

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

Adrian Brody and  
Pauline Brody  
Plaintiffs,

v.

Simpson Development Corporation,  
Simpson Construction, Inc.  
Defendants.

and

Simpson Construction, Inc.,  
Third Party Plaintiff,

v.

Lawrence Pike,  
Third-Party Defendant.

:  
:  
:  
: File No. 2:05-CV-293  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

10-16-07  
*AM*

JURY CHARGE

Members of the Jury:

Now that you have heard the evidence and the arguments,  
it is my duty to instruct you on the law.

The plaintiffs in this case are Adrian and Pauline  
Brody. The Brodys' home was damaged when a leak occurred in  
a pipe below the home's slab. The home was developed by  
Simpson Development and constructed by Simpson Construction.  
The plumbing in the home was installed by Lawrence Pike.  
The Brodys claim that Simpson Development and Simpson

Construction are liable for the damages to their home. Simpson Construction and Simpson Development claim that any fault in this case is attributable to Mr. Pike.

### General Instructions

It is your duty as jurors to apply the law that I give you to the facts that you find from the evidence. Your final role is to consider and decide the fact issues of the case. You are the sole and exclusive judges of the facts. You weigh the evidence, resolve conflicts in the evidence, determine the credibility of witnesses, and if warranted, draw inferences from the facts as you find them. Shortly, I will define the word "evidence" for you and instruct you on how to assess it, including how to weigh the credibility or believability of witnesses.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in these instructions

and anything other than the evidence presented in this case. Even though counsel may have mentioned a principle of law during their arguments, you must only consider the law as given to you in these instructions when reaching your verdict.

It is the sole province of the jury to determine the facts in this case. By these instructions, I do not intend to indicate in any way how you should decide any question of fact. Except for instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your findings of fact. I recognize that a judge can have significant influence on a jury. If you think you have perceived some opinion of how I think this case should be decided, I want you not to consider that at all. I am merely the judge here. It is my responsibility to rule on the objections made by counsel and upon the law. It is your sole responsibility to decide the facts and apply the law to those facts.

You are to discharge your duty as jurors in an attitude of complete fairness and impartiality. You should weigh the evidence calmly and deliberately and without the slightest trace of sympathy, bias, or prejudice for or against either

party. All parties expect that you will carefully consider all of the evidence, follow the law as it is now being given to you and reach a just verdict.

**All Persons Equal Before the Law**

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law, and are to be dealt with as equals in a court of justice.

Likewise, a corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, stand equal before the law, and are to be dealt with as equals in a court of justice.

**Evidence**

"Evidence" includes in-court sworn testimony of the witnesses given both on direct and cross-examination and exhibits admitted into the record.

As I have stated earlier, it is your duty to determine the facts, and in doing so, you may consider only the evidence I have admitted. Any evidence that I have instructed you to consider for a limited purpose must be considered only for that limited purpose. Although the

lawyers may call your attention to certain facts or inferences that might otherwise go unnoticed, the lawyers' statements, objections, and arguments are not evidence in the case. Likewise, when an attorney makes an objection or requests a conference at the bench, you should draw no inference either positive or negative from such actions. In the final analysis, it is your recollection and interpretation of the evidence that controls in this case, not any statement or implication that I or the lawyers have made in reference to the evidence.

While you should not speculate or guess about evidence not admitted into the record, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts as they have been established by the evidence in the case. However, in arriving at your verdict, you may not consider any personal knowledge or information pertaining to the facts of this case that you had acquired prior to or during this case that have not been admitted into evidence.

## Evidence: Direct and Circumstantial

The law recognizes two types of evidence: direct and circumstantial. Direct evidence is when a witness testifies about something she or he knows by virtue of their own senses - something she or he has seen, felt, touched or heard. Direct evidence may also consist of a physical object or document which in your mind establishes a particular fact. Circumstantial evidence is evidence that does not directly prove a fact but points to the existence of that fact. Using reason, experience, and common sense, you infer the existence or non-existence of some fact from established facts. For example, if you go to bed at night and there is no snow on the ground, and there is snow the next morning, you could reasonably infer that it snowed during the night even though you did not see it snow. The law makes no distinction between the weight to be given to either direct or circumstantial evidence, but a verdict must be based on all evidence presented.

## Credibility of Witnesses

As jurors, you are the sole judges of the credibility or believability of the witnesses. It is your responsibility to determine the weight to be given to the

testimony of each witness. You do not have to accept all the evidence presented in this case as true or accurate. In weighing the testimony you can take into account the witness's ability and opportunity to observe; the manner and conduct of the witness while testifying; any interest, bias, or prejudice the witness may have; the witness's relationship to the parties; the extent to which other evidence supports or contradicts the witness's testimony; and the reasonableness of the witness's testimony.

The weight of the evidence is not determined by the number of witnesses testifying. You may find the testimony of a small number of witnesses or a single witness about a fact more credible than the different testimony of a larger number of witnesses. The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of that party.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to discredit such testimony. Two or more persons may well hear or see things differently or have a different point of view regarding the same occurrences.

Innocent misrecollection or failure of recollection is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail and whether the discrepancy results from innocent error or intentional falsehood. After making your own judgment, you will give the testimony of each witness such weight, if any, that you think it deserves. You may accept or reject the testimony of any witness in whole or in part.

**Credibility of Witnesses - Inconsistent Statements**

The testimony of a witness may be discredited, or as we sometimes say, "impeached," by showing that he previously made statements which are different than or inconsistent with his testimony here in court. The earlier inconsistent or contradictory statements are admissible only to discredit or impeach the credibility of the witness and not to establish the truth of these earlier statements made somewhere other than here during this trial, unless the witness has adopted, admitted or ratified the prior statement during the witness' testimony in this trial. It is the province of the jury to determine credibility, if any, to be given the testimony of a witness who has made



prior inconsistent or contradictory statement.

### **Opinion Evidence - Expert Witnesses**

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state their opinion as to relevant and material matters in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. As with ordinary witnesses, you should determine each expert's credibility from his demeanor, candor, any bias, and possible interest in the outcome of the trial. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of that opinion are not sound, or if you feel that the opinion is outweighed by other evidence, you may disregard that evidence entirely.

### **Unanimous Verdict and Duty to Deliberate**

The verdict must represent the considered judgment of each juror. To return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges - judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

#### **Instructions of Law**

It is now my duty to give you instructions concerning the law that applies to this case. It is your duty as

jurors to follow the law as stated in these instructions. You must then apply these rules of law to the facts you find from the evidence.

It is the sole province of the jury to determine the facts in this case. By these instructions, I do not intend to indicate in any way how you should decide any question of fact.

### **Burden of Proof**

In a civil action such as this, the burden is on the plaintiffs to prove every essential element of their claims by a preponderance of the evidence. In a few minutes I will instruct you on the elements of the plaintiffs' claims.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

Stated another way, to establish a fact by a

preponderance of the evidence means to prove that the fact is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not the number of witnesses or documents. In determining whether a fact claim has been proven by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

### Claims

In their complaint, the Brodys allege that defendant Simpson Development and Simpson Construction breached an implied warranty that the house was built in a good and workmanlike manner.

The Brodys also allege that Simpson Construction and Simpson Development sold a defective product.

Simpson Construction and Simpson Development, in turn, allege that any fault causing damage in the construction of the house should be attributed to Mr. Pike as the person who installed the plumbing.

### Breach of Warranty

I will now instruct you on the Brodys' claim of breach of the implied warranty against Simpson Construction and Simpson Development.

Under Vermont law, when a builder constructs a new home, the builder makes an implied promise that the house was built in a good and workmanlike manner. While a builder or developer is not required to construct a perfect house, they are required to build homes to a good and workmanlike standard, as established by the practices of other builders and developers in the area.

In addition to determining whether the implied warranty of good and workmanlike construction was breached in this case, you must also decide whether this implied warranty remained in effect at the time of the damage to the house. The implied warranty of good and workmanlike construction is not one of indefinite duration, but only lasts for a reasonable amount of time. In determining whether it is reasonable for the implied warranty to remain in effect through the time of the damage to the Brodys' home, you may consider such factors as the age of the home and its maintenance history, the nature of any defect and the extent

to which it is discoverable through reasonable inspection, and the parties' expectations as to the reasonable durability and life-expectancy of the structure.

### Strict Products Liability

I will now instruct you on Strict Products Liability.

Under Vermont law, a person who places a defective product in the stream of commerce is strictly liable for any physical harm or property damage resulting from the product, if it reaches the consumer without undergoing substantial change.

To succeed on a claim of strict products liability the plaintiffs must prove that:

- (1) The product is defective;
- (2) The product reached the consumer without undergoing substantial change in conditions; and
- (3) The product caused damage to the consumer because of the defect.

A product is considered defective if it is "unreasonably dangerous" because it is dangerous beyond an extent which would be contemplated by the ordinary consumer who purchases it, with ordinary knowledge common to the community, as to its characteristics.

Plaintiffs do not have to prove that the product was made negligently or that the defendant sold the product to the consumer. Under strict products liability, a manufacturer or seller of a product is liable for damage caused by a defective product even if the manufacturer or seller has exercised all possible care in the preparation and sale of the product. However, a manufacturer does not have a duty to manufacture an absolutely perfect product. Strict liability is not absolute liability. Manufacturers are not insurers of users' safety or property. Neither Simpson Development nor Simpson Construction is required to guarantee that the plumbing in a home will last forever and the fact that the plumbing in the plaintiffs' home failed is not evidence that it was defective.

The first question you must decide is whether the home reached Mr. and Mrs. Brody without substantial change in the manner in which the plumbing was installed. In order to find Simpson Development and Simpson Construction liable you must find that the manner in which the plumbing was installed remained substantially unchanged from the time the house was built to the time it was sold to Mr. and Mrs. Brody. This isn't to say, however, that the plumbing had to

be exactly the same. It would not matter if the plumbing was merely older. On the other hand, it would matter if someone had modified the copper pipes or the rebar or the insulation on the copper pipes.

Next, you must decide whether the product was defective; specifically, whether the plumbing was defective. A product is defective if it is of such a character that its properties are different from those that would be expected by the ordinary consumer or user possessing ordinary knowledge common to the community, as to the product's characteristics. For example, good butter is not unreasonably dangerous merely because it deposits cholesterol in the arteries and high cholesterol can lead to heart failure. But butter contaminated with poison is unreasonably dangerous. Whether a product is defective is a question of fact to be determined by you, the jury.

Some of the factors that you should consider in making that determination are: the likelihood that the product will fail in ordinary use, the feasibility of an alternative design, and the adverse consequences to the product and to consumers or users which would result from the alternative design.



### Implied Indemnity

In addition to denying the claims that have been asserted against them by the Plaintiffs, Simpson Construction and Simpson Development have asserted claims of their own against Mr. Pike. They seek to hold Mr. Pike liable to indemnify them in the event Plaintiffs prevail on their claims against them. Since there was no express agreement by Mr. Pike to indemnify Simpson Construction or Simpson Development for any liability that might arise from Mr. Pike's workmanship, the question for you to decide is whether an obligation on the part of Mr. Pike to indemnify Simpson Construction and Simpson Development should be implied under the circumstances of this case.

This implied indemnity is the right of a party to be compensated, who without active fault, sustains a loss for the legal consequences of the conduct of another party. A right of indemnity shifts the entire loss upon the wrongdoer. It is only afforded to a party who is without active fault and who has been compelled, by reason of some legal obligation, to pay damages because of the fault of a third party. Indemnity is only implied where the circumstances of the parties' respective obligations and

conduct demonstrate that it is fair to shift the entire loss occasioned by the Brodys' damages from Simpson Construction and Simpson Development to Lawrence Pike. Therefore, in order to find in favor of Simpson Construction and Simpson Development on their implied indemnity claim against Mr. Pike, Simpson Construction and Simpson Development must prove that they were without active fault, and they are only liable to the Brodys because of some fault on the part of Mr. Pike. If you find that Simpson Construction and Simpson Development were actively at fault in causing damage to the Brodys, Simpson Construction and Simpson Development are not entitled to implied indemnity from Mr. Pike.

#### Damages

The fact that I am about to instruct you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance, in the event you find in favor of the Brodys by a preponderance of the evidence in the case in accordance with the other instructions.

The Plaintiffs must prove their damages by a

preponderance of the evidence. Damages may not be based on speculation or sympathy. The purpose of compensatory damages is to make plaintiff whole, to compensate them for any damage suffered. The purpose of compensatory damages is not to punish a defendant or reward a plaintiff.

Compensatory damages must be based upon the evidence presented at trial and only that evidence. You must be guided by the amount of loss that was actually incurred.

Where the amount of damages is capable of being calculated in dollars and cents, plaintiffs must demonstrate the amount of their loss in dollars and cents. Where the amount of damages is not capable of being calculated in dollars and cents, such as assertions of pain and suffering, plaintiffs are not required to demonstrate the exact dollar and cents value of the injury. Nonetheless, plaintiffs are still required to submit to you evidence of such a quality and quantity that you are capable of reasonably estimating the extent of loss suffered.

Compensatory damages are intended to put the plaintiffs in the same position they were in prior to the incident. If you find that the plaintiffs have proven any of their claims, you should determine:

- (1) the reasonable cost of repairing the home, if you find it reasonable to repair the home;
- (2) the reasonable cost of repairing any personal property which it would be reasonable to repair;
- (3) the reasonable cost of replacing any personal property that cannot be repaired;
- (4) how much value, if any, did the home lose because of the defect; and
- (5) the monetary value of the loss of the use of the home.

#### Duty to Mitigate

A person whose property has been damaged by the wrongful act of another is obligated to exercise reasonable care and effort to avoid as much loss as reasonably possible and to minimize their damages. Plaintiffs may not recover for losses which could have been prevented by making reasonable efforts to lessen the damage. If you award Mr. and Mrs. Brody any damages in this case, you must reduce those damages by the amount of damages that could have been avoided by their reasonable effort, without undue risk or expense.

#### Deliberation and Verdict

You have been permitted to take notes during trial for

use in your deliberations. You may take these notes with you when you retire to deliberate. They may be used to assist your recollection of the evidence, but your memory controls. Your notes are not evidence and should not take precedence over your independent recollections of the evidence. The notes that you took are strictly confidential. Do not disclose your notes to anyone other than your fellow jurors. Your notes should remain in the jury room and will be collected at the end of the case.

When you begin your deliberations, you shall first select a foreperson. The foreperson will preside over deliberations, and will be your spokesperson here in Court. The foreperson has no greater voice or vote than any other juror but is appointed to ensure that some order is established in the manner in which you proceed.

A copy of this charge and all exhibits admitted into evidence will go with you into the jury room for your use.

If during your deliberations you should desire to communicate with the Court, please reduce your message to a written question signed by your foreperson. The foreperson will then submit the note to the court security officer who will bring it to my attention. I will then respond as

promptly as possible, either in writing or by having you return to the courtroom so that I can address the question orally. I caution you, however, that with regard to any message or question you might send, you should never state or specify the jury's numerical division at the time. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing, and the Court will never communicate with any member of the jury on any subject related to the merits of the case other than in writing or orally here in open Court. During deliberation, you are not to communicate with any other persons in any way or manner on any subject related to the merits of the case unless given specific permission.

A verdict form has been prepared for your convenience. You will take the verdict form, these instructions, and the exhibits admitted into evidence into the jury room and when you have reached a unanimous agreement, you will have the foreperson fill out the verdict form, date and sign it. You will then return to the courtroom where the verdict will be read and each of you will be asked individually if this is your verdict.

The verdict must represent the considered judgment of

each juror. In order to return a verdict, it is necessary that each juror agree to it. In other words, your verdict must be unanimous as to each claim. It is proper to add the caution that nothing said in these instructions and nothing in any verdict form is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. Deciding what the verdict shall be is your sole and exclusive duty and responsibility.

It is your duty as jurors to consult with one another and to deliberate in an effort to reach agreement. Each of you must decide the case for yourself but only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. You may now retire and commence your deliberations.