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### Summary of Loomis v. Whitehead, 124 Nev. Adv. Op. No. 7

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*Loomis v. Whitehead*, 124 Nev. Adv. Op. No. 7, (May 1, 2008)<sup>1</sup>

**COMMERCIAL LAW – PARTNERSHIP**

**Summary**

Appeal from a district court order granting partial summary judgment in a contract action. The appeal addresses whether NRS 602.070 bars a partnership operating under a fictitious name from bringing an action for breach of contract when the contract was not entered into under the fictitious name.

**Disposition/Outcome**

Reversed and Remanded. NRS 602.070 does not bar partners from bringing an action “so long as the partners did not conduct the business or enter into an agreement under the fictitious name or otherwise mislead the other party into thinking that he was doing business with some entity other than the partners themselves.”<sup>2</sup>

**Factual and Procedural History**

Appellants Leroy Loomis and David R. Shanahan raised and sold cattle in Elko County, Nevada. Loomis was responsible for the livestock and paying expenses. Shanahan was responsible for the day-to-day care of the cattle. They did not have a partnership agreement and no business was registered, however Loomis and Shanahan referred to themselves the 52 Cattle Company.

In 2003, Shanahan and Whitehead, a rancher, entered into a verbal agreement for Shanahan’s cattle to be wintered at Whitehead’s ranch. The verbal agreement was made by Whitehead’s ranch foreman and neither Whitehead nor Loomis were present at the time of the agreement. The name 52 Cattle Company was not mentioned at the time of the agreement or during the course of business.

Shanahan and Loomis allege that during that winter their cattle were malnourished and several died from starvation at Whitehead’s ranch. Whitehead denies the allegations.

Shanahan and Loomis brought suit against Whitehead for negligence and breach of contract. During discovery, Whitehead discovered the existence of the 52 Cattle Company. He

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<sup>1</sup> By Emily Reed.

<sup>2</sup> *Loomis v. Whitehead*, 124 Nev. Adv. Op. No. 7, 2 (May 1, 2008).

also discovered that the 52 Cattle Company was not registered with the Elko County Clerk. Whitehead filed for partial summary judgment pursuant to NRS 602.070. “NRS 602.070 prohibits persons who fail to file an assumed or fictitious name certificate from suing on any contract or agreement made under the assumed or fictitious name.”<sup>3</sup> The district court granted summary judgment in favor of Whitehead. Loomis and Shanahan timely appealed.

### **Discussion**

The District Court concluded that because Loomis and Shanahan had failed to file a fictitious name certificate with the Elko County Clerk, and had conducted business under the name they were barred from bringing an action pursuant to NRS 602.070.

The Nevada Supreme Court reviewed this order granting summary judgment de novo. The Court found that “NRS 602.070 does not apply to individual partners whose transactions or business with another party were not performed under the fictitious name.”<sup>4</sup> In this case, Shanahan entered into the contract under his name, and not the name 52 Cattle Company. Whitehead does not allege that he believed or was lead to believe that he was doing business with the 52 Cattle Company. The name 52 Cattle Company was not mentioned until Shanahan’s deposition.

Because there is no indication that Loomis and Shanahan represented that they were the 52 Cattle Company and Whitehead did not rely on the fact that he was conducting business with the 52 Cattle Company NRS 602.070 does not apply.

This matter was previously considered in *Brad Associates v. Nevada Federal Financial*. In that case this court determined that “failure to register with the county clerk does not automatically bar partners from commencing suit for claims arising out of their business.”<sup>5</sup> In that case partners in a real estate venture failed to file a fictitious name certificate for the partnership. Both the partnership and the individual partners brought suit against their lender. The district court dismissed the action. The *Brad* majority reversed because the lender knew with whom it had done business and would not have been benefited by the partnership having a certificate.

This Court determined that the *Brad* majority properly determined the purpose of the statute and determined that it is to prevent fraud and provide the public with information. This Court reversed and remanded due to the fact that the business in question was not conducted under the name of the fictitious partnership.

### **Dissenting Opinion**

Hardesty, J., dissenting:

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 6 (citing *Brad Assocs. v. Nevada Fed. Financial*, 109 Nev. 145, 149, 848 P.2d 1064, 1066 (1993)).

<sup>5</sup> *Loomis*, 124 Nev. Adv. Op. No. at 7 (citing *Brad*, 109 Nev. 145, 848 P.2d 1064 (1993)).

Hardesty dissents because he believes that the statute was unambiguous and that “NRS 602.070 precludes any person doing business under an unregistered fictitious name from commencing or maintaining (1) any action on a contract made in the fictitious name or (2) “any cause of action arising or growing out of the business conducted” under the fictitious name.”<sup>6</sup>

Hardesty argues that because the claims arose from the business conducted under the 52 Cattle Company and that Shanahan is trying to enforce a partnership claim against Whitehead. Hardesty further argues that the Brad decision should be overruled because it does not base enforcement of NRS 602.070 on the plain and unambiguous meaning of the statute.

### **Conclusion**

Partners that do not conduct business or enter agreements under nonregistered fictitious names are not barred from bringing an action by NRS 602.070.

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<sup>6</sup> Citing Nev. Rev. Stat. 602.070.