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### Summary of Recontrust Co. v. Zhang, 130 Nev. Adv. Op. 1

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CIVIL PROCEDURE: PRESERVATION OF UNREACHED ISSUE ON REMAND

**Summary**

The Court determined whether a district court may consider an equitable subrogation claim upon remand when the district court previously resolved the case on other, later-reversed grounds, and the Supreme Court panel's orders for remand were silent on the matter.

**Disposition**

Appellate procedure does not allow a party the opportunity to raise a question upon remand that it could have raised on the prior appeal. However, an issue a party raises but the district court does not reach or decide, and a Supreme Court panel does not address in its orders, is properly preserved for the district court's consideration upon remand.

**Factual and Procedural History**

Lanlin Zhang secured a contract for the right to purchase Frank Sorichetti's house (the Property). When Sorichetti reneged, Zhang sued for specific performance and recorded a *lis pendens* against the Property. The district court granted Sorichetti's motions to dismiss and to expunge Zhang's *lis pendens*. On appeal, the Supreme Court granted Zhang's writ of mandamus directing the district court to reinstate Zhang's complaint and vacate the expungement order.<sup>2</sup>

Someone (the parties suspect Sorichetti) later recorded the nullified expungement, and Sorichetti applied to Countrywide for a \$705,000 loan against the house. Countrywide pulled title, finding both the *lis pendens* and the expungement, accepting the expungement as proof the Property was free from litigation. Countrywide secured the loan by recording first and second deeds of trust. Of the \$705,000 loan, \$281,090.12 went to retire preexisting mortgage debt. Sorichetti absconded with the proceeds and defaulted on the loan.

Countrywide initiated foreclosure and, upon learning of the proceedings, Zhang amended her complaint to join Countrywide. The district court entered default judgment for Zhang, ordering Sorichetti to convey the Property for the agreed upon price less damages due Zhang. However, Zhang could not complete the purchase because of Countrywide's deeds of trust.

In the dispute between Zhang and Countrywide, the district court addressed the validity of Zhang's *lis pendens*, ruling for Countrywide that the nullified expungement did not give Countrywide actual or constructive notice of Zhang's action against Sorichetti. The district court did not reach Countrywide's claim of equitable subrogation because it ruled Countrywide did not have notice. Zhang appealed and the three-judge panel of the Supreme Court found no merit in Zhang's negligence and slander-of-title claims, but reversed as to her declaratory and quiet-title

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<sup>1</sup> By Patrick Opdyke.

<sup>2</sup> *Zhang v. Eighth Judicial Dist. Court (Zhang I)*, 120 Nev. 1037, 103 P.3d 20 (2004) (abrogated in part by *Buzz Stew, L.L.C. v. City of N. Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008)).

claims, ruling that the *lis pendens* put Countrywide on inquiry notice.<sup>3</sup> The Court remanded for further proceedings.

Both parties filed for panel rehearing and, when these were denied, for *en banc* reconsideration. Zhang alleged error in the rejection of her negligence and slander-of-title claims, while Countrywide challenged the constructive notice decision. The *en banc* court denied reconsideration and remanded the case “to the district court to determine whether attorney fees and costs are appropriate.”

The district court did not decide Countrywide’s claim for equitable subrogation, believing it did not have jurisdiction from the Supreme Court’s order. The district court granted Zhang full recognition as owner of the Property. Countrywide filed to alter or amend the judgment, claiming Zhang was not entitled to a “free home,” in acquiring the Property without paying off the debt to which it was already subject. Because the panel order did not give any guidance on the equitable subrogation claim, the district court felt constrained to deny relief. Countrywide appealed on equitable subrogation and Zhang cross-appealed, claiming lack of jurisdiction for untimely notice of appeal.

## **Discussion**

The Court<sup>4</sup> acknowledged that Nevada recognizes the doctrine of equitable subrogation, which “permits a person who pays off an encumbrance to assume the same priority position as the holder of the previous encumbrance,”<sup>5</sup> so long as certain criteria are met. The Court then identified that Countrywide had a strong position on this claim because Countrywide lent Sorichetti \$705,000, of which \$281,090.12 retired the preexisting debt. The Court also recognized that both parties had stipulated without qualification that equitable subrogation was a legal issue in the case, at least through *Zhang II*, in their joint pre-trial memorandum to *Zhang II*.

At issue was the question of whether the district court was preempted from deciding the equitable subrogation claim on remand under theory of “law-of-the-case” doctrine, which stands for the general concept that a court should not re-open questions decided in earlier phases of a lawsuit. The Court noted “for the law-of-the-case doctrine to apply, the appellate court must actually address and decide the issue explicitly or by necessary implication.”<sup>6</sup> Here, because the district court neither reached nor decided equitable subrogation, the briefs in *Zhang II* did not discuss the topic. Accordingly, the panel did not discuss it either. The panel’s reference to quieting title in Zhang was a description of her claim, not a disposition of the unmentioned equitable subrogation.

The Court also dispensed with Zhang’s argument that Countrywide should have asserted the doctrine defensively in brief for *Zhang II*. Zhang argued that Countrywide should be barred from “us[ing] the accident of a remand to raise in a second appeal an issue that [it] could just as well have raised in the first appeal. . . .”<sup>7</sup> The Court found that failure to raise equitable subrogation in *Zhang II* did not preclude the issue on remand for two reasons: 1) the district court never ruled on it and, thus, there was no error to argue on appeal, and 2) Countrywide was

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<sup>3</sup> Zhang v. Recontrust Co., N.A. (*Zhang II*), Docket Nos. 52326/52835 (Order of Reversal and Remand, February 26, 2010).

<sup>4</sup> J. Pickering authored the Court’s opinion, in which C.J. Gibbons, J. Hardesty, J. Douglas, J. Cherry, and J. Saitta join. J. Parraguirre voluntarily recused himself from participation in this matter.

<sup>5</sup> Houston v. Bank of Am. Fed. Sav. Bank, 119 Nev. 485, 488, 78 P.3d 71, 73 (2003).

<sup>6</sup> Dictor v. Creative Mgmt. Servs., L.L.C., 126 Nev. \_\_, \_\_, 223 P.3d 332, 334 (2010).

<sup>7</sup> United States v. Parker, 101 F.3d 527, 528 (7th Cir. 1996).

not the appellant in *Zhang II*, and “forcing appellees to put forth every conceivable alternative ground for affirmance might increase the complexity and scope of appeals more than it would streamline the progress of the litigation.”<sup>8</sup> As such, the Court held that there was no fatal inconsistency between Countrywide’s position on rehearing and later on remand.

### **Conclusion**

Allowing the district court to consider Countrywide’s claim for equitable subrogation on the merits is proper here because the Supreme Court panel did not rule explicitly or implicitly on the subject. Additionally, Countrywide was not required to assert the doctrine on appeal in order to preserve it as it was never at issue.

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<sup>8</sup> Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 740–41 (D.C. Cir. 1995).