

In the Supreme Court of Nevada

WYNN RESORTS, LIMITED; and
STEPHEN A. WYNN,

Petitioners,

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

KAZUO OKADA; UNIVERSAL
ENTERTAINMENT CORP.;
and ARUZE USA, INC,

Real Parties in
Interest.

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Elizabeth A. Brown
Clerk of Supreme Court

District Court
No. A656710

**REPLY BRIEF ON ELAINE P. WYNN'S MOTION
TO INTERVENE AS REAL PARTY IN INTEREST**

Wynn Resorts attempts to pick and choose which parties may litigate an issue that may affect multiple claims and defenses in the underlying case. Here is how they try to do this, by bringing a narrow motion before trial, even though multiple parties' claims could be affected at trial:

First, even though their interpretation of the business judgment

rule could affect the claims by both the Okada parties and Elaine Wynn, WRL moves for a pre-trial ruling only on Okada's claims.

Then, when it files a pre-trial writ petition in this Court, WRL seeks review of their legal argument but supposedly only as to Okada's claim. This gives them the opportunity to protest that Ms. Wynn is not "interested" in that claim, even though her own claims and defenses could also be affected if this Court adopts WRL's construction of the business judgment rule.¹

But such clever maneuvering is not the correct way to determine interest so as to allow a party to participate in a writ petition that could affect her claims and defenses.

A. The Correct Standard for "Interest" to Intervene

WRL consented to Mr. Wynn's intervention, and as to Ms. Wynn, WRL invited her intervention if it was on behalf of, rather than in opposition to, its petition. (12/18/17 Hr'g Tr., at 8:20–21.) It seems clear

¹ WRL asserted this same type of "interest" argument before, in case No. 74326, where it claimed Elaine Wynn had no interest in Okada's writ petition seeking review of retrospective application of the new gaming privilege (Doc. No. 17-41404, at 24 n.5), despite that the very order under review also ruled on pre-enactment requests by Elaine Wynn in this litigation.

that WRL's analysis is based less on actual "interest" and more on whether a party agrees with its position. This Court should reject such crass analysis and grant Elaine Wynn's motion to intervene.

NRS 12.130 provides a good framework for this Court's evaluation of interest for a party to intervene, as it defines who may intervene:

Before the trial, any person may intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both.

NRS 12.130(1)(a). And NRCP 24(b) allows intervention when the intervenor's claim or defense has a "question of law or fact in common" with the issue under review.

Ms. Wynn is an appropriate intervenor because her interest in the correct application of the business-judgment rules arises in both her defenses and her claims. And her intervention is timely because this extraordinary writ petition was filed before the trial of the parties' claims.

B. Ms. Wynn is a Proper Intervenor

Elaine Wynn has a clearly recognizable interest in this issue. She is a defendant in claims by the Okada parties, just as is Steve Wynn, and WRL consented to and this Court allowed Mr. Wynn's intervention in this proceeding. On that basis alone, Ms. Wynn should be allowed to

participate.²

But Elaine Wynn is even more interested, as she also has her own claims against WRL and Mr. Wynn. She appeared amicus in Case No. 70500 on petition for rehearing to address this very legal position by WRL. That sweeping position not only affects Okada's claims as challenged in the petition but has implications for Ms. Wynn's claims, as well.

Even though WRL is attempting to exclude Ms. Wynn from litigating this issue in this Court, it will later raise the same arguments against her. If this issue later comes up on direct appeal after judgment, instead this pre-trial petition, the district court will by then have also decided the issues as to Ms. Wynn either pre-trial or in trial.³ In such a circumstance, Ms. Wynn will be a party to the appeal. The result should not be different in a pre-trial writ petition. WRL should not

² As the district court recognized, Ms. Wynn has an interest in the summary-judgment order that is the subject of Wynn Resorts' petition: The order "affect[s] her as a director, since I specifically excluded her from the summary judgment." (12/18/17 Hr'g Tr, at 8:17–18.)

³ On an appeal from a final judgment, the parties have "resolved all of the issues in the case." *Campos-Garcia v. Johnson*, 130 Nev., Adv. Op. 64, 331 P.3d 890, 891 (2014). By that point, Ms. Wynn would indeed have argued in the district court how the business-judgment rule applies to her claims. (Opp. 1:20.)

be allowed to exclude interested parties from the appellate review that will decide the law that could resolve their claims.

**C. Ms. Wynn has an Interest in Opposing
a Stay of the Entire Litigation**

Ms. Wynn also has an interest to intervene based on Wynn Resorts' emergency motion to stay the entire litigation. With this motion, Wynn Resorts again seeks to disrupt the upcoming trial, and that affects Ms. Wynn's claims and her rights. This circumstance gives Ms. Wynn the right to intervene and oppose Wynn Resorts' motion for a stay. *Cf.* NRCPC 24.

CONCLUSION

If Wynn Resorts wants this Court to jump into this litigation before the trial to interpret the business-judgment rule, it must let everyone affected by that interpretation intervene. This Court should grant Ms. Wynn's motion to intervene.

Dated this 21st day of December, 2017.

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I certify that on December 21, 2017, I submitted the foregoing “Reply Brief on Elaine P. Wynn’s Motion to Intervene and Join in the Petition” for filing *via* the Court’s eFlex electronic filing system. Electronic notification will be sent to the following:

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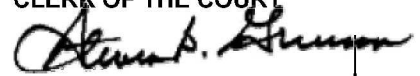
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/s/Adam Crawford

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EXHIBIT A

EXHIBIT A



TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

WYNN RESORTS LIMITED	.	
	.	
Plaintiff	.	CASE NO. A-12-656710-B
	.	
vs.	.	
	.	DEPT. NO. XI
KAZUO OKADA, et al.	.	
	.	Transcript of
Defendants	.	Proceedings
.....	.	

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTION TO STAY AND VARIOUS OTHER MOTIONS

MONDAY, DECEMBER 18, 2017

COURT RECORDER:

TRANSCRIPTION BY:

JILL HAWKINS
District Court

FLORENCE HOYT
Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

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1 MR. PEEK: Didn't see --

2 THE COURT: Mr. Williams is standing up now. I'm
3 sure he wants to tell you what happened.

4 Mr. Williams, how are you this morning?

5 MR. WILLIAMS: I'm good. And it was served on all
6 counsel.

7 THE COURT: Okay. So Mr. Polsenberg.

8 MR. POLSENBERG: Thank you, Your Honor. And, again,
9 we're in the middle of my apology to Mr. Bice. And it was
10 because they had -- I'd made a motion to intervene, they
11 expressed their intent to oppose that, and while Mr. Bice was
12 talking I'm thinking I need to get this transcript so I can
13 say to the Supreme Court, look, they're even saying the same
14 thing that I'm saying about this issue. But then Mr. Bice
15 added that, well, it doesn't affect Elaine Wynn. So I
16 apologize for finding that funny.

17 THE COURT: Doesn't it affect her as a director,
18 since I specifically excluded her from the summary judgment?

19 MR. POLSENBERG: Yes, it would. And that was Mr.
20 Bice's point to me. He suggested that I intervene on behalf
21 of his position, rather than opposing his position. But I
22 declined that invitation.

23 So I don't think this is a motion for stay. I think
24 this is really a motion to continue. The Supreme Court -- you
25 know, when we were here on November 30th -- and I'm confused

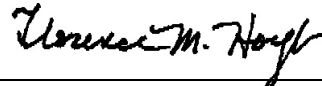
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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FLORENCE M. HOYT, TRANSCRIBER

12/18/17

DATE