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STATE OF WASHINGTON
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No. 97028-9

SUPREME COURT OF THE STATE OF WASHINGTON

EUGENE BURKE,

Appellant,

v.

JOSEPH FRICKEY, ANDREW DAY, BURLINGTON NORTHERN SANTE FE RAILWAY CO., and OLD REPUBLIC INSURANCE CO,

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

This action arises out of a December 2017 motor vehicle accident involving plaintiff Eugene Burke, who was driving his own dump truck, and defendant Joseph Frickey, an employee of defendant BNSF Railway Company, who was driving a BNSF-owned truck. Burke contacted BNSF's Claims Department about the damage to his truck and soon thereafter negotiated with BNSF senior claim representative Andrew Day to settle his claim against BNSF for property damage and related expenses. Burke carefully reviewed, modified, approved, and then signed a release and settlement agreement that expressly provided (among other terms) that the "settlement is for property damage, business loss, vehicle taxes, misc. costs, etc., but does not include personal injury claim."

Burke brought this action against BNSF, Frickey, Day, and defendant Old Republic Insurance Company under RCW 9A.82.100 – Washington's "little RICO" statute – alleging that defendants collectively engaged in a pattern of criminal profiteering activities to steal his claims for their own financial gain by intentionally tricking him into unwittingly signing the release and settlement agreement. He filed a motion for partial summary judgment on the issue of liability, but he submitted no evidence to support it. Defendants then filed a cross-motion for summary judgment based on the undisputed evidence that Burke and BNSF had entered into a valid, arm's-length settlement of Burke's claim against BNSF for property damage and related expenses only.

The trial court correctly denied Burke's motion (and granted defendants' cross-motion) because Burke offered no evidence of any misrepresentation, fraud, theft, conversion, or any other wrongful act by defendants in connection with the settlement agreement and because the agreement did not release any personal injury claim, as Burke had claimed.

On appeal, Burke assigns error only to the trial court's order denying his motion for partial summary judgment.[1] The trial court's ruling was correct and should be affirmed.

II. RESTATEMENT OF THE ISSUES

1. Can the court properly reach the merits of Burke's assigned error where the clerk's papers do not include either Burke's motion or defendants' response submissions and the opening appeal brief does not identify the issues and evidence that were called to the trial court's attention, does not otherwise cite evidence to support most of Burke's factual statements, and does not cite legal authority to support Burke's arguments?

2. If the court can reach the merits of the assigned error, did the trial court properly deny Burke's motion for partial summary judgment on the issue of liability under the Criminal Profiteering Act, where Burke offered no

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[1] Although Burke purports to assign error to the trial court's failure to "consider this matter a matter of public importance," Opening Brief at 3, he does not state the basis of the assigned error, make any argument to support any claim of error, or cite any legal authority bearing on the issue. The court thus should consider the assignment of error waived. *See State v. Thomas,* 150 Wn.2d 821, 874, 83 P.3d 970 (2004) ("Without argument or authority to support it, an assignment of error is waived.").

evidence that his settlement with BNSF was induced by fraud, misrepresentation, or any other type of deceit, or that defendants committed any other criminal acts in connection with the settlement?

III. RESTATEMENT OF THE CASE

Burke's Statement of the Case does not comply with RAP 10.3. In addition to containing argument, that section of his brief – like his entire "Argument" section (Opening Brief at 6-10) – is replete with statements of purported "fact" that are not supported by any reference to the clerk's papers or, at best, are supported by citations to his complaint, which is not evidence. Those "facts" thus are not properly part of the record on review of the trial court's order denying Burke's motion for partial summary judgment. To assist the court, defendants provide the following overview of the relevant historical facts and procedural events.

A. Facts Relevant to the Accident

According to Burke, at around 10:30 a.m. on December 6, 2017, he was driving his 1974 Kenworth dump truck west on Highway 14 in Skamania County when BNSF employee Joseph Frickey, who was driving a BNSF-owned truck, turned east onto the highway from a side street and directly in Burke's path. Burke said that he applied his brakes but could not avoid the impact with Frickey's left front bumper, which caused significant damage to the left side of Burke's dump truck and injury to his shoulder, head, and neck. CP 136-143.

B. Facts Relevant to the Release and Settlement Agreement

On December 7, 2017, Burke called BNSF about the accident and was directed to the Claims Department. Andrew Day, a BNSF senior claim representative who had been notified about the accident late the night before, returned Burke's call and introduced himself as an employee of BNSF's Claims Department. Burke told Day that his 1974 Kenworth dump truck had been damaged in the accident and that he believed he also had been injured. Day told Burke that, because he would be making a property damage claim, Day would send him documents that outlined what BNSF would need from him for that claim. CP 198, ¶¶ 2-4. At about 9:00 p.m. that night, Day emailed to Burke BNSF's Property Damage Claim Questionnaire. In his email, Day asked Burke to complete the questionnaire, which included a section for an estimate of the value of the property, and return the completed form and documentation to Day at BNSF's Claims Department once he had the necessary documentation, including repair estimates. CP 199, ¶ 5; CP 205.

At 8:00 a.m. the next morning, Burke emailed to Day photos of the damaged trucks and later sent the completed questionnaire, which included Burke's description of the accident and his belief that BNSF's employee was at fault. Burke estimated the net cash value of the damage to his truck to be $27,599, but he did not provide any supporting documentation. CP 199, ¶ 6; CP 206-08. Because Day sensed urgency from Burke to get his truck repaired and thought time was of the essence to reach a resolution of his property

damage claim, Day replied to Burke's email to find out if Burke had any information about the cost of repair. Burke responded that he was checking into it and would get the information to Day. CP 199, ¶¶ 7-8; CP 209-10. That same day (December 8), Day spoke with Burke, who suggested that he and Day meet at Western Star Truck Sales, Inc. in Ridgefield, Washington, to get a repair estimate. CP 199, ¶ 9.

On Monday morning – December 11, 2017 – Burke left a voice mail for Day suggesting that they get together that afternoon to get the estimate and asking that Day call him back "and maybe we can make an appointment out there with Jeff, the estimator." CP 199, ¶ 10; CP 211. Day called Burke and explained that he had another task that day but suggested that he might be able to meet Burke at Western Star at around 2:00 p.m. that afternoon. At about 1:45 p.m., Burke left another voicemail explaining his various efforts to coordinate a meeting with Jeff Birch at Western Star and asking Day if he was going to make it there by 2:00 p.m. because Birch now thought he'd have to leave and Burke had run into construction traffic and wasn't sure he'd get there in time. Burke told Day that Day could "start without me or call me as soon as you get there" but he didn't know if Mr. Birch was going to leave. CP 200, ¶ 11; CP 212.

Day arrived at Western Star before Burke and, as Burke had suggested, spoke directly with Birch, who told Day that it would cost over $20,000 to repair Burke's truck. That confirmed Day's preliminary impression, based on the photos of the damaged truck and his own research,

that the truck was totaled. CP 200, ¶ 12. When Burke arrived, Day told him about Birch's repair estimate and his (Day's) thought that the truck was totaled. They then walked over to the sales office to get information on the truck's replacement value. Todd Tracy, the new and used truck sales manager, told them that the retail value was $20,000 and the wholesale value was between $12,000 and $14,000. *Id.*, ¶ 13.

Either immediately before or immediately after their conversation with Tracy, Day asked Burke if he was interested in settling his claim for the damage to his truck. Burke indicated that he was and asked how much BNSF was willing to offer. Burke mentioned that he also had various other losses related to his truck, including the cost of a recently paid vehicle registration renewal, the fuel in the truck at the time of the accident, the lost profits from the load he was carrying, and the lost profits from another job that he said he was unable to fulfill because he didn't have a truck. *Id.*, ¶ 14.

Burke and Day then negotiated the amount that BNSF would pay for Burke's property damage and the related expenses he identified, based on Tracy's quoted wholesale and retail values, Burke's list of truck comparables (which he had brought with him), and an estimate of Burke's various related business expenses. They continued to negotiate until they agreed that BNSF would pay $22,500.00 for Burke's property damage and related expenses. CP 201, ¶ 15; CP 213.

Because Day had expected that the truck was totaled, and because he knew that Burke was worried about his ability to continue with his hauling

business without a repaired or replaced truck, Day expected to discuss settlement with Burke at Western Star. For that reason, he brought with him a form release and settlement agreement from BNSF's database that he had edited according to BNSF's requirements for property damage claims, by deleting the optional language relating to personal injury claims. CP 201, ¶¶ 16-17. The first of the 8 pre-printed paragraphs provided, in pertinent part, that Burke released and discharged BNSF and its employees and agents from all claims and liabilities "**FOR PROPERTY DAMAGE, IF ANY, WHETHER KNOWN OR UNKNOWN** * * * arising out of [the December 6, 2017, incident]." CP 130, ¶ 1 (caps and bold in original).

When Burke read the release, he pointed out that two paragraphs referenced matters related to personal injury. Day agreed that those terms should have been deleted and that any language that would suggest a release of personal injury claims should be removed. He then crossed out the inadvertently included text in paragraphs 5 and 8 and – in a further effort to clarify what the settlement did and did not include – he and Burke jointly decided to add a new paragraph 9, which provided: "Settlement is for property damage, business loss, vehicle taxes, misc. costs, etc., but does not include personal injury claims." *Id.*, ¶ 18; CP 132.

When both Burke and Day were satisfied that the release reflected their agreement, they each initialed the new paragraph 9. Day then asked Burke to write at the bottom of the release above the signature line: "I have read the above Release and Settlement Agreement and fully understand

it." Burke did that and then suggested that he should further clarify by adding "as it relates to Property Damages, Business Loss, Vehicle Taxes, Trucking related misc. costs." Day agreed to that addition, and Burke then signed the document. CP 201-02, ¶ 19; CP 132-33. In so doing, Burke agreed that, "in entering into this settlement, and agreeing to the terms and conditions contained in this document, I have not relied upon any statement, representation, or claim made by any agent, employee or representative of BNSF Railway Company, including the representative negotiating this settlement." CP 130, ¶ 3; *see also* CP 131, ¶ 7 ("I make this Release without reliance upon any statement, representation or claim" made by any of the released parties "or any agent of the [released parties] including the representative negotiating this settlement").

After Burke signed the release, Day gave him a check from BNSF in the settlement amount of $22,500, which Day wrote was for "Any and all property damage claims sustained at or near Skamania, WA on 12/6/2017." CP 202, ¶ 20. Day then asked Burke about his personal injury claim, which was still outstanding, and Burke said he was planning to hire a lawyer to handle that claim. *Id.*, ¶ 21.

The next day, Burke deposited BNSF's check, released to Day on behalf of BNSF "all interest and ownership" in Burke's dump truck, and gave Day the signed title to the truck. CP 135; CP 202, ¶ 22; CP 214-16. Burke later told Day that he had purchased another truck. CP 202, ¶ 22.

A month later, on January 10, 2018, Day received a letter from the senior case manager for Bradley Johnson Attorneys, Angela Tieken, advising him that the firm was representing Burke for "all claims regarding personal injuries which he sustained" in the accident. CP 202, ¶ 23; CP 217. On January 16, after writing back to acknowledge the representation and address certain claim-handling issues, Day received a response from Ms. Tieken advising him that, among other things, Bradley Johnson Attorneys would send a settlement demand when Burke completed treatment. CP 202, ¶¶ 24-25; CP 218-19. On February 7, however, Day received another letter from Ms. Tieken advising that Bradley Johnson Attorneys were no longer representing Burke on his claim against BNSF. CP 202, ¶ 26; CP 220.

All of Day's actions with respect to Burke and the settlement of his claim for property damage and related expenses were on behalf of Day's employer, BNSF. CP 198, ¶ 2. At no time during any of Day's communications with Burke, including their negotiations on December 11, 2017, did Day ever advise Burke to settle his claim or to accept BNSF's settlement offer. Burke never appeared to Day to be confused about the claim he was making against BNSF, about Day's role as a claim representative for BNSF, or about the agreement he and Day reached to settle his claim for property damage and related expenses. Burke never indicated to Day that he might need more time to consider whether to settle that claim or that he no longer wanted to settle that claim. CP 202-03, ¶ 27.

At all times on and after December 11, 2017, Day intended to and understood that he was entering into an agreement with Burke on BNSF's behalf to resolve only Burke's claim for property damage and related expenses. Day never represented to Burke or anyone else that Burke had released any personal injury or any other claim that was not identified in the Release and Settlement Agreement. CP 203, ¶ 28.

C. Relevant Procedural History

In September 2018, Burke filed his Complaint for Criminal Conduct based on RCW 9A.82.100(1)(a).[2] CP 1-146. Burke initially filed a Motion for Order for Determination of Liability, CP 149-66, but the trial court denied that motion as "not ri[pe]" and advised plaintiff that he could raise the issue in a motion for summary judgment. RP 12/7/18 at Tr. 17:11-19, 24:5-2-13. Burke does not assign error to that ruling.

Although not contained in the clerk's papers, Burke filed a Motion for CR (56) Partial Summary Judgment for Ruling on Liability, and defendants filed a combined response/cross motion for summary judgment supported by

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[2] The Criminal Profiteering Act, RCW 9A.82, is Washington's "little RICO," which Washington enacted in an effort to combat organized crime. *Winchester v. Stein*, 135 Wn.2d 835, 848-49, 959 P.2d 1077 (1998). RCW 9A.82.100(1)(a) provides a civil cause of action to a person who is injured in his or her "person, business, or property by an act of criminal profiteering that is part of a pattern of criminal profiteering activity, or by an offense defined in [several criminal statutes], or by a violation of RCW 9A.82.060 [involving leading organized crime]." "'Criminal profiteering'" includes the commission, or attempted commission, for financial gain, of any one of a number of crimes listed in the statute." *Winchester*, 135 Wn.2d at 850.

the declaration of Andrew Day.[3] Burke then filed a combined reply memorandum in support of his motion and response to defendants' cross motion. CP 167-197.

At the close of a hearing on the parties' summary judgment motions, the trial court denied Burke's motion and granted defendants' motion:

> THE COURT: Thank you very much. I don't think I need to hear any more.
>
> I'm going to grant the defense motion to – for summary judgment. I'm going to dismiss the case in its entirety. Joseph Frickey, Andrew Day and Burlington Northern Santa Fe are parties to the release and settlement agreement signed on December 11, 2017. It's replete in the settlement agreement that this agreement goes to officers, directors, employees or agents of the company and their attorneys. Frickey is an employee of the Burlington Northern Santa Fe. Andrew Day is a claims adjuster for the Santa Fe -- Burlington Northern Santa Fe, and Burlington Northern is a releasee under this agreement. All of those people are considered the releasees.
>
> There is evidence in this release agreement that Mr. Burke and Burlington Northern have -- Mr. Burke has not relied upon any statement, representation or claim made by any agent, employee or representative of Burlington Northern Santa Fe, including the representative negotiating this statement.
>
> Mr. Burke did a very good job of -- of [poring] through this agreement, making modifications to it. It was a well-negotiated release agreement. It was for $22,500. There just is no evidence -- no affirmative evidence, clearly no clear, cogent and convincing evidence of misrepresentation or fraud. There was no theft, no misrepresentation, no conversion and no fraud.

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[3] Burke's designation of the clerk's papers also did not include (1) defense counsel's declaration authenticating the documents that Burke filed as "Exhibit A" and "Exhibit B" to his complaint, although those exhibits are at CP 131-35, (2) defendants' reply in support of their summary judgment motion, (3) the trial court's signed order, (4) the final judgment, or (5) Burke's notice of appeal.

> I find no -- based on the evidence that's been presented to me, there was no wrongful act, nor any evidence of a pattern of fraud or misrepresentation. The evidence in the agreement is that it was competently negotiated and is not a misrepresentation and that has not occurred. The agreement is valid.
>
> The evidence that has been presented is nothing more than some hunches. No evidence of any violations.
>
> The argument that the -- that any business, including contractors or trucking agents or trucking companies, the argument that they use contracts is not persuasive that that rises to the level of an unlawful practice of law. It is just not persuasive. I recognize that contractors, trucking agents, trucking companies oftentimes use adhesion-type contracts. This cannot be viewed as an adhesion contract because it is -- is replete with modifications and position statements created for Mr. Burke and by Mr. Burke in the presentation of that agreement. It was reached fairly.
>
> Any finding that a contract drafted or used by a contractor or a trucking agent that -- the argument that it would be unlawful practice of law is contrary to the law and the freedom to contract as built into the law. Everybody is free to contract. Mr. Burke was free to contract. Burlington Northern was free to contract. What was left out of this contract was any personal injury claims. I do not for a minute believe that the Burlington Northern would be successful in arguing that this agreement forbids any personal injuries associated with the accident.
>
> So if you have an order, I'll sign it. And the case is dismissed.

RP 1/11/19 at Tr. 45:25-48:7.

Burke later filed a Motion for Reconsideration of the court's order granting defendants' motion for summary judgment, which the trial court denied. CP 222-250; RP 2/15/19 at Tr. 19:3-13. Burke does not assign error to that ruling.

IV. ARGUMENT

A. Standard and Scope of Review

This court reviews a summary judgment decision de novo, engaging in the same inquiry as the trial court. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). The moving party bears the burden of submitting evidence demonstrating that there is no "genuine issue [of] material fact, and . . . the moving party is entitled to judgment as a matter of law." CR 56(c); *Atherton Condo. Apt.-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

If the moving party "submits adequate affidavits" to satisfy its burden, then the nonmoving party must set forth specific facts that rebut the moving party's contentions and disclose that a material fact remains in dispute. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). But if the moving party does not meet its initial burden of showing that there is no issue of material fact, then summary judgment "should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials." *Jacobsen v. State,* 89 Wn.2d 104, 108, 569 P.2d 1152 (1977), *overruled on other grounds, Peeples v. Port of Bellingham,* 93 Wn.2d 766, 771, 613 P.2d 1128 (1980); *see Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 302, 616 P.2d 1223 (1980) (reversing partial summary judgment for plaintiff on the issue of liability, despite lack of opposition by defendant, because plaintiff failed to satisfy his initial burden of proof).

The court considers all facts and all reasonable inferences from them in the light most favorable to the nonmoving party. *Atherton Condo Apt.-Owners*, 115 Wn.2d at 516. Summary judgment is proper only if reasonable minds could reach but one conclusion from the evidence. *Adams v. King Cty.*, 164 Wn.2d 640, 647, 192 P.3d 891 (2008).

B. The Court Should Not Consider the Merits of Burke's Assignment of Error

This appeal is governed by RAP 9.12, the special rule that applies to appeals from summary judgment orders:

> On review of an order granting or denying a motion for summary judgment **the appellate court will consider only evidence and issues called to the attention of the trial court.** The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel.

(Emphasis added.) The purpose of the rule "is to effectuate the rule that the appellate court engages in the same inquiry as the trial court." *Washington Fed'n of State Employees, Council 28, AFL-CIO v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993).

Here, the court cannot identify the permissible scope of its review because Burke has not provided a trial court order that designates the documents and evidence that were called to the trial court's attention. Nor has he designated the key documents that would show the material "evidence and issues" that were before the court, *viz.*, his own motion for partial summary

judgment and defendants' combined response/cross-motion for summary judgment. And even the Opening Brief does not refer in any substantive way to the parties' summary judgment submissions, so it too does not permit this court to determine whether or to what extent Burke's various appeal arguments and factual statements – which appear in every section of his brief – were presented to or considered by the trial court.

This is not a mere technical violation of a minor procedural rule that the court could overlook. Instead, it goes to the very heart of the court's function on review of a summary judgment order because it precludes the court from ensuring that it conducts the same inquiry as the trial court. For example, Burke identifies as "issues" on appeal (1) whether "Mr. Day's failure to prepare the legal instrument with reasonable care" is "criminal negligence," and (2) whether "Mr. Day's negligent act of leaving property in the document that should have reasonably been removed constitute a criminally defined threat to Mr. Burke's health, safety, business, financial condition, or personal relationships." Opening Brief at 3; *see also id.* at 4, 7 (apparently arguing same). But neither of those issues is referenced in Burke's summary judgment reply memorandum or in the trial court's oral ruling, and the court cannot otherwise determine if those issues were ever brought to the trial court's attention, or are new issues impermissibly raised for the first time on appeal.

It also does not matter that Burke is appearing *pro se*. *See Holder v. City of Vancouver*, 136 Wn. App. 104, 106, 147 P.3d 641 (2006) (holding that

pro se litigants are bound by the same procedural rules and substantive law as attorneys); *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993) (reiterating that "the law does not distinguish between one who elects to conduct his or her own legal affairs and one who seeks assistance of counsel—both are subject to the same procedural and substantive laws" (internal quotation marks and citation omitted)).

The court thus should decline to consider Burke's substantive arguments on appeal.

C. The Trial Court Correctly Denied Burke's Motion for Partial Summary Judgment on the Issue of Liability

1. Burke failed to satisfy his burden on summary judgment

Even if this court were to reach the merits of Burke's appeal, it should affirm the trial court's denial of his motion for partial summary judgment.[4] In his combined summary judgment reply/response memorandum, Burke explained the basis of his motion:

> The Plaintiff has challenged the validity of the release, exhibit A [to the Complaint,] on grounds of criminal conduct involving fraud by deception, the unauthorized, unlawful, negligent practice of law, theft, and now leading organized crime, among other things, such as BNSF being a public service company under a strict legal guidance.

CP169. But Burke did not present *any* evidence to support his claimed challenge to the validity of the release agreement or to prove any of the claimed criminal conduct. Nor did he offer any evidence that any of the

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[4] Because Burke did not assign error to the trial court's order granting defendants' cross-motion for summary judgment, that ruling is not properly before the court. *See* RAP 10.3(a)(4).

wrongful acts he attributed to defendants caused "injury to his ... person, business, or property," as RCW 9A.82.100(1)(2) requires. Instead, he relied solely on allegations, arguments, conclusions, and speculation, none of which is legally sufficient to satisfy his burden as the moving party seeking partial summary judgment in his favor. *See, e.g., Atherton Condo.*, 115 Wn.2d at 516 (stating that the "moving party is held to a strict standard. Any doubts as to the existence of a genuine issue of material fact is resolved against the moving party.").

On appeal, Burke insists that he was entitled to summary judgment on liability under RWC 9A.83.100 based on Day's declaration, which defendants submitted in support of their own motion for summary judgment. Opening Brief at 6. Even if Burke's characterization of Day's testimony were correct – which, as explained next, it is not – it is procedurally irrelevant. Having failed to satisfy his initial burden of showing both the absence of a genuine issue of material fact on the issue of defendants' alleged liability for criminal profiteering and that he was entitled to judgment as a matter of law on that issue, Burke was not entitled to summary judgment in his favor. Period. *See Graves*, 94 Wn.2d at 302 (reiterating that, where the moving party does not satisfy its initial burden, summary judgment is inappropriate, "irrespective" of the nonmoving party's submissions). The trial court thus did not err in denying Burke's motion.

2. Day's testimony does not invalidate the settlement agreement or otherwise establish defendants' liability

Washington favors the finality of private settlements and ordinarily will not set aside a release unless induced by fraud, false representations, or overreaching, or if there is evidence of mutual mistake. *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 187, 840 P.2d 851 (1992); *see also Schulz v. Spokane United Rys.*, 16 Wn.2d 43, 46-47, 132 P.2d 366 (1942) ("A written instrument is a solemn declaration of the matters therein contained and cannot be lightly set aside.").

As a general rule, the party asserting fraud or intentional misrepresentation has the burden of proving by clear, cogent, and convincing evidence nine essential elements: (1) a representation of existing fact, (2) materiality, (3) falsity, (4) the speaker's knowledge of its falsity, (5) the speaker's intent to induce action by the plaintiff, (6) the plaintiff's ignorance of its falsity, (7) the plaintiff's reliance on the truth of the representation, (8) the plaintiff's right to rely on it, and (9) consequent damages. *Adams v. King Cty.*, 164 Wn.2d 640, 662, 192 P.3d 891 (2008); *Poulsbo Group LLC v. Talon Dev., LLC*, 155 Wn. App. 339, 345-46, 229 P.3d 906 (2010).

Contrary to what Burke argues, Day's declaration does not establish any of those elements. Nor does it even permit, let alone compel, a jury to find that Day – or any other defendant[5] – both intended and attempted to, or actually did, deceive Burke, "steal" his personal injury claim, engage in the

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[5] On appeal, Burke does not even suggest that Frickey or Old Republic had anything to do with the settlement or engaged in any criminal conduct.

unauthorized practice of law, or commit any of the other criminal acts for financial gain that Burke identified as causing him "injury" under RCW 9A.82.100(1)(a).

Even viewed in Burke's favor, Day's wholly uncontroverted testimony shows that Burke initiated contact with BNSF's Claims Department on December 7 about the accident and the harm he sustained. Between December 7 and December 11, Burke independently researched the replacement value of his dump truck, provided valuation information to Day, and identified and assessed the value of related business expenses that he said he sustained because of the damage to his truck. He initiated and exchanged numerous emails and phone calls with Day about his claim, heard the same information that Day heard from a third party regarding the wholesale and retail value of his truck, expressed his interest in settling his property damage claim, and negotiated with Day the amount he would accept from BNSF to replace his truck and for his related expenses. Day knew that Burke was worried about not having an operable truck, expected to discuss settlement of Burke's property damage claim, and brought with him a release agreement that he intended to be for a property damage claim *only*, not personal injury.

Before signing the BNSF Release and Settlement Agreement and accepting BNSF's check for the negotiated sum of $22,500 for his property damage and related expenses, Burke read, modified, and supplemented the pre-printed terms of the agreement, initialed the hand-written paragraph that he and Day jointly drafted to clarify the scope of the release (after Day

crossed out the four, inadvertently included words that related to personal injury[6]), and affirmatively stated in his own handwriting that he fully understood the terms of the agreement. The following day, Burke deposited BNSF's check, released his ownership interest in his truck to Day/BNSF, and gave Day/BNSF the title. Thereafter, he purchased another truck and retained an attorney to pursue his personal injury claim against BNSF.

As a matter of law, those facts do not even permit, much less compel, a finding that the release was secured by fraud, deceit, intentional misrepresentation, or any other wrongful conduct. Although Burke argues that Day obtained the release through "omissions and nondisclosures," fraud can be predicated on the failure to disclose material facts *only* where there is a duty to disclose, which ordinarily exists only where there is a fiduciary relationship. *Tokarz v. Frontier Fed. Sav. & Loan Ass'n*, 33 Wn. App. 456, 463–64, 656 P.2d 1089 (1982). Here, of course, there was no fiduciary or special relationship – Day was an employee of BNSF who was dealing with an adverse claimant who believed that BNSF was responsible for harm he

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[6] Burke's insistence that the release that Day brought with him was "for personal injury only" lacks merit. Properly viewing the agreement in context, even if Burke had signed it with the overlooked language, a court could not properly have concluded that the parties had intended to release his personal injury claim. *See Roats v. Blakely Island Maint. Comm'n, Inc.*, 169 Wn. App. 263, 274, 279 P.3d 943 (2012) (reiterating that Washington courts apply the "context rule" of contract interpretation in ascertaining the parties' intent, which "allows a court, while viewing the contract as a whole, to consider extrinsic evidence, such as the circumstances leading to the execution of the contract, the subsequent conduct of the parties and the reasonableness of the parties' respective interpretations") (internal quotation marks and citation omitted).

sustained in an accident and who had made a claim for damages against BNSF.

Burke's appeal arguments that Day was "negligent" in preparing the agreement or in giving him legal "advice"[7] fail for similar reasons. Burke assumes that Day owed him a duty of reasonable care when settling his tort claim against BNSF, but he does not, and cannot, identify any legal authority for such a duty. *See Munich v. Skagit Emergency Comm'n Ctr.,* 175 Wn.2d 871, 877, 288 P.3d 328 (2012) (reiterating that the "threshold negligence determination" is the legal question of "whether a duty of care is owed to the plaintiff"). Indeed, Day's undisputed testimony established that the parties had an arm's-length relationship in which Burke knew that his interests were adverse to BNSF/Day, Burke never sought, received, or acted on any legal advice from Day, and he consistently looked out for his own best interests by negotiating the amount of the settlement and carefully reading, modifying, and supplementing the release agreement before he signed it.

For any or all of the above reasons, Burke has failed to establish that the trial court erred in denying his motion for partial summary judgment on

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[7] Again, as a factual matter, the undisputed evidence established that Day did not give Burke any "advice" about settling with BNSF and that Burke did not rely on anything Day told him when he (Burke) decided to settle his claim for property damage and related expenses. CP 202, ¶ 27; CP 130-31, ¶¶ 3, 7; *see Kwiatkowski v. Drews*, 142 Wn. App. 463, 481, 176 P.3d 510 (2008) (plaintiff failed to show reliance on claimed misrepresentation where "he specifically agreed in paragraph five of the settlement agreement that he did not rely on any representations by any other party when negotiating the settlement agreement").

the issue of defendants' alleged liability for criminal profiteering. *See Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005) (court may sustain a summary judgment order on any basis supported by the record).

V. CONCLUSION

For the reasons set forth above, defendants respectfully request that the court affirm the judgment.

DATED this 28th day of August, 2019.

Respectfully submitted,

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Attorney for Respondents

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

On August 28, 2019, I arranged for service of the foregoing **Respondents' Brief** to the court and to the parties to this action as follows:

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Eugene Burke 151 Carson Depot Road Carson, Washington 98610 geno3350@yahoo.com Pro Se Appellant	**Via E-Mail and Regular Mail**

Dated: August 28, 2019

Wendy M. Margolis, WSBA No. 24590

COSGRAVE VERGEER KESTER LLP

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