

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 92-7215 & 93-7013

THE OXFORD MALL COMPANY,
A Texas General Partnership,

Plaintiff-Appellee,
Cross-Appellant,

versus

SADIE'S INC., A Mississippi
Corporation, d/b/a SADIE'S and
GUY T. FARMER, M.D.,

Defendants-Appellants,
Cross-Appellees,

SADIE'S INC., A Mississippi
Corporation, SADIE'S and
GUY T. FARMER, M.D.,

Plaintiffs-Appellants,
Cross-Appellees,

versus

HERRING MARATHON GROUP, INC., ET AL.,

Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court for the
Northern District of Mississippi
(WC87-138 B-O cons/w WC 91-24 & CA-WC-138-B-D cons/w WC91-24-B-D)

(February 22, 1994)

Before POLITZ, Chief Judge, Reynald G. GARZA, and JOLLY, Circuit
Judges.

E. GRADY JOLLY, Circuit Judge:*

I

In the spring of 1985, the Oxford Mall Company and Guy Farmer entered into ongoing discussions concerning the possibility that Farmer would open a restaurant/lounge at the Oxford Mall. These discussions ultimately culminated on July 3, 1985, with Oxford Mall executing a ten-year restaurant lease with Sadie's, Inc., a restaurant owned solely by Farmer. In addition to the lease agreement, Farmer signed a personal guaranty on June 15, 1985, that was to remain effective for the first five years of the lease term. Sadie's opened for business in November 1985. Sadie's closed for business on January 2, 1987.

Immediately prior to closing the restaurant, Sadie's informed Oxford Mall that they were rescinding their lease agreement because of fraudulent misrepresentations made by Oxford Mall during the 1985 negotiation of the restaurant lease. On January 7, 1987, Oxford Mall sent a notice of default to Farmer, accelerated the lease payments for the full ten years according to a provision in the lease, and demanded payment.

Once Farmer and Sadie's refused to pay, Oxford Mall brought this suit against Sadie's and Farmer under the lease and guaranty

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

agreements. Farmer and Sadie's counterclaimed, seeking a rescission of the lease and guaranty agreements, plus damages, based on a fraudulent misrepresentation theory. Oxford Mall defended that counterclaim, in part, arguing that Sadie's and Farmer had waived any right to claim these alleged misrepresentations. The facts in support of these adverse positions, respectively, are as follows:

According to Sadie's and Farmer, the fraudulent misrepresentations occurred during the 1985 lease negotiations. Oxford Mall's original plan was to open both a restaurant and a cafeteria inside the mall. As the negotiations proceeded, however, Oxford Mall's leasing agent, Bill Morris, advised Farmer that Oxford Mall would not lease space to any other restaurant that would compete with Farmer's "bread and butter." Once the lease was drawn up, Farmer asked for the addition of such a "non-competition" provision in the lease agreement, but Morris advised Farmer that Oxford Mall's policy was not to include such provisions in lease agreements because such provisions were "no longer legal." Morris promised, however, that Oxford Mall would honor its agreement nonetheless.

Sadie's and Farmer alleged that Morris fraudulently misrepresented the Mall's intentions--Oxford Mall had in fact planned all along to rent the space directly across the mall from Sadie's proposed location to Ole South Cafeteria. The lease between Oxford Mall and Ole South was executed on June 18, 1985,

which was after Farmer's personal guaranty had been signed, but before the execution of the lease.

Farmer testified that when he first learned about Ole South's lease, he immediately called Howard Brown, vice president of leasing for the Oxford Mall Company, in order to express his unhappiness with the cafeteria. Brown contends that at that time he offered Farmer the opportunity to rescind the lease. Sadie's contends, however, that the word "rescind" was never used, and that Brown only said that Farmer could "walk away." Farmer argues that to "walk away" at that time would have forced him to simply forfeit all of the money he had invested.¹

Farmer further testified that he declined Brown's offer to cancel the lease after he learned about the Ole South Cafeteria because he was still under the impression that Sadie's could gross a million dollars a year, based on a second material misrepresentation.

According to Sadie's and Farmer, Morris represented that the Warehouse Restaurant and Lounge, another business in Oxford that was supposedly similar to the proposed Sadie's, had annual gross

¹Thus, Farmer did not walk away at that time. In fact, Sadie's went on to open for business on November 23, 1985, and Sadie's and Farmer continued after that time to treat the lease and guaranty agreements as binding and enforceable. On April 4, 1986, Farmer, on behalf of Sadie's, executed a "tenant estoppel certification," which contained the representation that Sadie's considered the lease agreement to be "in full force and effect." Furthermore, on April 17, 1986, Sadie's and the mall entered into an agreement that modified the original lease agreement.

sales in the range of \$1 million to \$1.5 million. Further, Morris represented that the data about the Warehouse's gross receipts came from the Warehouse management. At trial, Morris denied having ever represented the Warehouse income figures to Farmer.

According to Farmer, he did not learn that Morris had misrepresented the Warehouse data until late September or October of 1986. At that time, in an effort to improve the profitability of Sadie's, Farmer approached Woody Lovejoy, former owner of the Warehouse. Lovejoy told Farmer, then later testified, that in fact the Warehouse grossed only between \$40,000 and \$60,000 a month. Thus, the maximum yearly gross revenue did not exceed \$720,000. Furthermore, Lovejoy stated that, although Morris talked to him on three occasions about moving the Warehouse to the mall, Morris never asked what the Warehouse's income figures were.

In any event, after Farmer met with Lovejoy in autumn 1986, he determined that Sadie's would never be profitable and should be closed. Farmer and Sadie's attorney notified Oxford Mall by letter that Sadie's and Farmer were rescinding the lease on December 22, 1986, and Sadie's ultimately closed shortly after the end of that year.

II

The Oxford Mall Company, a Texas general partnership, filed this breach of lease and guaranty contract action on August 13, 1987, against Sadie's, Inc., and Guy R. Farmer, M.D., as guarantor. Essentially, the Oxford Mall alleged that Sadie's and Farmer had

breached the ten-year lease contract by vacating the Mall premises and, further, by refusing to pay the rents due and owing under the lease contract as they became due.

On November 6, 1987, Sadie's and Farmer filed their answer to the complaint and counterclaim. In their counterclaim, Sadie's and Farmer asserted a claim of fraudulent misrepresentation, alleging that they reasonably relied on several false representations made by Bill Morris, an Oxford Mall leasing agent, during the course of the negotiations leading to the execution of the lease and guaranty agreements. Farmer and Sadie's asserted that but for said misrepresentations the agreements would not have been executed. Thus, they sued Oxford Mall for rescission of the lease and actual and punitive damages.

Oxford Mall responded in its answer that it had made no misrepresentations to Farmer and, in the alternative, that Sadie's and Farmer had waived any claim of misrepresentation that would allow them to rescind the lease and guaranty agreements.

The first trial began on August 14, 1989. ("Sadie's I"). The jury returned a verdict for Sadie's and Farmer for \$200,000.00. The court entered a final judgment on August 18, 1989.

Oxford Mall then moved for a judgment notwithstanding the verdict or, in the alternative, for a new trial. The court granted a new trial. This grant of a new trial is a central issue on appeal, and the details of the court's memorandum opinion dated October 27, 1989, are discussed below. Sadie's and Farmer then

filed a motion to reconsider and a motion for an interlocutory appeal; both were denied.

On January 25, 1990, Oxford Mall filed a motion for summary judgment on its claim of breach of contract against Sadie's and Farmer and, also, on defendants' counterclaim for rescission based on fraud in the inducement. Sadie's and Farmer immediately sought to reopen discovery and to hold the motion for summary judgment in abeyance pending the completion of additional discovery. The district court sustained the motion to reopen discovery and granted defendants' request to delay their response to the motion for summary judgment until after the period of discovery had ended. Ultimately, the district court denied Oxford Mall's motion for summary judgment.

In the meantime, Sadie's and Farmer filed a separate action against the individual partners of the Oxford Mall Company on February 28, 1991. Each partner named in the complaint was served with a summons. The defendants immediately filed a motion to dismiss the complaint or, in the alternative, to strike all allegations and claims not raised in Sadie's and Farmer's counterclaim set forth in the Oxford Mall case. Oxford Mall's motion to dismiss this suit against the partners was also ultimately denied.

The district court consolidated the action against the individual partners with the second trial between Oxford Mall, Sadie's and Farmer. The trial of the consolidated actions (Sadie's

II) began on February 24, 1992. At the conclusion of Sadie's II, on February 28, the jury returned a verdict in favor of The Oxford Mall Company and its individual partners. Finally, on March 23, following briefing by the parties concerning the scope and effect of the guaranty agreement, the district court issued a ruling sustaining Sadie's and Farmer's ore tenus motion to reform the judgment entered by the clerk of the court on March 18, 1992. A final judgment was accordingly entered by the district court on April 22, 1992, limiting Farmer's liability to the amount of the rent payments, which would have been due only under the first five years had Sadie's not defaulted.

On May 13, 1992, Sadie's and Farmer filed a timely notice of appeal. On May 15, 1992, Oxford Mall filed a timely notice of cross-appeal.

III

As the case now comes to us, the dispositive issue is whether the district court properly instructed either of the juries on the law with respect to the defense of fraudulent misrepresentation when multiple misrepresentations are alleged. We hold that the district court failed properly to present the law to the jury both in the first trial and in the second trial. Thus, we affirm the district court's grant of a second trial, but we reverse the judgment of the second trial and remand to the district court for further proceedings. Before we address the district court's various instructions, rulings, and judgments, however, we will

first set out some background that helps to reveal the error in the instructions at issue.²

A

The Mississippi law of fraudulent misrepresentation requires that Sadie's and Farmer--in order to have prevailed in their counter suit for rescission--must have shown that (1) Oxford Mall made a representation, (2) the representation was false, (3) the representation was material, (4) Oxford Mall knew that the statement was false or was ignorant of its truth, (5) Oxford Mall intended that the statement should be acted upon by Farmer in a manner reasonably contemplated, (6) Farmer was ignorant of its falsity, (7) Farmer relied on its truth, (8) Farmer had a right to rely thereon, and (9) Farmer suffered a consequent and proximate injury from his reliance. Martin v. Winfield, 455 So.2d 762, 764 (Miss. 1984); Gardner v. State, 108 So.2d 592, 594 (Miss. 1959). As the case has been narrowed on appeal, we focus on the third element--materiality--and how that element relates to the misrepresentations at issue.

The right to seek rescission or cancellation of a contract induced by fraudulent misrepresentations can be waived. A waiver

²For the purposes of this opinion only, we assume that Sadie's and Farmer can make out their counterclaim of fraudulent misrepresentation sufficiently to reach the jury. In the event of a trial on remand, this assumption should not prejudice the right of Oxford Mall to contest, as a matter of fact or of law, whether Sadie's and Farmer establish a claim of fraudulent misrepresentation.

occurs when a party has gained knowledge of the fact of fraud and then ratifies the contract through express ratification or any act inconsistent with an intention to avoid it. Crabb v. Wilkinson, 32 So.2d 356 (Miss 1947). A person ratifies the contract if rescission does not occur within a reasonable period of time after discovery of the facts on which it is based. Ryan v. Glenn, 489 F.2d 110 (5th Cir. 1974). In short, as the principle relates to our case, when a party is fully apprised that a supposed fact is a misrepresentation and does not change his conduct or previous decision, the party effectively concedes that the supposed fact was not material to his decisional process, and thus, because of the absence of the essential element of materiality, he cannot later make a claim of fraud based on that misrepresentation.

In this case, the parties presented evidence concerning several untrue statements. The various relevant statements, however, constitute only two basic claims of misrepresentation: First, that Oxford Mall would allow no competing restaurant to occupy space in the mall. In the context of this case, the jury permissibly could find from Sadie's and Farmer's evidence that this first misrepresentation spoke about Sadie's potential profits, allowing Farmer reasonably to rely on this representation as a factor in concluding that Sadie's should make a profit, in part because Sadie's would be the only restaurant in the mall.

Second, that the Warehouse, another Oxford restaurant similar to Sadie's, had--according to information from its manager--gross

sales of approximately \$1.5 million a year. Again, in the context of the case, the jury could have found that this second misrepresentation also spoke about Sadie's potential profits, allowing Farmer to rely on this representation as a factor in his determining whether a restaurant like Sadie's could profitably operate in the Oxford Mall.

Sadie's and Farmer knew that the first misrepresentation was untrue in October 1985; yet they chose to continue the lease agreement after they knew this representation was untrue. It could be argued, therefore, that Sadie's and Farmer conceded that this misrepresentation, standing alone, was not material to the formation of the contract. But the second of these representations was not known by Sadie's and Farmer to be false until later--until after Sadie's had been in business for approximately one year. Sadie's and Farmer, therefore, could argue to the jury that they did not waive their right to rely on this second misrepresentation as a basis for rescission. Furthermore, Sadie's and Farmer arguably did not make any concession about the materiality, i.e., waiver, of the cumulative effect of the two misrepresentations on the decision to open a restaurant in the Oxford Mall. It is the possibility of this cumulative effect that reveals the error of the district court's instructions.

In the context of some cases concerning multiple misrepresentations, the misrepresentations should be considered as being separate and independent of one another. In such a case, a

party has a duty to rescind a contract within a reasonable time after acquiring full knowledge of each separate and independent misrepresentation. Ryan v. Glenn, 489 F.2d 110 (5th Cir. 1974). In other words, if the party does not act to rescind the contract within a reasonable time after learning of any particular fraudulent misrepresentation, the party would be said to have waived any right to rescind the contract based on that particular misrepresentation.

In a case of multiple misrepresentations, however, each misrepresentation may have two identities: one as separate and independent of the others and a second identity as a component part of a whole. When such a misrepresentation is waived for one purpose, it may not necessarily be waived for a second purpose. In cases involving allegations of multiple misrepresentations, the misrepresentations often may be interrelated. See Mattox v. Western Fidelity Ins. Co., 694 F.Supp. 210, 216 (N.D. Miss. 1988) (evidence of high blood pressure combined with high blood sugar is relevant to question of materiality). Multiple misrepresentations that are interrelated are usually material when viewed as part of a whole, even if the component misrepresentations are each immaterial (e.g., waived) standing alone.

In the present case, it is undisputed that within approximately one week after Sadie's and Farmer began improving the space in the Oxford Mall, Farmer learned that Oxford Mall had leased space to the Ole South Cafeteria. The evidence further

showed that Farmer called an official with Oxford Mall and complained that the lease to the cafeteria was contrary to the promise that "no competing restaurant" would be allowed in the mall. At that time, Sadie's and Farmer chose not to rescind the contract but instead agreed to continue to prepare the space for operation as a restaurant. Moreover, in April 1986, when Sadie's and Farmer entered into an agreement with the Mall that modified the original lease agreement and in turn lowered Sadie's lease payments, Farmer also executed a "tenant estoppel certificate" that contained the representation that Sadie's considered the lease agreement to be "in full force and effect."

We, thus, will assume what appears clear on the record before us--Sadie's and Farmer waived their right to rescind the contract based on this misrepresentation standing alone. Stated differently, Sadie's and Farmer conceded that the presence of the cafeteria, in and of itself, was not material in deciding to continue to lease space for a restaurant, and they therefore waived this misrepresentation as a stand-alone basis for rescission of the contract.

Guy Farmer, however, specifically testified that when he made the decision to go ahead with the restaurant--even after he learned that a cafeteria was being built in the mall--he still thought that he had the potential to gross a million dollars a year based on the Warehouse figures; the Warehouse information provided Farmer a sort of fall-back assurance that although he would be hurt by the Ole

South Cafeteria, he could still be profitable because the type of restaurant he was planning had a lucrative market in Oxford. Thus, Farmer's testimony presents the theory that he considered the representations to be interrelated--that although the competition of Ole South was not material standing alone, it was immaterial only because of the additional representation concerning the Warehouse.

In the light of this testimony, we believe that a jury could have found the multiple misrepresentations in this case were interrelated, and the jury should have been so instructed: If the jury found that Farmer agreed to continue the lease even after he learned that a cafeteria was being built in the mall, then the jury should have found that Sadie's and Farmer waived their right to rescind the contract based on this misrepresentation standing alone. If, however, the jury also found that this waiver never would have occurred except for the undiscovered Warehouse misrepresentation, then the jury should have found that Farmer had not waived the Ole South misrepresentation for all purposes.

The law states that before a party can be said to have waived his claim of rescission, the party seeking rescission must have gained knowledge of the facts constituting fraud. Crabb v. Wilkinson, 32 So.2d 356 (Miss. 1947). We therefore hold that when multiple misrepresentations constitute component parts of the whole fraud, one cannot be said to have waived his claim of rescission

based on the interrelated misrepresentations until he knows the facts of all of the included fraudulent misrepresentations.

B

At the close of Sadie's I, the district court granted a second trial primarily on the basis of a faulty instruction it gave in the first trial, and the district court thus vacated the first jury's verdict in favor of Sadie's and Farmer. We find no reversible error in the district court's grant of a new trial.

"The decision to grant or deny a motion for new trial is a matter for the trial court's discretion, and this court will reverse its ruling only for an abuse of that discretion." Treadaway v. Societe Anonyme Louis-Dreyfus, 894 F.2d 161 (5th Cir. 1990); Munn v. Algee, 924 F.2d 568, 577 (5th Cir.), cert. denied, 112 S.Ct 277 (1991); see also Eyre v. McDonough Power Equipment, Inc., 755 F.2d 416, 420 (5th Cir. 1985) ("We review orders granting new trials for abuse of discretion, that is, for clear error."). This standard does not apply, however, to findings made under a mistake of law. NLRB v. Alterman Transport Lines, Inc., 587 F.2d 212 (5th Cir. 1979). Thus, "when the district court's ruling [on a new trial motion] is predicated on its view of a question of law, it is subject to de novo review." Munn, 924 F.2d at 575; Dixon v. International Harvester Co., 754 F.2d 573, 586 (5th Cir. 1985).

A grant of a new trial based on erroneous instructions to the jury is proper when the jury was misled in any way and when the jury failed to have an understanding of the issues and its duty to

determine those issues. Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1100 (5th Cir. 1973); Crist v. Dickson Welding, Inc., 957 F.2d 1281, 1287 (5th Cir. 1992). Furthermore, instructions are to be read "as a whole," and a new trial should be granted where the charge "leaves [the court] with substantial and ineradicable doubt whether the jury has been properly guided in its deliberations." Houston v. Herring, 562 F.2d 347, 348 (5th Cir. 1977).

In granting a new trial in this case, the district court concluded that it had erred in instructing the jury on the law of waiver. Particularly, the court concluded that its Instruction P-13 did not instruct the jury properly on the law to be applied. We agree with the district court that Instruction P-13, as well as the instructions taken as a whole, failed to articulate properly the law governing this case.³ Furthermore, the district court noted serious and substantial concerns about the sufficiency of the evidence at the close of the first trial. In sum, we cannot say that the district court abused its discretion in granting a new trial.

The problem with the district court's jury instructions in the first trial is that they failed to make a clear statement of the

³We do not agree, however, with what the district court thought the law should have been. It is for this reason that we reverse the second trial and remand for further proceedings.

law of fraudulent misrepresentation and waiver.⁴ Particularly, the

⁴The confusing nature of the instructions are illustrated by the following, which constitute the district court's instructions on the law of waiver:

[I]f you find that the defendants did establish their fraudulent misrepresentation defense by clear and convincing evidence, if you also find that the defendants waived any alleged misrepresentations by not asserting a right to rescind the lease agreement within a reasonable time after learning of this alleged misrepresentation or otherwise ratifying the agreement, such as by modification, after learning of these alleged misrepresentations, then your verdict in that event also should be for The Oxford Mall against Sadie's and Dr. Guy Farmer for the breach of the lease and guaranty agreements.

. . . .

Each of these misrepresentations that the defendants allege to have been made by the plaintiff must be separately judged according to each of the above essential elements that I just enumerated to you.

If you find that the defendants have failed to prove their claims of fraudulent misrepresentations by clear and convincing evidence as set out above, then your verdict would be for the plaintiff.

On the other hand, if you find that the defendants have established the existence of each and every element as to one or more of the alleged misrepresentations by clear and convincing evidence, then you must next consider the plaintiff's defense as to this claim, that is, that the defendants waived such misrepresentations by continuing to treat the lease agreement as effective after learning of the fraud.

Only if you find for the defendants on their claim of fraudulent misrepresentation and against the plaintiff on its defense of waiver, may you find in favor of the defendants; otherwise your verdict should be for the plaintiff.

. . . .

Under the law, a party to a contract may waive its right to rescind or avoid the contract for fraudulent

instructions failed to articulate that the jury was permitted to

misrepresentation by renewing or modifying the contract after acquiring the knowledge of these fraudulent misrepresentations.

If you find from a preponderance of the evidence that the defendants, Sadie's, through its President Guy Farmer, Sr., entered into the modification agreement on April 27th, 1986 with full knowledge of any previous misrepresentations alleged to have been made by plaintiff's agent, then you must find that the defendants thereby waived any right to rely on any such misrepresentation in defense of the plaintiff's claim of breach of contract. In that event your verdict should be for the plaintiff.

The court instructs you further that if you find that the defendants established their fraudulent misrepresentation defense by clear and convincing evidence, you must then consider whether the defendants sought rescission of the contract within a reasonable time after learning of all the fraudulent statements. You should consider whether, by the length of time defendants waited to seek the rescission, they thereby acquiesced in the misstatements or agreed to be bound by the contract regardless of those misstatements.

If you should find from a preponderance of the evidence that the defendants did not assert their right to rescind the lease agreement based on any alleged fraudulent misrepresentations within a reasonable time, under those circumstances your verdict should be for the plaintiff.

. . . .

The plaintiff, Oxford Mall Company, asserts the defense of waiver to the defendant's claim of fraudulent misrepresentation. Under the laws of Mississippi, a party to a contract who, subsequent to the execution of the contract, gains knowledge that certain misrepresentations of fact were made by the other party to the contract in order to induce the execution of the contract, waives his right to avoid or rescind the contract either by undertaking any act of recognition of the contract as enforceable or any act which is inconsistent with the intention of avoiding the contract. An election to rescind a contract must be promptly exercised within a reasonable time upon discovery of the alleged fraud. Otherwise, the right to seek rescission is waived.

find either that each of the multiple misrepresentations was material as a separate and independent misrepresentation or that the multiple misrepresentations were material as one misrepresentation composed of multiple, interrelated component parts.

Rather than presenting to the jury the distinct, alternative legal theories by which the jury was to judge the evidence, the district court's instructions in Sadie's I presented a mosaic of the various theories that was surely confusing and misleading. We therefore affirm the district court's grant of a new trial.

C

The instructions in Sadie's II, however, were also flawed.⁵

⁵The instructions given by the district court were as follows:

[It is the position of the Oxford Mall] that even if the defendants' version of the events were accepted as correct, the defendants in fact waived any right to void the lease by failing to take reasonably prompt action to rescind the lease once they learned that the Ole South Cafeteria was being located in the Mall, and once they were told by others that The Warehouse never grossed in excess of \$650,000.00 on an annual basis.

. . . .

Therefore, if you find from a preponderance of the evidence that two things occurred: One, that the defendant, Sadie's, entered into a lease contract with The Oxford Mall, and, two, that the defendant, Sadie's, breached the lease contract with The Oxford Mall by failing to make any payments under the lease agreement after July 1st, 1986, then by vacating the premises on January the 2nd, 1987, then your verdict should be for The Oxford Mall Company, unless you find that the defendants established their fraudulent misrepresentations defense by clear and convincing evidence, in which event then your verdict should be for the defendants.

However, if you find that the defendants did establish their fraudulent misrepresentation defense by clear and convincing evidence, and if you also find that the defendants waived any alleged misrepresentations by not asserting a right to rescind the lease agreement within a reasonable time after learning of the alleged misrepresentations or otherwise ratifying the agreement, then your verdict in that event should be for The Oxford Mall Company against Sadie's and Dr. Guy Farmer for the breach of the lease and guaranty agreements.

. . . .

Therefore, if you find from a preponderance of the evidence that the defendants, Sadie's, through its president Dr. Farmer, entered into the modification agreement with full knowledge of any previous misrepresentations which might have been made by Bill Morris, then you must find that the defendants waived any right to seek rescission of the lease contract based on those misrepresentations. In that event, your verdict should be for the plaintiffs, Oxford Mall.

In its grant of a new trial at the close of Sadie's I, the district court reasoned that it should have instructed the jury that the multiple misrepresentations were to be considered only as being "separate and independent of one another." The district court determined that multiple misrepresentations could not be considered as being interrelated, and it reasoned, therefore, that Sadie's and Farmer had a duty to rescind the contract within a reasonable time after acquiring full knowledge of each misrepresentation--not as the original instruction had stated, "after learning of all of the fraudulent statements." Thus, the district court proceeded under a mistake in law; as detailed above, a jury should be permitted to consider and determine whether the two misrepresentations were interrelated and whether Sadie's waived the Ole South misrepresentation for all purposes or whether it was waived only as

It is the jury's duty to determine, should you get to that point of considering whether the defendants failed to rescind the contract within a reasonable period of time after learning of any alleged fraudulent statements, it is a question of fact for the jury to determine should the jury find that the defendants established their misrepresentations by clear and convincing evidence.

. . . .

If the counter-plaintiffs, that is Sadie's, have proven to you each of the above elements by clear and convincing evidence, and that the misrepresentations were not waived by Sadie's, as that term has been defined to you in these instructions, then you must decide whether the reliance of Sadie's on those alleged misrepresentations resulted in damages

an independent ground by Sadie's because it was viewed in the context with and in the light of the Warehouse misrepresentation.

IV

In closing, and in fairness to the able district court, we should observe that it was faced with confusing and uncertain theories, strategies, and arguments at trial. Indeed, our opinion today does not result from the clear arguments of counsel, but, like the district court, we have done the best we can with the way we understand the arguments, both at the district court level and at the appellate level. We regret that this case must be tried a third time, but it is clear to us from reading the records of the respective trials and considering the instructions in the light of that evidence, that the applicable law allows neither verdict to stand. We therefore REVERSE and VACATE the judgment and REMAND for further proceedings not inconsistent with this opinion. The district court is hereby

AFFIRMED in part, and
REVERSED, VACATED, and REMANDED, in part.