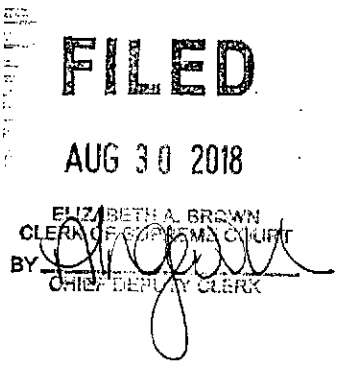
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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

No. 70583



ORDER OF AFFIRMANCE

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

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

---

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

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

18-901953

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

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

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

Standard of review

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

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

"The owner or occupant of property is not an insurer of the safety of a person on the premises, and in the absence of negligence, no liability lies." *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322 (1993). "An accident occurring on the premises does not of itself establish negligence." *Id.* "Yet, a business owes its patrons a duty to keep

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

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

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

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

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

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

---

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

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

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

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

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

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

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

---

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

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

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

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

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

Standard of review

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Wynn's additional grounds for a new trial also fail

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

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

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

AFFIRM the judgment of the district court.

_____, C.J.
Silver

_____, J.
Gibbons

TAO, J., dissenting:

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

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

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

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

I.

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

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

II.

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

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

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

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

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

III.

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

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

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

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

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

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

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

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

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

IV.

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

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

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

Tao, J.

Tao

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