IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

DONALD NOTDISCLOSED, a single man, Plaintiff, v. DONALD NOTDISCLOSED and CAROL NOTDISCLOSED, husband and wife, Defendants.	No. 99 2 00XX X XX **PLAINTIFF'S TRIAL BRIEF**

COMES NOW the Plaintiff, DONALD NOTDISCLOSED, by and through his Attorney of record, Chuck E. Marunde, and respectfully submits the following trial brief, including the Washington case precedent and authorities in support of Plaintiff's request for judgment for mutual mistake and the remedy, rescission of contract.

I. STATEMENT OF FACTS

1.1 The Plaintiff purchased real property in Clallam County from the Defendants. Unbeknownst to the Plaintiff, the air quality in the home is so bad that living in the home creates a serious health risk. The home has extremely high levels of mold, mildew, spores, and bacteria.

1.2 Plaintiff received a seller's disclosure statement, which included the simple statement, "Forced air plenum upgrade to forced air duct system." There was no practical way for Plaintiff to know that the system was seriously defective. It did not occur to Plaintiff that the system created a serious health hazard. Plaintiff would not have purchased the house had he thought otherwise. What actually happened was that Defendant created his own system with modifications, although Defendant has no knowledge or expertise in heating and ventilation

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systems.[1]

1.3 The result is that Plaintiff had no practical way of knowing or discovering that there was a hidden defect in the heating and ventilation system, or ultimately in the dangerous contaminants in the air. In fact, it was not apparent to inspectors either. The two inspectors included a pest inspector, who had one duty–to find any infestation of pests, and a building inspector, who had the duty of finding structural problems or other general construction problems. It certainly was not within the scope of either of these inspectors to test the air quality of the home. Testing air quality is done in laboratories found only in Seattle under very specialized testing procedures. Prior to closing a real estate transaction in Clallam County, it is not standard practice to do a specialized test of the kind done by Healthy Buildings.

1.4 While Defendants lived in the home, they had work done on the heating and ventilation system in 1988 and in 1997.[2] Defendant, although admittedly not qualified to do heating and ventilation work, did the work on the system himself,[3] although Defendant admits that the changes in 1995 left the system as "the same system."[4]

1.5 Defendant admitted that there were no vents around the house for the crawl space under the house, and that the crawl space was air tight except vents going directly into the house, and that there was only plastic Visqueen on the ground in that crawl space. Defendant admitted that he had concerns about the ventilation under the house, and apparently tried to address the problem by consulting with various companies in the area. It appears from Defendant Donald NOTDISCLOSED's answers in his deposition that the change to the system that he did only

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[1]See Deposition of Donald NOTDISCLOSED at p. 4 and p. 6 (line 19), attached as Exhibit 1 to Declaration of Chuck E. Marunde in Response to Defendants' Motion for Summary Judgment.

[2]See Deposition of Donald NOTDISCLOSED at p. 13 (lines 22-24), attached as Exhibit 1 to Declaration of Chuck E. Marunde in Response to Defendants' Motion for Summary Judgment. See also subsequent correction of date from 1995 to 1997 on p. 18, line 13.

[3]Id. at p. 14 (lines 4-5)

[4]Id. at p. 17 (line 13)

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increased heat flow and did not change the ventilation or circulation so as to reduce moisture problems.[5] It has been Defendant Don NOTDISCLOSED's testimony that he did not know there were moisture, mold, spore, and bacteria problems.

1.6 When asked about it, Defendant's response to moisture problems or high CO-2 levels was "Open a window."[6] Although first Defendant denied there ever was any moisture of any kind in the house, Defendant later admitted to being aware of excessive moisture on the windows and admitted that his wife often had to use a cloth of some kind to wipe standing water off window sills in the house.[7] In summary judgement, the Court dismissed the claims of intentional and negligent misrepresentation, so the issue at trial is mutual mistake of fact.

1.7 Although Defendant has denied that there are any serious problems with the house, the report of Healthy Buildings, Inc. raises the factual reality that the house is very dangerous to live in. This has never been rebutted by Defendant. The Study established several serious concerns, including but not limited to these factual statements:

a.) CO_2 (Carbon Dioxide) levels in the house are 1100 to 1524 PPM (normal being 450 to 700 PPM), which indicate grossly inadequate ventilation.
b.) There were no provisions for ventilation of the crawl space, and inadequate ventilation in the rest of the house.
c.) Moisture levels were excessively high, causing damage to the structure.
d.) Very high levels of health endangering molds and yeasts (microbial growth) were found in the living room, master bedroom, and attic.
e.) A serious microbe problem in the sampled locations, including, but not limited to, the master bedroom and living room.
f.) High levels of airborne mold spores in the crawl space.
g.) High levels of Cladosporium growth on the bottom of the window sill of the master bedroom/dressing room window sill and a high level of Taniolella or Annellophora species on the sill plate of the same window, both samples showing active mold growth.
h.) Such high microbial levels may lead to potential health responses or building related symptoms, including itching eyes, redness, irritation, inability to wear contact lenses, nasal dryness, stuffiness, congestion, itching and runny nose. Throat symptoms include dryness and irritation. Skin symptoms include dryness and irritation.

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[5]Id. at p. 18 (lines 2-7)

[6]Id. at p. 21 (line 18)

[7]Id. at p. 24 (lines 2-3)

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i.) The likely cause includes under these circumstances unsuitable ventilation system design, inadequate ventilation rates, and improper ventilation system maintenance.

1.8 The seriousness of the health hazard of contaminants in a home of the kind involved in the present case are well known and evident by the Plaintiff's testimony to be given at trial as well as the testimony of Plaintiff's witnesses. It is worth noting that not since the filing of Plaintiff's complaint in August of 1999 has Defendant rebutted the Healthy Buildings Report or the factual and laboratory conclusions of the Healthy Buildings Report. It must be concluded that Defendant has no defense or rebuttal to the reality of the health endangering environment of the home. In fact, Defendant's main argument throughout the eight (8) motions, including an appeal for discretionary review, has been that it is perfectly legal to sell a residence that is not inhabitable. The Defendant relies upon an long since overturned rule of caveat emptor.

1.9 Defendant Donald NOTDISCLOSED lived in the subject house for many years, and has testified that he has no ill effects and no knowledge that there was a potential problem. Defendant also admitted that he regularly used a wood stove, which Plaintiff does not. Wood stoves, or any radiant heat source, can and do typically reduce or completely eliminate excess moisture and the associated health endangering conditions.

II. LEGAL ISSUES

2.1 Was there a mutual mistake of fact for which the Plaintiff is entitled to relief?

2.2 What evidence is needed to prove that there was a mutual mistake of fact?

2.3 Is rescission of contract the remedy for mutual mistake of fact?

2.4 What does rescission of contract entitle Plaintiff to?

III. MUTUAL MISTAKE OF FACT

3.1 Was there a mutual mistake of fact by both parties?

3.2 The evidence clearly demonstrates that the subject house has serious moisture problems as a result of the design and operation of the heating and ventilation systems. The mold, mildew, and other dangerous bacteria are proof positive of a substantial and dangerous

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condition in the house.

3.3 ___Clearly Plaintiff was mistaken as to the condition of the house's heating and ventilation system as it relates to moisture and health hazards. Plaintiff thought he was buying a house that was inhabitable, one that did not have a health-endangering environment. In the first few weeks that Plaintiff lived in the house, he began having trouble with his eyes and his throat. Plaintiff's own doctor told him he should immediately move out of the house, but Plaintiff is retired and cannot afford to pay the mortgage and rent another apartment. Plaintiff immediately brought it to the attention of the seller. Plaintiff also had his grand daughter over, and she got sick every time she came over. Plaintiff had friends over, and they had trouble with coughing. Plaintiff's testimony states that he would not have purchased the home had he known it was dangerous to live in.

3.4 Defendant Donald NOTDISCLOSED's testimony is that he did not know about the problem. This means that he was mistaken as to the condition of the house. He intended to sell the Plaintiff a home that did not have these problems, but in fact he did, and by his own testimony, he did not intend to do that. His biggest argument thus far has been that he is not liable for selling a home with this kind of problem, that he can sell a home that is uninhabitable and that the Plaintiff has no remedy.

IV. LEGAL AUTHORITY FOR MUTUAL MISTAKE OF FACT

4.1 Washington has a number of relevant cases, which establish Plaintiff's right to rescission of contract based on mutual mistake of fact. Many of these cases combine their discussion of the doctrine of mutual mistake, the remedy of rescission, and the defense of culpable negligence. Rather than separate these discussions, I have kept each of the main cases together for the sake of coherence. With respect to the burden of proof, it is stated in Reformation, Rescission, and Lost Instruments of the Washington Real Property Deskbook, Volume V, Section 71.3(4)(b), "Generally, proof of an allegation in a civil case requires only a preponderance of the evidence, but when fraud or undue influence is alleged as a ground for

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rescission of an instrument, the evidence must be clear and convincing." The present case does not involve fraud or undue influence. It would seem the conclusion here is that the burden of proof is by a preponderance of the evidence. That is in apparent contradicton to the Vermette case cited below, which, as I understand it, requires a burden of proof which is clear, cogent, and convincing.

4.2 **Vermette v. Andersen, 16 Wash.App. 466, 558 P.2d 258 (1976)**. Mutual mistake of fact has been found to be the basis for rescission of a land contract when the land was not suitable for building a home on it. This is a Division 2 case, and an excellent example of rescission being the remedy when there was a mutual mistake of fact in a real estate transaction. Vermettes purchased property from Andersens. The Vermettes went through the process of planning to build their home, including retaining an architect and a building contractor, and they obtained a building permit and commenced construction. It was during a routine inspection that a county inspector discovered problems with the foundation footings, which he thought might be caused by soil slippage. The inspector stopped construction until an engineer could prove that there were not soil problems and that the land was sufficiently stable to construct a home. The Vermettes did not retain an engineer to find out if they could solve the problem, but sued and won at the Superior Court level, and they were upheld by the Division 2 Appeals Court. The judgment was for mutual mistake of fact, and the remedy was rescission of contract, including pre-judgment interest.

4.3 At trial, the Vermettes' expert geologist, who had not done any pre-trial penetration tests and did not do any other types of subsurface analysis, testified based on his visual observations of the land, on his general knowledge of the local area, and on the engineering report of one of his employees.

4.4 Also relevant to the present case is what the Vermette Court said about the evidence. "Thus, substantial evidence, which by itself is sufficient to satisfy the clear, cogent, and convincing standard, is not made any less substantial by the presence of contradictory

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testimony, which the trial court may have disregarded as not being credible." Vermette v. Andersen, 16 Wash.App. 466, 470, 558 P.2d 258 (1976).

4.5 The Vermette case is incredibly on point. Like the present case, there was an expert who testified as to the problem, which neither party knew about, which testimony was unrebutted by the Defendants. In both cases, it is not necessary for Plaintiff to attempt to reach some incredible level of proof, but only that Plaintiff demonstrate with substantial proof that there was a mutual mistake of fact. When the Defendant does not rebut Plaintiff's substantial evidence with their own expert studies, which were not done in the Vermette case and not done in the present case, Plaintiff is entitled to judgment.

4.6 The Vermette Court addressed the issue of whether the Vermettes were culpably negligent for failing to discover the slope instability. The Court concluded they were not based on the same reasons the Plaintiff is not culpably negligent here. A purchaser is bound by facts a reasonable investigation would disclose. Vermette v. Andersen, 16 Wash.App. 466, 471, 558 P.2d 258 (1976). It is worth quoting the Court on this matter, since this is the Defendant's second and last defense (the first being that an uninhabitable house can be sold to anyone without remedy).

> We find that this testimony constitutes substantial evidence to support the trial court's finding that the lot was not suitable for the construction of a residence. Likewise, there is substantial evidence that the Vermettes were not culpably negligent for failing to discover the slope instability present on the land. Davey v. Brownson, supra, 3 Wash.App. at page 825, 478 P.2d 258 addressed this issue of culpable negligence by holding that a purchaser is bound by the facts a reasonable investigation would disclose. Here the slides on the neighboring lots did not occur until after the sale had been consummated, and thus the Vermettes cannot be said to have had inquiry notice requiring them to make an investigation of the slopestability prior to the sale. See e.g., Enterprise Timber, Inc. v. Washington Title Ins. Co., 76 Wash.2d 479, 457 P.2d 600 (1969). There was also testimony from Hart that ordinary home builders do not normally consult engineers for the purposes of testing the stability of their property. Lastly, there is substantial evidence that both parties believed and relied on the belief that the land was in fact sufficiently stable to support a home. Accordingly, we affirm the decision of the trial court to rescind the sale.

4.7 The testimony from the Inspector, Bud Williams, on behalf of the Plaintiff, is that in inspection was ordered by the Plaintiff before he purchased the home. It was a standard

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inspection that would not put the buyer on notice of a latent defect of the kind found here, which was found only be extensive and expensive laboratory testing. The Plaintiff's Purchase & Sale Agreement called for a pest inspection and a general building inspection. These inspections would not normally reveal a hidden defect outside the scope of the inspection. This is the testimony of Bud Williams. The laboratory testing done by Healthy Buildings is not even available in the Port Angles area. The Plaintiff had to go to Seattle to locate a company with the kind of special expertise and testing done by Healthy Buildings, Inc.

4.8 The Vermette Court also concluded that pre-judgment interest should be paid from the date of the sale was rescinded, which in this case should be considered the date of the filing of the complaint, August 18, 1999. Plaintiff should receive the full purchase price, plus interest since August 18, 1999, plus attorney's fees and costs, all of which will be determinable after the completion of the trial and within a reasonable period of time to compile the total.

4.9 **Davey v. Brownson, 3 Wn. App. 820, 478 P.2d 258, 50 A.L.R.3d 1182 (1970)**. In Davey v. Brownson (a Division 3 case), it was reiterated that a court of equity may provide relief from a mutual mistake by decreeing rescission of a contract. Such a remedy is available only if both parties to the agreement are clearly mistaken about a material fact, and if the party seeking rescission is not guilty of culpable negligence in failing to discover the mistake. Davey v. Brownson, supra at 824. The test in cases of mutual mistake is whether the contract would have been entered into had there been no mistake. Davey v. Brownson, supra at 824. See also Stahl v. Schwartz, 67 Wash. 25, 120 P. 856 (1912); Ross v. Harding, 64 Wn.2d 231, 391 P.2d 526 (1964); 13 S. Williston, *A Treatise on Law of Contracts* §§ 1542, 1557 (3d ed. 1970).

4.10 In Davey v. Brownson, 3 Wash.App. 820, 821, 478 P.2d 258 (1970) it was written:

> . . . the trial court, in essence, found the parties contracted for the purchase and sale of a motel in sound condition, free of latent defects such as termite infestation; the defendant would not have sold nor plaintiff purchased the motel if the true condition had been known; all parties were operating under a mutual mistake and without full knowledge of

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the actual condition of the property; plaintiff was not negligent in failing to discover the true condition since only an expert could have done so; defendant was not guilty of any fraud or intentional misleading of plaintiff, although defendant had implied notice of dry rot; the latent defect of termite infestation requiring structural repairs went to the essence of the contract -- a motel in a basically sound condition; and the contract should be canceled and the loss apportioned between the parties.

4.11 The Davey Court further stated (starting at page 823):

Rescission for mutual mistake is recognized in numerous authorities: Restatement of Contracts s 502 (1962); 55 Am.Jur. Vendor and Purchaser s 48 (1946); 13 Am.Jur.2d Cancellation of Instruments s 33 (1964); 17 Am.Jur.2d Contracts s 143 (1964); 17A C.J.S. Contracts s 418(2) (1963); 91 C.J.S. Vendor and Purchaser s 51a (1955); 3 A. Corbin, Contracts s 613 (1960); 91 C.J.S. Vendor and Purchaser s 156 (1955); 6 Williston, Contracts s 893A (3rd ed. 1962); Ross v. Harding, 64 Wash.2d 231, 239, 391 P.2d 526 (1964); cf. Thiel v. Miller, 122 Wash. 52, 58, 209 P. 1081 (1922). The evidence leaves no doubt plaintiff would not have purchased the motel had she known of the termite condition. Because neither plaintiff nor defendant had knowledge of the termite condition when the sale agreements were executed, it is defendant's position the doctrine of caveat emptor applies to bar rescission. Defendant relies upon Hughes v. Stusser, 68 Wash.2d 707, at 712, 415 P.2d 89, at 92 (1966), wherein the court said: (C)aveat emptor, means nothing more than saying that the risks of latent defects in residences ought to fall on the purchaser rather than the vendor where those defects are unknown to the vendor. In Hughes, a residence was sold for cash. Shortly thereafter, the purchaser discovered termites and brought an action for damages. The theory was fraudulent misrepresentation and concealment. The trial court ruled on a challenge to the sufficiency of the evidence that fraud and concealment had not been proved by clear, cogent and convincing evidence and dismissed the complaint. This was affirmed on appeal. The language cited by defendants from Hughes is dictum since the purchaser in Hughes failed in its burden to prove fraud and concealment.

The instant case is distinguishable from Hughes because here the plaintiff seeks rescission based on mutual mistake. The elements of mutual mistake, Lindeberg v. Murray, Supra, are different than the elements of fraud. Markov v. ABC Transfer & Storage Co., 76 Wash.2d 388, 395, 457 P.2d 535 (1969). As in Hughes, plaintiff in this case was unable to prove the elements of fraud; rescission for this reason was denied. However, the trial court properly concluded both plaintiff and defendant dealt under a mutual mistake as to the actual condition of the property since both considered it to be in fair-to-good condition, free of a need for structural repair. It seems clear from the testimony of Robisch and plaintiff that the requirement to upgrade the property did not include the performance of major structural repairs within a matter of weeks after taking possession. Since the termite infestation went to the very heart, the sine qua non or the essence of the transaction, it was proper to grant rescission for mutual mistake.

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> Defendant contends if the instant agreement can be rescinded, then any contract can be set aside under a set of circumstances rendering a building no longer attractive to a purchaser. To the contrary, we hold a purchaser is bound by facts a reasonable investigation would normally disclose. However, in the instant case it is clear a reasonable investigation by a layman would not have disclosed termite infestation, nor does the record show that a purchaser making a reasonable investigation should employ an expert to investigate the premises for termites. Consequently, the contention of defendant is without merit.

4.12 Also especially relevant to the present case is this from the Davey Court (at page 825),

> Defendant also contends there is no implied warranty in the sale of real estate. Citing 1 Black, Rescission and Cancellation, at 412, 425 (1929); 3 Pomeroy, Equity Jurisprudence s 856(a) (5th ed. 1941); 55 Am.Jur. Vendor and Purchaser s 368 (1946); Steiber v. Palumbo, 219 Or. 479, 347 P.2d 978 (1959); Fain v. Nelson, 57 Wash.2d 217, 356 P.2d 302 (1960); Dennison v. Harden, 29 Wash.2d 243, 186 P.2d 908 (1947). Plaintiff's theory was not based upon implied warranty, nor is it the basis of the trial court's decision. Therefore, the rule urged by defendant is not applicable.

4.13 All of these quotes are incredibly on point as they are exactly the arguments Defendant has been making throughout the course of his motions and presumably at trial. As the Davey Court said, and as applied to this case, Defendant's defenses have no merit.

4.14 In Homer R. House v. Ray Thornton, 76 Wash.2d 428, 457 P.2d 199 (1969), at page 433:

> Rescission was thus granted and judgment awarded the buyers, as we understand the learned judge's opinion, on the basis that the defendants knew of the earlier soil slippage and removal of the house some 15 years earlier from lot 9; that this possible instability would not be evident to a purchaser even on careful examination unless he were a soil expert; and that this knowledge, even though the vendor conscientiously and for good reason believed the foundation and soil to be firm and secure, gave rise to a duty to disclose it to the buyer. The failure to make such a disclosure, concluded the trial court, engendered the same right to rescission in this case as would actionable fraud and deceit.

4.15 In Skagit State Bank v. Rasmussen, 109 Wn.2d 377, 384, 745 P.2d 37 (1987), the court said:

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> We have recognized that a material innocent representation may, in certain circumstances, be a sufficient basis for a claim for contract rescission. See *Anthony v. Warren*, 28 Wn.2d 773, 786, 184 P.2d 105 (1947); *Algee v. Hillman Inv. Co.*, 12 Wn.2d 762, 123 P.2d 332 (1942). Thus, for example, honest mistaken representations as to the boundaries of land can form the basis for rescission of a contract to purchase the land. *Algee*, at 674-75.

4.16 From Ross v. Harding, 64 Wn. 2d 231, 239, 391 P.2d 526, (1964) "[A]bsent fraud, the undenied misrepresentation would at least necessarily have to be characterized as a mutual mistake of fact. Where there is a clear bona fide mutual mistake regarding material facts, equity will grant a rescission."

4.17 From Stahl v. Schwartz, 67 Wash. 25, 33, 120 Pac. 856 (1912):

> The truest test in cases involving mutual mistake of fact is whether the contract would have been entered into had there been no mistake. The distinction between a mistake as to the legal effect of a contract and a mistake as to the subject-matter of the contract must be kept in mind. "Contracts are daily made upon the assumption of certain facts, and the parties give their assent, not absolutely, but upon the implied condition that the reality conforms to the assumption. If it should prove otherwise the condition is broken and equity relieves from the apparent agreement because there is no real assent." 20 Am. & Eng. Ency. Law (2d ed.), 812.

4.18 From Allen v. Hammond, 36 U.S. 63, 71 (1837):

> The equity of the complainant is so obvious, that it is difficult to make it more clear by illustration. No case, perhaps, that it is difficult to make supposed, where the principle on which courts of equity give relief, is more strongly presented than in this case. The contract was entered into through the mistake of both parties; it imposes great hardship and injustice on the appellee, and it is without consideration. These grounds, either of which, in ordinary cases, is held sufficient for relief in equity, unite in favor of the appellee. Suppose, a life-estate in land be sold, and at the time of the sale, the estate has terminated by the death of the person in whom the right vested; would not a court of equity relieve the purchaser? If the vendor knew of the death, relief would be given on the ground of fraud; if he did not know it, on the ground of mistake. In either case, would it not be gross injustice, to enforce the payment of the consideration? If a horse be sold, which is dead, though believed to be living by both parties, can the purchaser be compelled to pay the consideration? These are cases in which the parties enter into the contract, under a material mistake as to the subject-matter of it. In the first case, the vendor intended to sell, and the vendee to purchase, a subsisting title, but which in fact, did not exist; and in the second, a horse was believed to be living, but which was in fact dead. If, in either of these cases, the payment of the purchase-money should be required, it would be a payment without the shadow of consideration; and no court of equity is believed ever to have sanctioned such a principle.

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4.19 From Lindberg v. Murray, 117 Wash. 483, 495, 201 Pac. 759 (1921), "We think it is elementary that, where there is a clear bona fide mistake regarding material facts, without culpable negligence on the part of the person complaining, the contract may be avoided and equity will decree a rescission. We take it that the true test in cases involving mutual mistake of fact is whether the contract would have been entered into had there been no mistake."

4.20 From Haggat v. Jorgensen, 43 Wash. App. 782, 785, 719 P.2d 602 (1976):

> Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in §§ 154. Restatement (Second) of Contracts §§ 154 (1981) reads as follows: A party bears the risk of a mistake when (a) the risk is allocated to him by agreement of the parties, or (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

The evidence does not support an argument that Plaintiff bore the risk for any of these reasons. Clearly the parties did not allocate the risk to Plaintiff that the house had a dangerous contamination problem. Clearly Plaintiff was not aware that there was a problem of any kind of potential problem with the air quality, and there was no reasonable basis for Plaintiff to think he had limited knowledge on these matters. He hired inspectors so he would be informed. Neither Plaintiff nor Defendant knew of the air contaminants, and therein lies the justification for mutual mistake of fact.

4.21 From Thomas v. Ruddell Leasing, 43, Wash. App. 208, 212, 716 P.2d 911 (1986), "A party seeking to rescind must show by clear, cogent and convincing evidence that the mistake was *independently made by both parties, that is, by relying on independent sources* [italics added for emphasis] or a common source of information."

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V. WAIVER OR ASSUMPTION OF RISK

5.1 In addition to the quotes in the above cited cases, particularly the Vermette case and the Davey case, refuting the Defendant's defense of "assumption of risk" or what is also referred to as "culpable negligence," the following arguments are persuasive (although the above cited cases really resolve the issue for all practical purposes).

5.2 Earlier in this case in Defendant's motion for summary judgment, Defendant quoted Green v. APC, 136 Wn.2d 87 (1998), "One who has notice of facts sufficient to put him on inquiry is deemed to have notice of all acts which reasonable inquiry would disclose." As is readily apparent from the evidence, Plaintiff did not know and could not have reasonably known that the air in the home was dangerously polluted. Certainly, the normal pest inspection or general building inspection would not test air quality for dangerous pollutants of the kind found in this house.

5.3 In Puget Sound Service Corp. v. Dalarna Management, 51 Wn.App. 209 (1988), also cited by Defendant's, the buyers had a duty to inquire further because of water damage that they were aware of. That kind of damage is not at all like the "hidden" or "latent" defect of air quality as a result of unknown bacteria and pollutants. Plaintiff would not have been put on notice in the instant case. The same is true of the Sorrel v. Young, 6 Wn.App. 220 (1971), case cited by Defendant's, which involved land fill that the buyers should have checked out.

5.4 Purchasers' failure to discover latent foundation defect in home was not basis for denying them equitable rescission on ground of mutual mistake; defect would not have been discovered had purchasers made reasonable investigation of house's structural integrity and there was no showing that they had acted in bad faith. Knudsen v Jensen (1994, SD) 521 NW2d 415.

VI. RESCISSION RELIEF

6.1 Plaintiff is entitled to a refund of the total purchase price of the house and

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property. Plaintiff is also entitled to prejudgment interest as cited above in the Vermette case.

6.2 Plaintiff is entitled to reasonable attorney's fees and court costs according to the terms of the parties contract.

6.2 Plaintiff should also be entitled to consequential damages. Although this is not discussed extensively in Washington cases, it is addressed in California. Consequential damages in the rescinding party's favor may include all out-of-pocket expenses incurred in reliance on the contract--including, escrow fees, title charges, the value (or cost) of any improvements made to the property, and attorney fees if authorized by the rescinded contract. Soderling v. Tomlin (1959) 170 Cal.App.2d 169, 174, 338 P.2d 946, 949; Kass v. Weber (1968) 261 Cal.App.2d 417, 423, 67 Cal.Rptr. 876, 880; Hastings v. Matlock (1985) 171 Cal.App.3d 826, 841, 217 Cal.Rptr. 856, 866-867.

VII. CONCLUSION AND REQUEST

7.1 Plaintiff requests that the contract for the purchase of the real property from Defendant be rescinded entirely, that Plaintiff be returned all funds, including the purchase price, and all consequential fees and costs included in the purchase of the real property, including escrow fees, title insurance premiums, pro-rated closing costs, financing costs, appraisal fees, and all closing costs apportioned and charged to Plaintiff;

7.2 Plaintiff requests judgment for improvements made to the property;

7.3 Plaintiff requests pre-judgment interest on the total of the funds from the paragraph 7.1 above since the date of filing of the complaint; and

7.4 Plaintiff requests judgement for reasonable attorney's fees and costs according to the contract terms of the parties.

Respectfully submitted this 17th day of February, 2001.

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