

2004

Jamis M. Johnson v. Jayson Orvis : Brief of Appellee

Utah Court of Appeals

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to Utah Code §78-2-2(j).

STATEMENT OF ISSUES

Issue No. 1: Did Judge Hanson correctly conclude that defendant/appellant Johnson was judicially estopped from asserting, in this action, that he had a partnership interest in plaintiff/appellee Orvis' businesses when the undisputed facts demonstrated Johnson's prior sworn testimony in the SBA proceeding contradicted that position, the prior contradictory testimony was not a mistake, Johnson successfully maintained his prior contradictory position in the SBA proceeding to his benefit, and Orvis is in privity with the SBA?

This issue was preserved. [R. at 2619-2631]

This Court reviews Judge Hanson's grant of summary judgment and his legal conclusions for correctness. Young v. Salt Lake City Sch. Dist., 2002 UT. 64, ¶ 10, 52 P.3d 1230.

Issue No. 2(a): In the alternative, did Judge Hanson abuse his discretion in applying judicial estoppel to prevent Johnson from attempting to create an issue of material fact by asserting that Johnson owned a partnership interest in Orvis' businesses when that position contradicted Johnson's prior sworn testimony in the SBA proceeding, Johnson's previous contradictory testimony was not a mistake, Johnson successfully

maintained his previous contradictory position to his benefit, and Orvis is in privity with the SBA?

This issue was preserved below. [R. at 2619-2631]

This Court should review Judge Hanson's application of judicial estoppel under an abuse of discretion standard. See Alder v. Bayer Corp., 2002 UT. 115, ¶ 20, 61 P.3d 1068, 1075-76; see also Hamilton v. State Farm Fire & Casualty Co., 270 F.3d 778, 782 (9th Cir. 2001).

Issue No. 2(b): If Judge Hanson did not abuse his discretion in applying judicial estoppel to prevent Johnson from attempting to create an issue of material fact by asserting that Johnson owned a partnership interest in Orvis' businesses, did Judge Hanson correctly conclude that summary judgment was appropriate when each of Johnson's claims and defenses required Johnson to prove he had a partnership interest in Orvis' businesses?

This issue was preserved below. [R. at 2619-2631]

This Court reviews Judge Hanson's grant of summary judgment for correctness. Young, 2002 UT 64, ¶ 10.

3. Did Judge Hanson correctly conclude that judicial estoppel does not require the party asserting it to be a party to the prior action or in privity with a party to the prior action?

This issue was preserved. [R. at 2626]

This Court reviews Judge Hanson's legal conclusions for correctness. Young, 2002 UT 64, ¶ 10.

STATEMENT OF THE CASE

Plaintiff/Appellee Jayson Orvis ("Orvis") filed a declaratory judgment action against defendant/appellant Jamis Johnson ("Johnson") in the Third District Court for the State of Utah on August 28, 2001, seeking a judgment that Johnson has no right, claim or interest in any business, enterprise or entity, relating to credit repair, in which Orvis has any ownership interest ("Orvis' businesses"). [R. at 1-14] Judge Timothy R. Hanson was assigned as the presiding judge.

Johnson filed an answer to the complaint, a counterclaim against Orvis and a third party complaint against Deon Steckling, Sam Spendlove and Victor Lawrence. [R. at 20-39] Each counterclaim against Orvis and every claim against the third party defendants was based on Johnson's assertion that he is a partner with Orvis in Orvis' businesses.

[Id.]¹

On August 30, 2002, third party defendants Victor Lawrence and Sam Spendlove filed a motion for summary judgment against Johnson, which Johnson opposed. [R. at

¹ Orvis filed his answer to the counterclaims on November 21, 2001 denying the existence of any such partnership and each allegation of wrongdoing. [R. at 40-55] Third party defendants Lawrence and Spendlove filed their answers on December 20, 2001 and December 28, 2001, respectively, denying all allegations of wrongdoing. [R. at 62-72] Third party defendant Steckling filed his answer on February 22, 2002, denying all allegations of wrongdoing. [R. at 79-92]

1106-1108, 1114-1233, 1469-1493] After hearing oral argument, Judge Hanson granted the motion. Judge Hanson ruled, inter alia, that Johnson was judicially estopped from asserting he was a partner in Orvis' businesses based on Johnson's testimony, in another judicial proceeding, denying he had any interest in any partnership. [R. at 1849-1851, 1924-1933] Johnson never appealed that summary judgment, the time for appeal has long since passed, and that judgment is not the subject of this appeal. [R. at 2638-2639]

On March 30, 2004, Orvis filed a motion for summary judgment, on the ground of judicial estoppel, on Orvis' claims against Johnson and on Johnson's counterclaims against Orvis. [R. at 1940-1951, 1957-1990] Third party defendant Deon Steckling joined in the motion. [R. at 1991-1999]² Johnson, who was represented by attorney Joe Cartwright, opposed the motion. [R. at 2242-2515; R-2708 at 1]

After hearing oral argument on August 9, 2004, Judge Hanson issued a decision on October 20, 2004, granting Orvis' motion for summary judgment on the ground of judicial estoppel. [R. at 2607, 2619-2622] On November 23, 2004, Judge Hanson entered a final Judgment in favor of Orvis and against Johnson on Orvis' complaint and Johnson's counterclaim, and in favor of Steckling and against Johnson on Johnson's

² Based on Johnson's opening brief, Johnson has not appealed or requested reversal of Judge Hanson's grant of Steckling's motion for summary judgment. In the event the Court determines otherwise, this brief is also filed on behalf of Deon Steckling. [Johnson Br. caption & at vii-viii]

third party complaint. [R. at 2628-2632] Judge Hanson, on the same day, entered findings and conclusions. [R. at 2623-2629]

On December 21, 2004, Johnson appealed the Judgment. [R. at 2638-2639]

STATEMENT OF FACTS

1. Johnson, In The Prior SBA Proceeding, Denied Under Oath That He Had Any Interest In Any Partnership, Any LLC Or The Lexington Law Firm: Orvis Purchased And Became The Assignee Of The SBA Judgment After The SBA Could Not Collect From Johnson On The Judgment.

On September 14, 1995, Johnson was sued by the Small Business Administration (“SBA”) in the United States District Court for the District of Utah, Central Division, Civil No. 2:95-CV-838J. A \$260,000 judgment was entered against Johnson in that case on September 29, 1997. [R. at 2381]

The SBA, in post judgment supplemental proceedings in that action, took Johnson’s deposition on November 17, 1999, to identify assets to satisfy its judgment. [R. at 2389-2484] Before answering any questions, Johnson was sworn in by the court reporter, and he swore to truthfully answer each of the questions. [R. at 2484] At the time his deposition was taken, Johnson was a licensed attorney in Utah who had practiced law for a number of years.³ [R. at 2401, 2413]

In his deposition, Johnson denied, under oath, that he had any interest in any partnership or limited liability company:

³ Sometime after his deposition was taken, Johnson was disbarred on unrelated matters. [R. at 2412-2413; Johnson Br. at 25]

Q: Do you have any interest in any partnerships?

A: No. . . .⁴

. . . .

Q. Any interest in any limited liability companies?

A. No. . . .

[R. at 1983-1984]

At his deposition, Johnson was specifically asked questions relative to one of the credit repair business entities – Lexington Law Firm – with which Mr. Orvis is involved.

Johnson denied, under oath, that he had any interest in that business:

A. . . . Lexington Law Firms was in my name, **but since that time and with my bar problem, I have completely relinquished any interest.** They paid me a little, made my payment, and I resigned. Now, it's listed as an assumed name by Jamis Johnson, they're going to have to go in and change that. But, you know, they're operating now without me.

[R. at 1979-1980 (emphasis added)] Johnson did not change any of that testimony, either during the deposition or after his testimony was transcribed. [R. at 2483-2484]

The SBA, as a result of Johnson's sworn testimony that he had no interest in any partnerships or LLC or any other asset, as well as Johnson's wife's sworn testimony, did

⁴ The remainder of Johnson's answer to that question is irrelevant to the issue of judicial estoppel because it in no way limits or qualifies his denial of having any interest in any partnership, which would include any partnership interest he claims in this case in Orvis' businesses. The remainder of his answer was: "I mean, you know, often I'll have a joint venture with someone, but I don't have a partnership or set up a partnership or an LLC. You know, if I get a deal I say, Hey, do you want to do this deal together? We'll go up to Summit County and buy a lot."

not identify any asset to execute upon to satisfy its judgment against Johnson. [R. at 2389-2484]. The SBA judgment remained uncollected, and the SBA sold and assigned the judgment to a third party – All Star Financial, LLC – for a fraction of its face value on August 8, 2001. [R. at 2513] On August 11, 2001, All Star Financial, LLC sold and assigned the SBA judgment to Orvis. [Id.]

2. Orvis Filed This Action Against Johnson For A Declaratory Judgment That Johnson Has No Interest, Right Or Claim In Orvis' Businesses; Johnson, In Contradiction Of His Sworn SBA Testimony, Claims He Has A Partnership Interest In Orvis' Businesses.

Orvis, on August 28, 2001, filed a declaratory judgment action against Johnson seeking a judgment that Johnson has no right, claim or interest in any of Orvis' businesses. [R. at 1-14] Johnson responded to the complaint with an answer, counterclaim and third party complaint against Victor Lawrence, Deon Steckling and Sam Spendlove. [R. at 20-39] While Johnson used different labels for his numerous legal claims against Orvis and the third party defendants, every one of those claims was based upon Johnson's assertion that he and Orvis are partners in Orvis' businesses. [R. at 28-38]

On March 30, 2004, Orvis filed a motion for summary judgment against Johnson, both with regard to Orvis' claims and Johnson's counterclaims against Orvis, on the ground of judicial estoppel. Orvis argued that Johnson was judicially estopped from claiming a partnership with Orvis in Orvis' businesses in this action because Johnson had

denied owning any interest in any partnership, LLC or Lexington Law Firm in his sworn testimony in the SBA proceeding. [R. at 1940-1951, 1957-1990]

Johnson's lawyer, two months later on May 27, 2004, filed a 23 page opposition to Orvis' motion. [R. at 2242-2515, 2608-2618] Johnson opposed the motion on three basic grounds: (1) Johnson's SBA testimony is not inconsistent with his position in this case that he is a partner with Orvis in Orvis' businesses; (2) if there is any ambiguity in Johnson's SBA testimony, there is a material issue of fact as to whether Johnson's testimony and his position in this case are inconsistent; and (3) the doctrine of judicial estoppel does not apply here. [R. at 2257-2264]

The only record Johnson filed in opposition to Orvis' motion for summary judgment was his Affidavit filed with the opposition, and Corrections Supplementing Affidavit of Jamis Johnson, filed on August 11, 2004. [R. at 2266-2515, 2608-2618]

The only record relative to the issue of whether Johnson's SBA testimony was inconsistent with his position in this case was: (1) Johnson's actual SBA testimony and (2) Johnson's statement in his affidavit that: "In his deposition, Jamis Johnson accurately disclosed the information requested by the SBA," [Tr. at 2274] including in his testimony regarding his "Interests in any partnerships - P.30 lines 16-25 and P. 31 lines 1-24" – the testimony at issue. [R. at 2275] There was no other record relative to that issue – Johnson's first two points of opposition.

Johnson’s third argument – that the doctrine of judicial estoppel did not apply – was based on the assertion that, under Utah law, Orvis was required to prove three elements, and Orvis had failed to do so. [R. at 2262-2264] Specifically, Johnson asserted:

Under Utah law, three elements must be shown before a court may judicially estop a litigant from denying a position taken in a prior judicial proceeding: (1) The prior proceeding must be between “the same person’s or their privies”; (2) it must involve “the same subject matter”; and (3) the prior position must have been “successfully maintained.”

[R. at 2262] Johnson did not file or rely on any record to support his position that “[n]one of these elements is present here.” [R. at 2263]

There was, however, undisputed evidence before Judge Hanson relative to Johnson’s argument that judicial estoppel did not apply. That evidence included: (1) Johnson admitted in his affidavit that Orvis and the SBA were privies – “Orvis has, as the assignee of the SBA judgment . . .” [R. at 2281, ¶ 60; R. at 2280, ¶¶ 52, 54; R. at 2513];⁵ (2) The post-judgment supplementary proceedings in the SBA action was a proceeding to determine whether Johnson had any assets, including any interest in any partnership; this action is an action to determine whether Johnson has a partnership interest in Orvis’ businesses; [R. at 1-14, 20-55, 2381, 2389-2484] and (3) the SBA did

⁵ There was no record as to the source of the money Orvis used to purchase the judgment. In particular, there was no evidence that Orvis used money from the “alleged partnership” to purchase the SBA judgment. There also was no record or legal authority demonstrating that Orvis violated any legal duty to Johnson by buying the SBA judgment.

not execute on the partnership interest Johnson, in this action, claims he has in Orvis' businesses because Johnson testified under oath in the SBA proceeding that he had no interest in any partnership.⁶

Johnson never raised as an issue that, under Utah law, detrimental reliance was an essential element of judicial estoppel. [R. at 2242-2265] Johnson likewise never raised as an issue that, under Utah law, the prior testimony had to be in bad faith as opposed to a mistake. [Id.]

Johnson, furthermore, at no time raised an issue relative to or challenged Judge Hanson's impartiality. Nor did Johnson present any evidence of any bias.⁷

3. Judge Hanson Granted Orvis' Motion For Summary Judgment Based On Judicial Estoppel.

Judge Hanson heard oral argument on Orvis' motion for summary judgment on

⁶ Johnson makes numerous assertions regarding his wife's involvement in this matter. However, Judge Hanson ruled that Johnson's wife DaNell Johnson was not a proper party to the litigation because she had not been properly joined. [R. at 1845-1847] Johnson had over one year to add her as a party before Orvis filed his motion for summary judgment but never did so. He also never appealed Judge Hanson's ruling. Moreover, in his SBA testimony, Johnson never testified that DaNell Johnson received money from a partnership Johnson had with Orvis or in which she had a beneficial interest. [R. at 2480-2482] Finally, even if DaNell Johnson was a party, her claim would also be barred by judicial estoppel because she, at most, only had whatever partnership interest Johnson could claim.

⁷ Johnson spends a great percentage of his brief arguing that third party defendant Victor Lawrence engaged in wrongful conduct. Those arguments and assertions are irrelevant to this appeal. Judge Hanson granted summary judgment to Lawrence in June 2003. [R. at 1849-1857; 1924-1933] Johnson never appealed that judgment. Orvis' counsel does not and has never represented Lawrence in this litigation and obviously cannot and will not defend Mr. Lawrence.

August 9, 2004, and took the matter under advisement. [R. at 2607] On October 20, 2004, Judge Hanson entered a Minute Entry granting Orvis' motion for summary judgment on the ground of judicial estoppel. [R. at 2619-2622] In that decision, Judge Hanson held:

Mr. Johnson is judicially estopped from asserting that he had an interest in a partnership where he, in a separate proceeding under oath, testified he had none. There is no question of mistake. Mr. Johnson testified as he did, so as to avoid collection efforts from the Small Business Administration. The principle of judicial estoppel prohibits Mr. Johnson from in this later action now asserting a different position.

[R. at 2620]

On November 23, 2004, Judge Hanson entered a final Judgment in favor of Orvis and against Johnson on Orvis' claims and Johnson's counterclaims. The Judgment declared that "Defendant has no right, claim or interest in any business, enterprise or entity, relating to credit repair, in which plaintiff has any ownership interest." [*Id.* at 2631] [R. at 2630-2632] Judge Hanson's decision and the Judgment were supported, not only by the record, but by findings and conclusions he entered the same day as the Judgment. [R. at 2623-2629]

Judge Hanson's decision and the Judgment were based on undisputed facts, including the following material undisputed facts:

(1) The SBA took Johnson's deposition in post-judgment supplemental proceedings in United States of America v. Jamis Johnson, 2:95-CV-838J, in the United

States District Court for the District of Utah, on November 17, 1999, to identify assets on which it could execute to collect its judgment against Johnson. [R. 2627, ¶¶ 4-5] At his deposition, Johnson, under oath, denied he had any interest in any partnership, LLC, or Lexington Law Firm. [R. at 2627-2628, ¶ 5]

(2) Johnson's denial of any interest in any partnership, LLC or Lexington Law Firm was not a mistake. "Johnson testified as he did so as to avoid collection efforts by the SBA." [R. at 2627, ¶ 5]

(3) The SBA, after deposing Johnson and his wife, did not identify any asset to satisfy its judgment; it never collected on the judgment; and the SBA assigned the judgment to a third party on August 11, 2001. [R. at 2625, ¶ 6]

(4) On August 11, 2001, the third party assigned the SBA judgment to Orvis. [R. at 2625, ¶ 7]

(5) Johnson in this action, in his counterclaim against Orvis and in his third party complaint, claims that a partnership has existed between him and Orvis since before his SBA deposition was taken, and, that based on his partnership interest, he is entitled to partnership proceeds from intellectual property lease payments and consulting fees paid to Orvis by various credit repair businesses, including an entity called the Lexington Law Firm. [R. at 2624, ¶¶ 2-3]

Judge Hanson's Conclusions of Law included:

(1) “The principle of judicial estoppel prohibits Johnson from asserting a different position in this later action from the position to which he testified under oath in the SBA case.” [R. at 2626, ¶ 1]

(2) “Judicial estoppel does not require that the parties to the prior and present litigation be the same.” [R. at 2626, ¶ 2]

(3) “Even if Utah law requires that the parties to the prior and present proceedings be the same in order for judicial estoppel to apply, such is not determinative in this case because Orvis, having purchased and having been assigned the judgment owned by the SBA, is in privity with the SBA.” [R. at 2626, ¶ 3]

SUMMARY OF ARGUMENT

The Court should affirm Judge Hanson’s Judgment in favor of Orvis and against Johnson. Judge Hanson correctly held that Johnson is judicially estopped in this action from contradicting his earlier sworn testimony in the SBA supplemental proceeding that he did not have any interest in any partnerships. Judge Hanson considered the proper factors to determine whether to apply judicial estoppel – whether the prior testimony and subsequent position are contradictory, whether the prior position was successfully maintained, and whether the prior position was a mistake. There were no disputed issues of material fact relative to those factors. The undisputed facts demonstrated Johnson’s prior sworn testimony contradicted his position that he has a partnership interest in Orvis’ businesses, that Johnson successfully maintained his prior contradictory position

for his economic benefit, and that Johnson's prior contradictory sworn testimony was not a mistake. The application of judicial estoppel here, moreover, furthers the purpose for judicial estoppel – safeguarding the integrity of the judicial process. To reverse Judge Hanson's decision would permit Johnson to do exactly what judicial estoppel was designed to prevent – it would allow a litigant to use the courts to perpetrate a fraud.

Johnson, in addition to being wrong about the issues he preserved for appeal, attempts to raise issues for the first time on appeal to convince the court to reverse Judge Hanson. These newly raised issues include: (1) judicial estoppel requires detrimental reliance; (2) judicial estoppel requires bad faith; and (3) Judge Hanson was biased against Johnson. As a matter of law, Johnson has waived those as a basis for appeal. In any event, Johnson's positions on those issues are without merit.

ARGUMENT

I. COURTS BALANCE RELEVANT FACTORS TO DETERMINE WHETHER TO APPLY THE EQUITABLE DOCTRINE OF JUDICIAL ESTOPPEL. THOSE FACTORS DO NOT INCLUDE MUTUALITY OF PARTIES, DETRIMENTAL RELIANCE OR SAME SUBJECT MATTER.

Judicial estoppel is an equitable doctrine established by courts as a separate and distinct doctrine from other estoppel doctrines such as equitable estoppel and collateral estoppel. Judicial estoppel is the equitable doctrine that “prevents a party from seeking judicial relief by offering statements inconsistent with its own sworn statement in a prior judicial proceeding.” Jones, Waldo, Holbrook & McDonough v. Dawson, 923 P.2d

1366, 1371 (Utah 1996). The purpose of that doctrine, unlike the other estoppel doctrines, is “to protect the integrity of the judicial process . . . by prohibiting parties from deliberately changing positions according to the exigencies of the moment.” New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001) (citations omitted); accord Johnson v. Linton City Corp., 405 F.3d 1065, 1068-70 (10th Cir. 2005); Jones, Waldo, 923 P.2d at 1371 (“The purpose of judicial estoppel is to uphold the sanctity of oaths, thereby safeguarding the integrity of the judicial process from conduct such as knowing misrepresentation or fraud on the court.”) (citations omitted).

Utah law is unsettled as to what factors a court should consider to determine whether to apply judicial estoppel. The Utah Supreme Court’s 1942 articulation of judicial estoppel is contrary to the overwhelming majority of courts’ position of what factors are relevant in a judicial estoppel analysis. Later Utah Supreme Court cases have indicated Utah’s rule may, in fact, be in accord with the majority position.

This case presents the opportunity for this Court to clarify what the rule in Utah is relative to judicial estoppel.

A. Tracy Loan’s Statement Of Judicial Estoppel Is A Mixture Of Equitable Estoppel, Collateral Estoppel And Res Judicata.

In 1942, the Utah Supreme Court in Tracy Loan & Trust Co. v. Openshaw Inv. Co., 132 P.2d 388 (Utah 1942), set forth and followed the rule for judicial estoppel that it believed was the majority view at the time:

A person may not to the prejudice of another person deny any position taken in a prior judicial proceeding between the same persons or their privies involving the same subject-matter, if such prior position was successfully maintained.

132 P.2d at 390.⁸ Those factors are essentially a blend of the elements required for equitable estoppel, collateral estoppel and res judicata. Nunley v. Westakes Casing Servs., Inc., 1999 UT 100, ¶ 34, 989 P.2d 1077, 1088; Richards v. Hodson, 485 P.2d 1044, 1046 (Utah 1971).

Tracy Loan expressly rejected what it considered the minority position on judicial estoppel. That position was:

In the absence of mistake as to facts, inadvertence or misapprehension as to the law, one who takes a positive position in one case as to the facts, will be estopped to deny or alter such position or statement in a subsequent action although the parties may not be the same.

132 P.2d at 391. Tracy Loan rejected that position, while acknowledging it “is based on public policy, [is] not predicated on any prejudice to an adverse party [, and is] a punitive rule to deter a litigant from testifying falsely, and thereby us[ing] the judicial system to perpetrate fraud.” Id.

⁸ The federal cases on which Tracy Loan relied have since changed their position and have now adopted what Tracy Loan considered the minority rule which it rejected. See New Hampshire v. Maine, 532 U.S. 742 (2001); compare Galt v. Phoenix Indemnity Co., 120 F.2d 723 (D.C. Cir. 1941) with Konstantinidis v. Chen, 626 F.2d 933 (D.C. Cir. 1980); compare Sinclair Refining Co. v. Jenkins Petroleum Process Co., 99 F.2d 9 (1st Cir. 1938) with Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 30-32 (1st Cir. 2004).

B. The Overwhelming Majority Of Courts Today Have Adopted The Position Rejected By *Tracy Loan*.

The position and policy rejected by Tracy Loan is now the law in the overwhelming majority of federal and state courts. Those courts, moreover, have recognized that “the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle” but that “several factors typically inform the decision whether to apply the doctrine in a particular case.” New Hampshire, 532 U.S. at 750.

The United States Supreme Court, as well as the majority of courts, has utilized the following factors to determine whether judicial estoppel applies:

(1) whether a party’s later position is “clearly inconsistent” with its earlier position.

(2) whether the party has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding could create “the perception that either the first or the second court was misled.”

(3) whether the party attempting to assert an inconsistent position “would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.”

532 U.S. at 750-51. Those factors are not inflexible requirements or the only relevant factors. Id. at 751. Indeed, judicial estoppel is an equitable doctrine to be invoked by a court at its discretion. Id. at 750.

However, the overwhelming majority of courts have squarely held that mutuality of the parties is not a relevant factor because judicial estoppel is designed to protect the

judicial system, not the interests of individual litigants. See, e.g., Hall v. GE Plastic Pacific PTE Ltd., 327 F.3d 391, 399 (5th Cir. 2003) (privity is not required under judicial estoppel because judicial estoppel is “intended to protect the judicial system, rather than the litigants.”) (citation omitted); Johnson v. Si-Cor Inc., 28 P.3d 832, 835 (Wash. Ct. App. 2001) (“The majority of courts that have considered the matter have concluded that privity of the parties, reliance, and prejudice – generally recognized elements of estoppel – are inapplicable to the doctrine of judicial estoppel.”); Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 360 (3d Cir. 1996) (“[T]he purpose of the judicial-estoppel doctrine militates against the imposition of a privity requirement. Judicial estoppel ‘is intended to protect the courts rather than the litigants.’ . . . Our conclusion that privity is not required for application of judicial estoppel accords with the majority view.”) (citation omitted).⁹

⁹ Ortlieb v. Hudson Bank, 312 F. Supp. 2d 705, 711 (E.D. Pa. 2004) (“It is not required that the litigant arguing in favor of [judicial] estoppel was a party to the prior proceeding nor that he or she was in privity with a party to that proceedings”; “The integrity of the court is affronted by the inconsistency notwithstanding the lack of identity of those against whom it is asserted.”) (citation omitted); Cannon-Stokes v. Potter, 2004 WL 407014, at *4 (N.D. Ill. March 4, 2004) (“Because the purpose of judicial estoppel is to prevent a party from playing fast and loose with the courts, rather than to protect litigants, under the prevalent view there generally is no need to demonstrate . . . privity of the adverse party.”) (citation omitted); Whiteacre Partnership v. Biosignia, Inc., 591 S.E.2d 870, 881-82 (N.C. 2004) (judicial estoppel does not require “mutuality of parties” and may be “invoked by a stranger to the transaction where the prior position was asserted.”); Ex parte First Alabama Bank, 883 So.2d 1236, 1243 (Ala. 2003) (“[J]udicial estoppel, unlike the other estoppel doctrines, does not require privity between the parties in the two proceedings. . . . Indeed, the doctrine has nothing to do with other parties to the suit. Rather, it is the very inconsistency that judicial estoppel will not tolerate.”)

(citations omitted); Newfield Exploration Co. v. Applied Drilling Technology, Inc., 2003 WL 23253, at *6 (E.D. La. Jan. 2, 2003) (“The more prevalent view in this and other circuits is that for judicial estoppel to apply, both parties need not be the same in the first and second proceedings.”); Otis v. Arbella Mutual Ins. Co., 2003 WL 21385792, at *3 (Mass. Super. Apr. 18, 2003) (“Judicial estoppel is broader: ‘a party in the second action may rely on judicial estoppel, even though not a party in the first action.’”) (citation omitted); Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1286 (11th Cir. 2002) (“The doctrine of judicial estoppel protects the integrity of the judicial system, not the litigants; therefore, numerous courts have concluded, and we agree, that ‘[w]hile privity . . . [is] often present in judicial estoppel cases, [it] is not required.’”) (citation omitted); Montrose Medical Group v. Bulger, 243 F.3d 773, 779 n.3 (3d Cir. 2001) (privity, while a prerequisite for application of equitable estoppel, is “not required for invocation of judicial estoppel.”); In re Estate of Loveless, 64 S.W.3d 564, 578 (Tex. App. 2001) (“[E]quitable estoppel arises only in favor of the parties to the first suit and those in privity with them, while judicial estoppel may be invoked by a stranger to the original proceeding.”); International Billing Services, Inc. v. Emigh, 101 Cal. Rptr. 2d 532, 542 (Cal. Ct. App. 2000) (“Unlike equitable estoppel, judicial estoppel may be applied even if . . . privity does not exist.”) (citation omitted); Wabash Grain, Inc. v. American Car & Foundry Indus., Inc., 700 N.E.2d 234, 237-38 (Ind. Ct. App. 1998) (“[In contrast to judicial estoppel], equitable estoppel exists ‘only as between the same parties or those in legal privity with them.’ . . . The purpose of judicial estoppel is to protect the integrity of the judicial process rather than to protect litigants from allegedly improper conduct by their adversaries.”) (citation omitted); Vowers and Sons, Inc. v. Strasheim, 576 N.W.2d 817, 824 (Neb. 1998) (“[J]udicial estoppel may be applied even if . . . privity does not exist.”) (citation omitted); Johnson v. Du Page Airport Authority, 644 N.E.2d 802, 807 (Ill. App. Ct. 1994) (“[Judicial estoppel] may be applied despite the lack of . . . privity.”); State v. Fleming, 510 N.W.2d 837, 841 (Wis. Ct. App. 1993) (judicial estoppel, unlike equitable estoppel, does not require privity; “This distinction reflects a difference in policy objectives: in contrast to equitable estoppel’s concentration on the integrity of the parties’ relationship to each other, judicial estoppel focuses on the integrity of the judicial process.”) (citation omitted); McMaster v. Teledyne Pine, 838 F. Supp. 331, 334 (E.D. Mich. 1993) (judicial estoppel, unlike equitable estoppel, does not require privity; “This distinction reflects the difference in the policies served by the two rules. Equitable estoppel protects litigants from less than scrupulous opponents. Judicial estoppel, however, is intended to protect the integrity of the judicial process.”) (quoting Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982)); Monterey Dev. Corp. v. Lawyer’s Title Ins. Co., 4 F.3d 605, 609 (8th Cir. 1993) (“Judicial estoppel prevents a person who states facts under oath during the course of a trial from denying those facts in

The overwhelming majority of courts have likewise held that detrimental reliance is not a relevant factor in a judicial estoppel analysis. Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1286 (11th Cir. 2002) (detrimental reliance not required because “courts have concluded that since the doctrine is intended to protect the judicial system, those asserting judicial estoppel need not demonstrate individual prejudice.”); Lowery v. Stovall, 92 F.3d 219, 223 n.3 (4th Cir. 1996) (“[A] party asserting judicial estoppel does not have to prove detrimental reliance because judicial estoppel is designed to protect the integrity of the courts rather than any interests of the litigants.”); Konstantinidis v. Chen, 626 F.2d 933, 937 (D.C. Cir. 1980) (“‘Judicial estoppel,’ on the other hand, although otherwise similar to the equitable estoppel rule against inconsistency, does not require proof of privity, reliance, or prejudice. . . . This distinction reflects a difference in policy objectives: in contrast to equitable estoppel’s concentration on the integrity of the

a second suit, even though the parties in the second suit may not be the same as those in the first.”); State v. St. Cloud, 465 N.W.2d 177, 180 (S.D. 1991) (“Unlike collateral estoppel or equitable estoppel, judicial estoppel [does not require] privity between parties in the two proceedings . . . ‘The gravamen of judicial estoppel is not privity, reliance, or prejudice. Rather it is the intentional assertion of an inconsistent position that perverts the judicial machinery.’”) (citation omitted); Teledyne Indus., Inc. v. National Labor Relations Board, 911 F.2d 1214, 1220 (6th Cir. 1990) (“Judicial estoppel is not bounded by the limits of mutuality and finality that protect the parties in collateral estoppel.”); Konstantinidis v. Chen, 626 F.2d 933, 937 (D.C. Cir. 1980) (privity is not required under judicial estoppel; “This distinction reflects a difference in policy objectives: in contrast to equitable estoppel’s concentration on the integrity of the parties’ relationship to each other, judicial estoppel focuses on the integrity of the judicial process.”) (citing to Hamilton v. Zimmerman, 37 Tenn. (5 Sneed) 39 (1857)).

parties' relationship to each other, judicial estoppel focuses on the integrity of the judicial process.”).¹⁰

¹⁰ Friend v. Friend, 2004 WL 1875603, at *4 (Wash. Ct. App. Aug. 23, 2004) (“The doctrine of judicial estoppel is designed to protect the court, and not the litigants. [Thus, detrimental reliance need] not be present as would be the case in equitable or collateral estoppel.”); In re Bilstat, Inc., 314 B.R. 603, 610 (Bankr. S.D. Tex. 2004) (“[D]etrimental reliance, while it is an element of equitable estoppel, need not be shown to establish judicial estoppel.”); Roberts v. Alcoa, 811 N.E.2d 466, 475 (Ill. App. Ct. 2004) (detrimental reliance not required because “the purpose of judicial estoppel is to protect the integrity of the judicial process rather than to protect the parties to a case from improper conduct by their adversaries.”); In the Matter of Superior Crewboats, Inc., 374 F.3d 330, 334 (5th Cir. 2004) (“Importantly, because judicial estoppel is designed to protect the judicial system, not the litigants, detrimental reliance by the party opponent is not required.”); Cannon-Stokes v. Potter, 2004 WL 407014, at *4 (N.D. Ill. March 4, 2004) (detrimental reliance not required as the “‘doctrine of judicial estoppel protects the integrity of the judicial system, not the litigants.’”) (citation omitted); Whiteacre Partnership v. Biosignia, Inc., 591 S.E.2d 870, 882 (N.C. 2004) (noting “absence of a requirement of detrimental reliance on the part of the party invoking [judicial] estoppel”); Ex parte First Alabama Bank, 883 So.2d 1236, 1243 (Ala. 2003) (detrimental reliance not an essential element of doctrine of judicial estoppel); National Union Fire Ins. Co. v. Allfirst Bank, 282 F. Supp. 2d 339, 348 (D. Md. 2003) (“‘Judicial estoppel does not require . . . a showing of detrimental reliance by the party asserting its protections.’”) (citation omitted); Newfield Exploration Co. v. Applied Drilling Technology, Inc., 2003 WL 23253, at *6 (E.D. La. Jan. 2, 2003) (“‘[J]udicial estoppel may be applied even if detrimental reliance . . . does not exist.’”) (citation omitted); Steinman v. Levine, 2002 WL 31761252, at *11 (Del. Ch. Nov. 27, 2002) (“[M]ore recent Delaware cases cite the elements of judicial estoppel . . . [as] not requir[ing] detrimental reliance.”); White v. Goth, 47 P.3d 550, 552 n.1 (Or. Ct. App. 2002) (“‘[J]udicial estoppel does not require detrimental reliance, a component that is essential for equitable estoppel.’”) (citing Hampton Tree Farms, Inc. v. Jewett, 892 P.2d 683 (Or. 1995)); Lott v. Sally Beauty Co., 2002 WL 533651, at *3 (M.D. Fla. March 5, 2002) (detrimental reliance not required; “[b]ecause the doctrine [judicial estoppel] aims to protect the court’s interest, rather than any individual party’s, it is not necessary . . . that the party against whom the inconsistent pleading is being used be specifically prejudiced by the inconsistency.”); Montrose Medical Group v. Bulger, 243 F.3d 773, 779 n.3 (3d Cir. 2001) (detrimental reliance, while a prerequisite for application of equitable estoppel, is “not required for invocation of judicial estoppel.”); International Billing Services, Inc. v. Emigh, 101 Cal. Rptr. 2d

Most courts, moreover, do not use, as a factor, whether the prior and current legal proceedings involve the same subject matter. The relevant factor they use is whether the position in the first proceeding contradicts the position in the second proceeding. See e.g., New Hampshire, 532 U.S. 742 and authorities cited, supra, at fns. 9-10.

C. Utah Courts Since *Tracy Loan* Have Indicated Utah Will Follow The Modern Rule On Judicial Estoppel.

Since Tracy Loan was decided in 1942, Utah courts have quoted the language from Tracy Loan without explicitly re-examining whether that rule is appropriate in light of developments in the law of judicial estoppel and the policy behind that rule. There are three Utah cases, however, where the Court or members of the Court have indicated the rule should be liberalized along the lines of the modern rule.

532, 542 (Cal. Ct. App. 2000) (“Ordinarily ‘equitable estoppel’ entails detrimental reliance by one party, but ‘judicial estoppel’ does not.”); In the Matter of Coastal Plains, Inc., 179 F.3d 197, 205 (5th Cir. 1999) (“Because [judicial estoppel] is intended to protect the judicial system, *rather than the litigants*, detrimental reliance by the opponent of the party against whom the doctrine is applied is not necessary.”) (emphasis in original); Vowers and Sons, Inc. v. Strasheim, 576 N.W.2d 817, 824 (Neb. 1998) (“‘[J]udicial estoppel may be applied even if detrimental reliance . . . does not exist.’”) (citation omitted); Tozzi v. Long Island R.R. Co., 651 N.Y.S. 2d 270, 275 (N.Y. App. Div. 1996) (“[D]etrimental reliance is not a prerequisite to the applicability of judicial estoppel as the intent of said doctrine is not to protect the individual litigant, but to protect the integrity of the judicial system itself.”); Johnson v. Du Page Airport Authority, 644 N.E.2d 802, 807 (Ill. App. Ct. 1994) (“[Judicial estoppel] may be applied despite the lack of detrimental reliance”); State v. St. Cloud, 465 N.W.2d 177, 180 (S.D. 1991) (“Unlike collateral estoppel or equitable estoppel, judicial estoppel [does not require] detrimental reliance.”); Teledyne Indus., Inc. v. National Labor Relations Board, 911 F.2d 1214, 1220 (6th Cir. 1990) (“Judicial estoppel may apply regardless of detrimental reliance by the opposing party because it exists to protect the integrity of the courts instead of the litigants.”).

First, in International Resources v. Dunfield, 599 P.2d 515 (Utah 1979), the Utah Supreme Court stated, with regard to the Tracy Loan rule, that it was aware:

of a concededly overbroad statement in our case of Tracy Loan . . . to the effect that one would not be “judicially estopped” unless the parties and the issues are the same in the instant and the prior suit. Any misstatement of the rule was corrected and superseded by our decision in Richards v. Hodson, [485 P.2d 1044 (Utah 1971)].

Id. at 517 n.4. That language indicates the factors of “mutuality of the parties” and “same subject matters” may not be factors in a judicial estoppel analysis under Utah law. Cf. Masters v. Worsley, 777 P.2d 499, 504 (UT. App. 1989).

Second, in Royal Resources v. Gibraltar Financial Corp., 603 P.2d 793 (Utah 1979), Justice Maughn, in his dissent, addressed the doctrine of judicial estoppel. The majority had not addressed judicial estoppel, and Justice Maughan asserted judicial estoppel should have been the determinative principle. In discussing judicial estoppel, Justice Maughan stated that detrimental reliance may not be an element of judicial estoppel:

The maxim “one cannot blow hot and cold, in the same breath” finds its expression in the doctrine of judicial estoppel. A litigant is not allowed to maintain inconsistent positions in judicial proceedings.

. . . .

Those elements such as reliance and injury or prejudice to the individual, which are generally essential to the operation of an equitable estoppel do not enter into a judicial estoppel or at least not to the same extent.

603 P.2d at 797 & 798 n.7 (Maughan, J., dissenting).

Third, in Wiese v. Wiese, 699 P.2d 700 (Utah 1985), Justice Durham, in her dissent, also addressed the doctrine of judicial estoppel. The majority had decided the case under the doctrine of equitable estoppel and found there was no evidence of detrimental reliance. In her dissent, Justice Durham disagreed that equitable estoppel was the determinative issue and asserted that the case should have been decided on the basis of judicial estoppel. While quoting the Tracy Loan rule, Justice Durham stated that judicial estoppel, unlike equitable estoppel, did not require detrimental reliance:

I believe, however, that the principle of judicial estoppel has a strong and independent policy justification, namely the need to uphold the sanctity of oaths and the integrity of the judicial process. **Thus the requirement of prejudice to an adverse party which is part of the doctrine of equitable estoppel need not be imposed in the case of judicial estoppel.**

699 P.2d at 705 (Durham, J., dissenting)(emphasis added).

II. JUDGE HANSON CONSIDERED THE APPROPRIATE FACTORS IN HIS JUDICIAL ESTOPPEL ANALYSIS, AND CORRECTLY CONCLUDED, BASED ON UNDISPUTED FACTS, THAT JUDICIAL ESTOPPEL APPLIED AND SUMMARY JUDGMENT MUST BE GRANTED AGAINST JOHNSON.

A. Judge Hanson Correctly Concluded That Mutuality Of The Parties Is Not A Required Element Of Judicial Estoppel; That Conclusion, However, Was Not Determinative Of His Conclusion That Judicial Estoppel Applied.

Judge Hanson concluded that, under Utah law, mutuality of the parties is not a requirement for application of judicial estoppel. [R. at 2626, ¶ 2] Judge Hanson's conclusion was correct based on the recognized purpose for judicial estoppel, the modern

rule adopted by the overwhelming majority of courts, and the status of Utah law on the issue. See authorities cited, supra, at pp. 17-19.

However, regardless of whether Judge Hanson was correct in his conclusion is not determinative of the correctness of his conclusion that judicial estoppel applied and summary judgment should be granted. Judge Hanson concluded that there was mutuality of the parties because the SBA and Orvis were in privity. [R. at 2626, ¶ 3 (“Orvis, having purchased and having been assigned the judgment owned by the SBA, is in privity with the SBA.”)] Under Utah law, an assignee of a judgment is in privity with the original owner of the judgment. See Searle Brothers v. Searle, 588 P.2d 689 (1978); Condas v. Condas, 618 P.2d 491 (1980); Kunz Co. v. State, 913 P.2d 765 (Ut. App. 1996).

The undisputed record – the only record – before Judge Hanson demonstrated Orvis was in privity with the SBA. Johnson admitted that Orvis purchased and was assigned the SBA judgment; he attached the assignment to his affidavit. [R. at 2280, ¶¶ 52, 60; R. at 2513] Johnson’s admission, the written assignment and Orvis’ Affidavit were the only record relative to whether Orvis was in privity with the SBA.

Johnson’s assertion, for the first time on appeal, that there were material issues of fact relative to whether Orvis was an assignee of the judgment is without merit.

Johnson’s new position is: (1) there was no assignment to Orvis because the judgment was purchased with funds Orvis wrongly took from the “alleged partnership” and (2) the

assignment is void because it was purchased by Orvis in violation of his fiduciary duties as an “alleged partner” of Johnson. [Johnson Br. at 12-15] Johnson’s arguments are fallacious for three fundamental reasons.

First, Johnson never raised this issue below and therefore waived it as an issue on appeal. In fact, he admitted that Orvis had been assigned the judgment. Blackner v. State Dept. of Transportation, 2002 UT 44, ¶ 16, n.1, 48 P.3d 949, 953 n.1; Paulos v. Covenant Transp., 2004 UT. App. 35, ¶ 10, 86 P.3d 752.

Second, even if he had preserved the issue, there is no record to support Johnson’s mere allegations and speculation that the “alleged partnership” funds were used to purchase the SBA judgment or that Orvis violated some “alleged partnership” fiduciary duty by purchasing the SBA judgment. Johnson certainly does not cite to any such record in his brief. [Johnson Br. at 13-15]¹¹ Nor does he cite to determinative legal authority.

Utah law is clear that relevant issues of material fact cannot be created out of whole cloth – they cannot be based on the argument of counsel; they cannot be based on

¹¹ Johnson’s citation to and reliance on the deposition of Tommy Triplett [R. 855-875] and Jade Griffin [R. at 877-884] is totally inappropriate, as well as irrelevant. [Johnson Br. at 14] Judge Hanson, in September 2002, struck those depositions from the record and prohibited any reference to them because of the “irregularities in how the depositions were conducted.” [R. at 1439-1442] Johnson had taken the depositions in a case in Tennessee in which he was not counsel of record and which had already settled. He provided no notice of the depositions to Orvis, and Orvis did not attend the depositions. [Id.] The other deposition Johnson cites, Will Vigil’s [R. at 2585-2588] simply does not provide any evidentiary support for Johnson’s position.

conclusory or speculative allegations of a party; they certainly cannot be based on belated arguments on appeal with no record support. An issue of material fact can only be created by specific admissible facts. Norton v. Blackham, 669 P.2d 857, 859 (Utah 1983); Treloggan v. Treloggan, 699 P.2d 747, 748 (Utah 1985) (“ . . . the affidavit of an adverse party must contain specific evidentiary facts showing that there is a genuine issue for trial.”); Dairy Products Services, Inc. v. City of Wellsville, 13 P.3d 581 (Utah 2000) (“[A]n affidavit in opposition to a motion for summary judgment must set forth specific facts that would be admissible in evidence in order to show there is a genuine issue for trial. . . . An affidavit that merely reflects the affiant’s unsubstantiated opinions and conclusions is insufficient to create an issue of fact.” (citations omitted)); Winter v. Northwest Pipeline Corp., 820 P.2d 916, 919 (Utah 1991) (“Allegations of a pleading or factual conclusions of an affidavit are insufficient to raise a genuine issue of fact.”).

Third, Judge Hanson’s conclusion that judicial estoppel applied barred Johnson from using “purported evidence” of the alleged partnership to create an issue of fact.

B. Judge Hanson Considered Each Of The Three Elements Johnson Asserted Were Required Elements For Judicial Estoppel And, Based On The Undisputed Facts Relative To Those Elements, Correctly Concluded Judicial Estoppel Applied And Summary Judgment Was Warranted.

Johnson, in his opposition to Orvis’ motion for summary judgment, affirmatively asserted judicial estoppel had three required elements: (1) the prior proceeding and current action must be between the same parties or their privies; (2) the prior proceeding

and current action must involve the same subject matter; and (3) the position in the prior proceeding must have been successfully maintained. [R. at 2262] Those were the only elements Johnson asserted were required. [Id.]

On appeal, Johnson continues to assert that those three elements are required elements but, for the first time on appeal, now claims there are two additional required elements – (1) detrimental reliance on Johnson’s prior SBA testimony and (2) Johnson’s prior SBA testimony was in bad faith and not a mistake. [Johnson Br. at 5-6] These two newly asserted elements will be addressed in subsections C & D below.

Johnson asserts on appeal that there were issues of material fact with regard to the three elements Johnson did assert below which prevented Judge Hanson from entering summary judgment. Johnson’s argument is disingenuous and wholly without merit.

1. Johnson’s First Element – It Was Undisputed That Orvis Was In Privity With The SBA.

The first Johnson element – mutuality of the parties – has already been fully addressed above at pp. 24-27.

2. Johnson’s Second Element – It Was Undisputed The SBA Proceeding Involved The Same Subject Matter: Johnson’s Prior Sworn Testimony Contradicted His Position Here.

The second Johnson element – same subject matters – has two aspects. First, if this court determines that judicial estoppel requires same subject matters in the prior and current action – which Orvis submits it should not – the appropriate prior proceeding to consider is the proceeding in which Johnson’s SBA testimony was undisputably given.

The underlying action in which the SBA judgment was entered is not the proper prior proceeding to consider, contrary to Johnson's assertion, because that is not the judicial proceeding in which Johnson's SBA testimony was given. That proceeding is irrelevant for a subject matter determination.

The undisputed facts demonstrate the subject matter in the SBA post-judgment supplemental proceeding is the same as the subject matter in this proceeding for purposes of judicial estoppel. It is undisputed that the purpose of the SBA supplemental proceeding was to identify assets Johnson had that would satisfy the judgment against Johnson. Those assets included any interest Johnson had in any partnership or LLC. That is why Johnson's deposition was taken and that is why the questions at his deposition were directed at identifying assets in which he might have an interest. Indeed, Judge Hanson characterized those proceedings as proceedings "for collection purposes." [R. at 2627, ¶ 5] Likewise, the subject matter of this action is undisputed. This is an action to determine whether Johnson has as one of his assets a partnership interest in Orvis' businesses. [R. at 1-14, 20-39, 2624; Johnson Br. at vii] It strains credulity to argue the two subject matters are not the same for the purpose of judicial estoppel – preventing litigants from using judicial proceedings to perpetrate wrongdoing.

The real focus of Johnson's second element, however, is whether Johnson's testimony in the SBA proceeding contradicts his position here that he has a partnership

interest in Orvis' businesses. Judge Hanson, based on the undisputed facts, held that it did. [R. at 2624, 2625, 2627]

Johnson's challenge to Judge Hanson's conclusion on the ground there were issues of material fact with regard to that question [Johnson Br. at 19-24] is made out of whole cloth. While Johnson argues that there is an extensive record demonstrating the question he was asked regarding partnerships was vague and ambiguous, and that he understood the partnership question to "involve real estate activities, and not to encompass the Orvis credit repair businesses. . . ." [Johnson Br. at 19-22], Johnson does not cite to a single piece of evidence to support his position. For good reason; there is no record support. His only general reference to purported "substantial and extensive support" is his memorandum opposing the Orvis motion for summary judgment, Johnson's supporting affidavit, and his answer to the SBA's partnership question. [Johnson Br. at 20] Johnson's reliance on these three items is wholly misplaced; none of them created an issue of material fact relative to the question of contradiction.

Johnson's legal memorandum, filed by his lawyer, in opposition to Orvis' motion is not evidence; it cannot create an issue of material fact.

Johnson's affidavit not only does not support Johnson's position, it establishes that Johnson's SBA testimony contradicts his position in this case. Johnson's affidavit only addresses his SBA testimony at issue in one paragraph – paragraph 39 – of a 60

paragraph affidavit that is 16 pages in length. Johnson's only testimony in his affidavit regarding that SBA testimony is:

In his deposition, Jamis Johnson accurately disclosed the information requested by the SBA.

[R. at 2274] That is it. There is no testimony he didn't understand the question or thought the question was about real estate partnerships not a partnership interest in Orvis' businesses. In fact, the heading he uses in his affidavit for the SBA testimony demonstrates the SBA question and his answer included any partnership interest, not just real estate partnerships. In his affidavit, Johnson labeled the SBA testimony as testimony about "Interest in **any** partnerships – ". [R. at 2275 (emphasis added)]

Johnson's argument that there was an issue of material fact because the SBA question is ambiguous is refuted by the question itself. The question the SBA asked Johnson was:

Q. Do you have any interest in any partnerships?

[R. at 2275] That question, on its face, is a clear, unambiguous question. It does not create an issue of material fact.

Johnson's argument that his entire answer to that question created an issue of material fact again is wrong. Johnson's complete answer to the question "Do you have any interest in any partnerships" is:

A. **No.** I mean you know, often I'll have a joint endeavor with somebody, but **I don't have a partnership** or set up a partnership or an LLC. You know, if I get a deal I say, Hey,

do you want to do this deal together? We'll go up to Summit County and buy a lot.

Q. So a joint venture?

A. Yeah, you can call it that, but I don't have any outgoing partnerships.

[R. at 2275 (emphasis added)] His answer confirms his SBA testimony is contradictory.

He denied he had any interest in any partnerships.

Johnson's answer to the SBA's question whether Johnson had "[a]ny interest in any limited liability companies" is also a categorical denial.

A. **No.** I had an interest in a limited liability company in California called Simmons Shores, LLC. The property got foreclosed out from underneath it. I made some money from raising loans for it, but that no longer exists. I had an interest in an outfit called Western Equities, LLC, but that is no longer functional. **I have no interest in LLCs or corporations.**

[R. at 2275 (emphasis added)]

3. Johnson's Third Element – It Was Undisputed Johnson Successfully Maintained His Prior Position In The SBA Proceeding That He Had No Interest In Any Partnerships.

The record, as stated by Judge Hanson, undisputably demonstrated that Johnson successfully maintained his sworn denial that he had any interest in any partnerships or any other assets. The SBA never collected its judgment against Johnson and ultimately sold it for a fraction of its face value. [R. at 2271, ¶ 25; R. at 2280, ¶ 52; R. at 2282 ¶ 60;

R. at 2381, 2513; R. at 2627, ¶¶ 4-5; R. at 2627, ¶¶ 6-7] There is no evidence to the contrary.

C. Johnson Waived As An Issue On Appeal Whether An Essential Element Of Judicial Estoppel Is That The Prior Position Was Not A Mistake; In Any Event, The Undisputed Facts Demonstrated It Was Not A Mistake.

Johnson, for the first time on appeal, raises the issue of whether lack of mistake – inadvertence – was an essential element of judicial estoppel. [Johnson Br. at vi] Johnson never raised that issue before Judge Hanson. In fact, Johnson asserted below that there were only three essential elements of judicial estoppel, none of which was lack of mistake. [R. at 2262]¹² Johnson, therefore, has waived that issue as a basis for appeal. Blackner, 2002 UT 44, ¶ 16, n.1, 48 P.3d at 953 n.1; Paulos, 2004 UT App. 35, ¶ 10, 86 P.3d 752.

Even if he had preserved the issue, it would make no difference. Judge Hanson considered that factor, and it was undisputed, as stated by Judge Hanson, that: “There was no question of mistake. Johnson testified as he did so as to avoid collection efforts

¹² Johnson knows he did not preserve this issue below. The only cite he has for his assertion that he preserved the issue below is a cite to the page of his legal memorandum where he states there are only three elements, none of which is mistake. [Johnson Br. at vi]

from the Small Business Administration.” [R. at 2620]¹³ There was no evidence of mistake.

It was undisputed Johnson was a lawyer at the time he was deposed. He knew the purpose for his deposition being taken by the SBA. He knew the SBA would execute upon any asset, including any partnership interest in Orvis’ businesses, he disclosed in his deposition to satisfy the judgment against him. The question the SBA asked him about partnerships was clear and unambiguous – “Do you have any interest in any partnerships.” [R. at 1983] Johnson answered that question under oath with an unequivocal “No.” [Id.] Johnson never asked to have the question clarified and never changed his testimony during the deposition or after his testimony was transcribed. In his affidavit in opposition to Orvis’ motion, Johnson admitted his testimony was “accurate,” and that he understood the question to include interests he had in **any** partnerships – “Interests in **any** partnerships”, SBA deposition testimony at “P.30 lines 16-25 and P.31 lines 1-24.” [R. at 2275 (emphasis added)]

Johnson now in this case wants to contradict his prior sworn testimony for his own economic benefit. He wants to use the judicial system to perpetrate a fraud.

¹³ 3D Construction and Development v. Old Standard Life Insurance Co., 2005 UT. App. 307, ¶ 12, 117 P.3d 1082, 1086, requires nothing further to uphold Judge Hanson’s decision. It should be noted, moreover, that the Court’s statement that the Tenth Circuit does not recognize the doctrine of judicial estoppel is no longer true. Johnson v. Lindon City Corp., 405 F.3d 1065 (10th Cir. 2005).

Johnson either lied in the SBA proceeding for his own economic benefit or he is lying to Judge Hanson for his own economic benefit.

D. Johnson Did Not Raise And Therefore Waived As An Issue On Appeal Whether Detrimental Reliance Is An Essential Element of Judicial Estoppel; In Any Event, The Undisputed Record Demonstrated The SBA Relied On Johnson's SBA Testimony To Its Detriment.

Johnson, for the first time on appeal, raises as an issue that detrimental reliance is an essential element of judicial estoppel under Utah law. [Johnson Br. at vi]¹⁴ Johnson has waived that issue as a basis for appeal. Blackner, 2004 UT. 44, ¶ 16 n.1; Paulos, 2004 UT. App. 35, ¶ 10.

In any event, the undisputed evidence demonstrated the SBA detrimentally relied on Johnson's sworn denial he had no interest in any partnerships. It is undisputed the SBA never collected on its judgment and eventually sold it for a fraction of its face value.

E. Even Though Under A De Novo Review, Judge Hanson's Decision And The Final Judgment Must Be Affirmed, The Appropriate Standard For Reviewing Judge Hanson's Conclusion That Judicial Estoppel Applied Is An Abuse Of Discretion Standard.

It does not matter whether the Court reviews Judge Hanson's conclusion that judicial estoppel applied under de novo review or under an abuse of discretion standard.

¹⁴ Again, Johnson's record cite for preservation of this issue is to his opposing memorandum where he states there are three required elements, none of which is detrimental reliance. [Johnson Br. at vi; R. at 2262]

However, the proper standard for review is the abuse of discretion standard, even though this appeal is from Judge Hanson's grant of summary judgment.

While Utah appellate courts have never addressed the proper standard of review in a case such as this one, other appellate courts which have squarely addressed the issue apply an abuse of discretion standard of review to a trial court's application of judicial estoppel, even within the context of a grant of summary judgment.¹⁵ Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 30-32 (1st Cir. 2004); accord Nat. Union. Fire Ins. Co. of Pittsburg v. Mfrs. and Traders Trust Co., 137 Fed. Appx. 529, 530 (4th Cir. 2005); In re West Delta Oil Co., 66 Fed. Appx. 524 (5th Cir. 2003); De Leon v. Comcar Indus., Inc., 321 F.3d 1289, 1291 (11th Cir. 2003); Hamilton v. State Farm Fire & Casualty Co., 270 F.3d 778, 782 (9th Cir. 2001); Ahrens v. Perot Sys. Corp., 205 F.3d 831, 833 (5th Cir. 2000); Barack Ferrazzano Kirschbaum Perlman & Nagelberg v. Loffredi, 795 N.E.2d 779, 783-84, 789-90 (Ill. Ct. App. 2003); Otis v. Arbella Mut. Ins. Co., 824 N.E.2d 23, 29 (Mass. 2005); Garrett v. Morgan, 112 P.3d 531, 533 (Wash. Ct. App. 2005).

¹⁵An abuse of discretion standard of review is appropriate relative to the trial court's application of judicial estoppel because "judicial estoppel is an equitable doctrine invoked by a court at its discretion," application of the doctrine draws upon the trial court's intimate knowledge of the case, and the amorphous nature of the doctrine requires a flexible standard. Alternative Sys. Concepts, 374 F.3d at 30-31 (quoting New Hampshire v. Maine, 532 U.S. 742, 750 (2001)).

More specifically, in an appeal arising from the grant of summary judgment on the basis of judicial estoppel, these courts apply a two-tiered standard of review. First, the appellate court determines whether the trial court abused its discretion in applying judicial estoppel. Barack, 795 N.E.2d at 789-90. After making this determination, the court then reviews de novo the grant of summary judgment. Id. If the trial court did not abuse its discretion in applying judicial estoppel, then the non-moving party is “judicially estopped from attempting to create a question of fact for purposes of summary judgment by contradicting their previous positions,” and summary judgment is appropriate. Id.; Alternative Sys. Concepts, 374 F.3d at 31-32.¹⁶

As a result, Johnson’s argument that there were disputed material facts relative to the judicial estoppel factors is inapposite. The question is not whether there were disputed facts relative to the factors utilized for application of judicial estoppel. Rather, the question is whether, if Judge Hanson did not abuse his discretion in applying judicial estoppel to prevent Johnson from presenting any evidence of a partnership, were there any remaining material issues of disputed fact. Ultimately, if there were no remaining material issues of disputed fact, Judge Hanson’s grant of summary judgment was correct as a matter of law.

¹⁶Under Utah law, a trial court’s decision to exclude evidence for purposes of a motion for summary judgment is reviewed for abuse of discretion. See Alder v. Bayer Corp., 2002 UT 115, ¶ 20, 61 P.3d 1068, 1075-76; Murdock v. Springville Mun. Corp. (In re General Determination of the Rights to the Use of All the Water), 982 P.2d 65, 71-72 (Utah 1999).

III. JOHNSON WAIVED, AS A BASIS FOR APPEAL, HIS ASSERTION THAT JUDGE HANSON WAS BIASED; IN ANY EVENT, THERE IS NO EVIDENCE OF JUDICIAL BIAS.

Johnson asserts, for the first time on appeal, that the Judgment should be reversed because Judge Hanson was biased against Johnson. [Johnson Br. at vi] Johnson admits he did not raise that issue below. [Id.; 22-32]

The law in Utah is clear that Utah courts will not consider an allegation of judicial bias raised for the first time on appeal. Utah Rule Civ. P. 63(b); Campbell, Maack & Sessions v. Debry, 2001 UT. App. 397, ¶ 24, 38 P.3d 984; Wade v. Stangl, 869 P.2d 9, 11 (Utah Ct. App. 1994) (“We will not, therefore, consider the issue of judicial bias or prejudice when raised for the first time on appeal.”).

Moreover, Johnson’s assertion that Judge Hanson was biased against him because Judge Hanson oversaw Johnson’s disbarment proceedings is not supported by any record.¹⁷ Judicial bias is a serious charge, and one that should not be leveled lightly and with absolutely no evidence to substantiate it. See State v. State, 965 P.2d 551, 556 (Utah Ct. App. 1998) (“Utah cases have consistently required that the bias alleged . . . ‘have some basis in fact and be grounded on more than mere conjecture and

¹⁷ Johnson points as “evidence” that Judge Hanson was biased is the fact Judge Hanson ruled against him. But judicial bias cannot be based on a judge ruling against a party. If that were so, every litigant who lost a case could raise judicial bias on appeal as a basis for reversal. See State, 956 P.2d at 556 (“[N]o deduction of bias and prejudice may be made from adverse rulings by a judge.”) (citation omitted).

speculation.” (quoting Madsen v. Prudential Fed. Sav. & Loan, 767 P.2d 538, 544 n.5 (Utah 1998)).

Indeed, Rule 63(b) of the Utah R. Civ. P. requires that, when a party seeks the disqualification of a judge, that party must file a motion for disqualification and a supporting affidavit “stating facts sufficient to show bias, prejudice or conflict of interest.” Utah R. Civ. P. 63(b)(1)(A). The motion and affidavit must be filed no later than twenty days after a party or his attorney enters their appearance or they learn or with the exercise of reasonable diligence should have learned of the grounds upon which the motion is based. Id. Johnson never filed any such motion or affidavit because there was no basis for doing so.

CONCLUSION

The Court should affirm Judge Hanson’s decision that judicial estoppel applies and the Judgement entered by Judge Hanson on November 23, 2004.

DATED: December 2, 2005.

TOMSIC & PECK ^{LLC}

A handwritten signature in black ink, appearing to read 'Peggy A. Tomsic', is written over a horizontal line.

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CERTIFICATE OF MAILING

I hereby certify that I caused two true and correct copies of the within and foregoing BRIEF OF APPELLEE to be mailed this 5th day of December, 2005, to the following:

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