

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.

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COURT OF APPEALS  
DIVISION I  
CLERK OF COURT  
JENNIFER L. HARRIS

**APPELLANTS' REPLY BRIEF**

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**ORIGINAL**

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## I. ARGUMENT IN REPLY

Quadrant's response brief is misleading, mischaracterizes the record and conflates the issues and distorts the distinct analyses required of each of the Shimadas' causes of action. Throughout Quadrant's brief, it strays from the issues before this Court arguing issues that are neither germane to this appeal nor supported by the record. Quadrant's response brief addresses the Shimadas' claims and the events that occurred in 2007 and 2008 while specifically ignoring Quadrant's long-standing knowledge, since at least 2001, of mold contamination common to its homes. The brief also specifically ignores the events that transpired between the parties in 2003. The danger of Quadrant's brief is that it parses the history and circumstances giving rise to the Shimadas' claims in an incomplete and dishonest fashion. The Shimadas' claims do not arise in a vacuum; they depend on the totality of the events dating back to at least 2001 through 2007/2008. A complete review of these related events and accumulating representations requires a determination that at minimum a triable question of fact exists with each of the Shimadas' distinct claims<sup>1</sup>.

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<sup>1</sup> The trial court's summary dismissal entered before any reasonable right to engage in discovery must be reversed. The issue before this

A. Quadrant had a Duty to Disclose Known Defects in its Homes.

Quadrant contends as a matter of law that it had no duty to inform the Shimadas of known serious dangers in its homes when it made direct contrary representations to them in 2003 and later in 2007/2008. In its response brief, Quadrant disregards its long-standing knowledge of wide-spread dangers within its homes and ignores the distinctions between the two separate and distinct duties to disclose recognized under Washington law. Quadrant has a general on-going common law duty as a builder-vendor to disclose material facts in a real estate transaction. It has a separate duty to disclose known dangers and defects pursuant to Washington's Consumer Protection Act (RCW 19.86). The Shimadas presented sufficient evidence to establish that Quadrant hid known dangers in its homes. A genuine triable issue is supported under either of these bases of legal duties to speak truthfully and act reasonably.

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Court is whether the Shimadas presented sufficient evidence to create a question of fact regarding their claims that Quadrant, Weyerhaeuser and WRECO 1) violated Washington's Consumer Protection Act; 2) committed fraud; 3) were negligent; 4) engaged in negligent misrepresentation; and 5) committed outrage.

1. Quadrant Has a General Duty to Disclose Material Facts.

Quadrant does not dispute that it, like all builder-vendors in Washington, has a general on-going duty to disclose material facts in a real estate transaction if the facts are not easily discoverable by the buyer. See *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 194 P.3d 280 (2008); *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 969 P.2d 486 (1998). Quadrant does not dispute that the quality and safety of Quadrant-built homes was material and of primary importance to the Shimadas during Quadrant's marketing and sales activities in 2003.<sup>2</sup> CP 8-9; 349; 771-72; 797-800; 806-07. Quadrant similarly does not dispute that mold and moisture contamination in its homes was not easily discoverable by the Shimadas. Instead, Quadrant incorrectly asserts that 1) it did not have a duty to disclose because it did not know of any specific defects within the Shimadas' home; 2) that if the duty applies, it could not be required to make

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<sup>2</sup> Quadrant claims that the Shimadas did not focus on mold and mold contamination in their conversations with Quadrant. Br. of Respondent at 4. The record does not support this. The record establishes that the Shimadas' primary concern was the safety and quality of Quadrant homes, including a specific concern regarding mold and mold contamination. CP 799.

such specific disclosures to all prospective purchasers; and 3) that RCW 64.06.015 does not require a similar disclose. Quadrant's arguments on each of these points fail and a triable question of fact remains as to whether Quadrant breached its general duty to disclose.

i. Quadrant Has Known for Years That its Homes, Just Like the Shimadas', Are Plagued by Mold and Moisture Dangers.

Quadrant asserts that it did not have a duty to inform the Shimadas of these dangers either in 2003 or in 2007/2008 because it did not know the extent of the dangers within the Shimadas' home. Br. of Respondents at 21-22. Quadrant admits that the documents cited by the Shimadas show that Quadrant homes suffer from water leaks, mold growth and other defects, but asserts that none of these documents demonstrate knowledge regarding the extent of these dangers existing or developing within the Shimadas' home. Br. of Respondents at 21-22. Quadrant's argument fails because Quadrant conflates the Shimadas' claims and misstates both the law, and the uncontroverted evidence in the record. The common law requires disclosure of known potential dangers that are material to the transaction and not easily discoverable. See *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 194 P.3d 280 (2008); *Griffith v.*

*Centex Real Estate Corp.*, 93 Wn. App. 202, 969 P.2d 486 (1998).  
Quadrant's undisputed knowledge, since at least 2001, that mold and moisture problems are common to Quadrant's construction is certainly a material fact not easily discoverable by the Shimadas and is sufficient to give rise to a duty to disclose. See CP 6-7; 187-298; 772; 799; 868-1172.

Documents produced by Quadrant and prior testimony of its officers in this and other cases establishes that Quadrant homes commonly suffer from dangerous mold and moisture contamination and that Quadrant knew about these dangers well before the Shimadas purchased their Quadrant home. CP 6-7; 9-10; 187-298; 772; 868-1172. The Shimadas' misvented dryer is only one of many various construction defects in the Shimadas and other Quadrant homes that lead to mold and moisture contamination. The dryer vent is not the sole material danger that required discussions in this case. CP 9-10; 187-298; 868-1172. As the record confirms, the mold and moisture conditions inside Quadrant homes are the result of Quadrant's 54-day construction schedule that results in encasing wet building materials in a closed home. CP 5-15; 187-298; 772-73; 781-82; 868-1172. Quadrant knew from at least 2001 that the hazardous mold problems common to its homes caused sickness to babies,

infants, children and adult residents of Quadrant homes. CP 5-15; 187-298; 772-73; 781-82; 868-1172. Based on this knowledge alone, Quadrant had a duty to disclose these material dangers to the Shimadas in 2003 and when Quadrant later misrepresented material conditions in 2007/2008. The Shimadas produced sufficient evidence to establish a genuine issue of material fact as to Quadrant's knowledge and general duty to disclose and the trial court's summary dismissal should be reversed.

ii. The Shimadas' Claims in this Matter Relate to the Duty Quadrant Owed the Shimadas and Not Other, Unidentified Home Buyers.

Quadrant also asserts that no legal authority requires it to disclose all defects to all prospective purchasers. Br. of Respondents at 29. This argument departs from the issues before this Court<sup>3</sup>. The issue here is what disclosures did Quadrant fail to make to the

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<sup>3</sup> Quadrant likewise offers no support for its blanket assertion that the disclosure requirement imposed upon it by Washington's common law and RCW 19.86 would be burdensome under the facts of this case. Br. of Respondent at 27. The burden on Quadrant to comply with its duty to disclose would have been nominal at best. Moreover, under the law, the burden of disclosure upon the builder-vendor is not a consideration when courts evaluate a builder-vendor's duty to disclose. See *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 969 P.2d 486 (1998); *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 194 P.3d 280 (2008).

Shimadas under the facts in this case – not whether Quadrant should make disclosures to other potential home purchasers. As the record reflects, in 2003 the Shimadas were actively engaged with Quadrant for several months in discussions to buy a Quadrant home. CP 771; 797. In 2003, the Shimadas viewed a number of Quadrant homes and spoke repeatedly with Quadrant’s agents and employees. CP 8-9; 771; 797. The parties engaged in repeated interactions and conversations specifically related to the quality and safety of Quadrant homes. CP 349; 771-72; 797-800. These discussions continued when Quadrant elected to continue to misrepresent dangers and act at least negligently in 2007/2008. CP 11-14; 349-52; 776. Under these facts, Quadrant owed the Shimadas a general duty to disclose material facts relevant to their discussions in 2003 and later in 2007/2008.<sup>4</sup>

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<sup>4</sup> Quadrant argues that it had no duty to disclose known dangers connected to Quadrant homes under RCW 64.06.020. Br. of Respondents at 27. This is immaterial because Quadrant’s duty to disclose does not arise from RCW 64.06.020, it arises from common law and RCW 19.86. Quadrant’s common law duty to disclose known mold and moisture dangers within its homes to the Shimadas is however consistent with the legislature’s specific intent when it enacted the seller’s disclosure requirements in RCW 64.06.020.

Seller disclosure statements provide information of fundamental importance to a buyer ***to help the buyer determine whether the property has health and***

2. Quadrant Has a Duty to Disclose Pursuant to Washington's Consumer Protection Act (Chapter 19.86 RCW).

Quadrant does not dispute that a builder-vendor's failure to disclose amounts to an unfair or deceptive act or practice under Washington's Consumer Protection Act. *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 969 P.2d 486 (1998); *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 194 P.3d 280 (2008). Instead, Quadrant ignores and attempts to confuse the distinction between its general common law duty to disclose and its duty to disclose under Washington's Consumer Protection Act asserting that because the Shimadas did not purchase the Quadrant home directly from Quadrant that it did not breach its duty to disclose. It is well established in Washington that privity of contract is not required for a claimant to advance a CPA claim. See *Holiday Resort Community Ass'n v. Echo Lake Associates, LLC*, 134 Wn. App. 210, 135 P.3d 499 (2006); *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 744 P.2d 1032 (1987).

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***safety characteristics*** suitable for residential use and whether the buyer can ***financially afford the clean-up costs and related legal costs***. RCW 64.06.015, Findings, intent, 2007 c 107. (emphasis added).

Quadrant also fails in its attempt to distinguish *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 194 P.3d 280 (2008) from the present case. Quadrant argues that *Carlile* holding is inapplicable here because the subsequent purchasers in *Carlile* received an assignment of claims from the original purchasers. Br. of Respondents at 28-29. What Quadrant fails to recognize is that the subsequent home purchasers in *Carlile* did not have months of direct discussions with the builder-vendor as the Shimadas had with Quadrant in this case. The Shimadas, unlike the subsequent home purchasers in *Carlile*, do not need an assignment of claims from the original home purchaser to maintain their CPA claims against Quadrant because Quadrant made direct misrepresentations and omissions to the Shimadas which they relied upon to not only purchase, but later continue to reside in their Quadrant home. At a minimum, a question of fact exists regarding Quadrant's duty to disclose and the trial court's summary dismissal of the Shimadas' CPA claims should be reversed.

B. The Shimadas Reasonably Relied upon Quadrant's Representations Regarding the Quality of its Homes.

Quadrant asserts that the Shimadas were not entitled to rely upon its representations regarding the quality of Quadrant homes

because Quadrant admits that Quadrant homes are not flawless. Br. of Respondents at 30. Quadrant's argument is irrelevant, misleading and without merit. If this were the legal standard, no case arising from the sale of a dangerous home or product could ever be made.

1. The Shimadas Relied Upon Quadrant's Oral Representations of Quality.

Quadrant argues that because it provided the Shimadas with marketing materials that purport to state that Quadrant homes are not "flawless" that the Shimadas could not, as a matter of law, have relied upon Quadrant's oral representations of quality. Quadrant's argument fails because oral representations can induce and support reliance as a matter of law even when there are written documents which purportedly contradict oral statements. *Swartz v. KPMG, LLP*, 476 F.3d 756 (9<sup>th</sup> Cir. 2007). The existence of truth-containing documents in a plaintiff's possession may be relevant to the question of reasonable reliance, but it is not a dispositive factor. See *Swartz v. KPMG, LLP*, 476 F.3d 756 (9<sup>th</sup> Cir. 2007); See also *Stewart v. Estate of Steiner*, 122 Wn. App. 258, 93 P.3d 919 (2004). An analysis of reasonable reliance is an issue of fact that involves multiple considerations including related experience and sophistication of the parties. *Swartz v. KPMG, LLP*, 476 F.3d 756, 762 (9<sup>th</sup> Cir. 2004).

As the record reflects, Quadrant has known since at least 2001 that its homes are dangerous and unhealthy for families to live in because of mold and moisture infiltration, that Quadrant did not disclose this to the Shimadas in 2003 and later in 2007/2008. The record also reflects that the Shimadas relied upon Quadrant's representations of quality to purchase and later continue to reside in their Quadrant home. At minimum, a question of fact exists regarding the Shimadas reliance.

2. The Shimadas Were Inexperienced First-Time Homebuyers Entitled to Rely upon Quadrant's Representations.

The Shimadas, as first-time homebuyers, need not prove that Quadrant represented their homes as flawless to prevail here. As first-time homebuyers, the Shimadas were entitled to rely on Quadrant's representations. Although Quadrant mass produces and markets its dangerous homes as an ordinary commodity, in a unique and complex transaction such as a real estate transaction, it is justifiable to rely on a party's representation even if it is opinion if the opinion is put forth as facts because of the complex knowledge and specialization required. See *Westby v. Gorsuch*, 112 Wn. App. 558, 50 P.3d 284 (2002). If one party has special experience, training or purports to have them, the other, if without them, is entitled to rely

upon the honesty of the former's opinion and to attach to it the importance that is warranted by his superior competence. *Westby*, 112 Wn. App. at 574-75 (*quoting* Restatement (Second) of Torts § 542 cmt. f.).

Quadrant does not dispute that the Shimadas were first-time homebuyers and inexperienced with real estate transactions. The evidence in the record establishes that, as one of the nation's largest home builder-vendors, Quadrant had a far more sophisticated understanding regarding real estate transactions and its building process and practices than the Shimadas. CP 5; 523; 541; 745. On this record, the Shimadas were reasonably entitled to rely on Quadrant's statements of safety, excellence and quality to believe that a Quadrant-built home would not be plagued by mold and moisture problems – a danger to the health and safety of the Shimada family. CP 8; 349; 772; 801; 806-07; 810. At a minimum, there is a question of fact (for the trier of fact to determine) whether the Shimadas reasonably relied upon Quadrant's representations. The trial court's summary dismissal should be reversed.

3. The Shimadas Routine Home Inspection Does Not Preclude their Reasonable Reliance on Quadrant's Representations.

Quadrant claims that because the Shimadas had a home inspection, they must have relied upon that inspection rather than Quadrant's representations in deciding to purchase a Quadrant home. Br. of Respondents at 32-33. If this were the standard very few cases of dangerous latent home defects could be made. The Shimadas' home inspection does not immunize Quadrant from liability for their misconduct. In fact, the record demonstrates that the home inspection was only one factor the Shimadas could have considered in purchasing a Quadrant home and that the Shimadas did not rely upon the results of the home inspection in their purchasing decision or their later decision to stay in their Quadrant home. CP 539; 819-20. The record amply establishes that the Shimadas purchased their Quadrant home in reliance on Quadrant's representations of quality and safety. CP 8-9; 349-50; 774-75; 803; 814-15. The trial court's summary dismissal should be reversed.

C. The Shimadas Suffered Injuries as a Result of Quadrant's Fraudulent Misstatements and Omissions.

Quadrant misstates the actual record and cites to argument, not evidence, to assert that the Shimadas have not suffered damages

as a result of Quadrant's wrongful acts and fraudulent representations. Br. of Respondents at 19-20; 34-35. The record amply supports a finding that the Shimadas suffered personal injuries and damage to their property as a result of Quadrant's actionable conduct, both in 2003 and later in 2007/2008.

1. The Record Confirms that the Misvented Dryer Was a Source of the Mold Contamination in the Shimadas' Home.

Quadrant first asserts that the Shimadas do not know where the mold is coming from in their home and therefore, have no basis to seek damages. Br. of Respondents at 34. Quadrant's assertion is wrong. As the record reflects, Michelle Copeland, a certified industrial hygienist, testified that the misvented dryer<sup>5</sup> is a cause of

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<sup>5</sup> Quadrant incorrectly asserts that original construction defects have been dismissed in this matter and that the Shimadas do not dispute this. Br. of Respondents at 16; 34-35. The Shimadas have consistently disputed Quadrant's interpretation of the trial court's June 25, 2008 Order because the trial court modified its Order shortly after the court entered it. The Shimadas timely filed a Motion for Reconsideration after the trial court issued its June 25, 2008 Order. The trial court subsequently amended that Order to incorporate the holding of *Pfiefer v. City of Bellingham*, 112 Wn.2d 562, 772 P.2d 1018 (1989) (holding that a builder/seller may be liable for concealing known, dangerous conditions during the marketing and sale of real property – claims that are not subject to the construction statute of repose). CP 406-07; VP 61:6-19. The trial court did not memorialize its modification of the June 25, 2008 Order in writing. VRP 61:6-19. The parties addressed the modified June 25, 2008 Order at the summary judgment oral argument and

the mold. CP 856; 861-62. Moreover, the actual source of the mold was not even at issue before the trial court on Quadrant's Motion for Partial Summary Judgment. CP 856; 861-62. In an inappropriate, untimely and confused manner, the trial court raised this issue *sua sponte* for the first time during oral argument on Quadrant's summary judgment motion. CP 486-512; VRP at 41:1-9. At oral argument, counsel for the Shimadas repeatedly stated the mold in the Shimadas' home is the result of the misvented dryer vent along with a number of other documented defects that existed in the Shimadas' home. VRP 2-65. It is undisputed that the misvented dryer in the Shimadas' home had been pumping hot humid air into the cavities of the Shimadas' home for over seven years, resulting in over 32 gallons of debris being removed from the walls of their home. CP 775; 822. Ms. Copeland testified that the mold in the Shimadas' home is the result of the misvented dryer. CP 861. Quadrant has to misstate the record to assert that the Shimadas do not know the

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the court held that "nothing will change" with the modified Order. VRP 26:9-10. Quadrant's assertion that the Shimadas original construction defect claims are barred is incorrect and contrary to the trial court's rulings. VRP 26:9-10. The Shimadas raised the June 25, 2008 Order as a matter requiring review on this appeal. CP 1249-1250.

source of the mold and its argument, which is contrary to the facts, must fail.

2. The Duty to Mitigate Does Not Prevent the Shimadas from Recovering their Damages.

Quadrant argues that the Shimadas have no claim for damages because they have not mitigated their damages. This is a factual issue for trial, not a basis to dismiss all claims on summary judgment. The duty to mitigate prevents recovery only for those damages the injured party could have avoided by reasonable efforts and the reasonableness of the parties conduct is a question for the jury. *Flint v. Hart*, 82 Wn. App. 209, 917 P.2d 590 (1996). The Shimadas alleged failure to mitigate is not a bar to recovery. If proven, it merely reduces their recoverable damages and mitigation is an issue appropriately determined by the trier of fact. Quadrant's mitigation argument in no way supports the trial court's summary dismissal of all claims.

3. The Shimadas Suffered Personal Injuries.

Quadrant also asserts that the Shimadas cannot recover damages because they did not assert or plead a claim for personal injuries arising from Quadrant's negligent and fraudulent acts and omissions. The Shimadas detailed the personal injuries and health

problems they suffered as a result of Quadrant's acts and omissions in their complaint. CP 3-26; 789. Quadrant's discovery and depositions confirm these claims. Quadrant has been on notice since the inception of this action that the Shimadas have sought damages for their personal injuries. This argument constitutes no basis for summary dismissal of the Shimadas' claims.

4. The Shimadas Presented Uncontroverted Evidence of their Physical Injuries.

Quadrant also asserts that the Shimadas do not support their claims for physical injuries because the testimony of two of the Shimadas' physicians either did not physically examine the Shimadas or evaluated the Shimadas at a later date from Quadrant's negligent and fraudulent acts and omissions. Br. of Respondents at 15-16. This argument is without merit and is contrary to Washington law. An expert medical witness does not need to be the attending physician as long as the witness demonstrates the requisite qualifications within the sound discretion of the trial court, at which point the issue becomes the weight to be attached to the witness' testimony, not admissibility. *Kennedy v. Monroe*, 15 Wn. App. 39, 547 P.2d 899 (1976).

Here, Dr. Catherine Karr, an Assistant Professor at the University of Washington's Department of Pediatrics and Dr. Robert Harrison, a Clinical Professor of Medicine at the University of California, San Francisco, have testified that the Shimadas suffered physical injuries as a result of Quadrant's fraudulent and negligent acts and omission. CP 753-66; 1180-187. Quadrant's assertion that the law requires the Shimadas' medical experts be their treating physician is incorrect. This argument is also immaterial to the issues on summary judgment. Quadrant's argument about witness competency can be made at trial and further highlights that there are questions of fact that require a jury's determination, not summary dismissal.

5. Quadrant's Inadequate and Negligent 2007/2008 Investigation and Remediation Supports the Shimadas' Claims.

Quadrant asserts that the Shimadas were not injured by Quadrant's negligent remediation plan in 2007/2008. Br. of Respondent at 23-25. To argue this, Quadrant disregards its duty to speak and its long-standing knowledge of mold and moisture problems in its homes (which it did not disclose to the Shimadas in 2003 or 2007/2008). It also ignores the fact that when it chose to act in 2007/2008 it was required to speak truthfully and act reasonably.

The evidence establishes that at best Quadrant acted negligently in evaluating and developing a “remediation plan.” Quadrant also actively continued to make negligent and fraudulent representations to the Shimadas that they relied on 2007/2008.

Washington law imposes liability when one fails to reveal matters within one’s knowledge where there is a duty to speak. *Wilkinson v. Smith*, 31 Wn. App. 1, 639 P.2d 768 (1982). There is a duty to speak imposed upon a party whenever justice, equity, and fair dealing demand it. *Obde v. Schlemeyer*, 56 Wn.2d 449, 353 P.2d 672 (1960).

When the Shimadas notified Quadrant that their home was contaminated with mold in 2007, Quadrant responded by making new misrepresentations to the Shimadas that its homes are built with quality and are safer than other homes. CP 351. Quadrant had a duty to speak truthfully and inform the Shimadas of the known real dangers of residing in a Quadrant home with indoor mold growth. By this time it is undisputed that Quadrant knew that its homes commonly suffer from this problem. In 2007/2008, when Quadrant offered to “remediate” the Shimadas home, it had a duty to speak openly and truthfully about the dangers of mold contamination in its

homes. It knew of the breadth and dangers this problem presented to the health and safety of the Shimada family.

Moreover, when Quadrant offered to evaluate and “remediate” the Shimadas home, it made implicit and explicit representations that it would act reasonably to determine the scope of the mold contamination inside the Shimadas’ home and respond to it in a reasonable way. CP 574. Quadrant specifically told the Shimadas that it would address and alleviate all of their concerns. CP 577. When the Shimadas demanded that Quadrant complete pre-remediation and post-remediation air quality testing (required by EPA regulation) and that it document its remediation activities in the Shimada home, Quadrant refused. CP 351; 574.

In 2007/2008, the Shimadas suffered injuries as a result of their reliance on the totality of Quadrant’s representations to them. These misrepresentations begin with Quadrant false statements and nondisclosures in 2003. In 2007/2008, Quadrant continued to distort the truth by claiming anew that the Shimadas’ home was built with quality, was safe to live in and that Quadrant would fully remediate the mold in their home. Quadrant made these misleading representations without telling the Shimadas about the scope of the problem after undertaking no effective evaluation and offering, at

best, only a negligent remediation plan. The Shimadas relied by continuing to reside in their contaminated home. CP 12-14; 351-52; 776. Only later, after relying upon Quadrant's representations in 2003 and later in 2007/2008 did the Shimadas learn that Quadrant homes routinely suffer from mold contamination and that Quadrant offered an inadequate remediation plan. CP 351; 776; 826. Once the Shimadas learned of these facts, they feared to even stay in their home. CP 828. After Quadrant refused to act reasonably to correct the danger, the Shimadas were effectively hostages in the home. Quadrant's argument that the Shimadas did not rely in 2003 and later in 2007/2008 does not support the grant of summary judgment.

i. The Record Supports a Finding that Pre- and Post-Remediation Air Quality Testing is Required to Properly Remediate a Contaminated Home.

Quadrant also states that Michelle Copeland, a certified industrial hygienist, agreed with its proposed "remediation plan" and that any damages suffered by the Shimadas are the result of their own actions or inactions. Br. of Respondents at 13. This is incorrect and contrary to the record. Ms. Copeland testified that she did not evaluate Quadrant's "remediation plan" in detail. CP 860. She believes however, as does the U.S. Environmental Protection

Agency, that pre and post remediation air quality testing is required. CP 860. Quadrant does not dispute that its remediation plan did not include pre and post remediation air quality testing or that it refused to provide it when the Shimadas demanded it. Instead, Quadrant asserts here that it cannot be liable because it only “volunteered” to assist with the mold contamination inside the Shimadas home.<sup>6</sup>

There is a question of fact regarding whether Quadrant breached its duty to act reasonably and speak truthfully regardless of whether it is a “volunteer.” The record indicates that pre- and post-remediation air quality testing is needed to determine if successful remediation has been completed. CP 777; 843-44; 859-861. The Shimadas relied upon Quadrant’s acts and omissions and believed that Quadrant would fashion a reasonable remediation plan. The Shimadas remained in their home in reliance on Quadrant’s representations that its homes are safe, well built and that Quadrant

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<sup>6</sup> The record supports a finding that Quadrant breached its duty even if it is a volunteer by failing to exercise reasonable care by increasing the risk of harm to the Shimadas through the improper and negligent offering of an incomplete remediation plan and by failing to disclose and speak truthfully with the Shimadas about its knowledge of mold and mold contamination in its homes. See *Price ex rel. Estate of Price v. City of Seattle*, 106 Wn. App. 647, 24 P.3d 1098 (2001).

would properly test the Shimadas home. CP 11-14; 349-52; 776.

The trial court's summary dismissal should be reversed.

D. The Shimadas Claim for Outrage is Supported by the Record.

A question of fact exists regarding the Shimadas' claim for outrage and the trial court's summary dismissal should be reversed. Quadrant's characterization of being a volunteer "rewarded" with a lawsuit is a jury argument and not supported by the record. The record shows (even with WRECO and Weyerhaeuser refusing to produce any discovery in this matter) that Quadrant, WRECO and Weyerhaeuser each knew about mold and moisture contamination common to its homes many years before and after the Shimadas purchased a Quadrant home. Specifically it knew babies, children and adults were all being sickened by merely living in Quadrant homes. CP 6-7; 9-14; 187-298; 772-74; 781-82; 868-1172. Whether Quadrant, WRECO and Weyerhaeuser's acts and omissions support the Shimadas' claim for outrage is a question of fact for the jury and the trial court's dismissal should be reversed.

E. The Trial Court Abused its Discretion by Denying the Shimadas' CR 56(f) Motion to Continue.

WRECO and Weyerhaeuser contend that the Shimadas must pierce the corporate veil to hold the defendants liable for each of their

direct actions. The trial court failed to recognize that the Shimadas have direct claims against WRECO and Weyerhaeuser and erred in denying the Shimadas' CR 56(f) motion. As the record reflects, WRECO and Weyerhaeuser have direct liability based on their knowledge of dangers in Quadrant homes, individual ability to act and their admitted ability to control Quadrant's activities. CP 11; 674-76; 707-714; 717-18; 729-30; 732-33; 738-39. Participation by each conspirator in every detail in the execution of the conspiracy is unnecessary to establish liability. *Swartz v. KMPG, LLP*, 476 F.3d 756 (9<sup>th</sup> Cir. 2007) (quoting *Beltz Travel Serv., Inc. v. Int'l Air Transp. Ass'n*, 620 F.2d 1360 (9<sup>th</sup> Cir. 1980)). There is no absolute requirement that where several defendants are sued in connection with an alleged fraudulent scheme, the plaintiff must identify false statements made by each and every defendant. *Swartz*, 476 F.3d at 764. WRECO and Weyerhaeuser's knowledge for many years of mold and widespread moisture-related problems in Quadrant homes creates the same obligations in them as Quadrant had. CP 3-36; 674-76; 707-714; 717-18; 729-30; 732-33; 738-39.

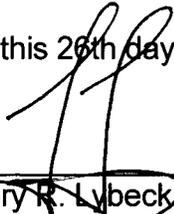
Moreover, WRECO and Weyerhaeuser do not dispute that they refused to produce any discovery in this matter. Each forced the Shimadas to file two motions to compel and a CR 56(f) motion in

response to their motion for summary judgment. CP 358; VRP 1-68. The trial court failed to even rule on these motions before granting summary judgment. As set forth in the Shimadas' opening brief, their CR 56(f) Motion to Continue explicitly detailed the evidence that the Shimadas sought and its materiality and relevance to WRECO and Weyerhaeuser's pending motion. CP 684-752. WRECO and Weyerhaeuser should not benefit from their refusal to produce discovery in this matter. The trial court abused its discretion when it denied the Shimadas CR 56(f) motion and the summary dismissal of these claims against these defendants should be reversed.

## II. CONCLUSION

For all of the reasons set forth above and in the Shimadas' opening brief, this Court should reverse the trial court's summary dismissal of the Shimadas' claims against Quadrant, Weyerhaeuser, and WRECO for violations of the Consumer Protection Act, fraud, negligence, negligent misrepresentation and outrage and remand for trial.

Respectfully submitted this 26<sup>th</sup> day of April, 2010.

By: 

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**CERTIFICATE OF SERVICE**

I hereby certify that on this date the undersigned caused copies of the documents identified below to be sent with messenger service to be served on April 26, 2010, as indicated on the following persons:

- Brief of Appellants with Certificate of Service

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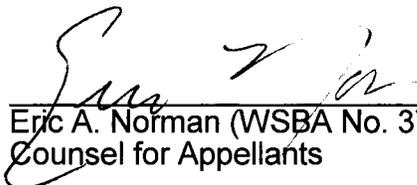
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Mercer Island, Washington, this 26<sup>th</sup> day of April, 2010.

  
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