rather than a reasonable estimate or calculation of such costs." *Bobby*
19 *Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 385-86 (1998) (internal quotations
20 omitted). The Supreme Court has also indicated that claimed costs must be supported by
21 documentation and itemization. *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 971 P.2d 383
22 (1998). Defendant only challenges certain specific fees, each of which will be addressed in turn.

23 **1. Expert Witness Fees**

24 With regard to Mr. Presswood, his testimony was not used at trial because this Court ruled
25 that his testimony would be unreliable. Since his testimony was clearly inadmissible under the
26 *Hallmark* standard, as reflected in this Court's prior pre-trial ruling, his fees should not be
27 awarded.
28

1 Plaintiff seeks expert witness fees of \$6,000 for Craig Tingey, M.D. and \$10,000 for
2 Thomas Dunn, M.D. NRS 18.005(5) provides for recovery of “reasonable fees of not more than
3 five expert witnesses in an amount of not more than \$1,500 for each witness, unless the court
4 allows a larger fee after determining that the circumstances surrounding the expert’s testimony
5 were of such necessity as to require the larger fee.”

6 In order for an award of expert witness fees in excess of the statutory maximum to be
7 proper, the fees must not only be reasonable, but also “the circumstances surrounding [each]
8 expert’s testimony [must be] of such necessity as to require the larger fee.” *Frazier*, 357 P.3d at
9 374 (citing NRS 18.005(5); *Logan v. Abe*, 131 Nev. ---, ---, 350 P.3d 1139, 1144 (2015)). In
10 crafting its decision, the Court of Appeals used the limited Nevada Supreme Court authority
11 available as well as extra-jurisdictional authority, particularly from Idaho (which has a statute
12 similar to NRS 18.005(5)), Louisiana, Connecticut, and Massachusetts.

13 Ultimately, the Nevada Court of Appeals set forth a nonexhaustive list of factors, some of
14 which may not necessarily be pertinent to every request for expert witness fees in excess of
15 \$1,500. The factors in evaluating requests for awards over the statutory maximum include:

- 16 1. The importance of the expert’s testimony to the party’s case;
- 17 2. the degree to which the expert’s opinion aided the trier of fact in deciding the case;
- 18 3. whether the expert’s reports or testimony were repetitive of other expert witnesses;
- 19 4. the extent and nature of the work performed by the expert;
- 20 5. whether the expert had to conduct independent investigations or testing;
- 21 6. the amount of time the expert spent in court, preparing a report, and preparing for
22 trial;
- 23 7. the expert’s area of expertise;
- 24 8. the expert’s education and training;
- 25 9. the fee actually charged to the party who retained the expert;
- 26 10. the fees traditionally charged by the expert on related matters;
- 27 11. comparable experts’ fees charged in similar cases; and
- 28

12. if an expert is retained from outside the area where the trial is held, the fees and costs that would have been incurred to hire a comparable expert where the trial was held.

Frazier, 357 P.3d at 377-78.

Plaintiff argues that pursuant to *Frazier*, this Court should award the entire \$6,000 for Dr. Tingey's fee. (Pl. Supp. Brief at 3-4.) Additionally, Plaintiff argues that this Court should award at least \$5,000 of Dr. Dunn's fee if not the entire amount. (Pl. Supp. Brief at 3-4.) In its brief, rather than discussing the *Frazier* factors in the brief itself, Defendant incorporated by reference its arguments set forth related to the "expert costs." Specifically, Defendant directs this Court to pages 10-13 of its Opposition to Plaintiff's Application for Fees, Costs and Pre-Judgment Interest and Motion to Retax Costs filed on December 7, 2016 as well as pages 7 and 8 of Defendant's Supplement to Motion to Retax Costs and Opposition to Plaintiff's Amended Application for Fees, Costs and Prejudgment Interest filed on December 28, 2016. In sum, Defendant argues there is not a sufficient basis to award Plaintiff expert costs for her treating physicians at all and especially not above the statutory maximum of \$1,500. (Def. Supp. Brief at 4.)

The Importance of the expert's testimony

Plaintiff argues that Dr. Tingey testified primarily regarding Plaintiff's right knee and Dr. Dunn testified primarily regarding Plaintiff's spine. (Pl. Supp. Brief at 5.) Both parties agree that the doctors testified that the injuries to the right knee and cervical spine were caused by the slip and fall. However, the parties disagree as to how important that testimony was to Plaintiff's case. Plaintiff argues that the testimony "formed the lynchpin" of Plaintiff's causation argument. (Pl. Supp. Brief at 6.) Alternatively, Defendant argues that the doctors did not add anything substantive to trial, because the doctors based their opinions solely on Plaintiff's subjective physical complaints without reviewing her medical history. (Def. Opp. to Pl. Motion for Fees at 12.) Defendant further argues that the doctors' opinions were unreliable, repetitive and unnecessary because Plaintiff testified regarding her subjective complaints of pain and injury. (Def. Opposition at 12.) Finally, Defendant argues that experts are generally needed in personal injury cases to testify regarding the necessity of past or future medical treatment or the reasonableness of costs, and because Plaintiff did not seek these damages, the doctors' testimony

1 was largely duplicative of Plaintiff's testimony and therefore unimportant in aiding the jury in
2 deciding the case. (Def. Opposition at 12.)

3 Even though the doctors based their opinions on the subjective pain about which the
4 Plaintiff testified at trial, the causation opinion was probably important to Plaintiff's case.
5 Further, even though Plaintiff did not seek any medical special damages, but only pain and
6 suffering, the doctors' testimony regarding causation was still important to Plaintiff's case,
7 because the testimony relates to the causation element of Plaintiff's claim. **Therefore, the first**
8 **factor favors the Plaintiff.**

9 *Whether the expert's reports or testimony were repetitive of other expert witnesses*

10 Defendant argues, as noted above, that the doctors' testimony was largely duplicative of
11 Plaintiff's testimony. (Def. Opposition at 12.) However, this factor relates to whether the
12 expert's testimony is repetitive of other experts. Here, Dr. Tingey testified regarding Plaintiff's
13 knee and Dr. Dunn testified regarding Plaintiff's spine. (Pl. Supp. Brief at 7.) Each expert
14 testified regarding different injuries resulting from the same slip and fall. **Therefore, the second**
15 **factor favors the Plaintiff.**

16 *The extent and nature of the work performed by the expert*

17 Defendant argues that both Dr. Dunn and Dr. Tingey admitted they did not perform much
18 work to prepare for trial. (Def. Opposition at 12.) However, Plaintiff believes this factor not only
19 weighs in her favor, but should be given more weight than other factors. (Pl. Supp. Brief at 7.)
20 Defendant argues that the doctors were treating physicians, not retained expert witnesses. (Def.
21 Opposition at 12.) Additionally, Defendant argues that the doctors did not prepare a written
22 expert report and were not deposed. (Def. Opposition at 12.) However, the Plaintiff is not asking
23 for money for depositions or reports. Instead, with respect to Dr. Tingey, Plaintiff is asking for
24 costs incurred for a telephone conference, file review and for his appearance and testimony at
25 trial. (Pl. Supp. Brief at 3.) With respect to Dr. Dunn, Plaintiff seeks costs incurred for the file
26 review and trial testimony. (Pl. Supp. Brief at 3.) Defendant merely argues that \$16,000 is
27 "simply absurd" for the work performed. (Def. Opposition at 12.) Alternatively, Plaintiff argues
28 that Drs. Tingey and Dunn are orthopaedic doctors who routinely perform surgeries on sensitive

1 areas of the body and are skilled professionals that perform work few others can perform.
2 However, Plaintiff did not describe the extent of the doctors' work as treating physicians. The
3 Court assumes that this is relevant to the fee that they can command as a result of having to leave
4 their normal practice in order to attend court. Plaintiff notes that Dr. Tingey was part of a
5 telephone conference, conducted a file review, and testified at trial. Additionally, Plaintiff noted
6 that Dr. Dunn conducted a file review and testified at trial on two separate days.

7 While the Defendant argues the doctors did not perform some work associated with expert
8 witnesses such as preparing a report, the doctors did review records and testified at trial.
9 **Therefore, given that Drs. Tingey and Dunn spent time reviewing records for trial and**
10 **actually testified, the third factor favors the Plaintiff.**

11 *Whether the expert had to conduct independent investigations or testing*

12 Defendant does not provide any additional argument with respect to this factor. Plaintiff
13 argues that this factor is irrelevant to this case because Dr. Tingey and Dr. Dunn performed the
14 work of any other treating physician. (Pl. Supp. Brief at 8.) However, this factor is not irrelevant
15 as Plaintiff argues, but rather this factor simply does not favor Plaintiff's argument, because the
16 doctors did not conduct and independent investigations or testing outside the ordinary course of
17 treatment. **Therefore, this factor does not favor an increased fee because neither doctor**
18 **performed work above and beyond that of a regular treating physician.**

19 *The amount of time the expert spent in court, preparing a report, and preparing for trial*

20 As stated above, Defendant argues that Dr. Tingey and Dr. Dunn did not prepare a report,
21 did not spend much time preparing for trial, and did not even spend that much time testifying in
22 court (Approximately 2-3 hours each). (Def. Opp. at 12.) Plaintiff argues that the fees are
23 customary for each doctor's specialty and their testimony required time away from their practices,
24 which does not address this factor. (Pl. Supp. Brief at 8.) Even though the doctors may not have
25 spent a lot of time in court, the doctors still spent several hours testifying. While Dr. Dunn had to
26 return for a second day, this was an accommodation by the court to the doctor's schedule.
27 **Therefore, this factor favors the Plaintiff regarding Dr. Tingey, but the Defendant**
28 **concerning Dr. Dunn's fees for 2 days.**

The expert's area of expertise, education, and training

Defendant does not make any additional argument with respect to this factor. Plaintiff notes that Dr. Tingey is board certified in orthopaedic surgery who focuses on ailments affecting the shoulders, hips, and knees. (Pl. Supp. Brief at 8.) Dr. Tingey graduated from medical school in 1999. (Pl. Supp. Brief Exhibit 1.) He completed a General Surgery Internship at Loma Linda University School of Medicine following graduation. (Pl. Supp. Brief Exhibit 1.) Additionally, Dr. Tingey was an Orthopaedic Surgery Resident and Loma Linda from 2000-2004. (Pl. Supp. Brief Exhibit 1.)

Dr. Dunn is a board certified orthopaedic surgeon specializing in spine surgery and disorders affecting the neck and back. (Pl. Supp. Brief Exhibit 2.) Plaintiff references the doctors' CV's for additional qualifications. Dr. Dunn graduated from Medical School in June of 1985 from the UC Irvine College of Medicine. (Pl. Supp. Brief Exhibit 2.) Upon graduation, Dr. Dunn completed a general surgery internship at the UC Irvine College of Medicine. (Pl. Supp. Brief Exhibit 2.) Dr. Dunn completed his residency at the UC Irvine School of Medicine and from 1991 to 1992 was a fellow at Rancho Los Amigos Hospital. (Pl. Supp. Brief Exhibit 2.)

The doctors seem to have the requisite education and experience that would justify an increased fee. Both Doctors graduated from Medical School over 15 years ago and are board certified surgeons. **Given the doctors' education and board certifications, this factor favors the Plaintiff.**

The fee actually charged to the party who retained the expert

Defendant does not make any additional argument with respect to this factor. Plaintiff notes that Dr. Tingey's fee of \$6,000 was actually charged and paid, and Dr. Dunn's fee of \$10,000 was actually charged and paid. (Pl. Supp. Brief at 9.) **Therefore, this factor favors the Plaintiff.**

Comparable experts' fees charged in similar cases

Defendant does not make any additional argument with respect to this factor. Plaintiff argues that a "flat-fee" for court appearances is common for medical experts in Las Vegas and cites to Dr. Victor Klausner's fee schedule, which uses a flat-fee structure at \$2,500 per ½ day or

1 \$5,000 per day. Plaintiff also points to “routinely used orthopaedic defense expert” Dr. Serfustini
2 as another example of an expert who uses a flat-fee structure for court appearances. Finally,
3 Plaintiff points to Dr. Muir as an example of a spine surgeon who charges the same as Dr. Tingey
4 and Dr. Dunn for court appearances. (Pl. Supp. Brief at 9.)

5 While Plaintiff argues Dr. Klausner’s credentials are not as distinguished as Drs. Tingey
6 and Dunn, this argument seems to ask the court to compare the qualifications of the experts rather
7 than compare expert fees. A more compelling point regarding Dr. Klausner is that he charges
8 \$2,500 per half day and \$5,000 per day (same as Dr. Dunn), and he is not a board certified
9 surgeon, which suggests that Dr. Tingey and Dr. Dunn’s fees are fair and reasonable. Dr. Muir is
10 a spine surgeon. Dr. Muir charges the same amount as Dr. Dunn and Dr. Tingey for court
11 appearances, and those three doctors are similar because they graduated from Medical School
12 over 15 years ago and perform surgeries and treatments on sensitive areas of the human body.
13 **Therefore, this factor favors the Plaintiff’s request for excess fees above \$1,500.00.**

14 Based upon the *Frazier* factors and the briefing by the Parties, the Court should award
15 expert witness costs in excess of the NRS 18.005(5) statutory cap, \$5,000 for Dr. Tingey’s fees
16 and \$5,000 for Dr. Dunn’s fees. Both doctors are similarly situated and testified for similar
17 lengths of time. Dr. Dunn’s fee of \$10,000 was apparently charged because he testified on two
18 separate days. This could have been avoided by better planning on the part of Plaintiff’s trial
19 counsel and the defense should not bear that extra expense.

20 Hence, as to the expert fees, Defendant’s Motion to Re-tax should be **granted in part**.

21 **2. Service Fees**

22 NRS 18.005(7) allows recovery of service fees. Defendant next challenges the service
23 fees claimed by Plaintiff in serving Yanet Elias, Corey Prowell, and Salvatore Risco. (Mot. to
24 Re-tax Costs at 8-9.) Plaintiff acknowledges that all costs must be both reasonable and *necessary*.
25 As to Yanet Elias and Corey Prowell, each was an employee of Defendant and Defendant points
26 out that it had accepted service for those persons. Even with the agreement that service can be
27 made upon counsel instead of the witness, however, does not eliminate the need to serve and the
28 fees would be necessary and she should be **granted** those fees.

1 As to Mr. Risco, Defendant argues that the service fees were unnecessary and
2 unreasonable because Plaintiff's counsel had good communication with him. However, unlike the
3 other two employee-witnesses, Mr. Risco was not a party to this case or an agent of a party to this
4 case, so service of a subpoena upon him was necessary. Additionally, Plaintiff has outlined
5 sufficient reasons for the amount of the claimed charge that show it to be reasonable and she
6 should be **granted** those fees.

7 **3. Jury Fees**

8 NRS 18.005(3) specifically allows an award of jury fees as an element of costs.
9 Defendant next argues it should not be responsible for the jury fees because Plaintiff failed to
10 request a jury trial within the time allowed. (Mot. to Re-tax Costs at 9.) Defendant essentially
11 only argues that because Plaintiff's demand for a jury trial was untimely and this should have been
12 a bench trial, it should not have to pay for the jury fees. However, those arguments are premised
13 on challenging this Court's grant of Plaintiff's request for a jury trial and the time for
14 reconsidering that decision has long since passed. Moreover, both parties had prepared this entire
15 case under the assumption that it was going to be tried by jury, so Defendant was not prejudiced
16 by the Court's ruling in any event. Since the jury fees were actually incurred and reasonable,
17 Defendant's Motion to Re-tax as to those fees should be denied, and Plaintiff should be **granted**
18 the jury fees incurred.

19 **4. Parking Fees**

20 NRS 18.005(17) allows the court to award any other reasonable costs actually incurred.
21 This would, of course, include costs incurred in parking for hearings and the like. Defendant
22 argues that there were other free places Plaintiff could have parked. (Mot. to Re-tax Costs at 9.)
23 This may or may not be true, but Defendant's argument is conclusory in any event. Because
24 Plaintiff actually incurred the parking costs, they should be **granted**.

25 **5. Skip Trace Fees**

26 Defendant lastly argues that Plaintiff's request for skip trace/investigative fees for Terry
27 Ruby were unreasonable and unnecessary. (Mot. to Re-tax Costs at 9.) Terry Ruby is a former
28

1 employee of Defendant and was the first to respond to Plaintiff's fall. (Opp. at 8.) It is clear why
2 Plaintiff would have a need to locate and depose Mr. Ruby. A \$150.00 fee for that service is not
3 unreasonable, given the extreme costs associated with reporting services like Accurint.
4 Therefore, Defendant's Motion to Re-tax as to the skip trace fee should be denied, and Plaintiff
5 should be **granted** that amount as a cost.

6 **6. Remaining Fees**

7 Defendant does not challenge the remaining requested fees. Plaintiff has attached back-up
8 documentation for each claimed cost and they all seem to be reasonable and within the going
9 market rate for each associated service. Plaintiff has therefore carried her burden under *Berosini*
10 and the remaining costs requested should be awarded. Therefore, Plaintiff's Amended
11 Application for Fees as to costs should be **granted** as to the remaining costs sought, as set forth
12 herein.

13 Based on the foregoing, with good cause appearing:

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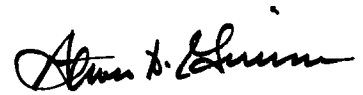
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IT IS HEREBY ORDERED that Plaintiff's Amended Application for Fees and Defendant's Motion to Re-tax are both **GRANTED IN PART, DENIED IN PART**. The requested attorney's fees are denied and Plaintiff is not awarded any attorney's fees related to this matter. Plaintiff's requested costs in this matter is partially granted, but the amount of costs set forth in Plaintiff's Amended Verified Memorandum of Costs is reduced by \$9,699.00 from the amount sought of \$26,579.38. As a result, Plaintiff is granted costs in the total sum of \$16,880.38.


EIGHTH JUDICIAL DISTRICT COURT JUDGE

IT IS HEREBY ORDERED that Plaintiff's Amended Application for Fees and Defendant's Motion to Re-tax are both **GRANTED IN PART, DENIED IN PART**. The requested attorney's fees are denied and Plaintiff is not awarded any attorney's fees related to this matter. Plaintiff's requested costs in this matter is partially granted, but the amount of costs set forth in Plaintiff's Amended Verified Memorandum of Costs is reduced by \$9,699.00 from the amount sought of \$26,579.38. As a result, Plaintiff is granted costs in the total sum of \$16,880.38.



CLERK OF THE COURT

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12 *d/b/a Wynn Las Vegas*

13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 YVONNE O'CONNELL, individually,

16 Plaintiff,

17 v.

18 WYNN LAS VEGAS, LLC, a Nevada
19 Limited Liability Company, doing business as
20 WYNN LAS VEGAS; DOES I through X;
21 and ROE CORPORATIONS I through X;
22 inclusive;

23 Defendants.

Case No. A-12-655992-C

Dept. No. V

NOTICE OF ENTRY OF ORDER

24 PLEASE TAKE NOTICE that an Order was entered by the Court on November 9, 2016, a
25 true and complete copy of which is attached hereto.

26 DATED this 10th day of November, 2016.

27 LAWRENCE J. SEMENZA, III, P.C.

28 /s/ Christopher D. Kircher

Lawrence J. Semenza, III, Esq., Bar No. 7174

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b) and NEFCR 9, I certify that I am an employee of Lawrence J. Semenza, III, P.C., and that on this 10th day of November, 2016 I caused to be sent through electronic transmission via Wiznet's online system, a true copy of the foregoing **NOTICE OF ENTRY OF ORDER** to the following registered e-mail addresses:

NETTLES LAW FIRM

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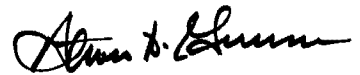
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CLERK OF THE COURT

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d/b/a Wynn Las Vegas

DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, individually,

Plaintiff,

v.

WYNN LAS VEGAS, LLC, a Nevada
Limited Liability Company d/b/a WYNN
LAS VEGAS; DOES I through X; and ROE
CORPORATIONS I through X; inclusive,

Defendants.

Case No. A-12-655992-C

Dept. No. V

**ORDER PARTIALLY GRANTING
AND PARTIALLY DENYING
DEFENDANT'S MOTION TO RETAX
COSTS AND PLAINTFF'S MOTION
TO TAX COSTS AND FOR FEES,
COSTS AND POST-JUDGMENT
INTEREST**

**Dates and Times of Hearings: March 4,
2016 at 8:30 a.m. and August 12, 2016 at
9:00 a.m.**

On March 4, 2016, the Court held a hearing on (1) Plaintiff Yvonne O'Connell's ("Plaintiff") Amended Application for Fees, Costs and Pre-Judgment Interest, amended and resubmitted as Plaintiff's Motion to Tax Costs and for Fees and Post-Judgment Interest (the "Amended Application for Fees") and on (2) Defendant Wynn Las Vegas, LLC's d/b/a Wynn Las Vegas ("Defendant") Motion to Re-tax Costs and Supplement to its Motion to Re-tax Costs (together "Motion to Re-tax"). Christian Morris, Esq. and Edward J. Wynder, Esq. of the Nettles Law Firm appeared on behalf of Plaintiff and Lawrence J. Semenza, III, Esq. and Christopher D. Kircher, Esq. of Lawrence J. Semenza, III, P.C. appeared on behalf of Defendant.

I. FACTUAL BACKGROUND

This is a personal injury action resulting from Plaintiff's slip and fall at Defendant's casino. A jury trial was held and the jury found in favor of Plaintiff on November 16, 2015. The jury awarded Plaintiff \$150,000 for past pain and suffering and \$250,000 for future pain and suffering, finding her to be 40% at fault. Plaintiff's total award was \$240,000. After the verdict was entered, Plaintiff filed her initial Application for Fees, Costs and Pre-Judgment Interest (the "Initial Application") on November 25, 2015, attaching a Memorandum of Costs as an exhibit. On December 7, 2015, Defendant filed its Opposition to the Initial Application and a Motion to Re-tax Costs. On December 21, 2015, Plaintiff filed an Amended Verified Memorandum of Costs and the above-described Amended Application for Fees. On December 28, 2015, Defendant filed its Supplement to its Motion to Re-tax Costs and Opposition to the Amended Application for Fees. On January 14, 2016, Plaintiff filed an Opposition to the Motion to Re-tax and Reply in support of her Amended Application for Fees.

II. DISCUSSION

A. Legal Standards and Applicable Statutes

Plaintiff moves for fees and costs under both NRCP 68 and NRS 18.010. NRCP 68(f) provides:

1 If the offeree [of an offer of judgment] rejects an offer and fails to
2 obtain a more favorable judgment,

3 (1) the offeree cannot recover any costs or attorney's fees and shall
4 not recover interest for the period after the service of the offer and
5 before the judgment; and

6 (2) the offeree shall pay the offeror's post-offer costs, applicable
7 interest on the judgment from the time of the offer to the time of
8 entry of the judgment and reasonable attorney's fees, if any be
9 allowed, actually incurred by the offeror from the time of the offer.
10 If the offeror's attorney is collecting a contingent fee, the amount of
11 any attorney's fees awarded to the party for whom the offer is made
12 must be deducted from that contingent fee.

13 NRS 17.115(4) similarly provides, in relevant part:

14 Except as otherwise provided in this section, if a party who rejects
15 an offer of judgment fails to obtain a more favorable judgment, the
16 court:

17 (c) Shall order the party to pay the taxable costs incurred by the
18 party who made the offer; and

19 (d) May order the party to pay to the party who made the
20 offer...(3) Reasonable attorney's fees incurred by the party
21 who made the offer for the period from the date of service of
22 the offer to the date of entry of the judgment. If the attorney of
23 the party who made the offer is collecting a contingent fee, the
24 amount of any attorney's fees awarded to the party pursuant to
25 this subparagraph must be deducted from that contingent fee.

26 Additionally, NRS 18.010(2)(b) provides that fees may be awarded to the prevailing party
27 "[w]ithout regard to the recovery sought, when the court finds that the claim, counterclaim, cross-
28 claim or third-party complaint or defense of the opposing party was brought or maintained
without reasonable ground or to harass the prevailing party."

NRS 18.110(1)-(2) provides that whenever a party claims costs, she must file a verified
memorandum setting forth those costs within 5 days of entry of the judgment and that witness
fees are recoverable costs, regardless of whether the witness was subpoenaed, if the witness
testified at trial. NRS 18.110(4) allows the opposing party to file a motion to re-tax claimed costs
within 3 days of service of a copy of the memorandum of costs.

1 As a preliminary note, Defendant's first argument is that Plaintiff improperly and
2 unilaterally filed the Amended Application for Fees after reading Defendant's Opposition, so the
3 Court should only consider the Initial Application. Here, judgment was entered on December 15,
4 2015. Plaintiff filed the Initial Application well before this, on November 25, 2015. She also
5 filed her Amended Application for Fees on December 21, 2015, which is within the time limit set
6 forth in the rule (note that under EDCR 1.14(a), the period for filing is five *judicial* days from
7 entry of judgment). However, Defendant's Motion to Re-tax Costs as to the Initial Application
8 was due on December 2, 2015,¹ but it was not filed until December 7, 2015, and was thus
9 untimely.² Defendant's Motion to Re-tax as to the Amended Verified Memorandum of Costs was
10 timely, though. It is true that generally, supplemental briefing is allowed only by leave of court.
11 See EDCR 2.20(i). However, given that Defendant's first Motion to Re-tax Costs was untimely, it
12 would seem that it would be willing to waive its first argument in opposition to Plaintiff's
13 Amended Application for Fees.

14 **B. Analysis: Fees under NRCP 68**

15 In order for the penalties associated with the rejection of an offer of judgment to apply, the
16 offeree must not have obtained a more favorable judgment. NRCP 68(f); NRS 17.115(4). To
17 determine whether the offeree of a lump-sum³ offer of judgment obtained a more favorable
18 judgment, the amount of the offer must be compared to the amount of the offeree's *pre-offer*,
19 *taxable costs*. *McCrory v. Bianco*, 122 Nev. 102, 131 P.2d 573, 576, n. 10 (2006) (stating that
20 NRCP 68(g) must be read in conformance with NRS 17.115(5)(b)). Here, Plaintiff offered to
21 settle the case for \$49,999.00 on September 3, 2015. The verdict was in favor of Plaintiff for a
22 total of \$240,000.00. It seems that this may be a more favorable judgment, although Plaintiff has
23 neglected to specifically set forth her pre-offer taxable costs. On the other hand, Plaintiff's total
24

25 ¹ Plaintiff served the Initial Application on November 25, 2015.

26 ² Defendant argues that Plaintiff never actually served the initial Memorandum of Costs, but this is
27 disingenuous because Plaintiff did in fact serve her Initial Application that attached a Memorandum of
28 Costs as an Exhibit.

³ A lump-sum offer of judgment is one that includes all damages, legal costs, and attorneys' fees.

1 claimed costs were \$26,579.38 (whether pre- or post-offer) and that, together with the offer,
2 amounts to \$76,578.38. Plaintiff's jury recovery was well above this – \$240,000.00 – so it
3 appears that Plaintiff has met the threshold requirement to show entitlement to fees and costs
4 under Rule 68.

5 The determination of whether to grant fees to a party under NRCP 68 rests in the sound
6 discretion of the trial court. *Chavez v. Sievers*, 118 Nev. 288, 296, 43 P.3d 1022, 1027 (2002).
7 Such a decision will not be disturbed unless it is arbitrary and capricious. *Schouweiler v. Yancey*
8 *Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (1985). District courts must consider several factors
9 when making a fee determination under *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268,
10 274 (1963): (1) whether the plaintiff's claim was brought in good faith; (2) whether the offer was
11 reasonable and in good faith in timing and amount; (3) whether the decision to reject the offer was
12 grossly unreasonable or in bad faith; and (4) whether the sought fees are reasonable and justified.
13 However, where the defendant is the offeree of an offer of judgment, the first factor changes to a
14 consideration of whether the defendant's defenses were litigated in good faith. *See Yamaha Motor*
15 *Co. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998).

16 As to the first factor, whether Defendant's defenses were litigated in good faith, Plaintiff
17 argues that Defendant's defense that it had no notice of the liquid on the casino floor was in bad
18 faith because it failed to make an inquiry into the last time the floor was checked before Plaintiff
19 slipped. (Am. App. at 5-6.) Plaintiff also argues that Defendant's defense that there was no
20 causation here was unreasonable because it relied upon expert testimony that lacked a basis in
21 modern science. (*Id.* at 6.) Defendant's Motion to Re-tax and Opposition to the Amended
22 Application for Fees does not address whether its defenses were maintained in good faith.
23 However, Nevada case law has caused some confusion in differentiating between constructive
24 notice and the "mode of operation approach," the latter of which is specifically discussed in cases
25 decided subsequent to *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320. 322-33
26 (1993). This is not a case where the law is black and white. Based on that and the evidence
27 presented at trial, it was not bad faith for Defendant to contend that it lacked notice of the
28 condition on the floor and Plaintiff in fact so concedes.

1 Furthermore, Plaintiff's evidence of constructive notice may have been enough to escape
2 the granting of a Rule 50 motion, but it was by no means overwhelming. Additionally, Plaintiff's
3 damages claims were reasonably disputed by expert testimony of a defense witness. That the jury
4 was not persuaded by this expert does not translate to bad faith by the Defendant. Thus, the first
5 factor therefore weighs in favor of the Defendant.

6 As to the second factor, Defendant argues that the offer was unreasonable in amount
7 because Plaintiff had no basis for its offer and that due to Plaintiff's "gamesmanship," Defendant
8 could not sufficiently evaluate the offer. (Opp. at 5-7.) Here, discovery closed on June 12, 2015.
9 Plaintiff was unable to submit proof of special medical damages at the time of trial because the
10 Court precluded them on the basis that they were not properly disclosed in discovery. This made
11 it extremely difficult for the Defense to evaluate a potential value of the case. An offer made at a
12 time when Plaintiff has not properly provided a calculation of damages is unreasonable. Thus, the
13 second factor weighs in favor of Defendant.

14 In ascertaining whether Defendant's decision to reject the offer was grossly unreasonable
15 or in bad faith, a pertinent consideration is whether enough information was available to
16 determine the merits of the offer. *Trustees of the Carpenters for S. Nev. Health & Welfare Trust*
17 *v. Better Building Co.*, 101 Nev. 742, 746, 710 P.2d 1379, 1382 (1985). Here, discovery closed
18 on June 12, 2015. The offer of judgment was made three months later, on September 3, 2015.
19 Given that at the time of the offer, Defendant had available all the materials obtained during
20 discovery, including witness depositions, Defendant's decision to reject the offer was well-
21 informed. Furthermore, the issues surrounding notice were not necessarily clear-cut, as evidenced
22 by the parties' pre-trial and post-trial motions on that issue. Overall, it is unlikely that Defendant's
23 rejection of the offer was grossly unreasonable or in bad faith, and in the end weighs in favor of
24 Defendant.

25 With regard to the last *Beattie* factor, the Court must undergo an analysis of whether
26 claimed fees were reasonable in light of the factors set forth in *Brunzell v. Golden Gate Nat'l*
27 *Bank*, 85 Nev. 345, 249, 455 P.2d 31, 33 (1969). Plaintiff has addressed some, but not all, of
28 these factors. Plaintiff's counsel has set forth the qualities of the advocate(s) on this case and, of

1 course, we know that a favorable result was obtained. However, Plaintiff has not provided any
2 bills setting forth what tasks were performed and the associated hours for those tasks. This
3 prevents the Court from determining whether the fees charged were reasonable in light of the
4 tasks actually performed. Therefore, because Plaintiff has not carried her burden under *Brunzell*,
5 this factor weighs in favor of Defendant. On the whole, all of the factors set forth in *Beattie* (as
6 modified by *Yamaha, supra*) weigh in favor of Defendant in this case and Plaintiff's Amended
7 Application for Fees should be **denied**.

8 **C. Analysis: Award of Costs**

9 Although NRCF 68 costs are only for post-offer costs, NRS 18.020(3) mandates awarding
10 all costs to Plaintiff since she prevailed in seeking damages in an amount more than \$2,500. NRS
11 18.110(1) requires the filing of a memorandum of costs by the party in whose favor judgment is
12 rendered, including a verification of the party, the party's attorney, or an agent of the party's
13 attorney that the costs are correct and were necessarily incurred.

14 The amount of awarded costs rests in the sole discretion of the trial court. *Bergmann v.*
15 *Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 565-66 (1993). The court also has "discretion when
16 determining the reasonableness of the individual costs to be awarded." *U.S. Design & Constr.*
17 *Corp. v. I.B.E.W. Local 357*, 118 Nev. 458, 463, 50 P.3d 170, 173 (2002). Claimed costs must be
18 "actual and reasonable, rather than a reasonable estimate or calculation of such costs." *Bobby*
19 *Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 385-86 (1998) (internal quotations
20 omitted). The Supreme Court has also indicated that claimed costs must be supported by
21 documentation and itemization. *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 971 P.2d 383
22 (1998). Defendant only challenges certain specific fees, each of which will be addressed in turn.

23 **1. Expert Witness Fees**

24 With regard to Mr. Presswood, his testimony was not used at trial because this Court ruled
25 that his testimony would be unreliable. Since his testimony was clearly inadmissible under the
26 *Hallmark* standard, as reflected in this Court's prior pre-trial ruling, his fees should not be
27 awarded.
28

1 Plaintiff seeks expert witness fees of \$6,000 for Craig Tingey, M.D. and \$10,000 for
2 Thomas Dunn, M.D. NRS 18.005(5) provides for recovery of “reasonable fees of not more than
3 five expert witnesses in an amount of not more than \$1,500 for each witness, unless the court
4 allows a larger fee after determining that the circumstances surrounding the expert’s testimony
5 were of such necessity as to require the larger fee.”

6 In order for an award of expert witness fees in excess of the statutory maximum to be
7 proper, the fees must not only be reasonable, but also “the circumstances surrounding [each]
8 expert’s testimony [must be] of such necessity as to require the larger fee.” *Frazier*, 357 P.3d at
9 374 (citing NRS 18.005(5); *Logan v. Abe*, 131 Nev. ---, ---, 350 P.3d 1139, 1144 (2015)). In
10 crafting its decision, the Court of Appeals used the limited Nevada Supreme Court authority
11 available as well as extra-jurisdictional authority, particularly from Idaho (which has a statute
12 similar to NRS 18.005(5)), Louisiana, Connecticut, and Massachusetts.

13 Ultimately, the Nevada Court of Appeals set forth a nonexhaustive list of factors, some of
14 which may not necessarily be pertinent to every request for expert witness fees in excess of
15 \$1,500. The factors in evaluating requests for awards over the statutory maximum include:

- 16 1. The importance of the expert’s testimony to the party’s case;
- 17 2. the degree to which the expert’s opinion aided the trier of fact in deciding the case;
- 18 3. whether the expert’s reports or testimony were repetitive of other expert witnesses;
- 19 4. the extent and nature of the work performed by the expert;
- 20 5. whether the expert had to conduct independent investigations or testing;
- 21 6. the amount of time the expert spent in court, preparing a report, and preparing for
22 trial;
- 23 7. the expert’s area of expertise;
- 24 8. the expert’s education and training;
- 25 9. the fee actually charged to the party who retained the expert;
- 26 10. the fees traditionally charged by the expert on related matters;
- 27 11. comparable experts’ fees charged in similar cases; and
- 28

12. if an expert is retained from outside the area where the trial is held, the fees and costs that would have been incurred to hire a comparable expert where the trial was held.

Frazier, 357 P.3d at 377-78.

Plaintiff argues that pursuant to *Frazier*, this Court should award the entire \$6,000 for Dr. Tingey's fee. (Pl. Supp. Brief at 3-4.) Additionally, Plaintiff argues that this Court should award at least \$5,000 of Dr. Dunn's fee if not the entire amount. (Pl. Supp. Brief at 3-4.) In its brief, rather than discussing the *Frazier* factors in the brief itself, Defendant incorporated by reference its arguments set forth related to the "expert costs." Specifically, Defendant directs this Court to pages 10-13 of its Opposition to Plaintiff's Application for Fees, Costs and Pre-Judgment Interest and Motion to Retax Costs filed on December 7, 2016 as well as pages 7 and 8 of Defendant's Supplement to Motion to Retax Costs and Opposition to Plaintiff's Amended Application for Fees, Costs and Prejudgment Interest filed on December 28, 2016. In sum, Defendant argues there is not a sufficient basis to award Plaintiff expert costs for her treating physicians at all and especially not above the statutory maximum of \$1,500. (Def. Supp. Brief at 4.)

The Importance of the expert's testimony

Plaintiff argues that Dr. Tingey testified primarily regarding Plaintiff's right knee and Dr. Dunn testified primarily regarding Plaintiff's spine. (Pl. Supp. Brief at 5.) Both parties agree that the doctors testified that the injuries to the right knee and cervical spine were caused by the slip and fall. However, the parties disagree as to how important that testimony was to Plaintiff's case. Plaintiff argues that the testimony "formed the lynchpin" of Plaintiff's causation argument. (Pl. Supp. Brief at 6.) Alternatively, Defendant argues that the doctors did not add anything substantive to trial, because the doctors based their opinions solely on Plaintiff's subjective physical complaints without reviewing her medical history. (Def. Opp. to Pl. Motion for Fees at 12.) Defendant further argues that the doctors' opinions were unreliable, repetitive and unnecessary because Plaintiff testified regarding her subjective complaints of pain and injury. (Def. Opposition at 12.) Finally, Defendant argues that experts are generally needed in personal injury cases to testify regarding the necessity of past or future medical treatment or the reasonableness of costs, and because Plaintiff did not seek these damages, the doctors' testimony

1 was largely duplicative of Plaintiff's testimony and therefore unimportant in aiding the jury in
2 deciding the case. (Def. Opposition at 12.)

3 Even though the doctors based their opinions on the subjective pain about which the
4 Plaintiff testified at trial, the causation opinion was probably important to Plaintiff's case.
5 Further, even though Plaintiff did not seek any medical special damages, but only pain and
6 suffering, the doctors' testimony regarding causation was still important to Plaintiff's case,
7 because the testimony relates to the causation element of Plaintiff's claim. **Therefore, the first**
8 **factor favors the Plaintiff.**

9 *Whether the expert's reports or testimony were repetitive of other expert witnesses*

10 Defendant argues, as noted above, that the doctors' testimony was largely duplicative of
11 Plaintiff's testimony. (Def. Opposition at 12.) However, this factor relates to whether the
12 expert's testimony is repetitive of other experts. Here, Dr. Tingey testified regarding Plaintiff's
13 knee and Dr. Dunn testified regarding Plaintiff's spine. (Pl. Supp. Brief at 7.) Each expert
14 testified regarding different injuries resulting from the same slip and fall. **Therefore, the second**
15 **factor favors the Plaintiff.**

16 *The extent and nature of the work performed by the expert*

17 Defendant argues that both Dr. Dunn and Dr. Tingey admitted they did not perform much
18 work to prepare for trial. (Def. Opposition at 12.) However, Plaintiff believes this factor not only
19 weighs in her favor, but should be given more weight than other factors. (Pl. Supp. Brief at 7.)
20 Defendant argues that the doctors were treating physicians, not retained expert witnesses. (Def.
21 Opposition at 12.) Additionally, Defendant argues that the doctors did not prepare a written
22 expert report and were not deposed. (Def. Opposition at 12.) However, the Plaintiff is not asking
23 for money for depositions or reports. Instead, with respect to Dr. Tingey, Plaintiff is asking for
24 costs incurred for a telephone conference, file review and for his appearance and testimony at
25 trial. (Pl. Supp. Brief at 3.) With respect to Dr. Dunn, Plaintiff seeks costs incurred for the file
26 review and trial testimony. (Pl. Supp. Brief at 3.) Defendant merely argues that \$16,000 is
27 "simply absurd" for the work performed. (Def. Opposition at 12.) Alternatively, Plaintiff argues
28 that Drs. Tingey and Dunn are orthopaedic doctors who routinely perform surgeries on sensitive

1 areas of the body and are skilled professionals that perform work few others can perform.
2 However, Plaintiff did not describe the extent of the doctors' work as treating physicians. The
3 Court assumes that this is relevant to the fee that they can command as a result of having to leave
4 their normal practice in order to attend court. Plaintiff notes that Dr. Tingey was part of a
5 telephone conference, conducted a file review, and testified at trial. Additionally, Plaintiff noted
6 that Dr. Dunn conducted a file review and testified at trial on two separate days.

7 While the Defendant argues the doctors did not perform some work associated with expert
8 witnesses such as preparing a report, the doctors did review records and testified at trial.
9 **Therefore, given that Drs. Tingey and Dunn spent time reviewing records for trial and**
10 **actually testified, the third factor favors the Plaintiff.**

11 *Whether the expert had to conduct independent investigations or testing*

12 Defendant does not provide any additional argument with respect to this factor. Plaintiff
13 argues that this factor is irrelevant to this case because Dr. Tingey and Dr. Dunn performed the
14 work of any other treating physician. (Pl. Supp. Brief at 8.) However, this factor is not irrelevant
15 as Plaintiff argues, but rather this factor simply does not favor Plaintiff's argument, because the
16 doctors did not conduct and independent investigations or testing outside the ordinary course of
17 treatment. **Therefore, this factor does not favor an increased fee because neither doctor**
18 **performed work above and beyond that of a regular treating physician.**

19 *The amount of time the expert spent in court, preparing a report, and preparing for trial*

20 As stated above, Defendant argues that Dr. Tingey and Dr. Dunn did not prepare a report,
21 did not spend much time preparing for trial, and did not even spend that much time testifying in
22 court (Approximately 2-3 hours each). (Def. Opp. at 12.) Plaintiff argues that the fees are
23 customary for each doctor's specialty and their testimony required time away from their practices,
24 which does not address this factor. (Pl. Supp. Brief at 8.) Even though the doctors may not have
25 spent a lot of time in court, the doctors still spent several hours testifying. While Dr. Dunn had to
26 return for a second day, this was an accommodation by the court to the doctor's schedule.
27 **Therefore, this factor favors the Plaintiff regarding Dr. Tingey, but the Defendant**
28 **concerning Dr. Dunn's fees for 2 days.**

The expert's area of expertise, education, and training

Defendant does not make any additional argument with respect to this factor. Plaintiff notes that Dr. Tingey is board certified in orthopaedic surgery who focuses on ailments affecting the shoulders, hips, and knees. (Pl. Supp. Brief at 8.) Dr. Tingey graduated from medical school in 1999. (Pl. Supp. Brief Exhibit 1.) He completed a General Surgery Internship at Loma Linda University School of Medicine following graduation. (Pl. Supp. Brief Exhibit 1.) Additionally, Dr. Tingey was an Orthopaedic Surgery Resident and Loma Linda from 2000-2004. (Pl. Supp. Brief Exhibit 1.)

Dr. Dunn is a board certified orthopaedic surgeon specializing in spine surgery and disorders affecting the neck and back. (Pl. Supp. Brief Exhibit 2.) Plaintiff references the doctors' CV's for additional qualifications. Dr. Dunn graduated from Medical School in June of 1985 from the UC Irvine College of Medicine. (Pl. Supp. Brief Exhibit 2.) Upon graduation, Dr. Dunn completed a general surgery internship at the UC Irvine College of Medicine. (Pl. Supp. Brief Exhibit 2.) Dr. Dunn completed his residency at the UC Irvine School of Medicine and from 1991 to 1992 was a fellow at Rancho Los Amigos Hospital. (Pl. Supp. Brief Exhibit 2.)

The doctors seem to have the requisite education and experience that would justify an increased fee. Both Doctors graduated from Medical School over 15 years ago and are board certified surgeons. **Given the doctors' education and board certifications, this factor favors the Plaintiff.**

The fee actually charged to the party who retained the expert

Defendant does not make any additional argument with respect to this factor. Plaintiff notes that Dr. Tingey's fee of \$6,000 was actually charged and paid, and Dr. Dunn's fee of \$10,000 was actually charged and paid. (Pl. Supp. Brief at 9.) **Therefore, this factor favors the Plaintiff.**

Comparable experts' fees charged in similar cases

Defendant does not make any additional argument with respect to this factor. Plaintiff argues that a "flat-fee" for court appearances is common for medical experts in Las Vegas and cites to Dr. Victor Klausner's fee schedule, which uses a flat-fee structure at \$2,500 per ½ day or

1 \$5,000 per day. Plaintiff also points to “routinely used orthopaedic defense expert” Dr. Serfustini
2 as another example of an expert who uses a flat-fee structure for court appearances. Finally,
3 Plaintiff points to Dr. Muir as an example of a spine surgeon who charges the same as Dr. Tingey
4 and Dr. Dunn for court appearances. (Pl. Supp. Brief at 9.)

5 While Plaintiff argues Dr. Klausner’s credentials are not as distinguished as Drs. Tingey
6 and Dunn, this argument seems to ask the court to compare the qualifications of the experts rather
7 than compare expert fees. A more compelling point regarding Dr. Klausner is that he charges
8 \$2,500 per half day and \$5,000 per day (same as Dr. Dunn), and he is not a board certified
9 surgeon, which suggests that Dr. Tingey and Dr. Dunn’s fees are fair and reasonable. Dr. Muir is
10 a spine surgeon. Dr. Muir charges the same amount as Dr. Dunn and Dr. Tingey for court
11 appearances, and those three doctors are similar because they graduated from Medical School
12 over 15 years ago and perform surgeries and treatments on sensitive areas of the human body.
13 **Therefore, this factor favors the Plaintiff’s request for excess fees above \$1,500.00.**

14 Based upon the *Frazier* factors and the briefing by the Parties, the Court should award
15 expert witness costs in excess of the NRS 18.005(5) statutory cap, \$5,000 for Dr. Tingey’s fees
16 and \$5,000 for Dr. Dunn’s fees. Both doctors are similarly situated and testified for similar
17 lengths of time. Dr. Dunn’s fee of \$10,000 was apparently charged because he testified on two
18 separate days. This could have been avoided by better planning on the part of Plaintiff’s trial
19 counsel and the defense should not bear that extra expense.

20 Hence, as to the expert fees, Defendant’s Motion to Re-tax should be **granted in part**.

21 **2. Service Fees**

22 NRS 18.005(7) allows recovery of service fees. Defendant next challenges the service
23 fees claimed by Plaintiff in serving Yanet Elias, Corey Prowell, and Salvatore Risco. (Mot. to
24 Re-tax Costs at 8-9.) Plaintiff acknowledges that all costs must be both reasonable and *necessary*.
25 As to Yanet Elias and Corey Prowell, each was an employee of Defendant and Defendant points
26 out that it had accepted service for those persons. Even with the agreement that service can be
27 made upon counsel instead of the witness, however, does not eliminate the need to serve and the
28 fees would be necessary and she should be **granted** those fees.

1 As to Mr. Risco, Defendant argues that the service fees were unnecessary and
2 unreasonable because Plaintiff's counsel had good communication with him. However, unlike the
3 other two employee-witnesses, Mr. Risco was not a party to this case or an agent of a party to this
4 case, so service of a subpoena upon him was necessary. Additionally, Plaintiff has outlined
5 sufficient reasons for the amount of the claimed charge that show it to be reasonable and she
6 should be **granted** those fees.

7 **3. Jury Fees**

8 NRS 18.005(3) specifically allows an award of jury fees as an element of costs.
9 Defendant next argues it should not be responsible for the jury fees because Plaintiff failed to
10 request a jury trial within the time allowed. (Mot. to Re-tax Costs at 9.) Defendant essentially
11 only argues that because Plaintiff's demand for a jury trial was untimely and this should have been
12 a bench trial, it should not have to pay for the jury fees. However, those arguments are premised
13 on challenging this Court's grant of Plaintiff's request for a jury trial and the time for
14 reconsidering that decision has long since passed. Moreover, both parties had prepared this entire
15 case under the assumption that it was going to be tried by jury, so Defendant was not prejudiced
16 by the Court's ruling in any event. Since the jury fees were actually incurred and reasonable,
17 Defendant's Motion to Re-tax as to those fees should be denied, and Plaintiff should be **granted**
18 the jury fees incurred.

19 **4. Parking Fees**

20 NRS 18.005(17) allows the court to award any other reasonable costs actually incurred.
21 This would, of course, include costs incurred in parking for hearings and the like. Defendant
22 argues that there were other free places Plaintiff could have parked. (Mot. to Re-tax Costs at 9.)
23 This may or may not be true, but Defendant's argument is conclusory in any event. Because
24 Plaintiff actually incurred the parking costs, they should be **granted**.

25 **5. Skip Trace Fees**

26 Defendant lastly argues that Plaintiff's request for skip trace/investigative fees for Terry
27 Ruby were unreasonable and unnecessary. (Mot. to Re-tax Costs at 9.) Terry Ruby is a former
28

1 employee of Defendant and was the first to respond to Plaintiff's fall. (Opp. at 8.) It is clear why
2 Plaintiff would have a need to locate and depose Mr. Ruby. A \$150.00 fee for that service is not
3 unreasonable, given the extreme costs associated with reporting services like Accurint.
4 Therefore, Defendant's Motion to Re-tax as to the skip trace fee should be denied, and Plaintiff
5 should be **granted** that amount as a cost.

6 **6. Remaining Fees**

7 Defendant does not challenge the remaining requested fees. Plaintiff has attached back-up
8 documentation for each claimed cost and they all seem to be reasonable and within the going
9 market rate for each associated service. Plaintiff has therefore carried her burden under *Berosini*
10 and the remaining costs requested should be awarded. Therefore, Plaintiff's Amended
11 Application for Fees as to costs should be **granted** as to the remaining costs sought, as set forth
12 herein.

13 Based on the foregoing, with good cause appearing:

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IT IS HEREBY ORDERED that Plaintiff's Amended Application for Fees and Defendant's Motion to Re-tax are both **GRANTED IN PART, DENIED IN PART**. The requested attorney's fees are denied and Plaintiff is not awarded any attorney's fees related to this matter. Plaintiff's requested costs in this matter is partially granted, but the amount of costs set forth in Plaintiff's Amended Verified Memorandum of Costs is reduced by \$9,699.00 from the amount sought of \$26,579.38. As a result, Plaintiff is granted costs in the total sum of \$16,880.38.


EIGHTH JUDICIAL DISTRICT COURT JUDGE

LAWRENCE J. SEMENZA, III, P.C.
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
Telephone: (702) 835-6803


1 **IT IS HEREBY ORDERED** that Plaintiff's Amended Application for Fees and
2 Defendant's Motion to Re-tax are both **GRANTED IN PART, DENIED IN PART.** The
3 requested attorney's fees are denied and Plaintiff is not awarded any attorney's fees related to this
4 matter. Plaintiff's requested costs in this matter is partially granted, but the amount of costs set
5 forth in Plaintiff's Amended Verified Memorandum of Costs is reduced by \$9,699.00 from the
6 amount sought of \$26,579.38. As a result, Plaintiff is granted costs in the total sum of
7 \$16,880.38.

8 DATED this ____ day of _____, 2016.

10
11 _____
EIGHTH JUDICIAL DISTRICT COURT JUDGE

12 *Respectfully Submitted By:*

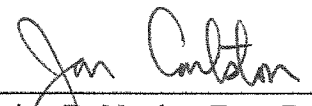
13 LAWRENCE J. SEMENZA, III, P.C.

14 
15 _____
16 Lawrence J. Semenza, III, Esq., Bar No. 7174
17 Christopher D. Kircher, Esq., Bar No. 11176
18 10161 Park Run Drive, Suite 150
19 Las Vegas, Nevada 89145

20 Attorneys for Defendant Wynn Las Vegas LLC d/b/a
21 Wynn Las Vegas

22 *Approved as to Form And Content:*

23 NETTLES LAW FIRM

24 
25 _____
26 Brian D. Nettles, Esq., Bar No. 7462
27 Christian M. Morris, Esq., Bar No. 11218
28 Jon J. Carlston, Esq. Bar No. 10869
1389 Galleria Drive, Suite 200
Henderson, Nevada 89014

Attorneys for Plaintiff Yvonne O'Connell

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

December 19, 2012

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

**December 19, 2012 3:00 AM Motion to Withdraw as
Counsel**

HEARD BY: Ellsworth, Carolyn **COURTROOM:**

COURT CLERK: Denise Trujillo

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- MOTION TO WITHDRAW

As supplemental affidavit with pertinent information was filed, there being no opposition, COURT ORDERED, Motion GRANTED.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

August 07, 2015

A-12-655992-C	Yvonne O'Connell, Plaintiff(s) vs. Wynn Resorts Limited, Defendant(s)
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August 07, 2015	9:30 AM	Motion for Protective Order	Deft's Motion for Protective Order and for OST
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HEARD BY: Bulla, Bonnie

COURTROOM: RJC Level 5 Hearing Room

COURT CLERK: Jennifer Lott

RECORDER: Francesca Haak

REPORTER:

PARTIES

PRESENT:	Kircher, Christopher D. Morris, Christian	Attorney Attorney
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JOURNAL ENTRIES

- Commissioner stated the 30(b)(6) Notice was not timely served. Arguments by counsel. Case involved a slip and fall in 2010, no one saw the fall, and the spill was cleaned before Security arrived (no video surveillance). Commissioner suggested a Mandatory Settlement Conference; Ms. Morris to coordinate with Dept. 30 within 30 days, then contact the Senior Judge Dept.

COMMISSIONER RECOMMENDED, motion is GRANTED but WITHOUT PREJUDICE for Pltf to move to re-open discovery to set a Rule 30(b)(6) deposition; submit a 2.35 Stipulation, or bring a Motion on OST. However, Commissioner advised counsel to try and work out the parameters, and Commissioner suggested five topic areas.

Ms. Morris to prepare the Report and Recommendations, and Mr. Kircher to approve as to form and content. A proper report must be timely submitted within 10 days of the hearing. Otherwise, counsel will pay a contribution. Ms. Morris to appear at status check hearing to report on the Report and Recommendations.

9/18/15 11:00 a.m. Status Check: Compliance

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

September 03, 2015

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

September 03, 2015 9:00 AM Settlement Conference

HEARD BY: **COURTROOM:**

COURT CLERK:

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- Settlement conference held, matter NOT SETTLED.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

September 17, 2015

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

**September 17, 2015 9:00 AM Motion for Summary
Judgment**

HEARD BY: Thompson, Charles **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Lara Corcoran

REPORTER:

PARTIES

PRESENT: Kircher, Christopher D. Attorney
 Morris, Christian Attorney

JOURNAL ENTRIES

- DEFT'S MOTION FOR SUMMARY JUDGMENT

Arguments by counsel. COURT ORDERED, Motion DENIED, Pltf's to prepare the order.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

September 18, 2015

A-12-655992-C	Yvonne O'Connell, Plaintiff(s) vs. Wynn Resorts Limited, Defendant(s)
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September 18, 2015	9:00 AM	Motion	Pltf's Motion to Re- Open Discovery for the Limited Purpose of Taking Deft's 30(b)(6) Deposition and for OST
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HEARD BY: Bulla, Bonnie

COURTROOM: RJC Level 5 Hearing Room

COURT CLERK: Jennifer Lott

RECORDER: Francesca Haak

REPORTER:

PARTIES

PRESENT:	Kircher, Christopher D. Morris, Christian	Attorney Attorney
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JOURNAL ENTRIES

- Case is three years old, Trial date is 10/12/15, and Commissioner cannot move the Trial date. Ms. Morris stated the case will likely be tried the end of October. COMMISSIONER RECOMMENDED, motion is GRANTED within parameters for relevant topics; complete deposition by 10/2/15, or as otherwise agreed to by counsel; set deposition on five business days notice with the understanding that Defense counsel and the Deponent must be available.

COMMISSIONER RECOMMENDED, Commissioner has no problem with Topics 1, 2, 3; Topic 4 is MODIFIED to date of incident in the Wynn Atrium area; Topic 5 and 6 - 30(b)(6) addresses policies and procedures for spills in a public area; narrow and answer Topic 7; include another Topic to identify employees working on the day in question (duties, responsibilities, documents they filled out, and knowledge); everything else is PROTECTED.

COMMISSIONER RECOMMENDED, Topic 10 - individuals working in the area the day in question, job duties for this area, and checking the floor; Topic 11 is the Investigator (Ms. Morris will switch out with Topic 5); if information becomes known that was not reasonably known before, the lawyers are INSTRUCTED to raise a Trial continuance with the District Court Judge.

Ms. Morris to prepare the Report and Recommendations, and Mr. Kircher to approve as to form and content. A proper report must be timely submitted within 10 days of the hearing. Otherwise, counsel will pay a contribution. Ms. Morris to appear at status check hearing to report on the Report and Recommendations.

10/16/15 11:00 a.m. Status Check: Compliance

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

October 01, 2015

A-12-655992-C	Yvonne O'Connell, Plaintiff(s)
	vs.
	Wynn Resorts Limited, Defendant(s)

October 01, 2015 9:00 AM All Pending Motions

HEARD BY: Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Debbie Winn

REPORTER:

PARTIES

PRESENT:	Kircher, Christopher D.	Attorney
	Morris, Christian	Attorney
	Semenza, Lawrence, III	Attorney

JOURNAL ENTRIES

- PLTF'S OMNIBUS MTNS IN LIMINE...DEFT'S MTN IN LIMINE #1 TO EXCLUDE PURPORTED EXPERT GARY PRESSWOOD...DEFT'S MTN IN LIMINE #2 TO EXCLUDE UNRELATED MEDICAL CONDITIONS & DAMAGES CLAIMED BY PLTFF...DEFT'S MTN IN LIMINE #3 TO EXCLUDE ANY REFERENCE OR TESTIMONY OF DEFT'S ALLEGED FAILURE TO PRESERVE EVIDENCE...CALENDAR CALL

After arguments of counsel, COURT ORDERED, Pltf's Omnibus Motion rulings are as follows:

1. Admit pleadings and discovery: DENIED, counsel can stipulate to authenticity, but that is different than admissibility.
2. Exclude argument & evidence re: 3rd party negligence: DENIED with the caveat that all arguments must be supported by evidence.
3. Preclude argument Pltf's injuries are unrelated to fall: DENIED, may argue if supported by evidence properly admitted.
4. Preclude references to prior accidents, etc.: GRANTED IN PART, to the extent of prior accident, if in a previous lawsuit she had a permanent disability, that could be relevant. FURTHER, only relevant to pre-existing complaints when met with treating physician after accident.

5. Exclude evidence & reference to Pltf's medical bills paid by insurance: GRANTED.
6. Limit defense experts opinions to their reports: If foundation is laid, Deft's will qualify their witness as an expert at time of trial, and Pltf's can object at trial if not qualified, and ORDERED, DENIED WITHOUT PREJUDICE.
7. Excluding evidence /references regarding Pltf's recovery is subject to income tax; GRANTED as no opposition.
8. Admit all properly disclosed medical records as authentic; previously DENIED.
9. Adverse inference instruction; DENIED WITHOUT PREJUDICE.

After arguments of counsel, COURT ORDERED, Deft's Motions in Limine rulings are as follows:

1. Exclude purported expert witness Gary Presswood; GRANTED.
2. Exclude unrelated medical conditions and damages claimed by Pltf.; DENIED WITHOUT PREJUDICE as to Dr. Dunn; and counsel to submit supplemental briefing as to Dr. Tingey.
3. Excluding reference or testimony as to Wynn's failure to preserve evidence; DENIED WITHOUT PREJUDICE.

FURTHER, all motions for sanctions and fees are DENIED. Counsel to submit their supplemental brief's as to Dr. Tingey no later than 10/27/15 for everything. FURTHER, trial date SET, and Motion in Limine as to Dr. Tingey reset. Counsel to call chambers after they have their settlement conference and advised Court whether or not case has resolved.

10/29/15 9 AM SUPPLEMENTAL BRIEF ON MOTION IN LIMINE

11/4/15 1:30 PM JURY TRIAL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

October 29, 2015

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

October 29, 2015 3:00 AM All Pending Motions

HEARD BY: Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER:

REPORTER:

PARTIES

PRESENT: Kircher, Christopher D. Attorney
 Morris, Christian Attorney
 Semenza, Lawrence, III Attorney

JOURNAL ENTRIES

- HEARING: SUPPLEMENTAL BRIEF ON MOTION IN LIMINE...PLTF'S EMERGENCY MOTION TO CONTINUE TRIAL

COURT reviewed pleadings and indicated she is not inclined to grant the motion as there is no basis. Arguments by counsel. COURT stated findings and ORDERED, Motion DENIED. COURT advised counsel upon reviewing file she noticed there was no jury demand filed in this case, and it was set for jury trial by a clerical error. Ms. Morris moved for Jury Trial. Arguments by counsel. COURT ORDERED, Motion GRANTED, Ms. Morris to prepare order. COURT noted there are no orders for other rulings in this case and they need to be filed immediately. Court advised she received supplemental briefing on outstanding Motions in Limine. Arguments by counsel. COURT ORDERED, Dr. Dunn WILL be allowed to testify. Arguments by counsel as to Dr. Tingy. COURT ORDERED, Dr. Tingy will be allowed to testify, however, defense counsel will be allowed to depose him on the stand in the absence of the jury. Mr. Semenza inquired if those were the only doctors counsel was going to call. Ms. Morris advised she had one more. Arguments by counsel. Ms. Morris conceded she will not call other doctor listed on her 16.1.

11/4/15 1:30 PM JURY TRIAL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

November 04, 2015

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

November 04, 2015 1:30 PM Jury Trial

HEARD BY: Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Lara Corcoran

REPORTER:

PARTIES

PRESENT:	Kircher, Christopher D.	Attorney
	Morris, Christian	Attorney
	Nettles, Brian D.	Attorney
	O'Connell, Yvonne	Plaintiff
	Rickard, Jarrod L.	Attorney
	Semenza, Lawrence, III	Attorney
	Wynn Las Vegas LLC	Defendant

JOURNAL ENTRIES

- JURY TRIAL

IN THE ABSENCE OF THE JURY VENIRE. Mr. Semenza advised there is an issue with Mr. Prowell, security officer, arising after floor has been cleaned up. Arguments by counsel. COURT advised counsel to make appropriate adjustments. As to the second issue, Mr. Semenza wants to make sure Pltf's don't go beyond damages on collection of evidence. Arguments by counsel. Court advised she wants further briefing on this issue. Counsel stipulated to joint exhibits being admitted. IN THE PRESENCE OF THE JURY VENIRE. Venire sworn, and jury selection commenced.

EVENING RECESS

CONTINUED TO: 11/5/15 11:00 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

November 05, 2015

A-12-655992-C	Yvonne O'Connell, Plaintiff(s)
	vs.
	Wynn Resorts Limited, Defendant(s)

November 05, 2015 11:00 AM Jury Trial

HEARD BY: Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Billie Jo Craig

RECORDER: Lara Corcoran

REPORTER:

PARTIES

PRESENT:	Kircher, Christopher D.	Attorney
	Morris, Christian	Attorney
	O'Connell, Yvonne	Plaintiff
	Semenza, Lawrence, III	Attorney

JOURNAL ENTRIES

- Attorney Edward Wynder present on behalf of Plaintiff.

OUTSIDE THE PRESENCE OF THE PROSPECTIVE JURY PANEL: Ms. Morris requested Badge No. 29 Becnel be questioned further regarding her work in a law firm as she had an E-mail with her name on it regarding another Wynn case. Mr. Semenza objected to her being excused. Ms. Becnel brought in and was questioned further by Court and counsel. Arguments by counsel. Court stated its findings, and ORDERED, Badge No. 29 Becnel is EXCUSED. Ms. Morris requested Badge No. 14 Herbert be excused as he worked at the golf course. Arguments by counsel. Court stated its findings, and ORDERED, Badge No. 14 Herbert is EXCUSED. Mr. Semenza requested Badge No. 1 Torres and Badge No. 7 De Madrigal be excused due to language problems. The Court advised it did not want to consider this now but counsel can ask qualifying questions during individual voir dire.

PROSPECTIVE JURY PANEL PRESENT: Voir dire continues. OUTSIDE THE PRESENCE OF THE PROSPECTIVE JURY PANEL: Court noted more Jurors coming at 2:00 PM. Colloquy regarding scheduling of witnesses. The Court advised it would be as accommodating as possible.

PROSPECTIVE JURY PANEL PRESENT: Voir dire continues. Peremptory Challenges. The Court thanked and excused the remaining prospective Jurors in the audience. The Court thanked and excused the remaining prospective Jurors. Jury chosen. EVENING RECESS. OUTSIDE THE PRESENCE OF THE JURY: Court noted it would swear in the Jury on Monday.

CONTINUED TO: 11/9/15 1:30 PM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

November 09, 2015

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

November 09, 2015 1:30 PM Jury Trial

HEARD BY: Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Lara Corcoran

REPORTER:

PARTIES

PRESENT: Morris, Christian Attorney
 Nettles, Brian D. Attorney
 Rickard, Jarrod L. Attorney
 Semenza, Lawrence, III Attorney

JOURNAL ENTRIES

- JURY TRIAL

IN THE PRESENCE OF THE JURY PANEL. Jurors sworn. Court instructed jury as to trial procedure. Opening statements by counsel. Testimony and exhibits per worksheets. IN THE ABSENCE OF THE JURY. Arguments by counsel regarding whether Dr. Dunn will be testifying to future medical procedures. Court noted it does not appear that Pltf's intend to ask that question. IN THE PRESENCE OF THE JURY. Testimony and exhibits continued. IN THE ABSENCE OF THE JURY. Dr. Dunn sworn and testified in the absence of the jury. Arguments by counsel. COURT believes testimony has been limited to what in his own charges that he reviewed. Further arguments. COURT will allow Dr. Dunn to go on what he knows and how he knows it. IN THE PRESENCE OF THE JURY. Testimony and exhibits continued.

EVENING RECESS

11/10/15 8:30 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

November 10, 2015

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

November 10, 2015 8:30 AM Jury Trial

HEARD BY: Ellsworth, Carolyn

COURTROOM: RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Lara Corcoran

REPORTER:

PARTIES

PRESENT:	Morris, Christian	Attorney
	Nettles, Brian D.	Attorney
	O'Connell, Yvonne	Plaintiff
	Rickard, Jarrod L.	Attorney
	Semenza, Lawrence, III	Attorney
	Wynn Las Vegas LLC	Defendant

JOURNAL ENTRIES

- JURY TRIAL

IN THE PRESENCE OF THE JURY. Testimony and exhibits per worksheets. IN THE ABSENCE OF THE JURY. Dr. Tingy sworn and testified in the absence of the jury. Mr. Semenza stated there are a whole bunch of medical records that were not provided and objects to Dr. Tingey testifying. Arguments by counsel. COURT will allow him to testify as to his own opinions based on files, is evaluation and history provided by Pltf. IN THE PRESENCE OF THE JURY. Testimony and exhibits per worksheets.

EVENING RECESS

CONTINUED TO: 11/12/15 8:30 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

November 12, 2015

A-12-655992-C	Yvonne O'Connell, Plaintiff(s)
	vs.
	Wynn Resorts Limited, Defendant(s)

November 12, 2015 8:30 AM Jury Trial

HEARD BY: Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Lara Corcoran

REPORTER:

PARTIES

PRESENT:	Morris, Christian	Attorney
	Nettles, Brian D.	Attorney
	O'Connell, Yvonne	Plaintiff
	Rickard, Jarrod L.	Attorney
	Semenza, Lawrence, III	Attorney

JOURNAL ENTRIES

- JURY TRIAL

IN THE ABSENCE OF THE JURY. Court advised counsel, that juror #6 called this morning and she has a family emergency, and noted she will put alternate #1 in juror #6's place. IN THE PRESENCE OF THE JURY. Alternate juror #1 sworn. Testimony and exhibits per worksheets. Pltf. rested. IN THE ABSENCE OF THE JURY. Mr. Semenza requested directed verdict as to liability. Arguments by counsel. COURT stated findings and ORDERED, Motion DENIED and advised counsel he can re-new motion in writing within 10 days after verdict, with full briefing. Mr. Semenza advised that jury should be instructed they can not consider the testimony of either doctor and provided Court with bench briefs. Court advised she will read these but believes this is better handled with jury instructions. IN THE PRESENCE OF THE JURY. Testimony resumed. IN THE ABSENCE OF THE JURY. COURT advised she read briefs offered by counsel, state findings, and ORDERED, Motion DENIED. IN THE PRESENCE OF THE JURY. Testimony and exhibits resumed. JURY EXCUSED for the evening.

EVENING RECESS

CONTINUED TO: 11/13/15 9:00 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

November 13, 2015

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

November 13, 2015 8:30 AM Jury Trial

HEARD BY: Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Andrea Natali

RECORDER: Lara Corcoran

REPORTER:

PARTIES

PRESENT: Kircher, Christopher D. Attorney
 Morris, Christian Attorney
 O'Connell, Yvonne Plaintiff
 Semenza, Lawrence, III Attorney

JOURNAL ENTRIES

- APPEARANCES CONTINUED: Edward Wynder, Esq. present on behalf of the Plaintiff. Kristen Steinbach, Representative for Wynn Las Vegas LLC, present.

OUTSIDE THE PRESENCE OF THE JURY: Jury instructions settled off the record. Arguments by counsel as to the relevance of Jury Instructions 27, 32, and 37. COURT stated FINDINGS as to relevance of the Jury Instructions.

IN THE PRESENCE OF THE JURY: Court read the jury instructions. Ms. Morris presented closing arguments on behalf of Plaintiff; Mr. Semenza presented closing arguments on behalf of Defendant. Marshal and Law Clerk Sworn to take charge of the Jury and the Alternate. Jury retired at the hour of 3:39 P.M. to begin deliberations. COURT ORDERED, trial CONTINUED for Jury Deliberations. Jury instructed to return Monday at the given time.

CONTINUED TO: 11/16/15 9:00 A.M.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

November 16, 2015

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
vs.
Wynn Resorts Limited, Defendant(s)

November 16, 2015 9:00 AM Jury Trial

HEARD BY: Ellsworth, Carolyn

COURTROOM: RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Lara Corcoran

REPORTER:

PARTIES

PRESENT:	Kircher, Christopher D.	Attorney
	Morris, Christian	Attorney
	Nettles, Brian D.	Attorney
	O'Connell, Yvonne	Plaintiff
	Semenza, Lawrence, III	Attorney

JOURNAL ENTRIES

- JURY TRIAL

At 9 AM, this date, jury returned for continued deliberations. At 9:45 juror #3 gave note to the Marshal during break. All counsel present. Court advised that juror stated they are concerned about the cord on the floor in the courtroom. Juror #3, present with Court and counsel, in the absence of the remaining jurors. Upon Court's inquiry, Juror #3 explained he was afraid someone was going to trip on the cord. Conference at the bench. Jury returned to deliberations, including juror #3. Counsel advised they have no objection to juror remaining on the jury. At 12:10 PM this date, jury returned with a verdict. Court reviewed verdict. Conference at the bench. COURT advised jury that they did not completely fill out the verdict, and sent jury back to deliberations. AT 12:15 PM this date, jury returned with a verdict in FAVOR of Pltf. and AGAINST the Deft. COURT thanked and excused the jury.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability**COURT MINUTES****March 04, 2016**

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
 vs.
 Wynn Resorts Limited, Defendant(s)

March 04, 2016 8:30 AM All Pending Motions

HEARD BY: Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Lara Corcoran

REPORTER:

PARTIES

PRESENT: Kircher, Christopher D. Attorney
 Morris, Christian Attorney
 Semenza, Lawrence, III Attorney
 Wynder, Edward J. Attorney

JOURNAL ENTRIES

- PLTF'S AMENDED APPLICATION FOR FEES, COSTS & PRE-JUDGMENT INTEREST - AMENDED & RESUBMITTED AS PLTF'S MTN TO TAX COSTS & FOR FEES AND POST-JUDGMENT INTEREST...DEFT. WYNN LAS VEGAS, LLC'S RENEWED MTN FOR JUDGMENT AS A MATTER OF LAW, OR, ALTERNATIVELY MTN FOR NEW TRIAL OR REMITTITUR

Prior to hearing, counsel provided following tentative as to Deft's Motion as follows: This is a personal injury action resulting from Pltf. s slip and fall at Deft. s casino. A jury trial was held and the jury found in favor of Pltf. on November 16, 2015. The jury awarded Pltf. \$150,000 for past pain and suffering and \$250,000 for future pain and suffering, finding her to be 40% at fault. Accounting for Pltf. s comparative fault, her total award was \$240,000. Deft. (hereinafter Wynn), having moved for judgment under NRCP 50 at the close of Pltf. s case, filed a renewed motion for judgment as a matter of law or, alternatively, a motion for new trial or remittitur. At trial, Pltf. (hereinafter O Connell) testified that she fell after slipping on what was described as a pale green, sticky, liquid substance on the floor. There was no evidence presented by O Connell that Wynn had caused the foreign substance to be on the floor. While O Connell speculated that the substance may have been

water from the irrigation system in the atrium area where she fell, she presented no evidence that such was the case. Rather, O Connell called, in her case in chief, an employee of Wynn who testified that she responded to the area of the fall immediately after the fall and she observed a substance on the floor which had been covered by a sweeper machine brought to clean up the area. She described the substance as looking a little sticky like honey. Trial Transcript (TT), Vol. 3 at 71:23-72:4. On cross-examination, the witness, when confronted with her previous deposition testimony, agreed that she had described the liquid substance as something like a syrup, like a drink, like something like that. Id. at 76:6-10. Additionally, O Connell presented no evidence that Wynn had actual notice of the foreign substance on the floor, and her counsel argued that it was in fact a constructive notice case, not an actual notice case.

A. Legal Standards and Applicable Statutes

NRCP 50 provides in pertinent part:

(a) Judgment as a matter of law.

(1) If during a trial by jury, a party has been fully heard on an issue and on the facts and law a party has failed to prove a sufficient issue for the jury, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(b) Renewing motion for judgment after trial; alternative motion for new trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after service of written notice of entry of judgment and may alternatively request a new trial or join a motion for new trial under Rule 59. In ruling on a renewed motion the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law.

NRCP 59(a) provides: A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1) Irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial; (2) Misconduct of the jury or prevailing party; (3) Accident or surprise which ordinary prudence could not have guarded against; (4) Newly discovered evidence material for the party making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial; (5) Manifest disregard by the jury of the instructions of the court; (6) Excessive damages appearing to have been given under the influence of passion or prejudice; or, (7) Error in law occurring at the trial and objected to by the party making the motion. The standard for granting a motion for judgment as a matter of law is based on the standard for granting a motion for involuntary dismissal under former NRCP 41(b). In applying that standard and deciding whether to grant a motion for judgment as a matter of law, the district 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. *Nelson v. Heer*, 123 Nev. 217, 222, 163 P.3d 420,424 (2007). Deft. presents several distinct arguments in support of its Motion for Judgment as a Matter of Law. These are: (1) there was insufficient evidence presented at trial for a finding that Deft. owed Pltf. a duty of care; (2) the testimony of Dr. Tingey and Dr. Dunn was improper and prejudiced Deft. ; and (3) Pltf. had a burden to apportion the amount of damages attributable to Deft. and those attributable to prior injuries, but failed to do so. Deft. also argues, in the alternative, that even if it is not entitled to judgment as a matter of law, it is entitled under NRCP 59 to a new trial or remittitur because the jury's award of future pain and suffering was unsupported, Pltf. posed improper questions to Deft.'s witnesses, and Pltf.'s counsel made prejudicial comments to the jury. Each of these will be addressed in turn.

1. Whether there was sufficient evidence produced at trial such that a reasonable jury could find that Deft. had notice of the foreign substance on the floor.

The law concerning negligence in relation to a foreign substance on the floor is, in some respects, well settled. Where the business owner or its agent caused the substance to be on the floor, liability will lie, as a foreign substance on the floor is not consistent with reasonable care. However where the business owner or his agent did not cause the foreign substance to be on the floor, a Pltf. must prove actual or constructive knowledge of the floor's condition, and a failure to remedy it. *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322-323 (1993). As stated above, O Connell produced no evidence that the Wynn caused the substance to be on the floor, or that it had actual notice. Thus, the question remains as to whether sufficient evidence was presented for a jury to find that Wynn was on constructive notice of the spill. Whether a business owner was under constructive notice of the hazardous condition is a question of fact properly left for the jury, *Sprague, id.*, but this does not relieve the Pltf. from having to admit evidence at trial of constructive notice. In *Sprague*, the Supreme Court noted that a reasonable jury could have determined that the virtually continual debris on the produce department floor put Lucky on constructive notice that, at any time, a hazardous condition might exist which would result in injury to Lucky customers. *Id.*, 109 Nev. at 251, 849 P.2d at 323. Nevada case law has caused some confusion in differentiating between constructive notice and the mode of operation approach, the latter of which is specifically discussed in cases decided subsequent to *Sprague*. The fact that there is a difference is made clear in *FGA v. Giglio*, 128 Nev. Adv. Op. 26, 278 P.3d 490, 497 (2012), where the court noted that the *Sprague* court had implicitly adopted the mode of operation approach when it stated that even in the absence of constructive notice, a jury could conclude that Lucky should have recognized the impossibility of keeping the produce section clean by sweeping alone. (emphasis added). With the mode of operation approach, which is not applicable in this case, a Pltf. satisfies the notice requirement (actual or constructive) by establishing that an injury was attributable to a reasonably foreseeable dangerous condition on the owner's premises that is related to the owner's self-service mode of operation. While evidence of a continuous or recurring condition might amount to constructive notice under *Sprague, supra* and *Ford v. Southern Hills Medical Center*, 2011 WL 6171790 (Nev. 2011), that is not the only way of proving constructive notice. Proof that a foreign substance on the floor had existed for such a length of time that the proprietor in the exercise of ordinary care should have known of it is another way of proving constructive notice. What would amount to sufficient time to warrant holding that the proprietor had constructive notice generally depends on the circumstances of the particular case and involves consideration of the nature of the danger, the

number of persons likely to be affected by it, the diligence required to discover or prevent it, opportunity and means of knowledge, the foresight which a person of ordinary care and prudence would be expected to exercise under the circumstances, and the foreseeable consequence of the conditions. See 61 A.L.R.2d 67(b). Moreover, Nevada has made clear that an innkeeper may be found on constructive notice of latent defects upon their premises if a reasonable inspection would have revealed such a danger. See *Twardowski v. Westward Ho Motels, Inc.*, 86 Nev. 784, 476 P.2d 946 (1970). In *Twardowski*, the court held that if a reasonable inspection of its pool slide would have revealed the defective handrails, the Westward Ho would be charged with constructive notice of the latent defect, but that whether the defect would have been discovered by a reasonable inspection was a jury question. The court further noted that [c]onstructive knowledge of a latent defect can be established by circumstantial evidence. *Id.*, 86 Nev. at 788, 476 P.2d at 948. The over-arching theme of a negligence case has been, and is, foreseeability. [T]here is no liability for harm resulting from conditions from which no unreasonable risk was to be anticipated, or those which the occupier did not know and could not have discovered with reasonable care. The mere existence of a defect or danger is not enough to establish liability, unless it is shown to be of such a character or of such a duration that the jury may reasonably conclude that due care would have discovered it. *Prosser, Law of Torts* 393 (4th ed. 1980). Whether reasonable care has been exercised is almost always a jury question as was made clear by the Nevada Supreme Court in *Foster v. Costco Wholesale Corp.*, 128 Nev. Adv. Op. 71, 291 P.3d 150 (2012). Abrogating the holding in *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 370 P.2d 682 (1962), the Nevada Supreme Court adopted the position of the Restatement (Third) of Torts concerning the duty of a landowner. Thus, under the Restatement (Third), landowners bear a general duty of reasonable care to all entrants. The duty issue must be analyzed with regard to foreseeability and gravity of harm, and the feasibility and availability of alternative conduct that would have prevented the harm. *Foster*, 291 P.3d at 156 (citations omitted). Here, during O'Connell's case in chief, Yanet Elias, whose job was that of an assistant manager in the public areas department at Wynn, testified that, It's very difficult to maintain the casino, you know, completely clean, because it's a job for 24 hours. There are people a lot of people walking through, a lot of children, they're carrying things. So, it's impossible to keep it clean at 100 percent. TT Vol. 3 at 70:22-71:1. Additionally, Ms. Elias testified that she did not know when the area where O'Connell fell had last been inspected prior to her fall, and when asked about how often the area is checked, she testified, It depends on how long it takes the employee to check the north area and return to the south area, because it's all considered one one whole area. And there aren't always two employees assigned to that area. Sometimes, there's only one. TT Vol. 3 at 69:5-11. While she repeatedly answered questions posed by both counsel by stating that she did not recall, Ms. Elias was also repeatedly impeached with her earlier deposition testimony. At one point she admitted that one of the signs that a porter is not doing their job is that there is debris on the floor. *Id.* at 70:3-6) O'Connell also called Cory Prowell in her case in chief, Wynn's assistant security manager who at the time of the incident was a security report writer. Mr. Prowell responded to the subject incident and eventually wrote a report. He described the scene of the fall as a high traffic area with marble flooring and indicated that upon his arrival, he was told by Ms. Elias that the liquid on the floor had already been cleaned up, and that he was told by another employee that the employee had seen O'Connell being helped up by four other guests. He also testified that O'Connell told him that when she had recovered from her fall, she saw a green liquid on the floor. During her testimony at trial, O'Connell

described the spill as at least seven feet with one side measuring about four feet still in a liquid state, and a three foot portion as almost dry, a little sticky with footprints on it. TT Vol. 3 at 59:19-24. She described the liquid as having just a hint of green, *Id.* at 59:12, and elaborating about the footprints she said, They looked like, you know, they were they looked like mine that I was making, and I m sure they were from the people that were standing around and helped me up [k]ind of like dirty footprints that you leave after you ve mopped your floor and you step on it, you walk on it, that s kind of how it looked. *Id.* at 62:19 63:2. Wynn argues that the record is completely devoid of any evidence regarding the length of time the foreign substance had been on the floor. *Mot.* at 15-17. While it is true that O Connell could not testify as to how long the substance had been on the floor, she did testify that a three foot section of the 7 foot spill was already dry and drying. While the defense seems to suggest that expert testimony would be required, presumably to testify as to the relative humidity within the casino and its relation to the rate of evaporation, common experience would allow a jury to infer that the spill had been in place longer than just a few minutes. As pointed out by Pltf. s Opposition, there was ample other evidence from which the jury could have found that Wynn had constructive notice of the substance of the floor. *Opp.* at 11-13. This evidence includes: (1) testimony that the atrium where the substance was located was highly trafficked; (2) testimony that it is impossible for Wynn s employees to keep the casino floor entirely clean; and (3) testimony that Deft. had no floor inspection schedule, did not maintain inspection logs, and could not say with certainty when the floor was last inspected prior to Pltf. s injury. This testimony was elicited from Deft. s own employees. A non-moving party can defeat a motion for judgment as a matter of law if it present[s] sufficient evidence such that the jury could grant relief to that party. *D&D Tire, Inc. v. Ouellette*, 131 Nev. Adv. Op. 47, 352 P.3d 32, 35 (2015) (internal quotations and citations omitted). All of the aforementioned testimony, taken together and drawing all reasonable inferences in favor of the Pltf. was sufficient to establish that Wynn was on constructive notice of the dangerous condition upon its floor.

Whether the testimony of Dr. Tingey and Dr. Dunn was improper. Deft. next makes the argument that the testimony of Pltf. s experts, Dr. Tingey and Dr. Dunn, was improper. *Mot.* at 19-21. Deft. first argues that the Court improperly admitted their testimony because Pltf. disclosed them as expert witnesses beyond the disclosure deadline. *Id.* at 18-19. Deft. argues that its rebuttal expert was unable to review their records and incorporate them into his report. *Id.* at 18. However, late production was substantially justified under NRCP 37(c) because O Connell continued to treat after the close of discovery, treatment records were provided to O Connell s counsel after the close of discovery, and were provided to Defense counsel soon after their receipt, and because O Connell had to change treating physicians after Dr. Martin had left the practice. The late disclosed records were only a few pages, the Court permitted the defense to Voir dire the doctors outside the presence of the jury before they testified in the presence of the jury, and the Court allowed Deft. s rebuttal expert to sit in the courtroom and listen to the testimony of both Dr. Tingey and Dr. Dunn, allowing him to incorporate his opinions on direct examination. Hence, Deft. was not prejudiced by any late disclosure on Pltf. s part. Wynn also argues that both doctors lacked a sufficient basis for their opinions because they were only based upon Pltf. s self-reporting. *Id.* at 19. In support, Deft. cites to the federal case of *Perkins v. United States*, 626 F. Supp. 2d 587 (E.D. Va. 2009). Notwithstanding the fact that *Perkins* is a federal case, it is not on point to the facts here. In *Perkins*, the court found that expert testimony as to medical causation should be excluded because the expert s opinion was based

solely on the patient's self-reporting that the expert had merely adopted the patient's explanation as his own opinion. 626 F. Supp. 2d at 592-593. Here, however, Pltf.'s self-reporting did not appear to be the sole basis of her experts' testimony. Both doctors testified as to the basis of their opinions, which included not only evaluation of the Pltf.'s medical history but also their examination of her, their review of her diagnostic medical tests, and their experience in treating orthopedic conditions and the conditions that would result from a slip and fall. There is simply no indication that O'Connell's experts wholly adopted her self-reporting as the sole basis for their opinions as to causation. Moreover, Dr. Tingey was candid in his opinion that he would not attribute all of O'Connell's knee problems to the subject fall because the MRI indicated a degenerative disease process in the left knee as opposed to the right knee.

2. Whether there is legal basis for a finding that Pltf. bears a burden to apportion damages between pre-existing conditions and the harm caused by Deft. Deft. next argues that Pltf. had the burden of apportioning her damages between pre-existing injuries and those injuries caused by her slip and fall at the Wynn but failed to do so. Mot. at 21-25. This is a familiarly incorrect argument (and, indeed, was raised and rejected during trial for the same reasons as it is now) because the legal premises upon which it rests are infirm. The main cause of confusion in this and other cases is the federal case of *Schwartz v. State Farm Mut. Auto. Ins. Co.*, 2009 WL 2197370 (D. Nev. July 22, 2009). In that case, Judge Dawson did indeed hold that [i]n a case where a Pltf. has a pre-existing condition, and later sustains an injury to that area, the Pltf. bears the burden of apportioning the injuries, treatment and damages between the pre-existing condition and the subsequent accident. *Id.* at *6. However, the cases cited as precedent by Judge Dawson for that statement do not support that assertion. *Kleitz v. Raskin*, 103 Nev. 325, 738 P.2d 508 (1987) involved apportioning damages between injuries caused by successive tortfeasor, not apportioning damages between pre-existing conditions and injuries caused by a sole tortfeasor. Judge Dawson also cited the Washington Court of Appeals case of *Phennah v. Whalen*, 621 P.2d 1304 (Wash. App. 1980), but that also involved apportioning damages between successive tortfeasor. The Restatement (Second) of Torts 433(b), also relied upon, doesn't even concern successive tortfeasor on its face but rather concerns the substantial factor test for determining proximate cause. Here, we do not have successive tortfeasor. Rather, we have a Pltf. who, admittedly, had various pre-existing mental and physical conditions. Therefore, the *Schwartz* case is in error and is inapplicable to this case. Deft. took the Pltf. as it found her and is liable for the full extent of her injuries, notwithstanding her pre-existing conditions. See *Murphy v. Southern Pac. Co.*, 31 Nev. 120, 101 P. 322 (1909).

Whether the Deft. is entitled to a new trial or remittitur.

In *Canterino v. The Mirage Casino-Hotel*, 117 Nev. 19, 24, 16 P.3d 415, 418 (2001), opinion reinstated on reh'g (Oct. 2, 2001), opinion modified on reh'g sub nom, *Canterino v. Mirage Casino-Hotel*, 118 Nev. 191, 42 P.3d 808 (2002), the Supreme Court addressed the issue of when a trial court may grant a new trial or issue a conditional order of remittitur reducing an award of damages by a jury. The court stated:

This court has held that damages for pain and suffering are peculiarly within the province of the jury. In *Stackiewicz v. Nissan Motor Corporation*, 100 Nev. 443, 454, 686 P.2d 925, 932 (1984), this court stated that the trial court cannot revisit a jury's damage award unless it is flagrantly improper. In actions for damages in which the law provides no legal rule of measurement it is the special province

of the jury to determine the amount that ought to be allowed, so that a court is not justified in reversing the case or granting a new trial on the ground that the verdict is excessive, unless it is so flagrantly improper as to indicate passion, prejudice or corruption in the jury.... The elements of pain and suffering are wholly subjective. It can hardly be denied that, because of their very nature, a determination of their monetary compensation falls peculiarly within the province of the jury.... We may not invade the province of the fact-finder by arbitrarily substituting a monetary judgment in a specific sum felt to be more suitable. *Stackiewicz*, 100 Nev. at 454 55, 686 P.2d at 932 (quotations and citations omitted). The mere fact that a verdict is large is not conclusive that it is the result of passion or prejudice. *Id.* (citing *Beccard v. Nevada National Bank*, 99 Nev. 63, 66 n. 3, 657 P.2d 1154, 1156 n. 3 (1983)). Here, it must be noted that O Connell was prevented from presenting evidence of her medical special damages due to discovery and evidentiary issues. Thus, she sought only pain and suffering damages. She testified that she had been suffering with her knee and her neck and back since the fall five years earlier and could no longer engage in the activities that she could prior to the fall, including the swing dancing she had done regularly before the accident. This testimony was corroborated by her former boyfriend and dance partner. She often described her pain throughout her medical records as 10 out of 10. While the defense may have thought that this testimony would be unbelievable to a jury, it was nonetheless the jury's choice to believe it. Additionally, Dr. Tingey testified that he had recommended surgery for O Connell's traumatically injured knee and that she would, if she chose the surgery, have post-operative pain, but that typically the result after surgery would be a complete relief of the symptoms. On the other hand, Dr. Dunn testified that due to O Connell's continued complaints of pain in her neck and symptoms in her arms, he recommended an anterior cervical neck discectomy; removal of the disc and an inter-body 3 level fusion with placement of a plate and screws. He described this surgery as non-curative, but rather taking away 50 to 60 percent of the pain which O Connell had described as terrible. While Dr. Dunn attributed the changes to O Connell's spine to a degenerative disease process, he attributed the pain, which he believed to be previously asymptomatic, to the fall describing the quintessential egg-shell Pltf. . Wynn argues in the alternative to the motion for judgment as a matter of law, that a new trial should be had or remittitur issued for several reasons. The first is that O Connell failed to establish future pain and suffering damages as required by Nevada law. *Mot.* at 25 (citing *Krause, Inc. v. Little*, 117 Nev. 929, 938, 34 P.3d 566 (2001) (holding that Nevada law requires that when an injury or disability is subjective and not demonstrable expert medical testimony is required)). The basis for this argument, however, is the same as above that Pltf. 's medical experts lacked a reliable basis for their opinion and that O Connell failed to carry her burden to apportion damages between pre-existing conditions. *Mot.* at 26:3-7. For the same reasons as outlined above, then, this argument should be rejected. Wynn next argues that O Connell was improperly allowed to question defense witnesses. Specifically, Deft. points to Pltf. 's counsel questioning witnesses on the lack of video coverage of the incident and references in her closing arguments that Wynn controlled the evidence. *Mot.* at 26. One of the statements cited by Wynn, on examination of Corey Prowell, does not appear to have been objected to by defense counsel and so that objection is now untimely. The other statements cited by Wynn were in Pltf. 's counsel's closing or rebuttal arguments. Deft. also did not object to those statements and, in any event, had the opportunity to make arguments rebutting those statements in its own closing. Therefore, no prejudice resulted. Wynn last argues that it is entitled to a new trial because O Connell's counsel made an improper statement in rebuttal as to damages. The statement in

issue is: As jurors, you are the voice of the conscience of this community. Deft. lodged a timely objection, which was immediately sustained by this Court. The Court also admonished counsel for making the statement and instructed the jury to disregard it. The Court stated: Sustained. No, no. The jury will disregard that. Counsel, this is not a punitive damage case. You may not address the they are not to be making decisions as the conscience of the community. You know that is improper argument. TT Vol. 6 at 46:12-16). The problem with such a statement is that it allows the jury to punish the Deft. , e.g., with punitive damages, which was not a part of Pltf. s case here. See *Florida Crushed Stone Co. v. Johnson*, 546 So.2d 1102, 1104 (1989). The Nevada Supreme Court has made clear, however, that a new trial is warranted only where the [comment] is so extreme that the objection and admonishment could not remove the misconduct's effect. *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008). This amounts to an analysis of whether no other reasonable explanation could exist for the jury s verdict. *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364, 212 P.3d 1068, 1079 (2009). Here, there was ample evidence presented at trial, as outlined above and in Pltf. s Opposition, to support the jury verdict. Deft. s timely objection was quickly sustained and a limiting instruction was given immediately. In light of the evidence presented at trial, it cannot be said that the jury s verdict was so unreasonable as to make the statement prejudicial. Cf. *Lioce*, supra (finding that the trial testimony supported the jury s verdict and the district court sustained the Deft. s objections to misconduct, so a new trial was not warranted). Based on the foregoing, then, Deft. s Motion should be denied.

Arguments by counsel. COURT stated findings and ORDERED, Motion DENIED.

As to Pltf's motion, tentative ruling submitted as follows: This is a personal injury action resulting from Pltf. s slip and fall at Deft s casino. A jury trial was held and the jury found in favor of Pltf. on November 16, 2015. The jury awarded Pltf. \$150,000 for past pain and suffering and \$250,000 for future pain and suffering, finding her to be 40% at fault. Pltf. s total award was \$240,000. After the verdict was entered, Pltf. filed an Application for Attorneys Fees and Costs, attaching a Memorandum of Costs as an exhibit. Pltf. then filed an Amended Application for Fees and Costs to address identified deficiencies in the first Application. Deft. has moved to Re-Tax the Costs and is opposing the request for fees in a Supplement to its opposition to Pltf. s first Application.

A. Legal Standards and Applicable Statutes:

Pltf. moves for fees and costs under both NRCP 68 and NRS 18.010. NRCP 68(f) provides:

If the offeree [of an offer of judgment] rejects an offer and fails to obtain a more favorable judgment, (1) the offeree cannot recover any costs or attorney s fees and shall not recover interest for the period after the service of the offer and before the judgment; and

(2) the offeree shall pay the offeror s post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney s fees, if any be allowed, actually incurred by the offeror from the time of the offer. If the offeror s attorney is collecting a contingent fee, the amount of any attorney s fees awarded to the party for whom the offer is made must be deducted from that contingent fee.

NRS 17.115(4) similarly provides, in relevant part:

Except as otherwise provided in this section, if a party who rejects an offer of judgment fails to obtain a more favorable judgment, the court:

(c) Shall order the party to pay the taxable costs incurred by the party who made the offer; and

(d) May order the party to pay to the party who made the offer (3) Reasonable attorney's fees incurred by the party who made the offer for the period from the date of service of the offer to the date of entry of the judgment. If the attorney of the party who made the offer is collecting a contingent fee, the amount of any attorney's fees awarded to the party pursuant to this subparagraph must be deducted from that contingent fee. Additionally, NRS 18.010(2)(b) provides that fees may be awarded to the prevailing party [w]ithout regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. NRS 18.110(1)-(2) provides that whenever a party claims costs, she must file a verified memorandum setting forth those costs within 5 days of entry of the judgment and that witness fees are recoverable costs, regardless of whether the witness was subpoenaed, if the witness testified at trial. NRS 18.110(4) allows the opposing party to file a motion to re-tax claimed costs within 3 days of service of a copy of the memorandum of costs. As a preliminary note, Deft's first argument is that Pltf. improperly and unilaterally filed an Amended Application for Fees and Costs after reading Deft's Opposition, so the Court should only consider the first Application. Here, judgment was entered on December 15, 2015. Pltf. filed the first Application well before this, on November 25, 2015. She also filed her Amended Application for Costs on December 21, 2015, which is within the time limit set forth in the rule (note that under EDCR 1.14(a), the period for filing is five judicial days from entry of judgment). However, Deft's Motion to Re-Tax as to the first Application was due on December 2, 2015, but it was not filed until December 7, 2015 and was thus untimely. Deft's Motion to Re-Tax as to the Amended Application was timely, though. It is true that generally, supplemental briefing is allowed only by leave of court. See EDCR 2.20(i). However, given that Deft's first opposition was untimely, it would seem that it would be willing to waive its first argument in opposition to Pltf.'s Amended Application. In order for the penalties associated with the rejection of an offer of judgment to apply, the offeree must not have obtained a more favorable judgment. NRCP 68(f); NRS 17.115(4). To determine whether the offeree of a lump-sum offer of judgment obtained a more favorable judgment, the amount of the offer must be compared to the amount of the offeree's pre-offer, taxable costs. *McCrary v. Bianco*, 122 Nev. 102, 131 P.2d 573, 576, n. 10 (2006) (stating that NRCP 68(g) must be read in conformance with NRS 17.115(5)(b)). Here, Pltf. offered to settle the case for \$49,999.00 on September 3, 2015. The verdict was in favor of Pltf. for a total of \$240,000.00. It seems that this may be a more favorable judgment, although Pltf. has neglected to specifically set forth her pre-offer taxable costs. On the other hand, Pltf.'s total claimed costs were \$26,579.38 (whether pre- or post-offer) and that, together with the offer, amounts to \$76,578.38. Pltf.'s jury recovery was well above this - \$240,000.00 - so it appears that Pltf. has met the threshold requirement to show entitlement to fees and costs under Rule 68. 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). Such a decision will not be disturbed unless it is arbitrary and capricious. *Schouweiler v. Yancey Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (1985). 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 (1963): (1) whether the Pltf.'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. However,

where the Deft. is the offeree of an offer of judgment, the first factor changes to a consideration of whether the Deft's defenses were litigated in good faith. See *Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998). As to the first factor, whether Deft's defenses were litigated in good faith, Pltf. argues that Deft's defense that it had no notice of the liquid on the casino floor was in bad faith because it failed to make an inquiry into the last time the floor was checked before Pltf. slipped. Am. App. at 5-6. Pltf. also argues that Deft's defense that there was no causation here was unreasonable because it relied upon expert testimony that lacked a basis in modern science. Id. at 6. Deft's Motion to Retax does not address whether its defenses were maintained in good faith. However, this Court has already highlighted in its Tentative Ruling on Deft's Renewed Motion for Judgment as a Matter of Law that Nevada case law surrounding constructive notice is, at best, confusing. This is not a case where the law is black and white. Based on that and the evidence presented at trial, it was not bad faith for Deft. to contend that it lacked notice of the condition on the floor and Pltf. in fact so concedes. Furthermore, Pltf.'s evidence of constructive notice may have been enough to escape the granting of a Rule 50 motion, but it was by no means overwhelming. Additionally, Pltf.'s damages claims were reasonably disputed by expert testimony of a defense witness. That the jury was not persuaded by this expert does not translate to bad faith by the Deft.. Thus, the first factor therefore weighs in favor of the Deft.. As to the second factor, Deft. argues that the offer was unreasonable in amount because Pltf. had no basis for its offer and that due to Pltf.'s gamesmanship, Deft. could not sufficiently evaluate the offer. Opp. at 5-7. Here, discovery closed on June 12, 2015. Pltf. was unable to submit proof of special medical damages at the time of trial because the Court precluded them on the basis that they were not properly disclosed in discovery. This made it extremely difficult for the Defense to evaluate a potential value of the case. An offer made at a time when Pltf. has not properly provided a calculation of damages is unreasonable. Thus, the second factor weighs in favor of Deft.. In ascertaining whether Deft's decision to reject the offer was grossly unreasonable or in bad faith, a pertinent consideration is whether enough information was available to determine the merits of the offer. *Trustees of the Carpenters for S. Nev. Health & Welfare Trust v. Better Building Co.*, 101 Nev. 742, 746, 710 P.2d 1379, 1382 (1985). Here, discovery closed on June 12, 2015. The offer of judgment was made three months later, on September 3, 2015. Given that at the time of the offer, Deft. had available all the materials obtained during discovery, including witness depositions, Deft's decision to reject the offer was well-informed. Furthermore, the issues surrounding notice were not necessarily clear cut, as evidenced by the parties' pre-trial and post-trial motions on that issue. Overall, it is unlikely that Deft's rejection of the offer was grossly unreasonable or in bad faith, and in the end weighs in favor of Deft.. 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, 249, 455 P.2d 31, 33 (1969). Pltf. has addressed some, but not all, of these factors. Pltf.'s counsel has set forth the qualities of the advocate(s) on this case and, of course, we know that a favorable result was obtained. However, Pltf. has not provided any bills setting forth what tasks were performed and the associated hours for those tasks. This prevents the Court from determining whether the fees charged were reasonable in light of the tasks actually performed. Therefore, because Pltf. has not carried her burden under *Brunzell*, this factor weighs in favor of Deft.. On the whole, all of the factors set forth in *Beattie* (as modified by *Yamaha*, supra) weigh in favor of Deft. in this case and Pltf.'s Amended Application for Fees should be denied. Although NRCP 68 costs are only for post-offer costs, NRS 18.020(3) mandates awarding

all costs to Pltf. since she prevailed in seeking damages in an amount more than \$2,500. NRS 18.110(1) requires the filing of a memorandum of costs by the party in whose favor judgment is rendered, including a verification of the party, the party's attorney, or an agent of the party's attorney that the costs are correct and were necessarily incurred. The amount of awarded costs rests in the sole discretion of the trial court. *Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 565 66 (1993). The court also has discretion when determining the reasonableness of the individual costs to be awarded. *U.S. Design & Constr. Corp. v. I.B.E.W. Local 357*, 118 Nev. 458, 463, 50 P.3d 170, 173 (2002). Claimed costs must be actual and reasonable, rather than a reasonable estimate or calculation of such costs. *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 86 (1998) (internal quotations omitted). The Supreme Court has also indicated that claimed costs must be supported by documentation and itemization. *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 971 P.2d 383 (1998). Deft. only challenges certain specific fees, each of which will be addressed in turn.

1. Expert Witness Fees

Deft. argues that the amounts for expert witnesses should be reduced because they are well over the statutory limit of \$1,500.00 per expert and the additional amounts are not necessary and reasonable. Mot. at 6-8. NRS 18.005(5) provides that recoverable costs include [r]easonable fees of not more than five expert witnesses in an amount of not more than \$1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee. Allowing fees above the statutory maximum requires this Court to determine whether those fees were necessary and reasonable. *Arnold v. Mt. Wheeler Power Co.*, 101 Nev. 612, 615, 707 P.2d 1137, 1139 (1985). Granting fees in excess of the statutory maximum may be necessary and reasonable where the expert witness testimony constituted most of the evidence. *Gilman v. Nevada State Bd. of Veterinary Med. Examiners*, 120 Nev. 263, 273, 89 P.3d 1000, 1006-07 (2004), disapproved of on other grounds by *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. Adv. Op. 27, 327 P.3d 487 (2014). Here, the testimony of Dr. Dunn and Dr. Tingey was important but did not constitute most of the evidence. Pltf. herself testified, as well as other witnesses and employees of Deft.. On the other hand, Pltf. outlined in her Amended Application and Opposition to Deft's Motion to Re-Tax that the nature of their testimony was fairly complex and required several hours of file review. Even though Drs. Dunn and Tingey were Pltf.'s treating physicians, as Deft. points out, this does not necessarily make an increased fee unnecessary or unreasonable. Pltf. requests a total fee of \$6,000 for Dr. Tingey, \$10,000 for Dr. Dunn, and \$3,699 for Gary Presswood. Dr. Tingey's fee seems to be reasonable, for the reasons identified by Pltf. in her Amended Application. As to Dr. Dunn, Deft. does point out that half of the claimed amount is for the second day of testimony, which lasted less than an hour and was done to accommodate his own schedule. Mot. at 8. Hence, Dr. Dunn should be allowed only \$5,000. As to Mr. Presswood, his testimony was not used at trial because this Court ruled that his testimony would be unreliable. Since his testimony was clearly inadmissible under the Hallmark standard, as reflected in this Court's prior pre-trial ruling, his fees should not be awarded. Hence, as to the expert fees, Deft's Motion should be granted in part.

2. Service Fees

NRS 18.005(7) allows recovery of service fees. Deft. next challenges the service fees claimed by Pltf. in serving Yanet Elias, Corey Prowell, and Salvatore Risco. Mot. at 8-9. Pltf. acknowledges that all costs must be both reasonable and necessary. As to Yanet Elias and Corey Prowell, each was an employee of Deft. and Deft. points out that it had accepted service for those persons. Defense counsel

should be prepared to address whether he agreed that these witnesses would be produced for trial without a subpoena at the time of oral argument. If so, the service fee was unnecessary, but if not, agreement that service can be made upon counsel instead of the witness does not eliminate the need to serve and the fees would be necessary. As to Mr. Risco, Deft. argues that the service fees were unnecessary and unreasonable because Pltf. s counsel had good communication with him. However, unlike the other two employee-witnesses, Mr. Risco was not a party to this case or an agent of a party to this case, so service of a subpoena upon him was necessary. Additionally, Pltf. has outlined sufficient reasons for the amount of the claimed charge that show it to be reasonable and she should be granted those fees, subject to the same question posed above.

3. Jury Fees

NRS 18.005(3) specifically allows an award of jury fees as an element of costs. Deft. next argues it should not be responsible for the jury fees because Pltf. failed to request a jury trial within the time allowed. Mot. at 9. Deft. essentially only argues that because Pltf. s demand for a jury trial was untimely and this should have been a bench trial, it should not have to pay for the jury fees. However, those arguments are premised on challenging this Court s grant of Pltf. s request for a jury trial and the time for reconsidering that decision has long since passed. Moreover, both parties had prepared this entire case under the assumption that it was going to be tried by jury, so Deft. was not prejudiced by the Court s ruling in any event. Since the jury fees were actually incurred and reasonable, Deft s Motion as to those fees should be denied, and Pltf. should be allowed the jury fees incurred.

4. Parking Fees

NRS 18.005(17) allows the court to award any other reasonable costs actually incurred. This would, of course, include costs incurred in parking for hearings and the like. Deft. argues that there were other, free, places Pltf. could have parked. Mot. at 9. This may or may not be true, but Deft s argument is conclusory in any event. Because Pltf. actually incurred the parking costs, they should be awarded.

5. Skip Trace Fees

Deft. lastly argues that Pltf. s request for skip trace/investigative fees for Terry Ruby were unreasonable and unnecessary. Mot. at 9. Terry Ruby is a former employee of Deft. and was the first to respond to Pltf. s fall. Opp. at 8. It is clear why Pltf. would have a need to locate and depose Mr. Ruby. A \$150.00 fee for that service is not unreasonable, given the extreme costs associated with reporting services like Accurant. Therefore, Deft s Motion as to the skip trace fee should be denied, and Pltf. should be allowed that amount as a cost.

6. Remaining Fees

Deft. does not challenge the remaining requested fees. Pltf. has attached back-up documentation for each claimed cost and they all seem to be reasonable and within the going market rate for each associated service. Pltf. has therefore carried her burden under Berossini and the remaining costs requested should be awarded. Therefore, Pltf. s Amended Application as to costs should be granted, as set forth herein.

Arguments by counsel. Upon Court's inquiry, Pltf. advised costs have been paid in full. COURT stated findings and ORDERED, Deft's Motion is GRANTED in part, noting calendar is in error as it state's Pltf's Motion. Pltf's Motion for fees and costs is DENIED, and for attorney fees is DENIED. Defense to prepare the order and join it all in one.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

June 29, 2016

A-12-655992-C	Yvonne O'Connell, Plaintiff(s)
	vs.
	Wynn Resorts Limited, Defendant(s)

June 29, 2016 3:00 AM Minute Order

HEARD BY: Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Lara Corcoran

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- MINUTE ORDER

This matter came before the Court on March 4, 2016 on Defendant s Motion to Retax Costs and Plaintiff s Motion to Tax Costs and for Fees, Costs, and Post-Judgment Interest. After reviewing the parties' briefs and hearing arguments of counsel, the Court made its findings granting in part and denying in part both Motions.

The Court received the proposed order on those Motions on May 27, 2016. The proposed order awarded fees to two expert witnesses, Dr. Tingey and Dr. Dunn, above the statutory maximum of \$1,500.00 set forth in NRS 18.005(5), and disallowed all fees for expert Gary Presswood.

However, in reviewing that proposed order and additional case law surrounding the award of expert witness fees, it has come to the Court s attention that the Nevada Court of Appeals has recently outlined several express factors that are to be considering when deviating above the statutory maximum in NRS 18.005(5) for expert witness fee awards. See *Frazier v. Duke*, 131 Nev. Adv. Op. 64, 357 P.3d 365 (2015). That case was issued in September of 2015, just before the trial of this matter, but was not cited in either party s briefing with regard to a fee award. Therefore, the Court finds it appropriate to order additional limited briefing on that issue and, good cause appearing,

IT IS HEREBY ORDERED that Plaintiff s counsel is to file a supplemental brief of no more than 10 pages that addresses the factors set forth in Frazier, supra, in detail, as applicable, for Drs. Tingey and Dunn no later than July 13, 2015.

IT IS FURTHER ORDERED that Defendant s counsel is to file a supplemental response brief of no more than 10 pages no later than July 27, 2016.

IT IS FURTHER ORDERED that this matter will be set for hearing on the supplemental briefs only on August 12, 2016 at 9AM. If the parties wish to submit on their briefs, or if the hearing date of August 12 is unavailable for either counsel, they are to contact the Court s law clerk, Travis Chance, at 702-671-4357 to reschedule to a mutually agreeable date.

The Court further notes that this matter has been appealed, however, a final order on the issue of a fee award has not yet been entered and may still be resolved by this Court.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability**COURT MINUTES****August 12, 2016**

A-12-655992-C Yvonne O'Connell, Plaintiff(s)
 vs.
 Wynn Resorts Limited, Defendant(s)

August 12, 2016 9:00 AM Hearing

HEARD BY: Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Phyllis Irby

RECORDER: Lara Corcoran

REPORTER:

PARTIES

PRESENT: Carlston, Jon J Attorney
 Semenza, Lawrence, III Attorney

JOURNAL ENTRIES

- Mr. Carlston stated he had a couple of points that he wanted to raise, one being Dr. Dunn's second day of testimony; these Frazier factors non exhausted lists trial witnesses can be difficult, he had to come back. The second issue we had been awarded Dr. Tingy's full \$6,000 fee and \$5,000 of that was for his testimony, \$1,000 was for consult with our office, we ask that is something that should be awardable it was part of his preparation for trial and his retention for treating as a medical expert should be awarded his full \$6,000 rather than capping it at \$5,000.

Mr. Semenza argued with regard to Dr's Dunn and Tingy there was an issues with the disclosures, in their disclosures they had provided identical descriptions for 30 something providers and that was the basis why we didn't take the depositions beforehand and there were concerns if these two doctors would be permitted to testify at all in this case. That was the basis for the voir dire that took some time that the Court did allow us to take. The reason Dr. Dunn took the stand so late was based on his schedule, not the Court's schedule. We didn't finish with him which required him to come back the following day. The Court appropriately limited the amount of the award relating to Dr. Dunn to only that first day, based upon his schedule. With regard to the \$6,000 or \$5,000 difference. The \$6,000 was related to Dr. Tingy and Dr. Dunn was \$5,000 for the day, Dr. Tingy was the same, therefore we believe that the \$5,000 is more appropriate. The Court stated the reason Dr. Tingy's fee was adjusted down from the original \$6,000 was because the medical record by both physicians which was

obtained late by the defense, was not very expansive or extensive. The Court finds the time Dr. Tingy spent testifying his fee was adequate. COURT ORDERED, DEFT'S RETAX COSTS GRANTED. Mr. Semenza will prepare the Order.

PLAINTIFF'S PROPOSED EXHIBITS

YVONNE O'CONNELL vs. WYNN LAS VEGAS, LLC					
Case Number A-12-655992					
	Description	Bate Numbers	Offered	Objected	Admitted
1	Picture of Plaintiff (far right) with her Cousins – pre- accident	00001			
2	Picture of Plaintiff (far left) with her nephew and his family – pre-accident	00002			
3	Picture of Plaintiff (far left) with her nephew and his family – pre-accident	00003			
4	Unredacted photograph of Plaintiff's buttocks showing bruising from fall	00004	11/12	NO	11/12/15
5	Redacted photograph of Plaintiff's buttocks showing bruising from fall	00005			
6	Unredacted photograph of Plaintiff's buttocks showing bruising from fall	00006	11/12	NO	11/12/15
7	Redacted photograph of Plaintiff's buttocks showing bruising from fall	00007			
8	Unredacted photograph of Plaintiff's buttocks showing bruising from fall	00008	11/12/15	NO	11/12/15
9	Redacted photograph of Plaintiff's buttocks showing bruising from fall	00009	11/12	withdrawn obj	
10	Unredacted photograph (close-up) of Plaintiff's buttocks showing bruising from fall	00010			
11	Redacted photograph (close-up) of Plaintiff's buttocks showing bruising from fall	00011			
12	Curriculum Vitae; Fee Schedule and Trial Testimony List – Thomas Dunn, M.D.	00012 - 00015			

YVONNE O'CONNELL vs. WYNN LAS VEGAS, LLC

Case Number A-12-655992

13	Plaintiff's Medical Records and Billing Statement for treatment rendered by Thomas Dunn, M.D.	00016 - 00048			
14	Curriculum Vitae; Fee Schedule and Trial Testimon List – Craig T. Tingey, M.D.	00049 – 00056			
15	Plaintiff's Medical Records and Billing Statement for treatment rendered by Craig T. Tingey, M.D.	00057 – 00076			
16	Wynn Las Vegas, LLC Answer to Amended Complaint	00077 – 00082			
17	Wynn Las Vegas Dust Mop/Damp Mop Policy dated 1/28/2005	0083 – 00084			
18	Wynn Las Vegas Dust Mop/Damp Mop Policy dated 8/1/07	00085 – 00086			
19	Wynn Las Vegas Dust Mopping/Damp Mopping Power Point Presentation – undated	00087 – 00090			
20	Wynn Las Vegas Wet Floor Signs and Spills Power Point Presentation – undated	00091 – 0092			
21	Wynn Las Vegas Wet Floor Signs & Spills Policy	00093			
22	Wynn Las Vegas Signs and Spills Power Point – undated	00094 - 00095			
23	Wynn Las Vegas Marble Care Policy	00096 - 00097			
24	Wynn Las Vegas Marble Care Power Point Presentation – undated	00098 - 00099			
25	Affidavit/Declaration of Custodian of Records for Desert Orthopedic/Dr Tingey	00100 - 00101			

YVONNE O'CONNELL vs. WYNN LAS VEGAS, LLC**Case No. A-12-655992-C, Dept. No. V****Wynn's Proposed Exhibit List**

<u>EX No.</u>	<u>DOCUMENT/BATES NUMBERS</u>	<u>OFFERED</u>	<u>OBJECTED</u>	<u>ADMITTED</u>
A. (1-11)	Color Pictures of Incident and Guest Statements WYNN-O'CONNELL 00001 - 00011			
B. (1-66)	UMC Records WYNN-O'CONNELL 00012, 00016, 00024, 00032, 00039 - 00040, 00047 - 00053, 00060 - 00067, 00075 - 00077, 00079 - 00080, 00090, 00099 - 00101, 00111, 00120 - 000122, 00126, 00135 - 00138, 00150, 00163, 00168 - 00169, 00175, 00184, 00193, 00201 - 00203, 00214, 00216, 00230, 00232, 00234 - 00235, 00239, 00241 - 00244, 00252, 00254 - 00258			
C. (1-11)	Apache Foot & Ankle Specialist (Lee Wittenberg DPM) WYNN-O'CONNELL00262 - WYNN-O'CONNELL00272			
D.	Ascent Primary Care (Suresh Prahbu MD) WYNN-O'CONNELL00277 - WYNN-O'CONNELL00278			
E. (1-5)	Clinical Neurology Specialists (Leo Germin MD) WYNN-O'CONNELL 00290 - 00291, 00296 - 00298			
F.	Desert Institute of Spine Care - Dr. Cash WYNN-O'CONNELL00302 - WYNN-O'CONNELL00303			
G. (1-15)	Ed Suarez WYNN-O'CONNELL 00307 - 00321			
H.	Matt Smith PT 5/3/10 WYNN-O'CONNELL00398 - WYNN-O'CONNELL00399			