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STATE OF WASHINGTON

COURT OF APPEALS, BY JW  
DEPUTY

DIVISION II

OF THE STATE OF WASHINGTON

Steven and Deborah Mattingly, husband and wife,

Appellants,

v.

Palmer Ridge Homes, LLC, a Washington limited liability company, and  
Contractors Bonding and Insurance Company, Bond Account Number  
SG0213, a Washington corporation,  
Respondents.

BRIEF OF RESPONDENT PALMER RIDGE HOMES

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ORIGINAL

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**A. COUNTER TO ASSIGNMENTS OF ERROR**

**Counter to Assignments of Error**

1. The trial court did not err in granting Palmer Ridge's Motion for Summary Judgment on the grounds that the Mattinglys did not bring their claims against Palmer Ridge within the one year contractual limitations period.

2. The trial court did not err in denying the Mattinglys' Motion for Reconsideration as summary judgment for Palmer Ridge was proper.

3. The trial court did not err in granting Palmer Ridge's Motion for Attorneys Fees on the grounds that attorneys' fees were authorized by both statute and the Construction Contract between the parties.

4. The trial court did not err in entering judgment dated February 13, 2009.

**Issues Pertaining to Assignments of Error**

1. Whether the trial court properly granted Palmer Ridge's Motion for Summary Judgment when the Construction Contract contains a valid one year limitation on suit, the Construction Contract was negotiated between the parties, the Mattinglys had knowledge of the one year

limitation, and the Mattinglys failed to file suit against Palmer Ridge within the one year period as required by the Construction Contract.

2. Whether the trial court properly granted Palmer Ridge's Motion for Summary Judgment when the 2-10 Warranty contains a valid one year limitation on suit, the Construction Contract was negotiated between the parties, the Mattinglys had knowledge of the one year limitation, and the Mattinglys failed to file suit against Palmer Ridge within the one year period as required by the 2-10 Warranty.

3. Whether providing the 2-10 Warranty was part of Palmer Ridge's duties under the Construction Contract and thus not a modification of the Construction Contract.

4. Whether, even if the 2-10 Warranty modified the Construction Contract, such modification was valid when the Mattinglys gave consideration for the 2-10 Warranty in the form of \$1,500, and the Mattinglys specifically acknowledge they contracted and paid for the 2-10 Warranty.

5. Whether the issue of disclaimer of the express warranties in the Construction Contract is immaterial when both the Construction Contract and the 2-10 Warranty include one year limitation bars on all of the Mattinglys' claims.

6. Whether Palmer Ridge met its burden of showing it is entitled to summary judgment based on the limitation of suit in the Construction Contract when it sufficiently raised the argument in its Motion for Summary Judgment and argued it at oral argument.

7. Whether the terms of the 2-10 Warranty are valid and not against public policy when the Mattinglys were aware of the terms, were provided with the 2-10 Warranty booklet and certified that they understood and consented to the terms, and the important terms were set out in bold and all capital letters.

8. Whether the award of attorneys' fees should be upheld when both statute and the Construction Contract specifically provided for attorneys' fees, and the Mattinglys did not properly present argument on the issue in their appellate brief.

9. Whether Palmer Ridge is entitled to attorneys' fees and costs on appeal pursuant to RAP 18.1 when Palmer Ridge, as the prevailing party, is entitled to recover its attorneys' fees and costs pursuant to the terms of the contract.

**B. STATEMENT OF CASE**

Palmer Ridge Homes, LLC ("Palmer Ridge") was at all pertinent times a general contractor. In December 2005, Palmer Ridge entered into two separate contracts with Appellants Steven and Deborah Mattingly (the

“Mattinglys”): one contract for the sale of a five acre parcel of real property to the Mattinglys; and another contract for the construction of a custom home by Palmer Ridge for the Mattinglys on that same parcel of land (the “Construction Contract”). CP 120-121; 129; 131-38. The terms of the Construction Contract were extensively negotiated by the parties.

CP 29.

The Construction Contract contains the following warranty provision:

At the completion of this project, Contractor shall execute an instrument to Owner warranting the project for one year against defects in workmanship or materials utilized.

CP 35.

The Construction Contract also contains the following provision, requiring any legal action related to the project to be brought within one year from completion of the project:

No legal action of any kind relating to the project, project performance or this contract shall be initiated by either party against the other party after one year beyond completion of the project or cessation of work.

Id. (emphasis added).

As required by the Construction Contract, Palmer Ridge provided the Mattinglys with a warranty related to the construction of their home called the 2-10 Home Buyer’s Warranty (the “2-10 Warranty”) from the

Home Buyer's Warranty Corporation. CP 30. The 2-10 Warranty was always part of the transaction to construct the house. The cost of the 2-10 Warranty was a specific part of the itemized cost breakdown for construction of the house. CP 281, 286.

Palmer Ridge signed the warranty deed to the Mattinglys on May 18, 2006.<sup>1</sup> CP 145. On June 5, 2006, the Mattinglys completed the purchase of the real property from Palmer Ridge. CP 248. The Mattinglys had to close on their construction loan and purchase the land where the house would be built, before Palmer Ridge could commence with construction. CP 131. The same day the Mattinglys closed on the construction loan, the Mattinglys enrolled in the 2-10 Warranty program. CP 277. The 2-10 Warranty was always part of the transaction between Palmer Ridge and the Mattinglys, not a later modification. By signing the 2-10 Warranty enrollment form Mr. Mattingly acknowledged that he had

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<sup>1</sup> As the recorded documents show, the Mattinglys did not complete the purchase of the real property from Palmer Ridge until they closed on their construction loan on June 5, 2006 (not May 18, 2006, the date Palmer Ridge signed the warranty deed to the Mattinglys). CP 144, 145. The Mattinglys executed a Deed of Trust and Construction Loan Rider on June 5, 2008. CP 264. The Deed of Trust was recorded on June 8, 2008. CP 250. The June 5, 2006 date is important because the Mattinglys did not later "modify" or "amend" their agreement with Palmer Ridge by enrolling in the 2-10 Warranty at some later date after closing on the purchase of the land. Instead, the Mattinglys had to close on their construction loan and purchase the land where the house would be built in order for Palmer Ridge to build the house. The 2-10 Warranty enrolment was done on the date of closing. CP 277.

read a copy of the 2-10 Warranty booklet and consented to its terms.<sup>2</sup> Id.

The 2-10 Warranty included the following provisions in bold type:

**EXCLUSIVE REMEDY AGREEMENT\*\*.** **Effective one year from the Effective Date of Warranty, You have waived the right to seek damages or other legal or equitable remedies from Your Builder...under any other common law or statutory theory or liability...Your only remedy in the event of a defect in or to Your Home or in or to the real property on which Your Home is situated is provided to You under this express Limited Warranty.**

CP 48. Thus, pursuant to both the 2-10 Warranty and the Construction Contract, the Mattinglys had only one year to commence an action against Palmer Ridge for any legal, equitable, common law, or statutory cause of action arising out of the construction of the house.

The Mattinglys' residence reached substantial completion in the spring of 2007. CP 30. Accordingly, on April 1, 2007, Steven Mattingly executed a Certificate of Substantial Completion, acknowledging that the residence was substantially complete as of March 30, 2007, and that he understood that the duration of all implied warranties had been limited to one year from the date of final payment or the date of occupancy. Id. The Certificate of Substantial Completion contains the following provision:

The owner understands that the duration of all implied warranties has been limited to one (1) year from the date of

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<sup>2</sup> The 2-10 Warranty enrollment form states that, "By signing below, you acknowledge that you have read a sample copy of the Warranty Booklet and **CONSENT TO THE TERMS OF THESE DOCUMENTS...**" CP 293.

final payment or the date of occupancy, whichever comes first. The owner understands that no warranties are being made by the contractor, except those in the written Limited Warranty provided by the contractor as part of the Contract Documents.

CP 41 (emphasis added).

The Mattinglys made the final payment for the construction of the house on April 23, 2007. CP 30. A final Certificate of Occupancy for the Mattinglys' residence was issued on May 14, 2007. Id. The Mattinglys moved into the house around the end of May of 2007. CP 124.

In short, by April of 2007, the Mattinglys had been told three times that the applicable warranties would last one year and that they must bring any and all claims against Palmer Ridge within that one year period: The Mattinglys were told in the Construction Contract that they had one year to make a claim against Palmer Ridge; they were told in the 2-10 Warranty that they had one year to make a claim against Palmer Ridge; and they were told again in the Certificate of Substantial Completion that implied warranties were limited to one year. CP 35, 48, 41. All of the contract documents reveal the parties' intent to limit claims against Palmer Ridge to one year. The documents warned the Mattinglys that, regardless of the substance of the warranties, they had one year to bring claims against Palmer Ridge.

On or about August 14, 2008, one year and four months after the date of substantial completion of their home, the Mattinglys made their first warranty claim under the 2-10 Warranty. CP 289.

On or about October 17, 2008, more than 18 months after substantial completion of their house, the Mattinglys commenced suit against Palmer Ridge. CP 1.

The Mattinglys made their second warranty claim under the 2-10 Warranty on November 5, 2008.<sup>3</sup> CP 289. On that warranty claim form, Mr. Mattingly acknowledged that the 2-10 Warranty began to run on May 29, 2007.<sup>4</sup> CP 293. In other words, the Mattinglys acknowledged that they knew the 2-10 Warranty expired at least five months prior to their second warranty claim, yet they still made the claim. Approximately one month later, Mr. Mattingly signed a declaration stating that he believed the one year provisions of the 2-10 Warranty expired on June 5, 2007, contradicting his prior statement. CP 124. Thus, Mr. Mattingly acknowledged that the one year workmanship warranty in the 2-10 Warranty did not expire just weeks after they moved into the house, and he acknowledged that both of their 2-10 Warranty claims were untimely.

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<sup>3</sup> The claim was signed by Mr. Mattingly on October 31, 2008, and submitted with a cover letter by counsel on November 5, 2008. CP 293. 292.

<sup>4</sup> Mr. Mattingly lists what he understands as the effective date of the 2-10 Warranty coverage as May 29, 2007. CP 293.

On or about November 20, 2008, Palmer Ridge filed its Motion for Summary Judgment based on the one year limitation of suit. CP 21. Four days prior to the hearing on Palmer Ridge's motion, the Mattinglys filed an Amended Complaint to redact the reference in the initial complaint that the house was completed in May of 2007.<sup>5</sup> CP 298. Subsequently, Mr. Mattingly filed a declaration changing his earlier statement that the house was completed on May 14, 2007. CP 349. The Mattinglys knew the house was complete in May of 2007. These subsequent self-serving statements should hold no weight.

In summary, the Mattinglys' own statements establish that they were fully aware of the one year limitations period contained in the Construction Contract, the 2-10 Warranty, and the Certificate of Substantial Completion. They also have shown that they knew when the limitation period commenced and when it had run.

### **C. SUMMARY OF ARGUMENT**

The issue at hand is not whether certain warranties were disclaimed or the substance of the warranties. Rather, the issue is the validity of the one year limitations period, to which the Mattinglys agreed in both the Construction Contract and the 2-10 Warranty, as well as in the Certificate of Substantial Completion. It does not matter which document

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<sup>5</sup> The Mattinglys' Amended Complaint changed the word "until Defendant Palmer Ridge completed construction of Residence," to read "until May 2007." CP 298.

the Mattinglys point to for the substance of the warranties. The agreements they made precluded them from bringing suit against Palmer Ridge after the one year limitations period had run. To prevail, the Mattinglys would have to show that none of the documents are valid. They do not even make such an argument.

The substance of the warranties, and any modification or disclaimer of those warranties, is inconsequential to this appeal.<sup>6</sup> The Mattinglys' focus on those issues is misguided. The one year limitations period contained in all three documents – Construction Contract, the 2-10 Warranty, and the Certificate of Substantial Completion – is the only proper focus on appeal.<sup>7</sup>

The Mattinglys knew they had one year to bring claims against Palmer Ridge; they were told this numerous times. The Construction Contract, the 2-10 Warranty, and the Certificate of Substantial Completion each notified the Mattinglys of the one year limitations period. The Mattinglys knew that the one year period began to run in May of 2007; they said so specifically in their complaint, in Mr. Mattingly's declaration, and on warranty claim forms.

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<sup>6</sup> Clearly the Mattinglys do not see the warranty as void or meaningless, as they have pending claims under the 2-10 Warranty. CP 289, 290.

<sup>7</sup> The Mattinglys are attempting to get the benefits of the warranties, but at the same time, assert that the procedural limitations applicable to those warranties do not apply.

It is clear that the Mattinglys knew they had one year from the completion of the house to file suit against Palmer Ridge and failed to do so. Therefore, the Mattinglys' claims against Palmer Ridge are barred. The Trial Court's decision to dismiss all of Mattinglys' claims should be upheld.

**D. ARGUMENT**

The Court of Appeals should uphold the Trial Court's decision to grant Palmer Ridge's Motion for Summary Judgment. The Mattinglys' claim for breach of contract is barred by the one year limitations period set out in the Construction Contract between the parties, the 2-10 Warranty, and the Certificate of Substantial Completion. There are no questions of material fact as to the requirement that the Mattinglys bring any claims against Palmer Ridge within one year from completion of the Project and their failure to do so. Therefore, the Mattinglys' claims are barred and summary judgment dismissal of the claims was proper.

The Appellate Court may affirm the Trial Court on any grounds established by the pleadings and supported by the record. Truck Ins. Exch. v. VanPort Homes, Inc., 147 Wn.2d 751, 766, 58 P.3d 276 (2002) (citing Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994)). An appellate court reviews a ruling of summary judgment de novo, and engages in the same inquiry as the trial

court. Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The purpose of summary judgment is to avoid a useless trial. Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 349, 588 P.2d 1346 (1979). After the moving party submits adequate affidavits the burden shifts to the nonmoving party to set forth specific facts sufficiently rebutting the moving party's contentions, and disclosing the existence of a material issue of fact. Hoff v. Mountain Const., Inc., 124 Wn. App. 538, 545, 102 P.3d 816 (2004). However, even questions of fact may be determined as a matter of law when reasonable minds could reach but one conclusion. Owen v. Burlington Northern and Santa Fe R.R. Co., 153 Wn.2d 780, 788 108 P.3d 1220 (2005).

By April of 2007, the Mattinglys had been told three times that they had one year to bring any claims related to the Project against Palmer Ridge. They were told in the Construction Contract that they had one year to make a claim against Palmer Ridge. CP 35. On June 5, 2006, when the Mattinglys signed the 2-10 Warranty enrollment paperwork, they were told that under the 2-10 Warranty that they had one year to make a claim against Palmer Ridge. CP 48. At that time the Mattinglys certified that they had read a copy of the 2-10 Warranty booklet. Id. The Mattinglys

were told a third time that they had one year to bring claims against the Palmer Ridge in the Certificate of Substantial Completion.<sup>8</sup> CP 41.

The Mattinglys' argument that they were not bound by the one year limitations period has changed over time, but all of the documents are clear with regard to the intent of the parties. It does not matter which document controls; each one provides that the Mattinglys had one year to bring claims against Palmer Ridge. They failed to do so, and therefore, their claims are barred.

**I. THE MATTINGLYS FAILED TO FILE SUIT AGAINST PALMER RIDGE WITHIN THE ONE YEAR LIMITATIONS PERIOD PROVIDED BY THE CONSTRUCTION CONTRACT.**

The Construction Contract required the Mattinglys to file any lawsuit against Palmer Ridge within one year of Project completion. The Mattinglys failed to do so.

a. The One Year Limitations Period Provided by the Construction Contract is Valid and Binding on the Parties.

Washington law is replete with confirmation of the right to contract for limitations on the ability to bring suit. It has long been the law of this State that contracting parties may freely shorten the statute of limitations for claims under a contract. City of Seattle v. Kuney, 50 Wn.2d 299, 302-03, 311 P.2d 420 (1957) (upholding one year time limit

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<sup>8</sup> As noted in the facts above, while the Mattinglys contest these facts, the documents they signed are quite clear.

on claims for construction contract); Southcenter View Condominium Owners' Ass'n v. Condominium Builders, Inc., 47 Wn. App. 767, 770, 736 P.2d 1075 (1986) (upholding one year time limit for condominium owners' claims against builder and developer); Yakima Asphalt Paving Co. v. Washington State Dept. of Transp., 45 Wn. App. 663, 664, 726 P.2d 1021 (1986) (upholding 180 day time limit for claims under a construction contract); Wothers v. Farmers Ins. Co. of Washington, 101 Wn. App. 75, 80, 5 P.3d 719 (2000) (upholding one year time limit for claims under a homeowners insurance policy).

Here, the Construction Contract entered into between the Mattinglys and Palmer Ridge states that “[N]o legal action of any kind relating to the project, project performance, or this contract shall be initiated by either party against the other after one year beyond the completion of the project or cessation of work.” CP 35 (emphasis added). The one year limitation in which to commence an action is valid here, as it was in Kuney, Southcenter, and Wothers, all noted above.

- b. There is No Issue of Fact Regarding Whether the Mattinglys Knew They Had One Year to File Suit Against Palmer Ridge.

By April of 2007, the Mattinglys were told three times that they had one year to bring claims related to the Project against Palmer Ridge. They were told in the Construction Contract that they had one year to

make a claim against Palmer Ridge. CP 35. When they signed the 2-10 Warranty enrollment paperwork, they were told that under the 2-10 Warranty that they had one year to make a claim against Palmer Ridge. CP 48. Mr. Mattingly admits that he knew the 2-10 Warranty was in effect by at least June 4, 2007, when the Mattinglys “just moved in.” CP 204. The Mattinglys acknowledged a third time that they had one year to bring claims against Palmer Ridge when they signed the Certificate of Substantial Completion. CP 41.

The Trial Court agreed with Palmer Ridge that the Mattinglys knew of the time limits on the warranties, and said that Mr. Mattingly “signed three times that he knew when the warranty was expiring,” and that he “indicated he had read his (2-10 Warranty) booklet.” RP, 02/06/09, 21, 21. Additionally, the Trial Court said that “the Mattinglys were aware that they had one year to serve [Palmer Ridge] and failed to do so.” RP, 01/16/09, 27.

- c. There is No Issue of Fact Regarding Whether the Limitations Period in the Construction Contract Began to Run Upon Completion of the House, in May 2007.

Washington Courts have held that substantial completion occurs when there is only punch list work to be completed and the real property is fit for occupancy. Lakeview Blvd Condominium Ass’n v. Apartment Sales Corp., 101 Wn. App. 923, 932, 6 P.3d 74 (2000).

The Mattinglys cite Honeywell, Inc. v. Babcock, 68 Wn.2d 239, 412 P.2d 511 (1996), for the proposition that incomplete punch list items mean that a project is not “complete.” However, stated more precisely, Honeywell stands for the rule that a project is not complete until all work necessary to perform the contract is complete. That a party to a project defines a list of work they want done as “punch list” is immaterial. The work that is to be completed is the proper focus. Honeywell is distinguished from the case at bar. Here, several dates are important: substantial completion, final payment for construction, final certificate of occupancy, and the Mattinglys occupying the house. The house was complete and work had ceased more than a year prior to the Mattinglys’ filing of the lawsuit against Palmer Ridge. The fact that the Mattinglys requested that Palmer Ridge perform minor tasks related to the house to address issues they were not happy with does not change the fact that the house was complete. The contract was complete. Simply because the Mattinglys continued to make fastidious requests of Palmer Ridge, and that Palmer Ridge responded in its attempts to make the Mattinglys happy, does not mean the house was not complete. The Mattinglys themselves stated in their Complaint that construction of the house was complete in May of 2007. CP 5.

The facts here show that there is no question that construction was complete by May of 2007 (CP 30), and that the Mattinglys moved into the house before the end of May of 2007. CP 5.

- d. The Mattinglys Should be Estopped by Their Conduct and Sworn Statements from Contesting that the One Year Period For Filing Lawsuits Did Not Begin to Run Until the House was Completed In May of 2007.

Estoppel precludes a person from denying or asserting anything to the contrary of that which has been established as the truth, whether by matter of record, by matter in writing, or by matter *in pais*. Kessinger v. Anderson, 31 Wn.2d 157, 169, 196 P.2d 289 (1948). (citing 19 Am.Jur. 600, 601, Estoppel, §§2, 3; 31 C.J.S. 191, Estoppel, §1).

In their Complaint, the Mattinglys acknowledged that construction of the house was completed on May 14, 2007. CP 5. Mr. Mattingly also stated in his signed declaration dated December 11, 2008, that the home was complete by May 14, 2007, when Pierce County issued the Certificate of Occupancy. CP 121. Approximately two weeks after filing the Complaint, the Mattinglys filed their second claim under the 2-10 Warranty. CP 289. Mr. Mattingly acknowledged in his own handwriting on that claim form that their warranty began to run in May of 2007. Id. For the Mattinglys to argue that the house was not complete by May of

2007, is not well taken as it was in response to the fact that the limitations period has run.<sup>9</sup>

**II. THE MATTINGLYS FAILED TO FILE SUIT AGAINST PALMER RIDGE WITHIN THE ONE YEAR LIMITATIONS PERIOD PROVIDED BY THE 2-10 WARRANTY.**

a. The One Year Limitations Period Provided by the 2-10 Warranty is Valid and Binding on the Parties.

As discussed above, Washington law is clear that contracting parties may freely shorten the statute of limitations for claims under that contract. City of Seattle v. Kuney, 50 Wn.2d 299, 302-03, 311 P.2d 420 (1957) (upholding one year time limit on claims for construction contract); Southcenter View Condominium Owners' Ass'n v. Condominium Builders, Inc., 47 Wn. App. 767, 770, 736 P.2d 1075 (1986) (upholding one year time limit for condominium owners' claims against builder and developer); Yakima Asphalt Paving Co. v. Washington State Dept. of Transp., 45 Wn. App. 663, 664, 726 P.2d 1021 (1986) (upholding 180 day time limit for claims under a construction contract); Wothers v. Farmers Ins. Co. of Washington, 101 Wn. App. 75, 80, 5P.3d 719 (2000) (upholding one year time limit for claims under a homeowners insurance policy).

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<sup>9</sup> The Mattinglys' Amended Complaint removed the reference to the house being complete in May of 2007, as discussed in the facts above. This change of story by the Mattinglys, while convenient for their claims, also appears disingenuous.

Here, the 2-10 Warranty provided that the Mattinglys must file any suit against Palmer Ridge within one year from the effective date of the 2-10 Warranty, which was April 17, 2007. CP 289. The Mattinglys failed to bring suit against Palmer Ridge until October 17, 2008, approximately five months after the limitation period had run.

b. There is No Issue of Fact Regarding Whether the Mattinglys Knew They Had One Year to File Suit Against Palmer Ridge Under the 2-10 Warranty.

When Mr. Mattingly signed the 2-10 Warranty enrollment form, he certified that he had read a copy of the 2-10 Warranty booklet and consented to its terms. CP 277. Our Supreme Court has stated that a party to a contract which he has voluntarily signed cannot later argue that he did not read it, or was ignorant of its contents. National Bank of Washington v. Equity Investors, 81 Wn. 2d 886, 912-13, 506 P.2d 20 (1973). Contract law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs. Perry v. Continental Ins. Co., 178 Wash. 24, 27-28, 33 P.2d 661 (1934). Absent fraud, deceit, or coercion, a party cannot repudiate his own signature voluntarily and knowingly fixed to an instrument whose contents he was bound by law to understand. Id.

The Mattinglys' source for their argument that they were not bound by the one year limitations period keeps changing, but all of the documents are clear with regard to the intent of the parties. It does not

matter which document the Mattinglys argue controls; every one provides that the Mattinglys had one year to bring claims against Palmer Ridge.

As stated above, the Trial Court said that Mr. Mattingly “signed three times that he knew when the warranty was expiring,” and that he “indicated he had read his (2-10 Warranty) booklet.” RP, 02/06/09, 21, 21. Additionally, the Trial Court agreed with Palmer Ridge that “the Mattinglys were aware that they had one year to serve [Palmer Ridge] and failed to do so.” RP, 01/16/09, 27.

**III. THE ISSUE OF MODIFICATION OF THE CONSTRUCTION CONTRACT BY THE 2-10 WARRANTY HAS NO IMPACT ON THE BAR OF CLAIMS AGAINST PALMER RIDGE, AND THEREFORE, IS NOT RELEVANT ON APPEAL.**

The Mattinglys argue in their appellant brief, “There was no modification of the Construction Contract by the 2-10 (Warranty).” Whether or not the 2-10 Warranty modified the Construction Contract does not change the fact that the Mattinglys had one year to sue Palmer Ridge and make the claims at issue. As with the Mattinglys’ argument related to disclaimer, the issue of modification has no bearing on the result of this appeal because both documents work to bar the Mattinglys’ claims against Palmer under the facts of this case.

**IV. IF THE ISSUE OF MODIFICATION IS RELEVANT ON APPEAL, THERE WAS NO MODIFICATION OF THE CONSTRUCTION CONTRACT BECAUSE THE 2-10 WARRANTY IS PART OF THE CONSTRUCTION CONTRACT.**

The Mattinglys' focus on the argument that the 2-10 Warranty modified the Construction Contract is misguided. As discussed further below, the 2-10 Warranty is part of the Construction Contract and the Mattinglys have previously acknowledged the same.

When the Mattinglys entered into the Construction Contract, they signed up for the 2-10 Warranty. The 2-10 Warranty is set out in the cost itemization as a separate \$1,500 cost. CP 281, 286. Mr. Mattingly acknowledged that he paid \$1,500 for the 2-10 Warranty in an email to Palmer Ridge. CP 204. The Mattinglys knew the 2-10 Warranty was part of the Construction Contract before construction of the house commenced.

**V. EVEN IF THE ISSUE OF MODIFICATION IS MATERIAL AND THE 2-10 WARRANTY WAS NOT PART OF THE CONSTRUCTION CONTRACT, THE MODIFICATION WAS EFFECTIVE AND VALID.**

If the Court determines that any modification of the Construction Contract is at issue on appeal, and that the 2-10 Warranty was separate and apart from the Construction Contract, the elements required to show a modification have been met.

Modification of a contract requires intent by both parties and a meeting of minds. Wagner v. Wagner, 95 W.2d 94, 103, 632 P.2d 1279 (1980). Consideration or a mutual change in obligations and rights is required. Id. A mutual modification is proven when clear and convincing evidence is shown. Neilsen v. Northern Equity Corp., 47 Wn.2d 171, 176, 286 P.2d 1031 (1955).

Here, the Mattinglys intended for the 2-10 Warranty to be effective. Mr. Mattingly certified that he consented to the terms of the 2-10 Warranty (CP 277) and sent an email to Palmer Ridge when he thought the 2-10 Warranty was expiring that “that better not be the case.” CP 204. Additionally, the Mattinglys made two separate claims under the 2-10 Warranty. CP 289. If the Mattinglys truly believed that the 2-10 Warranty was not part of the agreement, it would make no sense for Mr. Mattingly to agree that he paid \$1,500 for that warranty, to express concern over the expiration date of the 2-10 Warranty, and to make claims under the 2-10 Warranty. CP 204, CP 289.

a. There Was Consideration Given For the 2-10 Warranty

The Mattinglys’ cite Rosellini v. Banchemo, 83 Wn.2d 268, 273, 517 P.2d 955 (1974) for the proposition that a subsequent agreement modifying an existing contract must be supported by new, mutual consideration.

Rosellini is distinguishable from the present case. In that case, one party had the same duties as it did under the original contract, and the other had a lesser duty, unsupported by consideration. Id. Here, there was consideration for the 2-10 Warranty. The Mattinglys paid money and received additional warranty coverage. The Mattinglys paid \$1,500 and plainly acknowledged the same. CP 204. The 2-10 warranty gave the Mattinglys additional benefit in that the warranties were backed by an insurance company, which was not the case with the Construction Contract warranties. The 2-10 Warranty also included two year and ten year warranties for various aspects of construction. In other words, the Mattinglys received important benefits in the 2-10 Warranty. As part of the Construction Contract they were subject to procedural limitations, including the one year limitations period.

b. The Mattinglys Intended to be Bound by the 2-10 Warranty.

As discussed above, the Mattinglys showed that they intended to be bound by the terms of the 2-10 Warranty. They acknowledged that they paid \$1,500 specifically for the 2-10 Warranty (CP 204) and they consented to the terms of the 2-10 Warranty by signing the enrollment form. CP 277. Additionally, the Mattinglys made claims under the 2-10 Warranty. CP 289. It is obvious that the Mattinglys consented to the

terms of the 2-10 Warranty and made more than one attempt to enjoy the benefits offered by the same.<sup>10</sup>

**VI. WHETHER OR NOT ANY OF THE CONSTRUCTION CONTRACT WARRANTIES WERE DISCLAIMED BY THE 2-10 WARRANTY IS NOT RELEVANT ON APPEAL, AS THE SUBSTANCE OF THE WARRANTIES IS NOT AT ISSUE, AND HAS NO EFFECT ON THE BAR OF CLAIMS AGAINST PALMER RIDGE.**

The Mattinglys' discussion regarding disclaimer of the Construction Contract warranties is immaterial. The substance of any warranties provided is not the issue here. The one year limitations period applies to all the warranties and all claims against Palmer Ridge.<sup>11</sup> Even assuming the Mattinglys' argument that the 2-10 Warranty did not effectively disclaim any of the warranties within the Construction Contract was persuasive, they cannot escape the simple fact that the one year limitations period applied to bar any suit beyond the one year term.<sup>12</sup> Whether or not the parties modified any portion of the Construction Contract has no bearing on the outcome of this appeal, as the Mattinglys were required to bring all claims against Palmer Ridge within one year regardless of the substance of any warranties provided to them.

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<sup>10</sup> The Mattinglys still have pending claims under the 2-10 Warranty. CP 289.

<sup>11</sup> The two year warranty on electrical, plumbing, and mechanical systems, and the 10 year structural defect warranty, are not at issue.

<sup>12</sup> In their six pages of argument related to disclaimer, the Mattinglys fail to address how any disclaimer or non-disclaimer of warranties changes the fact that they had one year to make warranty claims and to bring suit against Palmer Ridge.

**VII. THE ISSUE OF DISCLAIMER OF THE CONSTRUCTION CONTRACT EXPRESS WARRANTIES BY THE 2-10 WARRANTY IS NOT RELEVANT ON APPEAL.**

The Mattinglys argue that the 2-10 Warranty did not effectively disclaim either the express warranties in the Construction Contract or the implied warranty of habitability. These arguments are likewise not relevant to this appeal. The substance of the warranties is not at issue. The only issue on appeal is whether the Mattinglys' claims are barred by the limitation on suit. It is clear that both the Construction Contract and the 2-10 Warranty included a one year limitations period. The Mattinglys failed to bring suit against Palmer Ridge within this time period. Therefore, their claims are barred. The substance of any warranties they have or do not have makes no difference with respect to the issue of whether they filed claims in time.

**VIII. PALMER RIDGE SUFFICIENTLY RAISED THE THEORY THAT IT IS ENTITLED TO SUMMARY JUDGMENT BASED ON THE LIMITATION OF SUIT IN THE CONSTRUCTION CONTRACT.**

The Mattinglys blur two distinct issues related to what was required of Palmer Ridge in order to prevail on its Motion for Summary Judgment. One issue is the burden on the moving party to show the absence of any genuine issue as to any material fact based on the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, and that the moving party is entitled to a judgment as a matter of law, which the Court must review in the light most favorable to the non-moving party. See Hash v. Children's Orthopedic Hosp. & Med. Ctr., 110 Wn.2d 912, 915, 757 P.2d 507 (1988). The second issue is whether the theory relied upon by the Court in awarding judgment was sufficiently raised by the moving party. See White v. Kent Med. Ctr., Inc., 61 Wn. App. 163, 169, 810 P.2d 4 (1991). Palmer Ridge both met its burden of providing documents and affidavits showing there is no genuine issue of material fact, as well as the requirement that it sufficiently raised its theory for summary judgment.

a. Palmer Ridge Sufficiently Met the Burden of Showing that No Genuine Issues of Material Fact Exist.

Palmer Ridge sufficiently shifted the burden of showing that no genuine issue of material fact existed related to judgment in its favor, based on the limitation period in the Construction Contract, by introducing the Construction Contract itself into the record and arguing that the Mattinglys' suit was time barred based on the limitation provision contained within the document. Palmer Ridge introduced the Construction Contract into the case record by attaching it to a declaration supporting its motion for summary judgment. CP 32-39. It is clear that the Construction Contract and the limitation period therein was part of the agreement

between the parties. The argument by the Mattinglys to exclude this from consideration is yet another attempt to muddy the waters.

b. Palmer Ridge Sufficiently Raised the Argument That The Limitation Period Set Out in the Construction Contract Bars the Mattinglys' Claims Against Palmer Ridge.

Palmer Ridge sufficiently raised its theory for judgment by arguing that the Construction Contract contained a valid one year time limit for law suits against Palmer Ridge and that the Mattinglys' lawsuit is time barred based, in part, on that provision. CP 20, 21.

In addition to raising the issue in its motion for summary judgment, the issue was argued by both parties in oral argument. While the Mattinglys had every opportunity to make their position known, the Court simply was not persuaded. RP, 01/16/09, 2-29.

**IX. THE TERMS OF THE 2-10 WARRANTY ARE VALID, NOT AGAINST PUBLIC POLICY, AND SHOULD BE ENFORCED.**

The Mattinglys' contention that the terms of the 2-10 Warranty are against public policy is disingenuous. They claim that the 2-10 Warranty required them to bring a lawsuit within three weeks after occupying the home, however, the Mattinglys know this is not true. The one year limitation to bring suit in the 2-10 Warranty began to run on the effective date of the warranty, in this case, the date of the certificate of occupancy. CP 289. The effective date of the 2-10 Warranty was initially incorrectly

identified; an honest error by the 2-10 Homebuyers Warranty Corporation. Id. Mr. Mattingly himself spotted this error and made a request of Palmer Ridge to have the error corrected, and it was. CP 204. A representative of the warranty company acknowledged the mistake and sent notice of the correction to the Mattinglys. CP 289. For the Mattinglys to raise this issue on appeal is disingenuous at best.

**X. THE COURT SHOULD NOT CONSIDER THE MATTINGLYS' ARGUMENT THAT THE AWARD OF ATTORNEYS FEES AND COSTS WAS IMPROPER BECAUSE THEY DID NOT INCLUDE PALMER RIDGE'S MOTION FOR ATTORNEYS' FEES IN THE CLERKS PAPERS AND FAILED TO BRIEF THE ISSUE.**

The Mattinglys did not include Palmer Ridge's Motion for Attorneys' Fees in the Designation of Clerk's Papers, nor did they provide briefing on the issue of the award of attorneys' fees and costs to Palmer Ridge by the Trial Court. In the absence of briefing on an argument, the appellate court declines to consider them. See RAP 10.3(a)(5); Ito Corp. v. Prescott, Inc., 83 Wn. App. 282, 288, n.2, 921 P.2d 566 (1996). Assignments of error unsupported by argument need not be considered on appeal. Puget Sound Water Quality Defense Fund v. Metro. Seattle, 59 Wn. App. 613, 618, 800 P.2d 387 (1990). Since the Mattinglys did not include Palmer Ridge's Motion for Attorneys' Fees in the Designation of Clerk's Papers, and since they failed to brief the issue, this Court should

not consider any argument from them related to the award of attorneys' fees and costs to Palmer Ridge by the Trial Court.

- a. If the Court Finds That the Issue Was Sufficiently Briefed By the Mattinglys, the Award of Attorneys Fees and Costs and Statutory Costs Was Proper Pursuant to the Construction Contract, RCW 18.27.040(6), and RCW 4.84.030.

In Washington, attorneys' fees may be awarded when authorized by a contract, a statute, or a recognized ground in equity. Fisher Props., Inc. v. Arden-Mayfair, Inc., 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986). A trial judge is given broad discretion in determining reasonableness of an award of attorneys' fees and, in order to reverse that award, it must be shown that the trial court manifestly abused its discretion. Scott Fetzer Co. V. Weeks, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993).

The Construction Contract contained the following provision:

In the event of any arbitration or litigation relating to the project, project performance or this contract, the prevailing party shall be entitled to reasonable attorney fees, costs and expenses, including expert witness costs.

CP 36.

The plaintiffs' lawsuit also involved a claim against Palmer Ridge's contractor's bond; therefore, the provisions of RCW 18.27.040 apply. Specifically, RCW 18.27.040(6) provides for an award of attorneys' fees to the prevailing party as follows:

The prevailing party in an action filed under this section against the contractor and contractor's bond or deposit, for breach of contract by a party to the construction contract involving a residential homeowner, is entitled to costs, interest, and reasonable attorneys' fees.

RCW 18.27.040(6).

The award of attorneys' fees to Palmer Ridge by the Trial Court was proper. Palmer Ridge provided its attorneys' bills in the declaration of its counsel, showing it incurred \$8660 in attorneys' fees defending against the Mattinglys' claims.

Additionally, the award of other costs and expenses of Palmer Ridge in defending the suit by the Mattinglys was proper pursuant to Paragraph 15.1 of the Construction Contract, which provides that the prevailing party is entitled to "costs and expenses, including expert witness costs." CP 36. Palmer Ridge requested an award of an additional \$1,836.39 for the expenses it incurred related to this suit and the Trial Court properly awarded the same. CP 416, 417.

Finally, pursuant to RCW 4.84.030, the prevailing party in any action is entitled to an award of costs. As set forth in RCW 4.84.060, in the event that costs are not allowed to the plaintiff, the defendant is entitled to an award of costs. Under RCW 4.84.010(6), a statutory attorney fee of \$200 is part of the prevailing party's costs.

For the reasons stated directly above, the Trial Court's award to Palmer Ridge of attorneys' fees, costs, and statutory fees was proper.

**XI. PALMER RIDGE IS ENTITLED TO FEES ON APPEAL PURSUANT TO RAP 18.1.**

RAP 18.1 provides for an award of attorneys' fees if applicable law grants that right. RAP 18.1(a). Pursuant to RAP 18.1, Palmer Ridge requests that it be awarded its attorneys' fees and cost incurred on appeal. For the reasons discussed above, as the prevailing party upon appeal before this Court, Palmer Ridge has a contractual right to recover its attorneys' fees and costs in this suit. Reeves v. McClain, 56 Wn. App. 301, 311, 783 P.2d 606 (1989); Marine Enter., Inc. v. Sec. Pac. Trading Corp., 50 Wn. App. 768, 774, 750 P.3d 1290 (1988).

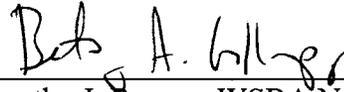
**E. CONCLUSION**

The Mattinglys had one year to bring claims against Palmer Ridge, were notified of this on several occasions, and repeatedly demonstrated their knowledge of this part of their agreement with Palmer Ridge. Yet they failed to bring their claims in a timely manner. They simply were too late in bringing their claims and are attempting now to argue their way out of that fact. Their attempts to make this matter more complex and confusing than it really is should be disregarded.

The Court of Appeals should uphold summary judgment, as the Trial Court correctly granted Palmer Ridge's Motion for Summary Judgment seeking dismissal of the Mattinglys' claims for breach of contract was barred by the one year limitations period set out in the contracts entered into by the parties. Additionally, the Court of Appeals should award Palmer Ridge its attorneys' fees and other costs on appeal.

Respectfully submitted this 10<sup>th</sup> day of September, 2009,

SALMI & GILLASPY, PLLC



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Attorneys for Respondent Palmer Ridge

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STEVEN and DEBORAH  
MATTINGLY, husband and wife,

Appellant,

vs.

PALMER RIDGE HOMES, LLC, a  
Washington limited liability company;  
CONTRACTORS BONDING AND  
INSURANCE COMPANY, Bond  
Account Number SG0213, a Washington  
corporation,

Respondent.

NO. 38981-9-II

CERTIFICATE OF SERVICE

I hereby certify that on this 10<sup>th</sup> day of September, 2009, I caused a true and correct copy of the Brief of Respondent Palmer Ridge Homes to be served on the following in the manner indicated below:

***Via Legal Messenger:***

Thomas L. Dickson  
Kevin T. Steinacker  
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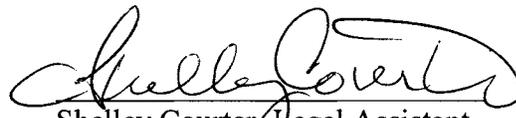
I hereby certify that on this 10<sup>th</sup> day of September, 2009, I caused a true and correct copy of the Brief of Respondent Palmer Ridge Homes to be served on the following in the manner indicated below:

***Via Legal Messenger:***  
Court of Appeals Division II  
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Tacoma, WA 98402-4454

DATED this 10<sup>th</sup> day of September, 2009.

Respectfully submitted,

SALMI & GILLASPY PS

  
Shelley Courter, Legal Assistant