

*In the*  
**Supreme Court**  
*for the*  
**State of Nevada**

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Electronically Filed  
May 01 2017 01:01 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

WYNN LAS VEGAS, LLC d/b/a WYNN LAS VEGAS,  
*Appellant and Cross-Respondent,*

v.

YVONNE O'CONNELL,

*Respondent and Cross-Appellant.*

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

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**APPELLANT'S APPENDIX**  
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LAWRENCE J. SEMENZA III, ESQ. (7174)  
CHRISTOPHER D. KIRCHER, ESQ. (11176)  
JARROD L. RICKARD, ESQ. (10203)  
SEMENZA KIRCHER RICKARD  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
(702) 835-6803 Telephone  
(702) 920-8669 Facsimile

*Attorneys for Appellant and Cross-Respondent,  
Wynn Las Vegas, LLC*



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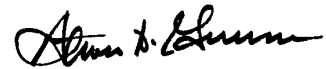
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CLERK OF THE COURT

**NEOJ**

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

Email: [ljs@semenzalaw.com](mailto:ljs@semenzalaw.com)

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

Email: [cdk@semenzalaw.com](mailto:cdk@semenzalaw.com)

LAWRENCE J. SEMENZA, III, P.C.

10161 Park Run Drive, Suite 150

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, doing business as  
WYNN LAS VEGAS; DOES I through X;  
and ROE CORPORATIONS I through X;  
inclusive;

Defendants.

Case No. A-12-655992-C

Dept. No. V

**NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an Order was entered by the Court on December 23, 2015,  
a true and complete copy of which is attached hereto.

DATED this 28th day of December, 2015.

LAWRENCE J. SEMENZA, III, P.C.

/s/ Christopher D. Kircher

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

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

10161 Park Run Drive, Suite 150

Las Vegas, Nevada 89145

Attorneys for Defendant Wynn Las Vegas, LLC

d/b/a Wynn Las Vegas

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

**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 28th day of December, 2015 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  
christianmorris@nettleslawfirm.com  
kim@nettleslawfirm.com

*Attorneys for Plaintiff*

/s/ Olivia A. Kelly  
An Employee of Lawrence J. Semenza, III, P.C.

  
CLERK OF THE COURT

**ORDR**

Lawrence J. Semenza, III, Esq., Bar No. 7174  
Email: ljs@semenzalaw.com  
Christopher D. Kircher, Esq., Bar No. 11176  
Email: cdk@semenzalaw.com  
LAWRENCE J. SEMENZA, III, P.C.  
10161 Park Run Drive, Suite 150  
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 ON SUPPLEMENTAL  
BRIEFING RELATING TO THE  
PROPOSED TESTIMONY OF DR.  
DUNN AND DR. TINGEY**

On October 29, 2015, the Court held a hearing in response to the Parties' Supplemental Briefing related to the hearing this Court conducted on October 1, 2015 on Defendant Wynn Las Vegas, LLC d/b/a Wynn Las Vegas' ("Defendant") Motion in Limine [#2] to Exclude Unrelated Medical Conditions and Damages Claimed by Plaintiff (the "Motion"). Plaintiff filed an Opposition and Supplement and Defendant filed a Reply and Supplement. Christian Morris, 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, with good cause appearing, hereby orders as follows:

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

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 Dr. Dunn will be allowed to testify at trial, however  
2 counsel for Defendant will be first allowed to depose Dr. Dunn on the stand in the absence of the  
3 jury.

4           **IT IS HEREBY FURTHER ORDERED** that Dr. Dunn's testimony will be limited to the  
5 medical records.

6           **IT IS HEREBY FURTHER ORDERED** that Dr. Tingey will be allowed to testify at  
7 trial, however counsel for Defendant will be first allowed to depose Dr. Tingey on the stand in the  
8 absence of the jury.

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

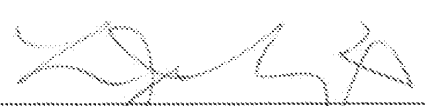
1 **IT IS HEREBY FURTHER ORDERED** that Dr. Tingey's testimony will be limited to  
2 the medical records.

3 DATED this 21<sup>st</sup> <sup>December</sup> day of November, 2015.

4  
5   
6 DISTRICT COURT JUDGE  
7 

8 Respectfully Submitted By:


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

10   
11 \_\_\_\_\_  
12 Lawrence J. Semenza, III, Esq., Bar No. 7174  
13 Christopher D. Kircher, Esq., Bar No. 11176  
14 10161 Park Run Drive, Suite 150  
15 Las Vegas, Nevada 89145

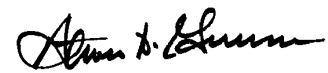
16 Attorneys for Defendant Wynn Las Vegas, LLC d/b/a  
17 Wynn Las Vegas

18 Approved as to Form And Content:

19 NETTLES LAW FIRM

20   
21 \_\_\_\_\_  
22 Brian D. Nettles, Esq., Bar No. 7462  
23 Christian M. Morris, Esq., Bar No. 11218  
24 1389 Galleria Drive, Suite 200  
25 Henderson, Nevada 89014

26 Attorneys for Plaintiff Yvonne O'Connell  
27  
28



CLERK OF THE COURT

**MJUD**

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

Email: ljs@semenzalaw.com

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

Email: cdk@semenzalaw.com

LAWRENCE J. SEMENZA, III, P.C.

10161 Park Run Drive, Suite 150

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, an individual,

Plaintiff,

vs.

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

Defendants.

Case No.: A-12-655992-C

Dept. No.: V

**DEFENDANT WYNN LAS VEGAS,  
LLC'S RENEWED MOTION FOR  
JUDGMENT AS A MATTER OF LAW,  
OR, ALTERNATIVELY, MOTION FOR  
NEW TRIAL OR REMITTITUR**

Defendant Wynn Las Vegas, LLC d/b/a Wynn Las Vegas ("Wynn"), by and through its attorneys of record, Lawrence J. Semenza, III, Esq. and Christopher D. Kircher, Esq., of Lawrence J. Semenza, III, P.C., hereby moves the Court to set aside the Judgment entered in this case in favor of Plaintiff Yvonne O'Connell ("O'Connell") on December 15, 2015 (the "Judgment") and enter judgment in favor of Wynn as a matter of law. Wynn alternatively moves the Court for a new trial or remittitur.

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

1 This Motion is made pursuant to NRCP 50(b) and 59 and is supported by the following  
2 Memorandum of Points and Authorities, the attached exhibits, the papers and pleadings on file  
3 herein, and any oral argument as may be permitted by the Court at the hearing on this Motion.

4 DATED this 30th day of December, 2015.

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

6  
7 /s/ Lawrence J. Semenza, III  
8 Lawrence J. Semenza, III, Esq., Bar No. 7174  
9 Christopher D. Kircher, Esq., Bar No. 11176  
10 10161 Park Run Drive, Suite 150  
11 Las Vegas, Nevada 89145

12  
13 Attorneys for Defendant Wynn Las Vegas, LLC  
14 d/b/a Wynn Las Vegas  
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LAWRENCE J. SEMENZA, III, P.C.  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
Telephone: (702) 835-6803

**NOTICE OF MOTION**

**PLEASE TAKE NOTICE** that the undersigned counsel will appear at the Regional Justice Center, located at 200 Lewis Avenue, Las Vegas, Nevada 89155, Eighth Judicial District Court, Las Vegas, Nevada, on the 04 day of F e b ., 2016, at 9:00 a.m., before Department V, or as soon thereafter as counsel may be heard, for a hearing on **DEFENDANT WYNN LAS VEGAS, LLC'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR, ALTERNATIVELY, MOTION FOR NEW TRIAL OR REMITTITUR.**

DATED this 30th day of December, 2015.

LAWRENCE J. SEMENZA, III, P.C.

/s/ Lawrence J. Semenza, III  
Lawrence J. Semenza, III, Esq., Bar No. 7174  
Christopher D. Kircher, Esq., Bar No. 11176  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145

Attorneys for Defendant Wynn Las Vegas, LLC  
d/b/a Wynn Las Vegas

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

On November 16, 2015, the jury rendered what can only be described as a shocking verdict and awarded O'Connell \$240,000.00 in compensatory damages, after reducing the total award by 40% to reflect her own comparative negligence.<sup>1</sup> A Judgment based on the verdict was filed approximately one month later, on December 15, 2015.<sup>2</sup> Simply put, the jury's verdict and the subsequent Judgment are wholly unsupportable given the evidence presented at trial and must be set aside. Therefore, a judgment must be entered in favor of Wynn as a matter of law, or, alternatively, the Court should grant Wynn a new trial or remittitur.

There are several grounds upon which this Court must grant Wynn the relief it requests and they are addressed in turn below. Perhaps the most obvious of which is the lack of evidence that Wynn had constructive notice of the green sticky liquid substance that O'Connell claims she slipped on – a prerequisite for liability under Nevada law.<sup>3</sup> Although O'Connell claims that the unidentified liquid was large and had begun to dry, her testimony does not establish that Wynn had constructive notice.

In Nevada, to establish constructive notice, a plaintiff must show that there was a virtually continuous or recurrent hazardous condition, which O'Connell has not done in this case. Even if this was not the law in Nevada and a more expansive definition of constructive notice was appropriate, which it is not, O'Connell still has not established that Wynn had constructive notice of the liquid substance before the incident.

Specifically, the size of the alleged spill has no bearing on the issue at hand. Instead, the only relevant evidence as to whether Wynn should have known about the substance on the floor is

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<sup>1</sup> O'Connell orally moved for a jury trial, as opposed to a bench trial, for the first time on October 29, 2015, more than 2 and ½ years after filing her Complaint and less than one week prior to trial.

<sup>2</sup> O'Connell never provided Wynn with a draft of the Judgment for review and comment prior to its submission to the Court.

<sup>3</sup> At the close of O'Connell's case, she conceded there was no evidence that Wynn had actual notice of the liquid substance and that this is a constructive notice case. (Trial Transcript from Tuesday, November 10, 2015 at 10:36 a.m., 5:22-23, 6:17-18, a true and correct copy of which is attached hereto as Exhibit 1.)

1 how long it had been there prior to O'Connell's fall. And importantly, there was no evidence  
2 presented during the trial of that time period. O'Connell claimed that she thought portions of the  
3 spill were drying or had dried, which is not evidence of how long it existed and she admittedly  
4 has no expertise to make any such conclusion. Because the drying time of this unidentified liquid  
5 substance is undoubtedly outside the scope of the jury's common knowledge, O'Connell was  
6 required to present admissible and competent evidence on the issue of how long the liquid was on  
7 the floor prior to her fall, which she did not do.

8 In addition, although O'Connell presented the testimony of Dr. Craig Tingey and Dr.  
9 Thomas Dunn at trial, which Wynn asserts was prejudicial and improper, neither physician  
10 apportioned any of O'Connell's claimed damages between her preexisting conditions and injuries  
11 and a subsequent fall that took place after her fall at the Wynn. Because of O'Connell's failure to  
12 apportion, she cannot recover any of her claimed past or future pain and suffering damages in this  
13 case.

14 Further, rather than producing evidence supporting her claim, O'Connell instead pointed  
15 her finger and blamed Wynn for her failure to meet her evidentiary burdens. For instance,  
16 O'Connell improperly elicited testimony from Wynn's employees that Wynn did not have  
17 surveillance camera coverage of her fall and repeatedly stated that Wynn controlled the evidence  
18 in the case, improperly suggesting that Wynn failed to preserve evidence and that had there been  
19 video surveillance coverage it would have supported O'Connell's claims.

20 Lastly, O'Connell's counsel made an improper and prejudicial statement during rebuttal  
21 closing arguments. Specifically, she stated that the jury was the conscience of the community,  
22 which implied that the jury should disregard the jury instructions given in the case and instead  
23 render a verdict based on public opinion.

24 Notwithstanding the jury's verdict, this Court has an independent obligation to ensure the  
25 legal sufficiency of O'Connell's claim. Accordingly, O'Connell's claims against Wynn fail as a  
26 matter of law and judgment must be entered in favor of Wynn, or, alternatively, the Court should  
27 grant Wynn a new trial or a remittitur.

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1 **II. STATEMENT OF FACTS**

2 **A. Wynn Did Not Have Constructive Notice of the Alleged Hazard**

3 On February 8, 2010 at approximately 2:30 p.m., O'Connell was walking through the  
4 atrium area of Wynn Las Vegas. As she was walking and not paying attention where she was  
5 going, O'Connell slipped on a liquid foreign substance that was located on the flower mosaic tile  
6 floor in Wynn's atrium. O'Connell claims the liquid substance was green in color and sticky.

7 O'Connell admitted during trial that she had no evidence Wynn caused the liquid  
8 substance to be present on the floor or that Wynn had actual knowledge of it prior to her fall.  
9 (Exhibit 1, 5:22-23, 6:17-18.)<sup>4</sup> Thus, the only theory of liability in this case was based entirely on  
10 a claim that Wynn had constructive notice of the alleged hazard.

11 There was, however, no evidence presented at trial supporting a conclusion that Wynn had  
12 constructive notice of the sticky liquid substance. In fact, at the close of O'Connell's case, Wynn  
13 made an oral motion for judgment as a matter of law. (*Id.*, 3:7-9:17.) The Court denied the  
14 motion without prejudice and directed counsel to renew the motion after the conclusion of the  
15 trial. (*Id.*, 9:13-17.)

16 O'Connell did not present any evidence that liquid spills have occurred frequently, or at  
17 all, in the area where she fell that otherwise might have provided Wynn with constructive notice.  
18 Additionally, there was no evidence presented that the frequency of the inspections conducted by  
19 Wynn employees were somehow unreasonable.

20 The only testimony remotely related to the issue of constructive notice came from  
21 O'Connell herself. It was her unsubstantiated opinion that Wynn should have known about the  
22 green sticky liquid substance because of its size and because she claimed that portions of it had  
23  
24

25 \_\_\_\_\_  
26 <sup>4</sup> The trial transcripts attached as exhibits hereto were transcribed on an expedited basis by a local Court  
27 Reporter here in Las Vegas. Counsel for Wynn repeatedly attempted to obtain an expedited copy of the  
28 official trial transcript but the request was refused. Counsel for Wynn was informed by Julie Lord, the  
assigned transcriptionist, that she could not provide the official transcript prior to the deadline to file the  
instant Motion.

1 begun to dry.<sup>5</sup> Such statements, however, are wholly insufficient to create a triable issue of fact  
2 as to Wynn's liability in this case. Thus, there was no evidence presented whatsoever as to how  
3 long the green liquid substance was on the floor prior to O'Connell's fall. The liquid substance  
4 could have, for example, been on the floor for mere seconds before O'Connell fell. And,  
5 O'Connell even conceded that she did not know how long it had been on the floor prior to her  
6 falling. (Exhibit 2, 162:3-20.)

7 Moreover, there was no evidence presented as to what the green sticky liquid substance  
8 was, which would be necessary to establish that the liquid substance had in fact begun to dry.  
9 While O'Connell testified that she assumed that the substance came from liquid fertilizer used on  
10 the surrounding plants, the only evidence presented at trial was that Wynn does not use fertilizer  
11 on its plants — only water. Thus, the green liquid substance could not have come from the  
12 planters.

13 Based on these facts, O'Connell did not, as a matter of law, establish that Wynn had  
14 constructive notice of the alleged hazard.

15 **B. Dr. Tingey and Dr. Dunn's Testimony at Trial Confused and Misled the Jury,**  
16 **Both Doctors Failed to Apportion O'Connell's Preexisting Conditions and**  
17 **Subsequent Injuries After Her Fall at Wynn and/or Their Testimony Was**  
18 **Insufficient to Establish an Award for Future Pain and Suffering**

18 It is important to note that O'Connell did not seek the recovery of any medical expenses  
19 she asserts were incurred as a result of her fall at Wynn. In fact, the only damages O'Connell  
20 sought recovery of were for her alleged past and future pain and suffering.

21 First, Dr. Tingey and Dr. Dunn were never timely disclosed as witnesses in this case and  
22 never should have been permitted to testify. In addition, because O'Connell was not seeking  
23 recovery of her alleged past and future medical expenses and her symptoms were entirely  
24 subjective in nature, their testimony had no relevance to the case and, instead, confused and  
25 mislead the jury. This is especially true given that Dr. Tingey and Dr. Dunn first treated  
26 O'Connell years after her fall.

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27 <sup>5</sup> O'Connell conceded that she did not recall if her clothes or hands were wet from the liquid substance.  
28 (O'Connell Trial Testimony, 187:12-18, the relevant portions of which are attached hereto as Exhibit 2.)

1 Second, Dr. Tingey and Dr. Dunn's testimony regarding causation was based exclusively  
2 on O'Connell's self-reporting of her alleged symptoms and injuries.<sup>6</sup> Neither doctor offered any  
3 substantive medical testimony regarding causation and instead concluded that because O'Connell  
4 represented to them that she was injured as a result of the fall, it must be true. This again served  
5 to confuse and mislead the jury, to the prejudice of Wynn. As the Court is aware, expert  
6 testimony should only be permitted if such testimony will assist the trier of fact. In this case,  
7 neither Dr. Tingey and Dr. Dunn's testimony assisted the trier of fact in deciding the factual issues  
8 presented.

9 Third, Dr. Tingey and Dr. Dunn were required to apportion the damages between  
10 O'Connell's preexisting medical conditions, her subsequent fall in July of 2010 and her fall at  
11 Wynn in February of 2010, which they did not do.<sup>7</sup> The jury should never have been permitted to  
12 consider their testimony given this failure. The reason that medical experts are required to  
13 apportion damages in cases where there are preexisting conditions and/or subsequent injuries is to  
14 assist in determining what percentage of the claimed injuries are directly attributable to a  
15 defendant's negligence and what percentage of the injuries are wholly unrelated. It goes directly  
16 to causation and damages. Again, because Dr. Tingey and Dr. Dunn failed to apportion the  
17 alleged damages in this case, Wynn is entitled to one of the following remedies: 1) a judgment as  
18 a matter of law; 2) the damages awarded to O'Connell should be reduced to zero; or 3) the Court  
19 should order a new trial.

20 Lastly, and alternatively, because of the completely subjective nature of O'Connell's  
21 claimed injuries, expert testimony was required to establish her claim for future pain and  
22 suffering. As set forth above, neither Dr. Tingey nor Dr. Dunn apportioned O'Connell's  
23 preexisting conditions and her subsequent fall, in relation to her fall at the Wynn in February of  
24 2010. Thus, there was insufficient evidence presented as a matter of law to establish an award to

25 <sup>6</sup> Wynn's expert medical witness attributed her numerous medical conditions to preexisting pathology,  
26 subsequent injury and/or symptom magnification syndrome. As set forth in his expert report, a "person  
27 manifests symptoms in order to receive some kind of secondary gain, whether it is avoidance of  
responsibility, attention or financial gain."

28 <sup>7</sup> Wynn argued this issue before the Court immediately following its request for a judgment as a matter of  
law. (Exhibit 1, 9:18-14:14.)

O'Connell of future pain and suffering damages. Thus, at a minimum the Judgment should be reduced by the amount of future pain and suffering damages awarded by the jury after taking into account O'Connell's comparative negligence.

**C. O'Connell Was Permitted to Question Wynn's Employees Regarding the Availability of Video Surveillance Coverage of the Incident and Represented that Wynn "Controlled the Evidence" in the Case, Which Prejudiced the Jury into Believing that Wynn Failed to Preserve Evidence**

Wynn filed a Motion in Limine to Exclude Any Reference or Testimony of Defendant's Alleged Failure to Preserve Evidence prior to trial. The Court denied the motion.

During trial, O'Connell questioned Wynn's various witnesses regarding whether video surveillance captured O'Connell's fall at the Wynn. (Corey Prowell Trial Testimony, 15:15-16:15, 37:18-25 the relevant portions of which are attached hereto as Exhibit 3.) In addition, O'Connell's counsel made repeated statements to the jury that Wynn "controlled the evidence" in the case. (O'Connell's Closing Argument, 4:9-20, 5:9-21, 7:23-8:1, attached hereto as Exhibit 4; Rebuttal Closing Argument, 5:7-16, 6:10-13, attached hereto as Exhibit 5.) All of these statements were entirely improper and created, in effect, an inference that Wynn failed to preserve evidence. Based on this improper questioning and conduct by O'Connell's counsel, Wynn should be given a new trial in this matter.

**D. Plaintiff's Counsel Inappropriately Argued to the Jury that It Was the Community's Conscience During Closing Argument**

During closing argument, Plaintiff's counsel made the following representation to the jury, "As jurors, you are the voice of the conscience of this community. And you will go back there --". (Exhibit 5, 9:10-12.) Wynn's counsel made an objection that was sustained:

MR. SEMENZA: Objection, Your Honor.

THE COURT: Sustained. That – 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 consciousness of the community. You know that. It's improper argument.

MS. MORRIS: As members of the community. Is that better?

THE COURT: No.



(*Id.*, 9:13-21.) Based on the statement given by O'Connell's counsel, Wynn has been materially prejudiced and should be given a new trial. In making the statement, O'Connell's counsel invited the jury to disregard the instructions given by the Court and instead render its decision, not based on the evidence presented, but instead based on perceived public opinion.

### III. ARGUMENT

NRCP 50(a) provides, in pertinent part, "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."

NRCP 50(b) allows a party to renew a motion for judgment as a matter of law, notwithstanding the verdict, after trial. Such motions present solely a question of law for the court. *Dudley v. Prima*, 84 Nev. 549, 551, 445 P.2d 31, 32 (1968) (citations omitted). A renewed motion for a judgment as a matter of law may be entered when the verdict obtained is clearly "contrary to the law." *M.C. Multi-Family Development, LLC v. Crestdale Assoc., Ltd.*, 193 P.3d 536, 542 (Nev. 2008) (quoting *Bliss v. DePrang*, 81 Nev. 599, 602, 407 P.2d 726, 727-28 (1965)). "Thus, a court may direct a verdict in the moving party's favor . . . if, as a matter of law, the jury could not have reached the conclusion that it reached." *Grosjean v. Imperial Palace, Inc.*, 212 P.3d 1068, 1077 (Nev. 2009) (citing *Fox v. Cusick*, 91 Nev. 218, 220, 533 P.2d 466, 467 (1975)).

NRCP 50(b) goes on to state, in part "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. . . ."

With regard to the Court ordering a new trial, NRCP 59(a) states:

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)

1 Irregularity in the proceedings of the court, jury, master, or adverse  
2 party, or any order of the court, or master, or abuse of discretion by  
3 which either party was prevented from having a fair trial; (2)  
4 Misconduct of the jury or prevailing party; (3) Accident or surprise  
5 which ordinary prudence could not have guarded against; (4) Newly  
6 discovered evidence material for the party making the motion which  
7 the party could not, with reasonable diligence, have discovered and  
8 produced at the trial; (5) Manifest disregard by the jury of the  
9 instructions of the court; (6) Excessive damages appearing to have  
10 been given under the influence of passion or prejudice; or, (7) Error  
11 in law occurring at the trial and objected to by the party making the  
12 motion. On a motion for a new trial in an action tried without a jury,  
13 the court may open the judgment if one has been entered, take  
14 additional testimony, amend findings of fact and conclusions of law  
15 or make new findings and conclusions, and direct the entry of a new  
16 judgment.

11 Based on NRCP 59(a), a court may grant a motion for a new trial where there is plain error in the  
12 record, a showing of manifest injustice, or the verdict is clearly erroneous when viewed in light of  
13 all the evidence presented. *Frances v. Plaza Pacific Equities, Inc.*, 109 Nev. 91, 94, 847 P.2d  
14 722, 724 (1993). The Court need not hesitate to grant a new trial where there is no substantial  
15 conflict in the evidence on any material point and the verdict or decision is manifestly contrary to  
16 the evidence. *Avery v. Gilliam*, 97 Nev. 181, 183, 625 P.2d 1166, 1168 (1981).

17 **A. Because Wynn Did Not Create the Alleged Hazardous Condition or Have**  
18 **Actual or Constructive Notice of It, Wynn Is Entitled to a Judgment as a**  
**Matter of Law**

19 "The owner or occupant of property is not an insurer of the safety of a person on the  
20 premises, and in the absence of negligence, no liability lies." *Sprague v. Lucy Stores, Inc.*, 109  
21 Nev. 247, 250, 849 P.2d 320, 322 (1993) (citation omitted). Accordingly, to recover on a claim  
22 for negligence in Nevada, the plaintiff has the burden of establishing: "(1) that the defendant had a  
23 duty to exercise due care with respect to the plaintiff; (2) that the defendant breached this duty; (3)  
24 that the breach was both the actual and proximate cause of the plaintiff's injury; and (4) that the  
25 plaintiff was damaged." *Joynt v. California Hotel & Casino*, 108 Nev. 539, 542, 835 P.2d 799,  
26 801 (1992) (citation omitted); *see also Turner v. Mandalay Sports Entertainment, LLC*, 124 Nev.  
27 213, 217, 180 P.3d 1172, 1175 (2008). To prevail at trial, a defendant need only negate one of the  
28 elements of negligence. *Foster v. Costco Wholesale Corp.*, 2012 Nev. LEXIS 123, \*8, 291 P.3d

1 150 (Dec. 27, 2012) (citing *Harrington v. Syufy Enters.*, 113 Nev. 246, 248, 931 P.2d 1378, 1380  
2 (1997)).

3 Wynn did not breach any duty to O'Connell. Property owners, such as Wynn, "must  
4 exercise reasonable care not to subject others to an unreasonable risk of harm. A [property  
5 owner] must act as a reasonable person under all of the circumstances including the likelihood of  
6 injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding  
7 the risk." *Moody v. Manny's Auto Repair*, 110 Nev. 320, 329, 871 P.2d 935, 941 (1994); *Costco*  
8 *Wholesale Corp.*, 2012 Nev. LEXIS at \*16 (The "duty issue must be analyzed with regard to  
9 foreseeability and gravity of harm, and the feasibility and availability of alternative conduct that  
10 would have prevented the harm.") (citation omitted). When persons other than the business or its  
11 employees are the cause of the foreign substance, liability will only lie if the business had actual  
12 or constructive notice of the condition and failed to remedy it. *Sprague*, 109 Nev. at 250, 849  
13 P.2d at 322.

14 As set forth above, O'Connell conceded that she presented absolutely no evidence during  
15 trial that Wynn created the foreign substance or had actual notice of the foreign substance before  
16 the incident.<sup>8</sup> Therefore, O'Connell had the burden to prove at trial that Wynn had constructive  
17 notice of the foreign substance, which she clearly failed to do.

18 **1. O'Connell Presented No Evidence that the Foreign Substance Was a**  
19 **Recurrent Condition that Would Place Wynn on Constructive Notice**  
20 **under Nevada Law**

21 Under *Sprague*, the seminal case on premise liability in Nevada, the standard to prove  
22 constructive notice is a virtually continuous or recurrent condition because that places the  
23 property owner on notice that the specific hazardous condition will likely occur again. *Sprague*,

24 \_\_\_\_\_  
25 <sup>8</sup> Wynn objected to the inclusion of Jury Instruction 27 at trial. (Trial Transcript of Argument Relating to  
26 Jury Instructions on November 10, 2015, attached hereto as Exhibit 6; Jury Instruction 27, attached hereto  
27 as Exhibit 7.) First, there was no basis to include any reference to Wynn having created the hazardous  
28 condition or having actual notice of it because there was no evidence presented at trial supporting such a  
conclusion. Second, the last paragraph of Instruction 27 identified what the jury could consider relating to  
the issue of constructive notice. The language utilized in the instruction, however, is not based on Nevada  
law and should never have been given to the jury. Thus, for this additional reason Wynn should be granted  
a new trial.

1 109 Nev. at 250, 849 P.2d at 322; *see also FGA, Inc. v. Giglio*, 278 P.3d 490, 497 (Nev. 2012). In  
2 *Sprague*, the plaintiff claimed to have slipped and fallen on a grape in the produce section of the  
3 defendant's grocery store. *Sprague*, 109 Nev. at 248, 849 P.2d at 321. In opposing summary  
4 judgment, the plaintiff provided deposition testimony that the produce section was "a virtually  
5 continuous hazard" because people dropped produce on the floor six or seven times per hour. *Id.*  
6 In reversing the district court's granting of summary judgment, the Nevada Supreme Court found  
7 that a jury could have found the defendant knew that produce was frequently on the floor and  
8 created an ongoing, continuous hazard for its customers. *Id.*, 109 Nev. at 250, 849 P.2d at 322.  
9 That being so, a "reasonable jury could have determined that the virtually continual debris on the  
10 produce department floor put [the defendant] on constructive notice that, at any time, a hazardous  
11 condition might exist which would result in an injury to [its] customers." *Id.*, 109 Nev. at 251,  
12 849 P.2d at 322.

13 In another case, the Nevada Supreme Court affirmed the granting of summary judgment in  
14 favor of the defendant after the plaintiff failed to present any evidence that liquid spills "were a  
15 virtually continuous condition that created an ongoing, continuous hazard, thus providing  
16 constructive notice of the condition to [the defendant]." *Ford v. S. Hills Med. Ctr., LLC*, 2011  
17 Nev. Unpub. LEXIS 1326, \*3, 2011 WL 6171790 (Nev. Dec. 9, 2011) (unpublished). In *Ford*,  
18 the plaintiff slipped and fell on a clear liquid on the floor of the emergency department of  
19 defendant's hospital. *Id.* at \*1. The plaintiff "provided no evidence that the [defendant] or one of  
20 its agents caused the liquid to be on the floor of the emergency department, or that [defendant] or  
21 its employees had actual notice of the presence of the liquid." *Id.* at \*3. That being so, the  
22 plaintiff argued constructive notice under *Sprague* based on the testimony of the defendant's  
23 employee that spills occurred in the emergency department waiting room. *Id.* In affirming  
24 summary judgment, the Nevada Supreme Court determined that is not enough to prove  
25 constructive notice. *Id.*

26 The Nevada Supreme Court's requirement that a virtually continuous or recurrent  
27 condition is necessary to place a defendant on constructive notice of the hazardous condition is  
28 not a new concept. *See Eldorado Club v. Graff*, 78 Nev. 507, 377 P.2d 174 (1962). In *Eldorado*

1 Club, the plaintiff slipped on a lettuce leaf on a ramp leading from an alley to the defendant's  
2 receiving room. *Id.*, 78 Nev. at 508. During the trial, a witness was permitted to testify to two  
3 separate occasions when he had slipped and fallen on the ramp due to wet spots and lettuce  
4 leaves. *Id.*, 78 Nev. at 509. The trial court permitted the testimony for the limited purpose of  
5 establishing notice to the owner of the dangerous condition of the ramp when wet or with refuse  
6 upon it. *Id.* In reversing the trial court's judgment and remanding the case for a new trial, the  
7 Nevada Supreme Court held that such notice evidence is inadmissible to prove constructive notice  
8 unless the slip and fall is caused by the temporary presence of debris or foreign substance that was  
9 shown to be *continuing*. *Id.*, 78 Nev. at 511.

10 *Eldorado Club* is aligned with the constructive notice analysis in *Sprague* and *Ford*  
11 because a rare or single event by a third party creating a hazardous condition is not enough to  
12 place a defendant on constructive notice of the hazard under Nevada law. Stated differently, the  
13 specific hazardous condition must be recurrent in order to place the defendant on constructive  
14 notice that it may occur again.<sup>9</sup>

15 Here, O'Connell presented no evidence at trial that the foreign substance was a continuous  
16 or recurrent hazardous condition that Wynn should have been aware of. Further, O'Connell  
17 presented no evidence at trial regarding the length of time the foreign substance was present on  
18 the floor or how often foreign substances are spilled in Wynn's atrium, if any, before this  
19 incident.<sup>10</sup> In fact, O'Connell could not establish what the foreign substance was or where it came  
20

21 <sup>9</sup> See also *Hammerstein v. Jean Dev. West*, 111 Nev. 1471, 1476, 907 P.2d 975, 978 (1995) (after the  
22 plaintiff was injured exiting the property due to a false fire alarm, the Nevada Supreme Court reversed  
23 summary judgment in favor of the defendant when the property owner had past issues with its  
malfunctioning fire alarm making it reasonably foreseeable that someone may be injured in the future  
trying to escape).

24 <sup>10</sup> While reviewing the jury instructions with the parties, the Court discussed the case *Kelly v. Stop &*  
25 *Shop, Inc.*, 281 Conn 768, 918 A.2d 249 (Conn. 2007), a Connecticut case that cites to *Sprague*. In *Kelly*,  
26 the Court stated that, in regards to constructive notice, the question is "whether the condition had existed  
27 for such a **length of time** that the [defendant's] employees should, in the exercise of due care, have  
discovered it in time to have remedied it." *Id.* at 777 (emphasis added). The notice "must be notice of the  
28 very defect which occasioned the injury and not merely of conditions naturally productive of that defect . .  
." *Id.* at 776. In this case, O'Connell did not present any evidence regarding the length of time the  
foreign substance was present or how often foreign substances such as this occur in Wynn's atrium.  
Therefore, O'Connell failed to meet her burden in establishing constructive notice as a matter of law.

1 from. By failing to present any such evidence at trial, O'Connell failed to meet her burden to  
2 establish that Wynn was on constructive notice of the foreign substance and failed to remedy it or  
3 appropriately warn her. Put differently, the record is devoid of any evidence that Wynn through  
4 the exercise of reasonable care should have known about the foreign substance before O'Connell's  
5 fall. As such, if the judgment is permitted to stand, the Court would be imposing what amounts to  
6 a strict liability standard merely because O'Connell slipped on a foreign substance on Wynn's  
7 property, which is clearly contrary to well-settled Nevada law. *See Sprague*, 109 Nev. at 250, 849  
8 P.2d at 322 ("An accident occurring on the premises does not of itself establish negligence.").

9 **2. O'Connell's Testimony that the Foreign Substance Was Large and**  
10 **Parts of It Had Begun to Dry Does Not Establish Constructive Notice**

11 As set forth above, in order to establish that Wynn had constructive notice of the foreign  
12 liquid substance on the floor, O'Connell would need to present evidence that there was an ongoing  
13 and continuous spill hazard in the area, which she has not done in this case. Even if the Court  
14 were to accept a more generalized definition of constructive notice, not based on Nevada law,  
15 O'Connell still presented no evidence at trial whatsoever supporting a finding that Wynn had  
16 constructive notice of the liquid substance.

17 O'Connell's testimony that the foreign substance was large, sticky and portions of it  
18 appeared to be drying does not, as a matter of law, place Wynn on constructive notice.

19 As a preliminary matter, it is absurd to conclude that the size of the alleged spill could  
20 establish how long the foreign substance was on the ground or that Wynn should have known that  
21 it was there. Courts have concluded that constructive notice cannot be established by the size of  
22 the foreign substance on the ground without additional evidence to prove the property owner  
23 should have known of its presence. For instance, in a case cited by O'Connell, a federal court in  
24 Alabama concluded that the size of a spill is insufficient to raise a question of fact regarding the  
25 length of time the spill had been present, "A large spill can be as young as a small spill. A large  
26 spill can be as sudden as a small spill. Anyone who has held a burping baby knows that a large  
27 spill can occur with lightning speed. A large, sudden spill gives an invitor no additional notice  
28

1 merely because of its size." *Tidd v. Walmart Stores, Inc.*, 757 F. Supp. 1322, 1324 (N.D. Ala.  
2 1991).<sup>11</sup>

3 Further, O'Connell's uncorroborated trial testimony that portions of the foreign substance  
4 was drying is similarly not evidence of how long the foreign substance was on the floor. *See, e.g.*,  
5 *Great Atlantic & Pacific Tea Co. v. Berry*, 203 Va. 913, 128 S.E.2d 311 (Va. 1962) (observing  
6 that the majority of jurisdictions prohibit evidence of spilled substances as appearing old-looking,  
7 dirty, or grimy to establish how long the substances had been on the floor because it would  
8 require the jury to purely speculate or guess in order to allow recovery); *Rodriguez v. Kravco*  
9 *Simon Co.*, 111 A.3d 1191, 1193 (Pa. Super. Ct. 2015) ("Without evidence of how long it takes  
10 the liquid in question to become sticky or dry, the jury would be unable to determine whether the  
11 spill was present for a sufficiently long time to warrant a finding of constructive notice."); *Woods*  
12 *v. Wal-Mart Stores, Inc.*, No. 3:05CV048, 2005 U.S. Dist. LEXIS 45404, \*8-9, 2005 WL  
13 2563178 (E.D. Va. Oct. 12, 2005) (holding that "Plaintiff's contention that the spill appeared  
14 dirty, drying, and had tracks running through it is not enough under Virginia law to establish  
15 when the spill occurred" and, since the plaintiff could not establish when the spill occurred, "she  
16 also cannot establish that the spill had existed for a long enough period of time to charge the  
17 Defendant with constructive knowledge.").

18 In *Adams v. National Super Markets, Inc.*, 760 S.W.2d 139, 141 (Mo. App. 1988), the  
19 appellate court held that the trial court erred by not granting the defendant's motions for directed  
20 verdict and for judgment notwithstanding the verdict when the only evidence adduced by plaintiff  
21 that an ice cream spill had existed for sufficient length of time to constitute constructive notice  
22 was that the edges of the ice cream puddle were crusty and hard; a wet cloth was required to clean  
23 it; and a white mark was left on the floor. *Id.* at 141-142. The Court found that the "time  
24 necessary for the ice cream to get into the condition described by [the plaintiff] was not  
25 established, and any estimate would be purely 'speculative and uncertain.'" *Id.* at 141 (citing  
26 *Grant v. National Super Markets, Inc.*, 611 S.W.2d 357, 359 (Mo. App. 1980)). To establish  
27

28 <sup>11</sup> O'Connell cited this case in her Trial Brief regarding Constructive Notice filed on November 12, 2015.

1 constructive notice, "evidence must be presented that the defect has existed for a sufficient length  
2 of time to constitute notice, or, in other words, to show defendant should reasonably have known  
3 of it." *Id.* at 141 (citations and quotations omitted).

4 Thus, attempting to determine the length of time the foreign substance was on the floor  
5 based on its size and whether it may have been drying is nothing more than pure speculation and  
6 insufficient as a matter of law to establish constructive notice. The liquid substance could have  
7 been on the floor only seconds before the incident took place and O'Connell has not presented any  
8 evidence to establish how long the liquid substance was on the floor, conceding this point at trial:

9 Q. So I'm asking you how long in time would it take for that  
10 spill to dry?

11 A. So you're asking -- if you're asking me in minutes, I don't  
12 know the minutes. . . .

13 Q. But you don't know how many minutes it takes, do you?

14 A. I -- I don't know how many minutes.

15 (Exhibit 2, 162:7-16.)

16 The record is completely devoid of any evidence regarding the length of time the foreign  
17 substance had been on the floor. "The duration of the hazard is important because if a hazard only  
18 existed for a very short period of time before causing any injury, then the possessor of the land,  
19 even 'by the exercise of reasonable care,' would not discover the hazard, and thus would owe no  
20 duty to protect invitees from such a hazard." *Craig v. Franklin Mills Assocs., L.P.*, 555 F. Supp.  
21 2d 547, 550 (E.D. Pa. 2008) (citing Restatement (Second) of Torts § 343). Without presenting  
22 any evidence regarding the length of time the foreign substance was on the floor prior to the  
23 incident, O'Connell failed, as a matter of law, to establish that Wynn had constructive notice of it.  
24 Thus, Wynn is entitled to a judgment as a matter of law in this case.



**B. Dr. Tingey and Dr. Dunn Should Not Have Been Permitted to Testify at Trial and Their Testimony Materially Prejudiced Wynn by Confusing and Misleading the Jury**

**1. O'Connell's Untimely Disclosure of Dr. Tingey and Dr. Dunn Severely Prejudiced Wynn**

There is no dispute that Dr. Tingey and Dr. Dunn were not timely and/or properly disclosed as witnesses in this case. The following timeline establishes that O'Connell did not timely disclose Dr. Tingey:

Extended Expert Disclosure Deadline	April 13, 2015
Extended Rebuttal Expert Deadline	May 13, 2015
Extended Discovery Deadline	June 12, 2015
Plaintiff's Disclosure of Dr. Tingey's Medical Records	July 14, 2015
Plaintiff's Disclosure of Dr. Tingey as a Witness	August 27, 2015
Plaintiff's Disclosure of Dr. Tingey's CV, Fee Schedule and Trial History	September 28, 2015

In fact, O'Connell did not disclose Dr. Tingey until well after Wynn filed its motions in limine on August 13, 2015. With regard to Dr. Dunn, O'Connell disclosed his CV, Fee Schedule and Trial History on September 18, 2015, which was untimely by more than five months from the expert disclosure deadline and by more than three months from the discovery deadline. Due to O'Connell's untimely disclosure of Dr. Tingey and Dr. Dunn, the Court should not have permitted them to testify at trial.<sup>12</sup>

O'Connell's untimely and deficient disclosure of these witnesses clearly prejudiced Wynn. For instance, Wynn's medical expert, Dr. Victor Klausner, did not have an opportunity to review Dr. Tingey's medical records prior to preparing his expert report and it was not until Dr. Tingey and Dr. Dunn were testifying at trial that Wynn was finally provided with an understanding of

<sup>12</sup> Wynn hereby incorporates its Motion in Limine [#2] to Exclude Unrelated Medical Conditions and Damages Claimed by the Plaintiff filed on August 13, 2015, its Reply thereto filed on September 10, 2015 and its Supplemental Brief to Exclude Plaintiff's Treating Physician Expert Witnesses filed on October 27, 2015.

1 what their testimony was going to encompass. Additionally, Wynn did not have an opportunity to  
2 present additional rebuttal witnesses, had it chosen to do so.

3 **2. Dr. Dunn and Dr. Tingey Were Not Expert Witnesses as Contemplated**  
4 **by Nevada Law, but Improperly Testified as Character Witnesses for**  
5 **O'Connell**

6 Additionally, because O'Connell did not seek the recovery of any medical expenses  
7 purportedly incurred as a result of her fall the Wynn and she self-reported the cause of her  
8 claimed injuries and what those alleged injuries were, Dr. Tingey and Dr. Dunn's testimony had  
9 no relevance to this case whatsoever. (Dr. Dunn Trial Testimony on November 9, 2015, attached  
10 hereto as Exhibit 8; Dr. Dunn Trial Testimony on November 12, 2015, attached hereto as Exhibit  
11 9; Dr. Tingey Trial Testimony, attached hereto as Exhibit 10.) To testify as an expert witness  
12 under NRS 50.275, the witness' specialized knowledge must assist the trier of fact to understand  
13 the evidence or to determine a fact in issue. *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d  
14 646, 650 (2008). "An expert's testimony will assist the trier of fact only when it is relevant and  
15 the product of reliable methodology." *Id.*, 189 P.3d at 651. Here, Dr. Tingey and Dr. Dunn  
16 provided no substantive medical testimony bearing on O'Connell's claimed injuries. Instead, they  
17 were used as character witnesses for O'Connell to support her subjective contention that she began  
18 experiencing pain after her fall in February of 2010 and that the cause of her symptoms was in  
19 fact her fall. The presentation of Dr. Tingey and Dr. Dunn in this capacity was wholly improper  
20 and served to confuse and mislead the jury.

21 More specifically, "[w]here the sole basis for a physician's testimony regarding causation  
22 is the patient's self-reporting that testimony is unreliable and should be excluded." *Hare v.*  
23 *Opryland Hospitality, LLC*, 2010 U.S. Dist. LEXIS 97777, \*14 (D. Md. Sept. 17, 2010)  
24 (excluding treating physician's testimony as to causation because he failed to conduct a  
25 "differential diagnosis" that considered alternative causes for the injury) (citing *Perkins v. United*  
26 *States*, 626 F.Supp.2d 587, n. 7 (E.D.Va. 2009); *see also Goomar v. Centennial Life Ins. Co.*, 855  
27 F. Supp. 319, 326 (S.D. Cal. 1994) (holding that proffered expert testimony concerning a patient's  
28

1 medical condition, based only upon the patient's self-report to the experts was "unsupported  
2 speculation").

3 In *Perkins*, the court excluded expert testimony regarding causation where a doctor simply  
4 took the patient's explanation and adopted it as his opinion. *Perkins*, 626 F.Supp.2d at 592. The  
5 treating physician "did not adequately investigate [the plaintiff's] relevant medical history" in  
6 determining the cause of her injuries, such as prior accidents and preexisting conditions. *Id.* at  
7 593-94. The treating physician's opinion was unreliable because the treating physician  
8 "categorically dismissed or ignored evidence of other preexisting conditions when such evidence  
9 was available to him at the time of treatment." *Id.* at 594. Specifically, the treating physician did  
10 not explain how osteoarthritis in the same areas of her body as her alleged injuries was not the  
11 cause, or partial cause, of the plaintiff's current symptoms. *Id.* The treating physician's "failure to  
12 adequately account for the obvious alternative explanation creates a fatal analytical gap in his  
13 testimony." *Id.* (citation omitted). The Court found that "[b]y selectively ignoring the facts that  
14 would hinder the patient's status as a litigant, [the treating physician] reveals himself as the  
15 infamous 'hired gun' expert." *Id.* at 595.

16 Thus, given that O'Connell's self-reporting was the only basis for Dr. Tingey and Dr.  
17 Dunn's conclusions regarding causation – making them essentially character witnesses – their  
18 testimony should never have been considered by the jury. Dr. Dunn, for example, testified to the  
19 following:

20 Q. Do you know whether prior to February 8, 2010, Ms.  
21 O'Connell was experiencing any symptomology in her  
cervical neck, pain symptomology?

22 A. It was my understanding that she wasn't.

23 Q. Okay. And that understanding that she didn't have any  
24 symptoms prior to February 2010 came from her statements;  
25 correct?

26 A. Yes.

27 Q. And exclusively came from her statements.

28 A. Yes.

(Exhibit 9, 32:21-33:9.) Dr. Tingey testified to the following:

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

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

...

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

A. Yes.

(Exhibit 10, 24:6-11, 28:15-19.) Moreover, the fact that O'Connell had both pre-existing conditions and a subsequent fall supports a conclusion that Dr. Tingey and Dr. Dunn's opinions were not based on any appropriate medical or scientific methodology. Thus, Wynn was materially prejudiced by their testimony.

**C. O'Connell Had an Obligation to Apportion Her Damages, Which She Failed to Do, Requiring the Court to Enter a Judgment as a Matter of Law in Wynn's Favor**

A plaintiff bears the burden of proving both the fact and the amount of damage. *See Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 955 P.2d 661, 671 (1998). Moreover, a plaintiff bears the burden of proof on medical causation.<sup>13</sup> *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 157-58, 111 P. 3d. 1112 (2005). In this situation, proving causation is too complex and beyond the capability of a layperson to decide and, thus, expert testimony is required. *Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 288, 112 P.3d 1093, 1100 (2005); *see also*

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<sup>13</sup> With regard to actual causation, at trial "the [plaintiff must] prove that, but for the [defendant's wrongdoing], the [plaintiff's damages] would not have occurred." *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 1481, 970 P.2d 98, 107 (1998) (*overruled in part on other grounds by* *GES, Inc. v. Corbitt*, 117 Nev. 265, 271, 21 P.3d 11, 15 (2001)). Likewise, the plaintiff must prove proximate causation. Proximate cause "is essentially a policy consideration that limits a defendant's liability to foreseeable consequences that have a reasonably close connection with both the defendant's conduct and the harm which the conduct created." *Id.*

1 *Cunningham v. Riverside Health Sys.*, 33 Kan. App. 2d 1, 199 P.3d 133 (Kan. Ct. App. 2003)  
2 (affirming the lower court's decision that the complexity of the patient's medical situation, as well  
3 as her preexisting condition of osteoporosis, required expert testimony to establish a disputed  
4 material fact that the defendant caused the injury). Importantly, O'Connell conceded that medical  
5 expert testimony was required in this case to establish her damages for past and future pain and  
6 suffering, "Now, in order to get medical pain and suffering, you can't just rely on [O'Connell]  
7 saying, Well, I'm hurt; right? You have to hear from an expert witness." (Exhibit 4, 9:11-13.)

8 "In a case where a plaintiff has a pre-existing condition, and later sustains an injury to  
9 that area, the Plaintiff bears the burden of apportioning the injuries, treatment and damages  
10 between the pre-existing condition and the subsequent accident." *Schwartz v. State Farm Mut.*  
11 *Auto. Ins. Co.*, 2009 U.S. Dist. LEXIS 64700, \*15-16, 2009 WL 2197370 (D. Nev. July 22, 2009)  
12 (citing *Kleitz v. Raskin*, 103 Nev. 325, 327, 738 P.2d 508 (Nev. 1987) (citing Restatement  
13 (Second) of Torts §433(B), and relying on *Phennah v. Whalen*, 28 Wn. App. 19, 621 P.2d 1304,  
14 1309 (Wash. Ct. App. 1980) (stating that the burden to allocate should not be shifted to the  
15 defendants where the situation involves the allocation of damages between a plaintiff with a  
16 previous injury and a single, subsequent tortfeasor); *see also Valentine v. State Farm Mut. Auto.*  
17 *Ins. Co.*, 2015 U.S. Dist. LEXIS 54722, \*15-16 (D. Nev. Apr. 27, 2015).

18 Dr. Dunn conceded during his trial testimony that O'Connell suffered from degenerative  
19 disk disease of the lumbar and cervical spine that predated the incident at Wynn's property on  
20 February 8, 2010:

21 Q. Now, you've diagnosed Ms. O'Connell as having  
22 degenerative disk disease in her cervical spine; is that  
correct?

23 A. Yes.

24 Q. And in that sense, it was a preexisting condition; correct?

25 A. Yes.

26 Q. You also diagnosed her with lumbar disk disease; is that  
27 correct?  
28

1 A. Yes.

2 Q. And, again, that diagnosis -- that condition predated February  
3 8, 2010; is that correct?

4 A. Yes.

5 Q. And, again, that was a preexisting condition of Ms.  
6 O'Connell; correct?

6 A. Yes.

7 (Exhibit 9, 32:1-20.)

8 Dr. Dunn further testified that there was not any indication of an acute injury to Plaintiff's  
9 neck or back from the incident. (*Id.*, 34:21-35:11.) In addition, O'Connell testified to having a  
10 previous back injury before the incident at Wynn's property. (Exhibit 2, 78:6-8.) Thus, it is clear  
11 that O'Connell had a preexisting back condition well before she fell in February of 2010.

12 Regarding O'Connell's alleged right knee injury, O'Connell conceded during trial that she  
13 suffered a severe right knee injury on July 10, 2010 during a fall (subsequent to her fall at Wynn)  
14 and O'Connell failed to inform Dr. Tingey of this subsequent fall.<sup>14</sup> (Exhibit 2, 110:5-115:11;  
15 Exhibit 10, 26:13-21.) In addition, Dr. Tingey testified that O'Connell has arthritic and/or  
16 degenerative changes in her right knee that were unrelated to the incident at Wynn's property.

17 Q. And did you note arthritic changes in her right knee?

18 A. As well. I documented minimal arthritic changes.

19 ...  
20

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

23 A. It's possible that she had both factors contributing to her pain.

24 ...

25 (Exhibit 10, 23:9-12, 23:24-24:3; *see also* 11:21-24.)

26 \_\_\_\_\_

27  
28 <sup>14</sup> Despite asserting before trial that she was seeking damages related to her left knee, Dr. Tingey testified  
that her purported injury to her left knee was completely unrelated to the incident at Wynn.

1 Furthermore, the uncontroverted evidence at trial established that O'Connell suffers from  
2 additional preexisting health issues and conditions, such as fibromyalgia, IBS, anxiety,  
3 depression, Ehler Danlos and Marfan syndrome. While testifying, Dr. Tingey and Dr. Dunn both  
4 conceded that some of these health issues, such as fibromyalgia, anxiety and depression may  
5 affect and contribute to O'Connell's pain symptomology and purported injuries. (*Id.*, 25:4-21;  
6 Exhibit 9, 36:1-37:20.)

7 Because O'Connell indisputably suffers from these numerous preexisting/contributing  
8 conditions and had a subsequent fall, she has the burden of apportioning her injuries, treatment  
9 and damages between, on the one hand, the incident at Wynn's property and, on the other hand,  
10 her preexisting and contributing health conditions and the subsequent fall on July 10, 2010. She  
11 did not do so, however. O'Connell's counsel even conceded that Dr. Tingey and Dr. Dunn had not  
12 apportioned damages in this case by stating that "So I don't think there is any requirement for  
13 apportionment in this case." (Exhibit 1, 13:23-24.) O'Connell's treating physician witnesses  
14 merely testified (unconvincingly for that matter) that her right knee, neck and back injuries were  
15 all related to the incident at Wynn because she told them it was. (Exhibit 9, 32:21-33:9; Exhibit  
16 10, 24:6-11, 28:15-19.) To be clear, Dr. Tingey and Dr. Dunn did not apportion her claimed  
17 injuries, treatment and damages between the incident at Wynn's property and her numerous  
18 preexisting/contributing conditions and subsequent injuries.<sup>15</sup>

19 Accordingly, the jury should not have been permitted to consider O'Connell's alleged  
20 injuries when determining an award of damages. Simply put, O'Connell has the burden to  
21 apportion damages between the incident at Wynn's property, her preexisting conditions and her  
22 July 10, 2010 fall, but she failed to do so with expert medical testimony, which was required.  
23 Without the requisite expert testimony, the jury was not permitted to make any determination as to  
24 the amount of damages she allegedly suffered as a result of the incident at Wynn's property short  
25

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26  
27 <sup>15</sup> Even if O'Connell had attempted to apportion her damages during her testimony, which she did not, it  
28 would not be competent evidence to support her claim of damages. *See Behr v. Diamond*, 2015 Nev. App. Unpub. LEXIS 504, \*2-4 (Nev. Ct. App. 2015) (a plaintiff's own testimony is not competent evidence to support damages for subjective injuries).

of pure speculation.<sup>16</sup> Simply put, Nevada law does not permit the resulting judgment against Wynn.

**D. O'Connell, Alternatively, Is Not Entitled to an Award of Future Pain and Suffering Damages**

"Damages for future pain and suffering must be established with reasonable certainty." *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988); *Scognamillo v. Herrick*, 106 Cal.App.4th 1139, 1151, 131 Cal. Rptr. 2d 393 (2003) ("do not award a party speculative damages, which means compensation for future loss or harm which, although possible, is conjectural or not reasonably certain") (citation omitted).

The Nevada Supreme Court "has held that when an injury or disability is subjective and not demonstrable to others (such as headaches), expert medical testimony is necessary before a jury may award future damages." *Krause Inc. v. Little*, 117 Nev. 929, 938, 34 P.3d 566 (2001) (citing *Gutierrez v. Sutton Vending Serv.*, 80 Nev. 562, 565-66, 397 P.2d 3, 4-5 (1964)); *Lerner Shops v. Marin*, 83 Nev. 75, 79-80, 423 P.2d 398, 400 (1967) (in cases involving "subjective physical injury, . . . the claim must be substantially supported by expert testimony to the effect that future pain and suffering is a probable consequence rather than a mere possibility"). Injuries that do not require expert medical testimony for future pain and suffering are broken bones or a shoulder injuries causing demonstrably limited range of arm motion because they are "readily observable and understandable by the jury without an expert's assistance." *Id.* at 938-39 (citing *Paul v. Imperial Palace, Inc.*, 111 Nev. 1544, 1548, 908 P.2d 226, 229 (1995)). Put differently, these are "objective" injuries which do not require expert medical testimony. *Id.* Injuries that are not demonstrable to others, and require expert testimony, include reinjuring a back, low-back

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<sup>16</sup> Expert testimony is required because the "trier of fact must separate pre-existing injuries from the new injury and award damages only for the injury." *Emert v. City of Knoxville*, 2003 Tenn. App. LEXIS 813, \*8-9, 2003 WL 22734619 (Ct. App. Tenn. Nov. 20, 2003) (citing *Baxter v. Vandenheovel*, 686 S.W.2d 908, 912 (Tenn. Ct. App. 1985), *Haws v. Bullock*, 592 S.W.2d 588 (Tenn. Ct. App. 1979)). The fact-finder should focus on whether the "subsequent incident caused the original condition to worsen physically, not merely whether it merely caused additional pain to manifest itself." *Menditto*, 121 Nev. at 288, 112 P.3d at 1100. In cases such as the one at hand, a layperson cannot apportion damages because, among other things, they lack the requisite skill, training and experience.



1 pain, mental worry, distress and grief. *Sierra Pac. Power Co. v. Anderson*, 77 Nev. 68, 75, 358  
2 P.2d 892, 896 (1961).

3 As set forth above, because Dr. Tingey and Dr. Dunn failed to offer any medical or  
4 scientific evidence in support of O'Connell's claimed damages (their opinions were based  
5 exclusively on O'Connell's self-reporting), or apportion O'Connell's preexisting conditions and her  
6 subsequent fall with her *fall* at Wynn, there is insufficient evidence to establish any award for  
7 future pain and suffering damages. As a result, the judgment should at a minimum be reduced by  
8 the amount of future pain and suffering damages awarded by the jury.

9 **E. O'Connell Never Should Have Been Permitted to Question Wynn's Witnesses**  
10 **About the Lack of Video Coverage of the Incident or that Wynn "Controlled**  
11 **the Evidence" in the Case**

12 As set forth above, O'Connell attempted to create an issue at trial as to whether Wynn  
13 failed to preserve video surveillance footage of the incident and repeatedly asserted that Wynn  
14 controlled the evidence in the case. This was entirely improper and created an impression in the  
15 jury's mind that Wynn had done something inappropriate.

16 O'Connell questioned Corey Prowell, among other witnesses, regarding whether video  
17 surveillance captured O'Connell's fall at the Wynn. (Exhibit 3, 15:15-16:15, 37:18-25.)  
18 Additionally, O'Connell's counsel made repeated statements to the jury that Wynn "controlled the  
19 evidence" in the case. (Exhibit 4, 4:9-20, 5:9-21, 7:23-8:1, Exhibit 5, 5:7-16, 6:10-13.) Again,  
20 O'Connell's conduct materially prejudiced Wynn, warranting a new trial. As an illustration,  
21 O'Connell's counsel stated:

22 This case is about control. There are two kinds of evidence you've  
23 been told. There's direct and evidence and there's circumstantial  
24 evidence. . . . It's not in Yvonne's control. It's in Wynn's control.  
25 And when they control the evidence, anything like that, we didn't see  
26 it. None of it. . . . Yvonne has her testimony. That's it. They made  
27 sure of it.

28 (Exhibit 4, 4:9-11, 4:17-20, 5:20-21.) These kinds of statements are clearly improper and warrant  
an appropriate remedy.

**F. O'Connell's Counsel Made Improper Statements to the Jury About Its Role in the Case to the Prejudice of Wynn**

During rebuttal closing argument, O'Connell's counsel referenced that the jury was the conscience of the community. "As jurors, you are the voice of the conscience of this community. And you will go back there --". (Exhibit 5, 9:10-12.) This statement was entirely improper and unfair, as evidenced by the fact that Wynn's counsel's objection was sustained by the Court. (*Id.*, 9:13-21.) The statement invited the jury to disregard the instructions given in the case, which it clearly did in rendering its verdict. "Whether an attorney's comments are misconduct is a question of law subject to de novo review. Still, we give deference to the district court's factual findings and to how it applied the standards to those facts. Although counsel 'enjoys wide latitude in arguing facts and drawing inferences from the evidence,' counsel nevertheless may not make improper or inflammatory arguments that appeal solely to the emotions of the jury." *Grosjean*, 212 P.3d at 1078-1079 (internal citations omitted). Again, the statements by O'Connell's counsel warrants a new trial based on the irreparable prejudice that it created.

**IV. CONCLUSION**

Based on the foregoing, Wynn respectfully requests that the Court grant its Motion and enter judgment as a matter of law in its favor. In the alternative, Wynn requests that it be granted a new trial or remittitur, reducing or eliminating altogether O'Connell's award of damages.

DATED this 30th day of December, 2015.

LAWRENCE J. SEMENZA, III, P.C.

/s/ Lawrence J. Semenza, III  
Lawrence J. Semenza, III, Esq., Bar No. 7174  
Christopher D. Kircher, Esq., Bar No. 11176  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145

Attorneys for Defendant Wynn Las Vegas, LLC  
d/b/a Wynn Las Vegas

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

**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 30th day of December, 2015 I caused to be sent through electronic transmission via Wiznet's online system, a true copy of the foregoing **DEFENDANT WYNN LAS VEGAS, LLC'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR, ALTERNATIVELY, MOTION FOR NEW TRIAL OR REMITTITUR** to the following registered e-mail addresses:

NETTLES LAW FIRM  
christianmorris@nettleslawfirm.com  
kim@nettleslawfirm.com

Attorneys for Plaintiff Yvonne O'Connell

/s/ Olivia A. Kelly  
An Employee of Lawrence J. Semenza, III, P.C.

# **EXHIBIT 1**

# **EXHIBIT 1**

1 CASE NO. A-12-655992-C

2 DEPT. NO. 30

3 DOCKET U

4

5

DISTRICT COURT

6

CLARK COUNTY, NEVADA

7

\* \* \* \* \*

8

9 YVONNE O'CONNELL, )  
10 individually, )  
11 Plaintiff, )  
12 vs. )  
13 WYNN LAS VEGAS, LLC, a Nevada )  
14 Limited Liability Company )  
15 d/b/a WYNN LAS VEGAS; DOES I )  
16 through X; and ROE )  
17 CORPORATIONS I through X, )  
18 inclusive, )  
19 Defendants. )  
20

21

22

PARTIAL TRANSCRIPT

23

OF

24

JURY TRIAL

25

BEFORE THE HONORABLE CAROLYN ELLSWORTH

26

DEPARTMENT V

27

DATED TUESDAY, NOVEMBER 10, 2015

28

29 TRANSCRIBED BY: KRISTY L. CLARK, RPR, NV CCR #708,  
30 CA CSR #13529

1 APPEARANCES:

2 For the Plaintiff:

3 NETTLES LAW FIRM  
4 BY: CHRISTIAN M. MORRIS, ESQ.  
5 1389 Galleria Drive  
6 Suite 200  
7 Henderson, Nevada 89014  
8 (702) 434-8282  
9 christian@nettleslawfirm.com

10 For the Defendant Wynn Las Vegas, LLC:

11 LAWRENCE J. SEMENZA, III, P.C.  
12 BY: LAWRENCE J. SEMENZA, III, ESQ.  
13 BY: CHRISTOPHER KIRCHER, ESQ.  
14 10161 Park Run Drive  
15 Suite 150  
16 Las Vegas, Nevada 89145  
17 (702) 835-6803  
18 ljs@semenzalaw.com

19 \* \* \* \* \*

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1 LAS VEGAS, NEVADA, TUESDAY, NOVEMBER 10, 2015;

2 10:36 A.M.

3  
4 P R O C E E D I N G S

5 \* \* \* \* \*

6  
7 THE COURT: All right. Back on the record?

8 All right. We're back on the record outside the  
9 presence of the jury, and Mr. Semenza indicated he had  
10 something outside the presence.

11 MR. SEMENZA: Yes, Your Honor. I'd like to  
12 move for a directed verdict as to liability in this  
13 particular matter. The only evidence that has been  
14 presented in this particular case relating to liability  
15 is Ms. O'Connell's assertion that the liquid substance  
16 came from the plants in the atrium area. She bases  
17 that statement upon two things. First, the proximity  
18 of the liquid substance to the plants; and secondly,  
19 its green color. Those two things are insufficient to  
20 send this case to the jury based upon liability.

21 And Ms. O'Connell did testify that she didn't  
22 know how -- the mechanism by which that liquid got on  
23 the floor. She didn't know where it came from  
24 specifically. She didn't know how long it had been  
25 there. There were no apparent leaks or anything of

1 that nature that she noticed. She doesn't know what  
2 the horticultural department waters its plants with.  
3 So it's pure speculation on her part that this green  
4 substance came from the plants.

5 She did say that it was sticky and that there  
6 were footprints in it. But she also testified that the  
7 footprints were from her and the individuals that  
8 picked her up. So there -- there is no evidence to  
9 support liability on the part of Wynn in this  
10 particular matter. And we would move for a directed  
11 verdict as to liability.

12 THE COURT: You're talking about a Rule 50  
13 motion for judgment as a matter of law. That directed  
14 verdict, you know, they changed it. It's not a --

15 MR. SEMENZA: Yes, Your Honor.

16 THE COURT: -- directed verdict. Okay.  
17 Plaintiff's response?

18 MS. MORRIS: Yes. Everything Mr. Semenza  
19 just addressed was the source of the liquid, and that's  
20 certainly not the issue. The issue is -- is that if  
21 Wynn had been acting reasonable, would that liquid  
22 still have been on the floor for such a period of time  
23 in such a shape and size and length that part of it  
24 would have been able to dry? And the testimony was  
25 very clear from Mrs. Yvonne -- or Ms. O'Connell is that



1 it was approximately 7 feet in length and a portion of  
2 it had started to dry.

3           There was also testimony from the employees  
4 at Wynn that it was so large that they actually had to  
5 place a sweeper machine over it. Additionally, the  
6 testimony is -- is that this is -- that was from Ynet  
7 Elias. If there's -- there is -- this is a  
8 high-traffic area in which they claim that they are  
9 continuously sweeping, continuously looking through,  
10 and that there's employees there. And if that was the  
11 case, if they had been doing that job, as they said,  
12 then they should have seen that liquid in the amount  
13 and shape that was there and cleaned it up or warned  
14 her of it prior to her coming through and falling in  
15 it. Now, the source --

16           THE COURT: Let me stop you. Because the  
17 issue in a premise liability case where there's a  
18 foreign substance on the floor is not whether they  
19 should have seen, it's notice, either actual or  
20 constructive notice. So do you believe that you've  
21 proved actual notice?

22           MS. MORRIS: I do not believe we have actual  
23 notice. This is an issue of constructive notice.

24           THE COURT: Okay. And what's the evidence  
25 you believe that you've brought to show constructive

1 notice?

2 MS. MORRIS: That due to the location, the  
3 size, and the fact that portions of it had started to  
4 dry, that if Wynn had been constantly sweeping, as they  
5 claim to have, that they should have seen it. So it's  
6 either knew or should have known. Were they on  
7 constructive notice? They have provided testimony that  
8 this is a high-traffic area, that it is important that  
9 they try to keep it clean, and due to the fact it was  
10 such a large size, and portions of it had started to  
11 dry, then they were on constructive notice that there  
12 is a large pool of green liquid in a -- the atrium area  
13 walkway that had begun to dry. And they should have  
14 been able to know of it and clean it up had they been  
15 acting reasonably in the way that they say that they  
16 do.

17 So I don't believe there's actual, but there  
18 is certainly constructive. And Ms. Elias said she  
19 didn't know what it was. She thought it was maybe a  
20 drink, but it was certainly sticky. It had gotten to  
21 the point where it had been on the floor long enough to  
22 actually have dried and become a different substance.  
23 So we had a liquid part in which she fell, and there  
24 was a dry part. The testimony was very clear, and  
25 Ms. Elias corroborated that.

1 THE COURT: Well, I don't recall that  
2 actually she did. But your client testified to that.

3 What's your response?

4 MR. SEMENZA: My response, Your Honor, is  
5 there's no evidence to suggest we should have known  
6 about it, period, end of story. I mean, we don't know  
7 how long it was there. Any conclusions or testimony  
8 that Ms. O'Connell has offered is pure speculation and  
9 based upon nothing. Whether it could have been a large  
10 spill or a small spill, the point here is, we don't  
11 know how long it was there for.

12 And, again, it's pure speculation that  
13 Ms. O'Connell said, Well, it started to dry. There's  
14 no evidence of that. There's no evidence of it at all  
15 other than her testimony. And -- and -- and so, again,  
16 I don't think that they've established any sort of  
17 constructive notice. They haven't met their burden in  
18 that regard. And -- and I think you have to grant us a  
19 directed verdict in that.

20 THE COURT: All right. Well, again, it's not  
21 a directed verdict. Under Rule 50, it's a judgment as  
22 a matter of law. And the Court has, you know, the  
23 option of either granting the motion or denying the  
24 motion and allowing it to proceed to the jury. And  
25 then if the jury returns a verdict, the -- allowing the

1 side who lose to renew within ten days and fully brief  
2 it. And so that's the -- the option I'm going to  
3 choose at this time.

4 Because right now, I mean, I've got to say  
5 that there is probably the -- very, very little  
6 evidence regarding constructive notice. Because  
7 really, the only evidence of constructive notice is  
8 Ms. O'Connell's testimony that the substance she  
9 slipped in was drying, you know.

10 And because Ms. Elias, her testimony of what  
11 she saw, describing the honey, syrup like substance  
12 that she saw when they moved the sweeper machine, you  
13 know, she didn't -- she didn't say she saw anything  
14 drying. She didn't describe a 7-foot spill. The only  
15 person who said that has been plaintiff. But is -- the  
16 question is is that sufficient? Normally I would have  
17 expected to see an expert witness who would come in and  
18 talk about what kind of -- you know, what kind of  
19 maintenance you would expect to see in -- in an area  
20 like this. And how long could a substance be on the  
21 floor that would be reasonable, that kind of thing. I  
22 mean, obviously you can't have somebody following along  
23 behind with a sweeper broom every customer that walks  
24 through the place. But there was no testimony of that.

25 So the question is: Is Ms. O'Connell's

1 testimony that the substance -- her -- I don't think  
2 that her belief that it was water, you know, would --  
3 would support a finding that -- that Wynn put the  
4 substance there. I mean, it's -- it was -- that was  
5 nothing. That was just a belief based upon pure  
6 speculation. There's absolutely been no evidence  
7 presented by the plaintiff. So this is -- this is  
8 purely an issue about constructive notice. And what --  
9 what would it take in terms of evidence to put somebody  
10 on constructive notice? And that's what I would expect  
11 to be briefed.

12 MR. SEMENZA: Thank you, Your Honor.

13 THE COURT: So the motion is denied without  
14 prejudice for it to be renewed if a verdict -- or after  
15 the trial is over. Because, of course, it can be  
16 renewed -- even if the jury doesn't reach a verdict  
17 potentially.

18 MR. SEMENZA: Thank you, Your Honor. There's  
19 one other matter I would like to address.

20 THE COURT: Yes.

21 MR. SEMENZA: It is our position, Your Honor,  
22 that the jury is not permitted to consider any of the  
23 testimony from either Dr. Dunn or Dr. Tingey. And the  
24 specific reason being is that neither of those two  
25 doctors testified as to the apportionment of

1 Ms. O'Connell's claimed damages which they are required  
2 to do.

3           So, for example, Ms. O'Connell identified  
4 that she had a prior back injury in 1989. Dr. Dunn  
5 also testified that she had degenerative disk disease  
6 in her back. Dr. Dunn is obligated and the plaintiffs  
7 are obligated to apportion that damage and identify  
8 percentages of what they attribute the symptoms that  
9 Ms. O'Connell is complaining of to the fall and those  
10 symptoms or -- or her prior medical condition. And  
11 they haven't done that in this particular case.

12           And so I think it would be improper for the  
13 jury to be permitted to consider any evidence from  
14 either one of them because they haven't apportioned it.  
15 It would be prejudicial error. The same is true with  
16 regard to Dr. Tingey. And going back to Dr. Dunn, we  
17 also have a preexisting condition of fibromyalgia. And  
18 so again, that plays a role that Dr. Dunn has to  
19 differentiate between all of these things in coming to  
20 his conclusions, which the plaintiff did not have him  
21 do.

22           With regard to Dr. Tingey, Dr. Tingey  
23 identified that Ms. O'Connell did in fact have mild  
24 right knee arthritis. He was not informed that  
25 Ms. O'Connell had a July 14th, 2010, fall.

1 Ms. O'Connell also has identified that she does in fact  
2 have fibromyalgia. And, again, these are preexisting  
3 conditions that the plaintiff is obligated to apportion  
4 through their physicians and their testimony which  
5 wasn't done in this particular case.

6           It's our position, Your Honor, that the jury  
7 is not permitted to consider any of the evidence by  
8 these two particular treating physicians by the failure  
9 to properly apportion the damages in this particular  
10 case whether it be special medicals, whether it be pain  
11 and suffering in past, or whether it's pain and  
12 suffering in the future. It doesn't frankly matter.  
13 They haven't apportioned it. And the jury can't  
14 consider it.

15           THE COURT: And you have some case authority  
16 to cite?

17           MR. SEMENZA: I do, Your Honor. And that's  
18 fine. Let me quote from this particular case. "In a  
19 case where a plaintiff has a preexisting condition and  
20 later sustains an injury to that area, the plaintiff  
21 bears the burden of apportioning the injuries,  
22 treatment, and damages between the preexisting  
23 condition and the subsequent accident." And that  
24 citation is Schwartz versus State Farm Mutual Auto  
25 Insurance Company. It is a federal district court case

1 out of Nevada, 2009, and it cites Klitz or Kleitz v.  
2 Raskin, 103 Nev. 325, 1987 case.

3 THE COURT: 103 Nev. 325 is the Nevada state  
4 court case.

5 MR. SEMENZA: Yes. And it's Schwartz versus  
6 State Farm. It is a Lexis cited case and a Westlaw  
7 cited case. And I do have those citations for you.  
8 Actually, I have a copy of the -- the -- the opinion,  
9 Your Honor. May I approach?

10 THE COURT: Yes.

11 MR. SEMENZA: Your Honor, we also do have a  
12 bench brief, and I know you haven't had an opportunity  
13 to review it.

14 THE COURT: Okay. So I'm going to have to  
15 read that and read this, and the Nevada case -- state  
16 court case that is cited as well.

17 MR. SEMENZA: Yes, Your Honor. May I  
18 approach?

19 THE COURT: Yes. I have read these before,  
20 but I need to read -- read them again.

21 Do you have -- do you want be heard on this  
22 at this point?

23 MS. MORRIS: I do just briefly. I mean,  
24 Dr. Tingey addressed that she had mild arthritis in her  
25 right knee, but he did not believe it had any impact in



1 the injury that was caused. She had no prior symptoms  
2 to her knee, no medical visits for -- at all, and he --  
3 he specifically addressed it in his testimony.

4           As for the back injury in 1989, that resolved  
5 and there was no further treatment to it. I certainly  
6 would not classify that as a preexisting condition that  
7 needed to be apportioned to what we have 20 years  
8 later. The crux of this case and other cases similar  
9 to it is where someone has a prior accident and a car  
10 accident, maybe they have just finished treating, maybe  
11 they had residual symptoms from it, and they have an  
12 additional accident in which you have to apportion.  
13 You know, where's the injury from that to happen in  
14 this case? Or they have symptoms and they have already  
15 had pain and it's resolved and they shortly later have  
16 another accident. Could it be related? But he's  
17 talking about a back injury in 1989 that resolved after  
18 some physical therapy and no need for it after that.

19           Additionally, Dr. Dunn did address  
20 fibromyalgia in his testimony and said that it would  
21 not change his opinion as to the need for the neck  
22 surgery and the complaints that she's having because  
23 it's generally not seen there. So I don't think there  
24 is any requirement for apportionment in this case. And  
25 they were very clear in their testimony what they

1 related the causation in the knees to be.

2 In addition, I would like the opportunity to  
3 review this information as well and provide a brief in  
4 response.

5 THE COURT: All right. Well, what we'll do  
6 is I'm going to obviously read the cases again. We've  
7 got the jury waiting, and really this impacts jury  
8 instructions.

9 MR. SEMENZA: Correct, Your Honor.

10 THE COURT: So we've got time for me to  
11 review this. And in the meantime, put your case on.

12 MR. SEMENZA: Understood, Your Honor.

13 THE COURT: All right. Let's bring our jury  
14 back.

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**TRANSCRIBER'S CERTIFICATE**

STATE OF NEVADA                    )  
  ) SS  
COUNTY OF CLARK                    )

I, Kristy L. Clark, a Nevada Certified Court Reporter  
and Registered Professional Reporter, do hereby  
certify:

That I listened to the recorded proceedings  
and took down in shorthand the foregoing.

That I thereafter transcribed my said shorthand notes  
into typewriting and that the typewritten transcript  
is a complete, true and accurate  
transcription of my said shorthand notes  
to the best of my ability to hear and  
understand the audio file.

I further certify that I am not a relative or  
employee of an attorney or counsel involved in said  
action, nor a person financially interested in said  
action.

IN WITNESS WHEREOF, I hereby certify this transcript  
in the County of Clark, State of Nevada, this 28th day  
of December, 2015.

\_\_\_\_\_  
Kristy L. Clark, RPR, CCR # 708

## **EXHIBIT 2**

## **EXHIBIT 2**

1 CASE NO. A-12-655992-C

2 DEPT. NO. 30

3 DOCKET U

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DISTRICT COURT

6

CLARK COUNTY, NEVADA

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\* \* \* \* \*

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9 YVONNE O'CONNELL,  
10 individually,

11 Plaintiff,

12 vs.

13 WYNN LAS VEGAS, LLC, a Nevada  
14 Limited Liability Company  
15 d/b/a WYNN LAS VEGAS; DOES I  
16 through X; and ROE  
17 CORPORATIONS I through X,  
18 inclusive,

19 Defendants.

20

21

PARTIAL TRANSCRIPT

22

OF

23

JURY TRIAL

24

BEFORE THE HONORABLE CAROLYN ELLSWORTH

25

DEPARTMENT V

26

DATED TUESDAY, NOVEMBER 10, 2015

27

28 TRANSCRIBED BY: KRISTY L. CLARK, RPR, NV CCR #708,  
29 CA CSR #13529

1 APPEARANCES:

2 For the Plaintiff:

3 NETTLES LAW FIRM  
4 BY: CHRISTIAN M. MORRIS, ESQ.  
5 1389 Galleria Drive  
6 Suite 200  
7 Henderson, Nevada 89014  
8 (702) 434-8282  
9 christian@nettleslawfirm.com

8 For the Defendant Wynn Las Vegas, LLC:

9 LAWRENCE J. SEMENZA, III, P.C.  
10 BY: LAWRENCE J. SEMENZA, III, ESQ.  
11 BY: CHRISTOPHER KIRCHER, ESQ.  
12 10161 Park Run Drive  
13 Suite 150  
14 Las Vegas, Nevada 89145  
15 (702) 835-6803  
16 ljs@semenzalaw.com

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I N D E X

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1 LAS VEGAS, NEVADA, TUESDAY, NOVEMBER 10, 2015;

2 9:25 A.M.

3  
4 P R O C E E D I N G S

5 \* \* \* \* \*

6  
7 THE COURT: May this witness now be excused?

8 MS. MORRIS: Yes.

9 MR. SEMENZA: Yes, Your Honor, with the  
10 caveat I reserve to call him in my case.

11 THE COURT: So the defense may recall you in  
12 their case, but you're excused.

13 THE WITNESS: Thank you, Your Honor.

14 THE COURT: You may call your next witness.

15 MS. MORRIS: We call Yvonne O'Connell.

16 THE COURT: Okay.

17 THE CLERK: Please remain standing, raise  
18 your right hand.

19 You do solemnly swear the testimony you're  
20 about to give in this action shall be the truth, the  
21 whole truth, and nothing but the truth, so help you  
22 God.

23 THE WITNESS: I do.

24 THE CLERK: You may be seated. Can you  
25 please state and spell your first and last name?



1 Q. Well, do you attribute it to the fall or not?  
2 A. I was healthy, and then I fell and  
3 immediately had these. That's all I can say.  
4 Q. Can I have you turn to R6, please.  
5 A. (Witness complies.)  
6 Q. And under 17, you identify your severe back  
7 injury from 1989?  
8 A. Yes.  
9 Q. You felt it was important enough to mention  
10 your back injury, which was 25 years ago, in this  
11 health questionnaire; is that correct?  
12 A. Well, all of them ask you to -- to write your  
13 history, so I also put down my tonsillectomy that I had  
14 in 1955.  
15 Q. But did you feel that it was important to  
16 identify your back injury as part of your history in  
17 this document?  
18 A. That was part of my history, so I was trying  
19 to -- to be as accurate as possible.  
20 Q. And you also identified that you had injured  
21 your hands; is that correct?  
22 A. Yes.  
23 Q. Okay. How did you injure your hands?  
24 A. Well, as I explained before, when I -- around  
25 1986, I had to stop practicing dental hygiene because

1 Defendant's Exhibit I.  
2 (Whereupon, Defendant's Exhibit I was  
3 admitted into evidence.)  
4 BY MR. SEMENZA:  
5 Q. Can I have you turn to Tab I, Ms. O'Connell.  
6 A. (Witness complies.) Okay.  
7 Q. And -- and just go to the first page, I1.  
8 Again, is that your -- well, I don't know if  
9 it's your signature or your name. Is that -- which is  
10 it at the top of the page?  
11 A. That's my name.  
12 Q. And it's dated what?  
13 A. October -- or, 10/15/10.  
14 Q. And did you treat at the Southern Nevada Pain  
15 Center for a period of time?  
16 A. Yes.  
17 Q. And directing your attention to Item No. 2,  
18 you identified your pain on that particular day as 10  
19 of 10; is that correct?  
20 A. Um, well, I put -- I circled 10, but I  
21 didn't -- it wasn't -- it's not -- it wasn't  
22 100 percent of the time, but that was the most pain I'd  
23 get --  
24 Q. You do identify --  
25 A. -- for me.

1 Q. I'm sorry. I didn't mean to cut you off.  
2 A. I'm sorry.  
3 Q. You do identify, however, that the daily  
4 average was 10; is that correct?  
5 A. Yes.  
6 Q. Is that true? Is that a true statement, that  
7 your daily average of pain during this period of time  
8 was 10 of 10?  
9 A. Well, what I'm saying here is that I would  
10 get the most pain that I had ever had in a day. But  
11 I'm not necessarily saying it's 100 percent of the  
12 time. If I let it go, if I don't do what I need to do  
13 to make the pain subside, the pain just keeps getting  
14 worse, and it will -- it will get to that extreme now.  
15 But now I know what causes it, and I know how  
16 to -- what to do to -- to keep it from going there. So  
17 I'm just saying here that -- that -- that it reached  
18 that, but this is when I didn't even know how to -- how  
19 to deal with it.  
20 Q. Okay. And so what I just understood you to  
21 say is that you've been able to deal with your pain  
22 over time; is that fair to say?  
23 A. I've learned the things that I need to do to  
24 keep it from -- from getting out of control.  
25 Q. You learned to control it? Is that fair to

1 say?

2 A. Well, as much as I can. I mean, I'm in pain  
3 every day, but I now know that there's certain moves  
4 that I can't -- if I move wrong or if I'm in the wrong  
5 position, that will cause a lot -- lot of pain. And if  
6 I keep doing it, it just gets worse. So now I know a  
7 lot of things that I'm not supposed to do.

8 Q. Okay. And so you avoid those kinds of turns  
9 or bends or those sort of things?

10 A. Yes, I -- I avoid them.

11 Q. And that has reduced your pain level over  
12 time; is that fair to say?

13 A. That will reduce it, but -- but like  
14 sometimes I -- it's out of my control, and I can't do  
15 what I need to -- like -- like, I'd have to lie down  
16 and -- and sometimes just can't do that.

17 Q. Okay. And under Item No. 3, you identified  
18 that your pain -- did you -- you circled everything in  
19 this particular section, didn't you?

20 A. Yes.

21 Q. Okay. You identified aching, stabbing,  
22 tender, nagging, throbbing, gnawing, burning, numb,  
23 shooting, sharp, exhausting, and unbearable; correct?

24 A. Yes. I'd had pain for quite a while then,  
25 and I was worn down and I just hurt.

1 Q. Turning to page 2 of the document, do you see  
2 what this document is dated?  
3 A. 9/3/10.  
4 Q. And so that's -- this predates the first page  
5 that we saw; correct?  
6 A. Yes.  
7 Q. Okay. And, again, you identify on here under  
8 Section No. 2 that you have 10 of 10 pain; correct?  
9 A. Yes. Same thing, same explanation.  
10 Q. And that's your daily average that you  
11 identify there as 10?  
12 A. Yes. And -- and you'll note that they're in  
13 the -- the same areas. When I fell that day, I had  
14 immediate pain in certain areas which, you know, I  
15 still get. And so those are the areas that I was -- I  
16 was having that in.  
17 Q. And, again, under No. 3, you circled all of  
18 those entries; correct?  
19 A. Yes.  
20 Q. I want to direct your attention to No. 10.  
21 And that question states, What treat -- "What  
22 treatments seem to help you the most in relieving your  
23 pain?"  
24 Did I read that correctly?  
25 A. Yes.

1 Q. Would you receive -- read your handwritten  
2 response to that question, please, out loud.

3 A. I had more pain after last visit and tried to  
4 continue physical therapy. I fell on 7/14/10. My  
5 right leg hurt so much it gave out on me and my right  
6 knee hit furniture, left knee, floor. Knees and hands  
7 injured more. Left knee had not been injured before.

8 Q. Okay. So prior to September -- well, the  
9 date you identified here is July 14th of 2010; is that  
10 correct?

11 A. Yes.

12 Q. Okay. You had a fall on that day, didn't  
13 you?

14 A. Well, my leg gave out on me, which is why I  
15 use a walker. One of the reasons is because my leg and  
16 my knees give out on me. So it -- I wasn't a complete  
17 fall, but my leg gave out on me, and so ...

18 Q. Okay. You do identify in your own words that  
19 you fell; correct?

20 A. Yes, but what I'm saying is, I -- I explained  
21 it here when -- also in writing. I wrote my leg gave  
22 out on me. And that's -- that's what it does still.  
23 I'll walk around my house, my leg and my knees give --  
24 give out on me, and I don't have a complete fall. So  
25 it's the same thing.

1 Q. Okay. And you identified here, it says, "My  
2 right leg hurts so much"; is that correct?

3 A. Yes.

4 Q. "It gave out on me"; right?

5 A. Yes. So which -- which is -- that's what it  
6 does. That's -- it hurts when I walk. So I start  
7 limping and then -- then I start hurting more, and then  
8 my leg and my knees give out on me.

9 Q. And you say in here your right knee hit  
10 furniture; is that correct?

11 A. Yes.

12 Q. And you said your left knee had not been  
13 injured before; is that correct?

14 A. Yes.

15 Q. So as of July 14th of 2010, your left knee  
16 had not been injured.

17 A. It had not been injured. I -- I had had the  
18 pain on the left side because I had been limping.

19 Q. So I understand what you're saying is because  
20 you were experiencing pain in your right leg, you began  
21 limping which affected your left leg?

22 A. Yes.

23 Q. And your left knee?

24 A. Yes.

25 Q. But you had never injured your left knee

1 Q. And how long is that?  
2 A. I haven't timed it.  
3 Q. How long would it take? You testified that  
4 you know how long it would take for that spill to dry.  
5 And so I'm -- let me finish.  
6 A. I'm sorry.  
7 Q. So I'm asking you how long in time would it  
8 take for that spill to dry?  
9 A. So you're asking -- if you're asking me in  
10 minutes, I don't know the minutes, but it -- the  
11 time -- the time that it takes for that big of a spill  
12 to have a 3-foot part of it almost dry, that's how much  
13 time.  
14 Q. But you don't know how many minutes it takes,  
15 do you?  
16 A. I -- I don't know how many minutes.  
17 Q. Thank you.  
18 You don't have any training or expertise in  
19 determining how quickly liquids dry, do you?  
20 A. No.  
21 Q. You testified earlier that the footprints  
22 that you saw were yours and the people that had picked  
23 you up; is that fair to say?  
24 A. Yes.  
25 Q. Okay. You don't know specifically how the



1 Dr. Cash. But I have had them since I fell.

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

4 THE WITNESS: Well, I chose to get the -- the  
5 placard.

6 THE COURT: All right. All right. Which UMC  
7 Quick Care did you drive to from your home and its --  
8 what are the cross streets?

9 THE WITNESS: There's one closest to my home.  
10 And it's -- it's not -- it's like a -- a few blocks  
11 away. It's a -- it's on Sahara and Fort Apache.

12 THE COURT: Okay. So do you recall if your  
13 pants were stained after the fall?

14 THE WITNESS: I didn't look.

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

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

19 THE COURT: Do you recall if you had to wipe  
20 off the bottom of your shoes after the fall?

21 THE WITNESS: I -- I was left standing on  
22 that drying part that was a little sticky. And when I  
23 walk -- when I limped to the side, I was on carpet. So  
24 there was a little stickiness on my shoes, so I -- I  
25 didn't really have to wipe anything off because I

1 correct?

2 A. Yes.

3 Q. And you also had an issue with breach of  
4 contract with insurance company back in the '80s; is  
5 that right?

6 A. Yes.

7 MR. SEMENZA: Objection. Leading. If we can  
8 just not do leading questions.

9 THE COURT: Sustained.

10 BY MS. MORRIS:

11 Q. Have you ever had a -- a claim for personal  
12 injury before this?

13 A. No.

14 Q. Have you ever had a lawsuit for personal  
15 injury before this?

16 A. No.

17 MS. MORRIS: Thank you.

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

19 THE COURT: All right. Thank you. And you  
20 may now rejoin your counsel.

21 THE WITNESS: Thank you, Your Honor.

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Kristy L. Clark, RPR, CCR # 708

## **EXHIBIT 3**

## **EXHIBIT 3**

1 CASE NO. A-12-655992-C

2 DEPT. NO. 30

3 DOCKET U

4

5

DISTRICT COURT

6

CLARK COUNTY, NEVADA

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\* \* \* \* \*

8

9 YVONNE O'CONNELL,  
individually,

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Plaintiff,

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vs.

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WYNN LAS VEGAS, LLC, a Nevada

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Limited Liability Company

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d/b/a WYNN LAS VEGAS; DOES I

15

through X; and ROE

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CORPORATIONS I through X,

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inclusive,

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Defendants.

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PARTIAL TRANSCRIPT

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OF

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JURY TRIAL

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BEFORE THE HONORABLE CAROLYN ELLSWORTH

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DEPARTMENT V

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DATED TUESDAY, NOVEMBER 10, 2015

29

30

25 TRANSCRIBED BY: KRISTY L. CLARK, RPR, NV CCR #708,  
CA CSR #13529

1 APPEARANCES:

2 For the Plaintiff:

3 NETTLES LAW FIRM  
4 BY: CHRISTIAN M. MORRIS, ESQ.  
5 1389 Galleria Drive  
6 Suite 200  
7 Henderson, Nevada 89014  
8 (702) 434-8282  
9 christian@nettleslawfirm.com

8 For the Defendant Wynn Las Vegas, LLC:

9 LAWRENCE J. SEMENZA, III, P.C.  
10 BY: LAWRENCE J. SEMENZA, III, ESQ.  
11 BY: CHRISTOPHER KIRCHER, ESQ.  
12 10161 Park Run Drive  
13 Suite 150  
14 Las Vegas, Nevada 89145  
15 (702) 835-6803  
16 ljs@semenzalaw.com

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I N D E X

WITNESS:	PAGE
<u>COREY PROWELL</u>	
Direct Examination by Ms. Morris	4
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Redirect Examination by Ms. Morris	43

1 LAS VEGAS, NEVADA, TUESDAY, NOVEMBER 10, 2015;

2 8:32 A.M.

3  
4 P R O C E E D I N G S

5 \* \* \* \* \*

6  
7 MS. MORRIS: Call Corey Prowell.

8 THE MARSHAL: Remain standing and raise your  
9 right hand, please.

10 THE CLERK: You do solemnly swear the  
11 testimony you're about to give in this action shall be  
12 the truth, the whole truth, and nothing but the truth,  
13 so help you God.

14 THE WITNESS: I do.

15 THE CLERK: You may be seated. And could you  
16 please state and spell your first and last name?

17 THE WITNESS: Yes. Corey C-o-r-e-y Prowell  
18 P, like Paul, r-o-w-e-l-l.

19 THE CLERK: Thank you.

20 THE COURT: You may proceed.

21  
22 DIRECT EXAMINATION

23 BY MS. MORRIS:

24 Q. Good morning, Mr. Prowell. How are you?

25 A. Good morning.



1 Q. And in this case, you documented certain  
2 injuries that Ms. O'Connell was claiming; isn't that  
3 correct?

4 A. Yes.

5 Q. And do you recall in this incident that you  
6 actually wrote the guest incident report for Yvonne?

7 A. The guest accident report, yes.

8 Q. But you did obtain her signature on it; isn't  
9 that right?

10 A. Yes.

11 Q. So Yvonne wasn't able to fill out the  
12 incident report, but she was able to sign it; isn't  
13 that right?

14 A. That's correct.

15 Q. Now, there are video surveillance cameras in  
16 the atrium area where Yvonne fell; correct?

17 A. I don't -- I don't work in the dispatch, but  
18 vaguely, I'm assuming there is cameras in that area.

19 Q. Now, you have checked with video  
20 surveillance, the video surveillance department, didn't  
21 you?

22 A. Yes.

23 Q. And you were informed that there were no --  
24 there was no video surveillance of Yvonne's fall; isn't  
25 that correct?

1           A.    That's correct.

2           Q.    And there's no video surveillance of Yvonne  
3 in the casino; isn't that correct?

4           A.    In the casino, I'm not aware.  When we  
5 contacted our dispatch, we concentrated on the accident  
6 area.

7           Q.    And did you request to get video surveillance  
8 of the area prior to Yvonne's fall?

9           A.    No.

10          Q.    Did you request to get any video surveillance  
11 of the area as it was being cleaned up?

12          A.    No.

13          Q.    So the only thing you requested from video  
14 surveillance was the actual fall; is that accurate?

15          A.    Yes.

16          Q.    Now, you didn't speak with the porter who was  
17 assigned to that area on the day -- on the day she  
18 fell; isn't that correct?

19          A.    No, I did not.

20          Q.    You didn't take any kind of report from the  
21 person who was responsible for that area in -- in the  
22 atrium; isn't that correct?

23          A.    No.

24          Q.    So the only statements you took were from  
25 Terry Ruby and Ynet Elias and Ms. O'Connell; is that

1 this spill?

2 A. To my knowledge, no.

3 Q. Thank you.

4 THE COURT: Redirect.

5 MS. MORRIS: Yes, just briefly.

6

7 DIRECT EXAMINATION

8 BY MS. MORRIS:

9 Q. So, Corey, you said that you've done

10 approximately 4,000 reports; is that right?

11 A. Yes.

12 Q. And it's been a variety of things you've

13 responded to; is that right?

14 A. Yes.

15 Q. And you mentioned some of them are criminal;

16 is that correct?

17 A. Yes.

18 Q. And in each of these incidents that you

19 respond to, do you always check to see if there's video

20 surveillance of anything involving that incident?

21 A. Yes.

22 Q. And isn't it true that the video surveillance

23 cameras in the casino can actually follow people

24 through the casino?

25 A. That's correct.

1 the jury question?

2 MR. SEMENZA: No, Your Honor.

3 MS. MORRIS: I have none.

4 THE COURT: Thank you. Give this to the  
5 clerk to mark as a Court exhibit.

6 THE MARSHAL: I think we have one more  
7 question. We have one more question.

8 THE COURT: Okay. Are there any other  
9 questions? Because this is your last opportunity. You  
10 know, we don't keep going. All right. Thank you.  
11 Counsel, approach.

12 (A discussion was held at the bench,  
13 not reported.)

14 THE COURT: Sorry. So the next question was  
15 already asked and answered. So it won't be asked again  
16 and will be marked as court exhibit. All right. And  
17 may this witness now be excused?

18 MS. MORRIS: Yes.

19 MR. SEMENZA: Yes, Your Honor, with the  
20 caveat I reserve to recall him in my case.

21 THE COURT: Okay. And so the defense may  
22 call you in their case, but you're excused.

23 THE WITNESS: Thank you, Your Honor.

24 THE COURT: You may call your next witness.

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**TRANSCRIBER'S CERTIFICATE**

STATE OF NEVADA                    )  
  ) SS  
COUNTY OF CLARK                    )

I, Kristy L. Clark, a Nevada Certified Court Reporter  
and Registered Professional Reporter, do hereby  
certify:

That I listened to the recorded proceedings  
and took down in shorthand the foregoing.

That I thereafter transcribed my said shorthand notes  
into typewriting and that the typewritten transcript  
is a complete, true and accurate  
transcription of my said shorthand notes  
to the best of my ability to hear and  
understand the audio file.

I further certify that I am not a relative or  
employee of an attorney or counsel involved in said  
action, nor a person financially interested in said  
action.

IN WITNESS WHEREOF, I hereby certify this transcript  
in the County of Clark, State of Nevada, this 28th day  
of December, 2015.

\_\_\_\_\_  
Kristy L. Clark, RPR, CCR # 708

## **EXHIBIT 4**

## **EXHIBIT 4**

1 CASE NO. A-12-655992-C

2 DEPT. NO. 30

3 DOCKET U

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DISTRICT COURT

6

CLARK COUNTY, NEVADA

7

\* \* \* \* \*

8

9 YVONNE O'CONNELL, )  
individually, )

10 )

Plaintiff, )

11 )

vs. )

12 )

WYNN LAS VEGAS, LLC, a Nevada )

13 Limited Liability Company )

d/b/a WYNN LAS VEGAS; DOES I )

14 through X; and ROE )

CORPORATIONS I through X, )

15 inclusive, )

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16 Defendants. )

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PARTIAL TRANSCRIPT

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OF

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JURY TRIAL

21

BEFORE THE HONORABLE CAROLYN ELLSWORTH

22

DEPARTMENT V

23

DATED FRIDAY, NOVEMBER 13, 2015

24

25 TRANSCRIBED BY: KRISTY L. CLARK, RPR, NV CCR #708,  
CA CSR #13529

1 APPEARANCES:

2 For the Plaintiff:

3 NETTLES LAW FIRM  
4 BY: CHRISTIAN M. MORRIS, ESQ.  
5 1389 Galleria Drive  
6 Suite 200  
7 Henderson, Nevada 89014  
(702) 434-8282  
christian@nettleslawfirm.com

8 For the Defendant Wynn Las Vegas, LLC:

9 LAWRENCE J. SEMENZA, III, P.C.  
10 BY: LAWRENCE J. SEMENZA, III, ESQ.  
11 BY: CHRISTOPHER KIRCHER, ESQ.  
12 10161 Park Run Drive  
13 Suite 150  
14 Las Vegas, Nevada 89145  
15 (702) 835-6803  
16 ljs@semenzalaw.com

17 \* \* \* \* \*



1 LAS VEGAS, NEVADA, FRIDAY, NOVEMBER 13, 2015;

2 2:25 P.M.

3  
4 P R O C E E D I N G S

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6  
7 THE COURT: And it is plaintiff closing  
8 argument.

9  
10 CLOSING ARGUMENT

11  
12 MS. MORRIS: All good? Can you hear me?

13 We started off in this case being told that  
14 Yvonne O'Connell allegedly fell at the Wynn. Over five  
15 years since she fell. The Wynn argues that she  
16 allegedly fell. They also say that she had a comped  
17 lunch before she allegedly fell. Maybe that's enough.

18 The statements written by their own  
19 employees, Terry said he saw her being picked up by  
20 four guests in the garden area. Corey Prowell had no  
21 reason to write down anything different from what he  
22 was reported on that day. Ynet Elias said, I came  
23 over. There was a green film, and it got covered up by  
24 a sweeper machine. Large enough that it needed to be  
25 covered, portions of it, by a sweeper machine.

1           Now, she came in here and said she doesn't  
2 really know. It was something sticky. It was honey.  
3 She didn't know. Not quite sure what she knows, but we  
4 know what she told Corey Prowell and he put into the  
5 report, she fell on a green liquid, and it got covered  
6 by a sweeper machine in the atrium area. But it's five  
7 years, eight months later, and she still just allegedly  
8 fell.

9           This case is about control. There are two  
10 kinds of evidence you've been told. There's direct and  
11 evidence and there's circumstantial evidence. And in  
12 this case, direct evidence, which would be the  
13 videotape of the fall, pictures of the substance on the  
14 floor, the time that it was last inspected before she  
15 fell, pictures of the area before she fell, her  
16 wandering the casino after the condition that she was  
17 in, direct evidence. It's not in Yvonne's control.  
18 It's in Wynn's control. And when they control the  
19 evidence, anything like that, we didn't see. None of  
20 it.

21           We heard from Trish -- well, we heard from  
22 two. We heard from the horticulture lady. She wasn't  
23 in the area that day. She didn't respond to the scene.  
24 She never talked to the person who was assigned there.  
25 But she took the stand and told us, this is what the

1 reports are. These reports, they can access water  
2 reports, detailed ones that show which gallon went  
3 where five years and eight months later. They can  
4 bring those because it's helpful. Then we heard from  
5 the claims lady. She wasn't there. She didn't go to  
6 the scene. She talked to someone who we don't know in  
7 the horticulture department that said something that,  
8 no, it isn't, and they noted in the file somewhere.

9           None of the evidence -- none of direct  
10 evidence was provided because they can control it.  
11 Helpful information. Well, Yvonne's red card history,  
12 they could pull that and bring that. And in order to  
13 find her in the casino, they'd need a picture of her.  
14 And there's a picture right there on her red card.  
15 They -- Corey testified they can go back and track and  
16 find people. And even the claims lady said, someone  
17 comes in, they said they were in this area of the  
18 casino, we can go back and, you know, locate them.  
19 That's why we take pictures of them.

20           Yvonne has her testimony. That's it. They  
21 made sure of it. She is telling you what she  
22 remembers, a large green substance with 3 feet of it  
23 dried. Luckily, at least the incident report tells us  
24 that Corey Prowell took the statement from Ynet Elias  
25 and Ynet Elias wrote down she saw a spill and it got

1 covered by a sweeper machine, and told us it was  
2 sticky. Circumstantial, that's all we have.

3 But do the pieces fall together? Because the  
4 argument is is that Yvonne O'Connell allegedly fell.  
5 But then, what do they do? Why are we here? A  
6 landowner has a duty to take reasonable care. And Wynn  
7 says, Come into our atrium area. Look at the beautiful  
8 designs. Look at the flowers. Don't look at the  
9 floor. We've got that taken care of. And the law says  
10 that Yvonne doesn't have to stare at the floor while  
11 she walks. There's a jury instruction right on it.

12 And she has a right to assume that Wynn is  
13 doing their duty. She has a right to assume that they  
14 are doing their duty in keeping it reasonably safe for  
15 her. And so when she went into the Wynn and she  
16 slipped and fell and landed on that marble with her  
17 degenerative spine -- they say she allegedly fell. But  
18 then they hire a doctor who says, Well, she did fall,  
19 and I think she has back and butt pain.

20 Now, this doctor came in and he took the oath  
21 and he took the stand and he told you to a high degree  
22 of medical certainty only thing she injured was her  
23 lower back and her butt. And I looked through  
24 everything very carefully. But you saw this man who is  
25 telling you how this has affected her life, who has

1 never met her, never touched her, never treated her,  
2 came in and said to a high degree of medical certainty,  
3 this is what's wrong with her. I had to point out to  
4 him, sir, you actually simply didn't look at the first  
5 page of that first visit to see another injury, nor did  
6 you look at the one 7 days later. He never even saw  
7 it.

8           That's what the Wynn puts their -- all their  
9 eggs are in that basket. Well, all right, if they  
10 think she fell, she wasn't really hurt. She was just  
11 hurt this way and this way. And this is a man who took  
12 the stand and told you, If you don't feel something in  
13 48 hours, it doesn't matter who you are, how old you  
14 are, what kind of injury you had, it doesn't exist.

15           I mean, this is a man who literally sat up  
16 there and says he wishes her the best even though he  
17 has never met her and he's called her a liar for money.  
18 Because we're in a civil justice system. And it says  
19 you have to ask for money. What else can we ask for?  
20 You're not allowed to ask for all of this to have never  
21 happened or people to do certain things. You are asked  
22 for money. That's it. You're cornered.

23           And so you have to look at who the convenient  
24 person is in this. Isn't it convenient that anything  
25 that would have helped Yvonne show you exactly what had

1 happened was kept? Isn't it convenient that they hire  
2 a man who has -- has no information about her, who has  
3 given certain records that they choose to give her to  
4 be told, well, she only wants money and then I stand up  
5 and ask you for it?

6           Because the civil justice system says it's  
7 only thing I can ask for. So it's tough because Yvonne  
8 has been exposed. She has been stared at. She has  
9 been judged. And she has been called a liar because  
10 she went into the Wynn, and she assumed that they were  
11 doing their duty. So she was walking in their atrium.  
12 And she fell there. And now it doesn't matter; right?  
13 Because what happened to her, well, it's just another  
14 claim. But for her it isn't.

15           Now, there is a big issue about what she puts  
16 in her medical records. There is one thing Yvonne sure  
17 isn't hiding anything when she puts anything in her  
18 medical records. She puts down everything. She writes  
19 down things that they say she could have had or maybe  
20 she did. I mean, she didn't have testing for the ulcer  
21 or for the hiatal hernia, and she's marking it down.  
22 She's marking it down. She has not handled this  
23 emotionally. She has injuries to her body and pain  
24 that she doesn't handle well. And it is affecting her  
25 emotionally.

1           Now, there's one very important fact. On  
2 February 8th, in the morning, before she went to Wynn,  
3 she was not the person she is now. And Mr. Semenza's  
4 an excellent attorney. If there were prior medical  
5 records, any indication that she was going to doctors,  
6 or writing things down, having all these problems, they  
7 would be right up on the screen in black and white.  
8 Yvonne was not the person that she is today. It had  
9 been 20 years since she had gone for anything besides a  
10 cold, infection, a lump biopsy. She wasn't who she is.  
11           Now, in order to get medical pain and  
12 suffering, you can't just rely on her saying, Well, I'm  
13 hurt; right? You have to hear from an expert witness.  
14 Now, we heard from Dr. Dunn and we heard from  
15 Dr. Tingey. Now, these are expert witnesses who have  
16 no motivation to just want to help her with her case.  
17 They're her treating physicians. They literally have  
18 an opinion based on their analysis of her. They came  
19 here and told you this is what we believe, in our  
20 expert opinion, as to what happened to her. Justice  
21 isn't trying to get all of her medical bills paid for,  
22 everything that she's put down and treated for. We're  
23 not asking for that. But the law says that when  
24 someone has been damaged by another person's  
25 negligence, then that negligence needs to be answered

1 for. And it's with pain and suffering and mental  
2 anguish. And Yvonne has told you she's overwhelmed.  
3 She is exhausted. She has pain and she has mental  
4 stress and anxiety that she did not have before.

5           She was a 58-year-old with a degenerative  
6 spine that went down on a marble provider -- or  
7 divider. And they want you to think maybe it was just  
8 soft tissue. No, nothing's wrong with her. The doctor  
9 you heard from, that was paid by Wynn, feeds into what  
10 they're saying; well, we have all these claims and  
11 people are just sucking off the system. And these  
12 doctors are diagnosing for money. But he was paid to  
13 look at her records and come to a decision. The man  
14 diagnosed her with a syndrome, and that syndrome feeds  
15 into -- it's very convenient. Feeds into exactly what  
16 the theory is; right?

17           But in order to diagnose that symptom,  
18 magnification syndrome, you have to do a physical  
19 evaluation of the patient. You have to watch their  
20 cognitive behavior. And then you have to do a  
21 structured interview with them in order to come to  
22 this. The man skimmed through some of her medical  
23 records and conveniently came to it because it fits the  
24 story.

25           Now, in order for there to be a verdict, we



1 have the burden. We have the burden as the plaintiff.  
2 And it's a preponderance of the evidence. It is, I am  
3 a little bit more right than I am wrong. Is it more  
4 likely than not what happened. Is it more likely than  
5 not that if Wynn had been doing their due diligence,  
6 their core value of guest satisfaction and services,  
7 the five-star luxury property, if they had been  
8 reasonably careful in doing that, would that liquid  
9 have been on the floor long enough that the portion of  
10 the liquid had dried and become sticky? They say that  
11 they are constantly going through there. Constantly.  
12 In a high-traffic area.

13           Now, if they had been acting reasonably,  
14 would it have been on the floor for that period of  
15 time? That's the question. Well, it would have been  
16 greatly answered by the time that floor was last  
17 inspected, information that Ynet Elias didn't know. So  
18 it is your job as the jury to infer if Wynn had been  
19 acting with reasonable care, would this have occurred?

20           Now, we also have to show -- it's our burden,  
21 is it more likely than not that Yvonne was injured as a  
22 result of the fall? Now, they have their doctor's  
23 testimony who says, whatever she had within 48 hours.  
24 And then if you remember yesterday, he gave me the knee  
25 and then he took it back. Right? He didn't want to --

1 he has this job to do. And it's very specific what  
2 he -- what he wants; right? That there's no way that a  
3 58-year-old woman with degenerative spine took a crash  
4 on a marble and now needs a three-level cervical fusion  
5 and has a meniscus tear. There's no way. That's their  
6 theory; right?

7           But is it more likely than not that that fall  
8 on the marble did the damage to Yvonne's body that her  
9 doctors say it does? And is it more likely than not  
10 that Yvonne still suffers pain and she has physical and  
11 mental anguish? That's the burden.

12           Now, here's the catch: After we have gone  
13 through all that, and she allegedly fell, defense  
14 counsel's going to get up and tell you that if she did  
15 fall, it's her fault. That's the next step in the  
16 process. That she should have been keeping a better  
17 lookout. That she should have seen what they didn't  
18 see. That she should have been looking at the floor,  
19 seen it, and avoided it. Right? In an atrium area  
20 where everything is beautiful trees and flowers, eye  
21 level, they want you to look around. That's why they  
22 have invited you there, to come there and take a look  
23 at it. And so they're going to argue that she was at  
24 fault for this. That it wasn't their fault. And that  
25 is actually their burden. So because they want to

1 argue that it's her fault, they also have a burden.  
2 And it's to say, more likely than not, was it her fault  
3 that this occurred?

4           Now, there are some jury instructions that  
5 are very important. I would like to go over them.  
6 This is Jury Instruction 27. Jury Instruction 27 says,  
7 in pertinent part, "You may consider whether the  
8 defendant inspected the premises on a reasonable basis  
9 or in a reasonable way in determining whether the  
10 defendant knew or should have known of the unsafe  
11 condition. You may consider the length of time the  
12 condition may have existed in determining whether the  
13 defendant should have known of the condition had the  
14 defendant used reasonable care. The issue is, were  
15 they being reasonably careful? Because they have a  
16 duty as a landowner to make sure that anyone who enters  
17 their property isn't exposed in any unreasonable way to  
18 danger on their property.

19           So in the marble walkway, which is a  
20 high-traffic area, where they have a bar at the end  
21 that serves beverages, and they have admitted they have  
22 constantly people roaming through, if they were acting  
23 reasonably, as they say they would, would that  
24 substance have been on the floor? This one, the  
25 testimony of one witness worthy of belief is sufficient

1 for the proof of any fact. You heard the deposition  
2 testimony or the trial testimony of, sorry, Dr. Dunn  
3 and Dr. Tingey. And as much as Victor Klausner or  
4 Dr. Klausner tried to say that they were wrong, he is  
5 not a board-certified orthopedic surgeon. And he has  
6 never treated Yvonne.

7           And Dr. Dunn and Dr. Tingey, who have been  
8 practicing in Las Vegas for many years, and who  
9 actually treated her, are witnesses worthy of belief,  
10 not Dr. Klausner who says he's down on the medical  
11 board a couple of times a year and he's got patients  
12 that are mad at him left and right. And I think that  
13 he said that someone over 60 shouldn't get a meniscus  
14 tear repaired. They shouldn't do that because it's bad  
15 for them. They should just continue on.

16           You have to look at the credibility of the  
17 witnesses who are giving you the information. Because  
18 that's what you need to decide. That's what you go  
19 back and look at the evidence. Well, was that witness  
20 worthy of belief?

21           Now, when you consider the evidence, and you  
22 consider the witnesses, sometimes there are  
23 inconsistencies. So when Ynet Elias took the stand and  
24 told us, Well, I don't really remember anymore. But  
25 Corey Prowell says, She told me exactly what it was.

1 You have to look at those inconsistencies and say, What  
2 was more likely: The statement that was made on the  
3 day it happened or the statement she made on the stand,  
4 five years and eight months later, which contradicts  
5 exactly what happened back then?

6 Now, you're going to get two verdict forms.  
7 These are going to go back with you. And the verdict  
8 form is one where you decide whether there's a verdict  
9 for Yvonne O'Connell or a verdict for Defendant Wynn.  
10 And the verdict form for Yvonne O'Connell also has an  
11 option of finding her comparatively negligent. Now, if  
12 you find Yvonne to be a percentage comparatively  
13 negligent, that means that whatever verdict you have  
14 found for her is reduced in accordance with that  
15 percentage. So whatever percentage she has, that is  
16 less than the verdict.

17 So, for example, if it was \$10, you found her  
18 40 -- 40 percent negligent, it would be 60 -- it would  
19 be \$6 left. However, if you find that Yvonne is more  
20 than 50 percent negligent, 51, then there is no verdict  
21 for her. It takes it away from her. Now, when you go  
22 back and you decide and you come to a decision, your  
23 verdict might be for Wynn. And it might be the right  
24 verdict. But if your reason is because you think  
25 there's too many claims, you think there's too many

1 frivolous lawsuits, why should the Wynn have to deal  
2 with this, that wouldn't be the right reason. The only  
3 reason you could come to a verdict for Wynn or should  
4 is if they did nothing wrong.

5           Now, also your verdict might be for Yvonne.  
6 And if your verdict is for Yvonne, it might be the  
7 right verdict. But if your reason is because you feel  
8 bad for her or she has been damaged and she has changed  
9 as a person, that's still not the right reason. The  
10 only reason you could come to a verdict for Wynn -- for  
11 Yvonne is if you think Wynn did something wrong.  
12 That's the focus now. Like I said before, this is not  
13 a verdict for her medical expenses. She has medical  
14 expenses. Clearly there's a lot of things in her  
15 medical records that are not related to this fall.  
16 Certainly didn't cause things that she's never been  
17 diagnosed with. Yvonne writes everything down, as  
18 you've seen. Her fingers bent when she was working as  
19 a dental hygienist. They told her it might be a  
20 connective tissue disorder. She wrote that down.  
21 She's having trouble with her divorce. She has --  
22 feeling anxious, she writes down anxiety. She gets  
23 told all these things and writes them all down. But  
24 you never know what her actual injuries are until you  
25 hear it from a doctor. And so in this case, we heard

1 from Dr. Dunn and Dr. Tingey. And then there's the  
2 element of mental anguish, and I think the mental  
3 anguish came out from Yvonne. You heard from Sal. He  
4 said that she's a very private person. This injury has  
5 taken a toll on her. And she suffers every day.

6           And unlike what Dr. Klausner wanted us to  
7 believe that she's a pill popper and that she's all  
8 these other reasons, there's none of that. There's no  
9 prescription in her medical records. I mean, I think  
10 the most telling thing is when he tried to call Lovaza  
11 a long lasting narcotic when it's just a fish oil. I  
12 mean, anything he can do to bolster his opinion. So  
13 when you go back and have this verdict form, this is  
14 the verdict form for Yvonne. I ask that you assess her  
15 past pain and suffering, what she's gone through since  
16 this fall happened up until today, at 150,000.

17           And then there's future pain and suffering.  
18 And that's the suffering that she will continue to have  
19 as a result. And at that I ask a verdict of 250,000  
20 for her past and her future. Is it more likely than  
21 not that Yvonne O'Connell was injured and has changed  
22 since her fall at the Wynn? That's the standard. Am I  
23 a little bit more right than I am wrong? If she was  
24 like this the morning of, there would be medical  
25 evidence of it as there has been multitudes of it

1 after. And the one defining factor is that fall on the  
2 marble divider at the Wynn and because of their  
3 negligence. Now defense counsel is going to get up,  
4 and he's going to talk to you, and then I have one more  
5 opportunity to speak to you. Thank you.

6 THE COURT: Defense.  
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**TRANSCRIBER'S CERTIFICATE**

**STATE OF NEVADA**                    )  
  ) **SS**  
**COUNTY OF CLARK**                    )

I, Kristy L. Clark, a Nevada Certified Court Reporter and Registered Professional Reporter, do hereby certify:

That I listened to the recorded proceedings and took down in shorthand the foregoing.

That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript is a complete, true and accurate transcription of my said shorthand notes to the best of my ability to hear and understand the audio file.

I further certify that I am not a relative or employee of an attorney or counsel involved in said action, nor a person financially interested in said action.

IN WITNESS WHEREOF, I hereby certify this transcript in the County of Clark, State of Nevada, this 28th day of December, 2015.

\_\_\_\_\_  
Kristy L. Clark, RPR, CCR # 708

## **EXHIBIT 5**

## **EXHIBIT 5**

1 CASE NO. A-12-655992-C

2 DEPT. NO. 30

3 DOCKET U

4

5 DISTRICT COURT

6 CLARK COUNTY, NEVADA

7 \* \* \* \* \*

8

9 YVONNE O'CONNELL, )  
10 individually, )

11 Plaintiff, )

12 vs. )

13 WYNN LAS VEGAS, LLC, a Nevada )

14 Limited Liability Company )

15 d/b/a WYNN LAS VEGAS; DOES I )

16 through X; and ROE )

17 CORPORATIONS I through X, )

18 inclusive, )

19 Defendants. )

20

21 PARTIAL TRANSCRIPT

22 OF

23 JURY TRIAL

24 BEFORE THE HONORABLE CAROLYN ELLSWORTH

25 DEPARTMENT V

DATED FRIDAY, NOVEMBER 13, 2015

26

27 TRANSCRIBED BY: KRISTY L. CLARK, RPR, NV CCR #708,  
CA CSR #13529

1 APPEARANCES:

2 For the Plaintiff:

3 NETTLES LAW FIRM  
4 BY: CHRISTIAN M. MORRIS, ESQ.  
5 1389 Galleria Drive  
6 Suite 200  
7 Henderson, Nevada 89014  
8 (702) 434-8282  
9 christian@nettleslawfirm.com

10 For the Defendant Wynn Las Vegas, LLC:

11 LAWRENCE J. SEMENZA, III, P.C.  
12 BY: LAWRENCE J. SEMENZA, III, ESQ.  
13 BY: CHRISTOPHER KIRCHER, ESQ.  
14 10161 Park Run Drive  
15 Suite 150  
16 Las Vegas, Nevada 89145  
17 (702) 835-6803  
18 ljs@semenzalaw.com

19 \* \* \* \* \*

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1 LAS VEGAS, NEVADA, FRIDAY, NOVEMBER 13, 2015;

2 3:25 P.M.

3  
4 P R O C E E D I N G S

5 \* \* \* \* \*

6  
7 THE COURT: Rebuttal closing.

8 MS. MORRIS: Thank you.

9  
10 R E B U T T A L C L O S I N G A R G U M E N T

11  
12 MS. MORRIS: Yvonne didn't act the way Wynn  
13 thinks she should have. She didn't accept their  
14 medical attention, and she waited two days to go to the  
15 doctor. So she's not hurt. In order for her to be  
16 hurt, she had to do exactly what they wanted her to do.  
17 She couldn't have been hurt, she didn't call her  
18 cousins who were headed back to California. She didn't  
19 try to get in touch with Sal who's on a cruise ship in  
20 the middle of the Caribbean. So she must not have been  
21 hurt.

22 Now, remember when Dr. Dunn said, When you  
23 hit your thumb with a hammer, you're focused on the  
24 thumb and not looking at the other parts. The natural  
25 progression and onset of pain in -- in certain areas

1 when you immediately fall, how you feel the next day,  
2 how you feel when you start moving around, it is  
3 inhuman to think the body has to act within a certain  
4 way and every single solitary thing has to be  
5 acknowledged right there. And if you don't take their  
6 medical treatment, then they want a waiver signed.  
7 We're not responsible. They show up at a scene, this  
8 five-star, guest service to make sure they -- the one  
9 thing they have is a waiver of their responsibility.

10 Now, Dr. Klausner doesn't have the whole  
11 picture. The man took the stand himself and said,  
12 Well, I'd have to see the whole person, the person in  
13 front of me. That's where it matters. And, in fact,  
14 during his testimony, he said, She might be terribly  
15 hurt; I don't know. Because he doesn't know. He has  
16 never seen her. Period.

17 Yvonne O'Connell's life has changed. She  
18 spends most of her days at home. She does not go out  
19 and go dancing. She does not have the boyfriend that  
20 she had anymore. She goes to the doctors and tells  
21 them she's in pain. And she tells them other things.  
22 But don't throw the baby out with the bathwater. The  
23 legitimate injuries, the changes to her, what she feels  
24 every day, the objective injuries in her body, don't  
25 let those get lost with -- with the other things are

1 that's going on. Everybody is different. Everyone is.  
2 You cannot predict how people will react to things.  
3 Should she be a 2? Should she be a 4? Would this be  
4 easier for them if she was a 5 all the time? They want  
5 to control how she reacted to this situation.

6 Now, they just said that Ynet Elias called  
7 somebody and they said that area was clean. Wynn  
8 Las Vegas knows exactly what's going on in their  
9 casinos. They know when watering happens. They know  
10 when people are doing things. You're not going to  
11 touch a chip and move in there. But conveniently  
12 whoever she might have called who gave her information  
13 that it was clean, who is that person? Where are they?  
14 They don't know that part? When was it last cleaned?  
15 If it was clean, then what was the substance on the  
16 floor that Ynet saw? How had it gotten sticky?

17 Now, Yvonne knows what she thought it was.  
18 And the jury instruction is clear that in order for the  
19 plaintiff to recover in the absence of proof that the  
20 defendant created the condition or actually knew of it,  
21 the plaintiff must prove that the defendant had  
22 constructive notice. So if Wynn didn't create the  
23 condition, if they didn't put it their themselves, that  
24 doesn't prevent them from being responsible and taking  
25 reasonable care. That means the defendant, using

1 reasonable care, should have known of the unsafe  
2 condition in time to have taken steps to correct the  
3 condition or to take other suitable precautions, like  
4 warn her.

5           Now, they had her on the stand, and they're  
6 like, Well, what was it? And how long had it been  
7 there? Information only they would have. What about  
8 the person that cleaned it up? Maybe they could  
9 describe what it was. Probably be the best person for  
10 it. How long it had been there, Yvonne. Well, why  
11 don't we talk to the person who Ynet called, we don't  
12 know, who said it was a clean condition. It's all very  
13 convenient. The amount of liquid on the floor, the  
14 fact that a portion of it was wet, and a portion of it,  
15 almost 3 feet, had dried. And it was sticky. And the  
16 sweeper machine had to be used to cover it up. That is  
17 their own information. The sweeper machine wouldn't  
18 have been put over the spill if it wasn't large enough  
19 to have needed the sweeper machine put over it. Liquid  
20 that you can slip on doesn't get sticky unless it has  
21 time to dry. That is the information. If they had  
22 been acting reasonably with reasonable care in their  
23 high-traffic area, they would have seen the liquid and  
24 cleaned it up before anyone was injured. Or they could  
25 have put cones up. Anything. Because in this area,



1 specifically in this area, in this specialty area, it's  
2 an atrium. This is an area where the last thing they  
3 want you to look at is your feet. They want you  
4 looking at the flowers. They want you looking up and  
5 enjoying it. And so they are required to make sure  
6 that marble floor is free from hazards in a reasonable  
7 fashion.

8           Now, Ynet said they can't keep it  
9 100 percent. One hundred percent is not required.  
10 It's reasonable care. And if that hadn't been sticky,  
11 and there weren't footprints in it, how could you tell  
12 how long it had been there? It had been there long  
13 enough to have dried. And that's what's important.  
14 Because reasonable care says they're doing a reasonable  
15 inspection of the areas to ensure it. And a reasonable  
16 time doesn't allow liquid in a 3-foot area to dry,  
17 become sticky, and get footprints in it.

18           Now, they said she wasn't looking out. The  
19 law says that depending on the circumstances, it may be  
20 reasonable conduct for a customer of a business  
21 establishment to walk and not constantly look and watch  
22 where he or she is going. So what's reasonable here?  
23 As she walking through their atrium, it's reasonable  
24 that she should be looking at the flowers. She doesn't  
25 have to be constantly looking where she's going. And

1 the law recognizes that.

2 Now, Dr. Dunn testified that Yvonne had a  
3 degenerative spine on the day she fell. Now, the law  
4 says not everyone is perfect. People have issues. As  
5 you go through life, you have them. So there's no  
6 dispute she had a degenerative spine at the time that  
7 she fell. And she's not entitled to recover anything  
8 for her degenerative spine. However, if it is  
9 aggravated, the damages are then for the aggravation.  
10 Yvonne O'Connell did not go to the doctor for pain in  
11 her spine for 20 years, but she had a degenerative  
12 spine. She had it. Cervical and lumbar. But until  
13 you injure the degenerative spine, it's typically  
14 asymptomatic. It doesn't hurt. It doesn't bother you.

15 Dr. Dunn has seen thousands of patients.  
16 Thousands of them. He knows what he's looking at. And  
17 he said he would be comfortable performing surgery on  
18 Yvonne. She reported anxiety and depression. She  
19 needs a psychological clearance. That is not uncommon.  
20 But he knows what he's looking for and he knows what he  
21 is looking at, and he has been doing it for 23 years.  
22 He is not fooled. He knows what he's looking at. And  
23 that is a major surgery. And they are now saying,  
24 Well, she hasn't had it in a year. It is a major  
25 surgery and it is a long time recover.

1           And Yvonne lives with her parent. She's  
2 going to need assistance when she has that. This is  
3 not an easy decision for her. But she has said, she  
4 just can't take the neck pain anymore. And she has  
5 significant findings in it that would be causing the  
6 pain that she has. Dr. Dunn gave an opinion that was  
7 both objective and subjective. Period. It was not  
8 just subjective like they want you to believe. He said  
9 his decision was based on both objective and subjective  
10 findings. As jurors, you are the voice of the  
11 conscience of this community. And you will go back  
12 there --

13           MR. SEMENZA: Objection, Your Honor.

14           THE COURT: Sustained. That -- the jury will  
15 disregard that. Counsel. This is not a punitive  
16 damage case you may not address the -- they are not to  
17 be making decisions as the consciousness of the  
18 community. You know that. It's improper argument.

19           MS. MORRIS: As members of the community. Is  
20 that better?

21           THE COURT: No.

22           MS. MORRIS: As a jury, you are going to go  
23 back there and deliberate. And you are going to  
24 determine what justice is. You get to make that  
25 decision. You take that in, you look at everything,

1 and you look at the preponderance of the evidence.  
2 This is not I am completely convinced beyond a  
3 reasonable doubt. It is, is it more likely than not?  
4 Am I a little bit more right than I am wrong that  
5 Yvonne was injured when she fell at the Wynn? And that  
6 it changed the person that she is.

7 This is her life. This is -- this is not a  
8 multiple claimant. This is her first personal injury.  
9 She hasn't filed lawsuits claiming injury left and  
10 right. And she certainly hasn't held anything back.  
11 If she was putting all this stuff into a medical record  
12 because a lawyer told her to like Dr. Klausner said,  
13 then she had a bad lawyer. I mean, there's just things  
14 in there that no one would ever believe because it --  
15 it's not related to the fall. And it's subjective. So  
16 you have to have an expert testify to say this is what  
17 your injuries are because you can't see them. You  
18 can't see her pain. You can only hear what the doctors  
19 have to say.

20 And so when you go back and you decide this,  
21 it is a preponderance of the evidence. Am I a little  
22 bit more right than I am wrong? If Wynn had been  
23 acting reasonably, that liquid would have been cleaned  
24 up or it would have been warned of before she got  
25 there. Am I a little bit more right than I am wrong

1 that she was injured as a result of the fall? Am I a  
2 little bit more right than I am wrong that this case is  
3 about control? It has been a long process. And Yvonne  
4 has stood her ground, and it has not been easy. But  
5 that is what it takes to get justice.

6           And so when you go in there and you  
7 deliberate, I want you to remember that this is about  
8 making a decision as to who is a little bit more right  
9 than they are wrong. Thank you.

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**TRANSCRIBER'S CERTIFICATE**

STATE OF NEVADA                    )  
  ) SS  
COUNTY OF CLARK                    )

I, Kristy L. Clark, a Nevada Certified Court Reporter  
and Registered Professional Reporter, do hereby  
certify:

That I listened to the recorded proceedings  
and took down in shorthand the foregoing.

That I thereafter transcribed my said shorthand notes  
into typewriting and that the typewritten transcript  
is a complete, true and accurate  
transcription of my said shorthand notes  
to the best of my ability to hear and  
understand the audio file.

I further certify that I am not a relative or  
employee of an attorney or counsel involved in said  
action, nor a person financially interested in said  
action.

IN WITNESS WHEREOF, I hereby certify this transcript  
in the County of Clark, State of Nevada, this 28th day  
of December, 2015.

\_\_\_\_\_  
Kristy L. Clark, RPR, CCR # 708

## **EXHIBIT 6**

## **EXHIBIT 6**

1 CASE NO. A-12-655992-C

2 DEPT. NO. 30

3 DOCKET U

4

5

DISTRICT COURT

6

CLARK COUNTY, NEVADA

7

\* \* \* \* \*

8

9 YVONNE O'CONNELL,  
10 individually,

11 Plaintiff,

12 vs.

13 WYNN LAS VEGAS, LLC, a Nevada  
14 Limited Liability Company  
15 d/b/a WYNN LAS VEGAS; DOES I  
16 through X; and ROE  
17 CORPORATIONS I through X,  
18 inclusive,

19 Defendants.

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PARTIAL TRANSCRIPT

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OF

23

JURY TRIAL

24

BEFORE THE HONORABLE CAROLYN ELLSWORTH

25

DEPARTMENT V

26

DATED TUESDAY, NOVEMBER 10, 2015

27

28 TRANSCRIBED BY: KRISTY L. CLARK, RPR, NV CCR #708,  
29 CA CSR #13529



1 APPEARANCES:

2 For the Plaintiff:

3 NETTLES LAW FIRM  
4 BY: CHRISTIAN M. MORRIS, ESQ.  
5 1389 Galleria Drive  
6 Suite 200  
7 Henderson, Nevada 89014  
8 (702) 434-8282  
9 christian@nettleslawfirm.com

8 For the Defendant Wynn Las Vegas, LLC:

9 LAWRENCE J. SEMENZA, III, P.C.  
10 BY: LAWRENCE J. SEMENZA, III, ESQ.  
11 BY: CHRISTOPHER KIRCHER, ESQ.  
12 10161 Park Run Drive  
13 Suite 150  
14 Las Vegas, Nevada 89145  
15 (702) 835-6803  
16 ljs@semenzalaw.com

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1 LAS VEGAS, NEVADA, FRIDAY, NOVEMBER 13, 2015;

2 1:45 P.M.

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4 P R O C E E D I N G S

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7 THE COURT: Okay. And this is Case No.

8 A-12-655922, continuation of Yvonne O'Connell versus  
9 Wynn, LLC. And the record will reflect we are outside  
10 the presence of the jury. Parties are present with  
11 their respective counsel, and all officers of the court  
12 are present. And are counsel familiar with the Court's  
13 jury instructions numbered 1 through 43?

14 MS. MORRIS: Yes.

15 MR. SEMENZA: Yes, Your Honor.

16 THE COURT: And does the plaintiff object to  
17 the giving of any of the instructions?

18 MS. MORRIS: No, Your Honor.

19 THE COURT: And does the plaintiff have any  
20 additional instructions to propose?

21 MS. MORRIS: No, Your Honor.

22 THE COURT: Does the defense have any  
23 objection to instructions 1 through 43?

24 MR. KIRCHER: Yes, Your Honor. As it relates  
25 to Jury Instruction No. 27, the defense is going to

1 object the last paragraph of the jury instruction. We  
2 believe that the totality of the circumstances apply to  
3 this type of case. And there's a number of factors  
4 that should be considered and not just the inspection  
5 of the property to determine constructive notice and  
6 other surrounding circumstances.

7           So just on that basis, we will object to that  
8 jury instruction. And then going to Jury  
9 Instruction No. 37, which relates to the aggravation of  
10 her preexisting condition, we believe that there's not  
11 sufficient evidence and testimony, especially expert  
12 testimony to prove an aggravation of a preexisting  
13 condition. And I think we mentioned the DeVito case  
14 previously so we would object on that basis.

15           And finally, we would object to Jury  
16 Instruction No. 32. Defense believes that this jury  
17 instruction is confusing to the jury, and it's  
18 irrelevant to this case because it applies to other  
19 cases such as motor vehicle accidents, and it will  
20 confuse the standard as it relates to liability  
21 cases. So the defense would object to that one for the  
22 record.

23           THE COURT: Okay. And so would the plaintiff  
24 like to address Jury Instruction No. 27 as far as the  
25 last paragraph they're objecting to? Why do you want

1 that given?

2 MS. MORRIS: Yes, Your Honor. The last  
3 paragraph of Jury Instruction No. 27 simply helps the  
4 jury understand the definition of what constructive  
5 notice is. Due to the fact actual notice was quite  
6 explanatory, we have to provide them with a definition  
7 as to what does constructive notice mean. And this  
8 paragraph here allows them to understand the definition  
9 of constructive notice. So when the -- it gives them  
10 factors to determine that has been based essentially on  
11 the evidence that has been presented here and is  
12 incredibly appropriate for a slip-and-fall case,  
13 especially in Nevada, and I think it accurately  
14 reflects the Nevada law.

15 THE COURT: So the reason the court is -- is  
16 doing this is -- or giving this instruction, including  
17 that last paragraph, is because the rest of the  
18 instruction describes the state of premises liability  
19 law concerning a foreign substance on the floor. And  
20 the most difficult part of that part of the law is the  
21 constructive notice part. We need to define for the  
22 jury what is constructive notice.

23 And the last two paragraphs are an attempt  
24 to, in fact, define for the jury what constructive  
25 notice means. And this is only by way of example. The

1 defense concern that -- that they won't be able to take  
2 into account all the circumstances, certainly that  
3 wouldn't be true because you could still, of course,  
4 argue about all of the circumstances, including the  
5 fact that even if someone was on constructive notice,  
6 there's the additional element. Once notice has been  
7 shown, then did the -- did the defense -- defendant  
8 failure -- fail to act reasonably to address the  
9 situation?

10           And so this -- this only goes to what is  
11 constructive notice. What types of things may a jury  
12 consider. And I think that there is Nevada case law  
13 that talks about the inspection of -- of premises. The  
14 Westward Ho case that we discussed in chambers where  
15 there was a slide at the hotel. It was -- the railings  
16 on the slide were loose, and there was a discussion  
17 about constructive notice and whether or not the  
18 defendant hotel should have, through reasonable  
19 inspection, discovered that went to the issue of  
20 constructive notice. So that's why I'm giving that.

21           MR. SEMENZA: And, Your Honor, just briefly  
22 on the same subject. With regard to the definition of  
23 constructive notice, obviously the Sprague case  
24 addresses that particular issue. And I'm simply noting  
25 this for the record. I don't need to -- to argue it

1 any further than we've had our discussions about it.  
2 But there is a unpublished case. It is Ford vs. Hills  
3 Medical Center which is an unpublished from the Nevada  
4 Supreme Court which seems to suggest that the  
5 constructive notice standard is that one would have to  
6 establish that the hazard was virtually -- a virtually  
7 continuous condition and created an ongoing continuous  
8 hazard.

9 And so generally speaking, we'd object to the  
10 inclusion of the -- of the constructive notice  
11 instruction based upon our reading of Sprague and this  
12 unpublished opinion which we have discussed.

13 THE COURT: All right. And I know you're not  
14 citing that case as precedent, but rather --

15 MR. SEMENZA: Correct.

16 THE COURT: -- rather as guidance. And the  
17 Court, of course, looks sometimes to unpublished  
18 opinion for guidance. And I did read that opinion, of  
19 course, and brought it to your attention. My concern  
20 there is the Court's emphasis on saying that the  
21 standard in Lucky Sprague -- in the Lucky Sprague case  
22 was that there was this continuous -- what was the  
23 wording again? Continuous and --

24 MR. SEMENZA: And ongoing continuous hazard.

25 THE COURT: Right.

1           MR. SEMENZA: For a virtually continuous  
2 condition.

3           THE COURT: Right. So that would, then,  
4 necessarily leave out the situation where you might  
5 have a situation where the evidence theoretically could  
6 support, and it could be argued in this case, because  
7 of plaintiff's testimony, that a condition was on the  
8 floor for a lengthy period of time. And that given all  
9 the circumstances, it was -- they should have been  
10 through a -- through a reasonable inspection that they  
11 were on constructive notice of that. And that more  
12 narrow discussion in that unpublished opinion seems to  
13 leave that whole possibility out.

14           So if you had a landowner who left --  
15 basically did not attend their floors at all nor did  
16 any inspection and there was debris all over the floor,  
17 but yet there was no proof of a continuous condition,  
18 that that might not amount to constructive notice. And  
19 so that was my concern about that. And so initially, I  
20 looked at that case for guidance, but then thought it  
21 wasn't necessarily helpful as -- as a be-all and  
22 end-all for the definition of constructive notice. So  
23 this will be the opportunity if -- perhaps for the  
24 court to clarify.

25           MR. SEMENZA: Yes, Your Honor. And

1 obviously, our position is that it does -- it does  
2 define the standard for constructive notice in this  
3 particular state.

4 THE COURT: Okay.

5 MR. SEMENZA: I noted it for the record.

6 THE COURT: Great. I think we have made a  
7 good record on that.

8 All right. And number -- let's see. Next  
9 one was No. 32. The defense is objecting. Is that --  
10 as well. That's the person who's exercising reasonable  
11 care has a right to assume that every other person will  
12 perform his duty under the law, and the absence of  
13 reasonable cause for thinking otherwise is not  
14 negligence for such person to fail to anticipate injury  
15 which can come to her only from a breach of duty by  
16 another.

17 And I believe I had stated in chambers the  
18 reason I was agreeing to give that was only because --  
19 well, in part because the defense is arguing  
20 comparative fault and also arguing that the substance  
21 was placed on the floor not by them, not by the Wynn  
22 but by somebody else. In other words, there is a lack  
23 of proof that the Wynn placed any foreign substance on  
24 the floor. And so that brings that whole issue. The  
25 plaintiff had indicated that they were seeking this



1 instruction because their argument is that the Wynn has  
2 breached the duty of reasonable care and so that they  
3 felt that instruction was required.

4           And I understand the defense that normally  
5 this is more typically seen in the -- in the setting  
6 of, like, an automobile accident where a -- you know,  
7 there's an argument that I was going down the road and  
8 obeying the law, and I have a right to say that I  
9 shouldn't have to be on a constant lookout for somebody  
10 running a red light, which is a violation of law and  
11 clearly a breach of their duty. And so the fact that I  
12 didn't maintain that -- that I had a right to believe  
13 that everybody would be following the law.

14           And in this case, plaintiff has a right to  
15 walk down the aisleway, believing that the Wynn is  
16 exercising a -- their duty to exercise reasonable care  
17 to keep their premises safe so that she shouldn't have  
18 to watch every step she was taking. And that's  
19 basically the basis for having this in; is that  
20 correct?

21           MS. MORRIS: That's correct. I don't have  
22 anything in addition.

23           THE COURT: Okay. And let's see. Lastly  
24 was No. 37. And this was the preexisting condition  
25 instruction. A person who has a condition at the time

1 is not entitled to recover damages; therefore, however,  
2 is entitled to recover damages for any aggravation.  
3 And the argument by defense is there's no proof of  
4 aggravation. But I think that the jury could  
5 reasonably infer from the expert testimony of Dr. Dunn  
6 concerning the neck that because he testified that  
7 she -- yes, she had a preexisting condition, but he --  
8 he testified at length about the difference between  
9 younger and older persons. And although, he believed  
10 and testified that every person as they get older will  
11 have degenerative disk disease in their spine, that  
12 this makes an older person more susceptible basically  
13 or -- or have a more difficult time recovering, and so  
14 that's what this instruction goes to.

15           So although the evidence, you know, may --  
16 may not be as clear as we'd like it, there is some.  
17 And so I think the plaintiff's entitled to the  
18 instruction because there is some evidence from  
19 Dr. Dunn in that regard. That's why I'm giving that  
20 one. Okay.

21           All right. Oh, I'm sure the jury has been  
22 waiting patiently for the last hour, so let's bring  
23 them in.

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**TRANSCRIBER'S CERTIFICATE**

STATE OF NEVADA                    )  
  ) SS  
COUNTY OF CLARK                    )

I, Kristy L. Clark, a Nevada Certified Court Reporter and Registered Professional Reporter, do hereby certify:

That I listened to the recorded proceedings and took down in shorthand the foregoing.

That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript is a complete, true and accurate transcription of my said shorthand notes to the best of my ability to hear and understand the audio file.

I further certify that I am not a relative or employee of an attorney or counsel involved in said action, nor a person financially interested in said action.

IN WITNESS WHEREOF, I hereby certify this transcript in the County of Clark, State of Nevada, this 28th day of December, 2015.

\_\_\_\_\_  
Kristy L. Clark, RPR, CCR # 708

## **EXHIBIT 7**

## **EXHIBIT 7**

JURY INSTRUCTION NO. 27

The owner of property is not an insurer of the safety of a person on the premises, and in the absence of negligence by the owner, the owner is not liable to a person injured upon the premises.

When a foreign substance of the floor causes a patron to slip and fall, liability will lie only where the business owner or one of its agents caused the substance to be on the floor, or if the foreign substance is the result of actions of persons other than the business or its employees, liability will lie only if the business had actual or constructive notice of the condition and failed to remedy it.

In order for the plaintiff to recover in the absence of proof that the defendant created the condition or actually knew of it, the plaintiff must prove that the defendant had constructive notice. That means that the defendant, using reasonable care, should have known of the unsafe condition in time to have taken steps to correct the condition or to take other suitable precautions.

You may consider whether the defendant inspected the premises on a reasonable basis or in a reasonable way in determining whether the defendant should have known of the unsafe condition. You may consider the length of time the condition may have existed in determining whether the defendant should have known of the condition had the defendant used reasonable care.

## **EXHIBIT 8**

## **EXHIBIT 8**

1 CASE NO. A-12-655992-C

2 DEPT. NO. 30

3 DOCKET U

4

5

DISTRICT COURT

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CLARK COUNTY, NEVADA

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\* \* \* \* \*

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9 YVONNE O'CONNELL,  
10 individually,

Plaintiff,

11

vs.

12

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

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Defendants.

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PARTIAL TRANSCRIPT

19

OF

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JURY TRIAL

21

BEFORE THE HONORABLE CAROLYN ELLSWORTH

22

DEPARTMENT V

23

DATED MONDAY, NOVEMBER 9, 2015

24

25 TRANSCRIBED BY: KRISTY L. CLARK, RPR, NV CCR #708,  
CA CSR #13529

1 APPEARANCES:

2 For the Plaintiff:

3 NETTLES LAW FIRM  
4 BY: CHRISTIAN M. MORRIS, ESQ.  
5 1389 Galleria Drive  
6 Suite 200  
7 Henderson, Nevada 89014  
8 (702) 434-8282  
9 christian@nettleslawfirm.com

8 For the Defendant Wynn Las Vegas, LLC:

9 LAWRENCE J. SEMENZA, III, P.C.  
10 BY: LAWRENCE J. SEMENZA, III, ESQ.  
11 10161 Park Run Drive  
12 Suite 150  
13 Las Vegas, Nevada 89145  
14 (702) 835-6803  
15 ljs@semenzalaw.com

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I N D E X

WITNESS:	PAGE
<u>THOMAS DUNN, M.D.</u>	
Voir Dire Examination by Mr. Semenza	4
Direct Examination by Ms. Morris	37

1 LAS VEGAS, NEVADA, MONDAY, NOVEMBER 9, 2015;

2 4:36 P.M.

3  
4 P R O C E E D I N G S

5 \* \* \* \* \*

6  
7 THE CLERK: You do solemnly swear the  
8 testimony you're about to give in this action shall be  
9 the truth, the whole truth, and nothing but the truth,  
10 so help you God.

11 THE WITNESS: Yes, I do.

12 THE COURT: Please be seated, and would you  
13 please state and spell your first and last name.

14 THE WITNESS: Thomas Dunn, T-h-o-m-a-s, and  
15 D-u-n-n.

16 THE CLERK: Thank you.

17 THE COURT: And you may proceed.

18 MR. SEMENZA: Thank you.

19  
20 VOIR DIRE EXAMINATION

21 BY MR. SEMENZA:

22 Q. Good afternoon, Dr. Dunn.

23 A. Good afternoon.

24 Q. Did you bring any materials with you today?

25 A. Yes, I brought my chart.

1 Q. May I examine those for a moment.  
2 A. Sure.  
3 Q. Dr. Dunn, is this the complete medical chart  
4 that you have in your possession relating to  
5 Ms. O'Connell?  
6 A. Well, it's the complete file that I have in  
7 the possession, but there -- I believe other doctors at  
8 Desert Orthopaedic Center have seen her, so I didn't --  
9 I don't believe I have their material in there.  
10 Q. When were these documents obtained?  
11 A. Well, I think my secretary gave them to me  
12 last week.  
13 Q. Okay. And do you know whether she went out  
14 and obtained additional documents? And here's --  
15 MR. SEMENZA: Your Honor, the documents that  
16 he brought with him include other materials outside of  
17 what he has produced in this case, so from other  
18 doctors, those sorts of things. So I don't --  
19 THE COURT: Yeah, just seeing the -- this is  
20 what I have.  
21 MR. SEMENZA: And -- and that's what I have  
22 as well.  
23 THE COURT: And that was produced by the  
24 plaintiff was Dr. Dunn's records, so I don't know what  
25 you're talking about. I mean, what are you referring

1 to? Do you know?

2 MR. SEMENZA: There's a whole host of  
3 documents relating to UMC, relating to -- may I?

4 THE WITNESS: Sure.

5 BY MR. SEMENZA:

6 Q. Let me -- let me ask you really quickly,  
7 Dr. Dunn, do you know when this compilation was  
8 undertaken by your staff?

9 A. I don't know.

10 Q. Okay.

11 MR. SEMENZA: Your Honor, contained within  
12 the documents that Dr. Dunn has provided as part of his  
13 medical charts, there are documents from Desert  
14 Institute of Spine Care. There are documents from  
15 Edson (inaudible). There are documents from UMC  
16 Medical.

17 THE COURT: And what dates?

18 MR. SEMENZA: There's a ton of them, Your  
19 Honor.

20 I'll identify them for the record. There is  
21 a lumbar spine report MRI dated 4/8/2010 which I  
22 believe is referenced in -- in Dr. Dunn's medical  
23 chart. So that's not an issue. There is also from UMC  
24 of Southern Nevada Department of Radiology, a LK spine,  
25 lumbosacral limited study that was done, and that is

1 dated February 10th of 2010. I don't know that that  
2 was referenced.

3 THE COURT: Plain films?

4 MR. SEMENZA: Pardon?

5 THE COURT: Plain films?

6 MR. SEMENZA: Three views of the lumbar spine  
7 were obtained. There are five lumbar type vertebrae.  
8 Alignment is within normal limits. Marked --  
9 Impression: Marked multi level degenerative disk  
10 disease of the lumbar spine.

11 THE COURT: Okay. So the doc's saying it's  
12 plain films, so X rays. Okay.

13 MR. SEMENZA: There is a chest radiograph  
14 dated March 19th of 2010. There is a medical record  
15 from Dr. Andrew Cash at the Desert Institute and Spine  
16 Care dated April 19th of 2010. There is a Dr. Cash  
17 Desert Institute and Spine Care report dated May 18th  
18 of 2010. There is a --

19 THE COURT: That's from Dr. Cash as well --

20 MR. SEMENZA: Yes.

21 THE COURT: -- May 18th?

22 MR. SEMENZA: There's a Southern Nevada Pain  
23 Center report office visit that does not -- oh, dated  
24 October 15th of 2010. There is a Desert Institute of  
25 Spine Care report from Dr. Cash dated September 13th of

1 2012. There is a Steinberg Diagnostic Medical Imaging  
2 Center lumbar spine series dated September 27th, 2011.  
3 There is a UMC authorization to release protected  
4 health information dated May 15th, 2014. There is a  
5 UMC chart record dated May 1 of 2014 comprised of  
6 two -- three pages. There is a UMC chart dated  
7 January 14th, 2014, comprised of three pages. There is  
8 a UMC chart dated September 4, 2013, comprised of three  
9 pages. There is a UMC chart dated June 4th of 2013 --  
10 THE COURT: What was it? What date?  
11 MR. SEMENZA: June 4th of 2013 comprised of  
12 three pages. There is a UMC chart dated February 5th  
13 of 2013 comprised of three pages. There is a document  
14 identified as E form external document, new problem,  
15 low back pain, provider, Dr. Dunn, 6/13 of 2014 that I  
16 don't believe I've seen before. There is a second  
17 document dated June 13th of 2014 from Dr. Dunn that I  
18 don't believe I've seen before. There is a third  
19 document dated June 13th, 2014, from Dr. Dunn that I  
20 don't believe I have seen before. There is a fourth  
21 document dated June 13th, 2014, that I don't believe I  
22 have seen before from Dr. Dunn. There is a HIPAA  
23 privacy notice for Ms. O'Connell that I have not seen  
24 before. There is a document from Dr. Dunn dated  
25 June 11, 2014, clinical lists update, that I don't

1 believe I have seen before. There is an internal other  
2 portal enrollment dated June -- June 11th, 2014, from  
3 Dr. Dunn that I don't believe I have seen before.  
4 There is a document that appears to be a service ledger  
5 for Dr. Dunn and Dr. Tingey that has additional charges  
6 that were not previously disclosed. There's a medical  
7 records request that is two pages dated September 10th,  
8 2014, from Dr. Martin.

9 THE COURT: To who? It's from Dr. Martin to?

10 MR. SEMENZA: It just identifies the  
11 practitioner as Dr. Martin, and it's comprised of one  
12 page. And a second medical records request that does  
13 not identify the practitioner dated October 20th of  
14 2014 that I don't recall having been produced.

15 So, Your Honor, if you'd like to examine the  
16 documents. I mean, obviously, Your Honor, I'm  
17 objecting on the basis that Dr. Dunn has reviewed and  
18 received additional medical documents that were not  
19 produced to us as part of his file. So I would ask  
20 that Dr. Dunn's testimony be stricken relating to this  
21 particular matter.

22 THE COURT: Dr. Dunn, the -- the MRI from  
23 2010, the X rays from UMC from 2010, the chest X ray  
24 from 2010 were Dr. Cash's medical records from 2010?  
25 When did you get those?

1           THE WITNESS: You know, as I sit here, I -- I  
2 don't recall. It's usual and customary practice of my  
3 medical assistants to get all the medical documents  
4 that I -- are typically relevant for me, and that would  
5 be radiographic reports, other spine physicians or pain  
6 management physicians who have seen the patient. And  
7 typically those are done at the time that I evaluate  
8 the patient.

9           THE COURT: Okay. But the reason we ask,  
10 obviously, is the first report that I have of, you  
11 know, she's coming in to see you, looks like the first  
12 time you see her is June 16th of 2014 referred by  
13 Dr. Cash. But these -- you know, what we have is  
14 supposed to be your medical chart, and there's nothing  
15 in there from Dr. Cash. But now there is a chest X ray  
16 and there's two medical records, one in -- in April,  
17 April 19th of 2010, and one in May, May 18th of 2010.

18           But you can't say whether you had those at  
19 the time you saw her or not?

20           THE WITNESS: Well, I -- I mean, I typically  
21 won't document all the records as a treating physician  
22 I have reviewed. So what I did document in here were  
23 the relevant records that I did look at. A chest X ray  
24 wouldn't be relevant to me, but an MRI of the neck and  
25 back would be. And so those are listed. So I



1 evidently had those. But to anything else, I just  
2 don't have a recollection.

3 THE COURT: All right. So, I think his  
4 testimony needs to be limited to what's documented in  
5 his own chart as to -- to what he reviewed because, I  
6 mean, it does indicate here, for instance, that you had  
7 the MRI, this is in that same visit on page 3, that was  
8 performed May 8th, 2010, as well as the MRI from  
9 April 8th, 2010. I wonder if that's a typo. I don't  
10 know why they would do MRIs a month apart, but --  
11 exactly on the same day. Let me see here.

12 But it couldn't -- is it true that it  
13 couldn't be in your report here if you hadn't seen it?

14 THE WITNESS: I mean, that's fair.

15 THE COURT: But beyond that, all of these  
16 other records, they're not mentioned at all. Are you  
17 relying on those? Because basically your testimony has  
18 to be limited in this matter to what's in your -- in  
19 your chart because of the disclosure. You're a  
20 treating physician and nothing -- the disclosure that  
21 was made said you were going to testify in -- in  
22 conformance with your chart. And then there was kind  
23 of a broad thing that said you were going to relate  
24 everything to the accident, but that was the -- the  
25 same disclosure that was made to every -- on every

1 single doctor that was disclosed, so your chart doesn't  
2 say anything about causation.

3 THE WITNESS: I would just answer it this  
4 way, Your Honor: The relevant material that I reviewed  
5 that would impact my opinions aren't put in my reports.  
6 And that would just be the MRI studies. And I ordered  
7 updated MRI studies, so that's why they're included.  
8 But the other reports, I don't recall if I saw those or  
9 not at the time. I have looked at them recently since  
10 I've had this packet here before me, and they really  
11 don't impact the opinions that I formulated in my mind  
12 from my own records without even having seen those.

13 MR. SEMENZA: Okay. Your Honor, the  
14 prejudice is that I need to know what he's reviewed,  
15 and I don't think it's appropriate or fair, to be  
16 perfectly honest, that if Dr. Dunn does show up with  
17 new documents here that I haven't had a chance to  
18 review and go through and, to be perfectly honest, then  
19 I'm expected to voir dire the witness, and we're  
20 supposed to be completed here today by 6:00 p.m. So I  
21 think I'm prejudiced in the sense that there are new  
22 documents that have now shown up which I don't believe  
23 have ever been produced in this particular case.

24 THE COURT: Does the plaintiff believe you've  
25 produced these other records?

1 MS. MORRIS: They were produced by other  
2 providers. Defense counsel and I both sent the same  
3 requests and got the same records and disclosed the  
4 same records and which in that, Dr. Dunn has clarified  
5 he's going to be testifying in accordance with the  
6 information that's contained only within his medical  
7 records. I don't see any prejudice. There's not going  
8 to be any reference to those records. The records that  
9 he has contained in his chart are records that have  
10 been disclosed in the litigation. However, he and I  
11 both put in requests and both got the same information.

12 Now, generally, when you depose a doctor  
13 during litigation, you show up to the deposition, they  
14 have different information in their charts aside from  
15 what's disclosed with their custodian of records which  
16 says these are the -- the records that we created and  
17 maintained in the course and scope of our practice and  
18 it was made close in time and time we saw her. They  
19 don't sign custodian of records for other people's  
20 medical records. That is standard. So there is no  
21 prejudice. He's not --

22 THE COURT: I don't -- I don't think that's  
23 true. I think that generally they copy the whole chart  
24 and say, this is, you know, what's in our chart.  
25 Because a -- a physician's allowed to if they -- if

1 they've used other physicians' records to form a  
2 diagnosis, they need to know that history. And if  
3 they've asked for those records and they're part of the  
4 chart, they can rely on that. And so, yeah, to say you  
5 should -- I mean, you really should when you go and you  
6 take a deposition, it should have everything that was  
7 produced in response to the request to produce the  
8 medical records, because it doesn't matter where  
9 they're from, it just needs to be -- you know, when  
10 you've asked for produce your chart, it needs to be the  
11 whole chart not what we think we'll pick and choose  
12 and --

13 MS. MORRIS: Well, the custodian of records  
14 sign for this to say these are the Desert Orthopaedic  
15 medical records related to the treatment of Yvonne  
16 O'Connell.

17 THE COURT: Mm-hmm.

18 MS. MORRIS: In this case, I think Dr. Dunn  
19 has been very clear that he -- he noted the relevant  
20 ones that he used in coming to his diagnosis, and it's  
21 stated right there, he looked at prior MRIs and X rays.  
22 He was referred by Dr. Cash. That's what he's going to  
23 be testifying about. I don't see any prejudice.

24 THE COURT: He looked at -- he looked at the  
25 prior MRI studies. That's --

1 MS. MORRIS: And X rays as well.  
2 THE COURT: No, it doesn't say --  
3 MS. MORRIS: It -- it states previous  
4 studies, X rays, CT scans, MRI.  
5 MR. SEMENZA: Where are you looking?  
6 MS. MORRIS: Page 1 from the office visit of  
7 6/16/2014.  
8 MR. SEMENZA: Where did these come from?  
9 MS. MORRIS: It's his chart.  
10 THE COURT: Office visit of 6/16 you're  
11 talking about, page 1?  
12 MS. MORRIS: Correct. Referred by Dr. Cash.  
13 Previous studies, X rays, CT scan, MRI.  
14 THE COURT: Previous studies performed. That  
15 just means that she had previous studies. Doesn't say  
16 he's got all of them. It does indicate that MRIs on  
17 page 3 and 4, which are -- are obviously significant,  
18 and they're noted here in some detail. So clearly he  
19 read them, because he couldn't have dictated this  
20 dictation unless he had.  
21 But I'm going to allow you to go forward and  
22 find out what he knows and how he knows it, and then we  
23 can make a decision.  
24 MR. SEMENZA: Okay.  
25 /////

1 BY MR. SEMENZA:

2 Q. Dr. Dunn, may I grab those from you? Thank  
3 you.

4 Dr. Dunn, what kind of doctor are you?

5 A. I'm a board-certified orthopedic surgeon,  
6 fellowship trained in spine surgery, and my practice is  
7 related to surgery of the spine.

8 Q. And do you have a specialty of the body? Is  
9 it back?

10 A. Yes. My specialty is a subspecialty of  
11 orthopedics which is a specialty of surgery of the  
12 musculoskeletal system and I specialize in the spine.

13 Q. And do you recall when Ms. O'Connell first  
14 came to you?

15 A. Well, June of 2014. June 16th I believe it  
16 was.

17 Q. And on June 16th, 2014, what did you see her  
18 for?

19 A. I was evaluating her for neck and low back  
20 pain.

21 Q. And was this an office visit?

22 A. Yes.

23 Q. Prior to this appointment with Ms. O'Connell,  
24 did you have any patient history?

25 A. Not that I recall, no.

1 Q. During this appointment on June 16th of 2014,  
2 did you or anyone from your staff take a patient  
3 history?

4 A. Yes. Typically with these -- the process  
5 with electronic medical records, the patient will fill  
6 out intake sheets, so on the computer. Then we have a  
7 person called a roomer who actually rooms the patient  
8 and then goes through a history. And then I sit down  
9 with the patient and go through the history that  
10 they've obtained.

11 Q. And where does the -- does the patient input  
12 into the computer prior to her appointment?

13 A. Yes. Right at the time of her appointment.  
14 We have portals in the lobby.

15 Q. And do you know if that was done in this  
16 particular case?

17 A. No. I -- I mean, it was done. I don't know  
18 if she did it at home, online, or if she did it in the  
19 lobby. I don't know.

20 Q. Do you know whether it was done before or  
21 after your initial appointment with her on June 16th,  
22 2014?

23 A. It wouldn't have been done after. It's done  
24 before I see her.

25 Q. And where is that patient evaluation or

1 history located in your records?

2 A. It's -- it's in our computer, and it's this  
3 document I have before me of June 16th, 2014.

4 Q. Okay. Is -- is the --

5 MR. SEMENZA: And may I approach, Your Honor?

6 THE COURT: Yes.

7 BY MR. SEMENZA:

8 Q. Is the first page of this set of documents  
9 that you brought with you today, is that the patient  
10 history that you've been referring to?

11 A. Yes.

12 Q. And it's comprised of five pages, the first  
13 five pages. Why don't you verify.

14 A. Yes.

15 MR. SEMENZA: And, again, Your Honor, I don't  
16 think that's ever been produced in this particular  
17 case. But I understand you would like us to move on.

18 THE COURT: Well, do you know if the --

19 MS. MORRIS: I don't know what he's talking  
20 to -- about. I haven't seen it.

21 THE COURT: Okay. Show her.

22 MR. SEMENZA: Thank you.

23 MS. MORRIS: I can look through our 16.1  
24 disclosures. It does look familiar to me.  
25 (Inaudible.)



1 MR. SEMENZA: Let me take a look as well.  
2 MS. MORRIS: Your Honor, I can keep looking  
3 if you would like to go with the questions (inaudible.)  
4 MR. SEMENZA: Well, I may have questions.  
5 I may have found it, Your Honor. I think it  
6 was produced.  
7 THE COURT: Okay.  
8 BY MR. SEMENZA:  
9 Q. And how did you come to treat Ms. O'Connell?  
10 Was it through referral?  
11 A. According to this document, it says it's a  
12 referral by Andrew Cash, Dr. Cash.  
13 Q. And do you have an understanding as to why  
14 Dr. Cash was referring you this patient?  
15 A. I believe it's a second opinion evaluation.  
16 Q. A second opinion as to what?  
17 A. Her neck and back pain.  
18 Q. And when you initially saw Ms. O'Connell on  
19 June 16th of 2014, did you have the previous doctor's  
20 medical history, medical charts?  
21 A. Again, I don't recall. May have. Typically  
22 when I see patients, my medical staff will obtain  
23 records of that physician's visit as well as injections  
24 or radiographic studies.  
25 Q. And at that June 16th, 2014, appointment,

1 what was her chief complaint?

2 A. She was complaining of pain in the low back  
3 radiating to the butt and right leg to the heel, and  
4 pain in the neck radiating to both arms down to the  
5 hands. And she was also having pain in the chest area.

6 Q. And did she provide an explanation as to what  
7 she believed the source of that pain was?

8 A. When you -- I don't quite understand. What  
9 do you mean "the source"?

10 Q. Did she provide a history as to the basis of  
11 why she was having these pains?

12 A. Yes. She said it developed after a  
13 slip-and-fall injury on February 8th, 2010.

14 Q. And prior to seeing her on June 16, 2014,  
15 other than the history that was taken and provided by  
16 Ms. O'Connell, was there anything else that you had in  
17 your possession relating to her prior care and  
18 treatment?

19 A. Again, I only referenced her MRI study, so  
20 I -- I don't recall if I looked at anything else at the  
21 time.

22 Q. As of June 16th of 2014, the first  
23 appointment, did you in fact have prior MRI studies of  
24 her?

25 A. Yes.

1 Q. And can you identify what those studies were.  
2 A. There was an MRI of the cervical spine that  
3 was obtained on May 8th, 2010. There was an MRI of the  
4 lumbar spine that was performed on April 8th, 2010.  
5 And there were radiographs of the cervical spine. I  
6 believe those, perhaps, were taken at my office, as  
7 well as flexion/extension, bending films of the lumbar  
8 spine taken at my office.  
9 Q. Okay. Where are the radiographs referenced?  
10 A. Right -- unfortunately, it all runs together  
11 in this report. But on page 2 at the very bottom of  
12 the page in bold letters, it says, Magnetic resonance  
13 imaging lumbar. And then I describe what I see. Then  
14 right below that, it says RAD, which stands for  
15 radiograph spine, cervico complete minimum views. And  
16 then the reading of that is on the next page. And then  
17 right below the reading of the (inaudible) the letter  
18 C, C5-6, C6-7, there's another indication of RAD,  
19 referring to radiographs of the lumbar, LS, which is  
20 lumbar spine, with bending views. Then there's,  
21 unfortunately, it looks like a double space. And then  
22 there's a description of my reading of those  
23 radiographs of the lumbar spine. That would be on  
24 page -- it's designated as page 4.  
25 Q. So at the top page, there are two sets of

1 X rays that were done at your office on that particular  
2 day?

3 A. Yes.

4 Q. Okay. And then show me where the prior --  
5 you were referencing on page 2 (inaudible).

6 A. I'm sorry. It's actually page 3. I have  
7 magnetic resonance imaging, cervical and lumbar, on the  
8 bottom of page 3.

9 Q. Okay. So below the bolded magnetic resonance  
10 imaging cervical performed on 5/8/2010, there's another  
11 MRI that you did on that particular day?

12 A. No, no. I -- I reviewed an MRI that was  
13 obtained on April 8th, 2010. And in bold letters, it  
14 says magnetic resonance imaging lumbar. And then below  
15 that I have one sentence where I describe what I see.  
16 And then below that it says, RAD in capital letters.  
17 That's an abbreviation for radiographs of the spine,  
18 neck, cervical, complete minimum, four views.

19 And then on the next page at the top of 4 is  
20 listed my reading of those radiographs. Then  
21 immediately before that (inaudible) designation capital  
22 letters RAD, referring to radiographs of the LS spine,  
23 which is the lumbosacral spine with bending views. And  
24 then there's a double space, and again, we're at the  
25 top of page 4, where I describe what I see there.

1 Q. Okay. Other than the MRIs performed on  
2 May 8th, 2010, and the MRI on 4/8/2010, and then the  
3 RAD spine cervical complete at the bottom of page 3,  
4 and the RAD spine LS with bending views at the top of  
5 page 4, those were the additional records that you  
6 reviewed?

7 A. Well, those are studies that I actually  
8 reviewed. I don't believe they were records. I  
9 believe they're actual studies -- I mean, actual films.

10 Q. And when was the next time you saw  
11 Ms. O'Connell?

12 A. Well, I -- I -- the first visit, which we  
13 just covered, I had recommended MRI studies, updated  
14 MRI studies of the neck and back. So she returned on  
15 July 14th, 2014, approximately a month later, to review  
16 those studies, both of which were obtained on July --  
17 June 27th, 2014. Excuse me.

18 Q. And those -- what were those studies that  
19 were performed prior to the appointment on June --  
20 July 14th of 2014 that you had ordered updated?

21 A. Yes. That was an MRI of the cervical spine  
22 and also of the lumbar spine.

23 Q. And did you see Ms. O'Connell again?

24 A. Well, I saw her to review those films, and  
25 then I saw her a final visit, which would have been a

1 third visit with me, on October 13th, 2014.

2 Q. Okay. So you saw her a total of three times?

3 A. Yes.

4 Q. Okay. And what was the appointment for the

5 third time related to?

6 A. Again, we were -- it was for neck and back.

7 And depending on the visit, one problem area would

8 predominate over the other. At that visit, she was

9 having a flare-up of her back pain. But she said

10 overall the neck pain predominates with the associated

11 symptoms of numbness and tingling and pain radiating

12 down her arm. Could be right arm some days, left on

13 others. And so at that point, I discussed surgical

14 options with her.

15 Q. And has she been to actually see you since

16 October 13th of 2014?

17 A. No.

18 Q. Has she made any determination as to whether

19 she's going to have surgery with you?

20 A. Again, not with me. Again, beyond that last

21 date in October, there's been no communication.

22 Q. Do you have any understanding as to why

23 there's been no communication since October 13th, 2014?

24 A. Well, I express to my patients at that point,

25 there's really nothing further I can do for them short

1 of surgery. So there's no reason to come back and see  
2 me unless they've decided to pursue surgery.

3 Q. And did you give Ms. O'Connell some  
4 nonsurgical options as well?

5 A. Well, basically at this point, based on her  
6 history, we're dealing with a chronic condition that  
7 has persisted for greater than six months, and  
8 according to her history, it dates back to this  
9 slip-and-fall accident in 2010, February. So at that  
10 point, pretty much the capacity of the human body to  
11 correct this problem is -- is in the area of what we  
12 call miracles. So anything we do at this point is  
13 palliative. In other words, it's just going to  
14 alleviate some of her symptoms, but it's not going to  
15 correct the problem.

16 So it's basically the recommendation of do  
17 your best to live with this any way you want to help  
18 you with the symptoms and improve your quality of life.  
19 And if none of that works and you can't endure the  
20 symptoms, then you have that option, which in this  
21 case, would be the option of last resort. That would  
22 be surgery.

23 Q. Is your knowledge about the slip and fall  
24 that Ms. O'Connell alleges that she had exclusively  
25 coming from her?

1           A.    Yes.

2           Q.    Are you aware of any other traumatic injuries  
3 that Ms. O'Connell may have suffered after February 8th  
4 of 2010?

5           A.    No.

6           Q.    Are you aware of whether Ms. O'Connell had  
7 any preexisting conditions prior to February 8th, 2010,  
8 that might impact your treatment of her?

9           A.    Well, she had noticed in her past medical  
10 history that she had a history of depression, so that's  
11 a psychological condition that may impact her outcome  
12 with surgery.

13          Q.    Any other preexisting conditions that  
14 Ms. O'Connell identified?

15          A.    No.

16          Q.    To your knowledge, did she ever identify that  
17 she had a history of fibromyalgia?

18          A.    No. Being fair to the process, I'm just  
19 going by my medical records, and I don't have that -- I  
20 don't see that document in my records, no.

21          Q.    If Ms. O'Connell did have a history of  
22 fibromyalgia, might that have affected her pain levels  
23 that she was identifying during your appointment?

24          A.    May have, yes.

25          Q.    Are you familiar with something called Marfan



1 syndrome?

2 A. Yes.

3 Q. Do you think that if Ms. O'Connell had a  
4 preexisting history of Marfan syndrome that that might  
5 have affected how she experiences pain?

6 A. Well, Marfan's disorder, we believe Abraham  
7 Lincoln may have had that, is a collagen disorder that  
8 can affect the large blood vessels such as the aorta  
9 that are under pressure. So it's unusual for a patient  
10 with that disorder to live into their sixth decade of  
11 life, but it would not impact her pain.

12 Q. What about Ehlers-Danlos syndrome?

13 A. Again, another collagen disorder. It would  
14 not affect her pain.

15 Q. But fibromyalgia would have an effect on her  
16 pain levels?

17 A. Yes.

18 Q. Did you undertake any attempts to  
19 differentiate -- strike that.

20 Did you look for any other initiating causes  
21 of Ms. O'Connell's back pain other than the claimed  
22 fall on February 8th of 2010?

23 A. Well, as part of the evaluation of all  
24 patients, the history gives us 80 percent of the time a  
25 diagnosis. It represents typically the largest part of

1 information a physician uses to develop the diagnosis  
2 or the cause of their problems. In musculoskeletal  
3 medicine, the main categories are degenerative,  
4 traumatic, infectious, carcinogenic, and those can  
5 interplay. It's not necessarily something that's  
6 independent of each other.

7           So I mean, that goes through your mind when  
8 you're sitting and talking to patients. So the history  
9 comes into play in helping to allot a lot of those  
10 factors. So one is always considering all of those  
11 issues.

12       Q. Is it your opinion that the back problems  
13 that Ms. O'Connell has relate to a traumatic injury?

14       A. Based on her history, yes.

15       Q. And her history is coming exclusively from  
16 her; is that correct?

17       A. Yes.

18       Q. Now, do you know what portions of  
19 Ms. O'Connell's body were impacted in this alleged  
20 fall?

21       A. Well, only as it was related from her to me  
22 as documented on the June 16th, 2014, note. And it  
23 simply says, While walking in the Wynn Hotel and  
24 Casino, she slipped and fell backwards twisting to the  
25 right striking her right buttock and leg on a raised

1 divider before hitting the ground.

2 Q. And after the first appointment, did you have  
3 a diagnosis of Ms. O'Connell's condition?

4 A. Yes.

5 Q. What was that?

6 A. I noted impressions of degenerative disk  
7 disease of the cervical spine with cervical  
8 radiculopathy, and lumbar disk disease with sciatica,  
9 and a bilateral carpal tunnel syndrome per history.

10 Q. And is that a -- the degenerative disk  
11 disease of the cervical spine that you identified here,  
12 do you know whether that was a condition Ms. O'Connell  
13 had prior to February 8th, 2010?

14 A. Well, that's a radiographic diagnosis which  
15 would have existed prior to her accident. But the  
16 critical factor is whether it's symptomatic or not.  
17 And by her history, it was not.

18 Q. Okay. What do you mean by radiographic  
19 history? So are you -- in a sense --

20 THE COURT: I -- I'm going to kind of stop  
21 here. I mean, what I'm seeing here is he's saying that  
22 he's got radiographic studies, including MRIs, that  
23 show she's got degenerative disk disease. And he's  
24 saying that he's going by what she said that I didn't  
25 have any pain, and -- and that he relied on that in

1 determining.

2 But you're going to link this up to the fall?

3 THE WITNESS: That's her history.

4 THE COURT: And it's based only on her. So

5 if she lied to you about whether she was symptomatic

6 before, then of course if you knew that, that would

7 change your opinion? So it's really based upon how

8 credible the patient is because you -- you have no way

9 of knowing.

10 THE WITNESS: That's correct.

11 THE COURT: And you know that degenerative

12 disk disease doesn't -- doesn't happen -- I mean, she

13 had this degenerative disk disease. She's just saying

14 that she was fine until this happened.

15 THE WITNESS: Correct.

16 THE COURT: Okay.

17 THE WITNESS: We all do at 58.

18 THE COURT: All right.

19 BY MR. SEMENZA:

20 Q. But what I want to understand is she had the

21 condition prior to February 8th, 2010, but your issue

22 is she was asymptomatic until that fall.

23 Is that what you're basing --

24 THE COURT: On history? That's what you're

25 saying by history?

1           THE WITNESS: That is my understanding, yes.  
2 I mean, this accident occurred with this patient when  
3 she was 58 years of age. That's the sixth decade of  
4 life. We all, unfortunately, deteriorate with time.  
5 And that deterioration is what we refer to as  
6 degeneration in the medical -- in the musculoskeletal  
7 system, or arthritis is another synonym. It is not  
8 significantly symptomatic in most patients.  
9           And so just the presence of radiographic  
10 abnormalities is not necessarily clinically relevant.  
11 We really have to see and talk to the patient. There  
12 will be many times where I see some horrible MRIs and  
13 radiographs, and talk to the patient and they go, No, I  
14 don't have that much pain. I did six weeks ago when I  
15 got these studies, but I'm actually doing fine. So we  
16 don't operate on X rays. We operate on people. And I  
17 can see normal looking -- well, relatively normal  
18 looking films in which patients are very symptomatic.  
19 So it's all part of the diagnostic jigsaw puzzle. But  
20 causation comes by talking to the patient and getting a  
21 history.  
22           So the radiographic findings that I see here,  
23 which really didn't change much in the years between  
24 the two studies that I ordered, are -- are simply  
25 reflective of her condition that existed prior to this

1 accident. Whether it was symptomatic or not, we have  
2 to turn to the patient for that information. Unless  
3 there's medical records, which I didn't review.

4 BY MR. SEMENZA:

5 Q. Okay. I just want to be clear, though, in my  
6 understanding, that the condition that Ms. O'Connell  
7 had that you've identified in your medical records, the  
8 degenerative disk disease, preexisted February 8th of  
9 2010; is that correct?

10 A. I would answer it this way: The radiographic  
11 findings that I see on these films more likely than not  
12 existed the day before she was injured, yes.

13 Q. Okay. And your causation analysis is based  
14 upon the symptomatology and the expression of pain that  
15 Ms. O'Connell has indicated to you during her  
16 appointments.

17 A. Yes. That's the history of the patient.

18 Q. And you had testified earlier that  
19 fibromyalgia might in fact impact that expression of  
20 pain that Ms. O'Connell was having.

21 A. Yes. It can. I mean, they're distinct  
22 issues from discogenic pain to fibromyalgia, but  
23 patients with chronic fibromyalgia will have pain  
24 issues that can affect the whole person. I'm not just  
25 saying that I -- I mean, I have treated patients that

1 have fibromyalgia and had neck and back injuries. And  
2 they're distinct and different, but it complicates the  
3 issue.

4 I think the important thing that I've  
5 expressed to this patient is even with surgery, she  
6 will continue to have pain. The issue is if we take  
7 50 percent or 60 percent of that pain away, is that  
8 sufficient and satisfactory to improve her quality of  
9 life? And many patients who are appropriately set up  
10 with the surgery are at a wit's end where they would  
11 welcome a 50 percent improvement. But it's not  
12 curative in which we're going to say you're going to be  
13 pain free. And part of that reason could be also her  
14 fibromyalgia, if she indeed has it.

15 Q. Do you know what percentage of her pain might  
16 be attributable to fibromyalgia, if she has it, versus  
17 the degenerative back issues that she has?

18 A. I think with her back, it can be confusing.  
19 And I would want further diagnostic studies to help  
20 sort that out. As far as her neck's concerned, I don't  
21 believe the fibromyalgia confuses that picture, in my  
22 opinion.

23 Q. But the lumbar, it could?

24 A. Yes.

25 Q. Just a couple quick follow-ups to move on.

1           THE COURT: Okay. Well, I mean, I think you  
2 need to do this on cross. Because I'm not seeing that  
3 there's something that he can't testify to that he has  
4 here. I mean, your -- your argument is, well, it's not  
5 enough for a doctor to rely on the patient's -- the  
6 patient history. But the -- the -- the bottom line is,  
7 they do rely on the patient history. And if you want  
8 to get the doctor to explain how it can be affected if  
9 she has other issues, psychological issues, other  
10 things like that, then that's part of cross-examination  
11 to get him to explain to the jury if he didn't know  
12 about these things, it might change his opinion,  
13 et cetera. But I don't see that it's going to prevent  
14 him from testifying from what I've heard today.

15           I mean, there's just -- I -- I disagree with  
16 your -- your brief is well, no doctor should be able to  
17 testify based upon the patient history. But the cases  
18 that you cited are -- are different, you know, where  
19 there was a lot of medical records that were available  
20 to the doctor. We don't have that in this case. In  
21 other words, we have --

22           MR. SEMENZA: There were -- there were a lot  
23 of medical records that were potentially available to  
24 this particular doctor.

25           THE COURT: Do you have them?



1           MR. SEMENZA: I -- I mean, her entire history  
2 as far as the fibromyalgia, as far as seeing pain  
3 doctors, as far as all those sorts of things. I mean,  
4 those documents exist and have been produced in this  
5 case. Whether they're used at trial, I don't know.  
6 But that's the issue I've got is this whole cornucopia  
7 of other stuff out there that obviously Dr. Dunn has  
8 not had an opportunity to review. And he testified  
9 that his entire basis for the confusion of causation  
10 was based upon what the plaintiff was telling him.  
11 That in and of itself I don't believe is sufficient to  
12 link the causation in this particular case. He was  
13 told X. It may or may not be true. Again, that's  
14 coming from the plaintiff herself.

15           And what he did say is that there are  
16 essentially objective findings that she had the  
17 physical condition prior to the fall. And so it's a  
18 function of symptomatology, again, which is even  
19 further back, which is subjective in nature as far as  
20 what she's experiencing and what she isn't. And so I  
21 don't think it's appropriate --

22           THE COURT: But pain -- reports of pain are  
23 always subjective. They're -- you can't visualize  
24 pain.

25           MR. SEMENZA: Exactly. So --

1           THE COURT: All right. So -- but doctors  
2 have to -- doctors do rely on reports. And if you can  
3 show him other things, that's cross-examination. I  
4 mean, if he wasn't given the proper tools to come up  
5 with a proper causal diagnosis and you can show that,  
6 then -- then do that. But I don't think at this point  
7 he is kept from testifying.

8           MR. SEMENZA: So that's -- and, Your Honor, I  
9 understand your ruling.

10          THE COURT: Okay. I've ruled. Let's go.  
11 Get this jury back in here.

12          What's your schedule look like for the rest  
13 of the week?

14          THE WITNESS: Well, tomorrow I'm in surgery,  
15 but any other day of the week, I'm open.

16          MR. SEMENZA: And I can tell you I'm not  
17 going to be done, Your Honor.

18          THE COURT: Well, okay. But he can come back  
19 Thursday he just told me.

20          MR. SEMENZA: Okay.

21          THE WITNESS: Or Wednesday. Whatever's easy,  
22 but Tuesdays --

23          THE COURT: Wednesday the courthouse is  
24 closed.

25          THE WITNESS: No problem.

1           THE MARSHAL: All rise for the jury, please.  
2                     (The following proceedings were held in  
3                     the presence of the jury.)  
4           THE MARSHAL: Jury is all present, Your  
5 Honor.  
6           THE COURT: Thank you. Please be seated.  
7           And we've called Dr. Thomas Dunn who has  
8 already taken the stand. I'm going to have the clerk  
9 swear you in again.  
10          THE CLERK: Doctor, can you please stand.  
11          THE WITNESS: Oh, yes.  
12          THE CLERK: You do solemnly swear the  
13 testimony you're about to give in this action shall be  
14 the truth, the whole truth, and nothing but the truth,  
15 so help you God.  
16          THE WITNESS: Yes, I do.  
17          THE CLERK: Thank you. Would you please  
18 state your name for the record.  
19          THE WITNESS: Thomas -- Thomas Dunn.  
20          THE COURT: Thank you.  
21          Proceed.  
22  
23                     DIRECT EXAMINATION  
24 BY MS. MORRIS:  
25          Q. Dr. Dunn, can you tell us where you currently

1 work.

2 A. I am a partner with Desert Orthopaedic Center  
3 and have been here since 1995 with that group.

4 Q. Tell us what you do for work.

5 A. I am a board-certified orthopedic spine  
6 surgeon, which means I limit my care and treatment of  
7 patients with neck and back problems.

8 Q. Do you have a certain specialty?

9 A. Yes. Again, that specialty is orthopedic  
10 surgery, and orthopedic surgery is the surgical  
11 disorders of the musculoskeletal system, so injuries to  
12 the joints and the bones of the body from the neck to  
13 the toes. But it -- there are many subspecialties of  
14 orthopedics. For instance, in my group there are 22  
15 orthopedic surgeons and we all have our subspecialties.  
16 I'm the senior spine surgeon. There are four spine  
17 surgeons, hand surgeons, sports medicine specialists,  
18 total joint specialists, so my specialty would be  
19 spine.

20 Q. How long have you worked at Desert  
21 Orthopaedic?

22 A. I came to Las Vegas from San Diego in 1995 at  
23 their invitation, and they've been here since 1969.

24 Q. Thank you.

25 Do you have any privileges at any hospitals

1 in the Las Vegas area?

2 A. Over the years, I've been at most of the  
3 hospitals. But as I -- at this stage in my career, I  
4 limit my practice to either Spring Valley Hospital or  
5 Southern Hills Hospital, and also, I'll go to Valley  
6 Hospital.

7 Q. Can you give us a little background about  
8 your education?

9 A. Sure. I went to undergraduate studies  
10 college at the University of California San Diego and  
11 received a -- a degree in biology which is a typical  
12 premed major. And I was accepted into the University  
13 of California Irvine Medical School and graduated in  
14 1985 with a medical doctor degree.

15 Upon receiving that degree, one then does an  
16 internship and a residency. I did two years of general  
17 surgery and then was accepted into the orthopedic  
18 surgery program at University of California Irvine.  
19 The medical center is actually in Anaheim or Orange,  
20 and then I did -- after four years of orthopedic  
21 surgery, that's the completion of the residency, I then  
22 did an extra year of subspecialty surgery training  
23 in -- in spine. And that's called a fellowship year.  
24 And that was done at Rancho Los Amigos Hospital in  
25 Downey, California. And that completed my formal

1 training. And then there was board certification,  
2 which requires both a written and an oral exam, which I  
3 passed. And then every ten years we take a written  
4 examination for recertification, and I've done that  
5 twice successfully when required.

6 Q. What kind of training do you need to become  
7 board certified?

8 A. Board certified, you have to complete an  
9 accredited residency program in this country, and then  
10 one has to take a written examination upon completion  
11 of that residency training. And then after two years  
12 of clinical practice, one is then eligible to sit for  
13 the oral board examinations. All this takes place in  
14 Chicago. And then upon passing both of those tests,  
15 you're then board certified.

16 Q. Have you ever testified in court as an expert  
17 in the field of orthopedic medicine?

18 A. Yes.

19 Q. How many times?

20 A. I will say roughly 20 times.

21 MS. MORRIS: Your Honor, I ask that Dr. Dunn  
22 be qualified as an expert in the field of orthopedic  
23 medicine.

24 THE COURT: The court doesn't qualify  
25 experts. The Court just rules on whether they'll be

1 allowed to testify, but you haven't asked him his  
2 opinions, and there's been no objection, so that's how  
3 it works.

4 BY MS. MORRIS:

5 Q. Dr. Dunn, can you tell us how you came to  
6 treat Yvonne O'Connell.

7 A. Yvonne O'Connell was referred to me by  
8 Dr. Andrew Cash on June 16, 2014.

9 Q. And what was the reason that Yvonne came to  
10 see you?

11 A. I was evaluating her for neck and low back  
12 pain.

13 Q. And when's the first date you saw Yvonne?

14 A. That was June 16th, 2014.

15 Q. And at that time, did you have any imaging  
16 studies of Yvonne O'Connell?

17 A. Yes. I had MRIs that were taken in 2010 of  
18 both her neck and lumbar spine. And we also -- we, my  
19 office also took radiographs, X rays of her neck and  
20 low back.

21 Q. Can you tell me how the X rays of her neck  
22 and low back were done.

23 A. We have X ray machines, radiograph machines  
24 in the office, and we have three, soon to have four,  
25 offices in town, and we all have X rays. So the

1 patient will just go in the X ray suite with a tech,  
2 and then they will take X rays of the neck while she's  
3 standing, a front view, side view, a flexion/extension  
4 view from the side of both her neck and back.

5 Q. Why did you order those studies be done?

6 A. Those are important diagnostic studies.  
7 Radiographs allow me to see the condition of the joints  
8 and bones in her neck and back and provide additional  
9 diagnostic information.

10 Q. During that first visit with Yvonne, did she  
11 tell you the reason why she was having pain?

12 A. She related that her neck and low back pain  
13 began with a slip-and-fall injury on February 8th,  
14 2010.

15 Q. Did you receive any history as to what  
16 treatment she had received prior to coming to you?

17 A. She states that two days later, she went to  
18 UMC Quick Care. She had a primary care physician.  
19 She'd seen a neurologist, a spine surgeon, a pain  
20 management physician, and she had previously had  
21 X rays, a CAT scan, and MRI studies.

22 Q. Did she tell you about any conservative care  
23 she had undergone?

24 A. I'm sure she did, but I didn't list it here.

25 Q. During that first visit with Yvonne, had you



1 reviewed her prior history before seeing the patient?

2 A. No. Typically I just look at the films with  
3 the patient and review it with them.

4 Q. When's the next time you saw Yvonne?

5 A. Well, at that visit, I had recommended  
6 updated MRI studies since it had been four years since  
7 she had had the original studies. And she obtained  
8 those studies and returned to see me approximately a  
9 month later on July 14, 2014.

10 Q. When Yvonne came and saw you on that first  
11 visit, did she tell you specifically what was hurting?

12 A. Well, principally, it was her neck, but it  
13 was low back and neck, and she had radiating symptoms  
14 into her extremities. Numbness and tingling and pain.

15 Q. Tell me about that second visit you had with  
16 Yvonne.

17 A. At that point, I reviewed the MRIs with her.  
18 Her symptoms persisted and -- which isn't surprising  
19 since they had been going on, according to her, since  
20 2010. And, again, I just reviewed the MRIs. And, in  
21 my opinion, there were no significant changes.

22 Q. What did you see in her cervical MRI?

23 A. Again, I saw changes that we would typically  
24 see in a patient of her age. At this time, we are  
25 now -- in a -- in a woman who's in her seventh decade

1 of age, early 60s, and she had some typical changes of  
2 degenerative -- of degeneration that would involve her  
3 disks, her facet joints, and she had a component of  
4 neuroforaminal stenosis in her mid and lower neck. The  
5 foramen represents the hole through which the nerve  
6 travels to go to the upper extremities. And we  
7 commonly see a tightness about that anatomy or that  
8 foramen, which in Latin means doorway. So it gets a  
9 little tight, and that may give patients some of these  
10 upper extremity symptoms that she was having.

11           And the lumbar spine, nothing there that I  
12 thought was significant other than some mild  
13 neuroforaminal stenosis at one level in her back.

14           Q.    During that second visit on July 14th, you  
15 reviewed the MRIs, you said; is that correct?

16           A.    Yes.

17           Q.    And did anything else occur on that visit?

18           A.    No. I examined the patient, and I let her  
19 know that there was -- the main -- I would say the most  
20 important information that is obtained from the MRI is  
21 to make sure that there's nothing dangerous. Sometimes  
22 you'll find a tumor or cancer that we didn't suspect,  
23 an infection, something that poses a threat to her  
24 neurologic status. And I really didn't see that. So  
25 the most important information, I says, hey, let's

1 celebrate, there's nothing dangerous. Therefore, this  
2 is about your pain. If you can live with your pain, so  
3 be it. If not, we'll look at other options.

4 I suggested she try fish oil. Fish oil at  
5 4,000 milligrams a day can serve as a great  
6 anti-inflammatory agent. And I -- and I -- I  
7 instructed her at that time, then, with that  
8 information, just come back as needed.

9 Q. Did you see Yvonne again?

10 A. I saw her one last time. Her third visit was  
11 on October 13th, 2014, where she was expressing  
12 increasing difficulty during symptoms, principally of  
13 her neck pain. And she wanted to discuss options of  
14 surgery, so I discussed that with her and told her,  
15 hey, there's nothing dangerous. If you can live with  
16 this, live with it. If not, then you have the option  
17 of surgery as your last resort, and instructed her to  
18 return if that was her choice.

19 Q. What did you recommend for surgery?

20 A. For her, to help improve her neck pain and to  
21 improve the symptoms into her arms, to open up that  
22 foramen or hole. The typical procedure is an anterior.  
23 We -- a little incision through the neck, and we would  
24 remove three disks. We would open up that space and  
25 fuse it in that proper position. So that's titled an

1 anterior cervical neck disectomy, removing the disk,  
2 and interbody fusion with the placement of a plate and  
3 screws. Quarterback for the Denver Broncos, Peyton  
4 Manning, had that surgery.

5 Q. Now, you said that type of surgery would help  
6 her neck pain; is that correct?

7 A. Yes. It's not curative for her problem, but  
8 it can take 50 to 60 percent of the pain away. And for  
9 people who are having a significant problem dealing  
10 with that pain, that's affecting their quality of life,  
11 then it's an option they can choose.

12 Q. Okay. Is there physical therapy required  
13 after a surgery such as the three-level fusion?

14 A. It's -- it varies from individual to  
15 individual, but typically anywhere from a month to two  
16 months of therapy can be ordered.

17 Q. Where would that surgery be conducted? Would  
18 it be in your surgery center or the hospital?

19 A. A three level would be in a hospital.

20 Q. Now, did you discuss with Yvonne her lumbar  
21 spine on that last visit?

22 A. Well, yes. Basically, again, I'm the  
23 surgeon. I didn't feel that there was any surgical  
24 treatment for her low back, so you basically do your  
25 best to live with it.

1 Q. When Yvonne came to see you, did she report  
2 any preexisting medical conditions to you?

3 A. She noted that she had a history of  
4 depression.

5 Q. Does that have any significance to you?

6 A. Well, certainly it can. Psychological issues  
7 like depression can affect one's perception of pain and  
8 can affect one's result from surgery or outcome of  
9 surgery.

10 So typically if I see that, it's not  
11 necessarily unusual, but I may require a psychological  
12 evaluation and clearance prior to surgery.

13 Q. Did you come to an opinion as to the cause of  
14 Yvonne's need for the three-level fusion?

15 A. Well, I think, as I share with every patient  
16 who comes to see me on their initial visit, as I did  
17 today on many occasions, that there are three things  
18 patients want to know when they see a specialist, or  
19 any physician for that matter. You want to know the  
20 cause of your symptoms. That's the diagnosis. We want  
21 to make sure that that particular problem is not  
22 dangerous as it involves your neurologic system or  
23 life. And then we want to discuss treatment options.  
24 Those are the three things we cover.

25 So establishing the cause of her symptoms is

1 an important part of her visit. Was that your  
2 question?

3 Q. Yeah. Did you come to a determination as to  
4 the cause of Yvonne's need to have the three-level  
5 fusion?

6 A. Well, the -- the need is based on a number of  
7 factors. Her complaints, No. 1. Establishing that  
8 there was nothing dangerous. In other words, I didn't  
9 believe that there was any threat to her neurologic  
10 status. So, again, this becomes an elective option at  
11 her choosing, an option of last resort. And then the  
12 radiographic findings and physical exam findings. So  
13 all of those lead me to my recommendation of surgery  
14 being an option for her. And based on her history, she  
15 said it began with the slip-and-fall accident. So  
16 that's how I would relate it to the accident.

17 Q. So is it your -- your opinion to a reasonable  
18 degree of medical probability that she's in need of  
19 this three-level cervical fusion due to the fall she  
20 had on February 8th of 2010?

21 MR. SEMENZA: Objection, Your Honor.

22 THE COURT: State your legal grounds.

23 MR. SEMENZA: I don't think he can provide  
24 that opinion to a reasonable degree of medical  
25 certainty.

1           THE COURT: Well, it's an opinion to a  
2 reasonable degree of medical probability. But I guess,  
3 it -- it more seems like skipped -- you skipped a step.  
4 I mean --

5           MR. SEMENZA: May we approach, Your Honor?

6           THE COURT: Yeah.

7                   (A discussion was held at the bench,  
8 not reported.)

9           THE COURT: I'm going to sustain the  
10 objection and let you clarify.

11 BY MS. MORRIS:

12           Q. Dr. Dunn, we're going to back up a little  
13 bit.

14                   The findings in Yvonne O'Connell's MRI, those  
15 are degenerative, is that correct, in her cervical and  
16 lumbar spine?

17           A. That's correct.

18           Q. And can you describe to us what degenerative  
19 means.

20           A. Degenerative is what you see before you right  
21 here. As we age, things wear out. In the  
22 musculoskeletal system, we call it arthritis, or  
23 degenerative disk disease. There are changes in our  
24 spine just like we can have in the rest of the -- the  
25 other joints of our body.

1           The clinical relevance of those changes,  
2 though, is based on your symptomatology as a patient,  
3 because we all develop degenerative changes typically  
4 by our third and fourth decade of life. And as we age,  
5 we can develop a lot of degenerative changes, but we  
6 don't see significant symptoms in the majority of  
7 people with degenerative arthritis. And remember,  
8 there are different types of arthritis. I'm just  
9 talking about the typical wear and tear that we all  
10 get. And what I mean by relevant, I mean enough  
11 symptoms where you're going to see a doctor and get  
12 treatment. Most people can take some Advil,  
13 over-the-counter medications and they feel fine and  
14 they can live with it.

15           So an X ray that shows degenerative changes  
16 in a 58-year-old, 62-year-old patient is not  
17 necessarily relevant. In other words, I can see a lot  
18 of, quote, abnormalities, but until I speak to the  
19 patient, get a thorough history and do an examination,  
20 many of those changes may be irrelevant and don't  
21 require treatment. And on the other side of the coin,  
22 I can see X rays and MRIs that are fairly normal  
23 looking without much degeneration, and yet patients can  
24 have severe pain, and through further diagnostic  
25 evaluation, we find the source of that pain that may



1 merit surgical treatment.

2           So in Ms. O'Connell's case, at the time that  
3 I evaluated her, she was 62 years of age, and she had  
4 radiographs taken after her accident in 2010 that  
5 showed typical changes that I would see in a  
6 58-year-old patient. So the main changes that we look  
7 for are fractures, disk herniations, tumors, infection.  
8 But I know from doing this for many years that we can  
9 see normal changes on MRI and X rays that don't reflect  
10 the injury.

11           So I think the films that we saw here  
12 demonstrated changes that I can attribute to her pain,  
13 and yes, those changes were there before she slipped  
14 and fell. But her history is that when she slipped and  
15 fell, that was when this pain began. And understanding  
16 that the mechanism is one of a slip and fall in a 58  
17 year old, that is not unusual, because we are more  
18 frail at 58 than we are at 48 or 38 or 28. And that  
19 fall is perilous in the sense that we can sustain  
20 injuries to the musculoskeletal system that become  
21 chronic.

22           So the degeneration that I see in her, I  
23 would see in everybody that's 58. But all that tells  
24 me is as an orthopedic specialist is that she is more  
25 frail because of those changes, and a slip and fall can

1 result in changes that we can't always measure on  
2 radiographic films, so her history is critical.

3 Q. So the history is critical because that's  
4 when she reported she started feeling pain; is that  
5 correct?

6 A. Well, I -- well, at the time that I'm seeing  
7 her, she has chronic pain. And I define chronic, and  
8 the textbooks define it as at least three months. I  
9 define it as six months. So at 2014 when I saw her,  
10 she states that she's had chronic pain that dates back  
11 to 2010, and her history is that she had the slip and  
12 fall. And that's a reasonable mechanism of injury that  
13 can cause a previously asymptomatic condition,  
14 degeneration, to become symptomatic.

15 Q. Now, in your treatment of Yvonne, did you  
16 notice or did you see any indication of Yvonne  
17 malinger or having issues of secondary gain?

18 A. No.

19 Q. Do you know what malinger means?

20 A. Yes.

21 Q. Can you tell us.

22 A. Malingering is a form of what we call  
23 secondary gain. In medicine, primary gain is the  
24 motive that, hey, I -- I -- I have a problem medically,  
25 and I want to be cured or I want to be treated for that

1 condition. So the gain is to become cured or have  
2 clinical improvement of a condition.

3 Secondary gain means that I -- basically this  
4 issue of wanting to get better is affected by a motive  
5 outside of getting better. I want to get out of work,  
6 for instance. That's malingering, or --

7 MR. SEMENZA: Objection, Your Honor. I'm  
8 sorry. I have to object. I think this is outside the  
9 scope of his treating of Ms. O'Connell.

10 THE COURT: All right. That's sustained.  
11 There's been -- there's nothing that addresses it in  
12 his medical records, and it was not -- his -- his  
13 testimony has been limited previously to his chart.  
14 That was the disclosure.

15 So the jury will disregard the last -- the  
16 testimony concerning malingering.

17 BY MS. MORRIS:

18 Q. Let me lay a little foundation.

19 Do you -- do you look for those symptoms when  
20 you treat patients?

21 A. Yes.

22 Q. And if you do note that, would you put it in  
23 your medical record?

24 A. Yes.

25 Q. And did you note anything like that in -- in

1 Yvonne's medical record?

2 A. No.

3 Q. Do you in your treatment of patients ever  
4 perform the Waddell factors?

5 A. Yes.

6 Q. What is that?

7 A. Well, the Waddell factors, one has to be very  
8 careful. I think it's used by too many doctors, and it  
9 should only be limited to surgeons. And Waddell  
10 signs -- the word Waddell is named after --

11 MR. SEMENZA: I'm going to object, again,  
12 Your Honor. He's going far afield of his medical chart  
13 in this particular case.

14 THE COURT: Well, I -- I think -- did you do  
15 that -- you did that test?

16 THE WITNESS: Yes, we did.

17 THE COURT: So he did the test and that's in  
18 the chart, so he can explain it to the jury.

19 THE WITNESS: It -- it's -- Gordon Waddell  
20 was a Scottish orthopedic surgeon who wrote a paper in  
21 1980 that described these tests that may help surgeons  
22 delineate organic sources of pain. Say, a person comes  
23 in and says they have arm pain. An organic source  
24 would be a fracture or a contusion, a problem with that  
25 arm, referred pain from a pinched nerve versus, say, a

1 psychological issue that may be affecting that  
2 patient's cause of pain. And so he developed these  
3 certain tests. There's five different tests you do  
4 that can be done within a minute, and that may give the  
5 surgeon some idea that there may be a psychological  
6 contribution to the pain. Doesn't exclude the patient  
7 could have that fracture or contusion. It just gives  
8 the surgeon information to help them better treat his  
9 patient. I think too often that is used erroneously to  
10 implicate a patient that's not being forthright and  
11 honest, and that's the improper use of that test.

12 BY MS. MORRIS:

13 Q. Why do you think it should be limited to  
14 orthopedic surgeons?

15 A. Because the information is predominantly for  
16 us offering the patient a surgery who potentially has a  
17 major complication and may affect the outcome of that  
18 surgery. And we want to optimize the patient's  
19 success, and psychological factors affect that success.  
20 So if we have those tests that may suggest that may be  
21 a complicating factor, we would then send the patient  
22 for preoperative psychological clearance. And we don't  
23 do that for every patient, but those type of tests help  
24 the surgeon make that determination.

25 Q. How do you perform a Waddell test?

1       A.   Well, it's just part of the physical  
2 examination, and there's five different categories.  
3 One of them -- and, again, going on, distraction. In  
4 other words, I may ask the patient to lay on the table  
5 and raise their leg, and they may say, I really can't  
6 do it. But if I distract them by examining something  
7 else and then have them raise the other leg, they may  
8 raise it so I can observe that and say, hey, the  
9 patient really can raise it when they're distracted as  
10 opposed to when they're told to do that.

11               Patients may have symptoms that aren't  
12 necessarily -- I forget the category, but numbness and  
13 tingling, paresthesias, or deficits that cannot be  
14 explained by what we see on radiographic findings. And  
15 sometimes those symptoms then indicate that their  
16 sensory examination is -- is off, and that might be a  
17 positive Waddell sign.

18               But there are so many disorders that give  
19 those types of findings other than like, say, a pinched  
20 nerve, inflammation of a nerve can give those patients.  
21 So that's why the Waddell signs are now -- have been  
22 refuted. There are tests where we can do physical  
23 findings that shouldn't create a particular sign. For  
24 instance, pushing down on the head shouldn't  
25 necessarily cause back pain, but we know that it can,

1 but that could be a potential Waddell sign. Like, if I  
2 pushed down on your head, it shouldn't cause low back  
3 pain. If you say it causes low back pain, that  
4 potentially could be a positive Waddell sign.

5           And I think there's -- there's five total,  
6 but that kind of summarizes. And -- and basically,  
7 it's not going black or white. It's me examining,  
8 establishing a rapport with the patient, speaking with  
9 the patient, understanding that there's trust, do I  
10 feel this patient is being forthright, and part of that  
11 exam may help me with that assessment.

12       Q.   In this case, did you perform the Waddell  
13 sign?

14       A.   It's part of my evaluation of every patient.  
15 And I would only note it if I felt that the patient had  
16 psychological factors that would affect my diagnosis  
17 and treatment.

18       Q.   Is it possible to perform the Waddell sign  
19 tests without ever touching the patient?

20       A.   No. You have to touch the patient. It's  
21 part of the physical examination.

22       Q.   In your treatment of Yvonne, did you ever  
23 diagnose her with symptom magnification disorder?

24       A.   No.

25       Q.   What is that?

1 MR. SEMENZA: Objection, Your Honor.

2 THE COURT: Over -- I mean, sustained. He

3 didn't diagnose her with it, so it's not relevant.

4 BY MS. MORRIS:

5 Q. Let me back up.

6 Is that something that you are -- you look

7 for when you see a patient?

8 A. Well, I think that's one of those things that

9 we use loosely. Like symptom magnification can be

10 interpreted a different way. So what you're asking me

11 is a patient saying they hurt when they really don't

12 hurt, or they're magnifying their symptoms. You just

13 barely touch them and they're jumping. The

14 interpretation of that must be very careful and can be

15 prejudicial against patients who have a very low pain

16 tolerance, for example. And everyone has a different

17 pain tolerance. And I see it in all my patients from

18 all walks of life.

19 And -- and so what I don't know about a

20 syndrome or disorder. It's not -- it can be

21 interpreted as a potential psychological problem, or it

22 could be potentially a patient who is feigning illness,

23 faking.

24 Q. In this case, do you recall what Yvonne told

25 you her pain levels were in her neck?



1           A.   Well, again, my recollection is only my  
2 medical record. And depending on what day for  
3 instance, the first day that I saw her, she said her  
4 pain on a 0 to 10 scale, 0 being no pain and 10 being  
5 the worst, her pain on that day was a 9, but at times  
6 it will be down to a 2 out of 10. And at its worst, it  
7 can be a 10, but she feels her average is somewhere  
8 around an 8.

9           Q.   So she described varying levels of pain to  
10 you.

11          A.   Yes.

12          Q.   Is that fair?

13          A.   Yes.

14          Q.   Do you have concerns when a patient comes to  
15 you and they claim a pain scale of a 10?

16               MR. SEMENZA: Objection, Your Honor. Again,  
17 I think this goes outside the scope of the chart.

18               THE COURT: I'm sorry. State the question  
19 again.

20               MS. MORRIS: Do you have concerns when a  
21 patient comes to you and they report a pain scale of a  
22 10 such as was indicated in Yvonne's chart?

23               THE COURT: All right. I'll allow that.  
24 Overruled.

25               THE WITNESS: No, because it's so common and

1 I'm not a big fan of the numeric pain scale. I mean,  
2 even on myself injuries, I find it hard to put a number  
3 on it. And patients sometimes become fearful that  
4 they're not taken seriously unless they give a high  
5 number. So I prefer mild, moderate, and severe. I  
6 don't like the number scale so much. But it's so  
7 common that patients come in and say they have a 10 out  
8 of 10 pain, but often it's not realistic. So I  
9 don't -- it doesn't concern me. It's the patient's  
10 interpretation of that pain and how it affects their  
11 quality of life that's important to me.

12 BY MS. MORRIS:

13 Q. Did she tell you the pain that she was  
14 feeling in her spine, her lumbar spine?

15 A. Yes, she complained of ongoing severe back  
16 pain. But, again, after reviewing her MRIs and  
17 studies, I'm the surgeon. I informed her that there's  
18 nothing I can do for her regarding her low back.  
19 And -- and remember, I'm seeing her four years after  
20 this began. So sending her to physical therapy or  
21 chiropractic or injections and all these other things  
22 are not going to substantially correct anything. Not  
23 that she can't do those things to help control the  
24 pain, but it would simply be palliative in alleviating  
25 some of the pain, but it's not going to correct the

1 underlying problem. So at this point, she's pretty  
2 much seeing the last resort. That's me as a surgeon.

3 Q. And you didn't recommend that she have  
4 surgery to the lumbar spine; is that correct?

5 A. That's correct. No.

6 Q. Why not?

7 A. Because I don't believe that there's any  
8 indications for surgery there that would correct her  
9 problem. In fact, it would probably make her worse.

10 Q. What indications do you see in her cervical  
11 spine that leads you to recommend surgery?

12 A. Well, the quality and severity of her neck  
13 pain is commonly what I see with patients who have a  
14 frail spine, that have the degeneration that she does,  
15 and also has the degree of foraminal stenosis and that  
16 has symptoms. So I think her quality of symptoms is  
17 very consistent with the problems I see in the lower  
18 three disks in her neck. And having done this for  
19 23 years in private practice and having good success  
20 with it, I think that I could get her to an  
21 appropriate, acceptable success. And that would be  
22 defined as taking 50 percent of her neck pain away  
23 and -- and preventing any progression of her upper  
24 extremity symptoms.

25 Q. Where do you get that approximation that it

1 will alleviate her pain approximately 50 percent?

2       A. Well, through my own experience of treating  
3 these kind of conditions over 23 years in private  
4 practice. So I mean, if I told everyone I could make  
5 them a hundred percent better, there'd be a line from  
6 here to Tijuana. But that's not realistic.

7       So we have to realize that there's surgeries  
8 for two purposes in the spine. There are the neural  
9 compressive lesions where you have a pinched nerve, and  
10 that creates severe pain down the extremity. It's the  
11 neck, it's the arm, it's the back and the leg, but the  
12 predominant problem is that arm or leg pain. And those  
13 surgeries have great success. We simply take the  
14 pressure off the nerve, and the patients have 90 --  
15 900 percent improvement. Those are simple procedures.

16       The problems that deal with what we call  
17 axial mechanical spine pain, neck or back pain, those  
18 are much more difficult to treat and correct, require  
19 much bigger surgeries. But the clinical result  
20 realistically is patients can experience 50 to  
21 60 percent improvement. And for those people who are  
22 truly desperate, it's a welcome option once they failed  
23 other treatments. And given that she's four years out,  
24 according to her history, she would be an appropriate  
25 candidate for surgery in her neck.

1 Q. Now, Yvonne hasn't come back to see you since  
2 October; is that correct?

3 A. That's correct.

4 Q. (Inaudible.)

5 A. That's correct.

6 Q. And does that cause any concern for you?

7 A. No, none at all. As part of her last visit,  
8 I informed her that -- what our surgical plan would be.  
9 And at this point I informed her that there was nothing  
10 dangerous here, nothing that was going to kill her or  
11 paralyze her. This was about her pain. If she could  
12 learn to endure that pain, then she wouldn't have to  
13 consider surgery. There's no guarantees with surgery.  
14 And there are major -- potential major complications  
15 with surgery. So it's to be avoided. But if you're at  
16 wit's end and you can't live with it, come back and see  
17 me, and we'll pursue surgical treatment.

18 Q. Okay. Now, you recommended a three-level  
19 cervical fusion; is that correct?

20 A. I did.

21 Q. Do you do any surgeries that are more  
22 extensive than that, four level or five level?

23 A. Extremely rare.

24 MR. SEMENZA: Your Honor, outside the scope.

25 THE COURT: Sustained.

1                   And how much longer? It's 6:00 o'clock. How  
2 much longer do you have on direct?

3                   MS. MORRIS: I have a bit more, and then  
4 he'll have cross.

5                   THE COURT: So let's just call it a day.  
6 And you're able to return on Thursday?

7                   THE WITNESS: Yes. Whatever the preference  
8 is here.

9                   THE COURT: Okay. So you'll discuss that  
10 with the subpoenaing lawyers, and -- about you're going  
11 to come back on Thursday. Okay. All right.

12                   Ladies and gentlemen, we're going to take an  
13 overnight recess. Going to see you tomorrow at 8:30.

14                   And during this recess, it's your duty not to  
15 converse among yourselves or with anyone else on any  
16 subject connected with the trial, or to read, watch, or  
17 listen to any report of or commentary on the trial by  
18 any person connected with the trial or by any medium of  
19 information including, without limitation, newspaper,  
20 television, radio, or Internet. You are not to form or  
21 express any opinion on any subject connected with this  
22 case till it's finally submitted to you.

23                   See you tomorrow morning at 8:30.

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

25                   /////

1 (The following proceedings were held  
2 outside the presence of the jury.)  
3 THE COURT: All right. Thank you. Jury has  
4 departed the courtroom, and I think you need to get  
5 with Dr. Dunn about when he will come back on Thursday.  
6 And let's try and make sure it's not so late that we  
7 can't get done. We need to give them plenty of time  
8 for cross.  
9 And thank you very much for your testimony.  
10 So you're excused.  
11 Anything outside the presence at this point  
12 today?  
13 MS. MORRIS: No.  
14 MR. SEMENZA: No, I don't think so, Your  
15 Honor.  
16 THE COURT: All right. 8:30 tomorrow. You  
17 have a witness lined up for that?  
18 MS. MORRIS: Yes. Corey, correct?  
19 MR. SEMENZA: Yes.  
20 MS. MORRIS: Yes, we do.  
21 THE COURT: I will see you tomorrow at 8:30.  
22 MR. SEMENZA: Thank you.  
23 MS. MORRIS: Thank you.  
24  
25

TRANSCRIBER'S CERTIFICATE

STATE OF NEVADA                    )  
  ) SS  
COUNTY OF CLARK                    )

I, Kristy L. Clark, a Nevada Certified Court Reporter  
and Registered Professional Reporter, do hereby  
certify:

That I listened to the recorded proceedings  
and took down in shorthand the foregoing.

That I thereafter transcribed my said shorthand notes  
into typewriting and that the typewritten transcript  
is a complete, true and accurate  
transcription of my said shorthand notes  
to the best of my ability to hear and  
understand the audio file.

I further certify that I am not a relative or  
employee of an attorney or counsel involved in said  
action, nor a person financially interested in said  
action.

IN WITNESS WHEREOF, I hereby certify this transcript  
in the County of Clark, State of Nevada, this 28th day  
of December, 2015.

\_\_\_\_\_  
Kristy L. Clark, RPR, CCR # 708