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Jayson Orvis v. Jamis M. Johnson : Reply Brief

Utah Court of Appeals

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

JAYSON ORVIS,

Plaintiff/ Appellee,

vs.

JAMIS M. JOHNSON,

Defendant/Appellant.

Utah Supreme Court Case No. 20061094

Utah Court of Appeals Case
No. 20041122-CA

Utah Third District Court Case
No. 010907449

APPELLANT'S REPLY 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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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES	v-vi
II. OBJECTIONS TO ORVIS' STATEMENT OF FACTS	1
III. ARGUMENT	2-23
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. Orvis never properly factually supported each element of judicial estoppel, therefore no <i>prima facie</i> case was set forth to shift any burden to Johnson	2-7
b. The Court of Appeals burden shifting stands summary judgment on its head as a moving party always has the burden and weighing evidence is province of jury ..	7-11
ISSUE NO. 2: THE COURT OF APPEALS DID NOT CORRECTLY APPLY THE SUMMARY JUDGMENT STANDARD IN THIS CASE	
a. The single element of judicial estoppel alleged by Orvis - prior inconsistent statement - was subject to a genuine dispute	11-13
b. Orvis' failure to plead or allege facts supporting the remaining missing elements of judicial estoppel defeat application of the doctrine	13-23
i. Contrary to Orvis' assertion that reliance can be or was waived, reliance is a critical and indispensable requirement for judicial estoppel.	13-15
ii. Orvis' claim to be a privy of the SBA is false	15-17
iii. Contrary to Orvis' assertion, the subject matter of the prior federal case is different from the subject matter of the present state case	17-19
iv. Orvis' claim the Johnson position was "successfully maintained" in federal court for judicial estoppel to apply is false	19-20
v. Orvis failed address Johnson's purported prior statement to the SBA, if inconsistent, was the result of inadvertence or mistake, not bad faith	20-22
c. Contrary to Orvis' false assertion, Johnson's public policy argument that	

judicial estoppel may not be used to preclude discovery of the truth was squarely raised in the Court of Appeals 22-23

IX. CONCLUSION 23

I. TABLE OF AUTHORITIES

<i>3D Constr. & Dev., L.L.C. v. Old Standard Life Ins. Co.</i> , 117 P. 3d 1082 (Utah 2005)	6, 19, 21
<i>Anderson Development Co. v. Tobias</i> , 116 P.3d 323 (Utah 2005)	10
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	8
<i>Cheves v. Williams</i> , 993 P.2d 191 (Utah1999)	2
<i>Deming v. Moss</i> , 123 P. 971 (Utah 1912)	17
<i>Frandsen v. Holladay</i> , 739 P.2d 1111, 1113 (Utah App. 1987)	17
<i>Fullmer v. Blood</i> , 546 P. 2d 606 (Utah 1976)	17
<i>Houghton v. Department of Health</i> , 125 P.3d 860 (Utah 2005)	8
<i>Kilpatrick v. Wiley, Rein & Fielding</i> , 909 P.2d 1283 (Utah App.1996)	10
<i>Mardanlou v. Ghaffarian</i> , 135 P.3d 904 (Utah App.2006)	1-2
<i>Masters v. Worsley</i> , 777 P.2d 499 (Utah Ct. App.1989)	10, 14, 18
<i>Nebeker v. Utah State Tax Commission</i> , 34 P. 3d 180 (Utah 2001)	14
<i>Provo City Corp. v. Thompson</i> , 86 P.3d 735 (Utah 2004)	8
<i>Richards v. Hodson</i> , 26 Utah 2d 113, 485 P.2d 1044, 1046 (1971)	18
<i>Salt Lake City v. Silver Fork Pipeline Corp.</i> , 913 P.2d 731 (Utah 1995)	14
<i>Shaw Res. Ltd., L.L.C. v. Pruitt, Gushee & Bachtell, P.C.</i> , 142 P. 3d 560 (Utah App. 2002)	10
<i>State v. Menzies</i> , 889 P.2d 393, 398 (Utah 1994)	10

<i>State v. Ortiz</i> , 987 P.2d 39 (Utah 1999)	8
<i>Staats v. Staats</i> , 226 P. 677 (Utah 1924)	17
<i>Still Standing Stable, LLC v. Allen</i> , 122 P.3d 556 (Utah 2005)	22
<i>Tracy Loan & Trust Co. v. Openshaw Investment Co.</i> , 132 P. 2d 388 (Utah 1942)	6, 14
<i>Utah Coal and Lumber Restaurant, Inc. v. Outdoor Endeavors Unlimited</i> , 40 P.3d 581 (Utah 2001)	21
<i>Waddoups v. Amalgamated Sugar Co.</i> , 54 P.3d 1054 (Utah 2002)	2, 8
<i>Winegar v. Froerer et. al.</i> , 813 P.2d 104 (Utah 1991)	10, 13, 17
Utah Code Anno. §48-1-5	16
Utah R. Civ. Pro. 12(b)(6)	8
Utah R. Civ. Pro. 56	5, 8, 10, 13

II. OBJECTIONS TO ORVIS' STATEMENT OF FACTS.

Orvis' Appellee's Brief makes numerous mis-statements of fact which should be corrected at the outset. Space permits only the more flagrant to be corrected here. Orvis, at page 7, inserts a quote from the SBA deposition (again entirely out of context) to the effect that Johnson, because of his bar problem, stepped down from Lexington Law Firm. Orvis neglects to disclose that at this same time that Johnson entered into the agreement stepping down from Lexington Law Firm, Orvis executed a memorandum of partnership with Johnson affirming the partnership in all Orvis/Johnson credit repair businesses. Lexington Law Firm is not the partnership in issue, but one of the partnership's activities was to operate the marketing for such law firm. Both the partnership agreement with Orvis, and the resignation from Lexington, were attached as exhibits to Johnson's affidavit in opposition to Orvis' summary judgment and this was specifically argued to Judge Hanson below (R. -). Moreover, Orvis himself is not a lawyer and cannot be a partner in a law firm nor control it. Such is a clear violation of law. Orvis' claim that by his resignation from Lexington, Orvis somehow proves that Johnson abandoned an Orvis business, would seem to be a tacit admission that he views the law firm as his.

Another example on page 9 and elsewhere, Orvis argues that the "sole" evidence in opposition to his Motion for Summary Judgment was merely an affidavit and implies that it contains no substantive proof in opposition. Orvis neglects to note that there were 19 exhibits with the affidavit including specific deposition testimony adduced in this case supporting the partnership, and documenting Orvis' embezzlement and use of partnership funds to purchase the SBA judgment; and including evidence of the profit share from the partnership divided between the Johnsons and Orvis, etc. The affidavit contains a wide range of proof well beyond that necessary to establish the partnership, let alone rebut Orvis superficial and legally dubious summary judgment motion.

III. 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. Orvis never properly factually supported each element of judicial estoppel, therefore no *prima facie* case was set forth to shift any burden to Johnson.

There is a fundamental flaw in Orvis' argument that pervades his entire brief. It is this: Orvis' repeated argument is summed up by his quote from *Waddoups v. Amalgamated Sugar Co.*, 54 P.3d 1054 (Utah 2002) on p. 20 of his Brief, "In *Waddoups* . . . the moving party met its initial burden by pointing out that plaintiffs did not have proof sufficient to meet an *essential element of their . . . claims.*" [Emphasis added]. This may or may not be the correct statement of the law, but Orvis, the moving party, entirely failed to do what he claims a moving party must do. Orvis' summary judgment motion below did not once address any element of Johnson's partnership claim or discuss elements of partnerships nor attempt to negate their existence. While Johnson provided overwhelming evidence of the partnership, documentary and witness testimony, some 19 exhibits laid out in his Affidavit Opposing Summary Judgment (R. 2266-2515) including everything from express written partnership agreements to years of partnership profit sharing to deposition testimony of Orvis employees that he was embezzling partnership funds from the Johnson, Orvis never to begin with addresses any element of the partnership doctrine that would have operated to shift any burden to Johnson.

The elements of a partnership have been amply defined by this Court. As the Court of Appeals stated in *Mardanlou v. Ghaffarian*, 135 P.3d 904 (Utah App.2006):

The “basic principle of partnership law is set forth in our Uniform Partnership Act, Title 48 of U.C.A.1953 .” *Cutler v. Bowen*, 543 P.2d 1349, 1351 (Utah 1975). “ ‘Partnership ’ is defined as ‘an association of two or more persons to carry on a business for profit.’ ” *Parduhn v. Bennett*, 2002 UT 93, ¶ 14, 61 P.3d 982 (emphasis omitted) (quoting Utah Code Ann. § 48-1-3 (1998)). The requirements for establishing the existence of a partnership are not exactly defined, but certain elements are essential: The parties must combine their property, money, effects, skill, labor and knowledge. As a general rule, there must be a community of interest in the performance of the common purpose, a joint propriety interest in the subject matter, a mutual right to control, a right to share profits, and unless there is an agreement to the contrary, a duty to share in any losses which may be sustained. *Bassett v. Baker*, 530 P.2d 1, 2 (Utah 1974).

More tellingly, this Court in *Cheves v. Williams*, 993 P.2d 191 (Utah1999) specifically held that whether a partner proclaims or disavows existence of a partnership is of no avail because the existence of the partnership is determined under partnership law, not what the partners say about it. Nowhere is an inconsistent statement (or a consistent one) an element of the doctrine of partnership. Indeed, as recognized in *Cheves*, individuals inadvertently or knowingly assert or disaffirm partnerships regularly without affecting whether there is indeed an actual partnership under the law. While Johnson has credibly shown that Orvis’ distorted SBA deposition quote does not mean at all what Orvis would have it mean, nonetheless even if the evidence is weighed, intent and credibility assessed to accept Orvis’ interpretation as was done by the Court of Appeals, that quote does not go to the “essential elements” of a partnership claim. Partners often accurately or inaccurately make statements that there is or is not a partnership to the IRS, to banks, lenders, creditors, ex-wives, CPA’s, gambling commissions, etc. However, a partnership is proven by none of these, but rather by the elements of partnership law regardless of what individuals may say that is consistent or inconsistent. Indeed, if partners could create, alter or break a partnerships and avoid

accounting and cover embezzlement simply by an inconsistent or consistent statement, partnership litigation would be full of such self-serving statements.

Thus, the fundamental deficiency of Orvis' summary judgment motion is a threshold one amply condemned by Orvis' own argument here. He omitted to address, in his summary judgment motion any actual element of the partnership claim. His motion only dealt with an *alleged* inconsistent statement by Johnson. However, even if we assume Orvis' self-serving, claim of a belatedly discovered, un-relied on, truncated deposition statement by Johnson in an entirely different judicial system which, by the way, was never even mentioned to the presiding federal judge in the case, which was purchased by Orvis with money embezzled from the partnership, is an inconsistent statement, it nonetheless does not negate, rebut or vitiate any element of the partnership between Johnson and Orvis. Such an allegedly inconsistent statement might possibly go to credibility. But to get this statement noticed in any dispositive way, Orvis must erect it on the scaffolding of judicial estoppel, but several legals of that scaffolding did not arrive in the truck. The "inconsistent statement" is useless to Orvis otherwise. Before Johnson as the non-moving party need take regard of this tortured little statement, it must meet and Orvis must argue, *every* element of judicial estoppel. Orvis may not merely assert an inconsistent statement and announce that it rebuts an actual defined element of the partnership doctrine. It does not. This tortured and hotly disputed single statement cannot as a naked phrase enter the front gates of our judicial consciousness unless it is formally draped in the full robes of judicial estoppel. It may seek admittance through a back door by standing in line with other credibility impeachers, but it will have to elbow

through that narrow back door called relevance and then be assessed by a jury.

In Orvis' Brief, each of the dozen or so times Orvis insists that the moving party may shift the burden by arguing a deficiency in an essential element of the non-moving party's legal claim, Orvis averts his eyes and leaps over the gaping hole in his own argument below. He omitted to address any element of partnership claims. Instead, Orvis points to a phrase that must be bolstered by a different doctrine, judicial estoppel, and unfortunately, he also forgot and omitted to argue the elements of judicial estoppel.

The defect in Orvis' analysis of summary judgment as to judicial estoppel is highlighted by the paraphrasing as he does the requirements of Rule 56, on p. 19 of his brief that, "Once a moving party has *properly supported* her [*sic*] motion as required by Rule 56(c), Rule 56(c) shifts the burden to the nonmoving party and requires him to respond with evidence 'set[ing] forth specific facts showing that there is a genuine issue for trial.' [emphasis added]." The properly supported *prima facie* case was never made to begin with to even reach the academic discussion of whether initial burdens or ultimate burdens or burden shifting should apply.¹ Orvis makes a contorted claim that a movant can either satisfy its burden of proof "that there are no genuine issues of material fact and judgment in the moving party's favor is therefore warranted as a matter of law" or where as here, in trying to defeat a counterclaim, that the moving party "satisfies its initial burden by challenging the nonmoving party's ability to prove an essential element of its case on the basis that no genuine issue of material fact exists as to that element," p. 16. He then alleges that the

¹Record 1940-1948 and 1957-1964

existence of an Orvis-Johnson business partnership is defeated by application of the doctrine of judicial estoppel by mere assertion of a prior inconsistent statement without more which defeats Johnson's counterclaim. The problem is there are several missing links in this tautology, apart from disputes of fact.

Orvis' argument begins with this unfounded assumption that he made out a *prima facie* to support summary judgment on the claim of judicial estoppel. This is simply not true. Orvis did not for the most part even allege facts to provide support for *each element* required to establish judicial estoppel, indeed he has argued some of them are *not* or should not be considered as elements. The required elements of Utah law are namely: 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, *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).

The missing elements 2-6 Orvis either ignores or claims need not be alleged because *Johnson* in *opposing* summary judgment did not raise them. 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.” This posture presents the peculiar anomaly of claiming a moving party can be entitled to a judgment as a matter of law without even sustaining all of the elements of a claim under the law. 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. 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. This is contorted logic that a party can raise a legal claim with six elements and prevail by asserting facts supporting only one of them then relying on an opposing party’s alleged failure to point out the defect in “properly supporting” the motion to begin with, while also ignoring Johnson did raise the missing elements in the trial court, argued them and briefed them. Moreover, the panel and Orvis 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.

b. The Court of Appeals burden shifting stands summary judgment on its head as a moving party always has the burden and weighing evidence is province of jury.

In order to reach this issue, it must be overlooked that no “initial burden” or *prima facie* case was alleged by Orvis to begin with. Thus, to a large extent this is something of an advisory opinion on this issue which need not be reached because it is not ripe. This has

previously not been favored in this Court, ”*Houghton v. Department of Health*, 125 P.3d 860 (Utah 2005) quoting *Provo City Corp. v. Thompson*, 86 P.3d 735 (Utah 2004), “We have observed on many occasions that this court is not inclined to issue mere advisory opinions,” or as stated in *State v. Ortiz*, 987 P.2d 39 (Utah 1999):

Where there exists no more than a difference of opinion regarding the hypothetical application of a piece of legislation to a situation in which the parties might, at some future time, find themselves, the question is unripe for adjudication.

Orvis argues that either Rule 56 already requires a burden shifting or if it does not, this Court should adopt the *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) summary judgment burden shifting analysis. Orvis claims this Court did adopt a burden shifting analysis in *Waddoups v. Amalgamated Sugar Co.*, 54 P.3d 1054 (Utah 2002). *Waddoups* while having originally arose from a summary judgment was an appeal of a dismissal of an amended complaint decided under a Rule 12(b)(6) motion to dismiss rather than a Rule 56 motion for summary judgment and involved choice of law and conflicts of law issues readily distinguishable from anything involved in this case. The language from *Waddoups* Orvis relies on is:

However, once the moving party challenges an element of the nonmoving party's case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact.

Waddoups then went on to discuss the *elements* of the legal claims for interference with prospective economic advantage, and conspiracy which were missing from the Plaintiff's complaint. This is not really what is present in the instant case at all. Orvis did not literally challenge “an element” of Johnson's counterclaims for partnership accounting and

embezzlement. Instead he is invoking a doctrine to prevent even looking at any element of the partnership accounting claim and it is that doctrine which is the subject matter of this appeal, not the substantive claim. Orvis challenges the existence of the partnership despite overwhelming evidence to the contrary, including his lawsuit seeking to avoid it.

Every analysis of summary judgment agrees on the same starting place of analysis, the existence of two requirements - no dispute of material facts and entitlement to a judgment as a matter of law based on those undisputed facts. Orvis and the Court of Appeals panel ignore both of these fundamentals. Apart from allocating burdens of proof on a summary judgment motion of initial burden, opposing, ultimate and any others, the concept is far too simplistic and incomplete for what is involved in applying for and opposing a summary judgment. An opponent of a summary judgment 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 - that 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 of each element of claim, i.e. a *properly supported* claim, 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.

The problem with calling this "burden shifting" is, despite what Orvis claims, that

identified by Judge Bench's concurring opinion in this case and his dissent in *Shaw Res. Ltd., L.L.C. v. Pruitt, Gushee & Bachtell, P.C.*, 142 P. 3d 560 (Utah App. 2002) that "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.'" This burden shifting notion is akin to the ultimate burden of proof at trial because inherent in the concept is weighing evidence, sifting conflicting claims, evaluating credibility, motive, intent, etc. - all traditionally rigorously abhorred in motions for summary judgment, *Anderson Development Co. v. Tobias*, 116 P.3d 323 (Utah 2005); *Winegar v. Froerer et. al.*, 813 P.2d 104 (Utah 1991); *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283 (Utah App.1996); *Masters v. Worsley*, 777 P.2d 499 (Utah Ct. App.1989).

Orvis goes on to invoke this Court's rule-making powers to adopt such a burden shifting rule to apply to this case where it could not be invoked due to failure to "properly support" each element of a *prima facie* case to begin with. 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? Orvis has not even attempted to meet the established elements required by this Court to overturn prior precedent, *State v. Menzies*, 889 P.2d 393, 398 (Utah 1994):

We will not overturn precedent "unless clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent." Id. at 399 (quoting John Hanna, *The Role of Precedent in Judicial Decision*, 2 Vill. L.Rev. 367, 367 (1957)).

Orvis instead argues that Utah should adopt this analysis because other courts do. They recite as grounds therefore the same grounds that support the use of summary judgment

to begin with - overworked courts and rooting out deficient or unsupported claims. This is not an additional reason to promulgate a new standard of proof which disregards prior precedent for summary judgments relying on the common meaning of the plain language of the rule - “The judgment sought shall be rendered if . . . 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 is not the time to determine who has the better evidence, but only to determine whether any opposing evidence exists.

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

Orvis’ argument supporting summary judgment relies on the policy behind judicial estoppel and a perceived prior inconsistent statement. Without bothering to argue why alleging only one of six required elements would entitle him to judgment as “a matter of law,” he simply claims Johnson did not create a dispute of fact as to the prior inconsistent statement and waived the remaining elements - both false assertions.

a. The single element of judicial estoppel alleged by Orvis - prior inconsistent statement - was subject to a genuine dispute.

The fact that the parties are here before the Utah Supreme Court arguing about the meaning, intent and content of facts demonstrates the existence of a dispute of material fact. The problem with the Orvis and Court of Appeals analysis is that they would remove these issues of dispute from the jury and allow the trial judge to determine credibility and weigh evidence. In his opening brief, Orvis for the first time in the record of this case recites the full text of alleged prior inconsistent statement made by Johnson in his deposition to the SBA.

He still overlooks the other preceding parts of that deposition where this very partnership and related business ventures were explored in excruciating detail. Yet he simply asks this Court to say “black is white” and that the quoted text does not mean exactly what it says. He says there is nothing to support Johnson’s assertion that the following quote refers only to real estate ventures:

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).

One easy place to analyze the plain meaning of this statement is to read *all* of the words in the entire quote used themselves. Johnson explicitly referenced “lots” and specific *real estate* ventures he had engaged in previously, for instance, in Summit County. Orvis argues this can only be interpreted the way he wants it to be to create an inconsistent statement, without any reference to the surrounding testimony in that and prior days’ depositions, the actual text of the answer and Johnson’s subjective intent and meaning of his answer as well his understanding of the question - i.e. highly fact dependent questions. Johnson has documented the nature of his interpretation of the question and answer in his affidavit, supporting exhibits, arguments below and his prior brief herein. The District Court and the Court of Appeals both adopted the Orvis interpretation of this quote and granted and upheld summary judgment respectively.

Orvis and the Court of Appeals continue to claim despite a record to the contrary, “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, much less the context in which it arose. 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.

b. The Orvis’ failure to plead or allege facts supporting the remaining missing elements of judicial estoppel defeat application of the doctrine.

i. Contrary to Orvis’ assertion reliance can be or was waived, reliance is a critical and indispensable requirement for judicial estoppel.

Orvis claims he need not present a necessary element of judicial estoppel because Johnson did not argue it was an element and did not preserve the issue below. This overlooks the requirements of Rule 56 that Orvis present facts showing he is entitled to judgment “as a matter of law” but also ignores the record below and on appeal. This claim that Johnson did not raise reliance is simply false. Johnson did clearly raise it in argument and by citing the specific cases calling for it in his pleadings.² For example, at the hearing before Judge Hanson on the elements necessary to support judicial estoppel which are lacking herein, counsel stated at R 2708 - Tr. p. 18, l. 1-2, "that's another party, that detrimentally changed its position by

²R. 2279-2281, R. 2508 -Tr. p. 18, l. 103, 23-24, p. 19, l. 3-12

reason of Salt Lake's inaccurate representation of Utah's water law in progress," and at R. 2708 - 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]. Orvis' attorney responded and also argued reliance to the trial court at R. 2708, Tr. p. 34, l. 20-25. 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. Judicial estoppel is also 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 partnership with Johnson.

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.. The District Court and Court of Appeals ignored this reliance element altogether. In *Masters v. Worsley, supra*, 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.]

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. 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.

ii. Orvis’ claim to be a privy of the SBA is false.

Orvis simply make a naked assertion that Johnson created no dispute of material fact that Orvis was privy of the SBA. Such assertion defies both the record and the law. Orvis asserts simply because it was admitted that he received an assignment of the SBA judgment he becomes *ipso facto* a privy. This ignores the issue in dispute -purchase of the assignment of the judgment through a sham dissolved LLC using embezzled partnership funds which make the judgment property of the partnership, not Orvis personally.

Johnson has asserted from the outset that Orvis purchased the judgment with monies wrongfully taken from the partnership and stated this in his Affidavit in Opposition to Summary Judgment, ¶¶4, 52, 53 and 54.³ 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). The facts of record show that the SBA judgment was purchased by an expired and defunct Utah limited

³Record 2267, 2280

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.⁴ 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.⁵

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 used embezzling partnership money to purchase the SBA and used a defunct "straw man" to disguise his identity. Johnson pointed out to the District Court and Court of Appeals 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.

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." As previously noted to this Court and not addressed by Orvis, this statute's substance has

⁴ Record 2256-2257; 2280-2281

⁵ *See also* Record 2098-2101, 2285-2367, 2389-2394

uniformly been the holding of Utah courts on partnership property beginning with *Deming v. Moss*, 123 P. 971 (Utah 1912):

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

See *Frandsen v. Holladay*, 739 P.2d 1111, 1113 (Utah App. 1987). *Deming* was quoted as standing for the rule that is “settled in this jurisdiction” and “amply supported by numerous authorities” in *Staats v. Staats*, 226 P. 677 (Utah 1924). Utah’s current statute was referenced in *Fullmer v. Blood*, 546 P. 2d 606 (Utah 1976):

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

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*. 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.

iii. Contrary to Orvis’ assertion, 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.⁶ Orvis claims that because the purpose of the deposition was to identify assets for collecting on the SBA judgment, that subject matter makes the subject matter of the lawsuit the same as the instant case regarding partnership embezzlement by Orvis and an accounting therefor. This is simply a stretch. The subject matters of the prior federal action and this state action are clearly different. Orvis engages in a fiction or disregards the actual content of this element 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.

Orvis distinguished the “actually litigated” requirement from *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) by claiming it related only to collateral estoppel and not judicial estoppel. The *Richards* case was indeed a case about collateral estoppel, however, *Masters* expressly adopted this requirement precisely to define judicial estoppel. The only subject matter litigated, and thus cognizable for application of judicial estoppel, in the prior SBA action were the foreclosure action and the guarantee contract. The specific Orvis-Johnson business relationship in this

⁶The 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.

case was not litigated in the prior SBA action, and so, Orvis fails the “same subject matter” test. He may not invoke judicial estoppel.

iv. Orvis’ claim the Johnson position was “successfully maintained” in federal court for judicial estoppel to apply is false.

Orvis overlooks the failure to have ever pled this element to begin with by claiming “it is undeniable . . . that . . . the SBA was unable to collect on its judgment.” This is indeed very deniable, as pointed out in Johnson’s brief. In fact, it indulges rank speculation to presume the SBA sat passive not collecting because they relied on a claim Johnson had no partnership with Orvis. There is simply no fact to support this proposition. Instead, the quite the contrary is shown. 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.⁷ 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.

Orvis somewhat confuses “successfully maintain” with “actually litigated, although both may be required.” 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

⁷see R. 2282, ¶50, R. 2508 - Tr. p. 17, l.10-14

(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.").

Thus, it is not a matter of having necessarily actually litigated a position, but that the position have been put before the Court, tried and tested in a courtroom and adopted by the Court and maintained by the party asserting it. This is substantially more than a cast off phrase in a deposition by a party. 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. This element of "successful maintenance" of an issue 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. The District Court and the Court of Appeals again ignored an essential element of judicial estoppel.

v. Orvis failed to address Johnson's purported prior statement to the SBA, if inconsistent, was the result of inadvertence or mistake, not bad faith.

Orvis again seeks refuge that a necessary legal element of his claim for relief under judicial estoppel need not be met because Johnson did not raise it below. This simply defies the requirement of being entitled to a judgment based upon undisputed facts "as a matter of law." The law requires six elements, not one. Yet 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.⁸ Mere inadvertence or mistake in making an inconsistent statement is not sufficient to sustain judicial estoppel. There must be “bad faith” to invoke judicial estoppel as discussed, *infra*, as well as all other essential elements. The SBA answer was at most a mistake and there is not any evidence of bad faith.

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),

This is an appeal of Judge Hanson’s decision. Whether Johnson had raised this element or not, Judge Hanson certainly made an explicit finding of its presence from which Johnson is entitled to appeal. 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

⁸ Record p. 2261

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. Contrary to Orvis' false assertion, Johnson's public policy and partnership accounting argument that judicial estoppel may not be used to preclude discovery of the truth were squarely raised in the Court of Appeals.

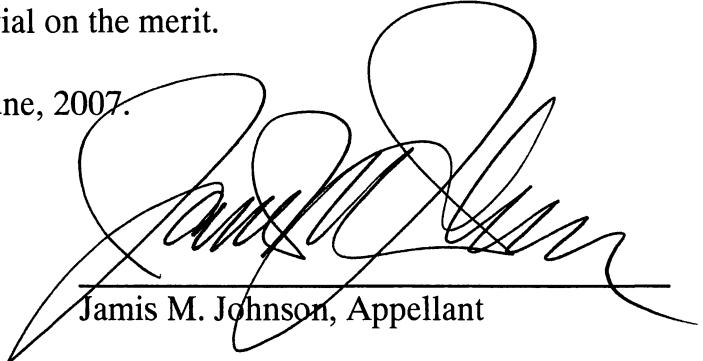
The claim that Johnson never asserted that judicial estoppel may not be used to preclude discovery of the truth again ignores every pleading he filed in the Court of Appeals. His initial Appellant's Brief contained an Argument VI entitled "ORVIS-JOHNSON PARTNERSHIP. A. The Orvis-Johnson partnership is clear and well documented and the district court should be required to require an accounting of the partnership immediately." Johnson's Appellant's Reply Brief contained an II.E. entitled "Orvis is Barred From Invoking the Doctrine to Block the Truth Herein." Orvis' deceit and embezzlement was raised before the trial court in part as to why judicial estoppel should not apply, R. 2708, Tr. p. 20, l. 1-6. It was argued in Johnson's Affidavit and Memorandum, *see e.g.* R. 2243, 2262. Orvis' contrary claim like most of his other arguments are simply refuted if the true pleadings and record are examined and not what Orvis mischaracterizes them as being. It is simply not credible to assert that Johnson's position that judicial estoppel cannot be used to

block discovery of the truth must be overlooked in this Court or to conceal the embezzlement, fraud and misappropriation of partnership funds by Orvis.

CONCLUSION

Orvis has failed to properly support a motion for summary judgement with all elements required to invoke the doctrine of judicial estoppel. His opening Brief mis-states the record and provides mere argument about what the law should be rather than what the law was at the time Judge Hanson rendered his improper Order. Based upon the foregoing, this Court is respectfully urged to reverse the Court of Appeals and District Court and to remand this to District Court for a trial on the merit.

DATED this 14th day of June, 2007.



Jamis M. Johnson, Appellant

CERTIFICATE OF SERVICE

I hereby certify that on June 14th, 2007, I served two copies of the attached APPELLANT'S REPLY BRIEF 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: _____