

WASHINGTON CASE UPDATE

When is a Statement considered an Offer to Compromise?

From the desk of Kyle Riley: Under Washington's evidence rules, an offer to compromise is not admissible in court. This allows the parties to engage in candid settlement discussions without concern that a statement will later be used as evidence against them. When is a statement considered an offer to compromise? Read on to learn more.

Claims Pointer: In this case arising out of an adverse possession claim over disputed land, the Washington Court of Appeals held that because no dispute had yet arisen as to the ownership of the land, a permit to use the property and an offer to purchase the property were not offers to compromise and were therefore admissible as evidence. The case provides insightful analysis of when a statement is properly considered an offer to compromise, a key consideration in any claim.

Buchanan v. Gray, No. 75150-6-I, Washington Court of Appeals Div. I (August 14, 2017) (unpublished)

Neighbors Dean Buchanan ("Buchanan") and Jerry Gray ("Gray") were in a dispute of ownership of land on the border between their lots. In the 1990s, before Buchanan owned his property, Gray installed a wire fence along the border between the two lots. Buchanan purchased the lot in 2007, and when he surveyed the property in 2009, he realized that some of Gray's improvements were within the recorded boundaries of Buchanan's property. In 2011, Buchanan and Gray executed a permit (the "Permit") that allowed Gray to continue to use the disputed area through the end of 2012. The Permit required Gray to indemnify Buchanan if anyone were to be injured while in the disputed area and to remove any "facility" that they had installed on the property after the Permit terminated. When the Permit expired, Gray failed to remove the improvements, and in 2013, he offered to purchase the disputed area from Buchanan (the "Offer").

In 2014, Buchanan sued Gray for breach of the Permit, to quiet title to the disputed area, and for ejectment. Gray filed a counterclaim, alleging he had acquired title to the disputed area through adverse possession. Adverse possession requires, among other things, that the possession of the disputed area be "hostile." In Washington, a claimant's use of land is hostile if the claimant treats the land as his own. Use of the land is not hostile if the true owner permits the claimant to use the land

in that manner. Where a claimant's statement indicates that he does not own the disputed property, it can support an inference that his use was permissive.

Buchanan offered both the Permit and the Offer as evidence that Gray's use of the land was not hostile because they constituted statements by Gray acknowledging that Buchanan owned the disputed area. However, the trial court ruled that these documents were offers to compromise and therefore inadmissible under Washington's Evidence Rule ("ER") 408. Both parties moved for summary judgment, and the trial court granted Gray's motion. Buchanan appealed, arguing that the trial court erred by excluding the Permit and Offer.

The Court of Appeals acknowledged that if the Permit and Offer were admitted into evidence, they would have created a genuine issue of material fact whether Gray acted as the true owner of the disputed area. As the Court of Appeals explained, a jury could find that offering to purchase the disputed area and executing a document accepting permission from Buchanan to use the disputed area was proof that Gray recognized Buchanan as owner of the disputed area. Under ER 408, statements made in the context of negotiations prior to the initiation of litigation are admissible unless there was an actual dispute at the time or hints at the potential of future litigation. Thus, the key issue governing admissibility was when the dispute arose. Generally speaking, a dispute arises when a claim asserting a right is rejected.

case in point...



Contact: Kyle Riley | www.smithfreed.com | email: kdr@smithfreed.com

Ph: 206.576.7575 | Fax: 206.576.7580 | 705 Second Avenue, 17th Floor | Seattle | WA | 98104

This article is to inform our clients and others about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in this article without seeking professional counsel.

WASHINGTON CASE UPDATE

When is a Statement Considered an Offer to Compromise?

case in point...

Buchanan argued that because the Offer and the execution of the Permit occurred before the dispute over ownership arose, they were not offers to compromise. Gray argued that the dispute arose in 2009, after the completion and recording of the survey. The court, however, determined that Gray's actions did not support that argument.

Gray executed the Permit in December 2011. For evidence a dispute existed at that time, Gray relied on his deposition testimony that he felt "bullied" into signing the agreement because he believed Buchanan would take his fence down if he did not sign it. Gray made the Offer in 2013. For evidence a dispute existed at that time, Gray relied on his deposition testimony that after the 2009 survey "brought to [his] attention" the fact that some improvements were in the disputed area, he decided that the "easiest and least expensive way" to handle the situation was to purchase the disputed area from Buchanan.

The court was not persuaded by Gray's evidence. For the court, Gray's evidence made it clear that he wanted to keep using the disputed area, but it did not establish that he had asserted an ownership interest in the disputed area prior to the beginning of litigation. Gray provided no evidence that Buchanan understood the Permit and Offer as offers to compromise, nor did he provide any evidence that he communicated his belief that the Permit and Offer were offers to compromise a dispute over ownership. Instead, the first time that Gray claimed he had adversely possessed the disputed area was in the counterclaim, which was filed in June 2014. Because the Offer and Permit could not be offers to compromise a claim that Gray had not yet asserted, the court held that the Permit and Offer were not offers to compromise and should not have been excluded under ER 408. Because the Permit and Offer created a genuine issue of material fact as to whether Gray's use of the disputed area was hostile, summary judgment on the

adverse possession claim was improper, and the case was remanded for further proceedings.

NOTE: This opinion has not been published. It is provided to demonstrate how the court approaches the issues involved in the case. It cannot be cited as authority to a court of law.

View full opinion at: <https://www.courts.wa.gov/opinions/pdf/751506.pdf>

Case updates are intended to inform our clients and others about legal matters of current interest. They are not intended as legal advice. Readers should not act upon the information contained in this article without seeking professional counsel.



Contact: Kyle Riley | www.smithfreed.com | email: kdr@smithfreed.com

Ph: 206.576.7575 | Fax: 206.576.7580 | 705 Second Avenue, 17th Floor | Seattle | WA | 98104

This article is to inform our clients and others about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in this article without seeking professional counsel.