

DETACHED FROM 11/13/17 MOTION
AND FILED SEPARATELY PER ORDER
12/5/17

Case No. 74184

In the Supreme Court of Nevada

ELAINE P. WYNN,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT of
the State of Nevada, in and for the County
of Clark; and THE HONORABLE ELIZABETH
GONZALEZ, District Judge,

Respondents,

and

STEPHEN A. WYNN; WYNN RESORTS,
LIMITED; LINDA CHEN; RUSSELL GOLDSMITH;
RAY R. IRANI; ROBERT J. MILLER; JOHN A.
MORAN; MARC D. SCHORR; ALVIN V.
SHOEMAKER; KIMMARIE SINATRA; D. BOONE
WAYSON; and ALLAN ZEMAN,

Real Parties in Interest.

FILED

DEC 05 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

District Court
No. A656710

MOTION TO STRIKE APPENDIX
(Filed Under Seal)

Petitioner Elaine P. Wynn moves to strike the Wynn parties' appendix to their answer because its contents are not part of the district-court record. Any portions of the answer that refer to these documents should be stricken, too.

17-41878

**A. The Appendix should
Contain Just Matters in the
District-Court Record**

1. The Record is Filed Documents

This Court “cannot consider matters not properly appearing in the record on appeal.” *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev., Adv. Op. 52, 399 P.3d 334, 340 n.3 (2017) (quoting *Carson Ready Mix, Inc. v. First Nat’l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981)). That is why all documents in an appendix “shall bear the file-stamp of the district court clerk, clearly showing the date the document was filed in the proceedings below.” NRAP 30(c)(1). Indeed, “[f]iling an appendix constitutes a representation by counsel that the appendix consists of true and correct copies of the papers in the district court.” NRAP 30(g)(1).

These limits on the contents of the appendix apply equally in writ proceedings. NRAP 21(a)(4); *see also Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev., Adv. Op. 52, 399 P.3d 334, 340 n.3 (2017) (applying the concept of the “record on appeal” to a writ petition); *Alper v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 43, 352 P.3d 28, 29

n.2 (2015) (same).¹

**2. Unfiled Documents and References
to them Must be Stricken**

An appendix that contains unfiled papers must be stricken. *In re Nev. State Eng'r Ruling No. 5823*, 128 Nev., Adv. Op. 22, 277 P.3d 449, 453 n.4 (2012) (quoting NRAP 30(g)(1)); accord *In re Discipline of Sero-ta*, 129 Nev., Adv. Op. 66, 309 P.3d 1037, 1041 n.5 (2013); *In re Candi-dacy of Hansen*, 118 Nev. 570, 574, 52 P.3d 938, 940 (2002).

**3. The Wynn Parties' Appendix of Unfiled
Transcripts Must be Stricken**

Here, the Wynn parties submitted an appendix that consists en-tirely of unfiled deposition transcripts, one of which is a rough draft.

The answer relies extensively on those transcripts. (Answer 4, 13–15, 20, 25–27.)

Ms. Wynn does not seek sanctions under NRAP 30(g)(1) because

¹ The appendix to a writ petition may include “any other original docu-ment that may be essential to understand the matters set forth in the petition,” NRAP 20(a)(4), but where the petition is in the nature of ap-pellate review of a district court’s decision, that decision can be evaluat-ed only against the record in the district court or matters appropriate for judicial notice on appeal. *Cf. Yellow Cab of Reno, Inc. v. Second Ju-dicial Dist. Court*, 127 Nev. 583, 589, 591 n.4, 262 P.3d 699, 702, 703 n.4 (2011) (after an initial decision relying on population statistics that “were not part of the district court record,” the Supreme Court granted rehearing and took the procedurally appropriate step of taking judicial notice of U.S. Census figures).

she assumes that the inclusion of these unfiled transcripts was not “willful or grossly negligent.” NRAP 30(g)(1). Nevertheless, the appendix, plus any portions of the answer that refer to it, must be stricken.

**B. Enforcing the Rule
Removes this Court from the Role
of Factfinder**

This case illustrates the reason for the procedural rule.

As a factual matter, Ms. Wynn [REDACTED]

[REDACTED]. (Ex. A, Elaine Wynn Decl., at ¶¶ 7–

8.) They point to her response to a question about [REDACTED]

[REDACTED]:

Q.

[REDACTED]?

A.

(Wynn App. 37.)

As context shows, however, [REDACTED]

[REDACTED]

[REDACTED]. (See Ex.

B, Elaine Wynn Decl., at ¶¶ 3, 8; 2 App. 369, at ¶¶ 2–5.) But the line of

questioning [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(Wynn App. 36.) Ms. Wynn [REDACTED]

[REDACTED]

[REDACTED]. (Ex. A, Elaine Wynn Decl., at ¶ 7.) Exacerbating the confusion, the Wynn parties' counsel first asks Ms. Wynn about [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (Wynn App. 36.) [REDACTED],

counsel then surmises [REDACTED]

[REDACTED]

[REDACTED] (Wynn App. 37.) Ms. Wynn [REDACTED]

[REDACTED]

(Ex. A, Elaine Wynn Decl., at ¶ 7.)

This Court should not weigh in on this factual disagreement. The requirement that an appendix contain only documents that were brought before the district court ensures that this Court does not stumble into the marshes of factfinding. *See Beazer Homes Holding Corp. v.*

Eighth Judicial Dist. Court, 128 Nev., Adv. Op. 66, 291 P.3d 128, 137 (2012) (leaving issues of fact to the district court); *Yellow Cab of Reno, Inc. v. Second Judicial Dist. Court*, 127 Nev. 583, 593, 262 P.3d 699, 705 (2011) (same).

CONCLUSION

The Wynn parties' appendix consists of documents outside the district-court record. The import and meaning of those documents are the subject of a factual dispute that the district court should resolve in the first instance. These documents, and the references in the answer to them, should be stricken.

Dated this 13th day of November, 2017.

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CERTIFICATE OF SERVICE

I certify that on November 13, 2017, I served the foregoing "Motion to Strike Appendix" by United States mail, postage prepaid, to the following:

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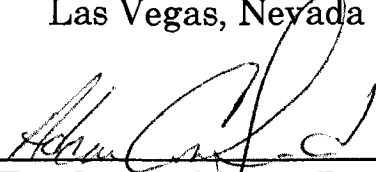
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EXHIBIT A

FILED UNDER SEAL

EXHIBIT A