

FILED
SUPREME COURT
STATE OF WASHINGTON
6/27/2019
BY SUSAN L. CARLSON
CLERK

No. 97028-9

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SUPREME COURT OF THE STATE OF WASHINGTON

Eugene Burke

Appellant

v.

Joseph Frickey, Andrew Day

BNSF Railway Co., Old

Republic Ins. Co.

Respondents

APPEAL FROM TRIAL COURT DECISION

OPENING BRIEF OF APPELLANT

EUGENE BURKE
151 CARSON DEPOT RD.
CARSON, WASHINGTON 98610
360-624-2384
APPELLANT

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I. INTRODUCTION

This case is about one rogue claims handler that got caught in the act of trying to pass off a form legal property release agreement as a release of one property

54 when in fact the document released another much more valuable property and any
55 and all rights to claims from a serious injury accident. The value of the property
56 the claims handler [tried to pass the release off as] is 1% of the value of the true
57 property released by the legal instrument. If the appellant in this case would have
58 signed the document as it was handed to him to sign, the consequences would
59 have meant catastrophic financial damage to his life.

60 **II. ASSIGNMENT OF ERROR**

61 **Assignment of Error**

62 **No. 1** The trial court erred by ruling against plaintiff's Motion for
63 Partial Summary Judgment for liability.

64 **No. 2** The trial court erred by failing to consider this matter a matter of
65 public importance.

66 **Issues Pertaining to Assignment of Error**

67 **No. 1** The trial court failed to determine the level of harm caused by
68 Mr. Day's negligent act of failing to delete the "optional language related to person
69 injury claims" from the property release agreement.

70 1a. Is Mr. Day's failure to prepare the legal instrument with reasonable
71 care criminal negligence?

72 1b. Coupled with the intentional conduct of self insuring, planning to
73 handle claims differently than the regulated insurance company, develop a claims
74 department, employing lawyers to create their database and write exhibit A,
75 employ private claims handlers to practice law and secure contracts deceptively
76 relieving BNSF of personal injury liabilities, using false impressions, omissions,
77 and non disclosures, for that purpose, intentional and chargeable or indictable as
78 the unlawful practice of law, attempted theft, theft, and leading organized crime?

79 1c. Is it obtaining a signature by deception? CCC page 22, line 7-14.

80 2. Is Mr. Burke entitled to move the court for order to prevent, restrain,
81 prohibit, and remedy this conduct under RCW 9A.82.100 or under RCW 2.48.180
82 or both?

83 3. Does Mr. Day's negligent act of leaving property in the document
84 that should have reasonably been removed constitute a criminally defined threat to
85 Mr. Burke's health, safety, business, financial condition, or personal relationships
86 as defined under RCW 9A.04.110(28)(j)?

87 4. RCW 9A..04.110 (28)“Threat” means to communicate, directly or
88 indirectly the intent: (j) To do any other act which is intended to harm
89 substantially the person threatened or another with respect to his or her health,
90 safety, business, financial condition, or personal relationships.

91 5. Is Mr. Burke's complaint an indictment according to RCW
92 9A.04.110(10)?

93 6. Is the combination of Andrew Day's the failure to delete the optional
94 language pertaining to personal injury claims along with the misrepresentation of
95 the legal document, and the false impressions, omissions, non disclosures combine
96 to complete the theft of Mr. Burke's property and nearly cost Mr. Burke his entire
97 financial future?

98 **III. Statement of the Case**

99 No.1. This entire matter is based on Mr. Day's negligent failure to delete
100 “optional language” from the release agreement he tried to pass off as a property
101 damage release. It's criminal negligence. It's intentional. It's the practice of law.
102 It's attempted theft, and it's theft. Mr. Day admitted the negligent act in his
103 Declaration if Andrew Day **(DAD page 4, paragraph 18)**.

104 “Washington 'recognizes two elements to proximate cause: cause in fact and
105 legal causation” Lowman 178 Wn. 2d at 169. “If a cause in fact is established and
106 the injuries fall within the scope of duty owed, there is no basis to foreclose
107 [liability].” Lowman. 178 Wn. 2d at 172. Does the admission of Mr. Day by
108 failing to “delete the optional language related to personal injury claims” establish
109 cause in fact of Burke's injuries? Lowman v. Wilbur 178 Wn.2d 165

110 Mr. Day tried to excuse his behavior with a perjury and a very contradictory
111 statement. **(DAD page 4, paragraph 17)** In attempting to pass it off he kept silent
112 about it and [all] relevant communications that [would have] enlightened Mr.
113 Burke to [all] the dangers of conducting a claims process for a damaged vehicle
114 with Andrew Day. The omissions and non disclosures are all material information
115 Mr. Burke is entitled to. BNSF is in violation of public service company
116 regulations for omissions, non disclosures, false impressions, among other things.
117 **Plead CCC page 48, line thru page 50, line 21**. The false impressions are
118 criminal on their own by being substantial steps toward the specific crime of theft.
119 **(Plead Complaint for Criminal Conduct (CCC) page 51, line 2 thru page 56,**

120 **line 2).** The practice of law requires specific disclosures surrounding contracts.
121 **(Plead CCC page 37, line 24 thru page 44, line 12)** When property is in the
122 balance deception is criminal. **(Plead CCC page 23, line 17 thru page 35, line**
123 **16)** The omissions and non disclosures include withholding the information that
124 this release form would become a condition of payment for property damage. Mr.
125 Day went through a complete claims process mimicking an insurance company
126 with claim form, questionnaire, estimates, pictures, proof of ownership and did
127 not disclose the citation issued to his driver, that settlement would occur, he
128 carried a check book, he is authorized to right the check and deliver it, until he
129 reached the point of finding a value he could write the check for, then he sprung
130 his release form. The personal injury claims information being on it started a
131 wrestling match over what losses go with property damage. Mr. Day was caught
132 but he was prepared. He claimed he 'grabbed' the wrong 'paper.' Mr. Burke was
133 already appalled by the mix up. Mr. Day advised Mr. Burke what to do to fix it but
134 Mr. Day continued to use it to take Mr. Burke's business loss, replacement costs,
135 license and title If Mr. Burke wasn't so shook up he would have realized the
136 replacement costs made it more reasonable to repair the damaged truck to avoid
137 those expenses all together. Mr. Day also took cargo and fuel. Because of the
138 threat to his financial well being, the enticement of the check, and feeling sick and
139 wanting to escape Mr. Burke gave up the extra property. There is \$23,685 dollars
140 worth of extra property he got away with in the form of actual losses.

141 This is a case about an intentional mistake made on a legal instrument, a
142 [form legal] [property release] agreement) made by a layman privately hired
143 claims administrator, employed along with an army of other privately hired claims
144 administrators in 28 states, with a hint of evidence from Andrew Day's declaratory
145 statement that they all conduct claims business the same way Andrew Day handles
146 claims handling business, as required by BNSF. This is considered here as
147 requiring your employees to violate the practice of law. They have probably been
148 getting away with it for years. Requiring your layman employees to practice law is
149 a Class A felony. **Plead CCC page 61, line 4-19.**

150 **No. 6.** RCW 9A.56.010 (4) “By the color or aid of deception” means that the
151 deception operated to bring about the obtaining of property or services; it is not
152 necessary that deception be the sole means of obtaining the property or services.”

153 **IV. Summary of Argument**

154 After doing his due diligence Mr. Burke finds BNSF is self insuring, hiring
155 private claims handlers, ignoring and controlling the insurance policy paid for and
156 issued by Old Republic, Joseph Frickey was issued a citation by Randall Cashatt
157 of the Washington State Police, Old Republic provides liability coverage for the
158 accident, realizes his name and claim number are printed on the release form,
159 meaning Mr. Day could not have “grabbed the wrong [paper],” meaning Mr. Day
160 lied to him, realizes Mr. Day tried to steel his rights to recovery for personal
161 injuries, realized why he felt sick, unsafe, and trapped from that moment on, and
162 wanted to get out of that moment, realizes Mr. Day prearranged the entire trap
163 ahead of time and lured Mr. Burke into the sham meeting, realized the meeting
164 was unnecessary for the reason given by Mr. Day, realized the meeting wasn't
165 necessary for the settlement check to be issued, realized the meeting was only
166 necessary in person for the release form to be attempted for Mr. Burke's signature,
167 releasing personal injury, Mr. Burke became more and more [unsettled], realized
168 a billion dollar a year corporate giant had to cheat parties they cause injury to, (the
169 third largest corporate conglomerate on earth whose railroad holding alone is
170 reported to earn 14 to 17 billion dollars per year needs to steel value of losses
171 from Mr. Burke's one truck, one man operation), became more [unsettled], studied
172 the law for a year, and brought this action.

173

174 **V. Argument**

175

176 The evidence is in. The facts are known. Mr. Day has admitted enough for
177 chargeable or indictable element of RCW 9A.82.100. Mr. Day admitted making the
178 financial blunder on the property release agreement. He also admitted selecting
179 the document, modifying it, offering it to Mr. Burke for Mr. Burke to sign it, and
180 continuing by advising Mr. Burke to make changes to it. He admitted offering it
181 for Mr. Burke's signature without knowing what was on it, none of which makes
182 any sense. He doesn't however say anything about his conflict of interest,
183 explaining his knowledge of the document, suggesting the advisability for Mr.
184 Burke to seek independent counsel before signing it, did not inform Mr. Burke of
185 the consequences by signing it, did not disclose the citation issued to Joseph

186 Frickey, still did not disclose BNSF is self insuring with private claims handlers,
187 did not excuse himself at the time. He let Mr. Burke anguish for 14 months before
188 even coming forward.

189 Had Mr. Burke signed it according to Mr. Day's advice, Mr. Burke would not
190 have a financial future whatsoever. Mr. Burke would be in debt the rest of his life.
191 Mr. Burke is one of the ones in a million that do not have any debt. Everything
192 Mr. Burke has he obtained by the sweat of his brow and owns it free and clear.
193 That is a serious life altering turn of events. It is very threatening and bothersome
194 to consider the consequences.

195 Mr. Day got away with 46,185 dollars worth of property for 22,500 dollars.
196 How did he get away with that? He tried to take Mr. Burke's rights to personal
197 injury claims away. He committed the act that attempted it and was caught. Then
198 he said, "Oh! I must have grabbed the wrong paper. You can write anything on
199 there you want." Legal advice? Deception? He didn't take the document back and
200 get the right one. He continued with the wrong one. It's intentional. He didn't
201 explain the database. He didn't explain he was already familiar with the document.
202 He let Mr. Burke keep on reading it, challenging Mr. Burke to find the hidden
203 language. Mr. Day hid the "optional language" behind the conspicuous text. The
204 document is designed for the signer to see the conspicuous text and sign it because
205 it says **PROPERTY DAMAGE**. The signer is supposed to believe he is only
206 releasing property damage. Mr. Day says he "deleted the optional language related
207 to personal injury claims." The whole document is meant for the release of
208 personal injury claims. In this case the property damage is 1% or less of the
209 personal injury claims. Nothing in the document is meant to guard the Releasees
210 from property damage. Paragraph 1 attempts to protect every company imaginable
211 with any connection whatsoever from the 1% of the damage claim? This is a
212 personal injury release. Mr. Day went to the meeting to get a personal injury
213 release signed, intentionally. Paragraph 4 attempts to protect Releasees from any
214 third party that rights might be assigned to for the 1% of the liabilities from
215 property damage? Ridiculous and unreasonable. This is a release for personal
216 injury damage claims only. Mr. Day went to the meeting to get a personal injury
217 release signed. They only fain property damage. It is only reasonable that this
218 document is for personal injury only. Paragraph 5 is completely directed to

219 personal injury claims. The focus from BNSF down to the claims department
220 through their lawyers and into the street by their claims handler personnel is on
221 personal injury damage claims and the high cost of liability from personal injury.
222 They could care less about property damage, the 1% of their liabilities. Paragraph
223 6 is not concerned with property damage. Property damage does not rise to the
224 level of personal injury. Personal injury is why paragraph 6 is in there. This is a
225 completely personal injury release form. This document is on the database to be
226 used for every damage claim. It is an instrument of deception. If the conspicuous
227 text is on it, it is meant to deceive the damaged party. Discovery would be a
228 simple matter of browsing these documents for conspicuous text and verify they
229 include personal injury. Contact the damaged party and ask if they released
230 personal injury wittingly.

231 The trial court misinterpreted the charges, the property taken, lists of specific
232 conduct of omissions and non-disclosures; an exhaustive list of false impressions
233 created and not corrected; a sufficient list of rights to claims as the property
234 taken, the anticipated or completed offenses as the same as committed; the
235 substantial steps listed as violations of separate laws; the false impressions, non
236 disclosures, and omissions as substantial steps; the violation by a public service
237 company as substantial steps, the allegation of the verbal affirmative
238 misrepresentation of the form legal [property] [release] agreement , exhibit A by
239 Andrew Day, [corroborated] by the conspicuous, large, bold, and capitalized text
240 misrepresenting the property released by the agreement as PROPERTY
241 DAMAGE written so obviously in the first paragraph of the document [and]
242 corroborated again by Mr. Burke's first hand account of the verbal
243 misrepresentation [and] admitted by Mr. Day stating that his frame of mind was
244 that the “optional language” was deleted leaving only PROPERTY DAMAGE.
245 Declaration of Andrew Day (DoAD) page 4, line 13-15. Substantially sufficient
246 overwhelming proof beyond a reasonable doubt that the misrepresentation
247 occurred. Is that deceptive? Is it negligent? Is it incompetent? Is it intentional?
248 Does it establish [liability]? Furthermore, is it the practice of law? Is it a
249 proximate cause of Mr. Burke giving up his property? Is it required by BNSF for
250 all the employee claims handlers to use it? Is it detrimental to the public health,
251 safety, and welfare?

252 Property damage is 1% of the liability from any given claim. What more
253 needs to be said? BNSF decided to self insure. They informed O. Republic by
254 notice or contract for O. Republic to stand down and deny all claims made to
255 them. They created a claims department. They hired their lawyers to write up this
256 form legal property release agreement. They put it in a data base. They hired
257 private claims personnel to select and modify (or fail to modify) the legal property
258 release. They instruct their claims personnel to remain quiet about everything
259 except their claims process. They focus on their claims process until they get the
260 victim ready to settle for property damage. They offer the check. Then spring the
261 release form into action. They misrepresent the release form verbally first. Then
262 they have the conspicuous text saying the same thing. They intend for you to sign
263 it without reading passed the first paragraph.

264 "I'll write you a check right now. I just have a 'paper' you need to sign." Just
265 implying you have to sign the paper to get the check. Not even the identity of the
266 'paper.' False impressions and omissions? Identifying it for what it is would alarm
267 you to the seriousness of it. "I just have a form legal property release agreement I
268 need you to sign." Particularly when there is a life changing financial mistake on
269 it.

270 The negligent act of Andrew Day is attempted theft and theft by continuing to
271 use the wrong document to get Mr. Burke to part with more property then what the
272 check was supposed to be for, which is the value of the totaled truck.

273 The attorney's involved make it a conspiracy plead CCC. Page 59, line 4 thru
274 page 60, line 2.

275 There are four counts of theft by deception with the intent to deprive. Three
276 counts of theft are the pattern of criminal profiteering activity.

277 Mr. Day's statement declares BNSF requires this activity which is the entire
278 element of leading organized crime. DAD page 4, line 11-14. BNSF is held to
279 knowledge of their employee's work. They hired them to do it. The lawyers were
280 employed to create the release form according to BNSF requirements. The
281 lawyers created it to BNSF specifications. BNSF requires the claims personnel to
282 select it, modify it, take it into the field, and get it signed. BNSF requires their
283 employees to commit the violation for the practice of law. Requiring your
284 employees to violate the law is leading organized crime.

285 The 'pattern' of three felonies violates RCW 9A.82.100. Unlawful Practice of
286 Law, Theft, and Leading Organized Crime are on the predicate list of specific
287 crimes violating RCW 9A.82.100..

288 The law identifies a considerable amount of Mr. Day's activity as the practice
289 of law or the attempt to practice law or a violation of insurance representation
290 laws, or a violation of insurance contract law, or a violation of public service
291 company laws, or a violation of professional conduct laws, or a violation of
292 criminal law, or a violation of criminal profiteering laws, The law identifies the
293 deception, enticement, false impressions, misrepresentations, all violations of
294 lesser laws, influencing to take Mr. Burke's property as theft by deception. It's
295 the net impression leading to the [taking] of the property that leads to the
296 conclusion that theft occurred.

297 RCW 2.48.180(7) In a proceeding under this section
298 it is a defense if proven by the defendant **by a**
299 **preponderance of the evidence** that, at the time of the
300 offense, the conduct alleged **was authorized** by the
301 rules of professional conduct or the admission to
302 practice rules, or Washington business and professions
303 licensing statutes or rules. (Supplemental Fast Track
304 to Understanding RCW 9A.82.100), (SFTU)page 2, line 3-8.

305 "Statutory forfeiture and penalty provisions are
306 also often designed to achieve a **remedial purpose**: that
307 of **separating the criminal from his or her ill-gotten**
308 **gain**. Federal courts have long held that criminal
309 forfeiture statutes authorizing the forfeiture of
310 "proceeds" of criminal conduct are remedial.....it
311 serves the . . . non-punitive goal of ensuring that
312 **persons do not profit from their illegal acts.**" United
313 States v. Ursery, U.S., 518 U.S. 267, 116 S. Ct. 2135,
314 2148-49, 135 L. Ed. 2D 549 (1996). SFTU page 10, line
315 20-28.

316

317 **VI. Conclusion**

318 1. Appellant is seeking the recovery of damages.
319 The amount taken by theft. \$46,185.
320 The object of attempted theft.
321 The personal injury claims.
322 Head injury. \$1,250,000
323 PTSD. \$150,000
324 Severe soft tissue strain. Pain therapy. \$200,000
325 Medical costs. \$48,675
326 Business losses to date. \$828,750.
327 1a. The costs of the suit. Filing fees. \$248
328 \$300
329 Stationary, ink, paper, \$150
330 Copies. \$345
331 Mailings. \$180
332 Parking. \$30
333 Transfer of trial record. \$85
334 Transcription of Record \$1035
335 1b.. Including reasonable investigative and attorney fees. 2736 hrs. x 300
336 =\$820,800
337 2. The civil penalty not exceeding two hundred fifty thousand dollars.
338 \$250,000

339 **Total to date.**

340 **Treble as deemed appropriate. \$3,550,598**

341 3. Various penalties for public service co. violations. (discovery)

342 VII. Appendix

343 **TABLE OF AUTHORITIES**

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348 LEXIS 1919
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350 Hagan & Van Camp, 96 Wn.2d at 447 (quoting Washington State Bar Ass'n v.
351 Washington Ass'n of Realtors, 41 Wn.2d 697, 712, 251 P.2d 619 (1952) (Donworth, J.,
352 concurring))

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354 LEXIS 2358 | 211 U.S.P.Q. (BNA) 646
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356 Perkins v. CTX Mortgage Co., 137 Wn.2d 93, 104-06, 969 P.2d 93 (1999) Cited in
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372 RCW 9A.60 Fraud. RCW 9A.60.030 Obtaining a signature by deception or
373 duress.Appellant Opening Brief (AOB)Page 3, line 79.
374 RCW 9A.56.010 (5) Definitions. CCC page 22, line 15.
375 RCW 9A.82.100(9)..... CCC page 28, line 18.
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388	RCW 9A.08.030 Corporate and personal liability. ..	CCC page 57, line 16.
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390	RCW 9A.82.060 Leading organized crime.	CCC page 61, line 4.
391	RCW 9A.82.010 Definitions.	CCC page 61, line 20.
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397	RCW 48.17.060 License required.	CCC page 65, line 27.
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406	RCW 18.130.180 Unprofessional conduct.....	CCC page 75, line 7.
407	RCW 81.04.010 Definitions. Public Service Compnay..	CCC page 80, line 7.
408	RCW 81.04.110 Complaint—Hearing	CCC page 81, line 9.
409	RCW 81.04.380 CCC	page 82, line 21.
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412 RCW 81.04.385 Penalties Violations by officersCCC page 86, line 8.
413 RCW 81.20.020 Cost of investigation may be assessed CCC page 86, line 20.
414 RCW 9A.08.010 General requirements of culpability. CCC page 87, line 6.
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465 Bowers v. Tranamerican Title Ins. Co. 100 Wn.2d 581 | 675 P.2d

466 193page 23-24

467 Perkins v. CTX Mortgage Co. 137 Wn.2d 93 | 969 P.2d 93 | 1999

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469 Bowers v. Transamerica Title Ins. Co. 100 Wn.2d 581 | 675 P.2d 193 | 1983

470 Wash.Page 24

471 Dauphin County Bar Ass'n v. Mazzacaro, 465 Pa. 545, 551, 351 A.2d 229,

472 232 (1976)..... page 24-25

473 Tegman v. Accident & Med. 107 Wn. App. 868 | 30 P.3d 8 | 2001 Wash.

474 App.page 25-

475 26

476 Restatement (Second) of Torts § 551page 26

477 PC 1.8(g); RPC 1.4(b)page 26
478 RCW 10.01.070page 27
479 RCW 9A.82.090page 28
480 RCW 9A.82.100 (2) or (3)page 28
481 RCW 9A.04.020page 28

482
483

Regulations and Rules

444 Transcription of Record \$1035
445 1b.. Including reasonable investigative and attorney fees. 2736 hrs. x 300
446 =\$820,800
447 2. The civil penalty not exceeding two hundred fifty thousand dollars.
448 \$250,000

449 **Total to date.**

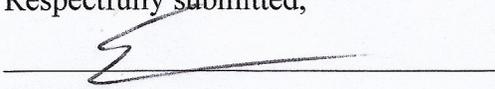
450 **Treble as deemed appropriate. \$3,800,598**

451 3. Various penalties for public service co. violations. (discovery)

452

453 Respectfully submitted,

454

455 
Signature

456 Eugene Burke

457

458 VII. Appendix

459

460 **TABLE OF AUTHORITIES**

461 Table of Cases

462 Bowcutt v. Delt N. Star Corp. 95 Wn. App. 311 | 976 P.2d 643 | 1999 Wash.

463 App. LEXIS 755

464 Bowers v. Transamerica Title Ins. Co. 100 Wn.2d 581 | 675 P.2d 193 | 1983 Wash.

465 LEXIS 1919

466 Jones v. Allstate 146 Wn.2d 291 | 45 P.3d 1068 | 2002 Wash.

467 Hagan & Van Camp, 96 Wn.2d at 447 (quoting Washington State Bar Ass'n v.

468 Washington Ass'n of Realtors, 41 Wn.2d 697, 712, 251 P.2d 619 (1952) (Donworth, J.,

469 concurring))

470 Kammerer v. W. Gear Corp. 27 Wn. App. 512 | 618 P.2d 1330 | 1980 Wash. App.

471 LEXIS 2358 | 211 U.S.P.Q. (BNA) 646

472 Lowman v. Wilbur 178 Wn.2d 165

Woodrow, Becky

From: Woodrow, Becky
Sent: Thursday, June 27, 2019 1:31 PM
To: 'Gene Burke'; wmargolis@cosgravelaw.com; pberg@cosgravelaw.com
Subject: RE: 97028-9 - Eugene Burke v. Joseph Frickey, et al.

Because this appears to be a court filing, I have forwarded it to supreme@courts.wa.gov for filing. In the future, please send all case filings and correspondence to supreme@courts.wa.gov.

Becky Woodrow

Senior Administrative Office Assistant

Washington State Supreme Court

Becky.Woodrow@courts.wa.gov

From: Gene Burke [mailto:geno3350@yahoo.com]
Sent: Thursday, June 27, 2019 1:15 PM
To: wmargolis@cosgravelaw.com; pberg@cosgravelaw.com; Woodrow, Becky <Becky.Woodrow@courts.wa.gov>
Subject: Re: 97028-9 - Eugene Burke v. Joseph Frickey, et al.

Erin,

This is the email including copies sent to the opposing parties with the attachments, appellant's opening brief and signature page.

On Wednesday, April 10, 2019, 04:28:28 PM PDT, Woodrow, Becky <Becky.Woodrow@courts.wa.gov> wrote:

Counsel:

Attached is a copy of the letter issued by the Deputy Clerk on this date in the above referenced case. Please consider this as the original for your files, a copy will not be sent by regular mail. Any documents filed with this Court should be submitted via our web portal: <https://ac.courts.wa.gov/>

Becky Woodrow

Senior Administrative Office Assistant

Washington State Supreme Court

Becky.Woodrow@courts.wa.gov