

1980

# Michael W. McBride v. Terry Lynne Jones (Formerly Known As Terry Lynne McBride) : Respondent's Brief

Utah Supreme Court

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## Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

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MICHEAL W. McBRIDE,	)	
	)	
Plaintiff-Respondent	)	
	)	No. 16650
vs.	)	
	)	
TERRY LYNNE JONES (formerly	)	
known as Terry Lynne McBride),	)	
	)	
Defendant-Appellant.	)	

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RESPONDENT'S BRIEF

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APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL  
DISTRICT COURT OF SALT LAKE COUNTY  
THE HONORABLE CHRISTINE M. DURHAM

---

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## INTRODUCTION

This appeal involves a refusal by the trial court to modify a property settlement agreement executed by the parties to this appeal and incorporated into a final Decree of Divorce entered on January 13, 1977 (R. at 29-31). The settlement agreement was the product of extensive negotiation between counsel for the parties during the course of the judicial proceeding surrounding the divorce action. Appellant claims that during the divorce proceedings counsel for respondent and respondent made a misrepresentation to appellant's counsel and, therefore, a modification of the settlement agreement and the Decree of Divorce on the basis of fraud is appropriate.

Contrary to plaintiffs assertions, the record in this matter uncontrovertedly establishes that (1) the representation in question, assuming arguendo that it is fraudulent, constitutes intrinsic fraud and is an insufficient basis to set aside the final judgment entered January 13, 1977; (2) appellant did not rely upon the alleged fraudulent representation and, therefore, as a matter of law cannot prove a cause of action for fraud; (3) the representation in question could not be relied upon as a statement of fact since it was merely a statement of the opinion of respondent and his attorney and, therefore, appellant cannot prove a cause of action for fraud, and; (4) the representation in question was both truthful and accurate.

By this appeal, appellant seeks assistance from this court in her efforts to set aside the final judgment entered on January 13, 1977, so she can renegotiate for the second time,<sup>1/</sup> a more lucrative settlement agreement.

#### STATEMENT OF FACTS

Since appellant's recitation of facts is incomplete, and therefore misleading, it is necessary for respondent to recount the pertinent facts relating to this appeal.

On February 15, 1979 appellant, Terry Lynne Jones, formerly known as Terry Lynne McBride (hereinafter sometimes "Mrs. Jones"), petitioned the trial court for an order to show cause why the Decree of Divorce between the parties entered on January 13, 1977 should not be modified. The petition (R. at 32-35) was supported by the affidavit of Mrs. Jones (R. at 36-39) which alleged that the division of property made by the court in the final Decree of Divorce should be modified since the division of property was founded upon a stipulation between the parties which had been fraudulently obtained by respondent, Micheal W. McBride (hereinafter sometimes "Mr. McBride").<sup>2/</sup>

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1/ As more fully discussed below, an initial settlement agreement (R. at 5-6) was set aside by stipulation when appellant retained her present counsel during the divorce proceedings in 1976.

2/ The affidavit of Mrs. Jones contained no allegation that the Decree of Divorce entered on January 13, 1977 should be modified based upon any need of Mrs. Jones. And, at no time during these

The stipulation (R. at 24-26) upon which the January 13, 1977 Decree of Divorce is founded was the product of extensive negotiation between counsel for the respective parties. It was negotiated totally within the context of the adversary proceedings surrounding the divorce in question. Indeed, the stipulation ultimately executed by the parties was agreed to only after Mrs. Jones retained the services of her present counsel to aid her in avoiding the default to which she had earlier consented (R. at 4) and to aid her in avoiding and renegotiating an earlier property settlement agreement. (R. at 5-6)

The action for divorce in this matter was commenced in October of 1976 when Mr. McBride filed a complaint (R. at 2-3). Attached to the complaint at the time of filing was an "Appearance, Acceptance and Waiver" (R. at 4) executed by Mrs. Jones in which she acknowledged receipt of the complaint, entered an appearance and consented that a default be entered in accordance with the relief prayed for in the complaint. The complaint incorporated by reference a property settlement agreement by which the parties agreed to distribute all assets acquired during marriage. This first property settlement was never effectuated in the Decree of Divorce because Mrs. Jones

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proceedings has Mrs. Jones claimed any financial need as the basis for her petition for modification. Indeed, less than one month after the Decree of Divorce at issue was entered, Mrs. Jones remarried obviating any financial assistance from Mr. McBride.

had second thoughts about the provisions of the agreement and sought the advice of independent counsel to represent her during the divorce proceedings and to renegotiate the terms of the settlement agreement. Thus, on November 26, 1976 Mrs. Jones, through her present counsel Joseph L. Henroid, submitted an answer and counterclaim (R. at 15-17) which, among other things, withdrew her original consent to default.

Having been retained by Mrs. Jones, Mr. Henroid and his law firm undertook to renegotiate a new property settlement agreement. The end-product of those negotiations was the stipulation dated January 13, 1977 (R. at 24-26) which was ultimately incorporated into the Decree of Divorce. Paragraphs 6 and 7 of the stipulation provided for the distribution of all of the marital properties to the parties and paragraph 7(d), specifically, awarded to Mr. McBride "Stock in Land and Cattle Funding" which had been acquired during the period of the marriage.

After the Decree of Divorce was entered on January 13, 1977, two years elapsed before Mrs. Jones filed the petition which gives rise to this appeal. The purpose of Mrs. Jones petition was to set aside the stipulation of the parties by which they divided the properties acquired during marriage. The petition recited that it was "made upon the ground and for the reason that plaintiff [during the divorce proceedings] purported to disclose all of his assets



but failed to disclose and withheld the fact that he owned 5,000 acres located in the northern part of Utah and the southern part of Salt Lake Counties" (R. at 32). In the affidavit accompanying Mrs. Jones' petition she alleged as follows:

6. It was represented by the plaintiff to the defendant that the properties listed in the stipulation and the properties detailed in the family trust were all of the properties owned by the parties.

7. Plaintiff failed to disclose all of his assets and in particular failed to disclose and withheld that fact that he owned an interest in 5,000 acres of land located in the northern part of Utah County and the southern part of Salt Lake County. (R. at 37) (Emphasis added.)

Contrary to the allegations contained in her petition and the sworn representations made in her affidavit in support of said petition, Mrs. Jones in answer to Plaintiff's First Set of Interrogatories admitted that she had been aware of the time of the divorce that the parties held an interest in an entity known as Alpine Ltd. (which owned the 5,000 acres referred to in the petition of Mrs. Jones) but that Mr. McBride had represented that interest to be worthless. (Answer to Interrogatory 1(a), R. at 69.) Specifically, in answer to Interrogatory 1(a), Mrs. Jones stated that Mr. McBride had represented "prior to the divorce that his interest in Alpine Ltd. was worthless." Likewise during the course of her deposition Mrs. Jones admitted that the basis of her petition -- namely that Mr. McBride had concealed the Alpine Ltd. asset -- was

unfounded since she had always been aware that the parties owned interest in the asset (Jones deposition pp. 37-38). She stated, however, that at the time of the divorce she believed the parties interest in Alpine Ltd. had little value because it had been transferred into Land and Cattle Funding and she knew that Land and Cattle Funding was having severe financial difficulty (Jones deposition pp. 5-8, 13-15, 37, R. at 246-249, 254-256, 278).

When Mrs. Jones abandoned the theory alleged in her petition that Mr. McBride had concealed the Alpine Ltd. asset, she instead advanced the theory that the value of the asset had been misrepresented. In a desperate attempt to substantiate this theory she looked to correspondence between her counsel Mr. Henroid and Mr. James Murphy, who represented Mr. McBride during the course of the divorce proceedings. The entirety of this claim is based upon two letters between Mr. Henroid and Mr. Murphy. On November 26, 1976, Mr. Henroid requested by letter that Mr. Murphy furnish him "with a list of assets in the trust with the estimated value opposite each asset. Also list any assets that the parties have outside the trust" (Jones deposition, exhibit 2, R. at 346). In a letter dated December 6, 1976, Mr. Murphy provided the information which had been requested of him (Jones deposition, exhibit 1, R. at 344-345). The December 6, 1976 letter from Mr. Murphy to Mr. Henroid contained a list of "assets not in trust" which included the following

disclosure: "Stock in Land and Cattle Funding. At this time the corporation is in very poor condition and has a negative net worth." That representation by Mr. Murphy is the total basis of Mrs. Jones' claim that Mr. McBride and his attorney Mr. Murphy fraudulently misrepresented the value of the Alpine Ltd. asset. Mrs. Jones asserts that since the parties interest in Alpine Ltd. had been assigned in 1973 to Land and Cattle Funding, (McBride deposition pages 9-11, exhibit 6; Jones deposition pages 9, 13, R. at 250, 254), Land and Cattle Funding could not have had a negative net worth at the time of the Divorce. The uncontroverted facts establish that this assertion is totally without merit.

In order to understand the nature and value of the interest whose worth was allegedly misrepresented it is necessary to review the status of three entities -- Geodyne II, Alpine Ltd. and, Land and Cattle Funding. Geodyne II, is the general partner in the limited partnership Alpine Ltd. In August of 1972 Mr. McBride acquired a one-third interest in Geodyne II for \$40,000 (McBride deposition, p. 64). Geodyne II owned approximately a 50% interest in Alpine Ltd. and therefore, McBride's interest in Alpine Ltd. through Geodyne II, was approximately 16% (McBride deposition, p. 64).

In May of 1973, Mr. McBride sold a 6% interest in Alpine Ltd. to Wendell Hansen for \$25,000 (McBride deposition p. 64). The

remainder of his original 16% interest (10%) was assigned to Land and Cattle Funding in December of 1973, (Jones deposition, pp. 9, 13, R. at 250, 254); McBride deposition, p. 9-12); McBride deposition, Exhibit 6).

Land and Cattle Funding was an Idaho corporation whose sole stockholders were Mr. McBride and the brother of Mrs. Jones, Michael Telford. Mr. McBride's contribution to Land and Cattle Funding was valued at \$125,000 and the corporate stock which he received was allocated to him in accordance with that value (McBride deposition, p. 9-12). From the time the interest in Alpine Ltd. was assigned to Land and Cattle Funding it was consistently carried on the books and records of the corporation at \$125,000.

Mrs. Jones' asserts that since the 10% in Alpine Ltd. was an asset of Land and Cattle Funding at the time of the divorce, the statement contained in Mr. Murphy's letter of December 6, 1976 is a misrepresentation. The only support which she has ever offered in support of this assertion is that the assets of Alpine Ltd. were sold in June of 1978 -- 18 months after the final Decree of Divorce for \$7,500,000.<sup>3/</sup> She claims if a 10% interest in the assets of

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<sup>3/</sup> In footnote 1 of her brief Mrs. Jones states that "Alpine Ltd. did not receive \$7.5 million. Approximately \$2.5 million is . . . to be paid to plaintiff as a sales commission." This statement is simply untrue. In February 1978 Mr. McBride obtained an option on the assets of Alpine Ltd. which he exercised in order to facilitate

Alpine Ltd. was worth \$750,000 (less liabilities) 18 months after the divorce, it had to be worth between \$370,000 and \$620,000 at the time of the divorce (Answer to Plaintiff's Second Set of Interrogatories, 2(b), R. at 115). Mrs. Jones offers no evidence of the value of the interest at the time of the divorce, but only facts and circumstances which existed 18 months after the divorce.

In her attempts to rely on facts which existed 18 months after the final Decree of Divorce, Mrs. Jones totally ignores the facts, circumstances and information which were available to the parties at the time of the divorce. Facts existing at the time of the divorce uncontrovertedly establish the accuracy of Mr. Murphy's representation with respect to Land and Cattle Funding. As noted above, Mr. McBride paid only \$40,000 for his entire 16% interest in Alpine Ltd. (McBride deposition, p. 64). He in turn sold 6% one year later for \$25,000 (Id.) Upon incorporation of Land and Cattle Funding, he valued the remaining 10% at \$125,000 (McBride deposition, p. 12). The nature of these transactions offered every incentive for Mr. McBride to place as high a value as possible on his interest in Alpine Ltd.

Additional facts available at the time of the divorce demonstrate the accuracy of the representation with respect to Land and

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a sale of the property at \$7.5 million. The real estate sales agreement was subsequently assigned to Alpine Ltd. on November 30, 1978. Mr. McBride did not and will not receive a commission of \$2.5 million on the sale of the Alpine Ltd. assets.

Cattle Funding. The business of Land and Cattle Funding was primarily agricultural and due to a general recession in agriculture during 1974 Land and Cattle Funding sustained substantial operating losses (McBride deposition, p. 16). As a result, Land and Cattle Funding was neither able to pay its loans to banks nor to pay off other creditors and suppliers. Indeed, the financial condition of Land and Cattle Funding was so poor, that in December of 1975, Mrs. Jones brother, Michael Telford, assigned all of the stock he owned in Land and Cattle Funding to Mr. McBride and abandoned the corporation believing it to be totally insolvent, in spite of the fact that the corporation still owned the 10% interest in Alpine Ltd. (McBride deposition pp. 31-32). Mr. Telford requested no compensation for his stock, but insisted that Mr. McBride assume all debts and obligations of Land and Cattle Funding. Thus, Mr. McBride was left with a corporation which had substantial debts, which he had personally guaranteed, and little means available in the corporation to satisfy the debts.

During the later part of 1975 and throughout 1976, Mr. McBride attempted to offer Land and Cattle Funding's interest in Alpine Ltd. as security to First Security Bank of Idaho. In all instances the bank refused to accept the interest as security, considering it to be unmarketable and inadequate as security. Mr. McBride also attempted to market the interest to private individuals and was

unsuccessful. The problem being that the interest was not an interest in any real property but rather was an interest in the profits of the limited partnership (McBride deposition, pp. 73-75).

In addition to the severe financial difficulties facing Land and Cattle Funding, limited partners in Alpine Ltd. began to default in the latter months of 1976 raising the possibility that the assets of Alpine Ltd. itself would be lost. Thus, at the time of the divorce, Mr. McBride owned all of the stock in Land and Cattle Funding which was in extremely poor financial condition, the only asset of which was an unmarketable interest in the profits of a limited partnership which itself was facing financial difficulties.

At the time the final Decree of Divorce was entered between these parties no partnership interest in Alpine Ltd. had ever been resold by any of the original limited partners, except the interest that Mr. McBride sold to Wendell Hansen. In fact, there was no market for such interests. However, in June of 1977, five months after the divorce, two 6% interests owned by the limited partner Pace Industrial were sold. The total sales price for the combined 12% interest was \$160,000, an amount virtually identical to the value at which the 10% interest had been carried on the books and records of Land and Cattle Funding (McBride deposition pp. 74-75). Prior to the time of the final Decree of Divorce there had not been

a single bona fide offer for the purchase of the assets of Alpine Ltd.

Hence, the record in this matter is totally void of any evidence which supports the assertion that the statement "Stock Land and Cattle Funding. The corporation is in very poor condition and has a negative net worth" was anything but true and accurate. The fact that the assets of Alpine Ltd. were sold 18 months after the divorce for a price of \$7.5 million does not alter the accuracy of the opinion at the time it was given.

In addition to the evidence which uncontrovertedly establishes that the representations made with respect to Land and Cattle Funding and Alpine Ltd. were accurate, Mrs. Jones testified, during the course of her deposition, that she did not rely upon the statement which she now claims to be fraudulent (Jones deposition pp. 57-58, R. at 298-299). Not only did she testify that she did not rely on the statement but she further testified that it was always her belief that the Alpine Ltd. asset had substantial value (Jones deposition pp. 29-30, R. at 270-271). Additionally, she testified that the reason she did not seek to obtain any of the stock in Land and Cattle Funding, even though it contained the Alpine Ltd. asset, was she knew, because of her brother's participation in Land and Cattle Funding, that Land and Cattle Funding was encumbered with debt (Jones deposition p. 44, R. at 285).



Yet, at this time, even though all of the representations made by Mr. McBride and his counsel were accurate, and even though Mrs. Jones in her own words did not rely on the representation at issue, and even though Mr. McBride spent two years satisfying creditors and ultimately salvaging an asset of Land and Cattle Funding and, even though the factors leading to the appreciation of that interest occurred entirely subsequent to the final Decree of Divorce, Mrs. Jones boldly seeks to obtain the fruits of the efforts which Mr. McBride has undertaken since his divorce from her in January 1977.

#### ARGUMENT

The uncontroverted facts in this action conclusively establish that the trial court's order of summary judgment was proper and must be affirmed by this court. The facts establish, as a matter of law, that insufficient grounds exist to set aside the final judgment entered on January 13, 1977. Specifically the uncontroverted facts establish that (1) even assuming for purposes of argument that the representations at issue constitute fraud, such representations constitute intrinsic fraud which is an insufficient basis to set aside the final Decree of Divorce; (2) Mrs. Jones cannot prove a cause of action for fraud because a) she did not rely upon any statements which she claims to be fraudulent and b) the allegedly fraudulent statements were merely statements of opinion and not representations of fact upon which an action for

fraud can be maintained; and, (3) the representations at issue were both truthful and accurate given the facts and circumstances which existed at the time of the divorce.

I. ASSUMING ARGUENDO THAT THE REPRESENTATIONS AT ISSUE WERE INACCURATE OR FRAUDULENT, SUCH REPRESENTATIONS CONSTITUTE INTRINSIC FRAUD FROM WHICH APPELLANT IS ENTITLED TO NO RELIEF FROM THE FINAL JUDGMENT OF THE DECREE OF DIVORCE ENTERED JANUARY 13, 1977.

The Decree of Divorce entered by this court on January 13, 1977 constitutes a final judgment, Sorenson v. Sorenson, 438 P.2d 180 (Utah 1968), which may not be upset upon the ground of fraud if the alleged fraudulent representation constitutes what courts have defined as intrinsic fraud. In those cases in which courts have addressed the issue of whether a final judgment should be set aside or modified on the ground of fraud, they have unanimously distinguished between extrinsic and intrinsic fraud. In so distinguishing, the courts have unanimously held that only in instances of extrinsic fraud is a claimant entitled to relief. Clissold v. Clissold, 519 P.2d 241 (Utah 1974); Haner v. Haner, 373 P.2d 577 (Utah 1962); Glover v. Glover, 242 P.2d 298 (Utah 1952); Rice v. Rice, 212 P.2d 685 (Utah 1949).

In Clissold, supra, this Court, relying on the distinction between extrinsic and intrinsic fraud, denied a former wife's motion to modify the property settlement aspects of the Decree of

divorce. The movant in Clissold sought to set aside the final judgment on the ground of fraud asserting that an interrogatory had been falsely answered. After recognizing that in certain instances fraudulent misrepresentations may provide a basis for setting aside a final divorce decree, the court stated:

. . . however, before relief can be granted, it must be determined that the alleged misrepresentation or concealment constitutes conduct, such as fraud, as would basically afford the complaining party relief from the judgment. The proper disposition of this case requires an analysis and discussion of the concepts of "intrinsic" and "extrinsic" fraud. The public interest requires that there be an end to litigation. To accomplish this objective the courts have always distinguished between the actions of a party litigant which bear upon the opposing party's opportunity for a fair submission of his case and a party's misrepresentation during trial. Those actions asserted to be fraudulent which prevent a fair submission of the controversy such as deceiving a party into not filing an answer or deceiving a party into staying away from court on the day of the trial are classed as extrinsic fraud, and if existent in fact, entitle the opposing party to relief from the judgment. Conduct asserted to be fraudulent which occurs during the course of the proceedings, such as false testimony, whether or not existent in fact, does not entitle a party to relief from the judgment. The principal, of course, is that during a trial veracity itself is on trial, and in the public interest cannot be tried again. Some exceptions to this rule exist in divorce cases where there has been a gross misrepresentation of assets by a party. Such does not appear in the case at bar. At most there was a dispute as to the value of some highly speculative property and an answer to an interrogatory, even if untrue, would be no different than a false answer during trial, and would therefore come within the classification of intrinsic fraud, not entitling the opposing party to the relief. 559 P.2d at 242 (Emphasis original, except last sentence).

Similarly, in Haner, supra this court faced the same issues and again refused to reverse the trial court's refusal to modify: decree of divorce because the fraud alleged was intrinsic fraud. In Haner the court discussed the issues as follows:

It is sometimes said that when a judgment is attacked collaterally on the ground that it was obtained by fraud or deceit it will be set aside only for extrinsic fraud. But we are in accord with the indications in the restatement of judgments that this is too limited. It seems more realistic to say that when it appears that the process of justice has been so completely thwarted or distorted as to persuade the court that in fairness and good conscience the judgment should not be permitted to stand, relief should be granted. However, inasmuch as the plaintiff here seems to be relying on the ground as fraud, there is a distinction which it is necessary to point out. In order to justify granting relief, the alleged wrong would have to be of the type characterized as extrinsic fraud: that is, fraud based on conduct or activities outside of the court proceedings themselves; and which is designed and has the effect of depriving the other party of the opportunity to present his claim or defense. This type of fraud which is regarded as a fraud not only upon the opponent, but upon the court itself, can be accomplished in a number of ways, such as making false statements or representations to the other party or to witnesses to prevent them from contesting the issues; or by that means or otherwise preventing the attendance of the parties for witnesses; or by destroying or secreting evidence; so that a fair trial of the issues is effectively prevented.

It is obvious that quite a different situation where there is no prevention of the party from contesting the issues in a trial, and where the complaint is simply that one party presented prejured testimony or false evidence. This charge is simply a continuation of the same dispute which the trial was supposed to resolve. It is the purpose of the law to afford the parties full opportunity to have themselves and their witnesses present; and to present their

evidence and their contentions to the court. When this has been done and the court has made its determination, that should end the matter, except for the right of appeal. It is so patent as to hardly justify comment that a judgment should not be set aside merely to grant the losing party another chance to accomplish the task at which he just failed: to prove that he was right and the opponent was wrong. To reopen a case just because a party persists in asserting and attempting to prove that his version of the dispute was the truth and that of the opponent was false would open the door to a repetition of that procedure, whoever won the next time; and thus to keeping the dispute going ad infinitum with no way of determining when the merry-go-round of the lawsuit would end. This would involve not only a waste of time, energy and expense but also would result in such uncertainty as to the peoples right that the very purpose of the lawsuit, the settling of disputes and putting them at rest, would be defeated. Resort to the courts would be frustrating and unpractical unless there were some point at which decisions become final so that the parties can place reliance thereon, leave their troubles behind and proceed to the future. It is for these reasons that courts accord to judgments regularly entered a high degree of sanctity; and would overturn a judgment such as the instant one on the ground of fraud only if it were shown that the complaining party had been wrongfully deprived of the opportunity to meet and contest the issues at the trial.

The averment set out in plaintiff's affidavit are to the effect that the defendant has, since the trial, admitted the accusations made in his pleadings and at the trial concerning her associations with other men were not true; and that erroneous values were placed on some of their properties. Inasmuch as the parties and their witnesses were present and these issues were contested during the trial, if there were in fact misrepresentations and fraud, as plaintiffs claim, they would have occurred within the trial itself (thus intrinsic to it) and therefore would not have been the type of fraud characterized as extrinsic fraud, explained above. In view of the principles herein discussed, the trial court correctly rules that plaintiff's charges would provide no basis upon which to set aside judgment. 373 P.2d at 578-579.

The issues presented by the petition of Mrs. Jones and the facts alleged are virtually identical to those addressed by this court in both Clissold and Haner. However, the alleged misrepresentation in this instance is not in the form of a false answer to an interrogatory as in the Clissold case, nor it is an admittedly false representation in a pleading as in the Haner case; rather it is merely a statement of opinion contained in a letter exchanged between counsel. Appellant argues that even though one is not entitled to relief from fraudulent representations contained in answers to interrogatories nor from fraudulent statements contained in other pleadings, one is, nevertheless, entitled to relief if information contained in a letter between counsel appears inaccurate in the light of circumstances existing 18 months later.

It is untenable to argue, as appellant does that because the representations at issue were contained in a letter between counsel rather than in a formal pleading, the alleged misrepresentation is transformed from intrinsic fraud into extrinsic fraud. The letters at issue herein were exchanged between counsel during the course of the adversary and judicial proceeding surrounding the divorce between the parties and were as intrinsic to those proceedings as any interrogatory or other pleading exchanged between counsel. To allow appellant to set aside the final judgment in this matter would be an incentive to counsel to seek discovery by



informal means rather than formal pleading, as a method of avoiding finality of judgments. The fact that appellants counsel choose to proceed by letter rather than by formal interrogatory should not allow her to avoid the finality of the judgment in question.

Appellant's reliance on Glover v. Glover, 242 P.2d 298 (Utah 1952) in support of her contention that the alleged fraud in this case was extrinsic, is misplaced. In Glover, the plaintiff was induced not to seek a distribution of certain property in the divorce decree, and did not bring certain property to the court's attention because of her reliance on a private agreement which defendant had no intention of keeping. This Court determined that the "false promise of a compromise" constituted extrinsic fraud. 242 P.2d at 300.

In this case no false promise of a compromise exists. The asset in question -- stock in Land and Cattle Funding -- was disclosed and contested. Mrs. Jones, with the aid of her counsel, had every opportunity to examine the validity of the opinion of Mr. McBride and his counsel with respect to Land and Cattle Funding; and, thus, had ample opportunity to litigate the matters which she now raises. Indeed, neither Mr. McBride nor his counsel made any statement which deprived Mrs. Jones of the opportunity to contest the matters which she now wishes to litigate years after

they were laid to rest. Mrs. Jones, of her own volition, choose not to litigate in January of 1977 because, in her own words, Mr. McBride agreed in the stipulation at issue to give her "every thing which she requested" (Jones deposition pp. 84-85, R. at 325-326).

The fact that appellant's counsel saw fit not to ask a single interrogatory, nor request a single document via Rule 34 of the Utah Rules of Civil Procedure, nor to take a single deposition must not be allowed as a means of circumventing the finality of the Decree of Divorce. The letters and negotiations between counsel for the respective parties were intrinsic to the judicial proceedings surrounding the divorce and, thus, do not constitute a sufficient basis to set aside the final Decree of Divorce. This Court's conclusion in Clissold, supra, is dispositive,

At most there was a dispute as to the value of some highly speculative property, and an answer to an interrogatory [or information contained in a letter exchanged between counsel], even if untrue, would be no different than a false answer during trial, and would therefore come within the classification of intrinsic fraud, not entitling the opposing party to relief. 592 P.2d at 242.

Hence, the trial court's order of summary judgment must be affirmed.

II. THE TRIAL COURT'S ORDER OF SUMMARY JUDGMENT MUST BE AFFIRMED SINCE, AS A MATTER OF LAW, APPELLANT CANNOT PROVE A CAUSE OF ACTION FOR FRAUD.

This Court has on a number of occasions enumerated the elements which must be proven in order to establish a cause of



action for fraud. The elements are as follows:

1. That the representation was made.
2. That the representation concerned an existing material fact.
3. That the representation was false.
4. That the person making the representation knew it to be false.
5. That the representation was made to induce action.
6. That the other party acted on the representation reasonably and in ignorance of its falsity.
7. That the other party did in fact rely on the statement.
8. That he was induced to act.
9. That he thereby suffered injury and damage.

Pace v. Parrish, 247 P.2d 273 (Utah 1952); Stuck v. Delta Land & Water Company, 227 P.2d 291 (1924). If a claimant fails to establish any one of the elements identified above, the cause of action for fraud must fail.

In this instance, Mrs. Jones cannot establish two essential elements. First, by her own testimony she did not rely upon the statements which she alleges to be fraudulent. Second, the representations at issue were merely statements of opinion and as such were not representations of fact sufficient to support an action for fraud.

- A. Assuming respondents representations with respect to Land and Cattle Funding were inaccurate, appellant cannot prove a cause of action for fraud because she did not rely upon the representations made by respondent.

The testimony of Mrs. Jones conclusively demonstrates that her action for fraud must fail as a matter of law. By her own testimony she did not rely upon the statements which she alleges to be false. The following testimony taken from her deposition is conclusive:

Question: At the time you decided not to take any stock in Land and Cattle Funding did you rely on the statement that the corporation had a negative net worth?

Answer: No, I did not rely on that statement.

Question: Did you rely on your counsel?

Answer: As far as Land and Cattle Funding was concerned, it was a joint -- I decided I didn't want that.

\* \* \*

Question: Did you read this document [December 6th letter from Mr. Murphy to Mr. Henroid] and see the statement, "the corporation has a negative net worth," and as a result of reading this statement say "I don't want any of that stock"?

Answer: Not as a result of just that, no.  
(Jones deposition, p. 57-58, R. at 298-299).

Thus, it is clear from the testimony of Mrs. Jones, herself, that she cannot substantiate an action for fraud because there was simply no reliance by her on the alleged fraudulent statement.

In addition to her own testimony the facts in this record demonstrate that there was simply no reliance by Mrs. Jones upon any representation made by Mr. McBride or his counsel. Indeed, it was because Mrs. Jones did not believe she could rely upon Mr. McBride that she retained the services of her present counsel to set aside and renegotiate the original property settlement agreement which she executed.

Since appellant did not rely upon the representations at issue, she cannot, as a matter of law, prove an action for fraud and, therefore the trial court's order of summary judgment must be affirmed.

- B. Appellant cannot maintain an action for fraud based upon the representations at issue since they were merely statements of respondent's opinions and were not representations of fact.

In his letter to Mr. Murphy of December 26, 1976, Mr. Henroid requested that he be furnished "with a list of assets in trust and their estimated values" and with a "list of assets not in trust." With respect to the assets not in trust Mr. Henroid did not even request an opinion as to their value. However, since Mr. Henroid had requested opinions as to the value of the assets held in trust, Mr. McBride and his counsel also provided, in the letter of December 6, 1976, opinions with respect to the assets not held in trust. The statement contained in the December 6, 1976 letter

from Mr. Murphy to Mr. Henroid to the effect that Land and Cattle Funding was in very poor condition and had a negative net worth constitutes nothing more than the opinion of Mr. McBride and his counsel as to what they believed the value of that stock to be at the date in question.

This court has held in Oberg v. Saunders, 184 P.2d 229 (Utah 1947) that "representations as to value are expressions of opinion and cannot form the basis of an action fraud. 184 P.2d at 234. Similarly in Davis v. Schiess, 417 P.2d 19 (Wyo. 1966) the Wyoming Supreme Court held:

Since the early days of this court, it has followed the general rule that an expression of opinion as to value is not fraud. Otherwise stated a statement which is but an opinion is generally not held to be a representation of fact. . . . an honest opinion as to value is not a fraudulent misrepresentation. 417 P.2d at 291.

In his letter of November 26 Mr. Henroid asked for nothing more than Mr. McBride's estimates or opinions as to the value of certain assets; and, in light of the circumstances which existed at the time, Mr. McBride provided what he believed to be honest and fair opinions as to the values of the respective assets. Given the severe financial troubles which afflicted Land and Cattle Funding during the entire divorce proceedings, it is untenable to even suggest that Mr. McBride misrepresented the viability of the corporation or the financial hardship which Land and Cattle Funding was encountering. In short, the representation made by Mr. McBride

and his counsel with respect to the financial status of Land and Cattle Funding was a totally accurate and truthful representation of their opinion as to the corporation's financial status.

However, regardless of the accuracy of the opinions in question, they were just that -- opinions. As such, they were not statements of fact sufficient to support an action for fraud, and, therefore, the trial court's order of summary judgment must be affirmed.

III. THE UNCONTROVERTED FACTS IN THIS RECORD CONCLUSIVELY DEMONSTRATE THAT MR. MCBRIDE COMMITTED NO FRAUD, MISREPRESENTATION OF FACT, NOR ANY KNOWING CONCEALMENT OF FACT, BECAUSE THE INFORMATION PROVIDED BY HIM WHICH APPELLANT CLAIMS WAS FRAUDULENT WAS IN FACT TRUTHFUL AND ACCURATE

The entire basis of Mrs. Jones' claim for relief in this matter is that the following representation contained in the letter dated December 6, 1976 from Mr. Murphy to Mr. Henroid constituted a fraudulent misrepresentation at the time the parties entered into the stipulation for the division of property between them:

Stock and Land and Cattle Funding. At this time the corporation is in very poor condition and has a negative net worth.

To the contrary, all of the evidence in the record uncontrovertedly establishes that from late 1974 and continuing until well after the divorce between these parties, Land and Cattle Funding encountered severe financial difficulty which ultimately led to

the revocation of its corporate charter. The record is also clear that the Alpine Ltd. asset owned by Land and Cattle Funding did not significantly improve the financial posture of Land and Cattle Funding since it was merely a limited partnership interest (not an interest in real property) and as such was unmarketable. Moreover, Alpine Ltd. itself was experiencing difficulties due to the default of its own limited partners. With these circumstances in mind there was no reason for Mr. McBride, nor his counsel, to be optimistic about the value of Land and Cattle Funding.

Mrs. Jones has asserted repeatedly that the statement "the corporation is in very poor condition and has a negative net worth" is tantamount to saying Land and Cattle Funding's interest in Alpine Ltd. was worthless. Such an assertion is simply not tenable, especially in light of her representation by sophisticated counsel. The fact of the matter is that at the time of the divorce Mr. McBride did not own a 10% interest in the real property owned by Alpine Ltd. He owned stock in Land and Cattle Funding which owned a 10% limited partnership interest in Alpine Ltd. The stock of Land and Cattle Funding was of little value because the liabilities and potential liabilities of the corporation were greater than the value which Mr. McBride believed the assets of Land and Cattle Funding represented. Moreover, since Mr. McBride had been unsuccessful in selling the 10% limited partnership interest he had no reason to believe that it added signifi-

ificantly to the net worth of Land and Cattle Funding.

The facts and circumstances which existed at the time of the divorce clearly demonstrate that the representations made by Mr. McBride and his counsel concerning Land and Cattle Funding were both truthful and accurate. It is futile for appellant to attempt to raise an issue of fact with respect to value of Land and Cattle Funding with evidence of facts and circumstances that came into existence some 18 months after the final Decree of Divorce was entered. This record is totally void of any evidence which indicates that Mr. McBride had any reason to believe that Land and Cattle Funding, even with its ownership interest in Alpine Ltd., had any significant value at the time these parties were divorced.

In short, the representations at issue were both true and accurate, and, therefore, the trial court's order of summary judgment must be affirmed.

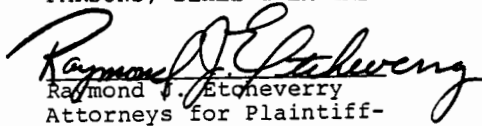
#### CONCLUSION

For all of the foregoing reasons, the order of summary judgment entered by the trial court must be affirmed.

DATED this 11<sup>TH</sup> day of February, 1980.

Respectfully submitted,

PARSONS, BEHLE & LATIMER

  
Raymond J. Etcheverry  
Attorneys for Plaintiff-  
Respondent

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed two true and accurate copies of the foregoing Respondent's Brief, postage prepaid, to Joseph L. Henroid and Earl Jay Peck of and for Nielsen Henroid, Gottfredson & Peck, 400 Newhouse Building, Salt Lake City, Utah 84111 this 11th day of February, 1980.

