

CLERK OF THE COURT

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Jun 16 2016 11:20 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

NOAS

LAWRENCE J. SEMENZA, III, ESQ., Bar No. 7174

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Attorneys for Defendant Wynn Las Vegas, LLC

d/b/a Wynn Las Vegas

DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, individually,

Plaintiff,

v.

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

Defendants.

Case No. A-12-655992-C

Dept. No. V

NOTICE OF APPEAL

Notice is hereby given that Defendant Wynn Las Vegas, LLC d/b/a Wynn Las Vegas ("Defendant") hereby appeals to the Supreme Court of Nevada from the Judgment on Jury Verdict entered in this action on the 15th day of December, 2015, and the Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law or, Alternatively, for a New Trial

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1 or Remittitur entered in this action on the 24th day of May, 2016, as well as any orders,
2 judgments and rulings made appealable by the foregoing, including but not limited to any award
3 of costs and/or interest to the Plaintiff in this case.

4 DATED this 8th day of June, 2016.

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

6
7 /s/ Christopher D. Kircher

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

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

10 Jarrod L. Rickard, Esq., Bar No. 10203

11 10161 Park Run Drive, Suite 150

12 Las Vegas, Nevada 89145

13 Attorneys for Defendant Wynn Las Vegas, LLC

14 d/b/a Wynn Las Vegas

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CERTIFICATE OF MAILING

Pursuant to Nev. R. Civ. P. 5(b) and NEFCR 9, I hereby certify that I am an employee with Lawrence J. Semenza, III, P.C., and that on the 8th day of June, 2016, I caused to be sent via Wiznet's online filing system, a true copy of the foregoing **NOTICE OF APPEAL** to the following registered e-mail addresses:

NETTLES LAW FIRM

Christian M. Morris, Esq., christianmorris@nettleslawfirm.com

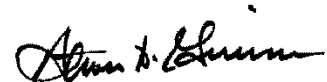
Edward Wynder, Esq., Edward@nettleslawfirm.com

Jenn Alexy, jenn@nettleslawfirm.com

Attorneys for Plaintiff

/s/ Olivia A. Kelly

Employee of Lawrence J. Semenza, III, P.C.


CLERK OF THE COURT

1 **ASTA**
2 LAWRENCE J. SEMENZA, III, ESQ., Bar No. 7174
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13 Attorneys for Defendant Wynn Las Vegas, LLC
14 d/b/a Wynn Las Vegas

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 YVONNE O'CONNELL, individually,

18 Plaintiff,

19 v.

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

24 Defendants.

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

CASE APPEAL STATEMENT

25 1. Name of appellant filing this case appeal statement: **Wynn Las Vegas, LLC d/b/a**
26 **Wynn Las Vegas ("Defendant").**

27 2. Identify the judge issuing the decision, judgment, or order appealed from: **The**
28 **Honorable Judge Carolyn Ellsworth of the Eighth Judicial District Court of Nevada.**

LAWRENCE J. SEMENZA, III, P.C.
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Telephone: (702) 835-6803

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

Wynn Las Vegas, LLC d/b/a Wynn Las Vegas
c/o LAWRENCE J. SEMENZA, III, P.C.
Lawrence J. Semenza, III, Esq., Bar No. 7174
E-mail: ljs@semenzalaw.com
Christopher D. Kircher, Esq., Bar No. 11176
Email: cdk@semenzalaw.com
Jarrold L. Rickard, Esq., Bar No. 10203
Email: jlr@semenzalaw.com
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145

4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel):

Yvonne O'Connell ("Plaintiff")
c/o NETTLES LAW FIRM
Brian D. Nettles, Esq., Bar No. 7462
Email: brian@nettleslawfirm.com
Christian M. Morris, Esq., Bar No. 11218
Email: christianmorris@nettleslawfirm.com
1389 Galleria Drive, Suite 200
Henderson, Nevada 89014

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission): **All of the attorneys listed above are licensed to practice law in the State of Nevada.**

6. Indicate whether appellant was represented by appointed counsel in the district court: **Lawrence J. Semenza, III, P.C. was not appointed, but retained by the Defendant in this case.**

7. Indicate whether appellant is represented by appointed counsel on appeal: **Lawrence J. Semenza, III, P.C. was not appointed, but retained by the Defendant for the appeal.**

1 8. Indicate whether appellant was granted leave to proceed in forma pauperis, and
2 the date of entry of the district court order granting such leave: **N/A**

3 9. Indicate the date the proceedings commenced in the district court (e.g., date
4 complaint, indictment, information, or petition was filed): **February 7, 2012.**

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

8 **Plaintiff alleges that on or about February 8, 2010, she was a guest at Defendant's**
9 **property and allegedly slipped and fell on a foreign substance present on the floor.**
10 **Defendant denies that it was negligent in any manner. Pursuant to Plaintiff's Amended**
11 **Complaint, she alleged a single claim of Negligence against Defendant.**

12 **After a jury trial, Plaintiff was awarded damages of \$150,000.00 in past pain and**
13 **suffering and \$250,000.00 in future pain and suffering. The jury, however, found Plaintiff**
14 **to be 40% at fault and Defendant to be 60% at fault. As a result, Plaintiff's award was**
15 **reduced to \$240,000.00 due to her own comparative negligence. The Jury Verdict was filed**
16 **in open court on November 16, 2015. Plaintiff was also awarded pre-judgment interest in**
17 **the sum of \$17,190.96. Accordingly, the District Court entered a Judgment on Jury Verdict**
18 **in favor of Plaintiff in the amount of \$257,190.96.**

19 **Defendant timely filed a Renewed Motion for Judgment as a Matter of Law or,**
20 **Alternatively, for a New Trial or Remittitur, which was subsequently denied by the District**
21 **Court. The Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law**
22 **or, Alternatively, for a New Trial or Remittitur was entered on May 24, 2016, and the**
23 **Notice of Entry of Order was filed and served on May 25, 2016.**

24 **Defendant appeals from the Judgment on Jury Verdict and the denial of Defendant's**
25 **Renewed Motion for Judgment as a Matter of Law or, Alternatively, for a New Trial or**
26 **Remittitur, which were both issued in error, as well as any orders, judgments and rulings**
27 **made appealable by the foregoing, including but not limited to any award of costs and/or**
28 **interest to the Plaintiff in this case.**

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1 11. Indicate whether the case has previously been the subject of an appeal to or
2 original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket
3 number of the prior proceeding: **This matter has uot previously been the subject of an appeal**
4 **or original writ proceeding to the Supreme Court.**

5 12. Indicate whether this appeal involves child custody or visitation: **This appeal does**
6 **not involve a child custody or visitatiou issue.**

7 13. If this is a civil case, indicate whether this appeal involves the possibility of
8 settlement: **This is a civil case, but the Defendant does not believe that there is a possibility**
9 **of settlement at this time.**

10 DATED this 8th day of June, 2016.

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

12 /s/ Christopher D. Kircher

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

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

15 Jarrod L. Rickard, Esq., Bar No. 10203

16 10161 Park Run Drive, Suite 150

17 Las Vegas, Nevada 89145

18 Attorneys for Defendant Wynn Las Vegas, LLC
19 d/b/a Wynn Las Vegas
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CERTIFICATE OF MAILING

Pursuant to Nev. R. Civ. P. 5(b) and NEFCR 9, I hereby certify that I am an employee with Lawrence J. Semenza, III, P.C., and that on the 8th day of June, 2016, I caused to be sent via Wiznet's online filing system, a true copy of the foregoing **CASE APPEAL STATEMENT** to the following registered e-mail addresses:

NETTLES LAW FIRM

Christian M. Morris, Esq., christianmorris@nettleslawfirm.com

Edward Wynder, Esq., Edward@nettleslawfirm.com

Jenn Alexy, jenn@nettleslawfirm.com

Attorneys for Plaintiff

/s/ Olivia A. Kelly

An Employee of Lawrence J. Semenza, III, P.C.

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

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

§
§
§
§
§

Location: **Department 5**
Judicial Officer: **Ellsworth, Carolyn**
Filed on: **02/07/2012**
Case Number History:
Cross-Reference Case Number: **A655992**

CASE INFORMATION

Statistical Closures

12/15/2015 Verdict Reached

Case Type: **Negligence - Premises Liability**

Subtype: **Slip and Fall**

Case Flags: **Appealed to Supreme Court**
Arbitration Exemption Granted

DATE

CASE ASSIGNMENT

Current Case Assignment

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

PARTY INFORMATION

Plaintiff

O'Connell, Yvonne

Lead Attorneys

Nettles, Brian D.
Retained
7024348282(W)

Defendant

Wynn Las Vegas LLC

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

Wynn Resorts Limited

DATE

EVENTS & ORDERS OF THE COURT

INDEX

02/07/2012



Complaint

Filed By: Plaintiff O'Connell, Yvonne

03/20/2012



Amended Complaint

Filed By: Plaintiff O'Connell, Yvonne

Amended Complaint

04/04/2012



Summons

Filed by: Plaintiff O'Connell, Yvonne

Summons

11/19/2012



Motion for Withdrawal

Filed By: Plaintiff O'Connell, Yvonne

Motion to Withdraw as Attorney of Record

11/20/2012



Certificate of Mailing

Filed By: Plaintiff O'Connell, Yvonne

Certificate of Mailing re Motion to Withdraw as Attorney of Record

12/19/2012

Motion to Withdraw as Counsel (3:00 AM) (Judicial Officer: Ellsworth, Carolyn)

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Motion to Withdraw as Attorney of Record

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

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

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

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

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

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

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

	Filed By: Defendant Wynn Las Vegas LLC <i>Reply in Support of Defendant's Motion in Limine [#1] to Exclude Purported Expert Witness Gary Presswood</i>
09/10/2015	 Reply in Support Filed By: Defendant Wynn Las Vegas LLC <i>Reply In Support of Defendant's Motion in Limine [#3] to Exclude Any Reference or Testimony of Defendant's Alleged Failure to Preserve Evidence</i>
09/10/2015	 Reply in Support Filed By: Defendant Wynn Las Vegas LLC <i>Reply In Support of Defendant's Motion in Limine [#2] to Exclude Unrelated Medical Conditions; Opposition to Plaintiff's Motion for Sanctions</i>
09/17/2015	 Motion for Summary Judgment (9:00 AM) (Judicial Officer: Thompson, Charles) <i>Defendant's Motion for Summary Judgment</i>
09/17/2015	 Reply to Opposition Filed by: Plaintiff O'Connell, Yvonne <i>Plaintiff's Reply to Defendant's Opposition to Plaintiff's Omnibus Motions in Limine</i>
09/18/2015	 Motion (9:00 AM) (Judicial Officer: Bulla, Bonnie) <i>Plt's Motion to Re-Open Discovery for the Limited Purpose of Taking Def't's 30(b)(6) Deposition and for OST</i>
09/18/2015	CANCELED Status Check: Compliance (11:00 AM) (Judicial Officer: Bulla, Bonnie) <i>Vacated - per Commissioner</i>
09/23/2015	 Discovery Commissioners Report and Recommendations Filed By: Plaintiff O'Connell, Yvonne <i>Discovery Commissioner Report and Recommendations</i>
09/24/2015	 Notice of Entry of Order Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Entry of Discovery Commissioner Report and Recommendations</i>
09/28/2015	 Pre-trial Memorandum Filed by: Plaintiff O'Connell, Yvonne <i>Joint Pre-Trial Memorandum</i>
10/01/2015	Motion in Limine (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) Events: 08/13/2015 Motion in Limine <i>Defendant's Motion In Limine [#1] To Exclude Purported Expert Gary Presswood</i>
10/01/2015	Motion in Limine (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) Events: 08/13/2015 Motion in Limine <i>Defendant's Motion In Limine [#2] To Exclude Unrelated Medical Conditions and Damages Claimed By Plaintiff</i>
10/01/2015	Motion in Limine (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) Events: 08/13/2015 Motion in Limine <i>Defendant's Motion In Limine [#3] To Exclude Any Reference Or Testimony of Defendant's Alleged Failure To Preserve Evidence</i>
10/01/2015	Omnibus Motion in Limine (9:00 AM) (Judicial Officer: Ellsworth, Carolyn) Events: 08/13/2015 Omnibus Motion In Limine <i>Plaintiff's Omnibus Motions in Limine</i>

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CASE NO. A-12-655992-C

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

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

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

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

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

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

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

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

	Filed By: Defendant Wynn Las Vegas LLC <i>Order on Supplemental Briefing Relating to the Proposed Testimony of Dr. Dunn and Dr. Tingey</i>
12/23/2015	 Order Denying Motion Filed By: Defendant Wynn Las Vegas LLC <i>Order Denying Plaintiff's Emergency Motion to Continue Trial</i>
12/28/2015	 Supplement Filed by: Defendant Wynn Las Vegas LLC <i>Defendant's Supplement to Motion to Retax Costs and Opposition to Plaintiff's Amended Application for Fees, Costs and Pre-Judgment Interest</i>
12/28/2015	 Notice of Entry of Order Filed By: Defendant Wynn Las Vegas LLC <i>Notice of Entry of Order</i>
12/28/2015	 Notice of Entry of Order Filed By: Defendant Wynn Las Vegas LLC <i>Notice of Entry of Order</i>
12/30/2015	 Motion for Judgment Filed By: Defendant Wynn Las Vegas LLC <i>Defendant Wynn Las Vegas, LLC's Renewed Motion for Judgment as a Matter of Law, or, Alternatively, Motion for New Trial or Remittitur</i>
01/12/2016	 Recorders Transcript of Hearing <i>Transcript of Proceedings: Plaintiff's Emergency Motion to Continue Trial and for Sanctions on Order Shortening Time; Supplemental Brief on Motion in Limine -- 10-29-15</i>
01/12/2016	 Recorders Transcript of Hearing <i>Transcript of Proceedings: Jury Trial - Day 1 -- 11-4-15</i>
01/12/2016	 Recorders Transcript of Hearing <i>Transcript of Proceedings: Jury Trial - Day 2 -- 11-5-15</i>
01/12/2016	 Recorders Transcript of Hearing <i>Transcript of Proceedings: Jury Trial - Day 3 -- 11-9-15</i>
01/12/2016	 Recorders Transcript of Hearing <i>Transcript of Proceedings: Jury Trial - Day 4 -- 11-10-15</i>
01/12/2016	 Recorders Transcript of Hearing <i>Transcript of Proceedings: Jury Trial - Day 5-- 11-12-15</i>
01/12/2016	 Recorders Transcript of Hearing <i>Transcript of Proceedings: Jury Trial - Day 6 -- 11-13-15</i>
01/12/2016	 Recorders Transcript of Hearing <i>Transcript of Proceedings: Jury Trial - Day 7 -- 11-16-15</i>
01/14/2016	 Opposition to Motion Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Opposition to Defendant's Motion to Retax Costs and Reply to Defendant's</i>

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

	<i>Opposition to Plaintiff's Motion and Notice of Motion to Tax Costs and for Fees and Post-Judgment Interest</i>
01/19/2016	 Opposition to Motion Filed By: Plaintiff O'Connell, Yvonne <i>Plaintiff's Opposition to Defendant's Renewed Motion for Judgment as a Matter of Law and Motion for New Trial</i>
01/28/2016	 Reply in Support Filed By: Defendant Wynn Las Vegas LLC <i>Defendant Wynn Las Vegas, LLC's Reply in Support of Renewed Motion for Judgment as a Matter of Law, Or, Alternatively, Motion for New Trial or Remittitur</i>
02/15/2016	Case Reassigned to Department 14 <i>Reassigned From Judge Ellsworth - Dept 5</i>
02/17/2016	Case Reassigned to Department 14 <i>Reassignment From Judge Ellsworth - Dept 5</i>
02/17/2016	Case Reassigned to Department 5 <i>Case Retained by Judge Ellsworth</i>
03/03/2016	 Notice Filed By: Defendant Wynn Las Vegas LLC <i>Notice of Related Authorities In Support Of Defendant Wynn Las Vegas, LLC's Renewed Motion for Judgment as a Matter of Law, or, Alternatively, Motion for New Trial or Remittitur</i>
03/04/2016	Motion for Fees (8:30 AM) (Judicial Officer: Ellsworth, Carolyn) <i>Plaintiff's Amended Application for Fees, Costs and Pre-Judgment Interest - Amended and Resubmitted As - Plaintiff's Motion and Notice of Motion to Tax Costs and for Fees and Post-Judgment Interest</i>
03/04/2016	Motion for Judgment (8:30 AM) (Judicial Officer: Ellsworth, Carolyn) <i>Defendant Wynn Las Vegas, LLC's Renewed Motion for Judgment as a Matter of Law, or, Alternatively, Motion for New Trial or Remittitur</i>
03/04/2016	 All Pending Motions (8:30 AM) (Judicial Officer: Ellsworth, Carolyn) <i>All Pending Motions: 3/4/16</i>
05/24/2016	 Order Denying Motion Filed By: Plaintiff O'Connell, Yvonne <i>Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law or Alternatively for a New Trial or Remittitur</i>
05/25/2016	 Notice of Entry of Order Filed By: Plaintiff O'Connell, Yvonne <i>Notice of Entry of Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law or Alternatively for a New Trial or Remittitur</i>
06/08/2016	 Notice of Appeal Filed By: Defendant Wynn Las Vegas LLC <i>Notice of Appeal</i>
06/08/2016	 Case Appeal Statement Filed By: Defendant Wynn Las Vegas LLC <i>Case Appeal Statement</i>
DATE	FINANCIAL INFORMATION

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

Defendant Wynn Las Vegas LLC

Total Charges

447.00

Total Payments and Credits

447.00

Balance Due as of 6/10/2016

0.00

Plaintiff O'Connell, Yvonne

Total Charges

270.00

Total Payments and Credits

270.00

Balance Due as of 6/10/2016

0.00



CIVIL COVER SHEET

CLARK County, Nevada

Case No.

(Assigned by Clerk's Office)

A-12-655992-C

I. Party Information

Plaintiff(s) (name/address/phone): YVONNE O'CONNELL, an individual, IN PROPER PERSON

8764 Captains Place, Las Vegas, NV 89117

(702) 228-4424

Attorney (name/address/phone):

Defendant(s) (name/address/phone): WYNN RESORTS, LIMITED, a Nevada corporation, d/b/a WYNN LAS VEGAS; DOES I through X, inclusive; and ROE BUSINESS ENTITIES I through X, inclusive

3131 Las Vegas Boulevard South, Clark County, State of Nevada.

Attorney (name/address/phone):

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

☐ Arbitration Requested

Civil Cases

Real Property	Torts	
☐ Landlord/Tenant ☐ Unlawful Detainer ☐ Title to Property ☐ Foreclosure ☐ Liens ☐ Quiet Title ☐ Specific Performance ☐ Condemnation/Eminent Domain ☐ Other Real Property ☐ Partition ☐ Planning/Zoning	☐ Negligence ☐ Negligence - Auto ☐ Negligence - Medical/Dental ☒ Negligence - Premises Liability (Slip/Fall) ☐ Negligence - Other	☐ Product Liability ☐ Product Liability/Motor Vehicle ☐ Other Torts/Product Liability ☐ Intentional Misconduct ☐ Torts/Defamation (Libel/Slander) ☐ Interfere with Contract Rights ☐ Employment Torts (Wrongful termination) ☐ Other Torts ☐ Anti-trust ☐ Fraud/Misrepresentation ☐ Insurance ☐ Legal Tort ☐ Unfair Competition
Probate	Other Civil Filing Types	
Estimated Estate Value: _____ ☐ Summary Administration ☐ General Administration ☐ Special Administration ☐ Set Aside Estates ☐ Trust/Conservatorships ☐ Individual Trustee ☐ Corporate Trustee ☐ Other Probate	☐ Construction Defect ☐ Chapter 40 ☐ General ☐ Breach of Contract ☐ Building & Construction ☐ Insurance Carrier ☐ Commercial Instrument ☐ Other Contracts/Acct/Judgment ☐ Collection of Actions ☐ Employment Contract ☐ Guarantee ☐ Sale Contract ☐ Uniform Commercial Code ☐ Civil Petition for Judicial Review ☐ Foreclosure Mediation ☐ Other Administrative Law ☐ Department of Motor Vehicles ☐ Worker's Compensation Appeal	☐ Appeal from Lower Court (also check applicable civil case box) ☐ Transfer from Justice Court ☐ Justice Court Civil Appeal ☐ Civil Writ ☐ Other Special Proceeding ☐ Other Civil Filing ☐ Compromise of Minor's Claim ☐ Conversion of Property ☐ Damage to Property ☐ Employment Security ☐ Enforcement of Judgment ☐ Foreign Judgment - Civil ☐ Other Personal Property ☐ Recovery of Property ☐ Stockholder Suit ☐ Other Civil Matters

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

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

FEBRUARY 6, 2012
Date

Yvonne O'Connell
Signature of initiating party or representative

Alvin L. Schuman

CLERK OF THE COURT

BRIAN D. NETTLES, ESQ.
Nevada Bar No. 7462
CHRISTIAN M. MORRIS, ESQ.
Nevada Bar No. 11218
NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, Nevada 89014
Telephone: (702) 434-8282
Facsimile: (702) 434-1488
briannettles@nettlawfirm.com
christianmorris@nettlawfirm.com
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

YVONNE O'CONNELL, an individual,

Plaintiff,

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

vs.

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

JUDGMENT ON VERDICT

Defendants.

This matter having been tried before a jury in Department 5, the Honorable Carolyn Ellsworth presiding, and having commenced on November 6, 2015. The final arguments of counsel were presented to the jury on November 12, 2015, and a Verdict awarding Plaintiff Yvonne O'Connell, \$150,000.00 in past pain and suffering and \$250,000.00 in future pain and suffering, and having assessed 40% fault to Plaintiff, Yvonne O'Connell, and having assessed 60% fault to Defendant Wynn Las Vegas, LLC dba Wynn Las Vegas, thus reducing Plaintiff's

///

NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, NV 89014
(702) 434-8282 / (702) 434-1488 (fax)

☐ Non-Jury	☐ Jury
☐ Disposed After Trial Start	☐ Disposed After Trial Start
☐ Non-Jury Judgment Reached	☒ Jury Verdict Reached
☐ Transferred before Trial	☐ Other

NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, NV 89014
(702) 434-8282 / (702) 434-1488 (fax)

1 total award to \$240,000.00, was filed in open court on November 16, 2015.

2 IT IS ORDERED that Plaintiff Yvonne O'Connell is awarded \$150,000.00 in past pain
3 and suffering and \$250,000.00 in future pain and suffering, to be reduced by a finding of 40%
4 fault to Plaintiff, Yvonne O'Connell, thus reducing Plaintiff's total award to \$240,000.00.

5 IT IS FURTHER ORDERED that Plaintiff is awarded pre-judgment interest in the sum
6 of \$17,190.96 (*figured as \$90,000.00 x 5.25% (Prime Rate Plus 2%) ÷ 365 = \$12.945 (Daily Rate) x*
7 *1,328 days [date of service of Summons 3/30/12 to date of verdict 11/16/15]*).

8 DATED this 14th day of December, 2015.

9
10
11 
12 DISTRICT COURT JUDGE
13  CAROLYN ELLSWORTH

12 Submitted by:

13 NETTLES LAW FIRM

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15 
16 BRIAN D. NETTLES, ESQ.

16 Nevada Bar No. 7462

17 CHRISTIAN M. MORRIS, ESQ.

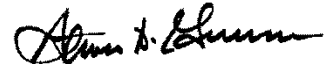
17 Nevada Bar No. 11218

18 NETTLES LAW FIRM

18 1389 Galleria Drive, Suite 200

19 Henderson, Nevada 89014

20 Attorneys for Plaintiff
21
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CLERK OF THE COURT

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

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

YVONNE O'CONNELL, an individual,

Plaintiff,

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

vs.

**NOTICE OF ENTRY OF
JUDGMENT ON VERDICT**

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

Defendants.

TO: WYNN LAS VEGAS, LLC, Defendant; and

TO: CHRISTOPHER D. KIRCHER, ESQ., LAWRENCE J. SEMENZA, III, P.C., Attorneys
for Defendant:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the *Judgment on
Verdict* was entered in the above-entitled matter on the 15th day of December, 2015, a copy of

....

....

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

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

1 which is attached hereto.

2 DATED this 15th day of December, 2015.

3 NETTLES LAW FIRM

4
5 /s/ Christian M. Morris
6 BRIAN D. NETTLES, ESQ.
7 Nevada Bar No. 7462
8 CHRISTIAN M. MORRIS, ESQ.
9 Nevada Bar No. 11218
10 1389 Galleria Drive, Suite 200
11 Henderson, Nevada 89014
12 Attorneys for Plaintiff

13 **CERTIFICATE OF SERVICE**

14 Pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26, I certify that on this 15th day of
15 December, 2015, I served the foregoing *Notice of Entry of Judgment on Verdict* to the
16 following parties by electronic transmission through the Wiznet system:

17 Lawrence J. Semenza, III, Esq.
18 Christopher D. Kircher, Esq.
19 Lawrence J. Semenza, III, P.C.
20 10161 Park Run Drive, Suite 150
21 Las Vegas, Nevada 89145
22 (702) 835-6803
23 Fax: (702) 920-8669
24 *Attorneys for Defendant*
25 *Wynn Las Vegas, LLC dba*
26 *Wynn Las Vegas*

27
28 Kim R. Alvarado
An Employee of Nettles Law Firm

ORIGINAL

Electronically Filed
12/15/2015 11:02:06 AM

Alvin L. Johnson
CLERK OF THE COURT

BRIAN D. NETTLES, ESQ.
Nevada Bar No. 7462
CHRISTIAN M. MORRIS, ESQ.
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briannettles@nettleslawfirm.com
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Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

YVONNE O'CONNELL, an individual,

Plaintiff,

vs.

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

Defendants.

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

JUDGMENT ON VERDICT

This matter having been tried before a jury in Department 5, the Honorable Carolyn Ellsworth presiding, and having commenced on November 6, 2015. The final arguments of counsel were presented to the jury on November 12, 2015, and a Verdict awarding Plaintiff Yvonne O'Connell, \$150,000.00 in past pain and suffering and \$250,000.00 in future pain and suffering, and having assessed 40% fault to Plaintiff, Yvonne O'Connell, and having assessed 60% fault to Defendant Wynn Las Vegas, LLC dba Wynn Las Vegas, thus reducing Plaintiff's

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☐ Non-Jury	☐ Jury
☐ Disposed After Trial Start	☐ Disposed After Trial Start
☐ Non-Jury	☒ Jury
☐ Judgment Reached	☐ Verdict Reached
☐ Transferred before Trial	☐ Other

NETTLES LAW FIRM
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2 IT IS ORDERED that Plaintiff Yvonne O'Connell is awarded \$150,000.00 in past pain
3 and suffering and \$250,000.00 in future pain and suffering, to be reduced by a finding of 40%
4 fault to Plaintiff, Yvonne O'Connell, thus reducing Plaintiff's total award to \$240,000.00.

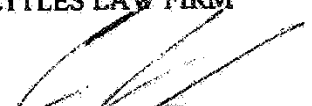
5 IT IS FURTHER ORDERED that Plaintiff is awarded pre-judgment interest in the sum
6 of \$17,190.96 (figured as $\$90,000.00 \times 5.25\%$ (Prime Rate Plus 2%) $\div 365 = \$12.945$ (Daily Rate) $\times$
7 1,328 days [date of service of Summons 3/30/12 to date of verdict 11/16/15]).

8 DATED this 1st day of December, 2015.

9
10
11 
12 DISTRICT COURT JUDGE
13  CAROLYN ELLSWORTH

14 Submitted by:

15 NETTLES LAW FIRM

16 
17 BRIAN D. NETTLES, ESQ.

18 Nevada Bar No. 7462

19 CHRISTIAN M. MORRIS, ESQ.

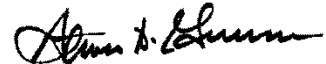
20 Nevada Bar No. 11218

21 NETTLES LAW FIRM

22 1389 Galleria Drive, Suite 200

23 Henderson, Nevada 89014

24 Attorneys for Plaintiff
25
26
27
28


CLERK OF THE COURT

BRIAN D. NETTLES, ESQ.
Nevada Bar No. 7462
CHRISTIAN M. MORRIS, ESQ.
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briann@nettlawfirm.com
christian@nettlawfirm.com
Attorneys for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

YVONNE O'CONNELL, an individual,

Plaintiff,

vs.

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

Defendants.

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

**ORDER DENYING DEFENDANT'S
RENEWED MOTION FOR
JUDGMENT AS A MATTER OF LAW
OR ALTERNATIVELY FOR A NEW
TRIAL OR REMITTITUR**

On March 4, 2016, the Court held a hearing on Defendant's Renewed Motion for Judgment as a Matter of Law or Alternatively for a New Trial or Remittitur. Christian Morris, Esq., and Edward J. Wynder, Esq., of NETTLES LAW FIRM appeared for the Plaintiff. L.J. Semenza, III, Esq., and Christopher D. Kircher., Esq., of LAWRENCE J. SEMENZA, III, P.C., appeared for the Defendant. The Court, having reviewed the pleadings and papers on file, and having heard the arguments of Counsel, and good cause appearing therefor, **HEREBY**

ORDERS AS FOLLOWS:

I. FACTUAL BACKGROUND

1 This is a personal injury action resulting from Plaintiff's slip and fall at Defendant's
2 casino. A jury trial was held and the jury found in favor of Plaintiff on November 16, 2015. The
3 jury awarded Plaintiff \$150,000 for past pain and suffering and \$250,000 for future pain and
4 suffering, finding her to be 40% at fault. Accounting for Plaintiff's comparative fault, her total
5 award was \$240,000. Defendant (hereinafter "Wynn"), having moved for judgment under NRCP
6 50 at the close of Plaintiff's case, filed a renewed motion for judgment as a matter of law or,
7 alternatively, a motion for new trial or remittitur.

8 At trial, Plaintiff (hereinafter "O'Connell") testified that she fell after slipping on what was
9 described as a pale green, sticky, liquid substance on the floor. There was no evidence presented
10 by O'Connell that Wynn had caused the foreign substance to be on the floor. While O'Connell
11 speculated that the substance may have been water from the irrigation system in the atrium area
12 where she fell, she presented no evidence that such was the case. Rather, O'Connell called, in
13 her case in chief, an employee of Wynn who testified that she responded to the area of the fall
14 immediately after the fall and she observed a substance on the floor which had been covered by a
15 sweeper machine brought to clean up the area. She described the substance as looking "a little
16 sticky—like honey." Trial Transcript ("TT"), Vol. 3 at 71:23-72:4. On cross-examination, the
17 witness, when confronted with her previous deposition testimony, agreed that she had described
18 the liquid substance as "something like a syrup, like a drink, like something like that." *Id.* at
19 76:6-10. Additionally, O'Connell presented no evidence that Wynn had actual notice of the
20 foreign substance on the floor, and her counsel argued that it was in fact a constructive notice
21 case, not an actual notice case.

22 **DISCUSSION**

23 **A. Legal Standards and Applicable Statutes**

24 NRCP 50 provides in pertinent part:

25 (a) Judgment as a matter of law.

26 (1) If during a trial by jury, a party has been fully heard on an issue
27 and on the facts and law a party has failed to prove a sufficient
28 issue for the jury, the court may determine the issue against that

1 party and may grant a motion for judgment as a matter of law
2 against that party with respect to a claim or defense that cannot
3 under the controlling law be maintained or defeated without a
4 favorable finding on that issue.

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

14 (1) if a verdict was returned:

15 (A) allow the judgment to stand,

16 (B) order a new trial, or

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

18 NRCP 59(a) provides:

19 A new trial may be granted to all or any of the parties and on all or part of
20 the issues for any of the following causes or grounds materially affecting
21 the substantial rights of an aggrieved party: (1) Irregularity in the
22 proceedings of the court, jury, master, or adverse party, or any order of the
23 court, or master, or abuse of discretion by which either party was
24 prevented from having a fair trial; (2) Misconduct of the jury or prevailing
25 party; (3) Accident or surprise which ordinary prudence could not have
26 guarded against; (4) Newly discovered evidence material for the party
27 making the motion which the party could not, with reasonable diligence,
28 have discovered and produced at the trial; (5) Manifest disregard by the

1 jury of the instructions of the court; (6) Excessive damages appearing to
2 have been given under the influence of passion or prejudice; or, (7) Error
3 in law occurring at the trial and objected to by the party making the
4 motion.

5 "The standard for granting a motion for judgment as a matter of law is based on the
6 standard for granting a motion for involuntary dismissal under former NRCP 41(b). In applying
7 that standard and deciding whether to grant a motion for judgment as a matter of law, the district
8 court must view the evidence and all inferences in favor of the nonmoving party. To defeat the
9 motion, the nonmoving party must have presented sufficient evidence such that the jury could
10 grant relief to that party." *Nelson v. Heer*, 123 Nev. 217, 222, 163 P.3d 420,424 (2007).

11 **B. Analysis**

12 Defendant presents several distinct arguments in support of its Motion for Judgment as a
13 Matter of Law. These are: (1) there was insufficient evidence presented at trial for a finding that
14 Defendant owed Plaintiff a duty of care; (2) the testimony of Dr. Tingey and Dr. Dunn was
15 improper and prejudiced Defendant; and (3) Plaintiff had a burden to apportion the amount of
16 damages attributable to Defendant and those attributable to prior injuries, but failed to do so.
17 Defendant also argues, in the alternative, that even if it is not entitled to judgment as a matter of
18 law, it is entitled under NRCP 59 to a new trial or remittitur because the jury's award of future
19 pain and suffering was unsupported, Plaintiff posed improper questions to Defendant's
20 witnesses, and Plaintiff's counsel made prejudicial comments to the jury. Each of these
21 arguments will be addressed in turn.

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

24 The law concerning negligence in relation to a foreign substance on the floor is, in some
25 respects, well settled. Where the business owner or its agent caused the substance to be on the
26 floor, liability will lie, as a foreign substance on the floor is not consistent with reasonable care.
27 However, where the business owner or his agent did not cause the foreign substance to be on the
28 floor, a plaintiff must prove actual or constructive knowledge of the floor's condition, and a

1 failure to remedy it. *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322-323
2 (1993). As stated above, O'Connell produced no evidence that Wynn caused the substance to be
3 on the floor, or that it had actual notice. Thus, the question at issue here was whether sufficient
4 evidence was presented for a jury to find that Wynn was on constructive notice of the spill.

5 Whether a business owner was under constructive notice of the hazardous condition is a
6 question of fact properly left for the jury, *id.*, but this does not relieve the plaintiff from having to
7 admit evidence at trial of constructive notice. In *Sprague*, the Supreme Court noted that "a
8 reasonable jury could have determined that the virtually continual debris on the produce
9 department floor put Lucky on constructive notice that, at any time, a hazardous condition might
10 exist which would result in injury to Lucky customers." *Id.* at 251, 849 P.2d at 323. Nevada case
11 law has caused some confusion in differentiating between constructive notice and the "mode of
12 operation approach," the latter of which is specifically discussed in cases decided subsequent to
13 *Sprague*. The fact that there is a difference is made clear in *FGA v. Giglio*, 128 Nev. Adv. Op.
14 26, 278 P.3d 490, 497 (2012), where the court noted that the *Sprague* court had implicitly
15 adopted the mode of operation approach when it "stated that **even in the absence of**
16 **constructive notice**, 'a jury could conclude that Lucky should have recognized the impossibility
17 of keeping the produce section clean by sweeping' alone." (emphasis added). With the mode of
18 operation approach, **which is not applicable in this case**, a plaintiff satisfies the notice
19 requirement (actual or constructive) by establishing that an injury was attributable to a
20 reasonably foreseeable dangerous condition on the owner's premises that is related to the
21 owner's self-service mode of operation.¹

22 While evidence of a continuous or recurring condition might amount to constructive
23 notice under *Sprague, supra*, and *Ford v. Southern Hills Medical Center*, 2011 WL 6171790
24 (Nev. 2011), that is not the only way of proving constructive notice.² Proof that a foreign
25

26 ¹ No argument was made that the condition was the result of self-service, nor was the jury
27 instructed on this inapplicable area of the law.

28 ² *Ford* stated that "the standard under *Sprague* to prove constructive notice is a virtually
continuous condition." Of course, *Sprague* does not actually say that—*Sprague* did not establish
a bright line test for what will establish constructive notice, since to have done so would amount

1 substance on the floor had existed for such a length of time that the proprietor in the exercise of
2 ordinary care should have known of it, is another way of proving constructive notice. What
3 would amount to sufficient time to warrant holding that the proprietor had constructive notice
4 generally depends on the circumstances of the particular case and involves consideration of the
5 nature of the danger, the number of persons likely to be affected by it, the diligence required to
6 discover or prevent it, opportunity and means of knowledge, the foresight which a person of
7 ordinary care and prudence would be expected to exercise under the circumstances, and the
8 foreseeable consequence of the conditions. *See* 61 A.L.R.2d 6 §7(b).

9 Moreover, Nevada has made clear that an innkeeper may be found on constructive notice
10 of latent defects upon their premises if a reasonable inspection would have revealed such a
11 danger. *See Twardowski v. Westward Ho Motels, Inc.*, 86 Nev. 784, 476 P.2d 946 (1970). In
12 *Twardowski*, the court held that if a reasonable inspection of its pool slide would have revealed
13 the defective handrails, the Westward Ho would be charged with constructive notice of the latent
14 defect, but that whether the defect would have been discovered by a reasonable inspection was a
15 jury question. The court further noted that “[c]onstructive knowledge of a latent defect can be
16 established by circumstantial evidence.” *Id.* at 788, 476 P.2d at 948. The over-arching theme of
17 a negligence case has been, and is, foreseeability.

18 [T]here is no liability for harm resulting from conditions from which no
19 unreasonable risk was to be anticipated, or those which the occupier did
20 not know and could not have discovered with reasonable care. The mere
21 existence of a defect or danger is not enough to establish liability, unless it
22 is shown to be of such a character or of such a duration that the jury may
23 reasonably conclude that due care would have discovered it.

24 Prosser, *Law of Torts* 393 (4th ed. 1980). Whether reasonable care has been exercised is almost
25 always a jury question, as was made clear by the Nevada Supreme Court in *Foster v. Costco*
26 *Wholesale Corp.*, 128 Nev. Adv. Op. 71, 291 P.3d 150 (2012). Abrogating the holding in

27
28 to an extreme departure from the common law on this subject, including Nevada’s own case law,
and *Ford*, as an unpublished opinion, is not binding precedent upon this Court.

1 *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 370 P.2d 682 (1962), the Nevada Supreme Court
2 adopted the position of the Restatement (Third) of Torts concerning the duty of a landowner.
3 “Thus, under the Restatement (Third), landowners bear a general duty of reasonable care to all
4 entrants. . . . The ‘duty issue must be analyzed with regard to foreseeability and gravity of harm,
5 and the feasibility and availability of alternative conduct that would have prevented the harm.”
6 *Foster*, 291 P.3d at 156 (citations omitted).

7 Here, during O’Connell’s case in chief, Yanet Elias, whose job was that of an assistant
8 manager in the public areas department at Wynn, testified that, “It’s very difficult to maintain the
9 casino, you know, completely clean, because it’s a job for 24 hours. There are people – a lot of
10 people walking through, a lot of children, they’re carrying things. So, it’s impossible to keep it
11 clean at 100 percent.” TT Vol. 3 at 70:22-71:1. Additionally, Ms. Elias testified that she did not
12 know when the area where O’Connell fell had last been inspected prior to her fall, and when
13 asked about how often the area is checked, she testified, “It depends on how long it takes the
14 employee to check the north area and return to the south area, because it’s all considered one –
15 one whole area. And there aren’t always two employees assigned to that area. Sometimes,
16 there’s only one.” TT Vol. 3 at 69:5-11. While she repeatedly answered questions posed by both
17 counsel by stating that she did not recall, Ms. Elias was also repeatedly impeached with her
18 earlier deposition testimony. At one point she admitted that one of the signs that a porter is not
19 doing their job is that there is debris on the floor. *Id.* at 70:3-6)

20 O’Connell also called Corey Prowell in her case in chief, Wynn’s assistant security
21 manager who at the time of the incident was a security report writer. Mr. Prowell responded to
22 the subject incident and eventually wrote a report. He described the scene of the fall as a high
23 traffic area with marble flooring and indicated that upon his arrival, he was told by Ms. Elias that
24 the liquid on the floor had already been cleaned up, and that he was told by another employee
25 that the employee had seen O’Connell being helped up by four other guests. He also testified
26 that O’Connell told him that when she had recovered from her fall, she saw a green liquid on the
27 floor. During her testimony at trial, O’Connell described the “spill” as “at least seven feet” with
28 one side measuring about four feet still in a liquid state, and a three foot portion as “almost dry,”

1 “a little sticky” with “footprints on it.” TT, Vol. 3 at 59:19-24. She described the liquid as
2 having “just a hint of green,” TT, Vol. 3 at 59:12, and elaborating about the footprints she said:

3 They looked like, you know, they were – they looked like mine that I was
4 making, and I’m sure they were from the people that were standing around
5 and helped me up . . . [k]ind of like dirty footprints that you leave after
6 you’ve mopped your floor and you step on it, you walk on it, that’s kind of
7 how it looked.

8 TT, Vol. 3 at 62:19 – 63:2.

9 Wynn argues that “the record is completely devoid of any evidence regarding the length
10 of time the foreign substance had been on the floor.” Mot. at 15-17. While it is true that
11 O’Connell could not testify as to how long the substance had been on the floor, she did testify
12 that a three-foot section of the seven-foot spill was already dry and drying. While the defense
13 seems to suggest that expert testimony would be required, presumably to testify as to the relative
14 humidity within the casino and its relation to the rate of evaporation, common experience would
15 allow a jury to infer that the spill had been in place longer than just a few minutes. As pointed
16 out by O’Connell’s Opposition, there was ample other evidence from which the jury could have
17 found that Wynn had constructive notice of the substance of the floor. Opp. at 11-13. This
18 evidence includes: (1) testimony that the atrium where the substance was located was highly
19 trafficked; (2) testimony that it is impossible for Wynn’s employees to keep the casino floor
20 entirely clean; and (3) testimony that Defendant Wynn had no floor inspection schedule, did not
21 maintain inspection logs, and could not say with certainty when the floor was last inspected prior
22 to O’Connell’s injury. This testimony was elicited from Defendant Wynn’s own employees.

23 “A non-moving party can defeat a motion for judgment as a matter of law if it present[s]
24 sufficient evidence such that the jury could grant relief to that party.” *D&D Tire, Inc. v.*
25 *Ouellette*, 131 Nev. Adv. Op. 47, 352 P.3d 32, 35 (2015) (internal quotations and citations
26 omitted). All of the aforementioned testimony, taken together and drawing all reasonable
27 inferences in favor of the Plaintiff was sufficient to establish that Wynn was on constructive
28 notice of the dangerous condition upon its floor.

1 2. *Whether the testimony of Dr. Tingey and Dr. Dunn was improper*

2 Wynn next makes the argument that the testimony of O'Connell's experts, Dr. Tingey
3 and Dr. Dunn, was improper. Mot. at 19-21. Wynn first argues that the Court improperly
4 admitted their testimony because O'Connell disclosed them as expert witnesses beyond the
5 disclosure deadline. Mot. at 18-19. Wynn argues that its rebuttal expert was unable to review
6 their records and incorporate them into his report. Mot. at 18. However, late production was
7 substantially justified under NRCP 37(c) because O'Connell continued to treat after the close of
8 discovery, treatment records were provided to O'Connell's counsel after the close of discovery,
9 and were provided to Defense counsel soon after their receipt, and because O'Connell had to
10 change treating physicians after Dr. Martin had left the practice. The late disclosed records were
11 only a few pages, the Court permitted the defense to voir dire the doctors outside the presence of
12 the jury before they testified in the presence of the jury, and the Court allowed Wynn's rebuttal
13 expert to sit in the courtroom and listen to the testimony of both Dr. Tingey and Dr. Dunn,
14 allowing him to incorporate his opinions on direct examination. Hence, Wynn was not
15 prejudiced by any late disclosure on O'Connell's part.

16 Wynn also argues that both doctors lacked a sufficient basis for their opinions because
17 they were only based upon Plaintiff's self-reporting. Mot. at 19. In support, Wynn cites to the
18 federal case of *Perkins v. United States*, 626 F. Supp. 2d 587 (E.D. Va. 2009). Notwithstanding
19 the fact that *Perkins* is a federal case,³ it is not on point to the facts here. In *Perkins*, the court
20 found that expert testimony as to medical causation should be excluded because the expert's
21 opinion was based *solely* on the patient's self-reporting – that the expert had merely adopted the
22 patient's explanation *as his own opinion*. *Id.* at 592-593. Here, however, O'Connell's self-
23 reporting did not appear to be the *sole* basis of her experts' testimony. Both doctors testified as to
24 the basis of their opinions, which included not only evaluation of the O'Connell's medical
25 history but also their examination of her, their review of her diagnostic medical tests, and their
26

27 ³ Although not addressed here, this could be significant because Nevada courts do not follow the
28 same procedure for determining whether expert testimony should be allowed as do federal courts
(i.e., Nevada has not adopted the *Daubert* standard).

1 experience in treating orthopedic conditions and the conditions that would result from a slip and
2 fall. There is simply no indication that O'Connell's experts wholly adopted her self-reporting as
3 the sole basis for their opinions as to causation. Moreover, Dr. Tingey was candid in his opinion
4 that he would not attribute all of O'Connell's knee problems to the subject fall because the MRI
5 indicated a degenerative disease process in the left knee as opposed to the right knee.

6 3. *Whether there is legal basis for a finding that Plaintiff bears a burden to*
7 *apportion damages between pre-existing conditions and the harm caused by*
8 *Defendant*

9 Wynn next argues that O'Connell had the burden of apportioning her damages between
10 pre-existing injuries and those injuries caused by her slip and fall at the Wynn but failed to do so.
11 Mot. at 21-25. This is a familiarly incorrect argument (and, indeed, was raised and rejected
12 during trial for the same reasons as it is now) because the legal premises upon which it rests are
13 infirm. The main cause of confusion in this and other cases is the federal case of *Schwartz v.*
14 *State Farm Mut. Auto. Ins. Co.*, 2009 WL 2197370 (D. Nev. July 22, 2009).

15 In that case, Judge Dawson did indeed hold that "[i]n a case where a plaintiff has a pre-
16 existing condition, and later sustains an injury to that area, the Plaintiff bears the burden of
17 apportioning the injuries, treatment and damages between the pre-existing condition and the
18 subsequent accident." *Id.* at *6. However, the cases cited as precedent by Judge Dawson for that
19 statement do not support that assertion. *Kleitv v. Raskin*, 103 Nev. 325, 738 P.2d 508 (1987)
20 involved apportioning damages between injuries caused by successive tortfeasors, not
21 apportioning damages between pre-existing conditions and injuries caused by a sole tortfeasor.

22 Judge Dawson also cited the Washington Court of Appeals case of *Phennah v. Whalen*,
23 621 P.2d 1304 (Wash. App. 1980), but that also involved apportioning damages between
24 successive tortfeasors. The Restatement (Second) of Torts § 433(b), also relied upon, doesn't
25 even concern successive tortfeasors on its face but rather concerns the "substantial factor" test
26 for determining proximate cause. Here, we do not have successive tortfeasors. Rather, we have a
27 Plaintiff who, admittedly, had various pre-existing mental and physical conditions. Therefore,
28 the *Schwartz* case is in error and is inapplicable to this case. Wynn took the O'Connell as it

1 found her and is liable for the full extent of her injuries, notwithstanding her pre-existing
2 conditions. *See Murphy v. Southern Pac. Co.*, 31 Nev. 120, 101 P. 322 (1909).

3 4. *Whether the Defendant is entitled to a new trial or remittitur.*

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

9 This court has held that damages for pain and suffering are
10 peculiarly within the province of the jury. In *Stackiewicz v. Nissan*
11 *Motor Corporation*, 100 Nev. 443, 454, 686 P.2d 925, 932 (1984),
12 this court stated that the trial court cannot revisit a jury's damage
13 award unless it is "flagrantly improper." "In actions for damages in
14 which the law provides no legal rule of measurement it is the special
15 province of the jury to determine the amount that ought to be
16 allowed, so that a court is not justified in reversing the case or
17 granting a new trial on the ground that the verdict is excessive,
18 unless it is so flagrantly improper as to indicate passion, prejudice or
19 corruption in the jury.... The elements of pain and suffering are
20 wholly subjective. It can hardly be denied that, because of their very
21 nature, a determination of their monetary compensation falls
22 peculiarly within the province of the jury.... We may not invade the
23 province of the fact-finder by arbitrarily substituting a monetary
24 judgment in a specific sum felt to be more suitable." *Stackiewicz*,
25 100 Nev. at 454-55, 686 P.2d at 932 (quotations and citations
26 omitted). The mere fact that a verdict is large is not conclusive that
27 it is the result of passion or prejudice. *Id.* (citing *Beccard v. Nevada*
28 *National Bank*, 99 Nev. 63, 66 n. 3, 657 P.2d 1154, 1156 n. 3
(1983)).

22 Here, it must be noted that O'Connell was prevented from presenting evidence of her
23 medical special damages due to discovery and evidentiary issues. Thus, she sought only pain
24 and suffering damages. She testified that she had been suffering with her knee and her neck and
25 back since the fall five years earlier and could no longer engage in the activities that she could
26 prior to the fall, including the swing dancing she had done regularly before the accident. This
27 testimony was corroborated by her former boyfriend and dance partner. She often described her
28 pain throughout her medical records as 10 out of 10. While the defense may have thought that

1 this testimony would be unbelievable to a jury, it was nonetheless the jury's choice to believe it.
2 Additionally, Dr. Tingey testified that he had recommended surgery for O'Connell's
3 traumatically injured knee and that she would, if she chose the surgery, have post-operative pain,
4 but that typically the result after surgery would be a complete relief of the symptoms. On the
5 other hand, Dr. Dunn testified that due to O'Connell's continued complaints of pain in her neck
6 and symptoms in her arms, he recommended an anterior cervical neck discectomy and an
7 interbody 3-level fusion with placement of a plate and screws. He described this surgery as non-
8 curative, but rather taking away 50 to 60 percent of the pain which O'Connell had described as
9 terrible. While Dr. Dunn attributed the changes to O'Connell's spine to a degenerative disease
10 process, he attributed the pain, which he believed to be previously asymptomatic, to the fall –
11 describing the quintessential egg-shell plaintiff.

12 Wynn argues in the alternative to the motion for judgment as a matter of law, that a new
13 trial should be had or remittitur issued for several reasons. The first is that O'Connell failed to
14 establish future pain and suffering damages as required by Nevada law. Mot. at 25 (citing
15 *Krause, Inc. v. Little*, 117 Nev. 929, 938, 34 P.3d 566 (2001) (holding that Nevada law requires
16 that "when an injury or disability is subjective and not demonstrable" expert medical testimony
17 is required)). The basis for this argument, however, is the same as above – that Plaintiff's
18 medical experts lacked a reliable basis for their opinion and that O'Connell failed to carry her
19 burden to apportion damages between pre-existing conditions. Mot. at 26:3-7. For the same
20 reasons as outlined above, then, this argument should be rejected.

21 Wynn next argues that O'Connell was improperly allowed to question defense witnesses.
22 Specifically, Wynn points to O'Connell's counsel questioning witnesses on the lack of video
23 coverage of the incident and references in her closing arguments that Wynn controlled the
24 evidence. Mot. at 26. One of the statements cited by Wynn, on examination of Corey Prowell,
25 does not appear to have been objected to by defense counsel and so that objection is now
26 untimely.⁴ The other statements cited by Wynn were in Plaintiff's counsel's closing or rebuttal

27
28 ⁴ A complete transcript of this portion of the trial was not provided, but upon reviewing the full
transcript on file, no objection appears to have been lodged following the questioning.

1 arguments. Defendant also did not object to those statements and, in any event, had the
2 opportunity to make arguments rebutting those statements in its own closing. Therefore, no
3 prejudice resulted.

4 Wynn last argues that it is entitled to a new trial because O'Connell's counsel made an
5 improper statement in rebuttal as to damages. The statement in issue is: "As jurors, you are the
6 voice of the conscience of this community." Defendant lodged a timely objection, which was
7 immediately sustained by this Court. The Court also admonished counsel for making the
8 statement and instructed the jury to disregard it. The Court stated:

9 Sustained. No, no. The jury will disregard that. Counsel, this is not a
10 punitive damage case. You may not address the – they are not to be
11 making decisions as the conscience of the community. You know that is
12 improper argument. (TT Vol. 6 at 46:12-16)

13 The problem with such a statement is that it allows the jury to punish the defendant, e.g.,
14 with punitive damages, which was not a part of Plaintiff's case here. *See Florida Crushed Stone*
15 *Co. v. Johnson*, 546 So.2d 1102, 1104 (1989).

16 The Nevada Supreme Court has made clear, however, that a new trial is warranted only
17 where "the [comment] is so extreme that the objection and admonishment could not remove the
18 [comment's] effect." *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008). This amounts to
19 an analysis of whether no other reasonable explanation could exist for the jury's verdict.
20 *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364, 212 P.3d 1068, 1079 (2009). Here, there
21 was ample evidence presented at trial, as outlined above and in Plaintiff's Opposition, to support
22 the jury verdict. Wynn's timely objection was quickly sustained and a limiting instruction was
23 given immediately. In light of the evidence presented at trial, it cannot be said that the jury's
24 verdict was so unreasonable as to make the statement prejudicial. *CF Lioce*, 124 Nev. at 17, 174
25 P.3d at 981. (finding that the trial testimony supported the jury's verdict and the district court
26 sustained the defendant's objections to misconduct, so a new trial was not warranted).

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1 Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion for Judgment as a
2 Matter of Law or Alternatively for a New Trial or Remittitur be **DENIED**.

3 DATED this 20th day of ^{May}~~April~~, 2016.

4
5 
6 DISTRICT COURT JUDGE
7 

8 Submitted by:

9 NETTLES LAW FIRM
10 

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Nevada Bar No. 7462

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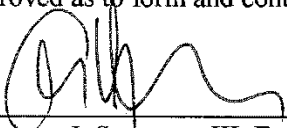
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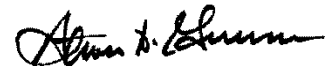
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25 O'Connell v. Wynn – Case No. A-12-655992-C
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27
28


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DISTRICT COURT
CLARK COUNTY, NEVADA

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

17 vs.

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

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

**NOTICE OF ENTRY OF
ORDER DENYING DEFENDANT'S
RENEWED MOTION FOR
JUDGMENT AS A MATTER OF LAW
OR ALTERNATIVELY FOR A NEW
TRIAL OR REMITTITUR**

24 TO: WYNN LAS VEGAS, LLC, Defendant; and

25 TO: CHRISTOPHER D. KIRCHER, ESQ., LAWRENCE J. SEMENZA, III, P.C., Attorneys
26 for Defendant:
27
28

NETTLES LAW FIRM
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1 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an *Order Denying*
2 *Defendant's Renewed Motion for Judgment as a Matter of Law or Alternatively for a New*
3 *Trial or Remittitur* was entered in the above-entitled matter on the 24th day of May, 2016, a copy
4 of which is attached hereto.

5 DATED this 25th day of May, 2016.

6 NETTLES LAW FIRM



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10 CHRISTIAN M. MORRIS, ESQ.

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12 Henderson, Nevada 89014

13 Attorneys for Plaintiff

14 **CERTIFICATE OF SERVICE**

15 Pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26, I certify that on this 25 day of
16 November, 2015, I served the foregoing **NOTICE OF ENTRY OF ORDER DENYING**
17 **DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR**
18 **ALTERNATIVELY FOR A NEW TRIAL OR REMITTITUR** to the following parties by
19 electronic transmission through the Wiznet system:
20

21 **Semenza Kircher Rickard**

22 **Contact**

Christopher D. Kircher

23 Jarrod L. Rickard

24 Lawrence J. Semenza, III

Olivia Kelly

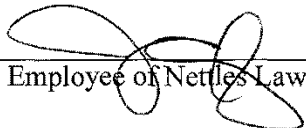
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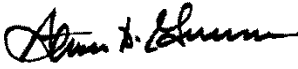
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9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

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

14 vs.

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

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

**ORDER DENYING DEFENDANT'S
RENEWED MOTION FOR
JUDGMENT AS A MATTER OF LAW
OR ALTERNATIVELY FOR A NEW
TRIAL OR REMITTITUR**

22 On March 4, 2016, the Court held a hearing on Defendant's Renewed Motion for
23 Judgment as a Matter of Law or Alternatively for a New Trial or Remittitur. Christian Morris,
24 Esq., and Edward J. Wynder, Esq., of NETTLES LAW FIRM appeared for the Plaintiff. L.J.
25 Semenza, III, Esq., and Christopher D. Kircher., Esq., of LAWRENCE J. SEMENZA, III, P.C.,
26 appeared for the Defendant. The Court, having reviewed the pleadings and papers on file, and
27 having heard the arguments of Counsel, and good cause appearing therefor, **HEREBY**
ORDERS AS FOLLOWS:

28 **I. FACTUAL BACKGROUND**

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1 This is a personal injury action resulting from Plaintiff's slip and fall at Defendant's
2 casino. A jury trial was held and the jury found in favor of Plaintiff on November 16, 2015. The
3 jury awarded Plaintiff \$150,000 for past pain and suffering and \$250,000 for future pain and
4 suffering, finding her to be 40% at fault. Accounting for Plaintiff's comparative fault, her total
5 award was \$240,000. Defendant (hereinafter "Wynn"), having moved for judgment under NRCP
6 50 at the close of Plaintiff's case, filed a renewed motion for judgment as a matter of law or,
7 alternatively, a motion for new trial or remittitur.

8 At trial, Plaintiff (hereinafter "O'Connell") testified that she fell after slipping on what was
9 described as a pale green, sticky, liquid substance on the floor. There was no evidence presented
10 by O'Connell that Wynn had caused the foreign substance to be on the floor. While O'Connell
11 speculated that the substance may have been water from the irrigation system in the atrium area
12 where she fell, she presented no evidence that such was the case. Rather, O'Connell called, in
13 her case in chief, an employee of Wynn who testified that she responded to the area of the fall
14 immediately after the fall and she observed a substance on the floor which had been covered by a
15 sweeper machine brought to clean up the area. She described the substance as looking "a little
16 sticky—like honey." Trial Transcript ("TT"), Vol. 3 at 71:23-72:4. On cross-examination, the
17 witness, when confronted with her previous deposition testimony, agreed that she had described
18 the liquid substance as "something like a syrup, like a drink, like something like that." *Id.* at
19 76:6-10. Additionally, O'Connell presented no evidence that Wynn had actual notice of the
20 foreign substance on the floor, and her counsel argued that it was in fact a constructive notice
21 case, not an actual notice case.

22 DISCUSSION

23 A. Legal Standards and Applicable Statutes

24 NRCP 50 provides in pertinent part:

25 (a) Judgment as a matter of law.

26 (1) If during a trial by jury, a party has been fully heard on an issue
27 and on the facts and law a party has failed to prove a sufficient
28 issue for the jury, the court may determine the issue against that

1 party and may grant a motion for judgment as a matter of law
2 against that party with respect to a claim or defense that cannot
3 under the controlling law be maintained or defeated without a
4 favorable finding on that issue.

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

14 (1) if a verdict was returned:

15 (A) allow the judgment to stand,

16 (B) order a new trial, or

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

18 NRCP 59(a) provides:

19 A new trial may be granted to all or any of the parties and on all or part of
20 the issues for any of the following causes or grounds materially affecting
21 the substantial rights of an aggrieved party: (1) Irregularity in the
22 proceedings of the court, jury, master, or adverse party, or any order of the
23 court, or master, or abuse of discretion by which either party was
24 prevented from having a fair trial; (2) Misconduct of the jury or prevailing
25 party; (3) Accident or surprise which ordinary prudence could not have
26 guarded against; (4) Newly discovered evidence material for the party
27 making the motion which the party could not, with reasonable diligence,
28 have discovered and produced at the trial; (5) Manifest disregard by the

1 jury of the instructions of the court; (6) Excessive damages appearing to
2 have been given under the influence of passion or prejudice; or, (7) Error
3 in law occurring at the trial and objected to by the party making the
4 motion.

5 "The standard for granting a motion for judgment as a matter of law is based on the
6 standard for granting a motion for involuntary dismissal under former NRCP 41(b). In applying
7 that standard and deciding whether to grant a motion for judgment as a matter of law, the district
8 court must view the evidence and all inferences in favor of the nonmoving party. To defeat the
9 motion, the nonmoving party must have presented sufficient evidence such that the jury could
10 grant relief to that party." *Nelson v. Heer*, 123 Nev. 217, 222, 163 P.3d 420,424 (2007).

11 **B. Analysis**

12 Defendant presents several distinct arguments in support of its Motion for Judgment as a
13 Matter of Law. These are: (1) there was insufficient evidence presented at trial for a finding that
14 Defendant owed Plaintiff a duty of care; (2) the testimony of Dr. Tingey and Dr. Dunn was
15 improper and prejudiced Defendant; and (3) Plaintiff had a burden to apportion the amount of
16 damages attributable to Defendant and those attributable to prior injuries, but failed to do so.
17 Defendant also argues, in the alternative, that even if it is not entitled to judgment as a matter of
18 law, it is entitled under NRCP 59 to a new trial or remittitur because the jury's award of future
19 pain and suffering was unsupported, Plaintiff posed improper questions to Defendant's
20 witnesses, and Plaintiff's counsel made prejudicial comments to the jury. Each of these
21 arguments will be addressed in turn.

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

24 The law concerning negligence in relation to a foreign substance on the floor is, in some
25 respects, well settled. Where the business owner or its agent caused the substance to be on the
26 floor, liability will lie, as a foreign substance on the floor is not consistent with reasonable care.
27 However, where the business owner or his agent did not cause the foreign substance to be on the
28 floor, a plaintiff must prove actual or constructive knowledge of the floor's condition, and a

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1 failure to remedy it. *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322-323
2 (1993). As stated above, O'Connell produced no evidence that Wynn caused the substance to be
3 on the floor, or that it had actual notice. Thus, the question at issue here was whether sufficient
4 evidence was presented for a jury to find that Wynn was on constructive notice of the spill.

5 Whether a business owner was under constructive notice of the hazardous condition is a
6 question of fact properly left for the jury, *id.*, but this does not relieve the plaintiff from having to
7 admit evidence at trial of constructive notice. In *Sprague*, the Supreme Court noted that "a
8 reasonable jury could have determined that the virtually continual debris on the produce
9 department floor put Lucky on constructive notice that, at any time, a hazardous condition might
10 exist which would result in injury to Lucky customers." *Id.* at 251, 849 P.2d at 323. Nevada case
11 law has caused some confusion in differentiating between constructive notice and the "mode of
12 operation approach," the latter of which is specifically discussed in cases decided subsequent to
13 *Sprague*. The fact that there is a difference is made clear in *FGA v. Giglio*, 128 Nev. Adv. Op.
14 26, 278 P.3d 490, 497 (2012), where the court noted that the *Sprague* court had implicitly
15 adopted the mode of operation approach when it "stated that **even in the absence of**
16 **constructive notice**, 'a jury could conclude that Lucky should have recognized the impossibility
17 of keeping the produce section clean by sweeping' alone." (emphasis added). With the mode of
18 operation approach, **which is not applicable in this case**, a plaintiff satisfies the notice
19 requirement (actual or constructive) by establishing that an injury was attributable to a
20 reasonably foreseeable dangerous condition on the owner's premises that is related to the
21 owner's self-service mode of operation.¹

22 While evidence of a continuous or recurring condition might amount to constructive
23 notice under *Sprague, supra*, and *Ford v. Southern Hills Medical Center*, 2011 WL 6171790
24 (Nev. 2011), that is not the only way of proving constructive notice.² Proof that a foreign
25

26 ¹ No argument was made that the condition was the result of self-service, nor was the jury
27 instructed on this inapplicable area of the law.

28 ² *Ford* stated that "the standard under *Sprague* to prove constructive notice is a virtually
continuous condition." Of course, *Sprague* does not actually say that—*Sprague* did not establish
a bright line test for what will establish constructive notice, since to have done so would amount

1 substance on the floor had existed for such a length of time that the proprietor in the exercise of
2 ordinary care should have known of it, is another way of proving constructive notice. What
3 would amount to sufficient time to warrant holding that the proprietor had constructive notice
4 generally depends on the circumstances of the particular case and involves consideration of the
5 nature of the danger, the number of persons likely to be affected by it, the diligence required to
6 discover or prevent it, opportunity and means of knowledge, the foresight which a person of
7 ordinary care and prudence would be expected to exercise under the circumstances, and the
8 foreseeable consequence of the conditions. *See* 61 A.L.R.2d 6 §7(b).

9 Moreover, Nevada has made clear that an innkeeper may be found on constructive notice
10 of latent defects upon their premises if a reasonable inspection would have revealed such a
11 danger. *See Twardowski v. Westward Ho Motels, Inc.*, 86 Nev. 784, 476 P.2d 946 (1970). In
12 *Twardowski*, the court held that if a reasonable inspection of its pool slide would have revealed
13 the defective handrails, the Westward Ho would be charged with constructive notice of the latent
14 defect, but that whether the defect would have been discovered by a reasonable inspection was a
15 jury question. The court further noted that “[c]onstructive knowledge of a latent defect can be
16 established by circumstantial evidence.” *Id.* at 788, 476 P.2d at 948. The over-arching theme of
17 a negligence case has been, and is, foreseeability.

18 [T]here is no liability for harm resulting from conditions from which no
19 unreasonable risk was to be anticipated, or those which the occupier did
20 not know and could not have discovered with reasonable care. The mere
21 existence of a defect or danger is not enough to establish liability, unless it
22 is shown to be of such a character or of such a duration that the jury may
23 reasonably conclude that due care would have discovered it.

24 Prosser, *Law of Torts* 393 (4th ed. 1980). Whether reasonable care has been exercised is almost
25 always a jury question, as was made clear by the Nevada Supreme Court in *Foster v. Costco*
26 *Wholesale Corp.*, 128 Nev. Adv. Op. 71, 291 P.3d 150 (2012). Abrogating the holding in

27
28 to an extreme departure from the common law on this subject, including Nevada’s own case law,
and *Ford*, as an unpublished opinion, is not binding precedent upon this Court.

1 *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 370 P.2d 682 (1962), the Nevada Supreme Court
2 adopted the position of the Restatement (Third) of Torts concerning the duty of a landowner.
3 "Thus, under the Restatement (Third), landowners bear a general duty of reasonable care to all
4 entrants. . . . The 'duty issue must be analyzed with regard to foreseeability and gravity of harm,
5 and the feasibility and availability of alternative conduct that would have prevented the harm."
6 *Foster*, 291 P.3d at 156 (citations omitted).

7 Here, during O'Connell's case in chief, Yanet Elias, whose job was that of an assistant
8 manager in the public areas department at Wynn, testified that, "It's very difficult to maintain the
9 casino, you know, completely clean, because it's a job for 24 hours. There are people — a lot of
10 people walking through, a lot of children, they're carrying things. So, it's impossible to keep it
11 clean at 100 percent." TT Vol. 3 at 70:22-71:1. Additionally, Ms. Elias testified that she did not
12 know when the area where O'Connell fell had last been inspected prior to her fall, and when
13 asked about how often the area is checked, she testified, "It depends on how long it takes the
14 employee to check the north area and return to the south area, because it's all considered one —
15 one whole area. And there aren't always two employees assigned to that area. Sometimes,
16 there's only one." TT Vol. 3 at 69:5-11. While she repeatedly answered questions posed by both
17 counsel by stating that she did not recall, Ms. Elias was also repeatedly impeached with her
18 earlier deposition testimony. At one point she admitted that one of the signs that a porter is not
19 doing their job is that there is debris on the floor. *Id.* at 70:3-6)

20 O'Connell also called Corey Prowell in her case in chief, Wynn's assistant security
21 manager who at the time of the incident was a security report writer. Mr. Prowell responded to
22 the subject incident and eventually wrote a report. He described the scene of the fall as a high
23 traffic area with marble flooring and indicated that upon his arrival, he was told by Ms. Elias that
24 the liquid on the floor had already been cleaned up, and that he was told by another employee
25 that the employee had seen O'Connell being helped up by four other guests. He also testified
26 that O'Connell told him that when she had recovered from her fall, she saw a green liquid on the
27 floor. During her testimony at trial, O'Connell described the "spill" as "at least seven feet" with
28 one side measuring about four feet still in a liquid state, and a three foot portion as "almost dry,"

1 “a little sticky” with “footprints on it.” TT, Vol. 3 at 59:19-24. She described the liquid as
2 having “just a hint of green,” TT, Vol. 3 at 59:12, and elaborating about the footprints she said:

3 They looked like, you know, they were – they looked like mine that I was
4 making, and I’m sure they were from the people that were standing around
5 and helped me up . . . [k]ind of like dirty footprints that you leave after
6 you’ve mopped your floor and you step on it, you walk on it, that’s kind of
7 how it looked.

8 TT, Vol. 3 at 62:19 – 63:2.

9 Wynn argues that “the record is completely devoid of any evidence regarding the length
10 of time the foreign substance had been on the floor.” Mot. at 15-17. While it is true that
11 O’Connell could not testify as to how long the substance had been on the floor, she did testify
12 that a three-foot section of the seven-foot spill was already dry and drying. While the defense
13 seems to suggest that expert testimony would be required, presumably to testify as to the relative
14 humidity within the casino and its relation to the rate of evaporation, common experience would
15 allow a jury to infer that the spill had been in place longer than just a few minutes. As pointed
16 out by O’Connell’s Opposition, there was ample other evidence from which the jury could have
17 found that Wynn had constructive notice of the substance of the floor. Opp. at 11-13. This
18 evidence includes: (1) testimony that the atrium where the substance was located was highly
19 trafficked; (2) testimony that it is impossible for Wynn’s employees to keep the casino floor
20 entirely clean; and (3) testimony that Defendant Wynn had no floor inspection schedule, did not
21 maintain inspection logs, and could not say with certainty when the floor was last inspected prior
22 to O’Connell’s injury. This testimony was elicited from Defendant Wynn’s own employees.

23 “A non-moving party can defeat a motion for judgment as a matter of law if it present[s]
24 sufficient evidence such that the jury could grant relief to that party.” *D&D Tire, Inc. v.*
25 *Ouellette*, 131 Nev. Adv. Op. 47, 352 P.3d 32, 35 (2015) (internal quotations and citations
26 omitted). All of the aforementioned testimony, taken together and drawing all reasonable
27 inferences in favor of the Plaintiff was sufficient to establish that Wynn was on constructive
28 notice of the dangerous condition upon its floor.

1 2. *Whether the testimony of Dr. Tingey and Dr. Dunn was improper*

2 Wynn next makes the argument that the testimony of O'Connell's experts, Dr. Tingey
3 and Dr. Dunn, was improper. Mot. at 19-21. Wynn first argues that the Court improperly
4 admitted their testimony because O'Connell disclosed them as expert witnesses beyond the
5 disclosure deadline. Mot. at 18-19. Wynn argues that its rebuttal expert was unable to review
6 their records and incorporate them into his report. Mot. at 18. However, late production was
7 substantially justified under NRCP 37(c) because O'Connell continued to treat after the close of
8 discovery, treatment records were provided to O'Connell's counsel after the close of discovery,
9 and were provided to Defense counsel soon after their receipt, and because O'Connell had to
10 change treating physicians after Dr. Martin had left the practice. The late disclosed records were
11 only a few pages, the Court permitted the defense to voir dire the doctors outside the presence of
12 the jury before they testified in the presence of the jury, and the Court allowed Wynn's rebuttal
13 expert to sit in the courtroom and listen to the testimony of both Dr. Tingey and Dr. Dunn,
14 allowing him to incorporate his opinions on direct examination. Hence, Wynn was not
15 prejudiced by any late disclosure on O'Connell's part.

16 Wynn also argues that both doctors lacked a sufficient basis for their opinions because
17 they were only based upon Plaintiff's self-reporting. Mot. at 19. In support, Wynn cites to the
18 federal case of *Perkins v. United States*, 626 F. Supp. 2d 587 (E.D. Va. 2009). Notwithstanding
19 the fact that *Perkins* is a federal case,³ it is not on point to the facts here. In *Perkins*, the court
20 found that expert testimony as to medical causation should be excluded because the expert's
21 opinion was based *solely* on the patient's self-reporting – that the expert had merely adopted the
22 patient's explanation *as his own opinion*. *Id.* at 592-593. Here, however, O'Connell's self-
23 reporting did not appear to be the *sole* basis of her experts' testimony. Both doctors testified as to
24 the basis of their opinions, which included not only evaluation of the O'Connell's medical
25 history but also their examination of her, their review of her diagnostic medical tests, and their

26 _____
27 ³ Although not addressed here, this could be significant because Nevada courts do not follow the
28 same procedure for determining whether expert testimony should be allowed as do federal courts
(i.e., Nevada has not adopted the *Daubert* standard).

1 experience in treating orthopedic conditions and the conditions that would result from a slip and
2 fall. There is simply no indication that O'Connell's experts wholly adopted her self-reporting as
3 the sole basis for their opinions as to causation. Moreover, Dr. Tingey was candid in his opinion
4 that he would not attribute all of O'Connell's knee problems to the subject fall because the MRI
5 indicated a degenerative disease process in the left knee as opposed to the right knee.

6 3. *Whether there is legal basis for a finding that Plaintiff bears a burden to*
7 *apportion damages between pre-existing conditions and the harm caused by*
8 *Defendant*

9 Wynn next argues that O'Connell had the burden of apportioning her damages between
10 pre-existing injuries and those injuries caused by her slip and fall at the Wynn but failed to do so.
11 Mot. at 21-25. This is a familiarly incorrect argument (and, indeed, was raised and rejected
12 during trial for the same reasons as it is now) because the legal premises upon which it rests are
13 infirm. The main cause of confusion in this and other cases is the federal case of *Schwartz v.*
14 *State Farm Mut. Auto. Ins. Co.*, 2009 WL 2197370 (D. Nev. July 22, 2009).

15 In that case, Judge Dawson did indeed hold that "[i]n a case where a plaintiff has a pre-
16 existing condition, and later sustains an injury to that area, the Plaintiff bears the burden of
17 apportioning the injuries, treatment and damages between the pre-existing condition and the
18 subsequent accident." *Id.* at *6. However, the cases cited as precedent by Judge Dawson for that
19 statement do not support that assertion. *Kleitv v. Raskin*, 103 Nev. 325, 738 P.2d 508 (1987)
20 involved apportioning damages between injuries caused by successive tortfeasors, not
21 apportioning damages between pre-existing conditions and injuries caused by a sole tortfeasor.

22 Judge Dawson also cited the Washington Court of Appeals case of *Phennah v. Whalen*,
23 621 P.2d 1304 (Wash. App. 1980), but that also involved apportioning damages between
24 successive tortfeasors. The Restatement (Second) of Torts § 433(b), also relied upon, doesn't
25 even concern successive tortfeasors on its face but rather concerns the "substantial factor" test
26 for determining proximate cause. Here, we do not have successive tortfeasors. Rather, we have a
27 Plaintiff who, admittedly, had various pre-existing mental and physical conditions. Therefore,
28 the *Schwartz* case is in error and is inapplicable to this case. Wynn took the O'Connell as it

1 found her and is liable for the full extent of her injuries, notwithstanding her pre-existing
2 conditions. See *Murphy v. Southern Pac. Co.*, 31 Nev. 120, 101 P. 322 (1909).

3 4. *Whether the Defendant is entitled to a new trial or remittitur.*

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

9 This court has held that damages for pain and suffering are
10 peculiarly within the province of the jury. In *Stackiewicz v. Nissan*
11 *Motor Corporation*, 100 Nev. 443, 454, 686 P.2d 925, 932 (1984),
12 this court stated that the trial court cannot revisit a jury's damage
13 award unless it is "flagrantly improper." "In actions for damages in
14 which the law provides no legal rule of measurement it is the special
15 province of the jury to determine the amount that ought to be
16 allowed, so that a court is not justified in reversing the case or
17 granting a new trial on the ground that the verdict is excessive,
18 unless it is so flagrantly improper as to indicate passion, prejudice or
19 corruption in the jury.... The elements of pain and suffering are
20 wholly subjective. It can hardly be denied that, because of their very
21 nature, a determination of their monetary compensation falls
22 peculiarly within the province of the jury.... We may not invade the
23 province of the fact-finder by arbitrarily substituting a monetary
24 judgment in a specific sum felt to be more suitable." *Stackiewicz*,
25 100 Nev. at 454-55, 686 P.2d at 932 (quotations and citations
26 omitted). The mere fact that a verdict is large is not conclusive that
27 it is the result of passion or prejudice. *Id.* (citing *Beccard v. Nevada*
28 *National Bank*, 99 Nev. 63, 66 n. 3, 657 P.2d 1154, 1156 n. 3
(1983)).

22 Here, it must be noted that O'Connell was prevented from presenting evidence of her
23 medical special damages due to discovery and evidentiary issues. Thus, she sought only pain
24 and suffering damages. She testified that she had been suffering with her knee and her neck and
25 back since the fall five years earlier and could no longer engage in the activities that she could
26 prior to the fall, including the swing dancing she had done regularly before the accident. This
27 testimony was corroborated by her former boyfriend and dance partner. She often described her
28 pain throughout her medical records as 10 out of 10. While the defense may have thought that

1 this testimony would be unbelievable to a jury, it was nonetheless the jury's choice to believe it.
2 Additionally, Dr. Tingey testified that he had recommended surgery for O'Connell's
3 traumatically injured knee and that she would, if she chose the surgery, have post-operative pain,
4 but that typically the result after surgery would be a complete relief of the symptoms. On the
5 other hand, Dr. Dunn testified that due to O'Connell's continued complaints of pain in her neck
6 and symptoms in her arms, he recommended an anterior cervical neck discectomy and an
7 interbody 3-level fusion with placement of a plate and screws. He described this surgery as non-
8 curative, but rather taking away 50 to 60 percent of the pain which O'Connell had described as
9 terrible. While Dr. Dunn attributed the changes to O'Connell's spine to a degenerative disease
10 process, he attributed the pain, which he believed to be previously asymptomatic, to the fall –
11 describing the quintessential egg-shell plaintiff

12 Wynn argues in the alternative to the motion for judgment as a matter of law, that a new
13 trial should be had or remittitur issued for several reasons. The first is that O'Connell failed to
14 establish future pain and suffering damages as required by Nevada law. Mot. at 25 (citing
15 *Krause, Inc. v. Little*, 117 Nev. 929, 938, 34 P.3d 566 (2001) (holding that Nevada law requires
16 that "when an injury or disability is subjective and not demonstrable" expert medical testimony
17 is required)). The basis for this argument, however, is the same as above – that Plaintiff's
18 medical experts lacked a reliable basis for their opinion and that O'Connell failed to carry her
19 burden to apportion damages between pre-existing conditions. Mot. at 26:3-7. For the same
20 reasons as outlined above, then, this argument should be rejected.

21 Wynn next argues that O'Connell was improperly allowed to question defense witnesses.
22 Specifically, Wynn points to O'Connell's counsel questioning witnesses on the lack of video
23 coverage of the incident and references in her closing arguments that Wynn controlled the
24 evidence. Mot. at 26. One of the statements cited by Wynn, on examination of Corey Prowell,
25 does not appear to have been objected to by defense counsel and so that objection is now
26 untimely.⁴ The other statements cited by Wynn were in Plaintiff's counsel's closing or rebuttal

27
28 ⁴ A complete transcript of this portion of the trial was not provided, but upon reviewing the full
transcript on file, no objection appears to have been lodged following the questioning.

1 arguments. Defendant also did not object to those statements and, in any event, had the
2 opportunity to make arguments rebutting those statements in its own closing. Therefore, no
3 prejudice resulted.

4 Wynn last argues that it is entitled to a new trial because O'Connell's counsel made an
5 improper statement in rebuttal as to damages. The statement in issue is: "As jurors, you are the
6 voice of the conscience of this community." Defendant lodged a timely objection, which was
7 immediately sustained by this Court. The Court also admonished counsel for making the
8 statement and instructed the jury to disregard it. The Court stated:

9 Sustained. No, no. The jury will disregard that. Counsel, this is not a
10 punitive damage case. You may not address the – they are not to be
11 making decisions as the conscience of the community. You know that is
12 improper argument. (TT Vol. 6 at 46:12-16)

13 The problem with such a statement is that it allows the jury to punish the defendant, e.g.,
14 with punitive damages, which was not a part of Plaintiff's case here. *See Florida Crushed Stone*
15 *Co. v. Johnson*, 546 So.2d 1102, 1104 (1989).

16 The Nevada Supreme Court has made clear, however, that a new trial is warranted only
17 where "the [comment] is so extreme that the objection and admonishment could not remove the
18 [comment's] effect." *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008). This amounts to
19 an analysis of whether no other reasonable explanation could exist for the jury's verdict.
20 *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364, 212 P.3d 1068, 1079 (2009). Here, there
21 was ample evidence presented at trial, as outlined above and in Plaintiff's Opposition, to support
22 the jury verdict. Wynn's timely objection was quickly sustained and a limiting instruction was
23 given immediately. In light of the evidence presented at trial, it cannot be said that the jury's
24 verdict was so unreasonable as to make the statement prejudicial. *CF Lioce*, 124 Nev. at 17, 174
25 P.3d at 981. (finding that the trial testimony supported the jury's verdict and the district court
26 sustained the defendant's objections to misconduct, so a new trial was not warranted).

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1 Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion for Judgment as a
2 Matter of Law or Alternatively for a New Trial or Remittitur be **DENIED**.

3 DATED this 20th day of ^{May}~~April~~, 2016.

4
5 
6 DISTRICT COURT JUDGE
7 (JC)

8 Submitted by:

9 NETTLES LAW FIRM
10 

11 BRIAN D. NETTLES, ESQ.

Nevada Bar No. 7462

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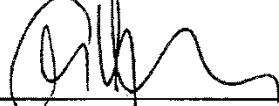
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25 O'Connell v. Wynn – Case No. A-12-655992-C
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27
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

December 19, 2012

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

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

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

COURT CLERK: Denise Trujillo

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- MOTION TO WITHDRAW

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

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

August 07, 2015

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

August 07, 2015	9:30 AM	Motion for Protective Order	Deft's Motion for Protective Order and for OST
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HEARD BY: Bulla, Bonnie

COURTROOM: RJC Level 5 Hearing Room

COURT CLERK: Jennifer Lott

RECORDER: Francesca Haak

REPORTER:

PARTIES

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

JOURNAL ENTRIES

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

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

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

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

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

September 03, 2015

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

September 03, 2015 9:00 AM Settlement Conference

HEARD BY: COURTROOM:

COURT CLERK:

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- Settlement conference held, matter NOT SETTLED.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

September 17, 2015

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

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

HEARD BY: Thompson, Charles

COURTROOM: RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Lara Corcoran

REPORTER:

PARTIES

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

JOURNAL ENTRIES

- DEFT'S MOTION FOR SUMMARY JUDGMENT

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

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

September 18, 2015

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

September 18, 2015	9:00 AM	Motion	Pltf's Motion to Re- Open Discovery for the Limited Purpose of Taking Deft's 30(b)(6) Deposition and for OST
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HEARD BY: Bulla, Bonnie

COURTROOM: RJC Level 5 Hearing Room

COURT CLERK: Jennifer Lott

RECORDER: Francesca Haak

REPORTER:

PARTIES

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

JOURNAL ENTRIES

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

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

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

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

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

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

October 01, 2015

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

October 01, 2015 9:00 AM All Pending Motions

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

COURT CLERK: Denise Trujillo

RECORDER: Debbie Winn

REPORTER:

PARTIES

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

JOURNAL ENTRIES

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

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

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

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

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

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

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

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

11/4/15 1:30 PM JURY TRIAL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

October 29, 2015

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

October 29, 2015 3:00 AM All Pending Motions

HEARD BY: Ellsworth, Carolyn

COURTROOM: RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER:

REPORTER:

PARTIES

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

JOURNAL ENTRIES

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

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

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11/4/15 1:30 PM JURY TRIAL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

November 04, 2015

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

November 04, 2015 1:30 PM Jury Trial

HEARD BY: Ellsworth, Carolyn

COURTROOM: RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Lara Corcoran

REPORTER:

PARTIES

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

JOURNAL ENTRIES

- JURY TRIAL

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

EVENING RECESS

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

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

November 05, 2015

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

November 05, 2015 11:00 AM Jury Trial

HEARD BY: Ellsworth, Carolyn

COURTROOM: RJC Courtroom 16D

COURT CLERK: Billie Jo Craig

RECORDER: Lara Corcoran

REPORTER:

PARTIES

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

JOURNAL ENTRIES

- Attorney Edward Wynder present on behalf of Plaintiff.

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

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

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

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

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

November 09, 2015

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

November 09, 2015 1:30 PM Jury Trial

HEARD BY: Ellsworth, Carolyn

COURTROOM: RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Lara Corcoran

REPORTER:

PARTIES

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

JOURNAL ENTRIES

- JURY TRIAL

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

EVENING RECESS

11/10/15 8:30 AM

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

November 10, 2015

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

November 10, 2015 8:30 AM Jury Trial

HEARD BY: Ellsworth, Carolyn

COURTROOM: RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Lara Corcoran

REPORTER:

PARTIES

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

JOURNAL ENTRIES

- JURY TRIAL

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

EVENING RECESS

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

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

November 12, 2015

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

November 12, 2015 8:30 AM Jury Trial

HEARD BY: Ellsworth, Carolyn

COURTROOM: RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Lara Corcoran

REPORTER:

PARTIES

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

JOURNAL ENTRIES

- JURY TRIAL

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

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EVENING RECESS

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

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

November 13, 2015

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

November 13, 2015 8:30 AM Jury Trial

HEARD BY: Ellsworth, Carolyn

COURTROOM: RJC Courtroom 16D

COURT CLERK: Andrea Natali

RECORDER: Lara Corcoran

REPORTER:

PARTIES

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

JOURNAL ENTRIES

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

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

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

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

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

November 16, 2015

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

November 16, 2015 9:00 AM Jury Trial

HEARD BY: Ellsworth, Carolyn

COURTROOM: RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Lara Corcoran

REPORTER:

PARTIES

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

JOURNAL ENTRIES

- JURY TRIAL

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

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

March 04, 2016

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

March 04, 2016 8:30 AM All Pending Motions

HEARD BY: Ellsworth, Carolyn

COURTROOM: RJC Courtroom 16D

COURT CLERK: Denise Trujillo

RECORDER: Lara Corcoran

REPORTER:

PARTIES

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

JOURNAL ENTRIES

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

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

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

A. Legal Standards and Applicable Statutes

NRCP 50 provides in pertinent part:

(a) Judgment as a matter of law.

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

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

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

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

NRCP 59(a) provides: A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1) Irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial; (2) Misconduct of the jury or prevailing party; (3) Accident or surprise which ordinary prudence could not have guarded against; (4) Newly discovered evidence material for the party making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial; (5) Manifest disregard by the jury of the instructions of the court; (6) Excessive damages appearing to have been given under the influence of passion or prejudice; or, (7) Error in law occurring at the trial and objected to by the party making the motion. The standard for granting a motion for judgment as a matter of law is based on the standard for granting a motion for involuntary dismissal under former NRCP 41(b). In applying that standard and deciding whether to grant a motion for judgment as a matter of law, the district court must view the evidence and all inferences in favor of the nonmoving party. To defeat the motion, the nonmoving party must have

presented sufficient evidence such that the jury could grant relief to that party. *Nelson v. Heer*, 123 Nev. 217, 222, 163 P.3d 420,424 (2007). Deft. presents several distinct arguments in support of its Motion for Judgment as a Matter of Law. These are: (1) there was insufficient evidence presented at trial for a finding that Deft. owed Pltf. a duty of care; (2) the testimony of Dr. Tingey and Dr. Dunn was improper and prejudiced Deft. ; and (3) Pltf. had a burden to apportion the amount of damages attributable to Deft. and those attributable to prior injuries, but failed to do so. Deft. also argues, in the alternative, that even if it is not entitled to judgment as a matter of law, it is entitled under NRCP 59 to a new trial or remittitur because the jury's award of future pain and suffering was unsupported, Pltf. posed improper questions to Deft.'s witnesses, and Pltf.'s counsel made prejudicial comments to the jury. Each of these will be addressed in turn.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Legal Standards and Applicable Statutes:

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

If the offeree [of an offer of judgment] rejects an offer and fails to obtain a more favorable judgment, (1) the offeree cannot recover any costs or attorney s fees and shall not recover interest for the period after the service of the offer and before the judgment; and (2) the offeree shall pay the offeror s post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney s fees, if any be allowed, actually incurred by the offeror from the time of the offer. If the offeror s attorney is collecting a contingent fee, the amount of any attorney s fees awarded to the party for whom the offer is made must be deducted from that contingent fee.

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

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

(c) Shall order the party to pay the taxable costs incurred by the party who made the offer; and
 (d) May order the party to pay to the party who made the offer (3) Reasonable attorney's fees incurred by the party who made the offer for the period from the date of service of the offer to the date of entry of the judgment. If the attorney of the party who made the offer is collecting a contingent fee, the amount of any attorney's fees awarded to the party pursuant to this subparagraph must be deducted from that contingent fee. Additionally, NRS 18.010(2)(b) provides that fees may be awarded to the prevailing party [w]ithout regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. NRS 18.110(1)-(2) provides that whenever a party claims costs, she must file a verified memorandum setting forth those costs within 5 days of entry of the judgment and that witness fees are recoverable costs, regardless of whether the witness was subpoenaed, if the witness testified at trial. NRS 18.110(4) allows the opposing party to file a motion to re-tax claimed costs within 3 days of service of a copy of the memorandum of costs. As a preliminary note, Deft's first argument is that Pltf. improperly and unilaterally filed an Amended Application for Fees and Costs after reading Deft's Opposition, so the Court should only consider the first Application. Here, judgment was entered on December 15, 2015. Pltf. filed the first Application well before this, on November 25, 2015. She also filed her Amended Application for Costs on December 21, 2015, which is within the time limit set forth in the rule (note that under EDCR 1.14(a), the period for filing is five judicial days from entry of judgment). However, Deft's Motion to Re-Tax as to the first Application was due on December 2, 2015, but it was not filed until December 7, 2015 and was thus untimely. Deft's Motion to Re-Tax as to the Amended Application was timely, though. It is true that generally, supplemental briefing is allowed only by leave of court. See EDCR 2.20(i). However, given that Deft's first opposition was untimely, it would seem that it would be willing to waive its first argument in opposition to Pltf.'s Amended Application. In order for the penalties associated with the rejection of an offer of judgment to apply, the offeree must not have obtained a more favorable judgment. NRCP 68(f); NRS 17.115(4). To determine whether the offeree of a lump-sum offer of judgment obtained a more favorable judgment, the amount of the offer must be compared to the amount of the offeree's pre-offer, taxable costs. *McCrary v. Bianco*, 122 Nev. 102, 131 P.2d 573, 576, n. 10 (2006) (stating that NRCP 68(g) must be read in conformance with NRS 17.115(5)(b)). Here, Pltf. offered to settle the case for \$49,999.00 on September 3, 2015. The verdict was in favor of Pltf. for a total of \$240,000.00. It seems that this may be a more favorable judgment, although Pltf. has neglected to specifically set forth her pre-offer taxable costs. On the other hand, Pltf.'s total claimed costs were \$26,579.38 (whether pre- or post-offer) and that, together with the offer, amounts to \$76,578.38. Pltf.'s jury recovery was well above this - \$240,000.00 - so it appears that Pltf. has met the threshold requirement to show entitlement to fees and costs under Rule 68. The determination of whether to grant fees to a party under NRCP 68 rests in the sound discretion of the trial court. *Chavez v. Sievers*, 118 Nev. 288, 296, 43 P.3d 1022, 1027 (2002). Such a decision will not be disturbed unless it is arbitrary and capricious. *Schouweiler v. Yancey Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (1985). District courts must consider several factors when making a fee determination under *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1963): (1) whether the Pltf.'s claim was brought in good faith; (2) whether the offer was reasonable and in good faith in timing and amount; (3) whether the decision to reject the offer was grossly unreasonable or in bad faith; and (4) whether the sought fees are reasonable and justified. However,

where the Deft. is the offeree of an offer of judgment, the first factor changes to a consideration of whether the Deft s defenses were litigated in good faith. See *Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998). As to the first factor, whether Deft s defenses were litigated in good faith, Pltf. argues that Deft s defense that it had no notice of the liquid on the casino floor was in bad faith because it failed to make an inquiry into the last time the floor was checked before Pltf. slipped. Am. App. at 5-6. Pltf. also argues that Deft s defense that there was no causation here was unreasonable because it relied upon expert testimony that lacked a basis in modern science. Id. at 6. Deft s Motion to Retax does not address whether its defenses were maintained in good faith. However, this Court has already highlighted in its Tentative Ruling on Deft s Renewed Motion for Judgment as a Matter of Law that Nevada case law surrounding constructive notice is, at best, confusing. This is not a case where the law is black and white. Based on that and the evidence presented at trial, it was not bad faith for Deft. to contend that it lacked notice of the condition on the floor and Pltf. in fact so concedes. Furthermore, Pltf. s evidence of constructive notice may have been enough to escape the granting of a Rule 50 motion, but it was by no means overwhelming. Additionally, Pltf. s damages claims were reasonably disputed by expert testimony of a defense witness. That the jury was not persuaded by this expert does not translate to bad faith by the Deft.. Thus, the first factor therefore weighs in favor of the Deft.. As to the second factor, Deft. argues that the offer was unreasonable in amount because Pltf. had no basis for its offer and that due to Pltf. s gamesmanship, Deft. could not sufficiently evaluate the offer. Opp. at 5-7. Here, discovery closed on June 12, 2015. Pltf. was unable to submit proof of special medical damages at the time of trial because the Court precluded them on the basis that they were not properly disclosed in discovery. This made it extremely difficult for the Defense to evaluate a potential value of the case. An offer made at a time when Pltf. has not properly provided a calculation of damages is unreasonable. Thus, the second factor weighs in favor of Deft.. In ascertaining whether Deft s decision to reject the offer was grossly unreasonable or in bad faith, a pertinent consideration is whether enough information was available to determine the merits of the offer. *Trustees of the Carpenters for S. Nev. Health & Welfare Trust v. Better Building Co.*, 101 Nev. 742, 746, 710 P.2d 1379, 1382 (1985). Here, discovery closed on June 12, 2015. The offer of judgment was made three months later, on September 3, 2015. Given that at the time of the offer, Deft. had available all the materials obtained during discovery, including witness depositions, Deft s decision to reject the offer was well-informed. Furthermore, the issues surrounding notice were not necessarily clear cut, as evidenced by the parties pre-trial and post-trial motions on that issue. Overall, it is unlikely that Deft s rejection of the offer was grossly unreasonable or in bad faith, and in the end weighs in favor of Deft.. With regard to the last Beattie factor, the Court must undergo an analysis of whether claimed fees were reasonable in light of the factors set forth in *Brunzell v. Golden Gate Nat l Bank*, 85 Nev. 345, 249, 455 P.2d 31, 33 (1969). Pltf. has addressed some, but not all, of these factors. Pltf. s counsel has set forth the qualities of the advocate(s) on this case and, of course, we know that a favorable result was obtained. However, Pltf. has not provided any bills setting forth what tasks were performed and the associated hours for those tasks. This prevents the Court from determining whether the fees charged were reasonable in light of the tasks actually performed. Therefore, because Pltf. has not carried her burden under *Brunzell*, this factor weighs in favor of Deft.. On the whole, all of the factors set forth in *Beattie* (as modified by *Yamaha*, supra) weigh in favor of Deft. in this case and Pltf. s Amended Application for Fees should be denied. Although NRCp 68 costs are only for post-offer costs, NRS 18.020(3) mandates awarding

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

1. Expert Witness Fees

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

2. Service Fees

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

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

3. Jury Fees

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

4. Parking Fees

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

5. Skip Trace Fees

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

6. Remaining Fees

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

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

PLAINTIFF'S PROPOSED EXHIBITS

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

YVONNE O'CONNELL vs. WYNN LAS VEGAS, LLC

Case Number A-12-655992

13	Plaintiff's Medical Records and Billing Statement for treatment rendered by Thomas Dunn, M.D.	00016 - 00048			
14	Curriculum Vitae; Fee Schedule and Trial Testimon List – Craig T. Tingey, M.D.	00049 – 00056			
15	Plaintiff's Medical Records and Billing Statement for treatment rendered by Craig T. Tingey, M.D.	00057 – 00076			
16	Wynn Las Vegas, LLC Answer to Amended Complaint	00077 – 00082			
17	Wynn Las Vegas Dust Mop/Damp Mop Policy dated 1/28/2005	00083 – 00084			
18	Wynn Las Vegas Dust Mop/Damp Mop Policy dated 8/1/07	00085 – 00086			
19	Wynn Las Vegas Dust Mopping/Damp Mopping Power Point Presentation – undated	00087 – 00090			
20	Wynn Las Vegas Wet Floor Signs and Spills Power Point Presentation – undated	00091 – 0092			
21	Wynn Las Vegas Wet Floor Signs & Spills Policy	00093			
22	Wynn Las Vegas Signs and Spills Power Point – undated	00094 - 00095			
23	Wynn Las Vegas Marble Care Policy	00096 - 00097			
24	Wynn Las Vegas Marble Care Power Point Presentation – undated	00098 - 00099			
25	Affidavit/Declaration of Custodian of Records for Desert Orthopedic/Dr Tingey	00100 - 00101			

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

Wynn's Proposed Exhibit List

<u>Ex No.</u>	<u>DOCUMENT/BATES NUMBERS</u>	<u>OFFERED</u>	<u>OBJECTED</u>	<u>ADMITTED</u>
A. (1-11)	Color Pictures of Incident and Guest Statements WYNN-O'CONNELL 00001 - 00011			
B. (1-66)	UMC Records WYNN-O'CONNELL 00012, 00016, 00024, 00032, 00039 - 00040, 00047 - 00053, 00060 - 0067, 00075 - 00077, 00079 - 00080, 00090, 00099 - 00101, 00111, 00120 - 000122, 00126, 00135 - 00138, 00150, 00163, 00168 - 00169, 00175, 00184, 00193, 00201 - 00203, 00214, 00216, 00230, 00232, 00234 - 00235, 00239, 00241 - 00244, 00252, 00254 - 00258			
C. (1-11)	Apache Foot & Ankle Specialist (Lee Wittenberg DPM) WYNN-O'CONNELL00262 - WYNN-O'CONNELL00272			
D.	Ascent Primary Care (Suresh Prahbu MD) WYNN-O'CONNELL00277 - WYNN-O'CONNELL00278			
E. (1-5)	Clinical Neurology Specialists (Leo Germin MD) WYNN-O'CONNELL 00290 - 00291, 00296 - 00298			
F.	Desert Institute of Spine Care - Dr. Cash WYNN-O'CONNELL00302 - WYNN-O'CONNELL00303			
G. (1-15)	Ed Suarez WYNN-O'CONNELL 00307 - 00321			
H.	Matt Smith PT 5/3/10 WYNN-O'CONNELL00398 - WYNN-O'CONNELL00399			

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

Wynn's Proposed Exhibit List

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

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

Wynn's Proposed Exhibit List

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

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

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

Deft's - EXHIBITS

CASE NO. 14658992

[illegible]

EXHIBIT LIST.doc4/9/2012

S:\DEPT 5 INFO\trial documents\TRIAL DOCS DEPT 5\PLAINTIFF'S

JOINT STIPULATED EXHIBITS OF THE PARTIES

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

Court's Exhibits

CASE NO. A655992

[illegible]

EXHIBIT LIST.doc4/9/2012

S:\DEPT 5 INFO\trial documents\TRIAL DOCS DEPT 5\PLAINTIFF'S



EIGHTH JUDICIAL DISTRICT COURT CLERK'S OFFICE
NOTICE OF DEFICIENCY
ON APPEAL TO NEVADA SUPREME COURT

LAWRENCE J. SEMENZA, III, ESQ.
10161 PARK RUN DR., SUITE 150
LAS VEGAS, NV 89145

DATE: June 10, 2016
CASE: A-12-655992-C

RE CASE: YVONNE O'CONNELL vs. WYNN LAS VEGAS, LLC DBA WYNN LAS VEGAS

NOTICE OF APPEAL FILED: June 8, 2016

YOUR APPEAL HAS BEEN SENT TO THE SUPREME COURT.

PLEASE NOTE: DOCUMENTS NOT TRANSMITTED HAVE BEEN MARKED:

- ☒ \$250 – Supreme Court Filing Fee (Make Check Payable to the Supreme Court)**
 - If the \$250 Supreme Court Filing Fee was not submitted along with the original Notice of Appeal, it must be mailed directly to the Supreme Court. The Supreme Court Filing Fee will not be forwarded by this office if submitted after the Notice of Appeal has been filed.
- ☐ \$24 – District Court Filing Fee (Make Check Payable to the District Court)**
- ☒ \$500 – Cost Bond on Appeal (Make Check Payable to the District Court)**
 - NRAP 7: Bond For Costs On Appeal in Civil Cases
- ☐ Case Appeal Statement
 - NRAP 3 (a)(1), Form 2
- ☐ Order
- ☐ Notice of Entry of Order

NEVADA RULES OF APPELLATE PROCEDURE 3 (a) (3) states:

"The district court clerk must file appellant's notice of appeal despite perceived deficiencies in the notice, including the failure to pay the district court or Supreme Court filing fee. **The district court clerk shall apprise appellant of the deficiencies in writing**, and shall transmit the notice of appeal to the Supreme Court in accordance with subdivision (e) of this Rule with a notation to the clerk of the Supreme Court setting forth the deficiencies. Despite any deficiencies in the notice of appeal, the clerk of the Supreme Court shall docket the appeal in accordance with Rule 12."

Please refer to Rule 3 for an explanation of any possible deficiencies.

*****Per District Court Administrative Order 2012-01, in regards to civil litigants, "...all Orders to Appear in Forma Pauperis expire one year from the date of issuance." You must reapply for in Forma Pauperis status.***

Certification of Copy

State of Nevada }
County of Clark } SS:

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

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; JUDGMENT ON VERDICT; NOTICE OF ENTRY OF JUDGMENT ON VERDICT; ORDER DENYING DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY FOR A NEW TRIAL OR REMITTITUR; NOTICE OF ENTRY OF ORDER DENYING DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY FOR A NEW TRIAL OR REMITTITUR; DISTRICT COURT MINUTES; EXHIBITS LIST; NOTICE OF DEFICIENCY

YVONNE O'CONNELL,

Plaintiff(s),

vs.

WYNN LAS VEGAS, LLC DBA WYNN LAS VEGAS,

Defendant(s),

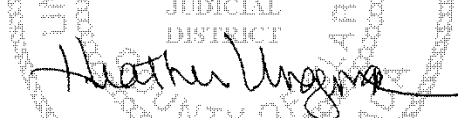
Case No: A-12-655992-C

Dept No: V

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 10 day of June 2016.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk

SLIP + FALL 2-8-10: I FELL ENTIRELY ON RIGHT SIDE +

HIP HIT SOMETHING. ALL BELOW SINCE SLIP + FALL.

AMBULATORY CARE MEDICAL HISTORY FORM

Page -2- CIRCLE YES OR NO FOR THOSE THAT APPLY WITHIN THE LAST TWO WEEK PERIOD SINCE SLIP + FALL

SYSTEMIC REVIEW:

General: Maximum weight 160 Minimum weight

Recent Changes

Have you been in good general health most of your life? Yes No

Have you recently had? SINCE SLIP + FALL - 2-8-10

Weakness Fever Chills

Night Sweats Fainting Problems Sleeping

Do you have any of the following?:

Skin:

Skin disease Yes No

Have you ever had a transfusion Jaundice Yes No

Hives, eczema or rash Yes No

Head-Eyes-Ears-Nose-Throat

Dry eyes or mouth Yes No

Bleeding Gums - Frequent or Constant Yes No

Blurred Vision DRIVING WITH GLASSES NOW Yes No

Date of Last Eye Exam 2003 DIFFICULT

Sneezing or runny nose LEFT LUMP BACK Yes No

Nosebleeds - Frequent OF NECK RETURNED Yes No

Chronic sinus trouble SINCE SLIP + FALL Yes No

Ear disease 2-8-10. Yes No

Impaired hearing 2-8-10. Yes No

Dizziness or sensation of room spinning Yes No

Frequent or severe headaches Yes No

Respiratory:

Asthma or Wheezing Yes No

Difficulty breathing PAIN INSIDE Yes No

Any trouble with lungs Yes No

Pleurisy or Pneumonia SINCE SLIP + FALL Yes No

Cough up Blood SINCE SLIP + FALL Yes No

Persistent cough for 3-8 months SINCE SLIP + FALL Yes No

Cardiovascular:

Chest pain, pressure or tightness Yes No

Shortness of breath with walking or lying down Yes No

Difficulty walking two blocks Yes No

Palpitations Yes No

Swelling of hands, feet or ankles Yes No

Needs to sleep with 2 or more pillows Yes No

Heart Murmur Yes No

Gastrointestinal: NAUSEA

Vomiting blood or food A LOT OF PAIN INSIDE. Yes No

Gallbladder disease INSIDE. Yes No

Change in appetite Yes No

Hepatitis/Jaundice Yes No

Painful bowel movements NO BOWEL MOVEMENTS Yes No

Bleeding with bowel movements Yes No

Black stools I HAD CONTROLLED IBS, Yes No

Hemorrhoids or piles GEAR + STRESS Yes No

Recent change in bowel habits DISORDER WITH Yes No

Frequent diarrhea DIET, JUICING, EXERCISE, Yes No

Heartburn or indigestion DANCING, ELIMINATING, Yes No

Cramping or pain in the abdomen OF STRESS, Yes No

Does food stick in throat ETC SINCE SLIP + FALL Yes No

Endocrine: SLIP + FALL IT'S OUT OF CONTROL

Hormone therapy Yes No

Any change in hat or glove size Yes No

Any change in hair growth Yes No

Do you feel colder than before or skin feel dryer Yes No

ENCL 78434586 58 0013 8/18/1951
O'CONNELL, YVONNE L
Subramanyam, Nanjunda F
MRN 000-794-300 701 ADM 3/18/2010

Neck:

Stiffness Sept, 2009, Summer in Hospital emergency, R ANTIBIOTICS, Yes No

Enlarged glands LEFT LUMP BACK OF NECK Yes No

Genitourinary: DISAPPEARED SINCE

Loss of urine SLIP + FALL, IT RETURNED. Yes No

Blood in urine SLIP + FALL, IT RETURNED. Yes No

Frequent urination LIQUID DIET + WATER Yes No

Burning or painful on urination Yes No

Night time urinating Yes No

Kidney trouble Yes No

Problem stopping/starting flow of urine Yes No

Testicular mass Yes No

Prostate trouble Yes No

Sexual dysfunction SINCE SLIP + FALL Yes No

STD/AIDS Risk Yes No

Gynecological: STAGED AGE 55

First day of last period 12

Age period started 12

How long do periods last? days

Frequency of periods every days

Pain with periods Yes No

Number of pregnancies 2

Number of miscarriages

Date of last cancer smear and results 2003 2 Normal

Breast lump Disappeared 2002 - cysts Yes No

Abnormal Vaginal Discharge Yes No

Breast Discharge Yes No

Skin change of Breast Yes No

Nipple retraction Yes No

Locomotor-Musculoskeletal:

Stiffness or pain in joints (check all that apply) STILL Hurts TO SIT

Finger Hands Wrist Elbows Shoulders Neck Back

Hip Knee Toes Foot Jaw

Weakness of muscles or joints Yes No

Any difficulty in walking Yes No

Any pain in calves or buttocks on walking Yes No

Is pain relieved by rest Some positions - Yes No

Neuro-Psychiatric:

Transient blindness Tremor Numbness in fingers Weakness

Have you ever had counseling for your mental health? Yes No

Have you ever been advised to see a psychiatrist? 1989 Yes No

Do you ever have, or have had fainting spells? Yes No

Convulsions Yes No

Paralysis Yes No

Problems with coordination Yes No

Domestic violence 1989 Yes No

Depression Symptoms (difficulty sleeping, loss of appetite loss of interest in activities feelings of hopelessness) 1989 + Yes No

Hematologic: NOW SINCE SLIP + FALL

Are you slow to heal after cuts SINCE SLIP + FALL = Yes No

Anemia. Poor cut = pus + infection spread Yes No

Phlebitis or blood clots in veins RAPIDLY. Yes No

Have you had difficulty with bleeding excessively after tooth extraction or surgery? Yes No

Have you ever had abnormal bruising or bleeding? Yes No

Source of information, if other than patient: Signature:

Provider Signature of Patient Yvonne O'Connell Date 3-18-10

Form 02-110 4/2006

1310

A=12-655992-C

PROPOSED DEFT. EXHIBIT B054

WYNN-O'CONNELL00234

3606

HISTORY OF PAST ILLNESS: Have you had

3607

Education: HS Diploma Years HS.

BS-4 Years College.

Years post-graduate.

What is the reason for today's visit?

Have you been treated by another neurologist for this problem?

Are you on Disability? ☐ Yes ☒ No Note: We only perform Disability consultations pre-arranged with the Bureau of Disability.

Are you being seen for an injury?

☒ Yes ☐ No

Are your main symptoms work related?

☐ Yes ☒ No

Do you intend to file Worker's Comp Claim?

☐ Yes ☒ No

Do you have an attorney involved in this case?

☒ Yes ☐ No

Do you plan to get an attorney?

☐ Yes ☒ No

Please list any illnesses or conditions for which you've been treated by a doctor as an office patient/outpatient:

1 60 YRS AGO BACK INJURY, STRESS DISORDER, HYPERTENSION - 3 10 YRS AGO Breast Bopsy, IBS, GERD THEN I MANAGED IT.

2 Mobility Syndrome - MARCHAND OR ELLER'S DYSPLASIA, 4 20 YEARS PAIN-FREE UNTIL 2-8-10 Slip + Fall -

1 1955? Tonsillectomy 2 Breast Bopsy 2001 Now seeing BACK surgeon, cardiologist GI physical therapy, podiatrist + probable ulcer + HERNIA.

Medications you take on a regular basis including over the counter medicines (i.e. aspirin or antacids):

Ex.	Medication Name:	Strength (e.g. mg, mcg)	Directions of use	Quantity Prescribed	Medication Form (tablet, capsule, etc.)	Prescribed by who	Date last Filled	Refills Left
	Vitamin C	500 mg	1 per day	30	tablets	Dr. Joe Smith	1/1/09	1
1	Pure Immune Plus		1		capsule			
2	Multi-Vitamin					from DONATHAN WRECKER		
3	Emergen-C							
4	CALMAX							
5								

Pharmacy Name:

Pharmacy Phone:

Cross Streets:

Store # (if known)

Drug allergies: Please list any known allergies and reactions:

DRUG INTOLERANT - AND SINCE fall = extremely severe constipation, chest pains, difficulty breathing AND DRUGS WILL MAKE ME WORSE

Did you have a trial dose of anti-inflammatory?

☒ Yes ☐ No

If yes, which one/how long? DISCONTINUED BECAUSE OF

What pain medication is patient currently on?

Did you have physical therapy?

☒ Yes ☐ No

If Yes, when/how long? 4-28-10 AND CONTINUING

Are you claustrophobic?

☒ Yes ☐ No

Do you smoke?

☐ Yes ☒ No

Do you have any metal in your body?

☐ Yes ☒ No

If no, have you smoked in the past?

☐ Yes ☒ No

If yes, How many packs/day?

How many years?

Do you drink alcohol?

☒ Yes ☐ No

If yes, number of drink(s):

per day 2 per week

Appetite is:

☒ Good ☐ Fair ☐ Poor

Have you experienced weight loss?

☐ Yes ☒ No

SINCE fall for pain

FAMILY HEALTH HISTORY

Relative:	If living: Age & Health	If deceased: Age at death & Cause	Has any blood relative ever had:	Who?
Mother			Cancer <u>DAD, MOM, AUNT</u>	
Father			Diabetes	☒ Yes ☐ No <u>GRANDMA</u>
Brother(s)	1		Heart Disease	☒ Yes ☐ No <u>BROTHER</u>
& Sister(s)	2		High Blood Pressure <u>MOM</u>	☒ Yes ☐ No <u>GRANDMA</u>
	3		Migraine Headaches	☐ Yes ☒ No <u>IT + AUNT</u>
	4		Neurological Disorders	☐ Yes ☒ No
Children	1		Brain Tumor	☐ Yes ☒ No
	2		Aneurysm	☐ Yes ☒ No
	3		Alzheimer's Disease	☐ Yes ☒ No
	4		Parkinson's Disease	☐ Yes ☒ No
	5		Seizures	☐ Yes ☒ No
			Stroke	☒ Yes ☐ No <u>GRANDMA</u>

Yvonne O'Connell
(Print Name)

Yvonne O'Connell
(Patient Signature)

10-18-10
(Date)

HAVE YOU HAD WITHIN THE PAST YEAR?

West: 1321 S. Rainbow Ste# 240 • Las Vegas, NV 89146 • Main# (702) 804-6555 • Fax# (702) 804-1998
East: 1691 W. Horizon Ridge Pkwy. Ste# 100 • Henderson, NV 89012 • Main# (702) 804-1212 • Fax# (702) 804-1273

PROPOSED DEFT. EXHIBIT E 001

WYNN-O'CONNELL00290

A-12-655992-C

Patient Name:

YVONNE O'CONNELL - ALL SINCE Slip + FALL 2-8-10

DoB:

8-18-51

• Frequent or severe headaches?	SINCE FALL	YES ☒	NO ☐	Frequency ☐	With back pain
• Dizziness on change of position?		YES ☐	NO ☐	Frequency ☐	
• Unconscious spells?		YES ☐	NO ☐	Frequency ☐	
• Blurred vision?		YES ☐	NO ☐	Frequency ☐	
• Double vision?		YES ☐	NO ☐	Frequency ☐	
• Pain behind your eyes?		YES ☐	NO ☐	Frequency ☐	
• Do you wear contacts?		YES ☐	NO ☐	Frequency ☐	
• Earaches?		YES ☐	NO ☐	Frequency ☐	
• Ringing in your ears?		YES ☐	NO ☐	Frequency ☐	
• Decrease in hearing?		YES ☐	NO ☐	Frequency ☐	
• Sinus trouble?		YES ☐	NO ☐	Frequency ☐	
• Hay fever?		YES ☒	NO ☐	Frequency ☐	occasional
• Strange taste or loss of taste?		YES ☐	NO ☐	Frequency ☐	
• Persistent hoarseness?		YES ☐	NO ☐	Frequency ☐	
• Difficulty swallowing?		YES ☒	NO ☐	Frequency ☐	With chest pain + Breathing
• Recurrent sore throat?		YES ☐	NO ☐	Frequency ☐	
• Chest pain?		YES ☒	NO ☐	Frequency ☐	
• Coughing up bloody mucus?		YES ☐	NO ☐	Frequency ☐	
• Weight loss?		YES ☐	NO ☐	Frequency ☐	
• Pain in arm(s)?		YES ☒	NO ☐	Frequency ☐	DAILY
• Fever chills?		YES ☐	NO ☐	Frequency ☐	
• Chronic or frequent cough?		YES ☒	NO ☐	Frequency ☐	With chest pain + Breathing
• Shortness of breath on: Walking several blocks?		YES ☐	NO ☐	Frequency ☐	Not walking much
Going up 1 flight of stairs?		YES ☐	NO ☐	Frequency ☐	SINCE FALL
Lying down?		YES ☒	NO ☐	Frequency ☐	often
• Palpitations or flutterings of the heart?		YES ☒	NO ☐	Frequency ☐	168 After fall -
• High blood pressure?		YES ☐	NO ☐	Frequency ☐	
• Swelling of feet or ankles?		YES ☐	NO ☐	Frequency ☐	
• Leg cramps at night?		YES ☐	NO ☐	Frequency ☐	
• Recurrent stomach pain?		YES ☒	NO ☐	Frequency ☐	DAILY
• Nausea or vomiting?		YES ☒	NO ☐	Frequency ☐	DAILY - Nausea only
• Difficulty starting urination?		YES ☐	NO ☐	Frequency ☐	
• Waking during the night to urinate?		YES ☒	NO ☐	Frequency ☐	hourly every 2 hrs
• Urinate more or less than before?		YES ☐	NO ☐	Frequency ☐	
• Backaches?		YES ☒	NO ☐	Frequency ☐	
• Joint pains?		YES ☒	NO ☐	Frequency ☐	
• Muscle spasms		YES ☒	NO ☐	Frequency ☐	
• Loss / change of sensation in hands?		YES ☒	NO ☐	Frequency ☐	
• Loss / change of sensation in feet?		YES ☒	NO ☐	Frequency ☐	
• Trembling in any arm, leg, hand or foot?		YES ☒	NO ☐	Frequency ☐	
• Tiredness without apparent reason?		YES ☐	NO ☐	Frequency ☐	Tired with Reason
• Hot flashes?		YES ☐	NO ☐	Frequency ☐	
• Bruising easily?		YES ☐	NO ☐	Frequency ☐	
• Skin rash?		YES ☐	NO ☐	Frequency ☐	
• Psychiatric or emotional problem?		YES ☐	NO ☐	Frequency ☐	Stress Disorder

* ONLY HAD IBS + STRESS DISORDER THAT WAS COMPLETELY UNDER CONTROL BEFORE Slip + FALL, 2-8-10. YVONNE O'CONNELL Yvonne O'Connell 6-10-10
(Print Name) (Patient Signature) (Date)

West: 1321 S. Rainbow Ste# 240 • Las Vegas, NV 89146 • Main# (702) 804-6555 • Fax# (702) 804-1998
East: 1691 W. Horizon Ridge Pkwy. Ste# 100 • Henderson, NV 89012 • Main# (702) 804-1212 • Fax# (702) 804-1273

PROPOSED DEFT. EXHIBIT E 002

A-12-655992-C

WYNN-O'CONNELL00291

3609

Patient Health Questionnaire - PHQ

ACN Group, Inc. - Form PHQ-202

ACN Group, Inc. Use Only rev 7/18/05

Patient Name Yvonne O'Connell Date 2-21-12

1. Describe your symptoms

PAIN from head to foot - But I'm here

a. When did your symptoms start?

for Hip + Knee - Hurts to SIT, WALK DRIVE WALK
up my STAIRS in House, still cannot sleep on RIGHT
SIDE. 2-8-10 SLIP + FALL

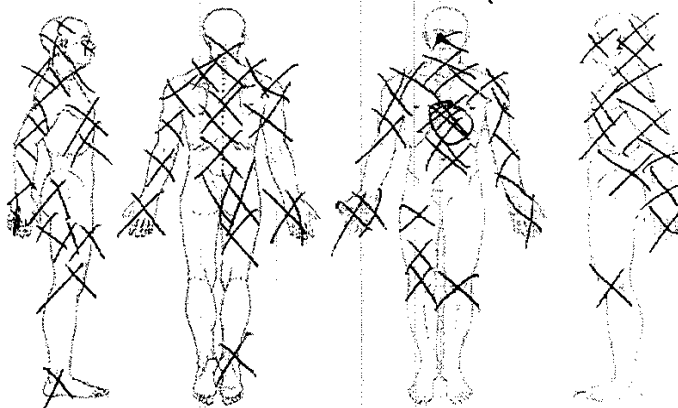
b. How did your symptoms begin?

I WAS HAPPY, EXERCISED DAILY, SWING - DANCED 4 to 6 hours week.
THEN 2-8-10 SLIP + FALL ON SUBSTANCE, RIGHT Gluteal + LEG

2. How often do you experience your symptoms?

Indicate where you have pain or other symptoms
HIT RAISED DIVIDER. ENTIRE BODY HIT FLOOR.

- ☒ 1 Constantly (76-100% of the day)
☐ 2 Frequently (51-75% of the day)
☐ 3 Occasionally (26-50% of the day)
☐ 4 Intermittently (0-25% of the day)



3. What describes the nature of your symptoms?

- ☒ Sharp ☒ Shooting
☒ Dull ache ☒ Burning
☒ Numb ☒ Tingling

4. How are your symptoms changing?

- ☐ 1 Getting Better
☐ 2 Not Changing
☒ 3 Getting Worse

5. During the past 4 weeks:

a. Indicate the average intensity of your symptoms

None ① ② ③ ④ ⑤ ⑥ ⑦ ⑧ ⑨ Unbearable

b. How much has pain interfered with your normal work (including both work outside the home, and housework)

- ☐ 1 Not at all ☐ 2 A little bit ☐ 3 Moderately ☐ 4 Quite a bit ☒ 5 Extremely

6. During the past 4 weeks how much of the time has your condition interfered with your social activities?

(like visiting with friends, relatives, etc)

- ☒ 1 All of the time ☐ 2 Most of the time ☐ 3 Some of the time ☐ 4 A little of the time ☐ 5 None of the time

7. In general would you say your overall health right now is... my health WAS EXCELLENT, Before

- ☐ 1 Excellent ☐ 2 Very Good ☐ 3 Good ☐ 4 Fair ☒ 5 Poor

8. Who have you seen for your symptoms?

- ☐ 1 No One ☒ 2 Medical Doctor ☐ 3 Other
☐ 4 Chiropractor ☒ 5 Physical Therapist

a. What treatment did you receive and when?

2010 - Physical Therapy for BACK + Neck THEN
LEG GAVE OUT + fell + Neck PAIN UNBEARABLE

b. What tests have you had for your symptoms and when were they performed?

☒ Xrays date: MAY 2011 ☒ CT Scan date: MAY 2011
☒ MRI date: 2010 ☐ Other date:
Cervical + LUMBAR

9. Have you had similar symptoms in the past?

a. If you have received treatment in the past for the same or similar symptoms, who did you see?

- ☐ 1 Yes ☒ 2 No
☐ 3 This Office ☐ 4 Medical Doctor ☐ 5 Other
☐ 6 Chiropractor ☐ 7 Physical Therapist

10. What is your occupation?

Retired

- ☐ 1 Professional/Executive ☐ 4 Laborer ☒ 5 Retired
☐ 2 White Collar/Secretarial ☐ 6 Homemaker ☐ 8 Other
☐ 3 Tradesperson ☐ 7 FT Student

a. If you are not retired, a homemaker, or a student, what is your current work status?

- ☐ 1 Full-time ☐ 3 Self-employed ☐ 5 Off work
☐ 2 Part-time ☐ 4 Unemployed ☐ 6 Other

Patient Signature Yvonne O'Connell

Date 2-21-12

A-12-655992-C

PROPOSED DEFT. EXHIBIT G001

WYNN-O'CONNELL00307

3610

SOUTHERN NEVADA PAIN CENTER

OFFICE VISIT FORM

TO BE COMPLETED BY PATIENT:

NAME: VONNE O'CONNELLDATE: 9-3-10

- 1) Draw an X on the figures below where your pain starts & indicate where it goes with an arrow



- 2) How is your pain today? "0" is no pain at all, "10" is the worst pain (circle one)

TODAY: 0 1 2 3 4 5 6 7 8 9 10
DAILY AVERAGE: 0 1 2 3 4 5 6 7 8 9 10

- 3) Circle all the words that describe your pain.

Aching Throbbing Shooting Stabbing Gnawing Sharp Tender Burning Exhausting Numb Unbearable

- 4) What time of day is the pain worst? Morning Afternoon Evening Night

- 5) What makes your pain worse? WALKING, USING HANDS, PRESSURE, UPRIGHT

- 6) Any changes in work status? YES NA NO If yes, explain

I HAD TO DISCONTINUE PHYSICAL THERAPY BECAUSE OF 2ND FALL

- 7) Have you seen any other doctors since last visit? YES X NO

If yes, who? What was done ONLY PHYSICAL THERAPY

- 8) Are you taking any new medications since last visit? YES X NO

If yes, Please List: _____

- 9) Since my last visit, (Please check one) I am Better Same X Worse

- 10) What treatments seem to help you the most in relieving your pain? I HAD MORE

PAID AFTER LAST VISIT & TRIED TO CONTINUE PHYSICAL THERAPY

I fell on 7-14-10, my RT KB hurt so much it came out on the

floor. I had to discontinue physical therapy because of 2nd fall

I had to discontinue physical therapy because of 2nd fall

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I had to discontinue physical therapy because of 2nd fall

OFFICE USE ONLY

BP: _____ PULSE: _____

RR: _____ WT: _____

Previous Health History on _____ has been reviewed and agreed with findings YES / NO

Current information & history are verified YES /

	YES	NO	N/A
Lab Tests Reviewed	☐	☐	☐
Diagnostic Tests Reviewed	☐	☐	☐
X-Rays Reviewed	☐	☐	☐
Consults/Reports Reviewed	☐	☐	☐

ROS

CON (wt loss/gain, ↓ appet, fatigue) NL / ABN

EYE (blur, jaundice, red) NL / ABN

ENT (bleeding, hearing) NL / ABN

CV (chest pain, palpitation) NL / ABN

PUL (SOB, wheezing,) NL / ABN

GI (NV, constipation, bleeding) NL / ABN

GU (hematuria, dysuria) NL / ABN

MUS (edema, joint swelling) NL / ABN

INT (rash, ptechie, itching) NL / ABN

NEU (seizure, dizziness, LOC) NL / ABN

PSY (suicide, depression, insomnia) NL / ABN

END (sugar, fatigue, sweating) NL / ABN

HEM (anemia, pancytopenia) NL / ABN

AL/IM (fever, cough, rash) NL / ABN

Sign of Addiction of Pain Med. NO/ YES

Sign of Tolerance of Pain Med. NO/ YES

Sign of ADR to Pain Med. NO/ YES

Improvement ADL with Pain Med. YES/ NO

Medication Renewal:

A-12-655992-C

PROPOSED DEFT. EXHIBIT I002

3612

WYNN-O'CONNELL00420

003/010

3/10

SOUTHERN NEVADA PAIN CENTER

HEALTH QUESTIONNAIRE-INITIAL CONSULTATION

Please answer all questions to the best of your ability as this will assist us in treating your pain. Thank you.

Name VONNE O'CONNELL

Date 7-9-10

Referring Physician ANDREW M. CASH, M.D. Primary Physician NANTUNDA SUBRAMANYAM, M.D.
 Age 58 Height 5' 8" Weight 158 Occupation RETIRED

Marital Status: Single ☐ Married ☐ Divorced ☐ Separated ☐ Widowed ☒

Date last worked _____ Date pain began 2-8-10 = SLIP + FALL ON LIQUID AFTER LARGE MEAL

Describe the circumstances related to the onset of pain (accident, injury, illness, surgery):
RIGHT BUTTOCKS + THIGH HIT RAISED VERTICAL PIPE + TILE DIVIDER, THEN ENTIRE RIGHT SIDE HIT GROUND. I COULD NOT GET UP ON MY OWN. IMMEDIATELY, PAIN WHEN SITTING + RIGHT FOOT, WHICH I STILL HAVE.

Have you retained an attorney? YES If yes give Attorney name & telephone number _____
W. JONATHAN WEBER, BENSON BERTOLDI BAKER + CARTER, 228.2600

Describe your pain (sharp, aching, burning, dull) YES MANY INJURIES INSIDE + OUT. DIFFICULT TO SEPARATE PAIN + NEEDLES, SORE, TREMBLING, TREMBLING, NAUSEA.

Pattern (constant, brief, radiating, night, morning) CONSTANT PAIN BECAUSE OF MANY INJURED PARTS. I STILL CANNOT STAY ON RIGHT SIDE. + HURT TO SIT.

What increases your pain? PRESSURE, IMMEDIATLY, WALKING, WIDING MOVEMENTS, PHYSICAL THERAPY.

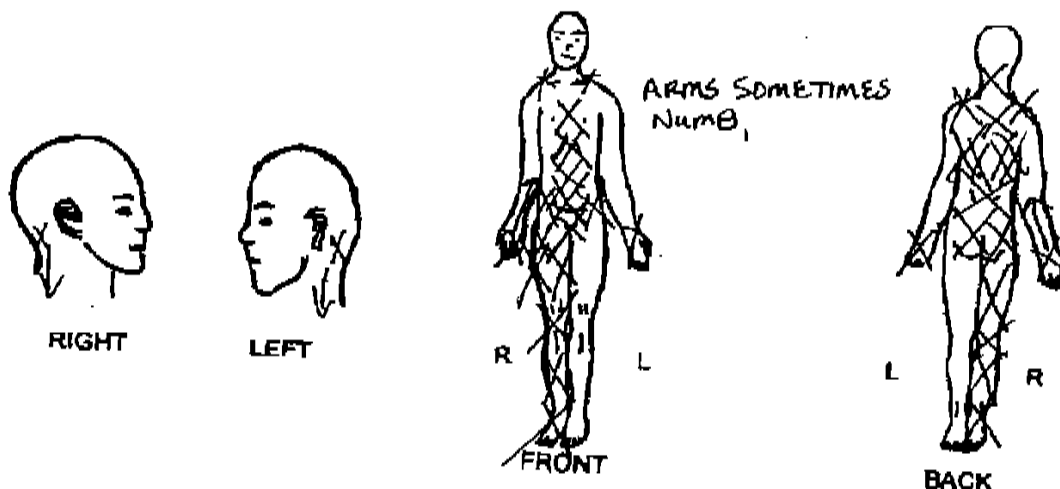
What decreases your pain? WALKER, PHYSICAL THERAPY, HEAT, RED WINE (SMALL AMOUNTS), REST

What is the location of your pain? NECK TO RT. FOOT, HANDS PINS + NEEDLES, RT. HAND TO ELBOW, SHOULDERS, BACK, RT. BUTTOCKS, HIP, THIGH, KNEE, FOOT, RT. SIDE BONE PAIN, CHEST TO ABDOMEN.

What is your current level of pain? (Please circle one) 10 = Most intense

No Pain = 0 1 2 3 4 5 6 7 8 9 10 = Most intense

Draw an X on the figure below where your pain starts and indicate where it goes with an arrow



4/10

List all medications you are taking for your pain: ^{DRUG} ~~NO~~ INTOLERANT BEFORE FALL. SINCE FALL, LIFE-THREATENING CONSTIPATION, ULCER, CHEST PAINS, HERNIA: NO DRUGS - OCCASIONAL SHORTAGES OF BREATH

List your other medications: PAIN IMMUNE, PLUS, MULTI VITAMINS, EMERGEN-C, CALMAX

List any medication allergies: SOME ANTIBIOTICS, CANNOT TAKE DRUGS UNLESS LIFE-THREATENING SITUATION.

What treatments have you had for your pain?

Surgery (describe) NO

Nerve blocks(type) NO

Check: Physical Therapy ONGOING Chiropractor TENS MANY TIMES, DISCONTINUED
 Xrays MANY CT Scan MR NECK + LUMBO SACRAL SPINE
 Psychologist Myelogram Other Other
 Nerve Conduction EMG + LEGS - NOT NECK

Health History:

List previous surgeries and dates 1955? TONSILLECTOMY, 2001? BREAST BIOPSY - STRESS DISORDER, IBS + GERD CAME BACK, I ELIMINATED GERD + MANAGED IBS + STRESS DISORDER WITH JUICING, DANCING, EXERCISE, NO STRESS

Do you Smoke: Yes NO Amount NO
 Do you take "street" drugs? Yes NO Amount NO
 Have you had recent weight change? Yes X Amount NO
 Are you pregnant? Yes NO Amount NO
 Do you drink? 2 glasses w/k for pain since fall Yes X Amount Before fall, Red wine 2 glasses a year
 Do you have false teeth? Yes NO
 Caps? Yes X No X
 Contact Lenses? Yes NO
 Have you had unexplained fever after surgery? Yes NO
 Have you had unusual reaction to anesthesia? Yes NO
 Do you take any anticoagulants? Yes NO

Please check any of the following you have or had:

<u>NO</u> Aids	<u>NO</u> Heart Attack	<u>NO</u> Hiatal Hernia	<u>NO</u> Thyroid Problems
<u>NO</u> Asthma	<u>NO</u> Hepatitis	<u>NO</u> Seizures	<u>NO</u> Bleeding Tendencies
<u>SINCE FALL</u> Arthritis	<u>NO</u> Glaucoma	<u>NO</u> Blackouts	<u>NO</u> Shortness of Breath
<u>NO</u> Diabetes	<u>NO</u> Stroke	<u>NO</u> Ulcers	<u>NO</u> Rheumatic Fever
<u>NO</u> Cough	<u>NO</u> Stiff Neck	<u>NO</u> Back Problems	<u>NO</u> Sickle Cell Anemia
<u>NO</u> Chest pain	<u>NO</u> Palpitations	<u>NO</u> Muscle Disease	<u>NO</u> Blood Transfusions
Other			

WYNN-O'CONNELL00427

BACK PROBLEMS 20 YEARS AGO BACK INJURED, DEVELOPED STRESS DISORDER, HYPERMOBILITY SYNDROME - MARFANOID OR EHLERS DANLOS, FIBROMYALGIA, IBS, GERD, WITH EXERCISE, DIET, I WAS PAIN-FREE FOR 20 YEARS UNTIL 2-8-10 SLIP + FALL, SINCE THEN, I HAVE NOT BEEN ABLE TO DO THE THINGS THAT KEPT ME HEALTHY, IN ADDITION TO HAVING MULTIPLE INJURIES, FOR 20 YEARS I DID DAILY BACK EXERCISES. SINCE FALL, I CANNOT DO THEM + HERNIA: ABDOMINAL PRESSURE CAUSES CHEST PAIN.

Date of accident/injury: 2/8/10

Which direction was your car impacted? (circle one) Rear-end, head-on, right side, left side
Describe what happened?

Were you the driver? If no, then which seat were you in?

Were you wearing a seatbelt?

Did airbags deploy?

Did you lose consciousness (did you black out)?

Was a police report filed?

Was your vehicle totaled? Was your vehicle drivable?

In which medical facility did you seek care?

When did you first go there after the accident?

How were you transported there?

Which doctor did you follow-up with after that? , when?

IF YOUR INJURY HAPPENED AT WORK:

Date of accident/injury: 2/8/10 I SLIPPED + FELL ON LIQUID. ENTIRE RIGHT

Describe what happened? SIDE WAS DOWN + I COULD NOT GET UP. TWO MEN HAD TO HELP ME UP, MY RIGHT HIP HIT SOMETHING HARD, IMMEDIATELY IT HURT TO SIT ON MY RIGHT SIDE + MY FOOT HURT. IT STILL HURTS TO SIT + I HAVE BEEN PUTTING ALL MY WEIGHT ON MY LEFT SIDE, SO NOW MY LEFT SIDE ACHES TOO.

Use the sensation key below to draw location and type of sensation on the body diagram.

Front Back

Key

~ ~ ~ Ache

000 Pins & Needles

XXX Burning

/// Stabbing

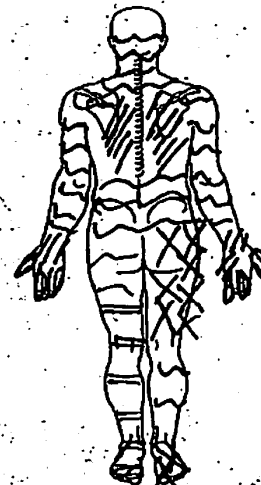
== Numbness

Complete

ONLY if you have NECK PAIN: (THIS ONLY FOR NECK PAIN)



Page 3 of 10



this page
PAGE IS

Andrew M. Cash M.D.
Phone 702-630-3472 fax 702-946-5115

66

NECK DISABILITY INDEX	
SECTION 1: Pain Intensity 0. I have no pain at the moment. (0 pts) 1. The pain is mild at the moment. (1 pt) 2. The pain comes & goes & is moderate. (2 pts) 3. The pain is moderate & does not vary much. (3 pts) 4. The pain is severe but comes & goes. (4 pts) 5. The pain is severe & does not vary much. (5 pts)	SECTION 6: Concentration 0. I can concentrate fully when I want to with no difficulty. (0 pts) 1. I can concentrate fully when I want to with slight difficulty. (1 pts) 2. I have a fair degree of difficulty in concentrating when I want to. (2 pts) 3. I have a lot of difficulty in concentrating when I want to. (3 pts) 4. I have a great deal of difficulty in concentrating when I want to. (4 pts) 5. I cannot concentrate at all. (5 pts)
SECTION 2: Personal Care (Washing, Dressing etc.) 0. I can look after myself without causing extra pain. (0 pts) 1. I can look after myself normally but it causes extra pain. (1 pts) 2. It is painful to look after myself and I am slow & careful. (2 pts) 3. I need some help but manage most of my personal care. (3 pts) 4. I need help every day in most aspects of self-care. (4 pts) 5. I do not get dressed; I wash with difficulty and stay in bed. (5 pts)	SECTION 7: Work 0. I can do as much work as I want to. (0 pts) 1. I can only do my usual work but no more. (1 pt) 2. I can do most of my usual work but no more. (2 pts) 3. I cannot do my usual work. (3 pts) 4. I can hardly do any work at all. (4 pts) 5. I cannot do any work at all. (5 pts)
SECTION 3: Lifting 0. I can lift heavy weights without extra pain. (0 pts) 1. I can lift heavy weights, but it causes extra pain. (1 pt) 2. Pain prevents me from lifting heavy weights off the floor, but I can if they are conveniently positioned, for example on a table. (2 pts) 3. Pain prevents me from lifting heavy weights, but I can manage light to medium weights if they are conveniently positioned. (3 pts) 4. I can only lift very light weights. (4 pts) 5. I cannot lift or carry anything at all. (5 pts)	SECTION 8: Driving 0. I can drive my car without neck pain. (0 pts) 1. I can drive my car as long as I want with slight pain in my neck. (1 pt) 2. I can drive my car as long as I want with moderate pain in my neck. (2 pts) 3. I cannot drive my car as long as I want because of moderate pain in my neck. (3 pts) 4. I can hardly drive my car at all because of severe pain in my neck. (4 pts) 5. I cannot drive my car at all. (5 pts)
SECTION 4: Reading 0. I can read as much as I want to with no pain in my neck. (0 pts) 1. I can read as much as I want with slight pain in my neck. (1 pts) 2. Pain prevents me from reading as much as I want with moderate pain in my neck. (2 pts) 3. I cannot read as much as I want because of moderate pain in my neck. (3 pts) 4. I cannot read as much as I want because of severe pain in my neck. (4 pts) 5. I can not read at all because of neck pain. (5 pts)	SECTION 9: Sleeping 0. I have no trouble sleeping. (0 pts) 1. My sleep is slightly disturbed (less than 1 hour sleepless). (1 pt) 2. My sleep is mildly disturbed (1-2 hours sleepless). (2 pts) 3. My sleep is moderately disturbed (2-3 hours sleepless). (3 pts) 4. My sleep is greatly disturbed (3-5 hours sleepless). (4 pts) 5. My sleep is completely disturbed (5-7 hours sleepless). (5 pts)
SECTION 5: Headache 0. I have no headaches at all. (0 pts) 1. I have slight headaches that come infrequently. (1 pt) 2. I have moderate headaches that come infrequently. (2 pts) 3. I have moderate headaches that come frequently. (3 pts) 4. I have severe headaches that come frequently. (4 pts) 5. I have headaches almost all the time. (5 pts)	SECTION 10: Recreation 0. I am able to engage in all recreational activities with no pain in my neck at all. (0 pts) 1. I am able to engage in all recreational activities with some pain in my neck. (1 pts) 2. I am able to engage in most, but not all, recreational activities because of pain in my neck. (2 pts) 3. I am able to engage in only a few of my usual recreational activities because of pain in my neck. (3 pts) 4. I can hardly do any recreational activities because of pain in my neck. (4 pts) 5. I cannot do any recreational activities at all. (5 pts)

Please circle your pain level 0 = No Pain, 10 = Worst possible pain

What is your AVERAGE: No Pain 1 2 3 4 5 6 7 8 9 10 Worst Pain

What makes pain feel worse? (Circle all that apply) Work sit stand walk lie down, daily activity

What is your WORST: No Pain 1 2 3 4 5 6 7 8 9 10 Worst Pain

What makes pain feel better? (Circle all that apply) Medication rest ice, heat, therapy, injections,

What is your BEST: No Pain 1 2 3 4 5 6 7 8 9 10 Worst Pain

How much did these treatments help your NECK pain? N/A

Physical therapy % Chiropractic % Injections % Surgery %

137
274

Complete this page ONLY if you have BACK PAIN: (THIS PAGE IS ONLY FOR BACK PAIN)

BACK DISABILITY INDEX	
SECTION 1: Pain Intensity 0. I have no pain at the moment. (0 pts) 1. The pain is mild at the moment. (1 pt) 2. The pain comes & goes & is moderate. (2 pts) 3. The pain is moderate & does not vary much. (3 pts) 4. The pain is severe but comes & goes. (4 pts) 5. The pain is severe & does not vary much. (5 pts)	SECTION 6: Standing 0. I can stand as long as I want without pain. (0 pts) 1. I have some pain on standing but it does not increase with time. (1 pts) 2. I cannot stand for longer than 1 hour without increasing pain. (2 pts) 3. I cannot stand for longer than 1/2 hour without increasing pain. (3 pts) 4. I cannot stand for longer than 10 minutes without increasing pain. (4 pts) 5. I avoid standing because it increases the pain immediately. (5 pts)
SECTION 2: Personal Care (Washing, Dressing etc.) 0. I can look after myself without causing extra pain. (0 pts) 1. I can look after myself normally but it causes extra pain. (1 pts) 2. It is painful to look after myself and I am slow & careful. (2 pts) 3. I need some help but manage most of my personal care. (3 pts) 4. I need help every day in most aspects of self-care. (4 pts) 5. I do not get dressed; I wash with difficulty and stay in bed. (5 pts)	SECTION 7: Social Life 0. My social life is normal and gives me no pain. (0 pts) 1. My social life is normal but it increases the degree of pain. (1 pt) 2. Pain has no significant effect on my social life apart from limiting my more energetic interests, for example, dancing, etc.. (2 pts) 3. Pain has restricted my social life and I do not go out very often. (3 pts) 4. Pain has restricted my social life to my home. (4 pts) 5. I have hardly any social life because of pain. (5 pts)
SECTION 3: Lifting 0. I can lift heavy weights without extra pain. (0 pts) 1. I can lift heavy weights, but it causes extra pain. (1 pt) 2. Pain prevents me from lifting heavy weights off the floor, but I can if they are conveniently positioned, for example on a table. (2 pts) 3. Pain prevents me from lifting heavy weights, but I can manage light to medium weights if they are conveniently positioned. (3 pts) 4. I can only lift very light weights. (4 pts) 5. I cannot lift or carry anything at all. (5 pts)	SECTION 8: Driving 0. I get no pain when traveling. (0 pts) 1. I get some pain when traveling but none of my usual forms of travel make it any worse. (1 pt) 2. I get extra pain while traveling but it does not compel me to seek alternate forms of travel. (2 pts) 3. I get extra pain while traveling which compels me to seek alternate forms of travel. (3 pts) 4. Pain restricts me to short necessary journeys under 1/2 hour. (4 pts) 5. Pain restricts all forms of travel. (5 pts)
SECTION 4: Walking 0. I have no pain on walking. (0 pts) 1. I have some pain on walking but it does not increase with distance. (1 pts) 2. I cannot walk more than 1 mile without increasing pain. (2 pts) 3. I cannot walk more than 1/2 mile without increasing pain. (3 pts) 4. I cannot walk more than 1/4 mile without increasing pain. (4 pts) 5. I cannot walk at all without increasing pain. (5 pts)	SECTION 9: Sleeping 0. I have no trouble sleeping. (0 pts) 1. My sleep is slightly disturbed (less than 1 hour sleepless). (1 pt) 2. My sleep is mildly disturbed (1-2 hours sleepless). (2 pts) 3. My sleep is moderately disturbed (2-3 hours sleepless). (3 pts) 4. My sleep is greatly disturbed (3-5 hours sleepless). (4 pts) 5. My sleep is completely disturbed (5-7 hours sleepless). (5 pts)
SECTION 5: Sitting 0. I can sit in any chair as long as I like. (0 pts) 1. I can sit only in my favorite chair as long as I like. (1 pt) 2. Pain prevents me from sitting more than 1 hour. (2 pts) 3. Pain prevents me from sitting more than 1/2 hour. (3 pts) 4. Pain prevents me from sitting more than 10 minutes. (4 pts) 5. I avoid sitting because it increases pain immediately. (5 pts)	SECTION 10: Recreation 0. My pain is rapidly getting better. (0 pts) 1. My pain fluctuates but is definitely getting better. (1 pt) 2. My pain seems to be getting better but improvement is slow. (2 pts) 3. My pain is neither getting better or worse. (3 pts) 4. My pain is gradually worsening. (4 pts) 5. My pain is rapidly worsening. (5 pts)

I sit on my left side.

Please circle your pain level 0 = No Pain, 10 = Worst possible pain

What is your AVERAGE: No Pain 1 2 3 4 5 6 7 8 9 10 Worst Pain

What makes pain feel worse? (Circle all that apply) Work, sit, stand, walk, lie down, daily activity,

What is your WORST: No Pain 1 2 3 4 5 6 7 8 9 10 Worst Pain

What makes pain feel better? (Circle all that apply) Medication, rest, ice, heat, therapy, injections,

What is your BEST: No Pain 1 2 3 4 5 6 7 8 9 10 Worst Pain

How much did these treatments help your BACK pain? N/A

Physical therapy % Chiropractic % Injections % Surgery %

Height: 5' 8"

Weight: 160

PLEASE LIST ANY AND ALL PRIOR BODILY INJURIES OR TREATMENTS: 1989 - SEVERE BACK +
(This includes accidents, workers comp, and other injuries.) HAND INJURY, WHICH LED TO IBS +
STRESS DISORDER. DIAGNOSED WITH HYPERMOBILITY SYNDROME (MARFANS OR EHLERS DANLOS)
+ FIBROMYALGIA. EXAMINED BY MANY SPECIALISTS. DEVELOPED DRUG INTOLERANCE, SUCCESSFULLY
TREATED WITH PHYSICAL THERAPY + BIASED BACK. I CANNOT BE MANIPULATED. BEFORE
SHIP + FALL I MAINTAINED A HEALTHY BODY WITH DAILY BACK EXERCISES, AEROBIC TRAK, WALKING,
SWING DANCING, QI GONG + JUICING.

Allergies:

List all medications/foods you are allergic to, include the type of reaction from this medication:

NAME 1989 - MANY MEDICATIONS HAD TO BE DISCONTINUED.
reaction: 2002 - ANTIBIOTIC HAD TO BE DISCONTINUED.
reaction: 2-10-10 PRESCRIPTIONS = (3)
reaction: TRIMADOL, DICLOFENAC, CYCLOBENZAPRINE
reaction: CHEST PAIN, DIZZY, STOMACH UPSET

Before 2-8-10, I CONTROLLED MY IBS, BUT NOW OUT-OF-CONTROL, WITH SEVERE CONSTIPATION.

Medications:

List all medications you are currently taking, include dosage and frequency and reason:

NAME
Multivitamins } dosage: Keep me frequency: reason:
CALMAX } dosage: healthy frequency: reason:
PURE IMMUNE PLUS } dosage: frequency: reason:
MIRALAX } dosage: frequency: reason:
CITRACEL } extremely SEVERE CONSTIPATION / IBS
INTESTINAL BOWL Support (herbs)

Medical History:

Please mark any conditions that apply to you:

- | | | |
|---|---|--|
| ☐ AIDS | ☐ emphysema/Bronchitis | ☐ Kidney Disease |
| ☐ Arthritis Fibromyalgia 1989 | ☐ Epilepsy/Seizures | ☐ Lung Disease |
| ☐ Asthma | ☐ Gout | ☐ Stroke |
| ☐ Cancer | ☐ Hearing Loss | ☒ Thyroid Problems |
| ☐ Chemical Dependency | ☐ Heart Disease | ☐ Tuberculosis |
| ☐ Depression 1989 | ☐ Heart Surgery | ☐ Varicose Veins |
| ☐ Diabetes | ☐ Hepatitis | ☒ Other: |
| ☒ Dizziness/Fainting SINCE 2-8-10 | ☐ High blood pressure | ☒ IBS, GERD |
| ☐ Psych Problems Type: _____ | | |

1989 - STRESS DISORDER
from SEVERE BACK + HAND
INJURY

HYPERMOBILITY SYNDROME
(MARFANS OR EHLERS DANLOS)

Female History:

Last Menstrual Period 1/12006?
Pregnancies # 0, Deliveries # _____, Abortions # _____, Miscarriages # _____
Are you currently on birth control? ☐ Yes ☒ No Are you Pregnant? ☐ Yes ☒ No

Andrew M. Cash M.D.
Phone 702-630-3472 fax 702-946-5115

Surgical History:

List any surgeries or other conditions for which you have been hospitalized:

Date	Surgery/Hospitalization	Reason
1956?	Tonsillectomy	

Social History:

Marital Status: ☐ Married ☐ Single ☐ Divorced ☒ Widow **SIGNIFICANT OTHER**

Occupation: Retired

Employer Name/Address: _____

(If rent, City, State, Zip)

Are you currently working? ☐ Yes ☒ No. Last day worked: 1/1/

Education Level: ☐ H.S. ☒ College/University ☐ Vocational ☐ Other

How much tobacco do you use? None

How much alcohol do you drink? Red Wine 8 X year

Do you use illegal substances? ☐ Yes ☒ No If yes, Explain _____

Family History:

Has anyone in your immediate family (Parents, Brothers, Sisters) ever been treated for any of the following?

☒ Arthritis

☒ Cancer

☒ Diabetes

☐ Heart Disease

☒ High Blood Pressure

☐ Kidney Disease

☒ Mental Disorder (type: MANIC)

☐ Stroke

☐ Tuberculosis

☐ Other: _____

Review of Systems:

Do you now or have you had any problems related to any of the following systems?

☒ Headaches SINCE FALL

☒ Visual Changes SINCE FALL

☐ Hearing Loss

☒ Dizziness SINCE FALL

☒ Chest Pain SINCE FALL

☐ Night Sweats

☐ Fevers

☒ Chills

☐ Swelling in Legs

☒ Pain wakes you up SINCE FALL

☐ Unexplained weight loss

☒ Shortness of breath SINCE FALL

☒ Cough SINCE FALL

☒ Abdominal Pain SINCE FALL

☒ Nausea SINCE FALL

☐ Vomiting

☒ Heartburn OUT-OF-CONTROL

☒ Constipation SINCE FALL

☐ Diarrhea

☐ Incontinence

Patient: YVONNE O'CONNELL Fax 3109363 Date: 2-17-10 Sep 10 2014 10:06am P005/013

In this diagram, show where you are now having difficulty.

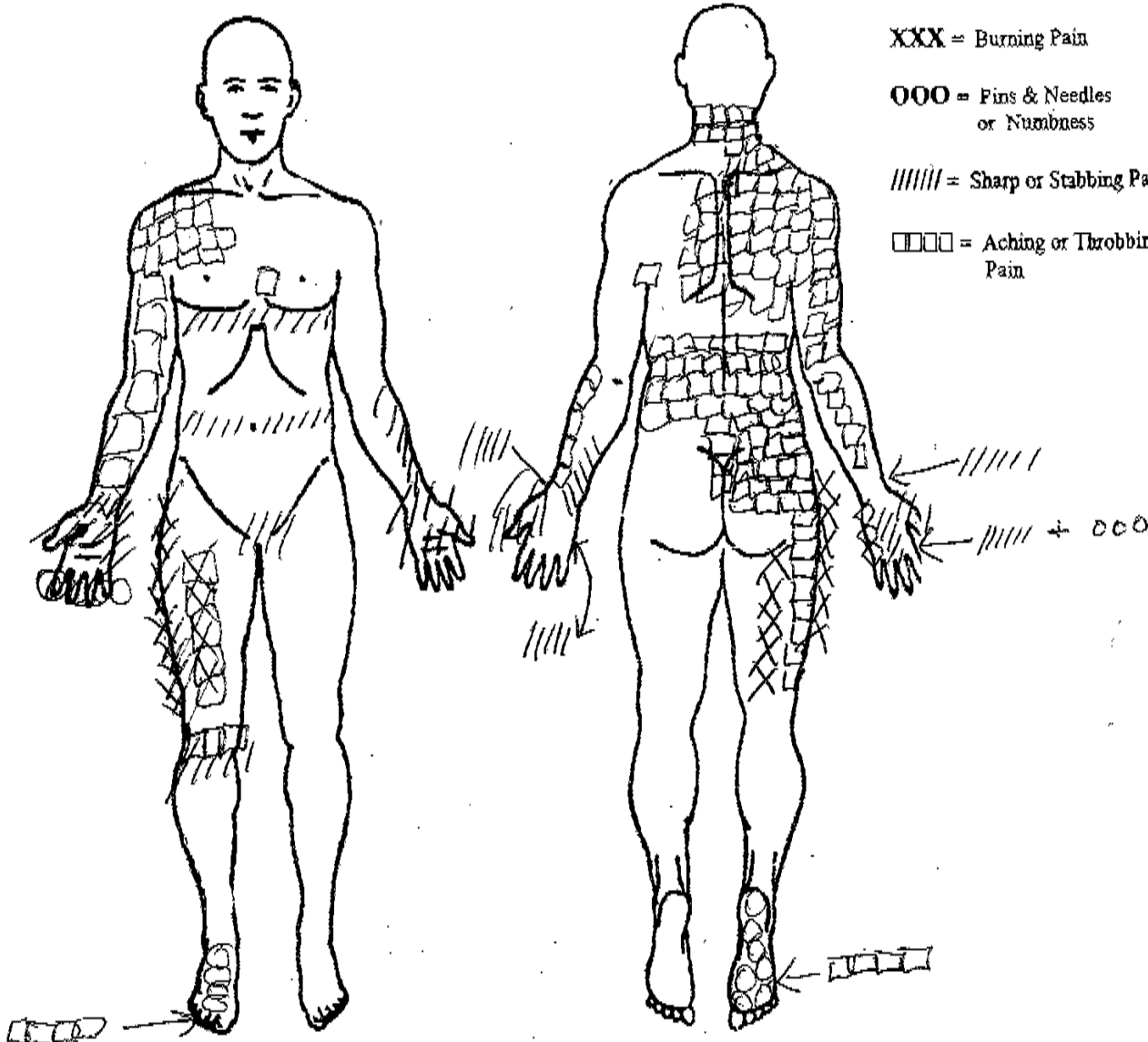
Use these symbols to show where you feel the following:

XXX = Burning Pain

ooo = Pins & Needles or Numbness

///// = Sharp or Stabbing Pain

□□□ = Aching or Throbbing Pain



For each area you marked above, rate the intensity of your problem.

Use a scale of 1-10, from mild to severe, with 10 being very severe.

* Right chest to BACK 10

Area (e.g. low back, left leg, etc.)	Intensity (1-10)	Other Comments to Describe the Problem (e.g. continuous pain, worse at night, helped by medicine, worse when sitting, etc.)
* <u>Chest: Between breasts to close to left 10</u>		
<u>Right leg + Buttocks</u>	<u>10</u>	<u>HURTS TO SIT, WAKES ME UP AT NIGHT, I STAND SORE WHEN</u>
<u>RT HAND + FOOT</u>	<u>10</u>	<u>WAKE UP NUMB OR PINS + NEEDLES ENTIRE</u>
<u>RT KNEE + LEFT FOOT</u>	<u>10</u>	<u>SOMETIMES WHEN I WALK - SHARP // SOLE OF FOOT</u>
<u>HANDS</u>	<u>10</u>	<u>SHARP PAINS WHEN I GRAB THINGS WHEN I STAND</u>
* <u>ACROSS CHEST Below breasts 10</u>		
<u>+ Across BELLY AREA</u>		<u>SHARP, STABBING, DOUBLES ME OVER</u>

Signature: Yvonne O'Connell Date: 2-17-10

Name: YVONNE O'CONNELL

D.O.B: 8-18-51

HEALTH PRIORITIES:

What symptoms, problems or health-related goals would you like to have addressed? Please list them in order of importance to you.

1. SINCE THE ACCIDENT, RIGHT SIDE PAIN NECK to FOOT.
2. LEG PAIN WHILE SITTING, RT HAND GOES NUMB,
3. RT FOOT + HAND FEEL LIKE PINS + NEEDLES
4. INTERNAL INJURIES - CHEST PAIN TO BACK, SHARP STABBING PAINS ACROSS CHEST BELOW BREASTS + ACROSS WAIST + RIGHT SIDE

ALLERGIES:

To medications, foods, or other substances:

I DO NOT TOLERATE DRUGS WELL. WMC QUICK CARE RX DRUGS + I WAS DIZZY, NAUSEOUS, WEAK + HAD TO DISCONTINUE THEM. ABOUT 6 YEARS AGO I HAD A REACTION TO AN ANTIBIOTIC.

Choose three words to describe how you usually feel physically:

BEFORE ACCIDENT =

1. STRONG
2. HEALTHY EXCEPT FOR IBS
3. EXTREMELY COORDINATED

NOW = WEAK

IN PAIN INSIDE + OUT

AFRAID TO FALL AGAIN.

Choose three words to describe how you usually feel emotionally:

BEFORE ACCIDENT =

1. HAPPY
2. IN CONTROL OF MY HEALTH
3. VERY ALERT + CAUTIOUS

NOW = AFRAID

ANXIOUS

AFRAID

Do you currently smoke cigarettes?

- ☐ YES, I do now. How much? _____
- ☐ NO, I did but quit. How long ago? _____
- ☒ NO, I have never smoked cigarettes.

Do you currently smoke cigars or a pipe?

- ☐ YES, I do now. How much? _____
- ☐ NO, I did but quit. How long ago? _____
- ☒ NO, I have never smoked cigars or a pipe.

Current Medications

Name of Medication	For What Reason?	For How Long Have You Taken This Medication?
TRAMADOL 50 MG	PAIN - DISCONTINUED =	Constipation, DIZZY, NAUSEA
DICLOFENAC SODIUM 50 mg	ALL THREE BECAUSE OF SLIP + FALL INJURIES = CONTUSIONS, SPASMS, PAIN	CHEST PAIN, STOMACH UPSET
CYCLOBENZAPRINE 10 mg		
MULTI VITAMINS	THEY HELP KEEP ME HEALTHY	many years
CALMAX - CALCIUM		10 months
PURE IMMUNE		at least A year

High Cholesterol	Hepatitis	Asthma	Carpal Tunnel Syndrome
High Blood Pressure	Fatty Liver or Cirrhosis	Pneumonia	Osteopenia or Osteoporosis
Coronary Artery Disease	Gallbladder Problems	Tuberculosis	Osteoarthritis
Atherosclerosis	Lupus	Chronic Fatigue Syndrome	Rheumatoid Arthritis
Peripheral Artery Disease	Multiple Sclerosis	<u>Fibromyalgia</u>	<u>Bulging/Herniated Disc</u>
Congestive Heart Failure	Parkinson's Disease	Epstein Barr Virus	Degenerative Disc Disease
Stroke or TIA	Kidney Disease	Cancer	Spinal Stenosis
Aneurysm	Kidney Stones	<u>Herpes Virus</u>	<u>Sciatica</u>
Bleeding/Clotting Disorder	Hypothyroidism	Shingles	Scoliosis
Stomach/Duodenal Ulcer	Hyperthyroidism	Lyme Disease	Torn Ligament or Tendon
Colitis or Spastic Colon	Sleep Disorder	HIV Positive	Joint Replacement
Gluten Sensitivity or Celiac	Migraine Headaches	Enlarged Prostate	Whiplash
Crohn's Disease	Neuropathy or Neuralgia	Other Prostrate Trouble	Clinical Depression
Diverticulitis	Epilepsy or Seizures	High PSA	Manic Depressive Disorder
<u>Irritable Bowel Syndrome</u>	Cataracts	Uterine Fibroids	Schizophrenia
Colon Polyps	Glaucoma	Ovarian Cyst	Obsessive/Compulsive Disorder
Pancreatitis	Macular Degeneration	Abnormal Pap Smear	Attention Deficit Disorder
Hypoglycemia?	Hearing Impairment	Endometriosis	Alcoholism
Type I Diabetes	Emphysema	<u>Fibrocystic Breasts</u>	Drug Addiction
Type II Diabetes	Bronchitis	<u>Breast Tumor or Cyst</u>	Nicotine Addiction

Other conditions/diagnoses you have that are not listed above: BACK WAS BADLY INJURED
IN 1989. I LEARNED HOW TO KEEP IT HEALTHY - I CANNOT BE MANIPULATED.
IT'S INJURED NOW + I HAVE TO BE CAREFUL HOW IT'S TREATED
UMC TOOK X-RAYS AFTER MY SHIP + FALL. BACK OF NECK, LEFT SIDE, SWELLS
 If you have ever had cancer, which organ(s) were involved, how long ago were you diagnosed, and
 what type of treatment did you receive. AND THEN SHRINKS.

List any surgeries you have had and the year performed:

Tonsilectomy - 1956?

How frequently do you experience each of the following:

Now = Since Skip + Fall

	Never or Rarely	Occasionally	Often
Upset stomach / indigestion		X	
Belching or intestinal gas		X	
Bloating or distention			X
Acid stomach or gastric reflux		X	
Constipation or hard stool			X
Loose stool or diarrhea	X		
Mucus in stool		X	
Blood in stool or rectal bleeding	X		
Anal itching	X		
Loss of appetite	X		
Cough		X	
Wheezing	X		
Shortness of breath	X		
Snoring or sleep apnea	X		
Difficult to get to sleep or stay asleep	Now		X
Pain interferes with sleep	Now		X
Tinnitus / ringing in ear	X		
Sinus problems		X	
Nasal congestion / stuffy nose		X	
Back or neck pain	Now		X
Pain that radiates down the leg	Now		X
Painful, swollen or tender joint	Now		X
Muscle pain, aches, stiffness	Now		X
Joint or muscle weakness	Now		X
Irregular heart beat or palpitations	Now	X	
Chest pressure, pain or angina	Now		X
Rapid or racing heart beat	Now	X	
Shortness of breath on exertion	X		
Pain in back of calf on exertion	X		
Easy bruising or bleeding	X		
Water retention in legs, ankles, feet	X		
Frequent urination	I DRINK A LOT OF WATER	X	
Excessive thirst	X		
Blurred vision	GLASSES FOR DISTANCE	X	

	Never or Rarely	Occasionally	Often
Headaches		X	
Low energy; fatigue; feel tired	Now		X
Infections, colds, or flu		X	
General weakness	Now		X
Low blood pressure	X		
Low body temperature or feel cold		X	
Get lightheaded upon standing up	Now		X
Hypoglycemia (low blood sugar)		X	
Alcohol intolerance	RARELY DRINK	X	
Craving for sweets or starches	X		
Craving for salty foods	X		
Excessive hunger	X		
Have a difficult time handling stress			X
Feel anxious, nervous, frustrated, irritable	Now		X
"Brain fog" or moments of confusion	X		
Poor memory	X		
Feel depressed, moody, or sad	Now		X
Feel apprehensive, fearful, worried	Now		X
Have difficulty building muscle	?		
Low libido; little interest in sex	X		
Difficulty recovering from exercise	X		
Feel unrested after sleep	Now		X
Palpitations (heart fluttering)	Now		X
Tendency towards inflammation	X		
Scanty perspiration		X	
Dizziness or vertigo	Now		X
Allergies or hayfever			X
Need caffeine or other stimulants	X		
Unexplained hair loss	X		
Dry or thin skin	X		
Difficulty losing weight	X		
Dry, brittle hair and or nails	X		
Unexplained hair loss	X		
Numbness or tingling in hands, legs, feet	Now		X

Name: YVONNE O'CONNELL Date of Birth: 8-18-51 Age: 58
 Address: 8764 CAPTAINS Place Las Vegas, NV 89117
 Home Phone: 702-228-4424 Cell Phone: _____ Work Phone: _____
 Best daytime contact no. (8am-5pm): ☒ Home ☐ Cell ☐ Work Best evening no.: ☒ Home ☐ Cell ☐ Work
 Regular Physician (Internist/Family Doctor): None
 Gynecologist: Dr. McConnell
 Emergency Contact: TROY VALDEZ 949-254-4550 Brother
 Name Phone Relation to you
 How did you learn about Dr. Thompson and Sotto Pelle™? Internet

1. Circle any of the following which you have experienced recently: Before Accident

Hot flashes	Night Sweats	Fatigue	Poor Sleep	Depression
Poor Memory	Headaches	Weight Gain	Decreased Sex Drive	Anxiety
"Brain Fog"	Joint Pain	Bladder Symptoms	Hair Loss	Irritability
Poor Concentration	Weakness			Moodiness

2. Do you still have a uterus? ☒ YES or _____ NO
 If No, give date of hysterectomy (month/year) _____ Reason: _____

3. Do you still have ovaries? ☒ YES, I have both _____ Yes, I have one _____ NO. Both ovaries removed.
 Reason for the removal of one or both ovaries: _____

4. Are you fully post-menopausal?
☒ YES. I have not had a period in over 12 months. My last period was 3? years ago. (skip to #7)
 _____ NO, I am not fully past menopause; I have had a period within the last 12 months.

5. If you are not post-menopausal, when was your last period? _____ (month).
 How would you describe your periods? _____ I still have periods regularly; OR
 _____ My periods come less frequently than they used to.

6. Describe your flow: My period currently lasts about _____ days.
 The flow is: _____ light _____ medium _____ heavy _____ heavy with clotting
 I experience: _____ little to no pain/cramping _____ moderate cramping _____ severe cramping.

7. Are you currently on hormone replacement therapy (HRT)? ☒ NO _____ YES.
 If YES, for how long? _____ What form and dose? _____
 Are you satisfied with your current HRT, and if not, why? _____

8. When was your last mammogram? 2002 Was it normal? No
 If not, explain: Cysts

9. When was your last gynecological exam with pap smear? 2003 Was it normal? yes
 If not, explain: _____

11. Do you have or have you ever had uterine fibroid tumors?

☒

NO, I have never been told that I had or have fibroids.

☐YES, I have been diagnosed with one or more fibroids **and still have them.** OR☐

YES, I had one or more fibroids, but they were surgically removed in _____ (month/year)

12. Have you ever had any of the following?			
	NO	YES	
Endometriosis	☒	☐	Thyroid problems <u>Goiter?</u>
Abnormal Pap Smear	☒	☐	Diabetes
Ovarian Cyst	☒	☐	Hypertension-High blood pressure
Bleeding between periods	☒	☐	Heart Disease
Painful or tender breasts	☐	☒	Stroke or TIA
Benign breast cysts or tumors	☐	☒	Blocked Arteries
Calcifications in breast	☐	☒	Peripheral Vascular Disease
Breast augmentation	☒	☐	Varicose veins or Phlebitis
Osteoporosis or Osteopenia	☒	☐	Anemia
Kidney Disease	☒	☐	Hemophilia or Bleeding Disorder
Anesthesia Complications	☒	☐	Lung Problems

Explain any YES answers above:

Goiter? BACK OF Neck left side, swells + shrinks

13. Have you had children?

☐ YES☒ NO

If yes, how many _____

Age of youngest child _____

14. List any surgeries, procedures, or hospitalizations: (include year & reason)

Tonsilectomy 1956?

15. Have you ever been diagnosed with any form of cancer?

☒ NO☐ YES. If yes, what type, when diagnosed, and how treated?

16. Do you have a family history of any of the following:

☐ Uterine cancer: Who? _____☐ Osteoporosis: Who? _____☐ Breast Cancer: Who? _____☐ Ovarian Cancer: Who? _____☒ Heart Disease: Who? GRANDMA = STOKES☐ Heart Disease: Who? _____

17. Are you now, or have you ever been medically treated for:

☒ depression☒ anxiety☐ bi-polar disorder☐ other psychological condition: _____1989 - SEVERE BACK INJURY + INJURED HANDS

18. Are there any other health-related or personal medical issues you'd like to share with Dr. Thompson? (Attach additional pages if desired)

Signature: Louanne O'ConnellDate: 2-17-10

Player Review
Home -> Player Review

Player

Credit Line Management

Edit

Comments

History

Transactions

Evaluation

Yvonne S Oconnell (1026028)



NEVADA DRIVER LICENSE
ANY INFORMATION ABOUT THIS LICENSE
IS VALID 11/19/2008 - 11/19/2011
YVONNE S OCONNELL
DOB: 06/17/1980
EXP: 11/19/2011



Limit
TTO Limit
Front Money
Total Limit
Plt Markers

Patron Management - [Player Workbook - MS Yvonne S Oconnell (1026028)]

8764

Yvonne S Oconnell

Session Information

Slot Session Detail

Site: Wynn Las Vegas
Machine: 201142
Location: 091803
Denom: \$0.05
MFR: BALLY
Desc: QHTS DBL JP TRIP 81
Start: 02/08/2010 04:30 PM
End: 02/08/2010 04:33 PM
Points Earned: 12
Comp Earned: \$1.11

Coin In: \$67.50
Coin Out: \$76.05
Games: 15
Jackpot: \$0.00
Time: 0:02:54
Coin In/Minute: \$23

FREECREDIT
Used: \$30.00
Scheduled Return Play: 0
Accrued: 0
CASHBACK
Used: 0 (\$0.00)
Personal Progressive: \$0.00
Earned: \$0.00

Player Session

DATE	PlayerID	Description	MitCoin	MitConout	MitGames	MitHD	MitSoft1	MitSoft2	MitSoft3	MitSoft4	MitSoft5	Mit
11/19/2008 09:43 PM	Wynn Las Vegas	Slot	062001	1	01:05:40							
06/17/2008 07:34 PM	Wynn Las Vegas	Slot	075203	9	01:04:45							

Actual Income

DATE	PlayerID	Description	MitCoin	MitConout	MitGames	MitHD	MitSoft1	MitSoft2	MitSoft3	MitSoft4	MitSoft5	Mit
11/19/2008 09:43 PM	Wynn Las Vegas	Slot	062001	1	01:05:40							
06/17/2008 07:34 PM	Wynn Las Vegas	Slot	075203	9	01:04:45							

Wynn Main Cage - Credit Dept 08

Limit
TTO Limit
Front Money
Total Limit
Plt Markers

WYNN-O'CONNELL01237

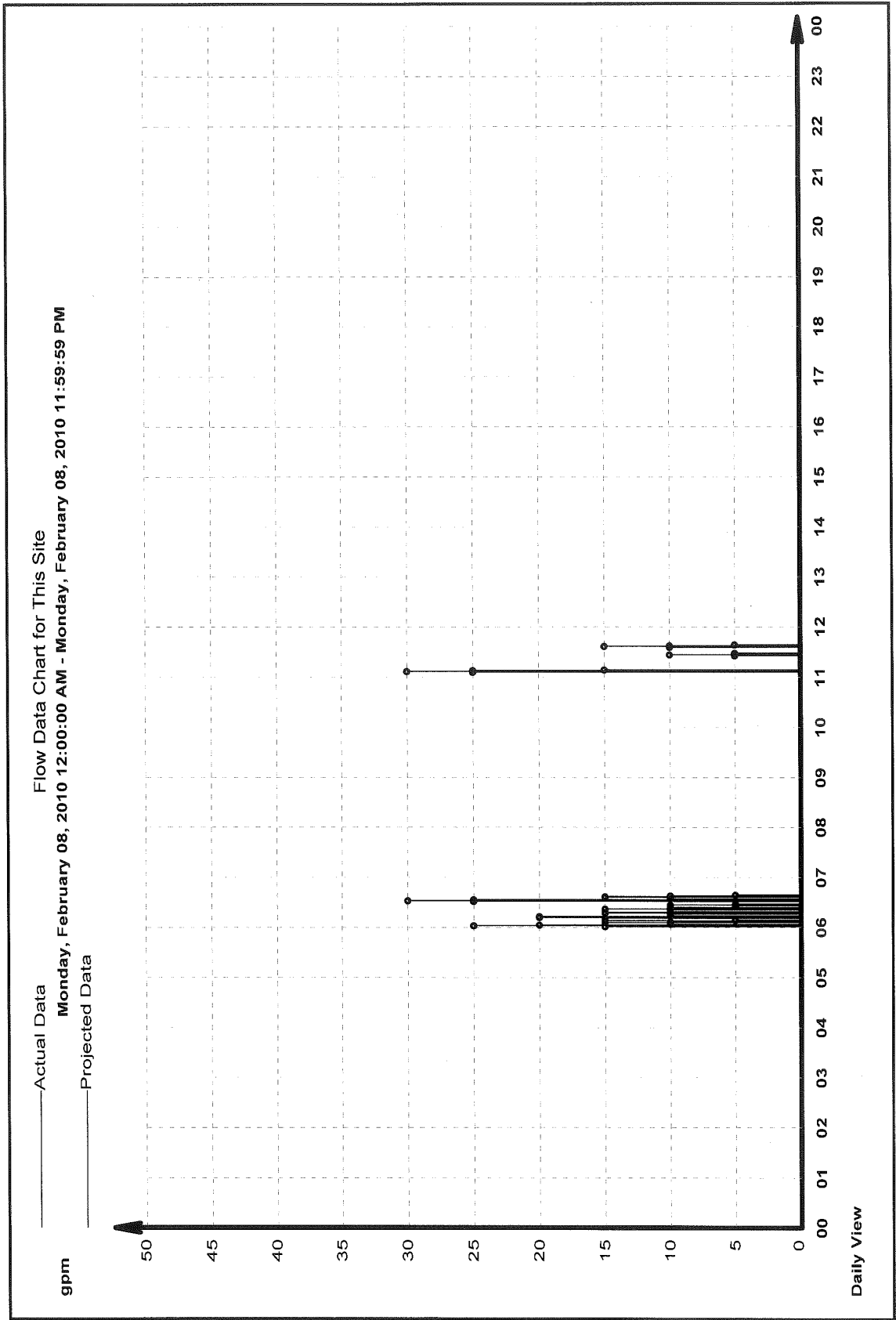
PROPOSED DEFT. EXHIBIT Y002

A-12-655992-C

Patron Management - [Player Workbook - MS Wynne S Oconnell (1076028)]														
File Edit View Player Tools Window Help														
Player Enroll a Player Find a Player View Contacts Favorites Quick Enroll														
Composite Comments Tips Evaluation Gaming Profile What If History Detail Bonuses Comps Balance History Credit Contact Coupons Rewards Guest Activity Profile														
All Linked Accounts All Properties Ratings All Revenue 3 Time Include Poker Comps														
Day LTD 8/2005-04/09/2015														
Site Group 09/18/2005														
Begin Date 100														
Days in Trip														
Room Type														
Promotion														
Room Follo														
Gaming Statistics														
Cash Buy In														
Net Markers														
TG Time Played														
TG Avg Bet														
Con In														
Points Earned														
Expenses														
CASHBACK														
Theo Income														
Actual Income														
Comp Guideline														
Total Exp as %														
Act Comp Guideline														
Total Exp as % of Act														
02/08/2010 04:23 PM	Wynn Las Vegas	Slot	091803	100403	2	00:47:51	5	01:02:54	67.50	1,050.00				
07/26/2010 09:08 PM	Wynn Las Vegas	Slot	042801		3	00:41:56			1,775.25					
07/26/2010 08:26 PM	Wynn Las Vegas	Slot	042802		2	00:10:48			260.00					
07/26/2010 08:08 PM	Wynn Las Vegas	Slot	043003		4	01:34:38			3,895.00					
07/26/2010 06:33 PM	Wynn Las Vegas	Slot	043001		4	00:30:51			1,033.75					
07/26/2010 06:02 PM	Wynn Las Vegas	Slot	043001		4	00:25:21			774.30					
07/26/2010 05:31 PM	Wynn Las Vegas	Slot	043002		4	02:23:26			5,055.20					
07/26/2010 01:34 PM	Wynn Las Vegas	Slot	364001		4	01:29:34			4,849.10					
06/02/2009 07:20 PM	Wynn Las Vegas	Slot	043002		3	00:50:46			1,703.75					
06/02/2009 06:23 PM	Wynn Las Vegas	Slot	043003		2	00:30:49			737.50					
03/17/2009 11:50 PM	Wynn Las Vegas	Slot	086804		1	02:28:43			2,647.50					
03/17/2009 05:01 PM	Wynn Las Vegas	Slot	086801		2	02:30:47			3,786.35					
03/16/2009 10:26 PM	Wynn Las Vegas	Slot	075001		4	00:34:35			1,327.80					
03/16/2009 09:34 PM	Wynn Las Vegas	Slot	363602		1	00:32:08			360.35					
03/16/2009 08:55 PM	Wynn Las Vegas	Slot	363603		1	00:44:02			246.10					
03/16/2009 08:09 PM	Wynn Las Vegas	Slot	363601		4	01:03:48			1,984.05					
03/15/2009 09:11 PM	Wynn Las Vegas	Slot	086804		2	01:36:42			2,328.90					
02/12/2009 01:35 AM	Wynn Las Vegas	Slot	048002		1	01:14:23			1,483.75					
02/12/2009 12:11 AM	Wynn Las Vegas	Slot	048001		1	02:13:51			2,872.25					
02/11/2009 09:54 PM	Wynn Las Vegas	Slot	077001		1	00:30:03			621.50					
02/11/2009 12:59 AM	Wynn Las Vegas	Slot	048005		2	04:29:15			9,525.00					
11/19/2008 09:43 PM	Wynn Las Vegas	Slot	062001		1	01:05:40			1,078.40					
06/17/2008 07:34 PM	Wynn Las Vegas	Slot	075203		9	01:04:45			4,484.50					
05/29/2008 06:45 PM	Wynn Las Vegas	Slot	049606		1	02:57:24			2,547.45					
05/12/2008 07:18 PM	Wynn Las Vegas	Slot	042603		4	00:21:45			741.65					
05/12/2008 07:18 PM	Wynn Las Vegas	Slot	049601		2	02:46:52			4,389.40					
05/12/2008 04:27 PM	Wynn Las Vegas	Slot	010801		3	00:07:53			220.00					
05/12/2008 01:25 AM	Wynn Las Vegas	Slot	075701		1	00:16:06			235.90					
05/12/2008 01:09 AM	Wynn Las Vegas	Slot	075702		1	00:14:23			198.75					
05/12/2008 12:53 AM	Wynn Las Vegas	Slot	075201		3	00:15:53			371.95					
05/12/2008 10:32 AM	Wynn Las Vegas	Slot	075203		1	01:57:12			1,892.95					
05/11/2008 10:32 PM	Wynn Las Vegas	Slot	075202		1	00:24:12			362.50					
05/11/2008 10:08 PM	Wynn Las Vegas	Slot	075201		1	01:20:01			921.00					
05/11/2008 08:48 PM	Wynn Las Vegas	Slot	075702		1	00:03:03			45.90					
05/11/2008 08:39 PM	Wynn Las Vegas	Slot	022201		3	00:01:45			51.50					
05/11/2008 08:33 PM	Wynn Las Vegas	Slot	012204		1	01:04:37			1,135.25					
04/08/2008 05:16 PM	Wynn Las Vegas	Slot	042402		1	00:29:35			325.80					
04/08/2008 04:45 PM	Wynn Las Vegas	Slot	042602		4	00:00:19			0.00					
04/08/2008 04:45 PM	Wynn Las Vegas	Slot	042602		4	00:38:50			1,216.85					
02/28/2008 07:03 PM	Wynn Las Vegas	Slot	096001		6	00:53:23			3,273.25					
02/28/2008 06:09 PM	Wynn Las Vegas	Slot	096002		4	00:09:53			983.75					
02/28/2008 05:59 PM	Wynn Las Vegas	Slot	096003		4	00:21:02			985.75					
02/28/2008 05:38 PM	Wynn Las Vegas	Slot	095801		7	00:10:20			712.25					
02/28/2008 05:27 PM	Wynn Las Vegas	Slot	095802		6	00:23:59			1,347.25					

Flow Data for Site: Wynn Atrium

From: 2/8/2010 12:16:00 AM To: 2/9/2010 12:07:59 AM



Printing time: Wednesday, May 27, 2015 6:11:59 AM

Schedule Data for Site: Wynn Atrium

No. Name	WB or ET Mode	Type	Repeats	Start Day	Start Time	Link Start
001 master valve sch.	Site ET	ET-based / Step	0	Every day	03:00AM	
007 Atrium master color Sch	Auto Send	Step	0	MON, FRI	06:00AM	701
100 ATRIUM FLOW	Auto Send / Protected	Step	0			
400 Atrium Pots	100% Auto Send	Step	0	FRI	08:00AM	
500 Atrium Kenilia	100% Auto Send	Step	0	TUE, FRI	05:00AM, 10:30AM	
501 Atrium Ficus	100% Auto Send	Step	0	TUE, FRI	10:30AM	
502 Theatrical Lake Trees	100% Auto Send	Step	0	MON, WED, FRI	08:00AM	
600 Atrium Shrubs	100% Auto Send	Step	0	FRI	09:00AM	
601 Theatrical Lake Shrubs	100% Auto Send	Step	0	MON, WED, FRI	07:30AM	
701 Atrium color Sch	100% Auto Send	Step	0			

Printing time: Wednesday, May 27, 2015 6:16:41 AM

Page 1 of 1

A-12-655992-C

PROPOSED DEFT. EXHIBIT Z002

WYNN-O'CONNELL01240

3630

Flow Data for Site: Wynn Atrium

From: 2/8/2010 12:48:13 AM To: 2/9/2010 12:46:18 AM

Flow Data List for This Site

Date	Actual Data	Projected Data	Projected Stations Running (Chan/Sta)	Date	Actual Data	Projected Data	Projected Stations Running (Chan/Sta)
2/8/2010 2:49:	0.00 gpm	5.00 gpm	01/22	2/8/2010 12:35	0.00 gpm	5.00 gpm	01/22, 01/24
2/8/2010 2:48:	0.00 gpm	5.00 gpm	01/22	2/8/2010 12:34	0.00 gpm	5.00 gpm	01/22, 01/24
2/8/2010 2:47:	0.00 gpm	5.00 gpm	01/22	2/8/2010 12:33	0.00 gpm	5.00 gpm	01/22, 01/24
2/8/2010 2:46:	0.00 gpm	5.00 gpm	01/22	2/8/2010 12:32	0.00 gpm	5.00 gpm	01/22, 01/24
2/8/2010 2:45:	0.00 gpm	5.00 gpm	01/22	2/8/2010 12:31	0.00 gpm	5.00 gpm	01/22, 01/24
2/8/2010 2:44:	0.00 gpm	5.00 gpm	01/22	2/8/2010 12:30	0.00 gpm	5.00 gpm	01/22, 01/24
2/8/2010 2:43:	0.00 gpm	5.00 gpm	01/22	2/8/2010 12:29	0.00 gpm	5.00 gpm	01/20, 01/24
2/8/2010 2:42:	0.00 gpm	5.00 gpm	01/22	2/8/2010 12:28	0.00 gpm	5.00 gpm	01/20, 01/24
2/8/2010 2:41:	0.00 gpm	5.00 gpm	01/22	2/8/2010 12:27	0.00 gpm	5.00 gpm	01/20, 01/24
2/8/2010 2:40:	0.00 gpm	5.00 gpm	01/22	2/8/2010 12:26	0.00 gpm	5.00 gpm	01/20, 01/24
2/8/2010 2:39:	0.00 gpm	5.00 gpm	01/20	2/8/2010 12:25	0.00 gpm	5.00 gpm	01/20, 01/24
2/8/2010 2:38:	0.00 gpm	5.00 gpm	01/20	2/8/2010 12:24	0.00 gpm	5.00 gpm	01/20, 01/24
2/8/2010 2:37:	0.00 gpm	5.00 gpm	01/20	2/8/2010 12:23	0.00 gpm	5.00 gpm	01/20, 01/24
2/8/2010 2:36:	0.00 gpm	5.00 gpm	01/20	2/8/2010 12:22	0.00 gpm	5.00 gpm	01/20, 01/24
2/8/2010 2:35:	0.00 gpm	5.00 gpm	01/20	2/8/2010 12:21	0.00 gpm	5.00 gpm	01/20, 01/24
2/8/2010 2:34:	0.00 gpm	5.00 gpm	01/20	2/8/2010 12:20	0.00 gpm	5.00 gpm	01/20, 01/24
2/8/2010 2:33:	0.00 gpm	5.00 gpm	01/20	2/8/2010 12:19	0.00 gpm	0.00 gpm	01/24
2/8/2010 2:31:	0.00 gpm	5.00 gpm	01/20	2/8/2010 12:18	0.00 gpm	0.00 gpm	01/24
2/8/2010 2:30:	0.00 gpm	5.00 gpm	01/20	2/8/2010 12:17	0.00 gpm	0.00 gpm	01/24
2/8/2010 12:59	0.00 gpm	0.00 gpm	01/24	2/8/2010 12:16	0.00 gpm	0.00 gpm	01/24
2/8/2010 12:58	0.00 gpm	0.00 gpm	01/24	2/8/2010 12:15	0.00 gpm	0.00 gpm	01/24
2/8/2010 12:57	0.00 gpm	0.00 gpm	01/24	2/8/2010 12:14	0.00 gpm	0.00 gpm	01/24
2/8/2010 12:56	0.00 gpm	0.00 gpm	01/24	2/8/2010 12:13	0.00 gpm	0.00 gpm	01/24
2/8/2010 12:55	0.00 gpm	0.00 gpm	01/24	2/8/2010 12:12	0.00 gpm	0.00 gpm	01/24
2/8/2010 12:54	0.00 gpm	0.00 gpm	01/24	2/8/2010 12:11	0.00 gpm	0.00 gpm	01/24
2/8/2010 12:53	0.00 gpm	0.00 gpm	01/24	2/8/2010 12:10	0.00 gpm	0.00 gpm	01/24
2/8/2010 12:52	0.00 gpm	0.00 gpm	01/24	2/8/2010 12:09	0.00 gpm	5.00 gpm	01/23, 01/24
2/8/2010 12:51	0.00 gpm	0.00 gpm	01/24	2/8/2010 12:08	0.00 gpm	5.00 gpm	01/23, 01/24
2/8/2010 12:50	0.00 gpm	0.00 gpm	01/24	2/8/2010 12:07	0.00 gpm	5.00 gpm	01/23, 01/24
2/8/2010 12:49	0.00 gpm	0.00 gpm	01/24	2/8/2010 12:06	0.00 gpm	5.00 gpm	01/23, 01/24
2/8/2010 12:48	0.00 gpm	0.00 gpm	01/24	2/8/2010 12:05	0.00 gpm	5.00 gpm	01/23, 01/24
2/8/2010 12:47	0.00 gpm	0.00 gpm	01/24	2/8/2010 12:04	0.00 gpm	5.00 gpm	01/23, 01/24
2/8/2010 12:46	0.00 gpm	0.00 gpm	01/24	2/8/2010 12:03	0.00 gpm	5.00 gpm	01/23, 01/24
2/8/2010 12:45	0.00 gpm	0.00 gpm	01/24	2/8/2010 12:02	0.00 gpm	5.00 gpm	01/23, 01/24
2/8/2010 12:44	0.00 gpm	0.00 gpm	01/24	2/8/2010 12:01	0.00 gpm	5.00 gpm	01/23, 01/24
2/8/2010 12:43	0.00 gpm	0.00 gpm	01/24	2/8/2010 12:00	0.00 gpm	5.00 gpm	01/21, 01/24
2/8/2010 12:42	0.00 gpm	0.00 gpm	01/24	2/8/2010 11:59	0.00 gpm	5.00 gpm	01/21, 01/24
2/8/2010 12:41	0.00 gpm	0.00 gpm	01/24	2/8/2010 11:58	0.00 gpm	5.00 gpm	01/21, 01/24
2/8/2010 12:40	0.00 gpm	0.00 gpm	01/24	2/8/2010 11:57	0.00 gpm	5.00 gpm	01/21, 01/24
2/8/2010 12:39	0.00 gpm	5.00 gpm	01/22, 01/24	2/8/2010 11:56	0.00 gpm	5.00 gpm	01/21, 01/24
2/8/2010 12:38	0.00 gpm	5.00 gpm	01/22, 01/24	2/8/2010 11:55	0.00 gpm	5.00 gpm	01/21, 01/24
2/8/2010 12:37	0.00 gpm	5.00 gpm	01/22, 01/24	2/8/2010 11:54	0.00 gpm	5.00 gpm	01/21, 01/24
2/8/2010 12:36	0.00 gpm	5.00 gpm	01/22, 01/24	2/8/2010 11:53	0.00 gpm	5.00 gpm	01/21, 01/24
				2/8/2010 11:52	0.00 gpm	5.00 gpm	01/21, 01/24

Flow Data for Site: Wynn Atrium

From: 2/8/2010 12:48:13 AM To: 2/9/2010 12:46:18 AM

Flow Data List for This Site						
Date	Actual Data	Projected Data	Projected Stations Running (Chan/Sta)	Date	Actual Data	Projected Data
2/8/2010 11:51	0.00 gpm	5.00 gpm	01/21,01/24	2/8/2010 11:07	30.00 gpm	0.00 gpm
2/8/2010 11:50	0.00 gpm	5.00 gpm	01/21,01/24	2/8/2010 11:06	25.00 gpm	0.00 gpm
2/8/2010 11:49	0.00 gpm	0.00 gpm	01/24	2/8/2010 11:05	0.00 gpm	0.00 gpm
2/8/2010 11:48	0.00 gpm	0.00 gpm	01/24	2/8/2010 11:04	0.00 gpm	0.00 gpm
2/8/2010 11:47	0.00 gpm	0.00 gpm	01/24	2/8/2010 11:03	0.00 gpm	0.00 gpm
2/8/2010 11:46	0.00 gpm	0.00 gpm	01/24	2/8/2010 11:02	0.00 gpm	0.00 gpm
2/8/2010 11:45	0.00 gpm	0.00 gpm	01/24	2/8/2010 11:01	0.00 gpm	0.00 gpm
2/8/2010 11:44	0.00 gpm	0.00 gpm	01/24	2/8/2010 11:00	0.00 gpm	0.00 gpm
2/8/2010 11:43	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:59	0.00 gpm	0.00 gpm
2/8/2010 11:42	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:58	0.00 gpm	0.00 gpm
2/8/2010 11:41	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:57	0.00 gpm	0.00 gpm
2/8/2010 11:40	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:56	0.00 gpm	0.00 gpm
2/8/2010 11:39	5.00 gpm	0.00 gpm	01/24	2/8/2010 10:55	0.00 gpm	0.00 gpm
2/8/2010 11:38	10.00 gpm	0.00 gpm	01/24	2/8/2010 10:54	0.00 gpm	0.00 gpm
2/8/2010 11:37	15.00 gpm	0.00 gpm	01/24	2/8/2010 10:53	0.00 gpm	0.00 gpm
2/8/2010 11:36	10.00 gpm	0.00 gpm	01/24	2/8/2010 10:52	0.00 gpm	0.00 gpm
2/8/2010 11:35	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:51	0.00 gpm	0.00 gpm
2/8/2010 11:34	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:50	0.00 gpm	0.00 gpm
2/8/2010 11:33	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:49	0.00 gpm	0.00 gpm
2/8/2010 11:32	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:48	0.00 gpm	0.00 gpm
2/8/2010 11:31	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:47	0.00 gpm	0.00 gpm
2/8/2010 11:30	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:46	0.00 gpm	0.00 gpm
2/8/2010 11:29	5.00 gpm	0.00 gpm	01/24	2/8/2010 10:45	0.00 gpm	0.00 gpm
2/8/2010 11:28	5.00 gpm	0.00 gpm	01/24	2/8/2010 10:44	0.00 gpm	0.00 gpm
2/8/2010 11:27	10.00 gpm	0.00 gpm	01/24	2/8/2010 10:43	0.00 gpm	0.00 gpm
2/8/2010 11:26	5.00 gpm	0.00 gpm	01/24	2/8/2010 10:42	0.00 gpm	0.00 gpm
2/8/2010 11:25	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:41	0.00 gpm	0.00 gpm
2/8/2010 11:24	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:40	0.00 gpm	0.00 gpm
2/8/2010 11:23	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:39	0.00 gpm	0.00 gpm
2/8/2010 11:22	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:38	0.00 gpm	0.00 gpm
2/8/2010 11:21	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:37	0.00 gpm	0.00 gpm
2/8/2010 11:20	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:36	0.00 gpm	0.00 gpm
2/8/2010 11:19	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:35	0.00 gpm	0.00 gpm
2/8/2010 11:18	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:34	0.00 gpm	0.00 gpm
2/8/2010 11:17	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:33	0.00 gpm	0.00 gpm
2/8/2010 11:16	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:32	0.00 gpm	0.00 gpm
2/8/2010 11:15	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:31	0.00 gpm	0.00 gpm
2/8/2010 11:14	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:30	0.00 gpm	0.00 gpm
2/8/2010 11:13	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:29	0.00 gpm	0.00 gpm
2/8/2010 11:12	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:28	0.00 gpm	0.00 gpm
2/8/2010 11:11	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:27	0.00 gpm	0.00 gpm
2/8/2010 11:10	0.00 gpm	0.00 gpm	01/24	2/8/2010 10:26	0.00 gpm	0.00 gpm
2/8/2010 11:09	15.00 gpm	0.00 gpm	01/24	2/8/2010 10:25	0.00 gpm	0.00 gpm
2/8/2010 11:08	25.00 gpm	0.00 gpm	01/24	2/8/2010 10:24	0.00 gpm	0.00 gpm

Flow Data for Site: Wynn Atrium

From: 2/8/2010 12:48:13 AM To: 2/9/2010 12:46:18 AM

Flow Data List for This Site

Date	Actual Data	Projected Data	Projected Stations Running (Chan/ST/24)	Date	Actual Data	Projected Data	Projected Stations Running (Chan/ST/24)
2/8/2010 10:23	0.00 gpm	5.00 gpm	01/22,01/24	2/8/2010 9:39:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:22	0.00 gpm	5.00 gpm	01/22,01/24	2/8/2010 9:38:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:21	0.00 gpm	5.00 gpm	01/22,01/24	2/8/2010 9:37:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:20	0.00 gpm	5.00 gpm	01/22,01/24	2/8/2010 9:36:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:19	0.00 gpm	5.00 gpm	01/20,01/24	2/8/2010 9:35:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:18	0.00 gpm	5.00 gpm	01/20,01/24	2/8/2010 9:34:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:17	0.00 gpm	5.00 gpm	01/20,01/24	2/8/2010 9:33:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:16	0.00 gpm	5.00 gpm	01/20,01/24	2/8/2010 9:32:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:15	0.00 gpm	5.00 gpm	01/20,01/24	2/8/2010 9:31:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:14	0.00 gpm	5.00 gpm	01/20,01/24	2/8/2010 9:30:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:13	0.00 gpm	5.00 gpm	01/20,01/24	2/8/2010 9:29:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:12	0.00 gpm	5.00 gpm	01/20,01/24	2/8/2010 9:28:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:11	0.00 gpm	5.00 gpm	01/20,01/24	2/8/2010 9:27:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:10	0.00 gpm	5.00 gpm	01/20,01/24	2/8/2010 9:26:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:09	0.00 gpm	5.00 gpm	01/20,01/24	2/8/2010 9:25:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:08	0.00 gpm	5.00 gpm	01/24	2/8/2010 9:24:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:07	0.00 gpm	5.00 gpm	01/24	2/8/2010 9:23:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:06	0.00 gpm	5.00 gpm	01/24	2/8/2010 9:22:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:05	0.00 gpm	5.00 gpm	01/24	2/8/2010 9:21:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:04	0.00 gpm	5.00 gpm	01/24	2/8/2010 9:20:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:03	0.00 gpm	5.00 gpm	01/24	2/8/2010 9:19:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:02	0.00 gpm	5.00 gpm	01/24	2/8/2010 9:18:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:01	0.00 gpm	5.00 gpm	01/24	2/8/2010 9:17:	0.00 gpm	0.00 gpm	01/24
2/8/2010 10:00	0.00 gpm	5.00 gpm	01/24	2/8/2010 9:16:	0.00 gpm	0.00 gpm	01/24
2/8/2010 9:59:	0.00 gpm	5.00 gpm	01/23,01/24	2/8/2010 9:15:	0.00 gpm	0.00 gpm	01/24
2/8/2010 9:58:	0.00 gpm	5.00 gpm	01/23,01/24	2/8/2010 9:14:	0.00 gpm	0.00 gpm	01/24
2/8/2010 9:57:	0.00 gpm	5.00 gpm	01/23,01/24	2/8/2010 9:13:	0.00 gpm	0.00 gpm	01/24
2/8/2010 9:56:	0.00 gpm	5.00 gpm	01/23,01/24	2/8/2010 9:12:	0.00 gpm	0.00 gpm	01/24
2/8/2010 9:55:	0.00 gpm	5.00 gpm	01/23,01/24	2/8/2010 9:11:	0.00 gpm	0.00 gpm	01/24
2/8/2010 9:54:	0.00 gpm	5.00 gpm	01/23,01/24	2/8/2010 9:10:	0.00 gpm	0.00 gpm	01/24
2/8/2010 9:53:	0.00 gpm	5.00 gpm	01/23,01/24	2/8/2010 9:09:	0.00 gpm	0.00 gpm	01/24
2/8/2010 9:52:	0.00 gpm	5.00 gpm	01/23,01/24	2/8/2010 9:08:	0.00 gpm	0.00 gpm	01/24
2/8/2010 9:51:	0.00 gpm	5.00 gpm	01/23,01/24	2/8/2010 9:07:	0.00 gpm	0.00 gpm	01/24
2/8/2010 9:50:	0.00 gpm	5.00 gpm	01/23,01/24	2/8/2010 9:06:	0.00 gpm	0.00 gpm	01/24
2/8/2010 9:49:	0.00 gpm	5.00 gpm	01/21,01/24	2/8/2010 9:05:	0.00 gpm	0.00 gpm	01/24
2/8/2010 9:48:	0.00 gpm	5.00 gpm	01/21,01/24	2/8/2010 9:04:	0.00 gpm	0.00 gpm	01/24
2/8/2010 9:47:	0.00 gpm	5.00 gpm	01/21,01/24	2/8/2010 9:03:	0.00 gpm	0.00 gpm	01/24
2/8/2010 9:46:	0.00 gpm	5.00 gpm	01/21,01/24	2/8/2010 9:02:	0.00 gpm	0.00 gpm	01/24
2/8/2010 9:45:	0.00 gpm	5.00 gpm	01/21,01/24	2/8/2010 9:01:	0.00 gpm	0.00 gpm	01/24
2/8/2010 9:44:	0.00 gpm	5.00 gpm	01/21,01/24	2/8/2010 9:00:	0.00 gpm	0.00 gpm	01/24
2/8/2010 9:43:	0.00 gpm	5.00 gpm	01/21,01/24	2/8/2010 8:59:	0.00 gpm	0.00 gpm	01/24
2/8/2010 9:42:	0.00 gpm	5.00 gpm	01/21,01/24	2/8/2010 8:58:	0.00 gpm	0.00 gpm	01/24
2/8/2010 9:41:	0.00 gpm	5.00 gpm	01/21,01/24	2/8/2010 8:57:	0.00 gpm	0.00 gpm	01/24
2/8/2010 9:40:	0.00 gpm	5.00 gpm	01/21,01/24	2/8/2010 8:56:	0.00 gpm	0.00 gpm	01/24

Flow Data for Site: Wynn Atrium

From: 2/8/2010 12:48:13 AM To: 2/9/2010 12:46:18 AM

Flow Data List for This Site

Date	Actual Data	Projected Data	Projected Stations Running (Chan/Spa)	Date	Actual Data	Projected Data	Projected Stations Running (Chan/Spa)
2/8/2010 8:55:	0.00 gpm	0.00 gpm	01/24	2/8/2010 8:11:	0.00 gpm	5.00 gpm	01/22,01/24
2/8/2010 8:54:	0.00 gpm	0.00 gpm	01/24	2/8/2010 8:10:	0.00 gpm	5.00 gpm	01/22,01/24
2/8/2010 8:53:	0.00 gpm	0.00 gpm	01/24	2/8/2010 8:09:	0.00 gpm	5.00 gpm	01/20,01/24
2/8/2010 8:52:	0.00 gpm	0.00 gpm	01/24	2/8/2010 8:08:	0.00 gpm	5.00 gpm	01/20,01/24
2/8/2010 8:51:	0.00 gpm	0.00 gpm	01/24	2/8/2010 8:07:	0.00 gpm	5.00 gpm	01/20,01/24
2/8/2010 8:50:	0.00 gpm	0.00 gpm	01/24	2/8/2010 8:06:	0.00 gpm	5.00 gpm	01/20,01/24
2/8/2010 8:49:	0.00 gpm	0.00 gpm	01/24	2/8/2010 8:05:	0.00 gpm	5.00 gpm	01/20,01/24
2/8/2010 8:48:	0.00 gpm	0.00 gpm	01/24	2/8/2010 8:04:	0.00 gpm	5.00 gpm	01/20,01/24
2/8/2010 8:47:	0.00 gpm	0.00 gpm	01/24	2/8/2010 8:03:	0.00 gpm	5.00 gpm	01/20,01/24
2/8/2010 8:46:	0.00 gpm	0.00 gpm	01/24	2/8/2010 8:02:	0.00 gpm	5.00 gpm	01/20,01/24
2/8/2010 8:45:	0.00 gpm	0.00 gpm	01/24	2/8/2010 8:01:	0.00 gpm	5.00 gpm	01/20,01/24
2/8/2010 8:44:	0.00 gpm	0.00 gpm	01/24	2/8/2010 8:00:	0.00 gpm	5.00 gpm	01/20,01/24
2/8/2010 8:43:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:59:	0.00 gpm	0.00 gpm	01/24
2/8/2010 8:42:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:58:	0.00 gpm	0.00 gpm	01/24
2/8/2010 8:41:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:57:	0.00 gpm	0.00 gpm	01/24
2/8/2010 8:40:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:56:	0.00 gpm	0.00 gpm	01/24
2/8/2010 8:39:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:55:	0.00 gpm	0.00 gpm	01/24
2/8/2010 8:38:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:54:	0.00 gpm	0.00 gpm	01/24
2/8/2010 8:37:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:53:	0.00 gpm	0.00 gpm	01/24
2/8/2010 8:36:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:52:	0.00 gpm	0.00 gpm	01/24
2/8/2010 8:35:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:51:	0.00 gpm	0.00 gpm	01/24
2/8/2010 8:34:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:50:	0.00 gpm	0.00 gpm	01/24
2/8/2010 8:33:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:49:	0.00 gpm	5.00 gpm	01/23,01/24
2/8/2010 8:32:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:48:	0.00 gpm	5.00 gpm	01/23,01/24
2/8/2010 8:31:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:47:	0.00 gpm	5.00 gpm	01/23,01/24
2/8/2010 8:30:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:46:	0.00 gpm	5.00 gpm	01/23,01/24
2/8/2010 8:29:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:45:	0.00 gpm	5.00 gpm	01/23,01/24
2/8/2010 8:28:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:44:	0.00 gpm	5.00 gpm	01/23,01/24
2/8/2010 8:27:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:43:	0.00 gpm	5.00 gpm	01/23,01/24
2/8/2010 8:26:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:42:	0.00 gpm	5.00 gpm	01/23,01/24
2/8/2010 8:25:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:41:	0.00 gpm	5.00 gpm	01/23,01/24
2/8/2010 8:24:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:40:	0.00 gpm	5.00 gpm	01/23,01/24
2/8/2010 8:23:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:39:	0.00 gpm	5.00 gpm	01/21,01/24
2/8/2010 8:22:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:38:	0.00 gpm	5.00 gpm	01/21,01/24
2/8/2010 8:21:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:37:	0.00 gpm	5.00 gpm	01/21,01/24
2/8/2010 8:20:	0.00 gpm	0.00 gpm	01/24	2/8/2010 7:36:	0.00 gpm	5.00 gpm	01/21,01/24
2/8/2010 8:19:	0.00 gpm	0.00 gpm	01/22,01/24	2/8/2010 7:35:	0.00 gpm	5.00 gpm	01/21,01/24
2/8/2010 8:18:	0.00 gpm	5.00 gpm	01/22,01/24	2/8/2010 7:34:	0.00 gpm	5.00 gpm	01/21,01/24
2/8/2010 8:17:	0.00 gpm	5.00 gpm	01/22,01/24	2/8/2010 7:33:	0.00 gpm	5.00 gpm	01/21,01/24
2/8/2010 8:16:	0.00 gpm	5.00 gpm	01/22,01/24	2/8/2010 7:32:	0.00 gpm	5.00 gpm	01/21,01/24
2/8/2010 8:15:	0.00 gpm	5.00 gpm	01/22,01/24	2/8/2010 7:31:	0.00 gpm	5.00 gpm	01/21,01/24
2/8/2010 8:14:	0.00 gpm	5.00 gpm	01/22,01/24	2/8/2010 7:30:	0.00 gpm	5.00 gpm	01/21,01/24
2/8/2010 8:13:	0.00 gpm	5.00 gpm	01/22,01/24	2/8/2010 7:29:	0.00 gpm	0.00 gpm	01/24
2/8/2010 8:12:	0.00 gpm	5.00 gpm	01/22,01/24	2/8/2010 7:28:	0.00 gpm	0.00 gpm	01/24

Flow Data for Site: Wynn Atrium

From: 2/8/2010 12:48:13 AM To: 2/9/2010 12:46:18 AM

Flow Data List for This Site

Date	Actual Data	Projected Stations Running (Chan 01/24)	Date	Actual Data	Projected Stations Running (Chan 01/24)	Projected Data
2/8/2010 7:27:	0.00 gpm	0.00 gpm	2/8/2010 6:43:	0.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:26:	0.00 gpm	0.00 gpm	2/8/2010 6:42:	0.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:25:	0.00 gpm	0.00 gpm	2/8/2010 6:41:	0.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:24:	0.00 gpm	0.00 gpm	2/8/2010 6:40:	0.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:23:	0.00 gpm	0.00 gpm	2/8/2010 6:39:	5.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:22:	0.00 gpm	0.00 gpm	2/8/2010 6:38:	10.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:21:	0.00 gpm	0.00 gpm	2/8/2010 6:37:	15.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:20:	0.00 gpm	0.00 gpm	2/8/2010 6:36:	15.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:19:	0.00 gpm	0.00 gpm	2/8/2010 6:35:	0.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:18:	0.00 gpm	0.00 gpm	2/8/2010 6:34:	10.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:17:	0.00 gpm	0.00 gpm	2/8/2010 6:33:	25.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:16:	0.00 gpm	0.00 gpm	2/8/2010 6:32:	30.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:15:	0.00 gpm	0.00 gpm	2/8/2010 6:31:	25.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:14:	0.00 gpm	0.00 gpm	2/8/2010 6:30:	0.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:13:	0.00 gpm	0.00 gpm	2/8/2010 6:29:	0.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:12:	0.00 gpm	0.00 gpm	2/8/2010 6:28:	5.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:11:	0.00 gpm	0.00 gpm	2/8/2010 6:27:	10.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:10:	0.00 gpm	0.00 gpm	2/8/2010 6:26:	5.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:09:	0.00 gpm	0.00 gpm	2/8/2010 6:25:	0.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:08:	0.00 gpm	0.00 gpm	2/8/2010 6:24:	10.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:07:	0.00 gpm	0.00 gpm	2/8/2010 6:23:	10.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:06:	0.00 gpm	0.00 gpm	2/8/2010 6:22:	15.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:05:	0.00 gpm	0.00 gpm	2/8/2010 6:21:	10.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:04:	0.00 gpm	0.00 gpm	2/8/2010 6:20:	0.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:03:	0.00 gpm	0.00 gpm	2/8/2010 6:19:	10.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:02:	0.00 gpm	0.00 gpm	2/8/2010 6:18:	15.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:01:	0.00 gpm	0.00 gpm	2/8/2010 6:17:	15.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 7:00:	0.00 gpm	0.00 gpm	2/8/2010 6:16:	10.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 6:59:	0.00 gpm	0.00 gpm	2/8/2010 6:15:	0.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 6:58:	0.00 gpm	0.00 gpm	2/8/2010 6:14:	10.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 6:57:	0.00 gpm	0.00 gpm	2/8/2010 6:13:	20.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 6:56:	0.00 gpm	0.00 gpm	2/8/2010 6:12:	20.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 6:55:	0.00 gpm	0.00 gpm	2/8/2010 6:11:	15.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 6:54:	0.00 gpm	0.00 gpm	2/8/2010 6:10:	0.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 6:53:	0.00 gpm	0.00 gpm	2/8/2010 6:09:	5.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 6:52:	0.00 gpm	0.00 gpm	2/8/2010 6:08:	15.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 6:51:	0.00 gpm	0.00 gpm	2/8/2010 6:07:	10.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 6:50:	0.00 gpm	0.00 gpm	2/8/2010 6:06:	15.00 gpm	0.00 gpm	0.00 gpm
2/8/2010 6:49:	0.00 gpm	0.00 gpm	2/8/2010 6:05:	0.00 gpm	5.00 gpm	01/05, 01/24
2/8/2010 6:48:	0.00 gpm	0.00 gpm	2/8/2010 6:04:	10.00 gpm	5.00 gpm	01/05, 01/24
2/8/2010 6:47:	0.00 gpm	0.00 gpm	2/8/2010 6:03:	20.00 gpm	5.00 gpm	01/05, 01/24
2/8/2010 6:46:	0.00 gpm	0.00 gpm	2/8/2010 6:02:	25.00 gpm	5.00 gpm	01/03, 01/24
2/8/2010 6:45:	0.00 gpm	0.00 gpm	2/8/2010 6:01:	15.00 gpm	5.00 gpm	01/03, 01/24
2/8/2010 6:44:	0.00 gpm	0.00 gpm	2/8/2010 6:00:	0.00 gpm	5.00 gpm	01/03, 01/24

Printing time: Wednesday, May 27, 2015 6:27:58 AM

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PROPOSED DEFT. EXHIBIT 2007

WYNN-O'CONNELL01245

A-12-655992-C

3635

Flow Data for Site: Wynn Atrium

From: 2/8/2010 12:48:13 AM To: 2/9/2010 12:46:18 AM

Flow Data List for This Site

Date	Actual Data	Projected Data	Projected Stations Running (Chan/ST/24)	Date	Actual Data	Projected Data	Projected Stations Running (Chan/ST/24)
2/8/2010 5:59:	0.00 gpm	0.00 gpm	01/24	2/8/2010 5:15:	0.00 gpm	0.00 gpm	01/24
2/8/2010 5:58:	0.00 gpm	0.00 gpm	01/24	2/8/2010 5:14:	0.00 gpm	0.00 gpm	01/24
2/8/2010 5:57:	0.00 gpm	0.00 gpm	01/24	2/8/2010 5:13:	0.00 gpm	0.00 gpm	01/24
2/8/2010 5:56:	0.00 gpm	0.00 gpm	01/24	2/8/2010 5:12:	0.00 gpm	0.00 gpm	01/24
2/8/2010 5:55:	0.00 gpm	0.00 gpm	01/24	2/8/2010 5:11:	0.00 gpm	0.00 gpm	01/24
2/8/2010 5:54:	0.00 gpm	0.00 gpm	01/24	2/8/2010 5:10:	0.00 gpm	0.00 gpm	01/24
2/8/2010 5:53:	0.00 gpm	0.00 gpm	01/24	2/8/2010 5:09:	0.00 gpm	0.00 gpm	01/24
2/8/2010 5:52:	0.00 gpm	0.00 gpm	01/24	2/8/2010 5:08:	0.00 gpm	0.00 gpm	01/24
2/8/2010 5:51:	0.00 gpm	0.00 gpm	01/24	2/8/2010 5:07:	0.00 gpm	0.00 gpm	01/24
2/8/2010 5:50:	0.00 gpm	0.00 gpm	01/24	2/8/2010 5:06:	0.00 gpm	0.00 gpm	01/24
2/8/2010 5:49:	0.00 gpm	0.00 gpm	01/24	2/8/2010 5:05:	0.00 gpm	0.00 gpm	01/24
2/8/2010 5:48:	0.00 gpm	0.00 gpm	01/24	2/8/2010 5:04:	0.00 gpm	0.00 gpm	01/24
2/8/2010 5:47:	0.00 gpm	0.00 gpm	01/24	2/8/2010 5:03:	0.00 gpm	0.00 gpm	01/24
2/8/2010 5:46:	0.00 gpm	0.00 gpm	01/24	2/8/2010 5:02:	0.00 gpm	0.00 gpm	01/24
2/8/2010 5:45:	0.00 gpm	0.00 gpm	01/24	2/8/2010 5:01:	0.00 gpm	0.00 gpm	01/24
2/8/2010 5:44:	0.00 gpm	0.00 gpm	01/24	2/8/2010 5:00:	0.00 gpm	0.00 gpm	01/24
2/8/2010 5:43:	0.00 gpm	0.00 gpm	01/24	2/8/2010 4:59:	0.00 gpm	0.00 gpm	01/24
2/8/2010 5:42:	0.00 gpm	0.00 gpm	01/24	2/8/2010 4:58:	0.00 gpm	0.00 gpm	01/24
2/8/2010 5:41:	0.00 gpm	0.00 gpm	01/24	2/8/2010 4:57:	0.00 gpm	0.00 gpm	01/24
2/8/2010 5:40:	0.00 gpm	0.00 gpm	01/24	2/8/2010 4:56:	0.00 gpm	0.00 gpm	01/24
2/8/2010 5:39:	0.00 gpm	0.00 gpm	01/24	2/8/2010 4:55:	0.00 gpm	0.00 gpm	01/24
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PROPOSED DEFT. EXHIBIT 2008

WYNN-O'CONNELL01246

A-12-655992-C

3636

Flow Data for Site: Wynn Atrium

From: 2/8/2010 12:48:13 AM To: 2/9/2010 12:46:18 AM

Flow Data List for This Site

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Flow Data for Site: Wynn Atrium

From: 2/8/2010 12:48:13 AM To: 2/9/2010 12:46:18 AM

Flow Data List for This Site							
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PROPOSED DEFT. EXHIBIT Z010

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3638

In the
Supreme Court
for the
State of Nevada

Electronically Filed
May 01 2017 01:04 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

v.

YVONNE O'CONNELL,

Respondent and Cross-Appellant.

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

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



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REGISTER OF ACTIONS

CASE No. A-12-655992-C

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

§
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Case Type: **Negligence - Premises Liability**
Subtype: **Slip and Fall**
Date Filed: **02/07/2012**
Location: **Department 5**
Cross-Reference Case Number: **A655992**

PARTY INFORMATION

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EVENTS & ORDERS OF THE COURT

03/04/2016 **All Pending Motions** (8:30 AM) (Judicial Officer Ellsworth, Carolyn)
All Pending Motions: 3/4/16

Minutes

03/04/2016 8:30 AM

- PLTF'S AMENDED APPLICATION FOR FEES, COSTS & PRE-JUDGMENT INTEREST - AMENDED & RESUBMITTED AS PLTF'S MTN TO TAX COSTS & FOR FEES AND POST-JUDGMENT INTEREST...DEFT. WYNN LAS VEGAS, LLC'S RENEWED MTN FOR JUDGMENT AS A MATTER OF LAW, OR, ALTERNATIVELY MTN FOR NEW TRIAL OR REMITTITUR Prior to hearing, counsel provided following tentative as to Deft's Motion as follows: This is a personal injury action resulting from Pltf. s slip and fall at Deft. s casino. A jury trial was held and the jury found in favor of Pltf. on November 16, 2015. The jury awarded Pltf. \$150,000 for past pain and suffering and \$250,000 for future pain and suffering, finding her to be 40% at fault. Accounting for Pltf. s comparative fault, her total award was \$240,000. Deft. (hereinafter Wynn), having moved for judgment under NRCP 50 at the close of Pltf. s case, filed a renewed motion for judgment as a matter of law or, alternatively, a motion for new trial or remittitur. At trial, Pltf. (hereinafter O Connell) testified that she fell after slipping on what was described as a pale green, sticky, liquid substance on the floor. There was no evidence presented by O Connell that Wynn had caused the foreign substance to be on the floor. While O Connell speculated that the substance may have been water from the irrigation system in the atrium area where she fell, she presented no evidence that such was the case. Rather, O Connell called, in her case in chief, an employee of Wynn who testified that she responded to the area of the fall immediately after the fall and she observed a substance on the floor which had been covered by a sweeper machine brought to clean up the area. She described the substance as looking a little sticky like honey. Trial Transcript (TT), Vol. 3 at 71:23-72:4. On cross-examination, the witness, when confronted with her previous deposition testimony, agreed that she had described the liquid substance as something like a syrup, like a drink, like something like that. Id. at 76:6-10. Additionally, O Connell presented no evidence that Wynn had actual notice of the foreign substance on the floor, and her counsel argued that it was in fact a constructive notice case, not an actual notice case. A. Legal Standards and Applicable Statutes NRCP 50 provides in pertinent part: (a)

Judgment as a matter of law. (1) If during a trial by jury, a party has been fully heard on an issue and on the facts and law a party has failed to prove a sufficient issue for the jury, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue. (b) Renewing motion for judgment after trial; alternative motion for new trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after service of written notice of entry of judgment and may alternatively request a new trial or join a motion for new trial under Rule 59. In ruling on a renewed motion the court may: (1) if a verdict was returned: (A) allow the judgment to stand, (B) order a new trial, or (C) direct entry of judgment as a matter of law. NRCP 59(a) provides: A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1) Irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial; (2) Misconduct of the jury or prevailing party; (3) Accident or surprise which ordinary prudence could not have guarded against; (4) Newly discovered evidence material for the party making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial; (5) Manifest disregard by the jury of the instructions of the court; (6) Excessive damages appearing to have been given under the influence of passion or prejudice; or, (7) Error in law occurring at the trial and objected to by the party making the motion. The standard for granting a motion for judgment as a matter of law is based on the standard for granting a motion for involuntary dismissal under former NRCP 41(b). In applying that standard and deciding whether to grant a motion for judgment as a matter of law, the district court must view the evidence and all inferences in favor of the nonmoving party. To defeat the motion, the nonmoving party must have presented sufficient evidence such that the jury could grant relief to that party. *Nelson v. Heer*, 123 Nev. 217, 222, 163 P.3d 420,424 (2007). Deft. presents several distinct arguments in support of its Motion for Judgment as a Matter of Law. These are: (1) there was insufficient evidence presented at trial for a finding that Deft. owed Pltf. a duty of care; (2) the testimony of Dr. Tingey and Dr. Dunn was improper and prejudiced Deft. ; and (3) Pltf. had a burden to apportion the amount of damages attributable to Deft. and those attributable to prior injuries, but failed to do so. Deft. also argues, in the alternative, that even if it is not entitled to judgment as a matter of law, it is entitled under NRCP 59 to a new trial or remittitur because the jury's award of future pain and suffering was unsupported, Pltf. posed improper questions to Deft. s witnesses, and Pltf. s counsel made prejudicial comments to the jury. Each of these will be addressed in turn. 1. Whether there was sufficient evidence produced at trial such that a reasonable jury could find that Deft. had notice of the foreign substance on the floor. The law concerning negligence in relation to a foreign substance on the floor is, in some respects, well settled. Where the business owner or its agent caused the substance to be on the floor, liability will lie, as a foreign substance on the floor is not consistent with reasonable care. However where the business owner or his agent did not cause the foreign substance to be on the floor, a Pltf. must prove actual or constructive knowledge of the floor's condition, and a failure to remedy it. *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322-323 (1993). As stated above, O Connell produced no evidence that the Wynn caused the substance to be on the floor, or that it had actual notice. Thus, the question remains as to whether sufficient evidence was presented for a jury to find that Wynn was on constructive notice of the spill. Whether a business owner was under constructive notice of the hazardous condition is a question of fact properly left for the jury, *Sprague, id.*, but this does not relieve the Pltf. from having to admit evidence at trial of constructive notice. In *Sprague*, the Supreme Court noted that a

reasonable jury could have determined that the virtually continual debris on the produce department floor put Lucky on constructive notice that, at any time, a hazardous condition might exist which would result in injury to Lucky customers. *Id.*, 109 Nev. at 251, 849 P.2d at 323. Nevada case law has caused some confusion in differentiating between constructive notice and the mode of operation approach, the latter of which is specifically discussed in cases decided subsequent to *Sprague*. The fact that there is a difference is made clear in *FGA v. Giglio*, 128 Nev. Adv. Op. 26, 278 P.3d 490, 497 (2012), where the court noted that the *Sprague* court had implicitly adopted the mode of operation approach when it stated that even in the absence of constructive notice, a jury could conclude that Lucky should have recognized the impossibility of keeping the produce section clean by sweeping alone. (emphasis added). With the mode of operation approach, which is not applicable in this case, a Pltf. satisfies the notice requirement (actual or constructive) by establishing that an injury was attributable to a reasonably foreseeable dangerous condition on the owner's premises that is related to the owner's self-service mode of operation. While evidence of a continuous or recurring condition might amount to constructive notice under *Sprague*, *supra* and *Ford v. Southern Hills Medical Center*, 2011 WL 6171790 (Nev. 2011), that is not the only way of proving constructive notice. Proof that a foreign substance on the floor had existed for such a length of time that the proprietor in the exercise of ordinary care should have known of it is another way of proving constructive notice. What would amount to sufficient time to warrant holding that the proprietor had constructive notice generally depends on the circumstances of the particular case and involves consideration of the nature of the danger, the number of persons likely to be affected by it, the diligence required to discover or prevent it, opportunity and means of knowledge, the foresight which a person of ordinary care and prudence would be expected to exercise under the circumstances, and the foreseeable consequence of the conditions. See 61 A.L.R.2d 67(b). Moreover, Nevada has made clear that an innkeeper may be found on constructive notice of latent defects upon their premises if a reasonable inspection would have revealed such a danger. See *Twardowski v. Westward Ho Motels, Inc.*, 86 Nev. 784, 476 P.2d 946 (1970). In *Twardowski*, the court held that if a reasonable inspection of its pool slide would have revealed the defective handrails, the *Westward Ho* would be charged with constructive notice of the latent defect, but that whether the defect would have been discovered by a reasonable inspection was a jury question. The court further noted that [c]onstructive knowledge of a latent defect can be established by circumstantial evidence. *Id.*, 86 Nev. at 788, 476 P.2d at 948. The over-arching theme of a negligence case has been, and is, foreseeability. [T]here is no liability for harm resulting from conditions from which no unreasonable risk was to be anticipated, or those which the occupier did not know and could not have discovered with reasonable care. The mere existence of a defect or danger is not enough to establish liability, unless it is shown to be of such a character or of such a duration that the jury may reasonably conclude that due care would have discovered it. *Prosser, Law of Torts* 393 (4th ed. 1980). Whether reasonable care has been exercised is almost always a jury question as was made clear by the Nevada Supreme Court in *Foster v. Costco Wholesale Corp.*, 128 Nev. Adv. Op. 71, 291 P.3d 150 (2012). Abrogating the holding in *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 370 P.2d 682 (1962), the Nevada Supreme Court adopted the position of the Restatement (Third) of Torts concerning the duty of a landowner. Thus, under the Restatement (Third), landowners bear a general duty of reasonable care to all entrants. The duty issue must be analyzed with regard to foreseeability and gravity of harm, and the feasibility and availability of alternative conduct that would have prevented the harm. *Foster*, 291 P.3d at 156 (citations omitted). Here, during O'Connell's case in chief, Yanet Elias, whose job was that of an assistant manager in the public areas department at Wynn, testified that, It's very difficult to maintain the casino, you know, completely clean, because it's a job for 24 hours. There are people a lot of people walking through, a lot of children, they're carrying things. So, it's impossible to keep it clean at 100 percent. TT Vol. 3 at 70:22-71:1. Additionally, Ms. Elias testified that she did not know when the area where O'Connell fell had

last been inspected prior to her fall, and when asked about how often the area is checked, she testified, It depends on how long it takes the employee to check the north area and return to the south area, because it's all considered one whole area. And there aren't always two employees assigned to that area. Sometimes, there's only one. TT Vol. 3 at 69:5-11. While she repeatedly answered questions posed by both counsel by stating that she did not recall, Ms. Elias was also repeatedly impeached with her earlier deposition testimony. At one point she admitted that one of the signs that a porter is not doing their job is that there is debris on the floor. Id. at 70:3-6) O Connell also called Cory Prowell in her case in chief, Wynn's assistant security manager who at the time of the incident was a security report writer. Mr. Prowell responded to the subject incident and eventually wrote a report. He described the scene of the fall as a high traffic area with marble flooring and indicated that upon his arrival, he was told by Ms. Elias that the liquid on the floor had already been cleaned up, and that he was told by another employee that the employee had seen O Connell being helped up by four other guests. He also testified that O Connell told him that when she had recovered from her fall, she saw a green liquid on the floor. During her testimony at trial, O Connell described the spill as at least seven feet with one side measuring about four feet still in a liquid state, and a three foot portion as almost dry, a little sticky with footprints on it. TT Vol. 3 at 59:19-24. She described the liquid as having just a hint of green, Id. at 59:12, and elaborating about the footprints she said, They looked like, you know, they were they looked like mine that I was making, and I'm sure they were from the people that were standing around and helped me up [k]ind of like dirty footprints that you leave after you've mopped your floor and you step on it, you walk on it, that's kind of how it looked. Id. at 62:19-63:2. Wynn argues that the record is completely devoid of any evidence regarding the length of time the foreign substance had been on the floor. Mot. at 15-17. While it is true that O Connell could not testify as to how long the substance had been on the floor, she did testify that a three foot section of the 7 foot spill was already dry and drying. While the defense seems to suggest that expert testimony would be required, presumably to testify as to the relative humidity within the casino and its relation to the rate of evaporation, common experience would allow a jury to infer that the spill had been in place longer than just a few minutes. As pointed out by Pltf.'s Opposition, there was ample other evidence from which the jury could have found that Wynn had constructive notice of the substance of the floor. Opp. at 11-13. This evidence includes: (1) testimony that the atrium where the substance was located was highly trafficked; (2) testimony that it is impossible for Wynn's employees to keep the casino floor entirely clean; and (3) testimony that Deft. had no floor inspection schedule, did not maintain inspection logs, and could not say with certainty when the floor was last inspected prior to Pltf.'s injury. This testimony was elicited from Deft.'s own employees. A non-moving party can defeat a motion for judgment as a matter of law if it present[s] sufficient evidence such that the jury could grant relief to that party. *D&D Tire, Inc. v. Ouellette*, 131 Nev. Adv. Op. 47, 352 P.3d 32, 35 (2015) (internal quotations and citations omitted). All of the aforementioned testimony, taken together and drawing all reasonable inferences in favor of the Pltf. was sufficient to establish that Wynn was on constructive notice of the dangerous condition upon its floor. Whether the testimony of Dr. Tingey and Dr. Dunn was improper. Deft. next makes the argument that the testimony of Pltf.'s experts, Dr. Tingey and Dr. Dunn, was improper. Mot. at 19-21. Deft. first argues that the Court improperly admitted their testimony because Pltf. disclosed them as expert witnesses beyond the disclosure deadline. Id. at 18-19. Deft. argues that its rebuttal expert was unable to review their records and incorporate them into his report. Id. at 18. However, late production was substantially justified under NRCP 37(c) because O Connell continued to treat after the close of discovery, treatment records were provided to O Connell's counsel after the close of discovery, and were provided to Defense counsel soon after their receipt, and because O Connell had to change treating physicians after Dr. Martin had left the practice. The late disclosed records were only a few pages, the Court permitted the defense to *Voir dire* the doctors outside the presence of the jury before they testified in the presence of the jury, and the Court

allowed Deft. s rebuttal expert to sit in the courtroom and listen to the testimony of both Dr. Tingey and Dr. Dunn, allowing him to incorporate his opinions on direct examination. Hence, Deft. was not prejudiced by any late disclosure on Pltf. s part. Wynn also argues that both doctors lacked a sufficient basis for their opinions because they were only based upon Pltf. s self-reporting. Id. at 19. In support, Deft. cites to the federal case of Perkins v. United States, 626 F. Supp. 2d 587 (E.D. Va. 2009). Notwithstanding the fact that Perkins is a federal case, it is not on point to the facts here. In Perkins, the court found that expert testimony as to medical causation should be excluded because the expert s opinion was based solely on the patient s self-reporting that the expert had merely adopted the patient s explanation as his own opinion. 626 F. Supp. 2d at 592-593. Here, however, Pltf. s self-reporting did not appear to be the sole basis of her experts testimony. Both doctors testified as to the basis of their opinions, which included not only evaluation of the Pltf. s medical history but also their examination of her, their review of her diagnostic medical tests, and their experience in treating orthopedic conditions and the conditions that would result from a slip and fall. There is simply no indication that O Connell s experts wholly adopted her self-reporting as the sole basis for their opinions as to causation. Moreover, Dr. Tingey was candid in his opinion that he would not attribute all of O Connell s knee problems to the subject fall because the MRI indicated a degenerative disease process in the left knee as opposed to the right knee. 2. Whether there is legal basis for a finding that Pltf. bears a burden to apportion damages between pre-existing conditions and the harm caused by Deft. Deft. next argues that Pltf. had the burden of apportioning her damages between pre-existing injuries and those injuries caused by her slip and fall at the Wynn but failed to do so. Mot. at 21-25. This is a familiarly incorrect argument (and, indeed, was raised and rejected during trial for the same reasons as it is now) because the legal premises upon which it rests are infirm. The main cause of confusion in this and other cases is the federal case of Schwartz v. State Farm Mut. Auto. Ins. Co., 2009 WL 2197370 (D. Nev. July 22, 2009). In that case, Judge Dawson did indeed hold that [i]n a case where a Pltf. has a pre-existing condition, and later sustains an injury to that area, the Pltf. bears the burden of apportioning the injuries, treatment and damages between the pre-existing condition and the subsequent accident. Id. at *6. However, the cases cited as precedent by Judge Dawson for that statement do not support that assertion. Kleitz v. Raskin, 103 Nev. 325, 738 P.2d 508 (1987) involved apportioning damages between injuries caused by successive tortfeasor, not apportioning damages between pre-existing conditions and injuries caused by a sole tortfeasor. Judge Dawson also cited the Washington Court of Appeals case of Phennah v. Whalen, 621 P.2d 1304 (Wash. App. 1980), but that also involved apportioning damages between successive tortfeasor. The Restatement (Second) of Torts 433(b), also relied upon, doesn t even concern successive tortfeasor on its face but rather concerns the substantial factor test for determining proximate cause. Here, we do not have successive tortfeasor. Rather, we have a Pltf. who, admittedly, had various pre-existing mental and physical conditions. Therefore, the Schwartz case is in error and is inapplicable to this case. Deft. took the Pltf. as it found her and is liable for the full extent of her injuries, notwithstanding her pre-existing conditions. See Murphy v. Southern Pac. Co., 31 Nev. 120, 101 P. 322 (1909). Whether the Deft. is entitled to a new trial or remittitur. In Canterino v. The Mirage Casino-Hotel, 117 Nev. 19, 24, 16 P.3d 415, 418 (2001), opinion reinstated on reh'g (Oct. 2, 2001), opinion modified on reh'g sub nom, Canterino v. Mirage Casino-Hotel, 118 Nev. 191, 42 P.3d 808 (2002), the Supreme Court addressed the issue of when a trial court may grant a new trial or issue a conditional order of remittitur reducing an award of damages by a jury. The court stated: This court has held that damages for pain and suffering are peculiarly within the province of the jury. In Stackiewicz v. Nissan Motor Corporation, 100 Nev. 443, 454, 686 P.2d 925, 932 (1984), this court stated that the trial court cannot revisit a jury's damage award unless it is flagrantly improper. In actions for damages in which the law provides no legal rule of measurement it is the special province of the jury to determine the amount that ought to be allowed, so that a court is not justified in reversing the

case or granting a new trial on the ground that the verdict is excessive, unless it is so flagrantly improper as to indicate passion, prejudice or corruption in the jury.... The elements of pain and suffering are wholly subjective. It can hardly be denied that, because of their very nature, a determination of their monetary compensation falls peculiarly within the province of the jury.... We may not invade the province of the fact-finder by arbitrarily substituting a monetary judgment in a specific sum felt to be more suitable. *Stackiewicz*, 100 Nev. at 454 55, 686 P.2d at 932 (quotations and citations omitted). The mere fact that a verdict is large is not conclusive that it is the result of passion or prejudice. *Id.* (citing *Beccard v. Nevada National Bank*, 99 Nev. 63, 66 n. 3, 657 P.2d 1154, 1156 n. 3 (1983)). Here, it must be noted that O Connell was prevented from presenting evidence of her medical special damages due to discovery and evidentiary issues. Thus, she sought only pain and suffering damages. She testified that she had been suffering with her knee and her neck and back since the fall five years earlier and could no longer engage in the activities that she could prior to the fall, including the swing dancing she had done regularly before the accident. This testimony was corroborated by her former boyfriend and dance partner. She often described her pain throughout her medical records as 10 out of 10. While the defense may have thought that this testimony would be unbelievable to a jury, it was nonetheless the jury's choice to believe it. Additionally, Dr. Tingey testified that he had recommended surgery for O Connell's traumatically injured knee and that she would, if she chose the surgery, have post-operative pain, but that typically the result after surgery would be a complete relief of the symptoms. On the other hand, Dr. Dunn testified that due to O Connell's continued complaints of pain in her neck and symptoms in her arms, he recommended an anterior cervical neck discectomy; removal of the disc and an inter-body 3 level fusion with placement of a plate and screws. He described this surgery as non-curative, but rather taking away 50 to 60 percent of the pain which O Connell had described as terrible. While Dr. Dunn attributed the changes to O Connell's spine to a degenerative disease process, he attributed the pain, which he believed to be previously asymptomatic, to the fall describing the quintessential egg-shell Pltf. . Wynn argues in the alternative to the motion for judgment as a matter of law, that a new trial should be had or remittitur issued for several reasons. The first is that O Connell failed to establish future pain and suffering damages as required by Nevada law. Mot. at 25 (citing *Krause, Inc. v. Little*, 117 Nev. 929, 938, 34 P.3d 566 (2001) (holding that Nevada law requires that when an injury or disability is subjective and not demonstrable expert medical testimony is required)). The basis for this argument, however, is the same as above that Pltf.'s medical experts lacked a reliable basis for their opinion and that O Connell failed to carry her burden to apportion damages between pre-existing conditions. Mot. at 26:3-7. For the same reasons as outlined above, then, this argument should be rejected. Wynn next argues that O Connell was improperly allowed to question defense witnesses. Specifically, Deft. points to Pltf.'s counsel questioning witnesses on the lack of video coverage of the incident and references in her closing arguments that Wynn controlled the evidence. Mot. at 26. One of the statements cited by Wynn, on examination of Corey Prowell, does not appear to have been objected to by defense counsel and so that objection is now untimely. The other statements cited by Wynn were in Pltf.'s counsel's closing or rebuttal arguments. Deft. also did not object to those statements and, in any event, had the opportunity to make arguments rebutting those statements in its own closing. Therefore, no prejudice resulted. Wynn last argues that it is entitled to a new trial because O Connell's counsel made an improper statement in rebuttal as to damages. The statement in issue is: As jurors, you are the voice of the conscience of this community. Deft. lodged a timely objection, which was immediately sustained by this Court. The Court also admonished counsel for making the statement and instructed the jury to disregard it. The Court stated: Sustained. No, no. The jury will disregard that. Counsel, this is not a punitive damage case. You may not address the they are not to be making decisions as the conscience of the community. You know that is improper argument. TT Vol. 6 at 46:12-16). The problem with such a statement is that it allows the jury to punish the Deft. ,

e.g., with punitive damages, which was not a part of Pltf. s case here. See *Florida Crushed Stone Co. v. Johnson*, 546 So.2d 1102, 1104 (1989). The Nevada Supreme Court has made clear, however, that a new trial is warranted only where the [comment] is so extreme that the objection and admonishment could not remove the misconduct's effect. *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008). This amounts to an analysis of whether no other reasonable explanation could exist for the jury s verdict. *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364, 212 P.3d 1068, 1079 (2009). Here, there was ample evidence presented at trial, as outlined above and in Pltf. s Opposition, to support the jury verdict. Deft. s timely objection was quickly sustained and a limiting instruction was given immediately. In light of the evidence presented at trial, it cannot be said that the jury s verdict was so unreasonable as to make the statement prejudicial. Cf. *Lioce*, supra (finding that the trial testimony supported the jury s verdict and the district court sustained the Deft. s objections to misconduct, so a new trial was not warranted). Based on the foregoing, then, Deft. s Motion should be denied. Arguments by counsel. COURT stated findings and ORDERED, Motion DENIED. As to Pltf's motion, tentative ruling submitted as follows: This is a personal injury action resulting from Pltf. s slip and fall at Deft s casino. A jury trial was held and the jury found in favor of Pltf. on November 16, 2015. The jury awarded Pltf. \$150,000 for past pain and suffering and \$250,000 for future pain and suffering, finding her to be 40% at fault. Pltf. s total award was \$240,000. After the verdict was entered, Pltf. filed an Application for Attorneys Fees and Costs, attaching a Memorandum of Costs as an exhibit. Pltf. then filed an Amended Application for Fees and Costs to address identified deficiencies in the first Application. Deft. has moved to Re-Tax the Costs and is opposing the request for fees in a Supplement to its opposition to Pltf. s first Application. A. Legal Standards and Applicable Statutes: Pltf. moves for fees and costs under both NRCP 68 and NRS 18.010. NRCP 68(f) provides: If the offeree [of an offer of judgment] rejects an offer and fails to obtain a more favorable judgment, (1) the offeree cannot recover any costs or attorney s fees and shall not recover interest for the period after the service of the offer and before the judgment; and (2) the offeree shall pay the offeror s post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney s fees, if any be allowed, actually incurred by the offeror from the time of the offer. If the offeror s attorney is collecting a contingent fee, the amount of any attorney s fees awarded to the party for whom the offer is made must be deducted from that contingent fee. NRS 17.115(4) similarly provides, in relevant part: Except as otherwise provided in this section, if a party who rejects an offer of judgment fails to obtain a more favorable judgment, the court: (c) Shall order the party to pay the taxable costs incurred by the party who made the offer; and (d) May order the party to pay to the party who made the offer (3) Reasonable attorney s fees incurred by the party who made the offer for the period from the date of service of the offer to the date of entry of the judgment. If the attorney of the party who made the offer is collecting a contingent fee, the amount of any attorney s fees awarded to the party pursuant to this subparagraph must be deducted from that contingent fee. Additionally, NRS 18.010(2)(b) provides that fees may be awarded to the prevailing party [w]ithout regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. NRS 18.110(1)-(2) provides that whenever a party claims costs, she must file a verified memorandum setting forth those costs within 5 days of entry of the judgment and that witness fees are recoverable costs, regardless of whether the witness was subpoenaed, if the witness testified at trial. NRS 18.110(4) allows the opposing party to file a motion to re-tax claimed costs within 3 days of service of a copy of the memorandum of costs. As a preliminary note, Deft s first argument is that Pltf. improperly and unilaterally filed an Amended Application for Fees and Costs after reading Deft s Opposition, so the Court should only consider the first Application. Here, judgment was entered on December 15, 2015. Pltf. filed the first Application well before this, on November 25, 2015. She also filed her Amended Application for Costs on

December 21, 2015, which is within the time limit set forth in the rule (note that under EDCR 1.14(a), the period for filing is five judicial days from entry of judgment). However, Deft's Motion to Re-Tax as to the first Application was due on December 2, 2015, but it was not filed until December 7, 2015 and was thus untimely. Deft's Motion to Re-Tax as to the Amended Application was timely, though. It is true that generally, supplemental briefing is allowed only by leave of court. See EDCR 2.20(i). However, given that Deft's first opposition was untimely, it would seem that it would be willing to waive its first argument in opposition to Pltf.'s Amended Application. In order for the penalties associated with the rejection of an offer of judgment to apply, the offeree must not have obtained a more favorable judgment. NRCp 68(f); NRS 17.115(4). To determine whether the offeree of a lump-sum offer of judgment obtained a more favorable judgment, the amount of the offer must be compared to the amount of the offeree's pre-offer, taxable costs. *McCrary v. Bianco*, 122 Nev. 102, 131 P.2d 573, 576, n. 10 (2006) (stating that NRCp 68(g) must be read in conformance with NRS 17.115(5)(b)). Here, Pltf. offered to settle the case for \$49,999.00 on September 3, 2015. The verdict was in favor of Pltf. for a total of \$240,000.00. It seems that this may be a more favorable judgment, although Pltf. has neglected to specifically set forth her pre-offer taxable costs. On the other hand, Pltf.'s total claimed costs were \$26,579.38 (whether pre- or post-offer) and that, together with the offer, amounts to \$76,578.38. Pltf.'s jury recovery was well above this - \$240,000.00 so it appears that Pltf. has met the threshold requirement to show entitlement to fees and costs under Rule 68. The determination of whether to grant fees to a party under NRCp 68 rests in the sound discretion of the trial court. *Chavez v. Sievers*, 118 Nev. 288, 296, 43 P.3d 1022, 1027 (2002). Such a decision will not be disturbed unless it is arbitrary and capricious. *Schouweiler v. Yancey Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (1985). District courts must consider several factors when making a fee determination under *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1963): (1) whether the Pltf.'s claim was brought in good faith; (2) whether the offer was reasonable and in good faith in timing and amount; (3) whether the decision to reject the offer was grossly unreasonable or in bad faith; and (4) whether the sought fees are reasonable and justified. However, where the Deft. is the offeree of an offer of judgment, the first factor changes to a consideration of whether the Deft.'s defenses were litigated in good faith. See *Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998). As to the first factor, whether Deft.'s defenses were litigated in good faith, Pltf. argues that Deft.'s defense that it had no notice of the liquid on the casino floor was in bad faith because it failed to make an inquiry into the last time the floor was checked before Pltf. slipped. *Am. App.* at 5-6. Pltf. also argues that Deft.'s defense that there was no causation here was unreasonable because it relied upon expert testimony that lacked a basis in modern science. *Id.* at 6. Deft.'s Motion to Retax does not address whether its defenses were maintained in good faith. However, this Court has already highlighted in its Tentative Ruling on Deft.'s Renewed Motion for Judgment as a Matter of Law that Nevada case law surrounding constructive notice is, at best, confusing. This is not a case where the law is black and white. Based on that and the evidence presented at trial, it was not bad faith for Deft. to contend that it lacked notice of the condition on the floor and Pltf. in fact so concedes. Furthermore, Pltf.'s evidence of constructive notice may have been enough to escape the granting of a Rule 50 motion, but it was by no means overwhelming. Additionally, Pltf.'s damages claims were reasonably disputed by expert testimony of a defense witness. That the jury was not persuaded by this expert does not translate to bad faith by the Deft.. Thus, the first factor therefore weighs in favor of the Deft.. As to the second factor, Deft. argues that the offer was unreasonable in amount because Pltf. had no basis for its offer and that due to Pltf.'s gamesmanship, Deft. could not sufficiently evaluate the offer. *Opp.* at 5-7. Here, discovery closed on June 12, 2015. Pltf. was unable to submit proof of special medical damages at the time of trial because the Court precluded them on the basis that they were not properly disclosed in discovery. This made it extremely difficult for the Defense to evaluate a potential value of the case. An offer made at a time when Pltf. has not properly provided a

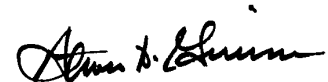
calculation of damages is unreasonable. Thus, the second factor weighs in favor of Deft.. In ascertaining whether Deft s decision to reject the offer was grossly unreasonable or in bad faith, a pertinent consideration is whether enough information was available to determine the merits of the offer. Trustees of the Carpenters for S. Nev. Health & Welfare Trust v. Better Building Co., 101 Nev. 742, 746, 710 P.2d 1379, 1382 (1985). Here, discovery closed on June 12, 2015. The offer of judgment was made three months later, on September 3, 2015. Given that at the time of the offer, Deft. had available all the materials obtained during discovery, including witness depositions, Deft s decision to reject the offer was well-informed. Furthermore, the issues surrounding notice were not necessarily clear cut, as evidenced by the parties pre-trial and post-trial motions on that issue. Overall, it is unlikely that Deft s rejection of the offer was grossly unreasonable or in bad faith, and in the end weighs in favor of Deft.. With regard to the last Beattie factor, the Court must undergo an analysis of whether claimed fees were reasonable in light of the factors set forth in Brunzell v. Golden Gate Nat l Bank, 85 Nev. 345, 249, 455 P.2d 31, 33 (1969). Pltf. has addressed some, but not all, of these factors. Pltf. s counsel has set forth the qualities of the advocate(s) on this case and, of course, we know that a favorable result was obtained. However, Pltf. has not provided any bills setting forth what tasks were performed and the associated hours for those tasks. This prevents the Court from determining whether the fees charged were reasonable in light of the tasks actually performed. Therefore, because Pltf. has not carried her burden under Brunzell, this factor weighs in favor of Deft.. On the whole, all of the factors set forth in Beattie (as modified by Yamaha, supra) weigh in favor of Deft. in this case and Pltf. s Amended Application for Fees should be denied. Although NRCP 68 costs are only for post-offer costs, NRS 18.020(3) mandates awarding all costs to Pltf. since she prevailed in seeking damages in an amount more than \$2,500. NRS 18.110(1) requires the filing of a memorandum of costs by the party in whose favor judgment is rendered, including a verification of the party, the party s attorney, or an agent of the party s attorney that the costs are correct and were necessarily incurred. The amount of awarded costs rests in the sole discretion of the trial court. Bergmann v. Boyce, 109 Nev. 670, 679, 856 P.2d 560, 565 66 (1993). The court also has discretion when determining the reasonableness of the individual costs to be awarded. U.S. Design & Constr. Corp. v. I.B.E.W. Local 357, 118 Nev. 458, 463, 50 P.3d 170, 173 (2002). Claimed costs must be actual and reasonable, rather than a reasonable estimate or calculation of such costs. Bobby Berosini, Ltd. v. PETA, 114 Nev. 1348, 1352, 971 P.2d 383, 385 86 (1998) (internal quotations omitted). The Supreme Court has also indicated that claimed costs must be supported by documentation and itemization. Bobby Berosini, Ltd. v. PETA, 114 Nev. 1348, 971 P.2d 383 (1998). Deft. only challenges certain specific fees, each of which will be addressed in turn. 1. Expert Witness Fees Deft. argues that the amounts for expert witnesses should be reduced because they are well over the statutory limit of \$1,500.00 per expert and the additional amounts are not necessary and reasonable. Mot. at 6-8. NRS 18.005(5) provides that recoverable costs include [r]easonable fees of not more than five expert witnesses in an amount of not more than \$1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert s testimony were of such necessity as to require the larger fee. Allowing fees above the statutory maximum requires this Court to determine whether those fees were necessary and reasonable. Arnold v. Mt. Wheeler Power Co., 101 Nev. 612, 615, 707 P.2d 1137, 1139 (1985). Granting fees in excess of the statutory maximum may be necessary and reasonable where the expert witness testimony constituted most of the evidence. Gilman v. Nevada State Bd. of Veterinary Med. Examiners, 120 Nev. 263, 273, 89 P.3d 1000, 1006-07 (2004), disapproved of on other grounds by Nassiri v. Chiropractic Physicians' Bd., 130 Nev. Adv. Op. 27, 327 P.3d 487 (2014). Here, the testimony of Dr. Dunn and Dr. Tingey was important but did not constitute most of the evidence. Pltf. herself testified, as well as other witnesses and employees of Deft.. On the other hand, Pltf. outlined in her Amended Application and Opposition to Deft s Motion to Re-Tax that the nature of their testimony was fairly complex and required several

hours of file review. Even though Drs. Dunn and Tingey were Pltf. s treating physicians, as Deft. points out, this does not necessarily make an increased fee unnecessary or unreasonable. Pltf. requests a total fee of \$6,000 for Dr. Tingey, \$10,000 for Dr. Dunn, and \$3,699 for Gary Presswood. Dr. Tingey s fee seems to be reasonable, for the reasons identified by Pltf. in her Amended Application. As to Dr. Dunn, Deft. does point out that half of the claimed amount is for the second day of testimony, which lasted less than an hour and was done to accommodate his own schedule. Mot. at 8. Hence, Dr. Dunn should be allowed only \$5,000. As to Mr. Presswood, his testimony was not used at trial because this Court ruled that his testimony would be unreliable. Since his testimony was clearly inadmissible under the Hallmark standard, as reflected in this Court s prior pre-trial ruling, his fees should not be awarded. Hence, as to the expert fees, Deft s Motion should be granted in part. 2. Service Fees NRS 18.005(7) allows recovery of service fees. Deft. next challenges the service fees claimed by Pltf. in serving Yanet Elias, Corey Prowell, and Salvatore Risco. Mot. at 8-9. Pltf. acknowledges that all costs must be both reasonable and necessary. As to Yanet Elias and Corey Prowell, each was an employee of Deft. and Deft. points out that it had accepted service for those persons. Defense counsel should be prepared to address whether he agreed that these witnesses would be produced for trial without a subpoena at the time of oral argument. If so, the service fee was unnecessary, but if not, agreement that service can be made upon counsel instead of the witness does not eliminate the need to serve and the fees would be necessary. As to Mr. Risco, Deft. argues that the service fees were unnecessary and unreasonable because Pltf. s counsel had good communication with him. However, unlike the other two employee-witnesses, Mr. Risco was not a party to this case or an agent of a party to this case, so service of a subpoena upon him was necessary. Additionally, Pltf. has outlined sufficient reasons for the amount of the claimed charge that show it to be reasonable and she should be granted those fees, subject to the same question posed above. 3. Jury Fees NRS 18.005(3) specifically allows an award of jury fees as an element of costs. Deft. next argues it should not be responsible for the jury fees because Pltf. failed to request a jury trial within the time allowed. Mot. at 9. Deft. essentially only argues that because Pltf. s demand for a jury trial was untimely and this should have been a bench trial, it should not have to pay for the jury fees. However, those arguments are premised on challenging this Court s grant of Pltf. s request for a jury trial and the time for reconsidering that decision has long since passed. Moreover, both parties had prepared this entire case under the assumption that it was going to be tried by jury, so Deft. was not prejudiced by the Court s ruling in any event. Since the jury fees were actually incurred and reasonable, Deft s Motion as to those fees should be denied, and Pltf. should be allowed the jury fees incurred. 4. Parking Fees NRS 18.005(17) allows the court to award any other reasonable costs actually incurred. This would, of course, include costs incurred in parking for hearings and the like. Deft. argues that there were other, free, places Pltf. could have parked. Mot. at 9. This may or may not be true, but Deft s argument is conclusory in any event. Because Pltf. actually incurred the parking costs, they should be awarded. 5. Skip Trace Fees Deft. lastly argues that Pltf. s request for skip trace/investigative fees for Terry Ruby were unreasonable and unnecessary. Mot. at 9. Terry Ruby is a former employee of Deft. and was the first to respond to Pltf. s fall. Opp. at 8. It is clear why Pltf. would have a need to locate and depose Mr. Ruby. A \$150.00 fee for that service is not unreasonable, given the extreme costs associated with reporting services like Accurant. Therefore, Deft s Motion as to the skip trace fee should be denied, and Pltf. should be allowed that amount as a cost. 6. Remaining Fees Deft. does not challenge the remaining requested fees. Pltf. has attached back-up documentation for each claimed cost and they all seem to be reasonable and within the going market rate for each associated service. Pltf. has therefore carried her burden under Berosini and the remaining costs requested should be awarded. Therefore, Pltf. s Amended Application as to costs should be granted, as set forth herein. Arguments by counsel. Upon Court's inquiry, Pltf. advised costs have been paid in full. COURT stated findings and ORDERED, Deft's Motion is GRANTED in part, noting calendar

is in error as it state's Pltf's Motion. Pltf's Motion for fees and costs is DENIED, and for attorney fees is DENIED. Defense to prepare the order and join it all in one.

[Parties Present](#)

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CLERK OF THE COURT

TRAN

EIGHTH JUDICIAL DISTRICT COURT
CIVIL/CRIMINAL DIVISION
CLARK COUNTY, NEVADA

YVONNE O'CONNELL,

Plaintiff,

vs.

WYNN RESORTS, LIMITED, et al,

Defendants.

CASE NO. A-12-655992

DEPT NO. V

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

FRIDAY, MARCH 4, 2016

TRANSCRIPT RE:
ALL PENDING MOTIONS

APPEARANCES:

For the Plaintiff:

CHRISTIAN MORRIS, ESQ.
CHRISTOPHER D. KIRCHER, ESQ.

For the Defendants:

LAWRENCE J. SEMENZA, III, ESQ.
EDWARD J. WYNDER, ESQ.

RECORDED BY: Lara Corcoran, Court Recorder

1 LAS VEGAS, NEVADA, FRIDAY, MARCH 4, 2016, 8:28 A.M.

2 * * * * *

3 THE COURT: This is Case No. A-12-655992, Yvonne O'Connell versus

4 Wynn Resorts. Post-trial motions. Good morning.

5 MR. SEMENZA: Good morning.

6 MS. MORRIS: Good morning.

7 THE COURT: How are you all?

8 MR. SEMENZA: Very well. How are you?

9 THE COURT: Good. I haven't seen you in awhile. It's good to see you

10 again.

11 MS. MORRIS: Did you miss us?

12 THE COURT: I did. I did. I've been in trial a lot since you were here.

13 All right. So you got my tentatives. I sent out -- I didn't realize that

14 my clerk had not sent out -- I finished the tentative on the first -- on the 50 motion

15 quite awhile ago, but I didn't realize he hadn't sent them out to you until he did.

16 But anyway, you got everything, right?

17 MR. SEMENZA: Yes, Your Honor.

18 THE COURT: All right. So let's start with the 50 motion.

19 MR. SEMENZA: Thank you, Your Honor.

20 THE COURT: And you know you've got a time limit because I've got to

21 start my murder trial at 9:00.

22 MR. SEMENZA: I will do my best to move as quickly as I can.

23 THE COURT: Okay. So you've got fifteen minutes.

24 MR. SEMENZA: Thank you, Your Honor. First of all, thank you for sending

1 out the tentative rulings. I know that that certainly assisted myself in preparing
2 for the oral argument today and in an effort, obviously, to focus the issues for
3 Your Honor here.

4 THE COURT: Sure.

5 MR. SEMENZA: There are a number of issues addressed in the motion
6 that I'm not going to specifically address today. The first is the statements made by
7 counsel during closing argument. I understand Your Honor's ruling in that respect.
8 The second are the issues relating to the video surveillance. And then the third are
9 the statements relating to the control of evidence that was at issue during closing
10 arguments and throughout the trial. So we obviously respectfully disagree with
11 your decision in that regard, but I'm not going to argue it here today.

12 THE COURT: Okay.

13 MR. SEMENZA: What I am going to argue today are the issues of
14 constructive notice and the apportionment issues. And with regard to the
15 constructive notice issue, again, I certainly respect Your Honor's tentative ruling
16 with regard to what constitutes constructive knowledge and there's that grey area
17 that was referenced as far as whether constructive notice is only established
18 through a recurrent condition or we've talked a lot about this singular incident
19 where constructive notice may be found, and that was sort of the banana peel case.
20 And obviously we're reserving our rights relating to that as well.

21 But in Your Honor's tentative ruling there was some discussion
22 concerning Ms. Elias' testimony. She had mentioned that it was difficult to keep
23 the property clean. There was a reference to whether it could be kept clean a
24 hundred percent of the time. Mr. Prowell testified that obviously, you know, people

1 walk through and that it is a high traffic area. But with regard to the issue of
2 constructive notice, it's our position that none of that, frankly, matters. The only
3 thing that really matters for purposes of constructive notice is how long that
4 substance had been on the floor prior to Ms. O'Connell's fall, and that's where
5 I have a dispute with the tentative ruling.

6 Ms. O'Connell testified during trial relating to the size of the spill,
7 okay. It's our position that that doesn't have anything to do with how long the spill
8 was actually there. And we did cite some case law relating to that specific issue.
9 Ms. O'Connell also identified that there were footprints in this particular substance
10 and she testified that she thought those footprints related to -- were her own or the
11 individuals that assisted her up after the fall. So again, there's nothing to indicate
12 in the record how long this particular substance was on the floor prior to her fall.

13 Now, Ms. O'Connell identifies that she believed the spill to be drying.
14 The problem with that assertion is it's not based on anything other than her pure
15 speculation because we don't know what that substance in fact was. This isn't
16 a case, and I know we cited it in our briefing, where there's ketchup on the floor
17 or some specific substance that is readily identifiable. We don't know what the
18 substance was. And so in order to make a conclusion as to how long it had been
19 there you have to at least have some evidence of that. All we know, it was green,
20 sticky, and Ms. Elias testified that she thought it might have been syrup or honey
21 or something to that effect. But what it ultimately comes down to is that there is
22 insufficient as a matter of law to establish that that substance was on the floor
23 for any particular period of time. And that in fact is the plaintiff's burden in this
24 particular case and she has not met that burden.

1 So I think with regard to the constructive notice issue, I think as a
2 matter of law you have to find in favor of Wynn on that particular issue. And again,
3 I understand Your Honor's tentative ruling in that regard, but I did want to highlight
4 it and note it for you.

5 I think the more important issue that we're confronting is the
6 apportionment issue, and in Nevada a defendant is only liable for the aggravation
7 of a pre-existing condition. In fact, we had a jury instruction specifically on that
8 issue.

9 THE COURT: Number 37.

10 MR. SEMENZA: Number 37. Exactly. And in Number 37 there was
11 intertwined this notion of the eggshell plaintiff, okay. And in essence basically
12 regardless of the plaintiff's condition and the foreseeability of harm relating to the
13 plaintiff's condition, the defendant is liable for any aggravation of a pre-existing
14 condition. Now, where I think the disconnect comes in is that it is plaintiff's
15 obligation and burden to establish what that aggravation is. It's not the defendant's
16 obligation, it's in fact the plaintiff's obligation. And the plaintiff did not meet her
17 burden in this particular case relating to that specific issue.

18 And that goes back now to the Schwartz case and the Kleit case and
19 what Judge Dawson had ultimately concluded. And what Judge Dawson concluded
20 was that in the context of a single tortfeasor, which we have in this particular case,
21 it is the plaintiff's burden to apportion those aggravating injuries versus the pre-
22 existing condition. And in the Schwartz case Judge Dawson did an analysis of the
23 experts that were providing opinions relating to that apportionment issue and Judge
24 Dawson concluded that that is the standard in Nevada. And in doing so, Judge

1 Dawson also looked at the Kleit case and the I think Phennah case, if I've got the
2 pronunciation correctly, and he distinguished those cases from the case that he
3 was adjudicating in that those cases involved multiple tortfeasors.

4 And the rationale in the Kleit case for putting the burden on the
5 particular defendants was this. When a plaintiff is injured and has established that
6 multiple defendants are responsible for the harm, the defendants are in the best
7 position to evaluate their respective liability as between themselves. The burden
8 then shifts to the defendants. But in this particular case and in the Schwartz case
9 we don't have those facts. This is one plaintiff versus one tortfeasor and the burden
10 remains with the plaintiff throughout that analysis. That's what the Schwartz case
11 says and it's directly on point with regard to the facts in this case. And so, again,
12 the burden is on the plaintiff to establish causation and to establish that there was
13 an aggravation of a pre-existing condition.

14 Now, yesterday afternoon we had provided to the Court, in light of her
15 tentative ruling -- I don't know whether you've had an opportunity to review it or not.

16 THE COURT: Yeah, I did, even though I don't know that it's appropriate
17 to supplement, you know, the day before a hearing.

18 MR. SEMENZA: And I understand that, Your Honor.

19 THE COURT: But I did look at it.

20 MR. SEMENZA: I understand that, Your Honor. And it was meant for
21 illustrative purposes and I would like to take a moment and just walk through that
22 case very briefly. And I did provide a copy to opposing counsel.

23 First of all, it's a Supreme Court of Minnesota case decided in 2015
24 and I think it provides the analysis by which this Court is bound and by which Judge

1 Dawson rendered his conclusion. In that particular case it discussed the eggshell
2 plaintiff doctrine and it stated, and this is on page 28 -- it's page 12 of 22 of the
3 document. "The eggshell plaintiff doctrine states that there a tort is committed and
4 injury may be reasonably anticipated, the wrongdoer is liable for the proximate
5 results of that injury, although the consequences are more serious than they would
6 have been had the injured person been in perfect health." That's fine; I take no
7 issue with that. "The eggshell plaintiff doctrine is not a mechanism to shift the
8 burden of proof to the defendant; rather, it makes the defendant responsible for
9 all of the damages that the defendant legally caused, even if the plaintiff was
10 more susceptible to injury because of a pre-existing condition or injury. Under this
11 doctrine --

12 THE COURT: Let me interrupt you for a second.

13 MR. SEMENZA: Of course. Please.

14 THE COURT: Because as I read this case, what the supreme court in
15 that state held in Minnesota, it said that the civil -- the instruction that was given
16 misstated Minnesota law because it said that the jury instruction that was given
17 where it said if you cannot separate damages caused by the pre-existing disability
18 or medical condition from those caused by the accident, then defendant is liable
19 for all of the damages. Well, we gave a jury instruction that in fact --

20 MR. SEMENZA: Yes, we did.

21 THE COURT: -- that in fact said that they're not, you know --

22 MR. SEMENZA: We did give that jury instruction.

23 THE COURT: Yeah.

24 MR. SEMENZA: And I understand your point, Your Honor. First of all,

1 the plaintiff acknowledges that they never apportioned. They didn't. They've
2 acknowledged that. Furthermore, the plaintiff has never identified that they could
3 not apportion and that's the issue, that in an instance where apportionment can be
4 undertaken, and we believe that apportionment could have been undertaken, there's
5 an obligation to do so, and that's the issue that I have.

6 THE COURT: All right. So let me ask you this question.

7 MR. SEMENZA: Yes.

8 THE COURT: We have an unusual posture in this case, and that is that
9 you were able because of pretrial decisions or lack of adhering to the rules regarding
10 discovery, plaintiff was not able to put in proof of special damages. So because of
11 that the jury wasn't even asked to say, okay, what part of her medical treatment was
12 due to pre-existing and what part was due to --

13 MR. SEMENZA: You're right.

14 THE COURT: -- the causation of the accident. Now, I have to disagree
15 with you a little bit because my recollection of Dr. Tingey's testimony at trial was that
16 he said -- and I can't remember which knee it was now, but he said that one knee --

17 MR. SEMENZA: Related.

18 THE COURT: -- one of the knees was related, one absolutely not.

19 MR. SEMENZA: Correct.

20 THE COURT: And the reason was because he could tell from the films that
21 one was a pre-existing degenerative condition, the other looked to him like an acute
22 injury. So basically the jury is instructed that they -- you know, she's not entitled
23 to anything that was pre-existing. He also talked about, you know, what kind of
24 surgery would be needed to repair, etcetera, etcetera. And Dr. Dunn's testimony

1 was basically, well, she has, you know, the conditions that I found and I believe
2 they're related to the jury because she was asymptomatic -- she reported being
3 asymptomatic. And, you know, of course plaintiff testified herself. So it goes to
4 the jury in the posture of they have to decide only pain and suffering.

5 MR. SEMENZA: Right. And, Your Honor, I don't think it matters. If the
6 case is a case where there are medical specials or where there aren't medical
7 specials, the jury is put in the same position. Experts have to opine as to the
8 aggravation, whether you're looking at damages for pain and suffering or you're
9 looking at medical specials. That's what Judge Dawson essentially said. And so
10 regardless of whether the specific -- whether medical specials were being sought or
11 not, it shouldn't matter and it doesn't matter. The jury is not in a position to evaluate
12 pain and suffering damages without expert testimony establishing the apportionment
13 between aggravation and pre-existing conditions. It doesn't and shouldn't make a
14 difference because the jury is still left to speculate. And in this --

15 THE COURT: Are you saying that you think that an expert must take the
16 stand and say some -- you know, use the talismanic phrase, well, I'm apportioning
17 this amount? Because Dr. Dunn's testimony -- you know, I mean, the jury chose to
18 believe that testimony. You know, they get to reject or accept an expert's testimony.

19 MR. SEMENZA: Correct, Your Honor.

20 THE COURT: But he testified that I feel it was all a result of the accident
21 because she reported that she was asymptomatic before and she was -- and, you
22 know, there was other testimony to support not only her reporting of that because
23 we had the boyfriend, right --

24 MR. SEMENZA: Correct.

1 THE COURT: -- who testified that, you know, we used to go swing dancing
2 and whatnot and it was after the accident that that changed. So that gives some
3 corroboration, if you will, to her reports.

4 MR. SEMENZA: Right, and I understand that. But my understanding and
5 my recollection of Dr. Dunn's testimony was that he didn't make a specific finding as
6 to what was aggravation and what was pre-existing. There was no specific or even
7 general conclusion with regard to that because Dr. Dunn said, look, she has a pre-
8 existing back problem. And when questioned about that, could her symptomology
9 be the result of fibromyalgia, her back problems, stress, depression, anxiety, all of
10 those sorts of things, the answer was yes. Yes.

11 And in addition to that, and let me switch to Dr. Tingey for a moment.
12 Dr. Tingey acknowledged that some of her pain symptomology specifically could
13 have been a result of the osteoarthritic condition in her right knee, the same knee
14 he concluded, look, it was a traumatic injury, okay. But again, the obligation of
15 the plaintiff is to prove that aggravation and the only way to do that is through the
16 specific expert testimony of the doctors. And you can't just simply say -- Well, I
17 take that back. You could say as an expert is a hundred percent related, everything
18 across the board is related to the injury that the plaintiff is suing the defendant for.
19 That's a possibility. The expert could also say none of it is related. But given
20 the questioning of both Dr. Dunn and Dr. Tingey and their equivocation as to the
21 relatedness, they're put in a position where they have to specifically describe what
22 is related and what is not related. And the jury -- if that's not done, the jury is left
23 to speculate.

24 So stepping back a moment, given that those things weren't done in

1 this particular case, the damages award to the plaintiff is defective on its face. Now,
2 I understand the evidentiary rulings that the Court made as far as retained experts,
3 as far as treating experts, all of those sorts of things, but it doesn't change the fact
4 that the plaintiff still has the obligation to do what she has to do to prove her case.
5 And this is a pre-existing condition case.

6 And I think the Schwartz case encapsulates the law in Nevada. And
7 jumping -- and again, I know my time is almost up and I don't want to belabor the
8 point. There was some reference in your tentative ruling to the Restatement not
9 supporting our theory in that regard that the burden remains with the plaintiff. And
10 in footnote -- this is on page 8 and it's footnote 2, the Restatement Second of Torts
11 is actually cited and this is what it says. Section 1: Except as stated in subsections
12 2 and 3, the burden of proof that the tortious conduct of the defendant has caused
13 the harm to the plaintiff is upon the plaintiff. And then Sections 2 and 3 talk about
14 this multi-tortfeasor situation, which isn't applicable in this particular case.

15 Last, I just want to basically button up the issue, if you will, by saying
16 this, and this is in the concurring opinion to the majority opinion in the Minnesota
17 case. And this is on page 18 and it's the noted page 47.

18 THE COURT: Okay, wait, let me get there. This is on page 18 of the
19 Minnesota case?

20 MR. SEMENZA: 18 of 22. Yes.

21 THE COURT: I must have a different --

22 MR. SEMENZA: Right above the dissent.

23 THE LAW CLERK: What's the pin cite?

24 THE COURT: Yeah.

1 MR. SEMENZA: The pin cite is page 40 -- 7 -- it's just above 748, the
2 single asterisk.

3 THE COURT: All right, just a minute. Okay.

4 MR. SEMENZA: Okay. So this is the citation and it cites to liability and
5 litigation, section 6.6, second edition, 2002. Quote: "Where the aggravation of
6 a pre-existing injury is involved, generally the plaintiff has the burden of proof on
7 apportioning the injuries which are a result of the pre-existing condition and those
8 which are a result of the aggravation of the condition." That's the state of the law,
9 I believe, in Nevada. That's what Judge Dawson concluded. And that's the law
10 by which the jury instructions were based. In this particular case the plaintiff has
11 not met her burden, admittedly so, by taking the position that she did not have to
12 apportion. She has to apportion in this case. She didn't do so.

13 So the remedy and the result in this particular case, if you agree with
14 the argument, is essentially this. I don't think the verdict itself should be modified.
15 The verdict was in favor of the plaintiff based on the factual underlying liability.
16 Understood. But given the failure to apportion, the damages have to be reduced
17 to zero in this particular case because she has not established any entitlement to
18 damages. And I'll go ahead and let opposing counsel argue.

19 THE COURT: Thank you.

20 MS. MORRIS: Good morning.

21 THE COURT: Good morning.

22 MS. MORRIS: I'll be very brief because my understanding is we had
23 fifteen to twenty minutes in entirety and I want to make sure that we address the --

24 THE COURT: No, you had a half an hour. I'm starting my trial at 9:00.

1 MS. MORRIS: Okay.

2 THE COURT: But since the tentative ruling is in your favor, I want you to
3 address --

4 MS. MORRIS: I'll solely address the case which was submitted last night
5 by Mr. Semenza. And I think the biggest issue is that throughout that case he
6 keeps interchanging pre-existing injury and pre-existing condition. And in that
7 case she had gone to the chiropractor for treatment for pain just a few days before
8 the accident that she was in in which they were litigating that case. And I think that
9 is the sole issue. They want to apportion pain that didn't exist before. You can't
10 apportion pain that didn't exist before. And as much as they would like to, there
11 wasn't pain before. There was no medical records to show she treated with any
12 doctor for pain. She testified she didn't have pain. There was corroborating
13 testimony that she didn't have pain. She has a degenerative spine which was
14 pain free. She did not have a pre-existing injury. She had an injury -- she had a
15 condition and that condition caused pain after her fall.

16 And so that's the key. And even when he was reading to you from
17 that page 18, it said pre-existing injury and there's a reason for that. If there had
18 been any type of injury to her body which she was feeling pain prior to, that she had
19 gotten treatment for, that she admitted to the pain for, then there would be a need to
20 apportion. But you simply cannot apportion pain that did not exist prior to the injury,
21 and I think that is the most important point and that is on point with Nevada law.
22 Had she had a pre-existing injury and there was pain recently that she had been
23 treating for and we had all of those issues come up at trial, that would be something
24 that we would be talking about today, but that's simply not the case. And the case

1 that he submitted even late addresses simply that, that there was an injury and that
2 she had treated with a chiropractor before the car accident they were litigating for
3 and they thought, okay, there's a need there to apportion. That's not the facts in this
4 case and not applicable to the arguments that were here at trial. And as much as
5 he's going to keep arguing it, the issue is that it was a condition that was pain free,
6 so there is no need to apportion.

7 THE COURT: All right.

8 MR. SEMENZA: Just briefly, and then we can turn to the motion. I don't
9 think there's a material distinction between condition and injury because the issue
10 here is whether the condition caused pain. So there is no distinction. And what
11 I believe I heard plaintiff's counsel say is that if it was an injury they would have
12 an obligation to apportion. But again --

13 THE COURT: No, I think what she's saying is the testimony was that she
14 was pain free before. She doesn't dispute that she had this degenerative spine.
15 It's just that she disputes that she had any symptoms as a result of that and that
16 then she had this accident and after that she had all the symptomatology.

17 MR. SEMENZA: But again --

18 THE COURT: And she wouldn't have needed any treatment, she wouldn't
19 have had any pain but for this accident. That's what she's saying, I think.

20 MR. SEMENZA: But that's the speculative nature of what we're talking
21 about here today because the doctors have to testify to that. If she was experiencing
22 pain after the accident, the doctors have to affirmatively say essentially she would
23 have experienced no pain essentially had she not fallen and they didn't do that.

24 The only -- the other example I just want to briefly raise and then I'll sit

1 down is the notion of the subsequent fall that she had. She had a subsequent fall,
2 I believe, in July of 2010 where she injured her right knee. That was in the medical
3 records. That's not at issue. Again, there's no apportionment with regard to that
4 because Dr. Tingey didn't know it took place. That's a material defect in the plaintiff's
5 case. You can't allow a damages award to stand when there is no medical testimony
6 on the aggravation issue when there is a subsequent injury or a previous injury or
7 condition, and that's what we have in this particular case.

8 So again, I don't think that the award of damages can stand based
9 upon a material failure to apportion the pre-existing conditions, the subsequent fall
10 and all of the other problems that Ms. O'Connell was facing, the medical problems
11 that she was facing at the time.

12 THE COURT: Do you want to address that at all, as far as the subsequent
13 fall?

14 MS. MORRIS: I'll just address it briefly, yes. It wasn't a subsequent fall.
15 She had a slip in which she did not go down, and Dr. Tingey addressed that on the
16 stand and discussed that issue. There was no reported increase in pain as a result.
17 And he stuck to his testimony to a reasonable degree of medical probability he
18 believes the tear in her right knee is a result of the fall, and the jury has a right to
19 rely on that. If they chose to believe in the questioning from counsel that it could
20 have caused, even though there was nothing in the medical records, they chose
21 not to. They had sufficient evidence to believe that the fall she had at the Wynn
22 was the cause of the tear and believed Dr. Tingey's testimony. Thank you.

23 THE COURT: Let's move on to the -- well, let me rule on the first motion.
24 Was I surprised at the verdict? Yeah, probably so, and then in other ways no,

1 because basically liability really wasn't addressed. You approached this from --
2 largely from defending it as a damages case, which is fine, that's a strategic
3 decision and maybe, you know, the whole issue of constructive notice was difficult
4 to defend because if in fact the company didn't have sweep logs, they hadn't
5 thought to go back and preserve video, for instance, going back to show that the
6 sweepers were through or maybe they did and it wasn't helpful to you, I don't know,
7 but we're stuck with what we had.

8 And I think that the testimony, albeit thin on the issue of the spill
9 and that it was drying, there was I think enough -- I don't think you need to have
10 an expert come in and say, well, the humidity in this particular room at this time was
11 X and, you know, if you put it out and you spread it out over this amount of area
12 and so it was so many millimeters thick it would have taken X number of minutes
13 or seconds or hours or whatever to dry, I mean, I don't think that that is necessary.
14 I think that common sense can be applied to that, that the jury can take that as a
15 belief that it was there long enough that there was constructive notice of the spill.
16 So I think that given all of the testimony taken together, as I described, it gets you
17 past the issue -- gets the plaintiff past the issue of whether they have met their
18 burden for the notice.

19 As far as the apportionment, you know, I think that your expert
20 basically testified none of this was believable and he explained in detail why that
21 was. You know, personally I thought his testimony was -- as I listened to the
22 substance of it was persuasive. The problem was his delivery. I mean, he was
23 arrogant. He was one of the worst expert witnesses I've ever seen testify. And
24 the jury probably hated him and so didn't listen to really what he was saying.

1 MR. SEMENZA: The jury actually liked him, strangely enough.

2 THE COURT: Interesting. Interesting, because I heard other comments,
3 neither here nor there because they weren't part of the trial, that people didn't
4 like him. But at any rate, obviously they didn't -- they weren't persuaded by his
5 testimony.

6 But I think that as far as the apportionment argument here there
7 was sufficient testimony. Dr. Dunn testified that he believed that she -- you know,
8 based upon her history that's what he based his decision on that she was pain
9 free. There was no evidence to the contrary, no testimony from her that she had
10 treated for or had back pain prior. Remember, Dr. Dunn's testimony was that
11 he's a surgeon, he advised surgery not to cure her condition because she has a
12 degenerative condition but to give her pain relief, and that she was complaining of
13 such excruciating pain -- remember, we talked a lot about her complaints of being
14 10 all the time -- that he would say she would need that or it could potentially give
15 her pain relief and that she had this pain. Remember, again, we have to come
16 back to the jury is talking about and asked to decide what her pain and suffering
17 was. That's all. She didn't even -- we didn't even have -- I can't remember now,
18 was there future --

19 MR. SEMENZA: Yes, there was future pain and suffering.

20 THE COURT: There was future pain and suffering. Right. And so that's all
21 they were looking at, not what was the cost of this -- her past medical treatment or
22 the cost of her future need for surgery, which would have been a whole different ball
23 of wax because then there would have I think needed to have been some way of
24 dividing that into, okay, what's pre-existing, what's not potentially. Although again,

1 for Dr. Dunn, as far as his opining regarding, you know, that he was offering her the
2 surgery as a method of pain relief, he never talked about the cost of the surgery
3 because that wasn't going to be at issue.

4 MR. SEMENZA: And that's a distinct issue, though, from the aggravation
5 issue. The harm or what she's expected to have in the future by way of medical
6 care or pain and suffering, that's what he -- I mean, he discussed that. The issue
7 that I have, though, is that doesn't go to the issue of aggravation, that goes to the
8 issue of what she's going to experience generally in the future. But the issue was
9 never addressed as to whether is it her osteoarthritic back or is it the fall at the
10 Wynn or is it a subsequent fall in July of 2010, and that's the real problem I have.

11 Now, the plaintiffs have conceded they didn't apportion. They say it.
12 And if they have an obligation to apportion it based upon the law, then I think the
13 result is obviously clear. You have to find in favor of us on that issue.

14 THE COURT: All right. Well, I think we discussed at length the issue of
15 the federal district court ruling vis-a-vis apportionment, and my concern about that
16 whole ruling was when the statement was made that if apportionment isn't shown
17 by a plaintiff in a single tortfeasor case then it can't go to the jury; that the citation
18 was to cases that were multiple tortfeasors. And so I don't think that he -- the judge
19 in that case did distinguish. But we've tortured that issue to death, and so --

20 MR. SEMENZA: With all due respect to you --

21 THE COURT: -- because we addressed it during the trial, as well as there
22 were motions.

23 MR. SEMENZA: Well, we did address it when I moved for a judgment
24 as a matter of law originally, and the way I recall it is that basically you deferred it

1 and that there was discussion concerning, well, it's more a jury question or a
2 jury instruction issue, which I didn't agree with. But I don't think we ever have
3 specifically addressed the apportionment issue other than through our -- my
4 original oral motion during trial and this motion here today.

5 THE COURT: All right. Well, maybe I'm incorrect on the procedural
6 posture on that, but I certainly had considered that and reviewed the case because
7 I remember the first time it was brought to my attention and I went, wow, okay, but
8 then that's when I read the cases that he's citing to and tried to read the case more
9 closely and found that the cases he cited to in his opinion didn't support the finding
10 there. And I still don't think that that's what we have. We had a jury instruction that
11 told them -- that told the jury that she wasn't entitled to anything that -- you know,
12 any damages or -- yeah, damages that were the result of a pre-existing condition
13 and that if a pre-existing condition was aggravated, she would be entitled to that,
14 but they apparently found that. And I think that the experts did talk about that
15 because -- as well as not only did they talk about it but that was also corroborated
16 through other evidence that apparently the jury believed. They could have
17 disbelieved it. But to me I think they believed that she was asymptomatic before
18 this fall and that that was the source of her pain and suffering subsequently and
19 they apparently believed her reports of how serious that pain was.

20 So the motion is denied for the reasons and arguments I've set forth.
21 And, you know, I realize that no matter what my ruling was in this case it would be
22 appealed.

23 MR. SEMENZA: I think you're correct in that regard.

24 THE COURT: And so we'll get some further instruction that may be helpful --

1 MR. SEMENZA: Thank you.

2 THE COURT: -- going forward from the supreme court.

3 Now let's talk about the motion for fees and costs.

4 MR. SEMENZA: And maybe I can short-circuit things a bit. As far as the
5 costs issue are concerned, I understand your tentative ruling. I'm fine with the
6 tentative ruling relating to the costs. I do think, and I'm just going to mention this
7 for the record, that I don't think that there was a sufficient showing as to permitting
8 either Dr. Dunn or Dr. Tingey to receive an expert fee in excess of the \$1,500.
9 And I do that -- I make that argument on the basis that essentially our position is
10 and has always been that these two individuals were character witnesses for the
11 plaintiff essentially, that there wasn't a whole lot, if any, substantive medical
12 evidence supporting basically anything other than her having pre-existing issues.
13 And so the testimony was essentially that based upon her description of pain that
14 they attributed the injuries that she claims to have suffered to the fall. So I don't
15 think that they've met that threshold showing that the fee in excess of \$1,500
16 was necessary. But I do understand the Court's order or tentative ruling relating
17 to the costs.

18 THE COURT: All right. So vis-a-vis that, I guess what I look at is obviously
19 those witnesses were necessary for the trial. The statute regarding the fees for
20 experts I believe hasn't been amended for something like twenty years, during
21 which time we've had a great -- we went through a very great inflationary period.
22 Obviously no one can get an expert to come to court, nor has the Discovery
23 Commissioner in years talked about forcing an expert to trial -- or, excuse me, a
24 deposition for something like \$1,500. Even chiropractors, who I don't think should

1 be allowed to use the term doctor, they would get paid more than \$1,500. And so
2 I think that the requested amount for Dr. Dunn was inappropriate and that's why I
3 found that, yes, they're entitled to more than the \$1,500. But, you know, the amount
4 that I allowed would be the reasonable fee and that was why.

5 MR. SEMENZA: Understood, Your Honor. And then the only other point
6 with regard to the costs is I do want to make sure that the plaintiff has actually paid
7 the costs that it is claiming in the memorandum of costs. And I don't know that that
8 has been specifically identified, and maybe Ms. Morris can specifically identify it
9 for the record.

10 THE COURT: Wasn't that in your declaration?

11 MS. MORRIS: It was. All of our costs have been paid in full; all of them.

12 MR. SEMENZA: Thank you. And I'm certainly comfortable with that
13 representation.

14 THE COURT: Thank you.

15 MS. MORRIS: There's a couple of things I wanted to address since we're
16 talking about the fees. First off is the issue of subpoenaing the witnesses, Corey
17 Prowell and Yanet Elias. I have emails here back and forth from Mr. Semenza
18 requesting where we should actually serve those subpoenas over at his office, so
19 that was certainly required. Sal Risco, I had been out of contact with and had been
20 leaving him multiple messages and actually had to drive to his house in Sun City
21 to make sure he was still around and subpoenaed him to make sure that he would
22 show at court because I certainly didn't want to have a no show witness and that
23 would be my fault because I hadn't properly subpoenaed him. So those were, in
24 my opinion, very necessary for us to go forward with the trial.

1 THE COURT: Okay. So those would be allowed as well because that
2 addresses the question I had. Obviously if Mr. Semenza had said, oh, you don't
3 need to serve those people, just mail me the subpoenas --

4 MR. SEMENZA: I looked at the emails and we made the representation
5 that service could be done at our office, that we would accept service as opposed
6 to email service or something else, so I'm not going to argue with that point.

7 THE COURT: Okay.

8 MS. MORRIS: And then I wanted to address Dr. Dunn just briefly. Now,
9 Dr. Dunn was here on the first day for a sufficient period of time under which he
10 underwent voir dire. There were several reasons for him undergoing voir dire,
11 one actually being the fact that he was never deposed in the case, and so defense
12 wanted to know the breadth of his testimony and whether he was going to be able to
13 testify as to when he formed his opinions regarding causation. During that voir dire
14 he went above and beyond simply that. He started asking him about Dr. Tingey,
15 other people in his practices, and the voir dire went on for quite an extensive period
16 of time, which ended that Dr. Dunn could only just begin his testimony on that first
17 day.

18 And in fact on the second day when Dr. Dunn did come back, he came
19 back and accommodated us with his schedule as well because he had been only
20 prepared to come that one day. But it was late in the evening and we had to be
21 done with that day, and so he did come back. On the second day when he testified,
22 I did a page count, he testified more on the second day, actual testimony, 45 pages
23 of it, than he did on that first day because the first day was voir dire. So the majority
24 of his testimony was on the second day to the jury.

1 THE COURT: I understand, but as I recall the reason we had to go through
2 that was because he was disclosed in an untimely fashion.

3 MS. MORRIS: That was Dr. Tingey. And that was because Dr. Martin had
4 been treating her and then Dr. Tingey took over.

5 THE COURT: And there were issues with the proper disclosure of an
6 expert, so I'm not changing my mind on that.

7 MS. MORRIS: I would just like to point out that Dr. Tingey -- Dr. Dunn was
8 known to them the entire time and they chose not to take his deposition, and that
9 was a major part of why the voir dire took such an extensive period of time, causing
10 the extra payment of \$5,000. The issue is is that when there are fees and costs
11 which can be put on the other side -- when we have an offer of judgment that goes
12 out, the purpose of it is to prevent unnecessary litigation and unnecessary expense.
13 And it is certainly not plaintiff's issue that this took so long. It was not as if it was so
14 extensive that plaintiff had done all this to need to bring Dr. Dunn and pay \$10,000
15 for him to come. That's quite excessive. And the purpose of the offer of judgment
16 is to say, okay, we encourage settlement, we encourage none of this unnecessary
17 litigation. And when there is a cost like that, it's clearly borne out in the trial
18 transcript why he had to come back and how much testimony he gave on that
19 second day.

20 THE COURT: Okay. But the bottom line is, yes, as the prevailing party
21 you're entitled to your costs anyway regardless of the offer of judgment issue,
22 okay. But the Court still has to issue costs that are reasonable, right? And so the
23 statute regarding expert costs limits to fifteen. Now, I realize if you beat an offer of
24 judgment there's a specific section regarding experts, but the Court still has to make

1 a determination about what a reasonable expert fee would be. And I still believe
2 that part of the reason we had to go through that additional testimony was -- my
3 recollection was that that was because the expert disclosures weren't done properly.
4 And so had they been done properly we might have a different story, but I'm not
5 going to change my mind on that.

6 MS. MORRIS: Okay. I just -- I would like to state that I believe that there
7 was nothing unreasonable in the way that Dr. Dunn had to come and be paid --

8 THE COURT: Okay, I've heard that now.

9 MS. MORRIS: -- in order for the evidence to get before the jury.

10 THE COURT: All right, thank you. Now, you want to talk about your
11 attorney's fees?

12 MS. MORRIS: Yes.

13 THE COURT: Okay.

14 MS. MORRIS: So, the attorney's fees and costs issue, I'd like to address
15 that because as we went through -- I read through the tentative ruling and I
16 completely understand it. The offer of judgment which we sent which was, you
17 know, far after discovery had closed, was sent when they had the entirety of her
18 medical expenses, which were in excess of \$37,000. And they knew that she had
19 been in need of a three level cervical fusion and they knew that she needed (sic)
20 a meniscus tear. So all of that was known to them and all of the issues regarding
21 causation, whatever would come out, was known to them. And so for an offer of
22 judgment to go out where you have incurred medical expenses of \$37,000 and a
23 need for future surgeries, to reject an offer of \$50,000 is unreasonable and it flies
24 in the face of what the purpose of the offer of judgment is.

1 And when you look at how this case was handled, this was a person
2 who never had any pre-existing injury, and if there was that out there then they
3 would be standing on that and saying we didn't cause this lady any injury, it wasn't
4 our fault. But they had none of that. All they had was her injury showing directly
5 after bruising, showing -- medical records showing the injury had consistently gotten
6 worse, conservative care had failed and she was now a surgical candidate. They
7 had all of that information. And so instead of looking at it and attempting to evaluate
8 the case in a reasonable manner, they rejected an offer of \$50,000 and chose to
9 take it to trial. And at trial they put forth what their case was, but was it reasonable
10 for them to reject an offer that was so reasonable? It was one of those ones where
11 what basis did they have for saying this isn't a reasonable offer and we have no
12 reason to even accept it or think about it, we're going to take this stuff to trial? Their
13 litigation of the case was in bad faith. They didn't have any evidence that her pain
14 came from anywhere else.

15 THE COURT: All right. So I just reject that because, frankly, I see this
16 could have been a defense verdict quite easily. It wasn't, and that's always the risk
17 that anyone takes when they go to a jury trial. I don't think it was in bad faith, given
18 -- rejecting such an offer, given the fact that, I'm sorry, but you pretty much argued
19 to the jury that your client was crazy. I mean, you said that, that she --

20 MS. MORRIS: Well, Your Honor, I disagree with that, and she's in the
21 courtroom and I would --

22 THE COURT: Okay, but you did.

23 MS. MORRIS: I said that she hadn't handled it well and that it had affected
24 her emotionally.

1 THE COURT: Yeah.

2 MS. MORRIS: And I don't believe that's in any way to interpret that she's
3 crazy.

4 THE COURT: All right. Well, both on liability was a thin case. Thin; not
5 to say that you didn't make it across the finish line to avoid a 50 Rule, but it was
6 thin. And the damages case, there was a strong damages case on the part of the
7 defense. I don't think that it was in bad faith for them to reject that offer. Plus,
8 you didn't ever give them your damages calculation.

9 MS. MORRIS: I did.

10 THE COURT: No, you didn't.

11 MS. MORRIS: \$37,900. It was disclosed throughout litigation.

12 MR. SEMENZA: In all fairness, I mean, it included her heart problems, her
13 alleged eye issues; all of the things that we addressed during trial which were totally
14 unrelated. And then during trial she basically abandons her calculation and says,
15 oh, we're just seeking a pain and suffering award and that's it. So we were in the
16 dark and we had repeatedly asked her for that information to find out specifically
17 what are you realistically claiming in this case, which we never heard until the trial
18 began. And that's the issue.

19 MS. MORRIS: And I respectfully disagree. I was never asked to provide
20 an actual calculation. There was none of those conversations that occurred.

21 MR. SEMENZA: You're obligated to do so.

22 THE COURT: All right. So anyway, in my tentative ruling I addressed each
23 of the Beattie factors. I've considered all of them. In considering all of them, I feel
24 that those factors weigh on the side of the defense and that's why I'm not awarding

1 attorney's fees in this case.

2 MS. MORRIS: Can I address one last thing and then --

3 THE COURT: No, you're out of time. I mean, I considered all your papers
4 and I've given it careful consideration and we've gone now sixteen minutes past the
5 time I had allotted for the hearing on this. And, you know, of course I didn't have to
6 set any oral argument for this under the rules. So I really have a jury trial I've got
7 to get back to and I've got a jury waiting, I'm sure, outside.

8 THE MARSHAL: Yes, you do, Your Honor.

9 THE COURT: Okay. And so, let's see. On the -- Do you want to prepare
10 the order on the Rule 50? And you'll prepare the order on the costs and fees?

11 MR. SEMENZA: Certainly fine with me, Your Honor.

12 THE COURT: Okay, and incorporate my tentative rulings.

13 MR. SEMENZA: Yes, Your Honor.

14 THE CLERK: So the plaintiff's motion is denied then?

15 THE COURT: Plaintiff -- No, defense -- It was the defendant's motion,
16 renewed motion for a Rule 50.

17 THE CLERK: Yeah, and that was denied.

18 THE COURT: And that's denied. And the defense motion to retax costs --

19 THE CLERK: Oh, it says plaintiff's.

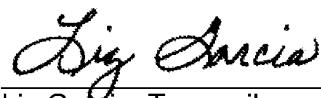
20 THE COURT: Oh. There was a defendant's motion to retax costs. That's
21 granted in part, denied in part. And the plaintiff had a motion for fees and costs that
22 was sort of incorporated. The plaintiff's motion for attorney's fees is denied. But I
23 think that the defense can roll their motion to retax as well as the plaintiff's for fees
24 and costs into the same order.

1 MR. SEMENZA: I'll do a unified order in that regard, Your Honor.
2 THE COURT: Okay, thank you.
3 MS. MORRIS: Thank you.
4 MR. SEMENZA: Your Honor, just briefly. Thank you for your time in this
5 particular matter and being as patient as you have been with all of us, so thank you.
6 THE COURT: Of course. Of course. And it was very -- thank you, you
7 were very respectful lawyers all during the trial and I appreciated that very much.
8 Thank you.

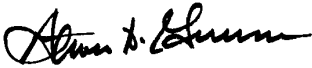
9 (PROCEEDINGS CONCLUDED AT 9:18 A.M.)

10 * * * * *

11
12 ATTEST: I do hereby certify that I have truly and correctly transcribed the
13 audio/video proceedings in the above-entitled case to the best of my ability.

14 

15 Liz Garcia, Transcriber
16 LGM Transcription Service
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CLERK OF THE COURT

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

YVONNE O'CONNELL, an individual,

Plaintiff,

vs.

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

Defendants.

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

**ORDER DENYING DEFENDANT'S
RENEWED MOTION FOR
JUDGMENT AS A MATTER OF LAW
OR ALTERNATIVELY FOR A NEW
TRIAL OR REMITTITUR**

On March 4, 2016, the Court held a hearing on Defendant's Renewed Motion for Judgment as a Matter of Law or Alternatively for a New Trial or Remittitur. Christian Morris, Esq., and Edward J. Wynder, Esq., of NETTLES LAW FIRM appeared for the Plaintiff. L.J. Semenza, III, Esq., and Christopher D. Kircher, Esq., of LAWRENCE J. SEMENZA, III, P.C., appeared for the Defendant. The Court, having reviewed the pleadings and papers on file, and having heard the arguments of Counsel, and good cause appearing therefor, **HEREBY**

ORDERS AS FOLLOWS:

I. FACTUAL BACKGROUND

1 This is a personal injury action resulting from Plaintiff's slip and fall at Defendant's
2 casino. A jury trial was held and the jury found in favor of Plaintiff on November 16, 2015. The
3 jury awarded Plaintiff \$150,000 for past pain and suffering and \$250,000 for future pain and
4 suffering, finding her to be 40% at fault. Accounting for Plaintiff's comparative fault, her total
5 award was \$240,000. Defendant (hereinafter "Wynn"), having moved for judgment under NRCP
6 50 at the close of Plaintiff's case, filed a renewed motion for judgment as a matter of law or,
7 alternatively, a motion for new trial or remittitur.

8 At trial, Plaintiff (hereinafter "O'Connell") testified that she fell after slipping on what was
9 described as a pale green, sticky, liquid substance on the floor. There was no evidence presented
10 by O'Connell that Wynn had caused the foreign substance to be on the floor. While O'Connell
11 speculated that the substance may have been water from the irrigation system in the atrium area
12 where she fell, she presented no evidence that such was the case. Rather, O'Connell called, in
13 her case in chief, an employee of Wynn who testified that she responded to the area of the fall
14 immediately after the fall and she observed a substance on the floor which had been covered by a
15 sweeper machine brought to clean up the area. She described the substance as looking "a little
16 sticky—like honey." Trial Transcript ("TT"), Vol. 3 at 71:23-72:4. On cross-examination, the
17 witness, when confronted with her previous deposition testimony, agreed that she had described
18 the liquid substance as "something like a syrup, like a drink, like something like that." *Id.* at
19 76:6-10. Additionally, O'Connell presented no evidence that Wynn had actual notice of the
20 foreign substance on the floor, and her counsel argued that it was in fact a constructive notice
21 case, not an actual notice case.

22 **DISCUSSION**

23 **A. Legal Standards and Applicable Statutes**

24 NRCP 50 provides in pertinent part:

25 (a) Judgment as a matter of law.

26 (1) If during a trial by jury, a party has been fully heard on an issue
27 and on the facts and law a party has failed to prove a sufficient
28 issue for the jury, the court may determine the issue against that

1 party and may grant a motion for judgment as a matter of law
2 against that party with respect to a claim or defense that cannot
3 under the controlling law be maintained or defeated without a
4 favorable finding on that issue.

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

14 (1) if a verdict was returned:

15 (A) allow the judgment to stand,

16 (B) order a new trial, or

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

18 NRCP 59(a) provides:

19 A new trial may be granted to all or any of the parties and on all or part of
20 the issues for any of the following causes or grounds materially affecting
21 the substantial rights of an aggrieved party: (1) Irregularity in the
22 proceedings of the court, jury, master, or adverse party, or any order of the
23 court, or master, or abuse of discretion by which either party was
24 prevented from having a fair trial; (2) Misconduct of the jury or prevailing
25 party; (3) Accident or surprise which ordinary prudence could not have
26 guarded against; (4) Newly discovered evidence material for the party
27 making the motion which the party could not, with reasonable diligence,
28 have discovered and produced at the trial; (5) Manifest disregard by the

1 jury of the instructions of the court; (6) Excessive damages appearing to
2 have been given under the influence of passion or prejudice; or, (7) Error
3 in law occurring at the trial and objected to by the party making the
4 motion.

5 “The standard for granting a motion for judgment as a matter of law is based on the
6 standard for granting a motion for involuntary dismissal under former NRCP 41(b). In applying
7 that standard and deciding whether to grant a motion for judgment as a matter of law, the district
8 court must view the evidence and all inferences in favor of the nonmoving party. To defeat the
9 motion, the nonmoving party must have presented sufficient evidence such that the jury could
10 grant relief to that party.” *Nelson v. Heer*, 123 Nev. 217, 222, 163 P.3d 420,424 (2007).

11 **B. Analysis**

12 Defendant presents several distinct arguments in support of its Motion for Judgment as a
13 Matter of Law. These are: (1) there was insufficient evidence presented at trial for a finding that
14 Defendant owed Plaintiff a duty of care; (2) the testimony of Dr. Tingey and Dr. Dunn was
15 improper and prejudiced Defendant; and (3) Plaintiff had a burden to apportion the amount of
16 damages attributable to Defendant and those attributable to prior injuries, but failed to do so.
17 Defendant also argues, in the alternative, that even if it is not entitled to judgment as a matter of
18 law, it is entitled under NRCP 59 to a new trial or remittitur because the jury’s award of future
19 pain and suffering was unsupported, Plaintiff posed improper questions to Defendant’s
20 witnesses, and Plaintiff’s counsel made prejudicial comments to the jury. Each of these
21 arguments will be addressed in turn.

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

24 The law concerning negligence in relation to a foreign substance on the floor is, in some
25 respects, well settled. Where the business owner or its agent caused the substance to be on the
26 floor, liability will lie, as a foreign substance on the floor is not consistent with reasonable care.
27 However, where the business owner or his agent did not cause the foreign substance to be on the
28 floor, a plaintiff must prove actual or constructive knowledge of the floor’s condition, and a

1 failure to remedy it. *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322-323
2 (1993). As stated above, O’Connell produced no evidence that Wynn caused the substance to be
3 on the floor, or that it had actual notice. Thus, the question at issue here was whether sufficient
4 evidence was presented for a jury to find that Wynn was on constructive notice of the spill.

5 Whether a business owner was under constructive notice of the hazardous condition is a
6 question of fact properly left for the jury, *id.*, but this does not relieve the plaintiff from having to
7 admit evidence at trial of constructive notice. In *Sprague*, the Supreme Court noted that “a
8 reasonable jury could have determined that the virtually continual debris on the produce
9 department floor put Lucky on constructive notice that, at any time, a hazardous condition might
10 exist which would result in injury to Lucky customers.” *Id.* at 251, 849 P.2d at 323. Nevada case
11 law has caused some confusion in differentiating between constructive notice and the “mode of
12 operation approach,” the latter of which is specifically discussed in cases decided subsequent to
13 *Sprague*. The fact that there is a difference is made clear in *FGA v. Giglio*, 128 Nev. Adv. Op.
14 26, 278 P.3d 490, 497 (2012), where the court noted that the *Sprague* court had implicitly
15 adopted the mode of operation approach when it “stated that **even in the absence of**
16 **constructive notice**, ‘a jury could conclude that Lucky should have recognized the impossibility
17 of keeping the produce section clean by sweeping’ alone.” (emphasis added). With the mode of
18 operation approach, **which is not applicable in this case**, a plaintiff satisfies the notice
19 requirement (actual or constructive) by establishing that an injury was attributable to a
20 reasonably foreseeable dangerous condition on the owner’s premises that is related to the
21 owner’s self-service mode of operation.¹

22 While evidence of a continuous or recurring condition might amount to constructive
23 notice under *Sprague*, *supra*, and *Ford v. Southern Hills Medical Center*, 2011 WL 6171790
24 (Nev. 2011), that is not the only way of proving constructive notice.² Proof that a foreign
25

26 ¹ No argument was made that the condition was the result of self-service, nor was the jury
27 instructed on this inapplicable area of the law.

28 ² *Ford* stated that “the standard under *Sprague* to prove constructive notice is a virtually
continuous condition.” Of course, *Sprague* does not actually say that—*Sprague* did not establish
a bright line test for what will establish constructive notice, since to have done so would amount

1 substance on the floor had existed for such a length of time that the proprietor in the exercise of
2 ordinary care should have known of it, is another way of proving constructive notice. What
3 would amount to sufficient time to warrant holding that the proprietor had constructive notice
4 generally depends on the circumstances of the particular case and involves consideration of the
5 nature of the danger, the number of persons likely to be affected by it, the diligence required to
6 discover or prevent it, opportunity and means of knowledge, the foresight which a person of
7 ordinary care and prudence would be expected to exercise under the circumstances, and the
8 foreseeable consequence of the conditions. *See* 61 A.L.R.2d 6 §7(b).

9 Moreover, Nevada has made clear that an innkeeper may be found on constructive notice
10 of latent defects upon their premises if a reasonable inspection would have revealed such a
11 danger. *See Twardowski v. Westward Ho Motels, Inc.*, 86 Nev. 784, 476 P.2d 946 (1970). In
12 *Twardowski*, the court held that if a reasonable inspection of its pool slide would have revealed
13 the defective handrails, the Westward Ho would be charged with constructive notice of the latent
14 defect, but that whether the defect would have been discovered by a reasonable inspection was a
15 jury question. The court further noted that “[c]onstructive knowledge of a latent defect can be
16 established by circumstantial evidence.” *Id.* at 788, 476 P.2d at 948. The over-arching theme of
17 a negligence case has been, and is, foreseeability.

18 [T]here is no liability for harm resulting from conditions from which no
19 unreasonable risk was to be anticipated, or those which the occupier did
20 not know and could not have discovered with reasonable care. The mere
21 existence of a defect or danger is not enough to establish liability, unless it
22 is shown to be of such a character or of such a duration that the jury may
23 reasonably conclude that due care would have discovered it.

24 Prosser, *Law of Torts* 393 (4th ed. 1980). Whether reasonable care has been exercised is almost
25 always a jury question, as was made clear by the Nevada Supreme Court in *Foster v. Costco*
26 *Wholesale Corp.*, 128 Nev. Adv. Op. 71, 291 P.3d 150 (2012). Abrogating the holding in

27
28 to an extreme departure from the common law on this subject, including Nevada’s own case law,
and *Ford*, as an unpublished opinion, is not binding precedent upon this Court.

1 *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 370 P.2d 682 (1962), the Nevada Supreme Court
2 adopted the position of the Restatement (Third) of Torts concerning the duty of a landowner.
3 “Thus, under the Restatement (Third), landowners bear a general duty of reasonable care to all
4 entrants. . . . The ‘duty issue must be analyzed with regard to foreseeability and gravity of harm,
5 and the feasibility and availability of alternative conduct that would have prevented the harm.”
6 *Foster*, 291 P.3d at 156 (citations omitted).

7 Here, during O’Connell’s case in chief, Yanet Elias, whose job was that of an assistant
8 manager in the public areas department at Wynn, testified that, “It’s very difficult to maintain the
9 casino, you know, completely clean, because it’s a job for 24 hours. There are people – a lot of
10 people walking through, a lot of children, they’re carrying things. So, it’s impossible to keep it
11 clean at 100 percent.” TT Vol. 3 at 70:22-71:1. Additionally, Ms. Elias testified that she did not
12 know when the area where O’Connell fell had last been inspected prior to her fall, and when
13 asked about how often the area is checked, she testified, “It depends on how long it takes the
14 employee to check the north area and return to the south area, because it’s all considered one –
15 one whole area. And there aren’t always two employees assigned to that area. Sometimes,
16 there’s only one.” TT Vol. 3 at 69:5-11. While she repeatedly answered questions posed by both
17 counsel by stating that she did not recall, Ms. Elias was also repeatedly impeached with her
18 earlier deposition testimony. At one point she admitted that one of the signs that a porter is not
19 doing their job is that there is debris on the floor. *Id.* at 70:3-6)

20 O’Connell also called Corey Prowell in her case in chief, Wynn’s assistant security
21 manager who at the time of the incident was a security report writer. Mr. Prowell responded to
22 the subject incident and eventually wrote a report. He described the scene of the fall as a high
23 traffic area with marble flooring and indicated that upon his arrival, he was told by Ms. Elias that
24 the liquid on the floor had already been cleaned up, and that he was told by another employee
25 that the employee had seen O’Connell being helped up by four other guests. He also testified
26 that O’Connell told him that when she had recovered from her fall, she saw a green liquid on the
27 floor. During her testimony at trial, O’Connell described the “spill” as “at least seven feet” with
28 one side measuring about four feet still in a liquid state, and a three foot portion as “almost dry,”

1 “a little sticky” with “footprints on it.” TT, Vol. 3 at 59:19-24. She described the liquid as
2 having “just a hint of green,” TT, Vol. 3 at 59:12, and elaborating about the footprints she said:

3 They looked like, you know, they were – they looked like mine that I was
4 making, and I’m sure they were from the people that were standing around
5 and helped me up . . . [k]ind of like dirty footprints that you leave after
6 you’ve mopped your floor and you step on it, you walk on it, that’s kind of
7 how it looked.

8 TT, Vol. 3 at 62:19 – 63:2.

9 Wynn argues that “the record is completely devoid of any evidence regarding the length
10 of time the foreign substance had been on the floor.” Mot. at 15-17. While it is true that
11 O’Connell could not testify as to how long the substance had been on the floor, she did testify
12 that a three-foot section of the seven-foot spill was already dry and drying. While the defense
13 seems to suggest that expert testimony would be required, presumably to testify as to the relative
14 humidity within the casino and its relation to the rate of evaporation, common experience would
15 allow a jury to infer that the spill had been in place longer than just a few minutes. As pointed
16 out by O’Connell’s Opposition, there was ample other evidence from which the jury could have
17 found that Wynn had constructive notice of the substance of the floor. Opp. at 11-13. This
18 evidence includes: (1) testimony that the atrium where the substance was located was highly
19 trafficked; (2) testimony that it is impossible for Wynn’s employees to keep the casino floor
20 entirely clean; and (3) testimony that Defendant Wynn had no floor inspection schedule, did not
21 maintain inspection logs, and could not say with certainty when the floor was last inspected prior
22 to O’Connell’s injury. This testimony was elicited from Defendant Wynn’s own employees.

23 “A non-moving party can defeat a motion for judgment as a matter of law if it present[s]
24 sufficient evidence such that the jury could grant relief to that party.” *D&D Tire, Inc. v.*
25 *Ouellette*, 131 Nev. Adv. Op. 47, 352 P.3d 32, 35 (2015) (internal quotations and citations
26 omitted). All of the aforementioned testimony, taken together and drawing all reasonable
27 inferences in favor of the Plaintiff was sufficient to establish that Wynn was on constructive
28 notice of the dangerous condition upon its floor.

1 2. *Whether the testimony of Dr. Tingey and Dr. Dunn was improper*

2 Wynn next makes the argument that the testimony of O'Connell's experts, Dr. Tingey
3 and Dr. Dunn, was improper. Mot. at 19-21. Wynn first argues that the Court improperly
4 admitted their testimony because O'Connell disclosed them as expert witnesses beyond the
5 disclosure deadline. Mot. at 18-19. Wynn argues that its rebuttal expert was unable to review
6 their records and incorporate them into his report. Mot. at 18. However, late production was
7 substantially justified under NRCP 37(c) because O'Connell continued to treat after the close of
8 discovery, treatment records were provided to O'Connell's counsel after the close of discovery,
9 and were provided to Defense counsel soon after their receipt, and because O'Connell had to
10 change treating physicians after Dr. Martin had left the practice. The late disclosed records were
11 only a few pages, the Court permitted the defense to voir dire the doctors outside the presence of
12 the jury before they testified in the presence of the jury, and the Court allowed Wynn's rebuttal
13 expert to sit in the courtroom and listen to the testimony of both Dr. Tingey and Dr. Dunn,
14 allowing him to incorporate his opinions on direct examination. Hence, Wynn was not
15 prejudiced by any late disclosure on O'Connell's part.

16 Wynn also argues that both doctors lacked a sufficient basis for their opinions because
17 they were only based upon Plaintiff's self-reporting. Mot. at 19. In support, Wynn cites to the
18 federal case of *Perkins v. United States*, 626 F. Supp. 2d 587 (E.D. Va. 2009). Notwithstanding
19 the fact that *Perkins* is a federal case,³ it is not on point to the facts here. In *Perkins*, the court
20 found that expert testimony as to medical causation should be excluded because the expert's
21 opinion was based *solely* on the patient's self-reporting – that the expert had merely adopted the
22 patient's explanation *as his own opinion*. *Id.* at 592-593. Here, however, O'Connell's self-
23 reporting did not appear to be the *sole* basis of her experts' testimony. Both doctors testified as to
24 the basis of their opinions, which included not only evaluation of the O'Connell's medical
25 history but also their examination of her, their review of her diagnostic medical tests, and their

26 _____
27 ³ Although not addressed here, this could be significant because Nevada courts do not follow the
28 same procedure for determining whether expert testimony should be allowed as do federal courts
(i.e., Nevada has not adopted the *Daubert* standard).

1 experience in treating orthopedic conditions and the conditions that would result from a slip and
2 fall. There is simply no indication that O'Connell's experts wholly adopted her self-reporting as
3 the sole basis for their opinions as to causation. Moreover, Dr. Tingey was candid in his opinion
4 that he would not attribute all of O'Connell's knee problems to the subject fall because the MRI
5 indicated a degenerative disease process in the left knee as opposed to the right knee.

6 3. *Whether there is legal basis for a finding that Plaintiff bears a burden to*
7 *apportion damages between pre-existing conditions and the harm caused by*
8 *Defendant*

9 Wynn next argues that O'Connell had the burden of apportioning her damages between
10 pre-existing injuries and those injuries caused by her slip and fall at the Wynn but failed to do so.
11 Mot. at 21-25. This is a familiarly incorrect argument (and, indeed, was raised and rejected
12 during trial for the same reasons as it is now) because the legal premises upon which it rests are
13 infirm. The main cause of confusion in this and other cases is the federal case of *Schwartz v.*
14 *State Farm Mut. Auto. Ins. Co.*, 2009 WL 2197370 (D. Nev. July 22, 2009).

15 In that case, Judge Dawson did indeed hold that "[i]n a case where a plaintiff has a pre-
16 existing condition, and later sustains an injury to that area, the Plaintiff bears the burden of
17 apportioning the injuries, treatment and damages between the pre-existing condition and the
18 subsequent accident." *Id.* at *6. However, the cases cited as precedent by Judge Dawson for that
19 statement do not support that assertion. *Kleitv v. Raskin*, 103 Nev. 325, 738 P.2d 508 (1987)
20 involved apportioning damages between injuries caused by successive tortfeasors, not
21 apportioning damages between pre-existing conditions and injuries caused by a sole tortfeasor.

22 Judge Dawson also cited the Washington Court of Appeals case of *Phennah v. Whalen*,
23 621 P.2d 1304 (Wash. App. 1980), but that also involved apportioning damages between
24 successive tortfeasors. The Restatement (Second) of Torts § 433(b), also relied upon, doesn't
25 even concern successive tortfeasors on its face but rather concerns the "substantial factor" test
26 for determining proximate cause. Here, we do not have successive tortfeasors. Rather, we have a
27 Plaintiff who, admittedly, had various pre-existing mental and physical conditions. Therefore,
28 the *Schwartz* case is in error and is inapplicable to this case. Wynn took the O'Connell as it

1 found her and is liable for the full extent of her injuries, notwithstanding her pre-existing
2 conditions. *See Murphy v. Southern Pac. Co.*, 31 Nev. 120, 101 P. 322 (1909).

3 4. *Whether the Defendant is entitled to a new trial or remittitur.*

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

9 This court has held that damages for pain and suffering are
10 peculiarly within the province of the jury. In *Stackiewicz v. Nissan*
11 *Motor Corporation*, 100 Nev. 443, 454, 686 P.2d 925, 932 (1984),
12 this court stated that the trial court cannot revisit a jury's damage
13 award unless it is "flagrantly improper." "In actions for damages in
14 which the law provides no legal rule of measurement it is the special
15 province of the jury to determine the amount that ought to be
16 allowed, so that a court is not justified in reversing the case or
17 granting a new trial on the ground that the verdict is excessive,
18 unless it is so flagrantly improper as to indicate passion, prejudice or
19 corruption in the jury.... The elements of pain and suffering are
20 wholly subjective. It can hardly be denied that, because of their very
21 nature, a determination of their monetary compensation falls
22 peculiarly within the province of the jury.... We may not invade the
23 province of the fact-finder by arbitrarily substituting a monetary
24 judgment in a specific sum felt to be more suitable." *Stackiewicz*,
25 100 Nev. at 454-55, 686 P.2d at 932 (quotations and citations
26 omitted). The mere fact that a verdict is large is not conclusive that
27 it is the result of passion or prejudice. *Id.* (citing *Beccard v. Nevada*
28 *National Bank*, 99 Nev. 63, 66 n. 3, 657 P.2d 1154, 1156 n. 3
(1983)).

22 Here, it must be noted that O'Connell was prevented from presenting evidence of her
23 medical special damages due to discovery and evidentiary issues. Thus, she sought only pain
24 and suffering damages. She testified that she had been suffering with her knee and her neck and
25 back since the fall five years earlier and could no longer engage in the activities that she could
26 prior to the fall, including the swing dancing she had done regularly before the accident. This
27 testimony was corroborated by her former boyfriend and dance partner. She often described her
28 pain throughout her medical records as 10 out of 10. While the defense may have thought that

1 this testimony would be unbelievable to a jury, it was nonetheless the jury's choice to believe it.
2 Additionally, Dr. Tingey testified that he had recommended surgery for O'Connell's
3 traumatically injured knee and that she would, if she chose the surgery, have post-operative pain,
4 but that typically the result after surgery would be a complete relief of the symptoms. On the
5 other hand, Dr. Dunn testified that due to O'Connell's continued complaints of pain in her neck
6 and symptoms in her arms, he recommended an anterior cervical neck discectomy and an
7 interbody 3-level fusion with placement of a plate and screws. He described this surgery as non-
8 curative, but rather taking away 50 to 60 percent of the pain which O'Connell had described as
9 terrible. While Dr. Dunn attributed the changes to O'Connell's spine to a degenerative disease
10 process, he attributed the pain, which he believed to be previously asymptomatic, to the fall –
11 describing the quintessential egg-shell plaintiff.

12 Wynn argues in the alternative to the motion for judgment as a matter of law, that a new
13 trial should be had or remittitur issued for several reasons. The first is that O'Connell failed to
14 establish future pain and suffering damages as required by Nevada law. Mot. at 25 (citing
15 *Krause, Inc. v. Little*, 117 Nev. 929, 938, 34 P.3d 566 (2001) (holding that Nevada law requires
16 that "when an injury or disability is subjective and not demonstrable" expert medical testimony
17 is required)). The basis for this argument, however, is the same as above – that Plaintiff's
18 medical experts lacked a reliable basis for their opinion and that O'Connell failed to carry her
19 burden to apportion damages between pre-existing conditions. Mot. at 26:3-7. For the same
20 reasons as outlined above, then, this argument should be rejected.

21 Wynn next argues that O'Connell was improperly allowed to question defense witnesses.
22 Specifically, Wynn points to O'Connell's counsel questioning witnesses on the lack of video
23 coverage of the incident and references in her closing arguments that Wynn controlled the
24 evidence. Mot. at 26. One of the statements cited by Wynn, on examination of Corey Prowell,
25 does not appear to have been objected to by defense counsel and so that objection is now
26 untimely.⁴ The other statements cited by Wynn were in Plaintiff's counsel's closing or rebuttal

27
28 ⁴ A complete transcript of this portion of the trial was not provided, but upon reviewing the full transcript on file, no objection appears to have been lodged following the questioning.

1 arguments. Defendant also did not object to those statements and, in any event, had the
2 opportunity to make arguments rebutting those statements in its own closing. Therefore, no
3 prejudice resulted.

4 Wynn last argues that it is entitled to a new trial because O'Connell's counsel made an
5 improper statement in rebuttal as to damages. The statement in issue is: "As jurors, you are the
6 voice of the conscience of this community." Defendant lodged a timely objection, which was
7 immediately sustained by this Court. The Court also admonished counsel for making the
8 statement and instructed the jury to disregard it. The Court stated:

9 Sustained. No, no. The jury will disregard that. Counsel, this is not a
10 punitive damage case. You may not address the – they are not to be
11 making decisions as the conscience of the community. You know that is
12 improper argument. (TT Vol. 6 at 46:12-16)

13 The problem with such a statement is that it allows the jury to punish the defendant, e.g.,
14 with punitive damages, which was not a part of Plaintiff's case here. *See Florida Crushed Stone*
15 *Co. v. Johnson*, 546 So.2d 1102, 1104 (1989).

16 The Nevada Supreme Court has made clear, however, that a new trial is warranted only
17 where "the [comment] is so extreme that the objection and admonishment could not remove the
18 [comment's] effect." *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008). This amounts to
19 an analysis of whether no other reasonable explanation could exist for the jury's verdict.
20 *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364, 212 P.3d 1068, 1079 (2009). Here, there
21 was ample evidence presented at trial, as outlined above and in Plaintiff's Opposition, to support
22 the jury verdict. Wynn's timely objection was quickly sustained and a limiting instruction was
23 given immediately. In light of the evidence presented at trial, it cannot be said that the jury's
24 verdict was so unreasonable as to make the statement prejudicial. *CF Lioce*, 124 Nev. at 17, 174
25 P.3d at 981. (finding that the trial testimony supported the jury's verdict and the district court
26 sustained the defendant's objections to misconduct, so a new trial was not warranted).

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1 Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion for Judgment as a
2 Matter of Law or Alternatively for a New Trial or Remittitur be **DENIED**.

3 DATED this 20th day of ^{May}~~April~~, 2016.

4
5 
6 DISTRICT COURT JUDGE
7 (seal)

8 Submitted by:

9 NETTLES LAW FIRM
10 

11 BRIAN D. NETTLES, ESQ.

Nevada Bar No. 7462

12 CHRISTIAN M. MORRIS, ESQ.

Nevada Bar No. 11218

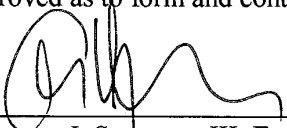
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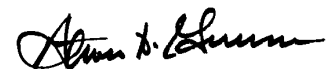
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25 O'Connell v. Wynn – Case No. A-12-655992-C
26
27
28


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14
15 **DISTRICT COURT**
16 **CLARK COUNTY, NEVADA**

17 YVONNE O'CONNELL, an individual,
18
19 Plaintiff,

20 vs.

21 WYNN LAS VEGAS, LLC, a Nevada
22 Limited Liability Company, doing business as
23 WYNN LAS VEGAS; DOES I through X;
24 and ROE CORPORATIONS I through X,
25 inclusive,
26
27 Defendants.

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

**NOTICE OF ENTRY OF
ORDER DENYING DEFENDANT'S
RENEWED MOTION FOR
JUDGMENT AS A MATTER OF LAW
OR ALTERNATIVELY FOR A NEW
TRIAL OR REMITTITUR**

28 TO: WYNN LAS VEGAS, LLC, Defendant; and

TO: CHRISTOPHER D. KIRCHER, ESQ., LAWRENCE J. SEMENZA, III, P.C., Attorneys
for Defendant:

NETTLES LAW FIRM
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702-434-8282 / 702-434-1488 (fax)

1 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an *Order Denying*
2 *Defendant's Renewed Motion for Judgment as a Matter of Law or Alternatively for a New*
3 *Trial or Remittitur* was entered in the above-entitled matter on the 24th day of May, 2016, a copy
4 of which is attached hereto.

5 DATED this 25th day of May, 2016.

6 NETTLES LAW FIRM



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10 CHRISTIAN M. MORRIS, ESQ.

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12 Henderson, Nevada 89014

13 *Attorneys for Plaintiff*

14 **CERTIFICATE OF SERVICE**

15 Pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26, I certify that on this 25 day of
16 November, 2015, I served the foregoing **NOTICE OF ENTRY OF ORDER DENYING**
17 **DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR**
18 **ALTERNATIVELY FOR A NEW TRIAL OR REMITTITUR** to the following parties by
19 electronic transmission through the Wiznet system:
20

21 **Semenza Kircher Rickard**

22 **Contact**

Christopher D. Kircher

23 Jarrod L. Rickard

24 Lawrence J. Semenza, III

Olivia Kelly

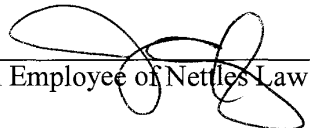
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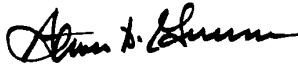
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9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

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

14 vs.

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

19 Defendants.

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

**ORDER DENYING DEFENDANT'S
RENEWED MOTION FOR
JUDGMENT AS A MATTER OF LAW
OR ALTERNATIVELY FOR A NEW
TRIAL OR REMITTITUR**

20
21 On March 4, 2016, the Court held a hearing on Defendant's Renewed Motion for
22 Judgment as a Matter of Law or Alternatively for a New Trial or Remittitur. Christian Morris,
23 Esq., and Edward J. Wynder, Esq., of NETTLES LAW FIRM appeared for the Plaintiff. L.J.
24 Semenza, III, Esq., and Christopher D. Kircher., Esq., of LAWRENCE J. SEMENZA, III, P.C.,
25 appeared for the Defendant. The Court, having reviewed the pleadings and papers on file, and
26 having heard the arguments of Counsel, and good cause appearing therefor, **HEREBY**
27 **ORDERS AS FOLLOWS:**

28 **I. FACTUAL BACKGROUND**

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1 This is a personal injury action resulting from Plaintiff's slip and fall at Defendant's
2 casino. A jury trial was held and the jury found in favor of Plaintiff on November 16, 2015. The
3 jury awarded Plaintiff \$150,000 for past pain and suffering and \$250,000 for future pain and
4 suffering, finding her to be 40% at fault. Accounting for Plaintiff's comparative fault, her total
5 award was \$240,000. Defendant (hereinafter "Wynn"), having moved for judgment under NRCP
6 50 at the close of Plaintiff's case, filed a renewed motion for judgment as a matter of law or,
7 alternatively, a motion for new trial or remittitur.

8 At trial, Plaintiff (hereinafter "O'Connell") testified that she fell after slipping on what was
9 described as a pale green, sticky, liquid substance on the floor. There was no evidence presented
10 by O'Connell that Wynn had caused the foreign substance to be on the floor. While O'Connell
11 speculated that the substance may have been water from the irrigation system in the atrium area
12 where she fell, she presented no evidence that such was the case. Rather, O'Connell called, in
13 her case in chief, an employee of Wynn who testified that she responded to the area of the fall
14 immediately after the fall and she observed a substance on the floor which had been covered by a
15 sweeper machine brought to clean up the area. She described the substance as looking "a little
16 sticky—like honey." Trial Transcript ("TT"), Vol. 3 at 71:23-72:4. On cross-examination, the
17 witness, when confronted with her previous deposition testimony, agreed that she had described
18 the liquid substance as "something like a syrup, like a drink, like something like that." *Id.* at
19 76:6-10. Additionally, O'Connell presented no evidence that Wynn had actual notice of the
20 foreign substance on the floor, and her counsel argued that it was in fact a constructive notice
21 case, not an actual notice case.

22 DISCUSSION

23 A. Legal Standards and Applicable Statutes

24 NRCP 50 provides in pertinent part:

25 (a) Judgment as a matter of law.

26 (1) If during a trial by jury, a party has been fully heard on an issue
27 and on the facts and law a party has failed to prove a sufficient
28 issue for the jury, the court may determine the issue against that

1 party and may grant a motion for judgment as a matter of law
2 against that party with respect to a claim or defense that cannot
3 under the controlling law be maintained or defeated without a
4 favorable finding on that issue.

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

14 (1) if a verdict was returned:

15 (A) allow the judgment to stand,

16 (B) order a new trial, or

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

18 NRCP 59(a) provides:

19 A new trial may be granted to all or any of the parties and on all or part of
20 the issues for any of the following causes or grounds materially affecting
21 the substantial rights of an aggrieved party: (1) Irregularity in the
22 proceedings of the court, jury, master, or adverse party, or any order of the
23 court, or master, or abuse of discretion by which either party was
24 prevented from having a fair trial; (2) Misconduct of the jury or prevailing
25 party; (3) Accident or surprise which ordinary prudence could not have
26 guarded against; (4) Newly discovered evidence material for the party
27 making the motion which the party could not, with reasonable diligence,
28 have discovered and produced at the trial; (5) Manifest disregard by the

1 jury of the instructions of the court; (6) Excessive damages appearing to
2 have been given under the influence of passion or prejudice; or, (7) Error
3 in law occurring at the trial and objected to by the party making the
4 motion.

5 "The standard for granting a motion for judgment as a matter of law is based on the
6 standard for granting a motion for involuntary dismissal under former NRCP 41(b). In applying
7 that standard and deciding whether to grant a motion for judgment as a matter of law, the district
8 court must view the evidence and all inferences in favor of the nonmoving party. To defeat the
9 motion, the nonmoving party must have presented sufficient evidence such that the jury could
10 grant relief to that party." *Nelson v. Heer*, 123 Nev. 217, 222, 163 P.3d 420,424 (2007).

11 **B. Analysis**

12 Defendant presents several distinct arguments in support of its Motion for Judgment as a
13 Matter of Law. These are: (1) there was insufficient evidence presented at trial for a finding that
14 Defendant owed Plaintiff a duty of care; (2) the testimony of Dr. Tingey and Dr. Dunn was
15 improper and prejudiced Defendant; and (3) Plaintiff had a burden to apportion the amount of
16 damages attributable to Defendant and those attributable to prior injuries, but failed to do so.
17 Defendant also argues, in the alternative, that even if it is not entitled to judgment as a matter of
18 law, it is entitled under NRCP 59 to a new trial or remittitur because the jury's award of future
19 pain and suffering was unsupported, Plaintiff posed improper questions to Defendant's
20 witnesses, and Plaintiff's counsel made prejudicial comments to the jury. Each of these
21 arguments will be addressed in turn.

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

24 The law concerning negligence in relation to a foreign substance on the floor is, in some
25 respects, well settled. Where the business owner or its agent caused the substance to be on the
26 floor, liability will lie, as a foreign substance on the floor is not consistent with reasonable care.
27 However, where the business owner or his agent did not cause the foreign substance to be on the
28 floor, a plaintiff must prove actual or constructive knowledge of the floor's condition, and a

1 failure to remedy it. *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322-323
2 (1993). As stated above, O'Connell produced no evidence that Wynn caused the substance to be
3 on the floor, or that it had actual notice. Thus, the question at issue here was whether sufficient
4 evidence was presented for a jury to find that Wynn was on constructive notice of the spill.

5 Whether a business owner was under constructive notice of the hazardous condition is a
6 question of fact properly left for the jury, *id.*, but this does not relieve the plaintiff from having to
7 admit evidence at trial of constructive notice. In *Sprague*, the Supreme Court noted that "a
8 reasonable jury could have determined that the virtually continual debris on the produce
9 department floor put Lucky on constructive notice that, at any time, a hazardous condition might
10 exist which would result in injury to Lucky customers." *Id.* at 251, 849 P.2d at 323. Nevada case
11 law has caused some confusion in differentiating between constructive notice and the "mode of
12 operation approach," the latter of which is specifically discussed in cases decided subsequent to
13 *Sprague*. The fact that there is a difference is made clear in *FGA v. Giglio*, 128 Nev. Adv. Op.
14 26, 278 P.3d 490, 497 (2012), where the court noted that the *Sprague* court had implicitly
15 adopted the mode of operation approach when it "stated that **even in the absence of**
16 **constructive notice**, 'a jury could conclude that Lucky should have recognized the impossibility
17 of keeping the produce section clean by sweeping' alone." (emphasis added). With the mode of
18 operation approach, **which is not applicable in this case**, a plaintiff satisfies the notice
19 requirement (actual or constructive) by establishing that an injury was attributable to a
20 reasonably foreseeable dangerous condition on the owner's premises that is related to the
21 owner's self-service mode of operation.¹

22 While evidence of a continuous or recurring condition might amount to constructive
23 notice under *Sprague*, *supra*, and *Ford v. Southern Hills Medical Center*, 2011 WL 6171790
24 (Nev. 2011), that is not the only way of proving constructive notice.² Proof that a foreign
25

26 ¹ No argument was made that the condition was the result of self-service, nor was the jury
27 instructed on this inapplicable area of the law.

28 ² *Ford* stated that "the standard under *Sprague* to prove constructive notice is a virtually
continuous condition." Of course, *Sprague* does not actually say that—*Sprague* did not establish
a bright line test for what will establish constructive notice, since to have done so would amount

1 substance on the floor had existed for such a length of time that the proprietor in the exercise of
2 ordinary care should have known of it, is another way of proving constructive notice. What
3 would amount to sufficient time to warrant holding that the proprietor had constructive notice
4 generally depends on the circumstances of the particular case and involves consideration of the
5 nature of the danger, the number of persons likely to be affected by it, the diligence required to
6 discover or prevent it, opportunity and means of knowledge, the foresight which a person of
7 ordinary care and prudence would be expected to exercise under the circumstances, and the
8 foreseeable consequence of the conditions. *See* 61 A.L.R.2d 6 §7(b).

9 Moreover, Nevada has made clear that an innkeeper may be found on constructive notice
10 of latent defects upon their premises if a reasonable inspection would have revealed such a
11 danger. *See Twardowski v. Westward Ho Motels, Inc.*, 86 Nev. 784, 476 P.2d 946 (1970). In
12 *Twardowski*, the court held that if a reasonable inspection of its pool slide would have revealed
13 the defective handrails, the Westward Ho would be charged with constructive notice of the latent
14 defect, but that whether the defect would have been discovered by a reasonable inspection was a
15 jury question. The court further noted that “[c]onstructive knowledge of a latent defect can be
16 established by circumstantial evidence.” *Id.* at 788, 476 P.2d at 948. The over-arching theme of
17 a negligence case has been, and is, foreseeability.

18 [T]here is no liability for harm resulting from conditions from which no
19 unreasonable risk was to be anticipated, or those which the occupier did
20 not know and could not have discovered with reasonable care. The mere
21 existence of a defect or danger is not enough to establish liability, unless it
22 is shown to be of such a character or of such a duration that the jury may
23 reasonably conclude that due care would have discovered it.

24 Prosser, *Law of Torts* 393 (4th ed. 1980). Whether reasonable care has been exercised is almost
25 always a jury question, as was made clear by the Nevada Supreme Court in *Foster v. Costco*
26 *Wholesale Corp.*, 128 Nev. Adv. Op. 71, 291 P.3d 150 (2012). Abrogating the holding in

27
28 to an extreme departure from the common law on this subject, including Nevada’s own case law,
and *Ford*, as an unpublished opinion, is not binding precedent upon this Court.

1 *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 370 P.2d 682 (1962), the Nevada Supreme Court
2 adopted the position of the Restatement (Third) of Torts concerning the duty of a landowner.
3 “Thus, under the Restatement (Third), landowners bear a general duty of reasonable care to all
4 entrants. . . . The ‘duty issue must be analyzed with regard to foreseeability and gravity of harm,
5 and the feasibility and availability of alternative conduct that would have prevented the harm.”
6 *Foster*, 291 P.3d at 156 (citations omitted).

7 Here, during O’Connell’s case in chief, Yanet Elias, whose job was that of an assistant
8 manager in the public areas department at Wynn, testified that, “It’s very difficult to maintain the
9 casino, you know, completely clean, because it’s a job for 24 hours. There are people – a lot of
10 people walking through, a lot of children, they’re carrying things. So, it’s impossible to keep it
11 clean at 100 percent.” TT Vol. 3 at 70:22-71:1. Additionally, Ms. Elias testified that she did not
12 know when the area where O’Connell fell had last been inspected prior to her fall, and when
13 asked about how often the area is checked, she testified, “It depends on how long it takes the
14 employee to check the north area and return to the south area, because it’s all considered one –
15 one whole area. And there aren’t always two employees assigned to that area. Sometimes,
16 there’s only one.” TT Vol. 3 at 69:5-11. While she repeatedly answered questions posed by both
17 counsel by stating that she did not recall, Ms. Elias was also repeatedly impeached with her
18 earlier deposition testimony. At one point she admitted that one of the signs that a porter is not
19 doing their job is that there is debris on the floor. *Id.* at 70:3-6)

20 O’Connell also called Corey Prowell in her case in chief, Wynn’s assistant security
21 manager who at the time of the incident was a security report writer. Mr. Prowell responded to
22 the subject incident and eventually wrote a report. He described the scene of the fall as a high
23 traffic area with marble flooring and indicated that upon his arrival, he was told by Ms. Elias that
24 the liquid on the floor had already been cleaned up, and that he was told by another employee
25 that the employee had seen O’Connell being helped up by four other guests. He also testified
26 that O’Connell told him that when she had recovered from her fall, she saw a green liquid on the
27 floor. During her testimony at trial, O’Connell described the “spill” as “at least seven feet” with
28 one side measuring about four feet still in a liquid state, and a three foot portion as “almost dry,”

1 “a little sticky” with “footprints on it.” TT, Vol. 3 at 59:19-24. She described the liquid as
2 having “just a hint of green,” TT, Vol. 3 at 59:12, and elaborating about the footprints she said:

3 They looked like, you know, they were – they looked like mine that I was
4 making, and I’m sure they were from the people that were standing around
5 and helped me up . . . [k]ind of like dirty footprints that you leave after
6 you’ve mopped your floor and you step on it, you walk on it, that’s kind of
7 how it looked.

8 TT, Vol. 3 at 62:19 – 63:2.

9 Wynn argues that “the record is completely devoid of any evidence regarding the length
10 of time the foreign substance had been on the floor.” Mot. at 15-17. While it is true that
11 O’Connell could not testify as to how long the substance had been on the floor, she did testify
12 that a three-foot section of the seven-foot spill was already dry and drying. While the defense
13 seems to suggest that expert testimony would be required, presumably to testify as to the relative
14 humidity within the casino and its relation to the rate of evaporation, common experience would
15 allow a jury to infer that the spill had been in place longer than just a few minutes. As pointed
16 out by O’Connell’s Opposition, there was ample other evidence from which the jury could have
17 found that Wynn had constructive notice of the substance of the floor. Opp. at 11-13. This
18 evidence includes: (1) testimony that the atrium where the substance was located was highly
19 trafficked; (2) testimony that it is impossible for Wynn’s employees to keep the casino floor
20 entirely clean; and (3) testimony that Defendant Wynn had no floor inspection schedule, did not
21 maintain inspection logs, and could not say with certainty when the floor was last inspected prior
22 to O’Connell’s injury. This testimony was elicited from Defendant Wynn’s own employees.

23 “A non-moving party can defeat a motion for judgment as a matter of law if it present[s]
24 sufficient evidence such that the jury could grant relief to that party.” *D&D Tire, Inc. v.*
25 *Ouellette*, 131 Nev. Adv. Op. 47, 352 P.3d 32, 35 (2015) (internal quotations and citations
26 omitted). All of the aforementioned testimony, taken together and drawing all reasonable
27 inferences in favor of the Plaintiff was sufficient to establish that Wynn was on constructive
28 notice of the dangerous condition upon its floor.

1 2. *Whether the testimony of Dr. Tingey and Dr. Dunn was improper*

2 Wynn next makes the argument that the testimony of O'Connell's experts, Dr. Tingey
3 and Dr. Dunn, was improper. Mot. at 19-21. Wynn first argues that the Court improperly
4 admitted their testimony because O'Connell disclosed them as expert witnesses beyond the
5 disclosure deadline. Mot. at 18-19. Wynn argues that its rebuttal expert was unable to review
6 their records and incorporate them into his report. Mot. at 18. However, late production was
7 substantially justified under NRCP 37(c) because O'Connell continued to treat after the close of
8 discovery, treatment records were provided to O'Connell's counsel after the close of discovery,
9 and were provided to Defense counsel soon after their receipt, and because O'Connell had to
10 change treating physicians after Dr. Martin had left the practice. The late disclosed records were
11 only a few pages, the Court permitted the defense to voir dire the doctors outside the presence of
12 the jury before they testified in the presence of the jury, and the Court allowed Wynn's rebuttal
13 expert to sit in the courtroom and listen to the testimony of both Dr. Tingey and Dr. Dunn,
14 allowing him to incorporate his opinions on direct examination. Hence, Wynn was not
15 prejudiced by any late disclosure on O'Connell's part.

16 Wynn also argues that both doctors lacked a sufficient basis for their opinions because
17 they were only based upon Plaintiff's self-reporting. Mot. at 19. In support, Wynn cites to the
18 federal case of *Perkins v. United States*, 626 F. Supp. 2d 587 (E.D. Va. 2009). Notwithstanding
19 the fact that *Perkins* is a federal case,³ it is not on point to the facts here. In *Perkins*, the court
20 found that expert testimony as to medical causation should be excluded because the expert's
21 opinion was based *solely* on the patient's self-reporting – that the expert had merely adopted the
22 patient's explanation *as his own opinion*. *Id.* at 592-593. Here, however, O'Connell's self-
23 reporting did not appear to be the *sole* basis of her experts' testimony. Both doctors testified as to
24 the basis of their opinions, which included not only evaluation of the O'Connell's medical
25 history but also their examination of her, their review of her diagnostic medical tests, and their

26 _____
27 ³ Although not addressed here, this could be significant because Nevada courts do not follow the
28 same procedure for determining whether expert testimony should be allowed as do federal courts
(i.e., Nevada has not adopted the *Daubert* standard).

1 experience in treating orthopedic conditions and the conditions that would result from a slip and
2 fall. There is simply no indication that O'Connell's experts wholly adopted her self-reporting as
3 the sole basis for their opinions as to causation. Moreover, Dr. Tingey was candid in his opinion
4 that he would not attribute all of O'Connell's knee problems to the subject fall because the MRI
5 indicated a degenerative disease process in the left knee as opposed to the right knee.

6 3. *Whether there is legal basis for a finding that Plaintiff bears a burden to*
7 *apportion damages between pre-existing conditions and the harm caused by*
8 *Defendant*

9 Wynn next argues that O'Connell had the burden of apportioning her damages between
10 pre-existing injuries and those injuries caused by her slip and fall at the Wynn but failed to do so.
11 Mot. at 21-25. This is a familiarly incorrect argument (and, indeed, was raised and rejected
12 during trial for the same reasons as it is now) because the legal premises upon which it rests are
13 infirm. The main cause of confusion in this and other cases is the federal case of *Schwartz v.*
14 *State Farm Mut. Auto. Ins. Co.*, 2009 WL 2197370 (D. Nev. July 22, 2009).

15 In that case, Judge Dawson did indeed hold that "[i]n a case where a plaintiff has a pre-
16 existing condition, and later sustains an injury to that area, the Plaintiff bears the burden of
17 apportioning the injuries, treatment and damages between the pre-existing condition and the
18 subsequent accident." *Id.* at *6. However, the cases cited as precedent by Judge Dawson for that
19 statement do not support that assertion. *Kleitiz v. Raskin*, 103 Nev. 325, 738 P.2d 508 (1987)
20 involved apportioning damages between injuries caused by successive tortfeasors, not
21 apportioning damages between pre-existing conditions and injuries caused by a sole tortfeasor.

22 Judge Dawson also cited the Washington Court of Appeals case of *Phennah v. Whalen*,
23 621 P.2d 1304 (Wash. App. 1980), but that also involved apportioning damages between
24 successive tortfeasors. The Restatement (Second) of Torts § 433(b), also relied upon, doesn't
25 even concern successive tortfeasors on its face but rather concerns the "substantial factor" test
26 for determining proximate cause. Here, we do not have successive tortfeasors. Rather, we have a
27 Plaintiff who, admittedly, had various pre-existing mental and physical conditions. Therefore,
28 the *Schwartz* case is in error and is inapplicable to this case. Wynn took the O'Connell as it

1 found her and is liable for the full extent of her injuries, notwithstanding her pre-existing
2 conditions. See *Murphy v. Southern Pac. Co.*, 31 Nev. 120, 101 P. 322 (1909).

3 4. *Whether the Defendant is entitled to a new trial or remittitur.*

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

9 This court has held that damages for pain and suffering are
10 peculiarly within the province of the jury. In *Stackiewicz v. Nissan*
11 *Motor Corporation*, 100 Nev. 443, 454, 686 P.2d 925, 932 (1984),
12 this court stated that the trial court cannot revisit a jury's damage
13 award unless it is "flagrantly improper." "In actions for damages in
14 which the law provides no legal rule of measurement it is the special
15 province of the jury to determine the amount that ought to be
16 allowed, so that a court is not justified in reversing the case or
17 granting a new trial on the ground that the verdict is excessive,
18 unless it is so flagrantly improper as to indicate passion, prejudice or
19 corruption in the jury.... The elements of pain and suffering are
20 wholly subjective. It can hardly be denied that, because of their very
21 nature, a determination of their monetary compensation falls
22 peculiarly within the province of the jury.... We may not invade the
23 province of the fact-finder by arbitrarily substituting a monetary
24 judgment in a specific sum felt to be more suitable." *Stackiewicz*,
25 100 Nev. at 454-55, 686 P.2d at 932 (quotations and citations
26 omitted). The mere fact that a verdict is large is not conclusive that
27 it is the result of passion or prejudice. *Id.* (citing *Beccard v. Nevada*
28 *National Bank*, 99 Nev. 63, 66 n. 3, 657 P.2d 1154, 1156 n. 3
(1983)).

22 Here, it must be noted that O'Connell was prevented from presenting evidence of her
23 medical special damages due to discovery and evidentiary issues. Thus, she sought only pain
24 and suffering damages. She testified that she had been suffering with her knee and her neck and
25 back since the fall five years earlier and could no longer engage in the activities that she could
26 prior to the fall, including the swing dancing she had done regularly before the accident. This
27 testimony was corroborated by her former boyfriend and dance partner. She often described her
28 pain throughout her medical records as 10 out of 10. While the defense may have thought that

1 this testimony would be unbelievable to a jury, it was nonetheless the jury's choice to believe it.
2 Additionally, Dr. Tingey testified that he had recommended surgery for O'Connell's
3 traumatically injured knee and that she would, if she chose the surgery, have post-operative pain,
4 but that typically the result after surgery would be a complete relief of the symptoms. On the
5 other hand, Dr. Dunn testified that due to O'Connell's continued complaints of pain in her neck
6 and symptoms in her arms, he recommended an anterior cervical neck discectomy and an
7 interbody 3-level fusion with placement of a plate and screws. He described this surgery as non-
8 curative, but rather taking away 50 to 60 percent of the pain which O'Connell had described as
9 terrible. While Dr. Dunn attributed the changes to O'Connell's spine to a degenerative disease
10 process, he attributed the pain, which he believed to be previously asymptomatic, to the fall –
11 describing the quintessential egg-shell plaintiff.

12 Wynn argues in the alternative to the motion for judgment as a matter of law, that a new
13 trial should be had or remittitur issued for several reasons. The first is that O'Connell failed to
14 establish future pain and suffering damages as required by Nevada law. Mot. at 25 (citing
15 *Krause, Inc. v. Little*, 117 Nev. 929, 938, 34 P.3d 566 (2001) (holding that Nevada law requires
16 that "when an injury or disability is subjective and not demonstrable" expert medical testimony
17 is required)). The basis for this argument, however, is the same as above – that Plaintiff's
18 medical experts lacked a reliable basis for their opinion and that O'Connell failed to carry her
19 burden to apportion damages between pre-existing conditions. Mot. at 26:3-7. For the same
20 reasons as outlined above, then, this argument should be rejected.

21 Wynn next argues that O'Connell was improperly allowed to question defense witnesses.
22 Specifically, Wynn points to O'Connell's counsel questioning witnesses on the lack of video
23 coverage of the incident and references in her closing arguments that Wynn controlled the
24 evidence. Mot. at 26. One of the statements cited by Wynn, on examination of Corey Prowell,
25 does not appear to have been objected to by defense counsel and so that objection is now
26 untimely.⁴ The other statements cited by Wynn were in Plaintiff's counsel's closing or rebuttal

27
28 ⁴ A complete transcript of this portion of the trial was not provided, but upon reviewing the full transcript on file, no objection appears to have been lodged following the questioning.

1 arguments. Defendant also did not object to those statements and, in any event, had the
2 opportunity to make arguments rebutting those statements in its own closing. Therefore, no
3 prejudice resulted.

4 Wynn last argues that it is entitled to a new trial because O'Connell's counsel made an
5 improper statement in rebuttal as to damages. The statement in issue is: "As jurors, you are the
6 voice of the conscience of this community." Defendant lodged a timely objection, which was
7 immediately sustained by this Court. The Court also admonished counsel for making the
8 statement and instructed the jury to disregard it. The Court stated:

9 Sustained. No, no. The jury will disregard that. Counsel, this is not a
10 punitive damage case. You may not address the – they are not to be
11 making decisions as the conscience of the community. You know that is
12 improper argument. (TT Vol. 6 at 46:12-16)

13 The problem with such a statement is that it allows the jury to punish the defendant, e.g.,
14 with punitive damages, which was not a part of Plaintiff's case here. *See Florida Crushed Stone*
15 *Co. v. Johnson*, 546 So.2d 1102, 1104 (1989).

16 The Nevada Supreme Court has made clear, however, that a new trial is warranted only
17 where "the [comment] is so extreme that the objection and admonishment could not remove the
18 [comment's] effect." *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008). This amounts to
19 an analysis of whether no other reasonable explanation could exist for the jury's verdict.
20 *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364, 212 P.3d 1068, 1079 (2009). Here, there
21 was ample evidence presented at trial, as outlined above and in Plaintiff's Opposition, to support
22 the jury verdict. Wynn's timely objection was quickly sustained and a limiting instruction was
23 given immediately. In light of the evidence presented at trial, it cannot be said that the jury's
24 verdict was so unreasonable as to make the statement prejudicial. *CF Lioce*, 124 Nev. at 17, 174
25 P.3d at 981. (finding that the trial testimony supported the jury's verdict and the district court
26 sustained the defendant's objections to misconduct, so a new trial was not warranted).

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1 Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion for Judgment as a
2 Matter of Law or Alternatively for a New Trial or Remittitur be **DENIED**.

3 DATED this 20th day of ^{May}~~April~~, 2016.

4
5 
6 DISTRICT COURT JUDGE
7 (JC)

8 Submitted by:

9 NETTLES LAW FIRM
10 

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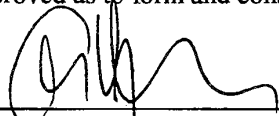
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