

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](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 and Peck; Attorneys for Appellee.

---

## Recommended Citation

Reply Brief, *Johnson v. Orvis*, No. 20041122 (Utah Court of Appeals, 2004).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/5457](https://digitalcommons.law.byu.edu/byu_ca2/5457)

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](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto: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,

Appellant,

vs.

JAYSON ORVIS,

Appellee.

Case No. 20041122-CA

---

**APPELLANT'S REPLY BRIEF**

---

**APPEAL FROM THE STATE OF UTAH THIRD DISTRICT COURT  
CASE NO. 010907449, THE HONORABLE TIMOTHY HANSON**

---

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

FILED  
UTAH APPELLATE COURTS  
FEB 03 2006

**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,

Appellant,

vs.

JAYSON ORVIS,

Appellee.

Case No. 20041122-CA

---

**APPELLANT'S REPLY BRIEF**

---

**APPEAL FROM THE STATE OF UTAH THIRD DISTRICT COURT  
CASE NO. 010907449, THE HONORABLE TIMOTHY HANSON**

---

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
Introduction .....	1-2
Argument	
I. Summary Judgment Was Improperly Granted .....	3-13
A. The Court Improperly Disregarded Established Standards for Granting Summary Judgment .....	3-5
B. The District Court Erred in Granting Summary Judgment Because Genuine and Disputed Material Issues of Fact Exist Precluding Summary Judgment .....	5-12
i. Johnson’s statement to the SBA was, at most, ambiguous .....	6-9
ii. Orvis was not a party or privy to the SBA judgment ..	9-10
iii. Johnson’s purported prior inconsistent statement was the result of inadvertence or mistake, not bad faith	10-12
C. The District Court Did Not View the Facts in the Light Most Favorable to Mr. Johnson as Required in Considering Summary Judgment .....	12
D. The District Court Improperly Weighed Conflicting Facts ..	12-13
II. Judicial Estoppel Is Not Applicable .....	13-31
A. The Elements of Judicial Estoppel Are Well Established Utah Law .....	13-15
B. Orvis’ Request to Overturn Long Established Utah Law Does Not Meet the Standard for Reversing Precedent .....	15-19
C. All Elements Required under Utah Law Are Not Present Herein .....	19-25
i. The purported inconsistent statement in the prior SBA litigation was not a knowing misrepresentation .....	19-20

ii. The SBA statement was not successfully maintained before U.S. District Court Judge Bruce Jenkins, nor accepted by that prior court .....	20-22
iii. There is a lack of identity of parties or privies .....	22
iv. Orvis did not detrimentally rely on the SBA statement and had equal knowledge of the facts .....	22-24
v. The prior statement was mistake and not bad faith ....	24-25
D. All Elements Required under Federal Law for Judicial Estoppel Are Not Present Herein .....	25-30
i. A party's later position must be 'clearly inconsistent' with its earlier position .....	26-27
ii. No party succeeded in persuading a court to accept that party's earlier position .....	27-28
iii. The party (Johnson) seeking to assert a purported inconsistent position would not derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped, but the opposite will occur if Orvis can successfully assert Judicial Estoppel .....	28-30
E. Orvis Is Barred From Invoking the Doctrine to Block the Truth Herein .....	30-31
III. Judicial Bias was Demonstrated Below .....	31
Conclusion .....	32-36

### **TABLE OF AUTHORITIES**

<u>3D Const. and Development, L.L.C. v. Old Standard Life Ins. Co.</u> , 117 P.3d 1082 (Utah App.2005) .....	3, 11, 13, 14, 20, 24
<u>Anderson Development Co. v. Tobias</u> , 116 P.3d 323 (Utah 2005) .....	5, 12
<u>Bearden v. Croft</u> , 31 P.3d 537 (Utah 2001) .....	9
<u>Carrier v. Pro-Tech Restoration</u> , 944 P.2d 346 ( Utah 1997) .....	15

<u>Chapman v. Uintah County</u> , 81 P.3d 761 (Utah App. 2003) .....	15
<u>City of Hildale v. Cooke</u> , 28 P.3d 697 (Utah 2001) .....	15-16
<u>Deming v. Moss</u> , 123 P. 971 (Utah 1912) .....	10
<u>Draper City v. Estate of Bernardo</u> , 888 P.2d 1097 (Utah 1995) .....	5, 13
<u>Eubanks v. CBSK Financial Group, Inc.</u> , 385 F.3d 894 (6 <sup>th</sup> Cir. 2004) .....	26
<u>Francisconi v. Union Pacific R. Co.</u> , 36 P.3d 999 (Utah App. 2001) .....	13
<u>Frandsen v. Holladay</u> , 739 P.2d 1111, 1113 (Utah App. 1987) .....	10
<u>Frisbee v. K &amp; K Const. Co.</u> , 676 P.2d 387 (Utah 1984) .....	9, 25
<u>Fullmer v. Blood</u> , 546 P. 2d 606 (Utah 1976) .....	10
<u>Graham v. Smith</u> , 292 F.Supp.2d 153 (D.Me.2003) .....	27-28
<u>In re Catholic Bishop of Spokane</u> , 329 B.R. 304 (Bkrtcy.E.D.Wash. 2005) .....	26
<u>Johnson v. Lindon City Corp.</u> , 405 F.3d 1065, 1068-1069 (10th Cir.2005) .....	18, 27
<u>Johnson, Autos, Inc. v. Gowin</u> , 330 B.R. 788 (D.Kan.2005) .....	19
<u>Jones, Waldo, Holbrook &amp; McDonough v. Dawson</u> , 923 P.2d 1366 (Utah 1996) ....	13, 22
<u>Masters v. Worsley</u> , 777 P.2d 499 (Utah Ct. App.1989) .....	15, 23
<u>Nebeker v. Utah State Tax Com'n</u> , 34 P.3d 180 (Utah 2001) .....	14-15
<u>New Hampshire v. Maine</u> , 532 U.S. 742 (2001) .....	17, 18, 19, 28
<u>Peterson v. Coca-Cola USA</u> , 48 P.3d 941 (Utah 2002) .....	25
<u>Pugh v. DozzoHughes</u> , 112 P.3d 1247 (Utah App.2005) .....	20
<u>Salt Lake City v. Silver Fork Pipeline Corp.</u> , 913 P.2d 731 (Utah 1995) .....	16, 16, 19, 23
<u>Salt Lake County v. Metro West Ready Mix, Inc.</u> , 89 P.3d 155 (Utah 2004) .....	5
<u>Saunders v. Sharp</u> , 818 P.2d 574 (Utah App.1991) .....	31
<u>Schaer v. State By and Through Utah Dept. of Transp.</u> , 657 P.2d 1337 (Utah 1983) .....	15, 23
<u>SanDisk Corp. v. Memorex Products, Inc.</u> , 415 F.3d 1278 (Fed. Cir. 2005) .....	28
<u>Shropshire v. Fred Rappoport Co.</u> , 294 F.Supp.2d 1085 (N.D.Cal. 2003) .....	26-27
<u>Smith v. Frandsen</u> , 94 P.3d 919 (Utah 2004) .....	5
<u>Staats v. Staats</u> , 226 P. 677 (Utah 1924) .....	10
<u>Stevensen v. Goodson</u> , 924 P.2d 339 (Utah 1996) .....	15, 21
<u>Still Standing Stable, LLC v. Allen</u> , 122 P.3d 556 (Utah 2005) .....	12
<u>Teledyne Indus., Inc. v. NLRB</u> , 911 F.2d 1214, 1218 (6th Cir.1990) .....	30
<u>Tracy Loan &amp; Trust Co. v. Openshaw Inv.</u> , 132 P.2d 388 (Utah 1942) .....	9, 13, 14, 15, 16, 17, 19, 23, 30
<u>United States v. Grap</u> , 368 F.3d 824, 830-31 (8th Cir.2004) .....	17
<u>Utah Coal and Lumber Restaurant, Inc. v. Outdoor Endeavors Unlimited</u> , 40 P.3d 581 (Utah 2001) .....	11
<u>Winegar v. Froerer et. al.</u> , 813 P.2d 104 (Utah 1991) .....	10, 13
Utah Code Anno. §48-1-5 .....	10, 22
Utah R. Civ. Pro. 56(c) .....	4
18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, <u>Federal</u> <u>Practice and Procedure</u> § 4477 at 596-97 (2d ed. 2002) .....	27
AmJur .....	16, 22

## **INTRODUCTION**

In his Appellee's Brief, Appellee Orvis argues primarily two separate topics: i) the doctrine of judicial estoppel, and ii) absence of disputed material facts.

First, regarding judicial estoppel, in response to Johnson's Appellant Brief where Johnson demonstrates that Utah law is long established and well-settled and requires several indispensable elements to be applicable, Orvis argues that judicial estoppel does not or should not contain the essential elements required by Utah courts and outlined by Johnson; that the doctrine is unclear in Utah; that the Utah Courts are in a minority; that federal law should be looked to for a new theory of judicial estoppel, and that the Court of Appeals should reverse long established Utah precedent to settle judicial estoppel.

Second, regarding the disputed issues of material facts, most notably, the SBA quote, the interpretation of which has been hotly contested below and here, Orvis simply says that there are no issues of disputed fact; that the standards for granting summary judgment (i.e. "no undisputed material fact issues", "viewed in light most favorable to Appellant", etc.) are not thus considerations here; and Judge Hanson's ruling applying judicial estoppel based on the disputed quote should be upheld. Orvis essentially glosses over the disputed material issues of fact by saying there are none.

Orvis doesn't question, however, that there are certain requisite elements of judicial estoppel that do exist, that each is an essential element of the doctrine; and *each* must be analyzed and met before judicial estoppel can be invoked in this case. Orvis fails to note, however, that there are **undisputed** facts in this case that irrevocably determine that several of the elements of judicial estoppel are missing making the doctrine inapplicable.

Appellant Johnson, in this Reply Brief, will cover the following:

Disputed Facts: In this case, Johnson will show that the District Court committed error in wholly ignoring every standard for granting summary judgment on these disputed facts; and that summary judgment must be reversed.

Judicial Estoppel: Appellant Johnson will show the following: Utah law is long-established and clear and does contain those elements previously outlined below before

Judge Hanson and here by Appellant Johnson. Each element is indispensable and must be shown to exist without dispute, or judicial estoppel is inapplicable; and that in addition to each element, there are policy issues through which judicial estoppel is filtered: the doctrine is disfavored and to be narrowly construed; the doctrine may not be used to prevent truthful assertions in the present case; the doctrine may not be unfairly applied. These policies strongly militate against the District Court's use of the doctrine. Johnson will also examine the federal law of judicial estoppel, only paraphrased by Orvis, and will show that Orvis does not, in truth, fully review federal law, but rather omits those quite significant aspects of the federal elements that disprove his arguments and which actually support Johnson's argument. Johnson will contrast state and federal standards for application of judicial estoppel and will show the federal scheme contains the same essential substantive elements for the doctrine that Utah courts require. Johnson will isolate those facts which are undisputed or indisputable in this action which negate necessary elements of the doctrine. Thus, judicial estoppel could not be applicable in any event, whether or not disputed facts also exist as to some elements of judicial estoppel.

Ultimately, this Court does not even need to reach any consideration of the many disputed issues of material fact, because, Johnson, in sum, will show that the lack of all elements of judicial estoppel entirely disposes of and prevents the summary judgment below and forever bars Orvis' disingenuous reliance on his distorted interpretation of the SBA quote. Whether the Orvis interpretation of the SBA quote were fully accurate or not, indeed regardless of whatever was said to the SBA, any consideration of this quote made in a separate prior federal matter is totally irrelevant here because it cannot come into Judge Hanson's consideration at all. This is so because Orvis has not met the necessary other elements of the doctrine of judicial estoppel under state law or federal law. So, while the Court of Appeals can reverse the summary judgment below under both the major matters raised by Johnson (disputed facts, and judicial estoppel) Johnson will specifically ask the Court of Appeals to reverse on those elements of judicial estoppel (each essential) that Orvis cannot prove.



## **I. SUMMARY JUDGMENT WAS IMPROPERLY GRANTED.**

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

Appellee Orvis' Brief puts the "cart before the horse" in terms of beginning with judicial estoppel rather than dealing first with disputed material facts. Orvis' Brief begins with a lengthy analysis of why well established Utah law on judicial estoppel should be overturned, claiming there is some doubt as to its elements - matters upon which, unfortunately for Orvis, neither this Court nor the Supreme Court has ever expressed any doubt or even ambiguity, even as recently as June, 2005, in 3D Const. and Development, L.L.C. v. Old Standard Life Ins. Co., 117 P.3d 1082 (Utah App.2005). But when finally discussing the disputed facts, Orvis claims on p. 37 of their Brief that "[J]ohnson'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." On the contrary, this is *precisely* the issue. The Orvis notion that a court can presume facts which are in dispute to make a legal determination that requires specific, defined elements of undisputed fact, is absurd.

Thus, it is a central and hotly disputed issue of fact as to what was meant by the allegedly "inconsistent" SBA statement. This Court of Appeals must reverse the District Court's ruling based as it was on that quote because the meaning of that quote was stoutly and credibly contested below but Judge Hanson ignored that clear dispute and improperly viewed the disputed fact in a light *least* favorable to Johnson, and improperly weighed conflicting facts, and made his own determination about the disputed fact - things that a trial judge simply cannot do on a summary adjudication.

At the same time, once Utah's elements of judicial estoppel are properly delimited here (by actually analyzing Utah's own law, not Orvis' indiscriminate strings of unanalyzed citations from legal encyclopedias, and after reviewing federal law), it will be shown that, even if all the disputed facts - the meaning of the SBA question and statement, whether Johnson was mistaken in his answer, and whether Orvis was a privy - were all undisputed

and interpreted as Orvis hopes, Orvis, nonetheless, still cannot, as a matter of law, support in any way most of the elements essential to sustain Judge Hanson's ruling below applying judicial estoppel against Appellant Johnson. Orvis did not plead, nor can one infer, nor did the District Court find, all of the requisite grounds to sustain judicial estoppel. There are perhaps some elements of the doctrine where Orvis may be said to have raised some dispute - however slight. For such an element, this brief will acknowledge, where appropriate, that a factual dispute might exist. For the other elements, this brief lays out six such situations and the Court of Appeals will see that Orvis has not alleged any facts or law that would prevent this Court from finding that there is no support as a matter of law in Orvis' position for these elements of judicial estoppel. For each failed element alone, the Court of Appeals must reverse the District Court judgment.

Johnson here first examines those facts that are in dispute before examining the doctrine of judicial estoppel and its necessary elements which are lacking. Orvis himself starts with a discussion of judicial estoppel. Orvis' entire discussion on judicial estoppel was premature coming first in his brief without regard to disputed facts making its application impossible, and out of context, This is an appeal of a grant of a motion for summary judgment in which the first focus under the plain language of Ut. R. Civ Pro. 56(c) is whether there is any dispute of material facts:

The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Orvis in his brief gets around to discussing disputed facts but then only in passing, yet his argument that there are not disputed facts is riddled with factual assertions and mischaracterizations of fact so as to create factual disputes beyond what is necessary to decide the case. These numerous factual assertions in and of themselves create clear factual disputes. Orvis attempts to dispute facts, which by means of doing so, prove the proposition they are attempting to defeat - that summary judgment was inappropriate because of the several disputed facts.

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, whereas because the facts which are undisputed show indispensable elements of judicial estoppel missing, so that it cannot apply, the Court of Appeals must reverse based on the correct review of law as Smith v. Frandsen, 94 P.3d 919 (Utah 2004) guides, “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 summary judgment standards in granting Orvis’ motion and also 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.**

There were three distinct critical material facts which are elements of judicial estoppel and which are clearly in dispute. These three disputed facts formed the basis of Judge Hanson’s order, and he improperly ruled against Johnson as to all three disputes. These three disputed issues are: i) what was the actual meaning of Johnson’s prior answer to the SBA in a prior unrelated SBA mortgage foreclosure case, i.e. whether the answer was actually a clearly inconsistent statement; ii) whether Orvis was actually a party or privy to the SBA judgment whereas it is disputed who actually owns the SBA judgment which was bought with partnership funds; and iii) whether Johnson’s statement to the SBA purportedly inconsistent with his current position regarding an interest in his partnership was the result of bad faith or inadvertence or mistake? Judge Hanson went out of his way to rule on the

third position without having received a scintilla of evidence on a central issue which Johnson argued.

**i. Johnson's statement to the SBA was, at most, ambiguous.**

The first of the three disputed material facts is the meaning of the SBA quote. The transcript of the SBA deposition, attached as Exhibit 11 to Johnson's Affidavit in Support of Memorandum of Jamis Johnson in Opposition to Jayson Orvis' Motion for Summary Judgment, showed that the SBA first propounded numerous questions about various Orvis-Johnson's partnership matters such as D.M. Johnson & Associates, Johnson & Associates, Lexington Law Firm and numerous other corporations, partnerships and LLC's before getting to the question and answer in issue. This deposition was the fourth of a series of depositions the SBA had with Johnson.

After a year into the current litigation, Orvis and attorney Lawrence, who were both parties in this litigation at the time, reviewed the extensive materials they had purchased from the SBA. They found, among the hundreds of pages, the short SBA deposition quote in controversy. Both Lawrence and Orvis in their respective briefs for summary judgment lifted the one word "No" from the 52 word answer, itself taken out of the context in which it arose, and presented their truncated quote to Judge Hanson as the complete answer by Johnson to the SBA question. This was clearly a further distortion of the small out of context quote. Relying initially on this truncated version of the quote, Orvis claimed that Johnson had "lied" to the SBA, and the District Court itself relied on this interpretation. Orvis did not reveal to the District Court that Johnson had participated in three prior depositions which explored the Johnson-Orvis business dealings and had produced with Orvis hundreds of pages of discovery on that relationship. Judge Hanson adopted this Orvis-Lawrence 'lie' view during the oral argument on the earlier Lawrence Motion for Summary Judgment on January 29, 2003, a transcript of which was attached as Exhibit 2 to the Addendum to Johnson's Appellant's Brief at p. 19, l. 2-4 that "Well you know, I don't even care if it's a fraud. Just a flat lie is bad enough for me, particularly from someone who used to be a lawyer." Judge

Hanson being of such disposition then ruled on this Motion for summary Judgment that no “mistake” had occurred with respect to Johnson’s SBA answer.

Orvis’ assertion adopted by the District Court, that Johnson had “lied” to the SBA about specifically not having a partnership with Orvis, does in fact, mean that Orvis admits and the District Court agrees, that Johnson does indeed have a partnership with Orvis. Otherwise Orvis cannot claim that his version of the prior statement of ‘no partnership’ with Orvis is inconsistent with Johnson’s current position that there is a partnership. Orvis misconstrued and misquoted the SBA answer so he could claim Johnson “lied” to the SBA and in straining to show the “lie,” Orvis with clarity reveals the truth that he understands there is indeed an Orvis-Johnson partnership. And in so straining, Orvis brought to center stage the meaning he desired to attribute to the SBA quote. While it will be shown in detail below that the SBA quote is utterly excluded by judicial estoppel from any consideration by Judge Hanson, nonetheless it was also a material fact in issue which Orvis made central to this case. The District Court below in the summary judgment motion, relied on the Orvis interpretation, finding it unambiguous. Actually looking at the quote and the context in which it arose, shows it, at the most, to be ambiguous. On its face, the Johnson answer cannot mean what Orvis states, much less carry the intent attributed by Orvis and Judge Hanson.

After some extensive lead-in statements about all these other businesses and tax matters and interests in life insurance term policies, the SBA asked, “Do you have any interest in any partnerships?” Johnson answered:

- 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.

The discussion then was about a variety of general interests including limited liability companies and limited partnerships. To support his interpretation, Orvis takes both the SBA question and Johnson’s statement out of context. Entirely apart from what Johnson understood the limits of the question to be, his answer is not an unequivocal “no interests in partnerships” but a qualified ‘no ongoing real estate partnership ventures are currently

pending.’ His answer clearly was directed to deal with drafting document and with proposals for random projects involving real estate transactions. Even more critical to the analysis of the meaning of “No” is that it occurred *after* extensive and varied discussions of Johnson’s relation with Lexington Law Firm, his cessation of a legal management role (but not ownership interest of the marketing thereof), and his and his wife’s business dealings with Orvis which had *already* been explored at length in earlier depositions. There were also hundreds of pages of documentation of the Orvis-Johnson business provided prior to this deposition in discovery (which were in large measure prepared and produced by Orvis and the Johnsons’ attorney, Lawrence, for Johnson to use). The SBA question was not posed in a vacuum by the SBA without its knowledge of the Orvis-Johnson business already. Thus, even had this question arisen other than in a discussion of real estate ventures, the logical interpretation Johnson should legitimately have given to the question itself was “Do you have any interest in any *other* partnerships *than the Orvis businesses we have spent hours discussing already and for which you have provided hundreds of pages of documentation?*”

If the SBA had indeed intended the question to be the Orvis version, then another reasonable inference is that the SBA would have followed up the negative reply with questions such as “So you are not including the Orvis businesses which we have discussed already?” or “What about the Orvis business or the DM Johnson & Associates business?” It is simply not logical to assume that Johnson believed the SBA was re-asking him about matters he had already extensively discussed. Indeed, he could not have knowingly, intentionally misled the SBA to hide something so extensively documented and about which they had so much information.

Thus, any meaning to be legitimately attributed to this question and answer by the District Court could only be fairly done based on *complete* written evidence and testimony regarding the full context and meaning to the SBA question and answer by Johnson at the time they were expounded, a highly fact intensive analysis. The meaning is not supplied in an absence of evidence by a naked transcript taken out of context coupled with presumptions supplied by Orvis. Such out of context extraction of bare text from a transcript and use of pure

assumptions against Johnson cannot support a summary judgment. The well established principle was that stated in Frisbee v. K & K Const. Co., 676 P.2d 387 (Utah 1984):

If there is any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the opposing party. Thus, the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment

In addition to reversing for the improper use of inference against Johnson by Judge Hanson, this Court must reverse as it views the facts *and inferences on appeal* in the light most favorable to the losing party-Johnson, Bearden v. Croft, 31 P.3d 537 (Utah 2001). Doing so puts the fact question of the potential inconsistency of the SBA statement and current position in dispute and not susceptible to summary judgment.

**ii. Orvis was not a party or privy to the SBA judgment.**

The second disputed material issue of fact is whether Orvis is a party or privy to the SBA judgment action. For judicial estoppel to apply, the parties to the prior (SBA) case and this case must be identical (*see In re Johnson*, 518 F.2d 246, 252 (10<sup>th</sup> Cir. 1975) or in privity (*see Tracy Loan & Trust Co. v. Openshaw Inv.*, 132 P.2d 388 (Utah 1942), Orvis is clearly not the SBA. Orvis claims to be a privy to the SBA because he acquired the SBA judgment (albeit that Orvis first used the defunct, dissolved All Star Financial, LLC as a ‘straw man’ intermediary to initially conceal his identity from the SBA). Johnson pointed out to the District Court that Orvis is not a privy because Orvis does not actually own the SBA judgment. This is so because he purchased the SBA judgment with partnership funds (using funds embezzled from the partnership). Johnson has asserted from the outset that Orvis purchased the judgment with monies wrongfully taken from the partnership and stated this in his Affidavit in Opposition to Summary Judgment, ¶¶4, 52, 53 and 54. Thus, Orvis would not own the judgment, rather the partnership would be the actual owner of the judgment. Orvis would not be a privy to the SBA judgment, the partnership would be the privy. The material issue of fact here is not whether Johnson is, or is not, Orvis’ partner (although that is the ultimate issue in the litigation), but whether Orvis is a privy to the SBA - a material fact

issue ignored by the District Court and preserved below. One or the other Orvis or the partnership, may be a privy, but not both.

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 ownership of the judgment which gives party/privy status was highly contested 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.

Utah statute and case law are well-established and long-standing in being 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 as standing for the rule that is "settled in this jurisdiction" and "amply supported by numerous authorities" in Staats v. Staats, 226 P. 677 (Utah 1924). 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.

**iii. Johnson's purported prior inconsistent statement was the result of inadvertence or mistake, not bad faith.**



The third disputed issue of material fact is whether Johnson's SBA answer was made in bad faith, not a result of inadvertence or mistake. Mere inadvertence or mistake in making an inconsistent statement is not sufficient to sustain judicial estoppel. There must be "bad faith" to invoke judicial estoppel as discussed, *infra*. The SBA answer was at most a mistake and there is not any evidence of bad faith.

To isolate and review solely the bare text of the SBA question "Do you have any interests in any partnerships" standing alone is *per se* taking the question out of the context in which it arose. With inherent ambiguity in the question taken in the context it arose, the answer itself is further additionally ambiguous. The presumption promoted by Orvis and adopted by the District Court is that the "No" was made in bad faith to attempt to conceal this partnership business from the SBA so they would not seize Johnson's interest with Orvis. This presumption defies the reality that the SBA already knew about the Johnson-Orvis business dealings at length. It is a strained and totally unreasonable presumption. The answer Johnson believed he was giving about matters other than had been discussed at length is not at all inconsistent with a claim or interest in the Johnson-Orvis partnership.

If Johnson's answer, based upon his misunderstanding of the scope of the question, was indeed 'no interest in any partnership whatsoever including business dealings with Orvis,' this clearly falls within the definition of "mistake" as set forth in Utah Coal and Lumber Restaurant, Inc. v. Outdoor Endeavors Unlimited, 40 P.3d 581 (Utah 2001):

Indeed, [a] mistake within the meaning of equity is a non-negligent but erroneous mental condition, conception, or conviction induced by ignorance, misapprehension, or misunderstanding, resulting in some act or omission done or suffered by one or both parties, without its erroneous character being intended or known at the time. 27A Am.Jur.2d Equity § 7 (1996). We acknowledged this principle over seventy years ago in Provo Reservoir Co. v. Tanner, 68 Utah 21, 25-26, 249 P. 118, 119 (1926),

Judge Hanson's finding of "no mistake" does not *ipso facto* mean the "bad faith" element for judicial estoppel required by 3D Const. and Development, L.L.C. v. Old Standard Life Ins. Co., *supra*, but even assuming for purpose of argument that Judge Hanson's ruling does incorporate "bad faith," the most critical defect of Judge Hanson's

presumption of “bad faith” in terms of summary judgment was the well-established principle expressed in Still Standing Stable, LLC v. Allen, 122 P.3d 556 (Utah 2005):

‘[A] finding of bad faith turns on a factual determination of a party's subjective intent.’ *Id.* [Utah Dep’t of Soc. Servs. v. Adams, 806 P.2d 1193, 1198 n. 6 (Utah Ct.App.1991)] (citing Pennington v. Allstate Ins. Co., 973 P.2d 932, 939 n. 3 (Utah 1998)).

Still Standing also explicitly states that making a presumption of bad faith in the absence of evidence is impermissible. No such factual determination was made, and given these parties’ positions, is one which will clearly be in dispute.

**C. THE DISTRICT COURT DID NOT VIEW THE FACTS IN THE LIGHT MOST FAVORABLE TO 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 viewed in that light most favorable toward Mr. Johnson. This is reflected by the District Court’s finding of ‘no mistake;’ in its failure to analyze the meaning of the SBA question and answer, in the context of all discussions and discovery; and in disregard of the party-privy dispute. The view of these facts in the light most favorable to Johnson is that: i) the prior statement at the SBA deposition when placed in context is not at all inconsistent with his current claim of a partnership interest; ii) Johnson’s qualified negative reply to a question about interests in partnerships after a discussion about businesses and days of testimony regarding the Orvis-Johnson was inadvertent or a mistake, not bad faith; and iii) that Orvis was not a privy to the SBA because the SBA judgment was bought through Orvis using embezzled partnership funds. Each such “view” would have precluded summary judgment by the District Court, but the District Court failed to take the view required by the standard necessary to grant summary judgment. This is reversible error.

**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 and reverse the lower court's grant of summary judgment. Masters v. Worsley, 777 P.2d 499 (Utah Ct. App. 1989).

The trial court is extensively experienced and it would seem beyond question that it understands the standards 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 there were material and strongly contested fact issues herein - it is improper and reversible error for the District Court 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. JUDICIAL ESTOPPEL IS NOT APPLICABLE.**

### **A. THE ELEMENTS OF JUDICIAL ESTOPPEL ARE WELL ESTABLISHED UTAH LAW.**

It is Judge Hanson's summary adjudication based on the doctrine of judicial estoppel which is subject to *de novo* review here for legal correctness, not Johnson's arguments made to Judge Hanson. All of the discussion in Appellee Orvis' Brief is about how unclear the elements of judicial estoppel are, or that some of the elements are confused or outdated and disfavored in other states, and Orvis urges this Court to overturn existing law - p.15 of Orvis' Brief - "This case presents the opportunity for this Court to clarify what the rule in Utah is relative to judicial estoppel." This is curious because it is apparently only they and Judge Hanson who are confused. Unfortunately for Orvis, neither this Court nor the Supreme Court has ever had any doubt as to what the rule is beginning with Tracy Loan & Trust Co. v. Openshaw Inv., 132 P.2d 388 (Utah 1942), but even as recently as June, 2005 in 3D Const. and Development, L.L.C. v. Old Standard Life Ins. Co., supra.

Tracy is the landmark Utah case setting forth the Utah rules and the factual elements necessary for application of the doctrine of judicial estoppel. Those elements are: i) inconsistent position in prior litigation, ii) which prior position was successfully maintained, iii) identical parties or privies in the prior and present actions, and iv) detrimental reliance on the prior position by the party seeking to assert judicial estoppel. Tracy held as follows:

The general rule of "judicial estoppel" or "estoppel by oath" is stated in 19 Amer.Jur. 712. Most of the decided cases hold that the rule may be invoked only where the prior and subsequent litigation involves the same parties, and where one party has relied on the former testimony and changed his position by reason of it. In other words, 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. Pratt v. Paris Gas Light & Coke Company, 168 U.S. 255, 18 S.Ct. 62, 42 L.Ed. 458; Sinclair Refining Co. v. Jenkins Petroleum Process Co., 1 Cir., 99 F.2d 9, *certiorari denied* 305 U.S. 659, 667, 59 S.Ct. 362, 83 L.Ed. 427, 1062, 1530.[2] A majority of the cases hold that the party invoking the rule of estoppel must show that he has done something or omitted to do something in reliance upon the conduct of the other party by reason of which he will be prejudiced now if the facts are shown to be different from those on which he relied; but there is no estoppel where there was no reliance and the parties had equal knowledge of the facts. Galt v. Phoenix Indemnity Co., 74 App.D.C. 156, 120 F.2d 723. See Macan v. Scandinavia Belting Co., 264 Pa. 384, 107 A. 750, 5 A.L.R. 1505; Hatten Realty Co. v. F. A. Baylies, 42 Wyo. 69, 290 P. 561, 72 A.L.R. 587; Helfer v. Mutual Benefit Health & Accident Assoc., 170 Tenn. 630, 96 S.W.2d 1103, 113 A.L.R. 921, 925, 929, 930. . . If a party litigant comes into court and falsifies, such conduct should not be employed to prevent him from telling the truth in a later action where there has not been any reliance on such false testimony, particularly where a rule estopping him from telling the truth would operate to injure innocent persons and not merely punish the wrongdoer.

Orvis falsely claimed to Judge Hanson that Tracy had been overruled - 9/9/04 Transcript of hearing on Motion for Summary Judgment attached as Addendum to Johnson's Appellant's Brief Exhibit 3, p. 8, l. 17-20. The elements of judicial estoppel set out by the Utah Supreme Court in Tracy have been consistently, steadfastly and uniformly applied and relied upon in every court of this state since that time, including very recently, and are consistently recited by this Court and the Utah Supreme Court, *see* 3D Const. and Development, L.L.C. v. Old Standard Life Ins. Co., *supra*; Nebeker v. Utah State Tax Com'n,

34 P.3d 180 (Utah 2001); Jones, Waldo, Holbrook & McDonough v. Dawson, 923 P.2d 1366 (Utah 1996); Stevensen v. Goodson, 924 P.2d 339 (Utah 1996); Salt Lake City v. Silver Fork Pipeline Corp., 913 P.2d 731 (Utah 1995); Masters v. Worsley, *supra*; and Schaer v. State By and Through Utah Dept. of Transp., 657 P.2d 1337 (Utah 1983).

Orvis proceeds to fashion a new definition of judicial estoppel based on his unique interpretation of parts of federal standards which will supposedly retroactively validate Judge Hanson's ruling. Thorough analysis of the federal standards in their entirety (dealt with in Argument II(D) below) shows that the Utah and federal courts essentially agree in the necessary elements of the doctrine, and under both systems, Orvis cannot rely on the doctrine to estop Johnson's partnership claim. It is Johnson who is entitled to judgment as a matter of law that judicial estoppel does not bar his present position, not Orvis. Orvis' argument to change existing Utah law, in and of itself, demonstrates that Judge Hanson's ruling did not comport with existing law.

**B. ORVIS' REQUEST TO OVERTURN LONG ESTABLISHED UTAH LAW DOES NOT MEET THE STANDARD FOR REVERSING PRECEDENT.**

A party seeking to overturn such well-established precedent has a very heavy burden which Orvis does not come close to meeting, Carrier v. Pro-Tech Restoration, 944 P.2d 346 (Utah 1997), "Those asking us to overturn prior precedent have a substantial burden of persuasion." Menzies, 889 P.2d at 398 (citing State v. Hansen, 734 P.2d 421, 427 (Utah 1986))." Because Tracy was decided by the Utah Supreme Court, in this appeal before this Court, the first problem for Orvis is that identified in Chapman v. Uintah County, 81 P.3d 761 (Utah App. 2003):

Additionally, Chapman attacks the reasoning in Heber City Corp. v. Simpson, 942 P.3d 307 (Utah 1997), and argues that we should either overturn or ignore the case. We decline to ignore clear precedent and note that we are not empowered to reverse rulings of the Utah Supreme Court. *See generally* State v. Thurman, 846 P.2d 1256 (Utah 1993).

That substantial burden of persuasion is defined in several cases including City of Hildale v. Cooke, 28 P.3d 697 (Utah 2001):

"Those asking us to overturn prior precedent have a substantial burden of persuasion. This burden is mandated by the doctrine of stare decisis." State v. Menzies, 889 P.2d 393, 398 (Utah 1994) (citation omitted). Specifically, parties seeking to have us depart from our prior case law must " 'clearly convince[] [us] that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.' " Id. at 399 (quoting John Hanna, The Role of Precedent in Judicial Decision, 2 Vill.L.Rev. 367, 367 (1957)).

Orvis' analysis and effort to distinguish Tracy, the long established and oft cited Utah landmark case on judicial estoppel, is simply way off the mark. The Orvis team opines that Utah in 1942 in requiring mutuality of parties adopted what was only a perceived majority position. They claim that the rejected position in Tracy is now the majority view but their discussion contains only strings of citations apparently lifted from the AmJur series with headnotes and no analysis whatsoever of the cases. There is no explanation as to why Utah law should be overturned other than that they can produce a long list of ostensibly contrary but unanalyzed cases from other non-Utah jurisdictions, while ignoring the unbroken line of Utah cases which follow the Tracy elements and supplement them without deviation. While Orvis never addresses the standards for overturning precedent, he also never cites any facts that could ever satisfy the elements of overturning precedent, i.e., originally erroneous or future application would cause more harm than good. The cases Orvis shrewdly fails to cite are the numerous and unwavering Utah cases. Orvis claims Utah courts are confused or in a minority and should reject some of the elements of judicial estoppel. He bases this upon two different dissenting Utah opinions more than 25 years old.

What Orvis ignores is that not only does this unbroken chain of Utah law never waiver in application of the Utah rule, most of the afore-referenced Utah cases further strengthen the very elements Orvis now seeks this Court to disregard. Silver Fork additionally highlighted a further critical aspect that works against Orvis found in numerous of the cases which is decisive of this issue herein, i.e. equal knowledge of the facts:

We conclude that this purpose is not served in cases such as this where there is no evidence that the party against whom judicial estoppel is sought knowingly misrepresented any facts in the prior proceeding and where the party seeking to invoke judicial estoppel had equal or better access to the relevant facts.

Orvis clearly had not merely equal, but better, knowledge of the facts than Johnson. Not only did he assemble to the discovery and document preparation for the SBA, but he knew the terms of the settlement discussion Johnson had conducted.

Orvis tires, superficially, to rely on federal law to urge overturning Tracy to adopt new standards for application of judicial estoppel for Utah. However, federal law in substance is entirely in accord with existing Utah law and supports Johnson. Orvis begins his argument by referencing federal standards from the New Hampshire v. Maine, 532 U.S. 742 (2001) case. As the analysis below demonstrates, the federal standards actually track the Utah standards in all respects. Orvis, however, fails to include a significant and substantial portion of the full New Hampshire case or an analysis of its progeny. In his discussion of the New Hampshire case, Orvis, not surprisingly, omits its entire analysis of factors referenced therein. Orvis omits the introductory statement which is that application of the doctrine of judicial estoppel is traditionally restricted to inconsistent statements made *in the same litigation*. This element alone would preclude application to the SBA case since that SBA case is in an entirely different judicial system, the U.S. District federal court, and is not remotely related to this case before Utah state Judge Hanson, let alone the “same” case. Federal Courts limit the doctrine so as to be narrowly applied “in the same or related litigation,” *see United States v. Grap*, 368 F.3d 824, 830-31 (8th Cir.2004). Orvis simply overlooks this and misrepresents the entirety of the contents of the federal standard. Orvis lists the New Hampshire federal elements without the surrounding factors in the case as to when judicial estoppel is to apply in the first instance. Orvis omits the “same litigation” requirement. Orvis omits that the concept of mutuality of parties as refined under federal law actually does include an “identity of parties.” Orvis omits that the federal standard requires that there be prejudice to the party in the litigation where the prior statement was made, i.e. “detrimental reliance” as well. The omitted introduction from New Hampshire was that:

“[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially *if it be to the prejudice of the party who has acquiesced in the position formerly taken by him*. Davis v. Wakelee, 156

U.S. 680, 689, 15 S.Ct. 555, 39 L.Ed. 578 (1895). This rule, known as judicial estoppel, generally prevents a party from prevailing in *one phase* of a case on an argument and then relying on a contradictory argument to prevail in *another phase*.” [Emphasis added].

Our own federal circuit, the Tenth Circuit, had traditionally actually refused to even allow the doctrine of judicial estoppel to apply in this Circuit, but after New Hampshire, it applied those principles as follows in Johnson v. Lindon City Corp., 405 F.3d 1065, 1068-1069 (10th Cir.2005):

Although this circuit has repeatedly refused to apply this principle, United States v. 162 MegaMania Gambling Devices, 231 F.3d 713, 726 (10th Cir. 2000); United States v. 49.01 Acres of Land, More or Less, Situate in Osage County, Okla., 802 F.2d 387, 390 (10th Cir. 1986), the Supreme Court's intervening decision in New Hampshire has altered the legal landscape. Accordingly, we must follow the guidance of the Court's binding precedent. United States v. Hernandez-Rodriguez, 352 F.3d 1325, 1333 (10th Cir. 2003).

The Tenth Circuit Court then defined the doctrine as being one to be *narrowly* applied as follows:

"[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." Davis v. Wakelee, 156 U.S. 680, 689 (1895). Although noting that this rule, known as judicial estoppel, is "'probably not reducible to any general formulation of principle,'" New Hampshire, 532 U.S. at 750 (citation omitted), the Court noted several factors which other courts have typically used to determine when to apply judicial estoppel. "First, a party's later position must be 'clearly inconsistent' with its earlier position." Id. (citation omitted). Moreover, the position to be estopped must generally be one of fact rather than of law or legal theory. Lowery v. Stovall, 92 F.3d 219, 224 (4th Cir. 1996). Second, "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 would create 'the perception that either the first or the second court was misled.'" New Hampshire, 532 U.S. at 750 (citation omitted). The requirement that a previous court has accepted the prior inconsistent factual position "ensures that judicial estoppel is applied in the *narrowest of circumstances*." Lowery, 92 F.3d at 224. Third, "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." New Hampshire, 532 U.S. at 751. [Emphasis added].



The very mutuality of parties requirement Orvis wishes to eliminate is embodied in the federal standard as noted in Johnson, Autos, Inc. v. Gowin, 330 B.R. 788 (D.Kan.2005):

Judicial estoppel is a discretionary remedy courts may invoke "to prevent 'improper use of judicial machinery.' " New Hampshire v. Maine, 532 U.S. 742, 750, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (citation omitted). "This rule ordinarily applies to inconsistent positions assumed in the course of the same judicial proceeding or in subsequent proceedings involving identical parties and questions." In re Johnson, 518 F.2d 246, 252 (10th Cir.1975).

The federal elements of New Hampshire, including the narrowing application of the case's introduction, and the Tracy elements are nearly identical and there is no reason for this Court to overturn any aspect of Utah law. The correct test is not what the law should be in the mind of some disapproving Orvis lawyer, but what it was when Judge Hanson made his ruling and whether the ruling complied with that law.

**C. ALL ELEMENTS REQUIRED UNDER UTAH  
LAW ARE NOT PRESENT HEREIN.**

**i. The purported inconsistent statement in the prior SBA litigation  
was not a knowing misrepresentation.**

This element of judicial estoppel was reiterated in Salt Lake City v. Silver Fork Pipeline Corp., *supra*:

We conclude that this purpose is not served in cases such as this where there is no evidence that the party against whom judicial estoppel is sought knowingly misrepresented any facts in the prior proceeding and where the party seeking to invoke judicial estoppel had equal or better access to the relevant facts. See Tracy Loan, 102 Utah at 515, 132 P.2d at 390-91 (concluding that judicial estoppel is not appropriate where "parties had equal knowledge of the facts"); DeMers v. Roncor, Inc., 249 Mont. 176, 814 P.2d 999, 1001 (1991) ("The rule of judicial estoppel does not apply ... when the knowledge or means of knowledge of both parties is equal.").

The SBA answer does not constitute an inconsistent position knowingly made - i.e. Johnson was not knowingly saying, " I do not have any interest in the Orvis-Johnson businesses." The interpretation and context of Johnson's short statement are extensively discussed in this brief at Argument I(B)(i) above. The actual statement itself taken alone, on its face, and even completely *out of context*, cannot be reasonably understood to be dealing

with the Orvis-Johnson businesses - it is addressing real estate transactions and whether partnership documents are prepared. The statement, viewed *in context*, shows further the statement was not intended to relate to Orvis-Johnson businesses and thus is not an inconsistent statement. The statement is not inconsistent when viewed in the context of the actual deposition in which it was made where the question and answer came among a string of questions regarding random interests such as insurance, limited liability companies, etc. and after three prior depositions and discovery. In that setting, the Johnson answer was clearly not intended to address the Orvis-Johnson businesses already discussed, and later discussed in that deposition. Neither the SBA nor Johnson could be reasonably said to be revisiting with this short question and answer, the Orvis-Johnson businesses already so exhaustively examined. The SBA quote is not an inconsistent statement and if Johnson made an inconsistent statement, it was not knowingly done. The inference used by Judge Hanson as earlier discussed is inapposite to the more reasonable interpretation of the question and both the indulging an unreasonable inference over a reasonable one and such weighing of facts is not permissible for a motion for summary judgment, Pugh v. DozzoHughes, 112 P.3d 1247 (Utah App.2005). Silver Fox requires a knowing misrepresentation - an inconsistent statement knowingly made. The SBA quote, if it may be said to be inconsistent at all, cannot be knowingly made as an inconsistent statement. Judicial estoppel requires a knowing inconsistent statement and such does not exist.

**ii. The SBA statement was not “successfully maintained” before U.S. District Court Judge Bruce Jenkins, nor accepted by that prior court.**

As explained in 3D Const. and Development, L.L.C. v. Old Standard Life Ins. Co.,supra:

"Under judicial estoppel, '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.' " Nebeker v. State Tax Comm'n, 2001 UT 74, 26, 34 P.3d 180 (quoting Tracy Loan & Trust Co. v. Openshaw Inv. Co., 102 Utah 509, 132 P.2d 388, 390 (1942))... Moreover, judicial estoppel is inappropriate where the party against whom judicial estoppel is sought did not successfully maintain the inconsistent position in the

prior proceedings. See Stevensen v. Goodson, 924 P.2d 339, 353 (Utah 1996) (explaining "the rule followed in Utah requires that the party seeking judicial relief must have prevailed upon its statement in the earlier proceeding.").

Again, in Stevensen v. Goodson, *supra* - "However, the rule followed in Utah requires that the party seeking judicial relief must have prevailed upon its statement in the earlier proceeding."

Orvis argues this element was somehow met by a non-action, i.e. the SBA not attempting to seize Johnson's partnership interest in the Orvis-Johnson business. It is obviously absurd to argue that a non-action by the SBA constitutes Johnson having successfully maintained a position of "no partnership" with Orvis before the Honorable U.S. District Court Judge Bruce Jenkins, the federal judge presiding over the SBA case. Masters v. Worsley, 777 P.2d 499 (Utah App.1989) further makes clear what is meant by this element of judicial estoppel of successfully maintained positions are only those that were "actually litigated" in the prior proceeding, not those that merely could have been litigated, "However, in Richards v. Hodson, 26 Utah 2d 113, 485 P.2d 1044, 1046 (1971), the court clarified that the doctrine [of judicial estoppel] was really akin to collateral estoppel and applied only to issues actually litigated, not those which could have been determined." There was *no* determination of Johnson's partnership claims by the U.S. District Court, nor was it an issue in that SBA extensively litigated mortgage deficiency action centered on the primary issue of which was whether the differing federal limitation period for pursuing SBA backed mortgage deficiencies trumped Utah's three month trust deed statute limitation period.

This element, i.e. successful maintenance, specifically requires that the Court not only have actually reviewed and relied on the position, but for the party asserting the position to have "prevailed" on that issue before the court. They claim the position was successfully maintained because they assume the SBA party relied on it. This is regardless of the fact that Orvis cannot know what was in the SBA mind as it sat passively, doing nothing. This position was never even looked at once by U.S. District Court Judge Bruce Jenkins. The U.S. District Court never relied upon or supported this position as it never went before the Court.

While Orvis speciously argues that this element “successful maintenance” was met because the SBA was passive and did not collect, in truth even that assertion by Orvis is false. The SBA actually did collect on its judgment. Indeed, Orvis himself paid the SBA and in fact, paid the exact amount that Johnson had negotiated with the SBA to pay off the SBA judgment. Orvis had learned of the exact amount to pay the SBA from Johnson’s former attorney, Lawrence, who wrongly went behind Johnson’s back and revealed this attorney-client secret to his other client. The SBA did collect exactly the discounted amount they sought.

**iii. There is a lack of identity of parties or privies.**

For judicial estoppel to apply, the parties in the prior matter and the current matter must be the same or in privity. *See* Argument I(B)(ii) above on this very issue which Johnson incorporates herein. The parties are clearly not identical, whether one is an assignee or not. The successor in interest to the SBA judgment was at best, the very Orvis-Johnson partnership in dispute and not Orvis, the individual partner who used partnership funds to acquire the claim, Utah Code Anno. §48-1-5. Orvis is not the privy and so the parties then and now are not the same. Without such identity of parties, the District Court committed reversible error in applying judicial estoppel.

**iv. Orvis did not detrimentally rely on the SBA statement and had equal knowledge of the facts.**

Orvis’ claim that the detrimental reliance element is not an essential element for the application of judicial estoppel in Utah is in pure defiance of established Utah law. Detrimental reliance was essential at the time of Judge Hanson’s decision though he utterly ignored it. Orvis lacks any such reliance to a stunning degree and instead, argues Utah law should be overturned and it should not apply. Orvis supports his argument with unanalyzed string citations of headnotes of cases from random other jurisdictions from AmJur. There is no reference to the consistent unequivocal requirement of the Utah courts for detrimental reliance by the opposing party as necessary to invoke the doctrine. There is no analysis by Orvis of the facts, issues or actual holdings in these cases - only headnotes. But a serious

analysis of the element of detrimental reliance shows it pervades Utah law. From the very beginning in Tracy:

A majority of the cases hold that the party invoking the rule of estoppel must show that he has done something or omitted to do something in reliance upon the conduct of the other party by reason of which he will be prejudiced now if the facts are shown to be different from those on which he relied; but there is no estoppel where there was no reliance and the parties had equal knowledge of the facts.

As restated in Schaer v. State By and Through Utah Dept. of Transp., *supra*:

[T]here is no estoppel where there was no reliance and the parties had equal knowledge of the facts . . . Thus, the absence of any reliance renders the doctrine of judicial estoppel or estoppel by oath inapplicable to the present case.

As restated in Masters v. Worsley, *supra*:

In Tracy Loan & Trust Co. v. Openshaw Inv. Co., 102 Utah 509, 132 P.2d 388, 390 (1942), the Utah Supreme Court said that a party invoking judicial estoppel must show that he or she has done something or omitted to do something in reliance on the other party's testimony in the earlier proceeding, and will be prejudiced if the facts are different from those upon which he or she relied. *Id.* However, "there is no estoppel where there was no reliance and the parties had equal knowledge of the facts." *Id.* 132 P.2d at 390-91.

As restated in Silver Fork, *supra*;

[There is no judicial estoppel] where the party seeking to invoke judicial estoppel had equal or better access to the relevant facts. See Tracy Loan, 102 Utah at 515, 132 P.2d at 390-91 (concluding that judicial estoppel is not appropriate where "parties had equal knowledge of the facts"); DeMers v. Roncor, Inc., 249 Mont. 176, 814 P.2d 999, 1001 (1991) ("The rule of judicial estoppel does not apply ... when the knowledge or means of knowledge of both parties is equal.").

As restated in Jones, Waldo, Holbrook & McDonough v. Dawson, *supra*:

We held in Silver Fork, however, that "this purpose is not served in cases such as this where there is no evidence that the party against whom judicial estoppel is sought knowingly misrepresented any facts in the prior proceeding and where the party seeking to invoke judicial estoppel had equal or better access to the relevant facts."

Thus, any argument that detrimental reliance is not required under Utah is flatly wrong. No basis for changing Utah law based on string citations from other jurisdictions is shown. Utah law, as defined by these numerous cases, presents the compelling public policy reasons

for this interpretation of what is supposed to be a doctrine applied in the narrowest of circumstances.

Orvis' complete lack of reliance, indeed his anti-reliance, was extensively covered in Appellant's Brief. Orvis lacks both any reliance and any detriment. Suffice it to say, buying the SBA judgment, as Orvis did, arguably for fraudulent purposes with respect to terminating the very partnership in issue and acting in concert with Johnson's former attorney, continuing to pay profit shares from the partnership, manifests the exact opposite of reliance, much less detriment. Orvis at all times had equal or better knowledge of every aspect of the partnership and its finances and accounting. Orvis always had equal or better knowledge of the facts. He was a party to every transaction regarding his partnership with Johnson. Orvis did not detrimentally rely on the SBA statement.

**v. The prior statement was mistake and not bad faith.**

See Argument I(B)(iii) above on this very issue which Johnson incorporates herein. This element of judicial estoppel was very recently reiterated by this Court in 3D Const. and Development, L.L.C. v. Old Standard Life Ins. Co., supra:

We do not believe, however, that this policy is furthered by imposing judicial estoppel in instances where the party's prior position was based on mere mistake or inadvertence. . . . See New Hampshire v. Maine, 532 U.S. 742, 753, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) ("We do not question that it may be appropriate to resist application of judicial estoppel 'when a party's prior position was based on inadvertence or mistake.'" (citation omitted)). Indeed, requiring a showing of bad faith by the party against whom judicial estoppel is sought is a widely-accepted view. See, e.g., Whiting v. Krassner, 391 F.3d 540, 544 (3d Cir.2004) (noting bad faith is "an essential requirement for the application of judicial estoppel"); Eubanks v. CBSK Fin. Group, Inc., 385 F.3d 894, 899 (6th Cir.2004) (restating "evidence of an inadvertent omission of a claim in a previous bankruptcy proceeding is a reasonable and appropriate factor to consider when analyzing judicial estoppel's applicability"); Johnson v. Oregon, 141 F.3d 1361, 1369 (9th Cir.1998) ("If incompatible positions are based not on chicanery, but only on inadvertence or mistake, judicial estoppel does not apply."); see also The Honorable William Houston Brown, Lundy Carpenter & Donna T. Snow, Debtors' Counsel Beware: Use of the Doctrine of Judicial Estoppel in Nonbankruptcy Forums, 75 Am. Bankr.L.J. 197, 225 (2001) (summarizing the circuits' different approaches toward intent as an element of judicial estoppel originating from prior bankruptcy proceedings)

Judge Hanson baldly asserts in his ruling, “There is no question of mistake.” Yet absolutely, *there was no evidence adduced on this issue of mistake* and the meaning of the SBA statement was hotly disputed. As set forth in Peterson v. Coca-Cola USA, 48 P.3d 941 (Utah 2002). “Although upon summary judgment the court must view all facts and inferences in favor of the nonmoving party, it may not assume facts for which no evidence is offered.” So it particularly may not make inferences against the non-moving party in an absence of evidence. This is perhaps one of the most widely recognized, fundamental judicial maxims. Here, in stark contrast, the District Court made its ruling in the most absolute of terms possible (There is *no* mistake) utterly without any evidence on the issue of mistake/bad faith provided by Orvis or even solicited by the court for its judicious consideration.

The Judge Hanson conclusion of “no question of mistake” can only be reached by Judge Hanson wholly ignoring any Johnson factual disputes and indulging in an assumption that Johnson intended there to deceive the SBA. But even if Johnson were not mistaken, as Judge Hanson wants to find, such absence of mistake still does not necessarily *per se* make the statement bad faith which is what Utah law requires. Judge Hanson’s inference is that Johnson did not claim an Orvis-Johnson partnership interest in order to avoid SBA collection upon their judgment, i.e. did not answer inadvertently or mistakenly in response to what he perceived the question to be, and therefore used bad faith to make the answer to the ambiguous question. This Reply Brief in Argument I(B)(iii) has earlier covered why the SBA quote must be mistake factually as a matter of law, and why there can not be bad faith associated with this quote. It was improper and reversible error for the District Court to indulge such unreasonable inference of “no mistake - bad faith” against the non-moving party Johnson, Frisbee, *supra*.

**D. ALL ELEMENTS REQUIRED UNDER FEDERAL LAW FOR JUDICIAL ESTOPPEL ARE NOT PRESENT HEREIN.**

Because the judicial estoppel doctrine clearly be properly invoked in this case since the necessary elements of the doctrine under Utah law are missing, Orvis claims those elements should be changed. Although the Utah doctrine of judicial estoppel is unambiguous,

since Orvis claims otherwise, he then looks generally to federal law. However the federal standards for application of judicial estoppel, when analyzed, do not support Orvis either, but are quite in line with Utah law and also support reversal of Judge Hanson's ruling below. The analysis of the federal doctrine of judicial estoppel is as follows:

**i. A party's later position must be 'clearly inconsistent' with its earlier position.**

This federal element of judicial estoppel is identical to the first element of Utah law and was fully discussed above in Argument I(B)(i) which is incorporated herein. As mentioned, both the meaning of the SBA question and what Johnson understood it to mean and intended to answer are ambiguous at best, and are clear disputed material factual issues. This ambiguity is fully set forth in the Argument above.

This federal element of judicial estoppel requires the earlier position to be “clearly inconsistent,” not “potentially inconsistent” or “theoretically inconsistent.” This situation is similar to a matter where a bankruptcy debtor had in fact, as here, discussed a potential claim with his bankruptcy trustee but did not list it on his schedules, when he later sued the party and the party claimed that the debtor was judicially estopped from pursuing the claim as not having been disclosed as an asset. Similarly here Johnson had thoroughly discussed the Orvis-Johnson business with the SBA, the Federal Sixth Circuit Court of Appeals held such positions to not be “clearly inconsistent,” Eubanks v. CBSK Financial Group, Inc., 385 F.3d 894 (6<sup>th</sup> Cir. 2004). Further, In re Catholic Bishop of Spokane, 329 B.R. 304 (Bkrcty.E.D.Wash. 2005) limited application of judicial estoppel as it should be limited here, “However, an *inference* or *implication* is not sufficient for application of the doctrine of judicial estoppel [emphasis added].”

A party's intent in making a statement is a factual issue which makes summary disposition inappropriate, Shropshire v. Fred Rappoport Co. 294 F.Supp.2d 1085 (N.D.Cal., 2003):

The Court notes that both of the remaining factors involve factual disputes. Therefore, if the Court were required to reach these factors, the question of judicial estoppel would not be suitable for resolution on a 12(b)(6) motion. See John S. Clark Company v. Faggert & Frieden P.C., 65 F.3d 26, 29 (4th Cir. 1995) (holding that district court



had erred in dismissing claim under judicial estoppel doctrine on Rule 12(b)(6) motion because question of whether party intentionally misled court to gain unfair advantage was a question of fact). First, the question of whether Plaintiffs' positions in the two actions are clearly inconsistent turns, in part, on the intent of Elmo Shropshire in taking the positions.

Further where the purported inconsistent positions arise in totally differing context, the caution noted in 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4477 at 596-97 (2d ed. 2002) comes into play:

Application of judicial estoppel to the law elements of prior positions must take care to recognize that seeming inconsistencies may be explained by the different legal standards that may masquerade under similar legal expressions. Positions taken under one body of law may not be inconsistent with positions taken under a different body of law.

This is the situation here. The SBA was presumably probing for discovery of some assets of value that it could locate and liquidate without more burden than gain. Orvis and Johnson are litigating issues, among others, that arise in fraud and embezzlement and partnership law as between them and other parties. The underlying law involved in the SBA case and in this case differ widely and involve substantively different legal concepts and elements.

**ii. No party has succeeded in persuading a court to accept that party's earlier position.**

This federal element of judicial estoppel is identical to the second element of Utah law and was fully discussed in Argument II(B)(ii) above which is incorporated herein. The Tenth Circuit in Johnson v. Lindon City, *supra*, emphasized this element, "The requirement that a previous court has accepted the prior inconsistent factual position "ensures that judicial estoppel is applied in the narrowest of circumstances."

It is not sufficient under Federal law that an inconsistent position simply have been made somewhere in the course of a prior litigation. Even where an inconsistent position is taken during the course of litigation, it actually must have been presented and accepted by the court itself as was made clear in Graham v. Smith, 292 F.Supp.2d 153 (D.Me.2003):

The First Circuit has suggested that, in order for judicial estoppel to apply, "the first forum [must have] accepted the legal or factual assertion alleged to be at odds with the

position advanced in the current forum ...” Gens v. Resolution Trust Corp., 112 F.3d 569, 572 (1st Cir.1997) (emphasis in original); Franco v. Selective Ins. Co., 184 F.3d 4, 9 (1st Cir.1999). Because of the settlement agreement, the Eastern District of Texas did not have the opportunity to rule on Graham's, Shane's and Vital Basic's motion to dismiss and therefore cannot be said to have “accepted” their position on arbitrability.

U.S. District Court Judge Bruce Jenkins, presiding over the SBA matter, never received or considered whatsoever, or made any ruling at all upon, or accepted or relied in any manner whatsoever upon Johnson’s statement made to the SBA during a post-judgment deposition. The Court could hardly have “accepted” any interpretation of the SBA quote when it was never even made aware of it. This federal requirement that a prior court “accept” the prior position also further demonstrates how specious is the argument by Orvis that the “non-action” by the SBA in failing to pursue collection is sufficient to meet this element of judicial estoppel without the prior court ever being involved. This element, alone, when applied to the Orvis SBA argument means that judicial estoppel cannot apply and Judge Hanson’s ruling must be reversed.

**iii. The party (Johnson) seeking to assert a purported inconsistent position would not derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped, but the opposite will occur if Orvis can successfully assert Judicial Estoppel.**

The Federal standard is sort of an interesting twist on the detrimental reliance element of Utah law. It inherently, by its definitions, includes detrimental reliance with the added consideration of fairness. Federal Courts clearly continue to require past reliance, SanDisk Corp. v. Memorex Products, Inc., 415 F.3d 1278 (Fed. Cir. 2005). This New Hampshire element of judicial estoppel appears to contemplate that the party (Orvis) had relied on the former position and was acting thereon currently so that the question is also of future prospective detrimental reliance based upon having to change current position.

The federal standard above adds that the party alleged to be making a purported inconsistent statement (Johnson) cannot gain unfair advantage thereby. That is not possible here based on the facts. Orvis never changed any position or relied on anything and has nowhere pled or argued that he relied. The alleged “advantage” to Johnson is asserting his

partnership claim is to get an accounting long past due and assert his just claims for his partnership interests. There is no possible way that recovering what is owed and preventing a fraud and embezzlement is either unfair or a detriment to anyone (except to one in Orvis' position seeking to bar an accounting and conceal partnership misdoings), but that is not unfair to require accounting and payment. The only advantage to either party if judicial estoppel does not apply is that the litigation may proceed and Johnson gets his fair day in court, a powerful policy that itself imposes no detriment or unfairness to anyone.

Conversely, as to this "fairness" consideration, Orvis himself, not Johnson, gains significant unfair advantage if allowed to judicially estop Johnson from asserting a partnership interest. The facts, undisputed below, and supported by sworn deposition of Orvis and Lawrence employees, are that Orvis was mis-stating and diverting partnership profit share, and conspiring with Johnson attorney Lawrence, to set up secret companies to hide from Johnson and other partners partnership funds. Upon demand for an audit and accounting of the partnership by Johnson, the undisputed facts are that Orvis conspired with Lawrence to buy the SBA judgment and within weeks of the demand for an audit, Orvis, using a sham, dissolved LLC, to initially conceal his identity from the SBA (to whom he had given discovery regarding the partnership) purchased the SBA judgment and brought this suit against Johnson. At the time of the filing of the suit, Johnson was told by the attorneys representing both Orvis and Lawrence, the firm of Berman, Tomsic & Savage, that Orvis and Lawrence had acquired the SBA judgment and wanted Johnson to abandon his partnership interest. (Affidavit of Johnson in Support of Memorandum in Opposition to Jayson Orvis' Motion for Summary Judgment, ¶¶ 4, 24, 50, 51, 53, 54, 55, 57 and 59). Orvis, thereafter, reviewing the hundreds of pages of deposition by Johnson and DaNell Johnson in the SBA case he purchased finds the quote in dispute and asserts that Johnson "lied" to the SBA by answering "No"—the only word from the quote Orvis initially chose to offer to the District Court which persuaded Judge Hanson that was all there was.

By using this spurious judicial estoppel claim to bar a partnership accounting, Orvis is able to hide his fraud and embezzlement by extinguishing the partnership. There can be no

doubt as to who obtains an unfair advantage by application of the doctrine. Simply put, Johnson is not that party under the federal element which couples detrimental reliance with “fairness.” Orvis, with discovery adduced to date, demonstrating fraud and embezzlement and conspiracy with Johnson’s attorney, and seizing millions of dollars of profit share, not only has not detrimentally relied on any SBA statement, but Orvis gains grossly unfair advantage if allowed to assert judicial estoppel.

**E. ORVIS BARRED FROM INVOKING THE DOCTRINE  
TO BLOCK THE TRUTH HEREIN.**

This is another critical element of both Utah and federal law on judicial estoppel which here involves undisputed facts which would preclude the judgment from being renewed or enforced. The purpose of the doctrine of judicial estoppel is to prevent perpetuation of falsehoods in the judicial system. The doctrine has never been intended to block the truth from ultimately prevailing. As stated in the very beginning in Tracy:

If a party litigant comes into court and falsifies, such conduct should not be employed to prevent him from telling the truth in a later action where there has not been any reliance on such false testimony, particularly where a rule estopping him from telling the truth would operate to injure innocent persons and not merely punish the wrongdoer.

This is also followed under Federal law, Teledyne Indus., Inc. v. NLRB, 911 F.2d 1214, 1218 (6th Cir.1990):

Judicial estoppel, however, should be applied with caution to avoid impinging on the truth-seeking function of the court, because the doctrine precludes a contradictory position without examining the truth of either statement.

Note that, as to the purported “inconsistent statement” pointed to by Orvis, inherent in the Orvis allegation that Johnson “lied” to the SBA is the obvious truth that to “lie” as Orvis loudly cries, Johnson must indeed be a partner with Orvis—else how could the Orvis interpretation of the SBA quote be said to be false. The more insistent Orvis is about the inconsistency or falsity of the statement, the more clear the partnership between Orvis and Johnson becomes. While the SBA statement is at most ambiguous as to meaning in context, the claim of a partnership now is clearly the truth.

Thus, under this “truth” consideration of application of judicial estoppel, even with the strained Orvis interpretation of the SBA quote as being somehow a “lie,” Johnson can and must assert truth in this case and not be estopped by the doctrine of judicial estoppel from asserting the truth. This concept looms large here where Orvis is using the doctrine to completely estop Johnson from asserting and proving the fraudulent actions of Orvis.

### **III. JUDICIAL BIAS WAS DEMONSTRATED BELOW.**

Appellant Johnson argues that the District Court improperly manifested bias against him. It is clear that, across the board, the District Court ignored every standard for granting summary judgment. This wholesale disregard of procedure cannot be routine with this district judge and is unusual at best, and would seem to give pause. Johnson, in his Appellant’s Brief, listed also, a portion of the oral statements made by the District Judge below in hearings involving Orvis and Lawrence that manifest a pre-determination about Johnson with a pre-conceived notion about the facts in this case, and manifest an animus toward Johnson. Orvis argues against Johnson’s claim of bias. First it would seem improper for Orvis to make any argument in behalf of the District Court. This could be viewed as an attempt to unfairly ingratiate Orvis’ counsel with the District Court. Given Orvis’ counsel’s efforts to capitalize, in pleadings, on the District Court’s apparent bias against the Appellant, Orvis’ defense of the Court appears calculated to curry favor with the District Court. If not improper, it appears so.

Orvis incorrectly argues that a motion must be made to recuse the District Court before a complaint of bias may be considered. That may be the case in some instances. However, the Court’s last act of executing the summary judgment led immediately to this appeal, after which wherein the District Court ceased to be actively involved in this case and lacked jurisdiction, Saunders v. Sharp, 818 P.2d 574 (Utah App.1991). A motion to recuse the District Judge, filed after his ruling of “no mistake” against Appellant, and his disregarding of all summary judgment standards, would be filed when the District Judge had no further acts to take in respect to this case. Such a motion to recuse would have been pointless by the time the extent of the District Judge’s hostility, bias, and willing departure from procedure, was manifest in the final summary judgment.

## **CONCLUSION**

The district court's ruling granting summary judgment must be reversed for clear error.

There exist below at least three disputed issues of material fact: 1) The SBA statement was not an inconsistent statement; 2) Orvis is not a privy to the SBA judgment; rather the Orvis-Johnson partnership is the privy since Orvis used partnership monies to acquire the SBA judgment; and 3) Any inconsistency between the prior SBA statement and Johnson's position here was mistake by Johnson, and there is no evidence of bad faith in the statement. The existence of these three issues of material fact prevent summary judgment as a matter of law.

The District Court committed error in granting summary judgment because: 1) the District Court ruled on disputed issues of material fact; 2) The District Court failed to view the facts in the light most favorable to the non-moving party, Appellant Johnson; and 3) The District Court improperly weighed facts and credibility in ruling as it did.

Regarding judicial estoppel, the District Court committed reversible error by failing to correctly analyze and apply the elements of the doctrine of judicial estoppel to the facts of this case. The doctrine of judicial estoppel, asserted by Orvis and relied on by the District Court, to enter summary judgment and a declaratory judgment estopping Johnson from asserting a partnership with Orvis is inapplicable in this case. The doctrine requires several elements and policy considerations, each of which is indispensable, before judicial estoppel may be applied here.

The elements of judicial estoppel required under Utah law and federal law as follows:

1. There must be a prior statement or position that is clearly inconsistent with a current position in this case;
2. The inconsistent statement must be not only intentional, i.e. not made mistakenly or inadvertently, but must also be made in bad faith;
3. The prior statement must be made in the same or a related case;
4. The parties in the prior case and in this case must be the same;
5. The issues in the prior case and in this case must be the same;

6. The prior inconsistent statement or position must be successfully maintained by litigation, not merely be a position that could have been litigated, and it must be “accepted” by the prior court;

7. The party asserting the doctrine (Orvis) must have detrimentally relied on the prior inconsistent statement;

8. There must not be unfairness by use of the doctrine; and

9. The doctrine may not be used to prevent the truth from being told in the present case; and

10. The doctrine is disfavored and is to be narrowly construed.

Orvis meets none of these elements necessary to establish and apply judicial estoppel.

1. Inconsistent statement: The prior statement, the SBA quote, is not inconsistent when reviewed on its face or in context.

2. Mistake-bad faith: There is no evidence adduced of Johnson’s intent in making the SBA statement and if the statement made was inconsistent, it was mistakenly so, and there is no evidence of bad faith by Johnson in making the statement. The Court wrongly inferred deliberate intent and bad faith without evidence thereof.

3. Same or related case: The prior statement was made in the entirely different federal judicial system, and certainly not in the same or a related case.

4. Identical parties: The parties in the prior SBA case and in this case are not the same. Orvis wrongly claims to be the privy of the SBA but is not because, under Utah partnership law, the SBA judgment, acquired with partnership monies, is property not of Orvis but of the partnership. The partnership is thus the privy with the SBA, not Orvis. Because Orvis is not the actual owner of the judgment, and is not a party or privy, he lacks standing to invoke this doctrine.

5. Identical issues: The issues in the prior case involved federal limitations on state real property foreclosure. The issues here involve partnership and fraud. The issues arise under different laws and are not the same in the prior and present cases.

6. Position successfully maintained: The prior position manifest by the contested SBA quote was never successfully maintained by litigation or otherwise, nor ever brought before U.S. District Judge Jenkins, and was never “accepted” by him or reviewed by him.
7. Detrimental reliance: Orvis must have relied to his detriment on the prior inconsistent statement but Orvis has never asserted or pled that he ever relied on the prior SBA statement, and the indisputable facts are that Orvis actually did the opposite of relying in that he conspired with attorney Lawrence to acquire the SBA judgment to use it to attempt to extinguish the partnership and to prevent an audit of the partnership.
8. Unfairness: It is not unfair of Appellant Johnson to seek an accounting of the partnership and assert his just claims against Orvis, but, on the other hand, it is unfair to allow Orvis to assert the doctrine of judicial estoppel to prevent an accounting and to conceal embezzlement and fraud.
9. Asserting Truth here: Johnson seeks to obtain an accounting and to uncover the fraud and embezzlement of Orvis. These misdeeds have been demonstrated to date by discovery. The District Court improperly invoked the doctrine of judicial estoppel because it prevents Johnson from asserting the truth here of a variety of matters including the partnership, embezzlement, and conspiracy to violate attorney-client fiduciary relationships.
10. Disfavored-Narrowly Construed - because the doctrine is disfavored under applicable law, its broad over-reaching use utilized by the District Court herein was reversible error. It was a strain to attempt to justify any element required to apply the doctrine and even then, such strained effort rests on disputed fact. Narrow construction is not a whimsical application when a judge does not like a party which is what appears to be the situation here.

The District Court improperly invoked the doctrine of judicial estoppel, when it is disfavored and is to be narrowly construed, and the District Court failed to make a close and careful review, or any review, of the elements of the doctrine as applied to the facts of the case, which review is mandated before invoking a disfavored and narrowly construed doctrine to use against Appellant Johnson.



The absence of indispensable elements of judicial estoppel preclude its application and use in this litigation. The District Court's disregard of these elements and failure to apply the law to the facts of this case constitutes clear error and mandate reversal of the District Court's summary judgment..

The District Court demonstrated improper and extreme bias against Appellant Johnson. This bias is demonstrated by the Court's improper statements in hearings involving Orvis and also attorney Lawrence which reflected the District Court's animus toward Johnson, and pre-determination of the facts in dispute. This bias is further demonstrated by the District Court's deliberate and sweeping failure to abide by fundamental and well established requirements for entering summary judgment, including viewing facts in the light most favorable to the non-moving party. The District Court improperly adopted the most extreme view possible against Johnson, including, among others, the assumption that Johnson acted in bad faith, that there could be "no mistake" about Johnson's intent; and in granting to Orvis, what is a clear windfall, in the face of assertions, documented by discovery, of fraud and embezzlement, and conspiracy with Johnson's attorney to defraud Johnson.

WHEREFORE, Appellant prays for the following relief:

The Court of Appeals should find as follows:

1. The District Judge committed errors of law in failing to apply the elements of judicial estoppel to the facts of the case below.
2. The doctrine of judicial estoppel is not properly invoked in this case because it is undisputed that most of the requisite elements necessary for the doctrine of judicial estoppel to apply are not present in the case; and therefore, regardless of the interpretation or meaning of the SBA statement cannot properly be considered by the District Court as to the partnership matters in this present case.
3. It is inherently unfair to apply the doctrine of judicial estoppel to prevent Johnson from asserting the truth of the partnership and obtaining an accounting therefore.

4. The summary judgment granted below must also be reversed due to the existence of undisputed material facts by virtue of which the doctrine of judicial estoppel cannot apply herein;

5. The District Court improperly manifested bias against Appellant Johnson below by oral statements in open court coupled with disregard, across the board, of standards for granting summary judgment.

6. Johnson is not barred by the doctrine of judicial estoppel from asserting an interest or claim in his partnership with Orvis.

6. The summary judgment granted below is reversed and the case remanded to the District Court to go forward and an accounting of the partnership proceed.

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

DATED this 14<sup>th</sup> day of January, 2006.



By: JAMIS M. JOHNSON  
Appellant

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 Appellant's Reply Brief, addressed to Peggy A. Tomsic, Tomsic and Peck, Attorneys for Appellee, 136 East South Temple, Suite 800, Salt Lake City, UT 84111



Jamis Johnson

1/17/06  
Dated