

No. 75150-6-I

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

DEAN BUCHANAN and SHEILA MACLANE,
Appellants,
v.

JERRY and TERESA GRAY,
Respondents.

APPELLANTS' BRIEF

Merryn B. DeBenedetti, WSBA No. 35777
Marina Visan, WSBA No. 49127
Attorneys for Appellants Buchanan and MacLane
CARSON & NOEL, PLLC
20 Sixth Avenue NE
Issaquah, WA 98027
Tel: 425.837.4717 | Fax: 425.837.5396

E
RECEIVED
APPELLANTS' BRIEF
MAY 14 2008

TABLE OF CONTENTS

A.	Introduction.....	5
B.	Assignments of Error.....	6
C.	Issues Pertaining to Assignments of Error	7
D.	Statement of the Case	8
	1. History of the Disputed Property	8
	2. Death of James Taper and Buchanan’s Purchase of Taper Property.	12
	3. Buchanan Grants Permission for the Grays to Use the Disputed Area Two Years Prior to Any Dispute.....	13
	4. Procedural History of the Litigation	14
E.	Argument.....	18
	1. Standards of Review on Appeal.....	18
	2. Summary Judgment Standards in Adverse Possession.....	18
	3. The Permit Is Not an ER 408 Offer to Compromise.	21
	4. Even if the Permit Is an Offer to Compromise, It Is Admissible for Other Purposes.....	26
	5. The Trial Court Erred When It Refused to Allow Buchanan to Test the Grays’ Credibility at Trial.....	28
F.	Conclusion	30

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Highline Sch. Dist. No. 401 v. Port of Seattle</i> , 87 Wn.2d 6, 15, 548 P.2d 1085 (1976)	18
<i>Yakima Fruit & Cold Storage Co. v. Cent. Heating & Plumbing Co.</i> , 81 Wn.2d 528, 530, 503 P.2d 108 (1972)	18
<i>Keck v. Collins</i> , 181 Wn. App. 67, 81, 325 P.3d 306 (2014).....	18
<i>Southwick v. Seattle Police Officer John Doe #s 1-5</i> , 145 Wn. App. 292, 297, 186 P.3d 1089 (2008)	18
<i>ITT Rayonier v. Bell</i> , 112 Wn.2d 754, 757, 774 P.2d 6 (1989)	19,21
<i>Riley v. Andres</i> , 107 Wn. App. 391, 395, 27 P.3d 618 (2001).....	19
<i>Sevener v. Nw. Tractor & Equip. Corp.</i> , 41 Wn.2d 1, 15, 247 P.2d 237 (1952)	24
<i>Bulaich v. AT&T Info. Sys.</i> , 113 Wn.2d 254, 263, 778 P.2d 1031 (1989)	24
<i>Brothers v. Pub. Sch. Employees of Wash.</i> , 88 Wn. App. 398, 406, 945 P.2d 208 (1997).....	26
<i>Brocklesby v. United States</i> , 767 F.2d 1288, 1292-93, (9th Cir. 1985) ...	27
<i>Mich. Nat'l Bank v. Olson</i> , 44 Wn. App. 898, 905, 723 P.2d 438 (1986)	28
<i>Nickell v. Southview Homeowners Ass'n</i> , 167 Wn. App. 42, 57, 271 P.3d 973 (2012)	28
<i>Newcomer v. Masini</i> , 45 Wn. App. 284, 287, 724 P.2d 1122 (1986).....	29
<i>August v. U.S. Bankcorp</i> , 146 Wn. App. 328, 347, 190 P.3d 86 (2008)..	29
<i>Snoqualmie Police Ass'n v. City of Snoqualmie</i> , 165 Wn. App. 895, 906, 273 P.3d 983 (2012).....	29,30

TABLE OF AUTHORITIES (Continued)

Evidence Rules	<u>Page</u>
ER 408	<i>passim</i>

A. Introduction

While it is often difficult in cases involving adverse possession to sort out conflicting evidence – much of which is years old as it is in this case – the trial court erred when it ignored the conflicts and granted summary judgment in favor of Respondents Jerry and Teresa Gray. It erred because it did not view the facts in the light most favorable to Appellants Dean Buchanan and Sheila MacLane (collectively “Buchanan”); instead, and contrary to precedent, the trial court simply accepted the testimony of the Grays and held their two offers to purchase and the “Limited Use Permit” (the “Permit”) the Grays signed were irrelevant. This “relevancy” determination was not an issue the Grays raised in their briefs on summary judgment. Rather, it was an issue that the trial court raised on its own. Yet, the Permit was relevant and critical evidence. It showed that the Grays did not possess the property in question with the requisite hostility. Under Washington law, this evidence created an issue of fact that should have prevented summary judgment.

After the trial court erred in granting the Grays’ motion, Buchanan addressed the trial court’s relevancy analysis in a motion for reconsideration. Buchanan again explained that the Permit was indicative of prior permission and lack of hostility under Washington law. Recognizing its error, the trial court changed course, ruling on its own

that the Permit and two offers to purchase were inadmissible offers to compromise a civil case under ER 408 and would not be considered. No party had ever raised ER 408 as an issue, and Buchanan was given no opportunity to respond to it. Had the trial court allowed Buchanan to address the issue, the trial court would have received briefing that a permit grant and offers to purchase years before litigation are not inadmissible “offers to compromise” a civil case because the case did not yet exist. And, even if the Permit and offers to purchase were offers to compromise, they should have been admitted for another purpose under ER 408.

For these reasons, as well as many other reasons discussed below, summary judgment was inappropriate. Buchanan deserves a trial before their property can be taken. The trial court’s decision should be reversed.

B. Assignments of Error

1. The trial court erred when it held that the “Limited Use Permit” signed by the Grays two years before any dispute arose between the parties was an inadmissible “offer to compromise” under ER 408, and when no party raised that issue or had the opportunity to respond to it. CP 1-4.

2. The trial court erred when it held that the Grays' two – possibly three - offers to purchase the disputed portion of property – before any dispute arose between the parties – were inadmissible offers to compromise under ER 408 and when no party raised that issue or had the opportunity to respond to it. CP 1-4.

3. The trial court erred when it granted summary judgment in favor of the Grays instead of allowing the case to proceed to trial so Buchanan could cross-examine the Grays in open court when James Taper (from whom the Grays claimed they adversely possessed Buchanan's property) was dead, and therefore Buchanan lacked access to information found in the Grays' self-serving statements. CP 1-4; CP 5-7; CP 11; CP 21.

C. Issues Pertaining to Assignments of Error

1. Whether the trial court erred when it held that the Permit and offers to purchase were inadmissible offers to compromise a civil case under ER 408 when the Permit and two offers to purchase were made years before any dispute arose or litigation began.

2. Whether the trial court erred as a matter of law when it granted summary judgment in favor of the Grays, despite the fact that Washington case law requires Buchanan to have the opportunity to cross-examine the Grays at trial since James Taper is dead and the Grays are the only parties with knowledge of what occurred during the time James Taper owned the Disputed Area (and from whom they allege they acquired it via adverse possession).

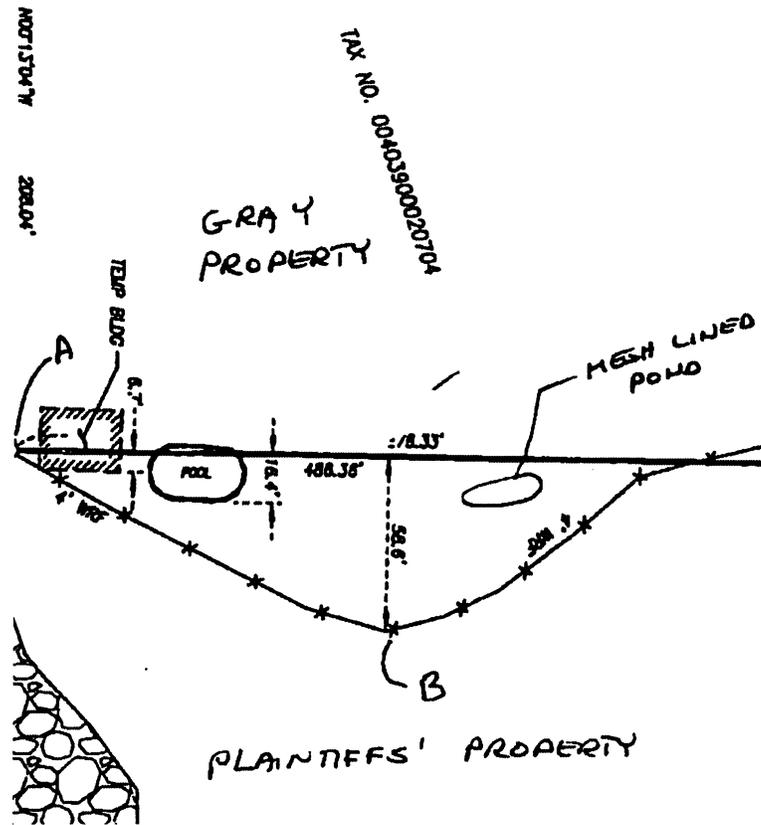
3. Whether the trial court erred as a matter of law when it granted summary judgment in favor of the Grays when the facts taken in the light most favorable to Buchanan require reversal, particularly when Mr. Gray stated that he tried to keep the fence “straight” along the true boundary line but did not testify about when that effort “failed.”

D. Statement of the Case

1. History of the Disputed Property

The Respondents, Jerry and Teresa Gray, purchased property located at 9330 180th Street SE, Snohomish, Washington (the “Gray Property”) sometime in 1983 or 1984. CP 78, 106, 107. At the time the Grays purchased their property, James Taper, who died in 2007, owned the property to the south of the Gray Property, located at 9310 180th Street SE, Snohomish, Washington (the “Buchanan Property”). CP 82. The portion of property in dispute is referred to as the “Disputed Area”

and is depicted at CP 76 and 77; CP 76 is the survey conducted by Buchanan in 2009. A chart, not to scale, is shown below for the Court's reference:



Summarized, the timeline of events in this case is as follows:

Date	Activity
1983-84	The Grays purchase property north of the Taper

	(now Buchanan) property. See CP 77; 179.
1992-93	The Grays build their residence and allegedly roll out some wire fencing in the Disputed Area. CP 107; 117. Jerry Gray stated via declaration at summary judgment that he “tried” to keep the fence in a straight line (adhering to the true boundary) but at some point he did not know, his effort to keep the fence on the property line “failed.” CP 63.
2000	The Grays allegedly install a pool in the Disputed Area. CP 164.
“Sometime” between 2003 and 2006	The Grays allegedly construct a pond in the Disputed Area. CP 117; 164.
2007	
2007	The Grays offer to buy Taper property. CP 111-12; 131.
2007	Buchanan buys Taper property from Estate of James Taper. CP 133.
2008	The Grays build a hoop shed in the Disputed Area. CP 164.
2009	Buchanan conducts a survey of Buchanan Property. CP 128.
December 31, 2011	The parties execute the Permit so Grays can continue to use Disputed Area. CP 142-43. The Grays testified they may have made an offer to purchase at execution of the Permit in 2011: At the time of signing, “we [the Grays] may have mentioned at that time that we [the Grays] would like to buy the property. And we still discussed it further at that time.”). CP 123.
January 1, 2013	Permit expires. CP 142-43.
2013	The Grays offer to purchase Disputed Area from Buchanan. CP 124, 126.
2013	Buchanan decline the Grays’ offer to purchase Disputed Area.
2013	The Grays refuse to remove storage and pool encroachments or any other facility subject to Permit. CP 120-22.
April 4, 2014	Buchanan files suit against Grays to quiet title to Disputed Area, for breach of contract (the Permit), and for trespass/ejectment. CP 186-91.

June 2014

The Grays counterclaim against Buchanan, **alleging adverse possession** and boundary by acquiescence for *the very first time*. CP 172-181.

As described above, sometime in 1992-93, the Grays built their residence and, according to the Grays, rolled out wire fencing in the area along the property line. CP 107.¹ This alleged construction of fencing likely did not enclose the entire Disputed Area, particularly around later encroachments such as a hoop shed that Mr. Gray did not install until 2008.² CP 64. Ms. Gray admitted in her deposition that by erecting the fence, the Grays were not attempting to exercise true ownership rights over the Disputed Area. CP 87. Mr. Gray admitted that he tried to keep the fence “in a straight line” (so presumably adhering to the true boundary) but his effort “failed” at some indeterminate point in time. CP 63. *There is no evidence in the record as to when* that effort “failed”—and thus when the fence began to encompass some or all of the Disputed Area—between 1992-93 and 2009 (the date the survey was done).

Mr. Gray installed a pool in 2000 and a pond in the Disputed Area “sometime” between 2003 and 2006. CP 63. Mr. Gray installed a hoop

¹ Mr. Gray also testified in his deposition that he actually owned the Disputed Area in 1984 *prior to* ever allegedly putting in a fence. CP 124. Mr. Gray’s testimony was contradictory throughout the litigation. *Compare* CP 124 *with* CP 67. He even testified that he had been *paying taxes* on the Disputed Area since 1984, which was impossible as the survey reflects. CP 127. By granting summary judgment, the trial court precluded Buchanan from raising these inconsistencies before a fact-finder, which of course would place the Grays’ entire counterclaim for adverse possession in jeopardy.

shed in the Disputed Area in 2008. CP 164. At the time this litigation began in 2014, nobody except the Grays had any information about what occurred during Mr. Taper's ownership because he had died in 2007 before Buchanan purchased their property, a fact about which the Grays boasted. CP 133, CP 68 (“[I]t is inconceivable that the Plaintiffs themselves possess any testimonial knowledge that would contradict the facts set forth herein.”).

According to Grays, at some point Mr. Gray and James Taper measured the property line between their two properties. CP 110. Mr. Gray admitted he discussed the property line with no one else, and testified that there were no other witnesses. CP 108-111. Yet, even Mr. Gray admits that they could have measured incorrectly. CP 113. Apart from self-serving testimony, the Grays offered no other documents, witnesses, statements, or any other evidence that Disputed Area was always theirs, except their own self-serving testimony.

2. Death of James Taper and Buchanan's Purchase of Taper Property.

In 2007, James Taper died. CP 133. The Grays admitted that they made an offer to purchase the Taper property from James Taper's estate back in 2007 – which was seven (7) years before this litigation began and before Buchanan and Gray had even met - although the Grays

claimed they could not recall specifics, e.g., list price, the name of their agent, or the amount of their offer or anything else about their plan to purchase the property. CP 111-112, CP 131. Because Buchanan's offer was higher, though, Mr. Taper's estate conveyed the property to Buchanan. CP 133. After Buchanan took title to the property, Mr. Gray installed a hoop shed that also encroaches on the Buchanan Property in 2008 in the southwest corner. CP 118. *See also* CP 77.

3. Buchanan Grants Permission for the Grays to Use the Disputed Area Two Years Prior to Any Dispute.

Buchanan paid for a survey in 2009, which the Grays obtained around that same time from Snohomish County. CP 114. That survey clearly shows that the Grays' unpermitted, above-ground pool, fence, and hoop shed are clearly on the Buchanan Property, and Mr. Gray admitted in his deposition that these items are in the Disputed Area. CP 72, 128. After the Grays obtained the 2009 survey, they signed a "Limited Use Permit Agreement" (the "Permit") to use the Disputed Area. CP 119-120; CP 142-143. The Permit was executed by both parties on December 31, 2011, and it was effective from January 1, 2012, through January 1, 2013. CP 142-143. The Permit allowed the Grays to use the Disputed Area for their "pool and storage building encroachments." CP 142-143. Upon termination of the Agreement on January 1, 2013, the Grays were to

remove “any facility” which they had placed in the Disputed Area. CP 142-143. The Grays admitted they never removed the pool or the hoop shed or any other facility from the Disputed Area after the Permit expired. CP 122. Jerry Gray admitted he read and understood the Permit when he signed it. CP 119-122. There is no language in the Permit indicating that it was meant to compromise any claim. CP 74-75. The Permit was offered as evidence to the trial court on summary judgment by both Buchanan *and the Grays*. CP 74-75; 142-43.

After the Permit expired in 2013, the Grays again offered to purchase the Disputed Area. CP 123-124, 126. Buchanan declined.

This litigation followed over a year later in April 2014 based upon the Grays’ continued use of the Disputed Area and breach of the Permit. *See* CP 188.

4. Procedural History of the Litigation

Sixteen months after the Permit expired, the Grays refused to remove the encroachments that were subject to the Permit. CP 142-143. Buchanan commenced litigation against the Grays to quiet title on April 14, 2014. CP 185-191. On June 4, 2014, the Grays filed their Answer, alleging *for the very first time* that they owned the Disputed Area via adverse possession. CP 172-177.

On January 15, 2015, Buchanan moved for summary judgment as to all claims. CP 93-100. On February 1, 2016, the Grays cross-moved for summary judgment as to their claim for adverse possession and boundary by acquiescence. CP 59-73. The Grays' motion was untimely because it was too close to the trial date, so Buchanan agreed to extend the trial date to accommodate the Grays. CP 56.

The Grays' cross-motion raised all sorts of issues related to the invalidity of the Permit and its ability to divest the Grays of title, rather than focus on the elements of adverse possession or on the relevancy of the Permit itself. CP 59-73. For example, on summary judgment, the Grays argued that the Permit was invalid under the Statute of Frauds. CP 65. The Grays argued that the Permit was invalid because it "lack[ed] real property conveyance language" from the Grays. CP 66. The Grays argued that the Permit was invalid because Jerry Gray's signature was not acknowledged. CP 66. The Grays argued that the Permit was invalid under community property laws because Teresa Gray did not sign it. CP 66. The trial court rejected these arguments. CP 5-7.

For purposes of this appeal it is critical to understand what arguments the Grays failed to make on summary judgment. The Grays did not assert that the Permit was irrelevant; indeed, *they offered it into evidence*. CR 59-75. The Grays' arguments lacked any suggestion that

either the Permit or the Grays' offers for purchase were "inadmissible offers to compromise" a civil case under ER 408. CR 59-73. And those arguments were devoid of any suggestion at all that the Permit did not negate the element of hostility as Buchanan argued it did. *See* CP 59-73.

Buchanan responded to all the arguments the Grays *did* raise. *E.g.*, CP 41-45. The Grays also raised several new arguments in a "supplemental response," which consisted of the Grays "suddenly" remembering that they saw James Taper mow the fence line on "his side of the fence" for 12 years. CP 48-50. Buchanan properly objected to consideration of the Grays' supplemental response. CP 26-28.

In its initial ruling, the trial court held that the Permit and two offers to purchase were "irrelevant" because the Grays already had adversely possessed the Disputed Area from James Taper who died in 2007, so the valid Permit and the two offers to purchase did not matter. CP 3. The trial court reached this conclusion even though *Riley* was brought to the trial court's attention—which as discussed below, directly rebuts the trial court's reasoning—*see* CP 68, and Buchanan had argued that the Permit and two offers to purchase defeated summary judgment as to hostility.³ The trial court also summarily dismissed Buchanan's breach

³ *E.g.*, CP 55 ("This is particularly true where, as here, there is ample evidence that the Grays tried to purchase it twice (thus, they did not legitimately believe they already owned it as they claim and were not 'treating it as owners' as against anyone else), and

of contract claim, even though it was clear the Grays had – in fact – breached the Permit. CP 5-7.

On reconsideration, the trial court abandoned its “relevancy” conclusion, instead holding that the Permit and Offers to Purchase were inadmissible offers to compromise a civil case under ER 408. CP 2.⁴ No party had argued that point before the court, and Buchanan was never given any opportunity to respond to it. CP 1-4.⁵ The trial court also did not discuss its decision to deny reconsideration as to the third issue. CP 1-4. Summary judgment should not have been granted because the Grays had all the facts pre-2007 because James Taper had died, and there was no other way to evaluate those facts and assess their credibility other than during cross-examination during trial. Buchanan should have the opportunity to cross-examine the Grays at trial on credibility when all the facts related to their adverse possession claim are solely within the Grays’ own knowledge. CP 1-4. *See also* CP 9-11.⁶

Jerry Gray signed a Limited Use Permit Agreement to use the Disputed Area, again not treating it as an owner against anyone else.”), CP 56 (“In fact, it is clear – by the permit agreement – that their [the Grays] use of the Disputed Area had been permissive.”), 98 n.2, CP 99.

⁴ The Grays’ Response on Reconsideration was untimely, and the trial court properly did not consider it. CP 1.

⁵ The trial court apparently invited the Grays to make that argument during summary judgment, but the Grays’ counsel declined. CP 1-4.

⁶ At the hearing on fees just after Buchanan filed the notice of appeal, counsel for Buchanan did mention that ER 408 did not apply. RP 9-12. But, the trial court and the Grays’ counsel, in a troubling colloquy, together surmised that the Grays had a “clear case of adverse possession.” RP 4-5, 14.

E. Argument

1. Standards of Review on Appeal.

When reviewing an order for summary judgment, this Court engages in the same inquiry as the trial court. *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). All facts and inferences are considered in the light most favorable to the nonmoving party. *Yakima Fruit & Cold Storage Co. v. Cent. Heating & Plumbing Co.*, 81 Wn.2d 528, 530, 503 P.2d 108 (1972). Summary judgment should only be granted when there are *no* genuine issues of material fact. CR 56(c). In other words, for summary judgment to be proper in this case, no reasonable fact-finder could find in favor of Buchanan as to each element of adverse possession. *See id.*

With respect to evidentiary issues on summary judgment, this Court independently examines “*all* the evidence presented to the trial court on summary judgment.” *Keck v. Collins*, 181 Wn. App. 67, 81, 325 P.3d 306 (2014) (emphasis in original); *Southwick v. Seattle Police Officer John Doe #s 1-5*, 145 Wn. App. 292, 297, 186 P.3d 1089 (2008). Thus, this Court “evaluates anew all evidence available to the trial court for potential consideration on summary judgment.” *Keck*, 181 Wn. App. at 81.

2. Summary Judgment Standards in Adverse Possession.

During summary judgment, the burden was on the Grays to show there was no genuine issue of material fact as to each element of adverse possession. *E.g., ITT Rayonier v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989). Washington courts should be reluctant to grant summary judgment where “material facts are particularly within the knowledge of the moving party,” such as where a prior owner of the property sought by adverse possession is dead and the subsequent title holders are unable to obtain contradictory evidence by virtue of this fact. *E.g., Riley v. Andres*, 107 Wn. App. 391, 395, 27 P.3d 618 (2001). As the court explained, “[i]n such cases, ‘it is advisable that the case proceed to trial in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying.’” *Id.*

A case cited on summary judgment and reconsideration – *Riley* - is instructive on this point. CP 9-10, 16, 68. In that case, the Rileys claimed they adversely possessed part of the Andres’ lot while the Andres’ predecessors in title, the Gaults, owned it. *Riley*, 107 Wn. App. at 393-94. Both the Gaults had died prior to the Andres’ purchase. *Id.* at 393. The Andres – like Buchanan here - had difficulty presenting evidence about what the Gaults did or did not do. *Id.* (“Because the Gaults had both died, the Andres could not show how the Rileys or the Gaults had used the disputed land.”). It is important to note that the

Andres did try to challenge the Rileys' credibility, as Buchanan did here. *Id.* at 393 ("The Andres did challenge Rileys' credibility, offering statements by Mrs. Riley that the land belonged to Andres.").⁷ However, the trial court granted summary judgment for the Rileys. *Id.* at 395. The Washington Court of Appeals reversed. *Id.* at 398. The Riley court explained that an admission of non-ownership – even after the 10-year period for adverse possession had run – is evidence of permission. *Id.* The *Riley* court also held that when the predecessor in interest to the true owner has died, the case should go to trial because there is no other way to evaluate the adverse possessor's evidence except by assessing the adverse possessor's demeanor and credibility while talking about it in open court. *Id.* at 395.

With these controlling standards in mind, the trial court below erred when it held the two offers to purchase and the Permit were inadmissible offers to compromise under ER 408. And, even if the two offers to purchase and the Permit were offers to compromise, they were otherwise admissible because the Permit was offered to show breach and negate hostility, both parties offered the Permit as evidence during summary judgment, and the Permit bears on the issue of the Grays' credibility.

⁷ As Buchanan argued to the trial court, there is no clearer statement of non-ownership of land than signing a license to use it and offering to buy it at least twice. CP 17.

And, finally, setting aside all of the other evidence in this case, Mr. Gray testified that he tried to keep the fence in a straight line, adhering to the true boundary, but “failed.” CP 63; CP 91-92. There is no evidence in the record about when that failure occurred – it could have been in 1993 or it could have been in 2008 or it could have been anytime in between. CP 63; CP 91-92. At summary judgment, the Grays had the burden as the moving party to show that there were no genuine issues of fact as to each element of their adverse possession claim, and all evidence should have been viewed in the light most favorable to Buchanan. *E.g.*, *ITT Rayonier*, 112 Wn.2d at 757. Based upon Mr. Gray’s admission alone, there was a discrepancy in the facts as to when the fence was no longer “straight,” and summary judgment was improper. CP 63; CP 91-92.

3. The Permit Is Not an ER 408 Offer to Compromise.

At the summary judgment hearing, the Trial Court erred when it concluded that the Permit and offers to purchase were “irrelevant.” CP 4. *Riley*, 107 Wn. App. at 397. Indeed, the court in *Riley* held that a statement from the adverse possessors that they “did not own the property” was relevant evidence of whether they “use[d] it as an owner would use it.” *Id.* at 397. The court was careful to note that it did *not* use the statement to inquire as to the alleged adverse possessor’s subjective belief.

Id. Specifically, the court concluded: “The Rileys have stated facts sufficient to establish such use [as an owner]. But their claim to have acquired title by using the property as an owner *is inconsistent* with Ms. Riley’s statement that the property was not theirs.” *Id.* at 397 (emphasis added).⁸ The court also observed that Ms. Riley’s statement supported a reasonable inference that the Rileys had permission to use the property from the Gaults, who were deceased, as Buchanan argued here with respect to the Permit and the two offers to purchase. *Id.* See, e.g., CP 55-56. The court reached this conclusion even though the Rileys “watered and pruned the plants, spread beauty bark, and pulled weeds” in the area over which they claimed ownership, just like the “maintenance” the Grays claimed. *Id.* Notably, the Rileys’ statement that they did not own the property at issue was made *after* they alleged they acquired the property via adverse possession, like the Grays here. *Id.* at 393. The Rileys claimed they acquired the property based on their use of it from 1968 to 1993, but Andres did not purchase the property until 1993. *Id.* The Rileys made a statement after the fact that they did not own the property. *Id.* at 394-95.

⁸ Using the property as a true owner would be the crux of hostility. As Buchanan argued in briefing and at the summary judgment hearing before the trial court, permission – in whatever form – negates this element. See CP 28; 45; 55-56; 98-99.

Buchanan argued that the Grays “execution of the valid permit agreement *greatly affects the Grays’ credibility* and goes directly the issue of whether they had permission from Mr. Taper and whether they treated the property as a true owner would,” which is the rule in *Riley*. CP 18 (emphasis added).⁹ Buchanan’s argument on this point foreclosed the possibility that the Permit was “irrelevant” as the Trial Court initially held on summary judgment. CP 4. So, instead of accepting the need for a trial per *Riley*, on reconsideration, the Trial Court held that the Permit and two offers to purchase were inadmissible offers to compromise under ER 408 instead, even though no party had raised, argued, or briefed that issue. In sum, the trial court raised a completely new justification on reconsideration and gave Buchanan no opportunity to argue that the Permit and offers to purchase were not inadmissible offers to compromise under ER 408 until now. CP 3.

Yet, even if one accepts the trial court’s new justification for granting summary judgment in favor of the Grays, the Permit is not an inadmissible offer to compromise a civil case for several reasons.

⁹ In fact, the record is replete with references from both parties as to the Permit as evidence of permission or weighing on credibility. CP 24 (“Indeed, [the Plaintiffs’] only real response to Defendants’ Motion for Summary Judgment is that the execution of the Permit by Jerry Gray somehow results in the characterization of the Defendants’ dominion over the Disputed Area as being “permissive”....); CP 45; CP 56 (arguing use of the Disputed Area was permissive because of the permit).

First, by offering it into evidence as the Grays did, they waived any ER 408 assertion. *Sevener v. Nw. Tractor & Equip. Corp.*, 41 Wn.2d 1, 15, 247 P.2d 237 (1952). ER 408 is designed to protect offerors of compromise from having those offers used against them. *See Bulaich v. AT&T Info. Sys.*, 113 Wn.2d 254, 263, 778 P.2d 1031 (1989) (citing comment to ER 408 regarding justification of rule as permitting parties to compromise “without sacrificing portions of their case in the event such efforts fail”). That was obviously not a concern of the Grays, since they voluntarily submitted the evidence to the trial court. CP 74-75. The Rule does not bar a settlement agreement when the agreement is offered by the party who proposed it. *See Bulaich*, 113 Wn.2d at 264-65. In this case, both parties offered the Permit into evidence, so it should not be viewed as an “attempt to establish an admission of liability” by *either* party. *Id.*; CP 61; 74-75 (attaching Permit to the Grays’ Response on Summary Judgment and their Cross-Motion). The trial court’s invocation of ER 408 served no purpose under the rule. *See Bulaich*, 113 Wn.2d at 263-64 (purpose of rule is free exchange of offers and recognition that an offer may not reflect belief that adversary’s position has merit). Indeed, apart from providing the trial court with an after-the-fact justification for its position, the rule serves no purpose in this case at all.

Second, neither the Grays nor the Trial Court pointed to any evidence establishing that the Permit was written to compromise a claim. Because, at the time it was signed, there was none. There was no “civil case” or dispute that would render “evidence of (1) furnishing or offering or promising to furnish” consideration in “compromising a claim which was disputed as to validity or amount...” ER 408. The Grays did not even raise the threat of adverse possession until over a year *after* they breached the Permit and Buchanan filed this action. Tegland is instructive on this point: “The point at which a claim is asserted, thus triggering the rule, is normally the filing of the action.” 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence CR 408 author’s cmts. at 266 (2012/2013 ed.) (“Statements made *before* the plaintiff asserts a claim remain admissible.”). Although pre-filing statements may in some cases be barred, an actual dispute must have arisen and litigation must be “imminent.” *Id.*

Neither the Grays nor Buchanan had brought any claims against each other – or made any mention of having any claims against each other -- at the time the Permit was executed. Indeed, the parties were nowhere near litigation, litigation which arose only *after* the Grays breached the Permit by failing to remove their encroachments and facilities from the Disputed Area. There is no discussion in the Permit

itself as to whether it constituted some sort of compromise of claims. CP 142-43. The mere fact that the parties negotiated a Permit under which the Grays could use the Disputed Area for one year does not render the Permit inadmissible under ER 408. CP 142-143. On its face, the Permit is not a settlement agreement. Neither the Grays nor the Trial Court did – or could – point to any portion of the record that established that litigation was imminent at the time of execution. But, even if they could, the Permit was still admissible for other purposes, such as to show breach or negate hostility.

4. Even if the Permit Is an Offer to Compromise, It Is Admissible for Other Purposes.

It is undisputed that the Grays breached the Permit when they failed to remove their encroachments after the Permit expired. CP 120-23; CP 142-43. It is also undisputed that the Permit constituted permission to use the Disputed Portion of the Buchanan Property. CP 142-43. Thus, the Permit was admissible to show that the Grays breached its terms and that the Permit constituted permission that negated the hostility element of adverse possession. CP 142-43. *See* ER 408 (“This rule does not required exclusion when the evidence is offered for another purpose....”); *Brothers v. Pub. Sch. Employees of Wash.*, 88 Wn.

App. 398, 406, 945 P.2d 208 (1997) (settlement agreements may be introduced where breach is at issue).

Moreover, even if the Permit and two offers to purchase made years before any dispute arose were somehow inadmissible offers to compromise under ER 408, the Rule does not bar the admission of settlement agreements if the relationship between the parties or credibility of witnesses is at issue. *Brocklesby v. United States*, 767 F.2d 1288, 1292-93, (9th Cir. 1985) (indemnity agreement admissible when offered to show nonadverse relationship between the parties and to attack credibility of witnesses). In this case, credibility is a key issue. *E.g.*, CP 98 (“[The Grays] have no evidence [their use] was hostile to Plaintiffs because Mr. Gray signed a “Limited Use Permit Agreement” to use it.”); CP 55; CP 55 n.2 (“[T]he Grays – not the Plaintiffs – have the evidentiary burden to establish hostility, and they have no evidence other than their own self-serving testimony....”). The Permit agreement could have been admitted to show the nonadverse relationship between the Grays and Buchanan and to attack the Grays’ credibility at trial on this point. The Permit should have been admitted and viewed in the light most favorable to Buchanan. The trial court did the opposite.

For numerous reasons, then, the Permit was admissible even if it was an offer to compromise a case that did not yet exist.

5. The Trial Court Erred When It Refused to Allow Buchanan to Test the Grays' Credibility at Trial.

On reconsideration, the trial court made no mention of Buchanan's argument that Buchanan be allowed to test the Grays' credibility at trial under *Riley*, 107 Wn. Ap. At 397-98. *Riley* stands for the proposition that "where material facts are particularly within the knowledge of the moving party, courts have been reluctant to grant summary judgment" in adverse possession because "it is advisable to proceed to trial in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying." *Id.* (citing *Mich. Nat'l Bank v. Olson*, 44 Wn. App. 898, 905, 723 P.2d 438 (1986)). In this case, the Grays argued – and the trial court agreed – that the Grays adversely possessed the Disputed Area before James Taper died. CP 1-4.¹⁰ Buchanan purchased their property (including the Disputed Area) from James Taper's estate after he died in 2007. The majority of allegations set forth by the Grays occurred prior to James Taper's death, with the exception of the hoop shed, which was installed in the Disputed Area in 2008. Nevertheless, the trial court granted summary judgment based upon the Grays' self-serving

¹⁰ If this were true, as the trial court believed, then the statute of limitations likely had run as to the Grays adverse possession claim. Buchanan pointed this issue out on Reconsideration, but the trial court completely disregarded it. *See Nickell v. Southview Homeowners Ass'n*, 167 Wn. App. 42, 57, 271 P.3d 973 (2012).

statements about what they allegedly did to establish adverse possession from James Taper before he died. Under clear Washington law, this was error and Buchanan should be permitted to test the Grays' "facts" at trial.

And this points to a larger problem with the trial court's process here, which is the fundamental lack of fairness. The trial court appeared to conclude that Buchanan did not argue the issues in the right way (relevancy and ER 408), thus precluding its consideration of the issues on reconsideration or preservation on appeal. CP 1-4. However, the Grays did not make arguments about relevancy or ER 408, instead electing to argue that the Permit was invalid under a myriad of other theories such as the statute of frauds and community property. CP 59-73. The Grays simply did not put relevancy and ER 408 before the trial court. CP 59073. Further, Buchanan *did* argue on summary judgment that that the offers to purchase and the Permit meant that the "Grays were not treating the property as true owners would, *see* CP 45 ("In fact, it is clear – by the enforceable Permit – that their use of the Disputed Area had been permissive"), CP 55, CP 55 n.2, CP 56. In Washington, issues which are not dependent on new facts can be considered by the trial court on reconsideration and are preserved for appeal. *See Newcomer v. Masini*, 45 Wn. App. 284, 287, 724 P.2d 1122 (1986); *August v. U.S. Bankcorp*, 146 Wn. App. 328, 347, 190 P.3d 86 (2008); *Snoqualmie Police Ass'n v.*

City of Snoqualmie, 165 Wn. App. 895, 906, 273 P.3d 983 (2012). There were no new facts. The parties discussed the timeline in this case at length both in briefing and at oral argument, with the Grays going so far as to boast that Buchanan could not have obtained any evidence to contradict them since James Taper was dead. It was fundamentally unfair to dismiss Buchanan’s claims and defenses—and take their land—without an opportunity for the Buchanan to address the issues the trial court thought (on his own) were dispositive.

F. Conclusion

The only way to avoid a trial in this case was for the Grays to argue that the Permit and two offers to purchase were invalid, which is precisely what they did. The only arguments they made on summary judgment were as follows: (1) the Permit could not have divested the Grays of title since they allegedly acquired the Disputed Area before Mr. Taper died, CP 64-65; (2) No legal description was attached to the Permit when it was signed, CP 65; (3) The Permit “lacks real property conveyance language” and Mr. Gray’s signature was not acknowledged, CP 66; and (4) the Permit was invalid because Teresa Gray did not sign it, CP 66-67. The actual arguments regarding adverse possession were sparse and merely consisted of cutting and copying large portions of text from cases. CP 67-72.

When these arguments did not work out for the Grays, the trial court decided that the Permit and two offers to purchase were irrelevant. CP 1-4; CP 5-7. After Buchanan brought the issue of credibility and permission to the trial court's attention again on reconsideration, the trial court concluded – despite no argument from anyone – that the Permit and two offers to purchase were inadmissible offers to compromise under ER 408. CP 1-4. And, by granting summary judgment in favor of the Grays, the trial court did not permit Buchanan to cross-examine the Grays at trial, even after the Grays boasted that they had all the evidence in their possession and Buchanan could not obtain any to rebut anything they said because Mr. Taper was dead. CP 72

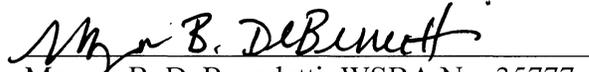
The trial court erred when it held that the Permit and two offers to purchase – years prior to any dispute arising – were irrelevant and then inadmissible. Under the trial court's theory, any contract that was later breached and upon which suit is brought could be construed as an inadmissible offer to compromise if the court deems it so. This outcome should not be the law in Washington.

The trial court erred when it did not allow Buchanan the opportunity to cross-examine the Grays at trial when Mr. Taper has long since died, and the all of the Grays' alleged activities upon which the trial court granted summary judgment in their favor – save one (the hoop shed) –

allegedly occurred before Mr. Taper died. Summary judgment in favor
the Grays should be reversed.

RESPECTFULLY SUBMITTED this 24th day of August, 2016.

CARSON & NOEL, PLLC



Meryn B. DeBenedetti, WSBA No. 35777

Marina Visan, WSBA No. 49127

Attorneys for Appellants

CARSON & NOEL, PLLC

20 Sixth Avenue NE,

Issaquah, WA 98027

Tel: 425.837.4717 | Fax: 425.837.5396

DECLARATION OF SERVICE

The undersigned hereby declare that on this 24th day of August, 2016, I caused the foregoing APPELLANTS' BRIEF to be served via the methods listed below on the following parties:

Via Email and Messenger to:

Dennis W. Jordan
Dennis W. Jordan & Associates, Inc. P.S.
4202 Hoyt Avenue, Suite A
Everett, WA 98203
attyjord@yahoo.com
Attorney for Respondents

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this declaration was executed on August 24, 2016, at Issaquah, Washington.



Dana Carrothers

FILED
CLERK OF SUPERIOR COURT
ISSAQUAH, WA
AUG 24 2016