For an agreed price of $20 million, a construction company contracted with a real estate developer to design and build on the developer's commercial plot a 15-story office building. In excavating for the foundation and underground utilities, the construction company encountered a massive layer of granite at a depth of 15 feet. By reasonable safety criteria, the building's foundation required a minimum excavation of 25 feet.

When the contract was made, neither the real estate developer nor the construction company was aware of the subsurface granite and neither party had hired a qualified expert to test for subsurface granite.

Claiming accurately that removal of enough granite to permit the construction as planned would cost the construction company an additional $3 million and a probable net loss on the contract of $2 million, the construction company refused to proceed with the work unless the real estate developer would promise to pay an additional $2.5 million for the completed building.

If the real estate developer refuses and sues the construction company for breach of contract, which of the following will the court probably decide?

A. The construction company is excused, because the contract is voidable on account of the parties' mutual mistake concerning an essential underlying fact.
B. The construction company is excused under the modern doctrine of supervening impossibility, which includes severe impracticability.
C. The real estate developer prevails, because the construction company assumed the risk of encountering subsurface granite that was unknown to the real estate developer.
D. The real estate developer prevails, unless subsurface granite was previously unknown anywhere in the vicinity of the real estate developer's construction site.

Explanation:

When party assumes risk of mistake

Express	Contract allocates risk to party
Conscious ignorance	Party enters contract despite conscious ignorance of facts related to mistake
Adjudication	Court allocates risk to party because reasonable under circumstances

When both parties enter a contract based on the same mistake (ie, **mutual mistake**), the contract is voidable by an adversely affected party if:

- the mistake relates to a **basic assumption** of the contract
- the mistake **materially affects** the agreed-upon **exchange of performances** (ie, the adversely affected party cannot fairly be required to carry it out) *and*
- the adversely affected party **did *not* assume** the **risk of the mistake**.

Here, when the contract was made, neither party knew that there was a massive layer of granite 15 feet below the surface. That mutual mistake related to a basic assumption of the contract since the building's foundation required a minimum excavation of 25 feet. And it materially affected the agreed-upon exchange since removing the granite would cost the construction company $3 million and likely cause a net loss of $2 million. However, the court will probably decide that the construction company assumed the risk of encountering the subsurface granite because:

- there is a foreseeable risk of encountering subsurface granite in excavation projects like this one *and*
- as a professional builder, the construction company should have been aware of this risk and so acted unreasonably by failing to hire a qualified expert to test for subsurface granite **(Choice D)**.

Therefore, the real estate developer will likely prevail in a breach-of-contract suit against the construction company **(Choice A)**.

(Choice B) As with mutual mistake, the doctrine of impossibility does not apply where the adversely affected party assumed the risk of the event that rendered performance impossible or severely impracticable (here, encountering subsurface granite).

Educational objective:

Mutual mistake renders a contract voidable by the adversely affected party when (1) the mistake relates to a basic assumption of the contract, (2) the mistake materially affects the agreed-upon exchange of performances, and (3) the adversely affected party did not assume the risk of the mistake.

References

- Restatement (Second) of Contracts § 153 (Am. Law Inst. 1981) (one party's mistake makes contract voidable).
- Restatement (Second) of Contracts § 154 (Am. Law Inst. 1981) (when party bears risk of mistake).