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### Summary of Sheehan & Sheehan v. Nelson Malley & Co., 121 Nev. Adv. Op. 49

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*Nevada Law Journal*

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*Sheehan & Sheehan v. Nelson Malley & Co.,*  
**121 Nev. Adv. Op. 49 (Aug. 11, 2005)<sup>1</sup>**

**CONTRACT LAW – BREACH OF CONTRACT, COVENANT NOT TO  
COMPETE**

**Summary**

In this case, the Nevada Supreme Court reviews the district court’s interpretation of a contractual covenant not to compete and a liquidated damages clause. The Court states that unless clearly erroneous, it will affirm a district court’s decision on whether a contract was breached or not. However, the Court does not have to use the district court’s construction of a contract to make that determination. The Court may use independent appellate review to construe contracts.

**Disposition/Outcome**

Using independent appellate review to construe the contract, the Court held that the Sheehans, as a matter of law, did not violate the covenant not to compete. Additionally, Thorne Nelson did not breach the contract by failing to provide month-to-month billing reports because the contract only asked for “monthly totals” rather than “monthly reports of totals.”

**Factual & Procedural History**

William and Thomas Sheehan (herein “the Sheehans”) operated an accounting firm and decided to sell their practice to Dennis Nelson and Patrick Thorne (herein “Nelson Thorne”). The sales agreement stated a price of \$375,000 with a \$55,000 price reduction if Nelson Thorne collected less than \$325,000 for services rendered in the first fourteen months following its purchase of the practice. This fourteen-month period was referred to as the “look-back” period.

As part of the sales agreement, Nelson Thorne was to “furnish to [the Sheehans] monthly totals of billings collections to/from Acquired Clients commencing with the period ending July 31, 1997.” However, Nelson Thorne never provided month-to-month reports to the Sheehans. Nelson Thorne simply provided the Sheehans with one document at the end of the look-back period that accounted for services rendered and bills collected during the entire period.

The sales agreement also included a covenant not to compete which stated, “[The Sheehans] hereby agree not to hold themselves out as accountants . . . in an area defined by a radius of fifty miles from the Clark County Court House [located in Las Vegas, NV].” If the Sheehans violated this covenant not to compete, the contract provided for a liquidated damages clause that would reduce the sales price by 75%.

The Sheehans filed a complaint for declaratory relief on the issue of Nelson Thorne’s collections during the look-back period. The district court ordered the Sheehans to reduce the sales price to \$320,000 concluding that Nelson Thorne collected less than \$325,000 services for the look-back period. The district court also held the Sheehans violated the covenant not to compete and reduce the sales price another 75%. Due to these price reductions, the court found

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<sup>1</sup> Summarized by Kimberly Lou.

that Nelson Thorne overpaid for the practice and ordered the Sheehans to repay Nelson Thorne \$139,272.26.

### **Discussion**

The Nevada Supreme Court will affirm a district court's decision that a party breached or did not breach a contract unless the lower court's decision was clearly erroneous. Nevertheless, contractual terms are subject to the Court's independent appellate review.

The district court held that Nelson Thorne did not breach the agreement by failing to prepare monthly billing reports to the Sheehans. The district court said a single report that conveyed the monthly billing information for the look back period satisfied the agreement. The Court agreed and held that the plain language of the sales agreement asks for monthly totals rather than a monthly report of totals. Thus, the single report satisfied the terms of the sales agreement. Moreover, even if Nelson Thorne's failure to provide monthly reports constituted a breach, the breach was immaterial.

The court strictly construes covenants not to compete according to their plain language. The plain meaning of this covenant was that Nelson Thorne was entitled to a reduction only in the outstanding sales price if the Sheehans held themselves out as accountants within 50 miles of the Clark County Courthouse.

In this case, William Sheehan performed accounting services for a man who was a shareholder in a Las Vegas corporation as well as a Tucson, Arizona, corporation. Sheehan worked for the Tucson corporation. The Court held that Sheehan did not violate the covenant not to compete because Tucson is located more than 50 miles from the Clark County Courthouse. The covenant did not prevent Sheehan from being hired within the 50-mile radius, only that he could not perform services within the geographical limit. As a matter of law, the Sheehans did not violate this covenant and thus Nelson Thorne was not entitled to the liquidated damages clause.

### **Concurring Opinions**

Justice Rose stated that the requirement that Nelson Thorne furnish "monthly totals of billing and collections" commencing with the period ending July 31, 1997, meant that he was to provide the Sheehans with this information at the end of every month, not at the end of the look-back period. However, she concurs with the majority opinion because this discrepancy was not a material breach to the contract on the part of Nelson Thorne.

### **Conclusion**

Unless the district court's finding is clearly erroneous, the Nevada Supreme Court will affirm the district court's finding on whether or not there was a breach of contract. The Nevada Supreme Court does not have to look at the district court's interpretation of the contract upon appellate review. The Nevada Supreme Court may look at a contract with independent appellate review and thus construe the contract itself.