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STATE OF WASHINGTON  
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No. 100986-1

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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DARRELL R. AXON and TERESA E. MAHONEY-AXON,  
husband and wife, and the marital community composed  
thereof,

Petitioners,

v.

KEYSTONE RV COMPANY, a foreign corporation,

Respondent.

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**RESPONDENT'S ANSWER TO  
PETITION FOR REVIEW**

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## **I. INTRODUCTION**

Appellants Darrell and Teresa Axon ask this Court to review whether the Court of Appeals erred “by relying on Keystone’s ‘buyer beware’ defense.” Appellants’ argument is a pure strawman fallacy, as Respondent Keystone RV Company (“Keystone”) has never raised a “buyer beware” defense at any point in this litigation. Moreover, neither the trial court nor the Court of Appeals applied (or even discussed) “buyer beware” in dismissing Appellants’ claims against Keystone.

Rather, Keystone and the lower courts properly applied the elements of Washington’s Consumer Protection Act (“CPA”) and found that Appellants could not establish either: (1) that Keystone engaged in unfair or deceptive conduct; or (2) that Keystone caused Appellants’ alleged injuries. Appellants here fail to establish that the lower courts erred in reaching these conclusions. Accordingly, Keystone asks this Court to deny review of Appellants’ Petition.

## **II. COURT OF APPEALS DECISION**

The Court of Appeals evaluated Appellants’ claim that Keystone engaged in unfair and deceptive acts in violation of Washington’s CPA and Auto Dealer’s Practices Act (“ADPA”). Appellants claim they were deceived by Keystone into purchasing a RV to live in full time because Keystone did not

disclose the risk of mold growth following prolonged occupancy in a recreational vehicle.

Appellants first contend that Keystone published a brochure which deceptively advertised its Fuzion RV—the brand purchased by Appellants—as intended for residential living. The Court of Appeals rejected this argument, stating:

Inherent in the phrase “recreational vehicle” is the concept that an RV is for recreational living, not residential living. The Fuzion’s recreational character is even more blatant: it is specifically described as a “toy hauler” on the cover of and throughout the brochure. The imagery of the brochure shows people using the Fuzion to camp on a beach with their “toys” – a boat, a small off-road vehicle, and a dirt bike. The imagery in the brochure is focused on the outdoors: it shows people sitting around a campfire.

The Court of Appeals thus concluded that Keystone’s brochure was not deceptive. The Court also found that the Fuzion RV brochure could not have caused Appellants’ alleged injury—purchasing a RV they no longer want—because there was no evidence in the record that Appellants even saw the brochure before purchasing their RV.

Appellants also contend that Keystone’s Owner’s Manual was deceptive because it omitted material facts about prolonged occupancy in the RV or otherwise minimized the risks of living

in a RV full time. The Court of Appeals also rejected this argument, concluding:

The owner's manual discusses the ease with which mold can develop in an RV and the risks posed by mold and formaldehyde. It encourages RV owners to properly vent their RV and use dehumidifiers. It further encourages RV owners to consult with their doctor and directs them to specialized resources. It does not minimize or try to hide the possible negative consequences of living in an RV. We conclude that the owner's manual is not deceptive because it does not mislead or misrepresent the danger of mold or formaldehyde.

The Court of Appeals also determined that Appellants could not establish that the alleged non-disclosures in Keystone's Owner's Manual caused their alleged injuries. The Court of Appeals thus affirmed the trial court's summary judgment dismissal of Appellants' claims against Keystone RV.

### **III. ISSUES PRESENTED FOR REVIEW**

Whether the Court of Appeals erred in affirming the trial court's summary judgment dismissal of Appellants' claims.

### **IV. STATEMENT OF THE CASE**

#### **A. Appellants' Claim Is for Economic, Not Personal, Injury.**

Darrell and Teresa Axon purchased a used Keystone Fuzion RV in 2018 with the intention of using it as a full-time residence. The first Keystone learned of the sale to the Axons



was when it was served with the Complaint in this litigation.<sup>1</sup> The Axons now contend that they would not have purchased the RV had they known of the potential health hazards associated with occupying a recreational vehicle for prolonged periods.

Despite making allegations of physical injury, Appellants made clear in their Complaint that they “do not seek damages for personal injuries, and “seek only economic damages related to the Defendants’ deceptive conduct.”<sup>2</sup> In other words, this is not a product liability action and involves only Appellants’ claims that Keystone violated the CPA.

**B. Keystone Cautioned Consumers About Prolonged Occupancy and Provided Information Regarding Maintaining Good Indoor Air Quality.**

Contrary to Appellants’ allegations, at the time the Axons were shopping for and purchasing their Keystone RV, Keystone disclosed and made publicly available significant amounts of information about the potential issues that may arise if a consumer uses a RV as a full-time residence—something consumers can do, but requires special attention be paid to maintenance and ventilation.<sup>3</sup> Indeed, Appellants’ central allegation of deceptive conduct in this litigation is based on a

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<sup>1</sup> CP 68

<sup>2</sup> CP 15.

<sup>3</sup> CP 134-137.

false premise that a consumer *cannot* safely occupy a Keystone RV for a prolonged period and that Keystone failed to disclose this limitation on the use of its RVs.<sup>4</sup> This is not true. Although Keystone informed consumers that its RVs are designed *primarily* for “recreational use and short-term occupancy,”<sup>5</sup> nowhere did Keystone state in any of its literature that RV owners *cannot* occupy their RVs for prolonged periods of time. Keystone RV owners *can* and do occupy their RVs for prolonged periods to camp and travel around the country. For those consumers who decide to use their RVs in such a way, Keystone included in its Owner’s Manual detailed information related to the importance of maintaining good indoor air quality, increasing ventilation, reducing condensation, and preventing/reducing indoor air pollutants such as mold.<sup>6</sup>

As was set forth in detail in Keystone’s publicly disseminated Owner’s Manual, any brand of recreational vehicle is susceptible to condensation because of their small size and enclosed space.<sup>7</sup> This is especially true when consumers use their

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<sup>4</sup> For example, Appellants refer to the “significant limitations on the use of an RV” and the “serious health hazards resulting from the use of its products.” CP 9.

<sup>5</sup> CP 134 (emphasis added).

<sup>6</sup> CP 134-137.

<sup>7</sup> CP 134.

RVs for extended periods that go beyond recreational use.<sup>8</sup> These are not “manufacturing defects” as Appellants contend, but simply the realities of living in a small, enclosed space. Based on the “relatively small” size of a recreational vehicle and the possibility of condensation developing, Keystone explicitly cautioned consumers that prolonged occupancy can lead to premature component failure and create conditions that could lead to poor indoor air quality if not managed properly.<sup>9</sup>

For example, Chapter 3 of Keystone’s Owner’s Manual is an entire chapter related to prolonged occupancy and the importance of maintaining good indoor air quality<sup>10</sup>—the very information Appellants falsely claim Keystone failed to disclose. At the outset of Chapter 3, Keystone included a yellow Caution safety box:

### Chapter 3: Effects of Prolonged Occupancy and Indoor Air Quality

#### Effects of Prolonged Occupancy



Your recreational vehicle was designed primarily for recreational use and short-term occupancy. Prolonged Occupancy can lead to premature component wear/failure and create conditions, which if not managed properly, may be hazardous to your health and/or cause significant damage to your recreational vehicle. These types of “Damage” are NOT covered under the Limited Warranty.

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> CP 134-137.

Immediately following the yellow Caution box, Keystone further explains:

Unlike a home which can be thousands of square feet in size, your RV is only a few hundred square feet. The relatively small volume and tight compact construction of modern recreational vehicles means that the normal living activities of even a few occupants (or animals) will lead to rapid moisture saturation of the air contained in the RV...Unless the water vapor is carried outside by ventilation or condensed by a dehumidifier, it will condense on the inside of the RV.<sup>11</sup>

Keystone then dedicated the next two pages of the Owner's Manual to providing the public with tips from the Center for Disease Control and Prevention (CDC) and the Environmental Protection Agency (EPA) for improving indoor air quality, like opening windows, cleaning often, and running an air conditioner or dehumidifier.<sup>12</sup> Keystone also provided tips for avoiding condensation and limiting mold growth.<sup>13</sup> This information was provided to consumers to help them safely and successfully occupy their RVs not, as Appellants contend, to "disclaim liability."

To the extent Appellants claim Keystone did not disclose information related to the potential harmful effects of mold,

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<sup>11</sup> CP 134.

<sup>12</sup> CP 135.

<sup>13</sup> CP 136.

Chapter 3 included a subsection titled “Where There is Moisture, There May Be Mold,”<sup>14</sup> further informing consumers that mold is a common source of indoor air pollution that could pose a risk to certain individuals, including people with asthma, allergies, chronic lung diseases, and the elderly.<sup>15</sup>

Notably, the Axons did not have to wait to purchase a Keystone RV to gain access to the Owner’s Manual as Keystone has made its Owner’s Manuals dating as far back as 2002 available to consumers on its public website.<sup>16</sup>

**C. Keystone Informed Consumers About the Use of Formaldehyde In Building Materials.**

Appellants allege that Keystone also fails to disclose to its consumers the use of formaldehyde in its RVs.<sup>17</sup> This too is false. At the time the Axons were shopping for and purchasing their Keystone RV, Chapter 3 of Keystone’s Owner’s Manual included a section entitled “Formaldehyde & Recreational Vehicles.” The section explained that “Formaldehyde is also an industrial chemical used in the manufacture of some of the components used in the construction of recreational vehicles” and that “[s]ome people are very sensitive to formaldehyde while

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<sup>14</sup> CP 136.

<sup>15</sup> CP 134.

<sup>16</sup> See [www.keystonerv.com/owners-manuals](http://www.keystonerv.com/owners-manuals).

<sup>17</sup> CP 104.

others may not have any reaction to the same levels of formaldehyde.”<sup>18</sup> Keystone also provided recommendations from the CDC and EPA on improving air quality.<sup>19</sup>

Moreover, Keystone included a subsection in the Formaldehyde & Recreational Vehicles section of its Owner’s Manual titled “Web Sites of Interest” with links to websites maintained by the EPA, the CDC, the former Formaldehyde Council, and the Recreational Vehicle Industry Association (“RVIA”).<sup>20</sup> The Owner’s Manual also included a “California Air Resource Board (CARB) Notice” which explained that Keystone was mandated to use materials that comply with California formaldehyde emission standards.<sup>21</sup>

**D. Appellants Fail to Present Evidence of Deceptive Conduct and Causation.**

Appellants’ Response to Keystone’s Motion for Summary Judgment was evasive and non-specific. Appellants submitted only the following documents as “evidence”<sup>22</sup>:

1. *A Keystone Fuzion Brochure.* This brochure depicts individuals using a recreational vehicle for its traditional and

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<sup>18</sup> CP 137.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> CP 113-114.

intended use: sitting around a campfire by a river while vacationing.<sup>23</sup> Absent from the Response is any declaration or sworn testimony from the Axons even suggesting that they saw this brochure prior to purchasing their RV.<sup>24</sup>

2. *Chapter 3 of the Keystone Owner’s Manual.* This Chapter, entitled “Effects of Prolonged Occupancy and Indoor Air Quality,” cautioned consumers against prolonged occupancy in RVs absent dedicated attention to ventilation and reducing condensation.<sup>25</sup> Appellants have explicitly admitted to never having read any portion of the Owner’s Manual, let alone Chapter 3 on prolonged occupancy.<sup>26</sup>

3. *The Amended Complaint in Cole, et al. v. Keystone RV, Inc.* Appellants cited to specific paragraphs in the *Cole* Amended Complaint—a separate matter brought by Appellants’ counsel—as “evidence” in support of their allegations in the case at bar.<sup>27</sup>

4. *The Axons’ Complaint.*

5. *Keystone’s Motion to Dismiss in Cole.* Keystone’s Motion to Dismiss in *Cole* did not involve the merits of the *Cole* plaintiffs’ CPA claim but instead argued that the claim was not

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<sup>23</sup> CP 117-132.

<sup>24</sup> CP 103-303.

<sup>25</sup> CP 134-137.

<sup>26</sup> CP 105.

<sup>27</sup> CP 139-172.

sufficiently pled. Accordingly, none of the arguments raised in Keystone's Motion to Dismiss are relevant to the litigation at bar.<sup>28</sup>

6. *The Cole Plaintiffs' Response to Keystone's Motion to Dismiss in Cole.*<sup>29</sup> Again, Keystone's Motion to Dismiss did not involve the merits of the *Cole* plaintiffs' CPA or ADPA claims.

7. *The Court's Order Granting in Part and Denying in Part Keystone's Motion to Dismiss in Cole.* Judge Leighton dismissed the *Cole* plaintiffs' ADPA claim as brought in violation of the one-year statute of limitations. Judge Leighton did not evaluate the merits of the *Cole* plaintiffs' CPA claim.<sup>30</sup>

8. *The Declaration of the Cole Plaintiffs' Expert Joellen Gill.* Joellen Gill is a Human Factors expert.<sup>31</sup> The Gill declaration was submitted in support of the *Cole* plaintiffs' Motion to Certify Class, which was denied.<sup>32</sup> Notably, in the context of the subsequent litigation involving the individual *Cole* plaintiffs, Appellants' counsel withdrew Ms. Gill as an expert witness. Notwithstanding, Appellants point to Ms. Gill's

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<sup>28</sup> CP 199-223.

<sup>29</sup> CP 225-251.

<sup>30</sup> CP 252-257.

<sup>31</sup> CP 259.

<sup>32</sup> *Cole, et al. v. Keystone RV Company*, No. C18-5182RBL, 2020 WL 3969993 (W.D. Wash. July 14, 2020).



declaration for the proposition that the “warning or caution provided by Keystone to consumers [in its Owner’s Manual] is wholly inadequate.”<sup>33</sup> As explained in more detail below, whether Keystone’s “warning or caution” was sufficient or effective is not at issue here where Appellants have not brought a claim for failure to warn pursuant to the Washington Product Liability Act (“WPLA”). Instead, under the CPA, Appellants must establish that Keystone withheld material information known only to it and not otherwise available to consumers. Ms. Gill’s testimony is not relevant to this inquiry.

9. *Declaration of the Cole Plaintiffs’ Expert David Buscher, M.D.* Appellants cite to Dr. Buscher’s declaration<sup>34</sup> for the proposition that excessive exposure to mold and formaldehyde can be harmful—a fact Keystone does not dispute and itself disclosed in its Owner’s Manual.

10. *Declaration of the Cole Plaintiffs’ Expert John Walker.* Mr. Walker is a vehicle appraiser retained by the plaintiffs in *Cole*.<sup>35</sup> In his Order denying the *Cole* plaintiffs’ Motion to Certify Class, Judge Leighton excluded Mr. Walker’s

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<sup>33</sup> CP 109.

<sup>34</sup> CP 289-293.

<sup>35</sup> CP 295-303.

testimony, concluding: “Walker is not qualified, and his opinions are neither reliable nor relevant.”<sup>36</sup>

Notably absent from Appellants’ Response was any declaration or testimony from the Axons themselves which established what, if any, Keystone materials they had read or reviewed prior to purchasing their RV.

**E. The Axon and Cole Matters Are Dismissed on Summary Judgment.**

On April 1, 2020, the trial court granted Keystone’s Motion for Summary Judgment and dismissed Appellants’ claims against Keystone.<sup>37</sup> Appellants moved for reconsideration, which was denied.<sup>38</sup>

On July 22, 2021, Judge Zilly granted Keystone’s Motion for Summary Judgment in the *Cole* matter, dismissing the plaintiffs’ claims in their entirety.<sup>39</sup> The *Cole* plaintiffs moved for reconsideration, which Judge Zilly denied.<sup>40</sup>

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<sup>36</sup> *Cole, et al. v. Keystone RV Company*, No. C18-5182RBL, 2020 WL 3969993 at \*9 (W.D. Wash. July 14, 2020).

<sup>37</sup> CP 322-324.

<sup>38</sup> CP 383-384 (Order on Reconsideration).

<sup>39</sup> *Cole, et al. v. Keystone RV Company*, No. C18-5182 TSZ, 2021 WL 3111452 (W.D. Wash. July 22, 2021).

<sup>40</sup> The *Cole* plaintiffs have appealed the matter to the 9th Circuit. *See Cole, et al. v. Keystone RV Company*, No. C18-5182 TSZ, 2021 WL 3111452 (W.D. Wash. July 22, 2021).

On May 3, 2022, Division III of the Court of Appeals issued an Unpublished Opinion in this matter, affirming the trial court’s dismissal of all claims against Keystone. Appellants now petition this Court for Review.

## V. LEGAL ARGUMENT

### A. Summary Judgment Standard.

Civil Rule 56(c) provides that summary judgment should be granted when the pleadings and other evidence presented “show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). An appellate court reviews a trial court’s decision on summary judgment *de novo*. *Pearson v. Dep’t of Labor & Indus.*, 164 Wn. App. 426, 431, 262 P.3d 837 (2011).

### B. Summary Judgment Is Proper Because Appellants Cannot Establish the Unfair or Deceptive Act and Causation Elements of Their CPA Claim.

To prevail on the CPA, a plaintiff must show: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) that impacts the public interest; (4) injury to her or his business or property; and (5) a causal link exists between the unfair or deceptive act and the injury suffered. Failure to establish *any* element of a CPA claim is fatal. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Appellants’ CPA claim against

Keystone should be dismissed because: (1) Appellants cannot establish that Keystone engaged in unfair or deceptive practices; and (2) Appellants lack evidence that Keystone’s alleged unfair or deceptive practices caused their injuries.

**1. Appellants Fail to Establish That Keystone Engaged in an “Unfair or Deceptive Act.”**

Whether a particular act is unfair or deceptive is reviewable as a question of law to be decided by this Court. *Blake v. Federal Way Cycle Ctr.*, 40 Wn. App. 302, 309, 698 P.2d 578, *review denied*, 104 Wn.2d 1005 (1985). Although the CPA does not specifically define an “unfair or deceptive act or practice,” Washington courts generally require a consumer establish an unfair or deceptive act by showing “either that an act or practice ‘has a capacity to deceive a substantial portion of the public,’ or that ‘the alleged act constitutes a per se unfair trade practice.’” *Saunders v. Lloyd’s of London*, 113 Wn.2d 330, 344, 779 P.2d 249 (1989) (quoting *Hangman Ridge*, 105 Wn.2d at 785-86). “Implicit in the definition of ‘deceptive’ under the CPA is the understanding that the practice misleads or misrepresents something of material importance.” *Holiday Resort Cmty. Ass’n v. Echo Lake Assocs., LLC*, 134 Wn. App. 210, 226, 135 P.3d 499 (2006).

Deceptive conduct can be either overt—like a misrepresentation—or by a failure to disclose information material to a consumer. *Deegan v. Windermere Real*

*Estate/Center-Isle, Inc.*, 197 Wn. App. 875, 890, 391 P.3d 582 (2017) (“the capacity to deceive here arises from the omission of [ ] material facts.”); *see, e.g., McRae v. Bolstad*, 32 Wn. App. 173, 646 P.2d 771 (1982) (real estate agent’s failure to disclose water conditions on property was deceptive omission of material fact).

Appellants’ allegation of deceptive conduct appears to be twofold: (1) that Keystone promoted full-time occupancy of its RVs in its advertising and marketing campaigns; and (2) that Keystone knowingly failed to disclose the risks of mold growth with full-time occupancy and presence of formaldehyde in some of its building materials. Keystone addresses each allegation in turn.

*a. Appellants Cannot Establish Keystone Engaged in Overtly Deceptive Conduct.*

An unfair or deceptive act must “have the capacity to deceive a substantial portion of the public.” *Id.* at 785. Despite repeated allegations that Keystone engages in deceptive conduct in its marketing materials, Appellants submitted only one exhibit to support this contention: a Fuzion RV brochure.<sup>41</sup> The brochure depicts a group of adults vacationing around a campfire near a river or lake and directs consumers to “Venture off the beaten path to where your ultimate playground awaits. Whether it’s the

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<sup>41</sup> CP 117-132.

mountains, the desert, the lake or even wine country... Go where you want to go and do what you want to do.”<sup>42</sup> There are no representations in the brochure which suggest the Fuzion RV is intended for anything other than short-term vacationing. Even assuming a consumer looked at the brochure and thought the RV appeared to have the same creature comforts as a home, there is nothing about the brochure which suggests a consumer can do what the Axons did—which is to purchase a Fuzion RV, use it as a full-time residence, ignore entirely the maintenance recommendations in the Owner’s Manual related to prolonged use, and expect to keep their RV free of mold.

*b. Appellants are Unable to Establish Deception By Omission In Light of Keystone’s Extensive Disclosures.*

Appellants’ allegation that Keystone did not disclose material information about mold, mildew, formaldehyde and prolonged occupancy lacks merit in light of the extensive information made available to consumers by Keystone in its Owner’s Manual.

Indeed, in the context of the CPA, a seller (such as Keystone) has a duty to disclose facts material to a transaction *only* “when the facts are known to a seller but not easily

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<sup>42</sup> CP 121.

discoverable by the buyer.” *Griffith v. Centenx Real Estate Corp*, 93 Wn. App. 202, 969 P.2d 486 (1998). Here, information about formaldehyde, prolonged occupancy, and tips to avoid condensation and mold growth were all disclosed by Keystone in Keystone’s Owner’s Manual.<sup>43</sup> Not only that, but Keystone also made the information “easily discoverable” by consumers by making Keystone Owner’s Manuals available on Keystone’s public website.

Where, as here, material information about a product is publicly available to consumers, the fact that the seller did not also disclose the information directly to the buyer at the time of sale is not deceptive conduct. In *Steele v. Extendicare Health Services, Inc.*, 607 F. Supp. 2d 1226, 1232-34 (W.D. Wash. 2009), the plaintiff claimed that the defendant nursing home did not tell the plaintiff about its history of violating state health statutes and regulations and, had they been aware of these violations, they would not have selected the defendant’s facility. The Court held, however, that because the nursing home’s “history of deficiencies is reported on the publicly available resource of a United States government website,” the defendant fulfilled its duty to disclose because the information was available to the plaintiff. *Id.*

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<sup>43</sup> CP 134-137.

Just as the nursing home defendant in *Steele*, Keystone fulfilled its duty to disclose because the information about the potential risk of indoor air pollutants (including mold) if a consumer does not properly maintain their RV and use of formaldehyde in certain materials was disclosed and available to consumers in its Owner’s Manual.

Appellants lean heavily on the Declaration of Joellen Gill from the *Cole* litigation to contend that Keystone’s Caution, while it existed, was nonetheless “ineffective” because consumers “do not reliably read owner’s manuals” and the “so-called safety information was not prominently displayed in front of the manual but instead buried in the third chapter of the manual.”<sup>44</sup> Appellants’ argument in this regard misses the mark. Whether Keystone “warned” consumers and whether that warning was “effective” is not relevant here. Appellants have not brought a product liability claim pursuant to the WPLA, which could potentially implicate the adequacy of Keystone’s warning in preventing personal injury to Appellants. Indeed, Appellants do not seek to recover for any physical or emotional injuries,<sup>45</sup> which is a prerequisite for a failure to warn claim under the WPLA. *See Bylsma v. Burger King Corp.*, 176 Wn.2d 555, 293

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<sup>44</sup> Appellants’ Opening Brief at 21-22.

<sup>45</sup> CP 15 (Complaint at ¶ 3.35).



P.3d 1168 (2013). Instead, Appellants seek only to recover the cost of their purchase pursuant to the CPA.<sup>46</sup>

Accordingly, the issue before the Court is not whether the Caution was *effective* to warn Appellants, but whether Keystone failed to disclose material facts and, thus, has engaged in conduct which has “the capacity to deceive a substantial portion of the public.” *Indoor Billboard*, 162 Wn.2d at 74-75. As the Court of Appeals concluded: “The Gill declaration, filed by the Axons, does not conclude that Keystone omitted material facts. Rather, the declaration asserts there was so much information in the owner’s manual that a consumer would not likely read it.”<sup>47</sup> Keystone did not fail to disclose material information.

In apparent recognition of the fact that Keystone did disclose information in its Owner’s Manual, Appellants instead claim that Keystone did not disclose *enough*. Keystone’s duty to disclose, however, is limited to those material facts which are only known to Keystone and not easily discoverable by consumers. Certainly, a detailed explanation about the science and health impacts of mold—information undoubtedly discoverable with a quick Google search—are not facts “only known” to Keystone and thus are beyond the scope of Keystone’s duty to disclose.

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<sup>46</sup> *Id.*

<sup>47</sup> Opinion at FN 5.

Appellants again shift their argument to contend it was not what Keystone disclosed, but where it disclosed the information. Appellants contend that a simple solution to this perceived problem is to affix a sticker on the side of each RV, disclosing the information already published in Keystone's Owner's Manual. Judge Zilly rejected this argument in *Cole*, stating this:

At its root, Plaintiffs' argument is that Keystone did not disclose the information to them in their preferred method, which does not itself constitute a deceptive action under the CPA. Under Washington law, because Keystone made the information publicly available online, making it easily discoverable, Keystone did not have a duty to disclose the information through other methods as well.<sup>48</sup>

Ultimately, Appellants are unable to show that Keystone failed to disclose material information about the risks associated with prolonged occupancy.

- i. Keystone disclosed all material information about the use of formaldehyde in its RVs.

Appellants also contend that Keystone did not disclose material information about the use of formaldehyde in its RVs. This is blatantly false. Keystone's Owner's Manual devoted an

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<sup>48</sup> *Cole, et al. v. Keystone RV Company*, No. C18-5182RBL, 2020 WL 3969993 (W.D. Wash. July 14, 2020).

entire page to “Formaldehyde & Recreational Vehicles,”<sup>49</sup> making known to consumers that formaldehyde is used in some of its composite wood products. Keystone also made clear that a small number of people may be particularly sensitive to formaldehyde, resulting in mild symptoms.<sup>50</sup> Appellants are unable to identify what, if any, material information about formaldehyde Keystone failed to disclose to consumers.

As a matter of law, Keystone has not engaged in unfair or deceptive conduct either by making overt misrepresentations or failing to disclose material information. Appellants cannot establish the first element of the *Hangman Ridge* analysis.

## **2. Appellants Fail to Establish Causation.**

Even if Appellants were able to establish Keystone engaged in a deceptive or unfair practice, which they cannot, Appellants’ CPA claim still fails because they are unable to establish a causal link between any unfair or deceptive acts and their alleged injury. In *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn. 2d 59, 170 P.3d 10 (2007), the Washington Supreme Court adopted the proximate cause standard embodied in WPI 15.01 whereby “[a] plaintiff must establish that, but for the defendant’s unfair or deceptive

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<sup>49</sup> CP 137.

<sup>50</sup> *Id.*

practice, the plaintiff would not have suffered an injury.” *Id.* at 84.

*a. Appellants’ Injury Could Not Have Been Caused by Keystone Marketing Materials and Literature They Never Read.*

Having placed no evidence of causation in the record on summary judgment, Appellants nonetheless contend that they were misled into purchasing the RV by Keystone’s allegedly deceptive marketing materials. Appellants, however, are unable to identify what, if any, Keystone marketing materials or other literature they read prior to making their purchase. Appellants have acknowledged that they did not read the Keystone Owner’s Manual, and the record is devoid of any sworn testimony that the Axons reviewed the Fuzion brochure Appellants contend was misleading. Instead, Appellants rely *solely* on the vague allegation in the Complaint that the Axons relied on the marketing representations of Keystone in their decision to purchase the RV.<sup>51</sup> Not only does this allegation fail to specify which marketing materials caused Appellants’ injury, but allegations in pleadings cannot be used to create the genuine issues of material fact necessary to overcome summary judgment. CR 56(e). Again, there is no evidence in the record that the Axons reviewed any Keystone marketing materials prior

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<sup>51</sup> Appellants’ Opening Appellate Brief at 31.

to purchasing their RV, let alone the Fuzion RV brochure or Keystone Owner's Manual that Appellants claim are deceptive.

Indeed, a plaintiff's failure to review the materials that they are claiming are deceptive is fatal to a CPA claim for lack of causation. *Maple v. Costco Wholesale Corp.*, 649 F. App'x 570, 572 (9th Cir. 2016); *see also Steele*, 607 F. Supp. 2d at 1233. To the extent Appellants here suffered any cognizable injury, Appellants have failed to establish that Keystone's marketing materials, Owner's Manual, and other literature were the "but for" cause.

*b. Keystone's Alleged Omissions Could Not Have Caused Appellants' Injury.*

Appellants' claim of deception by omission also fails for lack of causation. When a plaintiff claims a defendant failed to disclose material information, there exists a rebuttable presumption that the consumer relied on the omission in making the purchase. *Deegan v. Windermere Real Est./Ctr.-Isle, Inc.*, 197 Wn. App. 875, 890, 391 P.3d 582 (2017). The defendant, however, may rebut the presumption by proving that the plaintiff's behavior would not have changed even if the omitted fact had been disclosed. *Morris v. Int'l Yogurt Co.*, 107 Wn.2d 314, 329, 729 P.2d 33, 41 (1986). Here, Appellants claim that Keystone should do more to inform consumers about the risks of prolonged occupancy. Appellants have admitted, however, that

they have never reviewed the Owner's Manual.<sup>52</sup> They have also failed to identify what Keystone materials they did review before purchase. If Appellants cannot establish which Keystone materials they reviewed prior to purchase, they certainly cannot establish that Keystone disclosing even more information in those materials about prolonged occupancy would have made any difference or changed Appellants' decision to purchase the RV.

Appellants' CPA claim fails for lack of evidence that Keystone's allegedly deceptive acts or omissions caused Appellants' injuries.

**C. Appellants' Per Se CPA Claim Fails for Lack of Evidence of Deception and Causation.**

The trial court dismissed Appellants' ADPA claim as a result of Appellants' failure to present "competent evidence supporting the essential elements"<sup>53</sup> of their claim. For the first time on appeal, Appellants claimed to be asserting a "*per se* CPA" claim, using Keystone's alleged violation of the ADPA as evidence. Even if the Court were to entertain this newly raised argument, which it should not, Appellants' *per se* CPA claim still fails. Indeed, Appellants' ADPA claim is rooted in the same allegations of deceptive conduct made in support of their CPA

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<sup>52</sup> CP 105.

<sup>53</sup> CP 324.

claim. The allegations, as discussed above, are not supported by evidence. Accordingly, because Appellants cannot establish that Keystone engaged in deceptive conduct and that such conduct caused their alleged injuries, they cannot establish violation of the ADPA and, in turn, cannot establish a *per se* violation of the CPA.

## **VI. CONCLUSION**

Keystone asks this Court to deny Appellants' Petition for Review.

*I certify that this document contains 4,916 words, excluding the parts of the document exempted from the word count by RAP 18.17.*

RESPECTFULLY SUBMITTED this 19th day of July, 2022.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on July 19, 2022, I caused to be served a copy of the foregoing on the following person(s) by electronic mail:

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