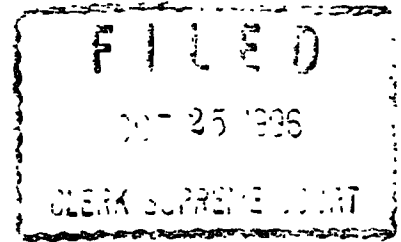


**IN THE COURT OF APPEALS OF IOWA**

No. 6-134 / 95-183



**PAUL R. FRAHM and SHELLY A. FRAHM,**  
Appellees/Cross-Appellants,

vs.

**GILBERT E. PERSINGER and BONNIE PERSINGER,**  
Appellants/Cross-Appellees

---

Appeal from the Iowa District Court for Woodbury County, John P. Duffy,  
Judge.

Gilbert and Bonnie Persinger appeal and Paul and Shelly Frahm cross-appeal the  
orders rescinding a real estate contract between the parties. **REVERSED.**

Michael P. Jacobs of Rawlings, Nieland, Probasco, Killinger, Ellwanger, Jacobs  
& Morhauser, Sioux City, for appellants.

James E. Walker of Corbett, Anderson, Corbett, Poulson, Flom & Vellinga,  
Sioux City, for appellees.

Considered by Sackett, C.J., and Habhab and Huitink, JJ.

**HUITINK, J.**

Gilbert and Bonnie Persinger appeal the district court's order rescinding their real estate contract between the Persingers and Paul and Shelly Frahm. The Frahms cross-appeal from the court's restitution award. We reverse.

This dispute arises out of a real estate transaction involving the Persinger's sale of a drive-in restaurant to the Frahm's. The Persingers are the owners of several parcels of property adjacent to Highway 141 in Smithland, Iowa. Their property included the drive-in sold to the Frahms and an adjoining gas station operated by a tenant. The gas station is located immediately to the west of the drive-in restaurant.

The parties agreed that the western boundary of the property sold under the contract would be 5½ feet west of the west wall of the drive-in building. It since has been discovered that the legal description in the contract is erroneous. The parties have stipulated to its correction and this mistake is no longer an issue.

The contract price was \$10,000 payable in installments. Upon full payment, the contract provides for a quit claim deed to be delivered to the Frahms. The Persingers' attorney prepared the required Groundwater Hazard Statement subsequent to the signing date of the contract. This document states that there were no known wells or underground storage tanks on the drive-in property nor were there any known hazardous wastes.

After purchasing the property, the Frahms made improvements and reopened the restaurant. Shortly after opening the drive-in, the Frahms discovered two monitoring wells within the boundaries of the drive-in property. The record indicates that neither party to the contract was aware of these wells in November 1988 when the contract was signed and the Ground Water Hazard Statement was prepared. It was also about this time that the Frahms and their customers noticed the smell of gasoline fumes in the drive-in building.

On April 29, 1990, the Persingers received a notice from the Iowa Department of Natural Resources concerning a potential problem with petroleum contamination from the adjoining gas station. The Frahms were informed of this problem in July 1991 and consented to the placement of an additional monitoring well near the western boundary of their property. In June 1992, test samples from this well revealed ground water contamination on the Frahm's property.

In 1993, three underground storage tanks were removed from the gas station property at Persinger's expense. Upon their removal, it was discovered that one of the tanks encroached onto the drive-in property within three feet and nine inches of the west edge of the building. Tests indicated this tank did not leak and was found to be secure. The Persingers denied any knowledge of the location of the tanks generally or that one of the tanks encroached on the property sold to the Frahms.

The Frahms initiated these proceedings seeking rescission of the contract based on mutual mistakes of fact regarding the legal description of the property. They subsequently amended their petition alleging material misrepresentations of facts in the Groundwater Hazard Statement concerning the presence of wells, underground storage tanks, and hazardous wastes.

The district court found the erroneous information provided in the Groundwater Hazard Statement was a mutual and material mistake of fact. The court also found that the Frahms would not have purchased the property if they knew of the underground storage tanks. The court accordingly rescinded the contract and awarded the Frahms the value of the principal payments made on the contract. The Frahms' demand for interest and the cost of improvements was denied.

The Frahms then filed a motion to enlarge seeking increased restitution and an award of attorney fees pursuant to the contract. On March 1, 1995, the court awarded the attorney fees but denied the rest of the motion.

## **I. Rescission**

On appeal the defendants argue that (1) the record does not support the district court's decision to rescind the contract and (2) that the only mutual mistake of fact in this case is the legal description.

Rescission is an action tried in equity. *Risse v. Thompson*, 471 N.W.2d 853, 856 (Iowa 1991). Therefore, our review is de novo. Iowa R.App.R.4. The court gives

weight to the fact findings of the trial court, but is not bound by them. Iowa

R.App.P.14(f)(7). This remedy has been described in the following terms:

Rescission is a restitutionary remedy which attempts to restore the parties to their positions at the time the contract was executed. The remedy calls for a return of the land to the seller, with the buyer given judgment for payments made under the contract plus the value of improvements, less reasonable rental value for the period during which the buyer was in possession. The remedy has long been available in Iowa to buyers under land contracts when the seller has no title to convey.

Rescission is considered an extraordinary remedy, however, and is ordinarily not available to a litigant as a matter of right but only when in the discretion of the court, it is necessary to obtain equity. Our cases have established three requirements that must be met before rescission will be granted. First, the injured party must not be in default. Second, the breach must be substantial and go to the heart of the contract. Third, remedies at law must be inadequate.

*Risse*, 471 N.W.2d at 856; *Potter v. Oster*, 426 N.W.2d 148, 151 (Iowa 1988) (citations omitted). In the present case, there has been no allegation that the Frahms are currently in default. Therefore, we will only consider the second and third elements of rescission as they relate to this case.

The trial court's rescission order is premised upon mutual mistakes of fact contained in the Groundwater Hazard Statement. A mistake of fact is one of the fundamental grounds of equitable relief, and if an agreement is entered into by mutual mistake between two parties as to their relative and respective rights, either is entitled to have it set aside. *Harding v. Willie*, 458 N.W.2d 612, 613 (Iowa App. 1990) (citations omitted). Under the doctrine of mutual mistake, the mistake must be both

“mutual” and “material”. *Wilden Clinic, Inc. v. City of Des Moines*, 229 N.W.2d 286, 290 (Iowa 1975). The general principles concerning a sufficient breach of contract warranting rescission were discussed in *Maytag Company v. Alward*, 112 N.W.2d 654 (Iowa 1962):

Not every breach of a contract affords a ground for rescission. It will not be granted for a mere breach not so substantial as to defeat the object of the parties in making the contract. . .

It [rescission] is permitted for . . . such a breach as substantially defeats its [the contract] purpose. It is not permitted for a slight, casual, or technical breach, but, as a general rule, only for such as are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract.

*Id.*, at 659-60. (citations omitted).

Based on our de novo review, we find that the record does not support rescission. We agree that the inaccuracies in the Groundwater Hazard Statement represent mutual mistakes of fact. However, we do not find that these mistakes are material. The erroneous information provided in the Statement does not rise to the level of a substantial breach that went to “the heart of the contract.” *See Risse*, 471 N.W.2d at 857.

The encroaching well only extended onto the drive-in property by a few inches. The underground storage tank, intruded onto the property by a mere foot, and in any event, has since been removed at the Persingers’ expense. Moreover, there is no evidence confirming the encroaching underground tank as the source of the

contamination or the gasoline odors. In fact, upon removal the tank was tested for tightness and passed. Finally, the record reveals no evidence of any present contamination on the property. Any fear of future contamination is speculative and insufficient to support rescission of the contract.

We also find no evidence to support the conclusion that either the defects in the Groundwater Hazard Statement or the gasoline odors prevented the Frahms from receiving what was intended by the contract. Paul Frahm testified that the drive-in was a success throughout the two years that he and his wife operated it. Nothing in the record suggests that the Frahms were forced to close the business because of lost profits due to the encroaching gas tank, wells, or odors. In fact, Paul Frahm testified that after closing the restaurant in 1991, he had intended to reopen. When asked why he closed the restaurant he simply replied that it was the end of the season. The fact that the Frahms continued to make improvements to the property long after discovering the gasoline odors, and the water contamination, discounts the significance of both defects. Furthermore, there is no evidence to indicate that the Frahms are now unable to sell the property. Paul testified that he and his wife have made no efforts to sell, nor have they sought to have it appraised.

Rescission also requires the Frahms to prove that their remedies at law are inadequate. *See Risse*, 471 N.W.2d at 856:

If the party who seeks rescission has an adequate remedy at law, ordinarily he is not entitled to rescind, but in case of repudiation, or of

a breach going to the root of the contract, unless the damages can be ascertained with reasonable certainty, rescission is a matter of right, with restitution instead of compensation.

*Maytag Company*, 112 N.W.2d at 660 (quoting *Callanan v. Keeseville, Ausable Chasm & L.C.R. Co.*, 199 N.Y. 268, 92 N.E. 747, 752 (1910)).

The Frahms have not met their burden to prove that any mutual mistake in this case was material or destroyed the object of the contract. Their rescission claim must therefore include proof that they have no adequate remedy at law. There is nothing in the record to suggest any damages they claim as the result of these mistakes cannot be recovered in an action at law.

## **II. Restitution and Attorney Fees**

The court declined to award the Frahms the interest payments made prior to the filing of the petition and also declined to award restitution for improvements made on the property. Since we are reversing the order that rescinded the contract and awarded restitution, it is unnecessary to reach these issues. We reverse the district court's award of attorney fees to the Plaintiffs.

**REVERSED.**

Habhab, J., concurs; Sackett, C.J., dissents.

**SACKETT, C.J.** (dissenting)

I dissent. I would affirm the trial court.