No. 100049-9
Court of Appeals No. 81948-8

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

GREGORY M. and R. SUE TADYCH, a married couple,

Petitioners,

v.

NOBLE RIDGE CONSTRUCTION, INC., a Washington corporation; and WESCO INSURANCE COMPANY, a foreign surety, Bond No. 46WB025486,

Respondents,

NOBLE RIDGE CONSTRUCTION, INC., a Washington corporation,

Third-Party Plaintiff,

v.

LOBERG ROOFING.COM, INC., a Washington corporation; HORACIO CASTELLANOS d/b/a MASTER STUCCO, a Washington sole proprietorship; MODERN SIDING, LLC, a Washington limited liability company; UNITED SUBCONTRACTORS, INC. d/b/a BURNHAM INSULATION & DRYWALL SYSTEMS, INC., a Washington corporation; MODERN METALS, LLC, a Wyoming limited liability company; TIMBERLINE NORTHWEST, LLC, a Washington limited liability company,

Third-Party Defendants.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

IDENTITY OF RESPONDENT, RELIEF REQUESTED & INTRODUCTION 1

FACTS RELEVANT TO ANSWER 2

REASONS THIS COURT SHOULD DENY REVIEW 3

A. This is not a "consumer protection" matter: the Tadyches pled only contract claims and did not present evidence on the CPA or other "consumer protection" issues in the trial court 3

B. The Court of Appeals carefully analyzed and correctly rejected the Tadyches' estoppel claims. 10

C. This Court should award Noble Ridge attorney fees under the contract and RAP 18.1(j). 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Cases

Absher Constr. Co. v. Kent Sch. Dist. No. 415,
77 Wn. App. 137, 890 P.2d 1071 (1995) 6

Adler v. Fred Lind Manor,
153 Wn.2d 331, 103 P.3d 773 (2004) 8

Burnett v. Pagliacci Pizza, Inc.,
196 Wn.2d 38, 470 P.3d 486 (2020) 8, 9

Central Heat, Inc. v. Daily Olympian, Inc.,
74 Wn.2d 126, 443 P.2d 544 (1968) 10, 11, 12

City of Seattle v. Kuney,
50 Wn.2d 299, 311 P.2d 420 (1957) 5

Club Envy of Spokane, LLC v. Ridpath Tower Condo. Ass'n,
184 Wn. App. 593, 337 P.3d 1131 (2014) 10

Cotton v. City of Elma,
100 Wn. App. 685, 998 P.2d 399 (2000) 13

Del Guzzi Constr. Co. v. Global Nw. Ltd.,
105 Wn.2d 878, 719 P.2d 120 (1986) 10, 13

Dix v. ICT Group, Inc.,
160 Wn.2d 826, 161 P.3d 1016 (2007) 8

EPIC v. CliftonLarsonAllen LLP,
199 Wn. App. 257, 402 P.3d 320 (2017) 5

Finkelstein v. Sec. Props., Inc.,
76 Wn. App. 733, 888 P.2d 161 (1995) 12

Gandee v. LDL Freedom Ent., Inc.,
176 Wn.2d 598, 293 P.3d 1197 (2013) 8

Los Angeles Olive Grower's Ass'n. v. Pac. Groc. Co.,
119 Wash. 293, 250 P. 375 (1922)..... 6, 7

Marsh v. Gen. Adjustment Bureau., Inc.,
22 Wn. App. 933, 592 P.2d 676 (1979) ... 10, 11, 14, 15

McLeod v. Nw. Alloys, Inc.,
90 Wn. App. 30, 969 P.2d 1066 (1998) 13

Nat'l Groc. Co. v. Pratt-Law Preserv. Co.,
170 Wash. 575, 17 P.2d 51 (1932)..... 6, 7

Peterson v. Groves,
111 Wn. App. 306, 44 P.3d 894 (2002) 10, 12

Rouse v. Glascam Builders, Inc.,
101 Wn.2d 127, 677 P.2d 125 (1984) 10, 11, 14, 15

Sheard v. U.S. Fid. & Guar. Co.,
58 Wash. 29, 107 P. 1024 (1910)..... 6, 7

Syrett v. Reisner McEwin & Assocs.,
107 Wn. App. 524, 24 P.3d 1070 (2001) 6

Tadych v. Noble Ridge,
No. 81948-8-I (July 19, 2021) ... 1, 2, 5, 8, 9, 10, 14, 15

Wash. State Maj. League Base. Stad. Pub. Fac. Dist. v. Hunt & Nichols-Kiewit Const. Co.,
176 Wn.2d 502, 296 P.3d 821 (2013) 5

Yakima Asphalt Paving Co. v. Dept. of Transp.,
45 Wn. App. 663, 726 P.2d 1021 (1986) 6

Statutes

UCC 7

Other Authorities

RAP 13.4(b)(1) 3

RAP 13.4(b)(4) 3

RAP 18.1 16

RAP 18.1(j) 15, 16

IDENTITY OF RESPONDENT, RELIEF REQUESTED & INTRODUCTION

Respondent Noble Ridge Construction, Inc. asks this Court to deny review of the unpublished opinion in ***Tadych v. Noble Ridge***, No. 81948-8-I (July 19, 2021) (copy attached). It does not conflict with any appellate decision. Moreover, this Court already rejected direct review, presumably because the Tadyches never raised their new unconscionability arguments in the trial court. *See* Noble Ridge Ans. to Stmnt. Of Grnds. for Dir. Rev. (July 23, 2020). Nor did they previously raise their new argument in the Court of Appeals that certain inapposite "consumer protection" cases might apply here. The Tadyches did not even plead a statutory cause of action. *See* CP 1-6.

The Court of Appeals opinion is legally correct. The Tadyches knowingly contracted for a reasonable one-year statute of limitation (SOL), knew of alleged injuries in time to sue, and chose to wait. Noble Ridge did nothing to lull them. Review is unwarranted.

FACTS RELEVANT TO ANSWER

The Court of Appeals states the facts in the light most favorable to the Tadyches. Unpub. Op. at 1-9. The unpublished opinion holds (*id.* at 10-25):

> (1) the Tadyches' Complaint raised only contractual rights, not statutory rights (*e.g.*, CPA or WLAD);
>
> (2) the "consumer protection" cases the Tadyches raised for the first time on appeal are inapposite;
>
> (3) the Tadyches did not raise procedural unconscionability in the trial court;
>
> (4) consistent with applicable appellate precedent, a contractual one-year SOL is reasonable and not unconscionable, and thus is enforceable;
>
> (5) the Tadyches had ample time to sue Noble Ridge after receiving their litigation expert's report;
>
> (6) even under the discovery rule, they knew of alleged injuries in time to file suit within the SOL, so the contractual limitations period is reasonable;
>
> (7) Noble Ridge made no statements asking or encouraging the Tadyches to hold-off filing suit prior to the expiration of the contractual SOL, so it is not estopped to assert the reasonable contract; and
>
> (8) Noble Ridge is entitled to fees on appeal under the contract.

REASONS THIS COURT SHOULD DENY REVIEW

A. This is not a "consumer protection" matter: the Tadyches pled only contract claims and did not present evidence on the CPA or other "consumer protection" issues in the trial court.

The Tadyches' first argument apparently relies on RAP 13.4(b)(1) – conflict with a precedent of this Court. PFR at 15.[1] Yet they nowhere argue that the appellate decision conflicts with the cases they discuss. *See* PFR at 7-15. As discussed *infra*, each of their cases is inapposite here, so no conflict can or does exist.

In the trial court, the Tadyches pled only (1) breach of contract; (2) breach of warranties; and (3) a claim against the contractor's bond. CP 4-5. No "consumer protection" violation was alleged, much less a CPA claim. *Id*. They did not try to raise "consumer protection" issues

[1] The Tadyches also cite RAP 13.4(b)(4) – but make no argument that their new appeal claims are of substantial public interest. PFR at 15. As discussed *infra*, this is a private contractual dispute.

on summary judgment either. CP 595-96; 922. In the trial court, this was solely a private contractual dispute. *Id*.

And the Tadyches had every good reason not to plead "unconscionability," much less a "consumer protection" violation: they have no evidence of either. Sue Tadych *admitted* that they had the draft contract in their possession for "at least a month" before they signed it, and both Tadyches *admitted* that they read it carefully, and sought no legal advice about it, because it "seemed clear" and "seemed like a fair contract that [they] could work with." CP 289, 290, 299. Far from being "unconscionable," the relevant provision is plain and direct (CP 347-48):

> Any claim or cause of action arising under this Agreement, including under this warranty, must be filed in a court of competent jurisdiction within one year . . . from the date of Owner's first occupancy of the Project or the date of completion as defined above, whichever comes first. Any claim or cause of action not so filed within this period is conclusively considered waived.

This clear language is reasonable, not unconscionable.

The Tadyches are not permitted to attack the trial and appellate court decisions unfairly, on grounds they never pled or proved. Nor are they permitted to ignore the controlling authority from this Court properly relied on and followed by both the trial and appellate courts, ***Wash. State Maj. League Base. Stad. Pub. Fac. Dist. v. Hunt & Nichols-Kiewit Const. Co.***, 176 Wn.2d 502, 296 P.3d 821 (2013) ("***MLB***"). *See, e.g.*, Unpub. Op. at 11-12 ("No court has held that a contract clause shortening the time for one party to bring a claim against the other is per se unconscionable. We have instead recognized that . . . parties can contractually agree to shorten a statute of limitations period" (citing ***MLB***, 176 Wn.2d at 512)). This correct reasoning is also supported by *many* appellate decisions. *Id*. at 12 (citing ***City of Seattle v. Kuney***, 50 Wn.2d 299, 302, 311 P.2d 420 (1957) (one-year construction contract SOL was reasonable); ***EPIC v. CliftonLarsonAllen LLP***, 199 Wn. App. 257, 271, 402

P.3d 320 (2017) (contractual SOL prevails if reasonable); ***Syrett v. Reisner McEwin & Assocs.***, 107 Wn. App. 524, 527-28, 24 P.3d 1070 (2001) (same); ***Absher Constr. Co. v. Kent Sch. Dist. No. 415***, 77 Wn. App. 137, 147-48, 890 P.2d 1071 (1995) (same for 120-day construction contract SOL); ***Yakima Asphalt Paving Co. v. Dept. of Transp.***, 45 Wn. App. 663, 665, 726 P.2d 1021 (1986) (same for 180-day construction contract SOL)). The ***Tadych*** opinion properly follows all this black-letter law.

By contrast, the three 90- to 110-year-old decisions the Tadyches cite and discuss for the first time in their PFR are obviously inapposite. PFR at 10-11 (citing ***Sheard v. U.S. Fid. & Guar. Co.***, 58 Wash. 29, 107 P. 1024 (1910); ***Los Angeles Olive Grower's Ass'n. v. Pac. Groc. Co.***, 119 Wash. 293, 250 P. 375 (1922) ("***L.A. Growers***"); ***Nat'l Groc. Co. v. Pratt-Law Preserv. Co.***, 170 Wash. 575, 17 P.2d 51 (1932) ("***Nat'l Groc.***")). ***Sheard*** simply holds that, *while it is perfectly fine for contracting parties to set a*

limitations period in their contract, an action *on a surety bond* covering a contractor's liability does not *accrue* until damages are judicially determined and actually paid. 58 Wash. at 32-33. ***L.A. Growers*** holds that in a contract *for the sale of goods* – not a construction contract – when defects in the merchandise (cans of tomatoes) could not be discovered by inspection within the *10-day* contractual rejection period, that limitation does not apply under well-established black-letter law. 119 Wash. at 296-97. Holding to the same effect is ***Nat'l Groc***., which involved the sale of nonconforming prunes. 170 Wash. at 585.

The appellate decision does not address – much less conflict with – the central holdings in these inapposite decisions. In fact, it is *consistent with* the reasoning in ***Sheard*** that parties may contract for a shorter limitations period, and the other two case likely became obsolete after the UCC was adopted. Certainly, contracting to construct a house is nothing like selling bad prunes. No conflicts exist.

The Court of Appeals has already correctly explained why ***Adler***, ***Gandee***, and ***Dix***, do not apply. Unpub. Op. at 13-15.[2] ***Adler*** found an *arbitration clause* with a *180-day* limitation period substantively unconscionable because it deprived employees of their state and federal *statutory protections* against *employment discrimination*. *Id*. at 13. ***Gandee*** applied ***Adler*** to invalidate *an arbitration provision* in a *debt collection* contract that shortened the *CPA*'s four-year SOL to *30 days*. *Id*. at 14. ***Dix*** similarly invalidated an *ISP*'s *forum selection clause* that deprived plaintiffs of their properly pled *statutory CPA claims*. *Id*.

The Tadyches now also misplace reliance on ***Burnett v. Pagliacci Pizza, Inc.***, 196 Wn.2d 38, 470 P.3d 486 (2020), which they cite for the first time in their PFR at 13. It too involved an *arbitration clause* that was held

[2] Discussing ***Gandee v. LDL Freedom Ent., Inc.***, 176 Wn.2d 598, 293 P.3d 1197 (2013); ***Dix v. ICT Group, Inc.***, 160 Wn.2d 826, 161 P.3d 1016 (2007); ***Adler v. Fred Lind Manor***, 153 Wn.2d 331, 103 P.3d 773 (2004)).

procedurally unconscionable because the employee handbook in which it appeared was not given to employees until after they signed their employment agreements. 196 Wn.2d at 54-57. The Tadyches neither pled nor proved procedural unconscionability. Unpub. Op. at 11 n.2. ***Burnett*** has no application here.

As the Court of Appeals correctly noted, this is a private contract dispute, not an attempt to block (through an unconscionable arbitration clause) or even to vindicate, statutory rights under the WLAD, CPA, or any other statute. Unpub. Op. at 14-15. Notwithstanding the Tadyches' ongoing attempts to convert their private contractual claims into "consumer protection" claims on appeal, no such claims were ever pled – or even attempted to be proven – in the trial court. No such evidence exists. None of their cases is apposite, no conflicts exist. This Court should deny discretionary review.

B. The Court of Appeals carefully analyzed and correctly rejected the Tadyches' estoppel claims.

The Tadyches assert that the Unpublished Opinion conflicts with decisions of this Court and the Court of Appeals regarding estoppel. PFR 15-19.[3] It does not.

The Court of Appeals carefully addressed the black-letter law of Washington. Unpub. Op. at 21-25 (citing and discussing ***Del Guzzi Constr. Co. v. Global Nw. Ltd.***, 105 Wn.2d 878, 885, 719 P.2d 120 (1986) (estoppel requires fraudulent or inequitable inducement to delay filing suit); ***Club Envy of Spokane, LLC v. Ridpath Tower Condo. Ass'n***, 184 Wn. App. 593, 601, 337 P.3d 1131 (2014) ("Equitable estoppel is disfavored and the party asserting it must prove each element by clear, cogent, and convincing evidence"); ***Peterson v. Groves***, 111 Wn. App.

[3] Citing and discussing ***Central Heat, Inc. v. Daily Olympian, Inc.***, 74 Wn.2d 126, 443 P.2d 544 (1968); ***Rouse v. Glascam Builders, Inc.***, 101 Wn.2d 127, 677 P.2d 125 (1984); and ***Marsh v. Gen. Adjustment Bureau., Inc.***, 22 Wn. App. 933, 592 P.2d 676 (1979).

306, 311, 44 P.3d 894 (2002) ("the key question is whether the defendant made representations or promises to perform which lulled the plaintiff into delaying the filing of a timely action"); ***Rouse***, 101 Wn.2d 127 (inapposite because defendant "repeatedly acknowledged the existence of defects, [whereas Noble Ridge] repeatedly denied that its work was improperly performed and consistently indicated that no defects existed in the home"); ***Marsh***, *supra* (inapposite because, "unlike Marsh, there is no evidence that [Noble Ridge] ever asked the Tadychs to delay filing suit or indicated that they should wait before doing so")). The appellate court carefully addressed and correctly rejected the Tadyches' estoppel claim.

As they did in the appellate court, the Tadyches again cite, but do not discuss ***Central Heat***. *Compare* PFR at 15-16 *with* BR 19. This Court held the plaintiff could not claim "estoppel to prevent an inequitable resort to the statute of limitations" and at the same time "sleep on [its]

rights." ***Central Heat***, 74 Wn.2d at 135. There, any alleged inducement to delay ceased to operate before the expiration of the limitation period, and the plaintiff had ample time to institute an action – but failed. *Id*. Indeed, equitable tolling requires a showing of bad faith, deception, or false assurances by defendants *and* the exercise of diligence by plaintiffs. ***Finkelstein v. Sec. Props., Inc.***, 76 Wn. App. 733, 739-40, 888 P.2d 161 (1995).

Thus, even if there had been a misleading inducement to delay prior to limitations expiring – which there was not – the Tadyches knew of the conditions of which they complain, and they had in hand an expert's report identifying concerns, well before limitations expired. Just as in ***Central Heat***, the Tadyches slept on their rights.

And of course, statements made *after* the SOL ran could not *induce* the Tadyches not to file suit. *See, e.g.*, ***Peterson***, 111 Wn. App. at 311 (gravamen of equitable estoppel is representations or promises to lull plaintiff into

delaying timely action); ***Cotton v. City of Elma***, 100 Wn. App. 685, 697, 998 P.2d 399 (2000) (plaintiff must not know true facts or have means to discover them).

The estoppel events the Tadyches alleged were an email exchange and a meeting in March 2015, after they received their litigation expert's report of alleged defects, and while still having a full month to file suit. CP 1307; PFR at 18. They did not even *allege* reliance, and they waited years to file, even longer than the ***Del Guzzi*** plaintiffs, who delayed filing for only 1.5 years, yet this Court rejected estoppel. 105 Wn.2d at 885. The Tadyches slept on their rights and cannot use estoppel to evade their delay.

"A defendant is not equitably estopped from raising a statute of limitations when the plaintiff had actual notice of the facts giving rise to a claim in sufficient time for the plaintiff to commence an action before the expiration of the statutory period." ***McLeod v. Nw. Alloys, Inc.***, 90 Wn. App. 30, 40, 969 P.2d 1066 (1998) (citation omitted). By

March 2, 2015, the Tadyches had alleged defects and possessed a *litigation report* raising concerns about "insufficient ventilation in walls and roof structures." CP 777-83. The Tadyches thus undisputedly had knowledge of alleged insufficiencies in their construction during the limitations period, but took no action on their own expert's recommendations within that period. CP 1308. No genuine issue of material fact exists as to estoppel. *Id*.

Thus, as the appellate decision states, ***Rouse*** and ***Marsh*** are easily distinguished. Unpub. Op at 23-25. In ***Rouse***, this Court found a one-year warranty provision *ambiguous as to accrual*, interpreted it against defendant, and affirmed an award of attorney fees under the contract. ***Rouse***, 101 Wn.2d at 135-36. Because of the ambiguity, *new* promises to repair made *after* the one-year contractual limitations period expired *could* equitably estop the builder from relying on its one-year limitation. *Id*. But here, the Tadyches claimed no ambiguity in the contractual

limitations provision, which is crystal clear on accrual. ***Rouse*** is inapposite.

And in ***Marsh***, the defendant's insurance adjustor allegedly told the potential plaintiff that she should not worry if she did not hear back from him for six months to a year, during which the statute of limitations expired. ***Marsh***, 22 Wn. App. at 936. The Tadyches identify no similar statement encouraging them to delay. ***Marsh*** is inapposite.

In sum, no conflicts exist with any appellate opinion. And this private contractual dispute is not of substantial public interest. Neither the trial nor the appellate court was proffered any evidence of a "consumer protection" claim, much less clear and convincing evidence of an estoppel. This Court should deny discretionary review.

C. This Court should award Noble Ridge attorney fees under the contract and RAP 18.1(j).

The Court of Appeals properly awarded Noble Ridge attorney fees under the contract. Unpub. Op. at 25. On the same basis, and under RAP 18.1(j), this Court should

award Noble Ridge fees for responding to the Tadyches' PFR. Noble Ridge will comply with RAP 18.1.

CONCLUSION

For the reasons stated above and in the trial and appellate court decisions, this Court should deny discretionary review.

RESPECTFULLY SUBMITTED this 4th day of October 2021.

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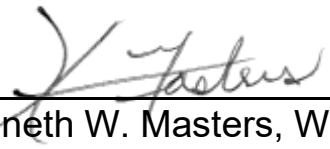

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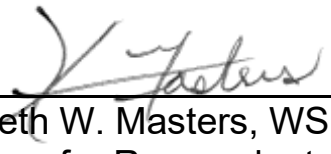
CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to RAP 18.17(b), the foregoing **ANSWER TO PETITION FOR REVIEW** was produced using word processing software and the number of words contained in the document, exclusive of words contained in any appendices, title sheet, table of contents, table of authorities, certificate of compliance, certificate of service, signature blocks, and pictorial images (*e.g.*, photographs, maps, diagrams, and exhibits) is 2,519.



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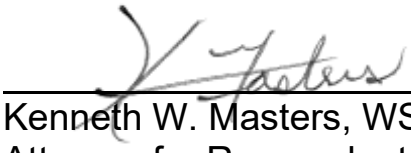

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