NO. 99185-5

(Court of Appeals No. 52415-5-II)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FIFE PORTAL, LLC, a Washington Limited Liability Company; FIFE PORTAL 140 OWNERS ASSOCIATION, LLC, a Washington Limited Liability Company; Z.V. COMPANY, INC., a Washington Corporation,

Plaintiffs/Petitioners,

v.

CENTURYLINK, INC., a Louisiana corporation licensed to do business in Washington; and PACIFIC UTILITY CONTRACTORS, INC., a Washington Corporation,

Defendants/Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF RESPONDENTS' ARGUMENT WHY REVIEW SHOULD BE DENIED 1

II. RESPONDENTS' STATEMENT OF THE CASE 5

A. Before it began work, Pacific knew it was required to lay conduit beneath and straight down the middle of the sidewalk in the City right-of-way; knew the City right-of-way ended at the southern edge of the sidewalk; did not refer to or rely on a CenturyLink site drawing to determine the boundary of the right-of-way; and told no one it would instead excavate far to the south of the sidewalk, well outside of the right-of-way 5

B. George Humphrey owns and/or exercises "100% control" over the Fife Portal property, the Fife Portal Owners Association and First Corps; Humphrey's "oral agreement" to retain Humphrey, to perform work he was not licensed to perform, and for which he could not legally compel plaintiffs to pay, was a sham; and no plaintiff produced evidence it had actually incurred or could ever incur a legal obligation to pay a salary, fees or any other compensation for the time entered in Humphrey's belatedly produced log…….....9

III. ARGUMENT AND AUTHORITIES 13

A. The Court should deny review, because unlike the foreign law on which Fife Portal relies, Washington's law evinces a strong public policy against punitive damages; and this Court's rule of strict construction of penal statutes will not permit a plaintiff to pile up multiple awards of treble damages for a single loss -- no matter how many defendants the plaintiff has chosen to sue for that loss……..13

B. The Court should deny review because all three Divisions of the Court of Appeals correctly have held that RCW 4.24.630(1) is precisely and unambiguously worded; and that it imposes treble damages liability only when a defendant physically trespasses on the plaintiff's land and wrongfully causes damage while on the land……16

C. The Court should deny review because under the unambiguous wording of ch. 19.122 RCW, the "Underground Utility Damage Prevention

Act," CenturyLink is not an "excavator" subject to liability for treble damages. 19

D. The Court should deny review because none of the plaintiffs incurred compensable damages – i.e., an enforceable obligation to pay for George Humphrey's time -- either as a paid employee or as an outside vendor 23

IV. CONCLUSION.....28

TABLE OF AUTHORITIES

WASHINGTON CASES

Broughton Lumber Co. v. BNSF Ry. Co., 174 Wn.2d 619, 278 P.3d 173 (2012)……1, 2, 15-19

Clevco v. Municipality of Metro Seattle, 59 Wn.App. 536, 543-44, 799 P.2d 1183 (1990). 20

Clipse v. Michels Pipeline Const., Inc., 154 Wn.App. 573, 577-78, 225 P.3d 492 (2010)……...17

Colwell v. Etzell, 119 Wn.App. 432, 442, 81 P.3d 895 (2003). 17

Compare Kamla v. Space Needle Corp., 147 Wn.2d 114, 121, 52 P.3d 472 (2002) 8

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) 3

Dailey v. North Coast Life Ins. Co., 120 Wn.2d 572, 574, 919 P.2d 589 (1996) 1

Dickson v. U.S. Fid. & Guar. Co., 77 Wn.2d 785, 787-88, 466 P.2d 515 (1970) 3

Gunn v. Riely, 185 Wn.App. 517, 525, 344 P.3d 225 (2015) 19

In re Disciplinary Proceeding Against Kennedy, 80 Wn.2d 222, 236, 492 P.2d 1364 (1972) 3

Kave v. McIntosh Ridge Primary Rd. Ass'n, 198 Wn.App. 812, 824, 394 P.3d 446 (2017). 17

Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 53, 25 P. 1072 (1891) 1

Stout v. Warren, 176 Wn.2d 263, 290 P.3d 972 (2012). 6

Vedder v. Spellman, 78 Wn.2d 834, 838, 480 P.2d 207 (1971) 25

OUT OF STATE CASES

Beerman v. Toro Mfg. Corp., 615 P.2d 749, 755 (Haw. Ct. App. 1980)……14

Condo Servs., Inc. v. First Owners' Ass'n of Forty Six Hundred Condo, Inc., 709 S.E.2d 163, 173 (Va.2011).....28

Cook v. Atlantic Coast Line R.R. Co., 183 S.C. 279, 190 S.E. 923 (S.C.1937) 14

Curt's Trucking Co. v. City of Anchorage, 578 P.2d 975 (Alaska 1978) …….....5, 23, 24, 25

Garnes v. Fleming Landfill, 186 W.Va. 656, 413 S.E.2d 897 (W.Va.1991) .14

Howell v. Asso. Hotels, 40 Haw. 492, 501, 1954 WL 7973 (1954).....14

Livenggood v. Balston, 722 N.W.2d 716 (N.D.2006).....14

Madrid v. Marquez, 131 N.M. 132, 33 P.3d 683 (N.M. 2001).....14

McGee v. Bruce Hosp. Sys., 545 S.E.2d 286 (S.C.2001).....14

Medaris v. Miller, 306 N.W.2d 200 (N.D.1981).....14

Quicken Loans, Inc. v. Brown, 737 S.E.2d 640, 668 (W.Va.2012) 14

Sanchez v. Clayton, 117 N.M. 761 (1994). 14

Turner v. Firstar Bank, N.A., 845 N.E.2d 816 (Ill.App.Ct. 2006) 14

TXO Prod. Corp. v. All. Res. Corp., 187 W. Va. 457, 419 S.E.2d 870 (W.Va.1992).....14

FEDERAL CASES

Broughton Lumber Co. v. BNSF Ry., 2010 WL 4670479, 2010 U.S. Dist. LEXIS 119721 (D. Or. Nov. 9, 2010)……16

STATUTES

RCW 2.48.180 - .190 25

RCW 4.24.630.....17

RCW 4.24.630(1) 2, 5, 6, 11, 15-19

RCW 18.20.080.....25

Ch. 19.122 RCW ..... 21 - 23

RCW 19.122.010(1).....19

RCW 19.122.020(10).....20

RCW 19.122.027.....20

RCW 19.122.030.....7, 20

RCW 19.122.030(1).....7

RCW 19.122.040.....20

RCW 19.122.040 - .050 8

RCW 19.122.050.....20

RCW 19.122.070.....2, 15

RCW 19.122.070(1)……20

RCW 19.122.070(2).. ……...5, 6, 15,16, 20, 22

RCW 64.12.030……15, 18

RULES

RAP 13.4(b)(4).....2

TREATISES

Restatement (Second) of Torts, §414, cmt. c (1965). ……...8

Restatement (Second) of Torts, §416 (1965)……....6

Restatement (Second) of Torts §427, illustration 4 (1965)..…….6

I. INTRODUCTION AND SUMMARY OF RESPONDENTS' ARGUMENT WHY REVIEW SHOULD BE DENIED

> Surely the public can have no interest in exacting the pound of flesh. … [P]unitive damages cannot be allowed on the theory that it is for the benefit of society at large, but must logically be allowed on the theory that they are for the sole benefit of the plaintiff, who has already been fully compensated; a theory which is repugnant to every sense of justice.[1]
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> ***
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> Since its earliest decisions, this court has consistently disapproved punitive damages as contrary to public policy. … Punitive damages not only impose on the defendant a penalty generally reserved for criminal sanctions, but also award the plaintiff with a windfall beyond full compensation.[2]

For over 125 years, Washington courts consistently and unequivocally have held that punitive damages are against the public policy of this State.

However, as far back as 1869 – before statehood -- our Legislature has enacted a number of "penal statutes," like the timber trespass act, that permit a plaintiff to recover a precisely limited form of exemplary damages: a sum exactly three times the plaintiff's proven actual damages. Because of Washington's strong, consistent and long-standing public policy against punitive damages, such statutes must be strictly construed.[3]

No Washington court ever has allowed a plaintiff to obtain a final judgment for treble damages against one defendant; and then seek to recover "punitive damages" over and over again against one or more additional defendants *for the same actual damages* – thereby treating the award of

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[1] *Spokane Truck & Dray Co. v. Hoefer,* 2 Wash. 45, 53, 25 P. 1072 (1891).

[2] *Dailey v. North Coast Life Ins. Co.,* 120 Wn.2d 572, 574, 919 P.2d 589 (1996).

[3] *Broughton Lumber Co. v. BNSF Ry. Co.,* 174 Wn.2d 619, 278 P.3d 173 (2012).

actual damages and the "penal" portion of a treble damages statute as independent remedies. In fact, this Court already has refused to construe and apply a treble damages statute by severing the recovery of actual damages from the "penal portion" of the statutory treble damages remedy.[4]

Nevertheless, the petitioners (collectively "Fife Portal" or "FP") ask this Court to apply and adopt the law of punitive damages from other states, where such damages are favored, and where judges and juries are free to award punitive damages, often against numerous defendants, without regard to the amount of actual damages. FP then asks the Court to rewrite the plain wording of two treble damages statutes, RCW 4.24.630(1) and RCW 19.122.070, to find that CenturyLink, Inc. ("CenturyLink") violated them. All of this would be to serve one purpose: to allow FP to collect a windfall never before permitted under Washington law: an award of "punitive damages" against CenturyLink, for the same actual damage that already has been reduced to a final, satisfied treble damages judgment against CenturyLink's independent contractor, Pacific Utility Contractors, Inc. ("Pacific").

The Court should reject Fife Portal's radical "punitive damages" arguments out of hand; and should refuse to accept review of the Issues numbered 1 through 3 in its petition. FP's petition does not merely fail to address a question of substantial public interest under RAP 13.4(b)(4). The petition seeks, without good reason, to overturn one of the most fundamental

[4] *Broughton,* 174 Wn.2d at 633.

principles of Washington public policy – our State's strong policy against windfall punitive damages.

Furthermore, FP did not assert this radical claim in the trial court. It was not raised in an assignment of error and was not supported by any argument or authority in its opening brief on appeal, either. Instead, FP impermissibly asserted this radical new claim for the very first time in its reply brief in Division II – months after Pacific had satisfied the judgment in full and abandoned its own cross-appeal, for the express purpose of narrowing the issues remaining in controversy.[5] On this basis alone, this Court can and should decline to review Issues 1 through 3; all of which relate to FP's belatedly concocted "punitive damages" claim against CenturyLink.[6]

FP has also asked the Court to grant review of Division II's decision to affirm the trial court's exclusion of its claim for "fees" FP allegedly incurred for George Humphrey's "legal" and "site" work as a putative "general contractor." However, as the record on review amply demonstrates, those

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[5] *See* Motion for Voluntary Withdrawal of Review of Cross-Appeal, filed herein on July 26, 2019; and Motion to Continue Hearing and appendices thereto, filed June 25, 2019 in *Fife Portal, LLC v. Eric L. Kotulan, et al.,* No. 53444-4-II.

[6] *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *In re Disciplinary Proceeding Against Kennedy*, 80 Wn.2d 222, 236, 492 P.2d 1364 (1972) ("Points not argued and discussed in the opening brief are deemed abandoned and are not open to consideration on their merits"); *Dickson v. U.S. Fid. & Guar. Co.*, 77 Wn.2d 785, 787-88, 466 P.2d 515 (1970) ("Contentions may not be presented for the first time in the reply brief"). *See* Respondents' Motion to Strike, filed May 4, 2020.

While FP has argued the claim did not arise until Pacific paid the judgment, the logic behind FP's claim itself defeats that argument. FP asserts that CenturyLink has a separate legal obligation to pay "punitive damages" under the two treble damages statutes, *despite* the entry of a final treble damages judgment against Pacific for the same property damage; and further argues that CenturyLink's obligation existed *before and after* Pacific paid that judgment.

"fees" were undocumented and illusory; and Humphrey's retention was a sham.

Licensed, independent outside professionals performed and completed the investigation, engineering and construction work required to restore FP's damaged property. The obligation to pay for their work went on the Association's accounting ledger of damage-related costs. Some costs on the Association's books were already paid, and others remained to be paid at the time of the second trial of FP's claims in May 2018. (RP 975-79; Trial Ex. 43; CP 1534-47; CP 2838-39).

Whether already paid or not, the trial court allowed the jury to consider and award damages for the uncontested and documented costs of investigation and repair work already completed before trial; as well as the disputed, estimated costs of additional repairs FP claimed would be needed in the future. (*Id.*).

On the other hand, the trial court declined to send to the jury a claim for damages based on Humphrey's alleged "oral retention agreement" with himself. FP never produced any evidence that it incurred an obligation to compensate Humphrey, whether as an employee or as an outside vendor, for the time he had recorded in a belatedly produced log – all of it allegedly spent performing legal, engineering and general contracting services he was not licensed to perform in the first place.

In affirming the trial court, Division II relied on the common sense legal principles set forth in the case law that FP's own opening brief on appeal asked Division II to follow.[7] FP cannot now argue that Division II erred by doing as FP asked. Division II's decision is not contrary to Washington law; and the petition's Issue 4 does not present a question of substantial public interest worthy of this Court's time, attention and a published decision.

CenturyLink and Pacific therefore ask this Court to deny the petition for review in all respects.

II. RESPONDENTS' STATEMENT OF THE CASE

A. Before it began work, Pacific knew it was required to lay conduit beneath and straight down the middle of the sidewalk in the City right-of-way; knew the City right-of-way ended at the southern edge of the sidewalk; did not refer to or rely on a CenturyLink site drawing to determine the boundary of the right-of-way; and told no one it would instead excavate far to the south of the sidewalk, well outside of the right-of-way.

In its zeal to portray CenturyLink as a "corporate oligarch" and "miscreant" this Court should subject to "punishment," FP's Statement of the Case grossly distorts the record -- by omitting the undisputed facts that FP itself proffered to obtain a summary judgment order holding Pacific liable under RCW 4.24.630(1) and RCW 19.122.070(2) just a few months after the damage occurred.

The undisputed and dispositive facts – established as a matter of law before and confirmed during trial -- are these:

[7] *See, e.g., Curt's Trucking Co. v. City of Anchorage,* 578 P.2d 975 (Alaska 1978) and other argument and authorities in Opening Brief of Appellants, filed April 12, 2019 at 70-73.

In October 2015, CenturyLink retained Pacific as an independent excavation contractor, to "bore & place" conduit that would provide essential telecommunications services to a new residential development of 300 homes. The contract and the permit documents for the project unequivocally and conspicuously required Pacific to "bore & place" conduit immediately beneath and down the middle of the City sidewalk where it fronted FP's property on 26th St. E. in Fife. (CP 74, referring to CP 84-87; Trial Ex. 5; *see generally* CP 48-65 (FP's motion for summary judgment against Pacific under RCW 4.24.630(1) and 19.122.070(2)).[8]

Pacific did not rely on the CenturyLink site drawing to locate the boundary of the right-of-way fronting Fife Portal's property. Instead, before it began work, Pacific walked the sidewalk on 26th St. E. with a City engineer, Ken Gill. Gill told Pacific's principal and foreman, Eric Kotulan, that the right of way ended less than a foot to the south of the sidewalk. (RP 518-20). Gill reviewed the permit documents and was confident that Pacific would not be performing any work on FP property, because Pacific was

[8] The boring method specified – akin to a "roto-rooter" -- allowed Pacific to create an underground burrow and pull conduit through it, without disturbing the sidewalk and other property above. FP has claimed this method created a "peculiar risk" that rendered CenturyLink liable for the conduct of its independent contractor Pacific, citing the *Restatement (Second) of Torts,* §416 and §427; and *Stout v. Warren,* 176 Wn.2d 263, 290 P.3d 972 (2012). However, even if this minimally invasive method did entail a "peculiar risk" – and it did not – Pacific's "collateral negligence" caused the damage here, not the boring method employed; and CenturyLink cannot be held liable for such negligence. The *Restatement (Second) of Torts,* §427, illustration 4, could not be more directly on point:

> A employs B, an independent contractor, to excavate a sewer in the street. B negligently follows the wrong line in excavating, and breaks the water main of C Company. This is collateral negligence, and A is not liable to C Company.

instructed to bore and place conduit under the middle of the sidewalk, which is indisputably in the City right-of-way. (CP 103, 105-07).

Before work commenced, Pacific notified the "811 call service," as an "excavator" is required to do under RCW 19.122.030(1). Pacific spoke with the City to obtain a "utility locate." Consistent with its understanding the right-of-way ended near the southern edge of the sidewalk, Pacific stated its excavation work *would not venture south of the sidewalk*. (CP 134, 140-42, 197). A City inspector came out to mark utilities and was assured there would be no boring done beyond the south edge of the sidewalk where it passed in front of FP's property. (CP 139-40, 143-44).

Nevertheless, Pacific began to bore a path underground and to pull conduit a number of feet to the south of the sidewalk. Pacific had not notified CenturyLink, the City or anyone else that it would deviate from the contract, the permit and its preconstruction notice to the "811 service" and other "facility operators" with infrastructure within the excavation boundaries. Nor did Pacific obtain the required authorization from CenturyLink and the City before making this material change. (CP 57. 111-13, 122-23).

As a direct result of Pacific's unauthorized and unexplained deviation from the clear direction in the permit and the contract to "BORE UNDER MIDDLE OF SIDEWALK" (CP 74, 84-87; Trial Exhibit 5, capitalization per original documents), Pacific struck and damaged a portion of FP's PVC storm drain pipe. Pacific apparently attempted to repair the damage, without

notifying FP, CenturyLink, the City or anyone else – despite the "excavator's duty of care" under RCW 19.122.040 - .050 that required it to promptly notify interested parties of the damage. (CP 72-75).

Pacific later struck and damaged a City water main, which did further damage to FP's property. Pacific finally notified the City of the problem -- so the City could stop water from escaping and repair the damaged water main. Pacific also notified FP. (*Id.*). Shortly after that notice, FP's own George Humphrey confronted Pacific's workmen; ordered them to stop work; and directed them to get off the property immediately. (*Id.*).[9]

There is no evidence that CenturyLink was aware of Pacific's deviation from the contract, or the damage Pacific had caused, before FP ordered Pacific to stop all work and leave the area.[10]

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[9] Interestingly enough, FP's petition asserts, without any citation to authority, that "under the common law" the right to stop Pacific's work alone would make Pacific an "agent" of CenturyLink. (Petition at 14). That is not the "common law" in Washington; and if it were the law, FP's own ability to stop Pacific's work would make *FP* Pacific's "principal" – and likely would negate its claims against CenturyLink based on Pacific's conduct. *Compare Kamla v. Space Needle Corp.,* 147 Wn.2d 114, 121, 52 P.3d 472 (2002) ("It is not enough that [the alleged principal] has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports," quoting *Restatement (Second) of Torts,* §414, cmt. c (1965).

[10] CenturyLink was present at the work site during the preconstruction walk-thru -- when Pacific was advised the right of way ended at the edge of the sidewalk and when no work was performed. A CenturyLink representative also may have briefly observed work that Pacific returned to the site to perform under an agreement with the City of Fife in January 2016 – after work under the contract with CenturyLink had long since ended. Humphrey himself acknowledged this before and during trial: *see* CP 73 (Humphrey demanded that the City order Pacific to stop work because it was performing tasks beyond the scope of its contract with the City); and RP 670 ("We had the City tell him [an alleged CenturyLink employee] to leave the site because they had no permission to be there and they're watching"). In neither instance did CenturyLink "go onto the land" of Fife Portal and "wrongfully" cause waste or damage, directly or through an "agent." RP 491-92, 542-43; CP 73, 330-34; *see also* Answer to Motion for Reconsideration, filed October 16, 2020, at 12-16.

At trial, the City's engineer, Ken Gill, and Pacific's principal, Eric Kotulan, unequivocally agreed: *if Pacific had bored and placed conduit under the sidewalk as the permit and the contract required, there would have been no trespass and no damage to FP's property.* (RP 511, 518-20, 572-73). There was no evidence to the contrary.[11]

All of this was entirely consistent with the sworn testimony and documents George Humphrey and FP themselves proffered in support of their successful motion for summary judgment against Pacific in May 2016 – two years before the second trial of FP's claims. (*See generally* CP 48-144).

B. George Humphrey owns and/or exercises "100% control" over the Fife Portal property, the Fife Portal Owners Association and First Corps; Humphrey's "oral agreement" to retain Humphrey, to perform work he was not licensed to perform, and for which he could not legally compel plaintiffs to pay, was a sham; and no plaintiff produced evidence it had actually incurred or could ever incur a legal obligation to pay a salary, fees or any other compensation for the time entered in Humphrey's belatedly produced log.

George Humphrey is a real estate developer, investor and owner. He candidly testified that he had created a web of holding companies to insulate himself from taxation and liability. (CP 396). Through those companies, Humphrey has 100% ownership and control over "the real estate out there that you [the defendants] damaged." (CP 382, 386, 634).

[11] The permitted project was to lay telecommunications conduit from 70th Ave. E. to a subdivision of 300 homes at Freeman Road – a distance of nearly a mile, only a portion of it fronting FP's property. (Trial Ex. 5). While FP asserts (Petition at 6) that the work Pacific was performing when it damaged FP's property required CenturyLink "to get an easement *from Fife Portal*," the cited portions of the record do not say any such thing. There is no evidence Pacific was under contract to do anything other than "BORE & PLACE" conduit "UNDER MIDDLE OF SIDEWALK" along 26th St. E. – and there is no evidence an easement was necessary to complete that work. (Trial Ex. 5).

Humphrey also is President, sole officer and the only decisionmaker of the Fife Portal Owners Association (CP 394, 402), an Association which Humphrey calls "basically just a flow through." (CP 395).

Humphrey and "Humphrey Enterprises" are the owners, and Humphrey is the sole decisionmaker, of "First Corps, Inc." (CP 392).

None of these entities pays Humphrey a salary. His compensation comes only if, when, in an amount and in the form Humphrey chooses – most often as an equity interest in real estate Humphrey "develops," like the FP property. (CP 383-96).

About eighteen months after Pacific struck and damaged the underground PVC plastic storm water drain pipe on FP's property, Humphrey advised the defendants that the Association – *i.e., Humphrey* -- had "orally agreed to retain" First Corps – *i.e., Humphrey* -- at $350 an hour. There is no evidence that any other person or entity ever authorized this "retention" or agreed to pay Humphrey.

With the discovery cutoff approaching, Humphrey handed the defendants a log of time he allegedly spent performing a wide variety of tasks -- from legal research, to drafting pleadings, communicating with FP's attorneys and attending depositions and hearings; to watching as duly licensed professional engineers inspected the damage and designed the repair, to shadowing the licensed outside general contractor retained to manage and

perform the repair work. (CP 436-39).[12] Humphrey testified he would demand to be paid $350 an hour for his time. The plaintiffs then claimed Humphrey's "fees" as damages that should be trebled under RCW 4.24.630(1). On the defendants' motion for summary judgment, the trial court dismissed FP's claim to recover Humphrey's alleged "fees" as damages under RCW 4.24.630(1). (CP 359-462, 580-81).

However, FP took the position the trial court's order did not preclude recovery of Humphrey's fees under its common law causes of action; and persisted in its attempts to show it had incurred compensable damages based on Humphrey's time log. (CP 585).

Nevertheless, FP never produced evidence that FP or any third party payor for FP ever incurred a legal obligation to pay for Humphrey's time. Humphrey was not a salaried employee of any plaintiff or of First Corps. Neither Humphrey nor First Corps was licensed to perform work as an attorney, engineer or general contractor – and they could not have compelled plaintiffs to pay for that work in an arm's length transaction. (CP 405).[13]

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[12] *See* Brief of Respondents at 14-18 (reviewing Humphrey time log entries). At trial, FP's licensed outside general contractor – who charged under $70 an hour for licensed general contracting and construction management services – testified there had been no reason to retain a second general contractor. (RP 855; Trial Ex. 18). The documented cost of licensed outside engineers, contractors and other vendors who completed work prior to trial in May 2018 was in evidence; the jury awarded damages for the cost of completed work; and the trial court trebled those costs under the statutes. (CP 2838-39). The jury also awarded the cost of future engineering, design and general contracting work based on rough, back of the envelope estimates to which Humphrey was permitted to testify. (*See generally* RP 688-710, 717-19; Trial Ex. 20; CP 2838-39).

[13] *See* authorities cited in footnote 39, *infra*.

The Association's outside accountant and administrator is Pacific Asset Advisors ("PAA"). PAA keeps the books and pays all bills for the Association; it only pays bills that Humphrey sends to PAA; and then only pays a bill if and when Humphrey directs PAA to pay. (CP 384, 393). At trial, PAA proffered a ledger represented to include all expenses of the Association related to the property damage at issue – whether paid by that time or not. The ledger did not include a single entry reflecting a charge from Humphrey/First Corps. (RP 975-79; Trial Ex. 43; *see also* CP 1534-47 (ledger produced prior to trial).

In May 2018, Humphrey submitted an "offer of proof" of the claim for his "fees." The "proof" consisted of a short declaration, declaring that his "fees" totaled $180,332.50; and opining the amount was reasonable.[14] There was no supporting documentation to show he had ever issued an invoice to the Association, to First Corps or to any other entity, individual, plaintiff or third-party payor. The "proof" did not include evidence that any plaintiff had ever placed a charge for Humphrey's alleged fees on its books, or that the Association ever issued an assessment to members to cover his "fees"; or had issued payment for any portion of those "fees"; or even had entered into an

[14] As has been the case throughout this litigation, FP's claimed damages have been a moving target – which resulted in a mistrial in 2017. (RP 137-52, 158, 167; CP 846-48). While Humphrey's "offer of proof" asserted FP was seeking about $180,000 for his alleged "fees," FP's petition now states the claim is for approximately $131,000. Petition at 18.

agreement to compensate Humphrey or First Corps – other than Humphrey's putative "oral agreement" with himself. (CP 1799-1800).[15]

Humphrey also made it plain that his undocumented "oral agreement" to "retain" himself and the claim for compensation for his time had one overriding purpose – to punish the defendants by making them "pay for all the time you made me waste" litigating FP's claim for treble damages. (CP 2137-38).

III. ARGUMENT AND AUTHORITIES

A. The Court should deny review, because unlike the foreign law on which Fife Portal relies, Washington's law evinces a strong public policy against punitive damages; and this Court's rule of strict construction of penal statutes will not permit a plaintiff to pile up multiple awards of treble damages for a single loss -- no matter how many defendants the plaintiff has chosen to sue for that loss.

FP disingenuously characterizes its belated, novel claim for an award of "punitive damages" against CenturyLink as a mere application of "the law of judgments"; and a simple matter of applying an "exception to the one-satisfaction rule" following Pacific's payment of the prior final judgment.

In truth, FP is asking this Court to accept review to radically transform Washington's well-established substantive law. Unlike the law FP has relied

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[15] Humphrey was no doubt aware of the deficiencies in his claim for "fees." First Corps/Humphrey belatedly generated lump sum "invoices" addressed to "Fife Portal Owners Association, c/o Pacific Asset Advisors" more than a year after Humphrey had logged most of his time – and then only after the discovery cutoff and after the question whether Humphrey had ever billed or the plaintiffs had paid his claimed fees arose during his deposition in March 2017. The lump sum invoices merely recite they are for "Fees billing for Fife Portal CenturyLink damages." CP 383-396; 557-564; and there is no evidence they ever actually went to PAA for payment. The defendants moved *in limine* to exclude the "fees billing" documents on grounds of late disclosure. CP 516-21. The trial court granted the motion. CP 837-38. *Fife Portal has never assigned error to that ruling.*

upon from Hawaii,[16] New Mexico,[17] South Carolina,[18] North Dakota,[19] Illinois[20] and a number of other states – all of which grant juries broad discretion to award punitive damages against any number of defendants, without regard to the quantum of actual damages -- Washington law has held for over a century that punitive damages are against public policy because they confer a windfall on the plaintiff*;* and because there is no valid public interest in extracting a "pound of flesh" from the defendants in a private civil action for damages.[21]

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[16] *Howell v. Asso. Hotels*, 40 Haw. 492, 501, 1954 WL 7973 (1954), cited with approval in *Beerman v. Toro Mfg. Corp.,* 615 P.2d 749, 755 (Haw. Ct. App. 1980) (punitive damages are separate from and need not bear any relation to amount of actual compensatory damages).

[17] *Madrid v. Marquez,* 131 N.M. 132, 33 P.3d 683 (N.M. 2001) (in New Mexico, the court may award punitive damages "in equity," and no compensatory damages need be proven before the court may impose punitive damages; expanding upon the earlier holding in *Sanchez v. Clayton,* 117 N.M. 761 (N.M.1994).

[18] *McGee v. Bruce Hosp. Sys.,* 545 S.E.2d 286, 288 (S.C.2001) (an award of "nominal damages" is sufficient to support a large separate award of punitive damages, citing *Cook v. Atlantic Coast Line R.R. Co.*, 183 S.C. 279, 190 S.E. 923 (S.C.1937)).

[19] *Medaris v. Miller,* 306 N.W.2d 200 (N.D.1981) (jury has discretion to award "punitive damages" against one or more of multiple defendants); *compare Livenggood v. Balston,* 722 N.W.2d 716 (N.D.2006) (where statute states that plaintiff may recover three times actual damages for wrongful ejectment, trial court has no discretion as to amount to be awarded).

[20] *Turner v. Firstar Bank, N.A.,* 845 N.E.2d 816 (Ill.App.Ct. 2006) (reducing jury's $500,000 award of punitive damages – a "double digit multiple" of her actual damages -- to $225,000, subject to the plaintiff's consent to the reduction under Illinois law).

[21] In Division II, FP also asked the court to follow the law of West Virginia, citing *Quicken Loans, Inc. v. Brown,* 737 S.E.2d 640, 668 (W.Va.2012) (settlement with co-defendants will be set off against compensatory damages but not against a jury's separate discretionary award of punitive damages). West Virginia's approach to punitive damages is repugnant to Washington public policy. *See. e.g., TXO Prod. Corp. v. All. Res. Corp.,* 187 W. Va. 457, 419 S.E.2d 870 (W.Va.1992) (affirming jury award of $19,000 in actual damages and $10 million in punitive damages where defendants "failed to conduct themselves as gentlemen" and were "really stupid" and "really mean"); *Garnes v. Fleming Landfill,* 186 W.Va. 656, 413 S.E.2d 897 (W.Va.1991) (punitive damages provide "a substitute for personal revenge"; therefore a jury may award substantial punitive damages where actual damages are *de minimis*).

There is one narrow exception to this unequivocal rule against damages as "punishment" and "deterrent": where the Legislature has enacted a "penal statute" that allows a plaintiff to recover a fixed multiple of her actual damages. Among these are the treble damage provisions of the timber trespass statute (RCW 64.12.030); the trespass and waste statute (RCW 4.24.630(1)) and the Underground Utility Damage Prevention Act (RCW 19.122.070(2)).

Not one Washington treble damages statute ever has been construed and applied to allow a plaintiff to obtain multiple awards of treble damages for a single loss. In fact, FP never has cited a single case from *any* jurisdiction that has applied a treble damages statute that way.

Hoefer, Dailey and *Broughton* provide the controlling Washington law; and the law of Hawaii, New Mexico, South Carolina and elsewhere provides no useful guidance here. As this Court observed in *Broughton*:

> Washington, unlike other states, employs a very restrictive approach to punitive damages…. Washington prohibits the recovery of punitive damages as a violation of public policy unless expressly authorized by statute…. ***Our interpretative approach should account for this philosophical difference***. [22]

Furthermore, to effect its tortured construction of the treble damages statutes, FP also has proposed that RCW 4.24.630 and 19.122.070 should be split into a "compensatory" component and a "punitive" component.[23]

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[22] *Broughton,* 174 Wn.2d at 639, n.14 (emphasis added).

[23] *See* Appellants' Reply Brief, filed October 31, 2019, at 4 (arguing that CenturyLink should be liable for twice the jury's award of actual damages -- the supposed "punitive damages"

However, that argument also runs afoul of *Broughton,* which held that a Washington treble damages statute "cannot reasonably be divided into a penal portion and a remedial portion" – exactly what FP has asked the Court to do here.[24]

When the Legislature says a plaintiff may recover treble damages, the Legislature means what it says. If the Legislature intended to permit a plaintiff to reap a windfall beyond three times her actual damages, it would say so – and it has never said so. This Court should deny review of FP's "multiple punitive damages" issue, enumerated Issue 1 in the petition for review.[25]

B. The Court should deny review because all three Divisions of the Court of Appeals correctly have held that RCW 4.24.630(1) is precisely and unambiguously worded; and that it imposes treble damages liability only when a defendant physically trespasses on the plaintiff's land and wrongfully causes damage while on the land.

Washington's "trespass and waste" statute, RCW 4.24.630(1), "precisely and unambiguously" applies to "[e]very person who goes onto the land of another" *and* removes valuable property or causes property damage while "on the land of another."[26] FP's petition somehow neglects to mention that all

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portion of the treble damages allowed under the statute – since the "compensatory" portion of the remedy was already reduced to judgment against Pacific).

[24] *Broughton,* 174 Wn.2d at 674.

[25] The Court need not even reach Issue 1 unless CenturyLink can be liable for treble damages under RCW 4.24.630(1) or RCW 19.122.070(2) – and it cannot be, as a matter of law.

[26] *Broughton Lumber Co. v. BNSF Ry.*, 2010 WL 4670479, 2010 U.S. Dist. LEXIS 119721 (D. Or. Nov. 9, 2010) ("Washington courts have opined that RCW 4.24.630(1) is 'precisely and unambiguously worded' and that *the 'statute's premise is that the defendant physically trespasses on the plaintiff's land.'")*(emphasis added).

three Divisions of the Court of Appeals have adopted this unequivocal construction of the plain text of RCW 4.24.630(1); and FP expends not one word in an effort to distinguish or provide grounds to reverse any one of the Court of Appeals' reported decisions construing the statute.

In 2003, in *Colwell v. Etzell,* Division III held:

> *RCW 4.24.630 is premised upon a wrongful invasion or physical trespass upon another's property*, a commission of intentional and unreasonable acts upon another's property, and subsequent destruction of physical or personal property *by the invader* to another's property…[27]

In 2010, consistent with *Colwell v. Etzell,* Division I held in *Clipse v. Michels Pipeline Const., Inc.*:

> ***The statute establishes liability for three types of conduct occurring upon the land of another:*** (1) removing valuable property from the land, (2) *wrongfully* causing waste or injury to the land, and (3) *wrongfully* injuring personal property or real estate improvements on the land. By its express terms, the statute requires wrongfulness only with respect to the latter two alternatives. ***Presence on the land is required for all three.***[28]

Most recently, in 2017, in *Kave v. McIntosh Ridge Primary Rd. Ass'n,*[29] Division II, like Division I, adopted the plain meaning construction of RCW 4.24.630(1) Division III applied in *Colwell v. Etzell.*

While keeping these decisions under wraps, FP's petition asks the Court to simply read "person who goes onto the land" out of the statute; and seeks

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[27] 119 Wn.App. 432, 442, 81 P.3d 895 (2003) (emphasis added).

[28] 154 Wn.App. 573, 577-78, 225 P.3d 492 (2010) (boldface emphasis added).

[29] 198 Wn.App. 812, 824, 394 P.3d 446 (2017).

support for the argument in *Broughton Lumber Co. v. BNSF Ry. Co.*[30]

However, FP's reliance on *Broughton* is misplaced -- a failed attempt to turn an apple into an orange. Unlike RCW 4.24.630(1), the wording of the timber trespass statute at issue in *Broughton* (the former RCW 64.12.030) *did not* expressly make "presence on the land of another" an essential element of the statutory cause of action. As the *Broughton* Court noted, "the [timber trespass] statute focuses on *conduct, not location*."[31] In glaring contrast, RCW 4.24.630(1) expressly focuses on *conduct and location*, as the Court of Appeals has held in *Colwell, Clipse* and *Kave.*

In *Broughton,* this Court also applied two basic principles of statutory construction: *first,* "a court must not interpret a statute in any way that renders any portion meaningless or superfluous"; and *second,* statutes that permit a plaintiff to recover treble damages are "penal in nature" and "must be strictly construed."[32] FP's proposed reading of RCW 4.24.630(1) would have the Court accept review to violate both those principles.

FP also simply ignores this Court's actual holding in *Broughton:* that a defendant's allegedly negligent, "indirect trespass" cannot result in liability for treble damages -- even under a statute, like the timber trespass statute, that does not specifically require that a defendant "go onto the land of another" as an essential element of the cause of action. Under the *Broughton* analysis,

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[30] 174 Wn.2d 619, 278 P.3d 173 (2012).

[31] *Broughton,* 174 Wn.2d at 635.

[32] *Broughton,* 174 Wn.2d at 633-34.

when a defendant's allegedly "culpable omissions" off the property indirectly cause damage, the plaintiff may have a claim for *actual damages* under common law. However, neither the "timber trespass" nor the "trespass and waste statute," when properly and strictly construed, expose a defendant to liability for *treble damages* and attorney fees because of allegedly negligent conduct that occurs away from the damaged property, resulting in an alleged "indirect trespass."[33]

Division II's decision here properly construed and applied RCW 4.24.630(1) to the evidence in the record. As a result, the Court should deny review of Issue 2 set forth in FP's petition.

C. The Court should deny review because under the unambiguous wording of ch. 19.122 RCW, the "Underground Utility Damage Prevention Act," CenturyLink is not an "excavator" subject to liability for treble damages.

In RCW 19.122.010(1), the Legislature expressly stated its intent to create a "comprehensive damage prevention program" that would "*assign responsibility* for providing notice of proposed excavation, locating and marking underground utilities, and reporting and repairing damage." (Emphasis added).

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[33] *Broughton,* 174 Wn.2d at 632-33. This is consistent with the legislative history, which indicates the treble damages remedy provided in RCW 4.24.630(1) was intended to deter malicious vandalism, and never intended to address negligence that might occur away from the property and indirectly result in property damage. *See Gunn v. Riely,* 185 Wn.App. 517, 525, 344 P.3d 225 (2015) (reviewing legislative history of RCW 4.24.630, including debate which shows that intentional acts of vandalism are "really what we are getting at" in the trespass statute).

The statute goes on to define the word "excavator," and then parses out the responsibilities of the "project owner"; who retains an "excavator"; who directly engages in excavation work that may affect the existing underground utilities of a "facility operator."

> RCW 19.122.020(10) defines the word "excavator" and it could not be clearer: "***any person who engages directly in excavation."***
>
> RCW 19.122.027 establishes a "one number service" that excavators must contact to obtain information on existing utilities; and requires "facility operators" who maintain existing underground utilities to subscribe to the service so they will obtain notice of proposed excavation work via the service;
>
> RCW 19.122.030, titled "*Excavator and facility operator duties prior to excavation,*" requires the "excavator" to notify "facility operators" via the service; and requires those "facility operators" in turn to come to the site to mark existing utilities that may be affected by the excavator's work;
>
> RCW 19.122.040, titled "*Excavator's duty of care*," only requires a "project owner" to notify its contracted "excavator" of existing utilities of which the owner has actual knowledge;[34] and assigns responsibility to the "excavator" to take specific steps to avoid damaging existing utilities;
>
> RCW 19.122.050, titled "*Damage to underground facility – notice by excavator*," requires the excavator to provide notice when it damages an existing underground utility;
>
> RCW 19.122.070(1), imposes a $1000 civil penalty on "any person" for violation of ch. 19.122 RCW; and finally,

[34] *Clevco v. Municipality of Metro Seattle,* 59 Wn.App. 536, 543-44, 799 P.2d 1183 (1990). Under RCW 19.122.030-040, Pacific was required to mark the boundaries of its excavation and confirm the location of property boundaries and underground utilities in its work area. CenturyLink never agreed to assume Pacific's statutory obligations. (RP 465-73). Consistent with the statute, the site drawing clearly stated the contractor (Pacific) must independently confirm the location of property boundaries and underground utilities. Trial Ex. 5.

> RCW 19.122.070(2), specifically imposes treble damages only on an "excavator" who willfully violates the Act; and whose failure to provide notice to the "one number service" prior to excavation is deemed willful and malicious, triggering the treble damages remedy.

CenturyLink is not in the excavation business and did not "engage directly in excavation" here. That is why CenturyLink retained Pacific under a contract to perform excavation work; and that is what the statutory scheme, read as a whole, plainly contemplates will usually occur.

Read as a whole, the statute also contemplates that the *excavator,* who puts shovel (or boring equipment) to dirt in the field must be the one to mark the boundaries of its work. The excavator must notify "facility operators" whose infrastructure might be affected before work commences and if damage occurs during the work. And thus the excavator will bear exposure to treble damages should it fail to meet the obligations the Legislature specifically assigned to the "excavator" in ch.19.122 RCW.

Under the statute the "project owner" – CenturyLink here -- is entitled to rely on its independent contractor to protect existing infrastructure and to perform its work without negligently, recklessly or willfully failing to comply with the responsibilities assigned to "excavators" under the Act.

There is no question FP fully understands this is how the "comprehensive scheme" set forth in ch. 19.122 RCW is intended work. That is how the statute's assignment of responsibility was understood when CenturyLink retained Pacific; and that is how Pacific plainly understood its responsibilities when it called the 811 service to advise what the boundaries

of its work would be; as well as when Pacific worked directly with the City to obtain and mark existing utilities in those boundaries.

In fact, that is the way FP asked the trial court to read ch. 19.122 RCW when it moved for summary judgment against Pacific. (CP 60-62).

In FP's sprawling 85-page opening brief in Division II, FP itself argued that CenturyLink is a "project owner" and/or a "facility operator" under ch. 19.122 RCW. (Brief of Appellant at 33-34). FP did not argue that CenturyLink is an "excavator" as defined in the statute in its 50-page Division II reply brief either.

Even after Division II issued its opinion, FP's motion for reconsideration did not so much as cite the provisions of ch. 19.122 RCW. Instead, FP vociferously argued at length that CenturyLink is a "corporate oligarchy" that ought to be punished, and that the treble damages statutes must be broadly construed in the interest of a "public interest" the Legislature evidently did not share with FP when it wrote the Act.[35]

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[35] Motion for reconsideration, filed August 31, 2020, at 23-25. As far as we have been able to discern, the sum total of FP's argument in Division II concerning CenturyLink's alleged status as an "excavator" under RCW 19.122.070(2) – buried in over 175 pages of briefing below -- appeared at page 6, in footnote 2 of the "Appellant's Post-Argument Reply Brief" filed on June 25, 2020:

> As for treble damages under the Dig Law [ch. 19.122 RCW], CenturyLink took on the responsibility for locating and marking utilities and then utterly failed in fulfilling that responsibility; CenturyLink should not be allowed to evade the ensuing punitive damages liability based on a rigidly technical and isolated reading of the term "excavator" that would serve only to frustrate the purpose of the statute.

Furthermore, if this Court were to adopt FP's gloss on the statute, that would upend the clearly defined roles and the orderly procedure for pre-construction notice and marking of existing utilities the Legislature created.

Boiled down to its essentials, FP's argument is that a telecommunications company like CenturyLink cannot retain an independent excavation contractor to perform excavation work and depend on that contractor to do what the contract and ch. 19.122. RCW require the excavator to do. This would result in confusion about who is responsible for what tasks before and during construction; and would impose responsibilities on telecommunications companies and other utilities the statutory wording plainly indicates the Legislature did not intend them to carry.

FP's proposed reading of ch. 19.122 RCW comes far too late;[36] and it runs directly counter to the statutory wording in any event. This Court should deny review of Issue 3 in the petition for review.

D. The Court should deny review because none of the plaintiffs incurred compensable damages – i.e., an enforceable obligation to pay for George Humphrey's time -- either as a paid employee or as an outside vendor.

No doubt aware that Humphrey's alleged "oral agreement" to retain himself would not withstand scrutiny, FP's opening brief in Division II cited, and asked the court to follow, a long list of authorities that address a plaintiff's right to recover damages for costs incurred to investigate and repair property damage using its own employees, equipment and materials.

[36] *See* footnote 6, *supra.*

Curt's Trucking Co. v. City of Anchorage[37] is a representative example of the numerous "self-help" cases FP's opening brief asked Division II to apply to determine whether Humphrey's "fees" are compensable damages – and it did not help FP's cause one iota.

In *Curt's Trucking*, the plaintiff was an electric utility. The defendant damaged the utility's overhead power lines and utility poles. The plaintiff had its own salaried employees – engineers, linemen and others – as well as an inventory of materials – cables, transformers, utility poles – and performed the repairs itself. The plaintiff then sought to recover the cost of the time and materials it actually incurred to complete the repairs, as well as an allocable portion of its overhead.

As FP told Division II, the Alaska Supreme Court stated the common sense, common law principles that should apply here. Those principles demonstrate why Humphrey's "fees" could not properly go to the jury.

First, the plaintiff may recover only costs of performing repairs that it *actually incurs*:

> ***Where a plaintiff has carried out the repairs itself, the losses and expenses actually incurred*** as a result of the accident should be included in a damage award. Costs which would have been recoverable had plaintiff hired someone else to do the work are a useful indicator of reasonable cost of repair ***only if plaintiff actually expends such an amount….***[38]

[37] 578 P.2d 975 (Alaska 1978) (cited and quoted in Opening Brief of Appellants at 72). Most of the cases FP cited at 70-73 of its opening brief involve either a utility's repair of damaged power lines and equipment using its own salaried employees, equipment and materials; or a plaintiff's repair of damage to a vessel or dock, again using its own paid employees, equipment and materials.

[38] *Curt's Trucking,* 578 P.2d at 978 (emphasis added).

That principle is readily applied in a case like *Curt's Trucking,* where the plaintiff/utility maintained a paid staff of engineers and linemen, its own construction equipment and an inventory of materials; and used those resources to perform the repair itself. The same principle bars recovery here, where not one of the plaintiffs employed and compensated Humphrey; and where there is no evidence that any plaintiff incurred a legally enforceable obligation to compensate him or his incarnation as "First Corps" as an outside vendor.[39]

Second, overhead expenses may be attributable to a plaintiff's repair of damage to its own property. Under *Curt's Trucking* and similar cases, the plaintiff may recover the portion of its overhead that can be allocated to the repair work– so long as its overhead claim is based on "sound accounting principles" or "widely accepted formulas."[40]

Third, a plaintiff may not be compensated for the disruption and inconvenience, or the time, effort and money that come with "the inherent friction… of damage recovery through civil litigation":

> Whenever tortious injury is inflicted, the party suffering harm faces, at a minimum, disruption and inconvenience. In the process of protecting a claim and acting upon it, an injured party

[39] It was illegal for Humphrey to seek compensation for performing "legal work." RCW 2.48.180 - .190. As an unlicensed, unregistered "general contractor," the plaintiffs did not have a legally enforceable obligation to pay Humphrey or his wholly owned holding company First Corps – and they would not have done so in a *bona fide* arms-length transaction. CP 387, 405; RCW 18.20.080, *see, e.g., Vedder v. Spellman*, 78 Wn.2d 834, 838, 480 P.2d 207 (1971) (property owner cannot be compelled to pay for work performed by unlicensed contractor).

[40] *Curt's Trucking,* 578 P.2d at 978-79.

> usually expends time, effort and money. Some of these items are readily quantifiable, while others either defy valuation entirely or are measurable only when the party suffering damage is a large organization with a specialized division to conduct the necessary claims activities. *Such costs normally should be regarded as unrecoverable expenses, which arise due to the inherent friction within our system of damage recovery through civil litigation. As such, they are not properly included as items of damage*.[41]

In our case, FP did not "carry out the repairs itself." Instead, these plaintiffs retained competent, licensed, independent outside professionals -- including engineers, a general contractor, and a variety of subcontractors and vendors who supplied the necessary expertise, labor and materials. The jury awarded FP the reasonable and necessary cost of that work – including work allegedly to be performed and billed in the future.

FP has not pointed to a single decision in which a plaintiff has been permitted to recover the cost of a full panoply of services performed by outside professionals -- and concurrently anoint itself "general contractor" at five times the rate charged by the licensed general contractor already on the job. Undoubtedly there is no such case.

Nor did FP incur any overhead expenses allocable to investigation and restoration of the damage to its property. FP presented no evidence that it had any compensated employees or incurred any expenses to maintain its own offices or administration; and neither did Humphrey/First Corps. Instead, Pacific Asset Associates ("PAA") provided all accounting and administrative

[41] *Id.* at 981 (emphasis added).

services for the Association. In fact, the jury awarded the plaintiffs the reasonable cost of those services related to the property damage.[42]

Three years after the damage occurred in October 2015, and just about as long after Humphrey began to log the time he spent building the claim against these defendants, not one charge for Humphrey's time appeared in PAA's accounting ledger; and there was no other evidence any defendant had been billed, received an assessment or paid a dime in "fees" for services Humphrey allegedly performed as early as October 2015. FP had the burden of proof of its damages; and it did not produce a scintilla of evidence it had actually "incurred" a *bona fide,* legally enforceable obligation to pay for the time in Humphrey's log – whether or not it had already disbursed payment for his "fees."

Finally, the time Humphrey logged falls squarely within the category of unrecoverable expenses related to a disputed, litigated claim described in *Curt's Trucking.* Humphrey made no bones about that when he was deposed shortly before the second trial – he wanted the defendants to pay for the time they "made me waste"; declared he would make an offer of proof to support the claim; and promised to take an appeal if he was not paid what he demanded.[43] When the "offer of proof" came, it provided no proof at all, other than Humphrey's *ipse dixit.* [44]

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[42] CP 2838-39.

[43] CP 2137-38.

[44] CP 1799-1800. FP argues that it did not have to issue payment for Humphrey's time in order to recover his fees – and no one has argued otherwise. Indeed, a substantial portion of

FP has not cited a single case in which damages have been awarded on remotely similar facts. Instead, FP cited and asked Division II to follow numerous cases that set forth basic principles of the common law of damages which, applied to this record, barred the plaintiffs from taking a claim for Humphrey's time to a jury.

This Court should deny review of the petition's Issue 4.

IV. CONCLUSION

For the reasons set forth in this Answer, CenturyLink and Pacific ask the Court to deny Fife Portal's petition for review.

RESPECTFULLY SUBMITTED this 30th day of December, 2020.

By */s/ David M. Jacobi*

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the jury award was for invoices not yet paid and for estimated future expenses. RP 975-79; Trial Ex. 43; CP 1534-47; CP 2838-39. However, FP did have to incur an enforceable legal obligation to pay for work already allegedly performed; and the very cases FP cited in Division II so hold. *See, e.g., Condo Servs., Inc. v. First Owners' Ass'n of Forty Six Hundred Condo, Inc.,* 709 S.E.2d 163, 173 (Va.2011) (IRS penalties resulting from the defendants' breach of contract were "incurred" as legal obligations of the plaintiffs and thus recoverable as damages, although not yet paid), cited in FP's motion for reconsideration at 12.

CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the below date I caused to be filed in the Supreme Court of the State of Washington, and arranged for service of true and correct copies of the foregoing **Respondents' Answer to Petition for Review** upon the following:

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