MISTAKE OF FACT IN THE SALE OF REAL PROPERTY

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I. INTRODUCTION

In an early article discussing the law of mistake in the formation and performance of a contract, one author began by simply stating, "The law relating to mistake is in a state of great confusion."[1] Today it is still true that the familiar legal principles governing the law of mistake are much easier to state than to apply.[2] Even though the *Restatement (Second) of Con-*

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1. Foulke, *Mistake in the Formation and Performance of a Contract*, 11 COLUM. L. REV. 197, 197 (1911).

2. *See* Maloney v. Sargisson, 18 Mass. App. Ct. 341, 465 N.E.2d 296 (1984).

For a general discussion of the law of mistake in contracting see Cavico, *Relief for Unilateral Mistake in Construction Bids*, 10 T. MARSHALL L. REV. 1 (1985); Foulke, *supra* note 1;

tracts seeks to avoid some of the more vague and perplexing legal terminology that has traditionally permeated the law of mistake,[3] there really is no test that can predict, with any degree of certainty, when relief will be granted in any given case. In part this is so because the rules governing relief for mistake, far from being precise, were actually designed to permit the courts a great deal of discretion in determining when relief is appropriate.[4] The rules were first shaped by the courts of equity, and they give the courts great flexibility in considering appropriate remedies in circumstances almost inevitably unforeseen by the contracting parties.[5] The law is thus characterized by such imprecise language as "material," "unconscionable," and considerations of who "bears the risk" of the mistake.[6]

Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUDIES 1 (1978); Lubell, *Unilateral, Palpable and Impalpable Mistake in Construction Contracts*, 16 MINN. L. REV. 137 (1932); Newman, *Relief for Mistake in Contracting*, 54 CORNELL L. REV. 232 (1969); Rabin, *A Proposed Black-Letter Rule Concerning Mistaken Assumptions in Bargain Transactions*, 45 TEX. L. REV. 1273 (1967); Seavey, *Problems in Restitution*, 7 OKLA. L. REV. 257 (1954); Note, *Contracts—Mutual Mistake—Rescission of a Land Contract for the Purchase and Sale of a Residence*, 29 WAYNE L. REV. 1433 (1983); Comment, *Relief from Burdensome Long-term Contracts: Commercial Impracticability, Frustration of Purpose, Mutual Mistake of Fact, and Equitable Adjustment*, 47 MO. L. REV. 79 (1982).

3. "There is probably no [other area of law] which contains so many perplexing and seemingly interchangeable legal labels than the [law] of mistake." Cavico, *supra* note 2, at 1.

4. For example, under *Restatement (Second) of Contracts* sections 152 and 153, a court must determine whether the mistake was made as to a "basic assumption" on which the contract was made and whether it had a "material effect" on the agreed exchange of performance. RESTATEMENT (SECOND) OF CONTRACTS §§ 152-153 (1979).

5. RESTATEMENT (SECOND) OF CONTRACTS §§ 151-158 introductory note (1979).

6. *Restatement (Second) of Contracts* section 152 provides:

> *When Mistake of Both Parties Makes a Contract Voidable*
>
> (1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.
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> (2) In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution, or otherwise.

RESTATEMENT (SECOND) OF CONTRACTS § 152 (1979).

Restatement (Second) of Contracts section 153 provides:

> *When Mistake of One Party Makes a Contract Voidable*
>
> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and
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> (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
>
> (b) the other party had reason to know of the mistake or his fault caused the mistake.

RESTATEMENT (SECOND) OF CONTRACTS § 153 (1979).

In cases in which the rules themselves do not do substantial justice, the court can depart from the rules and grant relief on such terms as justice requires. RESTATEMENT (SECOND) OF CONTRACTS § 158 (1979).

Furthermore, courts have traditionally exhibited an ambivalent approach to the problem of excusable mistake because there is a fundamental conflict between the policy promoting stability in contracting and the belief that it is wrong to hold a party to a contract that contains a mistake.[7] In an attempt to achieve predictability in mistake of fact cases, many courts purport to rely on rules and legal labels to explain decisions that are actually based on fact-specific notions of equity and fairness. This reliance on imprecise legal terminology as a basis for judicial decision making creates confusion and does little to help predict under what circumstances relief may be granted in the future. Terms like "intrinsic" or "incidental," for example, are fact-specific and actually have little meaning outside the circumstances of a particular case.[8] Even the time-honored distinction between mutual mistake and unilateral mistake of fact implies a difference that is frequently one more of form than substance.[9]

In most cases today in which a party seeks rescission of a contract for the sale of land because he was mistaken as to a basic assumption on which the bargain was made, the decision to grant relief does not depend on how the mistake is designated or on the application of any precise rule. Relief depends on flexible considerations of equity based on the particular circumstances of each case. When contemporary standards of fairness are applied in cases involving mistake of fact by a purchaser in the sale of real property, the courts generally permit some relief for mistake, regardless of whether the mistake is designated mutual or unilateral. The same policies underlying the retreat from caveat emptor in the sale of real property and the recognition of implied warranties and a seller's duty to disclose,[10] underlie the trend toward liberalizing relief for a purchaser of real property who is mistaken about an important fact concerning the transaction.[11] Even though a court may rely on traditional categories in granting or denying relief for mistake of fact in the sale of real property, factors such as the magnitude of the mistake, the certainty in the minds of the parties, and concerns about the fairness of requiring the mistaken purchaser to bear the responsibility for the mistake are more important to that determination than categorizing the mistake under traditional legal labels.

This Article begins with a discussion of the modern rules governing relief for mistake in the sale of real property. The next section examines decisions in which courts have granted or denied relief for mistakes designated

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7. Newman, *supra* note 2, at 236-37.

8. *See id.* at 234.

9. *See generally id.* Newman, *supra* note 2. Newman notes the requirement in mutual mistake cases that the mistake relate to the same fact is highly questionable, and separate mistakes about the same fact are hardly mutual. *Id.* at 233.

10. *See infra* notes 211-216 and accompanying text.

11. *Restatement (Second) of Contracts* section 153(a) recognizes that unconscionability may be a factor in the determination of whether to grant relief in cases involving unilateral mistake. RESTATEMENT (SECOND) OF CONTRACTS § 153(a) (1979).

as mutual and unilateral, suggesting that the distinctions are less important than equitable principles in determining who should bear the risk in such cases. This Article then discusses the policies underlying a court's determination of allocation of risk in such circumstances and considers the related problems of nondisclosure and innocent misrepresentation in mistake of fact cases. Finally, this Article concludes by arguing that in cases involving the sale of real property, relying on the traditional distinction between mutual and unilateral mistake of fact is simply not very helpful in determining whether relief will be granted. Policies underlying the retreat from caveat emptor in the sale of real property and general principles of conscionability should determine whether relief for mistake of fact in the sale of real property will be granted.

II. Mistake in General

A. *Mistake of Fact, Mistake of Judgment, and Ignorance*

Under the modern *Restatement*, a party seeking relief[12] for a mistake must prove he was mistaken about a fact as it existed at the time of the making of the contract, the mistake concerned a basic assumption on which the contract was made, and the mistake had a material effect on the agreed exchange of performances.[13] A party's prediction or judgment as to events that might occur in the future, even if erroneous, is not a "mistake" for which relief can be granted.[14] The law of mistake deals only with the risk of error relating to a factual basis of the agreement, not with the risk of error as to future matters.[15]

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12. The relief generally sought by parties for mistake is rescission of the contract and restitution when appropriate. E. Farnsworth, Contracts §§ 9.3-.4 (1979). Occasionally courts fashion more imaginative solutions when restitution will not do justice. *See, e.g.*, Thieme v. Worst, 113 Idaho 455, 745 P.2d 1076 (Ct. App. 1987) (when both parties to a contract for the sale of land mistakenly believed that water could be delivered to the property, the court "reformed" the contract and required the seller to specifically perform the reformed contract by providing a permanent delivery system that would again conduct the water to the corner of the property).

13. Restatement (Second) of Contracts § 152 (1979). The adversely affected party must also show that he did not bear the risk of the mistake. *Id.* In addition to these requirements, in cases in which only one party is mistaken, that party must also show either the effect of the mistake is such that enforcement of the contract would be unconscionable, or the other party had reason to know of the mistake or his fault caused the mistake. *Id.* § 153.

14. "A mistake is a belief not in accord with the facts." *Id.* § 151.

15. Lenawee County Bd. of Health v. Messerly, 417 Mich. 17, ____, 331 N.W.2d 203, 207-08 n.10 (1982). The court held:

> It is crucial to distinguish between the date on which a belief relating to a particular fact or set of facts becomes erroneous due to a change in the fact, and the date on which the mistaken nature of the belief is discovered. By definition, a mistake cannot be discovered until after the contract is executed. If the parties were aware, prior to the execution of a contract, that they were in error concerning a particular fact, there would be no misapprehension in signing the contract. Thus stated, it becomes obvious

The line between a mistake as to an existing fact and a poor prediction of the future, however, is far from precise, especially when the parties rely on existing facts to set their expectations as to the future.[16] In one case, for example, a purchaser contracted to purchase property for a use that, at the time, was permitted under existing zoning law.[17] Neither party knew at the time of contracting that the local planning board had recently published a notice of a proposed zoning change for the property.[18] The Massachusetts Supreme Court held that the purchaser was entitled to relief for mutual mistake of fact because both parties were mistaken in assuming the zoning laws permitted such use.[19] On the other hand, one could argue that the purchaser merely made a poor prediction as to the future zoning status of the property.[20]

A mistake of fact, because it implies a mistaken belief, should also be distinguished from ignorance about a fact. In *Thieme v. Worst*,[21] for example, the Thiemes purchased five acres of land from the Worsts for a house and garden.[22] The Thiemes believed that water could be delivered to the property through an existing irrigation ditch, but a cement barrier obstructed the delivery of water to the ditch.[23] The trial court granted the Thiemes relief holding the Worsts should be required to specifically perform a "reformed" contract by providing a permanent delivery system that would conduct water to the property.[24] The appellate court affirmed, finding that the Thiemes were entitled to relief under the doctrine of mutual mistake of fact.[25]

The Worsts argued that any mistake as to availability of water was unilateral, not mutual, because they were not mistaken but merely ignorant about the location of the water source and entry point onto the property.[26]

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that the date on which a mistaken fact manifests itself is irrelevant to the determination whether or not there was a mistake.

Id.

Questions of the risk of error relating to future matters are dealt with under the law of impracticability of performance or frustration of purpose. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 151-158 introductory note (1979).

16. E. FARNSWORTH, *supra* note 12, § 9.2, at 650.

17. Dover Pool & Racquet Club, Inc. v. Brooking, 366 Mass. 629, 322 N.E.2d 168 (1975) (discussed in E. FARNSWORTH, *supra* note 12, § 9.2, at 650).

18. *Id.* at ____, 322 N.E.2d at 169.

19. *Id.* at ____, 322 N.E.2d at 171.

20. E. FARNSWORTH, *supra* note 12, § 9.2, at 650.

21. Thieme v. Worst, 113 Idaho 455, 745 P.2d 1076 (Ct. App. 1987).

22. *Id.* at 456-57, 745 P.2d at 1077-78.

23. *Id.* at 457, 745 P.2d at 1078.

24. *Id.* at 456, 745 P.2d at 1077.

25. *Id.* at 458, 745 P.2d at 1079.

26. This case illustrates some of the difficulties in attempting to distinguish mutual mistake from unilateral mistake. The trial court believed that the Worsts were not ignorant but actually mistaken, and therefore, the parties were entitled to relief for mutual mistake of fact. *Id.* The appellate court did not disturb that finding on appeal. *Id.*

The appellate court found, however, because the owners of land are presumed to know the boundaries of their own land, the quantity of the acreage, and the amount of water available, "substantial evidence supports the [trial] court's finding that the Worsts did have a mistaken belief."[27] This case thus appears to stand for the odd proposition that a person can be legally mistaken even when, at least in his own mind, he was not mistaken. It is more likely that the court in *Thieme v. Worst* simply decided to treat the sellers as mistaken rather than ignorant in order to grant the purchasers a remedy under the doctrine of mutual mistake of fact.

B. *Mistake as to a Basic Assumption*

The *Restatement* adopts a two-tiered test requiring that the mistake concern a basic assumption on which the contract is made and that it have a material effect on the agreed exchange of performances. It is not enough for a party to prove he would not have made the contract but for the mistake.[28] "He must show that the resulting imbalance in the agreed exchange is so severe that he can not fairly be required to carry it out."[29] Despite the presence of this two-tiered test, in modern cases involving mistakes in the sale of land, many courts simply require that the mistake be "material."[30] As a practical matter, probably the only real difference between a mistake that goes to a basic assumption and one that is material is one of degree, with the term "basic" used as an admonition of caution to courts in determining whether to grant relief for mistake.[31]

What exactly is an assumption that is material to a transaction? In an attempt to explain why a particular mistake is deemed material, courts have used terms like "substantial" and "fundamental,"[32] and described the mistake as "going to the heart of the transaction."[33] In cases in which the court determines the mistake will not entitle the mistaken party to relief, materiality is defined as something more than "collateral" or "incidental."[34] Be-

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27. *Id.*

28. RESTATEMENT (SECOND) OF CONTRACTS § 152 comment c (1979).

29. *Id.*

30. Horner v. Bourland, 724 F.2d 1142, 1145 (5th Cir. 1984) (whether a given matter is material is the relevant inquiry in a case involving mutual mistake); Thieme v. Worst, 113 Idaho 455, 459, 745 P.2d 1076, 1080 (Ct. App. 1987).

31. Rabin, *supra* note 2, at 1282.

32. Carey v. Wallner, 223 Mont. 260, 264, 725 P.2d 557, 560 (1986).

33. Palumbo v. Ewing, 540 F. Supp. 388, 393 (D. Del. 1982).

34. Horner v. Bourland, 724 F.2d at 1145 (parties' mistaken assumption that vendors' FHA loan could be recast was not sufficiently material to render real estate contract unenforceable).

The difficulty in distinguishing a mistake as collateral rather than going to the very nature of the consideration is illustrated in the famous "barren cow" case of Sherwood v. Walker, 66 Mich. 568, 33 N.W. 919 (1887) (overruled by Lenawee County Bd. of Health v. Messerly, 417 Mich. 17, 331 N.W.2d 203 (1982)). In that case, the court rescinded the contract because the

yond such generalizations, the term cannot be satisfactorily defined because it is really a criterion that permits great flexibility and considerable discretion by the court in determining whether to permit relief for a particular mistaken assumption.[35] The use of the term material does little to provide a test for predicting when relief for mistake will be granted in future cases, because the determination of materiality is based on fact-specific factors that ultimately determine who should assume the loss in a particular case.

In cases involving the sale of real property, mistakes as to the presence of adequate water on the property,[36] the likelihood of water problems caused by flooding,[37] the zoning of the property,[38] and the adequacy of commercial business licenses[39] have been deemed material mistakes for which purchasers have been granted relief through contract rescission. The *Restatement* suggests a mistake that results in a substantial difference in value to the purchaser is almost always deemed a material mistake.[40] The *Restatement* thus rejects the argument that a mistake is not material merely because it results in a substantial difference in value.[41] In the case of real property, value depends not only on the physical characteristics of the property but also on a purchaser's intended use of the property. If a purchaser intends to engage in the large scale commercial cultivation of jojoba, for example, and the aquifer underlying the property is inadequate for commercial development, the mistake is material. The purchaser will be entitled to a rescission of the contract because the inability to grow jojoba on the property substantially diminishes the value of the property to the purchaser.[42]

C. *Did the Party Bear the Risk of the Mistake?*

Much of the confusion in the law of mistake has resulted from the arbi-

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mistake of the parties that the cow was barren, when in fact she was with calf, affected the substance of the whole consideration: "A barren cow is substantially a different creature than a breeding one." *Id.* at ____, 33 N.W. at 923.

Subsequently, the Michigan Supreme Court in Lenawee County Bd. of Health v. Messerly, 417 Mich. 17, 331 N.W.2d 203 (1982), found that the court's analysis in *Sherwood v. Walker* was not helpful to the equitable resolution of cases in which mistake is alleged and proven. The court found "that the inexact and confusing distinction between contractual mistakes running to value and those touching the substance of the consideration serves only as an impediment to a clear and helpful analysis [in such cases]." The holding in *Sherwood* was thus limited to the facts of that case. *Id.* at ____, 331 N.W.2d at 209.

35. Restatement (Second) of Contracts §§ 151-158 introductory note (1979).

36. Renner v. Kehl, 150 Ariz. 94, 96, 722 P.2d 262, 264 (1986); Thieme v. Worst, 113 Idaho 455, 456, 745 P.2d 1076, 1077 (Ct. App. 1987).

37. Thomas v. Pace, 496 So. 2d 609 (La. Ct. App. 1986).

38. Carey v. Wallner, 223 Mont. 260, 262, 725 P.2d 557, 558 (1986).

39. Glasgow v. Greenfield, 9 Ark. App. 224, ____, 657 S.W.2d 578, 579 (1983).

40. The argument that materiality is unrelated to value is generally illogical and not supported by the case law. Seavey, *supra* note 2, at 268.

41. Restatement (Second) of Contracts § 152 (1979).

42. Renner v. Kehl, 150 Ariz. 94, 722 P.2d 262 (1986).

trary and illogical distinctions sometimes made between mistakes that are deemed "extrinsic" or "intrinsic," or between mistakes going to the "identity" or "existence" of the subject matter and those that go merely to its "attributes," "quality," or "value."[43] The *Restatement* attempts to avoid such confusion by requiring that the party adversely affected not "bear the risk" of the mistake.[44] Under section 154 of the *Restatement*, there are three situations in which a party bears the risk of a mistake: (1) "when the risk is allocated. . .by agreement of the parties"; (2) when "he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts"; and (3) when "the risk is allocated to him by the court because it is reasonable in the circumstances to do so."[45]

The language of this section allows the courts broad discretion in determining when to deny relief to a mistaken contracting party under the theory that a party bore the risk of the mistake. In some cases a court may find that a purchaser bore the risk of a mistake about the condition of real property because the parties had allocated the risk by agreement through an as is clause in the contract.[46] In other cases, a court may grant relief to a mistaken party even though the contract contains an as is clause, under the theory that the clause was unfair, unconscionable, or adversely affected a party that did not bear the risk of mistake.

In *Garb-Ko, Inc. v. Lansing-Lewis Services*,[47] the purchaser, Garb-Ko brought an action for specific performance of a sales contract to purchase a gas station and automotive parts store in East Lansing from Lansing-Lewis and its parent company, Action Auto.[48] The location was to be used for a 7-Eleven convenience store.[49] The agreement contained an as is clause.[50]

Garb-Ko did not investigate the property for potential environmental problems before making the offer to purchase.[51] Neither party was aware at the time the buy-sell agreement was executed that the underground gasoline storage tanks on the property were leaking and contaminating the ground and groundwater.[52] Garb-Ko was informed of the contamination on the property and given the option of terminating the agreement or proceeding with the sale and providing Action Auto with full indemnification for all

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43. RESTATEMENT (SECOND) OF CONTRACTS § 154 comment a (1979).

44. As a general rule, a mistaken party is not barred from relief merely because he could have avoided the mistake by the exercise of reasonable care. Otherwise, the availability of relief for mistake would be greatly limited. E. FARNSWORTH, *supra* note 12, § 9.3, at 659.

45. RESTATEMENT (SECOND) OF CONTRACTS § 154 (1979).

46. Lenawee County Bd. of Health v. Messerly, 417 Mich. 17, 331 N.W.2d 203 (1982).

47. Garb-Ko, Inc. v. Lansing-Lewis Servs., 167 Mich. App. 779, 423 N.W.2d 355 (1988).

48. *Id.* at ___, 423 N.W.2d at 356.

49. *Id.*

50. *Id.*

51. *Id.*

52. There were seven underground storage tanks on the property that held four thousand to six thousand gallons of gasoline each. *Id.*

costs and penalties arising out of any gasoline storage leakage. However, Garb-Ko refused to agree to indemnify the sellers for such costs and expenses and subsequently filed an action for specific performance of the buy-sell agreement. "The [trial] court found that a mutual mistake affecting a basic, material assumption of the contract had occurred and that it would be unreasonable and unjust to enforce the terms of the buy-sell agreement."[53]

The appellate court agreed, calling this an "anomalous situation" in which a "seller seeks to rescind a contract for the sale of land based on a defect in the property discovered after the sales agreement was entered into."[54] The court held that the seller was entitled to a rescission of the agreement under these facts because present "environmental-protection statutes have altered the common law and made previous owners of sites liable for environmental contamination."[55] Thus a previous owner is subject to continuing liability after contaminated property is sold.[56]

The purchaser argued that an as is clause contained in the buy-sell agreement barred rescission of the contract because the purchaser had agreed to accept the property "in its present condition."[57] The appellate court, however, held that the clause allocated the risk to the purchaser, not the seller.[58] Because the purchaser was not the party adversely affected by the mistake, the as is clause was without significance.[59]

Under general principles of conscionability, an "all purpose" exculpatory clause in a contract for the sale of commercial property may also be an ineffective bar to an action for mutual mistake. In *Shore Builders, Inc. v. Dogwood, Inc.*,[60] Shore Builders purchased a 116 acre undeveloped tract of land that fronted on Indian River Bay in Sussex County, Delaware.[61] When it discovered that the land purchased could not be divided into enough buildable lots to be profitable without encroaching on federal wetlands, Shore Builders brought an action against the sellers, Dogwood, Inc., for contract rescission or reformation based on innocent misrepresentation or mutual mistake.[62] The sellers relied in part on the presence of an exculpatory clause in the contract of sale that expressly relieved them from any contractual liability to the purchasers in the event of any mistakes or misrepresen-

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53. *Id.*
54. *Id.*
55. *Id.* at ____, 423 N.W.2d at 357.
56. *Id.*
57. The clause stated: "PURCHASER HAS PERSONALLY EXAMINED THIS PROPERTY AND AGREES TO ACCEPT SAME IN ITS PRESENT CONDITION EXCEPT AS MAY BE SPECIFIED HEREIN AND AGREES THAT THERE ARE NO OTHER ADDITIONAL WRITTEN OR ORAL UNDERSTANDINGS." *Id.*
58. *Id.*
59. *Id.* at ____, 423 N.W.2d at 358.
60. Shore Builders, Inc. v. Dogwood, Inc., 616 F. Supp. 1004 (D. Del. 1985).
61. *Id.* at 1006-07.
62. *Id.* at 1005-06.

tation.[63] In granting partial summary judgment for the purchasers, the district court held that the exculpatory clause had no bearing or effect on the purchaser's action for mutual mistake or innocent misrepresentation.[64] The court found that giving effect to the clause and allocating the loss entirely to the purchasers would lead to gross inequities under the circumstances and violate principles of fair dealing.[65] Although the court found "the lack of legal sophistication among the parties in this three million dollar transaction somewhat surprising," the court concluded that this "only reinforce[d] [its] basic inclination to deny any legal effect to such clauses."[66]

III. Mutual v. Unilateral Mistake

A. *In General*

The most significant determination in the law of mistake is whether the mistake was made by one or both parties to the transaction.[67] A finding of mutual mistake implies that both the seller and the purchaser were subject to the same mistake.[68] A finding of unilateral mistake means that only one of the parties to the contract, usually the purchaser, was mistaken.[69]

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63. *Id.* at 1019.

64. *Id.* at 1019-21.

65. *Id.* at 1021.

66. *Id.* at 1020-21.

67. The *Restatement (Second) of Contracts* does not use the terminology of "mutual" or "unilateral," but expresses the distinction as a mistake of "both parties" or a mistake of "one party." *See* Restatement (Second) of Contracts §§ 152-153 (1979).

68. Cases in which a court granted relief to a party for mutual mistake of fact in the sale of real property include the following: Palumbo v. Ewing, 540 F. Supp. 388 (D. Del. 1982) (purchaser of commercial property entitled to rescission because of an active sewer line on the property); Renner v. Kehl, 150 Ariz. 94, 722 P.2d 262 (1986) (purchaser entitled to rescission of lease of property for jojoba cultivation because water supply to property was inadequate); Bejmuk v. Russell, 734 P.2d 122 (Colo. Ct. App. 1986) (seller entitled to relief when dispute arose as to the amount of interest required by the contract); Kidd v. Fowler, 498 So. 2d 969 (Fla. Dist. Ct. App. 1986) (seller entitled to relief because deed prepared by title company did not reserve seller's life estate); Thieme v. Worst, 113 Idaho 455, 745 P.2d 1076 (Ct. App. 1987) (purchaser entitled to reformation because an irrigation ditch did not supply water to the property); Garb-Ko, Inc. v. Lansing-Lewis Servs., 167 Mich. App. 779, 423 N.W.2d 355 (1988) (seller of commercial property entitled to rescission for mutual mistake of fact); Carey v. Wallner, 233 Mont. 260, 725 P.2d 557 (1986) (buyers entitled to rescission when property improperly zoned and licensed for foster care home); Kladouchos v. Ballis, 94 Or. App. 403, 765 P.2d 831 (1988) (buyers entitled to rescission because the house was only a three-plex rather than a four-plex under the law).

69. Cases in which the courts granted relief to a purchaser for unilateral mistake of fact include the following: Cummings v. Dusenbury, 129 Ill. App. 3d 338, 472 N.E.2d 575 (1984) (buyers entitled to rescission because house was not a "year-round" house); Home Savers, Inc. v. United Sec. Co., 103 Nev. 357, 741 P.2d 1355 (1987) (when other party had reason to know of mistake by purchaser, purchaser entitled to rescission); Howell v. Waters, 82 N.C. App. 481, 347 S.E.2d 65 (1986) (remanded for jury determination under theory of unilateral mistake because seller's agent misrepresented correct boundaries of the property).

It is easier for a purchaser to obtain relief for a mutual as opposed to a unilateral mistake in contracting.[70] Under the *Restatement*, in a case in which both parties are mistaken, an adversely affected party is entitled to relief if he can show he was mistaken as to a basic assumption on which the contract was made, the mistake had a material effect on the agreed exchange of performance, and he did not bear the risk of mistake.[71] If only one party is mistaken, the adversely affected party must prove, in addition to these requirements, the other party had reason to know of the mistake, the other party's fault caused the mistake, or it would be unconscionable to require the adversely affected party to perform.[72]

Why should it be easier to avoid a contract when both parties are mistaken than when only one party is mistaken? In cases involving mutual mistake, relief has been justified on the theory that a mistake by both parties, which affects the substance of the whole consideration, becomes a contract to sell something different than either party intended and thus should not be enforced.[73] In cases in which only one party to the contract was mistaken, however, courts are more reluctant to permit rescission because they fear granting such relief could destroy stability in contracting and substantially impair certainty and finality in all business transactions.[74]

The *Restatement* takes the position that in situations in which only one party is mistaken, a rescission of the contract will more clearly disappoint the expectations of the party who was not mistaken, than will a rescission when both parties were mistaken.[75] However, the expectations of the parties to a contract are usually different and "[t]he principle object of contracting is seldom the same on both sides" of a bargain.[76] As a result, a mistake,

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70. Despite the fact that the law's distinction between mutual and unilateral mistake of fact has never been completely justified, a court's designation of a mistake as mutual or unilateral is significant. Under the traditional rule of caveat emptor, a finding of unilateral mistake generally precluded recovery, while recovery was generally permitted in cases involving mutual mistake. E. FARNSWORTH, *supra* note 12, § 9.4, at 633.

71. RESTATEMENT (SECOND) OF CONTRACTS § 152 (1979).

72. *Id.* § 153.

73. *See, e.g.*, Sherwood v. Walker, 66 Mich. 568, 33 N.W. 919, 924 (1887). The distinction made by the court in *Sherwood* between collateral mistakes and mistakes that go to the "very nature of the transaction" was subsequently confined to the facts of the case by Lenawee County Bd. of Health v. Messerly, 417 Mich. 17, 331 N.W.2d 203 (1982).

74. E. FARNSWORTH, *supra* note 12, § 9.4, at 663.

75. RESTATEMENT (SECOND) OF CONTRACTS §§ 151-158 introductory note (1979).

76. Newman, *supra* note 2, at 233. In Lenawee County Bd. of Health v. Messerly, 417 Mich. 17, 331 N.W.2d 203 (1982), the court found that "[a]ll of the parties . . . erroneously assumed that property transferred by the vendors to the vendees was suitable for human habitation and could be utilized to generate rental income" when in fact the property was subsequently condemned because of an inadequate sewage system. *Id.* at ——, 331 N.W.2d at 210. The court noted that in such a case rescission for mistake would benefit the purchaser but harm the seller: "Although the [vendees] are disadvantaged by enforcement of the contract, performance is advantageous to the [vendors], as the property at issue is less valuable absent its income-earning potential." *Id.*

whether designated mutual or unilateral, will almost always be more harmful to one of the parties than to the other.[77] In most cases involving the sale of real property, the party harmed by the mistake is the purchaser because the property he thought he purchased is somehow different.

The distinction between mutual and unilateral mistakes is not always clear. By assuming that one party did not know of the other's mistake, a court can treat a unilateral mistake as mutual.[78] Conversely, by assuming misrepresentation, either express or implied, a court can treat a mutual mistake as unilateral and grant relief because the non-mistaken party or his agent caused the mistake.[79] Thus, the distinction between mutual and unilateral mistake may be made to justify rather than dictate a decision to grant or deny relief in a particular case.

For example, in *Kidd v. Fowler*,[80] "Mr. Kidd and his former wife entered into a purchase and sale agreement with [the Fowlers] for sale of their apartment complex."[81] The contract reserved a life estate for Mr. Kidd in a one bedroom apartment in the building.[82] However, the deed prepared by the title company did not include the clause in the contract reserving the life estate.[83] The trial court granted judgment for the purchaser, but the appellate court reversed and reformed the deed to include Mr. Kidd's life estate.[84] The Fowlers, who had purchased the property, contended that the mistake was unilateral on the part of the seller.[85] However, the appellate court found the facts supported a finding of mutual mistake.[86] The court held:

> To say that only appellant was mistaken would mean that appellees were aware of the mistake, yet chose to remain silent and unjustly enrich themselves at his expense. Believing in the good of our fellow man, we choose to find a mutual mistake which permits the reformation of the deed so as to make it express the real agreement and intention of the parties.[87]

As this opinion illustrates, cases do not always fall easily into the category of mutual or unilateral mistake, and knowledge, either actual or in-

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77. Newman, *supra* note 2, at 233.
78. *See* Kidd v. Fowler, 498 So. 2d 969, 970 (Fla. Dist. Ct. App. 1986).
79. Howell v. Waters, 82 N.C. App. 481, 490, 347 S.E.2d 65, 71 (1986).
80. Kidd v. Fowler, 498 So. 2d 969 (Fla. Dist. Ct. App. 1986).
81. *Id.* at 969.
82. *Id.*
83. *Id.* at 970.
84. The trial court had ruled that the doctrine of merger, which holds that at closing the contract for the purchase and sale of land merges into the deed, had extinguished the contract. *Id.* at 970.
85. *Id.*
86. *Id.*
87. *Id.*

ferred, can be used to change a unilateral error into a mutual one.[88] The court in *Kidd v. Fowler* acknowledged the ambiguity inherent in categorizing the mistake in this case, stating simply: "The mistake can be designated as mutual, unilateral, or a scrivener's error."[89]

In any given case, there are fact-specific reasons why a party to a contract for the sale of real property might be mistaken about a basic assumption on which the contract was made. The parties might be mistaken because a third party misrepresented an important fact about the property,[90] or because they did not discover a particular fact, such as the availability of water to the property through an existing aqueduct system, until after the sale of the property was completed.[91] The seller, however, is generally in a better position than the purchaser to know the true facts about the property. Consequently, in those cases in which a purchaser is mistaken about a fact that adversely affects the value or use of the property, the purchaser is usually granted relief, whether the mistake is considered mutual or unilateral, because the seller knew or should have known about the purchaser's mistake.[92] Relief to sellers, on the other hand, is denied more often because the seller bore the risk of the mistake or because the mistake was not material.[93]

B. *Cases Granting Relief for Mistake of Fact*

When discussing cases in which relief was granted for mistake of fact in the sale of real property, it is helpful to look at three general situations in which such mistakes have occurred: (1) cases in which the seller's acts or omissions caused or contributed to the purchaser's mistake; (2) cases in which actions or omissions by a third party caused or contributed to a party's mistake; and (3) cases in which the transaction led to the discovery of a fact not known by either party prior to the transaction.

1. *The Seller's Actions or Omissions Contributed to the Mistake*

If the actions of the seller cause or contribute to the purchaser's mistake, whether the mistake is called a misunderstanding[94] or is classified as

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88. *See* Cavico, *supra* note 2, at 17-18.

89. Kidd v. Fowler, 498 So. 2d 969, 970 (Fla. Dist. Ct. App. 1986).

90. Sunlight Funding Corp. v. Singer, 146 A.D.2d 625, 536 N.Y.S.2d 533 (1989); Hadley v. Clabeau, 140 Misc. 2d 994, 532 N.Y.S.2d 221 (N.Y. Sup. Ct. 1988), *aff'd*, 555 N.Y.S.2d 951 (App. Div. 1990).

91. *See* Thieme v. Worst, 113 Idaho 455, 745 P.2d 1076 (Ct. App. 1987).

92. RESTATEMENT (SECOND) OF CONTRACTS § 153 (1979).

93. *E.g.*, Dingeman v. Reffitt, 152 Mich. App. 350, 393 N.W.2d 632 (1986); Horner v. Bourland, 724 F.2d 1142 (5th Cir. 1984).

94. To be correct, one should classify those cases in which both parties to a real estate contract attach different meanings to their language as cases involving misunderstandings rather than mistakes. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 151-158 introductory note

mutual or unilateral, relief for the purchaser is almost certainly justified.[95] In cases in which the seller's "active" misrepresentations cause the purchaser's mistake, even though the seller was also mistaken, the courts generally grant relief to the purchaser either under the theory of mutual mistake or misrepresentation.[96] If a seller knows about a latent material fact and fails to disclose that fact to the purchaser, courts may grant rescission to the purchaser under a theory of unilateral mistake or nondisclosure.[97] If the purchaser's mistake arises as a result of an ambiguity caused by the seller, relief for the purchaser for mistake also is justified.[98]

In *Hagenbuch v. Chapin*,[99] the Chapins advertised the sale of their farm at public auction as: "Choice farmland . . . consisting of 129 acres—more or less."[100] The terms of sale provided that bids were to be submitted on a per acre basis and that a survey would not be provided.[101] The purchasers, the Hagenbuches, submitted the high bid for the property at $2610 per acre, with the sales price computed at 129 acres or $336,690.[102] Prior to the closing, the Hagenbuches questioned the acreage but the sale was closed as scheduled.[103] When a subsequent survey disclosed that there were only 127 acres within the legally described boundaries of the farm, the purchasers filed a complaint seeking damages for the deficiency in acreage conveyed.[104]

The trial court found that there had been no fraud and that the sale was "in gross" and not a sale by the acre.[105] On appeal, the appellate court noted that when a farm is sold and described as containing any certain number of acres, the presumption is that the sale is by acreage and not in gross.[106] Further, when the number of acres is considered material by the parties, a misrepresentation or mutual mistake of fact as to the acreage enti-

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(1979). The law says that, in such cases, there was no "meeting of the minds," and thus no contract was formed. For a recent example of such a case see Buckmaster v. Dent, 146 Ariz. 521, 707 P.2d 319 (Ct. App. 1985) (there was no meeting of the minds as to an essential term in a contract for the sale of property when a dispute arose as to whether the contract provided for only one easement for ingress and egress on the property or whether there were two easements reserved).

95. RESTATEMENT (SECOND) OF CONTRACTS § 153 comment a (1979).

96. *See, e.g.*, Howell v. Waters, 82 N.C. App. 481, 347 S.E.2d 65 (1986).

97. Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966).

98. RESTATEMENT (SECOND) OF CONTRACTS § 153 comment a (1979).

99. Hagenbuch v. Chapin, 149 Ill. App. 3d 572, 500 N.E.2d 987 (1986).

100. The advertisement then continued with a metes and bounds description of the property. *Id.* at ___, 500 N.E.2d at 988.

101. *Id.* at ___, 500 N.E.2d at 989.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

tles the purchaser to a remedy.[107] Although the purchasers had knowledge prior to the closing that some discrepancy in the acreage existed, neither party was aware that the quarter section in which the parcel was located was short by 4.03 acres and that adverse possession had affected title along the farm's southern and eastern boundaries.[108] This lack of knowledge, in the opinion of the court, was sufficient to establish the parties were mutually mistaken as to the acreage.[109]

Whether one classifies the situation in *Hagenbuch v. Chapin* as a misunderstanding or a mutual mistake of fact, it is clear that the court was inclined to give the purchasers some relief under these facts. The seller had actually represented that the property contained 129 acres, more or less, and the purchaser was entitled to rely on the acreage represented.[110] The misrepresentation affected the actual value of the property because bidding was invited on a per acre basis and the sale price was determined by multiplying the acreage by the purchaser's bid.[111] Under these circumstances, the court held that the purchaser stated a cause of action for return of the excess purchase price under the theory of mutual mistake of fact.[112]

In cases in which a purchaser's mistake is unilateral, the same policy prevails. If the mistake was caused by the misrepresentation of the seller, or if the actions of the seller in some way contributed to the mistake, the purchaser is entitled to relief. In *Cummings v. Dusenbury*,[113] the purchasers, the Cummings, sued the sellers, the Dusenburys, for a rescission of the contract for sale of a house.[114] The dispute arose over whether the home was suitable for year-round living.[115] The Dusenburys contended the purchasers' mistaken belief that the log cabin was a "year-round house" was a unilateral mistake, and rescission was only appropriate in cases of mutual mistake.[116] However, the Illinois appellate court affirmed the trial court's decision

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107. *Id.* at ____, 500 N.E.2d at 990.

108. *Id.* at ____, 500 N.E.2d at 991.

109. The court held that the purchaser bore the burden of proving the exact acreage deficiency for which damages are claimed; because there was no agreement on the issue of the precise acreage conveyed, the cause was remanded to the trial court for further proceedings. *Id.* at ____, 500 N.E.2d at 991-92.

110. *Id.* at ____, 500 N.E.2d at 989. The general rule of law controlling a sale by gross or acreage is that "[w]here the sale is in gross—for a lump sum regardless of the acreage—the vendor is not liable for any deficiency in the acreage except for fraud. By contrast where the sale is by the acre, the vendor will be held liable for such deficiency." *Id.* (citations omitted).

111. *Id.*

112. *Id.* at ____, 500 N.E.2d at 991. The court remanded the case to the trial court for determination of the precise acreage conveyed to purchasers. *Id.* at ____, 500 N.E.2d at 992.

113. Cummings v. Dusenbury, 129 Ill. App. 3d 338, 472 N.E.2d 575 (1984).

114. *Id.* at ____, 472 N.E.2d at 576.

115. *Id.* at ____, 472 N.E.2d at 576-77.

116. *Id.* at ____, 472 N.E.2d at 578.

granting rescission to the purchasers.[117]

The court of appeals first noted the traditional rule is that a unilateral mistake may not relieve a party from its contract obligations when the party's own negligence and lack of prudence resulted in the mistake; however, the courts have begun to permit rescission for unilateral mistakes under certain circumstances.[118] In this case, the trial court found that the purchasers inquired whether the home was a year-round home.[119] The court said that implicit in this finding was the fact that the sellers must have told the purchasers it was a year-round home.[120] Because the court inferred that the sellers actually contributed to the purchaser's mistake in this case, the argument that the purchasers failed to adequately investigate the home was not convincing:[121]

> Although plaintiffs could have called in independent parties for an analysis of the insulation, windows and heating system, the fact that they were advised by the sellers, who had lived in it, that it was suitable for year round living may have prevented them from looking into the question any further.[122]

The court stopped short of finding fraud because there was no evidence of intentional misrepresentation or nondisclosure.[123] In fact, the court noted a finding of mistake was "blatantly inconsistent with a finding that the Dusenburys intended to deceive the Cummings."[124] However, the court permitted the purchaser to rescind the contract for the unilateral mistake because it found that innocent misrepresentation by the seller had contributed to the purchaser's mistake.

In granting relief to the purchasers in *Cummings v. Dusenbury*, the court refused to extend an implied warranty of habitability to a nine-year-old house in which a number of tenants had lived.[125] However, the court specifically acknowledged that the policies underlying the retreat from caveat emptor in the sale of real property were a factor in its decision to grant relief to the purchasers. The court held:

> We recognize that countervailing policies such as *caveat emptor* and finality of contract are frequently employed in contract cases. However, in the case at bar evidence shows that the Cummings sought to purchase a year round home, and the sellers knew of their intended use. The house would apparently need substantial work to the walls and roof in order to

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117. *Id.* at ___, 472 N.E.2d at 581.
118. *Id.* at ___, 472 N.E.2d at 579.
119. *Id.*
120. *Id.*
121. *Id.* at ___, 472 N.E.2d at 580.
122. *Id.*
123. *Id.* at ___, 472 N.E.2d at 581.
124. *Id.*
125. *Id.*

> solve the problems it currently has. The record shows that the Cummings used reasonable care in inquiring about the suitability of the home. Additionally the parties were returned to the *statu quo* [sic]. Therefore, we believe the equitable relief of rescission was properly allowed in the case at bar.[126]

Even though the seller does not actually misrepresent the facts, if the seller knows or should know that the facts as they appear to the purchaser are misleading, the purchaser may be entitled to relief.[127] In *Home Savers, Inc. v. United Security Company*,[128] the purchaser, Home Savers, Inc., was in the business of buying real property at foreclosure sales and reselling the property for a profit.[129] United, acting as a trustee, gave notice of a trustee's sale.[130] Home Savers, after investigating the property, purchased it at a foreclosure sale for $64,285.00, one dollar more than United's opening bid for the beneficiaries.[131]

Based on its investigation, Home Savers thought it had purchased a 2,000 square foot home on a one-half acre lot.[132] Shortly after the sale, however, Home Savers discovered that it had actually purchased a parcel located in back of the house, which included a 600 square foot home in poor condition valued at $17,000.00.[133] After discovering the mistake, Home Savers sought a rescission of the agreement and damages.[134] The trial court found in United's favor.[135] On appeal, the Nevada Supreme Court reversed, holding that Home Savers was entitled to rescission for the unilateral mistake because no one would anticipate that the dilapidated back parcel would serve as security for a loan with a balance many times the value of the property.[136]

To the extent that courts are willing to grant relief to professional pur-

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126. *Id.* at ____, 472 N.E.2d at 582.
127. RESTATEMENT (SECOND) OF CONTRACTS § 153 (1979).
128. Home Savers, Inc. v. United Sec. Co., 103 Nev. 357, 741 P.2d 1355 (1987).
129. *Id.* at 358, 741 P.2d at 1356.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. The court in this case relied on section 153 of the *Restatement (Second) of Contracts*, because "the other party had reason to know of the mistake or his fault caused the mistake." RESTATEMENT (SECOND) of CONTRACTS § 153(b) (1979). There were at least three reasons why the court found that the seller caused the mistake under these facts: (1) the notice published by United was misleading because it included the street address for the front parcel; (2) no one would anticipate that the dilapidated back parcel would serve as security for a loan with a balance many times the value of the property; and (3) the record revealed Home Savers telephoned United for the purpose of investigating the property and United gave Home Savers the tax parcel number for the front parcel, not the back parcel. Home Savers, Inc. v. United Sec. Co., 103 Nev. at 359, 741 P.2d at 1357.

chasers like Home Savers, there has been a relaxation of the traditional rule of caveat emptor. The rise of ethical considerations of fairness in contracting prohibits one party from benefitting from another party's mistake.[137] In such cases, the "objective" theory of contracts, which stresses reliance on the justifiable expectations of the parties and promotes speed, certainty, and finality in business transactions, has given way to the recognition that principles of fairness and conscionability should prevail in the law of mistake.[138]

2. *Mistake Caused by the Actions or Omissions of a Third Party*

In some cases, the acts or omissions of a third party, such as a real estate agent or a title company, cause or contribute to the mistake of the contracting parties. Relief is granted in almost all such cases, although the theory for granting such relief may differ depending on the circumstances. If the mistake is caused by an agent of the seller, a court may grant relief to a purchaser either under a theory of misrepresentation or unilateral mistake.[139] In cases in which equity demands reformation because the mistake occurred through the inadvertence or mistake of a third party and the mistake is contrary to the intention of the parties, a court may grant relief for mutual mistake because there is an absence of "meeting of the minds."[140] If the third party is acting on behalf of *both* parties, rescission or reformation of the contract for mutual mistake is also appropriate.

Hadley v. Clabeau[141] is such a case. In *Hadley* an attorney mistakenly prepared a deed with incorrect boundary lines based on a hand drafted sketch of the property furnished by the seller.[142] The attorney who drew the deed represented both the buyer and seller in the transaction and was an agent for both in the preparation of the deed.[143] Under these circumstances, the court held that the facts supported a finding of mutual mistake and reformed the deed to describe the property by the natural boundaries of tree and fence lines.[144]

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137. Cavico, *supra* note 2, at 22.

138. *Id.* at 5.

139. *E.g.*, Howell v. Waters, 82 N.C. App. 481, 347 S.E.2d 65 (1986).

140. Sunlight Funding Corp. v. Singer, 146 A.D. 2d 625, ___, 536 N.Y.S.2d 533, 534 (1989) (real estate seller brought an action to rescind an agreement amending the contract for sale and for specific performance of the original contract because after amending the contract by reducing the purchase price from $625,000 to $375,000, the parties discovered the title company had erred and title never vested with the City of New York); *see also* Kidd v. Fowler, 498 So. 2d 969 (Fla. Dist. Ct. App. 1986); *supra* notes 80-87 and accompanying text.

141. Hadley v. Clabeau, 140 Misc. 2d 994, 532 N.Y.S.2d 221 (N.Y. Sup. Ct. 1988), *aff'd*, 555 N.Y.S.2d 951 (App. Div. 1990).

142. *Id.* at ___, 532 N.Y.S.2d at 222.

143. *Id.* at ___, 532 N.Y.S.2d at 225.

144. The court considered the following facts relevant in granting relief: (1) giving effect to the description as the attorney prepared it would result in a parcel too small for use as building lots and too small for tillage or pasture; (2) following the attorney's description would

3. *The Parties Discover an Unknown Fact*

In some cases, the parties simply may be unaware of a fact until discovered as a result of entering into the sales transaction. Examples include cases in which the parties incorrectly believed that the property was properly zoned for the enterprise the purchaser contemplated or that the purchaser could obtain a necessary license to operate a business on the premises.[145] In most of these cases, when the purchaser seeks relief, the court will grant a rescission or reform the contract under the theory of mutual mistake because both the seller and purchaser share a basic misconception about a material fact concerning the transaction.

In *Carey v. Wallner*,[146] the purchasers were permitted to rescind a contract for the purchase of a foster care home.[147] The sellers had assured the purchasers that no license was required.[148] Both parties and at least one county official believed the business was in conformity with the local zoning ordinance.[149] When both facts turned out to be untrue, the purchasers sought rescission for mutual mistake of fact.[150] The court held that rescission was proper because the purchasers did not receive what they bargained for and the mistake was "so substantial and fundamental as to defeat the object of the parties."[151]

In a situation like *Carey v. Wallner*, in which neither party knew the true facts and the facts were not obvious, relief to the purchaser may be justified on the theory that both parties at the time of contracting shared a misconception about a vital fact concerning the transaction.[152] Relief to the purchaser is also justified on the theory that a seller should not profit at the expense of an innocent purchaser in such cases, even though the seller did nothing to mislead or contribute to the purchaser's mistake.[153]

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create two narrow parcels of land with a fence that served no purpose; and (3) the actual acreage contained by the natural boundaries would be more consistent with that contemplated by the parties. *Id.* at ____, 532 N.Y.S.2d at 224.

145. *E.g.*, Carey v. Wallner, 229 Mont. 57, 744 P.2d 881 (1987); Glasgow v. Greenfield, 9 Ark. App. 224, 657 S.W.2d 578 (1983).

146. Carey v. Wallner, 223 Mont. 260, 725 P.2d 557 (1986). The Supreme Court of Montana rendered a decision on the merits of the case. *Id.* Subsequently, the Montana Supreme Court remanded to the district court for the entering of judgment. *Id.* Both parties appealed the district court judgment again to the Supreme Court of Montana. Carey v. Wallner, 229 Mont. 57, 744 P.2d 881 (1987).

147. Carey v. Wallner, 223 Mont. at 261, 725 P.2d at 558.

148. *Id.* at 263, 725 P.2d at 559.

149. *Id.* at 262, 725 P.2d at 558.

150. *Id.* at 263, 725 P.2d at 559.

151. *Id.* at 265, 725 P.2d at 560.

152. *Id.* at 266, 725 P.2d at 561.

153. *See, e.g.*, Glasgow v. Greenfield, 9 Ark. App. 224, 657 S.W.2d 578 (1983) (when purchaser discovered that she had to have a liquor license in her own name in order to operate a retail liquor store on property she had purchased from defendants, the court found the purchaser was entitled to rescission because the contract was predicated upon a mistake of fact

C. *Cases Denying Relief for Mistake*

Although courts today are generally inclined to grant relief to purchasers for mistake of fact in contracts for the sale of land, courts more often deny relief in cases in which a seller seeks relief for mistake. These cases are thus consistent with the presumption that the seller, rather than the buyer, is in the best position to know the facts concerning the property and thus should bear the loss in cases of mistake. The law is sufficiently flexible to permit a court to deny relief to a seller for mistake of fact by finding, for example, that the mistake was not material[154] or that the facts asserted by the purchaser were correct and thus there was no mutual mistake of fact.[155]

The law, while protecting the purchaser from a mistake that diminishes the value of the property, generally does not protect the seller from loss if he sells the property for less than it is worth. Why should this be so? If the purpose of the law of mistake is to permit relief in the case of mutual mistake by either party or unilateral mistake by one party when the other party had reason to know of the mistake, then a different policy clearly underlies the decision not to protect a seller's disappointed expectations.

A seller's ownership of the property presumably creates knowledge about the property, placing the seller in a better position than the purchaser to know the relevant facts, and the burden should rest on the party most likely to know those facts.[156] In the usual case, the seller is better able to prevent mistakes because the mistake is known or could be discovered at less cost by the seller than the purchaser. Thus, the principle of efficiency is best served by imposing liability for the mistake on the seller.[157] If the seller could not be presumed to know the facts because a third party misrepresented the true facts,[158] or in unusual situations in which it would impose an unreasonable hardship on the seller to require specific performance of the contract,[159] a court may grant the seller relief through contract rescission.

In the recent cases in which the courts have denied relief to a purchaser of real property for mistake, the courts have found the buyers had expressly assumed the risk either by agreeing to investigate the property[160] or by

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and law).

154. Dingeman v. Reffitt, 152 Mich. App. 350, 393 N.W.2d 632 (1986); Horner v. Bourland, 724 F.2d 1142 (5th Cir. 1984).

155. Ryan v. Boucher, 144 A.D.2d 144, 534 N.Y.S.2d 472 (1988).

156. Palumbo v. Ewing, 540 F. Supp. 388, 393 (D. Del. 1982).

157. Kronman, *supra* note 2, at 8. Consequently, when knowledge about the property is the product of a costly search by the purchaser, as may be the case when information concerning the presence of gas or oil on the property is deliberately acquired by a purchaser, it may be appropriate to permit nondisclosure by the purchaser because this encourages information-gathering. *Id.*

158. Sunlight v. Singer, 146 A.D.2d 625, 536 N.Y.S.2d 533 (1989); Kidd v. Fowler, 498 So. 2d 969 (Fla. Dist. Ct. App. 1986).

159. Garb-Ko, Inc. v. Lansing-Lewis Servs., 167 Mich. App. 779, 423 N.W.2d 355 (1988).

160. Maloney v. Sargisson, 18 Mass. App. 341, 465 N.E.2d 296 (1984).

purchasing the property as is.[161] In one case, the court found that the purchaser was experienced in residential land development and thus bore the risk of the mistake because he should have discovered his error.[162] In another case, the court denied relief to a purchaser because the sellers could not be presumed to know that a mistake by the purchasers concerned a principal cause for making the contract.[163]

1. *Denying Relief to the Seller*

In *Dingeman v. Reffitt*,[164] the Dingemans, who owned two parcels of lakefront property, contacted local health officials to determine whether on-site sewage disposal systems would permit residential development of the property.[165] They were informed that any application to install on-site sewage disposal on the east parcel would be denied.[166] The Dingemans then hired an engineering firm and commissioned tests of the property.[167] They were advised that the only practical method of sewage disposal for the east parcel would be to install an expensive pump disposal system.[168] They then listed the property for sale, specifically noting: "Health Department will not issue septic permit due to heavy clay soils."[169]

Subsequently, Reffitt purchased the property for $75,000 and three years later began construction of a home on the east parcel with the intent of installing a disposal system on the property.[170] Reffitt discovered an area of sand and gravel that he thought might be appropriate for an on-site system, and his application for a permit was granted.[171] After learning that the permit for the east parcel had been issued, the Dingemans filed an action for reformation to reflect the fair market value of the property or, in the alternative, for a rescission of the contract on the ground that there had been a mutual mistake in the formation of the contract.[172] When the trial court granted Reffitt's motion for summary judgment, the sellers appealed.[173]

The Dingemans argued that there were two mutual mistakes of fact: both parties thought the soil characteristics of the east parcel precluded an on-site sewage system and both parties believed that the health department

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161. Lenawee County Bd. of Health v. Messerly, 417 Mich. 17, 331 N.W.2d 203 (1980).
162. Deans v. Layton, 89 N.C. App. 358, 366 S.E.2d 560 (1988).
163. Bordelon v. Kopicki, 524 So. 2d 847 (La. Ct. App. 1988).
164. Dingeman v. Reffitt, 152 Mich. App. 350, 393 N.W.2d 632 (1986).
165. *Id.* at ____, 393 N.W.2d at 633.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at ____, 393 N.W.2d at 634.
171. *Id.*
172. *Id.*
173. *Id.*

would not issue a sewage permit.[174] The appellate court agreed, finding that when the parties entered the contract, they both believed that the east parcel was not perkable.[175] The court, however, held that "[r]escission is not available . . . to relieve a party who has assumed the risk of loss in connection with the mistake."[176] It then found, for several reasons, that the Dingemans should assume the loss of the mistake and affirmed the lower court's grant of summary judgment.[177]

The court first reasoned that the parties' erroneous assumption that the east parcel was not suitable for on-site sewage disposal did not materially affect the agreed performances of the parties.[178] From the standpoint of the purchaser, this was probably correct because the purchaser bought the land with the intention of building a home even though he would have to bear the cost of installing a sewage system.[179] However, from the standpoint of the seller, the fact that the property was capable of development at a much lower cost than presumed by the parties would clearly affect its value, and thus the mistake presumably would be material.[180]

The court also found that in cases of mistake by two equally innocent parties, it would look to whether the parties agreed to the allocation of the risk between themselves.[181] The contract's incorporation of an as is clause was "a persuasive indication that the parties intended that the defendant would bear both the risks *and the benefits* of the present condition of the property."[182] It seems clear that the as is clause was designed to protect the *seller* by expressly informing the purchaser it was the seller's belief that any application for an on-site sewage disposal application for the property would be denied. It is less likely that the parties intended the clause to benefit the purchaser, if the application were granted, because neither party believed

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174. *Id.*

175. *Id.*

176. *Id.* at ____, 393 N.W.2d at 635 (citing Lenawee County Bd. of Health v. Messerly, 417 Mich. at 30, 331 N.W.2d at 203). The court also noted that distinctions between mistakes that affect the "essence of the consideration" and those that go to the "quality of the nature of the thing bargained for . . . do not provide a satisfactory analysis of the nature of a mistake sufficient to invalidate a contract." *Id.* Thus a case-by-case analysis is the better approach. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. Thus this case can be seen as another example of a court avoiding discussion of the policy decisions underlying the decision to deny relief to a mistaken seller by designating the mistake as one that fails to meet the test of materiality. *See supra* notes 32-35 and accompanying text.

181. Dingeman v. Reffitt, 152 Mich. App. at ____, 393 N.W.2d at 635 (citing RESTATEMENT (SECOND) OF CONTRACTS § 154 (1979)).

182. *Id.* n.5 (emphasis added). The clause read: "(m) Purchaser accepts the property as is, and with knowledge that Seller has been informed by District Health Department No. 3 that the soil character is such that any applications to install an on-site sewage disposal system will be denied." *Id.*

the application would be granted. Nevertheless, the court considered the clause as a reason why "equity suggests that the sellers should assume the loss of the mistake."[183]

Finally, the court relied on the distinction between extrinsic facts and intrinsic facts, finding that in this case, there was no mistake as to the instrument actually entered into, and that the mutual mistake was not of an intrinsic fact.[184] *Dingeman* is a good example of a court's ability to deny relief to a seller by labeling the mistake as "extrinsic," or finding the mistake was not material. In fact, the decision to deny relief in *Dingeman* was probably based on equitable principles suggesting that a court should not intervene to protect a seller who, through no fault of the purchaser, is mistaken about the true value of his property. Although the Dingemans attempted to discover whether the land could percolate, their failure to do so did not warrant rescission or reformation against a purchaser like Reffitt who had not caused or contributed to the mistake.[185]

2. *Denying Relief to the Purchaser*

A court may deny relief to a purchaser for either unilateral or mutual mistake of fact if it finds the purchaser assumed the risk of the mistake.[186] If the purchaser is a professional land developer, a court may find he bore the risk because he should have discovered the true facts. In *Deans v. Layton*,[187] the seller, Deans, filed an action for damages for breach of contract or, in the alternative, for specific performance of a contract for the sale of 104

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183. *Id.* at ____, 393 N.W.2d at 635.

184. *Id.* at ____, 393 N.W.2d at 636.

185. *But see* Sunlight Funding Corp. v. Singer, 146 A.D.2d 625, 536 N.Y.S.2d 533 (1989) (involving a mistake caused by a title company that represented the purchasers). In *Singer* the appellate court reversed the trial court's denial of summary judgment for the sellers and rescinded an amendment to the contract. *Id.* at ____, 536 N.Y.S.2d at 534. The parties entered into a contract for the sale of real property for $625,000. *Id.* When the parties appeared for closing, they were advised by the purchaser's title company that title to the premises had vested with the City of New York pursuant to an in rem tax proceeding. *Id.* The parties then amended the contract by reducing the purchase price to $375,000. *Id.* Subsequently, the parties discovered that the title company had erred and title had never vested with the City. *Id.* The court held there was no dispute between the parties regarding the title company's misrepresentation and the dispute could best be remedied by awarding summary judgment for the sellers in the principal sum of $412,500, which represented the difference between the purchase price and sum received by the sellers. *Id.*

Other cases in which relief was granted to a seller for mistake of fact include Kidd v. Fowler, 498 So. 2d 1387 (Fla. Dist. Ct. App. 1986), and Garb-Ko, Inc. v. Lansing-Lewis Servs., 167 Mich. App. 779, 423 N.W.2d 355 (1988).

Cases in which relief to a seller was denied include Horner v. Bourland, 724 F.2d 1142 (5th Cir. 1984) and Rusiski v. Pribonic, 511 Pa. 383, 515 A.2d 507 (1986) (purchaser entitled to specific performance in contract for the sale of land but damage award improper because speculative).

186. RESTATEMENT (SECOND) OF CONTRACTS §§ 152-153 (1979).

187. Deans v. Layton, 89 N.C. App. 358, 366 S.E.2d 560 (1988).

acres of land.[188] The purchaser, Layton, raised the affirmative defenses of mutual mistake, misrepresentation, and lack of consideration, based on statements by Deans that the property contained 104 building lots.[189] In fact, because of drainage conditions, a substantial portion of the acreage was unsuitable for subdivision.[190] The trial court granted the seller's motion for summary judgment and the purchaser appealed.[191]

As to the purchaser's defense of mutual mistake, the North Carolina Court of Appeals found that both the purchaser and seller were experienced in matters involving the purchase and sale of land and that each had been involved previously in residential land development.[192] Furthermore, the purchaser had been told by his engineer that the "land was basically mighty wet out there," and that "I'd better check it good."[193] The purchaser conceded that no one prevented him from conducting a survey of the property himself or from having someone check the water levels.[194] Nevertheless, the purchaser did not arrange for an inspection of the property until approximately six months after signing the contract.[195] Because the parties were sophisticated in land development and were dealing at arms' length, the court found the purchaser assumed the risk of the mistake as to what percentage of the land would "perk."[196]

A purchaser who expressly undertakes the duty to investigate the property to determine the facts, such as whether the lot is a buildable lot, may also be held to bear the risk because the risk of mistake was allocated to him by agreement of the parties. In *Maloney v. Sargisson*,[197] the purchasers, the Maloneys, agreed to test the soil conditions to determine whether the lot would qualify for a building permit.[198] Some five months after the Maloney's acquired the property, they learned that a concrete drain line ran under the street on which their property fronted and that they could not build upon the land.[199] Even though there was no evidence either party knew about the drain line, the appellate court denied relief to the purchaser, holding that

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188. *Id.* at 359, 366 S.E.2d at 561.
189. *Id.* at 359, 366 S.E.2d at 561-62.
190. *Id.*
191. *Id.* at 360, 366 S.E.2d at 562.
192. *Id.* at 364, 366 S.E.2d at 564.
193. *Id.* at 365, 366 S.E.2d at 565.
194. *Id.*
195. *Id.*
196. *Id.*; *cf.* Shore Builders, Inc. v. Dogwood, Inc., 616 F. Supp. 1004 (D. Del. 1985) (material issue of fact existed concerning whether purchasers of property for development were entitled to rescission for innocent misrepresentation or mutual mistake when land could not be divided without encroaching on federal wetlands); Palumbo v. Ewing, 540 F. Supp. 388 (1982) (purchasers of commercial property were entitled to rescission for mutual mistake of fact concerning presence of easement, sewer line, and manhole on the property).
197. Maloney v. Sargisson, 18 Mass. App. Ct. 341, 465 N.E.2d 296 (1984).
198. *Id.* at ____, 465 N.E.2d at 298.
199. *Id.* at ____, 465 N.E.2d at 297.

the undisputed facts supported a finding that there was no mutual mistake of fact.[200] The court held that the purchaser's mistake about the ability to build was unilateral rather than mutual because the mistake was made in performing the soil tests.[201] The court then found that the risk of mistake was allocated to the purchasers by agreement of the parties because the purchasers had agreed to test the soil conditions of the property.[202]

IV. Allocation of Risk for Mistake of Fact

As the cases discussed above suggest, the important question in modern mistake of fact cases involving the sale of real property is whether, under general principles of equity, the law should permit one party to benefit from the other's mistake. In contracts for the sale of land, this raises not only fact-specific questions of fairness and equity, but also broader policy questions concerning the law of contracts.

The question whether courts should enforce contracts made by mistake raises the problem of reconciling competing policies in the law of contracts. On the one hand, the law encourages stability and certainty in commercial transactions and, under the objective theory of contracts, attaches importance to the outward expression of the parties' intent.[203] On the other hand, when one party is mistaken about an important fact, it is often unfair to hold that party to a contract he made without full information.[204]

In cases involving mistake of fact in the sale of real property, the fear that granting relief to a purchaser for mistake will undermine certainty and stability in contracting is largely unwarranted. Land is unique, and the value of real property is substantial. The law recognizes the importance of transactions for the sale of real property by requiring, for example, that such sales be in writing.[205] Presumably, a purchaser of real property also attaches importance to the transaction. It is fair to assume that a purchaser will make an effort to discover all the important and relevant facts about the property before making a purchase in order to protect himself from the risk of mistake. Even so, mistakes will occur because it is simply human nature to make mistakes. Legal rules punishing mistakes by prohibiting relief to the mistaken purchaser are unlikely to be effective in deterring careless behavior in the future.[206] The modern trend emphasizing minimum standards of equity and fairness in all contract bargaining under general principles of conscionability suggests that courts should liberally grant relief to purchasers of real property who are mistaken about an important fact at

200. *Id.* at ____, 465 N.E.2d at 300.
201. *Id.*
202. *Id.*
203. Newman, *supra* note 2, at 232.
204. *Id.* at 236-37.
205. Farnsworth, *supra* note 12, § 6.5, at 397.
206. Cavico, *supra* note 2, at 24.

the time of contracting.[207]

A. *Rationales Underlying the Retreat from Caveat Emptor*

Until the middle of this century, courts in this country upheld the rule of "buyer beware" in the sale of real property.[208] In recent decades, however, courts have made substantial inroads on the doctrine of caveat emptor. Most courts today recognize an implied warranty of quality in the sale of new homes[209] and impose upon sellers a duty to disclose known, material latent defects in real property to the purchaser.[210] Under this theory, courts tend to protect purchasers of real property against substantial defects in the property that affect the quality or value of the land or structure.

The requirement that a seller of real property disclose facts he knows materially affect the value or desirability of the property, if the purchaser does not know or could not reasonably discover such facts, also reflects the modern courts' increasing emphasis on minimum standards of fair dealing in the sale of real property.[211] Cases involving unilateral mistake of fact in the sale of real property often raise the same policy considerations as those addressed in cases that impose a duty to disclose on sellers. The common question is: Under what circumstances does a party who knows the other is mis-

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207. *See generally* Kratovil, *Unconscionability—Real Property Lawyers Confront a New Problem*, 21 J. MARSHALL L. REV. 1 (1987).

208. Grand, *Implied and Statutory Warranties in the Sale of Real Estate: The Demise of Caveat Emptor*, 15 REAL EST. L. J. 44, 44 (1986).

209. *Id.* at 45.

210. For a general discussion of the development of the implied warranty of habitability in the sale of new residential property, see Bearman, *Caveat Emptor in Sales of Realty: Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961); Grand, *Implied and Statutory Warranties in the Sale of Real Estate: The Demise of Caveat Emptor*, 15 REAL EST. L. J. 44 (1986); Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L. J. 633 (1965); Note, *Liability of the Builder-Vendor Under the Implied Warranty of Habitability—Where Does it End?*, 13 CREIGHTON L. REV. 593 (1979); Note, *Breach of Warranty in the Sale of Real Property: Johnson v. Healy*, 41 OHIO ST. L. J. 727 (1980); Note, *Implied Warranties in New Home Sales—Is the Seller Defenseless?*, 35 S.C.L. REV. 469 (1984); Note, *Defective Housing: Remedies Available to the First and Subsequent Purchasers*, 25 S.D.L. REV. 333 (1980).

For a discussion of the development of a seller's duty to disclose latent defects in real property, see generally Goldfarb, *Fraud and Non-Disclosure in the Vendor Purchaser Relation*, 8 CASE W. RES. 5 (1956); Kafker, *Sell and Tell: The Fall and Revival of the Rule of Nondisclosure in Sales of Used Property*, 12 U. DAYTON L. REV. 57 (1986); Keeton, *Fraud—Concealment and Non-Disclosure*, 15 TEX. L. REV. 1 (1936); Comment, *Home Sales: A Crack in the Caveat Emptor Shield*, 29 MERCER L. REV. 323 (1977); Note, *Johnson v. Davis: New Liability for Fraudulent Nondisclosure in Real Property Transactions*, 11 NOVA L.J. 145 (1986); Note, *Property—Caveat Emptor—Duty to Disclose Limited to Commercial Vendors*, 64 MARQ. L. REV. 547 (1981); Note, *When the Walls Come Tumbling Down—Theories of Recovery for Defective Housing*, 56 ST. JOHN'S L. REV. 670 (1982).

211. Johnson v. Davis, 480 So. 2d 625, 628 (Fla. 1985).

taken have a duty to speak?[212]

The rationales underlying development of a seller's duty to disclose suggest that courts should usually allocate the risk of mistake to the seller in cases in which the purchaser is mistaken about an important fact concerning the property.[213] In many cases, the purchaser seeks relief for a mistake that concerns a fact about a physical condition of the land or structure, or about a permitted use for the property. In such cases, the seller is in the best position to know about or discover the true facts concerning the property and should bear the risk of the mistake because he is best able to prevent such mistakes. The law of mistake, like the law requiring disclosure, should encourage the seller to discover and communicate all the important facts about the property to the purchaser. Granting relief to mistaken purchasers is thus consistent with the policies supporting the law's retreat from caveat emptor and the modern courts' tendency to protect purchasers under principles of fairness in contract bargaining.

B. *Justifiable Reliance and Allocation of Risk for Mistake*

In cases in which a purchaser seeks rescission or damages for misrepresentation or nondisclosure, a purchaser must prove that he actually relied on the seller's misrepresentation or nondisclosure and that his reliance was justified.[214] If the court finds that a purchaser should have discovered the true facts concerning the property, he will not be entitled to relief because his reliance in such cases is not justified.[215] In modern cases involving misrepresentation by a seller, courts have generally relaxed the requirement of justifiable reliance to permit recovery even when the purchaser was negligent in not discovering the true facts concerning the property.[216] In cases involving nondisclosure, especially in the case of residential property, some courts also have relaxed the requirement of justifiable reliance by requiring a seller to disclose any known material facts affecting the value of the property that are "not readily observable" by the buyer.[217]

The rationale for relaxing the requirement of justifiable reliance in

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212. Kronman, *supra* note 2, at 1-2. The law of mutual mistake is inconsistent with the rule requiring disclosure because a seller could obviously not warn purchasers of something of which he is unaware. Shore Builders, Inc. v. Dogwood, Inc., 616 F. Supp. 1004, 1008 (D. Del. 1985).

213. Kronman, *supra* note 2, at 33.

214. Fairmont Foods v. Skelly Oil, 616 S.W.2d 548, 551 (Mo. Ct. App. 1981). For a general discussion of the requirement of justifiable reliance in such cases, see W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 108, at 749-50 (5th ed. 1984).

215. The requirement of justifiable reliance provides some objective corroboration that the purchaser in fact relied on the misrepresentation. Fairmont Foods v. Skelly Oil, 616 S.W.2d at 551 (quoting Hanson v. Acceptance Finance Co., 270 S.W.2d 143 (Mo. Ct. App. 1954)).

216. Cousineau v. Walker, 613 P.2d 608 (Alaska 1980).

217. Johnson v. Davis, 480 So. 2d 625, 629 (Fla. 1985).

cases of innocent misrepresentation and nondisclosure is that the traditional relationship between a vendor and purchaser has changed and the law should reflect the "recognition of a new standard of business ethics, demanding that statements of fact are honestly and carefully made."[218] Like the requirement of justifiable reliance in the case of misrepresentation and nondisclosure, the requirement that a party not bear the risk of a mistake raises the question of the purchaser's duty to investigate and discover the true facts concerning the property.[219] In cases involving mistake of fact, the policies underlying relaxation of the requirement of justifiable reliance suggest that a purchaser should not bear the risk of a mistake because he failed to discover the true facts about the property unless the fact is obvious.[220] Only in those cases in which the fact is so obvious that an ordinary person would have seen the truth, should the courts deny relief to a purchaser who is mistaken about an important fact in the sale of real property.

V. Conclusion

It is not possible to formulate any simple or precise rule that will predict with certainty when relief for mistake in the sale of real property will be granted. The determination is fact-specific. Relevant factors include: the importance of the fact about which the parties are mistaken, when the mistake was discovered, the reason why one or both parties were mistaken, and the effect of granting or denying relief to the parties. The decision to grant or deny relief in any given case should depend on the particular circumstances of each case and the weight given to these factors.

If the mistake concerns a physical condition of the property or a condition affecting its use, the seller is generally in the best position to know such facts and to prevent such mistakes. In such cases, the courts should permit a mistaken purchaser to rescind the contract because the law of mistake, like the law of disclosure, should encourage the seller and his agent to discover all relevant facts about the property and communicate those facts to a prospective buyer. Rather than relying on traditional legal categories in determining whether to grant relief in cases of mistake, general standards of con-

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218. Asleson v. West Branch Land Co., 311 N.W.2d 533, 542 (N.D. 1981); *see also* Shore Builders, Inc. v. Dogwood Inc., 616 F. Supp. 1004 (D. Del. 1985); Parkhill v. Fueslier, 632 P.2d 1132 (Mont. 1981). *But see* Hoover v. Hegewald, 689 P.2d 965 (Or. App. 1984); Pakrul v. Barnes, 631 S.W.2d 436 (Tenn. App. 1981).

For a general discussion of innocent and negligent misrepresentation as a basis for relief in the sale of real property, see Note, *Potential Liability for Misrepresentations in Residential Real Estate Transactions: Let the Broker Beware*, 16 Fordham Urban L.J. 127 (1988).

219. Shore Builders, Inc. v. Dogwood, Inc., 616 F. Supp. 1004, 1017 (D. Del. 1985).

220. Under the *Restatement*, "a mistaken party's fault in failing to know or discover the facts before making the contract does not bar him from . . . avoidance or reformation under the rules stated in this chapter, unless his fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing." Restatement (Second) of Contracts § 157 (1979).

scionability should determine when such relief is appropriate.

In contracts for the sale of land, contemporary standards of fairness generally compel granting relief to a mistaken purchaser even when he negligently fails to discover the true facts. A seller cannot mislead a purchaser by actively misrepresenting facts about the property or by failing to disclose defects in the property that he knows the purchaser has failed to discover. For the same reasons, good faith requires that a seller not take advantage of a purchaser's mistake in order to benefit from a promise in circumstances the promise was never intended to cover.[221] In cases involving mistake in the sale of real property, when the property is unique and its value substantial, denying relief for mistake often results in substantial loss to a purchaser. Courts should grant the purchaser relief for mistake in such cases because the law should encourage the seller to discover and disclose all material facts concerning real property. In cases involving mistake of fact by a purchaser of real property, this policy and considerations of equity are more important than adherence to rigid rules designed to ensure stability in contracting.

221. A. Denning, The Changing Law 105 (1953).