

2006

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

Utah Court of Appeals

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**IN THE SUPREME COURT OF THE
STATE OF UTAH**

JAMIS M. JOHNSON,

Defendant/Appellant,

vs.

JAYSON ORVIS,

Plaintiff/Appellee.

Utah Supreme Court Case No. 20061094

Utah Court of Appeals Case
No. 20041122-CA

Utah Third District Court Case
No. 010907449

APPELLANT'S BRIEF

Review by Writ of Certiorari from the Utah Court of Appeals Panel Decision

by Judges Russell W. Bench, Pamela T. Greenwood and Gregory K. Orme.

for an appeal from a decision and orders of Third District Court

Judge Timothy Hanson

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FILED

UTAH APPELLATE COURTS

APR 11 2007

Appellant, Jamis M. Johnson (“Johnson”), appearing pro se, respectfully files his Appellant’s Brief pursuant to Rule 24, Utah Rules of Appellate Procedure. The Summary Judgment below declaring that Johnson is barred from asserting that he has any partnership interest with Appellee, Jayson Orvis (“Orvis”) by application of the doctrine of judicial estoppel should be vacated for the reasons that i) the doctrine of judicial estoppel was misapplied by the District Court and Court of Appeals; ii) summary judgment is precluded as a matter of law because a) there remain genuine issues of material fact, b) the facts were not viewed in the light most favorable to Appellant; and c) the District Court and Court of Appeals improperly weighed evidence and evaluated credibility.

PARTIES TO THE PROCEEDING

The Appellant in this Court is Jamis M. Johnson. The Appellee is Jayson Orvis.

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II. STATEMENT OF JURISDICTION OF SUPREME COURT

The statutory provision that confers jurisdiction on the appellate court is Utah Code Ann. § 78-2-3(a); and Utah Constitution, Article VIII, Section 3.

III. STATEMENT OF ISSUES PRESENTED & STANDARD OF REVIEW

Issue No. 1: The Court of Appeals did not correctly construe and apply the respective procedural burdens borne by opposing parties on summary judgment.

This issue was preserved below. (Record p. 2262, Petition for Rehearing)

The standard for review of this issue is as being a matter of law to review *de novo* for correctness.

Issue No. 2: The Court of Appeals did not correctly apply the summary judgment standard in this case.

This issue was preserved below. (Record p. 2258, Petition for Rehearing)

The standard for review of this issue is as being a matter of law to review *de novo* for correctness.

IV. CONSTITUTIONAL OR STATUTORY PROVISIONS.

Utah Code Anno. §48-1-5, in part: “Unless the contrary intention appears, property acquired with partnership funds is partnership property.”

Utah R. Civ. Pro 56(a), (c),(d), (e):

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

Utah R. Evid. 613(b)

Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

V. STATEMENT OF THE CASE

NATURE OF THE CASE:

The primary litigation involves the ownership by Orvis and Johnson of a partnership in a highly profitable business. Johnson learned Orvis was diverting partnership funds. When Johnson demanded an accounting, Orvis then sued for a declaratory judgment declaring he did not have a partnership with Johnson. Johnson counterclaimed for his partnership interest

and for an accounting of the partnership. This matter is before the Supreme Court on review by Writ of Certiorari of the Court of Appeals panel decision which upheld Third District Court Judge, Timothy Hanson's grant of summary judgment to Orvis declaring that Johnson is barred under the doctrine of judicial estoppel from claiming to be partner with Orvis. These rulings were based upon a portion of a statement made in a deposition taken by the SBA in a separate unrelated federal case. Johnson is alleged to have said to the SBA that he did not have any partnership interest with Orvis or in anything else. The District Court held that Johnson was "judicially estopped" from asserting a partnership with Orvis because of the SBA statement. Johnson appeals that summary judgment on the basis that the doctrine of judicial estoppel is inapplicable; that the elements were not raised nor met by Orvis in his Summary Judgment Motion; that summary judgment is precluded because of the existence of genuine material issues of fact, the failure to view the facts in a light most favorable to Appellant, and for improper weighing of credibility. The Court of Appeals determined that a movant need not allege each essential element for application of the judicial estoppel doctrine and falsely asserted that Johnson had not raised, in opposition to the summary judgment all of the elements of judicial estoppel, particularly reliance by the party (Orvis) asserting judicial estoppel and the element of acting in bad faith, and therefore had waived these elements. These issues were undisputedly raised by Johnson. The panel then weighed the parties' respective evidence and credibility, not to determine whether a dispute of material fact existed, but instead which version was more likely given extrinsic factors as to the remaining non-alleged and unwaived elements of judicial estoppel, viz. - the same party

or privity; same subject matter in the prior and current proceeding; and whether the prior SBA statement was actually inconsistent. The Court of Appeals determined that Orvis was entitled to a summary judgment without his even having suggested the presence of each element of the doctrine.

PROCEDURAL HISTORY OF THE CASE:

8-28-2001: Plaintiff/Appellee Jayson Orvis filed a Complaint in Third District Court against Defendant/Appellant Jamis Johnson.

11-05-2001: Appellant/Defendant Johnson counterclaimed and named also as Third Party Defendants Victor Lawrence, Deon Steckling, and Sam Spendlove.

11-05-2001: DaNell Johnson, wife of Johnson, was brought in and joined as a Third Party Plaintiff and counterclaimant against Orvis and the Third Party Defendants, Lawrence, et. al.

8-30-02: Victor Lawrence and Sam Spendlove moved for summary judgment to obtain dismissal from the case which was granted by the district court, and an order was executed.

4-18-2003. DaNell Johnson was dismissed from the case without prejudice because she was not properly joined as a party.

4-02-2004: Orvis moved for Summary Judgment against Johnson.

10-20-2004: The district court granted Orvis' motion entering summary judgment by Minute Entry, and executed Findings of Fact and Conclusions of Law, and an Order prepared by Orvis's counsel, on 11-23-2004.

12-21-2004: Johnson filed a Notice of Appeal to the Utah Court of Appeals of the Order

granting the Motion for Summary Judgment.

2-18-2005: Johnson filed a Motion For Summary Disposition, to which Orvis responded which was denied by the Court of Appeal pending full briefing and oral argument.

9-9-2006: A panel of the Utah Court of Appeals issued an opinion affirming the summary judgment of the District Court.

10-25-2006- Johnson filed a Petition for Rehearing *En Banc* to the Utah Court of Appeals.

11-28-2006: The Utah Court of Appeals denied Johnson's Petition for Rehearing.

11-30-2006: Johnson filed a Petition for Writ of Certiorari with the Utah Supreme Court.

2-12-2007: The Utah Supreme Court granted Johnson's Petition for Writ of Certiorari.

VI. SUMMARY OF FACTS

Brief Outline of Factual and Procedural History

1. Orvis (Plaintiff below) and Johnson (and wife DaNell) have a partnership extending back to 1994 and dividing profit share on a group of credit adjustment businesses (“Orvis-Johnson partnership”).

2. The partnership is extensively documented and evidenced by written agreements, a multi year course of performance dividing profit share, financial records, and numerous witnesses. An extensive listing of the partnership documents between the Johnsons and Orvis was set out in Johnson’s Verified Memorandum in Support of Motion For Summary Disposition (Summ. Disp. Mem.). (Addendum Ex. 1, Summ. Disp. Mem., Ex. 10, page 3 and exhibits attached thereto.)

3. The Orvis-Johnson partnership businesses grew to be extremely profitable now involving millions of dollars, and with Orvis now taking an estimated monthly profit of \$800,000 personally or in excess of \$10 Million annually. (Record p. 2243)

4. Johnson asserts that Orvis first began embezzling and misappropriating partnership profit shares as early as 1997. (Record p. 2247). Discovery to date, particularly deposition testimony of Orvis’s employees, confirms this. See the deposition testimony of Will Vigil (Record p. 2285-2288); See the deposition testimony of Tommy Triplett (Record p. 855-875); and see the deposition testimony of Jade Griffen. (Record p. 877-884)

5. Johnson had an SBA judgment against him stemming from a personal guarantee on a business that failed in the late 80s. (“SBA Judgment”). (Record p. 2247) Over several

years, Johnson was deposed by the SBA in post judgment proceedings, as was Johnson's wife, DaNell Johnson, who was not a judgment debtor of the SBA. (Record p. 2249)

6. Attorney Victor Lawrence represented DaNell Johnson before the SBA (Record p. 2390) and in numerous other matters; Attorney Victor Lawrence represented Jamis Johnson before the SBA and in numerous business matters. Attorney Victor Lawrence was eventually placed as directing attorney for Lexington Law Firm (the marketing for which was done by the Orvis-Johnson partnership); and Attorney Victor Lawrence represented the Johnsons with regard to the Orvis-Johnson partnership. (Record p. 2246)

7. In July 2001, Johnson, suspecting his partner Orvis of fraud and possible embezzlement, made written demand on Orvis for an accounting and an audit. (Record p. 2256)

8. Orvis immediately consulted with attorney Victor Lawrence and together they conspired to obtain the SBA judgment using funds from the Orvis-Johnson partnership and to pay exactly the amount Johnson had been negotiating through Attorney Lawrence with the SBA to settle. Orvis purchased the SBA judgment in order to prevent Johnson from obtaining an audit and to attempt to extinguish Johnson's partnership interest and to convert Johnsons' profit share money for themselves - thus exploiting confidential information possessed by Johnson's attorney, Victor Lawrence. (Record p. 2256)

9. Within days of Johnson's demand for an accounting, in August 2001, Orvis acquired the SBA judgment in his name. Orvis used funds misappropriated from the Orvis-Johnson partnership; Orvis purchased the SBA judgment against Johnson to use offensively

to mask the preceding fraud, to attempt to extinguish the partnership and to seize profit share distribution; and upon acquiring the SBA judgment withheld and converted the profit share that had hitherto been distributed to the Johnsons. (Record p. 2256)

10. The SBA judgment was purchased with the counsel and participation of Victor Lawrence, attorney for DaNell Johnson and for Johnson, in the SBA case, and in numerous other personal matters, and in business affairs of the partnership. (Record p. 2246, Triplett Deposition; Record p. 2390)

11. These actions by Lawrence and Orvis are in breach of attorney fiduciary duty and partner fiduciary duty (Record p. 2243); the object of this conspiracy by Lawrence and Orvis was to take the profit share owed to the Johnsons, which at this date would exceed \$3 Million (based on the last six months of actual profit share) and is closer to \$5 Million based on amounts concealed and converted by Orvis; Orvis and Mr. Lawrence profited by these acts by converting Johnson's profit share and dividing it between themselves. (Record p. 2257)

12. In August 2001, after Johnson's demand for accounting, and in concert with his purchase of the SBA judgment, Orvis brought this suit in Third District Court against Johnson seeking a declaratory judgment that Johnson had no partnership with Orvis or alternatively such interest was limited to 25% of two specific businesses. Orvis claimed that all monies distributed for several years under a formula between Orvis and Johnsons, and for which Orvis had been providing accountings monthly—were actually gratuities or a "gift" from Orvis to the Johnsons. (Record p. 5)

13. Johnson counterclaimed for an accounting and for profits; DaNell Johnson was

joined as a Third Party Plaintiff, and Deon Stoeckling and Victor Lawrence and others as Third Party Defendants. (Record p. 20)

14. On March 29, 2004, Orvis moved for summary judgment. (Record p. 1949) Therein Orvis asserted that Johnson was judicially estopped from asserting a partnership interest with Orvis; this estoppel was based on Orvis' interpretation of a response by Johnson in a deposition taken by the SBA in an unrelated prior federal case between the SBA and Johnson. Orvis asserted that Johnson responded to the SBA that he did not have any partnerships. (It is the judgment in that SBA case that was purchased by Orvis.) (Record p. 1228)

15. Johnson opposed the summary judgment motion. (Record p. 2242) Johnson asserted that i) the quote was misconstrued, but was irrelevant regardless under the doctrine of judicial estoppel, and ii) the doctrine of judicial estoppel, to be operative here, requires that the prior (SBA) action and this present action be between the same parties; the prior action involved the same issues as this action; the prior action be "successfully maintained"; and that Orvis must have detrimentally relied on the statement in the SBA deposition. Johnson argued that Orvis met none of the requirements for the doctrine of judicial estoppel to be applicable in this case.

16. The court heard oral argument on August 9, 2004. (Record p. 2607)

17. In its minute entry of October 20, 2004, the Court granted summary judgment to Orvis, stating "... there was no question of mistake, Johnson testified as he did [in the prior unrelated SBA deposition] so as to avoid collection efforts from the Small Business

Administration.” [Emphasis added]; the District Court found that Johnson should be judicially estopped in this case from asserting a partnership based on the contested SBA deposition statement; and the District Court granted summary judgment to Orvis. (Record p. 2619)

18. Orvis drafted a Judgment and a Findings of Facts and Conclusions of Law which were executed by the District Court on October 20, 2004. That findings of fact were entered is evidence alone of improper weighing of facts as opposed only deciding issues of law which is the only consideration for granting summary judgment. (Record p. 2623)

19. These facts do not reflect how broad ranging this assault on the Johnson by Orvis is. The following are documented in other of the numerous cases Orvis has filed against the Johnsons: Orvis has boasted that he would take Johnson’s profit share money and would use it to overwhelm him with litigation. (Record p. 2334) Orvis has sued Johnson in five cases, four of which are currently pending. They are cases before Judge Bruce Jenkins in federal court, before Judge Medley in Third District Court, this action here originally before Judge Hanson, and before Judge McCleve in Third District Court—and this last suit now filed seeking to take the Johnson home based on the SBA judgment he acquired. Orvis sent Johnson mocking documents telling Johnson he has lost everything. (Record p. 2507) Orvis has hired private investigators to surveil Johnson, and even his minor children, photographing his home (Medley case #20041040); Lawrence has been seeking other judgments against Johnson for himself and Orvis; Orvis is fraudulently transferring all profit share funds he is receiving, in anticipation of these lawsuits, as Johnsons have been informed

by Orvis contacts; Orvis used a sham dissolved LLC to conceal his identity when he sought judgments against Johnson (Record p. 2256); Orvis is operating Lexington law firm as his alter ego, and has been sued now, with Lawrence, in federal court in Connecticut (Record p. 2634), in a class action, etc. The appeal before the Utah Supreme Court is the only recourse that can be unaffected by the financial club wielded by Orvis.

VII. SUMMARY OF ARGUMENT

The Court of Appeals upheld the Third District Court's grant of summary judgment for Orvis upon clearly erroneous and factually unsupported bases. The opinion claimed to disavow a burden shifting concept adopted from Federal law, to wit, that once a proponent of a motion has established a prima facie case of undisputed facts entitling it to summary judgement that a burden shifts to the opponent to establish there are genuine disputes of material facts which preclude judgment as a matter of law; but then the Court of Appeals panel majority nonetheless adopted that very standard. Johnson argues a burden shifting notion is misplaced because there may very well never be any burden upon an opponent of a summary judgment if a movant is not entitled to judgment as a matter of law or has not alleged evidence supporting each element of a legal claim, as exists herein. The reluctantly concurring Court of Appeals opinion of Judge Russell Bench indicates this burden shifting notion seems to allocate burdens of proof which are required with respect to conflicts of evidence at trial. The issue on a summary judgement is simply whether or not a genuine dispute of material fact exists, not which party's evidence is more credible or persuasive. Issues of fact and weight of evidence or credibility are issues to be determined by the trier

of fact, not by summary adjudication. It is impermissible in determining a motion for summary judgment to indulge inferences and speculation adverse to the party opposing summary judgment or to weigh evidence and credibility as did the Third District Court and Court of Appeals herein.

The Court of Appeals first simply disregarded that Orvis in his Summary Judgment Motion had not even met the burden, under the Court's own burden shifting standard, to establish a prima facie case after which and only after which, could Johnson then be required to provide rebuttal. Orvis in his Motion simply failed to plead or offer any evidence supporting several essential elements of the doctrine of judicial estoppel. Indeed Orvis argued on appeal that the omitted elements were not actually required elements of judicial estoppel. The Court of Appeals in a factual and legal error incorrectly claimed that Johnson had waived these elements by not raising them below. This 'waiver' claim is wholly refuted by the record, but their opinion stands for a proposition that a party can obtain a summary judgment as a matter of law with less than all of the elements of a legal doctrine alleged or existing -- a clearly erroneous proposition.

The Court of Appeals resolved the dispute between the parties as to what are the required elements for application of the doctrine of judicial estoppel by listing the essential elements in Utah of judicial estoppel, but then, while ignoring that the Orvis Motion had failed to either plead or argue those essential elements, the Court of Appeals proceeded to ignore two elements – reliance and bad faith – altogether as having been “waived” by Johnson, and then grossly misapplied the other remaining elements to the undisputed and

disputed facts of this case. The Court of Appeals, in so disposing of each of the remaining essential elements of judicial estoppel, had to either disregard material facts in the record, or weigh disputed material facts, or credibility, or indulge in pure speculation – all improper for a motion for summary judgment. Those elements of judicial estoppel as have been established and reiterated over time by this Court are: 1) the party opposing judicial estoppel (Johnson) seeks to deny a position he or she took in a prior judicial proceeding [i.e. a prior inconsistent statement or position]; 2) the prior and subsequent judicial proceedings involve the same parties or their privies; 3) the prior and subsequent judicial proceedings involve the same subject matter; 4) the party seeking judicial estoppel (Orvis) in the subsequent judicial proceeding must have relied on the prior inconsistent position; 5) the prior inconsistent position must have been successfully maintained in the former action and 6) the party against whom judicial estoppel is sought must have exhibited bad faith in making an intentional misrepresentation.

Orvis' claim of a prior inconsistent position arose as follows: Johnson, suspecting mis-accounting for and embezzlement of partnership profit shares by Orvis (matters subsequently proven during discovery), had demanded an accounting from Orvis. Orvis promptly filed this action seeking declaratory relief of no partnership with Johnson. Immediately before filing this action, Orvis surreptitiously acquired the SBA judgment against Johnson. (To do this, Orvis conspired with Johnson's attorney, Lawrence, who represented Johnson in the SBA proceedings and in the Orvis-Johnson businesses; Orvis paid the SBA the very amount that the attorney Lawrence had, in Johnson's behalf, offered the

SBA to settle; Orvis paid the SBA with monies diverted and embezzled from Johnson's profit share; and Orvis and the attorney subsequently split the ongoing and diverted Johnson's profit share.) With the acquired SBA judgment came several thousand pages of discovery and depositions—much of it prepared and provided to the SBA by Orvis himself and documenting the Orvis-Johnson business relationship. Orvis moved for summary judgment against Johnson invoking judicial estoppel based on an alleged prior inconsistent statement by Johnson found by Orvis in one of the SBA depositions. Orvis' summary judgment motion alleged that Johnson had stated only the word "no" in answer to a partnership question posed by the SBA, leaving out virtually all of Johnson's actual answer. However, Johnson's actual full answer and the context of the deposition reflect that Johnson thought he was speaking there of real estate partnerships, not the Orvis-Johnson businesses. In opposition to Orvis' Motion for Summary Judgment, Johnson provided affidavit and documentary evidence setting forth his understanding and the actual meaning of the SBA quote—thus putting in direct dispute whether this quote is a prior inconsistent statement by Johnson. This is one of several material issues of fact raised by Johnson below. The District and Appellate Courts engaged in interpreting the meaning of the quote choosing the Orvis interpretation upholding summary judgment and estopping Johnson from pursuing his claims for an accounting, for fraud and embezzlement and indeed even for a partnership. The first factual dispute is the meaning of both the SBA question and Johnson's answer. It is discernable from the context, prior and subsequent deposition questioning, and other discovered documentation, and from Johnson's actual eyewitness testimony (indeed he's the

only witness), not from the bare text as paraphrased or redacted and interpreted by Orvis, by the District Court or the Court of Appeals (whose decision itself curiously did not ever set forth the entire quote but nevertheless interpreted its meaning.) These questions involve context, understanding, intent, and credibility, subjective fact intensive and fact disputed issues. For application of the doctrine of judicial estoppel, a prior inconsistent statement must first be an undisputed fact. This SBA statement is not inconsistent but whose meaning is clearly a material fact in dispute precluding summary judgment.

A significant issue of fact (and essential element of judicial estoppel) is whether the prior federal proceeding and instant state proceeding involve the same parties or privies. Johnson is the only same party in the two proceedings. The opposing party in the former lawsuit was the Federal SBA, not Orvis. Orvis claims to gain privy status by virtue of having purchased the judgment from the SBA. The problem with his analysis is that Johnson has claimed, as supported by deposition statements of former employees of Orvis and of the partnership, that Orvis had misappropriated funds from the partnership he had with Johnson and had acquired the SBA judgment using partnership funds. Utah law is clear that property acquired with partnership funds, even if in the name of a sole partner, is partnership property. Therefore it would be the Orvis-Johnson partnership which is the privy with the SBA, not Orvis individually. This material fact may be disputed, but the law is not in dispute.

Another essential element and fact dispute is that the prior federal and instant state proceeding do not in any manner involve the same subject matter. The former was a contract guarantee action and a foreclosure deficiency action brought by the SBA against Johnson.

The SBA obtained a money judgment against Johnson in which they used a deposition in collection efforts where the statement was made by Johnson about not having any interest in real estate partnerships. In the present action, Orvis seeks a declaratory judgment that would extinguish Johnson's partnership interest in their credit repair business, and Johnson is counterclaiming for an accounting, for conspiracy, embezzlement and related claims. The Court of Appeals misapplied this element of the doctrine by claiming that while the subject matter of the litigations was different, the subject matter of the position about real estate partnerships in the SBA deposition and the credit repair partnership at issue in this litigation are the same, which is not what the element involves.

Reliance by Orvis is another essential element of judicial estoppel. Orvis did not allege or ever argue any reliance on the SBA quote of Johnson. His conduct demonstrates the opposite of reliance. He bought the SBA judgment immediately before filing this action, years after the deposition and long after any time for reliance on a deposition statement. Orvis bought the judgment to use as shield against Johnson's demand for an accounting and to mask his fraud and only discovered the quote a year or so later when it became the centerpiece of the Motion for Summary Judgment. Orvis obviously did not rely on or know about the SBA quote. Orvis' only reply to this total failure to plead reliance or to factually demonstrate it is that reliance should not be an element for application of the doctrine. The Court of Appeals overlooked the absence of this critical element by claiming Johnson had not raised it below. The record irrefutably demonstrates that Johnson did raise Orvis' lack of reliance in several ways several times, despite Orvis' failure to plead it.

The “position” of no real estate partnerships was not successfully maintained by Johnson in the prior proceeding - another essential element - because it was never presented to, litigated or ever adopted by the Federal Court. Judge Bruce Jenkins in the prior federal case never heard, saw, had argued or litigated before him or resolved the question of the existence of real estate partnerships much less the Johnson-Orvis partnership one way or the other which is how a position gets successfully maintained. The Court of Appeals avoids this deficiency by indulging a speculation that the SBA was passive and did not pursue collection against Johnson so that the “position” was “successfully maintained,” while ignoring that, in fact, there was a settlement being negotiated and ultimately consummated, but by Orvis using Lawrence’s inside information about the details of the proposed settlement.

Finally, absence of mistake was presumed by the lower courts by virtue of speculating as to Johnson’s credibility and state of knowledge as an attorney at the time about the meaning of SBA answer. This lacks any element under established Utah law required to demonstrate intent, bad faith or absence of mistake, apart from indulging in fantasy which is wholly unsupportable as a matter of law.

VIII. ARGUMENT

ISSUE NO. 1: THE COURT OF APPEALS DID NOT CORRECTLY CONSTRUE AND APPLY THE RESPECTIVE PROCEDURAL BURDENS BORNE BY OPPOSING PARTIES ON SUMMARY JUDGMENT.

a. Because Orvis failed to factually support each element of judicial estoppel, no *prima facie* case was set forth to shift any burden to Johnson.

The majority of the panel and the reluctantly concurring opinion differ with respect

to the non-movant's burden in resisting a summary judgment, as to whether there is a burden shifting under *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). It is somewhat confusing and perhaps misleading to speak of “burdens” to begin with, at least in the traditional sense. The starting place of analysis must be the motion for summary judgment itself which is dependent upon the existence of two things - no dispute of material facts and entitlement to a judgment as a matter of law based on those undisputed facts. Thus, an opponent may oppose a summary judgment in at least three ways: 1) if the movant has not established any proof of one or more of the elements of the claim for which judgment is sought [as herein], then the opponent has no burden at all other than to argue the law, the movant would not be entitled to judgment as a matter of law, and facts are almost irrelevant at that point; 2) if the movant has presented material facts which on their face might entitle the movant to a judgment, then the opponent may dispute some of the material facts alleged by movant; or 3) the opponent might allege sufficient other additional material facts as to elements of the legal claims involved without controverting any of the movant’s facts.

Discussion of “burden shifting” may be somewhat misleading and confusing. Obviously, if the moving party has established some evidence in a form acceptable under Utah R. Civ. Pro. 56(c) and (e) establishing all required elements, the opposing party would need to present some evidence, but not necessarily controlling, decisive, more persuasive, or preponderating of the contrary fact in order to demonstrate that a dispute exists. But that is all that must be shown - that a genuine dispute exists. It is a minimal showing. It is a black or white, yes or no question, not of weighing the shades of grey. The actual dispute itself

does not get resolved in a summary judgment. That is antithetical to the essence of summary adjudication. Resolving disputes of fact, weighing evidence and credibility is the province of the jury at trial. The Panel's discussion of "burden shifting" bears further analysis and need for clarification by this Court as to what the concept means and how it is applied in a summary judgment motion such as the one at issue herein.

As stated by the "reluctantly" concurring opinion of Judge Bench, who felt compelled by *stare decisis* where this standard had been adopted in another Court of Appeals decision, to adopt a position taken by the majority defined in *Celotex* with which he disagrees, "the burden in federal courts has been shifted to the nonmoving party, aligning the 'movant's production burden for summary judgment to the burden of proof that party would bear at trial.'" The majority opinion here, in fn. 7, while claiming it is not adopting the *Celotex* standard nonetheless inconsistently claims that because "Orvis presented sufficient evidence that no partnership existed because [of Johnson's prior SBA quote] . . . the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact" which is the *Celotex* standard.

Utah has not adopted that *Celotex* standard, nor should it for a variety of reasons as urged by Judge Bench. The burden established under the plain language of Utah R. Civ. Pro. 56 as reiterated by Judge Bench in dissent in *Shaw Resources Limited, L.L.C. v. Pruitt, Gusgee & Bachtell, P.C.*, 2006 UT App. 313 (Utah Ct. App. 2006). He therein stated:

[T]he traditional rule is that summary judgment is available only where the moving party can affirmatively demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The burden in a Rule 56 motion is a simple yes or no question - are there material facts in dispute or not? Only if material facts are not in dispute, then do they entitle the movant to judgment as a matter of law?

The movant for any motion always has the “burden of persuasion” under established rule and principles of law. This should not be confused with a “burden of proof” which enters an entirely different realm. The accepted standards for burdens of proof in various contexts are a scintilla, substantial evidence, some credible evidence, probable cause, preponderance of the evidence, clear and convincing evidence, beyond a reasonable doubt and proof to a certainty. In a summary judgment, the movant to the extent there is a burden, has the latter highest standard and the opponent the first and lowest standard, i.e. only to show that a dispute exists *for a jury or fact finder to resolve*. When discussion is made about “burden shifting,” then it becomes a matter of weighing conflicting evidence and/or credibility of witnesses reserved for a jury and deciding what is more persuasive, but this, the jury’s job, was precisely the approach erroneously engaged in by the Court of Appeals. This is so entirely at odds with every precept of summary adjudication established in Utah that it would require overruling legions of cases which are based upon traditional standards of summary judgment adjudication. These axiomatic standards include:

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 credibility in deciding a motion for summary judgment, *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283 (Utah App.1996).

A summary judgment is not the time to determine who has the better evidence, but only to determine whether any opposing evidence exists.

Moreover, a fundamental defect in this case is that the *prima facie* case the panel suggests as the starting place for burden shifting was not met by Orvis in the first instance. Orvis presented no factual support for any element of judicial estoppel, apart from an alleged prior inconsistent statement, in his summary judgment motion and pleadings.¹ The panel thereby seems to imply judicial estoppel is invoked and a burden shifts to Johnson to negate all elements, even those Orvis did not bother to plead, by allowing Orvis to merely recite a single element of a prior inconsistent statement and not having to demonstrate any of the other elements of the doctrine. Moreover, the panel sidestepped the very real and substantial dispute as to that one fact as to whether that prior real estate partnership statement was in fact inconsistent with Johnson's current position by weighing the disputed evidence and Johnson's motive, credibility and inferring intent.

Orvis neither supported the remaining elements of judicial estoppel by Affidavit nor did he argue them by his Memorandum in Support of Motion for Summary Judgement. He did *not* make out a *prima facie* case to invoke judicial estoppel for Johnson to rebut in the first instance. Regardless of whether Orvis' burden to prove entitlement to summary judgment under Rule 56 is met by a mere assertion of judicial estoppel with nothing further

¹Record 1940-1948 and 1957-1964

and a burden was therefore shifted to Johnson to negate elements not pled, in this case Johnson fully set out and argued genuine disputes of material issues of fact central to the judicial estoppel analysis. The failure of Orvis to raise and factually support necessary elements of judicial estoppel is only overcome as the panel seems to indicate by (incorrectly) asserting that these necessary elements of the doctrine need not be pled or presented by Orvis, the moving party. This is clear error.

b. The District Court and Court of Appeals erred by adopting the most extreme view possible against Johnson, of the facts of the case rather than viewing the facts in the light most favorable to Appellant Johnson as required in considering summary judgment.

Judge Hanson adopted the most extreme view he could possibly adopt against Johnson in viewing the facts. When deciding a motion for summary judgment, the facts are to be viewed in the light most favorable to the one opposing summary judgment, *Anderson Development Co.*, supra. Rather than utilizing this “perspective” the Court did the opposite—there was not even an attempt at a middle ground here, let alone a recognition that these facts must be weighed in that light most favorable toward Johnson. This is reflected by the Court’s statement that Johnson “lied” to the SBA, urging Orvis to go to the U.S. Attorney. (Hearing on Motions January 29, 2003 Before the Honorable Timothy R. Hanson, p. 9, included as Addendum exhibit 2) Indeed this outrageous reflection of the Judge’s sentiment was stated by the Judge at the earliest possible moment in the case and before the court had actually read any pleading by Johnson or reviewed the claims of the complaint. Further, in his Minute Entry the Judge states “there is “no question” here on the facts but that Johnson was “avoiding creditors” To make such extreme statements requires the Judge to

view the facts exclusively in favor of Orvis.

That view of the facts most favorable to Johnson is that the SBA quote is misconstrued by Orvis, and that Johnson was responding to a series of questions by the SBA covering the standard list of assets, i.e., stocks, bonds, insurance, etc., and that Johnson presumed he was answering about real estate partnership matters and explicitly said so in the full answer.

Such a view would have precluded summary judgment, but the lower courts failed to take the view required by the standard required to grant summary judgment. The lower courts were in error in this regard and granting of summary judgment was improper.

c. The District Court and Court of Appeals improperly weighed the credibility of the parties.

While it is wrong to rule on one set of facts over another in summary judgment, *Winegar v. Froerer et. al.*, 813 P.2d 104 (Utah 1991), since Johnson's set of facts involves the issue of his credibility, the District Court and Court of Appeal's rejection of his version of the facts and attributing motives and intent, is in repudiation of his credibility as well. Weighing parties' credibility is also improper - *Masters v. Worsley*, 777 P.2d 499 (Utah Ct. App.1989) - and it is another manifest error by the lower courts requiring this Court to reverse the lower courts' grant of summary judgment.

The trial court and Court of Appeals are extensively experienced and it would seem beyond question they should understand the standard for granting summary judgment in the face of disputed facts. Nonetheless, these lower courts wholly abandoned the most fundamental of standards in granting summary judgment. If there is a factual dispute and

weighing credibility in itself indicates a dispute, then summary judgment is inappropriate, *Draper City v. Estate of Bernardo*, 888 P.2d 1097 (Utah 1995). That was error and it should be reversed.

ISSUE NO. 2: THE COURT OF APPEALS DID NOT CORRECTLY APPLY THE SUMMARY JUDGMENT STANDARD IN THIS CASE.

Manifest error is clear in this case where the evidence of the partnership is so overwhelming and the District Court decided to ignore all of it on the basis of a “no” response to a vague and ambiguous question posed by the SBA in a post judgment deposition in an unrelated case. Manifest error exists where the lower court clearly misapplies the law to the facts of the case - *Adams v. Adams*, 798 P.2d 1142 (Utah Ct. App.1990). The district court and Court of Appeals manifestly erred in the following ways:

1. The District Court and Court of Appeals misapplied the doctrine of judicial estoppel to the facts of this case. Not a single of the five necessary elements are present to invoke the doctrine.

2. The District Court improperly granted summary judgment where genuine issues of fact exist, and in doing so the District Court and Court of Appeals wrongly adopted the most extreme view of the facts against Johnson, rather than view those facts in the light most favorable to Johnson; and the District Court and Court of Appeals improperly weighed the credibility of Johnson; all of which constitute manifest error by the lower courts.

a. The elements of judicial estoppel.

The panel rejected the Orvis position and agreed with Johnson as to what the elements of judicial estoppel are in Utah. Unfortunately, the panel then proceeded to entirely misapply

these element to the facts in the record and to governing law. The necessary elements were identified and should be affirmed by this Court to clarify apparent confusion about them that the elements of judicial estoppel required to apply the doctrine are those required by *Tracy Loan & Trust Co. v. Openshaw Investment Co.*, 132 P. 2d 388 (Utah 1942) as supplemented by *3D Constr. & Dev., L.L.C. v. Old Standard Life Ins. Co.*, 117 P. 3d 1082 (Utah 2005), which can be summarized as: 1) the party opposing judicial estoppel seeks to deny a position he or she took in a prior judicial proceeding [i.e. a prior inconsistent statement or position]; 2) the prior and subsequent judicial proceedings involve the same parties or their privies; 3) the prior and subsequent judicial proceedings involve the same subject matter; 4) the party seeking judicial estoppel in the subsequent judicial proceeding must have relied on the former testimony; 5) the position must have been successfully maintained in the former action and 6) the party against whom judicial estoppel is sought must have exhibited bad faith in making an intentional misrepresentation.

b. No prima facie case was established by Orvis.

The Court of Appeals panel decision did not even bother to analyze two necessary elements - bad faith and reliance, falsely claiming these had not been raised below (refuted in discussion below) and were therefore “waived.” The analysis given to the existence of a prior inconsistent statement was woefully superficial and refuted by the record or the law as were the elements of same parties or privies, same subject matter and successful maintenance.

Whether or not Johnson argued application of a particular element required to apply

judicial estoppel does not mean that such element is unnecessary or that a district court may overlook it. A defective district court decision invoking a legal doctrine whose necessary factual elements are lacking and not even pled is manifest error. That decision is not immune from attack because a non-moving party is alleged not to have raised a necessary element, even if that were the case, which the record reflects is not. A moving party who does not even invoke any fact in support of a necessary element cannot be entitled to a summary judgment as a matter of law. Utah Appellate Courts routinely strike down or dismiss a plethora of cases where there is a failure to plead, prove or demonstrate any one necessary element of a legal doctrine.² Indeed, contrary to the panel's conclusion that Orvis made out a prima facie claim that Johnson had to rebut, Orvis's Motion, Memorandum and Affidavit neither pled nor argued any of the elements of judicial estoppel other than a prior inconsistent statement.³ The Court is respectfully asked to revisit Orvis' summary judgment pleadings and will clearly see Orvis wholly failed to factually plead or argue any element of judicial estoppel other than a prior inconsistent statement and the District Court and Court of Appeals failed to apply the doctrine with all of its requirements, as a matter of law. *Burton v. Youngblood*, 711 P.2d 245 (Utah 1985) held that "To make out a prima facie case, Burton must show compliance with

² *Cline v. State, Div. of Child and Family Services*, 142 P.3d 127 (Utah App. 2005); *Hatch v. Davis*, 102 P.3d 774 (Utah App. 2004); *Bennett v. Jones, Waldo, Holbrook & McDonough*, 70 P.3d 17 (Utah 2003); *Thurston v. Workers Compensation Fund of Utah*, 83 P.3d 391 (Utah App. 2003); *Jensen v. IHC Hospitals, Inc.*, 944 P.2d 327 (Utah 1997); *Alvarez v. Galetka*, 933 P.2d 987 (Utah 1997); *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950 (Utah App. 1989); *Marchant v. Park City*, 771 P.2d 677 (Utah App. 1989)

³Record 1940-91, 1957-1964

all of the . . . elements.”

i. No prior inconsistent statement exists -The central factual issue here is the meaning and interpretation of an answer by Johnson to a question posed in an SBA deposition pursuant to a judgment in federal court.

In his motion for summary judgment, Orvis asserted only the existence of a prior inconsistent statement by Johnson to the SBA made in an unrelated federal case. (Record p. 1942). This prior inconsistent statement alone, argued Orvis, sufficiently invokes the doctrine of judicial estoppel to estop Johnson from asserting his partnership claims with Orvis. The SBA had obtained a judgment against Johnson and was conducting a post-judgment deposition of Johnson. Johnson was asked about partnerships and he is alleged by Orvis to have stated he had no partnerships including Orvis-Johnson businesses. Orvis argued that the interpretation of this quote was that Johnson repudiated any partnership in Orvis-Johnson businesses, or was otherwise lying to the SBA. Johnson, in opposition, argued that this quote did not relate to Orvis-Johnson businesses and was intended by Johnson to refer only to real estate ventures. Johnson, the only witness, submitted his affidavit as to the meaning of the SBA quote, and submitted documents and other deposition quotes to establish the context of the deposition, his understanding of the question and his intent in answering the SBA. Appellant Johnson placed in dispute the Orvis interpretation of the SBA quote and asserted that the SBA quote, was not a prior inconsistent statement sufficient to invoke judicial estoppel. The District Court and the Court of Appeals both adopted the Orvis interpretation of this quote and granted and upheld summary judgment respectively. Both Courts observed that Johnson was an attorney and implied that status gave Appellant Johnson some special

insight to the question posed by the SBA and thus weighed his credibility.

While the quote itself is ultimately not an issue because it is made wholly irrelevant by application of the doctrine of judicial estoppel, nonetheless, that quote, together with the application of the doctrine of judicial estoppel became central to this appeal as it is the single thing relied on by the lower courts.

Orvis did not know of the SBA quote until a year after this litigation commenced when it was located among the discovery materials purchased by Orvis along with the SBA judgment. He bought the SBA judgment only a few days before commencing litigation.

The history of the SBA judgment is instructive and aids in understanding the short SBA quote. In 1997, the SBA obtained a judgment against Johnson. He was deposed approximately four times and his wife, who sat on a board of an Orvis-Johnson company and was also one of the partners, was deposed once. Johnson's wife was represented in the litigation by attorney Victor Lawrence of Lexington Law Firm at her deposition. He also represented the Orvis-Johnson enterprises (a client of which was Lexington Law Firm as well). Attorney Lawrence also represented Johnson to the SBA over a period of time. He participated in negotiating a proposed settlement to the SBA of the Johnson judgment. The SBA requested discovery be produced from some of the Orvis-Johnson businesses to ascertain the relationships of Johnson, his wife, and others to the Johnson-Orvis businesses. Orvis and attorney Lawrence produced extensive documents to the SBA outlining these business relationships. The SBA had asked Johnson, and his spouse, in previous depositions about the Orvis-Johnson business relationships and the SBA had received document

production.

In its 1999 deposition of Johnson, the SBA asked Johnson about the Orvis-Johnson businesses, and about his wife's relationships to various Orvis-Johnson businesses. At one point in the deposition, the SBA asked Johnson a series of general questions about assets such as insurance, stocks, bonds, real estate, etc. Johnson was asked if he had any partnerships. He understood the question to involve real estate and he answered that he did not formally set up real estate partnerships. It is this quote upon which Orvis relies.

Orvis' interaction with the SBA is also instructive and follows: Johnson, suspecting mis-accounting for and embezzlement of partnership profit share by Orvis (matters subsequently proven during discovery), had demanded an accounting from Orvis. Orvis promptly filed this action seeking declaratory relief of no partnership with Johnson. Immediately before filing this action, Orvis surreptitiously acquired the SBA judgment against Johnson. Orvis concealed his identity from the SBA by using a defunct Utah LLC, and then immediately conveying the judgment to himself in his name. To do all this, Orvis consulted and conspired with Johnson's attorney, Lawrence of Lexington Law Firm, who, as mentioned represented Johnson to the SBA, Mrs. Johnson to the SBA, the Johnsons to the Orvis-Johnson businesses, etc. Orvis offered to pay the SBA the precise amount that Johnson and Lawrence were negotiating to pay the SBA to settle the judgment, Orvis having obtained that information from attorney Lawrence. Further, Orvis paid the SBA with monies diverted and embezzled from Johnson profit share, and Orvis and attorney Lawrence subsequently split the ongoing and diverted Johnson profit share. Orvis acquired the SBA judgment to

shield him from Johnson's demand for an accounting and claims of embezzlement and as a means to attempt to extinguish Johnson's partnership interest. Johnson has documented, in the record, the actual purpose of Orvis' acquisition of the SBA judgment by the blunt demand of Orvis' attorney, Dan Berman. The day after Orvis filed this case, Orvis seized and cut off all profit share that had been allocated for several years among the partners, and Orvis arranged a meeting at the offices of his attorney Dan Berman who frankly stated that Orvis and Lawrence had acquired the SBA judgment against Johnson and offered to settle it and extinguish the Johnson-Orvis partnership. Johnson's responsive letter to Berman addresses this Ex. 18 in Addendum).

Orvis was nonetheless still unaware of the SBA quote. With the acquired SBA judgment came several thousand pages of discovery and depositions—much of it prepared and provided to the SBA by Orvis himself and documenting the Orvis-Johnson business relationship. After some discovery and a year into the case, Orvis moved for summary judgment against Johnson invoking judicial estoppel based on the alleged prior inconsistent statement by Johnson located by Orvis

At issue here, raised by Orvis in his summary judgment motion below is the interpretation of the 63 word quote, given in the 1999 SBA deposition. To support this, Orvis, in his Summary Judgment Motion, lifts only the single word “no” from Johnson's more lengthy quote. Orvis' version of the quote, as stated to the District Judge below is “Q. Do you have any partnerships? A. No.” (Record p. 1231 line 16). The actual quote is 63 words long:

: Q. Do you have any interest in any partnership?

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 L.L.C. You know if I get a deal I say, [h]ey, do you want to do this deal together? We'll go up to Summit County and buy a lot. [Emphasis added]

(Record p. 2424; 1231-1232, Jamis Johnson SBA Deposition, p. 30 lines 16-25 and p. 31, lines 1-24). Johnson in his opposition memorandum asserts that he understood this particular question to be about real estate partnerships as the actual words in his answer reflect. Johnson argued by affidavit and reference to other deposition statements and related documents submitted under oath that this particular question came in a series of short standard questions about stocks, bonds, insurance, real estate limited partnerships, partnerships, etc., and came after discussion of the Orvis enterprises earlier in the deposition, (which would again be touched on later in the deposition) and that Johnson had discussed the Orvis enterprises in other earlier depositions, as had his wife. (Record p. 2259). Johnson's understanding of what the SBA was asking him was not about the Orvis matters which they were already aware of. Nor does the plain language of the answer on its face state the negative proposition being attributed that no specific partnerships of any nature exist but is in terms of describing Johnson's general usual routine in the abstract, what was ordinary, in the conduct of real estate joint endeavors.

This one word "No" lifted from the larger original quote, was presented in the Orvis memo to the District Court as the entire and complete quote. (There is evidence that the District Court itself did not realize that the quote was actually lengthy and that contained within the quote are indeed references to real property—not the Orvis enterprises—and that

the District Court believed the disingenuous excerpted “no” as constituting the complete and full answer by Johnson). (Addendum Ex. 3 p. 15, line 1). Orvis, after providing the incomplete “No” quote as evidence, then asserted, in the memo, that “Johnson lied to the [SBA];”⁴ and that the doctrine of judicial estoppel was to stop such “lying.” (Record p. 1946). The District Court adopted the Orvis interpretation and made a finding in the Minute Entry of November 23, 2004 that Johnson was “avoiding creditors” by this SBA quote, and interpreted this quote to mean that Johnson was responding about the Orvis enterprises—not about real estate partnerships as Johnson asserts. (Record p. 2620). Further, the District Court’s explicit finding, in its Minute Entry, that the prior SBA statement was not a “mistake” thus made a factual ruling on the bad faith/mistake requirement of judicial estoppel—a critical material issue hotly in dispute, *3D Const. and Development, L.L.C.*, *supra*.

The Court of Appeals, like the District Court, engaged in interpreting the SBA quote. The Panel states “[W]e fail to see how this deposition statement *can be interpreted as* anything but a denial of interest in *any* type of partnership.” [Emphasis added]. (Curiously, in a decision ostensibly concerned with the central issue of the meaning of the SBA quote, the Panel decision does not ever set forth the entire quote and in fact divides it up, separates the word “No” and completely omits entirely the critical interpretive, modifying and

⁴The Orvis interpretation of the ambiguous SBA quote supporting his summary judgment is that “Mr. Johnson has *lied* [to the SBA about his partnership interest with Orvis].” [Emphasis added.] (The Court’s Record appears to lack this pleading – please see Addendum Ex. 1, Johnson’s Memo in Support of the Motion for Summary Disposition, Ex. 6, Orvis Memorandum in Support of Summary Judgment, p. 7).

qualifying language of “I mean you know” following that word “No,” reflecting Johnson’s thought process and uncertainty in trying to answer the question). The Court not only edits, and misinterprets the full quote, which on its face supports Johnson’s interpretation, but the Court ignores or dismisses the evidence in the record (cited, argued and preserved below by Johnson) of the prior deposition statements, other discovery provided to the SBA, and Johnson’s own testimony (as the sole witness) as to the meaning of the SBA quote. The Panel, like the District Court, observes that Johnson is an attorney, gratuitously noting the status of his law license in Utah, (and inadvertently revealing, perhaps, an unspoken basis for its ruling). The Court indulges in the speculation that this somehow must have affected his understanding of the SBA question, and anticipating this Orvis controversy two years before this litigation.

This type of misquoting both by the Court of Appeals and more so in Orvis’ and the District Court’s reliance only on the truncated “No” is transparent and ethically dubious. It would seem to give most courts pause. It simply strains credulity and is incorrect to claim Johnson’s response is anything other than about real estate ventures. Johnson explicitly referenced “lots” and specific ventures he had engaged in previously, for instance, in Summit County. This is not “unsubstantiated opinions and conclusions,” as speculated by the Court of Appeals panel, it is the plain language of the statement itself. The opinion indulges a speculation here which at the same time it accuses Johnson of doing in defending his interpretations of the question and answer. Johnson has offered a logical and documented explanation for the meaning of his answer and his interpretation of the question. The panel

chooses to simply ignore this dispute of material fact and weigh evidence to reach their own conclusion about the weight of this evidence. Indeed the basis of the panel and District Court's conclusion that 1) because Johnson was a lawyer, therefore 2) he must have actually understood the question to be something other than how he says he understood it, and 3) that he deliberately intended to mislead with a deceptive answer is actually the panel's own "unsubstantiated opinion and conclusion" wherein they indulge a whole series of inferences adverse to the opponent of the summary judgment, Johnson. This is impermissible in itself.

The Court of Appeals claimed, "Nothing in Johnson's affidavit supports his assertion that his response in the SBA deposition to the question about partnerships was based on his belief that it referred only to partnerships in real estate," which assertion is defied by the plain language of the full quote itself! Unless this statement is somehow characterized as an "admission," the Court of Appeals would not give to a litigant the right afforded by the Utah Rules of Evidence given to every witness in any case to explain any perceived inconsistency, Utah R. Evid. 613(b).

Despite the differing interpretations, both the District Court judge and Court of Appeals panel improperly ruled on this fact—the meaning of this quote—and entered summary judgment based on it. They attribute meaning and context on their own weighing of credibility to indicate that Johnson was "avoiding" the SBA creditor. To be satisfied that Johnson was avoiding creditors, the lower courts were indeed accepting the version of the facts presented by Orvis and rejecting Johnson's version that he never disavowed his partnership interest in the credit repair businesses with Orvis. 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., supra*. The disparate meanings of the SBA quote are a central focus of the case rendering it not susceptible to summary judgment.

ii. Reliance is a critical and indispensable requirement for judicial estoppel; Orvis did not rely on any statement made by Johnson during his SBA deposition.

The Court of Appeals claimed not to deal with the element of reliance because purportedly the panel erroneously asserted that reliance was not raised below by Johnson. Nonetheless the panel discussed reliance at some length as being a required element for application of judicial estoppel, but in doing so made some interesting observations directly applicable to this case. The panel recites in fn. 4 that “Other jurisdictions have determined that . . . reliance [is] not [an] essential element of the judicial estoppel doctrine,” and then cites *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002) for the proposition that “[T]he doctrine of judicial estoppel protects the integrity of the judicial system not the litigants.” The opinion goes on to recite that there has been disagreement with reliance as an element stated by several dissents in Utah, including by Justice Durham in *Wiese v. Wiese*, 699 P.2d 700 (Utah 1985) that, “[B]ecause judicial estoppel has a strong and independent public policy justification, the party asserting the judicial estoppel should not have to show either prejudice or reliance.” This “not a tool” of private party vs. judicial integrity/public policy distinction is interesting herein in that even these views pinpoint exactly why judicial estoppel should not be applied in this case regardless of Orvis’ complete lack of reliance. Namely the doctrine of judicial estoppel is being used as a tool by a private

litigant not to promote judicial integrity and to expose the truth but instead to hide embezzlement and fraud and to conceal the truth precisely contrary to any notion of public policy being served. Reliance by the prior court itself in the prior proceeding is under any analysis an element of reliance under the “successfully maintained” requirement.

Nonetheless, as the majority of this Court has consistently determined, as with any form of estoppel, an essential element of judicial estoppel is detrimental reliance. Orvis, as his offensive strategy, tries to claim that Johnson’s ambiguous SBA statement about “no” partnerships is a disavowal of his partnership interest with Orvis, but unless Orvis actually *relied* on that statement made to the SBA, that ambiguous SBA statement cannot operate to estop Johnson from asserting his partnership claims. The District Court ignored this reliance element altogether. In *Masters v. Worsley*, 777 P.2d 499 (Utah Ct. App.1989), the Court of Appeals reiterated the Supreme Court’s holding on this issue:

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.* at 390-91. However, in *Richards v. Hodson*, 26 Utah 2d 113, 485 P.2d 1044, 1046 (1971), the court clarified that the doctrine was really akin to collateral estoppel and *applied only to issues actually litigated, not those which merely could have been determined.* [Emphasis added.]

The glaring error with the District Court’s ruling is the blatant failure by Orvis to establish that “he . . . has done something or omitted to do something in reliance on [Mr. Johnson’s] testimony in the earlier proceeding,” much less that he did not have “equal knowledge of the facts.” Orvis has never, in any way, pled or claimed reliance on the SBA

statement—not in his motion for summary judgment, nor in his affidavit, nor in any other pleading. Nor is it possible to infer reliance by Orvis because there are no facts, actual or alleged, anywhere in this case, from which reliance may be inferred. The failure to allege any *prima facie* case that includes reliance, much less provide even nominal facts in support of this essential element of reliance renders the doctrine of judicial estoppel wholly inapplicable *as a matter of law*. For this reason alone, the District Court and Court of Appeals have committed manifest error.

Further, claiming that Johnson did not raise reliance is simply false. Johnson did clearly raise it.⁵ For example, at the hearing before Judge Hanson on the elements necessary to support judicial estoppel which are lacking herein, counsel stated at R 2508 - Tr. p. 18, l. 1-2, "that's another party, that detrimentally changed its position by reason of Salt Lake's inaccurate representation of Utah's water law in progress," and at R. 2508 - Tr. p. 19, l. 3-6, "The party claiming estoppel must have been misled and have changed its position. ***Here there's been zero reliance by Mr. Orvis.***" [Emphasis added]. Johnson's Memorandum to the District Court cited the cases of *Nebeker v. Utah State Tax Commission*, 34 P. 3d 180 (Utah 2001), *Salt Lake City v. Silver Fork Pipeline Corp.*, 913 P.2d 731 (Utah 1995), and *Tracy*, *supra*, for the elements of judicial estoppel, which all require reliance. In any event, judicial estoppel is inapplicable herein as additionally held in connection with reliance by *Silver Fork*, "The rule of judicial estoppel does not apply . . . when the knowledge or means of knowledge of both parties is equal." Orvis *per se* would have equal or better knowledge about his

⁵R. 2279-2281, R. 2508 -Tr. p. 18, l. 103, 23-24, p. 19, l. 3-12

partnership with Johnson.

Orvis' actual actions are the antithesis of reliance. First Orvis had never heard of Johnson's SBA statement until after he filed this action and it was raised in summary judgment. He only acquired the SBA judgment (and the depositions therein for review containing the quote) days before filing this action. Even if Orvis could now point to some evidence of reliance, his reliance must still be justifiable, and reliance on this 63 word quote to alter the complex Orvis-Johnson relationship could not be justified.

But Orvis has never manifested reliance. He has done the opposite. Three years *after* the SBA statement, Orvis went out to the SBA bought the SBA judgment (in conspiracy with Johnson's attorney Victor Lawrence). In July of 2001, Johnson had demanded an accounting with a CPA because the Johnsons suspected fraud. (Record p. 2256) Orvis, fearing that an accounting for the partnership would reveal his fraud, consulted with Mr. Lawrence, the Johnsons' attorney, (Record p. 2246) and these two conspired to acquire the SBA judgment against Johnson—the same judgment for which they had provided discovery. Mr. Lawrence knew, from being Johnson's attorney and consulting with him about the SBA matter, that Johnson was negotiating to settle the judgment for the sum of \$30,000. Exploiting that inside knowledge about their client and partner, Orvis and Lawrence determined to offer the SBA the same amount to buy the judgment but not to settle it for Johnson, but to buy it and use it to extinguish the Orvis-Johnson partnership and conceal the ongoing fraud (Record p. 2257). Orvis cannot claim to have expended money to pay the SBA since he used money misappropriated from the Johnson profit share. Attorney Victor Lawrence (with the

knowledge of Orvis and while working also for Orvis) actually represented and counseled DaNell Johnson in her deposition by the SBA where, at his directed questioning, she laid out to the SBA the profit share distribution—this only months before Johnson’s last SBA deposition. (Record p. 2390)

Indeed, Mr. Orvis’ original counsel herein, Dan Berman (also Victor Lawrence’s counsel) summoned Johnson to a meeting at his office on the day he filed this lawsuit. Mr. Berman informed Johnson that Orvis and Lawrence had acquired the SBA judgment to use against Johnson and would collect and offered to exchange the judgment if Johnson would abandon the Orvis-Johnson partnership. This exchange is confirmed in the letter to Mr. Berman from Johnson. (Record p. 2515). This is hardly a story of detrimental reliance by an unfortunate Orvis. Orvis bought the SBA judgment because he knew that, indeed, he *did* have a partnership with the Johnsons and he was searching for a means to avoid it. Thus, the SBA judgment was acquired by Orvis and Lawrence to be used against their partners and clients, and to hide fraud.

Further, after November 1999, the date of the SBA deposition, Orvis did not change his position from being a partner with the Johnsons to a position that he had no partnership with Johnson. Instead Orvis did the opposite. Profit share distribution (distributed by Orvis) not only continued uninterrupted on a monthly basis but increased dramatically over the next two years up to as high as \$35,000 per month just before Orvis filed this lawsuit; Orvis and Johnson continued to execute and exchange written documents regarding the partnership, and their active course of performance after the SBA statement also evidences the ongoing

partnership. There is no evidence of reliance by Orvis on the SBA quote - detrimental or otherwise. Summary judgment must be reversed because Orvis failed to plead or prove this essential element of judicial estoppel. "There is no estoppel where there was no reliance" is the controlling principal here.

iii. The parties in the prior federal case and the instant state case are not the same and any privy with the SBA is not Orvis but is the Orvis-Johnson partnership.

For judicial estoppel to apply, the parties in the prior case and in this case must be the same or privies. The parties are not the same nor privies for three reasons:

- i.) The actual parties are not the same.
- ii.) Orvis, who claims to be a privy to the SBA because he purchased the SBA judgment, did so with monies misappropriated from the partnership, and he is not, therefore, the "privy" because the SBA judgment would actually be the property of the partnership, which would be the "privy";
- iii.) The SBA judgment was purchased in violation of partner and lawyer fiduciary duties and is void in Orvis' hands.

The parties in the prior case were Johnson, the defendant therein, and the United States Government (the SBA), the plaintiff. The SBA was the opposing party in the former action. Orvis is not the SBA. The parties in this current matter were Johnson, DaNell Johnson, and Orvis, Victor Lawrence and Dean Stoeckling. The parties are clearly not the same in the unrelated federal and state actions. However, Orvis claimed, and the Court of Appeals agreed by finding that Orvis was a privy with the SBA because "All Star Financial assigned the judgment solely to Orvis, an undisputed fact evidenced by the judgment

attached to Johnson's affidavit."

The facts of record show that the SBA judgment was purchased by an expired and defunct Utah limited liability company, All Star Financial, LLC (owned by a relative of an Orvis partner and party herein-Deon Stoeckling). All Star was used by Orvis to conceal his identity from the SBA.⁶ Within 24 hours after the purchase, All Star assigned the SBA judgment to Orvis. Orvis used the Johnson profit share monies to pay the SBA. This plan was proposed and orchestrated by Victor Lawrence with Orvis. Lawrence, as Johnson's attorney to the SBA, knew the amount Johnson was negotiating with the SBA to pay to settle the judgment and that was the amount Orvis paid.

Whether the purchaser of the judgment is a privy to the SBA is not the dispute raised with respect to Orvis' party or privy status, but instead that Orvis was embezzling partnership money and purchased the SBA judgment using partnership funds wrongly taken from the partnership and used a defunct "straw man" to disguise his identity. Johnson pointed out to the District Court that Orvis could not be a privy because Orvis does not actually own the SBA judgment. Having been purchased with misappropriated partnership funds, under well established Utah law, the SBA judgment would be the property not of Orvis but of the partnership, even if held in Orvis' name.

The panel overlooked Johnson's detailed facts and legal arguments raised below that Orvis is not in fact the privy with the SBA - a necessary element. Johnson has asserted from the outset that Orvis purchased the judgment with monies wrongfully taken from the

⁶ Record 2256-2257; 2280-2281

partnership and stated this in his Affidavit in Opposition to Summary Judgment, ¶¶4, 52, 53 and 54.⁷ This was supported by sworn deposition testimony of Orvis employee Thomas Triplett (Record p.855-875), Orvis partner Jade Griffin (Record p. 877-884), and attorney Lawrence employee, Will Vigil (Record p. 2285-2288).⁸

Utah statute and case law are well-established and long-standing 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

⁷Record 2267, 2280

⁸ *See also* Record 2098-2101, 2285-2367, 2389-2394

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.

Accordingly, this would make the partnership a “privy” of the SBA, not Orvis. Since this is a genuine factual issue raised below that had to be tried, this element of whether the parties are the same or privies precludes summary judgment *as a matter of law*. It is not permissible to weigh two versions of facts on a motion for summary judgment, *Winegar v. Froerer et. al., supra*.

Further, Johnson, as partner, charges Orvis and Mr. Victor Lawrence with fraud, conspiracy to defraud, breach of both partner and attorney fiduciary duties, embezzlement, theft and criminal conversion by taking partnership assets and purchasing the SBA judgment to mask and extinguish his own ongoing fraud. There is significant testimony to this effect. The substance of and references to these depositions were raised and argued before the District Court in the relevant pleadings. Such acts would void the SBA judgment in the hands of Orvis, and he would not be a privy. *See Snow, Nuffer, Engstrom & Drake v. Tanasse*, 980 P.2d 208 (Utah 1999). Also argued in the district court, is that Mr. Victor Lawrence and Orvis manage, work for, and profit by Lexington law firm, Mr. Lawrence’s firm. Mr. Lawrence was also the attorney for the Johnsons in the SBA matter and in partnership matters. It is unethical for Lawrence, and for Orvis, in conspiracy with him, to acquire a judgment against a client and voids the judgment acquisition, *Snow, Nuffer, supra; Walter v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1290 (Utah Ct. App. 1996).

These are all substantial and material issues of fact raised below but ignored by the

District Court and the Court of Appeals in its grant of summary judgment to Orvis.

iv. The subject matter of the prior federal case is different from the subject matter of the present state case.

The prior case was a contract guarantee action and a foreclosure deficiency action brought by the SBA against Johnson.⁹ The SBA obtained a money judgment against Johnson. The SBA deposition was a post-judgment collection action. In the present action, Orvis seeks a declaratory judgment that would extinguish Johnson's partnership interest in their joint business, and Johnson is counterclaiming for an accounting, for conspiracy, and related claims. The subject matters of the prior federal action and this state action are clearly different. The Court of Appeals engages a fiction to claim the subject matter of the two unrelated lawsuits were the same by claiming that the issue of the existence of the Orvis-Johnson partnership was in dispute regardless of the actual "subject matter" of the litigation itself.

This distinction between the subject matter of the prior SBA case and this case is made clearer by a 1989 case, *Masters v. Worsley*, *supra*, wherein the Court of Appeals stated the Utah Supreme Court had clarified the doctrine of judicial estoppel by holding that "the doctrine [judicial estoppel] was really akin to collateral estoppel and applied only to issues actually litigated, not those which could have been determined," citing *Richards v. Hodson*, 26 Utah 2d 113, 485 P.2d 1044, 1046 (1971). The only subject matter litigated, and thus cognizable, in the prior SBA action were the foreclosure action and the guarantee contract.

⁹The SBA extensively litigated mortgage deficiency action centered primarily on the issue of whether the differing federal limitation period for pursuing SBA backed mortgage deficiencies trumped Utah's three month trust deed statute limitation period.

The specific Orvis-Johnson business relationship in this case was not litigated in the prior SBA action, and so, Orvis fails the “same subject matter” test. He may not invoke judicial estoppel.

v. The prior position must be “successfully maintained” in federal court for judicial estoppel to apply, and in the SBA case there was no position maintained.

A necessary element for application of judicial estoppel that Orvis must have demonstrated is that the alleged prior inconsistent statement of no partnership with Orvis derived from the SBA quote was successfully maintained by Johnson before the trier in that prior federal case. The panel opinion claims this element was met because the SBA did not take action to collect its judgment by going against Johnson's interest in the partnership. That is a false assumption to begin with. Neither Orvis nor the Court of Appeals knows what the SBA did or did not do and there was no evidence presented by Orvis or facts alleged regarding this. Moreover, the SBA did collect on its judgment.¹⁰ However, this “passive SBA” argument is not what is required by this element to “successfully maintain” a position.

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.").

¹⁰see R. 2282, ¶50, R. 2508 - Tr. p. 17, l.10-14

It is error to suggest that a non-action by the SBA constitutes having successfully maintained a position of “no partnership” with Orvis or having “prevailed” before the Honorable U.S. District Court Judge Bruce Jenkins, the federal judge presiding over the SBA case. Judge Jenkins never considered or ruled upon the position. The argument indulges a presumption as to what was in the SBA mind. The Court of Appeals cannot know what was in the SBA mind as (the Court speculates) the SBA sat passively, doing nothing.

While the Court of Appeals concludes that Orvis met this element of “successful maintenance” because the SBA was passive and did not collect, in truth even that assertion is false. The SBA actually did collect on its judgment for the exact amount negotiated with Johnson. 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. Attorney Lawrence having wrongly revealed this confidential attorney-client information to this other adverse party, Orvis.

Masters v. Worsley, supra, 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.

This element of “successful maintenance” of an issue which was “actually litigated” requires that the prior federal court not only have actually reviewed and relied on the position, but the party asserting the position (Johnson) “prevailed” on that issue before the

court.

There was no discernable action by the SBA or by Johnson, which was “maintained” or pursued, let alone concluded “successfully” involving the “position,” i.e. that there was no Orvis-Johnson partnership. The requirement that a particular position be successfully maintained forces the “position” through the filter of adjudication. Issues are necessarily defined and the position is clarified, debated, and placed before a trier, and is either maintained successfully or not. The *Richards* case leaves no room for deviation. It is not enough under *Richards* that the alleged “position” Orvis strains to attribute to Johnson, “might have been determined” or was merely asserted. It must have been “actually litigated.” The controverted “position” involving the interpretation of SBA quote, i.e. the prior purportedly inconsistent statement, was not litigated. It was never successfully maintained. This was duly and clearly argued below. The District Court and the Court of Appeals again ignored an essential element of judicial estoppel.

vi. Johnson’s purported prior statement to the SBA, if inconsistent, was the result of inadvertence or mistake, not bad faith.

The final disputed issue of material fact is whether ’s SBA answer was made in bad faith, not a result of inadvertence or mistake. To claim that Johnson did not raise this as an element simply ignores every pleading and argument and memorandum he has filed throughout the litigation from his initial counterclaim to his counter-affidavit to the summary judgment, forward.¹¹ Mere inadvertence or mistake in making an inconsistent statement is not sufficient to sustain judicial estoppel. There must be “bad faith” to invoke judicial

¹¹ Record p. 2261

estoppel as discussed, *infra*, as well as all other essential elements. 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 and Court of Appeals was that the “No” part of the answer 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 an unreasonable presumption. The answer Johnson believed he was giving about matters other than had been discussed at length is not 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 which we have already discussed at length,” 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" while an improper weighing of evidence and credibility, does not *ipso facto* meet the "bad faith" element for judicial estoppel required by *3D Const. and Development, L.L.C. v. Old Standard Life Ins. Co.*, *supra*, however, 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 this summary judgment with opposing views established in the record, 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 doctrine of judicial estoppel may not be invoked to preclude discovery of the truth and which would perpetuate a fraud and embezzlement.

The panel overlooked this fundamental bar to use of the doctrine of judicial estoppel in the instant proceeding and that the doctrine is disfavored and narrowly applied.¹² Disregard of this policy by the panel departs from the accepted and usual course of judicial proceedings or has sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision. The purpose of the doctrine of judicial estoppel is to prevent

¹²The U.S. Tenth Circuit Court of Appeals for this Circuit did not even allow use of the doctrine in our Federal Courts until it was allowed by the U.S. Supreme Court in narrow circumstances in *New Hampshire v. Maine*, 532 U.S. 742 (2001) , *see Johnson v. Lindon City Corp.*, 405 F.3d 1065, 1068-1069 (10th Cir.2005)

perpetuation of falsehoods in the judicial system. The doctrine can never be used to block the truth from ultimately prevailing. As stated in the very beginning in *Tracy Loan & Trust Co.*

v. Openshaw Inv., supra:

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.

See also 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.

The panel disregarded this public policy. The existence of the Orvis-Johnson partnership is extensively demonstrated, for instance, by the nineteen exhibits attached to Johnson's affidavit,¹³ and is the undisputed truth. Preventing an accounting of the proceeds of that partnership embezzled by Orvis through deceit and misrepresentations sanctions a fraud and promotes criminal behavior by giving it a judicial cloak based only upon an Johnson's conditional and ambiguous response referencing "lots" to a different question to a different party in a different context in a different proceeding on a different issue in a different judicial system. This is not proper use of judicial estoppel.

**d. The Orvis-Johnson partnership is clear and well documented,
and the District Court should be required to allow an accounting
of the partnership immediately.**

The evidence of the Orvis-Johnson partnership is extremely well documented and has

¹³R 2284-2515

proceeded for many years. An extensive documentation of the partnership is set out in Mr. Johnson's Summary Disposition Memorandum filed with the Court of Appeals. There are hundreds of profit share checks and memos of accounting data provided by Orvis and partnership documents. The Johnson's were receiving \$35,000 per month at the time Orvis and Mr. Lawrence bought the SBA judgment against them and commenced withholding profit share. Orvis claimed in his initial Complaint in this action that all those profit share funds were "gifts" from him to Johnson.¹⁴ That of course is wildly preposterous. However, Orvis has not ever denied, since then, the validity of the documents of partnership that have been presented. So while the existence of the partnership is virtually irrefutable, Orvis has not bothered to even try to refute it. He has let pass any opportunities to deny the documents and affidavits below or here. (Indeed inherent in Orvis' argument that Johnson "lied" to the SBA about having an Orvis-Johnson partnership is the tacit admission to the obvious fact that this would not be a "lie" as Orvis asserts, unless Johnson and Orvis do indeed have a partnership. Orvis' strategy was to ignore the issues surrounding the existence of the partnership, and to focus below and here, on the SBA quote defense. He should not be allowed to deny the existence of the partnership because he has not done so before this. Thus, the Orvis-Johnson partnership is a matter of established fact—though the actual accounting therefore remains to be done. If the SBA quote is regarded as inapplicable or as not barring a claim of existence of the partnership by this Court, then Johnson should not further have to prove the partnership below, but rather should proceed to get an accounting finalized for

¹⁴ Record p. 5

the Orvis-Johnson partnership.

IX. CONCLUSION.

The Appellant asks the Supreme Court to find as follows:

A party moving for summary judgment always has the “burden” of persuasion that no genuine dispute of material facts exist and that the undisputed facts entitle the movant to a judgment as a matter of law. An opponent of a motion for summary judgment has no burden in the traditional sense but may oppose a summary judgment purely on the basis of lack of entitlement under the elements required to support a claim under the law, or that there are additional facts which deflect from a movant’s entitlement to a judgment, or that there do exist genuine disputes of material fact. An opponent only has a “burden” to demonstrate that there exists a dispute of facts if the movant has set forth all material facts required to support a claim which are claimed to be not in dispute but which actually are disputed.

However, even under the Court of Appeals’ burden shifting analysis, no *prima facie* case was made out by Orvis in the first instance. The Court of Appeals and Third Judicial District Court erred in finding that the doctrine of judicial estoppel is properly invoked here to estop from asserting a partnership interest with Orvis. The disputed SBA quote is not a basis to estop Johnson’s partnership claims. Judicial Estoppel requires distinct elements, each of which are indispensable and none of which have been demonstrated by Orvis. The elements, with the applicable facts of this case, are:

1. Reliance: Orvis did not detrimentally rely on his alleged understanding of the SBA quote, or materially change his position as to his partnership with Johnson upon learning of

the SBA quote.

2. Same Parties: The parties to the SBA litigation are not the same as the parties to this litigation. Even though Orvis claims to be a privy of the SBA, because he used partnership monies to acquire the judgment, he would not be the actual owner of the judgment, the partnership would own it. If he conspired with attorney Victor Lawrence to acquire the judgment against Johnson, the judgment would be void in his hands for fraud and public policy.

3. Same subject matter. The issues in the SBA case and in this instant case must be the same. The only issues cognizable are those issues that have been litigated in the prior case. In the SBA case, that would be a real estate foreclosure and a guarantee under an SBA note. Those issues are not the same as here.

4. The prior position must be successfully maintained: Johnson's prior allegedly inconsistent position must have been litigated and Johnson must have prevailed on that position. The disputed quote, or Orvis' interpretation of it, was not ever a "position" that was litigated and successfully maintained.

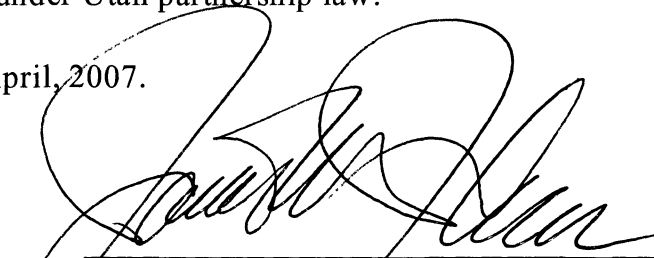
5. Bad faith by the non-moving party: The interpretation by Orvis and the lower courts of the meaning and intent of the SBA quote by Johnson was strongly disputed by Johnson who provided a reasonable alternative documented meaning to the SBA quote. The district court improperly granted summary judgment on this disputed material factual issue. The district court improperly adopted that perspective of the facts that was the least favorable to Johnson. The trial Court asserted in its minute entry that there was "no mistake" as to this

fact, which is not in itself bad faith. The facts as asserted by Johnson, when viewed as he urges prevent summary judgment. The district court also improperly weighed the credibility of Johnson.

The Orvis-Johnson partnership is well established and, as in any partnership is entitled to an accounting.

For the foregoing reasons, the decisions of the District Court and Court of Appeals should be set aside and the matter returned to the trial court to order and oversee an accounting and winding up, if applicable, under Utah partnership law.

DATED this ____ day of April, 2007.



Jamis M. Johnson, Appellant

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2007, I served a copy of the attached BRIEF OF APPELLANT JAMIS JOHNSON, upon Peggy Tomsic, the counsel for the Appellee in this matter, by mailing it to her by first class mail with sufficient postage prepaid to, or by hand delivering it to, the following address:

Peggy A. Tomsic
TOMSIC LAW OFFICE
136 East South Temple Suite # 800
Salt Lake City, UT 84111


By: _____