

*Loomis v. Whitehead*, 124 Nev. Adv. Op. No. 7 (February 28, 2008)<sup>1</sup>

## **CIVIL PROCEDURE – SUITS BY UNREGISTERED FICTITIOUS NAME PARTNERSHIPS**

### **Summary**

Appeal from an order granting partial summary judgment in a contract action. Summary judgment was based on NRS 602.070, barring persons who fail to file a fictitious name certificate from suing on any contract or agreement made under the fictitious name. Nevada Supreme Court (the “Court”) reversed and remanded.

### **Disposition/Outcome**

The Court concluded that “NRS 602.070 does not bar the partners from bringing the action so long as the partners did not conduct 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 ran a cattle business in Elko County, Nevada. They ran the business as a partnership, with one partner funding the operation and the other partner caring for the day-to-day operations. The partners shared the profits equally. The partners often referred to themselves as the “52 Cattle Company.” However, the partners had no formal partnership agreement and did not file a certificate to register their partnership name pursuant to NRS 602.010.

In 2003, one of the partners approached appellee’s foreman proposing an arrangement, under which the appellee would look over the cattle for the winter and receive a fee for his services. The foreman entered into the agreement on appellee’s behalf. During the negotiations, there was no mention of 52 Cattle Company. Later, appellee was informed that the cattle belonged to the Partnership.

Upon an inspection of the cattle during the winter, the partners found that most of their cattle were either dead or starving. They paid appellee for his services up to that point, removed their cattle, and brought this suit.

The district court entered summary judgment on appellee’s behalf because it found that under NRS 602.070 the partners could not bring the suit because they had not registered their fictitious partnership name. The partners appealed that decision.

### **Discussion**

NRS 602.070 provides that:

“No action may be commenced or maintained by any person mentioned in NRS 602.010 [requiring registration of fictitious business names], or by an

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<sup>1</sup> By Charles R. Peterson.

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

assignee of such a person, upon or on account of any contract made or transactions had under the assumed or fictitious name, or upon or on account of any cause of action arising or growing out of the business.”

The Court first stated that “[w]hen looking at a statute’s language, this court is bound to follow the statute’s plain meaning, unless the plain meaning was clearly not intended.”<sup>3</sup> The court decided that appellee was in no way misled into thinking that he was doing business with 52 Cattle Company. Therefore, there was no reliance and to allow this statute to bar recovery would be exalting form over substance.

The Court adopted the majority’s rule from *Brad Associates v. Nevada Federal Financial*, 109 Nev. 145, 149, 848 P.2d 1064, 1066 (1993), that NRS 602.010 did not apply to situations in which individual partners personally contracted with a third party. The Court stated that this rule looks to “the purpose of the statute to achieve the result the statute was designed to effect – fraud prevention and the provision of public information.”<sup>4</sup>

The Court ended by restricting its decision, finding that “maintenance of an action by an unregistered partnership, if the business was conducted under the partnership’s name . . . clearly violates NRS 602.070.”<sup>5</sup>

### **Dissenting Opinion**

The dissent argues first that the Court shouldn’t focus on if the action arose from a contract made *under* the fictitious name and should instead focus on the second half of NRS 602.070, which precludes persons maintaining actions “arising or growing out of the business conducted” under the fictitious name. The dissent argued that the facts showed that this action arose from the business conducted under the 52 Cattle Company name.

The dissent supplements this by arguing that the majority should not have gone past the plain language of the statute because the language is clear on its face and the dissent criticizes the majority for simply stating that the statutes are ambiguous without supporting that assertion. The dissent argues that the because the majority rule in *Brad* looked at the purpose of 602.070 and the dissent looked at the plain language, the majority is confused when it applies the majority rule from *Brad* but would limit that by the rule enunciated in *Brad*’s dissent.

The dissent would reverse that part of *Brad* that decided the purpose of NRS 602.070 should govern over the plain language of the statute.

### **Conclusion**

The Court reversed the district court’s partial summary judgment and remanded for trial because “while the lawsuit between Loomis and Whitehead involved partnership

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<sup>3</sup> *Id.* at 6.

<sup>4</sup> *Id.* at 8.

<sup>5</sup> *Id.*

business, the transaction at issue was not conducted and the subsequent suit was not maintained under the aegis of the fictitiously named partnership.”<sup>6</sup>

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<sup>6</sup> *Id.* at 8-9.