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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

PERRY SMITH and ERIN SMITH,

Appellants,

v.

PAUL STOUT and TRISHA SMITH,

Respondents.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

A few months after Appellants Perry and Erin Smith (“the Smiths”) purchased their home in Gig Harbor, their neighbors, Respondents Paul and Trish Stout,¹ (“the Stouts”) began clearing and building projects near the property line and buffer area between the properties. After the Stouts started constructing a fence through the Smiths’ landscaping and parking areas, the Smiths filed suit to quiet title and asserted a claim for adverse possession of certain areas around the property line.

On December 17, 2017, the Stouts filed a Motion for Summary Judgment based entirely on the grounds that the Stouts and the Smiths’ predecessors-in-interest had established the location of the property line through a “parol agreement” reached mere days before the property was sold to the Smiths. The Smiths were not a party to and were never told about this supposed parol agreement. The Stouts asserted that this parol agreement on the boundary line superseded any adverse possession that had occurred. The trial court agreed and granted summary judgment dismissal on the basis of the parol agreement argument, despite the fact that the Stouts had failed to affirmatively plead parol agreement; did not meet the elements of the parol agreement doctrine; and the existence of genuine issues of material fact.

¹ Also referred to as “Trish Smith” in the record, although she is married to Paul Stout and there is no relation between her and Appellants.

The Stouts then moved for an award of attorney fees under RCW 7.28.083 for successfully defending against the Smiths' claim of adverse possession even though they conceded the adverse-possession claim for the purposes of their summary-judgment motion. The Stouts' fee motion was undisputedly filed more than 10 days after the trial court's judgment and therefore was untimely under CR 54(d). The Stouts did not file a motion to enlarge time and did not show excusable neglect explaining their untimeliness – indeed, the trial court found that they did not establish excusable neglect. Nevertheless, mistakenly relying on *O'Neill v. City of Shoreline*,² the trial court found that it had to consider the Stouts' fee motion because the Smiths could not show that they were prejudiced by the Stouts' failure to comply with CR 54(d). The trial court then awarded \$25,218.19 in attorney fees and costs to the Stouts.

The Smiths now appeal the trial court's grant of summary judgment dismissal and award of attorney fees. This Court should reverse the trial court's rulings and remand the case for further proceedings.

² 183 Wn. App. 15, 332 P.3d 1099 (2014).

II. ASSIGNMENTS OF ERROR

1. **The trial court erred by granting summary judgment dismissal in favor of the Stouts.**

Issues Related to Assignment of Error No. 1:

- a. Did the trial court err when it considered the Stouts' parol agreement affirmative defense that was not pleaded under CR 8(c)? Yes.
- b. Did the trial court err by granting summary judgment when there were material issues of fact regarding the property and witness credibility? Yes.
- c. Did the trial court err by granting summary judgment when the Stouts failed to present evidence supporting each element of a parol agreement? Yes.

2. **The trial court erred by considering the Stouts' untimely fee motion and awarding them attorney fees under RCW 7.28.083.**

Issues Related to Assignment of Error No. 2:

- a. Did the trial court err by considering the Stouts' fee motion after recognizing that the motion was undisputedly untimely under CR 54(d), the Stouts did not move to enlarge time, and there was no excusable neglect? Yes.
- b. Did the trial court err by misapplying *O'Neill v. City of Shoreline* to require the Smiths to show prejudice in order to enforce the time requirements of CR 54(d)? Yes.
- c. Did the trial court err by awarding the Stouts attorney fees under RCW 7.28.083 for defending against a claim of adverse possession, even though the Stouts conceded the adverse possession issue for the purposes of summary judgment? Yes.

III. STATEMENT OF THE CASE AND BACKGROUND FACTS

1. The Properties.

Appellants Perry and Erin Smith (“the Smiths”) bought their two-acre property at 6920 56th Ave. Ct. NW in Gig Harbor (“the Smith Property”) from Kim Horvath and Doug Rossi in May 2016.³ Horvath and Rossi had moved onto the property in May 1995 after they constructed the home on the property.⁴

Respondents Paul and Trish Stout⁵ (“the Stouts”) bought 7016 56th Ave. Ct. NW (“the Stout Property”), the two-acre parcel to the north of the Smith Property, on September 26, 2013.⁶ The south 30 feet of the Stout property is encumbered by a natural buffer area created as part of the original short-plat.⁷

The Smith Property and Stout Property were created by a four-lot short plat recorded on August 30, 1985, under Pierce County Auditor’s Recording No. 8508300308.⁸ The short plat imposed a “natural buffer” area on the southern 30 feet of the

³ Clerk’s Papers (CP) at 70.

⁴ CP at 104.

⁵ Also referred to as “Trish Smith” in the record, although she is married to Paul Stout. There is no relation between her and Appellants.

⁶ CP at 26.

⁷ CP at 137.

⁸ CP at 89.

Stout Property that bordered the Smith Property. This buffer prohibits “building, clearing, filling or grading” within the area.⁹

2. The Smiths view the Smith Property.

Horvath and Rossi listed their home for sale in April 2017.¹⁰ When the Smiths first saw the 6920 - 56th Ave. Ct. NW property, the driveway to the home was bordered by a rock retaining wall along the north side, which is the side closest to the Stout Property.¹¹ Above that rock wall was a well-maintained planting area that included rose bushes and other plants, all surrounded by bark mulch and an irrigation system.¹² There was also a well-established graveled parking area and a maintained lawn area to the north of the property’s garden shed and fruit trees.¹³ To the north of the planting area, parking area, and lawn was a wide band of trees that completely blocked views of the Stouts’ home and tennis court.¹⁴

3. The Stouts have a survey done of their property.

The Stouts had a survey done of their property at some point after the Smiths’ initial viewing of the Smith Property (“Stout

⁹ *Id.*

¹⁰ CP at 58.

¹¹ CP at 71.

¹² *Id.*

¹³ *Id.*

¹⁴ CP at 75-76.

Survey”).¹⁵ Paul Stout stated that he had the survey done because he was planning to build a garage and wanted to know where the buffer zone between the properties ended.¹⁶

The Stouts did not tell Horvath or Rossi that they were having their property surveyed. In fact, Horvath was “surprised” by the appearance of survey stakes and felt that it was “aggressive” to mark the line just as Horvath and Rossi were selling their home.¹⁷

4. The Smiths discover the Stout survey stakes.

During their final walkthrough of the Smith Property before closing, the Smiths discovered that wood survey stakes with pink tape were haphazardly placed through a portion of the planting area above the rock wall, parking area, and lawn that had been maintained by Horvath and Rossi.¹⁸ This caused the Smiths considerable concern.¹⁹

Perry Smith and his realtor had a follow-up meeting with Horvath and Rossi.²⁰ Perry Smith and Rossi walked part of the staked line and discussed Perry Smith’s concerns: whether he would be able to use the parking area that Horvath and Rossi had used,²¹ whether

¹⁵ CP at 58-59.

¹⁶ *Id.*

¹⁷ CP 117.

¹⁸ CP at 71.

¹⁹ CP at 32, 71-72.

²⁰ CP at 65-66; 68-69.

²¹ CP at 71-72.

the shed was on the Smith Property,²² whether the landscaping maintained by Horvath and Rossi was part of the Smith Property,²³ and whether the buffer area would remain in place.²⁴ After receiving assurances from Rossi, Horvath, and their agent and being provided the short-plat that showed the designated natural buffer area, the Smiths agreed to proceed with closing.²⁵

5. Disputes arise between the Smiths and Stouts.

Starting in July 2016 but greatly accelerating in October 2016, the Stouts began clearing 60-70 year old trees and grading in a new road in the supposedly protected 30-foot buffer on their property.²⁶ They also used the area for four-wheeling for a time before they were advised by the County that doing so was illegal.²⁷

In December 2016 the Smiths received a letter from an attorney representing the Stouts claiming that the Smiths had been parking on a portion of the Stouts' property with permission for a short period of time and purporting to revoke that permission.²⁸ The Smiths had no idea what the attorney was talking about, as they had never discussed parking with the Stouts, and they had never received

²² CP at 41.

²³ CP at 71-72.

²⁴ *Id.*

²⁵ CP at 32, 72.

²⁶ CP at 72, 79-83.

²⁷ CP at 72.

²⁸ *Id.*

permission from the Stouts to park where they were parking, which is exactly where they had observed Doug Rossi parking.²⁹

The Stouts eventually the Stouts also cut down one of the Smiths' peach trees and started constructing a fence through the area that the Smiths and Horvath/Rossi before them had maintained.³⁰ Finally, the Smiths dumped logs from the cut trees in a portion of the parking area that the Smiths and Horvath/Rossi had used.³¹

6. The Smiths file suit.

Concerned about damage the Stouts' actions were causing, on March 9, 2017, the Smiths filed suit against the Stouts to quiet title, asserting a claim of adverse possession based on Horvath and Rossi's continued use and maintenance of certain areas: the rock wall, driveway and parking area, fruit tree orchard, and area between the orchard and shed.³²

The Smiths then obtained a survey ("Smith Survey") of the property line between the Smith Property and Stout Property.³³ The Smith Survey indicated the property line was different than the line staked by the Stout Survey. The Smith Survey showed that a portion of

²⁹ *Id.*

³⁰ CP at 59, 62, 72.

³¹ CP at 72, 80-83.

³² CP at 1-3.

³³ CP at 72, 85.

the rock wall, landscaping, parking area, and lawn were in the 30-foot buffer area on the Stout property.³⁴

7. The Stouts respond to the Smiths' suit.

The Stouts filed an Answer shortly after the Smiths filed their suit.³⁵ The Stouts' Answer generally denied the Smiths' assertions and did not assert any boundary-adjustment doctrines as affirmative defenses to the Smiths' adverse-possession claim.³⁶ In August 2017 the Stouts' attorney sent an "ER 408 Settlement Offer" letter to the Smiths' attorney.³⁷ The letter outlined what the Stouts' attorney saw as some possible issues in the case, including parcel agreement, before providing the Stouts' (inadmissible) settlement offer.³⁸ The letter also included the declarations of Horvath and Rossi dated July 31, 2017 ("July Declarations").³⁹

The July Declarations were essentially identical. Both Horvath and Rossi testified that when the Stouts' predecessors-in-interest, Jeff and Lisa Daily, bought the Stouts' property in the 1990s, the Dailys had a survey done ("the Daily Survey") that revealed that the original

³⁴ CP at 85, 137 (portions in buffer area highlighted).

³⁵ CP at 4.

³⁶ CP at 5. The only affirmative defenses pleaded in the Answer were: failure to state a claim and failure to name necessary parties. The Stouts reserved the right to name additional affirmative defenses at the completion of discovery. But the Stouts never formally amended their Answer to add new affirmative defenses.

³⁷ CP at 147.

³⁸ CP at 148-50.

³⁹ CP at 91-98.

driveway to the Smith Property was on the Stout Property.⁴⁰ Accordingly, Horvath and Rossi testified that they relocated the driveway entirely onto the Smith Property and, in conjunction with the relocation, they built the rock retaining wall along the northern edge of the driveway that was also entirely on the Smith Property.⁴¹

Horvath and Rossi further testified that from the time of the Daily Survey forward “*we knew where the property line was and we did our best to observe it.*”⁴² Both testified that the driveway and the rock wall were on the Smith Property side of the surveyed property line.⁴³ Rossi also testified that when the Stouts bought their property in 2013, he showed Paul Stout where the property line was and at that time “*there was nothing I was aware of that belonged to us that was planted on their side of the line.*”⁴⁴

8. Deposition Testimony

Horvath and Rossi were deposed separately on October 12, 2017. Horvath testified that she and her husband had signed the July Declarations after the Stouts’ attorney advised that doing so might prevent their being subpoenaed for a deposition.⁴⁵

⁴⁰ CP at 92, 97.

⁴¹ *Id.*

⁴² CP at 92 ¶ 5, 97 ¶ 5(emphasis added).

⁴³ CP at 92 ¶ 4, 96 ¶ 4.

⁴⁴ CP at 93 ¶ 8.

⁴⁵ CP at 102.

During her deposition, Horvath consistently testified that she and Rossi maintained the disputed areas and she always believed them to be on their side of the property line.⁴⁶ Horvath also testified that she never had any discussions with the Dailys after relocation of the driveway and never asked for permission to use any portion of the Dailys' property.⁴⁷ And the only time Dailys purported to give them permission was in relation to clearing a blackberry patch near the sports court on what is now the Stout Property.⁴⁸ Similarly, she said the Stouts never told Horvath/Rossi that they were encroaching on any portion of the Stout Property.⁴⁹ Finally, Horvath was provided a modified version of the Smith Survey that showed the various improvements discussed during the deposition but not the recorded property line. She testified that she and Rossi maintained all of them:

Q. (By Ms. Conway) The court reporter has handed you what's been marked Exhibit 14 –

A. Okay.

Q. – to your deposition.

A. Okay.

⁴⁶ CP at 23-24, 41-43, 49 (discussing rock wall and planting bed); CP at 33, 36, 39, 44, 46, 49-50 (discussing driveway and parking area); CP at 44, 49 (discussing fruit trees/ orchard); CP at 33, 46 (discussing area between orchard and shed).

⁴⁷ *Id.* at 35-36.

⁴⁸ *Id.* at 36.

⁴⁹ CP at 55.

Q. Which is an excerpt from an overall survey that was done. . . it just has the stuff that would have been there when you lived there.

A. Okay.

Q. So just to be clear, this dotted line right here that comes off the roundabout is the northern edge of your driveway.

A. Okay.

Q. And it shows the retaining walls and some of the planting areas. And then the dotted line that extends from the end of the rock wall, that's the extension of the graveled area.

A. Okay.

Q. Okay? And then above that, you'll see the rock wall that comes up, and there's a little dotted line.

A. Mm-hmmm.

Q. That's the edge of the maintained area with the plantings and –

A. Okay.

Q. – bark and whatever else.

A. Okay.

Q. And then down below, you'll see the edge of the graveled area, and then you can kind of see, sketched in, the raised beds. And then the other dotted line there, and that is the edge of the maintained area.

A. Okay.

Q. Do you follow?

A. Yeah.

Q. And then above the Stouts' property, you can see the chain-link, fence, and then you can also see the RV shed, just to kind of –

A. Okay.

Q. Okay. So, let's take the area by the shed first. And you see kind of the area of maintenance. Is that an area you maintained the entire time you were living in your house?

A. I would say yes.

Q. Okay. And the driveway, the graveled area, was that in its same location the entire time after you moved it once the Dailys moved in and found the problem?

A. I would say yes.

Q. Okay. And the portions of the planting beds that are shown on the survey, are those areas you maintained consistently through your ownership?

A. Yes.⁵⁰

9. The Stouts move for summary judgment.

On December 15, 2017, the Stouts moved for summary judgment based solely on the grounds that the Smiths' claims were barred by the parol-agreement doctrine.⁵¹ For the purpose of their summary-judgment motion, the Stouts assumed that the actions of Horvath and Rossi had led to adverse possession but argued that there was a subsequent parol agreement between Rossi and the

⁵⁰ *Id.* at 52-54 and Ex. 14.

⁵¹ CP at 7, 140.

Stouts on the eve of the sale to the Smiths readjusted the property boundary to conform with the survey stakes placed during the Stout Survey.⁵² The Stouts claimed that “[a]fter the stakes were in the ground” they met with Rossi and looked at the staked line together.⁵³ Rossi told the Stouts that the stakes looked to be about where he thought the boundary line was based on the Daily Survey many years earlier.⁵⁴ The Stouts alleged that this statement by Rossi formed a parol agreement between Horvath/Rossi and the Stouts that the flagged stakes represented the boundary line (i.e. that the true boundary – wherever that may have be – was adjusted to/conformed to the staked line). This conversation between Rossi and the Stouts happened just days before the Smiths closed on their purchase of the Smith Property.⁵⁵

In response, the Smiths argued that the trial court should not consider the Stouts’ Motion for Summary Judgment because the Stouts had not pleaded parol agreement as an affirmative defense in their Answer as required by CR 8(c).⁵⁶ Accordingly, the Smiths had not investigated the issue of a possible parol agreement between Rossi

⁵² CP at 17-18.

⁵³ CP at 59, 61-62.

⁵⁴ CP at 65.

⁵⁵ Nobody testified to the exact date of the conversation, but it is undisputed that the conversation happened after the Stout Survey was completed in early May (CP 58) and before the Smith purchase was finalized in late May (CP at 19).

⁵⁶ CP at 134.

and the Stouts during discovery. Further, the Smiths argued that there were material issues of fact precluding summary judgment and that the Stouts had not shown that the elements of parole agreement were met as a matter of law.⁵⁷

On January 19, 2018, the trial court heard argument on the Motion for Summary Judgment.⁵⁸ The trial court granted the Stouts' motion and dismissed the case.⁵⁹

10. The Stouts move for attorney fees and costs.

The trial court granted the Stouts' Motion for Summary Judgment on January 19, 2018.⁶⁰ Thirteen days later, the Stouts filed a Motion for Attorney Fees and Costs seeking attorney fees under Washington's adverse-possession statute, RCW 7.28.083 and CR 11 ("the Fee Motion").⁶¹ The Smiths responded by pointing out that the Fee Motion was untimely under CR 54(d)(2), which requires that the fee motion be brought within 10 days of judgment unless the time for filing is enlarged by the court.⁶² The Smiths also noted that the Stouts had not asked to enlarge the 10-day deadline and failed to meet the

⁵⁷ CP at 134; Verbatim Report of Proceedings (RP) (1/19/18) at 15-21.

⁵⁸ RP (1/19/18) at 1.

⁵⁹ RP (1/19/18) at 24; CP at 164.

⁶⁰ *Id.*

⁶¹ CP at 166.

⁶² CP at 199-201.

“excusable neglect” standard that applies to late requests to modify the strict time requirements set forth in the Civil Rules.⁶³

In a declaration submitted with the Stouts’ reply briefing filed less than 24 hours before the hearing, the Stouts’ attorney offered as an excuse that she had been too busy with another matter to comply with CR 54(d)(2) and asked that the trial court enlarge the time for the Stouts to file a request for fees.⁶⁴ But notably, the Stouts still failed to file any motion to enlarge the time to file as required by CR 6(b)(2). The Stouts also argued that, even if their Fee Motion was untimely, the Division One Court of Appeals decision in *O’Neill v. City of Shoreline*⁶⁵ put the burden on the Smiths to show that the Stouts untimeliness caused prejudice to the Smiths before the Court could strike the Fee Motion.⁶⁶

On February 9, 2018, the trial court heard initial argument on the Fee Motion. The arguments focused on whether the trial court could consider the Fee Motion, given its untimeliness under CR 54(d)(2).⁶⁷ The trial court found that the Stouts’ motion was filed late and without excusable neglect warranting the expansion of the 10-day

⁶³ CP at 201-02.

⁶⁴ CP at 238-41.

⁶⁵ 183 Wn. App. 15, 332 P.3d 1099 (2014).

⁶⁶ CP at 233-34.

⁶⁷ RP (2/9/18) at 1-10.

deadline.⁶⁸ But the trial court ultimately ruled that the Fee Motion would be considered, stating “the *O’Neill* case, to me, tells me to look at prejudice. I don’t find the type of prejudice defined in *O’Neill* to interfere with a late request for attorney’s fees, and based on that case, I do believe I need to go forward with the motion.”⁶⁹ The trial court then set the matter over for February 23, 2018 to allow additional briefing on the substance of the Fee Motion.⁷⁰

The Smiths filed a Motion to Strike to more squarely address the *O’Neill* case that the Stouts raised and relied on in their Fee Motion Reply Brief for the first time; the Smiths also detailed how the *O’Neill* decision was not relevant and renewed their request that the trial court strike the Fee Motion as untimely.⁷¹ At the subsequent hearing the trial court heard additional argument on *O’Neill* related to the Motion to Strike but reaffirmed its position that it would consider the untimely Fee Motion and denied the Smiths’ Motion to Strike.⁷² The trial court held that fees were not appropriate under CR 11 but awarded fees under RCW 7.28.083 because the Stouts prevailed against a claim of adverse possession even though that was not the basis for the award

⁶⁸ *Id.* at 10.

⁶⁹ *Id.*

⁷⁰ *Id.* at 11.

⁷¹ CP at 253.

⁷² RP (2/23/18) at 1-11; CP at 316.

of the Stouts summary-judgment motion.⁷³ The trial court awarded to the Stouts \$24,675.55 in attorney fees and \$542.69 in costs.⁷⁴

The Smiths ask that this Court reverse and remand for further proceedings:

(1) the trial court's order granting summary-judgment dismissal in favor of the Stouts on the basis of a parole agreement; and

(2) the trial court's award of attorney fees and costs to the Stouts under RCW 7.28.083.

IV. ARGUMENT

A. The trial court erred in granting the Stouts' motion for summary judgment asserting that a parole agreement superseded any adverse possession.

The Stouts' motion for summary judgment had fatal procedural, factual, and legal defects. The motion should have been denied because it was based on an affirmative defense (parole agreement) that was not pleaded as required CR 8(c) or consented to by the Smiths. Further, there were material issues of fact and credibility issues precluding summary judgment, and the Stouts failed to show that each element of their parole agreement affirmative defense was met.

⁷³ *Id.* at 23.

⁷⁴ CP at 320.

1. Standard of review.

This Court reviews a trial court's order granting summary judgment *de novo*.⁷⁵ Accordingly, this Court engages in the same inquiry as the trial court.⁷⁶ Summary judgment is appropriate when, reviewing the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.⁷⁷ “An issue of material fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party.”⁷⁸

When seeking summary judgment, the initial burden is on the moving party to show there is no genuine issue of material fact.⁷⁹ Summary judgment should be granted where reasonable minds can reach only one conclusion based on the admissible facts in evidence.⁸⁰ But the Court cannot weigh evidence or assess witness credibility when considering a motion for summary judgment.⁸¹

⁷⁵ *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015).

⁷⁶ *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014).

⁷⁷ CR 56(c); *Keck*, 184 Wn.2d at 370.

⁷⁸ *Keck*, 184 Wn.2d at 370.

⁷⁹ *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 169, 273 P.3d 965 (2012).

⁸⁰ *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 78 P.3d 1274 (2003).

⁸¹ *Barker v. Advanced Silicon Materials, LLC, (ASIMI)*, 131 Wn. App. 616, 624, 128 P.3d 633 (2006).

2. **The parol agreement doctrine has four elements that must occur in sequence and with the participation of both coterminous property owners.**

Parol agreement is one of several doctrines of boundary location.⁸² Adverse possession and location by mutual recognition and acquiescence are two other boundary location doctrines in the same family and share similar characteristics. But the elements of parol agreement are unique in that each element (1) requires the participation of both property owners and (2) must occur in the listed sequence. The sequence of events creating a parol agreement is:

(1) There must be either a bona fide dispute between two coterminous property owners as to where their common boundary lies upon the ground or else both parties must be uncertain as to the true location of such boundary;

(2) the owners must arrive at an express meeting of the minds to permanently resolve the dispute or uncertainty by recognizing a definite and specific line as the true and unconditional location of the boundary;

(3) they must in some fashion physically designate that permanent boundary determination on the ground; and

(4) they must take possession of their property by such occupancy or improvements as would reasonably give constructive notice of the location of such boundary to their successors in interest; or (as an alternative to (4) above), (4a) bona fide purchasers for value must take with reference to such boundary.⁸³

⁸² *Johnston v. Monahan*, 2 Wn. App. 452, 455, 469 P.2d 930 (1970).

⁸³ *Id.* at 457 (emphasis added).

Washington appellate courts have held repeatedly that these elements must occur in sequence. For example, the court in *Johnston v. Monahan* rephrased the elements as: “(1) a prerequisite condition of boundary uncertainty or dispute to circumvent the Statute of Frauds; (2) permanency and specificity of the *agreement resolving the dispute or uncertainty*, (3) *initial execution of the agreement* by demarcation on the ground; and (4) *full execution of the agreement* by use of the premises pursuant to the agreement to provide reasonable notice thereof.”⁸⁴ The court’s use of words like “prerequisite,” “initial execution,” and “full execution” clearly indicates that there is a required order of events. And the court summed up the required sequence of actions as (1) agree to resolve the boundary issue, (2) establish the new boundary, (3) mark the boundary, and (4) use the boundary.⁸⁵

This sequence is followed in every Washington parcel-agreement case, including the seminal case of *Piotrowski v. Parks*.⁸⁶ In *Piotrowski* the neighbors – Parks and Sawyer – did not know where the true boundary between their properties was and did not want to pay for a

⁸⁴ *Id.* at 457-58.

⁸⁵ *Id.* at 459.

⁸⁶ 39 Wn. App. 37, 691 P.2d 591 (1984).

surveyor to come mark the property.⁸⁷ So the parties agreed to fix the boundary based on an existing landmark which they believed marked the corner of Sawyer’s property.⁸⁸ The parties were confident that, if they built a fence starting from that corner landmark, they would not necessarily follow the true boundary, but they would come close to it without having to spend any money on a survey.⁸⁹ So Parks and Sawyer established the boundary from the corner, marked the boundary by building a fence, and used that boundary when clearing trees on their respective properties.⁹⁰ Sawyer then sold his land to Piotrowski, whose survey revealed that the fence encroached 13 feet onto his side of the true boundary.⁹¹ When Piotrowski sued to quiet title to the 13-foot strip, the court ruled against him, finding that the fence line had become the true boundary line based on the parol agreement between Parks and Sawyer.⁹² And Piotrowski was bound by the agreement because he purchased the property with notice of the “300 foot long, clearly visible” fence.⁹³

The sequencing of the elements for parol agreement is important to distinguish it from the similar doctrine of location by

⁸⁷ *Id.* at 39.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 38, 46.

⁹³ *Id.* at 43.

mutual recognition and acquiescence.⁹⁴ A boundary is located by mutual recognition and acquiescence when the boundary is marked on the ground unilaterally by one of the coterminous owners and the other owner merely acquiesces to the boundary over a period of time sufficient to satisfy the statute of limitations (10 years).⁹⁵ In contrast, the touchstone of a parol agreement is that the coterminous owners form an agreement at the outset to establish the boundary between their property and together mark the boundary.⁹⁶

3. **The trial court should not have considered the Stouts' Motion for Summary Judgment because parol agreement is an affirmative defense that the Stouts failed to properly plead under CR 8(c) and therefore waived.**

The Smiths' initial response to the Stouts' Motion for Summary Judgment argued that the trial court should not consider the Stouts' parol agreement affirmative defense because it was not properly pleaded in their Answer as required by CR 8(c).⁹⁷ The Stouts argued that their failure to formally plead the defense did not prejudice the Smiths because the Stouts' attorney sent a letter to the attorney for the Smiths that mentioned parol agreement in the context of

⁹⁴ *Id.* at 44.

⁹⁵ *Id.*

⁹⁶ *Lamm v. McTighe*, 72 Wn.2d 587, 593, 434 P.2d 565 (1967).

⁹⁷ *See* CP 134.

explaining a settlement offer.⁹⁸ The trial court did not discuss the application of CR 8(c) but decided to consider the parol-agreement argument.

The application of a court rule to a particular set of facts is a question of law, which this Court reviews *de novo*.⁹⁹ “Washington is a notice pleading state and requires that a party give the opposing party fair notice of the affirmative defense in its pleadings.”¹⁰⁰ CR 8(c) enumerates several defenses that must be specifically pleaded and includes “any other matter constituting an avoidance or affirmative defense.” An affirmative defense that is not pleaded is generally waived unless it is tried with the parties’ express or implied consent.¹⁰¹ A defendant also waives an affirmative defense if the assertion of the defense is inconsistent with the defendant’s previous behavior.¹⁰² Only where the failure to plead has *no effect* on the substantive rights of the parties such that rigid application of the rule would do an injustice will courts allow noncompliance with CR 8(c).¹⁰³

⁹⁸ CP at 141-42.

⁹⁹ *Corey v. Pierce Cty.*, 154 Wn. App. 752, 773, 225 P.3d 367 (2010).

¹⁰⁰ *Gunn v. Riely*, 185 Wn. App. 517, 528, 344 P.3d 1225 (2015).

¹⁰¹ *Id.* at 529.

¹⁰² *Id.*

¹⁰³ *Mahoney v. Tingley*, 85 Wn.2d 95, 100-101, 529 P.2d 1068 (1975) (allowing defendant to try its defense based on the contract’s liquidated damages clause where “record shows that a substantial portion” of the plaintiff’s trial memorandum and “entire substance” of hearing on summary judgment focused on the liquidated damages clause – i.e. plaintiff’s own written and oral argument on to the court on the

Here, the Stouts' parol-agreement argument was an affirmative defense subject to the pleading requirements of CR 8(c). In determining whether a defense is an affirmative defense that must be pleaded under CR 8(c), the court must consider what effect the defense has on the issue presented in the Complaint.¹⁰⁴ When a defense "introduces a new element by way of confession and avoidance, it is a new matter, and must be pleaded affirmatively."¹⁰⁵

By asserting that a parol agreement boundary adjustment occurred that superseded any prior adverse possession, the Stouts raised new issues and facts. They did not dispute the elements of the Smiths' adverse-possession claim but rather asserted that the elements of an entirely different boundary-location doctrine – parol agreement – were met. Accordingly, by introducing a new legal theory, the Stouts brought an affirmative defense for which they bore the burden of proof. Therefore, under CR 8(c) the Stouts were required to plead parol agreement in their Answer as an affirmative defense, and their failure to do so resulted in waiver of the defense unless the

legal issues raised in connection with the defense made rigid applicable of CR 8(c) inequitable).

¹⁰⁴ *Morse v. McGrady*, 49 Wn.2d 505, 507, 304 P.2d 691 (1956).

¹⁰⁵ *Id.* (quoting Bancroft's Code Pleading, § 266).

Smiths consented to allow the defense or unless the application of CR 8(c) would do an injustice.¹⁰⁶

The Smiths' responsive briefing and oral argument on summary judgment made clear that they did not consent in any way to the inclusion of the new affirmative defense.¹⁰⁷ Further, the Smiths were prejudiced by the Stouts' failure to plead parol agreement as an affirmative defense. Although the Stouts' attorney mentioned parol agreement as one of several possible defenses in relation to the Stouts' position for settlement, there was nothing in the accompanying Horvath and Rossi declarations that supported such a defense (or, for that matter, a defense to adverse possession). Moreover, the Stouts did not amend the Answer to actually put the Smiths on notice that the defense was being asserted. The letter sent by the Stouts' attorney was an "ER 408 Settlement Offer" and not a statement of defenses that the Stouts intended to raise.¹⁰⁸ Because the defense was not pleaded, the Smiths did not pursue the issue during the depositions of Horvath and Rossi.¹⁰⁹ And it wasn't until November, a month after Horvath and Rossi depositions were taken, the Stouts obtained and submitted a declaration from Rossi ("November Declaration") *with*

¹⁰⁶ *Gunn*, 185 Wn. App. at 529.

¹⁰⁷ CP at 134; RP (1/19/18) at 14-16.

¹⁰⁸ CP at 147.

¹⁰⁹ *See* CP at 65.

their Reply Brief that provided key facts related to their parol-agreement argument, including that Rossi discussed the Stout Survey with the Stouts and “agreed that the survey did accurately mark our property line.”¹¹⁰ The Smiths had no opportunity to refute these facts.¹¹¹

The Stouts’ noncompliance with CR 8(c) cannot be excused on the basis that “rigid application of the rule would do an injustice,” because the Stouts could still correct their pleading error by seeking leave to amend their Answer under CR 15(a).¹¹² In contrast, the trial court’s choice to consider the unpleaded affirmative defense *did* cause an injustice. The trial court allowed argument leading to the dismissal of the Smiths’ case based on a defense on which the Smiths were never put on notice and never had a proper chance to conduct discovery. Accordingly, the trial court erred by not applying CR 8(c) to bar consideration of a dispositive motion that relied entirely the Stouts’ parol agreement affirmative defense that had not been properly pleaded.

¹¹⁰ CP at 65. This declaration is dated November 7, 2017 – after the depositions were taken. It is largely the same as the July declaration, but adds a few key points necessary for the Stouts’ parol agreement argument, CP at 65.

¹¹¹ The facts in the November Rossi declaration were not mentioned in his earlier declaration or in the ER 408 letter. The letter’s discussion of parol agreement is markedly different than what appeared in the summary judgment motion. CP at 149.

¹¹² *Mahoney*, 85 Wn.2d at 100.

4. The trial court should have denied summary judgment because there were genuine issues of material fact.

There were genuine issues of fact regarding (1) whether *both* Horvath/Rossi and the Stouts were uncertain of the property boundary, (2) where exactly the wooden survey stakes were placed during the Stout Survey, and (3) whether the Smiths took possession of the Smith Property with reference to the staked boundary.

Evidence is construed in the light most favorable to the Smiths, as the nonmoving party.¹¹³ The first element of parol agreement is that the coterminous property owners (i.e. Horvath/Rossi and the Stouts) have a bona fide dispute over the true boundary line or are *both* uncertain as to the true boundary line.¹¹⁴ The Stouts did not present any evidence of a bona fide dispute between them and Horvath/Rossi over the location of the boundary line. And the evidence regarding the parties' certainty as to the location of the boundary line was conflicting.

Horvath and Rossi testified in their July Declarations that after the Daily Survey "*we knew where the property line was and we did our best to observe it.*"¹¹⁵ And Rossi testified in his July Declaration that he showed Paul Stout where the property line was when the Stouts

¹¹³ CR 56(c); *Keck*, 184 Wn.2d at 370.

¹¹⁴ *Johnston*, 2 Wn. App. at 457.

¹¹⁵ CP at 92 ¶ 5, 97 ¶ 5(emphasis added).

moved in next door.¹¹⁶ Similarly, in his deposition Rossi made many statements about the location of property line in relation to various improvements that indicated he was confident in the location of the boundary:

- “[B]asically the rock wall, as I remember, kind of delineated the line between the properties.”¹¹⁷
- “Based on the lines that the Dailys had established . . . we knew the – basically the – a lot of the area on top of that rock wall was not our property, *which we knew*.”¹¹⁸
- “Line of sight to me was that the rock wall probably was on our property, but the majority of the area above the rock was headed towards the Daily property, was technically their property.”¹¹⁹
- The shed was “within one to two feet of the property” and intentionally placed at the “edge of the property line . . . that’s why it’s kind of angulated to, rather than squared on the property.”¹²⁰
- “Again, the property line would have been established. There is a fence at the back of our property that would be the west of our house. And the corner of that fence—again, by line of sight, *knowing where the property markers were*, I specifically stopped the fence at that point, and if you look at the driveway, it follows a line there, and it follows back.”¹²¹

¹¹⁶ CP at 93 ¶ 8.

¹¹⁷ CP at 34.

¹¹⁸ *Id.* (emphasis added).

¹¹⁹ *Id.*

¹²⁰ CP at 36.

¹²¹ *Id.* (emphasis added).

But Rossi changed his testimony in the November Declaration, claiming that “[b]y the time I pointed out the property line to Paul, *I was not sure of the exact location* of the line in the area on top of the rock wall, but I did try to give him an approximate location.”¹²² Rossi noted that by the time the Stouts moved in, it had “been about 15 years since the Dailys marked the property line and we moved our driveway.”¹²³ Rossi went on to state in the same declaration that the Stout Survey “seemed to be in the same place as the Daily survey had been years earlier,” which implied that Rossi *did* remember where the Daily Survey line was.¹²⁴

Rossi’s inconsistent testimony created a credibility issue that could not be resolved on summary judgment.¹²⁵ Taken as a whole and viewed in the light most favorable to the Smiths, whether Horvath and Rossi were uncertain about the location of the boundary line is a disputed material fact.

Moreover, the Stouts did not present undisputed evidence that they were uncertain about the location of the true boundary line. The evidence presented was that when the Stouts moved in Rossi showed

¹²² CP at 65 ¶ 8 (emphasis added).

¹²³ *Id.*

¹²⁴ *Id.* at ¶ 9.

¹²⁵ *Barker*, 131 Wn. App. at 624.

Paul Stout the location of the boundary based on his knowledge of the Daily Survey,¹²⁶ and the Stout Survey showed the boundary was in the same place as the Daily Survey,¹²⁷ i.e. where Horvath/Rossi and the Stouts thought the boundary was. Further, the evidence did not show that the Stouts hired the surveyor because they were uncertain about the boundary line. Rather, Paul Stout decided to have the Stout Survey done because he was building a garage and wanted to know where the *buffer zone* was.¹²⁸ And based on Perry Smith's conversation with Rossi, Paul Stout had the survey done because it was part of the code requirements to build the garage.¹²⁹

Therefore, there is a disputed issue of material fact on the first element of parol agreement, because a fact finder could conclude from the evidence that Horvath, Rossi, and Paul Stout were all reasonably certain of the boundary line and the Stout Survey was done for purposes unrelated to resolving a boundary issue by parol agreement.

It is also disputed whether the Smiths took the property with reference to the alleged parol-agreement boundary so as to bind the Smiths. The staked line was not complete – it did not run the entire

¹²⁶ CP at 58, 64-65.

¹²⁷ CP at 59, 65.

¹²⁸ CP at 58.

¹²⁹ CP at 71.

length of the property – and was haphazard.¹³⁰ And, after inquiry, Perry Smith understood the Smiths would be able to use the property exactly the same way Horvath/Rossi had.¹³¹ Lastly, in paperwork on the sale of the Smith Property Horvath/Rossi were asked to indicate if there were any “boundary agreements” and did not indicate any.¹³² These facts create a genuine issue of material fact whether the circumstances provided sufficient notice to the Smiths.

In sum, summary judgment should not have been granted because there were genuine issues of material fact precluding a finding of parol agreement.

5. **The trial court should have denied summary judgment because the Stouts’ did not demonstrate that all the elements of a parol agreement were fully met in the appropriate sequence.**

The Stouts failed to present evidence showing that each element of their parol agreement theory was met and was completed in the necessary sequence. The Stouts’ *own summary* shows that the sequence of events to properly form a parol agreement was not followed in this case:

In this case, all four elements of the boundary by parol agreement doctrine have been met. The property line was uncertain. *The surveyed line was marked on the*

¹³⁰ CP at 41.

¹³¹ CP at 71-72.

¹³² CP at 121.

ground and the two coterminous property owners, Rossi/Horvath and Stout/Smith, agreed that the marked line was the boundary between their properties. Lastly, the [Smiths] purchased their property having seen the flagged survey stakes set out on the ground, knowing that the neighbors had completed a survey of the property line at a time when they could have walked away from the purchase, but chose instead to move forward representing that they were comfortable with that line. They clearly purchased with respect to the boundary to which the coterminous property owners agreed.¹³³

To form a parol agreement, the coterminous owners must have a mutual meeting of minds to agree with “permanency and specificity” to resolve the boundary uncertainty followed by “initial execution of the agreement by demarcation on the ground.”¹³⁴ In contrast, all the evidence showed that any alleged agreement was made between Rossi and the Stouts happened after the Stout Survey marked portions of the alleged boundary with some sort of flagged stakes.¹³⁵ Therefore, even if the Stouts had presented evidence supporting each element – which they did not, as discussed below – the elements were not sequenced properly to form a valid parol agreement.

¹³³ CP at 145 (emphasis added).

¹³⁴ *Johnston*, 2 Wn. App. at 457-58.

¹³⁵ CP 59, 61-62, 65. The Stouts’ unilateral marking of the boundary and Rossi’s subsequent acquiescence tracks some of the elements of location by mutual recognition and acquiescence but does not satisfy the required statutory period. If the same acts could be construed as a parol agreement (where no statutory period is required), then the doctrine of mutual recognition and acquiescence would be rendered pointless.

The Stouts glossed over numerous aspects of the required elements for a parcel agreement, trying to hide the fact that many key components were lacking. First, the Stouts glossed over the “prerequisite requirement” that there is a dispute or uncertainty between both coterminous owners.¹³⁶ As discussed in the prior section, there was significant evidence indicating that Horvath and Rossi, at least, were not uncertain of the boundary.

Second, the Stouts ignored the fact that they *unilaterally ordered* the Stout Survey to mark the boundary, instead of jointly marking the boundary with Horvath/Rossi.¹³⁷ As discussed in *Piotrowski*, the unilateral marking of a boundary by one owner is not indicative of a parcel agreement but is instead a component of the related and oft confused doctrine of boundary location by mutual recognition and acquiescence.¹³⁸ In this case the evidence is clear that Horvath/Rossi had no knowledge or participation in Stout’s survey. Rather, they only learned of the survey after the fact, when the stakes suddenly appeared. Horvath/Rossi’s lack of prior knowledge about the Stout’s survey further underscores the fact that there was no preexisting agreement to resolve a boundary dispute.

¹³⁶ *Id.* at 457.

¹³⁷ *Id.*

¹³⁸ 39 Wn. App. at 44.

Third, the Stouts glossed over the fact that the survey stakes they placed were *temporary* markers that were later removed.¹³⁹ This is important because in a true parol agreement the boundary must be marked on the ground with some permanency: “[the coterminous owners] must in some fashion physically designate that permanent boundary on the ground by the erection of *a structure capable of evoking inquiry as to its significance.*”¹⁴⁰ In *Piotrowski* the parties jointly built a 300-foot fence to mark the property boundary.¹⁴¹ In *Johnston* the court concluded that, because “the parties did not *permanently designate* the permanent boundary on the ground” they did not meet “the minimum criteria to establish a boundary by parol agreement.”¹⁴²

Here, the flagged survey stakes were temporary markers that are no longer in place and did not permanently designate the boundary on the ground.¹⁴³ It was the Stouts’ burden, as moving party and as the party asserting an affirmative defense, to establish each element of a parol agreement. The absence of these key components means that the Stouts failed to show evidence supporting each element of a parol

¹³⁹ RP (1/19/18) at 23.

¹⁴⁰ 39 Wn. App. at 43 (emphasis added).

¹⁴¹ *Id.* at

¹⁴² *Id.* at 461.

¹⁴³ RP (1/19/18) at 23 (The Stouts’ attorney acknowledging “This isn’t a fence. This isn’t a rock wall. . . . The wood stakes with the flags, yes, they’re gone.”)

agreement. Accordingly, the trial court erred by granting summary judgment in favor of the Stouts on their parole agreement argument.

B. The trial court erred by considering the Stouts' fee motion despite finding that the motion was untimely under CR 54(d)(2) and there was no excusable neglect.

There is no dispute that the Stouts' fee motion was untimely under CR 54(d)(2). But the trial court, relying on *O'Neill v. City of Shoreline*, ruled that it must consider the untimely fee motion unless the Smiths could show that they had suffered prejudice from its untimeliness. The trial court abused its discretion by imposing this burden on the Smiths and ignoring the clear time requirements of CR 54(d)(2)).

1. Standard of review.

The application of a court rule to a particular set of facts is a question of law, which this Court reviews *de novo*.¹⁴⁴ Accordingly, this is the standard that applies to the trial court's interpretation of CR 54(d)(2).

This Court reviews a trial court's decision to accept or reject untimely filed documents for an abuse of discretion.¹⁴⁵ A trial court abuses its discretion if its decision is manifestly unreasonable or

¹⁴⁴ *Corey v. Pierce Cty.*, 154 Wn. App. 752, 773, 225 P.3d 367 (2010).

¹⁴⁵ *Clipse v. Commercial Driver Servs., Inc.*, 189 Wn. App. 776, 787, 358 P.3d 464 (2015).

based on untenable grounds or reasons.¹⁴⁶ A decision rests on untenable grounds or reasons if the trial court applies the wrong legal standard or relies on unsupported facts.¹⁴⁷

2. Legal Principles

CR 54(d)(2) provides that a motion for attorney fees and expenses “must be filed no later than 10 days after entry of judgment” unless otherwise provided by statute or court order. The timeliness requirement of CR 54(d) applies only after the underlying claim is reduced to judgment in court. A motion that is untimely under CR 54(d)(2) is properly denied.¹⁴⁸

CR 6(b) allows the trial court to enlarge the time within which a specified act must be done, such as filing a motion for attorney fees and expenses:

[T]he court for cause shown may at any time in its discretion, (1) with or without motion or notice, order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect.¹⁴⁹

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Corey*, 154 Wn. App. at 774.

¹⁴⁹ CR 6(b).

In other words, a court may enlarge a time deadline **only if** the requesting party files a motion and shows their lateness was the result of excusable neglect.¹⁵⁰ As explained by Karl Tegland in the most recent (and post-*O'Neill*) edition of the Washington Practice Series, the excusable neglect requirement in CR 6(b)(2) is **strictly construed**.¹⁵¹ Hence, the failure to set in place organizational procedures to keep track of deadlines does not constitute “excusable neglect.”¹⁵² And courts have repeatedly held that misplacing documents, changes in personnel, holidays, and “short deadlines” do not constitute “excusable neglect.”¹⁵³ Missing the deadline for filing a motion for fees by “only two days” is also not a reason showing excusable neglect.¹⁵⁴

Here, the Stouts’ counsel admitted that she missed the deadline simply because she was distracted by another matter.¹⁵⁵ The

¹⁵⁰ *Clipse v. Commercial Driver Servs., Inc.*, 189 Wn. App. 776, 787, 358 P.3d 464 (2015).

¹⁵¹ Tegland, Karl B. ad Douglas J. Ende, § 6.10 Enlargement of time periods, 15A Wash. Prac., Handbook Civil Procedure § 6.10 (2017-2018 ed.)

¹⁵² See *Puget Sound Med. Supply v. Wash. State Dep’t of Social & Health Servs.*, 156 Wn. App. 364, 374-75, 234 P.3d 246 (2010) (discussing cases for vacation of judgment under CR 60, which similarly requires “excusable neglect”).

¹⁵³ *Id.*

¹⁵⁴ *Clipse v. Comm. Driver Servs., Inc.*, 189 Wn. App. 776, 789, 358 P.3d 464 (2015).

¹⁵⁵ CP 239-40; RP (2/9/18) at 6-7. The Stouts’ attorney’s attorney records show that she didn’t start working on the fee motion until 11 days after the summary-judgment order was entered. CP178.

trial court acknowledged that this excuse did not establish excusable neglect.¹⁵⁶

3. *O'Neill v. City of Shoreline*

The trial court decided that the Division One decision in *O'Neill v. City of Shoreline*¹⁵⁷ justified ignoring the strict language of CR 54(d) and CR 6(b) and instead placing the burden on the Smiths to prove they would be prejudiced by hearing the fee motion. It is true that both CR 54(d) and CR 6(b) are mentioned in *O'Neill*. But neither the trial court nor the appellate court in *O'Neill* interpreted or applied either rule.

The facts and procedural background in *O'Neill* played a crucial role in the court's reasoning and are easily distinguishable from the present case. First, in *O'Neill* the issue of attorney fees was a key part of the litigation and discussion throughout the case, which involved a Public Records Act dispute. Critically, the trial court in *O'Neill* granted partial summary judgment and stated in its order that, in addition to penalties, "Plaintiffs shall be entitled to an award of reasonable attorney's fees."¹⁵⁸ Shortly after plaintiffs won partial summary judgment, defendants made an offer of judgment regarding the

¹⁵⁶ RP (2/9/18) at 10.

¹⁵⁷ 183 Wn. App. 15, 332 P.3d 1099 (2014).

¹⁵⁸ 183 Wn. App. at 19.

amount of penalties that reserved attorney fees “in an amount to be determined by the Superior Court after subsequent briefing and argument.”¹⁵⁹ Plaintiffs accepted the Offer of Judgment, and the parties engaged in discovery over attorney fees before plaintiffs filed their fee motion.¹⁶⁰ Accordingly, plaintiffs’ fee motion was invited by the trial court, which had already found that they were entitled to fees, and defendants alike.

Nevertheless, while the O’Neills were responding to the City’s discovery requests, the City informed them that they had waived their ability to move for fees under CR 54(d)(2) because more than 10 days had passed since they accepted the offer of judgment.¹⁶¹ The O’Neills filed a fee motion arguing that (1) the time requirements of CR 54(d)(2) did not apply to the acceptance of an offer of judgment, (2) the City made discovery requests deliberately to delay the O’Neills’ fee motion, and (3) there was excusable neglect.¹⁶² The trial court awarded the O’Neills their requested fees, saying it was “not concerned” with the CR 54 issue.¹⁶³ Hence, the trial court did not make any finding regarding the applicability of the CR 54(d)(2) time

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 19-20.

¹⁶¹ *Id.* at 19-20.

¹⁶² *Id.* at 20.

¹⁶³ *Id.*

restriction or any finding under CR 6(b) regarding excusable neglect.¹⁶⁴

The City appealed the fee award to Division One of the Court of Appeals, arguing that the trial court could not award fees to O’Neill without first finding that there was excusable neglect.¹⁶⁵ But the Court of Appeals never ruled on whether CR 54(d)(2) applied to the facts and therefore never concluded that the O’Neill’s motion was actually untimely.¹⁶⁶ Similarly, it never applied CR 6(b) – rather, it engaged in an analysis of CR 6(d), which provides general requirements for filing motions and affidavits. In sum, **neither the trial court nor the appellate court in *O’Neill* ever held that the time requirements of CR 54(d)(2) applied to the judgment at issue in that case.**¹⁶⁷

Moreover, *O’Neill* cannot be used to impose a burden on the non-moving party to prove prejudice before the untimely motion can be dismissed because “the burden of showing prejudice should not rest with the party for whose benefit the time limits were imposed.”¹⁶⁸

[I]n those instances where statutes or court rules impose time limits, the party who violates that time

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 21.

¹⁶⁶ *Id.* at 23, 26 (“[W]e need not, and do not, resolve the O’Neills’ assertion that the stipulated judgment for damages was not a judgment for purpose of CR 54(d)(2).”).

¹⁶⁷ *O’Neill*, 183 Wn. App. at 20, 23 (trial court said it was “not concerned about the 54 issue” and appellate court stated “we need not, and do not, resolve” whether CR 54(d)(2) applied to the judgment).

¹⁶⁸ *State v. Eugene W.*, 41 Wn. App. 758, 762, 706 P.2d 235 (1985).

limit should have the laboring oar. To hold otherwise allows a party to ignore time limits with impunity save in those rare instances where a showing of prejudice and purposeful or oppressive delay can be demonstrated.¹⁶⁹

Allowing the Stouts to proceed with an indisputedly untimely motion as long as the Smiths cannot show prejudice amounts to passing off the “laboring oar” onto the Smiths. But the Smiths should not have to prove prejudice as a prerequisite to enforcing the clear requirements of CR 54(d)(2) and CR 6(b)(2).

Finally, the purpose of CR 54(d)(2)’s 10-day filing requirement is to provide a sense of certainty and finality in the resolution of a matter. To allow parties to ignore the time requirement of CR 54(d) and to disregard the excusable neglect standard of CR 6(b) would put parties in a position where they must constantly be looking over their shoulder after a final judgment, wondering whether or not a fee motion is coming.

4. The trial court abused its discretion by applying *O’Neill* and concluding that it had to consider the untimely fee motion unless the Smiths could show prejudice.

There was no dispute that the Stouts’ fee motion was filed more than 10 days after the entry of judgment and was therefore untimely

¹⁶⁹ *Id.* at 762-63.

under CR 54(d).¹⁷⁰ The Stouts did not file a CR 6(b) motion to enlarge the time in which to file their fee motion, either before or after the deadline had passed.¹⁷¹ Further, the trial court found that the Stouts' attorney's proffered reason for the delay did not amount to excusable neglect.¹⁷²

But the Stouts asserted that the trial court should consider their untimely fee motion anyway because under *O'Neill v. City of Shoreline* the Stouts did not need to show excusable neglect to enlarge the CR 54(d) time requirements because "the only consideration for enlargement of the time limits under CR 54(b) [sic] is prejudice to the party in being notified and able to oppose the fee award."¹⁷³ The trial court abused its discretion by agreeing with the Stouts because *O'Neill* does not apply.

The issue in *O'Neill* was whether the trial court abused its discretion by considering an *allegedly* untimely fee motion without making a finding of excusable neglect. The court in *O'Neill* never held that CR 54(d)(2) applied or that the fee motion was actually untimely.

¹⁷⁰ CP at 239.

¹⁷¹ CP at 238. The Stouts' counsel filed a Declaration "to Enlarge Time for Filing Motion for Attorneys Fees and Costs" attached to the Stouts' Fee Motion Reply, but never moved under CR 6(b). And in the Reply, the Stouts asserted that they *did not* need to move to enlarge time or show excusable neglect in order for the trial court to consider the late fee motion. CP at 232-34.

¹⁷² RP (2/9/18) at 10.

¹⁷³ CP 233.

Therefore, *O'Neill* has no application when the trial court makes a finding on excusable neglect, as the trial court did in this case. Here, the trial court did find that the motion was untimely and that there was no excusable neglect. In light of those findings, *Corey v. Pierce County*¹⁷⁴ is the applicable authority regarding the denial of an untimely fee motion. The court in *Corey* held that in the absence of excusable neglect an untimely fee motion is properly denied.¹⁷⁵ Notably, the court in *O'Neill* cited and approved of *Corey* as “affirm[ing] a trial court’s exercise of discretion to enforce the time requirements of CR 54(d)(2).”¹⁷⁶ *O'Neill* did not overrule or contradict *Corey*.

The later Division Two decision in *Clype v. Commercial Driver Services, Inc.*¹⁷⁷ is also relevant. That case held that the trial court did not abuse its discretion by denying an untimely fee motion where the moving party failed to show excusable neglect.¹⁷⁸ Notably, in *Clype* Division Two affirmed the denial of the untimely fee motion without any discussion of prejudice or of *O'Neill*.¹⁷⁹ In sum, *O'Neill* applies when the trial court finds that CR 54(d)(2) does not apply and, by extension,

¹⁷⁴ 154 Wn. App. 752, 225 P.3d 367 (2010).

¹⁷⁵ *Id.* at 774.

¹⁷⁶ 183 Wn. App. at 23.

¹⁷⁷ 189 Wn. App. 776, 358 P.3d 464 (2015).

¹⁷⁸ *Id.* at 788-89.

¹⁷⁹ The *Clype* opinion cites *O'Neill* for a general statement on the standard of review but does not otherwise discuss the case. That is because *O'Neill* was not relevant when reviewing the denial of an untimely fee motion.

neither does CR 6(b)(2). *Corey* and *Clipse* apply when the trial court finds that (1) CR 54(d)(2) applies, (2) a motion for fees was not filed within ten days, and (3) there is no excusable neglect. And those cases show that the proper result is denial of the untimely motion. Accordingly, the trial court abused its discretion by applying *O'Neill*, which was inapplicable to this case.

C. The trial court erred in awarding the Stouts attorney fees and costs under RCW 7.28.083.

This Court reviews the trial court's award of attorney fees for an abuse of discretion.¹⁸⁰ "Discretion is abused when the trial court exercises it on untenable grounds or for untenable reasons."¹⁸¹

The Stouts prevailed on summary judgment **not** by challenging that the Smiths met any of the elements of adverse possession but by arguing that a last-minute parole agreement between the Stouts and Rossi settled the boundary and precluded the Smiths' adverse-possession claim.

Under RCW 7.28.083(3), the court may award costs and reasonable attorney fees to "the party prevailing in an action asserting title to real property by adverse possession." But a fee award is completely discretionary – fees are awarded only if "after considering

¹⁸⁰ *Berryman v. Metcalf*, 177 Wn. App. 644, 656–57, 312 P.3d 745 (2013).

¹⁸¹ *Id.* at 657.

all the facts, the court determines such an award is *equitable and just*.”¹⁸²

In this case, fees were not equitable and just because the Smiths brought their suit in good faith to settle a legitimate boundary dispute and the Smiths’ adverse possession elements were supported by Horvath’s testimony. But the Smiths’ case failed not because the elements of adverse possession were not present or were refuted by the Stouts, but because the Stouts successfully claimed that, unbeknownst to the Smiths, a superseding parcel agreement was made between the Stouts and Rossi literally days before the closing of the Smiths’ purchase of the Smith Property. The Smiths were not a party to this completely undocumented agreement and were not told that it existed; moreover, Rossi explicitly assured Perry Smith that the Smiths could use the area by the Rossi garden wagon for parking, and neither Rossi nor Horvath ever advised the Smiths that any part of the landscaping or the parking area was on the Stouts’ property.¹⁸³

The Stouts never disputed that the Smiths met the requirements of adverse possession and indeed acknowledged that, for the purposes of their summary-judgment motion, the trial court had to assume that such requirements were met. Rather, the Stouts

¹⁸² RCW 7.28.083(3) (emphasis added).

¹⁸³ CP 71-72.

prevailed only by claiming that the elements of a different doctrine – which they failed to raise as an affirmative defense as required by the civil rules – were met that superseded the Smiths’ claim.

Therefore, an award of fees under RCW 7.28.083(3) was unfounded, unjust, and unequitable under the circumstances.

V. CONCLUSION

For the above stated reasons, this Court should (1) reverse the trial court’s order granting summary judgment dismissal and its order awarding attorney fees and costs, and (2) remand this case to the trial court for further proceedings.

DATED this 13th day of August 2018.

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