

No. 64254-5 - I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

**Courtney Shimada and Jenny Shimada, individually, on behalf of
their marital community, and on behalf of their minor children, Miya
Shimada and Kobe Shimada,**

Plaintiffs-Appellants,

vs.

**The Quadrant Corporation, a Washington Corporation;
Weyerhaeuser Real Estate Company, a Washington Corporation; and
Weyerhaeuser Company, a Washington corporation,**

Defendants- Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This action relates to construction defects that Plaintiffs-Appellants Courtney and Jenny Shimada allege exist (or existed) in their house, which was built by Defendant-Respondent The Quadrant Corporation (“Quadrant”) nearly a decade ago. The Shimadas, who bought the house from another family in May 2003, asked Quadrant, in December 2007, to reimburse them for costs related to an allegedly misconnected dryer vent in the attic. Without any legal obligation to do so, Quadrant reimbursed the Shimadas for corrections to the vent and for a brand new dryer. Quadrant then agreed to determine whether the allegedly misconnected vent caused other damage to the attic or other portions of the house. Quadrant conducted the investigation at no expense to the Shimadas, and, again, without any legal obligation to do so, offered to make any necessary additional repairs to the house at no expense to the Shimadas. The Shimadas rejected that offer without explanation and demanded that Quadrant buy their home. When Quadrant refused, the Shimadas sued Quadrant and its parent companies, Weyerhaeuser Real Estate Company (“WRECO”) and Weyerhaeuser Company (“Weyerhaeuser”).

None of these facts, or any of the others raised by the Shimadas in their Brief, is sufficient to state a claim for negligence, negligent misrepresentation, fraud, violation of the Consumer Protection Act (CPA),

or outrage. In fact, the legal claims asserted by the Shimadas are not grounded in the law, the facts, or even good faith. The trial court properly granted summary judgment for Quadrant, WRECO, and Weyerhaeuser, and should be affirmed.

II. STATEMENT OF THE ISSUES

A. Did the trial court properly determine that no genuine issue of material fact exists with respect to the Shimadas' claims against Quadrant, and that judgment as a matter of law was required?

B. Did the trial court properly determine that no genuine issue of material fact exists with respect to the Shimadas' claims against WRECO and Weyerhaeuser, and that judgment as a matter of law was required?

C. Did the trial court properly exercise its discretion in denying the Shimadas' request for a continuance under CR 56(f), when the Shimadas did not identify specific evidence that would create a genuine issue of material fact to preclude summary judgment for WRECO and Weyerhaeuser?

III. STATEMENT OF THE CASE

A. The Shimadas Bought a House from the Santos Family in May 2003.

The Shimadas did not buy their house from Quadrant. They purchased it from Louie and Marjorie Santos in May 2003. CP 4. The

Santos family had owned and maintained the house since they bought it from Quadrant in 2000. *Id.* After several rounds of offers and counteroffers, the Shimadas agreed to buy the Santos home subject to an inspection contingency, and hired an independent professional to inspect it. CP 535-36. After the inspection revealed alleged flaws in the Santos home (including, for example, damaged siding and an inoperable diverter valve on one of the bathtubs), the Shimadas chose not to back out of their purchase, and instead insisted that the Santos family repair the discovered flaws. CP 541-543, 648-49. After the alleged flaws were repaired to the Shimadas' satisfaction, the Shimadas completed their purchase of the Santos house. CP 541-543.

Before buying the Santos home, the Shimadas "very nearly purchased a Quadrant home directly from Quadrant," but elected not to do so. CP 349. In January 2003, during the early part of their housing search, the Shimadas considered newly-constructed homes in Quadrant's Woody Creek Development. CP 796-97. When they spoke to a Quadrant sales representative at Woody Creek, the Shimadas were given sales literature about Quadrant homes, and had discussions with the representative about the manner in which Quadrant builds its homes. CP 797-802. In performing what Courtney Shimada described as his "due diligence" on Quadrant homes, he asked about the timelines on which

Quadrant builds its homes, the supervision of construction on Quadrant building sites, the contractors used by Quadrant, and the way in which Quadrant centrally manages its construction process. CP 801. Quadrant's sales representative told the Shimadas that Quadrant used high quality materials and sound building practices, and that Quadrant used trained and experienced people both to build the homes and to supervise their construction. *E.g.*, CP 349, 797-802. Although Courtney Shimada testified that he was shopping for newly-constructed homes in part because of concerns about mold and other problems in older homes, the record does *not* show that he asked any specific questions about mold or moisture when interacting with Quadrant's sales representatives. CP 301-03 (Declaration of Court Shimada), CP 348-52 (Supplemental Declaration of Court Shimada), CP 797-802, 806-07, 810 (Deposition of Courtney Shimada).

In their Brief, the Shimadas repeatedly distort the record in an effort to suggest that Quadrant knowingly lied to the Shimadas in response to direct questions about mold and moisture. The Shimadas misleadingly assert, for example, that they "specifically asked Quadrant about mold and mold contamination in homes," and that "Quadrant and its sales representatives assured the Shimadas that no mold and other moisture related problems existed in Quadrant built homes" Br. of Appellants

at 5; *see also id.* at 11, 20, 21, 26-27, 38. To the contrary, the record reflects only general discussions about quality in preliminary sales meetings, and that those discussions did not include a blanket promise from Quadrant that “no mold and other moisture related problems existed in Quadrant built homes.” *E.g.*, CP 301-03 (Declaration of Court Shimada), CP 348-52 (Supplemental Declaration of Court Shimada), CP 797-802, 806-07, 810 (Deposition of Courtney Shimada).

In fact, the Shimadas were given sales literature by Quadrant’s sales representative explaining that Quadrant could not and did not promise a flawless home. CP 521, 603. Those materials explained that every Quadrant-built home is a “Handmade Product and Not Flawless” and is, in fact, “not perfect.” CP 603. The sales literature also contained Quadrant’s warranty policies. CP 602-15. The policies described in detail the steps Quadrant would take in the event defects of any kind were discovered in one of Quadrant’s newly-built homes. *Id.*

Even though the Shimadas were provided with sales and warranty literature indicating that Quadrant homes were “handmade products” that were “not flawless,” the Shimadas claim that the sales literature and their interactions with the sales representative led them to believe that every Quadrant-built home was entirely free from defects:

Q: You expected that every Quadrant home was a zero defect home?

A: Yes.

Q: And what was that expectation based on?

A: Our discussions with Quadrant representatives.

....

Q: Did the Quadrant representative say to you that every Quadrant home was a zero defect home?

A: They said that Quadrant stood behind every Quadrant home.

Q: I understand that. Did the Quadrant representative say to you that every Quadrant home was a zero defect home? And you can answer that by saying "yes" or "no."

A: Yes.

Q: A Quadrant representative said to you that every Quadrant home is a zero defect home?

A: Those words exactly?

Q: Yes. Did they use those words?

A: It was inferred.

Q: How was it inferred? What did they say that inferred to you that every Quadrant home is a zero defect home?

A: By talking about the building practices, the materials, the supervision, the constant supervision, all the checks and balances they have in place.

CP 530-31 (Deposition of Courtney Shimada). Because a Quadrant sales representative "talk[ed] about the building practices, the materials, the supervision, the constant supervision, all the checks and balances they have in place," the Shimadas contend that they believed that *all* Quadrant-

built homes, even those that had previously been sold, lived in, and maintained by others for several years, were flawless. CP 532-34. They suggest that they relied on that belief in purchasing a Quadrant-built home from the Santos, *e.g.*, Br. of Appellants at 33, even though they made their purchase of the Santos home contingent on an inspection, and even though the Shimadas demanded repairs to the Santos home before completing the purchase, *e.g.*, CP 541-543.

B. The Shimadas Asked Quadrant in December 2007 to Investigate Alleged Defects and Then Rejected Quadrant's Offer of Remediation.

Seven years after the Shimadas' house was built by Quadrant and sold to the Santos family, and four years after it was inspected by and re-sold to the Shimadas, the Shimadas discovered a problem with their dryer vent. CP 544. The Shimadas claim that their dryer had always taken an unusually long time to dry clothes and, after an investigation by a Sears service representative, discovered that the dryer vent, which led from the Shimadas' second-floor dryer into the attic, was not properly vented to the outside of the house. CP 544-46, 599. The Shimadas called a third-party vendor to repair the vent, and the repair was made on December 6, 2007. CP 544-46. The Shimadas then asked Quadrant, as the original builder, to reimburse them for the vent repair, the Sears service call, and the cost of a new dryer. CP 557-59, 569-70. Despite having no ongoing legal

obligation with respect to the Shimadas' house (which had been built and sold seven years earlier), and no obligation to the Shimadas (who had purchased the home from the Santos family), Quadrant agreed to the reimbursement, and sent the Shimadas checks totaling \$945.90 the day after receiving receipts. *Id.* The Shimadas agree that Quadrant did not know about any dryer vent problems, or any other specific alleged defect in the Shimadas' home, until the Shimadas brought the dryer vent to Quadrant's attention. CP 547, 600-01; *see also* CP 515-16.

On December 17, 2007, shortly after the Shimadas' dryer vent was repaired, the Shimadas' second-floor washing machine overflowed, causing significant damage to at least three rooms on the second floor, along with the first floor dining room and kitchen. CP 548-49, 561-63. The Shimadas agree that Quadrant was not responsible for the overflow. CP 549. The Shimadas called McClincy's Home Decorating & Water Loss Restoration to make arrangements for repair. CP 550-52. McClincy's removed wet materials from the house, and, among other things, removed the flooring from one second-floor bathroom (the "kids' bathroom") and the kitchen, and portions of the ceiling in the first-floor dining room. CP 552, 562-63, 617-18. The Shimadas' insurance company determined that the washing machine flood caused \$14,278.08 worth of damage. CP 553-54.

According to the Shimadas, they told a McClincy's employee about their previous dryer vent problem, and were allegedly encouraged by that employee to have someone investigate the dryer vent further. CP 555. The McClincy's employee allegedly told the Shimadas that the dryer vent could have been a source of moisture and mold in the attic. *Id.* The Shimadas then contacted Quadrant on December 26, 2007, and asked Quadrant to investigate potential moisture and mold problems caused by the dryer vent. CP 556-57.

Without any legal obligation to do so, Quadrant responded to the Shimadas the very next day (December 27, 2007), and agreed to investigate the Shimadas' house and make any necessary repairs at Quadrant's expense. CP 581-83. Quadrant contacted Bales Cleaning and Restoration, a licensed remediation contractor, and representatives from Quadrant and Bales visited the Shimada house on December 28, 2007. *Id.* Even though significant portions of the house had not been repaired since the December 17, 2007 washer overflow, *the Shimadas did not tell Quadrant or Bales about the overflow.* CP 560, 563. According to Courtney Shimada, "[t]hey didn't ask." CP 560. However, when Quadrant and Bales asked about repairs being made to the kitchen floor (where the flooring had been pulled up because of the washer overflow),

Shimada misleadingly told them that they were “upgrading it” by “putting in hardwood floors.” CP 563.

Quadrant and Bales conducted a visual inspection of the Shimadas’ house, and Bales took moisture readings throughout the house. CP 582. Bales found elevated moisture levels in several locations, *id.*, and, at Quadrant’s expense, set up drying equipment in the kids’ second-floor bathroom and on the first floor near the kitchen, CP 563, 567-68. Quadrant then hired AMEC Earth & Environmental, a certified industrial hygiene firm, to prepare a remediation plan for the house. CP 582.

AMEC inspected the Shimada house on January 2, 2008. CP 564. Courtney Shimada was present for AMEC’s inspection, which covered most of the house. CP 564-66. *Courtney Shimada again did not tell AMEC about the washing machine flood* because “[i]t did not come up in conversation.” CP 568.

AMEC issued a remediation plan on Friday, January 4, 2008, just seven days (including a weekend and the New Year’s holiday) after Quadrant’s initial investigation of the house. CP 582. The report was hand delivered by Quadrant to the Shimadas. *Id.* Quadrant arranged for Bales to implement AMEC’s protocol for cleaning and drying the Shimadas’ house starting on the very next working day—Monday, January 7, 2008. *Id.* AMEC’s protocols included remediation to the attic,

second floor rooms, and the first-floor dining room. *See* CP 584-95. The work included opening walls where elevated moisture had been detected, cleaning and drying all areas with elevated moisture or suspected mold growth, and restoring all affected areas. *See id.* Courtney Shimada asked Quadrant's representative if Quadrant would be willing to undertake additional repairs not listed in the AMEC report, including repair of alleged "nail pops" in the house, an alleged opening in the sheathing underneath the roof's cedar shingles, an alleged disconnected vent that had fallen down in the attic, and removal of an alleged bird's nest in the attic. CP 572. Quadrant's representative agreed to undertake those repairs in addition to the scope of work outlined in the AMEC report. CP 572-73. According to Shimada: "bottom line every time was they'll take care of it." CP 577.

The same day AMEC's remediation plan was delivered, and three days before remediation was set to begin at Quadrant's expense, Courtney Shimada asked that the work be postponed due to his travel schedule and a family wedding. CP 582. Quadrant later contacted the Shimadas several times to reschedule remediation. CP 582-83. The Shimadas *never* responded. *Id.*

In his deposition, Courtney Shimada explained that he did not authorize remediation because he believed Quadrant's proposal to be

inadequate. CP 573-76. The Shimadas contend that it was inadequate primarily because Quadrant allegedly would not perform “pre- or post-remediation air quality testing” of the house. Br. of Appellants at 14-15.

After the Shimadas rejected (in fact, never responded to) Quadrant’s remediation proposal, the Shimadas themselves did not undertake any of their own repairs, or any of the repairs agreed to by Quadrant, as outlined in the AMEC report. CP 578-80. Indeed, the Shimadas admit that “[t]here have been no remedial measures undertaken to address” the so-called “dangerous and damaging conditions in the home . . . aside from” the allegedly “negligent and improperly limited measures undertaken by Quadrant, AMEC, and their contractors.” CP 617-18.

C. The Shimadas Demanded that Quadrant “Buyback Their Home,” and Then Sued Quadrant.

On January 30, 2008, approximately three weeks after the Shimadas asked Quadrant to postpone remediation of their house, the Shimadas’ attorneys sent Quadrant a “Notice of Construction Defects” letter, in accordance with RCW 64.50 (which governs construction defect claims). CP 596-97. The Shimadas demanded that Quadrant “buyback their home” because of the dryer vent (which had been repaired at Quadrant’s expense on December 6, 2007), and an alleged opening in the sheathing underneath their roof’s cedar shingles (which Quadrant had

agreed to repair as part of the remediation plan). *Id.* Having already fixed or agreed to fix the alleged defects outlined in the Shimadas' letter, Quadrant did not agree to buy the Shimadas' house.

The Shimadas subsequently filed this action on April 17, 2008. CP 3-26 (Complaint). The Shimadas allege claims for fraud, violation of the CPA, negligence, negligent misrepresentation, and outrage.¹ *Id.*

D. The Shimadas Allege Mold Growth in Their House.

In their Complaint, filed in 2008, the Shimadas alleged that their house was “unsafe to live in,” CP 11, because “harmful and sickening mold, gases, and other particulate matter have filled the air of the living spaces of” their house, CP 14. However, even the Shimadas' indoor air quality expert, Michelle Copeland, was “not too concerned about” the Shimadas' home when she tested it for mold and other airborne particulate matter in January 2008, shortly after the Shimadas rejected Quadrant's offer of remediation. CP 645. Indeed, she did *not* determine that the Shimadas' house was “unsafe to live in,” and “would have preferred to allow the remediation to take place” in January 2008.² CP 646. She thought that Quadrant's remediation plan “would take care of any mold if

¹ The Complaint also contains a claim for breach of contract, but that claim was directed only at defendant AMEC. CP 24-25. The Shimadas dismissed their claims against AMEC in August 2008, and do not allege a breach of contract claim against Quadrant, WRECO, or Weyerhaeuser. Br. of Appellants at 1.

² The Shimadas indoor air quality expert has, in fact, never determined that the Shimadas' house is “unsafe to live in.” CP 647.

it were properly done,” *id.*, and that the “home was in pretty good shape based on that,” CP 645.

Now, two years later, having never attempted to fix any of the alleged problems remaining in their home, the Shimadas still claim that their home is “contaminated with mold and moisture contamination.” Br. of Appellants at 35. They concede, however, that they *do not know the source of the alleged mold and moisture*. When asked at the summary judgment hearing whether the Shimadas knew the source of the mold or moisture allegedly still present in their home, the Shimadas’ counsel admitted that “[i]t’s unknown where it’s coming from. It’s coming from some condition in their home.” RP at 48:10-13.

E. The Shimadas’ Request for Relief.

Even though the Shimadas rejected Quadrant’s offer of remediation and then undertook no repairs of their own, and even though the Shimadas do not know the cause of any alleged mold contamination still present in their home, the Shimadas seek an order requiring Quadrant to: (1) perform air quality testing of the Shimadas’ home at Quadrant’s expense; (2) disclose the results of that testing to the Shimadas; (3) make all remediation and repairs necessary to eliminate any risk of harm from mold or other harmful particulate matter; and (4) purchase the Shimadas’ home if adequate repairs cannot be performed. CP 25-26. In addition, the

Shimadas seek to recover the cost of any repairs paid for by the Shimadas, and recover the diminished value of their home, if any, resulting from alleged defects. CP 26. They also seek punitive damages, even though punitive damages are not available in this case because they are not explicitly authorized by statute. *Id.*; *Dailey v. N. Coast Life*, 129 Wn.2d 572, 574-75, 919 P.2d 589 (1996).

F. The Shimadas Provide No Evidence of Physical Injury Caused by Quadrant.

In the Complaint's Request for Relief, the Shimadas do not allege damages relating to personal injury. CP 25-26. Unsurprisingly, none of the Shimadas' treating physicians has identified any ailment suffered by any member of the Shimada family that can be linked to the alleged conditions in the Shimada house. CP 662-643 (excerpts from depositions of the Shimadas' treating physicians).

Notwithstanding the opinions of their treating physicians, the Shimadas, in their opposition to Quadrant's motion for summary judgment, offered two expert opinions from physicians suggesting that, as of last summer, the Shimadas were experiencing symptoms associated with exposure to mold or other particulates. *See* CP 753-55, 1180-82. However, only one of those experts had actually examined the Shimadas in person (and examined only the Shimada children), and neither expert

evaluated the Shimadas until approximately a year and a half after the Shimadas rejected Quadrant's offer of remediation. *See id.* Neither expert opined on the cause or source of any alleged mold or other particulate matter in the Shimadas' home. *See id.*

G. Procedural Posture.

On June 25, 2008, pursuant to Washington's statute of repose, RCW 4.16.310, the trial court properly dismissed all claims "arising from the original design, planning, construction, or supervision or observation of construction" of the Shimada house, as well as all claims arising from the alleged nondisclosure of alleged original construction defects. CP 111-12. The trial court did not dismiss claims arising from any remediation and repair activities that took place in December 2007 and January 2008. *Id.* The Shimadas do not challenge those rulings. Br. of Appellants at 1-2.

On September 4, 2009, the trial court granted Quadrant's Motion for Partial Summary Judgment, and dismissed with prejudice all of the Shimadas' claims against Quadrant. CP 1243-44. The trial court also granted summary judgment for WRECO and Weyerhaeuser, CP 1245-46, and denied the Shimadas' motion for a continuance pursuant to CR 56(f), CP 1247-48. Quadrant later voluntarily dismissed without prejudice its

counterclaim for fraud against the Shimadas (relating to their concealment of the washer overflow), and the Shimadas filed this appeal. CP 1249-58.

IV. ARGUMENT

The Shimadas and Quadrant interacted during only two distinct time periods: first, in early 2003, when the Shimadas visited a Quadrant sales representative while shopping for a new home; and second, in December 2007 and January 2008, when Quadrant voluntarily proposed a remediation plan for the Shimadas' home. At neither of those times did Quadrant violate a duty owed to the Shimadas or otherwise cause them harm. For that reason, the trial court properly granted summary judgment in favor Quadrant.

WRECO and Weyerhaeuser never had any interactions with the Shimadas at all. In fact, their only relationship to this action is their parent-subsidiary relationship with Quadrant. Because neither WRECO nor Weyerhaeuser caused the Shimadas any harm, the trial court also properly granted summary judgment dismissing claims against those two entities.

A. Standard of Review.

The Court reviews a grant of summary judgment *de novo* and may affirm summary judgment on any basis supported by the record.

Rounds v. Nellcor Puritan Bennett, Inc., 147 Wn. App. 155, 161-62,

194 P.3d 274 (2008). Summary judgment is appropriate when the pleadings and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). A court properly grants summary judgment when reasonable minds could reach but one conclusion on the evidence. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003).

B. The Shimadas' Allegations Relating to Remediation Activities in December 2007 and January 2008 Do Not Support their Legal Claims.

The Shimadas make two general allegations with respect to Quadrant's proposed repair and remediation activities in December 2007 and January 2008: (1) that Quadrant did not disclose that other Quadrant homes allegedly suffered from defects, including defects that resulted in mold growth, *e.g.*, Br. of Appellants at 33-34; and (2) that Quadrant devised an inadequate plan to repair and remediate the Shimadas' home, *e.g.*, *id.* at 23. Neither of those allegations supports a claim for fraud, negligent misrepresentation, negligence, violation of the CPA, or outrage.

1. The Shimadas Were Not Harmed by Quadrant's Alleged Failure to Disclose Defects in Other Quadrant Houses, and In Any Event, No Duty to Disclose Existed.

To prove fraud, negligent misrepresentation, negligence, violation of the CPA, and outrage, the Shimadas must prove that Quadrant caused

the Shimadas harm.³ Here, however, the Shimadas plainly were *not* harmed by Quadrant’s alleged failure, in 2007 and 2008, to disclose defects (including defects resulting in mold) alleged to exist in *other* Quadrant homes. In fact, the Shimadas could only have been harmed by such “nondisclosures” if the “nondisclosures” had caused the Shimadas not to remediate their house, or had induced them to remediate the house improperly. That did not happen here. To the contrary, the Shimadas and Quadrant initially cooperated in crafting an appropriate remediation plan, and the Shimadas then *rejected* that plan because they believed it to be *inadequate*, not *unnecessary*. The Shimadas clearly were not deterred by Quadrant’s alleged “nondisclosures.”

Moreover, the Shimadas could not possibly have been harmed by “nondisclosures” because the Shimadas admit, in their Complaint, that they learned about other alleged defects in other Quadrant homes through “their own inquiry” *before* asking Quadrant to investigate their house in December 2007:

When Plaintiffs through their own inquiry became aware that these conditions widely affect Quadrant homes, they

³ Harm caused by Quadrant is an essential element of each legal claim asserted by the Shimadas. *E.g.*, *N. Pac. Plywood v. Road Builders*, 29 Wn. App. 228, 234, 628 P.2d 482 (1981) (fraud); *Lawyers Title Ins. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002) (negligent misrepresentation); *Mathis v. Ammons*, 34 Wn. App. 411, 415-16, 928 P.2d 431 (1996) (negligence); *Mayer v. Sto Indus., Inc.*, 123 Wn. App. 443, 456-59, 98 P.3d 116 (2004), *rev'd in part on other grounds*, 156 Wn.2d 677, 132 P.3d 115 (2006) (CPA); *Reid v. Pierce County*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998) (outrage).

requested that Quadrant investigate their home and test to determine whether the home was contaminated with mold or other harmful airborne particulate matter.

CP 12 (Complaint).⁴ Armed with that alleged knowledge, the Shimadas could not have relied to their detriment on Quadrant's "nondisclosures," and therefore cannot state a claim for fraud, negligent misrepresentation, negligence, violation of the CPA, or outrage based on those "nondisclosures." *See, e.g., Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 524-25, 799 P.2d 250 (1990) (to state a claim for fraudulent concealment, an undisclosed fact must be "unknown" to the other party); *Richland Sch. Dist. v. Mabton Sch. Dist.*, 111 Wn. App. 377, 385, 45 P.3d 580 (2002) (duty to disclose arises only if the other party might rely on it "to act or refrain from acting in a business transaction"); *Mayer*, 123 Wn. App. at 458 (to state a claim for violation of CPA, plaintiff's damages must have been caused by reliance on an unfair or deceptive act of defendant).

Even if the Shimadas were harmed by "nondisclosures," the Shimadas have not, and cannot, identify a legal duty to disclose *other* alleged defects in *other* Quadrant homes under the circumstances presented here. For example, a party is obligated to disclose a fact only if

⁴ These are the Shimadas' own words. Quadrant vigorously disagrees with the Shimadas' assertion that any of the alleged problems in the Shimadas' house "widely affect Quadrant homes."

that party “knows [the nondisclosure of that fact] may justifiably induce the other to act or refrain from acting in a business transaction.” *Colonial Imports, Inc. v. Carlton Nw., Inc.*, 121 Wn.2d 726, 731, 853 P.2d 913 (1993) (quoting Restatement (Second) of Torts § 551 (1977)). Given the Shimadas’ active engagement in developing the remediation protocol for their home, Quadrant had no reason to believe that the Shimadas were neglecting necessary repairs simply because they might be uninformed about *other* defects alleged to exist in *other* homes.

Moreover, the alleged defects allegedly concealed by Quadrant had nothing to do with the misvented dryer in the Shimadas’ home. The Shimadas claim that, by late 2007, Quadrant knew that its homes “commonly suffered from water leaks, water damage, mold and mold contamination, and other construction and environmental defects requiring very expensive remediation and repair.”⁵ Br. of Appellants at 7. The Shimadas then cite to a number of customer service documents produced by Quadrant involving the repair of water-related problems including, for example, a leak in a crawl space, CP 871, a leak in a garage, CP 898, a leak caused by a defective bath tub, CP 990, and a leak caused during a

⁵ “Water leaks, water damage, mold and mold contamination” are *not* construction defects. They may be *symptoms* of construction defects, but are not themselves construction defects. In other words, both an improperly installed window and a faulty toilet may result in water damage or mold, but the improperly installed window and faulty toilet are not similar construction defects simply because they cause a similar problem.

dishwasher installation, CP 1007.⁶ *Id.* Even though Quadrant has built thousands of homes in Washington, the Shimadas do *not* claim that any other Quadrant-built home ever had an improperly installed dryer vent. Br. of Appellants at 1-43. Even if such a problem had ever existed in another Quadrant-built home, the Shimadas do not explain how the disclosure of a similar defect in another house would have aided them in repairing their own house, where the misvented dryer had already been discovered and fixed.

The Shimadas also cite a series of documents relating to mold discovered in Quadrant houses under construction in the fall and early winter of 2006. Br. of Appellants at 9 (citing CP 263-298). In those cases, heavy rains during construction led to suspected mold growth that was identified and cleaned before home construction was finished. CP 263-298. Again, there is no way that the Shimadas' remediation efforts in January 2008 were impeded by Quadrant's failure to disclose those unrelated instances even if Quadrant was legally required to do so (which it was not).⁷

⁶ None of the customer service documents cited by the Shimadas establishes *fault* for any of these alleged problems in other Quadrant homes. *See* CP 187-298, 868-1172. They show only that Quadrant undertook to investigate or fix problems experienced by homeowners, as Quadrant agreed to do, gratuitously, for the Shimadas.

⁷ The Shimadas also cite deposition testimony from an unrelated previous case to falsely suggest that Quadrant has a longstanding policy of concealing mold from homeowners. *E.g.*, Br. of Appellants at 10-11. The testimony cited by the Shimadas

In short, Quadrant had no duty to disclose to the Shimadas defects that allegedly existed in other Quadrant homes. Even if such a duty existed, the alleged “nondisclosures” plainly did not prevent the Shimadas from taking steps to remediate alleged defects in their own home, or cause them to remediate improperly.

2. The Shimadas Were Not Harmed by Quadrant’s Allegedly Inadequate Remediation Plan.

The Shimadas also claim that Quadrant owed them a “duty to conduct timely and thorough investigation, testing, remediation, decontamination and repair of their Quadrant home,” and that Quadrant failed to meet that duty by not conducting pre- and post-remediation air quality testing. CP 20; Br. of Appellants at 14-15. The Shimadas do not and cannot identify any source of this alleged duty. *See id.* In fact, Quadrant had no such duty in December 2007.

Instead, Quadrant gratuitously agreed to investigate the Shimadas’ home and repair any problems that had resulted from the dryer vent.

Under Washington law, “[a] person who undertakes, albeit gratuitously, to

relates to mold that was cleaned from building materials in homes under construction, and the deponent in that instance explained that he did not tell future homeowners about mold that was cleaned up during construction “[b]ecause it was clean before they would take occupation of the home;” much the same way he would not tell a homeowner “that they had a broken window” that was replaced before home construction was completed. CP 195-96. This testimony is especially irrelevant here, where, not only did the Shimadas not buy a newly-constructed home from Quadrant, they bought no home from Quadrant at all.

render aid to or warn a person in danger is required . . . to exercise reasonable care in his or her efforts.” *Folsom v. Burger King*, 135 Wn.2d 658, 676, 958 P.2d 301 (1998). Such a person breaches his duty to exercise reasonable care if he “increases the risk of harm to those he or she is trying to assist.” *Id.* The duty to exercise reasonable care also arises when a person “voluntarily promises to perform a service for another in need” and thereby “induces reliance and causes the promisee to refrain from seeking help elsewhere.” *Id.*

Here, even if Quadrant voluntarily assumed a duty to exercise reasonable care in remediating the Shimadas’ house, Quadrant did not breach that duty. The Shimadas, who did not buy their house from Quadrant, asked Quadrant to investigate their home on December 26, 2007, and Quadrant conducted the investigation two days later, on December 28, 2007. Based on that investigation, Quadrant hired a certified industrial hygiene firm to prepare a remediation plan, which Quadrant delivered within seven days (including a weekend and the New Year’s holiday). The Shimadas quickly rejected that plan as being, in their view, inadequate, and have done *nothing* to repair their home since. Quadrant therefore did not “increase the risk of harm” to the Shimadas or induce detrimental reliance by them. The Shimadas simply rejected Quadrant’s plan, and chose to rely on their own judgment instead. For

that reason, the Shimadas cannot state a claim for negligence (breach of duty to act reasonably) as a matter of law.

Nor can the Shimadas establish fraud, negligent misrepresentation, or violation of the CPA. Reliance is a necessary element of each of those causes of action, and the Shimadas plainly did not rely on Quadrant in January 2008. *E.g.*, *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996) (reliance a required element of fraud); *Lawyers Title Ins.*, 147 Wn.2d at 545 (reliance a required element of negligent misrepresentation); *Mayer*, 123 Wn. App. at 458 (reliance establishes causation for purposes of CPA). To the contrary, the Shimadas *rejected* Quadrant's offer of remediation because the Shimadas believed Quadrant's plan to be inadequate. The Shimadas therefore relied on their own judgment, not Quadrant's, and are solely responsible for the consequences of that choice.

Finally, the Shimadas did not suffer harm as a result of Quadrant's remediation plan because the Shimadas rejected the plan before it could be implemented. Moreover, it was postponed and rejected the same day it was proposed, so the Shimadas did not waste any time (and thereby incur injury) by "relying on" Quadrant in the first place. In fact, the Shimadas obviously were not worried about their health or the quick repair of their home because they rejected Quadrant's prompt offer of remediation, and

still have undertaken no remediation of their own. Because Quadrant's allegedly "inadequate" remediation plan did not cause the Shimadas harm, the Shimadas cannot, as a matter of law, establish fraud, negligent misrepresentation, negligence, violation of the CPA, or outrage.

C. The Shimadas' Allegations Relating to Marketing and Sales Activities in 2003 Do Not Support the Shimadas' Legal Claims.

The Shimadas also make two basic claims with respect to Quadrant's marketing and sales activities in 2003: (1) they suggest that, during preliminary sales meetings with the Shimadas, Quadrant had a duty to disclose all defects alleged to exist in Quadrant-built homes, e.g., Br. of Appellants at 21-22; and (2) they claim that they justifiably and detrimentally relied on their own inference that Quadrant homes were "zero defect" homes, that they reasonably made that inference based on Quadrant's sales and marketing representations, and that they justifiably relied on that inference when buying the Santos home, e.g., *id.* at 11-12. None of the evidence relating to those allegations creates a genuine issue of material fact with respect to the Shimadas' claims for fraud, negligent misrepresentation, negligence, violation of the CPA, or outrage.

1. Quadrant Did Not Breach a Duty to Disclose in 2003.

Under Washington statutes and case law, a home seller is required to disclose specific defects known by the seller to exist in the particular

home being sold. *E.g.*, RCW 64.06.020 (requiring disclosure by seller of known defects in home being sold); *Obde v. Schlemeyer*, 56 Wn.2d 449, 453, 353 P.2d 672 (1960) (seller knew about, but did not disclose, termite problem in home being sold). That well-established disclosure requirement does not apply in this case because (1) the Shimadas did not buy a house from Quadrant, and (2) Quadrant knew nothing in 2003 about specific defects allegedly existing in the Santos house (which the Shimadas ultimately purchased). CP 515-16. The Shimadas do not dispute those facts.

Nevertheless, the Shimadas contend that, when they were meeting with Quadrant sales representatives in 2003, Quadrant was required to disclose defects that were alleged to exist in other previously-built Quadrant homes. *E.g.*, Br. of Appellants at 21-22. They focus particularly on alleged defects involving “water leaks, water damage, mold and mold contamination.” *Id.* at 7. The Shimadas cite no legal authority to support such a burdensome disclosure requirement. In fact, RCW 64.06.020 requires no such disclosures, and each case cited by the Shimadas confirms that sellers must disclose to buyers only facts material to the transaction; *i.e.*, “material fact[s] adversely affecting the property and not likely to be easily discovered by the buyers.” *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 214-16, 969 P.2d 486 (1998); *see also* Br.

of Appellants at 19-20 (citing *Carlile v. Harbour Homes*, 147 Wn. App. 193, 198-99, 212-13, 194 P.3d 280 (2008) (homebuilder allegedly concealed defects relating to sealing and weatherization from plaintiffs who all suffered from common defect); *Griffith*, 93 Wn. App. at 214-15 (homebuilder sued for concealing defects in paint used on all plaintiffs' homes); *McRae v. Bolstad*, 101 Wn.2d 161, 162-63, 676 P.2d 496 (1984) (home seller sued for concealing from buyer known defects with sewage and drainage)).

The Shimadas also do not cite legal authority requiring home sellers to make specific disclosures to persons who do not actually buy a house from them. The Shimadas imply that *Carlile v. Harbour Homes* also involved subsequent purchasers like the Shimadas, but the facts in *Carlile* were very different from the facts here. See Br. of Appellants at 24-28. Although 11 of the plaintiff homeowners in *Carlile* were subsequent purchasers, like the Shimadas, who “purchased their homes from sellers who had purchased new homes directly from” the homebuilder, all of the subsequent purchasers in *Carlile* “obtained assignments of all claims from those original purchasers,” and therefore stood in the shoes of a direct purchaser. *Carlile*, 147 Wn. App. at 199. Indeed, this Court, in *Carlile*, evaluated the validity of the plaintiffs’ Consumer Protection Act claims, for example, only after having

determined that the assignments of the CPA and other claims were valid. *Id.* at 207-11. Here, by contrast, the Shimadas did not obtain an assignment of any claims that might belong to the Santosos.

The Shimadas also cite *Holiday Resort Community Ass'n v. Echo Lake Assocs., LLC*, 134 Wn. App. 210, 135 P.3d 499 (2006), and *Haberman v. Wash. Public Power Supply Sys.*, 109 Wn.2d 107, 744 P.2d 1032 (1987), to argue that they, as subsequent purchasers, can maintain an action against Quadrant, but neither *Holiday Resort* nor *Haberman* supports that proposition. Br. of Appellants at 29. First, neither *Holiday Resort* nor *Haberman* involves the sale of real property, which, as discussed above, is governed by specific disclosure requirements, including the requirements found in RCW 64.06.020. *Holiday Resort*, 134 Wn. App. at 214-28 (action involved drafting of mobile home park rental agreement); *Haberman*, 109 Wn.2d at 114-90 (action involved a bond issuance). Second, neither case requires a home seller, like Quadrant, to disclose to *all* prospective purchasers *all* defects alleged to have existed in previously-sold homes (homes that the seller could not possibly still sell to the prospective buyer). *Id.* Indeed, no legal authority requires such disclosures, which would be burdensome in the extreme.

In short, under Washington law, a seller of real estate must disclose to a buyer specific defects known to exist in the property being

sold. There is no legal duty to disclose defects allegedly affecting homes other than the home being sold. Because Quadrant neither sold a house to the Shimadas nor knew of any existing defects in the house ultimately purchased by the Shimadas, the Shimadas cannot state claims against Quadrant based on alleged “nondisclosures.”

2. The Shimadas Did Not Reasonably Infer That Quadrant Homes Were Flawless or Justifiably Rely on That Inference.

Even if Quadrant were required to make general disclosures about problems alleged to exist in other Quadrant-built homes, Quadrant met that obligation during its sales meetings with the Shimadas in 2003. In fact, the sales materials given to the Shimadas made clear that all Quadrant homes are handmade products that are neither “flawless” nor “perfect.” CP 603. Moreover, Quadrant’s own warranties indicated that defects may exist in newly built homes, and that Quadrant ensures the quality of its homes by promising to fix any defects according to the warranties, not by offering the false promise of a flawless home in the first instance. *See* CP 602-15. Thus, even assuming that *any* reasonable person could ever justifiably infer that *all* homes built by *any* builder were defect-free, the Shimadas were not entitled to make their “zero defect” inference here, when they were explicitly told otherwise by Quadrant. *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 832, 959 P.2d 651

(1998) (as a matter of law, Seafirst Bank could not reasonably rely on the accuracy of an audit marked “preliminary draft, for discussion purposes only”). Having disclosed that Quadrant homes are not defect-free, Quadrant did not misrepresent facts for purposes of fraud, negligent misrepresentation, or the CPA, each of which requires proof of false or deceptive statements. *E.g.*, *N. Pac. Plywood*, 29 Wn. App. at 234 (elements of fraud); *Lawyers Title Ins.*, 147 Wn.2d at 545 (elements of negligent misrepresentation); *Mayer*, 123 Wn. App. at 456-59 (elements of CPA claim).

Even if Quadrant had *not* told the Shimadas that Quadrant homes are imperfect, the Shimadas were not entitled to rely on Quadrant’s general assertions of quality. It is well-settled that “[r]epresentations as to mere matters of opinion” are not actionable. *E.g.*, *Grant v. Huschke*, 74 Wash. 257, 263, 133 P. 447 (1913). In fact, “the purchaser of an ordinary commodity is not justified in relying upon the vendor’s opinion

of its quality or worth.” Restatement (Second) of Torts § 542 cmt. d (1977). This is “particularly” true

of loose general statements made by sellers in commending their wares, which are commonly known as “puffing,” or “sales talk.” It is common knowledge and may always be assumed that any seller will express a favorable opinion concerning what he has to sell; and when he praises it in general terms, without specific content or reference to facts, buyers are expected to and do understand that they are not entitled to rely literally upon the words. “Such statements, like the claims of campaign managers before election, are rather designed to allay the suspicion which would attend their absence than to be understood as having any relation to objective truth.” *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir. 1918) (Learned Hand, J.).

Id. cmt. e. Under this long-established rule of law, Quadrant’s general assertions of quality cannot give rise to liability for fraud, negligent misrepresentation, or violation of the CPA.⁸

Moreover, it is evident that the Shimadas did not *actually* rely on Quadrant’s assertions of quality. In fact, the Shimadas made their purchase of the Santos home contingent on the outcome of an inspection by a professional, independent inspector. If the Shimadas disapproved the inspection, “there was no deal.” CP 539. After the inspection revealed flaws, the Shimadas agreed to purchase the Santos home only after the Santos family agreed to fix the flaws identified by the Shimadas. CP 541-

⁸ Courtney Shimada implicitly recognized this common sense principle. In his deposition, he described Quadrant’s marketing literature as being part of Quadrant’s “up-sell,” and complained that Quadrant did not temper its “up-sell” with extensive descriptions of previously discovered defects in other Quadrant homes. CP 525.

43. Because the Shimadas made their purchase of the Santos house contingent on an inspection, they cannot claim to have relied to their detriment on Quadrant's general assertions of quality, and cannot prove fraud, negligent misrepresentation, or violation of the CPA. *E.g., Stiley*, 130 Wn.2d at 505 (reliance element of fraud claim); *Lawyers Title Ins.*, 147 Wn.2d at 545 (reliance element of negligent misrepresentation); *Mayer*, 123 Wn. App. at 458 (reliance establishes causation element of CPA claim).

D. The Shimadas' Claim for Outrage is Baseless.

The Shimadas' claim for outrage is even more baseless than the Shimadas' other legal claims, and is utterly inconsistent with the facts presented here. To establish outrage, the Shimadas must prove conduct "so outrageous in character, and so extreme in degree" that it goes "beyond all possible bounds of decency," and can only "be regarded as atrocious, and utterly intolerable in a civilized society." *Reid*, 136 Wn.2d at 202 (quoting *Grimshy v. Samson*, 85 Wn.2d 52, 59-60, 530 P.2d 291 (1975)). In addition, the Shimadas must prove that they suffered "severe emotional distress" that was intentionally or recklessly caused by Quadrant. *Id.*

Here, the Shimadas cannot and do not offer any evidence of severe emotional distress suffered by anyone in their family. Even if they could,

the facts do not reveal conduct “beyond all possible bounds of decency,” or even intentional or reckless bad behavior by Quadrant. To the contrary, although not legally obligated to do so, Quadrant made a prompt, responsive, and good faith effort to help the Shimadas, and was rewarded with a lawsuit. The trial court properly found, as a matter of law, that the elements of outrage cannot be met on these facts.

E. The Shimadas Cannot Prove Damages Caused by Quadrant.

Finally, as a general matter, the Shimadas cannot prove damages caused by Quadrant. The Shimadas contend that their home “is now contaminated with mold and moisture contamination,” and that they have suffered harm as a result, but admit that they do not know the source of any alleged mold in their home. Br. of Appellants at 33-35. When asked during the summary judgment hearing if the Shimadas knew the source of the mold allegedly afflicting their house, the Shimadas’ counsel admitted that “[i]t’s unknown where it’s coming from. It’s coming from some condition in their home.” RP at 48:10-13. Without more, the Shimadas have no basis to seek damages from Quadrant. Moreover, even if evidence showed that mold existed and that its source was an original construction defect attributable to Quadrant, claims arising from original

construction defects have long since been dismissed pursuant to Washington's statute of repose.

Regardless, Quadrant agreed, in December 2007 and January 2008, to investigate the Shimadas' home and repair even alleged defects that were unrelated to the dryer vent, moisture, or mold. The Shimadas rejected Quadrant's offer. They cannot now complain that Quadrant has somehow caused them harm. They certainly are not entitled to recover for any injury incurred after they rejected remediation in January 2008, because the Shimadas have failed entirely to mitigate their damages since that time. By their own admission, they have undertaken no efforts to repair the problems that allegedly exist in their house. Under Washington law, the Shimadas were required to take reasonable steps to mitigate their damages, and were not entitled simply to await the outcome of this litigation. *Hyde v. Wellpinit Sch. Dist.*, 32 Wn. App. 465, 468-69, 648 P.2d 892 (1982).

F. The Court Properly Granted Summary Judgment In Favor of WRECO and Weyerhaeuser.

WRECO and Weyerhaeuser are Quadrant's parent companies. Quadrant is a wholly-owned subsidiary of WRECO, and WRECO is a wholly owned subsidiary of Weyerhaeuser. CP 665-66, 671-72. The Shimadas claim that the trial court should not have granted summary

judgment for WRECO and Weyerhaeuser and, instead, should have granted the Shimadas' request for a continuance under CR 56(f).

Rule 56(f) provides:

Should it appear from the affidavits of a party opposing the [summary judgment] motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

CR 56(f). A trial court's denial of a CR 56(f) motion may be reversed only for abuse of discretion. *Mannington Carpets, Inc. v. Hazelrigg*, 94 Wn. App. 899, 902, 873 P.2d 1103 (1999). A court abuses its discretion if it acts on untenable grounds or for untenable reasons. *Id.*

A court may deny a motion for continuance under CR 56(f) when (1) the moving party does not offer a good reason for the delay in obtaining evidence; (2) the moving party does not state what evidence would be established through additional discovery; or (3) the evidence sought would not raise a genuine issue of material fact. *Id.* at 903. Here, neither the evidence presented nor the evidence purportedly sought (which is described by the Shimadas only in vague terms) would raise a genuine issue of material fact with respect to any claim alleged by the Shimadas

against WRECO and Weyerhaeuser. Accordingly, the Court should affirm the trial court's grant of summary judgment.

1. The Shimadas Have Not and Cannot Produce Evidence Sufficient to Pierce the Corporate Veil.

At the summary judgment hearing below, the Shimadas' counsel admitted that WRECO and Weyerhaeuser had no direct interactions with the Shimadas, and that all of the relevant interactions in this matter were between the Shimadas' and Quadrant. RP 14; *see also* CP 665-66, 671-72. Because WRECO and Weyerhaeuser are separate legal entities from Quadrant, they cannot be held liable for Quadrant's acts or omissions. "It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 398, 47 P.3d 556 (2002) (quoting *United States v. Bestfoods*, 524 U.S. 51, 61, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998)).

Therefore, in order to hold Weyerhaeuser and WRECO liable for the acts or omissions of Quadrant, the Shimadas must produce evidence that would support piercing the corporate veil. To pierce the corporate veil, the Shimadas must establish two essential factors: (1) the corporate form was intentionally used to violate or evade a duty; *and* (2) disregard

of the corporate veil is necessary and required to prevent an unjustified loss to the Shimadas. *Dickens v. Alliance Analytical Labs., LLC*, 127 Wn. App. 433, 440-41, 111 P.3d 889 (2005). Summary judgment for a parent corporation is “appropriate if the plaintiff fails to show evidence of ‘either the requisite manipulation, *or* the perpetration of fraud on plaintiffs.’” *Minton*, 146 Wn.2d at 398-99 (emphasis added) (refusing to pierce the corporate veil and granting summary judgment to parent where subsidiary and parent shared common corporate headquarters and subsidiary labeled itself as a subsidiary of parent).

Here, the Shimadas cannot produce evidence that WRECO and Weyerhaeuser are intentionally using the corporate form to evade a duty. Nor do they suggest that such evidence would have been forthcoming had consideration of WRECO’s and Weyerhaeuser’s motion for summary judgment been continued pursuant to CR 56(f). Br. of Appellants at 38-43. The Shimadas also have not produced evidence that piercing the corporate veil is necessary to prevent a loss to the Shimadas and, again, do not suggest that such evidence is available to them even with additional discovery. *Id.* Quadrant is not a “sham” entity created improperly to shield WRECO and Weyerhaeuser from liability. In fact, Quadrant is the largest homebuilder in Washington State. CP 670. The Shimadas admit as much in both their Complaint and their Brief. CP 5; Br. of Appellants

at 3 (“Quadrant has produced and sold thousands of homes in Washington”). Because the Shimadas have not and cannot prove that Quadrant is a penniless “sham” entity created to perpetrate a fraud, they cannot pierce the corporate veil and hold WRECO and Weyerhaeuser responsible for Quadrant’s actions.⁹

2. The Shimadas Have Not and Cannot Produce Evidence of Direct Liability on the Part of WRECO and Weyerhaeuser.

Because the Shimadas cannot hold WRECO and Weyerhaeuser responsible for actions allegedly attributable to Quadrant, the Shimadas must produce direct evidence that WRECO and Weyerhaeuser themselves are liable for fraud, violation of the CPA, negligence, negligent misrepresentation, and outrage. The Shimadas have not, and cannot, produce any such evidence.

a. The Shimadas can produce no evidence of fraud.

To establish a fraud claim against WRECO and Weyerhaeuser, the Shimadas must produce evidence of (1) representations of existing fact made by WRECO and Weyerhaeuser to the Shimadas; (2) the representations’ materiality; (3) their falsity; (4) knowledge by WRECO

⁹ As explained above, even if WRECO and Weyerhaeuser could be held responsible for Quadrant’s actions, Quadrant’s alleged acts do not give rise to viable claims for fraud, negligent misrepresentation, negligence, violation of the CPA, or outrage.

and Weyerhaeuser of the representations' falsity; (5) WRECO's and Weyerhaeuser's intent that the representations be acted on by the Shimadas; (6) the Shimadas' ignorance of the falsity of the representations; (7) the Shimadas' reliance on the false representations; (8) the Shimadas' right to rely on the representations; and (9) consequent damages. *N. Pac. Plywood*, 29 Wn. App. at 232.

The Shimadas base their claim for fraud on statements made to them by Quadrant in early 2003, December 2007, and January 2008. CP 15-18. The Shimadas do not contend that any of those allegedly fraudulent statements were made by WRECO or Weyerhaeuser. Indeed, the Shimadas never interacted with WRECO and Weyerhaeuser, so the Shimadas cannot produce evidence sufficient to establish any of the elements required to prove fraud. The Shimadas also do not suggest that they will be able to produce any such evidence even with additional discovery. Br. of Appellants at 38-43. For that reason, summary judgment for WRECO and Weyerhaeuser is appropriate.

b. The Shimadas can produce no evidence that WRECO and Weyerhaeuser violated the CPA.

To prove a violation of the CPA by WRECO and Weyerhaeuser, the Shimadas must offer evidence of (1) unfair or deceptive acts by WRECO and Weyerhaeuser, (2) that occurred in trade or commerce,

(3) that affect the public interest, and (4) that caused injury to the Shimadas' business or property. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986). The Shimadas can offer *no* such evidence, and do not explain what evidence would support a CPA claim even if they had additional discovery. Br. of Appellants at 38-43. WRECO and Weyerhaeuser have had no interaction with the Shimadas, have done nothing to injure them, and are, therefore, entitled to summary judgment.

c. The Shimadas can produce no evidence that WRECO and Weyerhaeuser were negligent.

To prove negligence on the part of WRECO and Weyerhaeuser, the Shimadas must identify a duty owed to the Shimadas by WRECO and Weyerhaeuser, breach of that duty by WRECO and Weyerhaeuser, and damages to the Shimadas proximately caused by that breach. *Mathis*, 84 Wn. App. at 415-16. The Shimadas suggest that WRECO and Weyerhaeuser are directly liable for negligence because they were allegedly able to “control Quadrant’s activities” and failed to take necessary action despite allegedly having “longstanding knowledge . . . of mold and moisture related problems in Quadrant homes.” Br. of Appellants at 38-39. The Shimadas cite only two cases to support that legal theory: *Minton v. Ralston Purina Co.* and *Taliesen Corp. v. Razore*

Land Co. Id. at 38 n.10. Neither case supports a theory of liability against WRECO or Weyerhaeuser here.

In *Minton*, a case involving liability for a workplace accident, the court properly conducted only a veil piercing analysis to assess a parent company's liability, and held that the parent company was *not* liable for the acts of its subsidiary because the plaintiff produced no evidence that the parent and subsidiary "were attempting to perpetrate a fraud . . . by maintaining separate identities." *Minton*, 146 Wn.2d at 399. In *Taliesen*, a case involving responsibility for cleaning an oil spill, the court never assessed the liability of a parent company at all, and merely interpreted the word "control" as it is used specifically in Washington's Model Toxics Control Act, RCW 70.105D.020(12)(a), which imposes clean-up liability "on any person who has 'any control' over a facility." *Taliesen v. Razore Land Co.*, 135 Wn. App. 106, 126-27, 144 P.3d 1185 (2006). *Taliesen* therefore sheds no light on the Shimadas' apparent theory of liability here.

WRECO and Weyerhaeuser cannot be held liable for acts or omissions allegedly attributable to Quadrant without piercing the corporate veil, and neither WRECO nor Weyerhaeuser owed or breached a legal duty to the Shimadas, with whom WRECO and Weyerhaeuser had no interactions. Additional discovery under CR 56(f) will not change

those facts. Summary judgment for WRECO and Weyerhaeuser is appropriate.

d. The Shimadas can produce no evidence that WRECO and Weyerhaeuser made a negligent misrepresentation to the Shimadas.

To establish their claims of negligent misrepresentation against WRECO and Weyerhaeuser, the Shimadas must produce evidence (1) that WRECO and Weyerhaeuser supplied false information for the guidance of the Shimadas in a business transaction; (2) that WRECO and Weyerhaeuser knew or should have known that the information would be used by the Shimadas to guide a business transaction; (3) that WRECO and Weyerhaeuser were negligent in obtaining or communicating false information; (4) that the Shimadas relied on that false information; (5) that the reliance was justified; and (6) and that the false information was the proximate cause of damages to the Shimadas. *Lawyers Title Ins.*, 147 Wn.2d at 545. Again, the Shimadas simply cannot produce evidence sufficient, as a matter of law, to establish negligent misrepresentation because they had no interactions or communications with WRECO or Weyerhaeuser. A continuance under CR 56(f) would not change that fact. Br. of Appellants at 38-43. Summary judgment for WRECO and Weyerhaeuser is appropriate.

e. The Shimadas cannot adduce evidence supporting a claim for outrage.

Finally, the Shimadas can establish the claim of outrage only by identifying (1) extreme or outrageous conduct committed by WRECO and Weyerhaeuser; (2) that was intentionally or recklessly done; and (3) that resulted in severe emotional distress to the Shimadas. *Reid*, 136 Wn.2d at 202. As explained above, the extreme or outrageous conduct must have “been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.” *Id.* The Shimadas can offer no evidence of such behavior by WRECO or Weyerhaeuser, and no evidence of their own severe emotional distress. Br. of Appellants at 38-43. Accordingly, as with all of the Shimadas’ legal claims, the Court should grant WRECO and Weyerhaeuser summary judgment on the Shimadas’ claim for outrage.

V. CONCLUSION

Quadrant, WRECO, and Weyerhaeuser have never caused the Shimadas any harm or breached any duties owed to them; not in 2003, not in December 2007, and not in January 2008. To the contrary, Quadrant agreed, when contacted by the Shimadas in December 2007, to pay for the repair of a dryer vent and the cost of a new dryer, even though Quadrant

had no legal obligation to do so. Quadrant then agreed to identify and make other necessary repairs to the Shimadas home—again at no cost to the Shimadas, and again with no legal obligation to do so. For its efforts, Quadrant was rewarded with this baseless lawsuit. The Shimadas' claims against WRECO and Weyerhaeuser, which had no interactions with the Shimadas, are even more unfounded.

The Shimadas also do not and cannot identify any legal duties that were owed to them and breached by Quadrant during their limited sales and marketing interactions in 2003. They certainly cannot state viable legal claims simply by focusing on irrelevant defects alleged to exist in *other* Quadrant-built houses, and blaming Quadrant for not disclosing them.

Because the Shimadas can identify no legal duties that were breached by Quadrant, WRECO, or Weyerhaeuser, and can identify no harm caused to the Shimadas by those three entities, the trial court properly entered summary judgment for Quadrant, WRECO, and Weyerhaeuser. Those judgments should be affirmed.

RESPECTFULLY SUBMITTED this 26th day of March, 2010.

HILLIS CLARK MARTIN & PETERSON, P.S.

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CERTIFICATE OF SERVICE

On the date indicated below, I hereby certify that I caused to be served upon all counsel of record, via legal messenger service, a true and correct copy of the foregoing document.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 26 day of March, 2010, at Seattle, Washington.

Brenda K. Partridge
Brenda K. Partridge