

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELAINE P. WYNN, an individual

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,

Respondent,

and

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

Real Parties in Interest.

Case No. 74184

District Court No. A-12-656710

**THE WYNN PARTIES'
RESPONSE TO ELAINE P.
WYNN'S MOTION TO STRIKE
APPENDIX**

(Filed Under Seal)

FILED

DEC 05 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

I. INTRODUCTION

Ms. Wynn,¹ respectfully, is at it again. When the Wynn Parties filed their Motion to Compel before the District Court seeking Ms. Wynn's Notes, Ms. Wynn responded by submitting a declaration in an effort to explain the

¹ Capitalized terms used herein shall have the same meaning as those used in the Wynn Parties' Answer ("Ans.") filed on October 31, 2017.

17-41886

prior deposition testimony she gave [REDACTED]. That effort was unsuccessful, the District Court compelled production of the Notes, and Ms. Wynn sought writ relief before this Court.

Now that the Wynn Parties have provided this Court with original deposition testimony from Ms. Wynn [REDACTED]—evidence that did not exist when the matter was first presented to the District Court—Ms. Wynn moves to strike her own testimony on grounds it is not “part of the district court record.” Alternatively, Ms. Wynn has submitted yet another declaration again seeking [REDACTED]. The Motion should be summarily denied for the reasons set forth below.

II. RELEVANT PROCEDURAL HISTORY

The District Court rendered its oral ruling giving rise to Ms. Wynn’s Writ Petition on September 18, 2017. Arte Nathan was then deposed on October 3, 2017. Ms. Wynn filed her Writ Petition on October 11, 2017, and was deposed again about two weeks later on October 26, 2017. The Wynn Parties thereafter filed their Answer to the Writ Petition on October 31, 2017.²

² While Ms. Wynn seemingly chastises the Wynn Parties for originally including a “rough” version of her deposition transcript as part of their proposed Appendix, *see* Mot. at 3, the Wynn Parties explained at the time that a certified copy of the transcript was not yet available when their Answer to the Writ Petition was due. *See* Ans. at 14 n.4. This issue is now moot as the

III. ARGUMENT

A. Nevada Rule of Appellate Procedure 21(a)(4) Authorizes Parties to Include Original Documents in Appendices Submitted as part of an Original Writ Proceeding.

Ms. Wynn's Motion ignores the fact that, unlike an appeal, petitions for writ relief invoke this Court's original jurisdiction under the Nevada Constitution. *See State v. Eighth Judicial Dist. Ct.*, 116 Nev. 127, 133, 994 P.2d 692, 696 (2000) (“[t]he power to issue such writs is part of this court's original jurisdiction; it is not merely auxiliary to our appellate jurisdiction.”) (citing Nev. Const. art. 6, § 4). Thus, while appendices submitted in support of a writ petition must comply with the same *procedural* requirements as appendices submitted in support of an appeal, *see* NRAP 21(a)(4) (“petitioner shall submit with the petition an appendix that complies with Rule 30”), the respective rules governing the *contents* of appendices submitted in support of writ petitions versus appeals differ significantly.

On the one hand, NRAP 30(b) sets forth a detailed listing of specific documents required to be included in an appendix submitted as part of an appeal. *See* NRAP 30(b)(1)-(2). Whereas NRAP 21(a)(4), governing appendices submitted in support of writ petitions, is more open-ended:

Wynn Parties have since received a certified copy of Ms. Wynn's deposition transcript, which they will substitute in place of the rough version when the Court rules on their pending Motion to Redact and Seal filed on October 31, 2017.

The appendix shall include a copy of any order or opinion, parts of the record before the respondent judge, corporation, commission, board or officer, *or any other original document* that may be essential to understand the matters set forth in the petition.

(emphasis added); *see also Pan v. Eighth Judicial Dist. Ct.*, 120 Nev. 222, 229, 88 P.3d 840, 844 (2004) (Supreme Court’s “review in a writ proceeding is limited to the argument and documents provided by the parties.”).

The clause “any other original document” is separated from the earlier clauses of NRAP 21(a)(4) by a comma and the disjunctive “or.” As such, there is no requirement that documents submitted under this clause “be parts of the record before the respondent judge.” That is because “[t]he word ‘or’ is typically used to connect phrases or clauses representing alternatives.” *Coast Hotels and Casinos, Inc. v. Nevada State Labor Comm’n*, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001). While an earlier clause of NRAP 21(a)(4) requires appendices submitted in support of writ petitions to include “parts of the record before the respondent judge,” that limitation does apply to the final clause of the Rule because it “is in the alternative to, and is not conditioned by, the preceding clause.” *Coast Hotels*, 117 Nev. at 841, 34 P.3d at 546.

Thus, so long as the subject material is an “original document” that “may be essential to understand the matters set forth in the Petition,” it can be included in an appendix submitted pursuant to NRAP 21(a)(4). Here, the brief deposition excerpts the Wynn Parties included as part of their Appendix

undoubtedly meet these criteria. First, Ms. Wynn argued in her Writ Petition that the Wynn parties did not have a “substantial need” for the Notes because they could obtain the equivalent of the information contained therein by, *inter alia*, deposing Arte Nathan. *See* Pet. at 5; 19 n.4. But since the time Ms. Wynn originally made that argument before the District Court, Mr. Nathan was deposed and testified [REDACTED]. *See* Ans. at 27. Such information, hence, would certainly help this Court understand the issue of “substantial need” raised in the Writ Petition.

The same is true with respect to Ms. Wynn’s recent deposition testimony. Ms. Wynn argued unsuccessfully to the District Court that her Notes were protected work product because [REDACTED]. *See* 2 App. 369. After the lower court’s ruling, and after she made the same arguments to this Court in her Writ Petition, *see* Pet. at 11-13, Ms. Wynn was deposed again and acknowledged [REDACTED]. *See* Ans. at 13-14. While Ms. Wynn’s desire to shield this information from the Court is understandable, she cannot seriously contend it would not assist the understanding of matters set forth in the Writ Petition.

Ms. Wynn relegates her discussion of NRAP 21(a)(4) (mistakenly referred to as NRAP 20(a)(4)) to a footnote, citing an inapposite case for the proposition that this Court may take judicial notice of appropriate matters under NRS 47.130. *See* Mot. at 3, n.1 (citing *Yellow Cab of Reno, Inc. v. Second Jud. Dist. Ct.*, 127 Nev. 583, 262 P.3d 699 (2011)). No argument there. But *Yellow Cab* does not discuss, let alone decide, the issue presented in Ms. Wynn’s Motion—*i.e.*, the proper contents of appendices submitted pursuant to NRAP 21(a)(4) in the context of writ proceedings.³

NRAP 21(a)(4) appropriately recognizes the nature of writ proceedings is such that ongoing developments in the underlying litigation may help clarify or dispose of matters being reviewed by this Court.⁴ It makes sense, therefore,

³ The other cases upon which Ms. Wynn relies are equally far afield as most of them stand for the unremarkable proposition that the Court will not consider matters “not properly appearing in the record on appeal.” *See* Mot. at 2. Again, however, none of those authorities address the proper contents of an appendix submitted in the context of original writ proceedings. *See, e.g., Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 133 Nev. Adv. Op. 52, 399 P.3d 334, 340 n.3 (2017) (Court would not consider potential “at issue” waiver of attorney-client privilege when that was not the basis of the District Court’s decision); *Carson Ready Mix, Inc. v. First Nat. Bank of Nevada*, 97 Nev. 474, 635 P.2d 276 (1981) (Court would not consider alleged error regarding jury instructions where record did not contain objections or exceptions thereto); *Alper v. Eighth Judicial Dist. Ct.*, 131 Nev. Adv. Op. 43, 352 P.3d 28 (2015) (Court would not consider waiver argument where there was no hearing transcript, and appellant failed to supply a statement of the evidence under NRAP 9).

⁴ Ms. Wynn has likewise recognized this reality when it suits her needs. Recall that she filed a writ petition asking this Court to review her alleged protected status under federal whistleblower laws. *See* Case No. 71432. The

that the Rule provides parties with the flexibility needed to ensure this Court has all the documents that may be essential to understand the issues presented in an original writ petition. The Wynn Parties respectfully submit that is exactly what they have done here.

B. Ms. Wynn's Latest Declaration.

This is not the appropriate forum for the Wynn Parties to debate Ms. Wynn's latest declaration [REDACTED]

[REDACTED]

[REDACTED]. That said, insofar as the Motion claims [REDACTED]

[REDACTED], *see* Mot. at 4, the Wynn Parties would

direct the Court to the opening sequence of questions and answers during Ms.

Wynn's October 26 deposition:

[REDACTED]

[REDACTED]

[REDACTED]

Court granted a stay, the matter was fully briefed, and thereafter ordered to be set for oral argument. *See* Orders dated Oct. 21, 2016 and May 25, 2017. When, however, developments at the district court level threatened Ms. Wynn's ability to conduct certain discovery due in part to arguments made in her pending writ petition, Ms. Wynn promptly moved to lift the stay and voluntarily dismiss her petition. *See* Motions dated June 28 and 30, 2017.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

See Exhibit 1 (E. Wynn Tr.) 504:15 – 506:3.

Nowhere in the relevant series of questions posed to Ms. Wynn [REDACTED]

[REDACTED]

[REDACTED]. See Mot., Exhibit A (E. Wynn Decl.) ¶ 6. In the analogous context of submitting errata sheets to correct deposition testimony under NRCP 30(e) where a deponent was admonished in a manner like that set forth above, the courts have little sympathy for substantive changes based on [REDACTED]

[REDACTED]. See, e.g., *Blair v. CBE Grp. Inc.*, 2015 WL 3397629, at *6 (S.D. Cal. May 26, 2015) (“The Rule cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses.”) (quoting *Greenway v. Int'l Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992))

(interpreting federal counterpart).). The same principle applies to Ms. Wynn's latest declaration.

IV. CONCLUSION

Based upon the foregoing, the Wynn Parties respectfully submit that Ms. Wynn's Motion to Strike should be denied in its entirety.

DATED this 21st day of November, 2017.

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By /s/ J. Colby Williams

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CERTIFICATE OF SERVICE

I certify that I am an employee of Campbell & Williams and that I did, on the 21st day of November, 2017, serve upon the following in this action a copy of the foregoing **The Wynn Parties' Response to Elaine P. Wynn's Motion to Strike Appendix** by United States Mail, postage prepaid:

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EXHIBIT 1

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EXHIBIT 1