

2006

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

Utah Court of Appeals

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IN THE SUPREME COURT OF UTAH

JAYSON ORVIS,

Plaintiff and Respondent,

VS.

JAMIS M. JOHNSON,

Defendant and Petitioner.

Supreme Court Case No.
20061094-SC

BRIEF OF RESPONDENT

ON WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS AFFIRMING
JUDGMENT BY THE THIRD JUDICIAL DISTRICT COURT, THE HONORABLE
TIMOTHY R. HANSON PRESIDING

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UTAH APPELLATE COURTS
MAY 29 2007

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(a) & (5) (West 2004).

ISSUES PRESENTED

Issue # 1: Whether the Court of Appeals correctly construed and applied the parties' respective procedural burdens in affirming summary judgment in favor of Orvis¹ where, after Orvis presented evidence refuting an essential element for Johnson's² claims, the burden shifted to Johnson, the nonmoving party, to present evidence demonstrating there was a genuine issue of material fact for trial relative to that element?

This Court reviews pure questions of law for correctness. State v. Haltom, 2007 UT 22, ¶ 2, ___ P.3d ___.

Issue # 2: Whether the Court of Appeals correctly construed and applied the summary judgment standard in granting Orvis judgment where (1) Orvis submitted evidence showing Johnson's claim to a partnership interest in Orvis' businesses was barred by the doctrine of judicial estoppel because Johnson had testified unequivocally in a judgment collection proceeding with the SBA that he owned no interest in any partnership and successfully maintained that position by preventing the SBA from collecting its judgment, and (2) Johnson, the nonmoving party, failed to respond with

¹"Orvis" refers to Plaintiff and Respondent Jayson Orvis.

²"Johnson" refers to Defendant and Petitioner Jamis M. Johnson.

competent evidence demonstrating there was a genuine issue of material fact for trial as to whether he was judicially estopped from claiming such an interest?

This Court reviews the Court of Appeals' ruling on summary judgment for correctness. Machock v. Fink, 2006 UT 30, ¶ 8, 137 P.3d 779

DETERMINATIVE RULE

This case is governed by the following determinative rule:

Utah Rule of Civil Procedure 56³

(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, with or without support affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. 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

³The text quoted here is the text of Rule 56 at the time of Judge Hanson's decision in October 2004. In November 2004, Rule 56 was amended. However, the November 2004 amendments did not materially change the Rule with regard to the issues in this case. The redline version of the November 2004 amendment is contained in the Addendum as Exhibit 1.

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 his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

....

STATEMENT OF THE CASE

This case was filed on August 28, 2001, following Johnson's repeated assertions that he had a partnership interest in Orvis' credit repair businesses. [R. 1-14.] Orvis filed this action in the Third Judicial District Court for the State of Utah to obtain a declaratory judgment that Johnson has no right, claim or interest in any of Orvis' businesses, enterprises or entities, relating to credit repair. (the "Orvis' businesses"). [Id.] Judge Timothy R. Hanson was assigned as the presiding judge.

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

On August 30, 2002, third party defendants Victor Lawrence and Sam Spendlove filed a motion for summary judgment against Johnson, which Johnson opposed. [R. 1106-08, 1114-1233, 1469-93.] After hearing oral argument, Judge Hanson granted the motion. Judge Hanson ruled, *inter alia*, that Johnson was judicially estopped from asserting he was a partner in Orvis' businesses based on Johnson's testimony, in another judicial proceeding, denying he had any interest in any partnership. [R. 1849-51, 1924-33.] Johnson never appealed that summary judgment, the time for appeal has long since

passed, and that judgment was not the subject of the Court of Appeals' Opinion or the instant appeal. [R. 2638-39.]

On March 30, 2004, Orvis filed a motion for summary judgment on the grounds of judicial estoppel on Orvis' claims against Johnson and on Johnson's counterclaims against Orvis. [R. 1940-51, 1957-90.] On October 20, 2004, Judge Hanson granted Orvis' motion and, on November 23, 2004, entered a final judgment against Johnson on the ground of judicial estoppel. [R. 2607, 2619-22, 2623-29.]

Johnson appealed the Judgment on December 21, 2004. [R. 2638-39.] On September 28, 2006, in a published Opinion, the Court of Appeals affirmed the Judgment, Orvis v. Johnson, 2006 UT 394, 146 P.3d 886, and thereafter denied Johnson's Petition for Rehearing. This Court granted Johnson's petition for writ of certiorari on February 12, 2007.

STATEMENT OF FACTS

Johnson Denies Under Oath In A Prior Judicial Proceeding That He Had Any Interest In Any Partnership, Any LLC Or The Lexington Law Firm

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

On November 17, 1999, the SBA, in post-judgment supplemental proceedings in that action, (the "SBA proceedings") deposed Johnson to identify assets to satisfy its

judgment. [R. 2389-2484.] Before answering any questions, Johnson was sworn in by the court reporter, and swore to truthfully answer each of the questions. [R. 2484.] At the time his deposition was taken, Johnson was a licensed attorney in Utah who had practiced law for a number of years.⁴ [R. 2401, 2413.]

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

Q: Do you have any interest in any partnerships?

A: **No.** I mean, you know, often I'll have a joint venture with someone, but I don't have a partnership or set up a partnership or an LLC. You know, if I get a deal I say, Hey, do you want to do this deal together? We'll go up to Summit County and buy a lot.

....

Q. Any interest in any limited liability companies?

A. **No.** . . .

[R. 2424:16-2425:4 (the transcript of Johnson's SBA deposition is contained in the Addendum as Exhibit 2.)) When the SBA followed up with the statement: "[s]o a joint venture," [R. 2424:24] Johnson responded: "Yeah, you can call it that, but I don't have any outgoing [sic] partnerships." [R. 2424:25, 2425:1.] Johnson specifically denied having any interest in the major credit repair business entity -- Lexington Law Firm -- with which Mr. Orvis is involved:

⁴Sometime after his deposition was taken, Johnson was disbarred on unrelated matters. [R. 2412-2413.] See generally In re Discipline of Johnson, 2001 UT 110, 48 P.3d 881 (affirming order of disbarment).

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

[R. 2418:4-10 (emphasis added).] Johnson did not ask to have any of these questions clarified, did not state that he did not understand the question and did not ask to have any question re-asked. Moreover, Johnson never changed or modified any of his sworn testimony, either during the deposition or after his testimony was transcribed. [R. 2483-84.]

Orvis Purchases And Becomes The Assignee Of The SBA Judgment After The SBA Could Not Collect From Johnson On The Judgment.

As a result of Johnson's sworn testimony that he had no interest in any partnership or LLC or any other asset, the SBA did not identify any asset to execute upon to satisfy its judgment against Johnson. [R. 2389-84.] Unable to collect on its judgment, the SBA sold and assigned the judgment to a third party -- All Star Financial, LLC -- for a fraction of its face value on August 8, 2001. [R. 2513 (the assignment is contained in the Addendum as Exhibit 3).] On August 11, 2001, All Star Financial, LLC sold and assigned the SBA judgment to Orvis.⁵ [Id.]

⁵To date, Orvis has likewise been unable to collect on the judgment.

Contrary To His Sworn Testimony, Johnson Claims In This Action He And Orvis Are Partners In Orvis' Businesses; Orvis Moves For Summary Judgment.

By 2001, Johnson was repeatedly asserting that, since 1994, he owned a partnership interest in Orvis' credit repair businesses. [See R. 5, ¶ 23 (Compl. ¶ 23); 2267, ¶ 5.] In response, on August 28, 2001, Orvis filed a declaratory judgment action against Johnson seeking a declaration that Johnson has no right, claim or interest in any of Orvis' businesses. [R. 1-14.] Johnson responded to the complaint with an answer, counterclaim and third party complaint against Victor Lawrence, Deon Steckling and Sam Spendlove. [R. 20-39.] While Johnson used different labels for his numerous legal claims against Orvis, every one of those claims was based upon Johnson's assertion that he and Orvis are partners in Orvis' businesses.⁶ [R. 28-38.]

After substantial discovery had been conducted in the case, Orvis on March 30, 2004, filed a motion for summary judgment against Johnson, both with regard to Orvis' claims and Johnson's counterclaims against Orvis, on the ground of judicial estoppel. [R. 1940-51, 1957-90.] Orvis argued that Johnson was judicially estopped from claiming

⁶Judgment was previously entered against Johnson and in favor of defendants Victor Lawrence and Sam Spendlove on their motion for summary judgment on the grounds, inter alia, that Johnson was judicially estopped from asserting he was a partner in Orvis' businesses based on Johnson's testimony in the SBA judicial proceeding denying he had any interest in any partnership. [R. 1106-08, 1114-1233, 1469-93, 1849-51, 1924-33.] That final judgment is law of the case. See, e.g., Piacitelli v. S. Utah State College, 636 P.2d 1063, 1065 (Utah 1981) (stating "a final order, . . . unless reversed on appeal, is *res judicata* and binding on the[] parties").

a partnership with Orvis in Orvis' businesses -- an essential element Johnson must prove for all his claims -- because Johnson had previously denied owning any interest in any partnership, LLC or Lexington Law Firm in his sworn testimony in the SBA proceeding. [R. 1940-51, 1957-90.]

Johnson opposed Orvis' motion on three basic grounds: (1) Johnson's SBA testimony is not inconsistent with his position in this case that he is a partner with Orvis in Orvis' businesses; (2) if there is any ambiguity in Johnson's SBA testimony, there is a material issue of fact as to whether Johnson's testimony and his position in this case are inconsistent; and (3) the doctrine of judicial estoppel does not apply here. [R. 2257-64.]

The sole record Johnson filed in support of his opposition to Orvis' motion for summary judgment was an affidavit of Jamis Johnson (contained in the Addendum as Exhibit 4) and Corrections Supplementing Affidavit of Jamis Johnson (contained in the Addendum as Exhibit 5). [R. 2266-2515, 2608-18.] The only record Johnson submitted relative to the issue of whether Johnson's SBA testimony was inconsistent with his position in this case was: (1) Johnson's actual SBA testimony, and (2) **Johnson's statement in his affidavit that: "In his deposition, Jamis Johnson accurately disclosed the information requested by the SBA,"** [R. 2274, ¶ 39, Addendum Exh. 3] **including his testimony with regard to not having any interest in any partnership.** [R. 2275, ¶ 39.]

With regard to the doctrine of judicial estoppel, Johnson argued that there were

disputed issues of material fact with regard to **only three** of the elements of judicial estoppel: (1) the same persons or privy element, (2) the same subject matter element, and (3) the “successfully maintained” element. [R. 2262-64.] Johnson did not file or rely upon any record to support his position that these three elements were in dispute. Johnson never raised as an issue that reliance or bad faith/mistake were required, disputed elements; Johnson never submitted evidence showing there were genuine issues of disputed fact relative to those elements. [See R. 2242-65.]

The undisputed evidence before Judge Hanson established that the doctrine of judicial estoppel barred Johnson from claiming a partnership with Orvis, requiring that judgment be entered against Johnson on Orvis’ declaratory judgment claim and on Johnson’s counterclaims. That evidence included: (1) Johnson admitted in his affidavit that Orvis and the SBA were privies – “Orvis has, as the assignee of the SBA judgment . . .” [R. 2281, ¶ 60 & 2280, ¶¶ 52, 54, Addendum Exh. 3; R. 2513, Addendum Exh. 2];⁷ (2) the post-judgment SBA proceeding was a proceeding to determine whether Johnson had any assets, including any interest in any partnership and this action is an action to determine whether Johnson has a partnership interest in Orvis’ businesses; [R. 1-14, 20-55, 2381, 2389-2484] and (3) the SBA did not execute on any partnership interest

⁷There was no record as to the source of the money Orvis used to purchase the judgment. In particular, there was no evidence that Orvis used money from the “alleged partnership” to purchase the SBA judgment. There also was no record or legal authority demonstrating that Orvis violated any legal duty to Johnson by buying the SBA judgment.

Johnson claims in this action because Johnson testified under oath in the SBA proceeding that he did not have any interest in any partnership.

Judge Hanson Grants Orvis Summary Judgment Based On Judicial Estoppel.

Judge Hanson heard oral argument on Orvis' motion for summary judgment on August 9, 2004. [R. 2607.] After taking the motion under advisement, on October 20, 2004, Judge Hanson entered a Minute Entry granting Orvis summary judgment on the ground of judicial estoppel, ruling:

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

[R. 2619-22 (contained in the Addendum as Exhibit 6).]

On November 23, 2004, Judge Hanson entered a final Judgment in favor of Orvis and against Johnson on Orvis' claims and Johnson's counterclaims. The Judgment declared that "Defendant has no right, claim or interest in any business, enterprise or entity, relating to credit repair, in which plaintiff has any ownership interest." [R. 2631; 2630-32 (contained in the Addendum as Exhibit 7).] Judge Hanson's decision and the Judgment were supported, not only by the record,⁸ but by findings of undisputed facts

⁸Judge Hanson's decision and the Judgment were based on undisputed facts, including the following material facts Judge Hanson found to be undisputed:

(1) The SBA took Johnson's deposition in post-judgment supplemental

and legal conclusions he entered the same day as the Judgment.⁹ [R. 2623-29 (contained in the Addendum as Exhibit 8).]

The Utah Court of Appeals Affirms Judge Hanson's Decision and Judgment

Johnson appealed the final Judgment to the Utah Court of Appeals. After full briefing and oral argument, the Utah Court of Appeals issued a published opinion

proceedings in United States of America v. Jamis Johnson, 2:95-CV-838J, in the United States District Court for the District of Utah, on November 17, 1999, to identify assets on which it could execute to collect its judgment against Johnson. [R. 2627, ¶¶ 4-5.] At his deposition, Johnson, under oath, denied he had any interest in any partnership, LLC, or Lexington Law Firm. [R. 2627-28, ¶ 5.]

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

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

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

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

⁹Judge Hanson's Conclusions of Law included:

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

(2) "Judicial estoppel does not require that the parties to the prior and present litigation be the same." [Id. at ¶ 2.]

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

affirming the final Judgment on grounds of judicial estoppel. The Court of Appeals ruled that Johnson was precluded from asserting a partnership interest in Orvis' businesses under the doctrine of judicial estoppel and that summary judgment was warranted because "Johnson failed to present genuine issues of material fact that a partnership existed between him and Orvis." Orvis v. Johnson, 2006 UT App 394, ¶ 24, 146 P.3d 886.

SUMMARY OF ARGUMENT

This Court should affirm summary judgment in Orvis' favor because Johnson is judicially estopped from claiming an essential element of his case -- a partnership interest in Orvis' businesses -- and therefore no genuine issue of material fact exists for trial and judgment as a matter of law is proper.

The Court of Appeals correctly shifted, under current Utah law, the procedural summary judgment burden to Johnson, as the nonmoving party, to show a genuine issue of material fact existed for trial after Orvis satisfied his initial burden as the moving party. In support of his motion, Orvis submitted Johnson's own sworn deposition testimony in the SBA proceeding wherein Johnson unambiguously testified that he did not have any interest in any partnership. Based on that and other evidence, Orvis argued Johnson was judicially estopped in this case from asserting a partnership interest in Orvis' businesses -- an essential element of Johnson's case upon which he had the burden of proof. Once Orvis met his summary judgment burden, the burden then was

correctly shifted to Johnson to show there was a genuine issue of material fact as to whether he is judicially estopped from asserting an Orvis-Johnson partnership to avoid having summary judgment entered against him.

In the alternative, if the burden shifting approach applied by the Court of Appeals is not the current summary judgment procedure under Utah law, this Court should adopt such an approach to summary judgment motions under Utah Rule of Civil Procedure 56. This will align Utah law with the United States Supreme Court's interpretation and application of Federal Rule of Civil Procedure 56, upon which Utah's rule is based. In so doing, Utah's summary judgment procedure will be better positioned to fulfill its purpose of promoting judicial efficiency by helping to eliminate baseless claims from the crowded calendars of this State's courts before the expenditure of time and money for trial.

Under that proper summary judgment procedural standard, the Court of Appeals correctly affirmed the judgment in Orvis' favor and against Johnson based on the record. After Orvis challenged Johnson's ability to prove an essential element of his case based upon judicial estoppel, Johnson wholly failed to carry his burden of responding with competent evidence showing the presence of a genuine dispute of material fact for trial on that issue, which is dispositive as to all Johnson's claims. Johnson failed to present proof of a genuine dispute as to: (1) whether Johnson's sworn testimony in the SBA proceeding that he did not have an interest in any partnership is inconsistent with his

claim in this case that he has a partnership interest in Orvis' businesses; (2) whether Orvis is the SBA's privy; (3) whether this case involves the same subject matter as the SBA post-judgment proceeding; or (4) whether Johnson successfully maintained, in the SBA post-judgment collection proceeding, his position that he did not have an interest in any partnership. Johnson therefore failed to meet his summary judgment burden, and judgment as a matter of law was correctly entered in Orvis' favor.

Finally, Johnson did not argue to the district court that there was a genuine issue as to the reliance or bad faith/mistake elements of judicial estoppel. Johnson thereby waived any such argument on appeal as to those elements. Likewise, Johnson has waived his arguments to this Court that applying judicial estoppel in this case violates public policy, and that this Court should order an accounting of the alleged Johnson-Orvis partnership because those arguments were raised for the first time in Johnson's brief to this Court. Accordingly, they should not be considered in this appeal and do not provide a legitimate basis for finding error in the Court of Appeals' disposition of the case.

ARGUMENT

I. THE COURT OF APPEALS, UNDER UTAH PROCEDURAL LAW, CORRECTLY HELD THAT THE BURDEN SHIFTED TO JOHNSON TO PRESENT EVIDENCE ON THE DISPOSITIVE ISSUE OF JUDICIAL ESTOPPEL AFTER ORVIS PUT FORTH EVIDENCE ESTABLISHING THAT, AS A RESULT OF JUDICIAL ESTOPPEL, JOHNSON COULD NOT PROVE A PARTNERSHIP INTEREST.

The Court of Appeals correctly ruled that, under Utah procedural law, the

summary judgment burden shifted to Johnson after Orvis made a prima facie showing that Johnson could not prove, based upon judicial estoppel, an essential element of his case -- a partnership with Orvis. Summary judgment is properly granted under the Utah Rules of Civil Procedure where “there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Utah R. Civ. P. 56(c); Waddoups v. Amalgamated Sugar Co., 2002 UT 69, ¶ 31, 54 P.3d 1054. The rules of civil procedure place an initial burden upon the moving party to present evidence -- in the form of affidavits, depositions, answers to interrogatories, admissions and the like -- 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. Utah R. Civ. P. 56(c); Waddoups, 2002 UT 69, ¶ 31; Jensen v. IHC Hospitals, Inc., 944 P.2d 327, 339 (Utah 1997). Once the moving party satisfies its initial burden, the summary judgment burden is shifted to the nonmoving party to present evidence showing the presence of genuine issues of material fact for trial. Utah Rule of Civ. P. 56(e); Waddoups, 2002 UT 69, ¶ 31; Grand County v. Rogers, 2002 UT 25, ¶ 21, 44 P.3d 734.

If the moving party does **not** bear the ultimate burden of proof, it 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.

See In re Discipline of Sonnenreich, 2004 UT 3, ¶ 41, 86 P.3d 712; Waddoups, 2002 UT 69, ¶ 31; Gerbich v. Numed, Inc., 1999 UT 37, ¶ 12, 977 P.2d 1205; Jensen, 944 P.2d at

339; Shaw Res. Ltd., L.L.C. v. Pruitt, Gushee & Bachtell, P.C., 2006 UT App 313, ¶ 22, 142 P.3d 560 (quoting Waddoups, 2002 UT 69, ¶ 31); see Massey v. Griffiths, 2007 UT 10, ¶¶ 12-13, 152 P.3d 312 (moving party without ultimate burden met its summary judgment burden by challenging the validity of the plaintiffs' tax deeds); Thayne v. Beneficial Life, Inc., 874 P.2d 120, 124 (Utah 1994) (moving party without ultimate burden met summary judgment burden by challenging the existence two elements of plaintiff's claim).

The moving party, to satisfy its burden, must present evidence in opposition to the motion demonstrating there are admissible facts that can be interpreted to satisfy the essential elements of its case, entitling it to proceed to trial. Anderson Dev. Co., L.C. v. Tobias, 2005 UT 36, ¶ 23, 116 P.3d 323; In re Discipline of Sonnenreich, 2004 UT 3, ¶ 41; Gerbich, 1999 UT 37, ¶ 12; Jensen, 944 P.2d at 338; Thayne, 874 P.2d at 124; Shaw, 2006 UT App 313, ¶ 22; Derby, 2001 UT App, ¶ 18; Burns v. Cannondale Bicycle Co., 876 P.2d 415, 419 (Utah Ct. App 1994). If the nonmoving party fails to do so, the moving party is entitled to judgment in its favor as a matter of law. Tobias, 2005 UT 36, ¶ 23; see Utah R. Civ. P. 56(e) (if the nonmoving party fails to "set forth specific facts showing that there is a genuine issue for trial [then] summary judgment, if appropriate, shall be entered against him.").

This burden-shifting approach to summary judgment motions is a matter of existing Utah law, contrary to Judge Bench's concurring opinion in this case and his dissent in Shaw. Orvis v. Johnson, 2006 UT App., ¶¶ 25-27, 146 P.3d 886 (Bench, P.J., concurring); Shaw, 2006 UT App 313, ¶¶ 61-68 (Bench, P.J., dissenting). This burden-shifting framework is clearly stated in the procedures this Court adopted in Rule 56 and is illustrated by this Court's decisions.

The Utah Constitution specifically empowers this Court to adopt the procedural rules governing the method by which civil disputes are adjudicated. Utah Const. Art. VIII, § 4; see Utah Code Ann. § 78-2-4(1) (West 2004). This Court, pursuant to its constitutional rule-making authority, adopted the Utah Rules of Civil Procedure and has made changes to those rules where appropriate.¹⁰ Every new procedural rule or rule change, prior to adoption by this Court, has been subjected to extensive deliberation and consideration by the Court's Advisory Committee on the Rules of Civil Procedure; by the public, the bench, and the bar during a comment period; and by this Court before final adoption.¹¹

¹⁰This Court's change to procedural rules, pursuant to its rule-making authority, is significantly different from the Court's change to substantive common law rules by a subsequent decision. A change to substantive common law rules only occurs under "a very exacting standard" once a "substantial burden" has been met. Shaw, 2006 UT App 313, ¶ 65 (Bench, J., dissenting) (citations omitted).

¹¹The public can require further deliberation through their elected representatives in the Legislature and the Legislature's ability to seek a rule's change. Utah Const. Art. VIII, § 4; Utah Code Ann. 78-2-4(1) (West 2004).

This Court adopted Rule 56 – the rule governing the procedure for summary judgment motions – through this deliberative rule-making process. The procedure established in Rule 56 is the burden-shifting approach used by the Court of Appeals in this case. Rule 56(c) requires a party moving for summary judgment to present evidence in the form of pleadings, depositions, answers to interrogatories, and admissions on file, affidavits, and the like showing “that there is no genuine issue of material fact for trial and that [they] are entitled to judgment as a matter of law.” Utah R. Civ. P. 56(c). Once a moving party has properly supported her motion as required by Rule 56(c), Rule 56(e) shifts the burden to the nonmoving party and requires him to respond with evidence “set[ting] forth specific facts showing that there is a genuine issue for trial.” If the nonmoving party fails to meet his burden, summary judgment “shall be entered” in the moving party’s favor. Utah R. Civ. P. 56(e).

Rule 56’s burden-shifting approach to summary judgment motions is clearly illustrated by this Court’s decision in Waddoups, 2002 UT 69. There, this Court affirmed summary judgment in favor of the moving defendant on the ground that plaintiffs had failed to meet their burden as the nonmoving party. Id. at ¶¶ 34, 36. This Court applied the Rule that under Utah law “once the moving party challenges an element of the nonmoving party’s case on the basis that no genuine issue of material fact exists for trial, the burden shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact.” Id. at ¶ 31.

In Waddoups, defendant, as the moving party, met its initial burden by pointing out that plaintiffs did not have proof sufficient to meet an essential element of their intentional interference and conspiracy claims.¹² Id. at ¶ 33. As a result, the summary judgment burden shifted to the plaintiffs to demonstrate the presence of a genuine issue of material fact for trial to avoid having summary judgment entered against them. Id. at ¶¶ 33-34, 35-36. Because plaintiffs did not present competent evidence to demonstrate there was a genuine issue of material fact, this Court properly affirmed summary judgment in defendant's favor. Id. at ¶ 34, 36.

Here, the Court of Appeals held that Orvis properly supported his motion with admissible evidence of Johnson's own sworn testimony and judicial records from the SBA case. Orvis thus satisfied his initial burden when he challenged the fundamental essential element of Johnson's case. Under the plain requirements of Rule 56(e), as the Court of Appeals correctly ruled, the burden then shifted to Johnson to present evidence in opposition to the motion that could be interpreted to satisfy the essential element of his case, such that there was a genuine issue for trial.

Accordingly, the Court of Appeals correctly construed and applied the procedural burdens borne by opposing parties to a summary judgment motion under Utah law, and

¹²The opinion does not make clear what the defendants argued relative to plaintiffs conspiracy claim. See Waddoups, 2002 UT 69, ¶¶ 35-36. However, as the defendants' brief in that case makes clear, their sole position to this Court was that summary judgment was appropriate because "plaintiffs provide no evidence to support their claim" Br. of Appellee 48 (Case No. 20000776-SC) (on file with the Utah State Law Library).

this Court should therefore affirm summary judgment in Orvis' favor.

II. IN THE ALTERNATIVE, IF THE BURDEN-SHIFTING APPROACH APPLIED BY THE COURT OF APPEALS IS NOT UTAH LAW, THIS COURT SHOULD NOW ADOPT SUCH AN APPROACH TO DECIDING SUMMARY JUDGMENT MOTIONS IN UTAH.

If the Court determines the burden shifting approach applied by the Court of Appeals is not Utah law -- contrary to the language of Rule 56 and the applicable case law -- the Court should nonetheless adopt that approach to summary judgment motions in Utah, thereby aligning Utah law with the United States Supreme Court's interpretation of Federal Rule of Civil Procedure 56, upon which Utah Rule of Civil Procedure 56 is based. In so doing, this Court will better position Utah's summary judgment procedure to fulfill its purpose of promoting judicial efficiency by eliminating baseless claims from the calendars of Utah's district courts before the expenditure of the time and cost for needless trials. After adopting such an approach as Utah law, this Court should affirm, as correct, the application of that approach in this case.¹³

The Utah Constitution and the Utah Code grant this Court with authority to "adopt rules of procedure" to be used in the courts of the state and charge this Court with

¹³Celotex's burden shifting approach to summary judgment is the growing trend in this country. Thirty-five states have either adopted Celotex or cited Celotex with approval. See Thomas W. Logue and Javier Alberto Soto, Florida Should Adopt the Celotex Standard For Summary Judgments, Fla. B.J., Feb. 2002 at 20, App. 1 (collecting cases of the thirty-five states that have either adopted or cited Celotex with approval). As the Supreme Court of Massachusetts stated in adopting Celotex: "it makes eminent good sense to do so." Kourouvacilis v. General Motors Corp., 575 N.E.2d 734, 738 (Mass 1991).

“governing the practice of law.” Utah Const. Art. VIII, § 4; Utah Code Ann. § 78-2-4(1) & (3) (West 2004). The rules of procedure governing the practice of law in civil cases in this State have been designed by this Court to “secure the just, speedy, and inexpensive determination of every action.” Utah R. Civ. P. 1(a). As an integral part of the rules of civil procedure, summary judgment should be interpreted and applied by courts in a manner that most effectively promotes the rules’ ultimate design.

This is especially true in this era of mere notice pleading, see Utah R. Civ. P. 8(a), wherein summary judgment provides the only effective mechanism for a court to pierce the pleadings of a case, test its merits, and eliminate baseless claims before the court and parties needlessly spend the time and resources for trial. See Amjacs Interwest, Inc. v. Design Assocs., 635 P.2d 53, 54 (Utah 1981) (noting purpose of summary judgment is to eliminate time and expense of trial on baseless claims); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (“[W]ith the advent of ‘notice pleading,’ the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment.”); Martin B. Louis, A Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L. J. 746 (1974) (observing that, due to notice pleading, complaints will often survive motions to dismiss and, thus, “the motion for summary judgment has become the first real opportunity for identifying factually deficient claims or defenses”).

A burden-shifting approach which this Court applied in Waddoups, 2002 UT 69, ¶ 31, the Court of Appeals applied in this case, Orvis v. Johnson, 2006 UT App. 394, ¶ 16, 146 P.3d 886, and the United States Supreme Court, under the federal rule, applied in Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986), allows summary judgment procedure to be used most effectively.¹⁴

This approach aligns the burdens borne by opposing parties to a summary judgment motion with the ultimate burden they bear at trial. A moving party that does not bear the ultimate burden of proof on a claim or issue can discharge its initial burden by challenging, in the manner provided for in Rule 56(c), an essential element of the nonmoving party's case on the basis that no genuine issue of material fact exists as to that element for trial, without having to affirmatively negate the entirety of the nonmoving party's case. See Waddoups, 2002 UT 69, ¶ 31; Celotex, 477 U.S. at 323, 325. Summary judgment is appropriate in this circumstance because “a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.” Schafir v. Harrigan, 879 P.2d 1384, 1391 (Utah Ct.

¹⁴Because Utah Rule 56 and Federal Rule 56 are substantially similar, see Utah R. Civ P. 56, Compiler's Notes, the United States Supreme Court's interpretation and application of the federal rule is persuasive as to the proper interpretation and application of Utah's rule. Tucker v. State Farm Mut. Auto. Ins. Co., 2002 UT 54, ¶ 7 n.2, 53 P.3d 947 (“Interpretations of the Federal Rules of Civil Procedure are persuasive where the Utah Rules of Civil Procedure are ‘substantially similar’ to the federal rules.”); 438 Main Street v. Easy Heat, Inc., 2004 UT 72, ¶ 64, 99 P.3d 801 (“[S]ince the Utah Rules of Civil Procedure were fashioned after the Federal Rules of Civil Procedure, we may look to decisions under the federal rules for guidance.”)

App. 1994) (quoting Celotex, 477 U.S. at 323) (internal quotation marks omitted).

Once the moving party makes this initial showing, the burden is then shifted to the nonmoving party to present the court with competent evidence showing the presence of a genuine dispute of material fact as to that challenged element, making a trial to resolve that dispute necessary. See Waddoups, 2002 UT 69, ¶ 31; Celotex, 477 U.S. at 322-23.

As the United States Supreme Court has observed:

Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Celotex, 477 U.S. at 327. A burden-shifting approach to summary judgment, which aligns the summary judgment burden with the ultimate burden borne by the parties at trial, best serves this principle and promotes judicial efficiency:

If the party moving for summary judgment must discharge a rigorous burden regardless of whether he would bear the burden of proof of trial, he could almost never compel the pleader to demonstrate that he can prove the essential elements [of his case]. As a result the movant could rarely intercept a factually deficient claim or defense.

Louis, *supra* p.22, at 752.

Placing a less rigorous burden on moving parties who do not bear the burden of proof at trial, by allowing them to meet their initial burden by challenging the nonmoving party's ability to prove an essential element of his or her case, allows the summary judgment procedure to better serve its purpose of "isolat[ing] and dispos[ing] of factually

unsupported claims or defenses.” Id. at 323-24 (noting that summary judgment rule should be interpreted in a way that allows it to accomplish its principal purpose of isolating and disposing of factually unsupported claims and adopting burden shifting approach). As this Court has repeatedly recognized, the very purpose of summary judgment is to avoid unnecessary trials and the accompanying burden and expense on the parties and the courts. Reagan Outdoor Advertising, Inc. v. Lundgren, 692 P.2d 776, 779 (Utah 1984) (noting purpose of summary judgment rule is to avoid unnecessary trial); Amjacs Interwest, Inc. v. Design Assocs., 635 P.2d 53, 54 (Utah 1981) (noting that purpose of summary judgment is to “eliminate the time, trouble and expense” of trial); Continental Bank & Trust Co. v. Cunningham, 353 P.2d 168, 170 (Utah 1960) (same); see Charles E. Clark, The Summary Judgment, 36 Minnesota L. Rev. 567, 579 (1952) (stating, as one of the principal draftsmen of Federal Rule 56, that “summary judgment is an important and necessary part of the series of devices designed for the swift uncovering of the merits and either their effective immediate disposition or their advancement” to trial).

If a nonmoving party is challenged on an essential element of its case, and is unable to respond by presenting the court with competent evidence showing a genuine issue of material fact worthy of trial, proceeding to trial would only waste the trial court

and jurors' time and add to the cost and burdens of civil litigation.¹⁵ There is simply no question that resources are wasted by permitting a case to be tried when a party has no evidence to establish a necessary element and the exact same outcome (failure on the claim) could be obtained through summary judgment.

For example, if this Court would have reversed summary judgment in the defendant's favor in Waddoups because defendant did not affirmatively disprove the plaintiffs' case, the case would have proceeded to trial, even though plaintiffs had no evidence to establish essential elements of intentional interference and conspiracy and the eventual outcome for plaintiff would have been exactly the same. 2002 UT 69, ¶¶ 34, 36. Likewise, if the D.C. Circuit's decision reversing summary judgment in Celotex would have been adopted by the Supreme Court, the parties in that case would have been forced to trial because the defendant was unable to disprove the causation element of the plaintiff's case, even though the plaintiff had no evidence to create a genuine issue for trial on that element and the plaintiff's case therefore would necessarily have failed. 477 U.S. at 320. In both cases, application of a burden-shifting approach to summary judgment allowed the summary judgment procedure to fulfill its principal purpose of promoting judicial efficiency and justice, see Continental Bank & Trust, 353 P.2d at 332

¹⁵The burden on jurors -- disinterested members of the public -- is particularly acute because they will be required to spend their time participating in voir dire and to hear a plaintiff's entire case in chief, only to have a directed verdict entered due to the plaintiff's failure to provide evidence supporting an essential element of his or her case. See Utah R. Civ. P. 50(a).

(noting truism that “justice delayed is justice denied”), by avoiding the time, resources and expense inherent in civil litigation by timely eliminating baseless claims.

Although the Court has not expressly adopted Celotex as a matter of Utah law, see Harline v. Barker, 912 P.2d 433, 445 n.13 (Utah 1996), both this Court and the Court of Appeals have recognized the utility of this burden-shifting approach and have both applied this approach¹⁶ and cited Celotex with approval.¹⁷ The Court should not retreat from this precedent.

The restrictive approach to summary judgment that Johnson appears to advocate, based on Judge Bench’s dissent in Shaw, 2006 UT App 313, ¶¶ 61-68, would prevent the summary judgment procedure from fulfilling its very purpose. Under that approach, a moving party who does not bear the ultimate burden of proof at trial and is unable to affirmatively disprove the nonmoving party’s case in its entirety would nonetheless be forced to trial -- even where the nonmoving party has no evidence showing a genuine dispute on an issue dispositive of his claim. That approach would have allowed the meritless claims in both Waddoups and Celotex to proceed to a full trial.

Adoption of Judge Bench’s approach is unwise because it would virtually grind to a halt the ability of Utah’s district courts to resolve other meritorious and important

¹⁶Waddoups, 2002 UT 69, ¶ 31; Grand County; 2002 UT 25, ¶ 21; Shaw, 2006 UT App 313, ¶ 22; Andalex Res., Inc. v. Myers, 871 P.2d 1041, 1046-47.

¹⁷Tobias, 2005 UT 36, ¶ 23; Jensen, 944 P.2d at 338; Andalex Res., Inc. v. Myers, 871 P.2d 1041, 1046-47; Burns v. Cannondale Bicycle Co., 876 P.2d 415, 419 (Utah Ct. App. 1994); Schafir v. Harrigan, 879 P.2d 1384, 1391 (Utah Ct. App. 1994).

disputes. The district courts of this state have a staggering and building backlog. For example, in fiscal year 2006, 32,497 civil cases, aside from criminal and family law matters, were filed in the Third Judicial District Court alone. Utah Courts Caseload Statistics FY2006, District 3 (available at www.utcourts.gov/stats/). The Legislative Auditor General has further concluded, based on clearance rates in the district court, that the civil backlog is building. Report to the Legislature, Number 2005-05, A Performance Audit of the Timeliness of Civil Cases in District Court, 26-29 (April 2005). Under these circumstances, the district courts are in need of greater flexibility in dealing with and resolving cases, especially with cases when a party has no evidence to prove a fact essential to her claims.

Not only would a restrictive approach place a greater burden upon the courts, it also exacerbates an already heavy burden and expense that litigants must bear. As one commentator has explained:

Refusal of summary disposal of the case may be a real hardship on the more deserving of the litigants; since appeal does not lie from refusal, as it does from the grant, the penalties may be the severer. A court has failed in granting justice when it forces a party to an expensive trial of several weeks' [sic] duration to meet purely formal allegations without substance fully as much as when it improperly refuses to hear a case at all.

Clark, *supra* p. 25 at 578. Likewise, as former United States Supreme Court Justices Stewart, Powell, and Rehnquist have stated:

Delay and excessive expense now characterize a large percentage of all civil litigation The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. Persons or businesses of

comparatively limited means settle unjust claims and relinquish just claims simply because they cannot afford to litigate. Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system.

85 FRD 521, 523 (1980) (dissenting statement to 1980 Amendments to the Federal Rules of Civil Procedure). Forcing litigants who are faced with claims that will ultimately fail, but for which they are unable to affirmatively disprove every element, to endure the tremendous expense of a full trial, unjustifiably clogs the courts, prevents timely resolution of legitimate disputes, and otherwise forces capitulation to meritless claims.

In sum, if this Court does not agree that Court Appeals followed Utah law in applying a burden-shifting approach to summary judgment, this Court should nonetheless adopt that approach to govern summary judgment practice in Utah. In so doing, Utah's summary judgment rule will more effectively fulfill its principal purpose of promoting judicial efficiency by eliminating baseless claims and defenses prior to the time and expense of trial. Further, because the Court of Appeals correctly applied such an approach in this case, this Court should affirm summary judgment in Orvis' favor.

III. SUMMARY JUDGMENT IN ORVIS' FAVOR SHOULD BE AFFIRMED BECAUSE THE COURT OF APPEALS CORRECTLY APPLIED THE SUMMARY JUDGMENT STANDARD IN FINDING THAT JOHNSON FAILED TO PRESENT EVIDENCE CREATING A GENUINE ISSUE OF FACT FOR TRIAL.

The Court of Appeals correctly applied the summary judgment standard by affirming summary judgment in Orvis' favor where it is undisputed that Johnson is judicially estopped from asserting a partnership interest in Orvis' businesses -- the

fundamental essential element of Johnson's case -- entitling Orvis to judgment as a matter of law. Utah R. Civ. P. 56(c); Grand County, 2002 UT 25, ¶ 21.

As discussed in Part I, the Court of Appeals correctly construed and applied the procedural summary judgment burdens. In his summary judgment motion, Orvis challenged the fundamental element of Johnson's case by putting forth evidence that Johnson in the SBA proceeding had denied, under oath, that he had any interest in any partnership. That evidence proved that Johnson was judicially estopped from taking the opposite position in this case.

The policy behind the judicial estoppel doctrine is clear:

The doctrine is said to have found its foundation in the obligation under which every man is placed to speak and act according to the truth of the case; and in the policy of the law to suppress the mischiefs from the destruction of all confidence in the dealings of men, if they were allowed to deny that which by their solemn and deliberate acts they declared to be true. And this doctrine applies with peculiar force to admissions or statements made under the sanction of an oath, in the courts of judicial proceedings. The chief security and safeguard for the purity and efficiency of the administration of justice is to be found in the proper reverence for the sanctity of an oath.

Hamilton v. Zimmerman, 37 Tenn. (5 Sneed) 39, 1857 WL 2547, * 4 (1857). As this Court has reiterated, the purpose of the doctrine is "to uphold the sanctity of oaths, thereby safeguarding the integrity of the judicial process from conduct such as knowing misrepresentations or fraud on the court." Salt Lake City v. Silver Fork Pipeline Corp., 913 P.2d 731, 734 (Utah 1995). Accordingly, Johnson's testimony in the SBA proceeding, contrasted with his new position in this case, established Johnson lied --

either under oath, in SBA proceeding or before the court below. Judicial estoppel exists to “raise[] the cost of [such] lying.” Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1428 (7th Cir. 1993). The cost to Johnson was that he must be held to his testimony before the SBA, through an adverse judgment in this case on his claim of a partnership with Orvis.

Johnson’s response to the summary judgment motion failed to demonstrate evidence creating a dispute for trial on whether judicial estoppel should apply. Johnson opposed Orvis’ motion on two basic grounds: (1) his sworn testimony in the SBA proceeding -- that he did not have any interest in any partnership -- was not inconsistent with his position in this case that he has a partnership interest in Orvis’ businesses or, alternatively, there is a dispute of material fact as to whether his sworn testimony is inconsistent with his position in this case; and (2) three of judicial estoppel’s elements -- the prior judicial proceeding involved the same parties or their privies, this case and the prior judicial proceeding involve the same subject matter, and the prior position was successfully maintained in the prior judicial proceeding -- were not met in this case. [R. 2257-64.] Johnson did not dispute that any other elements of judicial estoppel, besides those three, had been satisfied. [See R. 2242-65.] The only evidence Johnson filed in support of his opposition was his Affidavit and a Corrections Supplementing Affidavit of Jamis Johnson. [R. 2266-2515, Addendum Exh. 4; 2608-18, Addendum Exh. 5.]

Johnson's arguments in opposition to Orvis' motion and the evidence he put forth in support of those arguments are wholly insufficient to meet his burden of showing a genuine issue of material fact worthy of trial as to whether he is judicially estopped in this case from asserting a partnership interest in Orvis' businesses.

A. There Is No Genuine Dispute As To Whether Johnson's Sworn Testimony Denying Any Interest In Any Partnership Is Inconsistent With His Position In This Case That He is A Partner With Orvis In Orvis' Businesses.

The Court of Appeals correctly held, viewing the evidence in the light most favorable to Johnson, that Johnson failed to show a genuine dispute for trial as to whether his sworn testimony in the SBA proceeding -- that he did not have any interest in any partnership -- was inconsistent with his position in this case that he has a partnership interest in Orvis' businesses. During his deposition in the SBA proceeding, Johnson was asked a series of questions to identify any assets of Johnson's on which the government may execute to collect its judgment. [R. 2395–2482, Addendum Exh. 2.] As part of that line of questioning, Johnson was asked about his savings and checking accounts, certificate of deposits, mutual funds, retirement accounts, and life insurance policies. [R. 2421–24.] The very next question was: “Do you have any interest in any partnerships?” [R. 2424:16–17.] Johnson's answer to this question was:

No. I mean, you know, often I'll have a joint endeavor with somebody, but I don't have a partnership or set up a partnership or an LLC. You know, if I get a deal I say, [h]ey, do you want to do this deal together? We'll go up to summit county and buy a lot.

[R. 2424:18–23.] When the SBA followed up with the statement: “[s]o a joint venture,”

[R. 2424:24] Johnson responded: “Yeah, you can call it that, but I don’t have any outgoing [sic] partnerships.” [R. 2424:25, R. 2425:1.]

Based upon this sworn testimony, it is undisputed that Johnson unequivocally represented under oath that he did not have any interest in any partnerships. Johnson argues, nevertheless, that there is a genuine issue as to whether his sworn statement is inconsistent with his position in this case on the basis that his statement before the SBA “was intended to refer only to real estate ventures.” [Pet’r Br. 22.¹⁸] Johnson did not present any evidence to support his bald assertion. In fact, the only evidence relative to this issue is the plain language of Johnson’s statement in the SBA proceeding and Johnson’s affidavit testimony that he “accurately disclosed the information requested by the SBA” in his deposition, including his interests in any partnerships. [See R. 2424-25; 2274-75, ¶ 39, Addendum Exh. 4.] There is nothing in Johnson’s affidavit that supported his assertion that he believed the SBA’s question only referred to real estate partnerships or that his answer only addressed real estate partnerships. [See generally R. 2266-83.]

To the contrary, the evidence in this case does show that in twenty-seven pages of questions preceding the partnership question, not one single question concerns property

¹⁸Johnson incorrectly refers to his brief as Brief of Appellant. Orvis’ cites to Johnson’s brief as Brief of Petitioner.

ventures or partnerships in which Johnson may have been involved. [See R. 2397–2424, Addendum Exh. 1.]¹⁹ In fact, the only questions about real estate concerned the address of his primary residence [R. 2398:2] and to whom he paid rent for his business office. [R. at 2401:21–25, 2402:1–2.] All the other questions prior to the partnership question concern income taxes, Johnson’s employment, Johnson’s sources of income, and Johnson’s interest in and income from D.M. Johnson & Associates, LLC. [See R. 2395–2482.] Johnson’s unsupported, bald assertion cannot create a genuine issue of fact, and, even when viewing facts in the light most favorable to the nonmoving party, a court may not assume facts for which no evidence is offered. Dairy Products Servs. Inc. v. City of Wellsville, 2000 UT 81, ¶ 24, 13 P.3d 581; Peterson v. Coca-Cola USA, 2002 UT 42, ¶ 20, 48 P.3d 941. The Court of Appeals therefore correctly held that Johnson failed to meet his burden of showing a genuine dispute as to whether his SBA sworn testimony statement and his position in this case are inconsistent and correctly granted summary judgment in Orvis’ favor.

B. Johnson Failed To Show A Genuine Issue As To Whether Orvis Is The Privy Of The SBA.

The Court of Appeals correctly held that Johnson failed to create a genuine issue of material fact for trial as to whether Orvis is the privy of the SBA because the

¹⁹Although the questioning did not involve property interests, Johnson did mention having “flipped” real estate in Park City in answering a question about whether all the income he generated came from legal work. [R at 2415:8–11.]

undisputed evidence shows that Orvis purchased and was assigned the SBA's judgment against Johnson. Invocation of judicial estoppel requires that the prior and subsequent judicial proceedings involve the same parties or their privies. Tracy Loan & Trust Co. v. Openshaw Investment Co., 132 P.2d 388, 390. Under Utah law, "as applied to judgments or decrees of the court, privity means one whose interest has been legally represented at the time." Searle Brothers v. Searle, 588 P.2d 689, 691 (Utah 1978). It is undisputed in this case that Orvis purchased, was assigned, and owns the SBA judgment. [R. 2513, Addendum Exh. 3.] Johnson admitted as much in the affidavit he submitted in support of his opposition to Orvis' summary judgment motion. [R. 2281, ¶ 60, Addendum Exh. 4.] Orvis is, therefore, the SBA's privy. As the SBA's privy, judicial estoppel is properly invoked to bar Johnson from taking a position in this action contrary his sworn testimony in the SBA proceedings in which the SBA was a party.

Johnson does not identify any genuine issues of material fact for trial as to whether Orvis is the SBA's privy. Johnson's only argument to this Court is that the judgment was purchased with misappropriated partnership funds and in violations of fiduciary duties. [Pet'r Br. 35-39.] But, as the Court of Appeals correctly held, Johnson has failed to present any proof of his conclusory contention.²⁰ Such unsupported

²⁰Johnson does not present any evidence of misappropriation by Orvis. Johnson's citation to and reliance on the deposition of Tommy Triplett [R. 855-57] and Jade Griffin [R. 877-84] is completely irrelevant. In fact, in September 2002, Judge Hanson struck those depositions from the record and prohibited any reference to them because of "irregularities in how the depositions were conducted." [R. 1439-42.] Additionally, Will

allegations cannot create a genuine issue sufficient to avoid summary judgment. See Dairy Products, 2000 UT 81, ¶ 54. Indeed, the only evidence relevant to this issue is the document assigning the SBA judgment which, even viewed in the light most favorable to Johnson, undisputedly assigns the SBA judgment to Orvis. [R. 2513, Addendum Exh. 2.]

Consequently, Johnson failed to meet his burden and summary judgment was correctly entered against him.

C. There Is No Genuine Issue As To Whether This Case Involves The Same Subject Matter As The Post-Judgment SBA Proceeding.

Because Johnson failed to present proof of a genuine issue for trial as to whether this case and the supplemental proceedings conducted by the SBA involved the same subject matter, the Court of Appeals correctly upheld summary judgment in Orvis' favor.

It is undisputed that the purpose of the SBA supplemental proceeding was to identify Johnson's assets, including any interest he may have in any partnerships, upon which the SBA could execute to satisfy its judgment against Johnson. This is the precise reason Johnson's deposition was taken and that is why the questions at his deposition were directed at identifying assets in which he might have an interest. Indeed, Judge Hanson characterized those proceedings as being "for collection purposes." [R. 2627, ¶ 5, Addendum Exh. 7.] The subject matter of this action is likewise undisputed; this is an

Vigil's deposition [R. 2585–88] simply does not provide any evidentiary support for Johnson's contention.

action to determine whether Johnson has, as one of his assets, a partnership interest in Orvis' businesses. [R. 1-14, 20-39, 2624; Pet'r Br. viii.]

There is simply no genuine dispute, therefore, as to the fact that both the SBA proceeding and this case involve the exact same subject matter of an alleged partnership between Orvis and Johnson. As a result, judicial estoppel should be applied to prevent Johnson from denying, truthfully, the existence of a partnership in the prior proceeding and then asserting the existence of a partnership to the court in this action.

Although the subject matters of the two proceedings are the same, Johnson constructs an argument asserting the actions do not involve the same subject matters by claiming that the SBA action concerned only issues of contract and foreclosure and not the alleged Johnson-Orvis partnership because only those issues of contract and foreclosure were "actually litigated." [See Pet'r Br. 39-40.] That argument misses the point.

First, the relevant prior judicial proceeding is the SBA post-judgment proceeding, in which Johnson testified under oath that he did not have any interest in any partnership; the relevant proceeding is not the pre-judgment SBA action where contract and foreclosure issues were resolved. It is undisputed that the post-judgment proceeding involved the subject of Johnson's interest in any partnerships.

Second, the application of judicial estoppel is not limited to issues "actually litigated." In fact, the statement that estoppel only applies to "issues actually litigated" in

Masters v. Worsley, 777 P.2d 499 (Utah Ct. App. 1989), upon which Johnson bases his argument, is irrelevant because it was not made in the context of judicial estoppel. See id at 504. Although Masters speaks in terms of judicial estoppel, Masters actually involved the distinct doctrine of collateral estoppel. The Masters court's holding was based upon this Court's statement in Richards v. Hodson, 485 P.2d 1044 (1971) that collateral estoppel -- not judicial estoppel -- "applies only to issues actually litigated and not those that could have been determined." Id. at 1046 (applying collateral estoppel to issue actually litigated). Johnson cites no authority in which judicial estoppel is not applied to a prior statement -- as opposed to a prior adjudication -- because that statement was not "actually litigated." Johnson has confused the doctrine of collateral estoppel, which requires actual litigation, with the doctrine of judicial estoppel, which does not and his argument regarding "issues actually litigated," therefore, misses the mark. See Richards, 485 P.2d at 1046 (noting collateral estoppel requires issues to have been actually litigated); Tracy Loan, 132 P.2d at 390 (listing judicial estoppel elements and not including actually litigated); In re Adoption of S.A.J., 838 A.2d 616, 636 n.4 (Pa. 2003) (noting confusion between collateral estoppel, requiring actually litigated, with judicial estoppel which does not).

Johnson provides no competent evidence to show a genuine issue of material fact as to whether the SBA post-judgment proceeding and this case involve the same subject matter of whether Johnson has a partnership interest in Orvis' businesses. Summary

judgment in Orvis' favor therefore was correctly granted and affirmed by the Court of Appeals.

D. Johnson Has Failed To Present Proof Creating A Genuine Issue For Trial On The “Successfully Maintained” Element of Judicial Estoppel Because It Is Undisputed That The SBA Did Not Collect Its Judgment From Johnson.

The Court of Appeals was correct in holding that Johnson failed to present a genuine issue of material fact as to whether he successfully maintained his position in the SBA proceeding that he did not have any interest in any partnerships. Although judicial estoppel requires the position asserted in the prior proceeding to have been “successfully maintained,” Tracy Loan, 132 P.2d at 390, it is undeniable in this case that, as a result, of Johnson's sworn testimony that he had no assets -- including any partnership interests -- the SBA was unable to collect on its judgment and, consequently, sold the judgment to Orvis at an extreme discount.²¹ [R. 2271, ¶ 25; 2280, ¶ 52; 2282, ¶ 60; 2381, 2513, Addendum Exh. 3; 2627, ¶¶ 4–7, Addendum Exh. 8.] Johnson presents no contrary

²¹Johnson's statement that it is “false” to assume that the SBA did not collect on its judgment has no actual basis in the record and the citation he provides does not support that statement. [See Pet'r Br. 40, 41 & n.10.] First, selling a judgment does not equate to collecting it. Indeed, to date, even with the judgment in Orvis' hands, Orvis has not been able to collect it. Second, Johnson cites merely to the affidavit that Johnson submitted to oppose Orvis' summary judgment motion, where Johnson states that the SBA judgment was purchased “at precisely the discount that Johnson was discussing with the SBA.” [See id.; R. 2282, ¶ 58.] That statement simply has no bearing on whether he successfully maintained his sworn position of not having any interest in any partnership and certainly does not establish that the SBA collected its full judgment from Johnson. Moreover, the SBA judgment was sold at a significant discount.

evidence. There is no doubt, therefore, that Johnson successfully maintained and prevailed upon his position in the prior SBA proceeding that he owned no partnership interest.

Further, Johnson's argument that there is a genuine dispute of fact as to whether the statement was "successfully maintained" because the statement was not "actually litigated" is without merit. [Pet'r Br. 41-42.] Once again Johnson bases this argument on Masters v. Worsley, 777 P.2d 499, and once again his argument is unpersuasive. As discussed above in Part II.C, the application of judicial estoppel does not require the statement to have been actually litigated; Masters' statement that estoppel only applies to issues actually litigated was made in the separate context of collateral estoppel and is, therefore, irrelevant. See id. [See *supra* p. 37-38.] Johnson cites no other authority to support his contention that the successfully maintained element of judicial estoppel is limited to statements actually litigated. In fact, the element is not so limited under Utah law. See, e.g., Occidental/Nebraska Fed. Sav. Bank v. Mehr, 791 P.2d 217, 220 (Utah Ct. App. 1990) (applying judicial estoppel to prevent Occidental from taking position in subsequent judicial proceeding that a trustee's sale was invalid due to a procedural error when it previously asserted an inconsistent position in a non-judicial proceeding).

In the absence of a genuine issue of material fact as to whether Johnson successfully maintained his position of owning no partnership interest in the SBA proceeding, the Court of Appeals correctly upheld summary judgment in Orvis' favor.

E. Johnson Did Not Argue, And Failed To Preserve As An Issue For Appeal, Whether Additional Elements of “Reliance” And “Bad Faith/Mistake” Are Required To Apply Judicial Estoppel.

Because Johnson presented the district court with no argument that reliance and bad faith/mistake were required elements of judicial estoppel or that genuine issues of material fact existed regarding them, there is no question that the Court of Appeals correctly held Johnson failed to preserve and, therefore, waived any argument as to these elements for appellate review. Under Utah law, to assert an issue as a basis for reversal on appeal, that issue must have been preserved in the lower court in “such a way that the trial court ha[d] the opportunity to rule on that issue.” Brookside Mobile Home Park v. Peebles, 2002 UT 48, ¶14, 48 P.3d 968. “This rule exists to give the trial court an opportunity to address the claimed error, and if appropriate correct it” and to “prevent[] a party from avoiding the issue at trial for strategic reasons only to raise the issue on appeal if the strategy fails.” Tschaggeny v. Milbank Ins. Co., 2007 UT 37, ¶ 20, ___ P.3d ___ (quoting State v. Cram, 2002 UT 74, ¶ 10, 10 P.3d 346).

Johnson’s papers in opposition to Orvis’ summary judgment motion challenged only the judicial estoppel elements of privity, same subject matter, and “successfully maintained.” [R. 2242–2515, 2608–18.] Johnson did not argue there were genuine disputes for trial as to any other element of judicial estoppel or that reliance and bad faith/mistake were additional elements that must be established. [See id.] As a result,

under settled Utah law, Johnson failed to preserve any argument on these elements as grounds for review. See Brookside, 2002 UT 48, ¶ 14.

Johnson's argument to this Court provides no other reasonable conclusion. Johnson provides no legitimate proof that he argued the reliance and bad faith/mistake elements below in a manner in which Judge Hanson could have considered and ruled upon them. [See Pet'r Br. 30-35, 42-44.] Johnson's contention that the issue of reliance was preserved merely because at oral argument his counsel suggested to the court that there had been no reliance by Orvis on the sworn statement is without merit; [See id. at 32] Johnson did not argue that the SBA did not rely upon his statement. To the contrary, the record established as an undisputed fact that the SBA (Orvis' privy) did rely on the sworn statement because it did not execute upon Johnson's alleged partnership interest. Johnson's papers on the summary judgment motion did not mention reliance at all, did not assert an absence of reliance by Orvis or the SBA, and there is no question Johnson failed to preserve for appellate review any argument regarding reliance.

Likewise, Johnson has presented nothing in this case showing he actually argued a bad faith/mistake element to the district court. [See id. at 42-44.] Even if Johnson had preserved an argument on a bad faith/mistake element, the evidence undisputedly showed that Johnson answered "[n]o" to the SBA's unambiguous question about whether he "had any interest in any partnerships." [R. 2424:18-23, Addendum Exh. 2.] Johnson never asked to have the question clarified, and he never changed his testimony either

during the deposition or after his testimony was transcribed. To the contrary, in his affidavit opposing summary judgment, Johnson unequivocally stated that his testimony before the SBA was accurate. [R. 2274, ¶ 39, Addendum Exh. 4.] Johnson's self-serving statements now that his sworn testimony was a mistake because he misconstrued the SBA's question to be only about real estate partnerships is unavailing. Such unsupported bald allegations are insufficient to create a genuine issue of material fact for trial. [*See supra* p. 35.]²²

The bottom line is that Johnson raised no argument relative to the elements of reliance or bad faith/mistake before the district court, and, therefore, the Court of Appeals correctly held that Johnson waived any argument relative to those issues on appeal.

F. Johnson's "Public Policy" and "Partnership Accounting" Arguments Are Made For The First Time To This Court And Cannot Provide A Basis To Reverse The Court Of Appeals' Holding.

The Court should reject Johnson's attempt to obtain reversal by arguing the application of judicial estoppel in this case would violate public policy, and that an accounting of the alleged Orvis-Johnson partnership should be ordered, because those arguments were never made to the Court of Appeals and, indeed, are asserted for the first

²²Johnson's argument that Judge Hanson's finding of "no mistake" constitutes an improper weighing of evidence [Pet'r Br. 44.] is irrelevant because on review pursuant to a writ of certiorari, this Court reviews the decision by the Court of Appeals, not the ruling of the district Court. *See Coulter & Smith*, 966 P.2d 852 at 856.

time ever. [See generally Br. of Appellant, (Case No. 20041122-CA (on file with Appellate Court Clerk's Office)).] Johnson does not even attempt to contend with this fact. [See Pet'r Br. 45-46.] This Court's review on a writ of certiorari is limited to reviewing conclusions actually made by the Court of Appeals as well as issues and arguments actually found in the record. See Coulter & Smith, Ltd. v. Russell, 966 P.2d 852, 855-56 (Utah 1998); Ogden City Corp. v. Indus.Comm'n, 92 Utah 423, 423, 69 P.2d 261 (1937) (declining, on petition for writ of certiorari, to consider argument not part of record). Issues must not be raised for the first time in this Court unless exceptional circumstances or plain error is shown. See Timm v. Dewsnup, 2003 UT 47, ¶¶ 38-39, 86 P.3d 699. Johnson presents this Court with no exceptional circumstance or plain error relative to these two issues. [see generally Pet'r Br. 44-46] and this Court should therefore disregard them.

In addition to Johnson's lack of preservation, Johnson's arguments are wholly without merit. Johnson's argument that applying judicial estoppel in this case would violate public policy by preventing the truth of his alleged partnership interest from ultimately prevailing, [see Pet'r Br. 45] ignores that Johnson swore he did not have any partnership interest, under oath, while he was a lawyer, and that he reaffirmed the accuracy of that testimony in this case. Indeed, when the SBA could not collect its judgment based on Johnson's truthful testimony that he did not own any partnership

interests, public policy actually weighs in favor of preventing Johnson from burdening the courts and Orvis with continuing litigation predicated on the exact opposite position.

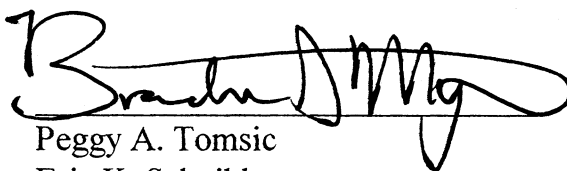
Likewise, Johnson's argument that this Court should order an accounting of the alleged Orvis-Johnson partnership cannot support reversal of the Court of Appeals' decision because summary judgment has been granted in Orvis' favor, establishing that the very partnership for which Johnson seeks an accounting does not exist. Further, even if this Court were to reverse that judgment, before any accounting could be permitted, a trial would have to still be held on whether the alleged partnership exists. Thus, Johnson's argument for an accounting is not properly preserved, is moot, and misplaced and should not be considered by this Court.

CONCLUSION

Based upon the foregoing, this Court should affirm the Opinion of the Court of Appeals.

DATED this 29th day of May, 2007.

TOMSIC & PECK ^{LLC}

A handwritten signature in black ink, appearing to read "Brandon G. Myers", written over a horizontal line.

Peggy A. Tomsic

Eric K. Schnibbe

Brandon G. Myers

136 East South Temple, #800

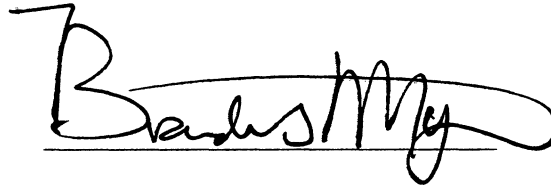
Salt Lake City, Utah 84111

Attorneys for Respondent Jayson Orvis

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2007 I caused two true and correct copies of the foregoing corrected BRIEF OF RESPONDENT to be mailed, postage prepaid, to the following:

Jamis M. Johnson
352 Denver Street #304
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "Brandon May", is written over a horizontal line.