

1986

Gay M. Beckstead, Jeanne Bertrand, Jeanne  
Fontaine v. Robert W. Marsing, Gay Marsing,  
Donald Ray Dennis, Francis H. Dennis, Jeffery W.  
McBride, Barbara H. McBride : Brief of  
Respondent

Utah Supreme Court

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TAH COURT OF A

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

Case No. ~~2~~ 860093

GAY M. BECKSTEAD, JEANNE )  
BERTRAND, and JEANNE )  
FONTAINE, )  
 )  
Plaintiffs/ )  
Appellants, )  
vs. )  
 )  
ROBERT W. MARSING, GAY )  
MARSING, DONALD RAY DENNIS, )  
FRANCIS H. DENNIS, JEFFERY )  
W. McBRIDE, and BARBARA H. )  
McBRIDE, )  
 )  
Defendants/ )

860093-CA  
Case No. 20411

BRIEF OF RESPONDENTS JEFFREY W. McBRIDE and BARBARA H. McBRIDE

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Plaintiffs/Appellants

**FILED**  
APR 22 1985

Clerk, Supreme Court, Utah

IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

---

GAY M. BECKSTEAD , JEANNE	)	
BERTRAND , and JEANNE	)	
FONTAINE ,	)	
	)	
Plaintiffs/	)	
Appellants ,	)	
vs ,	)	Case No. 20411
	)	
ROBERT W. MARSING , GAY	)	
MARSING , DONALD RAY DENNIS ,	)	
FRANCIS H. DENNIS , JEFFERY	)	
W. McBRIDE , and BARBARA H.	)	
McBRIDE ,	)	
	)	
Defendants/	)	

---

BRIEF OF RESPONDENTS JEFFREY W. McBRIDE and BARBARA H. McBRIDE

---

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

---

GAY M. BECKSTEAD , JEANNE	)	
BERTRAND , and JEANNE	)	
FONTAINE ,	)	
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Plaintiffs/	)	
Appellants ,	)	
vs	)	Case No . 20411
	)	
ROBERT W. MARSING , GAY	)	
MARSING , DONALD RAY DENNIS ,	)	
FRANCIS H. DENNIS , JEFFERY	)	
W. McBRIDE , and BARBARA H.	)	
McBRIDE ,	)	
Defendants/	)	
Respondents .	)	

---

STATEMENT OF ISSUES

1. WHETHER A VENDEE IN THE PURCHASE OF REAL PROPERTY PLACED IN ESCROW HAS UNTIL DELIVERY OF DEED FROM DEPOSITORY AFTER THE FINAL PAYMENT IS MADE TO REQUIRE REFORMATION OF CONTRACT .
2. WHETHER A SUBSEQUENT PURCHASER OF REAL PROPERTY CHARGED WITH INFORMATION , KNOWLEDGE AND CLAIMS OF A PURPORTED PRIOR PURCHASER OF REAL PROPERTY BY REASON OF RECORDING OF A NOTICE OF CONTRACT INTEREST , AND AFTER PERSONAL KNOWLEDGE OF CLAIM TO REAL PROPERTY , CAN BE PLACED IN TITLE IN A SUIT TO VOID THE CONVEYANCE TO HIM BECAUSE OF THE RUNNING OF THE STATUTE OF LIMITATIONS (THREE YEARS FROM DISCOVERY OF MISTAKE) PRIOR TO AN ACTION BEING BROUGHT TO CORRECT AN ERROR IN THE CONTRACT AND DEED .
3. WHETHER STATUTE OF LIMITATIONS FOR FRAUD AND MISTAKE IS TOLLED WHERE PARTY AGAINST WHOM THE STATUTE RUNS IS IN POSSESSION OR CONSTRUCTIVE POSSESSION OF THE PREMISES .

4. WHETHER THE STATUTE OF LIMITATIONS RUNS AGAINST  
A PARTY IN AN ACTION WHO FILES AN ACTION AFTER DISCOVERY OF A  
MISTAKE BUT DOES NOT ALLEGE FRAUD OR MISTAKE

STATUTES

1. Section 78-12-26 (3) , Utah Code Annotated , 1953 , as amended:

Within three years: An action for relief on the ground of  
fraud or mistake; but the cause of action in such case shall  
not be deemed to have accrued until the discovery by the  
aggrieved party of the facts constituting the fraud or mistake .

### STATEMENT OF CASE

Plaintiffs/Appellants brought action seeking affirmative relief to compel vendors Marsings to convey to Appellants an acre of land that was not contained in the contract and deed of the sellers (Marsing) claiming fraud and mistake. Plaintiffs/Appellants also asked that a subsequent warranty deed to successor purchasers of the disputed acre be voided and canceled and for attorney's fees in the sum of \$5,000. (R 5) The trial court granted Defendants/Respondents motion for summary judgment because Plaintiff/Appellants action was not brought within three years of having discovered the alleged fraud or mistake. (R 164, 170, 172)

### STATEMENT OF FACTS

Respondents Marsing originally owned a piece of real property situated in Slaterville, Weber County, Utah, that is basically long and narrow, running generally South to North with a frontage of 143 feet on Pioneer Road. Respondents Marsing had constructed a residence on the South two acres, fronting the county road.

Prior to October, 1977, Respondents Marsing sold the South two acres with the residence situated thereon to Defendants Dennis and on October 5, 1977, sold to Appellants Beckstead a portion of the remaining property with the deed reciting that the beginning point was "913.6 feet North of the county road" (R 2) This description left unconveyed, at the time, the area between 609 feet North of the point of beginning and 913.6 feet North of the point of beginning, which consists of approximately one acre.



In December 1977, Respondents Marsing deeded the unconveyed one acre to Respondents Dennis. This deed was recorded in the Weber County Records Office on May 8, 1979. (R 4, 139) Dennis fenced in said acre and occupied the same to the exclusion of all other parties. (R 121, 122). On July 31, 1981, Respondent Dennis deeded to Respondents McBride the three acres then owned by Dennis which comprised the original two acres with the residence and the one acre situated immediately to the North of the original two acres deeded to the Dennis' and adjacent to the South boundry of the Beckstead property. (R 4)

On February 16, 1979, Becksteads sold the property they were purchasing from Respondents Marsings to Appellants Bertrand and Fontaine (R 6, 7) and for some reason Appellant Beckstead can not explain why the party preparing the deed did not use the proper description by which Beckstead had obtained the property from Marsings which consists of nine acres, but used a description that, in effect, moved their south boundry one acre south of their deeded property line and took in the one acre that Marsing had reserved between the Dennis property and the Beckstead property (R 6, 7). In effect, Appellant Beckstead sold to Appellants Bertrand and Fontaine more property than she had been sold by Respondents Marsing and now attempts to reform her deed from Respondents Marsing to include the south one acre not included in her deed so that she can clear the error she has made in the deed to Bertrand and Fontaine.

The complaint of the plaintiff, which was filed on August 9, 1982, alleges fraud and mistake on the part of the Defendants Marsing as follows:

"4. That on or about the 5th day of October, 1977, Defendant Robert W. Marsing and Gay Marsing contracted to sell to Plaintiff Gay M. Beckstead and a Uniform Real Estate Contract was executed on said date between said properties, a copy of which is attached hereto and made a part thereof by reference. That during the negotiations for sale of said property, said Defendants Marsings represented to Plaintiff Beckstead that there were ten acres of land in said property. That during said negotiations Defendants Marsings represented to Plaintiff Beckstead that the location of the southern boundry of said parcel was a fence, which fence was approximately 609' north from the center of a county road. That, in fact, the description for said contract was changed so as to include only nine acres rather than the ten acres being sold by the defendants \* \* \*. That the description of the real estate contract is not the property intended by the parties to be conveyed and that it does not describe the property intended to be sold and purchased in said contract. Because of an error in the description the numerical figure 913.6 was inserted in the seventh line of the description in the place of 609.'

'5. During the spring of 1979, Plaintiffs discovered the error in the contract and deed.' (Emphasis added) (R2,3).

#### SUMMARY OF ARGUMENT

Appellants allege that they entered into an agreement with Respondents Marsings for the purchase of ten acres of real property; that Respondents Marsings "represented" that there were ten acres (R 2, 3), but when the agreement was put in writing and a deed prepared that "the agreement was changed so as to include only nine acres." (R 2); that there was "an error in description" (R 3), and that it was the "actual intention" (R 3), of the parties that there should be conveyed ten acres instead of the nine acres provided for in the contract and deed (R 3). Appellants allege in paragraph five (5) of their complaint that the fraud or mistake was discovered by the plaintiffs in the spring of 1979. (R 3). They also placed the time of learning of the fraud or mistake in March or

April of 1979 (R 144, 145) . In May of 1979 Appellants further learned of the fraud or mistake when a warranty deed , dated December 5, 1977, to the disputed acre was recorded on May 8, 1979, in the Weber County Recorders office by Defendants Dennis , naming Dennis' as grantees (R 139) . Appellants were also informed by Dennis personally in May of 1979 that he had received a deed to the disputed acre (R 145) . Respondents McBride's Motion for Summary Judgment was based upon the facts that Appellants' action was not brought within three years after the discovery of the alleged fraud or mistake and , therefore, barred by Section 78-12-26 (3) , Utah Code Annotated, 1953, as amended , which is as follows:

"78-12-26 WITHIN THREE YEARS -

Within three years: \* \* \* \* (3) An action for relief on the grounds of fraud or mistake; but the cause of action in such case shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

#### ARGUMENT

#### POINT ONE

WHETHER A VENDEE IN THE PURCHASE OF REAL PROPERTY PLACED IN ESCROW HAS UNTIL DELIVERY OF DEED FROM DEPOSITORY AFTER THE FINAL PAYMENT IS MADE TO REQUIRE REFORMATION OF CONTRACT .

1, The issue raised by Appellants is not relevant. The issue raised by Appellants is an affirmative defense that could be raised by Respondents Marsing and Appellants complain that Marsings have not done so. They need not do so inasmuch as Appellants have alleged fraud and mistake and have

thus given Respondents the opportunity of raising the three year statute of limitations provided for in 78-12-26(3) .

Appellants cited in support of their argument Hurwitz v. David B. Richards and Company, 436 P2d 794 (20 U. 2d 232) , which provides for the remedies of a vendee based on an anticipatory breach. They are:

"1. Treat the entire contract as broken and sue for damages.'

'2. Treat the contract as still binding and wait until the time arises for its performance and at such time bring an action on the contract.'

'3. Rescind the contract and sue for the money paid or for the value of services or property furnished."

Appellants are not seeking damages from Marsing. They have not waited until the conclusion of the contract to sue on the contract, nor are they seeking the return of their money. They seek reformation of the contract and cancellation of the warranty deed to the disputed acre from Marsing to Dennis and from Dennis to McBride. Because their actions are based on fraud or mistake the three year statute of limitation is governing. The reason for the three year statute of limitation contained in 78-12-26(3) is discussed in Daidsen v. Salt Lake City, 81 P2d 374, 95 Utah 347, where it is stated on page 376 as follows:

"This is for the very cogent reason that a person claiming to have been defrauded or to have been induced to enter into a contract by mistake should not be permitted to allow a great length of time to lapse after discovery of the fraud or mistake before instituting his suit. Otherwise, false claims of fraud or mistake might be asserted after the opposing party is unable to meet the issue because of death or absence of witnesses or destruction of vouchers and proofs."

" \* \* \* He may in one action, it is true, ask for cancellation of the deed and to have his title quieted and recover possession of the real estate. But if his relief in each case depends as here upon the cancellation of a deed for fraud or mistake he must bring his action within the period provided by law for an action based upon that ground. It would be extremely mischievous if a person claiming to be a victim of fraud or mistake were permitted to delay bringing his action until nearly seven years after the discovery of the fraud or mistake upon which he relies." (Emphasis added)

In Doxey-Layton Company v. Clark, 548 P2d 902 (1976), the court held that the three year statute of limitations did not begin to run as of the date of the contract but as of the date when the deed was recorded, which was the time when the grantor should have discovered the mistake.

The latest case from the Utah Supreme Court to speak on the issue of the applicability of 78-12-26(3), Utah Code Annotated, 1953, as amended, is Haslem v. Ottosen, 639 P2d 27. This is a case to reform a warranty deed to exclude "after acquired" mineral rights because it was alleged it was the intention that no such rights be conveyed inasmuch as at the time of the conveyance the grantor had no such rights and the grantee knew such to be the fact. The court state:

"Both parties agree that Plaintiffs action is based on mutual mistake. The applicable statute of limitation, which was the basis of the trial court rulings is U.C.A. 1953, Section 78-12-26 (3), Davidson v. Salt Lake City, 95 Utah 347, 81 P2d 374(1938), it provides: 'Within three years' \* \* \* (3) An action for relief on the ground of fraud or mistake; but the cause of action in such case shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake \* \* \*.'

' In Gibson v. Jensen, 48 Utah 244, 158 P 426 (1916), this court construed the predecessor to Section 78-12-26(3) and held that discovery occurs when facts arise which would put a reasonable prudent person on notice to inquire into the matter. Additionally, if no inquiry is made one is held to have discovered all that would have been revealed if reasonable inquiry had been made. \* \* \* Both cases held that the

statute of limitations did not being to run until the mistake was discovered or in the exercise of reasonable diligence, could have been discovered."

The above case clearly and unequivocally stands for the proposition that the three year statute of limitations commences running at such time as the aggrieved party learns of the fraud or mistake or should have.

The Haslem case cites Davidson v. Salt Lake City, 95 Utah 347, 81 P2d 374, which was a case seeking to reform a deed based upon the obtaining of the same by fraud. The court, thereon, at page 378, held that the three year statute of limitations applied and quoted extensively from Weight v. Bailey, 45 Utah 584, 147 P2d 899 (1915), as follows:

"Plaintiff brought a suit to reform a written contract and recover judgment according to its terms when reformed (Emphasis added). The three year statute of limitations relating to actions for relief on the ground of fraud or mistake pleaded in defense and the trial court held the suit to be barred by such statute. Upon appeal the Plaintiff urged that the statute did not apply and that an action to reform a written instrument might be brought at any time while an action upon the instrument could be brought to enforce it. (Emphasis added.) It was also urged that 'mere lapse of time does not bar any case of purely equitable jurisdiction.'

' This court held that the three year statute applied, the court saying (Page 901); '

'If the contract did not address the agreement made by the Respondent and himself (Appellant) he then had full notice of that fact and, hence, was required to bring the action to reform the contract so as to make it evidence the agreement as made. Such an action he was required to bring within three years from the time he learned of all the facts constituting the fraud or mistake pleaded by him. \* \* \* We are clearly of the opinion that both upon principal and authority under a statute like ours the right of action was barred." (Emphasis added)

## POINT TWO

WHETHER A SUBSEQUENT PURCHASER OF REAL PROPERTY CHARGED WITH INFORMATION, KNOWLEDGE AND CLAIMS OF A PURPORTED PRIOR PURCHASER OF REAL PROPERTY BY REASON OF RECORDING OF A NOTICE OF CONTRACT INTEREST, AND AFTER PERSONAL KNOWLEDGE OF CLAIM TO REAL PROPERTY, CAN BE PLACED IN TITLE BECAUSE OF THE RUNNING OF THE STATUTE OF LIMITATIONS (THREE YEARS FROM MISTAKE) PRIOR TO AN ACTION BEING BROUGHT TO CORRECT AN ERROR IN THE CONTRACT AND DEED.

In February, 1979, when Appellant Beckstead sold her interest in the contract with Marsing to Appellants Bertrand and Fontaine, Appellants Bertrand and Fontaine recorded the document entitled "Notice of Contract" in the office of the Weber County Recorder which stated that the said Appellants claimed an interest in and to the real property described in said notice, which property showed a beginning point of 609 feet North of the true point of beginning, which description would include the disputed acre.

The only effect of the recording of said notice is to appraise subsequent purchasers of the claim of Bertrand and Fontaines', no matter how faulty, but did not establish the ownership of Bertrand and Fontaines' to the property described in said notice. Such a notice is merely a warning to subsequent purchasers that they buy the disputed property at their risk. Generally, it remains for future litigation to determine the priority of rights between the parties. The trial court has already determined that any rights that the Appellants, Bertrand and Fonatine, have to the disputed acre have been barred by the three year statute of limitation, 78-12-26(3).

### POINT THREE

WHETHER STATUTE OF LIMITATIONS FOR FRAUD AND MISTAKE IS TOLLED WHERE PARTY AGAINST WHOM THE STATUTE RUNS IS IN POSSESSION OR CONSTRUCTIVE POSSESSION OF THE PREMISES.

In as much as this matter was presented to the court on Motions for Summary Judgment no parties nor witnesses were sworn and testified in open court and there was before the court only the pleadings of the parties, the affidavit of Appellant, Gay Beckstead, the affidavit of Donald Ray Dennis, and the deposition of Gay Beckstead. There are no pleadings of appellants alleging that any of the Appellants were in actual or constructive possession of the premises. However, the court has before it the affidavit of Respondents Dennis that he had enclosed the disputed area with a fence and that he was in the sole possession of the disputed acre and occupied it to the exclusion of all other parties (R 121, 122).

The case of Jensen v. Manila Corporation of the Church of Jesus Christ of Latter Day Saints, 565 P2d 63, cited by Appellants is not authority for Appellants' position. It is incorrect to allege "Statute of Limitations for fraud and mistake does not apply where one against whom the statute is to be asserted is in possession." The Statute of Limitations for Fraud and Mistake (78-12-26 (3)) was not raised as a defense in that case, nor was it discussed on appeal. Laches was raised by the defendant on page 65, but not the three year statute of limitations. Laches and the three year statute of limitations are two different doctrines as "Laches", according to Blacks Law Dictionary is defined as "Omission to assert a right for an unreasonable



and unexplained length of time under circumstances prejudicial to the adverse party." The statute relied upon requires action by the aggrieved party within the limits of three years after discovery or should have discovered the fraud or mistake (Haslem v. Ottosen, 639 P2d 27, Davidson v. Salt Lake City, 95 Utah 347, 81 P2d 374) .

The court in the Jensen case, supra, quoting from Tapler v. Fray, 194 PSupp 239, 132 A2d 890, as follows:

"Plaintiffs were in undisturbed possession of the premises and there was no occasion to bring the action earlier. Laches will not be imputed to one constantly in complete possession of Premises, the title to which is in controversy." (Emphasis added)

Thus, it can easily be seen that the court in the Jensen case, supra, was speaking only of laches and not the three year statute of limitations 78-12-26 (3), and its holding was based on "undisturbed", "constant" and complete possession.

In the case before the court, the record is completely void of any allegations or evidence that Appellants were in possession of any portion of the disputed acre for any period of time. The only evidence is that Respondent Dennis was in sole and exclusive possession of the disputed acre. (R 121, 122) .

#### POINT FOUR

WHETHER THE STATUTE OF LIMITATIONS RUNS AGAINST A PARTY IN AN ACTION WHO FILES AN ACTION AFTER DISCOVERY OF A MISTAKE BUT DOES NOT ALLEGE FRAUD OR MISTAKE.

In support of the Appellants position they cite Haws v. Jensen, (Utah) 209 P2d 229. This case did not involve fraud or mistake nor were

there any allegations as to either . This was an action to enforce an oral trust agreement upon real property . The three year statute of limitation was held not to apply because the facts upon which it could be applied simply were not raised by the parties nor considered by the trial court, but the defense was raised for the first time on appeal .

The fact of the matter is that in the case before the court , in paragraphs four and five of the complaint, the Plaintiffs allege both fraud and mistake (R 2, 3) , although a finding of either fraud or mistake would be sufficient to support the decision of the trial court .

The following from paragraphs 4 and 5 of said complaint is significant .

"That during the negotiations for the sale of said property , said defendants , Marsing , represented to said plaintiff's , Beckstead , that there were ten acres of land in said property . That during said negotiations Defendants , Marsings , represented to Plaintiff Beckstead , that the location of the southern boundry of said parcel was a fence , which fence was approximately 609 feet North from the center of a county road . That in fact the description for said contract was changed so as to include only nine acres rather than the ten acres sold by the defendant . \* \* \* Because of an error in the description , 913 was inserted on the seventh line of the description in the place of 609 . In order to make the deed describe the subject property and to make it conform to the actual intention of the parties number 609 should be inserted in the seventh line in place of 913.6 ."

'5. During the spring of 1979 , Plaintiffs s discovered the error in the contract and deed ." (Emphasis added)

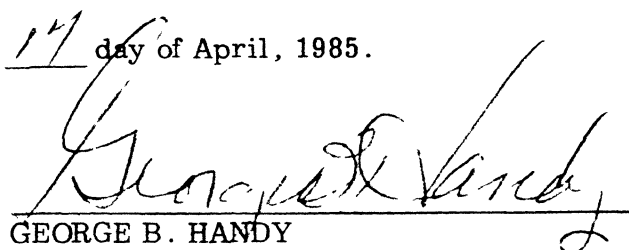
There can be no doubt that Appellants felt that there was (1) a misrepresentation as to the actual acreage to be conveyed , (2) a unilaterally changing of the contract and deed to provide for the conveyance of nine acres only instead of ten acres , (3) that there was an error in the description .

All of the above leads to only one conclusion. That there was either fraud on the part of the Defendant's Marsings or there was a mistake as to the amount of ground to be conveyed and this is reflected in the contract and deed. There can be no other conclusion than that the three year statute of limitations must govern in this matter and the three years had expired on the spring of 1982 as was found by the trial court and not in August of 1982.

#### CONCLUSION

The pleadings of Appellants and the facts show that there was either fraud or mistake involved in the transaction between Appellants, Beckstead, and Respondents, Marsings, in October 1977 and that said fraud or mistake was discovered by Appellants, Beckstead, Bertrand and Fontaine in the spring of 1979, March or April, but under no circumstances later than May 8, 1979, and that the three year statute of limitations provided for in 78-12-26(3) (Utah Code Annotated, 1953, as amended) is governing and the action of the Appellants is barred. The judgment of the trial court should be affirmed.

DATED AND SIGNED this 14 day of April, 1985.



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**ADDENDUM**

GAY M. BECKSTEAD, JEANNE  
BERTRAND, and JEANNE FONTAINE,

**RULING ON MOTION FOR  
SUMMARY JUDGMENT**

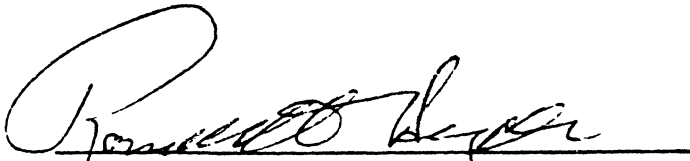
ROBERT W. MARSING, GAY MARSING,  
DONALD RAY DENNIS, FRANCIS H.  
DENNIS, JEFFREY W. MC BRIDE,  
and BARBARA H. MC BRIDE,

Defendants.

16

same thing as performing per a reformed contract. I hold statute of limitations of three years had run in this matter, and plaintiffs' action is, therefore, barred.

DATED this 1 day of November, 1984.

  
RONALD O. HYDE, Judge

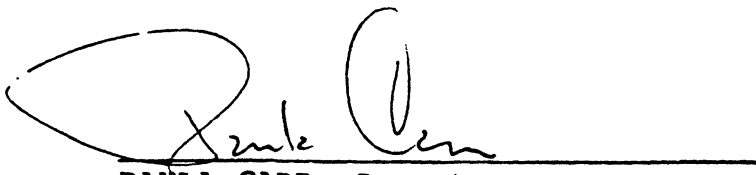
CERTIFICATE OF SERVICE

I hereby certify that on this 1 day of November, 1984, a true and correct copy of the foregoing Memorandum Decision was served upon the following:

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IN THE DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

-----

GAY M. BECKSTEAD, et al	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
Plaintiff,	)	
vs.	)	
ROBERT W. MARSING, et al	)	Civil No. 82896
	)	
Defendant.	)	

-----

The Motion of Summary Judgment of Defendant, Jeffery W. McBride and Barbara H. McBride, having come on for hearing before the above entitled court, the Honorable Ronald O. Hyde presiding, on the 5th day of October, 1984; the plaintiffs not being personally present but being represented by their counsel of record, Robert E. Froerer, Esq.; defendants, Jeffery W. McBride and Barbara H. McBride, not being personally present but being represented by their counsel of record, George B. Handy, Esq.; and the court having heard the arguments of counsel and having fully considered the record herein, deposition of plaintiff Beckstead and being fully advised in the premises now makes the following Finding of Fact:

LAW OFFICE  
**GEORGE B. HANDY**  
**LAWYER**  
2650 Washington Boulevard - Suite 102  
Ogden, Utah 84401

FINDINGS OF FACT

1. That plaintiffs and defendants are residents of Weber County, Utah.
2. That the real property which is the subject of the matter of this lawsuit is located in Weber County, Utah.
3. On or about the 5th day of October, 1977, defendants, Robert W. Marsing and Gay Marsing, sold to plaintiff, Beckstead, the following description of property situated in Weber County, Utah, to-wit:

Part of the Northwest Quarter of Section 11, Township 6 North, Range 2 West, Salt Lake Base and Meridian, U.S. Survey: Beginning at the Northwest corner of said Northwest Quarter Section and running thence South 1.22 chains; thence North  $83^{\circ}$  East 1.81 chains; thence South  $77^{\circ}20'$  East 9.4 chains; thence South  $6^{\circ}20'$  West 9.74 chains; thence South  $73^{\circ}$  East 5.95 chains; thence South  $14^{\circ}$  West 20.88 chains to center of county road; thence South  $74^{\circ}50'$  East 385.0 feet along center line of road, and North  $13^{\circ}52'$  East 913.6 feet to the true point of Beginning; running thence North  $13^{\circ}52'$  East 1571.4 feet, more or less, to the North line of said Northwest Quarter Section; thence North  $89^{\circ}41'$  East 400 feet, more or less, along said North line to the Northwest corner of John Perry Slater property; thence South  $5^{\circ}56'$  West 703.47 feet, more or less to the Southwest corner of said Slater property; thence East 72.72 feet; thence South  $1^{\circ}06'$  West 15 feet to the center of Four-Mile Creek; thence South  $59^{\circ}08'40''$  West 91.9 feet along said creek centerline; thence West 75 feet along said creek centerline to the Northwest corner of the Carl S. Pickett property; thence Northwesterly along said creek centerline to a point which bears South  $74^{\circ}50'$  East 143 feet, and North  $13^{\circ}52'$  East 1436.4 feet from the true point of beginning; thence South  $13^{\circ}52'$  West 1436.4 feet, and North  $74^{\circ}50'$  West 143 feet, more or less to the true point of Beginning.



Findings of Fact and Conclusions of Law  
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4. That by Warranty Deed, dated December 5, 1977, and recorded in the office of the recorder of Weber County, Utah, on May 8, 1979, defendants, Robert W. Marsing and Gay Marsing, conveyed to defendants, Donald Ray Dennis and Francis H. Dennis, the following real property situated in Weber County, Utah to-wit:

Part of the Northwest quarter of Section 11, Township 6 North, Range 2 West, Salt Lake Base and Meridian, U.S. Survey: Beginning at the Northwest corner of said Northwest Quarter Section and running thence South 1.22 chains; thence North 83° East 1.81 chains; thence South 77°20' East 9.4 chains; thence South 6°20' West 9.74 chains; thence South 73° East 5.95 chains, thence South 14° West 20.88 chains to center of county road; thence South 74°50' East 385.0 feet along center line of road; thence North 13°52' East 609.0 feet to the true point of beginning; running thence North 13°52' East 304.6 feet; thence South 74°50' East 143.0 feet; thence South 13°52' West 304.6 feet; thence North 74°50' West 143.0 feet to the true point of beginning. Containing 1.0 acres.

5. That on or about the 31st day of July, 1981, Donald Ray Dennis and Francis H. Dennis conveyed the above described property to Jeffery W. McBride

6. Plaintiffs contend and alleged that the one acre of real property above described was sold to plaintiff and that ~~by~~ fraud and misrepresentation the legal description of the real property contained in the contract between plaintiff, Beckstead, and defendant, Robert W. Marsing and Gay Marsing, dated October 1, 1977, did not contain said one acre.

7. Plaintiffs alleged that said fraud and mistake was discovered in the spring of 1979.

7. That on August 19, 1982, the plaintiffs filed the above entitled action praying for reformation of the Uniform Real Estate Contract, dated October 5, 1977, and alleged as grounds, therefore, misrepresentation and mistake.

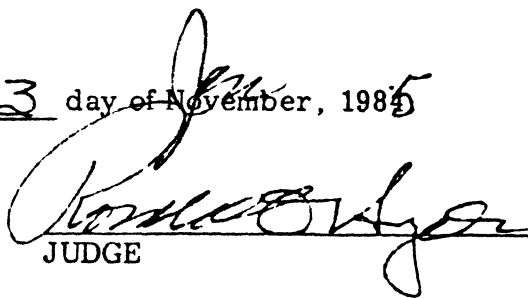
8. Plaintiffs learned of the incorrect description in the deed and the contract dated October 5, 1977, no later than May, 1979, when the deed from Robert W. Marsing and Gay Marsing to Donald Ray Dennis and Francis H. Dennis for the disputed one acre was recorded. It had become evident to plaintiffs no later than May, 1979, that defendants Marsing would not be able to perform the contract other than as written.

#### CONCLUSIONS OF LAW

As Conclusions of Law from the foregoing facts, the court finds the judgment in favor of the defendants, Jeffery W. McBride and Barbara H. McBride and against the plaintiffs, Gay M. Beckstead, Jeanne Bertrand and Jeanne Fontaine, as follows:

1. That the statute 73-12-26 (3) Utah Code Annotated 1953 as amended applies to the facts of this case and the said three year statute of limitations commenced to run in May 1979. and plaintiffs actions is therefore barred and judgment is awarded in favor of defendants, Jeffery W. McBride and Barbara H. McBride for no cause of action.

DATED AND SIGNED this 3 day of November, 1985

  
JUDGE

Approved as to form:

\_\_\_\_\_

**LAW OFFICES OF  
GEORGE B. HANDY  
LAWYER**  
2650 Washington Boulevard - Suite 102  
Ogden, Utah 84401

## STATE OF UTAH

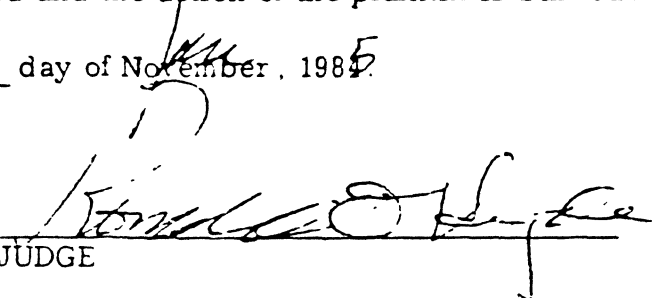
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IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant's  
motion for summary judgment is granted and the action of the plaintiff is barred.

DATED AND SIGNED this 3 day of November, 1985

  
JUDGE

Approved as to form:

\_\_\_\_\_  
Robert E. Froerer  
Plaintiff's attorney

78-12-26 (3) WITHIN THREE YEARS

Within three years: \* \* \* (3) An action for relief on the grounds of fraud or mistake: but the cause of action in such case shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituted in the fraud or mistake.

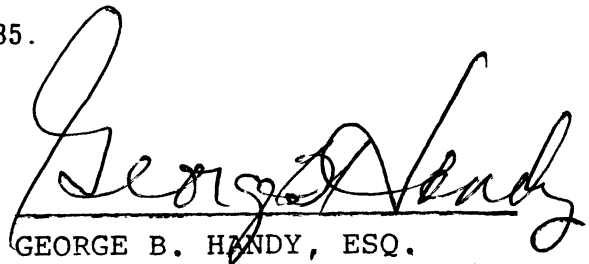
CERTIFICATE OF MAILING

I hereby certify that I mailed four true and correct copies of the  
above Respondent's Brief to each of the following:

ROBERT E. FROERER, Esq.  
Attorney for Plaintiffs/Appellants  
536 - 24th Street, Suite 2B  
Ogden, UT 84401

LaVAR E. STARK, Esq.  
Attorney for Defendnats/  
Respondents Marsing  
2485 Grant Avenue, Suite 200  
Ogden, UT 84401

postage prepaid, this 19<sup>th</sup> day of April, 1985.

  
GEORGE B. HANDY, ESQ.  
Attorney for Defendants/  
Respondents McBride