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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' REPLY BRIEF

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I. INTRODUCTION

The Stouts' Response Brief repeatedly and significantly mischaracterizes both the evidence and the case law and relies on multiple unsupported assertions. Ultimately, the Stouts fail to overcome the material questions of fact precluding summary judgment. Nor do they present sufficient evidence supporting their unpled parole-agreement defense. Therefore, summary judgment was not appropriate.

Further, at the Stouts' urging, the trial court applied the incorrect legal standard based on *O'Neill v. City of Shoreline*¹ when it considered the Stouts' undisputedly untimely fee motion. In their Response Brief, the Stouts now present a different interpretation of *O'Neill* than it argued before the trial court in an effort to have this Court affirm the trial court's error and its award of attorney fees. But this interpretation also ignores the civil rules and related Washington law.

II. ARGUMENT

A. The Stouts' Response Brief is rife with mischaracterizations and unsupported assertions.

1. The Smith Survey is in the record and properly before this Court for consideration in its *de novo* review.

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

The Stouts incorrectly assert that the Smith Survey is not in the record and cannot be considered by this Court.² But the Smith Survey is in the record at Clerk’s Papers 85 and 137, and it was before the trial court during the summary-judgment proceedings.³ Contrary to the Stouts’ assertion, there was no “voluntary withdrawal” of the Smith Survey by the Smiths.⁴ Rather, counsel for the Smiths argued against the Stouts’ objection and for its admissibility at the summary-judgment hearing, though she did acknowledge—accurately—that the Smith Survey was not an essential part of the motion.⁵

This Court is well aware that it reviews summary judgment *de novo*⁶ and engages in the same inquiry as the trial court.⁷ Accordingly, this Court is not bound by the trial court’s decision to exclude the Smith Survey from its consideration on summary judgment as indicated in its order.⁸ Rather, this Court is free to make its own

² Respondent’s Brief at 11.

³ CP 164-65 (excluding Exhibit A to Plaintiff’s Response and Exhibit C to Perry Smith’s Declaration – both exhibits were the Smith Survey); VRP (1/19/18) at 9-10 (discussion of Smith Survey admissibility).

⁴ Respondent’s Brief at 11.

⁵ VRP (1/19/18) at 9-10.

⁶ *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015).

⁷ *Lyons v. U.S. Bank Nat. Ass’n*, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014).

⁸ The Stouts cite *Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 261, 787 P.2d 553 (1990) in their brief, but that case and the ones it cites for support are cases where the evidence in question was never presented to the trial court. Here, the Smith Survey was clearly presented to and discussed before the trial court. Therefore, the case relied upon by the Stouts is inapplicable.

determination about which materials to consider and rely on in its *de novo* consideration of the Stouts' motion for summary judgment.⁹

2. The Smiths had many discussions with Horvath/Rossi about their use of the property before filing suit.

The Stouts claim repeatedly that the Smiths filed suit without ever consulting their predecessors.¹⁰ But the Stouts ignore that the Smiths engaged in much discussion with Horvath/Rossi about their use of the property during the process of purchase and sale of the property. Based on everything represented to the Smiths by Horvath/Rossi during the purchase process, the Smiths understood that they had exclusive use and control of the disputed area and, to put it in legal terms, there was *prima facie* case supporting adverse possession. Even if they had time to contact Horvath/Rossi after the Stouts started to unilaterally install a fence, there was no reason for the Smiths to contact Horvath/Rossi before filing suit, because they already knew how Horvath/Rossi had exclusively occupied and used the land in question.

3. The Smiths were never told that the survey stakes represented a new boundary line.

The Stouts repeatedly claim in their Response Brief that "Rossi and Horvath made it clear that they were not selling property beyond

⁹ See *Folsom v. Burger King*, 135 Wn.2d 658, 663-664, 958 P.2d 301 (1998).

¹⁰ Respondent's Brief at 4, 10, 45, 47.

the staked boundary line”¹¹ and that the Smiths had “actual notice” of the new boundary.¹² But there is no evidence that such representations were ever made to the Smiths.

It is undisputed that the Smiths **were never told** about any boundary uncertainty, any boundary dispute, or the alleged agreement between Rossi and the Stouts that the staked line represented a newly established boundary line. In fact, Perry Smith testified that he closed on the purchase of the property after receiving assurances that the stakes had no effect on the Smiths using the property just as Horvath/Rossi had.¹³ And Perry Smith was told the Stout Survey was done for purposes related to the Stouts’ garage construction, which was consistent with Paul Stout’s own declaration.¹⁴ Further, Horvath/Rossi did not indicate any “boundary agreements” in their seller disclosure paperwork, although it was a specific question on the form.¹⁵

4. The survey stakes were not placed as the result of any agreement to relocate the boundary.

The Stouts mischaracterize the staked line (the details of which is disputed) as being “based on” the agreement between Rossi and the

¹¹ *Id.* at 2, 29-30.

¹² *Id.* at 21, 24.

¹³ CP 71-72.

¹⁴ CP at 58, 71.

¹⁵ CP 121.

Stouts.¹⁶ That is significant, because “based on” implies there was an agreement as to the purpose and significance of the stakes before they were placed. But the undisputed evidence is that the Stouts unilaterally placed the survey stakes and Horvath/Rossi only learned about it when they later saw stakes in the ground.

Whether an agreement to establish a boundary occurred **before** or **after** the boundary is marked is the difference between potentially creating a parol agreement or simply establishing mutual recognition. Boundary relocation by mutual recognition and acquiescence is a different boundary-adjustment doctrine that applies when one party **unilaterally** establishes a boundary mark and the other party recognizes the mark and treats it as the boundary for a period of time sufficient to satisfy the ten-year statute of limitations.¹⁷ In other words, a party’s recognition of a newly marked boundary cannot support the immediate adjustment of the boundary to that location. In contrast, if the parties agree to mark a new boundary to resolve an uncertainty and then do so together, they have potentially formed a parol agreement that adjusts the boundary effective of the time of marking.¹⁸

¹⁶ Response Brief at 15.

¹⁷ *Piotrowski v. Parks*, 39 Wn. App. 37, 44, 691 P.2d 591 (1984).

¹⁸ *Id.*

Here, the evidence is undisputed that the survey stakes were installed **unilaterally** by the Stouts and Horvath/Rossi had no knowledge of or participation in calling the surveyor or setting out the stakes. Nor did Horvath/Rossi have any knowledge that there was any boundary uncertainty or disagreement. Rather, Horvath/Rossi only learned of the stakes after the line was marked. At that time Rossi looked at the stakes and—according to one iteration of his highly contradictory testimony—recognized the stakes as indicating a boundary between the properties. Because the marking had already happened without Horvath/Rossi’s participation, the parol-agreement doctrine cannot apply.

B. No legal theory permits Rossi to divest his adversely possessed property through statements made to the Stouts.

When land is adversely possessed, the possessor receives original title that is as good as if the possessor had acquired a paper deed.¹⁹ **That title cannot be divested through parol abandonment, relinquishment, verbal declarations, or any other act short of what would be required had title been acquired by deed.**²⁰

The Stouts incorrectly argue that “regardless of what actions Rossi and Horvath may have taken . . . that might have constituted

¹⁹ *Nickell v. Southview Homeowners Ass’n*, 167 Wn. App. 42, 50-51, 271 P.3d 973 (2012).

²⁰ *Id.*

some evidence of adverse possession, *the agreement to recognize the boundary as surveyed on the ground, renders any such actions irrelevant as a matter of law.*"²¹ The Stouts' position—that Horvath/Rossi relinquished title acquired by adverse possession when Rossi agreed with the Stouts that the staked line looked about right as far as what he thought the boundary was—is not supported by any legal theory and contradicts the rule that title cannot be divested by an oral statement. Simply put, it is legally impossible for Rossi to divest title to the portions of the Stout property that he had adversely possessed simply by acknowledging a new boundary as unilaterally marked by the Stouts.²²

C. The trial court erred in accepting the Stouts' untimely fee motion because it ignored the clear language of the civil rules and applied an incorrect legal standard at the urging of the Stouts.

The Stouts incorrectly imply that this Court may only review the trial court's written order granting the Stouts' motion to enlarge time and, therefore, should not review the statements made by the trial court during argument.²³

²¹ Respondent's Brief at 15 (emphasis added).

²² Because Rossi could not have divested the title acquired by adverse possession, the sale of the property to the Smiths included the adversely possessed land. It is irrelevant that the Smiths saw the stakes before they closed on the sale, as that had no effect on the title held by Horvath/Rossi through adverse possession.

²³ Brief of Respondent at 36.

This Court reviews the application of a court rule to a particular set of facts *de novo*.²⁴ Accordingly, the trial court’s application of CR 54(d)(2) and 6(b)(2) is subject to *de novo* review. While the trial court’s decision to accept or reject a claim of excusable neglect is reviewed for an abuse of discretion,²⁵ a trial court abuses its discretion when it applies the wrong legal standard.²⁶ Accordingly, this Court should look to what the trial court said with regard to what legal standard it applied in order to determine whether the trial court properly exercised its discretion in accepting and considering the untimely fee motion.

- 1. The trial court incorrectly interpreted and applied *O’Neill* to require a showing of prejudice by the Smiths before the trial court could deny the Stouts’ untimely motion.**

CR 54(d)(2) requires that a motion for attorney fees and expenses “**must** be filed no later than 10 days after entry of judgment”²⁷ absent a court order allowing more time. Under CR 6(b)(2) the trial court “may” in its discretion permit an untimely motion for attorney fees if—and only if—the moving party shows that the untimeliness was the result of excusable neglect.

²⁴ *Corey v. Pierce Cty.*, 154 Wn. App. 752, 773, 225 P.3d 367 (2010).

²⁵ *Clipse v. Commercial Driver Servs., Inc.*, 189 Wn. App. 776, 787, 358 P.3d 464 (2015).

²⁶ *Id.*

²⁷ Emphasis added.

Here, the trial court stated explicitly that it did not believe that the Stouts had shown excusable neglect to explain the untimeliness of their fee motion, which they attributed to their counsel being preoccupied with another client's matter, stating "I'm also convinced that the excuse posed is not the type of excusable neglect that is usually allowed for late filings."²⁸

Nevertheless, the Stouts argued that *O'Neill* effectively preempted the CR 6(b)(2) excusable-neglect requirement and that instead the burden was on the non-moving party—the Smiths—to show prejudice. Indeed, the Stouts asserted that "*O'Neill* was very clear that the only thing the Court is to consider is the prejudice to the defendant."²⁹ *O'Neill* defined prejudice to mean "a lack of actual notice, a lack of time to prepare for the motion, and no opportunity to provide countervailing oral argument and submit case authority."³⁰ Indeed, under the definition of prejudice given in *O'Neill*, a party responding to a fee motion filed 10 years beyond the deadline would not be able to show prejudice, because the party would have time to brief and respond before the hearing. That is an absurd result produced by applying an incorrect legal standard.

²⁸ VRP (2/9/18) at 10.

²⁹ VRP (2/9/18) at 6.

³⁰ 183 Wn. App. at 22 (quoting *Zimny v. Lovric*, 59 Wn. App. 737, 740, 801 P.2d 259 (1990)).

The trial court unfortunately decided to apply the standard urged by the Stouts and reject the interpretation argued by the Smiths:

Okay. So 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.**

I'm also convinced that the excuse posed in not the type of excusable neglect that is usually allowed for late filings, but I can't read the *O'Neill* case as suggested by [the Smiths' counsel].³¹

The trial court's statements show that the trial court did not believe there was excusable neglect as required under CR 6(d)(2) but that it nevertheless believed it was required to grant an enlargement because the Smiths could not show the type of prejudice outlined in *O'Neill*. This is entirely contrary to well-established Washington law and, accordingly, was an abuse of discretion.

2. *O'Neill* is not factually similar to the present case.

The Stouts commit an offensive overstatement when they claim that *O'Neill* is "nearly identical factually with respect to the missed deadline under CR 54(d)(2) and request to enlarge time under CR 6(d)." ³² There are several crucial distinctions worth noting.

First, in *O'Neill* it was never determined whether the time requirements of CR 54(d)(2) even applied because there was not a

³¹ VRP (2/9/18) at 10.

³² Respondent's Brief at 39-40.

clear “final judgment,”³³ whereas in this case it is undisputed that the trial court’s order granting summary judgment was a final judgment subject to the time requirements of CR 54(d)(2).

Second, in *O’Neill* the trial court did not make any ruling on timeliness at all,³⁴ whereas here the trial court and the parties all agreed that the fee motion was untimely filed.

Third, the parties in *O’Neill* were extensively discussing issues surrounding attorney fees as part of the underlying judgment, and the trial court had indicated that the plaintiff was entitled to a fee award and it expected to receive a fee motion following entry of the underlying order.³⁵ So the motion was no surprise. Notably, the facts of *O’Neill* are similar to this court’s decision in *North Coast Elec. Co. v. Signal Elec.*, where this Court ruled that fee motions made before entry of judgment are timely under CR 54(d)(2).³⁶ In light of the lack of clear final judgment in *O’Neill*, the fee motion was arguably timely on the basis that it occurred before the final judgment. In contrast, in this

³³ 183 Wn. App. at 19, 21-22.

³⁴ *Id.* at 20 (the trial court stated “I’m not concerned about the [CR] 54 issue, so let’s just talk about your rates.”)

³⁵ *Id.* at 19-20

³⁶ 193 Wn. App. 566, 572-73, 373 P.3d 296 (2016).

case there was a clear final judgment, and the first request for attorney fees was made in the late-filed motion.³⁷

Here, the trial court determined that the fee motion was untimely and there was no excusable neglect, but it believed that it was required by *O'Neill* to nevertheless ignore this Court's jurisprudence and consider the untimely motion, because the Smiths could not show prejudice from its consideration. By doing so, the trial court committed reversible error by applying the wrong the legal standard.

3. *O'Neill* does not divest the trial court of discretion to enforce time requirements of CR 54(d)(2) and deny consideration of untimely motions under CR 6(b)(2).

O'Neill does not stand for the proposition that a trial court must rely exclusively on prejudice to determine whether to consider an untimely fee motion. As discussed in Appellants' Opening Brief, the factual background in *O'Neill* was completely different to the one in this case and, perhaps most importantly, neither the trial court or Court of Appeals made any finding regarding the applicability of CR 54(d)(2)

³⁷ As set forth in the Appellants' Brief, the Smiths also maintain that, even if the fee motion was timely filed, there was no basis for awarding fees under RCW 7.28.083.

or CR 6(b) because the trial court had already ordered that fees would be awarded.³⁸

Indeed, the court in *O'Neill* discussed with approval *Corey v. Pierce County*,³⁹ a case where an untimely fee motion was denied without any discussion of prejudice.⁴⁰ The *O'Neill* court did not criticize the *Corey* court for denying an untimely fee motion based on a lack of excusable neglect and without any consideration of prejudice. And in *Clipse*, which was decided after *O'Neill*, this Court affirmed the trial court's rejection of an untimely fee motion where the moving party had not shown excusable neglect.⁴¹ The trial court in *Clipse* did not discuss prejudice before denying the untimely motion.

The present case is directly analogous to *Corey* and *Clipse* in that there was an untimely motion and no excusable neglect. Accordingly, the trial court should have denied the fee motion based on its finding that there was no excusable neglect, just as the courts in *Corey* and *Clipse* did. But the trial court clearly did not understand that it had such discretion as evidenced by its statement: "I do believe I **need** to go forward with the motion."⁴²

³⁸ *O'Neill*, 183 Wn. App. at 19.

³⁹ 154 Wn. App. 752, 225 P.3d 367 (2010). Discussed at *O'Neill*, 183 Wn. App. at 23.

⁴⁰ *Corey*, 154 Wn. App. at 773-74.

⁴¹ 189 Wn. App. at 787-89.

⁴² VRP (2/9/18) at 10.

Even the Stouts recognize that *O'Neill* does not bind trial courts to consider untimely motions despite a lack of excusable neglect. In their Response Brief the Stouts argue (incorrectly) that under *O'Neill* the court “**can exercise its discretion** to enlarge the period where no prejudice with respect to the motion for fees is shown.”⁴³ But when arguing before the trial court, the Stouts asserted that the trial court **must** grant an enlargement of time and consider an untimely motion unless the other party could show that doing so would cause prejudice.⁴⁴ That is an entirely different standard and the one that the trial court chose to apply.⁴⁵

In sum, the trial court mistakenly adopted the Stouts’ argument that it **had to** grant an enlargement and consider the Stouts’ untimely fee motion—even though they could not show excusable neglect—because the Smiths could not show that consideration of the untimely motion would cause prejudice. That is simply not the correct legal standard, because *Corey*, *Clipse*, and CR 6(b)(2) are all in accord that the trial court cannot enlarge time when the moving party has not shown excusable neglect. *Corey* and *Clipse* control. And *O'Neill* does not apply here because in that case the trial court had already ordered

⁴³ Respondent’s Brief at 39 (emphasis added).

⁴⁴ VRP (2/9/18) at 6.

⁴⁵ VRP (2/9/18) at 10.

that it would award fees in the stipulated judgment and it made no finding one way or the other on excusable neglect, whereas here the trial court stated that there was no excusable neglect. Accordingly, the trial court should have stricken and denied the untimely fee motion.

D. The Smiths' suit was not frivolous and CR 11 sanctions are not justified.

The Smiths had extensive discussions with Horvath/Rossi about their use of the property before the Smiths closed on the sale, and it is undisputed that the Smiths had no knowledge of the alleged agreements between Rossi and the Stouts. Accordingly, the Smiths had evidence to support a *prima facie* claim for adverse possession, and subsequent declarations by Rossi and Horvath as well as Horvath's deposition firmly confirmed the strong merits of an adverse-possession claim. Hence, the Smiths' suit was grounded in facts and the law and was filed in good faith. Accordingly, the Stouts are not entitled to fees under RCW 4.84.185 or CR 11.

IV. CONCLUSION

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 26th day of October 2018.

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