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### Summary of In re Fontainebleau Las Vegas Holdings, 128 Nev. Adv. Op. 53

David H. Rigdon  
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APPELLATE PROCEDURE – CERTIFICATION CASE RECORD

**Summary**

The Court considered a motion to strike an appendix from the record in a pending certification case from the United States Bankruptcy Court.

**Disposition/Outcome**

The Court concluded that review in a certification case is limited to the facts provided by the certifying court and answers to questions of law must be based on those facts. Appendices may be filed for additional consideration, but may not be used to controvert the facts stated in the certification order. The Court granted the motion to strike.

**Factual and Procedural History**

Fontainebleau was a planned hotel-casino property on the Las Vegas Strip. In 2005, a group of lenders, with Bank of America as the administrative agent, loaned money to the casino's developers. In 2007, Bank of America, as agent, negotiated extensive construction financing to over 300 contractors and suppliers that worked on the project. In the agreements between Bank of America, the contractor, and the subcontractors, a provision subordinated the liens to the Bank of America deed of trust. At some point after construction began, Bank of America refused to issue funds, which was followed by a work stoppage. Fontainebleau filed for Chapter 11 bankruptcy in Florida.

Appellant, Wilmington Trust, succeeded Bank of America as administrative agent for the lenders. Respondents are the contractors, subcontractors, and suppliers who asserted statutory liens against the property. The bankruptcy court certified the case because of the dispute over priority of the respective liens. The certification order provided an overview of the factual background and a copy of the adversary complaint that states the facts asserted by the Appellant.

Respondents argued that Appellant's filings are incomplete and filed an appendix in addition to their Answer. The parties disagreed on how the 2007 transaction was structured and whether, as a result, the doctrine of equitable subrogation applies. The documents in respondents' appendix were included to inform the Court that the facts listed in the bankruptcy court's summary are hotly contested.

**Discussion**

Justice Hardesty wrote for the unanimous Court, seated en banc.<sup>2</sup> Rule 5 of the Nevada Rules of Appellate Procedure<sup>3</sup> permits federal courts to certify questions of Nevada law to the

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<sup>1</sup> By Richard A. Andrews

<sup>2</sup> Justice Pickering voluntarily recused herself from participation in this decision.

<sup>3</sup> NEV. R. APP. P. § 5.

Court when there is no controlling Nevada authority. The certifying court must include “[a] statement of all facts relevant to the questions certified” in its order.<sup>4</sup> In this case, the bankruptcy court’s order included background information and facts as alleged by Appellant.

Respondents argued that the facts asserted and assumed in the complaint and the certified questions are not true and contended additional documentation is necessary. Appellant countered that the Court’s role is that of a fact-finder, which was the task of the certifying court.

The Court then considered the standards used by other jurisdictions and found that the majority of courts hold that the answering court is bound by the facts in the certification order. Furthermore, the answering court’s role is limited to answering the questions of law, and the certifying court determines the facts and applies the law provided by the answering court. The Court holds that this prevents the answering court from intruding into the certifying court’s sphere by making factual findings or resolving factual disputes.

### **Conclusion**

A court is bound by the facts as stated in the record from the certifying court. Parties are allowed to submit an appendix for consideration, but the Court may not use the information to contradict the certification order.

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<sup>4</sup> *Id.* § 5(c)(2).