

In the
Supreme Court
for the
State of Nevada

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

v.

YVONNE O'CONNELL,

Respondent and Cross-Appellant.

*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*

APPELLANT'S APPENDIX
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EXHIBIT 9

EXHIBIT 9

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,)
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,)

16)
Defendants.)

17

18

PARTIAL TRANSCRIPT

19

OF

20

JURY TRIAL

21

BEFORE THE HONORABLE CAROLYN ELLSWORTH

22

DEPARTMENT V

23

DATED THURSDAY, NOVEMBER 12, 2015

24

25 TRANSCRIBED BY: KRISTY L. CLARK, RPR, NV CCR #708,
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1 LAS VEGAS, NEVADA, THURSDAY, NOVEMBER 12, 2015;

2 8:32 A.M.

3

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

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6

7 THE MARSHAL: All rise for the jury, please.

8 (The following proceedings were held in
9 the presence of the jury.)

10 THE COURT: Good morning. Please be seated.

11 And the record will reflect that we have now been
12 rejoined by what is now all eight members of the jury
13 and one alternate. Sadly, one of our -- one of our
14 regular jurors, Ms. Harms, in Seat No. 6 had a family
15 tragedy with her grandmother and is -- is in the
16 hospital attending to her. And so that's what
17 alternates are for, and that's why they're so
18 important. And so we've replaced Susan Bird, our first
19 alternate, into Seat No. 6, and we'll proceed with the
20 trial.

21 And where are we now?

22 MS. MORRIS: Dr. Dunn, will be here -- well,
23 he should be here, so ...

24 He's here. We call -- recall Dr. Dunn.

25 THE COURT: Calling Dr. Dunn. Take the

1 stand, Doctor, and you're still under oath from before.

2 All right? Have a seat. You may proceed.

3

4

DIRECT EXAMINATION

5 BY MS. MORRIS:

6 Q. Good morning, Dr. Dunn.

7 A. Good morning.

8 Q. When we left off talking, I think you had
9 told us that you had been practicing for 26 years; is
10 that correct?

11 A. In private practice, since 1992. So it would
12 be 23 years.

13 Q. And in your time practicing in private
14 practice, do you know approximately how many fusion
15 surgeries you've performed?

16 A. Well, I -- I think the best way to say that
17 is consistently, I think, when I looked at my numbers,
18 I perform anywhere -- a little over 200 to 250 spine
19 surgeries a year, and about half of those will be
20 fusions.

21 Q. And so would it be fair to say that you've
22 seen thousands of patients?

23 A. Yes.

24 Q. Have you seen patients who have come
25 complaining to you for pain as a result of a fall?

1 MR. SEMENZA: Your Honor, I'm going to
2 object. This is outside the scope of the medical
3 charts.

4 THE COURT: Well, approach.

5 (A discussion was held at the bench,
6 not reported.)

7 THE COURT: All right. So the objection is
8 overruled, but I need you to lay the foundation. In
9 other words, we're not -- just what we discussed at the
10 bench, back into it.

11 MS. MORRIS: Yes.

12 BY MS. MORRIS:

13 Q. Dr. Dunn, I'd like to talk about your
14 experience in your practice of medicine.

15 THE COURT: No, no, no. He has an opinion.
16 What's the basis of his opinion?

17 BY MS. MORRIS:

18 Q. Dr. Dunn, you've been practicing for 23
19 years; is that correct?

20 A. Yes.

21 Q. And you've seen thousands of patients; is
22 that right?

23 A. Yes.

24 Q. Have you treated patients who have come to
25 you with complaints of pain as a result of a fall?

1 A. I have.

2 Q. When a patient -- when a -- when a person
3 falls, can they get hurt?

4 A. Yes.

5 Q. Does age factor into the amount of damage
6 that can happen when a person falls?

7 A. Yes.

8 Q. Tell us how.

9 A. Well, I believe we may have discussed this a
10 bit earlier, but as we age, the musculoskeletal system
11 experiences degenerative changes as a result of that
12 aging. Common terms for that are arthritis,
13 degenerative arthrosis. As it involves the articular
14 structures of the spine, we're talking about two
15 structures, really, the intervertebral disks which
16 serves as a shock absorber between the vertebra, and
17 with each intervertebral disk, whether it be in your
18 neck or back or the thoracic spine, your mid back,
19 there's an associate -- associated pair of joints
20 called the facet joints, otherwise known as swivel
21 joints. And that's what allows the complex motion we
22 have in our necks and backs. And you can compare that
23 to the knee which is a simple hinge joint.

24 So these articular structures are susceptible
25 to degeneration, and depending on genetics,

1 occupational activity, accidents throughout one's
2 lifetime, we can develop a wear-and-tear phenomenon of
3 these structures. And the structure specifically has
4 to do with cartilage which, unfortunately, in our
5 bodies does not replenish itself. Some of us, it's
6 hair cells, other it's neurologic cells, and then,
7 cartilage cells don't replenish or don't -- or heal
8 well.

9 As we age, there's a term that we use called
10 frailty. Our structures become weaker in a sense and,
11 therefore, they're more susceptible to injury. And I
12 think it's somewhat intuitive if you take a fall in a
13 20 year old versus a 30 versus a 40 versus a 50, there
14 are changes that make that older person more
15 susceptible to injury and, hence, that goes along with
16 the term frail or frailty.

17 Q. Can you explain to us how a fall in a 58 year
18 old can injure the spine, especially degenerative
19 spine.

20 A. Yes.

21 MR. SEMENZA: I'm going to object. It's
22 outside the scope of the medical chart.

23 THE COURT: Okay. That's sustained. I think
24 I had told you that I need you to talk about
25 Ms. O'Connell because that's what he needs to talk

1 about as to what his opinion was and why he came to
2 that opinion. But just this overall, I told you not to
3 do that, and you continue. So don't do it.

4 BY MS. MORRIS:

5 Q. How old was Ms. O'Connell when she fell?

6 A. Fifty-eight.

7 Q. And at the time she fell, did she have a
8 degenerative spine?

9 A. Yes.

10 Q. How can a 58 year old with a degenerative
11 spine fall?

12 A. Well, the forces --

13 MR. SEMENZA: Your Honor, this is outside the
14 scope of the medical chart.

15 THE COURT: All right. Doctor, do you have
16 an opinion as to why Ms. O'Connell might have injured
17 her spine in this fall?

18 THE WITNESS: Yes.

19 THE COURT: Okay. What -- what is that?

20 THE WITNESS: I believe that she sustained
21 microtears to the aged intervertebral disks in her
22 neck.

23 BY MS. MORRIS:

24 Q. And why do you believe that?

25 A. One, because of the nature and quality of her

1 symptomatology, she relates in her history to me on the
2 initial evaluation that she has been experiencing a
3 consistent quality of neck pain with variable symptoms
4 into her extremities, meaning sometimes it's to the
5 right arm, sometimes it's in the left arm. But
6 overall, the consistent quality has been what I would
7 describe as chronic axial mechanical neck pain that has
8 persisted at the time that I saw her for almost four
9 and a half years.

10 Q. Can you tell us, do you expect the pain to
11 the neck to be immediate upon a fall?

12 MR. SEMENZA: Objection, Your Honor. Again,
13 outside the scope of the medical chart.

14 THE COURT: I'm going to overrule that.
15 Go ahead.

16 THE WITNESS: No.

17 BY MS. MORRIS:

18 Q. Why not?

19 A. Well, often an accident results and it --
20 it's a traumatic event to people, and they register
21 pain differently. Although they may experience
22 discomfort in one area, often it's overridden by
23 injuries to other areas. We call that the gate theory
24 of pain. And the best way to understand that would be,
25 for instance, if you came in and you had some neck pain

1 or soreness and I took a hammer and I bashed your
2 finger, you're really not going to pay -- your brain is
3 not going to pay much attention to the afferent
4 information from the sensory fibers from the neck.
5 It's going to be overridden by the pain that you're
6 experiencing when I hit your thumb with that hammer.

7 So many times when people are injured,
8 they're focused on their main area of complaint which
9 may be the back, the hip, the knee, whatever it might
10 be, and they might not recognize the full extent of
11 their injuries. So over the course of days or even
12 weeks, there becomes a full realization or recognition
13 of pain to the different areas that were injured. So
14 it's not always immediate.

15 Q. Is there a certain time frame in which you
16 would expect to see an onset of pain?

17 A. I mean, it varies from individual to
18 individual. And it varies on the extent of injuries.
19 I mean, someone comes in with a pelvis fracture or a
20 head injury, you may not recognize it for months. So
21 it's a very generalized question. But I say overall,
22 most people who don't have a closed head injury or a
23 serious injury that requires emergent transport and
24 surgery, typically within a couple of weeks.

25 Q. Now, do you recall Yvonne O'Connell coming in

1 to see you?

2 A. Well, my recollection of the details of her
3 visit has to be from my medical records. But I do
4 specifically remember her, yes.

5 Q. And when she came in to see you, do you
6 recall her?

7 A. I do remember her, yes.

8 Q. And what was her demeanor like?

9 A. Well, I remember her uniquely upon seeing her
10 here in court because her personality is not uncommon
11 on many patients I see, and she is very similar to one
12 of my close relatives in that they're -- they're very
13 much interested in their ailments, and they go to the
14 worldwide web. It's called physician by Google.

15 MR. SEMENZA: I'm going to object. It's
16 outside the scope.

17 THE COURT: All right. Sustained. You need
18 to keep this just to Ms. O'Connell. So, you know, this
19 isn't about your relatives.

20 BY MS. MORRIS:

21 Q. Let's talk about Ms. O'Connell.

22 So when we came to see you, she reported she
23 had a mini stroke a couple days after the fall; is that
24 correct?

25 A. Yes.

1 Q. Is that significant in any way to you?

2 A. No.

3 Q. You said that she was very interested in her

4 health.

5 Can you describe that.

6 A. Yes. She is a common patient, and I'll just

7 refer this to Ms. O'Connell, who goes to Google and

8 puts in their symptoms and --

9 MR. SEMENZA: Objection. Lack of personal

10 knowledge.

11 THE COURT: Well, there's no foundation. So

12 I mean, find out if he -- lay a proper foundation for

13 this. What did she tell him?

14 BY MS. MORRIS:

15 Q. What was it about Ms. O'Connell that led you

16 to understand that she was very interested in her

17 health?

18 A. Because she was very knowledgeable, and I

19 know she hasn't gone to medical school and doesn't have

20 a formal medical education. So I know that it came by

21 way of the computer. And she was very knowledgeable

22 about many of her medical conditions, but was also very

23 respectful regarding my evaluation of her as it

24 involved her neck and back.

25 Q. When she came in to you, was she asking for

1 neck surgery?

2 A. Well, she came to me. I'm -- I'm a surgeon.
3 So when patients come to me, they're typically wanting
4 to know what their surgical options are, so yes.

5 Q. Did she demand a neck surgery?

6 A. No.

7 Q. Was she in any way demanding toward you about
8 the medical care you were giving her?

9 A. No.

10 Q. Have you ever treated patients who have
11 multiple complaints or are overly anxious about their
12 health?

13 MR. SEMENZA: Your Honor, I'm going to
14 object. Outside the scope of the medical chart.

15 THE COURT: Sustained.

16 BY MS. MORRIS:

17 Q. The demeanor that Ms. Yvonne -- Ms. O'Connell
18 showed when she came to see you, did that lead you to
19 think she was overly anxious about her health?

20 A. No.

21 Q. Is there anything about Ms. O'Connell that
22 you saw that would make you hesitant to perform surgery
23 upon her?

24 A. You know, I established a rapport with
25 Ms. O'Connell over three visits and spent a

1 considerable amount of time with her. And that's
2 important as a surgeon, in my opinion, because we're
3 dealing with a subjective complaint of pain. So the
4 objective of the surgery would be to improve that pain.
5 And so if I'm going to take this patient in a
6 relationship where I'm going to operate on them, I want
7 to be confident, at least in my own assessment and
8 abilities to assess this patient, that she is being
9 forthright about her complaints of subjective pain.

10 And I noted that there was a history of
11 depression, and that can affect an outcome of surgery.
12 And so, therefore, I would say upon reevaluation, I may
13 obtain a preoperative psychological clearance, which
14 spine surgeons utilize from time to time. And beyond
15 that, I -- I have no reservations about proceeding to
16 surgery if she requests it.

17 Q. And you evaluated Yvonne for (inaudible); is
18 that correct?

19 MR. SEMENZA: Objection. Outside the scope.

20 THE COURT: Sustained. No --

21 BY MS. MORRIS:

22 Q. Do you recall the Waddell -- Waddell testing;
23 is that correct?

24 A. Yes.

25 Q. And the purpose of the Waddell --

1 MR. SEMENZA: Your Honor, I'm going to object
2 to any questions relating to Waddell because I don't
3 think they're in the medical chart.

4 THE COURT: Approach.

5 (A discussion was held at the bench,
6 not reported.)

7 THE COURT: Sustained. Question has been
8 asked and answered about Waddell's last time he
9 testified.

10 BY MS. MORRIS:

11 Q. So the psychological clearance tests that you
12 required Yvonne have before the surgery, what does that
13 entail?

14 A. Typically --

15 MR. SEMENZA: Objection, Your Honor.

16 THE COURT: Sustained.

17 MR. SEMENZA: That's not in the medical
18 chart.

19 THE COURT: He's not designated as an expert.
20 We've already gone into this, that his -- his testimony
21 is restricted to his medical chart, so he's --

22 MS. MORRIS: He's testifying as an expert
23 about orthopedic surgery from his 23 years of practice.

24 THE COURT: And you're asking him about a
25 psychological workup?

1 MS. MORRIS: I'm asking if he knows what that
2 entails because that's something he requires the
3 patients to have.

4 THE COURT: Right. He wasn't designated for
5 that purpose. So the objection's sustained.

6 BY MS. MORRIS:

7 Q. Is it within your practice to refer patients
8 for a psychological clearance before they have surgery
9 if you believe it to be necessary?

10 MR. SEMENZA: Your Honor, same objection.

11 THE COURT: That's -- that's fine. He's
12 already -- it's already been asked and answered. He
13 said he does that. So you can ask him again. But
14 let's not -- let's move along. Let's not ask the same
15 questions.

16 BY MS. MORRIS:

17 Q. Okay. So in an individual like Yvonne where
18 she has a degenerative spine which has been injured,
19 would you expect --

20 MR. SEMENZA: Objection, your Honor.

21 THE COURT: Let her finish the question,
22 please.

23 Go ahead.

24 BY MS. MORRIS:

25 Q. -- would you expect the pain to resolve

1 itself on its own without surgery?

2 MR. SEMENZA: Again, Your Honor, my objection
3 is in a patient like Ms. O'Connell. That's improper.
4 It goes outside the scope of the medical chart.

5 THE COURT: With Ms. O'Connell.

6 BY MS. MORRIS:

7 Q. With Ms. O'Connell and her spine in the
8 condition that it is, would you expect her pain to
9 resolve without any surgery?

10 A. Given that I saw this patient in -- in June
11 of 2014, four and a half years after she stated she had
12 a -- a traumatic event where she fell, which she has
13 told me that marked the onset of her symptoms, and
14 given that she is beyond six months in which the body's
15 capacity to heal itself diminishes, I believe that she
16 has a -- a permanent condition at this point.

17 Q. Now, the surgery you recommended, would that
18 take place in a hospital or at your facility?

19 A. I have recommended a three-level cervical
20 fusion, and that would take place in a hospital.

21 Q. And aside from yourself, would there be any
22 other medical staff required for this surgery?

23 A. Well, yes. As part of the operating room
24 team, we have an anesthesiologist who's responsible for
25 putting the patient to sleep with (inaudible) and

1 analgesias so she doesn't feel any pain during surgery.
2 There are circulating nurses. I have a scrub tech that
3 passes me instruments, and then I have an assistant
4 surgeon who assists me in performing the procedure.

5 Q. And the pain that Yvonne came to you with,
6 you -- you said it was a radiating pain; is that
7 correct?

8 A. Well, her principal complaint was neck and
9 low back pain, with the neck pain predominating. But
10 she also had complaints that were radicular in nature.
11 In other words, the nerve root irritation that would
12 give a patient subjective sensations of pain or
13 paresthesias into their extremities, or arms and hands.

14 Q. What is radicular symptoms?

15 A. Radicular refers to the nerve root, and the
16 nerve emanates from the cervical spinal cord and then
17 goes to the tips of the fingers. And when the nerve is
18 either press -- has pressure upon it or is irritated by
19 inflammation, the patient may have symptoms from pain
20 to numbness or tingling.

21 Q. And would that pain -- would you expect that
22 pain to be consistent in Yvonne or could it change?

23 A. Well, I think what is consistent in Yvonne
24 and what's important in the diagnostic evaluation by a
25 spine surgeon is that her principal complaint that I'm

1 addressing is her neck pain. And that is described as
2 axial mechanical. Axial being the center of the body
3 as opposed to appendicular which is the extremity.

4 So the fact that her principal complaint is
5 axial, in her neck, that's an orthopedic problem. She
6 does have varying complaints of numbness or tingling or
7 pain. Depending on the day, may involve the right arm,
8 may involve the left. I understand that inconsistency
9 because it's not due so much to the nerve pressure but
10 nerve irritation from something called inflammation.
11 And inflammation varies from day to day depending on
12 weather, stress in one's life, physical activities.

13 But I believe if it was only her upper
14 extremity complaints, she would not be seeing a spine
15 surgeon. Her -- her objective is -- and question to me
16 is, What can we do for my neck pain?

17 Q. Can neck pain cause headaches?

18 A. Yes.

19 Q. The -- the neck pain that Yvonne expressed to
20 you, I think you said that surgery would relieve about
21 50 percent; is that correct?

22 A. I believe -- yes. The realistic expectation
23 with this type of surgery for this type of problem is
24 50 to 60 percent improvement over their preoperative
25 symptoms.

1 Q. Do you know why it wouldn't be 100 percent?
2 A. Yes. It's not 100 percent and there are
3 surgeries that give us close, if not 100 percent
4 relief. And that has to do with simple nerve pressure
5 problems. A herniated disk or fracture --
6 MR. SEMENZA: Your Honor, going to object.
7 Outside the scope of his medical chart.
8 THE COURT: All right. Let's focus on --
9 MS. MORRIS: This is --
10 THE COURT: -- Yvonne and why.
11 MS. MORRIS: Yes, and Yvonne is going to have
12 this surgery and so that's why I asked about
13 100 percent.
14 THE COURT: Right, but he explained this in
15 his last testimony, I remember, from last week.
16 MS. MORRIS: I am allowed to -- he did say
17 50 percent, and I don't think we got an explanation as
18 to how.
19 THE COURT: Well, we did, because he
20 explained all about this, how surgery on -- on -- you
21 know, if it was pressing on, you could relieve that, it
22 would -- you would get relief. So now let's focus on
23 why not in this case.
24 MS. MORRIS: Okay.
25 THE COURT: What she has. Okay?

1 MS. MORRIS: Okay.

2 BY MS. MORRIS:

3 Q. Why not, in this case, would she not
4 experience 100 percent, in your opinion?

5 A. Well, the fusion results in an immobilization
6 of three segments in her spine that move. So by
7 changing the movement of her neck, I'm altering the
8 biomechanics of her -- the way her neck works. So
9 motion is shared equally amongst this -- five different
10 disk levels in the neck. If I remove two of those,
11 there's going to be a biomechanical shift of stress to
12 the other levels. And so, therefore, she's going to
13 have pain from other areas that she may not be
14 experiencing pain at this point or more pain from those
15 other areas.

16 So we don't get a cure with this type of
17 surgery because of that change in biomechanics. And
18 then oftentimes with surgery, we also get some scar
19 tissue, and that could be an ongoing source of pain.

20 Q. In -- if Yvonne goes through and has this
21 three-level cervical fusion and feels the relief, will
22 that relief remain for the rest of her life?

23 A. I believe so, yes.

24 Q. Would -- could there be any potential
25 complications of the surgery?

1 A. Yes.

2 Q. And could those complications lead to need
3 for further surgery?

4 A. Yes.

5 Q. Now, the -- the neck pain that she was
6 experiencing when she came in, did she tell you that
7 she had difficulty in range of motion or did you test
8 her range of motion?

9 A. I need to refer to my note to remember that
10 detail. I don't see that she complained to me of a
11 stiff neck unless I'm missing it here. But on physical
12 examination, she had decreased range of motion, yes.

13 Q. And what did that physical examination
14 entail?

15 A. Physical examination entails observing the
16 patient, their gait pattern, looking at their neck,
17 palpating the neck, the interscapular, the mid back
18 region, examining the upper extremities, checking range
19 of motion, and the most important part would be
20 assessing her neurologic status.

21 Q. And how did you assess her neurologic status?

22 A. It's assessing any weakness on her motor
23 groups in the upper and lower extremities. And we call
24 that manual motor testing. It's a resistance muscle
25 testing. And then checking her dermatomes in the upper

1 extremities and lower extremities for any sensory
2 deficits.

3 MR. SEMENZA: Your Honor, I don't -- I don't
4 know that any of this is in his medical chart. I think
5 he's speaking generally. So I'd object to those
6 statements or -- or his response to that question.

7 BY MS. MORRIS:

8 Q. Dr. Dunn, did you get that information from
9 your medical chart?

10 THE COURT: Wait till I rule. All right?
11 Overruled.

12 Go ahead.

13 BY MS. MORRIS:

14 Q. All right. Now, with Yvonne's degenerative
15 spine that had been injured, would you recommend that
16 daily stretching help her?

17 A. Sure. I recommend she do anything that
18 provides her any relief.

19 MR. SEMENZA: Objection, Your Honor. That's
20 not in the medical chart.

21 THE COURT: Overruled.

22 BY MS. MORRIS:

23 Q. With Yvonne and the spine and the condition
24 it is, would her limiting certain movements help her
25 relieve her pain?

1 A. Yes.

2 Q. How about Yvonne's back? The condition of
3 her back, as you said, it was not surgical; is that
4 correct?

5 A. That's correct, it's not surgical.

6 Q. And it's your opinion that surgery simply
7 won't help the condition of her back?

8 A. That's my assessment, yes.

9 Q. What -- in what is -- can you tell by looking
10 at the MRI what's causing Yvonne's pain in her back?

11 A. I think the way I have to answer that, just
12 everything that a physician does in evaluation of the
13 patient represents information. The way I like to
14 describe it is it's a piece of the diagnostic jigsaw
15 puzzle. And there's some parts of that information
16 that are large pieces of the puzzle, and there are
17 others that are small. So depending on the type of
18 clinical problem we're evaluating, in this sense, the
19 MRI and radiographs are simply there to rule out any
20 obvious neurologic issues. But I know through my exam
21 there are no objective neurologic findings, so I don't
22 expect to see any major neurologic problems unless I
23 found an occult tumor, which she didn't have.

24 So the films are there mainly to give me an
25 idea of what's going on, but really represent a small

1 piece of the diagnostic jigsaw puzzle, and are
2 principally there to let me know and inform the patient
3 that there's nothing dangerous so, therefore, all
4 treatment remains optional, including surgery.

5 Q. In order to diagnose Yvonne, was it important
6 that you actually meet her?

7 A. Yes, absolutely.

8 Q. Why is that?

9 A. Well, 80 percent of our diagnosis regardless
10 of the medical condition comes from seeing and talking
11 to the patient, and upwards of 80 percent of that
12 diagnostic jigsaw puzzle is the history and physical
13 examination.

14 Q. In your history of treating patients, have
15 you ever had to fire a patient?

16 MR. SEMENZA: Objection, Your Honor. It's
17 outside the medical scope.

18 THE COURT: Sustained.

19 BY MS. MORRIS:

20 Q. You have evaluated thousands of patients; is
21 that correct?

22 A. Yes.

23 Q. Have you ever treated a patient who you
24 thought was lying to you?

25 MR. SEMENZA: Same objection.

1 THE COURT: Sustained. Sustained. It's the
2 same objection. Don't -- don't just reask the same
3 question when I sustain an objection.

4 BY MS. MORRIS:

5 Q. You said you saw Yvonne three times; is that
6 correct?

7 A. I did.

8 Q. And you haven't seen her since; is that
9 right?

10 A. I have not.

11 Q. Is that uncommon for a patient to not return
12 to you?

13 A. No.

14 Q. Why not?

15 A. Well, again, I'm a subspecialist as a spine
16 surgeon --

17 MR. SEMENZA: Your Honor, I'm going to
18 object. Again, it's not contained within the medical
19 chart.

20 THE COURT: Sustained.

21 BY MS. MORRIS:

22 Q. Do you know why Yvonne hasn't returned to
23 you?

24 A. Well, on our last visit, I made it clear that
25 I'm here to treat her from a surgical perspective, and

1 until she is ready to perform surgery, there's really
2 no need to return to me.

3 Q. And is it your opinion that the fall that
4 Yvonne sustained at Wynn injured and damaged her
5 degenerative spine?

6 A. Yes.

7 Q. And because of that fall, it's your opinion
8 to a reasonable degree of medical probability that she
9 needs this three-level cervical fusion; is that
10 correct?

11 A. Yes.

12 MS. MORRIS: I have nothing further.

13 THE COURT: Thank you.

14 Cross?

15 MR. SEMENZA: Thank you, Your Honor.

16

17 CROSS-EXAMINATION

18 BY MR. SEMENZA:

19 Q. Good morning, Dr. Dunn.

20 A. Good morning.

21 Q. Now, you're partners with Dr. Tingey; is that
22 correct?

23 A. Yes.

24 Q. How long have you been partners with
25 Dr. Tingey?

1 A. You know, I've been with Desert Orthopaedic
2 Center since 1995, and that's well before he joined the
3 group, but I don't know exactly when.

4 Q. He came after that.

5 A. Yes.

6 Q. You had already started; right?
7 And you're being compensated for being here
8 today?

9 A. Yes.

10 Q. How much are you being compensated?

11 A. \$5,000.

12 Q. And does that include your prior testimony I
13 think on Tuesday?

14 A. No. That's additional.

15 Q. Okay. So how much total are you being
16 compensated for your testimony in this particular case?

17 A. \$10,000.

18 Q. And is that being paid by opposing counsel?

19 A. Yes.

20 Q. Do you commonly testify as an expert in civil
21 cases?

22 A. Yes.

23 Q. Both as a treating physician and nontreating
24 expert physician?

25 A. Yes.

1 Q. You testified that you had seen Ms. O'Connell
2 three times?

3 A. Yes.

4 Q. And the last time you saw her was over a year
5 ago; is that correct?

6 A. Let me check my document and accurately
7 answer that. That's correct.

8 Q. And the first time you saw Ms. O'Connell was
9 on June 16th of 2014?

10 A. Yes.

11 Q. How long did you visit with her?

12 A. It could have been anywhere from 30 minutes
13 to an hour.

14 Q. It could have been less than that as well?

15 A. I doubt it was less than 30 minutes.

16 Q. Do you have any independent recollection of
17 how long you met with her?

18 A. No.

19 Q. And did you meet with her on July 14th, 2014?

20 A. Yes.

21 Q. How long did you meet with her during that
22 visit?

23 A. It would have been less than 30 minutes.

24 Q. Do you have an independent recollection of
25 how much time you spent with Ms. O'Connell on that

1 appointment?
2 A. No.
3 Q. And the last time you saw her was
4 October 13th of 2014?
5 A. Yes.
6 Q. Do you recall how much time you spent with
7 her during that appointment?
8 A. I would say it was less than 30 minutes.
9 Q. Do you have an independent recollection of
10 how long you actually spent with her?
11 A. No.
12 Q. Now, relating to the July 14th of 2014
13 appointment, did you refer her to a different doctor?
14 A. Yes, I did.
15 Q. And which doctor did you refer her to?
16 A. Andrew Martin.
17 Q. And he was -- is he still affiliated with
18 you?
19 A. No.
20 Q. Why did you refer Ms. O'Connell to
21 Dr. Martin?
22 A. He was a specialist in knee. I believe --
23 it's not documented, so I don't recall, but it would
24 have been for an area outside of her spine in
25 orthopedics.

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

4 A. Yes.

5 Q. That's a condition that predated the date of
6 her slip and fall, which was February 8th, 2010; is
7 that correct?

8 A. Yes.

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

11 A. Yes.

12 Q. You also diagnosed her with lumbar disk
13 disease; is that correct?

14 A. Yes.

15 Q. And, again, that diagnosis -- that condition
16 predated February 8th of 2010; is that correct?

17 A. Yes.

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

20 A. Yes.

21 Q. Do you know whether prior to February 8th,
22 2010, Ms. O'Connell was experiencing any symptomatology
23 in her cervical neck, pain symptomatology?

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

25 Q. Okay. And that understanding that she didn't

1 have any symptoms prior to February 2010 came from her
2 statements; correct?

3 A. Yes.

4 Q. And exclusively came from her statements.

5 A. Yes.

6 Q. So you were relying on Ms. O'Connell to
7 identify when the source of -- or when she began
8 experiencing pain; is that correct?

9 A. Yes.

10 Q. Now, would you agree with me that there are
11 some people in their 60s that don't have degenerative
12 disk disease in their cervical spine?

13 A. No. I believe everybody in their 60s has
14 some degree of degenerative disk disease.

15 Q. But that severity differs between people;
16 correct?

17 A. Yes.

18 Q. And the same would be true for the lumbar
19 area as well.

20 A. Correct.

21 Q. Do you know whether Ms. O'Connell had a
22 severe back injury prior to February 8th, 2010?

23 A. Not that I recall.

24 Q. That was something that Ms. O'Connell
25 didn't -- that was something that Ms. O'Connell didn't

1 identify to you, did she?

2 A. That's fair.

3 Q. And generally speaking, degenerative disk
4 disease is a progressive disease; is that correct?

5 A. That's fair.

6 Q. It will get worse over time?

7 A. Well, the radiographic findings will
8 certainly worsen, but symptoms may not.

9 Q. Okay. And obviously I'm not a doctor, but
10 can -- can you characterize or do you characterize
11 degenerative disk disease in laymen's terms as an
12 arthritic condition?

13 A. Yes.

14 Q. And so Ms. O'Connell did in fact have
15 arthritis in her cervical spine prior to February of
16 2010.

17 A. Yes.

18 Q. And she also had an arthritic condition in
19 her lumbar area prior to February 8th, 2010.

20 A. Yes.

21 Q. Now, when you saw her, there were no -- there
22 was nothing to indicate an acute injury to her cervical
23 neck, was there?

24 A. That's fair.

25 Q. Okay. There wasn't any herniated disk?

1 A. No.

2 Q. There wasn't a fracture?

3 A. No.

4 Q. Are there other things that might identify
5 whether there was an acute injury relating to her
6 cervical neck?

7 A. Typically, no.

8 Q. And did you make any findings with regard to
9 her lumbar back, that there had been an acute injury
10 such as a herniated disk or fracture?

11 A. No.

12 Q. And your conclusions regarding causation
13 relating to Ms. O'Connell's expression of pain is based
14 exclusively on what she's telling you; is that correct?

15 A. Well, I don't know if I like the word
16 "exclusively." But largely, yes.

17 Q. Did she tell you any specifics about the
18 fall?

19 A. Well, just as I've recorded in my report
20 here.

21 Q. Do you know whether Ms. O'Connell had any
22 falls after February 8th, 2010?

23 A. No.

24 Q. She didn't report any, did she?

25 A. Not that I recall.

1 Q. Other than the degenerative disk disease that
2 we've talked about, what other preexisting conditions
3 were you informed of that Ms. O'Connell had?

4 A. She had noted a history that included
5 diabetes, depression, and a mini stroke.

6 Q. Those are the only preexisting conditions she
7 identified?

8 A. Well, she had -- under her Review of Systems,
9 she noted that she had history of dizziness and nausea,
10 (inaudible) intolerance, issues with nighttime
11 urination, weakness, numbness, headaches.

12 Q. And those were preexisting conditions?

13 A. I believe so, yes.

14 Q. Now, depression can have an effect on how a
15 patient experiences and presents pain; is that fair?

16 A. It may, yes.

17 Q. And do you know what Ms. O'Connell was
18 referring to when she said she had a mini stroke?

19 A. As I sit here, I don't recall.

20 Q. Did you treat her in any way for that mini
21 stroke?

22 A. No.

23 Q. Did you treat her in any way for diabetes?

24 A. No.

25 Q. During your visits with Ms. O'Connell and the

1 history that was taken, were you ever informed that she
2 had a history of fibromyalgia?

3 A. No.

4 Q. And I know we talked about depression.

5 Were you ever informed that Ms. O'Connell had
6 a history of anxiety?

7 A. No.

8 Q. Now, would you characterize anxiety as being
9 something different from depression?

10 A. Yes.

11 Q. And if Ms. O'Connell did in fact have a
12 history of fibromyalgia, that could express itself in
13 pain throughout the body; is that fair to say?

14 A. Yes.

15 Q. And could express itself in back pain at some
16 level.

17 A. Yes.

18 Q. In fact, fibromyalgia could explain some of
19 her pain symptoms today; is that fair to say?

20 A. Yes.

21 Q. Now, I just want to be clear on this.

22 When -- when you testified previously, you had talked
23 about this surgery relating to the fusion in her neck.

24 Now, I want to be clear. Did you identify
25 that the reduction in pain would be between 50 and

1 60 percent or just 50 percent?

2 A. You know, typically I will say 50 or
3 60 percent, generally in that -- in that range
4 improvement. So they're going to have 50 -- 40 to
5 50 percent residual neck pain.

6 Q. And Ms. O'Connell has not scheduled her
7 surgery.

8 A. No.

9 Q. You don't know if she ever will.

10 A. I don't.

11 Q. Are you recommending that Ms. O'Connell have
12 physical therapy relating to her lumbar spine, her low
13 back?

14 A. I don't recall if I recommended therapy
15 specifically because I believe at this point where she
16 has express symptoms that have persisted for almost
17 four and a half years, that all of those types of
18 treatments, whether it be chiropractic or physical
19 therapy, are mainly going to be palliative. And if it
20 helps her with her pain, then more power to it.

21 Q. You didn't specifically recommend physical
22 therapy relating to her lumbar back, though?

23 A. I don't believe so, no.

24 Q. And do you know whether she's ever gone to
25 physical therapy?

1 A. I don't recall.

2 Q. Do you recall whether during your treatment
3 of Ms. O'Connell you discussed pain management?

4 A. Yes.

5 Q. And did you prescribe her any pain
6 medication?

7 A. The only thing that I prescribed her was
8 Lovaza, which is a pharmaceutical grade fish oil to
9 reduce inflammation.

10 Q. Do you recall specifically having a
11 discussion with Ms. O'Connell relating to prescribing
12 her pain medication?

13 A. I don't believe so. I don't recall.

14 Q. Do you recall her ever asking for pain
15 medication?

16 A. I mean, I don't recall.

17 Q. Were you aware that Ms. O'Connell had a
18 history of constipation?

19 A. I -- I recall that she had some GI issues,
20 but I don't recall the specifics of that.

21 Q. If Ms. O'Connell came back to you and asked
22 for surgery and you conducted a psychological clearance
23 on her and she didn't pass that, would you perform
24 surgery on her?

25 A. I'm sorry. Did you say did not pass?

1 Q. Yes.
2 A. Did not pass?
3 Q. Correct.
4 A. Then, no.
5 Q. And it's -- well, is it fair to say that
6 Ms. O'Connell's pain symptomatology is subjective in
7 nature?
8 A. Yes.
9 MR. SEMENZA: No further questions.
10 THE COURT: Redirect.
11 MS. MORRIS: Thank you.
12
13 REDIRECT EXAMINATION
14 BY MS. MORRIS:
15 Q. Dr. Dunn, would the fact that Yvonne
16 O'Connell was diagnosed with fibromyalgia affect your
17 opinion?
18 A. No.
19 MR. SEMENZA: Well --
20 BY MS. MORRIS:
21 Q. Why not?
22 MR. SEMENZA: Your Honor, I think that goes
23 outside the scope of the medical chart.
24 THE COURT: Well, I think you opened the door
25 for it, so it's overruled.

1 MR. SEMENZA: Okay.

2 BY MS. MORRIS:

3 Q. Why not?

4 A. Again, her principal problem was neck pain,
5 and fibromyalgia typically doesn't affect neck pain.
6 It involves extremities in the low back, and I just
7 don't believe that it -- it's involved in her neck
8 complaints to me.

9 Q. What do you base that opinion on?

10 A. My experience in seeing and treating similar
11 conditions over the past 23 years.

12 Q. Now, you said you wanted to send her for
13 clearance before surgery; is that right?

14 A. Yes.

15 Q. What was that based on?

16 A. Well, the fact that she mentioned there was a
17 history of depression.

18 Q. Was there any other indication that led you
19 to believe you would have to send her to get a
20 clearance?

21 A. No.

22 Q. Now, we talked about the fact that the
23 systems she reported to you were symptoms she felt
24 after the accident; correct?

25 A. That's what she reported, yes.

1 Q. And if she had symptoms to her neck and back
2 before the fall, would that affect your opinion?

3 A. It could, yes.

4 Q. Why?

5 A. Well, my understanding is that the pain for
6 which I was evaluating Ms. O'Connell arose with this
7 traumatic event. On the other hand, had she never been
8 involved in any traumatic events and came in with the
9 same complaints, my recommendations would be the same.

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

13 A. Yes.

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

17 A. Yes.

18 Q. If she had reports of pain before the fall,
19 that would affect your opinion; is that right?

20 A. Yes.

21 Q. Now, you testified that you have been paid
22 10,000 total; is that right?

23 A. Yes.

24 Q. Why is it 10,000 and not 5,000?

25 A. Well, I mean, I had to come here two days. I

1 do spend time in preparation for trial by reviewing the
2 files, and I'm not in clinic where I'm seeing patients
3 and I still have to pay overhead.

4 Q. So if we had finished your testimony on
5 Monday, you would not have needed the additional 5,000;
6 is that correct?

7 A. That's correct.

8 THE COURT: Recross?

9 MR. SEMENZA: Nothing, Your Honor.

10 THE COURT: Questions from the jury?

11 Okay. Approach, please.

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

14 THE COURT: Okay. So, Doctor, question from
15 the jury was -- is: If -- do you know whether she
16 needed assistance entering or leaving on the three
17 times that she came to visit you when you saw her?

18 THE WITNESS: She didn't require assistance.

19 THE COURT: So you -- you saw her come into
20 your office?

21 THE WITNESS: Yes. And I would have
22 documented if she were, like, in a wheelchair.

23 THE COURT: Okay. She was not in a
24 wheelchair.

25 THE WITNESS: No.

1 THE COURT: Or walker?
2 THE WITNESS: No.
3 THE COURT: Any questions -- further
4 questions?
5 MR. SEMENZA: Just one to clarify.
6 THE COURT: Okay.
7
8 RECROSS-EXAMINATION
9 BY MR. SEMENZA:
10 Q. So she wasn't in a walker when she arrived?
11 A. I don't believe so. No.
12 Q. Okay. And she wasn't in a wheelchair?
13 A. Correct.
14 Q. Do you know if she came or had anyone come
15 with her to your appointments with her?
16 A. I don't recall seeing her with anybody. I
17 don't know if somebody brought her or not.
18 Q. Do you know how she got to your office?
19 A. I don't.
20 Q. Do you know whether she drove?
21 A. I don't know.
22 MR. SEMENZA: Nothing further.
23 MS. MORRIS: Just a couple follow-up.
24
25 /////

1 FURTHER REDIRECT EXAMINATION

2 BY MS. MORRIS:

3 Q. Doctor, when you see a patient, are they
4 already in the room when you go see them?

5 A. Yes.

6 Q. And are they generally sitting on a table
7 when you go in to see them?

8 A. Yes.

9 Q. Do you get into the room and watch them come
10 into the room?

11 A. Typically, no.

12 Q. And then once you're done, you leave; is that
13 correct?

14 A. Yes.

15 Q. You don't watch them leave; is that correct?

16 A. Correct.

17 Q. So when you saw Yvonne, you basically saw her
18 in the room while she was sitting on the table; is that
19 correct?

20 A. Yes.

21 Q. So you don't know how she actually got into
22 the room; is that fair?

23 A. That's fair.

24 MR. SEMENZA: Nothing further, Your Honor.

25 THE COURT: All right. I have a question,

1 basically a clarification question so that the
2 attorney, Mr. Semenza asked you about -- he used the
3 term "subjective," that the pain complaint was
4 subjective.

5 What does that term mean? Tell the jury.

6 THE WITNESS: Subjective means it's what the
7 patient reports to you.

8 THE COURT: And is there a -- a -- is there
9 any other term that -- where you can see something
10 yourself?

11 THE WITNESS: Yes. I mean, the two terms
12 commonly used are subjective and objective. And
13 subjective purely means what the patient brings to me,
14 and that's information that she's reporting. Objective
15 information is not only me looking at an X ray or
16 looking at a study or test that is independent of the
17 patient's input, but also represents my interpretation
18 of the information she gives me.

19 THE COURT: Any questions as a result of my
20 questions?

21 MS. MORRIS: Yes. Thank you.

22

23 FURTHER REDIRECT EXAMINATION

24 BY MS. MORRIS:

25 Q. Dr. Dunn, your opinion that you came to in --

1 in this matter involving -- involving Yvonne, was that
2 based on both subjective and objective information?

3 A. Yes.

4 Q. And so your opinion involves both components;
5 is that correct?

6 A. Correct.

7 MS. MORRIS: Thank you.

8 THE COURT: Cross?

9 MR. SEMENZA: Quickly.

10

11 FURTHER RECROSS-EXAMINATION

12 BY MR. SEMENZA:

13 Q. Ms. O'Connell's expression of pain, though,
14 is based upon her subjective complaints; is that
15 correct?

16 A. That is defined purely subjective, yes.

17 Q. And objective findings you're relying on are
18 the MRIs which identify the degenerative disk disease;
19 is that correct?

20 A. Yes.

21 Q. Thank you.

22 THE COURT: All right.

23 MS. MORRIS: One more follow-up.

24 THE COURT: Based on his question? All
25 right. Go ahead.

1
2 FURTHER REDIRECT EXAMINATION
3 BY MS. MORRIS:
4 Q. Dr. Dunn, can you see pain?
5 A. No.
6 MR. SEMENZA: Objection, Your Honor. Go
7 ahead.
8 THE COURT: Overruled. He can't see pain.
9 Okay.
10 BY MS. MORRIS:
11 Q. So how do you learn if there is pain?
12 A. Well, basically that's part of my assessment.
13 MR. SEMENZA: And, Your Honor, I'm going to
14 object. It goes outside the medical chart.
15 THE COURT: Well, it goes beyond the scope of
16 the recross too. I think he's explained it. He relies
17 on what the patient tells him. That's -- I guess you
18 can't see it. So sustained. We're done.
19 Any questions -- any further questions from
20 the jury as a result of -- okay. We have another
21 question.
22 Approach.
23 (A discussion was held at the bench,
24 not reported.)
25 THE COURT: Doctor, did Ms. O'Connell tell

1 you she gave up being a dental hygienist because of not
2 being able to hold the instruments?

3 THE WITNESS: I don't recall.

4 THE COURT: All right. May this witness be
5 excused?

6 MS. MORRIS: Yes.

7 THE COURT: Thank you. Thank you very much
8 for your testimony, Doctor.

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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 10

EXHIBIT 10

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,)
individually,)

10 Plaintiff,)

11 vs.)

12)

13 WYNN LAS VEGAS, LLC, a Nevada)
Limited Liability Company)

14 d/b/a WYNN LAS VEGAS; DOES I)
through X; and ROE)

15 CORPORATIONS I through X,)
inclusive,)

16 Defendants.)

17

18 PARTIAL TRANSCRIPT

19 OF

20 JURY TRIAL

21 BEFORE THE HONORABLE CAROLYN ELLSWORTH

22 DEPARTMENT V

23 DATED TUESDAY, NOVEMBER 10, 2015

24

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

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I N D E X

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<u>CRAIG TINGEY, M.D.</u>	
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1 LAS VEGAS, NEVADA, TUESDAY, NOVEMBER 10, 2015;

2 4:13 P.M.

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

5 * * * * *

6
7 THE COURT: So we are back on the record
8 outside the presence of the jury. Mr. Semenza's
9 completed his voir dire of Dr. Tingey. Mr. Semenza,
10 did you have something outside the presence?

11 MR. SEMENZA: I do, Your Honor. I had a
12 chance to very briefly examine the file that Dr. Tingey
13 had brought with him today. And again, we have the
14 same problem that we did with Dr. Dunn that there are a
15 whole host of documents that were never produced as
16 part of the records. And in contrast to what Dr. Dunn
17 had said in that book, he just looked at the documents,
18 he doesn't know when he received additional documents.
19 I believe Dr. Tingey had testified that he had received
20 additional documents about a week and a half ago, if
21 I'm remembering correctly. So I think it would be
22 improper to allow him to testify here based on these
23 new and additional records that haven't been provided
24 to us.

25 THE COURT: But his testimony I thought was

1 that he's not basing his testimony on any of these new
2 documents but rather on the MRI the -- and his
3 evaluation of the patient, Ms. O'Connell, at the time
4 he saw her. I think that's pretty clear.

5 MR. SEMENZA: And I understand that's his
6 testimony, Your Honor. However, I obviously -- I mean,
7 he has reviewed those additional documents and read
8 those documents I haven't seen before. I don't know if
9 that's in any way going to affect any of my
10 questioning. I would like an opportunity obviously to
11 review the entire file, but obviously, we're here and
12 now. So I would object to allowing him to testify in
13 any capacity at this point in time.

14 THE COURT: Okay. Your response?

15 MS. MORRIS: It was my understanding that
16 Dr. Tingey reviewed the medical records in which he
17 created and said that were in the Desert Orthopaedic
18 file which contained the -- the fact that Dr. Martin
19 had seen her before. And that was what he was basing
20 his opinion on was him seeing her looking at the Desert
21 Orthopaedic files. And my understanding is that a week
22 and a half ago, he looked at the file and received
23 brand new information, and he was going to testify
24 about that. I didn't hear that at all, and it was not
25 my understanding from his testimony. So I think he

1 should be permitted to testify in accordance with what
2 he spoke to outside the presence of the jury during
3 voir dire.

4 THE COURT: Well, I'm going to allow him to
5 testify. His testimony from the voir dire appeared to
6 me was based solely -- his opinions were based solely
7 on his examination of the patient, his review of the
8 MRI films of the knees that he had, and, of course, her
9 history as he -- as it was reported to him by her.

10 And beyond that, he didn't refer to anything
11 else. Didn't see anything else was significant in his
12 findings. And, of course, you may and I -- I know you
13 will be cross examining him about the things that he
14 apparently did not know and may be able to pose
15 hypothetical question to him. But I -- I think as long
16 as -- he's not offering to say that he based his
17 opinion upon anything that you didn't have before, he's
18 not offering any testimony about any of those other
19 records, then I'm going to allow it.

20 MR. SEMENZA: I understand, Your Honor.

21 THE COURT: All right. All right. Let's
22 bring our jury in.

23 THE MARSHAL: All rise for the jury, please.

24 (The following proceedings were held in
25 the presence of the jury.)

1 THE MARSHAL: Jury is all present, Your
2 Honor.

3 THE COURT: Thank you. Please be seated.
4 And the record will reflect we're back in the presence
5 of all eight members of the jury as well as the
6 alternates. All parties are present with their
7 respective counsel, and all officers of the court are
8 present.

9 And you may call your next witness.

10 MS. MORRIS: Thank you. We call Dr. Tingey.

11 THE CLERK: Please remain standing, raise
12 your right hand.

13 You do solemnly swear the testimony you're
14 about to give in this action shall be the truth, the
15 whole truth, and nothing but the truth, so help you
16 God.

17 THE WITNESS: Yes.

18 THE CLERK: Please be seated and please state
19 and spell your first and last name for the record.

20 THE WITNESS: My name is Craig C-r-a-i-g
21 T-i-n-g-e-y.

22

23 DIRECT EXAMINATION

24 BY MS. MORRIS:

25 Q. Dr. Tingey, can you tell us what you do?

1 A. I'm an orthopedic surgeon.
2 Q. Where do you work?
3 A. At Desert Orthopaedic Center here in
4 Las Vegas.
5 Q. How long have you worked at Desert
6 Orthopaedic?
7 A. Since 2009.
8 Q. And are you board certified?
9 A. I am.
10 Q. When did you become board certified?
11 A. 2006.
12 Q. Do you have any specialty in your practice?
13 A. I specialize in surgery of the shoulder, hip,
14 and knee.
15 Q. Can you give us a little bit of background
16 about your education?
17 A. Well, I graduated from high school here in
18 Vegas and went to college at Brigham Young University
19 in Utah. Then went to medical school in Wake -- Wake
20 Forest University in North Carolina. And then
21 residency for orthopedic surgery at Loma Linda
22 University in California.
23 Q. Where did you -- did you work prior to
24 working at Desert Orthopaedic?
25 A. I was in a practice with a single other

1 doctor from 2004 to 2009, and then he retired, and I
2 joined Desert Orthopaedic Center at that time.

3 Q. Do you have any privileges at any of the
4 hospitals in Las Vegas?

5 A. Yes.

6 Q. Do you know which ones?

7 A. Centennial Hills Hospital, MountainView
8 Hospital, and San Martin Hospital.

9 Q. Have you ever in your -- your medical career
10 gotten any awards?

11 A. Yes.

12 Q. Can you tell us about those?

13 A. I received what's called the Leonard Marmor
14 award at Loma Linda University as a senior resident for
15 excellence in orthopedic surgery. And I also received
16 research awards both my junior and senior years. My
17 senior year was the first place research award for the
18 program.

19 Q. And do you speak any other languages?

20 A. I speak Spanish and Portuguese.

21 Q. Now, you have treated Yvonne O'Connell; is
22 that correct?

23 A. Yes.

24 Q. Can you tell us when you saw Yvonne?

25 A. I saw her on May 11th, 2015.

1 Q. And do you know why Yvonne came to see you?

2 A. For bilateral knee pain or knee pain in both
3 knees.

4 Q. And do you know who referred her to come see
5 you?

6 A. Dr. Dunn.

7 Q. Do you know if Yvonne had treated with any
8 other doctor at Desert Orthopaedic in relation to her
9 knees?

10 A. She had had two visits with Dr. Martin who
11 was my partner at the time as well.

12 Q. And when Yvonne came to see you, what was she
13 complaining of at the time?

14 A. Knee pain in both knees.

15 Q. And did you review any imaging when you saw
16 Yvonne?

17 A. Yeah. When I saw her, she had an MRI of both
18 the right knee and an MRI of the left knee.

19 Q. And did you look at those MRI results?

20 A. I did.

21 Q. Can you tell us what the findings were in the
22 MRI of her right knee?

23 A. The right knee showed a tear in the medial
24 meniscus.

25 Q. And what were the findings from the MRI of

1 the left knee?

2 A. The left knee showed a tear in the medial and
3 lateral meniscus.

4 Q. And how did Yvonne describe her pain on that
5 day? Do you recall?

6 A. She indicated that it started after she had a
7 slip and fall on February 8th, 2010. The pain was in
8 the -- we call it the anterior and medial region of the
9 knee which means on the front and on the inside of the
10 knee. She indicated that she had pain when twisting,
11 pain when climbing stairs, when going from sitting to
12 standing, and then she also noted a lot of what we call
13 mechanical symptoms: Popping, locking, catching in the
14 knee.

15 Q. Are those complaints consistent with having a
16 meniscus tear?

17 A. Yes.

18 Q. Did you look at any X-rays of Yvonne's knees?

19 A. Yes. Dr. Martin had taken X-rays several
20 months prior, and I looked at those X-rays.

21 Q. What did those X-rays show?

22 A. For the most part, normal. There was some
23 mild narrowing of the joint space which means there's
24 some mild arthritis in the knees.

25 Q. Can you describe what was going on in

1 Yvonne's left knee?

2 A. The left knee looked different from the right
3 knee. The left knee had what we call extrusion of the
4 meniscus, and that's more of a degenerative type of
5 condition. The meniscus actually gets squeezed out of
6 the joint space, and -- and then it will frequently
7 tear. So she did have tearing of both the medial and
8 lateral meniscus. There's two meniscuses in each knee.
9 So both were torn, but they were also extruded which
10 leads me to believe that it was more of a degenerative
11 condition of the knee rather than a traumatic
12 condition.

13 Q. And you were able to see that in her MRI; is
14 that correct?

15 A. Yes.

16 Q. And the arthritis that you could see, you can
17 see that through the X ray; is that correct?

18 A. Both on X ray and MRI?

19 Q. I want to talk about Yvonne's right knee.
20 Was the imaging different from her left knee than her
21 right knee?

22 A. The imaging -- an MRI it was the same, but
23 the findings were different.

24 Q. Can you tell me what the findings were for
25 here right knee?

1 A. The right knee showed a tear in the back part
2 of the medial meniscus. And that's the most common
3 location where you'll get a traumatic tear is in what
4 we call the posterior horn of the medial meniscus.

5 Q. And you said in the left knee there was
6 findings that lead you to believe it was a degenerative
7 condition; is that correct?

8 A. Correct.

9 Q. Were those findings in the MRI of her right
10 knee?

11 A. No.

12 Q. Now, how many patients approximately do you
13 think you have treated who have meniscus tears in your
14 practice?

15 A. Many thousands. That's the most common thing
16 I see. It would be -- I probably do -- I probably see
17 15 or 20 a week.

18 Q. And after someone suffers a meniscus tear,
19 when do you first expect them to report complaints of
20 pain?

21 A. It varies. Sometimes they have immediate
22 pain after an injury. Sometimes it will be a day or
23 two later. Sometimes it's a week or two later. I've
24 seen any -- any of those.

25 Q. Anything longer than a week or two later?

1 A. Well, yeah. I mean, it happens. But
2 typically, it's, you know, within a couple of weeks
3 they start to feel pain in the knee.

4 Q. What did you recommend Yvonne do for her
5 knees?

6 A. Well, of course we talked about various
7 options. And I believe I reviewed those with her. But
8 the recommended treatment for that, and what I
9 recommended for her was arthroscopy. And that's a
10 surgery where you treat the meniscus tear.

11 Q. Can you tell us what that surgery entails?

12 A. Yeah, it's a surgery. They're under general
13 anesthesia, but it's an arthroscopy, meaning you're
14 putting a camera into the knee. So there's two small
15 incisions on the front of the knee. You put a camera
16 in there so you can see what's going on. And typically
17 with a meniscus tear of this type, you'll do what's
18 called a meniscectomy, and that means removing the torn
19 part of the meniscus. And there's certain instruments
20 we use to actually take out the cartilage that's torn.

21 Q. And is physical therapy required after the
22 surgery?

23 A. Sometimes. Often it is.

24 Q. Now, when Yvonne came to you, how did -- what
25 did she rate her pain?

1 A. She rated it as a 10 on a scale of 10.

2 Q. And did that cause any concern that she was
3 rating her pain at a 10?

4 A. No.

5 Q. Did you find any indications that Yvonne was
6 lying about her pain?

7 A. No.

8 Q. Did you see any indications in Yvonne's
9 imaging showing fibromyalgia?

10 A. No.

11 Q. Is that something that you would see in an
12 MRI?

13 A. No, that's not.

14 Q. What does the MRI show?

15 A. The MRI show a lot of things. It shows, you
16 know, not only the bone, but soft tissue, cartilage,
17 ligaments. It can show tears. It shows inflammation
18 in the soft tissues. There's -- there's a lot of
19 things you can find on MRI.

20 Q. So if --

21 A. But not fibromyalgia.

22 Q. So if I understand correctly, in her right
23 knee, you found there to be a traumatic tear; is that
24 correct?

25 A. There's a tear that's consistent with a

1 history of trauma.

2 Q. And why is that tear consistent with a
3 history of trauma? What about it?

4 A. A degenerative tear of the meniscus or a
5 degenerative condition will have a different appearance
6 on MRI. You can't say with 100 percent certainty that
7 this happened because of this, just looking at the MRI,
8 but you can find -- you can look at findings that are
9 consistent with the trauma. For example, on the left
10 knee, I looked at the MRI, and I felt like it was not
11 consistent with a trauma because of the extrusion of
12 the meniscus. That's a clue that I can look at, and
13 that helps me make my determination.

14 Q. Now, you recommended that she have surgery to
15 both knees; is that correct?

16 A. Yes.

17 Q. And did you schedule an appointment for her
18 to have the surgery?

19 A. She said that she would want to consider her
20 options and would contact us if she decided to go
21 forward with the surgery.

22 Q. Did Yvonne tell you what kind of medical
23 treatment she had received prior to coming to see you?

24 A. Yes. She had said that she had had physical
25 therapy, and that didn't give her adequate improvement.

1 And I was aware that she had seen my partner,
2 Dr. Martin, as well.

3 Q. And did Yvonne describe to you how the fall
4 occurred in February?

5 A. She did. And the way I documented it is that
6 she was walking and slipped and fell on a liquid. She
7 fell backwards and she twisted on the right and fell,
8 striking her body on a raised divider. I'm not sure
9 what type of divider it was.

10 Q. Was the fact that when she fell it was in a
11 twisting motion have any impact on her?

12 A. Yes. A kind of typical way of tearing
13 meniscus is a twisting injury. Not all meniscus tears
14 occur because of a twisting injury, but often that is
15 the case. So that also correlates with her history of
16 meniscus tear.

17 Q. Can you -- or are you able to describe the
18 type of pain that a patient will experience after they
19 experience meniscus tear, have a meniscus tear?

20 A. Usually it hurts in the knee. And a medial
21 meniscus tear will typically hurt in the location she
22 described, in the front and on the medial side.
23 Meniscus tears will often have mechanical symptoms.
24 And that, like I said, earlier was popping, clicking,
25 catching, even locking sometimes. And -- and she

1 described that. That was consistent with the meniscus
2 tear as well.

3 Q. If you have a meniscus tear in your knee,
4 does it tend to weaken the knee?

5 A. Indirectly. If you have pain in any body
6 part, you tend to use it less, and that leads to
7 atrophy of muscles and it can lead to weakness.

8 Q. Now, you described, I think, the surgery that
9 would occur to her right knee, but you also recommended
10 she have surgery to her left knee; is that correct?

11 A. Yes.

12 Q. Is it a different type of surgery?

13 A. Only difference is that she had tears of both
14 the medial and lateral meniscus on the left knee. So
15 it would involve treating both sides of the knee.

16 Q. But it's your opinion that the -- the left
17 knee had -- was -- was essentially a degenerative tear;
18 is that correct?

19 A. That's correct.

20 Q. Did you come to opinion as to the causation
21 of the meniscus tear in Yvonne's right knee?

22 A. My opinion is that it was related to the
23 slip-and-fall on February 8, 2010.

24 Q. And is that to a reasonable degree of medical
25 probability?

1 A. Yes.

2 Q. The surgery that you recommended to her right
3 knee, where would that take place?

4 A. Typically I do it at our surgery center.
5 That's at our office on Desert Inn.

6 Q. And in the past, when you have done a
7 procedure such as the one you recommended to Yvonne's
8 right knee, has it caused -- has it cured the patient's
9 complaints of pain?

10 A. Yes.

11 Q. Do you have any reason to believe if Yvonne
12 got surgery she wouldn't have relief in her right knee?

13 A. That she would not have relief? No.

14 Q. Sorry.

15 A. I think I --

16 Q. That was a double negative.

17 A. I think I understood that correctly.

18 Q. Is undergoing the surgery to her right knee,
19 would that cause her any pain?

20 A. Sure.

21 Q. What type?

22 A. Usually, there's post-operative pain just
23 related to the surgical procedure itself, the
24 incisions, and the -- the procedures can cause some
25 pain that usually lasts a few weeks to a few months

1 after surgery.

2 Q. Now, is there any other cure for a meniscus
3 tear such as the one she has in her right knee?

4 A. Cure, no. Treatment, yes. But there's no
5 way to fix the tear other than surgery.

6 Q. Did you recommend that Yvonne get any other
7 treatment aside from surgery to her right knee?

8 A. Well, what I do is discuss the -- all the
9 treatment options, both surgical and nonsurgical. So I
10 will usually review options like physical therapy,
11 cortisone injections, Ibuprofen, or some sort of
12 anti-inflammatory medication. Those are all helpful.
13 And I review those, and then I also discuss the
14 surgical options and then let the patient decide.

15 Q. How long does the surgery take?

16 A. About a half an hour to an hour.

17 Q. Aside from the MRI study that you looked at
18 and the X ray, did you look at any other imaging of
19 Yvonne?

20 A. No.

21 Q. Would you have needed to do any other testing
22 on her to determine what was ailing her knees?

23 A. No. X ray and MRI are -- are what we
24 typically rely on for this diagnosis.

25 MS. MORRIS: Thank you.

1 THE COURT: Cross.

2 MR. SEMENZA: Thank you, Your Honor.

3

4 CROSS-EXAMINATION

5 BY MR. SEMENZA:

6 Q. Good afternoon, Dr. Tingey. Now good
7 evening.

8 A. Good evening.

9 Q. You're currently a partner with Dr. Dunn; is
10 that correct?

11 A. Yes. Yes, I am.

12 Q. And are you being compensated for being here
13 today?

14 A. Yes.

15 Q. And how much are you being compensated?

16 A. I believe it's 5,000 per half-day charge.

17 Q. And who is paying that fee?

18 A. I assume it's the plaintiff's attorney's
19 office.

20 Q. And have you received that payment yet?

21 A. That, I don't know.

22 Q. Okay. And you commonly testify as an expert
23 witness; is that true?

24 A. Yeah, I do.

25 Q. And how long have you been doing that?

1 A. Since I started. So I have been in practice
2 11 years.

3 Q. And you've testified as an expert witness
4 both relating to -- well, relating to knee pain; is
5 that correct?

6 A. Have I before? Yes, I do.

7 Q. And you've seen Ms. O'Connell one time.

8 A. Yes.

9 Q. And that was in May of 2015.

10 A. That's correct.

11 Q. How long did you spend with her during that
12 appointment?

13 A. I don't remember the appointment itself. I
14 don't know.

15 Q. And at that appointment, Ms. O'Connell
16 identified she had 10 of 10 pain; is that correct?

17 A. Yes.

18 Q. Did Ms. O'Connell differentiate between what
19 pain she was experiencing in her left knee versus her
20 right knee?

21 A. Not that I documented.

22 Q. And you were treating her for both her left
23 knee and her right knee during this appointment.

24 A. That's right.

25 Q. And your conclusion based upon your review of

1 the films, both X-rays, and MRI was that the left knee
2 did not have anything that -- that the tear in the
3 meniscus on the left knee was not caused by the fall on
4 February 8th, 2010?

5 A. Yes. That's correct.

6 Q. And you did note arthritic changes in that
7 left knee?

8 A. Very mild in both knees.

9 Q. And you did document and note arthritic
10 changes in her right knee?

11 A. As well. I documented minimal arthritic
12 changes.

13 Q. Do you know whether Ms. O'Connell was
14 experiencing pain related exclusively to the arthritic
15 condition in her right knee?

16 A. That's not my opinion. Her pain wasn't -- I
17 mean, it can be difficult to differentiate arthritis
18 pain from a meniscus tear. But, again, her -- the
19 findings of arthritis on both the X ray and the MRI
20 were very mild. And I wouldn't expect that to cause
21 very severe pain at all. Her -- her complaints with
22 the mechanical symptoms and the severe pain are much
23 more consistent with the meniscus tear.

24 Q. Is it possible that Ms. O'Connell was, in
25 fact, experiencing right knee pain as a result of the

1 arthritic condition in her right knee?

2 A. It's possible that she had both factors
3 contributing to her pain. But I would say the more
4 severe issue was the meniscus tear. Again, the
5 arthritis was mild.

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

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

12 Q. And that history included a fall on
13 February 8th, 2010.

14 A. Yes. But importantly, what she -- that she
15 reported that she wasn't having symptoms before the
16 fall and that the symptoms started soon after the fall.

17 Q. In your history of -- in taking your
18 history -- Ms. O'Connell's history, did she identify
19 any preexisting conditions?

20 A. To her knee?

21 Q. To anywhere on her body.

22 A. According to the chart note, she indicated
23 she had depression, and that she had a mini stroke two
24 days after the fall.

25 Q. And as you sit here today, do you know

1 whether Ms. O'Connell had a mini stroke as identified
2 in her history?

3 A. Only that she reported it to me.

4 Q. She did identify that she had depression as
5 well?

6 A. Yes.

7 Q. And can depression play a role in the
8 presentation of pain symptoms?

9 A. It can.

10 Q. Do you have your notes from her visit with
11 you on May?

12 A. Yes, I have it right here.

13 Q. Okay. Can I have you turn to page 2?

14 A. (Witness complies.) Okay.

15 Q. It identifies below the problem recorded as
16 diagnosis code. Do you see that? It says,
17 "information obtained by patient via web portal."

18 A. Yes.

19 Q. It identifies depression. It also identifies
20 neuropathy; is that correct?

21 A. Yes.

22 Q. And could neuropathy exhibit pain symptoms?

23 A. It can.

24 Q. In the -- in the lower limbs?

25 A. Lower extremities not typically in the knee,

1 isolated.

2 Q. It identifies "stroke," then "mini stroke
3 after accident, not stroke." Do you know what that
4 means?

5 A. This is information the patient put into the
6 computer. So I only know what it means from what we're
7 reading here. So this is what the patient put in, not
8 me.

9 Q. Do you know whether Ms. O'Connell might have
10 had injuries to her knees prior to February 8th, 2010?

11 A. She did not report any injuries prior to that
12 date.

13 Q. And do you know whether Ms. O'Connell had any
14 injuries to her knees after February 8th, 2010?

15 A. No.

16 Q. You weren't informed of any injuries after
17 February 8th, 2010; is that correct?

18 A. Well, I mean, we -- we -- I had a question
19 about that earlier. So I'm -- I'm informed now, but
20 as -- at that time and before today, I wasn't informed
21 of any injuries other than the one that we documented.

22 Q. Do X-rays show meniscus tears?

23 A. No.

24 Q. It's exclusively an MRI?

25 A. Not exclusively, but MRI is the best way to

1 diagnose a meniscus tear. In X-rays, you cannot see
2 the meniscus at all.

3 Q. Would you expect that Ms. O'Connell would
4 have had some sort of immediate right knee pain if she
5 had torn her meniscus?

6 A. Like I said earlier, some people will have
7 immediate pain. Sometimes it comes on after a few days
8 or weeks.

9 Q. So there are circumstances when an individual
10 would tear a meniscus and not know about it for a
11 period of two weeks?

12 A. Yes.

13 Q. Is that common?

14 A. Yes.

15 Q. Have you treated Ms. O'Connell at all for
16 her -- for her hips?

17 A. No.

18 Q. And -- strike that.

19 Outside of your practice, Desert
20 Orthopaedics, do you know who Ms. O'Connell saw prior
21 to your treatment of her?

22 A. No, I don't.

23 Q. And Ms. O'Connell reported that she had
24 undergone physical therapy prior to coming to you?

25 A. Yes.

1 Q. Okay. Do you know the specifics of that
2 physical therapy?

3 A. No.

4 Q. You don't know what it entailed?

5 A. No.

6 Q. Your understanding from her, though, was that
7 it was unsuccessful?

8 A. That she didn't get any improvement with it,
9 so yes.

10 MR. SEMENZA: Just a moment, Your Honor.

11 BY MR. SEMENZA:

12 Q. Is it fair to say Ms. O'Connell experiences
13 pain in both knees?

14 A. Yes. At the time I saw her, yes.

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

19 A. Yes.

20 Q. Has Ms. O'Connell scheduled an appointment to
21 conduct the surgery on her knees?

22 A. I don't believe so.

23 Q. And would there be two separate surgeries?
24 Do you do both knees at the same time? Or do you do
25 one knee and then the other?

1 A. You could do both knees at the same time.

2 Q. Do you know when Ms. O'Connell first sought
3 medical treatment relating to the fall that took place
4 on February of 2010?

5 A. No.

6 Q. Do you know if at her first visit -- okay.

7 A. No, I'm sorry, I don't. I just know when she
8 saw Dr. Dunn for the first time, but I don't know the
9 first visit.

10 Q. Do you know whether during that first medical
11 visit, after her fall, whether she complained of any
12 knee pain?

13 A. I don't.

14 Q. Is it unusual for a patient to be diagnosed
15 with a meniscus tear four years after it takes place?

16 A. No, it's not.

17 Q. It's common?

18 A. It's common for people to have meniscus tears
19 or knee complaints for a long time, and then they have
20 an MRI and then it's diagnosed as a meniscus tear.

21 Q. Could fibromyalgia play a role in a patient's
22 pain symptomatology?

23 A. Sure.

24 Q. And could that fibromyalgia play a role in a
25 pain -- a patient's pain symptomatology in a knee?

1 A. Not typically. Fibromyalgia does not mimic a
2 meniscus tear. And it's usually not on the list of
3 diagnoses that we consider when we're looking at knee
4 pain. It's not -- it rarely involves the knee.

5 Q. But sometimes it does; correct?

6 A. I assume -- I would suppose, yes.

7 MR. SEMENZA: Okay. Thank you. No further
8 questions.

9 THE COURT: Redirect.

10 MS. MORRIS: Yes. Just quick ones.

11

12 REDIRECT EXAMINATION

13 BY MS. MORRIS:

14 Q. Did you have to take time away from your
15 practice to come here today?

16 A. I did.

17 Q. Is the fee that you charge to appear in
18 court, is that -- is that a fee that you charge
19 everyone?

20 A. Yes.

21 Q. And you don't charge by the hour; is that
22 correct? You have a mandatory amount for a half day?

23 A. Half day, yes.

24 Q. Why is that?

25 A. Because for me to be here, I have to give up

1 seeing patients in clinic or give up doing surgeries.
2 And that's -- and I'm still paying my staff right now.
3 Well, it's after 5:00 so they're home. But I have
4 overhead I need to maintain. And I have loss of income
5 if I give up surgeries and give up clinic time.

6 Q. Does the fact that you were paid to appear
7 here in court affect your medical opinion in any way?

8 A. No.

9 Q. Now, you said that Yvonne could get surgery
10 to both knees at the same time; is that right?

11 A. Yeah, I would have that discussion with her.
12 The patient needs to be aware of the pros and cons, but
13 it's possible to do both knees.

14 Q. Is it difficult or any more difficult to
15 recover from having both knees operated on at the same
16 time?

17 A. Sure. Yes.

18 Q. Why is that?

19 A. Well, it's difficult to get around. You
20 know, if you do a meniscus surgery on one knee, you can
21 rely on the other knee for support. But when you do
22 both at the same time, it's going to be more difficult.
23 She'll probably need some sort of support and -- and
24 help at home if that -- if that's the case.

25 Q. Now, the tear that Yvonne has in her right

1 knee, would that cause her in any way to overcompensate
2 while walking?

3 A. Overcompensate?

4 Q. Or compensate on the other side.

5 A. If you're -- yes, if you have a meniscus
6 tear, you can -- sometimes you'll limp. Sometimes
7 you'll put more of your weight on the opposite limb.

8 Q. If you put more of your weight on the
9 opposite limb and there's degeneration in that limb,
10 could that cause symptoms in the other limb?

11 A. It could.

12 MS. MORRIS: I don't have any other
13 questions.

14 MR. SEMENZA: Just a few.

15 THE COURT: Questions? Oh, recross.

16

17 RECROSS-EXAMINATION

18 BY MR. SEMENZA:

19 Q. You were asked about overcompensating. Do
20 you traditionally find patients overcompensating to one
21 limb or the other when they have double meniscus tears?

22 A. When you have a meniscus tear, your gait is
23 going to be altered. So can it exacerbate pain in the
24 contralateral limb? Yes. And I see that frequently.
25 But if you have bilateral meniscus tears, you're not --

1 you're going to be -- I mean, it just depends on the
2 situation.

3 Q. Meniscus tear regardless of whether it's
4 bilateral or just one limb is going to cause some
5 mobility issues; is that correct?

6 A. Mobility issues, limping, gait abnormalities.
7 And that's going to stress both knees.

8 Q. So the left knee meniscus tear could have an
9 impact on the right knee meniscus tear?

10 A. Sure.

11 Q. And vice versa?

12 A. Sure.

13 MR. SEMENZA: Thank you.

14 MS. MORRIS: No other questions.

15 THE COURT: Questions from the jury?

16 THE MARSHAL: Anybody else?

17 THE COURT: Counsel approach.

18 (A discussion was held at the bench,
19 not reported.)

20 THE COURT: All right. Doctor, could a
21 traumatic tear of the medial meniscus occur from an
22 activity like swing dancing?

23 THE WITNESS: Yes.

24 THE COURT: And I had a question. The MRIs
25 that you reviewed, when were those MRIs taken?

1 THE WITNESS: The MRI of the right knee was
2 done on August 29th, 2014. And the MRI of the left
3 knee, September 22nd, 2014.

4 THE COURT: Any questions as a result of my
5 questions?

6 MR. SEMENZA: No, Your Honor.

7 MS. MORRIS: I just had one, Your Honor. One
8 follow-up question. Thank you.

9

10 FURTHER REDIRECT EXAMINATION

11 BY MS. MORRIS:

12 Q. If a person had a meniscus tear, is it
13 possible that they would have pain to the point that
14 they were not able to swing dance?

15 A. It is possible, yes.

16 THE COURT: All right. May this witness be
17 excused?

18 MR. SEMENZA: Yes, Your Honor.

19 THE COURT: Thank you very much for your
20 testimony.

21 All right. Ladies and gentlemen, we're
22 getting out.

23

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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
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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


CLERK OF THE COURT

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9 **DISTRICT COURT**
10
11 **CLARK COUNTY, NEVADA**

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

15 vs.

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

21 Defendants.

CASE NO. A-12-655992-C
DEPT NO. V

PLAINTIFF'S OPPOSITION TO
DEFENDANT'S RENEWED MOTION
FOR JUDGMENT AS A MATTER OF
LAW AND MOTION FOR NEW TRIAL

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1 Plaintiff, Yvonne O'Connell ("Plaintiff"), by and through her counsel, Brian D. Nettles,
2 Esq. and Christian M. Morris, Esq., of Nettles Law Firm, hereby submits her Opposition to
3 Defendant's Renewed Motion for Judgment as a Matter of Law and Motion for New Trial.

4 DATED this 15th day of January, 2016.

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15 **POINTS AND AUTHORITIES**

16 **I. The renewed motion for judgment as a matter of law should be denied because the**
17 **jury had a reasonable basis in fact for its decision**

18 A Rule 50 motion must be denied if there is any evidence "tending to support the
19 verdict." Nelson v. Heer, 123 Nev. 217, 222-223 (2007). The existence of an alternative and
20 reasonable viewpoint is insufficient to support a motion. See, id. A party seeking reversal of a
21 jury's verdict under Rule 50 bears the heavy burden of proving that the jurors had no reasonable
22 basis for their verdict.

23 When considering a Rule 50 motion, the court must view all evidence and all possible
24 inferences as being in support of the non-moving party, i.e., in support of the jury's verdict. Id. It
25 is improper to consider the credibility of witnesses or the weight of evidence. Air Service Co. v.
26 Sheehan, 95 Nev. 528, 530 (1979). Ultimately, unless the evidence is "so overwhelming for one
27 party that any other verdict would be contrary to law," a Rule 50 motion must be denied. M.C.
28 Multi-Family Dev., LLC v. Crestdale Assocs., 124 Nev 901, 910 (2008).

1 A Rule 50(b) motion is proper after a jury verdict is entered only if the party first
2 motioned for judgment as a matter of law under Rule 50(a) prior to the case going to the jury.
3 NRCP 50(a).

4 For reasons detailed below, the jury's verdict was proper and supported by sufficient
5 facts.

6 **II. The motion for a new trial should be denied because Defendant's substantial rights**
7 **were preserved**

8 Under Rule 59, granting a new trial is proper only when the moving party can show that
9 error of law has been committed by the court resulting in a material infringement of the moving
10 party's substantial rights. NRCP 59. This is a fact-intensive inquiry that requires the moving
11 party to show that "but for" the alleged error, the jury's verdict might have reasonably been
12 different. Wyeth v. Rowatt, 126 Nev. ___, 244 P.3d 765, 778 (2010); see also, NRCP 61. This
13 analysis requires that the alleged error be examined in light of the record as a whole. Id. When
14 this big picture view does not manifestly show that a different outcome would have occurred, the
15 motion for a new trial should be denied. See, id.

16 For the reasons stated below, the Defendant's substantial rights were preserved and
17 granting a new trial would be improper.

18 **III. Argument¹**

19 ***A. A finding of constructive notice was supported by Plaintiff's testimony, the testimony of***
20 ***Defendant's employees, and Defendant's incident report, and other evidence***

21 1. Business Owners' duties to patrons and Notice

22 In Nevada, a business owner has a duty to keep its premises reasonably safe for its
23 patrons. Sprague v. Lucky Stores, Inc., 109 Nev. 247, 250 (1993). When a foreign substance on
24 the ground causes injury to a patron, a business owner will be held liable if it caused the
25 substance to be there. Id. If the foreign substance is the result of a person other than the business
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27 ¹¹ Defendant's renewed motion did not distinguish which portions of its argument were to
28 support its renewed motion and those which were to support its alternative request for a new
trial. Accordingly, Plaintiff is unable to address the two issues separately. The argument here,
then, is presented in order of Defendant's renewed motion.

1 or its employee, liability will lie if the business had constructive notice of the substance. Id. That
2 is, ignorance of a dangerous condition is no defense when, in the exercise of reasonable care, the
3 business owner "should have" or "would have" discovered the condition.

4 What level of care is "reasonable," is a matter generally reserved for the trier-of-fact. Id.

5 2. Constructive notice in Nevada

6 Constructive notice has traditionally been a question of whether the premises owner, in
7 the exercise of reasonable care, would have discovered a dangerous condition in time to remedy
8 or warn of the condition. See, e.g., 61 A.L.R.2d 6, 28 (1958). Constructive notice has been
9 shown by two methods, either by establishing that the dangerous condition (1) existed long
10 enough that it should have been discovered, or (2) was a recurring or nearly continuous
11 condition. The first method was explained in the A.L.R.

12 [P]roof that the proprietor of a store or similar place of business had
13 constructive notice that a floor within the business premises was
14 dangerous as a result of the presence thereon of litter or debris requires
15 proof that the floor condition had existed for such a length of time that the
proprietor, in the exercise of ordinary care, should have known of it."

16 61 A.L.R. 6, 28 (1958). Federal district courts have understood this traditional approach applies
17 in Nevada and decided premises liability cases heard under diversity jurisdiction accordingly.
18 See, e.g., Staples v. Wal-Mart Stores, Inc., 2015 U.S. Dist. LEXIS 14440, *7 (D. Nev., February
19 4, 2015) (A plaintiff can show constructive notice by demonstrating that the dangerous condition
20 existed long enough that it would have been discovered had the business exercised reasonable
21 care); Morton v. Wal-Mart Stores, Inc., 2013 U.S. Dist. LEXIS 18647, *11 (D. Nev., February
22 12, 2013) (no evidence the substance "was present for any substantial period of time"). In fact, a
23 quotation included by Defendant in the instant motion also acknowledges this principle:

24 The duration of a hazard is important because if a hazard only existed for a
25 very short period of time before causing any injury, then the possessor of
26 the land, even 'by exercise of due care,' would not discover the hazard,
and thus would owe no duty to protect invitees from such a hazard.

27 See Defendant's Renewed Motion for Judgment as a Matter of Law at page 17:17-21.
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1 The second method was addressed indirectly in Eldorado Club v. Graff, 78 Nev. 507
2 (1962) (holding it was reversible error to allow evidence of two prior slip and fall incidents to
3 support an inference that condition was continual). In Eldorado Club, the Nevada Supreme Court
4 acknowledged that constructive notice could be also be established by showing the dangerous
5 condition was “continuing” or a “condition[] of permanency.” Id. at 511, 512. In other words, a
6 problem that happens often enough puts the business owner on constructive notice that it could
7 happen again. This acknowledgement, however, was not an exclusion of traditional time-based
8 constructive notice analysis.²

9 More recently, courts, including the Nevada Supreme Court, have responded to “modern
10 merchandising practices,” by beginning to apply either of two similar doctrines which impute
11 notice of a dangerous condition: “mode of operation liability” or “recurrent risk liability.” FGA,
12 LLC v. Giglio, 128 Nev. ___, ___, 278 P.3d 490, 495, 496–497, n. 5 (2012). In fact, these
13 approaches are not necessarily mutually exclusive, a concept expressly acknowledged in footnote
14 5 of Giglio. Though the Nevada Supreme Court has not adopted either approach, see, id., it did
15 decide to apply “mode of operation liability” in one case, i.e., Sprague v. Lucky Stores, 109 Nev.
16 247 (1993), and to not apply that approach in another, i.e., Giglio, 128 Nev. at ___, 278 P.3d at
17 497 (declining to extend mode of operation liability in one type of sit-down restaurant). Though
18 Nevada has not expressly adopted either approach, it has adopted an approach focused on
19 whether appropriate steps have been taken for recurrent or ongoing risks that are known or were
20 foreseeable. Id. at n. 5. By adopting this reasonable-care based approach, the Nevada Supreme
21 Court has not abandoned the traditional approach to constructive notice. Instead, the Nevada
22 Supreme Court’s decisions show that with respect to businesses, in addition to traditional
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24 ² Defendant relies heavily on Eldorado Club, stating it shows that a virtually continuous or
25 recurrent condition is a “requirement” for constructive notice. This is simply inaccurate.
26 Eldorado Club decided an evidence question: was it appropriate to allow evidence of two prior
27 slip and falls to support an inference that the dangerous condition was continual? Deciding it was
28 not proper to admit the evidence, the Eldorado Club court held that, as a matter of law, the two
prior incidents could not establish that the condition was continual or recurring. Nothing in
Eldorado Club supports Defendant’s assertion that time-based constructive notice analysis was
abrogated or otherwise rejected by the Nevada Supreme Court.

1 methods of showing constructive notice, notice will also be imputed to a business owner when
2 the business owner adopted a method of operation that created a known or foreseeable recurrent
3 risk and made customers the vehicle or source of the danger. See, id.

4 Thus, under Giglio, the Nevada Supreme Court has expanded the ways that notice can be
5 imputed to a business owner to at least three: (1) traditional ‘been on the floor long enough that it
6 should have been discovered,’ (2) “recurrent or nearly continuous condition,” or (3) “mode of
7 operation liability.” That these three methods are accepted in Nevada has been acknowledged at
8 the federal district court level. See, Morton, 2013 U.S. Dist. LEXIS 18647 at *11. In granting a
9 motion for summary judgment based on constructive notice, the district court in Morton noted,

10 [t]here is no evidence that [the business owner] knew that substances like
11 this were frequently on its floors, or that the substance ordinarily creates a
12 hazard, or that it was present for any substantial period of time.

13 Id.

14 Accordingly, Defendant’s insistence that the only way to establish constructive notice is
15 to show that the dangerous condition was a recurring or nearly continuous condition is
16 inaccurate.

17 3. Evidence to establish constructive notice

18 Constructive notice is frequently explained in law schools with the so-called “banana peel
19 cases,” out of Massachusetts. In these cases, train passengers slipped and fell on banana peels
20 and brought negligence claims seeking recovery for their injuries. In the first “banana peel” case,
21 liability did not lie because there was insufficient proof to show constructive notice of the
22 dangerous condition, i.e., the peel. Goddard v. Boston & M.R. Co., 179 Mass. 52 (1901). The
23 court explained, “the banana skin upon which the plaintiff step and which caused him to slip may
24 have been dropped within a minute by one of the persons leaving the train.” Id. at 52. In a
25 subsequent case, the second so-called “banana peel” case, evidence of the condition of the
26 banana peel was sufficient to establish constructive notice. Anjou v. Boston E.R. Co., 208 Mass.
27 273, 273 (1911). There the court noted

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1 It was described by several who examined it in these terms: it 'felt dry and
2 gritty as if there were dirt upon it,' as if 'trampled over a good deal,' as
3 'flattened down, and black in color,' every bit of it was black, there wasn't
4 a particle of yellow' and as 'black, flattened out and gritty.'"

5 Id. The court continued,

6 The inference might have been drawn from the appearance and condition
7 of the banana peel that it had been upon the platform a considerable period
8 of time, in such position that it would have been seen and removed by the
9 employees of the defendant if they had performed their duty.

10 Id. The banana peel cases demonstrate a principle of constructive notice: the observable
11 attributes of a substance can support an inference that the substance had been on the floor for a
12 considerable time. More modern cases have similarly discussed evidence regarding the condition
13 of a foreign substance.

14 In Maddox v. K-Mart Corp., the Supreme Court of Alabama held a plaintiff had
15 sufficient facts to support a finding of constructive notice and thus reversed the lower court's
16 summary judgment for the defendant. 565 So.2d 14, 15-16 (Ala. 1990). The plaintiff entered
17 defendant's store with his mother and sister, went to the customer service counter and slipped in
18 a liquid in front of the counter. Id. The plaintiff's sister testified that the liquid appeared to be a
19 cola and was wet, slippery and sticky. Id. The sister also testified that the liquid was two feet
20 wide, near the customer service counter, and "looked like it was trying to dry." Id. However,
21 none of them knew how long the substance had been on the floor. Id. Despite the lack of direct
22 evidence regarding how long it had been there, the court held that the circumstantial evidence of
23 drying supported an inference that the substance had been on the floor long enough that it should
24 have been discovered by the defendant. Id. at 16-17.

25 However, in Tidd v. Walmart Stores, Inc., the federal district court came to a different
26 conclusion in a slip and fall case for reasons that are instructive. 757 F.Supp. 1322, 1323 (Ala.
27 1991). In this case, summary judgement was granted because the plaintiff the condition of the
28 liquid did not show that it had been on the ground for a significant period of time prior to his fall.
Id. A witness testified that she saw the liquid immediately prior to the fall, verifying there was a
foreign substance, but she said that it was clear water and she did not say that it was dirty nor

1 could she provide any other description of the water that would support an inference that it had
2 been there for anything other than a short time. Id.

3 The facts here parallel those in Maddox and are dramatically different from those in Tidd.
4 Here the substance was light green, large, and had dried to the point that portions had become
5 sticky—just like the wet, slippery, and sticky dark liquid that was “trying to dry” in Maddox.
6 The substance here is NOT the clear, unremarkable liquid in Tidd for which there was no proof
7 to suggest that it had not just been put on the floor immediately before the fall. In fact, based on
8 the facts here, no person could reasonably conclude the liquid that caused Plaintiff to fall could
9 have “been put there right before” Plaintiff slipped and fell. **It is beyond reasonable doubt that**
10 **the liquid was there for some time and had not just been placed there.**

11 These cases demonstrate that the attributes of a substance can serve as evidence of how
12 long it has been on the floor. Thus when substances are ‘dirty and gritty’ or ‘dried out and
13 sticky,’ a trier-of-fact can reasonably infer that the substance had been on the floor for a
14 considerable time.

15 4. Virginia Law

16 Virginia cases suggest the jury’s verdict must be upheld. Under Virginia law, the
17 question revolves around this: whether it is just as likely that the substance was spilled on the
18 floor moments before the fall as it was that it was spilled a significant period of time earlier.³
19 Defendant asks this Court to look a 1962 Virginia slip and fall case which involved a piece of
20 celery, located 4–5 inches below a shelf and out of sight from people who were not stooping
21 down to look for it. A. & P. Co. v. Berry, 203 Va. 913 (1962). However, Defendant fails to cite
22 subsequent Virginia case law that distinguished Berry and was more on point to the facts of this
23 case.

24 In Berry, the plaintiff slipped and fell on a piece of celery underneath a shelf. Id. at 914–
25 915. In making its case, the plaintiff noted the celery was dark in color, concluding that it had

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27 ³ See, e.g., Winn-Dixie Stores, Inc. v. Parker, 240 Va. 180, 184 (1990) (noting “it was just as
28 logical to assume that it was placed on the floor an instant before [plaintiff fell] . . . as it is to
infer that it had been there long enough that [defendant] should have discovered it”) (quoting
Berry).

1 been on the floor for some time. Id. at 916. The court rejected this inference noting that the
2 plaintiff's stepping on it could have made it dark and thus the celery "could have been dropped . .
3 . only minutes before the plaintiff stepped on it." Id. For the Berry court, the evidence to which
4 plaintiff pointed was simply insufficient to show that the substance had been there for some time.
5 That is, the court did not say that the condition of a substance was never enough, only that it was
6 not enough in the case before it.

7 Forty-five years later, a Virginia district court distinguished Berry and denied a renewed
8 motion for judgment as a matter of law holding that a finding of constructive notice was
9 supported by evidence of condition of the spilled "ketchup or barbeque sauce," i.e., that it was
10 dry and crusty. Davis v. Spotsylvania Mall Co., 41 Va. Cir. 390, 392-393 (Va. Cir. Ct. 1997).⁴ In
11 Spotsylvania Mall, the court noted that the company correctly asserted that there was no
12 evidence that it caused a ketchup spill or had actual knowledge of it. Id. at 392. However, the
13 court disagreed with the company's assertion that there was "insufficient evidence of
14 constructive notice." Id. The court stated:

15 The Company's third point is that there is insufficient evidence of
16 constructive notice; i.e., there is no evidence that it should have known
17 the ketchup was on the floor. The Company is incorrect. There was
18 uncontroverted evidence from which the jury reasonably could conclude
19 that the ketchup had been there for a considerable period of time and that
the Company, using ordinary care, should have discovered and removed
it.

20 Id. The evidence which showed that the substance had been there for some time was the texture
21 of the substance, i.e., that it was "crusty and hard." Id. The court went on to explain how the
22 jury is entitled to use its "common sense":

23 Expert testimony is not necessary to permit a jury to conclude, using
24 common sense and human experience, that ketchup or a ketchup-like
25 substance in such a dried condition had been dropped or spilled on the
26 floor some considerable time prior to the fall. (Also in contrast to Berry,

27 ⁴ See, also, Sensabaugh v. Gateway, 51 Va. Cir. 267, 267-268 (Va. 20th Cir. Ct., 2000)
28 (upholding jury verdict based on demonstration of a "rug's stiffened and curled condition" using
paper when "[n]o one testified as to how long the rug had been there").

1 the ketchup was in an area where invitees normally walked and had reason
2 to expect would be free of slippery substances.)

3 Id. at 393. Spotsylvania Mall stands for the proposition expressed elsewhere, that sufficient facts
4 can support a common sense decision based on life experience that the condition of a substance
5 proves it was in existence long enough that it should have been discovered.

6 Here the facts follow Spotsylvania Mall much more than the facts of Berry. The spill was
7 in a high traffic area (not under a shelf), and had dried to the point of becoming sticky in areas.
8 Unlike the celery in Berry, where stepping on the celery could make it dark and dirty, **here**
9 **Plaintiff's walking and slipping in the substance could not make it dry and sticky**—this
10 happened in the time after it was spilled up to the time Plaintiff fell and was injured. Under the
11 facts here, it is **NOT** possible to say that the liquid was placed there only minutes before
12 because, based on common every-day experience, liquids like drinks do not dry and become
13 sticky in such a short period of time. **Here, it simply is impossible that the liquid was just**
14 **spilled or had been there for only a few minutes.**

15 5. Plaintiff has provided ample evidence to support the jury's finding that the
16 liquid was on the floor long enough that Defendant should have
17 discovered it in the exercise of reasonable care

18 Rule 50 motion analysis does not consider witness credibility or the weight of
19 testimony—it focuses squarely on whether there is evidence sufficient to provide a reasonable
20 basis for the jury's decision, even if a different version was believed by counsel or the court.
21 Sheehan, 95 Nev. at 530. Here, a finding of constructive notice is supported by the testimony
22 from Plaintiff, Corey Prowell (Defendant's report officer), Yanet Elias (Defendant's Public
23 Areas Department supervisor), Trish Matthieu (Defendant claim's department manager), and
24 documents, including Defendant's incident report. This evidence supports a finding that
25 Defendant did not require or verify regular inspection of a high traffic area with a slick marble
26 floor, i.e., the atrium, that it did not know when the atrium was last inspected, that even when
27 working hard the cleaning staff could not keep the Casino clean, that cleaning staff might not
28 return to the area for an hour or more, and that a large spill had been sitting on the floor for so
long that large portions had dried and become sticky. This narrative strongly supports a

1 conclusion that the Defendant was not exercising due care to keep the atrium clean, and that if it
2 had been, it would have discovered a spilled liquid before it dried to the point of becoming
3 sticky.

4 Ample evidence supports the jury's decision that the Defendant did not exercise
5 reasonable care:

- 6 • The atrium was a high traffic area⁵.
- 7 • The atrium is an area with beautiful gardens (where a patron might be expected to
8 look at the vegetation rather than where she is walking).⁶
- 9 • The atrium had marble floor which is very slippery when wet.⁷
- 10 • It was the weekend of the Super Bowl and was busy.⁸
- 11 • Even with maximum effort, it is impossible to keep the casino clean at the set
12 staffing levels.⁹
- 13 • Defendant¹⁰
 - 14 ○ Had no set inspection schedule;
 - 15 ○ Did not maintain inspection logs;
 - 16 ○ Set staffing levels where it could be as long as an hour or more between
17 visits by a cleaning employee; and
 - 18 ○ Did not know when the atrium was last inspected.¹¹
- 19 • Patrons are allowed to walk thru the casino with alcoholic beverages.¹²

21 ⁵ Trish Matthieu testified to this. See transcript from day 5, p. 162:16–18 attached hereto as
22 **Exhibit 3**.

23 ⁶ Plaintiff testified to this. See transcript from day 4, pp. 55:11–17, 56:2–4 attached hereto as
24 **Exhibit 2**; Exhibit 7 (picture of the atrium).

25 ⁷ Worthy of judicial notice, in light of decision to exclude Mr. Pressman's expert testimony.

26 ⁸ Salvatore Risco testified to this. See transcript from day 5, p. 68:8–11 attached hereto as
27 **Exhibit 3**.

28 ⁹ Yanet Elias testified to this. See transcript from day 3, pp. 70:22 to 71:1 attached hereto as
29 **Exhibit 1**.

¹⁰ Yanet Elias testified to this. See transcript from day 3, pp. 68:23 to 69:3, p. 69:5–11 attached
hereto as **Exhibit 1**.

¹¹ Yanet Elias and Trish Matheiu testified to this. See transcript from day 3, pp. 68:23 to 69:3
attached hereto as **Exhibit 1**.

- The spill was large and had been on the ground long enough to begin to dry.¹³
- The spill was mopped up soon after Plaintiff fell as was injured.¹⁴

All these facts support a finding that Defendant should have inspected the Atrium more often than it did and thus the level of care it exercised was not reasonable.

Ample evidence also supports the jury's decision that the liquid had been on the ground long enough that Defendant should have discovered it.

- The liquid that spilled¹⁵:
 - Was light green;
 - Had begun to dry and was sticky in areas;
 - Had accumulated footprints;
 - Was like a drink,¹⁶ and
 - Was seven feet long (and thus easy to see during an inspection).

All these facts support finding that the spilled liquid was on the ground long enough that it should have been discovered by Defendants because it was large (and thus easy to see) and had been there long enough for large areas dry, and thus it should have been discovered if the Defendant had taken reasonable care to maintain the area.

¹² This is worthy of judicial notice.

¹³ Plaintiff testified to this. See transcript from day 4, pp. 58–63 attached hereto as **Exhibit 2**. Her testimony was corroborated by Yanet Elias who testified that she saw a sticky substance on the floor. This was also corroborated by Corey Prowell who testified that Yanet Elias told him there was a liquid on the ground. The size of the spill is indirectly corroborated by the incident report which indicated that a large sweeper machine was placed to block off the spill area and Ms. Elias' testimony that when spills are large, they are sometimes cleaned immediately without waiting for security.

¹⁴ Plaintiff testified to this. See transcript from day 4, p. 64:14–18 attached hereto as **Exhibit 2**. (This supports an inference that the liquid was water-based, and could have been a drink, because otherwise water mopping would not have worked).

¹⁵ Plaintiff testified to this. See transcript from day 4, pp. 58–63 attached hereto as **Exhibit 2**. This testimony was corroborated by the testimony of Corey Prowell, Yanet Elias, and by Mr. Prowell's incident report.

¹⁶ Yanet Elias testified to this. See transcript from day 3, p. 76:6–12 attached hereto as **Exhibit 1**.

1 These facts support numerous inferences which support a finding of constructive notice,
2 including the following:

- 3 • The atrium was a particularly dangerous area that deserved frequent attention
4 because it was a high traffic area, it was the entrance to the casino, it was the job
5 of security to keep that area safe, the floor was marble and therefore smooth and
6 slippery when wet, and the beauty of the vegetation was likely to distract the gaze
7 of patrons walking there.
- 8 • Failing to provide for regular inspection was unreasonable because objects or
9 liquids dropped on the ground were particularly dangerous due to the high traffic
10 nature of the atrium.
- 11 • Defendant failed to produce one witness to contradict the testimony of the
12 Plaintiff.
- 13 • The fact a sweeper machine was used to cover a portion of the green liquid is
14 evidence to confirm the testimony of the Plaintiff.
- 15 • If the Defendant had acted reasonably, the liquid would have been discovered due
16 to the nature of the size, location, color and length of time the liquid had been on
17 the floor.
- 18 • The spilled liquid had been in the atrium for a considerable period of time because
19 it had dried to the point that it had become sticky in some areas.
- 20 • The liquid was a spilled beverage because it was colored light green, patrons are
21 allowed to walk through the casino with beverages, it had dried to the point that
22 portions had become sticky as liquids with sugar or alcohol are commonly known
23 to do.
- 24 • The liquid had been there for a significant period of time because it had dried to
25 the point that portions were sticky and liquids with sugar or alcohol often take that
26 long before they become sticky.

27 Here, evidence exists to support a reasonable conclusion that Defendant should have
28 discovered the spill before Plaintiff slipped and fell. Plaintiff testified that the spill, which was

1 almost seven (7) feet long in length, as a liquid with a green color that had begun to dry and get
2 sticky in areas. She also testified that after she fell two Wynn employees came over, one of
3 which blocked off the area with a large sweeper machine while the other began to clean up the
4 spill. This testimony is corroborated by the statement from Wynn Employee, Terry Ruby, and
5 the incident report and testimony by Corey Prowell. Moreover, that the employee decided that
6 the spill warranted moving a large sweeper machine to block off the area supports an inference
7 that the spill was large.

8 Testimony from Yanet Elias also corroborates Plaintiff's testimony. Miss Elias testified
9 that there was a sticky substance on the floor. She also testified that it was "like a drink." Finally,
10 Ms. Elias' courtroom testimony that she did not see liquid is consistent with Plaintiff's testimony
11 that the liquid was cleaned up by the earlier-responding unidentified Wynn employee. This
12 testimony is further corroborated by Mr. Prowell's report that Ms. Elias had ordered a porter to
13 clean the liquid.

14 Testimony from Wynn employee Trish Matthieu also indicated that the atrium was a
15 high-traffic area with a slippery floor. Moreover, it was an area was one of great beauty and
16 could be expected to entice patrons to walk thru without constantly watching the floor. These
17 facts support a conclusion that it should be regularly inspected. However, testimony indicated
18 that there was not set inspection schedule, that no inspection log was required or maintained, and
19 that Defendant did not know when the area was last inspected. In fact, testimony indicated that a
20 porter might not return to the atrium for 30 minutes to an hour, if not longer. Testimony also
21 indicated that an assistant manager in PAD walks around to verify places are clean, but again,
22 there is no set time for inspecting each area and no procedure for ensuring an area is adequately
23 inspected. Testimony from Ms. Elias also indicated that the casino was so big that it was
24 impossible to keep it 100% clean all the time.

25 Together this testimony supports the inference that a drink was spilled by a patron and
26 been on the ground long enough that it had begun to dry and get sticky. This testimony is
27 sufficient to warrant a reasonable conclusion based on common life experience that the liquid
28 had been there for a long time. The testimony supports a conclusion that the atrium warrants

1 special, frequent, and close attention because it is a high traffic area, very slippery when wet, and
2 designed to attract views toward decorations. The testimony supports the conclusion that Wynn's
3 wander-as-you-will policy for porters and assistant managers is inadequate to ensure regular
4 inspection. The testimony supports a reasonable conclusion that if a porter or assistant manager
5 had been through the area they would have noticed the spill if they conducted an adequate
6 inspection. The testimony supports a conclusion that Wynn either did not have adequate
7 procedures in place, because they did not have enough staff to keep the casino clean and/or
8 because they did not ensure regular inspection, thus resulting in staff covering too large an area
9 and unable to clean the spills that will inevitably happen in a high-traffic area where people are
10 drinking alcohol and in general focusing more on having a good time then looking out for the
11 well-being of their fellow patrons.

12 ***B. Testimony provided by Drs. Dunn and Tingey was proper and supported a reasonable***
13 ***finding of causation by the jury***

- 14 1. Allowing testimony from Drs. Dunn and Tingey was within this court's discretion
15 and was NOT error

16 This Court's rejection of Defendant's request to prohibit testimony from Drs. Dunn and
17 Tingey was proper given the good cause for delays and lack of prejudice. As part of that
18 decision, this Court provided that Defendant's expert witness, Dr. Klausner, could listen to the
19 trial testimony of Drs. Dunn and Tingey and include in his testimony, rebuttal of what Drs. Dunn
20 and Tingey testified to. This Court's decision to allow testimony from Drs. Dunn and Tingey and
21 allow the Dr. Klausner to listen to both was within this Court's discretion and was not error.

- 22 a. Plaintiff was substantially justified for the delay because Plaintiff was still
23 treating, production was made within a reasonable time, and changes in
24 physician staffing had recently occurred without Plaintiff's knowledge

25 Discovery sanctions, e.g., prohibiting treating physicians from testifying, are
26 inappropriate when delayed production of documents was substantially justified. NRCP 37(c).
27 Here, the timing of the production of documents and listing of Dr. Tingey as a witness was
28 justified because (1) Plaintiff was still treating up until the close of discovery, (2) treatment by

1 Dr. Tingey occurred one month before the close of discovery, (3) the medical provider sent
2 copies to Plaintiff six days after the close of discovery, (4) Plaintiff supplemented soon after
3 receiving the documents on July 14; and (5) treatment had recently shifted from Dr. Martin, a
4 disclosed witness, to Dr. Tingey, after Dr. Martin left the practice.

5 Plaintiff's delay in production was justified because there is a "lag time" between when
6 medical records are generated during treatment and when they are produced by the medical
7 provider. For example, though Defendant produced medical records from Dr. Tingey's office,
8 Desert Orthopaedic Center, on May 29, 2015, more than two weeks after the May 11, 2015 visit,
9 Defendant's supplement did not include records of the May 11 visit. When it comes to treating
10 physicians, plaintiffs and defendants have little control over how quickly medical records are
11 produced and should not be punished when slight delays result.

12 Plaintiff's delay in production was also justified because her treatment had recently
13 shifted from Dr. Martin to Dr. Tingey. In or around May 2015, Dr. Martin stopped practicing at
14 Desert Orthopaedic Center. At that time, Dr. Tingey was named as Plaintiff's replacement
15 treating physician. Plaintiff had already disclosed Dr. Dunn as a potential witness and added Dr.
16 Tingey to the list soon after the transition. Notably, this was not a change that Plaintiff sought,
17 rather it was forced on her by virtue of Dr. Martin leaving his practice at Desert Orthopedic
18 Center.

19 b. Production of Dr. Tingey's records and identification as a witness was
20 timely after documents were received by Counsel

21 As the discovery deadline approached, Plaintiff was still treating for her injuries suffered
22 in the subject incident. Included in her medical records are records from treatment by Dr. Tingey
23 on May 11, 2015, one month before the close of discovery. However, Plaintiff did not receive
24 them until after the close of discovery. Plaintiff thereafter produced the documents in her 4th
25 Amended 16.1 disclosure on July 14, 2015. Though production of these records came after the
26 close of discovery, their production should be considered proper for several reasons: (1)
27 production was consistent with Plaintiff's duty to supplement under NRCP Rules 16.1 and 26(e);
28 (2) Plaintiff was justified in the delay; and (3) Defendant has not been prejudiced.

1 Initially, Plaintiff had treated with Dr. Martin for her knee-related injury. However in or
2 about May 2015, Dr. Martin left the practice because of an unrelated criminal matter and Dr.
3 Tingey became Plaintiff's treating physician. Plaintiff had already disclosed Dr. Dunn and the
4 "person most knowledgeable" from Desert Orthopaedic Center in her 16.1 disclosures, but did
5 not specifically list Dr. Tingey until after the close of discovery. Though listing Dr. Tingey was
6 untimely it was justified consideration the situation and did not harm Defendant.

7 Moreover, Defendant knew Plaintiff was still treating at the close of discovery. This as
8 evidenced by Defendant's 9th supplement to its 16.1 disclosures, produced on May 29, 2015,
9 that included records from the office where Dr. Tingey worked, Desert Orthopaedic Center.
10 Notably, Plaintiff signed a HIPAA authorization that gave Defendant the right to access her
11 medical records from Dr. Tingey and thus Defendant had equally available access as Plaintiff.

12 Lastly, it is clear Dr. Tingey's medical records were not available to any party as of May
13 29, 2015 because Defendant itself had not received them.

14 c. Plaintiff fully complied with NRCP 26's duty to supplement because she
15 provided Dr. Tingey's records within a reasonable time

16 Rule 16.1 requires a party to disclose, without awaiting a discovery request, a copy of all
17 documents that are in its possession which are discoverable under Rule 26(b). NRCP
18 16.1(a)(1)(B). A party then has an ongoing "duty to supplement" its 16.1 disclosures "at
19 appropriate intervals." NRCP 26(e)(1). The duty does not terminate at the close of discovery and
20 supplementation is required when a party learns its disclosures are incomplete. NRCP 26(e)(1).

21 Here, Plaintiff was still treating when discovery closed. The records of Dr. Tingey's
22 treatment of Plaintiff originated on the treatment date, May 11, 2015, less than one month before
23 discovery closed. When Plaintiff's counsel became aware of additional treatment, she acted to
24 supplement the prior 16.1 disclosures. Thus, Plaintiff was appropriately supplementing pursuant
25 to her duty under NRCP.

26 Because Plaintiff was currently treating when discovery closed and Dr. Tingey's records
27 were produced within a reasonable time after treatment, the supplementation should be
28 considered proper.

1 d. Defendant was not prejudiced because the production came four months
2 before trial, included only 15 pages of medical records, and concerned
3 treatment of injuries which were noted throughout the medical record

4 Discovery sanctions are inappropriate when delayed production was harmless. NRCP
5 37(c). Here, production one month after the close of discovery was harmless because (1)
6 defendant already knew of the injuries for which Dr. Tingey treated Plaintiff, (2) production
7 occurred four months before trial, and (3) Defendant knew Plaintiff was still treating and should
8 have anticipated additional medical records.

9 Defendant already knew of the injuries for which Dr. Tingey treated Plaintiff. On August
10 13, 2014, Plaintiff presented to Dr. Andrew Martin, Desert Orthopaedic Center, for pain in her
11 hip and knees. In fact, records of this treatment were included by Defendant Wynn in its 16.1
12 productions. Thus, the production of Dr. Tingey's records were not a "surprise" to Defendant
13 because they already knew of the injury and its expert reviewed the prior records and came to an
14 opinion regarding her care.

15 Lastly, this Court has already ruled that Dr. Klausner, the Defendants expert, may sit
16 through the trial and listen to all the testimony provided by Plaintiff's treating physicians.
17 Therefore, there is no prejudice in Defendant's inability to depose.

18 2. Testimony from Drs. Dunn and Tingey was appropriate to provide objective
19 evidence of injury, corroborate Plaintiff's pain and suffering, and to explain what
20 future pain and suffering she was likely to endure.

21 Following voir dire by Defendant, Drs. Dunn and Tingey were properly allowed to testify
22 as Plaintiff's treating physicians. This testimony was helpful to the jury because it corroborated
23 Plaintiff's objective complaints of pain dating back to her initial care. Testimony from Drs. Dunn
24 and Tingey explained their objective findings of injury, i.e., clinical and diagnostic tests the
25 doctors conducted during their treatment of Plaintiff. Accordingly, testimony from Drs. Dunn
26 and Tingey went to both whether Plaintiff was injured AND how much pain and suffering she
27 endured. Both of these questions were before the jury.

1 The testimony was also helpful because it explained how determining the exact location
2 of pain is not immediate following an injury. In its defense, Defendant and its expert alleged that
3 injuries which are not complained of within 48 hours could not be related to an injury.
4 Testimony from Drs. Dunn and Tingey explained that this was inconsistent with medical science
5 and their own clinical experience. Their testimony was helpful to explain how Plaintiff's
6 understanding and identification of her pain was consistent in timing with others they have
7 examined.

8 Finally, testimony from Drs. Dunn and Tingey was also helpful because it explained the
9 pain and mechanical difficulties a person with knee and neck injuries experience. This
10 information is helpful because it could inform the jury's deliberation on how much Plaintiff was
11 suffering and how much an award of pain and suffering should be.

12 3. Testimony from Drs. Dunn and Tingey was reliable¹⁷

13 Defendant's assertion that the testimony from Drs. Dunn and Tingey was so unreliable
14 that it constituted inappropriate character testimony is silly. Defendant's cited cases address
15 issues involving testimony that are simply not present in the instant case and have already been
16 rejected by this Court. Plaintiff testified that a prior injury in 1989 had fully resolved long before
17 she fell. Defendant provided no evidence to suggest this was not true.

18 Plaintiff also testified that later fell at home.¹⁸ She explained that her injured knee gave
19 out and led her to seek a prescription for a walking aid, eventually selecting a walker. She did not
20

21 ¹⁷ Defendant argues in various places in the instant motion that the testimony of Drs. Dunn and
22 Tingey regarding causation is, essentially, *per se* unreliable because they rely on Plaintiff's
23 subjective complaints. Under Defendant's approach, however, potentially no treating physician
24 or retained medical expert could testify as to causation because they all rely, to some degree or
25 another, on what they are told by their patients. In fact, under Defendant's approach, every case
26 in which injuries are caused by a trauma and clinical findings show only degenerative changes,
27 no doctor could testify as to causation. Yet this is inconsistent with well-accepted medical
28 science that degenerative changes can remain asymptomatic unless and until the body
experiences an acute trauma. Undoubtedly, there are cases where the facts are so out of line with
what patients reported, that a doctor's testimony loses usefulness. However, no such facts exist
in this case. Moreover, to the extent they did, the jury had a chance to weigh the doctors'
credibility in arriving at its decision.

¹⁸ See transcript from day 4, pp. 75:9-15, 145-143 attached hereto as **Exhibit 2**.

1 testify that it increased her pain or changed her symptomology. Moreover, Defendant did not
2 seek to introduce any medical record to suggest that it did, including any consult with her
3 physician for a prescription for a walking aid. In fact, Plaintiff has maintained that her knee has
4 been hurt since she slipped and fall on the hard marble in Defendant's atrium. The jury believed
5 her accounting of the slip and fall at Wynn and when her injured knee gave out at home. For
6 reasons stated below, comparing this situation to those in the cases Defendant cited makes a
7 mountain from a mole hill and should be rejected by this Court.

8 For example, in Perkins v. United States, the district court held a physician's testimony
9 about causation was not reliable because the doctor either categorically dismissed or ignored
10 evidence of pre-existing conditions. 626 F. Supp. 2d 587, 594 (2009). There the doctor did not
11 consider, or summarily rejected, alternative theories of causation choosing instead the cause
12 proffered by the plaintiff, a recent motor vehicle accident. Id. However, the court observed that
13 the doctor was not informed of several previous serious injury-causing events including prior
14 motor vehicle accidents, a fall from a ramp resulting in a knee and back injury, a fall at work
15 injuring head and back, injury from picking up a heavy bag, and a trip to the emergency room
16 one month prior to the accident at issue in the case. Id. at 593.

17 The situation here is dramatically different. Both Drs. Dunn and Tingey knew of
18 Plaintiff's reported conditions including Marfan's Syndrome and Fibromyalgia. Though they did
19 not know of the 1989 injury or a later fall at home when Plaintiff's knee gave out, these events
20 are not significant as detailed above. Considering relevant aspects of her reported medical
21 history, the doctors arrived at conclusions about causation of Plaintiff's injuries. There is no
22 evidence to suggest that Drs. Dunn and Tingey were unaware of, or did not consider, relevant
23 parts of Plaintiff's medical history in coming to their opinions as to causation.

24 Hare v. Opryland Hospitality is also inapplicable here. 2010 U.S. Dist. LEXIS 97777,
25 2010 WL 3719915 (D. Md. Sept. 17, 2010). In Hare, the plaintiff alleged his face was cut by a
26 broken alcohol bottle during a melee with nightclub staff. Id. The plaintiff in Hare was
27 attempting to use his treating physician's testimony to prove that it was a bottle that cut him, an
28 issue at great dispute, as opposed to a fall to the ground or some other mechanism of injury. Id.

1 The issue was not whether the plaintiff was cut, rather it was what cut the plaintiff. The judge
2 found the doctor's testimony as to causation unreliable because the doctor relied on the
3 plaintiff's telling of the story and had no evidence to show that the cut came from glass, rather
4 than some other sharp object. Id.

5 Again, the situation here is dramatically different. Plaintiff's calling of her treating
6 physicians is to show that the slip and fall caused her injuries, not what substance caused the slip
7 and fall. Here, the fact that she slipped on a liquid and fell is not in real dispute, it is whether the
8 fall caused the injuries Drs. Dunn and Tingey diagnosed.

9 Finally, Goomar v. Centennial Life Ins. Co., is also inapplicable. 855 F. Supp. 319 (S.D.
10 Cal. March 8, 1994). In Goomar, the plaintiff had molested four female patients in his medical
11 practice. Id. He claimed total disability caused the molestations and that the resulting harm to his
12 practice ought to be covered by certain insurance policies he maintained. Id. The court held that
13 two physician's diagnoses of a psychotic episode were unreliable because they were arrived at
14 some 14 years later based on the patient's self-report and no other medical or psychiatric
15 information. Id.

16 Once again, diagnosis of a psychotic condition 14 years later is a far cry from treating a
17 patient with objectively verifiable injuries as Drs. Dunn and Tingey did here.

18 **C. Defendant's apportionment argument is incorrect as a matter of law and has**
19 **already been rejected by this Court**

20 Defendant's apportionment argument fails because there were no injuries with which
21 apportionment was required. Apportionment requires some documented pre- or post-incident
22 injury. See Kleitz v. Raskin, 103 Nev. 325, 326-327 (1987). Once a plaintiff shows that a
23 tortfeasor's breach was the cause of her injuries, the burden shifts to the Defendant to apportion.
24 Id. at 627. If the tortfeasor is not able to apportion, it is jointly and severally liable. Id.

25 Defendant points to a 1989 injury and a "fall" in which Plaintiff's knee gave out some
26 time after she fell and was injured at Defendant's hotel. At trial, Plaintiff testified that the 1989
27 injury had resolved itself long ago. This is corroborated by the lack of evidence in the medical
28 record of ongoing treatment or complaints of injury. Defendant has failed to provide any

1 evidence to the contrary. Accordingly, the evidence shows that injuries Plaintiff suffered in 1989
2 were not a condition affecting Plaintiff at the time she fell and was injured at the Wynn.

3 Plaintiff also testified that her knee gave out after she was injured at the Wynn. It was this
4 event that precipitated Plaintiff to seek a walker to help her stabilize herself while walking.
5 Plaintiff testified that her knee was already in significant pain and that she believed it gave out
6 because of the injuries she suffered when she fell at Defendant's hotel. This is consistent with
7 her complaints of knee pain dating back to her initial medical care following her injury at
8 Defendant's hotel. It is also consistent with the sudden and intense nature of her fall and injury at
9 Wynn as compared to her knee giving out at home. Defendant has failed to provide an alternate
10 explanation or evidence which contradicts this. Accordingly, there is no reason to apportion
11 injuries in this case.

12 Without any injury to apportion with, the testimony from Drs. Dunn and Tingey was
13 proper and the jury properly attributed Plaintiff's injuries to her slip and fall at Defendant's hotel.

14 **D. Plaintiff produced ample evidence to support her request for future pain and**
15 **suffering**

16 Nevada law on pain and suffering provides that it is "wholly subjective" and "peculiarly
17 within the province of the jury." Stackiewicz v. Nissan Motor Corp., 100 Nev. 442, 454-455
18 (1984). This is reflected in the jury instruction agreed to by Defendant, i.e., Personal Injury
19 Damages Instruction 5PID.2, which states

20 No definite standard or method of calculation is prescribed by law by
21 which to fix reasonable compensation for pain and suffering. Nor is the
22 opinion of any witness required as to the amount of such reasonable
23 compensation. In making an award for pain and suffering, you shall
24 exercise your authority with calm and reasonable judgment and the
25 damages you fix shall be just and reasonable in light of the evidence.

26 Instead of pointing to controlling Nevada law, Defendant cites a California case that pain
27 and suffering must be "established with reasonable certainty." Miller v. Rykoff-Sexton, Inc., 845
28 F.2d 209, 214 (9th Cir. 1988). This case cited California Civil Code § 3283 that "Damages may
be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or

1 certain to result in the future.” This flatly conflicts with Nevada law that pain and suffering
2 damages are subjective.

3 Plaintiff has provided ample evidence that she was and is in pain because of the fall,
4 corroborated by objective medical evidence, including, but not limited to the testimony from Drs.
5 Dunn and Tingey regarding diagnostic imaging that showed injury. Accordingly, the jury’s
6 decision to award future pain and suffering is supported by both subjective and objective
7 evidence.

8 **E. Questions regarding video evidence was proper**

9 Plaintiff properly questioned employees of Defendant about video surveillance of the slip
10 and fall and whether they knew when the area was last inspected. These questions were proper
11 and Defendant has not cited any particular one that was not. Moreover, Defendant has not cited
12 any objection it made at trial regarding these questions.

13 Plaintiff’s closing statement that Defendant controls evidence was factually accurate and
14 proper argument. Defendant does not dispute this. Instead, Defendant claims the statements
15 prejudiced Defendant because it suggested Defendant did something inappropriate. However, the
16 comments and questions were appropriate as they asked whether relevant evidence existed.
17 Moreover upon questioning at trial, it was uncovered at trial that Defendant had failed to produce
18 all relevant evidence during discovery; as the claims file was never identified or produced;
19 despite the fact it was requested during the discovery process.

20 Defendant’s employees testified that Defendant has video cameras in and around the area
21 where Plaintiff fell. These questions and answers regarding the same were in no way prejudicial.
22 A reasonable person could conclude that Defendant could, or should, have done further research
23 into the coverage of the incident due to the fact Defendants own employees testified that they
24 could track individuals in the casino as long as they had a photograph of the individual. In this
25 case, Defendant produced a photograph of Plaintiff from her player’s card. Therefore, there is an
26 inference that Defendant was fully capable of locating Plaintiff on the surveillance cameras for
27 any of the over 4 hours she was in the casino on the date of the incident. In other words, it would
28 have been proper for the jury to consider whether the defendant’s failure to know when the area

1 was last inspected, and when it was cleaned after the fall, was credible considering the presence
2 of multiple cameras in the atrium area and around the casino. Consideration of these facts could
3 reasonably be informed by the jury's assessment of the truthfulness of testimony. Thus, because
4 no video was produced and Defendant claimed it did not know this information, it was up to the
5 jury to decide if these witnesses were to be believed. The jury was free to believe the witnesses
6 and, in fact, there is no evidence they did not. Indeed, a reasonable person could believe all the
7 testimony that was provided at trial and still conclude that Defendant was negligent and that
8 Plaintiff was injured thereby.

9 Accordingly, the questions and statements were proper, and consideration of the lack of
10 video evidence was a proper thing for the jury to consider.

11 **F. This Court admonished the jury to disregard the community conscience comment**

12 Plaintiff's counsel was not the first to use "conscience of the community" in relation to a
13 negligence case. The Nevada Supreme Court also used the phrase stating that a jury in a
14 negligence case was "acting as the conscience of the community" when it award compensatory
15 damages. El Dorado Hotel v. Brown, 100 Nev. 622, 629 (1984) (questioned on other grounds).
16 The objectionable nature of "conscience of the community" comments arises when counsel asks
17 the jury to "punish" the defendant. See, e.g., Florida Crushed Stone Co. v. Johnson, 546 So.2d
18 1102, 1104 (1989). That is, to the extent the jury is determining what a reasonable and prudent
19 person would do, it acts as the conscience of the community by setting a standard of appropriate
20 behavior. Here, Plaintiff's counsel did not ask the jury to punish Defendant and its "conscience
21 of the community" comment was proper.

22 Even when a "conscience of the community" comment is improper, it can be corrected by
23 an admonishment to the jury. See, Haberstroh v. State, 105 Nev. 739, 742 (1989) (noting, in a
24 murder trial, that the "court's admonition that the jury disregard the statement cured any possible
25 prejudice). Here, this Court sustained Defendant's objection and admonished the jury to
26 disregard the comment. Accordingly there is no showing that Defendant suffered impairment of
27 its substantial rights.

28 ///

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1 **IV. CONCLUSION**

2 Based on the foregoing, Plaintiff respectfully requests Defendant's Motion be denied in
3 its entirety.

4 DATED this 19th day of January, 2016.

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CERTIFICATE OF SERVICE

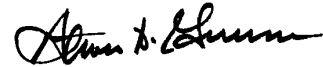
Pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26, I certify that on this 19 day of January, 2016, I served the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND MOTION FOR NEW TRIAL** to the following party by electronic transmission through the Wiznet system:

Lawrence J. Semenza, III, P.C.

Contact	Email
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Olivia Kelly	oak@semenzalaw.com


An Employee of the NETTLES LAW FIRM

Exhibit “1”



CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

YVONNE O'CONNELL,	.	CASE NO. A-12-655992-C
	.	
Plaintiff,	.	DEPT. V
	.	
vs.	.	
	.	
WYNN RESORTS LIMITED, et al.,	.	TRANSCRIPT OF
	.	PROCEEDINGS
	.	
Defendants.	.	
.	

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

JURY TRIAL - DAY 3

MONDAY, NOVEMBER 9, 2015

APPEARANCES:

FOR THE PLAINTIFF:	CHRISTIAN M. MORRIS, ESQ. EDWARD J. WYNDER, ESQ.
FOR THE DEFENDANTS:	LAWRENCE J. SEMENZA, III. ESQ. CHRISTOPHER D. KIRCHER, ESQ.

ALSO PRESENT:

Renee Ocougne de Gascon
Spanish Interpreter

COURT RECORDER:

LARA CORCORAN
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC
Englewood, CO 80110
(303) 798-0890

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produced by transcription service.

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WITNESSES

<u>NAME</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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PLAINTIFF'S WITNESSES:

Yanet Elias	58*	73	76	81
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Dr. Thomas Dunn (<i>Voir Dire by Mr. Semenza</i>)	84**			
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****Testimony with Spanish Interpreter***

*****Testimony outside the presence of the jury***

EXHIBITS

<u>DESCRIPTION</u>	<u>ADMITTED</u>
--------------------	-----------------

(No exhibits admitted)

1 LAS VEGAS, NEVADA, MONDAY, NOVEMBER 9, 2015, 1:33 P.M.

2 (In the presence of the jury)

3 THE MARSHAL: Jury's all accounted for, Your Honor.

4 THE COURT: Thank you. Please be seated. All
5 right. Good afternoon. And this is the continuation of case
6 number A-12-655992, Yvonne O'Connell vs. Wynn Resorts Limited.

7 And the record will reflect the presence of the
8 parties with their respective counsel, all officers of the
9 court are present, and the individuals who were selected as
10 jurors and alternate jurors last week during jury selection
11 are present, and we are now going to swear them in as jurors
12 and alternate jurors.

13 THE CLERK: Could everyone rise, except the two
14 alternates, and raise your right hand?

15 JURORS SWORN

16 THE CLERK: You may be seated. Would the
17 alternates please rise and raise your right hand?

18 ALTERNATE JURORS SWORN

19 THE CLERK: Please be seated.

20 THE COURT: Thank you. All right. All right,
21 ladies and gentlemen, I'm going to now give you a few pre
22 instructions just to let you know kind of how the case is
23 going to flow and what to expect as we proceed through the
24 week. So, you know, this is just an informal briefing to you,
25 and you're going to get at the end of the trial very specific

1 instructions as to the law in this matter. And those will be
2 in writing, and I will read those to you, so those
3 instructions will come at the end, and these are just some
4 things to let you know what to expect.

5 Now, this is a civil trial, of course, and it is the
6 plaintiff's burden of proof in a civil trial to prove their
7 case by a preponderance of the evidence, which basically means
8 that it's more likely than not that their case is as they
9 claim it to be.

10 Now, the way cases get started in a civil matter is
11 that a plaintiff files a Complaint, and the defense -- that
12 Complaint states what their claims are against the other side.
13 The defense reads that and files an Answer either admitting,
14 denying, or saying that they're denying because they don't
15 have enough information to form a belief as to the truth of
16 the allegations in the Complaint. Those are the documents
17 that start the case.

18 Now, during the trial, I wanted to admonish you from
19 the outset here that no juror may declare to a fellow juror
20 any fact relating to this case of that juror's own knowledge.
21 So, if any juror discovers during the trial or after the jury
22 has retired that that juror or any other juror has personal
23 knowledge of any fact or controversy in the case, then you
24 shall disclose that situation to me in the absence of the
25 other jurors.

1 So, what does that mean? Because that's a statutory
2 requirement that I admonish you. It means that if you learn
3 during the course of the trial that you're acquainted with the
4 facts of the case or the witnesses in the case -- and we had
5 previously asked you that, and you thought you weren't, but
6 sometimes, additional information comes up and you discover
7 something like that, and you hadn't previously told us about
8 it, then you need to let me know. You always do that by
9 letting the marshal know.

10 And then we would bring you, if you were the juror
11 in question, in, outside the presence of the other jurors to
12 make a determination, and that would be with the lawyers
13 present and the Court, to make a determination as to whether
14 you could continue to serve as a juror or not. This doesn't
15 happen often, it's just occasionally, but if it does, you need
16 to know what to do.

17 The other thing that might happen is if you're
18 deliberating and another juror has violated the Court's
19 previous orders that you're not to investigate or do anything
20 on your own -- this has happened in the past where a juror has
21 violated such a court order and then tries to tell all the
22 other jurors about it during deliberation.

23 If that should happen, then your responsibility as
24 jurors is to say, nope, stop, do not say another word, and to
25 immediately summon the marshal, who will be sitting outside

1 the door, guarding your deliberations, and let them know that
2 you -- that -- you know, if it's -- if it's a person that is
3 trying to do this, then it would be the foreperson, generally,
4 who would bring this to my attention. But again, it would be
5 something where we would bring the foreperson in if it was
6 another juror other than the foreperson that was doing this,
7 and find out what the circumstances were, and see what extent
8 there had been prejudice, if any, okay?

9 So, if something like that happens, you know what to
10 do. You contact the marshal, and the marshal will bring it to
11 my attention, I notify the lawyers of this, and we all are
12 present to figure out what happens next. All right.

13 I think I've told you before that during the course
14 of the trial, your contact with the Court is through the
15 marshal. Now, does that mean you can discuss the case with
16 the marshal? Absolutely not. You can discuss things with the
17 marshal like, during deliberations, you've run out of coffee
18 and you need to make another pot. And so, if you don't have
19 the ability, you know, or materials to do that, you let the
20 marshal know.

21 You know -- you know, if you've got some personal
22 issue or something that you think you're going to be late for,
23 you know, court, or something where you need to let the
24 marshal know, because he's going to need to bring that to my
25 attention, and I, in turn, the lawyers. That is something you

1 can talk to the marshal about.

2 You may never talk to the marshal about the case,
3 ask the marshal his opinion about the case, nothing about the
4 case. The marshal is more your contact for making sure your
5 stay in the courthouse runs smoothly, that your parking is
6 covered, and that, you know, the temperature of the room --
7 you can complain to him about the temperature of the room.
8 Sadly, I can't really do anything about that. The -- what
9 appear to be thermostats on the wall don't appear to be
10 connected to anything.

11 So, maybe there is someone who controls the
12 temperature in the building, but I don't know who that person
13 is. So, basically, layered -- the layered approach is the
14 best. Then you can -- if you're too warm, you can take your
15 jacket off, but if you're too cold, you can put it back on.
16 And it's oftentimes chilly in the courtroom, but you never
17 know. It's like that -- doesn't matter what the season
18 outside is, the courthouse is usually cold, except when it's
19 hot. So, again, I will do my best to keep you comfortable,
20 but some things are kind of outside my control.

21 Now -- and I think I told you last week, but I'll
22 just remind you again that if you pass any of the lawyers or
23 court personnel outside in the halls, please don't try and
24 engage them in conversation so they don't feel bad about
25 having to be rude and not responding to you. They're not

1 allowed to contact you at all outside the courtroom.

2 Even in the courtroom, they have to be very careful
3 about how they interact with the jury, because, otherwise, it
4 is -- can be seen as improper contact with the jury, trying to
5 curry favor with the jury, whereas their presentations are
6 supposed to be based on the evidence. And so, don't try and
7 have any contact with them outside in the halls if you should
8 pass them, because it will just make them feel bad.

9 Now, also, if you do while you're out in the halls
10 see a witness that's outside -- I mean, we don't have holding
11 areas for witnesses and holding areas for the jury. So, if
12 you see somebody that you think was a witness because maybe
13 their testimony had started, and then we took a break, stay
14 away from that person if that -- just, you know, if you see
15 them and they're talking to somebody, you don't want to
16 overhear anything they're saying, so just go to the other end
17 of the hall and try and keep from tainting what your
18 deliberations will be based upon, which they will be based
19 upon what you hear and see in this courtroom.

20 So, witnesses on the stand who will be under oath
21 testifying from the witness stand in this courtroom, and any
22 evidence that is admitted by the Court here at the time court
23 is in session.

24 Okay. Now, I told you last week, don't visit the
25 scene. That remains. Don't try and visit the scene or do any

1 research.

2 Now, during the trial, a lawyer may object, and of
3 course, that's their job, is when a lawyer voices an objection
4 to evidence in the trial, it's because -- they're doing that
5 for a reason; because they believe it violates the piece of
6 evidence, or the question asked violates the rules or the law,
7 and so it's their obligation to make an objection. In fact,
8 if they don't make an objection, it's not preserved, and so
9 they have to do that. So, you should not hold it against a
10 lawyer because an objection is made.

11 Now, if I sustain an objection, that means then --
12 to a question, for instance, then that means that you must
13 disregard that question as if it hadn't been asked. Don't try
14 and figure out or guess what the answer might have been to a
15 question. Questions aren't evidence; questions only are --
16 give meaning to an answer.

17 And so, if I sustain an objection, that the question
18 can't be asked, then you should completely disregard that,
19 because that's what that means; the evidence can't be
20 received. Same would be if evidence is offered, a piece of
21 evidence, physical evidence, a document, and there's an
22 objection which I sustain, the evidence can't come in.

23 And occasionally, I might tell you that I'm striking
24 some kind of evidence and you should disregard it. So, if I
25 do that, and you've been taking notes of that -- that

1 evidence, strike through that in your notes so you know later
2 when you go back you're not to consider that, because you've
3 been told you have to disregard that. If I overrule an
4 objection, then that means the question can be asked, the
5 answer can be had, or the evidence could be received.

6 Okay. So, if at any time you can't hear what the
7 witness is testifying to, then please raise your hand and say,
8 I can't hear, and don't be shy about it. It's really
9 important. You are the fact-finders in this trial, and you're
10 the ones who will decide what the facts are, and then use
11 those facts, apply them to the law, and by that method, come
12 up with a verdict in the case.

13 So, since you're the fact-finders, you need to hear
14 everything. So, if you can't hear either the question, if the
15 lawyer's voice is too low or what have you, and you can't hear
16 -- or a witness, then you need to bring that to the Court's
17 attention. Because sometimes I think I can hear it, and I'm
18 assuming you can hear it, and maybe you can't. Other times,
19 sometimes, I can tell, but if I don't, then you need to be
20 affirmative about saying that you couldn't hear, and we'll
21 have that question re-asked.

22 As I said, you're allowed to take notes in this
23 matter, and that's what the pads are for. So, all I can say
24 about that is don't let the note-taking distract you from
25 listening, because sometimes when we take notes and we are so

1 involved in making our note, we stop listening, and then the
2 problem is you're taking this note about something that
3 happened six questions ago, and you've missed all of the
4 questions and answers after that. So, don't let note-taking
5 distract you from your listening. Try and keep your note-
6 keeping, you know, to a minimum so that it doesn't distract
7 you from listening.

8 As well, you'll be given the opportunity to ask
9 questions of the witnesses after the lawyers have asked
10 questions. You don't get to just ask them questions and
11 practice your -- you know, being a lawyer. You have to write
12 your questions out in writing and submit them. They'll be
13 brought to the bench by the marshal, the lawyers and I will
14 confer and determine whether the question may be asked,
15 whether it's a proper question under the rules of evidence and
16 whatnot.

17 Sometimes the question has to be rephrased because
18 it's -- it's not articulated in a proper manner or what have
19 you. I may rephrase it if it doesn't -- you know, it can't be
20 just read. At any rate, the method of doing it is writing the
21 question. So, again though, don't let your -- don't let
22 yourself get preoccupied by writing out the question so that
23 then you're not listening to the other testimony, because
24 while you're writing out this question, what you may find is
25 the question has already been asked and answered, and if it

1 has been, I'm not going to re-ask the question, so don't do
2 that.

3 That has happened in the past where jurors decide
4 that they want to ask all the questions, and they're so busy
5 writing their question out that they don't listen to what all
6 the examination by the lawyers is, and they don't hear the
7 question -- the very question that they want asked that got
8 asked.

9 So, the method we'll use is, at the end of the
10 questioning -- so, you know, if you have a question, just
11 write a bare minimum about what you want your question. Then
12 I'll give you the opportunity to write the question down in a
13 manner that is legible and can be given to me, and then we'll
14 discuss it, and it will be dealt with in that fashion. So,
15 don't feel that you won't have adequate time.

16 Also, please remind me -- sometimes, you know, if
17 you want a question -- if you have a question and I -- we
18 finish, and I start saying, well, may this witness be excused,
19 and I haven't asked you affirmatively, say, I have a question
20 to remind me, because sometimes, we're moving along and we're
21 moving through the witnesses, I forget that the jury hasn't
22 had their opportunity, and that's because this questioning
23 thing by juries is relatively new in the scheme of my law
24 practice, which goes back 40 years.

25 So, okay, let's see. Now, the trial's going to

1 proceed in the following order. The -- first, the plaintiff
2 has the opportunity to make an opening statement. And the
3 purpose of an opening statement is to give you an overview of
4 what they expect to show through their witnesses during the
5 trial. It's not a closing argument. They're not going to be
6 arguing their case to you. And if they start arguing their
7 case to you, if either side does that in opening statements,
8 I will say, counsel, this is not argument.

9 So, but the purpose of it is this. You know, when
10 witnesses come in and testify, they're like pieces in a jigsaw
11 puzzle, so you have to take each of those pieces and see the
12 big picture. So, the purpose of an opening statement is to
13 kind of give you what the big picture is first so you know
14 where all of these pieces of evidence fits in to form that big
15 picture that they believe their case will show. So, that's
16 the purpose of an opening statement, and each side gets the
17 opportunity.

18 The plaintiff gets to go first. The defense may, if
19 they wish to, immediately follow the plaintiff's opening
20 statement with the defense opening statement, but they don't
21 have to make that opening statement immediately. They can
22 reserve it for the close -- after the close of the plaintiff's
23 case and before they begin their case. So, it's their option,
24 and the lawyer makes that decision at the relevant time
25 period.

1 So, now, after opening statements or statement are
2 concluded, then the plaintiff may call witnesses and put on
3 evidence for their case-in-chief, and so witnesses are called.
4 The plaintiff gets to go first with their witness -- their
5 witness. They ask questions first of the witness. Then the
6 defense may cross-examine those witnesses.

7 After the plaintiff's case has been put on, and the
8 plaintiff's case has rested, then the defense may then put on
9 a case if they wish to. It's of course the plaintiff's burden
10 of proof to prove their case, so the defense doesn't have to
11 put on a case, but generally does, and they proceed the same
12 way. They may call witnesses. If they call witnesses, then
13 the plaintiff may cross-examine those witnesses.

14 Close of the defense case. If it's appropriate, the
15 plaintiff might have a rebuttal case, and we won't know that
16 until the time comes. At the close of all of the evidence,
17 then you will be instructed on the law, and then you will hear
18 closing arguments from the lawyers.

19 Now, the trial, of course, is recorded. You won't
20 have the opportunity to get a transcription of the trial, so
21 it's really important to listen and pay attention. You have
22 the ability to take notes, as everyone will. And you'll be
23 able to share during your deliberations your thoughts and your
24 notes, but don't be overly swayed by notes of another juror.
25 Remember, you know, you should mainly rely on your

1 recollection of what occurred, and the notes are only to
2 enhance your recollection.

3 Occasionally, I might find it necessary to admonish
4 a lawyer to remind them about the rules of evidence, or the
5 rules of, you know, when they're examining a witness, or
6 whatever it is about, you know. But if I do that, it's for a
7 reason; to make sure that the trial is being handled in a fair
8 and impartial manner, and that they're following the rules.
9 So, you're not to hold that against a client just because of
10 -- either side, just because I've had to admonish a lawyer.
11 It happens, and it's kind of routine, so don't worry about
12 that.

13 All right. So, there are two types of evidence in a
14 trial; direct evidence and circumstantial evidence. So,
15 direct evidence is testimony by a witness on the stand that is
16 about something that they personally saw, or heard, or did, or
17 otherwise sensed, smelled even. And circumstantial evidence
18 is proof of a chain of facts from which you could infer
19 another fact.

20 You probably over the years have heard on television
21 or the movies, well, it was just a circumstantial case, or it
22 was only circumstantial evidence. Well, that -- that implies
23 that circumstantial evidence isn't good evidence, and in fact,
24 it is. The law recognizes both kinds of evidence in the same
25 way, circumstantial evidence and direct evidence.

1 So, let me give you an example of circumstantial
2 evidence as opposed to direct evidence. So, say you walked
3 out of your house this morning and you saw -- as you stepped
4 out, you know, you opened your door and you stepped out on the
5 porch, you saw that there was water dripping from the eaves of
6 your house. And as you looked out, you saw water running down
7 the gutters in the street. And you looked, and as far as you
8 could see, the streets appeared to be wet, and you looked the
9 other way, and the streets appeared to be wet and smelled like
10 rain.

11 Well, that's circumstantial evidence that it may
12 have rained during the night. You didn't see it yourself, so
13 you're taking these other facts that you did see, and you're
14 deducing. You're inferring from those facts a logical fact to
15 be drawn from that. That's circumstantial evidence.

16 Direct evidence would be, say you were awakened
17 during the night, and you thought you heard something, so you
18 opened the door and looked out, and looked up at the sky, and
19 you saw there were clouds in the sky and there was water
20 falling from the sky, and it fell on your face and/or on your
21 hands, and you saw that it was water, and you know from your
22 own experience living in this world that it was raining.
23 That's direct evidence that it was raining.

24 And that's the difference between circumstantial and
25 direct evidence. But as I say, the law gives equal weight to

1 both kinds of evidence, but as to any kind of evidence, you
2 are the ones who decide how much weight or importance to give
3 to any piece of evidence.

4 Now, there are some times that, you know, people may
5 forget things. And you -- so, when you're deciding whether or
6 not to believe a person's testimony, because you can make your
7 decision about whether to believe a person's testimony based
8 on all kinds of things; their demeanor on the stand, whether
9 they have a motive to fabricate, whether they said or did
10 anything before the trial that is contrary to what they're
11 saying while they're testifying, all these things that you can
12 assess in determining whether a witness is telling the truth
13 or not.

14 And you can believe everything a witness says, none
15 of what a witness says, or some of what a witness says. If
16 you think, well, this was proved by other evidence, it
17 corroborates what the witness said, you can choose any of
18 those options.

19 But if you're trying to decide whether or not
20 someone's telling the truth about a particular thing, then you
21 need to remember that sometimes people do forget things, and
22 that you should concentrate on thinking, well, is this an
23 important fact that someone should have remembered, and
24 therefore, if they're testifying contrary to what they said
25 before, it's likely that they were being untruthful, or is it

1 just a trivial matter that isn't of any consequence? And so,
2 again, it's always your decision as to how much weight you
3 give to any testimony as to whether you believe it or
4 disbelieve it.

5 I talked to you about not talking about the case,
6 and that remains throughout the trial. Also, don't make up
7 your mind about the verdict until you've heard all the
8 evidence. It's really important throughout the trial that you
9 keep an open mind, because you hear an opening statement, you
10 hear then some witnesses, and you start formulating opinions.
11 It's just natural, but don't -- don't close your mind.

12 Keep an open mind, knowing that you need to hear
13 everything before you make a decision, because you're going to
14 have that opportunity, and then you're going to have the
15 opportunity to deliberate with your fellow jurors and come up
16 with a decision. So, you should never make up your mind until
17 you've -- you have heard everything and you've had that
18 opportunity.

19 And again, please pay close attention, because
20 although we do have the ability to play back testimony, it is
21 time-consuming to do that, and if it's not necessary then --
22 because you're listening, that's the better way than to have
23 to replay lengthy testimony on our video and audio recording
24 system.

25 All right. So -- all right. Having given you those

1 preliminary instructions, we'll ask the plaintiff if they're
2 ready to deliver opening statement.

3 MS. MORRIS: Yes. Thank you.

4 THE COURT: All right. You may proceed.

5 MS. MORRIS: Is the microphone working? Thanks.
6 Good afternoon. Let's see if I can get this to work.

7 PLAINTIFF'S OPENING STATEMENT

8 MS. MORRIS: Wynn Las Vegas. You're going to learn
9 that Yvonne O'Connell used to love to go to Wynn Las Vegas.
10 She had been going there since it opened back in 2005. She's
11 going to tell you that she loved that casino. In fact, aside
12 from the Rampart Casino, it was her favorite casino to go to.
13 She loved that it was a luxurious property, that it was high
14 tech, state-of-the-art. She loved the name brand luxury
15 stores.

16 You're going to learn that she had a red card, a
17 player's card there, and because she was -- she had a player's
18 card, she got promotions from there. She would get free
19 buffets, she would get free slot play, and she would get
20 invited to play in their poker tournaments. You're going to
21 learn that, before February 8th, 2010, Yvonne O'Connell liked
22 the Wynn and never had any problems.

23 Now, back in February 2008, in the atrium area,
24 which is in the south entrance of the Wynn Casino, they were
25 celebrating the Chinese New Year. You can see the decorations

1 that are in this picture. Now, these photographs were taken
2 by security. You're going to hear from an Officer Corey
3 Prowell, and he took this photograph after Yvonne fell in the
4 area, showing where she fell, which I'll get you closer
5 photographs, but it's right here in this area.

6 Now, also on February 8th, 2010, aside from these
7 decorations, and before this photograph was taken, you're
8 going to learn that there was approximately a seven-foot spill
9 of a green liquid, and the evidence is going to show that that
10 liquid had been there long enough that three feet of it,
11 approximately that, had started to dry and had accumulated
12 footprints. You're also going to learn that above the area
13 where Yvonne fell were security cameras.

14 Now, also at the Wynn on February 8th, 2010 was
15 Yvonne. She had gone there to meet her cousins who were in
16 town visiting from California, and she had gone and eaten at
17 the buffet with them. Now, back in 2010, Yvonne had a
18 boyfriend named Sal, and at the time, Sal was out of town; he
19 got on a cruise.

20 And so, Yvonne will tell you that on February 8th,
21 her plan was to eat at the buffet with her cousins, and then
22 she was going to walk the Strip. She was doing that so she
23 could get exercise, she liked to sight see, look through the
24 shops, and then she was going to come back and gamble a little
25 at the Wynn. She'll tell you she plays video poker; the card

1 poker.

2 Now, this is a closer photograph of the area where
3 Yvonne fell, and she is going to show you that right in this
4 area was where the green liquid was, and this area over here
5 to the left was where the dried part of it was. And Yvonne's
6 going to tell you that after she left the buffet, she went and
7 got her coat and was headed to walk the Strip, but like she
8 usually does, she went to the atrium area because she liked to
9 see what the decorations were, and take a look, and see if the
10 displays had changed.

11 And she was walking down through the right side of
12 the atrium, and she slipped in the green liquid and landed on
13 her right side, right here on this marble curve. And so, she
14 was halfway in the garden area, and halfway on the marble
15 floor.

16 Now, these are guest reports that were created as a
17 result of her fall. It's -- this is a guest accident or
18 illness report. It was filled out by Corey Prowell because
19 Yvonne will tell you she was unable to write due to the
20 injuries she had to her arm, and so he filled it out for her.

21 MR. SEMENZA: Your Honor, I'm going to object. May
22 we approach for a moment?

23 THE COURT: Yes.

24 (Off-record bench conference)

25 THE COURT: Okay, proceed.

1 MS. MORRIS: Thank you. So, Corey filled this out
2 for Yvonne, showing that February 8th, 2010 at approximately
3 2:00 o'clock was when the incident happened.

4 Now, questions which were listed on the Incident
5 Report were what, if any, alcoholic beverages have you had to
6 drink, and which the response is, no. Did you examine the
7 premises of the area of your accident, in which she said, yes.
8 If yes, what did you find to be the contributing factor of
9 your accident, in which he wrote down for her, lots of green
10 liquid. Whom do you consider to be at blame for the accident,
11 and which she writes, the green liquid. And down here, what
12 if any injuries did you sustain, and she put right shoulder,
13 right ankle, and buttocks.

14 Now, you're also going to see this report, which was
15 written by a Terry Ruby, and Terry Ruby wrote, "I was
16 vacuuming the pathway carpet, going past Blush toward the
17 south entrance. When I was approaching the south entrance, I
18 noticed a group of people, approximately four, helping a guest
19 up that had fallen in the plants. I went to see if she was
20 okay, and she asked me to call for help. I called dispatch,
21 who then notified security. I" -- it's hard to read, but I --
22 "I informed our guest that someone would come and take a
23 report. I apologized to our guest for her mishap, and when my
24 supervisor arrived, I went back to work."

25 You're also going to hear from and you're going to

1 see the report of Yanet Elias. And at the time back in 2010,
2 Yanet Elias was an assistant manager in the public areas
3 department. And Yanet's going to tell you that she got a call
4 at approximately 2:30 on Monday, February 8th, and she
5 received a call from one public area employee "to let me know
6 that a lady fell into the south entrance between Cartier and
7 Chanel store. I go to see what happened, and I see a lady
8 stand up close to the garden area, and an employee cover a
9 spill with a sweeper machine."

10 Now, you're also going to hear from Officer Prowell.
11 He is the security officer who responded. And here is a
12 portion of his report. I've just given you the whole report,
13 and then this is a closer up version so we can read it. It
14 says, "On February 8th, 2010 at approximately 14:35," 2:35,
15 "I, Security Officer Prowell, an employee, responded to the
16 front atrium adjacent to Dior in regards to a guest injury.
17 Upon arrival, I met with public area manager Yanet Elias, who
18 was assisting non-guest Yvonne O'Connell." The category is
19 guest injury; the type of injury is medical.

20 This is another portion of his report. "Ms.
21 O'Connell stated, while rounding the corner of the front
22 atrium, she slipped and fell into the indoor landscaping.
23 After she recovered, she noticed a large liquid substance on
24 the floor, appearing to be green in color. Ms. O'Connell
25 stated she had moderate to severe pain in her right shoulder,

1 right ankle, and right buttocks. I was unable to observe Ms.
2 O'Connell's injury due to restrictive clothing; however, I
3 noticed Ms. O'Connell appeared to have limited mobility in her
4 right arm."

5 He also wrote, "I spoke with Manager Elias, who
6 stated, upon her arrival, she noticed the liquid substance on
7 the floor. She immediately assigned attendant to clean up the
8 area in order to prevent further incidents of the area --
9 incidents. The area was cleaned by attendant Terry Ruby.
10 Upon my observation of the scene after it was cleaned, I
11 noticed no unsafe conditions. Pictures attached."

12 And those are the pictures that I've shown you. The
13 pictures that Corey Prowell took are of the floor after it had
14 been cleaned, and after that, he observed no unsafe condition.

15 He also took photographs of Yvonne's shoes that she
16 had on that day. So, here are a couple of photographs of her
17 shoes. Here's one a little bit closer up. You're going to
18 learn that Corey took those after he sat down and took the
19 report from Yvonne.

20 Now, the atrium area by the south entrance is
21 inspected and cleaned by a porter. And you're going to learn
22 from Wynn that that porter is responsible for making sure that
23 the marble floor in that area is clean and safe from debris.
24 But that porter isn't assigned just to the atrium area. That
25 porter is assigned from the north entrance of Wynn where the

1 Ferrari dealership is, all the way down through the Parasol
2 Bar, which is the circular bar in the middle, all the way down
3 through the atrium area and to the south entrance.

4 And you're going to learn that that porter has
5 responsibilities, and their responsibility is to make sure
6 that all of the glass doors on the north entrance, of which
7 you're going to hear there are quite a few, are meant to --
8 they have to make sure that they're clean. And then it's that
9 porter's job to make sure that all of the marble floors from
10 that north entrance is clean and free of debris.

11 And they don't just walk straight. This porter
12 walks all the way around, kind of like in a zigzag, making
13 sure that there's nothing on the marble floor. And that
14 porter's also responsible for making sure that they refill
15 their supplies, and if they come across any spills whatsoever,
16 that they immediately clean them up.

17 And if they don't come across anything, and they are
18 able to just get all the way down through the atrium area, all
19 the way to the south entrance, it takes them about --
20 approximately 20 minutes. So, you're going to learn that that
21 porter is responsible for the north entrance all the way down
22 through the Parasol Bar, all the way through the south
23 entrance.

24 Now, you're also going to hear that that porter's
25 responsibility to make sure that floor is clean is important,

1 and you're going to learn that they have an assistant manager
2 who's over them, and that assistant manager's job is to make
3 sure that the porter is doing their job, because you're going
4 to learn that the porter doesn't fill out any kind of
5 paperwork, he doesn't -- or she doesn't fill out any kind of
6 sweep log, nothing to say, I've been here, I've done this.
7 But an assistant manager is assigned to kind of walk around
8 and ensure that that porter is doing the job that they need to
9 be doing.

10 And you're going to hear from Yanet Elias, assistant
11 manager at the time, and she'll tell you, the one indication
12 that a porter hasn't done the job that they need to is that
13 there's debris on the floor.

14 You're also going to learn that the south entrance
15 where the atrium area is is considered a high traffic area.
16 And the reason it's a high traffic area is because it's one of
17 the only two entrances to the casino from the Strip. And
18 you're going to learn that it's such a high traffic area that
19 if there's a spill in that area, it needs to be immediately
20 cleaned up, because they know that it poses risks to guests.

21 Now, you're going to learn about Yvonne O'Connell.
22 You're going to learn that Yvonne is from California; that
23 she's from a small town called Tehachapi where -- she grew up
24 there. She's got four brothers. Her father was the mayor
25 there, and her father actually passed when she was 13 from

1 cancer.

2 You're going to learn that Yvonne went to
3 Bakersfield Junior College because she got interested in
4 dental hygiene, and you're going to learn she graduated there,
5 and that she went to UC San Francisco, and UC San Francisco
6 was one of the schools at the time that offered a program in
7 dental hygiene.

8 You're going to learn that when she went up there,
9 she loved going to school. She liked working while she was in
10 school. She graduated and started working for a periodontist,
11 and at 25, she bought her first house and she met her first
12 husband, Barney. He was a dental student. You're going to
13 learn that she and Barney got married, and that they moved
14 down to the Southern California area.

15 And when they were down there, they're both working,
16 but eventually, she and Barney opened a dental practice, and
17 she was the dental hygienist and he was the dentist. You're
18 going to learn that she worked for about five to six years
19 with that dental practice.

20 It was doing good, but Yvonne actually couldn't hold
21 the tools for the deep cleanings that she was doing. She had
22 -- she has flexible fingers that couldn't hold the tools, so
23 she stopped working as a dental hygienist. And Yvonne will
24 tell you, at the time, she wanted to start a family, but
25 Barney did not want to start a family, and so Yvonne got back

1 in the workforce, and that she met -- she bought a franchise,
2 so she started a bakery company, and she ended up having a
3 wholesale bakery company for about three years.

4 And then you're going to learn that she and Barney
5 got divorced, and she met John O'Connell, who is the reason
6 that she moved here to Las Vegas.

7 So, John O'Connell was actually a law professor who
8 had taught one of her brothers. And so, she'd known him for
9 years, but they met after she divorced Barney, and he was
10 older, and he was winding down his career, and he wanted to
11 move out here to Las Vegas to retire.

12 So, in about 1996, they moved out here to Las Vegas,
13 and while he was still working a little bit, Yvonne worked as
14 his assistant. And she'd help him with his paperwork, and
15 drive him back and forth to California, because he was still
16 doing a little bit of teaching, and that's how Yvonne came to
17 Las Vegas. And they lived out here happily until about 2002
18 when John fell ill. And they were home one night, and he
19 passed away with her, and they got a chance to say goodbye.

20 And you'll learn that Yvonne mourned for about a
21 year, but then, after a year, she started to get back and get
22 out. And you'll learn that she got a flyer to go to the
23 Rampart Casino for a buffet, and she'll tell you she'll never
24 turn down a good meal. And when she was there, she met Sal
25 Risco, who you're going to hear from.

1 Now, Sal Risco, he's -- he'll tell you he's almost
2 80 but he doesn't act like it, and they started dating in
3 2003. And Sal will tell you that he and Yvonne had a great
4 time together. That they actually started taking swing
5 dancing lessons at a place on the 215 and Charleston, and that
6 they would spend most of their time swing dancing on the
7 weekends. They either went swing dancing at Suncoast, or they
8 also had it at Rampart, sometimes they would go to Bally's;
9 that they went out together, they went to dinners, they used
10 to go on cruises.

11 And Sal's going to help you understand the person
12 that Yvonne was before this fall. See, Yvonne will tell you
13 that she was used to being a strong, healthy person, and that
14 after this fall, her body stopped cooperating with her.

15 See, after the fall, when she had recovered from it,
16 she didn't admit to herself how hurt she was. And you'll hear
17 that she slowly got her way out of the Wynn Casino, and it
18 didn't take her a short period of time. She sat down and
19 would wait to feel better, and then moved to the next machine,
20 and sit down and wait to feel better. And Yvonne will tell
21 you she did not want to admit she was as hurt as she thought
22 -- as she actually was.

23 Now, Sal was out of town, so after she left Wynn,
24 she went to the Rampart and she sat there, and she said --
25 this is what she'll tell you. She just started to feel the

1 pain all over, and she went home. And you'll learn that
2 Yvonne didn't get out of bed the next day. And then, the day
3 after that, on the 10th, she got herself out of bed and she
4 went to UMC, and she told them about the pain that she's
5 having all the way down the right side of her body. Her knee,
6 her neck, her back, and her hands were hurting. And she'll
7 tell you that UMC ordered her some x-rays, they sent her for
8 some prescriptions, and that she went back home and hoped to
9 feel better.

10 Now, Sal came home from his cruise, and he'll tell
11 you that Yvonne actually came to pick him up from the airport,
12 and he was furious at her for coming out because he could tell
13 that she was in a lot of pain. And he'll tell you that she
14 had deep bruising down her backside, her arm, and her leg.

15 And back in February, she went back to the doctor.
16 She went on the 18th, and she told the doctor the pain that
17 she was feeling down the right side of her body, and that she
18 was having difficulty; feeling weakness in her right hand.
19 She's going to tell you that they ordered her more x-rays and
20 that they sent her for more prescriptions. But you're going
21 to learn that Yvonne doesn't take pain medication because she
22 has irritable bowel syndrome. She has constipation, so she
23 cannot take pain medication.

24 You're going to learn that in March, she got
25 referred to see Dr. Andrew Cash, who's a spine surgeon, and

1 that Dr. Cash ordered MRIs of her neck and her back, and he
2 prescribed her a cane to walk with.

3 MR. SEMENZA: Objection, Your Honor.

4 THE COURT: Approach.

5 (Off-record bench conference)

6 THE COURT: All right, continue.

7 MS. MORRIS: And you're going to learn that Yvonne
8 went and saw a nerve conduction doctor who did a nerve test on
9 her, and that she got sent to multiple physical therapists.
10 You'll learn that Yvonne O'Connell went to three different
11 physical therapists for months, and you're going to learn that
12 she finally got referred to Desert Orthopedic.

13 And her doctors at Desert Orthopedic are Dr. Thomas
14 Dunn, and he is a board certified orthopedic surgeon, and he
15 is treating Yvonne for the pain she has in her neck and her
16 back, and he's going to talk to you about the imaging that is
17 on her cervical and lumbar spine.

18 And you're also going to hear from Dr. Tingey. Dr.
19 Tingey is also a board certified orthopedic surgeon, and he is
20 treating Yvonne for the injuries to her knees, and he's going
21 to tell you what her imaging shows and the treatment he's
22 giving her.

23 You're also going to hear from a Victor Klausner.
24 Now, Victor Klausner has never seen Yvonne O'Connell. He's
25 never met her. He was hired by Wynn Casino, not in 2010 --

1 MR. SEMENZA: Objection, Your Honor.

2 MS. MORRIS: -- not in 2011 --

3 MR. SEMENZA: This is argument.

4 THE COURT: All right, sustained. Move on. I mean,
5 you don't know whether you're going to call him at this point.
6 It's not your -- your case. Go ahead.

7 MS. MORRIS: Well, wait a second. Sorry.

8 THE COURT: All right, approach.

9 (Off-record bench conference)

10 MS. MORRIS: You're also going to learn that there's
11 certain evidence you won't see in this case. We will never --

12 MR. SEMENZA: Objection, Your Honor.

13 THE COURT: All right, approach.

14 (Off-record bench conference)

15 THE COURT: The objection's overruled, according to
16 our discussion at the bench, so you know where to go.

17 MS. MORRIS: You're going to learn that there are no
18 medical records showing that Yvonne O'Connell treated for any
19 type of pain in her body for almost 20 years before she fell
20 in 2010. You're going to learn that --

21 MR. SEMENZA: Objection, Your Honor. I think we
22 were just talking about this. Can we approach again?

23 THE COURT: Okay.

24 (Off-record bench conference)

25 THE COURT: Proceed.

1 MS. MORRIS: You're going to learn that there are no
2 medical records that Yvonne O'Connell ever had any pain in her
3 body that she went for treatment for from 1990 to 2010.

4 Yvonne's going to tell you that she was healthy.
5 That in 2002, she had a lump biopsied, and that prior to the
6 fall, she had an infection of like pink eye that she went to
7 the doctor and got an antibiotic for. The last time Yvonne
8 O'Connell ever went and treated for pain was back in 1989.
9 She had an injury to her back. And at that 1989 visit, they
10 said, you need to go and get some therapy, which she did.
11 They said, it might be fibromyalgia, but she went and did the
12 treatment and didn't have any pain in her back after she
13 finished her treatment with a physical therapist back then.

14 What you also won't see is any photographs of the
15 substance that was on the floor. The photographs that we have
16 are the photographs of the floor after it was cleaned. You
17 also will hear from Corey Prowell that he checked the video
18 surveillance, and there was no video surveillance of this
19 incident at all.

20 You're also going to learn that we will never know
21 when that floor was last inspected by Wynn prior to the fall.
22 We will never know when that marble was last checked to make
23 sure there was nothing on it before Yvonne O'Connell walked
24 over it.

25 //

1 You're also going to hear that not only was Yvonne
2 O'Connell injured physically, she's going to tell you that she
3 has struggled as a result of this fall. And you're going to
4 learn from Sal Risco that the person Yvonne was before the
5 fall isn't the person that she is now.

6 Sal and Yvonne went out from 2003 until about 2011,
7 and they've since broken up, and Yvonne will tell you it's
8 because she just couldn't keep up with Sal anymore. But Sal
9 is going to help us understand, and he's going to talk to you
10 about the person that Yvonne was before, the things they used
11 to do, and the changes that he's seen in her.

12 See, Yvonne has struggled, and she'll tell you that
13 she has depression, as well as the injuries she feels in her
14 body. She feels them mentally as well, and she's going to
15 tell you that she's had a hard time with what has happened to
16 her in the way that she's changed, and that she has become
17 overly anxious about her health. That she wonders what her
18 body is going to do next; that she feels as though this has
19 taken from her the security and the stability that she used to
20 feel when she was happy, and healthy, and secure.

21 And Yvonne will tell you that she has become overly
22 detailed about everything that goes on in her body, and she
23 writes down -- maybe the -- maybe this fall caused her heart
24 to tear; maybe it's done something to her eyes. But you're
25 going to hear from Yvonne's treating physicians who are

1 looking at the imaging in her MRIs, and they're going to tell
2 you the analysis that they've done and the treatment that
3 Yvonne is going to need.

4 And at the conclusion of this case and all of the
5 evidence that you're going to hear, you are going to see that
6 even though what Wynn didn't do was intentional, but the
7 negligence of allowing that liquid to remain on the floor for
8 so long that a portion of it, almost three feet, started to
9 dry, posed a risk in a high traffic area where guests were
10 walking, and it should have been cleaned up. And at the end
11 of this, I will ask you to render a verdict for justice.
12 Thank you.

13 THE COURT: And how's my jury doing? You're still
14 -- anybody need a bathroom break? Everybody's good? Okay.
15 Would the defense like to make their opening statement?

16 MR. SEMENZA: I would, Your Honor. Thank you.

17 THE COURT: Thank you.

18 MR. SEMENZA: Let me make sure my mic is on.

19 DEFENSE'S OPENING STATEMENT

20 MR. SEMENZA: Good afternoon, everyone. Once again,
21 I'm L.J. Semenza. I represent the Wynn. I want to take a
22 moment to, again, thank you for your service. I know you have
23 other obligations, other commitments in your personal lives,
24 and certainly, we appreciate you being here, and we appreciate
25 your serious consideration of the evidence that will be

1 presented in this particular case.

2 I want to start with a couple quick things. First
3 of all, I think this is a relatively simple, straightforward
4 slip and fall case. And let me be the first to say that Wynn
5 does sympathize with Ms. O'Connell.

6 MS. MORRIS: Your Honor, may we approach?

7 THE COURT: Yes.

8 (Off-record bench conference)

9 THE COURT: Admonished not to repeat that type of
10 statement.

11 MR. SEMENZA: Let me move on. As I said before,
12 this case involves a slip and fall that took place at the Wynn
13 Hotel and Casino on February 8th of 2010 around 2:00 P.M. in
14 the afternoon. That's over five years from -- from now. Ms.
15 O'Connell was on the property on that particular day, having
16 lunch with her cousins. She was comped her meal and was
17 eating at the buffet at the Wynn.

18 At the conclusion of their meal, Ms. O'Connell
19 separated from her cousins, went back to her car to retrieve
20 her jacket -- her coat, and then reentered the Wynn with the
21 intention of going out on the Strip and walking. As she was
22 walking, she walked through the atrium area of the Wynn, and
23 alleges that she slipped and fell on a green sticky substance
24 -- liquid substance.

25 //

1 The evidence in this particular case will establish
2 that Ms. O'Connell was not paying very much attention to where
3 she was walking. She was viewing the plants in the atrium
4 area and was not focused on the ground in front of her.
5 Otherwise, she might have had the opportunity to avoid what
6 she perceived to be this alleged hazard.

7 MS. MORRIS: Can I approach, Your Honor?

8 THE COURT: Do you have an objection?

9 MS. MORRIS: I do.

10 THE COURT: All right, approach.

11 (Off-record bench conference)

12 THE COURT: Overruled. Proceed.

13 MR. SEMENZA: And again, after -- well, when Ms.
14 O'Connell was walking through the atrium area, she alleges
15 that she slipped and fell on a portion near the planter where
16 -- in the atrium area of the Wynn. After Ms. O'Connell fell,
17 she was assisted by a porter that arrived on scene with a
18 sweeper. The testimony and the evidence that will be elicited
19 will establish that that porter called essentially his
20 assistant manager, who arrived on scene, and that assistant
21 manager thereupon asked for security to come and assist Ms.
22 O'Connell.

23 Officer Corey Prowell did arrive on the scene and
24 assisted to Ms. O'Connell's needs. During his interaction
25 with Ms. O'Connell, he checked to make sure that she was doing

1 okay, and evaluated whether, in fact, she was injured in any
2 particular fashion. And I need to use the Elmo.

3 (Pause in the proceedings)

4 MR. SEMENZA: As part of Officer Prowell's
5 assistance to Ms. O'Connell, she was asked to execute a --
6 well, Officer Prowell asked Ms. O'Connell whether she wanted
7 any medical attention, whether it be emergency services, or
8 hospital, or anything like that. And as part of that
9 discussion with Ms. O'Connell, she did in fact decline any
10 medical attention that Officer Prowell was willing to provide.

11 In response to that, Officer Prowell completed this
12 document, where he notes that Ms. O'Connell did decline any
13 medical treatment at the scene. The document reads -- the
14 typewritten portion of the document reads, "I, the
15 undersigned, have been offered emergency medical services and
16 understand that refusal of such care and/or transport to a
17 hospital facility could result in death or impair my health by
18 increasing the opportunity for consequences or complications.
19 I refuse to accept emergency medical care and assume all risks
20 and consequences resulting from my decision, and release Wynn
21 Resorts and all personnel directly or indirectly involved in
22 my care from any and all liability resulting from my refusal.
23 I was given the opportunity to ask questions I felt necessary
24 to provide this informed refusal. The reason for this refusal
25 is as follows," and then it goes blank.

1 The evidence in this particular case will establish
2 that at the time immediately after Ms. O'Connell fell or
3 alleges to have fallen, she did in fact decline any medical
4 attention offered by the Wynn.

5 And I'm putting up Joint Stipulated Exhibit 4. This
6 document has also been admitted into evidence. In addition to
7 the refusal of medical treatment form, Officer Prowell
8 assisted Ms. O'Connell in completing this particular form.
9 Ms. O'Connell did not provide the handwritten portions of this
10 document. It was completed by Officer Prowell, but at the
11 bottom of the document on the right hand side, it does in fact
12 bear Ms. O'Connell's signature. She did verify the
13 correctness of the information that was provided in the
14 document.

15 And again, I know Ms. Morris spent a bit of time
16 walking through the document. The document does identify
17 where the alleged fall took place, and the pertinent part that
18 I would like to discuss with you relates to the line that
19 says, "What if any injuries did you suffer?"

20 In response to this written statement or written
21 question, there are three noted injuries. The first is to Ms.
22 O'Connell's right shoulder, the second is to Ms. O'Connell's
23 buttocks, and the third is to her right ankle. Those are the
24 only injuries Ms. O'Connell identified after the fall that
25 took place at the Wynn. There were no other injuries

1 identified at this point in time. And those injuries would be
2 consistent with her assertion that she fell on her right side
3 in that atrium area.

4 Importantly -- and just going back to that one
5 document, it also identifies that Ms. O'Connell alleges she
6 slept on -- slipped on a green liquid substance, and that's
7 important to keep in mind. In addition to completing the
8 forms that we've looked at, Officer Prowell did take
9 photographs of her shoes, and did take photographs of the
10 general scene so there would be a reference point in the
11 future as to the location where Ms. O'Connell fell.

12 A short time later, Ms. O'Connell departed from the
13 scene and went into -- the evidence will show she decided she
14 would go into the restroom. Her testimony will be that she
15 stayed in the restroom for approximately 30 minutes. In her
16 possession, she had her cell phone, and did not attempt to
17 reach out to call anyone relating to the fall. She didn't
18 pick up the phone and call her cousins that had just -- she
19 had left from the buffet. She didn't call anyone else for
20 assistance at that point in time.

21 After Ms. O'Connell departed the restroom, the
22 evidence in this particular case will show that she stayed on
23 the property for approximately another two hours, and during
24 that period of time, Ms. O'Connell in fact gambled. So, she
25 was sitting at a slot machine gambling during this period of

1 time. And the evidence will show in this particular case that
2 Ms. O'Connell gambled approximately \$1,000 after the slip and
3 fall, and before she departed the Wynn on that particular day.
4 Instead of going --

5 MS. MORRIS: Can we approach?

6 THE COURT: All right. Is there -- there's an
7 objection, I take it?

8 MS. MORRIS: There's an objection.

9 THE COURT: Okay.

10 (Off-record bench conference)

11 MR. SEMENZA: As I mentioned earlier -- a moment
12 ago, the testimony and evidence in this case will establish
13 that Ms. O'Connell did in fact gamble at the Wynn after her
14 slip and fall on February 8th of 2010.

15 At the conclusion of her gambling activities, she
16 went to the parking garage, got in her vehicle, felt well
17 enough and strong enough to drive, and then departed the Wynn.
18 Instead of going home, she went to the Rampart Casino, and
19 while at the Rampart Casino, she gambled as well. She will
20 testify that she stayed there for what she believed to be a
21 number of hours.

22 After her time at the Rampart Casino, she then went
23 ahead and drove back to her home. She did not seek medical
24 treatment the following day on February 9th of 2010. It was
25 not until two days later on February 10th, 2010 that Ms.

1 O'Connell finally went to seek medical care at UMC Quick Care.

2 Now, I want to talk a little bit about Ms.

3 O'Connell's claimed injuries and her medical care. After her
4 fall on February 8th of 2010, Ms. O'Connell sought treatment
5 for a whole host of medical ailments and medical complaints
6 that, at various times, she has asserted are in fact related
7 to her fall at the Wynn on February 8th of 2010.

8 Some of those ailments and complaints include the
9 following. Irritable bowel syndrome and constipation that she
10 attributes to the fall -- or has attributed to the fall at the
11 Wynn on February 8th, 2010. She has sought treatment for an
12 alleged stroke that she believed she had as a result of the
13 fall at the Wynn, which resulted, she alleges, in her eyelid
14 drooping.

15 She has sought treatment for sinus problems after
16 the fall. She has sought treatment for a claim that the --
17 her retinas in her eyes are detaching, and has asserted at
18 various times that that is related to the fall that took place
19 on February 8th of 2010. She sought treatment for knee pain,
20 she sought treatment for back pain, she sought treatment for
21 hip pain, she sought treatment for carpal tunnel syndrome as
22 well, which she has asserted is related to the fall on
23 February 8th of 2010.

24 She also claims to have developed a whole host of
25 other ailments and conditions, which include cough, neck pain,

1 headaches, blurred vision, chest pain, difficulty breathing,
2 pain in her arms, difficulty walking, stomach pain, nausea,
3 frequent urination, back pain, joint pain, muscle spasm,
4 decreased sensations in her hands and her feet, trembling,
5 fainting, problems sleeping, weakness, chills, a lump that
6 developed on the back of her neck, sexual dysfunction, and
7 depression, that at various times she has all related to her
8 fall at the Wynn on February 8th of 2010.

9 In addition to those ailments, those conditions that
10 she claims a relationship to the fall with, when she has
11 sought medical treatment, she has consistently identified that
12 her pain level is a ten of ten when going to the doctor, ten
13 of ten pain being the most extreme pain imaginable. That pain
14 she claims to be -- have experienced throughout her entire
15 body, and in areas not limited to her right shoulder, her
16 buttocks, and her right ankle.

17 She has seen numerous doctors since February of 2010
18 -- I'm sorry, 2010. In some of the medical records, Ms.
19 O'Connell has been described as tangential with a number of
20 her symptoms, and the symptoms that she experiences are
21 subjective in nature; not objective in nature. In at least
22 one instance, a physical therapist declined to treat her as a
23 result of this objective symptomology that she was
24 experiencing.

25 //

1 Regardless of what medical conditions at this point
2 in time Ms. O'Connell may be seeking compensation for in this
3 particular case, the medical care and the medical conditions
4 that she alleges she has suffered go directly to Ms.
5 O'Connell's truthfulness and credibility in this particular
6 case.

7 In addition to that, Ms. O'Connell has identified a
8 whole host of preexisting conditions in her medical charts --
9 or in the medical records. Some of those preexisting
10 conditions include irritable bowel syndrome. GERD, which is
11 an esophageal issue. She had disclosed that she had a prior
12 back injury. She had been diagnosed with depression in the
13 past, she had been diagnosed with anxiety in the past. She
14 had been diagnosed with stress disorder, fibromyalgia, Marfan
15 Syndrome, and Ehlers-Danlos Syndrome, all of these before her
16 fall.

17 We will establish in this particular case that Ms.
18 O'Connell's complaints, her symptoms, are either the result of
19 a preexisting condition, are unrelated to the fall, or are
20 related to something called symptom magnification syndrome.
21 And in a nutshell, symptom magnification syndrome is a
22 manifestation of symptoms in order to receive something in
23 return, and that something might very well be avoidance of
24 responsibility, attention, or financial gain.
25 //

1 The evidence in this particular case will establish
2 that the alleged slip and fall that Ms. O'Connell had on
3 February 8th, 2010 was extremely minor, as evidenced in part
4 by the fact that she didn't immediately seek medical care.
5 She declined medical care from the Wynn. She drove home that
6 particular day, she gambled at the Wynn, and thereafter,
7 gambled at the Rampart Casino.

8 The evidence in this particular case will establish
9 that Wynn is not responsible for Ms. O'Connell's fall. We
10 believe that the evidence will establish that there will be no
11 evidence -- let me back up.

12 There will be no evidence in this particular case
13 establishing that Wynn caused the sticky green liquid
14 substance to be present on the floor at that particular time
15 on that particular day just before Ms. O'Connell's alleged
16 fall. Ms. O'Connell will be unable to establish that Wynn
17 knew or had actual knowledge of the sticky liquid green
18 substance immediately before Ms. O'Connell's fall. And
19 lastly, Ms. O'Connell will be unable to establish at trial
20 that Wynn should have known of the presence of this sticky
21 green liquid substance.

22 And in conclusion, Ms. O'Connell will not be able to
23 establish that Wynn is in any way responsible for the fall
24 that she suffered or alleged to have suffered on February 8th
25 of 2010, and at the conclusion of this particular case, we'll

1 ask that you enter a verdict in Wynn's favor. Thank you.

2 THE COURT: Thank you. All right. How about my
3 jury now? Ready for a restroom break? No -- yes, okay. All
4 right. Oh, I've got a bunch of camels on my hands here. All
5 right, ladies and gentlemen. I'm like that, so.

6 During this recess, and we're going to take a recess
7 until 3:00, 3:10, so 15 minutes, it is your duty not to
8 converse among yourselves or with anyone else on any subject
9 connected with the trial, or read, watch, or listen to any
10 report of or commentary on the trial by any person connected
11 with the trial, or by any medium of information, including,
12 without limitation, newspaper, television, radio, or internet,
13 and you are not to form or express an opinion on any subject
14 connected with this case until it's finally submitted to you.
15 We'll be in recess until ten minutes after 3:00.

16 THE MARSHAL: All rise for the jury. Go ahead and
17 leave your notebooks in the chairs.

18 (Outside the presence of the jury)

19 THE COURT: And the record will reflect the jury has
20 departed the courtroom. Any matters outside the presence
21 before we have you -- let you have your recess, too?

22 MR. SEMENZA: No, Your Honor. Before you hop off
23 the bench, can I confer with Ms. Morris for a moment about --

24 THE COURT: Sure.

25 MR. SEMENZA: -- one potential issue?

1 (Pause in the proceedings)

2 MR. SEMENZA: Your Honor, I think that there are a
3 couple of issues that will need to be addressed before Dr.
4 Dunn takes the stand. I know that opposing counsel submitted
5 a brief to you today. I know that we submitted a couple of
6 briefs relating to the issue of the doctor's proposed
7 testimony.

8 I want to make sure, from a scheduling standpoint,
9 that we don't create more problems by not addressing those
10 issues either now or before Dr. Dunn takes the stand. And
11 obviously, however Your Honor would like to address those
12 briefs that we've submitted.

13 THE COURT: All right. Well, let's take a break so
14 staff can use the restroom, and we'll come back after the
15 break's over, which is now only about ten minutes.

16 MR. SEMENZA: That's fine.

17 THE COURT: And we'll address those.

18 MR. SEMENZA: Thank you.

19 (Court recessed at 2:59 P.M. until 3:16 P.M.)

20 (Outside the presence of the jury)

21 THE COURT: Okay. We're back on the record outside
22 the presence of the jury. Plaintiff's present with their
23 counsel. Defendant is present through their representative
24 and through counsel. And there are some matters you wanted me
25 to decide before Dr. Dunn gets here, so what is it you want to

1 talk about?

2 MR. SEMENZA: Well, I think that there are issues
3 regarding the scope of what he's going to be permitted to
4 testify to in front of the jury. I -- I think those issues
5 are essentially, is he going to be permitted to testify to any
6 future medical specials? I want to -- I believe the answer to
7 that is no, and I don't believe that plaintiff's counsel is
8 going to introduce any evidence relating to that. So, again,
9 I don't think that that is an issue, but I do want to confirm
10 that it is in fact not an issue.

11 THE COURT: Okay. Well, on the break, I read
12 through Dr. Dunn's medical records. The -- so, what I did
13 note is there's nothing in his medical records regarding
14 causation.

15 MR. SEMENZA: Correct.

16 THE COURT: You know, he doesn't opine -- make any
17 -- he doesn't say, I don't think it was -- he doesn't say
18 anything about causation. What he does say is that she has,
19 as confirmed of course by the MRIs that were done back in
20 2010, she has degenerative disc disease --

21 MR. SEMENZA: Correct.

22 THE COURT: -- and that -- in her back at --
23 particularly, at the areas that they looked at in the imaging,
24 at the cervical and lumbar regions, and that he ultimately
25 recommends to her a fusion surgery, and that's all.

1 I mean, there's nothing in here that talks about the
2 cost of that surgery; just that he's discussed with her the
3 options she's got available, surgical and non-surgical, but
4 interestingly, he doesn't seem to be advocating for the non-
5 surgical -- let me see. Let me find it here.

6 It's at Plaintiff's Bates stamp 619. After
7 discussion with the patient, I have recommended the anterior
8 cervical decompression and fusion at C4-C5, C5-C6, and C6-C7,
9 so a three-level fusion with allograft, and I have offered
10 non-operative options consisting of physical therapy, pain
11 management, and epidural steroid injections.

12 So, it seems like he's saying, I'm recommending that
13 she have a three-level fusion, but I've also told her she --
14 she could have physical therapy, pain management, and steroid
15 injections, none of which he seems to have tried before
16 recommending a three-level fusion.

17 But, so, I mean, I really don't know what he's going
18 to testify to at this point. I can say this. There was
19 nothing in the disclosures that said that he was going to --
20 you said he was going to testify in accordance with his
21 medical record. That's what it says in the disclosure. So,
22 that's the subject matter of -- of his treatment.

23 And then, as to the substance of the testimony, you
24 say he's going to relate -- or you say this is to all of them,
25 but I assume that it's based on something; that he's going to

1 say that it was caused by the fall.

2 MR. MORRIS: That's correct. And Dr. Dunn -- I
3 think it will be helpful when you have him on the stand. As
4 he testifies, he's going to explain to you his medical
5 records, and he does believe he states the causation in there.
6 She comes to see him following --

7 THE COURT: Does not.

8 MS. MORRIS: -- the trip and fall --

9 THE COURT: I've read these now three times.

10 MS. MORRIS: And that his --

11 THE COURT: He never states that he believes, nor
12 would there -- he's seeing her --

13 MS. MORRIS: It's right there in the first
14 paragraph.

15 THE COURT: -- four years after the fact, and when
16 he goes to see -- first, you know, he's looking at MRIs so he
17 can do a comparison. So, there's the MRI of the cervical
18 spine done three months after the accident, and there's the
19 lumbar that was done two months after the accident, and both
20 of those show, you know, the cervical spondylosis at C4
21 through C7 without significant neural compression.

22 And then there's a change in the intervening four
23 years, which is consistent with the disease, of course. It's
24 a degenerative condition. It doesn't get better; it only gets
25 worse. And when you -- and -- oh. The other -- the other

1 imaging shows severe disc space narrowing at C4-5, C5-6,
2 C7-T1, and severe facet joint arthritis at C4-5, C5-6, and
3 C6-7. That's all just the cervical.

4 So, then he goes back and he does another MRI in
5 2014, so four years -- more than four years after the
6 accident, and he sees mild central canal stenosis, which,
7 okay, now just means that this narrowing is starting to
8 impinge at C3-4, mild central canal stenosis at C4-5 with
9 severe bilateral neural foraminal stenosis, and moderate canal
10 -- central canal stenosis at C5-C6 with severe bilateral
11 (indecipherable) -- neural foraminal stenosis, and mild
12 central canal stenosis at C6-C7 with mild bilateral neural
13 foraminal stenosis again. So --

14 MS. MORRIS: Your Honor, if I might, this is the
15 third time we've addressed this, and --

16 THE COURT: Yeah.

17 MS. MORRIS: -- every single time, it has come down
18 to, let's do voir dire of Dr. Dunn to determine his -- his
19 analysis of her, and when he determined causation, as the FCH1
20 Palms case says, and make a determination on whether, as an
21 expert treating physician, he made that during his diagnosis
22 and treatment of her.

23 THE COURT: Okay. And so, you're going to -- you're
24 going to take him on voir dire --

25 MR. SEMENZA: Well --

1 THE COURT: -- and --

2 MR. SEMENZA: Yes, Your Honor, but the --

3 THE COURT: He can testify about his medical
4 records, what he saw, and --

5 MR. SEMENZA: Your Honor, there's -- there's -- and
6 I understand the point, but the first issue that I -- I still
7 want to make sure and get some clarification on is that they
8 are not going to seek to recover in this particular case any
9 future special damages, because they were not disclosed in the
10 16.1 disclosures. That's the first issue.

11 And so, they should be precluded from any testimony,
12 any damages relating to future specials. That's the first
13 issue. We addressed that last time, and I still don't quite
14 have an answer from opposing counsel as to whether --

15 THE COURT: Well, I got the impression from last
16 week that she was saying, well, we're not going to seek the
17 special -- future special damages and have the doctor testify
18 about the cost of those damages, but we're going to have him
19 testify that she needs this surgery. Okay, well that's --
20 that is in his records, that he thinks she needs surgery.

21 MR. SEMENZA: I understand that. So, the first
22 issue is whether they're seeking future medical specials. I
23 think the answer to that is no, but I want to confirm that.

24 Then, secondly, in the brief that they filed or
25 submitted today, now they want to get into the cost of the

1 future medical treatment, which I think is entirely improper
2 because they're not seeking future medical damages relating to
3 this case, and there's nothing in the medical chart talking
4 about cost, and it's not relevant for purposes of this case.

5 What they're trying to do is bootstrap a cost of
6 surgery argument into a pain and suffering argument, and they
7 can't do that. That's not permitted.

8 THE COURT: All right. Well, when I read your
9 papers, there was some argument about, well, the cost is
10 relevant to the pain and suffering because -- that how complex
11 it is is related to the cost. I disagree with that. I mean,
12 how doctors, you know, lay a cost on or assign a cost to a
13 particular procedure, I don't frankly know, but you didn't
14 ever disclose that you were seeking future medical specials,
15 so you can't do that. You can't now do it. That's -- that
16 was what we decided last week, and you agreed to that.

17 MS. MORRIS: Correct. And my understanding was the
18 briefing was to establish that the need for surgery in fact
19 necessitates an award for future pain and suffering. And so,
20 there doesn't have to be a cost applied to that -- that
21 surgery, but the fact that there is a surgery is in fact the
22 establishment that there will be future pain and suffering.
23 And there's a case directly on point, which I put in the
24 briefing. My understanding, that was the need for the
25 briefing and the clarification of the issue.

1 THE COURT: Right. So, your argument is you want
2 the doctor to be able to testify about what this surgery would
3 entail?

4 MS. MORRIS: Correct.

5 THE COURT: Okay.

6 MR. SEMENZA: I understand that is part of their
7 argument, but in their brief, they say, the cost of future
8 medical care is relevant though and could be --

9 THE COURT: Right.

10 MR. SEMENZA: -- helpful to determine --

11 THE COURT: Yeah.

12 MR. SEMENZA: -- future pain and suffering.

13 THE COURT: And I disagree with that.

14 MR. SEMENZA: Okay.

15 THE COURT: Okay.

16 MR. SEMENZA: Understood.

17 THE COURT: So, I disagree with that, but he did
18 during his treatment recommend that she have surgery. And so,
19 he can testify that he recommends this surgery, and he can say
20 what it's for and how it's done, and the jury can -- you know.
21 I mean, obviously, you're not going to be able to prove up the
22 cost of the surgery, but you're -- you're saying you want to
23 be able to argue pain and suffering going forward either for
24 -- because she hasn't committing to having the surgery. She
25 hasn't. She was told she needed it in -- more than a year

1 ago, and she hasn't had it.

2 MS. MORRIS: Right.

3 THE COURT: So, it's either, what pain is she
4 suffering you're going to argue about, because she isn't going
5 to have the surgery, she's decided she's not going to have the
6 surgery, she's just going to endure her -- her pain, or that
7 she's going to have this surgery, and she'll have recovery
8 pain and suffering from this surgery, and maybe she'll have a
9 -- she'll have a successful surgery, and maybe she won't.
10 Maybe she'll have failed back syndrome, and --

11 MR. SEMENZA: Well, that's all speculative.
12 That's --

13 THE COURT: That's all speculation.

14 MR. SEMENZA: Exactly.

15 THE COURT: So, I don't know what -- but Dr. -- the
16 doctor, if he's honest, can't say what the result. I'm sure
17 if questioned about that subject of what he told Ms. O'Connell
18 about the surgery would be that he can't guarantee what the
19 result would be. It may be -- it may help, and it may not.

20 MR. SEMENZA: The other issue, Your Honor -- and I
21 understand that I'm going to have an opportunity to voir dire
22 Dr. Dunn, and that's fine. The other issue that we've
23 identified is that nowhere in Dr. Dunn's medical records,
24 medical chart is there anything related to causation as you've
25 identified. And the exclusive and sole basis for causation,

1 if Dr. Dunn is in fact going to testify to causation, is based
2 upon the subjective complaints of Ms. O'Connell saying, I
3 slipped and fell on February 8th, 2010.

4 And so, if he gets up there and argues causation
5 based upon Ms. O'Connell's statements, that's improper. And
6 we've cited case law that says that, because it's not based
7 upon any education, training, et cetera. It's basically based
8 on a subjective complaint identified by Dr. Dunn's patient.

9 THE COURT: Well, okay, so --

10 MS. MORRIS: I mean, that's the purpose --

11 THE COURT: -- not necessarily.

12 MS. MORRIS: Is that what the voir dire is for?

13 THE COURT: Possibly. I mean, you're going to have
14 the opportunity to voir dire him on that, but, I mean, he has
15 physical objective findings about her spine?

16 MR. SEMENZA: Correct.

17 THE COURT: And you'll be able to cross-examine him
18 in front of the jury about, you know, well, didn't she have
19 all these things at the time?

20 MR. SEMENZA: But that's the point, Your Honor.

21 THE COURT: You know, and these things don't happen
22 overnight --

23 MR. SEMENZA: Right.

24 THE COURT: -- Doctor. I mean, that's
25 cross-examination.

1 MR. SEMENZA: Right.

2 THE COURT: The cases that you cited -- well, first
3 of all, they're federal cases where they're looking at the
4 Daubert standard, and the whole plethora of federal case law
5 that analyzes the Daubert standard and how that's approached.
6 And our Supreme Court has declined to adopt Daubert and has
7 instead adopted this Hallmark, which, really, then they've
8 kind of backed away from more and more as time goes on,
9 saying, essentially, it's really just will -- will it assist
10 the trier of fact, and is it based upon something that's --
11 that's there and can be shown. And we won't know that until
12 you voir dire.

13 MR. SEMENZA: And that's fine. As long as I can --
14 at the conclusion of voir dire, we can discuss these issues,
15 that's fine. Okay.

16 THE COURT: All right, so can we bring the jury back
17 in then?

18 MR. SEMENZA: Yes.

19 THE COURT: Okay, let's do it.

20 THE MARSHAL: All rise for the jury, please.

21 (In the presence of the jury)

22 THE MARSHAL: Jury's all present, Your Honor.

23 THE COURT: Thank you. Please be seated. And the
24 record will reflect the presence of all eight members of the
25 jury, as well as the two alternates. And all parties are

1 present by and through their counsel, and of course the
2 plaintiff is present, and the representative of Wynn is
3 present, both in the flesh. All officers of the court are
4 present. You may call your first witness.

5 MS. MORRIS: I call Yanet Elias.

6 (Pause in the proceedings)

7 THE MARSHAL: Step up, remain standing, and face the
8 court clerk. Raise your right hand, please.

9 YANET ELIAS, PLAINTIFF'S WITNESS, SWORN

10 THE CLERK: You may be seated. Please state and
11 spell your first and last name for the record.

12 THE WITNESS: Yanet Elias. Y-a-n-e-t, E-l-i-a-s.

13 THE CLERK: Thank you.

14 THE COURT: Thank you. You may proceed.

15 DIRECT EXAMINATION

16 BY MS. MORRIS:

17 Q Hi, Yanet.

18 A Hello.

19 Q Yanet, do you remember I took your deposition
20 earlier this year on March 24th, 2015?

21 A Yes.

22 Q And do you recall the deposition took approximately
23 an hour-and-a-half?

24 A I don't recall exactly how long.

25 Q Do you remember that I asked you questions about the

1 fall that Yvonne had at the Wynn on February 8th, 2010?

2 A Yes.

3 Q And today you have a translator with you, but at the
4 time I took your deposition, you did not have a translator; is
5 that correct?

6 A Yes.

7 Q Now, back in March of 2010, the deposition testimony
8 you gave me, that was your sworn testimony under oath; is that
9 correct?

10 A Yes.

11 Q And are you comfortable with the deposition
12 testimony that you gave me back in March of this year?

13 A That's why I requested an interpreter. I didn't
14 feel very comfortable with some of the questions because of
15 the legal terminology that is used in some of the questions.

16 Q Do you remember earlier this year when I took your
17 deposition, I asked you if you were comfortable giving your
18 sworn testimony in English?

19 A Yes.

20 Q And do you remember telling me that you were
21 comfortable giving me your sworn testimony in English?

22 A Yes.

23 Q Do you remember that I told you several times that
24 if you did not understand any question that I had, I wanted
25 you to let me know so I could ask it again?

1 A Yes.

2 Q And do you remember telling me that you would tell
3 me if you didn't understand something?

4 A Yes.

5 Q And you know that the oath that you just took in
6 court today, it's the same oath that you took when you gave
7 your deposition?

8 A Yes.

9 Q Isn't it true you've lived in Las Vegas for 26
10 years?

11 A Yes.

12 Q And you've worked at Wynn for approximately ten
13 years; is that correct?

14 A Yes.

15 Q You also worked at the Golden Nugget for about 16
16 years; is that right?

17 A Yes.

18 Q Back in 2010, isn't it true that you were an
19 assistant manager in the public areas department at Wynn?

20 A Yes.

21 Q Isn't it true that after that, in May, you got
22 promoted to be a shift manager at the public area department?

23 A I don't recall the year, but yes, I was promoted.

24 Q Isn't it true that your job as an assistant manager
25 at Wynn in the public areas department was to ensure that the

1 employees working on the casino floor were doing their job?

2 A Yes.

3 Q And at the time Yvonne fell, you weren't assigned to
4 the atrium area; is that correct?

5 A I don't recall.

6 Q Isn't it true that you were assigned to another area
7 of the casino --

8 THE COURT: Let's stop for a minute. We're going to
9 get the interpreter a chair. I thought maybe she didn't want
10 a chair, and that's why we didn't have one for her, but we
11 would want you to sit. Thank you.

12 THE MARSHAL: I apologize.

13 THE COURT: Then you don't have to lean over. Very
14 good. All right, sorry. Proceed.

15 BY MS. MORRIS:

16 Q Isn't it true you were assigned to another area of
17 the casino on that day?

18 A I don't recall. We work throughout the whole
19 casino.

20 Q Were you assigned to the atrium area that day?

21 A I don't recall.

22 Q Do you remember telling me back -- back in March
23 that you were not assigned to the atrium area that day?

24 A I don't recall what I answered.

25 Q Do you remember telling me that you received a call

1 that a woman had fallen in the atrium area, and so you went
2 over there?

3 A I -- they did not send it to my. They sent it to
4 any of the assistants who might answer.

5 Q Didn't you get a call from dispatch saying that a
6 lady had fallen in the atrium area?

7 A The dispatch tells us that, you know, any manager
8 who's available should answer the call.

9 Q Did you go over to the atrium area after you heard
10 that call?

11 A Yes.

12 Q And when you got over to the atrium area, did you
13 see that a sweeper machine had been put over a part of a green
14 liquid on the floor?

15 A I recall seeing the machine, but not what was under
16 the machine.

17 Q Did you see a green spill on the marble floor?

18 A Not a green liquid.

19 Q Did you see a spill on the floor?

20 A No.

21 Q I'd like to refer to the exhibit, which is the black
22 binder, and it's going to be Exhibit 4 in front of you.

23 A Should I open it?

24 Q Yes, please.

25 MS. MORRIS: Is this --

1 MR. SEMENZA: What is it?

2 MS. MORRIS: It's the --

3 MR. SEMENZA: Okay.

4 MS. MORRIS: Is the Elmo on?

5 BY MS. MORRIS:

6 Q Yanet, are you at Exhibit 4?

7 A Yes.

8 Q Is this your handwriting?

9 A Yes.

10 Q Now, looking at this handwritten statement, have you
11 seen this statement before?

12 A Yes.

13 Q Did you look at it back before I took your
14 deposition in March of this year?

15 A Can you repeat, please?

16 Q Did you look at this exhibit before I took your
17 deposition back in March of this year?

18 A Yes.

19 Q And do you see in this exhibit in your handwriting,
20 on the 5th line down, you stated that you saw an employee
21 cover a spill with the sweeper machine?

22 A Um-hum.

23 Q Do you see that sentence there?

24 A Yes.

25 Q Now, isn't it true that there are video surveillance

1 cameras above the area in the atrium where Yvonne fell?

2 MR. SEMENZA: Your Honor, I'm going to object.

3 THE COURT: Okay. Approach.

4 (Off-record bench conference)

5 THE COURT: The objection -- foundation was the
6 objection at the bench. That's sustained. Proceed. You can
7 lay a foundation if you can.

8 BY MS. MORRIS:

9 Q Yanet, you've worked at Wynn for ten years; is that
10 correct?

11 A Yes.

12 Q And you -- for the entire time you've worked at
13 Wynn, you've worked in the public areas department; is that
14 correct?

15 A Yes.

16 Q Do you remember telling me in March that you spend
17 about 90 percent of your time on the actual casino floor?

18 A Yes.

19 Q And are you familiar with the atrium area, which is
20 in the south entrance of the casino?

21 A Yes.

22 Q Could you tell me approximately how many times a day
23 you walk through the atrium area in the south entrance?

24 A I couldn't tell you exactly how many because the
25 casino's very big. And I'm not the only supervisor who is at

1 the casino.

2 Q Would you consider yourself to be familiar with the
3 atrium area?

4 A Yes.

5 Q And isn't it true that there are video surveillance
6 cameras on the ceiling in the atrium area?

7 A There's cameras all over the casino. Where they are
8 exactly, I do not.

9 Q Have you ever seen a video surveillance camera
10 directly above the atrium area?

11 A No.

12 Q Do you know if there are video surveillance cameras
13 in the atrium area?

14 A I believe there should be.

15 Q Now, it's my understanding that you never touched
16 the spill that was on the floor; is that correct?

17 A I don't recall.

18 Q Do you remember back in March of this year when I
19 took your deposition, you told me that you never touched the
20 liquid on the floor?

21 A I don't recall exactly.

22 MS. MORRIS: I have her original deposition. I'd
23 like to publish it.

24 THE COURT: All right. Publish the deposition.

25 //

1 BY MS. MORRIS:

2 Q And Yanet, I'm looking at page 15 of your deposition
3 transcript from March of this year.

4 MR. SEMENZA: What page, Christian? 15.

5 MS. MORRIS: Page 15.

6 BY MS. MORRIS:

7 Q Question, "Okay. Did you physically touch what was
8 on the floor?" And your response was, "No."

9 Now, you also stated that you never saw who cleaned
10 up the substance; is that correct?

11 A When I arrived, there was no liquid.

12 Q Yanet, I'm going to again refer you to Exhibit 4,
13 which we've looked at before, and you said this is in your
14 handwriting; is that correct?

15 A Yes.

16 Q And do you remember writing this statement back on
17 February 8th, 2010?

18 A Um-hum.

19 Q Is that a yes?

20 A Yes, I'm sorry.

21 Q And isn't it true, back on February 8th, 2010, you
22 said, "I go to see what happened. I see a lady stand up close
23 to the garden area, and an employee cover a spill with a
24 sweeper machine"?

25 A I put that it was a spill here because that's what

1 the -- what dispatch told us that it was. When she's called
2 to tell her something is going on, when -- you know, it could
3 be food, it could be a glass that has fallen; they always say
4 that it's a spill.

5 Q Yanet, isn't it true that you arrived at the scene
6 and waited there for security to come, and you made sure the
7 liquid wasn't cleaned up until security saw it; isn't that
8 correct?

9 A Yes.

10 Q So, looking here at your deposition transcript
11 again, I'm on page 42. You said, "I don't remember if
12 security is there, because I have to call security to come to
13 the area."

14 I said, "Do you know, when security arrived, had the
15 liquid been cleaned up yet, or the substance been cleaned up
16 yet?"

17 You responded to me, "They not clean, they not
18 clean. They never clean nothing until security come and
19 inspect the area."

20 A Yes.

21 Q Isn't it true that the procedure is to preserve the
22 area until security gets there to inspect the cause of the
23 fall; isn't that correct?

24 MR. SEMENZA: Objection, foundation.

25 THE COURT: Sustained.

1 THE INTERPRETER: What does that mean?

2 THE COURT: No, she can't answer that. I sustained
3 the objection.

4 BY MS. MORRIS:

5 Q Yanet, isn't it true that you told me that the
6 policy is not to clean anything until security comes and
7 inspects the area?

8 A Depending -- depending on what happens in the area
9 and the call.

10 Q Yanet, I'm going to look again at your deposition
11 transcript here on page 43. Isn't it true you told me, "They
12 never clean nothing until security coming and inspect the
13 area"? Wasn't that your deposition testimony under oath?

14 A Yes.

15 Q Isn't it true that you don't know when the south
16 entrance atrium area was last checked for spills prior to
17 Yvonne falling?

18 MR. SEMENZA: Objection. I'm sorry, go ahead. I'll
19 withdraw the objection.

20 MS. MORRIS: Okay.

21 THE WITNESS: No, I didn't.

22 BY MS. MORRIS:

23 Q Do you know -- you don't know when the area was last
24 inspected; is that correct?

25 MR. SEMENZA: Objection, vague as to time.

1 MS. MORRIS: Prior to Yvonne's fall.

2 THE COURT: All right.

3 THE WITNESS: No.

4 BY MS. MORRIS:

5 Q Isn't it true that you can't say how often an area
6 is checked, whether it be every hour or every 30 minutes?

7 A It depends on how long it takes the employee to
8 check the north area and return to the south area, because
9 it's all considered one -- one whole area. And there aren't
10 always two employees assigned to that area. Sometimes,
11 there's only one.

12 Q And in fact, back on February 8th, 2010, there was
13 only one porter; isn't that correct?

14 A I don't recall.

15 Q Isn't it true that one sign of a porter not doing
16 their assignment is that you find debris and things on the
17 floor?

18 A The person's work?

19 Q Excuse me?

20 A The -- the work done by the person at their station?

21 Q Yanet, isn't it your job to make sure that the
22 porters are doing their tasks in each assigned area?

23 A Yes.

24 Q Back in 2010, as an assistant manager, wasn't that
25 your task, was to ensure that the porters were doing their job

1 in their assigned areas?

2 A Yes.

3 Q And isn't it true that you told me that one of the
4 signs of a porter not doing their job is that there's debris
5 on the floor?

6 A Yes.

7 Q And isn't it true you don't know who the assistant
8 manager was who was assigned to the atrium area on February
9 8th, 2010?

10 THE INTERPRETER: Interpreter needs repetition,
11 please.

12 MS. MORRIS: Sorry.

13 BY MS. MORRIS:

14 Q Isn't it true that you don't know who the assistant
15 manager was who was assigned to the atrium area on February
16 8th, 2010?

17 A No, I don't recall.

18 Q And in your time as an assistant manager at Wynn, do
19 you remember testifying earlier this year that you claim
20 you've never discovered a porter not doing his or her
21 assignment in all of your time working at Wynn?

22 A It's very difficult to maintain the casino, you
23 know, completely clean, because it's a job for 24 hours.
24 There are people -- a lot of people walking through, a lot of
25 children, they're carrying things. So, it's impossible to

1 keep it clean at 100 percent.

2 Q Yanet, I want to talk to you briefly about your
3 shift back in 2010.

4 A Okay.

5 Q What shift were you working on February 8th, 2010?

6 A I don't -- I don't recall, because I used to work on
7 different shifts. What I understood is that, you know, what
8 shift I worked, and I told you that from 3:00 A.M. to 11:00
9 A.M.

10 Q So, your shift back in February was 3:00 in the
11 morning until 11:00 in the morning?

12 A In February of what year?

13 Q 2010.

14 A Yes.

15 Q Do you know what time Yvonne's fall happened?

16 A No.

17 Q You didn't actually see Yvonne fall, did you?

18 A No.

19 Q You got there after she fell and saw the spill
20 covered up with a sweeper; is that correct?

21 A I arrived when we were called. I saw the sweeper,
22 but I didn't see liquid.

23 Q Isn't it true that you saw a green substance on the
24 floor?

25 A When the employee moved the sweeper a little bit,

1 there was a substance that looked like honey.

2 Q You just said that it was a substance that looked
3 like honey?

4 A A little sticky like -- like honey.

5 Q Yvonne (sic), is this description you're saying,
6 "like honey," is this something that you just remembered?

7 A No.

8 Q How come you didn't tell me about honey back in
9 March of this year when I asked you about the spill?

10 A I think that I -- I told you something, that it was
11 like the honey for pancakes. What's it called?

12 Q I'm going to show you Exhibit 1, which is in your
13 binder in front of you. Now, this is the report made by Corey
14 Prowell after Yvonne fell. You've seen this report before?

15 A No.

16 Q Looking at the fourth paragraph down of Exhibit 1,
17 isn't it true it says, "I spoke with Manager Elias, who
18 stated, upon her arrival, she noticed the liquid substance on
19 the floor"?

20 A I don't recall this.

21 MS. MORRIS: Thank you for your help.

22 THE COURT: Cross?

23 MR. SEMENZA: Yes, Your Honor. I'm going to show
24 her Joint Stipulated Exhibit 6.

25 //

CROSS-EXAMINATION

BY MR. SEMENZA:

Q Do you recall when you completed this statement, Ms. Elias?

A No.

Q And is English your native language?

A No.

Q What is your native language?

A Spanish.

Q And did you complete your statement in English or in Spanish?

A In English.

Q And did you do the best you could do in completing your statement in English?

A Yes.

Q And did you try and be honest and accurate?

A I tried.

Q Did you do your best?

A Yes.

Q Do you recall how many porters were assigned to the atrium area of the Wynn around 2:00 o'clock on February 8th, 2010?

A I don't recall.

Q Do you know whether there were one or two porters assigned to the atrium area on February 8th, 2010 in or around

1 2:00 o'clock P.M.?

2 A I don't recall.

3 Q Generally speaking, do you think the porter staff at
4 Wynn Las Vegas that you oversee does a good job?

5 A Yes.

6 Q And do you have any involvement from time to time in
7 training the porter staff?

8 A Yes.

9 Q Do you know how many porter staff that you currently
10 supervise?

11 A During the day, there's about 55, but it's -- I
12 don't do it alone.

13 Q And at the time of Ms. O'Connell's fall, do you know
14 how many porters you supervised?

15 A No, I don't recall.

16 Q As you sit here today, do recall whether this spill
17 that we've been talking about was cleaned up prior to the
18 arrival of the security officer?

19 A It is possible that if it was a big water spill, as
20 it was mentioned, that they have started cleaning, because
21 it's a matter of security; safety.

22 Q And is the safety of Wynn's patrons of the utmost
23 importance to you?

24 A Of course.

25 Q Do you recall whether you left the scene prior to

1 the alleged spill being cleaned up?

2 A I don't recall.

3 Q And how did you first receive the call that there
4 had been a spill on this particular day, February 8th, 2010?

5 A Like I said, you know, when someone or a person
6 realize that there has been a spill or liquid, they call the
7 number that we use for dispatch and they let us know. Can I
8 say something?

9 Q Yes.

10 THE COURT: You have to wait for a question.

11 BY MR. SEMENZA:

12 Q Do you have your deposition testimony in front of
13 you?

14 A It's -- is it this?

15 MR. SEMENZA: May I approach, Your Honor?

16 THE COURT: Yes.

17 MR. SEMENZA: I just want to see if she has a copy.
18 No, you have the original. Can I approach?

19 THE COURT: Yes.

20 BY MR. SEMENZA:

21 Q Ms. Elias, I'd like you to turn to page 45 of your
22 deposition, please. Are you there?

23 A Yes.

24 Q Do you recall being asked a question, "So, do you
25 disagree with that statement that you reported seeing a liquid

1 substance on the floor"?

2 A I don't see it.

3 Q It's on page 45, line 10. Do you recall being asked
4 that question?

5 A Yes.

6 Q And do you recall giving the following answer? "The
7 liquid is not like water. It's like I told you, it's
8 something like sticky, because it's not something like a
9 really, really -- like a water. It's like something like a
10 syrup, like a drink, like something like that, but not like
11 they go more than a little space."

12 A Yes.

13 Q You remember giving that statement?

14 A Yes.

15 Q Thank you.

16 MR. SEMENZA: One moment, Your Honor.

17 (Pause in the proceedings)

18 MR. SEMENZA: No further questions, Your Honor.

19 THE COURT: Thank you. Any --

20 MS. MORRIS: Briefly.

21 THE COURT: -- redirect?

22 MS. MORRIS: Yes.

23 REDIRECT EXAMINATION

24 BY MS. MORRIS:

25 Q Yanet, I just want to clarify your testimony. The

1 handwritten statement that we've been looking at here, it's in
2 your handwriting; is that correct?

3 A Yes.

4 Q And you wrote that there was a spill; isn't that
5 correct?

6 A Yes.

7 Q And Corey Prowell's report states that you told him
8 there was a spill.

9 A When I wrote down a spill -- that there had been a
10 spill, it's because that's was what I had been told when I was
11 called to the area.

12 Q And do you recall who told you there was a spill?

13 A The person at dispatch.

14 Q And when you got there, there was a substance on the
15 floor, wasn't there?

16 A Yes.

17 Q And that substance, part of it had been covered up
18 by a sweeper machine; is that right?

19 A Yes.

20 Q After you got there, you called security and had
21 them come over; is that correct?

22 A We told dispatch to call security.

23 Q And do you recall why you had security come over?

24 A Because whenever there's an accident or something
25 happened, security must come.

1 Q I want to look back at your statement here. Isn't
2 it true that you wrote down here that you called security
3 because she wanted to make a report, Yvonne, because she had
4 pain in her arm? Do you remember writing that?

5 A Yes.

6 Q Isn't it true that you didn't stay and wait for the
7 liquid to get cleaned up?

8 A I don't recall.

9 Q Do you remember telling me in your deposition that
10 your shift was over, and so you left and didn't wait for the
11 liquid to get cleaned up?

12 A Like I said when you asked me, I thought that you
13 referred to my schedule. I thought you were talking about the
14 schedule that I was working that day.

15 Q Okay. I'm going to grab your deposition transcript
16 back from you, if that's okay.

17 THE COURT: Do you have a copy so she can have a
18 copy? I mean, that's normally the way you do it.

19 MS. MORRIS: Right, I apologize.

20 MR. SEMENZA: Your Honor, it is -- it's also located
21 in Defendant's Proposed EE, if that helps. You should have a
22 copy of --

23 (Pause in the proceedings)

24 THE COURT: Okay. I'm going to hand the interpreter
25 the copy --

1 MS. MORRIS: Thank you.

2 THE COURT: -- of the deposition so you can follow
3 along with the questions that the lawyer is asking.

4 THE WITNESS: Okay, yes.

5 (Pause in the proceedings)

6 MS. MORRIS: Sorry, I'm almost there. Hold on,
7 Yanet. Sorry.

8 (Pause in the proceedings)

9 MS. MORRIS: Give me two more minutes and I'll get
10 it.

11 THE COURT: You got one.

12 MS. MORRIS: One? All right, I'll take it.

13 (Pause in the proceedings)

14 MS. MORRIS: Maybe I'll save this then as soon as I
15 -- if I can find it.

16 BY MS. MORRIS:

17 Q Yanet, did you see the liquid get cleaned up off the
18 floor?

19 A I don't recall.

20 Q Do you remember if you left the area before the
21 liquid was cleaned up?

22 A Except there wasn't liquid.

23 Q The substance that you saw on the floor, was that
24 still on the floor when you left the area?

25 A I don't recall.

1 Q And do you recall how that was cleaned up?

2 A No.

3 Q Do you remember when your shift ended that day?

4 A No.

5 Q Do you remember speaking with Yvonne O'Connell?

6 A No.

7 Q Do you recall what Ms. O'Connell said was hurting
8 her?

9 A No.

10 Q Did you check to see if there was any video
11 surveillance of the fall?

12 MR. SEMENZA: Objection, foundation. Your Honor?

13 THE COURT: I'm sorry, I'm choking --

14 MR. SEMENZA: Oh.

15 THE COURT: -- on some water. Excuse me, I'm sorry.

16 MR. SEMENZA: No.

17 THE COURT: Okay, would you restate the question
18 again?

19 BY MS. MORRIS:

20 Q Did you check to see if there was any video
21 surveillance of the fall?

22 MR. SEMENZA: And I objected based on foundation,
23 Your Honor.

24 THE COURT: Okay. Sustained.

25 //

1 BY MS. MORRIS:

2 Q Yanet, is it your job to check to see if there's
3 video surveillance of an incident after a guest is injured at
4 Wynn?

5 A No.

6 Q Do you know whose job it is?

7 A Security.

8 MS. MORRIS: Thank you. I don't have any other
9 questions.

10 THE COURT: Counsel approach.

11 (Off-record bench conference)

12 THE COURT: All right. One more question, and then
13 we're going to ask the jury if they have any questions.

14 RECROSS-EXAMINATION

15 BY MR. SEMENZA:

16 Q Do you know what the hours for day shift are for the
17 Wynn?

18 A Right now, or before?

19 Q Well, let's -- February 8th, 2010.

20 A From 8:00 to 5:00.

21 Q And if you were working day shift that particular
22 day, would you be working 8:00 to 5:00?

23 A Yes.

24 MR. SEMENZA: I have no further questions, Your
25 Honor. I would like to reserve recalling the witness in my

1 case.

2 THE COURT: All right. So, what that means is that
3 Mr. Semenza may call you when he puts on his case. And now
4 I'm going to ask the jury if they have any questions. Does
5 the jury have any questions? And I see none, and so you're
6 excused. Thank you very much. Call your next witness.

7 MS. MORRIS: We call Dr. Dunn. Well, actually, we
8 have to --

9 THE COURT: Oh, okay, that's right. All right.
10 Ladies and gentlemen, we have to do something outside your
11 presence, so you're going to get a break while we have to
12 continue working. We -- trying to accommodate Dr. Dunn's
13 schedule, we are going to go until 6:00 o'clock today, no
14 later than that.

15 So, use this opportunity to stretch, stroll around,
16 use the restroom, knowing that we're going to go an hour later
17 than we normally go, because we're trying to get this trial
18 done and over, and, you know, we have that intervening
19 Wednesday that we're off because the courthouse is closed for
20 Veteran's Day.

21 So, during this recess, it is your duty not to --
22 it's not a recess for us, but it's a recess for you. And it's
23 your duty not to converse among yourselves or with anyone else
24 on any subject connected with the trial, or to read, watch, or
25 listen to any report of or commentary on the trial by any

1 person connected with the trial, or by any medium of
2 information, including, without limitation, newspaper,
3 television, radio, or internet, and you are not to form or
4 express an opinion on any subject connected with this case
5 until it's finally submitted to you.

6 You know, anticipate at least 15 minutes, probably.
7 It could be longer, but you know, if you're going to leave the
8 floor -- do we have any smokers in our -- no? Okay. So, the
9 marshal will tell you where you can smoke, but make sure you
10 do that in the next 15 minutes so you can get back to the
11 floor in case we need to call you.

12 THE MARSHAL: All rise for the jury, please. Follow
13 me, please.

14 (Outside the presence of the jury)

15 MR. SEMENZA: Your Honor, may I run to the restroom
16 very quickly?

17 THE COURT: Okay. So, we'll go off the record so
18 counsel can use the restroom, and then we'll go right back and
19 get Dr. Dunn on.

20 (Court recessed at 4:27 P.M. until 4:35 P.M.)

21 (Outside the presence of the jury)

22 THE MARSHAL: Follow me, okay? Remain standing,
23 face the clerk, raise your right hand.

24 //

25 //

1 DR. THOMAS DUNN, PLAINTIFF'S WITNESS, SWORN

2 THE CLERK: Please be seated, and then please state
3 and spell your first and last name.

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

5 THE CLERK: Thank you.

6 THE COURT: And you may proceed.

7 MR. SEMENZA: Thank you.

8 (Testimony outside the presence of the jury)

9 DIRECT EXAMINATION

10 BY MR. SEMENZA:

11 Q Good afternoon, Dr. Dunn.

12 A Good afternoon.

13 Q Did you bring any materials with you today?

14 A Yes, I brought my chart.

15 Q May I examine those for a moment?

16 A Sure.

17 (Pause in the proceedings)

18 BY MR. SEMENZA:

19 Q Dr. Dunn, is this the complete medical chart that
20 you have in your possession relating to Ms. O'Connell?

21 A Well, it's the complete file that I have in my
22 possession, but there are, I believe, other doctors at Desert
23 Orthopedic Center have seen her, so I don't believe I have
24 their material in there.

25 Q Okay. When were these documents obtained?

1 A Well, I think my secretary gave them to me last
2 week.

3 Q Okay. And do you know whether she went out and
4 obtained additional documents? And here's --

5 MR. SEMENZA: Your Honor, the documents that he
6 brought with him include other materials outside of what has
7 been produced in this case, so from other doctors, those sorts
8 of things. So, I don't --

9 THE COURT: Yeah, I'm just seeing that -- this is
10 what I have.

11 MR. SEMENZA: And that's what I have as well.

12 THE COURT: And that was produced by the plaintiff
13 of Dr. Dunn's records, so I don't know what you're talking
14 about. I mean, what are you referring to? Do you know
15 specific --

16 MR. SEMENZA: There's a whole host of documents
17 relating to UMC, relating to -- may I -- give me the chart.

18 THE WITNESS: Sure.

19 BY MR. SEMENZA:

20 Q Let me ask you real quickly, Dr. Dunn, do you know
21 when this compilation was undertaken by your staff?

22 A I don't know.

23 MR. SEMENZA: Your Honor, contained within the
24 documents that Dr. Dunn has provided as part of his medical
25 chart, there are documents from the Desert Institute of Spine

1 Care. There are documents from Edson Erkulvrawatr. There are
2 documents from UMC Medical.

3 THE COURT: From what dates?

4 MR. SEMENZA: There's a ton of them, Your Honor.
5 That's the -- I'll identify them for the record. There is a
6 lumbar spine report MRI dated 4/8/2010, which I believe is
7 referenced in Dr. Dunn's medical chart, so that's not at
8 issue. There is also from UMC of Southern Nevada Department
9 of Radiology a LK spine lumbo-sacral limited study that was
10 done, and that is dated February 10th of 2010. I don't know
11 that that was referenced.

12 THE COURT: On films?

13 MR. SEMENZA: Pardon me?

14 THE COURT: On plain films?

15 MR. SEMENZA: Three views of the lumbar spine were
16 obtained. There are five lumbar type vertebrae. Alignment is
17 within normal limits. Marked -- impression marked multilevel
18 degenerative disc disease of the lumbar spine.

19 THE COURT: Okay. So, the doc's saying it's plain
20 film, so x-rays. Okay.

21 MR. SEMENZA: There is a chest radiograph dated
22 March 19th of 2010. There is a medical record from Dr. Andrew
23 Cash at the Desert Institute of Spine Care dated April 19th of
24 2010. There is a Dr. Cash Desert Institute of Spine Care
25 report dated May 18th of 2010. There is a --

1 THE COURT: That's from Dr. Cash as well?

2 MR. SEMENZA: Yes.

3 THE COURT: May 18th?

4 MR. SEMENZA: There is a Southern Nevada Pain Center
5 report, office visit. It does not -- oh, dated October 15th
6 of 2010. There is a Desert Institute of Spine Care report
7 from Dr. Cash dated September 13th of 2012. There is a
8 Steinberg Diagnostic Medical Imaging Center lumbar spine
9 series dated September 27th of 2011.

10 There is a UMC Authorization to Release Protected
11 Health Information dated May 15th, 2014. There is a UMC chart
12 record dated May 1 of 2014, comprised of two -- three pages.
13 There is a UMC chart dated January 14th, 2014 comprised of
14 three pages. There is a UMC chart dated September 4, 2013
15 comprised of three pages. There is a UMC chart dated June 4th
16 of 2013.

17 THE COURT: What was it? What date?

18 MR. SEMENZA: June 4th of 2013, comprised of three
19 pages. There is a UMC chart dated February 5th of 2013
20 comprised of three pages. There is a document identified as,
21 E-form external document; new problem, low back pain;
22 provider, Dr. Dunn, 6/13 of 2014 that I don't believe I have
23 seen before.

24 There is a second document dated June 13th of 2014
25 from Dr. Dunn that I don't believe I've seen before. There is

1 a third document dated June 13, 2014 from Dr. Dunn that I
2 don't believe I have seen before. There is a fourth document
3 dated June 13, 2014, that I don't believe I have seen before
4 from Dr. Dunn. There is a HIPAA privacy notice for Ms.
5 O'Connell that I have not seen before. There is a document
6 from Dr. Dunn dated June 11, 2014, clinical lists update, that
7 I don't believe I have seen before.

8 There is an internal other portal enrollment dated
9 June 11, 2014 from Dr. Dunn that I don't believe I've seen
10 before. There is a document that appears to be a service
11 ledger for Dr. Dunn and Dr. Tingey that has additional charges
12 that were not previously disclosed. There was a medical
13 records request that is two pages dated September 10, 2014
14 from Dr. Martin.

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

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

21 So, Your Honor, if you'd like to examine the
22 documents. I mean, obviously, Your Honor, I'm objecting on
23 the basis that Dr. Dunn has reviewed and received additional
24 medical documents that were not produced to us as part of his
25 file. So, I would ask that Dr. Dunn's testimony be stricken

1 relating to this particular matter.

2 THE COURT: Dr. Dunn, the -- the MRI from 2010, the
3 x-rays from UMC from 2010, the chest x-ray from 2010, or Dr.
4 Cash's medical records from 2010, when did you get those?

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

12 THE COURT: Okay, but -- and the reason we ask,
13 obviously, is the first report that I have of -- you know,
14 she's coming in to see you, it looks like the first time you
15 see her is June 16th of 2014, referred by Dr. Cash.

16 But these -- you know, what we have is supposed to
17 be your medical chart, and there's nothing in there from Dr.
18 Cash, but now there is a chest x-ray and there's two medical
19 records; one in April, April 19th of 2010, and one in May, May
20 18th of 2010, but you can't say whether you had those at the
21 time you saw her or not?

22 THE WITNESS: Well, I mean, I typically won't
23 document all the records as a treating physician I've
24 reviewed. So, what I did document in here were the relevant
25 records that I did look at. A chest x-ray wouldn't be

1 relevant to me, but an MRI of the neck and back would be, and
2 so those are listed. So, I evidently had those. But anything
3 else, I just don't have a recollection.

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

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

15 THE COURT: All right. But beyond that, all of
16 these other records, they're not mentioned at all. Are you
17 relying on those? Because basically, your testimony has to be
18 limited in this matter to what's in your -- in your chart
19 because of the disclosure.

20 You're a treating physician, and nothing -- the
21 disclosure that was made said you were going to testify in
22 conformance with your chart, and then there was kind of a
23 broad thing that said you were going to relate everything to
24 the accident, but that was the same disclosure that was made
25 to every -- on every single doctor that was disclosed, so your

1 chart doesn't say anything about causation. So --

2 THE WITNESS: I would just answer it this way, Your
3 Honor. The relevant material that I reviewed that would
4 impact my opinions are included in my reports, and that would
5 just be the MRI studies, and I ordered updated MRI studies, so
6 that's why they're included.

7 But the other reports, I don't recall if I saw those
8 or not at the time. I have looked at them recently since I've
9 had this packet there before me, and they really don't impact
10 the opinions that I formulate in my mind from my own records,
11 without even having seen those.

12 MR. SEMENZA: Okay. Your Honor, the prejudice is
13 that I need to know what he's reviewed, and I don't think it's
14 appropriate or fair, to be perfectly honest, that Dr. Dunn
15 does show up with new documents here that I haven't had a
16 chance to review and go through, and to be perfectly honest,
17 then I'm expected to voir dire the witness, and we're supposed
18 to be completed here today by 6:00 P.M.

19 So, I think I'm prejudiced in the sense that there
20 are new documents that have now shown up which I don't believe
21 have ever been produced in this particular case.

22 THE COURT: Does the plaintiff believe you've
23 produced these other records?

24 MS. MORRIS: They were produced by other providers.
25 Defense counsel and I both sent the same request, and got the

1 same records, and disclosed the same records, and which, in
2 that, Dr. Dunn has clarified he's going to be testifying in
3 accordance with the information that's contained only within
4 his medical records. I don't see any prejudice. There's not
5 going to be any reference to those records.

6 The records that he has contained in his chart are
7 records that have been disclosed in the litigation. However,
8 he and I both put in requests, and both got the same
9 information.

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

19 THE COURT: No, I don't think that's true. I think
20 that, generally, they copy the whole chart and say, this is,
21 you know, what's in our chart, because a physician's allowed
22 to, if they -- if they've used other physicians' records to
23 form a diagnosis, they need to know that history, and if
24 they've asked for those records and they're part of the chart,
25 they can rely on that.

1 And so, yeah, to say, you should -- I mean, you
2 really should. When you go and you take a deposition, it
3 should have everything that was produced in response to the
4 request to produce the medical records, because it doesn't
5 matter where they're from; it just needs to be -- you know,
6 when you've asked for, produce your chart, it needs to be the
7 whole chart, not --

8 MS. MORRIS: Right, I think --

9 THE COURT: -- just what we think -- you know, we'll
10 pick and choose, and --

11 MS. MORRIS: Well, the custodian of records signs it
12 as to say, these are the Desert Orthopedic medical records
13 related to the treatment of Yvonne O'Connell.

14 THE COURT: Um-hum.

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

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

23 MS. MORRIS: And x-rays as well.

24 THE COURT: -- what it says.

25 MS. MORRIS: Correct.

1 THE COURT: No, it doesn't say -- well --

2 MS. MORRIS: It states --

3 THE COURT: Actually --

4 MS. MORRIS: -- previous studies, x-rays, CT scans,
5 MRI.

6 MR. SEMENZA: Where are you looking?

7 MS. MORRIS: Page 1 from office visit of 6/16/2014.

8 MR. SEMENZA: Well, where do these come from?

9 MS. MORRIS: It's his chart.

10 THE COURT: Office visit of 6/16 you're talking
11 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 just
15 means that she had previous studies. It doesn't say he's got
16 all them. It does indicate the MRIs on page 3 and 4, which
17 are -- are obviously significant, and they're noted here in
18 some detail. So clearly, he read them, because he couldn't
19 have dictated this dictation unless he had. But I'm going to
20 allow you to go forward and find out what he knows and how he
21 knows it, and then we can make a decision.

22 MR. SEMENZA: Okay.

23 BY MR. SEMENZA:

24 Q And Dr. Dunn, may I grab those from you? Thank you.
25 Dr. Dunn, what kind of doctor are you?

1 A I'm a board certified orthopedic surgeon, fellowship
2 training in spine surgery, and my practice is limited to
3 surgery of the spine.

4 Q And do you have a specialty of the body? Is it the
5 back?

6 A Yes. My specialty is a sub-specialty of
7 orthopedics, which is a specialty of surgery of the muscular
8 skeletal system, and I specialize in the spine.

9 Q And do you recall when Ms. O'Connell first came to
10 you?

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

12 Q And on June 16th, 2014, what did you see her for?

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

14 Q And was this an office visit?

15 A Yes.

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

18 A Not that I recall, no.

19 Q During this appointment on June 16th of 2014, did
20 you or anyone from your staff take a patient history?

21 A Yes. Typically, with these -- the process with
22 electronic medical records, the patient will fill out intake
23 sheets. It's all on the computer. Then we have a person
24 called a roomer who actually rooms the patient, and then goes
25 through a history, and then I sit down with the patient and go

1 through the history that they've obtained.

2 Q And where does the -- does the patient input into
3 the computer prior to her appointment?

4 A Yes, or at the time for appointment. We have
5 portals in the lobby.

6 Q And do you know if that was done in this particular
7 case?

8 A No. I mean, it was done. I don't know if she did
9 it at home online, or if she did it in the lobby. I don't
10 know.

11 Q Do you know whether it was done before or after your
12 initial appointment with her on June 16th, 2014?

13 A It wouldn't have been done after. It's done before
14 I see her.

15 Q And where is that patient evaluation or history
16 located in your records?

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

19 Q Okay. Is -- is the --

20 MR. SEMENZA: And may I approach?

21 THE COURT: Yes.

22 BY MR. SEMENZA:

23 Q Is the first page of the seven documents that you've
24 brought with you today -- is that the patient history that
25 you've been referring to?

1 A Yes.

2 Q And it's comprised of five pages; the first five
3 pages? I'll let you verify.

4 A Yes.

5 MR. SEMENZA: And again, Your Honor, I don't think
6 that's ever been produced in this particular case, but I
7 understand you'd like us to move on.

8 THE COURT: Well, do you know if that issue --

9 MS. MORRIS: I don't know what he's talking about.
10 I haven't seen it.

11 THE COURT: Okay, show her.

12 MR. SEMENZA: Thank you.

13 MS. MORRIS: I can look through our 16.1
14 disclosures. It does look familiar to me. [Inaudible]. I'll
15 look through our 16.1.

16 MR. SEMENZA: And let me take a look as well.

17 MS. MORRIS: Your Honor, I can keep looking if he'd
18 like to go through the questions since --

19 MR. SEMENZA: Well, I may have questions.

20 MS. MORRIS: -- we have a time constraint.

21 MR. SEMENZA: I may have found it, Your Honor.

22 Okay. I think it was produced.

23 THE COURT: Okay.

24 //

25 //

1 BY MR. SEMENZA:

2 Q And how did you come to treat Ms. O'Connell? Was it
3 through referral?

4 A Well, according to this document, it says it's a
5 referral by Andrew Cash -- Dr. Cash.

6 Q And do you have an understanding as to why Dr. Cash
7 was referring you this patient?

8 A I believe it's the second opinion evaluation.

9 Q A second opinion as to what?

10 A Her neck and back pain.

11 Q And when you initially saw Ms. O'Connell on June
12 16th of 2014, did you have the previous doctor's medical
13 history; medical charts?

14 A Again, I don't recall. I may have. Typically, when
15 I see patients, my medical staff will obtain records of that
16 physician's visit, as well as injections or radiographic
17 studies.

18 Q And at that June 16th, 2014 appointment, what was
19 her chief complaint?

20 A She was complaining of pain in the low back
21 radiating to the butt, and right leg to the heel, and pain in
22 the neck radiating to both arms, down to the hands, and she
23 was also having pain in the chest area.

24 Q And did she provide an explanation as to what she
25 believed the source of that pain was?

1 A When -- I don't quite understand. What do you mean,
2 the source?

3 Q Did she provide a history as to the basis of why she
4 was having these pains?

5 A Yes. She said it developed after a slip and fall
6 injury on February 8th, 2010.

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

11 A Again, I only referenced her MRI studies, so I -- I
12 don't recall if I looked at anything else at the time.

13 Q As of June 16th of 2014, the first appointment, did
14 you in fact have prior MRI studies of her?

15 A Yes.

16 Q And can you identify what those studies were?

17 A There is an MRI of the cervical spine that was
18 obtained on May 8th, 2010. There was an MRI of the lumbar
19 spine that was performed on April 8th, 2010. And there were
20 radiographs of the cervical spine, and I believe those perhaps
21 were taken in my office, as well as flexion/extension bending
22 films of the lumbar spine taken in my office.

23 Q Okay. Where are the radiographs referenced?

24 A Right -- unfortunately, it all runs together in this
25 report, but on page 2 at the very bottom of the page, in bold

1 letters, it says, "Magnetic resonance imaging: lumbar." And
2 then I describe what I see. Then right below that, it says
3 "RAD," which stands for radiograph, spine cervical complete
4 minimum views, and then the reading of that is on the next
5 page.

6 And then, right below the reading of the neck, which
7 is identified with the letter C, C5-6, C6-7, there is another
8 indication of RAD, referring to radiographs of the lumbar, LS,
9 which is lumbar spine, with bending views. Then there's --
10 unfortunately, it looks like a double space, and then there's
11 a description of my reading of those radiographs of the lumbar
12 spine, and that would be on page -- it's designated as page 4.

13 Q So, at the top of the page, there are two sets of
14 x-rays that were done at your office on that particular day?

15 A Yes.

16 Q Okay. And then, show me where the prior -- you were
17 referencing on page 2. I lost you on that.

18 A I'm sorry, it's actually page 3. I have magnetic
19 resonance imaging, cervical and lumbar on the bottom of page
20 3.

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

24 A No, no. I reviewed an MRI that was obtained on
25 April 8th, 2010, and in bold letters, it says, "Magnetic

1 resonance imaging, lumbar." And then, below that, I have one
2 sentence where I describe what I see, and then below that, it
3 says "RAD" in capital letters. That's an abbreviation for
4 radiographs of the spine, neck, cervical, complete minimal,
5 four views.

6 And then, on the next page, at the top of four, is
7 listed my reading of those radiographs. Then, immediately
8 before that designation, capital letters RAD, referring to
9 radiographs of the LS spine, which is the lumbar sacral spine,
10 with bending views. And then there's a double space, and
11 again, right at the top of page 4 where I describe what I see
12 there.

13 Q Okay. Other than the MRIs performed on May 8th,
14 2010, and the MRI on 4/8/2010, and then the RAD spine cervical
15 complete at the bottom of page 3, and the RAD spine LS with
16 bending views at the top of page 4, those were the additional
17 records that you reviewed?

18 A Well, those are studies that I actually reviewed. I
19 don't believe they were records. I believe they were actual
20 studies, I mean, actual films.

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

22 A Well, at the first visit, which we just covered, I
23 had recommended MRI studies -- updated MRI studies of the neck
24 and back. So, she returned on July 14th, 2014, approximately
25 a month later, to review those studies, both of which were

1 obtained on June 27th, 2014. Excuse me.

2 Q And those -- what were those studies that were
3 performed prior to the appointment on July 14th of 2014 that
4 you had ordered updated?

5 A Yes. That was an MRI of the cervical spine, and
6 also of the lumbar spine.

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

8 A Well, I saw her to review those films, and then I
9 saw her a final visit, which would have been her third visit
10 with me, on October 13th, 2014.

11 Q Okay, so you saw her a total of three times?

12 A Yes.

13 Q Okay, and what was the appointment for the third
14 time relating to?

15 A Again, we were -- it was for neck and back, and
16 depending on the visit, one problem area would predominate
17 over the other. At that visit, she was having a flare up of
18 her back pain, but she said, overall, the neck pain
19 predominates with the associated symptoms of numbness, and
20 tingling, and pain radiating down her arm. It could be right
21 arm some days; left on others. And so, at that point, I
22 discussed surgical options with her.

23 Q And has she been back to see you since October 13th
24 of 2014?

25 A No.

1 Q Has she made any determination as to whether she's
2 going to have surgery with you?

3 A Well, again, not with me. Again, beyond that last
4 date in October, there's been no communication.

5 Q Okay. Do you have any understanding as to why
6 there's been no communication since October 13th of 2014?

7 A Well, I express to my patients, at that point,
8 there's really nothing further I can do for them, short of
9 surgery, so there's no reason to come back and see me unless
10 they've decided to pursue surgery.

11 Q And did you give Ms. O'Connell some non-surgical
12 options as well?

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

22 So, it's basically the recommendation of, do your
23 best to live with this anyway you want to help you with the
24 symptoms and improve your quality of life, and if none of that
25 works and you can't endure the symptoms, then you have that

1 option, which in this case would be the option of last resort.
2 That would be surgery.

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

5 A Yes.

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

8 A No.

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

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

16 Q Any other preexisting conditions that Ms. O'Connell
17 identified?

18 A No.

19 Q To your knowledge, did she ever identify that she
20 had a history of fibromyalgia?

21 A Now, being fair to the process, I'm just going on my
22 medical records, and I don't have that -- I don't see that
23 documented in my records, no.

24 Q If Ms. O'Connell did have a history of fibromyalgia,
25 might that have affected her pain levels that she was

1 identifying during your appointments?

2 A It may have, yes.

3 Q Are you familiar with something called Marfan
4 Syndrome?

5 A Yes.

6 Q Okay. Do you think that if Ms. O'Connell had a
7 preexisting history of Marfan Syndrome, that that might have
8 affected how she experiences pain?

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

15 Q What about Ehlers-Danlos Syndrome?

16 A Again, another collagen disorder. It would not
17 affect her pain.

18 Q But fibromyalgia would have an effect on her pain
19 levels?

20 A Yes.

21 Q Did you undertake any attempts to differentiate --
22 strike that. Did you look for any other initiating causes of
23 Ms. O'Connell's back pain, other than the claimed fall on
24 February 8th of 2010?

25 A Well, as part of the evaluation of all patients, the

1 history gives us, 80 percent of the time, the diagnosis. It
2 represents typically the largest part of information a
3 physician uses to develop the diagnosis or the cause of their
4 problems. In musculoskeletal medicine, the main categories
5 are degenerative, traumatic, infectious, carcinogenic, and
6 those can interplay. It's not necessarily something that's
7 independent of each other.

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

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

14 A Based on her history, yes.

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

17 A Yes.

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

20 A Well, only -- it was related from her to me, as
21 documented on the June 16, 2014 note, and it simply says,
22 while walking in the Wynn Hotel and Casino, she slipped and
23 fell backwards, twisting to the right, striking her right
24 buttock and leg on a raised divider before hitting the ground.

25 Q And after the first appointment, did you have a

1 diagnosis of Ms. O'Connell's condition?

2 A Yes.

3 Q And what was that?

4 A I noted impressions of degenerative disc disease at
5 the cervical spine with cervical radiculopathy, and lumbar
6 disc disease with sciatica, and bilateral carpal tunnel
7 syndrome per history.

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

12 A Well, that's a radiographic diagnosis, would have --
13 which would have existed prior to her accident, but the
14 critical factor is whether it's symptomatic or not, and by her
15 history, it was not.

16 Q Okay. What do you mean by radiographic history?
17 So, are -- in a sense, are you --

18 THE COURT: Okay, I'm going to kind of stop you
19 here. I mean, what I'm seeing here is he's saying that he's
20 got radiographic studies, including MRIs, that show she's got
21 degenerative disc disease, and he's saying that -- he's going
22 by what she said, that I didn't have any pain, and that he
23 relied on that in determining that -- you're going to link
24 this up to the fall?

25 THE WITNESS: It's her history, yes.