worse than they were thought to be at the time of the settlement. Such cases involve tension between the social policies of finality of litigation and fair compensation for injury. Not surprisingly, courts differ in the degree to which they will allow such releases to be set aside. Compare Kendrick v. Barker, 15 P.3d 734 (Wyo. 2001) (rescission based on mutual mistake not available to injured party who settled claim with knowledge that extent of closed head injury was uncertain and with assistance of counsel), with Gibli v. Kadosh, 717 N.Y.S.2d 553 (App. Div. 2000) (to "avoid grave injustice," relief for mutual mistake would be available if plaintiff could demonstrate that injury was of different nature than both parties believed it to be at the time of release).

## DePrince v. Starboard Cruise Servs.

***Court of Appeal of Florida***
***163 So. 3d 586 (2015)***

Opinion by: Rothenberg

Thomas DePrince ("DePrince") appeals the trial court's order granting summary judgment in favor of Starboard Cruise Services, Inc. ("Starboard") on DePrince's claims against Starboard for breach of contract, specific performance, and conversion. Because we find that disputed issues of material fact remain to be resolved on all three counts of DePrince's complaint, we reverse and remand for further proceedings.

Historical Hollywood starlet Mae West once said, "I never worry about diets. The only carrots that interest me are the number of carats in a diamond." Thus, it appears quite likely that Ms. West would have been interested in the diamond in this case: a twenty carat diamond that Starboard offered to DePrince for a very low sum. As it turns out, the "too good to be true" price of the diamond was just that, and the price conveyed to DePrince was a mistake. Now DePrince wants his twenty carat diamond; Starboard wants out of its sales contract; and Starboard's supplier, who allegedly misquoted the price of the diamond upon which Starboard and DePrince relied, has not even been added as a party to the lawsuit. In short, this is truly a gem of a case.

Factual Background

DePrince embarked on a cruise from Miami in February 2013. During that cruise, DePrince visited an onboard jewelry shop that is wholly owned and operated by Starboard. When DePrince expressed some interest in a large loose diamond[1] and specified to the sales manager of the store, Mihai Rusan

1. A "loose diamond" refers only to the gemstone itself, rather than a gemstone that is a component of a larger piece of jewelry.

("Rusan"), that the stone should be between 15 and 20 carats, Rusan, who had never dealt with a diamond of such magnitude, sent an email inquiry to Starboard's corporate office in Miami ("the Miami Office").

Starboard maintains a consignment agreement with a supplier, Sophia Fiori ("Fiori"),[2] that allows Starboard to obtain gemstones and jewelry for sale in its onboard stores. The consignment agreement between Starboard and Fiori specifies, in relevant part:

> 3. Title to the Consigned Merchandise shall at all times remain with Consignor until the time of its sale to customers of Consignee, whereupon the Consigned Merchandise shall be deemed to have been purchased from Consignor by Consignee.[3]

Upon receiving the email inquiry from Rusan, the Miami Office relayed the information to Fiori to determine whether Fiori could fill such an order should DePrince decide to purchase a diamond. Fiori responded to the Miami Office via email, informing Starboard that there were two diamonds of that size available. Fiori's email described the diamonds precisely as follows:

> 1. EMERALD CUT 20.64 carats D VVS2 GIA VG Price $235,000
> 2. EMERALD CUT 20.73 carats E VVS2 GIA EX EX FNT Price $245,000

The Miami Office relayed this information to Rusan via email exactly as Fiori had typed it. Rusan notified DePrince of the availability of the size of the diamond he was interested in purchasing and the pricing information contained in the email, telling him that the purchase prices for the diamonds were $235,000 and $245,000 respectively.

DePrince told Rusan that he was interested, but that he would like to take some time to think about the purchase. That night, DePrince spoke with his life partner, Vernon Crawford, a certified gemologist who was on the cruise with DePrince, and also DePrince's sister, Carolyn DePrince, who holds the highest available degree in gemology. Both advised DePrince against making the purchase, telling him that the sale price was too good to be true and that the price for a diamond that large should be at least $2 million.

DePrince, however, ignored their advice and opted to complete the transaction. DePrince returned to Starboard's onboard jewelry store and placed a special mail purchase order for the 20.64 carat diamond the next day. Rusan prepared and signed a one-page sales agreement that listed the total price for the diamond at $235,000 plus a $25 shipping charge. DePrince made an initial down payment of $125,000 on the spot and paid the balance ($110,025) the next day. The parties agreed to have the diamond shipped to the Gemological Institute of America laboratory in New York so that a neutral gemologist could

2. Fiori is the business name for the corporation Elba Jewelry, Inc. DePrince refers to the supplier of the diamond as Elba Jewelry throughout his brief, but we will refer to it as "Fiori" in this opinion.

3. "Consigned Merchandise" refers to the jewelry items ordered by Starboard; the "Consignor" refers to Fiori; and the "Consignee" refers to Starboard.

verify that the diamond that was shipped was the same one specified in the sales agreement.

Soon after the sale was completed, Starboard learned that Fiori's $235,000 price quote in the email was the **per carat** price for the diamond rather than the **total price** for the diamond ($4,850,400), and thus, Starboard had inadvertently contracted to sell the diamond to DePrince for less than 1/20th of the diamond's actual value. Five days after the sales agreement was executed, Starboard contacted DePrince via telephone to explain the situation, stating that the price on the sales agreement was "seriously in error" due to the mix-up in the email. Starboard offered discounted future cruise rates to DePrince to compensate him for the inconvenience, but DePrince demanded that the sale be completed as specified in the sales agreement. Starboard unilaterally reversed the charges on DePrince's credit card to refund him all the money he had paid and then repudiated the sales agreement, informing DePrince that it would not be shipping the diamond as they had originally agreed. These communications were memorialized in an email Starboard sent to DePrince after the phone call. The record does not disclose how Starboard dealt with the cancellation of the sale with regard to Fiori.

Thereafter, DePrince filed a complaint against Starboard alleging counts for specific performance, breach of contract, and conversion. Starboard answered and pleaded the affirmative defense of unilateral mistake, among others, claiming that Rusan had misquoted DePrince the total price of the diamond rather than the per carat price and that DePrince had known about the error the whole time due to his extensive experience with jewelry. Starboard also counterclaimed for a declaratory judgment that the sales agreement was unenforceable and for rescission of the contract.

Starboard moved for summary judgment on the ground that there had clearly been a unilateral mistake in the pricing, and, after hearing argument on that issue, the trial court granted summary judgment against DePrince on all his claims. Specifically, the trial court ruled at the summary judgment hearing:

> I don't find that the plaintiff has established that there were any actionable damages and I don't find that there was a valid and enforceable contract for either the breach of contract or the conversion count. Particularly as to conversion, I don't find that the plaintiff or the defendant ever — there's no record evidence that the plaintiff possessed the diamond, as opposed to remaining in the possession of the vendor. I find, quite frankly, that it may be unconscionable to enforce this particular contract.

This appeal followed.

Analysis

"[A] party moving for summary judgment must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought." *Moore v. Morris,* 475 So. 2d 666, 668 (Fla. 1985). Summary judgment is only appropriate when an examination of the facts in the light most favorable to the non-movant demonstrates that the movant is entitled to judgment as a

matter of law. Fla. R. Civ. P. 1.510(c); *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.,* 760 So. 2d 126, 130 (Fla. 2000).

The trial court granted summary judgment against DePrince on his breach of contract action due to its finding that there had been a unilateral mistake of fact sufficient to rescind the otherwise-enforceable contract, enforcement of the contract would be "unconscionable," and DePrince had not alleged any actionable damages. On DePrince's claim for specific performance, the trial court found that the diamond was not unique and was therefore not the proper subject of the remedy of specific performance. And as to DePrince's conversion claim, the trial court granted summary judgment in Starboard's favor based on its finding that Starboard never had possession of the diamond.

We do not agree with the trial court that there are no genuine issues of material fact such that Starboard is entitled to judgment as a matter of law on any of these claims. Thus, Starboard was not entitled to summary judgment.

### I. CONTRACT FORMATION AND ENFORCEMENT

On appeal, Starboard has raised two defenses to the sales agreement's formation and enforcement. First and primarily, Starboard claims that a unilateral mistake of law prevents the contract from being formed. Second, Starboard summarily raised an unconscionability defense in its briefing and then pressed that point more extensively at oral argument. For the reasons that follow, neither of these arguments entitle Starboard to summary judgment on DePrince's breach of contract claim. Moreover, the trial court seemed to make a sua sponte finding that DePrince had not alleged any actionable damages to support his breach of contract claim. That ruling was also in error. We explain each of these theories at length because there appears to be a great deal of misunderstanding in each of these areas.

#### *A. Unilateral Mistake*

There are three potentially viable tests to determine whether a contract may be rescinded based on a unilateral mistake of fact: (1) A four-prong test requiring the highest burden of proof for the party seeking to avoid the contract; (2) a two-prong test requiring the lowest burden of proof for the party seeking to avoid the contract; and (3) a 3-prong disjunctive test that provides several more-flexible methods of establishing a unilateral mistake.

This Court's most recent decisions on this topic clearly articulated and reaffirmed the viability of the four-prong test to establish a unilateral mistake, *Rachid v. Perez,* 26 So. 3d 70, 72 (Fla. 3d DCA 2010), and this panel—along with the trial court—is of course bound by that decision, *see State v. Washington,* 114 So. 3d 182, 188-89 (Fla. 3d DCA 2012) ("This panel is not free to disregard, or recede from, [a prior decision from this Court]; only this Court, sitting en banc, may recede from an earlier opinion."). However, it matters not which test is applied at this stage of the proceedings because we find that the trial court's summary judgment order cannot be upheld due to a unilateral mistake of fact under any of these three formulations. Thus, the trial court's order granting summary judgment cannot be upheld based on a unilateral

mistake of fact. We analyze each of these three tests in turn to clarify what appears to be a confusing area of the law with inconsistent application among Florida's district courts of appeal.

*1. This Court's Four-Prong Test for Unilateral Mistakes of Fact*

This Court has held that in order to rescind an otherwise-valid contract based on a unilateral mistake, the party seeking to avoid the contract must show:

> (1) [T]he mistake was induced by the party seeking to benefit from the mistake,
> (2) there is no negligence or want of due care on the part of the party seeking a return to the status quo,
> (3) denial of release from the agreement would be inequitable, and
> (4) the position of the opposing party has not so changed that granting the relief would be unjust.

*Rachid,* 26 So. 3d at 72 (quoting *Lechuga v. Flanigan's Enters., Inc.,* 533 So. 2d 856, 857 (Fla. 3d DCA 1988)). Examining the facts as alleged and supported by DePrince, Starboard did not conclusively demonstrate either of the first two prongs of this analysis.[5]

First, Starboard presented no evidence that DePrince induced it into making the pricing mistake. The primary focus of Starboard's argument, both at the summary judgment hearing and in its brief, was that DePrince must have known of the mistake in pricing due to his background as a former antiques and jewelry dealer and the advice he received from his gemologist partner and his sister. DePrince, however, denied that he knew there had been a pricing mistake in his affidavit, which is sufficient at the summary judgment phase of the proceedings to create a genuine issue of material fact. More importantly, we note that even if DePrince had known that the price he was quoted to purchase the diamond was in error, knowledge of an error is markedly different than inducement of that error. *See, e.g., Gemini Investors III, L.P. v. Nunez,* 78 So. 3d 94, 97 (Fla. 3d DCA 2012) (explaining that fraudulent inducement requires that the party seeking to enforce the contract "(1) made a statement concerning a material fact, (2) knowing that the statement was false, (3) with intent that the [mistaken party] act on the false statement; and (4) the [mistaken party was] damaged as a result of [its] reasonable reliance on the false statement").[6] Because Starboard presented no evidence that the pricing mistake

5. DePrince has not argued on appeal that the third or fourth prong has not been satisfied. He seems to agree that the transaction appears inequitable and that he has not changed his position in reliance on the purchase.

6. We do not hold that the burden to establish inducement for purposes of the first prong of a unilateral mistake defense is the same as proving the elements for a fraudulent inducement defense, but merely use fraudulent inducement by way of example to demonstrate that inducement requires some type of action, not mere knowledge. In fact, the burden of proof cannot be the same because such a requirement would render the unilateral mistake of fact defense completely obsolete by requiring a party seeking to avoid a contract on that basis to prove fraudulent inducement, which is itself sufficient to render a contract voidable by the aggrieved party. *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.,* 761 So. 2d 306, 313 (Fla. 2000) ("It is axiomatic that fraudulent inducement renders a contract voidable . . . .").

was induced by DePrince, the trial court clearly erred by granting summary judgment in Starboard's favor under the four-prong test.

Second, there is a factual dispute regarding the second prong of the unilateral mistake standard: that the party seeking to avoid the contract (Starboard) was not inexcusably negligent or failed to act with due care. DePrince avers in both his complaint and affidavit that Starboard did **not** act with due care when it sold him the diamond. Starboard claims it simply provided DePrince with the quote provided to it by Fiori, and that it did not act negligently. Thus, whether Starboard made a reasonable and understandable mistake or acted negligently in its handling of the sale is a disputed issue of fact, and, because questions involving reasonableness and negligence determinations are highly factual inquiries upon which reasonable people could disagree, they are rarely appropriately resolved on summary judgment. *Spadafora v. Carlo,* 569 So. 2d 1329, 1331 (Fla. 2d DCA 1990). This case is no exception.

*2. The Two-Prong Test for Unilateral Mistakes of Fact*

Although we have determined that Starboard has not satisfied its burden of meeting the four-prong test adopted by this Court to set aside a contract for unilateral mistake for purposes of summary judgment, Starboard contends that the two-prong test for pleading and proving a unilateral mistake is the test that should be applied. Starboard's argument is not wholly without merit, and in fact, numerous Florida cases have relied on the two-prong standard. Most recently, in *Garvin v. Tidwell,* the Fourth District Court of Appeal stated "that a trial court may rescind an agreement based on unilateral mistake if '(1) the mistake did not result from an inexcusable lack of due care, and (2) defendant's position did not so change in reliance that it would be unconscionable to set aside the agreement.' " 126 So. 3d 1224, 1228 (Fla. 4th DCA 2012) (quoting *Stamato v. Stamato,* 818 So. 2d 662, 664 (Fla. 4th DCA 2002)). . . .

The two elements in the two-prong test are in substance nearly identical to two of the four prongs relied upon by this Court. Indeed, the four-prong test largely restates the two-prong test and adds the elements that "the mistake was induced by the party seeking to benefit from the mistake [and] . . . denial of release from the agreement would be inequitable." *Rachid*, 26 So. 3d at 72 (quoting *Lechuga,* 533 So. 2d at 857). Interestingly, both the courts espousing the four-prong test and the courts applying the two-prong test all seem to rely on the Florida Supreme Court's decision in *Maryland Casualty Co. v. Krasnek,* 174 So. 2d 541 (Fla. 1965), to support their variant formulations of the standard. . . .

Most importantly in this case, however, is the fact that both the two- and the four-prong tests require that the party seeking to invoke a unilateral mistake of fact as an affirmative defense establish that he was not unduly negligent in forming the contract. As explained above, a genuine question of fact remains regarding whether Starboard was negligent in this case, thereby precluding summary judgment under the two-prong standard as well.

*3. Florida's Jury Instruction for Unilateral Mistakes of Fact*

Lastly, although neither party initially argued for the application of the third test to establish unilateral mistake, Florida's new jury instruction, which

was adopted in June 2013, *In re Standard Jury Instructions—Contract and Bus. Cases,* 116 So. 3d 284, 324 (Fla. 2013), pertaining to unilateral mistake states the test in yet another substantially different way:

> To establish [the defense of unilateral mistake], (defendant) must prove all of the following:
>
> 1. (Defendant) was mistaken about (insert description of mistake) at the time the parties made the contract;
>
> 2. [The effect of the mistake is such that enforcement of the contract would be unconscionable]
>
> [or]
>
> [(Claimant) had reason to know of the mistake or [he][she][it] caused the mistake.]
>
> and
>
> 3. (Defendant) did not bear the risk of mistake. A party bears the risk of a mistake when [the parties' agreement assigned the risk to [him][her][it]]
>
> [or]
>
> [[he][she][it] was aware, at the time the contract was made, that [he][she] [it] had only limited knowledge about the facts relating to the mistake but decided to proceed with the contract].

Fla. Std. Jury Instr. (Civ.) 416.26 (first alteration added).

This instruction is nearly identical to the formulation of the unilateral mistake defense found in the Restatement (Second) of Contracts. *See* Restatement (Second) of Contracts §§153, 154 (1979). However, this particular three-prong test has not been adopted or cited by any Florida decision to date. . . .

Even if jury instruction 416.26 was the law in Florida, Starboard should not have prevailed on its summary judgment motion. That is because even if DePrince had been aware of the mistake and enforcement of the contract would be unconscionable—either or both of which would satisfy the second prong of the analysis—the third prong requires that the party seeking to assert the unilateral mistake defense show that it did not bear the risk of the mistake. Fla. Std. Jury Instr. (Civ.) 416.26. A party can be found to bear the risk of its mistake if the contract expressly assigns that risk to the party or if that party is aware at the time of the contract's formation that it had only limited knowledge about the facts relating to the mistake but decided to proceed with the contract anyway. The contract in this case does not assign the risk to either party, and factual questions certainly remain as to whether Starboard should have known at the time it formed the contract that it had insufficient information to facilitate such an expensive transaction. Indeed, Rusan himself stated in his deposition that he had never dealt with a diamond this large. Because this factual question remains, summary judgment would also have been inappropriate under the new jury instruction.

To reiterate our position on unilateral mistakes of fact, this Court currently adheres to the four-prong test as stated in *Rachid* and *Lechuga*. There are at least two other tests—the two-prong test found primarily in other districts' case law and the three-prong test found in standard jury instruction 416.26—in Florida jurisprudence. The existence of three different tests has caused a great deal of confusion in the case law and to litigants and trial courts. However,

under any of these three tests, Starboard should not have prevailed on summary judgment based on its unilateral mistake of fact defense.

*B. Unconscionability as an element of Unilateral Mistake*

[The court stated that Starboard had not claimed unconscionability as an independent affirmative defense in its motion for summary judgment. Instead, unconscionability was an element or factor in determining whether the defense of unilateral mistake applied.]

*C. Damages*

Finally, the trial court found that DePrince had not alleged any actionable damages as a result of the breach of contract. The trial court's ruling on this point reflects a fundamental misunderstanding of the nature of contractual damages. It is well-established in Florida, and in virtually every state, that the measure of a buyer's damages for a breach of contract when the seller refuses to deliver a product as agreed can include the difference between the market price of that product and the price of the product as specified in the repudiated contract. §672.713, Fla. Stat. (2013). . . .

The trial court's finding appears to be based on the notion that DePrince had not taken any action or incurred any additional expenses in reliance on the sales agreement, and thus, DePrince would have incurred no damages whatsoever had the contract never been made. However, this is only one method of calculating a plaintiff's damages for breach of contracts.[8] As explained in the Restatement (Second) of Contracts §344 (1981), there are three remedies a plaintiff may elect to vindicate his rights for a breach of contract depending on the circumstances:

> (a) his "expectation interest," which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed,
>
> (b) his "reliance interest," which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made, or
>
> (c) his "restitution interest," which is his interest in having restored to him any benefit that he has conferred on the other party.

A plaintiff that has alleged any of these types of damages has alleged actionable damages under the law. Here, DePrince clearly seeks to vindicate his expectation interest in the contract by recovering the difference between the market value of the contract and the price he agreed to pay—an amount that likely exceeds $2 million according to all the testimony below. Thus, the trial court erred in finding that DePrince had not alleged "actionable damages" and accordingly erred in granting summary judgment on that basis.

8. This detrimental reliance is also one of the elements to rescind a contract based on unilateral mistake as explained above.

II. SPECIFIC PERFORMANCE

DePrince pled specific performance as a wholly separate cause of action from his breach of contract claim. Specific performance is an equitable remedy that may be invoked in a breach of contract action under certain circumstances. . . . "It is a well-established legal principle that a court of equity will grant specific performance of a contract involving personal property when the property is of a unique character and value, such as an antique, and there is no adequate remedy at law." *Mangus v. Porter,* 276 So. 2d 250, 251 n. 1 (Fla. 3d DCA 1973) (citing *Graham v. Herlong, 50* Fla. 521, 39 So. 111, 111 (Fla. 1905)); *see also* §672.716(1), Fla. Stat. (2013) ("Specific performance may be decreed where the goods are unique or in other proper circumstances.").

The trial court granted summary judgment in Starboard's favor on DePrince's claim for specific performance based on its determination that the diamond at issue is not unique. This ruling, however, is in conflict with the facts DePrince alleged and averred in his action. In fact, the only evidence submitted on this issue was an affidavit submitted by DePrince's expert gemologist averring that the gem was unique based on a variety of characteristics and a specific laser number assigned only to that gem. Thus, whether the diamond in this case is unique is a factual issue not properly resolved on summary judgment.

. . .

CONCLUSION

The trial court erred by granting summary judgment on all three of DePrince's claims. There remain genuine issues of material fact to be resolved, and Starboard has not demonstrated that it is entitled to judgment as a matter of law.

We also note that, for some inexplicable reason, Fiori has not been made a party to this suit. It is difficult to imagine how DePrince's and Starboard's rights and obligations can be completely established and redressed without Fiori's involvement, particularly if specific performance is found to be a proper remedy. Importantly, both parties in their briefs have at times suggested that Fiori is the party who was actually negligent by way of its price quote, which omitted a "per carat" designation. Fiori can undoubtedly shed light on who, if anyone, should shoulder the blame of the price mistake, as well as explain industry standards and its pattern of dealings with Starboard.

We therefore conclude that while some may claim that diamonds are forever, the same cannot be said of the trial court's summary judgment order.

Reversed and remanded.

## Notes and Questions

1. *Tests for unilateral mistake.* The *DePrince* court discusses three tests for application of the doctrine of unilateral mistake. While the tests differ in their specific formulations, all three examine the conduct of the party seeking to

enforce the contract, the conduct of the party claiming relief from mistake, and the extent to which enforcement would be unjust or unconscionable. Florida's Jury Instruction test is similar to Restatement (Second) of Contracts §153, which provides:

> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in §154, and
>
> (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.

2. *"Palpable" nature or unconscionable effect of mistake.* Early cases granting relief on grounds of unilateral mistake required that the mistake be palpable — so obvious that the other party in the circumstances either knew or should have known that a mistake had been made. In such cases, the mistake is truly "unilateral" (i.e., the other party knows or has reason to know the true facts, or at least to know that there is a mistake). E.g., Belk v. Martin, 39 P.3d 592 (Idaho 2001) (lease agreement reformed on grounds of unilateral mistake where lessee knew that written lease amount should have been $14,768 instead of $1,476.80). Sometimes it is said that one party may not "snap up" an offer that is "too good to be true." (Recall that if one party is in fact aware of the other's material mistake, this would be a factor militating in favor of a duty of disclosure. Restatement (Second) §161.) Later cases have relaxed any requirement that the mistake be palpable. While Restatement (Second) §153 does not use the term "palpable mistake," it does allow for excuse based on the other party having reason to know of the mistake as well as when the other party caused the mistake or when enforcement would have an unconscionable effect. Although as we have seen, "unconscionability" in the context of Restatement (Second) §208 or UCC §2-302 is a complex and somewhat amorphous concept, "unconscionable" in the context of §153 seems to mean merely severe enough to cause substantial loss. See the discussion in *DePrince.*

3. *Mistake of fact vs. mistake of judgment.* In addressing claims of unilateral mistake, some courts granted relief for "clerical errors" or other "mistakes of fact," but not for "mistakes in judgment." What policy underlies this distinction? Many of the cases have indeed involved clerical, or "mechanical," errors. See, e.g., First Baptist Church of Moultrie v. Barber Contracting Co., 377 S.E.2d 717 (Ga. Ct. App. 1989) (rescission granted when contractor made $118,776 error in adding cost of materials on its work sheets). More recent cases have, like *DePrince,* been less disposed to insist on the rigidity of the fact-judgment distinction and more inclined to concentrate on the strength of the proof that a genuine and identifiable mistake was made. The Restatement does not use this distinction although it might be relevant to the question of "risk allocation."

4. *Effect of negligence.* Must a unilateral mistake be "non-negligent" in order to form a basis for relief? Many courts have so held and in fact the two- and four-prong tests discussed by the court in *DePrince* require an absence of negligence by the party seeking relief on the basis of mistake. However, there is a clear tendency to relax this requirement where the proof of mistake is strong and the effect of enforcement will be devastating or at least severely injurious to the mistaken party. In §157, the Restatement (Second) expressly negates any requirement that the mistaken party be non-negligent, requiring only that its conduct not fall below the level of good faith and fair dealing.

5. *Unilateral mistake in construction bidding cases.* A common situation in which claims of unilateral mistake may be raised are construction contracts in which a contractor claims to have made a mistake in submitting its bid. For example, in Wil-Fred's, Inc. v. Metropolitan Sanitary Dist., 372 N.E.2d 946 (Ill. Ct. App. 1978), the defendant Sanitary District solicited bids for rehabilitation work at one of its water reclamation plants. Wil-Fred's submitted a bid and made a $100,000 deposit. The bidding documents stated that Wil-Fred's certified that it had examined the contract documents, had made the examination and investigation necessary to submit its bid, that the bid could not be cancelled or withdrawn, and that the Sanitary District would retain a $100,000 deposit as liquidated damages if Wil-Fred's failed to perform after being awarded the contract. However, Wil-Fred's sought to avoid the contract on the ground that its bid price of $882,600 was based in material part on the bid of an excavating subcontractor who had made a $150,000 mistake in bidding based on a misunderstanding of the specifications. While recognizing the importance of maintaining the competitive bidding system, the court granted relief because Wil-Fred's had exercised reasonable care (it had dealt with the subcontractor over a period of years without problem), the consequences of denial of relief would be great because Wil-Fred's forfeiture of the deposit would reduce its bonding capacity for other projects by two to three million dollars, the Sanitary District should have known of the mistake because of the substantial difference between Wil-Fred's bid and that of the next lowest bidder, and the Sanitary District had not changed its position in reliance on Wil-Fred's bid. But see Handle Constr. Co. v. Norcon, Inc., 264 P.3d 367 (Alaska 2011) (denying relief to subcontractor on theory of unilateral mistake because subcontractor knew that it submitted its bid based on incomplete information and 35 percent differential with next lowest bid was insufficient to place contractor on notice of mistake).

Recall the *Baird* and *Drennan* cases in Chapter 3, involving the enforcement of subcontract bids after attempted revocation. On the basis of the principles illustrated in *Wil-Fred's*, should the subcontractors in those cases have been able to obtain relief from enforcement on the theory of unilateral mistake? If it had chosen to do so, could plaintiff Wil-Fred's have held the subcontractor to its subcontract bid? If the subcontractor had been capable of responding to a judgment for damages in a breach of contract action, should Wil-Fred's have been denied rescission against the defendant sanitary district, on the ground that enforcement against Wil-Fred's would not in the circumstances have been unconscionable?

6. *Unilateral mistake as to content of writing.* In Chapter 2, we first encountered the "objective theory" of contracts, and its corollary, the "duty to read," which

generally binds those who manifest agreement to what they know is intended to be a contract, even if they are ignorant of its contents (recall the Ray v. Eurice Bros. case). But the duty to read is not a principle that always carries the day, as we have since learned; it may be overcome by a variety of other protective doctrines, such as lack of capacity, fraud (recall the *Park 100* case in Chapter 7), or unconscionability. Where the parties are both equally mistaken about the accuracy of the agreement (it contains a typographical error, or a provision has been mistakenly omitted), the remedy of reformation may be available, as discussed in the notes following the *Lenawee County* case, above. But what if only one party is mistaken, because the agreement says just what the other party meant it to say? Can unilateral mistake provide an avenue of escape for the party who failed to read (or to understand) what he or she signed?

In Nauga, Inc. v. Westel Milwaukee Co., 576 N.W.2d 573 (Wis. Ct. App. 1998), Nauga was a selling agent for Westel, a cellular phone company. The parties were involved in two lawsuits and had disputes about their relationship. The existence of these disputes had not, however, resulted in a severance of the agency relationship between Nauga and Westel. While both of those suits were still in litigation, Westel submitted to Nauga and its other Wisconsin agents a proposed new agency agreement, to replace existing contracts. One clause of the proposed agreement was a release of any claims that the agent might have against Westel under their prior agreements or relationship. Believing that its agreement to this clause would result in Nauga's surrender of its pending claims against Westel, Nauga's attorney added to the proposed agency agreement a clause providing for the payment by Westel to Nauga of $250,000 for the settlement of all existing claims. The revised agreement was ultimately signed by Westel, assertedly without either its lawyers or its officers having noticed the existence and effect of the payment clause. (Nauga apparently conceded the truth of Westel's assertion that Westel never intended to assent to the payment term and was surprised to learn later of its existence.) Westel refused to make the $250,000 payment, and Nauga moved to enforce the settlement agreement. The trial court held that although Nauga was not guilty of fraud, the two parties' minds had not met, and the contract was not enforceable. A divided appellate court reversed, and gave judgment for plaintiff Nauga. In the absence of ambiguity, fraud, or mutual mistake, enforcement might "seem harsh," the court conceded, but nevertheless was "based on sound principles." Id. at 578. A strong dissent argued that the trial court should have been upheld in its conclusion that no enforceable agreement existed, because of Nauga's violations of good faith, fair dealing, and the duty to cooperate.

7. *Effect of unilateral mistake in an advertisement.* As noted above, the *Baird* and *Drennan* cases from Chapter 3 exemplify the category of cases in which a unilateral mistake is contained in an offer submitted by a subcontractor or supplier, and in those cases the mistaken party is not likely to be excused. Another recurrent type of case involves a published newspaper ad that contains a mistake. In Donovan v. RRL Corp., 27 P.3d 702 (Cal. 2001), a car dealer offered a used Jaguar for sale in a newspaper ad for about $12,000 less than the intended price of $38,000 due to errors made by the newspaper's staff in composing the ad. The plaintiff soon appeared at the dealership and,

after test driving the car and comparing it to similar cars offered at higher prices by another dealer, he attempted to buy the car at the published price. Although the court acknowledged that newspaper ads usually constitute invitations to negotiate rather than offers, the court decided that the ad in this case would constitute an offer, at least when viewed in light of a California consumer protection statute which requires that a dealer have available for sale any car which is advertised at a specific price and on specific terms. (Recall the *Izadi* case in Chapter 2 which also addressed the possibility that an ad may constitute an offer.) The plaintiff, having no notice of the mistake, could thus accept the offer by tendering the full advertised price before any published time limit expired. The court then ruled, however, that the resulting contract was subject to rescission on grounds of unilateral mistake. The erroneous price related to a basic assumption upon which the contract was made and had a material adverse effect on the mistaken party since the published price was about 32 percent less than intended. The court further held that the dealer's failure to discover the mistake in the ad did not amount to a "neglect of legal duty" that would bar rescission when the other party suffers no loss. Id. at 717-719. The court identified the dealer's error as failing to proofread the ad and relying on the newspaper staff to perform that function. How does the *Donovan* case compare with the decision in *DePrince* or the outcome in *Drennan,* an earlier California case? With *Izadi?*

8. *Remedies in* ***DePrince***. An in-depth examination of remedies for breach of contract will occur later in the course, however, the court's discussion highlights several important remedial principles:

- three interests are involved in determining contract damages: expectation, reliance, and restitution;
- the normal remedy for breach of contract is an award of expectation damages, often called the "benefit of the bargain," which in *DePrince* would be the difference between the market value ($4,850,400) and the contract prince ($235,000);
- specific performance may be awarded when the subject of the contract is unique;
- the same fact pattern may produce both claims for breach of contract and tort (conversion in *DePrince).*

## B. CHANGED CIRCUMSTANCES: IMPOSSIBILITY, IMPRACTICABILITY, AND FRUSTRATION

As we have seen, the defense of mistake is commonly characterized as resting on a mistake by one or both parties as to a fact existing at the time their contract was made. The three doctrines considered in this section—"impossibility," "impracticability," and "frustration of purpose"—are usually thought of as involving changes in circumstance that occur between the making of the contract and the time set for performance (although there are cases in which the circumstance in question already existed at the time of contracting, not