

2004

Jamis M. Johnson v. Jayson Orvis : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jamis M. Johnson; Appellant Pro Se.

Peggy A. Tomsic; Tomsic & Peck.

Recommended Citation

Reply Brief, *Johnson v. Orvis*, No. 20041040 (Utah Court of Appeals, 2004).
https://digitalcommons.law.byu.edu/byu_ca2/5399

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

JAMIS M. JOHNSON

Appellant *Pro Se*

352 South Denver Street, #304

Salt Lake City, UT 84111

Telephone: (801) 530-0100

Fax: (801) 530-0900

**IN THE UTAH COURT OF APPEALS
STATE OF UTAH**

JAMIS M. JOHNSON,

Defendant/Appellant,

vs.

JAYSON ORVIS,

Plaintiff/Appellee.

Case No. 20041040-CA

APPELLANT'S REPLY BRIEF

APPEAL FROM THE STATE OF UTAH THIRD DISTRICT COURT
CASE NO. 020904919, THE HONORABLE TYRONE MEDLEY

Peggy A. Tomsic (3879)

Tomsic & Peck

136 East South Temple, Suite 800

Salt Lake City, Utah 84111

Telephone: (801) 532-1995

Telefax: (801) 532-4202

Jamis M. Johnson

Appellant Pro Se

352 South Denver Street, Suite 304

Salt Lake City, Utah 84111

Telephone: (801) 530-0100

Telefax: (801) 530-0900

JAMIS M. JOHNSON

Appellant *Pro Se*

352 South Denver Street, #304

Salt Lake City, UT 84111

Telephone: (801) 530-0100

Fax: (801) 530-0900

**IN THE UTAH COURT OF APPEALS
STATE OF UTAH**

JAMIS M. JOHNSON,

Defendant/Appellant,

vs.

JAYSON ORVIS,

Plaintiff/Appellee.

Case No. 20041040-CA

APPELLANT'S REPLY BRIEF

APPEAL FROM THE STATE OF UTAH THIRD DISTRICT COURT
CASE NO. 020904919, THE HONORABLE TYRONE MEDLEY

Peggy A. Tomsic (3879)
Tomsic & Peck
136 East South Temple, Suite 800
Salt Lake City, Utah 84111
Telephone: (801) 532-1995
Telefax: (801) 532-4202

Jamis M. Johnson
Appellant Pro Se
352 South Denver Street, Suite 304
Salt Lake City, Utah 84111
Telephone: (801) 530-0100
Telefax: (801) 530-0900

TABLE OF CONTENTS

Table of Authorities	i
Argument	
I. Improper Grant of Summary Judgment	1-3
A. The Court Improperly Disregarded Established Standards for Granting Summary Judgment	1
B. The District Court Erred in Granting Summary Judgment Because Genuine and Disputed Material Issues of Fact Exist Precluding Summary Judgment	1-2
C. The District Court Did Not View the Facts in the Light Most Favorable to Mr. Johnson as Required in Considering Summary Judgment	2-3
D).The District Court Improperly Weighed Conflicting Facts	3
II. Purchasing a Judgment Is Not a Winding up of Affairs of an Administratively Dissolved Company	3-6
A. The Act of Assignment Was Void	3
B. The Assignment Was Void, Not Merely Voidable	3 5
III. It Was Clear Error for Judge Medley to Disregard Johnson’s Defenses Including Lack of Standing as “Immaterial” on a Claim of There Being a Distinction Between“Renewal” of a Judgment and “Enforcement” of a Judgement	6-8
IV. Orvis Is Not the Owner of the Judgment and Lacks Standing to Maintain the Action below Which Is a Threshold Question and a Central Issue Raised but Ignored Below	8-11
V. Judge Timothy Hanson’s Ruling Is Inapplicable Herein	11-12
VI. The Purchase of the Judgment in Collusion with Johnson’s Former Counsel Renders it Void as a Matter of Public Policy	12-13
VII. The Motion to Strike the Crawley Affidavit Should Have	

Been Granted	14-19
A. Point One - a Reply Memorandum for a Motion for Summary Judgment Is for Rebuttal Only	16
B. Point 2 - Rule 56(e) on Admissibility Makes the Orvis Reply - Defamatory Portion and Crawley Affidavit Inadmissible	16-17
C. Point 3 - The Orvis Reply-The Crawley Affidavit Contains Defamatory, Immaterial, Impertinent and Scandalous Matters and must Be Stricken under Rule 12(f)	17-19
VIII. Rule 11 Sanctions Against Orvis' Counsel Were Appropriate ...	19-21
VIII. Awarding Monetary Sanctions for the Protective Order Was Improper	21-22
Conclusion	12-24

TABLE OF AUTHORITIES

<u>Anderson Development Co. v. Tobias</u> , 116 P.3d 323 (Utah 2005)	1, 2
<u>Bio-Thrust, Inc. v. Division of Corporations</u> , 80 P.3d 164 (Utah App.2003)	9-10
<u>Brend v. Dome Development, Ltd.</u> 418 N.W.2d 610 (N.D. 1988)	5
<u>Deming v. Moss</u> , 123 P. 971 (Utah 1912)	8
<u>Draper City v. Estate of Bernardo</u> , 888 P.2d 1097, 1101 (Utah 1995)	1, 3
<u>Francisconi v. Union Pacific R. Co.</u> , 36 P.3d 999 (Utah App. 2001)	3
<u>Frandsen v. Holladay</u> , 739 P.2d 1111, 1113 (Utah App. 1987)	8
<u>Fullmer v. Blood</u> , 546 P. 2d 606 (Utah 1976)	9
<u>Haymond v. Bonneville Billing & Collections, Inc.</u> , 89 P.3d 171 (Utah 2004)	79
<u>Kilpatrick v. Wiley, Rein & Fielding</u> , 909 P.2d 1283 (Utah App.1996)	1, 13
<u>Macris & Associates, Inc. v. Neways, Inc.</u> , 16 P.3d 1214 (Utah 2000)	12
<u>Masters v. Worsley</u> , 777 P.2d 499, 112 Utah Adv. Rep. 39 (Utah Appeal 1989)	3
<u>Miller v. Celebration Mining Co.</u> , 29 P.3d 1231 (Utah 2001)	4, 5, 6
<u>Olson v. Salt Lake City Sch. Dist.</u> , 724 P.2d 960, 964 (Utah 1986)	9
<u>Paradise Creations, Inc. v. UV Sales, Inc.</u> , 315 F. 3d 1304 (Fed. Cir. 2003)	4, 5
<u>Peterson v. Coca-Cola USA</u> , 48 P.3d 941 (Utah 2002)	4
<u>Salt Lake City Corp. V. Property Tax Div.</u> , 979 P. 2d 346 (Utah 1999)	10
<u>Salt Lake County v. Metro West Ready Mix, Inc.</u> , 89 P.3d 155 (Utah 2004)	1
<u>Smith v. Frandsen</u> , 94 P.3d 919 (Utah 2004),	1

<u>Staats v. Staats</u> , 226 P. 677 (Utah 1924)	7
<u>Salt Lake City Corp. v. Property Tax Div.</u> , 979 P.2d 346 (Utah 1999)	8
<u>Snow, Nuffer, Engstrom & Drake v. Tanasse</u> , 980 P.2d 208 (Utah 1999)	13
<u>Staats v. Statts</u> , 226 P. 677 (Utah 1924)	8
<u>State ex rel. W.S.</u> , 118 P.3d 283 (Utah App.2005)	10
<u>Tanner v. Carter</u> , 20 P.3d 332 (Utah 2001)	13
<u>U.P.C., Inc. v. R.O.A. General, Inc.</u> , 990 P.2d 945 (Utah Ct. App. 1993)	15
<u>Walter v. Wiley, Rein & Fielding</u> , 909 P.2d 1283, 1290 (Utah Ct. App. 1996)	13
<u>Washington County Water Conservancy Dist. v. Morgan</u> , 82 P.3d 1125 (Utah 2003)	9
<u>Winegar v. Froerer et. al.</u> , 813 P.2d 104 (Utah 1991)	2, 3
11 U.S.C. §362(a)(1)	7
Utah Code Anno. §48-1-5	8
Utah Code Anno. §48-2c-1207	4
Utah Code Anno. §48-2c-1301	4
U.R.Civ. Pro. 11	13, 19-21
U.R.Civ. Pro. 12(f)	16, 17, 18
U.R.Civ. Pro. 56(e)	15, 17, 18
17 West's Ann.Code Civ.Proc. (1987 ed.) foll. § 683.110	7

I. IMPROPER GRANT OF SUMMARY JUDGMENT.

A. THE COURT IMPROPERLY DISREGARDED ESTABLISHED STANDARDS FOR GRANTING SUMMARY JUDGMENT.

Appellee Orvis' Brief is curiously out of place on a review of an appeal of a motion for summary judgment. Their argument is riddled with factual assertions and mischaracterizations of fact so as to create factual disputes beyond what is necessary to decide the case, but which in and of themselves create clear factual disputes. They attempt to dispute facts which by means of doing so prove the proposition they are attempting to defeat - summary judgment was inappropriate. The standards guiding the granting of motions for summary judgment are axiomatic and universal in American jurisprudence. These standards are established to assure that litigants get their fair day in court. These standards are:

1. Summary judgment is improper when there are disputed issues of material fact, Salt Lake County v. Metro West Ready Mix, Inc., 89 P.3d 155 (Utah 2004).

2. The facts are to be viewed in the light most favorable to the one opposing summary judgment, Anderson Development Co. v. Tobias, 116 P.3d 323 (Utah 2005).

3. It is improper to weigh evidence in deciding a motion for summary judgment, Draper City v. Estate of Bernardo, 888 P.2d 1097, 1101 (Utah 1995).

Further, because the facts must be undisputed to begin, it is *only* if and when there are not factual disputes that the trial court's view of law is reviewed for correctness, Kilpatrick v. Wiley, Rein & Fielding, 909 P.2d 1283 (Utah App.1996) and Smith v. Frandsen, 94 P.3d 919 (Utah 2004), "In reviewing a grant of summary judgment, we give no deference to the trial court with respect to its legal conclusions." The trial court violated each of these in granting Orvis' motion and ruled contrary to law.

B. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE GENUINE AND DISPUTED MATERIAL ISSUES OF FACT EXIST PRECLUDING SUMMARY JUDGMENT.

The central fact ruled on by the lower court was a hotly disputed factual issue - who

owns the judgment sought to be renewed, i.e. whether Orvis had standing to attempt to enforce a judgment bought with embezzled partnership funds. Orvis himself claims on p. 2 of his Brief that this issue, i.e. ownership, is an “essential element” to prove in an action to renew a judgment. Orvis spends time disputing whether Johnson was a partner, but does not actually dispute that the assignment of the judgment was acquired using embezzled partnership funds. Who the various partners in such partnership are, or are not, is not the issue preventing the summary judgment, it is whether the judgment acquired with partnership funds is actually owned by the partnership. Orvis is mistaken on his misplaced reliance on an order entered in another case between Orvis and Johnson by Judge Timothy Hanson during the pendency of this case before Judge Tyrone Medley. Another critical issue of fact in this action where a judgment was acquired by an administratively dissolved Utah business entity was whether acquisition of property is winding up of affairs which is the only activity permitted to be conducted by an administratively dissolved company.

To be satisfied of one set of facts over another involves a weighing of the two sets of facts. This of course is not permissible, as a matter of law, on a motion for summary judgment. Winegar v. Froerer et. al., 813 P.2d 104 (Utah 1991). Because the issues of ownership of the assignment of the judgment being pursued and the lawful party to enforce it were highly contested facts and there was ample, reasonable support for Appellant Johnson’s interpretation, the district court erred in granting summary judgment over a disputed material factual issue.

**C. THE DISTRICT COURT DID NOT VIEW THE FACTS IN THE LIGHT
MOST FAVORABLE TO MR. JOHNSON AS REQUIRED IN CONSIDERING
SUMMARY JUDGMENT.**

When deciding a motion for summary judgment, the facts are to be viewed in the light most favorable to the one opposing summary judgment, Anderson Development Co., *supra*. Rather than utilizing this “perspective” the Court did the opposite—there was not even an attempt at a middle ground here, let alone a recognition that these facts must be weighed in that light most favorable toward Mr. Johnson. This is reflected by the Court’s statement that

the issues of ownership of the judgment were immaterial to its renewal - R 1114 - 10/15/04 Transcript p.33, lines 12-15). That view of the facts most favorable to Johnson is that the assignment from Belding to the dissolved All Star Financial, LLC was void in the first place but that the assignment from All Star Financial was actually to a partnership which owns the judgment, not Jayson Orvis, one of the partners individually. Such a view would have precluded summary judgment, but the district court failed to take the view required by the standard for granting summary judgment.

D. THE DISTRICT COURT IMPROPERLY WEIGHED CONFLICTING FACTS.

While it is wrong to rule on one set of facts over another in summary judgment, Winegar, supra; it is totally impermissible for the court to weigh conflicting facts, Francisconi v. Union Pacific R. Co., 36 P.3d 999 (Utah App. 2001). Weighing differing versions of facts is improper and is another manifest error by the district court requiring this Court to summarily dispose of and reverse the lower court's grant of summary judgment. Masters v. Worsley, 777 P.2d 499, 112 Utah Adv. Rep. 39 (Utah Appeal 1989).

The trial court is extensively experienced and it would seem beyond question that it understands the standard for granting summary judgment in the face of disputed facts. Nonetheless, the trial court wholly abandoned the most fundamental of standards in granting summary judgment. If there is a factual dispute and the court chose to just overlook the dispute, then summary judgment is inappropriate, Draper City v. Estate of Bernardo, supra). That was error and it should be reversed.

**II. PURCHASING A JUDGMENT IS NOT A WINDING
UP OF AFFAIRS OF AN ADMINISTRATIVELY DISSOLVED COMPANY.**

A. THE ACT OF ASSIGNMENT WAS VOID.

All of the discussion by Appellee Orvis with respect to the acquisition of the Belding judgment by the administratively dissolved All Star Financial, LLC was not about whether the acquisition was void to begin with, but as to being merely voidable by the parties to the assignment. This distraction misses the most critical feature to begin with - purchase of a

judgment is not a permissible action of winding up. Winding up of affairs or reinstating is all that an administratively dissolved company may do. It is not business as usual - buying and selling products and transacting business as if it were in good standing. If the act is void to begin with, it hardly matters who is objecting to it or not - as if the parties to a void act can acquiesce in it so that it can be made valid. Utah Code Anno. §48-2c-1207 provides:

- (3) (a) [A] company administratively dissolved under this section continues its existence but may not carry on any business except:
 - (i) the business necessary to wind up and liquidate its business and affairs under Part 13, Winding Up; and (ii) to give notice to claimants . . .

Winding up is defined in Utah Code Anno. §48-2c-1301 of acts only of selling and disposing of existing assets to pay creditors, ***not*** any act of purchasing new assets or engaging in new ventures.

B. THE ASSIGNMENT WAS VOID, NOT MERELY VOIDABLE.

The statutory governance of a company's dissolution caused by its own failure to comply with statute would be entirely defeated if parties could acquiesce in acts beyond its legal authority. A statutory penalty of administrative dissolution would have no effect. The over-reading of a phrase from the Miller v. Celebration Mining Co., 29 P.3d 1231 (Utah 2001) case relied upon by Judge Medley which is urged by Orvis would have this result which is clearly contrary to public policy as expressed by the legislature in creating such penalty for company non-compliance. The over-reading results from a paraphrase of the purported holding of Miller in a footnote in passing from another Federal Circuit for which Orvis mis-states the page number where the case is actually found, Paradise Creations, Inc. v. UV Sales, Inc., 315 F. 3d 1304 (Fed. Cir. 2003). The paraphrase should not substitute for the case's holding themselves. Miller is cited in Utah law for the affirmative proposition that with respect to personal liability in a contract with a dissolved corporation, a party thereto can void the contract, Peterson v. Coca-Cola USA, 48 P.3d 941 (Utah 2002).. It did not directly reach nor was asked to the different proposition that an act by a dissolved corporation is anything other than void ab initio. Miller dealt with liabilities of principals

more than the validity of the corporate act and indeed the dissent stated at fn. 3:

Clearly, a contract is void as to the corporation itself post dissolution and we have previously so held. *See Bagnall v. Suburbia Land Co.*, 579 P.2d 914, 916 (Utah 1978) (holding deed executed by suspended corporation was a nullity because there was no showing that it was for purpose of winding-up pursuant to statute); *Houston v. Utah Lake Land, Water & Power Co.*, 55 Utah 393, 400-01, 187 P. 174, 177 (1919) (holding purchase of new corporation was "wholly void" because winding-up statute bars dissolving corporation from engaging in any new business transactions.)

This use of the Federal Circuit Paradise case is curious because Orvis then attempts to distinguish a non-Utah case directly on point upon which Johnson relies only on the basis that as a non-Utah case it is non-binding, Brend v. Dome Development, Ltd. 418 N.W.2d 610 (N.D. 1988). Obviously, what's good for the goose is good for the gander and their Federal Circuit case is also non-binding. While neither case may be binding, it may be useful to actually read the facts and law expressed in each to see which is more *persuasive*. A critical feature of the cases relied on by Orvis and trial Judge Medley and in Paradise as well as in Miller itself is that the issues in these cases were the liabilities of principals. The Brend case is directly on point and unequivocal:

A corporation is a creature of statute, acquiring its existence and authority to act from the State. State v. J.P. Lamb Land Co., 401 N.W.2d 713 (N.D.1987). Generally, in the absence of a contrary statute, a conveyance or contract by a dissolved corporation is void and of no effect. New Hampshire Fire Insurance Co. v. Virgil & Frank's Locker Service, Inc., 302 F.2d 780 (8th Cir.1962); Hearth Corporation v. C-B-R Development Co., Inc., 210 N.W.2d 632 (Iowa 1973); Cloverfields Improvement Association, Inc. v. Seabreeze Properties, Inc., 32 Md.App. 421, 362 A.2d 675 (1976); Kratky v. Andrews, 224 Minn. 386, 28 N.W.2d 624 (1947); Land Clearance For Redevelopment Authority v. Zitko, 386 S.W.2d 69 (Mo.1964); James v. Unknown Trustees, Etc., 203 Okl. 312, 220 P.2d 831 (1950); Mount Carmel R. Co. v. M.A. Hanna Co., 371 Pa. 232, 89 A.2d 508 (1952). See Patton on Titles § 405 (1938); 19 Am.Jur.2d, Corporations § 2891 (1986); 16A Fletcher Cyclopedia Corporations, Ch. 65, § 8137 (1979).

Thus, since this non-Utah case lists cases from seven other jurisdictions as well as Patton, AmJur and Fletcher, this appears to be the majority rule re void ab initio and that espoused by Orvis of voidable a minority view. It is not apparent on its face that Miller considered this hornbook law - perhaps only because not necessary to the decision therein.

The Miller court certainly did not make some explicit declaration to overturn prevailing and established law. Overturning precedent need be explicit, not inferred. It is more likely that reading Miller as Orvis does is an over-reading of it for something not squarely held. Indeed, the cases cited in the Miller dissent are Utah cases squarely in line with the majority rule, i.e. post dissolution acts are void, which should not be abandoned absent sound consideration. It is statute that mandates the limitations imposed upon administrative dissolution. Absent a legislative determination that the legislature does not intend for administrative dissolution to have any practical effect, the clear meaning of that statute should govern.

As a final matter, Orvis and Judge Medley in their disregard of administratively dissolved status, claim the “parties to the contract” can elect to dissolve it. This raises an interesting unexamined question which is that the contract in issue being litigated is the judgment creditor-judgment debtor contract. While a judgment debtor never has any choice about an assignment of the judgment (which could be to the proverbial evil harassing dunning collection agency), it may be different where the assignee is a dissolved company where the debtor may very well elect to claim “I do not have to deal with you because the legislature says so.”

**III. IT WAS CLEAR ERROR FOR JUDGE MEDLEY TO DISREGARD
JOHNSON’S DEFENSES INCLUDING LACK OF STANDING AS
“IMMATERIAL” ON A CLAIM OF THERE BEING A DISTINCTION
BETWEEN “RENEWAL” OF A JUDGMENT AND “ENFORCEMENT”
OF A JUDGEMENT.**

Johnson asserted and supported by affidavit and evidence, several defenses to Orvis’ Motion for Summary Judgment, such as that Orvis does not own the judgment because he used partnership funds to purchase it and that Orvis did not have individual standing to bring this case. Judge Medley disregarded the Orvis lack of standing defense and the other Johnson defenses on a spurious basis. Orvis asserted without reference to any authority as an academic concept, and Judge Medley pronounced that there is a distinction between renewal of a judgment and enforcement thereof; such that somehow the Johnson defenses may be ignored at the time that renewal of the judgment is sought, but the defenses might be

available upon enforcement, i.e. that these defenses had no bearing on “renewal.” Judge Medley states at R. 1114, 1015/04 Transcript p.33, lines 12-20:

These issues raised by Mr. Johnson and all of the issues raised by Mr. Johnson as they relate to the partnership I’m finding to be immaterial to the actual renewal of the judgment itself and while its not my intention to make any prejudgment whatsoever or to offer and invitation whatsoever, I want to make it clear that I do see a distinction consistent with Ms. Tomsic’s argument about the general principle of renewal versus enforcement and clearly what is sought in this particular case is renewal.

Simply stating such propositions shows its transparency - if there is no renewal, there can be no enforcement. The act of renewal is in and of itself an act of enforcement. It is so classified under Federal Law, 11 U.S.C. §362(a)(1). As in many states, the California Rules of Court 976 and 977 classify renewal under provisions relating to enforcement and indeed their statute “Enforcement of Judgments” specifies the renewal procedure, 17 West’s Ann.Code Civ.Proc. (1987 ed.) foll. § 683.110.

The distinction between renewal and enforcement is the only stated rationale for the District Court to have avoided any ruling on the issues duly raised by the Johnson defenses. Certainly, the District Court did ignore all legal arguments and material issues of fact raised by Johnson (as did Orvis in dealing only substantively with the “voidability” argument). But as shown here, the numerous defenses raised by Johnson, including, for example, the issue of Orvis’ lack of standing, are issues that must be confronted at the time the District Court addresses Orvis’ summary judgment motion to “renew” the judgment, a defined “threshold issue.” The Court may not isolate and solely review that single Orvis “renewal” voidability issue and leap over the other issues duly and clearly raised by Johnson in opposition to the summary adjudication process. There is no basis for this in Utah civil procedure or otherwise, nor did Orvis cite any other basis for this false dichotomy between renewal with no defenses available including challenge to standing and enforcement with defenses available. The distinction urged by Orvis and accepted by the trial court below that the Court need only address Orvis’ motion to renew the judgment and ignore Johnson’s substantive defenses because they may be raised later in some “enforcement” leg of this litigation, is not a valid

procedural or legal basis to disregard the Johnson claims that would either dismiss entirely the Orvis complaint or vitiate it to nothing.

**IV. ORVIS IS NOT THE OWNER OF THE JUDGMENT AND LACKS
STANDING TO MAINTAIN THE ACTION BELOW WHICH
IS A THRESHOLD QUESTION AND A CENTRAL ISSUE RAISED
BUT IGNORED BELOW.**

Johnson has asserted from the outset that Orvis purchased the Belding judgment with monies wrongfully taken from the partnership - R. pp.11, ¶¶ 13,14,15 and 16. Initial discovery supports this - R. pp. 63, 103, ¶¶22, 106, 111 et seq., 148, 167-168, 173, 176, 179, 189, 228, 261, 265-266, 291, 296 and 334. If Orvis used partnership funds (whether embezzled or not) to acquire the judgment, that judgment is an asset of the partnership not of Orvis personally. Orvis brought the action below individually in his own name, not on behalf of the partnership, or as a trustee, etc. The case must be dismissed since Orvis does not own the judgment. The partnership might otherwise bring the action, but for the fact that the judgment is now expired and no new action may be maintained to extend it.

Utah statute and case law are well established, long standing and clear that assets purchased with partnership monies, even if the assets are held in the name of an individual partner, are the property of the partnership. Utah Code Anno. §48-1-5 provides, in part, “Unless the contrary intention appears, property acquired with partnership funds is partnership property.” The statute was enacted in 1953 and has been unchanged since then. This current statute’s substance has uniformly been the holding of Utah courts on partnership property beginning with Deming v. Moss, 123 P. 971 (Utah 1912):

The law with respect to what, *prima facie* at least, constitutes partnership property as between partners is well stated in 22 A. & E. Ency., L. (2d Ed.) 91, in the following words: “All property brought with funds belonging to a firm is, *prima facie* at least, the property of the partnership, though the title to such property be taken in the individual names of one or more of the partners.”

See Frandsen v. Holladay, 739 P.2d 1111, 1113 (Utah App. 1987). Deming was quoted in Staats v. Staats, 226 P. 677 (Utah 1924) to affirm that this rule is “settled in this jurisdiction” and is “amply supported by numerous authorities.” And Utah’s current statute was referenced

in Fullmer v. Blood, 546 P. 2d 606 (Utah 1976):

Our statute provides that when property is purchased with partnership funds it becomes property of the partnership, unless a contrary intention is shown. This is true regardless of the form of the transaction, including where the purchase is made in the name of one or more of the partners as individuals without reference to the partnership.

Orvis's case, without standing, must be dismissed Haymond v. Bonneville Billing & Collections, Inc., 89 P.3d 171 (Utah 2004). Lack of standing is jurisdictional and may be raised at any time, Washington County Water Conservancy Dist. v. Morgan, 82 P.3d 1125 (Utah 2003); Olson v. Salt Lake City Sch. Dist., 724 P.2d 960, 964 (Utah 1986); As additionally stated in Bio-Thrust, Inc. v. Division of Corporations, 80 P.3d 164 (Utah App.2003):

Because of our determination that the petitioners lack standing to pursue this action, we need not reach the merits of petitioners' other claims. See Barnard v. Motor Vehicle Div., 905 P.2d 317, 322 (Utah Ct.App.1995) (holding that a petitioner's failure to establish standing leaves the court with "no choice but to dismiss the appeal as being beyond our jurisdiction to entertain").

Other than barely disputing the fact, Orvis has never addressed or responded to this legal issue which has been argued and briefed. It was extensively argued in Johnson's responsive memorandum to the Motion for Summary Judgment, and Orvis' failure to ever address this was further pointed out to the court. In this appeal, Orvis glosses over this argument again altogether. His silence on this issue should result in his default thereto.

This was clearly the central factual issue before the trial court admitted by Orvis at 10/15/04 Transcript p. 3, lines 9-11 and raised by Johnson at p. 6, lines 1-3 and repeatedly throughout the record below. It is impossible to claim such fact was not in dispute. This is what the parties argued about. It was curious that Judge Medley stated that this issue was "immaterial" to his decision to renew the judgment at R. 1114 - 10/15/04 Transcript p. 33, line 14 whereas it is, in fact, one of the essential elements required to renew a judgment - that the party seeking renewal own the judgment. "[T]he issue of whether a party had standing is a "threshold" determination that must be addressed first," Bio-Thrust, Inc. v. Division of

Corporations, 80 P.3d 164 (Utah App.2003); Salt Lake City Corp. v. Property Tax Div., 979 P.2d 346 (Utah 1999).

The issue raised by Johnson is that the judgment was purchased with embezzled partnership funds and if owned at all, is owned by the partnership, not Orvis individually. Thus this defense is, as a matter of law, the threshold issue which the trial court was required to determine, not just ignore as it did. If the fact of misuse of partnership funds may be said to have been disputed (however indirectly) by Orvis (Orvis likely would claim not to have defaulted as to this issue), then Orvis might avoid default but then clearly summary judgment was inappropriate with this key dispute. "[T]he question of whether a given individual ... has standing to request a particular relief is primarily a question of law, although there may be factual findings that bear on the issue," State ex rel. W.S., 118 P.3d 283 (Utah App.2005).

Orvis argues that a ruling in a separate case by Third District Court Judge Timothy Hanson disposes of all issues here. Orvis mischaracterizes the Hanson ruling and wrongly attributes to it great breadth of meaning beyond what it actually states. As Orvis describes it, the Hanson ruling ruled that no partnership existed whatsoever. That is not what the Hanson ruling says. The next section of this Brief discusses the limits and inapplicability of the Hanson decision as res judicata of any issue in this appeal. But herein, despite any Hanson ruling, Orvis cannot acquire the judgment in his own name using partnership funds. The standing issue does not go away because of Judge Hanson's ruling. The partners to the partnership may not be merely Johnson and Orvis, and the money misapplied by Orvis from the partnership does not magically fall outside a partnership accounting because Judge Hanson ruled on only Johnson's estoppel to assert claims against the partnership. Although the Hanson ruling may well also be reversed, that instability in the Hanson decision is not the reason the Medley Court must forge ahead to determine standing. Judge Medley should have confronted this standing issue regardless because the partnership statute mandates assets acquired with partnership funds are partnership property which deprives Orvis of standing.

It should also be noted that it was the Orvis strategy to bring multiple cases against Johnson. As Johnson has previously pointed out, Orvis has brought five cases against

Johnson as a strategy to overwhelm him. However, this strategy of Orvis necessarily exposes him to scrutiny of issues from various angles by various judges and potentially inconsistent rulings. He would have it that Judge Hanson disposed of this accounting and standing issue by Judge Hanson's facially inapplicable ruling, but Orvis created the multiplicity of lawsuits in which each court must deal with the distinct, precise, separate issues before it.

V. JUDGE TIMOTHY HANSON'S RULING IS INAPPLICABLE HEREIN.

Orvis' is off the mark entirely attempting to cloud the issue and misdirect what is in issue and further attempt to defame Johnson and his family to do so. Orvis argues a Judge Timothy Hanson ruling in another case about a Johnson claim regarding this partnership somehow has some bearing herein which it does not. First, the Orvis team flatly misrepresents what it is that Judge Hanson determined, claiming that Judge Hanson ruled that "no such partnership exists" Brief of Appellee p.1 - and that such ruling is *res judicata* herein. Judge Hanson never so ruled. In the first place, the actual text of Judge Hanson's ruling (which is itself on appeal) is not at all that no partnership existed or who its partners were, but rather something quite different, to wit, that "[J]udicial estoppel will not allow Johnson . . . to claim a partnership interest here." Being judicially estopped from claiming an interest in a partnership says nothing about the existence of the partnership or its members' interests other than perhaps Johnson's or who the members are. Johnson, by here asserting that Orvis used partnership funds to acquire the assignment through the defunct All Star Financial, LLC, is **not** here in these defenses asserting any claim or interest in the partnership. And though Johnson clearly claims to be one of the partners, and indeed the documentation to that effect is extensive and indisputable, here, in this context, that specific issue is not what was before Judge Medley. Johnson does not need to claim here in defense that he personally has an interest in the judgment at issue, but rather that it belongs to the partnership whose funds were used to acquire it, not Jayson Orvis. Thus the defensive claim asserted here that the judgment is not owned by Orvis personally was never part of the partnership claims or analysis before the Hanson court and that judge never considered such an issue. Thus, the Hanson ruling is inapplicable here because it lack an essential element of

either *res judicata* or collateral estoppel - an identity of issue or claim, Macris & Associates, Inc. v. Neways, Inc., 16 P.3d 1214 (Utah 2000).

Further, there are other defenses asserted consistently below, and ignored by the District Court, that do not relate in any manner to a “partnership” and are simply outside the parameters of any statement by Judge Hanson about judicial estoppel from asserting a claim against the partnership. For example, the Hanson decision does not even remotely touch or affect the other defenses, such as that the judgment is void in Orvis’ hands because of his conspiring with Johnson’s attorney, Lawrence, to acquire it. Orvis baldly asserts that the Hanson decision below in another case is so broad that it would smother all defenses raised before Judge Medley here. The Lawrence-Orvis fraud which arises from Lawrence acting in collusion with Orvis with Lawrence’s representation of Johnson and Danell Johnson and the illegality of an attorney to hold a judgment against a former client acquired this way, as set forth in Argument VI below. The doctrines of *res judicata* or collateral estoppel based on the Hanson ruling cannot reach the Lawrence-Orvis conspiracy defense asserted here, Lawrence’s breach of fiduciary duty. Relying here, as Orvis does, on the Hanson decision as the universal bar to the many defenses raised below demonstrates both Orvis’ and Judge Medley’s misunderstanding of *res judicata* as well as a misapprehension and misanalysis of the various defenses asserted below.

**VI. THE PURCHASE OF THE JUDGMENT IN COLLUSION WITH
JOHNSON’S FORMER COUNSEL RENDERS IT VOID
AS A MATTER OF PUBLIC POLICY.**

While Orvis discourses about how Victor Lawrence is not a party herein, at the very same time he resisted below having Lawrence deposed because Lawrence was aware and would testify about critical facts about the partnership, and the fraudulent purchase of this judgment with partnership funds.¹ Lawrence was the Lexington Law Firm head. The marketing for Lexington was one of the business activities of the Orvis-Johnson partnership.

¹ Indeed, one issue on appeal here involves the effort by Orvis to seek a protective order to prevent Johnson from deposing Lawrence.

It was funds from this business operation that Orvis used to purchase the judgment and with Lawrence acting in collusion with Orvis to do so. Whether Lawrence is an individual party or not, however, the judgment was purchased with funds from the partnership. Lawrence had previously acted as counsel for Johnson and Johnson's wife in several matters including the very SBA action referenced - R. p. 103, ¶¶24, 25. By virtue of his representation, Lawrence had knowledge of the SBA judgment and what the SBA was willing to settle it for. He took that attorney-client information and ran behind Johnson's back to use it against him to inform Orvis of the existence and amount to negotiate the purchase through the sham company to the partnership - R. p.103, ¶26. Lawrence acted as the "directing attorney" for Lexington Law Firm - R. p. 103, ¶¶28 29, whose partnership funds were used to purchase the judgment. The practice of an attorney purchasing a judgment to use against a former client was forbidden by the Utah Supreme Court in Snow, Nuffer, Engstrom & Drake v. Tanasse, 980 P.2d 208 (Utah 1999) as contrary to public policy.

Further, Orvis is alleged to have conspired with attorney Lawrence to convert, extinguish, and profit by Johnson's interest in the partnership. This is a material issue of fact that would, if proved, void Orvis' holding of the judgment. Civil conspiracy is a recognized cause of action in Utah, Tanner v. Carter, 20 P.3d 332 (Utah 2001). Here an attorney and a partner conspired against their client/partner for substantial gain at the client/partner's expense, and to hide preceding and ongoing fraud against him. As attorney, Lawrence owed Johnson a fiduciary duty of complete loyalty meaning that he "must never use [his] position of trust to take advantage of his client's confidences for [himself] or for other parties." Walter v. Wiley, Rein & Fielding, 909 P.2d 1283, 1290 (Utah Ct. App. 1996) ["In all relationships with clients, attorneys are required to exercise impeccable honesty, fair dealing and fidelity." (emphasis added)]. The court of appeals in Walter, supra, also emphasized the Kilpatrick, supra, ruling and held that attorneys may not "in any way deceive [clients] without being held responsible therefor." (Emphasis added.). The allegations of Orvis-Lawrence complicity, well supported by discovery adduced heretofore, are material issues of fact that render the judgment in Orvis' hands void. Thus, as a matter of factual dispute,

again summary judgment was inappropriate.

**VII. THE MOTION TO STRIKE THE CRAWLEY AFFIDAVIT
SHOULD HAVE BEEN GRANTED.**

The motion to strike and the Ut. R. Civ Pro. Rule 11 sanctions flow from the same continuous unethical and unprofessional behavior. Orvis denies that either motion is applicable and that he and his legal team did anything inappropriate.

Mr. Johnson's Motion To Strike was well taken and absolutely appropriate. The Rule 11 sanction motion against Orvis and his counsel discussed in Argument VIII below arose not only because Orvis illegally obtained and proffered an unresponsive, false and malicious pleading but because, once the illegality was uncovered and Orvis and counsel given written notice and a request to rectify this, Mr. Orvis and counsel failed to take any effort to rectify this matter and insisted on proffering it in court for the court to rely on.

Orvis and counsel deny, in their Appellee Brief, that any of this was improper. Orvis ignores the pleadings filed and arguments made and denies impropriety. The pleadings leading up to the Motion to Strike were initiated by Orvis. First, Orvis moved for summary judgment seeking to renew the Belding Judgment. Johnson responded asserting his legal defenses and citing the pertinent law supported by an extensive affidavit and exhibits..

Then came the first offensive and irrelevant pleading by Orvis- his reply to Johnson's opposition memorandum and affidavit opposing the Orvis summary judgment motion. Orvis' Reply did not reply to any of the Johnson defenses i.e. standing, partnership, etc. Rather, Orvis and counsel instead submitted what was a classic personal attack on the family of Johnson and on him personally. The Orvis Reply Brief attached the Affidavit of William Crawley, who would later be discovered to be unlicensed and illegally operating, knowingly, it appears now, with the longtime aid of Orvis counsel, then Berman, Tomsic & Savage.

This Orvis Reply Brief and the Crawley Affidavit were utterly unresponsive to all the issues at hand, and extremely inappropriate for any lawyer to have prepared and submitted, let alone for the vaunted firm that represented Orvis and prepared and filed this. The Orvis Reply memo and the Crawley Affidavit "replied" by attaching a large color photograph of

the Johnson family home; the Reply Memo and Crawley Affidavit “replied” to lack of standing, and lawyer breach of duty by quoting the Johnson children on matters not remotely germane, and reveal that Investigator Crawley spoke with the Johnson minor children on several occasions to find out about their father (conversations seemingly illegal not only because Crawley was operating illegally but because he was speaking to Johnson’s children for Orvis without any parental knowledge or consent) - Reply Memorandum pp. 4-5. If this is not illegal, good sense compels an assumption that it must certainly be an activity that is otherwise abhorrent to Utah’s citizens and virtually any judge and member of the Utah Bar, and outrageously unresponsive to the issues at hand)²; The Orvis Memo and the Crawley Affidavit “replied” by listing a computer run of court cases where Johnson was alleged to appear as a defendant avoiding collection and creditors - claiming that Johnson was a defendant in 93 cases, a list that was flatly false, incorrect and highly misleading - Reply Memorandum, pp. 4-5, Crawley Affidavit exhibits.³

This Orvis Reply Memo and the Crawley Affidavit constitute a classic *ad hominem* attack suffused with malice where, as it does here, it references the Johnson family, a photograph of the Johnson home, an interview with Johnson children, a list of litigation - all this forms the substance of the Orvis Reply memo ostensibly in reply to Johnson’s opposition to a motion for summary judgment. Nowhere does Orvis address the issue of standing,

² Orvis subsequently submitted a personal affidavit from Crawley attempting to rescind his statements in the Crawley Affidavit regarding his conversations with the Johnson children though it is in direct contradiction with the Crawley Affidavit and with oral argument made by Orvis counsel Tomsic in Judge Jenkins court in another of Orvis’ five cases, and in contradiction with testimony of the Johnson children and the affidavit of their mother, DaNell Johnson, filed in this case below.

³ Johnson pointed out that the list of his appearances as a defendant in “over 90 cases” was misleading and false in many cases in Memorandum in Support of Motion to Strike, p. 6; Memorandum in Support of Motion for Rule 11 Sanctions p. 3, ¶11, pp. 9-11: In fact there are references where Johnson is not even actually a defendant but a “Jami Johnson.” There are numerous places where Johnson is actually a plaintiff or a third party plaintiff; where Johnson is a defendant not as an individual but “as trustee” in mortgage foreclosure cases; there are listings where cases were dismissed, where Johnson is one of scores of Defendants. There are over 30 places where a contested tax lien is repeated in two counties. There are places where the same case is duplicated or even triplicated or case numbers merged or replaced. Orvis’ Brief of Appellee here incorporates on p. 9 a quote from his pleading below where he says “he does not contest any of the facts discovered by Mr. Crawley” and “Johnson does not dispute a single fact contained in the Crawley affidavit.” This is absurd and flatly misstates Johnson’s response and fails to ever indicate on any level that this irrelevant and inflammatory material is inappropriate let alone misleading.

partnership, mis-use of partnership funds, conspiracy with Johnson's attorney; etc. It would be hard to imagine any lawyer in the state who would find this sort of non-response and scandalous pleading appropriate. What indeed were Orvis' lawyers, let alone Orvis, thinking as they filed the Crawley Affidavit and the Orvis Reply besides an attempt to defame, intimidate and malign, i.e. malice?

Bear in mind, as Orvis' attorneys, Berman, Tomsic, & Savage, would admit under oath, as discussed *infra*, [Aff. Of Peggy Tomsic] that all this was collected and assembled by an illegally operating unlicensed private investigator (someone that this firm admits it had used numerous times also in violation of the statute) and knowing, it seems that there was at least an ambiguity in his licensure and knowing of the law he was violating. This is covered in the Rule 11 Sanctions Motion below.

So, to this strangely unresponsive and malicious Orvis Reply Memo and the Crawley Affidavit, Johnson filed a Motion to Strike the Crawley Affidavit. Johnson cited three reasons to Strike:

**A. POINT ONE - A REPLY MEMORANDUM FOR A MOTION
FOR SUMMARY JUDGMENT IS FOR REBUTTAL ONLY.**

The Orvis Reply-Defamatory Portion, and the Crawley Affidavit are completely unresponsive to any issue raised in Johnson's Opposition memorandum and were submitted to intimidate, malign, embarrass, and defame Defendant Johnson and his family. It is axiomatic in this state that a reply memorandum is limited to rebutting matters raised in the memorandum in opposition. U.P.C., Inc. v. R.O.A. General, Inc., 990 P.2d 945 (Utah Ct. App. 1993).

**B. POINT 2 - RULE 56(E) ON ADMISSIBILITY MAKES THE ORVIS
REPLY - DEFAMATORY PORTION AND CRAWLEY
AFFIDAVIT INADMISSIBLE.**

Ut. R. Civ. Pro. Rule 56(e) provides, in pertinent part, that:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein (Emphasis added).

The only issue before the Court was whether or not the Plaintiff is the true owner of the Belding Judgment with standing to seek a renewal of the expired Belding Judgment. Nothing in the Orvis Reply-Defamatory Portion or the Crawley Affidavit has any bearing on whether Plaintiff Orvis is the true owner. The Affidavit instead contains numerous false, distorted, defamatory and irrelevant allegations including the false and misleading claim of 93 actions, claims of private conversations with unsuspecting Johnson children, claims of surveillance of the Johnson household, Johnson's office, even claims of Johnson's long work hours and, bizarrely, a photo of the Johnson home. This mean-spirited and uncalled for assemblage of data has absolutely no bearing at all on whether or not Plaintiff Orvis is the true owner of the Belding Judgment. It is totally irrelevant. It is not admissible evidence here for any purpose, and does not meet the requirements of Rule 56(e). Accordingly, the irrelevant Orvis Reply-Defamatory Portion and the Crawley Affidavit must be stricken.

**C. POINT 3 - THE ORVIS REPLY- THE CRAWLEY AFFIDAVIT CONTAINS
DEFAMATORY, IMMATERIAL, IMPERTINENT AND SCANDALOUS
MATTERS AND MUST BE STRICKEN UNDER RULE 12(f).**

Ut. R. Civ. Pro Rule 12(f) proscribes recitations of certain types matters which if used, are a basis to be stricken:

[U]pon motion made by a party within twenty days after the service of the pleading, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

The Orvis Reply-Defamatory Portion and the Crawley Affidavit contain nothing but immaterial, impertinent and extremely scandalous matters about Defendant Johnson and his family (e.g. invasive and unauthorized conversations with unsuspecting children of Johnson's, photos of Johnson's home, surveillance of Johnson's office, etc.). Johnson has provided valid, reasoned support, grounded in law and civil procedure, for his motion to strike the Orvis Reply and Crawley Affidavit with all its falsehoods and scandalous material. Accordingly, for this additional ground, the lower court decision should be reversed and the Orvis Reply-Defamatory Portion and the Crawley Affidavit should be stricken.

Then, Orvis filed an astounding response to the Johnson Motion to Strike. Rather than argue that the Crawley Affidavit was interposed for some legitimate reason, Orvis' counsel revealed the underlying purpose of this unethical pleading and reflected the animus motivating the Orvis litigation team. In their Response to Jamis Johnson's Motion to Strike dated June 25, 2003, Orvis' counsel said the Crawley Affidavit on p. 4 was submitted to "belie any notion forwarded by Mr. Johnson that he is an innocent party" although no such "notion" was ever made or is relevant to anything, and that, "[Johnsons] have lived a very comfortable lifestyle for years that has been directly funded by Mr. Johnson's fraud and deceit to the detriment of his many creditors."

So, it was admitted here, by none less than Orvis' counsel, that the Crawley affidavit was not submitted to respond to any issues raised in the motion for summary judgment. This utterly irrelevant Crawley Affidavit, not touching once on the law and precedent involved in the legal arguments before the court, was submitted for a scandalous and malicious purpose. Orvis and counsel freely admit it and make the further astounding conceptual leap that their information—the photograph, the fake list of cases, the children's interview – show somehow that Johnson is defrauding creditors and the Johnson family is living off of deceit and fraud. Again, one wonders, what were these lawyers thinking when they filed this? This character assassination has nothing to do with standing of a purported owner of a judgment acquired with embezzled partnership funds obtained in collusion with Johnson's former counsel in violation of public policy. This is simply so clearly improper and it so reflects the real malicious purpose of Orvis that on that basis alone, Judge Medley should have struck these Orvis pleadings.

But Judge Medley did not strike any of the pleadings. Judge Medley claimed not to have considered the Hanson ruling (which Johnson had also requested stricken but is not a subject of this appeal). The Motion was brought pursuant to U.R.Civ. Pro. 12(f) and 56(e). Judge Medley, at the hearing, initially indicated that he was not going to rule on the Motion

to Strike, that “I’m not prepared” - R. 1114- 10/15/04 Transcript p. 20, lines 22-23, but then proceeded nonetheless to do so denying the Motion on the basis that, “I really see no utility in granting a motion to strike because the subject matter upon which - - was an attempt to have stricken was not relied upon by the Court in rendering this decision.” This ruling negates the force of U.R.Civ.Pro. 12(f) and Rule 56(e).

The Affidavit in issue was obtained by an unlicensed private investigator and used by counsel for Orvis which is probably a class A misdemeanor. Orvis, after the fact, provided a purported justification for it that Johnson had raised equitable claims and Orvis was merely showing unclean hands does not over-ride the rules’ prohibitions. Neither Rule 12 nor 56 has any requirement that striking be based upon whether the Court relied on the offensive document or not or improper, inadmissible items can be received if made on an “equitable” basis. The plain text of the rule provides that the evidence in an affidavit be admissible under the Rules of Evidence. Almost none of the allegations of the Crawley Affidavit meet that standard yet they all meet the “redundant, immaterial, impertinent, or scandalous” standard. That is what the trial court must consider, the tests specifically enumerated by the rules. Disregarding this common meaning of the plain text for some other self-generated new rule of procedure is reversible error.

**VII. RULE 11 SANCTIONS AGAINST ORVIS’ COUNSEL WERE
APPROPRIATE.**

Orvis, brazenly asserted that he filed his Orvis Reply memo and the Crawley Affidavit for an improper and malicious purpose. Then Johnson learned that investigator Crawley was operating illegally without a license. Johnson wrote Orvis counsel, Peggy Tomsic, a respectful letter pointing out that Crawley was unlicensed and operating illegally. Johnson asks Tomsic’s help in rectifying this problem. Johnson’s safe harbor stated:

This letter was in compliance with Rule 11 giving counsel notice and a period to cure. Orvis and attorney Tomsic did not respond to Johnson’s ‘safe harbor’ letter. Attorney Tomsic

did file an affidavit before Judge Medley attempting to justify use of an unlicensed investigator. There is support for the notion that i) Ms. Tomsic and the Berman firm did know that a private investigator must be licensed; ii) that they inquired of Crawley though they should have, and iii) that Crawley had been doing this for some time for the Berman firm and they were relatively lax about updating their knowledge in this matter.

Orvis and counsel compounded the problem they started by filing another Crawley Affidavit which contradicted his own earlier Affidavit and attempted to justify the apparent criminal violation. This is in the record as part of Tomsic's reply to Johnson's Motion for Rule 11 Sanctions. Facing the Motion To Strike, Orvis and counsel brazenly filed the second Crawley Affidavit and justified it asserting that it demonstrated fraud by Johnson. But Orvis and counsel had received notice that Johnson had uncovered the fact that not only was the material submitted by them outrageously false, unresponsive and malicious, and it was illegally obtained by the very person they had sign an affidavit under oath and file this material in court. At this point, Orvis and attorney Tomsic should have stepped up and have repudiated this material. It would have seemed prudent to have voluntarily withdrawn this material from consideration.

Orvis and counsel had notice of this illegal activity. The hearing on the Motion For Summary Judgment was approaching and the Rule 11 sanction hearing was going to be set later. But at the Motion For Summary Judgment hearing, Orvis and counsel had the obligation and the opportunity to inform the Court before their argument, of this illegality. Indeed, that would have been one way for Orvis and counsel to have rectified this situation under Rule 11. Instead, Orvis and counsel did not alert the Court, and allowed the Court to rely on the wrongful and illegally obtained pleadings at the hearing. Johnson, not the movant in this motion for summary judgment hearing, barely was heard on the motion to strike and nothing about the unlicensed and improper activities. Ultimately the court would deny the Rule 11 sanctions motion.

Entirely ignored by Judge Medley in his denial of Johnson's motion for Rule 11 sanctions against counsel for Orvis for use of the scandalous, defamatory, unlawfully obtained Crawley were the requirements of Rule 11, namely that a pleading submitted by an attorney must :

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Johnson submitted his safe harbor letter to counsel and she failed to withdraw the offensive Affidavit. The pleading quite clearly was submitted for improper purpose - namely to malign Johnson. Cloaking this in some equitable defense rebuttal of unclean hands is a subterfuge. The claims were either outright false or malignantly distorted as to be without evidentiary basis and was simply unwarranted under any theory, but particularly the only one announced that Judge Medley did not rely on these outrages in reaching his decision. Counsel's fault is threefold - 1) obtaining the affidavit by the unlicensed investigator for purely defamatory purposes to begin with, 2) submitting the Crawley Affidavit that was scandalous, false, inflammatory and irrelevant and 3) failing to withdraw it or for inform the court of the problems with the material, effectively perpetuating the crime by continuing to proffer malignant documents. This was a reprehensible approach and tactic which should not be condoned by the Court.

IX. AWARDING MONETARY SANCTION FOR THE PROTECTIVE ORDER WAS IMPROPER.

The granting of a protective order to halt proposed depositions and awarding fees therefore was an abuse of discretion for numerous reasons. First and foremost was that all

but one of the depositions had occurred by the time of the hearing because there were a total of four noticed, three of whom had been noticed by Orvis in two other cases. Johnson was merely adding the instant proceeding to already scheduled depositions so that they could be used herein as well. There was no last minute surprise. Secondly and more critically to the one remaining deposition which was really the only issue before the court on the protective order - service had not been made on Victor Lawrence so the deposition would not have occurred in any event! While it is true Johnson served a notice of deposition the evening before the intended deposition, the time set had already been set for other depositions by counsel for Orvis. It was disingenuous to begin with.

CONCLUSION

All this—over the simple renewal of a judgment. The machinations of Mr. Orvis and his counsel in attempting to acquire and enforce this judgment make clear that far more is at stake for Mr. Orvis than a mere “renewal.” For example, conspiring with Johnson’s counsel, Lawrence, as the discovered evidence reveals, to purchase the judgment even in the face of possible fraud claims and breach of fiduciary duty claims; using partnership proceeds (which Orvis has never denied) to acquire the judgment; acquiring, as he did, this judgment, by using the defunct LLC, All Star Financial, LLC as a front to receive and transfer the judgment within twenty-four into Orvis’ individual name - a company, undisputed by Orvis, shows to have been legally dissolved; the time energy, money, the risk expended in using the unlicensed private investigator to surveil the Johnson family, home and office; taking the calculated risk of refusing to withdraw any of that in the face of potential Rule 11 sanctions; and deliberately mis-stating cases where Johnson is alleged to have been a defendant. All of this is fraught with risks that both Orvis and his counsel were willing to undertake.

The foregoing acts which, if not unethical, fraudulent. or leading to potential exposure to liability, are, one must admit, so aggressive, mean-spirited and ill planned, as to be actually rather bizarre—that is unless, as was pointed out in these briefs, and below, that

materiality to be addressed by the trier of fact below;

3. That the District Court be found to have committed errors of law with respect to ignoring standing as a threshold issue, that purchasing a judgment is not a winding up of affairs of a dissolved company, that an act by a dissolved company is void not voidable, that there is a distinction between renewal of a judgment and enforcement thereof which renders defenses to enforcement not available, and that Judge Hanson's ruling on assertion of partnership interests is not conclusive of the defenses raised in this action.

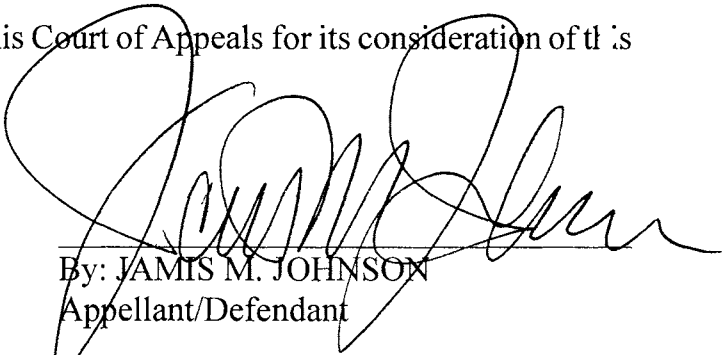
4. That the denial of the motion to strike be reversed and the offending pleadings be struck;

5. That the Rule 11 sanctions be imposed on Appellee Orvis and his counsel or that the district court be required to review the matter again based on the illegality of the private detective and the irrelevant, scandalous, and malicious nature of the pleadings; and

6. That the award of attorney's fees in connection with the protective order be rescinded.

Appellant expresses his gratitude to this Court of Appeals for its consideration of this Reply Brief of Appellant.

DATED this December 26, 2005.


By: JAMIS M. JOHNSON
Appellant/Defendant

CERTIFICATE OF SERVICE

I, Jamis M. Johnson, the undersigned Appellant, do hereby certify that I deposited in the U.S. mail, postage prepaid, a true and correct copy of the foregoing, in the U.S. mail, to Peggy A. Tomsic and Heather Keele, Tomsic Law Office, Attorneys for Appellee, 136 E South Temple, Suite 800, Salt Lake City, UT 84111


Jamis Johnson

12/27/05
Dated