the property, Bailey brought this quiet title action. Ewing counterclaimed and filed a third-party complaint, seeking reformation of his deed and of the deed to Bailey. He alleged mutual mistake, as well as fraud or misrepresentation on the part of the personal representative. The trial court found no fraud or misrepresentation had occurred. We do not question this finding and it is not material to our decision. The trial court also held that Ewing had made a unilateral mistake as to the location of the boundary line between lots five and six and was therefore not entitled to relief. We focus on this conclusion.

A mistake is an unintentional act or omission arising from ignorance, surprise, or misplaced confidence. See 13 Williston on Contracts §1535 (3d ed. 1970). The mistake must be material or, in other words, so substantial and fundamental as to defeat the object of the parties. Woodahl v. Matthews, 639 P.2d 1165 (Mont. 1982). A unilateral mistake is not normally grounds for relief for the mistaken party, whereas a mutual mistake is. . . . A mutual mistake occurs when both parties, at the time of contracting, share a misconception about a basic assumption or vital fact upon which they based their bargain. . . . Some courts require the parties to have the *same* misconception about the *same* basic assumption or vital fact. . . . However, mutual mistake also has been defined to include situations in which the parties labor under *differing* misconceptions as to the *same* basic assumption or vital fact. Restatement (Second) Contracts §152, comment h (1981) (hereafter cited as Restatement). We believe the Restatement presents the better view. The assumption or fact must be the same; otherwise two unilateral mistakes, instead of one mutual mistake, would result.

It is undisputed that Erhardt intended to sell the house with lot five and that he assumed the boundary line was located so as to allow him to sell the *whole* house. Erhardt believed the boundary line was somewhere east of its subsequently determined "true" location. Ewing shared this belief. Thus, both Ewing and Erhardt mistakenly believed that the boundary line was further east than it turned out to be. As a result of their ignorance concerning the true location, an act that neither of them intended occurred. Neither intended that the property sold as lot five would fail to include the whole house. Thus, there was an "unintentional act . . . arising from ignorance." We hold, therefore, that Ewing and Erhardt made a mutual mistake regarding the location of the boundary line between lots five and six.

The mere presence of a mutual mistake does not always afford relief to the party adversely affected by the mistake. A party is said to bear the risk of a mistake when "he is aware, at the time the contract is made, that he has limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient." Restatement §154. It is sometimes said in such a situation that, in a sense, there was not mistake but "conscious ignorance." Id. §154 comment c, at 404.

In this case it is clear that — at the time of the auction — neither Erhardt nor Ewing knew where the boundary line was. It is also clearly implied in the findings made by the trial judge and from the trial testimony, that Erhardt thought the boundary line was in the vicinity of the lilacs. The findings go

only so far as to say Erhardt "did not represent to [Ewing] specifically that the lilac trees were the East side line of said Lot 5, Block 8." Nevertheless, the record clearly shows that before the sale Erhardt indicated that the line of lilacs was a possible location of the lot boundary. There was no misrepresentation. Erhardt and the auctioneer made it clear that they did not know the actual location of the line. Erhardt sold and Ewing bought lot five with awareness that the true location of the boundary was not known.

We believe that both parties assumed a risk of uncertainty as to the line. However, the extent to which the doctrine of "conscious ignorance" applies depends upon the scope of the risk assumed. Clearly Ewing assumed the risk that the lilac bushes might not be within lot five. Ewing had no right to rely upon the uncertain belief of Erhardt that the lilac bushes represented the line. Nevertheless, it is equally clear that neither party consciously assumed a risk that the line would run beneath the eaves of the house. Nothing in the record indicates that either party intended, or reasonably should have anticipated, such a result. The mutual mistake which occurred was beyond the scope of the assumed risk. Therefore, the doctrine of "conscious ignorance" is not a bar to relief for Ewing in this case.

Because we have said that a mutual mistake was made, we need to offer some guidance to the trial judge, so that on remand he may determine whether reformation of the deeds is available to Ewing as a remedy. Given the proper circumstances a court may reform the instrument for an aggrieved party. . . . A court acts properly "in reforming an instrument when it appears from the evidence . . . that the instrument does not reflect the intentions of the parties" because of mutual mistake. . . . The court reforms the instrument to reflect the intention of the parties, i.e., the agreement the parties would have made but for the mistake. . . . What the parties actually intended is a question for the trier of fact. Pollard Oil Co. v. Christensen, 103 Idaho 110, 645 P.2d 344 (1982). Normally the intent of the parties must be derived from the language of the instrument itself if that instrument is unambiguous. Gardner v. Fliegel, 92 Idaho 767, 450 P.2d 990 (1969). In the present case the deed is clearly unambiguous as to the land conveyed. The deed conveys to Ewing: "Lot 5 of Block 8, Galloways addition to the City of Weiser, Idaho, as same appears on the official plat thereof on file in the office of the County Recorder of Washington County, Idaho." From the language of the instrument, Erhardt intended to convey lot five. This was, in fact, conveyed and therefore the instrument normally could not be reformed.

However, the intent as expressed in the written instrument is incompatible with a finding of mutual mistake. To restrict evidence on the true intent of the parties to the four-corners of the instrument would be to nullify the finding of mutual mistake. In *Collins,* our Supreme Court held that parol evidence may be admitted to show a modification of the instrument when mutual mistake is proved. "The parol evidence rule applies only to integrated writings, and if the mistake is mutual the writing is not integrated. Therefore parol evidence is admissible in this instance." . . . In Bilbao v. Krettinger, supra, parol evidence was held admissible to prove that by reason of mutual mistake the parties' true intent was not expressed

by the written instrument. Parol evidence may also be used to show what that true intent was.

Before reformation of the deeds is granted, however, other questions must be answered. It is undeniable that if the personal representative had not sold lot six, but merely sold lot five to Ewing, the deed to Ewing could be reformed. Only the rights of the estate and Ewing would be affected. However, Erhardt sold lot six to Bailey, thereby involving a third party. Any reformation of Ewing's deed adding land to lot five must result necessarily in reformation of Bailey's deed subtracting land from lot six. Under what circumstances, then, may the deed to a subsequent purchaser of a lot be reformed when the prior deed for an adjoining lot is reformed because of mutual mistake?

The general rule is that reformation will not be granted if it appears such relief will prejudice the rights of bona fide and innocent purchasers. See cases collected in 44 A.L.R. 78 (1926), supplemented by 79 A.L.R.2d 1180 (1961). A purchaser must lack notice both of the mistake and of the true intent of the parties, in order to prevent reformation. . . . Actual notice however is not required. . . . If there are circumstances which ought to put a party on inquiry as to ownership of property, that party is not considered a purchaser without notice and so cannot avoid reformation of the instrument. . . .

Another example of this rule is presented by Deubel v. Dearwester, 36 Ohio App. 60, 172 N.E. 640 (1930). There the plaintiffs sued to eject the defendant and the defendant counterclaimed to reform the deeds. The original grantor had built improvements on one lot, which improvements encroached upon the adjoining lot. The Ohio Court of Appeals in affirming the trial court's reformation of *both* deeds said:

> We think that the physical presence of the house and improvements upon the property conveyed by the original grantor indicated beyond question that the grantor intended to convey all the premises occupied by said improvement to [defendant's] predecessors in title, and, such deed having been made while the original grantor . . . still owned both lots, the subsequent grantees of the adjacent lot, now owned by the plaintiffs, took title to such adjacent lot impressed with that intention manifest by the physical occupation of the premises.

Whether a party is aware of circumstances sufficient to put him on inquiry is a question of fact. . . . The question becomes whether Bailey was a bona fide purchaser without notice. On remand the trial court will need to determine whether Bailey was a bona fide purchaser without notice. He bears the burden of proof on this point. . . . If Bailey was not a bona fide purchaser, then Ewing may obtain relief by having both deeds reformed in accordance with the parties' intentions. However, if Bailey is found to be a bona fide purchaser then reformation can be decreed only if some way is found for Bailey to be satisfactorily and fully compensated. We leave it to the trial court to properly exercise its fact-finding powers and its equitable jurisdiction to fashion a fair and proper solution to the dispute.

Judgment reversed. Cause remanded for proceedings consistent with this opinion. Costs to appellant.

QUESTION

Would this court have reached a different result in Wood v. Boynton (page 488) (the uncut diamond case)?

C. *Unilateral Mistake*

FIRST BAPTIST CHURCH OF MOULTRIE v. BARBER CONTRACTING CO.
Court of Appeals of Georgia, 1989
189 Ga. App. 804, 377 S.E.2d 717

McMURRAY, Presiding Judge. The First Baptist Church of Moultrie, Georgia, invited bids for the construction of a music, education and recreation building. The bids were to be opened on May 15, 1986. They were to be accompanied by a bid bond in the amount of 5 percent of the base bid. The bidding instructions provided, in pertinent part: "Negligence on the part of the bidder in preparing the bid confers no right for the withdrawal of the bid after it has been opened."

Barber Contracting Company ("Barber") submitted a bid for the project in the amount of $1,860,000. The bid provided, in pertinent part: "For and in consideration of the sum of $1.00, the receipt of which is hereby acknowledged, the undersigned agrees that this proposal may not be revoked or withdrawn after the time set for the opening of bids but shall remain open for acceptance for a period of thirty-five (35) days following such time." The bid also provided that if it was accepted within 35 days of the opening of bids, Barber would execute a contract for the construction of the project within 10 days of the acceptance of the bid.

A bid bond in the amount of 5 percent of Barber's bid ($93,000) was issued by The American Insurance Company to cover Barber's bid. With regard to the bid bond, the bid submitted by Barber provided: "If this proposal is accepted within thirty-five (35) days after the date set for the opening of bids and the undersigned [Barber] fails to execute the contract within ten (10) days after written notice of such acceptance . . . the obligation of the bid bond will remain in full force and effect and the money payable thereon shall be paid into the funds of the Owner as liquidated damages for such failure.". . .

The bids were opened by the church on May 15, 1986, as planned. Barber submitted the lowest bid. The second lowest bid, in the amount of $1,975,000, was submitted by H&H Construction and Supply Company, Inc. ("H&H").

Barber's president, Albert W. Barber, was present when the bids were opened, and of course, he was informed that Barber was the low bidder. Members of the church building committee informally asked President Barber if changes could be made in the contract to reduce the amount of the bid. He replied that he was sure such changes could be made.

On May 16, 1986, Albert W. Barber informed the architect for the project, William Frank McCall, Jr., that the amount of the bid was in error — the bid should have been $143,120 higher. In Mr. Barber's words:

> [T]he mistake in Barber's bid was caused by an error in totaling the material costs on page 3 of Barber's estimate work sheets. The subtotal of the material cost listed on that page is actually $137,990. The total listed on Barber's summary sheet for the material cost subtotal was $19,214. The net error in addition was $118,776. After adding in mark-ups for sales tax (4 percent), overhead and profit (15 percent), and bond procurement costs (.75 percent), the error was compounded to a total of $143,120. . . .

The architect immediately telephoned Billy G. Fallin, co-chairman of the church building committee, and relayed the information which he received from President Barber.

On May 20, 1986, Barber delivered letters to the architect and the church. In the letter to the architect, Barber enclosed copies of its estimate sheets and requested that it be permitted to withdraw its bid. In the letter to the church, Barber stated that it was withdrawing its bid on account of "an error in adding certain estimated material costs." In addition, Barber sought the return of the bid bond from the church.

On May 29, 1986, the church forwarded a construction contract, based upon Barber's bid, to Barber. The contract had been prepared by the architect and excuted by the church. The next day, Barber returned the contract to the church without executing it. In so doing, Barber pointed out that its bid had been withdrawn previously.

On July 25, 1986, the church entered into a construction contract for the project with H&H, the second lowest bidder. Through deletions and design changes, the church was able to secure a contract with H&H for $1,919,272.

In the meantime, the church demanded that Barber and The American Insurance Company pay it $93,000 pursuant to the bid bond. The demand was refused.

On May 26, 1987, the church brought suit against Barber and The American Insurance Company seeking to recover the amount of the bid bond. Answering the complaint, defendants denied they were liable to plaintiff.

Thereafter, defendants moved for summary judgment and so did the plaintiff. In support of their summary judgment motions, defendants submitted the affidavit of Albert W. Barber. He averred that in preparing its bid, Barber exercised the level of care ordinarily exercised by contractors submitting sealed bids. In support of its summary judgment motion, the church submitted the affidavit of a building contractor who averred that he would never submit a bid of any magnitude without obtaining assistance in verification and computation.

The trial court denied the summary judgment motions, certified its rulings for immediate review and we granted these interlocutory appeals. Held:

The question for decision is whether Barber was entitled to rescind its bid upon discovering that it was based upon a miscalculation or whether

Barber should forfeit its bond because it refused to execute the contract following the acceptance of its bid by the church. We hold that Barber was entitled to rescind its bid.

That equity will rescind a contract upon a unilateral mistake is a generally accepted principle. See Corbin on Contracts, §609 (1960). As it is said:

> 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 . . . and (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 (2d) of Contracts, §153 (1979).

The following illustration demonstrates the rule:

> In response to B's invitation for bids on the construction of a building according to stated specifications, A submits an offer to do the work for $150,000. A believes that this is the total of a column of figures, but he has made an error by inadvertently omitting a $50,000 item, and in fact the total is $200,000. B, having no reason to know of A's mistake, accepts A's bid. If A performs for $150,000, he will sustain a loss of $20,000 instead of making an expected profit of $30,000. If the court determines that enforcement of the contract would be unconscionable, it is voidable by A.

Restatement (2d) of Contracts, §153 (1979) (Illustration 1).

Corbin explains:

> Suppose . . . a bidding contractor makes an offer to supply specified goods or to do specified work for a definitely named price, and that he was caused to name this price by an antecedent error of computation. If, before acceptance, the offeree knows, or has reason to know, that a material error has been made, he is seldom mean enough to accept; and if he does accept, the courts have no difficulty in throwing him out. He is not permitted "to snap up" such an offer and profit thereby. If, without knowledge of the mistake and before any revocation, he has accepted the offer, it is natural for him to feel a sense of disappointment at not getting a good bargain, when the offeror insists on withdrawal; but a just and reasonable man will not insist upon profiting by the other's mistake. There are now many decisions to the effect that if the error was a substantial one and notice is given before the other party has made such a change of position that he cannot be put substantially in status quo, the bargain is voidable and rescission will be decreed.

Corbin on Contracts, §609 (1960).

Georgia law is no different. It provides for rescission and cancellation "upon the ground of mistake of fact material to the contract of one party only." OCGA §23-2-31. The mistake must be an "unintentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced

confidence." OCGA §23-2-21(a). But relief will be granted even in cases of negligence if the opposing party will not be prejudiced. OCGA §23-2-32.

We can see these principles at work in M. J. McGough Co. v. Jane Lamb Memorial Hosp., 302 F. Supp. 482 (S.D. Iowa 1969). In that case, a bid of $1,957,000 was submitted for a hospital improvement by a contractor. A bond in the amount of $100,000 was given to secure the contractor's bid. The contractor submitted the lowest bid. After the bids were opened, but before its bid was accepted, the contractor informed the hospital that it erroneously transcribed numbers in computing the bid and that, therefore, it underbid the project by $199,800. Nevertheless, the hospital tried to hold the contractor to its bid. When the contractor refused to execute a contract, the hospital awarded the contract to the next lowest bidder. The contractor and surety sought rescission of the bid and the return of the bond. The hospital sued the contractor and surety for damages. The district court allowed the contractor to rescind. Its decision is noteworthy and illuminating. We quote it at length:

> By the overwhelming weight of authority a contractor may be relieved from a unilateral mistake in his bid by rescission under the proper circumstances. See generally, Annot., 52 A.L.R.2d 792 (1957). The prerequisites for obtaining such relief are: (1) the mistake is of such consequence that enforcement would be unconscionable; (2) the mistake must relate to the substance of the consideration; (3) the mistake must have occurred regardless of the exercise of ordinary care; (4) it must be possible to place the other party in status quo. It is also generally required that the bidder give prompt notification of the mistake and his intention to withdraw. . . .
>
> Applying the criteria for rescission for a unilateral mistake to the circumstances in this case, it is clear that [the contractor] and his surety . . . are entitled to equitable relief. The notification of mistake was promptly made, and [the contractor] made every possible effort to explain the circumstances of the mistake to the authorities of [the hospital]. Although [the hospital] argues to the contrary, the Court finds that notification of the mistake was received before acceptance of the bid. The mere opening of the bids did not constitute the acceptance of the lowest bid. . . . Furthermore, it is generally held that acceptance prior to notification does not bar the right to equitable relief from a mistake in the bid.
>
> The mistake in this case was an honest error made in good faith. While a mistake in and of itself indicates some degree of lack of care or negligence, under the circumstances here there was not such a lack of care as to bar relief. . . .
>
> The mistake here was a simple clerical error. To allow [the hospital] to take advantage of this mistake would be unconscionable. This is especially true in light of the fact that they had actual knowledge of the mistake before the acceptance of the bid. Nor can it be seriously contended that a $199,800 error, amounting to approximately 10% of the bid, does not relate directly to the substance of the consideration. Furthermore, [the hospital] has suffered no actual damage by the withdrawal of the bid of [the contractor]. The Hospital has lost only what it sought to gain by taking advantage of [the contractor's] mistake. Equitable considerations will not allow the recovery of the loss of bargain in this situation.

M. J. McGough Co. v. Jane Lamb Memorial Hosp., 302 F. Supp. 482, 485, 486, supra.

In the case sub judice, Barber, the contractor, promptly notified the plaintiff that a mistake was made in calculating the amount of the bid. The plaintiff had actual knowledge of the mistake before it forwarded a contract to Barber. The mistake was a "simple clerical error." M. J. McGough Co. v. Jane Lamb Memorial Hosp., 302 F. Supp. 482, 485, supra. See OCGA §23-2-21(a). It did not amount to negligence preventing equitable relief. See OCGA §23-2-32(a). Furthermore, it was a mistake which was material to the contract (OCGA §23-2-31) — it went to the substance of the consideration. (The mistake amounted to approximately 7 percent of the bid.) To allow the plaintiff to take advantage of the mistake would not be just. M. J. McGough Co. v. Jane Lamb Memorial Hosp., supra at 486. See also Shelton & Co. v. Ellis, 70 Ga. 297 (1883).

The contention is made that Barber's miscalculation constituted negligence sufficient to prevent relief in equity. See OCGA §23-2-32(a). Assuming, arguendo, that the error stemmed from such a want of prudence as to violate a legal duty (OCGA §23-2-32(a)), we must nevertheless conclude that Barber is entitled to rescission.

Relief in equity "may be granted even in cases of negligence by the complainant if it appears that the other party has not been prejudiced thereby." OCGA §23-2-32(b). It cannot be said that plaintiff was prejudiced by Barber's rescission. After all, plaintiff "lost only what it sought to gain by taking advantage of [the contractor's] mistake." M. J. McGough Co. v. Jane Lamb Memorial Hosp., supra at 486.

The plaintiff takes the position that rescission is improper since, pursuant to the language set forth in the bid, Barber agreed not to withdraw the bid for a period of 35 days after the bids were opened. It also asserts that the language set forth in the bidding instructions prohibited Barber from withdrawing the bid on the ground of "negligence." We disagree. "[P]rovisions such as these have been considered many times in similar cases, and have never been held effective when equitable considerations dictate otherwise." M. J. McGough Co. v. Jane Lamb Memorial Hosp., 302 F. Supp. 482, 487, supra.

The trial court properly denied the plaintiff's (the church's) motion for summary judgment. It erred in denying defendants' (Barber's and The American Insurance Company's) motions for summary judgment.

QUESTIONS

1. In spite of the court's cavalier statement to the contrary, the black letter rule is that there is usually no relief for a unilateral mistake; careless parties should be more careful in the future. However, as the court indicates, courts of equity will grant relief, particularly in cases of mistaken bids where the error is promptly caught. Why would this situation attract the sympathy of the court more than others?

2. Surely the contractor was negligent here. Shouldn't that affect the result?

3. Why doesn't the court enforce the contractual agreement that the contractor would bear the risk of negligence?

4. Is this case right in your opinion?

Problem 113

When computing its bid on the new schoolhouse, Careless Construction Company turned two pages of its estimate book at once and thereby accidentally omitted a huge portion of the true amount of its bid. Other bidders bid amounts ranging from $2,500,000 to $3,000,000. Careless's bid was $1,250,000, and the school board snapped it up by an immediate acceptance. Performing at this low rate will put Careless into bankruptcy. Is there relief in the law of mistake? Will it help Careless if the school board unduly rushed it, while giving the other bidders greater time in which to compute their bids?

Problem 114

How would your answer change, if at all, if Careless had made a bid of $1,250,000, not because of missing pages in the estimate, but because Careless believed that the work could be completed in five months rather than the six months that were actually required?

Problem 115

When Careless Construction Company discovered that it had made a mistake that lowered its bid by $4,000, it nonetheless decided to go through with the project and accept the loss. The second lowest bidder was the Prudent Construction Company; its bid was $2,000 higher than that of Careless. Arguing that it would have been awarded the contract if Careless's mistake were taken into account, Prudent demanded that Careless's contract be voided for mistake and that Prudent be awarded the job. Is this argument valid?

Problem 116

To help with a charity golf tournament, the Klick-Lewis car dealership donated a new Chevrolet Beretta GT and placed it on the ninth tee with a sign saying "HOLE-IN-ONE Wins this car courtesy of Klick-Lewis, Inc." No one made a hole-in-one during the tournament. Two days later, before Klick-Lewis got around to removing the car or taking down the sign, Amos Cobaugh was playing in another tournament on the same course and made a hole-in-one on the ninth hole. Is he entitled to the car? Did he

furnish sufficient consideration for it? See Cobaugh v. Klick-Lewis, Inc., 385 Pa. Super. 587, 561 A.2d 1248 (Pa. Super. 1989).

NOTE ON UNILATERAL MISTAKES IN OTHER THAN CONSTRUCTION BIDDING CASES

Most of the material on unilateral mistake in your book and in real life concerns mistakes made in construction bids. But the *Cobaugh* case cited in the last Problem is one example where the unilateral mistake issue arises in other types of cases. A recent case concerned a car dealer's $12,000 error in an advertisement for a used Jaguar! Donovan v. RRL Corp., 26 Cal. Rptr. 2d 807, 27 P.2d 702 (Cal. 2001). The court first found that the ad was an offer (in part because of state law that requires a dealer to advertise a price that is in fact available), and ultimately allowed rescission by the dealer on the basis of unilateral mistake. The court emphasized the requirement under the Restatement (Second) of Contracts §153 that the enforcement of the contract with the unilateral mistake be *unconscionable*. The unconscionability found in the case was the fact that the auto was worth $12,000 more than the advertised price and the buyer had sold the auto after purchase for a price slightly above the price that the dealer had intended to advertise the auto.

D. Reformation

Reformation is an equitable action whereby the court is asked to rewrite the contract so that it represents the "true" agreement of the parties. Reformation is most often used to correct a "scrivener's error": the writing incorrectly reflects the parties' agreement. It is occasionally used to correct contracts where there is fraud, duress, undue influence, and unconscionability but not often. In fact some courts limit the use of the doctrine to cases where there is a scrivener's error. Since the primary allegation in a reformation action is that the contract is incorrectly reflected by the writing, obviously the parol evidence rule is inapplicable in such a suit. See Palmer, Reformation and the Parol Evidence Rule, 65 Mich. L. Rev. 833 (1967).

BEYNON BUILDING CORP. v. NATIONAL GUARDIAN LIFE INSURANCE CO.
Appellate Court of Illinois, 1983
118 Ill. App. 3d 754, 455 N.E.2d 246

UNVERZAGT, J. The plaintiff, Beynon Building Corporation, appeals a judgment denying its complaint for a release from a mortgage held consecutively by the defendants, Rockford Mortgage Co. (hereafter, "Rockford") and National Guardian Life Insurance Co. (hereafter, "National"), and

reforming the mortgage and note secured by the mortgage. Although Rockford was named as a defendant, it was no longer in business and did not participate in the lawsuit. The following issues are presented for review:

(1) Whether the trial court erred in denying the plaintiff's motion to strike National's affirmative defenses.
(2) Whether the affirmative defense of mistake and the prayer for reformation were barred by the statute of limitations or by laches.
(3) Whether the affirmative defense of mistake and the prayer for reformation were barred by the statute of frauds.
(4) Whether National met its burden of proving that a mistake was in fact made on the mortgage and note.

On October 23, 1964, the plaintiff executed a mortgage and note with Rockford. The mortgage document provided that the plaintiff would pay:

> the principal sum of Eighty-Five Thousand and no/100 Dollars ($85,000.00) as evidenced by a principal promissory note of even date herewith, payable in 180 equal monthly installments of Six Hundred Forty-Nine and 60/100 Dollars ($649.60) beginning December 15, 1964 and with a final payment November 15, 1979.

The installment note provided that the plaintiff would pay Rockford $85,000 as follows:

> Six Hundred Forty-Nine and 60/100 Dollars on the Fifteenth day of December A.D. 1964; Six Hundred Forty-nine and 60/100 Dollars on the Fifteenth day of each and every month beginning on the Fifteenth day of January A.D. 1965 for 178 months succeeding, and a final payment of Six Hundred Forty-nine and 60/100 Dollars on the Fifteenth day of November A.D., 1979, with interest at the rate of 5½ percent per annum, payable Monthly.

Rockford assigned the mortgage and note to National by a document also dated October 23, 1964.

The plaintiff made 178 monthly payments of $649.60. In September 1979, the plaintiff sent National a check for $1,299.20, with an accompanying letter explaining that it was to cover the final two payments and requesting a release of the mortgage. National refused to accept the check as the final payment and sent a reply letter explaining that an error had been made in drafting the original promissory note in that the correct monthly payments should have been $694.60 rather than $649.60.

When further attempts to obtain a release from the mortgage based on the 180th payment failed, the plaintiff filed a complaint for release from the mortgage on January 9, 1980. National filed an answer denying that the payments tendered by the plaintiff were in full payment of the mortgage. National also asserted as an affirmative defense that there was an

inadvertent mistake in the amount of monthly payments shown on the note, that the mistake was discovered and in 1965 a new amortization schedule was sent to the plaintiff showing that amortization would take 200 rather than 180 months, and that the plaintiff's former president acknowledged the longer loan term in a letter written to National in 1973. The loan amortization schedule was dated November 18, 1965, and showed that payments of $649.60 at 5½ percent interest would take 200 months, with the final payment due on August 15, 1981. The letter written by the plaintiff's former president in 1973 was a request for additional financing from National and stated, "The present mortgage balance is $51,695.06 and calls for payments of $649.60 through August of 1981 at 5½ percent interest."

A hearing was held before the court. The general counsel for National testified that, according to an amortization booklet, the monthly payments necessary to amortize an $85,000 loan at 5½ percent interest over 15 years (or 180 months) was $694.60. He concluded that a mistake had been made in the monthly payment figures but stated that National's records did not indicate that the discrepancy was discovered until 1979 when the "final payment" was tendered. No one from Rockford who was involved in the loan transaction was available to testify.

A local banker testified that he calculated the interest rate based on the amortization of an $85,000 loan over 180 payments at $649.60 to be about 4½ percent. He also testified that the prevailing prime rate in October 1964 was 4½ percent, according to the records of a local bank in existence at that time. The president of the plaintiff at the time the loan and mortgage were obtained acknowledged receiving the amortization schedule in 1965 and referring to its terms in his 1973 letter to National.

The court entered its judgment denying the plaintiff's complaint for release of mortgage and granting National's request for reformation of the mortgage and note so that the monthly payment would be $694.60 rather than $649.60, based on the parties' intentions that the loan be for $85,000 at 5½ percent interest for 15 years. The court found, based on testimony presented by National, that the balance due was $13,106.07, plus interest of $1,814 as of the date of trial, and the per diem interest was $2 per day.

It is undisputed that, given an $85,000 loan to be paid in 180 monthly payments, a 5½ percent interest rate and $649.60 payments do not compute. It is also clear that the interest rate was specified only in the note, as 5½ percent, and that the mortgage did not specify an interest rate. The other three terms — $85,000 for 180 months at $649.60 per month — were listed on both documents.

The first issue is whether the trial court erred in denying the plaintiff's motion to strike National's affirmative defense. In its motion to strike, the plaintiff stated that the mortgage spoke for itself and that the note referred to in the affirmative defense did not relate to the issue at hand, i.e., whether the terms of the mortgage had been fulfilled. The plaintiff argues that the mortgage and note are two separate, independent documents and that only the terms contained in the mortgage document itself control whether its obligation has been fulfilled.

The plaintiff cites Conerty v. Richtsteig (1942), 379 Ill. 360, 365, 41 N.E.2d 476, for the principle that a note and mortgage are separate undertakings and the note wholly independent of the mortgage. The defendant in turn cites Schultz v. Plankinton Bank (1892), 141 Ill. 116, 121, 30 N.E. 346, for the rule that a mortgage and note must be considered together and treated as one instrument. However, *Conerty* dealt with the rights and obligations of successive owners of mortgaged property, where the later owners assumed the mortgage and obtained extensions on the note, and *Schultz* dealt with whether a parol agreement entered into when a mortgage was executed was admissible to vary the contract as to payment of the notes. Neither case discussed the relationship of a mortgage and note where, as here, a mutual mistake of fact that would justify reformation was claimed.

Such a mistake results in the drawing of the contract itself. It is not a fundamental mistake relating to an essential element of the contract, which would prevent a meeting of the minds of the parties; rather, it occurs when an actual good-faith agreement is reached but, due to error, is not expressed in the written reduction of the agreement. (Friedman v. Development Management Group, Inc. (1980), 82 Ill. App. 3d 949, 954, 38 Ill. Dec. 379, 403 N.E.2d 610.) Thus, the mistake must have existed at the time of the execution of the instrument, must have been mutual and common to all parties, and must have been such that the parties intended to say one thing but by the written instrument expressed another. (Sedlacek v. Sedlacek (1969), 107 Ill. App. 2d 334, 337, 246 N.E.2d 6.) A mutual mistake exists when the contract has been written in terms that violate the understanding of both parties. (Biren v. Kluver (1976), 35 Ill. App. 3d 692, 696, 342 N.E.2d 325.) It is well settled that the parol evidence rule is no bar to the admission of evidence on the question of mutual mistake, and this is so even when the instrument to be reformed is clear and unambiguous on its face. (Ballard v. Granby (1980), 90 Ill. App. 3d 13, 16, 45 Ill. Dec. 485, 412 N.E.2d 1067.) Thus parol evidence may be used to show the real agreement between the parties when a mistake has been made and the evidence is for the purpose of making the contract conform to the original intent of the parties. (Stoerger v. Ivesdale Co-op Grain Co. (1973), 15 Ill. App. 3d 313, 317, 304 N.E.2d 300.) Since National alleged that a mutual mistake was made on the mortgage document as to the correct amount of the monthly payments, the note was admissible as extrinsic evidence to establish the real intention of the parties.

In addition, section 2 of "An Act relating to mortgages of property of public utilities" (Ill. Rev. Stat. 1981, ch. 95, par. 52) provides that a mortgagee shall release a mortgage, if so requested, upon receipt "of all such sum or sums of money as are *really* due to him from the mortgagor." (Emphasis added.) National's assertion that there was indeed more money owing and that a mistake had been made on the document was sufficiently pleaded under section 2-613(d) of the Civil Procedure (Ill. Rev. Stat. 1981, ch. 110, par. 2-613(d)) to raise that affirmative matter. Thus the trial court properly denied the plaintiff's motion to strike.

The next issue is whether the affirmative defense of mistake and the prayer for reformation were barred by the statute of limitations or by

laches. The plaintiff's statute-of-limitations argument is premised on the contention that National discovered the alleged mistake in 1965 and that the cause of action therefore accrued then. The plaintiff notes that National's affirmative defense stated "that said error was subsequently discovered, and in 1965, this Defendant sent a new loan amortization schedule to Plaintiff . . . ," which is inconsistent with the testimony that National did not discover the error until the plaintiff's request for relief. The plaintiff relies on the 10-year period in section 13-206 of the Code of Civil Procedure. (Ill. Rev. Stat. 1981, ch. 110, par. 13-206.) The plaintiff's theory, then, is that the cause of action accrued at the time of discovery, which was 1965, and the ten years ran before National sought reformation.

National responds that it had no actual knowledge of the mistake until 1979 when the plaintiff attempted to make a final payment and that, therefore, the request for reformation was timely. In addition, National suggests that the plaintiff's former president should have brought the mistake to National's attention in 1965 when he received the amortization schedule and that his failure to do so gave him unclean hands in a court of equity.

We found no Illinois case that addressed the application of the statute of limitations to an action for reformation based on mutual mistake. Although other states vary as to which statute of limitations applies (66 Am. Jur. 2d Reformation of Instruments §90 (1969)), in Illinois the applicable statute is found in section 13-206 of the Code of Civil Procedure (Ill. Rev. Stat. 1981, ch. 110, par. 13-206), which provides:

> Except as provided in Section 2-725 of the "Uniform Commercial Code," actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidences of indebtedness in writing, shall be commenced within 10 years next after the cause of action accrued; but if any payment or new promise to pay has been made, in writing, on any bond, note, bill, lease, contract, or other written evidence of indebtedness, within or after the period of 10 years, then an action may be commenced thereon at any time within 10 years after the time of such payment or promise to pay.

Other states are also divided as to when the appropriate statute of limitations begins to run against the right to sue for reformation. In some states, the period commences when the facts that constitute the mistake are discovered or through due diligence should have been discovered; in others, it commences at the accrual of the cause of action, being the date of execution or delivery of the instrument. 66 Am. Jur. 2d Reformation of Instruments §91 (1969).

Illinois' statute generally follows the latter rule. Although National posits that the limitations period did not commence until 1979 — the date it claims to have first actually discovered the mistake — the Illinois courts have rejected the "know or ought to know" rule as the time a limitations period begins to run. (Sabath v. Morris Handler Co. (1968), 102 Ill. App. 2d 218, 228-229, 243 N.E.2d 723.) Rather, the statute of limitations commences to run when the party to be barred has a right to invoke the aid of the court to enforce his remedy. (Maxwell for the use of Maxwell

v. Nieft (1942), 313 Ill. App. 354, 356, 40 N.E.2d 554.) Under the statute of limitations, a cause of action accrues when facts exist that authorize one party to maintain an action against another; thus the moment a creditor may legally demand payment the statute of limitations begins to run, because at that moment a cause of action has actually accrued. (Mazur v. Stein (1942), 314 Ill. App. 529, 534, 41 N.E.2d 979.) Even when an obligation is payable by installments and the statute of limitations runs against each installment when due, an action to determine the existence of the right under the contract is distinct as regards the commencement of the period of limitations, and the statute of limitations begins to run when the party first has the power to make the demand. (Brehm v. Sargent & Lundy (1978), 66 Ill. App. 3d 472, 474, 23 Ill. Dec. 419, 384 N.E.2d 55.) This effectuates the policy behind statutes of limitations, which are statutes of repose designed to prevent recovery on stale demands. The purpose of such statutes is not to shield a wrongdoer but to provide a sufficient opportunity to investigate factors upon which liability is based while such evidence is still ascertainable; thus, the statutes require diligence in initiating actions before the relevant facts are obscured by the lapse of time or the death, removal, or defective memory of witnesses. Brehm v. Sargent & Lundy (1978), 66 Ill. App. 3d 472, 475, 23 Ill. Dec. 419, 384 N.E.2d 55.

In the present case, the facts upon which the action for reformation was grounded existed in 1964 when the mortgage and note documents were drawn and executed. The cause of action therefore accrued at that time, rather than at the time when the discrepancy was actually discovered, and the limitations period began to run then.

National also argues that the statute of limitations does not apply because the plaintiff had reason to know of the mistake, in that it received the amortization schedule in 1965 and referred to it when making payments, and should have brought the error to National's attention before filing this suit. This argument is effectively one of estoppel.

In Sabath v. Morris Handler Co. (1969), 102 Ill. App. 2d 218, 243 N.E.2d 723, the court discussed the circumstances in which one may be estopped from raising the defense of the statute of limitations. Estoppel exists independent of those things set forth in the statute itself as causing suspension. If a party's conduct has reasonably induced another to follow a course of action that otherwise would not have been followed and that would be to the latter's detriment if he did not later repudiate such course of action, an estoppel arises to prevent injustice or fraud. (102 Ill. App. 2d 218, 223, 243 N.E.2d 723.) The test is not whether the representation or conduct was fraudulent in the strict legal sense or done with an intent to mislead or deceive, but rather whether in all the circumstances of the case conscience and duty of honest dealing should deny one the right to repudiate the consequences of his representations or conduct. Although there is ordinarily no duty to apprise an adversary of his rights, one cannot justly or equitably lull his adversary into a false sense of security, causing him to subject his claim to the bar of the statute, and then plead the very delay caused by his course of conduct. (102 Ill. App. 2d 218, 225, 243 N.E.2d 723.) In Reat v. Illinois Central R.R. Co. (1964), 47 Ill. App. 2d 267, 197

N.E.2d 860, the court said that the general principles of equitable estoppel require the party asserting the estoppel to have relied on the act or representation and because of that reliance refrained from commencing an action within the limitations period; the conduct must have been of such character as to prevent inquiry, elude investigation, or mislead the party with the cause of action. (47 Ill. App. 2d 267, 273, 197 N.E.2d 860.) In addition, the "lulling" period must not have expired before the limitations period. 47 Ill. App. 2d 267, 274-275, 197 N.E.2d 860.

In the present case, the totality of the circumstances justifies invoking the doctrine of estoppel. Although the plaintiff's silence upon receipt of the amortization schedule in 1965 would not alone be grounds for estoppel, the letter of 1973 acknowledged the terms of that schedule, even though they quite clearly differed from the note and mortgage by showing amortization over 200 rather than 180 months. This is analogous to the provision in the statute of limitations that, where a new promise to pay has been made in writing within or after the 10-year period, an action may be commenced within 10 years after that promise was made. Since the plaintiff had the amortization schedule, which clearly indicated that the loan would not be amortized according to the terms shown on the note and mortgage, and expressly acknowledged those terms as the terms of payment, it is not equitable to permit the plaintiff to assert the statute of limitations as a bar.

Similarly, we reject the plaintiff's contention that the action for reformation is barred by laches. In fixing the period in which rights and claims will be barred by laches, equity follows the law, and generally courts of equity will adopt the period of limitations fixed by statute. Thus, where a party's rights are not barred by the statute of limitations, unless his conduct or special circumstances make it inequitable to grant him relief, he is not barred by laches. (Wall v. Chicago Park District (1941), 378 Ill. 81, 96, 37 N.E.2d 752.) Here, there is evidence that National acted promptly to assert its claim, after discovering the discrepancy and the plaintiff's intention not to pay according to the amortization schedule, and it would be inequitable to permit the plaintiff's assertion of laches.

The next issue is whether the affirmative defense of mistake and the prayer for reformation were barred by the statute of frauds. [The court decided that the statute of frauds was not applicable.] . . . .

The last issue is whether National met its burden of proving that a mistake was in fact made on the mortgage and note. The plaintiff contends that evidence presented by National was insufficient to justify reformation. As the plaintiff notes, National's general counsel was not involved in the making of the note and mortgage, he acknowledged that the interest rate could have been listed incorrectly, and he did not know the parties' intentions or whether they ever arrived at any agreement regarding the monthly payment amount. In response, National argues that the evidence was uncontroverted that both parties intended to execute a mortgage for $85,000 over a 15-year period at 5½ percent interest. National believes that the installment payment figures were changed through an error and that it was a mutual mistake.

As the plaintiff points out, the burden of proving a reformation suit, which is on the party seeking reformation, is higher than that in an ordinary

civil lawsuit. A written agreement is presumed to express the intention of the parties and will not be reformed unless the evidence of mutual mistake or other ground for reformation is strong, clear, and convincing. (319 South LaSalle Corp. v. Lopin (1974), 19 Ill. App. 3d 285, 290, 311 N.E.2d 288.) The mistake must be one of fact rather than law, the proof clear and convincing that a mistake was made, and the mistake mutual and common to both parties to the instrument. Roots v. Uppole (1980), 81 Ill. App. 3d 68, 72, 36 Ill. Dec. 423, 400 N.E.2d 1003.

In the present case, there is no question that the terms on the written documents were inconsistent. Moreover, there is sufficient evidence to justify a conclusion that at some point the monthly payment figure was transposed to read $649.60 when it should have been $694.60, since the $694.60 figure was *exactly* consistent with the other terms. The suggestion that the interest rate was the mistaken term is less convincing since amortizing $85,000 over 15 years at $649.60 produces an interest rate of *approximately* 4½ percent.

The remaining question is whether the mistake was mutual. There is no testimony that the plaintiff was aware of the $694.60 figure and agreed to it before the mistake in drafting the documents was made. However, the 5½ percent interest rate was clear on the face of the note, was never challenged by the plaintiff during the 15 years it made payments, and was affirmed in the 1973 letter. There was thus sufficient evidence for the trial court to conclude that the true intent of the parties was to secure an $85,000 loan at 5½ percent interest for 15 years, justifying reformation of the instruments to reflect the correct monthly payment as $694.60.

The judgment of the circuit court of Winnebago County is affirmed.

Judgment affirmed.

III. FRAUD

VOKES v. ARTHUR MURRAY, INC.
District Court of Appeals of Florida, 1968
212 So. 2d 906

PIERCE, J. This is an appeal by Audrey E. Vokes, plaintiff below, from a final order dismissing with prejudice, for failure to state a cause of action, her fourth amended complaint, hereinafter referred to as plaintiff's complaint.

Defendant Arthur Murray, Inc., a corporation, authorizes the operation throughout the nation of dancing schools under the name of "Arthur Murray School of Dancing" through local franchised operators, one of whom was defendant J. P. Davenport whose dancing establishment was in Clearwater.

Plaintiff Mrs. Audrey E. Vokes, a widow of 51 years and without family, had a yen to be "an accomplished dancer" with the hopes of finding "new interest in life." So, on February 10, 1961, a dubious fate, with the assist of a motivated acquaintance, procured her to attend a "dance party" at

Davenport's "School of Dancing" where she whiled away the pleasant hours, sometimes in a private room, absorbing his accomplished sales technique, during which her grace and poise were elaborated upon and her rosy future as "an excellent dancer" was painted for her in vivid and glowing colors. As an incident to this interlude, he sold her eight ½-hour dance lessons to be utilized within one calendar month therefrom, for the sum of $14.50 cash in hand paid, obviously a baited "come-on."

Thus she embarked upon an almost endless pursuit of the terpsichorean art during which, over a period of less than sixteen months, she was sold fourteen "dance courses" totalling in the aggregate 2,302 hours of dancing lessons for a total cash outlay of $31,090.45, all at Davenport's dance emporium. All of these fourteen courses were evidenced by execution of a written "Enrollment Agreement — Arthur Murray's School of Dancing" with the addendum in heavy black print, "No one will be informed that you are taking dancing lessons. Your relations with us are held in strict confidence," setting forth the number of "dancing lessons" and the "lessons in rhythm sessions" currently sold to her from time to time, and always of course accompanied by payment of cash of the realm.

These dance lesson contracts and the monetary consideration therefor of over $31,000 were procured from her by means and methods of Davenport and his associates which went beyond the unsavory, yet legally permissible, perimeter of "sales puffing" and intruded well into the forbidden area of undue influence, the suggestion of falsehood, the suppression of truth, and the free exercise of rational judgment, if what plaintiff alleged in her complaint was true. From the time of her first contact with the dancing school in February, 1961, she was influenced unwittingly by a constant and continuous barrage of flattery, false praise, excessive compliments, and panegyric encomiums, to such extent that it would be not only inequitable, but unconscionable, for a Court exercising inherent chancery power to allow such contracts to stand.

She was incessantly subjected to over-reaching blandishment and cajolery. She was assured she had "grace and poise"; that she was "rapidly improving and developing in her dancing skill"; that the additional lessons would "make her a beautiful dancer, capable of dancing with the most accomplished dancers"; that she was "rapidly progressing in the development of her dancing skill and gracefulness," etc., etc. She was given "dance aptitude tests" for the ostensible purpose of "determining" the number of remaining hours of instructions needed by her from time to time. At one point she was sold 545 additional hours of dancing lessons to be entitled to award of the "Bronze Medal" signifying that she had reached "the Bronze Standard," a supposed designation of dance achievement by students of Arthur Murray, Inc.

At one point, while she still had to her credit about 900 unused hours of instructions, she was induced to purchase an additional 24 hours of lessons to participate in a trip to Miami at her own expense, where she would be "given the opportunity to dance with members of the Miami Studio."

She was induced at another point to purchase an additional 126 hours of lessons in order to be not only eligible for the Miami trip but also to

become "a life member of the Arthur Murray Studio," carrying with it certain dubious emoluments, at a further cost of $1,752.30.

At another point, while she still had over 1,000 unused hours of instruction she was induced to buy 151 additional hours at a cost of $2,049.00 to be eligible for a "Student Trip to Trinidad," at her own expense as she later learned.

Also, when she still had 1,100 unused hours to her credit, she was prevailed upon to purchase an additional 347 hours at a cost of $4,235.74, to qualify her to receive a "Gold Medal" for achievement, indicating she had advanced to "the Gold Standard."

On another occasion, while she still had over 1,200 unused hours, she was induced to buy an additional 175 hours of instruction at a cost of $2,472.75 to be eligible "to take a trip to Mexico."

Finally, sandwiched in between other lesser sales promotions, she was influenced to buy an additional 481 hours of instruction at a cost of $6,523.81 in order to "be classified as a Gold Bar Member, the ultimate achievement of the dancing studio."

All the foregoing sales promotions, illustrative of the entire fourteen separate contracts, were procured by defendant Davenport and Arthur Murray, Inc., by false representations to her that she was improving in her dancing ability, that she had excellent potential, that she was responding to instructions in dancing grace, and that they were developing her into a beautiful dancer, whereas in truth and in fact she did not develop in her dancing ability, she had no "dance aptitude," and in fact had difficulty in "hearing the musical beat." The complaint alleged that such representations to her "were in fact false and known by the defendant to be false and contrary to the plaintiff's true ability, the truth of plaintiff's ability being fully known to the defendants, but withheld from the plaintiff for the sole and specific intent to deceive and defraud the plaintiff and to induce her in the purchasing of additional hours of dance lessons." It was averred that the lessons were sold to her "in total disregard to the true physical rhythm, and mental ability of the plaintiff." In other words, while she first exulted that she was entering the "spring of her life," she finally was awakened to the fact there was "spring" neither in her life nor in her feet.

The complaint prayed that the Court decree the dance contracts to be null and void and to be cancelled, that an accounting be had, and judgment entered against the defendants "for that portion of the $31,090.45 not charged against specific hours of instruction given to the plaintiff." The Court held the complaint not to state a cause of action and dismissed it with prejudice. We disagree and reverse.

The material allegations of the complaint must, of course, be accepted as true for the purpose of testing its legal sufficiency. Defendants contend that contracts can only be rescinded for fraud or misrepresentation when the alleged misrepresentation is as to a material fact, rather than an opinion, prediction or expectation, and that the statements and representations set forth at length in the complaint were in the category of "trade puffing," within its legal orbit.

It is true that "generally a misrepresentation, to be actionable, must be one of fact rather than of opinion." Tonkovich v. South Florida Citrus

Industries, Inc., Fla. App. 1966, 185 So. 2d 710; Kutner v. Kalish, Fla. App. 1965, 173 So. 2d 763. But this rule has significant qualifications, applicable here. It does not apply where there is a fiduciary relationship between the parties, or where there has been some artifice or trick employed by the representor, or where the parties do not in general deal at "arm's length" as we understand the phrase, or where the representee does not have equal opportunity to become apprised of the truth or falsity of the fact represented. 14 Fla. Jur. Fraud and Deceit, §28; Kitchen v. Long, 1914, 67 Fla. 72, 64 So. 429. As stated by Judge Allen of this Court in Ramel v. Chasebrook Construction Company, Fla. App. 1961, 135 So. 2d 876:

> A statement of a party having . . . superior knowledge may be regarded as a statement of fact although it would be considered as opinion if the parties were dealing on equal terms.

It could be reasonably supposed here that defendants had "superior knowledge" as to whether plaintiff had "dance potential" and as to whether she was noticeably improving in the art of terpsichore. And it would be a reasonable inference from the undenied averments of the complaint that the flowery eulogiums heaped upon her by defendants as a prelude to her contracting for 1,944 additional hours of instruction in order to attain the rank of the Bronze Standard, thence to the bracket of the Silver Standard, thence to the class of the Gold Bar Standard, and finally to the crowning plateau of a Life Member of the Studio, proceeded as much or more from the urge to "ring the cash register" as from any honest or realistic appraisal of her dancing prowess or a factual representation of her progress.

Even in contractual situations where a party to a transaction owes no duty to disclose facts within his knowledge or to answer inquiries respecting such facts, the law is if he undertakes to do so he must disclose the *whole truth.* Ramel v. Chasebrook Construction Company, supra; Beagle v. Bagwell, Fla. App. 1964, 169 So. 2d 43. From the face of the complaint, it should have been reasonably apparent to defendants that her vast outlay of cash for the many hundreds of additional hours of instruction was not justified by her slow and awkward progress, which she would have been made well aware of if they had spoken the "whole truth."

In Hirschman v. Hodges, etc., 1910, 59 Fla. 517, 51 So. 550, it was said that "what is plainly injurious to good faith ought to be considered as a fraud sufficient to impeach a contract," and that an improvident agreement may be avoided "because of surprise, or mistake, *want of freedom, undue influence, the suggestion of falsehood, or the suppression of truth.*" (Emphasis supplied.)

We repeat that where parties are dealing on a contractual basis at arm's length with no inequities or inherently unfair practices employed, the Courts will in general "leave the parties where they find themselves." But in the case sub judice, from the allegations of the unanswered complaint, we cannot say that enough of the accompanying ingredients, as mentioned in the foregoing authorities, were not present which otherwise would have barred the equitable arm of the Court to her. In our view, from the showing made in her complaint, plaintiff is entitled to her day in Court.

It accordingly follows that the order dismissing plaintiff's last amended complaint with prejudice should be and is reversed.

Reversed.

NOTES AND QUESTIONS

1. Was her reliance reasonable? Should the reasonableness of the plaintiff's conduct be an issue in a fraud suit? As a judge would you allow the defendant this defense: "It's true I told the plaintiff an outrageous lie, but only an idiot would have believed me"?

In the leading case of Chamberlin v. Fuller, 59 Vt. 247, 9 A. 832 (1887), the court made this point: "No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool." Where the victim however signed up for a foolish venture having full knowledge of the facts, which include *no misrepresentations*, an action in fraud will not lie. See Stahl v. Balsara, 60 Haw. 144, 587 P.2d 1210 (1978) ("utterly unreasonable" to rely on astrologer's future predictions); Ellis v. Newbrough, 6 N.M. 181, 27 P. 490 (1891) (no relief for believer who gave all his property to a "land of Shalam" commune in the desert).

2. Fraud does not necessarily consist of verbal or written statements. Conduct by itself can be fraudulent. Where the defendant takes *affirmative steps* to conceal a problem, a "misrepresentation" occurs, Lindberg Cadillac Co. v. Aron, 371 S.W.2d 651 (Mo. Ct. App. 1963) (used car's engine spray-painted black to look shiny), as it does where the defendant knows that under no circumstances would plaintiff have gone through with the transaction had the truth been known, Jewish Center v. Whale, 86 N.J. 619, 432 A.2d 521 (1981) (rabbi failed to mention his past criminal record and disbarment as an attorney when hired by synagogue).

3. Simple nondisclosure may also suffice as an assertion of an existing fact. Generally, courts have found nondisclosure actionable in the following situations:

(a) There is a relationship of trust and confidence between the parties. See, e.g., Frowen v. Blank, 493 Pa. 137, 425 A.2d 412 (1981) (necessary relationship found when defendant was neighbor and close social friend of plaintiff, who was 86 years old, feeble, and had little business knowledge).

(b) One party has made an assertion and later learns it is false. See, e.g., Strand v. Librascope, Inc., 197 F. Supp. 743 (E.D. Mich. 1961) (seller told buyer that "noise" in computer components was due to buyer's circuits. Later, after only 5 percent of the requisite deliveries had been made, seller learned that the noise problems were caused by seller's components. It was misrepresentation not to relay this information to buyer.).

(c) Party A knows that Party B is laboring under a misconception that Party A has not caused.

4. Is it ever fraud to keep silent and not speak up? In the famous case of Peek v. Gurney, 6 H.L. 377 (1873), the House of Lords decided that there is never a duty to disclose no matter how morally censurable silence may be. Some courts still adhere to this. See Swinton v. Whitinsville Savings

Bank, 311 Mass. 677, 42 N.E.2d 808 (1942) (no duty to mention that termites were being sold along with the house). Others disagree, Obde v. Schlemeyer, 56 Wash. 2d 449, 353 P.2d 672 (1960) (a termites case coming out the other way), following the suggestion of Professor Page Keeton that "silent fraud" should be actionable whenever "justice, equity, and fair dealing demand it"; Keeton, Fraud: Concealment and Non-Disclosure, 15 Texas L. Rev. 1, 31 (1936). Keeton said that disclosure is most called for when silence will allow a dangerous condition to go undiscovered. See Annot., 22 A.L.R.3d 972.

STAMBOVSKY v. ACKLEY
New York Supreme Court, Appellate Division, 1991
169 App. Div. 2d 254, 572 N.Y.S.2d 672

RUBIN, Justice. Plaintiff, to his horror, discovered that the house he had recently contracted to purchase was widely reputed to be possessed by poltergeists, reportedly seen by defendant seller and members of her family on numerous occasions over the last nine years. Plaintiff promptly commenced this action seeking rescission of the contract of sale. Supreme Court reluctantly dismissed the complaint, holding that plaintiff has no remedy at law in this jurisdiction.

The unusual facts of this case, as disclosed by the record, clearly warrant a grant of equitable relief to the buyer who, as a resident of New York City, cannot be expected to have any familiarity with the folklore of the Village of Nyack. Not being a "local," plaintiff could not readily learn that the home he had contracted to purchase is haunted. Whether the source of the spectral apparitions seen by defendant seller are parapsychic or psychogenic, having reported their presence in both a national publication ("Readers' Digest") and the local press (in 1977 and 1982, respectively), defendant is estopped to deny their existence and, as a matter of law, the house is haunted. More to the point, however, no divination is required to conclude that it is defendant's promotional efforts in publicizing her close encounters with these spirits which fostered the home's reputation in the community. In 1989, the house was included in a five-home walking tour of Nyack and described in a November 27th newspaper article as "a riverfront Victorian (with ghost)." The impact of the reputation thus created goes to the very essence of the bargain between the parties, greatly impairing both the value of the property and its potential for resale. The extent of this impairment may be presumed for the purpose of reviewing the disposition of this motion to dismiss the cause of action for rescission (Harris v. City of New York, 147 A.D.2d 186, 188-189, 542 N.Y.S.2d 550) and represents merely an issue of fact for resolution at trial.

While I agree with Supreme Court that the real estate broker, as agent for the seller, is under no duty to disclose to a potential buyer the phantasmal reputation of the premises and that, in his pursuit of a legal remedy for fraudulent misrepresentation against the seller, plaintiff hasn't a ghost of a chance, I am nevertheless moved by the spirit of equity to allow the buyer to seek rescission of the contract of sale and recovery of his downpayment.

New York law fails to recognize any remedy for damages incurred as a result of the seller's mere silence, applying instead the strict rule of caveat emptor. Therefore, the theoretical basis for granting relief, even under the extraordinary facts of this case, is elusive if not ephemeral.

"Pity me not but lend thy serious hearing to what I shall unfold" (William Shakespeare, Hamlet, Act I, Scene V [Ghost]).

From the perspective of a person in the position of plaintiff herein, a very practical problem arises with respect to the discovery of a paranormal phenomenon: "Who you gonna' call?" as the title song to the movie "Ghostbusters" asks. Applying the strict rule of caveat emptor to a contract involving a house possessed by poltergeists conjures up visions of a psychic or medium routinely accompanying the structural engineer and Terminix man on an inspection of every home subject to a contract of sale. It portends that the prudent attorney will establish an escrow account lest the subject of the transaction come back to haunt him and his client — or pray that his malpractice insurance coverage extends to supernatural disasters. In the interest of avoiding such untenable consequences, the notion that a haunting is a condition which can and should be ascertained upon reasonable inspection of the premises is a hobgoblin which should be exorcised from the body of legal precedent and laid quietly to rest.

It has been suggested by a leading authority that the ancient rule which holds that mere non-disclosure does not constitute actionable misrepresentation "finds proper application in cases where the fact undisclosed is patent, or the plaintiff has equal opportunities for obtaining information which he may be expected to utilize, or the defendant has no reason to think that he is acting under any misapprehension" (Prosser, Law of Torts §106, at 696 [4th ed., 1971]). However, with respect to transactions in real estate, New York adheres to the doctrine of caveat emptor and imposes no duty upon the vendor to disclose any information concerning the premises (London v. Courduff, 141 A.D.2d 803, 529 N.Y.S.2d 874) unless there is a confidential or fiduciary relationship between the parties (Moser v. Spizzirro, 31 A.D.2d 537, 295 N.Y.S.2d 188, affd., 25 N.Y.2d 941, 305 N.Y.S.2d 153, 252 N.E.2d 632; IBM Credit Fin. Corp. v. Mazda Motor Mfg. (USA) Corp., 152 A.D.2d 451, 542 N.Y.S.2d 649) or some conduct on the part of the seller which constitutes "active concealment" (see, 17 East 80th Realty Corp. v. 68th Associates, 173 A.D.2d 245, 569 N.Y.S.2d 647 [dummy ventilation system constructed by seller]; Haberman v. Greenspan, 82 Misc. 2d 263, 368 N.Y.S.2d 717 [foundation cracks covered by seller]). Normally, some affirmative misrepresentation (e.g., Tahini Invs., Ltd. v. Bobrowsky, 99 A.D.2d 489, 470 N.Y.S.2d 431 [industrial waste on land allegedly used only as farm]; Jansen v. Kelly, 11 A.D.2d 587, 200 N.Y.S.2d 561 [land containing valuable minerals allegedly acquired for use as campsite]) or partial disclosure (Junius Constr. Corp. v. Cohen, 257 N.Y. 393, 178 N.E. 672 [existence of third unopened street concealed]; Noved Realty Corp. v. A.A.P. Co., 250 App. Div. 1, 293 N.Y.S. 336 [escrow agreements securing lien concealed]) is required to impose upon the seller a duty to communicate undisclosed conditions affecting the premises (contra, Young v. Keith, 112 A.D.2d 625, 492 N.Y.S.2d 489 [defective water and sewer systems concealed]).

Caveat emptor is not so all-encompassing a doctrine of common law as to render every act of non-disclosure immune from redress, whether legal or equitable. "In regard to the necessity of giving information which has not been asked, the rule differs somewhat at law and in equity, and while the law courts would permit no recovery of *damages* against a vendor, because of mere concealment of facts *under certain circumstances,* yet if the vendee refused to complete the contract because of the concealment of a material fact on the part of the other, equity would refuse to compel him so to do, because equity only compels the specific performance of a contract which is fair and open, and in regard to which all material matters known to each have been communicated to the other" (Rothmiller v. Stein, 143 N.Y. 581, 591-592, 38 N.E. 718 [emphasis added]). Even as a principle of law, long before exceptions were embodied in statute law (see, e.g., UCC 2-312, 2-313, 2-314, 2-315; 3-417[2][e]), the doctrine was held inapplicable to contagion among animals, adulteration of food, and insolvency of a maker of a promissory note and of a tenant substituted for another under a lease (see, Rothmiller v. Stein, supra, at 592-593, 38 N.E. 718 and cases cited therein). Common law is not moribund. *Ex facto jus oritur* (law arises out of facts). Where fairness and common sense dictate that an exception should be created, the evolution of the law should not be stifled by rigid application of a legal maxim.

The doctrine of caveat emptor requires that a buyer act prudently to assess the fitness and value of his purchase and operates to bar the purchaser who fails to exercise due care from seeking the equitable remedy of rescission (see, e.g., Rodas v. Manitaras, 159 A.D.2d 341, 552 N.Y.S.2d 618). For the purposes of the instant motion to dismiss the action pursuant to CPLR 3211(a)(7), plaintiff is entitled to every favorable inference which may reasonably be drawn from the pleadings (Arrington v. New York Times Co., 55 N.Y.2d 433, 442, 449 N.Y.S.2d 941, 434 N.E.2d 1319; Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634, 389 N.Y.S.2d 314, 357 N.E.2d 970), specifically, in this instance, that he met his obligation to conduct an inspection of the premises and a search of available public records with respect to title. It should be apparent, however, that the most meticulous inspection and the search would not reveal the presence of poltergeists at the premises or unearth the property's ghoulish reputation in the community. Therefore, there is no sound policy reason to deny plaintiff relief for failing to discover a state of affairs which the most prudent purchaser would not be expected to even contemplate (see, Da Silva v. Musso, 53 N.Y.2d 543, 551, 444 N.Y.S.2d 50, 428 N.E.2d 382).

The case law in this jurisdiction dealing with the duty of a vendor of real property to disclose information to the buyer is distinguishable from the matter under review. The most salient distinction is that existing cases invariably deal with the physical condition of the premises (e.g., London v. Courduff, supra [use as a landfill]; Perin v. Mardine Realty Co., 5 A.D.2d 685, 168 N.Y.S.2d 647, affd., 6 N.Y.2d 920, 190 N.Y.S.2d 995, 161 N.E.2d 210 [sewer line crossing adjoining property without owner's consent]), defects in title (e.g., Sands v. Kissane, 282 App. Div. 140, 121 N.Y.S.2d 634 [remainderman]), liens against the property (e.g., Noved Realty Corp. v. A.A.P. Co., supra), expenses or income (e.g., Rodas v. Manitaras, supra [gross receipts]) and other factors affecting its operation. No case has been brought to this

court's attention in which the property value was impaired as the result of the reputation created by information disseminated to the public by the seller (or, for that matter, as a result of possession by poltergeists).

Where a condition which has been created by the seller materially impairs the value of the contract and is peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent purchaser exercising due care with respect to the subject transaction, nondisclosure constitutes a basis for rescission as a matter of equity. Any other outcome places upon the buyer not merely the obligation to exercise care in his purchase but rather to be omniscient with respect to any fact which may affect the bargain. No practical purpose is served by imposing such a burden upon a purchaser. To the contrary, it encourages predatory business practice and offends the principle that equity will suffer no wrong to be without a remedy.

Defendant's contention that the contract of sale, particularly the merger or "as is" clause, bars recovery of the buyer's deposit is unavailing. Even an express disclaimer will not be given effect where the facts are peculiarly within the knowledge of the party invoking it (Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 322, 184 N.Y.S.2d 599, 157 N.E.2d 597; Tahini Invs., Ltd. v. Bobrowsky, supra). Moreover, a fair reading of the merger clause reveals that it expressly disclaims only representations made with respect to the physical condition of the premises and merely makes general reference to representations concerning "any other matter or things affecting or relating to the aforesaid premises." As broad as this language may be, a reasonable interpretation is that its effect is limited to tangible or physical matters and does not extend to paranormal phenomena. Finally, if the language of the contract is to be construed as broadly as defendant urges to encompass the presence of poltergeists in the house, it cannot be said that she has delivered the premises "vacant" in accordance with her obligation under the provisions of the contract rider. . . .

In the case at bar, defendant seller deliberately fostered the public belief that her home was possessed. Having undertaken to inform the public at large, to whom she has no legal relationship, about the supernatural occurrences on her property, she may be said to owe no less a duty to her contract vendee. It has been remarked that the occasional modern cases which permit a seller to take unfair advantage of a buyer's ignorance so long as he is not actively misled are "singularly unappetizing" (Prosser, Law of Torts §106, at 696 [4th ed. 1971]). Where, as here, the seller not only takes unfair advantage of the buyer's ignorance but has created and perpetuated a condition about which he is unlikely to even inquire, enforcement of the contract (in whole or in part) is offensive to the court's sense of equity. Application of the remedy of rescission, within the bounds of the narrow exception to the doctrine of caveat emptor set forth herein, is entirely appropriate to relieve the unwitting purchaser from the consequences of a most unnatural bargain. . . .

All concur except MILONAS, J.P. and SMITH, J., who dissent in an opinion by SMITH, J.

SMITH, Justice (dissenting). I would affirm the dismissal of the complaint by the motion court. . . . "It is settled law in New York that the seller of real property is under no duty to speak when the parties deal at

arm's length. The mere silence of the seller, without some act or conduct which deceived the purchaser, does not amount to a concealment that is actionable as a fraud (see Perin v. Mardine Realty Co., Inc., 5 A.D.2d 685, 168 N.Y.S.2d 647, affd., 6 N.Y.2d 920, 190 N.Y.S.2d 995, 161 N.E.2d 210; Moser v. Spizzirro, 31 A.D.2d 537, 295 N.Y.S.2d 188, affd., 25 N.Y.2d 941, 305 N.Y.S.2d 153, 252 N.E.2d 632). The buyer has the duty to satisfy himself as to the quality of his bargain pursuant to the doctrine of caveat emptor, which in New York State still applies to real estate transactions." London v. Courduff, 141 A.D.2d 803, 804, 529 N.Y.S.2d 874, app. dismd., 73 N.Y.2d 809, 537 N.Y.S.2d 494, 534 N.E.2d 332 (1988).

The parties herein were represented by counsel and dealt at arm's length. This is evidenced by the contract of sale which, inter alia, contained various riders and a specific provision that all prior understandings and agreements between the parties were merged into the contract, that the contract completely expressed their full agreement and that neither had relied upon any statement by anyone else not set forth in the contract. There is no allegation that defendants, by some specific act, other than the failure to speak, deceived the plaintiff. Nevertheless, a cause of action may be sufficiently stated where there is a confidential or fiduciary relationship creating a duty to disclose and there was a failure to disclose a material fact, calculated to induce a false belief. County of Westchester v. Welton Becket Assoc., 102 A.D.2d 34, 50-51, 478 N.Y.S.2d 305, affd., 66 N.Y.2d 642, 495 N.Y.S.2d 364, 485 N.E.2d 1029 (1985). However, plaintiff herein has not alleged and there is no basis for concluding that a confidential or fiduciary relationship existed between these parties to an arm's length transaction such as to give rise to a duty to disclose. In addition, there is no allegation that defendants thwarted plaintiff's efforts to fulfill his responsibilities fixed by the doctrine of caveat emptor. See London v. Courduff, supra, 141 A.D.2d at 804, 529 N.Y.S.2d 874.

Finally, if the doctrine of caveat emptor is to be discarded, it should be for a reason more substantive than a poltergeist. The existence of a poltergeist is no more binding upon the defendants than it is upon this court.

Based upon the foregoing, the motion court properly dismissed the complaint.

RESTATEMENT (SECOND) OF CONTRACTS

§161. When Non-Disclosure Is Equivalent to an Assertion

A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:

(a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.

(b) where he knows that the disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

(c) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part.

(d) where the other person is entitled to know the fact because of a relation of trust and confidence between them.

Superior knowledge. Where the misrepresentor has superior knowledge of the situation, the courts have deemed *opinions* as fraudulent. For instance, while ordinarily a misrepresentation of the rules of law is not fraudulent, it is actionable where the statement is made by an attorney, Ward v. Arnold, 52 Wash. 2d 581, 328 P.2d 164 (1958). This rule frequently traps insurance companies making predictions about the benefits of its policies; see Anderson v. Knox, 297 F.2d 702 (9th Cir. 1961), cert. denied, 370 U.S. 915 (1962).

COUSINEAU v. WALKER
Supreme Court of Alaska, 1980
613 P.2d 608

BOOCHEVER, J. The question in this case is whether the appellants are entitled to rescission of a land sale contract because of false statements made by the sellers. The superior court concluded that the buyers did not rely on any misrepresentations made by the sellers, that the misrepresentations were not material to the transaction, and that reliance by the buyers was not justified. Restitution of money paid under the contract was denied. We reverse and remand the case to the superior court to determine the amount of damages owed the appellants.

In 1975, Devon Walker and his wife purchased 9.1 acres of land in Eagle River, Alaska, known as Lot 1, Cross Estates. They paid $140,000.00 for it. A little over a year later, in October, 1976, they signed a multiple listing agreement with Pat Davis, an Anchorage realtor. The listing stated that the property had 580 feet of highway frontage on the Old Glenn Highway and that "Engineer Report Says Over 1 Million in Gravel on Prop." The asking price was $245,000.00.

When the multiple listing expired, Walker signed a new agreement to retain Davis as an exclusive agent. In the broker's contract, the property was again described as having 580 feet of highway frontage, but the gravel content was listed as "minimum 80,000 cubic yds of gravel." The agreement also stated that 2.6 acres on the front of the parcel had been proposed for B-3 zoning (a commercial use), and the asking price was raised to $470,000.00.

An appraisal was prepared to determine the property's value as of December 31, 1976. Walker specifically instructed the appraiser not to include the value of gravel in the appraisal. A rough draft of the appraisal and the appraiser's notes were introduced at trial. Under the heading, "Assumptions and Limiting Conditions," the report stated the appraisal

"does not take into account any gravel. . . ." But later in the report the ground was described as "all good gravel base . . . covered with birch and spruce trees." The report did not mention the highway footage of the lot.

Wayne Cousineau, a contractor who was also in the gravel extraction business, became aware of the property when he saw the multiple listing. He consulted Camille Davis, another Anchorage realtor, to see if the property was available. In January, Cousineau and Camille Davis visited the property and discussed gravel extraction with Walker, although according to Walker's testimony commercial extraction was not considered. About this time Cousineau offered Walker $360,000.00 for the property. Cousineau tendered a proposed sales agreement which stated that all gravel rights would be granted to the purchaser at closing.

Sometime after his first offer, Cousineau attempted to determine the lot's road frontage. The property was covered with snow, and he found only one boundary marker. At trial the appraiser testified he could not find any markers. Cousineau testified that he went to the borough office to determine if any regulations prevented gravel extraction. . . .

In February, 1977, the parties agreed on a purchase price of $385,000.00 and signed an earnest money agreement. The sale was contingent upon approval of the zoning change of the front portion of the lot to commercial use. The amount of highway frontage was not included in the agreement. Paragraph 4(e) of the agreement conditionally granted gravel rights to Cousineau. According to the agreement, Cousineau would be entitled to remove only so much gravel as was necessary to establish a construction grade on the commercial portion of the property. To remove additional gravel, Cousineau would be required to pay releases on those portions of ground where gravel was removed. This language was used to prevent Walker's security interest in the property from being impaired before he was fully paid.

Soon after the earnest money agreement was signed, the front portion of the property was rezoned and a month later the parties closed the sale.

There is no reference to the amount of highway frontage in the final purchase agreement. An addendum to a third deed of trust incorporates essentially the same language as the earnest money agreement with regard to the release of gravel rights.

After closing, Cousineau and his partners began developing the commercial portion of the property. They bought a gravel scale for $12,000.00 and used two of Cousineau's trucks and a loader. The partners contracted with South Construction to remove the gravel. According to Cousineau's testimony, he first learned of discrepancies in the real estate listing which described the lot when a neighbor threatened to sue Cousineau because he was removing gravel from the neighbor's adjacent lot. A recent survey shows that there is 415 feet of highway frontage on the property — not 580 feet, as advertised.

At the same time Cousineau discovered the shortage in highway frontage, South Construction ran out of gravel. They had removed 6,000 cubic yards. To determine if there was any more gravel on the property, a South Construction employee bulldozed a trench about fifty feet long and

twenty feet deep. There was no gravel. A soils report prepared in 1978 confirmed that there were no gravel deposits on the property.

After December, 1977, Cousineau and his partners stopped making monthly payments. At that time they had paid a total of $99,000.00 for the property, including a down payment and monthly installments. In March, 1978, they informed Walker of their intention to rescind the contract. A deed of trust foreclosure sale was held in the fall of 1978, and Walker reacquired the property. At a bench trial in December, Cousineau and his partners were denied rescission and restitution.

Among his written findings of fact, the trial judge found:

> At some point in time, between October 24, 1976, and January 11, 1977, there existed a multiple listing advertisement which included information relating to gravel as well as road frontage, said information subsequently determined to be incorrect.

He further found:

> The plaintiffs did not rely on any misinformation or misrepresentations of defendants. The claimed misinformation about gravel on the property and the road frontage was not a material element of the parties' negotiations, and these pieces of information did not appear in the February 16, 1977 purchase agreement document prepared by attorney Harland Davis, attorney for the plaintiffs and signed by the parties.

In part, based on these findings, the court adopted the following conclusions of law:

> The plaintiffs are not entitled to rescission of the contract of sale or restitution as they were not entitled to rely on the alleged misrepresentation. . . .
>
> The information which allegedly formed the basis of the misrepresentation was not material in the instant transaction, the agreement reached by the parties was valid and does not suffer any taint or defect of misrepresentation.

I. Rescission of the Contract

Numerous cases hold and the Restatement provides that an innocent misrepresentation may be the basis for rescinding a contract.[3] There is no

3. We decline to consider whether Walker's statements amounted to fraudulent or negligent misrepresentations. The trial judge made no findings on the question and our resolution makes it unnecessary to consider it. It is apparent, however, that Walker had little basis for making statements regarding gravel content. For example, the basis for the statement in the first listing, "over 1 million in gravel," was Walker's neighbor, Riley Curtis, not the "Engineer Report." Walker claimed that Curtis told him an engineering firm had dug core samples on the property and had prepared a report which estimated the amount of gravel. At trial, Curtis denied telling Walker that there was gravel on the property. He testified that he told Walker there was over one million in *material*, not gravel. As discussed in the text, Walker never actually saw the report. Moreover, Pat Davis, Walker's real estate agent, was aware of these facts, but included the statement on the listing anyway.

question, as the trial judge's findings of fact state, that the statements made by Walker and his real estate agent in the multiple listing were false.[4] Three questions must be resolved, however, to determine whether Cousineau is entitled to rescission and restitution of the amount paid for the property on the basis of the misrepresentations. First, it must be determined whether Cousineau in fact relied on the statements. Second, it must be determined whether the statements were material to the transaction — that is, objectively, whether a reasonable person would have considered the statements important in deciding whether to purchase the property. Finally, assuming that Cousineau relied on the statements and that they were material, it must be determined whether his reliance was justified.[5]

A. RELIANCE ON THE FALSE STATEMENTS

As quoted above, in his findings of fact, the trial judge stated, "The plaintiffs did not rely on any misinformation or misrepresentations of defendants." Because this case was decided by a judge without a jury, our standard of review of factual findings is the "clearly erroneous" standard. Alaska R. Civ. P. 52(a). When a finding leaves the court with the definite and firm conviction on the entire record that a mistake has been made, it is clearly erroneous. . . . In our opinion, the trial judge's finding that Cousineau and his partners did not rely on the statements made by Walker is clearly erroneous.

Regardless of the credibility of some witnesses, the uncontroverted facts are that Wayne Cousineau was in the gravel extraction business. He first became aware of the property through a multiple listing that said "1 Million in Gravel." The subsequent listing stated that there were 80,000 cubic yards of gravel. Even if Walker might have taken the position that the sale was based on the appraisal, rather than the listings, the appraisal does not disclaim the earlier statements regarding the amount of highway

4. The statements made regarding highway frontage and gravel content in the two listing agreements cannot be characterized as "puffing." They were positive statements "susceptible of exact knowledge" at the time they were made. Young & Cooper, Inc. v. Vestring, 214 Kan. 311, 521 P.2d 281, 290 (1974). Although not applicable to real property sales, it is revealing that under the Uniform Commercial Code, where it is frequently necessary to distinguish "sales talk" from those statements which create express warranties, such definite statements as those made in the listing agreements would most probably be construed as creating an express warranty. See Annot., 94 A.L.R.3d 729 (1979).

5. Restatement (Second) of Contracts §306, comment (a), (Tent. Draft no. 11, 1976) states:

> A misrepresentation may make a contract voidable under the rule stated in this Section, even though it does not prevent the formulation of a contract under the rule stated in the previous section. Three requirements must be met in addition to the requirement that there must have been a misrepresentation. First, the misrepresentation must have been either fraudulent or material. . . . Second, the misrepresentation must have induced the recipient to make the contract. . . . Third, the recipient must have been justified in relying on the misrepresentation.

frontage and the existence of gravel. In fact, the appraisal might well reaffirm a buyer's belief that gravel existed, since it stated there was a good gravel base. All the documents prepared regarding the sale from the first offer through the final deed of trust make provisions for the transfer of gravel rights. Cousineau's first act upon acquiring the property was to contract with South Construction for gravel removal, and to purchase gravel scales for $12,000.00. We conclude that the court erred in finding that Cousineau did not rely on Walker's statement that there was gravel on the property.

We are also convinced that the trial court's finding that Cousineau did not rely on Walker's statement regarding the amount of highway frontage was clearly erroneous. The Cousineaus were experienced and knowledgeable in real estate matters. In determining whether to purchase the property, they would certainly have considered the amount of highway frontage to be of importance. Despite Walker's insistence that Cousineau knew the location of the boundary markers, neither Cousineau nor the appraiser ever found them. It is improbable that Cousineau would have started removing gravel from a neighbor's property had he known the correct location of his boundary line.

B. MATERIALITY OF THE STATEMENTS

Materiality is a mixed question of law and fact. A material fact is one "to which a reasonable man might be expected to attach importance in making his choice of action." W. Prosser, Law of Torts §108, at 719 (4th ed. 1971). It is a fact which could reasonably be expected to influence someone's judgment or conduct concerning a transaction. . . . Under §306 of the tentative draft of the Restatement (Second) of Contracts, a misrepresentation may be grounds for voiding a contract if it is either fraudulent or material. Restatement (Second) of Contracts §306 (Tent. Draft no. 11, 1976). The reason behind the rule requiring proof of materiality is to encourage stability in contractual relations. The rule prevents parties who later become disappointed at the outcome of their bargain from capitalizing on any insignificant discrepancy to void the contract.

We conclude as a matter of law that the statements regarding highway frontage and gravel content were material. A reasonable person would be likely to consider the existence of gravel deposits an important consideration in developing a piece of property. Even if not valuable for commercial extraction, a gravel base would save the cost of obtaining suitable fill from other sources. Walker's real estate agent testified that the statements regarding gravel were placed in the listings because gravel would be among the property's "best points" and a "selling point." It seems obvious that the sellers themselves thought a buyer would consider gravel content important.

The buyers received less than three-fourths of the highway frontage described in the listings. Certainly the amount of highway frontage on a commercial tract would be considered important. Numerous cases from

other jurisdictions have held discrepancies to be material which were similar in magnitude to those here.[8]

C. JUSTIFIABLE RELIANCE

The trial judge concluded as a matter of law that the plaintiffs "were not entitled to rely on the alleged misrepresentation."

The bulk of the appellee's brief is devoted to the argument that Cousineau's unquestioning reliance on Walker and his real estate agent was imprudent and unreasonable. Cousineau failed to obtain and review the engineer's report. He failed to obtain a survey or examine the plat available at the recorder's office. He failed to make calculations that would have revealed the true frontage of the lot. Although the property was covered with snow, the plaintiffs, according to Walker, had ample time to inspect it. The plaintiffs were experienced businessmen who frequently bought and sold real estate. Discrepancies existed in the various property descriptions which should have alerted Cousineau and his partners to potential problems. In short, the appellees urge that the doctrine of caveat emptor precludes recovery.

In fashioning an appropriate rule for land sale contracts, we note initially that, in the area of commercial and consumer goods, the doctrine of caveat emptor has been nearly abolished by the Uniform Commercial Code and imposition of strict products liability. In real property transactions, the doctrine is also rapidly receding. Alaska has passed the Uniform Land Sales Practices Act, AS 34.55.004-.046, which imposes numerous restrictions on vendors of subdivided property. Criminal penalties may be imposed for violations. The Uniform Residential Landlord and Tenant Act, AS 34.03.010-.380, has greatly altered the common law of landlord and tenant in favor of tenants. Many states now imply warranties of merchantability in new home sales. Wyoming has recently extended this warranty beyond the initial purchaser to subsequent buyers. . . .

There is a split of authority regarding a buyer's duty to investigate a vendor's fraudulent statements, but the prevailing trend is toward placing a minimal duty on a buyer. Recently, a Florida appellate court reversed long-standing precedent which held that a buyer must use due diligence to protect his interest, regardless of fraud, if the means for acquiring knowledge concerning the transaction were open and available. In the context of a building sale the court concluded:

8. Piazzini v. Jessup, 152 Cal. App. 58, 314 P.2d 196 (1957) (misrepresentation as to boundary line and existence of termites); Richard v. Baker, 141 Cal. App. 2d 857, 297 P.2d 674 (1956) (misrepresentation as to boundary location); Sorenson v. Adams, 98 Idaho 708, 571 P.2d 769 (1977) (discrepancy as to amount of tillable acreage); Bennett v. Finley, 54 N.M. 139, 215 P.2d 1013 (1950) (misrepresentation as to amount of farmland); Heverly v. Kirkendall, 257 Or. 232, 478 P.2d 381 (1970) (existence of encroachment); Dreifus Lumber Co. v. Werner, 221 Or. 467, 351 P.2d 684 (1960) (misrepresentation as to boundary line and amount of timber); Annot., 33 A.L.R. 853 §§48-51 (1924).

> A person guilty of fraudulent misrepresentation should not be permitted to hide behind the doctrine of *caveat emptor*. . . .

The Supreme Court of Maine has also recently reversed a line of its prior cases, concluding that a defense based upon lack of due care should not be allowed in land sales contracts where a reckless or knowing misrepresentation has been made. . . . This is also the prevailing view in California, Idaho, Kansas, Massachusetts, and Oregon. On the other hand, some jurisdictions have reaffirmed the doctrine of caveat emptor, but as noted in Williston on Contracts,

> [t]he growing trend and tendency of the courts will continue to move toward the doctrine that negligence in trusting in a misrepresentation will not excuse positive willful fraud or deprive the defrauded person of his remedy.

W. Jaeger, Williston on Contracts §1515B at 487 (3d ed. 1970).

There is also authority for not applying the doctrine of caveat emptor even though the misrepresentation is innocent. The Restatements, case law, and a ready analogy to express warranties in the sale of goods support this view.

The recent draft of the Restatement of Contracts allows rescission for an innocent material misrepresentation unless a buyer's fault was so negligent as to amount to "a failure to act in good faith and in accordance with reasonable standards of fair dealing."[13] Restatement (Second) of Contracts §314, Comment b (Tent. Draft. no. 11, 1976).

In Van Meter v. Bent Construction Co., 46 Cal. 2d 588, 297 P.2d 644 (1956), the city of San Diego failed to properly mark the area of a reservoir that needed to be cleared of brush. A lower court concluded that the city's failure to mark the area properly was an innocent mistake, and that a bidder's actions in failing to discover the true area to be cleared was negligent. Recovery was denied because the city's misrepresentation was not willful. The California Supreme Court reversed, first noting that a party's negligence does not bar rescission for mutual mistake, and then concluding:

> There is even more reason for not barring a plaintiff from equitable relief where his negligence is due in part to his reliance in good faith upon

13. As an illustration of "fair dealing," the proposed Restatement suggests the following example:

> A, seeking to induce B to make a contract to buy land, tells B that the land is free from encumbrances. Unknown to either A or B, C holds a recorded and unsatisfied mortgage on the land. B could easily learn this by walking across the street to the register of deeds in the courthouse but does not do so. B is induced by A's statement to make the contract. B's reliance is justified since his fault does not amount to a failure to act in good faith and in accordance with reasonable standards of fair dealing, and the contract is voidable by B.
>
> Restatement (Second) of Contracts §314, Comment b, Illustration 2 (Tent. Draft no. 11, 1976).

> the false representations of a defendant, although the statements were not made with intent to deceive. A defendant who misrepresents the facts and induces the plaintiff to rely on his statements should not be heard in an equitable action to assert that the reliance was negligent unless plaintiff's conduct, in the light of his intelligence and information, is preposterous or irrational.

Id. 297 P.2d at 648 (citations omitted). The Massachusetts Supreme Judicial Court has expressed a similar view in Yorke v. Taylor, 332 Mass. 368, 124 N.E.2d 912, 916 (1955).[14]

We do not contend that real property transactions are the same as those involving sales of goods. Nevertheless, an analogy to the applicability of the doctrine of caveat emptor under the Uniform Commercial Code is helpful. Under the Code, factual statements regarding the sale of goods constitute an express warranty. AS 45.05.094. The official comment to section 2-316 of the Code (codified as AS 45.05.100), dealing with disclaimers of warranties, states:

> Application of the doctrine of "caveat emptor" in all cases where the buyer examines the goods regardless of statements made by the seller is, however, rejected by this Article. Thus, if the offer of examination is accompanied by words as to their merchantability or specific attributes and the buyer indicates clearly that he is relying on those words rather than on his examination, they give rise to an "express" warranty.

14. See also Sorenson v. Adams, 98 Idaho 708, 571 P.2d 769, 776 (1977), in which the tillable acreage sold was misrepresented by reference to an erroneous form prepared by the Department of Agriculture. The buyers sought damages for the shortage, and the Supreme Court of Idaho reversed a judgment of nonsuit, stating:

> In short, the general rule is that "a vendor may be liable in tort for misrepresentations as to the area of land conveyed, notwithstanding such misrepresentations were made without actual knowledge of their falsity." The reason, of course, is that the parties to a real estate transaction do not deal on equal terms. An owner is presumed to know the boundaries of his own land, the quantity of his acreage, and the amount of water available. If he does not know the correct information, he must find out or refrain from making representations to unsuspecting strangers. "Even honesty in making a mistake is no defense as it is incumbent upon the vendor to know the facts."

Id. 571 P.2d at 776 (citations omitted). In addition, the sellers argued that the buyers had no right to rely on the A.S.C. figures, since they could have checked the figures themselves or conducted their own survey. In rejecting this argument, the court stated:

> False statements found . . . to have been made and relied on cannot be avoided by the appellants by the contention that the respondents could have, by independent investigation, ascertained the truth.
>
> The appellants having stated what was untrue cannot now complain because respondents believed what they were told. Lack of caution on the part of respondents because they so believed, and the contention that the respondents could have made an independent investigation and determined the true facts, is no defense to the action. Weitzel v. Jukich, 73 Idaho 301, 305, 251 P.2d 542, 544 (1953). And see, Lanning v. Sprague, [71 Idaho 138, 227 P.2d 347] supra.

Numerous cases have concluded that a buyer is entitled to rely on an express warranty, regardless of an inadequate examination of the goods.

Furthermore, the protections of the Code extend to highly sophisticated buyers in arms length transactions as well as to household consumers. Other than tradition, no reason exists for treating land sales differently from the sale of commercial goods insofar as application of the doctrine of caveat emptor is involved. We conclude that a purchaser of land may rely on material representations made by the seller and is not obligated to ascertain whether such representations are truthful.

A buyer of land, relying on an innocent misrepresentation, is barred from recovery only if the buyer's acts in failing to discover defects were wholly irrational, preposterous, or in bad faith.

Although Cousineau's actions may well have exhibited poor judgment for an experienced businessman, they were not so unreasonable or preposterous in view of Walker's description of the property that recovery should be denied. Consequently, we reverse the judgment of the superior court.

II. Restitution

Walker received a total of $99,000.00 from Cousineau and his partners, but the appellants are not entitled to restitution of this amount. Cousineau apparently caused extensive damage to one building on the property, and he removed 6,000 cubic yards of gravel. Walker should be allowed some recoupment for these items, plus an amount for the fair rental value of the property less reasonable costs of rental.

It is necessary to remand this case to the trial court to determine the correct amount of damages.

Reversed and remanded.

Problem 117

When John Smith went into the Navy Recruitment Center, he told the recruiter on duty that he wanted to learn how to fly. He was told that his lack of 20/20 vision would prevent this, but that he could become a member of a flight crew if he went to a naval school to qualify as an air technician. He filled out the recruitment papers with this goal in mind, after being assured that he would be able to attend the air technician school. After he completed boot camp, John was denied entry to the school because he had indicated on his medical form that he suffered from hay fever. Instead the Navy sent him orders telling him to report for duty aboard a ship in the Mediterranean, where he would be a simple deckhand. John Smith hired a lawyer who filed a petition for a writ of habeas corpus. Is he going to be able to get out of the Navy? See Brown v. Dunleavy, 722 F. Supp. 1343 (E.D. Va. 1989).

Problem 118

When Portia Moot bought a used car from Honest John Motors, Honest John told her that he believed that it would be "maintenance free" for the first six months and that if anything went wrong in that period he would repair it. The car blew up a week after she bought it. When she asked Honest John to repair it, he told her she had bought a piece of junk "as is," that he never warranted his vehicles, and that he never did repair work. She sued him in fraud, producing a witness who had offered to buy the same car from Honest John a week before she did; this witness testified that John had told him that the car was worthless and "wouldn't run a month without major trouble." Honest John responded to the suit by claiming that fraud consists of the knowing misrepresentation of an *existing* fact, and that his statement of *opinion* and promises of repair in the future were not misrepresentations of existing matters. Who wins? See Vulcan Metals Co. v. Simmons Manufacturing Co., 248 F. 853 (2d Cir. 1918).

In a famous English case, Lord Bowen addressed this issue in oft-quoted language:

> There must be a misstatement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is but if it can be ascertained it is as much a fact as anything else.

Edginton v. Fitzmaurice, 29 Chan. 459 (1882).

Election of remedies. If the complaint in a fraud action asks for rescission, most courts hold that all the plaintiff can then recover is out-of-pocket expenses, and that by electing the remedy of rescission, the plaintiff has forfeited any claim for lost expectancy. Thus the lawyer drawing the complaint and wanting benefit-of-the-bargain damages has to be careful not to request rescission. Some jurisdictions ignore this election of remedies doctrine and permit the recovery of benefit-of-the-bargain damages no matter how the complaint is phrased. See Annot., 13 A.L.R.3d 875. The UCC adopts this latter position; read §2-721.

Punitive damages. From the plaintiff's point of view, one attractive feature of a fraud suit is the possibility of substantial punitive damages, which in many jurisdictions also include an award of attorney's fees; see Annot., 44 A.L.R.4th 776. Such damages are most appropriate where there is *intentional* conduct of the defendant which is "malicious, oppressive, or gross," Winn-Dixie Montgomery, Inc. v. Henderson, 395 So. 2d 475 (Ala. 1981), or "willful and wanton," Jeffers v. Nysse, 98 Wis. 2d 543, 297 N.W.2d 495 (1980). Where the plaintiff is a consumer or the defendant has a fiduciary relationship with the plaintiff, simple intentional fraud may be enough to allow for punitive damages, F. D. Borkholder Co. v. Sandock, 274 Ind. 612, 413 N.E.2d 567 (1980); Ford v. Guarantee Abstract & Title Co., 220 Kan. 244, 553 P.2d 254 (1976).

NOTE ON THE FEDERAL TRADE COMMISSION ACT AND STATE UNFAIR AND DECEPTIVE TRADE PRACTICE ACTS

Although a number of federal agencies have authority to protect consumers from a variety of wrongdoing, the agency considered to be the primary consumer protector is the Federal Trade Commission. The commission was formed in 1914 with the passage of the Federal Trade Commission Act. ch. 311, 38 Stat. 717 (1914). Although the FTC has been given authority through the years to enforce a wide variety of trade statutes, the commission's authority to enforce the FTC Act remains its major source of consumer protection power. Under the Act, it has the power to prohibit "unfair and deceptive trade practices."

One method by which the FTC may do so is through its "cease and desist" procedure. Once a complaint is filed with the FTC alleging a violation of the FTC Act, an investigation is conducted. If the commission staff concludes that a violation has occurred, the violator may be asked to enter into a "consent" to a "cease and desist order." Such a consent order applies only to prospective behavior and generally provides that the "consent" is not an admission of wrongdoing. If there is a refusal to enter into a consent order or the FTC decides the consent order is not in the public interest, the FTC may file a formal complaint and hold a public hearing before an administrative law judge of the FTC. After hearing testimony, the administrative judge may issue a cease and desist order. Any party to the initial decision of the administrative judge may appeal to the full commission. Further appeal must be to the U.S. Court of Appeals within any circuit where the method of competition or the act or practice in question was used or where such person resides or carries on its business. Final appeal is to the Supreme Court upon certiorari.

The FTC also has the authority to issue "trade regulation rules." To do so, the commission must (1) publish notice of proposed rulemaking stating with particularity the reason for the proposed rule; (2) allow interested persons to submit written data, views, and arguments, and make all such submissions publicly available; (3) provide for an informal hearing; and (4) promulgate, if appropriate, a final rule based on the rulemaking record together with a statement of basis and purpose. Judicial review of rules may be requested by interested persons including consumers or consumer organizations not later than 60 days after the promulgation of a rule. Appeal must be to the U.S. Court of Appeals for the District of Columbia Circuit or for the circuit in which such person resides or has his principal place of business. Final appeal is to the Supreme Court.

The 1975 FTC Improvement Act amendments specifically provide that the FTC has no power to issue rules that regulate banks. Within 60 days after the FTC promulgates a trade regulation rule, the Federal Reserve Board must issue "substantially similar" regulations prohibiting acts or practices of banks that are "substantially similar" to those prohibited by the FTC rules. However, the FRB is not required to issue such rules if it finds that the acts or practices of banks are not unfair or deceptive or that the implementation of similar regulations with respect to banks would seriously conflict with essential monetary and payment systems policies of

the FRB. 15 U.S.C. §57a(f)(1). It is generally accepted that there is no private right of action for the violation of the FTC Act. See, e.g., Alfred Dunhill Ltd. v. Interstate Cigar Co., 499 F.2d 232 (2d Cir. 1974); Carlson v. Coca-Cola Co., 483 F.2d 279 (9th Cir. 1973). Contra, Guernsey v. Rich Plan of the Midwest, 408 F. Supp. 582, 586-589 (N.D. Ind. 1976).

Upon violation of commission orders and trade regulation rules, the FTC may seek a variety of statutory remedies and penalties. The FTC may obtain preliminary injunctions against unfair or deceptive acts or practices that are unfair or deceptive to consumers. The commission may bring an action for a civil penalty of up to $10,000 for each violation against any person who is the subject of a cease and desist order. The commission may also recover such a penalty against persons who are not directly covered by an order if such persons have actual knowledge that acts or practices are unlawful under an existing order against a third party. The FTC may also recover a maximum $10,000 penalty for the violation of trade regulation rules.

Forty-nine states and the District of Columbia have laws based on the FTC Act's prohibition against deceptive and unfair acts and practices. Alabama is the exception.[1] Such statutes are commonly called *consumer protection statutes* or *little FTC acts.* All such statutes prohibit "deceptive" or "misleading" acts or practices. About one-half also prohibit "unfair" practices in their little FTC act. See, e.g., Mass. Ann. Laws ch. 93A §2.

Although there is no private right of action under the FTC Act, nearly all of the little FTC acts allow such an action. See, e.g., Mo. Ann. Stat. §407.025. Since most states give great weight to FTC cease and desist orders and trade regulation rules, the use of a state act's private right of action along with a substantive finding of deception or unfairness by the FTC in such an action may in effect give the consumer counsel the private right of action that would otherwise be missing.

All statutes providing for individual action allow actual damages. About one-third of the jurisdictions allowing the private right of action also allow multiple damages. See, e.g., D.C. Code Ann. §28-3905(K).

IV. DURESS AND UNDUE INFLUENCE

Problem 119

Herbert was charged with kidnapping. After being advised by his attorney and the prosecutor that there was a possibility of a death penalty, Herbert pleaded guilty and received a sentence of 50 years. Herbert decided to challenge his plea as being voidable because of

1. Survey of Consumer Fraud Law, chart at p.122, published by The National Institute of Law Enforcement and Criminal Justice (1978).

duress. Is it? Would your answer change if after he pleads guilty the statute prescribing the death penalty for kidnapping is declared unconstitutional? See Brady v. United States, 397 U.S. 742 (1970). Is a plea enforceable if the defendant pleads guilty so that his or her spouse will not be prosecuted? Compare Kent v. United States, 272 F.2d 795 (1st Cir. 1959) ("If a defendant elects to sacrifice himself for such motives, that is his choice"), with Crow v. United States, 397 F.2d 284 (10th Cir. 1968).

TOTEM MARINE TUG & BARGE v. ALYESKA PIPELINE SERVICE CO.

Supreme Court of Alaska, 1978
584 P.2d 15

BURKE, J. This appeal arises from the superior court's granting of summary judgment in favor of defendants-appellees Alyeska Pipeline Services, et al., in a contract action brought by plaintiffs-appellants Totem Marine Tug & Barge, Inc., Pacific, Inc., and Richard Stair.

The following summary of events is derived from the materials submitted in the summary judgment proceedings below.

Totem is a closely held Alaska corporation which began operations in March of 1975. Richard Stair, at all times relevant to this case, was vice-president of Totem. In June of 1975, Totem entered into a contract with Alyeska under which Totem was to transport pipeline construction materials from Houston, Texas, to a designated port in southern Alaska, with the possibility of one or two cargo stops along the way. In order to carry out this contract, which was Totem's first, Totem chartered a barge (the "Marine Flasher") and an ocean-going tug (the "Kirt Chouest"). These charters and other initial operations costs were made possible by loans to Totem from Richard Stair individually and Pacific, Inc., a corporation of which Stair was principal stockholder and officer, as well as by guarantees by Stair and Pacific.

By the terms of the contract, Totem was to have completed performance by approximately August 15, 1975. From the start, however, there were numerous problems which impeded Totem's performance of the contract. For example, according to Totem, Alyeska represented that approximately 1,800 to 2,100 tons of regular uncoated pipe were to be loaded in Houston, and that perhaps another 6,000 or 7,000 tons of materials would be put on the barge at later stops along the west coast. Upon the arrival of the tug and barge in Houston, however, Totem found that about 6,700 to 7,200 tons of coated pipe, steel beams and valves, haphazardly and improperly piled, were in the yard to be loaded. This situation called for remodeling of the barge and extra cranes and stevedores, and resulted in the loading taking thirty days rather than the three days which Totem had anticipated it would take to load 2,000 tons. The lengthy loading period was also caused in part by Alyeska's delay in assuring Totem that it would pay for the additional expenses, bad weather and other administrative problems.

The difficulties continued after the tug and barge left Houston. It soon became apparent that the vessels were travelling more slowly than anticipated because of the extra load. In response to Alyeska's complaints and with its verbal consent, on August 13, 1975, Totem chartered a second tug, the "N. Joseph Guidry." When the "Guidry" reached the Panama Canal, however, Alyeska had not yet furnished the written amendment to the parties' contract. Afraid that Alyeska would not agree to cover the cost of the second tug, Stair notified the "Guidry" not to go through the Canal. After some discussions in which Alyeska complained of the delays and accused Totem of lying about the horsepower of the first tug, Alyeska executed the amendment on August 21, 1975.

By this time the "Guidry" had lost its preferred passage through the Canal and had to wait two or three additional days before it could go through. Upon finally meeting, the three vessels encountered the tail of a hurricane which lasted for about eight or nine days and which substantially impeded their progress.

The three vessels finally arrived in the vicinity of San Pedro, California, where Totem planned to change crews and refuel. On Alyeska's orders, however, the vessels instead pulled into port at Long Beach, California. At this point, Alyeska's agents commenced off-loading the barge, without Totem's consent, without the necessary load survey, and without a marine survey, the absence of which voided Totem's insurance. After much wrangling and some concessions by Alyeska, the freight was off-loaded. Thereafter, on or about September 14, 1975, Alyeska terminated the contract. Although there was talk by an Alyeska official of reinstating the contract, the termination was affirmed a few days later at a meeting at which Alyeska officials refused to give a reason for the termination.

Following termination of the contract, Totem submitted termination invoices to Alyeska and began pressing the latter for payment. The invoices came to something between $260,000 and $300,000. An official from Alyeska told Totem that they would look over the invoices but that they were not sure when payment would be made — perhaps in a day or perhaps in six to eight months. Totem was in urgent need of cash as the invoices represented the debts which the company had incurred on 10-30 day payment schedules. Totem's creditors were demanding payment and according to Stair, without immediate cash, Totem would go bankrupt. Totem then turned over the collection to its attorney, Roy Bell, directing him to advise Alyeska of Totem's financial straits. Thereafter, Bell met with Alyeska officials in Seattle, and after some negotiations, Totem received a settlement offer from Alyeska for $97,500. On November 6, 1975, Totem, through its president Stair, signed an agreement releasing Alyeska from all claims by Totem in exchange for $97,500.

On March 26, 1976, Totem, Richard Stair, and Pacific filed a complaint against Alyeska, which was subsequently amended. In the amended complaint, the plaintiffs sought to rescind the settlement and release on the ground of economic duress and to recover the balance allegedly due on the original contract. In addition, they alleged that Alyeska had wrongfully terminated the contract and sought miscellaneous other compensatory and punitive damages.

Before filing an answer, Alyeska moved for summary judgment against the plaintiffs on the ground that Totem had executed a binding release of all claims against Alyeska and that as a matter of law, Totem could not prevail on its claim of economic duress. . . .

II

As was noted above, a court's initial task in deciding motions for summary judgment is to determine whether there exist genuine issues of material fact. In order to decide whether such issues exist in this case, we must examine the doctrine allowing avoidance of a release on grounds of economic duress.

This court has not yet decided a case involving a claim of economic duress or what is also called business compulsion. At early common law, a contract could be avoided on the ground of duress only if a party could show that the agreement was entered into for fear of loss of life or limb, mayhem or imprisonment. 13 Williston on Contracts, §1601 at 649 (3d ed. Jaeger 1970). The threat had to be such as to overcome the will of a person of ordinary firmness and courage. Id., §1602 at 656. Subsequently, however, the concept has been broadened to include myriad forms of economic coercion which force a person to involuntarily enter into a particular transaction. The test has come to be whether the will of the person induced by the threat was overcome rather than that of a reasonably firm person. Id., §1602 at 657.

At the outset it is helpful to acknowledge the various policy considerations which are involved in cases involving economic duress. Typically, those claiming such coercion are attempting to avoid the consequences of a modification of an original contract or of a settlement and release agreement. On the one hand, courts are reluctant to set aside agreements because of the notion of freedom of contract and because of the desirability of having private dispute resolutions be final. On the other hand, there is an increasing recognition of the law's role in correcting inequitable or unequal exchanges between parties of disproportionate bargaining power and a greater willingness to not enforce agreements which were entered into under coercive circumstances.

There are various statements of what constitutes economic duress, but as noted by one commentator, "The history of generalization in this field offers no great encouragement for those who seek to summarize results in any single formula." Dawson, Economic Duress — An Essay in Perspective, 45 Mich. L. Rev. 253, 289 (1947). Section 492(b) of the Restatement of Contracts defines duress as:

> any wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement.

Professor Williston states the basic elements of economic duress in the following manner:

> 1. The party alleging economic duress must show that he has been the victim of a wrongful or unlawful act or threat, and
> 2. Such act or threat must be one which deprives the victim of his unfettered will.

13 Williston on Contracts, §1617 at 704 (footnotes omitted).

Many courts state the test somewhat differently, eliminating use of the vague term "free will," but retaining the same basic idea. Under this standard, duress exists where: (1) one party involuntarily accepted the terms of another, (2) circumstances permitted no other alternative, and (3) such circumstances were the result of coercive acts of the other party. Undersea Engineering & Construction Co. v. International Telephone and Telegraph Corp., 429 F.2d 543, 550 (9th Cir. 1970); Urban Plumbing and Heating Co. v. United States, 408 F.2d 382, 389, 187 Ct. Cl. 15 (1969); W. R. Grimshaw Co. v. Nevil C. Withrow Co., 248 F.2d 896, 904 (8th Cir. 1957); Fruhauf Southwest Garment Co. v. United States, 111 F. Supp. 945, 951, 126 Ct. Cl. 51 (1953). The third element is further explained as follows:

> In order to substantiate the allegation of economic duress or business compulsion, the plaintiff must go beyond the mere showing of reluctance to accept and of financial embarrassment. There must be a showing of acts on the part of the defendant which produced these two factors. The assertion of duress must be proven by evidence that the duress resulted from defendant's wrongful and oppressive conduct and not by the plaintiff's necessities.

W. R. Grimshaw Co., supra, 111 F. Supp. at 904.

As the above indicates, one essential element of economic duress is that the plaintiff show that the other party by wrongful acts or threats, intentionally caused him to involuntarily enter into a particular transaction. Courts have not attempted to define exactly what constitutes a wrongful or coercive act, as wrongfulness depends on the particular facts in each case. This requirement may be satisfied where the alleged wrongdoer's conduct is criminal or tortious but an act or threat may also be considered wrongful if it is wrongful in the moral sense. Restatement of Contracts, §492, comment (g); Gerber v. First National Bank of Lincolnwood, 30 Ill. App. 3d 776, 332 N.E.2d 615, 618 (1975); Fowler v. Mumford, 48 Del. 282, 9 Terry 282, 102 A.2d 535, 538 (Del. Supr. 1954).

In many cases, a threat to breach a contract or to withhold payment of an admitted debt has constituted a wrongful act. Hartsville Oil Mill v. United States, 271 U.S. 43, 49 (1926); Austin Instrument, Inc. v. Loral Corp., 29 N.Y.2d 124, 324 N.Y.S.2d 22, 25, 272 N.E.2d 533, 535 (1971); Capps v. Georgia-Pacific Corporation, 253 Or. 248, 453 P.2d 935 (1969); see also 13 Williston, supra, §1616A at 701. Implicit in such cases is the additional requirement that the threat to breach the contract or withhold payment be done in bad faith. See Louisville Title Insurance Co. v. Surety Title & Guaranty Co., 60 Cal. App. 3d 781, 132 Cal. Rptr. 63, 76, 79 (1976); Restatement (Second) of Contracts, §318 comment (e).

Economic duress does not exist, however, merely because a person has been the victim of a wrongful act; in addition, the victim must have no choice but to agree to the other party's terms or face serious financial hardship. Thus, in order to avoid a contract, a party must also show that he had no reasonable alternative to agreeing to the other party's terms, or, as it is often stated, that he had no adequate remedy if the threat were to be carried out. First National Bank of Cincinnati v. Pepper, 454 F.2d 626, 632-633 (2d Cir. 1972); *Austin Instrument,* supra, 324 N.Y.S.2d at 25, 272 N.E.2d at 535; *Capps,* supra; Ross Systems v. Linden Dari-Delite, Inc., 35 N.J. 329, 173 A.2d 258, 261 (1961); Leeper v. Beltrami, 53 Cal. 2d 195, 1 Cal. Rptr. 12, 19, 347 P.2d 12, 19 (1959); Tri-State Roofing Company of Uniontown v. Simon, 187 Pa. Super. 17, 142 A.2d 333, 335-36 (1958). What constitutes a reasonable alternative is a question of fact, depending on the circumstances of each case. An available legal remedy, such as an action for breach of contract, may provide such an alternative. *First National Bank of Cincinnati,* supra; *Austin Instrument,* supra; *Tri-State Roofing,* supra. Where one party wrongfully threatens to withhold goods, services or money from another unless certain demands are met, the availability on the market of similar goods and services or of other sources of funds may also provide an alternative to succumbing to the coercing party's demands. *Austin Instrument,* supra; *Tri-State Roofing,* supra. Generally, it has been said that "[t]he adequacy of the remedy is to be tested by a practical standard which takes into consideration the exigencies of the situation in which the alleged victim finds himself." *Ross Systems,* 173 A.2d at 262. See also *First National Bank of Cincinnati,* supra at 634; Dalzell, Duress By Economic Pressure I, 20 N. Carolina L. Rev. 237, 240 (1942).

An available alternative or remedy may not be adequate where the delay involved in pursuing that remedy would cause immediate and irreparable loss to one's economic or business interest. For example, in *Austin Instrument,* supra, and Gallagher Switchboard Corp. v. Heckler Electric Co., 36 Misc. 2d 225, 232 N.Y.S.2d 590 (N.Y. Sup. Ct. 1962), duress was found in the following circumstances: A subcontractor threatened to refuse further delivery under a contract unless the contractor agreed to modify the existing contract between the parties. The contractor was unable to obtain the necessary materials elsewhere without delay, and if it did not have the materials promptly, it would have been in default on its main contract with the government. In each case such default would have had grave economic consequences for the contractor and hence it agreed to the modifications. In both, the courts found that the alternatives to agreeing to the modification were inadequate (i.e., suing for breach of contract or obtaining the materials elsewhere) and that modifications therefore were signed under duress and voidable.

Professor Dalzell, in Duress by Economic Pressure II, 20 N. Carolina L. Rev. 340, 370 (1942), notes the following with regard to the adequacy of legal remedies where one party refuses to pay a contract claim:

> Nowadays, a wait of even a few weeks in collecting on a contract claim is sometimes serious or fatal for an enterprise at a crisis in its history. The

> business of a creditor in financial straits is at the mercy of an unscrupulous debtor, who need only suggest that if the creditor does not care to settle on the debtor's own hard terms, he can sue. This situation, in which promptness in payment is vastly more important than even approximate justice in the settlement terms, is too common in modern business relations to be ignored by society and the courts.

This view finds support in Capps v. Georgia Pacific Corporation, 253 Or. 248, 453 P.2d 935 (1969). There, the plaintiff was owed $157,000 as a commission for finding a lessee for defendant's property but in exchange for $5,000, the plaintiff signed a release of his claim against the defendant. The plaintiff sued for the balance of the commission, alleging that the release had been executed under duress. His complaint, however, was dismissed. On appeal, the court held that the plaintiff had stated a claim where he alleged that he had accepted the grossly inadequate sum because he was in danger of immediately losing his home by mortgage foreclosure and other property by foreclosure and repossession if he did not obtain immediate funds from the defendant. One basis for its holding was found in the following quote by a leading commentator in the area of economic duress:

> The most that can be claimed [regarding the law of economic duress] is that change has been broadly toward acceptance of a general conclusion — that in the absence of specific countervailing factors of policy or administrative feasibility, restitution is required of any excessive gain that results, in a bargain transaction, from impaired bargaining power, whether the impairment consists of economic necessity, mental or physical disability, or a wide disparity in knowledge or experience.

Dawson, Economic Duress — An Essay in Perspective, 45 Mich. L. Rev. 253, 289 (1947).[4]

4. This court expressed a similar view in Inman v. Clyde Hall Drilling Company, 369 P.2d 498, 500 (Alaska 1962). In response to a claim that a contract provision was unconscionable, it was said:

> In the absence of a constitutional provision or statute which makes certain contracts illegal or unenforceable, we believe it is the function of the judiciary to allow men to manage their own affairs in their own way. As a matter of judicial policy the court should maintain and enforce contracts, rather than enable parties to escape from the obligations they have chosen to incur.
>
> We recognize that "freedom of contract" is a qualified and not an absolute right, and cannot be applied on a strict, doctrinal basis. An established principle is that a court will not permit itself to be used as an instrument of inequity and injustice. . . . In determining whether certain contractual provisions should be enforced, the court must look realistically at the relative bargaining positions of the parties in the framework of contemporary business practices and commercial life. If we find those positions are such that one party has unscrupulously taken advantage of the economic necessities of the other, then in the interest of justice — as a matter of public policy — we would refuse to enforce the transaction. But the grounds for judicial interference must be clear. Whether the court should refuse to recognize and uphold that which the parties have agreed upon is a question of fact upon which evidence is required. (Footnotes omitted.)

III

Turning to the instant case, we believe that Totem's allegations, if proved, would support a finding that it executed a release of its contract claims against Alyeska under economic duress. Totem has alleged that Alyeska deliberately withheld payment of an acknowledged debt, knowing that Totem had no choice but to accept an inadequate sum in settlement of that debt; that Totem was faced with impending bankruptcy; that Totem was unable to meet its pressing debts other than by accepting the immediate cash payment offered by Alyeska; and that through necessity, Totem thus involuntarily accepted an inadequate settlement offer from Alyeska and executed a release of all claims under the contract. If the release was in fact executed under these circumstances,[5] we think that under the legal principles discussed above that this would constitute the type of wrongful conduct and lack of alternatives that would render the release voidable by Totem on the ground of economic duress. We would add that although Totem need not necessarily prove its allegation that Alyeska's termination of the contract was wrongful in order to sustain a claim of economic duress, the events leading to the termination would be probative as to whether Alyeska exerted any wrongful pressure on Totem and whether Alyeska wrongfully withheld payment from Totem.[6]

One purpose of summary judgment, however, is to pierce the allegations in the pleadings in an effort to determine whether genuine issues of fact exist. As the moving party, Alyeska had the burden of showing that there were no such genuine issues and that it was entitled to judgment as a matter of law. E.g., Brock v. Rogers and Babler, Inc., 536 P.2d 778, 782 (Alaska 1975). Alyeska showed that Totem had executed the release, that Totem had been represented by counsel at the negotiating session leading to the settlement and release and that appellant Stair, who actually signed the release on behalf of Totem, was fully aware of the consequences of such a release. Such evidence, by itself, would have entitled Alyeska to summary judgment in its favor. As a matter of law, there is no doubt that a valid release of all claims arising under a contract will bar any subsequent claims based on that contract.

To avoid summary judgment once the moving party meets its burden, the non-moving party must produce competent evidence showing that there are issues of material fact to be tried. Id. The respondent must set forth specific facts showing that it could produce admissible evidence reasonably tending to dispute the movants' evidence or establish an affirmative defense. Id. The court then must draw all reasonable inferences in favor of the non-moving party and against the movant. E.g., Clabaugh v. Bottcher, 545 P.2d 172, 175 n.5 (Alaska 1976).

5. By way of clarification, we would note that Totem would not have to prove that Alyeska admitted to owing the precise sum Totem claimed it was owed upon termination of the contract but only that Alyeska acknowledged that it owed Totem approximately that amount which Totem sought.

6. We make no comment as to whether Alyeska's termination of the contract was wrongful nor as to the truth of Totem's other allegations.

In entering summary judgment against Totem, the court below reasoned as follows:

> The plaintiffs, specifically Mr. Stair, assert the release and settlement should be held for naught because of duress and coercion exerted upon him and his corporation by the defendants' action.
>
> Mr. Stair fails to show that the release and settlement negotiated by his attorneys was involuntary on his part. Mr. Stair did not personally participate in the negotiations which resulted in the release and settlement. No affidavit or other suggestion of evidence has been submitted to demonstrate that upon trial the plaintiffs could sustain their burden of proof required to set aside the release and settlement.

As thus stated, the superior court's decision clearly misstated the standard applicable on motions for summary judgment. A party opposing summary judgment need not establish that he will ultimately prevail at trial. Gablick v. Wolfe, 469 P.2d 391, 395 (Alaska 1970). Although we may affirm a trial court's grant of summary judgment if alternative grounds exist for upholding its judgment, Moore v. State, 553 P.2d 8, 21 (Alaska 1976), we do not believe that summary judgment was properly granted in this case.

Our examination of the materials presented by Totem in opposition to Alyeska's motion for summary judgment leads us to conclude that Totem has made a sufficient factual showing as to each of the elements of economic duress to withstand that motion. There is no doubt that Alyeska disputes many of the factual allegations made by Totem and drawing all inferences in favor of Totem, we believe that genuine issues of material fact exist in this case such that trial is necessary. Admittedly, Totem's showing was somewhat weak in that, for example, it did not produce the testimony of Roy Bell, the attorney who represented Totem in the negotiations leading to the settlement and release. At trial, it will probably be necessary for Totem to produce this evidence if it is to prevail on its claim of duress. However, a party opposing a motion for summary judgment need not produce all of the evidence it may have at its disposal but need only show that issues of material fact exist. 10 C. Wright and A. Miller, Federal Practice and Procedure: Civil, §2727 at 546 (1973). Therefore, we hold that the superior court erred in granting summary judgment for appellees and remand the case to the superior court for trial in accordance with the legal principles set forth above.

Reversed and remanded.

KASE v. FRENCH
Supreme Court of South Dakota, 1982
325 N.W.2d 678

WOLLMAN, J. This is an appeal from a judgment in an action brought by the administrator of the estate of Olivia M. McWilliams, deceased, (appellant) against Kenneth and Betty French to vacate a contract for deed and to recover various cash transfers allegedly obtained through undue influence. The trial court upheld the validity of the contract for deed and the

cash transfers, holding that no confidential relationship existed at the time of the sale and that no undue influence resulted from the confidential relationship that subsequently did develop. We affirm.

A widow in her eighties, Mrs. McWilliams lived in a large, somewhat rundown two-story house in Rapid City. As she had a fourth-grade education and no business experience, her nephew, Charles Bruggeman, had been assisting her in the conduct of her business affairs. There was no dispute, however, that Mrs. McWilliams was mentally competent. Mr. and Mrs. Bruggeman visited Mrs. McWilliams frequently and regularly ran errands for her even though they lived in Belle Fourche.

Charles Bruggeman was named as one of several beneficiaries in Mrs. McWilliams' original will. She gave him a general power of attorney in 1969 and added his name to her checking account and certificates of deposit. One year later she revoked this power of attorney. He continued to assist her with her business affairs, however, and their relationship continued on the same basis as before this revocation. Mrs. McWilliams also executed a new will in 1970 in which she left her entire estate to various branches of medical research.

Mr. and Mrs. French moved to Rapid City in 1971, where they purchased a small neighborhood grocery store. They delivered groceries as part of their service. In 1972 Mr. French delivered an order of groceries to Mrs. McWilliams. As he made her acquaintance he was struck by her resemblance to his grandmother. He commented upon this to Mrs. French and suggested to her that she also make Mrs. McWilliams' acquaintance. Once the two women met, a friendship quickly developed between them. Soon after their meeting, Mrs. French stopped by to see Mrs. McWilliams and found that she had injured herself in a fall. From that time on Mrs. French called on Mrs. McWilliams daily and started to help her with household work and other chores. About a month after meeting, Mrs. French told Mrs. McWilliams that she need never be lonely again because they, the Frenches, would take care of her for the rest of her life.

During the latter part of 1972 or early in 1973, the Frenches suggested to Mrs. McWilliams that she move to a dwelling that was less dilapidated. They testified that Mrs. McWilliams countered with the suggestion that they buy her home and fix an apartment in it for her. Within a few months, and after the Frenches had the property appraised (at $35,000), it was agreed that Mrs. McWilliams would sell her property, consisting of two lots, the home, a separate dwelling called the annex, and the personal property and fixtures in the home and the annex, to the Frenches for $40,000. There was to be no downpayment, and the purchase price was to be paid, with interest at the rate of one percent per year, in monthly payments over a period of twenty years ($184 per month) beginning two years after the date of sale. Mrs. McWilliams was to continue to occupy an apartment in the house, rent free, for two years.

Either Mrs. French or Mrs. McWilliams asked Mr. Eugene Christol, Mrs. McWilliams' attorney, to go to the McWilliams home to discuss the impending transaction. Both the Frenches and Mrs. McWilliams participated in this conversation and related the terms of the sale already agreed to. Mr. Christol attempted to dissuade Mrs. McWilliams from selling her

property under terms so inadequate to provide for her support and expenses for the rest of her life. He explained to her that one of the shortcomings of the proposed transaction was that the interest rate was not proper. In addition, he reminded her that other parties had expressed interest in buying her property at a far higher price. Mr. Christol testified that this advice made no impression on Mrs. McWilliams and that it appeared to him that her mind was set to transact the sale under those terms in spite of his advice and warnings. He testified that he asked Mr. Bruggeman to also try to persuade Mrs. McWilliams to change the terms of the transaction. Mr. Bruggeman testified that he reminded his aunt of a previous offer for her property of $90,000. (Neither Mr. Christol nor Mr. Bruggeman, however, was able to document any offers at trial.) Mr. Bruggeman was also unable to convince Mrs. McWilliams to take a second look at the terms and was informed by Mrs. McWilliams that she no longer needed him to take care of her business because the Frenches would do that for her. Eventually, Mr. Christol prepared a contract for deed according to the terms specified by Mrs. McWilliams and the Frenches. Very shortly thereafter Mrs. McWilliams removed Mr. Bruggeman's name from all her bank, savings and loan accounts, and certificates of deposit, and opened a joint account with the Frenches. Mr. Bruggeman continued to visit his aunt but no longer counseled her on her business affairs.

Mr. French testified that although Mrs. McWilliams did not want any interest, she thought that such an interest-free arrangement would not be legal. He further testified that Mrs. McWilliams suggested one percent interest because she was aware of one percent government loans available after the 1972 Rapid City flood and therefore thought that one percent would be legal. The Frenches' testimony reveals that they were aware that the going interest rate in Rapid City at the time of the sale ranged from six to eight percent. Neither Mr. nor Mrs. French informed Mrs. McWilliams of this fact.

The trial court found that a confidential relationship existed between Mrs. McWilliams and the Frenches only following the sale of her residence to the Frenches. Appellant contends that this finding was clearly erroneous. We agree.

"A confidential relationship 'exists whenever trust and confidence is reposed by the testator in the integrity and fidelity of another.' " Matter of Heer's Estate, 316 N.W.2d 806, 810 (S.D. 1982) (quoting In re Estate of Hobelsberger, 85 S.D. 282, 291, 181 N.W.2d 455, 460 (1970)). "[A] [c]onfidential relationship is not restricted to any particular association of persons. It exists whenever there is trust and confidence, regardless of its origin." Hyde v. Hyde, 78 S.D. 176, 186, 99 N.W.2d 788, 793 (1959). "Such a confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind." Schwartzle v. Dale, 74 S.D. 467, 471, 54 N.W.2d 361, 363 (1952).

In the light of the contacts Mr. and Mrs. French had with Mrs. McWilliams and of the fact that the promise to take care of Mrs. McWilliams was made prior to the sale of her home, we conclude that a confidential relationship existed between Mrs. McWilliams and the Frenches at the time of the sale of the property.

The existence of a confidential relation requires the dominant party "to exercise the utmost good faith and to refrain from obtaining any advantage at the expense of the confiding party." Hyde v. Hyde, supra, 78 S.D. at 186, 99 N.W.2d at 793. In Davies v. Toms, 75 S.D. 273, 281, 63 N.W.2d 406, 410 (1954), an action to set aside a deed, this court stated:

> While . . . the "burden of proof" never shifts from the one who undertakes to set aside a deed on the ground of undue influence, there is a burden that does transfer over to the other side when evidence offered shows a relationship of trust and confidence. . . . The latter type burden this court has called the "burden of going forward with the evidence." [T]he burden then rested on appellants to show that they took no unfair advantage of their dominant position.

The Frenches were therefore under a duty to go forward with the evidence and show that the transaction was free from undue influence. Hyde v. Hyde, supra. See also Niles v. Lee, 31 S.D. 234, 140 N.W. 259 (1913). During cross-examination as well as during the presentation of their witnesses, the Frenches, in fact, went forward with evidence as required by our decisions. Thus we are satisfied that the failure of the trial court to make the proper finding on the issue of the existence of a confidential relationship does not require reversal of the judgment.

The indicia of undue influence are: person susceptible to undue influence, opportunity to exert undue influence and effect wrongful purpose, disposition to do so for improper purpose, and result clearly showing effect of undue influence. Matter of Estate of Landeen, 264 N.W.2d 521 (S.D. 1978); In re Rowlands' Estate, 70 S.D. 419, 18 N.W.2d 290 (1945). The trial court concluded that "at all times [Mrs. McWilliams] enjoyed good health, was able to care for herself, was mentally alert and competent to the time of her death, was a strong-willed person and independent in her thinking, and was not weak willed or easily influenced." The record supports this finding. Even appellant in his brief describes Mrs. McWilliams as a "strong willed and stubborn old lady, [who] was not about to take advice."

We cannot say that the contract for deed clearly shows the effect of undue influence. The Frenches called as a witness the realtor who had appraised the property at $35,000. While the interest and down-payment terms were certainly favorable to the Frenches, Mrs. McWilliams received the favorable term of being able to live rent free in an apartment for two years. Although the promise to take care of Mrs. McWilliams for the rest of her life was not incorporated into the contract for deed, Mrs. McWilliams did, in fact, live with Mr. and Mrs. French rent free for one and a half years. Also, when Mrs. McWilliams was later placed in a nursing home, Mrs. French signed an agreement which made her the responsible party in the event of problems with payment.

This court has recognized the presence of independent legal advice as an important factor to be considered in determining whether undue influence exists. Davies v. Toms, supra; In re Daly's Estate, 59 S.D. 403, 240 N.W. 342 (1932). Appellant attempts to undermine the importance of the advice of Mrs. McWilliams' attorney, Mr. Christol, because his advice was

neither accepted nor acted upon. Appellant characterizes Mr. Christol's role as one of a draftsman who simply reduced to writing what was already agreed upon. We cannot agree with this characterization. Mr. Christol had been the attorney for Mrs. McWilliams since 1965. He had also given legal advice to her deceased husband and sister. His advice to Mrs. McWilliams was anything other than perfunctory. Cf. Black v. Gardner, 320 N.W.2d 153 (S.D. 1982). When Mr. and Mrs. French and Mrs. McWilliams informed Mr. Christol of the terms of their proposed contract, Mr. Christol explained to Mrs. McWilliams why he thought the contract would be a poor business agreement for her. He delayed in writing the contract and called Mr. Bruggeman to inform him of his opinion of the proposed contract. Merely because Mrs. McWilliams chose not to follow Mr. Christol's advice does not destroy the importance of her having received that advice.

The trial court found that the Frenches had neither taken unfair advantage of Mrs. McWilliams nor exerted undue influence upon her in any of their dealings. Given the trial court's opportunity to judge the credibility of the Frenches on the basis of their courtroom demeanor and testimony, we cannot say that this finding is clearly erroneous. SDCL 15-6-52(a); In re Estate of Hobelsberger, supra. . . .

The judgment is affirmed.

FOSHEIM, C.J., and DUNN, and MORGAN, JJ., concur.

HENDERSON, J., dissents.

HENDERSON, Justice (dissenting).

ACTION

This action to vacate a contract for deed and cash transfers, being equitable in nature, is on meritorious appeal to this Court. The majority opinion permits the Frenches to enrich themselves at the expense of an elderly lady, Mrs. McWilliams (her estate), thereby weakening the safeguards which courts of equity have historically employed to protect the weak. I dissent as the evidence does not disclose that the Frenches were the Good Samaritans they professed themselves to be unto Mrs. McWilliams nor to the South Dakota courts. Rather, the factual history reflects that the Frenches took advantage of Mrs. McWilliams by gaining her confidence, placing themselves in a fiduciary relationship, abusing that confidential and fiduciary relationship, profiting exceedingly when they were in a dominant position as compared to the dependent position of Mrs. McWilliams, and by garnering most of her earthly possessions and home before she died. By this dissent, I sustain and defend her cause. . . .

I

Not once, but twice, Mrs. French testified that "I told her she would never have to be lonely again."