8. Personal injury settlement cases. Claims of mutual mistake are also frequently made by litigants seeking to overturn releases or settlement agreements. A common fact pattern involves settlement of a personal injury claim that the plaintiff later regrets because the injuries turn out to be 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).

**Wil-Fred’s, Inc. v. Metropolitan Sanitary District**
*Illinois Appellate Court*
*57 Ill. App. 3d 16, 372 N.E.2d 946 (1978)*

Perlin, Justice.

In response to an advertisement published by the Metropolitan Sanitary District of Greater Chicago (hereinafter Sanitary District) inviting bids for rehabilitation work at one of its water reclamation plants, Wil-Fred’s Inc. submitted a sealed bid and, as a security deposit to insure its performance, a $100,000 certified check. After the bids were opened, Wil-Fred’s, the low bidder, attempted to withdraw. The Sanitary District rejected the request and stated that the contract would be awarded to Wil-Fred’s in due course. Prior to this award, Wil-Fred’s filed a complaint for preliminary injunction and rescission. After hearing testimony and the arguments of counsel, the trial court granted rescission and ordered the Sanitary District to return the $100,000 bid deposit to Wil-Fred’s. The Sanitary District seeks to reverse this judgment order.

The Sanitary District’s advertisement was published on November 26, 1975, and it announced that bids on contract 75-113-2D for the rehabilitation of sand drying beds at the District’s West-Southwest plant in Stickney, Illinois, would be accepted up to January 6, 1976. This announcement specified that the work to be performed required the contractor to remove 67,500 linear feet of clay pipe and 53,200 cubic yards of gravel from the beds and to replace these items with plastic pipe and fresh filter material. Although plastic pipes were called for, the specifications declared that “all pipes . . . must be able . . . to withstand standard construction equipment.”

The advertisement further stated that “[t]he cost estimate of the work under Contract 75-113-2D, as determined by the Engineering Department of the . . . Sanitary District . . . is $1,257,000.00.”

A proposal form furnished to Wil-Fred’s provided:
The undersigned hereby certifies that he has examined the contract documents . . . and has examined the site of the work . . .

The undersigned has also examined the Advertisement, the “bidding requirements,” has made the examinations and investigation therein required. . . .

The undersigned hereby accepts the invitation of the Sanitary District to submit a proposal on said work with the understanding that this proposal will not be cancelled or withdrawn.

It is understood that in the event the undersigned is awarded a contract for the work herein mentioned, and shall fail or refuse to execute the same and furnish the specified bond within thirteen (13) days after receiving notice of the award of said contract, then the sum of One Hundred Thousand Dollars ($100,000.00), deposited herewith, shall be retained by the Sanitary District as liquidated damages and not as a penalty, it being understood that said sum is the fair measure of the amount of damages that said Sanitary District will sustain in such event.

[Emphasis added.]

On December 22, 1975, the Sanitary District issued an addendum that changed the type of sand filter material which was to be supplied by the contractor. During the bidding period the District’s engineering department discovered that the material originally specified in the advertisement was available only out of state and consequently was extremely expensive. This addendum changed the filter material to a less expensive type that could be obtained locally.

On January 6, 1976, Wil-Fred’s submitted the low bid of $882,600 which was accompanied by the $100,000 bid deposit and the aforementioned proposal form signed on behalf of the company by Wil-Fred’s vice president. Eight other companies submitted bids on January 6. The next lowest bid was $1,118,375, and it was made by Greco Contractors, Inc.

On January 8, 1976, Wil-Fred’s sent the Sanitary District a telegram which stated that it was withdrawing its bid and requested return of its bid deposit. This telegram was confirmed by a subsequent letter mailed the same day.

On January 12, 1976, Wil-Fred’s, at the request of the Sanitary District, sent a letter setting forth the circumstances that caused the company to withdraw its bid. The letter stated that upon learning the amount by which it was the low bidder, Wil-Fred’s asked its excavating subcontractor, Ciaglo Excavating Company, to review its figures; that excavation was the only subcontracted trade in Wil-Fred’s bid; that the following day Ciaglo informed Wil-Fred’s that there had been a substantial error in its bid, and therefore it would have to withdraw its quotation since performing the work at the stated price would force the subcontractor into bankruptcy; that Wil-Fred’s then checked with other excavation contractors and confirmed that Ciaglo’s bid was in error; that Wil-Fred’s had used Ciaglo as an excavating subcontractor on many other projects in the past, and Ciaglo had always honored its previous quotations; that Ciaglo had always performed its work in a skillful fashion; that because of these facts Wil-Fred’s acted reasonably in utilizing Ciaglo’s quoted price in formulating its own bid; and that with the withdrawal of Ciaglo’s quotation Wil-Fred’s could not perform the work for $882,600.

On February 2, 1976, Wil-Fred’s received a letter from Thomas W. Moore, the Sanitary District’s purchasing agent. Moore’s letter stated that in his opinion
the reasons cited in Wil-Fred’s letter of January 12 did not justify withdrawal of the bid. For this reason Moore said that he would recommend to the Sanitary District’s general superintendent that the contract be awarded to Wil-Fred’s at the original bid price.

At a February 20 meeting between representatives of the Sanitary District and Wil-Fred’s, the company was informed that the District’s board of trustees had rejected its withdrawal request, and that it would be awarded the contract. In response to this information, Wil-Fred’s filed its complaint for preliminary injunction and rescission on February 26, 1976. The complaint alleged that the company would be irreparably injured if required to perform the contract at such an unconscionably low price or if forced to forfeit the $100,000 bid deposit. The hearing on this complaint commenced on March 10, 1976.

At the hearing William Luxion, president of Wil-Fred’s, testified that the company had been in business for 18 years; that Wil-Fred’s did 13 to 14 million dollars worth of business in 1975; that 95% of the company’s work was done on a competitive bid basis; that Wil-Fred’s never had withdrawn a competitive bid in the past; and that he personally examined the company’s bid prior to its submission. Luxion further stated that he told Wil-Fred’s chief estimator to review the company’s quotation immediately after he was notified on January 6 that Wil-Fred’s bid was more than $235,000 below the next lowest bid. At this time he also requested that Ciaglo Company review its figures.

The reexamination by the chief estimator revealed that there was no material error in the portion of the bid covering work to be done by Wil-Fred’s. However, the president of Ciaglo contacted Luxion on January 8 and stated that his bid was too low on account of an error and that, because of this, he was withdrawing his quotation. Upon receiving this information, Luxion sent the Sanitary District the telegram and letter in which he informed the District of this error, withdrew Wil-Fred’s bid and requested a return of the company’s bid deposit.

Lastly, Luxion testified that a loss of the $100,000 security deposit would result in the company’s loss of bonding capacity in the amount of two to three million dollars; that Wil-Fred’s decided not to attempt to force Ciaglo to honor its subcontract because the company felt that Ciaglo was not financially capable of sustaining a $150,000 loss; and that he was aware of the Sanitary District’s cost estimate before Wil-Fred’s submitted its bid. However, Luxion stated that he took the addendum changing the filter material into account when calculating the price of the bid and concluded that this alteration would result in a cost savings of over $200,000.

Dennis Ciaglo, president of Ciaglo Excavating, Inc., also testified on behalf of Wil-Fred’s and stated that prior to January 6, 1976, his company submitted a quote of $205,000 for the removal of the existing material in the sand beds, for digging trenches for the new pipe and for spreading the new filter materials. Ciaglo further stated that a representative of Wil-Fred’s called him on January 6 and asked him to review his price quotation. During his examination the witness discovered that he underestimated his projected costs by $150,000. Ciaglo said that this error was caused by his assumption that heavy equipment could be driven into the beds to spread the granular fill. Although he was aware that plastic pipes were to be used in the beds, Ciaglo
still presumed that heavy equipment could be employed because the specifications called for the utilization of standard construction equipment. Ciaglo first learned that the plastic pipes would not support heavy equipment when, as part of his review of the price quote, he contacted the pipe manufacturer.

Ciaglo testified additionally that his company probably would have to file for bankruptcy if forced to take a $150,000 loss; that Ciaglo Excavating Co. had never before withdrawn a price quotation given to Wil-Fred's or any other company; and that in his opinion the change in the filter material called for by the second addendum would cause a $300,000 reduction in "the cost of the material for the bids. . . ."

Only one witness testified for the Sanitary District. Leslie Dombai, a registered structural engineer for the District, stated that the Sanitary District's cost estimate was based directly upon the expense of the material specified in the advertisement, and he confirmed that the filter material was changed because the type initially called for was expensive and was not available locally. However, Dombai claimed that this substitution increased the District's original cost estimate by $40,000.

By bidding on the Sanitary District's rehabilitation project, Wil-Fred's made a binding commitment. Its bid was in the nature of an option to the District based upon valuable consideration: the assurance that the award would be made to the lowest bidder. The option was both an offer to do the work and a unilateral agreement to enter into a contract to do so. When the offer was accepted, a bilateral contract arose which was mutually binding on Wil-Fred's and the Sanitary District. . . . When Wil-Fred's attempted to withdraw its bid, it became subject to the condition incorporated in the proposal form furnished by the Sanitary District. Under this condition, the company's bid deposit was forfeited when it refused to execute the contract within the specified time period.

The principal issue, therefore, is whether Wil-Fred's can obtain rescission of its contract with the Sanitary District because of its unilateral mistake. Wil-Fred's argues that the mistake was material to the contract; that this error was directly caused by the Sanitary District's misleading specifications; that the Sanitary District did not alter its position in reliance upon the erroneous bid because the company promptly notified the District of the mistake; and that under these circumstances it would be unconscionable to enforce the contract or to allow the Sanitary District to retain the security deposit.

As a general rule, it is often said that relief will not be granted if but one party to a contract has made a mistake. . . . (Restatement of the Law of Contracts §503 (1932).) However, Professor Williston in his treatise on contracts indicates that unilateral mistake may afford ground for rescission where there is a material mistake and such mistake is so palpable that the party not in error will be put on notice of its existence. 13 Williston on Contracts §1578 (3d ed. Jaeger 1970).

In Illinois the conditions generally required for rescission are: that the mistake relate to a material feature of the contract; that it occurred notwithstanding the exercise of reasonable care; that it is of such grave consequence that enforcement of the contract would be unconscionable; and
that the other party can be placed in statu quo. . . . Evidence of these conditions must be clear and positive. . . .

If Ciaglo’s misestimation was established by competent evidence, it is apparent that the error was material. This determination is based on the fact that the $150,000 mistake represents approximately 17% of Wil-Fred’s bid. . . .

However, the Sanitary District contends that Wil-Fred’s failed to support its claim of materiality with clear and positive evidence. The District points out that neither of the plaintiff’s two witnesses described the proper method for spreading the new filter material on the plastic pipes, and it argues that because of this omission Wil-Fred’s failed to introduce sufficient evidence to substantiate Dennis Ciaglo’s conclusion that the correct procedure would have cost $150,000 more than the system he had planned to use.

We do not find this argument persuasive. It is manifest from the trial court’s judgment order that the trier of fact decided that Ciaglo’s mistake related to a material feature of the rehabilitation contract and that this condition was supported by clear and positive evidence. After carefully examining the record, we are in agreement with this finding.

Dennis Ciaglo testified that he gave Wil-Fred’s a price quotation of $205,000 for his work allotment, and he indicated that the amount of this bid was based directly upon his incorrect assumption that heavy trucks could be driven into the sand drying beds and onto the plastic pipes. This testimony is corroborated by the subcontractor’s price estimate sheet which was introduced into evidence by the Sanitary District.

It is true, nevertheless, that plaintiff’s witnesses failed to describe the correct spreading method, and that Ciaglo made only a conclusionary statement to the effect that employment of the proper procedure would have increased his original quotation by $150,000. However, the District did not cross-examine the subcontractor concerning this matter, and it failed to produce any evidence, testimonial or otherwise, that contravened his statement. Consequently, Ciaglo’s conclusion stands uncontradicted.

Furthermore, it is our opinion that the accuracy of the estimated error is supported by the fact that Ciaglo had eight years experience in the excavating business and by the fact that he confirmed this figure by checking with other contractors who had submitted bids on the same portion of the project. Under these particular circumstances we feel that Wil-Fred’s produced sufficient evidence to sustain its claim of a $150,000 error.

In addition to satisfying the first condition for rescission, Wil-Fred’s has decidedly fulfilled two of the three remaining requirements. The consequences of Ciaglo’s error were grave. Since the subcontractor was not capable of sustaining a $150,000 loss, Wil-Fred’s stood to lose the same amount if it performed the contract for $882,600. Wil-Fred’s will forfeit $100,000 if the contract is enforced. A loss of $100,000 will decrease the plaintiff’s bonding capacity by two to three million dollars. It is evident, therefore, that either deprivation will constitute substantial hardship. The Sanitary District was not damaged seriously by the withdrawal of the bid. When the subcontractor’s mistake was discovered 48 hours after the bid opening, Wil-Fred’s promptly notified the District by telegram and declared its intention to withdraw.
The rehabilitation contract had not been awarded at this time. Accordingly, the District suffered no change in position since it was able, with no great loss other than the windfall resulting from Ciaglo’s error, to award the contract to the next lowest bidder, Department of Public Works.

The central question, therefore, is whether the error occurred despite the use of reasonable care. The Sanitary District asserts that the mistake itself evidences Wil-Fred’s failure to use ordinary care in the preparation of its bid and argues that rescission is not warranted under such circumstances.

We cannot agree with this contention. Wil-Fred’s unquestionably exercised due care when it selected Ciaglo Excavating Company as its subcontractor. Ciaglo Excavating Company had been in business for five years; its president had eight years experience in the excavating field; the company had worked for Wil-Fred’s on 12 previous occasions; it had never failed to honor a prior quotation; and it had always performed its assignments in a highly skilled manner. Also, Dennis Ciaglo testified that prior to submitting his bid to Wil-Fred’s, he inspected the jobsite and carefully examined the specifications with plaintiff’s estimators. Taking into account the experience and preparations of the subcontractor, the prior business dealings between the two companies and the high quality of Ciaglo Excavating Company’s past performance, we conclude that Wil-Fred’s was justified in relying on the subcontractor’s quotation in formulating its own bid.

Similarly, we feel that Wil-Fred’s exercised reasonable care in the preparation of its portion of the total bid. The plaintiff made two separate reviews of its price quotation. The first was conducted prior to the bid’s submission, and it took into account the addendum that substituted a cheaper filter material for the type originally called for by the specifications. The second examination was made immediately after Wil-Fred’s president learned that his company’s bid was the lowest quotation. It revealed that plaintiff had not erred in estimating expenses for its part of the rehabilitation project.

The question of due care is a factual question to be determined by the trial court, and such determination will not be disturbed unless it is against the manifest weight of the evidence. . . . For the aforementioned reasons we feel that the record supports the trial court’s finding of due care on the part of Wil-Fred’s.

The Sanitary District asserts that even if due care was exercised by Wil-Fred’s, Illinois courts have granted relief only in cases where the bid has contained a clerical or mathematical error. Defendant argues that the trial court’s grant of rescission should not be upheld because Ciaglo’s mistake was not a factual error but an error in business judgment.

3. We believe that the change in filter material explains why the Sanitary District’s cost estimate was $374,000 higher than Wil-Fred’s quotation. Plaintiff’s witnesses testified that the substitution of cheaper material would result in a cost savings of $200,000 to $300,000. Additionally, the Sanitary District’s engineer stated that the District’s estimate was based directly upon the cost of the material specified in the advertisement, and he admitted that the initial type of filter material was very expensive because it was not available locally. In view of this testimony we must conclude that the large discrepancy would not necessarily have alerted Wil-Fred’s president to the fact that there was a substantial error in his company’s bid.
Regarding the District’s argument, it is the opinion of this court that Ciaglo’s error amounts to a mixed mistake of judgment and fact. Ciaglo’s belief that the plastic pipes would support heavy trucks was judgmental in nature and in this narrow sense his mistake was one of business judgment. However, his belief was predicated on a misunderstanding of the actual facts occasioned, at least in part, by his reliance on the Sanitary District’s misleading specifications which stated that all pipes had to be able to withstand standard construction equipment.

Generally, relief is refused for errors in judgment and allowed for clerical or mathematical mistakes. . . . Nonetheless, we believe, in fairness to the individual bidder, that the facts surrounding the error, not the label, i.e., “mistake of fact” or “mistake of judgment,” should determine whether relief is granted. White v. Berrenda Mesa Water District of Kern County (1970), 7 Cal. App. 3d 894, 907, 87 Cal. Rptr. 338, 347-348.

The testimonial evidence reveals that Wil-Fred’s acted in good faith and that Ciaglo’s error occurred notwithstanding the exercise of reasonable care. Furthermore, it was established that Wil-Fred’s quotation was $235,775 lower than the next lowest bid. It is apparent that such a sizable discrepancy should have placed the Sanitary District on notice that plaintiff’s bid contained a material error. . . . Accordingly equity will not allow the District to take advantage of Wil-Fred’s low offer.

We are aware of the importance of maintaining the competitive bidding system which is used in the letting of municipal construction contracts. Consequently we do not mean to imply by affirming the trial court’s order that a bidder who has submitted the lowest quotation on a municipal contract may cavalierly disregard the contract’s irrevocability clause and seek rescission. Allowing such action would be unfair to the other bidders and would result in the destruction of the system’s integrity. However, we are certain that the courts of this state are capable of preventing such a result by refusing to grant rescission where, unlike the present circumstances, the facts do not justify relieving the lowest bidder from his bid. See Calnan Co. v. Talsma Builders, Inc. (1977), 67 Ill. 2d 213, 10 Ill. Dec. 242, 367 N.E.2d 695, in which our supreme court, although not dealing with a municipal construction contract, recently denied rescission of a plumbing subcontract where the subcontractor failed to include the cost of the entire water supply system in its bid, a concededly material feature of the subcontract. The supreme court held that the subcontractor had not exercised reasonable care by failing to utilize its own bid preparation review system and by not discovering its error until four months after acceptance of its bid. The court also found that the general contractor could not be placed in statu quo since work had begun and the general contractor had no options; it either had to account for the error ($31,000) or had to negotiate another subcontract, at a greater cost with lack of continuity in work.

We note but do not consider the Sanitary District’s other arguments which we find to be without merit.

For the above stated reasons, the trial court’s order granting rescission and the return of Wil-Fred’s security deposit is affirmed.

Affirmed.

Stamos, P.J., and Pusateri, J., concur.
Notes and Questions

1. “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, however. Restatement (Second) §153, which permits avoidance of a contract for “mistake of one party,” requires either (a) that the mistake be such that enforcement of the contract would be unconscionable, or (b) that the other party either have reason to know of, or be responsible for causing, the mistake. 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 Wil-Fred’s case (“substantial hardship”). See also T-1 Construction, Inc. v. Tannenbaum Development Co., LLC, 314 S.W.3d 740 (Ark. Ct. App. 2009) (seller’s belief that contract price was $70,000 per lakefront lot instead of total price for all five lots supported trial court’s finding of unilateral mistake with unconscionable effect); Marana Unified Sch. Dist. v. Aetna Casualty & Sur. Co., 696 P.2d 711 (Ariz. Ct. App. 1984) (surveying relative amount of mistake in similar cases and concluding that $400,000 mistake in bid of $4.8 million would make enforcement of contract unconscionable).

2. Mistake of fact vs. mistake of judgment. As indicated by the discussion in Wil-Fred’s, it is often said that rescission in such cases will be permitted 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); Kenneth E. Curran, Inc. v. State, 215 A.2d 702 (N.H. 1965) (hand-operated adding machine could not record more than $99,999, causing bidder to lose $100,000 in its calculations when total exceeded that amount). More recent cases have, like Wil-Fred’s, 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 (rather than merely a poor prediction as to how profitable the contract would turn out to be); but see Mid-States General & Mechanical Contracting Corp. v. Town of Goodland, 811 N.E. 2d 425, 435-436 (Ind. Ct. App. 2004) (contractor who misunderstood unambiguous specifications and made error in bid not entitled to relief; relief is available for clerical error but not mistake of judgment).
3. **Effect of negligence.** Must a unilateral mistake be “non-negligent” in order to form a basis for relief? Many courts have so held, but, again, 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. See, e.g., Roberts & Schaefer Co. v. Hardaway Co., 152 F.3d 1283,1292 (11th Cir. 1998) (observing that relief for unilateral mistake is available provided that error does not result from “inexcusable lack of due care” and that Florida courts interpret standard “generously” to benefit of erring party); White v. Berenda Mesa Water District, 87 Cal. Rptr. 338 (Ct. App. 1970) (only “gross” negligence will defeat avoidance); and the *Kenneth E. Curran* case, cited in Note 2 above; but see Shoreline Communications, Inc. v. Norwich Taxi, 797 A2d 1165 (Conn. App. Ct. 2002) (lessee assumed risk by failing to ascertain whether space would be adequate for its radio transmission equipment before undertaking contractual obligation); Stamato v. Stamato, 818 So.2d 662 (Fla. Dist. Ct. App. 2002) (failure of party to “bother” to learn that trial court had ruled in her favor on motion for punitive damages constituted “inexcusable neglect” and barred rescission of settlement agreement on grounds of unilateral mistake). 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.

4. **Effect of reliance by nonmistaken party.** 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* and the other cases discussed above, should the subcontractors in those cases have been able to obtain relief from enforcement on the theory of unilateral mistake? See the discussion of the *Calnan* case at the end of the *Wil-Fred’s* opinion; to the same effect is Rotenberry v. Hooker, 864 So. 2d 266 (Miss. 2003) (relief for unilateral mistake available where parties can be returned to status quo). If it had chosen to do so, could plaintiff Wil-Fred’s have held subcontractor Ciaglo to its subcontract bid? If Ciaglo 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?

5. **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. Enrice 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), defendant Westel, a cellular telephone company, and plaintiff Nauga,
one of its selling agents, were involved in two separate lawsuits over alleged breaches by Westel of its agency agreement with Nauga. 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.

Nauga is of course complicated by the fact that the actors primarily responsible for the events leading to the dispute were lawyers. Like many law students, you may sometimes wear a sweatshirt quoting Shakespeare’s famous line from Henry VI, Part II: “The first thing we do, let’s kill all the lawyers.” You may be aware that in that speech, Shakespeare was not in fact damning lawyers; the line is spoken by one of a gang of villains, and was intended to express the idea that for evil to triumph, it would first be necessary to deprive society of the protection of the law. But most of your fellow citizens, sadly, probably take those words at face value—and perhaps agree with them.

6. 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 Wil-Fred’s or the outcome in Drennan, an earlier California case? With Izadi?

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 being discovered until later). Of the three, the earliest to evolve was the notion of “impossibility of performance.”

In order to consider why and when impossibility should constitute a defense to a duty of performance, it may be appropriate first to consider why it should not. To a nonlawyer, it might appear that the duty to perform a contractual obligation would naturally be excused whenever it should appear that the performance itself was literally impossible. To understand why that has not been the case, it is necessary to recall that contractual liability is historically a form of “strict” liability: Nonperformance is actionable simply because the defendant has failed to perform what he or she promised, not because that nonperformance is also “culpable” in any sense. So any failure to perform a contractual obligation—whether willful, negligent, or innocent—should in theory give the aggrieved party a cause of action. If that obligation was in fact impossible to perform, then the remedy for breach obviously could not be specific performance; however, the court still could and presumably would award damages to compensate the plaintiff for the lost value of the defendant’s expected performance.