IN THE IOWA DISTRICT COURT IN AND FOR HAMILTON COUNTY

WILLIAM SCHWERING, Plaintiff, v. TIGER Y. JUNG, Defendant.	Case No. LACV030443 **JURY INSTRUCTIONS**

Instruction No. 1

Members of the Jury: This is a civil case brought by the Plaintiff, William Schwering, against the Defendant, Tiger Y. Jung. This case arises from Schwering's purchase of residential real property located at 807 Moore St., Stratford, Iowa, from Jung.

Schwering claims that:

1. Jung had actual knowledge of, or failed to exercise ordinary care in disclosing, material defects in the home that he was required to disclose under Iowa Code chapter 558A;
2. Jung breached express and implied warranties regarding the repairs, renovations, and improvements made to the home;
3. Jung made fraudulent and/or negligent misrepresentations to Schwering about the condition of the home;
4. Jung's conduct deprived Schwering of the quiet use and enjoyment of his home; and
5. Jung was unjustly enriched at Schwering's expense.

Jung denies these claims and asserts several affirmative defenses, including that Schwering failed to mitigate his damages and that Schwering's own fault was a proximate cause of any damages he suffered. Jung has also filed a counterclaim against Schwering seeking attorney fees under the parties' Purchase Agreement.

If, based on the evidence presented, you determine that Schwering has proved all of the elements of a particular claim by the applicable standard of proof, then Jung is liable on that claim, and you must determine what amount of damages, if any, should be awarded to Schwering. If you determine that Schwering has failed to prove all of the elements of a particular claim, your verdict must be for Jung on that claim.

Do not consider this summary as proof of any claim or defense. Decide the facts from the evidence received by the Court and apply the law, which I will now give you.

Instruction No. 2

My duty is to tell you what the law is. Your duty is to accept and apply this law. You must consider all of the instructions together because no one instruction includes all of the applicable law. The order in which I give these instructions is not important. Your duty is to decide all fact questions.

As you consider the evidence, do not be influenced by any personal sympathy, bias, prejudices or emotions. It is common to have hidden or implicit thoughts that help us form our opinions. You are making very important decisions in this case. You must evaluate the evidence carefully. You must avoid decisions based on things such as generalizations, gut feelings, prejudices, fears, sympathies, stereotypes, or inward or outward biases. The law demands that you return a just verdict, based solely on the evidence, your reason and common sense, and these instructions. As jurors, your sole duty is to find the truth and do justice.

Instruction No. 3

Preponderance of the Evidence

Whenever a party must prove something, they must do so by the preponderance of the evidence, unless the instruction states otherwise.

Preponderance of the evidence is evidence that is more convincing than opposing evidence. Preponderance of the evidence does not depend upon the number of witnesses testifying on one side or the other.

Clear, Convincing and Satisfactory Evidence

Evidence is clear, convincing and satisfactory if there is no serious or substantial uncertainty about the conclusion to be drawn from it.

You may have heard of the term "proof beyond a reasonable doubt." That is a stricter standard, which applies in criminal cases. It does NOT apply in civil cases such as this. You should, therefore, put that standard out of your mind and apply the preponderance, or clear, convincing, and satisfactory, standard applicable to each claim in this case.

Instruction No. 4

You shall base your verdict only upon the evidence and these instructions. Evidence is:

1. Testimony in person or by deposition (if deposition testimony is admitted into evidence).
2. Exhibits received by the court.
3. Stipulations, which are agreements between the attorneys.
4. Any other matter admitted into evidence (for example, answers to interrogatories, matters of which judicial notice was taken, and so on).

Evidence may be direct or circumstantial. The weight to be given any evidence is for you to decide. Sometimes, during a trial, references are made to pre-trial statements and reports, witnesses' depositions, or other miscellaneous items. Only those things formally offered and received by the court are available to you during your deliberations. Documents or items read from or referred to which were not offered and received into evidence are not available to you.

The following are not evidence:

1. Statements, arguments, questions, and comments by the lawyers.
2. Objections and rulings on objections.
3. Any testimony I told you to disregard.
4. Anything you saw or heard about this case outside the courtroom.

Instruction No. 5

During this trial, you may have heard the word "interrogatory." An interrogatory is a written question asked by one party of another who must answer it under oath in writing. If received into evidence, consider interrogatories and the answers to them as if the questions had been asked and answered here in court.

Instruction No. 6

You will decide the facts from the evidence. Consider the evidence using your observations, common sense and experience. You must try to reconcile any conflicts in the evidence; but, if you cannot, you will accept the evidence you find more believable.

In determining the facts, you may have to decide what testimony you believe. You may believe all, part, or none of any witness's testimony.

There are many factors which you may consider in deciding what testimony to believe, for example:

1. Whether the testimony is reasonable and consistent with other evidence you believe;
2. The witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and
3. The witness's interest in the trial, their motive, candor, bias and prejudice.

Instruction No. 7

You may have heard evidence claiming a witness made statements before this trial which were inconsistent with what the witness said in this trial. If the witness did not make the earlier statements under oath, you may use them only to help you decide if you believe the witness.

Decide if the earlier statements of the witness were made and whether they were inconsistent with the testimony given. You may disregard all or any part of the testimony if you find the statements were made and they were inconsistent with the testimony given, but you are not required to do so. However, you should not disregard the testimony if other believable evidence supports it, or if for some other reason you believe it.

Instruction No. 8

You have heard evidence claiming a witness made statements before this trial while under oath which were inconsistent with what the witness said in this trial. If you find these statements were made and were inconsistent, then you may consider them as part of the evidence, just as if they had been made at this trial.

You may also use these statements to help you decide if you believe a witness. You may disregard all or any part of the testimony if you find the statements were made and were inconsistent with the testimony given at trial, but you are not required to do so. Do not disregard the trial testimony if other evidence you believe supports it, or if you believe it for any other reason.

Instruction No. 9

You have heard evidence claiming a party to this action, the Plaintiff or the Defendant, made statements before this trial. If you find such statements were made, you may regard the statements as evidence in this case the same as if the statements had been made under oath during the trial. If you find such statements were made and were inconsistent with the witness's testimony during the trial, you may also use the statements as a basis for disregarding all or any part of that witness's testimony during the trial, but you are not required to do so. You should not disregard any person's testimony during the trial if other credible evidence supports it or if you believe it for any other reason.

Instruction No. 10

In a prior instruction, you were instructed that the evidence you consider may be direct or circumstantial and that the weight to be given any evidence is for you to decide. Direct evidence is evidence from a witness who claims actual knowledge of a fact or from a document containing a specific fact. Circumstantial evidence is evidence about a chain of facts from which you may draw conclusions and inferences.

Neither party is required to present direct evidence in order to establish a claim or defense. You should use reason and common sense to evaluate the evidence regardless of whether it is direct or circumstantial. The law makes no distinction between direct and circumstantial evidence. Both are equally probative. Give all the evidence the weight and value you think it is entitled to receive.

Instruction No. 11

An expert witness was asked to assume certain facts were true and to give an opinion based on that assumption. This is called a hypothetical question. If any fact assumed in the question has not been proved by the evidence, you should decide if that omission affects the value of the opinion.

Instruction No. 12

You have heard testimony from persons described as experts. Persons who have become experts in a field because of their education and experience may give their opinion on matters in that field and the reasons for their opinion.

Consider expert testimony just like any other testimony. You may accept it or reject it. You may give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

Instruction No. 13

Plaintiff must prove all of the following propositions:

1. Iowa Code § 558A.4 required Tiger Jung, as the transferor of the home located at 807 Moore St., Stratford, Iowa, to furnish William Schwering a written disclosure statement disclosing information relating to the condition and important characteristics of the home and any improvements to it, before the transfer of the home;
2. Jung had actual knowledge of an error, inaccuracy, or omission in the disclosure statement, or failed to exercise ordinary care in obtaining the information used in preparing the disclosure statement;
3. The condition not disclosed, or inaccurately disclosed, materially affected the condition or value of the home; and
4. The amount of damage proximately caused to Schwering by the violation.
5. The Iowa Real Estate Disclosure Act does not impose strict liability upon a seller. The fact that a defect existed in the property does not, by itself, establish liability. In determining whether Defendant violated the Act, you may consider whether the alleged condition was open and obvious or readily discoverable upon reasonable inspection by Plaintiff. Plaintiff must prove the remaining elements of the claim.

If Plaintiff has failed to prove any of these propositions, Plaintiff is not entitled to damages on this claim. If Plaintiff has proved all of these propositions, Plaintiff is entitled to damages in some amount. Proof of fraud or intent to deceive is not required to establish this claim.

Instruction No. 14

558A.2 Procedures.

A person interested in transferring real property, or a broker or salesperson acting on behalf of the person, shall deliver a written disclosure statement to a person interested in being transferred the real property. The disclosure statement must be delivered prior to either the transferor making a written offer for the transfer of the real property, or accepting a written offer for the transfer of the real property.

558A.4 Required information.

The disclosure statement shall include information relating to the condition and important characteristics of the property and structures located on the property, including significant defects in the structural integrity of the structure, as provided in rules adopted by the real estate commission pursuant to section 543B.9. The rules may require the disclosure to include information relating to the property's zoning classification; the condition of plumbing, heating, or electrical systems; or the presence of pests.

558A.6 Liability under the chapter.

A person who violates this chapter shall be liable to a transferee for the amount of actual damages suffered by the transferee, but subject to the following limitation: the transferor shall not be liable under this chapter for the error, inaccuracy, or omission in information required in a disclosure statement, unless that person has actual knowledge of the inaccuracy, or fails to exercise ordinary care in obtaining the information.

Instruction No. 15

Plaintiff must prove all of the following propositions:

1. Jung made an affirmation of fact or promise relating to the home that became part of the basis of the parties' bargain, including the representations described in Instruction No. 16 below and those contained in the Residential Property Seller Disclosure Statement and the Purchase Agreement;
2. The specific representations, promises, and specifications made by Jung regarding the repairs, renovations, and improvements to the home;
3. Schwering performed his obligations under the Purchase Agreement, including payment of the purchase price;
4. Jung failed to perform as warranted, without legal excuse, because the repairs, renovations, and improvements were not completed, were not completed as specified, or were not completed in a good and workmanlike manner; and
5. The amount of damage proximately resulting from the breach.

If Plaintiff has failed to prove any of these propositions, Plaintiff is not entitled to damages on this claim. If Plaintiff has proved all of these propositions, Plaintiff is entitled to damages in some amount, the purpose of which is to place Plaintiff in the position he would have occupied had the Purchase Agreement been performed as warranted, limited to damages that were foreseeable or reasonably contemplated by the parties at the time of contracting.

Instruction No. 16

Concerning Instruction No. 15, Schwering claims that Jung represented and promised, during the negotiations for the sale of the home and the pendency of the closing, that the following repairs, renovations, and improvements had been made to the home:

a. The installation of a new roof and gutters;

b. The installation of a new air conditioning unit for the furnace and replacement of the furnace circuit;

c. The installation of new breakers;

e. The installation of a new mini-split air conditioner in the second-floor bonus room; and

g. The proper installation of the tile in the upstairs bathroom.

No particular form of words is necessary to create an express warranty, nor must the words "warrant" or "guarantee" be used, nor must Jung have intended to make a warranty. Whether these representations were made, and whether they were representations of fact rather than opinion, are for you to decide from all of the surrounding circumstances, including the exact words used.

Instruction No. 17

Plaintiff must prove all of the following propositions:

1. The home was constructed, repaired, renovated, or improved to be occupied by Schwering as a home;
2. Schwering purchased the home from Jung, a builder-vendor who constructed, or directed the construction of, the improvements to the home for the purpose of sale;
3. When sold, the home was not reasonably fit for its intended purpose, or had not been constructed, repaired, renovated, or improved in a good and workmanlike manner;
4. At the time of purchase, Schwering was unaware of the defect and had no reasonable means of discovering it; and
5. By reason of the defective condition, Schwering suffered damages.

Privity of contract is not required, and this warranty exists independently of the terms of any written agreement between the parties. If Plaintiff has failed to prove any of these propositions, Plaintiff is not entitled to damages on this claim. If Plaintiff has proved all of these propositions, Plaintiff is entitled to damages in some amount.

A builder-vendor is a person or business engaged in the construction and sale of residential property, who builds a residence with the intent that it be sold to a purchaser.

Instruction No. 18

Plaintiff must prove the following propositions by a preponderance of clear, satisfactory, and convincing evidence:

1. Jung made a representation to Schwering;
2. The representation was false;
3. The representation was material;
4. Jung knew the representation was false;
5. Jung intended to deceive Schwering;
6. Schwering acted in reliance on the truth of the representation and was justified in relying on it;
7. The representation was a proximate cause of Schwering's damage; and
8. The amount of damage.

If Plaintiff has failed to prove any of these propositions, Plaintiff cannot recover damages on this claim. If Plaintiff has proved all of these propositions, Plaintiff is entitled to recover damages in some amount.

Instruction No. 19

Concerning proposition No. 1 of Instruction No. 18, "a representation" is any word or conduct asserting the existence of a fact. It may include silence if Jung failed to disclose information which he had a duty to disclose and which Schwering had reason to believe would be disclosed. A representation of fact includes an opinion expressed for the deliberate purpose of deceiving another, and includes a promise to perform a future act.

A representation also includes an opinion. An opinion is a statement of a person's belief that a fact exists or their judgment as to quality, value, authenticity, or similar matter. A representation of fact implies that the maker has definite knowledge or information supporting the statement; a representation of opinion does not. You must consider all of the surrounding circumstances, including the exact words used, in deciding whether a representation is one of fact or opinion.

Instruction No. 20

Concerning proposition No. 3 of Instruction No. 18, a representation is "material" if:

1. A reasonable person would consider it important in making a decision;
2. Jung knew or had reason to know that Schwering considered, or was likely to consider, the representation important in making a decision; or
3. The representation influenced Schwering to enter into a transaction he would not otherwise have entered.

Instruction No. 21

Plaintiff must prove all of the following propositions:

1. Jung, during negotiations for the sale of the home, negligently supplied false information regarding the repairs, renovations, and improvements made to the home for Schwering's guidance;
2. Jung had a financial (pecuniary) interest in supplying the information;
3. Jung failed to exercise reasonable care or competence in obtaining or communicating the information;
4. Schwering justifiably relied on the information supplied, to his detriment;
5. The negligent representation was a proximate cause of Schwering's damage; and
6. The amount of damage.

If Plaintiff has failed to prove any of these propositions, Plaintiff cannot recover damages on this claim. If Plaintiff has proved all of these propositions, Plaintiff is entitled to recover damages in some amount.

Instruction No. 22

"Information," concerning proposition No. 1 of Instruction No. 21, means any word or conduct asserting the existence of a fact, and includes opinions based on facts equally well known to Jung and Schwering.

A person negligently supplies information, concerning proposition No. 3 of Instruction No. 21, by failing to exercise the reasonable care or skill of a person in the same business or profession in obtaining or communicating the information, including the duty to make any investigation that would be made by a reasonable person in the same business or profession.

The test of financial interest, concerning proposition No. 2 of Instruction No. 21, is whether Jung benefited financially, directly or indirectly, from supplying the information.

Reliance, concerning proposition No. 4 of Instruction No. 21, is justified when a reasonably careful person would be justified in relying on the information supplied. It is not necessary that the information be the only reason for Schwering's action; it is enough that the information had a material influence on his conduct and was a substantial factor in bringing about his action.

Instruction No. 23

If you find in favor of Schwering on one or more of the claims submitted to you, you must also determine, as an element of Schwering's damages, the amount, if any, that will fairly compensate him for the loss of quiet use and enjoyment of his home resulting from Jung's conduct. The implied right of quiet use and enjoyment means that a homeowner is entitled to the full use and enjoyment of the home. A breach of the right of quiet use and enjoyment occurs when the conditions of the home are rendered unsafe, unsanitary, or unfit for habitation, or when the seller fails to remedy conditions the seller expressed he would correct or improve.

Instruction No. 24

Plaintiff must prove all of the following propositions by a preponderance of the evidence:

1. Jung was enriched by receipt of a benefit, which may be direct or indirect;
2. The enrichment occurred at Schwering's expense; and
3. It is unjust, under the circumstances, for Jung to retain the benefit without compensating Schwering.

If Plaintiff has failed to prove any of these propositions, Plaintiff is not entitled to recover on this claim. If Plaintiff has proved all of these propositions, Plaintiff is entitled to recover damages in some amount, including the diminution in value of the home attributable to the benefit Jung retained.

Instruction No. 25

If you find in favor of Schwering on one or more of his claims against Jung, you must determine an amount that is fair compensation for his damages. You may award compensatory damages only for those damages that Schwering proves were proximately caused by Jung's wrongful conduct — no more, no less. If you find Schwering is entitled to damages, you must award the reasonable cost to repair or replace the affected portions of his home and property, together with any other item of damage described in Instruction No. 26 that you find Schwering has proved. The amount you assess cannot be measured by any exact or mathematical standard; you must use your sound judgment based upon an impartial consideration of all the evidence.

Instruction No. 26

In determining the amount, if any, of Schwering's damages, you may consider the following items of damage, to the extent you find them proved by the evidence and attributable to a claim on which you have found in Schwering's favor:

1. Cost to repair or replace the roof and gutters;
2. Cost to repair or replace the furnace, furnace circuit, and associated wiring;
3. Cost to repair or replace the air conditioning unit;
4. Cost to repair or replace the breakers;
5. Cost to repair or replace the mini-split air conditioner installed in the second-floor bedroom;
6. Cost to repair the improperly installed tile in the upstairs bathroom;
7. Cost to repair the sloping floor;
11. Diminution in the value of the home;
12. Consequential damages, including the time, effort, and expense reasonably incurred by Schwering in investigating and addressing the above conditions; and
13. Loss of quiet use and enjoyment of the home, as described in Instruction No. 23.

The measure of damages for fraudulent and negligent misrepresentation is the amount that will reimburse Schwering for the loss caused by his reliance on Jung's misrepresentation or omission and place him in as good a position as if the representation had not been made, or, alternatively, the amount that would place him in as good a position as he would have enjoyed had the representation been true, limited in either case to damages that were foreseeable or reasonably contemplated at the time the representation was made.

You should not include in your damages verdict any amount for attorney fees, pre-judgment interest, post-judgment interest, or court costs. If you return a verdict in favor of Schwering, the Court will separately determine and award reasonable attorney fees under the Purchase Agreement, together with any interest and costs allowed by law.

Instruction No. 27

Any future damages you award must be reduced to present value. "Present value" is a sum of money paid now which, together with interest earned at a reasonable rate of return, will compensate Schwering for future losses.

Instruction No. 28

In arriving at an item of damage, you cannot arrive at a figure by each juror stating an estimate of the item of damage and agreeing in advance that the average of those estimates will be your verdict on that item.

Instruction No. 29

In addition to any actual damages you may award on Schwering's claim for fraudulent misrepresentation submitted in Instruction No. 18, you may award punitive damages against Jung on that claim if, and only if, Schwering has proved, by a preponderance of clear, convincing, and satisfactory evidence, that Jung's fraudulent conduct constituted a willful and wanton disregard for Schwering's rights, which may be shown by legal malice — that is, the intentional commission of a wrongful act, such as an intentional deceit, without just cause or excuse. Proof of ordinary negligence, standing alone, is not sufficient to support an award of punitive damages; more than negligent conduct is required.

You may not award punitive damages unless you first find that Schwering has proved his claim for fraudulent misrepresentation and has been awarded actual or compensatory damages proximately resulting from that fraudulent misrepresentation. Punitive damages are not intended to compensate Schwering for injury; they are allowed to punish Jung and to discourage Jung and others from like conduct in the future. You may award punitive damages only if you find that Jung's conduct warrants a penalty in addition to the amount you award to compensate Schwering for his actual damages.

There is no exact rule for determining the amount of punitive damages, if any, you should award. You may consider:

1. The nature of Jung's fraudulent conduct that harmed Schwering;
2. The amount of punitive damages that will punish and discourage like conduct by Jung, including Jung's financial condition or ability to pay (you may not, however, award punitive damages solely because of Jung's wealth or ability to pay);
3. Schwering's actual damages, to which any punitive damages award must be reasonably related; and
4. The existence and frequency of any prior similar conduct by Jung.

Instruction No. 30

Concerning Instruction No. 29, conduct is willful and wanton when a person intentionally does an act of an unreasonable character in disregard of a known or obvious risk that is so great as to make it highly probable that harm will follow.

Instruction No. 31

Jung claims that Schwering failed to exercise ordinary care to mitigate his damages. Schwering had a duty to exercise ordinary care to reduce, minimize, or limit his damages, but he had no duty to do something unreasonable under the circumstances, such as an action that would impose unreasonable inconvenience or expense.

To prove this defense, Jung must prove all of the following:

1. There was something Schwering could have done to mitigate his damages;
2. Requiring Schwering to do so was reasonable under the circumstances;
3. Schwering acted unreasonably in failing to undertake the mitigating action; and
4. Schwering's failure to undertake the mitigating action caused an identifiable portion of his damages.

If Jung has proved all of these propositions, you shall reduce Schwering's damages award by the identifiable portion of damages caused by his failure to mitigate. If Jung has failed to prove one or more of these propositions, you shall not reduce Schwering's damages award on this basis.

Instruction No. 32

Jung claims that Schwering's own fault was a proximate cause of Schwering's damages. To establish this defense, Jung must prove, by a preponderance of the evidence, that Schwering was at fault and that Schwering's fault was a proximate cause of his damages.

If you find that both Jung and Schwering were at fault, and that the fault of each was a proximate cause of Schwering's damages, you must allocate the percentage of fault attributable to each. Schwering's total damages will be reduced by the percentage of fault, if any, you attribute to him, except that if you find Schwering's percentage of fault is greater than fifty percent (50%), Schwering is not entitled to recover any damages.

Instruction No. 33

Upon retiring, you shall select a foreman or forewoman. It will be his or her duty to see that discussion is carried on in an orderly fashion, the issues are fully and freely discussed, and each juror is given an opportunity to express his or her views.

If you need to communicate with me during your deliberations, you may send a note to me through the Court Attendant, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone — including me — how your votes stand numerically.

Your attitude at the beginning of your deliberations is important. It is not a good idea for you to take a position before thoroughly discussing the case with the other jurors. If you do this, individual pride may become involved and you may later hesitate to change an announced position even if shown it may be incorrect. Remember you are not partisans or advocates, but are judges — judges of the facts. Your sole interest is to find the truth and do justice.

Instruction No. 34

During the trial, you have been allowed to take notes. You may take these with you to the jury room to use in your deliberations. Remember, these are notes and not evidence. Generally, they reflect the recollection or impressions of the evidence as viewed by the person taking them and may be inaccurate or incomplete.

Upon reaching a verdict, leave the notes in the jury room, and they will be destroyed.

Instruction No. 35

I am giving you a verdict form. During the first six hours of deliberations, excluding meals and recesses outside your jury room, your decision must be unanimous. If you all agree, the verdict must be signed by your foreman or forewoman.

After deliberating for six hours from 11:25 o'clock a .m., excluding meals or recesses outside your jury room, it is necessary that only seven of you agree upon the answer to the questions. In that case, the verdict must be signed by all seven jurors who agree.

When you have agreed upon the verdict and appropriately signed it, tell the Court Attendant.

Derek Johnson
District Court Judge of the Second Judicial District of Iowa